ISSUES

The issues addressed in this decision concern the opinion of the DIME regarding maximum medical improvement (MMI) and permanent impairment. The specific questions addressed are:

I. Whether Respondents have produced clear and convincing evidence to overcome Dr. Timothy Hall's DIME opinion that Claimant is not at MMI for his November 2, 2015 admitted injury.

II. If Claimant is found to be at MMI, the question becomes whether Respondents have produced clear and convincing evidence to overcome Dr. Hall's Division IME opinion that Claimant has a 14% whole person permanent impairment rating of the lumbar spine as a result of the November 2, 2015 admitted injury.

III. As raised by the parties, the issue surrounding Claimant's impairment rating revolves around proper application of the AMA *Guides to the Evaluation of Permanent Impairment* ("AMA Guides"), Third Edition (*Revised*). Consequently, the ALJ takes judicial notice of the AMA Guides, particularly Chapter 3.3a, and Table 53.

FINDINGS OF FACT

Based on the testimony and evidence presented at hearing, the undersigned ALJ enters the following findings of fact:

1. Claimant was hired by Employer on April 27, 2015 as a laborer. (Claimant's Ex. 4, p. 12). Claimant's job as a laborer for the landscaping company included performing strenuous physical activities such as planting trees, moving dirt, moving rock, etc. (Tr. 36:10-15).

2. Claimant sustained an injury to his lower back while moving flagstone rocks for Employer on November 2, 2015. Claimant described lowering a rock to the ground when he felt a crack in his back along with immediate lower back pain. (Tr. 36:20 – 37:17). A first report of injury was completed on November 3, 2015. (Claimant's Ex. 4). A general admission of liability was filed by Respondents on December 18, 2015. (Resp. Ex. H).

3. Claimant sought treatment on the date of the injury at Concentra Medical Centers. (Claimant's Ex. 5, p. 14). Jocelyn Cavendar, PA-C examined Claimant and found tenderness in the lumbar spine along with bilateral muscle spasms on palpation. *Id.* at 15. Claimant reported having a deep ache in his mid and lower back, especially

when bending and sitting. *Id.* She diagnosed Claimant with a lumbar strain and spasm of the lumbar paraspinous muscles. *Id.* Ms. Cavendar referred Claimant for physical therapy to begin that same day. *Id.* at 16. Claimant reported no decrease in symptoms at his follow up visit at Concentra on November 17, 2015. *Id.* at 41.

4. At his first appointment at Concentra, the examining PA-C noted, under *Discussion/Summary* "findings suggestive of symptom magnification" (Respondent's Ex A, p. 3). However, this comment is not noted with regularity in Claimant's follow up appointments with Concentra.

5. Claimant returned to Concentra on November 10, 2015, and was evaluated by Dr. John Ronning, M.D. Dr. Ronning noted at that time, that Claimant's range of motion appeared to be within normal limits, and recommended at that time that Claimant continue with physical therapy. (Respondent's Exhibit A, pp 7-9).

6. Claimant, apparently unsatisfied with his treatment plan with Concentra, was also seen by Dr. Frank Polanco, beginning on November 19, 2015. At this time, Claimant continued complaining of lower back pain aggravated by bending and rotation. (Claimant's Ex. 6, p. 127). Dr. Polanco also recommended Claimant undergo physical therapy in conjunction with a home exercise program. *Id.* at 129. Claimant was only seen by Dr. Polanco one more time—on November 24, 2015—before Claimant returned to Concentra for treatment. *Id.* at 137.

7. Dr. Polanco noted that, despite the fact that Claimant's reported symptoms were suggestive of radiculopathy, there were "no clinical findings of sensory or motor or neural tension signs" (Respondent's Ex. C, p. 70). The office notes indicate that Claimant was "moving about freely" in the exam room in no acute distress (Respondent's Ex. C, p. 68).

8. Dr. Polanco testified that Claimant's symptoms were disproportionate to his clinical findings, and that Claimant showed "very, very strong pain behaviors that were not consistent with his …physical findings." (Hearing Transcript 12:1-3).

9. Claimant did not follow up with this physical therapy with Dr. Polanco. Claimant, however, did continue his physical therapy at Concentra, and was seen by Dr. Cheryl Meyers-Saffold at Concentra on January 6, 2016. (Claimant's Ex. 5, p. 90). He complained of ongoing back pain and bilateral muscle spasms were again documented on palpation. *Id.* at 91. Dr. Meyers-Saffold recommended additional physical therapy and a consult with a physiatrist for consideration of injections. *Id.* at 92. Claimant had completed at least 17 physical therapy visits by January 28, 2016 with no improvement. *Id.* at 116.

10. Claimant returned to Concentra on February 15, 2016, this time being examined by Dr. Nicholas Kurz. (Claimant's Ex. 5, p. 120). Claimant reported ongoing bilateral lower back pain to Dr. Kurz with some radiation of pain from the lower back to the right anterior thigh. *Id.* Dr. Kurz noted in his report that Claimant was "getting better

but slowly." *Id.* at 122. Despite acknowledging that Claimant was showing slow but continued improvement, Dr. Kurz placed Claimant at MMI with no restrictions and no permanent impairment. *Id.* Dr. Kurz felt that Claimant has returned to his pre-injury baseline and to follow up with his primary care physician for his non-work related, pre-existing, degenerative lumbar condition. *Id.* The ALJ finds that Claimant's degenerative lumber disc condition is non-work related. The ALJ further finds that this lumbar disc degeneration is not the source of Claimant's pain.

11. Claimant disagreed with the MMI determination by Dr. Kurz and sought a Division Independent Medical Examination with Dr. Timothy Hall. Dr. Hall examined Claimant on June 8, 2016. (Claimant's Ex. 9). Claimant reported ongoing lower back pain with some right leg numbness and weakness. *Id.* at 157. Dr. Hall's physical exam documents tightness throughout the thoracolumbar paraspinals with very tender fibrotic nodules at the midline at L5. *Id.* at 158. SI maneuvers created low back pain and straight leg raises were positive for back pain but no leg symptoms. *Id.*

12. Dr. Hall diagnosed Claimant with a lumbar strain and possible SI joint strain, myofascial pain with active trigger points in the lumbosacral area, and probably piriformis syndrome. (Claimant's Ex. 9, p. 159). Dr. Hall notes that nothing beyond physical therapy had been provided to Claimant and suggested Claimant receive additional treatment before being placed at MMI. *Id.* Dr. Hall recommended dry needling and trigger point injections along with a trial of chiropractic work and a strengthening program for the lumbar area. *Id.*

13. Dr. Hall points out in his report that there was no discussion in Dr. Kurz's MMI report as to why he felt Claimant was at MMI. (Claimant's Ex. 9, p. 159). Dr. Kurz indicated that Claimant has returned to his pre-injury baseline, though Claimant did not have *any* pain or functional loss prior to the injury per his report, and lack of medical records suggesting otherwise. *Id.*

14. Dr. Hall provided a provisional impairment rating of 14% whole person for the lumbar spine. (Claimant's Ex. 9, p. 159). He provided 5% for the Table 53 category II-B rating and 9% for the range of motion loss. *Id.*

15. Claimant returned to Dr. Polanco for evaluation subsequent to the DIME on July 28, 2016. (Claimant's Ex. 6, p. 141). There were continued reports of pain in the low back and right leg. *Id.* at 142. It was Dr. Polanco's opinion that Claimant's presentation was self-restricting and that he was magnifying his symptoms. *Id.* at 144-45. He did not believe Claimant required any additional treatment nor was entitled to an impairment rating for his condition. *Id.* at 145.

16. Dr. Polanco testified at hearing on behalf of Respondents. It was his opinion that Claimant exhibited Waddell's signs during his clinical examination, suggesting psychological involvement in regards to the symptomatology. He further felt that the symptoms were disproportionate to the clinical findings. (Tr. 11:2-24). Dr. Polanco reasoned that because Claimant did not participate in physical therapy, this

was a sign that he was demonstrating psychological of overlay. (Tr. 18:10-24). The medical records show that Claimant did not obtain ongoing physical therapy through Dr. Polanco's clinic, though he did receive 17 sessions of physical therapy through Concentra. (*See* Claimant's Exs. 5, 8).

17. Dr. Polanco testified that he did not feel that Claimant was entitled to an impairment rating for his condition. It was his opinion that there were no clinical findings to substantiate a Table 53 diagnosis. Per Dr. Polanco, six months of pain and rigidity are needed to qualify for a Table 53 diagnosis and that Claimant did not meet that requirement. (Tr. 15:2 – 16:6). Dr. Polanco also felt that Dr. Hall should have used the maximum range of motion measurements documented in the medical records as opposed to using his own measurements. (Tr. 15:11-17).

18. Dr. Polanco testified on cross-examination that he is not aware of any medical records suggesting that Claimant had any pre-existing symptoms for his lower back or any past treatment for his lower back. (Tr. 27:3-9).

19. Claimant testified credibly at hearing (and the ALJ so finds) that he had never had any lower back conditions or treatment for lower back conditions prior to the November 2, 2015 work injury. (Tr. 37:23 – 38:5). Claimant testified at hearing (and the ALJ so finds) that he has not sustained any new injury since November 2, 2015. (Tr. 38:6-9). Claimant testified at hearing (and the ALJ so finds) that he continues to have ongoing lower back symptoms that cause some functional loss. (Tr. 38:10-24).

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the Respondents. Section 8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ finds Claimant to be credible, insofar as his description of the injuries originally received. The ALJ further finds that Claimant continues to experience at least some symptoms from this workplace injury. It is not necessary, as the date of this Order, to determine the degree to which Claimant might be exaggerating his symptoms.

Overcoming the DIME Regarding MMI

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

E. The ALJ concludes that the evidence presented demonstrates a mere difference of opinion between physicians and does not amount to evidence that leads the ALJ to believe that it is highly probable that Dr. Hall erred in his assessment of

Claimant's MMI status. The evidence reflects that Claimant was undergoing continued physical therapy with an authorized treating provider prior to being placed at MMI. One of Claimant's providers at Concentra, Dr. Meyers-Saffold, recommended ongoing physical therapy and a consultation with a physiatrist for treatment. At Claimant's next appointment with Dr. Kurz, Claimant was placed at MMI despite Dr. Kurz acknowledging that Claimant continued to have ongoing lower back symptoms and that Claimant was slowly getting better. Dr. Kurz indicated that Claimant had returned to his pre-work injury baseline. The ALJ is not persuaded that Claimant was ever at MMI. The record is void of any indication that Claimant had any degree of a pre-work injury or functional limitations associated with his lower back. Claimant is only twenty-four years old with no documented lower back injury and no evidence contradicting his testimony that he never had any lower back condition that required treatment prior to November 2, 2015. The ALJ determines that Claimant continues to have ongoing back pain that requires treatment and that there is not clear and convincing evidence that his ongoing need for treatment is related to anything other than the November 2, 2015 industrial accident.

F. Dr. Polanco testified at hearing that he felt Claimant's presentation indicated there was psychological involvement with regards to Claimant's symptomatology and that he felt Claimant was malingering due to pain being out of proportion to the clinical findings. Regardless of whether there may be some psychological overlay or malingering, the ALJ concludes that Claimant remains symptomatic as a direct result of the November 2, 2015 injury and there is not clear and convincing evidence to support a decision to the contrary. The ALJ notes that part of Dr. Polanco's rationale included that Claimant did not attend the prescribed physical therapy that was offered; however, Claimant did actively and consistently undergo physical therapy through Concentra. Dr. Polanco himself concedes that there are no records to suggest Claimant had any symptomatic lower back condition prior to November 2, 2015.

G. The ALJ concludes that Claimant is not at MMI and Respondents shall be liable for all reasonable, necessary, and related treatment to bring Claimant's condition to MMI.

Overcoming the DIME Regarding Impairment Rating[1]

H. The question now turns to whether Respondents have proven by clear and convincing evidence that Dr. Hall erred in his assignment of a 14% whole person rating.

I. As the AMA Guides 3.3a states:

> "Impairment evaluation should be performed when the individual's condition has become static and well stabilized *following completion of **all** necessary medical, surgical, **and** rehabilitative treatment.* This precludes performing measurements when acute illness is present." (emphasis added).

[1] Only applicable if the ALJ determines that Claimant is at MMI.

J. The ALJ concludes that, because Claimant is not yet at MMI, the DIME ratings by Dr. Hall are advisory only. They were, at most, valid on the date when taken, and are of no assistance to the fact finder as of the date of this Order.

ORDER

It is therefore ordered that:

1. Claimant is not at maximum medical improvement. Respondents are liable for all reasonable, necessary, and related treatment to bring Claimant to maximum medical improvement.

2. Once Claimant does reach MMI, Impairment Ratings are to be determined by the assigned DIME physician.

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

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

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

DATED: December 1, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-965-608-03

ISSUE

Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Linda Mitchell, M.D. that he reached Maximum Medical Improvement (MMI) on April 17, 2015 with a 0% permanent impairment rating for his October 14, 2014 admitted industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer driving and unloading trucks. On October 14, 2014 he was unloading a truck with a pallet jack. While he was pulling a pallet jack weighing about 1200 pounds he heard "popping" in his neck and lower back areas. Claimant immediately experienced neck, back and shoulder discomfort. After Claimant reported his injuries, Employer referred him to Concentra Medical Centers for treatment.

2. On October 15, 2014 Claimant visited Concentra for an examination. He reported back and shoulder pain as a result of the October 14, 2014 work incident. After a physical examination Claimant was diagnosed with a lower back strain, a trapezius strain and muscle spasms. Physicians prescribed physical therapy and medications.

3. On November 10, 2014 Claimant underwent a lumbar MRI. The study revealed an L5-S1 minor disc bulge but was otherwise negative.

4. On February 10, 2015 Claimant visited John T. Sacha, M.D. for an evaluation. Claimant reported that he was suffering constant localized lower back pain that radiated into the right leg. He also experienced intermittent numbness and tingling into his right foot. Dr. Sacha remarked that Claimant had some discogenic pain based on imaging studies and a physical examination. However, Dr. Sacha explained "[Claimant] has such a nonphysiologic and somatic presentation that it makes it difficult to know for sure what his current pathology is. He certainly has only modest findings on the MRI and I would not expect significance of the symptoms this gentleman is having with his mild findings. So I do recommend a one-time EMG test."

5. On March 12, 2015 Claimant underwent an electrodiagnostic evaluation with Robert I. Kawasaki, M.D. Dr. Kawasaki noted that Claimant had lower back pain that radiated down his right lower extremity. An MRI had revealed a minimal disc bulge at L5-S1 without nerve root impingement. Furthermore, an EMG/nerve conduction study was normal. Dr. Kawasaki remarked that Claimant had presented with significant pain behaviors, diffuse tenderness, limited motion with guarding and an inconsistent examination. He detailed that "[e]ven with the sensory stimulation at low voltage, the patient was verbalizing pain, and particularly with upper testing and needle examination

electromyographically, the patient had significant pain behaviors with some screaming and verbalization of pain… When I asked him to relax his musculature as I was testing for spontaneous activity, he actually tensed up the muscles, indicating this was involuntary."

6. On March 16, 2015 Claimant returned to Dr. Sacha for an examination. Dr. Sacha remarked that "I am struggling to find any pathology for this gentleman." He explained that Claimant exhibited a "nonmedical appearance with respect to his complaints." Dr. Sacha anticipated that Claimant would reach Maximum Medical Improvement (MMI) and his case would be closed within two to three weeks.

7. On April 17, 2015 Claimant visited John Burris, M.D. for an examination. After considering the mechanism of injury and conducting a physical examination, Dr. Burris concluded that Claimant had reached MMI with no permanent impairment. He noted that Claimant's lumbar MRI was normal and revealed only a minor disc bulge at L5-S1 with no evidence of neural impingement. Furthermore, electrodiagnostic testing was normal. Dr. Burris diagnosed Claimant with non-physiologic pain. He remarked that Claimant's diffuse pain complaints did not follow a neuroanatomical pattern and were inconsistent with the original mechanism of injury. Dr. Burris commented that Claimant had not responded to conservative treatment but instead experienced expanding and worsening pain complaints. He agreed with Drs. Sacha and Kawasaki that Claimant did not exhibit any objective findings warranting an impairment rating or permanent work restrictions.

8. Claimant challenged Dr. Burris' MMI and impairment determinations and sought a Division Independent Medical Examination (DIME). On October 2, 2015 Claimant underwent a DIME with Linda Mitchell, M.D. After reviewing Claimant's medical records and conducting a physical examination, Dr. Mitchell agreed with Dr. Burris that Claimant reached MMI on April 17, 2015 with a 0% permanent impairment rating. Dr. Mitchell specifically examined Claimant's lumbar spine, cervical spine, bilateral shoulders, bilateral arms, bilateral hands, bilateral upper extremities, left foot, bilateral lower extremities, chest and torso. She noted "numerous inconsistencies, non-anatomical and non-physiologic findings" and diagnosed malingering. Dr. Mitchell remarked "I find it somewhat unusual that both the cervical and lumbar spines would pop and be injured at the same time…. He had a very thorough course of evaluation and treatment with escalating complaints, atypical of the usual medical history." She summarized "I am in complete agreement with Dr. Burris that his complaints at this time are totally nonphysiologic and nonanatomic… There are no restrictions on his activities."

9. On December 9, 2015 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Mitchell's MMI and impairment determinations. Respondents acknowledged that Claimant reached MMI on April 17, 2015 with a 0% permanent impairment rating.

10. Claimant testified at the hearing in this matter. He explained that he received conservative medical treatment including physical therapy, pool therapy, chiropractic care and medications. However, none of the treatment relieved his symptoms. Claimant asserted that Dr. Mitchell incorrectly determined that he was

malingering because he suffers pain but wants to improve and return to work. He did not present any medical evidence to challenge Dr. Mitchell's determination that he reached MMI on April 17, 2015 with a 0% permanent impairment rating.

11. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Mitchell that he reached MMI on April 17, 2015 with a 0% permanent impairment rating for his October 14, 2014 admitted industrial injuries. Dr. Mitchell specifically examined Claimant's lumbar spine, cervical spine, bilateral shoulders, bilateral arms, bilateral hands, bilateral upper extremities, left foot, bilateral lower extremities, chest and torso. She noted "numerous inconsistencies, non-anatomical and non-physiologic findings" and diagnosed malingering. Dr. Mitchell remarked that, although Claimant had undergone a very thorough course of evaluation and treatment, his symptoms had escalated over time.

12. Dr. Mitchell's conclusions are supported by Claimant's treating physicians. Drs. Sacha, Burris, and Kawasaki all noted on multiple occasions that Claimant exhibited numerous inconsistencies and non-physiologic findings. Drs. Sacha and Burris agreed with Dr. Mitchell that Claimant reached MMI on April 17, 2015 with a 0% permanent impairment rating. Dr. Burris specifically noted that Claimant's lumbar MRI was normal and revealed only a minor disc bulge at L5-S1 with no evidence of neural impingement. Furthermore, electrodiagnostic testing was normal. Dr. Burris also commented that Claimant had not responded to conservative treatment but instead experienced expanding and worsening pain complaints. The persuasive medical records thus corroborate Dr. Mitchell's MMI and permanent impairment determinations. In contrast, Claimant has not produced any medical evidence contradicting the opinions of his treating physicians or Dr. Mitchell's DIME determination. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Mitchell's MMI and impairment determinations were incorrect.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

7. The Colorado Division of Workers' Compensation *Impairment Rating Tips* (*Impairment Rating Tips*) provide that permanent impairment ratings are only warranted when a specific diagnosis and objective pathology can be identified. *See Desk Aid #11, General Principles* 1. In specifically addressing spinal impairment ratings the *Impairment Rating Tips* note that "[p]hysicians should be aware that in the

asymptomatic population, disk bulges, annular tears or high intensity zone areas, and disk height loss are commonly reported in the lumbar spine from 40 – 60% of the time depending on the condition and study. In the cervical spine, the prevalence of disc degeneration or loss of signal intensity on MRI is greater than 50% in the 50 years and older asymptomatic population." *See Desk Aid #11, Spinal Rating 7.* The *Impairment Rating Tips* summarize that

> the existence of [the preceding] anatomic findings cannot be considered pathological unless there are clear physiologic ties and correlation with clinical findings in an individual patient. The mere presence of these changes is not a sufficient justification to attribute correlation to a non-specific spinal complaint**.** The physician should not rate findings by diagnostic imaging which have not been clearly defined as contributing significantly to the patient's condition. . . . Due to discrepancies between x-ray findings and pathological conditions, it is incumbent on physicians to carefully examine and apply other diagnostic tests as appropriate to identify the true pain generators in a patient and plan their treatment and impairment rating accordingly.

See Desk Aid #11, Spinal Rating 7.

8. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Mitchell that he reached MMI on April 17, 2015 with a 0% permanent impairment rating for his October 14, 2014 admitted industrial injuries. Dr. Mitchell specifically examined Claimant's lumbar spine, cervical spine, bilateral shoulders, bilateral arms, bilateral hands, bilateral upper extremities, left foot, bilateral lower extremities, chest and torso. She noted "numerous inconsistencies, non-anatomical and non-physiologic findings" and diagnosed malingering. Dr. Mitchell remarked that, although Claimant had undergone a very thorough course of evaluation and treatment, his symptoms had escalated over time.

9. As found, Dr. Mitchell's conclusions are supported by Claimant's treating physicians. Drs. Sacha, Burris, and Kawasaki all noted on multiple occasions that Claimant exhibited numerous inconsistencies and non-physiologic findings. Drs. Sacha and Burris agreed with Dr. Mitchell that Claimant reached MMI on April 17, 2015 with a 0% permanent impairment rating. Dr. Burris specifically noted that Claimant's lumbar MRI was normal and revealed only a minor disc bulge at L5-S1 with no evidence of neural impingement. Furthermore, electrodiagnostic testing was normal. Dr. Burris also commented that Claimant had not responded to conservative treatment but instead experienced expanding and worsening pain complaints. The persuasive medical records thus corroborate Dr. Mitchell's MMI and permanent impairment determinations. In contrast, Claimant has not produced any medical evidence contradicting the opinions of his treating physicians or Dr. Mitchell's DIME determination. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Mitchell's MMI and impairment determinations were incorrect.

ORDER

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

1. Claimant reached MMI on April 17, 2015 with a 0% permanent impairment rating for his October 14, 2014 industrial injuries.

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

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

DATED: December 1, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-983-791-04

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 26, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 10/26/16, Courtroom 3, beginning at 1:30 PM, and ending at 3:00 PM).

Claimant's Exhibits 1 through 8 were admitted into evidence, without objection, Respondents' Exhibits A through K were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. The Claimant's opening brief was filed on November 1, 2016. The Respondents' answer brief, incorrectly labeled as "Findings of Fact, Conclusions of Law and Order" was filed on November 8, 2016. The ALJ does not accept proposed decisions prior to actually deciding a case, because it would project an appearance of an abdication of the ALJ's decision-making function. On November 8, 2016, counsel for the Claimant advised the Office of Administrative Courts (OAC) that the Claimant would not be filing a reply brief, at which time the matter was deemed submitted for decision.

ISSUES

The issues for decision concern whether the Claimant's low back condition and need for surgery is causally related to the admitted compensable injury of May 7, 2015; and, are the Respondents liable for the low back surgery performed at the University Hospital?

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

FINDINGS OF FACT

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

Preliminary Findings

1. Claimant worked for the Employer as a Superintendent who operated heavy equipment. On May 17, 2015, he suffered an admitted industrial injury to his head, neck, right shoulder and back. While operating a mini-excavator, the Claimant was struck by a dump truck that had rolled downhill. Upon impact, the Claimant was thrown from the mini-excavator.

2. The Claimant complained of neck pain at the time of the injury. He testified at hearing that he also had low back pain but that the neck pain was severe enough that it was his primary focus.

3. The Respondents filed a General Admission of Liability (GAL), dated August 26, 2015, admitting for authorized, causally related and reasonably necessary medical benefits; an average weekly wage (AWW) of $857.25; and, temporary total disability (TTD) benefits of $571.50 per week from August 17, 2015 and continuing.

Medical Chronology

4. Claimant saw Sanjay Jatana, M.D., for treatment of his neck injury. The Claimant stated that he complained about his neck to Dr. Jatana, but that he was told by Dr. Jatana's physician's assistant (PA) that they would not discuss or treat the low back because the carrier had not admitted liability for that injury. Whether or not the Claimant was so told or he misunderstood, the ALJ finds the Claimant credible concerning his understanding.

5. The Claimant also stated that he told his primary care physician, Kenneth R. Atkinson, M.D., about the low back injury. There is nothing in Dr. Atkinson's medical records indicating that he was told of a problem in the low back. In light of the fact that Dr. Atkinson is no longer available, the ALJ places no weight on that the Claimant says he told Dr. Atkinson, or on Dr. Atkinson's notes.

6. Dr. Atkinson was killed on April 4, 2016. After his death, the Claimant went without a treating physician for approximately one month. The parties stipulated at hearing that the insurance carrier tried to send the Claimant to Kristin Mason, M.D., and it was agreed that he would go there for treatment but Dr. Mason refused to accept the case.

7. During the time that the Claimant did not have an authorized treating physician (ATP), he saw Fredric M. Sonstein, M.D., at SpineOne, on his own self-referral. In his May 2, 2016 report, Dr. Sonstein stated that the Claimant had a large disc herniation at L3-4 with bilateral pain and weakness. He referred the Claimant for surgical intervention although Dr. Sonstein did not specify where he was referring the Claimant (Claimant's Exhibit 2, bates stamp 17). Dr. Sonstein did state the surgery was the best option for the treatment of the back injury.

8. During the time that the Claimant did not have a treating physician, he went to CU Health Sciences Center (UCHSC) for treatment of his low back. According to the Claimant, he was in terrible pain and it was an emergency situation. According to the Claimant, a Dr. Witt at UCHSC performed surgery on his low back.

9. The Claimant had a prior back fusion at L4-5 and L5-S1 several years prior to the recent injury. He stated that he was working his job without difficulty from this prior condition and had no symptoms up until May 17, 2015 when the truck collided with his back hoe.

10. Scott Monheit, D.O., eventually became the Claimant's ATP. Dr. Monheit received a questionnaire from the Respondents, dated July 22, 2016 (Claimant's Exhibit 1, bates stamp. 4). In his answers, Dr. Monheit stated, "It appears he has had preexisting lumbar disease, though it significantly worsened after the accident. My opinion is it was exacerbated by the accident and worsened over the next year." The ALJ finds that Dr. Monheit rendered an opinion, to a reasonable degree of medical probability, that the Claimant's pre-existing back condition was aggravated and accelerated by the admitted injury of May 7, 2015.

11. Other than the opinion of Dr. Monheit, no other persuasive medical evidence from a treating physician was presented at hearing.

Respondents' Independent Medical Examination (IME) by John Raschbacher , M.D.

12. Dr. Raschbacher performed an IME for the Respondents. He devoted his March 26, 2016 report exclusively to the Claimant's cervical injury, except for the last line which stated that he didn't think the back injury had a clear relationship to his workers compensation claim.

Ultimate Findings

13. The ALJ finds the opinion of Dr. Monheit, the Claimant's present ATP highly persuasive and credible. ATP Dr. Monheit's opinion is more consistent with the totality of the evidence. Dr. Monheit has rendered an affirmative opinion of the causal relatedness of an aggravation and acceleration of the Claimant's low back condition to the admitted May 7, 2015, injury. The ALJ finds that the Claimant was credible in his efforts to tell early treating physicians of his back condition, but they either told him that it was not admitted by the insurance carrier and they could not discuss it, or the Claimant misunderstood. Further, the Claimant was credible in stating that he focused on the neck injury because it was more bothersome at first. Further, the Respondents theory is based on the absence of notations in early medical reports, and not on any affirmative opinions contrary to ATP Dr. Monhiet's opinion.

14. Between conflicting medical opinions on the issue of causal relatedness of the Claimant's back condition, the ALJ accepts the opinions of ATP Dr. Monheit and rejects all opinions to the contrary.

15. The Claimant has proven, by a preponderance of the evidence that his present back condition is the result of an aggravation and acceleration of his pre-existing back condition; and, that it is causally related to the admitted injury of May 7, 2015.

16. The Claimant has proven, by preponderant evidence, that because Dr. Mason refused to take the Claimant's case, the Claimant was forced to go the UCHSC on an emergent basis and emergency surgery that was reasonably necessary to cure and relieve the effects of the admitted May 7, 2015 injury was required and performed.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinion of Dr. Monheit, the Claimant's present ATP was highly persuasive and credible. ATP Dr. Monheit's opinion was more consistent with the totality of the evidence. Dr. Monheit rendered an affirmative opinion of the causal relatedness of an aggravation and acceleration of the Claimant's low back condition to the admitted May 7, 2015, injury. Also, as found, the Claimant was credible in his efforts to tell early treating physicians of his back condition, but they either told him that it was not admitted by the insurance carrier and they could not discuss it, or the Claimant misunderstood. Further, as found, the Claimant was credible in stating that he focused on the neck injury because it was more bothersome at first. As found, the Respondents theory was based on the absence of notations in early medical reports, and not on any affirmative opinions contrary to ATP Dr. Monhiet's opinion.

Substantial Evidence

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

Aggravation and Acceleration of pre-Existing Condition

c. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant's back condition is the result of an acceleration and aggravation of his pre-existing back condition.

Reasonably Necessary and Causally Related Medical Care

d. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the aggravation of his back condition on May 7, 2015. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of the compensable aggravation and acceleration of the Claimant's low back condition.

Emergent Care

e. While Respondents are only liable for treatment by ATPs, an exception exists when the treatment is the result of a medical emergency. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). As found, the Claimant in this case had no ATP and according to his own un-rebutted testimony, he was in intense pain and went to UCHSC for emergency treatment, whereupon the surgery was performed von an emergent basis.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay all the costs of medical care and treatment for the Claimant's compensable low back injury of May 7, 2015, including the costs of emergent surgery already performed, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this______day of December 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he sustained a functional impairment not listed on the schedule?

2. Did Claimant prove by a preponderance of the evidence that "normalization" of his right knee range of motion is inappropriate?

3. Disfigurement.

FINDINGS OF FACT

1. Claimant was formerly employed by Employer as a "healthcare tech." On June 6, 2013, he injured his right knee when he slipped on a dryer sheet on the floor, causing him to hyperextend his knee.

2. Employer referred Claimant to Dr. Terrence Lakin of the Southern Colorado Clinic, who became the primary ATP. Claimant initially underwent conservative treatment including physical therapy, rest, and medication.

3. On August 13, 2013, Claimant underwent an MRI, which showed findings consistent with a hyperextension injury, including bone bruising and at least a partial ACL tear. Additionally, there was a tear of the medial meniscus.

4. Claimant was evaluated by Dr. Roger Davis, an orthopedic surgeon, on August 22, 2013. Claimant reported pain and episodic instability. Following physical examination and review of MRI films, Dr. Davis assessed a partial ACL tear, bone bruise, and meniscus tear, and recommended physical therapy. Dr. Davis indicated surgery might be necessary if Claimant had ongoing instability with activities.

5. Dr. Lakin placed Claimant at maximum medical improvement (MMI) on November 22, 2013, without permanent impairment. In his MMI report, Dr. Lakin noted Claimant had full range of motion of both knees.

6. Claimant saw Dr. Higginbotham on February 12, 2014 for a Division IME (DIME). Dr. Higginbotham agreed that Claimant was at MMI but assigned a 13% lower extremity impairment rating. Dr. Higginbotham noted that Claimant's left knee had 145° of flexion, which was "felt to the full and normal."

7. Respondents filed a Final Admission of Liability (FAL) based on Dr. Higginbotham's report.

8. On June 4, 2014, Dr. John Hughes performed an Independent Medical Examination (IME) at Respondent's request. Dr. Hughes agreed that Claimant was at MMI, and calculated a 9% lower extremity impairment. Dr. Hughes disagreed with certain maintenance medical treatments suggested by Dr. Higginbotham. Dr. Hughes took ROM measurements of both knees, which showed 140° of flexion on the right, and 148° of flexion on the left.

9. On August 28, 2014, Claimant presented to PA-C Terry Schwartz with a report of low to mid back pain. Claimant reported he was transferring a patient from a tub to a wheelchair. Physical examination revealed tenderness from T10 to L3. PA-C Schwartz diagnosed a lumbar strain.

10. Claimant filed a separate workers' compensation claim for benefits concerning the low back strain. He was placed at MMI on December 4, 2014 without impairment.

11. After MMI, Claimant continued to experience pain, swelling and instability in his right knee.

12. On April 28, 2015, Claimant saw Dr. James Duffey, an orthopedic surgeon, for reevaluation of his knee. Dr. Duffey assessed ACL deficiency and recommended ACL reconstructive surgery.

13. At a follow-up appointment with Dr. Duffey on July 7, 2015, Claimant continued to report right knee pain and instability. Dr. Duffey documented that "he is starting to have symptoms on his opposite knee because of favoring the right knee."

14. On July 16, 2015, Dr. William Ciccone performed an IME at Respondent's request. Dr. Ciccone opined that the surgery proposed by Dr. Duffey was reasonable, necessary, and causally related to the June 2013 injury.

15. Claimant underwent a right ACL reconstruction and partial medial meniscectomy with Dr. Duffey on August 20, 2015.

16. Claimant participated in extensive postoperative physical therapy. Medical records reflect slow but steady improvement in his condition.

17. Dr. Lakin placed Claimant at MMI on March 3, 2016. In a report dated March 30, 2016, Dr. Lakin assigned a 16% right lower extremity impairment rating. Dr. Lakin reduced the ROM component of the rating by reference to ROM measurements of Claimant's left knee. The DOWC refers to this process as "normalization." Without normalization, Claimant's right lower extremity impairment was 22%.

18. Claimant's left knee ROM has been measured several times throughout his course of treatment. The ALJ found at least eight instances of documented left knee ROM in the record:

	L Knee Flexion	**Provider**
11/5/2013	140 degrees	Lakin (MMI #1)
2/12/2014	“Full”	Higginbotham (DIME)
6/4/2014	148 degrees	Hughes (IME)
7/16/2015	130 degrees	Ciccone (IME)
2/9/2016	140 degrees	PT
3/1/2016	140 degrees	PT
3/3/2016	130+ degrees	Lakin (MMI #2)
3/30/2016	125 degrees	Lakin (IR)
8/25/2016	139 degrees	Wunder (IME)

19. The left knee flexion measurements Dr. Lakin used to “normalize” Claimant’s impairment rating are lower than Claimant’s documented ROM at any other time during his treatment.

20. Dr. Wunder performed an IME at Respondent’s request on August 25, 2016. Dr. Wunder opined that it was appropriate for Dr. Lakin to utilize Claimant’s contralateral knee ROM when calculating the impairment rating. Dr. Wunder opined that medical literature does not support a causal connection between knee pain and development of symptoms in the contralateral knee. Dr. Wunder further opined that medical literature shows no relationship between limping and development of low back or hip pain.

21. Dr. Wunder testified in a deposition on behalf of Respondent on October 18, 2016. Dr. Wunder testified Claimant did not report any low back symptoms at the time of his IME evaluation. Dr. Wunder opined there are no objective findings to substantiate any low back pathology. Dr. Wunder testified that Claimant reported left knee symptoms, but his physical examination of Claimant’s left knee was normal. Dr. Wunder reiterated his opinion that it was appropriate for Dr. Lakin to utilize the left knee ROM when evaluating the right knee impairment. But Dr. Wunder testified that “the opposite joint that you are measuring should not be, ***in any way***, pathologic, meaning ***it shouldn’t be symptomatic***.” (Emphasis added).

22. Claimant’s testimony that he has developed progressive symptoms in the left knee since the original date of injury is consistent with and supported by information in his medical records. For example, Claimant reported left knee pain due to favoring the right knee on July 2015. On February 25, 2016, Claimant’s physical therapy session was terminated early due to “severe fatigue in L knee, to the point of nearly falling down during walking lunges. Patient reported a ‘weird’ feeling in L knee which caused him to be unable to complete today’s session.”

23. Claimant’s testimony that he has developed progressive low back pain as a result of altered gait mechanics is not substantiated by the other evidence of record.

24. Claimant has failed to prove by a preponderance of the evidence he suffered functional impairment not listed on the schedule.

25. Claimant has proven by a preponderance of the evidence that the ROM “normalization” performed by Dr. Lakin is incorrect. Consequently, Claimant has proven by a preponderance of the evidence that he sustained a 22% scheduled right lower extremity impairment.

26. Claimant has four surgical scars on the right leg: a ½ inch diameter scar on the lateral aspect of the thigh, two ½ inch long by ¼ inch wide scars on the front of the knee below the patella, and a 3 inch long by ½ inch wide raised scar on the medial aspect of the shin. All of the scars are discolored compared to the surrounding skin. The scars are in areas normally exposed to public view. The ALJ finds that the claimant should be awarded $1,500 for this disfigurement.

CONCLUSIONS OF LAW

Claimant has raised two issues regarding permanent impairment. First, Claimant alleges he has sustained functional impairment in areas of his body not listed on the schedule of disabilities. Second, Claimant argues that he is entitled to PPD benefits based on Dr. Lakin’s 22% extremity rating, without “normalization” based on comparison to the contralateral knee.

The issues must be evaluated in that order. The ALJ must first determine whether Claimant has suffered a scheduled or whole person impairment. If Claimant has suffered a whole person impairment, Dr. Lakin’s 9% whole person rating is binding, because neither party requested a DIME. Section 8-42-107(8)(c); *Whiteside v. Smith*, 67 P.3d 1240, 1244 (Colo. 2003) (a DIME is a “jurisdictional prerequisite” to challenging the ATP’s findings regarding the “degree of non-scheduled impairments”).

On the other hand, if Claimant has sustained only a scheduled impairment, he may challenge the ATP’s impairment rating under the preponderance of the evidence standard. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

A. Whole Person Impairment

Whether a claimant has sustained a scheduled injury or a whole person impairment is a question of fact for determination by the ALJ. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). In resolving this question, the ALJ must determine “the situs of the functional impairment,” which is not necessarily the site of the injury itself. *Id*. The schedule of disabilities refers to the loss of “a leg.” Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the “leg,” he has sustained a whole person impairment and must be compensated under § 8-42-107(8).

Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant’s testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (ICAO, September 12, 2000).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (ICAO, December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (ICAO, August 9, 1996).

As found, Claimant has failed to prove by a preponderance of the evidence that he suffers functional impairment in parts of his body not listed on the schedule. Rather, the ALJ concludes that Claimant's functional impairment is limited to his right leg.

Claimant's primary argument to support whole person impairment is that he developed symptoms and associated limitations in his low back as a result of altered gait mechanics. The ALJ finds no persuasive corroborating evidence in Claimant's medical records to substantiate this argument. Claimant did not note back pain on any of the numerous pain diagrams he completed at Dr. Lakin's office. Nor did he report back symptoms to any of the IME physicians, including the DIME. Although Claimant testified that Dr. Lakin told him not to reference any body parts other than his right knee, that does not explain why he did not mention his back symptoms to other physicians. Although the Claimant may experience transient low back pain, the ALJ is not persuaded that any such symptoms give rise to functional impairment that would justify a finding of whole person impairment.

Furthermore, to the extent Claimant may suffer from episodic low back symptoms, he did not prove that any such symptoms relate to the June 2013 industrial injury. Dr. Wunder opined the medical literature does not show a causal relationship between altered gait and the onset of low back or hip pain. Claimant introduced no persuasive evidence that disputes Dr. Wunder's opinions in that regard.

After considering the totality of the evidence, the ALJ concludes that Claimant has suffered a purely scheduled impairment to his right lower leg.

B. Impairment Rating – "Normalization"

Section 8-42-101(3.7) provides that all physical impairment ratings must be calculated by reference to the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3d Edition, Revised, ("AMA Guides"). Section 8-42-101(3.5)(a)(II) requires the Director of the Division of Workers' Compensation ("Director") to establish impairment rating guidelines "based on" the AMA Guides.

Pursuant to that directive, the Director has promulgated numerous rating guidelines, many of which are contained in Desk Aid #11 – Impairment Rating Tips (the "Tips").[1]

The section of the Tips addressing the so-called "normalization" procedure provides:

> **Rating of Extremities Using Contralateral Joint/"Normalization":** In some cases, the contralateral joint is a better representation of the patient's pre-injury state than the AMA Guides population norms. The 3rd Revised Edition has little commentary on this procedure, however, the 5th Edition and the Division consider it reasonable to compare both extremities when there are specific conditions which would make the opposite, non-injured extremity serve as a better individual baseline. (This procedure is not an apportionment procedure as it does not reflect a prior pathologic condition with impairment; therefore, avoid using the term "apportionment" when referring to this process. This process can be termed "normalization.") Therefore, when deemed appropriate, the physician may subtract the contralateral joint ROM measurement from the injured joint's ROM impairment. (An example would be a patient with limited knee flexion due to obesity.) However, this subtraction should not be done if the contralateral joint has a known previous injury because that joint may not reflect the "normal" ROM for that individual. Make sure that you explain your methodology and your rationale in your report.

The ALJ concludes that the normalization applied by Dr. Lakin was inappropriate for several reasons. First, the Tips indicate that normalization should be the exception rather than the rule. The Tips state that normalization applies "***in some cases*** . . . ***when*** there are ***specific conditions*** which would make the opposite, non-injured extremity serve as a better individual baseline." (Emphasis added). The Tips give the example of a claimant with obesity. The record does not show that Claimant suffers from any condition that would reasonably be expected to limit his ROM irrespective of injury.

Second, the Tips instruct the rating physician to "make sure that you explain your methodology and your rationale in your report," but Dr. Lakin did not explain why normalization should be applied in Claimant's case. Without that explanation, the ALJ does not know what "specific conditions" warrant normalization in Claimant's case.

Third, the ostensible purpose of normalization is to provide a "better representation of the patient's ***pre-injury state.***" (Emphasis added). In Claimant's case, measurements of Claimant's left knee taken in 2014 showed essentially normal ROM. If the goal is to estimate Claimant's "pre-injury" ROM, it makes the most sense to use the measurements which were closest to the date of injury. Based on the ROM

[1] There have been at least five iterations of the Impairment Rating Tips since 2006. The most recent revision took effect in July 2016. With the exception of notations of emphasis, the text of the current section relating to "normalization" of impairment ratings is identical to the text of the prior version in effect at the time of Claimant's impairment rating.

measurements taken in 2014, the ALJ concludes it is most likely that Claimant had no deficits of left knee flexion before his industrial injury.

Fourth, Claimant persuasively testified that he developed symptoms in the left knee before reaching MMI in March 2016. That testimony is corroborated by the medical records. Dr. Wunder testified that normalization should not be applied if the contralateral joint is symptomatic. Claimant's testimony is also supported by the decrease in measured left knee ROM over the course of his claim.

Finally, the 125° of left knee flexion Dr. Lakin utilized to "normalize" Claimant's ROM impairment does not appear reliable in light of other measurements in the medical records. Claimant's left knee flexion was measured on multiple occasions before MMI as 140° or greater. Similarly, Dr. Wunder measured 139° of left knee flexion in August 2016. Therefore, the ALJ is not persuaded that the 125° measurement accurately reflects Claimant's ROM at the time of his rating, much less his "pre-injury" baseline.

Based on the totality of evidence presented, the ALJ concludes that Claimant's right knee impairment rating should not be reduced by reference to his left knee measurements. Accordingly, Claimant has proven by a preponderance of the evidence he suffered a 22% scheduled lower extremity impairment.

C. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has surgical scars as a result of his compensable injury. The ALJ concludes that Claimant should be awarded $1,500 for this disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's claim for whole person impairment benefits is denied and dismissed.

2. Respondents shall pay PPD benefits based on a 22% scheduled lower extremity impairment. Respondent make take a credit for any PPD benefits previously paid to Claimant.

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

4. Respondent shall pay Claimant $1,500 for disfigurement. Respondent may take a credit for any disfigurement benefits previously paid to Claimant.

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

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

DATED: December 7, 2016

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

➢ Whether claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and in the course and scope of her employment with employer on April 27, 2016.

➢ If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received, including treatment provided by Dr. Jesus Ochoa and the magnetic resonance imaging ("MRI"), was reasonable and necessary to cure and relieve her from the effects of the work injury.

➢ If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received, including treatment provided by Dr. Jesus Ochoa and the MRI, was authorized medical treatment under the Colorado Workers' Compensation Act.

➢ If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability ("TTD") benefits.

➢ If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to temporary partial disability ("TPD") benefits.

➢ At hearing, the parties stipulated that if claimant's injury is found compensable, her average weekly wage ("AWW") is $650.12.

➢ The parties stipulated that if claimant is found to be entitled to TTD benefits, the dates for TTD benefits will be for the period of May 2, 2016 through June 12, 2016.

➢ The parties stipulated that if claimant is found to be entitled to TPD benefits, the dates of TPD will be for the period of June 13, 2016 through June 19, 2016.

FINDINGS OF FACT

1. Claimant is 55 years old and has worked for employer since December 2013 as a 911 dispatcher. Due to the sedentary nature of the position, employer has provided employees with standing work stations. In addition, a treadmill is available to allow employees to walk at their work stations. Claimant has utilized the employer provided treadmill during her employment.

2. As indicated by the medical records, claimant has a 20 year history of back and neck issues and she has sought chiropractic treatment for these symptoms. Claimant testified that prior to April 2016 she did not miss work for prior back and neck issues.

3. Claimant testified that while she was at work on April 23, 2016 she squatted down to pick up her purse and her back "caught". This made it difficult for claimant to stand back up. Claimant testified that her coworker, Amy Sullivan, assisted her by carrying her bags to her car on that date.

4. On April 24, 2016, claimant sent a text message to her coworker Sharon Grotrian stating "I squatted down to pick up my bags to leave work yesterday and couldn't hardly get up …I think my disk has slipped and will need to go to the chiro tomorrow." At times Ms. Grotrian acts in a supervisory capacity and approved claimant's request for time off for April 24, 2016.

5. Claimant testified that on April 25, 2016 she received treatment from her chiropractor Dr. Gregory Lane because she was feeling "achy". According to the medical records, Dr. Lane indicates that claimant reported she had been experiencing these symptoms for approximately one week. Dr. Lane's report does not mention any incident regarding lifting a purse or her workplace.

6. Claimant testified that on April 27, 2016 she opted to use the treadmill that is available to employees. The treadmill has wheels, which claimant used to move it for use at her work station. Claimant testified that she felt a pull in her lower back when she attempted to roll the treadmill under her work station and it did not easily roll over the mat under her desk. Claimant continued to attempt to roll the treadmill a second time and was able to roll it under her desk successfully.

7. Claimant testified that she then walked on the treadmill for approximately thirty minutes. When she finished walking on the treadmill claimant asked a coworker, Amy Sullivan, to return the treadmill to the wall where it is kept when not in use. Claimant testified that she made this request of Ms. Sullivan because she felt that she could not lift the treadmill. Claimant did not report a work injury to employer on April 27, 2016.

8. Claimant testified that she worked her scheduled shift on April 28, 2016 and informed her coworkers that she had low back pain. Claimant did not report a work related injury to employer on that date.

9. Claimant testified that at approximately 1:00 a.m. on April 29, 2016 she was experiencing pain in her back and contacted her personal physician, Dr. Jesus Ochoa. Claimant testified that she did not seek care at the emergency room because she did not feel that emergency treatment was necessary.

10. As indicated by the medical records, claimant was able to see Dr. Ochoa on April 29, 2016 and reported to him that she had pain in her low back and into her left hip. Claimant informed Dr. Ochoa that the pain began the Saturday prior when she bent

down to pick up her purse. Claimant did not report a treadmill related incident to Dr. Ochoa on April 29, 2016.

11. On April 29, 2016, Dr. Ochoa administered a ketorolac injection in claimant's right buttock. Dr. Ochoa also ordered an MRI of claimant's lumbar spine. The MRI was conducted on April 29, 2016 and showed a lateral disc protrusion at the L4-L5 level.

12. Claimant was not scheduled to work on April 30, 2016 and May 1, 2016. Claimant called the employer and notified them that she would not be at work on May 2, 2016 because Dr. Ochoa had advised her not to work. During that time claimant sought additional chiropractic treatment from Dr. Douglas Chapman. On May 4, 2016, Dr. Chapman referred claimant "to medical for evaluation and treatment of a disc injury". Dr. Chapman's notes on that date do not mention the cause of the "disc injury", nor does he record any information related to moving a treadmill.

13. Claimant testified that she returned to work as scheduled on May 4, 2016. On that date, claimant reported to employer that she was injured on April 27, 2016 while moving the treadmill at work.

14. Based upon claimant's report of the April 27, 2016 treadmill incident, employer referred claimant to Surface Creek Family Practice for treatment and claimant began treating with Dr. Kevin Pulsipher on May 6, 2016. Claimant reported to Dr. Pulsipher that she injured her back while moving a treadmill at work on April 27, 2016. The ALJ finds that this is the first medical record that describes the treadmill incident as the mechanism of claimant's injury.

15. Dr. Pulsipher recommended claimant receive injections, pain medications, physical therapy, and referred her to Dr. Kenneth Lewis, a pain specialist.

16. At the claimant's request, on June 3, 2016, Dr. Ochoa amended his April 29, 2016 medical notes to reflect that the event that caused claimant's back and hip pain occurred two days prior on April 27, 2016.

17. On June 13, 2016, Dr. Pulsipher released claimant to return to work on a part-time basis. Claimant returned to full-time work on June 20, 2016. On July 5, 2016, Dr. Pulsipher placed the claimant at maximum medical improvement ("MMI").

18. Connie Johnson is the Communications Supervisor for 911 Dispatchers with employer and is claimant's supervisor. Ms. Johnson testified that she was aware of claimant's prior back issues as it was a general topic of conversation at work. On April 25, 2016, Ms. Johnson learned from another employee that claimant had taken time off to see her chiropractor on April 24, 2016.

19. Ms. Johnson also testified that claimant did not report any issue or work related injury to her on April 27, 2016. Although claimant and Ms. Johnson interacted on April 28, 2016 and discussed finding claimant a chiropractor, claimant did not mention any incident regarding the treadmill to Ms. Johnson on that date.

20. Ms. Johnson testified that claimant contacted her by telephone on April 29, 2016 to report that she was going to have an MRI of her back. During that telephone call, claimant informed Ms. Johnson that she hurt her back while lifting her purse on April 28, 2016. On April 29, 2016, claimant did not make any statement to Ms. Johnson regarding the treadmill. Ms. Johnson testified that May 4, 2016 was the first time she learned that claimant believed she injured her back on April 27, 2016 while moving the treadmill.

21. Ms. Johnson completed an incident report on May 6, 2016 regarding her understanding of claimant's injury. The employer completed a first report of injury on that same date. On May 16, 2016, employer issued a notice of contest of claimant's workers' compensation claim.

22. Claimant's coworker Sharon Grotrian testified that she received the April 24, 2016 text from claimant regarding her "need to go to the chiro". Ms. Grotrian also testified that she observed that claimant appeared to be in pain while at work on April 25, 2016.

23. Claimant's coworker Amy Sullivan testified that on April 23, 2016 she observed claimant having difficulty standing after bending to pick up her bags. Ms. Sullivan also testified that she assisted claimant with carrying these bags to claimant's car. Ms. Sullivan testified that on April 27, 2016 she moved the office treadmill for claimant, but she could not recall why she assisted claimant with the treadmill that day.

24. Respondent referred claimant for an independent medical examination ("IME") with Dr. Douglas Scott on August 12, 2016. Dr. Scott reviewed claimant's medical records, reviewed other non-medical documentation, obtained a history from claimant, and performed a physical examination in connection with the IME. Dr. Scott issued a medical report that summarized his findings and opined that the disc protrusion at claimant's L4-L5 level likely existed prior to April 2016 and that this condition is an age related degenerative disease.

25. Dr. Scott also opined that claimant did not injure her back at work on April 27, 2016, nor did she injure her back while moving a treadmill. Dr. Scott points to the discrepancies in claimant's reports to medical providers, her coworkers, and the information she reported to employer and opines that claimant was injured on either April 18, 2016 or April 23, 2016. Dr. Scott's testimony was consistent with his IME report.

26. The ALJ credits the medical records over claimant's testimony at hearing and finds that claimant has failed to demonstrate that it is more likely than not that she injured her back while moving a treadmill at work on April 27, 2016. The ALJ finds the claimant's testimony related to the alleged treadmill incident to be neither credible nor persuasive. The ALJ notes that claimant made no reference to a treadmill related incident until May 4, 2016, despite obtaining treatment from both Dr. Ochoa and Dr. Chapman.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2015). A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with “a preexisting disease or infirmity to produce disability or need for treatment.” *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has failed to demonstrate, by a preponderance of the evidence, that she sustained a work related injury to her low back on April 27, 2016. As found, the medical records are more persuasive and credible than claimant’s testimony at hearing.

ORDER

It is therefore ordered that:

1. Claimant’s claim for benefits is denied and dismissed.

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

DATED: December 7, 2016

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

ISSUES

The issue addressed by this decision involves Claimant's entitlement to additional medical benefits. The specific question answered is:

I. Whether Claimant established by a preponderance of the evidence presented that the L5-S1 discectomy with fusion procedure recommended by Dr. Bhatti is reasonable, necessary and related to his admitted industrial injury.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Markus, the ALJ enters the following findings of fact:

1. Claimant is a 43 year old male who was employed as an Assistant Manager for Employer when he was injured on October 11, 2013. According to Claimant, he was assisting co-employees in unloading a truck when he slipped and fell, injuring his left shoulder, neck and low back. Claimant testified that it was snowing and the loading dock was wet. He lost his footing on the wet floor and fell forward onto his left side while attempting to pick up a box from a conveyor belt.

2. Claimant reported his injuries and initiated treatment with Dr. Douglas McFarland. Treatment for Claimant's injuries has been extensive, involving both conservative measures and surgical intervention. Claimant has had one surgery to the left shoulder as performed by Dr. David Weinstein. As detailed below, Claimant has also undergone two back surgeries performed by Dr. Roger Sung.

3. As the current dispute involves Claimant's request for authorization of additional low back surgery, this order does not address all prior treatment directed to Claimant's neck and left shoulder.

4. As noted above, Dr. Sung has performed surgery in an attempt to address Claimant's leg and low back pain which was reportedly made worse by "bending, lifting, walking and standing." A surgery, consisting of a right L5-S1 microdiscectomy was performed on July 14, 2015. During this procedure, Dr. Sung performed a hemilaminotomy and after taking down the ligamentum flavum was able to visualize the S1 nerve root. He then retracted the nerve root medially discovering a "calcified disk herniation" which he removed.

5. During the week following his July 14, 2015 surgery, Claimant developed "increasing pain, numbness and dysfunction" in his right leg. He reportedly developed a fever on July 20, 2015 and presented to the local emergency room where concern was

expressed for infection. He was transferred to the emergency room at Parkview Hospital and subsequently to Memorial Hospital where he was re-evaluated by Dr. Sung. After assessing Claimant with right leg pain, numbness and weakness and recurrent disc herniation, Dr. Sung returned Claimant to the operating room for a "revision L5-S1 right, microdiscectomy" and "right S1 epidural steroid injection" where he discovered a "small recurrent disc herniation which he removed without difficulty." He also treated Claimant for potential infection by debriding the wound and thoroughly irrigating it and the disc space.

6. Claimant's leg pain improved following his second surgery; however, he continued to have weakness and what he described alternatively in the record as a "funny" or "fuzzy" feeling in his right foot and leg. Dr. Sung noted some weakness and encouraged Claimant to continue with strengthening exercise for his core and leg. Dr. Sung also noted that he wanted to give Claimant "up to a year to recover."

7. Post operatively, Claimant was followed both by Dr. Douglas McFarland and Dr. Dwight Caughfield. On September 10, 2015, Claimant reported to Dr. Caughfield that he had increased foot numbness since undergoing surgery. He complained of a persistently cold foot which he had to wrap in a blanket along with cramping in his right calf. Dr. Caughfield recommended physical therapy (PT) per Dr. Sung's recommendation and continued Lyrica.

8. On September 24, 2015, Claimant returned to Dr. Caughfield with complaints of continued back and leg pain and increasing depression and anxiety. After noted that he back pain was unchanged, Dr. Caughfield recommended "core strengthening and ROM with lumbar stabilization" exercises. He also noted that Claimant's mood had deteriorated, recommending a change in medication from Zoloft (which Claimant had run out of) to Lexapro. He referred Claimant to a psychiatrist "given [Claimant's] worsening mood."[1]

9. Dr. Caughfield's referral to a "psychiatrist for more specialized management of [Claimant's] depression and anxiety medication" was denied by Insurer. Consequently, Dr. Caughfield increased Claimant's anti-depressant to 20 mg.

10. Claimant was seen in follow-up by Dr. McFarland on January 7, 2016. During this visit discussion was had regarding Claimant's continued leg and back pain. Dr. McFarland noted that he agreed with Dr. Caughfield that Claimant likely needed an electrogdiagnostic study of his legs given his complaints of paresthesias in the lower extremities. Also discussed was Claimant's request to see another provider for his ongoing back pain. Based upon Dr. McFarland's January 7, 2016 note the ALJ finds

[1] Claimant had been previously referred to and was evaluated by psychologist Dr. David Hopkins, Ph.D. on June 2, 2014. At the time of his evaluation it was felt that Claimant was suffering from a moderate degree of anxiety and mild depression related to the disability connected to his industrial injury. Dr. Hopkins assessed Claimant with an "adjustment disorder with anxiety" and a "pain disorder with physical and psychological factors." Dr. Hopkins recommended biofeedback, adjustment counseling and continued antidepressant medication. Claimant's psychological care would later be transferred to Dr. Herman Staudenmayer based upon Dr. Hopkins retirement from practice.

that Claimant had discussed his desire to see another provider for his back with Dr. Caughfield prior to January 7, 2016. The inference is supported by Dr. McFarland's documentation that that Dr. Caughfield wanted Dr. McFarland to recommend another "back specialist." Finally, Dr. McFarland noted that there had been "recent concerns about fecal and urinary incontinence and possible cauda equine syndrome"; however, an MRI "did not show any signs of compression of the cauda equine."[2]

11. During a repeat examination with Dr. Caughfield on January 27, 2016, Claimant reported continued back and leg pain. Dr. Caughfield documented Claimant's report of "episodes of bowel and bladder incontinence noting that Claimant was scheduled for a colonoscopy. Dr. Caughfield noted that Claimant was continuing to struggle with "depression and anxiety." Dr. Caughfield recommended and preformed an EMG to "evaluate for any acute axonal loss. Regarding the anticipated study, Dr. Caughfield noted if it was "negative I would not recommend a repeat lumbar surgery since I believe the lack of prior improvement and is (sic) continued pain with functional limitation without correlation on MRI makes him a poor repeat surgery candidate and is not likely to have functional gains with further surgery. Once completed, the EMG demonstrated evidence consistent with a right S1 radiculopathy.

12. On February 10, 2016, Dr. Caughfield documented the following concerning Claimants' back and leg pain and the results of his EMG: "Chronic low back and leg pain with evidence of right S1radiculopathy on EDX study with axonal loss." Dr. Caughfield went on to note that the results of Claimant's study were "very limited by patient effort/pain on needle examination. Dr. Caughfield recommended an opinion, with MRI correlation, with Dr. Sana Bhatti in an effort to determine whether the results of Claimant's EMG were due to "continued compression or incomplete reinervation."

13. Dr. Bhatti evaluated Claimant on March 17, 2016. Regarding his back/leg, Claimant reported "numbness and paresthesias in both feet but much more severe on the right with right lateral foot numbness." He reported that it felt like he had "rocks on the bottom of his right foot" and "muscle spasms in his feet." He complained of "difficulty with ambulation" and noted that he was "unable to walk very far." He also complained of continued "urinary urgency and stress incontinence." He reported functional decline with activities of daily living, including showering. Physical examination revealed 4/5 strength in the right leg primarily with regard to plantar flexion and mild weakness in the left lower extremity. Claimant was unable to tandem walk, and unable to get onto his toes and heel with the right foot. Sensation was decreased in the lateral aspect of the right foot and while Claimant's lower extremity reflexes were symmetrical, they were diminished. Straight leg raise testing was also positive bilaterally. Dr. Bhatti opined that the etiology of Claimant's symptoms was unclear. He noted that the 12/11/15 MRI demonstrated a right L5-S1 disc herniation but did not have Claimant's pre-operative MRI, so could not compare the two. He recommended a lumbar myelogram and CT scan.

[2] An MRI of the lumbar spine had been completed on December 11, 2015 which demonstrated right-sided perineural and peridural enhancing fibrosis at the L5-S1 level. No recurrent disc protrusion was noted.

14. Claimant was evaluated by Dr. Timothy O'Brien at Respondents' request on May 31, 2016. Dr. O'Brien obtained a history from Claimant, reviewed medical records and completed a physical evaluation. At the conclusion of his independent medical examination (IME), Dr. O'Brien opined that Claimant sustained an isolated and minor injury to his left shoulder only. He opined further that this injury was "not substantial enough or energetic enough to result in a rotator cuff tear, acromioclavicular joint separation, or progression of pre-existing and underlying rotator cuff tendinitis. Although he did not specifically address Claimant's low back pathology and the findings on MRI and CT myelogram in the "impression" section of his report, Dr. O'Brien unquestionably attributes Claimant's low back and leg pain to "multilevel spondylosis" which he opined is normal for his age. Furthermore, Dr. O'Brien opined that the "degenerative changes" in Claimant's back was "not generating pain." Rather, Dr. O'Brien opined that Claimant's pain was "nonorganic which is why it could not be expected to respond to traditional treatment modalities . . ."

15. In opining that Claimant's pain was non-organic in origin, Dr. O'Brien suggests that Claimant's treatment providers have not served him properly. Per Dr. O'Brien, those providers would have been able to serve Claimant more effectively if they had "just told him that his pain could not be explained by their exam findings and could not be explained by their experience with similar patients." According to Dr. O'Brien, Claimant continues to report back and leg pain despite "receiving care with merely every medical and surgical modality available in western medicine" because his pain complaints are nonorganic in nature.

16. A careful read of Dr. O'Brien's report persuades the ALJ that Dr. O'Brien does not believe that Claimant sustained any injury to the low back that is related to his October, 11, 2013 slip and fall. Moreover, the ALJ finds from his report that Dr. O'Brien does not believe that Claimant's subjective complaints of back and leg pain have an objective basis. Indeed, Dr. O'Brien admitted as much when he noted that he ". . . would have told [Claimant] that ongoing care [would] not help him and in all likelihood [would] inappropriately validate his complaints which have no objective basis . . ."

17. The myelogram recommended by Dr. Bhatti was performed May 20, 2016. Testing revealed the following at the L5-S1 segment:

> L5-S1 level demonstrates right-sided posterior lateral, lateral recess and neural foraminal encroachment of moderate degree. There appears to be a far right lateral disc present. Additionally, there appears to be right-sided ligamentum flavum prominence at this level. The S2 nerve root sheath on the right is encroached upon and displayed posteriorly.

18. During a follow-up appointment with Claimant on June 14, 2016, Dr. Bhatti reviewed the findings of Claimant's myelogram and opined that the myelogram "shows a right-sided disc herniation at L5-S1 with a right S1 nerve root cut off." Dr. Bhatti recommended a "redo L5-S1 discectomy with fusion and instrumentation."

19. Dr. Bhatti requested surgical authorization on June 15, 2016. The request was denied and the matter set for hearing.

20. Respondents obtained surveillance video tape of Claimant on August 12th and 13th, 2016. They forwarded the surveillance video along with Claimant's answers to interrogatories to Dr. O'Brien for comment. On October 10, 2016, Dr. O'Brien authored a supplemental report after review of Claimant's interrogatory answers and the video surveillance tape. As part of his report, Dr. O'Brien noted that Claimant indicated in his responses to interrogatories that he "cannot lift any item of any weight" and that he could not stand or walk for prolonged periods of time. It was noted that Claimant reported that he had numbness from the waist down to the three toes on the right side" as well as "numbness in the left leg."

21. Dr. O'Brien viewed the surveillance video tape in the context of Claimant's interrogatory responses. After reviewing the video surveillance tape, Dr. O'Brien opined that Claimant's activities as depicted supported a conclusion that Claimant had misrepresented his "true level of pain and function." In this regard Dr. O'Brien notes:

> On the video tape, Mr. Madrid was using both upper extremities symmetrically without dysfunction. He was demonstrating normal lumbrosacral spine function and range of motion. He had no apparent pain on the video surveillance tape and yet at the time of my IME reported and postured as if his pain was disabling. He indicated that the pain was so severe he could not stand for a prolonged period of time and he could not use his upper extremities; in fact, was posturing as if his left upper extremity was so painful he could not move it away from his abdomen and yet at the time of the video evaluation, Mr. Madrid had normal function.

22. Following review of the surveillance video, Dr. O'Brien reiterated his opinion that Claimant's pain complaints were non-organic in nature and concluded as follows: "Ongoing care in the presence of nonorganic pain will always serve to inappropriately validate the subjective complaints which have no objective foundation, and in so doing, create or enhanced the specter of disability which in fact does not exist. Mr. Madrid is misrepresenting his true level of pain and function and medical attention should be discontinued immediately."

23. Upon careful review of the video surveillance tape submitted, the ALJ finds that the surveillance video tape demonstrates Claimant to be engaged in light functional activity, including sweeping, picking up dog waste with a small shovel and lifting the deck and loading the trunk of his car without apparent pain. Claimant is also seen visiting with another person and carrying a small dog with his right hand raised to the level of his shoulder. During these activities, the ALJ observed Claimant to repeatedly bend at the waist, sometimes as far as 90 degrees, to pick objects up from the ground. Claimant was noted to place his right hand on his right thigh for support and assistance when bending over and rising up again. Claimant was also observed to walk on a variety of surfaces, either barefoot or in sandals. He was on his feet for a prolonged

period of time but was noted to lean on a car for much of the time while visiting with another person. Finally, Claimant was noted to ambulate with a guarded and somewhat shuffling gait at times; however, he did not display an overt limp.

24. Dr. O'Brien testified by deposition on September 12, 2016. Dr. O'Brien testified that neither of Claimant's low back surgeries as performed July 14, 2015 and July 21, 2015 was reasonable or necessary for two reasons. First, because there was a "lack of concordance of the factual information in the case" and second, because the treatment (surgery), as a traditional operative modality, was directed to non-physiologic nonobjective, i.e. nonorganic pain which would "never" be relieved. In support of this opinion, Dr. O'Brien testified that Claimant did not have "objective weakness" in the right leg. Rather, Dr. O'Brien testified that Claimant's weakness was due to subjective complaints of pain and a volitional lack of effort.

25. As support for his conclusion that there was a lack of physical findings to have justified the July 14, 2015 surgery, Dr. O'Brien testified that Dr. Sung does not "[look] real hard into the patient database for nonorganic findings and that as a consequence many of his patients are "operated upon who have nonorganic physical findings."

26. Dr. O'Brien also testified that he did not believe that Claimant's imaging studies demonstrated "true disc herniation." Rather, he believed that there was desiccation and a "normal-for-age bulge of the disc.[3] When presented with Claimant's CT myelogram for the first time at his deposition, Dr. O'Brien testified that it referenced a "far right lateral disc protrusion" which the interpreting radiologist felt arose postoperatively. Dr. O'Brien considered this a "new finding." Nonetheless, he testified that this new finding was not a surgical indication for Claimant since the veracity of the finding had not been demonstrated. According to Dr. O'Brien, while a CT scan was a "very good study" the finding could represent scar tissue and not recurrent disc herniation. Dr. O'Brien characterized the CT post myelogram "inconclusive of factual information", suggesting that a dye enhanced MRI would be more sensitive in discerning the presence of recurrent disc herniation.

27. Dr. O'Brien testified further that even if a dye enhanced MRI demonstrated the presence of right sided disc herniation, his opinion regarding the reasonableness and necessity of performing the surgery recommended by Dr. Bhatti would not change because Claimant's pain is nonorganic and using "traditional modalities to treat pain that does not have a definable source, . . . will fail every time."

28. During cross examination, Dr. O'Brien testified that the first low back surgery performed July 14, 2015 consisted of a discectomy. Dr. O'Brien explained that in situations where a disc mechanically irritates a nerve, that irritation can manifest as "pain, numbness or tingling, and even weakness. In these circumstances, mechanically removing the disc to decompress the nerve should alleviate the symptoms.

[3] Dr. O'Brien admitted during cross examination that he had not reviewed any of the multiple MRIs of the lumbar spine.

29. Based upon the evidence presented, the ALJ finds that Claimant has consistently complained of pain, numbness, tingling and weakness in the right leg. The evidence presented persuades the undersigned that Claimant's slip and fall likely resulted in a disc herniation which mechanically irritated his L5-S1 nerve root giving rise to his back and leg pain and other associated symptoms. The MRI imaging identified this disc disruption with reasonable reliability and the herniation was confirmed during the July 14, 2015 surgery. Consequently, the ALJ finds the July 14, 2015 low back surgery reasonable, necessary and related to Claimant's October 11, 2013 work related slip and fall.

30. As noted above, Claimant developed recurrent disc herniation and post surgical infection which was subsequently treated by Dr. Sung on July 21, 2015. Based upon the evidence presented, the ALJ rejects Dr. O'Brien's suggestion that the need for this follow-up surgery was not reasonable or necessary. To the contrary, the ALJ finds the July 21, 2015 surgery was a reasonable and necessary treatment modality to address an infection which, more probably than not, developed as a direct consequence of the July 14, 2015 surgery. Moreover, the ALJ finds this surgery a reasonable and necessary procedure to cure and relieve Claimant of ongoing "right leg pain, numbness and weakness" likely caused by the recurrent herniation of disc material as discovered during the procedure.

31. Claimant testified that the July 14, 2015 surgery helped with his pre-surgical symptoms until his abscess necessitating his second surgery. Following that surgery, Claimant testified that he experienced increased weakness and numbness in his right foot. According to Claimant, it feels as though he has stuff in his shoes when he walks. He explained that he cannot get up on his toes and that toes 3-5 on his right foot are numb. Claimant testified further that he continues to experience incontinence of both his bowel and bladder 3-4 times a week which represents a worsening of this phenomenon over time.

32. Although Claimant testified to continuing pain which he reported fluctuates between a 7-9/10 since his July 21, 2015 surgery, he reported that he retained some functional capacity. The ALJ finds Claimant's activities as demonstrated on video tape to be consistent with his testimony that he retains "some" functional capacity. The activity demonstrated on video tape is not physically or aerobically demanding and there are multiple occasions where taping ceases only to start minutes later, suggesting that the video tape has been edited or that Claimant retreated out of view during which Claimant's activities and behavior are unknown. Consequently, the ALJ finds the video tape of limited value in determining whether Claimant is a candidate for additional low back surgery. That limited value extends to the light functional abilities clearly observed, i.e. sweeping, bending to pick up dog waste, visiting with another person and light lifting.

33. Claimant testified that his prescribed medications help with his pain levels and his functionality. Claimant testified that he takes the following medications for the following symptoms: Ibuprofen 800 mg for pain, Lexapro for depression, Lidocain for

pain, Lyrica for nerve pain/damage, Propananol for migraine headaches and Valium for anxiety.

34. Despite Dr. O'Brien's statements/opinions that Claimant does not have an objective basis for his pain, the medical records, including the MRIs, the post myelogram CT scan and the nerve conduction study performed January 27, 2016 objectively demonstrate that Claimant has changes at the L5-S1 spinal level that are consistent with disc pathology, an absent left gastroc (calf) h-reflex and an S1 radiculopathy. Moreover, the physical examinations of Dr. Caughfield and Dr. Bhatti that document weakness in the right ankle for dorsi flexion (DF) and plantar flexion (PF) along with Claimant's subjective complaints of pain, tingling and numbness in the leg and foot adequately correlate these symptoms to the objective diagnostic testing and his original October 11, 2013 work related slip and fall. Consequently, the ALJ finds Dr. O'Brien's testimony that Claimant's pain is purely nonorganic unconvincing.

35. Based on a totality of the evidence presented, the ALJ finds that Claimant has proven that the surgery recommended by Dr. Bhatti is reasonable, necessary and related to Claimant's October 11, 2013 slip and fall injury involving Claimant's low back. As found, the opinions expressed by Dr. O'Brien are largely contradicted by the balance of the competing evidence, particularly the imaging studies, the January 27, 2016 EMG and the physical examinations of Dr. Caughfield and Dr. Bhatti.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought, including medical treatment *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and

demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony regarding his functional abilities is generally consistent with his demonstrated capability captured on surveillance video tape. Moreover, his testimony concerning his symptoms has been consistent throughout the pendency of the case. Even Dr. O'Brien testified that in situations where a disc mechanically irritates a nerve, that irritation can manifest as "pain, numbness or tingling, and even weakness. These are the symptoms that Claimant has consistently and credibly complained are worsening since undergoing his July 21, 2015 surgery.

C. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). Here, the evidence presented persuades the ALJ that there is a demonstrated anatomical correlation regarding the objective weakness found by Dr. Caughfield and Dr. Bhatti on physical examination and the MRI, CT scan and EMG study findings. Consequently, the ALJ concludes that Dr. O'Brien's opinion/testimony that Claimant's ongoing pain is nonorganic and without an objective basis is incredible and unpursuasive. The ALJ also rejects the opinion of Dr. O'Brien that Claimant has had nearly every medical and surgical modality available in western medicine. To the contrary, Claimant has undergone traditional conservative care and a decompression procedure, i.e. a discectomy. Additional operative treatments, as provided for in the Medical Treatment Guidelines remain available to the Claimant should he otherwise meet the qualifications for the same.

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

Medical Benefits
The Proposed L5-S1 Spinal Surgery Recommended by Dr. Bhatti

E. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). Based upon the evidence presented, the ALJ concludes that Claimant has proven that L5-S1 fusion surgery recommended by Dr. Bhatti is reasonable and necessary. Contrary to Dr. O'Brien's testimony, the medical reports outline persistent pain, numbness and weakness which likely correlates with the findings on EMG testing as well as MRI and CT imaging. Furthermore, the video surveillance is consistent with limited functional capacity in the face of a failed operative procedure. Consequently, the ALJ concludes that the recommendation for a fusion with instrumentation is reasonable and necessary.

F. The Medical Treatment Guidelines (Guidelines) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight.

G. The Guidelines have been accepted in the assessment of low back pain. While the Guidelines provide that "surgery should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief", the evidence presented in this case persuades the ALJ that the surgical recommendation was not made solely to relieve Claimant's pain. The totality of the record evidence including Claimant's clinical course, physical examination findings and the results of diagnostic testing (MRI, CT scan and EMG study) persuade the ALJ that the recommendation for surgery was contemplated to both correct identified pathology to reduce Claimant's ongoing pain and improve his limited functional capacity. As provided for in the Guidelines, there has been a "comprehensive assimilation" of the aforementioned factors (clinical course, clinical findings and diagnostic testing results) leading to a specific diagnosis and a "positive identification of pathological conditions." The ALJ finds and concludes from evidence presented that the additional lumbar decompression and stabilization contemplated here is reasonably anticipated to result in significant functional gain above Claimant's limited capacity as demonstrated on video surveillance tape. As provided for under § 8-43-201(3), the ALJ has "[considered] the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease." In keeping with the Guidelines, the ALJ concludes that Dr.

Bhatti's recommendation for additional low back surgery has been contemplated within the context of expected functional outcome and not merely for the purposes of pain relief.

ORDER

It is therefore ordered that:

1. Respondent shall pay for all reasonable and necessary treatment medical treatment, resulting from the Claimants October 11, 2013 work related slip and fall, including but not limited to the L5-S1 spinal surgery recommended by Dr. Bhatti.

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

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

DATED: December 8, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80920

ISSUES

➢ Whether claimant has proven by a preponderance of the evidence that the surgery recommended by Dr. James Gebhard and performed on February 3, 2016 was reasonable and necessary to cure and relieve claimant from the effects of the admitted September 21, 2015 work injury.

➢ Whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability ("TTD") benefits.

➢ If claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits, what is claimant's average weekly wage ("AWW")?

➢ The parties stipulated that respondents are entitled to an offset for Social Security Disability Insurance ("SSDI") payments received by claimant. However, claimant has reserved the issue of the actual amount of any SSDI offset.

FINDINGS OF FACT

1. Employer operates a farm and produce stand. Claimant has worked for employer since 2003 on a seasonal basis. Typically she begins working for the employer in late March or early April and continues working until late October. In 2015, claimant was paid $10.00 per hour when paid in cash and $10.50 per hour when she was paid by check.

2. Claimant has an extensive prior history of low back issues, including five prior back surgeries. Prior to the September 21, 2015 work injury, claimant's most recent surgery was performed on October 29, 2014 by Dr. James Gebhard. This surgery included an osteotomy and revision posterior fusion from T-11 to S-1. Rods were placed along claimant's spine as part of this surgery. Claimant recovered from that 2014 surgery and returned to work without restrictions. On April 30, 2015, an x-ray of claimant's spine showed "consolidation of the bone fusion".

3. Claimant sustained an admitted injury to her low back on September 21, 2015. The injury occurred when claimant was sorting tomatoes and a table holding approximately 600 pounds of tomatoes fell on her back and pinned her to a second table.

4. Claimant testified that in the days following the September 21, 2015 injury she had pain in her low back and could feel and hear a "grinding" in her back. Claimant reported this pain and grinding sensation to her authorized treating physician ("ATP"), Dr. Stacia Baker. Dr. Baker referred claimant for a consultation with Dr. Gebhard.

5. On September 30, 2015 an x-ray was taken of claimant's back and showed a break in the rod on the left side of her spine. Claimant underwent a computerized tomography ("CT") scan on October 28, 2015 that showed a solid fusion. Dr. Gebhard recommended surgery to replace the broken rod. Respondents denied the surgery. However, claimant underwent the recommended surgery on February 3, 2016.

6. On February 25, 2016, Dr. Gebhard noted that claimant did not have any symptoms prior to the September 21, 2015 work injury. Dr. Gebhard further opined that it is within medical probability that the rod in claimant's back fractured at the time of claimant's work injury. On June 2, 2016, Dr. Gebhard further opined that the "high-energy injury" claimant sustained on September 21, 2015 was the cause of the rod breakage.

7. On December 5, 2015 and May 14, 2016 Dr. Michael Janssen issued written reports summarizing two reviews he performed of claimant's medical records. Dr. Janssen opined that the rod in claimant's back may have broken prior to the September 21, 2015 injury. Although Dr. Janssen noted that claimant achieved successful fusion following the 2014 surgery, he opined that the rod breakage occurred "a long time ago and the fusion went on to consolidate". Dr. Janssen's testimony was consistent with his written reports.

8. After the incident on September 21, 2015 claimant continued working for employer. Claimant's job duties were limited to answering phones and running the cash register. Claimant's employment with employer ended on October 31, 2015 because employer's season ended. Claimant has not returned to work.

9. On August 2, 2016, Dr. Gebhard determined that claimant had not yet reached maximum medical improvement ("MMI"), but that she would likely reach MMI by February 3, 2017, one year from the surgery. Dr. Gebhard also assigned claimant a lifting restriction of 25 pounds.

10. Claimant's 2015 W-2 Form indicates that she earned a total of $5,137.13 during that year. Claimant testified that this amount was for wages paid to her by employer for the months of August, September, and October 2015. Claimant also testified that employer paid her in cash for the period of April 2015 through July 2015.

11. The ALJ credits the claimant's testimony regarding the September 21, 2015 injury. The ALJ also credits the February 25, 2016 and June 2, 2016 opinions of Dr. Gebhard regarding the cause of the broken rod in claimant's back over the conflicting opinion of Dr. Janssen and finds that it is more likely than not that the rod in the claimant's back was broken when a table hit her in the back while she was at work on September 21, 2015.

12. The ALJ credits claimant's testimony and the medical records and finds that it is more likely than not that the February 3, 2016 surgery performed by Dr. Gebhard was reasonable and necessary to cure and relieve claimant from the effects of the September 21, 2015 work injury.

13. The ALJ credits claimant's testimony related to her inability to work after the February 3, 2016 surgery and finds that it is more likely than not that she experienced a wage loss as a result of the February 3, 2016 surgery. The ALJ also finds that claimant has failed to demonstrate that is more likely than not that she experienced a loss in wages between November 1, 2016 and February 3, 2016, because any wage loss during that period was the result of the conclusion of the employer's season and not the result of the work injury. Wage loss began on February 3, 2016 by virtue of the surgery, which the ALJ finds is related to the September 21, 2015 work injury.

14. The ALJ credits the claimant's testimony regarding her earnings as indicated by the 2015 W-2 Form and finds that it is more likely than not that these earnings were for the months of August, September, and October 2015. The ALJ takes judicial notice that August 1, 2015 through October 31, 2015 was a 13 week period. When the total of $5,137.13 is divided by 13 it is equal to an average of $395.16 per week.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2013. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S., *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. “Authorization” refers to the physician’s legal authority to treat, and is distinct from whether treatment is “reasonable and necessary” within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: “In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor.” “[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion….” *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers’ Compensation Law* § 61.12(g)(1983).

5. As found, the surgery performed by Dr. Gebhard on February 3, 2016 was reasonable and necessary to cure and relieve claimant from the effects of the September 21, 2015 work injury. As found, the claimant’s testimony and the opinion of Dr. Gebhard are credible and persuasive.

6. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

7. As found, the compensable injury resulted in a period of time in which claimant was unable to earn wages beginning February 3, 2016 when she underwent surgery. Respondents shall pay TTD benefits to the claimant for the period of February 3, 2016 until terminated by law.

8. The ALJ must determine an employee’s AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

9. As found, claimant earned $5,137.13 over a 13 week period between August 1, 2015 and October 31, 2015. As found, claimant's "AWW" is $395.16; ($5,137.13 divided by 13 weeks). The ALJ credits claimant's testimony that she was paid in cash for the period of April 2015 through July 31, 2015. The ALJ finds that the credible evidence entered at hearing is represented by claimant's 2015 W-2 and claimant's testimony that the W-2 represents wages for the period of August 1, 2015 through October 31, 2015. The ALJ credits these records in calculating claimant's AWW.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the cost of claimant's February 3, 2016 surgery because it was reasonable and necessary to cure and relieve claimant from the effects of the September 21, 2015 work injury.

2. Respondents shall pay TTD benefits to the claimant for the period of February 3, 2016 until terminated by law. Claimant's TTD benefits shall be paid based upon an AWW of $395.16.

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

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

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

DATED: December 12, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-899-523-05; WC 4-899-523-06

ISSUES

I. Has Claimant met his burden of overcoming the DIME findings of Dr. Aschberger by clear and convincing evidence?

II. Has Claimant sustained his burden on proving that he suffered an injury to his neck in the course of his employment?

III. Has Claimant reached Maximum Medical Improvement?

IV. If Clamant has reached MMI, is he entitled to Permanent Partial Disability benefits for loss of range of motion in his neck and back?

V. If Claimant has not reached MMI, is he currently entitled to Temporary Total Disability Benefits?

VI. Is the cervical surgery recommended by Claimant's ATPs reasonable, necessary and causally related to Claimant's industrial injury?

FINDINGS OF FACT

1. Claimant, Gentry Penny, was born on March 4, 1970. Claimant testified that he had worked for the Respondent-employer for over a year doing very heavy labor. Claimant testified that he had no pain in his neck, shoulder or low back before his work related incident on September 25, 2012. Claimant testified that he was injured on 9/25/12 while trying to push a cart weighing over one thousand pounds. Claimant went to the Emergency Department at St. Mary Corwin Hospital on 9/25/12 for pain in right shoulder & abdomen.

2. Claimant testified that he was taken to the CCOM industrial clinic by his employer on 9/26/12, and records note that on that visit, Claimant was now complaining of low back pain. (Exhibit 6 at 58). Claimant returned to CCOM on 9/28/12, 3 days after his injury, and was also then mentioning neck pain as well. The physician assistant who saw Claimant on that date diagnosed cervical, thoracic and lumbar strains. (Exhibit 6 at 59). Claimant has had neck and low back complaints since. (Exhibits 6 & 7).

3. Claimant had an MRI of his right shoulder which was positive for a rotator cuff tear. Claimant underwent surgery for the rotator cuff tear but it failed to improve his right upper extremity symptoms. Doctors felt part of his arm symptoms might be coming from a problem with his neck. Claimant underwent a cervical spine MRI on 1/16/13, which was positive for C4-5 & C5-6 disc herniations with significant canal stenosis (Exhibit 7 at 122-123). A low back MRI was also done 1/16/13 and was positive for a L5-S1 disc herniation. (Exhibit 7 at 124). Claimant also had an EMG study done on

6/10/15 which was positive for a C6 radiculopathy on the left side. (Exhibit 7 at 134). Claimant underwent extensive non-surgical treatment through his authorized treating physician (ATP), Dr. Daniel Olson, M.D.

4. Claimant received treatment for his shoulder injury and hernia condition. He underwent a lipoma excision and a shoulder surgery. These issues have resolved and the Parties agree that Claimant is at MMI for his shoulder and for the hernia condition.

5. Respondents also obtained an Independent Medical Evaluation from Dr. William Watson, M.D. Dr. Watson evaluated Claimant in person on May 6, 2014. Dr. Watson noted that Claimant had marked pain behavior throughout the examination, including diffuse tenderness and pain throughout the cervical spine. However, distracted palpitation was negative for pain. The Spurling's test revealed pain but no evidence of radicular symptoms. Regarding the lumbar spine, Dr. Watson noted on his physical evaluation that Claimant had "intense" pain on both light touch and deep palpitation. Dr. Watson noted that Claimant gave way on all muscle testing and that Claimant's symptoms seemed to change throughout the examination.

6. Dr. Watson further opined that Claimant showed positive Waddell's testing throughout the examination for both the cervical and lumbar spine. After reviewing the imaging studies Dr. Watson found no objective basis for Claimant's extreme pain complaints and subjectively reported symptoms. Thus, he felt that all active care should be terminated, that Claimant should be encouraged to do his home exercise program, and that no further surgical intervention was appropriate.

7. The Respondents eventually requested a 24-month DIME evaluation and Dr. William Griffis was selected as the DIME physician. The Respondent's requested that Dr. Griffis examine the Claimant for a right shoulder injury and hernia injury on their application and did not mention Claimant's neck and low back injuries. (Exhibit 2 at Bates stamp 9). Dr. Griffis noted the mistake and testified at his deposition that he contacted the Division about the failure to include the neck and low back conditions on the request for examination. He testified he was told just to examine the conditions listed on the application. (Exhibit 8 at page 147).

8. Dr. Griffis rendered a DIME report, dated 2/24/15, stating Claimant was at maximum medical improvement as far as his right shoulder and abdominal injuries were concerned as of August 12, 2013. The Respondents used this report to support a Final Admission of Liability, filed on March 16, 2015, which terminated Claimant's TTD benefits and listed a large overpayment. However, the Respondents continued to pay for the medical treatment rendered to Claimant's neck and low back. Claimant has had numerous non-surgical treatments for his neck injury, including an injection and physical therapy. A C3, C4, C5 Rhizotomy was performed on 6/4/15. None of the treatment modalities to date have led to sustained reduction of the Claimant's severe neck pain and have not relieved the numbness in his hands and arms.

9. Claimant was sent to surgeons for evaluation as to the need for surgery on his neck. Although Dr. Watson, Dr. Griffis, and a spine surgeon, Dr. Sceats, questioned whether surgery would help the Claimant's neck problems, Claimant was sent to another surgeon for a second opinion, Dr. Sana Bhatti, M.D. Dr. Bhatti ordered further tests on the Claimant, and, after receiving the test results, indicated that he felt that a cervical fusion surgery had a good chance of reducing the severe pain that Claimant is currently suffering in his neck. Dr. Bhatti testified that the most recent MRI of the Claimant's neck demonstrates a herniated disc and a recent EMG was positive for a cervical radiculopathy. (Exhibit 7 at Bates stamp page 134).

10. Claimant filed for a hearing on whether he was, in fact, at MMI and whether he was entitled to TTD benefits and the recommended neck surgery. The case went to hearing before Judge Walsh on 12/3/15. At the hearing, the Respondent's attorney admitted that the Claimant suffered injuries to his neck and low back in the work incident and the compensability of those injuries was not being contested. (CD1 at 11:34, 11:38 & 11:49). After the hearing, ALJ Walsh found that Dr. Griffis' DIME was not controlling since it didn't involve all Claimant's injuries. ALJ Walsh concluded that Claimant was not at MMI because no treating physician and no DIME had placed Claimant at MMI at the time. ALJ Walsh held that Claimant was entitled to TTD benefits, but that neck surgery was not appropriate at that time. (See Exhibit 10).

11. The denial of the neck surgery appears to be based largely on the fact the EMG study was positive on the left, but Claimant's major complaints were on his right side. ALJ Walsh's decision was not appealed by either party.

12. Since that time, Dr. Olson referred Claimant to another surgeon, Dr. David Wong, M.D. for another opinion. Dr. Wong ordered an updated EMG study which was found to be positive for a *bilateral* C6 radiculopathy, a clear *worsening* since prior findings. As a result, Dr. Wong opined that Dr. Bhatti was correct that Claimant is an appropriate candidate for a cervical fusion surgery. In light of the worsened condition, Dr. Olson recently testified that he now agrees that the cervical surgery is appropriate.

13. In the meantime, a new 24 month DIME was performed by Dr. Aschberger since Dr. Griffis has retired. Dr. Aschberger did his exam and issued a report on 5/2/16 in which he stated that Claimant was at MMI back on 2/24/15 when Dr. Griffis saw him. However, at the initial DIME evaluation by Dr. Griffis, he was only assessing the MMI date of 2/24/15 for the shoulder and abdomen. Further, Dr. Griffis testified at a deposition on 9/8/15 that Claimant was not at MMI for his neck, due to diagnostic and treatment modalities on his neck which had yet to occur.

14. Additionally, Dr. Aschberger appears to have ignored cervical treatments that were rendered *after* his MMI date of 2/24/15, including a rhizotomy performed on 6/14/15. Dr. Olson opined that Claimant would not have been at MMI on that date, since that procedure was intended to improve his condition.

15. Dr. Aschberger also opined that Claimant's neck problem was not related to the work injury on the grounds that the Claimant did not report complaints of neck

problems within a reasonable time after the injury. Despite that opinion, he gave Claimant an impairment rating for the cervical rhizotomy which had been performed in June 2015. He also opined that Claimant is not an appropriate candidate for a cervical fusion surgery. Further, he refused to give Claimant a rating for loss of range of motion in his neck and back, even though his measurements were repeated three times, and appeared to meet validation criteria.

16. The DIME Unit sent a letter to Dr. Aschberger stating that the rules required that he repeat the measurements again. Dr. Aschberger then declined to do so, saying he could rely on measurements previously done by Dr. Watson and Dr. Sparr. (Exhibit 13 at 240).

17. The longtime ATP, Dr. Daniel Olson, M.D. was deposed and has testified that he does not feel that Claimant is at MMI yet and that the worsening of his findings on the EMG study now makes the fusion surgery an appropriate consideration. He testified that he had serious disagreements with Dr. Aschberger's opinions on MMI, causality, and the need for surgery.

18. The ALJ finds Dr. Olson's opinions to be credible and persuasive.

19. The ALJ finds the medical opinions of Dr. Olson, the opinion of the original DIME physician Dr. Griffis (as updated in his deposition), coupled with the opinions of Drs. Bhatti and Wong, to be more credible and persuasive than the DIME opinion supplied by Dr. Aschberger.

20. The ALJ further finds that the methodology used, and conclusions drawn, by Dr. Aschberger in his DIME opinion as to causation, MMI, and impairment ratings are highly probably incorrect.

21. Claimant has overcome Dr. Aschberger's determination regarding MMI by clear and convincing evidence. Claimant has not reached MMI.

22. The ALJ further finds the live testimony of Claimant, and his wife, to be credible and persuasive regarding the symptoms he has experienced, and continues to experience.

23. Claimant's cervical condition is causally related to his industrial injury.

24. Claimant's cervical condition has worsened since the prior hearing before ALJ Walsh.

25. As a result of his worsened condition, the cervical surgery proposed by Dr. Bhatti and Dr. Wong is reasonable, necessary and causally related to Claimant's industrial injury.

CONCLUSIONS OF LAW

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

General Legal Principles

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, the medical record evidence, coupled with Claimant's credible testimony, support a finding that Claimant is not yet at MMI. For these reasons, the ALJ concludes that the opinions of Drs. Olson and Bhatti are more persuasive than those of Drs. Aschberger in his DIME report.

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

Overcoming the DIME Opinion of Dr. Aschberger Regarding MMI, Causation, & Impairment

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-

107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

G. There are several serious problems with the underlying manner in which Dr. Aschberger formed his opinions, which lead the ALJ to conclude his findings have been overcome: 1. Dr. Aschberger found Claimant was at MMI at that the time of Dr. Griffis' exam, (contrary to the opinions of Dr. Griffis himself), simply based on his *current* knowledge that none of treatments performed since 2/24/15 have significantly improved Claimant's condition. The effect of this analysis is to create, without further foundation, a *retroactive* MMI date, for the sole reason that treatment modalities employed (and approved) up to that time were ineffective. Dr. Olson persuasively opined that this is an inappropriate method of determining MMI. Moreover, it ignores the very real possibility that his condition could indeed be improved with the cervical fusion recommended by

Dr. Bhatti and Dr. Wong. 2. Claimant underwent significant medical treatment after 2/24/15 -- including a cervical rhizotomy on 6/14/15 -- which was reasonably expected to improve Claimant's condition *at the time the treatment was provided*. The substantial medical treatment Claimant received after 2/24/15 aimed at improving his condition supports a finding that he was not at MMI. 3. Dr. Aschberger's opinion that Claimant is not an appropriate candidate for cervical surgery is outweighed by the persuasive opinions of Dr. Olson, Dr. Bhatti and Dr. Wong. 4. Dr. Aschberger gave Claimant an impairment rating for a cervical rhizotomy, which was performed *after* 2/24/15. The fact that Claimant underwent a procedure in June 2015 which affected his degree of permanent impairment supports a finding that he was not at MMI as of 2/24/15. 5. Despite including a rating for the cervical rhizotomy, Dr. Aschberger then stated that Claimant's neck problem is not related to his work trauma, because no neck complaints were voiced within a short time after trauma. In fact, the medical records available to Dr. Aschberger show that Claimant reported neck pain, and was assessed a cervical strain by his ATP within three days of the date of injury. This reported neck pain persists in the medical records moving forward. 6. Dr. Aschberger refused to give Claimant a rating for restricted range of motion even though his measurements were appeared to meet validation criteria. He then refused to comply with the Division's request to repeat the measurements. Although the ALJ's finding that Claimant is not at MMI effectively moots Dr. Aschberger's rating, the flaws in his rating methodology further undermine the reliability and persuasiveness of his opinions.

H. Based on the totality of evidence presented, the ALJ finds and concludes that Dr. Aschberger's determination that Claimant reached MMI on 2/24/15 is highly probably incorrect. Therefore, Claimant has overcome Dr. Aschberger's finding of MMI by clear and convincing evidence.

I. Because the ALJ concludes that the DIME report of Dr. Aschberger has been overcome by clear and convincing evidence as to MMI, there is no need to address Claimant's position that the DIME need be overcome by clear and convincing evidence as to the issue of MMI alone.

Temporary Total Disability Payments

J. The next issue is whether Claimant is entitled to Temporary Total Disability benefits. Once commenced, TTD benefits continue until the occurrence of one of the events enumerated in § 8-42-105(3). *Bellon v. Grand Junction Diner*, W.C. No. 4-404-024 (ICAO, September 27, 2004). Respondents terminated Claimant's TTD benefits effective 2/24/2015 based on Dr. Aschberger's determination of MMI. In light of the ALJ's finding that Claimant has overcome the DIME on the issue of MMI, Respondents are required to reinstate Claimant's TTD benefits. Further, there is no persuasive evidence in the record indicating that Claimant is able to return to work, with or without restrictions.

Necessity of Neck Surgery

K. Claimant requests approval of a cervical surgery recommended by Dr. Bhatti and Dr. Wong. Respondents argue that the request for surgery should be dismissed on the basis of issue preclusion because ALJ Walsh previously denied the surgery in a final order.

L. Issue preclusion (*i.e.,* collateral estoppel), is an equitable doctrine that bars relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien*, 990 P.2d 78, 84 (Colo. 1999). The doctrine's purpose is to relieve parties of the burdens of multiple lawsuits, to conserve judicial resources, and to promote reliance on and confidence in the judicial system by preventing inconsistent decisions. *Id*. Although issue preclusion was conceived as a judicial doctrine, it has been extended to administrative proceedings, where it "may bind parties to an administrative agency's findings of fact or conclusions of law." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). In *Sunny Acres*, the Supreme Court held that:

> Issue preclusion bars relitigation of an issue if: (1) the issue sought to be precluded is identical to an issue already determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Id. at 47.

M. Even where issue preclusion would otherwise apply, a party has the right to revisit a previously decided issue under the reopening provisions of the Act. The Court of Appeals has held that "in the context of workers' compensation matters, a 'final' award means only that the matter has been concluded subject to later reopening under the applicable statutory criteria." *Renz v. Larimer County School Dist. Poudre R-1*, 924 P.2d 1177, 1180 (Colo. App. 1996). The court further noted that authority to reopen reflects "a strong legislative policy that, in workers' compensation matters, the goal of achieving a fair and just result overrides the interests of litigants in obtaining a final resolution of their dispute."

N. Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of "an error, a mistake, or *a change of condition."* (emphasis added). It is Claimant's burden to prove the existence of facts that would warrant a reopening of the surgery issue. Section 8-43-201(1).

O. The issues in the present proceeding are not "identical" to the issues heard by ALJ Walsh, because Claimant is alleging his condition has worsened since the prior decision. Therefore, ALJ Walsh's order does not preclude the ALJ from considering Claimant's current request for surgery.

P. The medical evidence on this case makes it clear that Claimant's condition has worsened since the time of his last hearing. Originally, Claimant's worst complaints were on his right side, and the EMG studies were abnormal for cervical radiculopathy on the left. A recent EMG performed at the request of a new surgeon on the case, Dr. Wong, is now positive for bilateral cervical radiculopathy. This abnormality is consistent with the findings of disc herniation and foraminal narrowing seen on a cervical MRI performed on January 16, 2013, the report of which states:

> IMPRESSION:
> C5-6 disc bulge with broad-based, **right central disc herniation and mild-to-moderate canal stenosis without cord compression with bilateral foraminal narrowing, worse towards the right, moderate-to-marked in severity**.
> C4-5 disc bulge with mild canal stenosis and foraminal narrowing, bilaterally, worse towards the left, moderate-to-marked in severity. There is superimposed, left central disc herniation extending to the left of midline.
> **C3-4 right, central disc herniation** and disc bulge without canal stenosis with mild foraminal narrowing present. (See Exhibit 7 at page122; emphasis added)

Q. The results of the recent EMG are set forth in the recent report Dr. David Wong, M.D., dated May 12, 2016, which states in part:

> New EMG and nerve conduction study 3/24/16 shows mild right carpal tunnel changes which are new from the EMGS's in June **2015. He now has some chronic bilateral C6 changes.** The left side is about the same and **right side changes are new.**
> ***
> He is potentially a candidate for the ACD&F that Dr. Bhatti discussed with him previously. From my perspective it might be a consideration to include C4-5 which is also degenerate and has some stenosis. (See Exhibit 11 at page 209; emphasis added)

R. Both Dr. Bhatti and Dr. Wong now recommend a fusion surgery to stabilize the Claimant's cervical spine. Dr. Bhatti testified at his deposition that he feels that the surgery is Claimant's only hope at this point since all other treatment modalities available have been tried and failed. The doctor's deposition testimony was clear on this point.

> Q All right. Now, I've attached the
> report, which I think is found in Exhibit 7, of
> the MRI done of the cervical spine on August 4,

2015 from the radiologist. Did you review the actual films from that MRI yourself?

A Yes, sir.

Q And what did you note when you reviewed those findings? In your opinion, what did the MRI show?

A So my note from 09/08/15 has a report of the MRI scan as cervical MRI, shows a right-sided disc herniation at C5-6. (Deposition of Dr Bhatti at pages 14 & 15)

***

Q What is there about this gentleman's situation, his complaints, then, that you feel that makes this surgery reasonable and medically necessary for him?

A So here is the patient who's had very miserable neck and right arm pain. As I said already, the pain is debilitating. Multiple efforts have been tried to fix his pain, extensive nonsurgical treatment, nothing has helped.

We have done an MRI scan, actually two now, both of them showing right-sided disc herniation at C5-6. I think that the disc herniation at C5-6, there is a reasonable chance that that is the cause of his symptoms. That's why I proposed the surgery. (Deposition of Dr Bhatti at pages 19 & 20)

***

Q And taking into account the risks and benefits, in your medical opinion, is this surgery still reasonable for this individual in light of everything that he's gone through up to this point?

A Exactly. And the same reason meaning that nothing short of surgery has helped him. – (Deposition of Dr Bhatti at page 20)

***

Q. Doctor, if I understand your testimony correctly, you're basing this surgery recommendation not only on the examination that you did and the abnormalities noted on the MRI, but on the fact that this gentleman has had these symptoms going on for a long period of time, and that all reasonable nonsurgical options have basically been exhausted?

> A Yes. I think that if this patient had
> these symptoms for even three months, I don't
> think the surgery should be entertained.
> Unfortunately, he has had a very long period of
> treatment and still complains of very significant
> pain, debilitating pain.
> In that light, when we are repeating
> MRI scans to see if there's anything to treat and
> we find a disc herniation at C5-6, that that may
> be worth treating. (deposition of Dr. Bhatti at Page 32)

S. Dr. Olson, who previously was against surgery, now says it is appropriate, and that the condition is related to the work injury:

> A. I think the initial injury was probably the tipping point of taking an asymptomatic condition and turning it into a symptomatic condition. It's – his first MRI scan showed fairly significant findings, and my opinion is that he did aggravate that, and it has just not – instead of getting better with all the treatment, it's gradually worsened now, to now where we're seeing nerve findings on our EMGs.
>
> Q. So isn't progressive worsening with treatment, isn't that typically a recommendation against further intervention, at least according to the medical treatment guidelines?
>
> **A. Worsening – you can also make an argument that he worsening condition means they need to do the surgery.**
>
> Q. So is it your opinion that he would have needed surgery immediately after the injury?
>
> A. At that time when the EMGs were negative, we try not to do surgery on those folks.
>
> Q. But after the third EMG, then that's when your recommendation changed?
>
> **A. By the time the third EMG is showing the findings on both sides, the epidural steroids are no longer working, surgery is certainly an option.** (Olson Dep at 44 & 45; emphasis added)

T. As Dr. Olson pointed out above, all non-surgical treatments for Claimant's cervical problems have been tried and have failed. The weight of current medical opinion is that the surgery is now appropriate, and the doctors' opinions relied on by the Respondents are not based on the most current information. Dr. Aschberger's opinion regarding the appropriateness of cervical surgery is not entitled to any statutory presumption. Dr. Aschberger, is neither an orthopedic surgeon nor a neurosurgeon, and only saw the Claimant on one occasion. Dr. Bhatti is a Board Certified Neurosurgeon and Dr. Wong is a Board Certified Orthopedic Surgeon. Dr. Olson, a Board Certified Internal Medicine Specialist with a subspecialty in occupational medicine, is the authorized treating physician and has had the benefit of treating the Claimant on a regular basis for over four years. The opinions of these health care providers that cervical surgery is now appropriate are more persuasive, and are given more weight than that of Dr. Aschberger and other physicians who did not have the current EMG results.

U. Both the Claimant and his wife testified that they are aware of the risks involved in the surgery and that they wish to have it performed anyway. The Compensation Act makes it clear that the Respondent insurer is liable for all reasonable and necessary medical care required to alleviate the effects of the work injury. In light of the worsening of Claimant's condition since the hearing originally held before Judge Walsh, it is now reasonable that he undergo the cervical fusion surgery.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside Dr. Aschberger's determination that Claimant reached MMI on February 24, 2015, is GRANTED. Claimant is not at MMI.

2. Respondents shall reinstate Claimant's TTD benefits retroactive to February 25, 2015. Respondents may take credit for any TTD benefits previously paid to Claimant.

3. Respondent's claim for overpayment of TTD payments is denied and dismissed.

4. Respondents shall pay for Claimant's cervical fusion surgery, as recommended by his ATPs.

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

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

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

DATED: December 12, 2016

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

ISSUES

The following issues were raised for consideration at hearing:

1) Whether Claimant proved by a preponderance of the evidence that she has experienced an occupational disease in the form of bilateral carpal tunnel syndrome in the course and scope of her employment with an onset of disability date of November 13, 2015; and

2) Whether Claimant proved by a preponderance of the evidence that she is entitled to reasonably necessary and related medical benefits, specifically, left-sided carpal tunnel release surgery.

STIPULATIONS

The parties stipulated to:

1. Claimant's average weekly wage is $697.86; and

2. Claimant's onset of disability date is November 13, 2015.

FINDINGS OF FACT

Having considered the evidence presented at hearing, and the post hearing deposition of Dr. Thomas Mordick, the ALJ makes the following Findings of Fact:

1. Claimant is a 52 year old manager and hairdresser for Employer. Claimant alleges the she is suffering from bilateral carpal tunnel, which she alleges is a cumulative trauma condition caused by her work. The stipulated date of onset of disability in this matter is November 13, 2015.

2. Claimant began to feel symptoms in her arms in approximately December 2014. On November 17, 2015, she sought treatment from Dr. Andrew Plotkin for bilateral upper extremity pain and paresthesia. Consistent with Claimant's report of her work history to Dr. Plotkin, it is found that Claimant worked as a hair stylist for 33 years, working for the Employer over the prior 15 years, performing 15-25 haircuts per day. Claimant had symptoms in her left arm for approximately the prior one and one half years, but the symptoms became "intolerable" in April 2015. Claimant could identify no

precipitating event causing her worsened symptoms. Dr. Plotkin opined that at least some of Claimant's symptoms were work related. Dr. Plotkin rendered this opinion without reference to specific job duties, nor was there an evaluation of the cumulative trauma causation pursuant to the CTCMTG.

3. Claimant was treated and eventually seen by Dr. Kavi Sachar of Hand Surgery Associates. On December 4, 2015, Dr. Sachar provided a diagnosis of bilateral carpal tunnel syndrome and right volar wrist mass. He recommended a left carpal tunnel release, an MRI for the right wrist volar mass and noted that Claimant would ultimately require a right carpal tunnel release.

4. Claimant testified at hearing that she felt that the cause of both her ganglion cyst and her bilateral wrist and arm symptoms was repetitive use of her clippers, trimmer and blow dryer during haircuts in the course and scope of her employment for Employer.

5. A job analysis was done on December 23, 2015. The ultimate finding of this job task analysis was that there were no primary and no secondary risk factors present to support an occupational disease claim, according to the thresholds provided by the CTCMTG.

6. Claimant alleges that the job analysis done in her case was inaccurate. However, the credible and persuasive evidence presented at hearing proves otherwise. The evaluator observed Claimant performing three haircuts, including a cut using clippers. The Salon Performance Reports reflect that Claimant cut an average of 2.5 to 2.8 haircuts per hour. The evidence further established that Claimant's equipment did not exceed a 2 lbs. weight. Claimant's clippers weigh 1 pound, 10 ounces, her blow dryer weighs 1 pound 13.8 ounces and her trimmers weigh 13.5 ounces.

7. Claimant established through her own testimony that every moment of a haircut, however, does not include the use of equipment and much of the time documented by Employer's records as the haircut includes greeting the customer, walking to Claimant's chair, placing a cape on the customer, discussing the cut and wetting the hair with a spray bottle. Eighty five percent of Claimant's haircuts were men's cuts. Claimant performs these cuts using her tools in her right hand, and holding her comb in her left. Men's haircuts require that Claimant use clippers. Claimant cuts the hair by rocking the clippers from the nape of the neck moving up the head. Claimant cuts the top of the hair with scissors, thinning shears or sometimes a razor. Claimant finishes the haircut with trimmers to get loose hairs off the neck, ears, and eyebrows. Claimant uses the blow dryer to remove stray hairs and wipes off the neck. Claimant wets the client's hair again, clips the top, and again uses the blow dryer to blow away hairs, finishing with trimmers and blow dryer. Claimant puts product in the hair, dries the hair and gives the client a hand mirror. Claimant walks the customer out at which point the haircut is deemed concluded.

8. The Employer data showed Claimant consistently performed 2.5 and 2.8 haircuts per hour. Each haircut lasted between 15 to 17 minutes on average per month. There is wait time between customers and tasks other than cutting hair done by Claimant daily.

9. Claimant is clinically obese, as of her November 17, 2015, evaluation with Dr. Plotkin. Claimant's BMI is 39, and she gained 20-30 pounds in the year prior to her worsening complaints*.*

10. Dr. Jonathan Sollender conducted a paper review regarding causation in this matter pursuant to the CTCMTG. He credibly concluded that there was no occupational risk factor present. He credibly opined that Claimant did not have a job which was repetitive within the meaning of the CTCMTG, and there were no tasks to establish work as a causative factor for Claimant's condition. It is found that Claimant did not experience a work related cumulative trauma condition. Respondents relied on Dr. Sollender's opinion to timely deny Dr. Sachar's request for prior authorization for surgery.

11. Claimant was evaluated by Dr. Thomas Mordick on May 17, 2016. Dr. Mordick did not agree with the diagnosis of carpal tunnel syndrome for Claimant. He explained that Claimant's diffuse, nonspecific complaints contradicted a carpal tunnel diagnosis. Dr. Mordick did not appreciate a ganglion cyst during his examination, and Claimant did not complain of one. As a Level II accredited physician, Dr. Mordick bases his opinions upon the CTCMTG. According to the CTCMTG, the physician must determine the diagnosis before further evaluation of the alleged cumulative trauma is undertaken. Dr. Mordick credibly opined that it was not reasonable to provide a carpal tunnel diagnosis in this case, and any ganglion cyst appeared resolved. Without a diagnosis known to be related to cumulative trauma, Dr. Mordick opined that under the CTCMTG, the analysis stops, and Claimant's condition is not likely work related.

12. Claimant's work did not meet the threshold of primary risk factor under the CTCMTG. Assuming a medically recognized diagnosis under the CTCMTG existed in this case, Dr. Mordick opined that Claimant's job duties had no primary risk factors as defined by the CTCMTG Primary Risk Factor Definition Table. Use of tools, according to the CTCMTG, is a primary risk factor if there are 6 hours of hand held tools in use weighing 2 pounds or greater. Claimant's tools were not 2 pounds or greater in this matter. And, Claimant's tool usage was in her right hand, not her left hand. The current recommendation for surgery is to the left carpal tunnel. Dr. Mordick credibly opined that there is no exposure to any factor that would be considered cumulative trauma nor was there vibration exposure that would pertain in this case.

13. Dr. Mordick further credibly opined that there are no secondary risk factors present under the CTCMTG. Claimant's alleged work exposure did not meet the threshold of 4 hours use of hand held tools weighing 2 pounds or greater for a

secondary risk factor. No tools were 2 pounds or greater in this matter. It is found that the totality of the Claimant's testimony, the job analysis, and the Employer's data, Claimant's work did not meet the threshold of one or more secondary risk factor under the CTCMTG.

14. It is concluded, using the Algorithmic Steps for Causation Assessment of the CTCMTG, Claimant's symptoms and condition are probably not job related. The proposed left sided carpal tunnel release would not be reasonably expected to cure and relieve Claimant's condition, because her findings do not correlate with carpal tunnel syndrome.

CONCLUSIONS OF LAW

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

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. For a claim to be compensable under the Act, a claimant has the burden of proving that he or she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. Section 8-41-301(1) (c), C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation

is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for the determination of the Judge. *Faulkner*, 12 P.3d. at 846.

4. The Act creates a distinction between the terms "accident" and "injury." The term "accident" refers to an "unexpected, unusual or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967); see also Section 8-40-20l(2), C.R.S. (injury includes disability resulting from accident). A "compensable" injury is one which is disabling and entitles the claimant to compensation in the form of disability benefits. *Id; Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). Conversely, no benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Id.*; Section 8-41-301, C.R.S. Under the Workers' Compensation Act, disability and medical benefits do not flow simply because an accident occurred while the claimant was in the course and scope of her employment. Rather, the Act requires that an "injury" occur which is proximately caused by the performance of work. *Loofbourrow v. Industrial Claim Appeals Office*, 320 P.3d 327 (Colo. 2014).

5. A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant’s employment or working conditions. *See, Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77, 81 (Colo. App. 1993). “Occupational disease” is defined by Section 8-40-201(14), C.R.S. as:

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

6. This section of the Act imposes additional proof requirements beyond that required for an accidental injury by adding the “peculiar risk” test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the condition for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to

the disability. *Id.* "The mere presence of a diagnosis that may be associated with cumulative trauma does not presume work-relatedness unless the appropriate work exposure is present." *CTCMTG Page 5.*

7. In this case, Dr. Sollender and Dr. Mordick reviewed the data provided by the job analysis and found that Claimant's condition is not work related. Dr. Mordick went further, and reviewed Claimant's statements and the detailed data showing the amount of time Claimant was doing the tasks she claims caused her condition. It is found that Claimant has not met her burden to prove that she experienced a compensable occupational disease.

8. Claimant has not met her burden to prove a compensable occupational disease. Two physicians have evaluated the claim using the criteria reflected in the CTCMTG and taught in the Level II accreditations classes and found that Claimant does not suffer from an occupational disease. There is no evidence that the job demands analysis is inaccurate, and even if there were some changes made based upon Claimant's testimony, it would not change the outcome of the report in regard to primary and secondary risk factor thresholds. There is no credible evidence that would justify deviating from the CTCMTG. There has been no credible evidence presented from a provider or expert declaring claimant's condition to be work related who has conducted any causation evaluation. Claimant's private doctors evaluated Claimant's reported injury without reference to the CTCMTG.

9. An analysis of Claimant's occupational disease claim based upon the principles underlying the occupational disease definition, Section 8-40-201(14), C.R.S, and the CTCMTG supports the conclusion that there is no credible or persuasive evidence that Claimant's work at Employer's caused, aggravated or accelerated the development of Claimant's condition, regardless of the diagnosis used.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant's claim for compensation is denied and dismissed.

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

DATED: December 9, 2016_____

/s/ Margot W. Jones

____

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

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Lynn Parry, M.D. that Claimant has not reached Maximum Medical Improvement (MMI).

FINDINGS OF FACT

1. Claimant worked for Employer as a General Laborer. On December 8, 2015 Claimant sustained admitted industrial injuries during the course and scope of his employment with Employer. A gust of wind blew over a piece of plywood that had been resting against a retaining wall and struck Claimant on top of his hardhat.

2. On December 23, 2015 Claimant visited Authorized Treating Physician (ATP) Gary Zuehlsdorf, M.D. at OccMed Colorado for an evaluation. Claimant recounted that on December 8, 2015 he was performing underground utility work for Employer. While he was sitting on a curb, a gust of wind blew over a piece of plywood. The plywood struck Claimant on to the "front of his head with a downward motion into his spine." He did not lose consciousness and experienced little pain. Dr. Zuehlsdorf diagnosed Claimant with a work-related head contusion and possible traumatic brain injury. He noted that Claimant was still suffering lightheadedness, dizziness and headaches.

3. After the December 23, 2015 appointment Dr. Zuehlsdorf learned from Employer that Claimant had a history of neck, back and head injuries. Furthermore, Claimant never reported significant discomfort to Employer after the incident. Dr. Zuehlsdorf explained that the additional information was very different from the history that Claimant had provided. He reasoned that Claimant's dishonesty made it difficult to determine the validity of his current complaints.

4. On January 11, 2016 Claimant returned to Dr. Zuehlsdorf for an examination. Claimant reported neck, lower back, mid-back and posterior leg pain. He acknowledged that he had been involved in two prior motor vehicle accidents. Claimant noted that the 2000 and 2005 car accidents caused neck, back, left shoulder and head injuries. However, he failed to disclose head and neck injuries as a result of a 2012 work incident that resulted in a 9% whole person impairment rating. Moreover, Claimant did not mention that he had been previously diagnosed with chronic lower back pain and migraine headaches. The record thus reveals that Claimant had a long history of neck, lower back, mid-back and migraines prior to the December 8, 2015 industrial injuries.

5. Dr. Zuehlsdorf reported that he could not rely on Claimant's subjective reports because of a lack of objective findings, MRI's that revealed only mild and insignificant spondylitic changes, an inconsistent presentation and a lack of candor about his prior medical history. Dr. Zuehlsdorf concluded that Claimant reached Maximum Medical Improvement (MMI) on January 11, 2016 with no permanent impairment, work restrictions or medical maintenance treatment.

6. On February 12, 2016 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Zuehlsdorf's MMI and impairment determinations. Respondents acknowledged that Claimant reached MMI on January 11, 2016 with a 0% permanent impairment rating. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME).

7. On March 2, 2016 Claimant underwent an independent medical examination with John S. Hughes, M.D. Claimant reported that on December 8, 2015 he was struck on the head by a piece of plywood that "knocked [him] out" while working for Employer. Dr. Hughes reviewed Claimant's medical history and conducted a physical examination. He determined that Claimant had a "somewhat perplexing medical history." Dr. Hughes agreed with Dr. Zuehlsdorf that Claimant "has sustained substantial degrees of globalization of his symptoms and that there is a paucity of clinical pathology that I can identify on examination." However, he remarked that Claimant's medical history was plausible and additional evaluation was warranted. Dr. Hughes thus concluded that Claimant had not reached MMI for his December 8, 2015 industrial injuries. He recommended a brain MRI and a consultation with a neurologist "to assess neurological residuals of a closed head injury."

8. On June 3, 2016 Claimant underwent a DIME with Lynn Parry, M.D. Dr. Parry explained that on December 8, 2015 a strong gust of wind picked up a large piece of plywood. The plywood struck Claimant, broke his hardhat and threw him backwards. Claimant suffered a transient loss of consciousness, jaw tightness, a bifrontal headache, nausea and blurred vision after the incident.

9. Dr. Parry noted that Claimant experienced 2-3 headaches each week. However, he had previously been diagnosed with migraines and had been taking Sumatriptan since 2014 for his condition. Dr. Parry commented that Claimant's migraines were now more frequent because he had only suffered 1-2 migraines per month prior to the industrial incident. She concluded that the December 8, 2015 incident caused an aggravation of Claimant's pre-existing migraine headaches, a TMJ dysfunction, a cochlear contusion, post-concussive mood disorder and a cervical strain. Dr. Parry determined that Claimant did not exhibit evidence of a traumatic brain injury and she found that his lower back and lower extremity issues were not related to the industrial incident. She also recommended that Claimant pursue treatment for his mood disorder outside of the Workers' Compensation system because the issue was multifactorial.

10. Dr. Parry concluded that Claimant had not reached MMI and required additional treatment. She specifically recommended an evaluation with an

otolaryngologist for hearing loss and tinnitus, a thoracic spine CT scan, evaluation for TMJ dysfunction, physical therapy and a gym membership. Dr. Parry also provided an advisory 15% whole person permanent impairment rating. The rating included 4% for a Table 53 cervical spine diagnosis, 7% for loss of cervical spine range of motion and 5% for migraines.

11. On August 5, 2016 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. Claimant recounted that on December 8, 2015 a strong gust of wind blew over a piece of plywood and struck him on top of his hardhat. He briefly lost consciousness. Although Claimant did not immediately experience any symptoms, he subsequently developed diffuse neck stiffness, lower back pain and a headache. Claimant's current symptoms included right thigh numbness, left buttock numbness, mid-back pressure, frequent lower back pain, right medial scapular pressure, mild neck pain and bilateral temporal headaches 1-3 times per week.

12. Dr. Lesnak concluded that Claimant sustained a very mild closed head injury on December 8, 2015 and his current symptoms were not related to the incident. He agreed with Dr. Zuehlsdorf that Claimant reached MMI on January 11, 2016 with no permanent impairment. He determined that the objective physical exam and radiographic findings suggested Claimant did not suffer any acute injuries or abnormalities. Dr. Lesnak remarked that, although Claimant's subjective pain complaints remained, Dr. Zuehlsdorf had found them to be unreliable. He noted that Claimant's subjective complaints were inconsistent with the objective findings and could not be trusted because of Claimant's prior history of dishonesty and exaggeration. Dr. Lesnak commented that there was no evidence that Claimant required further diagnostic testing or interventional treatment related to the December 8, 2016 work incident. He thus concluded that Dr. Parry incorrectly determined that Claimant had not reached MMI. Dr. Lesnak determined that Dr. Parry also erred in her advisory impairment rating and agreed with the 0% permanent impairment rating provided by Dr. Zuehlsdorf.

13. Dr. Parry testified at the hearing in this matter. She maintained that Claimant had not reached MMI and warranted a 15% whole person impairment rating as a result of his December 8, 2015 industrial injuries. Dr. Parry concluded that the December 8, 2015 incident caused an aggravation of Claimant's pre-existing migraine headaches, a TMJ dysfunction, a cochlear contusion, post-concussive mood disorder and a cervical strain.

14. Dr. Lesnak also testified at the hearing in this matter. He maintained that Claimant had reached MMI on January 11, 2016 with no permanent impairment. He commented that Claimant's main complaint was lower back pain with lower extremity symptoms. Dr. Lesnak remarked that the complaints were different from what Claimant had reported to Dr. Parry at the DIME. Claimant did not report hearing loss, ringing in his ears, jaw issues or concentration concerns at the independent medical examination.

15. Dr. Lesnak recounted that Claimant suffered a very minor closed head injury on December 8, 2015. He commented that patients with head injuries typically improve over time. In contrast, Claimant initially reported no symptoms but mentioned some neck stiffness, back pain and headaches on the following day. He subsequently reported more severe symptoms and additional injured body parts at the DIME. Dr. Lesnak testified that it is very unlikely for a patient to have minimal initial symptoms but develop symptoms six months later. He determined that Claimant's symptoms would likely have occurred within the first few hours or days if they were the result of a specific trauma. Finally, Dr. Lesnak disagreed with Dr. Parry's diagnoses of a TMJ dysfunction and cochlear contusion because Claimant never reported these symptoms to any of the other providers.

16. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Parry that Claimant has not reached MMI. Dr. Parry concluded that Claimant had not reached MMI and required additional evaluation. She specifically recommended an evaluation with an otolaryngologist for hearing loss and tinnitus, a thoracic spine CT scan, evaluation for TMJ dysfunction, physical therapy and a gym membership. Dr. Parry also provided an advisory 15% whole person permanent impairment rating. The rating included 4% for a Table 53 cervical spine diagnosis, 7% for cervical spine range of motion loss and 5% for migraines.

17. In contrast, ATP Dr. Zuehlsdorf noted that he could not rely on Claimant's reports because of a lack of objective findings, MRI's that revealed only mild and insignificant spondylitic changes, an inconsistent presentation and a lack of candor about his prior medical history. Dr. Zuehlsdorf concluded that Claimant reached MMI on January 11, 2016 with no permanent impairment. Moreover, Dr. Lesnak determined that Claimant sustained a very mild closed head injury and there was no evidence that ongoing symptoms were related to the December 8, 2015 incident. Dr. Lesnak agreed with Dr. Zuehlsdorf that Claimant reached MMI on January 11, 2016 with no permanent impairment. He specifically commented that the objective physical exam and radiographic findings suggested that Claimant did not suffer any acute injuries or abnormalities. Dr. Lesnak also noted that Claimant's subjective complaints were inconsistent with the objective findings and could not be trusted because of a prior history of dishonesty and exaggeration. He commented that there was no evidence that Claimant required further diagnostic testing or interventional treatment related to the December 8, 2015 work incident. He thus concluded that Dr. Parry incorrectly determined that Claimant had not reached MMI.

18. Although Drs. Zuehlsdorf and Lesnak disagreed with Dr. Parry's MMI determination, the persuasive testimony of Dr. Hughes supports Dr. Parry's conclusion. Dr. Hughes agreed with Dr. Zuehlsdorf that Claimant "has sustained substantial degrees of globalization of his symptoms and that there is a paucity of clinical pathology that I can identify on examination." However, he remarked that Claimant's medical history was plausible and additional evaluation was warranted. Dr. Hughes thus concluded that Claimant had not reached MMI for his December 8, 2015 industrial injuries. He recommended a brain MRI and a consultation with a neurologist "to assess neurological residuals of a closed head injury." Based on Dr. Parry's proper exercise of

medical discretion and the persuasive support of Dr. Hughes, the record reveals that Drs. Zuehlsdorf and Lesnak simply disagreed with Dr. Parry's impairment determinations. Respondents have not specifically identified any flaws that suggest it is highly probable that Dr. Parry's determination is erroneous. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Parry's determination that Claimant has not reached MMI was incorrect.

CONCLUSIONS OF LAW

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

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

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

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

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may

consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

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

7. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Parry that Claimant has not reached MMI. Dr. Parry concluded that Claimant had not reached MMI and required additional evaluation. She specifically recommended an evaluation with an otolaryngologist for hearing loss and tinnitus, a thoracic spine CT scan, evaluation for TMJ dysfunction, physical therapy and a gym membership. Dr. Parry also provided an advisory 15% whole person permanent impairment rating. The rating included 4% for a Table 53 cervical spine diagnosis, 7% for cervical spine range of motion loss and 5% for migraines.

8. As found, in contrast, ATP Dr. Zuehlsdorf noted that he could not rely on Claimant's reports because of a lack of objective findings, MRI's that revealed only mild and insignificant spondylitic changes, an inconsistent presentation and a lack of candor about his prior medical history. Dr. Zuehlsdorf concluded that Claimant reached MMI on January 11, 2016 with no permanent impairment. Moreover, Dr. Lesnak determined that Claimant sustained a very mild closed head injury and there was no evidence that ongoing symptoms were related to the December 8, 2015 incident. Dr. Lesnak agreed with Dr. Zuehlsdorf that Claimant reached MMI on January 11, 2016 with no permanent impairment. He specifically commented that the objective physical exam and radiographic findings suggested that Claimant did not suffer any acute injuries or abnormalities. Dr. Lesnak also noted that Claimant's subjective complaints were inconsistent with the objective findings and could not be trusted because of a prior history of dishonesty and exaggeration. He commented that there was no evidence that Claimant required further diagnostic testing or interventional treatment related to the December 8, 2015 work incident. He thus concluded that Dr. Parry incorrectly determined that Claimant had not reached MMI.

9. As found, although Drs. Zuehlsdorf and Lesnak disagreed with Dr. Parry's MMI determination, the persuasive testimony of Dr. Hughes supports Dr. Parry's conclusion. Dr. Hughes agreed with Dr. Zuehlsdorf that Claimant "has sustained substantial degrees of globalization of his symptoms and that there is a paucity of clinical pathology that I can identify on examination." However, he remarked that Claimant's medical history was plausible and additional evaluation was warranted. Dr. Hughes thus concluded that Claimant had not reached MMI for his December 8, 2015 industrial injuries. He recommended a brain MRI and a consultation with a neurologist "to assess neurological residuals of a closed head injury." Based on Dr. Parry's proper exercise of medical discretion and the persuasive support of Dr. Hughes, the record reveals that Drs. Zuehlsdorf and Lesnak simply disagreed with Dr. Parry's impairment determinations. Respondents have not specifically identified any flaws that suggest it is highly probable that Dr. Parry's determination is erroneous. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Parry's determination that Claimant has not reached MMI was incorrect.

ORDER

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

1. Claimant has not reached MMI for his December 8, 2015 industrial injuries.

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

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

DATED: December 8, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-958-125-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 16, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 11/16/16, Courtroom 1, beginning at 1:30 PM, and ending at 4:00 PM). The Spanish/English Interpreter was Annabel Cuadros Yeiser.

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

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents. The proposed decision was filed, electronically, on November 17, 2016. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, medical benefits, average weekly wage (AWW); and temporary total (TTD) and/or temporary partial disability (TPD) benefits from January 15, 2016 and continuing. The Claimant has the burden of proof, by a preponderance of the evidence on these issues.

The Respondents raised the affirmative defense of “responsibility for termination for which they have the burden by preponderant evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant is a 39 year old woman formerly employed by Lazy Days Mile High RV (Employer) as a cleaner. Her job duties consisted of cleaning the interiors and exteriors of the RV’s.

2. The Claimant had a previous Worker’s Compensation claim involving her low back in 2011. She injured her back while lifting boxes.

3. Prior to the date of the present alleged injury, the Claimant’s manager, Kyle Ferguson, observed her limping. He asked her what was wrong and the Claimant stated that she had leg pain. Ferguson then asked the Claimant whether her condition was related to a work injury, and her response was “no.” Ferguson informed the Claimant that if her condition was work related, she needed to fill out the appropriate paperwork, but the Claimant refused to do so. Ferguson does not recall the specific date of this conversation, but it was before the company changed ownership in November of 2015.

4. Ferguson recalls the Claimant limping intermittently and complaining of leg pain both before and after the change of ownership in November of 2015. He asked the Claimant on several occasions whether her condition was work-related, and her answer was always” no.”

5. Ferguson presented as straightforward, knowledgeable, and credible. He does not have any interest in the outcome of the claim or any plausible and realistic

reason to testify untruthfully. There is no persuasive evidence of any bias on the part of Ferguson.

The Alleged Compensable Event of January 5, 2016

6. The Claimant alleges that she sustained a work-related low back injury of January 5, 2016. The Respondents filed a timely Notice of Contest.

7. The Claimant had an initial evaluation at the Clinica Colorado on February 4, 2016. She complained of right buttock pain radiating down the back of her leg. There is no mention of any work injury. On the contrary, the medical record states that the Claimant "denies injury."

8. The Claimant resigned her employment on February 22, 2016. She did not report any work-related injury prior to or at the time of her resignation.

9. The Claimant was evaluated at another facility, Clinica Family Health, on March 2, 2016. This record also indicates there was "no injury" reported.

10. The Claimant was evaluated at Denver Integrated Spine on April 11, 2016 for leg and thigh pain. As part of the intake process, she filled out a questionnaire. The questionnaire asked whether the reason for her visit was related to a work accident, and she circled "no." The Claimant nonetheless told the chiropractor that she injured herself at work.

First Reporting of Alleged Work Injury

11. The Claimant notified her Employer of the alleged work related injury on or about June 3, 2016, almost ½ year after the alleged accident. This was the first time the Employer was notified of the claim.

Ultimate Findings

12. The ALJ infers and finds that the Claimant's actions are not consistent with a work-related injury. It makes no sense that she failed to report the injury at the time of the incident/injury, but almost five months later. Additionally, it makes no sense that she did not report an alleged work-related injury at the time of her resignation. Furthermore, the initial medical records from Clinica Colorado and Clinica Family Health work injury make no mention of an alleged work-related injury. Overall, the Claimant's version of events does not add up. Therefore, the ALJ finds that her testimony is not credible.

13. The ALJ has considered the opinions regarding causation submitted by the providers at Denver Integrated Health and Claimant's IME, Dr. Hughes. These opinions, purporting to support a work-related injury, are based entirely on the Claimant's statements (made later in time) regarding the mechanism of injury. Because Claimant's version of events is not credible, the medical opinions, like a house of cards, fall apart and are not credible.

14. The Claimant has failed to meet her burden of proof, by preponderant evidence, of showing that she suffered an injury in the course and scope of her employment. Consequently the other designated issues are moot.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour*

Cleaners v. Indus. Claim Appeals Office, 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's actions are not consistent with a work-related injury. It makes no sense that she failed to report the injury at the time of the incident/injury, but almost five months later. Additionally, it makes no sense that she did not report an alleged work-related injury at the time of her resignation. Furthermore, the initial medical records from Clinica Colorado and Clinica Family Health work injury make no mention of an alleged work-related injury. Overall, the Claimant's version of events does not add up. Therefore, the ALJ finds that her testimony is not credible. Indeed, as found, all of the medical opinions, including the opinions of Dr. Hughes, are based exclusively on the Claimant's later histories. Therefore, the opinions purporting to support a work-related injury, like a house of cards, fall apart and are not credible.

Compensability

b. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7 (**presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment unless an outside cause is shown). Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, because the Claimant's version of events is not credible for the reasons heretofore articulated, the Claimant did not sustain a compensable injury as alleged.

Burden of Proof

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld*

County Bi-Products, Inc., W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). “Preponderance” means “the existence of a contested fact is more probable than its nonexistence.” *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to meet her burden of proof. Consequently the other designated issues are moot.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers’ compensation benefits are hereby denied and dismissed.

DATED this______day of December 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

1. Has Claimant proven by a preponderance of the evidence she sustained an injury to her right ankle and right knee on July 6, 2015 in the course and scope of her employment?

2. Has Claimant established a basis to reopen W.C. No. 4-890-373?

3. Is Claimant entitled to medical benefits?

STIPULATIONS/JUDICIAL ADMISSIONS

At the commencement of the hearing, the parties agreed that, if the claim is deemed compensable, the medical treatment provided by Southern Colorado Clinic, Dr. Weinstein, and Dr. Shank was reasonable and necessary.

FINDINGS OF FACT

1. Claimant works as an LPN for the Colorado Mental Health Institute at Pueblo.

2. Claimant suffered an injury to her right ankle in 2011, which forms the basis for her claim in W.C. No. 4-890-373. Claimant was treated by Dr. Shank, who performed a Brostrom-Gould surgical procedure on her right ankle. Claimant underwent post-surgical rehabilitation and was placed at MMI on August 23, 2013 with a 16% scheduled impairment rating. Claimant returned to work without restrictions, and the claim was closed by a Final Admission of Liability dated October 17, 2013.

3. On June 19, 2015, Claimant was involved in an accidental fall at home. Claimant was carrying her daughter when she stepped on a toy at the top of her stairs. Claimant's right ankle rolled, and she fell down approximately ten stairs.

4. The next day Claimant sought treatment at the Parkview Medical Center emergency room. Claimant complained of "left elbow pain, right ankle, and right knee pain after a trip and fall down approximately 10 stairs yesterday." Claimant's worst pain was in her left elbow. Claimant also reported "bruises all over her body. She has been able to bear weight on her ankle and knee with some pain." On examination, right ankle range of motion was normal. The ER physician noted "soft tissue edema of the right ankle and left elbow." X-rays showed "soft tissue edema" of the right ankle and "small effusion of the right knee."

5. Claimant was given Percocet in the ER and her pain improved. She was released with instructions to rest, apply ice and compression, and elevate her leg.

6. Following the ER visit, Claimant returned to work and resumed her full duties without restriction or limitation. Claimant was able to participate in a dance/exercise class and do yoga with her patients without any limitations due to her right ankle or right knee.

7. The Claimant did not seek further treatment for right ankle or knee pain after being seen at the ER, until after a July 6, 2015 accident at work.

8. On the evening of July 6, 2015, the Claimant dispensed medications to patients as part of her job duties. The patients lined up outside the “med room” in which Claimant stood. The door to the med room is split in half so the top half can be opened separately from the bottom half. The bottom half of the door remains closed and creates a small counter where Claimant can stand to dispense the medications.

9. The patients are given cups and water to assist them in swallowing their medication. Occasionally patients will spill water while pouring water or taking their medications.

10. After Claimant had dispensed the medications, she left the med room. When she stepped outside the room, Claimant’s right foot slipped on some liquid on the floor, and she fell to the ground. This was most likely water spilled by a patient taking their medication.

11. Immediately after the fall, Claimant felt pain in her right ankle and right knee. Claimant “hobbled” to the nurse’s station and reported the incident to a supervisor. Claimant subsequently finished her shift. Her knee and ankle were painful during the remainder of her shift, so she applied ice to try to relieve the pain.

12. When Claimant got home after her shift, she took Tylenol, iced her knee and ankle, and sat in a recliner chair with her leg elevated.

13. The next morning, Claimant called another supervisor, Joe Galliant, to discuss the injury. Mr. Galliant directed Claimant to Employer’s designated provider, Southern Colorado Clinic.

14. Claimant was evaluated by Terry Schwartz, PA-C at Southern Colorado Clinic on July 7, 2015. The report documents “patient states on July 6, 2015 after she finished passing out meds, she walked out the door and slipped on the wet floor. Patient states she injured her R ankle, R knee and strained low back on Rt.” She reported pain at a level of 7. Physical examination revealed “tenderness” in the paraspinal musculature of the right lateral lumbar spine. Her right knee was “tender medially with testing.” She reported “hurts to bear weight” and “feels unstable to walk.” Her right ankle demonstrated “tenderness lateral malleolus,” with no erythema, ecchymosis or swelling. She reported it “hurts to walk.” PA-C Schwartz diagnosed a right ankle sprain, right knee sprain, and acute low back pain. He put Claimant in an ankle support sleeve and a

hinged right knee brace. He advised Claimant to use crutches “with progress of weight bearing as tolerated.” She was instructed to ice and elevate her leg and use OTC analgesics for pain relief. PA-C Schwartz gave Claimant work restrictions including “allow patient to stretch and change positions frequently for comfort, wear brace as directed, crutches with progressive weight bearing.”

15. Claimant returned to Southern Colorado Clinic on July 23, 2015, and saw Dr. Lakin. Her low back pain had resolved, but she reported ongoing right knee and right ankle symptoms. She reported a “strong sensation” of her right knee giving out. She was walking slowly, and her gait was “very antalgic.” Dr. Lakin ordered an MRI of the right knee, prescribed ibuprofen, and recommended that Claimant continued using the knee brace. She was released to return to work with the same restrictions.

16. Claimant underwent a right knee MRI on July 30, 2015. The MRI showed a medial meniscus tear and grade IV patellar chondromalacia.

17. After reviewing the results of the MRI, Dr. Lakin referred Claimant to Dr. Weinstein and Dr. Shank’s orthopedic practice for evaluation and treatment.

18. Claimant was evaluated by a physical therapist on August 7, 2015. She reported that since the July 6 accident, she had experienced “pain and instability with walking and stair climbing activities sometimes even requiring crutches.” Claimant ambulated “with a severely antalgic gait” despite wearing a hinged knee brace. She had decreased strength and range of motion deficits in the right knee and right ankle. The therapist recommended that Claimant participate in PT for approximately 10-12 weeks.

19. Claimant saw Dr. Weinstein regarding her right knee on September 21, 2015. She reported that when she slipped on the water, she “heard a pop . . . and had immediate swelling” in the right knee. She was continuing to experience moderate to severe aching and burning pain in her knee. She also reported periodic swelling and the sensation of her knee “giving away.” After performing a physical examination and reviewing the knee MRI, Dr. Weinstein opined that “the patient appears to have a combination of both aggravation of pre-existing patellofemoral arthritis as well as a tear of the medial meniscus.” Dr. Weinstein administered a cortisone injection, prescribed physical therapy and gave Claimant a patellar stabilizing brace. He asked her to return in six weeks, at which time surgery would be considered if she was not improved.

20. Claimant saw Dr. Shank for evaluation of her ankle on September 29, 2015. She told Dr. Shank about the fall at home and at work. She reported that her symptoms were exacerbated and she was experiencing “lateral-sided ankle pain and inversion instability with mistrust of her ankle.” Dr. Shank requested an MRI of the right ankle and placed Claimant in an ankle brace.

21. Claimant returned to see Dr. Shank on October 20, 2015. In light of Claimant’s persistent instability and pain, Dr. Shank recommended a revision ankle surgery. He indicated “I think the patient likely had a re-injury to her lateral ligaments

complex which has continued to be an instability problem for her following her recurrent injury."

22. Claimant underwent surgery on her right knee and right ankle on December 28, 2015. Dr. Weinstein performed the knee surgery and Dr. Shank did the ankle surgery.

23. Regarding the right knee, Dr. Weinstein performed an arthroscopic partial medial meniscectomy. For the right ankle, Dr. Shank performed an arthroscopic microfracture with revision modified Brostrom-Gould procedure.

24. After surgery, Claimant's condition gradually improved. The parties did not submit any medical records indicating whether Claimant has been placed at MMI.

25. Dr. Larson performed an Independent Medical Examination (IME) at the Respondent's request on February 25, 2016. Dr. Larson opined that the knee and ankle problems were more likely caused by Claimant's fall at home on June 19, 2015.

26. Dr. Larson testified in a deposition on September 28, 2016, wherein he reiterated and expounded upon the opinions expressed in his IME report.

27. Dr. Shank testified in depositions conducted on February 11 and November 8, 2016. Dr. Shank testified the June 19, 2015 fall and the July 6, 2015 fall were both capable of producing the Claimant's right ankle and right knee pathology. Therefore, Dr. Shank could not determine causation simply by reference to the description of each incident. Dr. Shank opined that if Claimant's pain was more severe after the July 6, 2015 accident, that incident was the more likely cause of her pathology.

28. Claimant's testimony is credible.

29. There is no persuasive evidence to contradict Claimant's testimony that she was able to perform regular work duties without limitation between June 21, 2015 and July 6, 2015.

30. Claimant has proven by a preponderance of the evidence that she sustained compensable injuries to her right ankle and right knee on July 6, 2015 as a result of her employment.

31. Dr. Weinstein and Dr. Shank are authorized providers.

32. The right knee surgery performed by Dr. Weinstein on December 28, 2015 was reasonable, necessary, and causally related to Claimant's compensable injury.

33. The right ankle surgery performed by Dr. Shank on December 28, 2015 was reasonable, necessary, and causally related to Claimant's compensable injury.

34. There is no basis to reopen the claim in W.C. No. 4-890-373.

CONCLUSIONS OF LAW

Compensability and medical benefits in W.C. No. 4-987-898

To receive compensation or medical benefits, Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

As found, Claimant has proven by a preponderance of the evidence that she injured her right knee and right ankle as a result of a fall at work on July 6, 2015. Based on the totality of evidence presented, the ALJ is not persuaded by Respondent's argument that the right knee and ankle conditions are primarily attributable to the June 19, 2015 fall at home. Although Claimant sustained trauma to her right knee and ankle on June 19, she was able to return to work and perform her regular duties without restriction or limitation. Claimant even participated in dance/exercise class and yoga with her patients without any limitations due to her right ankle or right knee. Respondent did not introduce any persuasive evidence to refute Claimant's testimony that she was fully functional at work with no gait abnormality between June 21, 2015 and July 5, 2015.

By contrast, Claimant has been continuously limited since the July 6, 2015 injury. Moreover, she was placed in a hinged knee brace and needed a right ankle brace after the July 6 accident. The ALJ is persuaded that the July 6 accident is the most likely cause of Claimant's right knee and right ankle pathology, which ultimately required surgery.

At the commencement of the hearing, the parties agreed that, if the claim is deemed compensable, the medical treatment provided by Southern Colorado Clinic, Dr. Weinstein, and Dr. Shank was reasonable and necessary.

Reopening W.C. No. 4-890-373

Given the finding that the Claimant suffered a compensable injury on July 6, 2015, which ultimately resulted in two surgeries on December 28, 2015, there is no basis to reopen the claim in W.C. No. 4-890-373.

ORDER

It is therefore ordered that:

1. Claimant’s claim in W.C. No. 4-987-898 is compensable.

2. Respondent shall pay for reasonable and necessary medical treatment related to the July 6, 2015 injury, including, but not limited to, bills from Southern Colorado Clinic, Dr. Weinstein and Dr. Shank, and the December 28, 2015 surgery.

3. Claimant’s petition to reopen W.C. No. 4-890-373 is denied and dismissed.

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

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

DATED: **December 12, 2016**

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

➢ Whether claimant has proven by a preponderance of the evidence that she is entitled to maintenance medical treatment after being placed at maximum medical improvement ("MMI").

FINDINGS OF FACT

1. Claimant sustained an admitted injury to her head and thoracic spine on February 24, 2015. The injury occurred when a coworker dropped a box that struck claimant in the back of the head and neck.

2. Dr. Gregory Reicks began treating claimant on February 26, 2015 as her authorized treating physician ("ATP"). Claimant received various modes of treatment including physical therapy, chiropractic treatment, and psychotherapy.

3. On February 1, 2016, Dr. Reicks placed claimant at MMI and opined that claimant did not have any permanent impairment and did not need maintenance medical treatment. Claimant has not seen Dr. Reicks since he placed her at MMI on February 1, 2016.

4. Based upon Dr. Reicks' report, respondents filed a Final Admission of Liability ("FAL") on February 2, 2016 admitting the MMI date of February 1, 2016 and denying liability for any maintenance medical treatment post-MMI.

5. Claimant objected to the February 2, 2016 FAL and requested a Division-sponsored independent medical examination ("DIME"). A DIME was performed by Dr. Robert McLaughlin on May 26, 2016.

6. Dr. McLaughlin reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with his DIME. Dr. McLaughlin issued a medical report that summarized his findings and opined that claimant reached MMI on February 1, 2016 and assigned a permanent impairment rating of 4% whole person for claimant's thoracic spine. Dr. McLaughlin specifically opined that claimant did not need post-MMI maintenance medical treatment.

7. Based upon Dr. McLaughlin's DIME report, respondents filed a second FAL on June 21, 2016 admitting the MMI date of February 1, 2016 and the permanent impairment rating of 4% whole person. In the June 21, 2016 FAL, respondents again

denied liability for maintenance medical treatment. Claimant applied for hearing on the issue of *Grover* maintenance medical benefits on June 30, 2016.

8. Respondents filed a third FAL on July 14, 2016 which recalculated claimant's permanent partial disability ("PPD") award based on the 4% whole person impairment rating and denied maintenance medical treatment. The hearing in this matter proceeded on claimant's June 30, 2016 application for hearing and the ALJ finds claimant was not required to file a new application for hearing in response to the July 14, 2016 FAL.

9. Claimant testified that she continues to have pain in her head, neck, and right shoulder. Beginning on July 13, 2016 claimant sought treatment from Dr. J. Dale Utt for these head, neck, and shoulder symptoms. According to the medical records, Dr. Utt opined on July 13, 2016 that claimant's head, neck, and shoulder pain was not related to her work injury.

10. Dr. Utt is in the same practice with Dr. Reicks. However, the medical records document that Dr. Utt is claimant's primary care physician with whom claimant received medical treatment from before her work injury.

11. Claimant has continued to see Dr. Utt regarding her head, neck, and right shoulder symptoms. Dr. Utt has prescribed Vicodin and Gabapentin to treat claimant's pain symptoms. In addition, Dr. Utt has recommended physical therapy and a consultation with an orthopedic surgeon. Claimant testified that it is her understanding that the referral to the orthopedic surgeon is to obtain additional injections for her right shoulder. Claimant argues that these treatments demonstrate her need for maintenance medical treatment related to her February 24, 2015 work injury.

12. The ALJ finds that claimant had failed to demonstrate that it is more likely than not that she needs post-MMI medical maintenance treatment. The ALJ credits the medical records and the opinions of Dr. Reicks and Dr. McLaughlin that claimant does not need post-MMI maintenance medical treatment related to the February 24, 2015 injury. The ALJ also credits the July 13, 2016 opinion of Dr. Utt that the recommendation for physical therapy is not related to claimant's work injury.

CONCLUSIONS OF LAW

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

306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2015). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

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

4. As found, claimant has failed to demonstrate by a preponderance of the evidence that she is entitled to post-MMI maintenance medical treatment. As found, the opinions of Dr. Reicks and Dr. McLaughlin are credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant's claim for post-MMI maintenance medical treatment is denied and dismissed.

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

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 14, 2016

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

ISSUES

I) Whether claimant willfully misled her employer about her physical ability to perform essential job functions when she willfully failed to disclose her prior work injuries and restrictions and was subsequently injured while pushing an individual outside of her permanent restriction.

II) Whether claimant alleged a penalty with such specificity as to put Respondent's on notice, as required by 8-43-304(4).

III) Whether Respondent's are subject to penalty under 8-43-304(1) for failure to pay full temporary benefits when due, and utilizing a groundless invocation of 8-42-112(1)(d).

FINDINGS OF FACT

1. Claimant is a 41-year-old certified nursing assistant who submitted her application for employment to Shadow Mountain Management Corporation on or about June 10, 2013. Claimants' Exhibit 1, 1-6. In her application for employment, Claimant noted that she had left a CNA job in December 2012 due to a back injury. Claimants' Exhibit 1, 2.

2. On June 20, 2013, Claimant filled out a "Conditional Job Offer & Medical Review" for the employer. Respondents' Exhibit H, 34.

3. The conditional job offer indicated Claimant was offered the position *conditional* upon her *accurately* filling out the paperwork which inquired about previous injuries or accommodations needed. (emphasis added).

4. Claimant acknowledged that the job was important to her and her family for financial and scheduling reasons.

5. Claimant admitted that she knew her job depended on the answers that she gave on the conditional job offer.

6. Claimant signed the document affirming that the information she provided was true and correct, and that there were no omissions. Respondents' Exhibit H, at 35.

7. Claimant testified that it was her signature found on the document.

8. Claimant indicated on this document that she had no circumstances or medical needs that the employer needed to be aware of, that she had never suffered from an injury on the job, that she had never missed time from work due to an injury, and that she was only taking medications for her thyroid. Respondents' Exhibit H.

9. However, Claimant had injured her lumbar spine in 2009 during a pushing incident while claimant was a CNA for a different employer. Respondents' Exhibit F, 16.

10. Claimant received substantial treatment which included imaging, physical therapy, injections and medications for almost 1 year.

11. At the conclusion of her treatment, Claimant underwent a functional capacity examination (FCE) by Dr. Venegas to determine her physical abilities. Claimant was assigned a 15% whole person impairment rating and was given permanent restrictions of no pushing more than 70 pounds.

12. Claimant testified that she had been a CNA in the medical field for 23 years, but that she had no idea or concern about anything that was going on in her claim or with her medical condition.

13. Claimant testified that she was represented by Patrick Spencer, now ALJ Spencer, and received $27,720.30. She admitted was more money than she made in a year, but she had no idea what the money was intended to compensate her for.

14. Claimant testified that she was in a hurry when she filled out the "Conditional Job Offer". Even though she knew it was important and that her job depended on her answers, she simply forgot to mention she was significantly injured in 2009 and received a 15% permanent impairment and permanent restrictions on her ability to push.

15. Claimant, however, acknowledged that she remembered her back injury when filling out the application for employment.

16. Claimant also admitted that she was well aware of her back condition when she went to apply at Hildebrand Care Center because she was specifically working at a job that would allow her back to heal.

17. On January 7, 2016, Claimant allegedly slipped on a "wet bus lift" and hurt her back and right leg. Claimants' Exhibit 1, 7. After x-ray results on claimant's right hip were negative, claimant was treated conservatively and placed at maximum medical improvement with zero impairment on January 22, 2016.

18. On January 27, 2016, Claimant was pushing a 400 lb. man in a wheelchair at work when she developed instant pain in her right lower back with radicular pain down her right leg and into her foot. Respondents' Exhibit G, 24. Claimant was diagnosed with a lumbar strain due to this pushing incident.

19. Chris Abraas, director of human resources for Hildebrand Care Center, testified that it was important for her to know about any restrictions or accommodations that her employees needed in order to ensure *the **safety** of the residents, claimant's co-employees, and the employees themselves*. (emphasis added). Ms. Abraas also testified that she attempts to accommodate all restrictions anyone may need, should they disclose such information.

20. Chris Abraas testified credibly that had she known about Claimant's restrictions on pushing, she would have never put Claimant in a position where she was solely responsible for pushing 400-plus pounds, and that she would have been able to accommodate Claimant's restrictions, had she known about them.

21. Ms. Abraas testified that the purpose of the conditional job offer and medical information sheet was specifically to avoid situations Claimant found herself in.

STATEMENT OF APPLICABLE LAW

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

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. The compensation provided for in articles 40 to 47 of this title shall be reduced fifty percent where the employee willfully misleads an employer concerning the employee's physical ability to perform the job, and the employee is subsequently injured on the job as a result of the physical ability about which the employee willfully misled the employer. C.R.S. 8-42-112(1)(d).

4. Section 8-42-112(1) does not create a "defense" for employers, but instead establishes a penalty based on misconduct of the claimant. *Wild West Radio, Inc. v. Industrial Claim Appeals Office,* 886 P.2d 304 (Colo. App. 1994). As such, Respondents bear the burden to prove by a preponderance of the evidence that claimant engaged in an act of misconduct justifying the reduction. *See Id.*

5. "The cardinal canon of statutory interpretation is that" a court "look[s] first to the text of the statute." *United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 622 (7th Cir.2015) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Turley v. Gaetz*, 625 F.3d 1005, 1008 (7th Cir.2010) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985)) (internal quotation marks omitted); *see also United States v. Titan Int'l, Inc.*, 811 F.3d 950, 952 (7th

Cir.2016). “In the absence of statutory definitions,” the court “accord[s] words and phrases their ordinary and natural meaning and avoid[s] rendering them meaningless, redundant, or superfluous.” *CFTC v. Worth Bullion Grp., Inc.*, 717 F.3d 545, 550 (7th Cir.2013) (internal quotation marks omitted). “Statutory interpretation is guided not just by a single sentence or sentence fragment, but by the language of the whole law, and its object and policy.” *Ibid.* (internal quotation marks omitted). “Indeed, statutory interpretation is a holistic endeavor and, at a minimum, must account for the statute's full text, language as well as punctuation, structure, and subject matter.” *Trs. of Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 828 (7th Cir.1996); *see also Estate of Moreland v. Dieter*, 576 F.3d 691, 699 (7th Cir.2009).

6. The term “willful” means with “deliberate intent” as opposed to mere thoughtlessness, forgetfulness, or negligence. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968); *Johnson v. Denver Tramway Corp.,* 115 Colo. 214, 171 P.2d 410 (1946).

7. The phrase “physical ability” is described in terms of the ability to do some physical action. *See Generally In the Matter of Scott Notz v. Notz Masonry, Inc,.* 1996 WL 344267 (Colo.Ind.Cl.App.Off).

8. The question of whether the respondents proved willfulness was one of fact for determination by the ALJ. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995).

CONCLUSIONS OF LAW

I. Claimant willfully misled her employer on her conditional job offer by not notifying her employer of her previous work injury and significant permanent restrictions on her ability to push.

1. Claimant testified that she forgot to mention the incident, and that she didn’t do so intentionally. Claimant's assertion is not credible.

2. Claimant admitted that she knew that the paperwork she was filling out was a conditional job offer and that it was important that she fill it out correctly.

3. As an experienced CNA, claimant knew full well that part of the physical requirements of the job would include pushing individuals that may weigh more than her 70-pound restriction.

4. Likewise, claimant claims ignorance when it comes to her prior injury and her medical status, however, it is simply not believable that claimant would have no idea about her prior injury, or the permanent restrictions put on her during the FCE with Dr.

Venegas.

5. Although claimant had been a CNA for over 20 years at the time, she expressed no concerns and asked no questions of her providers or her attorney about the effect this injury, impairment rating and restrictions would have on her ability to perform essential job functions.

6. Claimant claims that she received a check for over $20,000 and did not inquire of her attorney as to what the money was for.

7. Claimant admitted that she remembered the incident when filing out the application on June 3, 2014, as she noted that the reason she left her job of 4 years was due to her back injury, and that she was working a job specifically to relieve her back pain.

8. Claimant argues that she hurried through the document, but admits she took the time to write down her thyroid medication and contact information for medical emergencies. Claimant even took the time to change her check mark from "No" to "Yes" for the column for prescribed medications to accurately reflect her answers. The ALJ finds this to be further evidence that she read and understood the document in its entirety before signing it.

9. Likewise, the conditional job offer had a bold heading and specifically asked her about prior work injuries and any accommodations that claimant might need as a result. Claimant signed the document affirming that the information she had provided was true, correct, and without any omissions.

10. Claimant further argues that Respondent Employer was already placed on notice of her preexisting back injury, based upon a notation in her original job application that she had left a previous employer due to "Back Injury". Such reliance is misplaced. One cannot tell from this answer if the injury was incurred on the job at all, the severity of it, any time missed from work, nor if any permanent restrictions were placed into effect as a result thereof. In no way did this relieve Claimant of her obligation to accurately disclose her prior history, so that her employer could decide when, and how, to accommodate any work restrictions.

11. Claimant willfully misled her employer into believing that claimant had no restrictions on her ability to push, which resulted in Claimant being injured while pushing someone outside of her permanent restriction. Had Claimant been forthcoming about her inability to push more than 70 pounds, she might not have been injured. Ironically, credible testimony elicited from Chris Abraas indicated that Claimant would have been hired anyway, but with restrictions which would actually have made her job easier and safer. Claimant's apparent mistrust in the hiring process does not serve as an excuse for a willful failure to disclose.

12. Claimant argues that 8-42-112(1)(d) applies to the specific body part that was injured and argues that claimant injured her back in 2009 and injured her hip in 2016. Thus, she contends that 8-42-112(1)(d) does not apply. However, the statute is

clear on its face that it is her *physical ability and not the situs* of the injury or body part, which is dispositive. If the statute was meant to address the injured body part or situs of the injury, legislature would have done so as it has in numerous other statutes when speaking to the specific body part affected. *See* C.R.S. 8-42-107(8)(c.5); C.R.S. 8-42-104(5)(a) & (b).

13. As such, the statute speaks to claimant's *physical ability* to perform tasks such as standing, squatting sitting or pushing.

14. Claimant's physical ability to push was restricted to 70 pounds due to her previous work-related injury sustained while pushing. Claimant was pushing 400-plus pounds, clearly outside of her permanent restriction, and was injured as a result. Had claimant been forthcoming with her permanent restriction of 70 pounds, her employer would have never placed her in position where she was responsible for pushing over 400 pounds. However, Claimant willfully misled to her employer for what she perceived as a potential financial gain, and as such, was placed in a position where she was injured due to her physical inability to safely push more than 70 pounds.

15. Claimant argues that she had pushed this individual numerous times before and was never injured, as a defense. However, nowhere in the statue or supporting case law does it indicate that claimant has to be injured the first time she engages in the physical activity what she failed to disclose. The statute, again clear on its face, indicates that the Claimant only needs to be injured as a result of the physical ability about which she willfully mislead her employer.

II. Since Claimant acted willfully in her failure to disclose her prior injury, Employer was justified in imposing the 50% reduction in her benefits. Employer is therefore not subject to any penalties for wrongful withholding of benefits. There is no need to address herein Respondent's assertion that Claimant failed to allege her claim for penalties with sufficient specificity, as required by 8-43-304(4).

ORDER

It is therefore ordered that:

1. Claimant willfully misled her employer about her physical ability to perform essential job functions, and was subsequently injured on the job as a result. As such, Claimant is subject to a 50% reduction in her indemnity benefits pursuant to 8-42-112(1)(d).

2. Claimant's application for penalties, pursuant to 8-43-304 is denied and dismissed.

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

All matters not determined herein are reserved for future determination.

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

DATED: December 14, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-955-901-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/ Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 23, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 11/23/16, Courtroom 1, beginning at 8:30 AM, and ending at 10:30 AM).

Claimant's Exhibits 1 through 8 were admitted into evidence, without objection, with the exception of Claimant's Exhibit 3, whereby Respondents' objection thereto was overruled and the exhibit was admitted into evidence. Respondents' Exhibits A through F were admitted into evidence, without objection. Respondents; Exhibits G and H were withdrawn.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant , which was filed, electronically, on November 30, 2016. On December 2, 2016, the Respondents filed their "Objection to Claimant's Full Findings of Fact, Conclusions of Law and Order," which essentially amount to a counter proposed decision. After a consideration of the proposed decision and the counter proposed decision, the ALJ has modified the proposal submitted by the Claimant and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the April 13, 2016 Division Independent Medical Examination (DIME) report of Kathy McCranie, M.D. was in error insofar as it did not address and independently assess the Claimant's left foot injury to determine that the Claimant was at maximum medical improvement (MMI) with regard to such injury and all injuries sustained in the admitted injury of July 3, 2014; if not at MMI, whether the Claimant is likely in need of further diagnostic testing and treatment with regard to his left foot injury; and, ultimately whether the Claimant was properly assessed to be at MMI. Alternatively, the issue exists as to whether Claimant is entitled to post-MMI medical maintenance benefits pursuant to *Grover v. Indus. Comm.*, 759 P.2d 705, 710 (Colo. 1988). If the DIME opinion concerning MMI is overcome, the Claimant also designated the issue of temporary total disability benefits (TTD) from September 28, 2015 and continuing.

The Claimant bears the burden of proof, by clear and convincing evidence on overcoming Dr. McCranie's DIME opinions. On all other issues, the Claimant's burden is by preponderant evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant suffered an admitted industrial injury on July 3, 2014 while working for the Employer, when his left foot was run over by a small track hoe. He underwent a course of treatment for such injury (See Claimant's Exhibit. 7).

2. Ultimately, the Respondents filed an Amended Final Admission of Liability (FAL), dated April 22, 2016, admitting for an average weekly wage (AWW) OF $720.00; an MMI date of September 28, 2015; 10% of the left lower extremity (LLE); and, reasonably necessary post-MMI medical maintenance care and treatment. The Amended FAL was filed, based on DIME Dr. McCranie's opinions.

3. The Claimant was placed at MMI by his authorized treating physician (ATP), Gary Zuehlsdorff, D.O., a physiatrist, pursuant to Dr. Zuehlsdorff's report of September 28, 2015 .Dr. Zuehlsdorff had been one of the Claimant's authorized ATPs. At no time did Dr. Zuehlsdorff refer the Claimant to a podiatrist. Dr. Zuehlsdorff rated the Claimant at 10% of the LLE and placed the Claimant at MMI on September 28, 2015. DIME Dr. McCranie's opinions mirror the opinions of Dr. ,Zuehlsdorff.

4. James D. Davis, D.P.M. apparently last saw the Claimant on July 9, 2015, before Dr. Zuehlsdorff placed the Claimant at MMI. He indicated that the Claimant should be seen thereafter as needed.

5. Brett D. Sachs, D.P.M., evaluated the Claimant on June 6, 2016,and issued a report dated July 12, 2016 (Claimant's Exhibit 8). Dr. Sachs was of the opinion that "the Claimant's current symptoms are related to the previous injury and post-traumatic arthritis. At this point, I have recommended a CT scan to further evaluate the extent of the arthritis. [The Claimant] will require further treatment for the foot injury and may ultimately require additional surgery…." The ALJ infers and finds that Dr. Sachs has significantly more expertise than Dr. Zuehlsdorff and/or DIME Dr. McCranie concerning matters related to the feet, and his opinions are accorded more weight than those of Dr. Zuehlsdorff and Dr. McCranie. Indeed, based on Dr. Sachs' opinions, the ALJ infers and finds that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. McCranie was in error by placing the Claimant at MMI.

6. By an email chain of October 4, 2016 (Claimant's Exhibit 3), at 11:20 AM, the insurance adjuster, Llimoni Moten, advised Claimant's counsel: "I've contacted his treating provider, James Davis, DPM, to authorize an initial evaluation. They will contact [the Claimant] for scheduling." On the same date at 11:30 AM, the adjuster advised Claimant's counsel: "…please disregard the below. {the Claimant's] treating doctor is Dr. Gary Zuehlsdorff…." Subsequently, at 11:37 AM, counsel for the Respondents advised Claimant's counsel: "Yes. The ATP will make the referral back to a specialist if he deems appropriate. The ATP makes the decisions w/regard to future medical care. The adjuster is following the law." The ALJ infers and finds that Dr. Davis was **not** within the chain of authorized referrals and, therefore, not authorized.

The Division Independent Medical Examination (DIME) by Kathy McCranie, M.D.

7. Kathy McCranie, M.D., a physiatrist, was selected as the DIME examiner. The Claimant contends that he would have preferred a podiatrist, but no podiatrists were on the Division of Workers' Compensation (DOWC) list of DIME examiners. Dr. McCranie issued her DIME report on April 13, 2016 (Claimant's Exhibit. 6). The Claimant asserts that Dr. McCranie made no independent assessment of his left foot injury, or the need for further treatment for the left foot injury.

8. The ALJ infers and finds that the DIME report of Dr. McCranie, in fact, makes no reference to a persuasive independent evaluation of the Claimant's left foot injury, but instead is entirely deferential to Dr. Zuehlsdorff's opinions in his report, and in fact merely adopts, without a persuasive independent assessment, Dr. Zuehsldorff's conclusions.

9. In the reports, Dr. Sachs is of the opinion that the Claimant "has developed persistent pain and post-traumatic arthritis of the tarsometatarsal joints," and [u]pon further review of his medical records, [Dr. Sachs] suspect[s] that the current symptoms are related to the previous injury and post-traumatic arthritis." The trauma Dr. Sachs refers to is Claimant's industrial injury. Thus, this is a work-related injury and condition. Based upon this, Dr. Sachs has "recommended a CT scan to further evaluate the extent of the arthritis (post-traumatic)," and that Claimant "will require further treatment for the foot injury and may ultimately require additional surgery." The ALJ infers and finds that Dr. Sachs is recommending the additional test to ascertain whether there is a reasonable prospect that will reveal a course of treatment which may cure and relieve the effects of the admitted injury.

10. According to the Claimant, he desires such an assessment and would undergo any recommended treatment. The Claimant continues to have significant problems with the foot and he believes these injuries are preventing him from working full time. The Claimant's testimony, in this regard, is credible and convincing. Indeed, it is highly probable, unmistakable and free from serious and substantial doubt that the post-traumatic arthritis resulting from the July 3, 2014 "crush-like" injury is the sole cause of the Claimant's continuing LLE problems.

11. Since the originally determined MMI date of September 25, 2015, the Claimant has only been able to engage in part time light duty work, earning on average, $250-300 per week. His inability to engage in full time work is attributable to his ongoing problems from his admitted, compensable foot injury.

Ultimate Findings

12. The ALJ finds the opinions of Dr. Sachs, D.P.M., significantly more persuasive and credible than the opinions of DIME Dr. McCranie and ATP Dr. Zuehlsdorff because Dr. Sach's possesses more specific expertise concerning feet than the DIME doctor and the ATP; because Dr. Sachs articulates the condition of the Claimant's left foot in a more specific and relevant manner than the DIME and ATP. Further, since the DIME opinion mirrors the ATP opinion, the ALJ finds that it has been undermined by lack of a specific attention to the details of the Claimant's left foot condition. The same is true of Dr. Zuelsdorff's opinions.

13. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Sachs and to reject all opinions to the contrary.

14. The Claimant has demonstrated that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. McCranie erroneously placed the Claimant at MMI. Consequently, the Claimant has sustained his burden by clear and convincing evidence.

15. Based on the pendency of a CT scan test, recommended by Podiatrist Dr. Sachs, to determine if there is a reasonable prospect that a course of treatment can cure and relieve the effects of the admitted injury, the Claimant's condition has not become stable whereby "no further treatment is reasonably expected to improve the condition (of the left foot)." Consequently, the Claimant is not at MMI. If the test reveals that the Claimant was at MMI as of September 28, 2015, then, it would be premature to make any determinations concerning TTD benefits.

Respondents' Arguments

Citing Industrial Clam Appeals Office (ICAO) decisions in their Counter-Findings, the Respondents argue that the recommendation for an additional test is not enough to overcome an MMI finding by a DIME. While this may be true in a vacuum, if the additional test reveals a reasonable prospect of a course of treatment to cure and relieve the effects of an injury, then, opinions of the Court of Appeals trump ICAO decisions. Otherwise, the Respondents' Counter-Findings take issue with the Claimant's proposed Findings, which the ALJ has substantially modified but, nonetheless, rejects most of the counter proposals.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Sachs, D.P.M., were significantly more persuasive and credible than the opinions of DIME Dr. McCranie and ATP Dr. Zuehlsdorff because Dr. Sach's possesses more specific expertise concerning feet than the DIME doctor and the ATP; and, because Dr. Sachs articulates the condition of the Claimant's left foot in a more specific and relevant manner than the DIME and ATP. Further, since the DIME opinion mirrors the ATP opinion, the ALJ finds that it has been undermined by lack of a specific attention to the details of the Claimant's left foot condition. The same is true of Dr. Zuehlsdorff's opinions.

Substantial Evidence

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

Overcoming the DIME

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office***,** 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v.*

Indus. Claim Appeals Office, 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the Claimant has demonstrated that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. McCranie erroneously placed the Claimant at MMI. Consequently, the Claimant sustained his burden by clear and convincing evidence.

MMI

d. MMI is defined as the point in time when any medically determinable physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 [Indus. Claim Appeals Office (ICAO), October 27, 2011]. As found, based on the pendency of a CT scan test, recommended by Podiatrist Dr. Sachs, to determine if there is a reasonable prospect that a course of treatment can cure and relieve the effects of the admitted injury, the Claimant's condition has not become stable whereby "no further treatment is reasonably expected to improve the condition (of the left foot)." Consequently, the Claimant is **not** at MMI.

TTD

e. If the test reveals that the Claimant was at MMI as of September 28, 2015, then, it would be premature to make any determinations concerning TTD benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant has overcome the Division Independent Medical Examiner's (Kathy McCranie, M.D.) opinion by clear and convincing evidence. Therefore, the Claimant is not at maximum medical improvement.

B. The Respondents shall pay the costs of authorized, causally-related and reasonably necessary medical care and treatment for the admitted left lower extremity injury of July 3, 2014, subject to the Division of Workers' Compensation Medical Fee Schedule.

C. Any and all issues, including temporary total disability benefits from September 28, 2015 and continuing, are reserved for future decision.

DATED this______day of December 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

Claimant raised only one contention on appeal. Specifically, Claimant asserted that the ALJ "incorrectly placed the burden of proof on her to overcome the DIME physician's opinion regarding the cause of her left shoulder injury." Consequently, this order on remand addresses that limited issue only.

On appeal, Claimant argued that the DIME physician (Dr. Tyler) related Claimant's left shoulder injury to a November 12, 2014 fall which was caused by dizziness she experiences as a consequence of her compensable November 4, 2014. Claimant asserted that it was Respondents burden to prove that Dr. Tyler's determination regarding the cause of her left shoulder condition by clear and convincing evidence. The ICAO agreed, concluding that "in his DIME report, Dr. Tyler clearly attributed the Claimant's left shoulder injury to be a natural consequence of the dizziness she experiences from her November 4, 2014 admitted fall." The ICAO concluded that the "ALJ erred in his interpretation of the DIME report" and further "in placing the burden of proof on the claimant to overcome 'the [DIME physician's] opinion that the November 12, 2014 and not the November 4, 2014 injury is the cause of her need for treatment to the left shoulder." According to the Panel, it was "respondents' burden to overcome the DIME physician's opinion that the claimant's left shoulder injury is causally and proximately related to her original compensable fall on November 4, 2014."

In light of the above, the ICAO remanded the case to the ALJ who was ordered to "place the burden of proof on the respondents to overcome the November 4, 2014, causality opinion of the DIME physician with regard to the left shoulder, and then issue further factual findings and a new order." Succinctly stated, the issue on remand is whether Respondents produced clear and convincing evidence to overcome the causality opinion of Dr. Tyler that Claimant's left shoulder condition is related to her November 4, 2014 work related injury in as much as that injury caused her to experience dizziness and allegedly fall on November 12, 2014.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Jessica Lopez, Shannon Lemons, Rebecca Manuszak, and Aaron Griffen, Ph.D., the ALJ enters the following findings of fact:

Claimant's November 4, 2014 Work Related Incident and Her Prior Medical History

1. Claimant worked for Employer from August of 2013 to June 26 of 2015 as an assistant principal.

2. Claimant testified and the persuasive documentary evidence supports that on November 4, 2014, she responded to an altercation involving some students and a security guard on the Employer's educational campus. While attempting to separate the combatants, Claimant was hit from behind and knocked to the floor along with one of the students, who fell on Claimant's ankle. According to the security guard on scene, Claimant struck her head on the floor and lost consciousness for approximately thirty seconds. There is a lack of persuasive or credible evidence that Claimant injured her left shoulder as a direct result of the altercation.

3. Emergency medical technicians (EMT) were summoned to the scene and contacted Claimant who was, by the time EMT's arrived, sitting in a wheelchair. Claimant reported right ankle pain and a worsening headache. She specifically denied "dizziness, blurred vision, diplopia, chest pain, back pain, abdominal pain, pain in her right leg, left lower extremity, or bilateral upper extremities. Claimant was noted to have a Glasgow Coma Scale score of 15 and was alert and oriented to person, place, time and event. There is a lack of persuasive evidence that Claimant complained of or reported a left shoulder injury or symptoms to the EMT's responding on November 4, 2014. While Claimant alleged she injured her left shoulder in the November 4, 2014 scuffle, her testimony in this regard is not credible or persuasive.

4. After the scuffle on November 4, 2014, Claimant was transported to Penrose-St. Francis Hospital where she was evaluated in the Emergency Room (ER) by Dr. Christopher Johnson. Claimant's loss of consciousness was noted and it was documented further that she was "amnesic to the event." Claimant reported pain in the right eye, the head, right hip, right ankle and right foot. She specifically denied any vomiting, diarrhea, altered mentation, numbness, tingling or weakness. Claimant was provided with an aircast for a "potential sprained ankle." It was specifically noted that it was "okay" for Claimant to bear weight on her leg. There is a lack of credible or persuasive evidence that Claimant complained of or reported a left shoulder injury or symptoms as a result of the November 4, 2014 scuffle while in the ER.

5. Following her discharge from the ER on November 4, 2014, Claimant followed-up at Integrity Urgent Care (Integrity), Employer's designated provider, on November 5, 2014. At Integrity, Claimant was evaluated by Edwin Baca, M.D. Dr. Baca testified at hearing. He credibly testified he performed an "extensive" evaluation during Claimant's first visit on November 5, 2014. He reviewed Claimant's past medical history, evaluated all of her current bodily systems, obtained a history concerning the mechanism of injury (MOI) and performed a formal examination with treatment recommendations. Dr. Baca reported he had no difficulty speaking and communicating with Claimant at this appointment. During this visit, Claimant reported head, neck right hip, right knee, right foot and right ankle pain. Claimant told Dr. Baca she had a "moderate" headache and "intermittent" vision changes. She also reported "mild" nausea and one episode of vomiting prior to her appointment; however, she denied "current dizziness, nausea, vision changes memory loss or confusion." She had moderate ankle pain, difficulty weight bearing and walking. Claimant was given a prescription for medications and

provided with a “lace up” ankle brace and crutches which, according to a November 5, 2014 “Physicians Report of Workers’ Compensation Injury”, she was to use 100% of the time as she was instructed to engage in no weight bearing with the right leg. Dr. Baca testified throughout his care of Claimant, that he continued to evaluate and monitor her complaints/symptoms. Claimant had no complaints of left shoulder pain on November 5, 2014.

6. Dr. Baca testified that following his general examination of Claimant, he treated Claimant with a focus on the areas where she reported problems during his examination. Dr. Baca testified that he performed an examination of Claimant’s head for any signs of abrasions, lacerations or trauma. Dr. Baca noted that he performed a “complete” neurological examination to determine whether Claimant had any signs or symptoms of concussion or post-concussive injury. Dr. Baca’s findings on November 5, 2014 and on subsequent examinations were negative for closed trauma to the head and there were no signs of concussion or post-concussive symptoms according to Dr. Baca.

7. On November 13, 2014, Claimant returned to Integrity on a “walk-in” basis. She was evaluated by Dr. Autumn Dean for complaints of intermittent dizziness and forgetfulness and well as shoulder pain, which Claimant associated with nine days of crutch use. Contrary to the earlier reports of paramedics, emergency room providers and Dr. Baca, Claimant testified that she told Dr. Dean that she injured both shoulders during the November 4, 2014 incident. Claimant completed a pain diagram on this date depicting burning and aching pain in the left shoulder. According to Dr. Dean’s report from this date of encounter, Claimant reported that she thought her “concussion symptoms were improving, but a day or so after her last visit, she started noticing intermittent dizziness and forgetfulness again.” Claimant also specifically reported that the “crutches she is using hurt her left shoulder, which had been injured in a previous accident.”[1] Claimant was then provided with a walker to use for ambulation which took the place of the crutches that she had used for the past nine days. Dr. Dean’s report from this appointment is devoid of any indication that Claimant injured her shoulder after falling in Employer’s parking lot as a consequence of becoming dizzy.

8. Claimant has a pre-existing history of injury to the left shoulder resulting in a prior rotator cuff surgery. According to records from Claimant’s primary care physician (PCP), Dr. Michael Yoesel, Claimant had a prior 1979 left rotator cuff surgery.

9. Claimant testified that since the November 4, 2014 incident, she has had difficulty with balance, dizziness, and her short-term memory. Claimant’s testimony in this regard is inconsistent with the records and testimony of Dr. Baca. Dr. Baca testified he continued to evaluate claimant for any problems associated with a head injury after the November 4, 2014 fall, including signs of post-concussive syndrome and found none.

[1] Based upon Claimant’s specific pain complaints and history of left shoulder injury/surgery, the ALJ finds Claimant’s reference to “previous accident,” more probably than not, meant her remote car accident occurring around 1980 wherein she injured her left shoulder and not the November 4, 2014 incident.

Claimant's Alleged November 12, 2014 Slip and Fall and Continued Treatment at Integrity Urgent Care for the November 4, 2014 Work-Related Incident

10. At hearing regarding W.C. 4-974-447-02, Claimant testified that she fell in the parking lot of the school on November 12, 2014 after lunch as a result of her balance and dizziness issues. According to Claimant she injured her left shoulder in this fall. The ALJ finds this testimony inconsistent with Claimant's earlier statements to Dr. Dean on November 13, 2014 that her shoulder was hurting as a consequence of using crutches. Moreover, the ALJ finds this testimony at odds with Dr. Baca's examinations and testimony wherein he reported that he evaluated Claimant multiple times and found no objective evidence of impaired balance. Claimant also testified that she told Dr. Dean that she injured both shoulders during the November 4, 2014 incident, yet the records from the paramedics and ER personnel near the time of her injury fail to document any reports of injury to either shoulder. Claimant testified further that told Dr. Dean during her November 13, 2014 appointment that she fell on November 12, 2014. As noted, Claimant was seen by Dr. Dean on November 13, 2014 in follow-up for injuries sustained during the November 4, 2014 incident. During this visit, Dr. Dean documented that Claimant reported left shoulder pain as a consequence of using crutches secondary to her right ankle injury. As indicated above, the report of Dr. Dean is devoid of any discussion/reference to a left shoulder injury occurring during the November 4, 2014 incident or as a consequence of a fall occurring in Employer's parking lot on November 12, 2014.

11. Claimant detailed the mechanism of her alleged left shoulder injury testifying that she hit her shoulder against a vehicle in the parking lot on November 12, 2014 when she fell. According to Claimant, she landed on the parking lot surface on her outstretched arm. Claimant testified that she could not remember whether she had scrapes or bruises on her left shoulder, arm, elbow, wrist or hand as a consequence of falling on the pavement with her outstretched left hand, but she recall that the entire left arm hurt. Following physical examination on November 13, 2014, Dr. Dean reported the entire left upper extremity had normal appearance. Examination and testing of the entire left upper extremity revealed normal function. As both to the alleged fall and the crutch use allegedly causing problems, objective evaluations do not support any left shoulder injury. Conceivably, Claimant could have experienced pain from crutch use, but there is a lack of persuasive objective evidence supporting a conclusion that she sustained an aggravation or acceleration of a pre-existing left shoulder condition as a result of crutch use for nine days or that she fell in the parking lot as she claimed at hearing.

12. In addition to seeing Dr. Dean on November 13, 2014, Claimant was evaluated the same day by a physical therapist. Similar to Dr. Dean's report, the initial physical therapy note fails to mention that Claimant fell in the parking lot injuring her left shoulder on November 12, 2014, despite the fact that this appointment was one day after the alleged fall. There is lack of objective evidence to support a conclusion that Claimant fell onto a parking lot surface in the physical therapist's note from this date. Specifically, there is no documentation of objective evidence of cuts, scrapes, bruising or other skin changes one would expect to see on a person who fell and landed on her

outstretched arm as testified to by Claimant. Furthermore, the note from this date of visit reflects that Claimant did subjectively complain that her crutches caused her discomfort and that she had a prior history of a rotator cuff tear. Regardless, there is no mention of falling, there is no report of a new injury the day before, and there are no examination findings consistent with Claimant's allegation that she fell injuring her left shoulder on November 12, 2014.

13. On November 21, 2014, Claimant returned to Integrity for follow-up for what she reported was "severe pain from injury received at work when I fell on crutches." Dr. Baca noted that Claimant was "using a cane now b/c she is having a great deal of pain in her left shoulder and it was worse when using the walker." According to Dr. Baca's note, Claimant was "reporting pain in her shoulder secondary to her fall. She fell onto her left shoulder she believes and had immediate pain the day of the injury." Mention is made of Claimant's prior left shoulder surgery from 1980 with indication that Claimant reported no "problems with the shoulder" following that surgery until she fell "again." At face value, Claimant alleges the pain in the shoulder was secondary to a fall occurring on November 12, 2014; however, the report is devoid of any reference to the date of Claimant's alleged fall while using crutches.

14. Claimant completed a pain diagram dated November 20, 2014 depicting pain in the left shoulder caused by what is reported on the diagram as an "injury [occurring] at school when [Claimant] fell on crutches last week." The ALJ finds the date referenced on the pain diagram likely a documentation error as Claimant did not have a medical appointment on November 20, 2014. Rather, Claimant was evaluated on November 21, 2014. During her November 21, 2014 appointment, Claimant reported pain from a fall in the parking lot, not the experience of continued pain from using crutches or a walker.

15. On December 3, 2014, Claimant was seen in the offices of her PCP for a productive cough of one month duration. She was diagnosed with bronchitis and exacerbation of her asthma. Claimant also complained of left shoulder pain during this appointment, although discussion regarding a specific cause for her left shoulder pain is not included in the record.

16. Review of the evidence presented persuades the ALJ that Dr. Baca acted on Claimant's subjective complaints, regardless of whether Claimant's allegation of a fall on November 12, 2014 is inconsistent the medical history. His treatment of Claimant reflects thoroughness and an earnest effort to aid Claimant.

17. On December 4, 2014, Claimant was re-evaluated by Dr. Baca who ordered an MRI of the left shoulder for "possible RCT" (rotator cuff tear). Dr. Baca noted that Claimant was to continue use of the cane and "may engage in sedentary activities only. No reaching with L (left) shoulder or arm. Regarding causation, Dr. Baca noted: " >50% probability for causation."

18. MRI of the left shoulder was preformed December 8, 2014. The MRI demonstrated what Dr. Baca described as "moderate to severe degenerative changes

and rotator cuff tendonopathy, with associated labral fraying and tears.

19. On December 11, 2014, Dr. Baca reviewed the findings of the December 8, 2014, MRI with Claimant. After reviewing the MRI findings, Dr. Baca opined that there was a less than a 50% chance of Claimant's left shoulder injury being caused by her accident. Nevertheless, Dr. Baca referred Claimant to Dr. Christopher Jones for orthopedic consult.

20. As Claimant's treatment with Dr. Baca progressed he clarified his opinion concerning the cause of Claimant's left shoulder condition. On January 1, 2015, Dr. Baca, based upon Claimant's reported history, noted that Claimant sustained a "secondary injury" as a consequence of falling while using crutches. Consequently he noted the following regarding causation for Claimant's left shoulder condition: ">50% probability for causation; however, L (left) shoulder injury is <50% probability for causation for initial injury; however, PT (patient) fell using crutches and landed directly onto L (left) shoulder exacerbating chronic deg (degenerative) changes and causing labral tear." The ALJ infers from this causality statement that Dr. Baca does not ascribe any left shoulder injury to the November 4, 2014 incident, i.e. "initial injury." Rather, Dr. Baca concluded that Claimant's left shoulder injury was caused by an alleged secondary fall in Employer's parking lot which she said occurred while using crutches and that this fall aggravated chronic pre-existing degenerative changes in the shoulder and a labral tear.

Dr. Jones' Treatment

21. As noted above, Claimant was referred to Dr. Christopher Jones for orthopedic consult. Dr. Jones first evaluated Claimant on December 29, 2014. During this visit, Dr. Jones documented what he understood to be the events surrounding Claimant's injuries sustained on November 4, 2014. Regarding those events, Dr. Jones noted that Claimant had been "pushed into a door and struck her shoulder." He does not indicate which shoulder was struck however. Assuming Dr. Jones is referencing the left shoulder, the ALJ finds no record support, outside of Claimant's contention, for such conclusion. Nonetheless, Dr. Jones also documents that following the November 4, 2014 incident, Claimant was using crutches when she fell at "work on 11/10/14, and that is when she really feels like she re-hurt her shoulder." The reference to a date of injury of November 10, 2014 is inconsistent with the balance of the record evidence suggesting that Claimant allegedly fell and injured her left shoulder on November 12, 2014.

22. Dr. Jones also commented on the findings of Claimant's December 8, 2014 MRI, noting that the MRI demonstrated "a lot of intra-articular debris consistent with possible loose chondral debris and some synovitis associated with that" along with "some tendinopathy of [the] rotator cuff and possibly a partial tear, but . . . not a full-thickness defect."

23. Regarding the cause of Claimant's left shoulder symptoms', Dr. Jones noted:

“Given the mechanism of injury, this could certainly be a traumatic injury with impaction of the humeral head onto the glenoid. However, it could also be all chronic with some exacerbation of her previously existing injury.” Dr. Jones elected to proceed conservatively by injecting the shoulder with a 2:2:1 solution of Marcaine, Lidocaine and Depo-Medrol.

24. By January 19, 2015, it was evident Claimant had failed conservative treatments such as physical therapy and injections. Dr. Jones requested surgical authorization from Respondents on January 30, 2015. Respondents denied the request on February 11, 2015.

25. Claimant testified to having two surgeries on her left shoulder following her November fall while using crutches. The first surgery took place on February 11, 2015, and the second occurred in March of that year. The second surgery was necessary to correct a “popeye” deformity in Claimant’s left biceps caused by the first surgery. During Claimant’s February 11, 2015 procedure it was discovered that she had pseudo gout. Claimant’s surgery was covered by her private health insurance although she had out-of-pocket costs for the surgery and subsequent physical therapy.

Maximum Medical Improvement, Dr. Lindberg’s Evaluation, Dr. Hall’s Evaluation and Dr. Tyler’s Division Independent Medical Evaluation (DIME)

26. Dr. Baca placed Claimant at maximum medical improvement (MMI) without permanent impairment on March 3, 2015. At the time he placed Claimant at MMI, Dr. Baca noted she was not working secondary to her left shoulder condition. Claimant testified she missed work from February 11, 2015 through March 20, 2015, as a result of her left shoulder surgery. Dr. Baca’s opinion concerning causality of Claimant’s left shoulder condition/injury is unchanged from his January 1, 2015 opinion.

27. Respondents sought an opinion from Dr. James Lindberg regarding the cause of Claimant’s left shoulder condition. Dr. Lindberg examined Claimant on May 5, 2015 after which he opined that he did not believe Claimant had suffered an injury to her left shoulder as a result of the November 4, 2014 incident. He also concluded that there were multiple inconsistencies surrounding Claimant’s second injury stemming from a fall allegedly occurring on or about November 12, 2014.

28. Claimant sought an opinion from Dr. Timothy Hall. Dr. Hall evaluated Claimant on June 19, 2015. Dr. Hall concluded that while Claimant had pre-existing degenerative changes in the left shoulder, the two events in November, i.e. the original incident of November 4, 2014 and particularly the November 12, 2014 fall caused those changes to become symptomatic. Similar to Dr. Tyler’s opinion, Dr. Hall found that “but for” the November 12, 2014 fall, Claimant “would not have gone to surgery.” Consequently, he opined that Claimant’s left shoulder condition/injury was a direct result of the alleged work-related fall on November 12, 2014. Dr. Hall also felt that Claimant needed additional work-up for ongoing symptoms related to a concussion. According to Dr. Hall’s independent medical examination (IME) report, Claimant needed referral to a

neuro ophthalmologist and testing/treatment for ongoing cognitive complaints.

29. Dr. Hall provides multiple opinions regarding the condition of Claimant's left shoulder – that Claimant injured it on November 4, 2014 (an opinion the ALJ finds inconsistent with the medical records on or about that date of injury), that she fell on November 12, 2014 while getting out of her car (again, an opinion the ALJ finds inconsistent the totality of the evidence presented, including the medical records from Dr. Dean and the physical therapist from November 13, 2014). Dr. Hall fails to find any preexisting problem with the left shoulder, even though the MRI supports a conclusion of pre-existing degenerative change leading Dr. Jones to opine that Claimant's current symptoms may be emanating from an aggravation of this pre-existing degeneration. Dr. Hall found that Claimant had some left shoulder symptoms following the November 4, 2014 fall (a fall where he opines claimant hit her left shoulder, but such conclusion is unsupported by the record). He then concluded that Claimant was "markedly worse" after a fall in the parking lot on November 12, 2014. Dr. Hall's opinion relies on two pieces of evidence (a left shoulder injury occurring on November 4, 2014 and a significantly more severe left shoulder injury occurring on November 12, 2014) that are inconsistent with the credible and convincing evidence in this case, including the testimony of Claimant's co-workers regarding the alleged November 12, 2014 fall. Consequently, the ALJ rejects Dr. Hall's opinions regarding the cause of Claimant's left shoulder symptoms as unpursuasive.

30. Claimant requested a Division Independent Medical Examination (DIME) with Dr. John Tyler for the November 4, 2014 work injury only. Dr. Tyler completed the requested DIME on July 24, 2015. As concluded by the ICAO, Dr. Tyler relates Claimant's left shoulder complaints to a fall caused by the dizziness she has experienced since her November 4, 2014 work injury. As noted, this second fall allegedly occurred on November 12, 2014. As part of his opinion concerning the cause of Claimant's left shoulder symptoms and need for surgery, Dr. Tyler opines: "Claimant was only on crutches because of her work injury. While she may have had an underlying shoulder condition, this fall exacerbated that condition and created a need for surgery. "Whether or not this patient had previous trauma to the shoulder, that trauma went back nearly 34 years ago and was asymptomatic until this event."

Dr. Lindberg's Testimony

31. Dr. Lindberg testified that there was no initial injury to the left shoulder from the November 4 fall. He testified further that there was no objective medical evidence to support the occurrence of a fall on November 12, 2014.

32. Dr. Lindberg testified that Claimant has gout or other crystalline disorder that is unrelated to work. According to Dr. Lindberg, Claimant's left shoulder condition/symptoms and need for treatment is unrelated to any work related accident occurring November 4 or 12, 2014 and should be cared for under her health insurance.

The Testimony of Claimant's Co-Workers

33. Aaron Griffen, Ph.D. testified Claimant did not report a left shoulder injury as a consequence of a fall in the parking lot to him on November 12, 2014, the date Claimant asserts it occurred. This contradicts Claimant's report that she immediately told Dr. Griffen of the injury. Had Claimant reported an injury, Dr. Griffen testified he would have followed standard protocol, i.e. provide the employee with medical aide, contact Risk Management, and complete an accident report. Dr. Griffen testified that he did not learn about the alleged November 12, 2014 fall injury until February of 2015 when Claimant finally reported it.

34. Claimant's report of injury dated February 10, 2015 for the alleged November 12, 2014 fall came after Dr. Griffen counseled her in December 2014 and January 2015 regarding her need to improve her work performance. Claimant was working under restricted duty when Dr. Griffen spoke with her regarding her work. Claimant was missing crucial deadlines necessary and important to employer and those it served. She was also missing meetings necessary to conduct the business of the school district.

35. Dr. Griffen documented the problems associated with Claimant's job performance in a running memorandum. He removed some of Claimant's duties in January of 2015 because of her failure to meet mandatory deadlines which resulted in compliance issues for critical testing. Claimant was also counseled on her failure to respond appropriately to a subordinate challenging her authority. Finally, Claimant was warned to cease gossiping; she was a leader in the employer's organization and it was important to not undermine the authority structure given the nature of the work (education). On January 15, 2015, Claimant was told she would be put on a corrective action plan to bring her into compliance with the ten standards set by the state for administrators like her.

36. Dr. Griffen met with Claimant to finalize her corrective action plan on February 6, 2015 (four days before Claimant reported the November 12, 2014 alleged fall at work). The corrective action plan was signed on February 9, 2015, one day before Claimant filed her report of a November 12, 2014 work injury. In the corrective action plan, Claimant is put on notice that "Failure to meet the corrective actions mentioned above will result in further disciplinary actions that may lead to termination of your contract."

37. At hearing, Claimant amended her statement that Jessica Lopez witnessed the fall, testifying that she told her about it. She also testified that she could not remember whether her statement about reporting a November 12, 2014 injury to Dr. Griffen was correct.

38. Jessica Lopez testified that she did not witness the fall. Rather, Ms. Lopez testified that Claimant told her about the November 12, 2014 fall the day after (November 13, 2014) it allegedly occurred. According to Ms. Lopez, Claimant reported to her that she fell and everything was alright. In response to Ms. Lopez' inquiry as to

whether she needed to report an injury, Claimant replied “no”, that she was fine a little bumped and bruised, but nothing more than that. As noted above, no physical indications of injury, such as bruises, contusions or scrapes are documented in the physical therapy record or Dr. Dean’s notes from November 13, 2014.

39. Shannon Lemons testified that sometime in November 2014when Claimant returned to work after the November 4, 2014 incident, a student came into her office early in the morning (between 8:00 a.m. and 8:30 a.m.) asking for a wheelchair. Ms. Lemons asked the student why he needed the chair and he replied he needed it for Claimant. Ms. Lemons responded with the student to Claimant’s location. Ms. Lemons found Claimant in a doorway hunched over her crutches. Ms. Lemons knew Claimant had trouble with her lungs and Claimant was breathing heavily as she leaned over her crutches.[2]

40. Ms. Lemons testified that she had Claimant sit in the wheelchair and that she wheeled Claimant to her (Claimant’s) office. Claimant disputes Ms. Lemons’ account. Rather, Claimant testified that she needed the wheelchair after lunch on November 12, 2014 because she fell in the parking lot on her way back into the building. Ms. Lemons testified that she responded with the wheelchair first thing in the morning as Claimant arrived at work. According to Ms. Lemons she responded with a wheelchair before lunch and offered to help her the rest of the day. Ms. Lemons testified that Claimant used the wheelchair prior to lunch because Claimant called her and asked to be wheeled out to her vehicle for lunch. Per Ms. Lemons, when Claimant returned from lunch, she used her cell phone to call Ms. Lemons asking to meet at Claimant’s car so she could be wheeled from the parking lot back into the school. Ms. Lemons testified there was no fall in the parking lot at lunch time, as she wheeled Claimant to her car, helped her get into the vehicle and helped her get her seatbelt on. Ms. Lemons also testified that Claimant did not fall in the parking lot after lunch because when Claimant returned from lunch (the time which Claimant reports she fell in the parking lot), she met Claimant at her car. According to Ms. Lemons, Claimant was still in her vehicle when she arrived with the wheelchair. MS. Lemons reported that she rolled Claimant into the building. Ms. Lemons witnessed her arrival after lunch and testified there was no fall in the parking lot after lunch as Claimant asserts.

41. During her deposition, Ms. Lemons was asked whether Claimant reported a fall in the parking lot when she arrived at school on November 12, 2014. Ms. Lemons testified Claimant never reported a fall in the parking lot to her. Ms. Lemons, a health worker for Employer, testified Claimant was having trouble breathing when she responded with a wheelchair to Claimant’s location in the morning hours as noted above. According to Ms. Lemons, Claimant is an asthmatic and she helped Claimant with her nebulizer due to her labored breathing on the morning she responded to her location with a wheelchair. Ms. Lemons believed Claimant’s need for wheelchair assistance upon arrival to school that morning was due to trouble breathing, as there no report or signs of an injury consistent with a fall. At the end of the school day, Ms.

[2] The medical records from the office of Claimant’s PCP support a conclusion that Claimant was struggling with respiratory conditions and an unspecified exacerbation of her pre-existing asthma.

Lemons testified she wheeled Claimant out to her car around 3:15 p.m.

42. After Claimant reported the November 12, 2014 injury to Employer on February 10, 2015, Claimant approached Ms. Lemons and complained about the Insurer's denial of her left shoulder claim. Ms. Lemons responded she was unaware of Claimant hurting her left shoulder. Later, Claimant went to Ms. Lemons again about her denied claim. Claimant told Ms. Lemons she had reported a second injury to her. Claimant stated to Ms. Lemons, "I hope you don't get in trouble for this." Ms. Lemons was concerned about Claimant's statement, so she reported it to her supervisor, Rebecca Manuszak. Ms. Manuszak was the District Nurse for Employer at the time.

43. Both Ms. Lemons and Ms. Manuszak no longer work for Employer and were not employed by the school district when they testified. Like Ms. Lemons, Ms. Manuszak was present when Claimant was injured on November 4, 2014. She stayed with Claimant until paramedics arrived.

44. Ms. Manuszak was also aware of Claimant returning to work after the November 4, 2014 admitted work injury. Ms. Manuszak was aware that Ms. Lemons provided wheelchair assistance to Claimant when she returned to work. According to Ms. Manuszak, Ms. Lemons told her that Claimant had a difficult time ambulating on her crutches due to her asthma. Ms. Lemons reported to Manuszak that a student saw Claimant in distress and that Ms. Lemons brought a wheelchair to Claimant and wheeled Claimant around because of Claimant's asthma. Ms. Manuszak saw Claimant later on the day of her alleged fall in the parking lot. According to Ms. Manuszak, Claimant reported to her that it was too difficult to use the crutches because of her asthma. Ms. Manuszak believes the student notified Ms. Lemons of Claimant's distress as Claimant arrived to work, not after lunch as maintained by Claimant.

45. Ms. Manuszak testified that Ms. Lemons told her about Claimant coming to her office and asking her to support Claimant's allegation that she (Claimant) reported a second injury to Ms. Lemons in November of 2014. Ms. Manuszak characterized Claimant's actions as a threat to Ms. Lemons to "change her story" or "her job would be in jeopardy." Ms. Manuszak testified Ms. Lemons was very upset about Claimant's statements. Ms. Manuszak noted neither she nor Ms. Lemons were aware of a second fall. According to Ms. Manuszak, Claimant did not report a second fall to her and did not report a second fall to Ms. Lemons. Ms. Manuszak testified Ms. Lemons was upset because Claimant suggested that she (Ms. Lemons) would be in trouble because she failed to report Claimant's second injury at the time it allegedly occurred as required by Employer policy. Ms. Manuszak reported Claimant's statements to Claimant's supervisor's assistant and to the Risk Manager for Employer. She also went to Claimant's supervisor directly and indicated she would not tolerate an employee threatening Ms. Lemons. Ms. Manuszak testified she did not believe there was a second fall; she remembers Claimant coming into the clinic and reporting her shoulder began hurting when she was dressing at home one day. Claimant reported a "dislocation" of the left shoulder while "getting dressed for school" on January 21, 2015 according to records from Integrity. According to Dr. Baca's report from this date,

Claimant’s report of dislocation was the second time her shoulder had dislocated. Claimant testified she reduced the dislocation herself based on what she had seen on television.

46. Claimant testified that she believed Ms. Lemons knew about her injury in the parking lot when she mentioned to Ms. Lemons that she (Ms. Lemons) may get in trouble for not handling things right away. Based upon the evidence presented, the ALJ finds Claimant’s explanation regarding the verbal exchange between her and Ms. Lemons unconvincing. The totality of the evidence presented concerning this issue persuades the ALJ that Claimant’s decision to repeatedly approach Ms. Lemons about the denial of the alleged November 12, 2014 fall coupled with the statement suggesting that she (Ms. Lemons) may be in trouble for failing to report the claim constituted a veiled threat to intimidate Ms. Lemons into reporting that Claimant had actually fallen in an attempt to bolster the claim.

47. Based upon the totality of the evidence presented, the ALJ finds Claimant’s assertion that she fell in the parking lot on November 12, 2014 unreliable and unconvincing. When Claimant finally does report a November 12, 2014 injury on February 10, 2015, she provides details that are inconsistent with the testimony of her co-workers and her own later testimony. At hearing, Claimant reported she fell after getting dizzy while trying to use her crutches to get from the parking lot to the school. Claimant told Dr. Lindberg she slipped on ice. Clamant told the Division IME, she became dizzy as she got out of her car in the parking lot and fell. In her initial report of injury on February 10, 2015, Claimant asserts an employee (Ms. Lopez) witnessed the fall and that she reported the fall to her supervisor (Dr. Griffen) on the date of alleged injury, November 12, 2014. These reports were contradicted by the testimony of both Ms. Lopez and Dr. Griffen prompting Claimant to change her testimony regarding the same at hearing. Finally, the ALJ is convinced that Claimant did not report an injury to the left shoulder as a consequence of a fall and there is no objective evidence of injury to the left arm one day after the fall allegedly occurred in either the PT record or the report of Dr. Dean, despite Claimant’s report to Ms. Lopez that she was “bumped and bruised.”

48. Based upon the evidence presented, it appears that Dr. Tyler did not have the benefit of reviewing the depositions of Ms. Lemons, Ms. Manuszak, and Dr. Griffen when he performed his DIME. Consequently, the ALJ finds that he was unaware of the inconsistencies surrounding Claimant’s reporting of the alleged fall in addition to the lack of contemporary evidence supporting that a fall actually took place on November 12, 2014. To the contrary, the ALJ finds that Dr. Tyler relied solely on Claimant’s history and accepted, as fact that she fell on her outstretched arm on November 12, 2014, after experiencing an episode of dizziness while getting out of her car. While he mentions that Claimant was “suffering from dizziness and forgetfulness” when she was evaluated by Dr. Dean, he fails to address that the examination of Dr. Dean and or the physical therapist is devoid of any objective evidence of injury (bruising, contusions or scrapes) consistent with falling in a parking lot.

49. The ALJ credits the opinions of Dr. Lindberg to find that Claimant's left shoulder symptoms and need for treatment, including the surgeries performed by Dr. Jones, are/were causally related to her gout and the natural and probable progression of the pre-existing degenerative change present in the shoulder.

50. Based upon the evidence presented, the ALJ finds that Dr. Tyler erred in concluding that Claimant's left shoulder condition was causally related to a fall occurring on November 12, 2014. While there is evidence to support that Claimant suffers from dizziness as a consequence of her November 4, 2014 head injury, there is a dearth of persuasive evidence to support a finding/conclusion that Claimant actually fell as a consequence of that dizziness on November 12, 2014 as she maintains. As found, Claimant's testimony concerning the occurrence of this alleged fall is inconsistent, unreliable and contradicted by the more persuasive testimony of her co-workers. When the evidence regarding Claimant's alleged fall is considered as a whole, it overwhelming supports a conclusion that she did not fall and her shoulder symptoms/need for treatment are related to the natural progression of both a pre-existing condition and a non-work related gout. While Dr. Tyler has strong feelings about the cause of Claimant's left shoulder symptoms and need for treatment, the foundation for his opinions rests exclusively upon Claimant's reported history that she fell. As noted, the persuasive evidence contradicts Claimant's account of falling. Consequently, the ALJ finds Dr. Tyler's causation opinion that Claimant's left shoulder symptoms and need for treatment are related to a November 12, 2014 fall which was occasioned by residual dizziness from her November 4, 2014 injury, mistaken and highly probably incorrect.

51. Respondents have produced clear and convincing evidence that Dr. Tyler erred when he opined that Claimant's left shoulder symptoms arose from a fall occurring on November 12, 2014. Consequently, the ALJ finds that this causality opinion has been overcome.

CONCLUSIONS OF LAW

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

General Legal Principals

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

B. In determining credibility, the ALJ should consider the witness' manner and

demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found in this case, Claimant's testimony regarding her alleged November 12, 2014 fall is inconsistent and substantially contradicted by the more persuasive testimony of Ms. Lemons, Ms. Manuszak and Dr. Griffen. Consequently, the ALJ finds Claimant's testimony to be both unreliable and unconvincing.

C. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). Based upon the evidence presented, the ALJ finds/concludes that Dr. Tyler had limited information at his disposal when he completed his DIME. Moreover, he concluded that this limited information established as a matter of fact that Claimant fell as she contended. For the reasons outlined above, is not persuaded that Claimant actually fell. Accordingly, the ALJ concludes that the opinions of Dr. Lindberg regarding the cause of Claimant's left shoulder symptoms and need for treatment are more credible and persuasive than the contrary opinions of Dr. Tyler.

Overcoming Dr. Tyler's Opinion Regarding the Cause of Claimant's Left Shoulder Symptoms

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

E. In this case, Dr. Tyler expressed an opinion concerning the cause of

Claimant's left shoulder condition and her need for treatment when he completed the requested DIME for the admitted November 4, 2014 injury. As concluded by the ICAO, Dr. Tyler "expressly opined that the claimant became dizzy as a result of her fall from November 4, and she fell on November 12 because of the dizziness." In this case, the undersigned ALJ agrees with Respondents that the DIME report of Dr. Tyler reflects that he conflated the claim he was appointed to review (the November 4, 2014 claim) with a claim that was contested from November 12, 2014. Nonetheless, Dr. Tyler's opinion that the cause of Claimant's left shoulder symptoms and need for treatment resulted from a fall on November 12, 2014, caused by the lingering effects (dizziness) of her November 4, 2014 work injury is a determination of causation that falls squarely on the DIME doctor to decide. Since Dr. Tyler opined that Claimant's left shoulder symptoms and need for treatment were attributable to and a "natural consequence of the dizziness she experiences from her November 4, 2014, admitted fall", the burden to overcome this opinion rests with Respondents.

F. In order to effectively challenge Dr. Tyler's determination that the left shoulder injury is causally and proximately related to Claimant's November 4, 2014 fall there must be evidence that his determination is highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). The instant case involves complex medico-legal questions concerning the cause of Claimant's left shoulder condition and her need additional treatment in the context of two separate injuries, the second allegedly occurring eight days after the first. Here, the DIME report of Dr. Tyler reflects that he reviewed medical records from the various providers who evaluated and/or treated Claimant. Although he reviewed medical records documenting that Claimant suffers from persistent dizziness, which could have caused a fall on November 12, 2014, the ALJ concludes that Dr. Tyler's DIME report reflects that he simply accepted, at face value, Claimant's assertion that she did fall on November 12, 2014. In fact, Dr. Tyler found the suggestion that Claimant was ever thought not to have an injury brought on by a compensable workers' compensation injury to her left shoulder "insulting." Rather, he concluded that Claimant "suffered trauma to the left shoulder and the left shoulder was asymptomatic prior to the fall that occurred on November 12." (emphasis added).

G. While the ALJ finds and concludes that dizziness can cause falls, there is scant evidence, outside of Claimant's unpursuasive testimony that she actually did fall on November 12, 2014 as she claims. Here, Claimant's testimony regarding her alleged November 12, 2014 fall is inconsistent, unreliable and substantially contradicted by the more persuasive testimony of Ms. Lemons, Ms. Manuszak and Dr.

Griffen. Although Claimant alleges she sustained an injury in the parking lot on November 12, 2014, when she fell and injured her left shoulder, she was evaluated by Dr. Dean on November 13, 2014 – one day after this fall allegedly occurred. In that November 13, 2014 visit, Claimant makes no mention of a fall in a parking lot and there were no outward signs of injury to her left shoulder despite Claimant's report to Jessica Lopez that she was "bumped and bruised." Claimant also visited with a physical therapist on November 13, 2014 who makes no mention of a November 12, 2014 work injury to Claimant's left shoulder. This evidence coupled with the testimony of Ms. Lemons persuades the ALJ that Claimant did not fall in the parking lot on November 12, 2014. As found, Dr. Tyler did not have the benefit of this evidence when he completed his DIME. Consequently, the ALJ concludes that his causation opinions are based on incomplete information, are mistaken and highly probably incorrect. Accordingly, Respondents have presented clear and convincing evidence overcome the DIME opinions regarding the cause of Claimant's left shoulder symptoms and need for treatment.

ORDER

It is therefore ordered that:

1. Dr. Tyler's causation opinions regarding the left shoulder have been overcome. It is specifically concluded that Claimant's left shoulder symptoms and need for treatment are causally related to the natural progression of pre-existing degenerative change in the shoulder and gout as opined by Dr. Lindberg.

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

DATED: December 15, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-925-245-03

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits in the form of lumbosacral injection procedures designed to relieve the effects of his July 24, 2013 industrial injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

2. Whether Respondents have established by a preponderance of the evidence that they are entitled to recover an overpayment in the amount of $12,841.25.

FINDINGS OF FACT

1. Claimant worked for Employer as an Irrigation Technician. On July 24, 2013 Claimant suffered admitted industrial injuries during the course and scope of his employment when he was involved in a motor vehicle accident. Claimant was the restrained driver of a small truck stopped in a construction zone when he was struck from behind by a Ford Expedition driving approximately 40 miles per hour. He was then rear-ended a second time when a Cadillac Escalade SUV struck the Ford Expedition and pushed it into his truck.

2. On July 25, 2013 Claimant began receiving Temporary Total Disability (TTD) benefits as a result of his industrial injuries. He continued to receive TTD benefits at varying rates through November 11, 2015.

3. On July 26, 2013 Claimant visited Darla Draper, M.D. at Concentra Medical Centers for an examination. Claimant reported that he was rear-ended twice in a motor vehicle accident and lost consciousness. He recounted that his current symptoms included pain in his shoulders, neck, upper back and the left side of his head. Claimant also noted that he suffered vertigo. Dr. Draper diagnosed Claimant with a concussion involving loss of consciousness, a cervical strain, a cervical contusion, a back contusion, back pain, cephalgia and vertigo. She prescribed Flexeril and ice packs. Dr. Draper restricted Claimant from all work activities.

4. On August 7, 2013 Claimant returned to Concentra and underwent an evaluation with Carrie Burns, M.D. Claimant reported persistent pain in his upper back region. He also experienced "rare" headaches that he described as throbbing. Dr. Burns released him to return to work four hours per day with restrictions that included no lifting over 10 pounds, no pushing or pulling over 20

pounds, seated 50 percent of the time and no driving the company vehicle. She also referred Claimant for chiropractic treatment.

5. On August 20, 2013 Claimant returned to Concentra and visited Ronald Waits, NP for an examination. Claimant reported no significant symptom improvement. NP Waits decreased Claimant's work restrictions to no lifting in excess of 20 pounds with alternating sitting, standing and walking 50 percent of the time. Claimant remained limited to working four hours per day.

6. Claimant continued conservative treatment through Concentra with no reported improvement in symptoms. He was discharged from chiropractic care due to a failure to benefit. Claimant continued to work four hours per day until September 17, 2013 when he was released to work six hours per day by Patrick F. Freeman, PA. Claimant's other work restrictions remained unchanged.

7. On October 11, 2013 Claimant returned to Concentra and underwent an evaluation with PA Freeman. Claimant reported mild pain in his back and buttocks. He also noted brief daily headaches that lasted from a few seconds up to three hours. PA Freeman diagnosed Claimant with a cervical strain that had resolved, a lumbar strain that had resolved, an improving concussion and a thoracic strain. Claimant was released to return to work eight hours each day and his restrictions were reduced to lifting, pushing and pulling up to 20 pounds.

8. Claimant subsequently obtained a transfer of care to W. Rafer Leach, M.D. Dr. Leach evaluated Claimant on October 21, 2013. Claimant reported neck and back muscle pain. After reviewing Claimant's medical history and conducting a physical examination, Dr. Leach diagnosed Claimant with post-concussive syndrome, a sprain/strain of the thoracic region, vertigo, muscle spasms, disc disease of the cervical region, disc disease of the lumbar region, lumbosacral spondylosis, traumatic spondylopathy and post-traumatic headaches.

9. Claimant continued to periodically receive medical treatment from Dr. Leach. Dr. Leach restricted Claimant from all work activities. He also prescribed physical therapy and chiropractic treatment twice per week. Dr. Leach referred Claimant to Kenneth Allen, M.D. and James Benoit, M.D. for cervical and lumbar injection therapy. Drs. Allen and Benoit have performed multiple epidural steroid injections. They have not placed Claimant at Maximum Medical Improvement (MMI).

10. Claimant also continued to receive medical care from Concentra. On January 30, 2014 Matt Miller, M.D. released Claimant to return to work with restrictions of no lifting in excess of 40 pounds and no pushing or pulling in excess of 40 pounds.

11. On May 23, 2014 Claimant underwent an evaluation with John Burris, M.D. Dr. Burris noted that Claimant walked with a normal gait and transfer without

hesitation. Claimant also demonstrated full range of motion of the lumbar spine in all planes. Dr. Burris concluded that Claimant

> has a relatively benign examination with no objective findings and reportedly negative diagnostic work-up…. Based on today's examination, I find no objective basis for impairment or permanent work restrictions. He is released to full duty. Given the lack of objective findings, I would not endorse further injections until I have had a chance to review the records.

12. On June 9, 2014 Claimant visited Carlos Cebrian, M.D. for an independent medical examination. Dr. Cebrian reviewed Claimant's medical records and conducted a physical examination. He noted that Claimant exhibited full range of cervical, thoracic and lumbar motion. Dr. Cebrian determined that Claimant had reached MMI with no impairment or restrictions. Consistent with the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), Dr. Cebrian recommended discontinuation of Dr. Leach's prescriptions of muscle relaxers. He also suggested discontinuation of Carisoprodol under the supervision of a physician over 30 days. Dr. Cebrian summarized that no additional treatment was reasonable, necessary or related to Claimant's July 24, 2013 admitted industrial injuries. He specified that additional treatment would be inconsistent with the *Guidelines* because there had been no improvement in Claimant's functional ability.

13. On November 4, 2015 Claimant underwent a 24-month Division Independent Medical Examination (DIME) with Franklin Shih, M.D. Dr. Shih noted that Claimant had received therapy, medications and injections without significant benefit. Claimant reported that his symptoms had localized to the lower back and right gluteal region and were "about the same" as when he was initially injured. Dr. Shih determined that Claimant had reached MMI on June 9, 2014. He assigned Claimant a 7% whole person impairment rating for his lower back pursuant to the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). However, Dr. Shih assigned Claimant a 0% rating for range of motion limitations because his thoracolumbar range of motion testing was invalid after two separate attempts. Regarding maintenance care, Dr. Shih remarked that "[Claimant] via his son questioned why further injections were being pursued when previous injections had not been of any significant benefit, even short term, benefit. I would not recommend further injections. [Claimant] likely has multifactorial mechanical low back pain which is not likely to improve with further invasive treatments."

14. On February 1, 2016 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Shih's June 9, 2014 date of MMI and 7% whole person impairment rating. Respondents also acknowledged "post-MMI medical treatment provided by the authorized treating physician that is reasonable, necessary and related to the compensable injury." The FAL also reflected an overpayment of TTD

benefits in the amount of $12,841.25 for the period June 9, 2014 through November 11, 2015.

15. On April 13, 2016 Dr. Leach noted that Claimant required a "lumbosacral injection procedure, then therapy, to achieve MMI." On October 3, 2016 Dr. Leach reiterated that Claimant needed cervical and lumbar injections.

16. Dr. Cebrian testified at the hearing in this matter. He concluded that the "lumbosacral injection procedure" as requested by Dr. Leach was not reasonable and necessary. Dr. Cebrian explained that a November 15, 2013 lumbar MRI revealed that Claimant did not suffer an acute lumbar injury on July 24, 2013 but instead suffers from a degenerative condition. Claimant's worsening symptoms were not related to his industrial injury but were instead caused by his degenerative condition. Moreover, Dr. Cebrian reasoned that, despite numerous injections, physicians have not identified Claimant's pain generator. Finally, injections did not produce functional Improvement but only provided pain relief. Accordingly, lumbosactral injections were not warranted.

17. Dr. Cebrian also commented that the requested injections are not consistent with Rule 17, Exhibit 1 of the *Guidelines* because of Claimant's lack of functional improvement from prior injections. Rule 17, Exhibit 1, provides, "there is strong evidence that epidural steroid injections do not on average, provide clinically meaningful long-term improvements in leg pain, back pain, or disability in patients with sciatica." Further, the *Guidelines* specify that there is "strong evidence that ESI has no short or long term benefit for low back pain**.** A high quality meta-analysis provided additional good evidence against the use of lumbar facet or epidural injections for relief of non-radicular low back pain. Facet injections have very limited therapeutic or diagnostic use."

18. The *Guidelines* also delineate specific instructions for assessing the functional efficacy of a procedure.

> It is obligatory that sufficient data be accumulated by the examiner performing this procedure that the value of the procedure is evident to other reviewers' response to specific symptoms... A successful block requires documentation of positive functional changes by trained medical personnel experienced in measuring range of motion or assessing activity performance... To be successful the result should occur within the expected timeframe and there should be pain relief of approximately 80% demonstrated by pre-and post-Visual Analog Scale scores. Examples of functional changes may include sitting, walking and lifting. Additionally, a prospective patient completed pain diary must be recorded as part of the medical record that documents response hourly for a minimum requirement of the first eight-hours post-injection or until the block is clearly worn off and preferably for the week following an injection.

Dr. Cebrian explained that Drs. Leach, Allen and Benoit have not documented Claimant's functional improvement from previous injections. Moreover, Claimant has not provided a pain diary documenting his response to injections.

19. Finally, Rule 17, Exhibit 1 of the *Guidelines* specifies that poorly controlled diabetes mellitus is an absolute contraindication to steroid injections. Dr. Cebrian explained that Claimant suffers from poorly controlled diabetes mellitus because his blood sugar levels have been elevated over time. He thus summarized that the requested injections do not constitute reasonable, necessary and related medical maintenance benefits.

20. Claimant has failed to establish that it is more probably true than not that he is entitled to receive reasonable, necessary and related medical maintenance benefits in the form of lumbosacral injection procedures designed to relieve the effects of his July 24, 2013 industrial injuries or prevent further deterioration of his condition. Initially, Claimant received extensive conservative treatment for his industrial injuries that included therapy, medications and injections. However, the record reveals that he did not receive a significant functional benefit. After a 24-month DIME Dr. Shih determined that Claimant reached MMI on June 9, 2014 and assigned a 7% whole person impairment rating.

21. On April 13, 2016 Dr. Leach noted that Claimant required a "lumbosacral injection procedure, then therapy, to achieve MMI." On October 3, 2016 Dr. Leach recommended cervical and lumbar injections. However, Drs. Leach, Allen and Benoit have not provided justification for additional injections. Furthermore, Dr. Shih did not recommend additional injections because Claimant had not received any significant benefit from prior injections. He also noted that Claimant "likely has multifactorial mechanical low back pain which is not likely to improve with further invasive treatments."

22. Dr. Cebrian persuasively explained that additional injections would not be reasonable and necessary to relieve the effects of Claimant's July 24, 2013 industrial injuries or prevent further deterioration of his condition. Initially, he remarked that a November 15, 2013 lumbar MRI revealed that Claimant did not suffer an acute lumbar injury on July 24, 2013 but instead suffers from a degenerative condition. Claimant's worsening symptoms were not related to his industrial injury but were instead caused by his degenerative condition. Moreover, Dr. Cebrian reasoned that, despite numerous injections, physicians have not identified Claimant's pain generator. Furthermore, the requested injections are not consistent with Rule 17, Exhibit 1 of the *Guidelines* because of Claimant's lack of functional improvement from prior injections. Furthermore, Drs. Leach, Allen and Benoit have not documented Claimant's functional improvement as a result of previous injections and Claimant has not provided a pain diary documenting his response to the injections. Finally, Claimant's uncontrolled diabetes mellitus is an absolute contraindication to steroid injections. Accordingly, Dr. Cebrian summarized that the requested injections are not reasonable, necessary and

related medical maintenance benefits designed to relieve the effects of Claimant's July 24, 2013 industrial injury or prevent further deterioration of his condition.

23. Respondents have established that it is more probably true than not that they are entitled to recover an overpayment in the amount of $12,841.25. On February 1, 2016 Respondents filed a FAL. The FAL reflected an overpayment of TTD benefits in the amount of $12,841.25 for the period June 9, 2014 through November 11, 2015. On November 4, 2015 Dr. Shih had performed a 24-month DIME and concluded that Claimant reached MMI on June 9, 2014. Claimant had received TTD benefits from June 9, 2014 through November 11, 2015 for a total of $12,841.25. The TTD benefits that Respondents paid after June 9, 2014 constituted an overpayment because of Dr. Shih's MMI determination. Accordingly, Respondents are entitled to recover an overpayment from Claimant in the amount of $12,841.25.

CONCLUSIONS OF LAW

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

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

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

Medical Maintenance Benefits

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical

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

5. Pursuant to Workers' Compensation Rule of Procedure 17-2(A) health care practitioners are to use the *Guidelines* when furnishing medical care under the Workers' Compensation Act. *See* §8-42-101(3)(b), C.R.S. The ALJ may also appropriately consider the *Guidelines* as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. 4-665-873 (ICAP, Jan. 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the *Guidelines*. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAP, Apr. 27, 2009). The ALJ's consideration of the *Guidelines* may include deviations where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (ICAP, Jan. 25, 2011). There is no requirement for an ALJ to award or deny medical benefits based on the *Guidelines*. *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (ICAP, Apr. 27, 2009); *see Nunn v. United Airlines*, W.C. No. 40785-790 (ICAP, Sept. 9, 2011).

6. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits in the form of lumbosacral injection procedures designed to relieve the effects of his July 24, 2013 industrial injuries or prevent further deterioration of his condition. Initially, Claimant received extensive conservative treatment for his industrial injuries that included therapy, medications and injections. However, the record reveals that he did not receive a significant functional benefit. After a 24-month DIME Dr. Shih determined that Claimant reached MMI on June 9, 2014 and assigned a 7% whole person impairment rating.

7. As found, on April 13, 2016 Dr. Leach noted that Claimant required a "lumbosacral injection procedure, then therapy, to achieve MMI." On October 3, 2016 Dr. Leach recommended cervical and lumbar injections. However, Drs. Leach, Allen and Benoit have not provided justification for additional injections. Furthermore, Dr. Shih did not recommend additional injections because Claimant had not received any significant benefit from prior injections. He also noted that Claimant "likely has multifactorial mechanical low back pain which is not likely to improve with further invasive treatments."

8. As found, Dr. Cebrian persuasively explained that additional injections would not be reasonable and necessary to relieve the effects of Claimant's July 24, 2013 industrial injuries or prevent further deterioration of his condition. Initially, he remarked that a November 15, 2013 lumbar MRI revealed that Claimant did not suffer an acute lumbar injury on July 24, 2013 but instead suffers from a degenerative condition. Claimant's worsening symptoms were not related to his industrial injury but were instead caused by his degenerative condition. Moreover, Dr. Cebrian reasoned that, despite numerous injections, physicians have not identified Claimant's pain generator. Furthermore, the requested injections are not consistent with Rule 17, Exhibit 1 of the *Guidelines* because of Claimant's lack of functional improvement from prior injections. Furthermore, Drs. Leach, Allen and Benoit have not documented Claimant's functional improvement as a result of previous injections and Claimant has not provided a pain diary documenting his response to the injections. Finally, Claimant's uncontrolled diabetes mellitus is an absolute contraindication to steroid injections. Accordingly, Dr. Cebrian summarized that the requested injections are not reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's July 24, 2013 industrial injury or prevent further deterioration of his condition.

Overpayment

9. In 1997 the General Assembly amended §§8-43-303(1), C.R.S. and 8-43-303(2)(a), C.R.S. to permit the reopening of a claim on the grounds of "fraud" or "overpayment" in addition to the traditional grounds of error, mistake or change in condition. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011). The 1997 legislation is designated as an act "concerning the recovery from claimants of Workers' Compensation benefits to which such claimants are not entitled." *Id.* The statutes provide that reopening may not "affect moneys already" paid except in cases of fraud or overpayment. *In Re Stroman,* W.C. No. 4-366-989 (ICAP, Aug. 31, 1999). The statute contemplates that in the case of an overpayment the ALJ has the authority to remedy the situation. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011)

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

11. In *Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (ICAP, July 25, 2013) the DIME physician assigned the claimant a permanent impairment

rating lower than that determined by her treating physician. The ATP assigned the claimant a 16% lower extremity impairment rating. The respondents filed an FAL and paid the claimant $8,490.73 in PPD benefits. However, the DIME physician subsequently assigned the claimant a 12% lower extremity impairment rating. The respondents filed an amended FAL and awarded the claimant PPD benefits in the amount of $6,368.05. The respondents filed an application for hearing and sought to recover an overpayment in PPD benefits of $2,122.60. The ALJ agreed with the respondents and ordered the claimant to repay an overpayment of $2,122.60. The ICAP affirmed because an overpayment may result even though it did not "exist at the time the claimant received disability or death benefits." The reasoning and analysis in *Mattorano* is controlling in the present matter.

12. As found, Respondents have established by a preponderance of the evidence that they are entitled to recover an overpayment in the amount of $12,841.25. On February 1, 2016 Respondents filed a FAL. The FAL reflected an overpayment of TTD benefits in the amount of $12,841.25 for the period June 9, 2014 through November 11, 2015. On November 4, 2015 Dr. Shih had performed a 24-month DIME and concluded that Claimant reached MMI on June 9, 2014. Claimant had received TTD benefits from June 9, 2014 through November 11, 2015 for a total of $12,841.25. The TTD benefits that Respondents paid after June 9, 2014 constituted an overpayment because of Dr. Shih's MMI determination. Accordingly, Respondents are entitled to recover an overpayment from Claimant in the amount of $12,841.25.

ORDER

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

1. Claimant's request for lumbosacral injection procedures as recommended by Dr. Leach is denied and dismissed.

2. Respondents are entitled to recover an overpayment from Claimant in the amount of $12,841.25.

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

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

8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 13, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-004-888-01

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury.

2. Whether Respondents are entitled to a penalty of up to one day's compensation for Claimant's failure to timely report his injury pursuant to § 8-43-102(1)(a), C.R.S.

3. Whether Claimant willfully misled the Employer concerning his ability to perform the job and whether Respondents are therefore entitled to a penalty pursuant to § 8-42-112(1)(d), C.R.S.

STIPULATIONS

1. Claimant's average weekly wage is $831.67, with a corresponding temporary total disability (TTD) rate of $554.45.

2. If compensable, Claimant is entitled to TTD from March 1, 2016 through March 31, 2016.

3. All medical treatment Claimant has received for his left shoulder is reasonable and necessary.

FINDINGS OF FACT

1. Claimant was employed by Employer as a youth corrections officer and began his employment in July of 2015.

2. As part of his employment, Claimant attended a youth and staff safety (YASS) training session in late July of 2015.

3. Prior to attending the YASS training, Claimant signed a form titled Pre-Program Statement of Physical Well Being. Claimant checked wrist condition-R and knee condition when asked to check any types of injuries he may have had or still had. Claimant signed the form on July 27, 2015. *See* Exhibit A.

4. On July 31, 2015 Claimant completed a post-program statement of physical well being where he attested that he did not incur any injuries as a result of participating in the YASS training program. *See* Exhibit A.

5. Claimant alleges that during the YASS training he injured his left shoulder while completing an arm-bar takedown with his training partner Seth Howerton.

Claimant alleges that he struck his left forearm against a pad Mr. Howerton was using and felt an immediate electrical shock like sensation in his left shoulder that knocked the wind out of him. Claimant reported he had never felt anything like that before.

6. At training, Claimant was primarily using his left arm for maneuvers. Claimant asked not to be placed in an arm bar takedown using his right shoulder and arm. Claimant's right shoulder tended to get sore with all of his past training sessions and he was worried about hurting his right shoulder. Claimant testified that he thought it was time to use his left shoulder more because of the past soreness he had with his right shoulder. Claimant is and was unaware of any condition or injury to his right shoulder other than the soreness that he had in the past.

7. Prior to working for Employer, Claimant was employed with the Summit County Sheriff's Office as a deputy sheriff for approximately five years. Claimant had undergone defensive tactics training at this prior job.

8. Following the YASS training with Employer, Claimant did not immediately report any injury, and believed he was just sore. Claimant completed the training without making a report of injury and also later completed CPR training without reporting any injury. Claimant then began his employment and worked full duty for Employer for several months before making any report of injury.

9. In September or October of 2015 Claimant made the decision to seek new employment and started searching for other jobs. Claimant was concerned that he wouldn't be able to obtain employment with his hurt shoulder and also worried that he wouldn't be able to defend himself or use his arm if needed in his job. Claimant decided to get his shoulder evaluated.

10. On November 16, 2015 Claimant was evaluated by Jasmine Aldrich, PA. Claimant reported left shoulder pain with an onset of August 2015 after intensive defense training that waxed and waned. PA Aldrich noted no antecedent event and that Claimant had more pain with abduction and forward flexion especially with lifting objects. She assessed left rotator cuff syndrome and recommended use of Motrin for pain, physical therapy, and light duty desk work for eight weeks. *See* Exhibits 9, B.

11. On November 16, 2015 Claimant notified Employer for the first time that he had injured his shoulder at the YASS training in late July, 2015. On November 17, 2015 Claimant filled out an injury/exposure on the job (IOJ) form. Claimant noted on the IOJ form that he was subject to arm bar take downs during YASS training and that at the completion of the course his whole body hurt and he didn't think he had sustained any injuries. Claimant reported that as time passed the pain and soreness, except for the left shoulder, disappeared. Claimant reported believing that he could just stretch the left shoulder out over the next few weeks and that he would be better. On the IOJ form, Claimant noted that his coworkers finally suggested he go to a doctor and that he had seen a doctor the day prior. *See* Exhibit 5.

12. On November 17, 2016 Claimant was evaluated at Concentra by Scott Richardson, M.D. Claimant reported that he was in training at work and that after about a week his left shoulder started to get tender. Claimant reported doing YASS training and that afterwards he hurt all over but the left, non dominant shoulder pain never resolved. Claimant reported no prior problems with the left shoulder. Claimant reported that he had a previous right shoulder injury so was favoring the left side. Claimant reported intermittent pain and decreased strength in the left arm with some actions. Dr. Richardson assessed left shoulder strain, recommended physical therapy, and MRI, and acetaminophen for pain. *See* Exhibits 7, C.

13. On December 3, 2015, December 17, 2013 and December 31, 2015 Claimant was evaluated by Dr. Richardson. Dr. Richardson continued to diagnose left shoulder strain and continued to recommend an MRI of the left shoulder. *See* Exhibits 7, C.

14. On January 6, 2016 Claimant was evaluated by PA Aldrich. PA Aldrich assessed left shoulder joint pain and noted a differential diagnosis of rotator cuff injury versus tear and proximal biceps strain versus tear. PA Aldrich referred Claimant for an MRI of the left shoulder and referred Claimant to orthopedics for the shoulder. *See* Exhibits 9, B.

15. On January 21, 2016 Claimant underwent an MRI of the left shoulder. The impression was moderate to high-grade intrasubstance tear at the junction of the supraspinatus and infraspinatus tendons at the footprint measuring 2 mm mediolateral by 12 mm AP. *See* Exhibit 10.

16. On February 2, 2016 PA Aldrich left a voice message for Claimant with detailed MRI results and advised Claimant that orthopedics denied an evaluation since the case was a workers' compensation case. On February 4, 2016 PA Aldrich called Claimant and discussed the MRI report, noted workers' compensation was a non-issue, and advised that orthopedics had accepted the referral. *See* Exhibits 9, B.

17. On February 11, 2016 Claimant was evaluated by orthopedic surgeon Loukas Kyonos, M.D. Claimant reported left shoulder pain since the first week of August, 2015. Claimant reported doing defensive tactics training when he put out his arm to block a punch and felt a pop in the left shoulder. Claimant reported over the next few days feeling that something was really wrong and that the left shoulder had been plaguing him since. Claimant reported that physical therapy was causing more pain so he stopped. Dr. Kyonos noted that the MRI showed a partial rotator cuff tear. Dr. Kyonos noted that x-rays of the left shoulder taken that day showed a downsloping acromion and possible mild joint space narrowing at the glenohumeral joint and also AC joint degenerative changes. Dr. Kyonos noted that the MRI of the left shoulder from January 21, 2016 showed moderate to high-grade partial thickness tearing at the junction of the supraspinatus and infraspinatus tendons at the footprint and that the long head of the biceps was intact. Dr. Kyonos assessed high grade partial thickness rotator cuff tear and subacromial impingement, and listed a diagnosis of nontraumatic partial left rotator cuff tear. *See* Exhibits 9, B, 10.

18. Dr. Kyonos discussed the risks and benefits of various treatment options with Claimant. Claimant reported being at a critical stage in his career where he was trying to go for sheriff but knew he would not be able to hold up with training the way his shoulder was. Dr. Kyonos noted that Claimant was probably going to proceed with surgery to get the most durable and long term relief. Dr. Kyonos put in a surgical case request with the diagnosis of non traumatic partial left rotator cuff tear and requested the procedure of left shoulder arthroscopy with rotator cuff repair. *See* Exhibits 9, B.

19. On March 1, 2016 Claimant underwent left shoulder surgery performed by Dr. Kyonos. The surgical procedure included arthroscopic small partial thickness rotator cuff repair and subacromial decompression. Dr. Koyonos noted in surgery that Claimant had severe bursitis and a large anterior spur. Dr. Koyonos performed bursectomy and cleared off and resected the anterior spur. Dr. Kyonos took the area of intrasubstance tearing down to a full thickness tear and repaired it. *See* Exhibit 11.

20. Following surgery, Claimant had follow up appointments as well as physical therapy. On May 31, 2016 Dr. Koyonos noted that Claimant had good cuff strength, minimal pain, and Dr. Kyonos released Claimant to full duty work. Claimant has felt great following surgery and his left shoulder is now stronger than his right shoulder. *See* Exhibits 9, B, D.

21. On August 11, 2016 Wallace Larson, M.D. performed an independent medical examination (IME) of Claimant. Claimant reported sustaining an injury to his left shoulder in mid August of 2015 while in YASS training. Claimant reported he had been in law enforcement training previously where he had used his right shoulder for most of the maneuvers and subsequently had right shoulder pain. Claimant reported because of his prior right shoulder pain he asked during the recent YASS training to use primarily his left shoulder. Claimant reported being sore daily during the week long training and that he had been thrown to the ground approximately 100 times during the week. Claimant reported during one maneuver he had his left arm up with his humerus flexed and internally rotated with the left elbow flexed when he felt an electric type shock and left shoulder pain. Claimant reported not seeing anyone initially and that his whole body hurt and he did not believe it was serious. Claimant reported initially that both of his shoulders hurt but that his right shoulder improved and his left shoulder did not. Claimant reported a history of right shoulder problems and soreness and that his symptoms were the same as the left side but that he could feel the tear on the left side. Claimant reported that he had no treatment for his right shoulder. Dr. Larson noted that the past medical history was positive for some right shoulder symptoms but not positive for left shoulder symptoms because Claimant did most of his prior training using his right shoulder. Claimant reported that following surgery his left shoulder felt great and was stronger than his right shoulder. *See* Exhibit D.

22. Dr. Larson reviewed Claimant’s medical records. Dr. Larson noted that Claimant was documented to have an atraumatic, degenerative partial-thickness tear of the rotator cuff. Dr. Larson opined that the training session would not have caused this degenerative type of tear. Dr. Larson also noted the remaining question of whether the training session aggravated a pre-existing condition and aggravated it to a degree

requiring surgical intervention. Dr. Larson opined more likely than not that the condition was non-occupational. Dr. Larson noted the three month interval between occupational exposure and the initial decision to seek medical care and opined that it was more likely than not that Claimant would have sought medical care soon after the training sessions if those sessions had resulted in an aggravation of Claimant's pre-existing condition. *See* Exhibit D.

23. Dr. Larson testified by deposition consistent with his written IME report. Dr. Larson opined that Claimant's left shoulder condition was not work related and that it was a degenerative condition in Claimant's shoulder. Dr. Larson opined that the type of condition in Claimant's left shoulder typically develops over a period of years and is caused by age-related weakening of the tendon. Dr. Larson opined that there was objective evidence from both the MRI scan and from the operative report that Claimant's condition was degenerative.

24. Dr. Larson opined that with a history of an acute rotator cuff tear oftentimes there is a single highly traumatic episode, that is painful immediately, stays painful immediately, and results in immediate weakness in the arm and is confirmed as an acute tear by diagnostic studies. Dr. Larson opined that in Claimant's case, the history was suggestive of a chronic tear with a history of aching rather than immediate severe pain and that everything in Claimant's case was consistent with a degenerative type tear. Dr. Larson noted that people with degenerative changes typically have a longer history of symptoms that aren't as severe and that people with traumatic injuries are usually seen within a few days or a week or so from when the traumatic injury occurs because it causes a big change in their life. Dr. Larson agreed that it was a possibility that the reported mechanism of injury could have aggravated an underlying shoulder condition, but that the objective evidence in this case only identified degenerative conditions.

25. Seth Howerton testified at hearing. Mr. Howerton met Claimant at the YASS training and worked with him at training. Mr. Howerton did not work with Claimant after the training class. Mr. Howerton testified that he remembered Claimant complaining of irritation in one of his shoulders and that Claimant mentioned it was irritating him and that he was going to use his other arm. Mr. Howerton also recalled that Claimant talked with the instructor about the irritation. Mr. Howerton could not remember which shoulder Claimant reported bothering him and that Claimant was still able to perform all of the training.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish, by a preponderance of the evidence, that he sustained a compensable work injury in late July, 2015 during the YASS training. Dr. Larson’s opinions are found credible and persuasive. Claimant had a degenerative condition in his left shoulder that typically develops over a period of years. Dr. Larson points to both the MRI and the surgical reports in support that the condition was degenerative and not acute and persuasively opined that the YASS training did not cause the tear nor did it aggravate or accelerate Claimant's underlying condition. Dr. Larson is credible and persuasive that the condition is not work related.

Further, Claimant's reports surrounding the alleged incident and mechanism of injury were not consistent throughout his treatment and in his testimony. On November 16, 2015 Claimant initially reported to his primary care provider that he had left shoulder pain that waxed and waned with no antecedent event. The next day, when referred to Concentra by Employer, Claimant reported that after one week of training his shoulder was tender. However, in his testimony he reported a specific incident where he felt an electrical type shock that knocked the wind out of him and that he had never felt anything like that before. Despite testifying about this specific incident where he had a strong sensation of electric type shock, he failed to indicate this specific shock type sensation on his reports of injury or the IOJ form he filled out. He reported no antecedent event to the first provider he visited and then a tenderness type feeling to the second provider he visited. Further, when first evaluated by orthopedic surgeon Dr. Kyonos, he reported feeling a pop in his left shoulder and that the next few days he felt like something was really wrong. Claimant's actions in waiting almost four months before reporting any incident or injury are inconsistent with an acute "never felt before" type of incident and are inconsistent with his statements to Dr. Kyonos that he knew in the next few days following the incident that something was "really wrong." Had Claimant suffered an acute injury or an acute aggravation of an underlying condition, it is logically incredible that he would have waited so long to seek treatment and Dr. Larson is persuasive in providing this opinion. Claimant has failed to meet his burden to establish, more likely than not, that the training caused any injury or aggravation to his left shoulder. Based on the inconsistencies in Claimant's reports, the credible testimony of Dr. Larson, and the objective medical evidence, Claimant has failed to demonstrate that his work activities for Employer in July of 2015 caused an acute injury, aggravated an underlying condition, or produced the need for medical treatment.

As Claimant failed to establish a compensable injury, the other issues for determination are moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish, by a preponderance of the evidence, that he suffered a compensable injury in July of 2015. His claim is denied and dismissed.

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

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

DATED: 12/12/16

/s/ Michelle E. Jones

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the decompression surgery recommended by Dr. Castro is reasonable, necessary, and related to her November 17, 2015 work injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a full-time housekeeper. On November 17, 2015 she sustained an injury to her lumbar spine when pulling up a Glad bag with recycled newspaper. As she lifted the bag, she felt the sudden onset of low back pain.

2. On November 18, 2015 Claimant was evaluated by Dean Prok, M.D. Claimant reported developing pain in the midline and bilateral low back area with occasional radiation to the left and right legs after attempting to lift the contents of a recycling bin at work. Claimant reported pulling on the liner of the bin that contained heavy magazines when she felt pain in her back. Dr. Prok noted on exam pain in the lower back with straight leg raise and leg movement as well as slight weakness in both legs but that otherwise Claimant had a normal examination. Dr. Prok assessed lumbar strain, midline and low back pain with sciatica, and referred Claimant to Dr. Olsen. Dr. Prok continued to follow up with Claimant throughout her treatment and recommended conservative care and follow up with specialists Dr. Olsen and Dr. Castro. *See* Exhibits 9, 2.

3. On November 25, 2015 Claimant was evaluated by Nicholas Olsen, D.O. Claimant reported pain at a 4/10 level and increased with prolonged standing and prolonged sitting as well as with bending. Claimant reported continued numbness left greater than right. Dr. Olsen ordered x-rays of the lumbar spine that showed mild degenerative disc changes at all lumbar disc levels and no fracture or acute abnormality. *See* Exhibits A, 3.

4. On December 1, 2016 Claimant was evaluated by Dr. Olsen. Claimant reported pain at 7/10 with predominant axial back pain but also intermittent radiation into the left lower extremity. Dr. Olsen assessed lumbar sprain/strain, facet arthrosis, bilateral L4-5 and L5-S1 with left lower extremity radiculopathy. Dr. Olsen reassured Claimant that the x-rays showed mild degenerative changes and recommended Clamant continue physical therapy strengthening her core and reminded her to use correct lifting mechanics. *See* Exhibits A, 3.

5. On December 9, 2016 Claimant was evaluated by Dr. Olsen. Claimant reported increased pain and that physical therapy had aggravated her back. Claimant reported burning pain in the lower back exacerbated with extension maneuvers and intermittent sharp pains in the left leg. Dr. Olsen noted that Claimant continued with axial back pain despite a course of conservative care and more recently physical therapy. Dr. Olsen noted Claimant's subjective complaints suggestive of radiculopathy but yet that Claimant had a normal neurologic examination. He opined that the clinical examination was definitely consistent with possible facet arthrosis. Dr. Olsen ordered an MRI of the lumbar spine. *See* Exhibits A, 3.

6. On December 28, 205 Claimant underwent a MRI of her lumbar spine interpreted by Robert Leibold, M.D. The impression provided was: transitional vertebra, referred to as L5; and L4-5 degenerative disc disease, slightly asymmetric to the left degenerative endplate edema on the left with mild to moderate central stenosis and mild to moderate left foraminal stenosis. *See* Exhibits F, 5.

7. On January 6, 2016 Claimant was evaluated by Dr. Olsen. Claimant reported no change in her pain and intermittent paresthesias in the lower extremities. Dr. Olsen reviewed both the films and the report from Claimant's December 28, 2015 MRI. Dr. Olsen assessed lumbar facet arthrosis, bilateral L4-5 and L5-S1 with left lower extremity radiculopathy and broad based disc protrusion at L4-5, moderate central stenosis, moderate facet arthrosis, and mild-moderate left foraminal stenosis per MRI. Dr. Olsen opined that Claimant had two potential pain generators in both her lumbar disc protrusions and her moderate facet arthrosis, predominantly at the L4-5 level. Dr. Olsen opined that Claimant may note success with commitment to therapy, correct lifting mechanisms, and strengthening her core. Dr. Olsen also discussed epidural and facet injections and the unlikely possibility of surgery. Claimant indicated she would consult with her physicians about other conditions she had and whether there were any contraindications to injections. *See* Exhibits A, 3.

8. On January 20, 206 Claimant was evaluated by Dr. Olsen. Claimant reported a worsening of pain with pain at 9/10. Dr. Olsen noted that he had recommended bilateral L4-5 and L5-S1 facet injection for diagnostic purposes but that Claimant indicated she wanted to cancel the proposed injection and wanted to proceed with surgery reiterating that she just wanted it fixed. Dr. Olsen explained to Claimant that surgery was not a simple fix and that recovery from surgery could take as long as three to six months in successful cases and noted Claimant's surprise that it would not immediately address her complaints. Dr. Olsen noted that Claimant continued to want to discuss surgery believing it would be an answer and noted Claimant had an upcoming appointment with Dr. Castro. *See* Exhibits A, 3.

9. On February 1, 2016 Claimant was evaluated by Bryan Castro, M.D. Dr. Castro noted Claimant had been referred for evaluation of ongoing low back pain and pain into the left greater than right bilateral lower extremities. Dr. Castro noted Claimant had received conservative management with no injections. Dr. Castro reviewed x-rays and MRIs highlighting disc bulging and chronic disc degeneration at L4-5 on the left side

that was causing some lateral recess encroachment and could be impinging upon the exiting L4 and traversing L5 nerve root. Dr. Castro assessed chronic bilateral lumbar radiculopathy. Dr. Castro noted that a reasonable option would be an epidural injection first for treatment and diagnostics. He noted, alternatively, that a lumbar decompression surgery may be a reasonable option as well but at this juncture it was reasonable to start off with a trial of injection. He referred Claimant back to Dr. Olsen. *See* Exhibits B, 7.

10. On February 2, 2016 Claimant was evaluated by Dr. Olsen. Claimant reported that Dr. Castro had not recommended surgery and had recommended first that she exhaust interventional spine care and therapy options. Dr. Olsen again recommended bilateral L4-5 and L5-S1 facet injections and Claimant consented to undergoing the injections. *See* Exhibits A, 3.

11. On March 1, 2016 Claimant underwent bilateral L4-5 and L5-S1 facet injections with Dr. Olsen. Pre injection, Claimant reported a VAS score of 7/10 and post injection she reported a score of 6/10. Dr. Olsen noted the initial impression was a non diagnostic result and instructed Claimant to keep a pain diary hourly for the next eight hours. *See* Exhibits A, 3.

12. On March 9, 2016 Claimant was evaluated by Dr. Olsen. He noted that her recent facet injection only reduced her symptoms by 25% with no additional relief on the days after the procedure. Dr. Olsen noted that they had discussed two pain generators being possible in her case. Dr. Olsen opined the first possible pain generator was facet arthrosis and noted there had been a non diagnostic response to the injection. Dr. Olsen recommended that Claimant undergo a left L4-5 and L5-S1 transforaminal epidural steroid injection and noted that Claimant was now hopeful to avoid surgery. *See* Exhibits A, 3.

13. On March 22, 2016 Claimant underwent left L4-5 and L5-S1 transforaminal epidural steroid injections with Dr. Olsen. Pre injection she reported a VAS score of 8/10 and post injection she reported a score of 5/10. Dr. Olsen asked her to keep a pain diary hourly for the next eight hours. *See* Exhibits A, 3.

14. On March 29, 2016 Claimant was evaluated by Dr. Olsen. Claimant noted no significant relief from the epidural steroid injection and Dr. Olsen opined that based on Claimant's reports and recollection, it appeared the injection was non diagnostic. *See* Exhibits A, 3.

15. On April 4, 2016 Claimant was evaluated by Dr. Castro. Claimant reported ongoing buttock and leg pain which was lifestyle limiting. Dr. Castro opined that it was the pain was related to the L5 lateral recess encroachment and possible nerve impingement at the L5-S1 level and noted some acute bulging in the lateral recess at the L5-S1 level which could be affecting the L5 root. He recommended Claimant undergo an EMG to better evaluate the neural impingement and its possible

effects on her nerves and sent Claimant back to Dr. Olsen for the EMG testing. *See* Exhibits B, 7.

16. On April 4, 2016 Claimant was evaluated by Dr. Olsen. Claimant reported pain at a 10/10 level. Dr. Olsen noted that Dr. Castro had ordered an EMG/nerve conduction study of the left lower extremity. Dr. Olsen noted that Claimant would be scheduled for the study. *See* Exhibits A, 3.

17. On April 20, 2016 Claimant underwent an EMG with Dr. Olsen. The report shows that the study was normal and Dr. Olsen provided the impression of no electro diagnostic evidence of lumbar radiculopathy, peripheral nerve entrapment, or lumbosacral plexopathy. Dr. Olsen recommended continuing the home exercise program and following up with Dr. Castro. *See* Exhibit G.

18. On May 6, 2016 Claimant was evaluated by Dr. Castro. Dr. Castro noted that Claimant had ongoing buttock and leg pain as the predominant complaint and that it was getting worse. Dr. Castro reviewed the EMG and noted it highlighted overall good neurologic function with no evidence of radiculopathy or worrisome neurologic findings. Dr. Castro had a long conversation with Claimant concerning treatment options. He opined that one very reasonable and viable option would be expectant management only to see if she got better. Dr. Castro informed Claimant that surgical and nonsurgical outcomes were really similar. Dr. Castro noted that moving forward, surgical intervention allowed Claimant a more rapid return to function, but if Claimant chose to go the non operative course she would likely have a fairly similar long term outcome. Dr. Castro made a request on this date for approval of surgical decompression of the lumbar spine at L5-S1. *See* Exhibits B, 7.

19. On May 10, 2016 Claimant was evaluated by Dr. Olsen. Claimant reported that she wanted to pursue the lumbar discectomy surgery previously offered by Dr. Castro. Dr. Olsen noted that Claimant understood that both surgical and non surgical outcomes were similar. Dr. Olsen explained to Claimant that studies reflecting this information noted similar outcomes over 18 months to two years. Dr. Olsen noted Claimant was somewhat frustrated by the long duration of recovery regarding disc injuries. Dr. Olsen noted that Claimant understood that there was no guaranty that either approach would offer greater efficacy. Dr. Olsen noted that Claimant would think about it and if she decided to pursue surgery would contact Dr. Castro. *See* Exhibits A, 3.

20. On May 18, 2016 a letter denying the request for surgery was sent by Prium Medical Cost Management Services and by Peter Garcia, M.D. Dr. Garcia noted that he had spoken with Dr. Castro. Dr. Garcia opined that the clinical information provided did not establish the medical necessity of the surgical request. Dr. Garcia noted that there was no evidence of radiculopathy on exam or by nerve studies and that the request for surgery was not indicated. Dr. Garcia noted that surgical indications include radicular symptoms that correlated with an individual's pain, findings and evidence of nerve root compression on imaging, and failure of six to twelve weeks of

conservative treatment. Dr. Garcia opined that there was no evidence of any nerve root compression on imaging and that the electrodiagnostic studies were normal. Dr. Garcia also noted that there was no true clinical evidence of radiculopathy on physical examination and only subjective complaints. *See* Exhibits C, 8.

21. On June 1, 2016 Claimant was evaluated by Dr. Olsen. Dr. Olsen noted that they had previously discussed the pros and cons of surgery and that Claimant saw that she had no real options and planned to pursue a discectomy with Dr. Castro. Dr. Olsen noted that Claimant had exhausted more conservative care options and he again reviewed the surgical and nonsurgical outcomes. *See* Exhibits A, 3.

22. On July 5, 2016 Claimant was evaluated by Dr. Olsen. Claimant noted her surgery was on hold as the carrier denied it. Claimant reported continued pain. Dr. Olsen reviewed the importance of commitment to an exercise program. *See* Exhibits A, 3.

23. On October 4, 2016 Michael Rauzzino, M.D. issued an independent medical evaluation report. Claimant reported to Dr. Rauzzino at the evaluation that she had a primary complaint of axial back pain, and also reported radicular symptoms into her buttocks as well as burning in her feet and pain in the tops of her feet. Claimant reported wanting to have surgery so she could get back to work full time. Dr. Rauzzino noted that on the Computerized Outcomes Management Technologies assessment Claimant scored in the “distressed somatic” category for psychosocial functioning and noted that based on the score, it is possible that the examination may not demonstrate good correlation with Claimant’s history and subjective complaints. Dr. Rauzzino opined that the surgery proposed by Dr. Castro was not reasonable and necessary. Dr. Rauzzino opined that Claimant did not have an acute structural injury at L5-S1 or L4-L5 that would require decompression. Dr. Rauzzino noted that there was a negative EMG and non diagnostic response to injections. He opined that performing a decompression would not help Claimant with her symptoms since axial back pain was her primary complaint. He opined that Claimant’s symptoms did not necessarily fit the pattern of S1 radiculopathy given their location, particularly with Claimant’s reported sensation of burning at the tops of her feet. Dr. Rauzzino opined that Claimant’s symptoms were non anatomic and out of proportion to the mild degenerative changes seen on the lumbar MRI. Dr. Rauzzino opined that there was no simple surgery that would have a high likelihood of improving Claimant’s condition and noted that the fact that other modalities failed to relieve her complaints did not make surgery reasonable or necessary. Dr. Rauzzino opined that if she underwent decompression surgery, it was more likely than not that she would either be unimproved or worsened. *See* Exhibits D, 9.

24. On October 18, 2016 Dr. Olsen’s office responded to a denial of surgery that stated Claimant’s condition was not a work related injury or illness and thus was not the liability of the workers compensation carrier. Dr. Olsen strongly disagreed with the denial and with the position that the conditions were considered ordinary diseases of life. Dr. Olsen noted that Claimant’s condition had become apparent due to her work

duties and strongly disagreed with the assessment of Claimant's condition. *See* Exhibits A, 3.

25. On October 31, 2016 Claimant was evaluated by Dr. Castro. Dr. Castro noted that Claimant had largely a main complaint of low back pain and aching and some buttock pain. Dr. Castro noted that she had new right foot pain and that formerly her complaints were on the left. Dr. Castro noted that the low back pain was much more problematic than the leg symptoms. Dr. Castro opined that Claimant was not a good operative candidate from a low back pain standpoint and noted the minimal findings on MRI. Dr. Castro opined that it was reasonable to get a new MRI to better evaluate right sided compression or any new findings and that if the new MRI did not show any more nerve compression than the original MRI, he did not believe surgical intervention would be an option for her as the original December 2015 MRI findings were quite minor and largely degenerative in nature. *See* Exhibit L.

26. Dr. Rauzzino testified at hearing consistent with his independent medical evaluation report. Dr. Rauzzino noted the history where Claimant had mainly back pain at visits and vague leg pain/radiculopathy reports. Dr. Rauzzino noted that the decompression surgery was mainly for leg pain to free up a nerve that is compressed and that the decompression would not help the axial back pain Claimant had. Dr. Rauzzino opined that if Claimant has more back pain than leg pain, doing the surgery could actually make her worse. Dr. Rauzzino noted that the EMG was negative for active nerve irritability regarding the nerve in question and the level in question for the decompression and that there was no deficit on his physical examination of that nerve level. Dr. Rauzzino noted that the injections did not localize the cause of Claimant's pain. Dr. Rauzzino also noted that Claimant's leg complaints and symptoms were vague and all over the place and not referable to one nerve or the nerve that Dr. Castro wanted to decompress. Dr. Rauzzino noted that the medical treatment guidelines supported his position and that they are evidence based. Dr. Rauzzino opined that under the guidelines for surgery Claimant would have to have leg pain greater than back pain which interfered with her function, return to work, and/or active therapy and physical exam findings of abnormal reflexes, motor weakness, or radicular sensation deficits and findings on the MRI which indicate impingement of nerves or the spinal cord corresponding to reproducible physical exam findings. He opined that Claimant had none of these three requirements and opined that surgery was not reasonable or necessary.

27. Dr. Rauzzino is found to be credible and persuasive. He pointed out why surgery is unlikely to improve Claimant's condition, and why her symptoms and tests do not indicate surgery is appropriate. He also persuasively opined that the medical treatment guidelines were not met in this case.

28. Claimant is credible in her testimony that she wishes to get better as quickly as possible. Claimant also testified credibly that her pain was more in her back than her legs. However, her testimony surrounding pain and location of symptoms

along with the radiographic evidence does not indicate that decompression surgery is reasonable or necessary.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical benefits

Respondents are required to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has failed to establish by a preponderance of the evidence that the decompression surgery recommended by Dr. Castro is reasonable and necessary medical treatment. As found above, both treating providers, Dr. Olsen and Dr. Castro noted that the outcomes with either surgical or non surgical treatment were similar for Claimant. Dr. Rauzzino credibly opined why the surgical procedure was not reasonable and necessary and his opinion is consistent with the opinion of Dr. Garcia who also noted that Claimant had no evidence of radiculopathy on examination or by nerve conduction studies. Both Dr. Rauzzino and Dr. Garcia are credible and persuasive that the decompression surgery is not indicated. Further, Dr. Castro noted that it was very reasonable and viable to do expectant management only and that the outcomes of surgical and non surgical treatment were very similar. Although he opined that Claimant would have a more rapid return to function with surgery, the non surgical outcome offers Claimant a similar long term outcome and comes with much fewer risks. Additionally, it is noted that at a recent visit, Dr. Castro opined that Claimant’s low back pain was much more problematic than her leg symptoms and that from a low back standpoint she was not a good operative candidate and he recently recommended a new MRI, the results of which were not submitted at hearing. Overall, Claimant has failed to establish that the decompression surgery, more likely than not, is reasonable and necessary. Her request is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that the decompression surgery recommended by Dr. Castro is reasonable and necessary medical treatment. Her request for surgery is denied and dismissed.

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

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

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

DATED: December 15, 2016,

/s/ Michelle E. Jones

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

ISSUES

1. Was Claimant "responsible for termination" of her employment?

2. Did Claimant suffer a compensable injury to her right knee as a result of her March 30, 2016 industrial accident?

3. Is Dr. Javernick an authorized treating provider?

4. Is treatment recommended by Dr. Javernick reasonable, necessary, and related to Claimant's industrial accident?

STIPULATIONS

1. Claimant's average weekly wage (AWW) from March 30, 2016 through April 19, 2016, is $658.

2. Claimant is entitled to TTD benefits at the rate of $438.67 per week from March 30, 2016 through April 18, 2016.

3. Claimant's AWW commencing April 20, 2016 is $1,081.09, which includes $423.09 per week for COBRA continuation cost ($658 plus $423.09 = $1,081.09).

4. If Claimant is awarded TTD benefits ongoing from April 19, 2016, Respondents are entitled to an offset for Claimant's receipt of unemployment compensation benefits in the amount of $357 per week commencing May 15, 2016.

FINDINGS OF FACT

1. Claimant worked for Employer as an "overnight stocker." On March 30, 2016, Claimant was injured when she fell off a ladder while stocking merchandise on high shelves.

2. Claimant experienced the immediate onset of severe pain and swelling in her left ankle. She also had pain in her right knee.

3. One of Claimant's supervisors, Dawn Tibbits, helped her as she was lying on the floor. Ms. Tibbitts applied ice to Claimant's ankle, which was visibly swollen and "looked broken." Ms. Tibbits asked Claimant if she wanted to seek medical attention, but Claimant declined. Claimant indicated she would prefer to have her husband take her home. Ms. Tibbits told Claimant if she wanted medical treatment, she would need to see a physician designated by Employer, and "only an assistant manager could take her, due to the paperwork and the drug test." Ms. Tibbits did not provide Claimant with

names of any specific physicians or medical clinics, but emphasized that she “had to” come to the store first, and an assistant manager “has to take her to the doctor.” Claimant then left the store with her husband.

4. Employer has a policy that all employees injured on the job must take a urine drug test within 24 hours of their accident. The purpose of the post-accident drug test is “to ensure the accident was not caused by intoxication.” In this case, Employer did not require Claimant to take a drug test within 24 hours of the accident.

5. Claimant’s ankle pain continued to worsen after she arrived at home, so she sought treatment at Falcon Urgent Care later that day. She had x-rays taken of the left ankle, which showed fractures of the lateral malleolus and left fifth metatarsal. She was told to avoid weight bearing on the left leg and was referred to Dr. Hainge on an emergent basis.

6. Claimant saw Dr. Hainge the next day, on March 31, 2016. Dr. Hainge noted she was “splinted and has been keeping weight off of the foot is much as possible.” On physical examination, she had “moderate-to-severe” edema of the left lower leg and ankle down into the digits. There was moderate ecchymosis of the lateral ankle and foot. She had “acute pain” to palpation of the ankle and the fifth metatarsal base. Dr. Hainge ordered and personally interpreted x-rays of the left foot. Dr. Hainge diagnosed a nondisplaced Danis-Weber type A left fibula fracture, and a “minimally displaced” fracture of the left fifth metatarsal base with an “abnormally large avulsion fracture pattern.” Dr. Hainge applied a modified Jones compression dressing and PFS, and instructed Claimant “to maintain NWB status via crutches/walker/leg caddy.” Dr. Hainge also instructed Claimant to elevate her leg above her heart on an “almost constant” basis until her next visit.

7. In compliance with Dr. Hainge’s orders, Claimant spent the next five days primarily lying in bed with her foot elevated. Her ambulatory activities around the house were mostly limited to using the restroom. Even that minimal amount of activity caused her difficulty. Claimant tried to use crutches that she had available from a prior surgery, but hurt her shoulder. Claimant used a wheeled office-type chair as a makeshift knee caddy instead.

8. Claimant returned to Dr. Hainge on April 5, 2016. He noted that “she is having difficulty with the crutches and that they are investigating a knee caddy. Her husband admits she probably has ‘been on her foot too much.’” On physical examination, the edema was improved, although “still quite moderate.” Dr. Hainge placed Claimant in a fiberglass cast, and advised her to “maintain NWB status.” Dr. Hainge further instructed Claimant to keep her leg elevated above her heart “frequently.” Claimant could increase her dependency “to tolerance” as her swelling and pain improved.

9. Claimant’s understanding of the instructions she received from Dr. Hainge on April 5 was that she should keep the leg elevated most of the time until the pain and swelling went down.

10. After her accident, Claimant had two telephone conversations with the store manager, Jennifer Smith. The first conversation took place on or about April 7, 2016. At that time, Ms. Smith told Claimant she had to come to the store to complete claim-related "paperwork" and accompany an assistant manager to take a drug test. Claimant informed Ms. Smith she could not come in because she was in severe pain and "immobile." Claimant asked if someone could mail her the paperwork, but Ms. Smith said she could not do so. Ms. Smith then "kinda put it off" because she "felt bad" for Claimant and also was not sure how to proceed under the circumstances. Ms. Smith contacted her "MAPM" for instructions on what to do next.

11. Ms. Smith was subsequently informed by the MAPM that Claimant must come in and complete the paperwork, and was required to complete the drug test. Ms. Smith was instructed to give Claimant an ultimatum of 24 hours to complete the drug test, and to fire Claimant if she did not comply.

12. Ms. Smith spoke with Claimant via telephone on April 14, 2016. She informed Claimant she would be terminated if she did not come to the store to complete paperwork and take a drug test within 24 hours. Claimant replied that she was not able to ambulate and had been instructed by her doctor to stay off her leg. Claimant was upset, but stated she would come to the store if she received assurances that Employer would "be responsible" for any reinjury or aggravation of her condition. Ms. Smith stated she could not give any such assurance. Claimant then asked to speak to a different supervisor, with whom she had a similar conversation.

13. Ms. Smith was not scheduled to work the next few days. She returned to work on April 19 and learned that Claimant had not completed the paperwork or taken the drug test. Ms. Smith terminated Claimant's employment effective April 19, 2016.

14. Between the date of injury and the date of her termination, Claimant only left her home three times, to attend medical appointments. In each instance, she required significant assistance from her husband, including being carried from her home to their vehicle. She also had the benefit of a wheelchair at the doctors' offices.

15. Claimant's testimony that she had severe pain and significant difficulty with even minimal ambulation around her home prior to April 19, 2016 is credible and supported by the medical records.

16. Claimant completed a Workers' Claim for Compensation on April 22, 2016. In the section describing the parts of her body that were injured, Claimant included "right knee."

17. Claimant saw Dr. Hainge again on April 26, 2016. Dr. Hainge documented that "she is able to use the knee caddy, but this does increase the stress on her right knee. She tried a peg leg walker for the left lower extremity, but this also exacerbated right knee pain, to the point she could not use the apparatus." On physical examination, she had "moderate" edema, which was less than her previous visit. She still had "acute pain to palpation over the distal left fibular and fifth metatarsal base fracture sites." X-

rays showed progressive consolidation of the fibular fracture, but the metatarsal avulsion fracture was “slower to consolidate.” The fiberglass cast was reapplied and she was also given a cast shoe. Dr. Hainge instructed Claimant “to maintain mostly NWB status via the knee caddy, but she can intermittently perform guarded NWB to the left cast boot, preferably with a walker or crutches. Continue intermittent elevation above the heart.”

18. Claimant’s next visit with Dr. Hainge was May 17, 2016. By that time, she had been “intermittently performing WB activity via the cast boot.” Her pain was significantly improved. She still had “moderate edema,” which Dr. Hainge noted was “above average for this milestone.” Claimant was instructed to “wear the BK pneumatic Cam boot during all WB activities. If pain increases, she can revert back and forth to the leg caddy. Maintain intermittent elevation above the heart.”

19. Claimant’s ankle continued to improve slowly throughout the summer. On July 15, 2016, Dr. Hainge noted that “she did have a setback during the transition phase attributed to increasing her weight bearing activities too quickly.” X-rays showed good consolidation of the fractures. She was allowed to discontinue the cam boot and transitioned to a lace-up Velcro strap ankle brace, and a stable shoe as tolerated. Dr. Hainge advised Claimant to “slowly increase WB activities to tolerance.” Although he did not document it in his chart notes, Dr. Hainge verbally referred Claimant to his partner, Dr. Javernick, for evaluation of her right knee pain.

20. Claimant saw Dr. Javernick on August 3, 2016 for evaluation of her right knee. She told Dr. Javernick that “her knee was doing well until four months ago when she fell off of a ladder injuring her foot, ankle, and her knee. She has had pain ever since that time and she has pain on a daily basis.” She reported knee pain with routine activities such as entering and exiting a vehicle, putting on her shoes, and performing household tasks. She reported that her knees “grind, they get stuck in a position, they get swollen.” She had been icing and elevating her knee intermittently, and taking NSAIDs, without significant relief. She reported a previous meniscal surgery with Dr. Matthews in 2015. Dr. Javernick observed Claimant ambulate with “an antalgic gait.” She was guarding her lower extremity. Physical examination was “somewhat limited secondary to the amount of pain that she is currently experiencing in the knee.” Dr. Javernick ordered x-rays, which showed advanced degenerative changes in the knee. osteoarthritis in the knee.

21. Dr. Javernick assessed Claimant as “a 46-year-old female with a recent fall and history of previous meniscal surgery now with knee pain with the diagnosis of osteoarthritis. I suspect this is a combination of degenerative change as well as posttraumatic changes. Although this is unclear, I have not seen her prior to her fall. A fall can aggravate arthritic conditions.” Dr. Javernick reviewed treatment options including activity modification, NSAIDs, physical therapy, bracing, injections, and surgery. He placed Claimant in a medial unloader brace and recommended that she start formal physical therapy. If that failed to alleviate her symptoms, he indicated he would consider a steroid injection.

22. Claimant has a pre-existing history of injury and surgery on her right knee. Claimant tore her medial meniscus in April 2015 as a result of a "misstep" while she was walking down her driveway. An MRI showed a large radial tear of the posterior horn of the medial meniscus, and significant degeneration of the articular cartilage in the medial compartment and patellofemoral joint.

23. Claimant had arthroscopic surgery with Dr. Matthews on May 11, 2015. Thereafter, she underwent physical therapy and slowly improved. The last physical therapy note the ALJ was able to review was dated August 3, 2015. On that date, Claimant reported that "she is still having pain at the end of work shift but goes away after she sleeps. Pt feels that she may be ready to manage care without PT." She tolerated exercise well without increased pain.

24. After she was discharged from physical therapy, Claimant worked her regular duties as a stocker without limitation.

25. In February and March 2016, Claimant sought treatment for pain in multiple joints, including her bilateral knees. A physical examination performed on March 8, 2016 showed tenderness to palpation of the right patella, but normal range of motion. All other provocative tests were negative. She was not given any specific diagnosis referable to her knees.

26. Dr. John Burris performed an Independent Medical Examination (IME) at Respondents' request on September 26, 2016. Dr. Burris reviewed Claimant's medical records, interviewed Claimant, and performed a physical examination. Dr. Burris opined that Claimant had received appropriate treatment for her left ankle and foot fractures, and had reached MMI for those conditions. Dr. Burris opined that Claimant's knee symptoms were not causally related to her March 30, 2016 accident. Dr. Burris noted that Claimant's early treatment records do not reference any knee symptoms, with the exception of Dr. Hainge's April 26 note referring to the knee caddy. Dr. Burris opined that Claimant's knee symptoms are related to her pre-existing degenerative arthritis.

27. Dr. Burris testified at hearing as a witness for Respondents, wherein he expounded upon the opinions expressed in his IME report. Dr. Burris reiterated his opinion that Claimant's knee symptoms are attributable to severe pre-existing degenerative changes, which were not aggravated or accelerated by the industrial accident. Dr. Burris further noted that all of the treatment recommended by Dr. Javernick is directed to osteoarthritis. Dr. Burris agreed that Dr. Javernick's treatment recommendations were reasonable, but unrelated to the industrial injury.

28. Dr. Timothy Hall performed an IME on October 5, 2016 at Claimant's request. Dr. Hall disagreed with Dr. Burris' opinion regarding causation of the right knee complaints. Dr. Hall opined that the record is "far more consistent with two acute events superimposed on degenerative changes such as the injury in 2015 and then another injury in 2016 when she fell from the ladder." Dr. Hall also opined that Claimant's knee symptoms were aggravated by "excess loading and abnormal loading the right knee," as a result of being nonweightbearing on the left foot and ankle for an extended period.

Dr. Hall opined that Claimant likely reinjured the meniscus that was repaired in 2015. He recommended an MRI of the right knee and orthopedic follow-up with Dr. Javernick.

29. Claimant received $357 in weekly unemployment insurance (UI) benefits, commencing May 15, 2016. The UI Benefit Payment History admitted into evidence shows payments made through August 27, 2016. At that time, Claimant's account had a remaining balance of $3,927. Based on her weekly rate, Claimant was entitled to an additional 11 weeks of UI benefits. ($3,927 ÷ $357 = 11 weeks). The ALJ infers that Claimant's benefits terminated as of November 13, 2016.

30. Claimant was disabled by the March 30, 2016 accident, and suffered a wage loss as a direct consequence of the injury.

31. Respondents have failed to prove by a preponderance of the evidence that Claimant was "responsible for termination" of her employment.

32. Claimant has proven by a preponderance of the evidence that she suffered a right knee injury as a result of the March 30, 2016 accident.

33. Dr. Javernick is authorized by virtue of a referral from Dr. Hainge.

34. Dr. Javernick's current treatment recommendations of a knee unloader brace and physical therapy are reasonable and necessary treatment for Claimant's compensable knee injury.

35. Respondents are entitled to reduce Claimant's TTD benefits by $357 per week from May 15, 2016 through November 13, 2016.

CONCLUSIONS OF LAW

A. Was Claimant "responsible for termination" of her employment?

The termination statutes, § 8-42-103(g) and § 8-42-105(4)(a) C.R.S., provide:

> In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

The employer must prove by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). Whether the claimant acted volitionally or exercised control over the circumstances of the termination is a question of fact, which must be evaluated based on the totality of circumstances. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

An employer's policy, particularly one which may lead to discharge for absenteeism without regard to the reasons for the absences, is not determinative of whether a claimant acted volitionally with regard to a separation. *See Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. App. 1987). The mere fact that the employer discharged the claimant in accordance with its personnel rules does not establish that the claimant acted volitionally or exercised control over the circumstances of the termination.

Moreover, the term " responsible," as used in the termination statutes, may not be construed in a fashion which undermines the "overall scheme of the Act." *Colorado Springs Disposal v. Industrial Claim Appeals Office, supra,* In *Colorado Springs Disposal* the court held the "word 'responsible' does not refer to an employee's injury or injury-producing activity." The court reasoned that treating a claimant as "responsible" for the loss of employment caused by physical limitations resulting from the compensable injury itself would significantly alter fundamental principles of the Act.

Hence, a claimant does not act "volitionally" or exercise control over the circumstances leading to the termination if the effects of the injury ultimately lead to her termination. *E.g., Kauffman v. Noffsinger* W. C. No. 4-608-836 (ICAO, April 18, 2005); *Blair v. Art C. Klein Construction, Inc.*, W.C. No. 4-556-576 (ICAO, November 3, 2003); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (ICAO, April 24, 2002).

Claimant was physically unable to comply with Employer's request that she come to the store to complete paperwork and then be taken by a manager to another location for a drug test. She had been instructed to remain completely nonweightbearing on her injured left leg throughout the three weeks preceding her termination. For the first week, Dr. Hainge instructed her to elevate her leg above her heart on an "almost continual" basis. In other words, she was instructed to stay in bed with her leg up. Even minimal activities such as getting up to use the restroom were "too much" and aggravated her pain. For the following three weeks, she was instructed to lie down with her leg elevated "frequently." Furthermore, she could not use crutches, and had to use makeshift assistive devices until she was able to purchase a knee caddy. Claimant was minimally ambulatory and had difficulty performing basic activities in her home for the entire time before her termination. Employer did not offer her any accommodation or assistance with meeting its requirements. Nor was Employer willing to accept responsibility for any additional injury she might sustain trying to comply with its demands.

Based on the totality of evidence presented, the ALJ concludes that Employer's insistence that Claimant come to the store to complete paperwork, and then be taken by a manager to some other location, was objectively unreasonable. Claimant was put in the untenable position of violating her doctor's orders and exposing herself to further injury in order to preserve her job. Her refusal to do so does not constitute "volitional conduct" within the meaning of the termination statutes.

The circumstances which prevented Claimant from complying with Employer's directives were beyond her control. Accordingly, she was not "responsible for termination" of her employment.

B. Compensability of the right knee

The respondents are liable for authorized medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a). Even if the respondents have admitted liability for an injury, they retain the right to dispute whether any particular treatment is reasonable, necessary, and causally related to the industrial injury. *Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). If the claimant's entitlement to medical benefits is disputed, the claimant must prove a causal relationship between the industrial injury and the requested medical benefits by a preponderance of the evidence. *Id.* A claimant may rely on medical or lay evidence to carry his or her burden. *Colorado Fuel and Iron Corp. v. Industrial Commission*, 380 P.2d 28 (Colo. 1963).

The mere existence of a pre-existing condition does not disqualify a claim for compensation or medical benefits. A claimant with a pre-existing condition may recover benefits if an industrial accident "aggravates, accelerates, or combines with" the pre-existing condition to cause disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom caused by the aggravation of a pre-existing condition, but an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *Witt v. James J. Keil, Jr.*, W.C. No. 4-225-334 (ICAO, April 7, 1988). Rather, a claimant is entitled to medical benefits for treatment of pain only if the pain is proximately caused by the work-related activities or accident, rather than the underlying pre-existing condition. *F. R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985)*; Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

As found, Claimant has proven by a preponderance of the evidence that she injured her right knee as a result of the March 30, 2016 work accident. There is no doubt that Claimant suffers from significant pre-existing osteoarthritis in the right knee. But the Respondents are liable if an accident "aggravates, accelerates, or combines with" the pre-existing condition to produce a need for medical treatment. The ALJ is persuaded that the accident sufficiently aggravated her pre-existing condition to justify evaluation, diagnostic imaging, and the conservative treatment recommended by Dr. Javernick. Dr. Javernick opined Claimant's knee symptoms represent "a *combination* of degenerative change as well as posttraumatic changes." Dr. Hall agreed with that assessment. Although Dr. Burris opined that Claimant did not injure her knee as a result of the accident, he relied most heavily on the lack of notations regarding knee symptoms in the initial reports from Falcon Urgent Care and Dr. Hainge. The ALJ does not find that to be dispositive because Claimant's fractured ankle was comparatively much more severe and naturally the primary focus of evaluation. Claimant expressly claimed "right knee" problems as a compensable component of her injury on her Workers' Claim for Compensation form, which she completed slightly more than three weeks after the accident. Thereafter, Claimant has consistently described her increased right knee pain in discussions with Dr. Javernick, Dr. Hall, and Dr. Burris, and in her hearing testimony. After considering the totality of evidence presented, the ALJ concludes that Claimant suffered a compensable aggravation of her pre-existing right knee condition as a result of the March 30, 2016 accident.

C. Right knee treatment with Dr. Javernick

Besides showing that any requested medical treatment is reasonable, necessary and related, a claimant must also show that the treatment is "authorized." "Authorization" refers to a physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary within the meaning of § 8-42-101(1)(a). *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). An "authorized" provider includes any physician to whom the claimant is referred to in "the normal progression of authorized treatment." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

As found, Dr. Hainge referred Claimant to Dr. Javernick for evaluation and treatment of her right knee. Therefore, Dr. Javernick is "authorized."

The ALJ further concludes that the initial evaluation with Dr. Javernick, the unloader brace, and the physical therapy he recommended are all reasonable and necessary treatment modalities for Claimant's compensable knee injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD benefits at the weekly rate of $438.67, from March 31, 2016 through April 19, 2016, based on the stipulated AWW of $658.

2. Respondents shall pay Claimant TTD benefits at the weekly rate of $720.73, commencing April 20, 2016 and continuing until terminated according to law, based on the stipulated AWW of $1,081.09.

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

4. Respondents may take credit for any TTD benefits previously paid to Claimant.

5. Respondents may take credit for any statutory interest previously paid to Claimant.

6. Respondents' request to terminate Claimant's TTD benefits on April 19, 2016 is denied and dismissed.

7. Respondents may reduce Claimant's TTD benefits by $357 per week, from May 15, 2016 through November 13, 2016, on account of the UI offset.

8. Respondents shall pay the charges from Falcon Urgent Care and Dr. Hainge, in accordance with the parties' stipulation.

9. Respondents shall pay the charges from Claimant's August 3, 2016 appointment with Dr. Javernick.

10. Respondents shall pay for all reasonable, necessary and authorized medical treatment related to Claimant's compensable left leg injury and right knee injury, including the unloader knee brace and physical therapy prescribed by Dr. Javernick.

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

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

DATED: December 16, 2016

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-942-783-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 6, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 12/6/16, Courtroom1, beginning at 1:37 PM, and ending at 5:00 PM).

Claimant's Exhibits 1 through 16 were admitted into evidence, without objection. Respondents' Exhibits A through J were admitted into evidence, without objection. A written transcript of the evidentiary deposition of Yusuke Wakeshima, M.D. (hereinafter "Wakesima Depo.", followed by a page and line number) was filed.

PRELIMINARY MATTER

At the commencement of the hearing, Respondents made a Motion to Strike the Application for Hearing. This motion was previously heard by Pre-Hearing ALJ (PALJ) Michael E. Harr at a pre-hearing conference. PALJ Harr's legal analysis included consideration of Respondents' objection to ripeness of the issue of medical benefits. PALJ Harr determined that "ripeness" necessarily entails whether an issue is real, immediate, and fit for adjudication. Under the ripeness doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury that may never occur. *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006). The test for ripeness must account for whether a claimant has a “factual basis” for contesting a final admission. *Silveira v. Colo. Spgs. Health Partners*, W.C. No. 4-502-555 [Indus. Claim Appeals Office (ICAO), November 8, 2011] (issue not ripe when at the time the respondents filed their application for hearing, they had no factual basis for asserting that they should not continue to be liable for the claimant’s benefits).

In the present case, the Claimant presents a factual basis for requesting adjudication of the medical question concerning whether injections recommended by Dr. Wakeshima, the Claimant’s authorized treating physician (ATP), are reasonably necessary to cure and relieve the effects of the injury, irrespective whether such treatment is curative or reasonable to maintain the Claimant at MMI. Dr. Wakeshima recommended the injection therapy before Albert Hattem, M.D., placed the Claimant at maximum medical improvement (MMI). The Claimant’s authorized surgeon, Andrew Castro, M.D., agrees with Dr. Wakeshima’s recommendation for additional injection therapy. The PALJ agreed with the Claimant’s position that Dr. Wakeshima’s recommendation is ripe for adjudication, irrespective of the pendency of a Division Independent Medical Examiner’s (DIME) determination of MMI. PALJ Harr denied the Respondents’ Motion and the Claimant was allowed to proceed with the hearing on December 6, 2016. The present ALJ again denies Respondent’s Motion, after considering it *de novo*. The issue of reasonably necessary medical benefits is ripe for determination. The DIME process is not determinative of reasonably necessary medical care in this matter. The present ALJ hereby determines that it would subvert the underlying purpose of the Workers’ Compensation Act to provide speedy medical benefits, on a procedural legal basis, to abate reasonably necessary medical treatment because a DIME is pending. Additionally, Respondents Motion for the late endorsement of George Scharakaschwili, M.D., at the commencement of the hearing was denied on the record. A Division independent medical Examination (DIME) is pending for January 9, 2017, with Jade Dillon, M.D., however, counsel for the Claimant represented that the Claimant could not afford the DIME fee and it was unlikely that the DIME would occur.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. It was filed, electronically, on December 13, 2016. On December 15, 2016, the Respondents filed objections to the proposed decision. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concerns whether the Claimant is entitled to reasonably necessary medical benefits that are causally related to his admitted injury; whether his diagnosed ongoing Complex Regional Pain Syndrome (CRPS) is causally related to the admitted injury; and, whether lumbar sympathetic blocks/injections as ordered by authorized treating physician, Yusuke Wakeshima, M.D. are reasonably necessary to cure and relieve the effects of the admitted injury.

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

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant filed an Application for Hearing, dated August 11, 2016, on the issues of reasonably necessary medical benefits, specifically lumbar sympathetic block injections for C.R.P.S. (chronic regional pain syndrome), to be performed by Dr. Wakeshima. On the same day, August 11, 2016, the Respondents filed a Final Admission of Liability (FAL), to which Claimant timely objected.

2. On October 27, 2016, PALJ Michael E. Harr issued an order denying the Respondents' Motion to Strike the Application for Hearing and allowing this matter to proceed to hearing on the issue of whether injection therapy recommended by Dr. Wakeshima is reasonably necessary to cure and relieve the effects of the Claimant's admitted injury, despite the fact that the Claimant was placed at MMI by Albert Hattem, M.D.. Because the insurance adjuster referred the Claimant to Dr. Hattem, and Dr. Hattem notes on the first visit of February 4, 2016 that [the Claimant] presented today…for a medical evaluation…Prior to today's visit medical records were forwarded for my review…." The Claimant disputes whether Dr. Hattem is an ATP. The ALJ infers that if it walks, talks and squawks like an Independent Medical Examination (IME), it probably is an IME.

General Findings

3. On February 13, 2014, the Claimant presented to Katherine Drapeau, D.O., for an Initial Evaluation and reported being a passenger in a large pickup truck and was involved in an accident in a dense fog. The Claimant complained of pain starting in the lower lumbar area and extending up to midthorax bilaterally. He complained of pain in his right leg that extended down his foot accompanied by numbness. Dr. Drapeau noted a halting gait, flattening of the lordosis, muscle spasms, and tenderness bilaterally. Dr. Drapeau diagnosed lumbar strain with right radicular symptoms which were of concern for disk pathology, and she ordered a lumbar MRI (magnetic resonance imaging).

4. On February 28, 2014, John C. Roth, M.D. interpreted the MRI of the lumbar spine as indicating annular disc bulge at L5-S1 and moderate sized right paracentral disc extrusion resulting in impingement on the right S1 nerve root and into the upper right S1 lateral recess. Also indicated in the MRI was a slight annular disc bulge and a small left posterolateral/foraminal disc protrusion at L4-5 without findings for nerve impingement at L4-5.

5. On March 7, 2014, the Claimant was evaluated by Dr. Wakeshima. Dr. Wakeshima noted that the Claimant was a 39-year-old right hand dominant male who reported axial low back pain and right leg region. The pain radiated from the thoracic level down to the lower lumbar level. He had pain in his right leg, entirely down to the foot level. The pain was greatest about the posterior aspect of the thigh and leg. The Claimant reported that the symptoms had been ongoing since an injury at work on February 11, 2014. Dr. Wakeshima further reported: Axial low back pain with right leg pain in a global distribution from the thigh down to the toe level. The patient reported his pain level was at 8/10 to 9/10. The patient also noted increased heart rate when he has pain as well as numbness and tingling in the right lower extremity (RLE). Back pain radiated to the right lumbar region and gluteal region distal to the iliac crest level. Straight leg raise was positive on the right to the entire leg region, but reported it was greatest about the posterior thigh and posterior leg region. Gait was antalgic secondary to right leg pain symptoms. Dr. Wakeshima's impressions were: "1. Axial low back pain with right lower extremity pain. A. Clinical history and examinations are consistent with discogenic etiology of low back pain with S1 radiculopathy. B. MRI of the lumbar spine on February 28, 2014 reported L5-S1 slight generalized annular disc bulge and moderate sized right paracentral disc extrusion resulting impinging of the right S1 nerve root as it exits the thecal sac into the upper right S1 lateral recess. 2. The patient is unable to tolerate oral medications." Findings were most consistent with S1 radiculopathy.

6. On June 3, 2014, Dr. Wakeshima found mild to moderate S1 radiculopathy on the right. This correlated with the Claimant's clinical presentation and MRI studies. On July 16, 2014, the Claimant received a right-sided sacroiliac joint steroid injection from Samuel Y. Chan, M.D. On July 23, 2014, Dr. Wakeshima noted "the patient with no improvement after right L5 and right S1 transforaminal epidural steroid injection on May 7, 2014 where he reports pain went from 8/10 – 9/10 down to 7/10."

7. On September 10, 2014, the Claimant reported noticing increased pain that had been more ecchymotic, especially in the morning, and there was definitely significant color change and swelling. He reported increased perspiration on the right leg compared to the left with the right leg feeling cold in the morning. Examination found slight ecchymosis about the right lateral foot region and below the lateral malleoius and also allodynia in this region. Dr. Wakeshima's impression was right lateral foot and ankle pain and allodynia. Dr. Wakeshima sought to rule out CRPS of the RLE. He ordered an x-ray of the right foot and ankle to evaluate for demineralization and requested a triple phase bone scan to evaluate for CRPS. A positive finding would suggest undergoing sympathetic blocks. On September 26, 2014. Dr. Wakeshima noted that Dr. Castro recommended surgical intervention, microdiscectomy and decompression.

8. On September 30, 2014, the Claimant had a Three Phase Bone Scan showing increased flow in the region of the mid and lateral right ankle with focal increased activity projecting anteriorly over the mid and lateral distal tibia and the distal fibula. An addendum on October 15, 2014 found an increased flow of the right ankle. Dr. Wenzel stated the opinion that, "the findings on this study are not typical of complex regional pain syndrome or (RSD), however, CRPS cannot entirely be ruled out."

9. On October 13, 2014, the Claimant presented to Tashof Bernton, M.D. Dr. bernton reported that "Patient has abnormal stress thermogram with increased temperature in the right medial thigh and right lateral leg with cooling of the affected right side and the anterior and posterior calf." Dr. Bernton recommended a Doppler study to rule out deep vein thrombosis. "If indeed Doppler is negative, the thermogram study is consistent with complex regional pain syndrome; however, this would be a complex regional pain syndrome type 2 with presence of radiculopathy. In that setting, recommendations would be to move forward with treatment of the underlying pain generator, which is radiculopathy. **Consideration could be given to sympathetic blockade at the time of surgery and close monitoring postoperatively for findings of potential CRPS** (emphasis supplied)**.**"

10. On October 14, 2014, Dr. Wakeshima sought to rule out CRPS as the patient reported temperature fluctuation about the RLE. In a phone call, Dr. Bernton stated concerns about the increased swelling in the lower extremity. He advised that the thermogram studies demonstrated findings highly suggestive of CRPS. On October 28, 2014 Dr. Wakeshima diagnosed the Claimant with axial low back pain with right posterior thigh and leg region pain down to foot level where he reported increased pain in the foot region. The clinical history and thermogram studies were suggestive of CRPS, type II with persistent radiculopathy.

11. On January 15, 2015, Dr. Bernton performed an Automonic Testing Battery (QSART) which was positive for CRPS. He recommended treatment of the radiculopathy and that the presence of CRPS, type 2, should not contraindicate treatment, including surgical treatment if otherwise indicated. "**The presence of CRPS would indicate that use of sympathetic blockade preoperatively and postoperatively would be appropriate to consider if surgical indications for radiculopathy are otherwise present** (emphasis supplied)**."**

12. On January 22, 2015 Dr. Wakeshima, on an exam of the Claimant, found significant allodynia about the right posterior thigh and right posterior leg region as well as plantar aspect of the foot. The QSART study of January 15, 2015 was positive for CRPS, type II. "I have also put a request for lumbar sympathetic block on the right to address CRPS on the right lower extremity…. If this is ineffective, we will discuss with Dr. Castro whether he still wishes to go forth with decompression surgery."

13. On February 3, 2015, Dr. Wakeshima noted that the Claimant would go forward with the sympathetic block. "Based on his response to the sympathetic block, we will discuss the possibility of having this repeated and also coordinating this with Dr. Castro to perform a sympathetic block before the surgery and then also after the surgery. Claimant would reinitiate the Butrans patch." On February 17, 2015, Dr. Wakeshima wrote, "Sympathetic block was initially ordered but not yet authorized [by the] insurance carrier… We will once again investigate the status of the sympathetic block, which I do feel is paramount and I am not sure why this is not being authorized by his insurance carrier."

14. On March 5, 2015, Dr. Wakeshima noted that the adjuster authorized the sympathetic block injections. The adjuster requested that pain levels be well documented as well as changes in skin color, temperature, or perspiration before and after the sympathetic block. He further stated "I did inform the adjuster that I would opine that he does have complex regional pain syndrome type 2 superimposed over his lumbar radiculopathy and both will need

to be addressed. I also did inform him that it is my opinion that Dr. Castro would first like to have the patient undergo the sympathetic blocks and based on his response to sympathetic blocks, he would consider whether he will go forth with the surgical intervention. I did inform him that the CRPS symptoms could potentially worsen after spine surgery, and therefore, it would be best served to have him undergo sympathetic blocks and if this helps with pain symptoms have this once again repeated right before his surgery."

15. On March 26, 2015, the Claimant presented to Dr. Chan for right lumbar sympathetic block procedure. "During 30 minutes, the temperature of the right lower extremity has elevated from the preinjection level of 28.7 degrees Celsius to 36 degree Celsius indicating a successful sympatholysis. The patient noted that his pain complaint was substantially decreased and he was able to weight bear with bilateral lower extremities when he was discharged from the surgery center." Claimant's 7-day Pain Diary with an ending date of April 1, 2015 indicated a decrease in pain from an 8/10 just walking to a 4/10 during yard work.

16. On April 2, 2015, Dr. Wakeshima noted that the Claimant demonstrated diagnostic response to sympathetic block where he reported pain level went from 8/10 to 3/10 for two days after the injection on March 26, 2015.

17. On April 8, 2015, Dr. Wakeshima requested an EMG of the RLE and a repeat sympathetic block. On April 23, 2015, the Claimant presented for a second right lumbar sympathetic block with Dr. Chan. Dr. Chan wrote, "Initial temperature of the right lower extremity was 28.3 degrees Celsius and this was elevated to 37 degree Celsius indicating a successful sympatholysis."

18. On May 5, 2015, Dr. Wakeshima noted, "Electrodiagnostic studies of the right lower extremity demonstrated electrophysiological evidence of the increased spontaneous activity in the S1 innervated muscle test today. He had moderate S1 radiculopathy on the right. There was also mild decreased amplitude and distal onset of peroneal motor nerve test at the EDD. New findings of mild peroneal motor neuropathy distal to the tibialis anterior."

19. On May 18, 2015, Dr. Wakeshima noted in a follow up medical evaluation, "He did have difficulty sitting squarely on his right buttock due to increased pain. Straight leg raise was positive on the right to the posterior thigh and leg region, and negative of the left. There was pain with internal rotation about the right hip, and negative on the left. Manual muscle testing demonstrated 5/5 strength."

20. On June 30, 2015, Dr. Wakeshima noted, "He did demonstrate allodynia about the right posterior knee region. Gait was antalgic but stable…. Clinical history and medical records are consistent with complex regional pain

syndrome superimposed over the lumbar radiculopathy on the right. Electrodiagnostic studies of the right lower extremity did demonstrate findings of moderate S1 radiculopathy on the right. There was also peroneal neuropathy just to the tibialis anterior."

21. On July 2, 2015, Dr. Wakeshima requested a RLE Sympathetic Block, then 1 week later a R L5-S1 TFO ESI, then 1 week after the ESI another RLE Symapthetic Block for the patient was to be performed by Dr. Chan and to be scheduled when authorized. At the referral of Dr. Wakeshima, on July 22, 2015, Dr. Chan performed a right L5 and S1 transforaminal epidural steroid injection. There was significant increase in the temperature of the RLE, indicating successful sympatholysis. On July 29, 2015, [Claimant] presented for repeat right lumbar sympathetic block. He had a positive response to epidural steroid injection as well as sympathetic block in the past. He then rated his pain 4/10. There was contrast flowing in the anterior sympathetic chain."

22. On September 4, 2015, Dr. Wakeshima noted, "[Claimant] has done very well with the injections and if he continues to demonstrate the current level of improvement, he may not require spine surgery."

23. On November 12, 2015, Dr. Drapeau noted that the Claimant had been diagnosed with CRPS of the right lower leg. "He also does have some disk pathology shown on MRI. He has been seen by the spine surgeon, Dr. Castro, who stated that surgery would be a last resort treatment for him." She assessed: Low back pain with some disk pathology. Right lower leg CRPS. Dr. Drapeau referred the vClaimant to Dr. Wakeshima for medications and counseling. The Claimant was given temporary restrictions of 10 pounds for lifting, repetitive lifting, carrying, and pushing/pulling.

24. On November 18, 2015, Dr. Wakeshima noted allodynia about the right lateral thigh and leg region which was in contrast to what was mentioned in Dr. Olsen's (Nicholas Olsen, D.O.) notes. Dr. Wakeshima's impression included axial low back pain with right lateral lower extremity region pain symptoms. Clinical history, examination, and diagnostic studies were most consistent with complex regional pain syndrome superimposed over lumbar radiculopathy. "The patient demonstrated profound improvement after right L5 transforaminal epidural steroid injection on July 22, 2015 with sympathetic blocks performed one week before and one week after his epidural steroid injections. Sympathetic blocks were performed on July 16, 2015 and July 29, 2015 with positive response to the sympathetic block. Thermogram and QSART studies were positive for CRPS on October 13, 2014 and January 15, 2015. Electrodiagnostic studies of the right lower extremity did demonstrate findings of moderate S1 radiculopathy on the right. There was peroneal neuropathy distal to the tibialis anterior. MRI demonstrated generalized disc bulge and moderate-sized annular

disc extrusion at L5-S1 resulting in impingement of the right S1 nerve root. There was slight annular bulge with small left posterolateral disc protrusion at L4-5 without nerve root impingement. There was facet arthrosis appreciated at L4-5 and L5-S1 level."

25. On December 8, 2015, Dr. Drapeau reported that the Claimant was not doing very well and described feeling like he was walking on broken glass. There was a lot of burning in his foot and numbness in his toes. Gait was antalgic, limping on the right. On four occasions, in her narrative and the M164, she stated that she was transferring case management to Dr. Wakeshima.

26. On December 17, 2015, Dr. Wakeshima again noted Claimant "demonstrated allodynia about the right posterior thigh region."

27. On December 17, 2015, Ricardo Esparza, Ph.D, a clinical psychologist, conducted a Psychological Assessment. Dr. Esparza reported that the Claimant "remained depressed without major physical improvement and the persistent reality of having much less income and an unknown rehabilitation outcome. This reality triggered more distress since he could not consistently manage intrusive negative thoughts of a catastrophic and black-and-white nature. There was also persistent anxiety about ending up in a disabled condition without being able to return to his former financial stability. He obsessed about losing the quality of his life and at a point, began to have suicidal ideation about crashing his truck over a freeway embankment."

28. On January 4, 2016, Dr. Esparza wrote, "Today's issues center on his dread of ending up disabled, losing his home, remaining unemployed, and being forced into a less physical job since he cannot wait to retrain. Themes of depression illustrated emotional losses associated with his inability to work, a sense of feeling useless, a change in his relationships with others because he cannot be valued as in the past. He is preoccupied about potential medication side effects, persistence of his pain, and his inability to consistently manage negative thoughts or a catastrophic and black-and-white nature."

Denial of Injection Blocks to Treat CRPS

29. On January 14, 2016, Dr. Wakeshima discussed sandwiching sympathetic blocks with surgery. Dr. Wakeshima wrote a note to Dr. Castro to see if Dr. Castro had any objections with this proposed plan.

30. On February 4, 2016, Dr. Esparza wrote, "Overall, he seems to be gaining benefit from medication for depression, anxiety and frustration. He is still benefitting from psychological counseling as a way of developing pain management and anxiety reduction. Importantly, his mood seems to be stabilizing especially prior to surgical intervention."

31. On February 29, 2016, Dr. Wakeshima wrote to Dr. Castro, “Patient has CRPS superimposed over his radiculopathy… Please contact us when you have surgery date determined so we can have sympathetic block 3 days before your surgery is scheduled.”

32. On March 11, 2016, Dr. Castro noted that the patient would require a CRPS block several days before surgery.

33. On March 21, 2016, Dr. Wakeshima sent an appeal letter for reconsideration of authorization to pre-treat the patient’s CRPS with sympathetic blocks before his surgery.

34. On April 4, 2016, Dr. Esparza noted that the Claimant was gaining benefit from medication for depression, anxiety and frustration. He still benefited from psychological counseling as a way of developing pain management and anxiety reduction. Importantly, his mood seemed to be stabilizing especially before surgery.

35. On April 8, 2016 Dr. Castro noted that prior nerve blocks for CRPS, helped temporarily. The prior epidural steroid injections did not help. Dr. Wakeshima recommended nerve blocks before surgery but they were denied. Due to pain in the right buttock and posterior right leg, however, especially with stretching, the Claimant wished to proceed with surgery as planned.

36. On April 12, 2016, Dr. Castro performed partial laminectomy, L5 and S1, left side; Undercutting facetectomy and foraminotomy, left side, L5-S1; and Lumbar microdiskectomy, left side, L5-S1. On April 18, 2016 Dr. Castro was of the opinion that the Claimant had to have an injection for CRPS, due to increased pain, which he did well from in the past.

37. On April 20, 2016, Dr. Wakeshima again stressed that the Claimant previously demonstrated profound improvement after injections and required the blocks at this time. On April 25, 2016, Dr. Wakeshima was first advised that Dr. Drapeau had transferred primary ATP responsibility to him.

38. On May 4, 2016, the Claimant presented to Dr. Wakeshima, post lumbar decompressive surgery by Dr. Castro on April 12, 2016. “Sympathetic block was requested to be performed prior to surgery and re-submitted for reconsideration; however, this was denied by the insurance carrier to pre-treat for CRPS issues prior to surgery.” On May 23, 2016, Dr. Wakeshima stated the following opinion, “I do believe that he does have profound worsening of CRPS issues as a result of his spine surgery. I did clear this with Dr. Castro’s office and they did clear the patient to receive sympathetic blocks at this juncture.”

39. On June 3, 2016, the Claimant reported pain in the right buttock area and posterior right leg, especially with stretching. Sara Kornely, PA-C

(Physician's Assistant) to Dr. Castro, noted that the Claimant had an injection planned with Dr. Wakeshima in two weeks, since he had a history of CRPS and had gotten sympathetic nerve blocks. The Claimant would proceed with injections as planned and go ahead with pool therapy.

40. On June 10, 2016, Dr. Wakeshima once again found allodynia about the right posterior thigh and posterior knee region. On June 23, 2016, Dr. Wakeshima again documented that the insurance carrier denied treatment. "[Claimant] has been once again denied on the sympathetic blocks. While I still do believe he does have CRPS issues despite what is mentioned in Dr. Ring's physician adviser notes and I do disagree with some of his findings on Dr. Ring indicating that he did not demonstrate improvement with sympathetic blocks, which is incorrect according to my last notes and that he did have positive thermogram studies, which contraindicated to what Dr. Ring mentioned about temperature changes and did have positive thermogram and QSART studies, which are accepted studies for determining CRPS according to Rule 17, Colorado Worker's Compensation Medical Treatment Guidelines, 7 CCR 1101-3 (hereinafter "Medical Treatment Guidelines").. Dr. Wakeshima stated, "we will re-submit request for sympathetic blocks. He may need then to have this run through his attorney for possible consideration for a hearing regarding this issue, as this has not been authorized by his insurance in the past."

41. On July 8, 2016, Dr. Wakeshima proposed, "If Dr. Castro has no explanation for still ongoing posterior thigh and leg region pain symptoms, we will then re-submit a request for a sympathetic block, which has been efficacious in the past, but denied multiple times by his insurance carrier."

42. On July 18, 2016, the Claimant returned to Dr. Castro. After examination, Dr. Castro agreed it would be appropriate for Dr. Wakeshima to repeat the block injections for CRPS.

43. On July 27, 2016, the Claimant reported that Dr. Castro concurred with going forth with the sympathetic block. Dr. Wakeshima spoke with the patient today, and discussed sympathetic blocks, medications, and future treatment plans.

44. On November 2, 2016, Dr. Wakeshima provided a Medical Narrative in which he explained that the Claimant had a work injury which occurred on February 11, 2014. His MRI prior to surgery demonstrated moderate sized annular disc extrusion at L5-S1. Claimant had lumbar decompression surgery by Dr. Castro on April 12, 2016. Prior to his surgery, however, he was evaluated for CRPS and did demonstrate positive diagnostic studies for complex regional pain syndrome including thermogram and QSART studies that were positive for CRPS. He demonstrated significant improvement with sympathetic blocks prior to his surgery, and Dr. Wakeshima **therefore was of the opinion**

that Claimant's clinical history, examination, and diagnostic studies were still most consistent with complex regional pain syndrome superimposed over the lumbar radiculopathy(emphasis supplied). The Claimant reported that the sympathetic blocks did help with his pain symptoms by 75%. The Claimant reported that without his pain medication, his pain level is at 9/10 compared to 6/10, and he is able to do his exercise program and walk. He reported that this medication is improving his overall functional abilities. Dr. Wakeshima recommended that Claimant be authorized up to six maintenance sympathetic blocks over the course of twelve months for maintenance treatment. Per the Treatment Guidelines, sympathetic blocks were listed for maintenance treatment not exceed 4-6 blocks in a twelve-month period for a single extremity and to be separated by no less than four week intervals. Claimant had positive diagnostic response to sympathetic blocks in the past and positive diagnostic findings for CRPS in both thermogram and QSART studies. Dr. Wakeshima believed that if the pain decreased with the sympathetic blocks then they could wean him off opioid pain medication.

45. On November 7, 2016, the Claimant reported his lower extremity was still more problematic than his back, but his swelling had increased and therefore discomfort in his bottom of his foot has also increased. There was allodynia about the posterior thigh and posterior leg region. Dr. Wakeshima believed that the Claimant may benefit from sympathetic block, which was beneficial to address CRPS issues.

46. The Claimant testified that he continues to have burning pain in his leg continuously. The symptoms seem to be worse in the mornings than later in the day. He stated he was requesting the lumbar sympathetic blocks recommended by Dr. Wakeshima because they allowed him to be more functional. He would notice that all his pain did not go away with the injections, but that it helped reduce the burning, the numbness, the sweating, the hot and cold changes, and the pain. He stated that he thought the blocks would cut the symptoms down by about 75%. The injections help him walk better and do activities of living better. On cross-examination, the Claimant indicated that at least two of his lumbar sympathetic blocks on April 23, 2015 and July 29, 2015, did not improve his pain. Dr. Wakeshima indicated, however, that there was an insufficient number of blocks to determine the success thereof.

Dr. Wakeshima's Evidentiary Deposition

47. On November 14, 2016 Dr. Wakeshima testified by deposition as follows:

a. "I have … listed that his mechanism of injury was that he was involved in a motor vehicle accident. He was a front seat passenger, wearing a shoulder and lap belt." (Wakeshima Evid. Depo. p..9, L.8-14. Hereinafter page and line numbers).

b. Claimant was being treated for low back pain, lumbar radiculopathy, complex regional pain syndrome, chronic pain, and depression issues. Dr. Castro performed spine surgery. (p.8, L.3-23).The aforementioned treatment was consistent with the impact and injury sustained by Claimant. (p.9, L.15-p.10, L.9).

c. Dr. Wakeshima testified, "Well, one of the issues was that I had been treating him for complex regional pain syndrome, which was confirmed on two diagnostic studies, and that consisted of sympathetic blocks. And he had been responding well to it." (p.10, L.15-19).

d. A typical course of treatment for complex regional pain syndrome is to do an injection before the surgery so that the complex regional pain syndrome does not worsen. That was requested multiple times, and it was denied. And then he still had worsening pain after surgery. And it was, once again, requested and it was denied. And it still is being denied." (p.10, L.20-P.11, L.2).

e. Dr. Wakeshima testified, "The diagnostic studies for complex regional pain syndrome are not 100 percent accurate. For that reason, the Division of Workers' Compensation does recommend that you have at least two diagnostic studies either confirming or refuting that diagnosis.

   And he's had thus far, three of the four diagnostic studies that are consistent with complex regional pain syndrome; that specifically being the QSART, the stress thermogram studies, and positive response to lumbar sympathetic blocks." Claimant's (p.12, L.6-15).

f. Dr. Wakeshima testified, "Well, he did have hypersensitivity to light touch, also listed in my notes as allodynia in his entire right lower extremity. There was some bruising in the lower extremity.

   And when I first ordered all these studies back in my notes from – let me find that date – September 10, 2014, I did document under my Assessment - - Impression, No. 2, that there was right lateral foot and ankle pain and allodynia with reports of increased perspiration and coldness and skin color changes in the morning, which is consistent with complex regional pain syndrome." (p.17, L.18-P.18, L.4).

g. When Dr. Wakeshima was asked if symptoms or signs were always present he testified, "No. And that is the reason why we do these diagnostic studies, because they are not always present; and findings of an examination alone is not sufficient, per the treatment guidelines, to say whether this entity exists or does not exist. And that is why they have all these studies available to confirm the situation. And that's the reason why they need to have two diagnostic studies or greater to confirm this. (p.18, L.24-P.19, L.7).

h. Dr. Wakeshima testified, "Well, one issue that makes Mr. Portillo's case challenging to treat is that he is not able to tolerate medications in a pill format and can only tolerate medication in a liquid format. And that has been his statement even since when I first started seeing him.

   So currently his medications include liquid hydrocodone; he's taking the equivalent of 5 milligrams three times per day. Liquid ibuprofen; he's taking the equivalent of 600 milligrams three times per day. And he is also - - he was on liquid sertraline that was being prescribed by Dr. Moe of psychiatry, but that has since been discontinued." (p.21, L15-P.22, L.2).

i. Q. Why is it that you have prescribed sympathetic blocks?

   A. Well, that is the treatment for complex regional pain syndrome, and he has responded to them in the past. And he has also wanted to go forth with having this available to him, if made available. And no matter what we submitted, it has been denied.

   Q. What would be the benefit of having sympathetic blocks?

   A. It will help with his CRPS symptoms in his lower extremity. If we can get this CRPS under better control with sympathetic blocks, we should be able to start weaning him further on his narcotic pain medications. (p.22, L14-25).

j. Dr. Wakeshima testified, "He was placed at maximum improvement by Dr. Hattem, but I do believe that there is still some issues ongoing. Regarding his recovery from his spine surgery, I would opine that he is at maximum medical improvement, but he still requires treatment for the complex regional pain syndrome. Those treatments can potentially be accomplished under maintenance, but I would still recommend he still receive treatment for his ongoing back pain and complex regional pain syndrome issues." (p.28, L.22-P.29, L-7).

k. "I would anticipate that he should be able to be maintained under maintenance with these sympathetic blocks. I do believe that his case would necessarily need to remain open to continue on for the sympathetic blocks, that can certainly be accomplished under maintenance." (p.29, L.14-19). He further stated that in reality, Claimant is not at maximum medical improvement for his CRPS until he had at least one more sympathetic block. (p.30, L.4-14).

Medical Treatment Guidelines Relative to CRPS

48. The following sections of the Medical Treatment Guidelines (re: CRPS) are relevant in this matter:

Section E.1.a. xv. (p. 9) Presenting symptoms related to CRPS:
A) Severe, generally unremitting burning and/or aching pain and/or allodynia.
B) Swelling of the involved area.
C) Changes in skin color.
D) Asymmetry in nail and/or hair growth.
E) Abnormal sweat patterns of the involved extremity.
F) Motor dysfunction- limited active range-of-motion, atrophy, tremors, dystonia, weakness.
G) Subjective temperature changes of the affected area.

Section F. 3. (p.16) DIAGNOSTIC COMPONENTS OF CONFIRMED CRPS - patients should have a confirmed diagnosis of CRPS to proceed to other treatment measures in this guideline.
Both CRPS I and II confirmed diagnoses require the same elements. CRPS II is distinguished from CRPS I by the history of a specific peripheral nerve injury as the inciting event.
Patient must meet the below criteria:

A clinical diagnosis meeting the above criteria in 2, and
At least 2 positive tests from the following categories of diagnostic tests:

Trophic tests
A) Comparative X-rays of both extremities including the distal phalanges.
B) Triple Phase Bone Scan.Vasomotor/Temperature test - Infrared Stress Thermography.
Sudomotor test - Autonomic Test Battery with an emphasis on QSART.
Sensory/ Sympathetic nerve test - Sympathetic Blocks.

Section F. 7. b. (p. 19) Lumbar Sympathetic Block: Useful for diagnosis and treatment of pain of the pelvis and lower extremity secondary to CRPS-I and II. This block is commonly used for differential diagnosis and is the preferred treatment of sympathetic pain involving the lower extremity. For diagnostic testing, use two blocks over a 3-14 day period. For a positive response, pain relief should be 50% or greater for the duration of the local anesthetic and pain relief should be associated with demonstrated functional improvement.

Section G. 5. a. (p. 44) Treatment Parameters – To be effective as a treatment modality, the patient should be making measurable progress in their rehabilitation program and should be achieving an increasing or sustained duration of relief between blocks. If appropriate outcomes are not achieved, changes in treatment should be undertaken.

❖ Time to Produce Effect: 1 to 2 blocks. Demonstrated greater than 50% pain relief and objective/functional gains as noted under treatment parameters.

❖ Frequency: Variable, depending upon duration of pain relief and functional gains. During the first two weeks of treatment, blocks may be provided every 3 to 5 days, based on patient response meeting above criteria. The blocks must be combined with active therapy. After the first two weeks, blocks may be given weekly with tapering for a maximum of 7 -10.

❖ Optimum Duration: 10 over a period of 6 months with documentation of progressive functional gain verified by therapist or increased work capability after each injection.

❖ Maximum: If sympathetic and functional benefits are documented with the blocks refer to Section I. 12, Maintenance Management, for information on further blocks.

Section I. (p. 103) Maintenance Management:

INJECTION THERAPY

a. Sympathetic Blocks - These injections are considered appropriate if they increase function for a minimum of 4 to 8 weeks. Maintenance blocks are combined with and enhanced by the appropriate neuro- pharmacological medication(s) and an active self-management exercise program. It is anticipated that the frequency of the maintenance blocks may increase in the cold winter months or with stress.

❖ Maintenance Duration: Not to exceed 4 to 6 blocks in a 12 month period for a single extremity and to be separated by no less than 4 week intervals. Increased frequency may need to be considered for multiple extremity involvement or for acute recurrences of pain and symptoms. For treatment of acute exacerbations, consider 2 to 6 blocks with a short time interval between blocks.

Ultimate Findings

49. The ALJ finds the opinions of Dr. Wakeshima and Dr. Castro more credible and persuasive than all other opinions to the contrary because they are carefully articulated, consistent with the Claimant’s reported symptomatology, and supported by the Medical Treatment Guidelines.

50. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Wakeshima and Dr. Castro, and to reject all opinions to the contrary.

51. The Claimant has proven, by a preponderance of the evidence that his CRPS is a direct and natural consequence of the admitted injury of December 11, 2014. Further, the Claimant has proven, by preponderant evidence that the lumbar sympathetic blocks, recommended by ATPS Dr. Wakeshima and Dr. Castro, are reasonably necessary to cure and relieve the effects of the admitted injury.

52. Based on the opinions of the Claimant's two ATPs (Dr. Wakeshima and Dr. Castro), the issues of the causal relatedness of the CRPS and the reasonable necessity of the lumbar sympathetic blocks are ripe for adjudication at the present time, regardless of the academic pendency of a DIME on January 7, 2017 (it is unlikely that it will occur because the Claimant cannot afford to pay for it and there is no indication that Dr. Dillon will perform the DIME *pro bono*). The ALJ infers and finds that reasonably necessary medical care and treatment cannot be delayed until the Claimant can afford to pay for a DIME, or until the "twelfth of never," whichever comes first. The Workers' Compensation Act is designed to provide speedy benefits, especially speedy medical care and treatment that is reasonably necessary to cure and relieve the effects of an admitted injury.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Wakeshima and Dr. Castro were more credible and persuasive than all other opinions to the contrary because they were carefully articulated, consistent with the Claimant's reported symptomatology, and supported by the Medical Treatment Guidelines.

Substantial Evidence

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

Causal Relatedness of CRPS and Reasonable Necessity of Lumbar Sympathetic Blocks

c. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to his CRPS, which is a direct and natural consewquence of his admitted injury of December 11, 2014. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment for his CRPS, as recommended by his ATPs, Dr. Wakeshima and Dr. Castro, including the lumbar sympathetic blocks, was and is reasonably necessary to cure and relieve the effects of the Claimant's admitted injury..

Ripeness of Medical Care Issue

d. "Ripeness" tests whether an issue is real, immediate and fit for adjudication. *See Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006). Respondents argue that the issue of causal relatedness, which could be part and partial of a DIME opinion, is unripe during the pendency of a DIME. Indeed, the issue of causal relatedness of the Claimant's CRPS and the lumbar sympathetic blocks to treat the CRPS is real, immediate and fit for adjudication **now** and not at a speculative future time when the Claimant is able to afford to pay for the DIME. What is actually speculative is the Respondents' "Catch-22" argument that the pendency of the DIME, which could occur in the distant future, makes the issue of specific treatment recommended by the Claimant's ATPs months ago, and continuously recommended, unripe. The Workers' Compensation Act is not designed to allow a legal "checkmate" on reasonably necessary medical care until a DIME occurs. The ALJ concludes that the causal and "reasonably necessary" issues were ripe some time ago and are over-ripe **now**.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven the causal relatedness of his CRPS and the reasonable necessity of the lumbar sympathetic blocks recommended by ATPS Dr. Wakeshima and Dr. Castro.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all the costs of medical care and treatment for the Claimant's Complex Regional Pain Syndrome (CRPS), including the lumbar sympathetic blocks recommended by authorized treating physicians, Yusuke Wakeshima, M.D. and Andrew Castro, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this______day of December 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-976-862-02

ISSUES

1. Has Claimant overcome the DIME's finding of MMI by clear and convincing evidence?

2. If Claimant has overcome the DIME, is the shoulder surgery recommended by Dr. Simpson reasonable and necessary?

FINDINGS OF FACT

1. Claimant worked as a "signing specialist" for Employer. On December 11, 2014, she sustained an admitted industrial injury when she was hit by an automobile in Employer's parking lot.

2. The accident caused injury primarily to her right shoulder. She also experienced hip and neck pain following the accident.

3. Employer referred Claimant to Emergicare for authorized treatment, where she saw Dr. Elizabeth Arrington. X-rays of Claimant's chest, right shoulder, and pelvis were negative. Dr. Arrington administered an injection and prescribed medications.

4. On December 29, 2014, Dr. Arrington ordered MRIs of the cervical spine and right shoulder. Claimant had the MRIs on January 7, 2015.

5. The cervical MRI showed moderate diffuse cervical spondylosis at multiple levels and a posterior annular tear at C3-C4. With the possible exception of the annular tear, all issues were likely degenerative in nature and predated her accident.

6. Claimant's right shoulder MRI was interpreted by Dr. Michael O'Neill, a fellowship trained neuroradiologist. Dr. O'Neill opined that the MRI showed "mild to moderate diffuse chronic tendinosis of the supraspinatus with no rotator cuff tear." There was also a joint effusion and degenerative changes of the right AC joint.

7. After reviewing the MRI reports, Dr. Arrington referred Claimant to Dr. Simpson for evaluation of her shoulder, and to Dr. Illig for evaluation of her neck.

8. Claimant was initially evaluated by Dr. Douglas Bradley on December 29, 2014, who became the primary ATP thereafter.

9. Claimant had her initial evaluation with Dr. Simpson on January 30, 2015. On physical examination, Claimant had a painful arc, positive impingement and Speed's signs, and pain with subscapularis strength testing. She also had dysesthesias in a C6 and C5 distribution. Dr. Simpson personally reviewed Claimant's MRI images. Dr.

Simpson agreed with the radiologist’s interpretation of diffuse supraspinatus tendinosis. But Dr. Simpson also thought he saw a partial-thickness tear of the supraspinatus tendon. Dr. Simpson opined Claimant’s clinical presentation was consistent with the pathology he observed on the MRI.

10. Dr. Simpson prescribed a Medrol Dosepak. He suggested steroid injections and possible surgical intervention if Claimant’s shoulder did not improve. But Dr. Simpson was more immediately concerned about the possibility of a cervical radiculopathy. He recommended that Claimant see a neurosurgeon or orthopedic spine surgeon for evaluation of her neck before proceeding with any aggressive treatment for the shoulder.

11. Claimant saw Dr. Simpson again on March 3, 2015. The Medrol Dosepak had helped, but she was still having pain in her shoulder, and numbness and tingling in her arm. Dr. Simpson reiterated his recommendation that Claimant see a surgeon for evaluation regarding her cervical spine. He administered a steroid injection in the right shoulder, which provided Claimant “100% relief” of her shoulder pain.

12. Claimant returned to Dr. Simpson on April 1, 2015. She reported receiving approximately one hour of complete pain relief after the injection, after which her pain returned. Dr. Simpson opined Claimant had a partial-thickness rotator cuff tear and was not at MMI. He also felt she would likely require an arthroscopic debridement or rotator cuff repair, due to ongoing symptomatology. Dr. Simpson indicated he could not proceed with shoulder surgery until she was cleared from a cervical spine standpoint.

13. Dr. Wallace Larson performed an Independent Medical Examination (IME) at Respondents’ request on May 20, 2015. As a result of his examination and review of records, Dr. Larson opined that Claimant was at MMI with no ratable impairment. Dr. Larson noted inconsistencies between Claimant’s description of the accident and the police report. He indicated there was no objective evidence of injury. He opined that the pathology demonstrated by the cervical and right shoulder MRIs was degenerative, and not caused by the accident.

14. On May 29, 2015, Claimant saw Dr. Scott Primack, a PM&R and electrodiagnostic specialist, for evaluation of her cervical issues. Claimant reported that “her biggest problem is at the level of the right shoulder, more so than the cervical spine.” On physical examination, her most significant findings related to the right shoulder, although she did have some minor abnormalities on the cervical and neurological exam. Dr. Primack recommended an EMG/NCV study to complete his assessment.

15. Dr. Primack performed EMG/NCV testing on June 26, 2015. He found no evidence of cervical radiculopathy or brachial plexopathy. Dr. Primack opined “based on the history, the clinical examination, and today’s electrophysiologic data, Ms. Harper’s problem is at the shoulder.” He indicated she required no further cervical spine treatment.

16. Having been cleared by Dr. Primack regarding her neck, Claimant returned to Dr. Simpson on July 15, 2015. Dr. Simpson opined Claimant was suffering from a “chronic partial-thickness rotator cuff tear.” He recommended arthroscopic shoulder surgery, “either debridement or repair of her partial-thickness rotator cuff tear depending on the pathology.”

17. Dr. Simpson’s office submitted a surgical preauthorization request on July 28, 2015. Respondents forwarded the request to Dr. Larson for a Rule 16 peer review on August 4, 2015. Dr. Larson opined that the opinions expressed in his IME report were unchanged, and the requested surgery was not reasonable, necessary or related to Claimant’s work injury.

18. Respondents denied the request for surgery based on Dr. Larson’s Rule 16 report.

19. After the surgery was denied, Dr. Bradley placed claimant at MMI on September 24, 2015. On October 5, 2015, Dr. Bradley authored an impairment rating report outlining a 17% upper extremity rating.

20. Respondents filed a Final Admission of Liability (FAL) based on Dr. Bradley’s MMI report. Claimant objected to the FAL and requested a DIME. Dr. Brian Beatty was selected as the DIME physician.

21. Dr. Beatty evaluated Claimant for the DIME on March 16, 2016. Dr. Beatty physically examined Claimant and performed a comprehensive medical records review. Dr. Beatty opined that Claimant had reached MMI on October 5, 2015.

22. Dr. Bradley testified in a deposition on behalf of Claimant on September 13, 2016. Dr. Bradley agreed with Dr. Simpson’s surgical recommendation. Dr. Bradley opined that his determination of MMI was based on the denial of surgery. Dr. Bradley had not reviewed the shoulder MRI films and offered no specific opinion regarding their interpretation.

23. Dr. Simpson testified in a deposition on behalf of Claimant on September 21, 2016. Dr. Simpson reiterated and expounded upon the opinions expressed in his reports. Dr. Simpson testified that he reviews MRI films regularly in conjunction with surgical evaluations. Dr. Simpson opined that “MRIs are not a hundred percent study,” and do not always accurately depict the nature or extent of a patient’s pathology. Dr. Simpson disagreed with the radiologist’s interpretation of Claimant’s shoulder MRI. Based on his review of the MRI, Dr. Simpson opined that claimant likely has a partial-thickness tear of the supraspinatus tendon. Dr. Simpson acknowledged that Claimant also has pre-existing issues in the right shoulder that were not caused by her industrial accident. Dr. Simpson testified that the exact nature of the surgery would depend on the specific pathology he observed during the procedure.

24. Dr. Larson testified in a deposition on behalf of Respondents on October 31, 2016. Dr. Larson agreed with Dr. Beatty that Claimant is at MMI. Dr. Larson testified that he reviewed the shoulder MRI images in addition to the report. Dr. Larson opined

the imaging studies have not identified any pathology in need of specific treatment of additional intervention.

25. Claimant has failed to overcome the DIME by clear and convincing evidence.

CONCLUSIONS OF LAW

A. Did Claimant overcome the DIME by clear and convincing evidence?

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. A finding of MMI is premature if there is a course of treatment that has "a reasonable prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990).

The DIME physician's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the MMI and impairment findings are incorrect. *Qual-Med*, 961 P.2d at 592. A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002).

The ICAO has repeatedly held that "mere differences of medical opinion" do not constitute clear and convincing evidence that the DIME is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (ICAO March 18, 2016); *Javalera v. Monte Vista Head Start, Inc.*, W.C. No. 4-532-166 (ICAO July 19, 2004); *see also Gonzales v. Browning-Ferris Industries of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000).

As found, Claimant has failed to overcome the DIME's finding of MMI by clear and convincing evidence. Claimant's challenge to MMI primarily rests on Dr. Simpson's recommendation for surgery. But, whether surgery is reasonable and necessary ultimately hinges on whether Claimant has pathology that is amenable to surgical correction and is causally related to her accident. The medical records demonstrate Claimant suffers from chronic supraspinatus tendinosis, which most likely predated her work injury. Dr. Neill did not see any tear of the supraspinatus tendon. Dr. Larson opined that the MRI does not show any pathology that warrants further treatment. By contrast, Dr. Simpson saw findings he believes are "highly suspicious" for a partial-thickness supraspinatus tear. The interpretation of Claimant's MRI appears to be an issue about which reasonable physicians can disagree. The ALJ concludes that Dr. Simpson's disagreement with Dr. Neill's interpretation of the MRI represents a "mere difference of opinion," which is insufficient to overcome the DIME.

Based on the totality of evidence presented, the ALJ concludes Claimant has failed to prove that the DIME's determination of MMI was highly probably incorrect.

B. Shoulder surgery

Claimant's request for approval of surgery is part and parcel of her challenge to the DIME. The ALJ's conclusion that Claimant failed to overcome the DIME necessarily disposes of the issue of surgery, because the surgery was proposed to "improve" Claimant's condition. *See, e.g.*, *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995); *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992).

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME on the issue of MMI is denied and dismissed.

2. Claimant's request for authorization of shoulder surgery as recommended by Dr. Simpson is denied and dismissed.

3. All matters not determined herein, or otherwise closed by operation of law, are reserved for future determination.

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

DATED: December 20, 2016

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he sustained an injury arising out of his employment on April 19, 2014?

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary disability benefits from April 19, 2014, and continuing?

III. Whether Claimant has proven the correct Average Weekly Wage by a preponderance of the evidence?

IV. Whether Respondent has proven entitlement to offsets by a preponderance of the evidence?

V. Whether Respondent has proven entitlement to a penalty pursuant to §8-43-102(1)(a), for Claimant's failure to report the injury.

FINDINGS OF FACT

1. Claimant has a long-standing history of neck and back pain dating back to 1999. [Exhibit 12, p. 19]. On February 11, 2002, Claimant's primary care physician, Richard Evans, M.D., documented that Claimant was taking Vicodin (hydrocodone/acetaminophen), a narcotic pain medication. [*Id.*]. As a result of Claimant's chronic pain complaints, Claimant filed for disability benefits in 2000 and again in 2006. [Exhibit 12, p. 22]. By November 2006, Claimant's chronic pain had progressed to the point that he was taking one to two tablets of Percocet (Oxycodone Hydrochloride/Acetaminophen) 5/325 every four hours for pain. [Exhibit 12, p. 21].

2. In April 2008, Claimant sustained a non-industrial motor vehicle accident, and by March 18, 2009, Richard Evans, M.D., diagnosed Claimant with fibromyalgia, chronic pain syndrome, lumbar spondylosis, sciatica, and carpal tunnel syndrome. [Exhibit 12, p. 22].

3. On July 14, 2011, Dr. Evans documented that, because of Claimant's chronic pain syndrome, fibromyalgia, and "generalized pain and stiffness", Claimant again was contemplating filing for disability benefits and that he was "likely to need pain meds forever." [Exhibit G, p. 268]. By this time, Claimant's Percocet prescription had increased to 7.5/325 (1-2 every four hours), and he also was being prescribed OxyContin (oxycodone) 60 mg Oral Tablet Extended Release 12 Hour (1-2 every 12

hours), Carisoprodol (muscle relaxer) 350 mg Oral Tablet, and Diazepam (anti-anxiety and anti-muscle spasm medication). [Exhibit G, p. 269].

4. On April 27, 2012, Claimant complained to Dr. Evans of increased stress due to various family problems and noted that Claimant "would like to take time off work, as work is adding to his stress." [Exhibit G, p. 256]. On May 12, 2012, Dr. Evans documented that Claimant actually did begin to take time off work due to family crisis/stress and increased back and hip pain. [Exhibit G, p. 253]. Dr. Evans noted that Claimant was to be "work off until mid-June". [*Id*.] Dr. Evans continued Claimant's chronic pain syndrome medications without changes and added Prozac for the mood and anxiety problems. [*Id.*]. Dr. Evans completed short term disability paperwork on May 24, 2012, as a result of flaring pain and emotional distress related to home stressors. [Exhibit G, p. 250].

5. Claimant presented to Dr. Evans on July 22, 2013, needing refill of his medications and "questioning whether he is harming himself continuing to work while he masks some of the pain with the pain meds. But he has to work another 5 years to finish his career. Contemplating SSDI but does not know if he is qualified and wonders what to do. He hurts all the time in multiple joints now." [Exhibit G, p. 244]. Claimant complained of bilateral elbow pain, right hand pain, right hip pain, right knee pain, back pain, as well as arthralgias, joint pain, joint swelling, joint stiffness, limb pain and limb swelling. [Exhibit G, pp. 244-45].

6. On February 20, 2014, only two months before the alleged industrial injury, Dr. Evans was treating Claimant for 24 different "active problems," including acute reaction to stress; bilateral groin pain; carpal tunnel syndrome; chronic pain syndrome; depression; encounter for screening for malignant neoplasm of prostate; esophageal reflux; fibromyalgia; generalized osteoarthritis of unspecified site; insomnia; joint pain, knee; leg swelling; lumbar spondylosis; muscular aches; pain in hand; patellofemoral syndrome, left; post-traumatic stress disorder; and sciatica. [Exhibit G, p. 238]. Claimant stated that he "must earn a living a few more years, as required by the employer" and, therefore, he "continues to work but only as long has he has the pain med." *[Id.*]. However, Claimant reported that he was having problems obtaining the OxyContin because he "cannot afford the medication." [Exhibit G, p. 237]. Therefore, Dr. Evans changed Claimant's prescription medication from OxyContin to Morphine Sulfate Extended Release 15 mg. [*Id.*].

7. Claimant testified that his right elbow started hurting due to pulling and pushing pallet jacks and flatbed carts, and that on April 19, 2014, he informed Employer's store manager Shirley Holditch and produce specialist Chris Romero that his right elbow started hurting.

Q How did you injure your elbow, your right elbow?

A *Pulling and pushing on the pallet jacks and the flatbed carts*. The company started a new system called key retailing, and they brought in these new flatbed carts. And you had to put 12 items on the carts which would make them extremely heavy, but for quite a while there they weren't rolling. None of the flatbed carts were rolling. And we went to the store manager and department head, produce manager to see if we could get them to get store services in to fix those flatbeds because none of them were rolling. Even with nothing on, we would pull them and drag them, but they wouldn't roll.

Q And were these the flatbeds you were using when your elbow started to bother you?

A Yes.

Q Now after you injured your elbow, did you verbally report that injury to your employer?

A Yes, I did.

Q Who did you tell?

A I told Shirley Holditch and I told Chris Romero. He is the produce specialist.

Q And when did you verbally report your injury?

A 4-19. I was working.

Q And what did you tell them?

A I told them that my right arm started -- my right elbow started hurting. And then on 4-20-14 it started swelling up, my elbow started swelling up.

[Hearing Transcript, pp. 24:6 to 25:11](emphasis added).

8. The medical records do not support Claimant's testimony that he injured his right elbow at work on April 19, 2014, while pushing pallet jacks and flatbed carts. On the contrary, the medical records show that Claimant complained of pain to different body parts on successive visits to the physician's office as a result of carrying heavy objects while working on a roof:

- Claimant first sought treatment for this alleged injury on April 30, 2014, when he was seen by Stanley Yee, PA, in the same office as Dr. Evans. Mr. Yee documented a chief complaint of *"right back, neck, shoulder pain due to carrying heavy objects x 4d*" [Exhibit G, p. 234]. Mr. Yee's medical report dated April 30, 2014, makes no mention of pushing or pulling pallet jacks or flatbed carts, no mention of complaints of right elbow pain, and dates the onset of symptoms to four days prior to April 30, rather than the specific date of April 19, 2014.

- On May 8, 2014, Claimant saw Dr. Evans, who documented “Summary of Visit: … SHOULDER AND NECK AND ARM PAIN FROM HIS EXERTIONS ON THE ROOF OF THE HOUSE…. History of Present Illness: HURT HIS LOW BACK AT THE FARM AND SAW THE P.A. [Stanley Yee on April 30, 2014] THIS BEGAN WHILE CARRYING ROOFING PAPER UP TO THE ROOF. THIS AFFECTED THE RIGHT SHOULDER AND THE LOW BACK.” [Exhibit G, p. 231](emphasis in original). Dr. Evans further documented “Review of Systems: Musculoskeletal: …BOTH ARMS HURT ANS [sic] WELL AS SHOULDER AND NECK AREAS AFTER WORKING ON THE ROOF.” [Exhibit G, p. 232](emphasis in original);

- On May 14, 2014, Claimant returned to Dr. Evans, who documented “History of Present Illness: HAS A LOT OF PAIN IN THE RIGHT SHOULDER AREA. STARTED WORKING ON THE HOUSE, LIFTING A ROLL OF ROOFING OVER A LADDER. ALL EXTREMITIES ARE NUMB AND HAVE BEEN FOR A WHILE.”

- On June 20, 2014, Dr. Evans documented “History of Present Illness: RIGHT ELBOW PAIN AND RIGHT KNEE PAIN ISSUE AFTER WORKING AS A STOCKER AT KING SOOOPERS FOR MANY YEARS. HE NOW CANNOT LOAD OBJECTS SAFELY DUE TO THE RIGHT LATERAL ELBOW PAIN NO DIRECT INJURY. THINGS WORSENED AFTER HE HAULED A ROOFING MATERIAL UP A LADDER...THE ROOFING INCIDENT WAS IN APRIL 20TH AND HE SAW P.A. ABOUT A WEEK LATER WHEN HIS SHOULDER, KNEE AND ELBOW ERE [sic] DISABLING.” [Exhibit G, p. 224].

9. Four successive medical reports document an injury caused by heavy lifting and each report contains additional information different from the prior reports, which indicates that Claimant provided additional details regarding the roofing incident on each successive visit: April 30, 2014 (lifting heavy objects); May 8, 2014 (carrying roofing paper up to the roof); May 14, 2014 (carrying roofing paper up a ladder); and June 20, 2014 (hauled roofing material up a ladder, made elbow pain worse, roofing incident occurred on April 20, 2014). The documentation of the mechanism of injury was made contemporaneous with Claimant’s statements in April, May and June 2014, by disinterested health care providers with no bias or incentive to fabricate or exaggerate the onset and location of symptoms or the mechanism of injury, making the statements in the medical records highly credible. It is highly unlikely that Mr. Yee and Dr. Evans could have mistaken Claimant’s statements made on April 30, May 8, May 14 and June 20, regarding the mechanism of injury.

10. Both parties submitted a copy of the Rocky Mountain UFCW Unions Disability Notice: Claim for Weekly Disability Benefits form completed by Claimant and Employer. [See, Exhibit 2; Exhibit F, p. 121 and 123]. Part I of the form, to be completed by Claimant, contains the question: “Was the injury caused by claimant’s employment? Yes □ No □”.

11. Claimant testified that he marked the box for “Yes” when he completed the form on April 28, 2014, but the copy of the form in Employer’s possession appears to show that Claimant left that question blank and did not respond to that question.

12. Claimant has not shown, by a preponderance of the evidence, that he marked this box "Yes" when he filled it out. Assuming, arguendo, that Claimant did so, this application for disability benefits did not substitute for the required written notice to Employer of a workplace injury. Employer was never notified, constructively or actually, of any alleged work injury until Claimant filed a written claim for Workers Compensation on 2/29/2016.

13. Claimant further testified that he asked Store Manager Shirley Holditch to “fill out [paperwork] for workmen’s comp” but she told Claimant his injury “was not work related and would not let me fill out for workmen’s comp.” [Hearing Transcript, p. 29:7-20]. Holditch testified that in the 32 years she has been a store manager for King Soopers, she has reported over 50 workers’ compensation claims and has never made the determination of whether an injury is work-related. Holditch testified that store managers have 24 hours after an associate alleges a work-related injury to complete the multiple-page King Soopers Associate Report Packet and provide the packet to a third-party administrator, Sedgwick CMS, and that Sedgwick CMS makes the determination as to whether an injury is work-related or not based on the information in the Associate Incident Report Packet and Sedgwick’s investigation of the claim.

14. Holditch testified that Claimant never came to her wanting to report a work-related injury. She further testified that she never told Claimant that he could not complete the paperwork for a work-related injury because she had decided his injury was not caused by work. Holditch’s testimony is far more credible and persuasive than Claimant’s.

15. Holditch’s testimony that Claimant never told her that his injury was caused by work is supported by multiple documents:

- Part I of the Disability Notice: Claim for Weekly Disability Benefits (which Claimant had completed at least three times in the past for his non-industrial disability claims in 2000, 2006, and 2012), in which Claimant did not mark that his injury was caused by his employment [Exhibit G, p. 121];

- Physician’s Assistant Stanley Yee’s medical report dated April 30, 2014, documenting *“right back, neck, shoulder pain due to carrying heavy objects x 4d*” without any documentation of an elbow injury caused by pushing or pulling pallet jacks or flatbed carts [Exhibit G, pp. 234-36];

- Mr. Yee’s Physician’s Statement dated April 30, 2014, specifically stating that Claimant’s injury occurred on April 28, 2014, and was not caused by work [Exhibit F, p. 123];

- Dr. Evans' Attending Physician's Statement dated May 7, 2014, stating that Claimant's injury occurred on April 28, 2014, and was not caused by work [Exhibit F, p. 122];

- Dr. Evans' May 8, 2014, report documenting "SHOULDER AND NECK AND ARM PAIN FROM HIS EXERTIONS ON THE ROOF OF THE HOUSE" [Exhibit G, p. 231](emphasis in original);

- Dr. Evans' Physician's Statement dated May 8, 2014, stating that Claimant's injury occurred on April 28, 2014, and was not caused by work but by "working on house" [Exhibit F, p. 120];

- Dr. Evans' May 14, 2014, medical report documenting Claimant's injury occurred when he "STARTED WORKING ON THE HOUSE, LIFTING A ROLL OF ROOFING OVER A LADDER" [Exhibit G, p. 228].

- Dr. Evans' Physician's Statement completed May 14, 2014, indicating Claimant's injury occurred on April 28, 2014, and was not caused by work [Exhibit G, p. 119].

16. Claimant's testimony as to the chain of events is not credible, considering the overwhelming evidence contrary to Claimant's testimony. Claimant's testimony on almost every relevant point is inconsistent with the other evidence in this case. The ALJ concludes that Claimant's version of events has not been proven by a preponderance of the evidence.

17. Dr. Wallace Larson, M.D., provided further information through his deposition. Dr. Larson performed an independent medical examination ("IME") on Claimant, including a review of his past medical records. Dr. Larson credibly opined, among other things, that Claimant's alleged injuries are not consistent with his medical records, that his physical presentation during the IME was not consistent with the condition Claimant complains of, and that the surgery that Claimant sought through private insurance is suggestive of a repair for a long standing degenerative condition, and not from the sudden injury occurring in April, 2014, as Claimant now describes.

18. The ALJ finds that Claimant has failed to prove it more likely than not that he sustained an injury to his right elbow caused by work in April of 2014.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S.

A preponderance of the evidence is evidence that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2013. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. On February 20, 2014, only two months before the alleged industrial injury, Dr. Evans was treating Claimant for 24 different "active problems," including acute reaction to stress; bilateral groin pain; carpal tunnel syndrome; chronic pain syndrome; depression; encounter for screening for malignant neoplasm of prostate; esophageal reflux; fibromyalgia; generalized osteoarthritis of unspecified site; insomnia; joint pain, knee; leg swelling; lumbar spondylosis; muscular aches; pain in hand; patellofemoral syndrome, left; post-traumatic stress disorder; and sciatica. Claimant stated that he "must earn a living a few more years, as required by the employer" and, therefore, he "continues to work but only as long has he has the pain med." However, Claimant reported that he was having problems obtaining the OxyContin because he "cannot afford the medication,", causing Dr. Evans to change Claimant's prescription medication from OxyContin to Morphine Sulfate Extended Release 15 mg [Exhibit G, p. 237], a less potent pain killer than the one Claimant stated he needed in order to continue to work.

5. On April 30, 2014, Claimant was seen by a physician's assistant complaining of "right back, neck, shoulder pain due to carrying heavy objects" four days prior to April 30, 2014, stating that the pain complaints were not caused by work. On May 8, 2014, Claimant was seen by Dr. Evans complaining of "shoulder and neck and arm pain from his exertions on the roof of the house". On May 14, 2014, Claimant again saw Dr. Evans, stating that his injury occurred while working on the roof of a house, "lifting a roll of roofing over a ladder". On June 20, 2014, Claimant told Dr. Evans for the first time that he had right elbow pain "after working as a stocker" but that "things worsened after he hauled a roofing material up a ladder" on April 20, 2014. The medical records do not support Claimant's testimony that he injured his right elbow on April 19, 2014.

6. Claimant’s testimony regarding the report of his injury also is not credible or likely. Claimant testified that he reported the injury to the store manager on April 19, 2014, but the store manager ignored the report of injury. Claimant then testified that he completed a Disability Report on April 28, 2014, which stated his injury was caused by work, and again asked to complete the paperwork for a workers’ compensation injury, but the store manager refused to complete the paperwork because she had concluded that his injury was not caused by work. It is highly unlikely that the store manager would refuse to follow Employer’s established guidelines for reporting a work-related injury.

7. The AJ finds and concludes, considering the totality of the evidence, that Claimant has failed to prove by a preponderance of the evidence that he sustained an industrial injury arising out of and occurring within his employment with Employer.

8. Further, the ALJ finds and concludes that Claimant never informed Employer of any alleged injury until he submitted his Claim for Workers Compensation on 2/29/2016.

9. Because Claimant did not suffer a compensable injury, his Average Weekly Wage on the date of alleged injury is moot.

10. Because Claimant did not suffer a compensable injury, there is no need to address the issue of offsets due to any other disability claims.

11. Because Claimant did not suffer a compensable injury, any penalties sought by employer for failure to timely report this alleged injury are moot.

ORDER

It is therefore ordered that:

I. Claimant's claim for Workers Compensation benefits, including medical benefits and temporary disability, for an injury allegedly occurring in April of 2014 is denied and dismissed.

All matters not determined herein are reserved for future determination.

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

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

DATED: December 21, 2016

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

ISSUES

Has claimant proven by a preponderance of the evidence that he sustained a compensable injury to his right shoulder on January 15, 2016?

STIPULATIONS

1. Claimant' average weekly wage is $868.68.

2. The parties reserved any issues regarding temporary disability benefits.

3. If the Claim is compensable, the surgery performed by Dr. Jones on August 10, 2016 is authorized, reasonable and necessary treatment for the injury.

FINDINGS OF FACT

1. Claimant has worked for Employer since 1998. He was hired as an assembler and subsequently progressed to the position of ASES mechanic. He typically performed tasks such as drilling, riveting, assembling items using hand tools, and putting pre-formed parts together. When drilling, Claimant used a drill press or a hand drill, depending on the specific task being performed.

2. On January 15, 2016, Claimant's work tasks involved assembling helicopter seats. At approximately 1:00 or 1:30 p.m., Claimant developed pain in his right shoulder while drilling holes in the seat frame. By the end of his shift, Claimant was feeling a "fairly good pain" the shoulder. He had no right shoulder pain before starting work on January 15.

3. Claimant recalled the pain beginning during that shift while drilling holes for a seat. He used a hand drill from a standing position, pressing forward toward the seat. The seat was clamped in a holding fixture on a table that was approximately waist-height. The drilling action required Claimant to bend over at the waist with his arms elevated and abducted to approximately 60 degrees. Claimant's face was about level with the height of the drill. A simulation of this activity can be seen in Respondents' musculoskeletal investigation report (Resp. Ex. M). Claimant testified that when he was performing this task, he was bent over a bit more and his arms were extended farther than the individual depicted in the simulation.

4. Each hole drilled by Claimant would take approximately one to two minutes of forcefully pressing forward on the drill to get through the hardened steel. Claimant used a cobalt drill bit for this activity because they were out of carbide drill bits. The cobalt bit being used was not optimal because carbide drill bits are rated for harder steel.

5. Claimant felt pain in his right shoulder immediately after completion of the drilling and mentioned to his co-worker that his shoulder was sore. He did not report the incident to his supervisor that day, because he assumed it was just a sore shoulder which would resolve after a few days of rest.

6. Claimant rested his shoulder, iced it, and took ibuprofen, but the symptoms did not resolve. On January 20, Claimant reported the injury to the Environmental Health and Safety office of Employer. Employer referred Claimant to Dr. Chad Abercrombie with Alliance Health Partners.

7. Dr. Abercrombie initially examined Claimant on January 22, 2016. Regarding the onset of symptoms, Dr. Abercrombie documents "[Claimant] reports operating a drill and pushing with a moderate amount of force when he started having right shoulder pain. He reports the pain was immediate and has since not resolved."

8. Claimant subsequently treated with Dr. Baca at Integrity Urgent Care. His first visit with Dr. Baca was February 17, 2016. On the intake form, Claimant described the mechanism of injury as "drill[ing] through a stainless steel tube, when I had pain in shoulder and arm." In response to the question "how did it happen?" Claimant stated, "applying force to hand drill while drilling tube." Dr. Baca placed Claimant on work restrictions and referred him for physical therapy.

9. Dr. Baca referred Claimant for a right shoulder MRI, which was performed on March 11, 2016. The MRI showed a chronic appearing high-grade partial articular side tear of the subscapularis, moderate long head biceps tenosynovitis, and diffuse fraying of the labrum with partial detachment of the posterior quadrant. There was no significant articular cartilage abnormality.

10. Claimant saw Dr. Christopher Jones for a surgical consultation on March 28, 2016. Claimant described his mechanism of injury as "drilling holes through stainless steel sheeting to install helicopter seats." Claimant reported that "he immediately had pain in his biceps that evening [ ] which he initially thought was just soreness. Ultimately, it continued and did not improve." Dr. Jones recommended surgical repair to include a right shoulder arthroscopy with rotator cuff repair, subacromial decompression, debridement, and bicep tenodesis. Respondents denied the surgery pending an IME.

11. Dr. Jon Erickson performed an Independent Medical Examination (IME) on behalf of Respondents on May 5, 2016. Dr. Erickson stated in his report that Claimant did not recall a specific injury *per se*, but related it was "probably" due to drilling holes in stainless steel tubing.

12. Dr. Erickson opined that the MRI revealed only degenerative conditions and no acute trauma. He opined that Claimant "is a hard-working employee and honest, but his conditions are clearly not related to his work activities." Dr. Erickson relied partially on the musculoskeletal investigation report in offering his opinion. He stated that the primary and secondary risk factors in the report were "found not to apply," and

that the only occupational risk factor that really applies to the shoulder is awkward positions/repetition, which involves prolonged activities at greater than 60 degrees of shoulder flexion/abduction. Dr. Erickson felt the requested surgery was reasonable and necessary, but not work-related.

13. Dr. Timothy Hall performed an IME on behalf of Claimant on August 5, 2016. Dr. Hall was impressed that Claimant "is a good employee and is honest." Based on the information he reviewed, Dr. Hall opined that Claimant's shoulder symptomatology was work-related. Dr. Hall opined the musculoskeletal investigation report was not helpful because Claimant's injury resulted from "specific activity," rather than cumulative trauma. Dr. Hall explained there was a temporal relationship between the event and the onset of symptoms. Claimant's symptoms began at work and were further exacerbated by work activities. The symptoms made sense in the context of the questioned activity as the drilling position put strain on the shoulder. Dr. Hall felt there was also no better explanation for the cause of Claimant's symptoms than the drilling performed on January 15, 2016. Although Claimant's shoulder had degenerative conditions before the work injury, he was asymptomatic. Dr. Hall opined that Claimant's work activities aggravated his underlying pre-existing condition, and caused a previously asymptomatic degenerative condition to become symptomatic.

14. Claimant had a prior history of problems with his shoulder. He had shoulder surgery in 2009, but recovered well and returned to normal activities. He had no significant ongoing right shoulder symptoms after this treatment ended, and no limitations of his right shoulder immediately prior to the work incident on January 15.

15. Dr. Jones performed the right shoulder surgery in August 2016. Claimant's health insurance paid for the surgery.

16. Dr. Hall testified at hearing. His testimony was consistent with the opinions expressed in his IME report. Dr. Hall opined that Claimant's injury was an acute event superimposed on Claimant's degenerative shoulder condition. Dr. Hall stated that Claimant's shoulder was admittedly in bad health before January 15, 2016. Nevertheless, Claimant went to work asymptomatic and left work symptomatic. "[I]t was a specific event that made his asymptomatic situation symptomatic and has necessitated this surgery." In other words, Claimant's work activity on January 15 was "the straw that broke the camel's back, so to speak."

17. Dr. Erickson testified at hearing on behalf of Respondents. He did not recall Claimant reporting a specific incident during his IME examination. Rather, Dr. Erickson understood that the shoulder "had gradually gotten more painful as that day had gone on, and he had significant pain later that day." Dr. Erickson opined that the medical records did not document a specific incident, specifically referring to Dr. Baca's February 17, 2016 note. On cross-examination, the specific language from the February 17, 2016 note was read to Dr. Erickson. He responded, "That sounds to me like a specific event." Dr. Erickson also agreed the first report from Dr. Abercrombie also refers to a specific event. Dr. Erickson agreed that it takes less force to tear an already degenerated rotator cuff than a perfectly healthy one.

18. Claimant's supervisor, Andrew Hoese, testified on behalf of Respondents. Mr. Hoese testified to the accuracy of the musculoskeletal investigation report. He testified it takes approximately 30 seconds to two minutes to drill each hole in the stainless steel tube. Mr. Hoese testified on cross-examination that the cobalt drill bit Claimant was using required more force and longer duration for drilling.

19. Ms. Jody Glunz, the author of the musculoskeletal investigation report, testified by telephone at hearing on behalf of Respondents in her capacity as a board certified ergonomist. She explained that her report focused on ergonomics and engineering to determine if the job duties are potentially injurious. The report focuses on different risk factors, including repetition and force.

20. Ms. Glunz opined that Claimant's job duties were not sufficiently "repetitious" to cause a cumulative trauma disorder. She further testified that the forces applied by Claimant during his drilling were only applied for a short period and did not meet levels she would consider a risk factor for CTD. She concluded there were no risk factors present in Claimant's job duties from a cumulative trauma perspective. On cross-examination, Ms. Glunz conceded that information in her report shows that "partial or complete tears to a rotator cuff tendon are more likely to occur when the rotator cuff is already weakened or damaged."

21. Both Dr. Erickson and Dr. Hall perceived Claimant as "honest." The ALJ shares that impression, and finds Claimant's testimony to be credible.

22. Dr. Hall's opinions are more credible and persuasive than medical opinions in the record to the contrary.

23. Claimant has proven by a preponderance of the evidence that he sustained a work-related injury to his right shoulder on January 15, 2016.

CONCLUSIONS OF LAW

To establish compensability, a claimant must prove by a preponderance of the evidence that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *see also Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The phrases "arising out of" and "in the course of" are not synonymous, and a claimant must meet both requirements. *Younger v. City and County of Denver*, 810 P.2d 647, 649 (Colo. 1991). The "course and scope" requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). Hence, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17 (Colo. 1998).

The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publishing Co*., 552 P.2d 1033 (Colo. 1976). There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment.

An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando, supra*.

A pre-existing condition does not necessarily disqualify a claim. If an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability or a need for medical treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Walmart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). A claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation claim are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

As found, Claimant has proven by a preponderance of the evidence that he injured his right shoulder on January 15, 2016 as a result of his work activities.

Clearly, Claimant's shoulder has significant degenerative changes that predated his injury. But the degenerative pathology was asymptomatic before drilling holes on January 15. Drilling the holes required Claimant to exert force while his right shoulder was in an awkward position. Dr. Hall persuasively opined that the pre-existing degenerative changes made Claimant "more susceptible" to injury. This helps explain why Claimant's shoulder became symptomatic as a result of activities that might, at first blush, appear relatively benign.

Claimant credibly testified that he experienced the onset of symptoms while drilling the holes. Although temporal proximity alone does not automatically establish causation, it does suggest a causal relationship. In combination with other evidence of record, the ALJ finds the clear temporal relationship between the onset of symptoms and Claimant's work activities to be a persuasive factor in favor of compensability.

Dr. Erickson is undoubtedly correct that any number of activities *could have* caused Claimant's shoulder to become symptomatic. But the activity that triggered Claimant's symptoms on January 15, 2016 was a work-related job task within the course and scope of his employment. As such, the Claimant's injury had its origins in a work-related function and is compensable.

ORDER

It is therefore ordered that:

1. Claimant’s January 15, 2016 injury to his right shoulder is compensable.

2. Respondents shall provide all reasonable and necessary medical treatment for Claimant’s right shoulder injury, including reimbursement to Claimant for any out-of-pocket expenses, and any expenses paid by Claimant’s health insurance carrier for the surgery performed by Dr. Jones.

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

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

DATED: December 22, 2016

s/Patrick C.H. Spencer II

Patrick C.H. Spencer II
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant has sustained his burden of proving that his death from a fatal heart attack occurring on June 16, 2012 is compensable under the Workers' Compensation Act of Colorado.

II. If this claim is compensable, whether the surviving spouse was wholly or partially dependent upon Claimant for support at the time of his death, in order to calculate her death benefits as either a whole or partial dependent, under the Workers' Compensation Act of Colorado.

STIPULATIONS

At hearing, the parties agreed that the statute of limitations did not begin to run until the Employer flied the First Report of Injury on February 12, 2015. As a result, the parties agreed that this claim is not barred by the statute of limitations set forth in C.R.S. 8-43-103.

FINDINGS OF FACT

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

1. Claimant became employed with the Pueblo County Sheriff's Office on January 25, 1994 and remained employed with this employer until his death on June 16, 2012. (Resp's Exh. A)

2. Beginning in approximately 2011, Claimant was assigned by Sheriff Kirk Taylor to the position of Inspector for the Office of Professional Standards. Inspector, Claimant reported directly to Sheriff Kirk Taylor and Undersheriff J.R. Hall. In his role as Inspector, Claimant was responsible for matters that were commonly known as internal affairs.

3. In addition to his other employment duties, Claimant became a member of the employer's SWAT team in approximately 1996. In approximately 2010, Claimant became a SWAT team leader, which is a leadership position in the SWAT team. As a SWAT team leader, Claimant helped coordinate and engaged in SWAT trainings on average two full days a month. These trainings were held all year around, including in the summer months, and usually involved the SWAT team members wearing their full protective gear. In addition to SWAT trainings, Claimant would respond to SWAT calls as a member of the SWAT team whenever available. Although the testimony of various employer witnesses

varied regarding the average frequency of SWAT calls, the testimony as a whole reflects that SWAT calls occurred on average approximately once every one to two months per year.

4. Mrs. Watts testified at hearing that she and Claimant were high school sweethearts and got married on August 11, 1979. Mrs. Watts further testified that they were still married at the time of Claimant's death and had never been separated during that period of time.

5. Mrs. Watts testified that prior to his death, Claimant worked out, ran and "lifted huge" and was never sick. Mrs. Watts testified that, before Claimant passed away, she was not aware of Claimant having any type of heart conditions or disease.

6. Mrs. Watts testified that Claimant had a regular workout schedule and was very disciplined about his workout routine. On Mondays, Wednesdays and Fridays Claimant would lift weights and do sit ups, pushups and other calisthenics in the basement for approximately one hour. Then on Tuesdays, Thursdays, Saturdays and more than likely Sundays, Claimant would jog three to four miles. Claimant would jog regardless of the weather and would jog no less than three miles on each occasion. In addition, in the summer months, Claimant would swim about twice a week in their pool. Mrs. Watts testified that Claimant maintained a regular exercise routine for many years, and that Claimant had been working out and exercising regularly ever since they were in high school.

7. On May 10, 2012, Claimant responded with other SWAT team members to a call involving a hostage situation and a suicidal male. During this incident, Claimant was able to reach into the residence and grab the hostage, who was the suspect's elderly mother. It was estimated that this woman weighed approximately 90-100 pounds. Claimant ran while carrying this woman to a medical vehicle that had been set up approximately 50-100 yards away. Claimant delivered the woman to the medical personnel who were attending the vehicle before returning to the residence to continue assisting the other SWAT team members. At one point, the suspect was seen descending the staircase while brandishing a shotgun a short distance from the front door where Claimant and some other SWAT team members were stationed. Following the firing of bean bags by Lieutenant Kindred and the use of a flash bang diversionary device thrown by Claimant, the suspect was tackled and taken into custody and the situation was defused.

8. J.R. Hall testified that he is the Undersheriff of Pueblo County. Undersheriff J.R. Hall testified that he was present at the May 10, 2012 SWAT call, Undersheriff Hall testified that he was at the traffic control point with the medical vehicles and that he saw Claimant running toward them while carrying the suspect's elderly mother. Undersheriff Hall testified that when Claimant arrived, he observed Claimant to be breathing hard and sweating. However, Undersheriff Hall testified

that he was also sweating even though he wasn't wearing any tactical gear as it was a warm day. Undersheriff Hall's testimony indicates that he was only able to observe Claimant for a very short period of time as Claimant left to return to the scene where the suspect was located before he had time to recover.

9. Clifford Kindred testified that he is a Lieutenant Day Shift Watch Commander for the Pueblo County Sheriff's Office. At the time of the May 10, 2012 SWAT call, he was also a member of the SWAT team. J.C. Williams testified that he is employed as a Detective for the Pueblo County Sheriff's Office. Detective Williams is also a member of the SWAT team. Lieutenant Kindred and Detective Williams both responded to the SWAT call on May 10, 2012 and worked as a team together with Claimant during the call.

10. Lieutenant Kindred testified that the incident was stressful and stood out in his mind as one of the more significant events in his seven or eight years of being on the SWAT team. Detective Williams testified that his adrenaline and stress levels were very high during this incident and that this incident was among his top five most stressful incidents in his eight-year SWAT team career. .

11. Similarly, Undersheriff Hall testified that in his thirty years of working in law enforcement, he had never actually observed this type of human rescue where the person is carried out, as opposed to a barricaded incident. Undersheriff Hall agreed that the May 10, 2012 SWAT incident was stressful.

12. Lieutenant Kindred, Detective Williams and Captain Swearingen all agreed that there is a difference in stress and adrenaline levels between doing trainings versus being called out to an actual incident.

13. Mrs. Watts testified that following the May 10, 2012 SWAT call, Claimant was very angry at how the team had handled the call. Mrs. Watts testified that Claimant appeared stressed and told her that he was going to go home rather than go back to work, that he was really tired and that it had been a very stressful call. Mrs. Watts also testified that it was not typical for Claimant to go home from work early. Mrs. Watts testified that Claimant became even more aggravated as a result of the debriefing that occurred one day after the call. Mrs. Watts also testified that she first noticed that Claimant was sweating more the day following the call when Claimant went to the debriefing.

14. During the four to six weeks following the May 10, 2012 SWAT call, Mrs. Watts testified that Claimant did not stay outside with her and her daughters when they were playing at their outdoor pool, as he usually did, because he was so hot. Mrs. Watts also noticed that Claimant would get up at night and stand by the window because he was feeling so hot. In addition, Mrs. Watts testified, Claimant complained of having more than his usual amount of indigestion after the May 10, 2012 SWAT call. Prior to the call, Claimant would drink a glass of chocolate milk to treat his indigestion symptoms. After the May 10, 2012 call,

Claimant began buying and taking antacids to treat his indigestion symptoms. Mrs. Watts estimated that Claimant was buying antacids approximately every three days on his way to work. Mrs. Watts testified that the agitation, sweating and indigestion that Claimant had during the weeks following the May 10, 2012 SWAT call were unusual for Claimant.

15. Tracey Swearingen testified that he is employed by the Pueblo County Sheriff's Office as Captain of the Emergency Services Bureau and he also serves as the SWAT team commander. Captain Swearingen testified that he and Claimant attended a community event at City Park in Pueblo on June 15, 2012, the day before Claimant's death. The event is to bring the community out to see their gear and law enforcement tools that they have displayed, and to allow the community to get to know them outside of a bad situation. On that day, Claimant drove the van carrying their equipment from the annex where they keep the van into the park. Claimant and Captain Swearingen then unloaded the gear and set it out for display so that it could be seen and viewed. Captain Swearingen testified that they did not have to carry the gear very far when unloading it and setting it out for display. Captain Swearingen further testified that Claimant may have put on a tactical vest in order to demonstrate it for a short time, but otherwise they did not don their tactical gear or equipment that day. Captain Swearingen testified that they did not demonstrate or perform any physically strenuous activities at the park that day, and that there was no unusually stressful work activity that occurred that day. Captain Swearingen also testified that it was not an unusually hot day. Nevertheless, Captain Swearingen testified that Claimant spent most of the time sitting in the van with the air conditioner on, which was unusual for Claimant. Captain Swearingen testified that Claimant was not his usual self that day, and that he was not as talkative with him as he usually was on that day. Captain Swearingen testified that he attended the entire event at the park on June 15, 2012 together with Claimant.

16. Mrs. Watts testified that the day before Claimant passed away, she went during her lunch hour to bring lemonade to Claimant and Captain Swearingen at City Park, where they were participating in a drug safety community event. Mrs. Watts testified that when she arrived, Claimant was sitting in his car with the air conditioning on. Claimant complained to her of being hot and not being able to cool down. Claimant took Mrs. Watts on a tour but declined an offer by a mounted officer to ride one of the horses. Mrs. Watts testified that Claimant did not appear to be feeling well that day.

17. Mrs. Watts testified that on the evening of the day before Claimant died, they had dinner at a restaurant to celebrate Father's Day. Mrs. Watts testified that Claimant was really tired and decided to go home after dinner instead of going with his daughters to a sporting goods shop, which is something that he liked to do. Upon arriving home, Mrs. Watts testified that Claimant watched a television show that he liked to watch and then went to bed at approximately 9:00 p.m.

18. Mrs. Watts testified that at about 6:15 a.m. on the morning of June 16, 2012, she saw Claimant sitting on the back patio cooling down, as was his habit following his runs. Mrs. Watts further testified that Claimant later came in the house and she noted that he was sweating "really bad". Claimant said to her, "I just can't cool down" and asked her for a large glass of ice water, which she gave to him. Mrs. Watts testified that she asked Claimant what time he had to meet with the Secret Service, and Claimant responded, "When they call. You're on their time schedule. So as soon as they call, you leave." However, given that it was early in the morning and that Claimant had decided to leave to go for a run, after which he was planning to take a shower before going to work, Claimant reasonably believed that he had some time before the Secret Service would be calling him that day.

19. Mrs. Watts testified that she then went upstairs to get dressed but came back downstairs upon hearing a noise and found Claimant collapsed in a chair. Mrs. Watts testified that she called 911 and also ran across the street to get the help of some neighbors, who came and started administering CPR on Claimant. Mrs. Watts testified that the ambulance arrived and that Claimant was shocked three times in the kitchen before he was taken to the hospital. After arriving at the hospital, Mrs. Watts testified, she was placed in a little room and then was later informed by the doctor that Claimant had passed away.

20. Undersheriff Hall testified that Claimant was to be on a special assignment on June 16, 2012 to meet with the Secret Service to prepare for a visit by the first lady later that week. Undersheriff Hall testified that the Secret Service was supposed to arrive around noon, and that that was when Claimant was supposed to meet with them. Undersheriff Hall further testified that although Claimant would have been paid during the time he was meeting with the Secret Service, he was not "on the clock" and was not being paid for his time at the time he suffered his fatal heart attack on June 16, 2012.

21. Mrs. Watts testified that even after the May 10, 2012 SWAT call, Claimant maintained his regular exercise routine and exercise schedule right up until the day he passed away. In addition, Mrs. Watts testified that on the morning of his death, June 16, 2012, Claimant actually jogged six miles instead of his usual three to four miles because he had just brought a bunch of young guys onto the SWAT team and he "wasn't going to let them beat him."

22. Captain Swearingen testified that between the May 10, 2012 SWAT call and Claimant's death on June 16, 2012, he did not notice any physical changes or anything unusual about Claimant other than the day that they attended the community event at the park on June 15, 2012.

23. Shonna Cruz Gutierrez testified that she is employed by the Pueblo County Sheriff's Office as an Employee Leave Technician in Human Resources. Ms. Gutierrez testified that, although she and Claimant worked in different capacities,

Claimant's office was right down the hall from her office so she saw him on a fairly daily basis and engaged in passing office interactions with him. Ms. Gutierrez testified that in the months leading up to Claimant's death on June 16, 2012, she did not recall ever noticing that Claimant looked unwell or unusual.

24. Kirk Taylor testified that he is the elected Sheriff of Pueblo County and has been so since January of 2007. Sheriff Taylor testified that Claimant's office was very close in proximity to the Undersheriff's and his offices and that he saw Claimant on a relatively daily basis before Claimant passed away. Sheriff Taylor testified that in the months leading up to his death on June 16, 2012, Claimant never said anything to him about not feeling well, nor did he ever observe Claimant looking unusual or unwell during that time period.

25. Undersheriff Hall testified that during the time that Claimant was an Inspector, he worked closely with Claimant and saw Claimant every day that both he and Claimant were at work. Undersheriff Hall testified that during the last few months before his death on June 16, 2012, Claimant did not complain to him of any health problems and he did not notice anything unusual about Claimant's appearance or condition during that time. After Claimant passed away, Undersheriff Hall assisted in cleaning out Claimant's office and testified that he observed some over the counter heartburn medication in Claimant's office. However, he had never seen him take such medication.

26. James A. Wilkerson, IV, M.D., is a forensic pathologist who conducted an autopsy of Claimant on June 17, 2012. Dr. Wilkerson produced an autopsy report that he signed on July 10, 2012. (Resp's Exh. E) In his autopsy report, Dr. Wilkerson described his findings of the cardiovascular system as follows:

> The pericardial surfaces are smooth, glistening, and unremarkable; the pericardial sac is free of significant fluid or adhesions. The coronary arteries arise normally, follow the usual distribution, and are generally widely patent with moderate atherosclerosis but no thrombosis. In the left circumflex coronary artery there is moderate to severe stenosis. No thrombosis is seen. The chambers and valves exhibit the usual size-position relationship and are unremarkable. The myocardium is dark red-brown, firm, and remarkable for lateral left ventricle fibrosis consistent with a remote myocardial infarction. The atrial and ventricular septa are intact. The left ventricular free wall is thickened. The aorta and its major branches arise normally, follow the usual course, and are widely patent, free of significant atherosclerosis, tears, aneurysms or other abnormality. The vena cava and its major tributaries return to the heart in the usual distribution and are free of thrombi. The enlarged heart weighs 540 grams. (Resp's Exh. E., p. 21)

Regarding his findings on microscopic examination, Dr. Wilkerson noted the following:

> Coronary artery sections show moderate to high-grade stenosis with atherosclerotic plaque. Within one of the plaque sections there is recent and acute hemorrhage. Sections of the myocardium show areas of perivascular and perifascicular fibrosis with some enlarged myocytes. There are also some larger areas of fibrosis. Some of the fibers show wavy fiber change but no definitive necrosis or inflammatory infiltrates are seen. Rare areas of immature fibrosis are also present. (Resp's Exh. E, p. 23)

27. Dr. Wilkerson summarized his autopsy findings as follows:

> I. Hypertensive atherosclerotic cardiovascular disease:
> A) Cardiomegaly (540 grams)
> B) Moderate stenosis of most coronary arteries
> C) Severe stenosis of left circumflex coronary artery
> D) Recent and remote lateral left ventricle myocardial infarction
> E) Sudden cardiac death
>
> II. Pulmonary congestion
>
> III. Toxicology:
> A) Urine drug screen: Negative
> B) Ethanol, whole blood: None detected

(Resp's Exh. E, p. 18) Regarding the cause of death, Dr. Wilkerson concluded that Claimant died of hypertensive atherosclerotic cardiovascular disease with sudden cardiac death. (Resp's Exh. E, p. 18)

28. Dr. Wilkerson testified at a deposition prior to hearing. Dr. Wilkerson testified that included in the information he received from the Coroner prior to conducting the autopsy was that Claimant's father and uncle had cardiovascular disease, but that Clamant had no known cardiovascular disease. Dr. Wilkerson testified that Claimant's height and weight at the time of autopsy were 5'8" and 212 pounds. Dr. Wilkerson testified that that would be considered overweight, although not necessarily obese.

29. Regarding some of the notable autopsy findings of Claimant's cardiovascular system, Wilkerson noted that Claimant had atherosclerosis, which is the deposition of fatty material into the wall of the coronary artery, in all three of his main coronary arteries. While most of it was moderate, meaning that 40-60% of the lumen of the vessel is blocked, one of the vessels, *the left circumflex coronary artery, had severe stenosis,* which Dr. Wilkerson testified meant greater than a 60% blockage of the vessel.

30. Dr. Wilkerson also testified that Claimant had an enlarged heart. While the heart of a man of Claimant's size should have probably weighed no more than about 400 grams, Claimant's heart weighed 540 grams. Dr. Wilkerson testified that Claimant probably developed the enlarged heart and that it was most likely related to hypertension. Dr. Wilkerson explained that, although hypertension did not give you symptoms, it is a condition that they treat because it causes your heart to work harder, which then causes your heart, like any muscle that is working, to get bigger. Dr. Wilkerson testified that anytime you have a heart that big, it requires more oxygen. The problem, however, is that the heart has a limited blood supply, so if it gets too big, it outgrows its blood supply. Then if you have atherosclerosis, it compounds the problem even worse. Dr. Wilkerson testified that *Claimant's enlargement of the heart is something that would have taken months or years to develop.*

31. Dr. Wilkerson testified that another finding on autopsy was a focus of scarring or fibrosis in the lateral left ventricle, *which constituted an old scar and was consistent with an old heart attack that has healed.* Dr. Wilkerson testified that the scarring was in the vascular distribution of the *severe stenosis* from the left circumflex coronary artery. Dr. Wilkerson testified that this finding indicated that Claimant most likely had had a myocardial infarction or heart attack where the muscle did not get enough oxygen and died and then formed a scar in the past. Dr. Wilkerson testified that he was not able to tell the age or timeline of this prior cardiac event by looking at this particular scar, other than that *it was older than 4-6 weeks.*

32. In contrast to the age of the old scar, Dr. Wilkerson testified that *the few rare areas of immature fibrosis seen on microscopic exam probably occurred within 4-6 weeks of Claimant's death.* Dr. Wilkerson testified that these were smaller areas of immature fibrosis that represented small, little healing heart attacks that occurred not right before Claimant's death, but probably within 4-6 weeks of his death. Dr. Wilkerson explained that they were areas of fibrosis and scarring that had not yet formed the final scar. Dr. Wilkerson further testified that the cause of these areas of immature fibrosis would be called myocardial infarctions, or death of the tissue due to lack of oxygen.

33. Dr. Wilkerson testified that, based on the history that he received, the only indication that might suggest that Claimant might have been having symptoms of a heart attack before he died was the fact that he had been having what he thought was indigestion or heartburn. Regarding findings that one might see on autopsy that might indicate whether someone was having indigestion, Dr. Wilkerson testified that sometimes you can see changes in the esophagus, although it is pretty non-specific. Dr. Wilkerson testified that he did not note any changes indicative of indigestion during Claimant's autopsy.

34. Regarding his opinion as to the cause of Claimant's death, Dr. Wilkerson testified that *Claimant died of hypertensive atherosclerotic cardiovascular disease* with

sudden cardiac death. Dr. Wilkerson explained that sudden cardiac death means a cardiac issue within an hour of onset. Dr. Wilkerson further testified that he believes the cause of Claimant's death to be the *underlying disease*. Dr. Wilkerson testified that *sudden cardiac death due to hypertensive atherosclerotic cardiovascular disease is by far the most common cause of death in the United* States today. In addition, Dr. Wilkerson testified, Claimant was in an age group where is occurs pretty regularly.

35. On cross examination, Dr. Wilkerson agreed that Claimant's lab tests from August 14, 2001 and May 1, 2009 showed that *Claimant already had risk factors for coronary artery disease* as of the dates of those tests. Specifically, Claimant had a low HDL cholesterol and elevated triglycerides, which Dr. Wilkerson testified were independent risk factors for coronary artery disease. (Resp's Exh.s I and K). Dr. Wilkerson also testified that Claimant had additional independent risk factors for coronary artery disease and heart attack, including hypertension, being overweight and a family history of heart disease in his father and uncle.

36. In addition to risk factors, Dr. Wilkerson testified that there was evidence indicating that Claimant had actual coronary artery disease at the time of his death. This evidence included the atherosclerosis seen in all of Claimant's major coronary arteries and the enlarged heart. Dr. Wilkerson opined that, based on what he has seen, *Claimant had coronary artery disease for a significant period of time, most likely years, prior to his death.*

37. Dr. Wilkerson testified that the sudden cardiac death in this case was caused by a lack of oxygen to Claimant's heart, and that most likely it was a sudden lack of oxygen to the heart. Dr. Wilkerson also testified that more likely than not, the sudden cardiac death was triggered by the run that he went on earlier that morning. Dr. Wilkerson agreed that he could not say, within a reasonable degree of medical probability, that had Claimant not gone on a run on the morning of June 16, 2012, he would have died that day anyway as a result of whatever heart damage he may have suffered prior to June 16, 2012. Dr. Wilkerson also testified that he could not say, within a reasonable degree of medical probability, that had Claimant not had the prior myocardial infarctions or "microinfarctions", that he would or would not have died after going for his run on June 16, 2012.

38. Although Dr. Wilkerson testified that what was identified as the "microinfarctions", or the few areas of immature fibrosis that were consistent with small healing heart attacks, could *possibly* have played a role in Claimant's eventual cardiac arrest, at no point did Dr. Wilkerson state this opinion to a reasonable degree of medical probability. Nor did Dr. Wilkerson ever state that this was more likely the case than not. In fact, when specifically asked whether he could state this opinion within a reasonable degree of medical *probability*, Dr. Wilkerson responded by stating that he could only say it was *possible*. Dr. Wilkerson's testimony regarding the possible relationship between the "microinfarctions" and

the sudden cardiac arrest on June 16, 2012 does not satisfy the preponderance of the evidence standard of proof that applies to this claim.

39. John A. Boerner, M.D., is a cardiologist who conducted a record review Independent Medical Evaluation on Claimant's behalf. Dr. Boerner issued an initial 2-page undated IME report (Resp's Exh. D), as well as a supplemental report dated October 14, 2016 following review of Dr. Hutcherson's deposition testimony. Dr. Boerner also testified at a deposition prior to hearing.

40. Dr. Boerner testified that, based on the medical records that he reviewed, which included the lab reports dated August 13, 2001 and April 30, 2009, Claimant had a number of risk factors for cardiovascular disease. These risk factors were also listed in Dr. Boerner's IME report and included borderline hypertension, male sex, borderline age, family history, mildly abnormal coronary risk, lipid profile (dyslipidemia) and mildly elevated triglycerides, and mildly overweight. Dr. Boerner testified that while Claimant's risk profile was abnormal, it was not strikingly abnormal and placed him at a borderline level as to whether he should have been treated. However, Dr. Boerner did testify that Claimant's family history of coronary disease was significant because it is a major risk factor for coronary disease and would have made him more aggressive in terms of trying to go after it. Dr. Boerner agreed that, *with the possible exception of the hypertension, which could be related to stress, all of these risk factors were personal to Claimant and were not work-related.*

41. Dr. Boerner agreed that the actual coronary artery disease that Claimant was found to have was significant, and that he *likely had that coronary artery disease for more than six months, and probably more than a year, before his death.*

42. Dr. Boerner opined that the cause of Claimant's death on June 16, 2012 was a ventricular fibrillation arrest. Dr. Boerner also testified that he agreed with Dr. Wilkerson's conclusion regarding the cause of death, which he understood as being a ventricular arrhythmia in the setting of hypertensive cardiovascular disease.

43. Regarding Dr. Wilkerson's testimony as to the 4-6 week timeframe of scar formation for purposes of dating the time of a heart attack, Dr. Boerner testified that he had no reason to doubt Dr. Wilkerson's testimony. However, Dr. Boerner also testified that he could not personally comment on the accuracy of this testimony as he was not personally familiar with the pathology literature regarding this.

44. Dr. Boerner agreed in general that the presence of the areas of *immature fibrosis* seen by Dr. Wilkerson on his microscopic autopsy exam alluded to some relatively *recent* heart damage and heart muscle death, or heart attack, within the six weeks prior to Claimant's death.

45. Based on his review of deposition testimony from the employer witnesses, Dr. Boerner testified that he would consider the May 10, 2012 SWAT call to be an event that would increase Claimant's chances of having a heart attack. Dr. Boerner testified that this was particularly so in view of the subsequently documented coronary disease that Claimant was discovered to have at that time.

46. Dr. Boerner agreed that there was *no way to know the actual amount of heart muscle damage that existed in Claimant's heart* ***prior to*** *the May 10, 2012 SWAT incident.* Similarly, Dr. Boerner agreed that there was no way to know how much *additional damage* ***may*** have been done to the heart muscle as a result of the SWAT incident.

47. Dr. Boerner testified that he reviewed information provided by Mrs. Watts that indicated some symptoms that Claimant was experiencing following the May 10, 2012 SWAT call. The symptoms included complaints of indigestion and feeling hot and sweaty. Dr. Boerner also noted the reports of the symptoms that Claimant was exhibiting at the event the day before his death, such as again feeling hot and sweaty, not feeling well, and staying in the van to cool off, and that it was later found that Claimant had over-the-counter heartburn medication in his office. Dr. Boerner testified that reviewing the information as a whole, he believed that Claimant's symptoms were cardiac in origin rather than indicative of any GI pathology.

48. Dr. Boerner testified that, **if** indeed May 10, 2012 was the onset of Claimant's symptoms, he could say with a reasonable degree of medical probability that the event on May 10, 2012 was a cardiac event of significant myocardial ischemia, and that Claimant's major infarction probably occurred that day. Dr. Boerner testified that *"he wondered* ***if"*** Claimant was a *"fast scar former".* If so, he may have completed the scar formation from this event within the five weeks between May 10, 2012 and his death, and the old fully healed scar seen by Dr. Wilkerson on autopsy was from a major infarction that occurred with the SWAT incident on May 10, 2012. Dr. Boerner further opined that Claimant likely suffered subsequent microinfarctions in the following five weeks until his death, seen as areas of immature fibrosis on autopsy, and that these subsequent microinfarctions occurred either spontaneously or with lesser exertions. Dr. Boerner did not identify what any of these lesser exertions might be or whether they would be work related in any way. Dr. Boerner also acknowledged that it *was possible that Claimant may have had a heart attack* ***prior to*** *May 10, 2012 that resulted in heart muscle damage and the formation of the old fully healed scar seen on autopsy,* and that Claimant may simply not have noticed or not reported symptoms at the time.

49. Dr. Boerner testified that in the presence of scarred heart muscle, it was more likely that an episode of myocardial ischemia would cause primary arrhythmias, ventricular fibrillation and sudden cardiac death than if there were no previous heart attack or other heart damage present. Dr. Boerner explained that this was

due to disruption of the normal electrical flow of the electrical energy passing through the heart.

50. Dr. Boerner testified that in this case, Claimant's ventricular fibrillation arrest resulted from a combination of a previous heart attack and continuing ongoing myocardial ischemia due to untreated coronary disease.

51. Regarding the finding by Dr. Wilkerson of a recent and acute hemorrhage seen on microscopic autopsy exam, Dr. Boerner agreed that such hemorrhage would indicate a recent plaque rupture. Dr. Boerner testified that he did not know whether the plaque rupture and hemorrhage occurred at the time of Claimant's run on the day of his death, or whether it occurred in the day or days before his death with Claimant then becoming ischemic during his run on the morning of June 16, 2012 because of the worsening obstruction caused by the plaque rupture. However, Dr. Boerner testified that aside from the run on June 16, 2012, he was unaware of any other event that would have likely been the cause of the plaque rupture and recent and acute hemorrhage seen on autopsy. Dr. Boerner also testified that it would be speculative to say that, even if Claimant had not gone on his run on the morning of June 16, 2012, he would have died that day anyway as a result of any damage that occurred to his heart at the time of the May 10, 2012 SWAT call.

52. Dr. Boerner testified that, for reasons that are not yet fully understood, it happens that people who become acutely ischemic during exercise tend to get arrhythmias post exercise as opposed to during the exercise, as happened in Claimant's case. In other words, Claimant may have died because he was ischemic from running even though he did not die while he was actually running.

53. Dr. Boerner testified that, had Claimant presented to him between May 10, 2012 and his date of death on June 16, 2012, he believed that he would have done a cardiac cath and an angioplasty, and that Clamant would be alive today. Dr. Boerner also agreed, however, that the fact that the outcome may have been different had Claimant been treated did not affect or change the actual cause of Claimant's sudden cardiac arrest.

54. John D. Hutcherson, M.D., is also a cardiologist who conducted a record review Independent Medical Evaluation, but at the request of Respondents. Dr. Hutcherson issued an IME report dated August 5, 2016. (Resp's Exh. C) Dr. Hutcherson also testified by post-hearing deposition and issued a supplemental response report (in response to Dr. Boerner's October 14, 2016 supplemental report) dated October 24, 2016.

55. Dr. Hutcherson agreed with the testimonies of Dr. Wilkerson and Dr. Boerner that Claimant had several risk factors for coronary artery disease seen as far back as 2001, that he likely had actual coronary artery disease for at least a year, if not

years, before his death, and that the amount of coronary artery disease seen on autopsy was significant.

56. Dr. Hutcherson disagreed with Dr. Boerner's opinion that Claimant may have been a fast healer and that the old, fully healed scar seen on autopsy may have been the result of a major infarct that occurred just five weeks prior to death at the time of the May 10, 2012 SWAT call. Dr. Hutcherson testified that, in light of Dr. Wilkerson's description of this fibrotic tissue as a *"totally healed scar"* he understood the scar to be *fully healed and a fully fibrotic scar.* As such, Dr. Hutcherson testified that he would *estimate the age of the scar to be over six months.* Regarding the description of the scar as "dense", Dr. Hutcherson testified that "dense" in this context would mean that it's fairly dense fibrous tissue, there's very little heart muscle left, that it's contracted and has become smaller and more dense. Dr. Hutcherson further testified that the denser a scar is, the older it is.

57. Dr. Hutcherson agreed with the testimony of Dr. Boerner that it is possible for someone to have a heart attack and not have any symptoms from it (referred to by Dr. Boerner as a "silent MI"). Dr. Hutcherson further testified that in this case, the old fibrotic fully healed scar tissue seen on autopsy *could* have been from a prior heart attack *from which Claimant did not have any symptoms.*

58. Rather than causing the older fibrotic tissue, Dr. Hutcherson agreed with Dr. Wilkerson that the May 10, 2012 SWAT incident, perhaps in combination with an episode of loading and unloading some equipment one or two days prior to the SWAT call, could have caused a coronary event that led to the areas of immature fibrosis that he (Dr. Wilkerson) estimated to be approximately 4-6 weeks old at the time of Claimant's death. Dr. Hutcherson testified that he did not see anything in Dr. Wilkerson's autopsy report or testimony that indicated to him that Dr. Wilkerson believed that the old, fully healed fibrotic scar tissue could have been the result of the May 10, 2012 SWAT call. Dr. Hutcherson also testified that the old fully healed scar may have involved a small branch, and that the newer areas of immature and healing fibrosis involved more disease than the old scar.

59. Like Dr. Boerner, Dr. Hutcherson agreed with Dr. Wilkerson's assessment regarding the cause of Claimant's death, namely, hypertensive atherosclerotic cardiovascular disease with sudden cardiac death.

60. Dr. Hutcherson also agreed with both Dr. Wilkerson and Dr. Boerner that Claimant's sudden cardiac death was caused by a sudden lack of oxygen to his heart (as described by Dr. Wilkerson) and/or an acute decreased blood supply (as stated by Dr. Boerner). Dr. Hutcherson explained that blood carries oxygen such that blood and oxygen supply go hand-in-hand.

61. Regarding Dr. Boerner's testimony, that the recent plaque rupture leading to the recent and acute hemorrhage seen on autopsy could have occurred either on the morning of the June 16, 2012 run, or a short time before with the run then causing the ischemia in the presence of the decreased blood supply due to worsening of the obstruction because of the plaque rupture, Dr. Hutcherson testified that in either case, the triggering event that led to the ischemia-induced ventricular fibrillation arrest was the run on the morning of his death. Dr. Hutcherson testified that the run on June 16, 2012 was the triggering event regardless of exactly when the plaque rupture and hemorrhage began.

62. Dr. Hutcherson recalled Dr. Boerner's opinion that Claimant's ventricular fibrillation arrest on June 16, 2012 was the result of the previous heart attack combined with ongoing myocardial ischemia due to untreated coronary artery disease. Dr. Hutcherson agreed with Dr. Boerner that the ongoing myocardial ischemia that occurred in the weeks leading up to Claimant's cardiac arrest was due to untreated coronary disease. Dr. Hutcherson testified that the cause of the untreated coronary disease, aside from the obvious lack of medical care and failure to seek treatment, was the same group of risk factors that Claimant had had for much of his life, including gender, age, weight with an increased BMI, hypertension which was poorly followed and which produced several pretty significant levels, abnormal lipids, and family history with his father and uncle having had heart trouble. In terms of risk factors, Dr. Hutcherson testified that the only factors that Claimant was missing were smoking and diabetes. Dr. Hutcherson testified that Claimant's risk factors were not work-related. Dr. Hutcherson further clarified that, although he had commented in his IME report that of Claimant's coronary risk factors, only the hypertension appeared to be work-related (Resp's Exh. C, p. 14), what he meant by this statement was that hypertension was the only risk factor that he could possibly relate to Claimant's work activities. Dr. Hutcherson testified that he did not, in fact, know what Claimant's blood pressure was at work or whether he would consider Claimant's blood pressure to in fact be work-related. Dr. Hutcherson agreed that the symptoms that Claimant purportedly experienced during the weeks leading up to his cardiac arrest were coronary in origin given that the autopsy showed that Claimant's esophagus and stomach were "clean".

63. Dr. Hutcherson testified that, whatever the extent of heart damage that was caused by the May 10, 2012 SWAT call (and/or the carrying of equipment around that time), such damage did not cause Claimant's cardiac arrest on June 16, 2012, although it may have contributed to it. Dr. Hutcherson testified that, ***if*** *the damage from the events of early May 2012 were the cause of Claimant's cardiac arrest, he would have expected the cardiac arrest to occur sooner than five weeks later.*

64. Dr. Hutcherson testified that the fact that Claimant continued to perform his normal activities between the May 10, 2012 SWAT call and his June 16, 2012 cardiac arrest, including his daily workout routine and his regular work duties,

indicated that Claimant's heart condition was not bad enough during those five weeks to cause a significant enough cardiac event or increase in symptoms to make Claimant modify his normal activities. Dr. Hutcherson further testified that the six-mile run that Claimant did on the morning of June 16, 2012 was the precipitating factor that caused Claimant's cardiac arrest. In addition, Dr. Hutcherson testified that he could not say that, had Claimant not gone on the run on the morning of June 16, 2012, he would nevertheless have died that day anyway as a result of his heart condition at that time.

65. Dr. Hutcherson testified that the areas of immature and healing fibrosis that were seen on autopsy could have been the site where the rhythm disturbance started. However, Dr. Hutcherson also noted that there were findings of some hemorrhage and plaque problems lower down in the vessel. Dr. Hutcherson testified that he could not say definitely where the ventricular fibrillation started because it begins all over the ventricle. Dr. Hutcherson further testified that in his opinion, *what played a **larger** role in Claimant's death than the areas of immature fibrosis was the severity of the atherosclerosis of the vessels and the status of the coronary artery disease and obstructive disease.*

66. Regarding the community event at the park on June 15, 2012, Dr. Hutcherson testified that he did not see anything that indicated to him that a significant cardiac event occurred that day (other than ongoing cardiac-related symptoms). Dr. Hutcherson also testified that the events at the park on June 15, 2012 were not significant in terms of causing the cardiac arrest the following day.

67. Dr. Hutcherson testified that, had Claimant presented to him and undergone treatment during the time between the May 10, 2012 SWAT call and his cardiac arrest, there is a 95% chance that Claimant would have survived for another few years after June 16, 2012, and a 75% chance that Claimant would have still been alive at the time of the hearing.

68. In his October 14, 2016 supplemental report, Dr. Boerner wrote: "His death on June 15 (sic) was not caused by a new acute MI, but by ischemia induced by exercise in a patient with severe, untreated coronary artery disease, in the setting of prior scar from an antecedent MI. Both the scar and the acute ischemia were instrumental in inducing the fatal arrhythmia." However, Dr. Boerner had also testified that he could not say that Claimant would have died on June 16, 2012 as a result of the heart condition that he had at that time had Claimant not gone on the run earlier that morning. The evidence also indicates that Claimant likely had the old fully fibrotic scar for more than six months, and perhaps longer, and that it was not causing any symptoms or interference with Claimant's activities throughout that time. Although Dr. Boerner opined that the old scar may have been caused by a cardiac event that occurred at the time of the May 10, 2012 SWAT incident, both Dr. Wilkerson and Dr. Hutcherson opined that the May 10, 2012 SWAT call may have been the cause of the newer areas of immature fibrosis, and not the older scar that was fully healed. Dr. Wilkerson described the

old fibrotic tissue as a “fully healed scar” and testified that it was older than the newer areas of immature fibrosis that were approximately 4-6 weeks old. Reviewing the evidence and testimony as a whole, the ALJ credits the opinions of Dr. Hutcherson and Dr. Wilkerson on this point and finds their testimony in this regard to be more persuasive than that of Dr. Boerner.

69. In his supplemental report dated October 24, 2016, Dr. Hutcherson reiterated his opinion that the old fibrotic myocardial infarction was not related to Claimant’s more recent cardiac events in May of 2012. Dr. Hutcherson further noted that individuals may have a silent myocardial infarction and then develop symptoms later on with advancing coronary disease. In addition, Dr. Hutcherson wrote, without treatment, coronary artery disease will usually eventually cause symptoms, including disability or death, if left untreated.

70. Based on the evidence presented, Claimant has failed to sustain his burden of proving that his death on June 16, 2012 was proximately caused by the May 10, 2012 heart attack or that it arose out of and in the course and scope of his employment.

71. Dr. Boerner and Dr. Hutcherson both agreed with Dr. Wilkerson’s assessment regarding the formal cause of Claimant’s death, which was hypertensive atherosclerotic cardiovascular disease with sudden cardiac death (ventricular fibrillation arrest). A review of the opinions and testimony of all three of these physicians indicates that all three of them identified Claimant’s underlying coronary artery disease as a primary factor in causing his ventricular fibrillation arrest and death. Dr. Wilkerson specifically testified that he believed the cause of Claimant’s death to be the underlying disease.

72. All three physicians also agreed that Claimant’s sudden cardiac death or ventricular fibrillation arrest was most likely caused by a sudden lack of oxygen to the heart (ischemia) and/or a sudden decrease in blood supply to the heart due to the lack of oxygen. All three physicians further testified that the episode of acute ischemia was in turn triggered or caused by the run that Claimant did on the morning of June 16, 2012. Dr. Wilkerson testified that the run most likely caused the plaque rupture that led to the recent hemorrhage seen on autopsy. Dr. Wilkerson further testified that the sudden cardiac death was most likely triggered by the run that Claimant went on earlier that morning. Dr. Boerner testified that he did not know whether the plaque rupture occurred during the run, or whether it may have occurred a day or few days prior to the run with Claimant then becoming ischemic during his run because of the worsened obstruction caused by the plaque rupture. As noted by Dr. Hutcherson, however, in either case as contemplated by Dr. Boerner, the triggering event that would have led to the ischemia-induced ventricular fibrillation arrest would have been the run. Dr. Hutcherson testified that the run that Claimant did on the morning of June 16, 2012 was the precipitating factor that caused Claimant’s cardiac arrest.

73. Dr. Wilkerson, Dr. Boerner and Dr. Hutcherson all testified that Claimant had many risk factors for coronary artery disease dating as far back as 2001 and was found to have a significant amount of actual coronary artery disease on autopsy. With the possible exception of hypertension, Dr. Boerner and Dr. Hutcherson agreed that these risk factors were personal to Claimant and were not work-related. Based on this testimony, the ALJ finds that Claimant's coronary risk factors were not work-related.

74. Based on the evidence presented, Claimant's run on the morning of June 16, 2012 did not arise out of or in the course and scope of employment. Mrs. Watts testified that Claimant had engaged in a regular exercise routine since the time they were in high school, prior to Claimant becoming employed with the employer. Mrs. Watts further testified that Claimant's current exercise regimen involved him working out with weights and doing calisthenics on Mondays, Wednesdays and Fridays, and going for a jog or a run on Tuesday, Thursday, Saturdays and some Sundays. Mrs. Watts testified that Claimant conducted his exercise routines at home before showering and going to work. There was no evidence presented to indicate that Claimant engaged in his exercise regimen pursuant to the instruction or direction of his employer. To the extent Claimant may have been motivated in part by a desire to not allow the new SWAT members to beat him, such motivation was self-imposed and cannot be attributed to the employer, particularly in light of the lack of evidence indicating that Claimant was directed or instructed by his employer to engage in his run. According to Mrs. Watts' testimony, Claimant had returned from his run on the morning of June 16, 2012 (at Saturday) at approximately 6:15 a.m. Although Claimant was scheduled to meet with the Secret Service that day for a special assignment to plan for a pending visit by First Lady Michelle Obama, the evidence indicates that Claimant was not in the course and scope of his employment at the time of his run on June 16, 2012. Mrs. Watts testified that Claimant had indicated to her that the Secret Service may call whenever they arrive and that when they call, you leave. However, Undersheriff Hall testified that Claimant was scheduled to meet with the Secret Service upon their arrival at noon later that day. Moreover, the fact that Claimant had decided to go for a run, following which he typically would shower before proceeding to work, indicates that he was not anticipating receiving a call from the Secret Service in the immediate future. Undersheriff Hall testified that, while Claimant would have been paid during the time he was meeting with the Secret Service, he was not on the clock and was not being paid at the time of his run and cardiac arrest. Even if it could somehow be said that Claimant was in the course and scope of his employment in the early morning of June 16, 2012, the evidence indicates that the run still did not arise out of his employment with the employer. Further, while there was some testimony that SWAT team members are on call 24/7, Claimant was not involved in any SWAT team activity at the time of his heart attack and death.

75. Based on the evidence presented, the ALJ finds that the proximate cause of Claimant's ventricular fibrillation arrest and death on June 16, 2012 was a combination of his underlying coronary artery disease and the acute ischemia that was precipitated by his run on the morning of June 16, 2012. The ALJ further finds that neither the coronary artery disease nor the run are work-related factors. Claimant was not in the course and scope of his employment at the time of his death and his death did not arise out of employment.

76. The evidence as a whole does not support the conclusion that Claimant's sudden cardiac arrest and death on June 16, 2012 were proximately caused by the May 10, 2012 SWAT incident or the heart attack that occurred at that time. Dr. Wilkerson, Dr. Boerner and Dr. Hutcherson differed in their opinions as to whether the May 10, 2012 incident caused the older fully healed fibrotic scar tissue (Dr. Boerner) or the newer areas of immature healing fibrosis seen on autopsy (Dr. Wilkerson and Dr. Hutcherson). However, all three physicians agreed that the cardiac event associated with the May 10, 2012 SWAT call likely caused some heart damage that resulted in the formation of some type of scar tissue in Claimant's heart, whether healed or in the process of healing. The physicians also testified that the presence of scar tissue could possibly help cause electrical instability or destabilization in the heart, making it more likely that an episode of acute ischemia could cause a ventricular fibrillation. However, none of the physicians stated their opinions to the requisite degree of probability so as to satisfy the standard of proof with regard to causation. Rather, their opinions were only stated as a matter of possibility. Indeed, when specifically asked if he were able to state within a reasonable degree of medical *probability* whether the areas of immature fibrosis could have played a role in Claimant's eventual cardiac arrest, Dr. Wilkerson declined and limited his testimony to saying only that it was *possible*. Because the testimonies of Dr. Wilkerson, Dr. Boerner and Dr. Hutcherson regarding the role that the areas of fibrosis may have played in causing Claimant's death was only stated in terms of possibilities, it is found that their testimonies on this point are not sufficient to meet the applicable burden of proving causation by a preponderance of the evidence. Moreover, the evidence and testimony as a whole indicates that the factors of underlying coronary artery disease and the exercise-induced acute ischemia from the run were seen as more significant and definitive factors in causing Claimant's ventricular fibrillation arrest and death. Dr. Hutcherson expressly testified that the coronary artery disease played a much more important role in causing Claimant's death than the areas of immature fibrosis.

77. In addition to the medical evidence, there is other evidence in the record that further supports the conclusion that Claimant's death was not proximately caused by the May 10, 2012 SWAT call or a heart attack from that time. The evidence reflects that Claimant continued to perform his usual activities, including his full duty work and his usual daily exercise regimen, after the May 10, 2012 SWAT call all the way up until his death. Aside from the community event at the park on June 15, 2012, none of the employer witnesses, including Sheriff Taylor and

Undersheriff Hall who testified that they saw Claimant on a daily basis, reported hearing Claimant say anything about not feeling well or noticing anything unusual about Claimant during the weeks leading up to his death. Mrs. Watts is the only witness who reported being aware of some symptoms during this time (aside from the June 15, 2012 event at the park on the day immediately prior to his death). Thus, although according to Mrs. Watts, Claimant may have begun having some symptoms, the events of May 10, 2012 and the cardiac event that occurred at that time were not sufficient to preclude Claimant from being able to perform essentially all of his usual activities for the next five weeks. As Dr. Hutcherson testified, if the May 10, 2012 SWAT call and heart attack were the cause of Claimant's sudden cardiac arrest on June 16, 2012, one would have expected the cardiac arrest to occur much sooner than it did.

78. To the extent Claimant asserts that this claim is compensable because the May 10, 2012 heart attack exacerbated or aggravated his underlying coronary artery disease, such claim is not supported by the evidence. The evidence is insufficient to support the conclusion that Claimant's underlying coronary artery disease was meaningfully aggravated, exacerbated or accelerated by the events of May 10, 2012. Rather, when specifically asked whether the microinfarction would be considered an aggravation of his pre-existing condition, Dr. Wilkerson responded that he would just consider it part of the disease process. In addition, even if the May 10, 2012 heart attack did cause an aggravation or acceleration of Claimant's underlying coronary artery disease, the run on June 16, 2012 would constitute a subsequent intervening event sufficient to break the chain of causation between any aggravation caused by the May 10, 2012 heart attack and the cardiac arrest on June 16, 2012. As noted above, Claimant was able to continue with essentially all of his usual activities, including his daily exercise regimen, during the five weeks between May 10, 2012 and June 16, 2012. However, upon completing a run that was longer than usual on the morning of June 16, 2012, he suffered an ischemia-induced ventricular fibrillation arrest. The chronology and timeline of events, together with the medical testimony and evidence as a whole, indicates that the run was a non-work related subsequent intervening event.

CONCLUSIONS OF LAW

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

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §§8-41-301(1)(c); 8-42-101, C.R.S. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844

(Colo. App. 2000). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).
The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

D. In this case, the ALJ finds that the testimony of Lori Watts is totally credible, believable, and consistent with the voluminous evidence presented in this case. Likewise for the testimony of all personnel from the Pueblo County Sheriff's Office, to wit: Sheriff Kirk M. Taylor, Undersheriff Justin Hall, Deputies Jeffrey Teschner, Tracy Swearingen, Clifford Kindred, and J.C. Williams, along with Leave Technician Shonna Gutierrez.

E. Further, the ALJ finds that the reports and testimony of all of the physicians in this case to be credible, and with the sincere intention of assisting the trier of fact with their respective professional opinions, based upon the information each had at their disposal. As such, the conclusions to be drawn in this Order are based not on truthfulness per se, but rather persuasiveness, and in interpreting the sufficiency of the evidence. Out of sheer circumstances, neither Dr. Boerner, nor Dr. Hutchinson (both eminently qualified as experts in cardiology), were able to examine or treat Mr. Watts. Nor were they able to view firsthand the heart tissue that ultimately is at issue in this matter. In reconstructing the record before them, in the end, they all acknowledge the difficulties in drawing conclusions with certitude in the face of incomplete information.

Compensability

F. Under the Workers' Compensation Act of Colorado, it is necessary for an injury to not only "arise out of" but also to occur "in the course of" employment in order for the injury to be deemed compensable. Section 8-41-301(1), C.R.S. 2015; *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17 (Colo. 1988)*.* The "course of employment" requirement is satisfied when the claimant shows that the injury occurred within the time and place limits of the employment. *Popovich v. Irlando,* 811 P.2d 379 (Colo. 1991). The time limits of the employment embrace a reasonable interval before and after official working hours when the employee is on the employer's property. 2 *Larson, Workmen's Compensation Law* § 21.60(a) (2005); *Industrial Commission v. Hayden Coal Co.,* 113 Colo. 62, 155 P.2d 158 (1944). The place limits of the employment include parking lots controlled or operated by the employer, which are generally considered part of the employer's premises. *State Compensation Insurance Fund v. Walter,* 143 Colo. 549, 354 P.2d 591 (1960); *Woodruff World Travel, Inc. v. Industrial Commission,* 38 Colo. App. 92, 554 P.2d 705 (1976).

G. The "arising out of" element is narrower than the "course of employment" element and is a test of causation which requires the claimant to prove that the injury had its origin in the claimant's work-related functions and is sufficiently related thereto to be considered part of the claimant's service to the employer. *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). However, the claimant's activity need not constitute a strict duty or obligation of employment, or confer a specific benefit on the employer. *Price v. ICAO*, 919 P.2d 207 (Colo. 1996); *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). It is sufficient if the injury arises out of an activity that is incidental to the conditions under which the claimant usually performs the job. *City of Boulder, supra; University of Denver v. Nemeth,* 127 Colo. 385, 257 P.2d 423 (1953). Actions such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water and keeping warm have been held to be incidental to employment under the "personal comfort" doctrine. *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 22-23 (Colo. 1988); *Industrial Commission v. Golden Cycle Corp.,* 126 Colo. 68, 246 P.2d 902 (1952); *Ventura v. Albertsons' Inc.,* 856 P.2d 35 (Colo. App. 1992). Conversely, if an employee substantially deviates from the mandatory or incidental functions of the employment, such that she is acting for her sole benefit at the time of an injury, the injury is not compensable. *Kater v. Industrial Commission,* 728 P.2d 746 (Colo. App. 1986). Further, if the industrial injury aggravates, accelerates or combines with a preexisting condition so as to cause a need for treatment, the treatment is compensable. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

H. The questions of whether an injury arose out of and in the course of employment, whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury, and whether there has been a subsequent intervening event, are generally questions of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the*

United States Court of Appeals, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996); *University Park Care Center v. ICAO*, 43 P.3d 637 (Colo. App. 2001). The claimant bears the burden of proving both the "course of employment" and the "arising out of employment" elements by a preponderance of the evidence. Section 8-41-301(1)(b), C.R.S.

I. Section 8-41-302(2) establishes a two-prong test of compensability where the claim is based on a heart attack. The claimant must show he experienced an unusual exertion arising out of and within the course of employment, and that the heart attack was proximately caused by the unusual exertion. *Vialpando v.ICAO*, 757 P.2d 1152 (Colo. App.1988); *Kinninger v. ICAO,* 759 P.2d 766 (Colo. App. 1988). Exertion meets the statutory definition if it is unusual in kind and quality when compared to the work history of the claimant or decedent. *Vialpando v. ICAO, supra*; *Townley Hardware Co. v. Industrial Commission*, 636 P.2d 1341 (Colo. App. 1981). A claimant who is seeking benefits based on a heart attack bears the burden of proving the compensability of his claim by a preponderance of the evidence. *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850 (Colo. 1983); *Jekel v. Bankers Property*, W.C. No. 4-115-034 (ICAO, May 28, 1993); *Surprise v. Amerimar Realty Management*, W.C. No. 3-909-398 (ICAO, January 25, 1991).

J. As found, Claimant has failed to sustain his burden of proving that his death on June 16, 2012 was *proximately caused* by the May 10, 2012 heart attack, *or* that it arose out of and in the course and scope of his employment. Claimant's formal cause of death was hypertensive atherosclerotic cardiovascular disease with sudden cardiac death (ventricular fibrillation arrest). A review of the opinions and testimonies of Dr. Wilkerson, Dr. Boerner and Dr. Hutcherson as a whole indicates that Claimant's death was caused by a combination of his underlying coronary artery disease and the acute ischemia caused by his run on the morning of June 16, 2012. Claimant's coronary artery disease was caused by his risk factors, which are entirely personal to Claimant and are not work-related. As found, Claimant was not in the course and scope of his employment during the early morning of June 16, 2012 and his run did not arise out of his employment with the employer. Claimant was at home engaging in his daily exercise regimen that he had done on his own for many years. Claimant was not instructed or directed by his employer to engage in his exercise regimen or to go for a run on the morning of June 16, 2012. To the extent Claimant may have been motivated to run that day in part by a desire to not allow the new SWAT members to beat him, such motivation was self-imposed and cannot be attributed to the employer. It was approximately 6:15 a.m. when Claimant returned from his run. Although there was testimony indicating that Claimant was anticipating a call from the Secret Service, with whom he was scheduled to meet to prepare for a visit from the First Lady at some point that day, the evidence indicates that Claimant was not anticipating the Secret Service to call him at that hour or in the immediate future. Claimant was not being paid at the time he went on his run and the cardiac arrest occurred. Nor was Claimant engaged in any SWAT or other employment related activity at the time the cardiac arrest occurred.

K. In addition, as found, the evidence as a whole does not support the conclusion that Claimant's sudden cardiac arrest and death on June 16, 2012 were proximately caused by the May 10, 2012 SWAT incident or that a heart attack likely occurred at that time. A review of the opinions and testimonies of Dr. Wilkerson, Dr. Boerner and Dr. Hutcherson as a whole indicates that, while it is *possible* that the May 10, 2012 SWAT call and associated cardiac event *could* have had *some* impact in bringing about Claimant's death, *the much more likely and significant factors* were Claimant's long-standing underlying coronary artery disease and his episode of acute ischemia from the run on the morning of June 16, 2012. In addition, Claimant continued to perform his usual activities, including his full duty work and his usual daily exercise regimen, after the May 10, 2012 SWAT call all the way up until his death. While Claimant displayed some symptoms to his wife consistent with coronary issues after May 10, those symptoms did not preclude Claimant from performing essentially all of his usual activities for the next five weeks. The evidence as a whole is not sufficient to sustain Claimant's burden of proving by a preponderance of the evidence that it was more likely than not that the May 10, 2012 SWAT call and associated cardiac event proximately caused the sudden cardiac arrest on June 16, 2012.

L. As found, Claimant's underlying coronary artery disease was not meaningfully aggravated, exacerbated or accelerated by the events of May 10, 2012. Even if it were, however, the run on June 16, 2012 constitutes a subsequent intervening event that breaks the chain of causation between any aggravation caused by the May 10, 2012 SWAT call and heart attack on the one hand, and the June 16, 2012 sudden ventricular fibrillation cardiac arrest and death on the other hand.

M. Because the injuries suffered by Claimant are not compensable, the issue of dependence under C.R.S. 8-41-501, 8-42-115, and 8-42-119 need not be addressed herein.

ORDER

It is therefore ordered that:

I. Since the injuries suffered by Claimant are not compensable, Claimant's claim for benefits is denied and dismissed.

All matters not determined herein are reserved for future determination.

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

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

DATED: December 23, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-990-756-02

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to TTD benefits in from July 8, 2015 and on-going.

- If Claimant has proven that he is entitled to temporary disability benefits, have Respondents proven by a preponderance of the evidence that Claimant was "Responsible for his Termination," per C.R.S. §§ 8-42-103(1)(g), 8-42-105(4).

STIPULATION

- Claimant would be considered a maximum wage earner at the time of his alleged injury. Based on his date of alleged injury, his TTD rate would be $881.65.

FINDINGS OF FACT

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

1. Claimant was employed by Xtreme Drilling and Coil Services on two separate occasions. The first period of employment was from 2010 until October 7, 2011.

2. During this first period of employment Claimant was working as a driller. The position required him to be responsible for the crew at the rig site. Primarily, it was a position in which he was responsible for directing individual employees to work within the company guidelines and policies. He was also responsible for executing the drilling program within company guidelines and policies; he was deemed the "team lead" at the drilling site, he supervised activities that were done at any given drilling site. This was a less labor intensive position at any given rig site.

3. On October 5 and 6, 2011, Employer gave Claimant written corrective actions. Both corrective actions indicated Claimant's failure to follow through with the tasks associated with his position as Driller. The corrective actions also indicated Claimant was unable to properly direct his crew.

4. Claimant signed the second corrective action acknowledging,

> I am aware that my performance does not meet Company expectations and I agree to take the actions listed in the Performance Improvement Plan. I am also aware that failure to improve my performance to meet Company expectations

> will result in further corrective action, up to and including termination.

5. Claimant testified at hearing that he was required to follow Company policies in the drilling process. He acknowledged that the issue addressed in the corrective actions involved a generator and not following company policy is considered a safety issue, not only to the equipment but also a safety issue to the fellow crew members.

6. Employer ultimately terminated Claimant on October 7, 2011. The Separation Notice described the reasons for his separation: "[Claimant] does not run crew when given job task he never completes them. On 10-6-11 [Claimant] was having generator issues and never woke pusher or even attempted to resolve issue. [Claimant] showed poor attitude + work ethic to crew every day."

7. In July 2012, Employer re-hired Claimant. His new position was as a floor hand; this position was one in which he was directed by the driller at the site to perform drilling tasks. It was not a supervisory position. Claimant remained in this position until mid-2014. Significantly, Employer issued no corrective actions to Claimant while he worked in this position.

8. In late 2014, Employer promoted Claimant to the driller position. As discussed above, this position required Claimant again to be "team lead" and direct employees at the rig site.

9. Claimant testified that on December 25, 2014 he received a written corrective action. This is corroborated by Employer's records. The December 25, 2014 corrective action indicated Claimant was "not paying attention" at the drilling site during a serious operation. Claimant testified that failing to pay attention would be considered a safety issue involving equipment and the physical health of his drilling team. However, Claimant remained in his position as a driller.

10. On February 26, 2015 Claimant notified the Employer that he suffered a work related injury to his lower back. Respondents admitted the injury was work-related and filed a General Admission of Liability.

11. That same day Claimant sought treatment with Banner Occupational Health. The medical provider released Claimant to full duty and provided him with prescriptions for additional conservative care for his injuries.

12. On April 11, 2015, Employer issued Claimant two separate corrective actions for failing to follow proper procedure in the drilling process. Claimant admitted through testimony that this failure could have led to injuries to his fellow deck hands as well as potential damage to the drilling equipment. Claimant signed the corrective action sheets.

13. Claimant testified that the section above his signature indicated that if he was unable to comply with Company expectations, he could be terminated. This is corroborated by the corrective action document itself.

14. Ultimately, Employer issued Claimant a Separation Notice, ending his employment a second time. The final action that led to his termination was based on his inability to follow instructions from his Employer. Additionally, as noted in the Separation Notice, the client at the drilling site questioned Claimant's ability to follow instructions, as well as lead his crew.

15. Cozy Jones, Employer's human resource representative, testified to the importance of following Company policies in the drilling process. She indicated that failure to follow policies could lead to safety issues for fellow team members as well as potential for damage to the drill rig itself. Ms. Jones further testified that during Claimant's exit interview, Claimant never stated that he was unable to do his job due to his work injury.

16. Claimant testified that in his position as driller he spent the majority of his time in the "big house" on the rig floor and was to control the drilling process. This called for him to "do paperwork, control the drill itself, and direct his team members in the drilling process." Claimant was able to alternate between sitting and standing.

17. Claimant continued to work as a driller from the date of his injury until July 8, 2015 when Employer terminated his employment. Between February 26, 2015 and his termination, every medical provider Claimant saw released him to full duty.

18. It is undisputed that Claimant did not have any work restrictions until approximately one week after Employer terminated his employment. On July 15, 2015, his medical provider imposed work restrictions which were increased over the next several months.

19. On May 16, 2016, Dr. Vlahovich placed Claimant at MMI and opined that the work restrictions imposed on January 4, 2016 were permanent. Claimant has not been employed since Employer terminated his employment. Claimant attributes his unemployment to his work restrictions.

20. Claimant did not present persuasive evidence that his industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, or that he suffered any wage loss prior to his termination. Thus, the ALJ finds that Claimant did not meet his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits.

21. Based on the totality of the evidence, including testimony at hearing as well as the written corrective actions and separation notices that were received in evidence, the ALJ finds that Respondents met their burden of proving by a preponderance of the evidence that Employer terminated Claimant for long

standing and well documented performance issues which were within Claimant's control.

CONCLUSIONS OF LAW

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

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

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

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

To prove entitlement to temporary total disability ("TTD") benefits, the claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). As found, Claimant did not prove by a preponderance of the evidence that his industrial injury caused a disability lasting more than three work shifts, or that he left work as a result of the disability, or that his disability resulted in an actual wage loss. Thus, the ALJ concludes that Claimant failed to establish an entitlement to TTD benefits.

Because the ALJ has found and concluded that Claimant did not meet his burden of establishing entitlement to TTD benefits, the ALJ need not reach the remaining issues.

ORDER

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

1. Claimant's request for TTD is DENIED and DISMISSED.

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

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

DATED: December 27, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-953-610-01

ISSUES

1. Did Respondents overcome the DIME's impairment rating by clear and convincing evidence?

FINDINGS OF FACT

1. Claimant worked as a welder for Employer. On June 9, 2014, he suffered an admitted injury when he fell from a scaffold while changing a lightbulb. Claimant fell backward and hit his head on a concrete floor.

2. As a result of the fall, Claimant suffered a concussion and injured his neck. He also injured his left hand when the light bulb he was holding broke.

3. Claimant was initially treated at Penrose Hospital emergency room. The ER report noted a "possible loss of consciousness." Claimant reported a headache, neck pain and back pain. A head CT scan was unremarkable. The CT scan of his cervical spine showed degenerative changes, with no acute fracture. His left hand was sutured; he was placed in a cervical collar and instructed to follow up with neurology.

4. Claimant saw Mr. Todd Luft, PA-C at Colorado Springs Neurological Associates on June 29, 2014. Claimant reported intermittent headaches, difficulty concentrating and "buzzing" in his head. He also reported persistent neck pain radiating into his posterior shoulders. He reported "he has times where he feels unsteady with his gait." Physical examination revealed tenderness to palpation over the midline and the cervical paraspinals bilaterally, and associated spasm. Cervical range of motion was restricted in all planes. Motor and sensory examinations were normal. A mental status exam was within normal limits. PA-C Luft diagnosed "a closed head injury as well as some neck pain." He did not recommend any specific treatment for the head injury, but stated: "we need to give this time and see if his residual symptoms improve." PA-C Luft opined that Claimant's neck pain was most likely "soft tissue/myofascial in nature." He discussed the possibility of physical therapy and a referral to a physical medicine and rehabilitation specialist; Claimant indicated he would prefer to wait "and see if he improves."

5. Employer referred Claimant to Concentra Medical Centers for authorized treatment, where he saw numerous providers. His initial visit was on July 1, 2014, with Dr. Bryan Counts. Claimant told Dr. Counts that "one of his main symptoms is feeling odd and disoriented for several minutes at a time even at rest." Claimant was suffering from headaches, dizziness, and memory loss. He was still having back and neck pain. He exhibited pain with cervical motion in all directions. Dr. Counts noted "there is [sic] significant underlying degenerative changes in the cervical spine, but the neck pain

seems to be the result of the injury, not from arthritis." Dr. Counts released Claimant to modified duties, with no lifting greater than 15 pounds and no exposure to temperatures greater than 90°F. He prescribed medication and referred Claimant for physical therapy.

6. Claimant's next visit to Concentra was July 11, 2014, and he saw Dr. Jennifer Huldin. Claimant was still having back and neck pain, along with memory loss, confusion, poor coordination, and constant headaches. Claimant exhibited short-term memory deficits. Dr. Huldin referred Claimant to Dr. Hopkins for a psychological evaluation, and to an ophthalmologist for "post-traumatic vision syndrome."

7. On July 24, 2014, Claimant saw Dr. Michael Saxerud, an ophthalmologist. Claimant reported visual disturbance and chronic headaches since his accident. He described the headaches as "severe or debilitating," and indicated that they "occur on most days." The headaches were accompanied by "dizziness/vertigo." Dr. Saxerud recommended prism lenses to treat the injury-related vision problems.

8. Claimant saw Dr. Jocelyn Cavender at Concentra on July 25, 2014. Claimant reported constant headaches and "buzzing in his head." An antidepressant prescribed by Dr. Huldin had made his sleep and mood "worse." He had bilateral trapezius muscle spasms. Dr. Cavender referred Claimant to a neurologist and prescribed massage therapy. She subsequently referred Claimant to Dr. Rauzzino for a surgical evaluation.

9. Claimant saw Dr. David Hopkins for a neuropsychological evaluation on July 29, August 7 and August 21, 2014. Claimant's mood was "overtly dysthymic." He gave "clipped answers to interview questions and had to be encouraged to expand on his responses." Claimant was "very aggravated" about his inability to return to work. He reported numerous problems since his accident, including "poor concentration," memory problems, and difficulty reading. He was having dizziness and persistent headaches. He also reported periodic episodes of disorientation as a result of "overstimulation."

10. Claimant's neuropsychological test results showed impairment in multiple areas, ranging from "mild" to "moderate." Dr. Hopkins opined that the data "matches his report of daily problems with cognition." Validity measures indicated that Claimant gave "a reasonable [sic] good effort without evidence for malingering or symptom magnification." Dr. Hopkins recommended neuropsychological counseling to help Claimant learn to compensate for his cognitive issues, and address his underlying depression and "adjustment to disability issues."

11. Dr. Rauzzino evaluated Claimant on August 5, 2014. Claimant reported worsening neck pain, and difficulty using his hands for various routine activities such as manipulating buttons and other fine motor tasks. Because of the head injury, Claimant was "generally in a fog." He had trouble receiving and processing information, and had difficulty completing paperwork at Dr. Rauzzino's office. Dr. Rauzzino reviewed Claimant's cervical MRI films, which revealed severe foraminal stenosis and severe central stenosis. Dr. Rauzzino noted Claimant had "signs and symptoms of cervical myelopathy." Claimant denied having similar symptoms before his industrial accident.

Dr. Rauzzino recommended surgery to decompress the spinal cord, and requested that Claimant return with his son to discuss treatment options.

12. On August 8, 2014, Claimant saw Dr. Walter Larimore at Concentra. Claimant's major concern was ongoing "head and neck pain." Claimant also reported "a very loud buzzing in the whole head. Feels like a buzzing cap over the entire head. The louder the buzzing the more intense the headache." Claimant described episodes of disorientation "a few times a week." On physical examination, he had tenderness and muscle spasm of the bilateral trapezius muscles and paraspinal muscles. He had no specific tenderness of the cervical spine. Cervical range of motion was reduced in all planes. Dr. Larimore described Claimant's mood as "agitated, anhedonic, concerned, flat, hard and humorless." Dr. Larimore referred Claimant for a physiatry evaluation.

13. Claimant saw Dr. John Bissell, a physiatrist, on August 26, 2014. Claimant reported ongoing post-injury symptoms including "buzzing sensation in his ears, decreased memory and decreased concentration." Claimant was having 8/10 pain in his neck and both shoulders, which increased with activity. He reported no benefit from physical therapy or dry needling, although massage therapy had been temporarily helpful. Dr. Bissell suggested trigger point injections to the cervical and thoracic musculature. Claimant ultimately declined to pursue the injections.

14. Claimant returned to Dr. Rauzzino on September 30, 2014. He reported improvement in his symptoms and limitations since the previous visit. Dr. Rauzzino continued to recommend surgical decompression and fusion to relieve the stenosis, but Claimant said "he would like to think about this" before proceeding with any surgery.

15. Dr. Albert Hattem evaluated Claimant on November 25, 2014, and assumed control of his treatment thereafter. Claimant told Dr. Hattem he did not want to pursue surgery because a family member had a poor outcome from a similar procedure. His headaches and neck pain had improved, but he was still having significant difficulties with concentration.

16. Claimant received chiropractic treatment from September 2014 through January 23, 2015. Chiropractic treatment records reflect Claimant was consistently having problems with his back, neck, and shoulders.

17. Dr. Hopkins performed repeat neuropsychological testing on January 16 and 27, 2015. The test data showed improvement in cognition, but Claimant still demonstrated mild impairment of attention, concentration and processing speed. Dr. Hopkins indicated he would be concerned about Claimant operating machinery that requires attention and processing speed.

18. On February 19, 2015, Dr. Hattem recommended Claimant continue deep tissue massage for myofascial upper back pain.

19. Dr. Hattem placed Claimant at MMI on October 22, 2015. As of that date, Claimant reported persistent discomfort between his shoulder blades, occasional dizziness when exposed to moving objects, ongoing memory problems, headaches, and

difficulty with concentration. Dr. Hattem assigned a 10% whole person impairment for residuals of Claimant's head injury. Dr. Hattem utilized Section 4.1a of the *AMA Guides,* Disturbances of Complex Integrated Cerebral Functions (p. 105, *see also* Table 1, p. 109). Dr. Hattem opined that Claimant fit the description in Category 1, which allows a rating of 5%-15%. Dr. Hattem chose that rating because he assumed Claimant retained the ability to carry out most activities of daily living. Dr. Hattem did not feel Claimant warranted a cervical rating. Regarding permanent work restrictions, Dr. Hattem advised that Claimant should not operate machinery, not climb ladders, and not work in a safety sensitive position.

20. Respondents filed a Final Admission of Liability (FAL) dated March 7, 2016, based on Dr. Hattem's rating. Claimant objected to the FAL and requested a DIME.

21. Dr. Christopher Ryan performed the DIME on May 9, 2016. Claimant reported ongoing confusion and difficulty with multitasking. Multiple stimuli made him "very disoriented." He reported word finding problems and difficulty making decisions. Claimant continued to have interscapular pain, especially when bending forward or looking up. Claimant was working, but was "extremely limited" in terms of the tasks he could perform. Dr. Ryan described Claimant as "a stoic and yet somewhat disappointed man, who is troubled by his ongoing disability." Dr. Ryan saw "no evidence for any embellishment of symptoms at all." Claimant's interscapular pain was exacerbated by movement, particularly cervical extension. Examination of the cervical spine revealed "moderate rigidity," and significantly reduced cervical range of motion. Dr. Ryan diagnosed "moderately" severe postconcussive syndrome with cognitive dysfunction and substantial permanent aggravation of cervical spondylosis with spinal stenosis.

22. Dr. Ryan rated Claimant's cervical spine and postconcussive syndrome. He assigned a 26% whole person impairment for the cervical spine. For the cognitive dysfunction, Dr. Ryan utilized the same section of the *AMA Guides* as Dr. Hattem, but opined that Claimant fit within Category 2, due to his "substantial" disruption of activities of daily living. Category 2 allows a rating of 20%-45%. Dr. Ryan chose the low end of that range and assigned 20% impairment. The two components of the rating combined to an overall impairment of 41% whole person.

23. Dr. Hattem testified in a deposition on October 14, 2016. Dr. Hattem defended his 10% brain injury rating based on his assessment of Claimant's ability to complete activities of daily living. Dr. Hattem noted there was no indication that Claimant needed any supervision in his activities of daily living. Dr. Hattem noted that Claimant had returned to work, although he needed permanent work restrictions. Dr. Hattem testified he had no information that Claimant was having difficulty working within his restrictions. Dr. Hattem testified that the specific rating for cognitive dysfunction requires a "judgment call" by the rating physician, and there are "no hard and fast rules." In discussing Dr. Ryan's 20% cognitive rating, Dr. Hattem testified:

> Honestly, I don't take that much issue with his decision to assign a higher cognitive rating. Once again, it's a judgment call. And I decided on the 10

> percent. But 20 percent, that's where he feels, after interviewing the patient, would be — I don't think that's a totally unreasonable rating."

24. Dr. Hattem disagreed more strongly with Dr. Ryan's cervical spine rating. Dr. Hattem testified that, by November 25, 2014, Claimant's neck was "resolved" and therefore did not qualify for a Table 53 specific disorder rating. Without a Table 53 rating, Claimant does not qualify for a range of motion rating. Dr. Hattem explained that between November 25, 2014 and MMI in October 2015, there were no records reflecting Claimant was having any neck pain. Dr. Hattem opined any neck pain Claimant was having during Dr. Ryan's evaluation was related to his pre-existing cervical DDD, rather than the industrial injury. Dr. Hattem admitted he had not seen the chiropractic treatment records reflecting ongoing cervical pain as of January 23, 2015. Dr. Hattem conceded Claimant was still experiencing pain between his shoulder blades at the time of MMI, similar to that which Dr. Ryan noted in his report. Dr. Hattem testified that Dr. Ryan's cervical spine rating was consistent with the *AMA Guides'* protocols, but opined that Claimant did not warrant a cervical rating in the first instance.

25. Dr. Ryan testified in a deposition on October 24, 2016. Dr. Ryan elaborated on his description of Claimant as "stoic," meaning "he wasn't very talkative, and he didn't really like to complain was my impression. He was just kind of a — just solid blue-collar type worker that didn't — wasn't very expressive and didn't like to admit weakness." Dr. Ryan opined that Claimant's cognitive symptoms were consistent with post-concussive syndrome. Regarding the head injury rating, Dr. Ryan explained Claimant more closely fit within Category 2 than Category 1. Dr. Ryan testified "there were things that he did on an everyday basis that he simply couldn't do and that had to do largely with multitasking, which he prided himself on doing before he was injured. And if he only did one thing at a time, he wasn't too bad, but if anything came in as a distraction, he was completely knocked off balance cognitively." Dr. Ryan also noted Claimant's difficulty with numerous work activities.

26. Regarding Claimant's cervical spine, Dr. Ryan explained that Table 53, 2C provides a 6% whole person impairment when there is a medically documented injury with documented rigidity or neck pain with advanced degenerative changes on structural tests. Dr. Ryan opined Claimant exhibited cervicogenic pain between his shoulder blades with movement of his head. Dr. Ryan noted Dr. Hattem's October 22, 2015 MMI report documents similar symptoms. Dr. Ryan opined that Claimant's ongoing cervical/parascapular symptoms are causally related to the industrial injury. Dr. Ryan recognized Claimant has significant pre-existing degenerative changes in his cervical spine, but the industrial accident caused a substantial and permanent aggravation of that condition.

27. Claimant testified at the October 25, 2016 hearing. He described ongoing problems with his memory, concentration, multitasking, word finding, and decision-making. Claimant's demeanor was characterized by slow pace, concrete thinking, and difficulty with memory. Claimant credibly described difficulties performing his work activities because of his cognitive issues. Claimant also described ongoing cervical spine symptoms, including stiffness and pain at the base of his neck radiating between

his shoulder blades. Claimant testified his pain waxes and wanes depending on his activity level. Claimant described aggravation from activities such as welding, grinding, turning his head, looking up, and maintaining a static neck posture.

28. Claimant's testimony regarding his ongoing symptoms and limitations attributable to the industrial accident is credible.

29. Dr. Hattem's disagreements with Dr. Ryan's rating amount to mere differences of medical opinion.

30. Respondents have failed to overcome the DIME by clear and convincing evidence.

CONCLUSIONS OF LAW

A. Did Respondents overcome the DIME by clear and convincing evidence?

The DIME physician's determination regarding MMI and whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The DIME's determination regarding the cause of the claimant's impairment is an "inherent" part of the diagnostic assessment which comprises the DIME process of determining MMI and rating permanent impairment. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). Therefore, the party disputing the DIME's opinions on the issues of permanent impairment, MMI and causation must overcome those opinions by clear and convincing evidence.

"Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the MMI and impairment findings are incorrect. *Qual-Med*, 961 P.2d at 592. A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002).

The ICAO has repeatedly held that "mere differences of medical opinion" do not constitute clear and convincing evidence that the DIME is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (ICAO March 18, 2016); *Javalera v. Monte Vista Head Start, Inc.*, W.C. No. 4-532-166 (ICAO July 19, 2004); *see also Gonzales v. Browning-Ferris Industries of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000).

As found, Respondents have failed to overcome the DIME's impairment rating by clear and convincing evidence. Claimant's level of impairment appears to fall in the borderline area between Category 1 and Category 2. Dr. Ryan concluded that Category 2 was most appropriate. Dr. Hattem conceded that a physician evaluating cognitive dysfunction must make "judgment calls" and "there are no hard and fast rules" regarding the rating. Dr. Hattem even stated "I don't take that much issue with his decision to assign a higher cognitive rating. Once again, it's a judgment call." It also appears Dr. Ryan obtained a more detailed description from Claimant regarding the extent to which his cognitive deficits impact his vocational and avocational activities. The ALJ concludes that the appropriate rating for Claimant's cognitive dysfunction is a matter about which reasonable physicians can disagree. Respondents have not overcome Dr. Ryan's cognitive rating by clear and convincing evidence.

Nor have Respondents overcome Dr. Ryan's cervical rating by clear and convincing evidence. Claimant suffered a cervical injury as a result of his industrial accident. Although Claimant had pre-existing degenerative changes in his cervical spine, there is no persuasive evidence that he was symptomatic before the industrial accident. By contrast, he has been continuously symptomatic since the date of injury. Dr. Hattem opined that Claimant does not qualify for a cervical rating because the neck injury "had resolved by November of 2014." Dr. Hattem stated there was no record of any ongoing cervical complaints after November 24, 2015, but, in fact, Claimant continued to receive chiropractic treatment for neck pain until January 23, 2015. In February 2015, Dr. Hattem recommended that Claimant "continue deep tissue massage . . . for myofascial upper back pain." Finally, Dr. Hattem's MMI report of October 22, 2015 specifically documented that Claimant reported "persistent discomfort between his shoulder blades." Dr. Ryan found the same parascapular pain on examination, which was elicited and aggravated by neck motion. Dr. Ryan opined those symptoms were attributable to the neck, and should be rated as such. Based on the totality of evidence presented, the ALJ is not persuaded by Dr. Hattem's proposition that Claimant's neck injury had "resolved."

The ALJ concludes that Dr. Hattem's disagreement with Dr. Ryan's impairment rating represents "mere differences of opinion," which are insufficient to overcome the DIME. Therefore,the ALJ concludes Respondents have failed to prove that the DIME's rating was highly probably incorrect.

ORDER

It is therefore ordered that:

1. Respondents' request to overcome the DIME with respect to permanent impairment is denied and dismissed.

2. Insurer shall pay Claimant PPD benefits based on Dr. Ryan's 41% whole person rating.

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

4. All matters not determined herein, or otherwise closed by operation of law, are reserved for future determination.

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

DATED: December 27, 2016

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Has Claimant proved by a preponderance of the evidence that she sustained a compensable injury on May 3, 2016?

2. If Claimant suffered a compensable injury, is Claimant entitled to medical benefits?

STIPULATIONS

1. Claimant's average weekly wage is $398.37.

2. Dr. Douglas Bradley at Emergicare is the primary authorized treating physician.

FINDINGS OF FACT

1. On May 3, 2016, Claimant was working as a convenience store sales clerk for Employer. Her duties include restocking shelves and coolers with product. The store where Claimant works is relatively small, so some inventory is stored in a detached shed. Claimant went to the storage shed with a wheeled "buggy" to get 6-packs and 12-packs of soda. After loading the soda into the buggy, she began backing out of the storage shed.

2. There is a defect in the floor of the shed near the threshold of the door. Apparently, some of the wooden floor had deteriorated and was repaired with a strip of metal. There is a small gap between the metal strip and the floor. The rear wheels of the buggy were caught in the gap, which caused Claimant to "jerk" her neck.

3. Claimant felt immediate pain in her neck. She reported the incident to her store manager, but did not immediately request medical treatment because she thought she would be "okay."

4. Shortly after the incident, Claimant went to pick her son up from school. On her way to the school, her neck pain continued to worsen. She could not turn her neck, which caused her to hit a curb. She took her son back to the store and asked her manager to send her to the doctor.

5. Employer referred Claimant to Emergicare for authorized treatment, where she came under the care of Dr. Douglas Bradley. In his initial report, Dr. Bradley noted that Claimant "presents for neck pain related to a work accident that occurred earlier today." She reported neck pain at a level of 10/10. She also had a headache. Dr. Bradley noted Claimant's history of "chronic neck pain and has [sic] a fusion in 2009."

On physical examination, she had decreased cervical range of motion, and tenderness to palpation on the right side of her neck. Dr. Bradley ordered x-rays, gave Claimant an injection for pain and prescribed medications including muscle relaxers, extra strength Tylenol, and an analgesic cream. He also referred her for physical therapy. Dr. Bradley diagnosed "Strain of muscle, fascia and tendon at neck level." Dr. Bradley released Claimant to work with a 5-pound lifting restriction.

6. Claimant had her initial physical therapy visit on May 5, 2016. She reported ongoing neck pain and muscle spasm, and stated she was having difficulty performing her regular job duties and activities of daily living. On physical examination, she demonstrated tenderness of the bilateral posterior paraspinal musculature, the bilateral occipital area, and bilateral trapezius. Range of motion was decreased in all planes. The therapist also documented "mild neck spasm."

7. Claimant returned to see Dr. Bradley on May 10, 2016. She reported ongoing neck pain at the level of 7/10, and was having difficulty sleeping. Physical examination revealed tenderness to palpation of the cervical spine and mild pain with cervical rotation. Dr. Bradley appreciated "moderate neck spasm." Dr. Bradley recommended that Claimant keep using the muscle relaxer and the analgesic cream, and continue with physical therapy. He also prescribed Naprosyn.

8. At her next visit on May 17, Claimant's neck pain had decreased to the level of 5/10. She continued to demonstrate tenderness to palpation of the cervical spine and decreased range of motion. Dr. Bradley recommended Claimant continue the medications and therapy, and increased her lifting restriction to 10 pounds.

9. Claimant had a few more sessions of physical therapy, the last of which occurred on June 3, 2016.

10. The Respondents filed a formal Notice of Contest denying the claim on June 6, 2016. Claimant had no further medical treatment for the injury after that date.

11. Claimant has a significant prior history of neck problems. She had a work-related injury in 2008, which ultimately resulted in a cervical fusion in 2009. She was placed at MMI on January 21, 2010, with a 22% whole person cervical spine impairment. Claimant continued to receive maintenance treatment until she settled the claim on a full and final basis in 2011.

12. Claimant had no further treatment for her neck until May 2014. At that time, she reported neck pain as a result of an incident at work. She received treatment from CCOM for approximately one month until the Respondent denied the claim. Thereafter, Claimant's neck pain improved, although it does not appear it ever completely resolved. Nonetheless, there is no documentation that Claimant required or received any medical treatment for her neck between July 2014 and May 3, 2016.

13. Dr. Timothy Hall performed an Independent Medical Examination (IME) at Claimant's request on September 21, 2016. Dr. Hall reviewed Claimant's reported mechanism of injury and performed a physical examination. He also reviewed

Claimant’s pre-existing medical history, including the cervical fusion in 2009 and an episode of symptoms in 2014. Significant physical examination findings included hypertonicity of cervical musculature and restricted range of motion. Dr. Hall diagnosed a soft tissue injury in the cervicothoracic and parascapular area. Dr. Hall opined that Claimant’s described mechanism of injury “is certainly a reasonable one for a soft tissue injury through the cervicothoracic area.” Dr. Hall opined that Claimant’s prior history of neck problems “predisposed” her to injury, but ultimately concluded Claimant’s current symptoms are related to the incident she described on May 3, 2016.

14. Dr. Eric Ridings performed an IME at Respondent’s request on September 26, 2016. Dr. Ridings reviewed Claimant’s reported mechanism of injury and performed a physical examination. Dr. Ridings was skeptical regarding Claimant’s description of the incident. He noted that the mechanism of injury described in Dr. Bradley’s initial report differed from the mechanism Claimant described at the IME. Dr. Ridings also doubted that the described incident would generate sufficient force to injure Claimant’s neck. Dr. Ridings reviewed Claimant’s pre-existing history of treatment and surgery to her cervical spine related to the 2008 injury. Claimant told Dr. Ridings her symptoms eventually resolved, and she had absolutely “no symptoms related to her neck” before the incident on May 3, 2016. Claimant did not tell Dr. Ridings about the May 2014 episode, even though she had discussed it with Dr. Hall just five days earlier, and had also disclosed it in responses to interrogatories. Dr. Ridings’ physical examination findings were similar to Dr. Hall’s findings, although the range of motion measurements were different. Dr. Ridings concurred with Respondent’s decision to deny the claim and indicated he would await supplemental medical records before completing his report.

15. Dr. Ridings reviewed the additional records and submitted an addendum to his IME report on October 15, 2016. The primary supplemental records he reviewed related to the 2014 episode of neck pain. He also reviewed Dr. Hall’s IME report. Dr. Ridings opined that the additional medical records created “further doubt” regarding Claimant’s credibility as a medical historian. Dr. Ridings opined that it is not medically probable that Claimant would have sustained any injury to her neck given the described mechanism of injury. Ultimately, Dr. Ridings concluded that Claimant did not sustain a work-related injury on May 3, 2016.

16. Dr. Bradley testified in a deposition on October 24, 2016 as a witness for Respondent. Dr. Bradley testified that Claimant had completed a handwritten intake form at her initial visit to Emergicare. Dr. Bradley reviewed his initial report, and confirmed he had described the incident differently than Claimant had described it on the intake form. Dr. Bradley testified he diagnosed Claimant with a cervical strain. Dr. Bradley indicated he prefers the term “cervical strain” as opposed to “whiplash.” He indicated the movement of the neck need not be “forceful” to cause a cervical strain. Dr. Bradley opined “it can be a rotary movement, it can be a forward-and-back movement, it can be a side-to-side movement, it could be an — an alarm in which you turn your head rapidly in a certain position for whatever reason.” Dr. Bradley testified he knew about Claimant’s prior cervical fusion but could not recall when he learned of it. Dr. Bradley did not assume Claimant was “asymptomatic” before May 3, 2016. Rather, Dr. Bradley assumed “that she was probably having some difficulty — chronic neck problems that

were bothering her." Dr. Bradley testified that his review of Dr. Ridings' reports did not change his opinions regarding causation. Dr. Bradley opined that the May 3, 2016 incident caused "an aggravation of her previous injury or injuries."

17. Dr. Ridings testified at hearing on behalf of Respondent. Dr. Ridings reiterated and expounded upon the opinions expressed in his IME reports. Dr. Ridings continued to question the mechanism of injury described by Claimant, and opined it was not sufficiently forceful to cause injury. Dr. Ridings opined that Claimant's symptoms are related to her pre-existing condition, and she did not suffer any injury on May 3, 2016 at work.

18. Claimant's testimony regarding the onset of neck pain while pulling the soda-filled buggy is credible.

19. Dr. Bradley's opinion that Claimant suffered a cervical strain as a result of her work activities on May 3, 2016 is credible and more persuasive than medical opinions in the record to the contrary.

20. Claimant has proven by a preponderance of the evidence that she suffered a compensable injury on May 3, 2016.

21. Claimant has proven by a preponderance of the evidence that the treatment prescribed by Dr. Bradley is reasonable, necessary and related to her May 3, 2016 injury.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

If an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-91-616-03 (ICAO, September 9, 2016). The term medical treatment includes evaluations or diagnostic procedures required to ascertain the extent of the industrial injury. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2000).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1), C.R.S. In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (ICAO Aug. 17, 2016).

Even a "minor strain" can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused her to seek medical treatment. The ICAO's decision in *Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2004) is instructive regarding the minimal extent of an injury that can satisfy the basic threshold requirement of compensability. In *Garcia*, the claimant felt pain in her abdomen and hip while lifting a piece of glass at work. The employer referred the claimant to Dr. Caughfield, who diagnosed a lumbar strain, but opined she had already reached MMI. The ALJ found that the claimant suffered a "minor back sprain," but also found the sprain had "resolved" within five days of the incident. The ALJ denied the claim on the grounds that the claimant failed to prove she suffered a compensable "injury." The ICAO reversed, and held that the claimant had established a compensable injury as a matter of law:

> Where pain triggers the claimant's need for medical treatment, the claimant has established a compensable injury if the industrial injury is the cause of the pain. The term medical treatment includes diagnostic procedures required to ascertain the extent of the industrial injury.
>
> Here, the ALJ found there was an industrial accident which caused a minor lumbar strain. Further, the ALJ determined that when the injury was reported to the employer, the employer offered the claimant medical services from Dr. Caughfield, which the claimant accepted. Although Dr. Caughfield placed the claimant at MMI based upon his [ ] examination, the ALJ found with record support that Dr. Caughfield diagnosed a lumbar strain. Thus, the ALJ's findings compel the conclusion the claimant established a compensable injury which entitled her to an award of medical benefits. (Citations omitted).

Conry v. City of Aurora, W.C. No. 4-195-130 (ICAO, April 17, 1996) involved a similarly minor episode that was found to establish a compensable claim as a matter of law. In *Conry*, the claimant suffered from pre-existing asthma. One day she walked into work and encountered a “strong smell of ammonia.” As a result, she “began wheezing and became short of breath.” The claimant’s supervisor advised that she go to the doctor. There is no indication in the decision that the claimant required any treatment other than the one physician visit. The ALJ denied the claim because the ammonia exposure merely caused a “temporary exacerbation” of the claimant’s pre-existing asthma. She had no ongoing sequela or require any additional treatment other than the one-time visit. Therefore, the ALJ determined the claimant failed to prove that she suffered a compensable “injury.”

The ICAO reversed and found that the claimant had proven compensability as a matter of law. The ICAO stated “the claimant’s industrial exposure to ammonia caused her to experience respiratory symptoms for which she needed and received medical treatment. . . . [T]hese findings compel a conclusion that the claimant suffered a compensable aggravation of her pre-existing condition [asthma]. Therefore, we reverse the ALJ’s determination that the claimant did not suffer a compensable injury.”

As found, Claimant has proven by a preponderance of the evidence that she suffered a compensable injury on May 3, 2016. Claimant experienced the immediate onset of neck pain after her neck was “jerked” while pulling the buggy. Although the forces involved may have been relatively minor, they were sufficient to evoke symptoms in Claimant’s neck. The pain rapidly intensified over the next few hours, and she requested medical attention. Employer obliged and referred her to Emergicare. Claimant saw Dr. Bradley later that afternoon, and demonstrated clinical findings consistent with a soft tissue injury. Dr. Bradley diagnosed a cervical strain, prescribed medications, physical therapy, and imposed work restrictions. That chain of events was triggered by the pain Claimant developed as a result of her work activities.

Although Claimant has a well-documented history of prior neck problems, the May 3, 2016 incident more likely than not exacerbated her prior symptoms. Admittedly, there are some inconsistencies in Claimant’s statements regarding the severity of symptoms she was experiencing immediately before the incident in May 2016. Nevertheless, after considering the totality of evidence presented, the ALJ is persuaded that Claimant’s symptoms were likely worse after the accident at work. The pain Claimant experienced after the incident at work was the direct and proximate cause of her decision to pursue medical treatment.

The ALJ credits Dr. Bradley’s opinion that Claimant suffered a cervical strain as a result of her work activities on May 3, 2016. Dr. Bradley prescribed treatment and imposed work restrictions as a direct and proximate consequence of the work injury. These findings compel the conclusion that Claimant has proven the elements of a compensable claim.

B. Medical benefits

Respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury.

Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). As found, Claimant has proven by a preponderance of the evidence that the treatment recommended by Dr. Bradley is reasonable, necessary and related to her May 3, 2016 injury.

ORDER

It is therefore ordered that:

1. Claimant's May 3, 2016 neck injury is compensable.

2. Respondent shall provide all reasonable, necessary and related medical treatment for Claimant's compensable injury, including the charges from Emergicare and the diagnostic imaging performed at Peak Medical Imaging on May 3, 2016.

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

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

DATED: December 28, 2016

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-002-271-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/ Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 7, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 12/7/16, Courtroom1, beginning at 8:30 AM, and ending at 11:50 AM).

Claimant's Exhibits 1 through 24 were admitted into evidence, without objection. Respondents' Exhibits A through P were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Claimant's opening brief was filed, electronically, on December 16, 2016. Respondents were granted a brief extension of time within which to file an answer brief, which was filed on December 22, 2016. Claimant's Reply Brief was filed on December 27, 2016, at which time the matter was deemed submitted for decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable aggravation and acceleration of her right knee condition as to require medical care and treatment and which caused temporary total disability (TTD). The paramount issue involves the compensability of a work-related event on November

26, 2015. The primary issue concerns the causal relatedness of the need for the surgery of April 28, 2016, to fix the Claimant's patellar instability, or was the need for the surgery attributable to a pre-existing condition of the right knee and not to the incident of November 25, 2015, allegedly causing an aggravation and acceleration of the need for the surgery.

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

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant's date of birth is January 16, 1978. She would have been in high school in the mid-1990s.

2. At the commencement of the hearing the parties stipulated, and the ALJ finds, if the claim is compensable, all of the Claimant's medical care and treatment for her right knee since November 26, 2015 is authorized, causally related and reasonably necessary, including the right knee surgery of April 28, 2016, at the hands of Nathan Faulkner, M.D.

3. If compensable, the parties further stipulated, and the ALJ finds, that the Claimant's average weekly wage (AWW) is $1,145.83, which yields a TTD rate of $753.89 per week.

4. Also, if compensable, the parties stipulated and the ALJ finds that the Claimant was temporarily and totally disabled from April 28, 2016 through August 19, 2016, both dates inclusive, a total of 114 days. The ALJ determines that this is qualified by a determination of whether or not the surgery of April 28, 2016 was causally related to the incident of November 26, 2015.

Compensability

5. The Claimant was an Employee of the Employer. On November 26, 2015, she was scooting washing mashing with her hip and leg, when she felt a burning sensation her right knee (Respondents' Exhibit B, pp.24-25). In this regard, the Claimant's testimony is undisputed. The ALJ finds that the Claimant sustained a work-related event, however, there is no persuasive or credible evidence that she required medical treatment other than evaluations and treatment for her underlying right knee condition.

6. On November 28, 2015, the Claimant first presented to Concentra and was seen by Rammohan Naidu, M.D. Dr. Naidu noted that the Claimant reported a pop and then extreme burning in her knee (Claimant's Exhibit 12, p.109). Dr. Naidhu's report supports a temporary compensable event in the nature of a right knee strain.

7. On December 3, 2015, the Claimant again reported to Concentra and was seen by Natasha Deonarain, M.D. The Claimant stated that the burning sensation feels like *the last time* she tore her ligament (Respondents' Exhibit C, p. 30). The Claimant also told Dr. Deonarain that after her last surgery (sometime) prior to the injury in this case, she had an occasional sensation of patellar "slipping" with certain activity. (*Id*.) She was also aware of the anatomy of the knee, specifically reporting to Dr. Deonarain that she had a prior "MCL repair/dislocated patella" previously for which she underwent surgery. (*Id.)* The ALJ infers and finds that the Claimant's knowledge in this regard was acquired from her more recent left knee surgeries, and not from the 1996 right knee surgery.

8. On December 9, 2016, the Claimant had an MRI (magnetic resonance imaging) on her right knee, which showed no effusion and no hemarthrosis. (Respondents' Exhibit. D, p. 34). The MRI results further support a temporary right knee strain.

Mark Failinger, M.D.

9. The Claimant was referred to Dr. Failinger, an orthopedic surgeon, for consultation. In his report of December 17, 2015, Dr. Failinger noted the Claimant's "long history" of similar problems, and noted that the Claimant related she planned to undergo surgery for her knee previously in Texas. She also reported to Dr. Failinger that she did not want any therapy, injections or other conservative therapy. Rather, she wanted the surgery to her right knee that she was going to have performed previously in Texas (the ALJ infers and finds that the allegedly recent surgery the Claimant had wanted in Texas was to fix the patellar instability of her right knee --this never happened and there is no persuasive evidence that the Claimant had even consulted with a physician in Texas around 2013). The Claimant moved away from Texas in 2013 [this is corroborated by a medical record from Thornton Medical Center, dated January 27, 2014 (Claimant's Exhibit 10)] and she had previous right knee surgery in high school in 1996. She had two left knee surgeries (not part of this claim) in Texas in 2013 or shortly before 2013.

10. Dr. Failinger noted that he would normally recommend both therapy and a cortisone injection, however, the Claimant "has already done those things in the past and she was ready to push on with the surgery now." Dr. Failinger also recommended that all of the Claimant's records be obtained (a question remains concerning what "all" medical records means), including the records from the physician in Texas who was

going to perform the surgery noted by the Claimant to the right knee. The ALJ infers and finds that Dr. Failinger was incorrectly assuming that a physician in Texas had even been consulted, concerning right knee surgery, after 1996, much less medically contemplated.

11. The Claimant was seen at Concentra again on December 17, 2015 by Cheryl Meyers-Saffold, M.D. The note from this date contains a discussion with Claimant about her engaging in PT (physical therapy) and reviewing with the Claimant Dr. Failinger's desire to see the medical records from the prior orthopedic surgeon in Texas who had recommended right knee surgery. The ALJ infers and finds that Dr.Failinger's desire to see the Texas medical records is based on an incorrect assumption that there were such records when, in fact, there is no persuasive evidence that there were any medical records in this regard.,

12. The Claimant returned to Dr. Failinger on January 7, 2016. He noted that the Claimant had a prior surgery to the right knee (1996) from some old records brought in by the Claimant and that she "always had instability" in the knee and it "has never done well" prior to her injury with the Employer herein. Dr. Failinger diagnosed the Claimant with "right knee status post-previous patellar instability with persistent symptoms." He also noted that he would proceed with a surgery wanted by the Claimant and it was "not a problem because she really wants the surgery and she was *going to have some surgery* in Texas (in 2013 or prior to 2013).

13. On April 28, 2016, the Claimant underwent surgery with Nathan Faulkner, M.D., to fix her patellar instability (Claimant's Exhibit 17, p. 201). The ALJ infers and finds that the need for this surgery was based entirely on the Claimant's pre-existing patellar instability, which was not aggravated and/or accelerated by the incident of November 26, 2015, thus, the need for the surgery was not causally related to the incident. Moreover, the totality of the evidence establishes that the incident of November 26, 2015, although a compensable event, amounted to an injury in the nature of a sprain, which necessitated some medical care and treatment prior to April 28, 2016.

14. On December 17, 2015, Dr. Failinger noted that the Claimant "was in Alamo down in Texas and was going to have surgery and decided not to do so and came up to Colorado… She just wants to have the surgery that she was going to have done at Texas performed now" (Claimant's Exhibit 12, p.139). On January 7, 2016, Dr. Failinger repeated this statement and stated she had "moved recently" from Texas (Claimant's Exhibit 12, p. 149). According to the Claimant, these were not accurate statements. The Claimant moved from Texas in 2013, and lived in Washington before moving back to Colorado. No surgery had been recommended. Dr. O'Brien [Timothy O'Brien, M.D., the Respondents' independent medical examiner (IME) stated in his testimony that he agreed it was "very possible" that Dr. Failinger had misunderstood [the Claimant] on this matter (O'Brien Depo., p. 101). The record contains no medical records prescribing a surgery in Texas for the Claimant's right knee, beyond the known

surgery in 1996. The ALJ infers and finds that Dr. Failinger misunderstood the Claimant and inadvertently distorted time and events, which made it appear that what happened 20-years or even 3-years ago happened "only yesterday." Nonetheless, Dr. Failinger's distortion of time is a "red herring" to the resolution of the issue concerning causal relatedness of the need for the April 28, 2016 surgery.

15. Dr. Failinger **neve**r rendered an opinion that the need for the April 28, 2016 surgery was causally related to an aggravation and/or acceleration of her underlying right knee condition by virtue of the incldent of November 26, 2015.

16. On April 28, 2016, the Claimant underwent surgery with Dr. Faulkner to fix her patellar instability (Claimant's Exhibit 17, p. 201).

Claimant's Independent Medical Examiner (IME), Edwin M. Healey, M.D.

17. On June 3, 2016, the Claimant presented for an IME with Dr. Healey. Dr. Healy is a Level-2 Accredited [by the Division of Workers' Compensation (DOWC) and a board certified neurologist. He is of the opinion that based *on the information available to him*, the Claimant had a permanent, severe aggravation of a pre-existing chronic patellofemoral syndrome with intermittent subluxation as a result of the November 27, 2015 injury. As found herein below, the ALJ rejects this opinion attributing everything to the November 26, 2015 incident. The ALJ notes that Dr. Healey placed several caveats on his opinion:

- Dr. Healey actually called the Claimant's attorney's office for the opportunity to review Claimant's prior medical records regarding her right knee. He was told that the attorney did not have the records, but was attempting to obtain them.
- Dr. Healey noted that he was highly dependent upon what Claimant was telling him because he did not have the prior records
- He reiterated that he had requested the additional pre-existing records, and if review of the records changes his opinion, he will provide an addendum.

18. The ALJ finds that the record does not contain persuasive evidence that the Claimant ever provided the pre-existing records to Dr. Healey, or that Dr. Healey reviewed them after production of his report. Consequently, the ALJ finds Dr. Healey's ultimate opinions concerning permanency lacking in persuasiveness and credibility. The ALJ, however, finds that Dr. Healey's opinions support a compensable right knee strain of November 26, 2015.

Respondents' IME by Timothy O'Brien, M.D.

19. On June 28, 2016, Dr. O'Brien performed an IME on behalf of Respondents. Dr. O'Brien's is a board certified orthopedic surgeon. He has performed

numerous knee surgeries, including replacements, and several ACLs and arthroscopies (Respondents' Exhibit O, p. 82 ll 1-10).

20. Dr. O'Brien is of the opinion that the onset of the right knee pain on November 27, 2015 was a manifestation of the Claimant's personal health and that there was no new tissue breakage of yielding on that date (Respondents' Exhibit. A, p 11). Based on the totality of the evidence, the ALJ rejects Dr. O'Brien's opinion insofar as it denies a compensable event on November 27, 2015, albeit, a strain amounting to a temporary exacerbation, caused by a work-related event and necessitating some medical treatment up until the time of the April 28, 2016 surgery.

21. Dr. O'Brien also stated the opinion that the Claimant's reported mechanism and behavior after the alleged event is not consistent with an injury. Dr. O'Brien has no credentials in the behavioral sciences. He noted that an acute patellar dislocation, even in a person who has a history of chronic dislocations, typically results in significant pain and the need for medical attention as it is difficult to carry on with activities (Respondents' Exhibit A, p. 11). In summary, the evidence establishes that the Claimants' pattern showed that she did not have a first-time patella dislocation on November 27, 2015 (Respondents' Exhibit O, p. 112, pp. 20-23), and the ALJ so finds.

22. Dr. O'Brien is also of the opinion that in an acute patellar dislocation, even in a person who has history of chronic or recurrent locations, there is significant pain and typically bleeding into the knee joint, which was not present in this case (Respondents' Exhibit A, p. 11).

23. Dr. O'Brien stated that the MRI (magnetic resonance imaging) shows no evidence of an acute injury. When a kneecap dislocates for the first time, there should be massive bleeding, and that was not present on the MRI (Respondents' Exhibit A, pp. 11-14). Dr. O'Brien explained that there was no evidence of acute injury on the MRI and "all evidence points to a pre-existing, longstanding condition" (Respondents' Exhibit C, p. 95).

24. Dr. O'Brien explained that what Claimant felt on November 27, 2015 was related to her pre-existing patellofemoral instability. While he thinks Claimant did feel her knee shift when pushing on the washer, no new tissue tearing occurred but instead "she felt what exists in her on a day-to-day basis for years prior to that day, and it just manifested itself again" (Respondents' Exhibit O, p. 128). To support this opinion, Dr. O'Brien stated in his IME Report that "it is medically improbable and it borders on the impossible that a kneecap dislocated and yet there was no intra-articular swelling or hemarthrosis. I have been an orthopedic surgeon for nearly 30 years and I have treated many patellar dislocations, both acute and chronic, and I have never examined a knee where the patella actually dislocated and was not associated with an intra-articular accumulation of fluid, typically blood" (Respondents' Exhibit A, p. 12)

25. Dr. O'Brien stated the opinion that there was no injury in this case. He was of the opinion that the objective MRI showed no tissue tearing or yielding and no evidence of bleeding (Respondents' Exhibit O, p. 127 ll 7-24). Although expressing a medical opinion of "no injury," Dr. O'Brien is not expressing a legal opinion concerning "injury" within the meaning of the Workers' Compensation Act. As previously found, the Claimant sustained a temporarily exacerbating, compensable injury on November 27, 2015.

26. Dr. O'Brien is of the opinion that there is no objective evidence to support that Claimant dislocated her knee cap on November 27, 2015 (Respondents Exhibit A, p. 12).

27. Dr. O'Brien was further of the opinion that the need for any medical care was not due to the events of November 27, 2015, but rather to Claimant's pre-existing condition (Respondents' Exhibit O, p. 131 ll 3-7).

The Claimant's Histories

28. The Claimant maintained at hearing that the histories recorded by Dr. O'Brien, Dr. Failinger, and her own expert, Dr. Healey, were inaccurate with respect to her prior treatment and surgical recommendation to fix her knee prior to her alleged incident on November 27, 2015. The ALJ finds that Claimant's contention that these separate experts, including her own expert, were all incorrect strains credulity to the point that this would be beyond any reasonable bounds of coincidence. The ALJ finds it especially important that Dr. Failinger reviewed with the Claimant the potential for physical therapy, or an injection, but these suggestions were rejected by the Claimant in favor of a surgery, because she did not believe the therapy or injection would do any good. This fact demonstrates the Claimant's familiarity with both conservative treatment, and the surgery which she eventually underwent, which makes it more probable that she had contemplated, with the benefit of medical advice, the same treatment regimen previously in Texas, contrary to her representations at hearing. The ALJ finds it more likely that Claimant did report such a history to the physicians in this matter, and did have a surgery proposed prior to her alleged incident in this case which was to correct the problem with her knee which was ultimately done by Dr. Faulkner on April 28, 2016. The ALJ infers and finds this further supports that the incident of November 27, 2015 did not aggravate or accelerate the Claimant's right knee condition to the point of causing the need for the surgery of April 28, 2016. Moreover, the ALJ infers and finds that the need for the surgery of April 28, 2016 was caused, entirely by her pre-existing right knee condition. The five-month delay between the incident of November 27, 2015 and the surgery of April 28, 2016 reveals that the surgery was **not** of an emergent nature. The type of surgery, correction of the right knee instability, coupled with the totality of the facts herein, establish that the desirability of the surgery was of a more long-standing nature than the five months from November 27, 2015.

Ultimate Findings

29. Based on the totality of the evidence, the ALJ finds Dr. O'Brien's opinion that the April 28, 2016 surgery was **not** causally related to the claim involving the right knee injury of November 26, 2015. Indeed, the ALJ finds Dr. O'Brien's opinion in this regard more credible and persuasive than Dr. Healey's opinion. Other than his confusion which resulted in a distorted time sequence of events in the Claimant's history, the ALJ finds Dr. Failinger's opinions credible. Dr. Failinger, however, rendered **no** opinion concerning the causal relatedness of the need for the April 28, 2016 surgery. The ALJ, however, finds that the Claimant sustained a compensable injury on November 26, 2015, which was of a temporal duration (which may be characterized as a right knee strain) up until the date of the unrelated surgery of April 28, 2016. It would be unfair to attribute any percentage of the need for surgery to the compensable right knee strain of a temporary duration.

30. Between conflicting opinions concerning the causal relatedness of the surgery of April 28, 2016, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. O'Brien, part of the opinions of Dr. Failinger as specified in paragraph 29 above, and to reject all opinions to the contrary. On the compensability of the right knee strain, of temporal duration until the unrelated surgery of April 28, 2016, the ALJ accepts Dr. Healey's opinion, corroborated by the Claimant's undisputed testimony concerning the mechanics of the injury on November 27, 2015 insofar as it supports a temporary strain of the right knee.

31. The Claimant has failed to prove, by a preponderance of the evidence that the surgery of April 28, 2016, performed by Dr. Faulkner, was causally related to an aggravation and/or acceleration of her underlying right knee instability. The Claimant, however, has proven, by preponderant evidence that she sustained a compensable injury of temporal duration until April 28, 2016, on November 26, 2015, which may be characterized as a right knee strain.

32. The Claimant has proven, by a preponderance of the evidence, that Dr. Failinger and all of his referrals were authorized and within the chain of authorized referrals, insofar as they treated the temporary effects of the Claimant's right knee strain.

33. The parties stipulated and the ALJ found that the Claimant's AWW is $1,145.83, which at present is academic.

34. The Claimant did not designate as an issue nor did the Claimant prove any temporary disability prior to April 28, 2016 or after August 19, 2016.

35. The Claimant failed to prove that temporary disability from April 28, 2016 through August 19, 2016 was causally related to the compensable injury of November 26, 2015. Further, the Claimant failed to prove any temporary disability from August v19, 2016 through the hearing date of December 7, 2016. .

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. O'Brien's opinion that the April 28, 2016 surgery was **not** causally related to the claim involving the right knee injury of November 26, 2015 was more credible and persuasive than Dr. Healey's opinion. Other than his confusion which resulted in a distorted time sequence of events in the Claimant's history, the ALJ found Dr. Failinger's opinions credible as supporting a strain of the right knee resulting from the incident of November

26, 2015, which was of a temporary duration. Dr. Failinger, however, rendered **no** opinion concerning the causal relatedness of the need for the April 28, 2016 surgery. The Claimant sustained a compensable injury on November 26, 2015, which was of a temporal duration (which may be characterized as a right knee strain) up until the date of the unrelated surgery of April 28, 2016. As further found, the Claimant's description of the mechanism of injury on November 26, 2015 was credible and undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions concerning the causal relatedness of the surgery of April 28, 2016, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. O'Brien, part of the opinions of Dr. Failinger and to reject all opinions to the contrary. On the compensability of the right knee strain, of temporal duration until the unrelated surgery of April 28, 2016, the ALJ accepted Dr. Healey's opinion, corroborated by the Claimant's undisputed testimony concerning the mechanics of the injury on November 27, 2015 insofar as it supported a temporary strain of the right knee.

Basic Test for Compensability

c. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). The initial reports of Dr. Naidu and Dr. Deonarain, as found, support a compensable temporary right knee strain. Therefore, as found, the Claimant experienced an injury incident sufficient to be legally compensable.

Causal Relatedness of Need for April 28, 2016 Surgery

d. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the “direct and natural consequences” of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). As found, the surgery of April 28, 2016, performed by Dr. Faulkner, was **not** causally related to an aggravation and/or acceleration of her underlying right knee instability.

Medical Treatment Attributable to Pre-Existing Condition

e. The law concerning apportionment, by analogy, is helpful. In the case of successive employers, the Court of Appeals determined that an apportionment was compelled where the contribution of the previous employer was significant and it would be fundamentally unfair to hold the second employer to a full responsibility rule. *See Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004). Although a stretched analogy, as found, in the present case, the need for the April 28, 2016 surgery was 100% attributable to the Claimant’s preexisting right knee instability, and it would be unfair to attribute any percentage of the need for surgery to the compensable right knee strain of a temporary duration.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. This includes proving a causal relationship between the incident of November

26, 2015, and the need for the surgery of April 28, 2016. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to satisfy her burden with respect to the causal relatedness of the need for the April 28, 2016 surgery and the compensable strain of November 26, 2015. The Claimant, however, has satisfied her burden with respect to the right knee strain of November 26, 2015, which was of temporary duration.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of medical treatment at the hands of Rammohan Naidu, M.D., Natasha Deonarain, M.D., and Mark Failinger, M.D. , for treatment of the Claimant's right knee strain of temporary duration, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all claims for the surgery performed by Nathan Faulkner, M.D., are hereby denied and dismissed.

C. The Claimant's average weekly wage is $1,145.83, which is academic at this point.

D. Any all claims for temporary disability benefits from April 28, 2016 through the date of hearing, December 7, 2016, are hereby denied and dismissed. Also, any and all claims for temporary disability benefits from November 26, 2015 through April 28, 2016 are hereby denied and dismissed.

E. Any and all maters not determined herein are reserved for future decision.

DATED this______day of December 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

1. Whether the Claimant sustained a compensable injury on November 2, 2015 arising out of and in the course and scope of his employment with the employer;

2. If the Claimant has proven a compensable injury, whether the request for surgery from Dr. Mitchell is reasonable and necessary to cure and relieve him from the effects of the industrial injury; and

3. If the Claimant has proven a compensable injury, whether the medical treatment he has received was reasonable and necessary to cure and relieve him from the effects of the industrial injury, and whether he is entitled to ongoing medical treatment.

FINDINGS OF FACT

1. The Claimant was involved in a significant motor vehicle accident in 1997 while enlisted in active duty for the United States Army. (Resp. Exh. H: 78).

2. As part of his treatment for this motor vehicle accident, the Claimant underwent a surgery at the L4-L5 level of his lumbar spine, performed by Dr. Masferrer in 1998. The MRI performed on December 14, 2015 confirmed evidence of a left laminotomy procedure at this level. The Claimant described the procedure as a partial discectomy to his ATP. (Resp. Exh. D: 40).

3. On July 21, 2015, the Claimant was evaluated as part of his request to obtain military disability benefits for a service disability for the 1997 motor vehicle accident from the Department of Veterans' Affairs (VA). He reported to the VA that he sees a chiropractor twice per month to manage his chronic low back pain related to the service disability. (Resp. Exh. H: 78).

4. The Claimant's chiropractor from about 2008 forward was Aaron Smith, D.C. The Claimant presented to Chiropractor Smith approximately thirty times since 2008 for adjustments of his low back. Of particular note, the Claimant had nine chiropractic visits in the ten months prior to his alleged injury of November 2, 2015. The Claimant presented for an adjustment of L2 and L3 less than one month prior to his reported injury, reporting 3/5 pain levels. (Resp. Exh. F).

5. The Claimant alleges he sustained a low back injury on November 2, 2015. On November 3, 2015, the Claimant presented to Chiropractor Smith who performed an adjustment at the L2, L4, and L5 levels. (Resp. Exh. F: 62).

6. At his initial appointment with a Authorized Treatment Provider (ATP) doctor on November 6, 2015, the Claimant reported he was experiencing 9/10 levels of pain in his low back on the left, with pain radiating into his butt and back of his left leg. There is no indication in this initial report that the Claimant informed the doctor of his ongoing treatment for his service disability and chronic low back pain. (Resp. Exh. D: 52-54).

7. On November 20, 2015, the Claimant began physical therapy. He filled out an intake questionnaire wherein he noted that his current symptoms were similar to an injury he sustained eighteen years prior without reference to ongoing or chronic issues or treatment. He did not inform the physical therapist that he had sought chiropractic care for that condition in the ensuing eighteen years. (Resp. Exh. 60).

8. The Claimant reported on December 2, 2015 that, as part of his maintenance for the 1998 surgery, he received approximately three to four chiropractic sessions per year for ongoing lower back pain. Despite ongoing treatment, the Claimant reported to the ATP he had not had significant problems with his back since the 1998 surgery. (Resp. Exh. D: 40).

9. On January 12, 2016, the Claimant reported to Dr. Ross he had lumbar spinal surgery eighteen years prior with "resolution of symptoms and no recurrence until recent injury." (Resp. Exh. C: 17).

10. The Claimant applied for Veteran's Affairs disability benefits in 2015 for his service disability and obtained an evaluation to obtain those benefits in July 2015. He testified he scheduled this appointment because his back was still hurting and he needed to update his benefits. At his appointment, the Claimant reported:

- **Constant** pain at a **7-8/10** level, with occasional pain at the **9/10** level;
- Episodes of **electric shocks** in his back and bilateral legs **several times a day**;
- Significant range of motion deficits affecting his ability to put socks and shoes on;
- Increased pain with walking over **15 minutes**;
- A requirement for the occasional use of a walking stick; and
- An inability to perform his hobby of hiking.

In addition to these complaints, a physical examination performed established ***tenderness at the L4 level and mild radiculopathy in both lower extremities.*** The VA evaluator assessed that the claimant's pain involved sciatic nerve problems and the L4-S3 nerve roots bilaterally. (Resp. Exh. H: 78, 79, 82, 83).

12. The Claimant underwent a lumbar x-ray on this date, which established a disc protrusion at the L3-L4 level. (Resp. Exh. I: 93).

13. The Claimant testified that the result of this appointment was that his VA disability benefits were increased. He testified that his impairment for his back was 20% (which was a 10% increase from his prior rating per his testimony), and 10% impairment for nerve damage in each leg, for a total of 40% impairment. (Hrg. Tr. p. 34-35).

14. As part of his ongoing treatment for his lumbar spine post-surgery, the Claimant underwent a lumbar MRI on September 10, 2010. This study established a disc herniation at L3-L4 and bilateral facet arthropathy and hypertrophy at that level. Similarly, an x-ray performed on July 21, 2015 confirmed the existence of this L3-L4 disc herniation. (Resp. Exh. I: 92).

15. Dr. Michael Rauzzino, a neurosurgeon, testified at hearing that he had reviewed the film from the 2010 MRI and opined that it established "L3-L4 disc herniations in both directions." (Hrg. Tr. p. 56, ln. 2).

16. The Claimant has alleged that he sustained a low back injury on November 2, 2015 while working at a job site. He described that the injury occurred while he was shoveling dirt; specifically he noted a twisting mechanism of injury. (Hrg Tr. p. 12; Resp. Exh. D: 52).

17. After a course of conservative treatment, the Claimant underwent a MRI on December 14, 2015. That study established degeneration at the L3-L4 level. Dr. Orderia Mitchell opined that the findings were consistent with degeneration from T12 through the sacrum with retrolithesis at the L3-L5 levels and a disc bulge at L3-L4. (Resp. Exh. B: 8; Resp. Exh. I: 88).

18. The Claimant subsequently underwent epidural steroid injections for both diagnostic and therapeutic purposes at L4-L5 and L5-S1. No injection was performed at the L3-L4 level. The injections were noted by Dr. Mitchell to be unhelpful. (Resp. Exh. B: 8; Resp. Exh. C).

19. On January 5, 2016, Dr. Mitchell recommended a bilateral discectomy of the L3-L4 level with foraminotomies. (Resp. Exh. B: 10).

20. The Claimant testified that the alleged incident of November 2, 2015 caused new symptoms that he had not experienced previously and that his back was asymptomatic prior to the incident. He testified that his new symptoms were: (1) a "golf ball" sensation in his *left* foot; and (2) a new problem with pain on walking. (Hrg. Tr. p. 30-31). He also complained of low back pain at an 8/10 pain level while being examined by his ATP (CCOM) physicians. (Resp. Exh. D: 49).

21. The Claimant later reported to Dr. Rook (who performed an Independent Medical Examination [IME] at Claimant's request) that another completely new symptom after the alleged injury was radiation of pain into his left leg. (Cl. Exh. 13: 130).

22. At the Claimant's appointment with Dr. Mitchell on January 5, 2016, it was recorded that the claimant had the following physical examination: tenderness at L4, positive straight leg raise tests on both legs, and limited active range of motion. He specifically reported to Dr. Mitchell that he had a golf ball sensation in his *right* foot, not a golf ball in his *left* foot as he testified. (Resp. Exh. B: 12). This notation was made on January 5, 2016 in the Claimant's own handwriting. The Claimant conceded at hearing that he had a golf ball sensation in his *right* foot before the alleged incident. (Hrg. Tr. p. 27, ln. 8-9).

23. On November 20, 2015, the physical therapist similarly documented moderate loss of active range of motion, positive straight leg raise test on the left, and increased palpable tension at the piriformis. (Resp. Exh. E: 58).

24. Prior to November 2, 2015, the Claimant had voiced substantially similar subjective complaints. On September 17, 2015, the claimant was examined by his primary care physician for bilateral foot pain and complained of "golf ball pain" in his (unspecified-left or right) foot. (Resp. Exh. G: 70).

25. Despite his testimony that he had never had difficulty with walking prior to November 2, 2015, he specifically reported to the VA that any walking over 15 minutes or a few blocks caused pain and that he could no longer go hiking. He also reported to the VA occasional use of a cane or walking stick. (Resp. Exh. H: 78, 83; Hrg. Tr. p. 31, ln. 8-11).

26. Even though the Claimant specifically denied any prior radiating pain in his left leg to his own expert, the Claimant reported "electrical shocks" that radiated down *both* legs several times a day to the VA on July 21, 2015. Further, the Claimant was diagnosed with bilateral lower extremity radiculopathies on that same date. (Resp. Exh. H: 78, 82).

27. Further, on July 21, 2015, the Claimant reported to the VA that he had difficulty putting his shoes and socks on due to active range of motion loss and a physical examination documented both positive straight leg raise tests bilaterally and tenderness at the L4 level. (Resp. Exh. H: 78, 79, 82). These findings were similar to those found by Dr. Mitchell on January 5, 2016.

28. Finally, prior to the alleged work injury, which the Claimant testified caused him pain levels of 8-9/10, (Hrg T. P. 30), the Claimant had already reported to the VA the same chronic pain in July 2015 – "7-8/10 pain constantly with flares to 9/10". (Resp. Exh. H: 78).

29. The ALJ finds and determines that the great weight of the evidence establishes that the Claimant's reported subjective complaints of pain and function after the alleged incident were substantially similar to that reported by the Claimant prior to the alleged incident. The ALJ finds and determines that the Claimant's subjective presentation was largely unchanged by the alleged November 2, 2015 incident.

29. Dr. Rauzzino opined, having reviewed the Claimant's extensive medical history, there was no evidence of an acute injury occurring on November 2, 2015 and the Claimant's current condition appeared to be a natural progression of the L3-L4 disc herniation documented in the 2010 MRI. (Resp. Exh. A: 6).

30. Dr. Rauzzino, whose *report* was issued *prior to* reviewing the VA records (which were not tendered to Respondent until 9-30-16), found persuasive that the Claimant had been treating with a chiropractor in the months prior to his alleged injury, noting pain levels up to 10/10. He opined that the frequency of chiropractic care, which escalated over time, was due to the natural progression of the Claimant's degenerative changes seen on MRI in 2010. (Resp. Exh. A: 6).

31. Dr. Rauzzino testified at the hearing in this matter and was accepted as an expert in the field of his board certification, neurosurgery. (Hrg. Tr. p. 48-49).

32. Dr. Rauzzino testified that his review of the claimant's pre-incident records confirmed that the claimant was experiencing elevated levels of pain (5/5, which Dr. Rauzzino equated to 10/10 pain). He also testified the 2010 MRI established a L3-L4 disc herniation, which he would expect to naturally worsen over time. (Hrg. Tr. p. 55-57).

33. Dr. Rauzzino credibly explained that, when he compared the films of the 2015 MRI to the 2010 MRI, it showed expected progression in the disc herniation at L3-L4 seen in 2010 and similar progression of degeneration at the other spinal levels. He explained he would anticipate this progression over the period of five years between the two MRIs. (Hrg. Tr. p. 56-57).

34. Dr. Rauzzino credibly concluded that there was "no objective evidence to suggest that [the Claimant] sustained a new injury to his lumbar spine" on November 2, 2015. Rather, Dr. Rauzzino testified that the recent medical documentation established that the Claimant had "ongoing back pain, which he's had before... ongoing leg pain, which he's had before...There's nothing new here that he hasn't had before in the records." (Resp. Exh. A: 6; Hrg. Tr. p. 60, ln. 20-24).

35. Dr. Rook agreed that the Claimant had a pre-existing condition, but testified that he felt that the claimant suffered a "permanent aggravation of his chronic low back pain" on November 2, 2015 and that he developed a symptomatic radiculopathy on that date. (Rook Depo. Tr. p. 16, ln. 7-15).

36. Dr. Rauzzino disagreed with Dr. Rook's position (Dr. Rook's *report* was issued three weeks *before* receipt of the VA records by Claimant on 9-30-16) that the Claimant suffered a work-related aggravation on November 2, 2015. Dr. Rauzzino testified that the Claimant's pre-incident condition was significant: the Claimant reported 10/10 pain, was actively seeking chiropractic care, and noted a significant decrease in function to the VA. Dr. Rauzzino credibly testified that the Claimant's current condition is "the same ongoing complaints that he has had all along." (Hrg. Tr. p. 61-62).

37. The ALJ finds and determines Dr. Rook's opinion is undermined by the great weight of the medical records which establish that the Claimant had significant symptomatic low back pain and bilateral radiculopathy in the months and weeks prior to the alleged work injury -which was not reported to his treating physicians- and which was substantially similar to those pain and function complaints reported after the alleged incident.

38. The ALJ credits Dr. Rauzzino's opinions along with the supporting medical records and determines that the objective evidence in this claim supports a finding that the Claimant's objective condition was not changed by any incident occurring on November 2, 2015. Rather, the ALJ finds and determines that the objective evidence and the totality of the medical record do not support a finding that an injury occurred on November 2, 2015.

39. The ALJ also finds and determines the record does not support a finding that the Claimant experienced an aggravation of his underlying chronic low back pain on November 2, 2015. Specifically, the ALJ finds there is insufficient indication in the medical records that any incident or injury of November 2, 2015 aggravated, accelerated, or combined with a pre-existing condition to *cause the need for medical care or disability.* While Claimant may have experienced some back pain while shoveling on 11-2-15, it was, at most, due to temporary irritation of the surrounding soft tissue. In so finding, the ALJ finds Dr. Rauzzino's opinions and testimony were more persuasive than those of Dr. Rook.

40. As discussed above, the Claimant failed to fully disclose his condition arising out his service disability to his ATPs on this claim, including his own IME. Specifically, in his own handwriting, the Claimant reported:

- on November 6, 2015, that he had not had any treatment in the past for his low back;
- on November 20, 2015, the Claimant failed to disclose he had seen a chiropractor for his low back pains prior to the alleged injury; and
- he had similar symptoms 18 years prior, without mention to more recent treatment.

(Resp. Exh. D; 52; E: 60).

41. Further, the Claimant's ATPs specifically documented the Claimant reported he has not had significant problems with his back since his 1998 surgery and that post-surgery he had a "resolution of symptoms and no recurrence until recent injury." (Resp. Exh. C: 17; D: 40).

42. Dr. Rook documented the Claimant had experienced a number of work flare-ups since 2002 that required treatment with a chiropractor which he attributed to

his work with the employer. Dr. Rook is the only physician to document any such “work” flare-ups. (Cl. Exh. 13: 129-130).

43. Despite Dr. Rook’s documentation of alleged work flare-ups- as reported by the Claimant-, the medical records establish that the Claimant had no prior work injuries with the employer. In response to a direct question whether he had prior work injuries in a questionnaire, the Claimant wrote: “no work injuries till 02 Nov 15.” He also conceded in testimony that he never reported a work injury prior to this date. (Resp. Exh. D: 53; Hrg. Tr. p. 37, ln. 22-25).

44. Additionally, the Claimant reported to the VA in July 2015 that he got chiropractic treatment twice a month, not for any work injury, but due to ongoing pain from his military related disability. (Resp. Exh. H: 78).

45. The Claimant’s testimony to this Court minimized his prior history and his treatment with the ATPs. The ALJ finds that the Claimant’s testimony that he could not remember informing the ATPs of his prior history to be not persuasive. In particular, the fact that the Claimant failed to inform his providers that he was seeking treatment just weeks and months prior to the reported injury for vastly similar complaints is a significant omission. The ALJ finds and determines that the Claimant failed to disclose this information to his ATP, and to his Independent Medical Examiners.

46. The ALJ additionally finds the alleged work-related flare-ups reported to Dr. Rook were inconsistent with the great weight of the record. The ALJ finds and determines that the records establish that the Claimant specifically reported flare-up in his low pain to be related to his VA disability so as to receive benefits from the government. As a result, the ALJ finds it is more probable than not that any flare-ups, if they occurred at all, were related to this pre-existing military service disability, rather than to the Claimant’s work.

47. Based on the totality of the record and testimony, the ALJ finds and determines that the Claimant’s testimony regarding his subjective reports of pain and function were not consistent with his medical history. At least three times during the hearing, Claimant self-reported memory issues: "I need to interject something. I don't have the greatest memory." (Hrg Tr. p. 28). "My memory's not that great". (Hrg. Tr. p 33). "Your honor, my--my memory isn't what it used to be, with taking drugs every night" (Hrg Tr. p. 39).

48. Dr. Rook testified in this matter that he performed an IME, which included an interview and evaluation of the Claimant. He testified conceded that he based his causation opinions on the Claimant’s self-report of symptoms. Specifically, he conceded that he based his opinion on the Claimant’s report that he had new symptoms post-incident that he did not have pre-incident. However, Dr. Rook conceded at hearing that additional medical records had come to light – particularly the VA records – that contradicted the Claimant’s report to him regarding his “new” symptoms. Dr. Rook conceded that the Claimant reported 7-8/10 and 9/10 pain levels and radiating pain bilaterally months before the reported incident. (Rook Depo. Tr. p. 21-24).

49. Dr. Rook also testified that the Claimant reported to him that the alleged work injury affected his ability to function and perform activities that he could perform prior to the alleged work injury. Specifically, the Claimant reported that, as a result of the alleged work injury, he could no long hike, bike or walk his dog. The Claimant did not, however, report to Dr. Rook that he had already reported to the VA having difficulty with these activities prior to the alleged work injury. Dr. Rook conceded that the VA records document functional limitations inconsistent with what was reported to him at the IME. (Rook Depo. Tr. p. 55-56).

50. The ALJ finds and determines that Dr. Rook's opinion is based in large part on the Claimant's subjective reporting, which is inconsistent with the medical records and the totality of the evidence. The ALJ finds that the record does not establish that the Claimant's pre-alleged incident treatment was in any way related to his work with the employer.

51. The ALJ finds Dr. Rook's testimony and opinions to be less persuasive and credible than that of Dr. Rauzzino regarding the underlying medical reasons for the pain that Claimant now reports.

CONCLUSIONS OF LAW

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

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

3. The Claimant's testimony was neither consistent nor persuasive with regard to his subjective reporting of pain and function pre- and post-alleged incident. Just months prior to the alleged work injury the Claimant reported severe pain and

significant functional limitations, and thereby obtained government benefits for a military disability for a low back condition with bilateral lower extremity radiculopathy.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates, accelerates, or combines with” a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse,* 805 P.2d at 1167*.* The Workers’ Compensation Act creates a distinction between the terms “accident” and “injury.” The term “accident” refers to an “unexpected, unusual, or undesigned occurrence,” whereas an “injury” refers to the physical trauma caused by the accident. In other words, an “accident” is the cause and an injury is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable “injury.” § 8-41-201(1), C.R.S., *Wherry v. City and Cty. of Denver*, W.C. No. 4-475-818 (I.C.A.O., March 7, 2002).

5. The Claimant has failed to establish that he sustained an acute injury during the scope and course of his employment with his employer by a preponderance of the evidence. Specifically, the Claimant has failed to establish by a preponderance of the evidence that any incident at work on November 2, 2015 caused an injury that resulted in the need for medical treatment or disability. *Wherry*, W.C. No. 4-475-818.

6. The Claimant had a significant related pre-existing history of chronic low back pain and lower extremity radiculopathy that the Claimant failed to fully disclose to his treating physicians. Just months prior to the alleged work injury the Claimant sought and obtained a 40% disability rating from the VA for his low back condition and his bilateral leg pain and radiculopathy. Further, the Claimant reported similar subjective complaints and levels of function regarding areas of pain, pain levels, and activities affected in the weeks and months prior to the alleged November 2, 2015 incident and thereafter. As found, there is insufficient evidence in the medical records that any incident occurring on November 2, 2015 aggravated, accelerated, or combined with a pre-existing condition to cause the need for medical care or disability. *Merriman v. Indus. Comm’n*, 210 P.2d 448 (Colo. 1949). The ALJ finds that the opinions and testimony of Dr. Rauzzino was more persuasive than those of Dr. Rook regarding the underlying medical reasons for the pain that Claimant now reports.

7. If Claimant still desires the surgery being proposed by Dr. Mitchell to alleviate his symptoms, it may be performed outside the Workers' Compensation system.

ORDER

It is therefore ordered that:

1. The Claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury during the course and scope of his employment with the Employer on November 2, 2015.

2. The Claimant's claim for medical treatment, including the proposed surgery by Dr. Mitchell, and workers' compensation benefits is denied and dismissed.

All matters not determined herein are reserved for future determination.

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

DATED: December 29, 2016

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

ISSUES

- Did Claimant establish by a preponderance of the evidence that he suffered a compensable injury to his lower extremity/lumbar spine and cervical spine in the course and scope of his employment in April of 2016?

- What was Claimant's AWW?

- Is Claimant entitled to receive TTD and TPD benefits?

- Did the right to designate a new authorized treating physician pass to Claimant?

- Whether the medical care Claimant received at the University of Colorado Hospital, including ambulance and EMT services on April 12, 2016, was reasonable and necessary.

Stipulations

The parties stipulated that if the claim was found compensable:

1. Claimant's average weekly wage ("AWW") as of the date of injury was $528.00 and then increased on August 1, 2016 for the loss of health insurance benefits (COBRA) to $647.53.

2. Claimant is entitled to temporary partial disability ("TPD") benefits from April 12, 2016 to June 2, 2016, to the extent he did not earn $528.00 a week.

3. Claimant is entitled to temporary total disability ("TTD") benefits from June 3, 2016 (based on an AWW of $528.00) until July 31, 2016. After July 31, 2016, Claimant is entitled to TTD benefits based on an AWW of $647.53, subject to applicable offsets.

FINDINGS OF FACT

1. Claimant, who is forty-nine (49) years old, worked for Employer for six years. He worked on the glass line, taking glass for windows and doors off the line and stacking same on carts.

2. Claimant had a prior work-related injury which occurred on April 28, 2015 in which he hurt his legs pushing a cart that held 400-500 pounds of glass. Claimant required medical treatment for this injury, but was released to work with no restrictions.

Claimant testified he returned to work without restrictions and required no medical treatment from June 7, 2015 through April 6, 2016.[1]

3. On April 7, 2016, while working on the glass line, Claimant finished filling a cart and felt a pull in the back of his legs. Claimant testified that it felt like a hernia and his pain worsened when he continued working. After reporting the injury, Claimant was provided a list of medical providers and he chose Concentra.[2]

4. Brian Counts, M.D. evaluated Claimant on April 7, 2016 and noted he had tight hamstrings bilaterally, as well as mild tenderness to touch posteriorly. Claimant was diagnosed with a hamstring strain and plantar fasciitis. Dr. Counts opined there was greater than a 50% probability that this was a work-related injury. Dr. Counts also noted that this may be seen as an aggravation of the previous work injury, but Claimant was symptom free for the previous ten (10) months. The ALJ credited this opinion of Dr. Counts. Dr. Counts issued the following work restrictions: change positions periodically to relieve discomfort; may need to take 5-10 minute breaks every two hours to rest and stretch.

5. An Employer's Incident Report was prepared on April 7, 2006 in which Mark Davis, (Assistant Plant Manager) noted that, according to the employee, this was an old work-related injury. Mr. Davis not the employee said his job tasks were irritating his feet on the soles and ankles. Mr. Davis testified he sent Claimant to Concentra and then had him work on modified duty.

6. Claimant testified he was working on the glass line on April 12, 2016 when he experienced low back pain lifting glass with a co-worker. He reported the incident to Mr. Davis, who prepared an Employer's Incident Report that day.[3] Claimant stated he lifted four big pieces of glass. In the supervisor's section of this report, Mr. Davis confirmed Claimant was assisting another employee unload 4 sheets of glass and then complained of shoulder and lower back pain. The ALJ found Claimant's description of the injury to be credible and noted it was corroborated by the testimony of Mr. Davis.

7. Claimant testified that his symptoms became worse after sitting down and he told a co-worker he couldn't drive. Claimant called an ambulance to transport him to University Hospital. The ALJ inferred that Claimant believed he required immediate medical treatment on April 12, 2016 because the pain had significantly worsened.

8. Mr. Davis testified he filled out the incident report while Claimant sat down. He then talked to Claimant to tell him a taxi was called. Mr. Davis did not talk with Claimant after that and found out from Claimant's co-worker (Carla) that an ambulance was called. After Mr. Davis was informed an ambulance was called, he cancelled the taxicab.

[1] This was confirmed by medical records from Concentra admitted as Exhibit 13.

[2] Exhibit C.

[3] Exhibits 6, A.

9. Claimant was then transported by ambulance to the University Hospital emergency room and evaluated by Mohammed Hararah, M.D. (resident) and Taylor Burkholder, M.D. (attending), whose impression was lumbar strain-initial encounter and chronic back pain. On examination, cervical and lumbar paraspinal tenderness was noted, but no neurological deficits were found. X-rays were negative. Claimant was given a prescription for a small amount of Valium and told to "follow-up with workman's comp".

10. Randy Burris, M.D. testified as an expert in Occupational Medicine. He was also Level II accredited pursuant to the W.C.R.P. Dr. Burris testified that there was not a medical necessity for an ambulance on April 12, 2016 and that Claimant did not require emergency medical care.

11. The treatment Claimant received at University Hospital was reasonable and necessary to cure and relieve the effects of his injury on April 12, 2016.

12. On April 13, 2016, Claimant returned to Concentra where he was evaluated by Glen Petersen, PA who noted that "patient claims back and neck part of original injury and lifted glasses [sic] yesterday here for a new injury and he claims is not new only aggravated 4-7 injury". PA Petersen's assessment was: hamstring sprain; strain of hip and thigh; plantar fasciitis, right; back and neck pain. PA Petersen prescribed Diclofenac and ordered physical therapy ("PT"). The ALJ inferred Claimant's reported symptoms and the results of the evaluation led PA Petersen to conclude Claimant required treatment for the work injury.

13. Claimant was evaluated by Khoi Pham, M.D. on April 22, 2016, whom he saw for a second opinion. Claimant had diffuse neck/back pain at the time of this evaluation. Dr. Pham noted next stiffness with decreased observed ROM ("range of motion"). Dr. Pham's assessment was myofascial pain, neck pain and acute low back pain.

14. Claimant returned to Concentra on May 2, 2016 and reported modified duty was aggravating his symptoms. He had back, neck, hip, thigh and bilateral heel pain. PA-C Valerie Skvarca's assessment was neck pain, back pain, strain of hip and thigh, and inflammatory heel pain (left and right). Claimant's restrictions were: lifting up to 10 lbs. (frequently) and push/pull up to 10 lbs. (frequently).

15. On May 10, 2016, Claimant was evaluated by Charles Lackey, M.D. at Concentra. He was complaining of continued pain in the neck, upper and lower back. On examination, Dr. Lackey found decreased range of motion in the cervical and lumbosacral spine (on flexion and extension). The ALJ notes these findings were objective indications of injury. Dr. Lackey's assessment was neck pain, back pain, plantar fasciitis (right and left), and laceration of finger. Dr. Lackey's restrictions included: lifting up to 20 lbs. (frequently), push/pull up to 20 lbs. frequently, change positions periodically, and no bending.

16. On May 20, 2016, a Notice of Contest was filed on behalf of Respondents.

17. Claimant underwent a lumbar MRI on May 23, 2016 and the films were read by Bao Nguyen, M.D. Dr. Nguyen's impression was moderate facet arthrosis and shallow broad-based disc protrusion at L4-5 accounting for mild-moderate bilateral foraminal stenosis and mild central canal narrowing at this level-no focal exiting nerve or deformity; other disk levels remain normal; no osseous, or spinal listthesis, no evidence of spinal infection or bone tumor; no abnormal distal thoracic signal or syrinx.

18. Claimant returned to University Hospital on May 25, 2016, complaining of upper and lower back pain. He was evaluated by the Vikhyat Bebarta, M.D., whose clinical impression was upper back pain and acute low back pain. Dr. Bebarta signed a note taking Claimant off work May 25, 2016, noting he could return to work on May 26, 2016 with the previously existing restrictions.

19. The ALJ infers it was reasonable for Claimant to return to University hospital on May 25, as it was after the Notice of Contest was sent and would have been received by him.

20. Dr. Pham completed Family Medical Leave Act forms on June 3, 2016 after evaluating Claimant. At that time, he noted Claimant was being treated for a lifting injury at work and was off work from June 3 through July 15, 2016. The ALJ drew the inference that Dr. Pham was of the opinion that Claimant could not perform his regular job duties during this period of time.

21. On June 8, 2016, Employer approved Claimant's request for leave under the FMLA.

22. Dr. Burris performed an IME at the request of Respondents on August 24, 2016. Claimant had diffuse tenderness throughout the trapezius musculature, as well as his thoracic spine. No localized tenderness was found in the lumbar spine and Dr. Burris felt Claimant was limited on forward flexion. Dr. Burris' assessment was myofacial pain and opined that Claimant had subjective complaints as opposed to objective findings. He believed Claimant was at MMI. The ALJ concluded Dr. Burris' opinion was less persuasive than Claimant's health care providers at Concentra.

23. Claimant returned to Concentra, where on September 26, 2016, he was evaluated by Amanda Cava, M.D., who diagnosed radiculopathy- cervical region and radiculopathy- lumbar region. Dr. Cava continued Claimant's work restrictions, including lifting up to 10 lbs. The ALJ infers these restrictions would preclude Claimant from performing his regular job duties with Employer.

24. Dr. Burris, who was present at the hearing, testified that Claimant's pain complaints did not follow a neuroanatomical pattern and that his symptoms were out of proportion to the physical findings on examination. Dr. Burris opined Claimant may have suffered a mild soft tissue strain which would have resolved without further treatment or intervention on April 7, 2016. Dr. Burris further testified that any symptoms reported by Claimant beyond those related to a soft tissue injury had no objective basis and there was not a valid diagnosis tying these to the April 7, 2016 incident. Dr. Burris

stated Claimant magnified his symptoms on examination. Dr. Burris conceded on cross-examination that the diagnoses by Claimant's ATPs at Concentra were reasonable given his symptom presentation. The ALJ notes Dr. Burris characterized Claimant's cervical and lumbar spine as essentially normal. However, Dr. Burris did not refute the conclusion that the incidents of April 7 and 12, 2016 could have aggravated Claimant's cervical and lumbar spine.

25. No ATP has placed Claimant at MMI.

26. Claimant sustained a compensable industrial injury arising out of and in the course of his employment on April 7, 2016, as well as a further injury/aggravation on April 12, 2016.

27. The ALJ credited the opinions of Claimant's treating physicians at Concentra, who recommended and provided treatment to him for injuries sustained on April 7 and 12, 2016.

28. Claimant was not able to return to full duty after April 12, 2016.

29. Claimant suffered a wage loss as the result of his injuries on April 7 and 12, 2016.

30. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

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

General

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

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

Generally, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Compensability

Claimant argued that the evidence proved he sustained an injury in April 2016, arguing that the combination of his testimony and the support from the medical records led to this conclusion. He also contended that the treatment he received was reasonable, necessary and related. With regard to treatment after May 20, 2016, Claimant asserted that the right of selection passed to him because treatment was denied.

Respondents averred the mere fact that Claimant experienced pain at work did not create a compensable injury. Relying on the testimony of Dr. Burris, Respondents asserted there was no evidence that the duties of Claimant's employment cause the symptoms or accelerated/aggravated a pre-existing condition.

Section 8-41-301(1)(c), C.R.S., provides as a condition for the recovery of workers' compensation benefits the injury must be "proximately caused by an injury or occupational disease arising out of and in the course of the employment". A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits". *Duncan v. ICAO*, 107 P.3d 999, 1001 (Colo. App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury, the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siefried v. Industrial Commission*, 736 P.2d 1262, 1263 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

The question of whether the Claimant proved an injury or occupational disease proximately caused by the performance of service arising out of and in the course of employment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000) (proof of causation is threshold requirement that must be established before any compensation is awarded). Claimant is not required to prove that his work-related injury was the sole cause of his wage loss in order to establish eligibility to TTD benefits. Rather, the benefits are precluded only when the work-related injury plays "no part in the subsequent wage loss". *Horton v. ICAO,* 942 P.2d 1209, 1210-1211 (Colo. App. 1996).

The ALJ concludes Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury arising out of and in the course of his employment on April 7, 2016, as well as a further injury/aggravation on April 12, 2016. The ALJ concluded this was a compensable injury for two principal reasons. First, Claimant's testimony was credible in his description of the injury he sustained on both dates. (Findings of Fact 3 and 6.) No contrary evidence was presented to refute the fact he was performing the job duties as described on both April 7 and 12, 2016. In fact, Mr. Davis' testimony corroborated the fact that Claimant was injured while doing his job. (Finding of Fact 6.)

Second, there was objective medical evidence to support the conclusion Claimant was injured. As found, medical records from both University Hospital and Concentra documented Claimant's symptoms, as well as positive, objective physical findings. (Findings of Fact 4, 12 and 14.) This included decreased range of motion, as documented by the Concentra physicians who evaluated Claimant on multiple occasions. (Findings of Fact 4 and 12.) It is unlikely the doctors at Concentra would have continued to treat Claimant if they were not convinced he suffered an industrial injury. The ALJ credited these opinions over those proffered by Respondents' expert.

In short, the ALJ concluded Claimant satisfied his burden of proof that that suffered an injury arising out of his employment based upon the direct testimony and medical evidence introduced at hearing.

Medical Benefits

Having concluded Claimant suffered a compensable injury, Respondents are liable to provide reasonable and necessary medical benefits to Claimant. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994). As found, the medical treatment provided at Concentra was reasonable and necessary, as well as related to the injury. The ALJ also determined the treatment Claimant received at University Hospital on April 12, 2016 was reasonable and necessary, as well as being related to the injury. (Finding of Fact 11.) Mr. Davis did not specifically arrange to have Claimant evaluated at Concentra that day and given the degree of Claimant's symptoms, it was reasonable for him to seek immediate treatment. (Finding of Fact 8.) Respondents are liable for the payment of those benefits, pursuant to the fee schedule.

With regard to the issue of payment of the ambulance bill, Claimant has argued that because of his symptoms, he was required to be transported by ambulance to the hospital. Respondents have disputed whether this medical benefit was reasonable or necessary, relying on the expert testimony of Dr. Burris.

The ALJ notes that neither Claimant no Respondents cited any authority to assist in this determination. On the one hand, the record was not clear that Claimant needed to be transported by ambulance from Employer's premises. There was no indication in the record that Claimant's condition was not stable, or required the intervention of EMT personnel. On the other hand, Mr. Davis did not follow-up directly with Claimant, speaking only with his co-worker. (Finding of Fact 8.) Mr. Davis then cancelled the taxicab, acquiescing to Claimant taking the ambulance. Claimant credibly testified that his pain had significantly worsened. Claimant could reasonably believe he could not drive himself to the hospital and since Mr. Davis did not communicate that a cab would be (had been) called, it was reasonable for Claimant to call an ambulance. Therefore, transport by ambulance was a reasonable expense related to the treatment Claimant received for his injury. Accordingly, the ALJ has determined Respondents are liable for payment of this bill.

Claimant also argued that the right of selection of an ATP passed to him after the Notice of Contest was filed. However, there was no evidence in the record that Respondents failed to provide medical treatment to Claimant for the April 7 and 12, 2016 industrial injuries. Indeed, Respondents continued to provide medical benefits through Concentra to the Claimant through September 2016. (Finding of Fact 23.)

Indemnity

Claimant seeks TPD benefits from April 12 through June 2, 2016. As found, Claimant had restrictions as issued by the ATP during this period of time. The evidence reflected he worked modified duty for Employer during this time, but did not earn his full wages. Accordingly, Claimant is entitled to temporary partial disability benefits. The ALJ notes the record was somewhat unclear as to the dates Claimant actually worked or his earnings during that period.[4] Based upon the parties' stipulation, the ALJ finds Claimant is entitled to receive temporary partial disability benefits based upon his actual earnings during this period of time. Counsel for the parties will be ordered to confer and attempt to reach an agreement as to this amount.

Claimant requested TTD benefits from June 2 through July 30, 2016 at a rate of $352.00 per week. The temporary total disability rate is increased to $431.69 per week as of August 1, 2016. The evidence established Claimant is entitled to receive these benefits, as none of the conditions set forth in 8-42-105, C.R.S. have occurred. Claimant is entitled to receive those benefits until terminated pursuant to statute.

ORDER

IT IS HEREBY ORDERED:

1. Claimant has established by a preponderance of the evidence that he suffered an injury to his lower extremities, bilateral shoulders, cervical spine and lumbar spine in the course and scope of his employment on April 7, 2016 and April 12, 2016.

2. Respondents shall provide medical benefits to cure and relieve the effects of Claimant’s April 7 and 12, 2016 injuries.

3. Claimant’s trip to the emergency room on April 12, 2016 was reasonable, necessary, and related to Claimant’s compensable injury and it shall be the responsibility of the Respondents to pay the cost of transport to University Hospital and the University Hospital bill, pursuant to the Workers’ Compensation Fee Schedule.

[4] Although Claimant’s 2015 W-2 forms were admitted as Exhibit 3, the record was unclear regarding how much time he missed after the April 12, 2016 injury.

4. Claimant is entitled to TPD benefits to the extent he did not earn $528.00 per week for the time period between April 12, 2016 and June 2, 2016.

5. Counsel for the parties are order to meet and confer regarding the amount of temporary partial disability benefits Claimant is owed based upon the stipulated AWW of $528.00 per week. To the extent an agreement cannot be reached, Claimant may file an Application for Hearing on this issue.

6. Claimant shall be paid TTD benefits payable at the rate $352.00 per week from June 2, 2016 through July 30, 2016. Beginning on August 1, 2016, Claimant shall be paid TTD at the rate of $431.69 per week until terminated pursuant to statute, subject to applicable offsets.

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

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

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

DATED: December 27, 2016

Digital signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-954-493-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 12, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 10/12/16, Courtroom1, beginning at 1:30 PM, and ending at 5:15 PM). The hearing was not completed and the matter was continued until January 9, 2017 for completion.

The Claimant was present in person and represented by Ethan McQuinn, Esq. Respondents were represented by Jeff C. Staudenmayer, Esq.

Hereinafter Bruce Mann shall be referred to as the “Claimant." South Y-W Ambulance shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 6 through 14 and 20-23 were admitted into evidence, without objection, Claimant’s Exhibits 1 through 5 were withdrawn. The ALJ sustained Respondents’ objections to Claimant’s Exhibits 15 through 19, which were affidavits of Claimant’s witnesses, offered in lieu of their testimony. Respondents’ Exhibits A through N were admitted into evidence, without objection.

At the conclusion of the October 12, 2016 session of the hearing, the matter was continued until January 9, 2017 for completion of the hearing on the issue of average weekly wage (AWW) issue. The ALJ ordered interim briefs which were filed. On or about December 8, 2016, without securing the approval of the ALJ, the parties cancelled the January 9, 2017 session of the hearing on the ground that the AWW issue had been resolved by the parties, and the parties announced readiness for a decision. On December 12, 2016, the ALJ issued a procedural order requiring supplemental or updated briefs, including a reply brief due within 5 working days of the Respondents' answer brief. On December 22, 2016, the Claimant filed his opening brief. On December 27, 2016, the Respondents filed their answer brief. The Claimant filed a reply brief on (January 4, 2017], at which time the matter was deemed submitted for decision.

ISSUES

The sole issue to be determined by this decision is whether a reverse left shoulder arthroplasty is reasonably necessary and causally related to the admitted injury of April 2, 2014. The parties resolved the issue of AWW, the amount of which was not disclosed. Consequently, AWW is not an issue for determination.

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

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was born on October 10, 1962, and he was 54 years old on the date of the October 12, 2016 hearing.

2. The Claimant worked as an EMT (emergency medical technician) for the Employer on the date of the admitted injury.

3. The Claimant was involved in a work-related motor vehicle accident on April 2, 2014, when his vehicle was struck from the side by another vehicle, causing the Claimant's airbag to deploy. The Claimant was seated in the passenger seat with his seatbelt across his right shoulder.

4. At the time of impact, the Claimant guarded himself by turning downwards and with the right side of his body turned to the dashboard/airbags. He did not remember an impact to his left shoulder, however, he sustained an admitted injury to his left shoulder. The extent of the consequences thereof are in dispute.

5. The Respondents filed a General Admission of Liability (GAL), dated May 10, 2016, admitting for authorized, causally-related and reasonably necessary medical benefits, an AWW of $25.99, and temporary total disability benefits of $17.53 per week from February 9, 2016 through February 18, 2016. Among other things, the Claimant disputed the admitted AWW, and the hearing was continued until January 9, 2017 for evidence on AWW to complete the hearing. On December 8, 2016, the parties announced that the AWW issue had been resolved for an undisclosed sum.

Medical Treatment

6. Immediately after the MV accident, the Claimant was transported to Yuma District Hospital. He complained of pain in his right thigh but he denied other pain (Respondents' Exhibit J, p. 206). The Claimant's medical history is positive for rheumatoid arthritis, diabetes, and cardiac surgery. *See Id.* No swelling was noted in his extremities, and Daniel LePerriere, M.D., noted the Claimant's "Physical exam normal aside from right thigh." *Id.*

7. The Claimant returned to Dr. LaPerriere on April 9, 2014, with additional soreness, primarily in his right leg and knee, but he also had pain in his left shoulder. *Id.* at p. 211. Claimant had normal left shoulder strength. *Id.*

8. As of April 23, 2014, the Claimant noted his left shoulder was improved with "no severe pain." *Id.* at p. 216. Dr. LaPerriere stated that the Claimant had full range of motion "so doubt any major rotator cuff issue." *Id.* The Claimant continued to complain of pain and was referred for an MRI (magnetic resonance imaging) [Respondents' Exhibit M]. The MRI showed severe tendinopathy of the supraspinatus and infraspinatus with mild undersurface tearing of the supraspinatus, partial tearing and tendinopathy of the subscapularis with moderate fatty atrophy, and findings concerning for a complete tear of the biceps tendon. *Id.*

9. The Claimant was referred to Michael Rusnak, M.D. for his knee and shoulder issues (Respondents' Exhibit L, p. 304). On May 22, 2014, Dr. Rusnak noted the Claimant had "full active and passive motion . . . good strength of his rotator cuff including the subspacularis." *Id.* He also had "a little bit" of pain with testing, but there was no swelling, bruising, or instability. *Id.*

10. Sean Grey, M.D., evaluated the Claimant on August 28, 2014. *Id.* at p. 307. He noted the Claimant provided a history that, "When the airbag deployed, he ended up with pain in his left shoulder." *Id.* The Claimant complained of ongoing [left] shoulder pain and a feeling of loss of strength, especially with overhead activity. *Id.* The Claimant had full range of motion (ROM) on exam. *Id.* at p. 308. Dr. Grey noted the Claimant's condition was difficult to treat due to the thinning of his supraspinatus tendon and history of multiple co-morbid conditions, including diabetes and arthritis. *Id.* Dr.

Grey, however, felt that the Claimant's condition could be repaired via an arthroscopy, which would at least provide pain relief. *Id.*

11. The Claimant did not proceed with the surgery at that time, and he did not return to Dr. Grey for nearly two years while treating other injuries. On August 11, 2015, the Claimant was treated at Yuma District Hospital for an incident whereby he was "thrown across the corral by a cow" *(*Respondents' Exhibit J, p. 247). John D. Glick, M.D., noted at that time that the Claimant had a "lot of arthritis" in his neck. *Id.*

12. Dr. Grey finally re-evaluated the Claimant on May 17, 2016, nearly a year after his last evaluation. The Claimant complained of worsening pain, and was continuing to farm and ranch with more difficulties performing those activities (Respondents' Exhibit L, p. 310). Dr. Grey noted that the Claimant had "significant weakness," and he still had full, albeit painful, ROM (*Id.* at p. 311). The Claimant also had an MRI that day (Respondents' Exhibit M, p. 320). The MRI showed "severe fatty atrophy," a torn superior labrum, a full thickness tear of the supraspinatus tendon, and a chondral erosion of the superior humeral head. *Id.*

13. The 2016 MRI shows additional damage as compared to the 2014 MRI, including an increase in atrophy from moderate to severe, a torn labrum not previously noted, and development in the supraspinatus tendon from mild undersurface tearing to a full thickness tear. As the pathology changed, so did Dr. Grey's recommendations. He recommended a reverse arthroplasty instead of an arthroscopy, in light of the Claimant's "supraspinatus insufficiency" and underlying co-morbid conditions (Respondents' Exhibit L, p. 312).

14. The Claimant's request for surgery was reviewed by Peter Weingarten, M.D. (Respondents' Exhibit K), a staff reviewer for the insurance carrier. In a brief three-paragraph report, Dr. Weingarten expressed the opinion that the need for surgery was related to chronic degenerative changes. *Id.* He felt the procedure was questionable due to the Claimant's co-morbid conditions. *Id.*

Respondents' Independent Medical Examination (IME) by James Lindberg, M.D.

15. James Lindberg, M.D., performed an IME on August 23, 2016 (Respondents' Exhibit I) at the behest of the Respondents. Dr. Lindberg could not explain how the mechanism of injury could have caused the alleged injuries, given that the Claimant suffered no impact to his left shoulder. *Id.* at p. 196. Dr. Lindberg noted the biceps tendon rupture would have resulted in immediate pain. *Id.* He noted the Claimant did not complain of shoulder pain until one week later. *Id.* Regarding whether the arthroplasty was reasonably necessary, Dr. Lindberg wrote that such a surgery "is virtually a death sentence" for the Claimant due to his age, co-morbidities, and work as a farmer rancher which would destroy his arthroplasty "in short order." *Id.* He noted the Division of Workers' Compensation (DOWC) Medical Treatment Guidelines, Workers

Compensation Rules of Procedure (WCRP), Rule 17, 7 CCR 1101-3, do not recommend the reverse arthroplasty surgery for anyone younger than 65, and the Claimant was 53 at the time of Dr. Lindberg's evaluation. *Id.*

The Claimant's Testimony at Hearing

16. The Claimant testified he had no pre-accident pain in his left shoulder. He specifically stated that, although he has rheumatoid arthritis, "My shoulder has been a joint that has never bothered me." The Claimant testified he had right shoulder surgery in 2005, and he had remaining functional limitations in that shoulder, but he denied any ongoing pain in the right shoulder after his surgery. The Claimant stated that his left arm was his dominant arm after his right shoulder surgery until the present accident.

17. According to the Claimant, after the work accident at issue herein, he did not feel any pain in his left shoulder. His pain was in his right thigh. He stated that he felt functionally limited and had pain in his left shoulder during the week after the accident. The Claimant stated, however, that he has been limited in the types of work activities he can perform in his farming/ranching business due to his left shoulder issues.

18. The Claimant stated that he wanted to proceed with the reverse shoulder arthroplasty which had been recommended, because Dr. Grey advised him that the surgery would provide him the best chance to return to his regular farming/ranching duties. The Claimant further testified that he trusted Dr. Grey to perform the surgery based on his experience with Dr. Grey's resolution of his right shoulder issues. The Claimant stated that Dr. Grey did not tell him what was the chance of success.

Dr. Lindberg's Testimony at Hearing

19. Dr. Lindberg testified that the MRIs showed chronic changes in the left shoulder without any sign of acute changes or pathology. He was of the opinion that, if the Claimant suffered an injury to his left shoulder during the accident given the conditions shown, it would have been more painful than the hematoma in his right thigh, which was his primary complaint on the day of the accident. Dr. Lindberg also was of the opinion that if the degenerative conditions were aggravated during the accident, it would be expected within a reasonable degree of medical probability that he [Claimant] would have had immediate symptoms. Dr. Lindberg specifically refuted the possibility of a delayed onset of pain of a day or two, stating that an acute aggravation, acceleration, or exacerbation would have been evident during his post-accident evaluation at the hospital. Dr. Lindberg further testified it was unlikely that the Claimant would have been asymptomatic prior to the accident with the presence of the multiple degenerative conditions in his shoulder and the type of work he performed.

20. Dr. Lindberg is of the opinion that a reverse shoulder arthroplasty is more likely to fail than a regular shoulder arthroplasty and to fail "permanently." Dr. Lindberg stated that the high risk of failure is the reason why it is only recommended for older individuals with limited physical demands*; i.e*. those likely to lead sedentary lifestyles. Dr. Lindberg stated that the Claimant's expectation that he could return to his physical work as a farmer/rancher is not a realistic expectation and would result in the Claimant destroying his shoulder. Dr. Lindbeerg stated that the Claimant is one wrong movement away from a "disaster," and this procedure (reverse shoulder arthroplasty) is not meant to allow people to go back to physical work as the Claimant contemplates. He noted that any subsequent revision surgery would have reduced chances of success. Dr. Lindberg expressed the opinion that if the surgery did fail, the Claimant's options may only consist of having a flailed shoulder, or the arm could be fused to the shoulder to make it more stiff, and again, unusable.

General Findings

21. The mechanism of injury is not consistent with the injuries which form the basis of the surgical request. The Claimant suffered no impact to his left shoulder, and in fact, he testified that he guarded the left side of his body upon impact and did not even remember the left side of his body striking the air bag or otherwise being directly impacted. Dr. Lindberg is of the opinion that the mechanism of injury in that respect was not likely to cause a shoulder injury or acutely aggravate the conditions present in his shoulder, nor were there any signs of acute aggravation on MRI.

22. The Claimant affirmatively denied any prior left shoulder issues at hearing. A treatment note from Yuma District Hospital of March 9, 2010, however, clearly states that the Claimant had "longstanding" mid back and shoulder pain due to his rheumatoid arthritis (Respondents' Exhibit J, p. 199). This contradicts the Claimant's assertion that his shoulder was a joint which was never affected by his arthritis. Later treatment notes confirmed that this was a reference to left-sided pain (*Id.* at p. 202). Moreover, the reference is also not likely in reference to his right shoulder where the Claimant denied any remaining pain in the right upper extremity at hearing--from his 2005 right shoulder injury. When confronted with this March 9, 2010 note at hearing, the Claimant stated that he did not recall the complaint. Claimant is also documented to have a "lot of" arthritis in his neck, which is proximal to the shoulder. At hearing, the Claimant testified his arthritis affected his wrists, knees, and feet, and omitted any discussion of the effects of arthritis in the upper part of his body which is clearly documented in the medical records. Dr. Lindberg also is of the opinion that it is unlikely that the Claimant was asymptomatic from a medical perspective, given the amount of degenerative pathology in his shoulder and presence of rheumatoid arthritis. The Claimant's denial of pre-existing left shoulder pain is not likely in light of the totality of the evidence and is, therefore, not credible.

23. According to Dr. Lindberg, the Claimant would have likely suffered from immediate and severe pain if any of his left shoulder conditions were caused or aggravated by the motor vehicle accident. The Claimant's 2014 MRI documents conditions which Dr. Lindberg noted were entirely degenerative, and even if acutely caused or aggravated, would have been accompanied by immediate pain. For example, Dr. Lindberg stated that the Claimant's biceps tendon, if torn during the accident, would have resulted in immediate severe pain, swelling, and bruising. The clinical exams specifically document no swelling or bruising, and the Claimant also denied any pain in body parts other than his right thigh following the accident. There is no persuasive contrary medical evidence in the record disputing that the Claimant should have felt immediate pain to his left shoulder if the conditions present therein were caused or aggravated by the motor vehicle accident. Therefore, it is medically likely that the Claimant had a pre-existing complete biceps tear, atrophy, and other degenerative conditions prior to the time of the accident which were likely symptomatic.

24. Dr. Grey noted that the Claimant advised that, "When the airbag deployed, he ended up with pain in his left shoulder." Dr. Grey rendered an opinion that the accident was the causal impetus for the need for surgery, and it appears his understanding regarding the onset of pain in doing so is fundamentally flawed. The Claimant has presented no persuasive evidence that Dr. Grey reviewed the initial emergency room notes or that his opinion is ultimately formed by the correct set of facts*, i.e.*, that the Claimant did not suffer an immediate onset of pain in his left shoulder when the accident occurred. Consequently, the ALJ infers and finds that Dr. Grey's opinion on the causal relatedness of the need for reverse arthroplasty is only as good as the history he received from the Claimant. In light of the flawed assumption specified herein above, the ALJ does **not** find Dr. Grey's opinion on the causal relatedness of the need for left reverse arthroplasty credible.

25. The initial increase in pain does not explain the worsening pathology and clinical examinations in the subsequent two years which corresponds to Dr. Grey's changing treatment recommendations. In 2014, Dr. Grey recommended an arthroscopy. In 2016, he recommended a reverse total shoulder replacement. In the intervening time period, the MRIs show a progressive worsening, including that the Claimant apparently suffered a torn labrum, and his supraspinatus tendon went from having mild undersurface tearing to a full thickness tear. An aggravation of pain to a pre-existing condition does not lead to delayed tearing of tendons months (and even years) after the accident, and at the least, the Claimant has provided no persuasive proof of the same.

26. When recommending the arthroplasty in 2016, Dr. Grey specifically stated that the Claimant's "supraspinatus insufficiency" was a factor in recommending the arthroplasty over the arthroscopy. Dr. Grey recommended an arthroscopy, a less involved surgery, when the Claimant only had minor tearing of the supraspinatus tendon. Dr. Grey's surgery recommendation changed after the Claimant's supraspinatus completely tore for reasons unknown.

27. In addition to the pathology shown on MRIs, the Claimant's clinical picture has changed. In the months following the accident, including at the time the arthroscopy was recommended, the Claimant had complaints of pain with good to full strength and full range of motion in his left shoulder. In 2016, Dr. Grey noted the Claimant had continued to work as a farmer/rancher, a profession which the Claimant and Dr. Lindberg agreed at hearing is physically arduous. The Claimant presented with increased pain complaints and a significant reduction in strength in 2016. When examining the recommendations in detail, Dr. Grey noted, in 2014, that the surgery would provide the Claimant pain relief, while not focusing on functional limitations. Then when the Claimant's complaints became more inclusive of functional limitations, the treatment recommendation changed for the specific purpose of providing both functional and pain relief. The conditions which form the basis of Dr. Grey's reverse shoulder arthroplasty opinion were not those which were present after the accident.

28. The Claimant had pre-existing arthritis in his left shoulder, and by logical extension as shown in the records, pre-existing pain. There was no impact or otherwise a mechanism of injury involving his left shoulder. He had no immediate complaints of symptoms after the accident. He later developed symptoms of pain (consistent with his pre-existing rheumatoid arthritis) while presenting with a fairly normal clinical exam. Dr. Grey at that time recommended a less involved surgery. Two years later, the Claimant's pathology on MRI and his clinical exam had worsened substantially after the Claimant had put his shoulder through two more years of work as a farmer/rancher. This worsening condition is clearly the basis for Dr. Grey's recommendation for a reverse shoulder arthroplasty. The Claimant presented no persuasive evidence supporting that this worsening which led to the reverse shoulder arthroplasty recommendation was causally related to the accident, as opposed to continued degeneration, work as a farmer/rancher, or other unknown cause. Dr. Grey's brief written opinion is the sole medical evidence that the Claimant relies upon in this respect, but such opinion relies upon incorrect information regarding the onset of the Claimant's pain. Moreover, Dr. Grey's opinion does not address the causation of the Claimant's worsening exam and pathology.

The Reverse Shoulder Arthroplasty is not Reasonable and Necessary Treatment

29. The surgery recommended by Dr. Grey is a "salvage" procedure of last resort, which is not recommended for individuals under the age of 65-70, and as noted by Dr. Lindberg, it is certainly not recommended for individuals as active as the Claimant.

30. Dr. Grey stated that he feels that the reverse shoulder arthroplasty is the only procedure which will provide the Claimant with improvement in his pain and function (Respondents' Exhibit L, p. 317). At the time Dr. Grey recommended the procedure, he merely stated that he felt "it is more reproducible outcome in proceeding

with reverse arthroplasty that [sic] attempted rotator cuff repair" (*Id.* at p. 312). There is no persuasive evidence that Dr. Grey either considered, or discussed with the Claimant, the risks that the Claimant's work as a farmer/rancher, if continued after the surgery, would have on the viability of such a surgery, as well as the Claimant's options if the replacement surgery were to fail. To the contrary, the Claimant testified that Dr. Grey told him the shoulder replacement surgery was his best option to return to his level of functionality as a farmer/rancher. Dr. Grey's mere recommendation that he feels there is a higher chance of success in providing immediate pain relief and functionality to the Claimant does not address the larger long term dangers of the procedure for the Claimant. The ALJ finds that Dr. Grey's statements in this regard significantly undermine the credibility of his recommendation for reverse left shoulder arthroplasty.

31. According to Dr. Lindberg, neither a rotator cuff repair, nor a reverse shoulder arthroplasty had a high chance of success. Dr. Lindberg is of the opinion that the Claimant's work as a farmer rancher, his diabetes, and his rheumatoid arthritis are all complicating factors in the success of any surgery. Dr. Lindberg stated that he would first recommend a rotator cuff repair, because if that procedure failed down the line, the Claimant could then be considered for a shoulder arthroscopy. The reverse shoulder arthroscopy is a surgery of last resort.

32. Dr. Lindberg is of the opinion that the Claimant's left shoulder replacement surgery would most certainly fail if he continued his work as a farmer/rancher. The Claimant testified he intended to return to perform his work as a farmer/rancher after the surgery to the extent he was physically able to do so. Dr. Lindberg further stated the opinion that any subsequent shoulder arthroplasty after a failed surgery would have an even smaller chance of success. When the replacement shoulder would fail, Dr. Lindberg stated that the Claimant could find himself in a position of having a flailed arm or requiring a fusion of his arm to the shoulder socket, both resulting in a "dead arm" that would not be functional at all. Dr. Grey's records fail to address any of these risks. There is no persuasive evidence that Dr. Grey discussed these concerns or contingencies with the Claimant.

33. The DOWC Medical Treatment Guidelines ("Guidelines") similarly do not support performing a reverse shoulder arthroplasty in this instance. The Guidelines, the Guidelines have been accepted professional standards for care under the Workers' Compensation Act. *Rook v. Indus. Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonably necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 [Indus. Claim Appeals Office ((ICAO), March 18, 2005). Dr. Grey's recommendation is contrary to the Guidelines in a couple respects. First, the Guidelines make clear that a reverse arthroplasty "is generally considered a salvage procedure for patients over 70. . ." (Respondents' Exhibit N, p. 323. They also note the procedure "is generally limited to patients older than 65 with low physical demands." *Id*. The Claimant is 54 years old, well below the recommended

age for the procedure. Moreover, by the Claimant's own admission, he has high physical demands as a farmer/rancher, which he intends to continue. The Claimant stated he would abide by any post-surgical restrictions. Dr. Lindberg's testimony, however, is that this procedure is limited to individuals who lead to sedentary lifestyles. The Claimant's contention of abiding by6 any post-surgical restrictions is at odds with his intention to continue physical labor in his farming/ranching business.

34. Aside from the age and physical demands considerations, the Guidelines note that if the patient "can nevertheless elevate the shoulder, non-operative treatment such as NSAIDs and steroid injections are preferable to surger." (*Id.* at p. 324). The evidence and testimony at hearing show that the Claimant has consistently shown the ability to elevate his shoulder at hearing and in clinical exams. While the Claimant is limited from the injury, the Claimant has some use of his arm, which as was noted by Dr. Lindberg, is preferable to eventually losing use of his arm completely from returning to his physically laborious work after undergoing a complete shoulder replacement.

35. The totality of the documentary and testimonial evidence demonstrates that the risks of proceeding with the recommended surgery far outweigh any short-term benefits, which in and of themselves, are questionable to be realized by the Claimant anyway. At the very least, if the ALJ finds that the Claimant requires some form of surgical intervention is necessary and related to the work-accident, then the current request should be denied and the Claimant should return to Dr. Grey for further discussion of the long term risks associated with either surgery, as well as re-consideration of a less invasive arthroscopy which does not place the Claimant's use of his arm for the rest of his life in immediate danger.

Ultimate Findings

36. The ALJ finds the opinions of Respondents' IME physician, James Lindberg, M.D., for persuasive and credible than the opinions of Sean Grey, M.D., and based on Dr. Lindberg's opinions, the ALJ finds that Dr. Grey's recommended reverse left shoulder arthroplasty is neither causally related to the admitted accident of April 2, 2014, nor is it reasonably necessary, under the Claimant's unique circumstances, to cure and relieve the effects of that injury. Dr. Lindberg's opinions are more thoroughly grounded in an understanding of reverse shoulder arthroplasty than are the opinions of Dr. Grey.

37. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of IME Dr. Lindberg and to reject the opinions of Dr. Grey relative to the need for reverse left arthroplasty.

38. The parties resolved the issue of AWW for an undisclosed sum. Therefore, AWW is not an issue for decision herein.

39. Based on the totality of the evidence, the Claimant has failed to demonstrate that it is more likely than not that the need for reverse left shoulder arthroplasty is causally related to an aggravation and acceleration of the Claimant's underlying left shoulder condition. Also, the Claimant has failed to demonstrate that the need for the recommended reverse left shoulder arthroplasy is reasonably necessary to cure and relieve the effects of the Claimant's admitted injury.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Respondents' IME physician, James Lindberg, M.D., were more persuasive and credible than the opinions of Sean Grey, M.D., and based on Dr. Lindberg's opinions, the ALJ found that Dr. Grey's recommended reverse left shoulder arthroplasty was neither causally related to the admitted accident of April 2, 2014, nor was it reasonably necessary, under the Claimant's unique circumstances, to cure and relieve the effects of that injury. Dr. Lindberg's opinions were more thoroughly grounded in an understanding of reverse shoulder arthroplasty than were the opinions of Dr. Grey.

Substantial Evidence

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

Recommended Reverse Left Shoulder Arthroplasty

c. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App.1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). As found, the need for the reverse left shoulder arthroplasty was not caused by an aggravation or acceleration of the Claimant's underlying left shoulder condition.

Reasonable Necessity of Reverse Left Shoulder Arthroplasty

d. Medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the need for the reverse left shoulder arthroplasty is not reasonably necessary to cure and relieve the effects of the admitted injury.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). Also, the Respondents may challenge the causal relatedness and reasonable necessity of medical care and treatment, at any time, and when this is done, the Claimant continues to have the burden of proof, by preponderant evidence. As found, based on the totality of the evidence, the Claimant failed to demonstrate that it was more likely than not that the need for reverse left shoulder arthroplasty was causally related to an aggravation and acceleration of the Claimant's underlying left shoulder condition. Also, the Claimant failed to demonstrate that the need for the recommended reverse left shoulder arthroplasy was reasonably necessary to cure and relieve the effects of the Claimant's admitted injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims to make the Respondents liable for the reverse left shoulder arthroplasty, recommended by Sean Grey, M.D., are hereby denied and dismissed.

B. The parties having resolved the issue of average weekly wage for an undisclosed sum, the issue is moot.

C. The General Admission of Liability, dated May 10, 2016, remains in full force and effect, subject to settlement of the average weekly wage issue.

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

DATED this______day of December 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

I. Whether Respondent established by a preponderance of the evidence that they are entitled to withdraw either their September 18, 2013 final admission of liability which admitted for maintenance medical treatment;

II. Whether Claimant established by a preponderance of the evidence that she is entitled to a L3-L4, L4-L5 decompression with a L4-L5 fusion as maintenance care, and if not,

III. Whether Claimant established by a preponderance of the evidence that she suffered a worsening of a work related medical condition entitling her to reopen her workers' compensation claim to obtain the aforementioned L3-L4, L4-L5 decompression and fusion procedure recommended by Dr. David Wong.

FINDINGS OF FACT

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

1. On September 7, 2010, Claimant, who was working as a desk side computer support technician injured her low back while setting up a computer. Claimant testified that she was moving a full file cabinet weighing hundreds of pounds when she felt a sudden twinge on the right side of her lower back. Claimant reported her injury and her supervisor insisted that she go in for medical evaluation. The claim was admitted and Claimant would thereafter undertake a lengthy and complex course of conservative care directed primarily by physicians at Centura Centers for Occupational Medicine (CCOM).

2. Claimant initially presented to and was treated by Dr. Richard Nanes who noted full range of motion in both legs, but mild right-sided lumbar pain during straight leg testing. Claimant was assessed as having a lumbar strain.

3. Claimant's pain worsened over the ensuing week extending into and down the right leg down to the ankle. Dr. Nanes suspected disc herniation and referred Claimant for an MRI of the lumbar spine.

4. Claimant underwent the first of many MRI's of the lumbar spine on September 15, 2010. This study revealed "multilevel, advanced degenerative changes of the lumbrosacral spine" which resulted in "neural foraminal and spinal canal narrowing." In addition, there were specific findings consistent with disc herniation and bulging at multiple segments, including a "very large disk extrusion versus potential free fragment" at L1-2, a "large posterior disk protrusion/extrusion" at L3-4, and a "large circumferential

disk bulge" and posterior "disk protrusion" at the L5-S1 level. Regarding the L4-5 level, the MRI specifically revealed, contrary to Respondents suggestion otherwise,[1] a "moderate sized central disk protrusion" and "thickening of the ligamentum flavum and degenerate facet hypertrophy." Because it was impossible to rule out that the large mass visualized posterior to the L1 vertebral body was extradural in nature, it was recommended that Claimant proceed with a repeat contrast enhanced MRI of the lumbar spine.

5. While waiting to proceed with the second MRI, Claimant was referred to and undertook treatment with Dr. Douglas Hess who administered an epidural steroid injection (ESI) into the L4-5 interspace. Dr. Hess would go on to administer two additional injections initially and multiple maintenance injections into this spinal segment over the ensuing years.

6. On October 4, 2010, Claimant underwent the recommended contrast enhanced MRI during which the large mass located at L1 was evaluated further. According to the October 4, 2010 MRI, it was unlikely that the mass was either a metastatic or neoplastic process. Based upon the sequential MRI results and the reports of Dr. Jennifer Kang, the ALJ finds that the mass located at L1-2, more probably than not, represented a large disc extrusion.

7. Claimant continued to treat with Dr. Nanes and Dr. Hess. While the ESI's provided a measure of pain relief, the records indicate that Claimant's back and leg pain waxed and waned over the ensuing months and years requiring additional injections, acupuncture and chiropractic treatment.

8. Claimant was referred for and completed an EMG on or about March 7, 2011. The EMG was apparently negative for radiculopathy.[2]

9. On March 8, 2011, Dr. Nanes released Claimant to full unrestricted work, noting that she had good lumbar flexion and a negative straight leg raise test bilaterally. Nonetheless, Dr. Nanes noted that Claimant continued to experience 3/10 pain, 30% of the time.

10. Claimant was evaluated by Dr. Jennifer Kang on April 19, 2011. During this evaluation Claimant reported continued low back and right leg pain. According to Dr. Kang's report, Claimant complained of numbness into the sole of the right foot; however, she denied focal weakness or bowel/bladder dysfunction. Claimant's diagnostic studies were reviewed after which Dr. Kang documented: "Large disc fragment located on the right side behind the body of L1 which looks like it arose from the L1-2 disc space. Multilevel DDD (degenerative disc disease) with disc protrusion at

[1] See Respondent's position statement asserting that the September 15, 2010 MRI impression focused on multilevel degenerative changes, the L1 impression focused on multilevel degenerative changes, the L1 vertebral body, and a potential large disc extrusion without "specific discussion of any other level."
[2] According to a March 8, 2011, report authored by Dr. Nanes.

the right L3-4, central bulge L4-5 and a bulge with left sided disc fragment L5-1 with lateral narrowing. All superimposed on congenital stenosis."

11. Dr. Kang's April 19, 2011 treatment note reflects that the results of Claimant's imaging and her treatment options, including continued "conservative care versus surgery" were discussed. This note reflects further that if Claimant wanted to pursue surgical options, updated imaging including a "new MRI [scan] and lumbar flexion and extension x rays to rule out instability" would be necessary. The note reflects that Claimant elected to proceed with new imaging and follow-up with Dr. Kang once completed. Based upon the content of Dr. Kang's report, the ALJ finds that surgical options were likely discussed. The ALJ also finds that as part of that discussion Claimant elected to pursue up-dated imaging in anticipation of moving forward with surgery once her low back pathology, particularly the situation concerning potential instability at L4-5 was more clearly defined.

12. On April 26, 2011, Claimant underwent x-rays of the lumbar spine as recommended by Dr. Kang. The April 26, 2011 imaging revealed a "mild grade I, 4-5 mm anterior subluxation L4 on L5", in addition to disk space loss and anterior endplate osteophytes at all lumbar levels.

13. Additional MRI imaging, as recommended by Dr. Kang, was completed on May 3, 2011. The images from this study were compared to those obtained on October 4, 2010. The May 3, 2011 MRI report documents that the "extra thecal lesion at L1 is no longer present" and the findings at L5-S1 and L3-4 appeared essentially "stable". Findings at L4-5 included: ". . . moderate central hard discs/osteophyte complex which moderately encroaches upon the thecal sac as well as both neural foramina." According to the MRI report, these changes "may have progressed slightly since the prior study." Similar progression of the changes documented at the L2-3 level was noted by the radiologist interpreting the May 3, 2011 MRI. Based upon the content of the April 26, x-rays and the May 3, 2011 MRI, the ALJ finds that the primary pain generators likely to cause Claimant symptoms were, more probably than not, were the L2-3 and L4-5 spinal levels.

14. Claimant returned to Dr. Nanes on June 28, 2011. She reported that "after considerable thought" she had elected not to proceed with surgery as recommended by Dr. Kang. Consequently, Claimant was placed at maximum medical improvement (MMI). Dr. Nanes issued an impairment rating of 24% of the whole person. He also opined that Claimant would require maintence care in the form of medications and repeat ESI's (every six months) for the next two (2) years. He also specifically noted that there was a "chance that [Claimant] will need to see the neurosurgeon if her pain should become really serve again."

15. Respondent filed a final admission of liability (FAL) accepting the opinions of Dr. Nanes regarding permanent impairment and maintenance treatment on December 2, 2011. Regarding maintenance medical benefits the FAL indicates in part: "Repeat

epidural steroid injection apprx every 6 months for 2 yrs. Chance she may need to see a neurosurgeon."

16. Claimant continued to treat with Dr. Nanes post MMI. She also participated in chiropractic treatment and acupuncture. On October 10, 2011, she returned to Dr. Nanes for a maintenance visit. During this appointment, Claimant reported increased low back pain. She requested an ESI with Dr. Hess. Dr. Hess injected the L4-5 interspace approximately three weeks later which helped reduce her symptoms.

17. Over the next several months Claimant's back pain worsened again to a 7/10 intensity level at times. Consequently, a second ESI into the L4-5 interspace was administered by Dr. Hess on May 25, 2012. This second maintenance injection was of little benefit, prompting Claimant to return to Dr. Nanes on June 13, 2012. During her June 13, 2012 appointment, Claimant raised the option of seeing Dr. Kang again.

18. Claimant returned to see Dr. Nanes for a maintenance visit on August 29, 2012. During this visit, Claimant completed a pain diagram denoting 8/10 pain in the lumbar spine and down the right leg 100% of the time. According to the report generated from this visit, Claimant requested a referral to a neurosurgeon that preformed "minimally invasive laser-type surgery." Dr. Nanes noted that Claimant was to call him with the surgeon's name and phone number and he would make the referral. He also noted that she was to return in 8 weeks for a follow-up visit at which time she would be seen by a different provider.[3] Dr. Nanes assessed Claimant as having "herniated lumbar disc at 3 levels", although he did not specify which levels.

19. Claimant returned to CCOM on October 18, 2012. She was evaluated by Dr. Daniel Olson. Dr. Olson noted that Claimant was "trying to avoid surgery but continues to have right leg pain." Although Dr. Olson noted that Claimant's multilevel involvement did not make her an "ideal" candidate for back surgery, her continued right leg pain made it "something that has to be considered." Dr. Olson prescribed neuropathic pain medication (Lyrica) and recommended yet another MRI should she fail to improve with Lyrica.[4]

20. On January 14, 2013, Claimant presented to Dr. Olson in follow-up. She complained of an increase in her back and leg pain which she attributed to cleaning her house. Dr. Olson prescribed a Medrol Dosepak in an effort to gain control of her pain. He also recommended a repeat MRI and another ESI with Dr. Hess.

21. Repeat MRI was performed January 23, 2013. The images from this study were compared to Claimant's September 2010 MRI and demonstrated a posterior L4-5 disc bulge/protrusion with indention of the thecal sac but without nerve compression. Also present at this level was minimal spondylolisthesis. Both findings were without significant change. At the L3-4 level there was interval retraction of the disc herniation

[3] Although not noted in the report from this appointment, Claimant's need to see a "different" provider was prompted by Dr. Nanes' semi-retirement.
[4] Claimant would later change from Lyrica to Cymbalta to assist with ongoing pain and depression.

previously demonstrated on the September 2010 study; however, there was “subcortical bone marrow endplate reaction due to chronic degenerative disease with progression since the prior study.”

22. On February 24, 2013, Dr. Hess performed an L4-5 ESI. With additional ESI and acupuncture treatments, Claimant’s degree of pain improved modestly; however, it worsened again around July 2013. On July 9, 2013, Claimant reported increased leg pain which necessitated additional psychiatric treatment with Dr. John Hardy for continued depression and panic attacks as well as another ESI performed by Dr. Hess on August 10, 2013.

23. On September 18, 2013, Respondent filed a FAL which FAL admitted for temporary total disability benefits after MMI “based on the assumption that Dr. Olson had rescinded MMI. The FAL reflects that Respondent had contacted Dr. Olson regarding Claimant’s MMI status and Dr. Olson responded by letter on July 12, 2013, clarifying that Claimant had not been taken off of MMI. Respondent then elected to “use the 7-9-13 date as [a] new MMI date and begin PPD again at that time.” As part of this FAL, Respondents also took a position on medical benefits after MMI. In this regard, Respondent admitted as follows: “respondents admit to reasonable, necessary and related medical care after MMI that is provided by an authorized treating physician.”

24. Claimant did not file an objection to the September 18, 2013 FAL.

25. Claimant attended a maintenance medical appointment with Dr. Olson on October 11, 2013. Dr. Olson referred Claimant to physical therapy for an active exercise program. Claimant responded well to therapy and it was documented by Dr. Olson on December 20, 2013 that the “[t]herapy folks were recommending that she do a post rehab program as well as a TENS unit.”

26. On January 2, 2014, Dr. Olson authored correspondence to the claims representative assigned to the case. Dr. Olson was responding to the adjuster’s inquiry of whether Claimant’s continued pain was related to her September 7, 2010 injury. Dr. Olson opined that Claimant’s ongoing symptoms were related to her September 7, 2010 injury. He also outlined Claimant’s need for post MMI treatment.

27. On May 3, 2014, Dr. Hess performed an L4-5 steroid injection into the L4-5 interspace.

28. On August 8, 2014, Claimant returned to Dr. Olson complaining of muscle spasms that had developed the night before. She inquired about and was given Lidoderm patches to wear 12 hours per day. She was encouraged to exercise routinely and was scheduled for a return appointment in four months.

29. On January 26, 2015, Claimant was evaluated by Dr. Olson during a

maintenance visit. Claimant complained of aching and burning pain down the right leg. It was also noticed that Claimant was demonstrating signs of right foot drop when walking. Dr. Olson recommended a surgical consultation and a repeat MRI.

30. The recommended MRI was completed on February 23, 2015 and compared to the images obtained during the MRI completed January 23, 2013. Degenerative changes were present at all lumbar segments; however, the L4-5 level changes, including the anterolisthesis and central disc extrusion indenting the ventral thecal sac were unchanged from the prior January 23, 2013 study. Moreover, the L3-4 disc level demonstrated progressive loss of height and worsened degenerative endplate changes anteriorly and towards the left when compared to the January 23, 2013 MRI.

31. Claimant reported to Dr. Olson during a maintenance appointment on February 27, 2015, that her back remained quite bothersome. She had increased pain without any inciting event. She was noted to have a pelvic shift when she stood and could not stand completely erect. During her physical therapy appointment on this date, Claimant reported severe back pain which radiated into the anterior portion of the right thigh. Dr. Olson referred Claimant to Dr. David Wong for surgical consultation.

32. Dr. Wong evaluated Claimant on March 4, 2015. During this appointment, Claimant reported an onset of symptoms after “moving a filing cabinet to plug in a cord.” Claimant also reported a history of variable pain over the years; however, she indicated that overall her symptoms were slowing progressing with the passage of time. Claimant specifically reported worsening right thigh and groin pain as her “dominant” complaint. Imaging studies, including x-rays of Claimant’s hip were taken and reviewed. Following record review and physical examination, Dr. Wong felt that Claimant had “radicular irritation from spinal stenosis at L3-4 and L4-5”, which in the case of L3-4 was progressing. He also felt that Claimant had “mechanical back pain secondary to multilevel degenerative changes throughout the lumbar spine”, noting further that Claimant had an “associated Grade I L4-5 spondylolisthesis without instability on flexion/extension x-rays. Of consequence, Dr. Wong felt that Claimant’s right anterior thigh and groin pain was an acute problem related to osteoarthritis of the hip. Regarding her low back Dr. Wong recommended an ESI at the L3-4 spinal level. He opined that Claimant may be a candidate for a microdecompression at L3-4 and L4-5 with right laminotomies and left laminoplasty if her symptoms continued following steroid injection. He also raised the potential for minimally invasive fusion.

33. Per Dr. Wong’s recommendation, Dr. Hess injected the L3-4 interspace on March 15, 2015.

34. On March 23, 2015, Claimant was evaluated by Dr. Drew Ritter regarding the condition of her right hip. Dr. Ritter completed a physical examination and after completion concluded that Claimant was likely having multifactorial pain emanating from both her back and right hip. Dr. Ritter recommended a right hip injection under fluoroscopy. The injection was completed on April 6, 2015.

35. Claimant presented to Dr. Ritter on April 8, 2015 following her right hip injection. She continued to complain of significant functional decline and ongoing back, groin and pelvic pain. Dr. Ritter's assessment of Claimant's condition was noted as osteoarthritis of the right hip, sciatica and trochanteric bursitis. Treatment options, including total hip arthroplasty, were discussed.

36. CT scan of the lower extremities completed April 17, 2015 demonstrated arthritic changes bilaterally, right greater than left. During follow-up at Dr. Ritter's office on April 23, 2015, right lower extremity range of motion reproduced pain in the groin. Moreover, Claimant's imaging yielded findings consistent with end stage osteoarthritis of the right hip joint. Consequently, Claimant was scheduled for and underwent a total right hip arthroplasty on May 5, 2015.

37. Following her hip replacement surgery, Claimant developed balance problems and experienced at least two subsequent falls; one on or about June 14, 2015 and the second on July 11, 2015. Careful review of the medical records dated June 15 and July 13 from Dr. Ritter's office concerning these falls fails to support a finding that Claimant injured her back as a consequence of falling. To the contrary, Claimant's primary concern was that she may have injured her knee and/or damaged her total hip prosthesis. Additional serious injury was ruled out and Claimant was referred for additional physical therapy with an emphasis on gait and balance training.

38. Based upon the evidence presented, the ALJ is not convinced that Claimant suffered any intervening injury to her low back since her hip replacement surgery.

39. On September 15, 2015, Claimant returned to Dr. Olson for a follow-up visit. During this appointment, Claimant reported continued 5/10 back pain. She expressed a desire to see Dr. Wong but wanted to make sure her hip had "rehabbed completely." Dr. Olson scheduled a maintence ESI with Dr. Hess.

40. On October 17, 2015, Dr. Hess injected the L4-5 interspace.

41. Claimant returned to Dr. Olson for a maintenance appointment on December 11, 2015. By pain diagram, Claimant reported ongoing aching and stabbing pain in the low back and bilateral legs. She reportedly experienced some benefit from the October 17, 2015 ESI but it was short lived. She wanted to consider her surgical options and expressed a desire to follow-up with Dr. Wong.

42. Dr. Wong reevaluated Claimant on February 10, 2016. According to Dr. Wong's report, Claimant "continued to have some persistent discomfort in the low back, buttock and right worse than left lower extremity." She also reported the development of more "left-sided lower extremity radiation, more to the thigh, but her right side is still much worse." Dr. Wong opined that Claimant was "[s]till likely having some radicular irritation and mechanical back pain from stenosis primarily at L3-4 and L4-5, lesser at L2-3." He also continued to feel that Claimant had "[m]echanical back pain from known multilevel degenerative changes but also loss of disc height at almost all lumbar levels" as well as

a minor stable spondylolisthesis at L4-5. Dr. Wong felt that Claimant needed updated imaging to clarify the best surgical approach to the L2-3 segment; otherwise he planned to proceed with microdecompression without fusion.

43. An updated MRI of the lumbar spine was completed February 23, 2016. The images from this MRI were compared to those obtained on February 23, 2015. The February 23, 2016 study demonstrated "severe degenerative changes throughout the discs from L1 through S1." Unchanged specific findings at all lumbar levels remained according to radiologist interpretation.

44. Claimant returned to Dr. Olson on March 22, 2016 with new complaints of weakness in her legs and bladder incontinence. Plans were made for her to follow-up with Dr. Wong.

45. Claimant returned to Dr. Wong on March 25, 2016. Dr. Wong noted the following concerning the findings on Claimant's February 23, 2016 MRI:

> MR showed a small disc herniation asymmetric to the right at L3-4 plus facet and ligamentous hypertrophy giving rise to right greater than left lateral recess and foraminal stenosis. At L4-5 she has a bulge or small herniation centrally plus facet and ligamentous hypertrophy giving rise to mild bilateral foraminal narrowing. She has a Grade I spondylolisthesis at L4-5. At L2-3 she has a small disc herniation to the left and left greater than right lateral recess and foraminal narrowing.

46. Dr. Wong obtained AP flexion/extension x-rays which demonstrated that Claimant's previously identified spondylolisthesis at L4-5 was shifting by 2 to 4 mm.

47. Dr. Wong opined that Claimant's symptoms were likely emanating from "her stenosis at L3-4 and L4-5 primarily. He felt Claimant required a "decompression of L3-4 and L4-5 with right laminotomies and left laminoplasty. Because of Claimant's spondylolisthesis only moved a couple of millimeters, the question regarding how aggressive to get with a fusion was considered. Dr. Wong felt that Claimant could proceed with a minimally invasive fusion involving the use of an Aspen interspinous plate. Arrangements were made to proceed with surgery.

48. On April 4, 2016, Claimant presented for a psychological evaluation with Amy Alsum. Psychological testing was administered and the results interpreted by Dr. Dale Mann. Results were interpreted as consistent with an individual who was experiencing below average to high levels of anxiety and depression in addition to average somatic distress and very high functional distress.

49. Respondent sought an opinion from Dr. Michael Rauzzino regarding the reasonableness, necessity and relatedness of the surgery recommended by Dr. Wong to Claimant's September 7, 2010 admitted work injury.

50. Dr. Rauzzino completed the requested independent medical examination (IME) on August 15, 2016. After an exhaustive medical records review and physical examination, Dr. Rauzzino opined that Claimant experienced acute disc herniation at L1-2 and L3-4 only. According to Dr. Rauzzino, Claimant's acute disc herniation subsequently resolved with time as demonstrated by the retraction (desiccation) of the disc demonstrated on repeat MRI. Dr. Rauzzino also opined that Claimant suffered from progressive non-work related degenerative change in the lumbar spine as well as a non-work related progressive and degenerative spondylolisthesis at the L4-5 disc level. Considering that Claimant's acute disc herniations resolved and given Claimant's progressive degenerative conditions, Dr. Rauzzino opined that Claimant's current back and leg pain is not work-related. Dr. Rauzzino also opined that because Claimant did not have a right L3-4 radiculopathy, "performing a right-sided laminectomy at L3-L4 would not be of great help to her." According to Dr. Rauzzino, performing a laminectomy at L3-4 would not have a reasonable chance of improving Claimant's axial back and/or radiating leg pain. The ALJ finds from Dr. Rauzzino's IME report that he believes that performing surgery at L3-4 is neither reasonable or necessary.

51. Similarly, Dr. Rauzzino did not feel that performing a L4-5 decompression/fusion was likely to "alleviate her symptoms and provide her with functional gains, although he did not explain why. Rather, he noted that a fusion presented the "chance to worsen adjacent levels which are already severely degenerated through non-work-related means." Regardless, Dr. Rauzzino did not relate the L4-5 pathology to Claimant's work related injury. Consequently, the ALJ finds that Dr. Rauzzino believes that Claimant's need for surgery at L4-5 is not reasonable and is unrelated to Claimant's September 7, 2010 industrial injury.

52. Based upon the evidence presented, the ALJ finds that while Claimant's low back and right leg pain complaints have waxed and waned over the years, she has never been pain free since the injury occurring September 7, 2010. Indeed, the totality of the medical evidence submitted establishes that following her September 7, 2010 injury, Claimant has remained variably symptomatic for the past five plus years. The evidence presented also establishes that Claimant has received substantial conservative treatment in an effort to avoid surgery. Prescription medications, chiropractic treatment, acupuncture and multiple steroid injections have all failed to result in long-term benefit.

53. The medical records submitted generally support Claimant's March 4, 2015 report to Dr. Wong that her symptoms have been worsening with time. Moreover, the medical records subsequent to March 4, 2015 support Claimant's testimony that her condition is deteriorating. Indeed, by records from CCOM, Claimant is now experiencing stabbing pains down both legs, reported weakness in the legs, loss of sensation in the right leg, causing her to fall and a loss of bladder control. Consequently, the ALJ credits Claimant's testimony to find that she has suffered a worsening of condition since being placed at MMI.

54. The evidence presented also persuades the ALJ that the need to proceed with

surgical intervention in an effort to cure and relieve Claimant of her ongoing back and leg pain was a distinct likelihood in this case as of April 19, 2011, when the subject was first broached by Dr. Kang.

55. The ALJ finds from the evidence presented that while Claimant has received prior medical care for her right shoulder and cervical spine, there is a dearth of evidence to support a finding that she has ever had prior low back/right leg symptoms or treatment prior to her September 7, 2010 work related injury.

56. The record evidence in this case also persuades the ALJ that Claimant's September 7, 2010 injury not only resulted in disc herniation at L1-2 and L3-4, but also likely caused an acute disc protrusion at L4-5. Indeed, the September 15, 2010 MRI demonstrated both a "moderate sized central disk protrusion" and the degenerative changes discussed by Dr. Rauzzino in his IME report. Dr. Rauzzino does not persuasively address the cause of this disc protrusion in his IME report, nor does he discuss whether it is acute or degenerative in nature. He simply comments upon the presence of non-work related degenerative change in the lumbar spine, the presence of what he feels is a non-work related degenerative spondylolisthesis and the fact that a fusion may worsen the degenerative changes above and below L4-5.

57. Based upon the evidence presented as a whole, the ALJ credits the opinions of Dr. Olson, Dr. Wong and Dr. Ritter over those of Dr. Rauzzino to find that Claimant's current symptoms are likely multifactorial in nature and caused by a combination of acute injury and an aggravation of pre-existing degenerative disc disease in the lumbar spine. While Claimant probably had significant degenerative change in the lumbar spine, there is a lack of convincing evidence to suggest it was symptomatic until September 7, 2010, when Claimant moved a heavy filing cabinet in furtherance of her work duties. Respondent's suggestion that because Claimant was identified early on as having significant disc herniation at L1-2 and L3-4 and Dr. Hess' did not disagree with that before injecting the L4-L5 level (which injections Respondents contend were working on Claimant's L3-L4 disc herniation) does not persuasively support an inference all physicians believed the L4-L5 level injections were to treat the L3-L4 issues. To the contrary, the ALJ is persuaded that the record evidence supports a finding that Claimant's L4-5 ESI's were reasonable and necessary to treat pain that Dr. Hess felt was emanating from the disc protrusion and the aggravated degenerative spondylolisthesis at this level. The ALJ finds it unlikely that Dr. Hess would intentionally inject the L4-5 interspace multiple times if he thought that Claimant's symptoms were actually emanating from the L3-4 level. Indeed, only one ESI was administered at the L3-4 level at the request of Dr. Wong.[5]

58. Given that the September 7, 2010 incident likely caused an acute L4-5 disc protrusion and aggravated Claimant's previously asymptomatic L4-5 degenerative spondylolisthesis, the ALJ finds Claimant's need for treatment, including the L4-5

[5] By simple count from the records submitted, Claimant has received nine (9) steroid injections into the L4-5 interspace compared to one (1) ESI into the L3-4 interspace.

injections administered by Dr. Hess and the L4-5 surgery proposed by Dr. Wong, reasonable, necessary and related to the September 7, 2010 incident. Dr. Rauzzino's opinion to the contrary is unpursuasive.

59. As noted, Respondent's principally rely upon the opinions of Dr. Rauzzino as the basis for their denial of the surgery recommended by Dr. Wong. For the reasons outlined above, the ALJ rejects Dr. Rauzzino's opinions that Claimant's L4-5 disc changes and need for surgery at this spinal level are unrelated to Claimant's September 7, 2010 industrial injury. The ALJ is also not persuaded by Dr. Rauzzino's opinion that decompressing the L3-4 spinal level is unlikely to alleviate Claimant's ongoing symptoms. To the contrary, while MRI imaging suggests that Claimant's "large posterior disk protrusion/extrusion" visualized September 15, 2010 has retracted some, the MRI from February 23, 2016 demonstrates the presence of a 4 mm broad-based right paracentral disc protrusion along with degenerative changes and osteophyte complex towards the right side causing both mild canal stenosis and severe foraminal narrowing. Based upon the evidence presented, the ALJ finds and concludes that it is reasonable to decompress this spinal segment in an effort to alleviate Claimant's persistent low back and right leg pain. Importantly, Claimant has proven that she is more functional with symptom reduction. Indeed, the record evidence establishes that conservative measures resulted in temporary improvement in Claimant's pain during which time she enjoyed increased function, including the ability to work. Consequently, the ALJ finds Dr. Wong, more probably than not, recommended surgery to prevent further escalation of symptoms and maintain Claimant's current functional abilities.

60. Respondent has failed to carry it's burden to establish that Claimant's need for ongoing treatment, including surgery is not reasonable, necessary or related to her September 7, 2010 industrial injury. To the extent that Respondent's seek to withdraw the September 18, 2013 FAL for maintence care on the grounds that it was mistakenly filed, the evidence presented persuades the ALJ otherwise. To the contrary, the FAL establishes that the FAL was filed approximately one month after Dr. Olson clarified his position regarding MMI and Claimant's maintenance treatment needs. Based upon the evidence presented, the ALJ finds that Respondent had the necessary information to admit to specific maintenance treatment and chose instead to admit generally for "reasonable, necessary and related medical treatment after MMI that is provided by an authorized treating physician." Given that they had information outlining Claimant's specific maintence treatment needs and took approximately one month to consider it before filing their FAL, the ALJ finds any assertion that the FAL was filed improvidently unpursuasive. Based upon the above, the ALJ finds that this claim remains open for ongoing medical benefits, subject to Claimant's burden to establish that the requested treatment is reasonable, necessary and related to the September 7, 2010 injury.

61. Claimant has proven by a preponderance of the evidence that her condition has worsened and that the requested spinal surgery is reasonable and necessary to prevent further deterioration of the spinal conditions caused by, i.e. related to her September 7, 2010 work related injury.

CONCLUSIONS OF LAW

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

General Legal Principals

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

B. In deciding whether Claimant has met his burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). As found here, the opinions of Drs. Olson, Wong and Ritter are more persuasive than the contrary opinions of Dr. Rauzzino. Furthermore, Claimant's reports concerning the worsening of her condition is consistent throughout the written record and with her later testimony. The ALJ concludes the Claimant is a reliable witness and finds her testimony persuasive.

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

Respondent's Request to Withdraw the December 2, 2011 & September 18, 2013 Admissions for Maintenance Care

D. It is well settled that where respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), respondents are not precluded from later contesting liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Moreover, when respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission*, *supra; Snyder v. Industrial Claim Appeals Office*, *supra.* Where, however, respondents attempt to modify an issue that previously has been determined by an admission of liability, they bear the burden of proof for such modification. *Section 8-43-201(1), C.R.S*.; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the statute in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general
> or final admission, a summary order, or a full order shall bear the
> burden of proof for any such modification. (2) The amendments
> made to subsection (1) of this section by Senate Bill 09-168, enacted
> in 2009, are declared to be procedural and were intended to and
> shall apply to all workers' compensation claims, regardless of the
> date the claim was filed.

E. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed that burden on the respondents and made such a withdrawal the procedural equivalent of a reopening. The statute serves the same function in regard to maintenance medical benefits. The Supreme Court in *Grover v. Industrial Commission*, 759 P.2d 705, 712 (Colo. 1988), provided that after the respondents had admitted for maintenance medical benefits "the employer retains the right to file a petition to reopen, … for the purpose of either terminating the claimant's right to receive medical benefits or reducing the amount of benefits available to the claimant." The amendments to § 8-43-201(1), C.R.S., then, require that when the respondents seek a ruling at hearing that would serve as "terminating the claimant's right to receive medical benefits," they are seen as seeking to reopen that admission and the burden is theirs. In *Salisbury v. Prowers County School District*, *supra,* the Industrial Claims Panel held that where the effect of the respondents' argument is to terminate previously admitted maintenance medical treatment, the respondents have the burden, pursuant §8-43-201(1), C.R.S., to prove that such treatment is not reasonable, necessary or related to the claimant's industrial injury. In this case, Respondent is seeking to withdraw their admissions to ongoing maintenance care based upon Dr. Rauzzino's opinion that the demonstrated changes at the L4-5 disc level are not related to Claimant's September 7, 2010 injury and Claimant's ongoing need for surgery is no longer related to disc herniation caused by the September 7, 2010 injury since the work-related disc herniations retracted and are no longer causing symptoms. Simply put, Respondent's contend that Claimant's current need for treatment, including surgery at L3-4 and L4-5, is clearly related to an ongoing non-work related degenerative process in Claimant's lumbar spine. As found above, the ALJ is not persuaded.

F. Here, the evidence presented persuades the ALJ that Claimant likely had pre-existing, yet asymptomatic degenerative changes throughout the lumbar spine, to include a minor L4-5 spondylolisthesis. In addition to causing acute herniation at L1-2 and L3-4, the September 7, 2010 injury likely caused these degenerative conditions to become symptomatic necessitating the need for treatment. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). Here, the persuasive evidence demonstrates that Claimant sought treatment for her low back and right leg as a consequence of a specific activity, i.e. moving a heavy filing cabinet to gain access to an outlet. Although Claimant had significant pre-existing degenerative changes in the lumbar spine as confirmed by MRI, the ALJ finds a lack of persuasive evidence to establish that Claimant's pre-existing condition was symptomatic or disabling prior to September 7, 2010. Moreover Claimant's symptoms have persisted to a varying degree since September 7, 2010 in the absence of an intervening injury. The evidence presented persuades the ALJ that the stated mechanism of injury (MOI) likely placed Claimant's diseased spine in a compromised position sufficient to aggravate her pre-existing degenerative disc disease/spondylolisthesis giving rise to her symptoms and subsequent need for treatment. Accordingly, the ALJ concludes that Respondents have failed to prove, by a preponderance of the evidence, that Claimant's L4-5 spinal condition is unrelated to her September 7, 2010 injury. Moreover, the evidence presented convinces the ALJ that Claimant's need for surgery, including fusion at this level is directly related to the aforementioned aggravation and that surgery is otherwise reasonable and necessary in light of Claimant's relentless pain.

G. Concerning the L3-4 disc level, there is little question that the initial herniation demonstrated on MRI is causally related to Claimant's September 7, 2010 injury. Dr. Rauzzino concluded the same when he stated that both the L1-2 and L3-4 herniations "are temporally related to an event in which she states that she moved a moved file cabinet to manipulate a cable." Respondent is not contesting the treatment directed to this disc level through MMI. Rather, Respondent is contesting the need for post MMI treatment, including the recommended L3-4 surgery, on the ground that MRI evidence demonstrates that the large herniation present at L3-4 has desiccated and is no longer causing symptoms. Consequently, Respondents contend that the recommended surgery is no longer related to the industrial injury. Again, the ALJ is not convinced. Here, the February 23, 2016 MRI demonstrates a residual 4 mm broad-based right paracentral disc protrusion causing mild canal stenosis. This evidence persuades the ALJ that there is lingering disc herniation at L3-4 directly related to the September 7, 2010 injury. Contrary to Dr. Rauzzino's suggestion, while the disc herniation at this level has retracted, it has not "resolved" completely. Moreover, this spinal segment likely remains symptomatic as a consequence of facet hypertrophy and osteophyte formation causing severe right-sided foraminal narrowing. While the ALJ recognizes that these conditions are degenerative in nature, the ALJ is persuaded that the MOI which was sufficient to cause large disc protrusion/extrusion at multiple disc levels also likely aggravated the aforementioned degenerative changes contributing to Claimant's current symptom complex. Based upon the evidence presented, the ALJ concludes that the recommended L3-4 decompression procedure is necessary to address both the canal stenosis caused by residual disc herniation and the foraminal narrowing caused by degenerative change but made symptomatic by the accepted MOI. As found, the recommended procedure at this level is reasonable given Claimant's unremitting and worsening back and leg pain. The ALJ concludes that Respondent's have failed to carry their burden to prove that Claimant's need for treatment to cure and relieve her of ongoing symptoms attributable to this spinal level are no longer reasonable, necessary or related to the September 7, 2010 industrial injury.

H. As Respondent has failed to prove that Claimant's need for ongoing low back and leg treatment is no longer reasonable, necessary and related to her September 7, 2010 injury or that the September 18, 2013 FAL was filed improvidently, the ALJ concludes that the request to withdraw either the December 2, 2011 or the September 18, 2013 FAL must be denied and dismissed.

Reopening of the Claim

I. Section § 8-43-203(2)(b)(II)(A), C.R.S. 8-43-303 (1) C.R.S., provides that where the respondent files a FAL the case will automatically close as to the issues admitted in the FAL unless within thirty days of the final admission, the claimant contests the FAL and requests a hearing "on any disputed issues that are ripe for hearing." Here, Claimant did not object to either FAL filed by Respondent. Nonetheless, this claim remains open for "reasonable, necessary and related" maintenance treatment by virtue of Respondent's September 18, 2013 FAL admitting for the same. Consequently, the ALJ concludes that the question of wwhether Claimant established by a preponderance of the evidence that she suffered a worsening of a work related medical condition entitling her to reopen her workers' compensation claim to obtain the aforementioned L3-L4, L4-L5 decompression and fusion procedure recommended by Dr. David Wong need not be addressed further.

The Proposed Surgery as Maintenance Medical Care

J. A claimant is entitled to ongoing medical benefits after MMI if he/she presents substantial evidence that future medical treatment will be reasonably necessary to relieve the him/her of the effects of the injury or prevent deterioration of the claimant's condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

K. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents still retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

L. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). Here, the ALJ concludes that Claimant has met her burden to establish her entitlement to maintenance medical treatment. Substantial persuasive evidence demonstrates that there is an ongoing need to treat Claimant's chronic pain caused the injuries sustained in this admitted claim. Claimant was injured in excess of five years ago and has undergone substantial conservative care, yet she continues to have persistent pain which she credibly testified is worsening with time. Without ongoing treatment, including surgery the ALJ concludes that Claimant's present condition will likely deteriorate further.

M. Although Claimant asserts that she is at not MMI, she presented scant evidence to support such conclusion. Here, the evidence presented persuades the ALJ that Claimant remains at MMI and the proposed surgery is contemplated for maintenance purposes to control Claimant's pain and maintain her current level of function. Given that Claimant has proven that the recommended surgery is reasonable, necessary and related to her September 7, 2010 industrial injury, the question concerning her entitlement to additional medical treatment becomes whether Dr. Wong’s recommendation for surgery is properly considered maintence treatment.

N. The ALJ recognizes that surgery is often directed to curing and relieving a claimant's medical condition and not necessarily with maintaining and preventing deterioration of the claimant's condition. However, it is the purpose for which treatment is provided, not the "nature" of the treatment, which determines whether the treatment is curative or provided for maintenance reasons. *Milco Construction v. Cowan,* supra; *Hayward v. Unisys Corp.,* W.C. No. 4-230-686 (July 2, 2002), *affd, Hayward v. Industrial Claim Appeals Office,* (Colo. App. No. 02CA1446, January 9, 2003) (knee surgery may be curative or may be a form of Grover-style maintenance treatment designed to alleviate deterioration of the claimant's condition); *Jacobson v. American Industrial Service/Steiner Corp., V/.C.* No. 4-487-349 (April 24, 2007); *Cervantes* v. *Academy School District* # 20 W. C. No. 4-604-873 (May 23, 2005). Regarding the purpose of the surgery in question here, the ALJ finds the following statement from *Milco Construction v. Cowan,* pertinent:

> We hold, therefore, that, if the evidence in a particular case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that he will suffer a greater disability than he has sustained thus far, such medical treatment, *irrespective of its nature*, must be looked upon as treatment designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition. (Emphasis added).

In this case, the ALJ concludes that irrespective of the nature of the surgery recommended, substantial evidence exists to support a finding that the purpose of the procedure is to relieve the worsening pain associated with Claimant’s spinal injuries and to prevent deterioration of her present condition by decompressing the affected areas and in the case of fusion, stabilizing the mobile segment. Consequently, the ALJ concludes that Claimant is entitled to the recommended surgery on a maintenance basis.

ORDER

Based upon the above findings of fact and conclusions of law, it is hereby ordered that:

1. Respondent’s request to withdraw either the December 2, 2011 or the September 18, 2013 admissions for maintenance medical treatment is denied and dismissed.

2. Claimant is entitled to ongoing reasonable, necessary and related maintence care, including the surgery recommended by Dr. Wong. Respondent shall pay for the costs associated with Dr. Wong’s proposed surgery, in addition to all

reasonable and necessary medical care related to that surgery on a maintenance basis.

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

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

DATED: December 30, 2016

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

ISSUES

The issue presented for determination is whether Claimant has proven by a preponderance of the evidence that the left shoulder surgery recommended by Dr. Christopher Isaacs is reasonable, necessary, and causally related to Claimant's admitted industrial injury of December 12, 2013.

FINDINGS OF FACT

1. The Claimant worked for the Employer as a truck driver. At the time of the hearing in this matter, Claimant was 49 years old.

2. On December 12, 2013, Claimant was driving a loaded tractor-trailer and was stopped in traffic. A second tractor-trailer rear-ended Claimant's trailer.

3. Claimant was transported to the hospital by ambulance. The ambulance report notes complaints of severe back spasm and slight pain in the left hand. There is no mention of left shoulder pain.

4. The Lutheran Medical Center emergency room report notes minor damage to the Claimant's vehicle and no severe traumatic injury. The Claimant presented with back pain and spasm in the mid and upper back.

5. Claimant described the force of the impact from the accident as sufficient to knock a dashboard computer out of its rack and knock his truck out of gear. He testified he was jolted forward and to the right. He was restrained with a seat belt. According to at least one record, the accident was low speed, and the police report reflects that both vehicles sustained only minimal damage.

6. Claimant began treating with Dr. Robert Nystrom (with Concentra) on December 16, 2013. At this appointment, Claimant reported neck, back, left shoulder and tailbone pain. Claimant reported that most of his pain was in his low back and sacrum and neck and left shoulder. Dr. Nystrom noted diffuse tenderness to palpation of the left upper and posterior shoulder although the Claimant could abduct and internally rotate without too much difficulty, but he did have increased pain with resisted abduction. Dr. Nystrom assessed a left shoulder strain.

7. Dr. Nystrom's note of December 20, 2013 was silent regarding the left shoulder, but the pain diagram Claimant completed indicated posterior left shoulder pain.

8. On December 27, 2013, a Concentra nurse practitioner noted shoulder pain of 6/10 with marked spasm throughout the bilateral cervical spine, worse on the left, through the left paraspinous musculature and through the trapezius and rhomboid of the left shoulder. The range of motion of the left shoulder was complete but with pain. There was no diagnosis of the left shoulder complaints.

9. Claimant returned to Concentra on January 2, 2014 and again on January 6, 2014. The office notes from these appointments do not mention left shoulder complaints.

10. Claimant was referred to Dr. Janssen for an orthopedic consultation of his low back complaints. Dr. Janssen's office note of January 7, 2014 makes no mention of left shoulder complaints.

11. On January 13, 2014, Dr. Nystrom noted some diffuse tenderness to palpation of the left posterior shoulder. Dr. Nystrom assessed a left shoulder strain. Claimant was not exhibiting any improvement so he was referred to Dr. Jeffrey Wunder for a physical medicine evaluation.

12. Dr. Wunder first saw Claimant on January 14, 2014. The office note documents left anterior shoulder pain described as constant aching with no radiation or neurological symptoms. Dr. Wunder noted Claimant's “pain behavior was quite high and somewhat disproportionate to the palpatory pressure applied. The symptoms appeared to be in excess of objective findings.” On exam, the left shoulder had tenderness predominately at the left AC joint with minimal subacromial tenderness. Active range of motion revealed 150° of flexion and abduction, 90° exterior rotation and 60° interior rotation. Claimant had a negative cross-chest or O'Brien compression test. The Hawkins impingement maneuver was negative. Rotator cuff testing revealed no weakness. The Speed test was negative. Dr. Wunder’s impression of the left shoulder complaints was that Claimant probably had some AC joint dysfunction. He did not appear to have significant rotator cuff findings on exam. If Claimant did not respond to conservative treatment, consideration could be given to an AC joint injection

13. Claimant saw Dr. Nystrom on January 28, 2014. The office note for this appointment is silent regarding any complaints or treatment recommendations for the left shoulder.

14. On January 31, 2014, an RN at Dr. Janssen's office examined the Claimant. Claimant complained of back, neck, bilateral lower extremity and bilateral upper extremity pain. On motor exam of the shoulder adductors Claimant had 5/5 on both the left and right. The shoulder exam showed a negative impingement sign and no rotator cuff pathology. The range of motion of the upper extremity joints was full and unrestricted.

15. Claimant returned to Concentra on February 26, 2014. It was noted the left shoulder was improving with better range of motion and less pain. Claimant was

tender to palpation over the left AC joint. The range of motion was nearly full except on external and internal rotation. Physical therapy directed at Claimant's neck, lumbar spine and left shoulder was continued.

16. Dr. Leimbach conducted an EMG study of Claimant's upper extremities on February 27, 2014. He noted left greater than right upper extremity pain. He reported the EMG was consistent with C5 radiculopathy.

17. Dr. Nystrom and other providers at Concentra provided Claimant's primary treatment. The Concentra notes after March 10, 2014 are silent regarding specific problems with the left shoulder. There are comments about upper extremity radiculopathy associated with the cervical spine complaints.

18. Claimant completed pain diagrams during each visit with Concentra, and indicated which body parts were symptomatic. On nearly each pain diagram with Concentra, the left shoulder is marked as having symptoms.

19. Claimant testified he had persistent complaints of left shoulder pain since the date of injury.

20. In addition to the left shoulder complaints, however, Claimant was experiencing severe neck problems to the point where he had severe difficulty turning his head to the left. He also had numbness going down his left upper extremity.

21. Claimant testified that he had pain in his neck, that would radiate down into his shoulder, into his arms, into his fingers, and that both his shoulder and his neck would hurt during therapy.

22. Claimant understood that his treatment providers planned to treat his worst symptoms first then proceed to treat each body part as other areas improved.

23. On April 8, 2014, Claimant reported left shoulder pain to Mary Brasfield, a physician's assistant, at the Center for Spinal Disorders.

24. On June 12, 2014, Dr. Nystrom prepared a report addressing anticipated medical treatment and MMI. He indicated claimant needed injections for his neck and back followed by some physical therapy. Anticipated claimant would reach MMI six weeks after the injections. His report contained no mention of the left shoulder any recommendations for treatment relating to the left shoulder.

25. The medical records from Dr. Nystrom into late 2014 and 2015 are again silent regarding the left shoulder complaints, treatment and lack a diagnosis of any left shoulder problem.

26. In January 2015, Dr. Janssen recommended that Claimant undergo cervical spine surgery.

27. The July 30, 2015 pre-operative report noted Claimant had incapacitating neck pain and bilateral upper extremity pain. There was no mention of a specific left shoulder problem or a diagnosis of any left shoulder pathology.

28. After the neck surgery was performed, Claimant was still reporting left upper extremity weakness. On August 18, 2015, Claimant reported to Dr. Janssen’s nurse that he had experienced tremors in his left arm when he tried to tie a fly while fishing. He had never experienced tremors before. He stated he did not have the same pain he had pre-operatively and the numbness in his left upper extremity had diminished.

29. On September 15, 2015, Dr. Janssen examined the shoulder noting a negative impingement sign with no rotator cuff pathology. Range of motion of the upper extremity joints was reportedly full and unrestricted. The assessment was subjective complaints of weakness in the left upper extremity.

30. On December 16, 2015, the left shoulder diagnoses and specific left shoulder symptoms resurfaced. Claimant reported to Dr. Janssen's assistant that he had experienced increasing left shoulder pain recently. On exam he had moderate impingement findings and a positive drop sign. An MRI of the left shoulder was ordered.

31. A left shoulder MRI arthrogram was done on January 11, 2016. It showed a labral tear with small associated parameniscal cyst about the posterosuperior glenoid. The antteroinferior labrum was slightly irregular and frayed.

32. Claimant was referred to Dr. Isaacs for a consultation on the left shoulder. Claimant reported he had persistent shoulder pain since the date of injury. On exam, the impingement signs were dramatically positive while the AC joint was nontender. Drawer testing and Yergason’s sign were negative. The impression was left shoulder impingement and labral tear. Dr. Isaacs did not address causation in this report.

33. On February 4, 2016, Dr. Nystrom noted the left shoulder was getting worse. He diagnosed a degenerative tear of the glenoid labrum.

34. Claimant testified that his left shoulder pain has been the same throughout his claim, but that it is just more prominent now.

35. Respondents referred the Claimant to Carlos Cebrian, M.D., for an independent medical examination which occurred on June 1, 2016. He diagnosed as work-related conditions: a cervical strain with aggravation of pre-existing degenerative disc disease, a lumbar strain with a temporary aggravation of pre-existing lumbar pathology and a left shoulder strain. In his opinion, Claimant had reached maximum medical improvement (MMI) for all conditions. The current left shoulder pathology, i.e. the labral tear, was not related to the work injury. The mechanism of injury would not cause a labral tear.

36. After the IME, Dr. Cebrian received additional medical records, including a copy of the MRI arthrogram of the left shoulder. It remained his opinion that, to a reasonable degree of medical probability, the current left shoulder complaints were not related to the motor vehicle accident of December 12, 2013. The findings of labral tear with a paralabral cyst and impingement were degenerative in nature and not caused by an acute injury.

37. Dr. Isaacs also testified by deposition. He testified that based on Claimant's report of persistent left shoulder pain since the date of injury, the labral tear was related to the motor vehicle accident. Dr. Isaac reviewed the medical records from his practice. He did not review the medical records from Concentra. Dr. Isaac had no knowledge as to whether or not the medical records documented complaints of persistent left shoulder pain.

38. Dr. Issacs opined that if symptoms occur relative to the timing of the accident, immediately following or a short time following, then they relate to the accident.

39. Dr. Isaacs further testified that the mechanism described by Claimant was sufficient to cause the labral tear shown on the MRI performed on January 11, 2016.

40. Dr. Isaacs also explained that when there is both a cervical injury and shoulder injury, that there's a symptomatology overlap between cervical issues and shoulder issues that can be very difficult to sort out.

41. Dr. Isaacs also testified about how to determine which body part is causing the problem. Dr. Isaacs testified when one problem resolves, then you assume the other problem is the issue.

42. Dr. Isaacs acknowledged that he could not rule out a degenerative tear of the labrum. He also acknowledged that the nature of Claimant's symptoms had changed over the course Claimant's claim and treatment, including Claimant's reports or improvement in his left shoulder symptoms.

43. Dr. Cebrian testified that Claimant had complaints of left shoulder pain early on after the motor vehicle accident consistent with wearing a shoulder harness seatbelt. The early examinations of Claimant documented a different type of shoulder complaint in 2014 than he had in 2016. In 2014, there were no signs of impingement yet in 2016 there were dramatic signs of impingement, and the AC joint pain that was documented in 2014 was no longer present.

44. The complaints leading to a diagnosis of a labral tear and impingement were not documented in the medical records until December 2015, two years after the motor vehicle accident. Dr. Cebrian testified it was medically probable this was a new

condition related to degeneration that developed over a long period of time and was not related to the motor vehicle accident.

45. Dr. Cebrian's opinion is supported by the lack of documentation in the medical records from February 2014 through December 2015 of any shoulder diagnoses or work-up for shoulder-specific problems. As Dr. Cebrian explained if Claimant had continued to report shoulder symptoms, the treatment providers would not have ignored them to focus on Claimant's neck. But because Claimant had not demonstrated any signs of impingement, a labral tear or other shoulder conditions, no shoulder-related diagnostic studies were ordered. To the extent Claimant had complaints of pain in the upper extremities they were related to cervical radiculopathy and not a labral tear or impingement. This is especially true given the changing nature of Claimant's left shoulder symptoms over the course of the claim-related treatment.

46. Based on the foregoing, Claimant has failed to prove that his current shoulder symptoms and diagnoses are related to his work-related motor vehicle accident. As such, the Respondents are not liable for the surgery recommended by Dr. Isaacs.

CONCLUSIONS OF LAW

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

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

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

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

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

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

6. Claimant has failed to sustain his burden of proving that the need for left shoulder surgery is causally related to the motor vehicle accident of December 12, 2013 for the following reasons:

Claimant testified he had persistent complaints of left shoulder pain since the date of injury. This testimony is not supported by the numerous medical records. Although Claimant documented shoulder symptoms on his pain diagrams, there is a noticeable absence of treatment and diagnosis for the left shoulder in the medical records between late February 2014 and December 16, 2015. Further, the nature of the complaints changed between early 2014 and January 2016 when Claimant was diagnosed with a labral tear, cyst and impingement symptoms. The symptoms documented in December 2015 in January 2016 are not the same symptoms claimant had in January and February 2014. The nature of injury changed from AC joint irritation to impingement signs and greatly restricted range of motion. Claimant’s testimony is not particularly persuasive.

As Dr. Cebrian opined, the medical records show initial complaints of left shoulder pain consistent with wearing a shoulder harness. These complaints seem to have ended by March 2014. There is a gap of approximately 20 months during which the medical records are silent on specific left shoulder complaints, left shoulder treatment and any diagnosis for the left shoulder. Instead the shoulder complaints Claimant did make were more likely than not related to his cervical spine condition.

Dr. Isaacs relied upon Claimant’s statement that he had persistent left shoulder pain since the date of injury in concluding the labral tear and impingement of the left shoulder were causally related to the work injury of December 12, 2013. Dr. Isaacs did not review the medical records to determine if the left shoulder complaints had been consistently documented since the date of injury. Dr. Isaacs did not review the medical records to determine if the physical exams and objective findings had been consistent since the date of injury.

Dr. Cebrian reviewed medical records of the treatment over more than two years following the date of injury. He noted the physical exam and reported symptoms changed between early 2014 and early 2016. Dr. Cebrian testified the mechanism of injury is not consistent with a labral tear. Dr. Cebrian also testified the condition of Claimant's shoulder in 2016, i.e., the labral tear and impingement, was not causally related to the motor vehicle accident of December 12, 2013.

7. The ALJ concludes that the testimony and opinions of Dr. Cebrian are more credible and persuasive than those of Dr. Isaacs. As stated above, Dr. Isaacs did not have a full picture of Claimant's medical treatment history when he opined that Claimant's labral tear was caused by the work accident. Also as stated above, the Claimant's testimony concerning the duration and nature of his left shoulder complaints was not persuasive given the medical records to the contrary.

ORDER

It is therefore ordered that:

1. Claimant's request for medical benefits consisting of surgery to repair a left shoulder labral tear and impingement is denied and dismissed.

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

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

DATED: October 2, 2016

DIGITAL SIGNATURE:

L. Broniak

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

EXHIBITS

The following Exhibits were accepted into evidence: Claimant's Exhibits 1-18, 22-27, Golden's Exhibits A-U, Respondents' Joint Submissions A-S, South Metro's Exhibits AA-ZZ, Exhibit A House Bill 07-1008 legislative testimony, and evidentiary deposition of Dr. Mark Pattridge taken on November 10, 2010 with deposition exhibits 1-8.

ISSUES

1. Compensability under § 8-41-209, C.R.S. for prostate cancer.

2. Medical benefits, including treatment at Johns Hopkins University.

3. Average weekly wage.

STIPULATIONS

The parties stipulated to the following facts at hearing:

a) Claimant worked as a volunteer firefighter for Golden from August 7, 1990 through July 29, 2001.

b) Claimant worked as a firefighter for Castlewood from March 7, 1998 through July 30, 2001.

c) Claimant worked as a firefighter for Golden from July 30, 2001 through September 5, 2007.

d) Claimant worked as a Captain for Parker from September 6, 2007 through December 31, 2008.

e) Claimant worked as a volunteer firefighter for Golden on February 5, 2008 to present.

f) Parker merged with South Metro on January 1, 2009 and thus Claimant worked for South Metro from January 1, 2009 to present.

g) Claimant is entitled to maximum average weekly wage on date of onset of disability.

h) The medical treatment Claimant received including surgery for his prostate cancer at John Hopkins University is reasonable and necessary and authorized.

FINDINGS OF FACT

1. Claimant's date of birth is October 26, 1959.

2. Claimant has been employed as a firefighter since 1990. From August 7, 1990 through July 29, 2001, Claimant worked as a volunteer firefighter for Golden. His primary responsibilities were fire suppression and overhaul. From July 30, 2001 through September 5, 2007, Claimant worked full time for Golden as a training officer. Claimant trained volunteers and recruits and also performed fire suppression and overhauls. Approximately 3 fire suppression calls came into the station each day and Claimant usually responded to at least one of them. Claimant was rehired by Golden as a volunteer firefighter from February 5, 2008 and continuing through the date of the hearings in this matter.

3. Claimant worked as a firefighter for Castlewood from March 7, 1998 through July 30, 2001. Castlewood subsequently became South Metro. During his employment with Castlewood, Claimant's duties included public education, apparatus/equipment maintenance, fire prevention, building and hazard pre-incident planning, inspection and fire suppression and overhaul. Claimant responded to approximately 4-5 calls on a 24-hour shift and completed approximately one hundred twenty 24-hour shifts per year. Approximately 50% of the fire suppression calls were residential and 50% commercial structure fires.

4. Claimant worked for Parker as a Captain on September 6, 2007 through December 31, 2008. Claimant was a safety officer responding to major fires and going into burning structures to make sure both that operations were running safely and that firefighting equipment was properly used. Claimant was also exposed to numerous live fires during training burns while acting as a lead training instructor.

5. On January 1, 2009, Parker merged with South Metro. Claimant primarily worked as a training and safety officer for South Metro.

6. Collectively, Claimant completed five or more years of employment as a firefighter as required under Section 8-41-209, C.R.S.

7. Claimant's work as a firefighter for over 21 years, involved suppression and overhaul of residential and commercial structural fires. He also contained hazardous materials and spills as well as chemical and car fires. Both Claimant and Chief Bales credibly testified that firefighters suffer regular exposures to multiple chemicals that vary by fire type.

8. Claimant has a family history of prostate cancer. His father was diagnosed with prostate cancer at age 69/70. Two of his father's brothers were diagnosed with prostate cancer; one at age 69/70 and the other at age 71. He has a maternal uncle who was diagnosed with prostate cancer at age 69/70. Claimant has approximately 17 first cousins who are male and one has prostate cancer diagnosed at age 49. His paternal grandfather did not have cancer. His father's 3rd brother and Claimant's 58 year

old brother have not been diagnosed with cancer nor have the other 16 first male cousins.

9. On July 24, 2007, Claimant underwent a physical examination by Dr. John Harris, a physician for Parker. The physical included a digital rectal exam (DRE) and prostate exam, both of which were normal. At this time Claimant's prostate specific antigen (PSA) was 2.5. In 2007, a 2.5 PSA was not high enough to recommend a biopsy.

10. On November 4, 2008 when Claimant was 48 years old, his PSA was 3.6. This PSA was ordered by Dr. Harris. Dr. Harris referred Claimant to his family physician for follow-up. Claimant saw his family physician, Dr. Pattridge who felt that the proportional increase (velocity) of the PSA between 2007 and 2008 warranted a urological consultation and referred Claimant to Dr. Abernathy. Claimant underwent a biopsy on December 18, 2008 that showed he had clinically significant prostate adeno carcinoma. Dr. Abernathy referred Claimant to Johns Hopkins University where he underwent surgery on April 8, 2009.

11. Richard R. Augspurger, M.D., is an expert urologist. He is the medical director for The Urology Center of Colorado and has practiced medicine for more than 30 years. Dr. Augspurger has managed prostate cancer patients since 1973.

12. When asked to address the etiology of prostate cancer, Dr. Augspurger opined, "Most of them just occur spontaneously and we don't know the underlying cause. There are family histories of it where it runs through families. And then there are hereditary ones where there's a strong genetic component that runs through families." (8/12/11 hearing transcript (HT) p. 57 l. 25, p. 58 ll. 1-5). He further stated that the textbooks do not identify smoking or exposure to firefighting as a factor. (8/12/11 HT p. 58 ll. 7-9). He indicated that other risk factors for prostate cancer include a high fat diet, race, and vasectomy. (8/12/11 HT p. 60 ll. 17-25, p. 61 ll. 2-8, p. 89 ll. 1-9). When asked to explain the difference between hereditary and familial risk factors, Dr. Augspurger stated:

> If you look, we're going to take everybody who has prostate cancer and you have this big pool. Then you have another pool here and inside this pool is this. This is the prostate cancer that comes up and we don't know the cause, there's no family history, there's no genetics. And that's 85 percent of the cancers that we see. Then we have the cancers that run in families and that accounts for about 15 percent of all the cancers. And then inside that family, there are what are called the hereditary ones and that number is dependent on several factors. But if you have two family members who are less than 55 – this accounts for 43 percent of this 15 percent. So if you have two family members. So a diagnosis of familial cancer means that you have more than one person in a family that has prostate cancer.

(8/12/11 HT p. 58 ll. 17-25, p. 59 ll.1-5)

13. Dr. Augspurger opined that Claimant fell into the category between hereditary and familial. (8/12/11 HT p. 61 ll. 22-25). Dr. Augspurger testified that familial predisposition is a significant risk factor for prostate cancer. He further opined that the familial history is the most likely cause of Claimant's cancer. (8/12/11 HT p. 63 ll. 4-17). Dr. Augspurger does not believe that prostate cancer is firefighting caused or related. (8/12/11 HT p. 88). The ALJ finds Dr. Augspurger's opinions on causation to be less persuasive than the opinions of Dr. Mayer.

14. Dr. Augspurger persuasively testified that the practice of prostate cancer medicine has evolved since 2007. Dr. Augspurger opined that he "probably" would have ordered the biopsy when Claimant's PSA was 2.5 in 2007. (8/12/11 HT pg. 67 ll. 6-7)

15. Dr. Augspurger credibly explained that back in 1995 when claimant had a 1.3 PSA at age 35 that was considered "normal" because the PSA was below 2.5. Today physicians are suspicious of the existence of prostate cancer when a male who is under 50 years old has a PSA of more than 1.0. Dr. Augspurger persuasively testified that Claimant's 1.3 PSA at age 35 is suggestive that prostate cancer was present at that time. The normal PSA at age 35 should be less than 0.6. (Joint HS G)

16. Dr. Augspurger persuasively opined that it was medically probable that Claimant had prostate cancer in July 2007:

> I would say with a pretty good degree of medical probability that he had the cancer in 2007 and he probably had it in 2006. Because cancer is not just overnight you show up with cancer. So you start out with one cancer cell at some point. And depending on how fast it grows, you'll end up with a volume of cancer that's big enough to detect when you do a biopsy.

(8/12/11 HT, pg. 76 ll. 4-12)

17. Consistent with Dr. Augspurger, William Milliken, M.D., persuasively opined that it is medically probable that Claimant had prostate cancer in July 2007. Dr. Milliken is board certified in occupational medicine and Level II accredited. He has performed evaluations of hundreds of claims for assessment of whether occupational exposure to various materials was causally related to the development of various cancers. Dr. Milliken was accepted as an expert in occupational and environmental medicine.

18. Dr. Milliken testified that the firefighter statute should be limited to certain genitourinary cancers, such as kidney and/or bladder cancer, but not prostate. This is because "the path of destruction" from the chemicals involved in firefighting should not impact the prostate. (8/12/11 HT p. 107 ll. 3-25, p. 108 ll. 1-4). He did acknowledge a "weakly possible" occupational exposure contributing effect. Exhibit K, BS 166. He concluded that Claimant's carcinogenic exposure was not related to his occupation because he did not believe that carcinogens found in firefighting could impact the prostate.

19. Dr. Milliken disputes the Colorado Legislature's inclusion of the prostate gland as a covered cancer because the prostate gland is not significantly exposed to an excretory function (urine). Therefore, he believes that the statute's presumption is not supported by scientific evidence that there is a cellular interaction with prostate cell DNA. Exhibit K, BS 163.

20. Dr. Milliken agreed with Dr. Mayer that in many cases the cause of cancer is unknown.

> "A. Yes, I can. I would agree with the doctors that have all I think testified including Dr. Mayer that in many cases we don't have the precise cause of many cancers. And this is not unusual for a large number of cancers. The determination of most likely cause is based on probability or you know what does the majority of or the overwhelming percentage of the evidence suggest would be the cause.
>
> . . .
>
> So based on that probability analysis if you will when I look at genetic risk as 2 or 300 to 500 times increase in risk for prostate cancer as compared to someone without the genetic history, that to me in a very simple manner is clearly the chief risk factor. And while it may not be the sole cause or they (sic) may be other factors involved, I can't identify from that large group of other risk factors which one, if any, was the significant co-conspirator if you will or co-contributor to carcinogenesis or the development of prostate cancer. I don't know that - - I don't know that anybody could."

(8/12/11 HT p. 110 ll. 4-25, p. 111 ll. 1-5).

21. Dr. Milliken concluded, "[I]t was the familial or genetic risk that was the most prominent risk factor for prostate cancer." (8/12/11 HT p. 111 ll. 12-14). Dr. Milliken's opinions on causation are less persuasive that the opinions of Dr. Mayer.

22. Dr. Annyce Mayer was accepted as an expert in occupational medicine and public health. Dr. Mayer persuasively testified that Claimant had contracted genitourinary cancer or prostate cancer, had completed more than 5 years of firefighter service, and had undergone physical examinations at the time of becoming a firefighter and thereafter, which failed to reveal substantial evidence of the presence of prostate cancer. Therefore, Claimant has met the statutory threshold requirements set forth in § 8-41-209, C.R.S.

23. Dr. Mayer persuasively opined that the medical evidence presented by Respondents failed to demonstrate that Claimant's prostate cancer did not occur as a result of his job. She testified that although the exact cause of Claimant's prostate cancer is unknown, Claimant's cancer is likely the result of the synergistic interaction between familial factors and his occupational exposures as a firefighter. The ALJ finds Dr. Mayer's opinion in this regard to be credible and persuasive.

24. Dr. Mayer relied on published articles establishing that the risk of prostate cancer is influenced by the age of relatives in the first degree who had been diagnosed with cancer. Claimant's father was 69 or 70 when he was diagnosed and his uncles were between the ages of 69-71 when they were diagnosed with prostate cancer. Thus, Claimant's diagnosis at a much younger age indicates that other factors, including occupational exposures, combined with familial risk and unknown genes to create prostate cancer.

25. Dr. Mayer opined that Claimant's younger onset of prostate cancer was not consistent with a familial history of his other first-degree relatives. Further, of forty-two relatives in the first and second degree, only seven had some level of prostate cancer. Further, his older brother does not have prostate cancer, and his sister has not suffered from any type of cancer.

26. Dr. Mayer testified that recent epidemiological studies have demonstrated a nexus between exposure to polyaromatic hydrocarbons and the early development of cancer in individuals who were predisposed by heredity to the development of cancer. Although these studies have not defined the precise causal relationship, they provide support for the proposition that there is a relationship between an early onset of prostate cancer in individuals who are exposed to carcinogens and who have a hereditary predisposition.

27. Dr. Noel Weiss testified at the August 12, 2011 hearing as a joint witness for all Respondents. He is an epidemiologist and professor at the University of Washington in Seattle. Dr. Weiss was accepted as an expert witness in the area of epidemiology. (8/12/11 H.T. p. 13-16).

28. Dr. Weiss stated that "a strong family history predisposes to the incidence of prostate cancer. The specific means by which that operates in not known." (8/12/11 H.T. p. 46 ll. 19-21).

29. Dr. Weiss opined that it is premature to conclude that firefighting could lead to an increased risk of prostate cancer. (8/12/11 H.T. p.25, ll.12-17). Dr. Weiss stated that a person with a family history of prostate cancer is at a sharply increased risk of prostate cancer. (8/12/11 H.T. p. 26, ll. 2-8).

30. Dr. Weiss also provided testimony regarding a document prepared by a "working group" of the International Agency for Research on Cancer. This agency convenes these working groups to make judgments as to the likelihood that a particular occupation or substance is carcinogenic in human beings. Dr. Weiss explained that the International Agency specifically reviewed firefighting several years ago and found that the epidemiologic data on the relationship between cancer and firefighting was "limited" and that it was only "possible" that firefighting is a cause of cancer of any type. Dr. Weiss agreed that there is a possibility that firefighting is a cause of cancer but did not believe it was reasonable to opine beyond that *i.e.* opine based on probability. (8/12/11 H.T. p. 28, ll.19-25-p.29, ll.1-12).

31. Dr. Weiss opined within a reasonable degree of epidemiologic and medical probability that it was medically probable that Claimant would have developed prostate cancer even if he never served as a firefighter. (8/12/11 H.T. p. 29 ll.20-25 to p. 30, ll.1-2).

32. Dr. Weiss stated that when trying to gauge which is the more likely explanation for the cause of Claimant's prostate cancer, one is three times more likely to contract prostate cancer as a result of family history when compared to the 28% increased risk for firefighters to contract prostate cancer indicates that the larger figure would constitute the more likely explanation. (8/12/11H.T. p. 36 ll. 12-25, p.37, ll. 1-22).

33. Dr. Weiss opined that Claimant's cancer was not caused by firefighting but was caused by his familial predisposition. (8/12/11 H.T. p. 30, ll.1-13). The ALJ finds Dr. Weiss's opinions on causation to be less persuasive than the opinions of Dr. Mayer.

34. According to the persuasive and consistent testimony of Drs. Milliken and Augspurger, given Claimant's PSA between 2.5 and 2.8 at age 47 which increased from the 1.3 PSA Claimant had at age 35, it is medically probable that Claimant had prostate cancer in July 2007, before he went to work for Parker and South Metro.

35. Drs. Milliken and Augspurger also agree that Claimant's medical treatment following a biopsy positive for prostate cancer in July 2007, would have been identical to the treatment Claimant underwent after his official diagnosis. (8/12/11 HT p. 68 ll. 16-25, p. 69 ll. 1)

36. Dr. Augspurger persuasively opined that there is no medical literature to suggest that once the prostate cell has undergone malignant transformation, exposure to carcinogens would directly affect the cells or have any influence on the progression of the disease. In other words, once a male has prostate cancer, exposure to carcinogens will not alter, aggravate, or change the course of the prostate cancer. (8/12/11 HT, p. 69 ll. 2-9)

37. Dr. Milliken agreed that once a person has prostate cancer, the cancer has a natural progression and it is unlikely that subsequent firefighting exposures would have been significant in altering the course of Claimant's prostate cancer that likely existed in July 2007. (8/12/11 HT, pg. 167-168)

38. The ALJ finds the opinions of Dr. Augspurger and Dr. Milliken, that Claimant more likely than not had prostate cancer in July 2007 and the course of the prostate cancer was not aggravated or accelerated by carcinogen exposures or firefighting duties after July 2007, to be credible and persuasive and found as fact.

39. In passing § 8-41-209, C.R.S., the Legislature had the benefit of the expert opinion of Dr. Virginia Weaver, a specialist in the field of occupational medicine practicing at Johns Hopkins University. Dr. Weaver informed the Legislature that firefighters face an increased risk of cancer due to their occupational exposure and that these risks were frequently underestimated. She also testified that the presumption statute was needed because there is a significant challenge to determining exposure

assessment for firefighters, a challenge which is more difficult than in a controlled manufacturing setting. Nevertheless, firefighters are exposed to significant hazards which give rise to the need for increased protection.

40. Claimant met the threshold requirement of § 8-41-209. Therefore, his prostate cancer is occupationally related.

41. Respondents have failed to establish by a preponderance of the medical evidence that Claimant's prostate cancer did not occur on the job.

42. The persuasive medical evidence supports a finding that Claimant more likely than not had prostate cancer in July 2007 while employed by Golden.

43. The persuasive medical evidence supports a finding that Claimant's cancer was not caused, aggravated, or accelerated by Claimant's employment with Parker which began in September 2007 or with South Metro which began on January 1, 2009. The persuasive medical evidence also does not support a finding that Claimant had cancer during his employment with Castlewood from 1998 to 2001.

44. Claimant became disabled when he began losing time from work after his prostate cancer surgery on April 8, 2009.

CONCLUSIONS OF LAW

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

2. In deciding whether a party to a workers' compensation dispute has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office,* 53 P3d 1192, 1197 (Colo. App. 2002). ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. lCAO,* 55. P.3d 186 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and or actions; the motives of a witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 57 P.2d 1205 (1936); CJI (2005).

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

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

4. Section 8-41-209 (the "firefighter cancer statute") provides:

> (1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system hematological system or genitourinary system and resulting from his or her employment as a firefighter, shall be considered an occupational disease.
>
> (2) Any condition or impairment of health described in subsection (1) of this section:
>
> (a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and
>
> (b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.

5. "Proof by a preponderance of the evidence requires the proponent to establish that the existence of a 'contested fact is more probable than its nonexistence.'" *Jimenez-Chavez v. Cargill Meat Solutions*, W.C. No. 4-704-536 (ICAO, October 2008); *see Page v. Clark*, 592 P.2d 792 (Colo. 1979).

6. In general, "medical probability" or "more likely than not" means more than 51%. That is, the existence of a contested fact is greater than 50% likely.

7. Once the firefighter has met the threshold requirements of the firefighter statute, the burden shifts to Respondents to prove by a preponderance of the medical evidence that the firefighter's cancer was not caused by his or her employment.

8. The firefighter cancer statute has been the subject of significant litigation and appellate caselaw since its passage. The definitive interpretation of the statute was recently provided by the Supreme Court in *City of Littleton v. Industrial Claim Appeals Office*, 370 P.3d 157 (Colo. 2016). Although this claim was originally remanded for reconsideration of compensability under the Court of Appeals decision in the *City of Littleton* case, 2016 CO 25, the ALJ will apply the standards subsequently enunciated by the Supreme Court.

9. In *City of Littleton, supra,* the Supreme Court held that the statutory presumption embodied by § 8-41-209(2) "is substantive in that it remains in the case as a substitute for evidence." *Id*. at 165. But the court emphasized that the statutory presumption "is not conclusive, or irrebuttable." *Id*. at 168. The employer can overcome the presumption by proving, by a preponderance of the medical evidence, that the firefighter's cancer "did not occur on the job." *Id*. at 165. Nevertheless, the employer faces a "formidable" burden, "because the employer is tasked with proving a negative." *Id*. at 172.

10. *City of Littleton* clarified the types of evidence the employer can use to rebut the statutory presumption and prove that a firefighter's cancer is not work-related. The employer may attempt to meet its burden either with evidence addressing "general causation" or evidence regarding "specific causation." The court stated "the employer may establish, by a preponderance of the medical evidence, either: (1) that a firefighter's known or typical occupational exposures are not capable of causing the type of cancer at issue; or (2) that the firefighter's employment did not cause the firefighter's particular cancer, where, for example, the claimant firefighter was not exposed to the cancer-causing agent, or where the medical evidence renders it more probable that the cause of the claimant's cancer was not job-related." *Id*.

11. Drs. Weiss and Augspurger dispute the scientific validity of the Colorado Legislature's presumption that firefighting could give rise to an occupational disease claim. Dr. Milliken conceded the validity of the Legislature's presumptive language but did not agree that prostate cancer should be included. Despite *LeMasters*, Dr. Milliken disputes the scientific/medical validity of the Colorado Legislature's inclusion of prostate cancer as a presumptive cancer under the statute.

12. Drs. Weiss, Augspurger, and Milliken opined that the cause of prostate cancer is "unknown." Rather than attempt to prove a specific, alternative exposure or causal agent that would account for Claimant's cancer, Respondents focused on the relative risk of Claimant's familial history of prostate cancer as compared to the risk associated with firefighting.

13. *Industrial Claim Appeals Office v. Town of Castle Rock*, 370 P.3d 151, 157 (Colo. 2016), a companion case to *City of Littleton*, held that an employer "is not required to prove a specific alternate cause of the firefighter's cancer." The court further held that the employer may rely on "particularized risk-factor evidence" to prove that a firefighter's cancer is not related to his employment.

14. The ALJ is persuaded by Dr. Mayer's opinion that Claimant's "familial" predisposition does not constitute a preponderance of the medical evidence that his prostate cancer did not occur on the job. The experts testified to several risk factors for prostate cancer, including increased risk associated with working as a firefighter. The medical experts all agree that familial predisposition is risk factor. But the Claimant's increased risk of prostate cancer from familial predisposition does not diminish firefighting's causal role in the development of the disease.

15. The evidence regarding Claimant's familial predisposition does not persuade the ALJ that Claimant's cancer is not work-related. Dr. Mayer persuasively explained that there is a synergistic relationship between familial risk and Claimant's occupational exposures. Dr. Mayer testified:

> [W]here medicine is really kind of going is looking at gene by environment interactions. And we talk about how the genes load the gun and it's the environment that pulls the trigger. In so it really is most medically appropriate to consider that risk is determined not only by family history because if it were by family history, Uncle Tom, his brother, and the rest of his male cousins would also have prostate cancer. So it's a combination of genetic and environmental risk factors, not all of which we can identify, that determine risk in a particular individual.
>
> (7/1/11 HT, pp. 46-47 ll 20-25, 1-5).
>
> . . .
>
> [W]hat we're finding more and more is the gene by environment interaction where it's those people who already have the predisposition who are more susceptible to effect from an exposure.
>
> (8/12/11 HT, p. 188 ll. 19-22).

16. In accordance with *Town of Castle Rock*, *supra*, the ALJ has carefully considered the evidence of familial and other non-occupational risk factors presented by Respondents. The ALJ appreciates the opinions of Respondents' experts on this complex issue, but finds the opinions and testimony of Dr. Mayer to be more persuasive regarding the cause of Claimant's cancer.

17. Based on the totality of the evidence, the ALJ concludes that Respondents failed to prove by a preponderance of medical evidence that Claimant's cancer did not occur on the job. Therefore, Claimant's prostate cancer is occupationally related and compensable under § 8-41-209.

18. Claimant developed prostate cancer in July 2007 when he was employed by Golden. The need for medical treatment including surgery was causally related to Claimant's employment with Golden as a firefighter. Claimant's firefighting exposures after July 2007 did not aggravate or accelerate his prostate cancer or alter the course of treatment. Golden and its carrier are solely responsible for Claimant's medical treatment.

19. Onset of disability is defined as the time when Claimant's occupational disease either impairs his ability to effectively and properly perform his regular employment or renders him incapable of returning to work except in a restricted capacity. *See Ortiz v. Murphy*, 964 P.2d 595 (Colo. App. 1998).

20. It is well established that, although the onset of disability is important for several purposes, it does not determine or establish the existence of a compensable occupational disease claim in the first instance. *Wal-Mart Stores, Inc. v. ICAO*, 989 P.2d 251 (Colo. App. 1990) (holding that, “although the date of disability may be important for certain purposes such as determinations involving award of disability benefits or other situations in which the date of disability directly effects the Claimant’s benefits, a Claimant suffering from an occupational disease is nevertheless entitled to reasonable necessary medical benefits even if the disease has not yet become disabling)”. See also *Leming v. ICAO*, 62 P.3d 1015 (Colo. App. 2002); *Vigil v. United Parcel Service*, W.C. No. 4-724-653 (ICAO, 5/19/08); *Thomas v. Target Corporation, Inc.*, W.C. No. 4-683-268 (ICAO, 6/29/07).

21. Claimant’s onset of disability is April 8, 2009, when he underwent prostate cancer surgery at John Hopkins University.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable occupational disease, prostate cancer, as a result of his employment with Golden.

2. Golden and its carrier are solely liable for Claimant’s medical benefits.

3. Golden shall pay for reasonable, necessary and related medical treatment from authorized providers related to Claimant’s prostate cancer, including treatment Claimant received at Johns Hopkins University.

4. Pursuant to stipulation of the parties, Claimant is entitled to maximum average weekly wage on date of onset of disability, April 8, 2009.

5. Temporary disability benefits, and all other issues not explicitly determined herein, are reserved for future determination.

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

DATED: October 4, 2016

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge

STIPULATION

The parties reached the following stipulation:

Depending on the ALJ's determination regarding whole person impairment, Claimant's indemnity benefits may be limited by the statutory benefit cap pursuant to Section 8-47-107.5, C.R.S. If applicable in this case, the statutory benefit cap limits temporary disability and permanent partial disability benefits to $81,435.67.

This stipulation was accepted and approved by the ALJ.

ISSUES

The issues presented for hearing are:

1. What is the true opinion of the Division IME Dr. Joseph Fillmore regarding Claimant's permanent medical impairment?

2. Which party has the burden to overcome the Division IME opinion regarding permanent medical impairment by clear and convincing evidence?

3. Has the party with the burden to overcome the Division IME opinion regarding permanent medical impairment by clear and convincing evidence met their burden?

4. If the Division IME physician's opinion has been overcome, what is Claimant's permanent medical impairment?

5. Claimant withdrew the issue of medical maintenance benefits.

FINDINGS OF FACT

1. Claimant's date of birth is March 22, 1973 and he was 43 years old at the time of both hearings.

2. Claimant was employed as a firefighter by Employer from August 1, 2000 to August 12, 2015 (Respondent's Exhibit M, p. 240).

3. Claimant sustained an admitted work-related injury to his low back on January 11, 2015, when he was demonstrating to his colleagues how to lift a person on

a backboard. Claimant squatted down to lift the backboard and felt tightness in his low back.

4. Claimant was taken to St. Anthony Hospital North on January 12, 2015. The January 12, 2015 CT of the lumbar spine showed a large right paracentral disc herniation at the L4-L5 level. The January 12, 2015 MRI of the lumbar spine showed multilevel degenerative changes and a right central focal disc herniation at L4-L5 that was traversing the right L5 nerve root.

5. On January 19, 2015, Claimant underwent a right L4/5 hemilamynectomy, decompression of neural elements and microdiskectomy performed by Dr. Darbi Invergo (Claimant's Exhibit 7).

6. On February 19, 2015, Claimant underwent a left sacroiliac joint steroid injection under fluoroscopy with Dr. Brian Wernick (Claimant's Exhibit 8).

7. Katherine Drapeau, DO became Claimant's authorized treating physician. She provided post surgical treatment to include pain medications, dry needling, physical therapy, chiropractic treatment, and psychological treatment for pain management (Respondent's Exhibit E).

8. On March 19, 2015, Dr. Drapeau stated that Claimant was 50% better, was scheduled for physical therapy and placed on work restrictions (Respondent's Exhibit E, p. 073).

9. On March 26, 2015, Dr. Drapeau noted that Claimant had increased pain complaints after working 5 hours sitting at a desk. She noted that Claimant rated his pain at a 6/10 and was 50% worse. She removed him from work from March 26-April 2, 2015 (Respondent's Exhibit E, p. 075).

10. On April 2, 2015, Dr. Drapeau noted that Claimant rated his pain at 4-5 and "expresses concerns that he may never be strong enough to go back to work full duty, or that he will rupture the rest of his disk at a critical time during a fire. This thought has been very bothersome to him." Dr. Drapeau released him to work 4 hours per day with restrictions (Respondent's Exhibit E, p 079).

11. On April 16, 2015, Dr. Drapeau referred Claimant to massage therapy, physical therapy, and Dr. Carbaugh (Respondent's Exhibit E, p 081).

12. On May 8, 2015, Dr. Drapeau noted that Claimant complained of constant pain at a 5/10 to 6/10 "that is debilitating to him." She noted that Dr. Warnick provided an injection. She recommended a MRI (Respondent's Exhibit E, p 084).

13. On May 21, 2015, Dr. Drapeau noted that Dr. Warnick's injection was not helpful. The May 20, 2015 MRI showed enhancing epidural scar noted along the right

lateral and anterolateral margin of the thecal sac at L4-5. She referred Claimant to Dr. Samuel Chan for a second opinion (Respondent's Exhibit E, p 087).

14. On June 12, 2015, Dr. Chan evaluated Claimant and stated, "At this juncture, he is upset with the fact that he will be having chronic pain. He will most likely not be able to return back to full duty as a fire fighter. He most likely is thinking about retirement after his case is at maximum medical improvement. . . At this juncture, the patient notes that he would like to conclude his medical care." Dr. Chan recommended a FCE and follow up appointment (Respondent's Exhibit C, p 040).

15. On June 17, 2015, Claimant returned to Dr. Drapeau. She noted that Claimant had seen Dr. Chan who scheduled an FCE on July 15, 2015 and a follow up appointment with Dr. Chan on July 22, 2015. Dr. Drapeau stated that Claimant continued to complain of pain between 7/10 and 9/10 and an 8/10 at the appointment. She continued medication, physical therapy and work restrictions (Respondent's Exhibit E, pp. 089-90).

16. On July 24, 2015, Claimant returned to Dr. Chan who documented that Claimant had a FCE on June 16, 2015 and experienced an exacerbation of his pain complaints. A MRI with gadolinium was ordered. Dr. Chan stated: "the patient noted that he still has a significant amount of pain complaint and he has since been able to do less because of the FCE. He currently described his pain is axial in the lumbar spine area and he described that his pain is between 7/10 - 8/10. He discussed that this is greatly concerning to him." Dr. Chan further noted that the range of motion measurements were invalid and recommended Claimant return for additional testing after the MRI (Respondent's Exhibit C, p 043).

17. On August 14, 2015, Dr. Chan stated: "The patient noted that the main complaint is still rather severe and significant. As of today, he described that his pain is at 7/10. It is radiating down to the entire right lower extremity. Since he was most recently seen on a July 24, 2015, he was unable to do any kind of activities and (sic) all and his functional level is actually declining." Dr. Chan reported, "The patient was in mild-to-moderate acute distress. He lies down on the examining bed the majority of the time." Dr. Chan spent 45 minutes reviewing surveillance video taken on July 16, 17 and 24, 2015, and stated, "This showed that the patient's functional level was unlimited. He did not have any imitation or hesitation or distress. This is significantly different than the patient's presentation during his clinical visits. The differences observed between the appearance on the video surveillance and his clinical presentation is rather concerning. There appears to be a very unsophisticated attempt to misrepresent his symptoms. Conscious misrepresentation is the definition for malingering. Given the unlimited nature of functional level that was demonstrated on video surveillance, it is felt that the patient should be able to return his previous occupation without any difficulties. Even though the patient did have a functional capacity evaluation obtained, the function capacity evaluation is based on the patient's volitional and voluntary involvement. Since the patient's credibility is called into question, the patient is definitely not trustworthy enough to offer a valid FCE. Thus,

based on the observed video surveillance footage, the patient should be able to return to his previous occupation without any difficulties." Dr. Chan further stated, "The patient's lumbar range of motion is rather fluid and in fact on the surveillance video, there was one occasion in which the patient was able to bend at a 90 degree angle in the lumbar spine area for more than four minutes to re-arrange grocery items in the back of his pick up truck. He demonstrated the ability to bend freely to pick up jugs of milk and orange juice. Again, this is very different than when the patient was being measured on the very same day of the video footage on July 24, 2015. Since range of motion measurements are based on voluntary effort only and based on the honor system, and the patient demonstrated discrepancy when being observed and when he thought that he was not being observed, once again, his credibility is definitely called into question. At this point in time, impairment rating, the patient has had two measurements and continues to demonstrate rather invalid measurements, so there would be no impairment rating based on range of motion measurements." Dr. Chan gave 8% permanent medical impairment pursuant to Table 53 for Claimant's surgery (Respondent's Exhibit B, pp. 045-046).

18. On August 20, 2015, Dr. Drapeau noted that Claimant experienced more pain after the FCE that has not subsided. Claimant reported pain as 6/10 to 7/10. Dr. Drapeau called Dr. Chan who informed her that the impairment measurement for the lumbar spine were invalid on two different occasions and therefore Dr. Chan was not giving a range of motion rating. She noted that Dr. Chan gave an impairment rating for the surgery. Dr. Drapeau noted that Claimant did not have any permanent restrictions and was at MMI on August 14, 2015. Claimant was discharged from care at that time (Respondent's Exhibit E, p 094).

19. Dr. Joseph Fillmore performed a Division IME on December 31, 2015. Dr. Fillmore opined that Claimant was at MMI on August 14, 2015 and assigned 10% permanent medical impairment pursuant to Table 53 of the AMA Guides and 11% impairment for loss of range of motion for a combined impairment of 20%. He noted that Dr. Chan had reviewed surveillance video but could not comment on the films without personally viewing them (Respondent's Exhibit A).

20. Dr. Fillmore's deposition was taken on June 15, 2016. Dr. Fillmore reviewed the surveillance videos and when asked specifically about Claimant's activities on the July 24, 2015 video, Dr. Fillmore stated, "He does not appear to be in acute distress, which I would expect from someone who has a pain of seven or eight over ten." (Transcript deposition p. 28, ll. 20-22)

21. When asked about range of motion impairment, Dr. Fillmore testified:

> Q. So that's what I'm asking you at this point in time. You saw the surveillance tape on the same day that the range of motion was done for Dr. Chan where he tried to present with significant problems. Now you've got what you've deemed as valid range of motion. You've reviewed the surveillance. What's your opinion on the issue?

A. I'm agreeing with Dr. Chan.

Q. So you would agree there's no range of motion loss, correct?

A. I can't say that. I would agree that the range-of-motion measurements are inconsistent with what was demonstrated on the video.

Q. Okay. So at this point in time, Dr. Chan's giving a zero percent for range of motion; you would have to agree with him on that?

A. I would agree with that.

(Transcript of deposition p. 34 ll. 11-25 – p. 35 ll.1-2)

22. When asked about permanent medical impairment for specific disorders of the spine, Dr. Fillmore testified:

Q. What about the specific disorder part of this, the 8 to 10 percent? Do you agree with Dr. Chan? Or do you agree with the 10 percent that you gave?

A. Well, it's hard to say that. I'd have to prove the patient didn't have any pain. You know, so I don't know quite how to answer that. I don't have a problem with the 8 percent, the way he did it. But I don't have a problem with the 10 percent either.

Q. So it really comes down to whether the claimant has pain?

A. Yes.

Q. You, as a doctor, aren't in a position to –

A. It's hard to tell. You just use your best judgment when you evaluate a patient.

Q. So it really comes down to whether subjectively he has that pain or not?

A. Yes. And, again, what you see documented through the records.

(Transcript of deposition p. 35 ll. 3-21)

23. When asked to combine his 10% rating with Dr. Chan's 3% range of motion, Dr. Fillmore said that would total 13%. (Transcript of deposition p. 44, ll. 15-22)

24. Having reviewed his report and deposition, Dr. Fillmore's true opinion is that Claimant has 10% permanent medical impairment pursuant to the AMA Guides Table 53 II E. Dr. Fillmore's true opinion is that Claimant has no permanent medical impairment for loss of range of motion.

25. At the July 20, 2016 hearing, Claimant testified that he heard an audible pop in his back when he picked up a box at the FCE, and experienced numbness down the backside of his leg. (7/20/16 Hearing Transcript p. 51)

26. At the July 20, 2016 hearing, Claimant testified that he did not tell Dr. Chan on July 24, 2015 that he was in severe pain. Claimant further testified that he did not tell Dr. Chan on that date that he was unable to perform any kind of activities. (7/20/16 Hearing Transcript pp. 67-70)

27. Dr. Ronald Swarsen was accepted as an expert in the field of occupational medicine and Level II accreditation. Dr. Swarsen testified at the July 20, 2016 hearing that the difference between 8% and 10% permanent medical impairment pursuant to the AMA Guides Table 53 II is that 10% compensates for pain. (7/20/16 Hearing Transcript p. 110)

28. Dr. Swarsen also testified that physicians have the discretion to not give a range of motion impairment rating if they have concerns based on surveillance, invalid range of motion testing, or other information. (7/20/16 Hearing Transcript pp. 114-115)

29. Dr. Chan was accepted as an expert in physiatry and Level II accreditation at the August 19, 2016 hearing. When asked to explain the differences between the sacral range of motion testing done in his office on July 24, 2015 with the surveillance video taken that day, Dr. Chan explained:

> At 10:45 a.m. it was observed that he was reaching over the railing of flatbed truck above shoulder level with o hesitation or no distress, and later on in the morning he was observed reaching into the flatbed of the truck into a cooler while he was standing on the ground and he was unloading groceries without any issues. He was able to reach into the flatbed of the truck without any issues or problems. He was able to bend over to pick up orange juice. It was very fluid range of motion. And he was also observed to stand on just one leg only to reach inside the flatbed of the truck to rearrange the contents. And later on in the afternoon at 1:38 p.m. he climbed into the flatbed of the truck using his right leg to climb up and then using his right arm to pull up, and he was bent at the waist at 90 degrees and stays in that position for about four minutes.
>
> (8/19/16 Hearing Transcript p. 175, ll. 7-24)

30. Dr. Chan further testified:

> Well, the foundation of the rating is basically pain, and it's a self-reported. And it's basically really an honor system. You basically take the patient's word for it and says (sic) I am going to rate this. And there are some validity measures that are built in and whatnot. However, at the end of it (sic) still a medical assessment, and the Guides clearly say that we have to use all the information to make an analysis of this case.
>
> (8/19/16 Hearing Transcript p. 179, ll. 2-10)

31. Dr. Chan opined that due to the substantial discrepancies between Claimant's complaints and Claimant's actions shown on the surveillance videos, he did not assign a range of motion rating and did not believe Claimant qualified for a 10% impairment rating under the AMA Guides Table 53 II E because his pain complaints lacked credibility.

32. Dr. Chan's testimony concerning Claimant's permanent medical impairment is credible and persuasive. Dr. Chan's description of the surveillance is consistent with the ALJ's impression of the videos. Dr. Chan did not agree with Dr. Fillmore's 10% permanent impairment rating pursuant to AMA Guides Table 53 II E because he did not believe Claimant's pain complaints were credible. However, Dr. Chan did not state that Dr. Fillmore's rating was in error or not in compliance with the AMA Guides. The ALJ finds Dr. Chan's permanent medical impairment opinion a difference of opinion and does not rise to the level of clear and convincing evidence.

CONCLUSIONS OF LAW

Generally

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

ALJ Clarification of Conflicting Opinions Issued by the DIME Physician and Burden of Proof to Overcome the Opinion of a DIME Physician

The DIME physician's findings include his or her subsequent opinions, as well as his or her initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). If a Division IME physician issues conflicting or ambiguous opinions concerning whether the claimant's condition is work-related or there is an impairment rating, it is the ALJ's province to determine the Division IME's true opinion as a matter of fact. Once the ALJ clarifies the ambiguous opinion regarding these issues, the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. The Division IME's opinions, therefore, must be overcome by clear and convincing evidence even if the opinion is arguably initially ambiguous. Section 8-42-107(8)(b)(III); *Clark v. Hudick Excavating*, W.C. No. 4-524-162 (November 5, 2004); *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

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

As found, Dr. Fillmore provided the Claimant with a 10% whole person permanent medical impairment rating for his one level surgically treated disc herniation pursuant to the AMA Guides Table 53 II E. That section permits a 10% whole person rating where there is a surgically treated disc with residual medically documented pain. In his deposition, Dr. Fillmore stated that he did not have a problem with Dr. Chan's 8% rating, but he did not affirmatively change his rating from 10% to 8%. Dr. Fillmore testified that he couldn't prove that Claimant did not have pain and had to use his best judgment when evaluating a patient. Dr. Fillmore further stated that he also considered what was documented throughout the records. Additionally, Dr. Fillmore opined, after reviewing the surveillance videos, that Claimant was not entitled to a range of motion impairment rating, which he had assigned 11% in his report. Therefore, the true opinion of the Division IME, Dr. Fillmore is that Claimant sustained 10% permanent medical impairment.

The Respondent's Challenge to the DIME Physician's 10% Permanent Medical Impairment Rating

The Respondents propose that Dr. Fillmore changed his rating to 8% whole person permanent medical impairment pursuant to the AMA Guides Table 53. The ALJ specifically rejected this argument as explained above. Therefore, it is the Respondent's burden to overcome the DIME's 10% rating by clear and convincing evidence.

The authorized treating physician, Dr. Chan, extensively explained his rationale for assigning 8% impairment pursuant to Table 53 II D rather than 10% pursuant to Table 53 II E. Dr. Chan explained that Claimant's complaints are not credible because they are inconsistent with the surveillance videos. While Dr. Chan's opinions are credible and persuasive, they are a difference of opinion and do not rise to the level of clear and convincing evidence. Dr. Chan did not opine that Dr. Fillmore was in error in his 10% impairment assignment or that Dr. Fillmore's rating was not consistent with the AMA Guides. Therefore, Respondent has failed to overcome the DIME opinion of Dr. Fillmore on the issue of impairment.

The Claimant's Challenge to the DIME Physician's Impairment Rating which Failed to Include Rating for the Claimant's Loss of Range of Motion

The Claimant also seeks to overcome the DIME opinion of Dr. Fillmore insofar as it does not provide a range of motion rating. Dr. Fillmore declined to give Claimant a range of motion rating based on his view of the surveillance videos. The authorized treating physician, Dr. Chan, also decided not to provide Claimant with a range of motion rating based on his review of the surveillance videos. The videos clearly show that Claimant was capable of performing motions that he stated to the physicians he was not able to do. Dr. Swarsen testified that the range of motion testing performed by Dr. Fillmore were in compliance with the AMA Guides and valid. Dr. Swarsen also testified that Dr. Chan's range of motion tests supported a 3% loss of range of motion rating. However, Dr. Chan, Dr. Swarsen and Dr. Fillmore agreed that the rating physician has discretion not to provide a range of motion rating based on their evaluation and assessment. Dr. Swarsen did not opine that Dr. Fillmore was in error or not in compliance with the AMA Guides when he chose not to provide a range of motion rating. Claimant failed to overcome the DIME's rating by clear and convincing evidence.

ORDER

It is therefore ordered that:

1. The true opinion of the DIME physician based on a review of his report and testimony is that Claimant was entitled to a 10% impairment rating pursuant to the AMA Guides Table 53 II E.

2. The Respondent failed to overcome the DIME opinion by clear and convincing evidence that the Claimant is entitled to 8% whole person impairment rating.

3. The Claimant failed to overcome the DIME opinion by clear and convincing evidence that he is entitled to 20% impairment rating which includes impairment for loss of range of motion.

4. Respondent shall pay Claimant permanent disability benefits based on 10% whole person permanent medical impairment.

5. Respondent shall be given credit for sums previously paid for PPD.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 3, 2016

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

PRELIMINARY ISSUE

1. Whether the applicability of a safety rule violation is an issue ripe and ready to proceed to hearing.

The Claimants assert that pursuant to O.A.C.R.P. 12, parties must appraise the ALJ prior to hearing of the issues and affirmative defenses to be determined by endorsing issues and affirmative defenses in either the application for hearing or the response to application for hearing or by agreement of the parties or pursuant to a judge's order. The Claimants further assert that affirmative defenses must be explicitly pled and that penalties for an employee's willful failure to use a safety device or willful failure to follow a reasonable safety rule are affirmative defenses, and therefore, must be specifically pled or they are waived. The Claimants argue that the Respondents failed to endorse affirmative defenses pursuant to § 8-42-112(1)(a) & (b), C.R.S., in any of the multiple responses to applications for hearing filed in this matter. Respondents did not seek the Claimants' agreement to add the issue or a judge's order allowing them to add the issue for good cause shown subsequent to filing their most recent responsive pleading. Claimant RH further argues that he sought information through discovery regarding the penalties being taken in Respondents' General Admission of Liability pursuant to § 8-42-112, C.R.S. and Respondents objected to providing complete information in response to Claimant RH's discovery requests.

It is the position of the Respondents that, through the Fatal Case - General Admission, Respondents specifically asserted a safety rule violation. Respondents further argue that by Claimant MH endorsing death benefits as an issue for hearing (even though they are being paid through the admission), it is clear that the safety rule violation issue was understood. Otherwise there would be no reason for Claimant MH to proceed in the case disputing benefits paid. Respondents also note that discovery was completed regarding the safety rule violation and multiple documents acknowledged that the asserted safety rule violation was a disputed issue for the set hearing.

Waiver is the intentional relinquishment of a known right. A waiver must be made with full knowledge of the relevant facts, and the conduct should be free from ambiguity and clearly manifest the intention not to assert the right. *Johnson v. Industrial Commission, supra*; *Department of Health v. Donahue,* 690 P.2d 243 (Colo. 1984). In this case, the Respondents did clearly assert the safety rule violation on the Fatal Case – General Admission and took the penalty deduction per calculations of the benefits owed. There was considerable correspondence and multiple motions mentioning the safety rule violation. In addition, all parties indicated that they were prepared to proceed on the safety rule violation at the commencement of the hearing. The ALJ finds that the totality of the evidence shows that the parties understood that safety rule violation was an issue for hearing.

ISSUES

The issues for determination are:

1. Whether the Claimant RH is entitled to death benefits under the Workers' Compensation Act of Colorado as a dependent widower of the Decedent under the doctrine of common law marriage.

2. Determination of the Decedent's average weekly wage ("AWW") including COBRA benefits.

3. Whether Respondents have proven they are entitled to a fifty percent (50%) reduction in compensation because the Claimant's death on January 3, 2014 was caused by a willful failure to obey a reasonable rule adopted by Employer for the safety of the employee.

4. Determination of the offset amount for Social Security Survivor benefits to which the Respondent is entitled.

FINDINGS OF FACT

1. Decedent was hired by Employer as a route sales representative and delivery driver on October 25, 2012 (Claimant RH's Exhibit 34; Respondents' Exhibit H, p. 82, Respondents' Exhibit N; and Hearing Tr., p. 60:16-18).

2. Decedent was working for Employer in the course and scope of her employment when she was involved in a fatal motor vehicle accident on January 3, 2014. On January 3, 2014, the delivery vehicle of Employer's that Decedent was driving was rear ended by a tractor-trailer. The tractor-trailer pushed Decedent's vehicle off the road and caused it to rotate in a counter clockwise direction until Decedent's vehicle rolled one quarter turn onto the passenger side. Decedent was partially ejected out the front passenger side window. Decedent was killed when a portion of her vehicle came down on her head and upper torso.

3. Colorado State Trooper Seth Soukup testified via deposition on December 15, 2015. Trooper Soukup is a level 4 certified accident reconstruction specialist for the Colorado State Patrol. He is also accredited by the Accreditation Commission for Traffic Accident Reconstruction. Trooper Soukup has worked for the Colorado State Patrol since 2008. Trooper Soukup's job duties include going to crash sites, determining contributing factors, determining how the crash occurred, documenting the accident, using momentum calculations, doing computer animations, and concluding what occurred (Soukup Depo. 4:19 – 8:24).

4. Trooper Soukup testified that on January 3, 2014 he received a call to report to the scene of Decedent's accident. Trooper Soukup arrived on the scene and observed Decedent's vehicle laying on the passenger side (Soukup Depo. 9:7 – 10:17). He testified that he found Decedent deceased when he arrived on the scene. Decedent

was partially in her vehicle and partially out of the vehicle. Decedent’s torso was out of the passenger window with her head pinned beneath the A-pillar on the vehicle. Decedent’s legs and the lower part of her body were still inside the vehicle (Soukup Depo. 13:20 – 14:11). Trooper Soukup opined that the evidence shows Decedent was thrown out the passenger side window of her vehicle because the vehicle was turning left when it was hit from the rear causing it to turn even more sharply to the left. The fact that Decedent was hit from the rear by a vehicle traveling 30 to 40 miles faster than she was pushed her vehicle forward faster than she was and as a result, pushed her forward. Decedent maintained a northern course as the vehicle turned west causing her to be ejected out the passenger window (Soukup Depo. 56:2 – 60:12).

5. At the scene of the accident, Trooper Soukup was able to look into Decedent’s vehicle through the broken windshield and observed that the driver’s seat belt was fully retracted and had not been in use at the time of the accident. Trooper Soukup also entered into the vehicle and checked the seat belt at the scene to ensure it was functional and was not locked (Soukup Depo. 26:3-11 and 46:3 – 47:25). Trooper Soukup testified that he later inspected Decedent’s vehicle at the tow yard and “it was evident that the seat belt was fully retracted and had not been in use at the time of the crash.” Additionally, the seat belt was operational. When Trooper Soukup pulled on the seat belt, it was in non-locking mode so he was able to pull it out. The seat belt was able to latch and release and retracted fully (Soukup Depo. 26:3-22).

6. After completing his investigation of the accident, Trooper Soukup completed a Colorado State Patrol Traffic Accident Report. Trooper Soukup noted that Decedent’s vehicle was making a left turn at the time of the accident and was traveling at an estimated 5 mph. Trooper Soukup testified that he determined Decedent’s vehicle was traveling at 5 mph based on a speed work-up using momentum, weight and speed of the vehicles, roadway evidence, skid marks on the road, path of travel, and distance traveled. These same factors led Trooper Soukup to determine that Decedent was making a left turn at the time of impact (Respondents’ Exhibit D, p. 68 and Soukup Depo. 28:1 – 30:12). Trooper Soukup also noted that Decedent’s vehicle was equipped with safety equipment of a shoulder and lap belt that was not used at the time of the accident. Trooper Soukup testified that he determined the safety equipment was not used based on looking at the scene and the seat belt position being fully retracted and Decedent’s position under the vehicle with her torso being out of the vehicle and under the A-pillar. Trooper Soukup testified that there was evidence the seat belt had not been in use at that time (Respondents’ Exhibit D, p. 69 and Soukup Depo. 37:1-20). Trooper Soukup testified that there was no evidence Decedent was at a stop at the time of impact or that she had gotten out if her vehicle to check her stock or check a mechanical issue. This is because the driver of the other vehicle stated that he saw Decedent driving in from of him just moments before the accident (Soukup Depo. 51:7 – 52:2). Trooper Soukup also testified that at the time of impact, the driver’s side tires of Decedent’s vehicle were near the middle of the road and the passenger side tires were in the right-hand lane, several feet away from the side of the road. Decedent was not on the shoulder or side of the road due to mechanical defects or stopping for some reason. (Soukup Depo. 38:22 – 39:13).

7. In the Accident Narrative section of the report, Trooper Soukup concluded as follows:

> Both vehicles were northbound on Morgan County Road 24. Vehicle #2 [Decedent's vehicle] had slows to make a left turn onto Morgan Count Road U & 5/10 (U.5). Vehicle #1 rear-ended Vehicle #2, causing Vehicle #2 to begin to rotate counter-clockwise. Vehicle #2 traveled approximately 64.8' while it rotated one-quarter time counter-clockwise before rolling one-quarter time onto its right side. The unrestrained driver of Vehicle #2 was partially ejected out the passenger side window and Vehicle #2 came to rest partially on top of its driver. Vehicle #2 came to final rest on its right side facing southwest. Vehicle #1 came to final rest on the roadway on its wheels facing north.
>
> (Respondents' Exhibit D, p. 69)

8. Garrick Mitchell is an accident reconstruction specialist. Mr. Mitchell has a bachelor's degree and a master's degree in mechanical engineering. Mr. Mitchell is a Certified Accident Reconstructionist by the Accreditation Commission for Traffic Accident Reconstruction. Mr. Mitchell has been doing accident reconstructions since 2000. His accident investigations include mechanically inspecting vehicles, performing site inspections, gathering and analyzing data from police reports, photographs, and witness statements, and using digital site mapping (Respondents' Exhibit C, p. 58 and Mitchell Depo. 5:11-23). Mr. Mitchell has had specialized training courses on Traffic Accident Investigation, Traffic Crash Reconstruction, Commercial Vehicle Accident Reconstruction, and Human Factors in Traffic Crashes. Mr. Mitchell has given presentations on vehicle accident reconstruction, how to analyze and photograph vehicle accidents, technology in collision reconstruction, biomechanics of injury causation, and human biomechanics in low-speed vehicle collisions. Some of these courses and presentations, included seat belt training although none of the courses were exclusively on seat belts (Respondents' Exhibit C, p. 60 and Mitchell Depo. 5:24 – 8:5).

9. Mr. Mitchell completed an inspection and partial accident reconstruction of the motor vehicle accident in this matter. On January 3, 2014, Mr. Mitchell inspected the scene of the accident, spoke with the State Patrol, and took some initial photos. (Mitchell Depo. 10:19-53). Mr. Mitchell filled out an inspection form and checklist as part of his investigation to document his inspection of Decedent's vehicle. Mr. Mitchell noted that the seat belt on Decedent's vehicle was stowed, the retractor was okay and passed a functional test, and there was no damaged observed (Respondents' Exhibit A, p. 3 and Mitchell Depo. 17:25 – 19:11).

10. On January 8, 2014, Mr. Mitchell was able to perform a closer inspection of the site and Decedent's vehicle, including the seat belt in Decedent's vehicle. Mr. Mitchell did a digital map of the site, took measurements, and took numerous photos.

Mr. Mitchell took multiple photos of the seat belt to document its condition. Mr. Mitchell took photos of the seat belt depicting the driver's seat buckle, the B pillar (pillar that seat belt retracts into), the seat belt latch plate, the upper and lower D rings, and the seat belt webbing. (Resp. Ex. B p. 11-18 and Mitchell Depo 11:4 – 13:16).

11. Mr. Mitchell testified via deposition on December 7, 2015. Mr. Mitchell testified regarding his inspection of the seat belt. Mr. Mitchell also performed a functional test of the seat belt retractor to ensure that the seat belt would retract into the pillar properly and would lock and not rapidly extend if the seat belt were pulled suddenly. Mr. Mitchell also tested that the seat belt would latch and release properly. Mr. Mitchell concluded that the seat belt in Decedent's vehicle functioned properly. The seat belt was able to be fastened, it clicked into the latch properly, and it did not release improperly. Mr. Mitchell concluded that there were not any malfunctions or errors with the seat belt (Mitchell Depo. 13:20 – 14:15). Mr. Mitchell also testified that there was no physical evidence that the seat belt was being worn at the time of the accident. Mr. Mitchell described the seat belt as being "pristine" with no stains, no wear, no evidence of loading, no transfer of plastic from the D ring to the webbing, no marks on the D ring, and no grittiness in the retractor. Mr. Mitchell testified that what he observed was a seat belt that had been in the stowed position throughout the course of the accident. Mr. Mitchell concluded that Decedent had not been wearing a seat belt at the time of accident (Mitchell Depo. 14:16 – 15:10). Mr. Mitchell testified that he has only investigated one accident where a person wearing a seat belt ended up outside of the driver's seat, like Decedent did in this case. In that particular case, the vehicle hit a guardrail and the impact damaged the seat belt retractor causing the seat belt to unspool. There was severe, obvious damage to the seat belt. This was not the case in Decedent's accident. Decedent's seat belt was undamaged and not in use. (Mitchell Depo. 15:11 – 17:24). In Decedent's case, Mr. Mitchell opined that her body was lifted out of the driver's seat and ejected partially out the passenger window due to the force of the collision while the vehicle was rotating and curving off to the left at the same time. (Mitchell Depo. 36:12 – 37:10).

12. In response to questioning about whether Decedent may have recently reentered her vehicle after stopping to smoke, make a call, or check her inventory levels and may still have been in park, Mr. Mitchell noted that at the time of the accident, Decedent's vehicle was in the middle of a traffic lane. The road Decedent was driving on has a wide shoulder and Decedent was not parked on the shoulder of the road. Furthermore, Mr. Mitchell concluded that Decedent's vehicle was actually in motion at the time of the accident and not in park based on the skid marks on the ground. Decedent's vehicle was "in the northbound lane, turning left when it was rear-ended. It was not parked on the side of the road. It was in a position where it was about to or in the process of making a left turn." Mr. Mitchell could not determine the exact speed of the vehicles from his analysis since he did not do a complete accident reconstruction but he was able to determine that Decedent's vehicle's tires were in motion. Additionally, Trooper Soukup testified that the other driver, who hit Decedent's vehicle, stated he had seen Decedent driving in front of him in the moments prior to the crash. (Mitchell Depo. 33:20 – 34:20, 53:17-19, 54:14 – 55:7, and 58:3-14, Claimant MH's

Exhibit 3, and Soukup Depo. 44:14-18). The Claimants also questioned Mr. Mitchell about whether Decedent's vehicle may have had mechanical failures causing her to be stopped in the road. Mr. Mitchell testified that his examination of Decedent's vehicle lights showed that the left turn signal was illuminated at the time of impact but that the right turn signal was not illuminated at the time of impact. Therefore, Decedent likely had her left turn signal on and not her hazards or emergency lights (Mitchell Depo. 58:15-23 and 62:24 – 63:22).

13. Dr. Burson completed Decedent's autopsy on January 4, 2014. Dr. Burson recorded the following relevant articles of clothing on Decedent: a green rubber bracelet with the phrase "Safe by choice" on the left wrist, a white metal ring on the left thumb, and a yellow metal engagement-type ring with clear stones and a yellow metal band on the left ring finger (Respondents' Exhibit G, p. 76). Dr. Burson noted that the Decedent's death was due to blunt force injuries to Decedent's head and neck that were sustained during a motor vehicle accident. Specifically, Dr. Burson noted that Decedent sustained a severe crush type injury of the skull (Respondents' Exhibit G, p. 75). Dr. Burson noted that Decedent was reportedly the unrestrained driver of a delivery type vehicle that was involved in a motor vehicle accident and Decedent was partially ejected from the passenger side window. Decedent sustained fatal injuries to her head and was pronounced dead at the scene of the accident (Respondents' Exhibit G, p. 76).

14. The Morgan County Coroner's Office completed a personal effects release form for Decedent dated January 10, 2014. The form noted that Decedent was wearing a green wrist band at the time of her death. The form also noted that Decedent was wearing three rings at the time of her death-one white metal ring and two yellow metal rings with clear stones. The personal effects were received by Claimant RH who wrote that his relationship to the Deceased was "husband" (Respondents' Exhibit F). Claimant RH testified that the gold ring was the wedding band he gave Decedent when they reconciled in a church a few weeks after entry of the Divorce Decree. He referred to the rings the Claimant was wearing on her left hand as an "engagement/wedding set" (Hearing Tr. 86:16 – 87:1).

15. This is an admitted claim. Decedent and Claimant RH had one minor biological son, Claimant MH. Respondents filed a Fatal Case-General Admission on January 29, 2014 admitting to death benefits paid solely to Claimant MH, Decedent's minor son. Respondents calculated an average weekly wage of $577.85. Respondents reduced the compensation payable to Claimant MH for a 50% penalty for a safety rule violation (Claimant RH's Exhibit 10; Respondents' Exhibit V). Respondents contest that Claimant RH is entitled to benefits as a surviving spouse.

16. Claimant RH testified that he first met the Decedent on February 3, 2001. He and the Decedent were married on August 29, 2002 in front of a retired judge. There was no formal wedding ceremony at that time. The Claimant RH's credible testimony is supported by a Marriage License (Claimant RH's Exhibit 39). At the time of the marriage, Decedent was pregnant with Claimant MH. After the marriage, Decedent changed her surname from Kinion to Henry which is Claimant RH's surname.

17. Decedent and Claimant RH later separated and a separation agreement with a parenting plan was filed on October 4, 2010. Claimant RH and the Decedent were divorced effective January 4, 2011 (Claimant RH's Exhibit 40; Respondents' Exhibit S). Decedent did not legally change her surname back to Kinion following the divorce.

18. Claimant RH testified that while he and the Decedent were divorced, she moved out of their residence but they continued to see each other and worked on mending the problems they had in the marriage. Claimant RH testified that he and the Decedent reconciled on February 22, 2011 and at that time he presented the Decedent with a gold wedding ring to complete her wedding/engagement set (Hearing Tr. 53:12-18 and 69:8-17 and 86:16-24). At this time, the Decedent moved back into their shared residence. The title to the home and the mortgage remained in both their names the entire time (Hearing Tr. 53:21 – 54:16).

19. After their reconciliation, Decedent and Claimant RH were planning a ceremony in Las Vegas with their family. However, the wedding ceremony never took place (Hearing Tr. 67:25 – 68:4 and 87:7-9). Claimant RH testified that Decedent was allegedly getting pressure from her parents to have a second ceremony because they wanted a traditional kind of marriage and did not look at a marriage in front of a judge as real. He testified their parents are old-fashioned and that a formal ceremony was for their benefit (Hearing Tr. 75:6 – 76:2).

20. The Claimant RH's testimony about his marriage, divorce and subsequent reconciliation and recommitment of their marriage was credible and persuasive. The testimony is supported by evidence in the record.

21. Evelyn Oster, Claimant RH's mother, testified via telephone at the hearing. Ms. Oster testified that she believed Decedent and Claimant RH were married in their hearts in the months preceding Decedent's death. However, she later stated that she knew that they were thinking about having a wedding in Las Vegas in the future. (Hearing Tr. 106:1-8 and 112:14-18).

22. Susan Branom, Decedent's mother, testified at the hearing. Ms. Branom testified that she believed prior to Decedent's death, Decedent and Claimant RH "weren't married. They were just living together" (Hearing Tr. 125:9-13). Ms. Branom testified that Decedent and Claimant RH got divorced and then when Decedent moved back in with Claimant RH, she looked at her as living as an adultress. Ms. Branom said that she would always tell Decedent to go get married (Hearing Tr. 125:19-25). Ms. Branom testified that she did not have any issues with Decedent's marriage to Claimant RH in 2002 that was in front of a judge (Hearing Tr. 126:3-15). Ms. Branom testified that Claimant RH proposed marriage to Decedent after they reconciled by getting down on one knee and proposing marriage. Ms. Branom testified that Decedent wanted to go look for a wedding dress and go to Las Vegas to get married. Ms. Branom believed that Decedent and Claimant RH were engaged, not married, and were going to be getting

married (Hearing Tr. 131:23 – 132:4 and 135:4-25). Ms. Branom testified, however, that she is a Jehovah's Witness and that her religion does not recognize common law marriages regardless of whether they are recognized under the Colorado law. Because of her religious beliefs, she would only recognize a marriage if there is a certificate of marriage (Hearing Tr. 125:12-25).

23. The testimony of Ms. Branom actually supports Claimant RH's testimony that while he and Decedent considered themselves to be married after their reconciliation and held themselves out as married, they were still planning a formal ceremony to appease their families who were more traditional in their views of marriage. The ALJ specifically finds that the Decedent and Claimant RH did not consider themselves merely engaged to be married, in spite of planning an eventual ceremony, but rather they considered and held themselves out as husband and wife.

24. Claimant RH testified that tax returns for the years from 2002 until the Decedent's death were filed jointly. The tax returns submitted at Claimant RH's Exhibit 41 support this testimony.

25. Decedent completed a W-4 for Employer on October 25, 2012 and did not indicate she was married or single on the form. Decedent also claimed only 1 allowance on the tax form, indicating only herself and no spouse or dependents according to the personal allowance worksheet on the W-4 form. (Resp. Ex. U).

26. Claimant RH testified that he and the Decedent jointly held titles to several vehicles, namely a 1999 Chevy pickup, a 2000 Chevy pickup, and a Toyota Yaris.

27. At the time of her death, Decedent had a separate checking account in her name only. It was a single-party account. This account was opened on April 15, 2011. This was after Decedent and Claimant RH had reconciled their relationship. This was the account that Decedent requested Employer deposit her paychecks in. Claimant RH did not have access to this account while Decedent was alive. Decedent also had other checking accounts without Claimant RH's name on them. (Resp. Ex. T; Hearing Tr. 65:3-14). Claimant RH testified that when he and the Decedent first met, they had separate accounts and bills coming out of each that the other person was not responsible for, so they just kept that intact (Hearing Tr. 65:12-22).

28. Claimant RH testified that he relied on the Decedent's income to pay the family bills and that he would not have been able to cover the family bills on his own without her income (Hearing Tr. 66:12-20).

29. Claimant RH testified that when he and Decedent divorced, he began paying child support to her for Claimant MH. Claimant RH continued paying child support to Decedent despite the reconciliation and alleged remarriage (Hearing Tr. 82:8-15). Claimant RH testified that he and the Decedent had looked into terminating the child support payments but did not follow up due to court costs required (Hearing Tr. 83:20-24 and 88:22-89:3).

30. Claimant RH testified that Decedent never allowed Claimant MH to ride in a car without a car seat. Decedent's children wore seatbelts when they rode in the car with Decedent. Decedent wore a seat belt when she rode in the car with Claimant RH and he never saw Decedent not wear a seat belt. Claimant RH said that his family would stop at the edge of the driveway if anybody in the car did not have a seat belt on. Claimant RH testified that he heard Decedent reprimand the children to put on seat belts and that Decedent would stop the car and not go any further until the family had on their seat belts. (Hearing Tr. 70:24 – 71:1, 71:25 – 72:7, and 78:9 – 79:2).

31. Employer had written company rules regarding seat belt usage and all drivers following state driving/traffic laws. Employer's Fleet Safety Policies and Procedures (Respondents' Exhibit I), which requires employees to wear seat belts and follow traffic laws, state as follows:

- Page B-1 (Bates stamp p. 95) – "Obey all federal, state and local traffic laws, rules and regulations."
- Page B-1 (Bates stamp p. 95) – "Wear your seat belt – as a driver, you have a legal duty to wear your seat belt. The Federal Department of Transportation and company policy requires every employee to wear a seat belt. Enforcement will not only be by federal, state and local enforcement but all Schwan's management. You will pay any fines levied against you as a result of not complying with seat belt laws; the company will not reimburse you."
- Page B-6 (Bates stamp p. 100) – Self-Check Questions No. 1 "Both, Federal laws and Schwan's policy dictate that all drivers must wear their seatbelts. a. True b. False"
- Page D-4 (Bates stamp p. 123) – Driver Based Violations – "If the violation is driver based such as HOS, Medical Examiners Card, expired Driver License, seatbelt usage or traffic offenses, the direct supervisor will need to sign the original Inspection report and provide written documentation providing the Disciplinary Action taken to send back with the Inspection form."
- Page I-10 (Bates stamp p. 163) – Identifying High-Risk Safety Concerns – "Each supervisor will be held responsible to identify high-risk safety concerns and correct them on the spot. Although the following list is by no means complete, some safety behaviors which need on-the-spot corrections are: Failure to wear a seat belt."
- Page N-2 (Bates stamp p. 194) – Self-Check Answers No. 1 "Both, Federal laws and Schwan's policy dictate that all drivers must wear their seatbelts. (a) True. Seatbelt use is required by law and mandated by Schwan's policy. Schwan is committed to ensuring your safe return to your home, family, and friends. Using a seat belt helps ensure you're in a position to control the vehicle after impact. Statistics have shown that

> drivers who are belted-in have less severe injuries following an accident and are able to return to work sooner than those drivers involved in an accident who were not wearing a seat belt."
>
> (Respondents' Exhibit I).

32. Decedent signed a form acknowledging receipt and understanding of Employer's Fleet Safety Policies and Procedures on November 6, 2012. The acknowledgement form included a statement that Decedent had read, agreed with and understood she must comply with all federal, state, and local laws which govern the operation and maintenance of company vehicles. (Respondents' Exhibit H p. 83). A second acknowledgement form for receipt of the Employer's Fleet Safety Policies and Procedures was also completed by Decedent on November 26, 2012. (Respondents' Exhibit H p. 84).

33. The Colorado Driver Handbook states that Colorado's Safety Belt Laws (C.R.S. §§ 42-4-237 and 42-2-105.5) require that a fastened safety belt must be worn in all motor vehicles while in operation on public roadways by the driver of the vehicle. (Respondents' Exhibit J p. 211).

34. C.R.S. § 8-42-4-237(2) states that "every driver of and every front seat passenger in a motor vehicle equipped with a safety belt system shall wear a fastened safety belt while the motor vehicle is being operated on a street or highway in this state." (Respondents' Exhibit K).

35. William Vollmer, Employer's Safety Manager for the West Division of Home Service, testified via deposition on December 17, 2015. Mr. Vollmer testified that at the time of Decedent's death, he was safety manager for Colorado (Vollmer Depo. 4:25 – 5:10). Mr. Vollmer testified that Employer has a policy regarding drivers wearing seat belts and had a policy on drivers wearing seat belts at the time of Decedent's death. Employees are required to wear a seat belt while in Employer's vehicles (Vollmer Depo. 5:21 – 6:15). Employees are required to wear a seat belt any time a vehicle is in motion (Vollmer Depo. 7:18-25). Mr. Vollmer testified that employees are trained regarding the policies and rules on seat belt usage. The policy is communicated in the policy and procedure manual and is covered during training of new employees. Training includes computer work to review policies and procedures manuals and a written exam (Vollmer Depo. 6:17 – 7:17). Mr. Vollmer testified that Decedent would have been given a road test when she started work with Employer and not have been allowed to start driving until she passed the road test. A portion of the road test included wearing a seat belt (Vollmer Depo. 16:18 – 17:18). Mr. Vollmer testified that Employer's number one business priority is safety. Safety is a level 10 of importance to Employer on a scale of 0 to 10. Seat belt usage is also a level 10 of importance to Employer on a scale of 0 to 10. This is communicated on posters at every depot and also via monthly safety meetings and weekly power huddles (Vollmer Depo. 11:13 – 12:2, 13:4 – 14:12). Employees are also given green wrist bands that say "Safe By Choice" to wear to remind them to make safe choices while driving so they can come

home to their family at the end of the shift. Mr. Vollmer also testified that employees are given visor organizers in the vehicles that talk about being safe by choice. The visors have a spot for employees to place a photo of their family, kids, or anything important to them so that when they get in the vehicle, they notice the photo and it reminds them why it is important to drive safely (Vollmer Depo. 12:3 – 13:3). Mr. Vollmer also testified that there are permanent signs posted at the exits of the depots so employees can see when they are driving out. The signs remind employees to wear seat belts and buckle up (Vollmer Depo. 13:4-25). Mr. Vollmer also testified that at the time of Decedent's death, if an employee was seen not wearing a seat belt, they would receive a citation and points would be assessed against them. Employees would ultimately be terminated if they accumulated too many points. Since Decedent's death, Employer has decreased their tolerance even further and a violation of the seat belt policy is now automatic termination. (Vollmer Depo. 6:6-15 and 8:1 – 11:12).

36. At the time of her fatal injury, the Decedent was not wearing a seatbelt. Yet, there was no persuasive evidence presented as to the specific reason the Decedent failed to wear her seatbelt immediately prior to her fatal injury. Although it has been established that the seatbelt was in good working order and that the Decedent didn't fail to wear the seatbelt due to malfunction, there was no persuasive evidence to establish whether the Decedent intentionally or willfully failed to wear her seatbelt or whether she negligently forgot to wear her seatbelt or whether there was some other reason for her failure to wear her seatbelt. However based on the testimony from Claimant RH that the Decedent was vigilant about seatbelt use, and based on the evidence establishing that the Employer was adamant and vigilant about enforcement of the seat belt rule, and based on evidence that the Decedent was never disciplined for failure to use her seat belt and was generally known as a compliant employee with a good safety record, who was wearing her "Safe By Choice" bracelet at the time of her death, the ALJ makes the following inference from the evidence. It was more likely that the Decedent failed to wear her seatbelt because she negligently forgot, or for some other reason than it was that she intentionally and willfully failed to wear her seatbelt.

37. Decedent was enrolled in health insurance while employed with Employer. Decedent had elected benefits for herself, Claimant RH, and Claimant MH. Decedent completed the paperwork to obtain the benefits. Health benefits were only available for spouses and dependents of employees. In response to an April 22, 2013 eligibility audit, the Decedent provided a copy of her marriage certificate and the top portion of her most recent Federal 1040 tax return as requested by her Employer Claimant RH's Exhibit 36).

38. Respondents have admitted to an average weekly wage of $577.85. (Respondents' Exhibit V) which is based on Decedent's total earnings from 12/23/2012 to 12/21/2013 of $30,048.20 (Respondents' Exhibit P). The Claimant RH and the Claimant MH dispute this calculation and argue that it does not provide a fair approximation of wage loss and diminished earning capacity resulting from the Decedent's death and the loss of income to the Decedent's family.

39. The Decedent’s first paycheck from Employer was dated November 15, 2012 and the Decedent’s final paycheck from Employer was dated January 23, 2014. Her gross wages were paid approximately every 2 weeks and included the following categories: Product Sales Commission, Daily Base Pay, Daily Service Incentive, Incentive, New Customer Incentive, Ovations AwardperQs, and Vacation Pay. Some of these categories were included with each paycheck and some were only paid intermittently or when earned. All of these categories added up to the gross wage paid to the Decedent. Her gross wages are summarized as follows (taken from Claimant’s Exhibit 33):

Check Date	**Check Amount**
11/15/2012 (Initial Training Pay)	$1,265.00
11/29/2012	$1,137.42
12/13/2012	$1,197.80
12/27/2012	$1,102.21
1/10/2013	$1,078.35
1/24/2013	$977.93
2/7/2013	$1,137.15
2/21/2013	$1,109.64
3/7/2013	$1,212.45
3/21/2013	$1,199.53
4/4/2013	$1,147.44
4/18/2013	$1,176.49
5/2/2013	$1,230.80
5/16/2013	$1,390.79
5/30/2013	$1,335.32
6/13/2013	$1,326.81
6/27/2013	$1,558.17
7/11/2013	$1,141.13
07/25/2013	$981.56
08/08/2013	$1,443.27
08/22/2013	$1,341.03
09/05/2013	$1,238.70
09/19/2013	$1,133.46
10/03/2013	$1,153.07
10/17/2013	$1,212.17
10/31/2013	$1,300.06
11/14/2013	$1,249.13
11/27/2013	$1,315.45
12/12/2013	$1,024.38
12/26/2013	$1,208.72
01/09/2014 (final payout)	$1,383.58

40. Per the wage records, there were regular and natural fluctuations to the Decedent’s gross wages from paycheck to paycheck. Claimants argue that in the six

pay periods or twelve weeks prior to her death, the Decedent was earning increased wages because she was earning more commissions the longer she was on her route as her customer base and sales increased. Claimants argue that the Decedent earned an average weekly wage of $608.13 in this time period and that this is more representative of the wages that the Decedent was earning at the time of the injury.

41. The ALJ finds that there are fluctuations and finds persuasive the Claimants' argument that the last six regular pay periods, encompassing the last 12 full weeks the Decedent worked for Employer prior to her death would result in a fair approximation of her wages. The final paycheck on 01/09/2014 is not a regular paycheck in the ordinary course and is not included for the purposes of calculating the AWW. So, the paychecks from 10/17/2013, 10/31/2013, 11/14/2013, 11/27/2013, 12/12/2013 and 12/26/2013 which are the last 12 regular full weeks of the Decedent's employment are used to calculate AWW.

$1,212.17
$1,300.06
$1,249.13
$1,315.45
$1,024.38
$1,208.72
Total: $7,309.81
÷ 12 = **$609.16**

42. Decedent had group insurance benefits (health, dental, vision, wellness) through Employer covering herself, Claimant RH and Claimant MH at the time of her death. Per her 2014 Enrollment form which was effective January 1, 2014, the Claimant elected Health Plan, Dental and Vision Plan coverage for Employee + Spouse + Child. She did not have the Vision buy-up plan or other options, including the well-being coverage, that were available on the Annual Enrollment Form (Claimant RH's Exhibit 37). Per the COBRA Election Notice sent to Claimant RH on January 6, 2014, these benefits terminated effective January 11, 2014 in connection with the termination of Decedent's employment due to her death (Claimant RH's Exhibit 38, p. 1).

43. Per the COBRA Notice, the full cost of continuing these benefits for Individual + Spouse + Child would be $1,120.21 per month ($1,014.10 for health; $84.24 for dental; and $21.87 for vision) (Claimant RH's Exhibit 38, p. 4). The monthly amount corresponds to a weekly amount of $258.51 per week.

44. Per the COBRA Notice, the cost of continuing these benefits for only Claimant RH and Claimant MH (and excluding the Decedent) would be $739.15 per month ($664.42 for health; $59.78 for dental; and $14.95 for vision)(Claimant RH's Exhibit 38, p. 4). The monthly amount corresponds to a weekly amount of $170.57 per week.

45. As a result of her death, Decedent would no longer be eligible for health, dental and vision insurance benefits as of the date of her death. Thus, there is no actual cost associated with continuing such benefits for Decedent as there is a legal impediment to continuation.

46. Claimant MH was awarded $720.00 per month for Social Security Survivor benefits ("SSS benefits") effective January 2014 (Respondents' Exhibit N). A fifty percent offset of those periodic benefits would equate to an offset of $83.08 per week.

47. Claimant MH was awarded SSS benefits on March 1, 2014 based on the date of the Social Security Award Letter. Neither Claimant MH nor his guardian or representative notified Respondents of his receipt of benefits until September 18, 2015 with his Responses to Interrogatories, which only stated he was receiving benefits and did not provide the award amount. Claimant MH did not provide a copy of his Social Security award letter to Respondents until November 5, 2015 (Respondents' Exhibit N and II).

48. Claimant RH testified that he is also receiving SSS benefits every month. He receives a check for him and a check for Claimant MH each month. Claimant RH testified that he also received SSS benefits in the same amount of $720.00 per month. (Hearing Tr. 85:21 – 86:3 and 87:14 – 88:21). A fifty percent offset of those periodic benefits would equate to an offset of $83.08 per week.

49. Claimant RH did not notify Respondents of his receipt of SSS benefits until March 3, 2015 with his Responses to Interrogatories, which only stated he was receiving benefits and did not provide the award amount. Claimant RH did not notify Respondents of the amount of SSS benefits he was awarded until November 10, 2015 when he testified about his receipt of benefits during the hearing (Hearing Tr. 85:21 – 86:3 and 87:14 – 88:21).

50. In adjusting the Average Weekly Wage in this case, the increase for COBRA was effective on January 11, 2014. However, the SSS offset was effective starting on January 3, 2014 (Respondents' Exhibits L and N).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), C.R.S. §8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits at a reasonable cost to employers, without the necessity of litigation. C.R.S. §8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. §8-43-201 (2008).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Dependent Death Benefits and Common Law Marriage

The payment of death benefits is governed by the Act. In the event of death, the dependents of the deceased who are entitled to benefits shall receive death benefits equal to sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a maximum of ninety-one percent of the state average weekly wage per week, subject to offsets permitted by the statute. C.R.S. §8-42-114. The Act provides that "[d]eath benefits shall be paid to a dependent widow or widower for life or until remarriage…." C.R.S. §8-42-120. Under the Act, a widow or widower is presumed to by wholly dependent unless it is shown that he or she was voluntarily separated from the decedent and living apart at the time of the injury or death or was not dependent in whole or in part on the deceased for support. C.R.S. §8-41-501(a). Children of the deceased under the age of 18 years or who are under the age of 21 and were dependent on the deceased for support at the time of the decedent's death and were or are attending an accredited school are considered wholly dependent as well. § 8-41-501(1)(b)-(c).

A common law marriage may be the basis for the payment of death benefits to a widow or widower under the Act. *Sergio Reyes (Deceased) v. LVI Environmental Svcs., Inc.,* W.C. No. 4-425-155 (ICAO April 5, 2001). The determination of whether a common law marriage is proven turns on issues of fact and credibility. *Estate of Wires v. Medina,* 765 P.2d 618 (Colo. App. 1988); *Larry Baggett (Deceased) v. Don Ward, Inc.*, W.C. No. 4-391-071 (ICAO March 12, 2001).

The issue of the existence of a common law marriage arises in all types of cases. It frequently arises in the context of a dissolution proceeding under the UDMA. *See, In re Marriage of Cargill,* 843 P.2d 1335 (Colo. 1993); *In re Marriage of Gercken,* 706 P.2d 809 (Colo. App. 1985). However, the issue is also resolved in a host of other types of cases. *See, e.g., People v. Lucero,* 747 P.2d 660 (Colo. 1987)(spousal testimonial privilege); *Carter v. Firemen's Pension Fund,* 634 P.2d 410 (Colo. 1981)(entitlement to pension); *Employers Mut. Liab. Ins. Co. v. Indus. Comm'n,* 145 Colo. 91, 357 P.2d 929 (1960)(entitlement to workers' compensation benefits); *In re Estate of Sky Dancer,* 13 P.3d 1231 (Colo. App. 2000)(determination of heirship); *Whitenhill v. Kaiser Permanente, supra* (right to bring wrongful death action).

Common law marriage was first recognized by the Colorado Supreme court in *Klipfel's Estate v. Klipfel,* 92 P. 26 (Colo. 1907), noting that marriage in the State of Colorado is a civil contract or agreement between two consenting parties. A marriage by agreement of two parties with the capacity to consent, followed by other attendant circumstances, may be valid and binding. *Id.* at 28. The seminal case of *People v. Lucero,* 747 P.2d 660 (Colo. 1987) established that the consent or agreement of the parties to a common law marriage must be manifested by conduct that gives evidence of the mutual understanding of the parties. The *Lucero* court held that,

> The two factors that most clearly show an intention to be married are cohabitation and a general understanding or reputation among persons in the community in which the couple lives that the parties hold themselves out as husband and wife. Specific behavior that may be considered includes maintenance of joint banking and credit accounts; purchase and joint ownership of property; the use of the man's surname by the woman; the use of the man's surname by children born to the parties; and the filing of joint tax returns. See Mills, Common Law Marriage in Colorado, 16 Colo. Law. 252, 257 (1987). However, there is no single form that any such evidence must take. Rather, any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife will provide the requisite proof from which the existence of their mutual understanding can be inferred.

Cohabitation is "holding forth to the world by the manner of daily life, by conduct, demeanor, and habits, that the man and woman have agreed to take each other in marriage and to stand in the mutual relation of husband and wife." *Smith v. People*, 64 Colo. 290, 170 P. 959 (1918). The Court of Appeals in *Taylor v. Taylor*, 10 Colo. App. 303, 50 P. 1049 (1897), stated:

> "Cohabitation," as here used, means something more than sexual intercourse. Bouvier defines "cohabit" to be "to live together in the same house, claiming to be married." Webster defines "cohabitation" as "the act or state of dwelling together, or in the same place with another." "It is not a sojourn, nor a habit of visiting, nor even a remaining with for a time. None of these fall within the true idea of cohabitation as a fact presumptive of marriage. To cohabit is to live or dwell together, to have the same habitation; so that, where one lives and dwells, there does the other live and dwell with him."

The *Taylor* court also held that general reputation or repute means the "understanding among the neighbors and acquaintances with whom the parties associate in their daily life that they are living together as husband and wife." *Taylor at* 1049.

Relevant to the determination in this case Claimant RH and the Decedent were married on August 29, 2002 in front of a retired judge. There was no formal wedding ceremony at that time. After the marriage, Decedent changed her surname from Kinion to Henry which is Claimant RH's surname. The Decedent and Claimant RH later separated and a separation agreement with a parenting plan was filed on October 4, 2010. Claimant RH and the Decedent were divorced effective January 4, 2011. Decedent did not legally change her surname back to Kinion following the divorce. Claimant MH, the only child born to both Decedent and Claimant RH also used the surname Henry. While Claimant RH and the Decedent were divorced, she moved out of their residence but they continued to see each other and worked on mending the problems they had in the marriage. Per the credible testimony of Claimant RH, they reconciled on February 22, 2011 and the Decedent moved back into their shared residence, long before the Decedent's fatal injury and before the Decedent even began working for Employer. The title to the home and the mortgage remained in both their names the entire time in spite of the period of separation and divorce.

After their reconciliation, Decedent and Claimant RH were planning a ceremony in Las Vegas with their family. However, the wedding ceremony never took place. Claimant RH testified credibly and persuasively that Decedent was getting pressure from her parents to have a ceremony because they wanted a traditional kind of marriage and that a formal ceremony was for their benefit.

Claimant RH's mother testified that, although she knew they were thinking about having a wedding in Las Vegas in the future, she believed Decedent and Claimant RH were married in their hearts in the months preceding Decedent's death. The Decedent's mother testified that she believed prior to Decedent's death, Decedent and Claimant RH "weren't married. They were just living together." However, Ms. Branom testified that she is a Jehovah's Witness and that her religion does not recognize common law marriages regardless of whether they are recognized under the Colorado law. Because of her religious beliefs, she would only recognize a marriage if there is a certificate of marriage. The testimony of Ms. Branom actually supports Claimant RH's testimony that while he and Decedent considered themselves to be married after their reconciliation and held themselves out as married, they were still planning a formal ceremony to appease their families who were more traditional in their views of marriage. As found, the Decedent and Claimant RH did not consider themselves merely engaged to be married, in spite of planning an eventual ceremony that ultimately did not take place, but rather they considered and held themselves out as husband and wife.

There is considerable support in the record for the determination that the Claimant RH and the Decedent were married at the time of her death, including, but not limited to:

- Claimant RH and the Decedent filing joint tax returns for the years from 2002 until the Decedent's death

- Jointly held titles to several vehicles, namely a 1999 Chevy pickup, a 2000 Chevy pickup, and a Toyota Yaris

- Claimant RH and Decedent relied upon each other to pay joint bills and Claimant RH would not have been able to cover the family bills on his own without the Decedent's income

- At the time of her fatal accident, the Decedent was wearing and engagement/wedding set on her left hand, with both a gold band and a ring with stones, rather than only the engagement ring

- Decedent completed considerable paperwork for her employer noting the Claimant RH was her husband

Based on the foregoing, Claimant RH established by a preponderance of the evidence that he was the Decedent's common law spouse and her dependent for the purposes of C.R.S. §8-42-114 and C.R.S. §8-41-501(a).

Calculation of Average Weekly Wage

Under Colorado's Workers' Compensation Act, the "average weekly wage" is a key part of the formula used to calculate compensation for injured workers, and it is based upon the definition of "wages" provided at C.R.S. § 8-40-201(19). *Industrial Claim Appeals Office v. Ray,* 145 P.3d 661 (Colo. 2006). To determine a claimant's AWW, the ALJ may choose from two different methods set forth in C.R.S. § 8-42-102. The first method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." C.R.S. § 8-42-102(2). The default provision in C.R.S. § 8-42-102(2)(a)-(f), lists six different formulas for conducting this calculation. Per C.R.S. § 8-42-102(5)(a), the phrase "at the time of injury" in subsection (2) requires the AWW to be determined using the wage earned on the date of the employee's accident. The second method for calculating a claimant's AWW, referred to as the "discretionary exception," applies when the default provision will not fairly compute the employee's AWW. C.R.S. § 8-42-102(3). In such a circumstance, the ALJ has discretion to compute the AWW of a claimant in such other manner and by such other method as will, based upon the facts presented, fairly determine the employee's AWW. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No.*

7, W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office,* 841 P.2d 335 (Colo.App.1992). Because the default method will not fairly compute the Claimant's AWW in this case, the discretionary method is appropriate to use in order to arrive at a fair approximation of the Claimant's wage loss.

Respondents have admitted to an average weekly wage of $577.85. which is based on Decedent's total earnings from 12/23/2012 to 12/21/2013 of $30,048.20. The Claimant RH and the Claimant MH dispute this calculation and argue that it does not provide a fair approximation of wage loss and diminished earning capacity resulting from the Decedent's death and the loss of income to the Decedent's family. The Decedent's first paycheck from Employer was dated November 15, 2012 and the Decedent's final paycheck from Employer was dated January 23, 2014. Her gross wages were paid approximately every 2 weeks and included the following categories: Product Sales Commission, Daily Base Pay, Daily Service Incentive, Incentive, New Customer Incentive, Ovations AwardperQs, and Vacation Pay. Some of these categories were included with each paycheck and some were only paid intermittently or when earned. All of these categories added up to the gross wage paid to the Decedent. Per the Decedent's wage records, there were regular and natural fluctuations to the gross wages from paycheck to paycheck (see chart in Findings of Fact).

Claimants argue that in the six pay periods or twelve weeks prior to her death, the Decedent was earning increased wages because she was earning more commissions the longer she was on her route as her customer base and sales increased. Claimants argue that this is more representative of the wages that the Decedent was earning at the time of the injury.

The ALJ found that there were fluctuations and finds persuasive the Claimants' argument that the last six regular pay periods, encompassing the last 12 full weeks the Decedent worked for Employer prior to her death would result in a fair approximation of her wages. The ALJ also found that the final paycheck on 01/09/2014 is not a regular paycheck in the ordinary course because it included amounts paid out due to the termination of the Decedent's employment resulting from her death. Therefore, this paycheck is not included for the purposes of calculating the AWW. So, the paychecks from 10/17/2013, 10/31/2013, 11/14/2013, 11/27/2013, 12/12/2013 and 12/26/2013 which are the last 12 regular full weeks of the Decedent's employment are used to calculate base AWW for the Decedent.

$1,212.17
$1,300.06
$1,249.13
$1,315.45
$1,024.38
$1,208.72
Total: $7,309.81
÷ 12 = **$609.16**

Calculation of the Cost of Insurance Benefits

In this case, a portion of the dispute also centers over whether the Claimants have established that the full value of a health insurance benefit provided by the Employer should be added to Claimant's AWW for a further increase to her AWW.

C.R.S. §8-40-201(19)(a), provides:

> "Wages" shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied.

C.R.S. § 8-40-201(19)(b), provides, as follows:

> The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19). If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in the subsection (19), including the cost of health insurance coverage or the cost of the conversion of health insurance coverage, that advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment.

In interpreting statutes, we must give effect to the intent of the General Assembly, and if the statutory language is clear and unambiguous, we must give the words their ordinary meaning and apply the statute as written. *See Cochran v. West Glenwood Springs Sanitation Dist.,* 223 P.3d 123, 125-26 (Colo. App. 2009). In doing so, we must read and consider the statute as a whole and interpret it in a manner giving consistent, harmonious, and sensible effect to all of its parts. *Lujan v. Life Care Centers,* 222 P.3d 970, 973 (Colo. App. 2009). We should not interpret the statute so as to render any part of it either meaningless or absurd. *Id.* Additionally, nonexistent provisions should not be read into the workers' compensation act. *Kraus v. Artcraft Sign Co.,* 710 P.2d 480, 482 (Colo. 1985).

The Colorado Supreme Court has determined that the plain language of C.R.S. § 8-40-201(19)(b), does not require claimants to actually purchase health insurance in order for the cost of the insurance to be included in the average weekly wage. *Industrial Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006).

However, Respondents argue that they are not required to increase the average weekly wage for the *full* cost of continuing the terminated group insurance benefits because doing so would include premium amounts for Decedent's benefits. Respondents reason that Decedent is dead, and therefore, no longer in need of insurance. Thus, the cost of continuing insurance benefits for Claimant MH and Claimant RH (if the ALJ found him to be a dependent) would be included in the average weekly wage computation, but not the cost for continuing coverage for Decedent.

Claimant RH argues that C.R.S. § 8-40-201(19)(b) mandates that the full cost of the terminated benefits be included in the average weekly wage calculation. Claimant RH further asserts that, whether an injured worker actually uses the increased benefits to purchase health insurance, or their need to do so, has never been taken into account when addressing whether the average weekly wage is to be increased for the full amount of the terminated benefits. *See Industrial Claims Appeals Office v. Ray,* 145 P.3d 661 (Colo. 2006); and, *Restaurant Technologies, Inc. v. Industrial Claims Appeals Office*, 15CA0231 (Colo. App. February 4, 2016)(not selected for publication). Claimant RH argues that the only circumstance where the cost of insurance benefits is not includes is if an employer continues to pay for the benefits; a situation that is inapplicable here. Claimant points out that C.R.S. §8-40-201(19)(b), itself establishes that an injured worker who replaces employer provided group insurance benefits with Medicaid or some other low income medical program would still get the full average weekly wage increase. Claimant RH further argues that the average weekly wage calculation is focused on a fair approximation of the "wage" loss and the "cost" of continuing the benefit as opposed to whether or not benefits actually continue.

Yet, in this instance, it is not merely that Claimants chose to continue benefits or did not choose to continue the benefits for the Decedent. With respect to the Decedent, her death is a legal impediment to continuation of insurance benefits. The Decedent's death prevents the ability to obtain insurance coverage for the Decedent, whether it be through continuation of the employer's group health insurance plan or through the employee's cost of conversion to a similar insurance plan. The intent of the inclusion of the cost of continuing benefits is to provide the ability to continue to purchase the benefits, whether or not benefits are actually continued. In this case, the death of the Decedent means that no further benefits on her behalf would be available and could not continue under any circumstance. The Decedent's dependents could not legally choose to continue the benefits for her and, therefore, there is no cost for continuing coverage. To include this amount in the average weekly wage computation would result in a windfall for the dependents.

The cost for continuing to provide the insurance benefits for Claimant MH and Claimant RH are to be included in the from the date the benefits were terminated, January 11, 2014. However, as there is no cost for continuing coverage for the Decedent, this is not to be included in the calculation of the average weekly wage

As found, the cost of continuing these benefits for only Claimant RH and Claimant MH (and excluding the Decedent) would be $739.15 per month ($664.42 for health; $59.78 for dental; and $14.95 for vision). The monthly amount corresponds to a weekly amount of $170.57 per week.

Offsets

C.R.S. § 8-42-114 provides, in pertinent part,

> In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits. C.R.S. § 8-42-114.

The purpose of the offset is to prevent receipt of the full amount of social security and workers' compensation benefits for the same disability. *Yates v. Sinton Dairy,* 883 P.2d 562 (Colo. App. 1994); See also, *Engelbrecht v. Hartford Accident & Indemnity Co.,* 680 P.2d 231 (Colo.1984).

Claimant MH was awarded $720.00 per month for Social Security Survivor benefits ("SSS benefits") effective January 3, 2014. A fifty percent offset of those periodic benefits would equate to an offset of $83.08 per week. Claimant RH testified that he is also receiving SSS benefits every month. He testified that he also received SSS benefits in the same amount of $720.00 per month. A fifty percent offset of those periodic benefits would equate to an offset of $83.08 per week.

Respondents established the SSS offset of $83.08 per week against any death benefits paid to Claimant MH. Respondents also established the SSS offset of $83.08 per week against any death benefits paid to Claimant RH. The benefits for each Claimant MH and RH are both to be reduced by this amount.

Safety Rule Violation

C.R.S. § 8-42-112(1)(a) provides for a 50% reduction in compensation to a claimant where a respondent proves that the claimant's injury was caused by the willful failure obey any reasonable rule adopted by the employer for the safety of the employee. The Respondents carry the burden of establishing all five elements of a safety rule violation, which are:

1. There must be a specific, unambiguous and definite safety rule adopted by the employer.

2. The safety rule must be reasonable.

3. The safety rule must be "brought home" to the employee and diligently enforced.

4. Violation of the safety rule must be willful.

5. The violation of the safety rule must be a cause of the claimant's injury.

Here, the evidence established that the Employer adopted a safety rule requiring employees to be aware of their surroundings and work safely. This is a reasonable rule for the safety of the Employer's employees.

However, the Respondents have failed to establish that the Claimant acted willfully and with deliberate intent. The safety rule penalty is only applicable if the violation is willful. The question of whether the respondents proved willful violation of a safety rule by a preponderance of the evidence is one of fact for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Violation of a rule is not willful unless the claimant did the forbidden act with deliberate intent. A violation which is the product of mere negligence, carelessness, forgetfulness or inadvertence is not willful. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *Johnson v. Denver Tramway Corp.,* 171 Colo. 214, 171 P.2d 410 (1946); *In re Alverado,* W.C. No. 4-559-275 (ICAO December 10, 2003). Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

In the present case, both the investigating Colorado State Patrolmen and the Respondents' retained expert did establish that Decedent was not wearing her seatbelt at the time her delivery truck was rear-ended by the tractor trailer. Both witnesses testified to the physics of the movement of Decedent's body within the cab of her truck after it had been struck from behind by a much larger vehicle. However, neither individual could offer any persuasive evidence or analysis (nor could they be expected to) as to why an employee with a spotless safety record was not wearing her seatbelt when behind the wheel of her work vehicle.

Critically, the Respondents have failed to offer any persuasive evidence that the Decedent's failure to wear a safety belt was somehow "willful." The statute permitting the reduction in benefits requires the alleged failure to "use a safety device" or to follow a "reasonable rule" of the employer to have been "willful." Here, the record is devoid of evidence regarding alleged willfulness.

Although it has been established that the seatbelt was in good working order and that the Decedent didn't fail to wear the seatbelt due to malfunction, there was simply no persuasive evidence to establish whether the Decedent intentionally or willfully failed to wear her seatbelt or whether she negligently forgot to wear her seatbelt or whether there was some other reason for her failure to wear her seatbelt. However based on the testimony from Claimant RH that the Decedent was vigilant about seatbelt use, and based on the evidence establishing that the Employer was adamant and vigilant about enforcement of the seat belt rule, and based on evidence that the Decedent was never disciplined for failure to use her seat belt and was generally known as a compliant employee with a good safety record, who was wearing her “Safe By Choice” bracelet at the time of her death, it was found that it was more likely that the Decedent failed to wear her seatbelt because she negligently forgot, or for some other reason than it was that she intentionally and willfully failed to wear her seatbelt.

Where, as here, the Respondents fail to establish that the Decedent’s injury resulted from her willful failure to obey a reasonable rule adopted by the Employer for her safety, the Respondents are not entitled to a 50% reduction in death benefits to the dependents RH and MH. Death benefits awarded in this case shall not be subject to a 50% reduction.

ORDER

It is therefore ordered that:

1. The Claimant RH is entitled to benefits pursuant to §§ 8-42-114 & 8-41-501(1), C.R.S. as Decedent’s surviving common law spouse.

2. The average of Decedent’s paychecks for the last six regular pay periods, encompassing the last 12 full weeks the Decedent worked for Employer prior to her death would result in a fair approximation of her wages. The paychecks from 10/17/2013, 10/31/2013, 11/14/2013, 11/27/2013, 12/12/2013 and 12/26/2013 which are the last 12 regular full weeks of the Decedent’s employment are used to calculate base AWW for the Decedent. This results in a base average weekly wage of $609.16.

3. The cost for continuing to provide the insurance benefits for Claimant MH and Claimant RH are to be included in the average weekly wage calculation from the date the benefits were terminated, January 11, 2014. However, as there is no cost for continuing coverage for the Decedent, this is not to be included in the calculation of the average weekly wage. The cost of continuing these benefits for only Claimant RH and Claimant MH (and excluding the Decedent) would be $739.15 per month ($664.42 for health; $59.78 for dental; and $14.95 for vision). The monthly amount corresponds to a weekly amount of $170.57 per week to be added to the base average weekly wage.

4. Respondents established the Social Security Survivors benefit offset of $83.08 per week against any death benefits paid to Claimant MH. Claimant MH’s benefits are to be reduced by this amount.

5. Respondents established the Social Security Survivors benefit offset of $83.08 per week against any death benefits paid to Claimant RH. The benefits paid to Claimant RH are to be reduced by this amount.

6. Respondents have failed to establish that Decedent’s injury resulted from her willful failure to obey a reasonable safety rule adopted for the safety of the employees and therefore Respondents are not entitled to a reduction in benefits pursuant to §8-42-112(1).

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

DATED: October 4, 2016

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury on February 10, 2016.

2. If compensable, whether Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits.

3. If compensable, whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from February 14, 2016 through April 25, 2016.

4. If Claimant established an entitlement to TTD benefits, whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for his termination of employment.

STIPULATIONS

1. Claimant's average weekly wage from Respondent Employer is $399.62.

FINDINGS OF FACT

1. Employer is a family-friendly restaurant and entertaining corporation with a location in Denver at the intersection of Interstate 25 and Colorado Boulevard.

2. Claimant began employment with Employer at that location on or about January 12, 2016 as a line cook. Claimant's duties included preparing food, food prep work, cleaning, and doing dishes.

3. Claimant alleges he suffered a work injury on an unknown date sometime in February, 2016 when he slipped on grease, a plastic bag, and/or both in the kitchen. Claimant alleges he fell and hurt his lower back and head. Claimant continued working but alleges that the pain did not get better and that he reported the injury about one week later. Claimant then alleges he sought treatment. Claimant's initial complaints in the medical records include only low back pain. Claimant's complaints then expanded to include low back pain, thoracic/mid back pain, chest wall tenderness, a bump on the head, erectile dysfunction, and headaches. Claimant's testimony overall is not found credible or persuasive.

4. On February 15, 2016 Claimant was evaluated at University of Colorado Hospital. Claimant was evaluated by Kennon Heard, M.D. at 9:36 p.m. Dr. Heard noted complaints of back pain after heavy lifting at work 2-3 days ago. Dr. Heard noted

on examination that Claimant had normal reflexes, normal pulses, mild lower back spasm, no focal tenderness or redness, and that Claimant was able to heel and toe stand. Dr. Heard noted: fall back pain; no neurological symptoms; negative x-rays; history, exam, and testing consistent with muscular back pain; and no evidence for cauda equine, cord compression, infection, tumor, or fracture. At 9:38 p.m. Dr. Heard ordered x-rays of Claimant's lumbar spine noting "back pain fall." The x-rays reviewed by Dr. Heard showed: no fracture or malalignment; vertebral body height and alignment within normal limits; and intervertebral disc spaces grossly maintained. At 10:08 p.m. it was noted that Claimant was stable and improving with emergency department treatment and would be discharged home. The impression noted by Dr. Heard was bilateral low back pain without sciatica. Dr. Heard noted that Claimant could return to work the next day with a light duty work restriction until cleared by workmans comp. *See* Exhibits 1, A.

5. At 10:05 p.m. on February 15, 2016 Patrick Smith, RN completed emergency department notes. RN Smith noted that Claimant had complaints of falling at work while carrying dishes and that Claimant reported falling and landing on his lower back. Claimant reported pain while bending down and rising. *See* Exhibits 1, A.

6. Claimant was not treated again until approximately one month later. On March 16, 2016 Claimant was evaluated at University of Colorado Hospital by Jason Hoppe, D.O. Claimant reported back pain and that he fell at work one month prior from the ground level. Claimant reported difficulty achieving an erection over the last month. Dr. Hoppe noted lower thoracic midline pain on examination and a normal cremasteric reflex on testicular exam. X-rays of Claimant's thoracic and lumbar spine were noted to show mid and lower thoracic discogenic degenerative changes without evidence of fracture, and no evidence of acute traumatic abnormality with stable straightening of the lumbar lordosis. *See* Exhibits 1, A.

7. On April 6, 2016 Claimant was evaluated by David Yamamoto, M.D. Claimant reported that he was working as a cook for Employer when he slipped and fell on a plastic bag while in the kitchen. Claimant reported that his feet went out from under him and he went backwards landing on his back and buttocks. Dr. Yamamoto noted mild chest wall tenderness, and mild tenderness in the mid and lower back. Dr. Yamamoto also noted a small bump on Claimant's left scalp and that Claimant thought he might have bumped his head when he fell. Dr. Yamamoto assessed strain of the lower back, strain of the thoracic region, and strain of the chest wall. *See* Exhibit 2.

8. When Claimant was evaluated almost two months prior at the initial emergency department visit, there was no note of any chest wall tenderness, bump on the scalp, or mid back pain.

9. On May 2, 2016 Claimant underwent an independent medical evaluation (IME) performed by Carlos Cebrian, M.D. Dr. Cebrian noted that Claimant did not remember the date of injury and that Claimant was very tangential and a difficult historian. Claimant reported slipping on a plastic bag that was on the floor and that he

landed flat on his back. Claimant reported that he was carrying three plates under his left arm when he fell and that he had pain in his low back after the fall. Claimant reported that was the only area that hurt, but that after going home and showering he noticed that he had pain in his buttocks and upper back. Claimant denied any other injuries and reported that he did not hit his head. Claimant reported that he did not tell anyone about the accident for over one week because he thought his symptoms would go away. Claimant reported that after the fall he continued to work for the next week until he was laid off. Claimant reported pain in his low back and the he could feel a lump in his back and on the right side of his head. Claimant reported that since one week after his fall he had not had sex with his wife and was unable to get an erection. Claimant then said the problems started the day of his injury. Claimant reported that his low back pain was bilateral and denied radiation of pain into his legs. Claimant denied having any headaches even though he checked headaches on his paperwork. *See* Exhibits 3, B.

10. On examination, Dr. Cebrian noted the thoracic spine revealed no spasms, trigger points, or atrophy and that range of motion was full in all directions. Claimant reported diffuse pain present to palpation over the paraspinal thoracic muscles. Dr. Cebrian noted on examination of the lumbar spine that there were no spasms, trigger points, or atrophy and that range of motion was full in all directions. Claimant reported discomfort on extension but not on flexion and reported diffuse pain present to palpation over the paraspinal lumbar muscles. Dr. Cebrian opined that Claimant's non-claim related diagnoses included: lumbar spine degenerative disc disease; thoracic spine degenerative disc disease; diffuse and non-specific thoracic and lumbar spine pain with normal neurological exam; and subjective complaints of erectile dysfunction. *See* Exhibits 3, B.

11. Dr. Cebrian noted that Claimant's primary complaint was erectile dysfunction and that the initial complaints of lumbar spine pain expanded to mid and upper back pain one month after the alleged fall at work. Dr. Cebrian noted the inconsistencies in the date of injury as well as the mechanism of injury. Dr. Cebrian opined that Claimant had non-specific subjective complaints of thoracic and lumbar spine pain without any objective evidence and that Claimant had no neurological symptoms or examination findings that would explain erectile dysfunction secondary to a fall. Dr. Cebrian opined that Claimant did not sustain an injury on February 10, 2016. He noted that Claimant continued to work two jobs for one week after the fall, Claimant delayed one week in reporting the fall and injury, and that Claimant's initial examination on February 15, 2016 had limited physical examination findings. Dr. Cebrian opined that at the February 15, 2016 evaluation Claimant would not have had spasm without tenderness if there had been an acute injury to the lumbar spine. Dr. Cebrian also noted that Claimant's pain complaints had expanded after the initial visit to later include thoracic spine pain, erectile dysfunction, chest wall pain, and a bump to the head. Dr. Cebrian further opined that Claimant had undergone multiple examinations with normal neurological exams and that the lack of improvement of subjective pain complaints over a period of three months with limited examination findings was inconsistent. Dr. Cebrian opined that if Claimant had suffered a fall that resulted in injuries, Claimant

would have had some improvement over time. Dr. Cebrian opined that further evaluation, diagnosis, and treatment under workers' compensation was not medically reasonable, necessary, appropriate, or related. *See* Exhibits 3, B.

12. Dr. Cebrian testified at hearing consistent with his IME report. Dr. Cebrian again pointed out inconsistencies with Claimant's report of injury. Dr. Cebrian noted that at Claimant's first visit at the emergency department Claimant did not mention hitting his head, then at the first visit with Dr. Yamamoto it was noted that Claimant may have hit his head, and then at the IME with him Claimant denied hitting his head. Dr. Cebrian also pointed out that in his testimony Claimant stated that he did hit his head. Dr. Cebrian opined that Claimant would have had tenderness at his first visit if there had been acute trauma and that he would have expected the records to show tenderness to palpation in the lower back had Claimant sustained an acute injury to the low back. In this case, Dr. Cebrian noted that there was no tenderness in the lumbar spine at the initial emergency department visit, then mild tenderness in the mid and lower back when Claimant saw Dr. Yamamoto, then diffuse/widespread tenderness when Claimant was evaluated at the IME. Dr. Cebrian opined that he would not expect a lack of tenderness shortly after an acute incident, then great tenderness months later. Dr. Cebrian noted that his exam was unremarkable compared to the level of pain Claimant reported and that apart from the diffuse pain complaints from Claimant with palpation, there were no objective findings. Dr. Cebrian opined that the large and continued subjective complaints with no objective findings were highly unusual.

13. Claimant's supervisor while working for Employer was Robert Mayfield. Mr. Mayfield testified at hearing. Mr. Mayfield noted that Claimant reported the incident to him on February 14, 2016. Claimant reported that the incident happened on February 10, 2016 and that Claimant had been reaching into a drawer to grab protein when he hurt his back. Mr. Mayfield advised Claimant to see the doctors and to come back to report what the doctors said. Mr. Mayfield did not see Claimant again and terminated Claimant's employment after not hearing from Claimant and after Claimant had several days of no call/no show.

14. Claimant began working for Solid Rock Excavation on April 25, 2016. Claimant's supervisor at his new employment is Joseph Chupp who also testified at hearing. Mr. Chupp noted that Claimant is working as a labor employee on the water and sewer crew and that Claimant's crew digs under foundations to install water/sewer pipes on new construction homes. Mr. Chupp reported that Claimant is a great employee and hard worker and that Claimant is able to move pipes as needed to get the jobs done, with the two pipes they use weighing 25-35 pounds. He noted that Claimant is able to use a shovel to dig under footings, and that Claimant has never appeared to be in pain and has never mentioned pain while working.

15. The overall opinions and conclusions of Dr. Cebrian are found credible and persuasive. Claimant's pain complaints have expanded significantly from his initial visit to the emergency department shortly after the alleged incident, yet Claimant is able to perform a manual labor job well according to his current supervisor. The

inconsistencies in the records support Dr. Cebrian’s ultimate conclusions. Claimant, overall, is not credible or persuasive and has failed to meet his burden to establish that an injury occurred on February 10, 2016.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the alleged injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. The Act creates a distinction between an “accident” and an “injury.” The term “accident” refers to an “unexpected, unusual, or undesigned occurrence.” *See* § 8-40-201(1), C.R.S. In contrast, an “injury” contemplates the physical or emotional trauma caused by an “accident.” An “accident” is the cause and an “injury” is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable “injury.” A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish, by a preponderance of the evidence, that he suffered a compensable injury on February 10, 2016. Claimant’s testimony is not found credible or persuasive. His initial pain complaints at the emergency department are significantly different than his current pain complaints and his current expanded complaints have no objective basis. Claimant’s x-rays showed no signs of any acute trauma to his lower back, or mid back. The opinions and conclusions of Dr. Cebrian are found credible and persuasive. The opinions and assessments provided by Dr. Yamamoto are purely based on Claimant’s subjective reports and are not persuasive to establish a causal link between any work incident and a need for treatment. Dr. Yamamoto failed to address the discrepancy in Claimant’s initial limited reports close in time to the alleged incident at the emergency department and Claimant’s reports to Dr. Yamamoto which expanded to include multiple new body parts. Dr. Cebrian reviewed all the available medical reports, noted numerous inconsistencies, and provided a credible opinion that Claimant did not suffer an acute injury. His opinions, supported by the medical records lacking objective evidence of an acute injury, are found persuasive.

As Claimant has failed to meet his burden to show he sustained a compensable injury, he is not entitled to any medical benefits or temporary disability benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury. His claim is denied and dismissed.

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

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

DATED: October 4, 2016,

/s/ Michelle E. Jones

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment?
- If compensable, is Claimant entitled to temporary total disability benefits from December 3, 2015 through June 20, 2016?
- If compensable, is Claimant entitled to medical benefits to cure and relieve the effects of his industrial injury?

STIPULATION

Claimant and Respondents stipulated Claimant's average weekly wage at the time of the injury was $840.00 per week.

FINDINGS OF FACT

1. Claimant has worked as a journeyman painter for more than thirty (30) years.

2. There was no evidence admitted at hearing which established Claimant required treatment for his right knee prior to September 2015.

3. In 2015, Claimant was working as a painter for Employer. He had worked for the company for approximately 3 1/2 years.

4. Claimant testified that he was injured on either September 17 or 18, 2015. He was on a ladder, cutting in trim when his boot got caught and he began to fall. His body twisted, including his right knee. A co-worker (Kirt Carlson[1]) caught him and he fell to the ground. He testified he felt something in his right knee.

5. Claimant testified he did not report the injury to the supervisor, Steve Bailey, who was on the job site. He did not think it was serious and continued to work.

6. Claimant testified his knee pain worsened when he was on the next job for Employer. Specifically, Claimant then worked in Winter Park and experienced symptoms in his knee. Claimant testified that other employees assisted him with ladders on the job site. He admitted that he did not report his injury to Mr. Bailey at this time.

[1] Mr. Carlson, who could have corroborated Claimant's version of events, did not testify at hearing.

7. Claimant's last day of work was October 13, 2015. There was no evidence in the record to establish that Claimant reported an injury before he was laid off.

8. A series of text messages from Mr. Bailey's phone were admitted at hearing. On Friday, October 23, 2015, Claimant sent a text which said: "good morning Jay do I have work need to work". The response said it was going to be another week and Claimant was told to collect unemployment.

9. On October 30, 2015[2], Claimant sent a text to Mr. Bailey, asking if he was working on Monday. The text also said: "Jason I need to work unemployment does not pay bills Chuey".

10. There was no evidence in the record that Claimant provided notice of his knee injury from September 17, 2015 through October 23, 2015 .

11. Another text said: "Me and Kirt need to talk with you? Let me know OK so I can let him know so we can meet". Mr. Bailey responded that he did not know what there was to talk about. He said both of them would be back when work picked up. The ALJ notes Mr. Bailey's response related to the availability of work, however Claimant did not follow-up to report the injury.

12. Claimant testified these text messages were sent and Mr. Bailey confirmed the text messages were received.

13. On November 2, 2015, Claimant texted Mr. Bailey, explaining how he fell off a ladder at the Urban Metro Apartments. In this text, Clamant said he tried to work with it, but it got stiff and swollen. He needed to find out what was wrong with the knee, but did not want to lose his job.

14. Mr. Bailey testified Claimant has always been a good employee with very few issues. He found it "odd "that Claimant did not report the injury before this text.

15. A written report of injury, signed by Claimant on November 2, 2015, was admitted into evidence at hearing. The document was addressed: "To whom it may concern" and said that when he was working on one of the units, he almost fell off the ladder and twisted his knee. Claimant said Kirt was in the room when he almost fell and said he almost fell on him. He went on to say his knee got stiff and swollen while working at Winter Park and there was something wrong with it. He didn't want to lose his job over this, but wanted an x-ray to see what was wrong with the knee. No specific date of injury was referenced in this document.

16. Claimant was evaluated by Shelley Meyer, D.O. at Highlands Health and Wellness on November 11, 2015. At that time, he reported an injury while going up the

[2] Written copies of the screenshots were admitted into evidence at hearing as Exhibit 8 and Exhibit C respectively. Although there was no date on Exhibit 8, p. 26 /Exhibit C, p. 7, on direct examination Claimant confirmed October 30th as the date of these texts.

ladder and twisting. The ALJ notes there was no reference to almost falling off the ladder. On examination, his knee had normal joint contours, no effusion and normal range of motion. Claimant's knee had normal strength on extension and flexion, with no joint line pain noted. Dr. Meyer suspected ligament damage, which needed to be evaluated with an MRI. Ibuprofen was prescribed and a knee stabilizer was recommended, along with gentle range of motion ("ROM") exercises.

17. A Worker's Claim for Compensation was completed on November 16, 2015. Claimant specified the accident occurred at 2121 Delgany Street in Denver and said he almost fell off a ladder, twisting his knee.

18. Jason Bailey prepared a written document (statement) dated December 21, 2015. It stated he received a text from Claimant on October 23 regarding his need for work. Mr. Bailey stated Claimant had been laid off due to no work in mid-October, around October 15, 2015. Mr. Bailey noted Claimant texted him again on October 30, 2015 regarding work and stated unemployment "does not pay the bills". The statement noted Claimant wanted to talk to him, but he did not hear from him.

19. On December 23, 2015, Claimant was examined by Gary Zuehlsdorff, D.O. He reported being injured on a 4 foot stepladder, which began to slip and his foot got caught in the ladder. This caused him to twist his right knee in the lateral aspect. He fell against one of his associates, who caught him. Claimant said he reported the injury to his employer. On examination, tenderness was noted in the lateral joint line, but no significant swelling or effusion. Hard flexion caused pain in the lateral aspect of the popliteal area and some crepitus was noted. Dr. Zuehlsdorff's assessment was right lateral knee strain. Dr. Zuehlsdorff opined the injury was work related, at least from the history given by Claimant. An MRI was ordered and Claimant was given an ace wrap. Restrictions of: no kneel, crawl, squat, or climb were given.

20. Claimant underwent an MRI on his right knee on December 29, 2015. The films were read by Aamer Farooki, M.D. who noted a grade one cartilage loss in the medial compartment, patellafemoral compartment, along with full-thickness cartilage loss in the lateral compartment. Degenerative spur formation was noted in all three compartments. Dr. Farooki's impression was: complex tearing of the lateral meniscus; lateral compartment predominate osteoarthritis; and small knee effusion. The ALJ infers that the degenerative changes (osteoarthritis) noted in Claimant's knee were long- standing and not the result of trauma.

21. Claimant returned to Dr. Zuehlsdorff on January 8, 2016, at which time the MRI results were reviewed. Dr. Zuehlsdorff's assessment was right lateral knee strain, noting the x-ray showed moderate patellafemoral and lateral compartment osteoarthritis, along with MRI of right knee, which showed complex tear of the lateral meniscus with lateral compartment predominate osteoarthritis and effusion. Claimant's restrictions were continued and a prescription for Ultram was issued.

22. On January 26, 2016, Dr. Zuehlsdorff examined Claimant. Claimant reported his pain was about the same and a Synvisc injection was pending.

23. Claimant was evaluated by Rajesh Bazaz, M.D. on March 18, 2016. Claimant reported lateral sided pain, which he said was 5/10 at rest. He also noted the knee buckled the times. Dr. Bazaz' examination of the right knee showed no large joint effusion, range of motion to 110° of flexion, no gross instability and positive lateral joint tenderness. No medial joint line tenderness was noted.

24. Dr. Bazaz ordered x-rays, which showed no evidence of acute fracture dislocation. However bone-on-bone lateral compartment osteoarthritis was noted. There was no evidence of patellafemoral subluxation or tilt. Dr. Bazaz' impression was right knee advanced osteoarthritis aggravated by a knee contusion. Dr. Bazaz opined the degenerative meniscus tearing did not mean that much and did not recommend an arthroscopy. He proceeded with a steroid injection and wanted to see the Claimant for a follow-up appointment.

25. Dr. Zuehlsdorff saw Claimant on April 26, 2016 and Claimant said he was no better. He had seen Dr. Bazaz on April 15, 2016, who recommended a trial of Synvisc because the steroid injection did not work. Dr. Zuehlsdorff's assessment remained the same.

26. Mr. Bailey testified at hearing Claimant previously reported an injury on the job involving a cut on the finger. The ALJ infers Mr. Bailey believed Claimant knew he was required to report the knee injury. The ALJ credited this testimony.

27. A Notice of Contest was filed on January 19, 2016.

28. There was no evidence submitted to corroborate Claimant's testimony that he was injured on September 17 or 18, 2015. Claimant's testimony failed to persuade the ALJ he was injured as alleged.

29. Claimant's credibility was undermined by the multiple text messages he exchanged with Mr. Bailey in which he did not report an injury.

30. Claimant failed to prove that it is more probably true that not that he sustained an injury on September 17 or 18, 2015.

31. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

Claimant contends he proved by a preponderance of the evidence that on September 17 or 18, 2015, he sustained a compensable injury arising out of and in the course of his employment when he fell off a ladder and twisted his knee. Claimant argued he was performing duties required by his job when he twisted his knee. Claimant averred his testimony and the records of Dr. Zuelsdorff led to the conclusion the claim was compensable. Claimant also argued the case was controlled by *City of Brighton v. Rodriquez*, 318 P.3d 496, 503 (Colo. 2014) [governing unexplained falls] to support the conclusion there was a sufficient causal connection between work activities and his knee condition.

Respondents argued Claimant did not sustain a compensable "injury" based on the delay in reporting of the injury and credibility issues regarding Claimant. Respondents cited Claimant's failure to report the injury to Mr. Bailey and asserted he was not credible because he only reported the injury after he found out there was no work available.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ concludes Claimant failed to satisfy his burden of proof and did not prove he sustained an injury while working for Employer. The rationale supporting this decision was two-fold; first, Claimant failed to report any sort of injury at or near the time it occurred (Finding of Fact 5). As determined in Findings of Fact 9 through 12, Claimant initiated multiple communications with a representative of Employer (Mr. Bailey) on several occasions and failed to report that he was experiencing knee pain or that he was injured. Furthermore, Claimant had a prior finger injury, which he reported, so he was aware that he had to report work injuries. (Finding of Fact 26). The failure to report the injury hurt Claimant's credibility.

Claimant gave different versions of how the accident occurred. As found, the description Claimant provided in his statement (Finding of Fact 15–almost fell off the ladder) diverged from his testimony when he said he began falling and was caught by a co-worker. (Finding of Fact 4). Claimant also recounted different versions of the injury to Dr. Meyer (Finding of Fact 16-Claimant going up the ladder, but no mention of almost falling) than what was told to Dr. Zuehlsdorff (Finding of Fact 19-step ladder began to slip, he twisted his knee, then fell against co-worker).

Second, the medical evidence does not support the claim that Claimant sustained a traumatic injury. Although Dr. Meyer initially suspected ligament damage, no MRI was done on Claimant's right knee until December 29, 2015. (Finding of Fact 16). This was more than three months after the alleged injury and Claimant had already been off work for more than two (2) months. As found, the MRI report, as well as Dr. Bazaz's opinions regarding those objective findings, support the conclusion that Claimant had osteoarthritis in his right knee. (Findings of Fact 20 & 24). There was no evidence in the record to support the conclusion Claimant suffered an acute traumatic injury at or near September 17 or 18, 2015.

Therefore, based upon the totality of evidence before the Court, Claimant failed to persuade the ALJ that his knee was injured a result of his work for Employer.

In coming to this conclusion, the ALJ considered Claimant's argument that the case was governed by the Colorado Supreme Court's decision in *City of Brighton v. Rodriguez, supra*. The instant case was factually distinct in that it does not arise out of an "unexplained" fall. Rather, Claimant's testimony was that he lost his balance, caught his foot in the ladder and began to fall.[3] This is distinguished from the facts in *City of Rodriguez* where Claimant had no recollection or specific information as to why she fell and there were contradictory explanations as to why it occurred. *City of Brighton v. Rodriguez, supra* 318 P.3d at 500.

In light of the ruling on compensability, the issues of medical benefits and TTD benefits are moot.

[3] Hearing transcript, p. 9:11-20.

ORDER

It is therefore ordered that:

1. Claimant’s claim for benefits under W.C. 4-998-875-02 is denied and dismissed.

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

DATED: October 5, 2016

Digital signature

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

ISSUES

The issues presented for determination are as follows:

- Whether the ALJ has jurisdiction to hear the issues Claimant endorsed for hearing;

- If the ALJ has jurisdiction, whether Claimant sustained compensable injury to her head and neck;

- Whether Claimant is entitled to medical benefits for her head and neck; and

- Whether Claimant is entitled to temporary total disability benefits from January 6, 2016 and ongoing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as fact:

1. Claimant fell on September 29, 2015 while in the course and scope of her employment. Respondents filed a General Admission of Liability (GAL) on October 22, 2015. On November 20, 2015, Respondents filed an amended GAL, which specifically denied injuries to the head and neck, and admitted that Claimant suffered a right ankle injury.

2. Claimant underwent medical treatment for her ankle injury at Concentra primarily with Dr. Candice Sobanski. Dr. Sobanski is an authorized treating physician (ATP).

3. In a report dated December 14, 2015, Dr. Sobanski indicated that Claimant had reached maximum medical improvement (MMI) for her ankle injury with no permanent impairment. Dr. Sobanski referred Claimant to her primary care physician for ongoing headaches, dizziness.

4. On January 15, 2016, Claimant filed an Application for Hearing. Claimant endorsed medical benefits, reasonably necessary, ongoing temporary indemnity benefits from January 6, 2016, and specifically sought medical benefits related to alleged injuries to her head and neck.

5. On January 27, 2016, Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Sobanski's December 14, 2015 report. It specifically stated:

> Respondents admit to the right ankle injury only. All other body parts are denied.
>
> Position on Medical Benefits after Maximum Medical Improvement (MMI): Per Dr. Sobanski's attached December 14, 2015 report, Respondents admit to the 12/14/2015 MMI date with no permanent impairment. Respondents admit to reasonable, necessary, and related post-MMI care for the right lower extremity. Respondents specifically deny medical benefits for any other body part.

6. The ALJ finds that Respondents took a specific position with respect to which body parts were accepted as compensable, and to which body parts would receive medical treatment, and that Claimant had reached MMI for her industrial injury. A determination of MMI implies that Claimant needs no further medical treatment to cure and relieve her of the compensable components of her industrial injury.

7. Claimant failed to file an objection to the January 27, 2016 FAL.

8. Claimant failed to file a Notice and Proposal to Select an Independent Medical Examiner to contest issues admitted to or denied on the January 27, 2016 FAL.

9. Claimant failed to file a new application for hearing in direct response to the January 27, 2016 FAL.

10. On February 11, 2016, the Division of Workers' Compensation requested an amended FAL. Respondents filed an Amended FAL on March 1, 2016. The Amended FAL contained the same language concerning compensable components of the work injury.

11. Again, Claimant failed to object to the March 1, 2016 amended FAL. Claimant failed to file a Notice and Proposal to Select a Division Independent Medical Examination (DIME), and Claimant failed to file a new application for hearing.

12. On April 20, 2016, after Claimant failed to object to the two FALs, Respondents filed a Motion to Strike Claimant's January 15, 2016 Application for Hearing. In their motion, Respondents asserted Claimant was jurisdictionally barred from litigating the issues closed by the FALs and argued all issues endorsed on Claimant's January 15, 2016 Application for Hearing must be stricken with prejudice.

13. On April 22, 2016, PALJ David Gallivan issued an Order striking Claimant's January 15, 2016 Application for Hearing. PALJ Gallivan found the only remaining issue for hearing on May 12, 2016 was Claimant's appeal of PALJ Gallivan's Order.

14. At the hearing held on May 12, 2016, ALJ Kimberly Allegretti overturned PALJ Gallivan's April 22, 2016 order and found PALJ Gallivan made findings of fact, which is beyond the scope of his jurisdiction. ALJ Allegretti made no independent findings on the issue of jurisdiction.

15. Based on the foregoing, the ALJ finds that Claimant's workers' compensation claim automatically closed as to the issues admitted in the January 27, 2016 FAL, and the March 1, 2016 amended FAL. Both FALs denied liability, including medical benefits, for injuries to any body part other than the Claimant's right ankle. The FAL also took a position on MMI meaning that Respondents took the position that Claimant needed no additional treatment designed to cure and relieve her of the effects of her industrial injury.

16. The Claimant took no action following the FAL to formally contest the Respondents' final position on her claim. The Claimant's continued preparation for litigation on the January 15, 2016 application for hearing does not constitute substantial compliance with § 8-43-203(2)(b)(II), C.R.S.

17. Because Claimant's claim is closed as the issues of MMI, medical benefits and permanent impairment, the ALJ lacks the authority to determine the merits of the issues Claimant endorsed in her January 15, 2016 application for hearing.

CONCLUSIONS OF LAW

Section 8-43-203(2)(b)(II), C.R.S., states, in pertinent part,

> An admission of liability for final payment of compensation must include a statement that this is the final admission by the workers' compensation insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation, to whom the claimant should provide written objection, and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing, including the selection of an independent medical examiner pursuant to section 8-42-107.2 if an independent medical examination has not already been conducted. If an independent medical examination is requested pursuant to section 8-42-107.2, the claimant is not required to file a request for hearing on disputed issues that are ripe for hearing until the division's independent medical examination process is terminated for any reason. Any issue for which a hearing or an application for a hearing is pending at the time that the final admission of liability is filed shall proceed to the hearing without the need for the applicant to refile an application for hearing on the issue.

The principal objective of statutory construction is to effect the legislative intent. The words and phrases in the statute are the best indicators of legislative intent, and for that reason should be given their plain and ordinary meanings. *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002). Further, the words and phrases of the statute cannot be read in isolation, but instead must be read as a whole so as to give them a consistent and harmonious meaning. *Department of Labor and Employment v. Esser*, 30 P.3d 189 (Colo. 2001).

An uncontested final admission of liability automatically closes a case "as to the issues admitted in the final admission." Section 8-43-203(2)(b)(II), C.R.S.; *Cibola Constr. v. Industrial Claim Appeals Office*, 971 P.2d 666, 667 (Colo. App. 1998). Accordingly, the failure to properly contest a FAL closes the claim on all admitted issues. *Dyrkopp v. Industrial Claim Appeals Office,* 30 P.3d 821 (Colo. App. 2001).

The filing requirements under §8-43-203(2)(b)(II), C.R.S., have been held to be jurisdictional. By failing to timely apply for a hearing under §8-43-203(2)(b)(II)(A), C.R.S., the ALJ is barred from considering the issues which were closed by the Respondent's FAL and Amended FAL. *See Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005).

The Industrial Claims Appeals Office has held that, "[t]he apparent purpose of requiring a claimant to object to a final admission within thirty days is to notify the respondents that the claimant does not accept the respondents' 'final' position concerning the claimant's entitlement to additional benefits, and to alert the respondents that there is an ongoing controversy which is not subject to resolution by administrative closure." *Mcarthur Mitchell v. Office Liquidators, Inc.*, 4-409-905 (ICAO 2000).

As found, Claimant applied for a hearing nearly a month before the Respondents took their final position regarding liability in this matter. While the Claimant correctly argues that she does not need to file a new application for hearing on any issue for which a hearing or application for hearing is pending at the time a respondent files a final admission, Claimant was not relieved of her statutory obligation to file a written objection or otherwise "contest" the Respondents' "final" position or to request a DIME given that she was necessarily disputing the MMI determination[1]. It is undisputed that the Claimant failed to contest (whether through a written objection, application for hearing and DIME request) either the FAL or the Amended FAL within 30 days of their respective filing dates. As such, the issues admitted in the FALs are closed, and the ALJ may not consider the issues endorsed in the Claimant's January 15, 2016 application for hearing.

[1] It is well settled that a DIME is a prerequisite to challenging an MMI determination. See §8-42-107(8)(b)(II)C.R.S.; *See Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

ORDER

It is therefore ordered that Claimant's claim is closed as a matter of law. The issues Claimant endorsed in her January 15, 2016 application for hearing are stricken.

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

DATED: October 4, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

1. Whether Claimant proved, by a preponderance of the evidence, he sustained an occupational disease; and

2. Whether future medical treatment will be reasonable, necessary, and related to Claimant's occupational disease.

STIPULATIONS

1. The parties stipulate the only worker's compensation claims number at issue is WC # 4-967-508. While there were originally two workers' compensation claims, the other claim was merged into WC # 4-967-508 by order of Prehearing ALJ Clisham on February 13, 2015.

2. The parties stipulate all medical benefits requested up to the date of the hearing have been provided.

3. The parties stipulate to reserving the issues of temporary total disability benefits, average weekly wage, penalties for Claimant's failure to notify Employer, and the affirmative defense of termination for cause pending the outcome of this order.

FINDINGS OF FACT

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

1. In March 2013, Claimant, who was 25 years old at the time of the hearing, started working for Employer as a houseman in the Housekeeping Department. He worked approximately 40 hours per week as a houseman.

2. As a houseman, Claimant's work duties included bringing supplies to the housekeepers and moving room refrigerators that weighed between 25 and 35 pounds. Claimant stripped dirty sheets from the beds, and removed them. He also removed towels and trash from the rooms. He also moved rolling beds as needed to accommodate guests' needs.

3. In May or June 2013, Claimant also began working for Employer as a banquet houseman. His duties for this job included setting up and breaking down chairs and tables weighing as heavy as 50 to 65 pounds. He also set-up water stations and did

electrical work. At times, the banquet staff would be required to “flip” a banquet room within a very short period of time, meaning they must break down and set up a room to allow for cleaning and rearranging tables and chairs before the next banquet was scheduled to start.

4. When Claimant was performing the duties of both a housekeeping houseman and a banquet houseman, Claimant averaged 40 hours per week for both jobs in 2013; 33 hours per week in 2014; and 41 hours in 2015. However, during busy times, such as wedding season, Claimant would work 5 to 8 hours shifts after his housekeeping shift; on those days, he would work 13 to 16 hours.

5. Claimant’s wage records show that he worked more than 80 hours in a two-week pay period 6 times in 2014. Three of the 6 occasions occurred between January and late May, when he worked 87, 85.75, and 86 hours over a two-week span.

6. After working a double shift, Claimant would go home and watch TV before going to sleep; he was not involved in any extracurricular activities. Claimant was not involved in any types of accidents, including motor vehicle accidents and falls in the time span of 2013 to 2015, when he resigned from Employer.

7. During the summer of 2014, Claimant’s work became busier with increased volume of rooms to get ready and increased volume of banquets because of the wedding season. Late spring, summer, fall and the Christmas holiday season are the peak seasons for Employer.

8. Although Claimant doesn’t recall the exact date when his physical symptoms started, he remembered their exact onset. Claimant came home from working a double shift, sat down on the couch and his right leg went numb down to the foot.

9. Claimant was having pain mostly radiating from his right hip, down the knee and sometimes, farther down his leg.

10. Claimant’s symptoms of pain and numbness became more and more consistent as time went on, which would be on average three or four times a day, whenever he sat down.

11. Claimant awoke the morning of October 3, 2014 with pain in his right hip and knee as well as numbness from the knee down to his foot. He rated the pain as a ten out of ten.

12. Dr. Igor Borisov, who is Claimant’s personal physician, examined Claimant on October 6, 2014. Claimant complained of sciatic pain, back pain, and numbness in his leg. The note indicates that the onset of symptoms started suddenly about two months ago “without any known injury.” The Claimant described his symptoms as

severe and worsening. Dr. Borisov noted that Claimant had been working at a hotel lifting, moving and walking for one year.

13. Dr. Borisov asked Claimant if he did a lot of lifting and bending in his job. When Claimant responded that he did, Dr. Borisov told Claimant that his symptoms could be from his work.

14. Dr. Borisov referred Claimant for an MRI, which Claimant underwent on October 17, 2014. The MRI revealed a L4-L5 disc protrusion, moderate central canal stenosis with narrowing of the right lateral recess, and possible right L5 radiculopathy. There was also a broad L5-S1 disc bulge and mild left foraminal stenosis.

15. After Dr. Borisov suggested that Claimant's work could have caused his symptoms, Claimant reported to his Employer that he believed his symptoms were work-related. Claimant then started receiving medical treatment through HealthOne Occupational Medicine with Dr. Martin Kalevik.

16. Dr. Martin Kalevik performed an initial evaluation of Claimant on October 28, 2014. During this evaluation, Claimant denied any specific incident caused his back pain, although one form Claimant completed indicates that he lifted a mattress a "while ago" and now his pain is worse. Claimant stated that about a year earlier, he felt stiffness in his low back with some radiation down his leg. He felt it hurt then improve and it was up and down over a three-month period. He reported that about two and one-half weeks ago, it started flaring up significantly. Dr. Kalevik opined that based on Claimant's description of his job as one where he had to do lifting and moving, and that based on Claimant's history, his symptoms appeared to be work-related.

17. Claimant reported pain in his right hip and down the entirety of his right leg to his foot and his pain level was "pretty high."

18. Dr. Kalevik placed Claimant on work restrictions.

19. At the October 28, 2014 appointment, Dr. Kalevik prescribed hydrocodone because Claimant said he had taken all he had been prescribed. But Claimant filled a prescription for Vicodin from Dr. Borisov on October 21, 2014.

20. Claimant testified he took 120 Vicodin between October 21 and October 28. If he had done so, Claimant would have been hospitalized for hepatotoxicity, suffered liver failure, and likely died. None of which occurred — most notably Claimant's death.

21. Upon receiving notice of Claimant's prior prescription from Dr. Borisov, Dr. Kalevik rescinded his prescription for hydrocodone.

22. Although he raised the weight limit Claimant could lift and push, Dr. Kalevik maintained work restrictions during the course of Claimant's treatment.

23. Dr. Samuel Chan examined Claimant on January 9, 2015, after being referred by Dr. Kalevik. As he did when being examined by Drs. Kalevik and Borisov, Claimant told Dr. Chan “he was unable to pinpoint a specific traumatic incident.”

24. Claimant told Dr. Chan he had no back pain rather, the pain was in his right leg. Claimant rated his pain as 9 out of 10.

25. In his initial report, Dr. Chan wrote that he felt Claimant’s clinical findings correlated with the MRI findings. He noted that he discussed the case with Dr. Kalevik regarding causality, and even though there was not one specific traumatic incident, based on the history presented to him by Claimant regarding his work duties involving repetitive lifting of heavy objects and working 12 to 14 hours per day of setting up and breaking down banquets and tables, Claimant’s work would most definitely be a cause of the disc herniation.

26. When Dr. Chan reexamined Claimant on February 2, 2015, he again reported a pain level of nine out of ten.

27. Claimant was given oral steroids and had an epidural steroid injection. The oral steroids offered temporary relief, but the steroid injection failed to improve his symptoms.

28. EMG studies occurred on March 20, 2015. There was no evidence of lumbosacral radiculopathy on the right side, sacral plexopathy, or other peripheral neuropathy of the right lower extremity. In sum, the EMG studies were within normal limits.

29. Claimant wanted to work full time as a banquet attendant. Claimant’s Human Resources Manager, Bill Thomas, had concerns about Claimant’s health, so he denied Claimant’s request for a transfer. Claimant was already on work restrictions at the time he made the request.

30. On May 21, 2015, Claimant asked Dr. Kalevik to lift his work restrictions so he could do banquet work full time. Dr. Kalevik declined to do so because Claimant “does have a disk problem, and he was referred to a surgeon for possibly surgery.”

31. On June 8, 2015, Claimant underwent a Respondent-initiated independent medical examination with Dr. Bisgard.

32. According to Dr. Bisgard’s report, Claimant worked up to 15 hours per week as a banquet houseman. He reported that his job required him to set up tables and break them down, some of which were heavier than others. He reported working double shifts two to three days per week for several weeks. During the wedding and holiday seasons, Claimant worked more.

33. Claimant also told Dr. Bisgard he could not recall a specific incident at work from which his symptoms originated although he recalled that the hotel was very busy in May 2014. He told Dr. Bisgard his right leg would go numb once he arrived home after work and sat down. Claimant told Dr. Bisgard he woke up one morning in early October 2014 and could barely walk.

34. During Dr. Bisgard's physical examination, Claimant had a normal gait and could walk toe to heel. He had no difficulty with side bends and rotation, and full motion in those planes. He had had minimal pain with extension. Claimant had no tenderness over the spinous process and minimal tenderness in the SI joints. He had no pain with compression of the anterior superior iliac spine and a negative straight leg raise.

35. Dr. Bisgard diagnosed Claimant with preexisting degenerative disc disease and right-side disc protrusion resulting in probable L5 radiculopathy. According to Dr. Bisgard, Claimant has degenerative disc disease at a very early age. Dr. Bisgard opined Claimant likely has a congenital and genetic predisposition to herniated discs based on his father's medical history. She concluded that Claimant's "disk herniation was insidious in onset and spontaneously herniated in the fall of 2014 during sleep/upon waking."

36. Dr. Bisgard also indicated that the EMG tests were normal and Claimant had no response to the epidural steroid injection. She stated that the disc protrusion is likely not the source of Claimant's pain given that both of these tests were negative. She opined that Claimant's MRI findings do not correlate with Claimant's clinical exam. Dr. Bisgard also raised concerns about Claimant's reported high pain levels being inconsistent with his presentation and with the fact that he was taking Vicodin and Percocet at times.

37. Dr. Bisgard testified during the hearing. She essentially reiterated the opinions provided in her written report. She went on to add that although it initially appeared Claimant's degenerative disc disease was the source of his pain, this became less likely as his treatment progressed.

38. Ultimately, Dr. Bisgard concluded it was extremely unlikely Claimant's disc herniation was caused by his work for Employer. Rather, Claimant's symptoms were more likely the result of an insidious and spontaneous disc herniation that occurred while he was sleeping or awakening.

39. During a follow-up visit to Dr. Kalevik in July 23, 2015, he released Claimant from care because he could not dispute Dr. Bisgard's conclusions.

40. Claimant reported at least three different dates as the onset of his symptoms.

41. Claimant first reported his injury to Employer in October 2014.

42. On cross examination, Claimant testified he first had symptoms in October 2013. Claimant also told his employer the symptoms began about a year before October 2014.

43. Claimant informed Dr. Borisov his symptoms began in August 2014.

44. When Dr. Kalevik first examined Claimant on October 28, 2014, he reported his symptoms began about a year ago.

45. The inconsistencies in the dates of onset merely represent that Claimant's symptoms came and went (as he told Dr. Kalevik), and that the symptoms progressed over time. Claimant also explained that he just was not sure when his symptoms began and the Employer or Insurer required him to choose a date.

46. Based on the foregoing, Claimant has failed to prove that his low back and leg condition are a direct and proximate result of the work he performed for the Employer, or that his work aggravated or accelerated a pre-existing condition.

CONCLUSIONS OF LAW

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

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

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

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

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

5. "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

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

6. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

7. As a matter of law, medical evidence is not required to establish causation, although it is a factor that may be considered in addressing that determination. See *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983).

8. Claimant has failed to prove by a preponderance of the evidence that he suffered an occupational disease as a result of the work he performed for the Employer. Although the Claimant’s job involved physical activities including lifting and bending, the ALJ is not persuaded that his job duties proximately caused his leg and back condition or aggravated or accelerated any pre-existing condition. The evidence demonstrates that Claimant did not really believe his work caused or aggravated his condition until Dr. Borisov suggested it. Even after Dr. Borisov suggested to him that work may have played a role in his problems, Claimant asked to continue working in the banquet

department which involved the heaviest lifting. He also asked Dr. Kalevik to lift his restrictions so he could work in the banquet department. The ALJ acknowledges that Claimant earned significantly more money in the banquet department, but if the job duties in banquet truly caused or aggravated Claimant's physical condition, it would make sense for Claimant to avoid that type of work rather than seek it out. Claimant also had significant difficulty identifying when his symptoms started, which is not necessarily outcome determinative, but, in this case, the possible duration spans a year. If the Claimant experienced symptoms for a year which he believed had been work-related it seems he would have reported it sooner or avoided work activities that brought on the symptoms. The ALJ concludes that the persuasive evidence in the record fails to establish that Claimant suffered an occupational disease in the course and scope of his employment with the Employer. Any claim for medical benefits is denied.

ORDER

It is therefore ordered that Claimant's claim for workers' compensation is denied and dismissed. Claimant's request for medical treatment is also denied.

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

DATED: October 5, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUE

The issue whether the subacromial decompression recommended by Dr. Eric McCarty is reasonable, necessary, and related to the admitted injury was raised for consideration at hearing.

FINDINGS OF FACT

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

1. Claimant worked for Respondent as a recess supervisor. His responsibilities included monitoring children and leading them in recreational activities.

2. On August 7, 2013, while Claimant was moving children into a gymnasium out of the rain, he was struck by an I-beam weighing between 70 and 90 lbs.

3. Claimant was seen at Timberline Medical on September 4, 2013. He reported neck pain and blurred vision.

4. Claimant reported left shoulder pain in January 2014 and an MRI was ordered.

5. The MRI done on February 6, 2014 showed tendinopathy of the shoulder tendons and no evidence of deep partial thickness or full thickness rotator cuff tendon tear; concave under surface type II acromion with lateral down sloping. Acromioclavicular joint degenerative change with inferior osteophyte formation, mild degenerative osteoarthrosis, and chondromalacia of the glenohumeral joint, and trace subacromial sub deltoid bursitis.

6. Claimant was referred to Dr. Joseph Hsin for an orthopedic consult. He saw Claimant on March 5, 2014.

7. Dr. Hsin reviewed the MRI and gave Claimant an injection. Dr. Hsin indicated he did not find anything operative at that time. He released Claimant to follow up, as needed.

8. A report dated April 7, 2014, by Lorraine Scott, PAC determined that left shoulder symptoms were resolved.

9. Dr. Thurston's note of August 12, 2014, noted that Claimant's left shoulder range of motion had returned to normal and symptoms had resolved.

10. Claimant underwent an independent medical examination (IME) by Dr. Elizabeth Bisgard on August 17, 2015.

11. Dr. Bisgard noted that the left shoulder symptoms had resolved as of August 17, 2015, by Claimant's report.

12. Dr. Eric McCarty recommended subacromial decompression surgery for the left shoulder on January 4, 2016, because Claimant had recurrent pain and recurrent symptoms of impingement.

13. On January 12, 2016, Dr. Bisgard opined: that Claimant had preexisting degenerative changes in his left shoulder, that as a result of his work related injury, he developed symptoms of impingement; his left shoulder symptoms had resolved as of August 12, 2014, with full range of motion; and on December 4, 2014, Dr. Long reported full range of motion and no evidence of impingement in the left shoulder.

14. Dr. Bisgard testified by deposition that at her exam she did not find any signs of impingement; the impingement he had because of the traumatic injury had resolved by the time she examined him and that his subsequent impingement is due to his age and a natural progression of the underlying disorder not associated with the injury. Dr. Bisgard credibly testified that the symptoms that appeared in January 2016 were not related to the work accident.

15. Dr. Bisgard testified that she is Level II accredited by the Colorado Division of Workers' Compensation and has extensive training and experience in causation analysis in occupational injuries. Dr. Bisgard's opinion as an occupational medicine expert was more credible and persuasive than the opinion of Dr. McCarty, an orthopedic surgery expert.

CONCLUSIONS OF LAW

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

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

3.When determining credibility, the fact finders should consider, among other things, the consistency or inconsistency of the witness testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Company v. Klein,* 98 Colo. 275, 57 P2d.

1205 (1936: *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192) (Colo. App. 2002).

4.Claimant contends that he has sustain his burden of proof to establish entitlement to an order awarding reasonably necessary and related medical treatment for his left shoulder injury. Respondents are liable for medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

5.Respondents may challenge the reasonableness and necessity of current or newly requested treatment not withstanding its position regarding previous medical care in a case. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The question of whether a particular medical treatment is reasonable, necessary, and related is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, Supra.* The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group v. Kim,* 804 P.2d 250 (Colo. App. 1990).

6.The Judge concludes that Claimant failed to sustain his burden of proof to establish that his claim for medical treatment is related to the work injury. The evidence established that Claimant initially had symptoms in his left shoulder following the incident on August 27, 2013. Claimant also had degenerative changes upon MRI and anatomical findings that predisposed him to shoulder impingement.

7.Dr. Bisgard's credible causation analysis relies on the fact that Claimant's symptoms of impingement resulting from the work injury resolved by August 12, 2014, and Claimant had full range of motion. Dr. Bisgard credibly opined that after treatment of the work injury impingement symptoms and resolution of those symptoms, the January 2015 recurrence of impingement symptoms was no longer related to the work injury but were a natural progression of the underlying degenerative process.

ORDER

IT IS THEREFORE ORDERED:

1. The request for left shoulder surgery by Dr. Eric McCarty is denied and dismissed.

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

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

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

DATED: October 5, 2016_

/s/ ***Margot W. Jones***

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

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Claimant proved by a preponderance of the evidence that his condition has worsened and his petition to reopen should be granted; and

b. Whether Claimant is entitled to an award of penalties under Section 8-43-304, C.R.S.

FINDINGS OF FACT

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

1. Claimant was born January 14, 1987, and was 29 years of age at the time of the hearing.

2. Claimant worked for Employer as a warehouse worker loading trailer trucks.

3. On July 24, 2014, Claimant was injured in the course and scope of his employment lifting an odd shaped package.

4. Claimant sustained an injury to his low back.

5. Claimant's authorized treating providers were at Concentra. Carrie Burns, M.D., documented Claimant had improved by March 13, 2015: "Improved, no pain. Self reported." (Exhibit B, Bates 000002) Under History of Present Illness: "Doing well. … Saw Dr. Aschberger yesterday and he thought there wasn't an impairment." (*Id.*) Under Review of Systems: "Musculoskeletal: no muscle pain and no back pain. Neurological: no tingling and no numbness." (*Id.*) Under Physical Exam: "Musculoskeletal: Moves easily about the room. … Lumbosacral spine: … no tenderness and full ROM. Straight leg raises negative bilaterally. No spasms." (*Id.*, Bates 000003)

6. Dr. Burns determined Claimant reached MMI with no impairment and released Claimant from care on March 13, 2015.

7. Respondents filed a Final Admission of Liability (FAL) on March 27, 2015. The FAL admitted to maintenance care with Dr. Aschberger over the next year. The FAL was not objected to and the case closed but for the admitted maintenance care.

8. Claimant continued working his physically demanding regular job after being placed at MMI.

9. On June 19, 2015, Claimant was re-examined by Dr. Aschberger. Claimant complained of a worsening of condition. Dr. Aschberger documented, “With work activities of bending and lifting, he has experienced overall worsening of symptomatology.” (Exhibit D, Bates 000006) Although Dr. Aschberger considered this related to the original date of injury, it is found this is not a natural progression of the industrial injury.

10. Correspondence submitted as evidence at hearing reflects that Claimant requested the Insurer’s claim file, in writing, from the third-party administrator (TPA), Broadspire, on September 23, 2015. Broadspire received this request, as reflected in the adjuster claim log, on September 30, 2015.

11. Claimant returned to Dr. Aschberger October 2, 2015. Dr. Aschberger noted Claimant was settling down from his flare-up. Dr. Aschberger noted, “He still gets some aggravation with repetitive bending and lifting at work.” (*Id.*) Physical examination was good. (*Id.*) Dr. Aschberger’s October 2, 2015, report does not support a worsening of Claimant’s July 24, 2014, industrial injury as a natural progression thereof.

12. Documentary evidence submitted at hearing reflected that Claimant again requested the claim file on October 22, 2015. On October 22, 2015, Insurer advised Claimant’s counsel via email that Sedgwick Claims Management (Sedgwick) was the TPA and Sedgwick had not received Claimant’s claim file from the prior TPA, Broadspire. In this email, Insurer advised Claimant that Sedgwick expected to receive the claim file on October 27, 2015. On October 26, 2015, via email, Claimant requested that Sedgwick deliver the claim file to him within 15 days of October 27, 2015.

13. Claimant argues that Respondents failed to produce the claim file until December 17, 2015. No direct evidence was presented at hearing concerning when the claim file was provided to Claimant. Claimant contends, in argument, that the claim file was produced on December 17, 2015, 70 days after his September 23, 2015, request and 51 days after the October 26, 2015, request for the claim file. It is found that Claimant made a prima facie showing that Respondents violated Section 8-43-203(4), C.R.S. by failing to timely produce the claim file. It is further found that Respondents failed to carry their burden of persuasion to establish their actions were reasonable.

14. Claimant was seen for an independent medical evaluation (IME) at his attorney’s request by Dr. Yamamoto on November 3, 2015, even though Dr. Aschberger had advised Claimant that he could return to the doctor for treatment if there was significant aggravation or deterioration. Dr. Yamamoto documented significant symptoms in his IME. Claimant never returned to Dr. Aschberger despite the maintenance care admitted in the FAL. Dr. Yamamoto’s opinions are found to lack credibility and not persuasive.

15. Dr. D’Angelo performed an extensive records review and a detailed physical examination. She testified via deposition.

16. Dr. D’Angelo was offered and accepted as a level-II accredited medical expert. Dr. D’Angelo’s opinions are found credible and persuasive. The doctor testified that the onset of symptoms in June 2015 and those documented by Dr. Yamamoto in November 2015 do not represent or support a worsening of the July 2014 industrial injury as a natural progression thereof.

17. Dr. D’Angelo credibly testified that Claimant has a worsening of condition but it is a worsening of his pre-existing osteoarthritis not a worsening of his work condition. Dr. D’Angelo explained her opinion, noting that Claimant’s complaints following his July 2014 work injury had resolved completely by February 2015, when he presented to Dr. Aschberger with no complaints of pain and had a normal physical examination. Consequently, Dr. Aschberger did not feel Claimant required assignment of an impairment rating. Dr. D’Angelo pointed out that Dr. Burns’ initial assessment of Claimant’s injury was lumbar sprain. There were no findings of radiculopathy and no findings of disc herniation at all. Dr. D’Angelo pointed out that Dr. Burns’ initial assessment of Claimant’s injury was lumbar sprain. There were no findings of radiculopathy and no findings of disc herniation at all.

18. Looking at Dr. Burns’ exam of March 13, 2015, Dr. D’Angelo noted Dr. Burns made absolutely no objective findings of radiculopathy. Dr. D’Angelo explained that objective findings are noted in the physical findings or an EMG, not in the assessment. Dr. D’Angelo opined that the mention of radiculopathy in the assessment was an unfortunate byproduct of the electronic medical records system.

19. Dr. D’Angelo noted that when Claimant first complained of radicular pain to his left leg in May 2015, ten months after his injury and three months after MMI, this was a new symptom as during the entirety of his prior treatment course he had only one episode of left leg focal “tingling,” which resolved quickly and completely. Dr. D’Angelo also noted that the August 25, 2014, MRI, one month and one day after Claimant’s work injury, revealed L5 pars fractures with associated L5-S1 degenerative disc protrusion, not an acute injury. The radiologist documented a small L5-S1 disc protrusion with no dural sac or root sleeve involvement. Dr. D’Angelo also noted that the repeat of the MRI one year later, August 24, 2015, revealed progression of Claimant’s underlying pre-existing disc desiccation with increased disc herniation at L5-S1.

20. Dr. D’Angelo credibly explained Claimant’s increased disc herniation was a normal progression of his underlying osteoarthritis or degenerative spine disease at L5-S1. Dr. D’Angelo explained that osteoarthritis of the spine is not caused by an injury, and, from a medical standpoint, aggravation of osteoarthritis lasts approximately 2 to 3 months. She also explained that neither of Claimant’s underlying conditions, the pars fracture nor the osteoarthritis, predispose him to injury. “[T]he only thing osteoarthritis in a pars fracture will predispose you to is not injury of the spine, but to pain symptoms due to those underlying anatomical abnormalities.” She noted that Claimant’s

presentation of waxing and waning symptoms are not medically anticipated with acute disc herniation. If a patient has an acute disc herniation at L5-S1 on his date of injury, it is medically anticipated he would have developed symptoms of radiculopathy, with the greatest pain complaints temporally associated with his injury.

21. She opined that progression of disc desiccation seen on Claimant's MRI is the natural history of degenerative spine disease, not a result of his work injury. Similarly, the increased symptoms described by Claimant one year after his work injury, after a complete pain resolution, are the natural history of degenerative spine disease, not a result of his work injury. Dr. D'Angelo noted that at her April 4, 2016, independent medical evaluation, she found no objective evidence of neurological deficits or motor strength loss, muscle atrophy or even straight leg raising pain. She explained this is not consistent with symptomatic disc herniation with neurological impingement.

22. It is specifically found Claimant failed to meet his burden of proof. It is specifically found Claimant's complaints of increased symptoms in June and November 2015, and as testified to at hearing do not establish a worsening of condition as a natural progression of the July 24, 2014 industrial injury.

23. It is found that Dr. D'Angelo's opinions are more credible and persuasive than those contained in Dr. Yamamoto's, Dr. Sacha's, and Dr. Aschberger's written reports. Dr. D'Angelo reviewed medical records which support the conclusion that Claimant's complaints in November 2015 were not related to the industrial injury. Rather, the records reflect that the symptoms documented by Dr. Aschberger in June and October 2015 and Dr. Yamamoto's documentation in November 2015 were as a result or a natural consequence of Claimant's underlying pre-existing degenerative conditions, not caused by the industrial injury.

24. It is found that Claimant failed to sustain his burden of proof to establish that his petition to reopen should be granted. It is found Claimant's complaints of increased symptoms in June and November 2015 did not establish a worsening of his work related condition. Therefore, the petition to reopen is denied.

CONCLUSIONS OF LAW

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

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

must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936) (overruled on other grounds in *Lockwood v. The Travelers Insurance Company*, 498 P.2d 947, 952 (Colo. 1972)).

4. In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Petition to Reopen

5. A workers' compensation "award" may be reopened within six years after the date of injury on the ground of fraud, an overpayment, an error, a mistake, or change in condition. Section 8-43-303(1), C.R.S. A change in condition refers either "to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that can be causally connected to the original compensable injury." *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 330 (Colo. 2004).

6. The party seeking to reopen an issue or claim bears the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S. A claimant has the burden of proof in seeking to reopen a claim for a worsened condition. *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756, 758 (Colo. App. 2000).

7. The reopening authority granted to an ALJ by Section 8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ." *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177, 1181 (Colo.App.1996). Moreover, whether the claimant's condition is due to the natural progression of a pre-existing condition or a new industrial accident is one of fact for resolution by the ALJ. *Pavelko v. Southwest Heating and Cooling, LLC*, W.C. No. 4-897-489-02 (ICAO 9/4/15) (citing *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999)). Further, whether the claimant proved

a worsened condition, and whether the worsening was causally related to the industrial injury, are factual issues for resolution by the ALJ. *Id.*

8. As found, Dr. D'Angelo's opinion that Claimant has not experienced a worsening of his work injury is credible and persuasive. Dr. D'Angelo testified that Claimant has a worsening of condition but it is a worsening of his pre-existing osteoarthritis not a worsening of his work condition.

9. In contrast, Dr. Yamamoto, Dr. Sacha, and Dr. Aschberger do not differentiate symptoms related to Claimant's pre-existing condition from those related to his work injury.

10. Based upon a complete review of the evidence, it is concluded that Claimant has failed to prove by a preponderance of the evidence that his claim should be reopened. The ALJ concludes as a matter of law that based upon the credible and persuasive evidence it is more likely than not that Claimant has not sustained a worsening of condition that is a natural progression of or causally related to the industrial injury since being placed at MMI on March 13, 2015. The ALJ finds and concludes the opinions of Dr. D'Angelo are more credible and persuasive than those of Dr. Yamamoto, Dr. Sacha, and Dr. Aschberger.

11. In light of the ALJ's findings and conclusions on Claimant's petition to reopen, the ALJ need not address Claimant's request for medical benefits or temporary total disability benefits.

Penalties

12. Claimant established by a preponderance of the evidence that Respondents failed to comply with Section 8-43-203(4), C.R.S. when Respondents did not timely provide the claims file. Claimant seeks a penalty under Section 8-43-304(1), C.R.S. for Respondents failure to comply with a provision of the Act under Section 8-43-203(4), C.R.S. Claimant argues Respondents failed to timely produce the claims file until December 17, 2015. Claimant contends that providing the claim file on December 17, 2015, is 70 days after his September 23, 2015, request and 51 days after the October 26, 2015, request for the claim file.

13. Claimant contends that he is entitled to penalties under Section 8-43-304, C.R.S. for Respondent's failure to comply with Section 8-43-203(4), C.R.S. and that Claimant is entitled to a penalty for each day that Respondents failed to produce the claim file. Claimant contends that Respondents delay in producing the claim file caused unnecessary litigation and harmed Claimant's ability to timely assess his case.

14. Respondents contend that no penalty is warranted because Sedgwick did not have the claim file and therefore could not provide a copy of the claim file to Claimant until the file was received by Sedgwick from Broadspire.

15. Whether statutory penalties may be imposed under Section 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1,000 per day where the insurer “violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel....” Thus, the ALJ must first determine whether the insurer’s conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable.

16. The reasonableness of the insurer’s action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.*, W.C. No. 4-187-261 (I.C.A.O. August 2, 2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of “unreasonableness”). However, there is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996).

17. The question of whether the insurer’s conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a provision of the Act. If the claimant makes such a prima facie showing, the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office*, *supra*, *Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999).

18. In this case, Claimant made a prima facie showing that Respondents violated Section 8-43-203(4), C.R.S., by failing to provide Claimant’s claim file by October 8, 2015, or fifteen days from the date of mailing of Claimant’s first request for the claim file. Therefore, the burden of persuasion shifted to Respondents to show that their conduct was reasonable. Respondents did not carry their burden of persuasion to show that their conduct was reasonable. Respondents did not explain the delay in producing the claim file beyond Respondents’ October 26, 2015, email advising Claimant that Respondents were not in possession of the claim file. Thereafter, there is no explanation for the delay in producing the file.

19. Accordingly, it is concluded that Claimant is entitled to award of penalties under Section 8-43-304(1), C.R.S. Claimant is award $25.00 per day for each of the 70 days Respondent failed to produce the claim file, or an amount of $1,750.00.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen is denied.

2. Claimant is awarded penalties under Section 8-43-304(1), C.R.S. for failure to comply with Section 8-43-203(4), C.R.S. Respondents shall pay Claimant $1,750.00 for failure to timely produce his claim file.

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

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

DATED: October 5, 2016

/s/ *Margot W. Jones*

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that, because Respondents failed to timely deny his requests for prior authorization for a lumbar MRI and an intra-articular left hip injection, the procedures were deemed authorized pursuant to WCRP 16-9 & WCRP 16-10.

2. Whether Claimant has established by a preponderance of the evidence that a lumbar MRI and an intra-articular left hip injection constitute reasonable, necessary and causally related medical treatment for his July 27, 2012 industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a Forklift Operator. On July 27, 2012 he suffered admitted industrial injuries to his lower back, buttocks and left hip during the course and scope of his employment with Employer. Claimant slipped on soap and fell into his forklift.

2. After a course of conservative treatment Authorized Treating Physician (ATP) Jeffrey A. Wunder, M.D. determined that Claimant had reached Maximum Medical Improvement (MMI) on June 3, 2013. He assigned a 15% left lower extremity impairment rating. Dr. Wunder noted that Claimant suffered chronic left hip pain, a left acetabular laberal tear and degenerative osteoarthritis.

3. Claimant challenged Dr. Wunder's MMI determination and sought a Division Independent Medical Examination (DIME). On October 23, 2013 Claimant underwent a DIME with Wallace K. Larson, M.D. Dr. Larson determined that Claimant had not reached MMI and recommended a total hip arthroplasty. He noted that Claimant had not suffered any impairment to the lumbar spine.

4. On May 20, 2015 Claimant underwent a total left hip arthroplasty with Joshua Snyder, M.D. Dr. Snyder remarked that the hip implant was satisfactorily stable.

5. Claimant returned to Dr. Wunder for medical care. On May 27, 2015 he drafted a letter to Insurer noting that Claimant was experiencing surgical complications and had an unsteady gait. Dr. Wunder requested home health care assistance for Claimant.

6. On September 24, 2015 Claimant returned to Dr. Snyder for an examination. Dr. Snyder remarked that Claimant had been recovering well but began to experience increasing pain along the inside of his thigh down to the knee. Claimant

was required to use crutches. Dr. Snyder recommended strengthening of the adductor and decreased activity.

7. On November 16, 2015 Claimant returned to Dr. Wunder for an examination. Claimant reported pain primarily in the medial right thigh. Dr. Wunder diagnosed Claimant with chronic left hip pain and “S/P left THA.” He explained that Claimant required an “electrodiagnostic study to make sure there is no abnormality of the obturator nerve causing pain in the medial left thigh.” Dr. Wunder also referred Claimant to Dr. Pouliot “to consider [an] intra-articular injection of his left hip.”

8. Dr. Wunder’s Patient Care Coordinator and Medical Assistant Shurri Shaffer testified that her job duties include obtaining authorizations for referrals and medical care. She explained that when she needs to obtain prior authorization for a referral or procedure she FAXes a copy of Dr. Wunder’s referral, the M-164 Form and the dictated note for the date of service to the insurance adjuster.

9. Ms. Shaffer commented that on November 17, 2015 she sent Dr. Wunder’s November 16, 2015 hand-written referral, an M-164 Form and office dictation by facsimile to Insurer’s adjuster Kimberly Harrington requesting the intra-articular left hip injection. However, she never received any response from Insurer.

10. On November 19, 2015 Claimant visited Dr. Snyder for an examination. Dr. Snyder remarked that Claimant had been doing well after his total left hip arthroplasty but began experiencing increasing pain in the medial thigh of his left leg. On physical examination Claimant exhibited tenderness to palpation along his adductor and tenderness in his knee. Although Claimant had numbness along the “lateral femoral cutaneous nerve distribution” Dr. Snyder could not explain the reason for the symptoms. He noted that “I do not think that it is related to his total hip as he was doing well with it when it began to hurt.”

11. On December 17, 2015 Claimant returned to Dr. Wunder for an evaluation. Claimant reported continuing back and left leg pain. Dr. Wunder determined that it was not clear whether Claimant’s chronic left hip pain was work-related. He prescribed a “lumbar MRI scan to make sure that there [was] no high lumbar disc protrusion which could be responsible for his left groin and thigh pain.”

12. Ms. Shaffer testified that on December 17, 2015 she sent Dr. Wunder’s hand-written prescription referral, M-164 Form and office dictation requesting a left hip injection and lumbar MRI to Insurer. Ms. Shaffer never received a response.

13. On January 18, 2016 Claimant again visited Dr. Wunder for an examination. Claimant reported continuing left hip pain. Dr. Wunder noted that he had ordered a lumbar MRI scan that had not been authorized. He again recommended an MRI scan of the lumbar spine to determine whether there was a “lumbar contribution to his pain.” Dr. Wunder also recommended a left hip injection. He commented that, after the completion of the preceding diagnostic procedures, he would possess additional information about recommendations for further treatment and MMI.

14. Ms. Shaffer explained that on January 19, 2016 Ms. Shaffer sent Dr. Wunder's hand-written prescription referral, M-164 Form and office dictation requesting a left hip injection and lumbar MRI to Insurer. She never received a response.

15. On March 29, 2016 Claimant underwent an independent medical examination with Jorge O. Klajnbart, M.D. After reviewing Claimant's medical records and performing a physical examination, Dr. Klajnbart responded to several interrogatories. Initially, he diagnosed Claimant with a muscle/tendon injury of the left hip and mild, degenerative, pre-existing left hip arthrosis. Dr. Klajnbart remarked that the lumbar MRI recommended by Dr. Wunder was not related to Claimant's July 27, 2012 industrial accident. He detailed that Claimant's EMG/nerve conduction study did not reveal any lumbar radiculopathy and only one physical therapy note documented any back pain. Dr. Klajnbart summarized that Claimant's soft tissue injury had resolved as reflected in the medical records and there was thus no evidence to proceed with a lumbar MRI.

16. Dr. Klajnbart also addressed Dr. Wunder's request for a fluoroscopic guided intra-articular injection. He explained that the injection was not necessary to bring Claimant to MMI because he reached MMI approximately one year after his May 20, 2015 total left hip arthroplasty. Dr. Klajnbart commented that there was no evidence in the medical records suggesting any kind of infectious process or hardware loosening.

17. On May 11, 2016 Insurer sent a letter to Dr. Wunder addressing medical treatment for Claimant's July 27, 2012 industrial injuries. The letter specified that the "medical providers should proceed with whatever treatment is necessary in regard to [Claimant's] injury." The correspondence explained that all medical records would be reviewed "to determine if the treatment rendered was reasonable, necessary and related to the work-injury for payment consideration." The letter noted that Insurer might seek the opinion of "an outside medical professional to assist with such review and determination."

18. Claimant testified at the hearing in this matter. He explained that, after he received the MRI referral from Dr. Wunder on December 19, 2015, he attempted to obtain the MRI at Fort Collins MRI. However, he was advised that he needed prior authorization from Insurer to undergo the procedure.

19. Dr. Wunder also testified at the hearing in this matter. He clarified that injecting Claimant's left hip with a local anesthetic and completing the lumbar MRI would assist in diagnosing the root of Claimant's increased symptoms. Absent the diagnostic tests he would be unable to furnish a final diagnosis. Dr. Wunder explained that the tests were reasonable, necessary and related to Claimant's industrial injury. The tests were necessary to determine an appropriate diagnosis and course of treatment. Dr. Wunder remarked that after he requested prior authorization for the lumbar MRI and left hip injection on November 16, 2015, December 17, 2015 and January 18, 2016 he did not receive any response from Insurer.

20. On August 18, 2016 the parties conducted the post-hearing evidentiary deposition of Dr. Klajnbart. He explained that the purpose of the fluoroscopic guided intra-articular hip injection would be to determine the site of Claimant's continued pain. Dr. Klajnbart testified that it would be reasonable from a diagnostic standpoint. He remarked that the lumbar MRI was likely reasonable but not related to Claimant's industrial injury. Claimant had not suffered significant lower back pain for some time and the EMG/nerve conduction study had yielded normal results.

21. Claimant has demonstrated that it is more probably true than not that, because Respondents failed to timely deny his requests for prior authorization for a lumbar MRI and an intra-articular left hip injection, the procedures were deemed authorized pursuant to WCRP 16-9 & WCRP 16-10. The record reveals that Claimant visited Dr. Wunder for examinations on November 16, 2015, December 17, 2015 and January 18, 2016. Dr. Wunder recommended or prescribed a lumbar MRI and an intra-articular left hip injection at the evaluations. Ms. Shaffer credibly commented that on November 17, 2015 she sent Dr. Wunder's November 16, 2015 hand-written referral, an M-164 Form and office dictation by facsimile to Insurer's adjuster Kimberly Harrington requesting prior authorization for an intra-articular left hip injection. However, she never received any response from Insurer. Furthermore, Ms. Shaffer also detailed that on December 17, 2015 and January 18, 2016 she again requested prior authorization from Insurer for a left hip injection and lumbar MRI by submitting Dr. Wunder's hand-written referrals, M-164 Forms and office dictation. However, Insurer again failed to respond to the requests.

22. WCRP 16-9(F) specifies that a completed prior authorization request requires the provider to concurrently explain the reasonableness and medical necessity of the services requested and provide relevant supporting medical documentation. The medical documentation includes materials "used in the provider's decision-making process to substantiate the need for the requested service or procedure." Dr. Wunder's office notes from November 16, 2015, December 17, 2015 and January 18, 2016 reflect that he recommended or prescribed a lumbar MRI and an intra-articular left hip injection. Furthermore, Ms. Shaffer's credible testimony reflects that she requested prior authorization for the procedures by submitting Dr. Wunder's hand-written referrals, M-164 Forms and office dictation to Insurer's adjuster. The supporting medical documentation apprised Insurer of the reasonableness and necessity of the services requested. Because Insurer failed to respond to Dr. Wunder's requests for a lumbar MRI and an intra-articular left hip injection within seven business days, the procedures were deemed authorized pursuant to WCRP 16-9 & WCRP 16-10. It is thus unnecessary to address whether Claimant has established that it is more probably true than not that a lumbar MRI and an intra-articular hip injection constitute reasonable, necessary and causally related medical treatment for his July 27, 2012 industrial injuries.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured

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

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

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

4. W.C.R.P. 16-9(C) provides that prior authorization for a procedure may be granted immediately and without medical review. However, payers are required to respond to all providers requesting prior authorization within seven business days from receipt of the provider's completed request under W.C.R.P. 16-9(F). The duty to respond to a provider's written request applies regardless of who transmitted the request.

5. WCRP 16-10(A) explains that, "if the payer contests a request for prior authorization for non-medical reasons as defined under section 16-11(B)(1), the payer shall notify the provider and parties, in writing, of the basis for the contest" within seven business days from receipt of the completed request under WCRP 16-9(F). Moreover, WCRP 16-10(E) specifies that the failure of a payer to timely respond to a request for prior authorization shall be "deemed authorization for payment" unless a hearing is requested or the requesting provider is notified that the matter is proceeding to a hearing.

6. WCRP 16-9(F) defines a "completed request" for prior authorization as follows:

> To complete a prior authorization request, the provider shall concurrently explain the reasonableness and the medical necessity of the services requested, and shall provide relevant supporting medical documentation. Supporting medical

documentation is defined as documents used in the provider's decision-making process to substantiate the need for the requested service or procedure.

(1) When the indications of the Medical Treatment Guidelines are met, no prior authorization is required. If the provider requests prior authorization for payment, the following documentation is recommended:

(a) An adequate definition or description of the nature, extent, and necessity for the procedure;

(b) Identification of the appropriate Medical Treatment Guideline application to the requested service;

(c) Medical Treatment Guideline indications have been met; and

(d) Final diagnosis.

7. Claimant asserts that, because Respondents did not properly deny the requests for prior authorization of the lumbar MRI and an intra-articular hip injection on November 16, 2015, December 17, 2015 and January 18, 2016, the procedures were deemed authorized pursuant to WCRP 16-9 & WCRP 16-10. Respondents reply that Dr. Wunder's requests for prior authorization did not constitute "completed requests" pursuant to WCRP 16-9(F). Respondents claim that they were thus not required to respond.

8. As found, Claimant has demonstrated by a preponderance of the evidence that, because Respondents failed to timely deny his requests for prior authorization for a lumbar MRI and an intra-articular left hip injection, the procedures were deemed authorized pursuant to WCRP 16-9 & WCRP 16-10. The record reveals that Claimant visited Dr. Wunder for examinations on November 16, 2015, December 17, 2015 and January 18, 2016. Dr. Wunder recommended or prescribed a lumbar MRI and an intra-articular left hip injection at the evaluations. Ms. Shaffer credibly commented that on November 17, 2015 she sent Dr. Wunder's November 16, 2015 hand-written referral, an M-164 Form and office dictation by facsimile to Insurer's adjuster Kimberly Harrington requesting prior authorization for an intra-articular left hip injection. However, she never received any response from Insurer. Furthermore, Ms. Shaffer also detailed that on December 17, 2015 and January 18, 2016 she again requested prior authorization from Insurer for a left hip injection and lumbar MRI by submitting Dr. Wunder's hand-written referrals, M-164 Forms and office dictation. However, Insurer again failed to respond to the requests.

9. As found, WCRP 16-9(F) specifies that a completed prior authorization request requires the provider to concurrently explain the reasonableness and medical necessity of the services requested and provide relevant supporting medical documentation. The medical documentation includes materials "used in the provider's decision-making process to substantiate the need for the requested service or

procedure." Dr. Wunder's office notes from November 16, 2015, December 17, 2015 and January 18, 2016 reflect that he recommended or prescribed a lumbar MRI and an intra-articular left hip injection. Furthermore, Ms. Shaffer's credible testimony reflects that she requested prior authorization for the procedures by submitting Dr. Wunder's hand-written referrals, M-164 Forms and office dictation to Insurer's adjuster. The supporting medical documentation apprised Insurer of the reasonableness and necessity of the services requested. Because Insurer failed to respond to Dr. Wunder's requests for a lumbar MRI and an intra-articular left hip injection within seven business days, the procedures were deemed authorized pursuant to WCRP 16-9 & WCRP 16-10. It is thus unnecessary to address whether Claimant has established that it is more probably true than not that a lumbar MRI and an intra-articular hip injection constitute reasonable, necessary and causally related medical treatment for his July 27, 2012 industrial injuries.

ORDER

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

1. Claimant's request for prior authorization for a lumbar MRI and an intra-articular left hip injection is granted. Respondents shall be financially responsible for the procedures.

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

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

DATED: October 5, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

The issue to be determined by this decision is whether the two-level cervical artificial disc replacement at C3-C4 and C4-C5 recommended by Dr. Chad Prusmack is reasonable and necessary to cure and relieve Claimant of the effects of his work injury.

FINDINGS OF FACT

1. The Claimant is a 50 year old male who has worked for the Employer as a construction foreman since November 24, 2014.

2. Claimant's job as construction foreman required him to install tile and stone in construction projects, and to supervise others who did such installation work. The job required climbing up ladders and scaffolds, hauling product, and setting tiles and stones for floors. He was a "working foreman."

3. On March 11, 2015, Claimant suffered an injury. Claimant testified that he was running up a scaffolding ladder and struck his head while wearing a hard hat.

4. Respondents filed a General Admission of Liability on May 1, 2015, and a second General Admission of Liability on July 17, 2015.

5. Claimant has received extensive conservative care and numerous injections since his date of injury. Claimant testified that he struggles to move his head at the neck and must move his whole body to see to the left or to the right.

6. Claimant's authorized treating providers at Castle Pines Urgent Care began treating him on March 12, 2015. Claimant presented with neck and back pain. On March 19, 2015, Claimant complained of dizziness, a headache, and transient numbness and tingling in his upper and lower extremities. A CT scan was ordered of his cervical spine.

7. Claimant underwent the CT scan on March 16, 2015. The scan revealed some mild degenerative changes, but there were no acute findings.

8. Claimant underwent an MRI of his cervical spine on March 27, 2015. The imaging revealed some inflammatory osteoarthropathy, mild annular bulges, and mild facet arthropathy.

9. Claimant's pain complaints persisted, and he was referred to Dr. Prusmack for a neurosurgical consultation on April 21, 2015. Dr. Prusmack reviewed Claimant's MRI and noted that he did not have any acute disc herniation or active

radiculopathy. He concluded that he did not see any indication as yet to consider a cervical discography. He recommended that Claimant continue physical therapy and he prescribed Valium and oral steroids.

10. On May 21, 2015, Claimant was evaluated by Dr. Larry Wilner at Castle Pines Urgent Care. Dr. Wilner noted that Claimant was stable, but not improving. He referred Claimant back to Dr. Prusmack. On June 22, 2015, Claimant was evaluated again at Castle Pines. He complained of numbness in his right hand and foot.

11. Dr. Prusmack examined Claimant again on July 6, 2015. He noted that Claimant had not shown any improvement, and he referred him for an epidural steroid injection at C7-T1. The request was reviewed by Dr. Lynne Fernandez on July 13, 2015. Dr. Fernandez concluded that it was unclear why Dr. Prusmack wished to inject that level because there was no indication on the MRI or physical exam to support a conclusion that an injection at this level would provide any relief. Dr. Prusmack appealed the denial on July 30, 2015. Dr. Prusmack stated that an injection at C7-T1 would adequately flood the length of Claimant's cervical spine from C2-T1. He noted that this would be the most efficient and cost effective way to address Claimant's pain complaints without requiring him to undergo multiple injections at individual levels. He noted that the injection was for therapeutic purposes only.

12. The injections were approved, and Dr. Giancarlo Checa performed the procedure on August 13, 2015. Before receiving the injection, Claimant reported to Dr. Checa that his pain radiated down his neck and into his right and left arms to the tips of his fingers. Following the injection, Claimant reported to Dr. Checa that he felt a 30% reduction of his pain.

13. On September 9, 2015, Claimant returned to Dr. Wilner and reported that the injection only provided relief for 72 hours, and that he actually felt worse. Claimant also reported paresthesia down his right arm.

14. Claimant returned to Dr. Prusmack on September 22, 2015. Dr. Prusmack referred Claimant for a cervical discogram. The request was reviewed by Dr. Floyd Ring, who recommended that Claimant first undergo a series of facet injections to see if those relieved his pain complaints.

15. Claimant underwent a left facet injection at C2-C3, and bilateral facet injections at C6-C7 and C7-T1 with Dr. Checa on November 11, 2015. Claimant reported no immediate relief from the injections. On December 9, 2015, Dr. Ring evaluated the discogram request for a second time. He concluded that the discogram was appropriate at that time due to the failure of the facet injections.

16. Around this same time, due to Claimant's ongoing complaints to Dr. Wilner of pain that travelled into his upper extremities bilaterally, accompanied by intermittent numbness and tingling, he was referred for an EMG and pain management evaluation.

17. On December 23, 2015, Dr. Levi Miller performed the EMG. It was negative for any evidence of a left or right median or ulnar neuropathy, cervical radiculopathy, brachioplexopathy, neurogenic thoracic outlet syndrome or generalized peripheral neuropathy.

18. Dr. Scott Primack evaluated the Claimant on January 4, 2016. Dr. Primack concluded Claimant was approaching maximum medical improvement, and he was not sure that surgical intervention would help Claimant.

19. On February 10, 2016, Claimant underwent a cervical discography with Dr. Robert Wright. Dr. Wright noted that Claimant had highly concordant pain responses at C3-C4 and C4-C5. He also noted annular tears at those levels. No pain response was documented at C5-C6, but Dr. Wright stated that the anatomy was normal at that level.

20. Claimant also underwent a CT scan with contrast on February 10, 2016. The radiologist noted contrast materials in the central nucleus at C3-C4, contrast material that extended to the outer annular margins at C4-C5, and annular tearing at C5-C6.

21. On February 24, 2016, Dr. Prusmack reviewed the discography results. Dr. Prusmack noted that Claimant had a reproduction of pain at C3-C4 and C4-C5, which was supported by annular tears at both levels. Dr. Prusmack stated that based on Claimant's lengthy intractable pain and failing conservative care, he recommended a two-level artificial disc replacement.

22. Dr. Michael Janssen, an orthopedic surgeon, reviewed the request for a two-level disc replacement and authored a report dated March 8, 2016. Dr. Janssen noted that, according to the Cervical Spine Treatment Guidelines, cervical discography is not the best predictor for the outcome of symptomatology of the neck. He recommended a denial of the surgery until an IME could be performed. Respondents scheduled an IME with Dr. Michael Rauzzino.

23. Dr. Rauzzino performed an IME of Claimant on April 9, 2016. In his report, Dr. Rauzzino concluded that given the radiographic findings, Claimant's mechanism of injury, Claimant's presentation, and his neurologic complaints, the requested surgery was unlikely to provide relief of Claimant's symptoms. Specifically, Dr. Rauzzino noted that the MRI that Claimant underwent on March 27, 2015, showed "no acute structural injury…that would have been caused by [Claimant's] work-related injury." Additionally, Dr. Rauzzino noted that Claimant did not present with any neurologic symptoms that correlate with the affected levels at C3-C4 and C4-C5.

24. During the IME, Dr. Rauzzino administered a Computerized Outcomes Management Technologies ("COMT") assessment. Claimant scored in the "Distressed-Somatic" category for psychosocial functioning. Dr. Rauzzino noted that based on his scores, it is possible that an examination of Claimant would not demonstrate an

objective correlation with his subjective complaints. He therefore felt that reliance on Claimant's subjective reports during the discogram was flawed. Dr. Rauzzino recommended a second MRI of Claimant's cervical spine, as his last study was a year old, as well as a psychological evaluation due to his delayed recovery and the findings on his COMT test.

25. On May 17, 2016, Claimant followed up with Dr. Wilner at Castle Pines Urgent Care. Dr. Wilner reviewed Dr. Rauzzino's IME report and noted that he was in agreement with Dr. Rauzzino that Claimant's mechanism of injury did not correlate with the degree of pain that he was exhibiting although Dr. Wilner admitted he would "defer to the specialist on this subject as they have more expertise in this area." Dr. Wilner concluded that a psychological evaluation and better pain management strategies would be the best course of action.

26. Claimant underwent the second MRI on May 26, 2016. The imaging revealed mild degenerative changes of C3-C4 down to C5-C6 without evidence of nerve root impingement or cord compression.

27. Dr. Rauzzino reviewed the MRI report and authored an addendum to his IME report on June 16, 2016. Dr. Rauzzino stated that there was no significant difference between the two MRIs. Specifically, Dr. Rauzzino commented that the MRI was "fairly normal" for Claimant's age, he had minor degenerative changes at multiple levels, and there was no significant central or foraminal stenosis. Dr. Rauzzino re-affirmed his opinion that the C3-C4 and C4-C5 artificial disc replacements are not medically reasonable or necessary.

28. Dr. Rauzzino testified via pre-hearing deposition as an expert in neurosurgery with an expertise in the treatment of cervical spine conditions, spinal surgery, and as a Level II accredited physician in the State of Colorado. He testified that Claimant's pain presentation is not necessarily different from the general population who complain of neck pain on a daily basis. Dr. Rauzzino testified that an important consideration in evaluating this type of surgery is to accurately define the pain generator by ensuring that there are consistent radiographic findings, neurologic findings and a consistent exam that excludes all other causes of pain. He noted that this ensures that when you remove a piece of that person's anatomy, you are as certain as possible that they actually have an acute structural injury that will benefit from the operation.

29. Dr. Rauzzino explained that Claimant did not meet the prerequisite qualifications for the requested surgery due to a number of factors. Dr. Rauzzino testified that Claimant's mechanism of injury was not consistent with sustaining an acute structural injury based on his description of what happened, the mechanism of the injury, and the radiographic findings.

30. Dr. Rauzzino further testified that Claimant actually had annular tears at three levels of his cervical spine, despite the fact that two levels were reported as positive for pain during the discogram. Additionally, Dr. Rauzzino noted that Dr. Wright

had failed to record the levels of pressure that he utilized as part of the discography which goes against the recommendations in the Medical Treatment Guidelines.

31. Dr. Rauzzino explained that objective findings are needed to corroborate the subjective pain complaints. Surgeons look for radiographic findings of a disc pressing against a nerve, or shooting pain down an arm to corroborate patients' subjective complaints. He testified that not only does Claimant have no nerve root impingement in his cervical spine, he no longer complains of shooting pains, and his EMG was normal. Furthermore, Dr. Rauzzino noted that the kind of radicular symptoms that Claimant has complained of do not correlate with the cervical discs that Dr. Prusmack wishes to remove. For example, during his IME, Claimant complained of areas of itching in his fingers which actually correspond to C5-C6 and C6-C7. Additionally, Dr. Rauzzino testified that the potential benefits that Claimant would receive from the proposed surgery are far outweighed by the risks associated with the disc replacement. Dr. Rauzzino explained that the risks of the proposed surgery were numerous and included, but were not limited to injury to the spinal cord and vocal cords, a spinal fluid leak, bleeding, and infection.

32. Dr. Rauzzino went on to testify that the Medical Treatment Guidelines only allow for a one-level artificial disc replacement. Dr. Rauzzino also reiterated in his testimony that Claimant should undergo a psychological evaluation before any further treatment is considered.

33. Dr. Prusmack testified at a post-hearing deposition. Dr. Prusmack is a board certified neurosurgeon who is also Level II accredited in the State of Colorado. Dr. Prusmack agreed with Dr. Rauzzino that there were no acute findings on Claimant's May 26, 2016 MRI but that the May 27, 2015 MRI shows an inflammatory osteoarthropathy of the C2-3 facet joints. He believes that MRIs, however, "are not good at showing acute versus chronic changes."

34. Dr. Prusmack has recommended a C3-C4, C4-C5 total artificial disc replacement for Claimant, a procedure which he believes is medically appropriate, necessary and related to the admitted work injury. He believes that conservative therapy has been exhausted in this case.

35. Dr. Prusmack testified that he believes that the recommended surgery has a 95% chance of providing Claimant with a 50% improvement or greater of his overall pain. Dr. Prusmack explained that his position is based on the theory that the annular tears found in Claimant's cervical spine are the source of his pain. He testified that the reason that Claimant has pain at C3-C4 and C4-C5 is due to the annular tears at those levels. He likened the pain response to someone who has a hairline fracture down to the nerve in their tooth which you cannot see, yet the person still has shooting pain whenever they bite down on something. He stated that it is impossible to know where that pain is localized because it looks normal. Dr. Prusmack testified that discs themselves have pain fibers, and when you tear a disc down to the nerve supply it will create pain, similar to a tooth.

36. Dr. Prusmack has performed 2,400 cervical surgeries. He has performed approximately between 200 and 300 artificial cervical disc replacements in his career. He has probably performed between 20 and 30 two level cervical disc replacement surgeries.

37. He answered Dr. Rauzzino's question about why he chose the 4 levels for the discogram that he did by stating: "So based off physics, the literature, and standardization, all neurosurgeons know C3 to C7 you do uniformly."

38. Dr. Prusmack opined that Claimant has a 95 percent chance of improvement of pain with the surgery. Pointing to his personal experience as a surgeon, he stated that 95 percent of his patients who get cervical discography have had a 50 percent or greater improvement in their overall pain.

39. Dr. Prusmack stated that of the two options for Claimant, fusion or artificial disc replacement, "All literature supports artificial disc outperforms fusion in the long run and short run." He explained that the recovery time is shorter for disc replacement because the physician is not waiting for the biologic process of fusion to occur, that Claimant's expected time to go back to normal daily activities would be two weeks, and that his ability to return to manual work would range between six weeks and 4.5 months.

40. Dr. Prusmack opined that the artificial disc is preferable to the fusion over time because, "[a]n artificial disc moves. There is [sic] long term studies showing that the reoperation rate in 10 years for a fusion is around 20 percent, not because you have to fuse a level above or below, [but] because of the adjacent additional stress you get from the fusion because you've restricted motion."

41. With reference to the Colorado Medical Treatment Guidelines, Dr. Prusmack opined:

a. Claimant is otherwise a candidate for fusion under p. 51, A,(iii) because he has persistent non-radicular pain, non-operative treatment has failed,, residual symptoms of pain and signs of functional disability are unacceptable at the end of six months of active treatment and/or frequent recurrences of symptoms cause serious functional limitations, all pain generators are identified by discography, and a psychosocial evaluation is not indicated because he saw there were no listed history or concerns of depression, anxiety, posttraumatic stress disorder, or medication for any psychological disease, and the Claimant is not a smoker.

b. With respect to indicators for a total artificial cervical disc replacement, he opined that the patient has met fusion surgery criteria, that the patient is expected to comply with pre and post-operative protocol, and that he, the surgeon, is well-versed in anterior spinal techniques.

c. With respect to the restriction to a one-level disc replacement, Dr. Prusmack opined that the Guidelines are not up to date because they do not refer to the two level FDA trial of artificial disc versus anterior fusion, which is now at the 8 year mark, and they do not reflect that the FDA approved two level disc replacement surgery within the last two years.

42. Dr. Prusmack opined that his experience with 20 to 30 two-level disc replacement surgeries "supersedes the antiquated guidelines". Dr. Prusmack opined:

> …if you were a logician, and one would say a two-level cervical fusion is allowed, and you believe that a two-level artificial disc is better than a cervical fusion, and you can logically understand that, if you prevent his gentleman from having an artificial disc replacement, you are preventing him from having the medically necessary care to make his outcome the most optimal, and you are contradicting a surgeon who is experienced in this particular field.

43. Dr. Prusmack predicted that Claimant would have an 80 percent reduction of overall pain.

44. He opined that the type of disc bulging seen on Claimant's MRI are related to the industrial accident and whiplash injury, deduced by his knowledge of the mechanism of injury and how the physics would cause this annular tearing and bulging.

45. Dr. Prusmack explained that Dr. Rauzzino is incorrect that the discogram also revealed that there was an annular tear at the level of C5-C6. However, the CT scan did show an annular tear at C5-C6.

46. Dr. Prusmack testified that the Medical Treatment Guidelines do not recommend two-level artificial disc replacements because they are outdated, and the FDA approved two-level artificial disc replacements approximately two years ago. He admitted though that he had not read the Medical Treatment Guidelines with respect to artificial cervical disc replacements recently.

47. Dr. Prusmack also discussed the need for a psychological evaluation before surgery briefly in his testimony. He noted that because Claimant does not have a history or concerns of depression, anxiety, post-traumatic stress disorder, or medication for a psychological disease, he did not feel a psychological evaluation would be necessary.

48. Dr. Rauzzino drafted a rebuttal report in response to Dr. Prusmack's deposition testimony. Dr. Rauzzino explained that the idea that annular tears cause pain in the manner described by Dr. Prusmack is not as clear as it seems. Dr. Rauzzino noted that when surgeons perform spinal surgery they will typically remove a disc fragment and enlarge a hole in the spinal column to remove more pieces of a disc. When this occurs, the patient has a large hole in the annulus of their disc, however such

patients typically do not experience severe pain despite having a large hole in the annulus. However, if there is a causal relationship between annular tears and pain, one would expect the annular tear present at C5-C6 to be painful as well.

49. Dr. Rauzzino noted in his rebuttal report that two-level disc replacements are not generally accepted by all treating providers as the best treatment option when surgically treating claimants with neck pain. He stated that, regardless of Dr. Prusmack's assertions, the Medical Treatment Guidelines were written to exclude two-level disc replacements based on the authors' review of the current literature.

50. Dr. Rauzzino also called into question Dr. Prusmack's assertion that he guaranteed Claimant would have a 50% or more reduction in his pain. He stated that he did not believe that any literature supports Dr. Prusmack's position of being able to predict a 95% chance of a 50% or greater improvement of pain based on a discography alone.

51. In concluding his testimony, and in his rebuttal report, Dr. Rauzzino reiterated that the benefits of the recommended surgery are far outweighed by the risks associated with the surgery, and that there is not enough objective evidence to justify assuming those risks. He concluded that if he honestly believed that the proposed surgery would improve Claimant's functional and clinical outcomes and reduce his pain, then he would have no problem recommending authorization of the surgery. However, Dr. Rauzzino remained adamant that the clinical evidence that is present at this point does not indicate that Claimant would benefit from the surgery, nor does it indicate that Claimant should assume the risks of such a surgery.

52. The Claimant has failed to meet his burden of proving that the two-level artificial disc replacement surgery is reasonable, necessary and related to the industrial injury. Dr. Rauzzino's opinions regarding the proposed surgery were more credible and persuasive than Dr. Prusmack's. More particularly, Dr. Rauzzino's testimony and reports illustrated the difference between the subjective and objective findings in this case. The ALJ also credits Dr. Rauzzino's opinion that Claimant did not have pathology which warranted the proposed surgery. The ALJ notes that Dr. Rauzzino's opinions are consistent with the opinions of Dr. Primack, Dr. Wilner and Dr. Janssen in regard to Claimant's pain presentation, need for a psychological evaluation, and Claimant's current candidacy for the surgery in general. Dr. Prusmack's opinion regarding the sufficiency of the discogram, identity of the pain generator, and Claimant's need for surgery is an outlier opinion outweighed by the other evidence. Finally, the ALJ credited Dr. Rauzzino's opinion that the potential risks of the surgery outweigh the potential benefits.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

6. As found, the Claimant has failed to meet his burden of proving that the cervical spine two-level artificial disc replacement surgery is reasonable, necessary and related to the industrial injury. Dr. Rauzzino’s opinions regarding the proposed surgery were more credible and persuasive than Dr. Prusmack’s. More particularly, Dr.

Rauzzino's testimony and reports illustrated the difference between the subjective and objective findings in this case. The ALJ also credits Dr. Rauzzino's opinion that Claimant did not have pathology which warranted the proposed surgery. The ALJ notes that Dr. Rauzzino's opinions are consistent with the opinions of Dr. Primack, Dr. Wilner and Dr. Janssen in regard to Claimant's pain presentation, need for a psychological evaluation, and Claimant's current candidacy for the surgery in general. Dr. Prusmack's opinion regarding the sufficiency of the discogram, identity of the pain generator, and Claimant's need for surgery is an outlier opinion outweighed by the other evidence. Finally, the ALJ credited Dr. Rauzzino's opinion that the potential risks of the surgery outweigh the potential benefits.

ORDER

It is therefore ordered that:

1. Claimant's request for a two-level cervical spine artificial disc replacement surgery is denied and dismissed.

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

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

DATED: October 7, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

The issues to be determined by this decision are the following issues:

- Whether Claimant overcame the Division Independent Medical Examination (DIME) physician's opinions that Claimant reached maximum medical improvement (MMI) on June 11, 2015.

- Whether Claimant is entitled to medical benefits, including post-MMI medical benefits, in the form of an arthroplasty/full knee replacement.

FINDINGS OF FACT

1. Claimant is a traffic control supervisor for the Employer. His job duties involved driving and setting up traffic barricades. He sustained an injury to his right-knee during the course and scope of his employment on December 18, 2014, as a result of a fall. This is an admitted claim with an initial general admission of liability filed on January 27, 2015.

2. Dr. Cynthia Lund acted as Claimant's primary treating physician for this claim. Claimant initially underwent conservative treatment. Dr. Lund eventually referred Claimant for an MRI and to Dr. David Walden for an orthopedic consultation.

3. On February 13, 2015, Dr. Walden performed a right knee arthroscopy, which included a partial medial meniscectomy and right knee chondroplasty patella. Dr. Walden's post-operative diagnoses included right knee medial meniscal tear and right knee osteoarthritis with elements of pseudo-gout. Dr. Walden told Claimant that "arthroscopy was not curative for arthritis." Dr. Walden recorded his observations during the procedure, stating that the patellofemoral joint had significant osteoarthritic changes and elements of calcium crystal deposits.

4. Following his surgical procedure, Claimant continued to follow-up with Dr. Lund. He filled out a pain diagram on February 25, 2015, noting that his pain level was improved and that his pain was at 3/10 level. On that date, Dr. Lund wrote that Claimant stated that he had started physical therapy the week prior, and that his "ROM is slowly improving."

5. Claimant returned to Dr. Walden's office on March 10, 2015, where he was evaluated by Rachel Cerchia, PA-C. Claimant noted that his pain was diminishing.

6. On March 18, 2015, Claimant returned to Dr. Lund and again noted that his pain levels were at a 3/10, and that he was improving. His pain diagram noted that he had a greater activity level.

7. On April 7, 2015, Claimant again filled out a pain diagram in which he marked that he was improving, that his pain level was at a 2/10, and that he had an increased activity level. Dr. Lund remarked that Claimant "states he is doing better because PT is good." She also noted, "[m]inimal pain, gradually improving with ROM and strength with PT and HEP. No new complaints."

8. Claimant returned to Dr. Walden on April 21, 2015. Dr. Walden remarked that Claimant "reports that his knee is feeling better (approximately 80%)…." Claimant reported discomfort in and around the patellofemoral joint and anteromedial joint line. In an attempt to expedite Claimant's recovery and reduce swelling, Dr. Walden performed a steroid injection into the right knee. He noted that return to work could be considered if his knee continued to improve within the next week.

9. Claimant returned to Dr. Lund's office on April 29, 2015, where he again stated that he was improving, with pain level at a 2/10. Claimant also reported painful crepitance in the anterior right knee, and diffuse knee swelling. Claimant reported that Dr. Walden gave him a steroid injection, but he received no pain or swelling relief. Dr. Lund assessed probable aggravation of underlying osteoarthritis post-op.

10. Dr. Walden evaluated Claimant on May 19, 2015. Dr. Walden documented that the steroid injection given on April 21, 2015 was "not helpful." Claimant reported that had not returned to work, but his boss was willing to get him a helper for awhile so Claimant could attempt to ease back into normal work. Claimant expressed that he was hopeful he could get back to the heavy work he had previously performed but did not think he could yet. Dr. Walden noted that Claimant was slow to recover from the surgery, which may be attributable to the combination of arthritis and partial medial meniscectomy. Dr. Walden performed another steroid injection "in hopes of getting him from where is [sic] now to full duty."

11. The next day, May 20, 2015 Claimant returned to Dr. Lund. On his pain diagram, he marked that he had improved and that his pain level was at a 1-2/10. He was cleared to return to commercial driving and lift/carry up to 40 pounds.

12. On June 8, 2015, Claimant told his physical therapist, Heather Boehlke, DPT, that he felt 90% better, and was ready to return to normal work and activities.

13. A functional capacity evaluation (hereinafter "FCE") was performed by Michael Moore and Ashely Zimmerman at Excel Physical & Occupational Therapy on June 9, 2015. The purpose was "for assessment of right knee range of motion and current functional abilities as prescribed by his physician." The results of the FCE were considered valid, noting that Claimant "gave a reliable effort, with 6 of 6 consistency measures within expected limits." The FCE determined that he was able to push in the very heavy category, carry, pull and low-lift in the heavy category, and mid-lift and high-

lift in the heavy category. The FCE determined that Claimant was able to stoop or sit on a constant basis, walk, crouch or stand on a frequent basis, and kneel or climb stairs on an occasional basis.

14. Following the FCE, Claimant returned to Dr. Lund on June 11, 2015. On that date, Claimant relayed that he was ready to be released, and that his pain was at a 2/10. Dr. Lund cleared Claimant to return to full duty without restriction. Dr. Lund noted that Claimant's right-knee condition had stabilized, that it was not likely to improve with further active medical or surgical treatment, and that his degree of impairment was not likely to change more than 3% within the next year. Claimant was placed at MMI and assigned 25% impairment rating to his right-lower extremity. No maintenance care was prescribed but Claimant was advised to continue with home exercises.

15. Respondents filed a final admission of liability, and Claimant requested a DIME.

16. Claimant returned to work. Claimant's work schedule calendar notes that he began work again on June 14, 2015. His schedule documents that he continued to a work on a full-time basis through October 26, 2015.

17. Claimant did not seek any medical care between June 12, 2015 and October 26, 2015. On October 27, 2015, Claimant returned to Dr. Lund's office, where he was evaluated by Dr. Susan Fowler. At that time, Claimant stated that his right knee pain was at a 9/10, and that he could barely walk or straighten his knee. He denied re-injury, and claimed that "since the knee surgery his knee has never been the same." Claimant reported that he had been working and driving a lot. Claimant was given an injection and referred for another MRI.

18. The MRI of the right knee was done on October 27, 2015. The findings included moderate to severe thickening and scarring of the ACL, prior partial medial meniscectomy with more focal attenuation and fraying of the extreme posterior horn to root, likely in part post-operative although acute on chronic degenerative fraying/tearing cannot be excluded; moderate joint effusion with synovitis; grade 2-3 chondral wear; and at least 1-2 small osseous bodies are present.

19. Dr. Lund evaluated Claimant on November 2, 2015. Claimant reported his pain level was at a 7/10. Claimant "states knee always painful but worse and unable to tolerate wt. [bearing] x one month, after fall from truck and he also has been lifting a lot, up to 80 lb freq. at work for past 3-4 weeks. knee [sic] did pop." Dr. Lund suspected a "probable aggravation with heavy lifting…over past month at work with gradually increasing right knee pain. Also fell off truck 3 weeks ago, but does not think that he injured knee with that fall."

20. Dr. Lund referred the Claimant back Dr. Walden, who evaluated Claimant on November 9, 2015. Dr. Walden wrote that Claimant's "symptoms are emanating from overuse of his arthritic knee. Dr. Walden wrote that Claimant's job did not lead to his knee arthritis, but suggested that the meniscectomy could have aggravated the

condition. Diagnoses included chronic persistent symptoms from osteoarthritis. Dr. Walden referred Claimant to Dr. Michael Schuck regarding a total knee replacement.

21. On November 18, 2015, Dr. Timothy Sandell performed the DIME He found Claimant had reached MMI effective June 11, 2015. Claimant reported ongoing symptoms, but did not report any new injury. With regard to MMI, he wrote that he did believe that Claimant "was appropriately brought to MMI by his treating physicians. Therefore, I would agree with the MMI date June of 11, 2015. Dr. Sandell further wrote, that if an orthopedic surgeon opined that Claimant's ongoing problems were related to the original injury as opposed to normal wear and tear, he would need to be "taken off MMI status" to pursue potential surgical treatment. Respondents filed a final admission of liability consistent with the 19% impairment rating imposed by Dr. Sandell.

22. Dr. Michael Schuck and Andrew Dormer, PA, evaluated Claimant the next day, November 19, 2015. Mr. Dormer noted that Claimant had grade II and grade III degenerative changes in the knee at the time of the February 2015 procedure. Claimant reported that he had persistent pain following that right knee surgery, and underwent lengthy conservative treatment thereafter. Dr. Shuck noted, Claimant has experienced "steadily worsening symptoms for most of this year" without symptomatic relief from cortisone injections, viscosupplementation and physical therapy.

23. Dr. Schuck recommended arthroplasty. Dr. Shuck opined that Claimant's December 2014 injury aggravated his osteoarthritis.

24. Dr. Jon Erickson performed a record review regarding the proposed arthroplasty on behalf of the Insurer. He recommended denial of the request for the procedure because Claimant's "now symptomatic degenerative arthritis was not caused or aggravated by his work injury."

25. In response to a December 29, 2015 appeal from Dr. Walden, which remarked that the meniscectomy was to blame for the degeneration in Claimant's condition, Dr. Erickson wrote that "[this] is one of the reasons why, in the orthopedic literature, it is generally not recommended to perform arthroscopic debridement on the arthritic knee, simply because whatever benefits there might be are usually short term and have no effect on the progression of the patient's disease." Dr. Erickson went on to state that there was no way Dr. Walden's opinion can be proven. He also noted that osteoarthritis is a progressive disease, and Claimant went a full four months post-surgery without any reported pain. For these reasons he recommended continued denial of the procedure.

26. Claimant continued to follow-up with Dr. Lund through April 19, 2016. On that date Dr. Lund wrote that "at the time of MMI on 06-11-2015, [Claimant] desired to return to his regular job and completed work tasks on a Functional Capacity Evaluation which demonstrated that he was capable of returning to his regular job duties (lifting up to 50 lb)." She further wrote that "by mid-October, 2015, [Claimant] experienced increasing right knee pain and swelling with sense of instability after he had performed some repetitive, heavy lifting…." Dr. Lund noted that the Insurer denied the knee

arthroplasty and any further medical treatment. Dr. Lund placed Claimant at MMI a second time. She indicated that Claimant's knee is not likely to improve with further active medical intervention and he is in need of a total knee replacement. She opined that Claimant's function would improve with the knee replacement thereby improving his employability. She provided him a new rating. She apportioned the rating "since [Claimant] had a previous rating to this same knee for a work related injury of right knee on 06-24-2015."

27. Dr. Brian Lambden performed an IME on Respondents' behalf on June 21, 2016. Claimant told Dr. Lambden that the arthroscopy did not help, that the two steroid injections did not help, but may have masked his pain, but his knee was still not right. Dr. Lambden did not believe that the rapid degeneration in Claimant's knee condition was related to postoperative change alone "and likely there were other factors involved such as…abnormal response to steroid injections, presence of pseudogout crystal, or some type of unusual immunologic response." He remarked that the changes in Claimant's osteoarthritis "take many years to develop" and disagreed with Dr. Walden that the removal of the meniscus aggravated Claimant's condition. He recommended further workup to assess for pseudo-gout, and consideration of a repeat arthroscopy, before proceeding with any arthroplasty. He did not see significant joint destruction that would necessitate immediate total knee arthroplasty.

28. Claimant testified at hearing. He testified that when he was placed at maximum medical improvement, he could not bend or place weight on his knee. He stated that he relayed this information to Dr. Lund.

29. Claimant testified that Dr. Lund asked him to try to return to work to see if he could do his job. Claimant did return to work, and has he told Dr. Lund, the Employer gave him a helper. After Claimant returned to full duty work, his right knee pain increased.

30. Claimant testified that he needed to return to work because was concerned about losing his job.

31. Claimant testified on both direct and cross-examination that his pain overall only increased over time. Claimant testified that prior to his meniscectomy, his pain was usually at a level of 6-8/10. He testified that after he underwent the meniscectomy performed by Dr. Walden, he experienced no sustained improvement in his pain level, and that he only got worse.

32. After being confronted with the pain diagrams that he filled out at Dr. Lund's office, which indicated improvement in pain levels for months post-surgery, Claimant alleged some temporary relief. Claimant testified on cross-examination that he reported temporary pain relief on those days by chance, because injections that he received by Dr. Walden decreased his pain levels temporarily during his visits with Dr. Lund. Claimant denied that he ever told any of his physicians that the injections performed by Dr. Walden offered no relief. He also denied telling Dr. Lund that he felt a pop in his knee, as noted in her November 2, 2015 medical record.

33. Dr. Lambden testified by deposition post-hearing. He is specializes in physical medicine and rehabilitation. He is not an orthopedic surgeon. Dr. Lambden reiterated his belief that the surgical procedure did not advance Claimant's osteoarthritis, because "we do see a gradual increase in osteoarthritis over a 10- or 15-year period, but not over a 3- to 6-month period." He testified that pseudo-gout, or calcium pyrophosphate disease, is a typically genetic condition that deposits crystals in the knee joint, resulting in waxing and waning acute episodes of knee pain. He testified that claimant's post-surgery pain complaints are consistent with pseudo-gout. He testified that Claimant needed additional workup for pseudo-gout, including arthrocentesis and joint fluid analysis. He disagreed that an arthroplasty should be performed, because "even in the absence of pseudo-gout…his cartilage in his knee is not bone-on-bone. So it's not a typical recommendation for knee arthroplasty if you still have relatively decent cartilage in your knees."

34. Dr. Sandell testified by post-hearing deposition. He testified that he stood by his finding that Claimant was at MMI on June 11, 2015, based upon the information that he had at the time. He also testified that he agreed with Drs. Walden and Shuck that Claimant's need for a total knee replacement was work-related.

35. When asked whether it was reasonable to conclude that Claimant never reached MMI, Dr. Sandell testified that it "possible" that Claimant never actually reached MMI.

36. Dr. Sandell had not reviewed Dr. Lund's November 2, 2015 report, which documented Claimant engaging in heavy lifting and fall out of a truck. Dr. Sandell indicated that those two events were a concern, but that it is hard to understand the extent of any new injury. Dr. Sandell reiterated that Claimant was appropriately placed at MMI in June 2015, but then reiterated that the need for the total knee replacement surgery is related to the industrial injury.

37. Dr. Schuck testified by post-hearing deposition. He is a board certified orthopedic surgeon. He testified that he recommended surgical intervention in part because Claimant had gone through non-surgical treatments, including injections, without any reported relief.

38. Dr. Schuck testified that it is likely that the meniscectomy caused the rapid progression of the osteoarthritis. Dr. Schuck opined that the need for the knee arthroplasty was accelerated by Claimant's work injury and subsequent surgery. Dr. Schuck also opined that the crystals (or indications of pseudogout) had no bearing on the recommendation for a total knee arthroplasty.

39. Dr. Schuck testified that Claimant reported "his symptoms progressively worsened after having the knee arthroscopy…." He confirmed that Dr. Walden's records established that Claimant alleged that the cortisone injections offered no relief.

40. Dr. Schuck testified that Claimant reported "worsening knee pain that began with this original injury back in December 2014." Dr. Schuck was not aware of

the lifting and fall incidents described by Dr. Lund in her November 2, 2015 report. . Dr. Schuck testified that this did not concern him, because his primary reason for recommending the surgery was based upon how Claimant's knee appeared at the time of the original arthroscopy.

41. Dr. Schuck testified that if Claimant did in fact report 80% to 90% improvement in his symptoms following his arthroscopy, he was appropriately placed at maximum medical improvement in June of 2015. He further testified that the FCE supported the conclusion that Claimant was appropriately placed at MMI.

42. Dr. Schuck disagreed with Dr. Lambden's opinions that it would be unusual for a patient's osteoarthritis to rapidly progress following a meniscectomy. Dr. Schuck also disagreed with Dr. Lambden's recommendation to workup Claimant for pseudogout before the arthroplasty.

43. Dr. Schuck also testified that he would expect a person who goes from light duty to full duty after having knee surgery to experience a worsening of their symptoms.

44. Dr. Schuck's ultimate opinion is that Claimant needs a right knee arthroplasty and that it is related to Claimant's initial work injury.

45. Based on the foregoing, the ALJ finds that Claimant has overcome the opinions of Dr. Sandell concerning MMI. It is apparent that Claimant continued to have symptoms in his knee, and that at times those symptoms were temporarily relieved by injections. The Claimant obviously continued to present to Dr. Walden post-surgery with complaints or Dr. Walden would not have repeated injections. In addition, Dr. Sandell admitted that Claimant may not have been at MMI in June 2015 if his knee symptoms had persisted and if the need for a right knee arthroplasty was determined to be causally related to the initial industrial injury. The ALJ also finds Claimant's testimony credible concerning the circumstances surrounding his placement at MMI, the temporary relief injection therapy provided, and the rapid worsening of his symptoms after he returned to work full duty.

46. Claimant has proven that the need for the right knee arthroplasty is causally related to the initial injury. The opinions of Drs. Sandell, Schuck, Walden and Lund are more persuasive and credible than those of Drs. Lambden or Erickson. Dr. Lambden is not an orthopedic surgeon, and he examined the Claimant one time. Dr. Schuck, on the other hand, credibly opined that the work-related meniscectomy advanced the Claimant's osteoarthritis producing the need for the arthroplasty.

CONCLUSIONS OF LAW

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

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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

4. Sections 8-42-107(8)(b)(III) and (c), *supra*, provide that the finding of a DIME selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004).

5. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (Nov. 17, 2000).

6. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id.*

7. However, if the DIME physician offers ambiguous or conflicting opinions concerning MMI, it is for the Administrative Law Judge to resolve the ambiguity and

determine the DIME’s true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385, 388 (Colo. App. 2000). In doing so, the Administrative Law Judge should consider all of the DIME’s written and oral testimony. *Lambert & Sons, Inc., v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1988).

8. As found, the Claimant has overcome the opinions of Dr. Sandell concerning MMI by clear and convincing evidence. It is unmistakable and free from substantial doubt that Claimant had not reached MMI in June 2015. The credible evidence establishes that Claimant continued to have symptoms in his knee, and that at times those symptoms were temporarily relieved by injections. As Dr. Schuck explained, injections only provide temporary pain relief and patients can experience significant relief for a temporary period of time. The evidence establishes that this was the case for Claimant who was provided an injection prior to being placed at MMI.

9. The Claimant obviously continued to present to Dr. Walden post-surgery with complaints or Dr. Walden would not have repeatedly provided injections. In addition, Dr. Sandell admitted that Claimant may not have been at MMI in June 2015 if his knee symptoms had persisted and if the need for a right knee arthroplasty was determined to be causally related to the initial industrial injury. Finally, the ALJ finds Claimant’s testimony credible concerning the circumstances surrounding his placement at MMI, the temporary relief injection therapy provided, and the rapid worsening of his symptoms after he returned to work full duty.

10. Furthermore, Dr. Sandell was not provided the most recent medical records prior to the DIME evaluation. The most recent records establish that Dr. Lund had taken Claimant off MMI, Dr. Walden was recommending a total knee replacement surgery, and Claimant’s work restrictions had changed. The evidence establishes that Claimant’s knee deteriorated after returning to work and after injections wore off. The evidence also establishes that the deterioration in the knee is directly related to the industrial injury and arthroscopic surgery. Therefore, Claimant has established by clear and convincing evidence that he is not at maximum medical improvement for his industrial injury.

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

12. As found, Dr. Walden, Dr. Schuck, Dr. Sandell, and Dr. Lund all agree that the total knee replacement surgery is reasonable, necessary and related to the industrial injury. All four doctors also agree that the Claimant would benefit from a total knee replacement surgery. The Claimant suffered from pre-existing osteoarthritis prior to the injury on December 18, 2014. However, the evidence establishes that any pre-existing osteoarthritis was asymptomatic prior to the industrial injury. The MRIs clearly

establish that the osteoarthritis was permanently aggravated and accelerated after the injury and after the meniscus repair surgery. Dr. Walden and Dr. Schuck both agree that the meniscus repair surgery caused the osteoarthritis to worsen more rapidly due to the removal of the part of the meniscus. The ALJ rejects the opinions of Dr. Lambden as unpersuasive. He is not an orthopedic surgeon, and he examined the Claimant one time. Dr. Schuck, on the other hand, credibly opined that the work-related meniscectomy advanced the Claimant's osteoarthritis producing the need for the arthroplasty. Claimant has proven that the total knee replacement surgery is reasonable necessary and related to the industrial injury.

ORDER

It is therefore ordered that:

1. Claimant is not at MMI.

2. Respondents shall be liable for the right total knee replacement surgery recommended by Dr. Schuck.

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

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

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

DATED: October 7, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the right shoulder surgery recommended by Kevin Borchard, M.D. is causally related, reasonable and necessary to cure or relieve the effects of his June 11, 2008 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Medical Technician. On June 11, 2008 Claimant suffered an admitted industrial injury to his right upper extremity during the course and scope of his employment. While Claimant was opening a door to enter his place of employment a strong wind gust caused the door to fly back and twist his right arm up and over his head.

2. After undergoing conservative treatment Claimant reached Maximum Medical Improvement (MMI) for his right upper extremity injury on August 6, 2008. However, Respondents' voluntarily reopened the claim so that Claimant could undergo right elbow surgery on June 7, 2012.

3. During post-operative physical therapy Claimant began to experience increased right shoulder pain. A November 30, 2012 MRI revealed moderately severe supraspinatus tendinosis with probable partial thickness tear, subscapularis tendonitis with a partial tear and severe acromioclavicular joint osteoarthritis including inferior labral degeneration and fraying.

4. On May 9, 2014 Claimant underwent right shoulder surgery with David Weinstein, M.D. The surgery involved a right arthroscopic subacromial decompression, right arthroscopic extensive glenohumeral debridement of a partial rotator cuff tear and right arthroscopic biceps tendonesis. Claimant subsequently received conservative post-operative care.

5. .On September 15, 2014 Kevin Rice, M.D. concluded that Claimant had reached MMI. He assigned Claimant a 19% right upper extremity impairment rating that converted to an 11% whole person rating. He noted that Claimant did not require medical maintenance care for his condition.

6. Respondents subsequently filed a Final Admission of Liability (FAL) consistent with Dr. Rice's MMI and impairment determinations. The FAL specified that Claimant did not require medical maintenance treatment and he was released to full duty employment.

7. Claimant objected to the FAL and the parties proceeded to a hearing before ALJ Lamphere on April 30, 2015. ALJ Lamphere concluded that Claimant was entitled to receive medical maintenance care for his June 11, 2016 industrial injury.

8. On August 15, 2015 Claimant began receiving medical treatment from Authorized Treating Physician (ATP) Kevin Borchard, M.D. Because Claimant continued to experience right shoulder pain and neck symptoms, Dr. Borchers referred Claimant for an MRI.

9. On January 27, 2016 Claimant underwent a right shoulder MRI. The MRI revealed no full-thickness rotator cuff tear, a moderate intralamellar tearing of the distal infraspinatus tendon, mild bursa surface fraying and intrasubstance tearing of the supraspinatus tendon.

10. On April 1, 2016 Claimant visited Dr. Borchard for an examination. Dr. Borchard explained that he was unclear of the extent to which Claimant's cervical spine condition had caused right shoulder symptoms. He recommended revision of the intra articular biceps tenodesis, subpectoral biceps tenodesis and distal clavicle excision. Respondents objected to Dr. Borchard's surgical recommendations and sought a hearing.

11. On June 6, 2016 Claimant underwent an independent medical examination with Nicholas K. Olsen, D.O. Dr. Olsen also testified at the hearing in this matter. He reviewed Claimant's medical records and conducted a physical examination. In addressing Claimant's January 27, 2016 right shoulder MRI, Dr. Olsen remarked that there was no evidence of a full-thickness rotator cuff tear, the biceps tendons were intact and there was no identification of acromial compromise. More specifically, there was no structural damage to the biceps tendon. Dr. Olsen explained that Dr. Weinstein's May 9, 2014 right shoulder surgery had created sufficient space for the biceps tendon, rotator cuff and bursa to function properly and the desired surgical results had been achieved.

12. Dr. Olsen commented that during the physical examination Claimant exhibited significant hypertonicity in the upper trapezius. The trapezius bridges the gap between the shoulder and neck. The hypertonicity constituted evidence of significant muscle imbalance. Dr. Olsen remarked that correcting the muscle imbalance would be the most effective treatment for Claimant's pain reduction. He commented that Claimant has bursitis and impingement as a result of the muscle imbalance. Dr. Olsen summarized that Claimant had not undergone sufficient physical therapy and required additional therapy to correct the muscle imbalance.

13. Dr. Olsen maintained that medical providers had not identified a pain generator for Claimant's symptoms. Absent identification of a pain generator, the proposed surgery would not constitute reasonable and necessary medical treatment. Dr. Olsen summarized that the proposed surgery would not provide functional improvement, diminish pain or decrease medications. Accordingly, the surgery

proposed by Dr. Borchard was not reasonable and necessary to cure or relieve the effects of Claimant's June 11, 2008 admitted industrial injury.

14. On June 16, 2016 Claimant returned to Dr. Borchard for an evaluation. Dr. Borchard noted no significant changes in Claimant's symptoms. In his treatment recommendations he stated, "I discussed with them that I felt he had multiple pain issues that were probably not necessarily related to the shoulder and that I would not expect him to have all of his pain etiologies treated with a shoulder surgery. Despite that he felt it would be worth trying. Now he is thinking he would like to have further evaluation into his cervical spine and brachial plexus as possible causes for his pain. I think this is reasonable before committing to a surgical procedure."

15. Based on a referral from Dr. Borchard Claimant visited Gregory Gazzillo, M.D. for an examination on July 15, 2016. After reviewing Claimant's medical history and radiology results, Dr. Gazzillo explained that Claimant had "multiple issues" and that it was "hard to determine" whether the shoulder pain was related to the shoulder girdle or originated in the cervical spine. Dr. Gazzillo noted that physical therapy was the most important aspect of Claimant's treatment and a right shoulder injection could be considered. However, he did not recommend surgery.

16. Claimant testified at the hearing in this matter. He explained that he continued to experience pain across the top of his right shoulder to the top of the scapula and into the neck. Claimant noted that physical therapy had not been effective and he wished to proceed with the surgery recommended by Dr. Borchard.

17. Claimant has failed to demonstrate that it is more probably true than not that right shoulder surgery as recommended by Dr. Borchard is causally related, reasonable and necessary to cure or relieve the effects of his June 11, 2008 admitted industrial injury. Initially, on April 1, 2016 ATP Dr. Borchard recommended right shoulder surgery in the form of an intra articular biceps tenodesis, a subpectoral biceps tenodesis and a distal clavicle excision. However, he expressed uncertainty about the extent to which Claimant's cervical spine condition had caused the right shoulder symptoms. By June 16, 2016 Dr. Borchard noted that Claimant had multiple pain generators and right shoulder surgery would not likely relieve all of his symptoms. He remarked that it was reasonable to assess alternative possible pain generators before committing to right shoulder surgery. Furthermore, Dr. Gazzillo also could not determine whether Claimant's shoulder pain was related to the shoulder girdle or the cervical spine. Dr. Gazzillo noted that physical therapy was the most important aspect of Claimant's treatment and a right shoulder injection could be considered. However, he did not recommend surgery.

18. Dr. Olson explained that Claimant did not exhibit evidence of a full-thickness rotator cuff tear, the biceps tendons were intact and there was no identification of acromial compromise. More specifically, there was no structural damage to the biceps tendon. Dr. Olsen explained that the May 9, 2014 right shoulder surgery had created sufficient space for the biceps tendon, rotator cuff and bursa to function properly and the desired surgical results had been achieved. Moreover,

medical providers had not identified a pain generator for Claimant's symptoms. Absent identification of a pain generator, the proposed surgery would not constitute reasonable and necessary medical treatment. Dr. Olsen summarized that the proposed surgery would not provide functional improvement, diminish pain or decrease medications. Accordingly, the surgery proposed by Dr. Borchard is not reasonable and necessary to cure or relieve the effects of Claimant's June 11, 2008 admitted industrial injury.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that right shoulder surgery as recommended by Dr. Borchard is causally

related, reasonable and necessary to cure or relieve the effects of his June 11, 2008 admitted industrial injury. Initially, on April 1, 2016 ATP Dr. Borchard recommended right shoulder surgery in the form of an intra articular biceps tenodesis, a subpectoral biceps tenodesis and a distal clavicle excision. However, he expressed uncertainty about the extent to which Claimant's cervical spine condition had caused the right shoulder symptoms. By June 16, 2016 Dr. Borchard noted that Claimant had multiple pain generators and right shoulder surgery would not likely relieve all of his symptoms. He remarked that it was reasonable to assess alternative possible pain generators before committing to right shoulder surgery. Furthermore, Dr. Gazzillo also could not determine whether Claimant's shoulder pain was related to the shoulder girdle or the cervical spine. Dr. Gazzillo noted that physical therapy was the most important aspect of Claimant's treatment and a right shoulder injection could be considered. However, he did not recommend surgery.

6. As found, Dr. Olson explained that Claimant did not exhibit evidence of a full-thickness rotator cuff tear, the biceps tendons were intact and there was no identification of acromial compromise. More specifically, there was no structural damage to the biceps tendon. Dr. Olsen explained that the May 9, 2014 right shoulder surgery had created sufficient space for the biceps tendon, rotator cuff and bursa to function properly and the desired surgical results had been achieved. Moreover, medical providers had not identified a pain generator for Claimant's symptoms. Absent identification of a pain generator, the proposed surgery would not constitute reasonable and necessary medical treatment. Dr. Olsen summarized that the proposed surgery would not provide functional improvement, diminish pain or decrease medications. Accordingly, the surgery proposed by Dr. Borchard is not reasonable and necessary to cure or relieve the effects of Claimant's June 11, 2008 admitted industrial injury.

ORDER

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

1. Claimant's request for right shoulder surgery as recommended by Kevin Borchard, M.D. is denied and dismissed.

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

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

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

DATED: October 6, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Whether the Claimant proved by a preponderance of the evidence that he sustained a worsening of his condition that would entitle him to a reopening of W.C. Case No. 4-819-262 under Section 8-43-303(1), C.R.S.

2. If the Claimant proved that his condition worsened, whether the Claimant proved, by a preponderance of the evidence, that the cubital tunnel release surgery and removal a cyst in the left elbow, as recommended by Dr. In Sok Yi, is reasonably necessary and causally related to the Claimant's February 10, 2010 admitted work injury.

FINDINGS OF FACT

1. The Claimant suffered an admitted injury at work on February 5, 2010. The Claimant was replacing posts with reflectors after a snowstorm using a post hammer to beat the post down. When the post hit a piece of concrete it came to an abrupt stop injuring both of the Claimant's elbows.

2. The Claimant ultimately underwent three surgeries performed by Dr. In Sok Yi.

3. The Claimant had surgery on his right elbow on August 11, 2010 with both release of the right lateral epicondyle with debridement on the ECRB tendon and also a radial nerve release at the radial tunnel. Then, on April 13, 2011, the Claimant had a right cubital tunnel release surgery. The Claimant testified credibly that the surgeries on the right side took a while to heal, but they did heal well.

4. Based on the improvement to Claimant's right arm and elbow following Claimant's recovery from the right elbow surgery, Dr. Yi proposed and then, on October 11, 2011, proceeded with a left radial tunnel release and left ulnar release surgery during which he did not transpose or move the Claimant's left ulnar nerve.

5. However, the Claimant received no immediate relief from the left elbow surgery and continued to receive treatment and evaluation into 2012 and then into 2013.

6. The Claimant testified credibly that he continues to suffer symptoms in his left elbow, arm and hand and the condition has gotten worse as time has gone by with increased swelling and pain.

7. In 2011 and again in 2012, the Claimant had EMG studies which showed marked slowing of nerve signals across his left elbow.

8. On March 18, 2013, the Claimant had a repeat MRI scan of the left elbow which showed a small partial-thickness tear of the common extensor tendon and chronic calcification at the epicondyle and a small ganglion cyst behind the humeral attachment of the common extensor tendon. Dr. Yi was unable to explain why the MRI findings which were lateral were causing symptoms medially.

9. On March 8, 2013, Dr. Braden Reiter placed the Claimant at maximum medical improvement (MMI) and gave permanent impairment ratings for both of the Claimant's arms. Dr. Reiter assessed a 7% impairment of the left upper extremity and a 3% impairment of the right upper extremity. He imposed permanent restrictions of no lifting, pushing or pulling over 10 pounds.

10. On April 16, 2013, the Respondents filed a Final Admission of Liability (FAL). The FAL admits the Claimant reached MMI on April 9, 2013 and admits for the upper extremity impairment ratings provided by Dr. Reiter. The FAL admits for ongoing medical benefits after MMI.

11. On August 13, 2013, the Claimant returned for evaluation by Dr. Yi complaining of pain in both of his elbows. Dr. Yi noted that the left elbow MRI revealed a ganglion cyst and also a partial thickness tear of the common extensor tendon at the humeral attachment. He noted there is also the possibility of triceps tendonitis and mild radiocapitellar fusion. Dr. Yi stated, “I do not have a complete explanation for the fact that he has significant pain on both the medial and lateral aspect of the elbow.” To aid in diagnosis, Dr. Yi performed a diagnostic and therapeutic injection around the ganglion cyst posteriorly around the humerus and the Claimant was to return in 3-4 weeks for follow up evaluation.

12. On return to Dr. Yi on September 10, 2013, Dr. Yi noted that the Claimant reported the injection decreased his symptoms but the injection wore off and his pain worsened. Dr. Yi opined that because the injection helped with the Claimant’s symptoms, he felt that the ganglion cyst was symptomatic and he recommended an elbow arthrotomy with ganglion cyst excision. Dr. Yi stated that he didn’t have anything further to offer the Claimant about the residual numbness in his hands after the median nerve release and carpal tunnel release.

13. On January 22, 2014, the Claimant went to hearing to get authorization for proposed surgery by Dr. Yi to excise a ganglion cyst on the left elbow. ALJ Cain considered the opinions of Drs. Bisgard, Sollender and Ogin opining that the Claimant has undergone multiple surgeries without any substantial improvement which was indicative to them that the surgery recommended by Dr. Yi was also unlikely to benefit the Claimant by reducing pain or increasing functionality. ALJ Cain also considered the contrary opinions of Drs. Yi and Hughes that the Claimant’s condition had worsened

and that the surgical treatment plan was recommended. ALJ Cain denied the claim and the proposed surgery was never authorized.

14. After that hearing, the Claimant continued to receive maintenance care from Dr. Stephen Moe for psychiatric care, Dr. William Boyd for psychological care and Dr. Kristen Mason for physical medicine and rehabilitation.

15. The Claimant saw Dr. Mason on August 19, 2014 reporting he continued to struggle with pain most pronounced in the left elbow. She noted that Dr. Yi had referred the Claimant to Dr. Sing for a repeat EMG/nerve conduction study and neurologic evaluation. Dr. Mason also noted that the Claimant perceived that symptomatology was spreading to other areas of his body and he was having difficulty coping with his chronic pain.

16. On October 14, 2014, Dr. Mason reviewed the Claimant's EMG test with Dr. Sing which was compared to the 2011 EMG by Dr. Ogin. Dr. Mason noted bilateral median delayed sensory latencies and significant slowing across the ulnar nerve and stated that if the EMG from 2011 was pre-operation on the left arm, the EMG was really concerning given how bad the conduction across the elbow was. She noted that Dr. Yi was still recommending surgery and that the Claimant was considering remediation through private insurance because he wanted to proceed so he could return to work.

17. On January 20, 2015, the Claimant saw Dr. Yi again regarding his continuing left elbow pain and increasing numbness and tingling and pain on the left. Dr. Yi noted that the Claimant's treatment options for the left elbow and arm were doing nothing or a repeat ulnar nerve release with anterior subcutaneous transposition, arthroscopy to look at the cyst and evaluation for tennis elbow release. Dr. Yi noted, "[t]he main goal of the operation is to keep him from getting worse, but it can make the numbness and tingling better. The strength may also improve."

18. The Claimant saw Dr. Mason again on February 3, 2015 and she noted that Dr. Yi was still recommending further surgery for the ulnar nerve and she surmised that it sounded like a transposition. The Claimant reported that Kaiser was not willing to proceed with surgery and so he did not have the option to use his primary medical insurance.

19. There is no evidence of new trauma or cumulative trauma to Claimant's left elbow contained in the records of the three doctors providing regular maintenance care. The Claimant testified credibly at the hearing that he had no new injuries to his arms since being placed at MMI.

20. The Claimant was completely off work from the day of injury in 2010 until he returned to work in September 2015.

21. During his prolonged period not working, the Claimant was severely depressed and received medication and maintenance care to treat his depression.

22. The Claimant advised his treating physicians that he wanted to proceed with the surgery as his symptoms were getting worse and he could not leave it the way it was.

23. On February 5, 2015, Dr. Yi faxed a request to Insurer for pre-authorization for the left ulnar nerve release surgery and transposition with elbow arthroscopy along with his January 20, 2015 notes.

24. On February 15, 2015, Dr. Sollender issued a report regarding Dr. Yi's 2015 request and he opined that the work relatedness of the condition which required for Dr. Yi's proposed surgery was not established by the information supplied for review. Dr. Sollender further recommended denial of the proposed surgery because he opined that nothing in the current reports or examination findings are appreciably different from his examination in 2012. Dr. Sollender also expressed concern that the Claimant had "failed every surgical procedure he has had in the past" and so he felt it unwise to offer any procedure and get the Claimant's hopes up. Dr. Sollender opined that the Claimant remained at MMI and had not suffered any worsening of his condition from any occupational exposure.

25. On June 2, 2015, Dr. Yi issued a brief report in which he explained why he thought the surgery he was proposing was necessary and related to the original, admitted injury. Dr. Yi stated that he felt that after the ulnar release surgery with no moving of the nerve, the nerve had become unstable and started subluxing over the medial epicondyle causing irritation to the ulnar nerve, as will happen with a small percentage of the nerve release surgeries. Therefore, in this regard, he found the current condition to be related to the original injury. He noted that the removal of the cyst was not work-related as there were multiple prior MRIs in the past that did not show any cyst in the elbow.

26. At the hearing, Dr. Sollender testified that he previously discussed left ulnar nerve release surgery with submuscular transposition for the Claimant, but, on October 7, 2013, based on his perception that the carpal tunnel surgery the Claimant underwent had failed, Dr. Sollender withdrew that proposed treatment and stated that he did not recommend any further surgery for this claim.

27. The Claimant testified that did feel relief, somewhat delayed by his depression, from the surgeries on his right elbow and wrist. He testified credibly that he felt well enough by Autumn 2015 that he was able to return to work. The Claimant testified that he has, for the past several months, been a bus driver for travel to and from the airport. His job duties sometimes require him to lift luggage with both his hands but primarily with his right arm and hand.

28. The Claimant is found to be credible regarding the worsening of his condition and his left elbow symptoms.

29. Dr. Yi is found to be credible regarding the reasonable need of a repeat ulnar release surgery on Claimant's left elbow, this time with transposition of the nerve, and Dr. Yi is found to be credible regarding the change of the position of the nerve being related to the admitted injury.

30. Dr. Sollender’s opinion is less persuasive than Dr. Yi’s in that he once discussed the same surgery for the Claimant that he now opines is not reasonable or related to the admitted injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

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

Petition to Reopen

The Claimant filed his Petition to Reopen on the ground that his medical condition has worsened. The Claimant initially sustained work injuries on February 10, 2010 when he was replacing posts with reflectors after a snowstorm using a post hammer to beat the post down. When a post hit a piece of concrete it came to an abrupt stop injuring both of the Claimant’s elbows. The Claimant ultimately underwent three surgeries performed by Dr. In Sok Yi for both extremities. Based on the improvement to the Claimant's right arm and elbow following Claimant's recovery from the right elbow surgery, Dr. Yi proposed and then, on October 11, 2011, proceeded with a left radial tunnel release and left ulnar release surgery during which he did not transpose or move the Claimant's left ulnar nerve. However, the Claimant received no immediate relief from the left elbow surgery and continued to receive treatment and evaluation into 2012 and then into 2013. The Claimant established that he continues to suffer symptoms in his left elbow, arm and hand and the condition has gotten worse as time has gone by with increased swelling and pain. The Claimant now seeks medical benefits in the nature of a repeat ulnar release surgery on Claimant's left elbow with transposition of the nerve and removal of a ganglion cyst per Dr. Yi’s recommendation.

Section 8-43-303(1), C.R.S., provides that an award may be reopened at any time within six years after the date on the ground of a change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. Reopening is not warranted if once reopened, no additional benefits may be awarded. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

As a threshold matter, the Claimant bears the burden of establishing that change in the Claimant’s condition is causally related to the original injury. Section 8-41-301(1)(c), C.R.S.; *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Moreover, medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment, such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *City of Durango v. Dunagan*, *supra*. However, to the extent that the worsening of a condition occurs as the result of an independent intervening cause, then reopening would not be warranted as this is unrelated to the original compensable injury. Whether a particular condition is the result of an independent intervening cause is a question of fact for the ALJ. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002).

On March 8, 2013, Dr. Reiter placed the Claimant at maximum medical improvement (MMI) and gave permanent impairment ratings for both of the Claimant's arms. Dr. Reiter assessed a 7% impairment of the left upper extremity and a 3% impairment of the right upper extremity. He imposed permanent restrictions of no lifting, pushing or pulling over 10 pounds. By January 20, 2015, when the Claimant saw Dr. Yi again regarding his continuing left elbow pain and increasing numbness and tingling and pain on the left, Dr. Yi noted that the Claimant's treatment options for the left elbow and arm were doing nothing or a repeat ulnar nerve release with anterior subcutaneous transposition, arthroscopy to look at the cyst and evaluation for tennis elbow release. Dr. Yi noted, "[t]he main goal of the operation is to keep him from getting worse, but it can make the numbness and tingling better. The strength may also improve." There is no evidence of new trauma or cumulative trauma to Claimant's left elbow contained in the records of the three doctors providing regular maintenance care. The Claimant testified credibly at the hearing that he had no new injuries to his arms since being placed at MMI. The Claimant was completely off work from the day of injury in 2010 until he returned to work in September 2015. The Claimant advised his treating physicians that he wanted to proceed with the surgery as his symptoms were getting worse and he could not leave it the way it was.

Dr. Sollender issued a report regarding Dr. Yi's 2015 request and he has opined that the work relatedness of the condition which required for Dr. Yi's proposed surgery was not established by the information supplied for review. Dr. Sollender further recommended denial of the proposed surgery because he opined that nothing in the current reports or examination findings are appreciably different from his examination in 2012. Dr. Sollender also expressed concern that the Claimant had “failed every surgical procedure he has had in the past” and so he felt it unwise to offer any procedure and get the Claimant’s hopes up. Dr. Sollender opined that the Claimant remained at MMI and had not suffered any worsening of his condition from any occupational exposure.

On June 2, 2015, Dr. Yi issued a brief report in which he explained why he thought the surgery he was proposing was necessary and related to the original, admitted injury. Dr. Yi stated that he felt that after the ulnar release surgery with no moving of the nerve, the nerve had become unstable and started subluxing over the medial epicondyle causing irritation to the ulnar nerve, as will happen with a small percentage of the nerve release surgeries. Therefore, in this regard, he found the current condition to be related to the original injury. He noted that the removal of the cyst was not work-related as there were multiple prior MRIs in the past that did not show any cyst in the elbow.

At the hearing, Dr. Sollender testified that he previously discussed left ulnar nerve release surgery with submuscular transposition for the Claimant, but, on October 7, 2013, based on his perception that the carpal tunnel surgery the Claimant underwent had failed, Dr. Sollender withdrew that proposed treatment and stated that he did not recommend any further surgery for this claim. Contrary to Dr. Sollender’s opinion that all of the Claimant’s surgeries had failed, the Claimant testified that did feel relief from the surgeries on his right elbow and wrist. He testified credibly that he felt well enough by Autumn 2015 that he was able to return to work. The Claimant testified that he has, for the past several months, been a bus driver for travel to and from the airport. His job duties sometimes require him to lift luggage with both his hands but primarily with his right arm and hand. The Claimant is found to be credible regarding the worsening of his condition, his left elbow symptoms, related to the admitted injury. The Claimant’s testimony is persuasively supported by Dr. Yi who has opined that the proposed surgery of repeat ulnar nerve release with anterior subcutaneous transposition is related to the admitted injury.

Because the Claimant has proven by a preponderance of the evidence that his condition has changed and he is entitled to benefits, WC Claim No. 4-819-262 is reopened.

Medical Benefits – Reasonably Necessary

Once a claimant establishes the worsened condition is causally related, the claimant must prove the proposed medical treatment is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim*

Appeals Office, 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the “Medical Treatment Guidelines”) when furnishing medical aid under the Workers’ Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff’d Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

On January 20, 2015, the Claimant saw Dr. Yi again regarding his continuing left elbow pain and increasing numbness and tingling and pain on the left. Dr. Yi noted that the Claimant's treatment options for the left elbow and arm were doing nothing or a repeat ulnar nerve release with anterior subcutaneous transposition, arthroscopy to look at the cyst and evaluation for tennis elbow release. Dr. Yi opined that the proposed surgery is to keep the Claimant from getting worse, and potentially to improve the symptoms of numbness and tingling and increase the Claimant’s strength. On February 5, 2015, Dr. Yi faxed a request to Insurer for pre-authorization for the left ulnar nerve release surgery and transposition with elbow arthroscopy along with his January 20, 2015 notes.

Dr. Sollender subsequently issued a report regarding Dr. Yi's request and he opined that the work relatedness of the condition which required for Dr. Yi's proposed surgery was not established by the information supplied for review. Dr. Sollender further recommended denial of the proposed surgery because he opined that nothing in the current reports or examination findings are appreciably different from his examination in

2012. Dr. Sollender also expressed concern that the Claimant had “failed every surgical procedure he has had in the past” and so he felt it unwise to offer any procedure and get the Claimant’s hopes up.

On June 2, 2015, Dr. Yi issued a brief report in which he explained why he thought the surgery he was proposing was necessary and related to the original, admitted injury. Dr. Yi stated that he felt that after the ulnar release surgery with no moving of the nerve, the nerve had become unstable and started subluxing over the medial epicondyle causing irritation to the ulnar nerve, as will happen with a small percentage of the nerve release surgeries. Therefore, in this regard, he found the current condition to be related to the original injury. He noted that the removal of the cyst was not work-related as there were multiple prior MRIs in the past that did not show any cyst in the elbow.

At the hearing, Dr. Sollender testified that he previously discussed left ulnar nerve release surgery with submuscular transposition for the Claimant, but, on October 7, 2013, based on his perception that the carpal tunnel surgery the Claimant underwent had failed, Dr. Sollender withdrew that proposed treatment and stated that he did not recommend any further surgery for this claim. To the contrary, the Claimant testified that did feel relief from the surgeries on his right elbow and wrist. He testified credibly that he felt well enough by Autumn 2015 that he was able to return to work. The Claimant testified that he has, for the past several months, been a bus driver for travel to and from the airport. His job duties sometimes require him to lift luggage with both his hands but primarily with his right arm and hand.

Dr. Yi is found to be credible regarding the reasonable need of a repeat ulnar release surgery on Claimant's left elbow, this time with transposition of the nerve, and Dr. Yi is found to be credible regarding the change of the position of the nerve being related to the admitted injury. Dr. Yi’s opinion is likewise credible, and supported by Dr. Sollender and other medical records, that the surgery to excise the ganglion cyst is not related to the original injury. Dr. Sollender’s opinion is less persuasive than Dr. Yi’s in that he once discussed the same surgery for the Claimant that he now opines is not reasonable or related to the admitted injury.

In weighing all of the evidence presented, the ALJ concludes that the recommended surgery proposed by Dr. Yi for a repeat ulnar release surgery on Claimant's left elbow, this time with transposition of the nerve is reasonably necessary to cure and relieve the Claimant from the effects of his February 5, 2010 work injury or prevent further deterioration. However, surgery to remove the ganglion cyst is not reasonably necessary to cure and relieve the Claimant from the effects of his February 5, 2010 work injury.

ORDER

It is therefore ordered that:

1. Workers' Compensation Case No. 4-819-262 is reopened.

2. Insurer is liable for the repeat ulnar release surgery on Claimant's left elbow with transposition of the nerve recommended by Yi, but not for surgery for the removal of the ganglion cyst.

3. Insurer is liable for the post-surgical medical care the Claimant receives that is reasonably necessary to cure and relieve him from the effects of the compensable injury as determined by his authorized treating physicians and any authorized referrals per the Act, except as provided in paragraph 2 above.

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

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

DATED: October 5, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-957-400-01

ISSUES

➢ Whether claimant has overcome, by clear and convincing evidence, the findings of the Division-sponsored Independent Medical Examination ("DIME") physician regarding maximum medical improvement ("MMI") and permanent impairment rating.

➢ Whether claimant has overcome, by clear and convincing evidence, the findings of the Division-sponsored Independent Medical Examination ("DIME") physician that claimant's lower back pain in not work related.

➢ Whether the claimant sustained a serious permanent disfigurement to areas of his body normally exposed to public view, resulting in additional compensation.

STIPULATIONS

➢ At hearing, the parties stipulated that claimant reached MMI for his right ankle on September 21, 2015. The issue regarding MMI as it relates to claimant's alleged low back injury remains at issue.

FINDINGS OF FACT

1. Claimant is employed with employer's Road and Bridge Department. Claimant sustained an admitted industrial injury to his right ankle on June 25, 2014. The injury occurred when the claimant was working on an uneven edge of road and rolled his right ankle. Initially the claimant was diagnosed with a "sprained ankle".

2. As demonstrated by claimant's medical records and Dr. David Orgel's testimony, claimant's June 25, 2014 injury resulted in a Wolin lesion on his right ankle requiring surgery. Claimant underwent surgery on September 24, 2014 consisting of arthroscopy, debridement, and synovectomy of his right ankle.

3. As demonstrated by claimant's medical records and Dr. Deborah Saint-Phard's testimony, a nerve block administered during the September 24, 2014 surgery resulted in right distal tibial nerve damage. Dr. Saint-Phard testified that this nerve damage caused the claimant to walk with an altered gait.

4. Claimant demonstrated at the August 25, 2016 hearing that he continues to walk with an antalgic gait as a result of his June 25, 2014 injury and September 24, 2014 surgery.

5. As indicated by claimant's testimony and the medical records, claimant received various modes of treatment for his industrial injury. These treatments included physical therapy with Select Physical Therapy; biofeedback with the Denver

Biofeedback Clinic; and electrodiagnosic evaluation with Dr. L. Barton Goldman. During these various medical treatments, claimant made no complaints related to low back and/or buttock pain.

6. Claimant was placed at MMI on September 21, 2015 by his authorized treating physician ("ATP") Dr. William Miller. At that time, Dr. Miller provided claimant with a permanent impairment rating of 22% to claimant's right lower extremity.

7. Respondent filed a Final Admission of Liability ("FAL") admitting for the lower extremity permanent impairment rating. Claimant timely challenged the impairment rating through the Division-sponsored independent medical examination ("DIME") process.

8. A DIME was conducted by Dr. John Sacha on February 4, 2016. Dr. Sacha reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant in connection with the DIME. Following the DIME, Dr. Sacha issued a DIME report and agreed with Dr. Miller's determination that claimant had reached MMI on September 21, 2015. Dr. Sacha also assigned a 22% lower extremity impairment rating. Dr. Sacha included a 2% psychological whole person rating, resulting in an 11% whole person rating. The claimant received no additional medical treatment between September 21, 2015 and the February 4, 2016 DIME.

9. On March 29, 2016 respondents filed a FAL admitting for the 22% lower extremity impairment rating and 2% psychological whole person rating as determined by Dr. Sacha.

10. As demonstrated by Dr. Sacha's report, during the DIME claimant complained of lower back and buttock pain, with posterior thigh pain bilaterally. Dr. Sacha opined that claimant's low back and buttock pain is unrelated to the work injury.

11. Based on claimant's testimony and the medical records, the ALJ finds that the February 4, 2016 DIME was the first time the claimant raised complaints related to lower back and buttock pain. Claimant testified that he did not report complaints to his medical providers that he did not believe to be work related.

12. Claimant underwent an independent medical examination ("IME") with Dr. Orgel on June 13, 2016. Dr. Orgel reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant in connection with his IME. Dr. Orgel indicated in his June 13, 2016 report that he assessed a permanent impairment rating of 37% for claimant's right lower extremity. Dr. Orgel testified at hearing consistent with his IME report

13. With regard to claimant's low back and buttock pain, Dr. Orgel testified that it was his opinion that this pain was caused by claimant's June 24, 2014 injury. Specifically, Dr. Orgel testified that the claimant's low back and buttock pain is caused by his antalgic gait. As the altered gait arose from the claimant's September 24, 2014 surgery, Dr. Orgel opines that the ankle injury ultimately gave rise to claimant's current

low back and buttock pain. In addition, Dr. Orgel opines that claimant had not reached MMI with regard to his low back and buttock pain.

14. Claimant underwent an IME with Dr. Saint-Phard on June 27, 2016. Dr. Saint-Phard reviewed claimant's medical records obtained a medical history, and performed a physical examination of claimant in connection with her IME. Dr. Saint-Phard opined in her IME report that claimant sustained a permanent impairment rating of 27% to the lower right extremity. As it pertains to Dr. Sacha's permanent impairment rating, Dr. Saint-Phard testified that she had a slight difference of opinion, but that Dr. Sacha did not err in his determination of claimant's permanent impairment rating. Dr. Saint-Phard testified in this matter consistent with her IME report.

15. Dr. Saint-Phard testified, that within a reasonable degree of medical probability, claimant's low back and buttock pain do not relate to the June 24, 2014 injury, the September 24, 2014 surgical procedure, or claimant's altered gait. Dr. Saint-Phard noted that claimant told her that he has had low back pain for "about a year" because of "the way he walks". Approximately one year ago, claimant was actively treating with various workers' compensation providers and he did not report any back complaints to those providers. It was not until the DIME, five months post-MMI, that claimant raised any complaints related to lower back and/or buttock pain. In support of her causal analysis, Dr. Saint-Phard opined that if claimant's low back and buttock pain related to the September 24, 2014 surgical procedure and/or his altered gait, she would have expected the low back complaints to have occurred within the year prior to MMI, and not five months post MMI.

16. Dr. Saint-Phard testified that she did not find any errors made by Dr. Sacha regarding the date of MMI or his causal analysis. Dr. Saint-Phard testified that differing interpretations of causation of back pain between Dr. Sacha, Dr. Orgel and herself constituted a difference of opinion.

17. The ALJ credits the medical records and the opinions of Dr. Miller, Dr. Sacha and Dr. Saint-Phard over the conflicting opinion of Dr. Orgel and finds that claimant has failed to overcome the DIME physician on the issues of permanent impairment and MMI by clear and convincing evidence. The ALJ further finds the opinions expressed by Dr. Sacha and Dr. Saint-Phard to be credible and persuasive regarding claimant's low back and buttock complaints.

CONCLUSIONS OF LAW

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

interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2013. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S., *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2013).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

4. As found, claimant has failed to prove by clear and convincing evidence that Dr. Sacha's opinions regarding MMI and permanent impairment were incorrect. As found, Dr. Sacha's opinion is shared by Dr. Miller and Dr. Saint-Phard and is supported by the medical records. Claimant has failed to establish anything other than a difference of opinion between medical providers. The difference between the permanent impairment ratings determined by Dr. Sacha, Dr. Orgel, and Dr. Saint-Phard is merely a difference of medical opinion and does not demonstrate error.

5. Section 8-42-108 (1), C.R.S. provides that at claimant may be entitled to additional compensation if, as a result of the work injury, he has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

6. As found, claimant has a visible disfigurement to his body consisting of an antalgic gait as a result of his June 25, 2014 work injury. Therefore, claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome the DIME physician on the issues of MMI and permanent impairment rating.

2. Respondent shall pay claimant $1,000.00 for his disfigurement. Respondent shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

DATED: October 6, 2016

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

ISSUES

1. Whether Claimant has overcome the DIME, which places Claimant at MMI on September 28, 2015, by clear and convincing evidence; and

2. Whether Claimant's requested arthroscopic hip surgery is reasonable, necessary, and related to Claimant's work injury.

FINDINGS OF FACT

1. The Claimant was injured in a work accident on January 27, 2015, when she jumped over a chair while trying the catch a student who had run away.

2. The Claimant immediately thought that her injury was a quadriceps injury. The Claimant received treatment from Dr. Annu Ramaswamy for what was described as a left quadriceps strain, left gluteus strain and left greater trochanteric bursitis.

3. The medical records reveal, and the Claimant testified, that she was referred to a Dr. Fell for chiropractic care which made a significant difference in her symptoms. When the Claimant was found to be at MMI by Dr. Ramaswamy on September 28, 2015, he noted that the Claimant could walk "normally", that she was "80% better" and that the chiropractic treatment made a "significant difference for her." [Exhibit "B" and Exhibit "3"] When the Claimant was found to be at MMI on September 28, 2015, it was noted that she had been diagnosed as having a urinary tract infection, along with kidney stones.

4. The Respondents filed a Final Admission of Liability, based upon Dr. Ramaswamy's report, dated October 6, 2015. [Exhibit "B"]

5. The Claimant timely objected to the Final Admission of Liability and requested a DIME. The DIME physician was Dr. Joseph H. Fillmore. Dr. Fillmore also noted that the chiropractic care caused the Claimant's trochanteric tenderness and gluteal strain to have improved dramatically [Exhibit "C"] and when he examined her, the Claimant was in no acute distress and had only minor residuals of gluteus medius tendonosis and possible left sacroiliac joint irritation. He noted only minor limitations to her hip range of motion and provided her with a 2% lower extremity impairment rating in his report dated February 11, 2016. [Exhibit "C"]

6. After MMI, Dr. Ramaswamy referred the Claimant to Dr. Phillip Stull (orthopedist). In Dr. Stull's narrative report of January 15, 2016, he noted ongoing trochanteric bursitis in the left hip and provided the Claimant with an injection in the trochanteric bursa. The Claimant's condition did not improve with the injection. Dr. Stull

recommended an MRI. He reviewed the MRI on March 31, 2016 and noted a tear in the superior labrum of the hip. The Claimant was referred to Dr. Nathan Faulkner (an orthopedist who performs hip procedures regularly) for evaluation for potential surgery.

7. Dr. Faulkner saw the Claimant on April 11, 2016 and noted that the Claimant was reporting a "sharp pain in her groin and over the posterior lateral aspect of the hip." Dr. Faulkner twice mentioned proceeding with a *right* hip arthroscopy based upon the symptoms, despite the injury being to her *left* hip. The ALJ finds that references to the *right* hip are merely typographical errors, and that the *left* hip is the subject of this report.

8. The Respondents contested the reasonableness, relatedness and necessity of the hip arthroscopic labral surgery, pursuant to W.C.R.P. 16. Respondents had the Claimant's records reviewed by Dr. James Lindberg, a board certified orthopedic surgeon. Dr. Lindberg issued a report dated April 28, 2016 indicating that arthroscopic surgery was not reasonable because there had not been adequate work-up of the Claimant's pain complaints to isolate the problem to hip joint pathology. Dr. Lindberg indicated that despite there being a positive labral tear, the Claimant needed injections into the hip joint with anesthesia and corticosteroids, to see if her hip joint was the pain generator.

9. Dr. Lindberg also noted that even if the Claimant had a labral tear, it was not the result of the work-related injury, and there was no indication of groin pain until she had been seen by Dr. Faulkner. He noted that at no time, from the time of the injury until the examination by Dr. Faulkner, did Claimant complain of groin pain. He opined that if a labral tear repair was attempted, it should be done outside the workers' compensation system. Dr. Lindberg explained in his narrative report, and at his deposition, that it did not appear that the labral tear was symptomatic, and could be explained by her chronic congenital femoral acetabular impingement syndrome, which was not caused by trauma.

10. The Claimant testified at hearing on September 8, 2016 that she continues to have the same pain over her left lateral hip and gluteal region that she had when she was examined by both Dr. Ramaswamy and the DIME doctor, Dr. Joseph Fillmore. The Claimant explained that she did have groin pain when she was examined by Dr. Faulkner and that it was subsequently determined that the groin pain was related to her kidney stones. Once the Claimant passed the kidney stones, the groin pain subsided.

11. As recently as her office visit with Dr. Stull on January 29, 2016, Claimant denied any "pain in the groin or catching or popping or locking in the hip joint per se."

12. All of the physicians' records agree that the Claimant's initial quadriceps strain had resolved and was not permanently impairing her function.

13. Dr. James Lindberg testified at a deposition on September 12, 2016 for preservation of testimony. Dr. Lindberg testified that he is a board certified orthopedic

surgeon and Level II certified. He testified that he is currently retired, but when he was actively practicing, 50% of his practice was focused on hip injuries.

14. Dr. Lindberg testified that he reviewed all of the records and was able to look at the injury from a chronological standpoint. He noted that the original injury was a quadriceps strain. A month later, the Claimant was having some "hip pain," located over the trochanteric area and gluteal pain. Dr. Lindberg testified that he believed that the trochanteric bursitis and gluteal strains were correctly diagnosed and treated by Dr. Ramaswamy, until Dr. Ramaswamy found the Claimant to be at MMI, without impairment. Dr. Lindberg testified that there was no evidence of hip joint impairment, which he described as dysfunction of the articulating surfaces in the hip. Dr. Lindberg testified that there was no mention of any groin pain until Dr. Faulkner examined the Claimant in 2016. Dr. Lindberg testified that the Claimant did have groin pain when examined by Dr. Faulkner and the groin pain could possibly been an indication of hip joint dysfunction. However, the groin pain disappeared with the Claimant's treatment for kidney stones. Groin pain can also be a symptom of kidney stones. Thus, Dr. Lindberg testified that it was understandable that Dr. Faulkner might have thought that there was a hip joint dysfunction, based upon the fact that there was a labral tear accompanied, at that time, by groin pain. It was Dr. Lindberg's opinion that there was no need for arthroscopic surgery to repair a non-symptomatic labral tear.

15. Dr. Lindberg further testified at his deposition that the Claimant's trochanteric bursitis and gluteal strains have not resolved due to her weight, which puts a strain on the trochanteric bursa and gluteal area. Sciatica is a common symptom of being overweight. Dr. Lindberg believes that the treating physician, Dr. Ramaswamy and the DIME physician, Dr. Fillmore, were correct in finding the Claimant to be at MMI as of September 28, 2015. The Claimant's claimed relief from chiropractic care, in Dr. Lindberg's opinion, is indicative that her only problems related to the industrial injury are the trochanteric bursitis and gluteal strain, with possible sciatic pain. He does not believe that she has any articulating hip joint problems that will be improved by surgery. Dr. Lindberg explained the difference between actual hip joint dysfunction and lateral hip discomfort, based on trochanteric bursitis. He explained that Dr. Faulkner was probably convinced that there was true hip joint dysfunction because of the groin pain complaint, without realizing it was temporary groin pain related to kidney stones.

16. Dr. Lindberg's opinion is that the Claimant's work-related injury did not cause the labral tears seen on the MRI. Improper tracking of her femur and acetabulum could explain the labral tears as a result of the congenital malformation of the femur and the acetabular articulating surfaces. Since the Claimant is now asymptomatic in the groin area, after passing the kidney stone, there is no indication of any hip joint dysfunction that can be relieved by arthroscopic labral repair.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo.App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo.App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo.App. 1997), *cert. denied* September 15, 1997*.* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony is generally consistent with the content of the medical records. Consequently, the ALJ finds Claimant to be a generally credible, if unpersuasive witness.

C. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

Overcoming the DIME Physician’s Finding of MMI

D. It is well-established that the DIME physician’s opinion on MMI or a medical impairment rating is binding unless overcome by “**clear** and **convincing**” evidence. Section 8-42-107(8)(c), C.R.S., 2008; *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995).

> **Clear and convincing evidence** is evidence which proves that it is ‘highly probable’ the DIME physician’s opinion is incorrect. *Metro Moving and Storage Co. v. Gussert, supra.*

In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt.” Adams v. Sealy, Inc., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000). The courts have held that the DIME physician’s determination that an impairment is or is not caused by the industrial injury is also subject to the clear and convincing evidence standard. See, *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

E. The ALJ concludes that the findings by the DIME physician, Joseph Fillmore, M.D., that the Claimant was at MMI on September 28, 2015 (as also found by the treating physician Dr. Ramaswamy) has not been overcome by clear and convincing evidence. This conclusion is bolstered by the opinions of orthopedic specialist, James Lindberg, M.D., which are likewise credible and believable. The Claimant has admitted that her left lateral hip pain, which was diagnosed as trochanteric bursitis and gluteal pain, was the same pain that she reported to both Dr. Ramaswamy and the DIME physician, Dr. Joseph Fillmore. The ALJ concludes that these symptoms were properly considered and rated for permanent impairment by both Dr. Ramaswamy and the DIME physician, Dr. Fillmore. Although the DIME physician did not have the benefit of the MRI results when he placed her at MMI, it has not been clearly and convincingly shown that he would have reached a different conclusion if he had had said MRI results. Claimant’s congenital femoral acetabular impingement syndrome was referenced in the MRI report, and Claimant had yet to report the groin pain one would expect with a labral tear which resulted from trauma occurring about a year prior.

Medical Benefits

F. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of the his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 1997.

G. As found here, Claimant has not shown by a preponderance of the evidence that the labral tear appearing in her MRI from March 18, 2016 was caused by the admitted work accident which occurred on January 21, 2015. Likewise, it has not been shown that the proposed arthroscopic procedure is reasonable and necessary to cure and relieve Claimant from the injuries she did suffer due to this accident, to wit: trochanteric bursitis and gluteus strain. Although it was reasonable for Dr. Faulkner to conclude, based upon the information available from Claimant's exam in April, 2015, that this surgery was reasonable and necessary, the source of her groin pain disappeared once the kidney stone issue was resolved. The report and testimony of Dr. Lindberg is more persuasive in showing that the labral tear was not symptomatic, except for this limited interval during which Claimant suffered from kidney stones. Due to her congenital femoral acetabular impingement syndrome (as noted by Dr. Seda from Claimant's MRI), it is at least equally likely that she suffered this asymptomatic tear at some other time and place. The ALJ therefore concludes that the workplace injury Claimant suffered on January 21, 2015 was not the proximate cause of the labral tear to her left hip.

ORDER

It is therefore Ordered that:

1. Claimant's request to overcome the Division IME's opinion that Claimant reached MMI on September 28, 2015 is denied and dismissed.

2. Claimant has failed to show that the labral tear to her left hip was proximately caused by the admitted workplace injury which occurred on January 21, 2015. Her request for this arthroscopic surgery is denied and dismissed.

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

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

DATED: October 12, 2016

/s/ William G Edie
William G Edie
Office of Administrative Courts
2864 S Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

Did Claimant prove by a preponderance of the evidence that ongoing prescription of Xarelto is reasonable, necessary and related to her industrial injury?

FINDINGS OF FACT

1. Claimant works as a Lead Principal Recruiter for Employer. Her job entails managing teams in Colorado Springs and Rockville, Maryland. She recruits personnel for various defense contracts throughout the United States. Her job requires frequent travel to launch new contracts and support existing contracts on behalf of her employer. She also travels to meet with supervisors in California, Maryland and Virginia.

2. Claimant sustained an admitted industrial injury on December 9, 2013 while working for Employer in Utah. Claimant slipped and fell while walking down a flight of stairs at the hotel where she was staying. As a result of the fall, she sustained several right lower extremity fractures.

3. Claimant did not immediately seek medical attention, because she assumed she merely suffered a strain or sprain. When Claimant returned to Colorado Springs, her pain was severe. She presented to Memorial Hospital on December 12, 2013 with complaints of right ankle and foot pain. She was placed in a knee immobilizer, Ace wrap and an ankle stirrup.

4. On December 17, 2013, Claimant was evaluated by Stephanie Noble, a physician's assistant in Dr. John Shank's office. Claimant was diagnosed with a right ankle talus fracture, a right calcaneus fracture and medial malleolus fracture. She was placed in a high-tied walking boot.

5. Claimant again saw PA-C Noble on January 6, 2014, and reported right lower leg pain of the medial aspect of the right knee which shot up to the inner side of her thigh. Due to Claimant's high pain level, PA-C Noble recommended evaluation for a deep vein thrombosis (DVT).

6. Claimant was evaluated that same day at Memorial Hospital, and had an ultrasound of her right leg. The ultrasound showed an "[a]cute venous embolism and thrombosis of the deep vessels of the distal lower extremity." The DVT was "extensive," extending from high in the groin down through the calf.

7. Claimant was started on Lovenox and Coumadin and given compression stockings to treat the DVT.

8. Claimant had difficulty controlling her INR level on Coumadin. Additionally, Claimant felt “quite ill” on the Coumadin and experienced bleeding gums when she brushed her teeth.

9. Claimant began treating with Dr. Timothy Murphy, a hematologist, on February 19, 2014. Due to the difficulty she was having managing her INR levels, Dr. Murphy discontinued Coumadin and prescribed a different anticoagulant, Xarelto.

10. Xarelto offers several advantages to Coumadin: Xarelto allows “fixed dosing” and does not require continual monitoring to determine therapeutic levels; it has fewer issues with drug-to-drug interactions and fewer issues with nutritional interaction. Dr. Murphy testified that Xarelto has proven equally safe as Coumadin, without the inconvenience and expense of continual monitoring.

11. Although the DVT eventually resolved, Claimant still suffers from chronic thrombophlebitis in the right leg, with swelling and pain. The right leg swelling improved over time with compression stockings, but has never resolved.

12. Claimant began treating at Concentra Medical Centers on February 24, 2014. Eventually, her care was transferred to Dr. Albert Hattem. Dr. Hattem placed Claimant at MMI on June 19, 2014, and recommended maintenance care. Dr. Hattem recommended anticoagulation monitoring by Dr. Murphy through at least December 2014, but also stated “I defer to his recommendation as to the duration of anticoagulation.”

13. Dr. Hendrick Arnold performed a DIME on November 19, 2014. Dr. Arnold’s diagnoses included “right lower extremity deep vein thrombosis with residual dysesthesias and swelling. She has pain that interferes with her activities, namely hiking, running, working, and flying.” Dr. Arnold assigned a 23% lower extremity impairment rating, but offered no opinion regarding maintenance treatment.

14. Respondents filed a Final Admission of Liability (FAL) on December 5, 2014 based on Dr. Arnold’s rating. The FAL also admitted for reasonable and necessary medical treatment after MMI from authorized providers.

15. Dr. Murphy reevaluated Claimant on January 26, 2014 regarding her anticoagulation regimen. At that time, she was still taking Xarelto daily. Claimant continued to experience edema in her leg by the end of the day despite regularly using compression stockings. Physical examination revealed edema in the right leg. Dr. Murphy recommended that Claimant discontinue the daily Xarelto, and begin daily aspirin. Dr. Murphy opined that “given the persistent phlebitis of the leg, she will be at risk for recurrent DVT. If she develops a second clot in that leg, then she will need lifelong anticoagulation.” Dr. Murphy further opined that Claimant “will be at risk for recurrent phlebitis for years.” Given Claimant’s frequent job-related travel, Dr. Murphy recommended Claimant use Xarelto as a prophylactic measure on lengthy plane flights.

16. Dr. Murphy evaluated Claimant again on September 8, 2015. He noted she could not take aspirin as a secondary prophylaxis due to an allergy. He reiterated

that Claimant is at risk for recurrent DVT and will require lifelong anticoagulation if she develops a second clot in her leg. He recommended that she continue with the compression stockings indefinitely, and utilize Xarelto as prophylaxis during air travel.

17. Dr. Carlos Cebrian performed an Independent Medical Examination (IME) at Respondents' request on May 8, 2015. Dr. Cebrian agreed that claimant should continue to wear compression stockings to treat her ongoing phlebitic syndrome. But Dr. Cebrian opined that Xarelto was no longer reasonable or necessary. Dr. Cebrian cited 2012 Guidelines from the American College of Chest Physicians (ACCP) which do not recommend that long-distance travelers use aspirin or anticoagulants to prevent DVT secondary to air travel. Dr. Cebrian provided a follow-up opinion on July 13, 2016 that was unchanged from his original report.

18. Dr. Murphy testified at hearing as a witness for Claimant. Dr. Murphy explained that Xarelto is a better anti-coagulant medication than Coumadin in multiple respects. Dr. Murphy opined that Claimant's "biggest risk factor" for recurrent DVT is the extensive clot she suffered in December 2013 and ongoing venous damage, as evidenced by the persistent postphlebitic syndrome. Claimant's entire vein was damaged by the clot, which places her at high risk for recurrent DVT. Dr. Murphy testified that the risk of a recurrent DVT in Claimant's case outweighs the comparatively minor risks associated with Xarelto. Dr. Murphy opined there is significant risk of developing a recurrent blood clot during lengthy plane flights, and a recurrent DVT might be life-threatening. At a minimum, she would require continuous anticoagulation medication for life, which Dr. Murphy characterized as "a big change of life for people."

19. Regarding the ACCP's 2012 Guidelines, Dr. Murphy testified that the recommendation against anticoagulation during air travel is not based on strong scientific evidence, and the recommendation is the weakest in the ACCP's grading scheme. Dr. Murphy noted that Xarelto is FDA-approved for the prevention of blood clots. Dr. Murphy opined that compression stockings alone would not be sufficient in a high-risk patient such as Claimant.

20. Dr. Cebrian testified at hearing as a witness for Respondents. Dr. Cebrian opined that Xarelto is not reasonable, necessary or related to the admitted injury. Dr. Cebrian testified that Claimant had a temporary aggravation of her DVT based on the admitted injury that has resolved. Dr. Cebrian interpreted Claimant's medical records as showing a prior history of blood clots. Dr. Cebrian testified Claimant has several non-work related risk factors associated with DVT. Dr. Cebrian recommended that the claimant use compression stockings on any flights, but that Xarelto is not reasonable or necessary.

21. Claimant testified that she had never been diagnosed or treated for DVT prior to December 9, 2013. There was a "suspicion" of DVT in her left leg in 1998, but she underwent an ultrasound and had no treatment for DVT or follow up.

22. The ALJ finds that Dr. Murphy's opinions are more persuasive than medical opinions in the record to the contrary.

23. The ALJ finds Claimant's testimony to be credible.

24. Claimant has proven by a preponderance of the evidence that the ongoing prescription of Xarelto is reasonable, necessary and causally related to her December 2013 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Walmart Stores Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation claim are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

2. A workers' compensation case is decided on its merits. Section 8-43-201. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved conflicting evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item in the record, and the ALJ has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

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

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

4. Thus, Respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement (MMI) if the claimant requires periodic maintenance care to prevent further deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

5. Even where the respondents admit liability for medical benefits after MMI, they retain the right to challenge the compensability, reasonableness, and necessity of specific treatment. *Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific post-MMI medical

treatment, the claimant must prove entitlement to the medical benefit(s) at issue. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO February 12, 2009). On the other hand, if the effect of Respondents' challenge to medical treatment is to terminate all previously admitted maintenance benefits, Respondents must prove under § 8-43-201(1) that treatment is not reasonable, necessary or related to the injury.

6. Respondents' counsel stated on the record that Respondents are only challenging the Xarelto prescription, and are not seeking to terminate all maintenance care. Based on that representation, the ALJ has placed the burden of proof on the Claimant.

7. As found, Claimant proved by a preponderance of the evidence that periodic prescriptions of Xarelto in conjunction with air travel, as determined and recommended by Dr. Murphy, are reasonably necessary to relieve the effects of the December 2013 industrial injury. Claimant suffered an extensive DVT in December 2013, and continues to suffer from residual venous damage, as evidenced by her ongoing postphlebitic syndrome. Dr. Murphy persuasively explained that the relatively small risk associated with Xarelto is outweighed by the substantial risks associated with recurrent DVT.

8. The preponderance of persuasive evidence shows that the need for continued Xarelto is causally related to the December 9, 2013 industrial injury. Although the medical records suggest a concern for a DVT in 1998, there is no record that Claimant was diagnosed with or received any treatment for DVT before the 2013 industrial injury. If Claimant truly had a substantial pre-existing problem with DVTs, the ALJ would expect to have received medical records documenting that history and treatment.

9. Additionally, the previous "suspicion" of DVT was directed to Claimant's contralateral left leg, rather than the right leg injured in the 2013 industrial accident.

10. By contrast, the "extensive" DVT caused by the December 2013 injury is well-documented throughout the record. Additionally, Claimant has suffered from postphlebitic syndrome and associated edema in the right leg since the industrial injury. Although this condition has "improved" over time, it has not resolved.

11. After carefully considering the totality of the evidence, the ALJ concludes that the December 9, 2013 industrial injury is the most probable cause of Claimant's need for ongoing prophylactic treatment with Xarelto.

[ORDER CONTINUES ON NEXT PAGE]

ORDER

It is therefore ordered that:

1. Respondents shall pay for Xarelto medication as prescribed by Dr. Murphy or other authorized provider(s).

2. All matters not determined herein, or otherwise closed by operation of law, are reserved for future determination.

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

DATED: October 12, 2016

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge

ISSUES

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

I. Whether Respondents are barred from contesting the surgical procedure requested by Dr. Paul Stanton by the doctrine of collateral estoppel (Issue Preclusion) and if not;

II. Whether Claimant has proven by a preponderance of the evidence presented that the L4-S1 fusion procedure recommended by Dr. Stanton is reasonable and necessary.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Markus, the ALJ enters the following findings of fact:

1. Claimant sustained an admitted industrial injury to his low back while unloading a produce truck on December 16, 2012.

2. Claimant initially sought treatment from his primary care physician at Colorado Springs Family Practice on December 20, 2012.

3. Claimant eventually obtained care from Dr. Baca at Integrity Urgent Care. Care under Dr. Baca included physical therapy. Because Claimant continued to have persistent low back pain, Dr. Baca referred Claimant for an orthopedic evaluation.

4. On February 25, 2013, Claimant was evaluated by orthopedic surgeon Dr. Paul Stanton. During this appointment, Claimant reported ongoing pain in his back radiating down his right lower extremity. Dr. Stanton recommended injections and referred Claimant to Dr. Brooks for L4-L5 and L5-S1 facet injections. The recommended injections were performed on March 20, 2013; however, failed to provide relief.

5. Claimant returned to Dr. Stanton on April 2, 2013, complaining of escalating pain in his lower extremities. Dr. Stanton referred Claimant back to Dr. Brooks for L4-3 right side transforaminal injections.

6. Claimant underwent right L4-L5, L5-S1 transforaminal epidural steroid injections on April 17, 2013 Claimant with Dr. Brooks.

7. Additional injection therapy failed to provide lasting relief prompting Dr.

Stanton to document the following during a follow-up appointment with Claimant on July 2, 2013:

> At this point, as the patient has not done well with medications, therapy or epidural steroid injections, he wishes to proceed with operative intervention. I have recommended that he undergo an anterior posterior fusion for his grade 1 mobile spondylolisthesis at L4-5 and a right-sided L5-S1 laminoforaminotomy to relieve his foraminal stenosis.

8. On October 28, 2013 Claimant undertook the above referenced procedures on October 28, 2013. Dr. Stanton's office note indicates that Claimant was doing better with his leg pain although he was still having some intermittent leg pain at night.

9. On December 10, 2013, Claimant returned to Dr. Stanton with complaints of increased pain down his right side which Dr. Stanton felt may be due to an increase in activity. Dr. Stanton felt that Claimant's nerves were irritated. He prescribed a Medrol Dosepak and referred Claimant to Dr. Christopher Malinky for a right sided SI joint injection.

10. On January 16, 2014, Claimant was seen by Dr. Stanton for an acute onset of pain in his lower extremities. Dr. Stanton was concerned about an L5-S1 disc herniation and ordered an MRI.

11. An MRI of the lumbar spine was done on January 29, 2014. In note dated February 25, 2014 Dr. Stanton noted that the MRI showed moderate L5-S1 disc disease and mild L5-S1 right side foraminal stenosis along with mild to moderate right upper S1 lateral recess stenosis. Dr. Stanton referred Claimant for physical therapy and an additional L5-S1 facet injection.

12. On March 27, 2014 Claimant underwent a bilateral L5-S1 facet injection performed by Dr. Chris Malinkey.

13. Claimant returned to Dr. Stanton on April 15, 2014 at which time he told Dr. Stanton his pain was "worse now than before the injection." Dr. Stanton noted that Claimant was having significant arthritis at L5-S1 more on the left side than the right which seems to be more sacroiliac in nature and possibly due to irritation caused by an altered gait secondary to left knee pathology. Dr. Stanton felt that if Claimant's gait could be improved, his back pain may also improve. Dr. Stanton referred Claimant out for a left SI joint injection with Dr. Malinky.

14. On May 13, 2014, Dr. Stanton noted that Claimant continued to have left sided symptoms and that it was possible that his "L5-S1 segment may still be generating some of his pain." Dr. Stanton noted that Claimant had not experienced "good relief" with injection therapy. Nonetheless, he noted that with injections he was "definitely trying to isolate [Claimant's] pain generator." He referred Claimant for an additional transforaminal injection and if this provided relief, then Claimant "may be a candidate for

a limited decompressive vs. reconstruction of his L5-S1 segment.

15. On June 5, 2014, Claimant returned to Dr. Stanton reporting that we was "not doing well." He wanted his L5-S1 segment addressed. Dr. Stanton did not feel that additional left sided decompression was in Claimant's best interests as this was "likely" to "destabilize his spine where he has already had a right-sided decompression and he has an existing fusion at the L4-5 segment. Based upon Claimant's prior surgical intervention and his continued symptoms, Dr. Stanton recommended a L5-S1 fusion.

16. Respondents denied Dr. Stanton's request to perform the above referenced L5-S1 fusion on the grounds that the surgery was not related to Claimant's admitted December 16, 2012 work injury.

17. The issue surrounding the relatedness of Claimant need for a L5-S1 fusion to his December 16, 2012 work injury proceeded to hearing on October 15, 2014 before ALJ Kimberly B. Turnbow. Based on the evidence presented at the hearing, Judge Turnbow, issued an order on December 2, 2014, finding and concluding that the requested procedure was related to Claimant's December 16, 2012 work injury. Accordingly, Judge Turnbow ordered Insurer to pay for the L5-S1 fusion procedure. Respondents did not appeal Judge Turnbow's order.

18. On February 3, 2015, Claimant returned to Dr. Stanton in follow-up regarding the recommended surgery Judge Turnbow ordered Insurer to pay the expenses of. Claimant reported that he was "ready to proceed with surgery of his L5-S1 level" as he had "persistent" pain in his legs which had become "very debilitating with his activities of daily living." Before proceeding, Dr. Stanton noted that Claimant's last MRI was "greater than 1-year old." Consequently, Dr. Stanton noted that he "would like to update this to be sure there is no new onset of pathology before proceeding." Dr. Stanton requested an updated MRI.

19. On February 13, 2015, Claimant underwent an MRI of his lumbar spine which revealed findings consistent with metastatic disease within the T-12 and L-1 vertebral bodies with extensive retroperitoneal lymphadenopathy. The MRI also revealed a new right paramedian disc extrusion at the L5-S1 level, when compared to an MRI done on January 31, 2013, which displaced the exiting right L-5 nerve root.

20. Claimant returned to Dr. Stanton on February 15, 2015 to go over the MRI results Dr. Stanton referred Claimant for a full oncological work up. Claimant's surgery was postponed pending further care for his cancer.

21. On March 9, 2015, Claimant was seen by oncologist Dr. Maurice Markus. Dr. Markus performed an examination including a number of diagnostic tests and concluded that Claimant had metastatic prostate cancer which had spread to the L1 vertebral, some ribs, and some lymph nodes.

22. Claimant underwent chemotherapy with Dr. Markus through August, 2015 with

good results. Claimant is currently on a maintenance regimen of Depo Lupron.

23. On January 8, 2016, Claimant was seen by Dr. Markus' nurse practitioner (NP), Anne Zobec. During this appointment Claimant had multiple questions regarding his ability to undergo the back surgery recommended by Dr. Stanton. Claimant told NP Zobec that his legs are weak and his back bothers him a lot. NP Zobec noted that Claimant was not taking his medication due to a lack of funds. NP Zobec advised Claimant that if he could control his pain with over the counter medication and is able to maintain a "very active" lifestyle "we" would not recommend surgery.

24. Claimant follow-up with Dr. Markus on January 18, 2016. In response to Claimant's fitness to proceed with additional spinal surgery, Dr. Markus noted that he would "defer to Dr. Stanton on this" but "there are no oncological contraindications to this" and that if Claimant "could receive significant palliative benefit from the surgery, it would not be unreasonable to proceed."

25. On February 25, 2016, Claimant presented back to Dr. Stanton. On this date, Claimant told Dr. Stanton that he was experiencing significant pain and weakness in his lower extremities similar to what he had at his last visit back on February 17, 2015. Dr. Stanton recommended a L4-S1 ROH TLIF posterior spinal fusion.

26. On March 3, 2016, respondents denied Dr. Stanton's request for the L4-S1 ROH TLIF posterior spinal fusion.

27. On July 19, 2016, in a letter addressed "To Whom It May Concern", Dr. Stanton explained his reasoning for changing the recommended procedure from an L5-S1 fusion to a "contiguous" L4-S1 fusion. The ALJ finds the reasoning articulated in the July 19, 2016 letter persuasive of the concern regarding the necessity to extend Claimant's current need for an L5-S1 fusion to a revision of the L4-5 fusion. According to Dr. Stanton, contiguous fusion with re-instrumentation as necessary to make one longer construct is the standard of care when "performing an adjacent level of fusion for preexisting fusion construct."

28. On August 16, 2015, Claimant was evaluated by Dr. Tashof Bernton at the request of Respondents. In his report prepared after his independent medical examination (IME), Dr. Bernton came to the following conclusions:

- Claimant had a work related exacerbation of underlying disc disease;
- That Claimant's metastatic cancer involving the L1 vertebrae is certainly contributing to Claimant's low back pain;
- That Claimant's lower lumbar spine pain is consistent with his L5-S1 and L4-L5 degenerative disc disease and his upper lumbar spine pain is related to his prostate cancer;
- That Claimant's disability at the time of his evaluation is related to both his

work injury as well as the cancer but within three to six months the prostate cancer will be "by far" the cause of his disability;

- That as he progresses, Claimant's low back symptoms due to the cancer will increase and present a progressive and progressively escalating cause of disability and limitation;

- That both the patient's present cancer and work injury are equal contributors to Claimant's disability but the apportionment may drastically change;

29. In a letter dated July 19, 2016, Dr. Stanton explained that he still recommends a L5-S1 fusion. Dr. Stanton further explained that the standard of care in this type of surgery is to extend Claimant's current L4-L5 fusion so as to be contiguous with the L5-S1 fusion. In order to do this requires removal of the instrumentation with re-instrumentation as necessary to make one longer construct. The reason the L4-L5 posterior instrumentation would need to be revised is this technically is a better construct in terms of connecting to an existing fusion. According to Dr. Stanton, it would not be considered the standard of care to try to perform a stand-alone fusion at L5-S1 without connecting to the L4-L5 segment.

30. Claimant testified that he has undergone treatment for his prostate cancer and wishes to proceed with the back surgery recommended by Dr. Stanton. Claimant testified that he continues to have low back pain with pain and weakness down his legs which affects his functional abilities. Claimant testified that he tries to do very light yard work and perform other light activities but still has significant problems with most activities of daily living. His daughter helps with cleaning and doing the dishes. He has given up fishing as it requires too much walking and walking increases his pain. At this time, Claimant is only taking Aleve for pain control. Claimant credibly testified that he does not like taking strong pain medication due to their side effects. Claimant also testified that prescription pain medication is expensive. For these reasons Claimant avoids strong pain medication. Insofar as his back pain is concerned, Claimant testified that the pain is variable; that he has good days and bad days but he always has a degree of daily pain.

31. As referenced above, Dr. Markus testified by deposition as a board certified hematologist, medical oncologist and internal medicine physician on July 14, 2016. Dr. Markus testified that Claimant's prostate cancer has metastasized to the bone, including the T5 and L1 vertebral segments. Consequently, he testified that it is medically probable that Claimant's bony metastatic disease could be a contributing to his back pain. However, Dr. Markus testified that it is impossible to say to what extent Claimant's back pain is related to the cancer versus the injury. Moreover, he testified that it is possible that both were contributing to Claimant's pain to some degree. While Dr. Markus testified that it is impossible to determine to what extent Claimant's current back pain was caused by his metastatic disease versus his injury, Dr. Markus testified that it "seems unlikely that a metastasis to L1 would radiate down to the L5 distribution."

32. In reiterating his opinion that there are no oncological contraindications to proceeding with the surgery recommended by Dr. Stanton, Dr. Markus testified that the requested surgery "would not worsen oncologic outcomes" and that "if Dr. Stanton feels that it would provide the patient with improvement of his quality of life, then it's worth pursuing." Dr. Markus also testified that because Claimant's "prognosis is measured in the order of multiple years from his disease" and "palliation of his symptoms should be paramount in terms of our goals of care", increases in Claimant's PSA would not be a contraindication to proceeding with surgery. Dr. Markus repeated his stated decision to "defer" to Dr. Stanton to surgically treat the "area he thinks is causing most of the symptoms."

33. As noted, Dr. Bernton, an expert in internal and occupational medicine, testified at hearing. Dr. Bernton testified that the surgery recommended by Dr. Stanton is neither reasonable nor necessary. Dr. Bernton reasoned that Claimant is fairly active and is only taking Aleve for his symptoms which indicates to him that Claimant's pain is not bad enough to require surgery. Dr. Bernton also testified that Claimant's low back pain is at least partially caused by the metastatic disease in the lumbar spine found on MRI. Dr. Bernton testified that Claimant's main complaints are of low back pain and not so much leg pain. Accordingly, Dr. Bernton testified that Claimant does not have a radiculopathy which would be amenable to surgery.

34. Dr. Bernton testified that the surgery recommended by Dr. Stanton on February 25, 2016 is not the same surgery that was being recommended in May, 2014, in that it involves an additional spinal segment.

35. Dr. Bernton testified that under Colorado's Medical Treatment Guidelines (hereinafter the "Guidelines") surgery should be contemplated within the context of expected functional outcomes and not purely for the purposes of pain relief. Dr. Bernton testified the Claimant's pain generator has not been adequately identified as is required by the Guidelines prior to performing surgery. Consequently, Dr. Bernton testified that is not medically reasonable or necessary to perform a major surgical procedure, which requires a major recovery period on a patient with a limited life expectancy and a limited period during which his health will be reasonably well, particularly in a case where the pain generator has not been adequately identified.

36. Dr. Bernton testified that the surgery being requested by Dr. Stanton will do nothing to address the pain being caused by Claimant's metastatic disease.

37. Relying primarily on the January 8, 2016 note from Dr. Markus' office, Respondents suggest that Dr. Markus is actually recommending against surgery. Respondents' contend further that Dr. Bernton agrees with this opinion noting that Dr. Bernton testified that while there are no oncological contraindications to surgery that Dr. Markus was not "actively" recommending it. The ALJ finds Respondents' suggestion unpursuasive. The January 8, 2016 report was prepared by NP Anne Zobec who opined that, if Claimant could control his pain with over-the-counter pain medications

and remain “very active”, “we” would recommend against surgery. It is unclear as to who NP Zobec means when using the term “we”; however, the deposition testimony of Dr. Markus convinces the ALJ that while he defers to Dr. Stanton regarding which area (spinal segment) is causing most of Claimant’s symptoms, proceeding with surgery is reasonable and “palliation of Claimant’s symptoms should be paramount in terms of our goals of care.” Moreover, the ALJ finds the evidence that Claimant has been able to control his pain with over the counter medications wanting. The ALJ finds the fact that Claimant does not take prescription pain medications does not automatically lead to a conclusion that his pain is controlled with over the counter analgesics. To the contrary, Claimant credibly testified that he experiences a degree of daily pain despite his use of over the counter medication.

38. Based upon the evidence presented, the ALJ finds the opinions of Dr. Stanton and Dr. Markus credible and more persuasive than the contrary opinions of Dr. Bernton.

39. Claimant has proven by a preponderance of the evidence that the recommended L4-S1 surgery requested by Dr. Stanton is reasonable and necessary.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers’ Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers’ compensation claim is to be decided on its merits. *Id.*

B. In deciding whether Claimant has met his burden of proof, the ALJ is empowered: “To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence.” *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App.

2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

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

Collateral Estoppel (Issue Preclusion)

D. Issue preclusion principles, although developed in the context of judicial proceedings, may be applied to administrative proceedings in Workers Compensation Claims. *Sunny Acre Villa Inc. v. Cooper*, 25P3d 44 (Colo. App.). Issue and claim preclusion work to preclude the relitigation of matters that have already been decided. *Argus Real Estate, Inc. v. E-470 Pub Highway Auth.,* 109 P3d 604, 608 (Colo. 2005). The doctrine is intended to promote judicial economy and to confirm the finality of judgments by preventing inconsistent decisions. *Argus,* 109 P3d at 608, 611.

E. Issue preclusion bars re-litigation of an issue if all of the following elements are satisfied: (1) The issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) The party against whom estoppel is asserted has been a party to or in privity with a party to the prior proceeding; (3) There is a final judgment on the merits in a prior proceeding; and (4) The party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in a prior proceeding: *Sunny Acre Village, Inc.,* 25 P3d at 47, and *Bebo Construction Co. v. Mattox & O' Brien, P.C.*, 990 P2d 78, 84 (Colo. 1999).

F. In this case, Claimant has failed to establish that Respondents are barred from challenging the surgical procedure requested by Dr. Stanton by the doctrine of collateral estopple. While the parties in the prior hearing before ALJ Turnbow are the same as those before this Court and the order issued by ALJ Turnbow on December 2, 2014 ordering Respondents to pay for Claimant's L5-S1 fusion is final, the issues heard by ALJ Turnbow and subsequently by the undersigned are not identical. Rather, ALJ Turnbow addressed the distinct issue of whether or not Claimant's need for a L5-S1 fusion procedure as recommended by Dr. Stanton was related to his December 16, 2012 industrial injury. In the instant case, the undersigned has been tasked with determining whether or not Claimant's need for an L4-S1 fusion is reasonable and necessary. The undersigned ALJ also notes that the surgical procedures recommended between the first hearing and the instant case are not identical. To the contrary, the back surgery at issue in the first proceeding involved a request to proceed with a L5-S1 fusion where as Dr. Stanton's current request involves performing an anterior/posterior spinal fusion extending from L4 through S1. The ALJ has considered

Claimant's argument that the surgery ordered by ALJ Turnbow is identical to the procedure at issue because either surgery necessarily would include a revision of Claimant's previous L4-L5 fusion. The ALJ rejects this argument as unpursuasive. Based upon the evidence presented, the ALJ concludes that there are distinct differences between the procedures recommended. Contrary to Claimant's assertion, the issue litigated and determined in the prior proceeding before ALJ Turnbow is not identical to the issues for determination before the undersigned.

G. Insofar as Claimant has failed to meet an element required to be established for the doctrine of issue preclusion to apply, the ALJ concludes that Respondents are not collaterally estopped from litigating the issue of whether Dr. Stanton's request for a L4-S1 fusion is reasonable and necessary simply because the recommended procedure includes a spinal segment (L5-S1) which was the subject of a previous order issued by ALJ Turnbow. Nonetheless, the evidence presented persuades the undersigned that the request is reasonable and necessary.

Medical Benefits

H. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back. The evidence presented persuades the ALJ that this compensable injury is the proximate cause of Claimant's current need for medical treatment, including the recommended surgical procedure. Taken in its entirety, the ALJ finds the evidentiary record to contain substantial evidence to support a conclusion that the pathology in his low back secondary to his industrial injury and not his metastatic disease is the cause his current symptoms and need for treatment. Consequently, the ALJ concludes that Claimant has established that his need for L4-S1 fusion surgery is causally related to his December 16, 2012 work-related injury. Moreover, the totality of the evidence presented establishes that the proposed L4-S1 fusion surgery is reasonable and necessary given Claimant's credible complaints of continued pain and functional decline. Consequently, the ALJ concludes that Respondents are liable for the L4-S1 fusion recommended by Dr. Stanton.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation fee schedule, to cure and relieve Claimant from the effects of his low back injury, including the L4-S1 fusion surgery recommended by Dr. Stanton.

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

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

DATED: October 12, 2016

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she sustained a work related injury to her right knee on September 14, 2015 arising out of and in the course of her employment.

II. Whether Claimant established by a preponderance of the evidence that the surgery recommended by Dr. Simpson is reasonably necessary and causally related to her alleged September 14, 2015 work related injury.

STIPULATIONS

At the commencement of hearing, the parties stipulated that if Claimant's injury was determined to be compensable, Claimant's average weekly wage is $841.38. The ALJ approved the stipulation.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. O'Brien, the ALJ enters the following findings of fact:

1. Claimant works as a correctional officer for Respondent-Employer. She has been employed as a correctional officer for the past 8 ½ years. On September 14, 2015, Claimant drove to work arriving at work at approximately 5:45 a.m. She parked her car, grabbed her lunch and exited her car in preparation to walk from the parking lot into work. While walking into work from the parking lot, Claimant stepped up onto a concrete island. As she stepped up, her right ankle rolled outward resulting in a pop and sharp pain in her right knee.

2. Claimant testified that Respondent's exhibits L and M accurately depict the island that she stepped onto that day. Claimant admitted the island was a typical island that you would encounter in other parking lots and public areas. Claimant also admitted that the island was not icy, she did not step into a hole on the island, she did not trip, she did not strike her knee on anything on the island, and she did not fall. Claimant was just stepping up onto the island when her ankle rolled causing an injury to her right knee.

3. Claimant reported her injury and was referred to Dr. Douglas Bradley where she provided a history of injury consistent with her hearing testimony. Dr. Bradley conducted and examination and ordered x-rays of the right knee.

4. X-rays demonstrated "small effusion" and "mild patellofemoral and minimal medial compartment degenerative change" but "no joint space narrowing.

5. Claimant testified to a pre-existing history of arthritis in both of her knees prior to September 14, 2015. This is corroborated by the medical records admitted into evidence at hearing. Treatment for her pre-existing arthritis has included cortisone injection therapy, Voltaren gel, and prescription medications. On April 3, 2015, approximately five (5) months before her alleged work related injury, Claimant was seen by Dr. Patrick Timms for a rheumatologic consultation for her arthritis. In the clinic notes, it indicates that Claimant had been diagnosed with bilateral osteoarthritis in her knees 6 years ago. (Exhibit D, bate stamp 12) Dr. Timms noted that Claimant's knee pain was worse when negotiating stairs and that she has issues standing on her feet for prolonged periods of time. Dr. Timms obtained x-rays of Claimant's knees which demonstrated "slight loss of joint space in the medial as well as the bilateral patellofemoral compartments" of the knees. Dr. Timms diagnosed Claimant with osteoarthritis involving the patellofemoral joint and recommended the use of Voltaren gel four times a day for her knees.

6. Claimant testified regard the changing nature of her right knee pain following the alleged September 14, 2015 injury. Claimant testified that following the September 14, 2015 incident she has experienced constant pain in the right knee, particularly on the medial aspect of the knee. Moreover, Claimant testified that since the September 14, 2015 injury, the right knee feels unstable which she feels may affect her ability to run and perform take downs currently. Respondent does not take issue with this testimony. Indeed, Respondent concedes that Claimant probably sustained an injury in the form of a medial meniscus tear to her right knee on September 14, 2015. Rather, it is Respondent's position that Claimant's pre-existing arthritis caused her meniscus tear and that the island is not a special hazard of employment.

7. Claimant also admitted to prior injuries involving the right knee and right ankle. Specifically, Claimant admitted suffering a work related injury to her right knee on July 25, 1995 while employed with M Cline Inc., a work related injury to her right foot on August 18, 2007 with pain extending from her right foot up to her right knee, a work related injury to her right foot, ankle, and knee on February 1, 2012 when she kicked a door, and a work related injury to her right knee on September 9, 2013 while climbing onto a bunk and falling.

8. Claimant had an MRI scan of her right knee on September 21, 2015, seven days after the September 14, 2015 incident. The MRI revealed "moderately advanced osteoarthritis involving the patellofemoral compartment with diffuse articular cartilage loss and subchondral degenerative cystic changes", "subchondral degenerative cystic changes involving the trochlear region of the distal femur and mild osteoarthritic changes involving the medical and lateral compartments of the knee with mild marginal hypertrophic osteophyte formations." Importantly, the MRI also demonstrated "small joint effusion" and "mild intrasubstance degenerative signal scattered throughout the medial meniscus" suggesting the presence of a "subtle radial tear involving the posterior horn of the medial meniscus . . ." Based upon the findings the radiologist interpreting the MRI reached the following impressions: "1. Moderately advanced osteoarthritis

involving the patellofemoral compartment; 2. Small joint effusion and 3. Questionable subtle radial tear involving the posterior horn of the medial meniscus.

9. Claimant was referred to Dr. Michael Simpson for a consultation on October 7, 2015. Dr. Simpson reviewed Claimant's MRI noting that the "MRI scan of the right knee obtained 09/21/15 shows inches of some degenerative signal throughout the medial meniscus with a radial tear at the posterior horn of the medial meniscus." Dr. Simpson went on to document that Claimant was having pain at the time of his examination that was "distinctly different from the pain she has had before. He expressed his opinion that the change in Claimant's pain was suspicious for "meniscal pathology" rather than an "exacerbation of her underlying arthritis." Consequently, Dr. Simpson recommended an arthroscopic medial meniscectomy.

10. Respondent sought an opinion from Dr. Timothy O'Brien regarding the cause of Claimant's meniscal tear and whether the arthroscopic surgery recommended by Dr. Simpson was reasonable, necessary and related to Claimant's alleged September 14, 2015 work related injury. Dr. O'Brien performed an Independent Medical Evaluation (IME) and generated a written report on March 30, 2016. Following his evaluation, Dr. O'Brien opined that the September 14, 2015 incident "resulted in a minor right knee strain/sprain that temporarily aggravated [Claimant's] pre-existing and longstanding patellofemoral osteoarthritis but did not produce an acute meniscus tear." Dr. O'Brien substantiated his opinion by the findings documented on the September 21, 2015 MRI which noted a "questionable subtle tear of the posterior horn of the medial meniscus and the small amount of effusion which he concluded was "entirely consistent" with Claimant's osteoarthritis.

11. Regarding the reasonableness and necessity of surgery as recommended by Dr. Simpson, Dr. O'Brien noted:

> What Dr. Simpson will achieve, if he is allowed to undertake the surgery he is recommending, is the creation of an intractable synovitis due to the introduction of rigid arthroscopic instrumentation with its attendant high-pressure, high-volume hydrodistention. The intractable synovitis will result from the surgical trauma and injury that awakens quiescent areas of arthritis. [W]hat Ms. Avila will actually experience is an acceleration of her osteoarthritis symptomology rather than pain relief.

12. Dr. O'Brien concluded that the "risk/benefit analysis, based upon scientific and empirical evidence, convincingly argues against Dr. Simpson's recommendation to proceed with surgical intervention in the form of an arthroscopy." Consequently, Dr. O'Brien opined that not only was the recommended surgery unreasonable, it was actually "contraindicated."

13. As noted Dr. O'Brien testified as an expert in orthopedic surgery during a post-hearing deposition convened August 1, 2016. During his deposition, Dr. O'Brien reiterated his opinion that while Claimant did sustain a "minor strain or sprain" injury on

September 14, 2015 she did not tear her meniscus on that date and the “MRI scan proves that.” With regard to the MRI findings, Dr. O’Brien explained that an acute traumatic tear would have produced a large hemarthrosis or synovial effusions which were not seen on the MRI and the “absence of those findings that herald acute injury” supports a conclusion that all the findings on MRI were chronic in nature. Dr. O’Brien reviewed the September 21, 2015 MRI film prior to his deposition. Dr. O’Brien testified that a review of the actual MRI film supported the concerns he noted in his IME report regarding the reading of that film and that in his opinion, there is no true medial meniscus tear, only intrameniscal changes, that are normal age-related degenerative changes. To the extent that there is evidence of a meniscal tear supported by MRI, the ALJ infers from Dr. O’Brien’s testimony that he believes that such tear is degenerative in nature and unrelated to the September 14, 2015 incident.

14. Dr. O’Brien testified that there was no clinical evidence of a symptomatic meniscus tear during his evaluation of Claimant on March 30, 2016 and that the pain Claimant experienced on September 14, 2015 was the predictable manifestation of her underlying osteoarthritis. With regard to Claimant’s reported knee pain during palpation, Dr. O’Brien explained that because Claimant failed multiple McMurray tests during his examination; her reported pain was more likely the result of her underlying arthritis rather than a symptomatic meniscus tear.

15. Dr. O’Brien referred to scientific studies involving arthroscopic surgery in expanding on his opinion that introducing instrumentation into Claimant’s knee during the surgery proposed by Dr. Simpson was contraindicated and would only introduce additional trauma to the knee which would likely aggravate Claimant’s underlying osteoarthritis and increase her pain complaints. According to Dr. O’Brien, double-blinded studies establish that the surgery recommended by Dr. Simpson “doesn’t help people with arthritis and a degenerative meniscus tear.”

16. The ALJ has carefully considered Dr. O’Brien’s opinions and has weighed them against the balance of the competing evidence. Based upon the totality of the evidence presented, the ALJ finds Dr. O’Brien’s opinions credible and persuasive.

17. The evidence presented, persuades the ALJ that Claimant failed to prove that she suffered an acute tear of the medial meniscus as a direct consequence. To the contrary, the evidence presented persuades the ALJ that Claimant’s meniscal tear is, more probably than not, degenerative in nature and caused by her underlying, longstanding advanced osteoarthritis rather than by rolling her right ankle while stepping up on the concrete island as she claims. Consequently, Claimant has failed to prove by a preponderance of the evidence that she sustained a work related injury arising out of her employment on September 14, 2015.

18. Even if Claimant had established a causal connection between her right medial meniscal tear and her work related functions, she failed to prove by a preponderance of the evidence that the surgery recommended by Dr. Simpson is reasonable or necessary. To the contrary, the ALJ is persuaded by Dr. O’Brien’s testimony that given

Claimant's preexisting osteoarthritis that the recommended surgery is specifically unreasonable and contraindicated as it would only introduce additional trauma to the knee which would likely aggravate Claimant's underlying osteoarthritis and increase her pain complaints.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

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

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Based upon the evidence presented, the ALJ finds that Respondents are not contending that Claimant's alleged injury did not occur in the course of her employment. Rather, based principally on the testimony of Dr. O'Brien and the medical records presented, the undersigned ALJ understands Respondents contention to be that Claimant's medial meniscal tear did not "arise out" of her employment. In other words, Respondents contend that Claimant's medial meniscus tear was precipitated by a pre-existing condition, i.e. her longstanding osteoarthritis, and not an activity or condition distinctly associated with Claimant's employment, i.e. stepping up onto a concert island while walking into work. Given the evidence presented, the argument is persuasive.

E. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As noted above, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2014. Here, Dr. O'Brien persuasively testified that Claimant's MRI did not correlate with an acute injury but rather demonstrated chronic degenerative changes. Dr. O'Brien also testified that Claimant has osteoarthritis which he suspected was the cause of her small joint effusion. The record evidence supports Dr. O'Brien's opinions. Indeed, Claimant's MRI specifically notes that there was evidence of "intrasubstance degenerative signal scattered throughout the medial meniscus." Concerning Claimant's pre-existing arthritis and the condition of her right knee as a whole, the ALJ finds Dr. O'Brien's opinion that what Claimant experienced on September 14, 2015 was the predictable manifestation of her underlying osteoarthritis credible and persuasive.

F. The question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and her need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App.

2000). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case Claimant has failed to establish a causal connection between her employment related duties and the resulting condition for which medical treatment benefits are sought. Here, the origin and cause of Claimant's injury while stepping up onto the island on September 14, 2015, more probably than not, was her significant pre-existing arthritis. Consequently, her claim must be denied and dismissed. *See Horne v. St. Mary-Corwin Hospital*, W.C. No. 4-205-014 (April 14, 1995); *Crass v. Cobe Laboratories,* W.C. No. 3-960-622 (October 10, 1991); *Gutierrez v. Wal-Mart Stores, Inc.*, W.C. No. 4-432-838 (November 30, 2000).

G. Although Claimant is not alleging that her meniscal tear was "precipitated" by a pre-existing condition and instead by a discrete injury, the ALJ finds and concludes, that Respondents are contending, that the meniscal tear is a consequence of a pre-existing condition brought by Claimant to the workplace. Consequently, the ALJ has also analyzed the compensable nature of this case pursuant to the decision announced by the Colorado Supreme Court in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014) and the "special hazard" rule announced by the Court of Appeals in *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

H. In *City of Brighton*, the Colorado Supreme Court identified three categories of risk that cause injuries to employees: (1) employment risks directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which are neither employment related nor personal. 318 P.3d 496 (Colo. 2014). The second category includes risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to her employment. Idiopathic conditions have been defined to mean "self-originated." *Id.* at 503. Purely idiopathic personal injuries generally are not compensable unless an exception applies. *Id.* at 503. One exception is when a pre-existing or idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. Referred to as the "special hazard rule", the Colorado Court of Appeals held that a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by "the concurrence of a pre-existing weakness and a hazard of employment." *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Gates Rubber Co. v. Industrial Comm'n.*, 705 P.2d 6, 7 (Colo. App. 1985). The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission, supra; Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the employment and the injury. *See Ramsdell v. Horn, supra.* In order to be considered a special hazard, the employment condition cannot be a ubiquitous one; it must be a special hazard not generally encountered. *Id.* The rationale for this exception is that unless a special hazard of employment increases the risk or extent of injury, an injury due to a claimant's personal or idiopathic condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Gates, supra* at 7. Courts have previously held that hard level concrete floors, concrete stairs, and a sidewalk curb are not special hazards of employment. *Id.; Alexander v. ICAO*, No. 14CA2122 (Colo. App. June 4, 2015); *Gaskins v. Golden Automotive Group, LLC*, W.C. No. 4-374-591 (ICAO Aug. 6, 2009). There is no requirement that the pre-existing condition is symptomatic prior to the injury in order for the special hazard rule to apply. *Alexander v. Emergency Courier Services, supra*. Here, Claimant did not testify that any particular flaw in the island caused her right knee injury. This is supported by her testimony and the photographs submitted into evidence. The island is not a special hazard of employment but rather a ubiquitous condition which Claimant could have encountered off the job. Moreover, as found, the record evidence supports a conclusion that Claimant's meniscal tear was precipitated by her pre-existing osteoarthritis. Consequently, the ALJ concludes that Claimant bore the burden to establish that there was a concurrence of a pre-existing weakness and a hazard of employment to result in a compensable work injury to Claimant's right knee. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); See *also Ramsdell v. Horn*, *supra.* Here Claimant failed to establish that a special hazard of employment combined with her pre-existing condition to cause the injury in question. Accordingly, her claim for benefits must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim for worker's compensation benefits is denied and dismissed.

2. Claimant's claim for the surgery recommended by Dr. Simpson is denied and dismissed as it is neither reasonably necessary nor causally related to the September 14, 2015 incident.

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

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

DATED: October 7, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-010-091-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED
c/o GALLAGHER BASSETT,

Third-party Administrator (TPA)

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 28, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 9/28/16, Courtroom 3, beginning at 8:30 AM, and ending at 11:15 AM).

The Claimant was present in person and represented by Andrew Sandomire, Esq. Respondent was represented by Nancy Hummel, Esq.

Hereinafter jack Hogan II shall be referred to as the "Claimant." Vail Valley Resorts shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 2, 3, 7, 8, 9 and 10 were admitted into evidence, without objection. Claimant's Exhibits 1, 4, 5 and 6 were withdrawn. Respondent's Exhibits A through K were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and took the matter under advisement for the preparation of a written decision, which hereby issues.

ISSUES

The paramount issue to be determined by this decision concerns whether the Claimant suffered a compensable injury to his left leg as the result of a fall on March 18, 2016, arising out of the course and scope of his employment; or, whether his injury was the result of a significant deviation from the course and scope of his employment so as to take his injury outside the sphere of his employment. If the injury is compensable, the additional issue concerns entitlement to medical benefits.

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

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was born on May 25, 1993 and was 23 years of age on the date of the hearing.

2. The Claimant began working at his current position since around November 2015. The Employer operates a ski resort in Colorado.

3. The Claimant was a ski lift operator for the Employer. His job duties included operating a ski lift to which he was assigned. His duties encompassed a wide variety of tasks including operating the ski lift, loading passengers, clearing snow from the lift and so forth.

The Incident on March 18, 2016

4. On March 18, 2016, while traveling to his assigned lift, the Claimant was accompanied by co-workers Brian Atkins and Nick Murray. This group was at the top of the mountain attempting to reach Lift 7 in order to open the lift. The designated route for traveling to Lift 7 was a route known as Lost Boy. Due to snow conditions from the night before, however, the Claimant and his two coworkers decided to take The Woods route. On direct examination, the Claimant stated that one of his coworkers was using a snowboard and that the grade of the Lost Boy route would require him to unstrap from his board and walk up the hill. The Claimant further testified that the lift needed to be opened around 8 AM. According to the Claimant, their decision to take The Woods

route arose because they did not want to be late opening Lift 7. The Claimant testified that late openings were “frowned upon” by his supervisors. While nearing the bottom of The Woods, the Claimant skied on top of a ridge and fell onto a bed of rock that was covered by snow. Atkins and Murray did not witness the fall but heard the Claimant screaming in pain.

5. The Claimant experienced severe hip and leg pain at the time of the impact. He struck around the left leg/hip area and sustained a broken left femur. The medical records support and corroborate a significant injury.

6. The Claimant was eventually taken to the Vail Valley Medical Center where it was determined that his injury required immediate surgery. Following surgery to his left leg, the Claimant was in the hospital for four days. He was physically unable to start working again until May 1, 2016. He also attended follow up medical appointments, completed physical therapy (PT), and he received acupuncture for his leg following his discharge from the hospital.

7. Soon after the work-related incident, the Claimant’s coworkers reported the injury to their supervisor. The supervisor immediately fired the Claimant on March 18, 2016 and asked him to vacate his company apartment on April 1, 2016.

8. On direct examination, Chris Mills, who is the Senior Manager for Lift Operations, testified that the Claimant did not follow the designated route policy. Mills testified that the Claimant and all other lift operators were trained to follow their designated route and seek permission if an alternate route was to be taken. Safety violation was **not** designated as an issue. Moreover, the Respondent argues that “not following the designated route,” although in furtherance of getting the job done, amounted to a frolic and detour, which took the Claimant out of the course and scope of his employment.

9. The Employer has refused to cover any medical expenses associated with the initial work-related incident. The Employer contests the Claimant’s assertion that the leg injury arose during the scope of employment.

10. During closing arguments, the Respondent maintained that the Claimant’s decision to take The Woods route without permission constituted a significant deviation and therefore placed the Claimant’s injury outside the scope of employment.

Ultimate Findings

11. The ALJ finds that the Claimant's testimony is credible, convincing, and it persuasively refutes the Respondent's denial of causal relatedness (to work) concerning the incident of March 18, 2016. Thus, the ALJ finds that the Claimant has proven, by a preponderance of the evidence, a work-related left leg injury as a consequence of his fall on a bed of rocks during the course and scope of his employment. While, the Respondent presented Mills' opinion that contradicted the Claimant's testimony, the Claimant's testimony is based upon his state of mind at the time of the incident, *i.e.,* furthering the interests of his Employer. The Claimant's primary justification for taking an alternate route concerned snow conditions and arriving to the lift on time in furtherance of his job for the Employer. A mistake in judgment on the Claimant's part does **not** amount to a significant deviation, frolic and detour from the course and scope of his employment.

12. The ALJ makes a rational choice, based on substantial evidence, to accept the testimony of the Claimant as dispositive and to reject the Respondent's claim that the left leg injury was caused outside the course and scope of the Claimant's employment.

13. The Claimant has proven, by a preponderance of the evidence that he sustained a compensable injury to his left leg, arising out of the course and scope of his employment.

14. The evidence does **not** support a "frolic and detour significant enough to take the Claimant's accident outside the course and scope of his employment. At the time of his accident, the Claimant was furthering the interests of his Employer, although misguidedly taking a different route to open the lift on time. The evidence simply does **not** support the proposition that the Claimant's actions were for his **sole** benefit. In fact, the evidence establishes that the Claimant experienced a significant injury to his left leg while attempting to reach his assigned lift on time, in furtherance of his work for the Employer.

15. The Claimant has proven, by preponderant evidence that his medical care and treatment was authorized, within the chain of authorized referrals, causally related to the accident of March 18, 2016, and reasonably necessary to cure and relieve the effects of that injury.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible, convincing, and it persuasively refuted the Respondent's denial of causal relatedness (to work) concerning the incident of March 18, 2016. As further found, while the Respondent presented Mills' opinion that contradicted the Claimant's testimony, the Claimant's testimony was based upon his state of mind at the time of the incident, *i.e.,* furthering the interests of his Employer. The Claimant's primary justification for taking an alternate route concerned snow conditions and arriving to the lift on time. A mistake in judgment on the Claimant's part does **not** amount to a significant deviation, frolic and detour from the course and scope of his employment.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007).

Substantial evidence is “that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence.” *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ’s resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the testimony of the Claimant as dispositive and to reject the Respondent’s claim that the left leg injury was caused outside the course and scope of the Claimant’s employment.

Detour From the Course and Scope of Employment

c. Indeed, the “dual purpose” doctrine holds that an injury sustained while the employee is performing an act for the mutual benefit of the employer and the employee is usually compensable. *See Berry’s Coffee Shop, Inc. v. Palomba,* 161 Colo. 369, 423 P.2d 2 (1967); *Bob Hagestad Porsche Audi, Inc. v. Indus. Comm’n,* 503 P.2d 628 (Colo. App. 1972). Typical “frolics and detours” from the course and scope of employment involve: (1) recreational activities [*see White v. Indus. Claim Appeals Office,* 8 P.3d 621 (Colo. App. 2000)]; horseplay [*see McKnight v. Houck,* 87 Colo. 234, 286 P. 279 (1930)], or actions for the **sole** benefits of the employee such as recreational skiing as a perk of employment. *See Kater v. Indus. Comm’n,* 728 P.2d 746 (Colo. App. 1986) [holding that the question of whether a deviation from employment is significant enough to remove the claimant from the scope of employment is generally a question of fact to be determined by the fact finder]. The Respondent cited an old Industrial Claim Appeals Office Order, wherein the Claimant was engaged in **recreational** skiing on a slope specifically prohibited to the claimant. *See Satterfield v. Vail Associates, Inc.,* W.C. No. 3-108-224 [Indus. Claim Appeals Office (ICAO), March 24, 1994]. In *Satterfield,* the claimant was engaged in **recreational** skiing on a slope which the Employer prohibited to the claimant There is a substantial, distinguishing fact pattern in *Satterfield,* as opposed to the facts in the present case, *i.e.,* in the present case, the Claimant was pursuing his Employer’s interests to open the ski lift on time. *Also see* 1A Larson, *Workmen’s Compensation Law,* section 234.00. It is **fundamental** that eligibility for workers’ compensation benefits is not dependent upon **fault.** *See Banks v. Indus. Claim Appeals Office,* 794 P.2d 1062 (Colo. App. 1990). The fact that an employee sustains an injury as a result of his own negligence does **not** affect the employee’s right to workers’ compensation benefits. *See Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P.3d 1061 (Colo. App. 2002). As found, at the time of his accident, the Claimant was furthering the interests of his Employer, although misguidedly taking a different route to open the lift on time in furtherance of his Employer's interests.

Medical Benefits

d. Because this matter is compensable, Respondent is liable for medical treatment which is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, all of the Claimant's medical care and treatment for his left leg injury was authorized.

e. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, all referrals were within the chain of authorized referrals.

f. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the compensable accident of March 18, 2016. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of his compensable left leg injury of March 18, 2016.

Burden of Proof

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

Appealable Order

h. Recently, the Industrial Claim Appeals Office (ICAO) apparently changed course and determined that a "change of physician" order was **not i**nterlocutory but appealable. In finding an evidentiary fact and/or testimonial inference that differed from the fact finder's finding, ICAO held that a letter to the respondents, indicating that the claimant had no faith in her then present treating physicians and was changing to another doctor did **not** amount to a request to change physicians, thus the ALJ' s order permitting a change of physicians was reversed. *See Huston v. Allcable, Inc.,* W.C. No. 4-997-535-01 [Indus. Claim Appeals Office (ICAO), October 5, 2016].

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay the costs of medical care and treatment for the Claimant's compensable left leg injury, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this______day of October 2016.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the back surgery recommended by Sanjay Jatana, M.D. is reasonable and necessary to cure or relieve the effects of his May 17, 2015 admitted industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a Superintendent who operated heavy equipment. On May 17, 2015 he suffered admitted industrial injuries to his head, neck, right shoulder and back. While operating a mini-excavator Claimant was struck by a dump truck that rolled downhill. Upon impact, Claimant was thrown from the mini-excavator.

2. Sanjay Jatana, M.D. diagnosed Claimant with cervical region spinal stenosis and provided medical treatment for the injuries. An MRI of Claimant's neck revealed a C3-C4 left paracentral disc bulge causing moderate spinal left neural foraminal stenosis. Claimant also had foraminal stenosis at C5-C6 and C6-C7. Dr. Jatana recommended a C3-C6 anterior cervical discectomy and fusion. He also suggested a possible fusion at C6-C7.

3. Claimant testified through a post-hearing evidentiary deposition in this matter. He explained that he suffers pain in his neck that goes down his right shoulder into his arm. He has received radio frequency ablations, facet injections, trigger point injections and physical therapy. Claimant obtained temporary relief from conservative treatment. He wishes to proceed with the surgery recommended by Dr. Jatana.

4. Brian Reiss, M.D. conducted a records review of Claimant's case and testified at the hearing in this matter. He distinguished between a neurological comprise and axial or mechanical back pain. Dr. Reiss commented that, if a patient exhibits a neurological compromise, surgical outcomes are usually positive. However, if a patient suffers from axial back pain, surgical outcomes are typically not positive.

5. Dr. Reiss commented that Claimant's cervical MRI films revealed left-sided pathology but he complained of right-sided neck pain. Moreover, although Claimant had received facet blocks and epidural steroid injections, they occurred contemporaneously in overlapping locations. The tests thus had limited diagnostic value. Furthermore, an emergency room report from December 8, 2015 revealed that Claimant's neurological status was intact with no weakness, sensory deficits or reflex deficits. Claimant thus likely suffered from neck pain that would not likely be remedied through the cervical fusion proposed by Dr. Jatana. Finally, Dr. Reiss noted that Claimant did not have a response to epidural steroid injections. His nerve roots thus

were not likely the source of his pain. Because Claimant's pain is likely axial and myofascial in origin, the fusion surgery proposed by Dr. Jatana would not likely be effective.

6. Relying on the Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), Dr. Reiss explained that back surgery is not appropriate unless a pain generator has been clearly identified, the proposed surgery is designed to yield functional improvement and the patient has undergone a psychological evaluation. However, he commented that a clear pain generator has not been identified, the proposed surgery would not decrease Claimant's pain or improve his function and psychological evaluations have revealed that Claimant is a poor surgical candidate. Dr. Reiss thus summarized that Dr. Jatana's proposed surgery is not reasonable and necessary to cure or relieve the effects of Claimant's May 17, 2015 admitted industrial injuries.

7. On December 10, 2015 Claimant underwent a psychological evaluation with Ron Carbaugh, Psy.D. After reviewing Claimant's history and administering diagnostic tests, Dr. Carbaugh concluded that Claimant was a poor candidate for invasive surgery. He explained:

> Clearly [Claimant] is having a dramatic psychological reaction to his injury. This is not to minimize any physiologic or objective medical findings that are present. However, it is clear that psychological factors and compromised coping strategies are impacting his recovery and response to appropriate treatment.
>
> Based on his presentation on this date, he would appear to be a poor candidate for any invasive or interventional strategies. Expect these types of interventions to provide no relief, or, of more concern, create iatrogenic complications. This appears to be the case with the radiofrequency neurotomies performed some weeks ago.

8. Dr. Jatana responded to written questions in a letter from Claimant's attorney dated January 20, 2016. He noted that psychological factors, including anxiety and depression, would not affect Claimant's recovery from the proposed surgical procedure. Furthermore, he commented that the psychological factors outlined in Dr. Carbaugh's report would not preclude the proposed surgery.

9. On February 18, 2016 Claimant underwent a psychological evaluation with Kevin J. Reilly, Psy.D. Dr. Reilly reviewed Claimant's history and psychological testing results. He diagnosed Claimant with somatic symptom disorder, adjustment disorder with mixed and depressed mood, and substance abuse-unspecified. Dr. Reilly determined that Claimant's presentation was indicative of chronic pain/delayed recovery syndrome. He remarked that Claimant's frustration and irritability was likely a feature of his depressive disorder and chronic pain syndrome. Dr. Reilly agreed with Dr. Carbaugh that Claimant would "not likely benefit from medical interventions." He

explained that Claimant would "potentially benefit from behavioral medicine treatment focused on chronic pain coping and adjustments."

10. Claimant has failed to demonstrate that it is more probably true than not that the back surgery recommended by Sanjay Jatana, M.D. is reasonable and necessary to cure or relieve the effects of his May 17, 2015 admitted industrial injuries. Dr. Jatana diagnosed Claimant with cervical region spinal stenosis and recommended a C3-C6 anterior cervical discectomy and fusion. He also suggested a possible fusion at C6-C7. Claimant explained that he suffers pain in his neck that goes down his right shoulder into his arm. He has received radio frequency ablations, facet injections, trigger point injections and physical therapy but has only obtained temporary relief. Claimant wishes to proceed with the surgery recommended by Dr. Jatana.

11. In contrast, Dr. Reiss persuasively determined that Dr. Jatana's proposed surgery is not reasonable and necessary to cure or relieve the effects of Claimant's May 17, 2015 admitted industrial injuries. He explained that Claimant's diagnostic testing had limited value. Furthermore, an emergency room report from December 8, 2015 revealed that Claimant's neurological status was intact with no weakness, sensory deficits or reflex deficits. Claimant thus likely suffered from neck pain that would not likely be remedied through the cervical fusion proposed by Dr. Jatana. Finally, Dr. Reiss noted that Claimant did not have a response to epidural steroid injections. Claimant's nerve roots thus were probably not the source of his pain. Because Claimant's pain is likely axial and myofascial in origin, the fusion surgery proposed by Dr. Jatana would not likely be effective.

12. Relying on the *Guidelines*, Dr. Reiss explained that back surgery is not appropriate unless a pain generator has been clearly identified, the proposed surgery is designed to yield functional improvement and the patient has undergone a psychological evaluation. However, he commented that a clear pain generator has not been identified, the proposed surgery would not decrease Claimant's pain or improve his function and psychological evaluations have revealed that Claimant is a poor surgical candidate. Dr. Reiss thus summarized that Dr. Jatana's proposed surgery is not reasonable and necessary to cure or relieve the effects of Claimant's May 17, 2015 admitted industrial injuries.

13. Psychological evaluations also reveal that Claimant is not an appropriate surgical candidate. Dr. Carbaugh persuasively explained that Claimant experienced a dramatic psychological reaction to his injury. He commented that psychological factors and compromised coping strategies were impacting his recovery and response to appropriate treatment. Dr. Carbaugh thus determined that Claimant would be a poor candidate for an invasive surgical procedure and did not expect surgical intervention to provide any relief. Furthermore, Dr. Reilly persuasively determined that Claimant's presentation was indicative of chronic pain/delayed recovery syndrome. He remarked that Claimant's frustration and irritability was likely a feature of his depressive disorder and chronic pain syndrome. Dr. Reilly agreed with Dr. Carbaugh that Claimant would "not likely benefit from medical interventions." He concluded that Claimant would "potentially benefit from behavioral medicine treatment focused on chronic pain coping

and adjustments." Although Dr. Jatana noted that psychological factors would not preclude the proposed surgical procedure, the record reveals that Claimant suffers a myriad of psychological factors and deficient coping strategies that would render him a poor surgical candidate. Accordingly, the surgery proposed by Dr. Jatana is not reasonable and necessary to cure or relieve the effects of Claimant's May 17, 2015 admitted industrial injuries.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the back surgery recommended by Sanjay Jatana, M.D. is reasonable

and necessary to cure or relieve the effects of his May 17, 2015 admitted industrial injuries. Dr. Jatana diagnosed Claimant with cervical region spinal stenosis and recommended a C3-C6 anterior cervical discectomy and fusion. He also suggested a possible fusion at C6-C7. Claimant explained that he suffers pain in his neck that goes down his right shoulder into his arm. He has received radio frequency ablations, facet injections, trigger point injections and physical therapy but has only obtained temporary relief. Claimant wishes to proceed with the surgery recommended by Dr. Jatana.

6. As found, in contrast, Dr. Reiss persuasively determined that Dr. Jatana's proposed surgery is not reasonable and necessary to cure or relieve the effects of Claimant's May 17, 2015 admitted industrial injuries. He explained that Claimant's diagnostic testing had limited value. Furthermore, an emergency room report from December 8, 2015 revealed that Claimant's neurological status was intact with no weakness, sensory deficits or reflex deficits. Claimant thus likely suffered from neck pain that would not likely be remedied through the cervical fusion proposed by Dr. Jatana. Finally, Dr. Reiss noted that Claimant did not have a response to epidural steroid injections. Claimant's nerve roots thus were probably not the source of his pain. Because Claimant's pain is likely axial and myofascial in origin, the fusion surgery proposed by Dr. Jatana would not likely be effective.

7. As found, relying on the *Guidelines*, Dr. Reiss explained that back surgery is not appropriate unless a pain generator has been clearly identified, the proposed surgery is designed to yield functional improvement and the patient has undergone a psychological evaluation. However, he commented that a clear pain generator has not been identified, the proposed surgery would not decrease Claimant's pain or improve his function and psychological evaluations have revealed that Claimant is a poor surgical candidate. Dr. Reiss thus summarized that Dr. Jatana's proposed surgery is not reasonable and necessary to cure or relieve the effects of Claimant's May 17, 2015 admitted industrial injuries.

8. As found, psychological evaluations also reveal that Claimant is not an appropriate surgical candidate. Dr. Carbaugh persuasively explained that Claimant experienced a dramatic psychological reaction to his injury. He commented that psychological factors and compromised coping strategies were impacting his recovery and response to appropriate treatment. Dr. Carbaugh thus determined that Claimant would be a poor candidate for an invasive surgical procedure and did not expect surgical intervention to provide any relief. Furthermore, Dr. Reilly persuasively determined that Claimant's presentation was indicative of chronic pain/delayed recovery syndrome. He remarked that Claimant's frustration and irritability was likely a feature of his depressive disorder and chronic pain syndrome. Dr. Reilly agreed with Dr. Carbaugh that Claimant would "not likely benefit from medical interventions." He concluded that Claimant would "potentially benefit from behavioral medicine treatment focused on chronic pain coping and adjustments." Although Dr. Jatana noted that psychological factors would not preclude the proposed surgical procedure, the record reveals that Claimant suffers a myriad of psychological factors and deficient coping strategies that would render him a poor surgical candidate. Accordingly, the surgery

proposed by Dr. Jatana is not reasonable and necessary to cure or relieve the effects of Claimant's May 17, 2015 admitted industrial injuries.

ORDER

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

1. Claimant's request for the back surgery recommended by Sanjay Jatana, M.D. is denied and dismissed.

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

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

DATED: October 12, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

The issues for determination are:

1. The calculation of the Claimant's average weekly wage ("AWW").

2. Whether the Claimant proved, by a preponderance of the evidence, that she is entitled to temporary total disability indemnity benefits from June 25, 2015 ongoing.

FINDINGS OF FACT

1. The Claimant was employed as a produce clerk for Respondent Employer on February 3, 2015 when she sustained a compensable work injury. At the time of this injury, the Claimant also was concurrently employed as a home attendant for IRN International.

2. The Claimant was taken off work from her job at Respondent Employer and was paid TTD benefits beginning February 4, 2015. The Claimant testified credibly that due to her injury, she also had to quit her job as a home attendant on February 3, 2015 because she was unable to perform the job duties.

3. She testified credibly worked seven days a week as a home attendant for IRN, the concurrent employer, with varying hours from two to two-and-a-half hours per day, and was paid $10.00 per hour. This testimony would place her range of weekly wages from the concurrent employer from $140.00 - $175.00 per week.

4. From the Claimant's W-2s for the concurrent employer, the Claimant grossed $10,310 in 2014 and $2,137.50 in 2015. If the Claimant worked all 52 weeks in 2014, this would average out to $198.27 per week for 2014. If the Claimant stopped working on February 3, 2015 (as she testified), then she worked for 4 weeks and 6 days of 2015 or 4.86 weeks. This would average out to $439.81 per week.

5. As the amount of $439.81 is significantly higher than the $140.00 - $175.00 estimated rate to which the Claimant testified and is more than double the 2014 rate, the ALJ concludes that it is likely that the 2015 W-2 does not correspond to only 4.86 weeks of work and this calculation is not reliable for the purpose of calculating average weekly wage for the Claimant for her concurrent employment. Therefore, the ALJ will use the average weekly wage of $198.27 calculated from the Claimant's 2014 W-2 from her concurrent employer to calculate the addition to the AWW to account for wages from the concurrent employer.

6. The Respondents filed a General Admission of Liability on February 23, 2015 and admitted for an AWW of $435.16 for Claimant's employment with Employer only. This corresponds to a TTD rate of $290.11 per week (Claimant's Exhibit 2).

7. The average weekly wage for the Claimant's job with Employer and her job with the concurrent employer IRN equals $633.43 ($435.16 + $198.27) which corresponds to a TTD rate of $422.29.

8. Subsequent to the Claimant's work injury, Hiep Ritzer, M.D. became an authorized treating physician. Dr. Ritzer referred the Claimant to Samuel Chan, M.D. and Sean Griggs, M.D. for further evaluation (Claimant's Exhibit 5, p. 6).

9. On June 16, 2015, Dr. Ritzer noted that she returned the Claimant to modified duties of four hours per day on May 26, 2015 but the Claimant reported she was unable to tolerate that. Dr. Ritzer observed and reported pain behaviors including the Claimant keeping her eyes closed in the exam room, walking with slow gait and holding on to counters or her husband for stability. Dr. Ritzer opined, "her subjective complaints are out of proportion to her objective findings" and indicated the Claimant would follow up with Dr. Chan for pain management. Dr. Ritzer reported this was a "delayed recovery" case and kept her at modified duty (Claimant's Exhibit 7, pp. 26-28).

10. On June 25, 2015, Dr. Chan placed the Claimant at maximum medical improvement with no impairment and return to work full time and on a full duty basis. Dr. Chan's opinion relied, in large part, on his belief that the Claimant was engaged in "an unsophisticated attempt to misrepresent her symptoms" after viewing surveillance video footage and the Claimant's appearance at her follow up medical examination. Dr. Chan noted that at this juncture in the Claimant's treatment, "…since we are treating pain and there is no credibility on the patient's part, I do not feel that further treatment intervention will alter any kind of outcome" (Claimant's Exhibit 8; Respondent's F).

11. Dr. Ritzer also placed the Claimant at maximum medical improvement on June 25, 2015 upon discharge from care. Dr. Ritzer noted the Claimant presented for her follow up visit unchanged from the prior visit in terms of subjective reports of pain and physical functioning. Dr. Ritzer noted that she discussed the Claimant's case with Dr. Chan who also saw the Claimant on this same day and he advised her that he closed the Claimant's case after reviewing surveillance video. Dr. Ritzer noted that Dr. Chan felt the Claimant "may be malingering." Dr. Ritzer opined the Claimant was now at MMI and gave the Claimant a return to work at full duty with no restrictions, no maintenance care and no impairment rating (Claimant's Exhibit 7, pp. 29-32; Respondents' Exhibit E).

12. Respondents filed a Final Admission of Liability on July 9, 2015 consistent with Dr. Ritzer's 6/25/2016 medical report (Claimant's Exhibit 3, p. 3). The Final Admission of Liability terminated the Claimant's temporary total disability benefits, which she received from February 4, 2015 through June 24, 2015.

13. Subsequently, Kristin Mason, M.D. performed a Division IME on November 16, 2015. Dr. Mason determined that the Claimant was not at maximum medical improvement. Dr. Mason opined that the Claimant's restrictions were no lifting over 5 pounds at waist level for the right upper extremity and bilateral lifting restrictions of 20 pounds. The Claimant was unrestricted for the left upper extremity. (Clm. Ex. 6, Bates No. 23).

14. A hearing was held May 5, 2016 before ALJ Felter on the issues of (1) Respondents' request to overcome the Division IME (DIME) opinion of Dr. Kristin Mason, who had determined that the Claimant had not reached maximum medical improvement (MMI) and (2) medical benefits (Claimant's Exhibit 5, p. 6). The issues of temporary disability benefits and average weekly wage were not an issue at that hearing.

15. ALJ Felter ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. Respondents did not file a timely objection to the proposed order. ALJ Felter thereafter modified the proposed Order and entered Full Findings of Fact, Conclusions of Law and Order on May 17, 2016 and the Order was served on May 18, 2016 (Claimant's Exhibit 5).

16. Respondents did not appeal the May 18, 2016 Order.

17. The May 18, 2016 Order made the following factual findings concerning the work releases provided by attending physicians Dr. Ritzer and Dr. Chan:

- Dr. Chan failed to adequately evaluate Claimant's right shoulder injury as a treating physician, and he ignored the MRI findings that documented the Type IV SLAP tear resulting from this occupational injury. His moral characterization of the Claimant as "malingering" and misrepresenting her symptoms is rejected by the ALJ as not credible or persuasive. Because Dr. Chan misapprehended Claimant's activities on video surveillance and failed to provide medical treatment that relieved Claimant from the effects of the SLAP tear, his opinion that Claimant could work without any work restrictions is rejected as not credible or persuasive.

- Claimant remained under work restrictions given by Dr. Ritzer of no use of the upper right extremity through at least June 16, 2015 . . . when she released Claimant to lifting and carrying no more than 5 pounds and no use of her right arm to reach overhead, away from her body or for repetitive motion. . . The full work release given by Dr. Ritzer on June 25, 2015 . . .was based solely on Dr. Chan's opinion and, thereby, is also rejected by the ALJ as not credible or persuasive evidence as to Claimant's work abilities prior to MMI.

(Findings of Fact # 22 and #23, Claimant's Exhibit 5, p. 10)

18. Judge Felter ordered that the Claimant was not at maximum medical improvement and that Respondents shall pay the costs of all causally related and

reasonably necessary medical expenses to cure and relieve the effects of the laimant's admitted injury. There was no Order regarding temporary total disability benefits or average weekly wage (Claimant's Exhibit 5, p. 15).

19. The Respondents filed an Amended General Admission of Liability on July 18, 2016, still admitting for $435.16 in average weekly wage, with a corresponding temporary total disability rate of $290.11 per week. Those temporary total disability benefits began on February 4, 2015. Respondents did not admit to ongoing temporary total disability benefits because Dr. Chan and Dr. Ritzer had not rescinded the full duty release and the full duty was still in place. (Claimant's Exhibit 4; Respondent's Exhibit C).

20. Subsequently, the Claimant filed an Application for Hearing on April 25, 2016 on the issue of average weekly wage because she was concurrently working as a home health care attendant for IRN International up until the date of her February 3, 2015 injury with the Employer (Claimant's Exhibit 11). Respondents filed a Response only endorsing the issue of AWW (Claimant's Exhibit 12).

21. At a prehearing conference on July 19, 2016, PALJ Eley granted Claimant's Motion to endorse the additional hearing issues of temporary disability and interest on benefits.

22. At a prehearing conference on August 16, 2016, PALJ Goldstein granted the Respondent's Motion to endorse the affirmative defense to TTD of release to full duty.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Calculation of Claimant's Average Weekly Wage and Temporary Total Disability Award

Under Colorado's Workers' Compensation Act, the "average weekly wage" is a key part of the formula used to calculate compensation for injured workers, and it is based upon the definition of "wages" provided at section 8-40-201(19). *Industrial Claim Appeals Office v. Ray,* 145 P.3d 661 (Colo. 2006). To determine a claimant's AWW, the ALJ may choose from two different methods set forth in section 8-42-102. The first method, referred to as the " default provision," provides that an injured employee's AWW " be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." § 8-42-102(2), C.R.S. The default provision in § 8-42-102(2)(a)-(f), C.R.S lists six different formulas for conducting this calculation. Per § 8-42-102(5)(a), the phrase "at the time of injury" in subsection (2) requires the AWW to be determined using the wage earned on the date of the employee's accident. The second method for calculating a claimant's AWW, referred to as the "discretionary exception," applies when the default provision will not fairly compute the employee's AWW. § 8-42-102(3), C.R.S. In such a circumstance, the ALJ has discretion to compute the AWW of a claimant in such other manner and by such other method as will, based upon the facts presented, fairly determine the employee's AWW. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office,* 841 P.2d 335 (Colo.App.1992). Because the default method will not fairly compute the Claimant's AWW in this case, the discretionary method is appropriate to use in order to arrive at a fair approximation of the Claimant's wage loss.

There is no dispute regarding the Claimant's AWW with respect to her job with Employer. The AWW attributable to that job is $435.16. The issue arises with respect to additions to the AWW due to wages the Claimant earned in her concurrent employment with IRN. Calculation of the Claimant's AWW for the concurrent employment position is complicated by the fact that she is an hourly wage earner whose hours would have varied. Using the estimate of hours worked at the concurrent employment that the

Claimant provided in her testimony at the hearing actually results in the lowest amount of the potential approximation of income. She testified credibly worked seven days a week as a home attendant for IRN, the concurrent employer, with varying hours from two to two-and-a-half hours per day, and was paid $10.00 per hour. This testimony would place her range of weekly wages from the concurrent employer from $140.00 - $175.00 per week.

However, from the Claimant’s W-2s for the concurrent employer, the Claimant grossed $10,310 in 2014 and $2,137.50 in 2015. If the Claimant worked all 52 weeks in 2014, this would average out to $198.27 per week for 2014. If the Claimant stopped working on February 3, 2015 (as she testified), then she worked for 4 weeks and 6 days of 2015 or 4.86 weeks. This would average out to $439.81 per week. As the amount of $439.81 is significantly higher than the $140.00 - $175.00 estimated rate to which the Claimant testified and is more than double the 2014 rate, the ALJ concludes that it is likely that the 2015 W-2 does not correspond to only 4.86 weeks of work and this calculation is not reliable for the purpose of calculating average weekly wage for the Claimant for her concurrent employment. Therefore, the ALJ used the average weekly wage of $198.27 calculated from the Claimant’s 2014 W-2 from her concurrent employer to calculate the addition to the AWW to account for wages from the concurrent employer.

As a result of the foregoing, the ALJ determines that a fair approximation of the Claimant's total wage loss in this case is expressed as an AWW of $633.43 ($435.16 + $198.27) which corresponds to a TTD rate of $422.29.

Temporary Total Disability Benefits

Temporary disability benefits compensate an injured employee for wage loss or impaired earning capacity during the healing time following a compensable injury. *Eastman Kodak Co. v. Indus. Comm’n of State of Colorado*, 725 P.2d 107 (Colo. App. 1986). In order to receive temporary disability benefits, a claimant must establish a causal connection between the injury and the loss of wages. Pursuant to C.R.S. §8-43-103(1)(a), an award of temporary disability benefits is mandated by the Workers’ Compensation Act if: (1) the injury or occupational disease causes the disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts for more than three regular working days duration.

Respondents admitted liability for temporary total disability benefits in the July 18, 2016 General Admission of Liability. The time period was from February 4, 2015 through June 24, 2015. Respondents terminated benefits on June 25, 2015 when the authorized treating physicians, Dr. Ritzer and Dr. Chan, found that the Claimant was able to return to work full duty.

C.R.S. §8-42-105(3) provides in relevant part:

> Temporary total disability benefits shall continue until the first occurrence of any one of the following: (a) The employee reaches maximum medical improvement; (b) The employee returns to regular or modified employment; (c) The attending physician gives the employee a written release to return to regular employment; or (d)(I) The attending physician gives the employee a written released to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

At issue in this case is the provision under (3)(c) that terminates TTD benefits upon a written release to return to regular employment by an attending physician.

Respondents rely upon the opinion in *Burns v. Robinson Dairy, Inc. and Indus. Claim Appeals Office*, 911 P.2d 661, 662 (Colo. App. 1995) that the use of the word "shall" in the statute is presumed to indicate a mandatory requirement for the ALJ to terminate benefits. Respondents argue that, "the effect of this mandate is to limit the scope and frequency of disputes concerning the duration of TTD benefits by treating the opinion of the attending physician as conclusive with respect to a claimant's ability to perform regular employment" *Burns* at 662. "Thus, unless the record contains conflicting opinions from attending physicians regarding a claimant's release to work, the ALJ is not at liberty to disregard the attending physician's opinion that a claimant is released to return to employment." *Id*. Any evidence concerning claimant's self-evaluation of his ability to perform his job is irrelevant and should be disregarded by the ALJ. *See Id.*

Respondents further argue that even though Judge Felter made findings in his May 18, 2016 Order regarding restrictions, those findings were not binding. Additionally, temporary total disability benefits and defenses to temporary total disability benefits were not issues for the hearing in May 2016. The Respondents characterize the findings on restrictions as extraneous findings and note that there is no order regarding TTD benefits, only regarding MMI and medical benefits.

Respondents finally argue that there were no conflicting opinions from the treating/attending physicians in this case. Both Dr. Chan and Dr. Ritzer determined that the Claimant could return to work full duty without restrictions on June 25, 2015. The record is void of any conflicting opinions from any other attending physicians regarding the Claimant's release to work full duty after June 25, 2015. Respondents dispute that the Division IME restrictions from Dr. Mason have any legal effect on restrictions because Dr. Mason is not an attending or authorized treating physician.

The Claimant acknowledges that TTD benefits are terminated pursuant to C.R.S. §8-42-105(3)(c) upon a full duty release to employment by attending physicians. However, the Claimant points out that there is an exception per *Burns v. Robinson Dairy, Inc., supra*, where the record contains conflicting opinions from attending physicians regarding a claimant's release to work. The Claimant also argues that conflicting opinions of an attending physician can include situations where there is an internal conflict in an attending physician's report as to whether the Claimant has been released to regular employment. In such cases, the Claimant argues the ALJ has authority to weigh the evidence in order to resolve the conflict. *Imperial Headware, Inc. v. Industrial Claim Appeals Office*, 15 P.3d 295 (Colo.App. 2000). Claimant notes that in resolving such conflicts the ALJ may consider earlier medical reports.

Under this argument, the Claimant points out that Dr. Ritzer's June 16, 2015 report shows the Claimant was continuing with Dr. Griggs for treatment of a type IV SLAP tear of the right shoulder. Dr. Ritzer referred the Claimant to Dr. Ament, a headache specialist, and to Dr. Hawkins for psychological pain evaluation/biofeedback and was awaiting authorization and scheduling. In addition, Dr. Ritzer provided work restrictions for Claimant's right shoulder injury. The Claimant points out that ten days later, with none of the recommended treatment having been provided, Dr. Ritzer released the Claimant to full duty because Dr. Chan opined the Claimant was malingering after he reviewed a surveillance video. Because of this, the Claimant urges the ALJ to find that there is a conflict in medical reports of the attending physicians due to an internal conflict in Dr. Ritzer's opinon.

Having reviewed all of the evidence and considering the arguments, the ALJ finds no conflict exists among attending physicians regarding the Claimant's full duty release to employment with no restrictions. While Dr. Ritzer lifted all work restrictions from the Claimant on June 25, 2015 that she had previously placed on June 16, 2015, she was clear about her reasons. Even at the June 16, 2015 appointment, Dr. Ritzer expressed concern that the Claimant's subjective presentation was inconsistent with any objective findings. She nevertheless placed restrictions and kept the Claimant at modified duty. By June 25, 2016, Dr. Ritzer unequivocably changed her mind and provided a full duty release to return to regular employment. There was nothing ambiguous or conflicting about Dr. Ritzer's opinion as expressed in the medical record of June 25, 2016.

While the DIME physician, Dr. Mason, holds a different opinion, that the Claimant is not at MMI and still requires work restrictions, Dr. Mason is, by definition, not an attending or treating physician. Per ALJ Felter's May 18, 2016 Order, the Respondents failed to overcome the DIME opinion on the issue of MMI and this is controlling on that issue. However, this has no bearing on the issue of the termination of TTD benefits due to the application of C.R.S. §8-42-105(3)(c).

Currently, no treating physician has issued restrictions contrary to the June 25, 2015 full duty return to work release, and the opinions of Dr. Chan and Dr. Ritzer are unequivocal and without internal conflict, so temporary total disability benefits were properly terminated on June 25, 2015. Because the attending physicians have provided the Claimant with a full duty written release as of June 25, 2015, the ALJ is bound by law to find that Claimant is not entitled to temporary total disability benefits pursuant to C.R.S. § 8-42-105(3)(c).

ORDER

It is therefore ordered that:

1. The Claimant's average weekly wage (AWW) is $633.43.

2. The Claimant's temporary total disability benefits were properly terminated on June 25, 2015. Because the attending physicians have provided the Claimant with a full duty written release as of June 25, 2015, and there is no conflict or ambiguity in the opinions of the attending physicians, the ALJ is bound by law to find that Claimant is not entitled to temporary total disability benefits pursuant to C.R.S. § 8-42-105(3)(c).

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

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

DATED: October 12, 2016

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

ISSUES

- Did Claimant suffer a compensable injury to his low back on June 19, 2015 arising out of and in the course of his employment?

- If the injury is compensable, is Claimant entitled to medical benefits to cure and relieve the effects of his industrial injury?

FINDINGS OF FACT

1. Claimant is employed as a materials technician for Employer, a job he has held for twelve years, eight months. In that capacity, he works primarily in the warehouse. Claimant testified he performs the following job duties on a regular basis: unload trucks (including gas pipe, concrete vaults, and electrical conduit), handle freight inside the warehouse, get materials ready for those working in the field, open boxes, perform inventory and operate a fork lift. Claimant testified this is a physically demanding job.

2. Claimant's prior medical history was significant, as he sustained several prior injuries to his low back. More particularly, he sustained a work-related injury in August 2009. Claimant testified he was lifting a streetlight pole, tried to straighten it out on the forklift and he wrenched his back.

3. Claimant was evaluated on August 24, 2009 by Kyle Akers, M.D.[1] Dr. Akers noted Claimant was having some pain down the posterior right leg to mid-calf, but no weakness, numbness or tingling. Dr. Akers' assessment was right lumbar strain/sprain.

4. Improvement was noted as of August 29, 2009, when Dr. Akers recorded Claimant's lumbar spine was non-tender, had normal range of motion and no pain. Dr. Akers stated Claimant could resume full-time duty, with no medical restrictions on August 31, 2009.

5. There was no evidence admitted at hearing which showed Claimant required treatment for his low back from September 2009 until December 2010.

6. On December 3, 2010, Claimant re-injured his low back lifting heavy equipment at work. Claimant testified he felt a sharp pain in his right back.

7. Claimant was examined by Dr. Akers that same day, who recorded mild

[1] Dr. Akers works for Employer.

pain with function/extension, marked pain with tilts, particularly to the left. Dr. Akers assessment was right mid-back strain/spasm. Claimant was told he could return to work on December 6, 2010, if he felt fine.

8. No evidence was present in the record that Claimant required medical treatment for his low back from December 3, 2010 until November 15, 2011. No diagnostic testing was done on Claimant's lumbar spine before 2011.

9. In November 2011, Mr. Zappitelli experienced an episode of low back symptoms. Claimant testified there was no particular incident which caused the increased pain, but he worked the day before he experienced the increased pain.

10. On November 15, 2011, he saw his primary care provider (Anthony Vecchiarelli, M.D.) and was seen by April Caldwell, PA-C who recorded:

> "R lower back/hip/leg pain X this AM. Woke up 2:30 AM w/ pain. Had lifting-related injury @ work 2 years ago. Dx: back sprain. [No] known or specific injury recently. Works for utilities – does work w/ forklift and doing lifting (manual). 0 bowel or bladder incont. Pain worse with sitting & moving."

11. Claimant described pain from his right buttock down the back of his right leg. He had a "slight limp, favoring L leg". On examination, strength and reflexes in his lower extremities were normal, but he did have a positive straight leg raise. PA-C Caldwell diagnosed "sciatica" and prescribed Robaxin and Naprosyn. Claimant was also referred for a lumbar MRI.

12. An MRI was performed on Claimant's lumbar spine on November 21, 2011. The films were read by James Sweeney, M.D., whose impression was: bilobed posterior disc herniation L5-S1, with an extruded disk fragment that extends caudally and compresses the right S1 nerve root. A second focal disc herniation was superimposed on a degenerated bulging disc at the left S1 nerve root and may also compress the left S1 nerve root significantly. Other small disc abnormalities were present in each level, including a bulge or osteophyte at L1-L2, slight lateral herniation at L3-4 and slight diffuse posterior bulging disc at L4-5.

13. Claimant returned to PA-C Caldwell on November 28, 2011, who made a neurosurgery referral and referred Claimant for physical therapy ("PT").

14. Claimant received treatment from Jason Keller, D.C., starting on December 5, 2011. At that time, he rated his back and leg symptoms at 7/10. Claimant received various treatment modalities, including chiropractic decompression, electro stimulation, and cryo/thermal therapy. Two weeks later (December 19), his leg pain had decreased to 3/10. On December 27, 2011, he stated his back pain was "100% better" and his leg symptoms were "95% better". He continued to report minimal symptoms

until his final chiropractic visit on February 23, 2012. The ALJ infers Claimant received relief from the treatments with Dr. Keller.

15. On March 15, 2012, Claimant was evaluated by Dr. Akers, who recorded that Claimant pulled his right back while loading 2 inch gas coil pipe onto a forklift. When he pushed the pipe above his head, he experienced increased pain in his right lumbar area with some numbness/tingling in his right foot. Dr. Akers's assessment was low back strain with right radicular symptoms, but no objective signs. Dr. Akers offered some analysis on the issue of causation, stated "the challenge will be in determining if either of his prior back incidents at work had anything to do with the MRI findings, …which was probably unknowable"; or "if the March 14 incident merely resulted in a simple muscle strain, which should resolve fairly quickly/easily, or if it actually aggravated the L5-S1 HNP". The ALJ infers Dr. Akers was of the opinion that the work-related incidents could have aggravated Claimant's lumbar spine.

16. Claimant returned to Dr. Akers on March 19, 2012, who noted Claimant's low back pain had resolved, with no pain down his legs. Dr. Akers' assessment was lumbar strain, temporary aggravation. Claimant was returned to full duty, with no restrictions.

17. On February 11, 2013[2], Claimant was evaluated at Freedom Chiropractic. As his primary complaint/condition, Claimant listed weight loss. He listed low back pain "secondarily" as a complaint. He rated his back pain at 1/10. Lumbar range of motion was normal, with the exception of slightly reduced right lateral flexion. Records for three (3) other appointments [April 4, 2013, June 25, 2013 and December 18, 2014] were admitted at hearing. The appointments on June 25, 2013 and December 18, 2014 related to low back and hip pain, respectively.

18. There was no evidence admitted at hearing which documented any treatment for Claimant's low back condition from December 19, 2014 to June 22, 2015.

19. There was no evidence in the record which showed Claimant had anything more than temporary work restrictions from 2009-2014.

20. Claimant testified he believed his work during the week of June 15-19, 2015 injured his low back. Claimant stated they were under time pressure to complete the process of creating small spools of 250-300 feet of wire from a 5000 foot reel. The process of creating the spools of wire required Claimant to lift a motor (weighing 45 lbs.) to chest height, attach it to the spindle, then lower it to the floor. Then he had to remove a spindle shank from the completed reel, place the spindle shank on a new blank reel, and lift the motor from the floor and place it back on the winding machine.

21. Claimant completed 62 spools of wire that week, and each spool required the motor be lifted two times for each spool of wire–first to place the motor on the

[2] The ALJ notes the physical, neurological and orthopedic exam form notes were dated February 12, 2013.

machine, and again when removing the completed spool. Claimant was working with another employee, who performed other parts of the job, including getting the forklift ready and taking the reels of the spools. Claimant did a majority of the lifting. Claimant estimated that he lifted the motor 65-70% of the time.[3] The ALJ inferred that the time pressure created by the deadline for completion of this task caused Claimant to work faster than he normally would and increased the forces operating on his low back.

22. Claimant testified he noticed low back pain around Thursday of that week (June 18, 2015), which really started flaring up on Friday (June 19, 2015).

23. On June 22, 2015, Claimant was evaluated by Dr. Akers. The clinic note stated:

> Works in warehouse materials handling. Has history of right low back/right leg problems, pain, numbness/tingling dating back to 2009. Has been in to see us several times over the past few years for exacerbations. In November 2011, got out of bed one morning with marked right lumbar and right leg pain, numbness/tingling with no reported preceeding trauma. Saw his personal physician who got an MRI which showed a large right S1 disk herniation. His doctor recommended surgery[4], but employee decided against it. Gradually improved. Has had episodes off and on the last few years, has been seeing a chiropractor for several years. He reports that last week he noticed increasing symptoms again, right low back pain, right leg pain, and right leg/foot numbness/tingling. His job for the past few years involves reported picking up and moving 50 pound spools and motors about 10 times a day, 3 to 4 days a week on average. Has not suffered any unusual twist, slip or fall. Having pain at night, worse in the morning.

24. The ALJ finds the June 22, 2015 note from Dr. Akers was consistent with Claimant's testimony that he noticed increasing symptoms the week before. Dr. Akers noted an MRI might show if the lumbar spine had worsened and also stated the etiology of the condition had not been established. Dr. Akers referred Claimant to Dr. Leggett for an evaluation[5].

25. A second MRI was performed on Claimant's lumbar spine on June 25, 2015. The films were read by Timothy Cloonan, M.D., whose impression was: persistent degenerative disc disease of the lumbar spine with osteoarthritis of the posterior elements. The most severe level, as before, was L5-S1. Improvement was noted in the previous bilobed posterior disc protrusion since the prior exam. Resolution of the bilateral lateral recess encroachment of the traversing bilateral S1 nerve joints

[3] Claimant argued this equated to 86 separate incidents of lifting that motor (62 x 2 = 124 x 70% = 86.

[4] This appears to be an error, as there was no evidence of a surgical recommendation made by any physician.

[5] Exhibit 3, p. 10.

was also noted. No significant spinal stenosis was found, however, there was mild foraminal encroachment.

26. Claimant was evaluated by Dwight Leggett, II, M.D. on July 10, 2015. He reported pain beginning at the center of the back, just below his belt line, traveling into his right buttock, with numbness in tingling down the lateral aspect of the leg and to the foot. On examination, moderate myofascial tightness and tenderness was noted extending from the mid lumbar paraspinals downward, as well as into the quadratus lumbar spine, and right greater than left internal and external obliques, latissimus dorsi and gluteal musculature. Paresthesias were reproduced traveling down the lateral aspect of the right leg and into the foot. Claimant also had a mild amount of antalgia with a widened base of support and mildly decreased stance phase and stride length on the right. Dr. Leggett's diagnoses were: lumbar disc derangement; lumbar sprain/strain; lumbar radiculopathy, and myofascial pain. Dr. Leggett recommended an epidural steroid injection targeting the right L5-S1level.

27. On October 19, 2015 Nicholas Olsen, D.O. performed an independent medical evaluation ("IME") of Claimant on behalf of Respondent. Dr. Olsen's objective findings included: reduction in forward flexion, signs of lumbar radiculopathy involving the L5 nerve root and, to a lesser degree, the L4 and S1 nerve roots. His diagnosis was: history of acute disc extrusion in November 2011, now with progressive degenerative disc disease. Interval improvement of MRI imaging most recently completed 6/25/15 demonstrating resolution of disc extrusion leading to a diagnosis of chronic degenerative disc disease with right lower extremity radiculopathy. Dr. Olsen did not believe Claimant qualified for a cumulative trauma disorder and related to symptoms he was experiencing in June 2015 to those which he experienced in 2011.

28. Dr. Hall performed an IME on February 10, 2016, at the request of Claimant. Dr. Hall's impressions were: disc pathology, primarily L5-S1 with a history of extruded fragment; right L5 and S1 radiculopathy, improved with epidural steroid injection; and general deconditioning. Dr. Hall disagreed with Dr. Olsen's opinion regarding causation. Dr. Hall opined that Claimant's symptoms related to his work activities. Dr. Hall felt calling it a cumulative trauma event was reasonable. Dr. Hall stated Claimant initially injured his back at work, probably in 2009, and has had episodes ever since. Dr. Hall opined that the increased work activity in June 2015 was a permanent exacerbation of the low back condition.

29. Claimant's work restrictions issued by Dr. Leggett have been in effect since July 10, 2015. Employer has provided modified duty to Claimant since that time.

30. Dr. Hall testified as a medical expert by way of evidentiary deposition on June 15, 2016. Dr. Hall was qualified as an expert in Physical Medicine and Rehabilitation, a specialty in which he is board-certified. Dr. Hall is Level II accredited pursuant to the W.C.R.P. Dr. Hall reiterated his diagnosis of Claimant, as documented in the February 10, 2016 report. Dr. Hall noted Claimant's exam was pretty benign, although there was a loss of normal lordosis, possibly indicative of reactive muscle spasm. Claimant had minimal sensory abnormalities. He did not believe Claimant was

a surgical candidate, but felt the epidural steroid injection was a reasonable course of treatment.

31. In his testimony, Dr. Hall provided additional information as to why he thought cumulative trauma was a reasonable explanation. In taking Claimant's history, Claimant explained to Dr. Hall, that he did a number of activities during the week of June 15, 2015 which were out of the ordinary in the workplace. This activity put stress on Claimant’s discs, ligaments and facet joints. Dr. Hall opined this aggravated the underlying pre-existing disc problem. The ALJ credited Dr. Hall's testimony on this subject.

32. Dr. Olsen testified as a medical expert. Dr. Olsen was qualified as an expert in Physical Medicine and Rehabilitation, a specialty in which he is board-certified, as well as electrodiagnostic studies and epidural injections. Dr. Olsen is Level II accredited percent to the W.C.R.P. Since his October 19, 2015 report, Dr. Olsen reviewed Dr. Hall’s records and his deposition. Dr. Olsen testified Claimant did not identify a singular incident or injury at work which caused the sudden onset of back pain on or about June 19, 2015. Dr. Olsen also was of the opinion that, based on Claimant’s statements to him as well as to Dr. Akers about his general work activities and the work activities that were performed for the week ending June 19, 2015, Claimant’s work activities for that week did not amount to anything more than Claimant’s usual exertions for the week. As a result, Dr. Olsen believed it was necessary to make a determination as to whether Claimant’s general work activities rose to the level of a compensable occupational disease.

33. Dr. Olsen testified that, in determining whether general work activities rise to the level of compensable occupational disease, an analyzing physician must look at three particular areas. First, a physician must assess the exertion that the individual needs to apply to accomplish his job. Second, the physician then needs to determine the frequency with which that exertion is applied. Third, the physician needs to determine the duration of each of these specific events of exertion. Frequency and duration of these exertions are important relative to whether an individual has adequate time to rest or recover from exertions.

34. Dr. Olsen stated that if Claimant is performing work activities that allow for enough time to rest and recover from exertions, Claimant’s low back would not have been continually stressed, and his low back would have an adequate amount of time to recover between exertions. Dr. Olsen reviewed Dr. Hall’s deposition testimony. He agreed that if an individual performs exertional work activities, but was allowed enough time to rest and recover between those exertional activities, such activities help that individual build their strength in those particular activities, which would be protective. Dr. Olsen opined that Claimant had sufficient time to rest in between his lifting activities. He also believed the lifting Claimant performed during the week of June 15-19, 2015 was not significantly different than his normal duties.

35. Claimant testified he continues to experience pain in his low back, which limited his activities. The ALJ found Claimant to be credible when he described the symptoms in his lumbar spine.

36. The ALJ found Dr. Hall's opinions to be more persuasive than those offered by Dr. Olsen.

37. The ALJ concludes it is more probable than not that Claimant's work activities during the week of June 15-19, 2015 exacerbated his low back condition and caused his current symptoms. The ALJ concluded Claimant's work activities were sufficient to cause an aggravation of the preexisting condition present in his lumbar spine.

38. The ALJ was not persuaded Claimant’s employment caused an occupational disease in his lumbar spine. Rather, the events of June 15-19, 2015 constituted an acute traumatic exacerbation of Claimant's low back condition.

39. Claimant’s lumbar spine requires medical treatment.

40. The recommendations made by Dr. Leggett are reasonable and necessary to cure and relieve the effects of his injury.

41. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of Claimant, as well as the various health care providers bore directly on the issue of compensability.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing a service for Respondent-Employer arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. §§ 8-41-301(1)(b) & (c), C.R.S.; *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); § 8-41-301(1)(c), C.R.S. The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Compensability

Claimant contended he sustained a compensable injury to his low back during the week of June 15-19, 2015, specifically that his work duties aggravated a preexisting degenerative condition. Claimant argued first, there was a medically plausible relationship between Claimant’s lifting activities and his symptoms, as he was performing repetitious lifting at work during this period of time. Second, there was a sufficient temporal relationship between Claimant’s lifting activities and his development of symptoms. Third, there was no other alternative explanation that is an equally or more probable explanation for the exacerbation of his low back pain and radiculopathy. Claimant argued all of the causation criteria were satisfied in this case.

Respondent argued the claim was not compensable, as Claimant did not introduce sufficient evidence to show he suffered a trauma or occupational disease. Respondent disputed Claimant’s work duties the week of June 15, 2015 represented a period of unusual exertion. Respondent argued Claimant’s work activities that week were not out of the ordinary. Respondent relied upon the testimony of Dr. Olsen to support their contention that Claimant’s symptoms came from his pre-existing low back condition and not the work performed in June 2015.

This case presented the question of whether Claimant’s work for Employer was the cause of his low back symptoms, as opposed to preexisting degenerative changes. A pre-existing condition “does not disqualify a Claimant from receiving workers' compensation benefits". *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A Claimant may be compensated if the work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease “to produce the disability for which workers' compensation is sought". *H&H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990).

The Colorado Supreme Court 's holding in *Colorado Fuel and Iron Corp. v. Industrial Commission*, 380 P.2d 28, 30 (Colo. 1960) has application to the case at bar. In that case, the Court held Respondents can be liable for the aggravation of a pre-existing condition (pre-existing low back condition); which resulted in the need for medical treatment. Where Claimant had a dormant pre-existing physical condition, which had not interfered with his ability to do work,"a direct causal connection between a precipitating event and the resulting disability can be proved by lay testimony and without affirmative medical testimony". *Id.*

Subsequent decisions reinforced the precept that when a pre-existing condition is aggravated by an employee's work, the resulting disability is a compensable industrial injury*. Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. App. 1990). As the Court of Appeals held in *Cowin & Co. v. Medina,* 860 P.2d 535, 538, an employer must take an employee as it finds him/her, "so that the employer is responsible for any increased disability resulting to an injured worker from a preexisting weakened condition". *Id.*

The evidence before the ALJ established Claimant experienced low back pain for which he required treatment before 2015. (Findings of Fact 2-4 and 9-17). More particularly, Claimant required treatment for two work-related incidents, which occurred in 2009 and 2010. (Findings of Fact 2 and 6). As determined in Findings of Fact 9-12, Claimant also experienced a significant episode of low back pain in 2011 and an MRI was ordered which revealed degenerative changes, as well as a disc extrusion. The occasions where Claimant required treatment prior to 2015 were noteworthy for the fact that Claimant treated for a relatively short period of time, after which there were intervals during which there was no evidence he received treatment. The evidence showed Claimant had only temporary work restrictions after any of these episodes of low back pain from 2009 through 2014. (Finding of Fact 19).

The most significant area of dispute concerned the impact of Claimant's work activities during the second week of June 2015. In this regard, Respondent did not contest Claimant's version of his work tasks that week, namely, putting wire on 62 reels from a 5000 foot spool, which he did with a co-worker. (Finding of Fact 20). Claimant also testified he was required to work with increased alacrity during the week of June 15, 2015, which provided a rational explanation for increased symptoms. This was not disputed by Respondent. As found, this work involved both repetitive activities, as well as speed. (Finding of Fact 21).

The ALJ was persuaded by Claimant's testimony that he experienced discomfort in his lower back toward the end of that week. (Finding of Fact 22). This was corroborated by his report to Dr. Akers on June 22, 2015, which was consistent with his testimony at hearing. Accordingly, the evidence presented established both a proximal and temporal connection with Claimant's reported low back pain after June 15-19, 2015.

Having determined the evidence established Claimant's work duties were the cause of his increased symptoms, the inquiry turned to the whether the medical evidence showed his preexisting condition was aggravated by his work for Employer.

The ALJ answered this question in the affirmative after considering of the expert opinions of Drs. Hall and Olsen. As found, the activities performed at work during this week were sufficient to aggravate Claimant's low back condition, as opined by Dr. Hall. (Finding of Fact 31). Dr. Hall's written report and expert testimony supported this conclusion.

The ALJ considered Dr. Olsen's opinion that Claimant's condition was degenerative in nature and connected with the symptoms he experienced in 2011. Dr. Olsen opined Claimant's symptoms were a natural progression of the degenerative condition. Dr. Olsen's opinion did not persuade the ALJ for two reasons; first, Claimant's symptoms were worse in 2015 than in 2011 and resulted in work restrictions, as established by the medical evidence and Claimant's testimony.

In this regard, Dr. Olsen postulation was based on the assumption Claimant performed 50% of the job duties involving the lifting and had sufficient time to rest. When confronted with the evidence that Claimant performed a greater percentage of these duties, Dr. Olsen's opinion did not vary and he concluded Claimant's symptoms were the results of degenerative changes in the low back. Respondent cited Dr. Olsen's opinions to dispute the effect the work activities from June 15-19, 2015 had on Claimant's lumbar spine. Notwithstanding Dr. Olsen's opinions, the ALJ was persuaded that the speed with which Claimant performed his job duties during this week was an aggravating factor and Claimant developed symptoms for which he sought treatment.

Second, the objective medical evidence in the form of the MRI findings actually documented improvement in the lumbar spine (no disc extrusion noted in 2015). As opined by Dr. Hall, Claimant's radicular symptoms were supported by the MRI findings. The objective evidence concerning Claimant's lumbar spine actually documented improvement in that there was resorption of the disc fragment. Dr. Hall's testimony that the stress on Claimant's facet joints and connective tissues aggravated his symptoms provided a plausible explanation to the ALJ.

The medical records admitted at hearing also provided support for the conclusion Claimant did not require treatment in the months before June 2015. This undercut Dr. Olsen's conclusion that Claimant's current symptoms resulted from the episode in 2011. Following Dr. Olsen's opinion to its logical conclusion, Claimant should have had less symptoms in 2015, as the disc fragment was not present on the MRI. The more plausible explanation was that Claimant suffered an acute exacerbation of his low back condition directly caused by his work activities during the week of June 15-19, 2015.

After considering the evidence, Claimant met his burden of proof that the work activities accelerated his underlying low back condition. The ALJ was persuaded that it was more probable than not that Claimant's work activities June 15-19, 2015 exacerbated his low back condition. Therefore, this aggravation of Claimant's pre-existing condition is compensable and Claimant is entitled to benefits under the Colorado Workers' Compensation Act.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In this case, the evidence established Claimant continues to experience symptoms in his low back. Since the claim has been found compensable, Claimant is entitled to receive treatment to cure and relieve the effects of his industrial injury, which must be provided by Respondent. § 8-42-101(1)(a), C.R.S. More particularly, Claimant treated with Dr. Akers, the on-site physician for Employer, who referred him to Dr. Leggett. Dr. Leggett made treatment recommendations, which are reasonable and necessary. Respondent is liable for medical benefits to cure and relieve the effects of Claimant's injury, including the treatment recommended by Dr. Leggett.

ORDER

It is therefore ordered that:

1. Claimant suffered an aggravation of his low back condition which was caused by his work activities during the week of June 15, 2015.

2. Respondent shall provide medical benefits to Claimant under the Colorado Workers' Compensation Act.

3. Respondent shall pay for the treatment recommended by Dr. Akers, Dr. Leggett and other referrals from ATPs.

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

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

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 12, 2016

Digital signature

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

ISSUES

1. Whether either party is bound by the ratings provided by an authorized treating provider (ATP) as to Claimant's permanent partial disability (PPD) impairment since neither party requested a Division Independent Medical Examination (DIME).

2. Whether Claimant has established by a preponderance of the evidence that he suffered functional impairment to the whole person that is not included on the schedule of injuries set forth by § 8-42-107(2) C.R.S.

FINDINGS OF FACT

1. Claimant worked for Employer as a forklift driver. On March 16, 2015 Claimant sustained an injury to his left hand and wrist when they became trapped and crushed between the forklift he was driving and a forklift behind him.

2. On March 17, 2015 Claimant was evaluated by Allison Hedien, NP at Concentra. Claimant reported smashing his left hand between two forklifts. Claimant was noted to have 10/10 pain to his left hand, swelling, seeping, edema, possible cellulitis, and notable infection with swelling radiating up his left arm. NP Hedien noted Claimant was unable to move his fingers which were also swollen. NP Hedien assessed cellulitis of hand, and left hand fracture. NP Hedien referred Claimant to the emergency room. *See* Exhibit 1.

3. On March 19, 2015 Claimant was evaluated by NP Hedien. Claimant reported that the emergency room told him to follow up with Concentra. NP Hedien continued to assess cellulitis of hand and left hand fracture. Dr. Hedien referred Claimant to a hand specialist and noted a stat referral was placed to hand surgery and that Claimant should see them the next day. *See* Exhibit 1.

4. On March 20, 2015 Claimant was evaluated at Hand Surgery Associates by Philip Heyman, M.D. Dr. Heyman noted that Claimant had smashed his left hand between two forklifts. Dr. Heyman noted that an x-ray of the hand was negative for fracture or dislocation. Dr. Heyman diagnosed: pain in the hand/finger; swelling in the finger/hand/arm; and crush injury of the left hand. *See* Exhibit F.

5. On March 24, 2015 Claimant was evaluated by Dr. Heyman. Dr. Heyman noted that the soft tissue swelling in Claimant's palm had gone down by 30-40% and that the wound over the thenar eminence was healing without signs of infection. Dr. Heyman noted the impression of contusion of the left hand, laceration that was healing

without infection, and soft tissue swelling. Dr. Heyman recommended therapy to work on edema control and mobilization. *See* Exhibit F.

6. On March 27, 2015 Claimant was evaluated by Dr. Heyman. Dr. Heyman noted that Claimant was getting better and making very slow progress in therapy. Claimant had continued soft tissue swelling in the palm of the hand. Dr. Heyman noted that Claimant had about 75% of normal motion of his PIP and DIP joints digits 2 through 5. Dr. Heyman noted that Claimant tended to hold his wrist in ulnar deviation 30 degrees, but with coaxing, could present his wrist in neutral and hold it there. Dr. Heyman again noted that the wound on the base of the thumb/thenar eminence area was healing without sign of infection. Dr. Heyman provided the impression of crush injury left palm, slowly improving. *See* Exhibit F.

7. On April 8, 2015 Claimant was evaluated by Dr. Heyman. Claimant had some edema in the palm but Dr. Heyman noted that it had gone down rather significantly. Dr. Heyman noted that Claimant was now holding his wrist in about 10 degrees of ulnar deviation, less than what was last seen. Dr. Heyman provided the impression of persisting edema of the left hand, slow progress. *See* Exhibit F.

8. On April 8, 2015 Claimant was evaluated Concentra by Diane Adams, D.O. Dr. Adams noted that Claimant had been seeing a hand specialist. Claimant reported that his hand was feeling better, his pain and swelling was improving, that he had sutures removed, and that he was going to therapy 3-5 times per week. Dr. Adams ordered a CT scan of Claimant’s left wrist and hand and noted the plan to monitor for RDS and compartment symptoms. *See* Exhibit E.

9. On April 23, 2015 Claimant underwent a CT scan of his left hand that was interpreted by Charles Wennogle, M.D. Dr. Wennogle provided the impression of: mildly displaced fracture through the midportion of the trapezium with 6 mm of displacement; and fracture of the tip of the hook of the hamate. *See* Exhibit D.

10. On April 27, 2015 Claimant was evaluated by Dr. Adams. Dr. Adams noted Claimant’s continued pain in the left wrist and hand. Dr. Adams reviewed the CT scan and noted a displaced fracture of the mid trapezium and a fracture of the tip of the hamate. Dr. Adams referred Claimant to hand specialist Dr. Sachar and also referred Claimant to a physiatrist for evaluation of CRPS. *See* Exhibit E.

11. On April 27, 2015 Claimant was evaluated at Hand Surgery Associates by Kavi Sachar, M.D. Dr. Sachar noted that Claimant had normal skin and subcutaneous tissue in the involved regions, but a very swollen left hand. Dr. Sachar noted the ulnar deviated position was about 30 degrees. Dr. Sachar opined that Claimant appeared to be grossly neurologically intact. Dr. Sachar reviewed multiple view x-rays taken that day as well as a CT scan. Dr. Sachar noted abnormalities of the fourth and fifth CMC joints, separation between the ulnar column and the radial column, and what appeared to be a hamate fracture as well as a triquetrum fracture. Dr. Sachar wanted to get

another CT scan to see the wrist better before assessing whether or not surgical intervention was indicated. *See* Exhibit F.

12. On April 29, 2015 Claimant was evaluated by Dr. Sachar. Dr. Sachar reviewed the CT scans in detail. Dr. Sachar planned to try therapy to get better range of motion and to get the edema down. *See* Exhibit F.

13. On May 6, 2015 Claimant was evaluated by Dr. Sachar. Dr. Sachar noted better finger motion. Dr. Sachar opined that he was not certain that surgical intervention would be beneficial and that the fractures were essentially healed. Dr. Sachar noted the goal of trying to get as good of motion as they could with continued therapy. Dr. Sachar opined that at some point they might need to take out the hook of the hamate but that it was not a major part of Claimant's pain. *See* Exhibit F.

14. On May 18, 2015 Claimant was evaluated by Dr. Sachar. Claimant was doing well and it was noted that therapy had been helping. Dr. Sachar noted that Claimant would be seeing Dr. Kawasaki for pain management. *See* Exhibit F.

15. Claimant was evaluated by NP Hedien on May 6, 2015 and May 20, 2016. NP Hedien noted the plan to continue evaluation and treatment with specialists *See* Exhibit E.

16. On May 21, 2015 Claimant was evaluated by Robert Kawasaki, M.D. for a physical medicine consultation. Dr. Kawasaki noted that Claimant had hypersensitivity along the dorsum of his hand particularly in a radial nerve distribution. Dr. Kawasaki noted the left hand, wrist, and forearm were swollen particularly along the dorsum of the left hand. Dr. Kawasaki noted that the left hand was cooler than the right with some skin color change with darkness of the left hand compared to the right. Dr. Kawasaki noted hyperhidrosis bilaterally but that Claimant appeared to be sweatier on the left than the right side. Dr. Kawasaki provided the impression of crush injury left hand, wrist fractures of the lunate and hamate, and radial neuritis with potential causalgia. Dr. Kawasaki discussed with Claimant CRPS/reflex sympathetic dystrophy of the left upper extremity and opined that based on a clinical basis the diagnosis could be made. Dr. Kawasaki recommended starting Claimant on prednisone for a two week course with a higher initial dose that decreased over the two week period to help decrease the inflammation in Claimant's left upper extremity. Dr. Kawasaki planned to recheck Claimant after two weeks. Dr. Kawasaki opined that if the steroid did not significantly decrease Claimant's symptoms then he would consider electro diagnostic testing and potentially a workup for CRPS. Dr. Kawasaki also opined that cervical stellate ganglion blocks might be an option down the line, but he would see if he could get Claimant's symptoms under control more conservatively. *See* Exhibit B.

17. On May 27, 2015 Claimant underwent occupational therapy with Helen March, OT. Claimant reported he was able to now make a better fist and was using the hand helper one time per day as recommended. Claimant reported he was taking prednisone and that his pain was decreasing overall. Claimant reported that he could

now dress himself. OT March assessed an overall improvement in range of motion and recommended he continue therapy 3-5 times per week. *See* Exhibit G.

18. On June 1, 2015 Claimant was evaluated by Dr. Sachar. Dr. Sachar noted that Claimant was 11 weeks status post crush injury and that Claimant was now seeing Dr. Kawasaki. Dr. Sachar noted Claimant's wounds were nicely healed, that he was still fairly stiff in terms of wrist motion, and that finger motion was improving. *See* Exhibit F.

19. On June 4, 2015 Claimant was evaluated by Dr. Kawasaki. Claimant reported continued problems with his left upper extremity and reported that the prednisone had helped somewhat to decrease the inflammation. On examination Claimant had some swelling along the dorsum of the hand into the wrist and some skin color change with darkening of the skin on the left compared to the right. Dr. Kawasaki also noted hyperhidrosis and hypersensitivity. Dr. Kawasaki provided the impression of: crush injury of the left hand, wrist fracture of the lunate and hamate, radial neuritis with causalgia, and left upper extremity CRPS. Dr. Kawasaki put Claimant on anti-inflammatory medication (diclofenac potassium) and added Gabapentine 300 mg. Dr. Kawasaki noted he would see how Claimant did with the new medications and that if Claimant was not improved, that he might need to consider stellate ganglion blocks. *See* Exhibit B.

20. On June 17, 2015 Claimant was evaluated by Dr. Adams. Dr. Adams assessed crush injury of hand, hand fracture left, and complex regional pain syndrome. Dr. Adams noted the treatment plan was to continue care with specialists. *See* Exhibit E.

21. On June 25, 2015 Claimant was evaluated by Dr. Kawasaki. Claimant reported overall improvement. Claimant had continued dorsal swelling with some skin color changes and some hypersensitivity of the hand. Dr. Kawasaki also noted hyperhidrosis but that Claimant sweated somewhat profusely on both sides. Dr. Kawasaki provided the impression of left hand crush injury, wrist fracture of the hamate lunate, and radial neuritis with causalgia/CRPS. Dr. Kawasaki opined that Claimant was improving overall and had made good gains. Dr. Kawasaki noted he would hold off on stellate ganglion blocks, although they remained an option. *See* Exhibit B.

22. On June 29, 2015 Claimant was evaluated by Dr. Sachar. Dr. Sachar noted that Claimant's wounds were nicely healed, that Claimant was not taking any pain medication, and that Claimant was doing quite well. *See* Exhibit F.

23. On July 6, 2015 Claimant was evaluated by Dr. Adams. Dr. Adams noted that Claimant was doing much better and was only taking NSAIDs. Dr. Adams re-ordered occupational therapy and provided a treatment plan of continuing specialist care. *See* Exhibit E.

24. On July 30, 2015 Claimant was evaluated by Dr. Kawasaki. Claimant reported his wrist was somewhat improved but that he continued to have chronic pain in the wrist with any motion. Dr. Kawasaki noted that it was unclear if Dr. Sachar planned to do surgery. On examination Claimant had some mild swelling in the left hand, no significant hypersensitivity, and symmetric hyperhydrosis sweat patterns. Dr. Kawasaki provided the impression of left hand crush injury, left hamate and lunate fractures, and radial neuritis with causalgia. Dr. Kawasaki noted that if Dr. Sachar opined that surgery was not indicated then Claimant would be at maximum medical improvement. Dr. Kawasaki opined that Claimant did not require any medication. Dr. Kawasaki noted that he would see Claimant for follow up after Claimant saw Dr. Sachar and that if no surgical recommendations were made, Claimant would be placed at maximum medical improvement and given an impairment rating. *See* Exhibit B.

25. On August 10, 2015 Claimant was evaluated by Dr. Sachar. Dr. Sachar noted that Claimant continued to sit in a slight ulnar deviation posture but could now get passively into a full fist and had near full extension. Dr. Sachar continued the therapy plan and opined that Claimant was continuing to make progress. *See* Exhibit F.

26. On August 17, 2015 Claimant was evaluated by Dr. Adams. Dr. Adams opined that Claimant was doing much better and she referred Claimant for an impairment rating. Dr. Adams noted that Claimant was to see Dr. Sachar first, then see Dr. Kawasaki for an impairment rating. Dr. Adams also requested that Claimant return to her for a follow up after the impairment rating. *See* Exhibit E.

27. On September 9, 2015 Claimant was evaluated by Dr. Sachar. Claimant reported that he would be seeing Dr. Kawasaki soon for an impairment rating. Dr. Sachar noted that all of Claimant's wounds were healed, that Claimant had limited range of motion and slight ulnar deviation but could make a composite fist. Dr. Sachar opined that he did not have much more to offer Claimant. Dr. Sachar noted that Claimant had multiple injuries to the wrist with a small hamate fracture and some carpal bone injuries and opined there was not really anything specifically that could help Claimant with surgery. Dr. Sachar opined that taking out the hamate fragments of the hyperthenar eminence would not make much of a difference in terms of pain. Dr. Sachar agreed with Claimant going ahead and getting an impairment rating and noted that he would see Claimant back as needed. *See* Exhibit F.

28. On September 17, 2015 Claimant was evaluated by Dr. Kawasaki. Dr. Kawasaki noted a history of Claimant's treatment. Dr. Kawasaki opined that Claimant had initially had some findings suspicious for CRPS but that Claimant's pseudomotor changes had diminished. Dr. Kawasaki opined that Claimant did not have significant swelling of the hand or significant hypersensitivity. Dr. Kawasaki noted that the hand specialist Dr. Sachar had no further recommendations. Dr. Kawasaki also noted that Claimant remained quite limited with regard to left hand function. Dr. Kawasaki noted that Claimant had no cervical tenderness and no problems with the distal upper extremities. Dr. Kawasaki noted no temperature change or color change from side to side and that Claimant had hyperhidrosis but of both hands. Dr. Kawasaki noted

decreased sensation over the left radial nerve distribution with some hypersensitivity. Dr. Kawasaki provided the impression of left wrist fractures of the hamate and lunate, and radian neuralgia with causalgia. Dr. Kawasaki opined that Claimant was at maximum medical improvement. Dr. Kawasaki performed an impairment rating pursuant to the AMA Guides to Evaluation of Permanent Impairment, Third Edition Revised. Dr. Kawasaki performed range of motion testing and opined that Claimant had a 22% impairment of the upper extremity. Dr. Kawasaki also noted that Claimant had radial distribution causalgia. Dr. Kawasaki used Table 14, page 46 radial sensory giving a maximum of 5% impairment of the upper extremity multiplied by a sensory grade for causalgia on Table 10, page 42 of 80% of the maximum produced a 4% impairment of the upper extremity. Dr. Kawasaki used the Combined Values Charts to reach a 25% impairment of the upper extremity, and noted for a nonscheduled rating it would equal 15% impairment whole person. *See* Exhibit B.

29. On September 21, 2015 Claimant was evaluated by Dr. Adams. Dr. Adams referred Claimant for a functional capacity evaluation. Dr. Adams noted that Dr. Kawasaki had done an impairment rating with a 25% upper extremity rating and Dr. Adams noted that equaled 15% impairment of whole person. *See* Exhibit E.

30. On October 5, 2015 Claimant was evaluated by Dr. Adams. Dr. Adams noted that Claimant was doing much better but documented that Claimant had minimal use with his left hand. Dr. Adams noted that Claimant could not use his hand to wash his body, get dressed, or comb his hair. Dr. Adams noted that Claimant was released from care as maximum medical improvement had been reached for his injuries. Dr. Adams noted Claimant was to continue in therapy/rehabilitation as scheduled, continue medications as directed, and continue specialist care. Dr. Adams noted Dr. Kawasaki's impairment rating of 25% of upper extremity but opined that given Claimant's CRPS in his non dominant hand with the deficits in self-care, the Spinal Cord injury rating was more appropriate to rate Claimant's injury and disability. Dr. Adams noted that using the Table on page 107 of the AMA Guides to the Evaluation of Permanent Impairment she found a 25% whole person impairment. Dr. Adams listed the date of maximum medical improvement as October 5, 2016 and provided permanent work restrictions of: sedentary work capacity – Claimant may lift 1 pound with his left hand. *See* Exhibit E.

31. On October 6, 2015 Claimant underwent a function capacity evaluation. Claimant reported that his response to treatment had been poor and that he was at 20% overall function. Claimant reported that his left hand function was poor for self-care and most activities. The summaries and conclusions noted that based upon the validity measures, Claimant might not have put forth consistent effort during testing. It was concluded that Claimant's overall demonstrated abilities were most consistent with the light work category for occasional work and the sedentary work category for frequent work. *See* Exhibit C.

32. On November 2, 2015 Respondents filed a Final Admission of Liability (FAL). In the FAL Respondents admitted to a PPD rating of .25% of the scheduled impairment of body code 01. Respondents attached Dr. Adams' October 5, 2015 report

that listed Dr. Kawasaki's rating of 25% upper extremity as well as her different rating of 25% whole person. Also attached to the FAL was Dr. Kawasaki's worksheet showing the range of motion and impairment calculations he made in coming to the 25% upper extremity rating. *See* Exhibit J.

33. No party requested a Division IME. Instead, Claimant applied for hearing.

34. On February 1, 2016 Claimant was evaluated by Dr. Adams. Dr. Adams noted that Claimant was there for pain medications and a onetime evaluation. Dr. Adams noted that Claimant had been released in October with pain management as the only medical maintenance and that the medical maintenance was specified to be with Dr. Kawasaki. Dr. Adams assessed crush injury of hand and left hand fracture and removed the CRPS assessment. Dr. Adams noted the plan of care was to continue with medical maintenance and pain medications as needed per Dr. Kawasaki. *See* Exhibit E.

35. On February 10, 2016 Claimant underwent an independent medical examination performed by Michael Striplin, M.D. Claimant reported constant left wrist and hand pain that made the use of his left hand difficult or impossible, extreme pain with light touch over the dorsum of the left hand on the radial side, and intermittent paresthesias over the dorsum of the left hand. On examination Dr. Striplin noted the left wrist and hand showed normal color and temperature, enlargement and possible swelling over the radial side of the dorsum of the left hand and the radial side of the left wrist. Dr. Striplin was unable to take motion measurements reliably due to Claimant's reported pain and light touch sensitivity. *See* Exhibit A.

36. Dr. Striplin assessed: carpal bone fractures, left wrist; lesion of the left radial nerve; and left wrist and hand pain. Dr. Striplin opined that Claimant had symptoms and clinical findings compatible with CRPS involving the radial nerve at the wrist. Dr. Striplin opined that on physical examination Claimant's motion was only minimally worse than the measurements obtained by Dr. Kawasaki and that the impairment rating performed by Dr. Kawasaki resulting in a 25% upper extremity rating was performed without mathematical or procedural errors. Dr. Striplin opined that the injury to the carpal bones and the radial nerve involved the upper extremity (arm) and was a scheduled injury. Dr. Striplin opined that there was no basis to rate Claimant's impairment as a spinal cord injury. See Exhibit A.

37. Dr. Adams testified by deposition in this matter. Dr. Adams noted that she referred Claimant to physiatrist Dr. Kawasaki due to her concern that Claimant might have some CRPS symptoms. Dr. Adams testified that she would not make a diagnosis of CRPS but that if she had suspicions she would refer to a specialist. Dr. Adams also testified that prior to Claimant's case, she had never performed an impairment rating. Dr. Adams testified that her office was very busy and that impairment ratings were very time consuming. Dr. Adams testified that she generally referred people out for impairment ratings unless it was something simple and that anything complicated was referred out.

38. Dr. Adams testified that once she reviewed Dr, Kawasaki's impairment rating, she did not think that it was appropriate or adequate. Dr. Kawasaki testified that she decided to perform her own impairment rating and believed she could override Dr. Kawasaki's rating. Dr. Adams opined that her rating was predominantly based on limitations in self-care and Claimant's ability to use the involved extremity but with difficulty. Dr. Adams noted that Claimant's crush injury involved diffuse pain and all of the nerves in his hand and that it was thus something that would tend to go back up more towards the nerve root. Dr. Adams testified that after conferring with a colleague and based on the impairment rating tips provided by the division, she believed she could rate Claimant either using the spinal cord table or the peripheral nerve table. Dr. Adams opined that the spinal cord table was more appropriate for Claimant's injury.

39. Michael Striplin, M.D. testified at hearing. Dr. Striplin is board certified in occupational medicine and is level II accredited. Dr. Striplin has performed a significant number of DIME evaluations dealing with injuries to the hand and wrist. Dr. Striplin noted that none of the doctors involved in Claimant's care had performed CRPS testing. Dr. Striplin noted that Claimant had injured the radial nerve on the thumb side of the wrist and that he suspected if electro diagnostic testing had been performed that it would have been abnormal for the radial nerve. Dr. Striplin noted that Dr. Kawasaki thought it was likely that the radial nerve was injured and used the table for sensory loss of that nerve in his rating. Dr. Striplin noted that the radial nerve has origins in the spinal cord at C5-T1, and then exits the spinal canal through the brachial plexus. Dr. Striplin opined that if you injure the radial nerve higher up, you can get motor loss at the shoulder or elbow. Dr. Striplin opined that when you injure the radial nerve lower and at the wrist only the sensory function at the wrist is involved

40. Dr. Striplin noted that CRPS was a consideration in Claimant's care. However, he noted that as time developed, the possible CRPS diagnosis was not substantiated. Dr. Striplin opined that Claimant's diagnoses were carpal bone fractures and a radial nerve injury at the wrist. Dr. Striplin opined that Dr. Kawasaki's impairment was accurate and the same or similar to his rating and opined that the impairment rating should not be converted to a whole person rating. Dr. Striplin opined that the injury clearly involved the wrist/hand and did not go into the shoulder or beyond the upper extremity. Dr. Striplin opined that the situs of impairment is at the wrist.

41. Dr. Striplin opined that even if CRPS was theoretically a correct diagnosis, for CRPS you can use either the peripheral nerve tables or the spinal cord table in providing a rating and opined that with Claimant's injury, the peripheral nerve tables would adequately address the impairment. Dr. Striplin noted that Dr. Adams based the rating on Claimant's subjective reports on his ability to perform self care when Claimant's reports at physical therapy were different. Dr. Striplin noted that at physical therapy Claimant reported he could get dressed and could carry items.

42. The opinions of Dr. Kawasaki and Dr. Striplin are found credible and persuasive. Their opinions are consistent with the overall medical evidence. The

opinion of Dr. Adams is not found as credible or persuasive. Her opinion is based in part on Claimant's subjective reports that were inconsistent with his reports at occupational therapy. Dr. Adams also could not adequately describe or explain her use of the spinal cord table or provide an analysis as to why it was more appropriate in to use in this case. Dr. Kawasaki used the peripheral nerve table and noted the peripheral nerve involved and Dr. Striplin provided a credible and persuasive opinion as to why the peripheral nerve table was appropriate.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2013), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2013). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2013). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

Absence of DIME

Initially at the outset of hearing, both parties argued that the opposing party should have requested a division independent medical evaluation (DIME) in response to the final admission of liability (FAL).

Claimant argues that Respondents were required to admit to authorized treating provider (ATP) Dr. Adams' whole person impairment rating of 25% whole person and that because Respondents did not request a DIME to dispute ATP Dr. Adams' whole person rating, Respondents were bound by the rating. Claimant cited *Egan v. ICAO*, 971 P.2d 664 (Colo. App. 1998) in support of their argument. Claimant's argument is not found persuasive.

Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Claimant's argument centers on the determinations made by ATP Dr. Adams. However, Claimant fails to address the fact that Dr. Kawasaki, who is also an ATP in this claim, provided an extremity impairment rating of 25%. As found above, Claimant was referred to Dr. Kawasaki for treatment, for an impairment rating, and for maintenance treatment. Dr. Kawasaki is an ATP and he placed Claimant at MMI and provided an impairment rating of 25% extremity.

The Respondents issued an FAL based on ATP Dr. Kawasaki's impairment rating. Attached to the FAL was a copy of Dr. Adams' report where she noted her disagreement with Dr. Kawasaki's rating. The report lists both Dr. Adam's and Dr. Kawasaki's ratings. Also attached to the FAL was Dr. Kawasaki's impairment rating worksheet showing the calculations and measurements that got him to the 25% extremity rating. In the *Egan* case cited by Claimant, an ATP had provided a whole person impairment rating that included the injured worker's neck and upper extremity. Despite the ATP's rating, the respondents only admitted to the upper extremity part of the rating and they did not admit to the whole person rating provided by the ATP. The respondents did so without requesting a DIME. The court held that because the respondents had failed to request a DIME to dispute the ATP's whole person rating, in which the ATP considered both the neck and upper extremity to be causally related, the court had no jurisdiction to consider causation or to alter the rating provided by the ATP. Essentially, the respondents in *Egan* were attempting to admit that only part of the body was causally related when the ATP had opined both body parts were related and rated both. The facts of this case are distinguishable from the *Egan* case. Here, Respondents are not admitting to only a part of an ATP's rating. Rather, they admitted in the FAL to the entire rating provided by ATP Kawasaki. As they agreed in whole with his rating, they were not required to seek a DIME to dispute the rating provided. Although an additional ATP, Dr. Adams, provided a different impairment rating after reviewing ATP Dr. Kawasaki's rating, the ALJ is not aware nor does Claimant point the

ALJ to any requirement that the Respondents admit to one ATP's higher rating over another ATP's rating. In his argument, Claimant essentially argues that Respondents admitted to the 25% extremity rating without reason and contrary to the ATP's rating. However, this is inaccurate. The 25% extremity rating is the exact rating provided by the ATP to whom Claimant was referred not only for ongoing treatment throughout the claim, but also to provide the impairment rating, and to provide ongoing maintenance care. Respondents admitted to this rating in whole and the ALJ can find no basis to deny the Respondents from presenting evidence or from being barred from moving forward in this matter for failing to request a DIME. Respondents were not required to either admit for ATP Adams' rating or request a DIME. They also had the option of admitting to ATP Kawasaki's rating, in whole, which they did.

Respondents also argued at the outset of hearing that Claimant should have and was compelled after the FAL was filed to request a DIME to dispute the 25% extremity rating. This argument also is not found persuasive. Scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. In particular, the procedures of § 8-42-107(8)(c), which state that a DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App.1998); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (2000). There is no requirement that Claimant undergo a DIME as a prerequisite to a hearing on permanent impairment when, in this case, the FAL admitted to a scheduled impairment rating. The ALJ finds no bar to Claimant applying for hearing to dispute the scheduled impairment rating admitted by the Respondents in the FAL, and similarly finds no basis to deny Claimant from presenting evidence to dispute the admitted scheduled rating.

Scheduled Injury vs. Whole Person Impairment

The Act classifies work-related injuries as either scheduled or non-scheduled injuries. Scheduled injuries are those listed in § 8-42-107(2). Non-scheduled injuries are those that are not listed or that are excluded from the statutory schedule. *See* §§ 8-42-107(1)(b) and 8-42-107(8). Whether a claimant's impairment falls within the schedule in § 8-4-107(2) is a question of fact for the ALJ. Langton v. Rocky Mountain Health Care Corp., 937 P.2d 883 (Colo.App.1996). The term "injury" refers to the part or parts of the body that sustain the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Claimant bears the burden of proof to establish by preponderant evidence that he suffered functional impairment that is not included on the schedule of injuries listed at § 8-42-107(2) C.R.S. Whether Claimant has met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Maestas v. American Furniture Warehouse,* WC No. 4-662-369 (June 5, 2007).

In this case, Claimant has failed to meet the burden of proof to establish that the situs of his functional impairment was beyond his arm at the shoulder or that he is entitled to a whole person impairment rating. The expert opinions of Dr. Striplin and Dr. Kawasaki, substantiated by the medical records, establish that the rating provided using the peripheral nerve table was appropriate for Claimant's condition and limitations from his work injury. Claimant did not establish functional impairment beyond his left upper extremity and did not establish that the spinal cord table would be appropriate. The opinions of Dr. Striplin and Dr. Kawasaki are found credible and persuasive. Dr. Adams is not found as credible or persuasive. As found above, Dr. Kawasaki was the specialist and provider to whom Dr. Adams referred Claimant for treatment as she recognized that diagnosing and/or treating potential CRPS was outside her specialty. Dr. Kawasaki found peripheral nerve problems on the radial nerve on the dorsum side, which is why he found the peripheral nerve table appropriate for rating Claimant's permanent impairment. Dr. Striplin concurred that the peripheral nerve table was appropriate given Claimant's impairment. Further, Dr. Adams actually referred Claimant to Dr. Kawasaki for an impairment rating as she typically did not deal with impairment ratings on difficult cases. Dr. Adams was unable to persuasively explain why the spinal cord table would be more appropriate and her indications that Claimant had trouble in self-care are partly discredited by Claimant's statement to the occupational therapist in May of 2015 that he was able to dress himself. In viewing the evidence overall, Claimant has failed to meet his burden to show an impairment off the schedule. Claimant's functional impairment and diagnoses are limited to the left upper extremity and do not extend beyond the arm at the shoulder. Further, the peripheral nerve table used by ATP Kawasaki in his rating is found appropriate and supported by the medical evidence as well as by the opinion of Dr. Striplin.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden to establish that he suffered functional impairment to the whole person that is not included on the schedule of injuries set forth by § 8-42-107(2) C.R.S.

2. Claimant is entitled to PPD benefits as calculated by Dr. Kawasaki of 25% of the left upper extremity.

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

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

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

DATED: October 12, 2016

/s/ Michelle E. Jones

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

STIPULATIONS

1. The Claimant's Average weekly wage is $768.89, including COBRA.

2. If the Claimant proves he sustained a compensable injury, Respondent is responsible for all medical treatment at Concentra Medical Center, Patient's First Medical Center, CACC Physical Therapy, and the lumbar spine MRI from Touchstone Imaging on December 31, 2015 and for any authorized referrals from those providers.

ISSUES

The issues for determination are:

1. Whether the Claimant proved, by a preponderance of the evidence, that he suffered a compensable injury in the course and scope of his employment on December 16, 2015.

2. If the Claimant proves he suffered a compensable injury, whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability indemnity benefits from December 22, 2016 ongoing.

4. If the Claimant proves he suffered a compensable injury, whether the Respondents proved, by a preponderance of the evidence, that the Claimant is responsible for his termination of employment and resulting wage loss.

FINDINGS OF FACT

1. The Employer is a dairy plant which supplies affiliated grocery stores throughout the country with dairy products for sale. The plant where the Claimant worked began operations in April of 2014.

2. The Claimant submitted an online application for employment with Employer on October 20, 2014. The Claimant testified at the hearing that, in his interview, he informed the Employer that he was enrolled in college and needed weekends off of work to attend classes. However, interview notes from the Claimant's employment file noted that the Claimant stated he was available to work any shift and made no mention of attending classes or needing weekends off. Additionally, the transcript from Columbia College shows that Claimant last was enrolled in a course ending on May 17, 2014 and Jennifer Thorpe, Registrar for Columbia College testified

that there was no indication that the Claimant was enrolled in any courses after May 17, 2014.

3. The Claimant was hired to work on Employer's "Distribution" team in early November 2014. On November 10, 2014, the Claimant signed a Receipt and Acknowledgement of Employer's Handbook, which is attached as Appendix B a copy of Employer's attendance policy (Respondents' Exhibit B).

4. On March 9, 2015, Employer placed the Claimant on probation for violations of the attendance policy. The Written Disciplinary Warning for Attendance, signed by Claimant on April 2, 2015, notified the Claimant that the probation would last for nine months and that a total of three additional attendance occurrences in that nine-month period would result in termination of the Claimant's employment.

5. As part of an organizational restructure, Employer dissolved the Distribution team in March 2015, and the Claimant was transferred to the "Aseptic" team. Jeff Hotaling, Employer's Team Lead for the Aseptic team, testified that within weeks of the Claimant transferring onto the Aseptic team, the Claimant began to complain of an inability to work weekends, stating he needed weekends off to attend school. However, the Claimant's statements that he needed weekends off to attend school in 2015 were deceptive as the Columbia College transcript of enrollment establishes that the Claimant last was enrolled in a class which ended in May 2014, which was before he began working for Employer. The ALJ finds that the Claimant's statements to Mr. Hotaling in March 2015 that he needed weekends off to attend school are an attempt to mislead the Employer that he was attending classes on the weekends so that he would not be scheduled to work weekends.

6. Mr. Hotaling testified that in the Fall 2015, the Aseptic team expanded distribution to affiliated grocery stores nationwide, resulting in a significant increase in plant production and a corresponding need for Aseptic team members to work more and more weekends. Jeff Hotaling, Susan Long and Human Resources trainee Luke Clayton all testified that the Claimant repeatedly complained in September, October, November and December 2015, that he needed weekends off to attend school. Thus, the Claimant continued to deceive Employer in order to avoid working weekends.

7. The Claimant received an attendance occurrence on September 14, 2015, and a second attendance occurrence on November 24, 2015 (Respondents' Exhibit A, pp. 7-8). According to Employer's attendance policy, a third attendance violation while the Claimant was still on attendance probation would result in the Claimant's termination.

8. Mr. Hotaling testified that in early-November 2015, the other Aseptic team members began to express their frustration to him that the Claimant was not being scheduled weekends when all other Aseptic team members were required to work weekends. Therefore, Mr. Hotaling notified the Claimant that Mr. Hotaling would need to schedule the Claimant to work on the weekends.

9. The Claimant then presented to Employer a letter dated October 23, 2015, which he represented was from Columbia College, stating that the Claimant was enrolled in the late-fall session beginning October 26, 2015, and running through Saturday, December 19, 2015 (Respondent's Exhibit C). In Respondent's case-in-chief, Respondent presented the testimony of the Registrar for Columbia College, Ms. Jennifer Thorpe, who testified that the letter presented by the Claimant dated October 23, 2015, in fact was not generated by anyone at Columbia College, as the letter is not on Columbia College letterhead and is not signed by anyone at Columbia College. Furthermore, Thorpe testified that all enrollment records are kept on Columbia College servers, and she has reviewed the same and there is no evidence that the Claimant ever applied for enrollment in the late-fall session 2015, or at any time after 2014. Ms. Thorpe is not associated with Respondent and has no incentive to testify falsely in this case or to have any bias in favor of either party. Further, Thorpe's testimony is supported by a copy of a letter with the true letterhead from Columbia College (Respondent's Exhibit P, p. 84), which is materially different from the letter which the Claimant presented to Employer. The ALJ finds that it is more likely true than not that the Claimant generated a counterfeit letter to Employer in order to continue his deception regarding attendance at school so that he would not be scheduled to work weekends.

10. On both direct examination and cross-examination the Claimant repeatedly testified dishonestly under oath that he was enrolled in school on the weekends in 2015. It was only *after* Thorpe's testimony that the Claimant testified on rebuttal that he never was enrolled in the late-Fall semester or any other semester in 2015. The ALJ finds that the Claimant's testimony lacks credibility and that he perpetuated a lie to his Employer, and continued to present this lie through his testimony at the hearing, about enrollment in college courses to avoid working on weekends. He continued this lie until he was confronted with solid evidence to the contrary.

11. Employer's Human Resources trainee Luke Clayton testified that, on December 10, 2015, the Claimant approached Mr. Clayton, telling Mr. Clayton that he was having problems with attending college courses on the weekends due to being scheduled to work on the weekends. Mr. Clayton discussed with the Claimant that many people attend school while still working their full schedules and that the Claimant must find ways to prioritize his time and attendance. Mr. Clayton also documented that the Claimant requested that Mr. Clayton to look into the status of the Claimant's attendance probation. On December 11, 2015, Mr. Clayton responded to the Claimant's inquiry about the status of his attendance probation, informing the Claimant that he would be terminated for missing another day of work while on probation, but that he would be off probation effective Monday, December 14, 2015. In addition, Mr. Clayton testified and documented that sometime during the following week of December 13-19, 2015 (after the Claimant's attendance probation ended on December 14, 2015), the Claimant again asked about the attendance policy and when occurrences drop off under the policy. Mr. Clayton informed the Claimant that a total of four occurrences in the previous six months would put the Claimant back on probation again.

12. Mr. Hotaling testified that the Claimant advised him that he would not be appearing for his scheduled workdays on the weekend of December 19-20, 2015, because he needed to take a family member to Oklahoma. Mr. Hotaling clearly testified that the Claimant never stated he needed the time off to go to school, and stated only that he needed to take someone to Oklahoma. Mr. Clayton also testified that the Claimant stated that he would not be appearing for work on December 19-20, 2015, because he needed to take someone to Oklahoma. Susan Long testified that Mr. Hotaling told her sometime before December 19, 2015, that the Claimant announced that he would be not be appearing for work on December 19-20 in order to take someone to Oklahoma. The Claimant's testimony regarding the conversation with Mr. Hotaling was vague, evasive and introduces another excuse that the Claimant provided to his Employer for not working weekend shifts:

Q: So at some point, Jeff Hotaling gave you days off, your testimony is, to go to school. Yes or no?

A. No.

Q. He never gave you days off to go to school?

A. He gave me days off, but he didn't give me days off. It wasn't elaborated for that particular thing.

Q. Okay. He just said you can have two days off for whatever you want?

A. Correct.

Q. Okay. And originally -- and that was so you could go to Oklahoma?

A. No.

Q. That was so you could go to school?

A. That was so I could study for school, basically. Right.

Q. Okay. But yet you knew you had to go to Oklahoma?

A. No.

Q. You previously testified that you couldn't drive to Oklahoma because of your back injury?

A. Okay.

Q. So you knew you had to go to Oklahoma?

A. I knew I didn't have to. It wasn't something I had to do. It was just something that was requested for me to do.

Q. Okay. Did you go?

A. Requested.

Q. And so let me rephrase that. You knew that you were going to drive to Oklahoma if you hadn't been injured. Right?

A. No.

Q. No?

A. It was something that was requested. I didn't -- I didn't say I was going to do it or anything like that. It was a request.

Q. You never told Jeff Hotaling you wanted those two days off to go to Oklahoma?

A. No. I said it was a request. I said I might. I didn't tell him I was going.

Q. I thought you just said you just told him you needed two days off and you didn't tell him what for?

A. He knew I was in school. He knew I was in school. That was pretty much what it was.

Q. See, that is not what I asked, though.

A. I know.

Q. I didn't ask what he knew. I asked what you told him.

A. I told him I need these two days off. He said, okay.

Q. So did you tell him you needed two days off to go to Oklahoma?

A. Not to go to Oklahoma, no.

(May 10, 2016, Hearing Transcript, pp. 129:9-131:14)

13. The Claimant’s testimony regarding the conversation with Hotaling is not credible for several reasons:

- This conversation occurred only a few weeks after Mr. Hotaling informed the Claimant that he needed to start scheduling the Claimant to work weekends and while the Claimant still was on attendance probation, so it is not logical that Mr. Hotaling would have told Claimant he could have two days off for whatever reason the Claimant wanted. Rather, it is much more likely that the Claimant announced he would not be coming to work, and Mr. Hotaling simply said acknowledged what the Claimant told him since the Claimant had consistently stated he could not work on weekends so it did not matter what Mr. Hotaling told him.

- Mr. Hotaling, Mr. Clayton and Ms. Long all testified that the Claimant announced he would not be appearing for the scheduled weekend shifts because he needed to drive a family member to Oklahoma, and that the Claimant did not request to be taken off the schedule and was not given permission to be taken off the schedule for December 19-20, 2015.

- Despite the fact that the Claimant never was enrolled in the late-Fall 2015 semester, the Claimant testified falsely under oath that he needed December 19-20 off to study for school.

- The context of the Claimant's conversations with Mr. Clayton on December 10, 2015, December 11, 2015, and sometime during the week of December 13-19, 2015, makes it more likely that the Claimant knew several days beforehand that he would be missing his scheduled shifts on December 19-20, 2015, in order to drive a family member to Oklahoma, and wanted to know the consequences of receiving the two attendance occurrences on his continued employment;

- If Mr. Hotaling had given the Claimant December 19-20, 2015 off from work, there would have been no reason for the Claimant to call the attendance line on December 19 and December 20, 2015, because the Claimant would not have been on the schedule for those two days. Yet, the Employer's records indicate that the Claimant did call the attendance line to report absences (Respondent's Exhibit A, pp. 9-10).

14. The ALJ finds that the Claimant announced to Mr. Hotaling that he would not be appearing for his scheduled shifts on December 19-20, 2015, because he needed to drive a family member to Oklahoma. Based on the Claimant's conversations with Mr. Clayton the previous weeks, the Claimant knew that he would receive two attendance occurrences and that it was a likelihood that his employment would be terminated on December 21, 2016 as a result of the absences.

15. On December 16, 2015, the Claimant struck a pole while driving a double-walkie pallet jack. The Claimant testified that the floor was wet and slippery, precipitating the machinery striking the pole. The Claimant testified that after striking the pole he immediately felt excruciating pain in his left buttocks and lower back:

Q. Now, you testified also that you were having excruciating pain in your left buttocks and lower back. When did you start having this excruciating pain?

A. Immediately after I was injured on the Double Walkie.

Q. So before you even went to Jeff Hotaling, you were having this excruciating pain in your left buttocks and lower back?

A. Correct.

[(May 10, 2016, Hearing Transcript, p. 84:12-21)

16. HR Leader Susan Long testified that the Employer had motion-activated security cameras which recorded all activity in the packaging area, and that the software for viewing the video file documents the time of all activities over the course of the day, allowing someone to review all those times in which any activity occurred during a work shift. Ms. Long testified that the security video approached the pole in question only nine times over the course of his shift. The security video of the Claimant's activities on the double-walkie each time he approached the pole in question shows that he never gave any indication of being injured, and did not stop the double-walkie after striking the pole despite the Claimant's claim of immediate "excruciating" pain. Instead, the Claimant continued to work his shift and perform his regular duties for the rest of his shift.

17. The Claimant testified that shortly after striking the pole he told both Aseptic Team Lead Mr. Hotaling and Aseptic supervisor Nick Jackson that he was in pain and needed medical care, but neither Mr. Jackson nor Mr. Hotaling completed paperwork or referred him to a physician. Mr. Jackson and Mr. Hotaling both denied that the Claimant ever stated that he was in pain, only that he struck the pole.

18. The Claimant finished his shift that day and punched out at 9:58 p.m. The Claimant testified that when he went home after work on December 16, 2015, he continued to experience "excruciating pain going down my left buttocks and my lower back." The Claimant testified that he appeared for work on December 17, 2016, and December 18, 2016, and on both days told both Nick Jackson and Kiet Nguyen he was in excruciating pain and needed treatment:

Q: So 12/17, who do you tell again, "I am in excruciating pain, I need treatment"? Who do you tell on 12/17?

A. I tell Nick and I tell Kiet.

(May 10, 2016, Hearing Transcript, p. 109:12-15)

* * *

Q: So now we are on the 18th. You're now working another full shift, full duty, and I asked you, who did you report it to and -- I'm confused.

A. I told Nick.

Q. Again, you told Nick.

A. Exactly.

Q. So you told Nick on the 17th, the following day, and then you told him again on the 18th?

A. Correct.

Q. No doubt in your mind about that?

A. I told Nick twice.

Q. So you told him the 16th, the 17th, the 18th?

A. Twice. Three times, exactly. He knew about the injury. He was supposed to do the paperwork two days, and he never did.

(May 10, 2016, Hearing Transcript, pp. 111:18-112:8)

19. The Claimant's testimony that he told Jackson and Nguyen that he was injured on December 16, December 17, or December 18, 2015, is not credible for several reasons:

- Nick Jackson, who no longer works for the Employer, testified that his normal days off were Thursday, Friday and Saturday and he did not work Thursday, December 17 or Friday, December 18, 2015, so the Claimant could not have told him he was injured and needed medical care on those two days;

- It is not likely that three supervisors, Jeff Hotaling, Nick Jackson and Kiet Nguyen all would ignore the Claimant's report of an injury and request for medical treatment, and instead force Claimant to work his normal job despite "excruciating" pain on December 16, December 17, and December 18, 2015, especially since each of these supervisors testified regarding company policy that all injuries were required to be reported immediately;

- Kiet Nguyen testified that he had no knowledge of the alleged injury until Claimant approached him on December 21, 2015, and that he reported the alleged injury as soon as the Claimant mentioned it to him.

20. The ALJ finds the testimony of Mr. Hotaling, Mr. Jackson and Mr. Nguyen more credible than that of the Claimant, and finds that the Claimant did not tell anyone at Employer that he was injured as a result of striking the pole until December 21, 2015, when he presented to Mr. Nguyen who completed the Initial Incident Form (Respondent's Exhibit F).

21. The Claimant worked his normal shift on December 18, 2015, clocking out at 9:53 p.m. (Respondent's Exhibit M, p. 70). The Claimant then called the attendance line sometime between 11:00 p.m. and midnight notifying his Employer that he would not be in to work on Saturday, December 19, 2015. The Claimant testified that he specifically stated he was "sick because of a back injury":

> Q. Did you say, I won't be in because I'm sick, or I won't be in because I injured my back?
>
> A. I said I was sick because of the back injury.
>
> (May 10, 2016, Hearing Transcript, p. 120:5-9).

22. The ALJ finds the Claimant's testimony again is not credible for several reasons:

- Paul Hammer completed the Absentee Report marking as the reason for the absence only "Other" without specifying a reason. [Exhibit A, p. 9]

- Mr. Hammer testified that Claimant's voice message was sent to Hammer by the attendance line via e-mail, and that Claimant did not state why he would not be into work on December 19, 2015, never stated it was as a result of an alleged injury, and that if Claimant had stated he injured his back Mr. Hammer would have notified Safety Manager Mary Beth Clark and Human Resources Lead Susan Long;

- This version of events would involve four different supervisors who each ignored the Claimant's report of an injury, despite all four supervisors testifying that the Employer had a policy requiring them to report work injuries and that all of the supervisors had reported work injuries in the past;

- Tim Weber testified that he received an e-mail from the he attendance line at noon on Sunday, December 20, 2015, containing the audio file of the Claimant's call to the attendance line on that date, and that the Claimant again did not report that he was missing time as a result of an alleged injury.

23. The Claimant's testimony is inconsistent with the bulk of evidence to the contrary. Even if the Claimant had not created a counterfeit letter from Columbia college to perpetuate his deception on his Employer or repeatedly lied under oath in his testimony on direct and cross examination about attending school in 2015, the Claimant still testified in direct conflict with multiple credible witnesses (Mr. Hotaling, Mr. Jackson, Mr. Nguyen and Mr. Hammer) that they all ignored the Claimant's report of an injury. Additionally, the Claimant persisted in his testimony that there was "no doubt" in his mind that he reported the alleged injury to Mr. Jackson on December 17 and December 18, 2015, dates when Mr. Jackson was not even working. The ALJ finds that the

Claimant lacks credibility on the issue of reporting a work injury to his Employer prior to December 21, 2015.

24. The Claimant reported for work on December 21, 2015, and reported a back injury to Kiet Nguyen, who completed the Initial Injury Form (Respondent's Exhibit F). On the morning of December 22, 2015, the Claimant reported to Concentra for treatment, where he was seen by physician's assistant Glenn Peterson. The physician's assistant assessed "Crush injury, back" and "contusion of left hip and thigh" (Claimant's Exhibit 7, p. 18). The "Physical Exam" portion of the physician's assistant's report does not list any objective findings, instead listing only the Claimant's subjective complaints of pain or tenderness.

25. After leaving Concentra, the Claimant returned to Employer and met with Safety Manager Mary Beth Clark. Ms. Clark and Susan Long both testified that when the Claimant walked into Clark's office he had an obvious and significant limp. Ms. Clark testified that during her meeting with the Claimant he presented with significant pain behaviors and barely could sit down or stand up from his chair during the meeting. However, security video of the Claimant entering the building only minutes before meeting with Ms. Clark shows that Claimant exited the passenger side of a motor vehicle without any problems moving from a seated position to a standing position and quickly walked into the building without a limp. The same security video shows the Claimant leaving the meeting with Mr. Clark, briskly walking from the Employer's plant and actually hopping over a pile of snow in the Employer's parking lot without hesitation or pain behaviors (Respondent's Exhibit S).

26. Ms. Clark testified that she had viewed the video surveillance at Exhibit S and that the Claimant's presentation during the meeting with her differed substantially from his presentation in the security video. While Ms. Long did not stay for the meeting, she did see the Claimant walk into Ms. Clark's office and testified that the Claimant had a significant limp which differed substantially from the security video. Again, the Claimant's subjective presentation at his meeting with Ms. Clark, and during times when he knew he was being observed, is inconsistent with the objective evidence of his condition while walking into the building without a limp and jumping over the snow in the curb without any hesitation.

27. Dr. Michael Striplin performed an Independent Medical Examination of the Claimant on May 11, 2016. Dr. Striplin stated that the medical records do not document any objective evidence of a crush injury to the back or a contusion of the left hip or thigh, and that the diagnosis of a contusion is based "solely on Claimant's subjective complaints" (Respondent's Exhibit Q, p. 89). Dr. Striplin further stated that he reviewed the Claimant's MRI findings and those on MRI are consistent with degenerative changes which could exist without sustaining any injury and can exist in the absence of any symptoms. In other words, Dr. Striplin stated that the only evidence of any claimed injury is the Claimant's subjective statement that he is in pain.

28. While the Respondent agrees that the double-walkie that the Claimant was driving on December 16, 2015 struck a pole, Respondent argues that the Claimant

did not sustain any injury when he struck the pole on December 16, 2015. Since the physician's assistant who examined Claimant on December 22, 2015, did not document any objective evidence of an injury such as ecchymosis (bruising), hematoma (blood in the tissues), erythema (redness of the skin caused by increased blood flow), edema (swelling) or inflammation, the only evidence of an injury is based exclusively on the Claimant's subjective complaints of pain. Therefore, Claimant's credibility is crucial to a determination of the question of whether he sustained an injury when the double-walking he was driving struck a pole. As previously documented in these findings of fact, the Claimant has a serious credibility issue. Namely,

- The Claimant repeatedly knowingly testified under oath during direct and cross examination that he was enrolled in school in 2015, and finally admitted that he never was enrolled in school in 2015 only on rebuttal testimony, after Columbia College Registrar Jennifer Thorpe's testimony and the Columbia College transcript brought to light the Claimant's series of compounding lies regarding his enrollment in school;

- The Claimant's testimony that he told the Employer at the time he was hired that he needed weekends off to attend school is inconsistent with the Claimant's own application for employment indicating he was not enrolled in school and the notes in his employment file from the interview process indicating the Claimant was available to work weekends and was not enrolled in school;

- The Claimant repeatedly lied to multiple Employer representatives over the course of nine months from March through December 2015, that he needed weekends off to attend school when, in fact, the Claimant never was enrolled in school in 2015;

- The Claimant submitted a counterfeit letter from Columbia College dated October 23, 2015, in order to perpetuate his lies and convince the Employer to give him weekends off;

- The Claimant's testimony that he was in excruciating pain after striking the pole is inconsistent with the security video showing the Claimant continuing to work without even pausing on numerous occasions that he approached the pole in question on December 16, 2015, and is also inconsistent with the Claimant's working full shifts on December 17 and December 18, 2015, without exhibiting any pain behaviors;

- The Claimant's testimony that he told Mr. Hotaling, Mr. Jackson, Mr. Nguyen, and Mr. Hammer that he was injured when he struck the pole is highly improbable, as it makes no sense that all four witnesses would ignore the reports of injury until December 21, 2015, despite Employer's policy requiring all injuries to be reported;

- The Claimant's testimony that there is "no doubt" that he reported the injury to Mr. Jackson and requested medical care on December 17 and December 18, 2015, cannot be reconciled with the fact that Mr. Jackson did not work on those two dates;

- Ms. Clark and Ms. Long both testified that the Claimant limped significantly when he entered Ms. Clark's office on December 22, 2015, and Ms. Clark testified that the Claimant barely could sit down in the chair upon entering her office or stand up from the chair upon leaving her office, but the security video of the Claimant entering and leaving the building on December 22, 2015, shows that upon entering the building the Claimant moved fluidly from a seated position in a car to a standing position and walked briskly into the building without any limp, and upon leaving actually jumped over a pile of snow at the curb of Employer's parking lot without any hesitation or pain behaviors.

29. Several days *before* striking the pole with the double-walkie on December 16, 2015, the Claimant told both Mr. Hotaling and Mr. Clayton that he would be missing his scheduled shifts on December 19 and 20, 2015, and had several conversations with Human Resources trainee Mr. Clayton about the attendance policy and what would happen if the Claimant missed any more time from work. Thus, before he struck the pole on December 16, 2015, the Claimant clearly knew that when he missed his scheduled shifts on December 19 and 20, 2015, he would be facing some type of disciplinary action up to and including probation or termination. Therefore, it is more likely than not that the Claimant reported an injury on December 21, 2015 in order to avoid disciplinary action for missing his shifts on December 19 and 20, 2015, as opposed to the possibility that the Claimant actually sustained an injury on December 16, 2015. The ALJ finds that the Claimant fabricated his story of an injury and did not, in fact, sustain any injury when his double-walkie struck a pole.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The Claimant was hired by Employer in early November of 2014. By March of 2015, he was on probation for attendance issues. When the Employer's needs for its employees to work weekends increased due to an expansion of the workload required of the facility, the Claimant convinced his supervisors that he could not work weekends due to a scheduling conflict with college courses he stated he was taking. As the evidence established, the Claimant was not, in fact, taking college classes at Columbia College. He had not been enrolled in classes, either in person or on-line courses, since May of 2014, months prior to his starting the job with his Employer. The Claimant's statements that he needed weekends off to attend school in 2015 were deceptive and an attempt to mislead the Employer that he was attending classes on the weekends so that he would not be scheduled to work weekends. The Claimant even presented a counterfeit letter dated October 23, 2015, which he represented was from Columbia College, stating that the Claimant was enrolled in the late-fall session beginning October 26, 2015, and running through Saturday, December 19, 2015. The ALJ found that the Claimant's testimony lacked credibility and that he perpetuated a lie to his Employer, and continued to present this lie through his testimony at the hearing, about enrollment in college courses to avoid working on weekends. He continued this lie until he was confronted with solid evidence to the contrary.

The Claimant received an attendance occurrence on September 14, 2015, and a second attendance occurrence on November 24, 2015. According to Employer's attendance policy, a third attendance violation while the Claimant was still on attendance probation would result in the Claimant's termination. The Claimant also engaged in a series of discussions and inquiries with the Employer's Human Resources trainee Luke Clayton about the status of the Claimant's attendance probation. On December 11, 2015, Mr. Clayton responded to the Claimant's inquiry about the status of his attendance probation, informing the Claimant that he would be terminated for missing another day of work while on probation, but that he would be off probation effective Monday, December 14, 2015. In addition, Mr. Clayton testified and documented that sometime during the following week of December 13-19, 2015 (after the Claimant's attendance probation ended on December 14, 2015), the Claimant again asked about the attendance policy and when occurrences drop off under the policy. Mr. Clayton informed the Claimant that a total of four occurrences in the previous six months would put the Claimant back on probation again. Around this time period, the Claimant also advised his supervisor Mr. Hotaling that he would not be appearing for his scheduled workdays on the weekend of December 19-20, 2015, because he needed to take a family member to Oklahoma. The Claimant testified that he either told Mr.

Hotaling that he needed time off for school or that he was granted a weekend off for no particular reason. However, Mr. Hotaling clearly testified that the Claimant never stated he needed the time off to go to school, and stated only that he needed to take someone to Oklahoma. Mr. Clayton also testified that the Claimant stated that he would not be appearing for work on December 19-20, 2015, because he needed to take someone to Oklahoma. The Claimant's testimony regarding the conversation with Mr. Hotaling was found not credible and Mr. Hotaling's testimony was found to be credible, supported and persuasive. Therefore, the ALJ found that the Claimant announced to Mr. Hotaling that he would not be appearing for his scheduled shifts on December 19-20, 2015, because he needed to drive a family member to Oklahoma. Based on the Claimant's conversations with Mr. Clayton the previous weeks, the Claimant knew that he would receive two attendance occurrences and that it was a likelihood that his employment would be terminated on December 21, 2016 as a result of the absences.

On December 16, 2015, the Claimant struck a pole while driving a double-walkie pallet jack. The Claimant testified that the floor was wet and slippery, precipitating the machinery striking the pole. The Claimant testified that after striking the pole he immediately felt excruciating pain in his left buttocks and lower back. However, this testimony is refuted by the testimony of other witnesses and surveillance video. The security video of the Claimant's activities on the double-walkie each time he approached the pole in question shows that he never gave any indication of being injured, and did not stop the double-walkie after striking the pole despite the Claimant's claim of immediate "excruciating" pain. Instead, the Claimant continued to work his shift and perform his regular duties for the rest of his shift.

The Claimant also testified that shortly after striking the pole he told both Aseptic Team Lead Mr. Hotaling and Aseptic supervisor Nick Jackson that he was in pain and needed medical care, but neither Mr. Jackson nor Mr. Hotaling completed paperwork or referred him to a physician. Mr. Jackson and Mr. Hotaling both denied that the Claimant ever stated that he was in pain, only that he struck the pole. The Claimant then finished his shift that day and punched out at 9:58 p.m. The Claimant testified that when he went home after work on December 16, 2015, he continued to experience "excruciating pain going down my left buttocks and my lower back." The Claimant testified that he appeared for work on December 17, 2016, and December 18, 2016, and on both days told both Nick Jackson and Kiet Nguyen he was in excruciating pain and needed treatment. The Claimant's testimony that he told Mr. Jackson and Mr. Nguyen that he was injured on December 16, December 17, or December 18, 2015, was found not credible in part because Nick Jackson's normal days off were Thursday, Friday and Saturday and he did not work Thursday, December 17 or Friday, December 18, 2015, so the Claimant could not have told him he was injured and needed medical care on those two days. The Claimant's testimony about reporting an injury on December 16th and 17th is also not credible as it is unlikely that three supervisors, Jeff Hotaling, Nick Jackson and Kiet Nguyen all would ignore the Claimant's report of an injury and request for medical treatment, and instead force the Claimant to work his normal job despite "excruciating" pain on December 16, December 17, and December 18, 2015, especially since each of these supervisors testified regarding company policy that all injuries were required to be reported immediately. After working his normal shift on December 18, 2015, the Claimant then called the attendance line sometime between 11:00 p.m. and midnight notifying his Employer that he would not be in to work on Saturday, December 19, 2015. The Claimant testified that he specifically stated he was “sick because of a back injury,” however, the ALJ found that this testimony was not credible and found that the Claimant did not report a back injury when calling in to the attendance line.

Overall, the Claimant’s testimony is inconsistent with the bulk of evidence to the contrary. Even if the Claimant had not created a counterfeit letter from Columbia college to perpetuate his deception on his Employer or repeatedly lied under oath in his testimony on direct and cross examination about attending school in 2015, the Claimant still testified in direct conflict with multiple credible witnesses (Mr. Hotaling, Mr. Jackson, Mr. Nguyen and Mr. Hammer) that they all ignored the Claimant’s report of an injury. Additionally, the Claimant persisted in his testimony that there was “no doubt” in his mind that he reported the alleged injury to Mr. Jackson on December 17 and December 18, 2015, dates when Mr. Jackson was not even working. The ALJ finds that the Claimant lacks credibility on the issue of reporting a work injury to his Employer prior to December 21, 2015.

The initial medical records also fail to contain any objective evidence that the Claimant has sustained a low back work injury on December 16, 2015. On the morning of December 22, 2015, the Claimant reported to Concentra for treatment, where he was seen by physician’s assistant Glenn Peterson. The physician’s assistant assessed “Crush injury, back” and “contusion of left hip and thigh.” The “Physical Exam” portion of the physician’s assistant’s report does not list any objective findings, instead listing only the Claimant’s subjective complaints of pain or tenderness. Then, after leaving Concentra, the Claimant returned to Employer and met with Safety Manager Mary Beth Clark. Ms. Clark and Susan Long both testified that when the Claimant walked into Clark’s office he had an obvious and significant limp. Ms. Clark testified that during her meeting with the Claimant he presented with significant pain behaviors and barely could sit down or stand up from his chair during the meeting. However, security video of the Claimant entering the building only minutes before meeting with Ms. Clark shows that Claimant exited the passenger side of a motor vehicle without any problems moving from a seated position to a standing position and quickly walked into the building without a limp. The same security video shows the Claimant leaving the meeting with Mr. Clark, briskly walking from the Employer’s plant and actually hopping over a pile of snow in the Employer’s parking lot without hesitation or pain behaviors. Ms. Clark testified that she had viewed the video surveillance at Exhibit S and that the Claimant’s presentation during the meeting with her differed substantially from his presentation in the security video.

Dr. Michael Striplin also performed an Independent Medical Examination of the Claimant on May 11, 2016. Dr. Striplin stated that the medical records do not document any objective evidence of a crush injury to the back or a contusion of the left hip or thigh, and that the diagnosis of a contusion is based “solely on Claimant’s subjective complaints.” Dr. Striplin further stated that he reviewed the Claimant’s MRI findings and those on MRI are consistent with degenerative changes which could exist without sustaining any injury and can exist in the absence of any symptoms. In other words, Dr.

Striplin stated that the only evidence of any claimed injury is the Claimant's subjective statement that he is in pain.

While the Respondent agrees that the double-walkie that the Claimant was driving on December 16, 2015 struck a pole, Respondent argues that the Claimant did not sustain any injury when he struck the pole on December 16, 2015. Since the physician's assistant who examined Claimant on December 22, 2015, did not document any objective evidence of an injury, the only evidence of an injury is based exclusively on the Claimant's subjective complaints of pain. Therefore, Claimant's credibility is crucial to a determination of the question of whether he sustained an injury when the double-walking he was driving struck a pole. As previously documented in these findings of fact, the Claimant has a serious credibility issue.

Ultimately, the Claimant's claim for compensability fails as a result of credibility issues. Several days *before* striking the pole with the double-walkie on December 16, 2015, the Claimant told both Mr. Hotaling and Mr. Clayton that he would be missing his scheduled shifts on December 19 and 20, 2015, and had several conversations with Human Resources trainee Mr. Clayton about the attendance policy and what would happen if the Claimant missed any more time from work. Thus, before he struck the pole on December 16, 2015, the Claimant clearly knew that when he missed his scheduled shifts on December 19 and 20, 2015, he would be facing some type of disciplinary action up to and including probation or termination. Therefore, it is more likely than not that the Claimant reported an injury on December 21, 2015 in order to avoid disciplinary action for missing his shifts on December 19 and 20, 2015, as opposed to the possibility that the Claimant actually sustained an injury on December 16, 2015. The ALJ finds that the Claimant fabricated his story of an injury and did not, in fact, sustain any injury when his double-walkie struck a pole.

Based on the foregoing, it hereby determined that the Claimant's testimony with regards to critical elements related to the purported work injury on December 16, 2016 is not credible and persuasive. Given the circumstances, including the inconsistent statements made by the Claimant, and the contrasting and more persuasive testimony of other witnesses, and the lack of evidence of injury in the medical records, the ALJ determines that the Claimant has failed to meet his burden of proof to establish that he sustained a work injury on December 16, 2016. As such, the Claimant's claims for compensation under W.C. 5-002-613-01 are denied and dismissed.

Remaining Issues

The Claimant failed to prove that when he struck a pole while working on a double-walkie on December 16, 2016, this resulted in a compensable injury requiring medical treatment or caused a disability that resulted in wage loss due to the inability to work. As such, the remaining issues regarding temporary disability benefits, medical benefits and responsibility for termination are moot.

ORDER

It is, therefore, ordered that:

1. The Claimant has failed to sustain his burden of proving by a preponderance of the evidence that he suffered a compensable injury resulting from work activities on December 16, 2015.

2. The Claimant's claims for benefits under the Workers' Compensation Act of Colorado under case number WC 5-002-613-01are denied and dismissed.

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

DATED: October 11, 2016

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

ISSUES

The issues to be determined by this decision are the following:

1. Whether Claimant overcame the Division independent medical examiner's (DIME's) opinion with regard to impairment rating and/or causation by clear and convincing evidence;

2. Whether Claimant proved by a preponderance of the evidence entitlement to permanent total disability (PTD) benefits;

3. Whether Respondents accrued an overpayment;

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

5. Whether Claimant established by a preponderance of the evidence that she is entitled to a disfigurement award.

FINDINGS OF FACT

Having considered the evidence presented at hearing and the depositions of Dr. Jeffrey Wunder and Katie Montoya, the following Findings of Fact are entered.

1. Claimant is a 62 year old female who has been employed by Employer for 11 years in Fort Collins, CO. On July 16, 2012, Claimant sustained an admitted injury. She testified she tripped over a piece of rubber and fell to her left. She described a hyperextension of her left knee and striking her right hand and right knee on the ground.

2. Claimant has a medical history significant for right upper extremity conditions, specifically, right arm pain, dysesthesias, neuralgia, and carpal tunnel for which she received neurological treatment just days prior to the work injury. Specifically, on July 12, 2012, four days prior to the work injury, Claimant presented to Dr. Curiel to evaluate right hand/arm pain that had resulted in Claimant having trouble at work typing because of right hand pain, which was reported to be aggravated by use. Claimant was prescribed a Gabapentin formulation to control her upper extremity pain.

3. In the months leading to the work injury, Claimant sought treatment for decreased wrist range of motion, a 1.5 year-history of hand numbness and pain, arthritis, and Ehlers-Danlos syndrome. These conditions interfered with her sleep.

4. Ehlers-Danlos is a connective tissue condition which results in joint laxity. Over time, this joint laxity can result in osteoarthritis, nerve pathology, and neuropathies.

5. Claimant's medical history is also significant for a 2011 right carpal tunnel release and a 2000 bilateral total knee replacement.

6. Following Claimant's July 16, 2012, work injury, initial diagnostic testing established unremarkable bilateral knee x-rays, a right wrist x-ray showed no acute abnormality, and a negative brain MRI.

7. An EMG established a C7 radiculopathy without any evidence of an ulnar neuropathy. Subsequently, a cervical MRI was performed, finding degeneration at multiple levels, multilevel neural foraminal stenosis, anterolisthesis of C7 on T11, and development of central canal stenosis from C3 through C6.

Overcoming the DIME with Regard to Causation;
The ulnar nerve, carpel tunnel and the left knee condition

8. The ALJ finds that Claimant did not overcome Dr. Ginsburg's causation opinions by clear and convincing evidence with regard to Claimant's ulnar nerve, carpel tunnel and her left knee condition. In coming to this conclusion, the ALJ finds the opinions of Dr. Ginsburg, Dr. Cebrian, and Dr. Edmonds to be more persuasive and credible than that of Dr. Wunder.

9. Claimant's right ulnar nerve condition, including the need for surgery and ongoing sequelae, is not related to the July 16, 2012, industrial injury. While Claimant's authorized treating physicians (ATPs) initially aimed at conservative treatment of Claimant's right ulnar nerve condition, Claimant was referred to a neurosurgeon for a surgical consultation. Dr. Hans Coester ultimately recommended a C4-C5, C5-C6, and C6-C7 anterior cervical discectomy and fusion. He opined this procedure was partially required due to Claimant's underlying Ehlers-Danlos syndrome. This procedure occurred on September 24, 2013.

10. Claimant testified her first complaints of ulnar issues, including numbness in her ring and middle fingers, occurred after her cervical surgery. She testified she was getting physical therapy for post-operative rehabilitation when the symptoms began.

11. Dr. Jeffrey Wunder, an ATP, opined Claimant's development of an ulnar neuropathy was either related to her time in physical therapy arising from the cervical surgery or the result of positioning during the neck surgery.

12. Dr. Wunder subsequently retracted the positioning argument for causation and opined that Claimant developed ulnar neuropathy during the physical therapy sessions performed as part of her post-operative care arising from the cervical surgery.

13. In deposition testimony, Dr. Wunder conceded that he could not read the handwritten physical therapy notes, so he did not know which activities were performed during these sessions. Because of this, he could not explain if any of those activities met the W.C.R.P. 17 guidelines known to plausibly cause ulnar neuropathy.

14. Dr. Cebrian credibly testified at hearing that Dr. Wunder's causation theory was not medically probable. Specifically, because Claimant spent an insignificant amount of time in physical therapy for a few weeks at the time of the onset of symptoms, those activities would not meet the threshold requirements of a W.C.R.P. 17 causation analysis.

15. Dr. Hope Edmonds, an ATP, agreed with Dr. Cebrian that Claimant's development of ulnar neuropathy was not work related.

16. Dr. Ginsburg, the DIME, also credibly opined that the right carpal tunnel syndrome was not related to the July 16, 2012, work injury. Dr. Wunder agreed with Dr. Ginsburg that there was no aggravation of Claimant's underlying right carpal tunnel syndrome as a result of the July 16, 2012, work injury. Accordingly, the ALJ finds that Claimant failed to overcome the DIME opinion with regard to causation of the Claimant's right carpal tunnel syndrome.

17. The DIME physician opined Claimant's left knee condition was not related to the July 16, 2012, work injury, but rather was a pre-existing condition that did not cause additional difficulty after the work injury.

18. Dr. Wunder initially opined he "could not determine...if there was any additional injury to the left knee as a result of her work related injury." He subsequently retracted this opinion, noting it was a typographical error and he meant there was no ratable left knee injury. He conceded, however, that when he compared the left knee to the right knee, they were "virtually" the same. He also conceded that his opinion regarding causation of the left knee was merely a different opinion than that of the DIME.

19. Dr. Wunder did not point to any specific errors in Dr. Ginsburg's causation analysis. Dr. Wunder reluctantly conceded on cross examination that his opinions with regard to causation of the left knee and right upper extremity conditions were differences of opinion. However, with regard to the left knee, Dr. Wunder persisted in the opinion that the left knee condition was a rateable condition for which Claimant received a 0% impairment.

20. The ALJ finds the opinion presented by Claimant regarding the causal analysis of the left knee condition is merely a difference of opinion from that of the DIME physician and does not amount to clear and convincing evidence that Dr. Ginsburg's opinion is most probably incorrect.

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Maintenance Medical Benefits for unrelated medical conditions

21. The ALJ finds that Claimant failed to prove by a preponderance of the evidence that her request for medical maintenance treatment related to the right ulnar nerve, right carpel tunnel and the left knee condition is for reasonably necessary and related medical treatment. Since the DIME physician concluded that the right ulnar nerve, right carpel tunnel and the left knee conditions are not related to the work injury, maintenance medical treatment for these condition is not reasonably necessary or related.

22. The DIME physician, Dr. Ginsburg, opined the only condition that was related to the work injury was the cervical condition. Dr. Ginsburg's causation opinion is supported by both the opinion of Dr. Edmonds (ATP) and Dr. Cebrian.

23. Claimant testified that the right ulnar nerve condition, the right upper extremity condition, and the left knee conditions were related to her work injury. In support of that argument, she presented the opinion of Dr. Wunder. However, Dr. Wunder did not point to any specific errors in Dr. Ginsburg's causation analysis. Dr. Wunder reluctantly conceded on cross examination that his opinions with regard to causation of the left knee and right upper extremity conditions were differences of opinion. However, with regard to the left knee, Dr. Wunder persisted in the opinion that the left knee condition was a rateable condition for which Claimant received a 0% impairment.

Overcoming the DIME with Regard to Impairment

24. Dr. Ginsburg, the DIME physician, opined Claimant had a 20% whole person impairment arising out of her cervical condition. The rating arose from a Table 53(II)(D) rating of 9% whole person impairment for the multi-level disc lesion and 12% whole person impairment for range of motion loss. He opined the date of maximum medical improvement (MMI) was December 1, 2014.

25. While Dr. Edmonds' impairment rating of 23% whole person was higher than the DIME, she concurred with a 9% whole person rating for Table 53(II)(D), but found 15% whole person impairment for range of motion loss.

26. Dr. Wunder provided an impairment rating of 26% whole person impairment. His opinion was based on a cervical condition (22% whole person impairment) and an exacerbation of the right wrist condition (8% scheduled impairment). Discounting the right wrist impairment, the sole difference between Dr. Wunder's cervical impairment and the Division IME's opinion is with regard to an additional rating under Table 53(II)(F); Dr. Wunder does not explain in his report how that rating was arrived at, nor did he give an opinion regarding why that rating was incorrectly omitted by the DIME physician.

27. Claimant did not overcome the DIME with regard to causation of the right wrist, thus there can be no impairment for a right wrist condition. The ALJ finds Claimant has not overcome the DIME with regard to impairment arising out of any right wrist condition. The ALJ finds the opinions of Dr. Ginsburg, Dr. Cebrian, and Dr. Edmonds to be more persuasive than that of the opinion of Dr. Wunder.

28. The ALJ also finds that in Claimant's argument to overcome the DIME with regard to cervical impairment, Claimant merely presented a different medical opinion. Claimant did not present significant evidence regarding any error made by Dr. Ginsburg in his impairment rating. Therefore, the ALJ finds Claimant has not overcome the DIME with regard to cervical impairment. In this regard, the ALJ credits the opinion of Dr. Ginsburg, which is supported by Dr. Edmonds and Dr. Cebrian.

29. The ALJ finds that Claimant reached MMI on December 1, 2014, with a 20% whole person impairment arising out of her cervical condition. Claimant failed to sustain her burden of proof to establish by clear and convincing evidence that the DIME physician is most probably incorrect with regard to causation and impairment rating.

PTD

30. Claimant's job history includes accounting work, bookkeeping, paralegal work, performing work as a title clerk at a car dealership, handling the business side of a self-owned business for 10-plus years, performing payroll services, and transcribing and managing a police substation in Fort Lupton, CO.

31. Claimant's job at Employer, prior to her injury, was an office job, where most of the day was spent at a desk typing and answering phones. Additionally, Claimant has significant managerial/supervisory skills; Claimant managed four employees while working for the employer and managed thirty-five employees in a business she operated with her husband for ten years.

32. Claimant is qualified to work in sedentary jobs. Claimant's prior jobs as a bookkeeper, office worker, and legal assistant were all sedentary jobs according to the Dictionary of Occupational Titles. Claimant has good transferable skills for other professions/jobs. Claimant is considered to be in a skilled classification of work.

33. Prior to Claimant's placement at MMI for the work injury, Dr. Edmonds referred Claimant to a functional capacities evaluation (FCE). That FCE was performed over a two day period, on November 21, 2014, and December 4, 2014. That exam reached the following conclusions:

- Claimant was able to sit unrestricted during the intake interview for 85 minutes;
- Stationary standing was limited to 12 minutes prior to a positional change, i.e. walking, in a 30 minute test;
- Walking restricted to 4 minutes 45 seconds; and

- Lifting in the light work classification category (20 pounds from 11.5" to knuckle, 17.5 pounds knuckle to shoulder, 12 pounds shoulder to overhead, and 100 foot bilateral lift carrying 15 pounds).

34. Having reviewed the November 21, 2014, and December 4, 2014, FCE, Dr. Edmonds, the ATP, indicated the sole restriction on Claimant's work was a limitation to a six-hour work day.

35. Dr. Wunder did not assign permanent work restrictions contemporaneous with Claimant's placement at MMI. Rather, almost a year later, on August 10, 2015, Dr. Wunder opined Claimant should have a 10 pound lift/push/pull limitation on an occasional basis and 5 pounds frequently. He also limited Claimant's use of the right hand to occasional use.

36. On October 12, 13 and 14, 2015, Claimant underwent a second FCE at Starting Points, at the request of Claimant's attorney. That FCE concluded Claimant had the ability to lift up to 10 pounds, should take "micro-breaks" during her day, and should be limited to 4 hours of work per day. No physician has adopted the October 2015 FCE. Dr. Wunder specifically rejected the four hour limitation provided by the Starting Points FCE.

37. Dr. Wunder issued a second opinion regarding restrictions on November 12, 2015. There, he noted that many of the restrictions identified by the Starting Points FCE would not be related to the work injury. Specifically, he opined many of the restrictions, including the bending, crouching, squatting, kneeling, and crawling restrictions are in regard to Claimant's longstanding low back and knees problem and are not related to her work injuries.

38. Dr. Cebrian opined that Claimant's claim-related permanent work restrictions were no lifting, pushing, or pulling over 20 pounds. He also opined there would be no requirement for time limitations arising out of the work injury.

39. The Starting Point FCE occurred on October 12-14, 2015; therein, there is no mention of right hip pain. Ms. Montoya performed her vocational evaluation on October 21, 2015. At the time of her interview, Claimant had been taken off work by Dr. Clark for two weeks for an acute onset of AVN/hip pain. Claimant reported to Ms. Montoya that the week prior to the interview, she did not work several days because of this hip pain. Claimant alleged at the hearing that her right hip condition had very little impact on the Starting Point FCE because in the couple weeks prior to that FCE, her hip symptoms resolved. Claimant's testimony is not credible.

40. Despite Claimant's testimony, the record establishes that Claimant sought right hip treatment with Dr. Clark on October 15, 2015, the day after the FCE. Dr. Clark noted that Claimant had a limp and has been unable to work due to hip pain. Dr. Clark noted that activity modification had failed. On October 29, 2015, Dr. Clark reported that

Claimant was unable to stand for a couple of minutes and able to walk about a block before the onset of severe pain.

41. Mr. Blythe, Claimants vocational expert, testified he was did not know about the severe hip problem and he was not aware of any work absences arising out of that problem. Despite not knowing about the hip and its timing of symptoms, Mr. Blythe testified he gave the Starting Point FCE more weight than the FCE performed in 2014.

42. Dr. Cebrian opined that, at the time of the Starting Point FCE, Claimant was being evaluated for severe right hip pain that he opined would significantly impact Claimant's performance on testing and her reported pain levels. Dr. Cebrian testified this condition invalidates the Starting Point FCE and potentially explained the differences in the Starting Point FCE relative to the 2014 FCE. .

43. Ms. Montoya also questioned the Starting Point FCE because Claimant was still symptomatic for the hip and undergoing care and treatment for that condition. She testified it was difficult to separate out the implications of the hip pain and mobility from the other issues examined by the FCE.

44. Ms. Montoya credibly testified the 2014 FCE correctly allowed for a light classification of work, lifting 20 pounds occasionally and that the definition of light work, being able to materially handle (lift) up to 20 pounds occasionally and 10 pounds or less frequently without limitation of the lifting level.

45. Mr. Blythe's opinions regarding Claimant's employability were found less credible than the opinions of Ms Montoya. Based on the inconsistencies in Mr. Blythe's testimony and report, the ALJ finds and determines that his testimony and report are not credible.

46. Ms. Montoya opined in her report that Claimant was able to work within the restrictions put forth by Dr. Edmonds, allowance of six hours per day. Ms. Montoya opined the ongoing job with Employer, performed until December 2015, was appropriate for Claimant as the job was sedentary, and there was no physical reason Claimant could not continue at six hours per day as recommended by the ATP. Ms. Montoya similarly opined the work restrictions as proffered by Dr. Cebrian and Dr. Wunder would allow Claimant to continue her work with the employer. Ms. Montoya opined that, considering the opinions of Dr. Edmonds, Dr. Cebrian, and Dr. Ginsburg, Claimant maintains the capacity to return to work.

47. Ms. Montoya credibly opined that Claimant would be hired due to her good skill base and because she is a desirable candidate and Claimant will be able to maintain employment. Ms. Montoya further credibly opined that this is because Claimant is working within the restrictions she has been provided, frequent absences and/or breaks will not be hindrances to her continued employment.

48. Ms. Montoya credibly testified Claimant was employable in the following fields: reception, general clerical, and customer service. She testified these types of jobs were readily available in the Fort Collins geographical area. Ms. Montoya testified her opinion was based on the work restrictions opinions issued by the providers, along with consideration of Claimant's relevant vocational background. The ALJ finds Ms. Montoya's testimony that Claimant is employable in her competitive labor market within her restrictions to be credible and persuasive. In so finding, the ALJ finds Ms. Montoya's employability opinion to be more credible and persuasive than that of Mr. Blythe. Claimant has not met her burden to establish that she is PTD as the result of her July 16, 2012 work injury.

49. It is found that Claimant's continued employment with Employer was not sheltered employment. Claimant worked within her work restrictions as assigned by Dr. Edmonds from the date of maximum medical improvement (MMI) December 1, 2014, until mid-December 2015. Claimant, in her post-MMI work, earned approximately $38,000 per year and maintained her pre-injury job title. Claimant testified that the reason she stopped working for Employer in December 2015 was because she thought her workers' compensation claim settled and that as part of that settlement she agreed to resign. Claimant did not return to Employer after December 2015 to try to work again.

50. Ms. Montoya credibly testified that the job Claimant was performing post-MMI for the employer was not sheltered employment. She testified that she came to this conclusion because (1) Claimant was still performing the work tasks that were required for her position, (2) Claimant was still performing needed work tasks, and (3) the actual work performed, clerical and customer service work, is available in the Fort Collins labor market. Claimant was actually productive during this post-MMI employment and Ms Montoya learned that she did not have excessive or frequent absences.

51. Ty Hendrickson was Claimant's supervisor from July 2012 until July 2015. He testified credibly at hearing. The following is found that in the position post-MMI with Employer: Claimant arranged her schedule given her six-hour-work restriction and that Claimant would schedule her medical appointments around that limitation; Claimant's hour limitation was not a problem because in a call center all employees report at different hours, so there was flexibility; Claimant had average productivity between December 2014 and July 2015 on par with other employees; Claimant performed the same job duties as all other coordinators for the Employer; and Claimant could have continued her job had she not resigned in December 2015.

52. Dave Mueller, Claimant's supervisor from September 2015 through December 2015, testified credibly at hearing. It is found that Claimant's performance during that time was similar to that of other employees and, if Claimant did not cease her employment in December 2015, she would still be working for Employer.

53. Based on the totality of the evidence, the ALJ finds that Claimant failed to establish by a preponderance of the evidence that she is unable to earn any wages. Therefore, it is found that Claimant is not permanently totally disabled.

Overpayment

54. Claimant was originally placed at MMI by Dr. Edmonds on December 18, 2014, with a rating of 23% whole person impairment. Subsequently, the DIME placed Claimant at MMI on December 1, 2014, with a 20% whole person impairment. On September 15, 2015, Respondents filed a Final Admission of Liability, admitting to the DIME opinions on MMI and impairment rating.

55. Payroll records reflect that as of May 9, 2016, Respondents paid $71,106.18 in combined TTD, TPD, and PPD benefit payments. The Final Admission of Liability, dated September 15, 2015, admits to a total of combined TTD, TPD, and PPD benefit in the amount of $78,482, consistent with the benefit cap under Section 8-42-107.5, C.R.S.

56. Respondents concede that any overpayment initially incurred due to the filing a Final Admission of Liability after the placement of MMI has been recouped. The ALJ finds that no overpayment exists.

Disfigurement

57. As a result of Claimant's July 16, 2012, work injury, Claimant has a visible disfigurement to the body consisting of an one and one half inch long and one fourth inch wide neck scar. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation.

CONCLUSIONS OF LAW

General Legal Principles

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

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

conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

Overcoming the DIME

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

4. Claimant failed to overcome the DIME with regard to causation or impairment by clear and convincing evidence. Claimant presented the opinion of Dr. Wunder, which was merely a difference of opinion from the DIME on both causation and impairment. Dr. Wunder's opinions are insufficient to meet the clear and convincing standard required for the claimant to overcome the DIME. *Javalera*, *supra*. In reaching this conclusion, the ALJ credits the persuasive opinions of the DIME, which was supported by the totality of the medical record and the opinions of Dr. Edmonds and Dr. Cebrian.

Medical Benefits for Unrelated Body Parts

5. The need for medical treatment may extend beyond the point of MMI, where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). The claimant must prove entitlement to maintenance medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993).

6. As found, Claimant's right wrist condition, right ulnar condition, and left knee condition are not related to the work injury pursuant to the opinion of the DIME. Claimant's request for maintenance medical benefits, including the knee brace and physical therapy, for these body parts is denied.

Maintenance Medical Benefits for Claimant's Cervical Spine Injury

7. The claimant must prove entitlement to maintenance medical benefits for her cervical spine injury by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, *supra.* Claimant failed to establish by a preponderance of the evidence that maintenance medical benefits are warranted. Dr. Cebrian credibly opined that maintenance medical care was not reasonably necessary or related. Dr. Edmonds credibly opined that a minimal amount maintenance care would be required for one year following Claimant's placement at MMI on December 18, 2014.

8. Claimant specific requests for a TENS unit for the cervical spine pain and compounded topical pain medications was addressed by Dr. Cebrian who credibly opined that the TENS unit was not reasonably necessary or related maintenance medical treatment and compounded pain medications are not recommended by the chronic pain guidelines.

9. Accordingly, it is concluded that Claimant's claim for maintenance medical benefits for her cervical injury is denied.

PTD

10. PTD is defined as the inability to earn "any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S.; *Christie v. Coors Transportation Co*., 933 P.2d 1330 (Colo. 1997). Under this statute, a claimant is not PTD if he is able to earn some wages in modified, sedentary, or part-time employment. *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). *T*he claimant has the burden of proof to establish PTD by a preponderance of the evidence. The question of whether the claimant has proven PTD is a question of fact for resolution by the ALJ*. Id.* A claimant is required to prove a direct causal relationship between the industrial injury and the resulting PTD, which necessitates a determination of the nature and extent of her residual impairment from the industrial injury. *Seifried v. Indus. Comm'n,* 736 P.2d 1262 (Colo. App. 1986).

11. In determining whether the claimant is unable to earn any wages, the ALJ may consider a number of "human factors." *Christie*, *supra*. These factors include the claimant's physical condition, mental ability, age, employment history, education, and the "availability of work" the claimant can perform. *Weld County School Dist. RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). Another human factor is the claimant's ability to obtain and maintain employment within his physical abilities. *See Professional Fire Protection, Inc. v. Long, 867 P.2d 175 (Colo. App. 1993).*

12. In this case, as found, Claimant failed to sustain her burden of proof to establish that she is PTD as a result of the admitted work injury. The testimony of Dr. Cebrian, and a review of the medical records, is persuasive that Claimant's permanent

work restrictions are limited to the cervical spine and would permit a full range of sedentary work, which is the type and kind of work she performed prior to the work injury. Additionally, based on the credible and persuasive opinions of Ms. Montoya, Claimant is able to earn wages in her geographical labor market of Fort Collins and within her work restrictions. *Bymer, supra*.

Disfigurement

13. Pursuant to Section 8-42-108 (1), C.R.S., Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation.

ORDER

It is therefore ordered that:

1. Claimant failed to overcome the DIME with regard to causation or impairment. Claimant is at MMI as of December 1, 2014, with a whole person impairment of 20%. The right upper extremity, ulnar or wrist, and the left knee complaints are not related to the work injury of July 16, 2012.

2. Claimant failed to establish an entitlement to post-MMI maintenance medical benefits to treat her left knee condition, her right wrist condition, or her right ulnar condition. Claimant's request for medical benefits for those body parts is denied and dismissed with prejudice.

3. Claimant failed to establish that she is permanently and totally disabled as a result of the July 16, 2012, work injury. Claimant's claim for permanent total disability benefits is denied and dismissed with prejudice.

4. Insurer shall pay Claimant $500.00 for her disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

All matters not determined herein are reserved for future determination.

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

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

DATED: October 13, 2016

DIGITAL SIGNATURE:
Margot W. Jones

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

STIPULATION

1. At the time of the hearing the Claimant's Average Weekly Wage (AWW) was still in dispute. Subsequent to the close of the hearing, the Respondent agreed and thus the parties stipulate that the Claimant's AWW prior to COBRA is $982.66 and subsequent to the inclusion of COBRA, beginning on September 1, 2016, is $1,076.13.

ISSUES

The issues for determination are:

1. Whether the Claimant proved, by a preponderance of the evidence, that he suffered a compensable injury in the course and scope of his employment on February 1, 2016.

2. If the Claimant proves he suffered a compensable injury, whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability indemnity benefits.

3. If the Claimant proves he suffered a compensable injury, whether the Respondents proved, by a preponderance of the evidence, that the Claimant is responsible for his termination of employment and resulting wage loss.

FINDINGS OF FACT

1. The Claimant was employed in the commercial bakery operated by Employer as a bread molder for freezer bread. The Claimant testified that he would "tap" on the bread loaves going by to top them with flour or other toppings and make sure that they pass by correctly on the conveyor belt. The Claimant testified that after the dough passed by him it would travel by conveyor belt to the freezer. The Claimant's normal station is about 40 meters away from where an incident of bread falling off an overhead conveyor belt occurred.

2. The bakery has overhead conveyor belts that transport loaves of raw bread dough. On February 1, 2016, the conveyor belt was not functioning properly and bread dough fell in pieces from the conveyor belt and then through the catch tarp beneath the conveyor belt to the floor below.

3. The Claimant and a coworker went to pick up the dough off the floor after the overhead conveyor belt was shut down. As the store video of the incident shows,

the dough had accumulated into one large piece which would stretch several feet and eventually break into two pieces. The dough was stretchy and it would drape on the arm of the co-worker and on the sides of a disposal bin as the Claimant and the co-worker lifted the dough into the bin. The Claimant did not cut the dough contrary to what he later reported to Dr. Sadie Sanchez. Rather, he pulled the stretchy, pliable dough up from the ground and put it into the bin. While the Claimant and the co-worker were picking up the dough, the conveyor belt was accidentally restarted. Another piece of dough fell off the conveyor belt and through the chute onto the back of the Claimant around his shoulder/neck area as he was bent over. The Claimant had started his shift at 5:30 p.m. This incident occurred approximately one hour later, around 6:30 p.m.

4. After the dough struck the Claimant, store video of the incident shows that the Claimant reached behind his neck with his arm and touched the back of his neck. He then proceeded to pick up more dough from the floor and place it in the bin, and then push bin under the chute where the dough had fallen from. To the bakery's operations manager, Duane Perea, from the video it appeared that when the Claimant reached behind his back, he was cleaning dough or flour from the back of his neck. Mr. Perea testified that the dough that fell would have been covered with a dusting of flour.

5. The Claimant admitted that he did not see the piece of dough that actually struck him because his head was down. Despite not having seen the dough, he reported to Dr. Sadie Sanchez that it consisted of 10 or more loaves of bread, and that one loaf weighed 1.2 lbs., so the entire piece of dough weighed 10 to 20 pounds (Respondent's Exhibit C-1). The Claimant also told an independent medical examiner, Dr. John Raschbacher that one loaf weighs 1.2 pounds and that 10 or more loaves fell on him. (Respondent's Exhibit B-2). However, the video showed what appears to be one loaf of dough, or possibly two loaves combined, fall on the Claimant. Subsequent pieces of dough that fell appeared to be the size of one loaf of bread.

6. Duane Perea, the operations manager, watched the video of the February 1, 2016 incident. He testified credibly that he estimated that two pieces of dough struck the Claimant. The weight of two loaves of bread dough is 38.92 oz. (this would be just about 2 lbs. 7 oz). Mr. Perea concluded it was just two pieces of dough based not only on what he saw in the video, but also on the fact that the catch tarp had previously been cleared out when a rather large blob of dough had fallen shortly before the incident, causing the conveyor belt to be turned off. There was not enough time after the conveyor belt was restarted for enough dough to collect to comprise 10 or more loaves (also see Respondent's Exhibit J-4).

7. The Claimant told Dr. Sadie Sanchez on February 5, 2016 that the conveyor belt from which the bread dough fell was about 30 feet above the floor (Respondent's Exhibit C-1). However, Duane Perea measured the distance between the floor and the bottom of the chute, or tarp, at 10 ½ feet. Mr. Perea estimated that the dough fell six feet when it struck the Claimant as the Claimant was bending over. Respondent's Exhibit J-1 and J-2 are photographs that show that the distance between the bottom of the chute and the floor is approximately 10 feet (the individual in the

photograph is 6’1” tall), so the distance the dough would have fallen before striking the Claimant would probably have been around six feet, as estimated by Mr. Perea.

8. The Claimant testified at the hearing that the temperature of the dough was “a lot less” than room temperature. The colder the dough, the more it weighs, he said. Cold implies the dough tended to be stiffer and harder, but the store video clearly showed the dough to be soft and pliable when the Claimant and a co-worker were picking up a large piece of dough that had fallen to the floor, and the dough was so malleable that the Claimant and the co-worker had a difficult time picking it up because it stretched out as they were pulling it up from the floor.

9. The Claimant’s supervisor, Jesse Gonzales, testified that the dough was “freezer bread” which is 69 to 71° F as compared to “normal bread dough” which would be 76 to 78°F. When the dough is on the conveyor belts moving through the bakery, it is not actually frozen. Duane Perea also testified that the dough is very pliable, so if it strikes something, “it’s just going to form itself around the – whatever it strikes.”

10. The Claimant continued working after the dough strike incident for about five hours, taking a thirty-minute break during that five hour period.

11. Around 11:30 p.m., the Claimant reported the incident to his supervisor, Jesse Gonzales. The Claimant stated that he reported to Mr. Gonzales that he had sustained an injury, but Mr. Gonzales testified that the Claimant reported only that an incident happened in which he was struck by a piece of dough, and that he didn’t require any medical treatment. The Claimant told Mr. Gonzales that he was reporting the incident after speaking to a couple of associates who said that he should reported it to his supervisor. Mr. Gonzales understood the Claimant to be reporting the incident only because reporting of incidents was required by the Employer’s policies. Mr. Gonzales gave the Claimant a list of doctors as “standard protocol… That’s our best practice. That way they are informed, you know, if they need to a later date … seek medical treatment, they can do so.” This report is called an “FYI, for your information.” Mr. Gonzalez credibly testified that the Claimant did not indicate in any way that he was having pain or problems as a result of the incident when he reported the incident to Mr. Gonzales. Mr. Gonzales specifically denied offering the Claimant pain medication or telling him to take the rest of the shift off. He also denied instructing the Claimant to go to the emergency room. The Claimant never indicated to Mr. Gonzales that he thought he needed to go to the emergency room.

12. After reporting the incident, the Claimant went to the Denver Health Medical Center’s emergency department for medical treatment on February 2, 2016. He complained of neck pain. The MRI and CT scans performed that day were normal. He was diagnosed with a neck strain and was advised that most patients are back at work or school within a few days. Typically, the report said, complete healing takes about 2 to 3 weeks (Respondent’s Exhibit D-1).

13. The Claimant told Dr. Sanchez that he “was *sent* to Denver General ER,” but in his testimony, the Claimant waivered on this, stating that the supervisor gave him a list of medical providers but the supervisor did not “have to decide” whether he should go to the emergency room. He testified that Dr. Sanchez “could be” wrong when she said that the Claimant’s supervisor sent him to the emergency room.

14. The Claimant went to a different emergency department, at the University of Colorado Hospital, the following day, February 3, 2016. The diagnosis was “neck pain.” (Respondent’s Exhibit E-1). The Claimant did not explain why he went to two different emergency rooms on two consecutive days.

15. Around February 2 or February 3, Mr. Gonzales briefly observed the Claimant in the hallway at the bakery. He observed the claimant in a C-collar, “kind of scaling the wall, walking very disoriented, almost like he was intoxicated… To me he just extremely exaggerated the situation.” By scaling the wall, Mr. Gonzales further testified that he meant that the Claimant was “dragging along (the wall) to help keep him standing,” much like an intoxicated person would look if they been drinking or if someone was on medication where “they’re kind of disoriented and stumbling about.”

16. The Claimant reported to Dr. Sanchez on February 5, 2016 that he had 10/10 pain in his head, neck, shoulder and back along with left-sided arm and leg weakness (Respondent’s Exhibit C-1). However, Dr. Sanchez’s physical examination, under the title “musculoskeletal,” reports that the Claimant’s loss of motion was negative, muscle weakness, extremity pain, back pain was negative (Respondent’s Exhibit C-2). Dr. Sanchez said that the Claimant was walking “with a small, very deliberate steps and not moving his upper body.” He demonstrated “very limited ROM of neck (patient reports pain in all directions), patient reports pain in neck and upper back with a very light palpation to the top of his head, diffuse TTP of posterior neck, no spasms noted” (Respondent’s Exhibit C-2). Dr. Sanchez noted that the MRI and CT scan of the cervical spine were negative (Respondent’s Exhibit C-3).

17. When he testified, the Claimant contended that as a result of this incident, he sustained an injury to his entire head except for his face. The alleged injury includes a constant headache on the top of his head and both sides which keeps him from “human emotion,” cooking, doing laundry, or driving, although he admitted that he had since driven a few times. On a scale of 1 to 10, the Claimant rates his pain as a 9. The Claimant stated that because he has not had any treatment, “I don’t think there is any reason for it to get any better,” which is contrary to what the University of Colorado Hospital emergency room report stated. The Claimant did not testify that he had left side pain and left leg weakness, unlike what he had initially reported to Dr. Sanchez.

18. Dr. Sanchez was able to review the store surveillance video before seeing the Claimant again on February 5, 2016. She stated that the incident as described to her initially by the Claimant was not consistent with what she saw in the store video (Respondent’s Exhibit C-3). She noted that the conveyor belt appeared to be a few feet above the Claimant’s head, not 30 feet as reported by the Claimant. She noted a

disagreement between the bakery manager and the Claimant regarding the weight of the dough. Dr. Sanchez felt that the appearance and size of the dough on the surveillance was more consistent with the Employer's description. Further, Dr. Sanchez said, the video depicted the Claimant stepping away from the conveyor and rubbing the right side of his neck with his right arm for a few seconds. When more employees entered the area, the Claimant appear to repeatedly motion using his right arm to the conveyor to explain what happened. It appeared that he even reenacted the incident with exaggerated movements. Dr. Sanchez said that the Claimant exhibited no pain symptoms at that point and continued to push a bin on rollers with both arms and pick up more dough from the floor. Based on the video and imaging results, Dr. Sanchez did not believe that the incident correlated with the Claimant's complaints. She noted it was unclear how an alleged injury to the right side of the Claimant's neck would cause left-sided weakness, especially of the lower extremity. However, Dr. Sanchez found that the Claimant may have sustained a right-sided neck strain (Respondent's Exhibit C-3).

19. Dr. Sanchez stated that the Claimant did not need to use the cervical collar, and it was emphasized that the collar may increase pain and weakness his muscles (Respondent's Exhibit C-4).

20. On February 8, 2016, Dr. Sanchez initially placed the Claimant on restricted duty consisting of no lifting, carrying, or pushing/pulling greater than 10 lbs. (Claimant's Exhibit 5, p. 33). On February 9, 2016, Dr. Sanchez wrote that the restricted duty would end on February 15, 2016 (Respondent's Exhibit C-7).

21. The Claimant testified that he returned to light duty work on two consecutive days following the date of injury, working two hours the first day and one hour the second. His job was to ensure that each bag of bread that passed by on a conveyor belt had a clip or tag on it, and to remove the any bag of bread that did not have a clip on it. He could place the bag of bread without a clip in the trash or return it to get tagged. He said this required bending, grabbing, and walking 6 to 7 feet to the 4 foot high trash can, and grabbing from two conveyor belts at the same time. He said this job caused him considerable pain.

22. In contrast to the Claimant's description of the light duty work, Duane Perea testified that the modified duty offered to the Claimant consists of quality inspection. It requires the associate to sit in front of two conveyers that are converging and watch individual bags of bread run by. If an individual loaf of bread is not in good shape or if it doesn't have a closure tag on it, the associate is supposed to take the bag off of the line and either put it in a basket for others to deal with or throw it away if it's too "disheveled." One bag of bread weighs 1.5 lbs. The basket in which the associate puts the loaf of bread is raised to whatever level is comfortable for the associate. If the bread is to be thrown away, the trash container in which the bread is placed can be located next to the associate, so the associate can remain seated while throwing the bread away. The position does not require any overhead reaching, reaching in general, or bending. Other injured workers have successfully worked in this modified position, and Mr. Perea has never had another worker complain that this modified work causes

pain. Mr. Perea also disputed the Claimant's testimony that the Claimant actually attempted to perform the modified duty. Mr. Perea testified on cross-examination that when the Claimant was told what the modified job was, the Claimant said he did not feel that he could do it and he left the bakery and asked to go see the doctor again.

23. In any event, after the two times the Claimant was asked to perform light duty work, he did not return to work again after either refusing to perform light duty or failing to be able to do the requested work.

24. Dr. Raschbacher testified that if the Claimant truly had a neck strain, he did not see any reason why the Claimant could not have tolerated the modified duty that was offered, "particularly as he has no lesion, he has no anatomic abnormality." Dr. Raschbacher further testified that the Claimant never actually needed any restrictions. He testified that he could understand how Dr. Sanchez may have imposed restrictions at the time as appropriate, based on the information and presentation she had. However, considering all of the information now available, Dr. Raschbacher opines that there was not a need for work restrictions based on what is known about the Claimant's condition.

25. The Claimant was terminated for cause on August 8, 2016 based on the following events. Mr. Perea testified that the Claimant could have protected his job by applying for short-term disability and also for leave under the Family Medical Leave Act. The Claimant was required by both union and employer policies and procedures to fill out the paperwork for a medical and/or personal leave of absence. Zach Burgesser, the safety manager, tried multiple times, unsuccessfully, to contact the Claimant about this. The human resources leader, Luke Clayton, tried unsuccessfully to reach the Claimant twice by telephone so that the Claimant could apply for leave under these policies. The second time, the Claimant's phone was out of service, so Mr. Clayton called the Claimant's sister, who was listed in the employer's records as a back-up contact, and asked her to tell him that he needed to complete the paperwork. There was no response from the Claimant, and the Claimant made no contact with the employer.

26. Respondent had absentee policy that if an associate does not call in an absence for three days, the associate will be terminated for cause. The claimant was trained on both the "Met-Life" short term disability policy and the absentee policy every year. The claimant missed more than three days from work without calling in. Thus, when the employer was not able to communicate with the Claimant or obtain the necessary applications for short term disability, leave under the Family Medical Leave Act, or a personal leave of absence, the Employer decided to enforce the attendance policy. Mr. Clayton sent the Claimant a letter on August 8, 2016, advising him that he was terminated for violation of the attendance policy; namely, three incidents of "No Call, No Show." The Claimant's failure to provide the necessary paperwork for a leave of absence, which would have protected his job, was the underlying reason that the Respondent finally decided to enforce the absenteeism policy (Respondent's Exhibit G).

27. The Claimant wore a hard cervical collar to the hearing, with a scarf wrapped around it because he testified that “I don’t like people asking me questions,” although the hard collar was clearly visible under the scarf. He testified that takes the collar off only when he goes to sleep. The Claimant admitted that Dr. Sanchez told him to remove the cervical collar, but he refused and testified that “since she denied my case I don’t think I should follow up with what she tells me.”

28. Dr. John Raschbacher, a specialist in occupational medicine, conducted an independent medical examination on May 20, 2016. When he wrote his report of the same date, Dr. Raschbacher had not seen the store video or heard the testimony of the lay witnesses. As he did for the hearing, the Claimant also wore a hard cervical collar, jacket, and winter scarf around his neck over the collar to Dr. Raschbacher’s examination. (Respondent’s Exhibit B-4). Dr. Raschbacher stated that the collar was not helpful. Moreover, he noted, the Claimant was wearing a hard collar rather than a soft collar. A hard collar is usually only provided post-operatively or for a major trauma. Emergency departments do not usually give out hard collars unless imaging has identified a fracture or a reason for immobilizing the cord. Further, the collar is counterproductive by restricting motion and promoting muscle atrophy. Thus, Dr. Raschbacher said, this this collar signified pain behavior rather than a medical condition.

29. During Dr. Raschbacher’s examination, the Claimant appeared “to make a fairly minimal effort in testing for pinch grip, power grip, finger abduction and adduction.” On palpation, the Claimant told Dr. Raschbacher not to press, and he clutched his trapezius muscle. This occurred even with very light touch. The pain was diffuse, per the Claimant’s subjective report, but there was no spasm or objective finding” (Respondent’s Exhibit B-3). Dr. Raschbacher noted that the Claimant even complained of trapezius pain when wrinkling the forehead on cranial nerve motor testing, and the Claimant grabbed his trapezius muscle with his hand from the opposite side (Respondent’s Exhibit B-4). In his report, Dr. Raschbacher stated that he did not see any clear evidence that the Claimant did in fact suffer an industrial injury. He noted that the Claimant’s “presentation was marked in terms of its non-physiologic nature. (The Claimant’s) range of motion at cervical spine was quite minimal. His pain behaviors including wearing a hard cervical collar and wearing a winter scarf in the summer were fairly remarkable…. His presentation is grossly inconsistent with a cervical strain or contusion injury and is not explicable on a physical or physiologic or medical basis” (Respondent’s Exhibit B-4).

30. Dr. Raschbacher also testified at the hearing. He testified that the Claimant essentially declined that part of the examination involving palpation which was “grossly unusual.” Dr. Raschbacher also noted that the Claimant’s range of motion was “almost nil. Forward flexion 4° net, extension 4° net, right lateral bend nil, nothing. Left lateral bend, four over three, one degree. This is virtually an immobile neck. And there’s just no -- there is nothing in terms of the lesion or anatomy that would explain that. He also had multiple other things, the grip strength was 15 pounds and 10 pounds which (I) could not explain, shoulder motion 94° on the right instead of 180. 97 degrees on the

left instead of 180…. There is no medical explanation for his presentation." He testified that normal grip strength ranged from 80 to 130 pounds depending on the individual. Dr. Raschbacher could not explain why the grip strength was different between the right and left hands or why the Claimant would have such a limitation and strength with the type of injury he was alleging. Normal shoulder range of motion is 180°, so Dr. Raschbacher could not explain why the Claimant's shoulder range of motion was so limited in the absence of any lesion in the shoulder. Dr. Raschbacher also testified that the Claimant's headache which covers his entire head except for his face did not fit any pattern that he was able to discern.

31. Dr. Raschbacher stated that Dr. Sanchez's initial conclusion that part of the Claimant's complaints were work-related was reasonable based on all the symptoms the Claimant reported to her at the time, his visits to the emergency room, and the description of the dough weighing 10 to 20 pounds and falling from 30 feet. However, with the information that Dr. Raschbacher now has in its entirety, it no longer makes sense to conclude that the Claimant ever sustained an actual injury in the February 1, 2016 event at work.

32. Dr. Raschbacher subsequently viewed the store video at the hearing and listened to the testimony of the other witnesses at the hearing. Dr. Raschbacher testified that based on the video and other information, his best understanding of the incident was that two soft loaves of bread dough, with a temperature of 70°, fell approximately 6 feet onto the back the claimant's head and neck. He understood that the dough weighed 38-39 oz., and that it was soft, not frozen or partially frozen. With the additional information, Dr. Raschbacher testified that the event on February 1, 2016 would not have been expected to cause an actual injury, and that it was not likely that it did cause an actual injury.

33. Other reasons that Dr. Raschbacher offered for determining that the Claimant likely did not sustain an injury was the Claimant's "gross magnification of the reported mechanism of injury, the fact that he's exhibiting fairly pronounced pain behaviors, particularly the wearing a hard collar at this juncture, which I would describe not as treatment, but as a pain behavior (and) the fact that he's reporting no improvement over a significant period of time, even though there's been no anatomic disruption, no injury. These things when you put them together in a package I think have a fair amount of force in addition to just considering the mechanism of injury."

34. Finally, when Dr. Raschbacher was asked how he knew the Claimant did not even have a minor injury such as a neck strain that may have been masked by the Claimant's exaggerations, Dr. Raschbacher stated that he would have to "retreat to the medical likelihood." While, initially the Claimant's complaints may have made some sense to Dr. Sanchez or the emergency department doctor, Dr. Raschbacher said he has now seen the mechanism of injury, the Claimant's overall presentation, and things that don't make sense medically. So, he said "I'm extrapolating back to say well if these things aren't true or likely now when were they ever true or likely....I think that that

begins if you take a critical eye and go back and look at the described mechanism of injury."

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). An incident or accident at work that does not result in an injury is not a compensable claim. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO March 2, 2002).

The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment.

In this case, there was an incident, when the piece of bread dough fell on the back of the Claimant's upper back/neck area. However, there is insufficient evidence that this incident actually caused an injury.

The Claimant greatly exaggerated the event itself, initially advising that the conveyor belt from which the bread dough fell was 30 feet off the ground and that at least 10 lbs. of frozen dough struck him from that height. Actual measurements show that the distance between the catch tarp below the conveyor belt (from which the dough fell) and the floor was 10 ½ feet, and that with the Claimant bent over, the dough probably fell about 6 feet. The Claimant insists that at least 10 pounds of dough fell on him, whereas Employer presented persuasive evidence that the video of the incident showed only, at most, the equivalent of two loaves falling, which would weigh 2 to 2.6 pounds. The Employer testified that multiple pieces of dough had already collected and fallen to the ground in a large blob by the time the conveyor belt was shut down, which meant that after the conveyor belt was restarted, there is not a sufficient time for more than a few loaves of dough to collect and fall as the Claimant stood underneath the conveyor belt.

The video of the incident shows that immediately after the Claimant was struck by the piece of dough, he reached behind his neck, either rubbing it or, as Mr. Perea contended, rubbing off flour from the dough. He did not evidence any pain behaviors at that time although he did demonstrate what happened to co-workers with some gesturing. Shortly thereafter, the Claimant proceeded to pick up some more dough from the floor and then wheeled the trash bin under the chute to collect any other dough that might fall. The Claimant did not act like he was injured at that point.

The Claimant then continue to work for the next five hours, taking only his usual half-hour break. He did not report the incident to a supervisor, Jessie Gonzales, until five hours after it happened. There is dispute between the Claimant and Mr. Gonzales as to whether the Claimant actually reported an injury rather than just the incident itself. Mr. Gonzales denies that the Claimant told him he was injured. Mr. Gonzales gave the Claimant a list of doctors to see, as per the employer's protocol, in case the Claimant later thought that he needed medical treatment. Mr. Gonzales did not know that the Claimant left work after the Claimant reported the incident to him, and he did not know that the Claimant intended to go to the emergency room. The Claimant was evasive in his testimony about the conversation he had with Mr. Gonzales regarding the emergency room. The Claimant was not forthcoming with Mr. Gonzales about reporting an injury resulting from the incident of the dough striking him. The testimony of Mr. Gonzalez was found to be more credibly and persuasive than that of the Claimant where there are variations in the testimony.

The Claimant sought medical treatment at two different emergency rooms during the next two days. It is unclear why he went to two different facilities. The first day, Denver Health Medical Center reported that MRI and CT scans were normal, and that the diagnosis was a cervical strain. The University of Colorado Hospital's diagnosis was merely "neck pain." Both of these diagnoses would be based on subjective complaints alone, and therefore, the Claimant's credibility is critical in order to determine if the diagnoses are reliable.

The Claimant came back to work a few days later. Mr. Gonzales observed the Claimant acting in a very exaggerated manner, as if he was intoxicated. The Claimant testified that he attempted to work in modified duty for two hours one day and one hour on the next but that the work caused him too much pain. Mr. Perea stated that the Claimant rejected the offer of modified work on the days he reported to work after the incident and never actually attempted the work. Mr. Perea described the modified work as very light, consisting of pulling loaves of bread from a conveyor belt that had missing tags or were defective in some manner, and placing the bags of bread in either a basket or a trash can, both of which would have been situated next to the Claimant as he remained seated.

When the Claimant was first examined by Dr. Sadie Sanchez on February 5, 2016, he reported not only back and neck pain, but head and shoulder pain and left-sided arm and leg weakness. He said his pain was 10/10. Dr. Sanchez noted that he took "small, very deliberate steps and not moving his upper body." He had "very limited range of motion in his neck (patient reports pain in all directions)," pain with very light palpation to the top of the head and diffuse pain in the posterior neck and back, although no spasms were noted by the doctor. Dr. Sanchez later viewed the store video of the incident and stated that the incident as initially described to her by the Claimant was not consistent with what she saw in the video. Dr. Sanchez did not believe that the incident correlated with the patient's complaints but she said it was reasonable that the Claimant could have right-sided neck/back/shoulder pain only. There was no mention of headaches. The rest of the Claimant's injuries were in question.

On February 9, 2016, Dr. Sanchez noted the Claimant was wearing a soft collar and the Claimant stated he could not hold his head up without it. He would not look directly at Dr. Sanchez and often had his eyes closed during the examination. He complained of memory loss, headaches, and pain in his entire body. Dr. Sanchez noted that his findings were nearly normal and is imaging was negative.

Dr. Raschbacher was of the opinion that the Claimant's presentation was greatly exaggerated and there was no basis for finding that he had been injured whatsoever. Dr. Raschbacher understood Dr. Sanchez's decision to accept a neck sprain as a possibility based on the Claimant's initial subjective reports. However, the fact that the Claimant's behaviors had been so exaggerated for an extended period of time, about six months, with no improvement whatsoever, and the fact that the mechanism of injury was so minimal, Dr. Raschbacher was of the opinion that there was no clear evidence that the Claimant suffered any injury at all as a result of the February 1, 2016 incident. The ALJ finds Dr. Raschbacher's opinion persuasive in this case. Prior diagnoses and treatment were offered based primarily on the Claimant's subjective complaints. In viewing all of the evidence presented, the Claimant's representations to physicians were significantly exaggerated and his testimony at the hearing and his physical presentation was not credible. While physicians relied on the Claimant's earlier representations in good faith, the totality of the evidence now suggests that the physicians were misled by the Claimant's presentation and exaggerated statements regarding the mechanism of injury.

Based on the foregoing, it hereby determined that the Claimant's testimony with regards to critical elements related to the purported work injury on February 1, 2016 is not credible and persuasive. Additionally, his exaggerated presentation to his treating physicians, and when he testified in person at the hearing, further damage his credibility. Given the circumstances, including the inconsistent statements made by the Claimant, and the contrasting and more persuasive testimony of other witnesses, and the lack of objective evidence of actual injury in the medical records, the ALJ determines that the Claimant has failed to meet his burden of proof to establish that he sustained a work injury on February 1, 2016. As such, the Claimant's claims for compensation under W.C. 5-006-280-01 are denied and dismissed.

Remaining Issues

The Claimant failed to prove that he suffered a compensable injury on February 1, 2016 when a small amount of soft dough fell from approximately 6 feet and landed on the back of the Claimant's neck before falling to the ground. The Claimant failed to prove that this incident caused him to require medical treatment or caused a disability that resulted in wage loss due to the inability to work. As such, the remaining issues regarding temporary disability benefits, medical benefits and responsibility for termination are moot.

ORDER

It is, therefore, ordered that:

1. The Claimant has failed to sustain his burden of proving by a preponderance of the evidence that he suffered a compensable injury resulting from work activities on February 1, 2016.

2. The Claimant's claims for benefits under the Workers' Compensation Act of Colorado under case number WC 5-006-280-01are denied and dismissed.

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

DATED: October 11, 2016

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

ISSUES

The following issues were raised for consideration at hearing:

- Whether Claimant suffered a compensable acute injury and occupational disease.

- Whether Claimant is entitled to medical benefits if her claim is compensable;

- Identification of authorized treating providers; and

- Whether Claimant is entitled to temporary total disability benefits, beginning October 23, 2015, and ongoing.

STIPLATIONS

1. The parties stipulated to an average weekly wage of $879.97.

2. Unemployment benefits were received by Claimant, and the parties stipulate that an offset is appropriate, should there be an award of temporary benefits. The specific amount of unemployment benefits were unknown, and the parties will endeavor to come to an agreement regarding offset, but reserve the issue of the amount of offset for future determination if necessary.

FINDINGS OF FACT

1. Claimant is a 44 year old woman who was working as a production worker for the Employer when she asserts she developed right hand pain and discomfort. Claimant is right hand dominant.

2. On September 14, 2015, Claimant reported to the Employer that she started feeling slight discomfort and pain in her right thumb, hand, and wrist during her work shifts. Claimant testified that her onset was August 6, 2015. In her prior interrogatory responses, Claimant asserted an onset date of September 17, 2015.

3. Claimant began working for the Employer in mid-January 2015, and was engaged in preparing the interiors of wind turbine blades manufactured and sold by the Employer.

4. At the time of onset, Claimant worked in the Blades Assembly department. She worked with a team to create large fiberglass parts to be later assembled into blades for electric windmills. Details of her duties in that position were discussed at hearing. Photographs were used to illustrate the process. The blade parts are very

large. Claimant and those she worked with would use a large mold to create the various parts. The parts were designated alphabetically, and fit together when completed to become the inside of a windmill blade, later covered with a shell.

5. Claimant testified that she normally worked on the "B" mold, which is an upside down "U" shaped. First, a layer of plastic is laid on the mold to assist with later removal of the fiberglass blade part. Layers of fiberglass biax, similar to fabric, are then laid upon the mold one layer at a time. *(examples of fabric biax and scissors shown at hearing and photos of same provided as supplemental Exhibits W-Y)* The fiberglass biax came pre-sized in rolls in "kits" with additional fabric available for use as needed. 8 layers were laid at 5 minutes per layer, and pushed and tucked into place. Each layer was placed over the mold by rolling out the biax fabric and trimmed with scissors as appropriate for each layer. Claimant testified that she used only manual scissors for cutting, which weighed about 1 pound, and were provided for viewing at the hearing. Claimant trimmed approximately 11 meters per day, 5-10 minutes per cut. After all fiberglass layers are in place, a bag is placed over the molded fabric, and air is removed with a vacuum process. Resin is then infused into the fabric. Claimant or another worker carried the buckets of resin to the mold one at a time as the buckets were emptied in the infusion process, 4-5 times per 12 hour shift, 100 feet, comprised of 3 buckets of 20 kilos, 1 of 15 kilos, and 1 of 10 kilos, with breaks in between carrying as dictated by when buckets need to be replaced.

6. Claimant testified that the infusion process took about two hours. A sleeping-bag type of cover is then rolled over the fiberglass blade part on the mold. The fiberglass blade part is then cured. Once cured, the mold was debagged, using hand grip up to 30-60 minutes per shift. When assembly of one part on the mold was completed and infusion began, Claimant would proceed with debagging and finishing another fiberglass part.

7. Claimant testified that she worked 12 hour shifts and 1 ¼ to 1 ½ fiberglass parts were completed by her crew per shift.

8. Claimant credibly testified that she began experiencing pain in her right arm in late spring to her right arm but continued to full-time work.

9. Claimant credibly testified that during the week of August 3, 2015, she spoke twice to her supervisor Jared Becker, telling him she was suffering severe pain in her right arm. When the Claimant was not referred for medical treatment, she sought medical attention from her primary treating doctor, Dr. Sonya Norman, who referred her to Dr. David A. Chavez.

10. A note dated August 26, 2015 from Dr. Chavez documents complaints of left rotator cuff tendinitis and right de Quervains, stating that the pain was "from lifting blades" and had a two-month duration at that point. Dr. Chavez performed an injection which Claimant reported had helped. She stated that her pain had returned after the holiday (Labor Day holiday).

11. Following reporting her injury, and during the month of August, Mr. Becker move the Claimant to "carbon" with regular duty, twelve hours a day. This position required measuring then cutting carbon pieces by manually operating scissors. She then stacked the pieces throughout the day.

12. Claimant was then moved to the "Assembly" section. Work in "Assembly" involved sanding throughout the twelve hour shift, using a hand sander and not automatic electric sanding machines to remove glue applied. The Employer determined that the electric sanding machines would create deformities in the glue on top of the web. In addition, the Claimant was using a hand tool to screw in scrivets.

13. After reporting her claim in writing as work related on September 14, 2015, Claimant was referred to Peak Form Professional, LLC on that same date. The treatment note indicates, "Patient has noted pain in her right wrist forearm and hand slowly developing over the past 3-4 months getting worse in August and really hurting her last week when she went to see her PCP."

14. Claimant saw Dr. Craig Davis on October 14, 2015. His report states, "In early August she developed fairly rapid onset of pain over the radial aspect of her right wrist." He noted that Claimant reported the symptoms to her supervisor but was discouraged from filing a claim. Claimant reported severe activity-related pain and a "grinding" sensation over the dorsal radial aspect of her distal forearm. On physical examination, Dr. Davis observed swelling, he noted tenderness to palpation over the distal forearm, and extreme response to Finkelstein's test, and crepitation. Dr. Davis's impression was intersection syndrome of the right distal forearm. He provided an injection of lidocaine and Depo-Medrol.

15. Claimant reported on October 26, 2015 that the injection only helped a little bit in terms of tenderness, but not in terms of activity related pain, which was unchanged. Another injection was done, she was provided with a brace, topical cream, tramadol and physical therapy.

16. On October 23, 2015, Dr. Carol Ramsey at Peak Performance determined that Claimant could no longer work. On October 27, 2015, Claimant was placed on modified duty that severely limited the use of her right arm. She was also restricted to working eight-hour shifts.

17. Claimant has not worked since October 23, 2015. The Employer did not offer her modified duty after October 23, 2015, and Claimant's position was eventually terminated in July 2016.

18. On November 9, 2015, Dr. X.J. Ethan Moses stated that he had assumed treatment of Claimant after Dr. Ramsey departed from Peak Performance. As the authorized treating physician, he stated, "It appears clear from the notes that there was no specific injury, but rather an insidious onset of pain as the result of repetitive motions." He recommended a work-site evaluation.

19. On November 23, 2015, Dr. Moses discussed his review of the job task analysis with Claimant. Following that discussion and review, his assessment was, "right forearm intersection syndrome with associated swelling and pain, not compensable under the Colorado Division of Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 5." ("Guidelines"). Dr. Moses encouraged Claimant to establish care for her right arm symptoms with her primary care physician.

20. The job duties analysis was performed by Jeanette Hrubes of Peak Form Physical Therapy and Occupational Medicine. The initial analysis was done on November 20, 2015. An addendum was done on February 23, 2016. Ms. Hrubes noted, "Initial job task analysis was performed 11/20/15. Second job task analysis was performed with Sonia Huerta present to make sure that all tasks that she performed during her shifts were captured accurately. There were several additional tasks noted, that were not captured in the first analysis. These will be bolded to assist in identification."

21. Claimant testified that she felt that the job analysis done did not accurately reflect her duties. Specifically, she discussed carrying buckets of resin, gripping to take finished blade forms off molds, cutting hard resin, and the use of manual scissors.

22. Ms. Hrubes testified that during the second job duties evaluation, Claimant was present, and was provided the opportunity to explain her duties. Ms. Hrubes discussed her observations with Claimant in a meeting after Ms. Hrubes watched employees perform Claimant's usual job duties. In the revised job analysis, carrying buckets, gripping, cutting resin, and use of manual scissors were included. Using the threshold standards of the Guidelines, Ms. Hrubes concluded that there were no duties that met either primary or secondary risk factors, including additional duties discussed with Claimant and included in her revised report.

23. Claimant testified that the employees Ms. Hrubes observed did not perform the tasks in the same way that Claimant performed them. She did not use electric scissors as none were available to her; she manually carried the resin buckets rather than using a cart; and she and her co-workers manually lifted the blades rather than having a crane for assistance. In addition, Claimant explained that she held her scissors at a 90-degree angle while cutting in awkward position, and at times, above her head whereas Ms. Hrubes documented use of scissors at an even level.

24. Dr. Moses saw Claimant again on January 5, 2016. His notes indicate that he worked with Claimant to appeal her short term disability denial and to make clear that he felt her condition was not work related. He discussed reviewing the updated job analysis and his continued conclusion that Claimant did not experience a work-related injury.

25. Claimant testified that she has continued treatment with her personal providers, including Dr. Leo, and that he has continued to give her work restrictions.

26. Dr. Allison Fall evaluated Claimant on March 1, 2016. She testified at hearing and was qualified as an expert in physical medicine and rehabilitation and causation under the Cumulative Trauma Conditions Medical Treatment Guidelines. Dr. Fall discussed the history with Claimant. She reviewed the medical records, including the revised job analysis. She listened to Claimant's testimony. Her conclusion after considering all of these facts was that Claimant has not experienced either an acute injury or an occupational disease. Dr. Fall testified that diagnosis in this case was questionable. Her possible diagnosis was 1) right distal forearm pain, possible wrist extensor tenosynovitis versus intersection syndrome based upon medical records, and 2) Psychological issues likely playing a role in persistent symptomology. Dr. Fall explained that she felt that the diagnosis at #1 were a more specific types of extensor tendon disorder of the wrist. Dr. Fall noted that, although Claimant had stopped working for the employer in October of 2015, her complaints continued at the time of her March 1, 2016 evaluation. She testified that this further indicated to her that Claimant's condition was not work related. Claimant, however, testified that her symptoms have improved since she stopped working.

27. Dr. Fall explained that, as a medical professional, she relies upon the Guidelines in her analysis of cumulative trauma causation. She explained the time and expertise that has gone into the creation of the causation guidelines and the algorithmic steps for causation assessment contained in the Guidelines. The thresholds of the primary and secondary risks factors have been established using evidenced based medical studies. Dr. Fall testified that these are guidelines, and there are situations where a medical professional could choose not use them. She testified that this is not a case that she felt would warrant deviation from the causation analysis process recommended by the Guidelines.

28. Claimant has proven that she suffered a compensable occupational disease. The ALJ is persuaded by Claimant's testimony concerning her job duties and that her job duties brought on her symptoms. The opinions of Dr. Fall and Dr. Moses are rejected.

29. The Claimant has proven that the Employer failed to provide her with a list of authorized providers after she initially reported the injury to her supervisor. She elected to see Dr. Norman who referred her to Dr. Chavez. Thereafter, the Employer referred the Claimant to Peak Performance where she received treatment with Dr. Ramsey and Dr. Moses. Dr. Moses referred Claimant back to her primary care physician for non-medical reasons (he opined her injury was not work-related so he discharged her from care). Dr. Chavez then referred Claimant to Dr. John Mangelson.

CONCLUSIONS OF LAW

General

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

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

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

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

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

Compensability

"Occupational disease" is defined by §8-40-201(14), C.R.S., as:

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

This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

As a matter of law, medical evidence is not required to establish causation, although it is a factor that may be considered in addressing that determination. See *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983).

The Colorado Division of Workers' Compensation has adopted the Guidelines for use by medical providers rendering treatment under the Workers' Compensation Act. They were established by the Director pursuant to an express grant of statutory authority found at § 8-42-101(3.5)(a)(II), C.R.S.

In this case, the Respondents urge the ALJ to rely upon the opinions of Dr. Fall and Dr. Moses because they applied the Guidelines to conclude that Claimant is not suffering from an occupational disease. However, as specifically found in § 8-43-201(3), C.R.S., the ALJ is not required to use the Guidelines as the as "the sole basis" for determining whether treatment is reasonable, necessary or related to an occupational disease. Furthermore, in *Hall v. Industrial Claim Appeals office*, 74 P.3d 459 (Colo. App. 2003) the Court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Act. See §8-42-101(3)(b), C.R.S. 2008.

The Guidelines further state that treatment for a work-related condition is covered when the work exposure causes the activation of a previously asymptomatic or latent medical condition or the work exposure combines with, accelerates or aggravates a pre-existing symptomatic condition.

Based on the persuasive and credible evidence, the Claimant has proven by a preponderance of the evidence that her job duties caused her to develop a new condition or caused an aggravation of a pre-existing latent condition. At this point, Claimant has had three different diagnoses for her right arm symptoms, thus whether intersection syndrome, de Quervain's syndrome or wrist extensor tenosynovitis, the ALJ finds and concludes that such condition was brought on by Claimant's work duties. Claimant credibly explained her job duties and the required use of her hands while performing them. The ALJ credits Claimant's testimony that the job duties evaluation did not accurately reflect the manner in which she performed her job.

In addition, the findings on physical examination during medical appointments established Claimant's need for treatment. Specifically, Dr. Davis noted that the Claimant was extremely tender over the intersection area near the distal forearm and does have some crepitation with range of motion of her thumb. He also stated that she continued to have severe activity related pain and a grinding sensation over the dorsal radial aspect of her distal forearm. Dr. Fall also agreed that Claimant is suffering from some condition in the right forearm. Dr. Fall just believes it is not work-related.

Authorized Provider

After the Claimant reported her injury to her supervisor in early August 2015 she was not referred for medical care by the employer "in the first instance". Section 8-43-404(5), C.R.S. She thereafter sought the medical attention from her primary care physician, Dr. Norman, who referred her to Dr. Chavez. Because of the Employer's failure to comply with § 8-43-404(5), C.R.S., Drs., Chavez and Norman are authorized treating providers. The Respondents thereafter referred the Claimant to Peak Performance where she saw Drs. Ramsey and Moses. Dr. Ramsey referred the Claimant to Dr. Davis. After concluding that Claimant did not suffer a work-related injury, Dr. Moses referred Claimant back to her primary care physician. Claimant returned to Dr. Chavez who then referred the Claimant to Dr. Mangelson. In light of the foregoing, the following are the Claimant's ATPs: Drs. Norman, Chavez, Moses, Davis, Ramsey and Mangleson.

Medical Benefits

Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Williams v. Industrial Commission*, 723 P.2d 749 (Colo. App. 1986). The Claimant is entitled to medical treatment to cure and relieve her of the effects of her right forearm condition whether diagnosed as intersection syndrome, de Quervain's syndrome or wrist extensor tenosynovitis.

Temporary Total Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Claimant has proven that her compensable occupational disease caused or contributed to her wage loss beginning on October 23, 2015. Claimant's authorized treating physician restricted Claimant to "no work" beginning on October 23, 2015, then released to her restricted duty effective October 27, 2015. The Employer did not offer Claimant modified duty work after October 23, 2015, and Claimant has not returned to work. The parties agreed that Claimant received some unemployment insurance benefits and that the Respondents would be entitled to an offset in an amount to be determined.

ORDER

It is therefore ordered that:

1. The Claimant suffered an occupational disease of the right forearm in the course and scope of her employment with the Employer.

2. The Claimant's medical treatment with Drs. Norman, Chavez, Moses, Ramsey, Mangleson, and Davis is authorized.

3. The Claimant is entitled to medical benefits to cure and relieve her of the effects of her work-related occupational disease.

4. The Claimant is entitled to TTD benefits commencing her last day worked on October 23, 2015, ongoing, payable at the TTD rate of $584.06 pursuant to the stipulated AWW of $879.97, subject to unemployment benefits offset.

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

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

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

DATED: October 11, 2016

DIGITAL SIGNATURE:

L. Broniak

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-952-124-04

ISSUES

WC No. 4-928-516 (August 11, 2013 D.O.I):

- Whether the Respondents proved, by a preponderance of the evidence, that the 26 percent scheduled impairment rating assigned by Division Examiner, Dr. Kenneth Finn, is incorrect.

- Whether the Respondents proved, by a preponderance of the evidence, that the claimant does not require medical treatment to maintain his condition arising out of the August 11, 2013, injury at MMI.

- Whether the claimant proved, by a preponderance of the evidence, that he suffered impairment beyond the arm at the shoulder as a result of the August 11, 2013, industrial injury.

- If the claimant proved he suffered impairment beyond the arm at the shoulder as a result of the August 11, 2013, industrial injury, what is the correct percent of whole person permanent physical impairment which should be assigned to the injury?

WC No. 4-952-124 (May 18, 2014 D.O.I.):

- Did the claimant prove, by a preponderance of the evidence, that he is entitled to an award of temporary total disability from May 5, 2015 through May 23, 2016?

- Did the Respondents prove, by a preponderance of the evidence, that the claimant was responsible for the termination of his employment on May 5, 2015, and therefore, not entitled to an award of temporary total disability benefits?

FINDINGS OF FACT

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

1. Claimant is a 50-year-old man with a March 31, 1966 date of birth. Claimant was hired by Employer on May 23, 2008 to work as a sales associate.

2. Claimant initially injured his right shoulder in an admitted accident in the course and scope of his employment with Employer on August 11, 2013, when he was lifting cases of frozen chicken. An August 15, 2013, MRI showed a complete rupture of the long head of the biceps tendon, retracted, 3mm insertional

intrasubstance partial tear supraspinatus tendon, and moderate subscapularis tendinosis, without tear.

3. Claimant was referred to orthopedic surgeon, Dr. Richard Cunningham. Dr. Cunningham evaluated Claimant on August 19, 2013. He noted the MRI findings and recommended a diagnostic arthroscopy with debridement followed by probable open biceps tenodesis. Dr. Cunningham performed surgery on August 30, 2013. At the time of surgery, the AC joint was inspected and revealed "exposed eburnated bone." Dr. Cunningham performed an arthroscopic distal clavicle resection removing approximately 8 mm of bone.

4. Following surgery, Claimant continued to complain of pain with limited range of motion due to guarding. Dr. Cunningham thought Claimant would go on to have full range of motion and strength.

5. Due to Claimant's ongoing pain complaints, an MRI was performed on December 24, 2013. Dr. Cunningham reviewed the MRI and thought it was consistent with adhesive capsulitis. Although Dr. Cunningham did not think Claimant would need it, an arthroscopic lysis of adhesions could be performed.

6. On March 7, 2014, Dr. Cunningham performed a right shoulder arthroscopy with lysis of adhesions, manipulation under anesthesia, arthroscopic subacromial decompression and debridement of low grade partial supraspinatus tearing and rotator cuff fraying.

7. On May 18, 2014, Claimant was exiting the restroom at work when he slipped and fell striking the posterior aspect of his head, without loss of consciousness. Claimant presented to the Vail Valley Medical Center Emergency Room where he complained of right wrist, right shoulder, and diffuse left knee and bilateral back pain. On physical exam, Claimant had no evidence of swelling or discoloration of the shoulder. There was a small amount of soft tissue swelling of the wrist. Claimant was assessed with right wrist pain, left knee pain, right shoulder pain, lumbar back strain and posterior scalp contusion. He was directed to follow-up with Dr. Cunningham.

8. Dr. Cunningham evaluated Claimant on May 19, 2014. On exam, there was mild swelling over the right shoulder. Claimant's right wrist was placed in a splint and he was referred to a hand specialist.

9. Claimant continued to complain of right wrist pain. An MRI performed on June 20, 2014 was read as showing an avulsion fracture of a carpal bone on the dorsum of the right wrist. On August 27, 2014, Claimant underwent surgery on his right wrist, a right hand carpal nonunion repair with excision and an osteoplasty.

10. On March 7, 2014, Dr. Cunningham documented "good shoulder range of motion."

11. Despite extensive physical therapy for the shoulder and the wrist, Claimant was not progressing. On October 23, 2014, authorized provider, NP Lucia London, received a call from Claimant's physical therapist who was concerned about his lack of progress. The therapist was spending at least 80 percent of her visits discussing Claimant's concerns and problems. Claimant did not seem to be progressing with therapy and she was concerned that there might be some psychosocial barriers preventing Claimant from progressing.

12. Multiple providers noted that psychological factors appeared to be present in Claimant's pain presentation. Dr. Raub noted on September 25, 2014, that, "after evaluating this patient, I have some concerns about the inconsistencies in his history and my discussion with Lucia London, NP. Additionally, he has multiple musculoskeletal complaints beyond what one would expect from his lumbar MRI. I am concerned about other influences, perhaps, psychosocial issues." Dr. J. Tashof Bernton opined, "The patient's examination is characterized by multiple nonorganic findings and inconsistencies, which indicate a significant psychologically based contribution to his pain presentation." Dr. Bernton further opined, "There is significant evidence of somatoform disorder, and, given the Waddell findings on examination, significant symptom magnification is probably present." On May 14, 2015 (two months before the DIME), Dr. Scherr noted, "Severe pain behaviors are present. . . He has limited ROM in all planes, but has suboptimal effort... Grip strength is diminished, but again, suboptimal…Shoulder is not swollen, but diffusely tender with jerking upon light touch." Dr. Scherr also documented a phone call from the physical therapist who reported Claimant was "so obsessed with his pain that therapy was nearly impossible to perform. The therapist stated that he would continually talk about the pain and would not perform the activities or exercises." Therapy was put on hold secondary to this.

13. Authorized treating provider, Dr. Susan Lan, placed Claimant at MMI from the August 11, 2013, accident on November 19, 2014. Dr. Lan assigned 8 percent scheduled impairment for loss of right shoulder motion. Eight percent scheduled impairment converts to 5 percent whole person impairment. Dr. Lan indicated, "Maintenance care should include therapy bands for a home exercise program and a 3 month gym membership so he can continue exercising."

14. Insurer filed a Final Admission of Liability consistent with Dr. Lan's opinions on MMI, impairment and medical treatment post-MMI.

15. Claimant was dissatisfied and requested a Division IME. Dr. Kenneth Finn was selected as the Division Examiner. Dr. Finn performed his examination on August 7, 2015. In the course of his examination, Dr. Finn took a history of Claimant's injury from him. Claimant reported undergoing seven months of physical therapy, "which was not helpful". Claimant told Dr. Finn that, after his May 18, 2014, fall, he noted increasing right shoulder pain. On physical exam, Dr. Finn noted Claimant had give way weakness in throughout the right upper extremity and nonanatomic diminished sensation to light touch throughout the

right upper extremity. Despite Claimant’s give way weakness and nonanatomic findings, Dr. Finn assigned 18 percent scheduled impairment for loss of shoulder motion. He assigned an additional ten percent scheduled impairment for Claimant’s distal clavicle resection of “eburnated bone”. The combined scheduled impairment is 26 percent. Twenty six percent scheduled impairment converts to 16 percent whole person impairment.

16. Prior to undergoing the Division IME, the claimant’s employment with the Respondent Employer was terminated on May 4, 2015, for gross misconduct, “integrity issue”.

17. Employer’s Assistant Manager, Glen Liguori, testified at hearing. Mr. Liguori testified that on May 4, 2015, Claimant was employed by Employer in a modified work position of “People Greeter”. Mr. Liguori testified that, at that time, he was the Assistant Manager over the front end, which included the management and supervision of associates in the position of People Greeter. Mr. Liguori testified that he had also been Claimant’s supervisor when he worked in the produce department. Mr. Liguori credibly testified that new associates are required to attend an orientation session, which discusses Employer’s policies and procedures, including attendance, Open Door policy, breaks, meal periods, and days of rest, and Statement of Ethics. Mr. Liguori credibly testified that Employer provides the orientation in both the English and Spanish languages for their associates. Mr. Liguori testified that in addition to their initial orientation, Employer’s associates are required to complete annual “Computer based learning,” which also reviews Employer’s policies relating to breaks and meal periods. Mr. Liguori testified concerning Employer’s four-step disciplinary process and situations when the four-step disciplinary process is not used, such as instances of “Gross Misconduct”. Mr. Liguori testified Employer’s associates are permitted two paid 15 minute breaks per shift. He testified concerning the circumstances leading up to the termination of Claimant’s employment. Mr. Liguori credibly testified that he reviewed in-store security video in an effort to ascertain Claimant’s whereabouts after being questioned by another associate. At that time, he learned Claimant had taken an extended break. On further review, Mr. Liguori discovered that throughout April 2015, Claimant was taking anywhere from 25 minutes up to 41 minutes for his paid 15 minute breaks. Mr. Liguori credibly testified this is considered “theft of time” and gross misconduct and resulted in the termination of Claimant’s employment with Employer. Claimant is responsible for the termination of his employment with Employer.

18. A reasonable employee would appreciate that repeatedly taking paid breaks, of two to three times in length of the allotted time, would likely result in the termination of employment. As found, Respondents have proven, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment.

19. Dr. Carlos Cebrian examined Claimant on December 18, 2015, at Respondents’ request. Dr. Cebrian also testified at hearing as a Level II accredited expert in

the field of occupational medicine and family medicine. In connection with his IME, Dr. Cebrian reviewed surveillance video of Claimant, which is included in the record at Exhibit K. The surveillance video was not available to Dr. Finn at the time of the Division IME.

20. On Dr. Cebrian's physical exam, consistent with his presentation to Dr. Finn, Claimant demonstrated jerky cog wheeling movements on range of motion testing. However, when Dr. Cebrian tested Claimant's strength, he was able to hold both arms at shoulder level at 90 degrees in flexion, inconsistent with his range of motion.

21. After Dr. Cebrian's evaluation, Dr. Scherr placed Claimant at MMI from the May 18, 2014 accident. In connection with that determination, Dr. Scherr attempted to provide an impairment rating of the right shoulder. In Dr. Scherr's May 23, 2016, evaluation, he notes, "PT did not feel PT was beneficial due to [Claimant's] pain behaviors and his inability to participate. He did have the FCE and because of his severe pain behaviors was a difficult exam and was hard to validate. He has had 3 stellate ganglion blocks which have been helpful, but only temporarily. He did have a urine drug screen in which the UDT was negative for Oxycodone when it should have been positive…. There is also the issue of the surveillance video that indicates his ability to do more with his right arm than is demonstrated here in the office." Dr. Scherr noted, "Very Severe Pain behaviors are present, which makes any exam difficult, as he won't even really try to move his arm period. He will raise the arm about 120 degrees in flexion/abduction, which is an improvement… I attempted to measure both L and R shoulders today and he was very difficult in complying with the request, despite the interpreter and my demonstrating several times the correct movement of the arm. I was able to obtain the L shoulder measurements. The R, I was not able to do IR and ER due to pain behaviors and reported pain. His R arm movements were non-physiologic…. I was unable to obtain accurate physiologic measurements from the R arm, so I was not able to impair this arm for ROM." Regarding maintenance care, Dr. Scherr opined, "As stellate ganglion blocks only temporarily helpful and UDT testing inconsistency with absence of Oxycodone when should have been positive, as such, no maintenance care required."

22. Dr. Cebrian credibly testified that Dr. Finn erred at the time of his DIME, in assigning impairment for the range of motion measurements that he obtained as they were not an accurate reflection of Claimant's range of motion resulting from the August 11, 2013, injury. The only appropriate ranges of motion measurements are those Dr. Lan obtained when she placed Claimant at MMI on November 19, 2014. According to the AMA Guides, page 78, "Pain, fear of injury, or neuromuscular inhibition may limit mobility by diminishing effort. Such limitations provide inaccurately low and inconsistent measurements that lead to improperly inflated impairment estimates." Dr. Cebrian credibly explained that Dr. Finn's rating is not in accordance with the AMA Guides because it is not reproducible and physiologic.

23. Dr. Cebrian credibly testified that Dr. Finn erred in assigning an additional ten percent impairment for the distal clavicle resection to remove eburnated bone. The purpose of the distal clavicle resection was to remove osteoarthritis in the AC joint. Claimant did not injure or aggravate his AC joint in the August 11, 2013 accident. He suffered a rupture of the biceps tendon and a partial supraspinatus tear. Dr. Cunningham was not considering a distal clavicle resection at the time of pre-operative planning. At the time of surgery, Dr. Cunningham found the AC joint had degenerative findings of exposed and eburnated bone. At that time, he elected to perform a distal clavicle resection for a degenerative and non-claim related condition.

24. The opinions of Dr. Cebrian are more credible and persuasive than those of Dr. Finn.

25. Claimant testified his right shoulder condition worsened between his November 19, 2014, date of MMI and his appointment with Dr. Finn. Dr. Finn agreed with the November 19, 2014, date of MMI. When Dr. Lan placed Claimant at MMI on November 19, 2014, she restricted him to no lifting in excess of fifteen to 20 pounds. By the time Claimant was evaluated by Dr. Finn, his restrictions had increased to no lifting in excess of five pounds. Impairment is to be determined as of the date of MMI. The range of shoulder motion exhibited by Claimant, as measured by Dr. Lan on the date of MMI, more accurately reflects Claimant's permanent physical impairment from the August 11, 2013 accident.

26. Claimant testified to restrictions in the use of his right upper extremity and difficulty sleeping, as evidence that his impairment is beyond the arm at the shoulder. However, Claimant's physicians strongly encouraged him to use the right upper extremity normally. Despite this encouragement, Claimant does not use his right upper extremity normally. He exhibits severe pain behaviors with non-physiologic movements. Claimant's sleep disturbance pre-existed the August 11, 2013 date of injury.

27. Respondents have proven, by a preponderance of the evidence, that the scheduled impairment rating assigned by Dr. Finn is incorrect. The only appropriate ranges of motion measurements are those Dr. Lan obtained when she placed Claimant at MMI on November 19, 2014. Claimant's correct impairment rating is eight percent scheduled impairment to the right upper extremity, as assigned by Dr. Lan. As found, the additional ten percent scheduled impairment assigned by Dr. Finn for the distal clavicle resection was incorrectly assigned. The procedure was performed to correct a non-work-related degenerative condition in the AC joint.

28. Claimant has failed to prove, by a preponderance of the evidence that the 8 percent scheduled impairment assigned by Dr. Lan should be converted to whole person.

29. Dr. Cebrian testified that no treatment provided to date has improved Claimant's subjective complaints. Claimant has been noncompliant with physical therapy, as noted by the treating physicians. The treating physician also noted a non-compliant urine drug test and recommended against medical treatment to maintain MMI. The opinions of Dr. Scherr and Dr. Cebrian that Claimant does not require medical treatment to maintain his August 11, 2013 injury at MMI are credible and persuasive.

30. The ALj declines to order a gym membership and therapy bands as maintenance care, given Claimant's refusal to participate in supervised physical therapy. Claimant provided no credible evidence that he needs, or even desires, medical treatment to maintain his condition at MMI.

CONCLUSIONS OF LAW

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

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

The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

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

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

A rating physician must rate impairment in accordance with the provisions of the *AMA Guides to the Evaluation of Permanent Impairment,* 3d Ed., Revised. Section 8-42-101(3.7), C.R.S.; § 8-42-107(8)(c), C.R.S.; *see also, Wilson v. Industrial Claim*

Appeals Office, 81 P.3d 1117 (Colo. App. 2003). Impairment is to be determined as of the date of MMI.

As found, Dr. Finn's evaluation of the claimant's loss of range of shoulder motion was not in accordance with the provisions of the *AMA Guides to the Evaluation of Permanent Impairment,* 3d Ed., Revised. As found, Dr. Finn's assigned impairment for loss of shoulder motion was not consistent with those in the record and were not reproducible and physiologic. Therefore, they are not an accurate reflection of the claimant's permanent impairment and should not be used. The range of motion reflected in Dr. Lan's November 19, 2014, report of MMI and impairment more accurately reflects the claimant's impairment as of MMI. As found, Dr. Finn inappropriately included an additional ten percent scheduled impairment for a distal clavicle excision, which was performed to remove eburnated bone, a non-work-related condition. Accepting Dr. Lan's range of motion and excluding Dr. Finn's additional ten percent for loss of shoulder motion, the claimant's permanent physical impairment resulting from the August 11, 2013 accident totals eight percent of the right upper extremity.

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

The question of whether a claimant's impairment falls within the schedule of benefits is one of fact for the Administrative Law Judge. *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo.App. 1996). It is the situs of the functional impairment that is at issue. *See, e.g., Id.* at 368.

The claimant described functional limitations primarily affecting the use of his right arm and shoulder. As found, the claimant failed to prove, by a preponderance of the evidence, that the situs of functional impairment for the right upper extremity extended beyond the extremity. Therefore, § 8-42-107(7)(b)(II), C.R.S. precludes an award of medical impairment benefits for the right upper extremity based on the whole person conversion of the appropriate upper extremity rating.

The claimant has the burden of proving entitlement to medical benefits by a preponderance of the evidence. Section 8-43-201, C.R.S; *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury or disease and the condition for which benefits or compensation is sought. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo.App. 1997).

Here, as found, the claimant failed to meet his burden of proving that he requires medical treatment to maintain his condition at MMI.

To obtain indemnity benefits, a claimant must prove, by a preponderance of the evidence, that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 639 (Colo. App. 1997).

Under sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., the claimant is precluded from receiving indemnity benefits if he is found to be responsible for his wage loss. The concept of "responsibility" in sections 8-42-105(4) and 8-42-103(1)(g), is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). Fault does not require willful intent. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996)(unemployment insurance).

Respondents sustained their burden of proof to establish that Claimant engaged in volitional acts, which caused the termination of his employment. Respondents' evidence, both documentary and testimonial, was found more credible and persuasive than the testimony provided by Claimant.

ORDER

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

1. Claimant's request for an award of 26 percent scheduled permanent physical impairment is denied and dismissed;

2. Respondents are ordered to pay Claimant an award of 8 percent scheduled impairment, taking credit for any PPD benefits previously admitted and paid;

3. Claimant's request for conversion of the award of scheduled impairment benefits to whole person permanent physical impairment benefits is denied and dismissed;

4. Claimant's request for an award of medical benefits post-MMI is denied and dismissed.

5. Claimant's request for an award of TTD benefits from May 4, 2015 through May 23, 2016, is denied and dismissed.

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

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

DATED October 14, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-800-018-03

ISSUES

The following issue was raised for consideration at hearing:

1. Whether Claimant proved, by a preponderance of the evidence, that the medical treatment consisting of L5-S1 fusion surgery recommended by Dr. Feler is related and reasonably necessary to cure and relieve the effects of the Claimant's July 14, 2015 work injury.

FINDINGS OF FACT

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

1. The Claimant, who was 35 years old as of October 25, 2015, worked as a driver. The Claimant lives in Cheyenne, Wyoming.

2. The Claimant testified credibly that on July 14, 2015, he was unloading a trailer that came from Denver, CO to Cheyenne, WY. When a trailer arrives from Denver, CO, certain boxes are to stay in Cheyenne, WY and certain boxes are to be delivered to Casper, WY.

3. The Claimant was in the process of unloading boxes from a trailer that weighed between 5 pounds up to 75 or 100 pounds. When he was about ¾ of the way through the unload, the Claimant picked up a box weighing approximately 25 pounds, stood, heard a snap but stated that he didn't that much of it at the time. He finished unloading boxes that were to remain in Cheyenne and then drove the remainder of the boxes from Cheyenne to Casper, WY. The Claimant testified that he made the drive to Casper, WY without feeling any pain. When Claimant arrived in Casper, and tried to get out of the truck, he felt pain. He testified that he could not get in touch with anyone in the Denver office to report his medical issue. On his return to Cheyenne, the Claimant went to the doctor for medical attention because his back was hurting badly by that point.

4. The Claimant reported the problem to his employer and was referred for medical care to Dr. Nevins, Dr. Ribnik and Dr. Feler.

5. On Dr. Ribnik's new patient paperwork, the Claimant reported he was most uncomfortable standing; sitting; bending at the waist; and lying on his back, stomach, left side, and right side. Claimant reported that activities guaranteed to make pain worse included "moving my body, walking, sitting for long periods of time." On the pain diagram, the Claimant shaded the low back area and the back of both lower extremities (Respondents' Exhibit F).

6. On July 14, 2015, X-ray of the lumbar spine was read to reflect grade 1 anterior listhesis of L5 on S1 and mild degenerative changes throughout the lumbar spine (Respondents' Exhibit G).

7. On July 23, 2015, an MRI of the lumbar spine had findings which included L5 spondylolysis and grade 1 L5-S1 spondylolisthesis. Severe left foraminal stenosis and possible left L5 nerve root compression. Moderate right foraminal stenosis at L5-S1. There is disc narrowing and diffuse bulge with circumferential osteophytes. There is no sac stenosis but there is severe left foraminal stenosis and moderate right foraminal stenosis. There is a flattening of the left L5 nerve root as it traverses its foramen. (Respondents' Exhibit H).

8. On August 3, 2015, Dr. Harlan Ribnik evaluated the Claimant and recommended bilateral L4/5 transforaminal epidural injections, medications, and a referral for physical therapy (Claimant's Exhibit 2; Respondents' Exhibit I).

9. On August 17, 2015, Dr. Nevins recommended work restrictions of sedentary work only until reevaluation on September 17, 2015; no lifting over 10 pounds, no forceful pushing, pulling, or gripping, cannot drive, no prolonged bending, stooping, kneeling, squatting or climbing, no prolonged walking and/or standing (Claimant's Exhibit 1, p. 27; Respondents' Exhibit J).

10. On August 20, 2015, Dr. Ribnik evaluated the Claimant after an August 10, 2015 epidural steroid injection. The Claimant reported his pain remained stable in character and distribution. The Claimant reported that his pain interfered with general activity (8), normal work (10), and interfered with his walking ability (7). (Claimant's Exhibit 2, p. 80; Respondent's Exhibit K).

11. On August 24, 2015 Dr. Eric Siiteri evaluated the Claimant. The Claimant reported that his pain increases with prolonged walking, sitting, or standing longer than twenty minutes. Dr. Siiteri noted that the Claimant "makes an effort to ignore his pain, and engage in physical activities to divert his attention away from pain." Dr. Siiteri 's impression was that the Claimant was "generally stable psychologically, and behaviors and complaints [were] consistent with identifiable pathology" (Claimant's Exhibit 8).

12. On September 3, 2015, the Claimant saw Dr. Ribnik and reported increased pain after another epidural injection that occurred on August 28, 2015. The Claimant reported that his pain interfered with general activity, normal work, and interfered with his walking ability (Claimant's Exhibit 2, p. 62; Respondents' Exhibit N).

13. On September 10, 2015, Dr. Ribnik reported that the Claimant did not think the epidural steroid injections improved his pain and in fact increased his pain. By this visit, the Claimant was reporting that his pain had returned to his pre-injection level and he was better (Claimant's Exhibit 2, p. 59; Respondents' Exhibit P).

14. On September 11, 2015, Dr. Nevins maintained the Claimant's restrictions of sedentary work only; no lifting over 10 pounds, no forceful pushing, pulling, or

gripping, cannot drive, no prolonged bending, stooping, kneeling, squatting or climbing, no prolonged walking and/or standing (Respondents' Exhibit O).

15. On September 28, 2015, Dr. Ribnik noted that the Claimant reported the epidural steroid injections made his usual pains miserable. The Claimant rated his pain at 10/10. He further reported that Lyrica at bedtime was helpful for sleep (Claimant's Exhibit 2, p. 53; Respondents' Exhibit R).

16. On October 1, 2015, electrodiagnostic testing reflected bilateral tarsal tunnel, F waves and H reflexes asymmetric by more than 1 ms and some polyphasia that suggested proximal injury (Claimant's Exhibit 2, pp. 50-52; Respondents' Exhibit S).

17. On October 12, 2015, Dr. Ribnik noted that the Claimant's left lower extremity goes numb quicker in any position or during any activity and he still can't identify any particular activity or position that will improve his symptoms reliably. Dr. Ribnik recommended referral to another spine surgeon because he saw Dr. Feler who felt the Claimant was too young at this point for a fusion (Respondents' Exhibit T).

18. On October 12, 2015 Dr. Nevins noted the Claimant "appears to have exhausted all conservative measures without any improvement in symptoms. Next step likely surgery but will await his decision" (Claimant's Exhibit 1, Page 21).

19. On October 26, 2015, Dr. Claudio Feler reported that the Claimant "failed multiple modalities including NSAIDS, Pain Meds, LSO bracing, and multiple injections. He has mechanical low back pain with radiating paresthesias down both legs, right worse than left. We will plan for L5-S1 fusion" (Claimant's Exhibit 5, p. 179; Respondents' Exhibit U).

20. Dr. Nevins noted the Claimant was medically cleared to proceed with the planned surgery (Claimant's Exhibit 1, p. 18).

21. On October 27, 2015, Dr. Ribnik noted that Dr. Feler now recommended L5-S1 lumbar fusion and he cautioned the Claimant about the potential of adjacent level degeneration with a fusion. The Claimant reported medications were only providing about 10% pain relief (Claimant's Exhibit 2, p. 46; Respondents' Exhibit V).

22. On November 9, 2015, Dr. Nevins stated that the Claimant has not had much improvement with anything attempted and the next medical step appears to be surgical intervention. However, there was a delay due to some video surveillance. Dr. Nevins noted, "the amount of activity seen in the video was not over and above what I would expect him to be able to do for short periods of time when feeling well but he would certainly not be able to keep that level of activity up for an entire day of labor intensive work or qualify for a CDL driving on his current medications (Claimant's Exhibit 1, p. 16).

23. On November 17, 2015, Dr. Ribnik noted that the Claimant was having difficulty with Worker's Compensation due to video surveillance. The Claimant was felt to have been magnifying his condition. Dr. Ribnik reported he that reviewed the videos

“and did not see any indication of heavy lifting or activity that he has been limited from.” Pain medications provided 30% relief (Claimant’s Exhibit 2, p. 37; Respondents’ Exhibit W).

24. On January 6, 2016, Dr. Nevins reported that the Claimant’s activities in the video were consistent with his presentation in clinic and did not exceed the recommended restrictions. “On the good days I could see him attempting some of these activities but on the poor days as he presents to clinic it would not be possible… [the Claimant’s] activities on the video do exceed the recommended restrictions. One of the restrictions was not to drive and he is clearly driving in the video, although the intent of that was not to drive using his CDL license. Additionally, he was lifting several objects in the video. None appeared overly heavy to me but they certainly may have been over 10 pounds, which was the extent of his restrictions.” Dr. Nevins noted that the MRI explained some of the Claimant’s radicular symptoms and that “the pain still seems to be primarily generated from the L5/S1 disc and subsequent nerve impingement as well as surrounding inflammation/spasm.” He opined that “medically I do not feel that there is anything further to be done other than proceeding with the proposed surgery by Dr. Feler.” This was Dr. Nevins’ main recommendation at this time “given his lack of improvement with typical medical therapy and steady progression of symptoms to date” (Claimant’s Exhibit 1, pp. 1-2; Respondents’ Exhibit Y.)

25. The Claimant saw Dr. Jeffrey Wunder for an IME on January 19, 2016. The Claimant reported back pain and he described to Dr. Wunder that “he was loading boxes weighing between 10-100 pounds. He was putting boxes from the trailer onto a roller belts. He reported he picked up a box weighing about 15 pounds and heard a pop in his back but had no immediate onset of pain. He reported finishing unloading and then drove to Casper. When he got to Casper, he reported that his pain was worse, and he could not stand erect due to his pain, which extended from his low to mid back. He had no lower extremity pain radiation. He reported that he drove his truck back to Cheyenne, Wyoming.” Dr. Wunder then summarized medical records dated July 28, 2015 to January 6, 2016 that he had reviewed. Dr. Wunder’s impression was “non-specific complaints of low back pain, grade 1 L5-S1 spodylolisthesis long-standing and preexisting the work related injury and symptom embellishment. Dr. Wunder had also reviewed video surveillance and generally commented on the parts when Dr. Wunder felt that the Claimant was demonstrating lesser symptoms in the video than his presentation for Dr. Wunder. Dr. Wunder also identified parts of the surveillance that Dr. Wunder believes show the Claimant engaged in activities outside of his work restrictions. Dr. Wunder disputes Dr. Nevins opinion that “the L5-S1 spondylolisthesis is the pain generator and is causing radicular symptoms in his lower extremities.” In Dr. Wunder’s opinion, there are significant issues of symptom embellishment and perhaps malingering. Dr. Wunder opined that the Claimant is not a surgical candidate, needs no further treatment, has reached MMI and had a 0% permanent impairment with no physical restrictions (Respondent’s Exhibit A).

26. Dr. Wunder testified on May 16, 2016 by deposition. His deposition testimony was substantially similar to his report. Ultimately, Dr. Wunder opined that the proposed surgery is not indicated for the Claimant. Dr. Wunder bases this on his

physical examination and what he felt to be significant pain behaviors. Dr. Wunder contrasts the limited lumbar range of motion on examination with the range of motion that he observed in the video surveillance. Dr. Wunder also opines that he finds no evidence of radiculopathy. Dr. Wunder also testified that he does not believe that the Claimant's reported mechanism of injury would result in a significant lumbar disk load. Dr. Wunder also questioned how the Claimant could have a severe back injury without the immediate onset of back pain. Dr. Wunder also testified that he had concerns about performing a fusion surgery on the Claimant due to his relatively young age. He discussed the concerns about putting more pressure on adjacent levels and the higher potential for future surgery.

27. The Claimant testified at the hearing that when he saw Dr. Wunder, the exam was strange because he was putting pressure on lower back with one hand (which made the Claimant hurt) but then using his other finger to push in at other places on his middle and upper back. At one point, Dr. Wunder told the Claimant to straighten all the way up and was pushing him back. The Claimant told him to stop doing that because he does not straighten up all the way like that anymore. The Claimant also testified about events depicted on the video surveillance. The Claimant admitted he assists his son who is in a wheelchair. The Claimant testified that he is independent in activities of daily living. He walks without assistive devices. He did recall moving a dishwasher with his son. He admitted he probably moved trash cans and he admitted moving golf bags.

28. Overall, after review of the video surveillance and review of the testimony of the Claimant and Dr. Wunder, as well as the notes of the Claimant's treating physicians Dr. Nevins and Dr. Ribnik, the ALJ finds that the Claimant's activities, more likely than not, were generally within his restrictions. The ALJ finds the Claimant credible that he has some days that are better days for him and he is able to function at higher level than usual. This is supported by the medical opinions of Drs. Nevins and Ribnik, which the ALJ finds more persuasive than the opinion of Dr. Wunder.

29. Although there is conflicting testimony on the issue, crediting the persuasive medical reports of Drs. Nevins, Ribnik and Feler and the Claimant's testimony, it is found that the Claimant's current low back symptoms are related to the Claimant's July 14, 2015 work injury. It is further found that based upon the MRI, the EMG findings and the Claimant's lack of progress with conservative treatment, the fusion surgery proposed by Dr. Feler is more likely than not to provide the Claimant relief his symptoms. Therefore, Dr. Feler's recommendation for L5-S1 fusion surgery is reasonably necessary to cure and relieve the effects of the Claimant's July 14, 2015 work injury. Although an intended purpose of the surgery is pain relief, there is also an intended goal of improved function and permitting the Claimant to engage in his normal activities. While the surgery itself is intended to improve function, in part, this second goal of improved function may also be achieved by the reduction or elimination of the need for medications which are a limiting factor in the Claimant's overall functioning as they would prevent him from driving with a CDL.

CONCLUSIONS OF LAW

Generally

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

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

Medical Benefits – Relatedness and Reasonably Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the “Medical Treatment Guidelines”) when furnishing medical aid under the Workers’ Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May

5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

Rule 17, Exhibit 1 of the Medical Treatment Guidelines sets forth the guidelines for treatment of low back pain. Per, Rule 17, Exhibit 1 (B)(8): "Surgical Interventions should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief. The concept of "cure" with respect to surgical treatment by itself is generally a misnomer. All operative interventions must be based upon positive correlation of clinical findings, clinical course, and diagnostic tests. A comprehensive assimilation of these factors must lead to a specific diagnosis with positive identification of pathologic conditions."

In considering spinal fusion as an operative intervention, pre-operative surgical indications include: all pain generators are adequately defined and treated, all physical medicine and manual therapy interventions are completed, X-ray, MRI, or CT/Discography demonstrate disc pathology or spinal instability, spine pathology is limited to two levels, psychosocial evaluation with confounding issues addressed and the injured worker is to refrain from smoking for at least 6 weeks prior to surgery and during the period of fusion healing. *Rule 17, Exhibit 1 (F)(4)(d), Medical Treatment Guidelines.*

The medical records and the credible testimony of the Claimant establish that the Claimant underwent extensive conservative treatment but nothing offered long-term relief from the pain symptoms that the Claimant continues to suffer. While there have been concerns raised by Dr. Wunder as to the pain generator for the current symptoms, Dr. Feler has opined that the pain generator is at the L5-S-1 level and that the Claimant has mechanical low back pain with radiating paresthesias down both legs, right worse than left.

Crediting the opinions of Drs. Feler, Ribnik and Nevins, it is found the fusion surgery proposed by Dr. Feler is more likely than not to provide relief from symptoms and L5-S1 fusion surgery is reasonably necessary to cure and relieve the effects of the Claimant's July 14, 2015 work injury. Despite Dr. Wunder's conflicting opinion, it is also found that the Claimant is a reasonable candidate for the proposed surgery.

Therefore, the Claimant has established by a preponderance of the evidence that Dr. Feler's recommendation for L5-S1 surgery is reasonably necessary to cure and relieve the effects of the Claimant's July 14, 2015 work injury.

ORDER

It is therefore ordered that:

1. The L5-S1 fusion surgery requested by Dr. Feler is reasonably necessary to cure and relieve the Claimant from the effects of his July 14, 2015 work injury.

2. Respondents liability shall specifically include medical treatment consisting of the proposal of Dr. Feler to perform the L5-S1 fusion surgery and all related medical treatment required for appropriate preparation for the surgery, as well as post-surgical follow-up treatment.

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

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

DATED: October 17, 2016

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

ISSUE

The following issue was raised for consideration at hearing:

1. Whether the Claimant proved, by a preponderance of the evidence, that the medical treatment consisting of right knee surgery recommended by Dr. David Schneider is reasonable, necessary, and causally related to the Claimant's December 10, 2014 admitted industrial injury.

FINDINGS OF FACT

1. The Claimant sustained an admitted work related injury on December 10, 2014 during an altercation with a patient at Swedish Hospital. At the time, the Claimant worked as a patrol officer. According to the December 10, 2014 Swedish Medical Center Emergency Department report, the Claimant "was tackled to the ground by another patient when he stopped him as he tried to leave the ED. He states that he hit his back on the door and then landed on his back on the ground, denies hitting head, no LOC" (Claimant's Exhibit 7, p. 151). As a result of this assault, the Claimant sustained injuries to his low back, right shoulder and left hip/pelvic. The Claimant did not complain of any right knee pain or injury at the outset of the claim.

2. The Claimant conceded in testimony that he did not report or experience any right knee pain until approximately November 2015, at which point he reported the pain to Dr. Gellrick, his authorized treating physician. He also conceded that had he experienced right knee pain at any point, he would have reported that pain to his doctors (Hrg. Tr. p. 23, ll. 9-18; p. 32, ll. 18-22; Respondents' Exhibit C, p. 71).

3. The medical records corroborate that no right knee pain or injury was reported by the Claimant to his treating physicians prior to November 2015:

- The Claimant specifically denied extremity pain or injury, had full extremity range of motion, and no contusions when he presented to the Swedish emergency room immediately after the incident (Respondents' Exhibit J, p. 151).
- The Claimant had normal gait and stance and good range of motion in his knees on December 12, 2014 (Respondents' Exhibit I, p. 147).
- The Claimant reported bilateral lumbopelvic pain with radiculopathy and no knee complaints to Dr. Roth on January 23, 2015 (Respondents' Exhibit G).
- Dr. Gellrick's initial evaluation on February 7, 2015 noted symptoms of low back pain, right lateral pelvis and hip pain, and right shoulder pain, with no mention of knee pain (Respondents' Exhibit C, p. 96).

- On May 22, 2015, Shawn Karns, MPA, PA-C performed a physical examination and noted that the Claimant's knees had "good range of motion with no significant discomfort" (Respondents' Exhibit D, p. 103).
- The Claimant omitted any knee pain or symptoms in a medical history form completed on July 2, 2015 (Respondents' Exh E).
- On October 21, 2015, the last appointment with Dr. Gellrick before the right knee pain was noted, the Claimant reported low back and hip pain, but no right knee pain or complaints and had normal reflexes in his lower extremities (Respondents' Exhibit C, p. 73).

4. At his November 19, 2015 appointment with Dr. Gellrick, nearly a year after the admitted injury, the Claimant reported right knee pain and instability. This is the first mention of right knee pain during the course of the Claimant's treatment for his work related injuries to his back, pelvic, right shoulder and hip (Respondents' Exhibit C, p. 71).

5. Dr. Gellrick documented in her November 19, 2015 report that the Claimant "recollects his mechanism of injury and tells me he was thrown back and landed on his back sacral region and then landed on both his knees but it is the right knee that is worrying him now; had old surgery." This is the first and only mention of an acute right knee injury sustained on December 10, 2014 (Respondents' Exhibit C, p. 71).

6. Dr. Gellrick's November 19, 2015 report is inconsistent with her initial treatment record of the Claimant. On February 7, 2015, just two months after the incident, she recorded that the Claimant hit his back on a door and then landed on his back on the floor. She also noted that the assailant, after throwing the Claimant on his back on the floor, got on top of the Claimant and was choking him. There is no mention of the Claimant flipping onto his knees or sustaining a right knee contusion (Respondents' Exhibit C, p. 95).

7. Dr. Gellrick's November 19, 2015 report is also inconsistent with the mechanism of injury explained by the Claimant to his initial treaters:

- The Claimant told Swedish emergency room personnel on the date of injury that "he hit his back on the door and then landed on his back on the ground" (Respondents' Exhibit J, p. 149).
- In the December 12, 2014 Colorado Urgent Care Physicians report, the Claimant explained to Dr. Siefer that he was picked up by the waist and thrown to the ground and then the patient got on top of him and put him in a choke hold (Respondents' Exhibit I, p. 146).
- On December 22, 2014, the Claimant reported to chiropractor, Dr. Michael Vernay, that a hallucinating patient slammed him against a door multiple times and he fell backwards onto the floor where the Claimant placed the patient in a head lock until the police arrived (Respondents' Exhibit H, pp. 138-139).

8. Timothy O'Brien, M.D. performed an independent medical evaluation on behalf of Respondents. On March 28, 2016, Dr. O'Brien evaluated the Claimant's various versions of the mechanism of injury (including the history taken during the IME exam) and opined that "there was no way he could have landed on his buttocks with a patient who was admittedly larger than him, and then somehow land on his knees.... a person cannot fall on his buttocks and then somehow bounce off his buttocks and onto his knees with a patient on top of him" (Respondents' Exhibit A, p. 36).

9. In addition to basing her initial causation opinion on the Claimant's revised mechanism of injury, Dr. Gellrick also noted in her November 19, 2015 report that the Claimant suddenly remembered that his right knee was initially contused by the December 10, 2014 incident (Respondents' Exhibit C, p. 72).

10. However, the initial emergency room record does not document any contusions. Specifically, the record documents that the Claimant's skin was "normal to inspection" Respondents' Exhibit J, p. 151).

11. At the hearing, Dr. O'Brien was accepted as an expert in orthopedic surgery and Level II accredited at the Division of Workers' Compensation. Dr. O'Brien testified that the Claimant was "very thoroughly evaluated in the emergency room...and an excellent history was taken and they went through a checklist and the exam was very thorough." He explained that that initial evaluation was not consistent with the Claimant sustaining an acute ACL tear on December 10, 2014 (Hrg. Tr. p. 44, ll. 4-7, 21-25).

12. Dr. O'Brien credibly opined that the Claimant did not sustain an acute right knee injury on December 10, 2014 based on his review of the medical records and the various versions of the mechanism of injury (Respondents' Exhibit A, p. 36).

13. The ALJ finds and determines that the Claimant did not sustain an acute injury to his right knee on December 10, 2014. In so finding, the ALJ credits the totality of the medical record and the persuasive opinions and testimony of Dr. O'Brien. The ALJ also finds persuasive that despite Dr. Gellrick's November 2015 opinion (which is contrary to the totality of the medical record), the Claimant concedes he did not sustain an acute injury to his right knee on December 10, 2014. The ALJ finds that the Claimant's revised mechanism of injury as described in Dr. Gellrick's November 19, 2015 report to be inconsistent with the totality of the medical record and therefore not credible or persuasive.

14. Prior to his admitted industrial injury, the Claimant underwent two ACL reconstructions to his right knee in approximately 2004 and 2006 (Respondents' Exhibit K, p. 169; Hrg. Tr. p. 20, ll. 1-5).

15. The Claimant testified that after these surgeries, he had no ongoing symptoms and did not need treatment for ongoing knee pain (Hrg. Tr. p. 20, ll. 7-9).

16. Despite the Claimant's testimony to the contrary, the medical records establishes that:

- The Claimant presented to Denver Health on August 12, 2010 with complaints of bilateral knee pain and a sensation that his right knee was "shorter" than his left knee. An x-ray of the right knee was performed to evaluate his condition (Respondents' Exhibit K, pp. 169-170; Respondents' Exhibit L, p. 178).

- On July 30, 2011, the Claimant returned to Denver Health complaining of right lateral knee pain. Again, an x-ray was performed to evaluate for acute trauma to the right knee. The Claimant was dispensed Vicodin for pain control (Respondents' Exhibit K, p. 168; Respondents' Exhibit L, p. 177).
- On August 1, 2011, the Claimant was evaluated at Denver Health for right knee pain following an emergency room visit for the same complaint. The Claimant was referred for a MRI to evaluate whether he had a minor strain from repetitive motion or cartilage ACL damage (Respondents' Exhibit K, p. 167).
- A MRI of the right knee was performed on August 16, 2011. That study established an undisplaced tear of the frontal horn lateral meniscus (a full thickness tear); attenuation of the tibial portion of the ACL tendon repair; and a buckled PCL which could indicate ligamentous laxity and instability (Respondents' Exhibit L, p. 174).

17. Dr. O'Brien testified that the August 16, 2011 MRI demonstrated evidence of a failed ACL graft. He explained that as of 2011, the right ACL was attenuated, or torn, which is evidence the graft had failed after the second reconstruction surgery. He testified that he would expect that a physical examination performed contemporaneous with this 2011 MRI would establish right knee joint instability (Hrg. Tr. p. 63, ll. 4-8).

18. Dr. O'Brien testified that the 2011 MRI was "essentially" the same as the post-injury MRI of the right knee performed in December 2015. He testified that the 2015 MRI did not show any acute injury (Hrg. Tr. pp. 49-50; p. 52, ll. 10-17; Respondents' Exhibit L, pp. 171, 174).

19. Dr. O'Brien further testified that the Claimant's right knee condition continued to naturally deteriorate after the two failed ACL reconstructions. Specifically, he testified that the prior graft performed in 2006 failed due to "attrition over time" because either (a) the graft was misplaced at the time of revision procedure in 2006 or (b) the revision procedure required that the graft be placed in a less than ideal location due to the prior procedure (Hrg. Tr. p. 65, ll. 7-14).

20. While the Claimant testified that he was able to ride his bike without knee pain prior to December 10, 2014, Dr. O'Brien testified that that ability did not surprise him. Specifically, Dr. O'Brien testified that biking is a tool that orthopedists have individuals with an ACL insufficient knee perform to rehabilitate their knee as it is one activity that should not cause knee instability (Hrg. Tr. p. 55, ll. 2-13).

21. The ALJ finds and determines that the totality of the medical record establishes that the Claimant had a failed right ACL graft prior to the industrial injury that was structurally similar in pre-injury and post-injury diagnostic imaging.

22. The Claimant underwent left hip surgery performed by Dr. Brian White on June 29, 2015. The Claimant was on crutches for three and one-half months and non-

weight bearing for his left leg for one month with gradual progression of weight on the left leg. The Claimant testified that after the surgery and using the right leg to walk for three and one-half months, his right hip and right knee started to hurt (Hrg. Tr. p. 23, ll. 22-25; p. 24. ll, 1-2).

23. The Claimant also testified that after the left hip surgery, he was required to squat with his right leg during rehabilitation and his right knee began to hurt and then felt loose. (Hrg. Tr. p. 25, ll. 19-25; p. 26, l. 1).

24. On November 19, 2015, the Claimant report to Dr. Gellrick that he was experiencing right knee pain with physical therapy and "having trouble doing deep knee squats" as well as instability. Dr. Gellrick referred the Claimant to an orthopedic surgeon (Respondents' Exhibit C)

25. Dr. David Schneider performed an orthopedic evaluation of the Claimant's right knee on December 7, 2015. He noted that the Claimant's right knee became painful during rehabilitation following the hip surgery and especially while doing squat exercises. He recorded that the Claimant "has a feeling of clicking and mechanical instability." Dr. Schneider ordered a MRI (Respondents' Exhibit B, p. 45)

26. On March 30, 2016, Dr. Schneider opined that the Claimant had an incompetent ACL and recommended ACL reconstruction. Dr. Schneider did not opine on the cause of the Claimant's right knee condition and need for surgery (Respondents' Exhibit B, p. 40)

27. Dr. O'Brien testified that the Claimant's use of crutches after the left hip surgery and a temporary limp favoring the left leg would not have caused the Claimant's right knee pain and symptoms. Specifically, Dr. O'Brien testified that individuals who were recovering from surgery (like the Claimant) are globally less active and are almost sedentary. Dr. O'Brien testified that Claimant conceded a less active history after his left hip surgery during the IME exam. As a result, Dr. O'Brien testified that the Claimant could not have created an "over-use" environment that would generate enough energy to cause Claimant's right ACL to fail (Hrg. Tr. p. 40-41; Respondents' Exhibit A, p. 36). Dr. O'Brien's opinions are credible and persuasive.

28. Dr. O'Brien also credibly and persuasively testified that, in his experience of performing thousands of hip and knee surgeries, there was a lack of empirical evidence for the Claimant's suggestion that his crutch use or non-weight bearing status could have caused his right knee pain. Specifically, Dr. O'Brien noted that, after performing nearly 3000 knee surgeries and 1500 hip surgeries, he had "never once seen an individual develop contralateral lower extremity pain or tissue breakage or yielding as they were recovering from the surgery on the contralateral side" (Hrg. Tr. p. 41, ll. 7-25; Respondents' Exhibit A, p. 36).

29. With regard to the Claimant's attribution of knee pain to his post-surgery physical therapy and the squat exercises that he performed, Dr. O'Brien credibly and persuasively testified that an individual cannot tear an ACL squatting as the ACL is one of the strongest ligaments in the body (Hrg. Tr. p. 42, ll. 10-17).

30. Dr. O'Brien further credibly and persuasively testified that even where the ACL was attenuated prior to the Claimant's onset of pain (as documented in the 2011

MRI), the acts of squatting or using crutches would not cause the already failed ACL to further deconstruct or aggravated the underlying condition (Hrg. Tr. p. 65, ll. 2-7).

31. Dr. O'Brien credibly testified that prior to the admitted injury, the Claimant had an ACL insufficiency in his right knee for a long period of time (Hrg. Tr. p. 66, ll. 13-14).

32. Dr. O'Brien credibly and persuasively testified that the December 10, 2014 incident neither caused a new acute knee condition nor accelerated or aggravated a pre-existing knee condition (Hrg. Tr. p. 53-54).

33. Dr. O'Brien further credibly and persuasively testified that no treatment rendered as part of the work injury caused a new acute knee condition or accelerated/aggravated a pre-existing knee condition (Hrg. Tr. p. 54-55).

34. The ALJ finds that the Claimant's explanations of potential causes for his right knee pain are not credible or persuasive. In so finding, the ALJ credits the totality of the medical records and the testimony of Dr. O'Brien. The ALJ finds that the mere onset of pain after the Claimant's injury does not causally link the onset of that pain to the Claimant's date of injury or treatment thereof.

35. The ALJ finds that the incident of December 10, 2014 did not cause, aggravate, accelerate, or contribute to the Claimant's pre-existing failed right ACL. The ALJ also finds that no treatment rendered as part of the December 10, 2014 injury caused, aggravated, accelerated, or contributed to the Claimant's pre-existing failed right ACL. In so finding, the ALJ finds the opinions and testimony of Dr. O'Brien to be more persuasive and credible than the opinions expressed in the records of Dr. Gellrick.

36. Dr. O'Brien credibly and persuasively testified that the proposed procedure was directed at a pre-existing condition of the Claimant's right knee that was unrelated to the December 10, 2014 incident. Specifically, he testified that the reconstruction procedure was aimed at correcting a failed graft that was known to have failed as early as 2011 as evidenced in the 2011 MRI (Hrg. Tr. p. 53, ll. 24-25; p. 54, ll. 1-3, 23-25).

37. The ALJ finds and determines that the Claimant has not proven, by a preponderance of the evidence, that the need for the right ACL reconstruction surgery as proposed by Dr. Schneider was causally related to either the December 10, 2014 injury or any subsequent treatment. In so finding, the ALJ finds the testimony and opinions of Dr. O'Brien to be more persuasive and credible than the opinions of Dr. Gellrick.

CONCLUSIONS OF LAW

Generally

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

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

Medical Benefits – Related and Reasonably Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Here, the Claimant conceded that he did not experience any right knee pain or symptoms at the time of the December 10, 2014 work related altercation at Swedish Hospital. The Claimant conceded that he did not report any right knee pain or symptoms to his medical providers until November 19, 2015 when he saw Dr. Gellrick. The mechanism of injury stated in Dr. Gellrick's November 19, 2015 report is inconsistent with her initial treatment records. Dr. Gellrick initially documented that at the time of the altercation, the Claimant hit his back on a door and then landed on his back on the floor. This description of the incident significantly changed in her November 19, 2015 report wherein she documented that the Claimant was thrown back and landed on his back sacral region and then flipped onto his knees. This later description is inconsistent with the mechanism of injury explained by the Claimant to his other treaters including the Swedish Hospital emergency room personnel immediately after the incident. Therefore, Dr. Gellrick's opinion that the Claimant sustained a right knee injury as a result of the altercation was found not credible and persuasive.

Dr. O'Brien opined that there was no way the Claimant could have landed on his buttocks with a patient on top of him and then somehow flipped over onto his knees. Dr. O'Brien also testified that the Claimant had been thoroughly evaluated in the emergency room and there was no documentation of an acute ACL tear. Dr. O'Brien further opined that the Claimant did not sustain an acute right knee injury on December 10, 2014 based on his review of the medical records. His opinions were found credible and persuasive. Therefore, the Claimant failed to prove by a preponderance of the evidence that he sustained a right knee injury as a result of the altercation on December 10, 2014.

The Claimant also failed to prove by a preponderance of the evidence that he sustained a right knee injury as a result of the medical treatment he received following the December 10, 2014 work incident or that the work altercation or treatment thereof aggravated, accelerated, or contributed to his pre-existing condition. Dr. O'Brien testified that the Claimant's use of crutches after the left hip surgery and a temporary limp favoring the left leg would not have caused the Claimant's right knee pain and symptoms. He explained that the Claimant could not have created an overuse environment that would generate enough energy to cause the Claimant's right ACL to fail. Dr. O'Brien further testified that the Claimant did not tear an ACL squatting during physical therapy as the ACL is one of the strongest ligaments in the body. Dr. O'Brien opined that neither the December 10, 2014 incident nor the treatment afterwards caused a new acute knee condition or accelerated, aggravated, or contributed to the Claimant's current knee condition. Dr. O'Brien's opinions were found credible and persuasive. The Claimant underwent two ACL reconstructions to his right knee in 2004 and 2006. The August 16, 2011 MRI demonstrated evidence of a failed ACL graft. The December 2015 MRI was essentially the same as the 2011 MRI and the 2015 MRI did not show any acute injury. It is more likely than not that the Claimant's preexisting failed right ACL graft continued to naturally deteriorate resulting in his current condition and need for surgery.

The proposed right knee surgery recommended by Dr. Schneider is treatment for a pre-existing condition unrelated to the Claimant's December 10, 2014 industrial incident. The Claimant's work injury did not cause, combine with, or aggravate the Claimant's pre-existing right knee condition, nor did it accelerate the need for the surgical treatment proposed. As a result, the Claimant's request for medical benefits consisting of a right ACL reconstruction surgery is denied.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is therefore ordered that:

1. The Claimant's request for medical benefits consisting of a right ACL reconstruction surgery is denied and dismissed.

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

DATED: October 17, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-625-241-06

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 28, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 9/28/16, Courtroom 3, beginning at 1:30 PM, and ending at 3:00 PM).

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

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was filed, electronically, on October 5, 2016. On October 6, 2016, counsel for the Claimant indicated that the Claimant did not take issue with the proposed decision. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns a medical benefit, *i.e.,* the reasonable necessity of prescribed Tramadol as post-maximum medical improvement (MMI) maintenance benefits (post-MMI *Grover* medicals).

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant is a 36-year-old man with a September 25, 1980, date of birth.

2. The Claimant injured his low back in an admitted May 10, 2004, accident in the course and scope of his employment with the Employer.

3. A Division Independent Medical Examiner (DIME), Ray Jenkins, M.D., originally placed the claimant at MMI on August 15, 2007. Dr. Jenkins assigned a 16 % whole person physical impairment as a result of the Claimant's May 10, 2004, industrial injury. In a Final Admission of liability (FAL), dated February 6, 2007, the Respondents admitted liability consistent with Dr. Jenkins' opinions on MMI and medical impairment.

4. The Claimant's claim was subsequently reopened based on his worsened condition. On January 19, 2010, the Claimant underwent a disc replacement surgery, performed by John Beard, M.D., for treatment of his work injuries.

5. Following the January 19, 2010, surgery, authorized treating physician (ATP), Gregory Reichhardt, M.D., placed the Claimant at MMI on February 14, 2011. Dr. Reichhardt assigned a 16 % whole person permanent physical impairment, resulting from the May 10, 2004, accident. Dr. Reichhardt imposed permanent physical restrictions of no lifting in excess of 50 pounds, with no other restrictions indicated. In his February 14, 2011, report of MMI and impairment, Dr. Reichhardt stated the opinion, "I recommend the availability of four follow-up visits with a physician, four follow-up visits with a therapist, coverage of medications and any necessary laboratory tests to monitor for side effects of medications. I would recommend the above be available on an as-needed basis over each of the next five years". On the date of MMI, the Claimant was taking Tramadol 50 mg. six times per day. The Respondents filed a March 23,

2011, FAL, admitting liability consistent with Dr. Reichhardt's opinions on MMI, impairment and medical treatment, post-MMI.

DIME by John Douthit, M.D.

6. The Claimant objected to the March 23, 2011, FAL and requested a DIME. DIME, Dr. Douthit, agreed with Dr. Reichhardt's MMI date of February 14, 2011. Dr. Douthit, however, assigned a 17 % whole person permanent physical impairment as a result of the May 10, 2004, accident. The Respondent filed a January 24, 2012, FAL, consistent with Dr. Reichhardt's opinion on medical treatment post-MMI and Dr. Douthit's opinions on MMI and impairment.

The Tramadol Prescription

7. After reaching MMI on February 14, 2011, the Claimant continued treatment with Dr. Reichhardt. On March 28, 2012, the Claimant reported taking six Tramadol tablets per day, but requested a prescription for eight tablets per day. Dr. Reichhardt prescribed Tramadol, 50 mg., two tablets four times per day, as needed. Dr. Reichhardt, however, also discussed the importance of minimizing the Claimant's medication usage at the lowest possible dose

8. Dr. Reichhardt last evaluated the Claimant on October 13, 2015. At that follow-up, the Claimant reported working 60 to 70 hours per week, as well as helping to care for his twin infant children.

9. Since Dr. Reichhardt's October 13, 2015, evaluation, the Claimant moved to Bullhead City, Arizona. Dr. Reichhardt expressed an unwillingness to prescribe Tramadol, a Schedule I narcotic, across state lines. As a result, the Claimant sought treatment from Khatib Family Practice. Respondents contest the authorization of Dr. Khatib and his referrals, Dr. Tang for example, within the workers' compensation system. Nadim B. Khatib, M.D., first evaluated the Claimant on June 29, 2016. Dr. Khatib's June 29, 2016, treatment note indicates that the Claimant is working as a data analyst with the Aquarius Casino. Dr. Khatib documented the Claimant's history of a January 20, 2010, arthroplasty and chronic pain medications, including Tramadol 50 mg., two tablets four times a day. Dr. Khatib provided a 30-day refill of the Claimant's Tramadol prescription. He also diagnosed obesity and recommended a lower calorie diet, regular exercise, as well as dietary management education, guidance and counseling.

10. Dr. Khatib reevaluated the Claimant on July 26, 2016. The Tramadol prescription was again refilled for a 30-day supply, 50 mg., two tablets orally, every six hours. Dr. Khatib again recommended a lower calorie diet, regular exercise, as well as dietary management education, guidance and counseling.

11. On August 22, 2016, the Claimant was evaluated by Nianjun Tang, M.D. Dr. Tang's August 22, 2016, treatment note reflects the Claimant's "current medications" to be Tramadol 50 mg., one tablet by mouth twice a day as needed for pain and Tramadol 50 mg. one tablet by mouth four times a day as directed. Dr. Tang's August 22, 2016, treatment note reflects a prescription was written for 60 Tramadol, 50 mg., "one tablet by mouth twice a day as needed for pain". Dr. Tang also instructed the Claimant to increase his physical activity, as to "deal more effectively with a chronic pain condition, [the patient] has to take responsibility for daily exercises, within abilities".

12. Neither Dr. Khatib's nor Dr. Tang's treatment notes reflect that the Claimant signed an "Opioid Contract" detailing the side effects anticipated from the medication, the Claimant's requirement to continue active therapy, the Claimant's need to achieve functional goals, and the reasons for termination of opioid management, referral to addiction treatment, or tapering of medications.

13. The Respondents dispute Dr. Khatib and Dr. Tang's status as ATPs. The issue of authorization was not endorsed for hearing and shall be reserved for future determination.

Independent Medical Examination (IME)/Medical Records Review by Timothy O'Brien, M.D.

14. On April 4, 2016, Dr. O'Brien performed a review of the medical records relating to the Claimant's May 10, 2004, industrial injury. Dr. O'Brien disagreed with the ongoing prescription of Tramadol to treat the Claimant's chronic pain. Dr. O'Brien was of the opinion that "Tramadol contains an opiate. All opiates are addictive. Addiction to an opiate can lead to overdosing and death." Dr. O'Brien further was of the opinion that, if the Claimant "needs medication to treat his chronic pain, he needs to be directed to an over-the-counter anti-inflammatory, which he should use on an as needed basis. If his primary care physician wants to monitor [the claimant's] kidney function while he is using over-the-counter anti-inflammatories on a chronic basis, I would advise this."

15. Dr. O'Brien testified at hearing as a Level II accredited physician with expertise in the field of orthopedics and orthopedic surgery. Dr. O'Brien further explained that chronic use of Tramadol has toxic effects on the liver and kidneys. Dr. O'Brien credibly testified that while the Claimant is tolerant and dependent on Tramadol from his many years of usage, he is not currently exhibiting any addictive behaviors. Dr. O'Brien further testified that Dr. Tang's August 22, 2016, treatment note appears to reflect a "weaning dose" of Tramadol. Dr. O'Brien stated the opinion that the Claimant should be weaned off of Tramadol and utilize over-the-counter anti-inflammatories, lose weight and exercise in treatment of his chronic pain. Dr. O'Brien explained that discontinuing Tramadol, weight loss and aerobic exercise would be beneficial to the Claimant and, after weaning, effectively treat the Claimant's chronic pain.

16. Dr. O'Brien outlined a schedule for weaning the Claimant off of Tramadol over a three-month period. Because Dr. O'Brien only reviewed medical records, the ALJ is not persuaded by his testimony regarding the schedule for weaning the Claimant off Tramadol. The ALJ finds the prescribing physician, Dr. Tang, who is actually treating the Claimant at present, is in a better position to outline a schedule for weaning the Claimant off of Tramadol.

Ultimate Findings

17. The ALJ finds Dr. O'Brien's testimony as articulate, thorough, credible and more persuasive than all other medical opinions contained in the evidence.

18. Between apparently conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. O'Brien and to reject all medical opinions to the contrary, with the exception of a weaning off Tramadol schedule, which is yet to be done.

19. The ALJ finds that the Claimant failed to prove, by a preponderance of the evidence that the continued prescription of Tramadol is reasonably necessary medical treatment to maintain his condition at MMI, however, a weaning off Tramadol period is reasonably necessary, and should best be done by the Claimant's present primary care physician, Dr. Tang.[1]

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The

[1] Dr. Tang has not been authorized by the Respondents.

same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995 As found, Dr. O'Brien's testimony was articulate, thorough, credible and more persuasive than all other medical opinions contained in the evidence.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between apparently conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. O'Brien and to reject all medical opinions to the contrary, with the exception of a weaning off Tramadol schedule. As further found, the ALJ does not accept Dr. O'Brien's suggested three-month weaning of period. Moreover, as found, the present primary care physician, Dr. Tang, although not authorized by the Respondents, is in the best position to wean the Claimant off Tramadol.

Respondents' Challenge to Post-MMI Medical Benefits

c. Where respondents file an FAL, admitting for post-MMI medical maintenance medical benefits pursuant to *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988), respondents are not precluded from later contesting the causal relatedness or reasonable necessity for a particular treatment. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Moreover, when respondents contest liability for a particular medical benefit, the claimant must prove, by a preponderance of the evidence, that such contested treatment is reasonably necessary to treat the industrial injury and is causally related to that injury. *See Grover v. Indus. Comm'n, supra; Snyder v. Indus. Claim Appeals Office, supra*. As found, the Claimant failed to prove that the continued prescription of Tramadol is **reasonably necessary,** however, a reasonable weaning off period is necessary, as appropriate in the medical judgment of the Claimant's present primary care doctor, Dr. Tang.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits, including entitlement to post-MMI medical maintenance benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to prove that an indefinite prescription of Tramadol is reasonably necessary to cure and relieve the effects of his May 12, 2004 industrial injury, however, it has been established that a reasonable weaning off period, in the medical judgment of the Claimant's present primary care physician, Dr. Tang, is warranted.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Nianjun Tang, M.D., shall, within 20 days of the mailing of this decision, provide Claimant's counsel and Respondents' counsel a Pain Contract, signed by the Claimant. In addition to the information suggested by the Colorado's Medical Treatment Guidelines, Rule 17, Exhibit 9(F)(7)(g), Workers' Compensation Rules of Procedure (WCRP), the signed Pain Contract shall provide a reasonable schedule for weaning the Claimant off the medication Tramadol. The proposed weaning schedule shall start immediately following the Claimant's signature on the contract, whereby the Claimant shall be completely weaned from the medication within six (6) months.

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

DATED this______day of October 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

- Whether claimant has shown by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits from April 4, 2016 and ongoing.

- If claimant has proven entitlement to TTD, whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to his termination of employment.

- If respondents have proven that claimant was responsible for his termination of employment, whether claimant has shown by a preponderance of the evidence that he sustained a worsening of his condition that would establish a reinstatement of TTD benefits.

FINDINGS OF FACT

1. Claimant began employment with the employer on April 1, 2013 as a merchandiser. On June 10, 2013, claimant was promoted to the position of warehouse operations lead. Claimant's job duties included moving cases of product in employer's beverage distribution warehouse. This involved lifting and moving product from pallets and also stacking product onto new pallets. This process can be done by hand, with the use of pallet jacks, or with a fork lift. Cases of product varied in weight from approximately 15 pounds to more than 20 pounds.

2. Claimant suffered an admitted injury to his left upper extremity on March 4, 2016. Respondents filed a General Admission of Liability in which claimant's average weekly wage ("AWW") was determined to be $803.21.

3. As indicated in the medical records, after claimant's March 4, 2016 injury, he was first seen by Dr. Jon Hamilton on March 7, 2016. Dr. Hamilton released claimant to return to work with a 15 pound lifting restriction for his left upper extremity. On March 21, 2016, Dr. Hamilton specified that in addition to the general 15 pound lifting restriction, claimant was also limited to repetitive lifting of 15 pounds and pushing/pulling of 15 pounds.

4. Claimant's supervisor, Doug Yochem, Sales Center Manager, testified that he and claimant met to discuss work tasks that would comply with claimant's work restrictions. Both claimant and Mr. Yochum testified that claimant continued to work under these restrictions at the time his employment was terminated on April 4, 2016.

5. As indicated by claimant's testimony and the employment records in evidence, Mr. Yochum presented claimant with an annual performance evaluation on

March 30, 2016. Claimant received a 2.33 out of a possible score of 4 on his evaluation. A score of 2 is considered "meets most requirements". In this March 30, 2016 review claimant was notified that he was expected "to improve his ability to work well with individuals to enhance professionalism through the organization" and that he "must find ways to interact in a professional manner with coworkers".

6. Mr. Yochem testified that at the conclusion of the March 30, 2016 evaluation discussion claimant was receptive to the issues addressed in the evaluation. The claimant did not demonstrate any disagreement or anger about his score at that time. Claimant's March 4, 2016 injury was not discussed at the March 30, 2016 evaluation meeting.

7. As indicated by claimant's employment records, he received a score of 2.92 on a similar evaluation on April 1, 2014. On March 6, 2015 claimant received a score of 3.1 on his annual evaluation. In that 2015 evaluation claimant was described as "pleasant and easy to work with".

8. Mr. Yochum testified that between the 2015 and 2016 evaluations, he had observed a general decline in claimant's job performance. Mr. Yochem discussed various performance related issues with the claimant five or six times between the March 2015 evaluation and the March 2016 evaluation. These performance related discussions occurred prior to claimant's March 4, 2016 injury.

9. Claimant testified that in the days following the evaluation he considered the evaluation and felt that it was unfair. When he arrived at work on April 1, 2016, claimant approached Mr. Yochem about his dissatisfaction with the evaluation.

10. Mr. Yochem testified that when claimant approached him on April 1, 2016 claimant stated: "Really. This is the lowest score I've ever gotten. This is bullshit". Mr. Yochem asked claimant what specific concerns he had. Claimant responded by stating "you gave me a shitty review" and "kept me out of the sales manager position". Also during this discussion claimant yelled at Mr. Yochem; called him "a fucking liar"; and told him he was "full of shit". Claimant did not discuss his work injury during this time. Based upon claimant's behavior Mr. Yochem informed claimant that he was suspended for the remainder of the day.

11. Mr. Yochem testified that after being told that he was suspended, claimant left Mr. Yochem's office and entered his own office. Claimant then called Byron Bultsma, Product Supply Manager. During that telephone discussion, claimant again asserted that he believed his evaluation was unfair. Mr. Bultsma agreed with Mr. Yochem that it was appropriate to suspend claimant. Ultimately claimant left the work place as instructed.

12. Claimant testified that when he initiated the discussion on April 1, 2016 he did so in a calm manner. Claimant testified that both he and Mr. Yochem became "heated" during that discussion. Claimant testified that at one point in the discussion, Mr. Yochem informed claimant "I'm the boss and you'll do whatever the fuck I tell you to

do". Claimant testified that at that time he exited Mr. Yochem's office and returned to his own office. Claimant testified that Mr. Yochem followed claimant to claimant's office. At that time claimant called Mr. Bultsman. Claimant testified that he was not suspended until after he had returned to his office and contacted Mr. Bultsman.

13. Beverly Morris, Director of Human Resources, testified at hearing that claimant's behavior toward his supervisor was a violation of employer's "work rules and standards policy". Specifically, Ms. Morris opined that that claimant failed to behave professionally.

14. Mr. Yochem and Ms. Morris testified that claimant's employment was terminated when he returned to work on Monday, April 4, 2016 because of the insubordinate behavior he demonstrated on April 1, 2016.

15. It is undisputed that prior to April 1, 2016 claimant would raise his voice at Mr. Yochem when a disagreement arose in the work place. Both Mr. Yochem and claimant describe an incident in which claimant became upset by the poor job performance of a coworker, Oz. In doing so claimant yelled and used obscenities when communicating with Mr. Yochem. Claimant admits that this was a normal way for him to communicate with Mr. Yochem.

16. As indicated by the medical records, claimant continued to see Dr. Hamilton for treatment. On April 11, 2016, Dr. Hamilton included the same lifting restrictions he had indicated on March 21, 2016; (a general 15 pound lifting restriction; repetitive lifting restricted to 15 pounds; and pushing/pulling restricted to 15 pounds).

17. As indicated by the medical records, on July 18, 2016 Dr. Hamilton changed claimant's work restrictions to "use right arm only". Dr. Hamilton indicated in his notes that claimant had described to him that his "pain had gotten worse recently". However, Dr. Hamilton found no explanation for claimant's symptoms.

18. As indicated by the medical records, respondents referred claimant for an independent medical examination ("IME") with Dr. Eric Ridings on August 6, 2016. Dr. Ridings reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with his IME. Dr. Ridings issued a medical report that summarized his findings and opined that claimant has not reached maximum medical improvement ("MMI"). Dr. Ridings also recommended a lifting restriction of 25 pounds for the left upper extremity, and no limitations for the right upper extremity up to shoulder height. Dr. Ridings further opined that claimant may push and pull up to 100 pounds bimanually.

19. Claimant testified that he continues to have the work restrictions determined by Dr. Ridings. Claimant has been seeking other employment since his job separation on April 4, 2016. However, due to his work restrictions claimant has been unable to obtain employment.

20. The ALJ credits the testimony of Mr. Yochem as to the claimant's behavior on April 1, 2016 over claimant's contradictory testimony. The ALJ finds that claimant

engaged in the behavior as described by Mr. Yochem and was suspended and ultimately discharged for that behavior. The ALJ also finds that respondents have demonstrated that it is more likely than not that claimant's employment was terminated because of a volitional act by the claimant, specifically claimant's insubordination toward his supervisor.

21. The ALJ credits the testimony of Mr. Yochem over the contradictory testimony of claimant. Claimant had previously engaged in inappropriate and unprofessional behavior in the work place. On March 30, 2016, claimant was specifically informed that he was expected to "to improve his ability to work well with individuals to enhance professionalism through the organization" and that he "must find ways to interact in a professional manner with coworkers". The claimant knew, or reasonably should have known, that his behavior two days later in which he yelled vulgarities at his direct supervisor was a failure to meet these expectations of the employer. The claimant's actions on April 1, 2016 constitute a volitional act that resulted in his termination of employment.

22. The ALJ credits claimant's testimony regarding his work restrictions; Dr. Hamilton's increased work restrictions as of July 18, 2016; and the work restrictions included in Dr. Ridings's report and finds that it is more likely than not that claimant's condition has worsened since the termination of employment on April 4, 2016. Specifically, claimant's condition had worsened as of July 18, 2016.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2015).

4. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *Id*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

5. As found, claimant has proven by a preponderance of the evidence that his injury resulted in work restrictions. In turn these work restrictions have resulted in a loss of income, as claimant is unable to find employment with his current work restrictions.

6. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases “where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury.” In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term “responsible” reintroduced into the Workers’ Compensation Act the concept of “fault” applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of “fault” as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, “fault” requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

7. As found, respondents have demonstrated by a preponderance of the evidence that claimant committed a volitional act that resulted in his termination of employment. As found, the ALJ credits the testimony of Mr. Yochem over the contradictory testimony of claimant regarding the April 1, 2016 confrontation at work that led to claimant’s termination of employment.

8. As found, claimant had previously engaged in inappropriate and unprofessional behavior in the work place. On March 30, 2016, claimant was specifically informed that he was expected to “to improve his ability to work well with individuals to enhance professionalism through the organization” and that he “must find

ways to interact in a professional manner with coworkers". The claimant knew, or reasonably should have known, that his behavior two days later in which he yelled vulgarities at his direct supervisor was a failure to meet these expectations of the employer. The claimant's actions on April 1, 2016 constitute a volitional act that resulted in his termination of employment.

9. In *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004) the Colorado Supreme Court held that in cases where it is determined that the claimant is responsible for his or her termination of employment, the statutory provisions of Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S., are not a permanent bar to receipt of temporary disability benefits. In *Anderson*, the claimant suffered a worsened condition causally related to the industrial injury as evidenced by increased work restrictions after claimant's termination of employment that prevented claimant from working. The court held in *Anderson* that because the worsened condition and not the termination of employment caused the wage loss, the claimant was entitled to temporary disability benefits. See *Anderson, supra.*

10. As found, claimant has established by a preponderance of the evidence that he sustained a worsening of his condition that has resulted in wage loss. As found, the claimant had the same work restrictions shortly after his job separation when he saw Dr. Hamilton on April 11, 2016. Then on July 18, 2016, Dr. Hamilton noted a worsening of claimant's condition, resulting in increased work conditions. Although Dr. Ridings' changed claimant's work restrictions again after the IME, these restrictions of 25 pounds are clearly higher than the initial 15 pound work restrictions. As found, it is the worsening condition and not the April 4, 2016 job separation that has caused claimant's wage loss. Therefore, despite the claimant's volitional action that resulted in termination of his employment, he is entitled to an award of TTD benefits as of July 18, 2016.

ORDER

It is therefore ordered that:

1. Respondent shall pay claimant TTD benefits based on an AWW of $803.21 for the period of July 18, 2016 and continuing until terminated by law or statute.

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

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

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

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

DATED: October 17, 2016

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

ISSUES

➢ Whether claimant has shown by a preponderance of the evidence that that he is entitled to an award of penalties pursuant to Section 8-43-304 C.R.S. for respondent's alleged failure to timely pay temporary total disability ("TTD") benefits; alleged failure to pay for claimant's reasonable and necessary medical treatment; and alleged failure to file a bond with the Division of Workers' Compensation.

➢ Whether claimant has shown by a preponderance of the evidence that an order for payment of attorney fees is appropriate in this matter pursuant to Section 8-43-408(4) C.R.S.

ISSUE BIFIRCATED AT HEARING

On September 15, 2016 claimant submitted an Unopposed Motion to Bifurcate Issue of Piercing the Corporate Veil. The undersigned ALJ granted the motion on September 20, 2015.

FINDINGS OF FACT

1. Claimant was employed with employer in the service department as a mechanic. Claimant sustained a compensable injury to his low back on June 19, 2015. The injury occurred when claimant fell while he was carrying a fuel tank and slipped on fuel that had spilled on the floor. The fuel tank claimant was carrying landed on his chest.

2. Employer was not insured for workers' compensation injuries at the time of claimant's June 19, 2015 injury.

3. On December 15, 2015 and February 3, 2016, claimant proceeded to hearing before Administrative Law Judge Keith E. Mottram on the issues of compensability; medical benefits; temporary total disability benefits; average weekly wage; penalties pursuant to Section 8-43-408 C.R.S. for employer's failure to maintain workers' compensation insurance; and penalties pursuant to Section 8-43-103(1) C.R.S. for employer's failure to timely file a notice of injury with the Division of Workers' Compensation ("DOWC").

4. On December 15, 2015 Monty Dana, Owner of Dana Motors, appeared at hearing without legal representation. At that time, Mr. Dana requested a continuance to obtain counsel. The continuance was granted by Judge Mottram. However, on February 3, 2016, Mr. Dana again appeared at hearing without counsel and proceeded to hearing pro se.

5. On February 22, 2016, Judge Mottram issued his Findings of Fact, Conclusions of Fact and Order in which claimant's June 19, 2015 work injury was found to be compensable. In that February 22, 2016 order, employer was ordered to pay temporary total disability ("TTD") benefits to the claimant beginning June 20, 2015. Those TTD benefits were to be paid at a higher average weekly wage of $924.61 because at the time of claimant's injury, employer was uninsured. Judge Mottram ordered that employer was entitled to credit against TTD benefits in the amount of $3,678.25 for wages paid to claimant in July 2015.

6. Judge Mottram also ordered employer to pay for all reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. Judge Mottram's February 22, 2016 order specifically listed treatment provided by St. Mary's Hospital Emergency Room; St. Mary's Occupational Medicine; Dr. Ellen Price; and Grand Junction Therapies; as being reasonable medical treatment employer was to pay.

7. Pursuant to Section 8-43-203(2)(a), C.R.S. Judge Mottram ordered additional penalties of $570.00 ($285.00 to claimant and $285.00 to the subsequent injury fund) related to employer's failure to timely notify the DOWC of the injury.

8. Finally, Judge Mottram calculated the value of employer's liability as of the February 22, 2016 order and ordered employer, in lieu of payments to claimant, to file a bond or deposit the sum of $41,000.00 with the DOWC.

9. On March 2, 2016, Sue Sobolik, Trustee for the Division of Workers' Compensation Special Funds Unit, sent a letter to employer providing notice of nonpayment of any ordered amounts including failure to make a trust deposit or file a bond as ordered by Judge Mottram. Ms. Sobolik advised employer that if payments were not made additional penalties could be assessed pursuant to Section 8-43-408(3), C.R.S.

10. On March 30, 2016, claimant applied for hearing endorsing the issue of penalties against employer.

11. Notice of the September 20, 2016 hearing was sent to the parties on July 14, 2016 by the Office of Administrative Courts ("OAC"). These notices were sent to the email addresses found in the records of the OAC. The email address used for employer was martydana67@gmail.com. Thereafter, claimant submitted a Case Information Sheet ("CIS") on September 12, 2016 to the OAC and sent copies to employer's email address of martydana67@gmail.com and employer's physical address of Dana Motors, Inc., 2586 Highway 6 & 50, Grand Junction, Colorado 81501.

12. As indicated by the records, the parties have participated in three (3) pre-hearing conferences with the DOWC. These pre-hearing conferences were held on May 5, 2016; July 7, 2016; and August 4, 2016; and employer participated in each one. Employer was provided notices and subsequent orders at the same email address of martydana67@gmail.com for these pre-hearing matters. Therefore, the ALJ finds that

the email address used by OAC to notify employer of the September 20, 2016 hearing was appropriate and likely to have been received by employer.

13. Employer did not appear at the September 20, 2016 hearing before the undersigned ALJ. At the time of hearing, the ALJ waited 20 minutes before the commencement of the hearing to allow employer time to appear. At that time, the ALJ considered the factors listed in OACRP 23. As of the date of this order, employer has not filed a motion or otherwise contacted this court.

14. At the current hearing, claimant testified that since the issuance of Judge Mottram's February 22, 2016 order he has not received any payments of TTD benefits payments from employer.

15. Claimant testified that all medical bills related to his work injury remain unpaid. Claimant estimates that the total amount owed to these medical providers is $15,000.00. As of the date of the hearing, St. Mary's Hospital has attempted to collect $3,297.35 directly from claimant for treatment he received related to his work injury. In addition, claimant's medical providers have refused claimant additional treatment because of the unpaid bills. Respondent's failure to make payments on claimant's medical bills is negatively impacting claimant's credit.

16. Claimant testified that it is his understanding that no payments have been made by respondent to any of the medical providers. Nor has the respondent contacted the medical providers regarding payment.

17. Employer failed to appear at the hearing in this matter. As a result, there is no persuasive evidence on the record to demonstrate any mitigating circumstances that would have resulted in respondent's failure to comply with Judge Mottram's order. Nor has the employer provided any explanation that his failure to comply is reasonable.

18. The ALJ relies upon claimant's testimony and the exhibits entered into evidence and finds that it is more likely than not that employer has failed to comply with Judge Mottram's February 22, 2016 order.

19. Claimant has requested an order of attorney fees pursuant to Section 8-43-408(4), C.R.S. Claimant asserts that he has incurred legal fees in response to employer's failure to comply with Judge Mottram's February 22, 2016 order. The ALJ has reviewed Mr. Mueller's "Affidavit of Time Spent on Dustyn Laude v. Dana Motors, Inc. Hearing and Litigation" (Exhibit 14) which shows a total of 30 hours.

20. In consideration of what constitutes "reasonable attorney fees" the ALJ finds that time spent from employer's initial non-compliance through the present hearing is "reasonable". Therefore, the 7.5 hours indicated in the affidavit as "Hearing & Post-hearing position statement" is reduced from 7.5 hours to 1.5 hours to remove time spent preparing the post-hearing position statement. The ALJ further reduces the amount of "Additional legal research" from 2.5 hours to 0.5. Therefore, a total of 22 hours is deemed to be reasonable.

21. The affidavit presented by Mr. Mueller does not provide the ALJ with an hourly rate to apply in this matter. Absent a specific hourly rate, the ALJ determines that it is within her discretion to ascertain an appropriate hourly rate. Therefore, the ALJ finds that $175.00 is a reasonable hourly rate for Mr. Mueller's time. Therefore, the reasonable attorney fees in this matter of 22 hours at $175.00 per hour totals $3,850.00.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

3. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides, in relevant part, that any employer or insurer:

> "who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel…, or fails, neglects, or refuses to obey any lawful order…, shall be subject to … a fine of not more than one thousand dollars per day for each such offense."

This provision has been construed as applying to violation of an order issued by an ALJ. *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001).

4. Before penalties may be assessed the ALJ must first determine whether a party has violated any provision of the Workers' Compensation Act or an order. If the ALJ finds such a violation, penalties may be imposed if it is also found that the

employer's actions were objectively unreasonable. Section 8-43-304, C.R.S*.* *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jimenez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The "objective standard" is measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

5. An order is defined as including "any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge." *See* Section 8-40-201(15), C.R.S. The fine shall be apportioned in whole or part at the discretion of the director or administrative law judge between the aggrieved party and the workers' compensation cash fund created in Section 8-44-112, C.R.S. with the amount apportioned to the aggrieved party being a minimum of fifty percent of any penalty assessed. *See* Section 8-43-304, C.R.S. In addition, Section 8-43-305 C.R.S. provides that each day a party engages in the violation is construed as a separate offense.

6. In this case, the Claimant seeks penalties for three reasons: 1) employer's failure to pay TTD benefits; 2) employer's failure to pay for claimant's medical treatment; and 3) employer's failure to post a bond with the Division of Workers' Compensation.

7. As found, claimant has demonstrated by a preponderance of the evidence that employer has failed to comply with Judge Mottram's February 22, 2016 order. There is no persuasive evidence on the record to demonstrate any mitigating circumstances that would indicate a reasonable cause for respondent's failure to comply. As found, employer's failure to comply with Judge Mottram's order is not reasonable. Therefore, Section 8-43-304 C.R.S. is applicable.

8. Pursuant to Section 8-43-301(2), C.R.S, an ALJ's order becomes final 20 days after it is mailed to the parties, if a petition to review is not filed by the parties. Additionally, Section 8-43-401(2)(a), C.R.S. provides that "in cases where there have been no appeals, all insurers and self-insured employers shall pay benefits within thirty days after any benefits are due".

9. Pursuant to Section 8-43-301(2), C.R.S., Judge Mottram's February 22, 2016 order became final 20 days after it was issued. However, applying Section 8-43-401(2)(a), C.R.S., respondent had 30 days from the date of the order to pay benefits as ordered. Therefore, any penalties begin on the 31st day. In this matter, 31 days from February 22, 2016 is March 24, 2016.

10. As found, Sections 8-43-304 and 8-43-305 C.R.S. are applicable in this matter. Therefore, employer shall be assessed penalties in the amount of $1,000.00 per day beginning on March 24, 2016 through and including the date of hearing of September 20, 2016. This is a total of 180 days, resulting in penalties totaling $180,000.00. These penalties shall be apportioned 60% to claimant and 40% to the subsequent injury fund.

11. Section 8-43-408, C.R.S. addresses employers who, at the time of the injury, are uninsured. Additionally, Section 8-43-408(4) C.R.S. specifically provides that:

> "[a]ny employer who fails to comply with a lawful order or judgment issued to pursuant to subsection (2) or (3) or this section is liable to the employee . . . in addition to the amount in the order or judgment, for an amount equal to fifty percent of such order or judgment or one thousand dollars, whichever is greater, plus reasonable attorney fees incurred after entry of a judgment or order."

12. As found, employer was uninsured at the time of claimant's injury. Employer failed to comply with a lawful order in this matter. Therefore, claimant has shown by a preponderance of the evidence that an award of attorney fees is appropriate. As found, 22 hours of reasonable attorney fees, at an hourly rate of $175.00, have been incurred by claimant after entry of Judge Mottram's February 22, 2016 order. Therefore, attorney fees in the amount of $3,850.00 are awarded to claimant.

ORDER

It is therefore ordered that:

1. Employer shall be liable to claimant for 180 days of penalties at the rate of $1,000.00 per day, totaling $180,000.00. Sixty percent (or $108,000.00) shall be paid to claimant and forty percent (or $72,000.00) shall be paid to the subsequent injury fund.

2. Employer shall pay the Director of the Division of Workers' Compensation on behalf of the Workers' Compensation Cash Fund as follows: employer shall issue any check payable to "Cash Fund" and shall mail the check to: Brenda Carrillo, SIF Penalty Coordinator, Revenue Assessment Officer, DOWC Special Funds Unit, P.O. Box 300009, Denver, Colorado 80203-0009.

3. Employer shall pay attorney fees of $3,850.00, pursuant to Section 8-43-408(4) C.R.S.

4. Employer continues to be responsible for filing a bond in the original amount of $41,000.00 with the Division of Worker's Compensation as ordered by Judge Mottram

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

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

7. In lieu of payment of the above compensation and benefits to the claimant, the Respondent-Employer shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $224,850.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; OR

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $224,850.00 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Respondent-Employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

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

DATED: October 17, 2016

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she suffered a compensable injury on February 17, 2016, arising out of an in the course and scope of her employment with employer.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received from Dr. Krebs and his referrals were reasonable and necessary to cure and relieve claimant from the effects of the work injury.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment provided by Dr. Krebs and his referrals was authorized medical treatment.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability (“TTD”) benefits.

STIPULATIONS

At hearing, the parties stipulated that if claimant’s claim is found to be compensable her average weekly wage (“AWW”) is $785.50.

FINDINGS OF FACT

1. Claimant began her employment with employer on January 10, 2010 as a licensed practical nurse (“LPN”). Claimant’s job duties included passing medications to patients, providing medical treatments, and other resident care. Claimant’s normal work schedule was Wednesday through Saturday; 2:00 p.m. to 10:00 p.m.

2. As indicated by claimant’s testimony and the medical records, she has been diagnosed with Parkinson’s disease. Claimant testified that her Parkinson’s related symptoms do not impact her ability to perform her job tasks.

3. Claimant underwent total hip replacement surgery for her left hip on March 25, 2015. Thereafter, claimant pursued physical therapy and recovered from the surgery. Claimant testified that after the March 2015 surgery she returned to work in late summer 2015. On December 15, 2015 claimant reported to Dr. Christopher Copeland that she had mild and dull pain in her left hip. On that date, Dr. Copeland administered a cortisone injection. Related to her left hip pain, claimant also pursued some physical therapy treatment in December 2015.

4. Claimant saw Dr. Jonathan Osorio on January 21, 2016. During that visit claimant requested prescription refills for “chronic left hip pain” and also raised concerns related to her Parkinson’s symptoms.

5. Claimant testified that prior to February 17, 2016 pain in her left hip did not impact her ability to work. Claimant had no work restrictions related to her March 25, 2015 surgery or the hip pain she reported to Dr. Copeland in December 2015.

6. Claimant testified that on February 17, 2016 she was at work performing her normal duties at the Nurses’ Station. At approximately 3:30 p.m., a resident in an electric wheelchair was attempting to exit the building to the outside smoking area. Claimant attempted to assist this resident by opening the door. However, at that same moment the resident accelerated the electric wheelchair into the door. Claimant testified that this momentum caused her to fall out the door onto the concrete, landing on her face, elbows, knees, and left side.

7. Claimant testified that her coworkers, Tia Shipley and Owana Forehand observed her fall. Both Ms. Shipley and Ms. Forehand assisted claimant into a wheelchair, while other coworkers assisted in providing claimant with first aid care including icing her nose and applying dressings to the wounds on her elbows and knees.

8. Claimant’s co-worker, Tia Shipley, CNA, testified that she witnessed claimant’s February 17, 2016 fall. Ms. Shipley’s testimony regarding the fall is consistent with claimant’s testimony.

9. Claimant’s co-worker, Jessica Christensen, CNA, testified that she did not see claimant fall, but did see claimant soon after. Ms. Christensen noted that claimant appeared to be limping after the February 17, 2016 fall. Ms. Christensen also testified that when she saw claimant at work on February 18, 2016, claimant told her that she was working because there was no one available to replace her.

10. Claimant testified that after receiving the initial first aid care, she completed an incident report with Donna Treat, Business Office Director for employer. In the incident report, claimant indicated that the body parts involved were her nose, right hand, right elbow, right knee, and left knee. Claimant did not report pain in her back or hips at that time.

11. Both claimant and Ms. Treat testified that Ms. Treat informed claimant that if she wished to receive medical care employer would assist her with scheduling an appointment with a provider. Claimant did not request medical treatment at that time.

12. Lucy Frahm, an Administrator for employer, testified that at the time of claimant’s fall on February 17, 2016, employer’s former workers’ compensation provider had closed his practice. As a result, employer was unsure where to refer claimant for medical treatment. Later, employer was able to obtain a list of providers from insurer.

13. Cheryl “Cherry” Chriestenson, Director of Nursing for employer, testified at hearing that when she spoke with claimant following the incident, claimant indicated that her knees hurt but that she was “good to go” to complete her shift on February 17, 2016.

14. Claimant testified that she was in pain following the fall on February 17, 2016. However, she completed the remainder of her shift on that date because no one was available to work in her place. Claimant also testified that at the end of her shift she had pain in both knees, her left hip, both wrists, and both elbows.

15. Claimant and claimant’s spouse, Lloyd Lewis, testified that Mr. Lewis drove claimant home after her shift on February 17, 2016 because claimant was in pain. Claimant did not seek medical care after her shift. Claimant testified that she believed that she did not have permission from employer to seek medical care at that time.

16. Claimant testified that she worked on February 18, 2016, because there was no one available to cover her shift. Coverage was found for the claimant’s February 19, 2016 shift and claimant was scheduled to be off on February 20 and 21, 2016. Claimant has not worked since February 18, 2016.

17. Claimant and Ms. Treat both testified that on February 22, 2016, claimant informed Ms. Treat that she wanted to seek medical treatment related to her February 17, 2016 fall. Ms. Treat informed claimant she could see Dr. Jeffrey Krebs on February 24, 2016.

18. As demonstrated by the medical records entered into evidence, claimant began receiving treatment from Dr. Krebs on February 24, 2016. Claimant reported to Dr. Krebs that she had pain in her back, left hip, and left leg. Claimant testified that this left hip pain was different from pain she experienced leading up to her hip replacement surgery. Claimant likened her pain after February 17, 2016 as a sciatic type pain which she felt in her low back, left buttock, and left leg.

19. Dr. Krebs initially released claimant to return to modified duty as of February 24, 2016. According to his report, Dr. Krebs determined that claimant was able to work 4 hours per day, but only able to perform work while sitting. At that time, claimant’s work restrictions included no bending, squatting, or twisting. However, beginning February 29, 2016, Dr. Krebs restricted claimant to “no work”.

20. Mr. Lewis testified that prior to the February 17, 2016 fall, claimant intended to take a week-long vacation beginning on February 24, 2016. However, due to the pain claimant experienced related to her fall on February 17, 2016, the trip was cancelled.

21. Ms. Frahm testified that claimant was offered “alternate duty” that included answering phones and completing admissions charts. These offers were made to claimant on March 1, 2016 and March 8, 2016, respectively. As indicated by the medical records, as of those dates claimant was restricted from all work according to Dr. Krebs’ February 29, 2016 report.

22. As indicated by the medical records, Dr. Krebs ordered x-rays of claimant's left hip and lower lumbar spine. The x-ray of claimant's left hip was conducted on February 24, 2016. That x-ray was normal and showed that claimant's hip replacement hardware components were well seated without evidence of complication. The x-ray of claimant's lower lumbar spine was conducted on February 29, 2016 and showed no acute fracture or dislocation. Magnetic resonance imaging ("MRI") of claimant's lumbar spine was performed on March 14, 2016. The MRI showed diffuse degenerative change at the lumbar facets without evidence of focal neural impingement.

23. Respondents filed a notice of contest ("NOC") to claimant's worker's compensation claim on March 28, 2016.

24. Dr. Krebs referred claimant to Dr. Michael Hehmann as of May 12, 2016. Claimant initially saw Dr. Hehmann on June 7, 2016. At that time Dr. Hehmann performed an electromyography ("EMG") on claimant's lower left extremity. The EMG showed a chronic type of denervation at the L5-S1 myotoma, but no acute denervation.

25. Dr. Krebs also referred claimant to Dr. Ellen Price as of June 9, 2016. Claimant initially saw Dr. Price on July 5, 2016. Dr. Price recommended sacroiliac joint injection with fluoroscopy. In her report, Dr. Price suggested claimant would benefit from a sacroiliac ("SI") belt and yoga. In light of Dr. Price's recommendations, Dr. Krebs ordered yoga and a SI belt for claimant. In her July 5, 2016 written report, Dr. Price opines that claimant's Parkinson's symptoms did not cause her February 17, 2016 injury.

26. Dr. Krebs has also referred claimant for physical therapy, massage therapy, and acupuncture.

27. The ALJ finds that claimant's report of injury occurring at work on February 17, 2016 is consistent with the medical records entered into evidence. The ALJ also credits the testimony of Mr. Lewis, Ms. Shipley, and Ms. Jessica Christensen. The ALJ credits the testimony of claimant and Ms. Treat and finds that claimant reported the injury to Ms. Treat on the date the injury occurred. Claimant sought treatment from Dr. Krebs, the physician designated by employer.

28. The ALJ finds that claimant has proven that it is more likely than not that she injured her low back, left hip, and left leg in the course and scope of her employment with employer on February 17, 2016 when she fell. Although claimant had prior left hip issues, the claimant has proven that it is more likely than not that the fall on February 17, 2016 aggravated, accelerated, or combined with her prior left hip issues to necessitate treatment.

29. The ALJ credits the medical records; work restrictions set forth by Dr. Krebs beginning on February 29, 2016; and claimant's testimony at hearing; and determines that claimant has established that it is more likely than not that she is not capable of performing her regular job duties and is currently unable to return to work.

30. The ALJ recognizes employer's offers of modified employment on March 1, 2016 and March 8, 2016. However, these offers were extended to claimant after Dr. Krebs had determined claimant was unable to return to work. The ALJ finds that these offers of modified employment did not comply with the current restrictions set for claimant by Dr. Krebs, the attending physician designated by employer.

31. The ALJ credits claimant's testimony at hearing and the medical records entered into evidence and finds that claimant has proven that it is more probable than not that the treatment provided to claimant by Dr. Krebs and his referrals (including but not limited to Dr. Hehmann and Dr. Price) is reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury.

32. The ALJ credits claimant's testimony at hearing and the medical records entered into evidence and finds that claimant has proven that it is more probable than not that the treatment provided to claimant by Dr. Krebs and his referrals (including but not limited to Dr. Hehmann and Dr. Price) is authorized medical care. Specifically, the ALJ finds that employer referred claimant to Dr. Krebs on February 22, 2016. The ALJ credits the medical records and finds that Dr. Hehmann and Dr. Price were authorized by virtue of the referrals from Dr. Krebs.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2015). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical

condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As noted by the court in *City of Brighton*, the term "arising out of" refers to the origin or cause of an employee's injury. *City of Brighton,* 318 P.3d at 502, *citing Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo.2001). Specifically, the term calls for examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Id.* An injury "arises out of" employment when it has its "origin in" an employee's work-related functions and is "sufficiently related to" those functions so as to be considered part of employment. *Id*. It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of the injury. *Id. citing City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo.1985).

5. As found, claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her low back, left hip, and left leg arising out of an in the course of her employment with employer when she fell at work on February 17, 2016. As found, claimant's fall on February 17, 2016, aggravated, accelerated, or combined with her preexisting left hip condition to require treatment. The ALJ finds the medical records; claimant's testimony; and the testimony of Mr. Lewis, Ms. Shipley, and Ms. Jessica Christensen to be credible and persuasive.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

8. When the authorized treating physician refers the claimant to another health care provider, the treatment rendered by the referred provider is compensable as

part of the legal chain of authorization. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026, 1029 (Colo. App. 1993) (*citing Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985)).

9. As found, claimant has proven by a preponderance of the evidence that the treatment claimant has received and continues to receive from Dr. Krebs and Dr. Krebs' various referrals is reasonable and necessary to cure and relieve claimant from the effects of her February 17, 2016 work injury. Furthermore, the treatment provided by Dr. Hehmann and Dr. Price is deemed authorized by virtue of the referrals from Dr. Krebs.

10. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

11. As found, claimant has proven by a preponderance of the evidence that she is entitled to TTD commencing on February 19, 2016, when she was unable to work because of her compensable work injury. Based on claimant's testimony at hearing and the medical records entered into evidence, the ALJ finds claimant has established by a preponderance of the evidence that her inability to work has limited her ability to earn wages. Therefore, claimant is entitled to an award of TTD for the period of February19, 2016 until terminated by law.

12. Section 8-42-105(3), C.R.S. provides, in pertinent part, that temporary total disability benefits shall continue until the first occurrence of any one of the following: (a) the employee reaches maximum medical improvement; (b) the employee returns to regular or modified employment; or (c) the attending physician gives the claimant a written release to return to regular employment.

13. As found, employer offered claimant modified employment on March 1, 2016 and March 8, 2016. However, these offers were extended to claimant after Dr. Krebs had determined claimant was unable to return to work. Therefore, ongoing TTD

benefits are appropriate at this time because claimant was unable to accept the offer of modified employment as of February 29, 2016 due to the restrictions of Dr. Krebs.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits beginning February 19, 2016 and continuing until terminated by law, based upon an AWW of $785.50.

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the February 17, 2016 industrial injury including treatment provided by Dr. Krebs and his referrals.

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

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

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

DATED: October 18, 2016

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

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Kristin D. Mason, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) for his admitted February 20, 2015 back injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Delivery Driver. On February 20, 2015 Claimant was pulling a dolly carrying approximately 200 pounds of groceries up an outside stairway of an apartment building. He slipped on ice, twisted and experienced immediate mid-line lower back pain.

2. Employer referred Claimant to Concentra Medical Centers for medical treatment. Authorized Treating Physician (ATP) Eric Tentori, M.D. determined that Claimant "may have sustained a thoracic strain, lumbar strain and lumbosacral strain." After receiving conservative treatment including medications, physical therapy, massage therapy and chiropractic treatment, Dr. Tentori concluded that Claimant reached Maximum Medical Improvement (MMI) on September 8, 2015. Dr. Tentori assigned Claimant a 0% permanent impairment rating and did not recommend any additional treatment for his injuries.

3. On September 16, 2015 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Tentori's MMI and impairment determinations. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME).

4. On January 25, 2016 Claimant underwent a DIME with Kristin D. Mason, M.D. After reviewing Claimant's medical history and conducting a physical examination, Dr. Mason diagnosed Claimant with a left pelvic upslip with resulting SI mediated pain. She commented that Claimant has suffered from consistent back pain since the date of his industrial accident. She noted that an April 3, 2015 MRI reflected no acute abnormalities associated with the work accident. Dr. Mason concluded that Claimant had not reached MMI because his function could be improved through additional treatment. To achieve MMI, Dr. Mason recommended manual treatment, chiropractic, osteopathic or physical therapy and lumbopelvis stabilization training. She also suggested transition to a gym-based or home-based independent exercise program. Dr. Mason anticipated 8-12 weeks of treatment to achieve functional improvement. Finally, Dr. Mason assigned Claimant a 5% provisional whole person impairment rating pursuant to Table 53 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*) and a 7% whole person rating for range of motion deficits. Combining the Table 53 and range of motion ratings yields a total 12% whole

person impairment for Claimant's February 20, 2015 industrial injury. She noted that Claimant did not suffer any thoracic spine or psychological impairment as a result of his work accident.

5. On June 8, 2016 Claimant underwent an independent medical examination with John Burris, M.D. Dr. Burris recounted that Claimant developed back pain while pulling a dolly loaded with groceries upstairs while at work on February 20, 2015. An April 3, 2015 MRI did not reveal any acute abnormalities associated with the work accident. He diagnosed Claimant with lower back pain. Dr. Burris explained that, despite conservative treatment, Claimant continued to have subjective pain complaints. He summarized that

> Based on the original mechanism, subsequent examinations, and the MRI, the only diagnosis that can reasonably be associated with the work event is the lumbosacral soft tissue strain/sprain. This type of injury heals predictably, regardless of treatment, within days to weeks. His persistent subjective complaints, 18 months later, are not consistent with the original diagnosis. His reported pain does not follow a known neuroanotomical pattern. There is no realistic expectation that additional treatment will affect his subjective complaints.

6. On June 27, 2016 Claimant underwent an independent medical examination with David Orgel, M.D. Dr. Orgel considered Claimant's mechanism of injury, treatment history and medical records. He remarked that Claimant was still experiencing lower back pain in his mid-lumbar spine. Dr. Orgel commented that the April 3, 2015 MRI reflected scarring on the spinal cord that was likely not caused by the industrial injury or the source of Claimant's back pain. He recommended an MRI of Claimant's lower back with contrast to determine whether there was a significant lesion. Barring a significant lesion, he recommended the treatment prescribed by Dr. Mason. Dr. Orgel assigned Claimant a provisional 5% whole person impairment rating pursuant to Table 53 of the *AMA Guides* and a 5% rating for range of motion deficits. Combining the ratings yields a 10% whole person impairment.

7. Dr. Burris testified at the hearing in this matter. He maintained that Dr. Mason erroneously determined that Claimant had not reached MMI. Dr. Burris explained that Claimant had completed reasonable and necessary treatment pursuant to the Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). He also commented that Claimant's April 3, 2015 MRI did not reveal any acute abnormalities associated with the work accident and Dr. Tentori did not note any objective findings. Dr. Burris noted that no physicians besides Dr. Mason had diagnosed Claimant with left pelvic upslip with resulting SI mediated pain. He remarked that, if a DIME physician diagnoses an injury that is not in the prior medical records, the injury is unrelated to the industrial event. Similarly, Dr. Burris commented that there was no evidence of nerve impingement on Claimant's MRI or in the medical records, but Dr. Mason had documented that Claimant exhibited a positive slump test. He noted that it was unlikely that treating physicians had missed the pathology identified by Dr.

Mason. Finally, Dr. Burris explained that Claimant did not have any objective evidence to support a rating pursuant to the *AMA Guides*.

8. Dr. Burris explained that the treatment recommended by Dr. Mason would not cure or relieve the effects of Claimant's February 20, 2015 industrial injury. He remarked that Claimant had already received the treatment recommended by Dr. Mason and it had been unsuccessful. It would thus be unlikely that the same treatment would create functional improvement approximately six months later. Furthermore, because Claimant had returned to full-duty employment, it was unlikely that additional treatment would improve his functional abilities.

9. Dr. Orgel also testified at the hearing in this matter. He maintained that Dr. Mason properly concluded that Claimant has not reached MMI as a result of his February 20, 2015 industrial injury. Dr. Orgel explained that Dr. Mason was not the first medical provider to identify Claimant's SI joint issue. In fact, Claimant had received SI joint treatment from Richard Mobus, D.C. subsequent to his February 20, 2015 industrial injury. Dr. Orgel commented that, although Claimant had received prior chiropractic treatment and physical therapy, the modalities had failed to completely address Claimant's problems. He concluded that Claimant required the additional treatment recommended by Dr. Mason to achieve MMI. Finally, he assigned Claimant a provisional 5% whole person impairment rating pursuant to Table 53 of the *AMA Guides* and a 5% rating for range of motion deficits. Combining the ratings yields a 10% whole person impairment.

10. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Mason that Claimant has not reached MMI for his admitted February 20, 2015 back injury. Dr. Mason diagnosed Claimant with a left pelvic upslip with resulting SI mediated pain. She commented that Claimant has suffered from consistent back pain since the date of his industrial accident. Dr. Mason concluded that Claimant had not reached MMI because his function could be improved through additional treatment. To achieve MMI, Dr. Mason recommended manual treatment, chiropractic, osteopathic or physical therapy and lumbopelvis stabilization training.

11. In contrast, Dr. Burris maintained that Dr. Mason erroneously determined that Claimant had not reached MMI. He explained that, based on Claimant's mechanism of injury, subsequent examinations and the MRI, Claimant suffered a lumbosacral soft tissue strain/sprain. Dr. Burris noted that a lumbosacral strain/sprain will heal, regardless of treatment, within days to weeks. Claimant's continued subjective complaints 18 months after the date of injury are simply not consistent with his diagnosis. Dr. Burris explained that Claimant had completed reasonable and necessary treatment pursuant to the *Guidelines*. He also commented that Claimant's April 3, 2015 MRI did not reveal any acute abnormalities associated with the work accident and Dr. Tentori had not noted any objective findings. Dr. Burris commented that no physicians besides Dr. Mason had diagnosed Claimant with left pelvic upslip with resulting SI mediated pain. He remarked that, if a DIME physician diagnoses an injury that is not in the prior medical records, the injury is unrelated to the industrial event. Dr. Burris

concluded that the treatment recommended by Dr. Mason would not cure or relieve the effects of Claimant's February 20, 2015 industrial injury. He remarked that Claimant had already received the treatment recommended by Dr. Mason and it had been unsuccessful.

12. Although Dr. Burris disagreed with Dr. Mason's determination that Claimant has not reached MMI, the persuasive testimony of Dr. Orgel supports Dr. Mason conclusion. Dr. Orgel maintained that Dr. Mason properly concluded that Claimant has not reached MMI as a result of his February 20, 2015 industrial injury. He explained that Dr. Mason was not the first medical provider to identify Claimant's SI joint issue. In fact, Claimant had received treatment from chiropractor Dr. Mobus subsequent to his February 20, 2015 industrial injury. Dr. Orgel commented that, although Claimant had received prior chiropractic treatment and physical therapy, the modalities had failed to completely address Claimant's problems. He concluded that Claimant required the additional treatment recommended by Dr. Mason to achieve MMI. Moreover, Dr. Burris' opinion simply constitutes a difference of opinion with Dr. Mason about whether Claimant has attained MMI. He disagreed with Dr. Mason's diagnosis and recovery time. However, Dr. Mason reviewed Claimant's medical history, conducted a physical examination and diagnosed Claimant with a left pelvic upslip and resulting SI mediated pain. Because prior treatment modalities had failed to completely address Claimant's problems, Dr. Mason reasonably recommended approximately 8-12 weeks of additional treatment to achieve functional improvement. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Mason's MMI determination was incorrect.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

7. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Mason that Claimant has not reached MMI for his admitted February 20, 2015 back injury. Dr. Mason diagnosed Claimant with a left pelvic upslip with resulting SI mediated pain. She commented that Claimant has suffered from consistent back pain since the date of his industrial accident. Dr. Mason concluded that Claimant had not reached MMI because his function could be improved through additional treatment. To achieve MMI, Dr. Mason recommended manual treatment, chiropractic, osteopathic or physical therapy and lumbopelvis stabilization training.

8. As found, in contrast, Dr. Burris maintained that Dr. Mason erroneously determined that Claimant had not reached MMI. He explained that, based on Claimant's mechanism of injury, subsequent examinations and the MRI, Claimant suffered a lumbosacral soft tissue strain/sprain. Dr. Burris noted that a lumbosacral strain/sprain will heal, regardless of treatment, within days to weeks. Claimant's continued subjective complaints 18 months after the date of injury are simply not consistent with his diagnosis. Dr. Burris explained that Claimant had completed reasonable and necessary treatment pursuant to the *Guidelines*. He also commented that Claimant's April 3, 2015 MRI did not reveal any acute abnormalities associated with the work accident and Dr. Tentori had not noted any objective findings. Dr. Burris commented that no physicians besides Dr. Mason had diagnosed Claimant with left pelvic upslip with resulting SI mediated pain. He remarked that, if a DIME physician diagnoses an injury that is not in the prior medical records, the injury is unrelated to the industrial event. Dr. Burris concluded that the treatment recommended by Dr. Mason would not cure or relieve the effects of Claimant's February 20, 2015 industrial injury. He remarked that Claimant had already received the treatment recommended by Dr. Mason and it had been unsuccessful.

9. As found, although Dr. Burris disagreed with Dr. Mason's determination that Claimant has not reached MMI, the persuasive testimony of Dr. Orgel supports Dr. Mason conclusion. Dr. Orgel maintained that Dr. Mason properly concluded that Claimant has not reached MMI as a result of his February 20, 2015 industrial injury. He explained that Dr. Mason was not the first medical provider to identify Claimant's SI joint issue. In fact, Claimant had received treatment from chiropractor Dr. Mobus subsequent to his February 20, 2015 industrial injury. Dr. Orgel commented that, although Claimant had received prior chiropractic treatment and physical therapy, the modalities had failed to completely address Claimant's problems. He concluded that Claimant required the additional treatment recommended by Dr. Mason to achieve MMI. Moreover, Dr. Burris' opinion simply constitutes a difference of opinion with Dr. Mason about whether Claimant has attained MMI. He disagreed with Dr. Mason's diagnosis and recovery time. However, Dr. Mason reviewed Claimant's medical history, conducted a physical examination and diagnosed Claimant with a left pelvic upslip and resulting SI mediated pain. Because prior treatment modalities had failed to completely address Claimant's problems, Dr. Mason reasonably recommended approximately 8-12 weeks of additional treatment to achieve functional improvement. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Mason's MMI determination was incorrect.

ORDER

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

1. Respondents have failed to overcome the DIME opinion of Dr. Mason. Claimant has not reached MMI.

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

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

DATED: October 14, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-952-124-04

ISSUES

WC No. 4-928-516 (August 11, 2013 D.O.I):

- Whether the Respondents proved, by a preponderance of the evidence, that the 26 percent scheduled impairment rating assigned by Division Examiner, Dr. Kenneth Finn, is incorrect.

- Whether the Respondents proved, by a preponderance of the evidence, that the claimant does not require medical treatment to maintain his condition arising out of the August 11, 2013, injury at MMI.

- Whether the claimant proved, by a preponderance of the evidence, that he suffered impairment beyond the arm at the shoulder as a result of the August 11, 2013, industrial injury.

- If the claimant proved he suffered impairment beyond the arm at the shoulder as a result of the August 11, 2013, industrial injury, what is the correct percent of whole person permanent physical impairment which should be assigned to the injury?

WC No. 4-952-124 (May 18, 2014 D.O.I.):

- Did the claimant prove, by a preponderance of the evidence, that he is entitled to an award of temporary total disability from May 5, 2015 through May 23, 2016?

- Did the Respondents prove, by a preponderance of the evidence, that the claimant was responsible for the termination of his employment on May 5, 2015, and therefore, not entitled to an award of temporary total disability benefits?

FINDINGS OF FACT

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

1. Claimant is a 50-year-old man with a March 31, 1966 date of birth. Claimant was hired by Employer on May 23, 2008 to work as a sales associate.

2. Claimant initially injured his right shoulder in an admitted accident in the course and scope of his employment with Employer on August 11, 2013, when he was lifting cases of frozen chicken. An August 15, 2013, MRI showed a complete rupture of the long head of the biceps tendon, retracted, 3mm insertional

intrasubstance partial tear supraspinatus tendon, and moderate subscapularis tendinosis, without tear.

3. Claimant was referred to orthopedic surgeon, Dr. Richard Cunningham. Dr. Cunningham evaluated Claimant on August 19, 2013. He noted the MRI findings and recommended a diagnostic arthroscopy with debridement followed by probable open biceps tenodesis. Dr. Cunningham performed surgery on August 30, 2013. At the time of surgery, the AC joint was inspected and revealed "exposed eburnated bone." Dr. Cunningham performed an arthroscopic distal clavicle resection removing approximately 8 mm of bone.

4. Following surgery, Claimant continued to complain of pain with limited range of motion due to guarding. Dr. Cunningham thought Claimant would go on to have full range of motion and strength.

5. Due to Claimant's ongoing pain complaints, an MRI was performed on December 24, 2013. Dr. Cunningham reviewed the MRI and thought it was consistent with adhesive capsulitis. Although Dr. Cunningham did not think Claimant would need it, an arthroscopic lysis of adhesions could be performed.

6. On March 7, 2014, Dr. Cunningham performed a right shoulder arthroscopy with lysis of adhesions, manipulation under anesthesia, arthroscopic subacromial decompression and debridement of low grade partial supraspinatus tearing and rotator cuff fraying.

7. On May 18, 2014, Claimant was exiting the restroom at work when he slipped and fell striking the posterior aspect of his head, without loss of consciousness. Claimant presented to the Vail Valley Medical Center Emergency Room where he complained of right wrist, right shoulder, and diffuse left knee and bilateral back pain. On physical exam, Claimant had no evidence of swelling or discoloration of the shoulder. There was a small amount of soft tissue swelling of the wrist. Claimant was assessed with right wrist pain, left knee pain, right shoulder pain, lumbar back strain and posterior scalp contusion. He was directed to follow-up with Dr. Cunningham.

8. Dr. Cunningham evaluated Claimant on May 19, 2014. On exam, there was mild swelling over the right shoulder. Claimant's right wrist was placed in a splint and he was referred to a hand specialist.

9. Claimant continued to complain of right wrist pain. An MRI performed on June 20, 2014 was read as showing an avulsion fracture of a carpal bone on the dorsum of the right wrist. On August 27, 2014, Claimant underwent surgery on his right wrist, a right hand carpal nonunion repair with excision and an osteoplasty.

10. On March 7, 2014, Dr. Cunningham documented "good shoulder range of motion."

11. Despite extensive physical therapy for the shoulder and the wrist, Claimant was not progressing. On October 23, 2014, authorized provider, NP Lucia London, received a call from Claimant's physical therapist who was concerned about his lack of progress. The therapist was spending at least 80 percent of her visits discussing Claimant's concerns and problems. Claimant did not seem to be progressing with therapy and she was concerned that there might be some psychosocial barriers preventing Claimant from progressing.

12. Multiple providers noted that psychological factors appeared to be present in Claimant's pain presentation. Dr. Raub noted on September 25, 2014, that, "after evaluating this patient, I have some concerns about the inconsistencies in his history and my discussion with Lucia London, NP. Additionally, he has multiple musculoskeletal complaints beyond what one would expect from his lumbar MRI. I am concerned about other influences, perhaps, psychosocial issues." Dr. J. Tashof Bernton opined, "The patient's examination is characterized by multiple nonorganic findings and inconsistencies, which indicate a significant psychologically based contribution to his pain presentation." Dr. Bernton further opined, "There is significant evidence of somatoform disorder, and, given the Waddell findings on examination, significant symptom magnification is probably present." On May 14, 2015 (two months before the DIME), Dr. Scherr noted, "Severe pain behaviors are present. . . He has limited ROM in all planes, but has suboptimal effort... Grip strength is diminished, but again, suboptimal…Shoulder is not swollen, but diffusely tender with jerking upon light touch." Dr. Scherr also documented a phone call from the physical therapist who reported Claimant was "so obsessed with his pain that therapy was nearly impossible to perform. The therapist stated that he would continually talk about the pain and would not perform the activities or exercises." Therapy was put on hold secondary to this.

13. Authorized treating provider, Dr. Susan Lan, placed Claimant at MMI from the August 11, 2013, accident on November 19, 2014. Dr. Lan assigned 8 percent scheduled impairment for loss of right shoulder motion. Eight percent scheduled impairment converts to 5 percent whole person impairment. Dr. Lan indicated, "Maintenance care should include therapy bands for a home exercise program and a 3 month gym membership so he can continue exercising."

14. Insurer filed a Final Admission of Liability consistent with Dr. Lan's opinions on MMI, impairment and medical treatment post-MMI.

15. Claimant was dissatisfied and requested a Division IME. Dr. Kenneth Finn was selected as the Division Examiner. Dr. Finn performed his examination on August 7, 2015. In the course of his examination, Dr. Finn took a history of Claimant's injury from him. Claimant reported undergoing seven months of physical therapy, "which was not helpful". Claimant told Dr. Finn that, after his May 18, 2014, fall, he noted increasing right shoulder pain. On physical exam, Dr. Finn noted Claimant had give way weakness in throughout the right upper extremity and nonanatomic diminished sensation to light touch throughout the

right upper extremity. Despite Claimant's give way weakness and nonanatomic findings, Dr. Finn assigned 18 percent scheduled impairment for loss of shoulder motion. He assigned an additional ten percent scheduled impairment for Claimant's distal clavicle resection of "eburnated bone". The combined scheduled impairment is 26 percent. Twenty six percent scheduled impairment converts to 16 percent whole person impairment.

16. Prior to undergoing the Division IME, the claimant's employment with the Respondent Employer was terminated on May 4, 2015, for gross misconduct, "integrity issue".

17. Employer's Assistant Manager, Glen Liguori, testified at hearing. Mr. Liguori testified that on May 4, 2015, Claimant was employed by Employer in a modified work position of "People Greeter". Mr. Liguori testified that, at that time, he was the Assistant Manager over the front end, which included the management and supervision of associates in the position of People Greeter. Mr. Liguori testified that he had also been Claimant's supervisor when he worked in the produce department. Mr. Liguori credibly testified that new associates are required to attend an orientation session, which discusses Employer's policies and procedures, including attendance, Open Door policy, breaks, meal periods, and days of rest, and Statement of Ethics. Mr. Liguori credibly testified that Employer provides the orientation in both the English and Spanish languages for their associates. Mr. Liguori testified that in addition to their initial orientation, Employer's associates are required to complete annual "Computer based learning," which also reviews Employer's policies relating to breaks and meal periods. Mr. Liguori testified concerning Employer's four-step disciplinary process and situations when the four-step disciplinary process is not used, such as instances of "Gross Misconduct". Mr. Liguori testified Employer's associates are permitted two paid 15 minute breaks per shift. He testified concerning the circumstances leading up to the termination of Claimant's employment. Mr. Liguori credibly testified that he reviewed in-store security video in an effort to ascertain Claimant's whereabouts after being questioned by another associate. At that time, he learned Claimant had taken an extended break. On further review, Mr. Liguori discovered that throughout April 2015, Claimant was taking anywhere from 25 minutes up to 41 minutes for his paid 15 minute breaks. Mr. Liguori credibly testified this is considered "theft of time" and gross misconduct and resulted in the termination of Claimant's employment with Employer. Claimant is responsible for the termination of his employment with Employer.

18. A reasonable employee would appreciate that repeatedly taking paid breaks, of two to three times in length of the allotted time, would likely result in the termination of employment. As found, Respondents have proven, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment.

19. Dr. Carlos Cebrian examined Claimant on December 18, 2015, at Respondents' request. Dr. Cebrian also testified at hearing as a Level II accredited expert in

the field of occupational medicine and family medicine. In connection with his IME, Dr. Cebrian reviewed surveillance video of Claimant, which is included in the record at Exhibit K. The surveillance video was not available to Dr. Finn at the time of the Division IME.

20. On Dr. Cebrian's physical exam, consistent with his presentation to Dr. Finn, Claimant demonstrated jerky cog wheeling movements on range of motion testing. However, when Dr. Cebrian tested Claimant's strength, he was able to hold both arms at shoulder level at 90 degrees in flexion, inconsistent with his range of motion.

21. After Dr. Cebrian's evaluation, Dr. Scherr placed Claimant at MMI from the May 18, 2014 accident. In connection with that determination, Dr. Scherr attempted to provide an impairment rating of the right shoulder. In Dr. Scherr's May 23, 2016, evaluation, he notes, "PT did not feel PT was beneficial due to [Claimant's] pain behaviors and his inability to participate. He did have the FCE and because of his severe pain behaviors was a difficult exam and was hard to validate. He has had 3 stellate ganglion blocks which have been helpful, but only temporarily. He did have a urine drug screen in which the UDT was negative for Oxycodone when it should have been positive…. There is also the issue of the surveillance video that indicates his ability to do more with his right arm than is demonstrated here in the office." Dr. Scherr noted, "Very Severe Pain behaviors are present, which makes any exam difficult, as he won't even really try to move his arm period. He will raise the arm about 120 degrees in flexion/abduction, which is an improvement… I attempted to measure both L and R shoulders today and he was very difficult in complying with the request, despite the interpreter and my demonstrating several times the correct movement of the arm. I was able to obtain the L shoulder measurements. The R, I was not able to do IR and ER due to pain behaviors and reported pain. His R arm movements were non-physiologic…. I was unable to obtain accurate physiologic measurements from the R arm, so I was not able to impair this arm for ROM." Regarding maintenance care, Dr. Scherr opined, "As stellate ganglion blocks only temporarily helpful and UDT testing inconsistency with absence of Oxycodone when should have been positive, as such, no maintenance care required."

22. Dr. Cebrian credibly testified that Dr. Finn erred at the time of his DIME, in assigning impairment for the range of motion measurements that he obtained as they were not an accurate reflection of Claimant's range of motion resulting from the August 11, 2013, injury. The only appropriate ranges of motion measurements are those Dr. Lan obtained when she placed Claimant at MMI on November 19, 2014. According to the AMA Guides, page 78, "Pain, fear of injury, or neuromuscular inhibition may limit mobility by diminishing effort. Such limitations provide inaccurately low and inconsistent measurements that lead to improperly inflated impairment estimates." Dr. Cebrian credibly explained that Dr. Finn's rating is not in accordance with the AMA Guides because it is not reproducible and physiologic.

23. Dr. Cebrian credibly testified that Dr. Finn erred in assigning an additional ten percent impairment for the distal clavicle resection to remove eburnated bone. The purpose of the distal clavicle resection was to remove osteoarthritis in the AC joint. Claimant did not injure or aggravate his AC joint in the August 11, 2013 accident. He suffered a rupture of the biceps tendon and a partial supraspinatus tear. Dr. Cunningham was not considering a distal clavicle resection at the time of pre-operative planning. At the time of surgery, Dr. Cunningham found the AC joint had degenerative findings of exposed and eburnated bone. At that time, he elected to perform a distal clavicle resection for a degenerative and non-claim related condition.

24. The opinions of Dr. Cebrian are more credible and persuasive than those of Dr. Finn.

25. Claimant testified his right shoulder condition worsened between his November 19, 2014, date of MMI and his appointment with Dr. Finn. Dr. Finn agreed with the November 19, 2014, date of MMI. When Dr. Lan placed Claimant at MMI on November 19, 2014, she restricted him to no lifting in excess of fifteen to 20 pounds. By the time Claimant was evaluated by Dr. Finn, his restrictions had increased to no lifting in excess of five pounds. Impairment is to be determined as of the date of MMI. The range of shoulder motion exhibited by Claimant, as measured by Dr. Lan on the date of MMI, more accurately reflects Claimant's permanent physical impairment from the August 11, 2013 accident.

26. Claimant testified to restrictions in the use of his right upper extremity and difficulty sleeping, as evidence that his impairment is beyond the arm at the shoulder. However, Claimant's physicians strongly encouraged him to use the right upper extremity normally. Despite this encouragement, Claimant does not use his right upper extremity normally. He exhibits severe pain behaviors with non-physiologic movements. Claimant's sleep disturbance pre-existed the August 11, 2013 date of injury.

27. Respondents have proven, by a preponderance of the evidence, that the scheduled impairment rating assigned by Dr. Finn is incorrect. The only appropriate ranges of motion measurements are those Dr. Lan obtained when she placed Claimant at MMI on November 19, 2014. Claimant's correct impairment rating is eight percent scheduled impairment to the right upper extremity, as assigned by Dr. Lan. As found, the additional ten percent scheduled impairment assigned by Dr. Finn for the distal clavicle resection was incorrectly assigned. The procedure was performed to correct a non-work-related degenerative condition in the AC joint.

28. Claimant has failed to prove, by a preponderance of the evidence that the 8 percent scheduled impairment assigned by Dr. Lan should be converted to whole person.

29. Dr. Cebrian testified that no treatment provided to date has improved Claimant's subjective complaints. Claimant has been noncompliant with physical therapy, as noted by the treating physicians. The treating physician also noted a non-compliant urine drug test and recommended against medical treatment to maintain MMI. The opinions of Dr. Scherr and Dr. Cebrian that Claimant does not require medical treatment to maintain his August 11, 2013 injury at MMI are credible and persuasive.

30. The ALj declines to order a gym membership and therapy bands as maintenance care, given Claimant's refusal to participate in supervised physical therapy. Claimant provided no credible evidence that he needs, or even desires, medical treatment to maintain his condition at MMI.

CONCLUSIONS OF LAW

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

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

The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

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

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

A rating physician must rate impairment in accordance with the provisions of the *AMA Guides to the Evaluation of Permanent Impairment,* 3d Ed., Revised. Section 8-42-101(3.7), C.R.S.; § 8-42-107(8)(c), C.R.S.; *see also, Wilson v. Industrial Claim*

Appeals Office, 81 P.3d 1117 (Colo. App. 2003). Impairment is to be determined as of the date of MMI.

As found, Dr. Finn's evaluation of the claimant's loss of range of shoulder motion was not in accordance with the provisions of the *AMA Guides to the Evaluation of Permanent Impairment,* 3d Ed., Revised. As found, Dr. Finn's assigned impairment for loss of shoulder motion was not consistent with those in the record and were not reproducible and physiologic. Therefore, they are not an accurate reflection of the claimant's permanent impairment and should not be used. The range of motion reflected in Dr. Lan's November 19, 2014, report of MMI and impairment more accurately reflects the claimant's impairment as of MMI. As found, Dr. Finn inappropriately included an additional ten percent scheduled impairment for a distal clavicle excision, which was performed to remove eburnated bone, a non-work-related condition. Accepting Dr. Lan's range of motion and excluding Dr. Finn's additional ten percent for loss of shoulder motion, the claimant's permanent physical impairment resulting from the August 11, 2013 accident totals eight percent of the right upper extremity.

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

The question of whether a claimant's impairment falls within the schedule of benefits is one of fact for the Administrative Law Judge. *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo.App. 1996). It is the situs of the functional impairment that is at issue. *See, e.g., Id.* at 368.

The claimant described functional limitations primarily affecting the use of his right arm and shoulder. As found, the claimant failed to prove, by a preponderance of the evidence, that the situs of functional impairment for the right upper extremity extended beyond the extremity. Therefore, § 8-42-107(7)(b)(II), C.R.S. precludes an award of medical impairment benefits for the right upper extremity based on the whole person conversion of the appropriate upper extremity rating.

The claimant has the burden of proving entitlement to medical benefits by a preponderance of the evidence. Section 8-43-201, C.R.S; *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury or disease and the condition for which benefits or compensation is sought. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo.App. 1997).

Here, as found, the claimant failed to meet his burden of proving that he requires medical treatment to maintain his condition at MMI.

To obtain indemnity benefits, a claimant must prove, by a preponderance of the evidence, that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 639 (Colo. App. 1997).

Under sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., the claimant is precluded from receiving indemnity benefits if he is found to be responsible for his wage loss. The concept of "responsibility" in sections 8-42-105(4) and 8-42-103(1)(g), is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). Fault does not require willful intent. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996)(unemployment insurance).

Respondents sustained their burden of proof to establish that Claimant engaged in volitional acts, which caused the termination of his employment. Respondents' evidence, both documentary and testimonial, was found more credible and persuasive than the testimony provided by Claimant.

ORDER

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

1. Claimant’s request for an award of 26 percent scheduled permanent physical impairment is denied and dismissed;

2. Respondents are ordered to pay Claimant an award of 8 percent scheduled impairment, taking credit for any PPD benefits previously admitted and paid;

3. Claimant’s request for conversion of the award of scheduled impairment benefits to whole person permanent physical impairment benefits is denied and dismissed;

4. Claimant’s request for an award of medical benefits post-MMI is denied and dismissed.

5. Claimant’s request for an award of TTD benefits from May 4, 2015 through May 23, 2016, is denied and dismissed.

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

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

DATED October 14, 2016

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

STIPULATION

At the commencement of hearing, the parties agreed that since the question of the overpayment is directly impacted by whether claimant prevails in overcoming the Division Independent Medical Examination (DIME); the issue of an asserted overpayment should be held in abeyance until a determination on claimant's attempt to overcome the DIME. The ALJ approves the parties' stipulation.

REMAINING ISSUES

I. Whether Claimant established by clear and convincing evidence that Dr. Polanco, as the Division IME physician, erred in calculating Claimant's impairment rating.

FINDINGS OF FACT

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

1. Claimant sustained an admitted work related injury on February 6, 2014 while working for Employer when he slipped and fell on ice. He fell straight forward, landing on his left elbow. He experienced pain in his left elbow, left shoulder, and some pain. He denied striking his head. R.E. E, Bates 46.

2. Claimant was referred to Concentra as the designated provider. He first presented to Concentra on February 7, 2014. Upon examination, he was found to have full active range of motion in all directions without pain or stiffness in his left shoulder. His left elbow showed some mild swelling without any ecchymosis or redness. Examination of claimant's neck revealed no evidence of external trauma; he had some diffuse tenderness along the trapezius musculature, but he had adequate range of motion in all directions. Claimant did not complain of any headaches or low back pain. He was returned to full duty without restrictions. R.E. E, Bates 46.

3. Claimant undertook extensive conservative care for his neck, upper back and left elbow including physical therapy (PT), chiropractic treatment with Dr. Brian Polvi and physiatric evaluation on June 5, 2014 with Dr. John Bissell, M.D.

4. On June 9, 2014, when claimant returned to Concentra, he reported constant headaches and intermittent numbness to the left 3rd to 5th fingers, in addition to ongoing neck and upper back pain. Claimant was referred to Dr. Hattem, for delayed recovery. R.E. X.

5. On June 13, 2014, claimant presented to his personal primary care physician complaining of ongoing headaches since April 2014, two weeks following claimant's original date of injury. Claimant was diagnosed with acute sinusitis and started on antibiotics. R.E. Y.

6. Due to persistent diffuse complaints of numbness and tingling, Claimant was referred for electrodiagnostic (EMG) testing on July 2, 2014. EMG testing was interpreted as being normal, without evidence of carpal tunnel syndrome, cubital tunnel syndrome or cervical radiculopathy. R.E. Z.

7. Claimant returned to Concentra on July 21, 2014 complaining of very diffuse and extremely migratory "increased pain all over, occipital to mid scalp headaches, neck and back pain from his neck down his upper and lower back, and both arms and legs are now numb." This July 21, 2014 medical record is the first documented complaint of pain in the low back. R.E. EE.

8. On August 7, 2014, Claimant returned to Dr. Albert Hattem reporting that "his whole body [hurt]." Physical examination revealed mild paracervical tenderness in the cervical spine. Nonetheless, claimant demonstrated full cervical range of motion. Likewise, claimant had full range of motion at the shoulders and elbows, as well as a normal neurologic examination. R.E. II.

9. Dr. Hattem documented that he could find no indication that claimant ever complained of low back pain until three months following the original date of injury. Dr. Hattem opined that claimant's complaints of low back pain were not work related. He further noted that claimant's initial complaints were in the left upper extremity, not the right and that claimant's pain complaints were migrating without objective explanation. Documenting his concerns that there were behavioral issues that were impeding the claimant's recovery, Dr. Hattem referred claimant for a psychological evaluation with David Hopkins. R.E. II.

10. On September 9, 2014, claimant underwent a psychological evaluation with David Hopkins. Dr. Hopkins assessed claimant as having an adjustment disorder with depression and anxiety, as well as a pain disorder with physical and psychological factors. He recommended that claimant continue with biofeedback training in addition to 4 to 6 individual psychotherapy sessions. He also suggested that claimant would be a good candidate for antidepressant medication, apparently unaware that claimant was already being prescribed Wellbutrin for a nonwork related condition of depression and anxiety. R.E. PP; R.E. VVVV, Bates 411.

11. In the interim between the August 7, 2014 appointment with Dr. Hattem and the September 9, 2014 psychological evaluation with David Hopkins, claimant returned to his personal primary care provider continuing to complain of headaches. Claimant was diagnosed with chronic sinusitis. R.E. JJ.

12. As part of claimant's pain management treatment, he underwent occipital nerve blocks. In a follow-up with pain management specialist Dr. Bissell on October 6, 2014, claimant reported no improvement with the occipital nerve blocks and limited benefit with Tramadol. Subsequently, on October 14, 2014, Dr. Bissell administered cervical and thoracic trigger point injections. Claimant's pain diagram from this date indicates aching, numbness, burning, pins and needles, and stabbing from the bottom of his ribs proximally, throughout the entirety of his right and left upper extremity, and in the right low back and butt talk, and extending throughout the right lower extremity. R.E. XX, AAA.

13. Claimant's last medical appointment with Dr. Bissell was on November 3, 2014. On that date, claimant reported no improvement after administration of the above referenced trigger point injections. Dr. Bissell documented that claimant complained of low back pain and right lower extremity pain which were new pain complaints since his initial evaluation by Dr. Bissell on June 5, 2014. Dr. Bissell further noted that claimant's left elbow contusion had resolved. R.E. CCC.

14. Dr. Bissell explained to claimant on November 3, 2014 that he had no further treatment options which he felt would be beneficial to claimant and that from his standpoint, claimant had reached maximum medical improvement (MMI). R.E. CCC.

15. On November 20, 2014, claimant presented to Dr. Timothy Hart, who had previously examined and evaluated claimant under this workers' compensation claim for his bilateral upper extremity complaints. Dr. Hart noted that claimant complained of diffuse numbness bilaterally, noting further that these complaints did not correlate with the objective findings on claimant's previously conducted nerve conduction studies. Dr. Hart noted that claimant had "somewhat transitory . . . symptoms over time." As he had stated previously, Dr. Hart reiterated his opinion that claimant was not a surgical candidate stating, "I do not think it likely to be successful because we do not have a clear correlation between objective findings and subjective complaints." Dr. Hart then discharged claimant from his care. R.E. EEE.

16. Claimant returned to Dr. Hattem at Concentra for a follow-up appointment on November 25, 2014. Claimant presented in no acute distress. Physical examination revealed mild decreased range of motion of the cervical spine and full shoulder range of motion. Claimant's upper extremities demonstrated good muscle tone with normal muscle strength. Dr. Hattem's impression was that claimant suffered an aggravation of pre-existing cervical spondylosis; a cervical MRI preformed previously demonstrating cervical spondylosis most prominent at the C5-6 level with potential impingement of the exiting C6 nerve root and a previous cervical x-ray demonstrating degenerative disc disease at C5-6 and C6-7. Dr. Hattem also documented that claimant had completed physical therapy and six chiropractic visits as well as biofeedback and psychological counseling. Additionally, Dr. Hattem documented that claimant had undergone ultrasound-guided left cervical and thoracic paraspinal steroid and anesthetic trigger point injections with no improvement, and that Dr. Bissell had discharged claimant because he had no further treatment options to recommend. Dr. Hattem also remarked

on the findings of Dr. Hart, specifically noting that there was a mismatch between the EMG findings and the somewhat changing nature of claimant's symptoms over time. Finally, he documented that his opinion that claimant's low back pain was not causally related to the February 6, 2014 original work injury and that claimant's pain complaints were migrating without objective medical findings to support them was unchanged. R.E. FFF.

17. Claimant underwent a functional capacity evaluation on December 15, 2014. The study was valid and found the claimant able to lift 40 pounds occasionally, carry 40 pounds, push 65 pounds, and pull 78 pounds. R.E. GGG. Claimant then returned to Dr. Hattem on February 12, 2015, during which appointment Dr. Hattem placed claimant at MMI. Dr. Hattem assigned 4% whole person impairment rating for abnormal cervical motion and a Table 53 impairment of 6% whole person for six months of medically documented pain with moderate to severe degenerative changes on structural test, yielding an overall 10% whole person impairment rating for the February 6, 2014 work injury. Dr. Hattem also recommended that claimant retain access to maintenance medical care to include prescription refills. Lastly, Dr. Hattem stated that regarding claimant's work capabilities, he should return to the medium category of work, referencing the functional capacity evaluation. R.E. III.

18. Respondents filed a final admission of liability (FAL) consistent with Dr. Hattem's report, admitting for the 10% whole person impairment rating and maintenance medical care following MMI. Claimant subsequently sought a Division of Workers Compensation sponsored independent medical examination (DIME). Dr. Frank Polanco was selected as the DIME doctor.

19. Dr. Polanco conducted the requested DIME on June 23, 2015. At the time of the DIME, claimant continued to complain of his arms and hands becoming numb, pain in his neck and shoulders "that feels like numbness and heat," that his elbows were painful, and that he had low back pain extending from the right side down his leg with numbness in his foot. R.E. JJJ, Bates 276.

20. On physical examination, Dr. Polanco found claimant to have a normal spinal curvature and an intact neurological examination. He also found claimant to hold his head erect and move it in a smooth coordination with his body motion. Bony palpation was unremarkable. According to Dr. Polanco, claimant had "normal muscle tone with no evidence of muscular tightness, tenderness, trigger points, or muscular spasm", as well as normal alignment and normal muscle tone in the thoracolumbar spine. In the upper extremities, claimant had normal range of motion throughout and normal neurologic examination as was also the case in the lower extremities. R.E. JJJ, Bates 278-279.

21. After review of claimant's medical treatment records related to this industrial injury, including diagnostic study results, and after conducting his own physical examination of claimant, Dr. Polanco documented no findings to support that claimant sustained a structural injury to his cervical, thoracic, or lumbar spine or that he

permanently aggravated a pre-existing degenerative condition in the spine. While claimant had ongoing complaints of pain, Dr. Polanco could find no objective clinical findings on physical examination to support a Table 53 diagnosis related impairment. Dr. Polanco assigned 0% impairment for claimant's cervical/thoracic strain. R.E. JJJ, Bates 279. Because he concluded that claimant did not qualify for Table 53 impairment, Dr. Polanco did not include any impairment for cervical range of motion loss, despite performing range of motion measurements.

22. Respondents filed a FAL consistent with Dr. Polanco's DIME report, noting the overpayment for permanent partial disability benefits that had already been paid. Claimant subsequently filed an objection and an application for hearing to overcome the DIME with regard to the impairment rating and permanent partial disability benefits.

23. In support of his attempt to overcome Dr. Polanco's DIME opinion regarding permanent impairment, claimant sough an opinion from Dr. Jack Rook. Consequently, Dr. Rook completed an independent medical examination (IME) on September 10, 2015. On presentation to Dr. Rook, claimant complained of headaches, neck pain, upper extremity numbness, and low back pain that radiates into the right lower extremity. In his description of the mechanism of injury to Dr. Rook, claimant stated that when he slipped on ice and fell in the driveway, his feet went out from under him and he fell forward's, landing on his forearms and elbows. He further claimed that his head whipped forward after the impact but it did not strike the ground and he did not sustain a loss of consciousness. R.E. KKK, Bates 281. This version of the events described to Dr. Rook is different from claimant's first report of injury and his initial descriptions of the mechanism of injury to his treatment providers under the workers' compensation claim. Additionally, in the version presented to Dr. Rook, claimant contends for the very first time that his head whipped forward.

24. Upon examination of claimant, Dr. Rook diagnosed claimant with chronic neck pain – aggravation of cervical degenerative disc disease most severe at the C5-6 level and myofascial pain syndrome; upper extremity paresthesias – physical examination consistent with myogenic thoracic outlet syndrome; sleep disturbance; and reactive depression. R.E. KKK, Bates 287-288.

25. With regard to claimant's lumbar spine complaints, Dr. Rook conceded that "it is difficult to relate the low back condition to the occupational injury in view of the lack of documentation early on." However, as Dr. Rook documented in his IME report and testified at hearing, it is his opinion that claimant has had persistent complaints of headaches, neck pain, and upper extremity symptoms since the date of injury. R.E. KKK, Bates 288. The medical records submitted at hearing support this opinion.

26. Dr. Rook testified that claimant experienced bilateral upper extremity pain immediately following the injury on February 6, 2014, yet in response to the very next question, testified that claimant documented pain complaints were to only the left elbow and left shoulder.

27. Dr. Rook testified that the MRI of claimant's cervical spine revealed advanced degenerative disc disease that occurred over many years prior to the date of injury. Dr. Rook testified that claimant aggravated this underlying degenerative condition in the fall suggesting that claimant experienced "pretty significant traumatic forces" in what Dr. Rook characterized as a "whiplash type event." The ALJ infers from Dr. Rook's report and testimony that he believes claimant qualifies for an impairment rating under Table 53 of the American Medical Association (AMA) Guidelines to the Evaluation of Permanent Impairment because claimant sustained a medically documented injury (sprain/strain) to his cervical spine and subsequently experienced a minimum of six months of medically documented pain and rigidity associated with moderate to severe degenerative changes on structural tests. Consequently, Dr. Rook opined that Dr. Polanco erred when he concluded that claimant did not qualify for a Table 53 diagnosis related impairment.

28. Dr. Rook explained his opinion that Claimant has a permanent impairment as follows:

> He has a permanent impairment because he has residual complaints of neck pain associated with functional limitations and impairment of the quality of his life and impairment of his sleep, which is – which is disturbed.
>
> He has chronic neck pain. He has been found to have moderate to advanced degenerative changes in his cervical spine. I knew of his residual complaints of neck pain way more than two years occupational injury, in conjunction with objective findings, both on physical examination and objective testing.
>
> He warrants an impairment rating for specific diagnosis according to Table 53 on page 80 of the guidelines. This has to be administered in conjunction with range of motion measurements.
>
> Range of motion measurements were not taken by both Dr. Polanco and the Respondents' independent medical examiner, Dr. Ridings, whereas range of motion testing was performed by Dr. Hattem when he provided the impairment rating on the 7th. (Hr. Tr., p. 35-36).

29. Dr. Rook testified that Dr. Polanco erred in determining that claimant had sustained no impairment because Dr. Polanco did not perform range of motion measurements and if he did he erred when he did not attach the range of motion worksheets to his DIME report.

30. Referencing his testimony that because claimant had continued subjective complaints of ongoing cervical pain, this would make claimant eligible for an impairment rating for that condition, Dr. Rook was asked on cross examination why, using this reasoning, he did not rate claimant for significant chronic headaches or upper extremity

numbness, since claimant continued to complain of symptoms associated with these conditions. In response, Dr. Rook testified that he had no diagnosis or objective findings to support a rating for these complaints.

31. In support of its position that Dr. Polanco's DIME findings are correct, respondents referred claimant for an IME with Dr. Eric Ridings on May 2, 2016. Dr. Ridings reviewed a significant volume of claimant's medical records as related to this workers compensation claim, he obtained a personal history from the claimant, and performed his own physical examination of claimant.

32. Upon presentation to Dr. Ridings, claimant complained of constant pain at the bilateral elbows, primarily from the lateral epicondyles into the forearms. He also reported neck pain extending from the sub occipital region all the way down into the thoracic interscapular region to the bottom of the scapulae. Claimant described this as one unified area of pain. He also stated that his arms and hands are constantly numb. He reported to Dr. Ridings that he is 0% improved with pain ranging from 4/10 – 9/10. R.E. PPPP, Bates 417.

33. When recalling the mechanism of injury and claimant's initial pain complaints, claimant changed his description to state that his right upper extremity symptoms were worse immediately following the fall than they were on the left. R.E. PPPP, Bates 419. This is inconsistent with claimant's first report of injury and claimant's reports of the mechanism of injury to his treating providers as well as to his own IME, Dr. Rook.

34. On examination of claimant, Dr. Ridings could find no objective findings any current medical diagnosis for claimant beyond an anxiety disorder. Dr. Ridings documented in his IME report his suspicion that claimant's anxiety is the primary reason for claimant's complaints of ongoing significant symptoms (although claimant has been able to successfully continue his fairly heavy job duties to the present). R.E. PPPP, Bates 419. Specifically, on examination, Dr. Ridings found claimant to have clearly normal myofascial tone throughout the cervicothoracic region and across the upper traps and the rest of the bilateral upper quadrants. Claimant did not report any tenderness with palpation in these areas when relaxed. Shoulder ranges of motion were full bilaterally without discomfort. Claimant also had good cervical range of motion. Claimant had full range of motion of the elbows bilaterally with no pain with wrist flexion or wrist extension. R.E. PPPP, Bated 418. Dr. Ridings also found claimant to have a normal neurologic examination including strength, sensation, and reflexes. Testing for cervical radiculopathy and myogenic thoracic outlet syndrome were negative.

35. On May 20, 2016 Dr. Ridings provided an update to his original evaluation of claimant addressing a motor vehicle accident, which Claimant was involved in on December 17, 2015, after the on-the-job injury. (Resp. Ex. VVVV). In that addendum, Dr. Ridings attacked claimant's credibility because he perceived that Claimant did not disclose the motor vehicle accident during his May 2, 2016, IME. (Resp. Ex. VVVV). In

challenging claimant, Dr. Ridings noted that the "[claimant's] failure to report the intervening motor vehicle accident to me at his independent medical examination was in my opinion deceptive, and damages the [claimant's] credibility." However, Dr. Ridings had discussed the motor vehicle accident with Claimant during the original IME and makes reference regarding his failure to ask specific questions regard that MVA in his original IME report. (Resp. Ex. PPPP). On cross examination, Dr. Ridings admitted that Claimant did in fact discuss the motor vehicle accident with him during the IME. (Hr. Tr., p. 75). Dr. Ridings testified that his addendum report was "too strongly stated" and that he "forgot" about the information claimant imparted to him during the original IME. (Id., p. 76). Based upon the evidence presented, the ALJ finds Dr. Ridings addendum report and his subsequent testimony contradictory. While the ALJ finds Dr. Ridings reporting in this case inconsistent, as a practical matter, the ALJ finds Dr. Riding's testimony/opinion of claimant's credibility of limited value in resolving the issue presented in this case. The question to be answered here is whether Dr. Polanco erred when calculating claimant's impairment rating, not whether Dr. Ridings believes claimant is credible. Accordingly, the undersigned ALJ has focused his attention in resolving this question on the content of claimant's medical records documenting the presence/absence of objective findings on physical examination and not Dr. Ridings comment on whether claimant should be deemed credible by virtue reporting a post MMI MVA.

36. In this regard, the ALJ finds documentation from the following medical records relevant:

- Concentra Medical Centers: 2/12/2014: Neck: . . . Midline tenderness over the C5-7 spines with minimal paracervical discomfort with no spasm or nodularity. Negative spurling and axial load.

- Concentra Medical Centers: 2/27/2014: Neck: Full range of motion. No palpable bony or muscular tenderness. Negative spurlings & axial load.

- Concentra Medical Centers: 3/13/2014: X-Rays of cervical spine: There is no paravertebral soft tissue swelling or other soft tissue abnormality.

- Concentra Medical Centers: 4/22/2014: Neck: The neck is supple and symmetric with midline trachea and no masses. . . Normal muscle strength and tone. Cervical spine with normal lordosis, no tenderness and full ROM.

- Absolute Health Center, Inc. (Dr. Polvi): 4/28/2014: "Physical examination findings were relatively unremarkable for determining any valid pain generators for the patient's persistent symptomatology. The patient has minimal myofascial reactive dysfunction and compensatory mechanical dysfunction of the posterior element joints/facet joints. The patient's continued reported symptomatology does not have significant objective findings to justify their ongoing symptomatology."

37. While a note from Dr. Ginsburg dated June 9, 2014 references bilateral muscle spasms in the cervical paraspinal muscles, which notation carries through, without modification, to other records from Concentra Medical Centers, no such findings were documented by Dr. Hattem when he placed claimant at MMI on February 12, 2015. Rather, Dr. Hattem only documented a "slight" decrease in claimant's cervical range of motion. Moreover, Dr. Hattem did not document the presence of increased muscle tone, spasms or rigidity. To the contrary, Dr. Hattem simply noted that claimant complained of paracervical tenderness.

38. Dr. Ridings testified that by February 27, 2014, the objective medical evidence supported a finding that claimant's symptoms and physical findings had resolved. He further testified that once everything is resolved from the acute traumatic event, medically you wouldn't expect that a person would then have a worsened symptoms, particularly in other parts of the body that weren't a problem in the first two weeks following the injury.

39. Dr. Ridings also testified that he had the opportunity to review Dr. Rook's IME report and that he disagreed with the findings and conclusions of Dr. Rook. Specifically, Dr. Ridings testified that his findings were consistent with those of DIME physician Dr. Polanco to include a palpatory examination failing to reveal a finding of increased myofascial tone. Dr. Ridings further testified that claimant's failure to improve with the array of treatment measures provided makes it likely that there is significant symptom magnification and that the lack of any objective findings to yield a diagnosis makes it clear that claimant did not qualify for any impairment rating under the AMA Guides.

40. Dr. Ridings testified that Dr. Polanco specifically documented his reasoning for not providing an impairment rating in this case, including the lack of any objective findings, i.e. increased muscle tome/rigidity to support a Table 53 diagnosis, which is required in order to provide a Table 53 diagnosis related impairment rating.

41. Dr. Ridings testified that Dr. Polanco did not err in any way and that he agreed with the opinions and conclusions reached by Dr. Polanco in the DIME.

42. Based upon the evidence presented, the ALJ finds that the opinions expressed by Dr. Polanco in his DIME report are generally supported by the content of the medical records presented to him for review. Moreover, the ALJ finds a paucity of evidence to suggest that Dr. Polanco erred in the methodology he employed to complete the DIME in this case. Rather, the ALJ finds that Dr. Polanco performed a physical examination, the findings of which are consistent with the findings of other providers who also failed to discern evidence of increased muscle tone and/or rigidity to support a finding that claimant is entitled to a Table 53 diagnosis related impairment rating. Despite Dr. Rook's testimony to the contrary, the evidence presented persuades the ALJ that Dr. Polanco performed range of motion measurements.

Indeed, the DIME report references the same, noting specific degrees of cervical range of motion for flexion, extension, right and left lateral bending and rotation.

43. The ALJ finds the opinions expressed by Dr. Polanco to be supported by his review of the medical records and his examination findings. Accordingly, the ALJ finds the opinions expressed by Dr. Polanco credible and more persuasive than the contrary opinions of Dr. Rook.

44. Claimant has failed to prove that the 0% impairment rating as calculated by Dr. Polanco is highly probably incorrect.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

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

Overcoming the DIME Opinion of Dr. Polanco

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by “clear and convincing evidence.” Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's opinion concerning impairment is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding impairment the party challenging the DIME must demonstrate that the physicians determinations in this regard is highly probably incorrect and this evidence must be “unmistakable and free from serious or substantial doubt.” *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. In resolving the question of whether the DIME physician’s opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The determination of impairment under the AMA Guides inherently requires the rating physician, when diagnosing the claimant’s condition, to evaluate and identify all losses caused by the industrial injury.

F. The AMA Guides, Section 1.2 provides, “The key to an effective and reliable evaluation of impairment is review of the office and hospital records maintained by the physicians who have provided care since the onset of the medical condition.” Section 2.1 further states that, “When a medically sufficient evaluation is carried out, the current clinical status of the individual will be documented accurately. If the current findings are consistent with the result of previous clinical evaluations performed by other observers, the findings may be compared with the tables in the Guides to determine the percentage of impairment.”

G. The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). In the present matter, Dr. Frank Polanco reviewed the claimant’s medical treatment records, obtained his own personal history from the claimant, and performed his own physical examination of claimant which included range of motion testing. Dr. Polanco documented very specifically in his DIME reports his findings on physical exam, to include a structural examination, neurological examination, cervical spine examination, thoracolumbar spine examination, upper extremity examination, lower extremity examination, and behavioral examination. Dr. Polanco further specifically documented in his DIME report that he could find no objective findings to support that claimant sustained a structural cervical spine, thoracic, or lumbar injury or that claimant sustained a permanent aggravation of his pre-existing degenerative findings. Dr. Polanco went on to state that while claimant has had ongoing complaints of pain, on examination claimant has no objective clinical findings to qualify for a Table 53 diagnosis. He further documented that even if claimant could qualify for a range of motion impairment, claimant's range of motion is essentially normal. Consequently, the ALJ concludes that there would 0% impairment for cervical range of motion loss. As found, the opinions expressed by Dr. Polanco are generally supported by the documentation of other providers who periodically evaluated claimant. Similar to the evaluation findings of Dr. Polanco, these providers documented normal muscle tone and full range of motion in the cervical spine. While the ALJ recognizes that some of the records provided may have lead Dr. Polanco to conclude differently as to impairment, Dr. Polanco's own evaluation rendered results which he concluded were indicative of claimant having no structurally related diagnosis which would support a finding of impairment as required by Table 53 of the AMA Guides. The fact that Dr. Rook disagrees with Dr. Polanco, based upon his interpretation of the medical records does not rise to the level of clear and convincing evidence to overcome Dr. Polanco. Likewise, merely because Dr. Rook observed some rigidity during his examination does not prove that Dr. Polanco's did not.

H. After considering the totality of the evidence presented, the ALJ concludes that Claimant has failed to produce unmistakable evidence establishing that Dr. Polanco's determination regarding impairment is highly probably incorrect. Rather, the ALJ concludes that the evidence presented at hearing establishes a mere difference of opinion between the DIME physician and claimant's retained medical expert (Dr. Rook). A professional difference of opinion do not rise to the level of clear and convincing evidence that is required to overcome Dr. Yamamoto's opinion concerning MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents have failed to meet their required legal burden to set Dr. Polanco's opinion regarding impairment aside.

I. The ALJ also rejects claimant's argument that the DIME is incomplete in this case and that Dr. Polanco erred and based upon the failure to attach range of motion worksheets to his DIME report. *See Carlson v. Informatics Corporation,* W.C. No. 4-380-302 (November 1, 2002)(claimant's argument that a Division-sponsored independent medical examination (DIME) report was incomplete because it did not include an evaluation of mental impairment or the mental impairment worksheet rejected).

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the Division IME opinion of Dr. Polanco

regarding impairment is denied and dismissed.

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

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

DATED: October 18, 2016

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment with employer.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received, including surgery performed on March 16, 2016, was reasonable and necessary to cure and relieve claimant from the effects of the work injury.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was authorized medical treatment.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of TTD benefits.

STIPULATIONS

At the time of hearing, the parties stipulated to the following:

- Claimant's average weekly wage ("AWW") is $575.00

- If claimant is found to be entitled to temporary total disability ("TTD") benefits, the dates of any TTD award will be from March 16, 2016 through April 3, 2016.

- The parties have reserved the issue of total partial disability ("TPD") benefits for the period of April 4, 2016 through May 4, 2016.

FINDINGS OF FACT

1. Claimant has been employed by employer since March 2013 in employer's dog treat manufacturing operation. Claimant's job duties include weighing out, lifting, and moving tubs of dog treats for bagging. The tubs weigh between 35 and 55 pounds. Claimant testified that he will lift and move tubs in this way repeatedly throughout his workday.

2. Claimant testified that once treats are bagged, they are placed in boxes. Claimant then lifts these full boxes from a table that is approximately 3 feet high and carries the boxes, at waist level, to other areas of the warehouse. Claimant describes that lifting full boxes in this way "is like hugging a tree".

3. Claimant testified that on March 16, 2016 he was performing his normal job duties of lifting bags of dog treats off of the table when he felt a sharp pain in his lower abdomen. The pain was so severe that claimant left the warehouse floor and went to the restroom. While in the restroom, claimant noted a bulge in his abdomen. Claimant testified that he reported his pain to his supervisor, Tyrel “Ty” Corem.

4. As indicated by claimant’s testimony and the First Report of Injury, Mr. Corem instructed claimant to go to Mountain Peaks Urgent Care in Montrose, Colorado. Due to the severity of the claimant’s condition, the staff at Mountain Peaks Urgent Care instructed claimant to seek treatment at the emergency room (“ER”) at Montrose Memorial Hospital.

5. Claimant testified that he sought treatment at the ER immediately and was evaluated by Dr. Andrew Yeowell who diagnosed claimant’s condition as an incarcerated right inguinal hernia. Dr. Yeowell made two attempts to reduce the hernia while claimant was awake. When these attempts were unsuccessful, Dr. Yeowell discussed the case with Dr. K. Michael Jay. Dr. Yeowell and Dr. Jay determined that the claimant’s condition required emergency hernia surgery. Dr. Jay performed surgery that same day. Dr. Jay also diagnosed the claimant with incarcerated right inguinal hernia hydrocele.

6. On April 18, 2016, Dr. Jay opined that there was “no evidence that [claimant] previously had an incarcerated hernia”. In Dr. Jay’s opinion claimant’s hernia was “brought on due to heavy lifting at [claimant’s] place of employment.”

7. Claimant testified that he that he did not return to work until he was released to modified duty on April 4, 2016. Claimant had work restrictions of no lifting over 10 pounds and no pushing or pulling at that time. On May 4, 2016, claimant was cleared to return to full duty. Since his return to work, claimant’s job duties have been that of a “warehouse runner”.

8. Claimant submitted to an independent medical exam (“IME”) on May 25, 2016 with Dr. Douglas Scott. Dr. Scott reviewed claimant’s medical records, obtained a medical history, and performed a physical examination of claimant in connection with the IME. Following the IME, Dr. Scott issued an IME report and opined that claimant had a preexisting hydrocele in his right scrotum prior to March 16, 2016. Dr. Scott further opined that claimant’s hernia on March 16, 2016 did not arise from his job duties with employer. Dr. Scott’s testimony was consistent with his IME report.

9. Dr. Scott testified that he disagreed with Dr. Jay’s causation analysis that claimant’s hernia was caused by lifting at work. Dr. Scott opined that claimant’s hydrocele hernia was more likely the result of a direct blow to his scrotum. Dr. Scott testified that claimant would likely have had this same diagnosis and resulting surgery whether or not he had been working on March 16, 2016. Dr. Scott further testified that hydroceles are typically congenital.

10. Claimant testified that prior to the events of March 16, 2016 he did not have any issues with his abdomen or his scrotum. Claimant had no knowledge of any preexisting condition.

11. The ALJ credits the testimony of claimant regarding the injury that he sustained on March 16, 2016. The ALJ also credits the medical records and the opinion of Dr. Jay over the contrary opinion of Dr. Scott and finds that claimant's work duties on March 16, 2015 let to the incarcerated right inguinal hernia hydrocele.

12. The ALJ finds that claimant has proven that it is more likely than not that he sustained the incarcerated right inguinal hernia hydrocele in the course and scope of his employment with employer on March 16, 2016 while he was lifting boxes of dog treats. Although claimant may have had a preexisting condition, as opined by Dr. Scott, claimant has proven that it is more likely than not that lifting on March 16, 2016 aggravated, accelerated, or combined with his preexisting condition which necessitated treatment including emergency hernia surgery.

13. The ALJ credits claimant's testimony at hearing and the medical records entered into evidence and finds that claimant has proven that it is more probable than not that the treatment provided to claimant by Montrose Memorial Hospital, including emergency surgery, was reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury.

14. The ALJ credits claimant's testimony at hearing and the medical records entered into evidence and finds that claimant has proven that it is more probable than not that the treatment provided to claimant by Montrose Memorial Hospital was authorized medical care. Specifically, the ALJ finds that employer referred claimant to Mountain Peaks Urgent Care on March 16, 2016, making Mountain Peaks Urgent Care an authorized provider. The ALJ credits the medical records and finds that Montrose Memorial Hospital was authorized by virtue of the referral from Mountain Peaks Urgent Care.

15. In addition, the ALJ finds that claimant sought care with Montrose Memorial Hospital on March 16, 2016 on an emergent basis for his abdominal pain. The ALJ also notes that claimant sought care with the tacit approval of employer, because claimant's supervisor Mr. Corem knew claimant was seeking medical care and had directed him to Mountain Peaks Urgent Care.

CONCLUSIONS OF LAW

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

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance of the evidence that he suffered a compensable injury out of an in the course of his employment with employer when he suffered a right inguinal hernia hydrocele on March 16, 2016 while lifting bags of dog treats. As found, claimant's employment aggravated, accelerated, or combined with a preexisting condition to require treatment, including emergency surgery. The ALJ finds the medical records and claimant's testimony to be credible and persuasive.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury,

the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

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

8. As found, claimant has proven by a preponderance of the evidence that the treatment he received from Montrose Memorial Hospital was reasonable and necessary to cure and relieve him from the effects of his March 16, 2016 work injury. Furthermore, the treatment provided by Montrose Memorial Hospital is deemed authorized by virtue of the referral from Mountain Peaks Urgent Care.

9. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

10. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

11. As found, claimant has proven by a preponderance of the evidence that for the period or March 16, 2016 through April 3, 2016 he was unable to work due to his compensable work injury. As found, claimant has established by a preponderance of the evidence that his inability to work limited his ability to earn wages for the period of March 16, 2016 through April 3, 2016. Therefore, claimant is entitled to an award of TTD for the period of March 16, 2016 through April 3, 2016.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the March 16, 2016 industrial injury provided by Montrose Memorial Hospital, including but not limited to the surgery performed on March 16, 2016.

2. Respondents shall pay claimant TTD benefits for the period of March 16, 2016 through April 3, 2016 based on the stipulated AWW of $575.00.

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

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

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

DATED: October 19, 2016

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

PROCEDURAL HISTORY

As noted above, the referenced hearings were held pursuant to an order of the Industrial Claim Appeals Office (ICAO) which reversed a procedural order issued by the undersigned ALJ striking Claimant's December 4, 2015 application for hearing. Consequently, the matter was remanded to the undersigned ALJ for further proceedings. The case has a lengthy procedural history which is summarized as follows:

On October 18, 2009, a hearing in this matter was held before ALJ Keith Mottram in Glenwood Springs. Claimant was represented during this hearing by Attorney Paul Gertz. In an Order dated January 20, 2010, ALJ Mottram determined that Claimant failed to prove that he sustained a compensable injury. The order specified as follows: "Claimant's claim for benefits is denied and dismissed." The order also provided that "[a]ll matters not determined herein are reserved for future determination."

Claimant did not appeal ALJ Mottram's January 20, 2010 order. Rather, on December 4, 2015, Claimant filed an application for hearing endorsing, among other issues, compensability, medical benefits and "petition to reopen". The stated basis for Claimant's "petition to reopen" included an assertion that the medical testimony of Dr. John Brodie, Respondents expert was perjured and as such constituted a fraud perpetrated on the Court and ALJ Mottram.

In a motion dated December 23, 2015, Respondent-Insurer moved to strike Claimant's application for hearing on the grounds of claim preclusion (*res judicata)*. In their motion, Respondents argued that all the elements required for the doctrine of claim preclusion to apply were present concerning the issues raised in Claimant's December 4, 2015 Application for Hearing. Consequently, Respondents requested that Claimant's application be stricken..

On January 13, 2016, the undersigned ALJ issued an order striking Claimant's December 4, 2015 application for hearing, albeit for reasons other than that requested by Respondents. The undersigned ALJ found that while Claimant had endorsed "Petition to Reopen", ostensibly on the grounds of fraud, he concluded that Claimant's claims were barred by the applicable statute of limitations as the request to reopen the matter was filed outside the six year time frame to reopen any award on the grounds of fraud. Claimant appealed to the ICAO which issued an opinion in *Cotter v. Busk Construction*, W.C. No. 4-796-185-02 on May 25, 2016.

The ICAO reversed, concluding that the statute of limitations referenced in C.R.S. § 8-43-303(1) was not jurisdictional and must be raised affirmatively. Because Respondents had not raised the defense and Claimant had not been afforded an opportunity to respond to any assertion that the statute of limitations defense barred his claims, the Panel concluded that the "application of the statute of limitations as a basis for striking the claimant's application for hearing was premature." See *Kersting v. Industrial Commission*, 567 P.2d 394 (Colo. App. 1977). The Panel also noted that pursuant to *Renz v. Larimer County School District*, 924 P.2d 1177 (Colo. App. 1996), the doctrine of *res judicata* does not bar an attack on a prior decision in a workers' compensation matter through application of the reopening statute described in C.R.S. § 8-43-303. Accordingly, the Panel found that the ALJ could entertain a challenge to ALJ Mottram's 2010 decision. Finally, the panel found that ALJ Mottram's 2010 order contained a reservation clause which reserved jurisdiction over issues not specifically addressed in his order. See *Brown & Root v. Industrial Claim Appeals Office*, 883 P.2d 980 (Colo. App. 1991)(holding that if an order grants of denies one category of benefits, but does not mention another type of benefit that order will still constitute an award in regard to the unmentioned benefit). Consistent with the holding of the *Brown & Root* and the decision announced in *Hire Quest, LLC v. Industrial Claim Appeals Office*, 264 P.3d 632 (Colo. App. 2011), the Panel concluded that the "only issue actually determined by ALJ Mottram's order and barred from future litigation was respondents' liability for the four months of medical treatment." All other issues, including claimant's entitlement to temporary total disability benefits, permanent disability benefits, and medical benefits subsequent to October 2009 were, as concluded by the Panel, "preserved" for future determination. Accordingly, the Panel concluded:

> In accord with the *Hire Quest* decision, because these benefits have not been determined, the claimant's eligibility for them has is not closed. It is not necessary for the claimant to reopen them. They are not subject to the statute of limitations set forth in § 8-43-303(1) and they are not barred by the doctrine of claim preclusion.

The ICAO further held that if Respondents pled the statute of limitations defense, "the running of the limitations period for reopening would prevent the claimant from reopening the issue of liability for medical benefits between June and October, 2009."[2]

ISSUES

Based upon the remand order of the Industrial Claim Appeals Panel, the undersigned ALJ concludes the following issues require determination:

I. Whether Claimant sustained any compensable injury on June 18, 2009 during the course and scope of his employment with employer.

II. If Claimant did suffer a compensable injury, whether he is entitled to an award of temporary total disability (TTD) benefits.

[2] As noted above, Respondents moved to add the issue/defense of statute of limitations following Claimant's request for a continuance of the proceedings at the first hearing convened August 19, 2016. Both Claimant's motion for an extension of time and Respondents' motion to add the statute of limitations defense were granted.

III. If Claimant did suffer a compensable injury, whether he is entitled to an award of temporary partial disability (TPD) benefits.

IV. If Claimant did suffer a compensable injury, whether he is entitled to an award of permanent partial disability (PPD) benefits.

V. If Claimant did suffer a compensable injury, whether he is entitled to an award of permanent total disability (PTD) benefits.

VI. If Claimant did suffer a compensable injury, whether he is entitled to an award of reasonable, necessary and related medical benefits subsequent to October 18, 2009.

VII. Whether Claimant's established by a preponderance of the evidence that he is entitled to reopen his claim on the issue of liability for medical benefits between June and October, 2009, on the grounds of fraud.

VIII. Whether Claimant's petition to reopen his claim for additional medical benefits between June 2009 and October 2009 is barred by the statute of limitations.

FINDINGS OF FACT

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

1. Review of the transcript of hearing from October 18, 2009, reveals that Claimant was employed as an interior trim carpenter for Employer. While there was discussion about whether Claimant would be brought on with the company as a subcontractor, the evidence persuades the ALJ that Claimant was hired as an employee on or about June 15, 2009. He was paid $30 per hour.

2. Claimant was brought on to assist Employer in completing a large job with a tight deadline. Claimant was one of a number of people retrained to complete the job, although the others were hired as subcontractors.

3. As part of his employment contract, Claimant underwent a pre-employment physical on June 16, 2009 that included an examination of his low back. Claimant was cleared to work in the position for which he was hired as objective findings on examination revealed normal range of motion in low back and a negative straight leg test.

4. On June 18, 2009, Claimant reportedly injured his back while lifting a slide miter saw weighing approximately 45 pounds out of his toolbox. According to Claimant the feet which connected to the saw to the stand which the saw stood on got "hooked" on the tool tray in Claimant's tool box as he attempted to lift the saw.

5. Claimant testified that he experienced a sharp burning pain in his low back at that “point” in time.

6. Claimant also admitted to a prior history of low back pain, caused a prior injury to his low back in 1986 while employed with B&H Construction and a pars fracture to his low back in 1995.

7. At hearing on October 18, 2009, Claimant testified that he thought he pulled a muscle. He was able to complete his shift for the day and return home. Claimant did not report his injury to his employer, choosing instead to wait until after the weekend to determine if his back felt better. Claimant testified that he did not report his work injury immediately because he felt if he reported a minor injury to his employer it would expose his employer to workers’ compensation claims and was fearful that he would be fired.

8. Claimant testified the injury occurred on a Thursday, and that he did not work Friday, Saturday or Sunday due to a project shut down to accommodate a community event. Claimant reported that his back pain remained the same during the course of the day and over the weekend. He testified that he tried to loosen up his back by riding his bicycle and by soaking in the hot water of the wading pools in Glenwood Springs. He also took Aleve and generally took it easy over the weekend.

9. Claimant returned to work on Monday. Upon his arrival at work, he was pulled aside by the owner of Employer and was advised that his employment was not working out. Claimant was terminated. He did not report his alleged low back injury prior to being terminated, nor did he mention it at the time he was discharged. Rather, Claimant told employer “yeah, you can fire me” and turned and walked away. Claimant testified that he was not given a reason for his termination.

10. Claimant testified that after he was terminated he was contacted by Employer’s office manager, Paula Busk who had a check or his unpaid wages, asking him to come to the office and pick it up. Claimant testified that the paycheck included money in excess of what he had earned as an employee. Claimant refused the check since it paid him as though he was a contractor and not an employee. He also reportedly informed Ms. Busk, “I’m sorry to tell you, but I’ve got a back injury and I don’t know what it is, and I’d like to know what’s wrong with the back before I accept the check.” Ms. Busk contacted a physician whom Claimant later contacted and an appointment was scheduled.

11. Claimant reported to Dr. Brokering on June 23, 2009, the day after he was terminated from employer. Claimant reported to Dr. Brokering that he was employed as a carpenter for employer for one week before being terminated. Claimant reported to Dr. Brokering that he was picking up a miter saw on June 18 when he injured his lower back. Claimant reported to Dr. Brokering that he had a history of low back pain. Dr. Brokering noted Claimant had fairly good range of motion on flexion and extension but experienced tenderness in his back with lateral flexion and twisting. Dr. Brokering intended to take an x-ray of the low back, but Claimant refused citing concerns over

sterility from the radiation. Claimant suggested an MRI as an alternative. Dr. Brokering diagnosed Claimant with a low back strain and referred him for physical therapy with Peak Performance. He also provided Claimant with a prescription for Celebrex and Cyclobenzaprine. Finally, Dr. Brokering provided Claimant with work restrictions of no lifting greater than ten (10) pounds.

12. Claimant returned to Dr. Brokering on June 24, 2009 and advised Dr. Brokering that he was concerned about taking Celebrex from a cardiologic standpoint after reading the accompanying warning label. Claimant requested a prescription for Vicodin, which was provided.

13. Claimant attended physical therapy (PT) sessions during which he reported a pain level of 9.5/10 at its maximum. Claimant reported to the physical therapist that his pain interfered with his personal care, kept him from sleeping and made it so he was unable to work. He also reported that he needed pain medication to be comfortable. Claimant returned to the physical therapist on June 26, 2009 reporting increased left lower extremity weakness and his leg giving out.

14. During hearing on October 18, 2009, Claimant conceded that following his workplace injury, but before seeing Dr. Brokering on June 23, 2009, he was able to work on his truck to remove four aluminum cylinder heads. He denied lifting anything over 30 to 40 pounds in performance of this work. He testified that he continued working on his truck outside of his home, and lifted up to 30 pounds, even after seeing Dr. Brokering who had imposed a lifting restriction of 10 pounds. He testified that the Vicodin masked his pain which made it possible to work on this truck. He continued to work on the truck on August 18, 20 and 21, 2009, which was documented in video surveillance. According to Claimant, his pain had improved by August 18, 2009. Indeed, Claimant report that by this date his pain was “on and off”.

15. On his own accord, Claimant sought a medical opinion regarding the condition of his low back from Dr. Thomas St. John. Claimant reported to Dr. St. John on July 15, 2009 with complaints of lower back pain and right leg/foot pain with bilateral weakness and numbness of his lower extremities. Dr. St. John performed a magnetic resonance image (“MRI”) of the lumbar spine which revealed “endplate edema and mild to moderate central disc protrusion at L2-3, slightly more to the left than right…but without impingement of the ganglia or L3 nerve.”

16. Claimant returned to Dr. St John for a follow-up evaluation of his lumbar spine on July 21, 2009. During this appointment, Dr. St. John interpreted Claimant’s MRI film, noting that he had a “very long discussion “with Claimant concerning the findings on MRI. According to Dr. St. John’s July 21, 2009 report, Claimant did not have a “surgically treatable lesion” noting further that “his changes are degenerative in nature”. Dr. St. John recommended “physical therapy, activity modification, and oral anti-inflammatory medications”. Contrary to his previous documentation, Dr. St. John placed a question mark in front of the impression of work-related injury in his July 21, 2009 report.

17. Claimant underwent a Respondent requested independent medical examination ("IME") with Dr. Brodie on September 15, 2009.

18. Claimant alleged to Dr. Brodie that on June 19, 20 and 21, 2009, his low back pain was at a 9/10. He then alleged that by June 22, 2009, when he returned to work, his back pain had improved to a level of 3/10. He told Dr. Brodie that he had pulled the cylinder head off of his truck on June 23, 2009. Dr. Brodie noted that he had reviewed the July 15, 2009 MRI scan report noting that the conclusion was "endplate edema and mild to moderate disk protrusion at L2-3". Claimant relayed a history of back injuries to Dr. Brodie, noting a previous pars fracture at L5-S1 and a swimmers fracture at T4-T5. He reported and subsequently testified that his September of 2008 incident was caused by a fall while working in a mine. He denied the allegations of chronic back pain as referenced in the emergency room records testifying that his history was confused by the medical providers at Heart of the Rockies Regional Medical Center.

19. Dr. Brodie opined that review of the medical records "documents abnormalities of the lumbar spine for the MRI scan, such as degenerative changes, which may not be causally attributable to any specific incident, including the incident in 1995, 2008, or 2009." According to Dr. Brodie, the content of Claimant's pre-injury medical records indicated that it was more probable than not that Claimant did have chronic low-back pain prior to June 18, 2009 and that there was a paucity of evidence or data to suggest that any incident on June 18, 2009 altered claimant's baseline condition. Dr. Brodie noted a difference between Claimant's presentation and complaints as compared to his demonstrated functional abilities on video surveillance, which he opined was inconsistent with a disabling back injury. He also indicated that the reporting delay, the reporting after employment termination, the lack of credibility of Claimant concerning his pre-existing injuries and the overall inconsistencies in the record raised concerns for the presence of a factitious[3] or cognitive disorder.[4] Because there was no medical data in the case "documenting or suggesting" a factitious or cognitive disorder, Dr. Brodie noted that the presence of a "malingering disorder, perhaps for secondary gain issues, [remained] plausible". Ultimately, Dr. Brodie opined that Claimant's low back pain was the consequence of a chronic pre-existing pain condition, and that is was not probable that he suffered a back injury or aggravated a pre-existing degenerative condition on June 18, 2009.

20. Dr. Brodie testified at hearing consistent with his medical report. He testified that "it's not probable that Mr. Cotter sustained an injury at work as he describes, and more probable, that he has a pre-existing and ongoing chronic back pain condition that was not affected by his work activities…." He testified that the MRI showed degenerative changes, and did not change his opinion regarding the cause of Claimant's pain complaints. He testified that the June 18, 2009 incident did not aggravate Claimant's pre-existing condition.

[3] According to Dr. Brodie, a factitious disorder could include a somatoform disorder, a conversion disorder, a histrionic condition and malingering disorders.

[4] Cognitive disorders includes those conditions leading to memory deficits.

21. On cross-examination, Mr. Cotter's previous counsel, Mr. Gertz, questioned Dr. Brodie concerning the endplate edema on the MRI scan. Dr. Brodie testified that the edema indicates a problem with a disc. As discussed below, the presence of endplate edema is central to Claimant's contention that Dr. Brodie perpetrated a fraud upon ALJ Mottram which entitles him to reopen the case for the medical treatment he received between June 23, 2009 and October 18, 2009.

22. Several employer witnesses testified at the October of 2009 hearing. Donnie Suazo testified that he worked with Claimant on June 18, 2009, and witnessed him work and lift without issue or limitation.

23. Gustavo Menchaca testified that he discussed with Claimant that his production was not up to par and that he was causing problems with co-workers on June 18, 2009. According to Mr. Menchaca, Claimant did not allege or display any injury on June 18, 2009.

24. Kevin Busk testified that Claimant was terminated because of his slow work and his inability to get along with his co-workers. He testified that he told Claimant why he was terminated. He testified that before he terminated Claimant on June 22, 2009, he found him setting up and getting ready to work.

25. Based upon careful review of the evidence presented as a whole, the ALJ finds Claimant's testimony concerning the mechanism of injury, the pre-existing condition of his low back and his functional capabilities to be contradicted by the content of the medical records submitted, the activity described on video tape per the transcript of the October 18, 2009 hearing and the more persuasive testimony of Dr. Brodie, Donnie Suazo, Gustavo Menchaca and Kevin Busk. The ALJ finds Claimant's testimony inconsistent with the more convincing competing evidence. Consequently, the ALJ finds Claimant's testimony that he was injured while lifting a miter saw unreliable and unpursuasive.

26. The ALJ credits the opinions of Dr. Brodie, to find that Claimant's low back pain is, more probably than not, unrelated to lifting a miter saw from a toolbox, even assuming that Claimant engaged in such lifting. The ALJ infers and finds from the evidence presented, including the MRI report, Dr. St. John's medical record and Dr. Brodie's testimony that Claimant's low back pain is, more probably than not, due to the natural progression of a pre-existing degenerative process in his lumbar spine rather than any work related aggravation of that condition or an acute injury suffered as a consequence of lifting a miter saw.

27. Claimant submitted an engineering report from Dr. Ngai regarding the cause of Claimant's low back pain. The ALJ finds many of the conclusions expressed by Dr. Ngai regarding the cause of Claimant's symptoms to constitute medically based causation opinions. The ALJ sustains Respondents' objections to Dr. Ngai's medically based causation opinions on foundation grounds and rejects those opinions as unpursuasive.

28. Claimant has failed to prove by a preponderance of the evidence presented that he sustained a compensable aggravation of his pre-existing low back condition or in the alternative a acute low back injury on June 18, 2009.

29. As noted, Claimant's primary assertion that he is entitled to have his claim reopened, is the contention that Dr. Brodie's testimony was perjured. Specifically, Clamant characterizes Dr. Brodie's testimony as conceding that he suffered an acute injury to his low back as evidenced by the presence of endplate edema caused by bleeding from the acute injury and that he "lied" when he testified during the October 18, 2009 hearing that such findings were not present on Claimant's MRI. A complete understanding of Claimant's assertion requires reference to the colloquy between Dr. Brodie and Claimant's then counsel, Paul Gertz. The following exchange was had:

> Q: Doctor, would an MRI definitely show a muscle strain?
>
> A: Rarely. If it was severe enough to cause tearing of the muscle, then you'd see bleeding, you'd get fluid accumulation. In this case we did not see that.
>
> Q: Was there some (inaudible) edema?
>
> A: In the MRI scan?
>
> Q: Yes.
>
> A: I will take a look. I don't see that. My summary provided in my report (inaudible) Have. Just a moment. If you have the hard copy (inaudible) that . . .
>
> Q: Okay.
>
> A: I did find it. (Inaudible) edema is mentioned. That is fluid at the edge of the disc.
>
> Q: And what does that fluid indicate? That there's some problem with the disc?
>
> A: Yes it does.

30. Based upon the evidence being discussed, the ALJ finds that the inaudible portion of the record preceding the word "edema", more probably than not, relates to the finding of endplate edema on Claimant's MRI scan. While it is true that Dr. Brodie, without having a copy of his report in front of him, initially noted that he did not "see that", i.e. endplate edema, the record supports that once he found his reference materials, Dr. Brodie testified that endplate edema was present and that the presence of endplate edema suggested a problem with the disc. No follow-up was forthcoming as to what may have caused the disc problem however.

31. The undersigned ALJ finds from the evidence presented that Claimant has failed to establish that Dr. Brodie "lied" or otherwise perjured his testimony at the October 18, 2009 hearing before ALJ Mottram. Accordingly, the ALJ finds that Claimant

has failed to prove by a preponderance of the evidence that he is entitled to reopening of his case on the basis of fraud. The ALJ has also considered and rejects Claimant's remaining assertions that the evidence, as presented, supports a finding that an error or mistake of law or fact was made in the initial determination of the claim, which error or mistake would justify the limited reopening for additional medical benefits between June and October 2009 as addressed in the remand order of the ICAO.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As found, the testimony of Claimant is inconsistent with and contradicted by the documentary evidence and the testimony of Claimant's co-workers and Dr. Brodie. The inconsistencies in Claimant's testimony cannot be reconciled with the competing record evidence. Rendering Claimant's testimony unconvincing and unreliable. Moreover, the testimony of Dr. Brodie, contrary to Claimant's assertions, is credible and supported by the balance of the medical records submitted. Even Dr. St. John, Claimant's hand selected physician, identified the changes on Claimant's MRI to be degenerative in nature not warranting surgical intervention.

Compensability

D. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*.* *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment relationship with Employer and during an activity, specifically setting up a miter saw as part of his duties as an interior trim carpenter for Employer. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" his employment must be resolved before the injury is deemed compensable.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

G. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease “to produce the disability and/or need for treatment for which workers’ compensation is sought”. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

H. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, *supra*; *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case, Claimant’s medical records include reference to a prior history of back pain pre-existing the alleged June 18, 2009 incident. There is no convincing evidence establishing Claimant’s allegation that both the physician and the nurse at Heart of the Rockies Regional Medical Center both erred in noting documenting Claimant’s complaints of chronic low-back pain in September of 2008. While Claimant challenges this documentation specifically, his testimony is unreliable and is contradicted by the extent of degenerative change noted on MRI.

I. Additionally, his complaints varied widely over the course of several days following his alleged workplace injury. Claimant initially alleged that he did not report his injury because he thought that the issue was minor and would go away. Then, he alleged that he was in extreme pain on June 19 – 21, 2009, with pain at a 9/10 level. Despite this, he appeared at work on June 22, 2009, ready to work until being terminated, yet he still did not to report any workplace injury. He claimed that his pain had dissipated to a 3/10 by January 23, 2015. Then, when he returned to physical therapy the next day, he was back in extreme pain. His extreme pain complaints belie his demonstrated functional abilities, evidenced by his ability to both ride his bicycle and work on his truck following his alleged injury. Claimant had almost full range of motion (ROM) when he treated with Dr. Brokering, but his ROM was extremely limited with Dr. Brodie approximately three months later, after initiating his claim. Claimant’s fluctuating pain levels prompted ALJ Mottram to find as follows:

> Claimant’s testimony inconsistent with the anticipated progression of a back injury insofar as Claimant’s pain apparently was present immediately, but

Claimant did not believe that the pain was reportable because it was a minor injury.[5] Claimant's pain then increased over the weekend, but decreased prior to Claimant reporting to work on Monday morning. Then, after being fired by his employer, Claimant's pain increased over the next two days when Claimant was examined by Dr. Brokering (the day after his termination) and the physical therapist (two days after termination.

J. The undersigned ALJ finds record support for ALJ Mottram's findings. Based upon the evidence presented as a whole, the undersigned finds/concludes from Dr. Brodie's opinion that malingering, possibly for secondary gain, is a plausible phenomenon at play in this case. Regardless, the undersigned ALJ also finds and concludes that Claimant's testimony regarding his alleged injury is not credible. In this case, the evidence presented persuades the ALJ that Claimant's low back symptoms and need for treatment are related to the natural progression of a degenerative condition in the lumbar spine and not related to his work duties as a carpenter. In this case, Claimant has failed to prove that a logical causal connection exists between his work duties, his low back symptoms and his need for treatment. Because Claimant failed to establish he suffered a compensable "injury" as defined by the aforementioned legal opinions, his claim is denied and dismissed. Accordingly, the remaining claims for medical, temporary, permanent partial and permanent total disability benefits need not be addressed.

Reopening

K. C.R.S. § 8-43-303(1) provides in pertinent part that "at any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition…" The party seeking to reopen bears the burden of proof to establish grounds for reopening. *See Garcia v. Qualtek Manufacturing*, W.C. No. 4-391-294 (ICAO August 13, 2004).

L. Claimant's assertion that his claim should be re-opened on the basis that Dr. Brodie perjured his testimony and committed fraud is unconvincing. The elements of fraud were set forth by the Colorado Supreme Court in *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 (1937). In that case, the Court stated: "The constituents of fraud, though manifesting themselves in a multitude of forms, are so well recognized that they may be said to be elementary. They consist of the following:

(1) A false representation of a material existing fact, or representation as to a material existing fact made with a reckless disregard of its truth or falsity; or concealment of a material existing fact, that in equity and good conscience should be disclosed.

[5] During the October 18, 2009 hearing, Claimant admitted that he knew it was company policy to report all injuries occurring on the job, including minor injuries.

(2) Knowledge on the part of the one making the representation that it is false; or utter indifference to its truth or falsity; or knowledge that he is concealing a material fact that in equity and good conscience he should disclose.

(3) Ignorance on the part of the one to whom representations are made or from whom such fact is concealed, of the falsity of the representation or the existence of the fact concealed.

(4) The representation or concealment made or practiced with the intention that it shall be acted upon.

(5) Action on the representation or concealment resulting in damages."

M. As noted by the Panel in *Essien v. Metro Cab*, W.C. Number 3-853-693 (ICAO August 22, 1991), "[t]he existence of the elements is generally a question of fact for the determination of the ALJ", and because proof of fraud is a factual issue, the ALJ may base his decision on inferences drawn from circumstantial or direct evidence. *See Essien*, supra, citing *Electric Mutual Liability Insurance Co. v. Industrial Commission*, 154 Colo. 491, 391 P.2d 677 (1964). Here, Claimant's suggestion that Dr. Brodie lied to ALJ Mottram about the existence of endplate edema as cover for what Claimant believe constitutes evidence of an acute injury is not supported by the record when it is viewed in its entirety. Rather, the record of Dr. Brodie's testimony supports a conclusion that he admitted that endplate edema was present and that it constituted evidence of a disc problem is evident. Ignoring that Claimant failed to question Dr. Brodie concerning the "cause" of any disk problem supported by the presence of endplate edema, the ALJ concludes that the record does not support that Dr. Brodie directly lied to ALJ Mottram with the intent to deceive him when he initially testified that he did not see evidence of endplate edema/fluid accumulation and that those findings were not present. As is clear in the record, Dr. Brodie noted that he would need to review his records and that upon doing so, he confessed that endplate edema was present. Based upon the evidence presented, the ALJ finds/concludes that while the strength of Dr. Brodie's memory could affect his credibility and the weight of his opinion, there was nothing fraudulent about his testimony at the October 18, 2009 hearing. Accordingly, the ALJ denies and dismisses Claimant's request to reopen the claim based upon fraud. As the ALJ concludes that Claimant failed to carry his burden to prove that Dr. Brodie perjured his testimony constituting a fraud upon the Court, this decision does not address application of the statute of limitation regarding the reopening period provided by § 8-43-303(1).

N. The ALJ also concludes that to the extent that Claimant asserts that his claim should be reopened based upon error or mistake, Claimant failed to establish such error or mistake. In this case, Claimant contends that that ALJ Mottram unreasonably determined the facts of the case, based upon the evidence presented, that is that the findings of fact do not support the order. Claimant also contends that ALJ Mottram's Conclusions of Law are not supported by the evidence presented.

O. When determining whether a particular mistake justifies reopening, the ALJ may consider whether it is the type of mistake which justifies reopening, including whether the mistake could have been avoided by the timely exercise of available remedies. *See Fisher v. Wal-Mart Stores,* W.C. No. 4-247-158 (ICAO August 20, 1998): *Travelers Ins. Co v. Industrial Comm'n,* 646 P.2d 399, 400 (Colo. App. 1981). Reopening is not appropriate "based on facts and evidence which were clear or should have been within the knowledge of [the Claimant] at the time the Order was issued" by the ALJ. *Colo. Dept. of Agriculture v. Wayne*, 493 P.2d 683, 684 (Colo. App. 1971). In this case, the undersigned ALJ views the petition to reopen as a mere substitute for Claimant's failure to timely appeal the January 20, 2010 order of ALJ Mottram. An ALJ does not commit an abuse of discretion if he denies a petition to reopen where the evidence indicates that the error or mistake presents a question which could have been raised by direct appeal. *Colorado Department of Agriculture v. Wayne*, *supra*; *Perrin v. Colorado Department of Labor and Employment* W. C. No. 3-984-399 (March 25, 1996). Here, the evidence presented supports a conclusion that Claimant had at his disposal all information outlining his rights and obligations to object to and appeal the January 20, 2010 order FAL and failed to do so. Accordingly, the ALJ concludes that any error or mistaken alleged to have occurred on the grounds that the facts were unreasonably determined and/or that the conclusions of law are do not support the order are errors or mistakes which could have been raised directly on appeal. The petition to reopen on such grounds is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury arising out of and in the scope of his employment on June 18, 2009, consequently his claims for compensation and benefits are denied and dismissed as follows:

   a. Claimant's request for medical benefits subsequent to October 18, 2009 is denied and dismissed.

   b. Claimant's requests for indemnity benefits including temporary partial disability benefits, temporary total disability benefits, permanent partial disability benefits and permanent total disability benefits are denied and dismissed.

2. Claimant's petition to reopen his claim for medical benefits between June 18, 2009 and October 18, 2009 is denied and dismissed.

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

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

DATED: October 24, 2016

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment with employer.

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

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was authorized medical treatment.

FINDINGS OF FACT

1. Claimant began his employment with employer in March 2014 as a concrete finisher. Claimant's job duties included setting concrete forms, tying rebar, pouring concrete, and finishing concrete. Claimant testified that it is physically demanding work.

2. Claimant testified that he sustained an injury to his back while at work on November 5, 2015. Claimant testified that he was pushing snow off a tarp with a 2 by 4 when he felt a popping in his back and felt a lot of pain. Claimant testified that he sat for approximately one hour after this incident and performed no work. Claimant testified that he reported the November 5, 2015 incident to Nathan Moffat, the owner of Custom Concrete Services, Inc., on that same date.

3. Claimant testified that Mr. Moffat told him he needed to stretch more. Employer did not provide claimant with a list of medical providers and claimant did not seek medical care at that time. Claimant testified that he worked the remainder of his normal shift on November 5, 2015. The ALJ takes judicial notice that November 5, 2015 was a Thursday. Claimant worked on Friday, November 6, 2015 and was not scheduled on Saturday, November 7, 2015 or Sunday, November 8, 2015. Claimant returned to work on Monday, November 9, 2015 as scheduled.

4. On November 9, 2015, claimant sought medical treatment at Mountain Family Health Center. Claimant testified that he had a previously scheduled appointment related to his white blood cell count. During that appointment, claimant notified Dr. Amy Brown that that he had pain in his lower back. Claimant reported to Dr. Brown that he was bending over at work when he twisted to shove snow off a tarp and

felt pain in his low back that shot down into his right buttock. Dr. Brown recommended claimant use over the counter pain relievers such as ibuprofen and prescribed Cyclobenzaprine, a muscle relaxer.

5. Claimant testified that he returned to work on November 9, 2015 and reported to work each day until January 18, 2016. Claimant testified that although he was at work, he did not perform the physically demanding aspects of his job. Claimant testified that he would only begin to work if Mr. Moffat arrived at the job site. However, as indicated by the time records in evidence claimant continued to complete his time cards as if he was working full days of physical concrete work including setting stairs, pouring stairs, and tying rebar. Claimant testified that he falsified his time records so that he could be paid.

6. Claimant testified that on November 13, 2015 he sought additional treatment at Valley View Hospital and was treated by Dr. Gregg Minion. Dr. Minion's report states that claimant reported low back pain after working "last Thursday". Dr. Minion referred claimant for x-rays which were conducted on November 13, 2015 and showed an anterior wedge compression at T12 which Dr. Minion deemed to be an old injury. Dr. Minion recommended claimant treat with ice, ibuprofen, back exercises and prescribed Vicodin. Dr. Minion did not assign any work restrictions. Dr. Minion's report also indicated that claimant reported a "prior condition". At hearing claimant testified that he does not have a prior history of back pain and no prior back injury.

7. Claimant testified that in December 2015 he received a bill for approximately $2,000.00 from Valley View Hospital for x-rays. Claimant testified that he asked Mr. Moffat to pay this bill because claimant knew that employer had assisted other employees with medical bills. Claimant testified that Mr. Moffat agreed to pay the bill.

8. Claimant testified that he did not seek additional medical care and continued to report to work, but did not work unless Mr. Moffat was present. Claimant testified that his last day working for employer was January 18, 2016. Claimant did not miss any work between November 5, 2015 and January 18, 2016. Claimant turned in his completed time cards for that period writing "last day" on the time card for January 18, 2016. However, claimant testified at hearing that he did not quit and Mr. Moffat told him "to leave".

9. Claimant filed his Worker's Claim for Compensation on January 20, 2016 for the alleged November 5, 2015 incident. Claimant testified that he did not initiate a workers' compensation claim until he learned that employer had not paid the Valley View Hospital bill.

10. Claimant sought additional medical treatment on January 30, 2016 at Valley View Hospital and was examined by Dr. Charles Abramson. Claimant reported to Dr. Abramson that he had increasing pain in his right lower back in the three days prior to January 30, 2016, but had no new trauma or falls. Dr. Abramson diagnosed sciatica, recommended claimant use ibuprofen and also prescribed Flexeril.

11. Claimant submitted to an independent medical exam ("IME") on July 9, 2016 with Dr. Kathleen D'Angelo. Dr. D'Angelo reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant in connection with the IME. Following the IME, Dr. D'Angelo issued an IME report and opined that claimant suffered a mild lumbar myofascial irritation on November 5, 2015 and has reached maximum medical improvement ("MMI"). Dr. D'Angelo also noted that it is her opinion that claimant does not require any further acute or maintenance care. Dr. D'Angelo's testimony was consistent with her IME report.

12. As indicated by Dr. D'Angelo's report, claimant told Dr. D'Angelo that he quit on January 18, 2016 because Mr. Moffat was not paying attention to him and had reassigned claimant's work truck to another employee. Claimant also informed Dr. D'Angelo that he had continued to perform his normal job duties until he decided to slow down four or five days before January 18, 2016.

13. The ALJ credits the testimony and report of Dr. D'Angelo and finds that the statements claimant made to Dr. D'Angelo at the IME are more credible than claimant's testimony at hearing. Claimant's testimony at hearing was internally inconsistent and also inconsistent with prior statements he made to Dr. D'Angelo at the IME. The ALJ finds claimant's testimony at hearing neither credible nor persuasive and finds that claimant was able to continue working in a physically demanding job until January 18, 2016 and missed no work between November 5, 2015 and his final day of January 18, 2016.

14. The ALJ further credits statements claimant made to Dr. D'Angelo regarding his job separation and finds that claimant quit on January 18, 2016 because Mr. Moffat had assigned the company vehicle to another employee and was not paying attention to claimant.

15. At hearing, claimant confirmed that he had failed to disclose a period of employment in which he had sustained a work injury while working for another employer. Claimant admits that prior work injury was reported under a different date of birth and a different social security number. However, claimant testified that the hospital was responsible for these errors. The circumstances of that prior work injury are wholly unrelated to the current alleged injury. However, the ALJ notes that claimant's failure to disclose this information undermines his credibility in the current case.

16. Claimant's testimony regarding his alleged injury in this case relies upon the claimant being found credible at hearing. The ALJ notes that claimant's testimony is contradicted by the history he provided to Dr. D'Angelo. Claimant testified that his appointment with Dr. Brown on November 9, 2015 was previously scheduled for his white blood cell count and was not specifically made for his alleged work injury.

17. The ALJ credits the medical reports from Dr. Minion and finds that claimant's treatment on November 13, 2015 was intended to treat an old injury and was not related to claimant's alleged injury with employer on November 5, 2015.

18. The ALJ credits the medical records from Dr. Abramson and finds that his pain increased in the three days prior to January 30, 2016, which was after he had stopped his employment with employer on January 18, 2016.

19. The ALJ determines that claimant has failed to meet his burden of proving that the alleged incident at work on November 5, 2015 resulted in the need for medical treatment to cure and relieve him from the effects of the work injury.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded

the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

5. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

6. As found, claimant's testimony at hearing regarding the facts and circumstances surrounding his alleged injury, including his symptoms after the alleged injury, is neither persuasive nor credible.

7. As found, the ALJ finds claimant's treatment with Dr. Brown on November 9, 2015 was related to his white blood cell count and was not related to claimant's alleged work injury with employer.

8. As found, the ALJ credits the reports of Dr. Minion and finds that claimant has failed to establish that his medical treatment on November 13, 2015 was related to claimant's alleged work injury with employer on November 5, 2015.

9. As found, claimant has failed to establish by a preponderance of the evidence that his medical treatment with Dr. Abramson on January 30, 2016 was reasonable, necessary, or related to any alleged injury with employer on November 5, 2015.

10. As found, the ALJ credits Dr. D'Angelo's testimony and the medical records entered into evidence over the testimony of claimant at hearing and finds that claimant has failed to prove that he sustained a compensable injury arising out of and in the course of his employment with employer.

11. As found, claimant continued to work with employer from November 5, 2015 through January 18, 2016. As found, claimant's testimony that he did not perform heavy labor during that time is neither credible nor persuasive.

12. As found, claimant has failed to meet his burden of proof establishing a compensable injury. Therefore, claimant's claim for benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits related to a November 5, 2015 work injury is denied and dismissed.

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

DATED: October 25, 2016

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

STIPULATIONS

1. The parties stipulated the Claimant's Average Weekly Wage (AWW) is $543.29.

2. Unemployment benefits were paid and the parties stipulated that these will result in an offset.

3. If the Claimant is entitled to temporary disability benefits, they would be for the time period of September 9, 2014 to November 9, 2014 and would be offset by unemployment benefits paid.

4. The issue of permanent total disability (PTD) is reserved.

ISSUES

The issues for determination are:

1. Whether the Respondents are permitted to withdraw the Final Admission of Liability filed on October 20, 2015, having proved, by a preponderance of the evidence, that the Claimant did not suffer a compensable injury or occupational disease.

2. If the evidence establishes that the Claimant suffered a compensable injury or occupational disease, whether the Claimant proved, by a preponderance of the evidence, that she is entitled to maintenance medical benefits.

3. If the evidence establishes that the Claimant suffered a compensable injury or occupational disease, whether Claimant proved by a preponderance of the evidence that she suffered a functional impairment contained off the schedule of injuries set forth at C.R.S. § 8-42-107(2), C.R.S. and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

4. If the Claimant proves she suffered a compensable injury, whether the Claimant proved, by a preponderance of the evidence, that she is entitled to temporary total disability indemnity benefits from September 9, 2014 to November 10, 2014.

5. If the Claimant proves she is entitled to temporary total disability benefits, whether the Respondents proved, by a preponderance of the evidence, that the Claimant is responsible for her termination of employment and resulting wage loss.

6. Whether the Claimant is entitled to compensation for disfigurement pursuant to C.R.S. § 8-42-108 and, if so, the amount of compensation.

FINDINGS OF FACT

1. The Claimant, now 77 years of age, began working for the hospital in 1989 as an environmental services technician, mainly cleaning at the third floor birthing rooms and the operating room for C-section deliveries. She continued in this position until she was terminated on September 9, 2014.

2. The claimed mechanism of injury in this case was the repetitive and forceful use of the micro mop, particularly when it came to cleaning up dried blood and meconium. The Claimant described the process as soaking everything first and then picking up blood clots with a towel. If some substances stuck to the floor, she used more wet towels and then a scraper to remove it. Whereas the string mop picked up the blood, the micro mop did not, so she had to get on her knees and scrape. The Claimant testified that it got to where she was more or less just getting a little scraper and scraping it up and using a towel then just sort of rinse the floor out with the micro mop. But she testified she was mostly doing the messy cleaning squatted down with towels.

3. Over the course of the claim, the Claimant's theory of how the micro mop caused her injury evolved into having to use pressure on the handle to keep the mop from flipping over. First of all, as testified by Ms. Kechter, the mop flipping over is usually caused by putting too much pressure on the mop. If putting pressure on the handle was causing the Claimant's pain, it would seem logical that she would use less pressure to avoid pain, which would in turn help prevent the mop from flipping over. Second, the problem of the mop flipping over is easily remedied by merely lifting up the lightweight mop and allowing the mop head to right itself. Third, the use of the micro mop was not a significant portion of the job. According to Ms. Kechter, a typical birthing room took approximately 30 to 40 minutes to clean, of which 6 to 7 minutes was mopping. (Exh. EE, p. 7: use of vacuum and micro mop was a total of one hour per day.). An operating room would typically take a little longer. Only a small percentage of the mopping time required using extra force to clean up dried substances. The majority of the workday was spent using a wet cleaning cloth to wipe down rooms and equipment. (Exh. EE, p. 5). Other tasks included wiping down computer screens, keyboards, tabletops, surgical trays, surgical tables; cleaning the walls and ceilings as necessary, emptying trash and removing sharps containers; and to ensure the entire suite was decontaminated. (Exh. EE, p. 1). Fourth, the micro mop is much easier on the muscles than a string mop. The micro mop weighs less than 1 pound and the force exerted on the micro mop rarely exceeded one or two pounds, as measured by Martin Rauer. (Exh. EE, p. 5).

4. The Claimant alleges an occupational disease to her neck, left shoulder, collarbone, and sternoclavicular joint due to using a micro-fiber mop ("micro mop"). A micro mop is pictured at Exhibit DD. The Claimant was first exposed to the micro mop in 2006 and she complained of symptoms similar to those in this claim.

5. The Claimant was seen December 31, 2007 by Dr. Frederick Scherr, M.D. Claimant noted that the use of the “micro mop” had caused increased pain and discomfort in her right shoulder and neck area. She noted that the mop required more pressure for her to push down on the mop and that it would flip on her. She did not have right shoulder or neck problems prior to the use of the “micro mop”. She was given restricted duty to include no mopping.

6. The Claimant was seen by Dr. Scherr on January 14, 2008. Dr. Scherr wrote in his report, “We discussed long and hard about being smart while she is at work with any of her problems and also discussed making sure that she does talk with her supervisor about the mopping duties and the use of the micro mop and make sure that she is using it appropriately, and if it is not working for her whether or not there are some alternatives to her job duties that she may be able to use that will not aggravate her cervical strain” (Exh. 4 p. 23).

7. After some conservative treatment and returning to using the regular string mop, the Claimant’s symptoms resolved and she returned to her regular duty without impairment and continued using the regular string mop. She had no symptoms and required no treatment until August of 2014.

8. At some point prior to September 2013, the employer formally transitioned to the use of the micro mops and began requiring their employees to use them in place of the regular string mops; however, the Claimant was reluctant to make the transition. On September 21, 2013, Melissa Kechter, the Claimant’s immediate supervisor, emailed her superiors saying that the Claimant was “balking at using the micro mops.” The Claimant had informed Ms. Kechter that she had a previous work-related injury that prohibited her from using the micro mop, but Ms. Kechter’s take on the matter was that she thought that the Claimant just did not want to use the micro mops. (Exh. AA, pages 1-2). The Claimant preferred the string mops because she thought they cleaned better.

9. On September 26, 2013, Marianne Beaver, Ms. Kechter’s direct supervisor, wrote to the Claimant following up on the Claimant’s annual meeting with Ms. Beaver’s supervisor, Dutch Fla Havhan, regarding the use of the micro mop. She noted that the Claimant was required to provide a doctor’s note to verify that she could not use a micro mop, but in the meantime, she was required to use them. She pointed out that they were easier to use and lighter in weight. In her note, Ms. Beaver voiced her understanding that people who have cleaned for a long time “find reasons why they can’t use the micro mops” and that this may not be an easy transition. Ms. Beaver informed the Claimant that she supplied her cleaning cart with the micro mop supplies. (Exh. Z). Ms. Beaver also removed the string mop from the Claimant’s cart.

10. The Claimant explained in her testimony that using the micro mop caused pain in her collarbone, which led to pain in her shoulder and neck and up into her head. She explained that pushing down on the micro mop pushed up her ribs which pushed up her collarbone. The pain went down to the middle of her right arm and up to the middle of her neck. At the time of the hearing, it was still hard for her to hold onto things,

pick up heavy items, and push with her right arm. The tight neck muscles causes pain to the left side of her head and sometimes affects her hearing in her left ear.

11. In August 2013, prior to using the micro mop, the Claimant reported to her private physician, Flora Brewington, M.D., with complaints of tension in her neck muscles, which was "pretty chronic for her." (Exh. P, p. 7). The following month (still prior to using the micro mop) she presented to another physician, Jeffrey Kauffman, M.D., with neck swelling and a collarbone that protruded more on the right side. The Claimant explained at hearing that whenever her neck gets bad, it swells. The Claimant explained to Dr. Kaufman that she had a childhood injury of her collarbone at that location. Dr. Kauffman's examination showed that the right sternoclavicular joint and medial clavicle were more prominent and larger than the left side. She also had mild rotational change which Dr. Kauffman related to mild scoliosis to the right in the thoracic spine. (Exh. P, p. 6).

12. Although the Claimant sought medical treatment thereafter for various conditions, the record is devoid of any complaints related to the use of a micro mop. On June 23, 2014, the Claimant was seen at the emergency room after falling down approximately four steps and landing on her left side. She complained of left upper arm and elbow pain, left knee and hip pain, and left-sided neck pain. She reported a loss of consciousness from the fall and was placed in a cervical collar. (Exh. M).

13. On July 15, 2014, the Employer issued a second written warning regarding attendance issues. The notice detailed absences and tardies and noted that every unexcused absence was adjacent to a day off or a weekend off. She was warned that one more unexcused absence in a three month period would result in termination. (Exh. V).

14. On July 29, 2014, the Claimant saw her family physician, John Cranor, M.D., to obtain FMLA paperwork related to her migraines and Ménière's disease. Dr. Cranor noted that she was followed in the past for dyspepsia, symptomatic menopause, mild hyperlipidemia, and hypovitaminosis D. There is no mention of her collarbone, neck, or shoulder. (Exh. L).

15. On Friday, August 22, 2014, the Claimant called Ms. Kechter approximately 30 minutes after her shift was scheduled to begin (9:30 p.m.), and explained that she was going to be late because she had been stuck on a long distance phone call. The Claimant told Ms. Kechter that she had been speaking with a cousin about getting the electricity turned on at the ranch. The Claimant arrived late to work and failed to complete her tasks for that day. (Exh. S). Under the hospital's policy, this was considered an unexcused absence. The Claimant testified that on that day, as she was leaving for her shift, her husband's colostomy bag burst. The Claimant's husband was bed ridden. There was no one else present to clean up her husband and his bed. The Claimant testified that she cleaned up the mess and proceeded to work. The Claimant qualified for FMLA due to her husband's condition. She testified that she could have called in under FMLA but she knew work would be short handed so she went in

even though it meant she would be late. Ms. Kechter testified that the Claimant did not tell her about the situation with her husband's colostomy bag. The ALJ finds Ms. Kechter's testimony that the Claimant did not advise her of the situation with her husband to be credible.

16. On Monday, August 25, 2014, the Claimant reported to her employer that she was experiencing pain to her right upper side from using the micro mops. She listed the date of injury as August 20, 2014. (Exh. U). She reported the injury to Mr. Fla Havhan.

17. Later that day, the Claimant was seen by Tracey Stefanon, M.D., the authorized treating physician. The Claimant explained to Dr. Stefanon that the pain she was experiencing, which was now at the level of 9/10 (Exh. E, p.2), had developed over the last year to year and a half at approximately the same time she started using the micro mop. She informed Dr. Stefanon that the fullness in the sternoclavicular area developed in the last one to one and a half months. Dr. Stefanon commented that she was unclear as to whether the Claimant's condition was caused by the occupational exposure of using a micro mop. (Exh. J). Dr. Stefanon felt that the Claimant's underlying osteoarthritis could have been contributing to her symptoms and that the fullness in the sternoclavicular joint clearly stemmed from arthritis. (Depo. Stefanon, p. 9).

18. At no time prior to reporting the claim did the Claimant tell anyone she was having difficulties or request accommodations for her alleged condition with the micro mop. The only thing the Claimant discussed with her co-workers and supervisors was her disapproval of the micro mop – not pain from using it (although the Claimant testified she did discuss pain in her shoulders on a couple occasions after gardening over the weekend). The fact that she did not raise the claim until after she knew she was going to get fired, and after having used the micro mop for a year without pain complaints to anyone, leads to the conclusion that the claim is not really related to the micro mop, but is a distraction from attendance issues.

19. On August 26, 2014 the Claimant was seen by her physical therapist, Barbara Walden. The Claimant complained that her head was vibrating up and down, but without any movement. Ms. Walden reported that the Claimant jumped with light palpation of all areas along her right shoulder, and was unable to sustain muscle testing and collapsed with all tests. Ms. Walden characterized the Claimant's reactions as demonstrating fear-avoidance activities and commented that the Claimant had shown to have delayed recovery with past injuries for which Ms. Walden had treated her. (Exh. I).

20. On September 9, 2014, the Claimant was called into Mr. Fla Havhan's office and was told she was being terminated. The Claimant did not explain what had happened with her husband on the evening of August 22, 2014. The Claimant testified that she already felt that her employer was trying to get rid of her because of her age. She testified that was asked frequently when she intended to retire. The Claimant testified that she did not think it was worth trying to defend herself regarding why she was late. She testified that she had never reported that she felt harrassed and offended

because her supervisors used profanity and harassed her about retirement so she felt she had no one to report it to. She did not report the abuse to Mr. Fla Havhan because he was not present when she was working the night shift. The Claimant likely knew she was going to lose her job after calling into work late on August 22, 2014. When she walked into Mr. Fla Havhan's office, she asked him if he was going to fire her before he said anything. When Ms. Beaver was walking the Claimant out after she was terminated, the Claimant confided with her that her family had warned her that she was going to be fired because of her attendance issues.

21. On November 6, 2014, Dr. Stefanon commented that it was "interesting" that at her previous evaluation the Claimant's range of motion on the right side was better than the unaffected left side, but on that day the range of motion was significantly different. Dr. Stefanon had no explanation for why the Claimant would show this degree of improvement and then digress to her current state. Dr. Stefanon stated, "I would definitely consider this case to be delayed recovery." (Exh. E, p. 4).

22. On November 13, 2014, the Claimant was seen by orthopedist Steven Seiler, M.D. The Claimant explained that the pain in her right shoulder, neck, scapula, and sternoclavicular joint was due to using the micro mop. Her primary complaint was pain at the base of her neck. Dr. Seiler felt that the prominence at the sternoclavicular joint was likely due to osteoarthritis and assessed her with "neck pain." He had no treatment to offer her and felt she was at MMI. (Exh. D).

23. Dr. Stefanon placed the Claimant at MMI on November 20, 2014. At that point, Dr. Stefanon came to the conclusion that the Claimant's condition did not relate to the use of the micro mop. (Exh. C). As she explained in her deposition testimony, Dr. Stefanon reached this conclusion because the Claimant's condition really had not changed even though the Claimant had not used a micro mop for an extended period of time. When looking at causality, she explained that symptoms should either improve or resolve once the exposure to the pain-inducing activity is removed. Dr. Stefanon was also concerned with the Claimant's pain behaviors and inconsistencies with her range of motion testing. (Depo. Stefanon, p. 20). She released the Claimant with no permanent impairment and no maintenance medical care. (Exh. C).

24. The Respondents filed a Final Admission of Liability on November 24, 2014, consistent with Dr. Stefanon's determinations. (Exh. 8).

25. The Claimant had an Independent Medical Examination performed by John Hughes, M.D. on January 6, 2015. Dr. Hughes diagnosed the Claimant with a sternoclavicular joint sprain/strain with globalizing right myofacial pain in the cervicothoracic region. (Depo. Tr. p. 15, l. 3 -5). He opined that this was an inflammatory problem as a result of her work related activities, particularly using the micro mop. (Depo. Tr. p. 15 l. 9 – 12). It was his understanding that the Claimant would push down on the micro mop forcibly. "Force is transmitted through the arm and shoulder through a single bony articular complex. And that's the clavicle with two joints, the acromioclavicular and sternoclavicular joints." (Depo. Tr. p. 15 l. 20 – 23).

When Dr. Hughes was asked why other employees did not developed the same problem, Dr. Hughes explained that Claimant was uniquely vulnerable because of her age, small stature, and female gender. (Depo. Tr. p. 16 l. 13 – 15). “People with those particular underlying factors are more vulnerable to joint and soft tissue problems of the upper extremities and scapulothoracic articulation complex.” (Depo. Tr. p. 16 1. 15 -18).

26. The Claimant requested a Division IME and was seen for that purpose by Franklin Shih, M.D. on September 8, 2015. The Claimant explained that her neck pain and pain into the upper back area was from using the micro mop at work. Within a few months of using the micro mop, she had pain radiating to her right hand and she developed numbness in the second and third digits. She denied any previous cervical or upper extremity injuries other than the 2007 problems and a 2005 motor vehicle accident. Dr. Shih noted that the Claimant exhibited marked pain behavior during the examination. Dr. Shih agreed with the November 20, 2014 date of MMI and assessed the Claimant with a 10% right upper extremity impairment rating. (Exh. B).

27. The Respondents filed a Final Admission of Liability on October 20, 2015, consistent with Dr. Shih’s determinations and admitted to PPD benefits in the amount of $5,762.22. (Exh. 9).

28. The Claimant was seen by Allison Fall M.D. on February 4, 2016 at the Respondents’ request. Dr. Fall’s examination was limited secondary to the Claimant’s pain behaviors. (Exh. A, p. 7). Examination of the cervical spine revealed a range of motion that was much more limited than what she observed during the Claimant’s spontaneous activities. The Claimant was able to abduct her right shoulder to 80° initially but only to 45° on the second attempt. Dr. Fall noted that these measurements were significantly less than those measured by Dr. Hughes and Dr. Shih and were likely not physiologic. The Claimant indicated that she could not internally rotate at all; whereas Dr. Seiler obtained an internal rotation of 70° a year and a half earlier (Exh. D) and the therapist found normal internal rotation in August 2014. (Exh. I). Dr. Fall documented give-way weakness throughout the right upper extremity, similar to that noted by other examiners.

29. It was Dr. Fall’s opinion that use of the micro mop would not lead to a sternoclavicular joint injury, a shoulder injury, or to cervical radiculopathy. (Exhibit A). Dr. Fall questioned whether cognitive issues were playing a role. She felt that the Claimant’s right shoulder and neck pain could be explained based on progressive degeneration that was noted in her cervical spine x-rays throughout the years. She felt the Claimant had sustained no permanent impairment from using the micro mop. (Exh. A).

30. At the hearing, Dr. Fall testified consistent with her written opinion. Overall, Dr. Fall opined that it is not probable that use of the micro mop led to the Claimant’s right sided neck and shoulder complaints. Dr. Fall felt that, if anything, listening to the Claimant’s testimony over 2 days of hearing provided even greater support for her opinion that the micro mop use didn’t require an additional use of force

that could have caused the reported symptoms. Dr. Fall further opined that use of the micro mop did not in any way aggravate, accelerate or exacerbate the Claimant's preexisting conditions which were: prominence of her right clavicle and arthritis in her neck. Dr. Fall also pointed out that Rule 17 cumulative trauma issues are usually seen for the neck and shoulder.

31. Dr. Hughes testified in this matter by deposition. Based on his testimony, he was unaware of how long the Claimant had been using the micro mop. His causation opinion was based on his understanding that the Claimant had been using the micro mop for a seven-year period of time. (Depo. Hughes, pp. 5-6, 24). His understanding of the mechanism of injury, as obtained from the Claimant, was that the Claimant would need to apply a lot of pressure when getting blood and fluids off the floor. (Depo. Hughes, p. 7). He understood that it took up to 15 pounds of pressure when pushing hard on the mop, but he conveyed no understanding of how much time during the day was spent removing the substances or how much pressure was typically used. (Depo. Hughes, p.12, ll.15-16). Dr. Hughes felt that the Claimant had sustained a sternoclavicular joint sprain/strain, but explained that it is much more common to see an acromioclavicular joint problem than a sternoclavicular joint problem. (Depo. Hughes, p. 15-16). When asked why the Claimant was having sternoclavicular issues, Dr. Hughes responded, "I really have no idea." (Depo. Hughes, p. 16). Additionally, Dr. Hughes did not seem to be aware that the Claimant had been seen prior to her use of the micro mop with regard to her sternoclavicular joint, which was likely caused by scoliosis and arthritis.

32. The Claimant filed an Application for Hearing endorsing the issue of permanent total disability benefits. Respondents filed a Response to the Application for Hearing endorsing the issue of compensability and withdrawal of the Final Admission of Liability.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Withdrawal of Admissions Made in a General Admission of Liability

C.R.S. § 8-43-201 generally establishes the burden of proof in disputes arising under the Workers' Compensation Act of Colorado. It provides, in pertinent part, that,

> A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; a workers' compensation case shall be decided on its merits; and a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.

Thus, under the provisions of C.R.S. § 8-43-201(1), the party seeking to modify an issue already determined by a general or final admission shall bear the burden of proof for any such modification. *Rodriguez v. City of Brighton,* W.C. No. 4-782-516 (ICAO August 23, 2011). Here, the Respondents seek to modify the issue of compensability of an occupational disease claim as determined by a General Admission of Liability filed by Insurer. Respondents therefore bear the burden of proof, by a preponderance of the evidence, to show that the Claimant did ***not*** sustain a compensable occupational disease with a date of injury of August 20, 2014.

Compensability - Occupational Disease

The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury or illness have its origins in an employee's work-related functions. There is no presumption than an injury or illness which occurs in the course of employment arises out of the employment. *Finn v.*

Industrial Commission, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 124 Colo. 210, 236 P.2d 293 (1951). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, supra.

An occupational disease, as opposed to an occupational injury, arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). Occupational diseases are subject to a more rigorous test than accidents or injuries before they can be found compensable. All elements of the four-part test mandated by the statute must be met to ensure the disease arises out of and in the course of employment.

C.R.S. § 8-40-201(14) defines “occupational disease” as:

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

The statute imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test which requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. Id. Where the disease for which a claimant is seeking compensation is produced solely by some extrinsic or independent cause, it is not compensable. *Anderson* at 824. The purpose of this rule “is to ensure that the disease results from the claimant’s occupational exposure to hazards of the disease and not hazards to which the claimant is equally exposed outside of employment.” *Saenz-Rico v. Yellow Freight System, Inc.,* W.C. No. 4-320-928 (January 20, 1998); see also *Stewart v. Dillon Co.,* W.C. No. 4-257-450 (November 20, 1996). Once the claimant makes such a showing, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

The hazardous conditions of employment need not be the sole cause of the disease. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.*, W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office*, N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines*, W.C. 4-785-790 (ICAO September 9, 2011).

Of particular importance in the Claimant's case is analysis of whether or not she has suffered a work-related cumulative trauma injury which is addressed in Rule 17, Exhibit 5 of the Guidelines.

Rule 17, Exhibit 5 (D)(3) provides that,

> The clinician must determine if it is medically probable (greater than 50% likely or more likely than not) that the need for treatment in a case is due to a work-related exposure or injury. Treatment for a work-related condition is covered when: 1) the work exposure causes a new condition; or 2) the work exposure causes the activation of a previously asymptomatic or latent medical condition; or 3) the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic condition. In legal terms, the question that should be answered is: "Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place?" If the answer is "yes," then the condition is not work-related. If the answer is "no," then the condition is most likely work-related.

The Cumulative Trauma Guidelines then set out the steps the clinician should follow to make a proper causation evaluation. There is a 6-step general causation analysis and a 5-step causation analysis when using risk factors to determine causation.

The claimed mechanism of injury in this case was the repetitive and forceful use of the micro mop, particularly when it came to cleaning up dried blood and meconium. The Claimant described the process as soaking everything first and then picking up blood clots with a towel. If some substances stuck to the floor, she used more wet towels and then a scraper to remove it. Whereas the string mop picked up the blood, the micro mop did not, so she had to get on her knees and scrape. The Claimant testified that it got to where she was more or less just getting a little scraper and scraping it up and using a towel then just sort of rinse the floor out with the micro mop. But she was mostly doing the messy cleaning squatted down with towels.

The Claimant likely knew she was going to lose her job after calling into work late on August 22, 2014. When she walked into Mr. Fla Havhan's office, she asked him if he was going to fire her before he said anything. When Ms. Beaver was walking the Claimant out after she was terminated, the Claimant confided with her that her family had warned her that she was going to be fired because of her attendance issues.

The Claimant did not report her condition until her pain reached 9/10 (Exh. E, p. 2). She continued to work her regular job up until August 25, 2014 when she reported the injury and was first seen by Dr. Stefanon. At no time prior to reporting the claim did she tell anyone she was having difficulties or request accommodations for her alleged condition. The only thing the claimant discussed with her co-workers and supervisors was her disapproval of the micro mop – not pain from using it (although the claimant testified she did discuss pain in her shoulders on a couple occasions after gardening over the weekend). The fact that she did not raise the claim until after she knew she was going to get fired, and after having used the micro mop for a year without pain complaints to anyone, leads to the conclusion that the claim is not really related to the micro mop, but is a distraction from a attendance issues.

Over the course of the claim, the Claimant's theory of how the micro mop caused her injury evolved into having to use pressure on the handle to keep the mop from flipping over. First of all, as testified by Ms. Kechter, the mop flipping over is usually caused by putting too much pressure on the mop. If putting pressure on the handle was causing the Claimant's pain, it would seem logical that she would use less pressure to avoid pain, which would in turn help prevent the mop from flipping over. Second, the problem of the mop flipping over is easily remedied by merely lifting up the lightweight mop and allowing the mop head to right itself. Third, the use of the micro mop was not a significant portion of the job. According to Ms. Kechter, a typical birthing room took approximately 30 to 40 minutes to clean, of which 6 to 7 minutes was mopping. (See Exh. EE, p. 7: use of vacuum and micro mop was a total of one hour per day.). An operating room would typically take a little longer. Only a small percentage of the mopping time required using extra force to clean up dried substances. The majority of the workday was spent using a wet cleaning cloth to wipe down rooms and equipment.

(Exh. EE, p. 5). Other tasks included wiping down computer screens, keyboards, tabletops, surgical trays, surgical tables; cleaning the walls and ceilings as necessary, emptying trash and removing sharps containers; and to ensure the entire suite was decontaminated. (Exh. EE, p. 1). Fourth, the micro mop is much easier on the muscles than a string mop. The micro mop weighs less than 1 pound and the force exerted on the micro mop rarely exceeded one or two pounds, as measured by Martin Rauer. (Exh. EE, p. 5).

The medical opinions varied among the experts as to the compensability of the claim. However, the ALJ finds that the Claimant's ATP Dr. Stefanon and Dr. Fall had the clearest understanding as to what the Claimant's actual job duties were, and the Claimant's complete medical history. Dr. Fall was in the hearing room and heard all the evidence presented in the proceeding. Both these physicians concluded that the use of the micro mop did not lead to the Claimant's condition. As noted by Dr. Stefanon, Dr. Shih performed no causation analysis. (Depo. Dr. Stefanon, p. 47).

The Claimant's expert, Dr. Hughes, was unaware of how long the Claimant had been using the micro mop. His causation opinion was based on his understanding that the Claimant had been using the micro mop for a seven-year period of time. (Depo. Hughes, pp. 5-6, 24). His understanding of the mechanism of injury, as obtained from the claimant, was that the Claimant would need to apply a lot of pressure when getting blood and fluids off the floor. (Depo. Hughes, p. 7). He understood that it took up to 15 pounds of pressure when pushing hard on the mop, but he conveyed no understanding of how much time during the day was spent removing the substances or how much pressure was typically used. (Depo. Hughes, p.12, ll.15-16). Dr. Hughes felt that the Claimant had sustained a sternoclavicular joint sprain/strain, but explained that it is much more common to see an acromioclavicular joint problem than a sternoclavicular joint problem. (Depo. Hughes, p. 15-16). When asked why the Claimant was having sternoclavicular issues, Dr. Hughes responded, "I really have no idea." (Depo. Hughes, p. 16). Dr. Hughes was seemed unaware that the Claimant had been seen prior to her use of the micro mop with regard to her sternoclavicular joint, which was likely caused by scoliosis and arthritis.

The experts all agreed that temporality was an important factor to consider when addressing causation. Dr. Hughes felt that the temporality of the Claimant's condition fit the aggravation model. However, as noted above, he thought that the Claimant had been using the micro mop for seven years, and that once the micro mop was removed, the claimant got better. As noted by Dr. Fall and Dr. Stefanon, the Claimant initially reported an improvement when she began physical therapy and the micro mop was removed. Given that these two variables were changed at the same time, it was impossible to know what was causing the improvement at the time. However, when the Claimant's condition then worsened over time once the physical therapy was removed, it is evident that the removal of the micro mop was not a factor in her initial improvement. Dr. Fall noted that the range of motion measurements of the shoulder actually deteriorated over time and after removal of the micro mop, leading her to conclude that the micro mop was not an injury-inducing factor.

The Claimant explained in her testimony that using the micro mop caused pain in her collarbone, which led to pain in her shoulder and neck and up into her head. She explained that pushing down on the micro mop pushed up her ribs which pushed up her collarbone. There is no medical support for this claim. At the time of the hearing, it was still hard for her to hold onto things, pick up heavy items, and push with her right arm. It is difficult to understand how the claimant could have continued performing her regular job up to August 25, 2014 if her current condition is actually an improvement on her condition due to the removal of the micro mop.

Dr. Fall explained that the shoulder is not covered under Rule 17 cumulative trauma disorders, because the shoulder and neck problems are typically not caused by an overuse exposure.

The doctors could all agree that the Claimant had pre-existing multilevel degenerative disc disease, underlying cervical spine spondylosis, and osteoarthritis. Dr. Hughes also believed that the Claimant likely had rheumatoid arthritis given his examination of her fingers. Dr. Hughes, Dr. Fall, and Dr. Stefanon all agreed that the Claimant's symptoms could have been evident in a 77-year-old woman absent any injurious exposure other than activities of daily living.

The Claimant generally has the burden of proving compensability by a preponderance of the evidence. In this case, however, the Respondents had the burden, given their admission of liability. See § 8-43-201(1). The fact that there was a DIME performed in this case does not change the evidentiary standard. *Faulkner v. ICAO*, 12 P.3d 844 (Colo. App. 2000). The Respondents have carried their burden of proving by a preponderance of the evidence that the Claimant's purported injuries did not arise out of her use of the micro mop.

Remaining Issues

The Respondents are permitted to withdraw the Final Admission of Liability having proven by a preponderance of the evidence, that the Claimant did not suffer a compensable injury or occupational disease. As such, the remaining issues regarding temporary disability benefits, maintenance medical benefits, disfigurement, conversion, and responsibility for termination are moot.

Overpayment

The term "overpayment" is defined in C.R.S. § 8-40-201(15.5), as,

> money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it

> is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

"Generally, an 'overpayment' is anything that has been 'paid' but is not 'owing as a matter of law.'" *Cooper v. Indus. Claim Appeals Office*, 109 P.3d 1056 (Colo. App. 2005). Further, in *Simpson*, the Court considered the statutory definition of "overpayment" in § 8-40-201(15.5) and found it provided for three distinct categories of overpayment:

> The statute makes clear that the phrases are disjunctive such that three categories of possible overpayment are included in the statutory definition: one category is for overpayments created when a claimant receives money "that exceeds the amount that should have been paid"; the second category is for money received that a "claimant was not entitled to receive"; and the final category is for money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of Title 8. § 8-40-201(15.5). See *Simpson*, 219 P.3d 359.

The definition is explicit that an "overpayment" can be found even when there would not have been an overpayment "at the time the claimant received … benefits." Thus, in *Haney v. Shaw, Stone & Webster,* W.C. No. 4-796-763 (July 28, 2011), the panel determined that temporary benefits paid pursuant to a general admission could be ordered retroactively repaid to the respondents. In *Haney*, the ALJ determined that the claimant was responsible for his termination of employment and that the respondents were able to retroactively recover TTD payments made since the date of termination of employment as an overpayment. *See also Stroman v. Southway Services, Inc.*, W. C. No. 4-366-989 (August 31, 1999).

The Respondents admitted to PPD benefits in the amount of $5,762.22. (Exh. 9). Because the claim is not compensable, this amount constitutes an overpayment. The Claimant is required to repay this amount.

The Claimant is no longer employed by Employer. It would be a serious hardship for her to repay the entire amount of the overpayment in a lump sum. Therefore, the Claimant is not required to pay the entire $5,762.22 in a lump sum. The Claimant shall make payments of $50.00 per month until the overpayment is repaid.

ORDER

It is therefore ordered that:

1. Respondents are permitted to withdraw the Final Admission of Liability filed on October 20, 2015 having proven by a preponderance of the evidence, that the Claimant did not suffer a compensable injury or occupational disease.

2. As the Claimant did not suffer a compensable injury or occupational disease, the issues of disfigurement, temporary disability, post-MMI medical benefits, and permanent partial disability/conversion are moot and are denied and dismissed.

3. The Respondents proved that there was an overpayment for PPD benefits that were paid but not due. The overpayment amount was $5,762.22. The Claimant shall make payments of $50.00 per month until the overpayment is repaid.

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

DATED: October 18, 2016

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

ISSUES

- Did Claimant suffer a compensable injury to her right eye on November 30, 2015 arising out of and in the course of her employment?

- If compensable, is Claimant entitled to medical benefits to cure and relieve the effects of her industrial injury?

STIPULATION

Claimant and Respondents stipulated Claimant was on travel status on November 30, 2015. The Court accepted the stipulation.

FINDINGS OF FACT

1. Claimant worked for Employer as a flight attendant for 10 years. Claimant testified her duties included ensuring the security of the passengers.

2. Claimant was based in Denver, Colorado.

3. There was no evidence admitted at hearing which showed Claimant had an injury to her right eye before November 30, 2015.

4. Claimant was working on November 30, 2015 for Employer on a flight from Denver to Cancun. Claimant testified this was a redeye flight and they arrived in Cancun at 6:00 a.m.

5. Claimant testified the flight crew checked in at the hotel sometime between 6:00 a.m. and 7:00 a.m. She then took a nap, as working a redeye was very tiring. Claimant estimated she woke up somewhere between 11:00 a.m. and 12:00 PM.

6. Claimant testified the hotel was paid for by Employer. She confirmed there were no meetings she had to attend for Employer on November 30, 2015 and there were no activities required by Employer that day.

7. Claimant was on travel status while staying at the hotel in Cancun.

8. Claimant testified she had lunch with other flight attendants on the beach that day. Claimant testified she could not bring food with her on such a trip and had to purchase meals. Employer paid a per diem for food. Claimant was at the hotel location on the beach eating lunch, which was incidental to her employment. The act of eating lunch did not constitute a purely personal errand or deviation.

9. Claimant described the weather as very hot and windy. She testified she and her co-workers relaxed on the beach, as they were scheduled to return at 7:00 a.m. the next morning. Claimant testified FAA rules restricted them from drinking alcohol eight (8) before the flight the next morning. This regulation limited Claimant's activities that day and was related to her employment.

10. After lunch, Claimant testified she noticed her eye was red, but she did not know if it was because she was tired from the night before or because she had gotten sand in her eye. Claimant testified she and the other flight attendants made plans to eat dinner at another hotel and they walked to that hotel along the beach. Claimant confirmed it was still very windy when they were walking along the beach.

11. Claimant testified that she went to dinner at the Taco Factory and on the way home walking along the street, she noticed the lights on billboards were very bright. This caused pain in her right eye, which she talked about with another flight attendant (Meghan). Claimant testified the pain was excruciating by the time she returned to the hotel room and she took her contacts out and went to bed. Her eye was sensitive to light and she woke up at approximately 3:00 a.m. with pain and could not turn on the light because her eye was so sensitive.

12. The ALJ concludes it is more probable than not that Claimant's eye was exposed to sand while she was on the layover in Cancun. The ALJ infers this exposure most likely occurred during the time she was eating lunch and with her co-workers, as Claimant testified she noticed the eye irritation around that time. This exposure to sand was incidental to Claimant's employment. Claimant's testimony regarding her exposure to sand was persuasive to the ALJ.

13. Claimant's activities on November 30, 2015 did not constitute a substantial deviation from employment.

14. Claimant treated with the hotel nurse, who flushed out her eye and confirmed there was no foreign body in it.

15. Claimant contacted crew scheduling, as they had to leave the hotel at 6:00 a.m. for the return leg of her trip. Employer scheduled another flight attendant for the flight and Claimant returned to Denver as part of "dead head" leg.

16. Claimant contacted the triage nurse for Employer and was told to go to the ER. Claimant testified this was the procedure she was required to follow. Claimant was seen that night at Medical Center of the Rockies at approximately 9:50 p.m.

17. Records from Medical Center of the Rockies were admitted at hearing. Claimant reported that she was on the beach and thought sand had flown in her eye. Since that time, she noticed irritation and photosensitivity in her right eye. Henry Lansgaard, D.O. examined her right eye, which had a corneal abrasion, but no corneal flair, or ulcer, foreign body, no hypehma, and no hypopyon. The diagnosis was:

corneal abrasion.[1] Claimant was prescribed Hydrocodone and Ciprofloxacin.

18. Claimant testified her eye has improved and she has no problems with it.

19. A Worker's Claim for Compensation was filed on or about December 30, 2015. In that document, Claimant stated the injury occurred “while walking outside, the wind was strong-sand got in under her contact”.

20. Claimant suffered a compensable eye injury while on travel status.

21. Claimant’s eye required medical treatment as a result of the injury suffered while on the layover in Mexico. Respondents are liable for medical treatment to cure and relieve the effects of the injury to Claimant’s eye.

22. Dr. Landsgaard is an ATP.

23. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

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

General

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

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

Generally, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

[1] This referred to the left eye, which appears to be a typographical error, as all other references were to the right eye.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing a service for Respondent-Employer arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. §§ 8-41-301(1)(b) & (c), C.R.S.; *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); § 8-41-301(1)(c), C.R.S. The question of whether Claimant met her burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

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

Compensability

Claimant alleged she sustained a compensable injury to her right eye while she was on travel status working for Employer. In this regard, Claimant argued the injury to eye occurred while she was engaged in activities that were incidental to her employment. Claimant cited *Continental Airlines v. Industrial Commission,* 709 P.2d 953, 954 (Colo. App. 1985) as an analogous and controlling case.

Respondents argued that Claimant injured her eye while she was engaged in a purely recreational activity on the beach with other co-workers and that the current case is comparable to *Silver Engineering Works, Inc. v. Simmons,* 505 P.2d 966, 968 (Colo. 1973). In that case, Claimant drowned during a fishing trip with co-workers on his day off while on a business trip in Mexico. The Court concluded that the claim was not compensable, as the activities were personal and not connected to the employment. *Id.* Alternatively, Respondents averred that Claimant deviated from the scope of her employment while she was eating in the cabana and walking on the beach between hotels because she voluntarily engaged in those activities and such activities were not incidental to her responsibilities as a flight attendant.

As a starting point, the parties stipulated that Claimant was on travel status while she was in Cancun on a layover day for work when her injury occurred. The issue is whether Claimant's injury occurred while she was within the scope of her employment or when she deviated from the course of her employment duties on a personal errand or recreational activity.

As a general rule, an employee whose work for the employer necessitates travel away from home is deemed to be in continuous employment from the time she leaves until the time she returns home. *Alexander Film Co. v. Industrial Commission*, 319 P.2d 1074 (Colo. 1957); *Continental Airlines v. Industrial Commission, supra.* Circumstances not covered by the travel doctrine include activities where the employee is shown to have made a distinct departure on a purely personal errand or is engaged in recreational activity while on travel status. *Silver Engineering Works, Inc. v. Simmons, supra,* at 968. [2] Such departures are characterized as acts not “beneficial or incidental to her employment and would constitute a stepping aside from employment”.

However, employee activities that involve personal or bodily ministrations are not considered deviations, but rather incidental to and within the scope of employment, and an employee can be compensated for any injuries arising out of activities that include eating and sleeping. *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). In *Phillips Contracting, Inc*, the Colorado Court of Appeals affirmed the ICAO Order holding Claimant was on travel status when he was injured while riding with a co-worker in a company truck. The employees were working out of town in Limon, Colorado and obtained permission to drive a company truck for personal errands on a Saturday (doing laundry and buying winter clothes). On the way back, they stopped at a bar for lunch and the co-worker consumed alcohol. Claimant was injured in a motor vehicle accident on the return trip to Limon. The Court held that an employee returned to travel status, even after the departure for a personal errand.

As Justice Pierce articulated: "It is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. [citing *City of Boulder v. Streeb*, *supra,* 706 P.2d 786]. This rule, applied to traveling employees, means that the risks associated with the necessity of eating, sleeping, and ministering to personal needs away from home are considered incidental to and within the scope of the traveling employee's employment”. *Phillips Contracting, Inc. v. Hirst,* 905 P.2d at 12.

The parties stipulated Claimant was on travel status and away from home for work. As found, Claimant was not allowed to bring her own food off the planes and received a per diem allowance to purchase meals for herself while on a layover day. (Finding of Fact 8). Claimant had no choice but to go out and eat meals in nearby restaurants. *Id.* As found, eating meals was incidental to Claimant’s employment and the location of where she ate lunch was reasonably incidental to the circumstances of her trip to Cancun.

Furthermore, the evidence admitted at hearing revealed Claimant's exposure to sand most probably occurred during the time she was at lunch. (Findings of Fact 8, 12 and 22). Eating meals was incidental to Claimant's employment. Therefore, the instant case fits within the ambit of those cases describing what has been described as the personal comfort or personal ministration doctrine for an employee on travel status. The specific circumstances of Claimant’s employment and the temporal proximity of her work on the redeye flight to this injury made the claim compensable. *Phillips Contracting, Inc. v. Hirst,* supra. Under the facts of the instant case, the ALJ declined to find Claimant had deviated from her employment. (Finding of Fact 8).

[2] The ALJ notes *Silver Engineering Works, Inc. v. Simmons, Alexander Film Co. v. Industrial Commission*, *Continental Airlines v. Industrial Commission* were all decided before the 1991 amendments to the Act, including §8-40-201(8) C.R.S.,the recreational activities statute.

In concluding that the claim was compensable, the ALJ considered Respondents' argument that pursuant to the Worker's Compensation Act found in §8-40-201(8) C.R.S., Claimant should not be compensated for engaging in a voluntary recreational activity. C.R.S. § 8-40-201(8) provides that the scope of employment shall not include "the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity. § 8-40-201(8) C.R.S. Respondents compared Claimant's forays on the beach while in Cancun to the Claimant in *Dover Elevator Co. v. industrial Claim Appeals Office* where the injury that occurred during Claimant's voluntary participation in a game of bowling while attending a mandatory company holiday party was found to be not compensable, which was affirmed on appeal. *Dover Elevator Co. v. Industrial Claim Appeals Office,* 961 P.2d 1141,1143 (Colo. App. 1998).

In *White v. Industrial Claim Appeals Office,* 8 P.3d 621 (Colo. App. 2000), the court held that the statutory term "recreational activity" should be given its plain and ordinary meaning as an activity that "has a refreshing effect on either the mind or the body." Determining whether an activity is "recreational" depends on consideration of the circumstances including whether the activity occurred during working hours, whether the injury occurred on the employer's premises, whether the employer initiated the activity, whether the employer exerted control over the employee's participation in the activity, and whether the employer stood to benefit from the employee's participation in the activity. Determination of whether the Claimant's participation in a recreational activity was "voluntary" requires consideration of the Claimant's "motive" for participation in the activity. *Dover Elevator Co. v. Industrial Claim Appeals Office,* supra, 961 P.2d at 1143. The question of whether an activity was "recreational" is one of fact for determination by the ALJ. *Lopez v. American Lumber Construction,* W.C. No. 4-434-488 (I.C.A.O. Oct. 29, 2003).

As found, it was most probable that Claimant's eye injury occurred during the time she was outside at lunch, as her unrefuted testimony established she noticed redness after she had eaten lunch and was outside with her co-workers. (Finding of Fact 12). This is distinct from the situation in *Dover*, where the Court gave the words "recreational activity" their plain meaning and found Claimant voluntarily engaged in such activity. There was no direct evidence that Claimant's activities which led to her exposure were purely recreational. Under these facts, Claimant was engaged in personal ministration activities, as opposed to recreational activity. As such, the ALJ determined this exception did not apply.

The ALJ also considered *McLachlan v. Center for Spinal Disorders,* W.C. 4-789-747 (ICAO July 2, 2010) cited by Respondents. In that case, the Panel affirmed the ALJ's denial of benefits for an injury sustained while playing at an employer-sponsored street hockey match. Claimant did not dispute that playing street hockey was a voluntary recreational activity and the evidence supported such a finding. However Claimant asserted the ALJ erroneously concluded that playing street hockey was a substantial deviation from employment. The Court reasoned, under the totality of circumstances test, the evidence supported the conclusion Claimant's playing street hockey was a substantial deviation, which removed it from the employment relationship.

In the case at bench there was insufficient evidence adduced at hearing to establish such a deviation. (Finding of Fact 13). The Employer could anticipate Claimant would eat at a restaurant in the hotel where she was staying and for which a per diem was paid. It could further be anticipated that Claimant would eat lunch at the location in the hotel which was outside and could expose Claimant to sand. As such, Claimant's activities were did not remove her for the employment relationship.

Accordingly, the ALJ finds the eye injury sustained by Claimant arose out and was in the course of her employment and was therefore compensable.

ORDER

It is therefore ordered that:

1. Claimant suffered an injury to her right eye arising out of her employment on November 30, 2015.

2. Respondents shall provide medical benefits to Claimant under the Colorado Workers' Compensation Act, including Medical Center of the Rockies and Dr. Landsgaard.

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

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

DATED: October 19, 2016

Digital signature

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

ISSUES

The following issues were raised for consideration at hearing:

- Whether Claimant suffered a compensable acute injury and occupational disease.

- Whether Claimant is entitled to medical benefits if her claim is compensable;

- Identification of authorized treating providers; and

- Whether Claimant is entitled to temporary total disability benefits, beginning October 23, 2015, and ongoing.

PROCEDURAL STATUS

The Findings of Fact, Conclusions of Law, and Order were issued on October 11, 2016 and mailed on October 13, 2016. On October 20, 2016, Respondents filed a Request for Corrected Findings of Fact, Conclusions of Law, and Order. The undersigned ALJ[1] reviewed this request and finds good cause exists to issue a Corrected Order.

STIPULATIONS

1. The parties stipulated to an average weekly wage of $879.97. The Court accepted the stipulation. Claimant's TTD rate is $586.65.

2. Unemployment benefits were received by Claimant, and the parties stipulate that an offset is appropriate, should there be an award of temporary benefits. The specific amount of unemployment benefits were unknown, and the parties will endeavor to come to an agreement regarding offset, but reserve the issue of the amount of offset for future determination if necessary.

FINDINGS OF FACT

1. Claimant is a 44 year old woman who was working as a production worker for the Employer when she asserts she developed right hand pain and discomfort. Claimant is right hand dominant.

2. On September 14, 2015, Claimant reported to the Employer that she started feeling slight discomfort and pain in her right thumb, hand, and wrist during her

[1] As ALJ Broniak left the Office of Administrative Courts, the Request for Corrected Findings of Fact, Conclusions of Law, and Order was reviewed by the undersigned.

work shifts. Claimant testified that her onset was August 6, 2015. In her prior interrogatory responses, Claimant asserted an onset date of September 17, 2015.

3. Claimant began working for the Employer in mid-January 2015, and was engaged in preparing the interiors of wind turbine blades manufactured and sold by the Employer.

4. At the time of onset, Claimant worked in the Blades Assembly department. She worked with a team to create large fiberglass parts to be later assembled into blades for electric windmills. Details of her duties in that position were discussed at hearing. Photographs were used to illustrate the process. The blade parts are very large. Claimant and those she worked with would use a large mold to create the various parts. The parts were designated alphabetically, and fit together when completed to become the inside of a windmill blade, later covered with a shell.

5. Claimant testified that she normally worked on the "B" mold, which is an upside down "U" shaped. First, a layer of plastic is laid on the mold to assist with later removal of the fiberglass blade part. Layers of fiberglass biax, similar to fabric, are then laid upon the mold one layer at a time. *(examples of fabric biax and scissors shown at hearing and photos of same provided as supplemental Exhibits W-Y)* The fiberglass biax came pre-sized in rolls in "kits" with additional fabric available for use as needed. 8 layers were laid at 5 minutes per layer, and pushed and tucked into place. Each layer was placed over the mold by rolling out the biax fabric and trimmed with scissors as appropriate for each layer. Claimant testified that she used only manual scissors for cutting, which weighed about 1 pound, and were provided for viewing at the hearing. Claimant trimmed approximately 11 meters per day, 5-10 minutes per cut. After all fiberglass layers are in place, a bag is placed over the molded fabric, and air is removed with a vacuum process. Resin is then infused into the fabric. Claimant or another worker carried the buckets of resin to the mold one at a time as the buckets were emptied in the infusion process, 4-5 times per 12 hour shift, 100 feet, comprised of 3 buckets of 20 kilos, 1 of 15 kilos, and 1 of 10 kilos, with breaks in between carrying as dictated by when buckets need to be replaced.

6. Claimant testified that the infusion process took about two hours. A sleeping-bag type of cover is then rolled over the fiberglass blade part on the mold. The fiberglass blade part is then cured. Once cured, the mold was debagged, using hand grip up to 30-60 minutes per shift. When assembly of one part on the mold was completed and infusion began, Claimant would proceed with debagging and finishing another fiberglass part.

7. Claimant testified that she worked 12 hour shifts and 1 ¼ to 1 ½ fiberglass parts were completed by her crew per shift.

8. Claimant credibly testified that she began experiencing pain in her right arm in late spring to her right arm but continued to full-time work.

9. Claimant credibly testified that during the week of August 3, 2015, she spoke twice to her supervisor Jared Becker, telling him she was suffering severe pain in her right arm. When the Claimant was not referred for medical treatment, she sought medical attention from her primary treating doctor, Dr. Sonya Norman, who referred her to Dr. David A. Chavez.

10. A note dated August 26, 2015 from Dr. Chavez documents complaints of left rotator cuff tendinitis and right de Quervains, stating that the pain was "from lifting blades" and had a two-month duration at that point. Dr. Chavez performed an injection which Claimant reported had helped. She stated that her pain had returned after the holiday (Labor Day holiday).

11. Following reporting her injury, and during the month of August, Mr. Becker move the Claimant to "carbon" with regular duty, twelve hours a day. This position required measuring then cutting carbon pieces by manually operating scissors. She then stacked the pieces throughout the day.

12. Claimant was then moved to the "Assembly" section. Work in "Assembly" involved sanding throughout the twelve hour shift, using a hand sander and not automatic electric sanding machines to remove glue applied. The Employer determined that the electric sanding machines would create deformities in the glue on top of the web. In addition, the Claimant was using a hand tool to screw in scrivets.

13. After reporting her claim in writing as work related on September 14, 2015, Claimant was referred to Peak Form Professional, LLC on that same date. The treatment note indicates, "Patient has noted pain in her right wrist forearm and hand slowly developing over the past 3-4 months getting worse in August and really hurting her last week when she went to see her PCP."

14. Claimant saw Dr. Craig Davis on October 14, 2015. His report states, "In early August she developed fairly rapid onset of pain over the radial aspect of her right wrist." He noted that Claimant reported the symptoms to her supervisor but was discouraged from filing a claim. Claimant reported severe activity-related pain and a "grinding" sensation over the dorsal radial aspect of her distal forearm. On physical examination, Dr. Davis observed swelling, he noted tenderness to palpation over the distal forearm, and extreme response to Finkelstein's test, and crepitation. Dr. Davis's impression was intersection syndrome of the right distal forearm. He provided an injection of lidocaine and Depo-Medrol.

15. Claimant reported on October 26, 2015 that the injection only helped a little bit in terms of tenderness, but not in terms of activity related pain, which was unchanged. Another injection was done, she was provided with a brace, topical cream, tramadol and physical therapy.

16. On October 23, 2015, Dr. Carol Ramsey at Peak Performance determined that Claimant could no longer work. On October 27, 2015, Claimant was placed on

modified duty that severely limited the use of her right arm. She was also restricted to working eight-hour shifts.

17. Claimant has not worked since October 23, 2015. The Employer did not offer her modified duty after October 23, 2015, and Claimant's position was eventually terminated in July 2016.

18. On November 9, 2015, Dr. X.J. Ethan Moses stated that he had assumed treatment of Claimant after Dr. Ramsey departed from Peak Performance. As the authorized treating physician, he stated, "It appears clear from the notes that there was no specific injury, but rather an insidious onset of pain as the result of repetitive motions." He recommended a work-site evaluation.

19. On November 23, 2015, Dr. Moses discussed his review of the job task analysis with Claimant. Following that discussion and review, his assessment was, "right forearm intersection syndrome with associated swelling and pain, not compensable under the Colorado Division of Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 5." ("Guidelines"). Dr. Moses encouraged Claimant to establish care for her right arm symptoms with her primary care physician.

20. The job duties analysis was performed by Jeanette Hrubes of Peak Form Physical Therapy and Occupational Medicine. The initial analysis was done on November 20, 2015. An addendum was done on February 23, 2016. Ms. Hrubes noted, "Initial job task analysis was performed 11/20/15. Second job task analysis was performed with Sonia Huerta present to make sure that all tasks that she performed during her shifts were captured accurately. There were several additional tasks noted, that were not captured in the first analysis. These will be bolded to assist in identification."

21. Claimant testified that she felt that the job analysis done did not accurately reflect her duties. Specifically, she discussed carrying buckets of resin, gripping to take finished blade forms off molds, cutting hard resin, and the use of manual scissors.

22. Ms. Hrubes testified that during the second job duties evaluation, Claimant was present, and was provided the opportunity to explain her duties. Ms. Hrubes discussed her observations with Claimant in a meeting after Ms. Hrubes watched employees perform Claimant's usual job duties. In the revised job analysis, carrying buckets, gripping, cutting resin, and use of manual scissors were included. Using the threshold standards of the Guidelines, Ms. Hrubes concluded that there were no duties that met either primary or secondary risk factors, including additional duties discussed with Claimant and included in her revised report.

23. Claimant testified that the employees Ms. Hrubes observed did not perform the tasks in the same way that Claimant performed them. She did not use electric scissors as none were available to her; she manually carried the resin buckets rather than using a cart; and she and her co-workers manually lifted the blades rather than having a crane for assistance. In addition, Claimant explained that she held her

scissors at a 90-degree angle while cutting in awkward position, and at times, above her head whereas Ms. Hrubes documented use of scissors at an even level.

24. Dr. Moses saw Claimant again on January 5, 2016. His notes indicate that he worked with Claimant to appeal her short term disability denial and to make clear that he felt her condition was not work related. He discussed reviewing the updated job analysis and his continued conclusion that Claimant did not experience a work-related injury.

25. Claimant testified that she has continued treatment with her personal providers, including Dr. Leo, and that he has continued to give her work restrictions.

26. Dr. Allison Fall evaluated Claimant on March 1, 2016. She testified at hearing and was qualified as an expert in physical medicine and rehabilitation and causation under the Cumulative Trauma Conditions Medical Treatment Guidelines. Dr. Fall discussed the history with Claimant. She reviewed the medical records, including the revised job analysis. She listened to Claimant's testimony. Her conclusion after considering all of these facts was that Claimant has not experienced either an acute injury or an occupational disease. Dr. Fall testified that diagnosis in this case was questionable. Her possible diagnosis was 1) right distal forearm pain, possible wrist extensor tenosynovitis versus intersection syndrome based upon medical records, and 2) Psychological issues likely playing a role in persistent symptomology. Dr. Fall explained that she felt that the diagnosis at #1 were a more specific types of extensor tendon disorder of the wrist. Dr. Fall noted that, although Claimant had stopped working for the employer in October of 2015, her complaints continued at the time of her March 1, 2016 evaluation. She testified that this further indicated to her that Claimant's condition was not work related. Claimant, however, testified that her symptoms have improved since she stopped working.

27. Dr. Fall explained that, as a medical professional, she relies upon the Guidelines in her analysis of cumulative trauma causation. She explained the time and expertise that has gone into the creation of the causation guidelines and the algorithmic steps for causation assessment contained in the Guidelines. The thresholds of the primary and secondary risks factors have been established using evidenced based medical studies. Dr. Fall testified that these are guidelines, and there are situations where a medical professional could choose not use them. She testified that this is not a case that she felt would warrant deviation from the causation analysis process recommended by the Guidelines.

28. Claimant has proven that she suffered a compensable occupational disease. The ALJ is persuaded by Claimant's testimony concerning her job duties and that her job duties brought on her symptoms. The opinions of Dr. Fall and Dr. Moses are rejected.

29. The Claimant has proven that the Employer failed to provide her with a list of authorized providers after she initially reported the injury to her supervisor. She elected to see Dr. Norman who referred her to Dr. Chavez. Thereafter, the Employer

referred the Claimant to Peak Performance where she received treatment with Dr. Ramsey and Dr. Moses. Dr. Moses referred Claimant back to her primary care physician for non-medical reasons (he opined her injury was not work-related so he discharged her from care). Dr. Chavez then referred Claimant to Dr. John Mangelson.

CONCLUSIONS OF LAW

General

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

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

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

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

Compensability

"Occupational disease" is defined by §8-40-201(14), C.R.S., as:

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

This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

As a matter of law, medical evidence is not required to establish causation, although it is a factor that may be considered in addressing that determination. See *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983).

The Colorado Division of Workers' Compensation has adopted the Guidelines for use by medical providers rendering treatment under the Workers' Compensation Act. They were established by the Director pursuant to an express grant of statutory authority found at § 8-42-101(3.5)(a)(II), C.R.S.

In this case, the Respondents urge the ALJ to rely upon the opinions of Dr. Fall and Dr. Moses because they applied the Guidelines to conclude that Claimant is not suffering from an occupational disease. However, as specifically found in § 8-43-201(3), C.R.S., the ALJ is not required to use the Guidelines as the as "the sole basis" for determining whether treatment is reasonable, necessary or related to an occupational disease. Furthermore, in *Hall v. Industrial Claim Appeals office*, 74 P.3d 459 (Colo. App. 2003) the Court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Act. See §8-42-101(3)(b), C.R.S. 2008.

The Guidelines further state that treatment for a work-related condition is covered when the work exposure causes the activation of a previously asymptomatic or latent medical condition or the work exposure combines with, accelerates or aggravates a pre-existing symptomatic condition.

Based on the persuasive and credible evidence, the Claimant has proven by a preponderance of the evidence that her job duties caused her to develop a new condition or caused an aggravation of a pre-existing latent condition. At this point, Claimant has had three different diagnoses for her right arm symptoms, thus whether intersection syndrome, de Quervain's syndrome or wrist extensor tenosynovitis, the ALJ finds and concludes that such condition was brought on by Claimant's work duties. Claimant credibly explained her job duties and the required use of her hands while performing them. The ALJ credits Claimant's testimony that the job duties evaluation did not accurately reflect the manner in which she performed her job.

In addition, the findings on physical examination during medical appointments established Claimant's need for treatment. Specifically, Dr. Davis noted that the Claimant was extremely tender over the intersection area near the distal forearm and does have some crepitation with range of motion of her thumb. He also stated that she continued to have severe activity related pain and a grinding sensation over the dorsal radial aspect of her distal forearm. Dr. Fall also agreed that Claimant is suffering from some condition in the right forearm. Dr. Fall just believes it is not work-related.

Authorized Provider

After the Claimant reported her injury to her supervisor in early August 2015 she was not referred for medical care by the employer "in the first instance". Section 8-43-404(5), C.R.S. She thereafter sought the medical attention from her primary care physician, Dr. Norman, who referred her to Dr. Chavez. Because of the Employer's failure to comply with § 8-43-404(5), C.R.S., Drs., Chavez and Norman are authorized treating providers. The Respondents thereafter referred the Claimant to Peak Performance where she saw Drs. Ramsey and Moses. Dr. Ramsey referred the Claimant to Dr. Davis. After concluding that Claimant did not suffer a work-related injury, Dr. Moses referred Claimant back to her primary care physician. Claimant returned to Dr. Chavez who then referred the Claimant to Dr. Mangelson. In light of the foregoing, the following are the Claimant's ATPs: Drs. Norman, Chavez, Moses, Davis, Ramsey and Mangleson.

Medical Benefits

Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Williams v. Industrial Commission*, 723 P.2d 749 (Colo. App. 1986). The Claimant is entitled to medical treatment to cure and relieve her of the effects of her right forearm condition whether diagnosed as intersection syndrome, de Quervain’s syndrome or wrist extensor tenosynovitis.

Temporary Total Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Claimant has proven that her compensable occupational disease caused or contributed to her wage loss beginning on October 23, 2015. Claimant’s authorized treating physician restricted Claimant to “no work” beginning on October 23, 2015, then released to her restricted duty effective October 27, 2015. The Employer did not offer Claimant modified duty work after October 23, 2015, and Claimant has not returned to work. The parties agreed that Claimant received some unemployment insurance benefits and that the Respondents would be entitled to an offset in an amount to be determined.

ORDER

It is therefore ordered that:

1. The Claimant suffered an occupational disease of the right forearm in the course and scope of her employment with the Employer.

2. The Claimant’s medical treatment with Drs. Norman, Chavez, Moses, Ramsey, Mangleson, and Davis is authorized.

3. The Claimant is entitled to medical benefits to cure and relieve her of the effects of her work-related occupational disease.

4. The Claimant is entitled to TTD benefits commencing her last day worked on October 23, 2015, ongoing, payable at the TTD rate of $584.06 pursuant to the stipulated AWW of $879.97, subject to unemployment benefits offset.

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

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

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

DATED: October 21, 2016

Digital signature

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

ISSUES

The issue raised for consideration is whether Respondent established by a preponderance of the evidence that there are no disputed issues of fact between the parties and that judgment should be entered for Respondent as a matter of law on Claimant's six penalty claims.

FINDINGS OF UNDISPUTED FACT

1. Prior to the work injury, Claimant's medical history included neck problems for which Dr. Van Buskirk performed cervical fusion surgery at C4-7 on September 23, 2014.

2. On January 8, 2015, Claimant reinjured his neck and upper back in a work related motor vehicle collision. This injury is the subject of this claim.

3. In February 2015, Claimant's counsel requested a copy of the entire claim file from the adjuster. This was prior to Respondent's counsel's entry of appearance in this matter.

4. The adjuster produced the claim file but omitted the claim notes. On March 13, 2015, Claimant's counsel requested a copy of the claim notes. When the claim notes were not produced, more than one year later, Claimant requested a Prehearing Conference that was held on May 13, 2016, and Claimant filed an Application for Hearing on May 27, 2016.

5. On April 14, 2015, Dr. Sander Orent placed Claimant at maximum medical improvement (MMI) with no impairment.

6. On April 20, 2015, Respondent filed a Final Admission consistent with Dr. Orent's report.

7. On May 13, 2015, Claimant objected to the Final Admission and started the Division independent medical examination (DIME) process.

8. Dr. Stieg performed the DIME. Initially, Dr. Stieg reported Claimant was not at MMI.

9. After additional treatment, Dr. Orent reported Claimant reached MMI on February 10, 2016, and rated Claimant with a 19% whole person impairment.

10. Claimant returned to Dr. Stieg for a follow up DIME. This time, Dr. Stieg agreed that Claimant reached MMI on February 10, 2016. Dr. Stieg rated Claimant with a

30% cervical spine impairment and used the Division of Workers' Compensation apportionment worksheets to arrive at 17% whole person impairment due to the work injury.

11. Respondent filed a Final Admission based on Dr. Stieg's DIME report and determination that Claimant reached MMI and suffered a work related 17% whole person impairment.

12. Claimant objected to the Final Admission and filed an Application for Hearing on May 27, 2016, and listed the issues of Permanent Partial Disability Benefits, Permanent Total Disability Benefits and Penalties.

13. Claimant asserts six bases for the claim for penalties:

    1 - Respondent's apportionment "that they know is a mistake";
    2 - Respondent's violation of Section 8-43-203(4), C.R.S. for failure of provide the claim file within 15 days of request made on February 11, 2015 and March 6, 2015;
    3 - Respondent's violation of Section 8-43-203(4), C.R.S., WCRP 9-4, C.R.C.P. 11 and C.R.C.P.26(5)(g)(2) for providing a "false privilege log" on June 4, 2015, through May 2, 2016, and failure to provide adequate privilege logs that did not include information required by 1.5 and were not signed by an attorney;
    4 - Respondent's violation of Sections 8-43-401.5 and 10-3-1104(1)(hh) and (ii) because "CCMSI is incentivizing reduction of benefits and that probably is a cause for the bogus apportionment";
    5 - Respondent's violation of Section 8-43-404(5)(C), C.R.S. for ex parte communication in January and February of 2015;
    6 – Respondent's violation of Section 8-43-503(3), C.R.S. for attempts to direct medical care in January and February 2015.

14. On July 22, 2016, Respondent moved for summary judgment on the ground that there are no disputed issues of fact between the parties and judgment should be entered for Respondent as a matter of law

CONCLUSIONS OF LAW

General Legal Principles of Law

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

The Law Related to Respondent's Motion for Summary Judgment

OAC Rule 17 authorizes a party to file a motion for summary judgment concerning any endorsed issue for hearing. Summary judgment is appropriate only if the pleadings and supporting documents demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to establish that no genuine issue of fact exists, and any doubts in this regard must be resolved against the moving party. *Wilson v. Marchiondo,* 124 P.3d 837 (Colo. App. 2005). The non-moving party is entitled to all favorable inferences that may be drawn from the undisputed facts. *A.C. Excavating v. Yacht Club II Homeowners Ass'n., Inc.,* 114 P.3d 862 (Colo. 2005). However, if the moving party meets its burden to establish the nonexistence of a genuine issue of material fact, the burden shifts to the non-moving party to present specific facts demonstrating the existence of a disputed issue of material fact, and the non-moving part may not rest on its pleadings or the arguments of counsel to meet the burden*. Snook v. Joyce Homes, Inc.,* 215 P.3d 1210 (Colo. App. 2009).

OAC Rule 17 requires that a motion for summary judgment be supported by "an affidavit or affidavits, transcripts of testimony, or medical reports or employer records." CRCP 56 is also applicable to motions for summary judgment filed with the OAC to the extent that it is consistent with OAC Rule 17. Specifically CRCP 56(e) applies except that there is no requirement that medical records and employer records be supported by sworn affidavits. *See Fera v. Industrial Claim Appeals Office,* 169 P.3d 231 (Colo. App. 2007). CRCP 56(c) permits consideration of pleadings and answers to interrogatories when considering a motion for summary judgment, and the ALJ concludes that consideration of these items is not inconsistent with OAC Rule 17.

Claimant's Penalty Claims

1. **Respondent seeks an order granting summary judgment on the grounds that that Claimant's claim for a penalty against Respondent for filing a Final Admission of Liability (FAL) based on the DIME report is without merit as a matter of law and the claim should be summarily dismissed.**

Respondent contends that Claimant seeks penalties because Respondent filed a FAL based on a DIME report. Respondent contends it cannot be penalized for filing a FAL consistent with a DIME report and that summary judgment should be entered for Respondent on this penalty issue.

Claimant argues that he is seeking penalties against Respondent for filing a FAL based on an erroneous Division independent medical examiner (DIME) report, which, Claimant contends, Respondent knew was erroneous. Claimant contends that Respondent took credit for an apportionment that they knew was mistaken. Claimant does not site authority for his position that he is entitled to penalties for Respondent's alleged action. Claimant does not specify what penalty provision is relied upon.

It is found and concluded that Respondent is legally obligated to file a FAL consistent with the DIME report or set the matter for hearing to overcome the DIME. Section 8-42-107.2(4)(c), C.R.S.; WCRP 5-5(F) In this case, Respondent complied with their legal obligation and timely filed a FAL consistent with the DIME report regarding MMI and impairment rating. Claimant asserts no legal basis for his contention that penalties should be imposed on Respondent for its action in filing a FAL based on the DIME report. Claimant cannot challenge the DIME's determination on apportionment by making a claim for penalties. Accordingly, it is concluded that Respondent is entitled to summary judgment as a matter of law based on this claim for penalties. Claimant's claim for penalties is without merit and summary judgment for Respondent is granted on this claim.

2. **Respondent seeks an order granting summary judgment for Claimant's claim for penalties against Respondent, for Respondent's alleged failure to timely provide Claimant a complete copy of the claim file pursuant to Section 8-43-203(4), C.R.S.**

Respondent seeks summary judgment for Claimant's claim for penalties, under Section 8-43-203(4), C.R.S., for Respondent's alleged failure to timely provide Claimant a complete copy of the claim file. Respondent contends that Claimant's claim for penalties is barred by a statute of limitation found in Section 8-43-304(5), C.R.S. which requires the claim for penalties to be brought within one year after the date that the requesting party first knew or reasonably should have known of the facts giving rise to the penalty claim.

The evidence is undisputed that in February 2015, Claimant's counsel requested a copy of the entire claim file from the adjuster. And, further, it is undisputed that the adjuster produced the claim file but omitted the claim notes. On March 13, 2015, Claimant's counsel requested a copy of the claim notes. Claimant took no further action to get the claim file until more than one year later when Claimant requested a Prehearing Conference that was held on May 13, 2016, and Claimant filed an Application for Hearing on May 27, 2016.

Claimant correctly contends that the question whether Claimant's claim is barred by a statute of limitation is determined based on the date when the claim accrued. In other words, when did Claimant know or when should Claimant have known of the facts giving rise to the claim for penalties. Respondent argues that date is in March 2015 when the complete claim file was produced for Claimant. Claimant contends that the claim file was not produced until June 2015.

Since there is a disputed issue of fact between the parties, the issue whether penalties against Respondent should be imposed for failure to timely produce the claim file is not appropriate for summary disposition and the motion for summary judgment is denied.

3. **Respondent seeks an order granting summary judgment on the grounds that no basis exist for Claimant's claim for penalty under Section 8-43-203(4), C.R.S. related to the production of privilege logs.**

Respondent seeks an order granting summary judgment on the grounds that there is no disputed issue of fact between the parties and that judgment as a matter of law should be entered for Respondent. Respondent argues in support of the motion for summary judgment that no basis exist for Claimant's claim for penalty under Section 8-43-203(4), C.R.S. related to the production of privilege logs. Respondent contends that it produced privilege logs consistent with the provisions of Section 8-43-203(4), C.R.S. Claimant contends that he is entitled to a penalty for Respondent's failure to provide privilege logs and Claimant argues his entitlement to the penalty cannot be resolved by summary disposition. Claimant contends that Respondent's assertion of privilege is a matter of opinion and cannot be resolved without testimony and evidence. Claimant further contends that penalties need not be imposed if Respondent's actions are shown to be objectively reasonable, another question which cannot be resolved by summary disposition. Claimant contends that the issues raised by his penalty claim can only be established by Respondent through evidence produced at a hearing.

The undisputed facts do not form a basis to draw conclusions regarding Claimant's claim for penalties. Nor do the undisputed facts form a basis for summary disposition of this claim regarding Respondent's production of the privilege logs or regarding the reasonableness of Respondent's actions in regard to the production of privilege logs.

4. **Respondent seeks an order granting summary judgment because Claimant did not pled his claim for penalties with specificity in regard to Claimant's claim that under Sections 8-43-401.5 and 10-3-1104(1)(hh) and (ii), C.R.S. "[Respondent] is incentivizing reduction of benefits and that probably is the cause of the bogus apportionment."**

Respondent contends that Claimant failed to plead the claim for penalties with specificity and Respondent is unable to ascertain from Claimant's allegations what provision of the Workers' Compensation Act it failed to comply with.

Respondent's motion for summary judgment is granted with regard to Claimant's claim for penalties under Sections 8-43-401.5 and 10-3-1104(1)(hh) and (ii), C.R.S. "[Respondent] is incentivizing reduction of benefits and that probably is the cause of the bogus apportionment." Claimant's conspiracy theory does not provide specificity with regard to his penalty claim and is summarily dismissed.

5. **Respondent seeks an order granting summary judgment on Claimant's claim that Respondent's violated Section 8-43-404(5)(C), C.R.S. by having ex parte communication in January and February 2015.**

Under Section 8-43-404(5)(C), a treating physician shall not communicate with the employer or insurer of an injured worker regarding the injured worker unless the worker is present or the physician makes an accurate written record of the communication. Claimant's allegation of penalty under Section 8-43-404(5)(C) failed to provide Respondent with information regarding the allegation of ex parte communication with a treating physician. Claimant did not inform Respondent of the dates the alleged communication occurred or the nature of the communication. In the absence of pleading containing specificity, Respondent cannot cure the alleged violation and Respondent is left to speculate regarding the basis of the penalty claim. Accordingly, it is concluded that Respondent's motion for summary judgment is granted with regard to this penalty claim.

6. **Respondent seeks an order granting summary judgment on Claimant's claim for penalties under Section 8-43-503(3), C.R.S. Claimant alleges that Respondent attempted to direct medical care in January and February 2015.**

Section 8-43-503(3), C.R.S. provides that no party shall dictate to any physician the type or duration of treatment or degree of physical impairment. The bald allegation that Respondent directed medical care in January and February 2015 does not allow Respondent to cure or defend against the penalty. Accordingly, Respondent's motion for summary judgment is granted with regard to this penalty claim.

ORDER

Based on the undisputed facts, it is ordered that Respondent's motion for summary judgment is granted, in part, and denied, in part.

1. Respondent's motion for summary judgment is granted with regard to: Claimant's penalty claim for filing a FAL based on the DIME report; Claimant's penalty claim for violation of Sections 8-43-401.5 and 10-3-1104(1)(hh) and (ii); Claimant's penalty claim for violation of Section 8-43-404(5)(C) for ex parte communication by the employer or insurer with the treating physician; and Claimant's penalty claim for violation of Section 8-43-503(3), C.R.S. for Respondent's alleged attempt to direct medical care.

2. There are disputed issues of fact between the parties with regard to Claimant’s claim for penalties for failure to provide the claim file and failure to provide disclosure logs and therefore these penalty claims are not appropriate for summary disposition and Respondent’s motion for summary judgment with regard to these claims is denied.

All matters not determined herein are reserved for future determination.

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

DATED: October 24, 2016____

/s/ Margot W. Jones

____

MARGOT W. JONES
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant suffer a compensable injury to her right eye on November 30, 2015 arising out of and in the course of her employment?

- If compensable, is Claimant entitled to medical benefits to cure and relieve the effects of her industrial injury?

STIPULATION

Claimant and Respondents stipulated Claimant was on travel status on November 30, 2015. The Court accepted the stipulation.

FINDINGS OF FACT

1. Claimant worked for Employer as a flight attendant for 10 years. Claimant testified her duties included ensuring the security of the passengers.

2. Claimant was based in Denver, Colorado.

3. There was no evidence admitted at hearing which showed Claimant had an injury to her right eye before November 30, 2015.

4. Claimant was working on November 30, 2015 for Employer on a flight from Denver to Cancun. Claimant testified this was a redeye flight and they arrived in Cancun at 6:00 a.m.

5. Claimant testified the flight crew checked in at the hotel sometime between 6:00 a.m. and 7:00 a.m. She then took a nap, as working a redeye was very tiring. Claimant estimated she woke up somewhere between 11:00 a.m. and 12:00 PM.

6. Claimant testified the hotel was paid for by Employer. She confirmed there were no meetings she had to attend for Employer on November 30, 2015 and there were no activities required by Employer that day.

7. Claimant was on travel status while staying at the hotel in Cancun.

8. Claimant testified she had lunch with other flight attendants on the beach that day. Claimant testified she could not bring food with her on such a trip and had to purchase meals. Employer paid a per diem for food. Claimant was at the hotel location on the beach eating lunch, which was incidental to her employment. The act of eating lunch did not constitute a purely personal errand or deviation.

9. Claimant described the weather as very hot and windy. She testified she and her co-workers relaxed on the beach, as they were scheduled to return at 7:00 a.m. the next morning. Claimant testified FAA rules restricted them from drinking alcohol eight (8) before the flight the next morning. This regulation limited Claimant's activities that day and was related to her employment.

10. After lunch, Claimant testified she noticed her eye was red, but she did not know if it was because she was tired from the night before or because she had gotten sand in her eye. Claimant testified she and the other flight attendants made plans to eat dinner at another hotel and they walked to that hotel along the beach. Claimant confirmed it was still very windy when they were walking along the beach.

11. Claimant testified that she went to dinner at the Taco Factory and on the way home walking along the street, she noticed the lights on billboards were very bright. This caused pain in her right eye, which she talked about with another flight attendant (Meghan). Claimant testified the pain was excruciating by the time she returned to the hotel room and she took her contacts out and went to bed. Her eye was sensitive to light and she woke up at approximately 3:00 a.m. with pain and could not turn on the light because her eye was so sensitive.

12. The ALJ concludes it is more probable than not that Claimant's eye was exposed to sand while she was on the layover in Cancun. The ALJ infers this exposure most likely occurred during the time she was eating lunch and with her co-workers, as Claimant testified she noticed the eye irritation around that time. This exposure to sand was incidental to Claimant's employment. Claimant's testimony regarding her exposure to sand was persuasive to the ALJ.

13. Claimant's activities on November 30, 2015 did not constitute a substantial deviation from employment.

14. Claimant treated with the hotel nurse, who flushed out her eye and confirmed there was no foreign body in it.

15. Claimant contacted crew scheduling, as they had to leave the hotel at 6:00 a.m. for the return leg of her trip. Employer scheduled another flight attendant for the flight and Claimant returned to Denver as part of "dead head" leg.

16. Claimant contacted the triage nurse for Employer and was told to go to the ER. Claimant testified this was the procedure she was required to follow. Claimant was seen that night at Medical Center of the Rockies at approximately 9:50 p.m.

17. Records from Medical Center of the Rockies were admitted at hearing. Claimant reported that she was on the beach and thought sand had flown in her eye. Since that time, she noticed irritation and photosensitivity in her right eye. Henry Lansgaard, D.O. examined her right eye, which had a corneal abrasion, but no corneal flair, or ulcer, foreign body, no hypehma, and no hypopyon. The diagnosis was:

corneal abrasion.[1] Claimant was prescribed Hydrocodone and Ciprofloxacin.

18. Claimant testified her eye has improved and she has no problems with it.

19. A Worker's Claim for Compensation was filed on or about December 30, 2015. In that document, Claimant stated the injury occurred "while walking outside, the wind was strong-sand got in under her contact".

20. Claimant suffered a compensable eye injury while on travel status.

21. Claimant's eye required medical treatment as a result of the injury suffered while on the layover in Mexico. Respondents are liable for medical treatment to cure and relieve the effects of the injury to Claimant's eye.

22. Dr. Landsgaard is an ATP.

23. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

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

General

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

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

Generally, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

[1] This referred to the left eye, which appears to be a typographical error, as all other references were to the right eye.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing a service for Respondent-Employer arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. §§ 8-41-301(1)(b) & (c), C.R.S.; *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); § 8-41-301(1)(c), C.R.S. The question of whether Claimant met her burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

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

Compensability

Claimant alleged she sustained a compensable injury to her right eye while she was on travel status working for Employer. In this regard, Claimant argued the injury to eye occurred while she was engaged in activities that were incidental to her employment. Claimant cited *Continental Airlines v. Industrial Commission,* 709 P.2d 953, 954 (Colo. App. 1985) as an analogous and controlling case.

Respondents argued that Claimant injured her eye while she was engaged in a purely recreational activity on the beach with other co-workers and that the current case is comparable to *Silver Engineering Works, Inc. v. Simmons,* 505 P.2d 966, 968 (Colo. 1973). In that case, Claimant drowned during a fishing trip with co-workers on his day off while on a business trip in Mexico. The Court concluded that the claim was not compensable, as the activities were personal and not connected to the employment. *Id.* Alternatively, Respondents averred that Claimant deviated from the scope of her employment while she was eating in the cabana and walking on the beach between hotels because she voluntarily engaged in those activities and such activities were not incidental to her responsibilities as a flight attendant.

As a starting point, the parties stipulated that Claimant was on travel status while she was in Cancun on a layover day for work when her injury occurred. The issue is whether Claimant’s injury occurred while she was within the scope of her employment or when she deviated from the course of her employment duties on a personal errand or recreational activity.

As a general rule, an employee whose work for the employer necessitates travel away from home is deemed to be in continuous employment from the time she leaves until the time she returns home. *Alexander Film Co. v. Industrial Commission*, 319 P.2d 1074 (Colo. 1957); *Continental Airlines v. Industrial Commission, supra.* Circumstances not covered by the travel doctrine include activities where the employee is shown to have made a distinct departure on a purely personal errand or is engaged in recreational activity while on travel status. *Silver Engineering Works, Inc. v. Simmons, supra,* at 968. [2] Such departures are characterized as acts not “beneficial or incidental to her employment and would constitute a stepping aside from employment”.

However, employee activities that involve personal or bodily ministrations are not considered deviations, but rather incidental to and within the scope of employment, and an employee can be compensated for any injuries arising out of activities that include eating and sleeping. *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). In *Phillips Contracting, Inc*, the Colorado Court of Appeals affirmed the ICAO Order holding Claimant was on travel status when he was injured while riding with a co-worker in a company truck. The employees were working out of town in Limon, Colorado and obtained permission to drive a company truck for personal errands on a Saturday (doing laundry and buying winter clothes). On the way back, they stopped at a bar for lunch and the co-worker consumed alcohol. Claimant was injured in a motor vehicle accident on the return trip to Limon. The Court held that an employee returned to travel status, even after the departure for a personal errand.

As Justice Pierce articulated: "It is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. [citing *City of Boulder v. Streeb*, *supra,* 706 P.2d 786]. This rule, applied to traveling employees, means that the risks associated with the necessity of eating, sleeping, and ministering to personal needs away from home are considered incidental to and within the scope of the traveling employee's employment”. *Phillips Contracting, Inc. v. Hirst,* 905 P.2d at 12.

The parties stipulated Claimant was on travel status and away from home for work. As found, Claimant was not allowed to bring her own food off the planes and received a per diem allowance to purchase meals for herself while on a layover day. (Finding of Fact 8). Claimant had no choice but to go out and eat meals in nearby restaurants. *Id.* As found, eating meals was incidental to Claimant’s employment and the location of where she ate lunch was reasonably incidental to the circumstances of her trip to Cancun.

Furthermore, the evidence admitted at hearing revealed Claimant's exposure to sand most probably occurred during the time she was at lunch. (Findings of Fact 8, 12 and 22). Eating meals was incidental to Claimant's employment. Therefore, the instant case fits within the ambit of those cases describing what has been described as the personal comfort or personal ministration doctrine for an employee on travel status. The specific circumstances of Claimant’s employment and the temporal proximity of her work on the redeye flight to this injury made the claim compensable. *Phillips Contracting, Inc. v. Hirst,* supra. Under the facts of the instant case, the ALJ declined to find Claimant had deviated from her employment. (Finding of Fact 8).

[2] The ALJ notes *Silver Engineering Works, Inc. v. Simmons, Alexander Film Co. v. Industrial Commission*, *Continental Airlines v. Industrial Commission* were all decided before the 1991 amendments to the Act, including §8-40-201(8) C.R.S.,the recreational activities statute.

In concluding that the claim was compensable, the ALJ considered Respondents' argument that pursuant to the Worker's Compensation Act found in §8-40-201(8) C.R.S., Claimant should not be compensated for engaging in a voluntary recreational activity. C.R.S. § 8-40-201(8) provides that the scope of employment shall not include "the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity. § 8-40-201(8) C.R.S. Respondents compared Claimant's forays on the beach while in Cancun to the Claimant in *Dover Elevator Co. v. industrial Claim Appeals Office* where the injury that occurred during Claimant's voluntary participation in a game of bowling while attending a mandatory company holiday party was found to be not compensable, which was affirmed on appeal. *Dover Elevator Co. v. Industrial Claim Appeals Office,* 961 P.2d 1141,1143 (Colo. App. 1998).

In *White v. Industrial Claim Appeals Office,* 8 P.3d 621 (Colo. App. 2000), the court held that the statutory term "recreational activity" should be given its plain and ordinary meaning as an activity that "has a refreshing effect on either the mind or the body." Determining whether an activity is "recreational" depends on consideration of the circumstances including whether the activity occurred during working hours, whether the injury occurred on the employer's premises, whether the employer initiated the activity, whether the employer exerted control over the employee's participation in the activity, and whether the employer stood to benefit from the employee's participation in the activity. Determination of whether the Claimant's participation in a recreational activity was "voluntary" requires consideration of the Claimant's "motive" for participation in the activity. *Dover Elevator Co. v. Industrial Claim Appeals Office,* supra, 961 P.2d at 1143. The question of whether an activity was "recreational" is one of fact for determination by the ALJ. *Lopez v. American Lumber Construction,* W.C. No. 4-434-488 (I.C.A.O. Oct. 29, 2003).

As found, it was most probable that Claimant's eye injury occurred during the time she was outside at lunch, as her unrefuted testimony established she noticed redness after she had eaten lunch and was outside with her co-workers. (Finding of Fact 12). This is distinct from the situation in *Dover*, where the Court gave the words "recreational activity" their plain meaning and found Claimant voluntarily engaged in such activity. There was no direct evidence that Claimant's activities which led to her exposure were purely recreational. Under these facts, Claimant was engaged in personal ministration activities, as opposed to recreational activity. As such, the ALJ determined this exception did not apply.

The ALJ also considered *McLachlan v. Center for Spinal Disorders,* W.C. 4-789-747 (ICAO July 2, 2010) cited by Respondents. In that case, the Panel affirmed the ALJ's denial of benefits for an injury sustained while playing at an employer-sponsored street hockey match. Claimant did not dispute that playing street hockey was a voluntary recreational activity and the evidence supported such a finding. However Claimant asserted the ALJ erroneously concluded that playing street hockey was a substantial deviation from employment. The Court reasoned, under the totality of circumstances test, the evidence supported the conclusion Claimant's playing street hockey was a substantial deviation, which removed it from the employment relationship.

In the case at bench there was insufficient evidence adduced at hearing to establish such a deviation. (Finding of Fact 13). The Employer could anticipate Claimant would eat at a restaurant in the hotel where she was staying and for which a per diem was paid. It could further be anticipated that Claimant would eat lunch at the location in the hotel which was outside and could expose Claimant to sand. As such, Claimant's activities were did not remove her for the employment relationship.

Accordingly, the ALJ finds the eye injury sustained by Claimant arose out and was in the course of her employment and was therefore compensable.

ORDER

It is therefore ordered that:

1. Claimant suffered an injury to her right eye arising out of her employment on November 30, 2015.

2. Respondents shall provide medical benefits to Claimant under the Colorado Workers' Compensation Act, including Medical Center of the Rockies and Dr. Landsgaard.

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

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

DATED: October 19, 2016

Digital signature

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable left shoulder injury during the course and scope of his employment with Employer on July 15, 2015.

2. Whether Claimant has proven by a preponderance of the evidence that the medical treatment he received prior to November 18, 2015 was authorized.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 15, 2015 until terminated by statute.

FINDINGS OF FACT

1. Claimant worked for Employer as a Courier. Claimant's wages for the period March 11, 2016 through July 11, 2016, or 17.571 weeks, totaled $9,221.58. Dividing $9,221.58 by 17.571 weeks yields an Average Weekly Wage (AWW) of $524.81.

2. Claimant testified that he injured his left shoulder on July 15, 2015 while unloading J-Cans for Employer. He specifically noted that, as he was placing the J-Cans on a belt, he experienced a burning sensation in his left shoulder area. Claimant did not report the injury to Employer and completed his work shift.

3. Claimant explained that his left shoulder pain and discomfort continued to worsen over time. He thus sought medical treatment from his personal physician Kelly Locke, M.D. Dr. Locke administered injections but Claimant did not receive any lasting benefits.

4. On November 1, 2015 Claimant requested leave without pay from his employment for the period November 3, 2015 through November 7, 2015. He sought to care for his wheelchair-bound father and build a wheelchair ramp at his father's home. Claimant testified that, although he cared for his father, he did not construct the wheelchair ramp.

5. Claimant returned to work for Employer on November 10, 2015. He initially reported his July 15, 2015 injury to his acting supervisor because Operations Manager Jean Anton was on vacation. The acting supervisor contacted Ms. Anton to discuss Claimant's injury.

6. On November 10, 2015 Claimant contacted Ms. Anton by telephone. He reported that he had injured his back and left shoulder, visited a doctor and received a 10 pound lifting restriction. Ms. Anton inquired whether Claimant had injured his shoulder while building a ramp for his father and he responded that he was uncertain about how he had injured himself. Ms. Anton also asked Claimant whether he was reporting a workplace injury and he replied "no." Although Ms. Anton repeatedly requested a statement concerning the injury and documentation regarding lifting restrictions, Claimant failed to provide any information until November 18, 2015. The documentation stated that Claimant injured himself while working approximately three and one-half months earlier but did not include a specific date of injury.

7. On November 18, 2015 Claimant received medical treatment at Aspen Orthopedic Associates with Mark L. Purnell, M.D. Claimant reported left shoulder pain. He specified that while working for Employer on July 15, 2015 he was unloading cargo. Claimant noted that while he was unloading objects he felt a stabbing pain in the anterior aspect of his left shoulder. He remarked that he has continued working for the past three months. Claimant commented that he had visited Dr. Locke, received a corticosteroid injection that provided only temporary relief and has undergone physical therapy with continued pain and range of motion limitations. Dr. Purnell determined that Claimant's history was "most consistent with a rotator cuff tear, probably supraspinatus." He recommended an MRI to ascertain whether Claimant had a surgical lesion. Dr. Purnell suggested no "overhead loading of the shoulder."

8. On November 25, 2015 Claimant visited Glenn E. Kotz, M.D. at MidValley Family Practice P.C. for an evaluation. Claimant reported that in late June or early July his was at work lifting a very heavy box when he experienced immediate left shoulder pain. However, he also explained that in mid-July 2015 he was unloading cargo, felt a pull and believed he had suffered a shoulder strain. Claimant remarked that he had been heating and icing his left shoulder "every chance he gets" but his pain has continued to worsen.

9. Claimant continued to work for Employer through November 26, 2015.

10. On December 9, 2015 Claimant returned to Dr. Purnell to review his left shoulder MRI. The MRI revealed left shoulder impingement, supraspinatus tendinitus and biceps tendinitis. Claimant subsequently underwent arthroscopic surgery for his left shoulder condition.

11. Claimant has a long history of timely reporting Workers' Compensation injuries. On August 8, 1992 Claimant sustained an ankle injury and reported the accident to his employer on the same day. On January 4, 1999 Claimant suffered a left wrist injury and reported the incident to his employer on January 6, 1999. On October 7, 2015 Claimant suffered a cut on his head while working for Employer. He reported the incident to his supervisor but did not request medical treatment and declined to pursue a Workers' Compensation claim.

12. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable left shoulder injury during the course and scope of his employment with Employer on July 15, 2015. Initially, Claimant testified that he injured his left shoulder on July 15, 2015 while unloading J-Cans for Employer. He specifically noted that, as he was placing the J-Cans on a belt, he experienced a burning sensation in his left shoulder area. However, Claimant failed to report his injury until November 18, 2015 or approximately 127 days after the incident.

13. Ms. Anton credibly explained that on November 10, 2015 Claimant contacted her by telephone. He reported that he had injured his back and left shoulder, visited a doctor and received a 10 pound lifting restriction. Ms. Anton inquired whether Claimant had injured his shoulder while building a ramp for his father and he responded that he was uncertain about how he had injured himself. Ms. Anton also asked Claimant whether he was reporting a workplace injury and he replied "no." In conjunction with Claimant's significant delay in reporting his work accident, his explicit denial that he suffered a work-related injury suggests that his testimony is not credible. Furthermore, on November 25, 2015 Claimant visited Dr. Kotz and reported that in late June or early July his was at work lifting a very heavy box when he experienced immediate left shoulder pain. However, he also explained that in mid-July 2015 he was unloading cargo, felt a pull and believed he had suffered a shoulder strain. The ambiguity in Claimant's report to Dr. Kotz also reveals that Claimant unlikely injured his left shoulder while working for Employer on July 15, 2015.

14. Claimant also has a long history of timely reporting Workers' Compensation injuries. On August 8, 1992 Claimant sustained an ankle injury and reported the accident to his employer on the same day. On January 4, 1999 Claimant suffered a left wrist injury and reported the incident to his employer on January 6, 1999. On October 7, 2015 Claimant suffered a cut on his head while working for Employer. He reported the incident to his supervisor but did not request medical treatment and declined to pursue a Workers' Compensation claim. Claimant's failure to report his July 15, 2015 claim for 127 days is contrary to his pattern of timely reporting work-related injuries. Finally, although Dr. Purnell determined that Claimant's history was "most consistent with a rotator cuff tear, the opinion is not persuasive based on the complete medical records, testimony of Ms. Anton and Claimant's prior history of timely reporting work-related injuries. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a

coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable left shoulder injury during the course and scope of his employment with Employer on July 15, 2015. Initially, Claimant testified that he injured his left shoulder on July 15, 2015 while unloading J-Cans for Employer. He specifically noted that, as he was placing the J-Cans on a belt, he experienced a burning sensation in his left shoulder area. However, Claimant failed to report his injury until November 18, 2015 or approximately 127 days after the incident.

8. As found, Ms. Anton credibly explained that on November 10, 2015 Claimant contacted her by telephone. He reported that he had injured his back and left shoulder, visited a doctor and received a 10 pound lifting restriction. Ms. Anton inquired whether Claimant had injured his shoulder while building a ramp for his father and he responded that he was uncertain about how he had injured himself. Ms. Anton also asked Claimant whether he was reporting a workplace injury and he replied "no." In conjunction with Claimant's significant delay in reporting his work accident, his explicit denial that he suffered a work-related injury suggests that his testimony is not credible. Furthermore, on November 25, 2015 Claimant visited Dr. Kotz and reported that in late June or early July his was at work lifting a very heavy box when he experienced immediate left shoulder pain. However, he also explained that in mid-July 2015 he was unloading cargo, felt a pull and believed he had suffered a shoulder strain. The ambiguity in Claimant's report to Dr. Kotz also reveals that Claimant unlikely injured his left shoulder while working for Employer on July 15, 2015.

9. As found, Claimant also has a long history of timely reporting Workers' Compensation injuries. On August 8, 1992 Claimant sustained an ankle injury and reported the accident to his employer on the same day. On January 4, 1999 Claimant suffered a left wrist injury and reported the incident to his employer on January 6, 1999. On October 7, 2015 Claimant suffered a cut on his head while working for Employer. He reported the incident to his supervisor but did not request medical treatment and declined to pursue a Workers' Compensation claim. Claimant's failure to report his July 15, 2015 claim for 127 days is contrary to his pattern of timely reporting work-related injuries. Finally, although Dr. Purnell determined that Claimant's history was "most consistent with a rotator cuff tear, the opinion is not persuasive based on the complete medical records, testimony of Ms. Anton and Claimant's prior history of timely reporting work-related injuries. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

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

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

DATED: October 19, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUE

Whether Claimant proved by a preponderance of the evidence that the situs of his functional impairment extends beyond the arm at the shoulder, entitling him to have his scheduled impairment rating converted to a whole person impairment rating.

FINDINGS OF FACT

1. At hearing, Claimant testified that he is employed as a youth correctional officer at Division of Youth Corrections, Spring Creek. Claimant was working at Spring Creek throughout the claim, and remains employed there.
2. On February 18, 2014, Claimant suffered a compensable injury to his right shoulder while at work. Claimant testified that pulled a resident "over the railing" after he threatened to jump from the upper tier of the unit. Claimant testified that he felt "a little pop" in his shoulder during the take down. As Claimant walked away from the scene, he began feeling "pain just starting to rush in."
3. Claimant testified that he immediately reported the incident to his supervisor, and went for treatment right away.
4. Claimant testified that he underwent some physical therapy and treatment for his injury at CCOM, but was eventually released back to work.
5. On December 6, 2014, Claimant suffered a compensable re-injury to his right shoulder while restraining a resident. Claimant testified that he responded to a

"gang fight" on his unit, and once again had to restrain a resident, while performing a "takedown" (physically restraining an inmate), then another "takedown" about 5 minutes later.

6. Claimant testified that he immediately reported this to his supervisor, and returned to CCOM to restart treatment.

7. Claimant underwent a right shoulder arthroscopic distal clavicle resection, subacromial decompression, and limited debridement with Dr. Derek Purcell on June 1, 2015 (Claimant's exhibit 13).

8. Claimant testified that he remembered the surgery had occurred "kind of going down to upper right chest, shoulder area. On the side—[his] deltoid, and on the back of [his] shoulder".

9. Claimant had the following post-operative diagnoses:

   1. Right shoulder AC osteoarthritis.
   2. Right shoulder rotator cuff tendinopathy with extensive subacromial bursitis.
   3. Right shoulder posterior superior labral tear.
   4. Right shoulder anterior mid glenoid chondrosis" (Claimant's exhibit 13).

10. During this surgery, "a chondroplasty of the anterior glenoid rim was performed utilizing an arthroscopic shaver". Additionally, "a bursectomy was performed," with "extensive bursitis extending down through the subdeltoid bursa as well." Later, "A burr was utilized to perform an anterior acromioplasty and approximately 5mm of bone was resected off the anterior surface." Finally, a burr was used to resect "approximately 3 to 4 mm of bone… off the distal end of the clavicle as well as the distal aspect of the acromion. (Claimant's exhibit 13).

11. Claimant was released by Dr. Purcell on October 15, 2015. (Exhibit B) At that time, Dr. Purcell noted that Claimant felt "significantly improved from his preoperative status" and released Claimant to return to all activities as tolerated. (Exhibit B) Dr. Purcell did not document any complaints in the neck, back, head, torso or anywhere else beyond the arm at the shoulder. (Exhibit B)

12. Following his release from Dr. Purcell, Claimant testified that he continued to treat with Dr. Johnson, the authorized treating physician for this claim, at CCOM. From October 20, 2015 through December 15, 2015 Claimant reported having only minor infrequent pain. (Exhibit C). Claimant did not report taking any medications for pain during this period of time. Dr. Johnson did not document any complaints in the neck, back, head, torso or anywhere else beyond the arm at the shoulder during this time period.

13. The Claimant continued treating until January 21, 2016, when Dr. George Johnson placed him at MMI (Claimant's exhibit 7). At this appointment, Dr. Johnson noted that the Claimant was still in "mild to moderate pain." He noted "decreased range of motion following the surgery." He noted that Claimant "did not have problems with [his] shoulder prior to the injury." Claimant also noted that the pain, intermittent though it was, was made worse by lifting away from his body.

14. However, Dr. Johnson further noted that Claimant had no pain with crepitis, nor any apparent pain with motion while performing movements for an impairment rating. During this exam, Claimant reported that after returning to work "it has not been *too* difficult" for him.

15. Claimant testified at hearing that after he was released, he “wasn’t at a hundred percent” because he “didn’t have full strength back.” He testified that he was told “don’t lift any weights…don’t overexert yourself,” and so his strength “had really gone down”. Claimant testified that both Dr. Johnson and Dr. Purcell told him not to do anything he felt he couldn’t do.

16. He testified that he couldn’t put his arm behind his back or “far above” his shoulder, to reach items on a tall shelf, and that this remains an issue.

17. Claimant testified that he suffered from “slight” pain, along with stiffness and soreness. These were all issues existing before February of 2016.

18. Claimant testified that he performed his job without any “major” issues, to the best of his abilities. Claimant testified that he did suffer from pain at work, and reported this to his supervisor. He testified that he was not performing “to a hundred percent degree”.

19. He testified that he suffers from anxiety because of the injury, and requires “prescription medication to calm his anxiety down.” Claimant specifically referenced anxiety about having to perform “takedowns”, as part of his regular duties at work.

20. Claimant testified that he would “wake up in the middle of the night” with soreness and pain if he slept on his right shoulder, and this still bothers him.

21. Claimant testified that he was very active in various ball sports before his injury, but has not participated in sports since his initial injury. However, he has not been specifically told by any treating physician that he should not do so, nor did he testify that he has tried, but failed, to continue to play his preferred sports,

which are football, basketball, baseball, and softball. Claimant testified that when he goes to the gym, he can no longer do everything he used to do. Specifically, he no longer does “certain chest presses,” and he “[doesn’t] even attempt” shoulder presses. He testified that his “strength isn’t where it used to be.”

22. Claimant testified that he has difficulty putting things on high shelves with his right arm, because it “just kind of goes to a certain point”.

23. On February 27, 2016, Claimant once again reinjured his shoulder while taking down a resident, and that it hurt right away. He again returned to CCOM. Claimant testified that he has not had any surgery for this claim—to date. He only has had the surgery occurring on June 1, 2015.

24. On April 18, 2016, Claimant saw Dr. Frank Polanco for a Division Independent Medical Exam. Dr. Polanco agreed that Claimant was at maximum medical improvement. He gave Claimant a 15% upper extremity impairment rating. Five percent was for range of motion, and the other ten was based on impairment resulting from the rotator cuff repair with distal clavicle resection. Dr. Polanco stated that conversion would be calculated at a 9% whole person rating.

25. In his DIME report, Dr. Polanco also noted that Claimant had “tenderness to palpation at the posterior supraspinatus muscle”.

CONCLUSIONS OF LAW

General Conclusions

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

Permanent Partial Disability

4. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The question of whether the Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 893 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996).

5. Pain and discomfort which limit a Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury

is off the schedule. See *Langton v. Rocky Mountain Healthcare Corp.*, *supra*; *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996).

6. Claimant has proven by a preponderance of the evidence that the situs of his functional impairment extends beyond the "arm at the shoulder." The credible evidence shows that Claimant's right shoulder joint itself is impaired. It does not function as it did before Claimant's work injury. Thus, the situs of the functional impairment is the shoulder joint, which is not on the schedule of injuries. The mere fact that the shoulder joint affects arm mobility does not mean Claimant sustained only a "loss of arm at the shoulder." In addition, whether Claimant had neck or back symptoms resulting from his right shoulder injury is only one factor to consider. In this case, Claimant credibly testified that he continues to have pain and some loss of function involving his right shoulder. Claimant credibly testified to limitations proximal to the glenohumeral joint with range of motion and activities. Accordingly, Claimant's impairment is not on the schedule of permanent impairment.

7. While no direct evidence was elicited which showed that his participation in various ball sports was impossible or medically proscribed, a diminished ability to participate up to one's pre-injury potential is a natural consequence of a limited range of right shoulder motion.

8. In addition to ball sports, Claimant was a regular participant in weight lifting before his injury. While he has been medically cleared to return to these activities "as tolerated," Clamant testified credibly that certain exercises, notably *chest* and *shoulder* presses, cannot be performed to the degree they once were without pain.

9. An integral part of Claimant's job duties involves "takedowns" of unruly inmates. These are tasks which might be reasonably expected of him by his employer. A diminished range of motion, and accompanying pain while lifting away from his body significantly impact his ability to perform his job as safely as he could before this injury occurred.

10. Further, according to the DIME report, Claimant experienced some pain with palpation to the supraspinatus muscle. The supraspinatus muscle is proximal to the glenohumeral joint; thus the effects of the injury extend beyond the shoulder and into the whole person of Claimant. The DIME's physical exam findings corroborate Claimant's testimony that he experiences functional limitations beyond his arm.

Disfigurement

11. As a result of Claimant’s right shoulder work-related injury, he has a visible disfigurement to the body. The amount of compensation for this has been stipulated to be $500. Claimant has sustained a serious permanent disfigurement to areas of his body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S. Insurer shall pay Claimant $500 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore ordered that:

1. Claimant’s request to convert the scheduled rating of his right shoulder to a whole person rating and award Permanent Partial Disability (“PPD”) benefits based on the whole person is granted. Respondents shall pay Claimant a PPD award consistent with the 9% whole person impairment rating assigned by the DIME physician Dr. Polanco.

2. Respondents shall pay Claimant $500.00 for disfigurement, pursuant to § 8-42-108 (1), C.R.S.

3. Claimant’s Average Weekly wage is $751.14, and shall form the basis for any calculations made pursuant to this Order.

4. Respondents shall pay Claimant $26.47 in Temporary Partial Disability.

5. Respondents shall pay Claimant $1329.46 in Temporary Total Disability.

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

All matters not determined herein are reserved for future determination.

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

DATED: October 26, 2016 William G Edie

William G Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-991-181-04

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED c/o
SEDGWICK CMS, INC.,

Third Party Administrator (TPA),

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 6, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 9/6/16 Courtroom 4, beginning at 8:30 AM, and ending at 9:00 AM).

At hearing, Claimant's Exhibits 1 through 3 were admitted into evidence, without objection. Respondent's Exhibits A through G were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ kept the record open for the filing of a written transcript of the evidentiary deposition of Gary Zuehldorff, D.O., which was taken on August 26, 2016, and a transcript thereof filed on September 20, 2016. A written transcript of the evidentiary deposition of Lawrence Lesnak, D.O., was filed at the commencement of the hearing.

Also, at the conclusion of the hearing, the ALJ established a briefing schedule: Claimant's opening brief to be filed within 5 calendar days of the filing of a written transcript of Dr. Zuehldorff's evidentiary deposition, or no later than September 27, 2016. Respondent's answer brief to be filed within 5 calendar days of the Claimant's opening brief; and, the Claimant's reply brief, if any, within 2 calendar days of the answer brief. The Respondent's answer brief was filed on September 22, 2016. On September 23, 2016, the Claimant moved for an extension of time until September 27, 2016 within which to file an opening brief. On the same date, the ALJ denied to Motion for Extension of Time, however, he granted leave until September 27, 2016 within which the Claimant should file a **reply brief.** No reply brief was timely filed. Consequently, the matter was deemed ready for decision on September 28, 2016.

ISSUE

The sole issue to be determined by this decision concerns whether Dr. Zuehldorff's [the authorized treating physician (ATP)] recommendation for diagnostic right shoulder arhroscopy is causally related to, and reasonably necessary, to cure and relieve the effects, of the admitted right shoulder injury of June 23, 2015.

FINDINGS OF FACT

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

1. While working for the Employer, the Claimant injured her right shoulder on June 23, 2015.

2. The Respondent filed a General Admission of Liability (GAL) on April 19, 2016. The Respondent admitted to medical benefits; an average weekly wage (AWW) of $505.74; and, temporary partial disability (TPD) and temporary total disability (TTD) benefits. For the latest period, the Claimant has been receiving temporary TTD benefits since April 4, 2016.

3. The Claimant began treatment with Dr. Zuehldorff's office on June 25, 2015. For her first appointment, she saw a nurse practitioner. (Zuehldorff Depo., page. 6, lines10-11.) Dr. Zuehldorff, a physician, specializing in internal and occupational medicine, examined the Claimant for this first time on July 8, 2015.

4. On July 13, 2015, the Claimant underwent a right shoulder MRI (magnetic resonance imaging) arthrogram, or an MRI with contrast. The MRI arthrogram revealed a full thickness tear of the supraspinatus tendon.

5. Christopher Isaacs, D.O., surgically repaired a 2 centimeter avulsion tear in Claimant's right rotator cuff on August 14, 2015.

6. As part of her post-surgical recovery, the Claimant went to physical therapy (PT).

7. Because the Claimant had not regained a full range of motion, Dr. Isaacs performed a right shoulder manipulation under general anesthesia on December 14, 2015. After the manipulation, Dr. Isaacs injected the Claimant's right shoulder with a corticosteroid.

8. Upon Dr. Zuehldorff's referral, Ron Carbaugh, Psy.D., a clinical psychologist, examined the Claimant on January 4, 2016.

9. Dr. Carbaugh observed that the Claimant's high self-reported pain levels were more likely related to "high pain sensitivity and compromised pain coping skills[]."

10. Dr. Carbaugh diagnosed the Claimant with depression, and observed her depression will interfere with her recovery.

11. The Claimant was approved for six pain and adjustment counseling sessions with Dr. Carbaugh. After her February 3, 2016 session, Dr. Carbaugh was of the opinion that the Claimant's "current level of dysfunction" was "out of proportion to [her] medical physical findings."

12. The Claimant last saw Dr. Carbaugh on February 3, 2016, and never returned to his care after February 3, 2016.

13. On February 22, 2016, Dr. Isaacs reexamined the Claimant. The Claimant reported continued discomfort in her right shoulder and little improvement. Dr. Isaacs observed that PT was not progressing her range of motion and mobility. He recommended that the Claimant "push herself" during PT.

14. Dr. Zuehldorff re-examined the Claimant on March 9, 2016. He estimated that the Claimant was at 70-75% and making progress. Dr. Zuehldorff recommended that the Claimant "continue to push hard in therapy."

15. On March 21, the Claimant complained of significant pain although her passive range of motion was "quite good," and her Drawer test was negative.

16. Dr. Zuehldorff ordered a second MRI of the Claimant's right shoulder. He mistakenly ordered an MRI without contrast. (Zuehldorff Depo., page 48, lines:14-17.)

17. On April 6, 2016, Dr. Zuehldorff observed the sessions with Dr. Carbaugh were helping the Claimant, and he recommended that she continue to treat with Dr. Carbaugh.

18. The non-contrast MRI occurred on April 7, 2016. It revealed that the repaired tendon was intact and "no substantial evidence of recurrent high-grade or full-thickness tearing of tendon or tendon retraction."

19. The MRI also showed infraspinatus tendinosis, subacromial subdeltoid bursitis, degenerative morphology of the superior labrum without definite tear, and mild degenerative changes to the acromioclavicular joint.

20. Dr. Zuehldorff recommended a third right-shoulder surgery, and sought a second opinion from orthopedic surgeon, Rajesh Bazaz, M.D.

21. Dr. Bazaz examined the Claimant on May 9, 2016. (*Id.* at 8:16-9:4; R. Ex. E, Bates 15.) Upon reviewing her July 13, 2015 and April 7, 2016 MRIs, Dr. Bazaz observed "the rotator cuff repair seems to have taken quite nicely." Dr. Bazaz also noted the steroid injection did not help the Claimant.. He also noted that there was no evidence of internal or external rotator pathology, significant glenohumeral joint osteoarthrosis, displaced labral pathology, anchors in the bone, or paralabral cysts.

22. The Claimant denied having any outward signs of infection to Dr. Bazaz. During his physical examination, the Claimant's active forward flexion and abduction were both 90 degrees. Passively, her forward flexion was 160 degrees and abduction was 150 degrees. Because the Claimant had reasonable passive range of motion, Dr. Bazaz was of the opinion that she did not have adhesive capsulitis again. Ultimately, Dr. Bazaz concluded that the "etiology of [Claimant's] pain is not clear." He offered two treatment options: "live with the situation" or shoulder arthroscopy. The arthroscopy would provide a "clear look at the rotator cuff repair" and permit biopsies and cultures to rule out an infection. A full debridement would also be performed "with the hope that if there is inflammatory tissue that can be removed to help with her pain/active motion."

Independent Medical Examination (IME) by Lawrence Lesnak, D.O.

23. Dr. Lesnak performed an IME, at the request of the Respondent, on June 21, 2016 (Lesnak Depo. p.4, lines:8-11.) Dr. Zuehldorff, who regularly worked with Dr. Lesnak during the first few years of his medical practice, described Dr. Lesnak as an "excellent colleague."

24. At the IME, the Claimant reported constant diffuse pain throughout her right shoulder that worsened when she moved her right arm or shoulder. (Lesnak Depo. p. 10, lines14-16;p. 50:lines13-14.)

25. Over the six weeks before her examination with Dr. Lesnak, the Claimant rated her worst pain at 70 out of 100, with 100 being pain so severe she would feel as though she might pass out or die. The Claimant rated her current pain as 50-60.

26. During the IME, the Claimant expressed tenderness in her right shoulder even to gentle brushing of the skin.

27. As part of Dr. Lesnak's IME, the Claimant underwent a Computerized Outcome Assessment (COA). The COA is accepted in the field of osteopathic medicine, with literature and textbooks on the subject, according to Dr. Lesnak. (Lesnak Depo. at p. 34, lines20-24). Additionally, it is part of the Workers' Compensation Medical Treatment Guidelines [Workers' Compensation Rules of Procedure (WCRP), Rule 17, exhibit 1, 7 CCR 1101-3] and has associated codes for payment.

28. The COA measures whether any psychosocial factors may be influencing a patient's symptoms and how a patient perceives his/her functionality. Indeed this computerized test may be able to look into the soul of the subject.

29. According to Dr. Lesnak, the COA is a screening test — not a formal psychiatric evaluation.

30. Based on the Claimant's answers to the COA, Dr. Lesnak concluded that psychosocial factors are influencing her symptoms, recovery, and/or perceived function.

31. During Dr. Lesnak's physical examination, the Claimant had the following active right shoulder range of motion measurements: 68 degrees flexion; 50 degrees abduction; 48 degrees extension; 30 degrees adduction; 80 degrees internal rotation; and 10 degrees external rotation.

32. Dr. Lesnak was of the opinion, however, that the Claimant self-limited the active range of motion because she had "more active range of motion in these planes" during her time in his presence. Dr. Lesnak estimated that the Claimant's actual active flexion was 90-100 degrees and abduction was 80-90 degrees because of her actions and "normal-day decisions" during the IME. (Lesnak Depo., p. 30, linesd1-24.) According to Dr. Lesnak, the difference in these measurements is "dramatic."

33. Dr. Lesnak also performed provocative maneuvers on the Claimant's right shoulder. (Lesnak Depo., p. 17, lies12-15.) All formal provocative tests were negative. (*Id.* at p. 1, 7lines15-16;p. 60, lines15-16.)

34. According to Dr. Lesnak, there are no objective clinical findings to suggest that theClaimant has residual right shoulder adhesive capsulitis, no clinical evidence of right shoulder impingement, and the post-operative MRI revealed changes without a recurrent high grade or full thickness rotator cuff tear.

35. Dr. Lesnak was also of the opinion that the Claimant was at maximum medical improvement (MMI) as of May 18, 2016. Dr. Lesnak based his opinion in part on three factors: (1) Dr. Isaacs discharged the Claimant from his care following the post-surgical MRI because there was no evidence of surgical pathology; (2) her discharge from physical therapy in March 2016; and (3) she has a very high sensitivity to pain according to Dr. Carbaugh.

Dr. Zueldorff

36. On August 8, 2016, Dr. Zuehldorff responded to Dr. Lesnak's IME. (Cl. Ex. 1, Bates 2.) He was of the opinion that the Claimant's right shoulder injury requires further treatment because of the results of the postoperative MRI and her continued reports of pain.

37. During his deposition, however, Dr. Zuehldorff stated that that he "would throw out the MRI completely in this case. I don't think it has much relevance at all." (Zuehldorff Depo., p. 37, lines 14-16.)

38. According to Dr. Zuehldorff, relying on an MRI in the Claimant's situation is "fraught with potential for artificial overlay that can basically hide true pathology." Dr. Zuehldorf further was of the opinion that an MRI "in and of itself of the shoulder has limited specificity for ultimately determining true and final diagnoses." Moreover, using an "MRI as the final determinant as to whether or not the patient should have surgery is almost completely unfounded," according to Dr. Zuehldorff.

39. Dr. Zuehldorff is of the opinion that an MRI arthrogram usually provides "better delineation of certain integral structures." And, in his case it would "clarify" the clinical state of Claimant's right shoulder.

40. Dr. Zuehldorff is of the opinion that even if the Claimant were to receive an MRI arthrogram that is "relatively negative and not much worse than this other MRI we did without contrast, I would still say you need to go in[.]" [arthroscopic surgery].

41. Dr. Zuehldorff also stated that there is "no question she (Claimant) does have a low pain trigger."

42. Once or twice while Dr. Zuehldorff was examining the Claimant, she expressed tenderness in her right should even to gentle brushing of the skin.

43. Dr. Zuehldorff concluded that "there's some degree of psychological component to [Claimant's] pain."

44. If the surgery were to occur and not reveal anything, Dr. Zuehldorff would likely conclude that he did everything he could for the Claimant. Additional physical therapy, injections, or medication would be unlikely to make a difference, according to Dr. Zuehldorff.

45. In Dr. Zuehldorff's opinion, the diagnostic arthroscopy would provide "a better determination of the diagnoses, [and] hopefully there could be some intervention surgically that could then help resolve them." In essence, the ALJ finds that Dr. Zuehldorff is searching for a diagnosis.

46. Dr. Zuehldorff concedes that the Claimant did not "follow a linear recovery pattern," and "obviously had a delayed recovery." He also described the Claimant's responses to the two previous surgical procedures as "unusual." (Zuehldorff Depo., p. 22, lines 3-5).

Dr. Lesnak

47. Like Dr. Zuehldorff, Dr. Lesnak believes that the Claimant has had a delayed recovery. (*See* Lesnak Depo., p. 27, lines 4-7). Dr. Lesnak observed Claimant has not healed "as her own treating physician has expected." (*Id.* at 27:4-7).

48. Because the Claimant has no surgical pathology, Dr. Lesnak disagreed with Dr. Zuehldorff's recommendation for a diagnostic arthroscopy and to obtain a second opinion.

49. In Dr. Lesnak's opinion, Dr. Bazaz neither diagnosed the Claimant with a specific condition requiring surgical repair nor recommended a specific treatment he would perform. Instead, Dr. Bazaz suggested the shoulder arthroscopy simply "to take a look" and determine if there might be a clinical reason for the Claimant's pain

50. Dr. Lesnak is of the opinion that the Claimant should have had a positive diagnostic response — albeit temporarily — to the corticosteroid injection performed by Dr. Isaacs. (Lesnak Depo., p. 15, lines16-22). Dr. Lesnak observed that the Claimant did not improve when the right shoulder was numb. (*Id.* at p. 19, lines 20-22.)

51. According to Dr. Lesnak, there was no clinical indication that the Claimant has an infection in her shoulder. (*Id.* at p. 51, lines 6-7.) Also, the post-operative MRI did not show any inflammation, which is an indication of infection. (*Id.* at p. 51, lines 17-21).

52. In Dr. Lesnak's opinion, the Claimant's subjective complaints of pain may be unreliable due to her hypersensitivity. **(***Id.* at p. 52, lines 12:20).

53. Ultimately, Dr. Lesnak concluded that the Claimant is not a candidate for any type of right-shoulder surgery (Lesnak Depo. , p. 13, lines 2; p. 21, lines 8-9; p. 40, lines 1-9.) According to Dr. Lesnak, the Claimant's "symptoms are not coming from inside her shoulder." (Lesnak Depo., p. 13, lines 19-20). According to Dr. Lesnak, one does not perform "diagnostic surgery [on a shoulder] to try and find something." (*Id.* at p. 61, lines 16-21). Furthermore, Dr. Lesnak stated that he does not rely on referrals to surgeons to help him diagnose patients. (*Id.* at p. 43, lines 4-5.) Instead, he refers patients to a surgeon if they have the surgical pathology warranting surgery — not for a diagnostic procedure. (*Id.* at p. 43, lines10-12).

54. According to the Workers' Compensation Medical Treatment Guidelines diagnostic arthroscopy is deemed reasonably necessary depending on the clinical correlation (Zuehldorff Depo. p. 36, lines 21-25). In the present case, there is no clinical correlation for the diagnostic arthroscopy because there are no objective clinical findings that the Claimant needs this surgery, according to Dr. Lesnak (Lesnak Depo., p. 21, lines 7-12). This is true according to Dr. Zuehldorff as well.

Ultimate Findings

55. Based on the totality of the evidence, the ALJ finds Dr. Lesnak's opinion that the recommended right shoulder arthroscopy is not reasonably necessary to cure and relieve the effects of the Claimant's admitted right shoulder injury of June 23, 2015 is more credible and persuasive than Dr. Zuehldorff's opinion. Indeed, Dr. Zuehldorff concedes that there is no clinical correlation for the diagnostic arthroscopy because there are no objective clinical findings that the Claimant needs the surgery. The ALJ infers and finds that Dr. Zuehldorff wants to try one last-ditch effort to look inside the Claimant's right shoulder to see if he finds something.

56. Between conflicting medical opinions, if they are indeed in conflict, the ALJ makes a rational decision, based on substantial evidence, to accept Dr. Lesnak's opinion that surgery is not warranted and to reject opinions to the contrary.

57. Because there are no objective clinical findings that the Claimant needs arthroscopic surgery, the weight of the medical evidence establishes that the Claimant has failed to prove, by a preponderance of the evidence that the arthroscopic surgery recommended by Dr. Zuehldorff is reasonably necessary to cure and relieve the effects of the Claimant's June 23, 2015 right shoulder injury.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Lesnak and Dr. Zuehldorff are in agreement that there are no objective clinical findings indicating that surgery is warranted. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, Dr. Lesnak's opinion that the recommended right shoulder arthroscopy is not reasonably necessary to cure and relieve the effects of the Claimant's admitted right shoulder injury of June 23, 2015 is more credible and persuasive than Dr. Zuehldorff's opinion. Indeed, Dr. Zuehldorff conceded that there was no clinical correlation for the diagnostic arthroscopy because there were no objective clinical findings that the Claimant needs the surgery.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, if they were indeed in conflict, the ALJ made a rational decision, based on substantial evidence, to accept Dr. Lesnak's opinion that surgery is not warranted and to reject opinions to the contrary.

Reasonable Necessity of Recommended Right Shoulder Arthroscopy

c. The Respondent is only liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether medical treatment is reasonably necessary to cure and relieve the effects of an industrial injury is one of fact for determination by the ALJ. *Kroupa v. Indus. Claim Appeals Office*, *supra,* and the Claimant bears the burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc. v. Indus. Claims Office*. 989 P.2d 251, 252 (Colo. App. 1999).

Burden of Proof

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

(D.C. Cir. 2001). “Preponderance” means “the existence of a contested fact is more probable than its nonexistence.” *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain her burden of proof concerning the reasonable necessity of the arthroscopic surgery recommended by Dr. Zuehldorff.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant’s request for the arthroscopic surgery recommended by Gary Zuehldorff, D.O., is hereby denied and dismissed.

B. The general Admission of Liability, dated April 19, 2016 remains in full force and effect.

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

DATED this______day of October 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-968-142-01

ISSUES

The issue determined in this order involves Claimant's entitlement to medical benefits. The specific question is whether Claimant has established, by a preponderance of the evidence, that a patellar femoral joint (PFJ) arthroplasty recommended by Dr. Matthew Simonich is reasonable, necessary, and related to his admitted industrial injury.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Simonich and Dr. O'Brien, the ALJ enters the following findings of fact:

1. Claimant was employed by Respondent-Employer as a correctional officer on September 6, 2014 when he sustained an admitted work related injury to his right knee while ascending a flight of stairs. According to Claimant he caught his toe/foot on a stair causing his right knee to twist as he shifted to the right to avoid an inmate who was running down the stairs.

2. Claimant was seen at St. Mary Corwin Hospital in the emergency room (ER) on the morning of September 7, 2014 for continued complaints of right knee pain. A history was taken where after it was documented that Claimant reported a "history of meniscal tear in that knee that was surgically repaired." The reference to "that" meaning the right knee. Physical examination was positive for effusion and tenderness over the medial joint line. There was no ligamentous laxity to varus and valgus stress or AP drawer testing. X-rays were obtained which were interpreted failing to demonstrate "acute change". Claimant was diagnosed with a "knee sprain" and instructed to wear a knee immobilizer and follow-up with Centura Centers for Occupation Medicine (CCOM).

3. Claimant was first seen at CCOM on September 8, 2014. Dr. Merchant noted that Claimant's knee was grossly normal appearing without ecchymosis or erythema, although he had "mild swelling around the anterior and medial side of the patella" and tenderness "along the medial joint line and medial collateral." Claimant "denied a prior history of right knee injury." The history regarding prior injury to the right knee as provided to Dr. Merchant conflicts with the history of prior surgical repair of a right meniscal tear documented by the ER physician on September 7, 2014. Dr. Merchant diagnosed internal derangement of the knee and referred Claimant for an MRI.

4. MRI of the right knee was completed on September 12, 2014. Findings included "increased signal in the medial marrow of the distal femur consistent with marrow contusion" and "mild irregularity of the medial articular facet of the patella . . . and increased signal in the subarticular marrow of the patella as well." There was also

“increased signal in the distal femoral marrow” which may have represented a “portion of the same injury.” Finally there was a “small amount of joint fluid” present in the joint and a “small Baker’s cyst noted posteriorly” in the knee.

5. Claimant was referred to Dr. Alex Romero who initiated a course of conservative treatment, including injection therapy focused on Claimant’s right knee condition. Conservative measures failed to produce lasting improvement. Consequently, Claimant underwent a right knee arthroscopy and debridement of an articular cartilage defect on December 8, 2014 as performed by Dr. Romero. As justification for the arthroscopy, Dr. Romero noted that Claimant had failed several months of conservative measures. That surgery and the associated follow up care, including post surgical injections to which Claimant had an allergic response did not resolve Claimant’s pain.

6. On August 5, 2015, Claimant was seen in follow-up in CCOM by Physician Assistant Robert Simmons who noted that he “spent a long time discussing further treatment options . . . given [Claimant’s] chronic progressive pain.” PA Simmons raised the potential for patellofemoral unicompartmental arthroplasty and felt Claimant should obtain a second opinion regarding his candidacy for the procedure. As neither Dr. Romero nor his partner Dr. Nakamura performed the procedure, Claimant was referred to Dr. Simonich for “another opinion.”

7. Claimant saw Dr. Simonich on August 20, 2015 and was diagnosed with mild/moderate osteoarthritis in his right knee. Dr. Simonich recommended a repeat MRI noting that if Claimant’s “symptoms persist and he had a lesion then consideration could be given for the performance of a fracture arthroplasty vs. a mosaicplasty vs. an ACI. However, Dr. Simonich felt the chance of success with these procedures was affected by the fact that Claimant had pathology on both sides of the patellofemoral joint and he was overweight. Dr. Simonich went on to note: “I think he is too young, too heavy, too active and without endstage OA for a partial PFJ arthroplasty to be successful.” Based upon the content of the medical record, the ALJ finds Dr. Simonich’s initial opinion to be qualified as he was waiting on the repeat MRI results and because he later noted that “[w]e may need to do anther arthroscopy and be ready to do all the above” meaning a fracture arthroscopy, a mosaicplasty, an ACI or a partial PFJ arthroplasty.

8. A repeat MRI was completed on September 1, 2015. Findings from that MRI included “thinned and somewhat irregular” patellar cartilage “suggesting chrondromalica patella.” Both the cruciate ligaments and menisci appeared intact without tears. The radiologist reached the following pertinent impression: “Chrondromalacia patella type 3.”

9. Claimant returned to Dr. Simonich on September 8, 2015. Dr. Simonich’s diagnosis continued to be mild/moderate osteoarthritis of the right knee, “unchanged.” Dr. Simonich scheduled Claimant for a right PFJ arthroplasty.

10. Surgical authorization was denied by Respondent-Employer. On December 22,

2015, Claimant returned to Dr. Simonich who noted that Claimant's pain was worsening by report. He noted further that the knee was locking and the patella was not tracking. Dr. Simonich documented that Claimant would be scheduled for a six month follow-up and if Claimant's persisted at that time he would "consider repeat arthroscopic chrondroplasty vs. cortisone injection since we can't get a PFJ arthroplasty authorized . . . ."

11. Claimant was examined at Respondent-Employer's request by Dr. Timothy O'Brien on February 24, 2016. Following his independent medical examination (IME), Dr. O'Brien opined that Claimant's injury was "minor" which opinion is substantiated by the mechanism of injury described. According to Dr. O'Brien, the minor twisting event described by Claimant would not generate sufficient amounts of energy to result in significant "tissue breaking or yielding" i.e. acute chrondral tearing of the PFJ and medial compartment. If such tissue breaking or yielding would have occurred, Dr. O'Brien testified that it would have resulted in "massive bleeding of the joint and/or a massive effusion." Because such hemarthrosis and effusion were not present on MRI, Dr. O'Brien opined that the findings on the MRI represent "chronic degenerative chrondromalacia changes without effusion. Accordingly, Dr. O'Brien opined that Claimant sustained "no significant intra-articular injury."

12. Dr. O'Brien noted further that minor injuries such as that sustained by Claimant in this case would "heal reliably and expeditiously and without sequel." Dr. O'Brien went on, indicating that Claimant had reached an "end-of-healing before Dr. Romero performed surgery on December 8, 2014, which Dr. O'Brien characterized as "ill-advised and not indicated", citing epidemiological studies which purport to stand for the proposition that patients who have knee pain secondary to osteoarthritis have "absolutely no hope" of benefitting from arthroscopic surgery. According to Dr. O'Brien, arthroscopic surgery in such patients increases their pain because the surgery creates additional trauma due to the introduction of rigid instruments operating under high pressure which "awakens quiescent areas of osteoarthritis due to the creation of an intractable synovitis" which "accelerates" the symptoms associated with osteoarthritis rather than relieving them. Consequently, Dr. O'Brien noted that he was "unable to reconcile Dr. Simonich's recommendation to proceed with . . . arthroscopic surgical intervention when this surgery has already proven to be a failure." Finally, Dr. O'Brien opined against additional surgery on the grounds that Claimant's arthritis is "not advanced enough"; he is obese and is young to warrant such intervention. Regarding the last two of these factors, Dr. O'Brien noted, "[t]he main reason that Mr. Walter has significant ongoing knee dysfunction and pain is due to his obesity and physically deconditioned state." Dr. O'Brien opined that it is "inappropriate for Mr. Walter to continue to rely on the medical system to provide him with an answer for his knee pain as he has already exhausted all available medical treatment modalities." According to Dr. O'Brien, the "medical system has already proven to be a failure, not the least reason of which is its misapplication [of] an arthroscopic surgical intervention which predictably was doomed to fail before it was ever undertaken." For these reasons, Dr. O'Brien opined that Claimant was not a candidate for an arthroscopy or a unicompartmental to total knee arthroplasty regardless of the cause of his right knee arthritis.

13. Claimant returned to Dr. Simonich on April 22, 2016 for reevaluation and follow-up. During this appointment, Claimant continued to report worsening pain and dysfunction regarding the right knee. He reported that his knee was buckling and giving out and that his ongoing pain was limiting his sleep to 2 hours at a time. Dr. Simonich recommended additional arthroscopic debridement. The ALJ finds Dr. Simonich's recommendation for arthroscopic debridement on this date to constitute a different procedure than a PFJ unicompartmental arthroplasty as he had recommended previously. The ALJ also finds that Dr. Simonich, more probably than not recommended a different procedure because he could not secure authorization to proceed with the PFJ unicompartmental arthroplasty that he had scheduled Claimant for on September 21, 2015.

14. On May 18, 2016 Respondent-Employer requested a WCRP Rule 16 evaluation regarding Dr. Simonich's request to proceed with an arthroscopy and chrondroplasty following Claimant's April 22, 2016 appointment. Respondent-Employer requested that Dr. O'Brien conduct such review. Citing the opinions expressed in his March 14, 2016 IME report, Dr. O'Brien reiterated that Dr. Simonich's requested surgery was contraindicated, was likely to increase Claimant's right knee pain and was neither reasonable nor necessary. Consequently, Dr. O'Brien opined that the surgery should be denied.

15. Dr. Simonich testified by deposition. He testified that when he reviewed Claimant's MRI films he noted that the "articular cartilage on the back side of the kneecap was thinned and somewhat irregular." He also noted what he felt were "cartilage defects on the trochlear side of the joint as well." Based upon review of the evidence as a whole, the ALJ finds that the backside of the knee cap and the trochlea articulate with one another to comprise the patella femoral joint (PFJ).

16. Dr. Simonich attributed Claimant's PFJ defects to Claimant's September 6, 2014 industrial injury.

17. Dr. Simonich testified that proceeding with a PFJ unicompartmental arthroplasty is not contraindicated in an absolute fashion. He explained that from a relative fashion surgeons do not like performing such procedures on young patients but in Claimant's situation he has a "bipolar lesion" and some "early bony changes going on due to the stress of the loss of cartilage on both the trochlear side of the joint and the patellar side of the joint. Consequently, Dr. Simonich testified that while Claimant was not a "ideal" candidate for a partial knee replacement procedure because of his age, weight and extent of disease, he has been through all conservative treatment modalities that one could do and because he still has ongoing pain and disability at a level that has precluded his return to work, the recommended PFJ arthroplasty procedure is "really the only option that he has."[1]

18. According to Dr. Simonich, the recommended partial knee replacement is

[1] During his deposition, Dr. Simonich agreed that additional arthroscopic surgery would not help Claimant.

reasonably calculated to relieve Claimant's ongoing symptoms and return him to work. Dr. Simonich testified that he believed the surgery would be successful and that the condition of the claimant's knee will not heal on its own. Specifically, Dr. Simonich testified, when asked if the Claimant's knee condition would heal on its own without the partial knee replacement: "No. We don't grow cartilage."

19. Dr. Simonich further testified that he reviewed Claimant's situation with other orthopedists during an orthopedic sports medicine society in July of 2015. After reviewing Claimant's case with those additional doctors, Dr. Simonich's testified that there was a consensus that Claimant was not a "good candidate for anything other than patella femoral joint arthroplasty."

20. Dr. O'Brien testified by deposition on August 15, 2016. Dr. O'Brien testified that while the PFJ arthroplasty might "temporarily be successful in relieving pain" it would, with "100 percent" certainty fail in five years. Moreover, Dr. O'Brien testified that the procedure would not relieve pain but conversely "induce more pain." Consequently, Dr. O'Brien testified that performing the procedure would be a "catastrophic failure early on" and Claimant should not have it done. According to Dr. O'Brien, if Claimant "truly had advanced arthritis, severely advanced bone-on-bone" . . . [was] a little bit fitter, lost weight . . . and could modify his activity level to avoid high-impact activity, [he] might consider patellofemoral replacement." Because he felt Claimant was physically deconditioned, aerobically unfit and trending towards being morbidly obese, Dr. O'Brien opined that Claimant was not a candidate for such procedure. Dr. O'Brien recommended additional injections, weight loss and up-modulating Claimant's fitness level. If these modalities did not affect sustained improvement, Dr. O'Brien testified that Claimant would have to "live with pain."

21. Dr. O'Brien testified that the Claimant did not suffer an injury on September 8, 2014 to his right knee and did not exacerbate a preexisting condition either. Relying upon the ER record documenting that Claimant had a prior menicsal surgery to the right knee; Dr. O'Brien testified that Claimant had sustained a prior injury to his right knee. Outside of the one historical entry from the ER regarding prior injuries to the right knee, careful review of the medical record fails to substantiate any support for the conclusion that Claimant ever suffered a prior right knee injury let alone a prior surgery to repair/debride a damaged meniscus. Based upon the evidence presented, the ALJ finds an absolute dearth of evidence to support that Claimant was ever treated for symptoms associated with a right knee condition prior to the incident occurring in this case. Consequently, the ALJ finds that the ER physician, more probably than not, mistakenly documented that Claimant had a prior surgery to the right knee, considering the aforementioned lack of evidentiary support and considering that there is evidence that Claimant suffered an injury to his left knee that was surgically repaired.

22. Based upon the evidence presented, the ALJ is persuaded that the September 6, 2014 mechanism of injury probably aggravated a pre-existing, albeit asymptomatic condition in Claimant's right knee resulting in his need for treatment. The ALJ is also

persuaded that Claimant's current symptoms and need for treatment, i.e. a PFJ arthroplasty is causally related to that aggravation.

23. The ALJ credits the opinions of Dr. Simonich to find that Claimant suffers from pain and dysfunction caused by a bipolar lesion in the PFJ which, more probably than not will respond positively to the partial knee replacement procedure recommended and requested by Dr. Simonich. While Claimant is not an ideal candidate for such surgery, even Dr. O'Brien concedes that the surgery will be successful, if nothing else on a temporary basis in relieving Claimant's pain. Moreover, Dr. Simonich credibly and persuasively testified that the surgery would be successful and that the condition of Claimant's knee will not heal on its own. Based upon the testimony of Dr. Simonich and the evidence presented as a whole, the ALJ is convinced that the PFJ arthroplasty is more likely to ameliorate Claimant's ongoing pain and functional decline than is Dr. O'Brien's recommendation of performing additional injections and/or "living with pain." Accordingly, the ALJ finds the requested unicompartmental knee replacement reasonable and necessary.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). In this case, Claimant has provided consistent statements to all medical providers. Accordingly, the ALJ concludes that his current reports of pain and dysfunction are reliable and persuasive. Moreover, based solely on the above referenced facts, the expert medical opinions of Dr. Simonich are more persuasive than the contrary opinions of Dr. O'Brien. While Dr. O'Brien's opinion that the introduction a rigid arthroscope operating under high pressure is likely to activate other areas of quiescent osteoarthritis in the knee is persuasive, the record supports that the requested PFJ arthroplasty is an open procedure directed to the specific areas of pathology in the knee negating those concerns. Indeed, Dr. O'Brien cites his opposition to the requested PFJ procedure on the basis that Claimant is too young, too heavy and without sufficient pathology to warrant the requested procedure.

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

Medical Benefits

D. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

E. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). As found in this case, the totality of the evidence presented persuades the ALJ that Claimant's current symptoms and need for treatment, i.e. a PFJ arthroplasty is causally related to a industrially based aggravation of a pre-existing osteoarthritic condition in the right knee. In so concluding, the undersigned ALJ rejects Dr. O'Brien's contrary opinions as unpursuasive.

F. Once a claimant has established the compensable nature of his/her work injury, as in this case, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S*.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*. As found, Claimant has established that his need for PFJ arthroplasty is directly related to his compensable right knee injury. Nonetheless, the question of whether the PFJ arthroplasty is reasonable and necessary must be addressed.

G. The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that the right PFJ arthroplasty is reasonable and necessary. The medical reports submitted outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Simonich to recommend surgery which he testified will be successful in reliving Claimant's pain and returning him to work. Dr. O'Brien agrees with this, but asserts that benefit will be short lived and the procedure will fail catastrophically within five years. While the ALJ concludes that such failure is possible, the ALJ finds Dr. O'Brien's opinion that the procedure will "100 percent" fail amounts to hyperbole as such opinion is not supported by the evidence presented, including the various published epidemiological studies cited by Dr. O'Brien and submitted into evidence. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that the right knee PFJ arthroplasty is reasonable and necessary to cure and relieve Claimant of the ongoing effects of his September 6, 2014 industrial injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his right knee injury, including the right knee PFJ arthroplasty as requested by Dr. Simonich

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

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

DATED: October 27, 2016

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

ISSUES

1. Determination of Claimant's average weekly wage (AWW).

2. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from 9/14/15 through 11/29/15 and from 12/4/15 through 12/6/15 at an increased AWW.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary partial disability (TPD) benefits.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to a permanent partial disability (PPD) rating of 10% whole person.

STIPULATIONS

1. The issue of mileage reimbursement was withdrawn.

FINDINGS OF FACT

1. Claimant works for Employer as a janitor. On April 9, 2015 Claimant sustained an admitted injury to his right shoulder and arm.

2. At the time of his injury in addition to working for Employer, Claimant also worked as a janitor for Kohl's.

3. Prior to his injury, and from December 28, 2014 through April 4, 2015 Claimant earned a total of $2,957.88 in gross wages from Kohl's. These wages were earned during a 14 week period of time resulting in an average weekly wage from Kohl's of $211.27.

4. For Respondent Employer, Claimant was paid twice per month. In the three months prior to his work injury and from January 1, 2015 through March 31, 2015 Claimant earned gross wages of $4,374.75. These wages were over a 90 day period and amount to an average daily wage of $48.61 which multiplied by 7 days in the week provides an average weekly wage of $340.27.

5. Due to his injury, Claimant underwent an MRI of his right shoulder on July 24, 2015 that was interpreted by Eduardo Seda, M.D. Dr. Seda provided the

impression of supraspinatus and infraspinatus tendinosis and acromioclavicular osteoarthritis. *See* Exhibit 4.

6. On September 14, 2015 Claimant underwent right shoulder surgery performed by John Papilion, M.D. Dr. Papilion performed arthroscopic debridement of the superior labrum and partial thickness, bursal sided rotator cuff, arthroscopic subacromial decompression with release of the coracoacromial ligament, and arthroscopic distal clavical resection. *See* Exhibit B.

7. On September 22, 2015 Claimant was evaluated by Allison Hedien, NP. Claimant reported that he had not yet started physical therapy, that he was taking pain medications which helped, and that he was tolerating symptoms okay. Claimant had sharp pain in the upper right area of his neck and back, sharp pain in the upper right neck/arm area, joint swelling and joint stiffness. Claimant reported moderate neck pain and pain migrating to the upper back area. NP Hedien noted Claimant's activity status was no work. *See* Exhibit 3.

8. On September 24, 2015 Claimant was evaluated by Dr. Papilion. Dr. Papilion noted that Claimant had been in the sling and on the CPM machine and that his pain was under control. Dr. Papilion recommended getting Claimant into a course of physical therapy and provided work restrictions of no use of the right arm and noted that Claimant did not require pain medication and could wean out of the sling in the next 1-2 weeks. *See* Exhibit 3.

9. On October 6, 2015 Claimant was evaluated by NP Hedien. Claimant reported that his pain was improving, that he felt physical therapy was helpful, and that he was only taking Norco a few times at night. NP Hedien noted on examination tenderness in the AC joint, anterior shoulder, lateral shoulder, and posterior shoulder with limited range of motion in all planes. NP Hedien noted the plan was to continue physical therapy, use ice/head/meds as helpful, and continued the work restriction of no use of the right upper extremity. *See* Exhibit 3.

10. Claimant returned to work for Kohl's in mid October. Between October 18, 2015 and October 31, 2015 Claimant worked 59.07 hours. Claimant continued to work at Kohl's in November and December and continued to earn wages consistent with his AWW from Kohl's prior to his injury. Claimant testified credibly that he was able to work at Kohl's despite his work restrictions and that he was able to self-modify his duties. *See* Exhibit 5.

11. On December 3, 2015 Claimant was evaluated by Dr. Papilion. Claimant was noted to be three months post shoulder surgery with improvement in motion through therapy. Claimant reported continued pain with overhead use and difficulty with internal rotation. Dr. Papilion performed a subacromial injection. *See* Exhibit 3.

12. On February 2, 2016 Claimant underwent physical therapy with Angela Wilt, PT. PT Wilt noted that Claimant had continued signs of shoulder impingement and

that they had to modify therapy exercises due to pain complaints and scapular weakness. Claimant reported fatigue in the right shoulder/scapular at the end of the session. PT Wilt noted the follow up plan included a focus on scapular stabilization and strengthening. *See* Exhibit 3.

13. On February 23, 2016 Claimant underwent physical therapy with PT Wilt. Claimant reported he was not having any shoulder pain that day and that he sometimes had shoulder pain at work that comes and goes. PT Wilt noted range of motion deficits and that Claimant was making significant progress toward his goal of being pain free. *See* Exhibit C.

14. On February 25, 2016 Claimant underwent physical therapy with PT Wilt. Claimant reported having no shoulder pain for a couple of days. Claimant reported that repetitive movements increased his pain and that his shoulder was usually sore by the end of the work day. Claimant reported that he was unable to sleep on his right shoulder due to pain. PT Wilt noted that the goal status for pain was 90% achieved as Claimant still had occasional shoulder pain and soreness at the end of the work day. PT Wilt discharged Claimant from therapy services due to the anticipated goals and expected outcomes being achieved. PT Wilt noted that the goal of lifting trash bins weighing 20 pounds was 100% achieved, the goal of push/pull a mop was 100% achieved, the goal of push/pull carpet cleaner with 50 pounds of force was 100% achieved, that the goal of lifting 20 pounds overhead with the right arm was 100% achieved, and that the goal of repetitively lifting 5-10 pounds overhead was 100% achieved. PT Wilt in her evaluation noted that Claimant's impairment list included pain and a pinching feeling at OH end range, impaired joint mobility, impaired motor function, impaired muscle performance, and impaired range of motion. *See* Exhibit C.

15. On February 29, 2016 Claimant was evaluated by Eric Tentori, D.O. Dr. Tentori noted that the surgeon, Dr. Papilion, had indicated that there was nothing more to offer Claimant. Dr. Tentori reviewed the operative report from Dr. Papilion and also performed an examination of Claimant. Dr. Tentori noted that Claimant had well-healed arthroscopic surgical sites with no edema, minimal residual discomfort with palpation of a diffuse nature, and active range of motion deficits. Dr. Tentori noted that the neurovascular systems were grossly intact in the right upper extremity and that there was no significant crepitance with passive range of motion. Dr. Tentori placed Claimant at maximum medical improvement (MMI). Dr. Tentori performed an impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment. Dr. Tentori provided a 7% upper extremity impairment rating for right shoulder active range of motion deficits, a 10% upper extremity impairment rating for the distal clavicle resection, and combined the upper extremity ratings using the combined values chart to provide a total upper extremity rating of 16%. Dr. Tentori noted that, if applicable, according to Table 3 of the Guides, the 16% upper extremity rating would convert to a 10% whole person impairment rating. Dr. Tentori noted that no additional impairment rating was indicated. *See* Exhibits 3, B.

16. Dr. Tentori also placed Claimant on permanent work restrictions for Claimant’s bilateral upper extremities with a maximum lifting on an occasional basis limited to 25 pounds and a maximum pushing/pulling on an occasional basis limited to 30 pounds. For Claimant’s right upper extremity, Dr. Tentori placed Claimant on permanent work restrictions with a maximum lifting on an occasional basis limited to 5-10 pounds and with no work with the right upper extremity at or above right shoulder height. *See* Exhibits 3, B.

17. On March 7, 2016 Respondents filed a Final Admission of Liability (FAL). In the FAL they admitted to an AWW of $340.27. They also admitted to a scheduled impairment rating of 16% of body code 01. Respondents also admitted to TTD from 9/14/15 through 11/29/15 and from 12/4/15 through 12/6/15 at a rate of $226.85 per week. *See* Exhibit A.

18. Claimant testified credibly at hearing. Claimant missed time from work at both Kohl’s and Employer due to his surgery. Claimant continues to have pain in his right shoulder that interferes with sleeping, driving, and his work duties. Claimant’s right shoulder has pain that travels from his shoulder in three different points and goes up to his neck and back down. Claimant indicated in court the three main points of pain that he feels with use of his right shoulder. Claimant pointed to the front of his right shoulder, the side of his right shoulder, and the backside of his right shoulder leading to his neck. Claimant has pain and limitations from his shoulder injury that go into his neck and that are outside the glenohumeral joint.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance*

Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Scheduled Injury vs. Whole Person Impairment

Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The question of whether the Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Pain and discomfort which limit a Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Claimant bears the burden of establishing functional impairment beyond the arm at the shoulder and the consequent right to permanent partial disability benefits under § 8-42-107(8)(c), C.R.S., by a preponderance of the evidence. *Maestas v. American Furniture Warehouse,* W.C. No. 4-662-369 (June 5, 2007); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005).

In this case Claimant's testimony, substantiated by the medical records, establish that the Claimant is entitled to a whole person medical impairment rating under § 8-42-107(8)(c), C.R.S. Claimant has established that he suffered a functional impairment to a part of the body that is not contained on the schedule of impairment and that his functional impairment extends beyond the "arm at the shoulder." The credible evidence shows that Claimant's shoulder joint itself is impaired. It does not function as it did before Claimant's work injury. Work activities and other activities of daily living cause pain in his arm, shoulder, shoulder joint, upper right back muscles, and cervical area such that he is unable or limited in his ability to engage in actions requiring overhead movement. His impairment has caused him to make adaptations in the performance of his work duties and activities including driving and sleeping. Claimant's testimony is credible and persuasive that he has pain and limitations over areas that are part of his upper right back and into his neck that are not limited to his arm at the shoulder. Claimant's continued pain and limitations in these areas are consistent with the areas shown on MRI to have tendinosis and are also consistent with the surgical procedure that was done and the later injection that was done. NP Hedien noted pain in the upper right area of Claimant's neck and back consistent with his testimony at hearing. PT Wilt noted scapular weakness and a plan to focus on scapular stabilization which is also consistent with Claimant's testimony at hearing. The MRI, the surgery, and the injection all showed indications that the injury was beyond the glenohumeral joint and support Claimant's continued pain and limitation to areas beyond the glenohumeral joint. Accordingly, the ALJ finds that Claimant has established by preponderant evidence that his impairment is not on the schedule of permanent impairments that he is entitled a rating of 10% whole person.

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on her earnings at the time of injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon her AWW on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Earnings from concurrent employment may be included in a claimant's AWW where the injury impairs earning capacity from such employment. *Jefferson County Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

Claimant has established that earnings from his employment at Kohl's are properly included in the determination of his AWW. Claimant had loss of earning capacity from Kohl's due to his work injury. Claimant has established that his AWW from his concurrent employment at Kohl's was $211.27.

For Respondent Employer, Claimant was paid twice per month. In the three months prior to his work injury and from January 1, 2015 through March 31, 2015 Claimant earned gross wages of $4,374.75. These wages were over a 90 day period and amount to an average daily wage of $48.61 which multiplied by 7 days in the week provides an average weekly wage of $340.27. The objective of calculating AWW is to arrive at a fair approximation of Claimant's wage loss due to his injury. Here, in the months immediately preceding his injury, Claimant was earning the wages listed above. Although it is true that prior to January of 2015, Claimant's average gross pay was generally less over each pay period than it was after January of 2015, the wage records have established that Claimant was earning an average weekly wage of $340.27 at the time of his injury. The ALJ concludes that a fair approximation of Claimant's lost earning capacity includes the wages more close in time to his injury and a fair approximation would not include wages earned prior to January 1, 2015 when he was working fewer hours and making less money. At the time of his injury his average weekly wage for Respondent Employer was $340.27. Adding the AWW from his concurrent employment at Kohl’s results in an overall AWW at the time of his injury of $551.54.

Temporary Total Disability (TTD)

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

Claimant is asking for an increase of TTD benefits due to his increased AWW. Claimant has established concurrent employment from Kohl’s and an entitlement to an increase in his overall AWW and thus the corresponding TTD benefits for the period of September 14, 2015 through October 17, 2015. Claimant’s testimony, substantiated by the medical records, establishes that he had shoulder surgery and was off work completely for a period of time following the surgery while he recovered and was in a sling. However, Claimant has failed to establish a continued entitlement to TTD benefits from October 18, 2015 through November 29, 2015 and has failed to establish an entitlement to TTD benefits from December 4, 2015 through December 6, 2015. TTD benefits continue until an employee returns to regular or modified employment. The wage records submitted show that Claimant returned to employment at Kohl’s and earned wages from October 18, 2015 through November 29, 2015 and from December 4, 2015 through December 6, 2015. Claimant failed to demonstrate an entitlement to TTD and an inability to resume his prior work during these periods of time. Although Claimant had restrictions and impairments that prevented him from working for Respondent Employer, he was still able to work for and earn wages from Kohl’s and therefore has not established that he was totally disabled from earning wages during these time periods. Thus, Claimant has failed to establish an entitlement to TTD benefits from October 18, 2015 through November 29, 2015 and from December 4, 2015 through December 6, 2015. Claimant has established an entitlement to TTD benefits based on the higher AWW of $551.54 for the period of time covering September 14, 2015 through October 17, 2015.

Temporary Partial Disability

Section 8-42-106, C.R.S. provides that in cases of temporary partial disability, the employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability. Claimant has established an entitlement to TPD from October 18, 2015 through November 29, 2015 and from December 4, 2016 through December 6, 2016. During these periods of time Claimant was recovering from shoulder surgery and from a shoulder injection. Due to his injury, he had the loss/restriction of use of his injured shoulder/arm and had medical restrictions that made him unable to perform his regular employment with Respondent Employer. During this period of time, Claimant was able to work for Kohl's and so was able to earn his normal AWW from Kohl's. However, as he was impaired from earning wages from Respondent Employer, Claimant has established an entitlement to TPD and sixty-six and two-thirds percent of the difference between his AWW at the time of the injury and his AWW during the continuance of the TPD. Here, Claimant has established an entitlement to sixty-six and two-thirds percent of $340.27 (AWW at time of injury of $551.54 minus Kohl's AWW of $211.27 that he continued to earn) for the periods of time covering October 18, 2015 through November 29, 2015 and December 4, 2015 through December 6, 2015.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence an entitlement to a permanent partial disability rating of 10% whole person.

2. Claimant's average weekly wage is $551.54.

3. Claimant has established an entitlement to temporary total disability benefits from 9/14/15 through 10/17/15 at a rate of **$367.69** per week. (sixty-six and two-thirds percent of his AWW).

4. Claimant has established an entitlement to temporary partial disability benefits from 10/18/15 through 11/29/15 and from 12/4/15 from 12/6/15 at a rate of $226.85 per week. (sixty-six and two-thirds percent of the difference between his AWW at the time of the injury and the AWW during his TPD).

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

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

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

DATED: October 27, 2016

/s/ Michelle E. Jones

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-996-905-02**

ISSUES

The following issues were raised for consideration at hearing:

- Whether Claimant suffered a compensable acute injury and occupational disease.
- Whether Claimant is entitled to medical benefits if her claim is compensable;
- Identification of authorized treating providers; and
- Whether Claimant is entitled to temporary total disability benefits, beginning October 23, 2015, and ongoing.

PROCEDURAL STATUS

The Findings of Fact, Conclusions of Law, and Order were issued on October 11, 2016 and mailed on October 13, 2016. On October 20, 2016, Respondents filed a Request for Corrected Findings of Fact, Conclusions of Law, and Order. The undersigned ALJ[1] reviewed this request and finds good cause exists to issue a Corrected Order. A Corrected Order was issued on October 21, 2016.

Respondents requested a Second Corrected Findings of Fact, Conclusions of Law, and Order to reflect the correct TTD rate in the Order section. Good cause exists to issue a Corrected Order, pursuant to §8-43-302(1)(a), C.R.S.

STIPULATIONS

1. The parties stipulated to an average weekly wage of $879.97. The Court accepted the stipulation. Claimant's TTD rate is $586.65.

2. Unemployment benefits were received by Claimant, and the parties stipulate that an offset is appropriate, should there be an award of temporary benefits. The specific amount of unemployment benefits were unknown, and the parties will endeavor to come to an agreement regarding offset, but reserve the issue of the amount of offset for future determination if necessary.

[1] As ALJ Broniak left the Office of Administrative Courts, the Request for Corrected Findings of Fact, Conclusions of Law, and Order was reviewed by the undersigned.

FINDINGS OF FACT

1. Claimant is a 44 year old woman who was working as a production worker for the Employer when she asserts she developed right hand pain and discomfort. Claimant is right hand dominant.

2. On September 14, 2015, Claimant reported to the Employer that she started feeling slight discomfort and pain in her right thumb, hand, and wrist during her work shifts. Claimant testified that her onset was August 6, 2015. In her prior interrogatory responses, Claimant asserted an onset date of September 17, 2015.

3. Claimant began working for the Employer in mid-January 2015, and was engaged in preparing the interiors of wind turbine blades manufactured and sold by the Employer.

4. At the time of onset, Claimant worked in the Blades Assembly department. She worked with a team to create large fiberglass parts to be later assembled into blades for electric windmills. Details of her duties in that position were discussed at hearing. Photographs were used to illustrate the process. The blade parts are very large. Claimant and those she worked with would use a large mold to create the various parts. The parts were designated alphabetically, and fit together when completed to become the inside of a windmill blade, later covered with a shell.

5. Claimant testified that she normally worked on the "B" mold, which is an upside down "U" shaped. First, a layer of plastic is laid on the mold to assist with later removal of the fiberglass blade part. Layers of fiberglass biax, similar to fabric, are then laid upon the mold one layer at a time. *(examples of fabric biax and scissors shown at hearing and photos of same provided as supplemental Exhibits W-Y)* The fiberglass biax came pre-sized in rolls in "kits" with additional fabric available for use as needed. 8 layers were laid at 5 minutes per layer, and pushed and tucked into place. Each layer was placed over the mold by rolling out the biax fabric and trimmed with scissors as appropriate for each layer. Claimant testified that she used only manual scissors for cutting, which weighed about 1 pound, and were provided for viewing at the hearing. Claimant trimmed approximately 11 meters per day, 5-10 minutes per cut. After all fiberglass layers are in place, a bag is placed over the molded fabric, and air is removed with a vacuum process. Resin is then infused into the fabric. Claimant or another worker carried the buckets of resin to the mold one at a time as the buckets were emptied in the infusion process, 4-5 times per 12 hour shift, 100 feet, comprised of 3 buckets of 20 kilos, 1 of 15 kilos, and 1 of 10 kilos, with breaks in between carrying as dictated by when buckets need to be replaced.

6. Claimant testified that the infusion process took about two hours. A sleeping-bag type of cover is then rolled over the fiberglass blade part on the mold. The fiberglass blade part is then cured. Once cured, the mold was debagged, using hand grip up to 30-60 minutes per shift. When assembly of one part on the mold was completed and infusion began, Claimant would proceed with debagging and finishing another fiberglass part.

7. Claimant testified that she worked 12 hour shifts and 1 ¼ to 1 ½ fiberglass parts were completed by her crew per shift.

8. Claimant credibly testified that she began experiencing pain in her right arm in late spring to her right arm but continued to full-time work.

9. Claimant credibly testified that during the week of August 3, 2015, she spoke twice to her supervisor Jared Becker, telling him she was suffering severe pain in her right arm. When the Claimant was not referred for medical treatment, she sought medical attention from her primary treating doctor, Dr. Sonya Norman, who referred her to Dr. David A. Chavez.

10. A note dated August 26, 2015 from Dr. Chavez documents complaints of left rotator cuff tendinitis and right de Quervains, stating that the pain was "from lifting blades" and had a two-month duration at that point. Dr. Chavez performed an injection which Claimant reported had helped. She stated that her pain had returned after the holiday (Labor Day holiday).

11. Following reporting her injury, and during the month of August, Mr. Becker move the Claimant to "carbon" with regular duty, twelve hours a day. This position required measuring then cutting carbon pieces by manually operating scissors. She then stacked the pieces throughout the day.

12. Claimant was then moved to the "Assembly" section. Work in "Assembly" involved sanding throughout the twelve hour shift, using a hand sander and not automatic electric sanding machines to remove glue applied. The Employer determined that the electric sanding machines would create deformities in the glue on top of the web. In addition, the Claimant was using a hand tool to screw in scrivets.

13. After reporting her claim in writing as work related on September 14, 2015, Claimant was referred to Peak Form Professional, LLC on that same date. The treatment note indicates, "Patient has noted pain in her right wrist forearm and hand slowly developing over the past 3-4 months getting worse in August and really hurting her last week when she went to see her PCP."

14. Claimant saw Dr. Craig Davis on October 14, 2015. His report states, "In early August she developed fairly rapid onset of pain over the radial aspect of her right wrist." He noted that Claimant reported the symptoms to her supervisor but was discouraged from filing a claim. Claimant reported severe activity-related pain and a "grinding" sensation over the dorsal radial aspect of her distal forearm. On physical examination, Dr. Davis observed swelling, he noted tenderness to palpation over the distal forearm, and extreme response to Finkelstein's test, and crepitation. Dr. Davis's impression was intersection syndrome of the right distal forearm. He provided an injection of lidocaine and Depo-Medrol.

15. Claimant reported on October 26, 2015 that the injection only helped a little bit in terms of tenderness, but not in terms of activity related pain, which was

unchanged. Another injection was done, she was provided with a brace, topical cream, tramadol and physical therapy.

16. On October 23, 2015, Dr. Carol Ramsey at Peak Performance determined that Claimant could no longer work. On October 27, 2015, Claimant was placed on modified duty that severely limited the use of her right arm. She was also restricted to working eight-hour shifts.

17. Claimant has not worked since October 23, 2015. The Employer did not offer her modified duty after October 23, 2015, and Claimant's position was eventually terminated in July 2016.

18. On November 9, 2015, Dr. X.J. Ethan Moses stated that he had assumed treatment of Claimant after Dr. Ramsey departed from Peak Performance. As the authorized treating physician, he stated, "It appears clear from the notes that there was no specific injury, but rather an insidious onset of pain as the result of repetitive motions." He recommended a work-site evaluation.

19. On November 23, 2015, Dr. Moses discussed his review of the job task analysis with Claimant. Following that discussion and review, his assessment was, "right forearm intersection syndrome with associated swelling and pain, not compensable under the Colorado Division of Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 5." ("Guidelines"). Dr. Moses encouraged Claimant to establish care for her right arm symptoms with her primary care physician.

20. The job duties analysis was performed by Jeanette Hrubes of Peak Form Physical Therapy and Occupational Medicine. The initial analysis was done on November 20, 2015. An addendum was done on February 23, 2016. Ms. Hrubes noted, "Initial job task analysis was performed 11/20/15. Second job task analysis was performed with Sonia Huerta present to make sure that all tasks that she performed during her shifts were captured accurately. There were several additional tasks noted, that were not captured in the first analysis. These will be bolded to assist in identification."

21. Claimant testified that she felt that the job analysis done did not accurately reflect her duties. Specifically, she discussed carrying buckets of resin, gripping to take finished blade forms off molds, cutting hard resin, and the use of manual scissors.

22. Ms. Hrubes testified that during the second job duties evaluation, Claimant was present, and was provided the opportunity to explain her duties. Ms. Hrubes discussed her observations with Claimant in a meeting after Ms. Hrubes watched employees perform Claimant's usual job duties. In the revised job analysis, carrying buckets, gripping, cutting resin, and use of manual scissors were included. Using the threshold standards of the Guidelines, Ms. Hrubes concluded that there were no duties that met either primary or secondary risk factors, including additional duties discussed with Claimant and included in her revised report.

23. Claimant testified that the employees Ms. Hrubes observed did not perform the tasks in the same way that Claimant performed them. She did not use electric scissors as none were available to her; she manually carried the resin buckets rather than using a cart; and she and her co-workers manually lifted the blades rather than having a crane for assistance. In addition, Claimant explained that she held her scissors at a 90-degree angle while cutting in awkward position, and at times, above her head whereas Ms. Hrubes documented use of scissors at an even level.

24. Dr. Moses saw Claimant again on January 5, 2016. His notes indicate that he worked with Claimant to appeal her short term disability denial and to make clear that he felt her condition was not work related. He discussed reviewing the updated job analysis and his continued conclusion that Claimant did not experience a work-related injury.

25. Claimant testified that she has continued treatment with her personal providers, including Dr. Leo, and that he has continued to give her work restrictions.

26. Dr. Allison Fall evaluated Claimant on March 1, 2016. She testified at hearing and was qualified as an expert in physical medicine and rehabilitation and causation under the Cumulative Trauma Conditions Medical Treatment Guidelines. Dr. Fall discussed the history with Claimant. She reviewed the medical records, including the revised job analysis. She listened to Claimant's testimony. Her conclusion after considering all of these facts was that Claimant has not experienced either an acute injury or an occupational disease. Dr. Fall testified that diagnosis in this case was questionable. Her possible diagnosis was 1) right distal forearm pain, possible wrist extensor tenosynovitis versus intersection syndrome based upon medical records, and 2) Psychological issues likely playing a role in persistent symptomology. Dr. Fall explained that she felt that the diagnosis at #1 were a more specific types of extensor tendon disorder of the wrist. Dr. Fall noted that, although Claimant had stopped working for the employer in October of 2015, her complaints continued at the time of her March 1, 2016 evaluation. She testified that this further indicated to her that Claimant's condition was not work related. Claimant, however, testified that her symptoms have improved since she stopped working.

27. Dr. Fall explained that, as a medical professional, she relies upon the Guidelines in her analysis of cumulative trauma causation. She explained the time and expertise that has gone into the creation of the causation guidelines and the algorithmic steps for causation assessment contained in the Guidelines. The thresholds of the primary and secondary risks factors have been established using evidenced based medical studies. Dr. Fall testified that these are guidelines, and there are situations where a medical professional could choose not use them. She testified that this is not a case that she felt would warrant deviation from the causation analysis process recommended by the Guidelines.

28. Claimant has proven that she suffered a compensable occupational disease. The ALJ is persuaded by Claimant's testimony concerning her job duties and

that her job duties brought on her symptoms. The opinions of Dr. Fall and Dr. Moses are rejected.

29. The Claimant has proven that the Employer failed to provide her with a list of authorized providers after she initially reported the injury to her supervisor. She elected to see Dr. Norman who referred her to Dr. Chavez. Thereafter, the Employer referred the Claimant to Peak Performance where she received treatment with Dr. Ramsey and Dr. Moses. Dr. Moses referred Claimant back to her primary care physician for non-medical reasons (he opined her injury was not work-related so he discharged her from care). Dr. Chavez then referred Claimant to Dr. John Mangelson.

CONCLUSIONS OF LAW

General

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

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

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

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

Compensability

"Occupational disease" is defined by §8-40-201(14), C.R.S., as:

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

This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

As a matter of law, medical evidence is not required to establish causation, although it is a factor that may be considered in addressing that determination. See *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983).

The Colorado Division of Workers' Compensation has adopted the Guidelines for use by medical providers rendering treatment under the Workers' Compensation Act. They were established by the Director pursuant to an express grant of statutory authority found at § 8-42-101(3.5)(a)(II), C.R.S.

In this case, the Respondents urge the ALJ to rely upon the opinions of Dr. Fall and Dr. Moses because they applied the Guidelines to conclude that Claimant is not suffering from an occupational disease. However, as specifically found in § 8-43-201(3), C.R.S., the ALJ is not required to use the Guidelines as the as "the sole basis" for determining whether treatment is reasonable, necessary or related to an occupational disease. Furthermore, in *Hall v. Industrial Claim Appeals office*, 74 P.3d 459 (Colo. App. 2003) the Court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Act. See §8-42-101(3)(b), C.R.S. 2008.

The Guidelines further state that treatment for a work-related condition is covered when the work exposure causes the activation of a previously asymptomatic or latent medical condition or the work exposure combines with, accelerates or aggravates a pre-existing symptomatic condition.

Based on the persuasive and credible evidence, the Claimant has proven by a preponderance of the evidence that her job duties caused her to develop a new condition or caused an aggravation of a pre-existing latent condition. At this point, Claimant has had three different diagnoses for her right arm symptoms, thus whether intersection syndrome, de Quervain's syndrome or wrist extensor tenosynovitis, the ALJ finds and concludes that such condition was brought on by Claimant's work duties. Claimant credibly explained her job duties and the required use of her hands while performing them. The ALJ credits Claimant's testimony that the job duties evaluation did not accurately reflect the manner in which she performed her job.

In addition, the findings on physical examination during medical appointments established Claimant's need for treatment. Specifically, Dr. Davis noted that the Claimant was extremely tender over the intersection area near the distal forearm and does have some crepitation with range of motion of her thumb. He also stated that she continued to have severe activity related pain and a grinding sensation over the dorsal radial aspect of her distal forearm. Dr. Fall also agreed that Claimant is suffering from some condition in the right forearm. Dr. Fall just believes it is not work-related.

Authorized Provider

After the Claimant reported her injury to her supervisor in early August 2015 she was not referred for medical care by the employer "in the first instance". Section 8-43-404(5), C.R.S. She thereafter sought the medical attention from her primary care physician, Dr. Norman, who referred her to Dr. Chavez. Because of the Employer's failure to comply with § 8-43-404(5), C.R.S., Drs., Chavez and Norman are authorized treating providers. The Respondents thereafter referred the Claimant to Peak Performance where she saw Drs. Ramsey and Moses. Dr. Ramsey referred the Claimant to Dr. Davis. After concluding that Claimant did not suffer a work-related injury, Dr. Moses referred Claimant back to her primary care physician. Claimant returned to Dr. Chavez who then referred the Claimant to Dr. Mangelson. In light of the foregoing, the following are the Claimant's ATPs: Drs. Norman, Chavez, Moses, Davis, Ramsey and Mangleson.

Medical Benefits

Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Williams v. Industrial Commission*, 723 P.2d 749 (Colo. App. 1986). The Claimant is entitled to medical treatment to cure and relieve her of the effects of her right forearm condition whether diagnosed as intersection syndrome, de Quervain's syndrome or wrist extensor tenosynovitis.

Temporary Total Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Claimant has proven that her compensable occupational disease caused or contributed to her wage loss beginning on October 23, 2015. Claimant's authorized treating physician restricted Claimant to "no work" beginning on October 23, 2015, then released to her restricted duty effective October 27, 2015. The Employer did not offer Claimant modified duty work after October 23, 2015, and Claimant has not returned to work. The parties agreed that Claimant received some unemployment insurance benefits and that the Respondents would be entitled to an offset in an amount to be determined.

ORDER

It is therefore ordered that:

1. The Claimant suffered an occupational disease of the right forearm in the course and scope of her employment with the Employer.

2. The Claimant's medical treatment with Drs. Norman, Chavez, Moses, Ramsey, Mangleson, and Davis is authorized.

3. The Claimant is entitled to medical benefits to cure and relieve her of the effects of her work-related occupational disease.

4. The Claimant is entitled to TTD benefits commencing her last day worked on October 23, 2015, ongoing, payable at the TTD rate of $586.65 pursuant to the stipulated AWW of $879.97, subject to unemployment benefits offset.

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

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

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

DATED: October 27, 2016

Digital signature

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her back on August 10, 2015.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to a general award of reasonable and necessary medical benefits.

FINDINGS OF FACT

1. Claimant is employed by Employer as a store manager at a McDonald's location. Claimant's general duties include scheduling employees, training employees, ordering and inventory, and performing other duties as needed.

2. Claimant's typical work week involves six days of work, working approximately 9-10 hours per day. Claimant regularly takes on other duties when the restaurant is short staffed.

3. On August 10, 2015 the restaurant was short staffed. Between approximately 5:00 and 5:30 p.m. a delivery of frozen food arrived. The food needed to be put into the freezer and with no one there to put it away, Claimant began carrying the cases of food to the freezer.

4. While carrying the cases, Claimant felt something in her back pull and felt a sharp pain that caused her to lean to the left. Claimant completed her work shift and walked home, but was leaning to the left during her walk.

5. The next day Claimant was scheduled for a work meeting, but had difficulty getting out of bed due to her severe back pain. Claimant did not attend the work meeting and went to the doctor for evaluation.

6. Claimant had previously experienced back pain but never to a degree as severe as what she felt the morning of August 11, 2015. Claimant had never missed work before due to back pain and had never received prior back treatment or pain medicine for her back.

7. On August 11, 2015 Claimant was evaluated at Clinica Colorado by James Williams, M.D. On the report, Dr. Williams noted chief complaint of abdominal pain, but also noted that Claimant had come in for left lower back pain. Dr. Williams also noted that Claimant had left low back pain intermittently for 2 months, that she worked at McDonalds, and that she had severe pain in the left lower back and down the left leg to her ankle for three days. On examination Claimant sat leaning back on her

left hand and was very tender at the midline and left sciatic notch. Dr. Williams assessed: back pain, left sciatica, rule out disc disease; and gastritis. Dr. Williams prescribed prednisone and vicodin and wrote a note taking Claimant off work for one week. *See* Exhibits E, 4.

8. On August 18, 2015 Claimant was evaluated by Dr. Williams. Dr. Williams noted the chief complaint was: recheck leg pain. Claimant reported feeling slightly better. On examination Claimant was in much less pain, but had pain all the way to her toes on the left. Claimant had more tenderness in the left sciatic notch and less in the midline. Claimant was prescribed tramadol and was taken off work until August 26, 2015. *See* Exhibits E, 4.

9. On September 3, 2015 Claimant was evaluated by Dr. Williams. Dr. Williams noted that Claimant had severe pain now for 3.5 weeks and was not getting better in spite of bed rest and minimal activity. Dr. Williams noted the pain went down her low back into her left leg and that she moved very slowly and cautiously. Dr. Williams continued to assess back pain, left sciatica, and rule out disc disease. Dr. Williams referred Claimant for an MRI of the lumbar spine and took Claimant off work until September 15, 2015. *See* Exhibits E, 4.

10. On September 4, 2015 Claimant underwent an MRI of her lumbar spine interpreted by Sean Bryant, M.D. Dr. Bryant's impression was L4-L5 large disc extrusion and severe thecal sac narrowing. Dr. Bryant noted that there was multilevel mild facet osteoarthritis. *See* Exhibits E, 7.

11. On September 14, 2015 Claimant was evaluated by Dr. Williams. Dr. Williams reviewed the large central disc with compression shown by MRI. Dr. Williams noted that Claimant was still in significant pain with walking and was tender in the low mid back and on the left thigh adductor tendon. Dr. Williams assessed large L4-L5 midline herniated disc and left thigh adductor tendonitis. Dr. Williams recommended Claimant rest the left thigh as much as possible and opined that it was inflamed from sitting and walking abnormally. Dr. Williams noted that Claimant would apply for Medicaid and would try to arrange a surgery consultation. *See* Exhibits E, 4.

12. On November 9, 2015 Claimant was evaluated by Dr. Williams. Claimant was noted to have less left leg pain. Dr. Williams noted that Claimant had severe family stress with her mom just having a below the knee amputation for diabetic neuropathy. Dr. Williams noted that Claimant moved with pain, he continued prescription medications, and provided a note taking Claimant off work until December 15, 2015. Dr. Williams noted that Claimant needed to put off her medical issues to stabilizer her mom. *See* Exhibits E, 4.

13. On November 17, 2015 Claimant was evaluated by Dr. Williams. Claimant reported that her pain was less with use of Gabapentin but that it was now going down both legs. Dr. Williams noted Claimant was walking fairly normal. Dr. Williams assessed essential hypertension and herniated L4-5 disc. *See* Exhibits E, 4.

14. On December 14, 2015 Claimant was evaluated by Dr. Williams. Dr. Williams noted that Claimant was now 4 months with the herniated disc and that she was feeling better. Claimant reported no pain in her legs but that her back was weak and tired easily. Dr. Williams assessed herniated L5-5 disc and provided a note that Claimant could return to work on February 15, 2016. Dr. Williams continued the tramadol prescription and instructed Claimant to begin more activity to strengthen the back and legs. *See* Exhibits E, 4.

15. On March 28, 2016 Respondents submitted a letter to Dr. Williams asking questions surrounding Claimant's maximum medical improvement date, relatedness of her symptoms to a work injury, ability to return to work full duty, and impairment rating. On March 30, 2016 Dr. Williams hand wrote the following response: "I am not a workers comp doctor and do not do disability evaluations. Therefore, I cannot answer these questions. My last visit with Pamela was 12/14/15." *See* Exhibits E, 4.

16. On April 8, 2016 Claimant underwent an independent medical examination performed by John Raschbacher, M.D. Claimant reported that her symptoms were getting worse and that she was no better with use of Gabapentin. Claimant reported that at the leg she might have had a little bit of improvement, but had no improvement in her back symptoms. Claimant reported that the week prior to the alleged injury on a Wednesday, she told her supervisor she hurt herself and had low back pain and trouble with walking and strength. Claimant reported that on August 10, 2015 she had a little bit of pain before it worsened and really flared up. Dr. Raschbacher noted on examination that Claimant was very obese, and that she had had non physiologic presentation. *See* Exhibits D, 5.

17. Dr. Raschbacher opined that he was unable to explain the degree of Claimant's symptomatology and her presentation with quite reduced active range of motion based on the radiographic findings. He opined that it was reasonable to conclude, medically, that the disc extrusion and herniated disc was likely caused by work-related activities. However, he noted that individuals can and frequently do sustain disc herniation in the complete absence of any causative factor. Dr. Raschbacher also opined that her current complaints were not substantiated by the September 2015 MRI findings and that even if she had a symptomatic disc, her range of motion and strength testing were non physiologic. Dr. Raschbacher opined that Claimant's pain behaviors were fairly remarkable and therefore precluded the use of her subjective complaints as a good basis to rely upon. *See* Exhibits D, 5.

18. Dr. Raschbacher recommended repeating the lumbar MRI and noted that he could make further comment depending on what the MRI showed. He opined that given the left lower extremity symptomatology, there should be an attempt to determine whether or not the disc protrusion was symptomatic and thus also recommended bilateral lower extremity EMG nerve conduction studies. He also opined that further comments could be made after the testing with respect to treatment recommendations, maximum medical impairment, impairment rating, etc. *See* Exhibits D, 5.

19. On June 22, 2016 Claimant underwent an MRI of her lumbar spine that was interpreted by Michael Bennett, M.D. The impression was: resolved disc extrusion and central stenosis at L4-5; and unchanged mild lateral recess and foraminal narrowing at L4-5 and right L5-S1. *See* Exhibits F, 7.

20. On August 10, 2016 Claimant underwent an independent medical examination performed by John Hughes, M.D. Claimant reported the gradual onset of low back pain for a couple of months prior to August 10, 2015. Claimant reported that on August 10, 2015 a shipment of frozen food arrived and needed to be carried to the freezer. Claimant reported while carrying a box weighing 35-45 pounds she felt that something pulled and had increased low back pain and the onset of radiating pain into her left leg. Claimant reported that she continued to have burning quality low back pain that was worse at the end of the day and that the low back pain radiated into her left leg, that she had diffuse numbness in her left leg, and that her left leg was weak. *See* Exhibit 6.

21. Dr. Hughes assessed: lumbar spine sprain/strain with development of an L4-L5 disc extrusion, resolved by MRI criteria by June 22, 2016; persistence of facet joint arthropathy, secondary to the lumbar spine sprain/strain, rule out left lower extremity radiculopathy; and deconditioning and obesity. Dr. Hughes opined that Claimant sustained the lumbar spine injuries on August 10, 2015 and had a rather significant change in her symptoms. Dr. Hughes opined that it was probable that Claimant sustained an acute disc extrusion as a result of her work activities. Dr. Hughes opined that Claimant still had left lower extremity symptoms despite the disc extrusion resolving and that Claimant was not yet at maximum medical improvement pending left lower extremity EMG and nerve conduction studies to assess radiculopathy. *See* Exhibit 6.

22. Dr. Raschbacher testified at hearing. Dr. Raschbacher noted that Claimant's subjective complaints of pain were inexplicable. Dr. Raschbacher noted that Claimant's June 2016 MRI showed that the disc herniation had resolved and was gone yet Claimant continued to have significant subjective symptoms. Dr. Raschbacher opined that Claimant's complaints did not match his examination findings, the radiological findings of the MRI scan, and that her complaints were non-physiologic. Dr. Raschbacher opined that initially he thought Claimant's explanation of work injury might have reasonably caused her back pain, but that he had changed his opinion based on the inconsistencies and non-physiologic pain complaints. Dr. Raschbacher noted the same pain complaints reported by Claimant when she had the disc herniation and when the herniation had resolved. Dr. Raschbacher also noted inconsistencies in the reported date of injury and mechanism of injury.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the alleged injury she was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." *See* § 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-

650-711 (ICAO February 15, 2007). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met her burden of proof to establish that she suffered a compensable injury to her back on August 10, 2015. The ALJ finds credible that on that date, while working, Claimant had severe sharp back pain while unloading frozen food products. Although Claimant had prior back pain, she sustained an acute onset of severe pain on August 10, 2015 that caused her to begin missing work. Claimant had previously worked 50-60 hours per week without issue performing all her normal job duties and functions. After August 10, 2015 and this acute onset of severe pain, Claimant was unable to continue performing her job duties. The acute onset of severe pain is also supported by MRI findings showing a herniation.

Claimant is credible in describing the incident and acute onset of severe pain and has established, more likely than not, that she sustained a compensable injury on August 10, 2015. The opinion of Dr. Hughes is found credible and persuasive. The opinion of Dr. Raschbacher is not found as credible or persuasive. Dr. Raschbacher pointed out inconsistencies in the date of injury reported. However, the ALJ finds it credible and persuasive that although Claimant had some pre-existing low back pain, she had a specific incident causing severe pain while at work on August 10, 2015. This caused her to seek back treatment the following day, to stop working her normal 50-60 hour per week schedule, and to begin medications. Claimant had previously been able to work significant hours in a demanding position and had never previously been treated or medicated for her lower back. Dr. Raschbacher also pointed out discrepancies in the subjective symptoms Claimant has continued to report at this time despite the MRI showing that the herniation had resolved. However, Claimant has initially established that she sustained a compensable injury and is entitled to a general award of medical treatment and benefits. Whether she still has a need for treatment as the herniation has resolved is an issue for future determination. Claimant is found credible in describing the acute injury and has established, more likely than not, that an acute injury was sustained.

Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). As Claimant has established that she sustained a compensable work injury, she has established an entitlement to reasonable and necessary medical treatment for her injury. The issue of whether any specific treatment is reasonable or necessary was not before the ALJ. Therefore, the ALJ provides a general award of medical benefits and Respondents retain the right to contest any specific treatment recommendations going forward.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her lower back on August 10, 2015.

2. Claimant is entitled to medical treatment that is reasonable and necessary to cure and relieve the effects of her injury.

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

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

DATED: October 27, 2016,

/s/ Michelle E. Jones

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

ISSUES

1. Is the DIME's finding that Claimant is not at MMI barred or otherwise limited by the doctrines of issue preclusion, claim preclusion and/or law of the case based on ALJ Lamphere's February 3, 2016 Final Order?

2. If the answer to the first question is no, has Respondent overcome the DIME on the issue of MMI by clear and convincing evidence?

3. Is the left elbow transposition revision surgery reasonable and necessary treatment for the admitted industrial injury?

FINDINGS OF FACT

1. Claimant was employed as an Automotive and Diesel Vehicle Technician for Employer for over 21 years. His job duties included repair and maintenance of over-the-road and local delivery trucks. Claimant sustained admitted injuries to his bilateral upper extremities on April 30, 2010, while performing maintenance work on a vehicle.

2. Claimant's injuries lead to a lengthy course of treatment involving conservative measures and surgical intervention. In the course of this claim, Claimant has undergone the following surgical procedures:

- 12/9/10: right shoulder subacromial decompression/distal clavicle resection
- 7/7/11: left shoulder subacromial decompression/distal clavicle resection
- 7/7/11: left elbow ulnar neurolysis/elbow debridement
- 3/6/12: right elbow ulnar neurolysis
- 3/6/12: right carpal tunnel release
- 2/7/14: right elbow epicondylar debridement/ulnar nerve revision

3. Claimant initially presented to Concentra on April 30, 2010, complaining of shoulder and elbow symptoms. Claimant described pain in both shoulders attributable to his job duties, which included repetitive lifting, use of upper extremities, and overhead work. Claimant also described pain in his bilateral elbows, at a level of 6/10. Dr. Suzanne Malis assessed shoulder impingement and bilateral epicondylitis due to cumulative trauma.

4. Claimant subsequently obtained a change of physician to Dr. Dallenbach, who has been the primary ATP since July 8, 2010.

5. In the early portion of his claim, treatment was primarily focused on Claimant's bilateral shoulders. Claimant saw Dr. Weinstein, an orthopedic surgeon, on

July 26, 2010, who diagnosed bilateral rotator cuff tendinitis, bilateral acromioclavicular joint inflammation, and right elbow lateral epicondylitis. Dr. Weinstein recommended a right shoulder arthroscopic subacromial decompression and a distal clavicle resection. He also proposed a steroid injection to the right elbow.

6. Dr. Weinstein subsequently diagnosed left lateral epicondylitis and provided a steroid injection to the left elbow on August 30, 2010.

7. Dr. Weinstein performed right shoulder surgery on December 9, 2010.

8. On March 28, 2011, Claimant's saw Dr. Jutta Worwag for an independent medical examination (IME) at the Respondent's request. Dr. Worwag opined that Claimant's bilateral shoulder and bilateral elbow diagnoses were causally related to his work for the Employer. Dr. Worwag concluded that Claimant was at maximum medical improvement (MMI) for the right shoulder and bilateral elbows. She opined "there is no reasonable expectation that any surgical intervention with respect to the elbows would lead to any meaningful lasting functional gains."

9. On April 19, 2011, Claimant underwent bilateral EMG and nerve conduction studies of the upper extremities with Dr. Griffis. The electrodiagnostic testing showed bilateral moderately severe cubital tunnel syndrome. Dr. Griffis recommended cubital tunnel injections. If the symptoms persisted, he recommended that Claimant consider a cubital tunnel release.

10. Claimant started treating with Dr. Karl Larsen, an orthopedic surgeon, on May 23, 2011. Dr. Larsen diagnosed bilateral cubital tunnel syndrome and bilateral epicondylitis. Dr. Larsen recommended a left lateral tennis elbow debridement and left ulnar release surgery. Dr. Larsen advised Claimant that while surgery was an option for the lateral epicondylitis, it was "not a guaranteed success, and the recovery from this [could] be lengthy and incomplete." Regarding the right elbow, Dr. Larsen recommended cubital tunnel decompression, so his condition did not progress to something more chronic.

11. On July 7, 2011, Claimant underwent left shoulder arthroscopic subacromial decompression and left arthroscopic distal clavicle resection surgery performed by Dr. Weinstein. During the same surgery, Dr. Larsen performed a left elbow cubital tunnel release and left elbow lateral upper condyle debridement.

12. Claimant returned to Dr. Larsen on December 19, 2011, and described complete relief as a result of the left ulnar surgery. But Claimant continued to complain of occasional pain over the left lateral elbow with gripping and grasping. Dr. Larsen noted that Claimant "still needs to consider cubital . . . tunnel release[] on the right side but is not quite ready to do so from a recovery perspective on the left side.

13. Six weeks later Claimant returned to Dr. Larsen, who noted that Claimant was recovering "relatively well" on the left side. He indicated that Claimant was ready to proceed with the right elbow surgery. Claimant ultimately underwent right in-situ ulnar neurolysis on March 6, 2012.

14. Dr. Worwag performed a second IME on May 10, 2012. At that time, Claimant rated his pain as 7/10. His symptoms included “both shoulders pain, both elbows postop pain, right hand postop pain.” Dr. Worwag reiterated that Claimant’s bilateral shoulder and bilateral elbow symptoms were related to his work for the Employer. Dr. Worwag noted that despite numerous surgical interventions, Claimant had not experienced any significant change in his functional status.

15. Dr. Dallenbach placed Claimant at MMI on June 25, 2012.

16. Claimant returned to see Dr. Larsen on December 5, 2012. Claimant described persistent right lateral elbow pain, similar to the pain on the left side for which he had surgery. Claimant described difficulty with gripping and grasping activities. As Claimant’s persistent symptoms were unacceptable to him, Dr. Larsen noted he could proceed with additional surgery for his right elbow pain, which would be scheduled on receipt of authorization.

17. Dr. Worwag completed a record review concerning Dr. Larsen’s request for right lateral upper condyle surgery. Dr. Worwag cited the Colorado Medical Treatment Guidelines (MTGs) and opined that the surgeon and the patient should clearly define expected functional gains when evaluating the appropriateness of surgery. Dr. Worwag noted that the Claimant had not returned to work or otherwise demonstrated significant functional improvement as a result of his previous surgeries. Dr. Worwag believed there was little reason to expect any significant improvement as a result of the proposed right elbow surgery.

18. Claimant underwent a Division Independent Medical Examination (DIME) with Dr. Thomas Higginbotham on January 14, 2013. The DIME disagreed with Dr. Worwag’s characterization of Claimant’s clinical responses to treatment. He opined that the surgery proposed by Dr. Larsen was reasonable and necessary, and “would benefit” the Claimant. Accordingly, the DIME determined that Claimant was not at MMI.

19. The Respondent challenged the DIME’s MMI determination. In conjunction with that process, Claimant underwent an IME with Dr. Kavi Sachar on June 19, 2013. Dr. Sachar largely agreed with Dr. Worwag’s assessment regarding the proposed surgery. Dr. Sachar opined that the surgery was not reasonable or necessary. Dr. Sachar opined that the Claimant had not demonstrated significant functional improvement as a result of the previous surgeries, and concluded that the potential for Claimant regaining significant function and significant pain relief from the recommended surgery was “extremely guarded.”

20. Hearings were held before ALJ Walsh in September and November 2013. ALJ Walsh determined that Respondent failed to overcome the DIME regarding MMI, and further found that the right elbow surgery proposed by Dr. Larsen was reasonable, necessary, and related to the industrial injury.

21. Subsequently, Claimant underwent a revision of the right ulnar nerve at the elbow, a right submuscular ulnar nerve transposition, and a right lateral tennis elbow

debridement with Dr. Larsen on February 11, 2014. The intraoperative findings showed significant ongoing pathology affecting the ulnar nerve. There was “dense” scar tissue overlying the nerve. Additionally, the nerve had developed a “bulbous pseudoneuroma” the ulnar nerve had “clearly subluxated” and was “where it had subluxated onto the medial epicondyle and taken a fairly acute turn to come back into the forearm muscles.”

22. Dr. Larsen’s notes over the ensuing several months document slow but steady progress and improvement as Claimant recovered from the right ulnar transposition surgery. On May 5, 2014, Claimant reported he was “very pleased” with the improvement of paresthesias in his right hand. He still had some aching discomfort over the lateral elbow, but “overall he feels like he is doing quite a bit better.”

23. On September 15, 2014, Claimant reported he was “doing very well” with “complete resolution” of numbness and tingling in his right hand. Unfortunately, Dr. Larsen noted “he has developed recurrent lateral epicondylar pain on the left side. He feels like he has developed a recurrent numbness in the ring and small finger with small discomfort at the medial elbow.” On physical examination of the left elbow, Dr. Larsen observed that “the [ulnar] nerve itself feels mobile.” Dr. Larsen indicated that Claimant “has done well from his revision surgery on the right side from the ulnar nerve; however, his lateral epicondylar pain still persists.” The ALJ infers that Dr. Larsen was referring to the left side when describing the persistent “lateral epicondylar pain.”[1]

24. Claimant underwent an EMG/NCV testing by Dr. Griffis on November 11, 2014. The testing revealed mild left cubital tunnel syndrome and moderate right cubital tunnel syndrome.

25. On December 1, 2014, Claimant returned to Dr. Larsen. Dr. Larsen concluded that the electrodiagnostic testing results were “generally better” than the earlier studies. Dr. Larsen opined that the ongoing neuropathy symptoms were “fairly typical for post-surgery,” and there was “not much left for me to do” regarding the lateral epicondyle. Dr. Larsen concluded that “I certainly would not advocate for a revision on the left side unless he got far worse.”

26. Claimant underwent an IME with Dr. Castrejon on January 5, 2015, at Respondent’s request. Claimant reported ongoing pain in both elbows. Dr. Castrejon opined that the Claimant was at MMI, as he did not expect further surgery to result in any significant functional gains. Dr. Castrejon opined that additional surgery carried a “high risk for functional loss and worsening chronic pain.”

27. Dr. Larsen subsequently placed Claimant at MMI on January 26, 2015. He recommended maintenance care, including a home exercise program, periodic steroid injections for flare-ups, and access to orthopedic follow-up if Claimant’s symptoms worsened.

28. Claimant returned to Dr. Larsen on April 20, 2015, complaining of worsening left upper extremity symptoms. Claimant described tenderness along the

[1] This inference is consistent with Dr. Larsen’s testimony in his October 7, 2015 deposition at p. 19.

course of his ulnar nerve, as well as pain and numbness in the ring and small fingers "when he rests on the area." On physical examination, he had a "rapidly positive elbow flexion compression test," although Dr. Larsen noted that "the nerve is not frankly subluxating back and forth over the epicondyle." Dr. Larsen opined that Claimant's presentation was consistent with ulnar nerve irritation or ulnar neuritis of the left elbow. Dr. Larsen explained that he did not see any non-surgical solution to the symptoms, and Claimant's "options are to live with it or consider a revision." Claimant indicated "his symptoms are bad enough that he wants to pursue left side [surgery]." Therefore, Dr. Larsen requested authorization for left arm surgery to include a revision ulnar neurolysis and submuscular transposition. This is the same procedure Claimant previously had on the right elbow.

29. Respondent applied for a hearing to contest Dr. Larsen's request for prior authorization of surgery.

30. Claimant had a second IME with Dr. Sachar at Respondent's request on July 6, 2015. His physical examination noted full range of motion and "diffuse tenderness along the ulnar nerve with a mildly positive Tinel's sign in that area." Dr. Sachar found "no evidence of subluxation of the nerve. It is in an anterior transposed position." Dr. Sachar opined that the surgery recommended by Dr. Larsen was not reasonable, necessary, or related to the original industrial injury.

31. The parties subsequently obtained deposition testimony from Dr. Larsen and Dr. Sachar. In his deposition testimony, Dr. Larsen explained that the proposed ulnar nerve revision and transposition is the "last" surgical option, and "there is nowhere else to go from there." Dr. Larsen opined that Claimant's significant level of symptoms in the left elbow warranted further treatment. Dr. Larsen stated the goal of surgery is to alleviate symptoms which will hopefully lead to improved functional capacity. Dr. Larsen does not feel the repeat EMG/NCV test results are substantially helpful in determining whether Claimant would benefit from an additional surgery because electrodiagnostic test results can be skewed by the effects of prior surgery. Dr. Larsen opined "you can't base everything on electrodiagnostic findings . . . . At the end of the day, we are treating Mr. Holcombe, not his electrodiagnostic tests." Regarding causation, Dr. Larsen considered Claimant's symptoms to represent "a failure of his previous surgery," which was a compensable benefit under the admitted claim. Dr. Larsen noted that Claimant had a positive outcome from the "identical" surgery performed on the right elbow with respect to improved symptomatic complaints, which supports the decision to move forward with surgery on the left.

32. Dr. Sachar's deposition was taken on October 13, 2015. Dr. Sachar opined the left elbow transposition surgery is not reasonable or necessary because he does not anticipate it will lead to any significant improvement. Dr. Sachar opined the surgery is more likely to make Claimant's condition "worse."

33. A hearing was held before ALJ Lamphere on December 2, 2015 regarding the left elbow revision surgery. In an order dated February 3, 2016, ALJ Lamphere determined that the left ulnar nerve revision and transposition surgery was not

reasonable and necessary. Accordingly, ALJ Lamphere denied and dismissed the request for surgery. Neither party appealed ALJ Lamphere's order, and it became final.

34. After the surgery had been denied, Claimant returned to Dr. Dallenbach on February 18, 2016. Dr. Dallenbach referred Claimant back to Dr. Higginbotham for a follow-up DIME "to assess MMI status as well as impairment rating."

35. Claimant saw Dr. Higginbotham for the follow-up DIME on April 25, 2016. The DIME stated this is "a difficult and complicated case." He noted Claimant had received benefit from the revision ulnar transposition surgery on the right elbow. The DIME further noted that the left ulnar neuritis has worsened since the initial left elbow surgery, at least from a clinical and symptomatic standpoint. The DIME opined that "beyond a reason[able] degree of medical probability, the recommendation [made by Dr. Larsen] for the left ulnar nerve transposition is necessary and reasonable," and concluded Claimant "is not at MMI until after the proposed left ulnar nerve transposition."

36. The Respondent requested a hearing to challenge the determination that Claimant is not at MMI until he receives the left ulnar nerve transposition surgery. Respondent notes that procedure was explicitly denied and dismissed by ALJ Lamphere in a final order. In the alternative, the Respondent asserts that the DIME determination is contradicted by clear and convincing evidence.

37. Dr. Castrejon performed a second IME on August 2, 2016, at Respondent's request. Dr. Castrejon disagrees with the DIME's determination that Claimant is not at MMI, and does not believe further surgery is likely to improve Claimant's condition or functional capacity. Dr. Castrejon indicated that Claimant's physical examination findings were "nearly identical" to the initial IME. Dr. Castrejon did not appreciate any physical findings to support the need for revision surgery.

38. Dr. Castrejon elaborated on his opinions in a deposition on August 30, 2016. Dr. Castrejon disagrees with Dr. Larsen and the DIME regarding whether Claimant achieved any significant functional gains from the revision surgery previously done on the right elbow. Dr. Castrejon opined that symptom relief alone, absent corresponding functional gains, does not justify surgery. Based on Claimant's response to the right-side revision surgery, Dr. Castrejon does not anticipate functional gains on the left.

39. The DIME testified via deposition on September 26, 2016. The DIME explained that his recommendation to proceed with the left ulnar transposition is based on Claimant's "persistent elbow pain and numbness and tingling in that ulnar distribution of his left hand," coupled with the "reasonable outcome" from the identical surgery performed on the right side. When asked to identify clinical findings that support surgery, the DIME cited the anatomic distribution of numbness and tingling consistent with an ulnar neuropathy, and tenderness around the elbow "where the nerve would be." The DIME explained that transposing the nerve relieves it from being stretched as it

passes the medial condyle, thereby eliminating or at least reducing the tension which irritates the nerve and causes it to be symptomatic.

40. Claimant testified regarding the functional improvement he has experienced since his right side ulnar nerve revision surgery. He provided several examples of improvement in his capacity to perform activities of daily living. Claimant testified he can now shift to the manual transmission of his car and open jars with his right hand. In addition, he can vacuum and stir food with his right arm. He can carry groceries with the right arm. He has gone fishing on a few occasions and cast the reel with his right arm. Moreover, Claimant described significant symptomatic improvement in the right arm. He testified that the right revision surgery "absolutely" helped his pain level. He no longer has numbness in his fourth and fifth digits on the right and has no pain in the right elbow.

41. Claimant's testimony regarding symptomatic improvement following the right ulnar revision surgery is supported by records from his treating providers. For instance, in September 2014 Claimant reported to Dr. Larsen that he was "doing very well" with "complete resolution" of numbness and tingling in his right hand. Similarly, on June 24, 2015, he told Dr. Dallenbach that "the surgery performed on his right elbow has been quite helpful." Dr. Dallenbach's records in 2015 and 2016 document progressive improvement in right elbow symptoms. A physical examination on December 15, 2015 revealed only "minimal swelling and only slight tenderness of the [right] lateral epicondyle." On that same date, motor, sensory, and vascular status in the right upper extremity was "intact" and "within normal limits." By August 15, 2016, Dr. Dallenbach noted there was "no swelling or tenderness" of the right lateral epicondyle.

42. The ALJ finds that issue preclusion does not bar relitigation of Claimant's entitlement to the left elbow revision surgery because the issues in the current proceedings are not "identical" to the issues decided by ALJ Lamphere's February 3, 2016 order.

43. The ALJ finds that Respondents have failed to overcome the DIME's finding that Claimant is not at MMI by clear and convincing evidence. Claimant will not be at MMI until he undergoes the revision ulnar transposition surgery on the left elbow.

44. The ALJ finds that the left elbow revision surgery has a reasonable prospect of improving the Claimant's condition. Consequently, the surgery is reasonable and necessary treatment for the admitted industrial injury.

CONCLUSIONS OF LAW

1. Issue preclusion does not apply to the DIME's determination of MMI

The sole basis for the DIME's determination that Claimant is not at MMI is the opinion that "the recommendation for the left ulnar nerve transposition is necessary and reasonable." Consequently, the DIME opined that Claimant "is not at MMI until after the proposed left ulnar nerve transposition."

As noted, that exact surgical procedure was the subject of ALJ Lamphere's February 3, 2016 final order, wherein ALJ Lamphere denied and dismissed the request for surgery as not reasonable or necessary. Consequently, the DIME's determination is squarely at odds with ALJ Lamphere's final order.

Respondents argue that the DIME's MMI finding is overcome as a matter of law because it rests solely on a treatment that was previously adjudicated not reasonable and necessary in a final order. On the other hand, Claimant argues that the Act allows the DIME to revisit ALJ Lamphere's determination in deciding whether Claimant is at MMI, and the prior finding is not binding if a party seeks to overcome the DIME.

Issue preclusion (*i.e.,* collateral estoppel), is an equitable doctrine that bars relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien*, 990 P.2d 78, 84 (Colo. 1999). The doctrine's purpose is to relieve parties of the burdens of multiple lawsuits, to conserve judicial resources, and to promote reliance on and confidence in the judicial system by preventing inconsistent decisions. *Id*. Although issue preclusion was conceived as a judicial doctrine, it has been extended to administrative proceedings, where it "may bind parties to an administrative agency's findings of fact or conclusions of law." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). In *Sunny Acres*, the Supreme Court held that:

> Issue preclusion bars relitigation of an issue if: (1) the issue sought to be precluded is identical to an issue already determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Id. at 47.

At first blush, it would appear that all the requirements for issue preclusion are satisfied in this case. There is no question that elements (2)-(4) are present. But the difficult question involves whether the first prong of the test is met. Respondent argues that the issues in the two proceedings are identical because ALJ Lamphere specifically denied the same surgery that the DIME found the Claimant needs.

In a series of cases, the ICAO has indicated that the DIME's authority to determine MMI and permanent impairment is not constrained by prior ALJ orders. *Mahana v. Grand County*, W.C. No. 4-430-788 (ICAO Feb. 15, 2007); *Braun v. Vista Mesa*, W.C. No. 4-637-254 (ICAO Apr. 15, 2010); *Ortega v. JBS USA*, W.C. No. 4-804-825 (ICAO Jun. 27, 2013); *Sanchez v. American Federation of State*, W.C. No. 4-666-226-06 (ICAO Nov. 27, 2013); *Madrid v. Trinet Group, Inc.*, W.C. No. 4-851-315-03 (ICAO Apr. 1, 2014).

Of the above-cited cases, the situation in *Mahana v. Grand County* is the closest to Claimant's case. In *Mahana*, ALJ Jones had previously determined that the Claimant did not suffer from CRPS and failed to prove that sympathetic blocks were a reasonable and necessary treatment for the industrial injury. Subsequently, the claimant underwent a DIME, which determined that the claimant suffered from sympathetically mediated pain (SMP) or complex regional pain syndrome (CRPS) and recommended sympathetic blocks. The respondents challenged the DIME at a hearing before ALJ Felter. ALJ Felter found the respondents failed to overcome the DIME on the issue of MMI and ordered respondents to pay for the sympathetic blocks. The respondents argued ALJ Felter was precluded from adjudicating whether the claimant was entitled to sympathetic blocks because ALJ Jones had previously denied that same treatment in a prior final order.

The ICAO ultimately held that ALJ Jones' final order did not preclude ALJ Felter from readjudicating the claimant's entitlement to medical benefits in the context of challenging a DIME. The ICAO stated:

> Affording preclusive effect to ALJ Jones' order regarding the Claimant's diagnosis of CRPS would eviscerate the DIME process designed to permit a party to challenge maximum medical improvement or the extent of permanent impairment. The DIME physician in this case was specifically charged with determining whether the claimant was at maximum medical improvement. . . . As we read the DIME report, it was expressly *because* the claimant was suffering from SMP and expressly *because* she needed the sympathetic blocks to treat that condition that the DIME physician opined that she had not reached maximum medical improvement. **Precluding the DIME physician from stating that opinion regarding maximum medical improvement because a previous ALJ had determined that the medical treatment was not reasonable and necessary would, in our view, impermissibly interfere with the statutory role of the DIME doctor.** (Italics in original, bold emphasis added).

The ICAO has followed this principle repeatedly in a variety of contexts. For instance, in *Braun v. Vista Mesa, supra*, the ICAO held that a previous ALJ finding that the claimant suffered from thoracic outlet syndrome (TOS) and awarding medical benefits did not preclude the DIME from subsequently determining the claimant did not have TOS and did not require further treatment for TOS.

Similarly, *Madrid v. Trinet Group, Inc., supra*, held that a previous ALJ order denying treatment for symptoms beyond the claimant's elbow as unrelated to the industrial injury did not preclude the DIME from determining the claimant suffered from CRPS of the entire arm and was not at MMI without a spinal cord stimulator trial.

In *Ortega v. JBS USA, supra*, the ICAO held that a prior ALJ order finding that the claimant's industrial injury did not aggravate his pre-existing arthritis, did not preclude the DIME from subsequently concluding that the work injury *did* aggravate arthritis, and providing an impairment rating.

Finally, in *Sanchez v. American Federation of State*, *supra*, a previous ALJ finding that the claimant's low back problems were causally related to his industrial injury was not binding when the DIME later determined that the back issues were not injury-related.

The rule in *Mahana* and the other cases is based on a conclusion that the issues in a hearing challenging a DIME are not "identical" to issues tried in a previous hearing because of the differing burdens of proof (*i.e.*, "preponderance" vs. "clear and convincing"). The ICAO has repeatedly cited *Holnam, Inc. v. Industrial Claim Appeals Office*, 159 P.3d 795 (Colo. App. 2006) as "instructive" on how different burdens of proof impact the application of issue preclusion. In each of these cases, the ICAO stated that issue preclusion did not apply because the issues decided by the first ALJ were not "identical" to the issues addressed by the second ALJ when reviewing a DIME's determination.

It necessarily follows that the DIME was not precluded from determining that Claimant requires the elbow revision surgery, notwithstanding ALJ Lamphere's order. Consequently, the DIME's determination is binding unless overcome by clear and convincing evidence.

2. Did Respondent overcome the DIME by clear and convincing evidence?

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. A finding of MMI is premature if there is a course of treatment that has "a reasonable prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990).

The DIME physician's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the MMI and impairment findings are incorrect. *Qual-Med*, 961 P.2d at 592. A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002).

The ICAO has repeatedly held that "mere differences of medical opinion" do not constitute clear and convincing evidence that the DIME's determination is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (ICAO March 18, 2016); *Javalera v. Monte Vista Head Start, Inc.*, W.C. No. 4-532-166 (ICAO July 19, 2004); *see* *also Gonzales v. Browning-Ferris Industries of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000).

As found, Respondent has failed to overcome the DIME's determination that Claimant is not at MMI by clear and convincing evidence. The DIME and Dr. Larsen persuasively opined that the proposed left elbow revision surgery has a reasonable likelihood of improving the Claimant's symptoms and function. That opinion is bolstered by the positive results the Claimant enjoyed as a result of the "identical" surgery on the right elbow. The good outcome on the right elbow increases the likelihood that Claimant will have a similar result from the revision surgery on the left elbow.

By contrast, Dr. Sachar and Dr. Castrejon opined the left elbow revision surgery will most likely either result in no improvement or make the Claimant's condition worse. While that may ultimately prove to be the case, that supposition is not consistent with the experience with the Claimant's right elbow. Respondent's experts have given substantial weight to the fact that Claimant has not returned to work. The ALJ is not persuaded that return to work is necessarily the most significant factor in determining whether a course of treatment is reasonable and necessary. To the contrary, a treatment modality that significantly improves an individual's symptoms fits within the definition of reasonable and necessary, regardless of whether it ultimately enables the individual to return to work. *E.g., City and County of Denver, School Dist. 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). The ALJ further notes it is unlikely Claimant will ever return to the same work that caused his injuries. Respondent has not offered Claimant's any modified duty, and a temporarily disabled claimant has no affirmative obligation to seek alternative employment. *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987). Accordingly, the ALJ finds that whether the Claimant has returned to work is not a particularly helpful yardstick by which to measure whether the proposed surgery has a reasonable prospect of improving his condition.

Reasonable physicians can disagree (as they have here) regarding whether the proposed left elbow revision will be beneficial for the Claimant. The DIME's opinion trumps other opinions unless it is clearly incorrect. Although the Respondent's experts have presented cogent arguments to support their position, the ALJ does not find that the evidence presented rises to the level of clear and convincing evidence to overcome the DIME.

The preponderance of persuasive evidence establishes that the left elbow revision surgery has a reasonable prospect of improving Claimant's condition. Consequently, the surgery is reasonable and necessary treatment for the admitted injury.

[ORDER CONTINUES ON NEXT PAGE]

ORDER

It is therefore ordered that:

1. Respondent has failed to overcome the DIME's determination that Claimant is not at MMI.

2. Respondent shall pay for the revision left ulnar transposition surgery recommended by Dr. Larsen.

3. All matters not determined herein, or otherwise closed by operation of law, are reserved for future determination.

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

DATED: October 31, 2016

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 8096

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-002-879-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 21, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 9/21/16, Courtroom 4, beginning at 8:30 AM, and ending at 12:00 PM).

Claimant's Exhibits 1 through 14 were admitted into evidence, without objection. Respondents' Exhibits A through R were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: The Claimant's opening brief was filed on September 28, 2016. The Respondents' answer brief was filed on the same date. No timely reply brief, due 2 working days after the answer brief, was filed. Therefore, the matter was deemed submitted for decision on October 3, 2016.

ISSUES

The paramount issues in this case concerns whether the Claimant's cervical condition is causally related to the admitted injury that occurred on June 3, 2015, and whether the anterior cervical fusion at C5-C7 is reasonably necessary to cure and relieve the effects of the industrial injury.

The burden of proof rests with the Claimant by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was born on August 10, 1956 and was 60 years of age on the date of the hearing.

2. The Claimant is a full time employee and has worked in his current position for the Employer since April 21, 2015. He has been an employee with Employer for over ten years.

3. The Claimant is an administrative assistant in the shipping and receiving department for Employer. His job duties include handling all mail and packages which include transporting mail, and loading and unloading deliveries.

4. On June 3, 2015, while attempting to open the shipping door for mail delivery, the Claimant tripped on a weather rug and fell forward landing hard on the left side of his body with his left arm outstretched bracing his fall. He landed on his hand and hit his left hip. The accident was recorded on camera but was later deleted through inadvertence on the part of the Employer.

5. On June 4, 2015, the Claimant received medical treatment at Harmony Urgent Care of the University of Colorado Health Sciences Center (UCHSC). The Claimant experienced the immediate onset of pain in his left hip and wrist, and pain and numbness in his thumb. He was diagnosed with a probable triquetral fracture of the left wrist and referred to Occupational Health Services at UCHSC.

6. The Respondents filed a General Admissions of Liability (GAL) on February 11, 2016 and August 31, 2016, admitting to medical benefits only.

Subsequent Diagnosis and Treatment for Cervical Condition

7. On June 5, 2015, the Claimant was evaluated by Kevin T. O’Connell, M.D. at Occupational Health Services at UCHSC. Dr. O’Connell assessed the Claimant to

with a triquetral fracture in his left wrist, a contusion of the greater trochanter in his left hip, and hypesthesia diffusely in the digits of his left hand. Dr. O'Connell then referred the Claimant to Mark B. Durbin, M.D. at the Orthopedic and Spine Center of the Rockies.

8. The Claimant saw Dr. Durbin on August 19, 2015 and he reported complete numbness to his left thumb region. Dr. Durbin recommended that the Claimant undergo a nerve conduction study to check for nerve damage. Dr. O'Connell agreed with Dr. Durbin's recommendation for an EMG of the left upper extremity (LUE) to determine if there was a nerve injury because he found that the Claimant had left thumb radial and ulnar digital nerve neuropraxia.

9. On September 25, 2015, Raymond P. van den Hoven, M.D. completed electrodiagnostic testing of the Claimant's LUE and found moderate acute/subacute left arm denervation in a C6 myotome pattern. Dr. van den Hoven observed decreased reflexes in the Claimant's left biceps and pronator teres, sensory changes in the C6 dermatome, and clear weakness of biceps, pronator teres, and wrist dorsiflexion. Dr. van den Hoven could not, however, confirm conclusive evidence for the Claimant's cervical radiculopathy.

10. At a follow-up appointment, Dr. O'Connell was of the opinion that considering the work-relatedness of the left thumb pain and numbness and after reviewing the previous tests and examinations, the impact resulting from the fall wrenched the Claimant's left shoulder and neck which resulted in either traction or contusion, leading to the C6 nerve root impingement. Both Dr. O'Connell and Dr. Durbin recommended that the Claimant proceed with an MRI (magnetic resonance imaging) scan of the cervical spine.
.

11. On November 25, 2015, the Claimant underwent a cervical spine MRI without contrast in Fort Collins. The MRI revealed moderately advanced and diffused cervical spondylosis with disc desiccation and annular bulging in several areas including the C5-C6 and C6-C7 vertebrae. After completion of the cervical spine MRI, the Claimant felt no change in his pain and other symptoms, and Dr. O'Connell referred the Claimant to David J. Columbus, D.O., for a cervical epidural steroid injection at the C6-C7 level which Dr. Columbus performed on January 12, 2016.

12. Following the injection, the Claimant still had persistent numbness and increased intensity of left thumb paresthesias and increased discomfort on the left side of his neck with right lateral bending. Dr. O'Connell recommended a trial of physical therapy (PT) for the neck as well as referring the Claimant to neurosurgeon Hans Coester, M.D. Dr. O'Connell doubted that the Claimant would make significant recovery from PT and believed that surgical decompression should be considered "as other more conservative measures have gotten no significant results".

13. Satoru T. Chamberlain, M.D. evaluated the Claimant on March 14th, 2016, and observed that the Claimant's EMG demonstrated C6 and possibly C7 nerve root involvement that coincided with the Claimant's MRI findings. Dr. Chamberlain also advised the Claimant to keep his appointment with Dr. Coester for the cervical surgical evaluation. Stuart Peterson, P.T.(physical therapist), who provided the Claimant with PT services, consistently noted a decrease in sensation at the C6 dermatome at the thumb as well as significant tenderness at the C6 spinous process and ROM (range of motion) deficits at the cervical spine.

14. On April 16, 2016, the Claimant was examined by Dr. Coester. Dr. Coester found decreased sensation in a C6-C7 nerve distribution on the left and diminished reflexes in the triceps. Dr. Coester was of the opinion that the Claimant was having neck pain, arm pain, and weakness due to disc disease at C5-C6 and C6-C7 and recommended a C5-C6 and C6-C7 anterior cervical discectomy and fusion. Dr. Coester discussed the procedural risks and side effects with the Claimant. Dr. Coester also commented that the Claimant had a 4 out of 5 chance that he would gain improvement from the procedure, but he also noted that the procedure will not make the Claimant pain free but would put increased stress on the levels above and Claimant has a risk of needing more surgery higher or lower down in the future. Dr. Coester also was of the opinion, however, that the Claimant "has pretty much exhausted the more conservative options."

15. On June 16, 2016, the Claimant was examined by a Dr. O'Toole who reiterated that Claimant had numb*nes*s in the dorsum of his left thumb and, after further examination of the EMGs, showed evidence for a C6 radiculitis. Dr. O'Toole also noted that the Claimant had pain in a radicular type pattern from the neck into the shoulder.

Medical Records Review by Respondents' Independent Medical Examiner (IME), Carlos Cebrian, M.D.

16. Dr. Cebrian completed a review of the Claimant's records and concluded that the fall on June 3, 2015, did not cause injury to the Claimant's neck because he did not see evidence that the Claimant struck his head and because the cervical complaints were not noted immediately following the incident. The ALJ finds that Dr. Cebrian's reasoning underlying his opinion that there was no cervical injury was general and vague. For the reasons articulated herein below, the ALJ does not find Dr. Cebrian's opinion in this regard persuasive or credible; and, his opinion is outweighed by the totality of the medical and lay evidence. Dr. Cebrian felt that the surgery should be "denied" because the cervical condition was independent, incidental, and unrelated to the work accident. The ALJ infers and finds that Dr. Cebrian's use of the word "**denied"** illustrates a partisanship against surgery and is an additional factor giving rise to an inference that Dr. Cebrian's opinion in this regard is not credible.

17. On June 30, 2016, the Claimant was referred back to Dr. Chamberlain to move forward with the left thumb the surgery, which the Respondents authorized on July 13, 2016, although Dr. Chamberlain recommended that the Claimant should have his neck condition addressed first. The Respondents did not authorize the neck surgery based on the opinions of Dr. Cebrian and Brian Reiss, M.D. The Claimant underwent the authorized thumb surgery on August 17, 2016, which improved pain at his thumb joint but did not improve the numbness in his thumb or weakness in his arm, hand, or wrist.

Respondents' Independent Medical Examiner (IME), Brian Reiss, M.D.

18. On May 11, 2016, the Respondents referred the Claimant to Dr. Reiss, who is the Respondents' IME, who also testified at the hearing. Like Dr. Cebrian, Dr. Reiss was of the opinion that the Claimant's cervical condition was not caused by his fall on June 3, 2015.

19. Dr. Reiss stated the opinion that the Claimant did not suffer a traction injury during the fall; and, because there was no immediate neck pain, such an injury "is very unlikely" to have occurred without significant impact to the neck or head. Dr. Reiss is of the opinion that radiculopathy without pain is possible but highly unlikely. Dr. Reiss also noted that there were no evidence of neck symptoms until time has passed from the date of the accident and after Claimant had an EMG and was advised that he had a cervical problem. For the reasons articulated herein below, the ALJ finds Dr. Reiss' opinions lacking in credibility and contrary to the weight of the evidence.

20. Regarding the EMG, Dr. Reiss is of the opinion that such results are not diagnostic, particularly in light of no paraspinal muscle spasms on examination. He is of the opinion that a peripheral nerve injury was a much more likely cause of the Claimant's symptoms. Dr. Reiss further stated that instead of improving mobility and reducing pain, a cervical fusion would most likely worsen the Claimant's condition. Dr. Reiss characterized the medical opinions recommending surgery as "speculative," but he was unwilling to characterize the recommendations as "medical malpractice." The ALJ infers and finds that reason and common sense, without the necessity of a medical degree, dictates that the performance of "speculative" surgery may amount to malpractice, thus, Dr. Reiss' opinions in this regard are lacking in persuasiveness and credibility.

21. Dr. Reiss testified that the recommended surgery was contrary to the Division's Medical Treatment **Guidelines** and that the Claimant had not received adequate conservative treatments. Dr. Reiss did not adequately explain his underlying reasons for this generalized opinion. Dr. Reiss also stated that the fact that the epidural steroid injection had no effect on the Claimant's condition was a strong indicator against surgery. He explained that an injection would have had some diagnostic response,

even if momentarily, if the Claimant was indeed suffering from a cervical issue which, according to Dr. Reiss, the Claimant was not.

Jeffrey Wunder, M.D., Claimant's Independent Medical Examiner (IME)

22. On July 19, 2016, the Claimant was referred for a Claimant's IME with Jeffery Wunder, M.D., who testified at the hearing by telephone. Dr. Wunder is of the opinion that the Claimant's continuing symptoms are a result of a cervical condition caused by his fall on June 3, 2015.

23. Dr. Wunder reviewed the Claimant's medical records and noted the continuing numbness and decrease in sensation in Claimant's left fingers as well as signs of tenderness in the central cervical spine and left cervical paraspinal muscles along with several other symptoms. He noted that the Claimant's MRI showed multilevel cervical degenerative disc disease and foraminal stenosis, and that the Claimant's fall caused traction on the nerves which most likely produced some nerve root irritation in multiple nerve roots producing a pattern of numbness, tingling, and sensory loss.

24. Dr. Wunder was further of the opinion that while the Claimant had degenerative changes in his neck prior to the injury, the Claimant never had any symptoms or findings suggestive of cervical radiculopathy prior to his fall. He continued to state that radiculopathy can occur without any back or neck pain and that the EMG revealed proximal neurological issues that were not found previously. Dr. Wunder believed that the EMG confirmed the C6 radiculopathy and was consistent with the Claimant's physical presentation from his first evaluation with Dr. O'Connell to the present. Like Dr. O'Connell, Dr. Wunder is of the opinion that due to the Claimant's lack of improvement with conservative care and the correlation of symptoms, the cervical fusion surgery is reasonably necessary to cure and alleviate the Claimant's condition after the compensable accident.

Ultimate Findings

25. The ALJ finds that Dr. Wunder's testimony including the expert opinions of Dr. O'Connell, Dr. Durbin, Dr. Chamberlain, Dr. O'Toole, and Dr. Coester, are more credible, convincing, and persuasive than opinions to the contrary; and, they refute the Respondents' denial of causal relatedness of the cervical spine, concerning the incident of June 3, 2015. Thus, the ALJ finds that the Claimant has proven a work-related cervical injury that was caused by his fall when he tripped on a mat at work. While the Respondents presented Dr. Reiss' medical opinion that contradicted Dr. Wunder's opinion, Dr. Wunder's medical opinion is corroborated by the other physicians who diagnosed and treated the Claimant for over a year. Dr. Reiss's underlying rationale relies on surface observations, *i.e.,* the lack of neck pain reported by the Claimant immediately following the accident and Dr. Reiss' interpretation of the medical records

that the Claimant did not fall onto his head or neck. Furthermore, Dr. Reiss's main objection to the cervical fusion surgery is that it is allegedly not within the Division's Medical Treatment Guidelines. The ALJ finds Dr. Wunder's opinions concerning the causal relatedness of the cervical spine; and, the reasonable necessity of the cervical surgery significantly more persuasive and credible than Dr. Reiss' opinions.

26. The ALJ makes a rational choice between conflicting medical opinions, based on substantial evidence, to accept the opinions of Dr. Wunder and the other ATPs, including Dr. Coester, and to reject the opinion of Dr. Reiss and the Respondents' position that the cervical condition was not causally related to the Claimant's accident at work on June 3, 2015. Also, there is no persuasive evidence that the Claimant's degenerative changes in his neck prior to the injury were the main cause for his current condition post injury. Indeed, the Claimant has proven an acceleration sand aggravation of his underlying degenerative cervical condition.

27. The evidence establishes that the Claimant experienced a significant impact on his left hand, wrist, and arm which caused traction on the nerves producing nerve root irritation. Therefore, the Claimant has proven, by preponderant evidence that he sustained a compensable injury to his neck on June 3, 2015. Also, all of the Claimant's medical care and treatment for his compensable neck injury was and is causally related thereto and reasonably necessary to cure and relieve the effects of his injury.

CONCLUSIONS OF LAW

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

Credibility

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

(1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Wunder's testimony including the expert opinions of Dr. O'Connell, Dr. Durbin, Dr. Chamberlain, Dr. O'Toole, and Dr. Coester, were more credible, convincing, and persuasive than opinions to the contrary; and, these opinions refute the Respondents' denial of causal relatedness of the cervical spine, concerning the incident of June 3, 2015. Thus, as found, the Claimant proved a work-related cervical injury that was caused by his fall when he tripped on a mat at work. While the Respondents presented Dr. Reiss' medical opinion that contradicted Dr. Wunder's opinion, Dr. Wunder's medical opinion is corroborated by the other physicians who diagnosed and treated the Claimant for over a year. Dr. Reiss' underlying rationale relied on surface observations, *i.e.,* the lack of neck pain reported by the Claimant immediately following the accident and Dr. Reiss' interpretation of the medical records that the Claimant did not fall onto his head or neck. Furthermore, Dr. Reiss's main objection to the cervical fusion surgery is that it is allegedly not within the Division's Medical Treatment Guidelines. The ALJ finds Dr. Wunder's opinions concerning the causal relatedness of the cervical spine; and, the reasonable necessity of the cervical surgery significantly more persuasive and credible than Dr. Reiss' opinions.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice between conflicting medical opinions, based on substantial evidence, to accept the opinions of Dr. Wunder and the other ATPs, including Dr. Coester, and to reject the opinion of Dr. Reiss and the Respondents' position that the cervical condition was not causally related to the Claimant's accident at work on June 3, 2015. Also, there was no persuasive evidence that the Claimant's degenerative changes in his neck prior to the injury were the main cause for his current condition post injury. Indeed, the Claimant proved an acceleration sand aggravation of his underlying degenerative cervical condition.

Reasonable and Necessary Medical Care: recommended Surgery

c. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the admitted injury injury of June 3, 2015. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S; *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment for the cervical spine was and is reasonably necessary to cure and relieve the effects of his admitted injury.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of the recommended cervical spine surgery, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this______day of November 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUE

Whether Claimant has established that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. based on Respondents’ violations of §8-42-102(2)(d), C.R.S. and §8-42-105(1), C.R.S. for failing to accurately calculate his Average Weekly Wage (AWW).

FINDINGS OF FACT

1. On November 14, 2015 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. On December 18, 2015 Insurer filed a General Admission of Liability (GAL) acknowledging that Claimant was entitled to receive medical benefits and Temporary Total Disability (TTD) benefits for the period November 15, 2015 until terminated by statute. Insurer also noted that Claimant earned an Average Weekly Wage (AWW) of $900.99.

2. Insurer’s Claims Adjuster Daniel Bay testified at the hearing in this matter. He explained that an AWW is determined by adding a claimant’s gross wages for a period of time and then dividing by the number of weeks in the period. Gross pay includes overtime earnings, bonuses, room and board and mileage reimbursement. Referencing Claimant’s wage records, Mr. Bay commented that Claimant’s gross wages for the 16 week period from July 13, 2015 through November 1, 2015 were $14,415.85. He then divided $14,415.85 by 16 to arrive at an AWW of $900.99.

3. Mr. Bay only used Claimant’s regular gross wages in calculating the AWW. There are a total of nine columns on the wage record attached to the GAL. The regular gross wages appear in the third column of the wage record. There are also separate columns for Claimant’s overtime hours and gross pay. Moreover, Claimant’s taxable gross wages appear two columns from the right side of the wage record. Despite the delineation of Claimant’s overtime pay in the wage records, Mr. Bay failed to include overtime amounts when calculating the AWW.

4. On January 27, 2016 Claimant’s counsel drafted an e-mail to Mr. Bay regarding the AWW calculation. Claimant’s counsel explained that Mr. Bay had understated Claimant’s AWW by over $600 by failing to include overtime pay. Claimant’s counsel specified that Claimant’ earned taxable gross wages, including overtime, of $24,165.79 for the period July 13, 2015 through November 1, 2015. Dividing $24,165.79 by 16 weeks yields an AWW of $1,510.36. He commented that Mr. Bay’s failure to include overtime pay in calculating Claimant’s AWW constituted an “obvious discrepancy” that warranted a claim for penalties.

5. Mr. Bay explained that he mistakenly failed to include Claimant's overtime pay in the AWW calculation. He noted that he incorrectly used the "gross" column instead of the "taxable gross" column in Claimant's wage records in calculating the AWW. Mr. Bay explained that the miscalculation was not intentional and he recognized that overtime wages should have been included in the AWW calculation.

6. After reviewing his calculations and conferring with in-house counsel, Mr. Bay amended Claimant's AWW determination to $1,510.36 on February 5, 2016. Because February 5, 2016 was a Friday, Insurer did not issue an Amended GAL until Monday, February 8, 2016. Nevertheless, Insurer issued the Amended GAL, and cured any violation of the Act, well-within 20 days of receiving the January 27, 2016 letter from Claimant's counsel. Respondents sent Claimant a check in the amount of $3,571.05 to reimburse him for the TTD deficiency because of the initially incorrect AWW calculation.

7. Claimant has failed to establish that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. based on Respondents' violations of §8-42-102(2)(d), C.R.S. and §8-42-105(1), C.R.S. for failing to accurately calculate his AWW. Claimant asserts that Insurer was legally obligated to admit liability for a higher AWW. His argument is premised on the assumption that Insurer was legally obligated to admit liability for a higher AWW. However, Insurer did not violate any provision of the Act when it initially failed to include Claimant's overtime pay in the AWW calculation. Although Insurer mistakenly understated Claimant's AWW by approximately $600.00, the error does not support a claim for penalties. The reasoning of *Allison, Sanchez* and *Reves* reflects that, if a respondent admits liability, the respondent is only liable to pay benefits in accord with the admission. The amount of liability need not ultimately be determined to be correct to avoid penalties. Because §§8-42-102 & 8-42-105(1), C.R.S. do not mandate an admission for a specific AWW, penalties cannot be imposed for failing to admit for a certain wage. There is simply no specific statutory violation in failing to admit for what is ultimately determined to be the correct AWW. Respondents conduct thus did not violate a provision of the Act or a Rule. Accordingly, Claimant's request for penalties is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

5. The imposition of penalties under §8-43-304(1), C.R.S. requires a two-step analysis. *See In re Hailemichael,* W.C. No. 4-382-985 (ICAP, Nov. 17, 2004). The ALJ must first determine whether the disputed conduct violated a provision of the Act or rule. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623, 624 (Colo. App. 1995). If a violation has occurred, penalties may only be imposed if the ALJ concludes that the violation was objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 907 P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of an insurer's actions depends upon whether the action was predicated on a "rational argument based in law or fact." *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998).

6. Even if an insurer's actions are objectively unreasonable, a violation of §8-43-304(1), C.R.S. may be cured within 20 days after an application for hearing is filed. If a violation is cured no penalties may be imposed in the absence of "clear and convincing evidence" that the violator "knew or reasonably should have known" of the violation. §8-43-304(4), C.R.S. "Clear and convincing evidence" exceeds the preponderance standard and is evidence that "makes a proposition highly probable and free from serious doubt." *In re Barnes,* W.C. No. 4-632-352 (ICAP, Oct. 30, 2006). Whether a respondent's actions were objectively unreasonable and whether it knew or should have known of a violation are questions of fact for the ALJ. *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998).

7. In *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623 (Colo. App. 1995) the court of appeals determined that the respondents' failure to admit liability for the correct temporary disability benefits did not support the imposition of penalties under §8-43-304, C.R.S. In *Allison* the respondents filed an admission of liability for TTD benefits but reduced the weekly disability payment based upon an asserted offset for the claimant's receipt of proceeds from a structured settlement. Although the claimant sought penalties because the respondents withheld the full weekly benefits, the court reasoned that the TTD statute does not create an express duty to pay benefits without regard to any applicable offsets. *Id.* at 624. The *Allison* court specifically noted that the respondents' obligations were limited "by statute only to admit or deny liability in a timely manner and pay benefits consistent with that admission." The claimant thus failed to establish a violation of the Act that would entitle him to recover penalties. *Id.*

8. In *Sanchez v. Pueblo Medical Investors,* W.C. No. 3-942-960 (ICAP, Dec. 14, 1998) the claimant sought penalties for the respondents' failure to include concurrent wages into her AWW. Relying on *Allison*, the ICAP reasoned that "where the respondents admit liability, they are only required to pay according to admitted liability." The ICAP thus "rejected the claimant's contention that if a respondent admits liability, the amount of admitted liability must be correct to avoid penalties." There is therefore no specific statutory violation in failing to admit for what is ultimately determined to be the correct AWW. *Sanchez v. Pueblo Medical Investors,* W.C. No. 3-942-960 (ICAP, Dec. 14, 1998).

9. Similarly, in *Reves v. McCormick Excavation & Paving, LLC.*, W.C. No. 4-835-166-04 (ICAP, Jan. 2, 2013) the insurance adjuster intentionally omitted some of the claimant's actual wages and used her own calculation to approximate the claimant's earnings. Claimant was a seasonal employee with a short period of employment. The adjuster used the claimant's daily pay rate without including overtime pay. Relying on *Allison*, the ICAP explained that "if penalties cannot be imposed for an incorrect admission of TTD benefits, penalties cannot be imposed for an incorrect admission of AWW." The ICAP thus specified that "because the statute does not mandate an admission for a specific AWW, penalties cannot be imposed for failure to admit for a specific wage." *Reves v. McCormick Excavation & Paving, LLC.*, W.C. No. 4-835-166-04 (ICAP, Jan. 2, 2013).

10. Section 8-43-203(1), C.R.S. gives the respondents the option to admit or deny liability and require the claimant to prove his entitlement to benefits. Furthermore, the Act specifically assigns the claimant the burden of proving his entitlement to benefits. §8-43-201, C.R.S. Under the preceding statutory scheme, if a respondent admits liability for a claim, it need not be correct in order to avoid the imposition of penalties. Similarly, §8-42-102, C.R.S. does not describe a precise method for calculating a claimant's AWW and an insurer does not violate the Act when it fails to admit liability for a specific wage. *See Reves v. McCormick Excavation & Paving, LLC.*, W.C. No. 4-835-166-04 (ICAP, Jan. 2, 2013).

11. As found, Claimant has failed to establish that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. based on Respondents' violations of §8-42-

102(2)(d), C.R.S. and §8-42-105(1), C.R.S. for failing to accurately calculate his AWW. Claimant asserts that Insurer was legally obligated to admit liability for a higher AWW. His argument is premised on the assumption that Insurer was legally obligated to admit liability for a higher AWW. However, Insurer did not violate any provision of the Act when it initially failed to include Claimant's overtime pay in the AWW calculation. Although Insurer mistakenly understated Claimant's AWW by approximately $600.00, the error does not support a claim for penalties. The reasoning of *Allison, Sanchez* and *Reves* reflects that, if a respondent admits liability, the respondent is only liable to pay benefits in accord with the admission. The amount of liability need not ultimately be determined to be correct to avoid penalties. Because §§8-42-102 & 8-42-105(1), C.R.S. do not mandate an admission for a specific AWW, penalties cannot be imposed for failing to admit for a certain wage. There is simply no specific statutory violation in failing to admit for what is ultimately determined to be the correct AWW. Respondents conduct thus did not violate a provision of the Act or a Rule. Accordingly, Claimant's request for penalties is denied and dismissed.

ORDER

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

1. Claimant's request for penalties is denied and dismissed.

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

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

DATED: October 27, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-938-765-05

ISSUES

- Whether Claimant's fall at work on December 30, 2013 and related medical treatment are compensable.
- Whether Claimant is entitled to a change of physician.
- Whether Claimant is entitled to a disfigurement award and, if so, in what amount.

STIPULATIONS

- The issues of average weekly wage, TTD, TPD, and offsets are reserved for future determination.
- The parties stipulated that if the claim is found compensable, the medical treatment to Claimant's right lower extremity is reasonable, necessary, and related; and is provided by an authorized treating physician..

FINDINGS OF FACT

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

1. Claimant was employed by Employer as a full time assembler for 33 years.

2. Claimant's first language is Korean. Medical records from Boulder Community hospital note that some information from Claimant was "difficult to ascertain" as Claimant demonstrated, "slight language barrier in as much as she is Korean but I am still able to discern" that she takes certain specified medications. The record also notes, "She does not speak fluent [E]nglish, but communicates well enough to discuss her condition with her."

3. On December 30, 2013, Claimant was working her regular job. As Claimant was returning from a break walking near an exit door and laundry machines, she slipped and fell onto her right side fracturing her right femur.

4. When Claimant's coworker could not help her up, the coworker notified the supervisor, Henry Homer. Eventually paramedics arrived and transported Claimant to Boulder Community Hospital where she was diagnosed with a right femur fracture. During transport, the paramedics gave Claimant pain medication, Fentanyl, which made her fall asleep. Claimant testified that she awoke in a hospital room.

5. Claimant was given additional Fentanyl and Versed upon hospital admission.

6. On December 31, 2013, Claimant underwent open reduction and internal fixation surgery performed by Jeffrey R. Gagliano, M.D., and remained in the hospital for approximately five days. Nothing in the surgical report indicates Claimant's fracture was "atypical" or likely caused by anything other than a mechanical fall.

7. Dr. Gagliano's surgical report includes the following finding:

   > Short oblique subtrochanteric femur fracture with mild comminution. The patient did have notable sub-trochanteric, lateral-sided cortical spur defects at the fracture site as well as on the non-operative left hip consistent with possible prior tension-sided stress fracture or response.

   No persuasive medical testimony was offered to explain this finding or its relevance, if any.

8. Claimant was discharged to a skilled nursing facility and also participated in physical and occupational therapy as part of her rehabilitation.

9. Claimant experienced persistent greater trochanteric pain near the area of the screw used to secure the internal fixation hardware.

10. On September 28, 2015, Claimant underwent a second surgery to remove the screw. The surgery involved two incisions. Findings from that surgery include "Copious scar around the illiotibial band as well as the fat superficial to the ITB. There was additional scarring between the IT band and the vastus lateralis fascia."

Mechanism of Injury

11. Clamant testified at hearing that she slipped and fell. She explained "It was a really bad day for that day, because there is a, a lot of water travel in and out, because it was really sunny and a lot of snow. And so water's in and out, and also we have a washing machine there. And they got a drain there sometimes that dripping water there, too." When asked if she knew where the water came from, Claimant answered, "Like I say, it was a, a – really was a traffic was pretty bad. And the salt, salt, and the sand is in and out – lots of things." She also testified that after she fell, her head was close to the drain. Claimant landed on her right side.

12. On cross examination, Respondents' counsel asked a number of questions that elicited much more ambiguous answers about the circumstances of Claimant's fall. The ALJ finds these answers to be less clear and reliable than those in Claimant's direct and rebuttal testimony.

13. Claimant testified that her leg did not give out and that she had not previously fallen. Her leg was not weak the day of the injury, and she walked for exercise that morning before work. Claimant also hiked without difficulty prior to her injury.

14. The paramedics' report notes that Claimant "was standing talking to [a] co-worker when she turned to walk away and 'tripped over my own foot and fell down." The report is not attributed to Claimant.

15. Boulder Community Hospital's intake report records, "Per patient, she was at work, pivoted and 'my feet got caught up' and the patient tripped and fell onto her right hip."

16. With respect to this report, Claimant testified that she did not provide information. "No, I didn't told her anything what happened." Claimant further explained that she did not talk to anybody about what happened, but rather a nurse told her what had happened.

17. Similarly, Dr. Gagliano's record indicates that Claimant's feet became tangled up and that she fell from standing. However, Claimant testified that he had not asked her how she fell and that she never mentioned anything to him about how she fell.

18. Dr. Gagliano's discharge summary attributes the fracture to being caused by the fall: "[Claimant] is a 63-year-old female who fell on 12/30/2013 causing a subtrochanteric femur fracture."

19. On September 18, 2014, Dr. Bisgard performed a Respondents sponsored independent medical examination (IME). Claimant reported to Dr. Bisgard that there was a laundry basket of wet towels near where she fell and that the floor was also wet as the result of melted snow being tracked in from outside. While Claimant was unsure which was the source of the water, Claimant specified that there was water on the floor where she slipped and fell. When Dr. Bisgard referred in her hearing testimony to Claimant's report of the mechanism of her injury, she described Claimant's report as consistent, and that Claimant gave a good description of water being on the floor. Dr. Bisgard testified further hat she found Claimant to be credible, very forthcoming, and a reliable historian. After examining Claimant, taking her history, and reviewing Claimant's medical records – including the paramedic report, the emergency room report, and Dr. Gagliano's initial record – Dr. Bisgard opined that Claimant's fall caused her femur fracture.

20. Respondents introduced Employer's Incident Investigation Report. Claimant's supervisor Henry Holmes completed the report and noted, "the floor area she fell in was clean and free of any liquid or other slippery substance." No evidence was presented to establish when Mr. Holmes observed the area or completed the report, however, it is clear from context that Mr. Holmes made his observations after the paramedics had transported Claimant to the hospital.

21. The ALJ reasonably infers that the responding paramedics would have removed any fall hazards as part of their response to the call. Thus, the ALJ does not find the incident report to be a reliable source of information as to the condition of the area where Claimant fell at the time of her fall.

22. Prior to her injury, Claimant had been diagnosed with a number of medical conditions including osteoarthritis, rheumatoid arthritis, osteopenia, and osteoporosis.

23. Employer's Incident Investigation Report noted that one of Claimant's coworkers and Mr. Holmes had noticed Claimant walking with a slight limp for approximately two weeks.

24. Claimant, who stands 4'8" and weighs approximately 95 pounds, testified that she worked at a high table and that she had to raise her chair too high which caused her legs to fall asleep. When she then stood up, it would affect her walking. Claimant's testimony is supported by employment records which indicate that Employer previously modified Claimant's workspace because of her very slight stature, as she was unable to properly use her ergonomic chair. Claimant acknowledged a slight limp in both her deposition and hearing testimony.

25. Claimant acknowledged mentioning problems with her right leg at a regularly scheduled December 18, 2013 appointment with Dr. Jeffrey Perkins, the doctor she saw for her arthritis. Dr. Perkins' records reveal that he was familiar with the medications Claimant had taken historically and was then taking. She described the feeling as being in her muscle and indicated during testimony that the feeling was located over her right knee and lower thigh. Dr. Jeffrey Perkins diagnosed Claimant with right iliotibial band syndrome and prescribed physical therapy which Claimant did with good result. Dr. Perkins continued the iliotibial band syndrome diagnosis in his December 26, 2013 medical record.

26. Dr. Ammie Christiansen's medical records reflect that Claimant took a medication called Boniva for approximately five years until 2011, and that the medication was associated with an increased risk of atypical femur fractures.

27. Dr. Bisgard testified that other medications Claimant took also were associated with an increased risk of typical femoral fractures, as well as some of Claimant's medical conditions. However, the medical records reflect that her treatment providers were monitoring her "Long-Term Dangerous Medication," and those records reflect that lab work was done and that there were no signs of medication toxicity or side effects. Additionally, Dr. Bisgard offered no persuasive testimony concerning how high that risk was.

28. Dr. Bisgard testified that if an x-ray had been taken just prior to Claimant's fracture, it could have shown "a very specific pattern of bone loss in that area" if the fracture was atypical. While no x-ray was taken before the fall, numerous

xrays were taken at the hospital to diagnose and fix the fracture. No persuasive evidence was offered that those x-rays showed that specific pattern of bone loss.

29. At hearing, Dr. Bisgard testified that during the very early morning hours before the hearing, she reviewed the incident report prepared by Mr. Holmes which documented no water being on the floor. She described the report as her “ah-ha moment.” Dr. Bisgard went back “and reviewed the records even further.” She testified that “given the fact that [Claimant] had multiple risk factors for what we call these atypical femur fractures, it’s likely that the fracture occurred, causing her to fall.” Dr. Bisgard acknowledged that she did not know when Mr. Holmes prepared the report or whether the area appeared the same as at the time Claimant fell.

30. Dr. Bisgard’s testimony did not rise to the level of medical probability. Rather, she hedged her testimony. For example, when discussing whether Claimant fell causing the fracture of fell because of the fracture, she stated, “Which came first? I can’t tell you which came first. All I can do is tell you these, these are the scenarios that are possible.” When discussing whether Claimant had experienced an atypical fracture, Dr. Bisgard stated, “I can’t, definitely, tell you, with 100% certainty, or even more that 50%certainty, what exactly happened.”

31. No persuasive evidence was offered to support a finding that Claimant’s leg gave out causing her to fall.

32. The ALJ finds Claimant to be a reliable historian and finds credible her reports and testimony that she slipped on a wet floor at work, causing her to fall and fracture her femur.

33. The ALJ finds Dr. Bisgard’s IME report to be more credible and persuasive than her hearing testimony. The report was based on Claimant’s reports of slipping on a wet surface which the ALJ has found to be credible and persuasive. The IME report is also stated to a reasonable degree of medical probability. In contrast, Dr. Bisgard’s hearing testimony was based on portions of Claimant’s testimony which the ALJ found to be ambiguous, and on an incident report which the ALJ finds unreliable. Dr. Bisgard’s hearing testimony was also expressly not stated in terms of reasonable medical probability.

34. The ALJ finds Claimant’s right leg injuries to be related to her employment and that her medical treatment for those injuries reasonable, necessary, and related to her employment.

Change of Physician

35. Claimant endorsed for Hearing the issue of change of physician. Claimant has been treating with the same medical provider, Boulder Community Hospital, since her fall. This is an approved medical provider through Claimant’s employer.

36. Claimant's first request for a change of physician was in her Application for Hearing dated February 29, 2016. Respondents timely denied this request through their Response to Application for Hearing dated March 9, 2016. Respondents complied with the 20-day requirement for denying a written request for change of physician under Rule 8-7 and section 8-43-404(5)(a)VI.

37. Claimant testified that neither Employer nor Insurer provided her with a choice of treatment providers as required by statute. Respondents did not offer any persuasive evidence to the contrary.

38. Claimant testified that she was happy with her treatment providers and had not requested a change of physicians.

39. The ALJ finds no cause for a change in Claimant's medical care, as she has been receiving care for her right leg injury, and has no complaints about her medical care.

Disfigurement

40. The ALJ finds and concludes that as a result of her December 30, 2013 work injury, Claimant has a visible disfigurement to the body consisting of two highly discolored scars on the lateral aspect of her right thigh, each measuring two and one-half inches long with significant skin dimpling. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

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

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

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

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

A claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See Section* 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998).

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

Based on the totality of the evidence, the ALJ finds and concludes that Claimant slipped on water at work causing her to fall and fracture her femur. This conclusion is supported by the weight of Claimant's persuasive and credible testimony and the lack of persuasive evidence to the contrary. To the extent that Dr. Bisgard attempted to suggest that the fracture was caused by Claimant's medical conditions, the ALJ finds such testimony not credible or persuasive as it was based on evidence the ALJ has found was ambiguous and unreliable. No persuasive evidence suggested that Claimant's femur spontaneously fractured causing her to fall.

ORDER

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

1. Claimant's right leg injuries are compensable.

2. Claimant's medical treatment for those injuries is reasonable, necessary, and related to her employment.

3. Insurer shall pay Claimant $2,100 for her disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

DATED: September 1, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-927-874-02

ISSUES

- Whether Respondent proved by a preponderance of the evidence that Claimant's claim is closed pursuant to §8-43-203(2)(b)(II)(A),C.R.S.

- If not closed, whether Respondent proved by a preponderance of the evidence that Claimant waived his right to challenge the Final Admission of Liability.

- If not closed, whether Respondent proved by a preponderance of the evidence that Claimant's request for benefits is barred by laches.

- If not closed, waived, or barred by laches, whether Claimant has proven by a preponderance of the evidence that the situs of his functional impairment extends beyond the arm at the shoulder entitling him to have his scheduled impairment rating converted to a whole person impairment rating.

STIPULATIONS

Claimant's counsel stipulated at hearing that he agrees with the Respondent's calculation of average weekly wage as contained in the Final Admission of Liability.

FINDINGS OF FACT

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

1. Claimant sustained an admitted workers' compensation injury in a motor vehicle accident on August 24, 2013 while employed as a State Trooper for the State of Colorado, Department of Public Safety. (Exhibit A)

2. Claimant underwent surgery on his left shoulder with Dr. Durbin on September 4, 2014. (Exhibit D, bate stamp 14)

3. On November 11, 2014, Dr. Durbin noted that Claimant was doing "extremely well" 10 weeks out from surgery. No clinical findings were documented for any complaints/symptoms in the neck, back, head, torso or anywhere else beyond the arm at the shoulder. (Exhibit C, bate stamp 5)

4. Claimant returned to Dr. Durbin on December 16, 2014 at which time Dr. Durbin noted that Claimant was doing "extremely well" with "minimal complaints", "just a little bit of soreness every once in a while". Dr. Durbin further noted that Claimant was back to almost full strength and that he had returned to full activities. No clinical findings were documented for any complaints/symptoms in the neck, back, head, torso

or anywhere else beyond the arm at the shoulder. Claimant was released to return to full activities with no restrictions. (Exhibit C, bate stamp 3-4)

5. Claimant was placed at MMI by Dr. O'Toole on February 12, 2015. At the time, Dr. O'Toole noted that Claimant had "returned to full duty and has been tolerating unrestricted work without difficulty. He has no pain or other complaints related to his shoulder injury." The Review of Systems and Physical Examination do not include any complaints/symptoms in the neck, back, head, torso or anywhere else beyond the arm at the shoulder. Dr. Durbin provided Claimant with a 14% upper extremity impairment rating (8% whole person), released Claimant to return to work with no permanent work restrictions, and did not recommend any medical maintenance treatment. (Exhibit D, bate stamp 10-17)

6. A Final Admission of Liability was filed on April 2, 2015 admitting to the 14% upper extremity impairment rating. (Exhibit D)

7. Claimant filed an Application for Hearing on May 1, 2015 (Exhibit E) but never set a hearing so the Application for Hearing was stricken pursuant to OAC Rule 8(K).

8. On March 16, 2016, Respondent filed a Motion to Close Claim for Failure to Prosecute. (Exhibit G) Claimant responded by filing the current Application for Hearing on March 25, 2016. An Order to Show Cause was entered on March 31, 2016. (Exhibit H)

9. Because Claimant's May 1, 2015 Application for Hearing was stricken, it is as if it was never filed. As a result, Claimant's current claim for conversion filed on March 25, 2016 is not timely. Claimant's claim is closed pursuant to §8-43-203(2)(b)(II)(A), C.R.S.

10. Claimant, through his inaction in setting a hearing on his May 1, 2015 Application for Hearing or otherwise pursuing his objections to the Final Admission of Liability for nearly 1 year, has waived his right to challenge the Final Admission of Liability. The current Application for Hearing was filed more than 1 year after Claimant was placed at MMI and almost 1 year after the Final Admission of Liability was filed. By failing to timely contest the Final Admission of Liability, Claimant frustrates the express legislative intent of the Workers' Compensation Act, unconscionably delays the statutory remedy available to him to challenge the Final Admission of Liability, and prejudices the Respondent's right to have Claimant's permanent medical impairment determined at or near the time Claimant was placed at MMI.

11. Claimant and his attorney were sent copies of the Final Admission of Liability. The Final Admission of Liability contains a Notice to Claimant, that he had 30 days to object to the Final Admission of Liability. A timely Application for Hearing was filed but never set. It wasn't until Respondent filed a Motion to Close Claim for Failure to Prosecute that Claimant pursued his claim for conversion. Claimant's failure to contest the Final Admission of Liability for nearly 1 year is inconsistent with the

assertion of his right to challenge that admission, manifests his intent not to challenge the admission, and constitutes a waiver of that right.

12. There are no medical records in evidence after Claimant was placed at MMI. Claimant did not attend the hearing or offer any testimony regarding his inability to meet any personal, social, or occupational demands. Claimant's attorney argued at hearing that Claimant had cervical tightness/soreness entitling Claimant to have his scheduled injury converted to a whole person impairment rating. Claimant's counsel's argument is not evidence and is not supported by the medical records near or at the time that Claimant was placed at MMI.

13. Claimant was released to return to work full duty, without any restrictions, on December 16, 2014. When Claimant returned to the ATP on February 12, 2015, he did not report any problems as a result of returning to work full duty. The MMI report contains no notations of complaints of pain or functional limitations beyond the arm at the shoulder. No evidence was submitted after Claimant was placed at MMI documenting any complaints or limitations as a result of being released to return to work without any permanent restrictions. Accordingly, the ALJ concludes that the situs of Claimant's functional impairment does not extend beyond the arm at the shoulder.

CONCLUSIONS OF LAW

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

Generally

The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. Claimant carries the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. Respondent carries the burden of proof, by a preponderance of the evidence, for its affirmative defenses. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988); *Sholund v. Argenbright Security*, W.C. No. 4-415-403 (June 16, 2004). A preponderance of the evidence is evidence which leads the trier-of fact, after conserving all of the evidence, to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). Facts in a workers' compensation case are not interpreted liberally in favor of either the injured worker or the employer. C.R.S. §8-43-201.

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

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

Closure, Waiver, and Laches

§8-43-203(2)(b)(II)(A), C.R.S. provides, in relevant part, that a case will close as to the issues admitted in a final admission if the claimant does not contest the final admission within 30 days after the date of the final admission. The automatic closure of contested issues from a Final Admission of Liability furthers the legislative intent of providing the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Leewaye v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). Failure to contest an admission within 30 days closes the claim on all admitted issues. *Dyrkopp v. Industrial Claim Appeals Office*, 30 P.3d 821 (Colo. App. 2001). Once a case has closed, the issues resolved by the Final Admission of Liability are not subject to further litigation unless they are reopened pursuant to §8-43-303, C.R.S. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270, 272 (Colo. App. 2005); *Ballesteros v. Westaff, Inc.*, W.C. No. 4-475-838 (November 24, 2008). As found, because Claimant's May 1, 2015 Application for Hearing was stricken, it is as if it was never filed. The March 25, 2016 Application for Hearing was not filed within 30 days of the Final Admission of Liability so the Court has no jurisdiction to hear the issues endorsed in that Application for Hearing absent a reopening.

Waiver is the intentional relinquishment of a known right. *Johnson, supra*. The exercise of a statutory right is always subject to equitable limitations. *Id.* Waiver may be implied as when a party engages in conduct which manifests an intention to relinquish the right or acts inconsistently with its assertion. *Id.; see also, Munoz v. JBS Swift & Company*, W.C. No. 4-780-871 (March 1, 2010); *Rodriguez v. Safeway Stores, Inc.*, W.C. No. 4-712-019 (June 3, 2009). A party may, through inaction, delay, or other similar conduct, waive specific rights. *Johnson, supra.; Munoz, supra.*; *Rodriguez, supra.*; *Gaither v. The Resource Exchange*, W.C. No. 4-125-439 (September 14, 1994); *Stein v. Alliance*, W.C. No. 4-533-782 (October 5, 2004); *Sholund*, supra.; *Hakizimana v. JBS USA, LLC*, W.C. No. 4-909-058 (October 23, 2014). The equitable defense of laches may be used in a workers' compensation proceeding to deny relief to a party whose unconscionable delay in enforcing his rights has prejudiced the party against whom enforcement is sought. *Small v. Coors Porcelain Company*, W.C. No. 3-500-834; *Safeway, Inc. v. Industrial Claim Appeals Office*, 186 P.3d 103 (Colo. App. 2008); *Burke v. Industrial Claim Appeals Office*, 905 P.2d 1 (Colo. App. 1994); *Bacon v. Industrial Claim Appeals Office*, 746 P.2d 74 (Colo. App. 1987). Parties to a workers' compensation claim are presumed to know the applicable law. *Midget Consol. Gold Mining Co. v. Industrial Commission*, 193 P. 493 (Colo. 1920); *Paul v. Industrial Commission*, 632 P.2d 638 (Colo. App. 1981). The presumption aids a party in meeting its burden of proof. *Union Ins. Co. v. RCA Corp.*, 724 P.2d 80 (Colo. App. 1986). A party may not use ignorance of the law as a defense to its legal duties. *Grant v. Professional Contract Services*, W.C. No. 4-531-613 (January 24, 2005).

As found, Claimant, through his inaction in setting a hearing on his original Application for Hearing or otherwise pursuing his objections to the Final Admission of Liability for nearly 1 year, has waived his right to challenge the Final Admission of Liability. The period of time to challenge a Final Admission of Liability is provided by statute to further the legislative intent of providing the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. The period of time to challenge a Final Admission of Liability is also provided by statute to further the legislative intent that impairment is to be determined at the time of MMI. §8-42-107(8)(c), C.R.S. By failing to challenge the Final Admission of Liability for almost 1 year since the Final Admission of Liability was filed, Claimant frustrates the express legislative intent of the Workers' Compensation Act, unconscionably delays the statutory remedy available to him to challenge the Final Admission of Liability, and prejudices the Respondent's right to have Claimant's permanent medical impairment determined at or near the time Claimant was placed at MMI. Claimant, through his attorney, knew that he had 30 days to challenge the Final Admission of Liability. Claimant's failure to challenge the Final Admission of Liability for nearly 1 year is inconsistent with the assertion of his right to challenge the Final Admission of Liability, manifests his intent not to challenge the Final Admission of Liability, and constitutes a waiver and/or unconscionably delay of that right.

Permanent Impairment

Permanent medical impairment is to be determined at the time of MMI. §8-42-107(8)(c), C.R.S. As found, it has been more than 1 year since Claimant was placed at MMI. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. §8-42-107(1)(a), C.R.S. However, a claimant may establish that his injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in §8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled not the situs of the injury itself of the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the shoulder. *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996); *Strauch, supra.* The issue of conversion is a question of fact for the ALJ. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000).

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

Symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with a claimant's ability to use a portion of his body to be considered a functional impairment. *See Mader v. Popejoy Construction Co., Inc.,* W.C. No. 4-198-489 (August 9, 1996). Thus, in order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether Claimant has pain, but whether the injury and the associated pain caused thereby has impacted part of Claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996); *Bernal v. CMHIP*, W.C. No. 4-956-645 (October 5, 2015).

As found, Claimant did not attend the hearing or offer any testimony regarding his inability to meet any personal, social, or occupational demands. Claimant's counsel's argument that Claimant had cervical tightness/soreness entitling Claimant to have his scheduled injury converted to a whole person impairment rating is not evidence. *Lewis v. Pacific Fruit Produce*, W.C. No. 3-048-301 (November 15, 1995); *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo. App. 1987). Claimant was released to return to work full duty, without any restrictions, on December 16, 2014. When Claimant returned to the ATP on February 12, 2015, he did not report any problems as a result of returning to work full duty. The MMI report contains no notations of complaints of pain or functional limitations beyond the arm at the shoulder. No evidence was submitted after Claimant was placed at MMI documenting any complaints or limitations as a result of being released to return to work without any permanent restrictions. Accordingly, the ALJ concludes that the situs of Claimant's functional impairment does not extend beyond the arm at the shoulder.

ORDER

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

1. Claimant's claim is closed pursuant to §8-43-203(2)(b)(II)(A), C.R.S.

2. Claimant has waived his right to challenge the Final Admission of Liability.

3. Claimant's claim is barred by laches.

4. Claimant's claim for conversion is denied and dismissed.

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

DATED: September 2, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-938-765-05

ISSUES

- Whether Claimant's fall at work on December 30, 2013 and related medical treatment are compensable.
- Whether Claimant is entitled to a change of physician.
- Whether Claimant is entitled to a disfigurement award and, if so, in what amount.

STIPULATIONS

- The issues of average weekly wage, TTD, TPD, and offsets are reserved for future determination.
- The parties stipulated that if the claim is found compensable, the medical treatment to Claimant's right lower extremity is reasonable, necessary, and related; and is provided by an authorized treating physician..

FINDINGS OF FACT

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

1. Claimant was employed by Employer as a full time assembler for 33 years.

2. Claimant's first language is Korean. Medical records from Boulder Community hospital note that some information from Claimant was "difficult to ascertain" as Claimant demonstrated, "slight language barrier in as much as she is Korean but I am still able to discern" that she takes certain specified medications. The record also notes, "She does not speak fluent [E]nglish, but communicates well enough to discuss her condition with her."

3. On December 30, 2013, Claimant was working her regular job. As Claimant was returning from a break walking near an exit door and laundry machines, she slipped and fell onto her right side fracturing her right femur.

4. When Claimant's coworker could not help her up, the coworker notified the supervisor, Henry Homer. Eventually paramedics arrived and transported Claimant to Boulder Community Hospital where she was diagnosed with a right femur fracture. During transport, the paramedics gave Claimant pain medication, Fentanyl, which made her fall asleep. Claimant testified that she awoke in a hospital room.

5. Claimant was given additional Fentanyl and Versed upon hospital admission.

6. On December 31, 2013, Claimant underwent open reduction and internal fixation surgery performed by Jeffrey R. Gagliano, M.D., and remained in the hospital for approximately five days. Nothing in the surgical report indicates Claimant's fracture was "atypical" or likely caused by anything other than a mechanical fall.

7. Dr. Gagliano's surgical report includes the following finding:

   > Short oblique subtrochanteric femur fracture with mild comminution. The patient did have notable sub-trochanteric, lateral-sided cortical spur defects at the fracture site as well as on the non-operative left hip consistent with possible prior tension-sided stress fracture or response.

   No persuasive medical testimony was offered to explain this finding or its relevance, if any.

8. Claimant was discharged to a skilled nursing facility and also participated in physical and occupational therapy as part of her rehabilitation.

9. Claimant experienced persistent greater trochanteric pain near the area of the screw used to secure the internal fixation hardware.

10. On September 28, 2015, Claimant underwent a second surgery to remove the screw. The surgery involved two incisions. Findings from that surgery include "Copious scar around the illiotibial band as well as the fat superficial to the ITB. There was additional scarring between the IT band and the vastus lateralis fascia."

Mechanism of Injury

11. Clamant testified at hearing that she slipped and fell. She explained "It was a really bad day for that day, because there is a, a lot of water travel in and out, because it was really sunny and a lot of snow. And so water's in and out, and also we have a washing machine there. And they got a drain there sometimes that dripping water there, too." When asked if she knew where the water came from, Claimant answered, "Like I say, it was a, a – really was a traffic was pretty bad. And the salt, salt, and the sand is in and out – lots of things." She also testified that after she fell, her head was close to the drain. Claimant landed on her right side.

12. On cross examination, Respondents' counsel asked a number of questions that elicited much more ambiguous answers about the circumstances of Claimant's fall. The ALJ finds these answers to be less clear and reliable than those in Claimant's direct and rebuttal testimony.

13. Claimant testified that her leg did not give out and that she had not previously fallen. Her leg was not weak the day of the injury, and she walked for exercise that morning before work. Claimant also hiked without difficulty prior to her injury.

14. The paramedics' report notes that Claimant "was standing talking to [a] co-worker when she turned to walk away and 'tripped over my own foot and fell down." The report is not attributed to Claimant.

15. Boulder Community Hospital's intake report records, "Per patient, she was at work, pivoted and 'my feet got caught up' and the patient tripped and fell onto her right hip."

16. With respect to this report, Claimant testified that she did not provide information. "No, I didn't told her anything what happened." Claimant further explained that she did not talk to anybody about what happened, but rather a nurse told her what had happened.

17. Similarly, Dr. Gagliano's record indicates that Claimant's feet became tangled up and that she fell from standing. However, Claimant testified that he had not asked her how she fell and that she never mentioned anything to him about how she fell.

18. Dr. Gagliano's discharge summary attributes the fracture to being caused by the fall: "[Claimant] is a 63-year-old female who fell on 12/30/2013 causing a subtrochanteric femur fracture."

19. On September 18, 2014, Dr. Bisgard performed a Respondents sponsored independent medical examination (IME). Claimant reported to Dr. Bisgard that there was a laundry basket of wet towels near where she fell and that the floor was also wet as the result of melted snow being tracked in from outside. While Claimant was unsure which was the source of the water, Claimant specified that there was water on the floor where she slipped and fell. When Dr. Bisgard referred in her hearing testimony to Claimant's report of the mechanism of her injury, she described Claimant's report as consistent, and that Claimant gave a good description of water being on the floor. Dr. Bisgard testified further hat she found Claimant to be credible, very forthcoming, and a reliable historian. After examining Claimant, taking her history, and reviewing Claimant's medical records – including the paramedic report, the emergency room report, and Dr. Gagliano's initial record – Dr. Bisgard opined that Claimant's fall caused her femur fracture.

20. Respondents introduced Employer's Incident Investigation Report. Claimant's supervisor Henry Holmes completed the report and noted, "the floor area she fell in was clean and free of any liquid or other slippery substance." No evidence was presented to establish when Mr. Holmes observed the area or completed the report, however, it is clear from context that Mr. Holmes made his observations after the paramedics had transported Claimant to the hospital.

21. The ALJ reasonably infers that the responding paramedics would have removed any fall hazards as part of their response to the call. Thus, the ALJ does not find the incident report to be a reliable source of information as to the condition of the area where Claimant fell at the time of her fall.

22. Prior to her injury, Claimant had been diagnosed with a number of medical conditions including osteoarthritis, rheumatoid arthritis, osteopenia, and osteoporosis.

23. Employer's Incident Investigation Report noted that one of Claimant's coworkers and Mr. Holmes had noticed Claimant walking with a slight limp for approximately two weeks.

24. Claimant, who stands 4'8" and weighs approximately 95 pounds, testified that she worked at a high table and that she had to raise her chair too high which caused her legs to fall asleep. When she then stood up, it would affect her walking. Claimant's testimony is supported by employment records which indicate that Employer previously modified Claimant's workspace because of her very slight stature, as she was unable to properly use her ergonomic chair. Claimant acknowledged a slight limp in both her deposition and hearing testimony.

25. Claimant acknowledged mentioning problems with her right leg at a regularly scheduled December 18, 2013 appointment with Dr. Jeffrey Perkins, the doctor she saw for her arthritis. Dr. Perkins' records reveal that he was familiar with the medications Claimant had taken historically and was then taking. She described the feeling as being in her muscle and indicated during testimony that the feeling was located over her right knee and lower thigh. Dr. Jeffrey Perkins diagnosed Claimant with right iliotibial band syndrome and prescribed physical therapy which Claimant did with good result. Dr. Perkins continued the iliotibial band syndrome diagnosis in his December 26, 2013 medical record.

26. Dr. Ammie Christiansen's medical records reflect that Claimant took a medication called Boniva for approximately five years until 2011, and that the medication was associated with an increased risk of atypical femur fractures.

27. Dr. Bisgard testified that other medications Claimant took also were associated with an increased risk of typical femoral fractures, as well as some of Claimant's medical conditions. However, the medical records reflect that her treatment providers were monitoring her "Long-Term Dangerous Medication," and those records reflect that lab work was done and that there were no signs of medication toxicity or side effects. Additionally, Dr. Bisgard offered no persuasive testimony concerning how high that risk was.

28. Dr. Bisgard testified that if an x-ray had been taken just prior to Claimant's fracture, it could have shown "a very specific pattern of bone loss in that area" if the fracture was atypical. While no x-ray was taken before the fall, numerous

xrays were taken at the hospital to diagnose and fix the fracture. No persuasive evidence was offered that those x-rays showed that specific pattern of bone loss.

29. At hearing, Dr. Bisgard testified that during the very early morning hours before the hearing, she reviewed the incident report prepared by Mr. Holmes which documented no water being on the floor. She described the report as her “ah-ha moment.” Dr. Bisgard went back “and reviewed the records even further.” She testified that “given the fact that [Claimant] had multiple risk factors for what we call these atypical femur fractures, it’s likely that the fracture occurred, causing her to fall.” Dr. Bisgard acknowledged that she did not know when Mr. Holmes prepared the report or whether the area appeared the same as at the time Claimant fell.

30. Dr. Bisgard’s testimony did not rise to the level of medical probability. Rather, she hedged her testimony. For example, when discussing whether Claimant fell causing the fracture of fell because of the fracture, she stated, “Which came first? I can’t tell you which came first. All I can do is tell you these, these are the scenarios that are possible.” When discussing whether Claimant had experienced an atypical fracture, Dr. Bisgard stated, “I can’t, definitely, tell you, with 100% certainty, or even more that 50%certainty, what exactly happened.”

31. No persuasive evidence was offered to support a finding that Claimant’s leg gave out causing her to fall.

32. The ALJ finds Claimant to be a reliable historian and finds credible her reports and testimony that she slipped on a wet floor at work, causing her to fall and fracture her femur.

33. The ALJ finds Dr. Bisgard’s IME report to be more credible and persuasive than her hearing testimony. The report was based on Claimant’s reports of slipping on a wet surface which the ALJ has found to be credible and persuasive. The IME report is also stated to a reasonable degree of medical probability. In contrast, Dr. Bisgard’s hearing testimony was based on portions of Claimant’s testimony which the ALJ found to be ambiguous, and on an incident report which the ALJ finds unreliable. Dr. Bisgard’s hearing testimony was also expressly not stated in terms of reasonable medical probability.

34. The ALJ finds Claimant’s right leg injuries to be related to her employment and that her medical treatment for those injuries reasonable, necessary, and related to her employment.

Change of Physician

35. Claimant endorsed for Hearing the issue of change of physician. Claimant has been treating with the same medical provider, Boulder Community Hospital, since her fall. This is an approved medical provider through Claimant’s employer.

36. Claimant's first request for a change of physician was in her Application for Hearing dated February 29, 2016. Respondents timely denied this request through their Response to Application for Hearing dated March 9, 2016. Respondents complied with the 20-day requirement for denying a written request for change of physician under Rule 8-7 and section 8-43-404(5)(a)VI.

37. Claimant testified that neither Employer nor Insurer provided her with a choice of treatment providers as required by statute. Respondents did not offer any persuasive evidence to the contrary.

38. Claimant testified that she was happy with her treatment providers and had not requested a change of physicians.

39. The ALJ finds no cause for a change in Claimant's medical care, as she has been receiving care for her right leg injury, and has no complaints about her medical care.

Disfigurement

40. The ALJ finds and concludes that as a result of her December 30, 2013 work injury, Claimant has a visible disfigurement to the body consisting of two highly discolored scars on the lateral aspect of her right thigh, each measuring two and one-half inches long with significant skin dimpling. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

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

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

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

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

A claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See Section* 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998).

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

Based on the totality of the evidence, the ALJ finds and concludes that Claimant slipped on water at work causing her to fall and fracture her femur. This conclusion is supported by the weight of Claimant's persuasive and credible testimony and the lack of persuasive evidence to the contrary. To the extent that Dr. Bisgard attempted to suggest that the fracture was caused by Claimant's medical conditions, the ALJ finds such testimony not credible or persuasive as it was based on evidence the ALJ has found was ambiguous and unreliable. No persuasive evidence suggested that Claimant's femur spontaneously fractured causing her to fall.

ORDER

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

1. Claimant's right leg injuries are compensable.

2. Claimant's medical treatment for those injuries is reasonable, necessary, and related to her employment.

3. Insurer shall pay Claimant $2,100 for her disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

DATED: September 1, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-950-337-04

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 28, 2016 and August 22, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 6/28/16, Courtroom 4, beginning at 1:30 PM, and, ending at 2:10 PM; and, 8/22/16, Courtroom 3, beginning at 1:30 PM, and ending at 2:45 PM).

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection, After the conclusion of the hearing, closing of the evidence and bench ruling in favor of the Respondents on August 22, 2016, the Claimant filed additional medical reports from Dr. Gehrs, which may be considered by the Respondents concerning post maximum medical improvement (MMI) medical benefits, admitted in the Final Admission of Liability (FAL). Respondents' Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents. The proposed decision was filed, electronically, on August 29, 2016. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

PRELIMINARY MATTERS

At the outset of the hearing, the ALJ heard arguments from the Claimant and Respondents. Claimant admitted that he was attempting to overcome the determination of the Division Independent Medical Examiner (DIME), Anjmun Sharma, M.D., by clear and convincing evidence as to both maximum medical improvement (MMI) and degree of permanent impairment based upon his own disagreement with Dr. Sharma's decision to not find that his thoracic spine required continued medical care and/or an impairment rating arising from the admitted work injury. The ALJ confirmed with the Claimant that he had no additional testimonial evidence to rely upon, besides that which was contained in the exhibit packets, other than his arguments and commentary as to evidence in the Exhibits.

Upon confirmation that the Claimant did not intend to offer additional evidence, and after confirming with counsel for the Respondents that Respondents therefore had no additional evidence to present if Claimant was not going to submit additional evidence, the ALJ ruled from the bench in favor of the Respondents based upon the Exhibits submitted into the record.

ISSUES

The issues to be determined by this decision concern: (1) the Claimant's attempt to overcome the opinion of the Division Independent Medical Examiner (DIME), Anjmun Sharma, M.D., by clear and convincing evidence; (2) the Claimant's request for temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits if Dr. Sharma's maximum medical improvement (MMI) determination was overcome; (3) the Claimant's request for additional pre-MMI medical benefits, if Dr. Sharma's MMI opinion were overruled; and, (4)the Claimant's request for a change of physician.

The Claimant also endorsed average weekly wage (AWW) as an issue for hearing, but at the hearing he conceded he had no contrary evidence to dispute the admitted AWW and he withdrew the issue.

The standard of proof for overcoming the DIME is by "clear and convincing evidence." The standard of proof for change of physician is "preponderance of the evidence."

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was born on August 20, 1976, and he was 40 years of age at the date of the hearing.

2. The Claimant was working for the Employer as a Rig Hand in Carlsbad, New Mexico, on the date of the injury. He had been employed with the Employer for approximately three weeks at the time of the injury.

3. Ultimately, the Respondents filed an amended FAL, dated February 9, 2016, based on DIME dr. Sharma's opinion, admitting for 11% whole person permanent impairment for the back; an MMI date of April 28, 2015; an AWW of $1,057.42; TTD benefits through April 19, 2015; and, reasonably necessary and causally related post-MMI medical maintenance benefits (*Grover* medicals) [Respondents' Exhibit L]..

The Injury Incident

4. The Claimant suffered a work-related injury on May 8, 2014 when he slipped and fell off a pipe. Claimant's "First Report of Injury" that he completed referenced that he injured his left lower back and suffered a "pinch nerve lower back" (Claimant's Exhibit 9).

5. The Respondents first filed a General Admission of Liability (GAL) on May 22, 2014, which admitted for ongoing temporary TTD benefits, medical benefits, and an AWW of $1,057.42.

The Claimant's Medical Treatment Post-Injury

6. The Claimant's primary authorized treating provider (ATP) in this claim is Aviation and Occupational Medicine. The Claimant was first evaluated by Hector J. Brignoni, M.D., on May 15, 2014. Dr. Brignoni is an authorized treating physician (ATP). The Claimant complained of pain in his left lower back, radiating into his left leg, as well as pain in his mid-back (Respondents' Exhibit E, pp. 110-111). Dr. Brignoni diagnosed the Claimant with a lumbar strain and thoracic strain, and he referred the Claimant for physical therapy (*Id.* at pp. 115-116).

7. The Claimant thereafter moved to Tulsa, Oklahoma, where he was evaluated by Randal Hendricks, M.D., an orthopedic surgeon. Claimant had a lumbar MRI (magnetic resonance imaging) on June 26, 2014 (Respondents' Exhibit J, p. 216). It showed mild findings with a small annular tear and disc protrusion at L5-S1. *Id.* Dr. Hendricks authored a note dated August 6, 2014 in which he noted that the Claimant continued to complain of significant low back and leg pain (Claimant's Exhibit 1). Dr. Hendricks noted attempting an epidural steroid injection which only provided temporary relief, and he recommended the Claimant undergo a discectomy and fusion at L5-S1. *Id.* There is no discussion of thoracic complaints in this record or any of Dr. Hendricks' records submitted into evidence. *See Id.* However, Dr. Hendricks referred the Claimant

for a thoracic MRI, which occurred on September 12, 2014. The MRI noted a moderate right disc protrusion at T7-8 without associated cord impingement, and small protrusions at T8-9 and T9-10 (Respondents' Exhibit J, p. 218).

8. James Ogsbury III, M.D., a neurosurgeon, reviewed the request for lumbar surgery and recommended denial of the requested surgery on the basis that a fusion was not indicated without six months of conservative care and in the absence of spinal instability (Claimant's Exhibit 3).

9. The Claimant moved back to Colorado. He was scheduled for an independent medical examination (IME) with Brian Reiss, M.D., an orthopedic surgeon, at the request of the Respondents. He also resumed treatment with Aviation and Occupational Medicine. On November 17, 2014, Dr. Brignoni noted re-evaluating the Claimant for the first time, he referred the Claimant to Franklin Shih, M.D., for evaluation and treatment, and Dr. Shih noted waiting on the results of the Dr. Reiss IME (Respondents' Exhibit E*,* p. 117).

10. Dr. Shih first evaluated the Claimant on November 19, 2014 (Respondents' Exhibit H, pp. 176-178). Dr. Shih noted that the Claimant complained of mid back and low back pain, but his examination was "unremarkable." *Id.* Dr. Shih noted that he did not recommend that the Claimant proceed with any more injections or surgery, but he recommended focused physical therapy and acupuncture. *Id.*

Dr. Reiss' Independent Medical Examination (IME)

11. Dr. Reiss performed his IME of the Claimant on December 10, 2014. He noted that he agreed with the treatment outlined by Dr. Shih and recommended a core strengthening, aerobic conditioning, and stretching program (Respondents' Exhibit F). He disagreed with Dr. Hendricks' prior request for surgery in the absence of instability, and he noted that there were no objective findings to identify the true pain generator. *Id.* Dr. Reiss noted at that time that he believed the Claimant's work injury caused a thoracolumbar strain. *Id.*

Continued Medical Treatment

12. As of December 23, 2014, the Claimant was continuing his treatment with Dr. Shih, another ATP, who noted again that he informed the Claimant that "if I was in his shoes I would not pursue this into more invasive treatment" (Respondents' Exhibit H, p. 184). On December 30, 2014, Dr. Shih reiterated his belief that the Claimant should not pursue more invasive treatment for his mid or low back pain. *Id.* at p. 186. He

referred the Claimant for an appointment with Nicholas K. Olsen, D.O., and scheduled an EMG. *Id.* Dr. Olsen became an ATP.

13. Dr. Shih performed the EMG for ongoing low back pain and alleged left leg symptoms on January 6, 2015. *Id.* at p. 188. The EMG was normal. *Id.*

14. Dr. Olsen evaluated the Claimant on January 13, 2015 (Respondents' Exhibit I, pp. 193-194). Dr. Olsen recommended, on the Claimant "reassurance that he has predominantly mechanical pain in his thoracic spine," a left S1 transforaminal epidural steroid injection for his lumbar spine complaints. *Id.* He administered the injection on January 27, 2015. *Id.* The Claimant reported no relief from the injection, so Dr. Olsen recommended a left L3-4 medial branch block and L5 dorsal primary ramus block. *Id.* at p. 198. Those injections occurred on February 17, 2015. *Id.* at p. 201.

15. Michael V. Ladwig, M.D., authored a letter to Pinnacol Assurance on February 16, 2015, stating that he agreed that the Claimant was not a surgical candidate for his lumbar spine pathophysiology after reviewing Dr. Reiss's IME report (Respondents' Exhibit E, p. 136). Dr. Ladwig was also an ATP.

16. The Claimant reported to Dr. Olsen on February 23, 2015 that he received only temporary relief from the injections (Respondents' Exhibit I, p. 203). Dr. Olsen recommended either a surgical consultation or an attempt at work conditioning. *Id.* Dr. Olsen referred the Claimant for work conditioning, and he later referred the Claimant to Andrew Castro, M.D., an orthopedic surgeon, for a surgical consultation.

17. Dr. Ladwig referred the Claimant for an updated thoracic MRI on February 25, 2015 (Respondents' Exhibit E, p. 137). The MRI occurred on February 28, 2015. It showed small central disc protrusions at T7-8, and T8-9 without significant foraminal compromise or cord compression (Respondents' Exhibit J, p. 220).

18. On March 9, 2015, the Claimant reported continuing low back and left lower extremity symptoms to Dr. Olsen. *Id.* at p. 206. There were no complaints mentioned as to the Claimant's mid or upper back at this time. *Id.*

19. Dr. Castro evaluated the Claimant on April 1, 2015 (Respondents' Exhibit G). Dr. Castro referred to the Claimant's complaints of low back pain, and there were no references to complaints of mid or upper back pain in this evaluation. *Id.* Dr. Castro definitively stated that that he felt Dr. Hendrick's prior opinion in favor of surgery was "not indicated and indeed further, I think, somewhat inappropriate." *Id.* at p. 173. He went on to state that he did not believe the Claimant would benefit from surgery of any kind, and he recommended the Claimant continue his conservative treatment. *Id.*

20. Dr. Olsen re-examined the Claimant on April 6, 2015 (Respondents' Exhibit I, p. 208). On re-examination, the Claimant's only abnormal finding was some

tenderness and mild deconditioning in the lower back. There was again no discussion of mid to upper back symptoms at this time.

21. ATP Dr. Olsen placed the Claimant at MMI on April 20, 2015. There were no references to mid to upper back complaints at this time either. Dr. Olsen provided a 7% whole person impairment rating for the Claimant's low back. *Id.* He recommended maintenance care of a 12 month health club membership.

22. Dr. Brignoni re-examined the Claimant on April 28, 2015. He noted the Claimant brought up his ongoing concerns with his upper back/thoracic region (Respondents' Exhibit E, p. 143). Dr. Brignoni in his handwritten notes wrote that he discussed in length with the Claimant about his thoracic MRI and the anatomy shown therein. *Id.* at p. 145. Dr. Brignoni confirmed Dr. Olsen's MMI finding, which Dr. Brignoni made effective as of that date, April 28, 2015. *Id.* He also confirmed post-MMI medications as a 12 month gym membership only. *Id.* The FAL was based on the opinions of ATPs Dr. Brignoni and Dr. Olsen.

23. The Claimant returned to see Dr. Brignoni on May 14, 2015, complaining of continued pain and was referred for additional physical therapy sessions (Respondents' Exhibit E, p. 147).

Dr. Sharma's DIME Opinion

24. Dr. Sharma performed the DIME on August 6, 2015 (Respondents' Exhibit C). Dr. Sharma documented that the Claimant had complained of both low back pain and mid-back pain as a result of his injury. *Id.* at p. 16. Dr. Sharma documented a comprehensive review of the Claimant's medical records, which discussed the Claimant's lumbar and thoracic complaints throughout his claim. *See Id.* Dr. Sharma documented that the Claimant had high pain behaviors and it was difficult for him to understand how the Claimant's pain was so out of proportion to the examination. *Id.* at p. 34. Dr. Sharma nonetheless assigned an 11% whole person impairment rating for the Claimant's lumbar spine. *Id.* at p. 35. Ultimately, the Respondents filed an amended FAL, based on Dr. Sharma's DIME opinions.

25. Dr. Sharma noted that the Claimant was requesting an additional surgical consultation. *Id.* Dr. Sharma discussed that he "was not necessarily sure that this was the best option for the patient . . ." *Id.* He also noted that he was skeptical the referral would be helpful, but he was willing to give him the opportunity to discuss with one more surgeon. *Id.* at p. 36. He therefore withheld finding that the Claimant was at MMI at that time. His diagnoses for the Claimant included low back pain but no thoracic diagnosis.

26. Dr. Sharma's deposition occurred on November 30, 2015. Dr. Sharma was asked repeatedly regarding his lack of findings for thoracic spine. Dr. Sharma

testified that he did not examine the thoracic spine, because “I do not believe he was complaining of any thoracic symptoms” (Respondents’ Exhibit D, p. 51, lines. 7-8). Dr. Sharma went on to clarify that he did not feel the thoracic spine was the pain generator for this claim, and he therefore did not feel it was appropriate to include it into the claim. *Id.* at p. 94, ll. 23-25. He explicitly stated that, “I do not think that the thoracic spine is involved necessarily.” *Id.* at p. 72, ll. 19-21. He also noted that the Claimant’s complaints as to his thoracic spine had been more sporadic than his low back complaints. *Id.* at p. 95, ll. 13-15.

27. Dr. Sharma further testified that he had not had Dr. Castro’s surgical evaluation report at the time he conducted the DIME. *Id.* at p. 101, ll. 2-4. He testified that he was curious as to why Dr. Castro felt the Claimant was not a surgical candidate, that he would like to review the report, and he would be willing to answer additional questions based upon the report. *Id.* at pp. 101-102.

28. Dr. Sharma authored an Addendum Report on January 27, 2016 based upon his subsequent review of Dr. Castro’s report (Respondents’ Exhibit C, pp. 42-43) He noted that Dr. Castro’s report clearly indicated that the Claimant was not a surgical candidate. *Id.* at p. 43. He concurred with Dr. Castro’s assessment and placed the Claimant at MMI as of April 28, 2015, the previous date assigned by Dr. Brignoni. *Id.*

The Claimant’s Post-DIME Medical Treatment

29. Dr. Reiss performed a follow-up IME on June 8, 2016. Dr. Reiss noted that the Claimant was complaining of 10/10 pain, but he displayed no corresponding pain behaviors and was able to move with no apparent distress (Respondents’ Exhibit F, pp. 164-168). Dr. Reiss agreed that the Claimant was at MMI. *Id.* He stated that he doubted that the Claimant’s thoracic complaints were related to his work injury. *Id.* Dr. Reiss further was of the opinion that the Claimant’s psychological screening was very concerning for depression and potentially a somatic disorder. *Id.* He recommended a psychological evaluation be performed as maintenance care. *Id.*

30. The Claimant was evaluated by Dr. Ladwig again on October 23, 2015. Dr. Ladwig noted at that time that the Claimant’s pain, “is primarily in low back.” *Id.* at p. 151.

Claimant’s Change of Physician Request

31. With respect to the Claimant’s change of physician request, the Claimant admitted at hearing that he had no evidence to submit verifying the identity of a physician to whom he was requesting a change of physician. Therefore, Claimant’s request to change physicians should be denied.

Findings, Re: The Claimant Voluntarily Declining to Testify

32. The Claimant advised the ALJ and the Respondents at the outset of the hearing that he had no additional evidence to provide other than what had been submitted as documentary exhibits. The ALJ listened to the arguments of the parties and ruled on the evidence submitted.

33. Although the Claimant's thoracic spine was discussed and evaluated in the claim, the evidence demonstrates that towards the end of the Claimant's treatment his complaints were almost entirely focused on his lumbar spine. There is nothing on the face of Dr. Sharma's opinion which indicates that he was clearly wrong in excluding any remaining complaints from the claim and determining that the Claimant was at MMI. In fact, Dr. Sharma's report and deposition testimony clearly demonstrate that he was aware of and considered the Claimant's prior thoracic complaints, but he finally determined that the Claimant had no thoracic complaints on the date of the DIME, the thoracic spine was not a pain generator, and Dr. Sharma did not believe a rating for the thoracic spine should have been included in a rating for this claim. Ultimately, the ALJ finds that the Claimant failed to present evidence sufficient to prove that Dr. Sharma was clearly wrong in his opinions.

Ultimate Findings

34. Based on the findings herein above, the ALJ finds DIME Dr. Sharma's opinions persuasive, credible and based on the medical records including the Claimant's earlier complaints of thoracic pain. Indeed, the Claimant presented no medical evidence which contradicts Dr. Sharma's findings, including his decision to exclude any impairment rating for the thoracic spine. To the contrary, Dr. Sharma's findings regarding MMI and impairment were entirely consistent with Dr. Olsen who assigned a lumbar rating only, with the physicians at Aviation and Occupational Medicine who incorporated Dr. Olsen's findings, and with Dr. Reiss who agreed with Dr. Sharma's MMI determination and determination that the Claimant's ongoing thoracic complaints were not a ratable condition to include in the claim.

35. The ALJ finds that the Claimant has failed to overcome the opinions of Dr. Sharma by showing that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. Sharma's failure to rate the Claimant's thoracic spine and placing the Claimant at MMI was in error. Therefore, the Claimant failed to overcome Dr. Sharma's DIME opinions by clear and convincing evidence.

36. The Claimant has failed to prove, by a preponderance of the evidence, that he is entitled to a change of physician.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, DIME Dr. Sharma's opinions were persuasive, credible and based on the medical records including the Claimant's earlier complaints of thoracic pain. Indeed, the Claimant presented no medical evidence which contradicts Dr. Sharma's findings, including his decision to exclude any impairment rating for the thoracic spine. To the contrary, Dr. Sharma's findings regarding MMI and impairment were entirely consistent with Dr. Olsen who assigned a lumbar rating only, with the physicians at Aviation and Occupational Medicine who incorporated Dr. Olsen's findings, and with Dr. Reiss who agreed with Dr. Sharma's MMI determination and determination that the Claimant's ongoing thoracic complaints were not a ratable condition to include in the claim.

Post-MMI Medical Benefits

b. As admitted in the latest FAL, the Claimant is entitled to causally-related and reasonably related post-MMI medical care and treatment. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988).

Change of Physician Request

c. If a claimant wants to change physicians, there is a statutory obligation to follow the prescribed procedures in § 8-43-404(5)(a), C.R.S.; *Yeck v. Indus. Claim Appeals Office,* 996 P.2d 228, 229 (Colo. App. 1999). The Act does not permit an injured worker to change physicians or employ additional physicians without notice and consent. *Pickett v. Colorado State Hospital,* 513 P.2d 228 (Colo. App. 1973). A claimant may, however, seek a change of physician upon a "proper showing." § 8-43-404(5)(a)(VI),C.R.S. As found, Claimant presented no evidence substantiating to whom he was requesting a change of physician or a basis for the same. He argued that he wanted a new physician located closer to where he lived and because Dr. Ladwig's office had told him they would not see him again. As found, the Claimant did not made a proper showing justifying a change of physician without any documentation of to whom he wanted to take over his care. Also, as found, the Claimant was unable to make a proper showing of the need for a change of physician when he was already released at MMI, Dr. Ladwig had seen the Claimant on multiple occasions post-MMI already, and the Respondents had filed an FAL which admitted for post-MMI medical care. The Claimant's request for a change of physician is accordingly denied.

Overcoming the DIME

d. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the Claimant failed to overcome DIME DR. Sharma's determination that the Claimant's thoracic spine was not ratable and the Claimant was therefore at MMI, with an 11% whole person permanent impairment rating by **clear and convincing evidence.**

Burden of Proof on Change of Physician

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant's request to have the maximum medical improvement and impairment rating determinations of the Division Independent Medical Examiner Anjmun Sharma, M.D. overcome is hereby denied and dismissed.

B. The ultimate Final Admission of Liability, dated February 9, 2016, is hereby adopted and approved as if fully restated herein. Any and all other benefits requested, including average weekly wage, that are inconsistent with the latest Final Admission of Liability are hereby denied and dismissed.

C. The Claimant's request for a change of physician is hereby denied and dismissed without prejudice to properly requesting a change of physician with the Respondents according to the procedures. *See* § 8-43-404 (5) (a) (VI), C.R.S.

DATED this______day of September 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-950-337-04

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 28, 2016 and August 22, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 6/28/16, Courtroom 4, beginning at 1:30 PM, and, ending at 2:10 PM; and, 8/22/16, Courtroom 3, beginning at 1:30 PM, and ending at 2:45 PM).

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection, After the conclusion of the hearing, closing of the evidence and bench ruling in favor of the Respondents on August 22, 2016, the Claimant filed additional medical reports from Dr. Gehrs, which may be considered by the Respondents concerning post maximum medical improvement (MMI) medical benefits, admitted in the Final Admission of Liability (FAL). Respondents' Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents. The proposed decision was filed, electronically, on August 29, 2016. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

PRELIMINARY MATTERS

At the outset of the hearing, the ALJ heard arguments from the Claimant and Respondents. Claimant admitted that he was attempting to overcome the determination of the Division Independent Medical Examiner (DIME), Anjmun Sharma, M.D., by clear and convincing evidence as to both maximum medical improvement (MMI) and degree of permanent impairment based upon his own disagreement with Dr. Sharma's decision to not find that his thoracic spine required continued medical care and/or an impairment rating arising from the admitted work injury. The ALJ confirmed with the Claimant that he had no additional testimonial evidence to rely upon, besides that which was contained in the exhibit packets, other than his arguments and commentary as to evidence in the Exhibits.

Upon confirmation that the Claimant did not intend to offer additional evidence, and after confirming with counsel for the Respondents that Respondents therefore had no additional evidence to present if Claimant was not going to submit additional evidence, the ALJ ruled from the bench in favor of the Respondents based upon the Exhibits submitted into the record.

ISSUES

The issues to be determined by this decision concern: (1) the Claimant's attempt to overcome the opinion of the Division Independent Medical Examiner (DIME), Anjmun Sharma, M.D., by clear and convincing evidence; (2) the Claimant's request for temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits if Dr. Sharma's maximum medical improvement (MMI) determination was overcome; (3) the Claimant's request for additional pre-MMI medical benefits, if Dr. Sharma's MMI opinion were overruled; and, (4)the Claimant's request for a change of physician.

The Claimant also endorsed average weekly wage (AWW) as an issue for hearing, but at the hearing he conceded he had no contrary evidence to dispute the admitted AWW and he withdrew the issue.

The standard of proof for overcoming the DIME is by "clear and convincing evidence." The standard of proof for change of physician is "preponderance of the evidence."

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was born on August 20, 1976, and he was 40 years of age at the date of the hearing.

2. The Claimant was working for the Employer as a Rig Hand in Carlsbad, New Mexico, on the date of the injury. He had been employed with the Employer for approximately three weeks at the time of the injury.

3. Ultimately, the Respondents filed an amended FAL, dated February 9, 2016, based on DIME dr. Sharma's opinion, admitting for 11% whole person permanent impairment for the back; an MMI date of April 28, 2015; an AWW of $1,057.42; TTD benefits through April 19, 2015; and, reasonably necessary and causally related post-MMI medical maintenance benefits (*Grover* medicals) [Respondents' Exhibit L]..

The Injury Incident

4. The Claimant suffered a work-related injury on May 8, 2014 when he slipped and fell off a pipe. Claimant's "First Report of Injury" that he completed referenced that he injured his left lower back and suffered a "pinch nerve lower back" (Claimant's Exhibit 9).

5. The Respondents first filed a General Admission of Liability (GAL) on May 22, 2014, which admitted for ongoing temporary TTD benefits, medical benefits, and an AWW of $1,057.42.

The Claimant's Medical Treatment Post-Injury

6. The Claimant's primary authorized treating provider (ATP) in this claim is Aviation and Occupational Medicine. The Claimant was first evaluated by Hector J. Brignoni, M.D., on May 15, 2014. Dr. Brignoni is an authorized treating physician (ATP). The Claimant complained of pain in his left lower back, radiating into his left leg, as well as pain in his mid-back (Respondents' Exhibit E, pp. 110-111). Dr. Brignoni diagnosed the Claimant with a lumbar strain and thoracic strain, and he referred the Claimant for physical therapy (*Id.* at pp. 115-116).

7. The Claimant thereafter moved to Tulsa, Oklahoma, where he was evaluated by Randal Hendricks, M.D., an orthopedic surgeon. Claimant had a lumbar MRI (magnetic resonance imaging) on June 26, 2014 (Respondents' Exhibit J, p. 216). It showed mild findings with a small annular tear and disc protrusion at L5-S1. *Id.* Dr. Hendricks authored a note dated August 6, 2014 in which he noted that the Claimant continued to complain of significant low back and leg pain (Claimant's Exhibit 1). Dr. Hendricks noted attempting an epidural steroid injection which only provided temporary relief, and he recommended the Claimant undergo a discectomy and fusion at L5-S1. *Id.* There is no discussion of thoracic complaints in this record or any of Dr. Hendricks' records submitted into evidence. *See Id.* However, Dr. Hendricks referred the Claimant

for a thoracic MRI, which occurred on September 12, 2014. The MRI noted a moderate right disc protrusion at T7-8 without associated cord impingement, and small protrusions at T8-9 and T9-10 (Respondents' Exhibit J, p. 218).

8. James Ogsbury III, M.D., a neurosurgeon, reviewed the request for lumbar surgery and recommended denial of the requested surgery on the basis that a fusion was not indicated without six months of conservative care and in the absence of spinal instability (Claimant's Exhibit 3).

9. The Claimant moved back to Colorado. He was scheduled for an independent medical examination (IME) with Brian Reiss, M.D., an orthopedic surgeon, at the request of the Respondents. He also resumed treatment with Aviation and Occupational Medicine. On November 17, 2014, Dr. Brignoni noted re-evaluating the Claimant for the first time, he referred the Claimant to Franklin Shih, M.D., for evaluation and treatment, and Dr. Shih noted waiting on the results of the Dr. Reiss IME (Respondents' Exhibit E*,* p. 117).

10. Dr. Shih first evaluated the Claimant on November 19, 2014 (Respondents' Exhibit H, pp. 176-178). Dr. Shih noted that the Claimant complained of mid back and low back pain, but his examination was "unremarkable." *Id.* Dr. Shih noted that he did not recommend that the Claimant proceed with any more injections or surgery, but he recommended focused physical therapy and acupuncture. *Id.*

Dr. Reiss' Independent Medical Examination (IME)

11. Dr. Reiss performed his IME of the Claimant on December 10, 2014. He noted that he agreed with the treatment outlined by Dr. Shih and recommended a core strengthening, aerobic conditioning, and stretching program (Respondents' Exhibit F). He disagreed with Dr. Hendricks' prior request for surgery in the absence of instability, and he noted that there were no objective findings to identify the true pain generator. *Id.* Dr. Reiss noted at that time that he believed the Claimant's work injury caused a thoracolumbar strain. *Id.*

Continued Medical Treatment

12. As of December 23, 2014, the Claimant was continuing his treatment with Dr. Shih, another ATP, who noted again that he informed the Claimant that "if I was in his shoes I would not pursue this into more invasive treatment" (Respondents' Exhibit H, p. 184). On December 30, 2014, Dr. Shih reiterated his belief that the Claimant should not pursue more invasive treatment for his mid or low back pain. *Id.* at p. 186. He

referred the Claimant for an appointment with Nicholas K. Olsen, D.O., and scheduled an EMG. *Id.* Dr. Olsen became an ATP.

13. Dr. Shih performed the EMG for ongoing low back pain and alleged left leg symptoms on January 6, 2015. *Id.* at p. 188. The EMG was normal. *Id.*

14. Dr. Olsen evaluated the Claimant on January 13, 2015 (Respondents' Exhibit I, pp. 193-194). Dr. Olsen recommended, on the Claimant "reassurance that he has predominantly mechanical pain in his thoracic spine," a left S1 transforaminal epidural steroid injection for his lumbar spine complaints. *Id.* He administered the injection on January 27, 2015. *Id.* The Claimant reported no relief from the injection, so Dr. Olsen recommended a left L3-4 medial branch block and L5 dorsal primary ramus block. *Id.* at p. 198. Those injections occurred on February 17, 2015. *Id.* at p. 201.

15. Michael V. Ladwig, M.D., authored a letter to Pinnacol Assurance on February 16, 2015, stating that he agreed that the Claimant was not a surgical candidate for his lumbar spine pathophysiology after reviewing Dr. Reiss's IME report (Respondents' Exhibit E, p. 136). Dr. Ladwig was also an ATP.

16. The Claimant reported to Dr. Olsen on February 23, 2015 that he received only temporary relief from the injections (Respondents' Exhibit I, p. 203). Dr. Olsen recommended either a surgical consultation or an attempt at work conditioning. *Id.* Dr. Olsen referred the Claimant for work conditioning, and he later referred the Claimant to Andrew Castro, M.D., an orthopedic surgeon, for a surgical consultation.

17. Dr. Ladwig referred the Claimant for an updated thoracic MRI on February 25, 2015 (Respondents' Exhibit E, p. 137). The MRI occurred on February 28, 2015. It showed small central disc protrusions at T7-8, and T8-9 without significant foraminal compromise or cord compression (Respondents' Exhibit J, p. 220).

18. On March 9, 2015, the Claimant reported continuing low back and left lower extremity symptoms to Dr. Olsen. *Id.* at p. 206. There were no complaints mentioned as to the Claimant's mid or upper back at this time. *Id.*

19. Dr. Castro evaluated the Claimant on April 1, 2015 (Respondents' Exhibit G). Dr. Castro referred to the Claimant's complaints of low back pain, and there were no references to complaints of mid or upper back pain in this evaluation. *Id.* Dr. Castro definitively stated that that he felt Dr. Hendrick's prior opinion in favor of surgery was "not indicated and indeed further, I think, somewhat inappropriate." *Id.* at p. 173. He went on to state that he did not believe the Claimant would benefit from surgery of any kind, and he recommended the Claimant continue his conservative treatment. *Id.*

20. Dr. Olsen re-examined the Claimant on April 6, 2015 (Respondents' Exhibit I, p. 208). On re-examination, the Claimant's only abnormal finding was some

tenderness and mild deconditioning in the lower back. There was again no discussion of mid to upper back symptoms at this time.

21. ATP Dr. Olsen placed the Claimant at MMI on April 20, 2015. There were no references to mid to upper back complaints at this time either. Dr. Olsen provided a 7% whole person impairment rating for the Claimant's low back. *Id.* He recommended maintenance care of a 12 month health club membership.

22. Dr. Brignoni re-examined the Claimant on April 28, 2015. He noted the Claimant brought up his ongoing concerns with his upper back/thoracic region (Respondents' Exhibit E, p. 143). Dr. Brignoni in his handwritten notes wrote that he discussed in length with the Claimant about his thoracic MRI and the anatomy shown therein. *Id.* at p. 145. Dr. Brignoni confirmed Dr. Olsen's MMI finding, which Dr. Brignoni made effective as of that date, April 28, 2015. *Id.* He also confirmed post-MMI medications as a 12 month gym membership only. *Id.* The FAL was based on the opinions of ATPs Dr. Brignoni and Dr. Olsen.

23. The Claimant returned to see Dr. Brignoni on May 14, 2015, complaining of continued pain and was referred for additional physical therapy sessions (Respondents' Exhibit E, p. 147).

Dr. Sharma's DIME Opinion

24. Dr. Sharma performed the DIME on August 6, 2015 (Respondents' Exhibit C). Dr. Sharma documented that the Claimant had complained of both low back pain and mid-back pain as a result of his injury. *Id.* at p. 16. Dr. Sharma documented a comprehensive review of the Claimant's medical records, which discussed the Claimant's lumbar and thoracic complaints throughout his claim. *See Id.* Dr. Sharma documented that the Claimant had high pain behaviors and it was difficult for him to understand how the Claimant's pain was so out of proportion to the examination. *Id.* at p. 34. Dr. Sharma nonetheless assigned an 11% whole person impairment rating for the Claimant's lumbar spine. *Id.* at p. 35. Ultimately, the Respondents filed an amended FAL, based on Dr. Sharma's DIME opinions.

25. Dr. Sharma noted that the Claimant was requesting an additional surgical consultation. *Id.* Dr. Sharma discussed that he "was not necessarily sure that this was the best option for the patient . . ." *Id.* He also noted that he was skeptical the referral would be helpful, but he was willing to give him the opportunity to discuss with one more surgeon. *Id.* at p. 36. He therefore withheld finding that the Claimant was at MMI at that time. His diagnoses for the Claimant included low back pain but no thoracic diagnosis.

26. Dr. Sharma's deposition occurred on November 30, 2015. Dr. Sharma was asked repeatedly regarding his lack of findings for thoracic spine. Dr. Sharma

testified that he did not examine the thoracic spine, because “I do not believe he was complaining of any thoracic symptoms” (Respondents’ Exhibit D, p. 51, lines. 7-8). Dr. Sharma went on to clarify that he did not feel the thoracic spine was the pain generator for this claim, and he therefore did not feel it was appropriate to include it into the claim. *Id.* at p. 94, ll. 23-25. He explicitly stated that, “I do not think that the thoracic spine is involved necessarily.” *Id.* at p. 72, ll. 19-21. He also noted that the Claimant’s complaints as to his thoracic spine had been more sporadic than his low back complaints. *Id.* at p. 95, ll. 13-15.

27. Dr. Sharma further testified that he had not had Dr. Castro’s surgical evaluation report at the time he conducted the DIME. *Id.* at p. 101, ll. 2-4. He testified that he was curious as to why Dr. Castro felt the Claimant was not a surgical candidate, that he would like to review the report, and he would be willing to answer additional questions based upon the report. *Id.* at pp. 101-102.

28. Dr. Sharma authored an Addendum Report on January 27, 2016 based upon his subsequent review of Dr. Castro’s report (Respondents’ Exhibit C, pp. 42-43) He noted that Dr. Castro’s report clearly indicated that the Claimant was not a surgical candidate. *Id.* at p. 43. He concurred with Dr. Castro’s assessment and placed the Claimant at MMI as of April 28, 2015, the previous date assigned by Dr. Brignoni. *Id.*

The Claimant’s Post-DIME Medical Treatment

29. Dr. Reiss performed a follow-up IME on June 8, 2016. Dr. Reiss noted that the Claimant was complaining of 10/10 pain, but he displayed no corresponding pain behaviors and was able to move with no apparent distress (Respondents’ Exhibit F, pp. 164-168). Dr. Reiss agreed that the Claimant was at MMI. *Id.* He stated that he doubted that the Claimant’s thoracic complaints were related to his work injury. *Id.* Dr. Reiss further was of the opinion that the Claimant’s psychological screening was very concerning for depression and potentially a somatic disorder. *Id.* He recommended a psychological evaluation be performed as maintenance care. *Id.*

30. The Claimant was evaluated by Dr. Ladwig again on October 23, 2015. Dr. Ladwig noted at that time that the Claimant’s pain, “is primarily in low back.” *Id.* at p. 151.

Claimant’s Change of Physician Request

31. With respect to the Claimant’s change of physician request, the Claimant admitted at hearing that he had no evidence to submit verifying the identity of a physician to whom he was requesting a change of physician. Therefore, Claimant’s request to change physicians should be denied.

Findings, Re: The Claimant Voluntarily Declining to Testify

32. The Claimant advised the ALJ and the Respondents at the outset of the hearing that he had no additional evidence to provide other than what had been submitted as documentary exhibits. The ALJ listened to the arguments of the parties and ruled on the evidence submitted.

33. Although the Claimant's thoracic spine was discussed and evaluated in the claim, the evidence demonstrates that towards the end of the Claimant's treatment his complaints were almost entirely focused on his lumbar spine. There is nothing on the face of Dr. Sharma's opinion which indicates that he was clearly wrong in excluding any remaining complaints from the claim and determining that the Claimant was at MMI. In fact, Dr. Sharma's report and deposition testimony clearly demonstrate that he was aware of and considered the Claimant's prior thoracic complaints, but he finally determined that the Claimant had no thoracic complaints on the date of the DIME, the thoracic spine was not a pain generator, and Dr. Sharma did not believe a rating for the thoracic spine should have been included in a rating for this claim. Ultimately, the ALJ finds that the Claimant failed to present evidence sufficient to prove that Dr. Sharma was clearly wrong in his opinions.

Ultimate Findings

34. Based on the findings herein above, the ALJ finds DIME Dr. Sharma's opinions persuasive, credible and based on the medical records including the Claimant's earlier complaints of thoracic pain. Indeed, the Claimant presented no medical evidence which contradicts Dr. Sharma's findings, including his decision to exclude any impairment rating for the thoracic spine. To the contrary, Dr. Sharma's findings regarding MMI and impairment were entirely consistent with Dr. Olsen who assigned a lumbar rating only, with the physicians at Aviation and Occupational Medicine who incorporated Dr. Olsen's findings, and with Dr. Reiss who agreed with Dr. Sharma's MMI determination and determination that the Claimant's ongoing thoracic complaints were not a ratable condition to include in the claim.

35. The ALJ finds that the Claimant has failed to overcome the opinions of Dr. Sharma by showing that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. Sharma's failure to rate the Claimant's thoracic spine and placing the Claimant at MMI was in error. Therefore, the Claimant failed to overcome Dr. Sharma's DIME opinions by clear and convincing evidence.

36. The Claimant has failed to prove, by a preponderance of the evidence, that he is entitled to a change of physician.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, DIME Dr. Sharma's opinions were persuasive, credible and based on the medical records including the Claimant's earlier complaints of thoracic pain. Indeed, the Claimant presented no medical evidence which contradicts Dr. Sharma's findings, including his decision to exclude any impairment rating for the thoracic spine. To the contrary, Dr. Sharma's findings regarding MMI and impairment were entirely consistent with Dr. Olsen who assigned a lumbar rating only, with the physicians at Aviation and Occupational Medicine who incorporated Dr. Olsen's findings, and with Dr. Reiss who agreed with Dr. Sharma's MMI determination and determination that the Claimant's ongoing thoracic complaints were not a ratable condition to include in the claim.

Post-MMI Medical Benefits

b. As admitted in the latest FAL, the Claimant is entitled to causally-related and reasonably related post-MMI medical care and treatment. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988).

Change of Physician Request

c. If a claimant wants to change physicians, there is a statutory obligation to follow the prescribed procedures in § 8-43-404(5)(a), C.R.S.; *Yeck v. Indus. Claim Appeals Office,* 996 P.2d 228, 229 (Colo. App. 1999). The Act does not permit an injured worker to change physicians or employ additional physicians without notice and consent. *Pickett v. Colorado State Hospital,* 513 P.2d 228 (Colo. App. 1973). A claimant may, however, seek a change of physician upon a "proper showing." § 8-43-404(5)(a)(VI),C.R.S. As found, Claimant presented no evidence substantiating to whom he was requesting a change of physician or a basis for the same. He argued that he wanted a new physician located closer to where he lived and because Dr. Ladwig's office had told him they would not see him again. As found, the Claimant did not made a proper showing justifying a change of physician without any documentation of to whom he wanted to take over his care. Also, as found, the Claimant was unable to make a proper showing of the need for a change of physician when he was already released at MMI, Dr. Ladwig had seen the Claimant on multiple occasions post-MMI already, and the Respondents had filed an FAL which admitted for post-MMI medical care. The Claimant's request for a change of physician is accordingly denied.

Overcoming the DIME

d. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the Claimant failed to overcome DIME DR. Sharma's determination that the Claimant's thoracic spine was not ratable and the Claimant was therefore at MMI, with an 11% whole person permanent impairment rating by **clear and convincing evidence.**

Burden of Proof on Change of Physician

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant's request to have the maximum medical improvement and impairment rating determinations of the Division Independent Medical Examiner Anjmun Sharma, M.D. overcome is hereby denied and dismissed.

B. The ultimate Final Admission of Liability, dated February 9, 2016, is hereby adopted and approved as if fully restated herein. Any and all other benefits requested, including average weekly wage, that are inconsistent with the latest Final Admission of Liability are hereby denied and dismissed.

C. The Claimant's request for a change of physician is hereby denied and dismissed without prejudice to properly requesting a change of physician with the Respondents according to the procedures. *See* § 8-43-404 (5) (a) (VI), C.R.S.

DATED this______day of September 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-983-648-07

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on, in Denver, Colorado. The hearing was digitally recorded (reference: 8/25/16, Courtroom 1, beginning at 8:30 AM, and ending at 10:40 AM).

Claimant's Exhibits 1, 2 and 4 through 12 were admitted into evidence, without objection. Respondents' objected to Claimant's Exhibit 3 (adjuster notes), the ALJ reserved ruling thereon and ultimately sustains the objection. Respondents' Exhibits A through G (a video of the Claimant at work during the time of the alleged injury) were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was filed, electronically, on August 31, 2016. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether Claimant sustained a compensable injury to his left shoulder on May 14, 2015; If so, whether the Claimant is entitled to reasonably necessary medical benefits; whether the Claimant is entitled to temporary total disability (TTD) benefits from July 2, 2015 to January 22, 2016; and, whether the Respondents proved that the Claimant was responsible for termination and therefore not entitled to temporary benefits

The Claimant bears the burden of proof, by a preponderance of the evidence on all issues with the exception of "responsibility for termination," in which case the Respondents bear the burden of proof.

FINDINGS OF FACT

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

Stipulations and Findings

At the commencement of the hearing, the parties stipulated and the ALJ finds:

1. If compensable, the Claimant's average weekly wage (AWW) is $1,131.06.

2. If compensable, the Claimant's authorized treating physicians (ATPs) are at Injury Care Colorado, Anthony Euser, M.D. and Adam Bonner, PA-C.

3. The Claimant received unemployment benefits (UI) beginning July 4, 2015 through February 28, 2016 at the weekly rate of $502.00, except for September 1, 2015 to October 25, 2015.

Preliminary Findings

4. The Claimant was born on March 17, 1962 and was 54 years of age at the time of the hearing.

5. The Claimant began working for the Employer on July 3, 2014. The Employer manufactures sheet metal and coils.

6. The Claimant was a truck driver for the Employer. His job duties included securing and un-securing loads of sheet metal and coils and transporting the loads to and from destinations in Colorado.

7. The Claimant's job of securing the loads required him to tie down straps. This entailed tossing the straps from the driver's side to the passenger's side, affixing the straps to hooks and then ratcheting the straps down after placing protective covers between the straps and the sheet metal. Upon delivery, the secured straps had to be "un-ratcheted."

The Alleged Injury Incident

8. On May 14, 2015, the Claimant alleged that, at approximately 11:30 AM, while securing a load, he tripped on a strap and fell with his left shoulder going into the load and then he fell to the ground.

9. The Employer had continuous real-time equipment and cameras located on the south side of the facility. Review of the continuous real-time video (Respondents' Exhibit G) established that the alleged trip and fall could not possibly have occurred.

10. The continuous real-time, unedited, nature of the video evidences that no "doctoring" of the video occurred. The Claimant confirmed, on cross-examination, that the video showed the location and the time when the alleged trip and fall occurred. He further conceded that the video does not establish the trip and fall occurred nor did he offer any credible explanation why it did not show his trip and fall. The video is credible and persuasive.

11. Although there was medical documentation that Claimant had a torn rotator cuff in his left shoulder, merely having medical documentation of pathology does not establish that pathology was caused by a compensable industrial injury, arising out of the course and scope of employment. The ALJ specifically finds that the credible evidence does not support that the pathology documented by the MRI (magnetic resonance imaging) was a direct or proximate result of the alleged May 14, 2015 incident.

Ultimate Findings

12. At the close of Claimant's case-in-chief, Respondents moved for a judgment in the nature of a directed verdict. Respondents argued that the continuous unedited video of the date, time and location of the alleged incident established that Claimant was not injured on the job. Therefore judgment should be entered in their favor.

13. The ALJ specifically finds that the video, introduced and shown during the Claimant's case-in-chief (Respondents' Exhibit G), is credible, persuasive and it conclusively refutes the Claimant's testimony concerning the alleged incident of May

14, 2015, thus, the ALJ is compelled to find that Claimant's testimony lacking in credibility.

14. At the conclusion of the Claimant's case-in-chief, he failed to prove, by preponderant evidence that he sustained a compensable injury to his left shoulder on May 14, 2015.

CONCLUSIONS OF LAW

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

Judgment in the Nature of a Directed Verdict

a. Colo. Rules of Civil Procedure, Rule 41(b) (1), provides that, after a plaintiff in a civil action *tried without a jury* has completed the presentation of his evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief. In determining whether to grant a motion to dismiss or in the nature of a directed verdict, the court is not required to view the evidence in the light most favorable to the plaintiff, as argued by a claimant. *Rowe v. Bowers*, 160 Colo. 379, 417 P.2d 503 (Colo. 1966)*; Blea v. Deluxe/Current, Inc.*, W.C. No. 3-940-062 [Indus. Claim Appeals Office (ICAO), June 18, 1997] (applying these principles to workers' compensation proceedings). Neither is the court required to "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the Claimant. Rather, the test is whether judgment for the respondents is justified on the claimant's evidence. *Amer. National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (Colo. App. 1970); *Bruce v. Moffat County Youth Care Center*, W. C. No. 4-311-203 (ICAO, March 23, 1998). The question of whether the Claimant carried this burden was one of fact for resolution by the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, at the close of Claimant's case-in-chief, the totality of the evidence revealed that the Claimant had not proven compensability by preponderant evidence. Therefore, a judgment in the nature of a directed verdict was appropriate.

Credibility

b. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). As found, the video (respondents' exhibit G), introduced and shown during the Claimant's case-in-chief, is credible, persuasive and it conclusively refutes the Claimant's testimony concerning the alleged incident of May 14, 2015, thus, the ALJ was compelled to find that Claimant's testimony lacking in credibility.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

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

DATED this______day of September 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

The issues determined by this decision are the same for the above referenced consolidated claims. The specific questions answered are:

I. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury to her left elbow on November 2nd/3rd, 2015 or alternatively on November 8th/9th as alleged in W.C. No. 5-001-385

II. Whether Claimant established by a preponderance of the evidence that she sustained a traumatic injury to her left knee arising out of and in the course and scope of her employment on January 2, 2016, as alleged in W.C. No. 5-007-049

III. Whether Claimant established by a preponderance of the evidence that she sustained a traumatic injury to her left elbow, left shoulder, and left upper extremity arising out of and in the course and scope of her employment on January 2, 2016, as alleged in W.C. No. 5-007-050,

IV. If Claimant has proven that a compensable injury occurred in any of the above referenced claims, whether she has proven, by a preponderance of the evidence, that the medical benefits she requests are causally related to that compensable work injury;

V. If Claimant has proven that she sustained a compensable injury in any of the above referenced claims, whether her average weekly wage (AWW) is $333.55 as calculated by Respondent;

VI. If Claimant has established that she sustained a compensable injury in any of the aforementioned, whether she has proven by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits;

VII. Whether Respondent established by a preponderance of the evidence that Claimant was responsible for her wage loss secondary to a voluntary resignation, thereby precluding her entitlement to temporary total disability (TTD) benefits.

FINDINGS OF FACT

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

Background

1. Respondent-Employer operates a convenience store in Limon, Colorado. Claimant worked as a cashier/customer service representative for Respondent-Employer. Claimant's duties included waiting on customers, stocking, counting cash and cleaning the store.

2. Claimant is currently 50 years old and has a complex medical history concerning her left knee, low back and left shoulder.

3. Claimant injured her left knee in 2010 while playing softball. Imaging at that time revealed a torn meniscus which was subsequently treated surgically. Claimant has had continued complaints of periodic knee and low back pain since 2010. On July 13, 2015, Claimant reported a two month duration of left lateral knee pain radiating into the left hip which was aggravated by standing and squatting. Medical restrictions of no "prolonged standing and no lifting over 20 pounds were imposed on July 20, 2015.

4. On July 30, 2015, Claimant's restrictions were clarified and it was further recommended that Claimant have a "bench step stool for stocking lower shelves, preferably with a handle to aid in standing and back up." Claimant returned to work with these restrictions. Follow-up with an orthopedic specialist was planned.

5. Claimant was seen by her primary care provider on August 10, 2015 for continued left knee and low back pain.

6. On August 18, 2015, Claimant was evaluated by Dr. Adams who directed treatment to Claimant's low back. Treatment focus remained primarily on the low back and left hip through October 26, 2015 when Claimant reported increased symptoms as a consequence of straining her low back when her grandson jumped from a bed into her extended arms.

7. Claimant also has a history of prior injury to the left shoulder. On December 8, 2012, while working as a correctional officer, Claimant was shaking down a cell when she inadvertently knocked a metal box off a shelf onto her left shoulder. Claimant was evaluated by Kristen Janssen, PA-C who obtained x-rays which demonstrated mild AC arthritis. Claimant was diagnosed a trapezius strain and referred to physical therapy.

Claimant's Alleged November 2, 2015 Elbow Injury[1]

8. On November 2, 2015, Claimant was assigned to work the graveyard shift which extended into the early morning hours of November 3, 2015. As part of her work duties, Claimant testified that she began mopping the store in sections between 12:00

[1] Although Claimant testified that her injury occurred on November 2, 2015, the evidence presented establishes that her claimed injury would actually have occurred on November 3, 2015 since she was mopping between 12:00 and 4:00 AM. The ALJ finds that Claimant likely reported that her injury occurred on November 2nd and not November 3rd as her work shift actually began on November 2, 2015 and she was allegedly injured during this shift.

and 4:00 am. Claimant was alone in the store at the time. Claimant testified that she developed pain around the outside portion of her left elbow hours after mopping the store. Claimant also reportedly developed a large “bump” in the area of the left lateral elbow.

9. Claimant testified that she reported her elbow condition to Leticia Crosby, an assistant manager and her immediate supervisor, when Ms. Crosby reported to the store for her shift on November 3, 2015. According to Claimant, Ms. Crosby brushed off the report and delayed reporting the injury to her supervisor, Chris Jones until November 8, 2015, because she “did not know how to find nor fill out the workers’ compensation paperwork.”

10. Claimant testified that she then reported her injury again on November 8, 2015, by calling Chris Jones, the store manager. According to Claimant, she reported to Mr. Jones that her elbow injury occurred November 2, 2015. Claimant testified that during her discussion with Mr. Jones she felt “coerced” into using November 8, 2015 as the date of injury for her elbow claim despite her indication to Mr. Jones that the injury occurred November 2, 2015. Claimant suggested that Mr. Jones would not process the claim or allow her to get help and would otherwise retaliate against her if she did not use the November 8, 2015 date of injury as he demanded. Consequently, Claimant testified that she used November 8, 2015 as the date of injury to appease her employer.

11. The “Associate Work Related Injury/Illness Report” completed by Claimant and submitted into evidence documents the date of injury (DOI) as November 8, 2015. The completed report indicates that the injury took place between “somewhere” in the store between 12:00 and 4:00 am, while Claimant was mopping. Claimant’s report of injury was signed November 9, 2015. In addition to Claimant’s report of work related injury, the evidence presented establishes that Claimant was provided with a designated medical provider list from which she selected Peak Vista Community Health Care Center (hereinafter Peak Vista) as the provider to attend to her claimed elbow injury. Claimant signed the designation form November 9, 2015.

12. Regarding her decision to use November 8, 2015 as the DOI, Claimant was questioned about her interrogatory answers completed while she was attorney represented. In her responses, Claimant reported that the injury occurred November 8, 2015. Claimant responded to the obvious inconsistency between her hearing testimony, the documentary evidence and her prior interrogatory response by testifying simply that both her boss and her prior attorney told her to “lie” about the DOI. Claimant went on to testify that she subsequently corrected the record concerning the DOI by reporting to Dr. Ridings, an expert witness for Respondent-Employer that the injury occurred on November 2, 2015.

13. Review of Claimant’s medical records reveals that she was seen at Peak Vista on November 3, 2015 and again on November 9, 2015. Inspection of the record from the November 3, 2015 encounter reveals that Claimant reported to the clinic at 3:30 pm with complaints of back pain. Assessment included “lumbago with sciatica, left

side", "segmental and somatic dysfunction of thoracic region" as well as segmental and somatic dysfunction of lumbar region." Claimant ascribed her symptoms to "doing a lot of cleaning at work and not taking breaks" and generally overdoing it. The report is devoid of any mention of elbow pain, which by Claimant's report would have happened earlier that day during her graveyard shift.

14. Review of the November 9, 2015 report indicates that Claimant reported that she "hurt her elbow last week mopping at work." According to the report, Claimant complained of symptoms of one week in duration. Claimant reported tenderness and "moderate pain w/motion" of the left elbow."

15. Leticia Crosby testified that she was acting assistant manager when Claimant alleged she injured her elbow in November 2015. According to Ms. Crosby, Respondent-Employer had been accommodating work restrictions for Claimant since August 2015. Based upon the evidence presented, the ALJ finds that Respondent-Employer was likely accommodating the restrictions imposed on Claimant's work capacity secondary to her left knee and low back conditions; not an elbow condition.

16. Ms. Crosby testified that Claimant reported working over and above her restrictions and limitations periodically. Ms. Crosby responded to Claimant's reports by counseling her not to work beyond her restrictions. She also testified that she was careful to schedule Claimant so she would not have to complete tasks which exceeded her work restrictions. Regardless, the ALJ finds from the evidence presented, that Claimant was not precluded from mopping based upon the restrictions imposed on her by her medical provider.

17. Ms. Crosby testified that Claimant reported suffering an elbow injury earlier during her shift on November 8, 2015, when she (Ms. Crosby) arrived at work later in the morning on the 8th. Ms. Crosby testified that once Claimant reported the injury, she contacted Chris Jones so that the necessary paper work to initiate the claim could be completed. Ms. Crosby testified that she never told Claimant what to include in the injury report as she (Claimant) completed it. She also testified that Claimant never reported to her that the actual DOI was November 2, 2015 as opposed to November 8, 2015 while Claimant completed her Associate Work Related Injury/Illness Report.

18. Ms. Crosby testified that Respondent-Employer does not have a corporate culture of dissuading injured workers from reporting injuries. Ms. Crosby also testified that she did not delay in taking Claimant's report of injury by a week nor did Mr. Jones ever direct her not to file the claim.

19. Christopher Jones testified as a 15 year employer of Respondent-Employer. He is currently the manager of Store 50 in Calhan, Colorado. He previously managed the store where Claimant worked in Limon for 4 years prior to his transfer to Store 50. He worked directly with Claimant. As part of his managerial duties, Mr. Jones testified he is familiar with the forms to be completed to initiate claims of injury in the work place.

20. As noted above, Mr. Jones managed Claimant and has worked with her frequently. Mr. Jones testified that in August 2015, Claimant was given work restrictions, including lifting limitations, which were accommodated. According to Mr. Jones, Claimant was provided with a stool and anti-stress/fatigue mats for use in the store as part of the accommodation surrounding her restrictions caused by her left knee and low back conditions, particularly her sciatica.

21. Echoing the testimony of Ms. Crosby, Mr. Jones testified that Claimant would report that she was working above her restrictions occasionally. Consequently, Mr. Jones would remind Claimant to stay within her work restrictions. He would also make sure Claimant was scheduled to work with others who could assist her should she need help with task completion secondary to her left knee and low back conditions and the restrictions imposed as a consequence of both.

22. Mr. Jones testified that he was informed about Claimant's alleged left elbow injury from another employee on November 8, 2015. Based upon the evidence presented, the ALJ finds the "other employee" referenced to be Leticia Crosby. Mr. Jones testified further that when he became aware of the alleged injury, he immediately took steps to initiate a claim, including directing the co-employee (Ms. Crosby) to complete an injury report form and send it to the appropriate persons. Mr. Jones testified further that Claimant was very vague about her injury in that she did not provide a specific time or location regarding when and where the injury occurred. Mr. Jones testified that he did not resist in taking the claim nor did he delay in filing it. Contrary to Claimant's suggestion, Mr. Jones testified that he was not angry with Claimant for filing her claim, that there were no threats not to file Claimant's reported injury and there was no retaliation for filing it.

23. Based upon the evidence presented, the ALJ finds Claimant's suggestion that Ms. Crosby and/or Mr. Jones delayed in filing her claimed left elbow injury incredible. These is a lack of evidence to support that either Ms. Crosby and/or Mr. Jones retaliated against Claimant for reporting her left elbow injury by delaying the taking of Claimant's report and/or filing of the claim by a week.

24. Throughout November and December 2015, Claimant continued to see her provider at Peak Vista.

25. On November 13, 2015, Claimant reported left elbow pain along with low back pain. She also complained of left shoulder pain. She was referred to physical therapy for evaluation and treatment for elbow, shoulder and low back pain.

26. On December 8, 2015, Claimant returned to Peak Vista for a discussion regarding her need for pain medication. During this encounter, Claimant reported 7/10 pain which was relieved by a ½ tablet of methadone she obtained from a friend.

27. On December 29, 2015, Claimant was reevaluated at Peak Vista complaining

of “acute” left hip and low back pain radiating down the leg to the left knee. Claimant also noted that her left shoulder continued to “bother” her and that this was under workers compensation. Imaging studies of the low back and hip were ordered.

28. Respondent-Employer requested an independent medical examination (IME) with Dr. Eric Ridings. Dr. Ridings completed his examination on May 18, 2016. As part of his examination, Dr. Ridings took a verbal history from Claimant regarding her injuries. Concerning the alleged left elbow injury as a consequence of mopping, Dr. Ridings documented that Claimant reported a DOI of November 9, 2015. After additional discussion with Claimant, wherein she reported again that her claim was delayed by a week, Dr. Ridings clarified that Claimant was alleging that her elbow injury occurred the week before. According to Dr. Ridings report, Claimant changed the history of her alleged injury after she was confronted about the inconsistency in her reported dates of injury. The ALJ infers from Dr. Ridings report and his testimony that Claimant told him she was injured during the early morning hours of November 9, 2015 and only when he brought up the fact that the medical record suggested that she was claiming to have been injured a week earlier did Claimant assert that her claims were delayed by Ms. Crosby and Mr. Jones. This contradicts Claimant’s testimony that she told Dr. Ridings that she actually injured her left elbow on November 2, 2015 and not November 8/9th as is documented in Dr. Ridings report.

29. Dr. Ridings testified that regardless of the DOI, it was unusual to develop pain several hours after engaging in offending activity. Dr. Ridings noted: “I do not see any causal link between physical activity several hours earlier and the subsequent development of focal pain at the elbow.” Additionally, Dr. Ridings noted that Claimant’s physical examination upon follow-up to the clinic on November 9, 2015 was not consistent with injury to the elbow. According to Dr. Ridings, a complaint of pain on examination does not mean that Claimant sustained an injury. The ALJ infers and finds from review of Claimant’s medical records and the testimony from Dr. Ridings that Claimant possessed no objective evidence of having sustained an injury to her left elbow on November 2/3rd or November 8/9th, 2015.

Claimant’s Alleged January 2, 2016 Upper Extremity (Elbow/Shoulder) Claim

30. During the evening hours of January 2, 2016, Claimant alleged that she suffered a second injury to her left elbow in addition to an injury to the left shoulder as a consequence of shaking dirt and debris out of the stores area rugs. Claimant reported the injury to Ms. Crosby by leaving a hand written note wherein she noted the following: “Your going to hate me but I reinjured my left elbow by shaking out the rugs you can look on the camera between 9-10 pm.” Claimant also noted that, if needed, she could complete paperwork surrounding the claimed injuries when she returned to the store at around 3:00 pm on January 3, 2016.

31. Claimant completed an “Associate Work Related Injury/Illness Report” form

on January 5, 2016. In her report, Claimant indicates that she was in the processing of “standing” a heavy rug up to “shake it out” when she “felt a pull” in her left elbow (shoulder). Claimant stopped the activity and brought the rug back into the store. Claimant was working the store with Karon Kilmer at the time of this alleged injury.

32. Claimant testified that while the store had a vacuum, it was clogged and it would not have been effective in cleaning the rug.

33. Ms. Crosby testified that the store rugs are cleaned with the use of a vacuum and not by shaking them out. She testified that to her knowledge, the store vacuum was working on January 2, 2016 and if not Claimant never mentioned that it was inoperable to her.

34. Mr. Jones testified that employees are trained to use a vacuum to clean the store area rugs. He repeated Ms. Crosby's testimony that employees have never been trained to take the rugs outside to shake them out. Nonetheless, Mr. Jones completed an "Associate Incident In-Store Investigation report providing the following incident description: "9:30 ish, shaking out rugs . . . has been asked not to by myself and Leticia Crosby. We have a vacuum . . . left elbow/shoulder pain." As part of the investigation into the claims, video tape of the activity in the store on January 2, 2016 was viewed by the District Manager for Respondent-Employer.

35. Leah Gortticelli has worked as the Distinct Manager for the store in question since May 2016. Ms. Gortticelli testified that she viewed all in-store activity for the period extending 15 minutes before and 15 minutes after the alleged injury occurring on January 2, 2016. According to Ms. Gortticelli, video evidence verified that Claimant pulled rugs outside of the store. While Claimant pulled the rugs from the store, Ms. Gortticelli testified that Claimant cannot be seen shaking the rugs out.

36. Based upon the content of Mr. Jones' investigation report and Ms. Gortticelli's testimony, the ALJ finds that while the store had a vacuum to clean the store's area rugs, Claimant likely repeatedly cleaned them by shaking them out despite being "asked not to" by Mr. Jones and Ms. Crosby.

37. Claimant saw Nurse Practitioner (NP), Kendra Black for left arm pain on January 4, 2016. NP Black documented the following history of present illness: "She presents today for workmen's comp injury to Lt arm and Left leg that occurred 2 days ago. She states she was shaking out a heavy rug in order to vacuum it and she felt a sharp pain from the Lt elbow up to her Lt shoulder and middle of back." During this visit, Claimant completed a description of her injury. She provided as follows: "left arm again- was shaking out carpets and felt my arm/shoulder give out." The ALJ finds this history inconsistent with the written statement provided in the Associate Work Related Injury/Illness Report" form on January 5, 2016 wherein Claimant specifically indicates that she was in the processing of "standing" a heavy rug up to "shake it out" when she "felt a pull" in her left elbow (shoulder) rather than her shoulder "giving out."

38. Although a physical examination of the shoulder was conducted during Claimant's initial, there is no documentation that provocative testing for the elbow and/or shoulder was preformed. Rather, the results of physical examination document only

that Claimant had subjective complaints of tenderness and decreased range of motion, secondary to complaints of pain, in the left elbow and shoulder. X-rays of the left elbow and shoulder were ordered.

39. X-rays of the elbow and shoulder were interpreted as being negative for acute boney abnormality. Minimal degenerative changes were noted in the coracoclavicular joint of the left shoulder.

40. As part of his IME, Dr. Ridings addressed Claimant's alleged upper extremity injury from shaking rugs. Dr. Ridings completed a physical examination which included range of motion testing and special maneuvers testing. Following his physical examination, Dr. Ridings noted that Claimant did not have provocative testing results consistent with "intraarticular pathology." Furthermore, he noted full range of motion combined with normal muscle tone of the shoulder did not support a diagnosis of myofascial pain. He also noted that overall Claimant's subjective complaints of pain were "out of proportion" considering the lack of objective findings on physical examination.

Claimant's Alleged Left Knee Injury

41. In addition to asserting that she injured her left shoulder while shaking out rugs on January 2, 2016, Claimant alleges that she injured her left shoulder and left knee later during her shift when she was assisted from the floor of the store by a co-worker after counting the money in the company safe.

42. Claimant testified that toward the end of her shift she sat on the floor of the store to count the money in the safe. After counting the safe, Claimant testified that she attempted to get up from the floor by rolling onto her right knee with her left foot on the floor and the left knee in the air. Claimant explained that she pivoted to her right and grabbed the safe handle with her right hand to pull herself up. While in the process of pulling herself from the floor, Claimant testified that Karon Kilmer reached over her right shoulder and grabbed her underneath her right arm and jerked her from the floor.[2] According to Claimant, she twisted her left knee in the process.

43. As part of her Associate Work Related Injury/ Illness Report, Claimant noted: "I felt someone grab under my right arm to help me get up which caused my right knee to turned (sic) to the left and I felt a a (sic) pull." Claimant also referenced that in-store video would confirm Ms. Kilmer's actions and her knee injury.

44. As noted, Ms. Gortticelli viewed in-store video concerning the incident. In addition to verifying that Claimant pulled the rugs from the store, Ms. Gortticelli testified that the video confirmed that Claimant was sitting on the floor counting the safe and that Ms. Kilmer helped her get up. Contrary to the testimony of Claimant, Ms. Gortticelli testified that the video demonstrates that Ms. Kilmer placed her hand on Claimant's

[2] See also Claimant's "Workers Claim form Compensation" which provides that Claimant was "getting up from the floor using my right side, co-worker assisted from behind me, twisted knee."

upper arm to steady her as she gets up. According to Ms. Gortticelli no "jerking" was involved.

45. Karon Kilmer provided a witness statement in which Ms. Kilmer notes that Claimant was kneeling down to count the safe and that as Claimant began to stand up by pulling on the safe handle, she reached down to offer a "hand to steady her" so Claimant would not hit her face on the safe if she fell forward.

46. Ms. Kilmer testified that she observed Claimant sitting on the floor counting the safe and that she was complaining that her arm was hurting. She noticed that Claimant was having a hard time pulling herself up so she testified that she placed her hand under Claimant's right arm, between the elbow and arm pit, in an effort to steady her as she stood up. According to Ms. Kilmer, Claimant stood on her own. She did not lift or "jerk" Claimant as she rose from the floor. Ms. Kilmer also testified that she used her right arm to steady Claimant was she stood because she has lifting restrictions on her left arm.

47. Dr. Ridings addressed Claimant's alleged left knee injury during his May 18, 2016 IME. Claimant's report regarding her left knee injury as provided to Dr. Ridings is consistent with her testimony. She also reported to Dr. Ridings that she felt a "small pop" and a shift in the knee as she stood up.

48. On January 10, 2016 an x-ray of left knee was performed which demonstrated "no fracture, dislocation or osseous abnormality." Additionally, the "patella and extensor mechanism [appeared] intact and there [was] no effusion." The impression of the interpreting radiologist was: "degenerative change involving the medial femoral compartment.

49. During his IME, Dr. Ridings completed a physical examination of the left knee. He documented "moderate swelling" without redness, increased warmth or other sings of inflammation. There was no ligamentous laxity and meniscal testing was negative. However, patella grind testing produced pain, per Claimant's report, extending from the knee up the lateral thigh to the hip, which according to Dr. Ridings was a "non-anatomic" response.

50. Based upon the evidence presented, the ALJ is not persuaded that Ms. Kilmer's assistance caused any injury to Claimant's left arm/shoulder. Even if Ms. Kilmer "jerked" Claimant up from the floor, as she has suggested, the force (pulling) was to Claimant's right, not left arm. There is simply no mechanism likely to cause injury to the left arm during the incident in question. The ALJ is also not convinced that Claimant sustained an acute injury to her left knee as she rose from the floor. In his IME report, Dr. Ridings opined that Claimant's "patellofemoral syndrome at the left knee is clearly preexisting and in my opinion was not caused, aggravated, or accelerated by the incident getting up from the floor on January 2, 2015." He explained Claimant's subjective symptoms were non-physiologic, including Claimant's asserted inability to flex the left knee to 90 degrees when asked to demonstrate her range of motion despite sitting for an hour with her knee at 90 degrees of flexion. Careful review of the record

evidence persuades the ALJ that Claimant's left knee was symptomatic and functionally limiting prior to her alleged January 2, 2016 injury. Indeed, Claimant's was given restrictions, in part, for left lateral knee pain extending into her hip which was aggravated by standing and squatting as of July 13, 2015.

51. The ALJ finds Dr. Ridings medical opinions supported by the record evidence presented, including the records documenting Claimant's following-up visits at Peak Vista after November 9, 2015. Dr. Ridings' opinions are more persuasive than Claimant's contrary testimony, which the ALJ finds inconsistent, evasive and unreliable, when record evidence is considered as a whole.

52. Claimant has failed to prove, by a preponderance of the evidence, that she sustained an injury to her left elbow on 2/3, 2015 or alternatively 8/9, 2015, while mopping. Furthermore, the ALJ is not convinced that Claimant sustained a compensable injury to either her left elbow, left shoulder or left knee on January 2, 2016 while shaking out rugs or getting up from the floor after counting the safe at the end of her work shift. While the incident in question may have occurred, the ALJ is persuaded that the incident did not cause compensable injuries.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). To the extent that expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As found, the testimony of Claimant is inconsistent and unreliable. Moreover, the medical opinions of Dr. Ridings regarding Claimant's medical conditions and causality are supported by the record evidence and are more persuasive than the contrary assertions of Claimant.

Compensability

E. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*.* *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that

Claimant's alleged injuries occurred within the time and place limits of her employment relationship with Employer and during an activity, specifically mopping, cleaning and counting the safe as a cashier/clerk for Employer. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" her employment must be resolved before the injury is deemed compensable.

G. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while, or in the case of her first elbow injury, shortly after performing job duties, does not mean that she sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

H. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable injury" is one which requires medical treatment or causes disability. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S.

I. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from at work without sustaining a compensable "injury." This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where a claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where a claimant involved in motor vehicle accident without resultant injuries suffered no compensable injury). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted, "[C]orrelation is not causation." Thus, merely because a coincidental correlation between Claimant's work and her symptoms exists in this case does not mean there is a causal connection between Claimant's alleged injury and her work duties.

J. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Moreover, the question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

A. As found, the ALJ conclues that the expert opinions of Dr. Ridings regarding the cause of Claimant’s left upper extremity and left knee symptoms are credible and more persuasive than contrary opinion/assertions of Claimant. In this case, the totality of the evidence presented, including the testimony of Dr. Ridings, in addition to the medical records, particularly the Peak Vista records, persuades the ALJ that Claimant’s worsening extremity pain/symptoms are, more probably than not, a direct result of the natural progression of Claimant’s pre-existing degenerative change in the left shoulder and knee rather than her work duties on January 2, 2016. In the case of Claimant’s alleged November 2/3 elbow claim, the evidence presented convinces the ALJ that Claimant’s complaints of severe pain as a consequence of mopping are not credible and that the claim was motivated by social/psychological factors as alluded to by Dr. Ridings and argued by Respondents. Accordingly, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between her employment and the resulting condition for which medical treatment and indemnity benefits are sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because Claimant failed to establish she suffered a compensable “injury” as defined by the aforementioned legal opinions, her claim is denied and dismissed and the claims for medical and temporary disability benefits need not be addressed.

ORDER

It is therefore ordered that:

Claimant’s claims for compensation for injuries occurring November 2/3, 2016 and January 2, 2016 are denied and dismissed.

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

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

DATED: September 7, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-927-874-02

ISSUES

- Whether Respondent proved by a preponderance of the evidence that Claimant's claim is closed pursuant to §8-43-203(2)(b)(II)(A),C.R.S.

- If not closed, whether Respondent proved by a preponderance of the evidence that Claimant waived his right to challenge the Final Admission of Liability.

- If not closed, whether Respondent proved by a preponderance of the evidence that Claimant's request for benefits is barred by laches.

- If not closed, waived, or barred by laches, whether Claimant has proven by a preponderance of the evidence that the situs of his functional impairment extends beyond the arm at the shoulder entitling him to have his scheduled impairment rating converted to a whole person impairment rating.

STIPULATIONS

Claimant's counsel stipulated at hearing that he agrees with the Respondent's calculation of average weekly wage as contained in the Final Admission of Liability.

FINDINGS OF FACT

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

1. Claimant sustained an admitted workers' compensation injury in a motor vehicle accident on August 24, 2013 while employed as a State Trooper for the State of Colorado, Department of Public Safety. (Exhibit A)

2. Claimant underwent surgery on his left shoulder with Dr. Durbin on September 4, 2014. (Exhibit D, bate stamp 14)

3. On November 11, 2014, Dr. Durbin noted that Claimant was doing "extremely well" 10 weeks out from surgery. No clinical findings were documented for any complaints/symptoms in the neck, back, head, torso or anywhere else beyond the arm at the shoulder. (Exhibit C, bate stamp 5)

4. Claimant returned to Dr. Durbin on December 16, 2014 at which time Dr. Durbin noted that Claimant was doing "extremely well" with "minimal complaints", "just a little bit of soreness every once in a while". Dr. Durbin further noted that Claimant was back to almost full strength and that he had returned to full activities. No clinical findings were documented for any complaints/symptoms in the neck, back, head, torso

or anywhere else beyond the arm at the shoulder. Claimant was released to return to full activities with no restrictions. (Exhibit C, bate stamp 3-4)

5. Claimant was placed at MMI by Dr. O'Toole on February 12, 2015. At the time, Dr. O'Toole noted that Claimant had "returned to full duty and has been tolerating unrestricted work without difficulty. He has no pain or other complaints related to his shoulder injury." The Review of Systems and Physical Examination do not include any complaints/symptoms in the neck, back, head, torso or anywhere else beyond the arm at the shoulder. Dr. Durbin provided Claimant with a 14% upper extremity impairment rating (8% whole person), released Claimant to return to work with no permanent work restrictions, and did not recommend any medical maintenance treatment. (Exhibit D, bate stamp 10-17)

6. A Final Admission of Liability was filed on April 2, 2015 admitting to the 14% upper extremity impairment rating. (Exhibit D)

7. Claimant filed an Application for Hearing on May 1, 2015 (Exhibit E) but never set a hearing so the Application for Hearing was stricken pursuant to OAC Rule 8(K).

8. On March 16, 2016, Respondent filed a Motion to Close Claim for Failure to Prosecute. (Exhibit G) Claimant responded by filing the current Application for Hearing on March 25, 2016. An Order to Show Cause was entered on March 31, 2016. (Exhibit H)

9. Because Claimant's May 1, 2015 Application for Hearing was stricken, it is as if it was never filed. As a result, Claimant's current claim for conversion filed on March 25, 2016 is not timely. Claimant's claim is closed pursuant to §8-43-203(2)(b)(II)(A), C.R.S.

10. Claimant, through his inaction in setting a hearing on his May 1, 2015 Application for Hearing or otherwise pursuing his objections to the Final Admission of Liability for nearly 1 year, has waived his right to challenge the Final Admission of Liability. The current Application for Hearing was filed more than 1 year after Claimant was placed at MMI and almost 1 year after the Final Admission of Liability was filed. By failing to timely contest the Final Admission of Liability, Claimant frustrates the express legislative intent of the Workers' Compensation Act, unconscionably delays the statutory remedy available to him to challenge the Final Admission of Liability, and prejudices the Respondent's right to have Claimant's permanent medical impairment determined at or near the time Claimant was placed at MMI.

11. Claimant and his attorney were sent copies of the Final Admission of Liability. The Final Admission of Liability contains a Notice to Claimant, that he had 30 days to object to the Final Admission of Liability. A timely Application for Hearing was filed but never set. It wasn't until Respondent filed a Motion to Close Claim for Failure to Prosecute that Claimant pursued his claim for conversion. Claimant's failure to contest the Final Admission of Liability for nearly 1 year is inconsistent with the

assertion of his right to challenge that admission, manifests his intent not to challenge the admission, and constitutes a waiver of that right.

12. There are no medical records in evidence after Claimant was placed at MMI. Claimant did not attend the hearing or offer any testimony regarding his inability to meet any personal, social, or occupational demands. Claimant's attorney argued at hearing that Claimant had cervical tightness/soreness entitling Claimant to have his scheduled injury converted to a whole person impairment rating. Claimant's counsel's argument is not evidence and is not supported by the medical records near or at the time that Claimant was placed at MMI.

13. Claimant was released to return to work full duty, without any restrictions, on December 16, 2014. When Claimant returned to the ATP on February 12, 2015, he did not report any problems as a result of returning to work full duty. The MMI report contains no notations of complaints of pain or functional limitations beyond the arm at the shoulder. No evidence was submitted after Claimant was placed at MMI documenting any complaints or limitations as a result of being released to return to work without any permanent restrictions. Accordingly, the ALJ concludes that the situs of Claimant's functional impairment does not extend beyond the arm at the shoulder.

CONCLUSIONS OF LAW

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

Generally

The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. Claimant carries the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. Respondent carries the burden of proof, by a preponderance of the evidence, for its affirmative defenses. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988); *Sholund v. Argenbright Security*, W.C. No. 4-415-403 (June 16, 2004). A preponderance of the evidence is evidence which leads the trier-of fact, after conserving all of the evidence, to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). Facts in a workers' compensation case are not interpreted liberally in favor of either the injured worker or the employer. C.R.S. §8-43-201.

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

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

Closure, Waiver, and Laches

§8-43-203(2)(b)(II)(A), C.R.S. provides, in relevant part, that a case will close as to the issues admitted in a final admission if the claimant does not contest the final admission within 30 days after the date of the final admission. The automatic closure of contested issues from a Final Admission of Liability furthers the legislative intent of providing the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Leewaye v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). Failure to contest an admission within 30 days closes the claim on all admitted issues. *Dyrkopp v. Industrial Claim Appeals Office*, 30 P.3d 821 (Colo. App. 2001). Once a case has closed, the issues resolved by the Final Admission of Liability are not subject to further litigation unless they are reopened pursuant to §8-43-303, C.R.S. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270, 272 (Colo. App. 2005); *Ballesteros v. Westaff, Inc.*, W.C. No. 4-475-838 (November 24, 2008). As found, because Claimant's May 1, 2015 Application for Hearing was stricken, it is as if it was never filed. The March 25, 2016 Application for Hearing was not filed within 30 days of the Final Admission of Liability so the Court has no jurisdiction to hear the issues endorsed in that Application for Hearing absent a reopening.

Waiver is the intentional relinquishment of a known right. *Johnson, supra*. The exercise of a statutory right is always subject to equitable limitations. *Id.* Waiver may be implied as when a party engages in conduct which manifests an intention to relinquish the right or acts inconsistently with its assertion. *Id.; see also, Munoz v. JBS Swift & Company*, W.C. No. 4-780-871 (March 1, 2010); *Rodriguez v. Safeway Stores, Inc.*, W.C. No. 4-712-019 (June 3, 2009). A party may, through inaction, delay, or other similar conduct, waive specific rights. *Johnson, supra.; Munoz, supra.*; *Rodriguez, supra.*; *Gaither v. The Resource Exchange*, W.C. No. 4-125-439 (September 14, 1994); *Stein v. Alliance*, W.C. No. 4-533-782 (October 5, 2004); *Sholund*, supra.; *Hakizimana v. JBS USA, LLC*, W.C. No. 4-909-058 (October 23, 2014). The equitable defense of laches may be used in a workers' compensation proceeding to deny relief to a party whose unconscionable delay in enforcing his rights has prejudiced the party against whom enforcement is sought. *Small v. Coors Porcelain Company*, W.C. No. 3-500-834; *Safeway, Inc. v. Industrial Claim Appeals Office*, 186 P.3d 103 (Colo. App. 2008); *Burke v. Industrial Claim Appeals Office*, 905 P.2d 1 (Colo. App. 1994); *Bacon v. Industrial Claim Appeals Office*, 746 P.2d 74 (Colo. App. 1987). Parties to a workers' compensation claim are presumed to know the applicable law. *Midget Consol. Gold Mining Co. v. Industrial Commission*, 193 P. 493 (Colo. 1920); *Paul v. Industrial Commission*, 632 P.2d 638 (Colo. App. 1981). The presumption aids a party in meeting its burden of proof. *Union Ins. Co. v. RCA Corp.*, 724 P.2d 80 (Colo. App. 1986). A party may not use ignorance of the law as a defense to its legal duties. *Grant v. Professional Contract Services*, W.C. No. 4-531-613 (January 24, 2005).

As found, Claimant, through his inaction in setting a hearing on his original Application for Hearing or otherwise pursuing his objections to the Final Admission of Liability for nearly 1 year, has waived his right to challenge the Final Admission of Liability. The period of time to challenge a Final Admission of Liability is provided by statute to further the legislative intent of providing the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. The period of time to challenge a Final Admission of Liability is also provided by statute to further the legislative intent that impairment is to be determined at the time of MMI. §8-42-107(8)(c), C.R.S. By failing to challenge the Final Admission of Liability for almost 1 year since the Final Admission of Liability was filed, Claimant frustrates the express legislative intent of the Workers' Compensation Act, unconscionably delays the statutory remedy available to him to challenge the Final Admission of Liability, and prejudices the Respondent's right to have Claimant's permanent medical impairment determined at or near the time Claimant was placed at MMI. Claimant, through his attorney, knew that he had 30 days to challenge the Final Admission of Liability. Claimant's failure to challenge the Final Admission of Liability for nearly 1 year is inconsistent with the assertion of his right to challenge the Final Admission of Liability, manifests his intent not to challenge the Final Admission of Liability, and constitutes a waiver and/or unconscionably delay of that right.

Permanent Impairment

Permanent medical impairment is to be determined at the time of MMI. §8-42-107(8)(c), C.R.S. As found, it has been more than 1 year since Claimant was placed at MMI. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. §8-42-107(1)(a), C.R.S. However, a claimant may establish that his injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in §8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled not the situs of the injury itself of the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the shoulder. *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996); *Strauch, supra.* The issue of conversion is a question of fact for the ALJ. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000).

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

Symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with a claimant's ability to use a portion of his body to be considered a functional impairment. *See Mader v. Popejoy Construction Co., Inc.,* W.C. No. 4-198-489 (August 9, 1996)*.* Thus, in order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether Claimant has pain, but whether the injury and the associated pain caused thereby has impacted part of Claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996); *Bernal v. CMHIP*, W.C. No. 4-956-645 (October 5, 2015).

As found, Claimant did not attend the hearing or offer any testimony regarding his inability to meet any personal, social, or occupational demands. Claimant's counsel's argument that Claimant had cervical tightness/soreness entitling Claimant to have his scheduled injury converted to a whole person impairment rating is not evidence. *Lewis v. Pacific Fruit Produce*, W.C. No. 3-048-301 (November 15, 1995); *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo. App. 1987). Claimant was released to return to work full duty, without any restrictions, on December 16, 2014. When Claimant returned to the ATP on February 12, 2015, he did not report any problems as a result of returning to work full duty. The MMI report contains no notations of complaints of pain or functional limitations beyond the arm at the shoulder. No evidence was submitted after Claimant was placed at MMI documenting any complaints or limitations as a result of being released to return to work without any permanent restrictions. Accordingly, the ALJ concludes that the situs of Claimant's functional impairment does not extend beyond the arm at the shoulder.

ORDER

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

1. Claimant's claim is closed pursuant to §8-43-203(2)(b)(II)(A), C.R.S.

2. Claimant has waived his right to challenge the Final Admission of Liability.

3. Claimant's claim is barred by laches.

4. Claimant's claim for conversion is denied and dismissed.

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

DATED: September 2, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-972-954-02

ISSUE

The following issue was raised for consideration at hearing:

Whether Claimant proved by a preponderance of the evidence that the need for surgery to repair her right knee meniscal tear is related to the admitted work injury of January 6, 2015.

FINDINGS OF FACT

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

1. Claimant, who was a medical assistant with the Employer, sustained compensable injuries when she slipped and fell on ice while pulling open a door at work on January 6, 2015. Her right leg went straight out in front of her and her left leg went under her. Her left knee hit the ground and her buttocks landed on her left heel which caused her to "shoot" to the left.

2. Soon after, she was seen in the emergency room at the Employer where she worked. Records from the emergency room described a bruise on the left knee with tenderness to palpation over the right posterior thigh and left anterior knee. The diagnosis was left knee contusion.

3. Two days later, Claimant was seen by her authorized treating physician, Gary Petry, M.D., who recorded a similar description of the fall. Dr. Petry is not level 2 accredited with the Division of Workers Compensation. He sees only one workers' compensation patient a week and seldom addresses causation. Dr. Petry diagnosed a right hamstring strain or tear. Claimant declined pain medication.

4. Dr. Petry referred Claimant to Parker Physical Therapy where on January 12, 2015, the therapist noted complaints of anterior-medial left knee pain where her knee touched down during the fall. As described by the previous providers, the therapist also noted right hamstring and quadricep pain.

5. The left knee pain quickly resolved and Claimant made no further complaints of pain to that body part. She testified at hearing that she had no long-term problems with the left knee.

6. By February 2, 2015, Claimant reported to Vail-Summit Orthopedics that her leg pain, as it related to her hamstring injury, was a 2 out of 10, whereas her low back pain was a 7 out of 10.

7. On February 24, 2015, Claimant reported to her therapist that she had no pain on Saturday and just a little pain the next day and had been walking over 10 minutes daily. By March 6, 2015, at her 17th physical therapy appointment, the therapist noted that treatment for the right hamstring injury had diminished and greater emphasis was being placed on treating the low back pain. The therapist noted that Claimant was able to ambulate on a treadmill for 10 minutes at 1.2 mph.

8. On March 26, 2015, Scott Raub, D.O., who saw Claimant for her back pain, stated that Claimant was significantly overweight and that he believed that was contributing to ongoing symptoms and also contributing to delayed recovery. He reported that Claimant walked with a normal gait.

9. Dr. Raub administered facet injections on May 6, 2015. Claimant informed Dr. Brian Lambden, Respondents' independent medical examiner (IME), that the injections into her low back from Dr. Raub decreased almost all of her pain for two months.

10. On May 19, 2015, Dr. Petry observed that Claimant was able to ambulate without deficit and was able to completely extend the right knee and that the tightness in her hamstring was improving.

11. On June 25, 2015, Claimant informed Dr. Petry that she awakened with pain radiating from the right lower back area up to the right scapula; however, she was able to sit in her chair, which had been causing her discomfort in the past. He noted that her strength in her right lower extremity was normal as was her neurological function of her right lower extremity.

12. The physical therapist noted on July 21, 2015, that Claimant had no pain extending into her legs.

13. On July 27, 2015, Claimant informed Dr. Raub that she had recently noticed increased right scapular pain, which he felt was related to postural issues.

14. On July 28, 2015, Dr. Petry again noted that Claimant was ambulating without deficit.

15. On September 22, 2015, Claimant informed Dr. Petry that the epidural steroid injections in her low back had helped significantly and that her pain was now 2/10.

16. The therapist noted on September 24, 2015, that Claimant was feeling better and had worked eight hours a day before and a partial day that day without difficulty. On October 22, 2015, the physical therapist noted that treatment had consisted of ambulating on the treadmill and that Claimant had been able to participate in a walking program and basic core strengthening exercises without difficulty.

17. On December 21, 2015, after 38 therapy visits, Claimant reported to her therapist that she had the onset of right knee pain and swelling after riding in a vehicle

to Denver for two hours, walking about 30 minutes, and returning home. With the exception of two isolated references to right knee pain early in the claim, this was the first mention of serious right knee pain with swelling observed.

18. On December 29, 2015, Claimant reported to Dr. Petry that she started having right knee pain and swelling after shopping on Christmas Eve. He noted that she was unable to completely extend the right knee because of pain in her right hamstring muscles and down along the medial aspect of the knee.

19. On January 21, 2016, Dr. Petry stated that Claimant had “intermittently complained of right leg pain above and below her right knee [but that] recently, the pain ha[d] become more localized to her right knee.” Dr. Petry suspected internal derangement such as a medial collateral ligament injury or medial meniscus injury.

20. Subsequent therapy notes discuss the improvement of low back pain but increasing right medial knee pain along with a significant limping gait.

21. Dr. Petry referred Claimant to Richard Cunningham, M.D., who saw Claimant on January 29, 2016. When asked if she had a problem with the right knee in the past, Claimant answered, “No.” In fact, when asked about prior surgeries, she revealed to Dr. Cunningham prior bunion surgery to both feet in 2005, but not a 2006 right knee surgery. She was placed on crutches the day of the December 27, 2005, right knee injury, had been living with mild arthritis in her knee for some time before the injury, and was still experiencing knee pain four months after surgery, which was thought to be due to arthritis in the medial compartment of the knee.

22. When describing her right knee pain to Dr. Cunningham on February 2, 2016, Claimant stated that she experienced immediate pain and swelling in her right knee from the January 6, 2015, slip and fall injury, and that her symptoms were constant and had remained unchanged since their onset. Claimant again denied any history of right knee pain prior to this incident. At hearing, Claimant testified that her right knee pain really did not start until December 2015 after her trip to Denver, which is consistent with the record up to December 2015.

23. On February 29, 2016, after viewing images from the February 22, 2015, MRI that demonstrated a complex tear of the body and posterior horn segments of the medial meniscus and other abnormalities, Dr. Cunningham recommended right knee arthroscopy with partial medial meniscectomy.

24. Claimant had previously undergone a right knee medial meniscus repair and a partial lateral meniscectomy to repair a right medial meniscus tear and right lateral meniscus tear on January 18, 2006. The preoperative MRI of January 12, 2006, showed increased signal intensity throughout the posterior horn of the medial meniscus, an old area of chondral degeneration, and a tear of the proximal fibers of the MCL.

25. Dr. Brian Lambden, M.D., an expert in physical medicine and rehabilitation, performed an IME at Respondents’ request on May 5, 2016. In his report, Dr. Lambden credibly stated that he did not believe that Claimant’s right knee symptoms

were related to the work injury because the symptoms did not occur for almost one year and she had a prior history of a right knee injury in 2005. He stated that it was difficult to relate the acute onset of knee pain on December 21, 2015, to the January 6, 2015, falling incident. He believed that the onset of right knee pain was related to her prior history of a complex meniscal tear and apparent new extrusion with aggravation of knee pain complicated by obesity. He testified that the MRI findings from 2005 and 2016 were essentially the same, with some worsening as would be expected through the natural degeneration process. The tear was in exactly the same place.

26. Claimant told Dr. Lambden that she had never before seen a physician for knee problems, and when discussing her surgeries, informed him of a carpal tunnel release 10 years previously, the bunionectomy, and a patent foramen ovale surgery from 20 years ago.

27. At hearing, Claimant attributed her right knee problems to limping and her inability to stretch her leg out because of her hamstring injury. However, the records reveal that Claimant was walking with a normal gait at least as of March 2015. Surveillance video from April 2015 shows Claimant walking with a regular gait with full extension of her right leg. An unnatural gait cannot be the cause of Claimant's current knee condition, because the serious pain did not appear until December 2015, long after her gait returned to normal. In any case, as testified by Dr. Lambden, walking without fully extending the knee can shorten the stride, but it would not lead to a medial meniscal tear, the reason surgery is needed.

28. Dr. Petry’s opinion that the intense pain Claimant was experiencing in other body parts masked the pain in her right knee is not credited, as the evidence does not support it. Claimant declined pain medicine offered by Dr. Petry two days after the incident. Claimant was reporting low levels of pain in her right hamstring and low back long before the onset of right knee pain. Further, Claimant initially reported left knee pain for the first few days, but the left knee pain quickly resolved and was no more than a bruise. Likewise, Claimant started reporting pain to her right shoulder in June 2015, which was felt to be related to postural issues.

29. The delay in the onset of symptoms to the right knee also contradicts the fact that if Claimant had torn her medial meniscus or done something to aggravate her pre-existing condition, it should have been apparent to her soon after the incident, if not immediately, as testified by Dr. Lambden. It is not persuasive support for Claimant’s position that she could feel a bruise on her left knee but not a torn meniscus on her right knee on the date of the incident or soon after bearing weight on the right leg.

30. Dr. Petry’s explanation that the reason Claimant experienced pain after sitting for two hours in December 2015 was due to a bucket-handle tear in the knee is not credited. The MRI, which Dr. Petry did not review, does not show a bucket-handle tear. As stated by Dr. Lambden, knee pain after getting up from sitting for long periods of time is a classic symptom of osteoarthritis of the knee, a condition which is confirmed by the MRIs from before and after the incident. Dr. Petry’s explanation also fails to

explain why it took over 11 months for the condition to be revealed, and why, if the proposed surgery is for a meniscal tear, the bucket-handle tear is relevant.

31. Claimant points to a February 2, 2015, report from Vail-Summit Orthopedics as evidence that Claimant complained of right knee pain early on. First, February 2, 2015, is four weeks from the date of injury. Second, the pain was in the back of the right knee, which both Dr. Lambden and Dr. Petry attributed to the hamstring tear. In fact, the same report stated that the discomfort in the right knee was due to resistance to flexion from the hamstring discomfort.

CONCLUSIONS OF LAW

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

General legal authority

1. The purpose of the Workers' Compensation Act of Colorado (Act), Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

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

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

Medical Benefits

4. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). Claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

5. Claimant contends that she is entitled to medical benefits to cure and relieve her of the right knee meniscal tear. Respondents argue that the right knee meniscal tear is not related to the January 6, 2015, admitted work injury.

6. In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. Although a preexisting condition does not disqualify a claimant from receiving workers' compensation benefits, Claimant must prove a causal relationship between the injury and the medical treatment claimant is seeking. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo.App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002).

Conclusion

7. Claimant has failed to prove by a preponderance of the evidence that she sustained an injury to her right knee from the January 6, 2015, fall, either directly or indirectly.

8. Claimant's representations to Dr. Lambden and Dr. Cunningham that she experienced immediate pain and swelling in her right knee from the slip and fall injury, and that her symptoms were constant and had remained unchanged since their onset, are not credible. These representations were discredited by the medical records and Claimant's own testimony at hearing.

9. Claimant denied prior right knee problems and the previous right knee surgery to Dr. Lambden and Dr. Cunningham. Dr. Petry was not aware of the prior right knee problems until a few days before hearing. In fact, when asked about prior surgeries, she revealed to Dr. Cunningham prior bunion surgery to both feet in 2005, but not the 2006 right knee surgery. She was placed on crutches the day of the December 27, 2005, right knee injury, had been living with mild arthritis in her knee for

some time before the injury, and was still experiencing knee pain four months after surgery, which was thought to be due to arthritis in the medial compartment of the knee. Claimant told Dr. Lambden that she had never before seen a physician for knee problems, and when discussing her surgeries, informed him of a carpal tunnel release 10 years previously, the bunionectomy, and a patent foramen ovale surgery from 20 years ago.

10. Claimant's representation to the court that she was walking with an altered gait is contradicted by the medical records and the surveillance video.

11. Dr. Petry is not Level 2 accredited with the Division of Workers Compensation. He sees only one workers' compensation patient a week and seldom addresses causation. Dr. Lambden, who was accepted as an expert witness, is Level 2 accredited and board certified in physical medicine and rehabilitation. Dr. Lambden's opinion that Claimant's right knee symptoms are not related to the work injury is credible. The right knee symptoms did not occur for almost one year and Claimant had a prior history of an arthritic right knee with surgery in 2006. As stated by Dr. Lambden, it is difficult to relate the acute onset of knee pain on December 21, 2015 to the January 6, 2015 falling incident, especially since the MRI findings from 2005 and 2016 are essentially the same, with some expected degeneration.

ORDER

It is therefore ordered that:

1. Claimant's request for surgery to the right knee is denied and dismissed.

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

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

DATED: _September 1, 2016___

DIGITAL SIGNATURE:
Margot W. Jones

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-982-261-04

STIPULATION OF FACT

The parties stipulated and agreed that Claimant's average weekly wage is $1,163.17, the temporary total disability (TTD) rate is $775.44 and Respondents shall pay Claimant retroactively owed TTD in the amount of $11,281.26.

ISSUES

> The following issues were raised for consideration at hearing: whether Respondents overcame by clear and convincing evidence the opinion of the Division Independent Medical Examiner (DIME) regarding a 26% whole person impairment rating

FINDINGS OF FACT

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

1. Claimant was injured in a motor vehicle accident on November 11, 2014, in Fort Collins, Colorado in the course and scope of his employment for Employer. Claimant sustained a herniated disc in his cervical spine as a result of the accident.

2. On October 27, 2015, Claimant was evaluated by Paul M. Legant, M.D. and was placed at maximum medical improvement (MMI). On November 20, 2015, Claimant was assigned an 11% whole person impairment rating by Wallace K. Larson, M.D.

3. Respondents filed a Final Admission of Liability (FAL) on December 1, 2015, and an amended FAL on December 18, 2015. The FALs admitted for an 11% whole person rating. Claimant timely objected to both FAL and pursued a DIME.

4. The Division Independent Medical Examination took place on March 22, 2016, with Brian Beatty, D.O. Dr. Beatty concluded in his report that "Based on the AMA Guides Third Edition Revised, the [Claimant] was found to have a 26% whole person impairment." Dr. Beatty's rating was broken down as follows:

   a. A total 26% whole person impairment based upon 18% impairment for the cervical spine and 10% impairment for the lumbar spine;

b. The cervical spine impairment of 18% was based on a 6% impairment from table 53 combined with a 13% impairment for loss of range of motion;

c. The lumbar spine impairment of 10% was based on 5% impairment from table 53 combined with 5% impairment for loss of range of motion.

5. Claimant filed an application for hearing on April 18, 2016, on the issue of AWW. Respondents filed a response to the application for hearing on April 21, 2016, seeking to overcome the DIME's impairment rating. The parties resolved the AWW issue at hearing by stipulation.

6. Dr. Beatty credibly testified at hearing that in the course of the DIME, measurements were taken regarding Claimant's lumbar flexion range of motion, among others. The results of these measurements were invalid according to Dr. Beatty. Dr. Beatty also testified that he stands by all aspects of the impairment rating measurements.

7. Dr. Beatty credibly testified that he was familiar with the *AMA Guides* and followed them to the best of his ability when performing his DIME. Dr. Beatty testified that nothing in his report was incorrect. Dr. Beatty credibly testified regarding Claimant's 5% specific disorder rating for the lumbar spine and the 18% rating on the cervical spine. Dr. Beatty conducted lumbar range of motion impairments and those range of motion impairments were *valid*.

8. Dr. Beatty's lumbar flexion range of motion measurements were invalid. Dr. Beatty took six range of motion lumbar flexion measurements. Dr. Beatty was familiar with the Division of Workers' compensation Level II curriculum, and testified that he was supposed to repeat the range of motion tests given they were invalid. Dr. Beatty did not repeat the range of motion measurements.

9. Dr. Beatty reaffirmed Claimant was at MMI and had an impairment rating of 26% whole person. Dr. Beatty's testimony was credible and persuasive and no other testimony was elicited at hearing. It is found that Respondents failed to sustain their burden of proof to prove that Dr. Beatty's impairment rating is most probably incorrect.

CONCLUSIONS OF LAW

Having entered the foregoing findings of fact the following conclusions of law are reached.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as noted below, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that

which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. Respondents in this matter challenge Dr. Beatty's DIME determination with regard to Claimant's impairment rating. Respondents contend that Dr. Beatty did not comply with the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* (*AMA Guides*) with regard to range of motion measurements. Respondents contend that Dr. Beatty was required under the *AMA Guides* to repeat the range of motion measurements where the measurements were invalid. Respondents argue that, because Dr. Beatty did not get valid lumbar range of motion measurements, his impairment rating is most probably incorrect.

3. The determination of MMI and the assessment of permanent impairment both require the DIME physician to diagnose the claimant's condition or conditions, and determine their causal relationship to the industrial injury. *See Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The burden of proof rests on the party challenging the DIME physician's determinations to overcome them by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office, supra; Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998). Clear and convincing evidence is evidence demonstrating that it is "highly probable" that the DIME physician's rating is incorrect. *American Compensation Insurance Co. v. McBride,* 107 P.3d 973, 980 (Colo. App. 2004). Such evidence must be unmistakable and free from serious or substantial doubt. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1150 (Colo. App. 2002). The questions of whether the DIME physician has correctly applied the rating protocols, and ultimately whether the rating itself has been overcome by clear and convincing evidence, are questions of fact for the ALJ. *McLane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999*); Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). Further, even if the ALJ finds the DIME physician deviated from the rating protocols of the *AMA Guides*, the party challenging the rating must still demonstrate that the deviation casts substantial doubt on the overall validity of the rating. *Schrameck v. USA Waste Management*, W.C. No. 4-407-221 (ICAO May 18, 2001), *Rivale v. Beta Metals, Inc*., W.C. No. 4-2655-360 (April 16, 1998), *aff'd. Rivale v. Industrial Claim Appeals* Office, (Colo. App. No. 98CA0858, January 28, 1999) (not selected for publication).

4. In *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*, the court noted that under the *AMA Guides* the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data.

Adams v. Manpower, W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002).

5. Ultimately, the questions of whether the DIME physician properly applied the *AMA Guides*, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the *AMA Guides* requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the *AMA Guides* constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

6. Here, in this case, there is no difference of opinion. Dr. Beatty was the only medical expert to testify at hearing. He testified credibly that he is fully aware of the *AMA Guides* and did his best to comply with them. Dr. Beatty affirmed the correctness of Claimant's 26% whole person impairment rating after his repeated attempts to obtain valid lumbar range of motion measurements.

7. The ALJ concludes that Respondents failed to present clear and convincing evidence that Dr. Beatty's DIME opinion regarding impairment rating was most probably incorrect.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant workers' compensation benefits based on Dr. Beatty 26% whole person permanent impairment rating.

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

All matters not determined herein are reserved for future determination.

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

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

DATED: _August 30, 2016

DIGITAL SIGNATURE:
Margot W. Jones

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that the two year statute of limitations for filing a Claim for Workers' Compensation was tolled because Respondent failed to file a First Report of Injury with the Division of Workers' Compensation pursuant to §8-43-103(2), C.R.S.

2. Whether Claimant has established by a preponderance of the evidence that Decedent's August 11, 2012 death occurred during the course and scope of his employment with Employer and she is thus entitled to receive death benefits pursuant to §§8-42-114 & 8-42-115 C.R.S.

3. Whether Respondent has proven by a preponderance of the evidence that Decedent willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on August 11, 2012.

4. Whether Respondent has demonstrated by a preponderance of the evidence that it is entitled to a 50% reduction in nonmedical compensation benefits pursuant to §8-42-112.5 C.R.S. because Decedent's death resulted from the presence of non-medically prescribed controlled substances in his system during working hours.

FINDINGS OF FACT

1. Employer is a university located in Colorado. Decedent worked for Employer as a Stationary Plant Operator. On August 11, 2012 Decedent was found dead in Employer's steam tunnels underneath the campus. Decedent was born on March 10, 1963 and thus was 49 years old at the time of his death.

2. Respondent challenges Claimant's contention that Decedent died during the course and scope of his employment. Respondent contends that Decedent was not engaged in work-related activities, did not have permission to enter the steam tunnels and was on vacation at the time of his death on August 11, 2012.

3. Employer's heating system consists of boilers in the heating plant that generate high temperature steam conveyed campus-wide through a closed loop system of pipes to various buildings on the campus. The steam is returned to the heating plant through "condensate return" pipes that feed the boilers. The closed loop system traverses a maze of underground tunnels that span beneath Employer's campus.

4. Decedent's job description included "[r]esponsibility for proper operation and maintenance of campus wide water treatment program for steam and hot water boilers, cooling towers; closed loop systems; [and] condensate return systems." His job duties included, "[a]nalyz[ing] equipment failures and determin[ing] methods of repair,

modification or replacement; perform[ing] and follow[ing] a preventative maintenance program …; [and] isolat[ing] and repair[ing] piping for steam, condensate, compressed air and chilled water distribution." Decedent was charged with the "proper operation and maintenance of campus wide water treatment program for steam and hot water boilers; closed loop systems; [and] condensate returns systems."

5. Utility Plant Supervisor Ken Vergo testified at the hearing in this matter. He explained that he supervised six Stationary Plant Operators. Mr. Vergo specified that Utility Plant Operators maintain and monitor boilers and chillers on Employer's campus. Utility Plant Operators primarily work in the Operational Control Room in Employer's Heating Plant. They are responsible for the steam pipes exiting the boilers before the pipes enter the steam tunnels. Mr. Vergo summarized that Stationary Plant Operators do not normally work in the steam tunnels except when the Distribution Crew or Pipefitters request help or during the annual outage when the steam system is closed for repairs.

6. Pipe Mechanical Trade Supervisor or Pipefitter Ralph Lewis testified at the hearing in this matter. He noted that Pipefitters are responsible for the maintenance and repair of the Steam Distribution System in Employer's steam tunnels. Mr. Lewis commented that major leaks are repaired immediately but minor leaks are deferred until an annual shutdown of the system. Pipefitters enter Employer's steam tunnels approximately twice each month to perform inspections and complete repairs. He clarified that the Steam Distribution System does not include boilers but only the steam distribution pipes within the tunnels.

7. Mr. Lewis explained that Pipefitters noted leaks on a whiteboard in the Distribution Office. The Distribution Office is upstairs from the Operational Control Room. Mr. Lewis commented that Pipefitters use a buddy system and never enter the steam tunnels alone. Notably, Mr. Vergo also maintained that employees never work alone in the steam tunnels.

8. Claimant testified that Decedent worked the night shift from 2:00 p.m. until 10:00 p.m. on August 8-10, 2012. She explained that on the evening of August 10, 2012 Claimant returned home from work at approximately 12:00 a.m. After Claimant and Decedent talked for several hours, Claimant left home to visit his workplace at approximately 3:30 a.m.. Claimant explained that Decedent visited his workplace to enter his time and use a FAX machine to send a rental application that had to be submitted by 5:00 a.m. She also assumed that Decedent had gone to work to look for a steam leak in the campus heating system.

9. A weekly Operations Department schedule reveals that Decedent worked on August 7, 2012 but did not work on August 8-10, 2012. Mr. Vergo noted that August 8-10, 2012 were Decedent's regularly scheduled days off from work. Moreover, Decedent had requested vacation time for the entire period from August 8-19, 2012. In fact, handwritten Operations Logs reflect that Decedent did not work at any time from 2:00 p.m. on August 9, 2012 through his death on August 11, 2012. The Operations

Logs reflect that Decedent’s co-worker Greg Zupon worked the 2:00-10:00 p.m. shift on August 9-10, 2012.

10. Human Resources Manager of the Facilities Department Kim Dahleen testified that she reviewed Decedent’s timesheets and payroll information. She commented that Decedent last entered time into Employer’s system on August 7, 2012. The timesheet entry included annual leave for August 11-12, and 16-19, 2012. Decedent did not make any time entries for August 8-10, 2012 because those were his regularly scheduled days off.

11. When Decedent did not return home on the morning of August 11, 2012 Claimant contacted Decedent’s coworkers. She specifically called Jorge Figueroa and stated that Decedent had left home at 3:30 a.m. to use a work computer but had not returned. Mr. Figueroa subsequently contacted the campus police department. Campus Police Officer Josiah Thiemann responded to the scene. Mr. Figueroa noted that Claimant had informed him that Decedent had come to work to use a computer.

12. Officer Thiemann contacted Claimant. Claimant explained that Decedent enjoyed exploring Employer’s steam tunnels. She also stated that Decedent may have visited Employer’s motor pool to salvage and recycle scrap metal. Claimant noted that Decedent had located several large pieces of copper but was uncertain whether he could move them. Notably, Decedent operated a scrap metal recycling business for approximately 20-22 hours each week.

13. Campus police, fire and rescue workers searched Employer’s steam tunnels for Decedent beginning at about 8:15 p.m. Approximately 45 minutes later searchers found Decedent’s body in the tunnels near a manhole access about 0.85 miles from the heating plant. Officer Thiemann reported that there was a very large copper pipe leaning against a ladder towards the manhole near where Decedent’s body was found. He noted that Decedent appeared to have attempted to remove the copper pipe from the tunnel, sat down to take a break and never got back to his feet.

14. Campus Police Officer Chris Melvin conducted a follow-up investigation of Decedent’s death. He contacted Claimant on August 13, 2012. Claimant reported that Decedent had gone to Employer’s campus to use a computer and fix a steam leak in the tunnels.

15. Officer Thiemann testified at the hearing in this matter that Claimant did not report that Decedent had entered the steam tunnels to perform his job duties on August 11, 2012. He suspected that Decedent entered the tunnels to steal copper piping from Employer. Officer Thiemann knew that Decedent had used methamphetamines and addicts used copper piping to supplement their incomes. Moreover, Decedent could have driven his car over to the hatch above where his body and the copper piping were found. Finally, Decedent did not possess any tools that could have been used to repair a steam leak.

16. Officer Melvin testified at the hearing in this matter that Decedent was likely attempting to steal copper pipe from Employer at the time of his death. He explained that Decedent's clothes were very dirty and covered with small bits of gravel. Decedent's clothing thus suggested that he had been crawling around in the steam tunnels. Considering Decedent was not working or scheduled to work, was not following safety protocols and had not notified anyone that he planned to enter the steam tunnels, Officer Melvin concluded that Decedent was attempting to steal property from Employer at the time of his death.

17. Mr. Lewis stated that he was familiar with the storage of copper piping in Employer's steam tunnels. He explained that copper piping was typically stored approximately 200-300 feet from where Decedent's body was found. Mr. Lewis noted that there is a ditch encased in concrete that runs through a tunnel. There is approximately two feet of clearance in the ditch. The copper was stored on the south side of the ditch and was never stored on the north side of the ditch. Because Decedent's body and copper piping were found on the north side of the ditch, Mr. Lewis remarked that the copper piping must have been moved. Mr. Lewis finally noted that there were no leaks or required repairs in the steam system at the time of Decedent's death.

18. Larimer County Coroner Patrick Allen, M.D. performed an autopsy on Decedent's body to assess the cause and manner of his death. He concluded that Decedent died as a result of heat stroke with the ingestion of 1000 mg/dl of methamphetamines as a contributory factor. At the hearing in this matter Dr. Allen maintained that Decedent's high level of methamphetamines in conjunction with the hot environment of the steam tunnels contributed to his death. He noted that methamphetamines increase the effects of heat on the human body. Dr. Allen remarked that he discarded Decedent's blood sample after one year according to standard procedures.

19. Toxicologist and Occupational Medicine Physician Michael Kosnett conducted a forensic evaluation of the cause of Decedent's death. He issued a report on April 27, 2015 and testified at the hearing in this matter. Dr. Kosnett agreed with Dr. Allen that Decedent died of heat stroke with methamphetamines as a contributing factor. He emphasized that methamphetamines constituted a highly substantial factor in Decedent's death because methamphetamines are associated with elevated body temperatures.

20. Claimant filed a Claim for Workers' Compensation on November 14, 2014 or over two years after Decedent's August 11, 2012 death. Employer's Workers' Compensation Manager Kenda Weigang testified that she did not complete an Employer's First Report of Injury prior to Claimant's Claim for Workers' Compensation because she had no knowledge that Decedent's death was related to his work for Employer. She explained that prior to the filing of the November, 14, 2014 Claim for Workers' Compensation she had not been notified by Claimant or anyone acting on Claimant's behalf that Decedent's death had occurred during the course and scope of his employment. Ms. Weigang remarked that, if she had been notified that Decedent's

death was related to his job duties, she would have completed an Employer's First Report of Injury. On December 4, 2014 Insurer filed a Notice of Contest challenging Claimant's claim because Decedent's death was not work-related.

21. Claimant has demonstrated that it is more probably true than not that the two year statute of limitations for filing a Claim for Workers' Compensation was tolled because Respondent failed to file a First Report of Injury with the Division of Workers' Compensation pursuant to §8-43-103(2), C.R.S. Ms. Weigang did not complete an Employer's First Report of Injury prior to the filing of Claimant's Claim for Workers' Compensation because she had no knowledge that Decedent's death was related to his work for Employer. She remarked that she had not been notified by Claimant or anyone acting on Claimant's behalf that Decedent's death occurred while he was performing his job duties. However, Decedent had worked for Employer and was found dead in Employer's steam tunnels on August 11, 2012. Although it was questionable whether Decedent's death occurred during the course and scope of his employment, Employer had some knowledge of accompanying facts connecting Decedent's death with the employment and suggesting to a reasonably conscientious manager that the case might involve a potential compensation claim. Because Respondent failed to file a First Report of Injury the statute of limitations in §8-43-103(2), C.R.S. did not begin to run Accordingly, Claimant's November 14, 2014 Claim for Workers' Compensation is not barred by the statute of limitations in §8-43-103(2), C.R.S.

22. Claimant has failed to establish that it is more probably true than not that Decedent's August 11, 2012 death occurred during the course and scope of his employment with Employer and she is thus not entitled to receive death benefits pursuant to §§8-42-114 & 8-42-115 C.R.S. Decedent's death did not originate from his work-related functions and was not sufficiently related to his job duties to be considered part of his service to Employer. The record reveals that Decedent was on vacation and not performing any job duties for Employer at the time of his death.

23. Claimant testified that Decedent worked the night shift from 2:00 p.m. until 10:00 p.m. on August 8-10, 2012. She explained that on the evening of August 10, 2012 Claimant returned home from work at approximately 12:00 a.m. After Claimant and Decedent talked for several hours, Decedent left home to visit his workplace at approximately 3:30 a.m. Claimant explained that Decedent visited his workplace to enter his time and use a FAX machine to send a rental application that had to be submitted by 5:00 a.m. However, a weekly Operations Department schedule reveals that Decedent worked on August 7, 2012 but he did not work on August 8-10, 2012. In fact, the Operations Logs reflect that Decedent's co-worker Greg Zupon worked the 2:00-10:00 p.m. shift on August 9-10, 2012. Mr. Vergo noted that August 8-10, 2012 were Decedent's regularly scheduled days off from work. Moreover, Decedent had requested vacation time for the entire period from August 8-19, 2012. Furthermore, Ms. Dahleen testified that she reviewed Decedent's timesheets and payroll information. She commented that Decedent last entered time into Employer's system on August 7, 2012. The timesheet entry included annual leave for August 11-12, and 16-19, 2012. Decedent did not make any time entries for August 8-10, 2012 because those were his regularly scheduled days off.

24. During a follow-up investigation with Officer Melvin Claimant reported that Decedent had gone to Employer's campus to use a computer and fix a steam leak in the tunnels. She also testified that she assumed Decedent had gone to work to look for a steam leak in the campus heating system. However, the record is devoid of persuasive evidence that Decedent entered Employer's steam tunnels at approximately 3:30 a.m. on August 12, 2012 to repair a steam leak. Mr. Vergo specified that Utility Plant Operators primarily work in the Operational Control Room in Employer's Heating Plant. They are responsible for the steam pipes exiting the boilers before the pipes enter the steam tunnels. Mr. Vergo summarized that Stationary Plant Operators do not normally work in the steam tunnels except when the Distribution Crew or Pipefitters request help or during the annual outage when the steam system is closed for repairs. Mr. Lewis noted that Pipefitters are responsible for the maintenance and repair of the Steam Distribution System in Employer's steam tunnels. Furthermore, Officer Thiemann testified that Claimant did not report that Decedent had entered the steam tunnels to perform his job duties on August 11, 2012. He suspected that Decedent entered the tunnels to steal copper piping from Employer. Officer Thiemann remarked that Decedent did not possess any tools when he was found that could have been used to repair a steam leak. Finally, Officer Melvin testified that Decedent was likely attempting to steal copper pipe from Employer at the time of his death. He explained that Decedent's clothes were very dirty and covered with small bits of gravel. Decedent's clothing thus suggested that he had been crawling around in the steam tunnels. Considering Decedent was not working or scheduled to work, was not following safety protocols and had not notified anyone that he planned to enter the steam tunnels, Officer Melvin concluded that Decedent was attempting to steal property from Employer at the time of his death. Finally, Mr. Lewis commented that, because Decedent's body and copper piping were found on the north side of the ditch, the copper piping must have been moved. He noted that there were no leaks in the steam system that required repairs at the time of Decedent's death.

25. The bulk of the evidence reflects that Decedent was not performing any job duties at the time of his death. There were no steam leaks in need of repair at the time of his death. While Decedent may have been allowed to use Employer's FAX machine or computer for personal reasons, his job duties did not require him to independently search for or repair leaks in the tunnels at 3:30 a.m. without notifying other employees. Decedent's death thus did not occur within the time and place limits of his employment. Decedent's presence in Employer's steam tunnels during a scheduled vacation at the time of his death was not sufficiently related to the conditions and circumstances under which he generally performed his job functions to be considered part of his service to Employer. Moreover, Decedent's death did not arise out of a risk that was reasonably incidental to the conditions and circumstances of his employment. Accordingly, Claimant's request for death benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured

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

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

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

Statute of Limitations

4. Section 8-43-103(2), C.R.S. specifies that the right to Workers' Compensation benefits is barred unless a formal claim is filed within two years after the injury. However, §8-43-103(2), C.R.S. also provides, in relevant part, "in all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as required by the provisions of said articles, this statute of limitations shall not begin to run against the claim of the injured employee or said employee's dependents in the event of death until the required report has been filed with the division." Notably, §8-43-103(2), C.R.S.also specifies that employers shall immediately provide notice of the death of an employee from an injury to the Division of Workers' Compensation. An employer is deemed to have notice of an injury when it has "some knowledge of accompanying facts connecting the injury or illness with the employment and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Jones v. Adolph Coors Co.* 689 P.2d 681, 684 (Colo. App. 1984); *In Re Gillespie*, W.C. No. 4-737-182 (ICAP, Mar. 4, 2009). In the event the employer does not file a first report of injury or death, the statute of limitations is "tolled because of employer's failure to report the injury to the Division." *City of Englewood v. Indus. Claim Appeals Office*, 954 P.2d 640, 642-43 (Colo.App. 1998).

5. The claimant bears the burden of demonstrating that the employer had sufficient knowledge to trigger the duties required by §8-43-103(2), C.R.S. *In Re Gillespie*, W.C. No. 4-737-182 (ICAP, Mar. 4, 2009). The claimant bears the burden of proof because the tolling provisions create an exception to the claimant's duty to file a

claim within two years of the injury. *Id.* The question of whether the employer had notice of an injury or death is a factual determination for the ALJ. *Id.*

6. As found, Claimant has demonstrated by a preponderance of the evidence that the two year statute of limitations for filing a Claim for Workers' Compensation was tolled because Respondent failed to file a First Report of Injury with the Division of Workers' Compensation pursuant to §8-43-103(2), C.R.S. Ms. Weigang did not complete an Employer's First Report of Injury prior to the filing of Claimant's Claim for Workers' Compensation because she had no knowledge that Decedent's death was related to his work for Employer. She remarked that she had not been notified by Claimant or anyone acting on Claimant's behalf that Decedent's death occurred while he was performing his job duties. However, Decedent had worked for Employer and was found dead in Employer's steam tunnels on August 11, 2012. Although it was questionable whether Decedent's death occurred during the course and scope of his employment, Employer had some knowledge of accompanying facts connecting Decedent's death with the employment and suggesting to a reasonably conscientious manager that the case might involve a potential compensation claim. Because Respondent failed to file a First Report of Injury the statute of limitations in §8-43-103(2), C.R.S. did not begin to run Accordingly, Claimant's November 14, 2014 Claim for Workers' Compensation is not barred by the statute of limitations in §8-43-103(2), C.R.S.

Compensability

7. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991).

8. There is no requirement under the Act that a claimant must be on the clock or performing an act "preparatory to employment" in order to satisfy the "course of employment" requirement. *In Re Broyles,* W.C. No. 4-510-146 (ICAP, July 16, 2002). As noted in *Ventura v. Albertson's, Inc.,* 856 P.2d 35, 38 (Colo. App. 1992):

> The employee, however, need not be engaged in the actual performance of work at the time of injury in order for the "course of employment" requirement to be satisfied. Injuries sustained by an employee while taking a break, or while leaving the premises, collecting pay, or in retrieving work clothes, tools, or other materials within a reasonable time after termination of a work shift are within the course of employment, since these are normal incidents of the employment relation.

9. The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). Nevertheless, the employee’s activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). It is sufficient “if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment.” *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). Incidental activities include those that are “devoid of any duty component, and are unrelated to any specific benefit to the employer.” *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008). Actions including eating, sleeping, resting, washing, toileting, seeking fresh air, drinking water and keeping warm have been determined to be incidental to employment under the personal comfort doctrine. *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008). Whether a particular activity has some connection with the employee’s job-related functions as to be “incidental” to the employment is dependent on whether the activity is a common, customary and accepted part of the employment as opposed to an isolated incident. *See Lori’s Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

10. As found, Claimant has failed to establish by a preponderance of the evidence that Decedent’s August 11, 2012 death occurred during the course and scope of his employment with Employer and she is thus not entitled to receive death benefits pursuant to §§8-42-114 & 8-42-115 C.R.S. Decedent’s death did not originate from his work-related functions and was not sufficiently related to his job duties to be considered part of his service to Employer. The record reveals that Decedent was on vacation and not performing any job duties for Employer at the time of his death.

11. As found, Claimant testified that Decedent worked the night shift from 2:00 p.m. until 10:00 p.m. on August 8-10, 2012. She explained that on the evening of August 10, 2012 Claimant returned home from work at approximately 12:00 a.m. After Claimant and Decedent talked for several hours, Decedent left home to visit his workplace at approximately 3:30 a.m. Claimant explained that Decedent visited his workplace to enter his time and use a FAX machine to send a rental application that had to be submitted by 5:00 a.m. However, a weekly Operations Department schedule reveals that Decedent worked on August 7, 2012 but he did not work on August 8-10, 2012. In fact, the Operations Logs reflect that Decedent’s co-worker Greg Zupon worked the 2:00-10:00 p.m. shift on August 9-10, 2012. Mr. Vergo noted that August 8-10, 2012 were Decedent’s regularly scheduled days off from work. Moreover, Decedent had requested vacation time for the entire period from August 8-19, 2012. Furthermore, Ms. Dahleen testified that she reviewed Decedent’s timesheets and payroll information. She commented that Decedent last entered time into Employer’s system on August 7, 2012. The timesheet entry included annual leave for August 11-12, and 16-19, 2012.

Decedent did not make any time entries for August 8-10, 2012 because those were his regularly scheduled days off.

12. As found, during a follow-up investigation with Officer Melvin Claimant reported that Decedent had gone to Employer's campus to use a computer and fix a steam leak in the tunnels. She also testified that she assumed Decedent had gone to work to look for a steam leak in the campus heating system. However, the record is devoid of persuasive evidence that Decedent entered Employer's steam tunnels at approximately 3:30 a.m. on August 12, 2012 to repair a steam leak. Mr. Vergo specified that Utility Plant Operators primarily work in the Operational Control Room in Employer's Heating Plant. They are responsible for the steam pipes exiting the boilers before the pipes enter the steam tunnels. Mr. Vergo summarized that Stationary Plant Operators do not normally work in the steam tunnels except when the Distribution Crew or Pipefitters request help or during the annual outage when the steam system is closed for repairs. Mr. Lewis noted that Pipefitters are responsible for the maintenance and repair of the Steam Distribution System in Employer's steam tunnels. Furthermore, Officer Thiemann testified that Claimant did not report that Decedent had entered the steam tunnels to perform his job duties on August 11, 2012. He suspected that Decedent entered the tunnels to steal copper piping from Employer. Officer Thiemann remarked that Decedent did not possess any tools when he was found that could have been used to repair a steam leak. Finally, Officer Melvin testified that Decedent was likely attempting to steal copper pipe from Employer at the time of his death. He explained that Decedent's clothes were very dirty and covered with small bits of gravel. Decedent's clothing thus suggested that he had been crawling around in the steam tunnels. Considering Decedent was not working or scheduled to work, was not following safety protocols and had not notified anyone that he planned to enter the steam tunnels, Officer Melvin concluded that Decedent was attempting to steal property from Employer at the time of his death. Finally, Mr. Lewis commented that, because Decedent's body and copper piping were found on the north side of the ditch, the copper piping must have been moved. He noted that there were no leaks in the steam system that required repairs at the time of Decedent's death.

13. As found, the bulk of the evidence reflects that Decedent was not performing any job duties at the time of his death. There were no steam leaks in need of repair at the time of his death. While Decedent may have been allowed to use Employer's FAX machine or computer for personal reasons, his job duties did not require him to independently search for or repair leaks in the tunnels at 3:30 a.m. without notifying other employees. Decedent's death thus did not occur within the time and place limits of his employment. Decedent's presence in Employer's steam tunnels during a scheduled vacation at the time of his death was not sufficiently related to the conditions and circumstances under which he generally performed his job functions to be considered part of his service to Employer. Moreover, Decedent's death did not arise out of a risk that was reasonably incidental to the conditions and circumstances of his employment. Accordingly, Claimant's request for death benefits is denied and dismissed.

ORDER

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

Claimant's request for Workers' Compensation death benefits is denied and dismissed.

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

DATED: September 2, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

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

STIPULATION

1. The parties stipulate and agree that the Claimant's average weekly wage (AWW) is $260.00

ISSUES

The issues for determination are:

1. Whether the Claimant proved, by a preponderance of the evidence, that he suffered a compensable injury in the course and scope of his employment on November 10, 2014.

2. If the Claimant proves he suffered a compensable injury, whether the Claimant proved, by a preponderance of the evidence, that medical treatment that he received is reasonably necessary to cure and relieve the Claimant of the effects of his November 10, 2014 injury, including, but not limited to medical treatment provided by South Aurora Family Health Services and Quality Health Physical Therapy.

3. If the Claimant proves he suffered a compensable injury, whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability indemnity benefits August 23, 2015 ongoing.

4. If the Claimant proves he suffered a compensable injury, whether the Respondents proved, by a preponderance of the evidence, that the Claimant is responsible for his termination of employment and resulting wage loss.

FINDINGS OF FACT

1. The Claimant is a 36-year-old man with a date of birth of March 6, 1980. The Claimant was hired by Employer in September of 2014 in the housekeeping department and his typical job duties as a housekeeper included keeping locker rooms clean, keeping the racquet ball and basketball courts prepared, folding towels, and keeping the gym clean.

2. The Claimant testified at the hearing that on November 10, 2014, he began work for Employer at approximately 6:00am and that he sustained an injury at work around 10:00am. The Claimant testified that while he was preparing to mop the locker rooms, he received a call from his manager on duty to go outside and pick up a

delivery from FedEx. The delivery man left a dolly stacked with packages for the Claimant to take. The dolly had a flat tire and was difficult to move (Hrg. Tr., pp. 15–16).

3. After the Claimant unloaded the bales of towels and the boxes off the dolly, the Claimant returned to his usual job duties, which at that point in time consisted of stocking folded towels for the club members. The Claimant bent over to reach into a bin to grab some towels to fold. He testified that his back popped as he attempted to stand up from the bent position from grabbing the towels. He described feeling a pinching sensation in the middle of his back shortly thereafter. The Claimant denied ever having any problems in this middle area of his back prior to this event (Hrg. Tr., pp. 16-17).

4. The Claimant's testimony about his mechanism of injury is credible and has been generally consistent since his first report of injury. While there have been some variations of the reporting, these do not appear to be attributable to the Claimant providing inconsistent stories, but rather they are more likely due to note takers mixing up some of the details of the reporting.

5. The Claimant notified his supervisor after the incident occurred. The Claimant testified that he told his supervisor that he had just hurt his back, but the supervisor would not meet with him to complete an incident report on the day of the injury (Hrg. Tr., pp. 17-19). The Claimant testified that he insisted on completing an incident report the following day and so it was prepared on November 11, 2014. (Hrg. Tr., p. 19; Claimant's Ex. 3, p. 9).

6. The Claimant received medical treatment on November 11, 2014 after he was instructed to receive treatment from Concentra. (Hrg. Tr., p. 20). The Claimant was examined by Allison Hedien, NP, and she noted a mechanism of injury that the assisted with a Fed Ex delivery but the dolly was broken but he assisted with heavy loads of towels. NP Hedien noted that he the Claimant "felt a sudden onset of a sharp, pulling, throbbing pain in his thoracic back" which "remained last night and through today" making it difficult to work and giving him "excruciating pain." MP Hedien documented that the Claimant was now experiencing a throbbing pain in his thoracic spine to the point of him crying in the examination room. Her physical examination also documented tenderness over the thoracic paraspinal muscles around the T5-T12 area. The Claimant was assessed with a (1) strain of thoracic region; and (2) thoracic myofascial strain. The Claimant was taken off work until he could be seen for a recheck the next day (Claimant's Exhibit 4, pp. 14-17; Respondents' Exhibit C, pp. 24-25).

7. On November 12, 2014, the Claimant was evaluated again by NP Hedien and his pain level was reported again at 8/10. He was continued with a "no work" status (Claimant's Exhibit 4, pp. 22-24; Respondents' Exhibit C, pp. 26-27). That same day, the Claimant was evaluated by Sara Landgrave, DPT for an initial physical therapy evaluation. The Claimant reported a mechanism of injury that he assisted with a delivery and he had to use a dolly with a broken wheel to carry the bales of towels. Then after repeatedly loading and unloading the dolly, the Claimant bent into a bin to grab some

towels and felt a sharp pain in his back. The Claimant currently described a pain along his mid-back that was a constant, burning pain. Physical therapy twice a week was recommended until the Claimant's next re-check (Claimant's Exhibit 4, p. 18-20).

8. The Claimant's first examination by a doctor took place on November 14, 2014 with Dr. Jennifer Huldin. Dr. Huldin confirmed the diagnosis of a thoracic myofascial strain. She ordered the Claimant to continue physical therapy and referred him for chiropractic care. The Claimant was returned to work with modified duty with no lifting over 5 pounds, no work above the shoulder and no work below knee level (Claimant's Exhibit 4, pp. 28-34; Respondents' Exhibit C, pp. 28-30).

9. At a visit with NP Hedien on November 20, 2014, the Claimant reported an improving 6/10 pain level and that physical therapy was going well and helping significantly. The Claimant was returned to work with modified duty and restrictions of no lifting greater than 15 pounds, no pushing and pulling over 20 pounds, with walking, standing and bending up to 6 hours a day, no walking on uneven terrain and no climbing stairs or ladders and no reaching above head with affected extremities (Claimant's Exhibit 4, pp. 41-43; Respondents' Exhibit C, pp. 31-32).

10. The Claimant saw Richard Mobus, DC, for an initial chiropractic evaluation on November 24, 2014. He noted that the Claimant's cervical region and upper and lower extremities were pain free with normal active range of motion. On palpation, Dr. Mobus noted only discrete tenderness and moderate periarticular hypertonicity, most prominently at the T-5-T6 level on the left. The Claimant was instructed to ice the treatment area and provided with resisted stretching exercises for the anterior shoulder girdle (Claimant's Exhibit 4, pp. 45-46; Respondents' Exhibit E, pp. 49-50). The Claimant continued to treat with Dr. Mobus through November and the beginning of December.

11. On December 12, 2014, the Claimant saw Dr. Aschberger who noted that chiropractic treatments were providing temporary relief. The Claimant reported that he was working his usual duties as of this visit. The Claimant reported pain in the mid thoracic levels and pain across the ribs to the chest. On examination, Dr. Aschberger noted tenderness at the costosternal junction at the mid thoracic levels bilaterally, right more than left. Dr. Aschberger assessed the Claimant with a thoracic strain with some associated rib restriction and noted that a discogenic component to the symptoms should be considered (Claimant's Exhibit 4, pp. 64-65; Respondents' Exhibit C, pp. 36-37).

12. The Claimant saw Dr. Aschberger again on January 9, 2015 with continued thoracic irritation. The Claimant was discharged from chiropractic care due to lack of progress. Dr. Aschberger noted stiffness and tightness at the right ribs at the mid thoracic levels and increased pain with lateral compression over the ribs. The Claimant reported his symptoms were up and down. Dr. Aschberger recommended a home exercise program and massage with osteopathic manual therapy (Claimant's Exhibit 4, p. 73; Respondents' Exhibit C, p. 41).

13. On January 12, 2015, the Claimant reported to NP Hedien that he felt his pain was not improved and remained at 7-8/10. He reported he had been working light duty, but his hours may be cut soon due to his restrictions. NP Hedien noted that his MRI was negative but he was having pain in his right trapezoid and occasionally wrapping around his right ribs. His work restrictions were lifting up to 15 pounds, pushing and pulling up to 20 pounds, standing and walking frequently/up to 6 hours per day (Claimant's Exhibit 4, pp. 74-76; Respondents' Exhibit C, pp. 42-44).

14. On February 9, 2015, the Claimant saw NP Hedien again at Concentra reporting a pain level of 6-7/10. He reported that he was working on restrictions and it was going okay. NP Hedien noted that Dr. Aschberger referred the Claimant to Dr. Winslow for manual therapy and the Claimant had several appointments with him, along with continuing massage therapy and behavioral based psychotherapy sessions with Dr. Cohen. At this point the Claimant was discharged from further chiropractic with Dr. Mobus. As of this visit the work restrictions were lifting up to 15 pounds, pushing and pulling up to 20 pounds, bending up to 3 hours per day, and standing and walking up to 6 hours per day (Claimant's Exhibit 4, pp. 83-85; Respondents' Exhibit 45-47).

15. The Claimant testified that on February 14, 2015, he was incarcerated. He testified that the only treatment he received for his back while incarcerated was some prescription pills. The Claimant was released from jail on August 23, 2015 (Hrg. Tr., pp. 22-24). The Department of Corrections medical records document that the Claimant requested treatment for his low back while incarcerated. The healthcare provider documented that the Claimant sustained a back injury in 2014 and had been receiving treatment through workers' compensation although her note contains some inaccurate details about the Claimant working for Fed Ex when he was injured (Claimant's Exhibit 6, p. 88).

16. On March 5, 2015, the Claimant was voluntarily separated from employment due to not being available for work because of his incarceration. The Employer's separation form indicates that the Claimant was eligible for rehire (Respondents' Exhibit I).

17. After the Claimant was released from jail on August 23, 2015, he resumed treatment for his back pain at South Metro Community Provider Network/South Aurora Health Services/HealthONE Aurora South since Concentra had previously closed his claim for noncompliance (Hrg. Tr., p. 24 and Claimant's Exhibit 4, p. 86).

18. The Claimant saw PA-C Tiffany Knudsen at South Aurora Health Services on October 19, 2015 for back pain. She noted that the Claimant reported a known back injury a year ago with a period of incarceration in the intervening time. The Claimant reported Tylenol and Ibuprofen was not helping his symptoms. He reported that the pain was originally more in the left back but is now more in the middle of the back. PA-C Knudsen referred the Claimant to physical therapy and provided him with home

exercises and medications (Claimant's Exhibit 7, p. 109-111; Claimant's Exhibit 8, pp. 135-154; Respondents' Exhibit G, pp. 80-83).

19. At an initial physical therapy evaluation on October 27, 2015, the Claimant demonstrated decreased range of motion and reported pain that limited his functional activities. DPT Brian Shin found deficits that could be addressed by physical therapy and recommended 1-2 physical therapy visits per week for 4-6 weeks (Claimant's Exhibit 7, pp. 109-110).

20. On December 17, 2015, the Claimant continued to treat with providers at Aurora South who noted that the Claimant's treatment for a prior work injury was not completed and during the interruption while he was incarcerated, the Claimant did not receive treatment. While he was doing better before, the Claimant was reporting that the pain is now interfering with his daily activities and his ability to work (Claimant's Exhibit 8, pp. 131-135; Respondents' Exhibit G, pp. 75-79). The Claimant followed up again at Aurora South on January 13, 2016 continuing to report back pain. His medications were changed and he was referred for physical therapy (Claimant's Exhibit 8, pp. 115-131; Respondents' Exhibit G, pp. 59-75).

21. The Claimant underwent an Independent Medical Examination with Dr. Edwin Healey on February 5, 2016 (Claimant's Exhibit 9, pp. 155-170). The Claimant reported a mechanism of injury to Dr. Healey of being at work as a housekeeper when he was called by his supervisor to unload boxes and bales of towels being delivered by a FedEx truck. The dolly used to bring the items in to the health club had a flat tire and the Claimant struggled to push and pull the loaded dolly to the storage room. Then after this, when the Claimant bent to grab some towels, the Claimant felt a pop in his mid back and had an immediate onset of pain (Claimant's Exhibit 9, p. 155). Dr. Healey reviewed the Claimant's medical records from prior to his dates of incarceration. Dr. Healey also reviewed medical records from HealthONE Aurora South after the Claimant was released, and he provided a thorough summary of the records (Claimant's Exhibit 9, pp. 156-164). The Claimant reported that he has continued to have thoracic pain since the initial injury but the pain has fluctuated in severity. Now, the Claimant reports to Dr. Healey that prolonged sitting, standing, bending, twisting and lifting more than 10 pounds aggravates his upper back pain. The Claimant reported that initially, his pain was primarily in the thoracic region, but over time it has developed and now radiated into his upper low back (Claimant's Exhibit 9, p. 165). On examination, Dr. Healey noted tenderness, hypertonicity and trigger points in the T5-T12 paraspinals with deep palpation causing pain to radiate into his upper lower back. Based on the history, medical records and the examination, Dr. Healey opined that "the current diagnoses causally and directly related to the November 10, 2014 work injury include thoracic sprain/strain, with secondary myofascial pain and referral to the upper lumbar region" (Claimant's Exhibit 9, p. 166). Dr. Healey opined that the Claimant does not have significant lumbar pain, but to the extent he does, Dr. Healey found it unrelated to the November 10, 2014 injury. Dr. Healey recommended a trial of aggressive myofascial low back pain treatment, psychological counseling and possible antidepressant medication. He specifically opined that the Claimant "is still symptomatic as a result of

his November 10, 2014 work injury and needs further evaluation and treatment" (Claimant's Exhibit 9, p. 167). Dr. Healey recommended work restrictions of no lifting greater than 10 pounds, no repetitive bending at the waist and no pushing/pulling greater than 20 pounds (Claimant's Exhibit 9, p. 168).

22. On March 3, 2016, the Claimant returned to Concentra and was by Dr. Bryan Counts. Dr. Counts assessed the Claimant with thoracic myofascial strain and referred the Claimant for osteopathic manipulative treatments with Dr. Winslow. Dr. Counts placed work restrictions on the Claimant that he may lift up to 20 pounds up to 3 hours per day (Respondents' Exhibit C, pp. 47a-47d).

23. The Claimant testified that he did not go back to the Employer after his release from incarceration to be reinstated in his job (Hrg. Tr., p. 31).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

There is sufficient evidence in the record that the Claimant suffered an injury to thoracic spine on November 10, 2014 and the Claimant's testimony regarding his mechanism of injury was credible. While there were some slight variations in medical notes and reporting to prison intake personnel, these seem to be due more to the note takers than the Claimant's story changing. The Claimant does appear to have consistently reported a mechanism of injury that while he was preparing to mop the locker rooms, he received a call from his manager on duty to go outside and pick up a delivery from FedEx. The delivery man left a dolly stacked with packages for the Claimant to take. The dolly had a flat tire and was difficult to move. After the Claimant unloaded the bales of towels and the boxes off the dolly, the Claimant returned to his usual job duties, which at that point in time consisted of stocking folded towels for the club members. The Claimant bent over to reach into a bin to grab some towels to fold. Immediately, the Claimant had an onset of pain.

The Claimant testified credibly that he did not have prior issues with the area of his back that he injured on November 10, 2014 and he also reported this to medical treatment providers. There was no persuasive evidence presented to contradict this and no indication of prior thoracic spine injury. As of January 2015, Dr. Aschberger continued to opine that the Claimant had a thoracic irritation and he reported evidence of symptoms on examination and per the report of the Claimant. At that point he was recommending osteopathic manual therapy and exercise and the Claimant was continued under work restrictions.

There is also evidence to establish that the Claimant continues to have symptoms resulting from his November 10, 2014 work injury. While the diagnosis is thoracic strain or sprain and this would generally have been expected to resolve, the Claimant's medical care was interrupted by a period of incarceration from February 14, 2015 to August 23, 2015. After being released from jail, the Claimant sought treatment again for his symptoms and Dr. Healey opined that at least some of his symptoms, including thoracic sprain/strain with secondary myofascial pain referred to his upper lumbar region are related to the original work injury and the Claimant still requires treatment for this. Dr. Healy also opined that the Claimant requires psychological counseling and possibly antidepressants due to the ongoing, chronic nature of the Claimant's symptoms.

Subsequent to the IME by Dr. Healy, the Claimant was seen back at Concentra by Dr. Bryan Counts who also assessed the Claimant with thoracic myofascial strain and recommended osteopathic manipulative treatments and work restrictions. The Claimant was not placed at MMI by his treating physician as of the date of the hearing and continued to suffer symptoms consistent with his original injury.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that his work activities on November 10, 2014 caused the injury that previously and currently produced the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits – Authorized, Reasonable and Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. The employer's duty to provide designated medical providers is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

However, respondents may by their conduct or acquiescence waive the right to object to a change of physician. A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990); *Rogers v. Industrial Claims Appeals Office*, 746, 565 (Colo. App. 1987); *Cabela v. ICAO*, 198 P. 3d 1277 (Colo. pp. 2008); *Roybal v. University of Colorado Health Sciences Center*, 768 P .2d 1249 (Colo. App. 1988).

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

Here, the Claimant was receiving medical treatment at Concentra that was interrupted by a period of incarceration. As of the Claimant's last medical record prior to his incarceration on February 9, 2015, the Claimant was reporting a pain level of 6-7/10. He reported that he was working on restrictions and it was going okay. NP Hedien noted that Dr. Aschberger referred the Claimant to Dr. Winslow for manual therapy and the Claimant had several appointments with him, along with continuing massage therapy and behavioral based psychotherapy sessions with Dr. Cohen. At this point the Claimant was discharged from further chiropractic with Dr. Mobus. As of this visit the work restrictions were lifting up to 15 pounds, pushing and pulling up to 20 pounds, bending up to 3 hours per day, and standing and walking up to 6 hours per day.

After the Claimant was released from jail on August 23, 2015, he resumed treatment for his back pain at South Metro Community Provider Network/South Aurora Health Services/HealthONE Aurora South since Concentra had previously closed his claim for noncompliance. He treated with providers at HealthONE Aurora South and their referrals from October 2015 through January 2016. Then, on February 5, 2016, Dr. Healey performed an IME of the Claimant and determined that the Claimant's current diagnoses of thoracic sprain/strain with secondary myofascial pain and referral to the upper lumbar region are causally and directly related to the November 10, 2014 work injury and that the Claimant should have work restrictions of no lifting greater than 10 pounds, no repetitive bending at the waist and no pushing/pulling greater than 20 pounds. He recommended treatment similar to the conservative care that was provided by HealthONE Aurora South. Shortly after this, on March 3, 2016, the Claimant returned to Concentra and was seen by Dr. Bryan Counts. Dr. Counts also assessed the Claimant with thoracic myofascial strain and referred the Claimant for osteopathic manipulative treatments with Dr. Winslow. Dr. Counts placed work restrictions on the Claimant that he may lift up to 20 pounds up to 3 hours per day.

The opinion of Dr. Healey was based on a thorough review of pre-incarceration and post-incarceration medical records as well as a physical examination and is persuasive. Further, upon return to treatment with Dr. Counts at Concentra, the Claimant was provided with medical treatment and work restrictions similar to that recommended by Dr. Healey. Having received little to no treatment during his period of incarceration, the Claimant's condition did not improve and dragged longer than was originally expected. The Claimant did not have the option to return to Concentra right after his incarceration was complete since his claim was closed for non-compliance. Therefore, he sought treatment from providers at HealthONE Aurora South until Dr. Healey opined that the Claimant still suffered from a work related condition and the Claimant was returned to Concentra for treatment. The conservative treatment recommended and provided Concentra providers after March 3, 2016 is similar to that from HealthONE Aurora South providers.

Respondents argue that the HealthONE Aurora South medical treatment is not authorized and treatment there was directed at the Claimant's lumbar spine, not his thoracic spine. However, Dr. Healey noted that the Claimant did not have significant lumbar pain. Rather Dr. Healey opined that the Claimant still had a thoracic strain with referred pain to the upper lumbar region.

The Claimant argues that because Claimant's case was closed by Concentra for non-medical reasons, the Respondents are liable for the care received by the Claimant through HealthONE Aurora South and its referrals, as well as continuing care recommended by Dr. Healey and the physicians at Concentra since March 3, 2016.

The Claimant has established that he is entitled to further evaluation of his lower back condition to determine if he requires any additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act and based on the medical opinion of his current treating physicians at Concentra. The Claimant has also established that the care received from HealthONE Aurora South and its referrals was reasonably necessary. Further, as Respondents closed the Claimant's case for non-medical reasons, Respondents waived the right to object to the care received at HealthONE Aurora South for his work related condition on the grounds that it was unauthorized.

Temporary Disability Benefits

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

(a) the employee reaches maximum medical improvement;
(b) the employee returns to regular or modified employment;
(c) the attending physician gives the employee a written release to return to regular employment; or
(d) the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

However, an individual who is otherwise entitled to benefits shall not receive benefits for any week during which he is confined in a jail, prison or any department of corrections facility. C.R.S. § 8-42-113(1). Once released from confinement, the individual shall be restored to the same position with respect to entitlement to benefits as he would otherwise have been as of the time of release from confinement C.R.S. § 8-42-113(2).

In this case, the Claimant established that he suffered a compensable work injury on November 10, 2014, but he did not establish that he suffered a wage loss due to that injury prior to his incarceration. Rather, in January 2015, the Claimant was working light duty for Employer in accordance with his work restrictions. Then, in February 2015, the Claimant was incarcerated and he was not released until August 23, 2015. Pursuant to statute, he would not be entitled to benefits during this period of incarceration.

Then, as found, the Claimant required continued medical treatment for his thoracic spine after his release from incarceration. Treatment providers at South Metro Community Provider Network/South Aurora Health Services/HealthONE Aurora South found that while the Claimant has been improving with treatment prior to incarceration, he did not receive any significant treatment during the period of incarceration and his pain was again interfering with his daily activities and his ability to work. His medications were changed and he was referred for physical therapy.

At an IME on February 5, 2016, Dr. Edwin Healey reviewed the Claimant's medical records from prior to his dates of incarceration. Dr. Healey also reviewed medical records from HealthONE Aurora South after the Claimant was released, and he provided a thorough summary of the records. He also performed a physical examination and determined that the current diagnoses causally and directly related to the November 10, 2014 work injury include thoracic sprain/strain, with secondary myofascial pain and referral to the upper lumbar region. Dr. Healey recommended additional medical treatment and recommended work restrictions of no lifting greater than 10 pounds, no repetitive bending at the waist and no pushing/pulling greater than 20 pounds. On March 3, 2016, the Claimant returned to Concentra and was by Dr. Bryan Counts who then placed work restrictions on the Claimant of no lifting greater than 20 pounds up to 3 hours per day.

Based on the continued need for medical treatment and physical restrictions due to disability that physicians have related back to the original work related injury, the Claimant established an impaired earning capacity that entitles him to TTD benefits after August 23, 2015. After August 23, 2015, the Claimant is not at MMI, has not returned to regular or modified employment, has not received a written release to return to regular employment, and Employer has not offered modified employment to the Claimant that he failed to begin.

Therefore, it is necessary to address Respondents' contention that the Claimant is precluded from receiving temporary indemnity benefits because the Claimant is responsible for his termination on March 5, 2015.

Responsible for Termination

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995).

Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*.

However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

On March 5, 2015, the Claimant was voluntarily separated from employment by Employer due to not being available for work because of his incarceration. However, Respondents did not provide persuasive evidence that the Claimant committed a volitional act that led to his termination. Discharge for violation of an employer's policy alone is not enough to establish that the Claimant acted volitionally or exercised control over the circumstances of his employment. There was no persuasive evidence presented as to the terms and conditions of the Claimant's parole or probation, nor was there evidence presented that the Claimant understood that the act that he committed, or action/requirement that he failed to do, would cause a revocation of his parole or probation that would result in his incarceration that caused him to be unavailable for work. In fact, there was no evidence presented that established the reason the Claimant was incarcerated or the Claimant's knowledge that whatever he did (or didn't do) would result in incarceration.

Thus, the Respondents have failed to establish that the Claimant was responsible for his termination from employment.

ORDER

It is therefore ordered that:

1. The Claimant suffered a compensable industrial injury during the scope and course of his employment with Employer on November 10, 2014.

2. The Claimant proved, by a preponderance of the evidence, that medical treatment that he received is reasonably necessary to cure and relieve the Claimant of the effects of his November 10, 2014 injury, including, but not limited to medical treatment provided by South Aurora Family Health Services and Quality Health Physical Therapy, and is either authorized or deemed authorized due to Respondents' denial of medical treatment for case closure due to non-medical reasons.

3. The Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability indemnity benefits August 23, 2015 ongoing.

4. Respondents failed to prove that the Claimant is responsible for his termination of employment and resulting wage loss.

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

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

DATED: September 6, 2016

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

PRELIMINARY MATTERS

The Respondent was not present and was not represented by counsel at the hearing. The Notice was not returned as undelivered. Written notice of the hearing scheduled for August 9, 2016 at 8:30 PM was sent to the Respondent by e-mail from the Office of Administrative Courts. Through testimony and exhibits, the Claimant established that this e-mail address was correct. The notice was not returned as undelivered. Based upon the information contained in the file, and the testimony presented at hearing, the ALJ determined that there was sufficient notice to the Respondents for the hearing and the hearing could proceed notwithstanding the failure of the Respondents to appear.

ISSUES

The following issues were raised for consideration at hearing:

1. Whether the Claimant proved he suffered a compensable injury while performing services arising out of and in the course of his employment with Respondents on November 19, 2015.

2. If the Claimant's claim is compensable, whether the Claimant proved that medical treatment he received was reasonably necessary to cure and relieve the effects of his November 19, 2015 work injury and whether the Claimant is entitled to additional medical benefits.

3. If the Claimant's claim is compensable, whether the Claimant proved that he is entitled to temporary disability benefits.

4. The calculation of the Claimant's average weekly wage.

FINDINGS OF FACT

Based upon the evidence presented at hearing and contained in Claimant's exhibits, which were admitted into evidence without objection, the ALJ makes the following findings of fact:

1. Respondents failed to appear at the hearing, after being properly notified. Respondents had actual notice via texts from the Claimant's father as well as the emailed Notice of Hearing. Claimant's Exhibit 6 sets forth the evidence of the mailing address which Respondent Bob Wolf provided to the Claimant and his father and insisted be used for communications. Claimant's Exhibit 6 also sets forth the e-mail address that the Respondent Bob Wolf provided to the Claimant and his father.

2. The Claimant testified credibly that he was employed by the Employer on November 19, 2015. The Claimant was a friend of the owner’s son and the son got the Claimant the job with the Employer. The Claimant’s job duties for the Employer included making deliveries of bagels and driving the delivery truck. The Claimant would start delivering bagels at 1:30 AM to approximately 8-9 locations.

3. The Claimant testified that he made $11.00 an hour. He usually started working at 1:30 AM and finished work at 9:00 AM, working 7.5 hours a day, four hours per week. Based on the testimony of the Claimant which is further supported with text messages in Claimant’s Exhibit 6 between the Claimant and the owner’s son, the Claimant’s average weekly wage is found to be $330.00.

4. On November 19, 2015 the Claimant left for a delivery to a store in Golden, CO and, at approximately 3:00 AM, lost control of the truck on eastbound I-70, causing the truck to strike a barricade, rolling onto the driver’s side (also see Claimant’s Exhibit 2). The Claimant established this collision occurred during the course and scope of his job duties.

5. The Claimant was injured in the collision that occurred on November 19, 2015. He was transported to Exempla Lutheran Medical Center by ambulance. The ER report notes that,

> The Claimant was the restrained driver traveling in a work vehicle at 65 mph on the highway, when he hit the median in the front passenger compartment of his vehicle. Patient’s car rolled onto its side and the airbags deployed. He self-extricated, and was able to ambulate normally. Patient reports moderate pain in the bridge of his nose, and a left elbow abrasion with pain. He denies headache or loss of consciousness. No neck or back pain. No chest wall pain, abdominal pain, pelvic pain, or other extremity pain….
> (Claimant’s Exhibit 3).

The ER physician noted that an x-ray of the left elbow revealed a persistent foreign body, but it could not be located with irrigation and exploration of the wound. The wound was left open for recheck and so that the foreign body might work its way out (Claimant’s Exhibit 3).

6. The Claimant timely reported the injury to the Employer. There are multiple text messages between the Claimant and the owner’s son and messages between the Claimant’s father and the Respondent Bob Wolf in Claimant’s Exhibit 6 to establish the notification and that the Employer was aware that the Claimant was in a work injury that required medical treatment. The vehicle that the Claimant was driving was severely damaged and inoperable and was a total loss.

7. In spite of notice to the Employer of the work injury, the Claimant was not provided a choice of physicians.

8. On December 8, 2015, the Claimant was seen by Dr. David Yamamoto for a left elbow injury. Dr. Yamamoto reviewed a photocopy of the x-rays taken at the emergency department at Lutheran Hospital and noted the appearance of a foreign body. The Claimant reported that the Claimant doesn’t have elbow pain until he moves the elbow into certain positions and then gets a loose body sensation and pain. Dr. Yamamoto assessed the Claimant with left elbow contusion, open left elbow wound and laceration of the left elbow with foreign body. He recommended the Claimant be seen by a hand specialist. Dr. Yamamoto noted the Claimant was at full duty work status with no restrictions (Claimant’s Exhibit 4).

9. On December 17, 2015, the Claimant was seen by Dr. Tracy Wolf for an initial encounter regarding the laceration with foreign body on the left elbow. The billing history from Dr. Wolf’s office indicates contact by phone between the office and Bob Wolf about payment of the bill of $300.00. The bill appears to have been submitted to CNA worker’s compensation insurance and this bill was paid (Claimant’s Exhibit 5).

10. The Claimant testified that all of the treatment listed in Exhibit 5 was related to his injuries from the MVA on November 19, 2015. ‘

11. The Claimant testified that his current symptoms are that a few pieces of shrapnel in his left elbow that cause irritation, but there is not much that can be done to improve this situation.

12. The Claimant’s father, Laurence Bacon, provided testimony about the Claimant’s outstanding medical bills and contact that he had with Mr. Wolf about payment of those bills. Mr. Bacon testified that all of the bills in Exhibit 5 had been provided to Mr. Wolf, sent by certified mail to the address that Mr. Wolf provided to Mr. Bacon. Mr. Bacon testified that two of the submitted bills were paid, the radiology bill of $162.50 and the doctor bill for Tracy Wolf, M.D. for $300.00. Both Mr. Bacon and the Claimant testified that the remaining bills remained unpaid despite repeated demands to Mr. Bob Wolf to pay the same.

13. The Claimant submitted the following bills and both he and his father testified credibly about the payment status of each bill (set forth below). The following bills related to the Claimant’s treatment for his November 19, 2015 injury are:

(a)	Lutheran Medical Center		$11,127.55
(b)	Emergency Service Physicians, P.C.		$ 833.70
(c)	Rocky Mountain Radiologists, P.C.	**(paid)**	**($ 162.50)**
(d)	Tracy Wolf, M.D.	**(paid)**	**($ 300.00)**
(e)	David Yamamoto, M.D.		$ 197.00
(f)	Out-of-pocket medical supplies		$ 150.00
	Total medical bills remaining unpaid:		$12,770.75

14. The Claimant submitted a Claim for Workers’ Compensation on December 2, 2015 (Claimant’s Exhibit 1). The Claimant filed an Application for Hearing and Notice to Set on June 7, 2016 requesting a hearing on the issues of: Compensability, Medical Benefits – Authorized Provider, Reasonably Necessary, Average Weekly Wage, Disfigurement, TTD from November 19, 2015 to December 31, 2015. There is no record of a Response filed with the Office of Administrative Courts in this case.

15. The Claimant’s testimony regarding his injury and medical treatment was supported by the testimony of his father and by the medical bills submitted as Exhibit 5. His corroborated testimony was not controverted, was credible and persuasive and is found as fact.

CONCLUSIONS OF LAW

Generally

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

Notice of Hearing

OAC Rule 23 provides the following with respect to non-appearing parties:

> If a party fails to appear at a hearing after the OAC has sent notice of the hearing to that party, prior to entering any orders against the non-appearing party as a result of that hearing, the judge will consider:
>
> A. The addresses to which the notice of hearing was sent are the most recent addresses provided by the non-appearing party to either the OAC or the Division of Workers' Compensation; or
>
> B. If no address for the non-appearing party is on file with the OAC or the Division of Workers' Compensation, the judge finds on the basis of other evidence that:
>
> 1. Notice of the hearing was sent to an address at which it is likely to be received by the non-appearing party or the non-appearing party's authorized representative; or
>
> 2. The non-appearing party in fact received notice of the hearing.

Respondents failed to appear at the hearing, after being properly notified. Respondents had actual notice via texts from the Claimant's father as well as the emailed Notice of Hearing. Claimant's Exhibit 6 sets forth the evidence of the mailing address which Respondent Bob Wolf provided to the Claimant and his father and insisted be used for communications. A copy of the Application for hearing was mailed to this address along with other documents. Claimant's Exhibit 6 also sets forth the e-mail address that the Respondent Bob Wolf provided to the Claimant and his father. This is the e-mail address that the OAC used to send the Notice of Hearing. Although the Respondents did not appear, it was proper to proceed with the hearing and it is proper to enter orders against the Respondents.

Compensability

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

Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo.App.Div. 5 2009).

The Claimant testified credibly that he was employed by the Employer on November 19, 2015. The Claimant was a friend of the owner's son and the son got the Claimant the job with the Employer. The Claimant's job duties for the Employer included making deliveries of bagels and driving the delivery truck. The Claimant would start delivering bagels at 1:30 AM to approximately 8-9 locations. The Claimant further testified credibly that on November 19, 2015 the Claimant left for a delivery to a store in Golden, CO and, at approximately 3:00 AM, lost control of the truck on eastbound I-70, causing the truck to strike a barricade, rolling onto the driver's side. The Claimant established this collision occurred during the course and scope of his job duties. The Claimant was injured in the collision that occurred on November 19, 2015. He was transported to Exempla Lutheran Medical Center by ambulance. The ER medical report corroborates the Claimant's testimony and established that he suffered a work injury that required medical treatment. The Claimant's testimony is further supported by a follow up medical record of Dr. Yamamoto.

Based upon the Claimant's uncontroverted and supported testimony and the medical records confirming the Claimant's physical condition, and other records confirming the Claimant's employment status, it is found that the Claimant suffered a compensable injury.

Medical Benefits – Reasonably Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999). However, an employer has an obligation to designate a treating physician forthwith upon notice of the injury or the right of selection of a physician passes to the employee. An employer is deemed notified of an injury when it has "some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006).

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

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

Here, the Claimant has established that the medical treatment he received from Lutheran Medical Center, Emergency Service Physicians, P.C., Rocky Mountain Radiologists, P.C., was provided on a bona fide emergency basis. The medical treatment provided by Tracy Wolf, M.D., David Yamamoto, M.D., and out-of-pocket medical supplies for bandages and antibiotic solutions was also reasonably necessary to cure and relieve the effects of the November 19, 2015 work injury. Additionally, this treatment was provided after Employer had notice of the Claimant's work injury and failed to provide a choice of physicians. Therefore. the right to select a physician passed to the Claimant and he saw Dr. Yamamoto who then referred the Claimant to a specialist, Dr. Tracy Wolf. The outstanding medical bills for Claimant's work-related treatment total $12,308.25.

The Claimant has also established that he is entitled to further evaluation of his elbow to determine if he requires additional medical treatment and/or physical therapy to cure and relieve the Claimant from the effects of the injury in accordance with the Act.

Because the Employers are liable for payment of Claimant's medical costs associated with his work injury, no medical provider shall seek to recover such costs from the Claimant. C.R.S.§ 8-42-101(4), C.R.S.

Calculation of Claimant's Average Weekly Wage

Under Colorado's Workers' Compensation Act, the "average weekly wage" is a key part of the formula used to calculate compensation for injured workers, and it is based upon the definition of "wages" provided at C.R.S. § 8-40-201(19). *Industrial Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006). To determine a claimant's AWW, the ALJ may choose from two different methods set forth in C.R.S. § 8-42-102. The first method, referred to as the "default provision," provides that an injured employee's AWW " be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." *§ 8-42-102(2), C.R.S.* The default provision in § 8-42-102(2)(a)-(f), C.R.S lists six different formulas for conducting this calculation. Per § 8-42-102(5)(a), the phrase "at the time of injury" in subsection (2) requires the AWW to be determined using the wage earned on the date of the employee's accident. The second method for calculating a claimant's AWW, referred to as the "discretionary exception," applies when the default provision will not fairly compute the employee's AWW. *§ 8-42-102(3), C.R.S.* In such a circumstance, the ALJ has discretion to compute the AWW of a claimant in such other manner and by such other method as will, based upon the facts presented, fairly determine the employee's AWW. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992).

Here, at the time of his injury, and prior thereto, the Claimant received wages of $330.00 per week. He worked 7.5 hours per day for 4 days per week at the rate of $11.00 per hour.

Temporary Disability Benefits

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

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

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

Although the Claimant suffered a work injury on November 19, 2015 that required medical treatment, the ER physicians placed no work restrictions on the Claimant upon discharge nor was he provided any narcotic pain medications which may have impaired his ability to work. On December 8, 2015, Dr. Yamamoto examined the Claimant and confirmed an elbow laceration with foreign body, but he did not place any work restrictions and returned the Claimant to full duty work. The Employer offered substitute work opportunities to the Claimant since the vehicle that the Claimant used for deliveries was rendered inoperable. The Claimant's own testimony was that his elbow condition was irritating to him and, at times, caused discomfort. However, he did not testify that the condition caused loss or restriction of body function such that he could not work.

Therefore, as the Claimant has the burden to establish entitlement to temporary total disability benefits under the Act, the claim for TTD benefits between November 19, 2015 and December 31, 2015, is denied and dismissed.

ORDER

Based on the above factual findings and legal conclusions, it is therefore ORDERED that:

1. The Claimant was an employee of the Employer under the Act and the Claimant suffered a compensable injury on November 19, 2015.

2. Medical treatment and evaluation that the Claimant received that related to the November 19, 2015 motor vehicle accident and his elbow condition was reasonably necessary to cure and relieve the Claimant from the effects of the work injury.

3. The Respondent Employer shall pay the following medical bills to the providers:

(a)	Lutheran Medical Center	$11,127.55
(b)	Emergency Service Physicians, P.C.	$ 833.70
(c)	David Yamamoto, M.D.	$ 197.00
(d)	Out-of-pocket medical supplies	$ 150.00
	Total medical bills remaining unpaid:	$12,770.75

To the extent that the Claimant has paid all or any portion of the above bills, the Respondent Employer shall reimburse the Claimant for the amounts that the Claimant paid and pay any remaining balance due to the providers. Because the Employers are liable for payment of Claimant's medical costs associated with his work injury, no medical provider shall seek to recover such costs from the Claimant. C.R.S.§ 8-42-101(4), C.R.S.

4. The Claimant shall continue to receive reasonable and necessary medical treatment that is designed to cure or relieve the effects of work injury suffered on November 19, 2015, including, but not limited to, reasonable and necessary evaluation, assessments and care of the Claimant's current medical condition by Dr. Yamamoto and/or Dr. Wolf subject to the provisions of the Act. The Respondent Employer shall be responsible for the payment of all such medical treatment.

5. The Claimant's average weekly wage (AWW) is $330.00.

6. The Claimant's claim for temporary total disability benefits is denied and dismissed

7. All compensation not paid when due shall bear interest at the rate of 8% per annum.

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

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

DATED: September 6, 2016

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

ISSUES

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

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his admitted April 25, 2010 left knee injury.

FINDINGS OF FACT

1. On August 13, 2015 the undersigned Administrative Law Judge (ALJ) conducted a hearing in this matter. The issue presented was whether Claimant had established by a preponderance of the evidence that he should be permitted to reopen his April 25, 2010 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. On September 16, 2015 the ALJ issued Findings of Fact Conclusions of Law and Order in this matter. He denied Claimant's Petition to Reopen because Claimant failed to demonstrate that he suffered a change in the condition of his original compensable injury or a change in his physical or mental condition that was causally connected to the original injury.

2. Claimant appealed the denial of his Petition to Reopen to the Industrial Claim Appeal Panel (ICAP). On January 28, 2016 the ICAP dismissed Claimant's Petition to Review without prejudice for lack of a final order. The ICAP noted that the only issue presented to the ALJ involved Claimant's Petition to Reopen. The ICAP reasoned that Claimant "has not made a request for any medical or compensation benefits at this point in the claim and, therefore, the ALJ's order does not grant or deny a benefit." Accordingly, the ICAP lacked the ability to review the ALJ's September 16, 2015 Order.

3. On February 15, 2016 Claimant filed a new Application for Hearing. The Application listed Petition to Reopen and medical benefits as issues to be considered at the hearing. The Application noted that, because of ICAP's January 28, 2016 decision, "we are requesting payment of medical bills for treatment subsequent" to Claimant's April 25, 2010 admitted industrial injury."

4. The parties subsequently executed a Stipulated Motion to Open Order agreeing that the issues for the upcoming hearing remained the same as the issues determined at the August 13, 2015 hearing with the addition of a request for medical benefits. The parties specifically sought a determination of the reasonableness and necessity of additional left knee treatment. The Stipulation reflected that the parties

presented evidence at the August 13, 2015 hearing regarding the reasonableness, necessity and relatedness of the requested left knee treatment. The Stipulation also sought reopening of the undersigned ALJ's September 16, 2015 Findings of Fact, Conclusions of Law and Order to address the issue of medical benefits. By adding the issue of medical benefits the parties desired to obtain a final appealable order for the ICAP's review. On June 29, 2016 the undersigned ALJ denied the Stipulated Motion to Open Order.

5. On July 13, 2016 the parties participated in a pre-hearing conference with Pre-Hearing Administrative Law Judge (PALJ) Barbo. The parties jointly sought an order allowing the merits judge at the July 28, 2016 hearing to utilize the transcript of the testimony taken at the August 13, 2015 hearing. The parties agreed that all evidence was presented at the August 13, 2015 hearing and desired to facilitate judicial economy. PALJ Barbo granted the joint motion and specified that the merits ALJ at the July 28, 2016 hearing could utilize the hearing transcript from the August 13, 2015 hearing instead of considering repetitive testimony on the issues presented for determination. He also noted that the parties added the issue of medical benefits to be decided at the July 28, 2016 hearing.

6. At the July 28, 2016 hearing Claimant again sought to reopen his April 25, 2010 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. However, the September 16, 2015 Findings of Fact, Conclusions of Law and Order did not award or deny benefits. Consequently, the Order was interlocutory and afforded no basis for the application of the doctrines of issue or claim preclusion.

7. Claimant has not presented any new evidence but simply relied on the transcript from the August 13, 2015 hearing. There is thus no reason to disturb the September 16, 2015 Order denying Claimant's Petition to Reopen based on a change in condition. Applying the law of the case doctrine, there are no persuasive circumstances warranting modification of the September 16, 2015 Order. Accordingly, Claimant's Petition to Reopen is denied and dismissed.

8. At the July 28, 2016 hearing Claimant also added the issue of whether he is entitled to receive authorized, reasonable and necessary medical treatment for his admitted April 25, 2010 left knee injury. The parties sought a determination of Claimant's entitlement to medical benefits to construct an appealable Order for review by the ICAP. Because Claimant's Petition to Reopen is denied and dismissed, his request for authorized, reasonable and necessary medical benefits is also denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

5. Although the principles of issue or claim preclusion were developed in the context of judicial proceedings, the doctrines are applicable in Workers' Compensation matters. *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44 (Colo. 2001). Issue preclusion is an equitable doctrine that bars relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien*, 990 P.2d 78, 84 (Colo. 1999). The purpose of the doctrine is to relieve parties of the burden of multiple lawsuits, to conserve judicial resources and to promote reliance upon and confidence in the judicial system by preventing inconsistent decisions. *Id.* Issue preclusion operates to bar the relitigation of matters that have already been decided as well as matters that could have been raised in prior proceedings. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.,* 109 P.3d 604 (Colo. 2005). The doctrine prevents relitigation of an issue when the following apply: "(1) the issue sought to be precluded is identical to an issue actually determined in the prior proceedings; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3)

there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding." *Sunny Acres Villa, Inc.*, 25 P.3d at 47; *In re Lockhart*, W.C. No. 4-725-760 (ICAP, May 21, 2009).

6. Workers' Compensation orders that do not require the payment of benefits or penalties or deny the claimant benefits or penalties are interlocutory and not subject to review. §8-43-301(2), C.R.S.; *Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110 (Colo. App. 2003). An order denying a petition to reopen that does not determine the claimant's entitlement to benefits is thus not final and reviewable. *Director of the Division of Labor v.* Smith, 725 P.2d 1161 (Colo. App. 1986); *Bishop v. City of* Thornton, W.C. No. 4-830-904 (ICAP, Aug. 22, 2014).

7. As found, the September 16, 2015 Findings of Fact, Conclusions of Law and Order did not award or deny benefits. Consequently, the Order was interlocutory and afforded no basis for the application of the doctrines of issue or claim preclusion.

8. An ALJ is not precluded from adhering to a prior interlocutory ruling or determination if the parties were afforded due process of law. Reliance on a prior determination may be characterized as the "law of the case." However, application of the "law of the case" doctrine is discretionary. An ALJ may elect not to follow a prior ruling if new facts, changes in the law or other "persuasive circumstances" warrant modification of the ruling. *Dworkin, Chambers and Williams v. Provo,* 81 P.3d 1053 (Colo. 2003); *In re Younger*, W.C. No. 4-326-355 (ICAP, June 17, 2004).

9. As found, Claimant has not presented any new evidence but simply relied on the transcript from the August 13, 2015 hearing. There is thus no reason to disturb the September 16, 2015 Order denying Claimant's Petition to Reopen based on a change in condition. Applying the law of the case doctrine, there are no persuasive circumstances warranting modification of the September 16, 2015 Order. Accordingly, Claimant's Petition to Reopen is denied and dismissed.

10. As found, at the July 28, 2016 hearing Claimant also added the issue of whether he is entitled to receive authorized, reasonable and necessary medical treatment for his admitted April 25, 2010 left knee injury. The parties sought a determination of Claimant's entitlement to medical benefits to construct an appealable Order for review by the ICAP. Because Claimant's Petition to Reopen is denied and dismissed, his request for authorized, reasonable and necessary medical benefits is also denied and dismissed.

ORDER

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

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

2. Claimant's request for authorized, reasonable and necessary medical benefits is denied and dismissed.

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

DATED: September 6, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-001-044-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on August 8, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 8/8/16, Courtroom 3, beginning at 8:30 AM, and ending at 4:00 PM). A written transcript of the hearing was lodged with the office of Administrative Courts on August 24, 2016.

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection. Respondents' Exhibits through V, with the exception of Exhibits I,J & K (for which the Claimant's objections were sustained and the exhibits were rejected) were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: The Claimant's opening brief was filed on August 22, 2016. The Respondent's answer brief was filed on September 6, 2016. No timely reply brief, which was due by the close of business on September 8, 2016, was filed. Therefore, the matter was deemed submitted for decision on September 9, 2016.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable aggravation of her pre-existing asthmatic condition at work with a date of alleged last injurious exposure of January 1, 2016. If so, additional issues concern medical benefits and temporary total disability (TTD) benefits from May 3, 2016 and continuing.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant is 77 years old and semi-retired. She works as a community worker at the Elizabeth Workforce Center (under the Division of Employment & Training, Colorado Department of Labor & Employment). She has been a part-time worker at the facility which is located in the end unit of a strip mall in Elizabeth, Colorado.

2. The Claimant typically works 20 hours per week at 4 hour intervals Monday through Friday either from 8:00 AM. to 12:00 PM or from 1:00 PM to 5:00 PM.

3. The Claimant has been working at the same location of the Workforce Center at 240 Elizabeth St. Suite A-1, Elizabeth, Colorado, since 2009. Since her arrival, there has been an operational nail salon adjacent to the Workforce Center.

4. In late 2014, the Claimant underwent a cervical fusion for a non-work related condition. According to the Claimant, she was released from the hospital with bronchitis.

5. Immediately after her release from the hospital, the Claimant was treated by Amilda Heckman, M.D., on January 12, 2015 for acute sinusitis before returning to work post-surgery (Respondents’ Exhibit B, p. 109).

Onset of the Alleged Occupational Exposure

6. The Workforce Center had always been located next to a nail salon (since 2009 and the Claimant has worked there since 2009). The Claimant filed an Application for Hearing, listing a “date of injury” of December 4, 2015. According to the Claimant, she began smelling an increase in odors from the nail salon although she testified that

has no sense of smell. Based on the totality of the evidence, the ALJ infers and finds that the Claimant is alleging an onset of the alleged aggravation of her asthmatic condition sometime in 2015.

7. According to the Claimant, while at work she would develop respiratory problems including Bronchitis, coughing, heaviness in her chest and she kept having bronchial infections. She testified that she “normally doesn’t have these (conditions).”

8. Based on the totality of the Claimant’s testimony and the other evidence, The ALJ infers and finds that theClaimant’s perception as to the timing of and cause of her symptoms is not reliable. She has a complicated medical history that requires a detailed analysis of the timing of her symptoms. When this is done, it becomes clear to the ALJ that there is not a temporal relationship between the Claimant’s subjective symptoms and her alleged exposure at work. More importantly, the Claimant has failed to establish that the air quality in the Workforce Center is more hazardous than the air quality outside of the Center. Indeed, based on the evidence, it is equally probable that the Claimant was exposed to aggravating factors outside of work.

Dawn Garcia

9. According to Dawn Garcia the Claimant worked at the Workforce Center until approximately December 30, 2015. The Claimant then began to work from home on about January 25, 2016 (Respondent’s Exhibit L, p.327). The Claimant then stopped working on March 30, 2016 (Respondent’s Exhibit. L, p. 320) due to an exacerbation of her sinusitis that occurred when she was working from home (Respondent’s Exhibit. B, p.31-33).

10. According to Dawn Garcia, the Claimant returned to work at the Workforce Center after it reopened on April 18, 2016 (Respondent’s Exhibit L, p. 316).

Jeffrey S. Schwartz, M.D., Respondent’s Independent Medical Examiner (IME)

11. The Claimant had a longstanding history of asthma and chronic rhinosinusitis (CRS), dating back about 25 years. This is a common disorder that is of unknown etiology but is often related to asthma. CRS is known to wax and wane and the Claimant’s medical records document long standing problems with frequent exacerbations typical of the disorder pursuant to the opinion of Dr. Schwartz (Respondent’s Exhibit A, p. 11).

12. Dr. Schwartz was accepted as an expert witness in the fields of pulmonology, internal medicine and critical care. He has been practicing medicine for several years and has treated dozens of patients with asthma and CRS.

13. According to Dr. Schwartz, the Claimant's alleged exacerbations to CRS and/or asthma after April of 2015 could not have been due to poor air quality since the results of the mold evaluation in May of 2015 by MoldCheck was negative. Further, the air quality testing by A.G. Wassenaar established good air quality in January of 2016. (Respondent's Exhibit A, p. 12).

14. According to Dr. Schwarz and set forth in his report, the Claimant's cause and effect analysis is not valid since she did not improve once leaving the Workforce Center. Dr. Schwartz stated at hearing and in his report that the non-correlation between the Claimant's recurrence of sinusitis and the work environment is most evident when the Claimant had not been in the work place for at least 11 weeks when she sought treatment by Dr. Heckman for acute sinusitis on March 26, 2016 (Respondent's Exhibit A. p. 12). He also noted that the Claimant had acute sinus complaints on February 22, 2016 and March10, 2016 when she had been away from the workplace for 6.5 and 9 weeks, respectively, at the time of these alleged acute exacerbations (Respondent's Exhibit A, p. 12).

15. Dr. Schwartz is of the opinion that the Claimant's medical records over the past 3 years do not show any objective evidence of asthma exacerbation. These would include findings of wheezing or air flow obstruction on her many spirometries performed by Allergy Asthma Center (Respondent's Exhibit A p. 12).

16. Dr. Schwartz is of the opinion that the medical literature has established that a patient's history of concern for occupational asthma is unreliable by itself upon which to base a diagnosis of work-related asthma (respondent's Exhibit A, p. 12).

17. According to Dr. Schwartz, there is no evidence that the Claimant was exposed to a workplace environment that was substandard or that would have caused an exacerbation of her underlying CRS and asthma (Claimant's Exhibit 13). Dr. Schwartz is of the opinion that there is no clear temporal correlation between the Claimant's respiratory exacerbations and her exposure to her workplace environment since she had 3 separate exacerbations in February and March 2016 after being away from the office for at least 6 weeks (Respondent's Exhibit A, p. 13).

18. Dr. Schwartz is of the opinion that it is **very** improbable that any exposure in the workplace would have caused these exacerbations many weeks later (Respondent's Exhibit A, p. 13).

19. According to Dr. Schwartz, even if the Claimant had an exposure to nail salon fumes that she couldn't smell, any response to this would have been temporary and short lived. Any such irritation would last only hours or maybe a day or two but would not cause longstanding symptoms or acute symptoms months later.

Kirk L. Nelson, D.O.

20. Since undergoing sinus surgery, the Claimant has denied having a sense of smell. She reported to the Employer, in a memo dated August 3, 2015, complaining of odors in the workplace. She wrote "since I've had no sense of smell for years I haven't been able to experience the odor but continue to have sinus and bronchial health issues" (Claimant's Exhibit 5). This is consistent with what she told Dr. Heckman when she said "she cannot smell the fumes because she has a hard time smelling, but another worker tells her there are fumes" (Respondent's Exhibit B, p. 52).

21. Dr. Nelson examined the Claimant first on December 28, 2015. In that examination, the Claimant told him that she has a poor sense of smell. She indicated her belief of exposure to "noxious smells" came by virtue of the comments from other people. She told Dr. Nelson that there was "black mold" under the carpet (Respondent's Exhibit. H, p. 178). There was no evidence substantiating "black mold" under the carpet.

22. Dr. Nelson performed pulmonary function testing which showed the Claimant's lungs were functioning normally (Respondent's Exhibit H, p. 248). On January 21, 2016, Dr. Nelson found the Claimant had returned to baseline in spite of her cough" (Respondent's Exhibit H, p. 248).

23. After reviewing the A.G. Wassenaar Report, Dr. Nelson agreed that the Claimant was not exposed to a sensitizing asthma agent (Respondent's Exhibit H, p. 243). He also noted that the Claimant's pulmonary function tests were within range of the previous pulmonary function studies performed by her PCP and her pulmonologist.

24. Dr. Nelson acknowledged and relied upon the findings of the A.G. Wassenaar Report to find that the Claimant was not exposed to an asthma sensitizer. He stated that the condition of the office could be considered to exacerbate her chronic conditions, but he did not say it in fact exacerbated her chronic conditions (Respondent's Exhibit H, p. 243). Dr. Nelson did not and could not say that the air in the Workforce Center was different than the ambient air outside. He could not say that the Claimant was exposed to harmful levels of contaminants or what those purported contaminates were in fact. The ALJ finds that Dr. Nelson has **not** expressed an opinion concerning a work-related exposure to a reasonable degree of medical probability.

25. Dr. Nelson recommended that the Claimant follow up with her primary care physician and her "pulmonologist as she would regularly see them". He did not see a need to refer her to anyone to address her condition (Respondent's Exhibit. H, p. 243). He did not prescribe or administer any treatment.

26. Dr. Nelson did **not** review the Claimant's prior medical records. He relied exclusively on the Claimant's subjective report that her symptoms were worse without

having full knowledge of the medical context in which those symptoms presented themselves. Furthermore, he offered the Claimant no specific medical treatment. He simply said that the Claimant could continue to treat with the physicians she would otherwise have seen.

27. Dr. Nelson suggested that the Claimant work from home until the recommendations made by AG Wassenaar were completed. These recommendations were completed and the Claimant was invited back to work at the Center. Therefore, the conditions upon which Dr. Nelson said the Claimant could return to work at the Workforce Center facility had been met (Respondent's Exhibit V). Additionally, Dr. Heckman had also stated that the Claimant could return to work at the facility as of April 14, 2016 (Respondent's Exhibit B, p.32).

28. Dr. Schwartz's knowledge of the Claimant's past medical records was greater than that of Dr. Nelson. Dr. Schwartz had reviewed additional documentation that was not available to Dr. Nelson at the time Dr. Nelson authored his reports. Dr. Schwartz also has greater medical expertise, training and experience in pulmonary matters that render his opinion on causation the more reliable than Dr. Nelson's opinions.

Environmental Testing

29. The Claimant returned to work for a couple of weeks in April 2016, but then refused to come back because she still thought the air was making her ill. The ALJ finds that even though the air quality was within acceptable limits for a human workplace to start with, extra steps had been taken to improve air circulation in the center and a smoke test had confirmed that there was no air passing from the nail salon to the Claimant's office through the roof deck or walls (Respondent's Exhibit V). The ALJ finds that the totality of the evidence establishes that any exposure to aggravating factors at the Workforce Center was no greater than exposure to aggravating factors in the world at large, regardless of the Claimant's alleged hyper-sensitivity.

MoldCheck

30. In April 2015, MoldCheck, Inc. was retained by the owner of the strip mall in which the Workforce Center was located to perform a visual inspection for mold in the Workforce Center. Jeff Werpy, owner and operator of Moldcheck, performed a visual inspection of the Center and performed thermal imaging with a camera to inspect for moisture in the walls. There was no moisture in the walls. Readings were also obtained in the affected areas near the front door and rear the entryway of the unit. There was no elevated moisture in the walls at these areas that would be suggestive of mold growth. Werpy nevertheless recommended that a portion of the carpet be removed and that an apparent leak in the roof be assessed. Once these tasks were

done, Werpy recommended that the indoor air quality be assessed to establish whether spore activity was within acceptable limits (Respondent’s Exhibit S).

31. The Workforce Center’s landlord completed the recommended modifications. Moldcheck, Inc. was invited back to perform indoor air quality sampling. The air quality sampling was performed on May 20, 2015 (Respondent’s Exhibit T). An outdoor air quality sample was taken from the rear entry way and compared with mold spore activity inside. Samples of air in the Workforce Center were taken within the offices and compared to the outdoor sample. The results of the testing showed that the indoor spore levels were not five (5) times or greater than the control sample. Therefore, the indoor quality of the indoor air was deemed acceptable in Werpy’s opinion. The quality of the indoor air was comparable to the quality of the outdoor air.

32. Claimant presented no credible evidence at hearing that the air quality in the Workforce Center contained mold spores or other chemicals at un-acceptable levels, exceeding those in the outdoor air. The Claimant presented no credible evidence that the air in the Workforce Center actually contained any hazards to which she was not equally exposed to outside of her employment.

The Claimant and the Employer’s Actions

33. In October 2015, the Claimant complained of severe headaches, stuffiness and congestion to her ENT (eye, ear, nose and throat) specialist Michael R. Menachof, M.D. Dr. Meanachof recommended a CT scan of the Claimant’s sinuses to rule out infection. The CT scan was negative (Respondent’s Exhibit D, p. 195). The Claimant’s pulmonary function testing at Parker Adventist Hospital on March 6, 2016 was normal (Respondent’s Exhibit E). Dr. Schwartz’s pulmonary function testing in May 2016 was normal (Respondent’s Exhibit A. p. 15).

34. At the Claimant’s request, the Employer purchased an air purifier for the Workforce Center in late October 2015. The Claimant also had an air purifier at her home which is out in the country and dusty. The Claimant has been found to be allergic to grasses, weeds, pet hair and dust.

35. Despite the removal of the carpet at the Workforce Center,, the addition of an air purifier and normal air test results, the Claimant continued to complain to her Employer that she believed that she suffered respiratory problems as a result of the air in the Workforce Center.

A.G. Wassenaar and Todd Kramer, Industrial Hygienist

36. Todd Kramer is a senior industrial hygienist with A.G. Wassenaar, Inc. He was accepted as an expert witness in the field of industrial hygiene. An industrial hygienist is one who analyzes the interaction of chemicals and the environment to

determine if there is a health risk to the occupants of a given space or building. Kramer also is an expert in the sampling and analysis of work environments to determine if there are airborne or other contaminants which can be hazardous to the health of workers. He is has been employed in this field for 23 years and has been with A.G. Wassenaar for the past 19 years.

37. Kramer's testing in January 2016 and later smoke testing in March 2016 both establish no harmful fumes were coming from the nail salon next door.

38. Kramer testified and authored two reports (Respondent's Exhibits U and V). He performed sampling of the Workforce Center at the Employer's request to determine if there were excessive amounts of mold spores or other agents in the air which could be causing the Claimant's respiratory issues.

39. Kramer sampled the air at the Workforce Center in all of the offices and the waiting area on January 4, 2016. This took place over an 8 hour period during a typical work day, while the usual ventilation system was running and while the nail salon was at work as it usually is. The sampling included two samples for airborne concentrations of chemicals commonly used in the nail salon industry.

40. Kramer also tested for particulate/bio aerosol sampling to determine if the airborne levels of fungal spores and other particulates which could also cause irritation were present. One sample was taken of outdoor air for comparison and the others were collected in the lobby/front door area, in the Claimant's office and in Cynthia Rears' office (Respondent's Exhibit R). On January 7, 2016, surficial tape left samples were taken from surfaces in the Workforce Center.

41. An analysis of the chemical air sampling showed that all of the chemicals tested for were at significantly lower levels than the level at which have been documented to cause irritation in most individuals (Respondent's Exhibit R, p. 6). Most were under the odor threshold level (Respondent's Exhibit U, p. 5).

42. An analysis of the non-biological particles present in the indoor **air**, including molds revealed that the mold identified in the indoor samples were consistent with the normal outdoor populations for Colorado and were similar to the mold genera identified on the outdoor sample collected during the sample event. No Stachybotrys (referred to by the media as toxic black mold) were identified on the indoor samples. Only low levels of Penicillium/Aspergillus type spores were observed (Respondent's Exhibit U. p. 6).

43. With respect to the air sampling, none of the spores tested for were at levels many times of that of the sample outdoor air. (Table 2, p. 5, Respondent's Exhibit R). In fact, some spore counts were at levels less than the outdoor air (Penicillium/aspergillus). To assist in the interpretation of the results, the lab provides a

“mold score” which indicates the likelihood that they originated from an indoor source. A low score means it is less likely that the spores detected originated from the indoor source. The score for the Workforce Center was “low”, meaning it is likely that the fungal spores that were detected indoors most likely originated from entrainment of the **outdoor air** (Respondent’s Exhibit U. p. 7).

44. In sum, Kramer concluded that he did not identify air contaminants within the indoor air at elevated levels.

45. The surface testing done on the west wall of the Workforce Center was positive for a small spot of Stachybotrys. According to Kramer, the existence of surface spores is not necessarily harmful. This is because for the spores to be affecting someone’s respiratory system, they must be inhaling the excess levels of the spores. The existence of the spores alone is inconsequential just as Dr. Schwartz stated that a piece of moldy bread on a counter is not hazardous. For mold to affect the respiratory system it has to be both airborne and airborne in excessive levels. In this case, neither condition was met, according to Kramer and Dr. Schwartz.

46. There is no persuasive, objective evidence that the air in the Workforce Center contained excessive or elevated levels of fungus mold or nail salon fumes that could be responsible for causing or aggravating the Claimant’s breathing issues. There is no persuasive, objective evidence of fumes from the nail salon in excess of OSHA permissible limits. Many of the chemicals were below the smell threshold level.

47. The Claimant presented no persuasive evidence that the sampling and testing done by MoldCheck, Inc., A.G. Wassenaar and/or Todd Kramer was not valid or reliable. The Claimant presented no credible evidence the sampling was flawed. In fact, the sampling was done under the same conditions in which the Claimant worked day after day. The results of the air testing done by Todd Kramer in January 2016 are consistent with the results of the air quality testing done in May 2015 by MoldCheck.

48. Claimant’s “smell test” is not as reliable an indicator of the air quality as that of the experts who performed actual scientific tests.

49. Two separate, independent testing companies both concluded the air quality inside the Workforce Center was comparable to the fresh air outside of the building. This objective testing is un-refuted by the Claimant. The Claimant presented no expert testimony that the air in the Workforce Center was in any way different from or more hazardous than the air to which the Claimant was equally exposed outside of the work place.

Findings Concerning Completion of A.G. Wassenaar Recommendations

50. The lay testimony and perceptions of the Claimant and her co-worker are insufficient to establish causation in this type of case where the burden of proof is on the Claimant to show that she suffered an exposure at work to contaminants **that she would not otherwise have been exposed in the world-at-large.**

51. The Employer went well above the call of duty in this case to reassure the Claimant that the conditions at the Workforce Center were safe. The Employer insisted that the landlord implement the recommendations (not requirements) made by Todd Kramer of A.G. Wassenaar. Further, the Employer voluntarily closed the Workforce Center while the upgrades were being made.

52. Kramer revisited the Workforce Center on March 8, 2016 to assure that the five recommendations were completed (Respondent's Exhibit.V). Kramer confirmed that the suggested work had been completed with the exception that he could not confirm certain baseboards had been removed and replaced.

53. Dawn Garcia was there at the Workforce Center when the contractor performed this work and took photos of those areas. She confirmed that the baseboards had been replaced. She also confirmed the drywall on the west wall had been cut out and replaced.

54. The Claimant last worked at the Workforce Center on December 28, 2016. After that time, she was permitted to work from home until April 18, 2016. The ALJ infers and finds that If the Workforce Center was making the Claimant ill, then working from home should have alleviated her exposure to harmful substances,. but it did not.

55. While working from home, the Claimant sought treatment from Dr. Heckman on March 30, 2016, for "recheck of sinusitis", onset was "gradual 4 days ago." Symptoms were "severe and unchanged". The symptoms included chills and periorbital swelling, nasal congestion, purulent rhinorrhea, postnasal drainage, cheek pain, forehead pain, cough and headache (Respondent's Exhibit B p.33). Dr. Heckman's notes reflect that the Claimant stated her condition "started after church Sunday, today is Wednesday, started with sore throat and runny nose, now with nasal discharge (Respondent's Exhibit B, p. 36). The Claimant also noted that she was too exhausted to feed the dogs and was "probably never totally well from the last visit."

56. On March 10, 2016, the Claimant was seen by Dr. Heckman and treated for sinusitis (Respondent's Exhibit B, p. 45). This occurred although the Claimant was working from home and hadn't been to the Workforce Center in over 9 weeks.

Additional Medical Treatment

57. On January 20, 2016, the Claimant was treated by Dr. Heckman for an upper respiratory infection (Respondent's Exhibit B, p. 59).

58. The Claimant was diagnosed by Dr. Heckman with sinusitis on February 22, 2016 (Respondent's Exhibit B, p. 52). The Claimant was relating this to the air in the Workforce Center but she had not breathed air at the Workforce Center for several weeks. Dr. Heckman reported "she cannot smell the fumes because she has a hard time smelling, but another worker tells her there were fumes" (Respondent's Exhibit B, p. 52)

59. On April 1, 2016, before returning to work on April 18, 2016 the Claimant was seen by ENT Dr. Menachof because previously treated symptoms of a sinus infection "have returned" (Claimant's Exhibit 1, p. 1). These were the same symptoms the Claimant complained of in 2015 when she saw Dr. Menachof and he noted that the Claimant has "been bothered by these symptoms for years" (Respondent's Exhibit C, p. 180).

60. The Claimant's primary care physician (PCP), Dr. Heckman, agreed that based on the Claimant's subjective complaints alone, she could not draw a medical conclusion that the Claimant's respiratory symptoms were a result of her work environment. Dr. Heckman carefully made clear that it was the Claimant's opinion, not Dr. Heckman's opinion, that the workplace was affecting the Claimant's health (Respondent's Exhibit A, pp. 21. 32 and. 50).

61. Dr. Heckman agreed that the Claimant could return to regular employment on April 14, 2016, and reaffirmed this on April 18, 2016 (Respondent's Exhibit B, pp. 30 (a) and 32). Dr. Heckman agreed that the Claimant was physically able to return to work, but that "She (the Claimant) believes the workplace is still toxic so will not return". (Respondent's Exhibit B, p. 32). Dr. Heckman deferred to the expertise of Dr. Schwartz and Todd Kramer as to the causation of the Claimant's health condition. Dr. Heckman was satisfied that "if you have determined it is safe-it is safe" (Respondent's Exhibit B. p. 32).

62. The Claimant returned to work on April 18, 2016, and began working her normal 4 hour shift. She last worked on May 2, 2016 (Respondent's Exhibit L, p. 314). According to Dawn Garcia from that point on, the Claimant just started calling into work saying she was "sick."

Factors Affecting the Credibility of the Claimant's Case

63. According to Dawn Garcia, in the past the Claimant had asked her if she could reduce her hours to 10 hours per week because of her declining age. But Garcia told her that she could not permit this because it would make it impossible to hire someone to cover the other 10 hours. The Claimant is post-retirement age and her desire to retire is clear from her resignation letter dated March 16, 2016 when she said she was not going to return to work because of her health issues (Respondent's Exhibit M).

64. There are no physical work restrictions in effect now, nor have there been since the Claimant was released to return to work by her authorized treating physician (ATP), Dr. Heckman, on April 18, 2016. The repairs to the Workforce Center were made and the Claimant's co-worker has been back to work since. The Claimant may not be in a physical condition to work but it is not a result of any work related exposure.

65. The Claimant seeks temporary total disability (TTD) benefits for wage loss subsequent to May 10, 2016. Any lost time after the Claimant returned to work, however, was based on the Claimant's voluntary decision to not to return to work (Respondent's Exhibit B,pp. 24 and 28).

Ultimate Findings

66. The Claimant had pre-existing asthma and CRS for many years. Her conditions would wane and routinely require the interventions of the Claimant's primary care provider and specialists in the areas of ENT and pulmonology.

67. Although the Workforce Center had always been located next to the nail salon, for unknown reasons, the Claimant began sensing an increase in odors from the nail salon even though she stated that has no sense of smell. The Claimant also began complaining of "mold" growing in the Center. Her complaints seem to coincide with comments made by her co-worker, Cynthia Rule.

68. The complaints came at a time after there was some water intrusion into the Workforce Center. Although multiple tests established the air in the Workforce Center was comparable to outside air, the landlord and the Employer took steps to clean, remove, or fix all perceived deficiencies with the air flow in the Workforce Center.

69. After the repairs were made and after a period of closure of the Center, the Claimant continued to claim that the environment at the Center is "toxic" and she will not return to work at the facility.

70. The ALJ accepts the medical opinions of Dr. Schwartz, which are undisputed by other medical opinions, and rejects the Claimant's lay opinion on the

issue of causation. There is a plethora of medical evidence that the Claimant suffered non-work related exacerbations of her pre-existing respiratory conditions whereby she required medical care.

71. Dr. Nelson did not render an opinion to a reasonable degree of medical probability that the Claimant's asthma or sinusitis was exacerbated by work-related factors. He only stated that it might have been. "Might" is a word of possibility **not** "probability." Additionally, Dr. Nelson's conclusions were based solely on the subjective report of the Claimant's increase in symptoms while at work. Dr. Schwartz credibly was of the opinion that the Claimant's subjective reports of worsening symptomology are not a reliable indicator of a worsened condition warranting medical care. Further, Dr. Nelson did not have the benefit of reviewing all of Claimant's past medical records at the time he saw the Claimant in January 2016. Therefore the ALJ finds Dr. Schwartz's expert opinions on causation highly persuasive, credible and undisputed by any other medical evidence or testimony.

72. The ALJ makes a rational decision, based on substantial evidence, to accept the medical opinions of Dr. Schwartz on causation, and to reject the Claimant's lay opinions thereon.

73. The Claimant failed to prove, by a preponderance of the evidence that her asthma and/or chronic sinusitis was caused, aggravated or accelerated by the employment or the conditions under which she worked. She failed to prove such conditions followed as a natural incident of the work and as a result of an exposure caused by the Claimant's employment, which can be traced to her employment as a proximate cause and which did not come from a hazard to which the Claimant would have been equally exposed outside of work. Therefore, the Claimant has failed to prove a compensability injury or occupational disease by preponderant evidence. .

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Schwartz's expert opinions concerning the lack of work-relatedness of any aggravation or acceleration of the Claimant's pre-existing respiratory conditions are undisputed by any other credible medical evidence. No other medical provider has opined to a reasonable degree of medical probability that the conditions of the Claimant's work at the Workforce Center aggravated and/or accelerated her pre-existing respiratory conditions. .*See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, the ALJ accepted the medical opinions of Dr. Schwartz, which are undisputed by other medical opinions, and rejected the Claimant's lay opinion on the issue of causation. There is a plethora of medical evidence that the Claimant suffered non-work related exacerbations of her pre-existing respiratory conditions whereby she required medical care. Underlying the main thrust of the Claimant's argument for compensability is the holding in *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). Under the totality of the evidence in this case, the application of the *Lymburn* rationale in this case is entirely inappropriate.

Substantial Evidence

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

Occupational Disease

c. An "occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. § 8-40-201 (14), C.R.S. *See City of Colorado Springs v. Indus. Claim Appeals Office,* 89 P. 3d 504 (Colo. App. 2004). As found, the Claimant failed to prove, by preponderant evidence that airborne mold or other irritants at work proximately caused her an aggravation or acceleration of her asthma or sinusitis, and she failed to show that the air inside the Workforce Center contained irritants that were not contained in the air outside of the Workforce Center.

Aggravation/Acceleration of pre-Existing Condition

d. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant has failed to meet any of the tests for compensability based on a work-related aggravation and/or acceleration of her pre-existing respiratory conditions.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

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

DATED this______day of September 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-990-404-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on August 24, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 8/24/16, Courtroom 3, beginning at 8:30 AM, and ending at 11:20 AM).

Claimant's Exhibits 1 through 7 were admitted into evidence, without objection. Respondents' Exhibits B through J were admitted into evidence, without objection. Respondents' Exhibit A was withdrawn.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was filed on August 31, 2016. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

At the threshold, the Claimant raised to issue of spoliation of evidence, specifically, the fact that the Employer's real time video of the Claimant's fall at work was not available. *Black's Law Dictionary,* Tenth Ed. (2014) defines "spoliation" as:"the **intentional** (emphasis supplied) destruction, mutilation, alteration or concealment of evidence." The Claimant bears the burden of proof, by a preponderance of the evidence to establish a spoliation of the real time video occurred. In the alternative, Claimant's counsel moved to exclude any testimony concerning the viewing of the video by two Employer supervisors on the basis of the "best evidence" rule. Secondary evidence in the form of witnesses' verbal statements concerning their observations of a video that is unavailable are admissible if the real time video is unavailable. The burden of establishing "unavailability" is upon the proponent of the testimony in lieu of viewing the unavailable video. *See* Rule 804 (a), C.R.E.

The paramount issue to be determined by this decision is whether or not the Claimant suffered compensable injuries as the result of a fall on July 23, 2015, arising out of the course and scope of his employment for the Employer; or, whether the injuries sustained were the result of a non-work related syncope. Because this decision determines that the Claimant did not sustain work-related injuries, the other issues are moot.

The Claimant bears the burden of proof by a preponderance of the evidence of establishing "spoliation" of the real time video of the injury incident, in order to exclude any secondary evidence concerning the unavailable video. The Respondents bear the burden of establishing "unavailability" of the video.

At the conclusion of the Claimant's case-in-chief, he failed to prove, by preponderant evidence, that he sustained compensable injuries to his head on July 23, 2015, thus, the ALJ granted the Respondents' motion for a judgment in the nature of a directed verdict.

FINDINGS OF FACT

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

Stipulations and Findings

1. At the commencement of the hearing, the parties stipulated and the ALJ finds: (a) if compensable, the Claimant's average weekly wage (AWW) is $298.35; and, (b) the Claimant's date of hire was June 22, 2015. As found herein below, any issues concerning AWW are moot.

Preliminary Findings

2. The Claimant was born on September 9, 1932 and was 83 years of age at the date of the hearing.

3. The Claimant began working for the Employer on June 22, 2015. The Employer provides mobile blood donation centers for the Denver metro area.

4. The Claimant was a bus driver for the Employer. His job duties included driving the buses to various locations and setting up or taking down the mobile blood donation centers.

The Injury Incident

5. On July 23, 2015, the Claimant alleged that, at approximately 5:00 PM, while walking up a flight of stairs at the Employer's facility, he collapsed and fell down the stairs onto the ground.

6. Prior to arriving at the Employer's facility, according to the Claimant, he had driven the blood mobile in from 6th Avenue in heavy traffic, however, he testified that this was not stressful to him. Indeed, there is no persuasive evidence of any work-related stressors leading up to the Claimant's fall on the Employer's premises.

7. The real-time surveillance video of the incident is no longer available since the data was routinely and periodically deleted from the Employer's servers. Curtis D. Larson, the Employer's facility manager, credibly testified that he transferred the video footage of the incident to a computer file, however, for unexplained reasons after the passage of time he could not find the file. There was no evidence of deliberate or negligent spoliation of the file with the video showing the before and after time of the incident. Although the video itself is the best evidence of before-and-after the fall, the Respondents have established, by preponderant evidence that it the video unavailable for unexplained reasons and secondary evidence of the witnesses stating what they saw on the video is admissible. In sum, the ALJ finds that the Claimant's objections to the testimony of Larson and goes to weight rather than admissibility.

8. The Employer had continuous real-time equipment and cameras located on the facility. Review of the continuous real-time video by Larson and Mike Davidson, established that the Claimant fell, but it did not illustrate any special hazards of work causing the fall. Indeed, stairs are ubiquitous and the stairs in question were not steep nor did they illustrate any characteristics that would pose a special hazard (*e.g.,* metal runners upon which the heel of a shoe could be caught causing a person to lose balance). The Claimant just fell after coming down a normal and short flight of outside stairs. The Claimant had no memory concerning the before-and-after circumstances preceding his fall.

9. The witnesses who viewed the original footage (Curtis Larson and Mike Davidson) confirmed, on direct examination, that the video showed the location and the

time when the Claimant's fall occurred. According to both witnesses, the Claimant was walking up the stairs, became unsteady, and then collapsed. The witnesses further conceded that the video does not establish where the Claimant landed after the fall. The area of the fall was not within the view of the surveillance video. These testimonies are credible and persuasive. There was no testimony concerning any special hazards on the stairs that could have triggered the Claimant's fall.

10. Although there was medical documentation that the Claimant had a small right-side subarachnoid hemorrhage, there is no persuasive evidence that a special hazard on the stairs caused the subarachnoid hemorrhage which in turn caused the fall. Merely having medical documentation of a medical condition does not establish that an injury is a compensable injury, arising out of the course and scope of employment. At the time of hospitalization, the Claimant was also found to be in atrial fibrillation. In order to address this issue, a pacemaker was implanted to ensure that the Claimant's heart could perform cardiac contractions.

11. Jeffrey S. Schwartz, M.D., testified as a medical expert in pulmonary and emergency medicine on behalf of Respondents. After reviewing the Claimant's medical records, Dr. Schwartz was of the opinion that the Claimant's heart had numerous blockages which did not allow the proper transmission of electrical impulses through the heart (atrial fibrillation). Dr. Schwartz found that the atrial fibrillation caused an episode of sudden syncope (loss of consciousness) which led to Claimant falling down the stairs.

12. Dr. Schwartz is of the opinion that the cardiac event leading to the Claimant's **syncope** was not caused by the Claimant's job duties because the abnormality was present before the fall.

Ultimate Findings

13. The ALJ specifically finds that the Respondents' witness testimony, including the expert opinion of Dr. Schwartz, is credible, persuasive, and it persuasively refutes the Claimant's assignment of causal relatedness (to work) concerning the incident of July 23, 2015. Thus, the ALJ finds that the Claimant has failed to prove, by a preponderance of the evidence a work-related aggravation or acceleration of his heart condition that resulted in his injuries as a consequence of his fall and his subsequent hospitalization. The Claimant presented no medical opinion that contradicted Dr. Schwartz's opinion, thus, Dr. Schwartz's medical opinion is undisputed by other medical evidence. It is disputed only by the Claimant's testimony.

14. The ALJ makes a rational choice, based on substantial evidence, to accept the opinion of Dr. Schwartz as dispositive and to reject the Claimant's lay opinions. Also, there is no evidence of any special hazards at the Employer's facility contributing to the fall.

15. The Claimant has failed to prove, by a preponderance of the evidence that he sustained compensable injuries on July 23, 2015, arising out of the course and scope of his employment. In fact, the evidence establishes that the Claimant experienced a syncopal or idiopathic event which caused his fall which in turn caused the head injury in question.

16. At the conclusion of the Claimant's case-in-chief, he had failed to prove, by preponderant evidence, that he sustained a compensable injury to his head on July 23, 2015, thus, the ALJ granted the Respondents' motion for judgment in the nature of a directed verdict.

CONCLUSIONS OF LAW

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

Judgment in the Nature of a Directed Verdict

a. Colo. Rules of Civil Procedure, Rule 41(b) (1), provides that, after a plaintiff in a civil action *tried without a jury* has completed the presentation of his evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief. In determining whether to grant a motion to dismiss or in the nature of a directed verdict, the court is not required to view the evidence in the light most favorable to the plaintiff, as argued by a claimant. *Rowe v. Bowers*, 160 Colo. 379, 417 P.2d 503 (Colo. 1966)*; Blea v. Deluxe/Current, Inc.*, W.C. No. 3-940-062 [Indus. Claim Appeals Office (ICAO), June 18, 1997] (applying these principles to workers' compensation proceedings). Neither is the court required to "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the Claimant. Rather, the test is whether judgment for the respondents is justified on the claimant's evidence. *Amer. National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (Colo. App. 1970); *Bruce v. Moffat County Youth Care Center*, W. C. No. 4-311-203 (ICAO, March 23, 1998). The question of whether the Claimant carried this burden was one of fact for resolution by the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, at the conclusion of the Claimant's case-in-chief, he had failed to prove, by preponderant evidence, that he sustained a compensable injury to his head on July 23, 2015, thus, the ALJ granted the Respondents' motion for judgment in the nature of a directed verdict.

Credibility

b. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant presented no medical opinion that contradicted Dr. Schwartz's opinion, thus, Dr. Schwartz's medical opinion is undisputed by other medical evidence. It is disputed only by the Claimant's testimony. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, the Respondents' witness testimony, including the expert opinion of Dr. Schwartz, was credible and it persuasively refuted the Claimant's assignment of causal relatedness (to work) concerning the incident of July 23, 2015.

Substantial Evidence

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

evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the opinion of Dr. Schwartz as dispositive and to reject the Claimant's lay opinions, with cognizance of the holding in *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). Also, there was no evidence of any special hazards at the Employer's facility contributing to the fall.

Lack of Special Hazards/Syncope

d. To recover benefits under the Act, an employee's injury must both occur "in the course of" employment and "aris[e] out of" employment. § 8-41-301(1)(c), C.R.S. The term "arising out of" refers to the origin or cause of an employee's injury. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). Specifically, the term calls for examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Id*. An injury "arises out of" employment when it has its "origin in" an employee's work-related functions and is "sufficiently related to" those functions so as to be considered part of employment. *Id*. As held in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo.. 2014), **2014 CO 7*,*** "All risks that cause injury to employees can be placed within three well-established, overarching categories: (1) employment risks, which are directly tied to the work itself; (2) personal risks, which are inherently personal or private to the employee him- or herself; and (3) neutral risks, which are neither employment related nor personal." The second category contains risks that are entirely personal or private to the employee. *See Horodyskyj*, 32 P.3d at 475-77. These types of purely idiopathic or personal injuries are generally not compensable under the Act, unless an exception applies. These risks include an employee's preexisting idiopathic illness or medical condition that is completely unrelated to his or her employment. *Irwin v. Indus. Comm'n*, 695 P.2d 763, 765-66 (Colo. App. 1985) (holding that an employee who had a medical history of blacking out and who did so at work did not suffer an injury "arising out of" employment); *Gates Rubber Co. v. Indus. Comm'n*, 705 P.2d 6, 7 (Colo. App. 1985) (holding the same, regarding an employee who had an epileptic seizure and struck his head on a level, non-slippery concrete floor).

e. The "special hazard" doctrine represents an exception to the general rule of non-compensability for personal risks. Under this doctrine, an injury is compensable even if the most direct cause of that injury is a preexisting idiopathic disease or condition so long as a special employment hazard also **contributed** to the injury. *Gates Rubber Co. v. Indus. Comm'n*, *supra*, and *Ramsdell v. Horn*, 781 P.2d 150, 152 (Colo. App. 1989). To be considered an employment hazard for this purpose, however, the employment condition must not be a **ubiquitous** one; it must be a special hazard not generally encountered. *Gates*, 705 P.2d at 7. Ordinary stairs, absent some unusual feature (which there was not) are ubiquitous. It was Dr. Schwartz's persuasive an undisputed opinion that the cause of Claimant's collapse was due to an interruption of the electric impulses controlling cardiac contractions in the Claimant's heart. The interruptions in the electric impulses in Claimant's heart are an idiopathic condition and were purely personal to the Claimant. The interruptions in the electric impulses were unrelated to the conditions of the Claimant's employment. Further, there is no indication of any contribution between a special hazard of employment, the interruptions in the electric impulses, and Claimant's episode of sudden syncope, which caused the fall and subsequent head injury.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain his burden concerning compensable injuries on July 23, 2015, arising out of the course and scope of his employment. In fact, the evidence established that the Claimant experienced a syncopal or idiopathic event which caused his fall which in turn caused the head injury in question.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Judgment in the Nature of a Directed Verdict in favor of the Respondents is hereby granted.

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

DATED this______day of September 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his December 18, 2013 Workers' Compensation claim based on a worsening of condition pursuant to §8-43-303(1), C.R.S.

2. If Claimant's claim should be reopened, whether he has proven by a preponderance of the evidence that the surgeries performed by Wayne Gersoff, M.D. on January 5, 2016 and March 1, 2016 were reasonable, necessary and related to his admitted December 18, 2013 left knee injury.

FINDINGS OF FACT

1. Claimant has worked as a Firefighter with Employer for almost 22 years. On December 18, 2013 Claimant suffered an admitted industrial injury to his left knee during the course and scope of his employment with Employer. Claimant was responding to a fire call in an engine that had a different number of steps than he was accustomed to on his usual engine. As he was exiting the engine he stepped down, slipped and twisted his left knee.

2. Claimant has suffered a long history of prior left knee problems. On September 1, 2002 Claimant was in a street intersection collecting money for a Muscular Dystrophy Association "Fill the Boot" campaign. He was struck by a motor vehicle and rolled over the top of the car. Claimant sustained injuries to his left hip and left knee as a result of the September 1, 2002 incident. Following the accident Claimant returned to regular employment and was released from care without any permanent impairment in late October 2002.

3. By 2007 Claimant was still suffering left knee pain. He sought a consultation with his personal care provider Orthopedic Surgeon Roger L. Greenberg, M.D. After diagnostic testing, Dr. Greenberg advised Claimant that he had a torn meniscus. Dr. Greenberg prescribed Diclofenac for Claimant's left knee pain and swelling. He also informed Claimant that he would eventually require a total left knee replacement.

4. On July 20, 2012 Claimant again visited Dr. Greenberg to obtain an updated Diclofenac prescription for his left knee pain. Repeat x-rays revealed that Claimant suffered from left knee tricompartmental degenerative disease. Dr. Greenberg assessed Claimant with degenerative joint disease that was "well compensated on medication." In the months preceding Claimant's December 18, 2013 admitted left knee injury he obtained refills of Diclofenac on August 7, 2013, September 26, 2013 and December 11, 2013.

5. Claimant did not immediately seek medical treatment for his December 18, 2013 admitted left knee injury. However, on February 7, 2014 he visited Elizabeth W. Bisgard, M.D. for an evaluation. Claimant identified the September 1, 2002 motor vehicle accident as the original date of his left knee injury. He advised Dr. Bisgard that he had been experiencing left knee problems since the September 1, 2002 incident. Dr. Bisgard remarked that she had known Claimant through annual Firefighter physicals and noted that he had been suffering knee pain at the examinations. Claimant reported that his left knee pain had worsened over the last couple of years. Although he had continued to work full duty, he had modified his activities and was no longer playing basketball or pivoting his left knee. In characterizing the December 18, 2013 incident, Dr. Bisgard noted that Claimant had "jolted" his knee as he stepped down from a fire truck. Claimant experienced immediate pain and swelling. After conducting a physical examination Dr. Bisgard diagnosed Claimant with left knee degenerative disease including questionable meniscal pathology and referred him for an MRI. She authorized continued full duty employment.

6. On February 15, 2014 Claimant underwent a left knee MRI. Radiologist Jeffry Weingardt, M.D. read the MRI. He noted a complex, vertical, peripheral zone tear of the meniscus with marked and mucoid degeneration. Dr. Weingardt summarized the following left knee findings: (1) chronic lateral bucket handle meniscal tear; (2) complex central and peripheral zone tear of the posterior horn of the medial meniscus; (3) evidence of tricompartmental chondromalacia most advanced in the lateral compartment; (4) intact ACL; and (5) moderate volume joint effusion with Baker's cyst.

7. On February 19, 2014 Claimant returned to Dr. Bisgard for an examination. Claimant remarked that he had been working full duty without difficulty. Dr. Bisgard referred Claimant to Steven E. Horan, M.D. for a surgical consultation.

8. On February 26, 2014 Claimant visited Dr. Horan for an examination. Claimant reported that he had injured his left knee "long ago" but it had become "much, much worse" over the last couple of months. Claimant remarked that he had been experiencing swelling after activities such as playing basketball or performing his job duties. There is no specific mention in Dr. Horan's report of the December 18, 2013 work injury. Dr. Horan noted that the February 15, 2014 left knee MRI revealed a chronic lateral meniscal tear and a new medial meniscus tear. He thus assessed Claimant with left knee medial and lateral meniscus tears with some degenerative changes.

9. On April 2, 2014 Claimant underwent left knee surgery with Dr. Horan. Dr. Horan specifically performed a partial medial meniscectomy, partial lateral meniscectomy, osteophyte removal and chrondroplasties of the medial, lateral and patellofemoral compartments.

10. On May 5, 2014 Claimant visited Lone Tree Physical Therapy for a physical therapy session. Claimant reported a long history of left knee pain, mensical tears and osteoarthritis. He remarked that he was able to delay surgery for a long time by avoiding cutting and deep squatting. Claimant commented that in December 2013

he had “tweaked” his left knee exiting a truck. He stated that over the ensuing months the pain continued and he decided to get an MRI and undergo surgery.

11. On June 4, 2014 Claimant advised Dr. Bisgard that he had returned to full duty work, completed several tours and was not having any difficulties with his knee. Although Claimant still noted some occasional swelling and pain levels that were at most up to 2/10, the symptoms did not limit his activities. Dr. Bisgard summarized Claimant’s left knee problems, December 18, 2013 injury and course of treatment. She placed Claimant at Maximum Medical Improvement (MMI) and assigned a 15% permanent impairment rating for the left lower extremity. Dr. Bisgard released Claimant to full duty employment and noted that he did not require maintenance treatment.

12. On June 9, 2014 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Bisgard’s MMI and impairment determinations. Claimant did not file an objection to the FAL and the matter closed by operation of law.

13. Because Claimant continued to experience left knee pain, he underwent an MRI on August 6, 2014. After comparing the MRI with Claimant’s February 15, 2014 MRI, Todd D. Greenberg, M.D. provided the following summary:

> (1) When compared to February 15, 2014, there has been an interval surgery. Possible lateral meniscectomy considering the smaller size of the lateral meniscus. Otherwise, the lateral meniscal remnant is very similar in morphology, frayed posteriorly. Consistent with a partial lateral meniscectomy. No evidence of a retear if the prior surgery confirms interval progressive lateral meniscectomy; (2) Interval medial meniscectomy with a frayed edge of the posterior remnant within the posterior horn. No retear; (3) Stable high-grade broad surface area of chondromalacia of the lateral compartment cartilage; (4) Stable grade 3-4A chondromalacia of the medial compartment cartilage; (5) Unchanged capsulitis; and (6) Patellofemoral disease grade 3 chondromalacia, limited. medial facet and lateral facet.

14. On August 20, 2014 Claimant returned to Dr. Bisgard for an evaluation. He reported that he was still suffering left knee pain. Dr. Bisgard recommended viscosupplementation treatment with Dr. Horan and referred him to Rocky Mountain Spine & Sport for instruction on a directed exercise program. She continued Claimant on full duty employment.

15. On August 29, 2014 Claimant visited Rocky Mountain Spine & Sport for physical therapy. Claimant reported that 10 years ago he was run over by a car and suffered significant bruising to his left side. He also commented that a few months following the incident he began having left knee pain. Claimant explained that five years earlier he underwent a left knee x-ray that revealed an “un-repairable meniscus tear” and was advised that he would need a knee replacement. Claimant reported that he avoided surgery and began taking medications to help control the pain. He also remarked that in December 2013 he twisted his left knee and suffered significant

swelling. Claimant reported that his symptoms have worsened since he underwent surgery in April 2014. He commented that he was unable to participate in activities such as jogging, jumping, cutting or agility movements. Claimant underwent treatment at Rocky Mountain Spine & Sport through September 19, 2014.

16. On December 12, 2014 Claimant visited Robert Broghammer, M.D. for an examination. After Claimant reported continued left knee pain, Dr. Broghammer discussed the possibility of a total knee arthroplasty, additional viscosupplementation or meniscus replacement. Dr. Broghammer recommended consultation with an orthopedist to consider additional left knee surgery.

17. Claimant testified that, because of his continuing left knee problems he suffered an increased loss of balance, limitations in range of motion and sleep disturbances. He also modified his work activities because of continuing knee pain.

18. On January 2, 2015 Claimant visited Orthopedic Surgeon ATP Wayne Gersoff, M.D. After conducting a physical examination and reviewing Claimant's medical records, Dr. Gersoff discussed the pathophysiology of a meniscal deficient knee and the subsequent chondral injury that develops. Dr. Gersoff mentioned the possibilities of biologic reconstruction utilizing lateral meniscus allograft transplantation and Carticel implantation rather than a unicompartmental knee replacement. He noted that he would perform an arthroscopy of Claimant's left knee joint to further evaluate the articular cartilage and determine whether Claimant was a good candidate for a biological reconstructive procedure.

19. Respondent did not authorize the surgical procedures recommended by Dr. Gersoff. Claimant wished to undergo the procedures but was unable to obtain the surgery through his group health insurance. He remarked that he had to wait until the open enrollment period in January 2016 to change his insurance coverage so that he could undergo the surgeries with Dr. Gersoff. In the meantime, Dr. Gersoff administered Synvisc injections to Claimant's left knee on May 18, 2015 and November 2, 2015.

20. Claimant testified about the progressive worsening of his left knee condition. His symptoms became more evident during a training session in October 2015 in which he had to remain on his knees while learning a new technique about deploying a hose into a commercial structure. Because of his left knee symptoms, Claimant remarked that he had significant difficulties performing the new technique.

21. On January 5, 2016 Claimant underwent left knee surgery with Dr. Gersoff. The surgery involved the removal of the left knee meniscus. In his operative report Dr. Gersoff listed his postoperative diagnoses as left knee lateral meniscus deficiency, articular cartilage defect of the lateral femoral condyle and hypertrophic scar tissue. Dr. Gersoff noted that a meniscus transplant was not currently appropriate. Instead, he would proceed with a cartilage biopsy and then perform a combined procedure of a meniscus transplant and autologous chondrocyte implantation.

22. On March 1, 2016 Dr. Gersoff performed a second surgery on Claimant's left knee. The procedure involved the re-installation of the meniscus after laboratory growth. Dr. Gersoff diagnosed Claimant with a left knee lateral meniscal deficiency and a grade 4 chondral defect of the lateral femoral condyle.

23. On February 24, 2016 Claimant underwent an independent medical examination with Orthopedic Surgeon Mark Failinger, M.D. Dr. Failinger also testified through a post-hearing evidentiary deposition in this matter on July 11, 2016. In addition to reviewing Claimant's medical records and performing a physical examination, Dr. Failinger considered the February 15, 2014 and August 6, 2014 MRI's of his left knee. Dr. Failinger concluded that Claimant has not suffered a worsening of his left knee condition since he reached MMI on June 4, 2014. Instead, Claimant's worsening left knee symptoms are attributable to the natural progression of his pre-existing degenerative joint disease.

23. Dr. Failinger explained that Claimant's December 18, 2013 admitted left knee injury constituted a flare-up or exacerbation of his pre-existing degenerative joint disease. He remarked that it was not probable that the December 18, 2013 incident caused any significant change in Claimant's underlying pathology. Dr. Failinger noted that the February 15, 2014 MRI findings reflected a chronic and progressive degenerative left knee condition. There were no MRI findings that suggested a new or acute left knee injury.

24. Dr. Failinger testified that he did not review any objective evidence that Claimant suffered a worsening of his left knee condition after he reached MMI on June 4, 2014. He commented that he was not surprised by Claimant's subjective report of worsening symptoms because his presentation was typical of degenerative joint disease. Dr. Failinger summarized Claimant's course of symptoms as "classic." He explained that "arthritis has this course of getting worse and then it kind of settles down as you take it easier, take anti-inflammatories. Then it can come back. It may be an event, it may not be an event. Say I was on it hiking. Maybe it's just weather changes. So then it gets worse and then it gets better; but given that he's down to bone and he doesn't have any cartilage left out there really essentially, one would expect him to have this worsening course that would flare up with anything or nothing." Based on what he knew about the condition of Claimant's left knee as it existed prior to December 18, 2013, Dr. Failinger commented that he would have expected Claimant's symptoms to progress over time. He summarized that Claimant had a "very typical course" and it was "just a classic story of how arthritis progresses."

25. Dr. Failinger determined that nothing occurred during Dr. Horan's April 2, 2014 left knee surgery that would have caused the acceleration of Claimant's underlying degenerative arthritis. Because Claimant's left knee condition was essentially down to the bone, "there really wasn't cartilage to be scraped." Moreover, even on the inner part of Claimant's left knee where Dr. Horan trimmed the meniscus, there might be "increased symptoms or repeat acceleration" but very little, if any cartilage remained. Dr. Failinger also noted that the post-operative MRI dated August 6, 2014 was

consistent with the pre-operative MRI and did not show significant changes that would precipitate or aggravate Claimant's underlying arthritis condition.

26. Dr. Failinger explained that the surgeries performed by Dr. Gersoff on January 5, 2016 and March 1, 2016 involved the lateral compartment of Claimant's left knee. He determined that the preceding surgeries were not causally related to Claimant's December 18, 2013 industrial injury or Dr. Horan's April 3, 2014 surgery because Claimant suffered from pre-existing lateral compartment arthritis that had not worsened. He noted that Carticel transplants were designed for people with single knee compartment disease instead of Claimant's multi-compartment problems. The surgeries thus did not impact Claimant's underlying pathology of degenerative arthritis. Dr. Failinger also commented that the surgeries had a low probability of success because of Claimant's chronic degenerative changes.

27. Claimant has failed to establish that it is more probably true than not that he should be permitted to reopen his November 18, 2013 Workers' Compensation claim based on a worsening of condition. The record is replete with evidence that Claimant has suffered a long-history of degenerative left knee arthritis. Claimant's increasing left knee symptoms constitute the natural progression of his pre-existing degenerative joint disease.

28. Initially, Claimant has suffered a long history of prior left knee problems. On September 1, 2002 Claimant was in a street intersection collecting money for a Muscular Dystrophy Association "Fill the Boot" campaign. He was struck by a motor vehicle and sustained injuries to his left hip and left knee. Following the accident Claimant returned to regular employment and was released from care without any permanent impairment in late October 2002. However, by 2007 Claimant was still suffering left knee pain and sought a consultation with personal care provider Dr. Greenberg. After diagnostic testing, Dr. Greenberg advised Claimant that he had a torn meniscus. Dr. Greenberg prescribed Diclofenac for Claimant's left knee pain and swelling. He also informed Claimant that he would eventually require a left knee replacement. On July 20, 2012 Claimant again visited Dr. Greenberg to obtain an updated Diclofenac prescription for his left knee pain. Repeat x-rays revealed that Claimant suffered from left knee tricompartmental degenerative disease. Dr. Greenberg assessed Claimant with degenerative joint disease that was "well compensated on medication." In the months preceding Claimant's December 18, 2013 left knee injury he obtained refills of Diclofenac on August 7, 2013, September 26, 2013 and December 11, 2013. Finally, at a May 5, 2014 physical therapy appointment Claimant reported a long history of knee pain, mensical tears and osteoarthritis, but remarked that he was able to delay surgery for a long time. The record thus reveals that Claimant has suffered a long history of persistent, progressively worsening left knee pain as a result of degenerative arthritis.

29. On December 18, 2013 Claimant suffered an admitted left knee injury when he slipped and twisted as he exited a fire engine. On April 2, 2014 Claimant underwent left knee surgery with Dr. Horan. Dr. Horan specifically performed a partial medial meniscectomy, partial lateral meniscectomy, osteophyte removal and

chrondroplasties of the medial, lateral and patellofemoral compartments. By June 4, 2014 Claimant advised Dr. Bisgard that he had returned to full duty work, completed several tours and was not having any difficulty with his knee. Dr. Bisgard thus released Claimant to MMI and assigned a 15% permanent impairment rating for the left lower extremity. However, Claimant continued to experience progressive left knee symptoms. On January 5, 2016 Claimant underwent left knee surgery with Dr. Gersoff. The procedure included the removal of the left knee meniscus. On March 1, 2016 Dr. Gersoff performed a second surgery involving the re-installation of the meniscus after laboratory growth.

30. The persuasive medical reports and testimony of Dr. Failinger also reflect that Claimant has not suffered a worsening of his left knee condition since he reached MMI on June 4, 2014. Instead, Claimant's worsening left knee symptoms are attributable to the natural progression of his pre-existing degenerative joint disease. Dr. Failinger commented that he was not surprised by Claimant's subjective reports of worsening symptoms because his presentation was typical for degenerative joint disease. He summarized Claimant's course of symptoms as "classic." Dr. Failinger explained that arthritis symptoms typically wax and wane and can flare up for any or no reason. Based on what he knew about the condition of Claimant's knee as it existed prior to December 18, 2013, Dr. Failinger commented that he would have expected Claimant's symptoms to progress over time. He summarized that Claimant had a "very typical course" and that it was "just a classic story of how arthritis progresses." Furthermore, Dr. Failinger determined that nothing occurred during Dr. Horan's April 2, 2014 left knee surgery that would have caused the acceleration of Claimant's underlying degenerative arthritis. The post-operative MRI dated August 6, 2014 was consistent with the pre-operative MRI and did not show significant changes that would precipitate an aggravation of Claimant's underlying arthritis condition. Finally, the surgeries performed by Dr. Gersoff on January 5, 2016 and March 1, 2016, involved the lateral compartment of Claimant's left knee. Dr. Failinger determined that the preceding surgeries were not causally related to Claimant's December 18, 2013 industrial injury or Dr. Horan's April 3, 2014 surgery because Claimant suffered from pre-existing lateral compartment arthritis that had not worsened. The surgeries thus did not impact Claimant's underlying pathology of degenerative arthritis. Accordingly, Claimant has failed to demonstrate that he has suffered a change in the condition of his original compensable injury or a change in his physical or mental condition that is causally connected to the original injury. Claimant's request to reopen his December 18, 2013 Workers' Compensation claim based on a worsening of condition pursuant to §8-43-303(1), C.R.S. is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering

all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

5. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his November 18, 2013 Workers' Compensation claim based on a worsening of condition. The record is replete with evidence that Claimant has suffered a long-history of degenerative left knee arthritis. Claimant's increasing left knee symptoms constitute the natural progression of his pre-existing degenerative joint disease.

6. As found, initially, Claimant has suffered a long history of prior left knee problems. On September 1, 2002 Claimant was in a street intersection collecting money for a Muscular Dystrophy Association "Fill the Boot" campaign. He was struck by a motor vehicle and sustained injuries to his left hip and left knee. Following the accident Claimant returned to regular employment and was released from care without any permanent impairment in late October 2002. However, by 2007 Claimant was still suffering left knee pain and sought a consultation with personal care provider Dr. Greenberg. After diagnostic testing, Dr. Greenberg advised Claimant that he had a torn

meniscus. Dr. Greenberg prescribed Diclofenac for Claimant's left knee pain and swelling. He also informed Claimant that he would eventually require a left knee replacement. On July 20, 2012 Claimant again visited Dr. Greenberg to obtain an updated Diclofenac prescription for his left knee pain. Repeat x-rays revealed that Claimant suffered from left knee tricompartmental degenerative disease. Dr. Greenberg assessed Claimant with degenerative joint disease that was "well compensated on medication." In the months preceding Claimant's December 18, 2013 left knee injury he obtained refills of Diclofenac on August 7, 2013, September 26, 2013 and December 11, 2013. Finally, at a May 5, 2014 physical therapy appointment Claimant reported a long history of knee pain, mensical tears and osteoarthritis, but remarked that he was able to delay surgery for a long time. The record thus reveals that Claimant has suffered a long history of persistent, progressively worsening left knee pain as a result of degenerative arthritis.

7. As found, on December 18, 2013 Claimant suffered an admitted left knee injury when he slipped and twisted as he exited a fire engine. On April 2, 2014 Claimant underwent left knee surgery with Dr. Horan. Dr. Horan specifically performed a partial medial meniscectomy, partial lateral meniscectomy, osteophyte removal and chrondroplasties of the medial, lateral and patellofemoral compartments. By June 4, 2014 Claimant advised Dr. Bisgard that he had returned to full duty work, completed several tours and was not having any difficulty with his knee. Dr. Bisgard thus released Claimant to MMI and assigned a 15% permanent impairment rating for the left lower extremity. However, Claimant continued to experience progressive left knee symptoms. On January 5, 2016 Claimant underwent left knee surgery with Dr. Gersoff. The procedure included the removal of the left knee meniscus. On March 1, 2016 Dr. Gersoff performed a second surgery involving the re-installation of the meniscus after laboratory growth.

8. As found, the persuasive medical reports and testimony of Dr. Failinger also reflect that Claimant has not suffered a worsening of his left knee condition since he reached MMI on June 4, 2014. Instead, Claimant's worsening left knee symptoms are attributable to the natural progression of his pre-existing degenerative joint disease. Dr. Failinger commented that he was not surprised by Claimant's subjective reports of worsening symptoms because his presentation was typical for degenerative joint disease. He summarized Claimant's course of symptoms as "classic." Dr. Failinger explained that arthritis symptoms typically wax and wane and can flare up for any or no reason. Based on what he knew about the condition of Claimant's knee as it existed prior to December 18, 2013, Dr. Failinger commented that he would have expected Claimant's symptoms to progress over time. He summarized that Claimant had a "very typical course" and that it was "just a classic story of how arthritis progresses." Furthermore, Dr. Failinger determined that nothing occurred during Dr. Horan's April 2, 2014 left knee surgery that would have caused the acceleration of Claimant's underlying degenerative arthritis. The post-operative MRI dated August 6, 2014 was consistent with the pre-operative MRI and did not show significant changes that would precipitate an aggravation of Claimant's underlying arthritis condition. Finally, the surgeries performed by Dr. Gersoff on January 5, 2016 and March 1, 2016, involved the lateral compartment of Claimant's left knee. Dr. Failinger determined that the preceding

surgeries were not causally related to Claimant's December 18, 2013 industrial injury or Dr. Horan's April 3, 2014 surgery because Claimant suffered from pre-existing lateral compartment arthritis that had not worsened. The surgeries thus did not impact Claimant's underlying pathology of degenerative arthritis. Accordingly, Claimant has failed to demonstrate that he has suffered a change in the condition of his original compensable injury or a change in his physical or mental condition that is causally connected to the original injury. Claimant's request to reopen his December 18, 2013 Workers' Compensation claim based on a worsening of condition pursuant to §8-43-303(1), C.R.S. is denied and dismissed.

ORDER

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

Claimant's request to reopen his December 18, 2013 Workers' Compensation claim is denied and dismissed.

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

DATED: September 9, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

PROCEDURAL ISSUES

At the commencement of hearing, the parties agreed to reserve, for future determination, if necessary, the issues of average weekly wage, temporary partial disability and temporary total disability.

ISSUES

The remaining issues addressed in this decision concern compensability and Claimant's entitlement to medical benefits. The specific questions answered are:

I. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back arising out of and in the course of his employment on January 20, 2016.

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable, necessary, and related medical treatment stemming from his January 20, 2016 injury.

FINDINGS OF FACT

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

1. Claimant works as a specialist on the hard-line department of Employer's department store. As a specialist, Claimant organizes the dock and loading area. He also stocks merchandize, including kitchen and house wares.

2. On January 20, 2016, Claimant was working alone on the loading dock in an effort to break down a pallet to clear a pathway to additional merchandize destined for stocking. The pallet contained multiple 30-35 pound boxes of plastic bags. Claimant had to bend over and reach forward to move the boxes from the pallet to a U-boat. While lifting and twisting to clear the boxes from the pallet, Claimant developed pain in his low back. Claimant's shift on the day of injury extended from approximately 6:00 am to 2:00 pm.

3. Claimant reported his low back pain and was immediately sent to Centura Centers for Occupational Medicine (CCOM) where he was evaluated by Dr. Daniel Olson. Dr. Olson completed his evaluation and prepared a report outlining his findings/ and opinions which he signed on 10:42 am.

4. During his initial examination with Dr. Olson, Claimant reported while he was moving some boxes of plastic bags weighing approximately 30-35 pounds from a pallet he began to experience sharp pains in his left lower back. Claimant denied having any shooting pains down his legs. Dr. Olson noted, “He does appear to be in mild to moderate discomfort. He does get spasms with any type of change position. Looking at his back he does have some dextroscoliosis noted. He also has spasms and acute tenderness in the left lower paraspinals. He has difficulty getting up and down off the exam table due to the spasms.” Regarding his past medical history, Claimant reported to Dr. Olson that he “does not have any pain in [the] back on a day-to-day basis but sometimes with activity.” Dr. Olson opined, “The cause of this problem is related to work activities.” Dr. Olson diagnosed claimant with a sprain of ligaments of lumbar spine which he related to Claimant’s work activity. Dr. Olson offered a Toradol injection, which claimant declined. Claimant was prescribed Naproxen and Cyclobenzaprine. Claimant was to remain off of work until January 22, 2016. (Respondents Ex. B, pgs. 36-40).

5. On January 22, 2016 claimant attended a follow-up exam with Dr. Olson. Dr. Olson noted the Claimant had fairly limited movement. Claimant reported he had discomfort across the lower back and some up into his mid thoracic area. Dr. Olson noted, “His sitting posture is a little improved today. He is getting up out of the chair a little easier. He still has palpable spasm in the left lower paraspinals that are still tender to palpation.” Dr. Olson released the Claimant to return to work under modified duty with a 10 pound lifting restriction, limited bending at the waist, no ladders, and change positions frequently. (Respondents Ex. B, pgs. 29-35).

6. Claimant testified following the injury he missed work on January 21st and January 22nd. He then engaged in a previously scheduled vacation, after which he returned to work.

7. Claimant returned to Dr. Olson on January 27, 2016 for a follow-up. Dr. Olson reported the Claimant had started physical therapy, but was still experiencing spasms in his lower back. Dr. Olson noted, “He is alert but still appears to be in mild to moderate discomfort. His overall movement is a little bit quicker, but he still has a fair amount of guarding. He is still firm and tender in the left lower paraspinals. He also has some discomfort in the upper lumbar region on the right side.” Claimant was released to continue modified duty. (Respondents Ex. B, pgs. 25-28).

8. Claimant attended a follow-up with Dr. Olson on February 17, 2016. Claimant reported making very slow progress in physical therapy. Claimant reported any time he tried to advance his activities and exercise he got spasms. Claimant’s pain diagram indicated pain in the low back as well as the rest of the spine. Dr. Olson noted, “His overall sitting posture is good. He is not favoring his back at all. He is a little stiff getting to a standing position. He does appear to have a mild scoliosis with some firmness on the right side thoracic muscles, but again not as tender.” Claimant was to be evaluated by Dr. Michael Sparr and continue medications and physical therapy. (Respondents Ex. B, pgs. 17-20).

9. Claimant was evaluated by Dr. Sparr on March 16, 2016. Claimant reported he was injured while lifting cases of storage bags from a pallet. Claimant reported sharp shooting pains in his low back, left-sided which radiated to the upper back. Claimant reported working a second job at Sears in the Warehouse Department. Claimant reported this did not require heavy lifting. Physical examination revealed a levoconvex lumbar scoliosis with muscular imbalance, lumbar and gluteal tightness and spasm, left sacroiliac up-slip, mildly positive Lesegue's maneuver and positive facet loading testing at L5-S1 on the left. Additionally, straight leg raise testing caused increased back and buttock pain but "no obvious lower extremity symptoms." Following examination, Dr. Sparr noted, "The patient presents today with significant asymmetric myofascial tightness in the left thoracic lumbar and gluteal regions. He has underlying scoliosis which contributes. There is an element of left greater than right sacroilitis. He likely has facet dysfunction and arthralgias in the mid to lower lumbar region." Dr. Sparr recommended the Claimant undergo an MRI. (Respondents Ex. C, pgs. 41-45).

10. On March 24, 2016, Insurer requested a prospective pre-certification to determine whether an additional eight sessions of physical therapy (PT) was medically necessary. Claimant's medical records were forwarded to Dr. Moshe Lewis for review. Dr. Lewis prepared a report following his records review in which he notes: "This claimant sustained a work related injury. He was lifting cases of storage bags from a pallet, when he felt a sharp shooting pain in his low back, left sided which radiated to the upper back." Dr. Lewis continued: The claimant has attended land-based physical therapy twice weekly for several weeks. He did not feel this was particularly beneficial. He has been in the pool for two weeks and reported good benefit." Dr. Lewis noted that 6 additional PT visits were medically necessary.

11. Prior to his alleged January 20, 2016 industrial injury, Claimant was evaluated at CUHCC Clinic on April 29, 2015 for neck and low back pain and spasms associated with a motor vehicle accident (MVA) occurring on April 21, 2015. Claimant reported persistent pain in the cervical and lumbar regions with pain down both legs. Claimant was diagnosed with back and neck spasms. Claimant was to begin physical therapy and start chiropractic treatment once the spasms settled down. Claimant was released to return to work with a 10 pound limit for one week. (Respondents Ex. A, pgs. 1-2).

12. Respondents denied liability for Claimant's alleged January 20, 2016 injury and requested an independent medical examination (IME) with Dr. Eric Ridings.

13. Dr. Ridings completed the IME on May 25, 2016. As part of his IME, Dr. Ridings reviewed Claimant's medical records. With regards to Dr. Olson's initial report Dr. Ridings opined that it would have been "helpful" if Dr. Olson "had documented information about the frequency, location, and character of the pain that he gets at times with activity." Dr. Ridings explained, "[i]f for example, his usual symptoms were exactly like the symptoms he were having at presentation on that visit, that might raise a question as to whether this was simply his pre-existing back pain rather than a new injury." (Respondents Ex. E, pg. 49).

14. Claimant provided Dr. Ridings with an MRI report dated March 31, 2016. While reviewing the MRI report Dr. Ridings noted, “This was read as normal at L1-2 and L2-3. L3-4 had a minimal posterior disc bulge. L4-5 had a minimal disc bulge and mild facet hypertrophy leading to mild to moderate bilateral neural foraminal narrowing. At L5-S1 there was a mild disc bulge and mild thickening of the ligamentum falvum and mild degenerative facet hyerptrophy.” (Respondents Ex. E, pg. 51).

15. Following review of Claimant’s MRI report, Dr. Ridings opined, “This study is well within the normal range for asymptomatic middle-aged population. I would not typically expect any of the mild degenerative changes noted to by symptomatic.” (Respondents Ex. E, pg. 51).

16. Claimant reported to Dr. Ridings on January 20, 2016 he was moving store supplies in boxes from a pallet onto a U-boat. Claimant reported while stacking the boxes he felt discomfort in his left low back which radiated all the way up to the top of the left shoulder. (Respondents Ex. E, pg. 52).

17. Upon examination, Claimant reported to Dr. Ridings that his primary complaint was to his lower back with “pins and needles up and down his back to the top of the thoracic region.” Claimant also reported pain in the left groin and lateral left hip area with pins and needles on the bottom of his left foot. Claimant reported increased pain with any sort of activity and also when lying down. Dr. Ridings noted, “I was unable to determine a pattern such as increased pain with flexion versus extension. His pain ranges from 5/10 to 9/10 and is improved with “just the right amount of rest.”“ (Respondents Ex. E, pgs. 52-53).

18. Claimant denied any previous injuries or problems in his current areas of complaint. Upon examination Dr. Ridings noted: “He complained of severe pain with flinching away with light touch, brushing my thumbs across the skin of his back from the interscapular region to the buttocks on the left more so than on the right. Pain with light touch caused marked pain behaviors in the left lumbar and gluteal regions, in the groin over the iliopsoas, and at the lateral hip more so than in the left thoracic region which was then more than through the entire right thoracolumbar region. Nevertheless, even on the least severe right side of his back he had pain behaviors with brushing the surface of the skin to a non-physiologic degree.” (Respondents Ex. E, pg. 53).

19. Dr. Ridings continued his examination of the Claimant and noted, “The patient did not relax sufficiently to all assessment of his underlying muscle tone throughout his areas of complaint and did not well tolerate more firm palpation in any case.” (Respondents Ex. E, pg. 54).

20. Dr. Ridings opined that combining the results of Claimant’s MRI scan with the findings on physical examination lead him to believe that it was “unlikely that the patients pain is discogenic or radicular.” Rather, because his “pain was quite diffuse, and his exam was marked by non-physiologic pain behaviors such as complaints of widespread severe pain with light touch and brushing the surface of his skin throughout the thoracic lumbar and gluteal regions” the only diagnosis he would consider, if in fact

Claimant had a work related injury, was a left lumbar strain. (Respondents Ex. E, pg. 54-55). Regarding whether Claimant could have been injured in the manner he described, Dr. Ridings noted: "it is certainly medically possible to sustain an injury from lifting and moving boxes in this manner." According to Dr. Riding, the "differential diagnosis based upon the mechanism of injury in my opinion would be a thoracolumbar strain, disc injury, or SI joint dysfunction.

21. Nonetheless, Dr. Ridings opined, "I am not convinced that Mr. Shannon sustained a work injury on January 20, 2016 given his quite diffuse complaints that do not localize to any one structure or even pair of structures, several fairly unusual complaints such as cramping after lying down, and numbness, pins and needles in his back among others. Additionally, his physical examination was, as noted, marked by non-physiologic pain behaviors of a severity that limited the diagnostic utility of the entire physical examination. It also does not make a lot of sense to me that he was having such severe complaints and severe discomfort with minimal stimulation on physical examination, yet stated he was 60% improved. Beyond pain behaviors, I was unable to determine any specific objective abnormality on examination."

22. Dr. Ridings concluded, "It is my opinion at this time that while it is possible that he sustained a work injury on January 20, 2016, I cannot state that it is more likely than not that he did so based on the totality of my evaluation of the patient today…It is not medically probable that the patient sustained an injury as he described. I do not find it probable or reasonable that in lifting boxes of medium weights that he sustained an injury or injuries that would lead to the patient's wide ranging and wide spread symptoms, with severe pain on physical examination, yet tolerates working 20 hours a week with a 15 pound restriction at Kohl's and another 20 hours a weeks as a cashier at Sears. It is my judgment that, more likely than not, symptom magnification is present in this case." (Respondents Ex. E, pg. 55).

23. Dr. Ridings testified at hearing. Dr. Ridings testified that Claimant's reported mechanism of injury during the IME was consistent with his testimony at hearing. Nevertheless, Dr. Ridings testified that there was nothing on the MRI that would cause Claimant's symptoms nor were there objective findings[1] on physical examination suggestive of injury. Consequently, Dr. Ridings testified that while the reported mechanism of injury (MOI) could cause a lumbar strain he was unable to conclude that the MOI, more probably than not, did cause the alleged injury. Dr. Ridings testified that two things were needed in order to state that an injury was work-related. The first prong, according to Dr. Ridings is that there must be a MOI that can cause the alleged injury. The second prong is that the MOI is the most probable cause of the alleged injury.

[1] Dr. Ridings testified that physicians often use the term spasms incorrectly typically when a injured worker demonstrates increased muscle tone as a consequence of guarding which he testified is does not represent true spasm but is frequently documented as such.. Consequently, Dr. Ridings testified that generally speaking, he does not consider reported "muscle spasm(s)" to constitute "objective" evidence when he encounters the term in review of medical records.

24. Dr. Ridings testified that none of the other physicians who evaluated Claimant performed a causation analysis. However, on cross examination, Dr. Ridings admitted that he could not identify an activity, other than lifting, that was likely to cause Claimant's symptoms, which was identified by Dr. Olson as causing a sprain of the ligaments of the lumbar spine on January 20, 2016. Dr. Ridings testified that Claimant did not have an objective medical diagnosis that fit with his complaints of diffuse back pain and without an objective diagnosis; Claimant could not be determined to have sustained an injury. Accordingly, Dr. Ridings testified that he could not state to a reasonable degree of medical probability that Claimant sustained a work-related injury on January 20, 2016. The undersigned ALJ is not persuaded.

25. The ALJ finds the examinations of Dr. Olson and Sparr to contain objective evidence consistent with low back injury. While Dr. Ridings apparently does not believe that Claimant presented to Dr. Olson and Dr. Sparr with actual muscle spasm and they were mistaken when they documented the same, the ALJ finds Dr. Ridings testimony surrounding the question of whether Claimant had spasm unpursuasive. The ALJ also finds Dr. Ridings' explanation of what Drs. Olson and Sparr were appreciating, i.e. spasm versus guarding, during their physical examination speculative and equally unconvincing. Finally, beyond spasm, the evaluation of Dr. Sparr contains reference to positive provocative testing suggestive of injury to the low back and/or SI joints. The ALJ finds the difference in the objective findings on examination between the early evaluations of Drs. Olson and Sparr and the IME findings of Dr. Ridings' four months after injury likely due to Claimant's treatment, including PT and injection therapy, which Claimant testified was particularly effective in reducing his symptoms.

26. Crediting the reports of Dr. Olson and Dr. Sparr along with the consistent and credible testimony of Claimant, the ALJ finds it more probable than not that Claimant's described MOI is the cause of his low back and SI joint symptoms and need for treatment. Accordingly, the ALJ finds that Claimant has met his burden of proof to establish that he suffered a compensable industrial injury on January 20, 2016.

27. Based upon the evidence presented, the ALJ finds the treatment rendered to Claimant by Drs. Olson and Sparr reasonable, necessary and related to his January 20, 2016 injury.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an “injury” arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers’ compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers’ compensation claim is decided on its merits. *Section 8-43-201, supra.*

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

C. In determining credibility, the ALJ should consider the witness’ manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found here, Claimant’s testimony is credible, consistent and convincing. Moreover, the opinions of Dr. Olson and Dr. Sparr regarding diagnosis, causality and treatment are more persuasive than the contrary opinions of Dr. Ridings.

Compensability

D. A “compensable injury” is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable “injury.” *Romero*, supra; § 8-41-301, C.R.S. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an “injury” arising out of and in the course of employment*.* *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff’d Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of” and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injuries occurred within the time and place limits of his employment relationship with Employer and during an activity, specifically moving merchandize from a pallet to a U-boat as a hard-line inventory specialist for Employer. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" his employment must be resolved before the injury is deemed compensable.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that Claimant sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). As found, the examinations of Drs. Olson and Sparr, on the day of and after the asserted injury, contain objective findings consistent with a low back/SI joint injury. More probably than not, the lifting pattern employed by Claimant to repeatedly lift 30-35 pound boxes from the pallet sprained/strained the soft tissue and ligaments of the lumbar spine giving rise to Claimant's symptoms. Even Dr. Ridings admitted it is medically possible to sustain an injury from lifting and moving boxes in the manner described by Claimant. Consequently, the ALJ concludes that a logical causal connection exists between Claimant's work duties and his low back symptoms and his need for treatment. Claimant's low back/SI joint injury is compensable.

Medical Benefits

G. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back and/or SI joints. The evidence presented persuades the ALJ that this compensable "injury" is the proximate cause of Claimant's need for medical treatment, including his need for physical therapy and the injection(s) subsequently provided by Dr. Sparr. Taken in its entirety, the ALJ finds the evidentiary record to contain substantial evidence to support a conclusion that Claimant's work duties and not a pre-existing condition caused by his scoliosis or a prior injury from an MVA occurring approximately nine (9) months earlier caused his current symptoms and need for treatment, including PT and injection therapy. Consequently, the ALJ concludes that Claimant has established that his need for treatment with Drs. Olson and Dr. Sparr was causally related to his work-related lifting injury on January 20, 2016. Moreover, the totality of the evidence presented establishes that the care, including physical and injection therapy were reasonable and necessary given Claimant's continued pain and functional decline as evidenced by the imposition of work restrictions by Dr. Olson. Consequently, the ALJ concludes that Respondents are liable for Claimant's care at CCOM with Dr. Olson and Dr. Sparr. As Claimant has not been placed at maximum medical improvement (MMI), Respondents remain liable for all future reasonable, necessary and related care.

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that he suffered a compensable injury to his low back/SI joints as a consequence of lifting and moving 30-35 pound boxes of plastic storage bags from a pallet on January 20, 2016.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation fee schedule, to cure and relieve Claimant from the effects of his right shoulder injury, including the care provided at CCOM by Dr. Olson and his referrals, specifically Dr. Sparr.

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

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

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

DATED: September 14, 2016

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a right leg injury on June 7, 2016 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and related medical benefits for her June 7, 2016 industrial injury.

FINDINGS OF FACT

1. Claimant worked as a Bus Driver for Employer. She was assigned to drive a charter bus of football players from Eaton High School to Chadron State College in Nebraska for a football mini-camp from June 5-8, 2016. The actual travel days were June 5, 2016 and June 8, 2016.

2. Claimant stayed at the Best Western Inn in Chadron while the football players stayed on the campus of Chadron State College. On June 6, 2016 Claimant drove the football team to a local Wal-Mart store and washed the charter bus. Claimant also drove to Chadron State Park to service the toilet because it was the only dump station in the area. Chadron State Park is located approximately eight miles south of town.

3. Claimant explained that on June 7, 2016 she spoke with the coach of the football team. He told her that she would not be needed that morning. Because she would not be needed, Claimant prepared a small sack lunch and drove to Chadron State Park. Claimant planned to spend time at the lake but decided to take a guided horseback trail ride through the park. Approximately one-quarter of a mile from the stable one of the guides' horses became startled and turned into Claimant's horse. Both the guide and Claimant fell from their horses. Claimant fractured her lower right leg during the incident.

4. Employer's Bus Supervisor Bob Killian testified at the hearing in this matter. He explained that on travel days bus drivers are paid for their bus inspection and drive times for up to 15 hours each day. On non-travel days, when a bus driver is out of town, drivers are "on call" but are paid for eight hours each day because they are out of state. On non-travel days bus drivers may take passengers to meals, hotels or on sightseeing trips. When bus drivers are not needed and "on call" they may engage in their own activities but must be available within 30 minutes. Bus drivers are also permitted to use the bus for reasonable personal transportation.

5. Claimant has failed to establish that it is more probably true than not that she suffered a compensable right leg injury on June 7, 2016 during the course and scope of her employment with Employer. Claimant explained that on June 7, 2016 she spoke with the coach of the football team. He told her that she would not be needed that morning. Claimant was thus "on call" and permitted to engage in her own activities but had to be available within 30 minutes. Claimant drove approximately eight miles to Chadron State Park and decided to take a guided horseback trail ride through the park. Approximately one-quarter of a mile from the stable Claimant fell from her horse and fractured her lower right leg. Although Claimant was permitted to engage in personal activities on the morning on June 7, 2016 her participation in a voluntary recreational activity and substantial personal deviation from employment reflects that her right leg injury did not arise during the course and scope of her employment with Employer.

6. Claimant voluntarily went horseback riding at Chadron State Park. Claimant's voluntary participation in a recreational activity is specifically excluded from the definition of "employment" pursuant to §8-40-201(8), C.R.S. Moreover, Claimant was not an "employee" pursuant to §8-40-301(1), C.R.S. while she was horseback riding.

7. The record reveals that Claimant's right leg injury did not arise in the course and scope of her employment with Employer. Claimant's job duties involved driving a bus for the football team. Her injury did not occur within the time and place limits of her employment because the accident happened in Chadron State Park when she fell from a horse. Claimant's injury also did not arise out of her job duties for Employer. Claimant's activity of horseback riding when she was "on call" was for her sole benefit and constituted a substantial deviation from the mandatory or incidental duties of employment. Her action of riding a horse did not have its origin in her work-related functions and was not sufficiently related to her work activities to be considered part of her service to Employer. Accordingly, Claimant has failed to demonstrate that she suffered a compensable right leg injury during the course and scope of her employment with Employer on June 6, 2016. Claimant's claim for Workers' Compensation benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. The Workers' Compensation Act specifically excludes from the definition of "employment" "the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." §8-40-201(8), C.R.S. Additionally, §8-40-301(1), C.R.S. defines the scope of the term "employee" to exclude any person "while participating in recreational activity." The preceding statutes reflect that the intent of the General Assembly was to remove the voluntary participation in a recreational activity from the employment relationship. *In re McLachlan* W.C. No. 4-789-747 (ICAP, July 2, 2010).

5. To establish a compensable injury an employee must prove by a preponderance of the evidence that her injury arose out of the course and scope of employment with her employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "time" limits of employment include a reasonable interval before and after working hours while the employee is on the employer's property. *In Re Eslinger v. Kit Carson Hospital,* W.C. No. 4-638-306 (ICAP, Jan. 10, 2006). The "place" limits of employment include parking lots controlled or operated by the employer that are considered part of employer's premises. *Id.*

6. Although injuries incurred while traveling to and from work do not occur in the course of employment, an employee who has fixed hours and a place of work is covered while going to and coming from work while on the employer's premises. *In re Broyles,* W.C. No. 4-510-146 (ICAP, July 16, 2002). The preceding principle has been extended to injuries that occur on the employer's premises during an unpaid lunch break even if the employee is not required to remain on the premises for lunch. *Id.*

7. There is no requirement under the Act that a claimant must be on the clock or performing an act "preparatory to employment" in order to satisfy the "course of employment" requirement. *In re Broyles,* W.C. No. 4-510-146 (ICAP, July 16, 2002). As noted in *Ventura v. Albertson's, Inc.,* 856 P.2d 35, 38 (Colo. App. 1992):

> The employee, however, need not be engaged in the actual performance of work at the time of injury in order for the "course of employment" requirement to be satisfied. Injuries sustained by an employee while taking a break, or while leaving the premises, collecting pay, or in retrieving work clothes, tools, or other materials within a reasonable time after termination of a work shift are within the course of employment, since these are normal incidents of the employment relation.

8. The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). Nevertheless, the employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). It is sufficient "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment." *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). Incidental activities include those that are "devoid of any duty component, and are unrelated to any specific benefit to the employer." *In re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008). Actions including eating, sleeping, resting, washing, toileting, seeking fresh air, drinking water and keeping warm have been determined to be incidental to employment under the personal comfort doctrine. *In re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008). Whether a particular activity has some connection with the employee's job-related functions as to be "incidental" to the employment is dependent on whether the activity is a common, customary and accepted part of the employment as opposed to an isolated incident. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

9. The issue is thus whether the "claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from her job and was performing an activity for his sole benefit." *In re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). Ministerial actions for an employee's personal comfort do not constitute a substantial deviation from employment unless the personal need being met or the means chosen by the employee to satisfy his personal comfort is unreasonable. *In re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008); *see Larson's Workers' Compensation Law,* §21.00.

10. When the employer asserts a personal deviation from employment activities "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship."

Roache v. Industrial Commission, 729 P.2d 991 (Colo. App. 1986); *In re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that she is acting for her sole benefit at the time of injury, her claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). The question of whether a deviation is significant enough to remove the claimant from the course and scope of employment is a factual determination for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

11. As found, Claimant has failed to establish by a preponderance of the evidence that she suffered a compensable right leg injury on June 7, 2016 during the course and scope of her employment with Employer. Claimant explained that on June 7, 2016 she spoke with the coach of the football team. He told her that she would not be needed that morning. Claimant was thus "on call" and permitted to engage in her own activities but had to be available within 30 minutes. Claimant drove approximately eight miles to Chadron State Park and decided to take a guided horseback trail ride through the park. Approximately one-quarter of a mile from the stable Claimant fell from her horse and fractured her lower right leg. Although Claimant was permitted to engage in personal activities on the morning on June 7, 2016 her participation in a voluntary recreational activity and substantial personal deviation from employment reflects that her right leg injury did not arise during the course and scope of her employment with Employer.

12. As found, Claimant voluntarily went horseback riding at Chadron State Park. Claimant's voluntary participation in a recreational activity is specifically excluded from the definition of "employment" pursuant to §8-40-201(8), C.R.S. Moreover, Claimant was not an "employee" pursuant to §8-40-301(1), C.R.S. while she was horseback riding.

13. As found, the record reveals that Claimant's right leg injury did not arise in the course and scope of her employment with Employer. Claimant's job duties involved driving a bus for the football team. Her injury did not occur within the time and place limits of her employment because the accident happened in Chadron State Park when she fell from a horse. Claimant's injury also did not arise out of her job duties for Employer. Claimant's activity of horseback riding when she was "on call" was for her sole benefit and constituted a substantial deviation from the mandatory or incidental duties of employment. Her action of riding a horse did not have its origin in her work-related functions and was not sufficiently related to her work activities to be considered part of her service to Employer. Accordingly, Claimant has failed to demonstrate that she suffered a compensable right leg injury during the course and scope of her employment with Employer on June 6, 2016. Claimant's claim for Workers' Compensation benefits is thus denied and dismissed. *See In re McLachlan*, W.C. No. 4-789-747 (ICAP, July 2, 2010) (concluding that claim was not compensable where the application of §8-40-201(8), C.R.S. was dispositive and the claimant's voluntary participation in a street hockey game constituted a substantial deviation from employment activities).

ORDER

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

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

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

DATED: September 13, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

The Respondents' application for hearing states that Respondents "request a judicial determination as to what treatment Claimant is currently receiving from her authorized physicians is reasonable and necessary and related to the injury." The Respondents failed to identify any specific treatment with which they take issue. At the commencement of hearing, the Respondents again failed to identify any specific treatment they believed was no longer reasonable, necessary or related to the Claimant's work injury. During opening statement, Respondents' counsel indicated that Respondents have "some issues about what . . . ongoing symptom presentology [sic] may be related to the injury." Respondents also asserted that multiple medications as well as interventional treatment including injections, and diagnostic studies such as MRI arthrogram studies are no longer reasonable and necessary.

Based on the application for hearing, the comments made by counsel, the evidence presented, and the post-hearing position statements filed by the parties, the ALJ finds that the issues to be determined by this decision are whether the Claimant has proven that continued Oxycontin, Percocet, Methocarbamol, Cymbalta, Protonix, and Gabapentin are reasonable, necessary and related to her workers' compensation claim. The ALJ declines the invitation by Respondents to determine whether future diagnostic studies, injections or any other specific treatment recommendations not currently pending are reasonable, necessary or related to Claimant's injury. Such a determination would be speculative, and evaluating the merits of treatment not currently being recommended would be difficult. The ALJ also declines to determine which body parts are causally related to the work injury unless a specific treatment recommendation is pending for that body part.

FINDINGS OF FACT

General Findings

1. The Claimant is a 62-year old woman.

2. On February 17, 1993, ALJ Conway Gandy found that Claimant sustained an occupational disease to her low back.

3. On July 15, 2006, ALJ Gandy found Claimant permanently and totally disabled as a result of the occupational disease, and ordered the Respondents to pay for Claimant's future medical expenses arising out of her compensable injury.

4. In 1992, Claimant had surgery under her workers' compensation claim that consisted of a posterior lumbar interbody fusion with instrumentation done at L4-5 and L5-S1. Claimant still has hardware in her lumbar spine.

5. Claimant testified that she continues to experience low back pain that sometimes radiates up to her neck. She has bilateral leg pain and groin pain. She experiences spasms in her low back and upper back about two to three times per week. Her average pain level is 7 out of 10 with medications.

6. Dr. Harlan Ribnik has been the Claimant's authorized treating physician (ATP) for approximately 18 years.

7. Dr. Ribnik manages Claimant's prescription medications. As of the date of the hearing Dr. Ribnik prescribed the following medications to the Claimant:

Oxycontin
Percocet
Methocarbamol (Robaxin)
Cymbalta
Protonix
Gabapentin (Neurontin)
Senokot
Trazadone

8. The Claimant testified that she feels stable on her medications. She can engage in activities and care for herself.

9. According to Dr. Ribnik's records, the Claimant consistently reports pain at a level of 7 out of 10.

10. Dr. Ribnik testified by deposition. He explained that Claimant has chronic low back pain, some sacroilitis, post laminectomy syndrome, pain in the lower extremities, lumbar spinal stenosis and lumbosacral spondylolysis.

11. Dr. Ribnik described Claimant's symptoms as predominantly back pain, pain her hips and pain in her lower extremities, with the pain greater in her right rather than left lower extremity. Dr. Ribnik associates all of these symptoms with her work injury.

12. There is no pending treatment recommendation for Claimant's lower extremities other than Gabapentin, and no treatment recommendation pending for Claimant's groin or hips.

13. Dr. Ribnik indicated that Claimant suffers from depression and anxiety due to her work injury. He explained Claimant suffers from the sleep issues due to difficulties with finding a comfortable position because of pain. He prescribes Trazadone for sleep.

14. Claimant walks with a marked antalgic gait to the right side and uses a cane. Dr. Ribnik opined that Claimant's symptoms are consistent with the pathology in her lower back associated with the work injury. He explained that it was not uncommon for people who have extensive lumbar surgery to have continued pain in that area and that the lower extremity pain is related to the nerves involved in the low back.

15. Dr. Ribnik indicated that Claimant suffers from some nerve irritation related to her back surgery. He indicated that the hardware "creates an abnormal physiologic and mechanical condition and it occupies a space that can potentially attract scarring or create narrowing of areas against which nerves may rub and become irritated."

16. Dr. Ribnik testified that Claimant's description of her leg pain fits the S1 dermatomal pattern.

17. Claimant is compliant with her medication. She has had no failed drug screens.

18. Dr. Ribnik testified that his treatment goal for Claimant is to maintain a reasonable level of function, control pain and allow Claimant to take care of herself. He does not believe she is symptom magnifying.

19. On February 23, 2015, Dr. Elizabeth Bisgard performed an independent medical examination at Respondents' request. Dr. Bisgard examined the Claimant as well as reviewing the Claimant's medical records prior to issuing a report.

20. Dr. Bisgard indicated that multiple diagnostic studies demonstrate that Claimant's hardware is intact and, therefore, not the source of Claimant's back pain. Dr. Bisgard also indicated that CT myelograms failed to reveal the source of Claimant's back or leg pain.

21. Dr. Bisgard diagnosed the following:

Chronic low back pain secondary to posterior fusion, L4 to S1.
Groin pain bilaterally.
Bilateral leg pain without clear radiculopathy.
Depression.
Chronic constipation secondary to chronic narcotic pain medication.
Narcotic dependency.

22. Dr. Bisgard noted that Claimant has not responded to SI joint injections, radiofrequency ablation of the SI joints or numerous epidural injections.

23. Dr. Bisgard noted that Claimant reports only a 10-20% improvement in her function with medications. She ultimately opined that Dr. Ribnik's records fail to document increased functional activity or decreased pain thus Claimant should be weaned from all pain medications.

24. Dr. Bisgard also opined that Claimant should receive no maintenance medication under her workers' compensation claim, but if it is determined Claimant is entitled medications, the only appropriate medications would be Cymbalta, 30 mg, twice per day, and methocarbamol as needed at the lowest recommended dose of 500 mg.

25. Claimant has been reporting ongoing right leg pain. The medical records reflect that Claimant has been reporting right leg pain since 2004 or earlier.

26. Dr. Ribnik believes that there is objective support for Claimant's right leg pain, and that she carries a diagnosis of S1 radiculopathy.

27. Dr. Bisgard disagrees that objective evidence supports S1 radiculopathy or any right leg symptoms.

28. Dr. Ribnik testified that when Claimant identifies an area of pain (such as her right leg), then he would perform injections to help verify that there is a pain generator at that location and then attempt to do something about it. As reflected in Dr. Bisgard's report, Dr. Ribnik, since January 2008, has performed seven epidural steroid injections in Claimant's low back, with the last injection performed on March 21, 2014. As explained by Dr. Bisgard, the purpose of epidural injections is to determine a pain generator. Specifically, under fluoroscopy, a needle is inserted into a specific level of the spine and injected with both a local numbing medication, as well as a steroid. In order for an injection to be considered diagnostic, there needs to be an 80% or greater reduction of pain in the immediate time period of the anesthetic, and, for a therapeutic response, a lasting benefit from the effect of the steroid.

29. Dr. Bisgard opined that Claimant did not have a diagnostic response to any of the epidural steroid injections.

30. In her report, Dr. Bisgard documented the fact that Claimant's right SI joint radiofrequency ablation in February 2014 resulted in significant benefit in right leg symptoms, but no relief in her back. However, Dr. Bisgard indicated that Claimant's reported response to this procedure was "non-physiologic." As explained by Dr. Bisgard, a radiofrequency ablation performed at the SI joint is not designed to target the nerves that would cause right leg symptomology. Dr. Bisgard opined that it makes no medical sense that Claimant, following a procedure at her SI joint, would experience significant relief in right leg pain.

31. Claimant saw Dr. Ribnik on October 21, 2014. At that time, Claimant had seen Dr. Tolge for an evaluation. Dr. Ribnik explained that he made the referral to Dr. Tolge, a neurologist, for purposes of attempting to determine what may be causing Claimant's ongoing complaints. Dr. Ribnik, in his October 21, 2014 report, made the following comments:

> I had a conversation with Dr. Tolge today about [Claimant's] issues.
>
> She felt that there wasn't likely any pathology interspinally, but can't rule out retroperitoneal pathology. She suggested that a trial of

> peripheral nerve blocks might be helpful diagnostically, possible ilioinguinal or genitofemoral.
>
> I reviewed the report of the lumbar myelogram dated August 2013 that shows only a mild flattening of the thecal sac at L2-L3 without any compression of the cord or nerve roots or any paravertebral structures. I did a lumbar epidural injection for her at L2-L3 in March 2014. Reviewing the subsequent office notes, she did not get more than a day's relief from that injection, suggesting that it was only a brief local anesthetic effect, and not an effect of the steroid.

32. Dr. Bisgard, after reviewing this clinical note, agreed with Dr. Tolge that there was no interspinal pathology to explain Claimant's ongoing symptom presentation.

33. Dr. Ribnik testified that just because imaging shows the hardware intact does not mean that it cannot be the source of Claimant's pain. Dr. Ribnik explained that the hardware is a foreign substance in the body and can create an abnormal physiological and mechanical condition.

34. In addition to providing a written report, Dr. Bisgard also testified at the hearing. She is Board Certified in Occupational Medicine. She is not Board Certified in anesthesiology, not sub-specialty Board Certified in pain management, not Board Certified in interventional pain medicine, and has no certification of any kind in pain management. She does not specialize in treatment of chronic pain patients. She refers her difficult pain patients to other chronic pain specialists.

35. Dr. Bisgard testified Claimant is a chronic pain patient and The Division of Workers' Compensation Chronic Pain Disorder Medical Treatment Guidelines are applicable. She acknowledges the Division recognizes that acceptable medical practice may include deviation from the Treatment Guidelines as individual changes dictate and she agrees with that statement.

36. Referencing Claimant's Exhibit 15, page 187, Dr. Bisgard testified she agrees with the Guidelines' statement that some healthcare providers, by virtue of their experience and additional training or accreditation by pain specialist organizations, have much greater expertise in the area of chronic pain evaluation and treatment than others and that such patients should be referred to recognized specialists.

37. Dr. Bisgard acknowledges Claimant had an L4-S1 posterior lumbar spinal fusion and, on direct examination, testified that L4-5 and L5-S1 involves nerves that go down the right leg. Dr. Bisgard was unaware of what symptoms Claimant reported following her injury and surgery as she did not have records dating back to that time.

38. When asked if she admits Claimant has chronic low back pain secondary to her fusion, Dr. Bisgard stated: "That's what she has been diagnosed with for the last

20 plus years." She conceded: "I agree she has chronic low back pain, that she is subjectively reporting low back pain. It has been attributed to her posterior fusion….and I understand why that is confusing." Dr. Bisgard then testified Claimant does not have low back and right leg pain secondary to her fusion but then comments: "I will clarify. I am not stating that she is not experiencing pain. I am—I cannot get into her head and tell—and say that she is subjectively not feeling some pain. I am looking at a medical explanation for the pain. There is no medical explanation for the bilateral leg pain and the subjective chronic low back pain."

Oxycontin & Percocet

39. Oxycontin, 20 milligrams, is a sustained release form of oxycodone. Dr. Ribnik is prescribing Claimant Oxycontin in a 20 mg dose one tablet, four times a day.

40. Dr. Ribnik indicated that this dosage is moderate, but Dr. Bisgard opined the dosage is excessive especially because Claimant takes the Oxycontin more frequently inasmuch as she is only taking Oxycontin between 5:00 a.m. and 10:00 p.m.

41. Dr. Bisgard went on to testify that Oxycontin should be prescribed once every 12 hours. Because Oxycontin is a medication that is timed released, the manufacturers have designed and packaged this medication so that there is a 12 hour benefit from it.

42. Dr. Ribnik testified that Percocet (5 mg of oxycodone and 325 mg of Tylenol) is a narcotic pain medication directly related to Claimant's pain and maintenance of function. She takes it every six hours.

43. Percocet is a short-acting narcotic pain medication. Dr. Bisgard noted that because Percocet is a short-acting medication, it is designed only for breakthrough pain to be taken on a PRN basis. According to Dr. Bisgard, there is no need to take a short acting medication (Percocet) while you are taking the long acting medication (Oxycontin).

44. Dr. Ribnik explained that he prescribes the Percocet in a way that is most effective for the patient. In this case, it works best for the Claimant to take it every six hours "when the Oxycontin wears thin." He also explained that Claimant is free not to take the Percocet if she feels she does not need it.

45. Dr. Ribnik acknowledged that the FDA has specifically identified how Oxycontin and Percocet should be taken and that he is not prescribing these medications the way the FDA has recommended. Dr. Ribnik also acknowledged that he has never read the specific FDA provisions for the proper use of Oxycontin and Percocet. Dr. Ribnik, however, opined that the FDA recommendations do not establish the standard of care for treatment by a physician.

46. Claimant testified that she tried tapering or weaning from the opioid medications in the past without much success. She recalled reducing her dosage by

one pill per day for approximately one month. She felt her pain increased from 7 out of 10 to 8-8.5 out of 10.

47. Claimant testified that her function was impacted by the reduction in opioids such that on some days she did not get dressed, she sat in her recliner up to 6 hours rather than 1 to 2 hours, she did not cook or clean her house.

48. The Claimant explained that she became more depressed and her sleep disturbances increased. Once she returned to her normal dosages, her pain levels stabilized and returned to her baseline 7 out of 10.

49. Dr. Ribnik agreed that he tried a reduction of Claimant's narcotic pain medications at the Insurer's request but that Claimant's pain levels increased accompanied by increased anxiety.

50. The Claimant's testimony concerning her pain levels in her back is credible. As found above, Dr. Bisgard acknowledged that Claimant experiences pain, but Dr. Bisgard believes that no objective medical evidence supports the Claimant's pain complaints. Dr. Bisgard has opined that Claimant's pain may be psychogenic. Dr. Bisgard is not a mental health professional and the Claimant has not been evaluated by one.

51. The ALJ is also not persuaded by Dr. Bisgard's opinions regarding the lack of an objective basis for Claimant's back pain. The ALJ credits Dr. Ribnik's opinions concerning the hardware and irritation the hardware can cause. Claimant has experienced ongoing back pain since her work injury and resulting surgery. She has received treatment for her back pain for over 20 years. Respondents' argument would essentially suggest "improvement" in Claimant's condition, which is not supported by the medical evidence.

52. Dr. Bisgard takes issue with the reasonableness of the Oxycontin and Percocet dosages and Dr. Ribnik's "off label" prescriptions of these two drugs. While the reasonableness of the dosages may be questionable and there is little doubt that Claimant's continued use of opioids presents other health risks, a medical utilization review would be the more appropriate avenue for modifying the treatment plan for the Claimant. The "off label" use in and of itself is not a basis to simply discontinue the prescriptions as unreasonable and unnecessary.

53. Based on the evidence, the ALJ finds that Oxycontin and Percocet are reasonable, necessary and related to the claim. The Claimant has proven that she continues to experience pain that is relieved with Oxycontin and Percocet.

Methocarbamol

54. Methocarbamol (also known as Robaxin) is a muscle relaxer used to treat muscle spasms. Dr. Ribnik has prescribed Methocarbamol on a scheduled basis (1-2 tablets 4 times per day) as opposed to a PRN basis.

55. Dr. Ribnik testified that Claimant suffers from "quite a bit" of muscle spasms. However, Dr. Bisgard noted that Dr. Ribnik's medical records rarely, if at all, document that Claimant is having ongoing muscle spasms in the three year period of time prior to Dr. Bisgard's evaluation.

56. When asked about lack of documentation of spasms in his reports, Dr. Ribnik admitted that he has not documented spasm consistently.

57. Both Dr. Ribnik and the Claimant believe the Methocarbamol is working to alleviate the spasms. Dr. Ribnik testified that Claimant's chronic low back pain triggers muscle spasm.

58. Dr. Bisgard opined that Methocarbamol is designed to treat muscle spasms when they are present, as opposed to acting as a prophylactic medication to prevent muscle spasms.

59. Dr. Bisgard does not disagree that Methocarbamol is reasonable, necessary or related to Claimant's injury. Rather, Dr. Bigard disagrees with the prophylactic use of Methocarbamol. Again, the dosage and prescription indications are subjects more appropriately addressed by a medical utilization review.

60. Based on the credible medical evidence, the Claimant has proven that Methocarbamol is reasonable, necessary and related to her work injury.

Cymbalta

61. Dr. Bisgard conceded that Cymbalta, 30 mg, twice per day, would be appropriate if Claimant were entitled maintenance medications. The ALJ finds that Claimant has proven she is entitled to continued prescriptions for Cymbalta based on the opinions of Dr. Bisgard and Dr. Ribnik. The ALJ makes no finding regarding the specific appropriate dosages.

Protonix

62. Protonix is a medication designed to relieve symptoms of GERD.

63. Dr. Ribnik opined that the Protonix is related to the Claimant's work injury due to the litigation.

64. According to Dr. Ribnik's medical records, Respondents began questioning Dr. Ribnik's ongoing medical care during the summer of 2014. Dr. Ribnik's records indicate that he has prescribed Protonix since as early as October 4, 2010.

Thus, Dr. Ribnik's opinion that Claimant needs Protonix due litigation stress lacks any foundation.

65. Dr. Ribnik later testified that almost all of Claimant's medications cause some form of gastric irritation. He could not specifically recall Claimant's history of gastric irritation and when he began prescribing Protonix.

66. The medical evidence fails to support that Claimant's work injury or the associated medications cause her to need Protonix. As such, Claimant has failed to prove that Protonix is related to her work injury.

Gabapentin

67. Gabapentin (Neurontin) is a nerve stabilizer designed to treat specific nerve pain.

68. On April 22, 2011 by Dr. Ribnik's physician's assistant started Claimant on Neurontin. The medical record fails to clearly document the basis for the prescription.

69. On June 1, 2011, the Claimant reported "some benefit" from the Nuerontin but her reported pain levels remained the same at 7 out of 10.

70. Dr. Ribnik believes that Claimant suffers from nerve irritation associated with the low back surgery. He characterized the dosages of 600 mg three times per day as mild.

71. Based on a review of Dr. Ribnik's medical records, Dr. Bisgard was unable to identify any reports of neuropathic pain that Claimant would benefit by the ongoing consumption of Gabapentin.

72. Dr. Ribnik's records fail to document any evidence of neuropathic pain generators. The Claimant may have right leg pain but there has been no objective evidence to support that such pain is neuropathic in nature.

73. The ALJ finds that none of the medical records clearly document an objective basis to support the need for Gabapentin. As found above, the initial prescription for Gabapentin lacked support. Claimant has failed to prove that the ongoing need for Gabapentin is reasonable, necessary or related to her work injury.

CONCLUSIONS OF LAW

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

General Legal Principals

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

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

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

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

Medical Benefits

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

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

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

The Claimant has proven entitlement to ongoing pain medications. Dr. Bisgard admitted that Claimant suffers from pain, but Dr. Bisgard contends there is no objective reason for it. As found above, the ALJ credits Dr. Ribnik's opinions concerning Claimant's pain generator. The Claimant has been complaining of back pain for over 20 years and has consistently received treatment for it, including pain medications. Claimant's ongoing back pain continues to be related to her work injury. To the extent the Respondents argue that the dosages prescribed by Dr. Ribnik are excessive, the Respondents should pursue the appropriate remedy which is a medical utilization review. Claimant has also proven that she is entitled to Cymbalta.

Claimant has failed to prove that the Protonix is related to her industrial injury. Respondents are no longer liable for the Protonix prescription. Claimant has failed to prove that Gabapentin is reasonable, necessary or related to her industrial injury. Dr. Ribnik shall wean the Claimant from Gabapentin within 90 days of the date of this order or Claimant assume responsibility for payment of the Gabapentin beginning on the 91st day from the date of this order.

The Respondents did not seriously dispute the prescription for Trazadone or Senakot/Senna. In addition, the Claimant and Dr. Ribnik credibly explained that Trazadone improves Claimant's ability to sleep and that her sleep disturbances are directly related to her work injury. Further, Dr. Bisgard diagnosed Claimant with narcotic related constipation which Senakot is designed to treat.

ORDER

It is therefore ordered that:

1. Claimant is entitled to **ongoing maintenance medical benefits**, **including but not limited to,** Oxycontin, Percocet, Methocarbamol and Cymbalta, **Trazadone and Senakot/Senna.**

2. Claimant is no longer entitled to Gabapentin or Protonix. Dr. Ribnik shall wean Claimant from Gabapentin within 90 days of the date of this order, or Claimant shall assume responsibility for payment of Gabapentin.

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

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

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

DATED: September 14, 2016

DIGITAL SIGNATURE:

L. Broniak

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-952-142-02

STIPULATION

1. The parties stipulated to the authorization of a right L4-S1 transforaminal epidural steroid injection as related and reasonably necessary to cure and relieve the effects of the Claimant's May 21, 2014 work injury.

ISSUE

1. Whether the Claimant proved, by a preponderance of the evidence, that medical treatment, consisting of S1 selective nerve root blocks, is related and reasonably necessary to cure and relieve the effects of his May 21, 2014 work injury.

FINDINGS OF FACT

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

1. The Claimant works as a taxi cab driver for Employer. On May 21, 2014, he was performing his usual job duties and suffered a low back injury while lifting a passenger's luggage to load it in the trunk of the vehicle (Respondents' Exhibit A).

2. Respondents admitted for medical benefits and temporary total disability in the General Admission of Liability filed on January 27, 2016 (Respondents' Exhibit B).

3. Dr. Sanjay Jatana is an authorized treating physician (ATP) of the Claimant. On November 4, 2015, the Claimant saw PA-C Brooke DiStefano in Dr. Jatana's office and she noted that the bilateral gluteal and leg pain was approximately 40% of the Claimant's complaint. She noted a positive straight leg raise on the right and a straight leg raise on the left that reproduces gluteal pain. FABER test was negative bilaterally. PA-C DiStefano noted that the Claimant did get initial relief with an L4-5 transforaminal epidural steroid injection, but insurance denied a second injection and now the Claimant reports his symptoms are much worse. PA-C DiStefano recommended a follow up MRI and noted that the Claimant would "follow up here after imaging for discussion with SJ regarding surgical options vs. injection options although he has failed injections long term in the past and really would like to consider surgery if it is an option" (Claimant's Exhibit 1, pp. 1-2).

4. On January 14, 2016, Dr. Jatana performed an L5-S1 microdiscectomy on the Claimant (Claimant's Exhibit 1, p. 4). At the 6-week post operative appointment with Dr. Jatana on February 24, 2016, the Claimant reported ongoing lower back pain and

bilateral lower extremity pain, right greater than left. The Claimant reported no improvement for the lower extremity symptoms from the surgery. Following the surgery, the Claimant had four sessions of physical therapy without much symptomatic improvement. Dr. Jatana further noted, “[d]iminished sensation noted in the right lower extremity in an L5 distribution.” Based on a positive straight leg raise test and the lack of improvement postoperatively for the lower extremities, Dr. Jatana recommended repeat MRI imaging “to rule out a recurrent disc herniation or any other changes as far as the central disc herniation at the L4-5 segment” (Claimant’s Exhibit 1, pp. 4-5).

5. On March 4, 2016, Claimant had an MRI of the low back which was compared to November 13, 2015 imaging. The radiologist, Dr. Solsberg, noted a right paracentral protrusion at L4-5 that has increased in size since the prior study. Lateral recess stenosis at that level had progressed and was now considered moderate. Dr. Solsberg also noted that at L5-S1, there was a small non-enhancing, less than 3mm protrusion and bilateral foraminal protrusions but no recurrent protrusion or stenosis (Claimant’s Exhibit 3, pp. 27-28).

6. The Claimant saw Dr. Jatana again on March 7, 2016. At this visit, Dr. Jatana noted, “[r]adicular complaints are primarily in an L5 distribution. Dr. Jatana noted that the Claimant’s March 4, 2016 MRI revealed “epidural scarring at the L5-S1 segment.” Dr. Jatana discussed injection options with the Claimant including right-sided L4-5 and L5-S1 injections and a selective nerve root block at the S1 nerve root. Dr. Jatana also discussed the option of surgical decompression at the L4-5 level if the selective nerve root block provided temporary relief (Claimant’s Exhibit 1, pgs. 6-7).

7. On March 15, 2016, Respondents denied Dr. Jatana’s request for both the requested right L4-S1 transforaminal epidural steroid injection and the S1 selective nerve root block based on a peer review report. The peer reviewer, Dr. Polanco stated the epidural injections do not offer a long term benefit and “[n]o clinical findings are noted, no conservative treatment is noted and there is no indication of functional limitations,” so the requested procedures were not found to be medically necessary (Respondents’ Exhibit C).

8. On March 28, 2016, Dr. Jatana again recommended going forward with the injections to gain diagnostic information. He commented that the peer reviewer’s opinion that there were no physical exam findings to suggest radiculopathy and no new disc protrusion correlating with radiculopathy was “[simply inaccurate based on the updated imaging study postoperatively which shows increased symptoms at the L4-5 segment and some lateral recess stenosis which would be consistent with his clinical picture of a right L3 radiculopathy which is the patient’s chief complaint...He has been completing physical therapy and treatment with anti-inflammatory medications as well as pain medications and no substantial relief has been noted” (Claimant’s Exhibit 1, pp. 8-9).

9. On April 1, 2016, Dr. Jatana’s renewed requests for a right L4-S1 transforaminal epidural steroid injection and the S1 selective nerve root block were

referred for review by Dr. Stephen Lindenbaum. Dr. Lindenbaum noted that he spoke with Dr. Jatana on April 1, 2016. They discussed Claimant's symptoms and Dr. Jatana's plan to use the steroid injections to see if they could reduce pain. He also noted that Dr. Jatana "understands that the S1 nerve block should not be done at the same time [as the steroid injection]." Dr. Lindenbaum recommended authorization of the right L4-S1 transforaminal epidural steroid injection opining that it was medically necessary based on comparison of the March 4, 2016 MRI to the Claimant's preoperative November 13, 2015 MRI. Dr. Lindenbaum did not find the S1 selective nerve root block to be medically necessary as he found the problem predominantly existed at the L4-5 level. Therefore, on April 5, 2016, the Respondents approved the right L4-S1 transforaminal epidural steroid injection and denied the S1 selective nerve root block (Claimant's Exhibit 5, pp. 34-37).

10. On April 7, 2016, the Claimant had an epidural steroid injection (ESI) at L4, L5 and S1 disc levels performed by Dr. Usama Ghazi. Dr. Ghazi noted that the Claimant was unable to tell the difference between the L4 and L5 injections, "reporting that he felt pressure on the back and lateral aspect of the calf and shin…." After the procedure, the Claimant was reevaluated. Prior to the procedure, the Claimant had reported a 7/10 pain level at rest which increased to 10/10 during straight leg raises and afterwards he reported a 0/10 pain level at rest which increased to 4/10 with straight leg raise maneuvers (Claimant's Exhibit 6, pp. 42-43).

11. On April 18, the 2016, Claimant was evaluated by Dr. Jatana who noted that the Claimant still had have some residual L5 radicular complaints in the right lower extremity, but overall noted symptoms were improving. Dr. Jatana also noted that he discussed ongoing treatment with the Claimant, including additional injections vs. surgery if symptoms are unimproved over the long term (Claimant's Exhibit 1, pp. 10-11).

12. The Claimant saw Dr. Jatana again on June 29, 2016 for follow up. Dr. Jatana noted that the Claimant appeared to be the same overall, but no any worse. The Claimant still had radicular symptoms in the bilateral lower extremities with pain scale ranging from 4-7/10. Straight leg raises caused some low back pain and some paresthesias down the right posterior thigh and calf. Dr. Jatana opined that since the Claimant had continued relief from injections, that nonsurgical treatment be considered at this time and Dr. Jatana recommended repeat injections (Claimant's Exhibit 1, pp. 12-13).

13. On July 14, 2016, Dr. Moshe Lewis performed a peer review for the request for a repeat right L4-S1 ESI. Dr. Lewis noted that he spoke with Dr. Jatana regarding the Claimant's post lumbar surgery status and the recent MRI imaging showing an increase in disc size at L4-5 which appeared to be causing the Claimant's radicular pain. Dr. Lewis opined that the Claimant had signs and symptoms consistent with radiculopathy and he recommended approval of the repeat ESI for pain therapeutic purposes to avoid surgery (Claimant's Exhibit 8, pp. 52-56). However, on July 20, 2016, Dr. Frank Polanco performed a peer review for the request for a repeat right L4-S1 ESI.

Dr. Polanco noted that he also spoke with Dr. Jatana on July 20, 2016 to discuss the case. Dr. Polanco came to a different conclusion than Dr. Moshe, stating that the request for a repeat L4-S1 TFESI was not medically necessary as it was not supported by objective documentation of significant sustained relief with functional improvement (Claimant's Exhibit 9).

14. Although the recommended repeat L4-S1 ESI was originally denied, it has since been authorized and, at the hearing, the Respondents stipulated that it is authorized.

15. The Respondents denied the S1 selective nerve root block again on July 25, 2016 as not medically necessary. The denial was based on the peer review report of Dr. Moshe Lewis, who observed that Claimant had been approved for the steroid injection and that "more details about the benefit or lack thereof" were necessary before determining whether the S1 selective nerve root block was clinically indicated (Claimant's Exhibit 10).

16. The Claimant testified that he continues to have radiating pain with associated numbness down the backside of his right leg and into his right foot. He further testified that he has not been placed at maximum medical improvement (MMI) and would like to undergo the recommended selected nerve root block to help with his radicular symptoms.

CONCLUSIONS OF LAW

Generally

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

Reasonable, Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

This is an admitted claim with respect to the Claimant's low back. The Claimant's treating physicians continue to offer treatment and recommendations related to the Claimant's low back and lower extremity radicular symptoms. Respondents now challenge the reasonableness and necessity of one of the recommended procedures, a selective nerve root block at the S1 level recommended by the Claimant's ATP, Dr. Jatana.

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury in a compensable case, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. See *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra; Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. § 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

There was no persuasive evidence presented that the Claimant's radicular symptoms are related to a pre-existing condition. Rather, the Respondents argue, in part, that the selective nerve root block was denied because an epidural steroid injection was already approved and should not be done at the same time as the selective nerve root block. As the ESI was previously approved and was scheduled to be completed by this time, this argument is moot. Respondents also argue that the selective nerve root block is not clinically indicated based upon peer review reports of physicians who have not treated or examined the Claimant.

The Medical Treatment Guidelines for Low Back pain discuss indications for spinal injections:

> All spinal injections should be preceded by either an MRI or a CT scan. Selection of patients, choice of procedure, and localization of the level for injection should be determined by clinical information indicating strong suspicion for pathologic condition(s) from reproducible exam findings. Diagnostic blocks may be helpful when MRI or other diagnostic tests are not definitive. The number of diagnostic procedures should be limited in any individual patient to those most likely to be primary pain generators. Patients should not receive all of the available or related diagnostic blocks listed merely in an attempt to identify 100% of the pain generators. Blocks are only appropriate if the patient is eligible for increased therapy, such as rhizotomy or active therapy, based on the results of the block. Informed decision making should also be documented for injections and all invasive procedures. This must include a thorough discussion of the pros and cons of the procedure and the possible complications as well as the natural history of the identified diagnosis. The purpose of spinal injections, as well as surgery, is to facilitate active therapy by providing short-term relief through reduction of pain.
>
> (Rule 17, Exhibit 1, p. 21; Exhibit 1 E.2.b.ii)

Here, the Claimant's ATP, Dr. Jatana has noted over time in the medical records that the selective nerve root block is clinically indicated and may provide further insight into the Claimant's pain generator(s) and may provide short-term pain relief that would allow the Claimant to participate more effectively in therapy and other conservative treatment. Dr. Jatana has also noted that this procedure has been considered as a way of avoiding or delaying surgery which is also discussed as a rationale for spinal injections in the Medical Treatment Guidelines.

On January 14, 2016, Dr. Sanjay Jatana performed an L5-S1 microdiscectomy on the Claimant. On February 24, 2016, Dr. Jatana noted the Claimant continued to experience ongoing lower back pain as well as pain bilaterally in the lower extremities right greater than left with no subjective improvement from the lower extremity symptoms. At that time, it was noted that the Claimant had "completed four sessions of physical therapy without much symptomatic improvement." The Claimant continued to undergo physical therapy. On March 7, 2016,Dr. Jatana noted that the Claimant's radicular complaints are primarily in an L5 distribution. Dr. Jatana interpreted the Claimant's March 4, 2016 MRI to reveal epidural scarring at the L5-S1 segment" and ultimately recommend a selective nerve root block at the S1 nerve root. On March 15, 2016, Respondents' denied Dr. Jatana's request for the S1 SNRB in part because the peer reviewer found that no clinical findings were noted, no conservative treatment was noted and there was no indication of functional limitations. On March 28, 2016, Dr. Jatana addressed the reasoning used to support the denial in part, stating, it was "simply inaccurate based on the updated imaging study postoperatively which shows increased symptoms at the L4-5 segment and some lateral recess stenosis which would be consistent with his clinical picture of a right L3 radiculopathy which is the patient's chief complaint...He has been completing physical therapy and treatment with anti-inflammatory medications as well as pain medications and no substantial relief has been noted." On April 7, 2016, the Claimant underwent the recommended injections. On April 18, 2016, the Claimant was evaluated by Dr. Jatana who noted, the Claimant still had some residual L5 radicular complaints in the right lower extremity, but all in all symptoms were improving.

Since his January 14, 2016 surgery, the Claimant has undergone conservative care (physical therapy and medication/pain management), has had an MRI showing an increasing disc bulge and has had a repeat ESI which provided only limited relief to his symptoms. The radicular symptoms are the Claimant's biggest concern at this point. The Claimant has not been released from care and has not reached maximum medical improvement. As such, the Claimant has proven by a preponderance of the evidence that the recommended S1 Select Nerve Root Block is reasonable, necessary and related medical treatment.

ORDER

Based on the above factual findings and legal conclusions, it is therefore ORDERED that:

1. The Claimant has proven by a preponderance of the evidence that the S1 selective nerve root block recommended by Dr. Jatana is reasonable and necessary to cure and relieve the Claimant from the effects of his May 21, 2014 work injury.

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

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

DATED: September 14, 2016

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

ISSUE

The issue presented for determination is whether a right knee scope with partial medial and lateral menisectomies is reasonably necessary and related to the work injury.

FINDINGS OF FACT

1. On June 22, 2015, Claimant was rear-ended in a vehicle collision. Claimant was driving south on York street and while completing a right turn, was struck by another vehicle traveling westbound on 13th Street. Claimant testified that his elbow and shoulder hit the door of his vehicle and his knees drew up and hit the dashboard. He immediately noted pain in his left knee and shoulder and felt dizzy and lightheaded. Claimant was taken to the Denver Health emergency department (ED).

2. At the ED images were taken of Claimant's left shoulder and left knee. Both were negative for acute fracture or dislocation. The ED prescribed Percocet for the pain. Claimant was discharged and returned to work. He did not perform any significant work and completed his shift.

3. Later that night, Claimant testified that he experienced progressive symptoms in his back, bilateral neck pain, and mild tingling in his right upper extremity. In addition, Claimant reported that his right knee first became swollen and was locking when he got out of bed to go to the bathroom.

4. Claimant has a history of right knee symptoms predating 2015. Significantly, Claimant had right knee surgery in July 2012. Prior to that surgery, Claimant complained of nightly right knee pain and received narcotics to treat the pain.

5. At hearing, Dr. Messenbaugh, who was recognized as an expert in orthopedic surgery, credibly testified that 15 percent of Claimant's medial meniscus and 40 percent of his lateral meniscus had been removed in the prior surgery. He stated that once the delicate balance of the knee is interrupted by removing portions of the meniscus, the mechanics, protection, and stability of the knee is altered. This leads to aggressive impaction imperfections and to progressive wear and tear of the remainder of the knee, including further tearing of the menisci.

6. At hearing, Claimant testified that he performed some mulching at work a week prior to the accident. He had to get up on the pickup truck with a shovel and wheelbarrow to fill the wheelbarrow up with mulch. He described the motions

involved in this activity as “twisting, turning, lifting the wheelbarrow up…I’d get it back to the back of the truck and lower it. So I would need to use my knees and my arms to lift it and then move it to the spot we were going to lay mulch.” (HT 15: 16-21). Claimant claimed that he experienced no pain with these actions.

7. The day following the accident, June 23, 2015, Claimant went into the Center for Occupational Safety and Health (COSH) and saw Dr. David Blair. Dr. Blair concluded that Claimant suffered from multiple musculoskeletal injuries from the June 22, 2015, event and estimated Claimant’s maximum medical improvement (MMI) date to be in approximately one month.

8. Claimant underwent an MRI of his neck and right knee on July 2, 2015, at Diamond Hill Health Images Center. The MRI of the knee revealed a multiplanar tear of the anterior horn body and posterior horn of the medial meniscus and lateral meniscus, thickening and increased signal in the anterior cruciate ligament, prepatellar bursitis, Grade III chondromalacia of the patellar apex, and Grade IV chondromalacia lateral tibial plateau. The neck MRI showed moderate C5-6 central stenosis with moderate to severe bilateral foraminal stenosis, moderate C6-7 central stenosis with severe bilateral foraminal stenosis, and moderate to severe left and moderate right C7-T1 foraminal stenosis. Conservative treatment was initially recommended for both the knee and neck.

9. Claimant’s neck began to improve, but his right knee continued to bother him. Therefore, Dr. Motz recommended arthroscopic surgery in August 2015. Respondent denied the surgical request for the right knee surgery after Dr. Messenbaugh completed a W.C.R.P., Rule 16, report stating that the knee surgery was not related to the motor vehicle accident.

10. Respondent retained Dr. Jeffrey Broker, Ph.D., to review the biomechanics of the car accident and the mechanisms of injury. Dr. Broker was qualified as an expert in biomechanics. Dr. Broker concluded that while Claimant reported the impact speed of 20 to 30 mph, such an impact does not appear consistent with the damage profile, such descriptions of impact speed are almost always unreliable, and it is quite possible that Claimant did not know the collision was coming. In addition, the damage to the rear aspect of Claimant’s truck characterizes the collision as a low-speed, rear-end collision event. Dr. Broker assumed a conservative upper limit of impact-phase change in speed of 10mph, with an associated impact phase peak acceleration of 10 Gs. Dr. Broker found that Claimant’s whiplash associated injuries were biomechanically consistent with cervical spine motions, forces and torques which could have developed from a rear-end impact.

11. Dr. Broker credibly opined that Claimant’s report of striking his knees on the dashboard or steering column in the accident, however, are not biomechanically consistent with rear-end collisions. Occupant motions are dominantly rearward relative to the vehicle, away from the steering column. Only on the rebound could

mild contact occur, but the contact is unlikely, due to pelvis restraint, limited rebound at the low seatback, and even bracing of the legs.

12. Further, Drs. Broker and Messenbaugh credibly opined that impacts to the front of knees are not recognized mechanisms of tearing the meniscus or the ACL. The loading conditions associated with these injuries are absent in rear-end collisions, and not associated with simple knee impacts. In addition, given Claimant's prior right knee symptoms and surgery, no traumatic event is needed, from a biomechanical perspective, to explain Claimant's right knee condition before or after the collision.

13. Dr. Broker credibly opined that even if Claimant had been sitting forward on his seat and to the left, as Claimant testified, that would not affect the function of the seatbelt preventing the passenger driver from moving forward.

14. In addition, Dr. Broker credibly opined at hearing that the seatbelt would prevent the loading event that causes meniscus tears. In order to achieve sufficient loading to catch the meniscus, there needs to be more than body weight compressing the knee. In this case, when Claimant was sitting in the vehicle, his body weight was dispersed between his foot, leg, lap belt, shoulder harness and friction with the seat and no loading event occurred. Dr. Broker also credibly testified that even if the motor vehicle accident occurred at a higher speed than he estimated, that would not change his conclusions.

15. In his W.C.R.P., Rule 16, report, Dr. Messenbaugh agreed with Dr. Broker's assessment. The doctor opined that one does not tear a medial meniscus, much less both a medial and lateral meniscus, by sustaining a direct blow to one's knee. Dr. Messenbaugh further opined that Claimant merely experienced the expected continued, progressive wear and tear osteoarthritis of his right knee including degenerative wearing and tearing of both his medial and lateral menisci and not an acute injury. Finally, Dr. Messenbaugh credibly opined that based on the chronic pathology on Claimant's right knee MRI, he may benefit from the right knee arthroscopy. However, Claimant's need for surgery is not related to the motor vehicle accident.

16. Dr. Messenbaugh testified that the MRI of Claimant's right knee suggested that the changes in his knee were degenerative in nature and not acute. The doctor also credibly opined that acute meniscal tears are painful and that pain would register instantly, not hours after the event.

17. Both Drs. Messenbaugh and Broker agreed that Claimant's mulching activities in the days prior to the motor vehicle accident involved the type of twisting activities that could have caused the meniscus tear.

18. Respondent contests the reasonableness, necessity, and relatedness of a right knee arthroscopy to the motor vehicle accident. It is found that that Claimant

right knee condition and proposed treatment is not related to the work injury of June 22, 2015.

CONCLUSIONS OF LAW

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

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

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986). If there is a compensable injury, the employer and its insurance carrier must provide all medical benefits, which are reasonably necessary to cure and relieve the work-related injury. Section 8-42-101 C.R.S.; *Owens v. Indus. Claim Appeals Office of State of Colo.,* 49 P.3d 1187, 1188 (Colo. Ct. App. 2002). The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-42-101, C.R.S.; See *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Where liability for a particular medical benefit is contested, the claimant must prove that it is reasonably necessary to treat and is causally related to the industrial injury. *Id*.; See *Grover v. Industrial*

Commission, 759 P2d 705 (Colo. 1988). The record must distinctly reflect that the medical treatment was necessary and designed to cure or relieve the effects of the work injury. *Pub. Serv. Co. of Colorado v. Indus. Claim Appeals Office of State of Colo.,* 979 P.2d 584, 585 (Colo. Ct. App. 1999).

4. Dr. Broker, a biomechanical expert, credibly testified, and it is concluded, that it is not biomechanically consistent with a rear-end collision for someone to strike their knees on the dash or steering column. Additionally, Dr. Broker credibly testified, and it is concluded, that the claimed mechanism of injury, a blow to the front of the knee, does not cause a meniscus tear. There needs to be weight bearing and then either twisting or flexion or extension for a meniscus tear to occur.

5. Dr. Messenbaugh, an orthopedic surgeon, credibly testified, and it is concluded, that Claimant's right knee condition is not related to the motor vehicle accident. Dr. Messenbaugh agreed with Dr. Broker that a meniscus does not tear by sustaining a direct blow to the knee. Instead, there needs to be some sort of weight bearing twisting motion. Claimant's meniscus tear is more likely related to his history of degenerative osteoarthritis and previous right knee surgery and not due to an acute injury.

6. Claimant's preexisting history of right knee issues caused Drs. Broker and Messenbaugh to opine that no traumatic event is needed to explain the current condition of Claimant's knee.

7. Accordingly, it is concluded that a right knee surgery is not related or reasonably needed to cure and relieve Claimant of the effects of the compensable motor vehicle accident.

ORDER

It is therefore ordered that:

Claimant claim for medical benefits, i.e., a right knee scope with partial medial and lateral menisectomies, is not reasonably necessary or related to the work injury.

All matters not determined herein are reserved for future determination.

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

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

DATED: September 15, 2016

DIGITAL SIGNATURE:
Margot W. Jones

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that her scheduled 23% left upper extremity impairment rating should be converted to a 14% whole person rating.

2. Whether Claimant has established by a preponderance of the evidence that she should be permitted to reopen her January 30, 2015 Workers' Compensation claim based on a worsening of condition pursuant to §8-43-303(1), C.R.S.

FINDINGS OF FACT

1. Claimant worked for Employer as a Back Door Receiver. On January 30, 2015 Claimant was moving a pallet jack cart backwards and tripped over the corner of another cart. She fell to the ground and landed on her left shoulder. Claimant immediately experienced left shoulder pain and sought medical treatment.

2. On February 3, 2015 Claimant visited Bryan Bomberg, M.D. for an examination. He noted that Claimant exhibited tenderness over the lateral subacromial space and limited left shoulder range of motion. Dr. Bomberg recommended physical therapy treatment and a left shoulder MRI.

3. On February 6, 2015 Claimant underwent a left shoulder MRI. The MRI revealed a "large full-thickness tear of the distal fibers of the supraspinatus and infraspinatus tendons."

4. After receiving conservative treatment Claimant underwent left shoulder surgery with Dr. Bomberg on April 14, 2015. The surgery included an arthroscopic rotator cuff repair, a modified Mumford procedure and a subacromial decompression.

5. On December 8, 2015 Claimant returned to Dr. Bomberg for an evaluation. Dr. Bomberg determined that Claimant had reached Maximum Medical Improvement (MMI). He noted that Claimant had a "lack of active [left shoulder] elevation" and significant weakness. Dr. Bomberg remarked that, if Claimant's left shoulder became more painful, she might require a reverse shoulder replacement. He referred Claimant for an impairment rating.

6. On January 21, 2016 Claimant underwent an impairment evaluation with John Tobey, M.D. Dr. Tobey agreed with Dr. Bomberg that Claimant had reached MMI on December 8, 2015. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Toby assigned Claimant a 23% left upper extremity impairment rating that converted to a 14% whole person impairment. The rating consisted of 10% for a distal clavicle excision and 14% for

range of motion deficits. Dr. Tobey remarked that Claimant exhibited "significant limitation with range of motion particularly in flexion and abduction at 90 degrees." Moreover, he recounted that Dr. Bomberg had noted that he "did not expect to see much more functional improvement return secondary to the atrophy of the supraspinatus." Dr. Tobey commented that Claimant was entitled to receive medical maintenance benefits in the form of intermittent Ibuprofen usage and an ongoing home exercise program. He also agreed with Dr. Bomberg that Claimant would be a candidate for a reverse total shoulder replacement in the future if her pain became severe.

7. On March 31, 2016 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Tobey's MMI and impairment determinations. Respondent also recognized that Claimant was entitled to receive post-MMI medical treatment that was reasonable, necessary and related to her January 30, 2015 admitted left shoulder injury.

8. On March 9, 2016 Respondent's attorney authored a letter to Dr. Tobey inquiring whether Claimant had "functional impairment above the glenohumeral joint" of her left upper extremity. Dr. Tobey simply responded "no."

9. Claimant filed a timely objection to the FAL. On April 25, 2016 Claimant filed an Application for Hearing and a Petition to Reopen.

10. On April 19, 2016 Claimant underwent an independent medical examination with John S. Hughes, M.D. Dr. Hughes reviewed Claimant's medical records and performed a physical examination. He noted that Claimant exhibited range of motion deficits in her left upper extremity. Dr. Hughes specifically commented that there was "constant crepitation elicited during passively assisted motion of the left shoulder particularly in the plane of flexion/extension." He thus remarked that Claimant suffered the "progressive development of left shoulder crepitation and range of motion deficits consistent with adhesive capsulitis." Dr. Hughes summarized that "range of motion criteria alone [were] consistent with a worsening" of Claimant's January 30, 2015 admitted left shoulder injury. He concluded that Claimant had not reached MMI.

11. Relying on the *AMA Guides* Dr. Hughes assigned Claimant a 21% left upper extremity impairment rating based on range of motion deficits. He noted constant crepitation at a 20% severity grade based on §3.1j of the *AMA Guides*. Multiplying the 20% severity grade by 60% as outlined in Table 17 yielded a 12% left upper extremity impairment. Combining the range of motion deficits and the Table 17 rating yielded a 30% left upper extremity or 18% whole person impairment rating. Dr. Hughes summarized that Claimant suffered a left upper extremity functional loss that extended beyond the "glenohumeral joint into the region of the cervical spine." The functional impairment loss was not documented by Dr. Tobey in his January 21, 2016 examination of Claimant. The change was thus consistent with a worsening of Claimant's work-related left shoulder condition.

12. On May 4, 2016 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Dr. Fall considered Claimant's medical records, conducted a

physical examination and reviewed Dr. Hughes' April 19, 2016 independent medical examination report. She diagnosed Claimant with a left shoulder subscapularis tear as a result of her January 30, 2015 industrial injury. Dr. Fall commented that, although MRI findings revealed tears of the supraspinatus, infraspinatus and subscapularis, only the subscapularis did not reveal associated atrophy that suggested a long-standing process. Dr. Fall also commented that Claimant did not exhibit any functional impairment into the neck. Specifically, Claimant had not reported any functional deficits proximal to the glenohumeral joint. Although Claimant had noted range of motion limitations of the left shoulder in various arm positions, she had not described any functional limitations related to the cervical or thoracic spines. Dr. Fall also noted that Claimant did not exhibit any left shoulder crepitus. She assigned Claimant a 14% left upper extremity impairment rating.

13. On July 5, 2015 Claimant visited Dr. Bomberg for an examination. He noted that Claimant had continued to experience "increasing discomfort in her trapezial musculature and cervical spine aspect on the left side." Dr. Bomberg remarked that Claimant could not elevate her left arm "above the horizon" and had significant rotator cuff weakness. She had increasing left shoulder pain because of the "degree of heavy lifting and work she does and the compensation of her trapezial and cervical musculature." Dr. Bomberg summarized that Claimant's shoulder had not improved and her potential outcome would be a reverse shoulder arthroplasty.

14. On August 15, 2016 the parties conducted she pre-hearing evidentiary deposition of Allison M. Fall, M.D. Dr. Fall agreed with Drs. Bomberg and Tobey that Claimant had reached MMI on December 8, 2015. She explained that the purpose of the shoulder joint was to move the arm in different planes. Dr. Fall noted that Claimant had complained of some cervical and trapezius area pain. However, she concluded that, even if Claimant has some tightness from tension and guarding in the musculature of the cervical and trapezius areas, the tightness did not constitute functional impairment warranting a whole person rating. Dr. Fall also reiterated that Claimant did not exhibit left shoulder crepitus during her independent medical examination. She maintained that Claimant has not suffered a worsening of condition since she reached MMI and was not a candidate for left shoulder replacement surgery.

15. Dr. Hughes testified at the hearing in this matter. He explained that Claimant had suffered a full thickness left rotator cuff tear. Dr. Hughes maintained that Claimant experienced left upper extremity pain in muscles proximal to or beyond the glenohumeral joint. He specified that Claimant has left shoulder crepitus that causes functional impairment into her neck area. Nevertheless, he acknowledged that there was no documented crepitus in Dr. Bomberg's December 8, 2015 evaluation, Dr. Tobey's January 21, 2016 examination or Dr. Fall's May 4, 2016 independent medical examination. Finally, Dr. Hughes commented that Claimant had suffered a worsening of condition since reaching MMI because she exhibited additional range of motion limitations, developed crepitus and likely suffered from adhesive capsulitus.

16. Claimant testified at the hearing in this matter. She detailed her left shoulder range of motion limitations. Claimant stated that she is only able to lift her left

arm in front of her to about chest height before she is stopped because of pain from her shoulder into her neck. She remarked that she is also only able to reach out to her side to about chest height because of pain in her shoulder that extends into her neck. Claimant is also only able to reach back a few inches because of the pain in her shoulder that extends into her neck. Finally, Claimant summarized that her condition has worsened since April 2016 because she is suffering increased pain in her left shoulder and neck.

17. Claimant has demonstrated that it is more probably true than not that her scheduled 23% left upper extremity impairment rating should be converted to a 14% whole person rating. Claimant suffers functional impairment proximal to, or above, the left arm at the shoulder as a result of her January 30, 2015 industrial injury. She credibly testified that she has range of motion limitations because of left shoulder pain that extends into her neck area. Moreover, Dr. Hughes persuasively explained that Claimant had suffered a full thickness left rotator cuff tear. He maintained that Claimant had left upper extremity pain in muscles proximal to or beyond the glenohumeral joint. Dr. Hughes summarized that Claimant suffered a left upper extremity functional loss that extended beyond the "glenohumeral joint into the region of the cervical spine."

18. In contrast, Dr. Tobey responded "no" to an inquiry from Respondent's attorney about whether Claimant had "functional impairment above the glenohumeral joint" of her left upper extremity. Furthermore, although Dr. Fall explained that Claimant had noted range of motion limitations of the left shoulder, she had not described any functional limitations related to the cervical or thoracic spines. Dr. Fall concluded that, even if Claimant has some tightness from tension and guarding in the musculature of the cervical and trapezius areas, the tightness did not constitute a functional impairment warranting a whole person rating. However, despite the response of Dr. Tobey and the reasoning of Dr. Fall, the record reveals that Claimant has consistently experienced functional limitations to her left upper extremity that have extended beyond her glenohumeral joint. Claimant's left shoulder pain extends into her neck and shoulder areas and limits her movements. Accordingly, Claimant is entitled to a 14% whole person impairment rating for her January 30, 2015 industrial injury.

19. Claimant has failed to establish that it is more probably true than not that she should be permitted to reopen her January 30, 2015 Workers' Compensation claim based on a worsening of condition. On December 8, 2015 Dr. Bomberg determined that Claimant had reached MMI. He noted that Claimant had a "lack of [left shoulder] elevation" and significant weakness. On January 21, 2016 Dr. Tobey agreed with Dr. Bomberg that Claimant had reached MMI on December 8, 2015. He assigned a 23% left upper extremity impairment rating that converted to a 14% whole person impairment. He remarked that Claimant exhibited "significant limitation with range of motion particularly in flexion and abduction at 90 degrees." Moreover, Dr. Tobey recounted that Dr. Bomberg had stated he "did not expect to see much more functional improvement return secondary to the atrophy of the supraspinatus." The record thus reveals that Claimant had significant left shoulder limitations at the time she reached MMI and there was little expectation that her function would improve. Finally, Dr. Fall

persuasively summarized that Claimant has not suffered a worsening of condition since reaching MMI.

20. In contrast, Dr. Hughes maintained that Claimant had suffered a worsening of condition since reaching MMI because she exhibited additional range of motion limitations, developed crepitus and likely suffers from adhesive capsulitus. Nevertheless, he acknowledged that there was no documented crepitus in Dr. Bomberg's December 8, 2015 evaluation, Dr. Tobey's January 21, 2016 examination or Dr. Fall's May 4, 2016 independent medical examination. Furthermore, Claimant testified that her condition has worsened since April 2016 because she is suffering increased pain in her left shoulder and neck. However, the persuasive medical records and testimony reflect that Claimant had been suffering from significant left shoulder range of motion limitations when she reached MMI and there was little chance of improvement. Claimant's continued left shoulder range of motion deficits do not demonstrate that she has suffered a change in the condition of her original compensable injury or a change in her physical or mental condition that is causally connected to the original injury. Accordingly, Claimant's request to reopen her January 30, 2015 Workers' Compensation claim based on a worsening of condition pursuant to §8-43-303(1), C.R.S. is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

Whole Person Conversion

4. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." *See* §8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Maree v. Jefferson County Sheriff's Department*, W.C. No. 4-260-536 (ICAP, Aug. 6, 1998); *Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAP, June 11, 1998).

5. When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

6. Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

7. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAP Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *Id.* Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *Eidy v. Pioneer Freightways*, W.C. No. 4-291-940 (ICAP, Aug. 4, 1998).

8. As found, Claimant has demonstrated by a preponderance of the evidence that her scheduled 23% left upper extremity impairment rating should be converted to a 14% whole person rating. Claimant suffers functional impairment proximal to, or above, the left arm at the shoulder as a result of her January 30, 2015 industrial injury. She credibly testified that she has range of motion limitations because of left shoulder pain that extends into her neck area. Moreover, Dr. Hughes persuasively explained that Claimant had suffered a full thickness left rotator cuff tear. He maintained that Claimant had left upper extremity pain in muscles proximal to or beyond the glenohumeral joint. Dr. Hughes summarized that Claimant suffered a left upper extremity functional loss that extended beyond the "glenohumeral joint into the region of the cervical spine."

9. As found, in contrast, Dr. Tobey responded "no" to an inquiry from Respondent's attorney about whether Claimant had "functional impairment above the glenohumeral joint" of her left upper extremity. Furthermore, although Dr. Fall explained that Claimant had noted range of motion limitations of the left shoulder, she had not described any functional limitations related to the cervical or thoracic spines. Dr. Fall concluded that, even if Claimant has some tightness from tension and guarding in the

musculature of the cervical and trapezius areas, the tightness did not constitute a functional impairment warranting a whole person rating. However, despite the response of Dr. Tobey and the reasoning of Dr. Fall, the record reveals that Claimant has consistently experienced functional limitations to her left upper extremity that have extended beyond her glenohumeral joint. Claimant's left shoulder pain extends into her neck and shoulder areas and limits her movements. Accordingly, Claimant is entitled to a 14% whole person impairment rating for her January 30, 2015 industrial injury.

Worsening of Condition

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

11. As found, Claimant has failed to establish by a preponderance of the evidence that she should be permitted to reopen her January 30, 2015 Workers' Compensation claim based on a worsening of condition. On December 8, 2015 Dr. Bomberg determined that Claimant had reached MMI. He noted that Claimant had a "lack of [left shoulder] elevation" and significant weakness. On January 21, 2016 Dr. Tobey agreed with Dr. Bomberg that Claimant had reached MMI on December 8, 2015. He assigned a 23% left upper extremity impairment rating that converted to a 14% whole person impairment. He remarked that Claimant exhibited "significant limitation with range of motion particularly in flexion and abduction at 90 degrees." Moreover, Dr. Tobey recounted that Dr. Bomberg had stated he "did not expect to see much more functional improvement return secondary to the atrophy of the supraspinatus." The record thus reveals that Claimant had significant left shoulder limitations at the time she reached MMI and there was little expectation that her function would improve. Finally, Dr. Fall persuasively summarized that Claimant has not suffered a worsening of condition since reaching MMI.

12. As found, in contrast, Dr. Hughes maintained that Claimant had suffered a worsening of condition since reaching MMI because she exhibited additional range of motion limitations, developed crepitus and likely suffers from adhesive capsulitus. Nevertheless, he acknowledged that there was no documented crepitus in Dr. Bomberg's December 8, 2015 evaluation, Dr. Tobey's January 21, 2016 examination or Dr. Fall's May 4, 2016 independent medical examination. Furthermore, Claimant testified that her condition has worsened since April 2016 because she is suffering increased pain in her left shoulder and neck. However, the persuasive medical records

and testimony reflect that Claimant had been suffering from significant left shoulder range of motion limitations when she reached MMI and there was little chance of improvement. Claimant's continued left shoulder range of motion deficits do not demonstrate that she has suffered a change in the condition of her original compensable injury or a change in her physical or mental condition that is causally connected to the original injury. Accordingly, Claimant's request to reopen her January 30, 2015 Workers' Compensation claim based on a worsening of condition pursuant to §8-43-303(1), C.R.S. is denied and dismissed.

ORDER

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

1. Claimant suffered a 14% whole person impairment as a result of her January 30, 2015 industrial injury.

2. Claimant's request to reopen her January 30, 2015 Workers' Compensation claim is denied and dismissed.

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

DATED: September 14, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-995-144-01

PRELIMINARY MATTER

An Order was originally entered on September 7, 2016. The Order contained an incorrect calculation. The parties jointly requested a Corrected Order that would provide an accurate calculation of AWW based on the method the ALJ determined the AWW should be calculated. This Corrected Findings of Fact, Conclusions of Law and Order is issued to correct the mistaken calculation.

ISSUES

1. Calculation of the Claimant's Average Weekly Wage (AWW).

2. Whether the Claimant proved that she is entitled to temporary partial disability benefits from September 2, 2015 to May 19, 2016.

FINDINGS OF FACT

1. The Claimant was an automobile sales person for Employer. She sustained an admitted workplace injury to her low back and cervical spine on September 1, 2015.

2. Prior to the Claimant's current admitted workplace injury, the Claimant had been receiving treatment for a chronic low back condition due to a 2009 work-related injury. Her chiropractor, Dr. Karen Cain, DC, stated on February 11, 2015 that the Claimant had a prior chronic pain condition that required on-going management. At that time, she recommended continuing chiropractic care, massage therapy and physical therapy (Respondents' Exhibit G, pp. 62-63).

3. The Claimant was also evaluated by Don Fresques, NP at Dr. George Schakaraschwili's office on September 10, 2014, after her prior workers' compensation physician Dr. Rick Artist retired. The Claimant's diagnoses at that time included subjective coccydynia, myofascial pain syndrome, and chronic pain and opioid dependence. NP Fresques noted that the Claimant had no true pain generator at that time, and he expressed concern over her high doses of opioid medications. He recommended continued chiropractic and weaning off the Percocet, OxyContin and all opioid medications. The Claimant agreed to be weaned off of all opioid medications and to continue care with Dr. Schakaraschwili's office (Respondents' Exhibit F, pp. 46-47).

4. On cross-examination, the Claimant testified that she completed the pain scale in Dr. Cain's records. She also marked the body parts that were hurt on the pain diagram and indicated what symptoms she was feeling. In the year of chiropractic treatments with Dr. Cain preceding the September 1, 2015 injury, the Claimant always

marked on the pain scale that her pain was somewhere between moderate and severe. The records also show that in the year preceding her September 1, 2015, the Claimant circled her neck and low back as body parts that were in pain (Respondents' Exhibit G, pp. 51-76). In the year prior to September 1, 2015, the Claimant consistently complained of symptoms in her neck including aching, stiffness, tightness, pain and spasms (Respondents' Exhibit G, pp. 66, 69, and 72). In the year prior to September 1, 2015, Claimant consistently complained of symptoms in her low-back including pain, pressure, stabbing, aching, stiffness, spasm, discomfort and pressure (Respondents' Exhibit G, pp. 72 and 74). On redirect, the Claimant testified that although she noted the pain was in the "moderate" range, she has a high threshold for pain and moderate pain for her is a tolerable pain. She testified that the levels of pain she was feeling prior to the September 1, 2015 work injury were different and that after the work injury, her pain was worse. The Claimant testified that prior to September 1, 2015, she was feeling significantly better from her prior injury, better than she had been feeling in a very long time.

5. When the Claimant was injured on September 1, 2015, she was first treated by Dr. Michael Striplin on September 2, 2015. Dr. Striplin placed the Claimant on temporary restrictions, limiting her to lifting 15 pounds, and no repetitive forward bending (Respondents' Exhibit H, p. 86). Dr. Striplin entered the same restrictions on September 10, 2015 (Respondents' Exhibit H, p. 87).

6 The Claimant's care was subsequently transferred to Concentra and on September 21, 2015, the Claimant began treating with Dr. Carol Ramsey. Dr. Ramsey noted that "patient has a history of 2009 sacroiliac injury at work. On September 1, 2015, she was talking to her boss when the chair broke, and she fell backwards causing herself to experiencing pain over her left SI joint again." She was diagnosed with sacroiliac dysfunction (Respondents' Exhibit I, p. 90). Dr. Ramsey issued restrictions. Dr. Ramsey's restrictions were as follows: May lift up to 15 pounds frequently (up to six hours per day), may lift up to 25 pounds occasionally (up to 3 hours per day), may push/pull up to 30 pounds frequently (up to six hours per day), may bend occasionally (up to 3 hours per day), may stand frequently (up to six hours per day), sit as needed. Stretch breaks as needed (Respondents' Exhibit I, pp. 88-91). The same restrictions were imposed on September 28, 2015 (Respondents' Exhibit I, p. 94). On that date, Dr. Ramsey again remarked that Claimant's pain was "along the left SI joint and extending into the buttock" (Respondents' Exhibit I, p. 96).

7. On October 6, 2015, the Claimant was evaluated by Dr. Lloyd Thurston at Concentra. He noted that the Claimant had a prior SI injury 6 years prior and that she does not want medications. He diagnosed the Claimant with sacroiliac dysfunction, along with cervical sprain and lumbar strain. He recommended physical therapy and imposed the same restrictions as Dr. Ramsey (Respondents' Exhibit I, pp. 103-105).

8. On October 9, 2015, the Claimant saw Dr. Darla Draper who noted that the Claimant has not wanted medications but now her pain is preventing sleep and she would like medications. Dr. Draper assessed the Claimant with cervical sprain, lumbar

sprain and sacroiliac dysfunction and imposed the same restrictions as Dr. Thurston and Dr. Ramsey (Respondents' Exhibit I, pp. 109-111).

9. The Claimant saw PA-C Rammohan Naidu on October 15, 2015 and she reported that she was still in significant pain but has been working with restrictions. She reported that she was afraid that she might lose her job and she really wants to work. Mr. Naidu noted that Claimant had undergone an MRI of the lumbar spine which was "essentially normal." PA-C Naidu assessed the Claimant with multilevel degenerative disc disease, lumbar facet arthropathy and multilevel facet arthropathy. PA-C Naidu changed the Claimant's restrictions. The Claimant's restrictions were changed to the following: may lift up to 15 pounds constantly (up to 8 hours per day), may push/pull up to 30 pounds constantly (up to 8 hours per day), sit as needed, stretch breaks as needed (Respondents' Exhibit I, pp. 112-114). The same restrictions were imposed by Dr. Thurston on October 30, 2015, November 20, 2015 and December 18, 2015 (Respondents' Exhibit I, pp. 128, 134 and 141).

10. The Claimant saw Dr. Frederic Zimmerman for a physiatry consultation on October 29, 2015. Dr. Zimmerman noted the prior 2009 low back injury for which she was undergoing maintenance care. The Claimant reported that "her current set of symptoms are in a different location and different character than her preexisting low back pain." After physical examination noting pain throughout the lumbosacral region, perisacral region and bilateral SI joints and lumbosacral facets, Dr. Zimmerman assessed the Claimant with lumbosacral contusion, bilateral SI joint pain and extension based pain at the lumbosacral facets with evidence of mild facet arthrosis on MRI. He recommended SI joint and L5-S1 facet injections for diagnostic purposes (Respondents' Exhibit I, pp. 120-123).

11. Dr. John Burris evaluated the Claimant on February 4, 2016 for delayed recovery issues. Dr. Burris noted that the Claimant received significant, but temporary, relief from the SI joint injections but did not receive benefit from the facet injections. Dr. Burris noted that the Claimant is resistant to some recommended treatments, including medications and chiropractic care through Concentra due to prior issues. His diagnoses were low back pain and cervical strain. He opined that her examination was benign with no objective findings other than diffuse tenderness other than the positive response to the SI joint injections. Dr. Burris indicated that Claimant had refused to accept fibromyalgia or somatization diagnoses from Dr. Zimmerman. He further indicated that he discussed "the relatively minor nature of the original mechanism and expectations for complete recovery in light of the negative diagnostic testing." He recommended a pelvic x-ray to rule out occult fracture. He also recommended chiropractic treatment with Dr. Cain as the Claimant had a positive response with her in the past, subject to the medical treatment guideline limitations for workers' compensation cases. Dr. Burris recommended that Claimant work "light duty" but imposed only one restriction: no lifting over 20 pounds (Respondents' Exhibit I, pp. 145-146).

12. The Claimant returned to Dr. Thurston on February 11, 2016. Dr. Thurston reviewed the pelvic x-ray and found nothing "worrisome" (Respondents' Exhibit I, p. 151).

13. The Claimant returned to Dr. Burris on March 23, 2016. Dr. Burris noted no significant changes but also noted that a second opinion might be considered. He noted that the Claimant was not happy with her ATP Dr. Zimmerman because of his conclusions of somatization and fibromyalgia, which the Claimant insists she does not have. Again, Dr. Burris imposed the same 20 pounds lifting restriction (Respondents' Exhibit I, pp. 154-155).

14. Following her September 1, 2015 injury, the Claimant continued to treat with Dr. Cain. As she had prior to September 1, 2015, the Claimant filled out a pain diagram when she treated at Dr. Cain's office. On September 3, 2015, the Claimant marked her pain between "work" and "sleep", which coincided with the same place she had previously marked between "moderate" and "severe" [1] (Respondents' Exhibit G, p. 77). She made the same indication on September 22, 2015 and September 28, 2015 (Respondents' Exhibit G, pp. 78 and 80). On February 15, 2016 and February 29, 2016, the Claimant again marked her pain between moderate and severe (Respondents' Exhibit G, pp. 81 and 85).

15. Dr. Nicholas Olsen performed an independent medical exam on behalf of Respondents, and issued a report dated February 29, 2016. He reviewed Claimant's medical history related to her 2009 injury and prepared a thorough written summary of medical records from December 4, 2009 – August 6, 2015 (Respondents' Exhibit E, pp. 22-36). Dr. Olsen noted that the Claimant's diagnoses for that injury included "low back pain, left SI joint versus left lumbar facet with myofascial pain in the high lumbar and thoracic region" (Respondents' Exhibit E, p. 23). He noted that the Claimant had undergone a sacroiliac joint block, in April of 2010, which resulted in a non-diagnostic response (Respondents' Exhibit E, p. 24). Dr. Olsen also noted that the Claimant had undergone an FCE on October 4, 2010 which placed her in the light level work category. She was restricted from lifting more than 20 pounds from the floor to overhead and more than 5 pounds frequently. On October 11, 2010, Dr. Artist assigned the Claimant permanent restrictions, of "no lifting more than 20 occasionally, 5 pounds frequently" (Respondents' Exhibit E, p. 26). The Claimant continued to treat for her pain complaints for a number of years. On February 22, 2013, Dr. Artist told the Claimant that her prognosis was guarded (Respondents' Exhibit E, p. 30). Dr. Olsen noted that on January 9, 2014, Dr. Cain indicated that the Claimant was struggling to make progress and her back pain was escalating on January 17, 2014 (Respondents' Exhibit E, p. 31).

16. The Claimant told Dr. Olsen that her pre-existing low back symptoms were located in the L3 area. She stated that she was placed at MMI at some point but did not know the date. She did not recall if she had an impairment. She advised that post-MMI, she continued massage and chiropractic care. (Respondents' Exhibit E, p. 40). After physical and neurological examination, Dr. Olson opined that he was unable to identify a persistent diagnosis of SI joint dysfunction and he was unable to identify any specific pain generator related to the September 1, 2015 injury. This is based in part on his

[1] The Claimant testified on re-direct examination that she did not notice the difference in the pain scales with these different categories

construing the Claimant's response to the SI joint injection from Dr. Zimmerman as non-diagnostic based upon Claimant's pain diary as opposed to her memory of 50% pain relief or Dr. Zimmerman's report of 75%-80% (Respondents' Exhibit E, p. 43). Dr. Olsen also reviewed Claimant's spinal MRI which she showed her SI joint. He noted that it was well visualized, with no evidence of abnormal physiology. The only changes on the lumbar spine were degenerative in nature. Dr. Olsen also examined a cervical spine MRI, which was also normal except for degenerative changes (Respondents' Exhibit E, pp. 43-44). Dr. Olsen opined that the Claimant "does not demonstrate any functional deficits. While she has not made any functional gains in the last 30 days, she is essentially functioning at full capacity. The subjective complains she reports of pain do not lead to functional deficits." (Respondents' Exhibit E, p. 43-44). He further opined that the Claimant "has some limitations in lumbar extension which are attributed to her progressive disease persisting after the 2009 injury" (Respondents' Exhibit E, p. 45).

17. Dr. Olsen testified at hearing as an expert witness in the areas of physical medicine and rehabilitation as well as Workers' Compensation Level II accreditation matters. He testified that he could not identify any specific diagnosis that he attributed to the current work injury due to the Claimant's significant preexisting issues. He testified that he looked at possible SI joint dysfunction due to Dr. Zimmerman's finding of a positive response to an SI injection, but he concluded that the Claimant's response to Dr. Zimmerman's SI joint injection yielded the same result as an SI joint injection that she had following her 2009 injury, both of which Dr. Olsen believes indicated a non-diagnostic response. He testified that Claimant had no functional deficits as a result of her September 1, 2015 injury. He made this determination based his review of the Claimant's medical workup following her September 1, 2015 injury which he finds failed to reveal any specific pain generator. He also opines that her imaging studies showed no significant change. Dr. Olsen further testified that Dr. Artist's last 20 pound lifting restriction from the 2009 injury remained in place at the time of the Claimant's September 1, 2015 injury, and that remained an appropriate restriction relating to her pre-existing event. He testified on cross-examination that Dr. Artist maintained this same permanent work restriction up until his last visit with the Claimant in July of 2014, supporting the position that the restriction remained in place. Dr. Olsen could not identify any activity restriction related to her September 1, 2015 injury that exceeded her pre-existing permanent restriction or would have restricted her ability to do her job.

18. On cross-examination, Dr. Olsen testified that he did not believe that the Claimant was currently a "drug-seeker," although he did find her prior levels of opioid medication usage to be high. However, he agreed that the Claimant has never been prescribed opioids for this current claim and as of September 1, 2015, she was off all narcotic medications. Dr. Olsen testified that the Claimant to seek care for significant pain complaints in the time frame leading up to her September 1, 2015 injury. He opined that the Claimant's symptoms were elevated due to the Claimant's lack of access to care when Dr. Artist retired and Dr. Schakaraschwili's office declined to continue prescribing narcotic pain medications to Claimant. He testified that the Claimant continued to treat in 2015 with complaints of pain and spasm. Dr. Olsen testified that he listened to Claimant's testimony at hearing. He testified that her testimony concerning her improvements in function leading up to the September 1,

2015 injury were not supported by the medical records that he reviewed. He testified that Dr. Cain's 2015 records were devoid of any note evidencing any marked change in functional improvement from the 2009 injury.

19. Dr. Burris released the Claimant from care and placed her at maximum medical improvement, without impairment or restriction, on May 20, 2016 (Respondent's Exhibit I, pp. 156-157).

20. The Claimant was accepted by the court as an expert in car sales. The Claimant was hired by Employer in August of 2014, and began working in the Lakewood location where she was one of three salespeople. The Claimant testified that she began working at the Northglenn location in January of 2015, where she was the only salesperson. Prior to her September 1, 2015, the Claimant worked from 9:00 a.m. to 6:00 p.m. on the weekdays, and 9:00 a.m. to 1:00 p.m. on Saturdays. The Claimant received a commission based upon selling cars. She also received a sales bonus for meeting certain sales goals. She was paid by the month. Her work duties included, moving cars around the lot, removing snow from cars in the winter, and performing some minor detailing on the vehicles as part of her work duties, and cleaning the car lot. The Claimant estimated that there were two to three snows per month between December and February that required her to remove snow from the vehicles. The Claimant testified that it was difficult for her to remove snow from the vehicles and use the "jump-box" used for starting car batteries. The Claimant testified that she was, at one point, she believed that she was in jeopardy of being transferred to another location because she was unable to perform her regular job duties due to her work-related injuries. However, the Claimant also testified on cross-examination that she spent most of her workday for Employer seated and she was allowed to stand and stretch. The Claimant was able to perform most of her job functions while sitting.

21. Prior to her work injury, the Claimant's monthly wages for Employer varied. Her earnings from March of 2015 through August of 2015 were as follows:

March of 2015:	$9,057.35	
April of 2015:	$6,660.17	
May of 2015:	$1,540.58	
June of 2015:	$2,850.18	
July of 2015:	$6,645.16	
August of 2015:	$5,757.64	(Claimant's Exhibit 3; Respondent's Exhibit D).

22. With respect to her income, the Claimant testified that she missed a few days from work in May or June of 2015 to attend a family member's graduation, but could not remember which month. She believed that it was the first week of June of 2015.

23. The Claimant’s income continued to vary after her workplace injury. Her post-injury earnings were as follows:

September of 2015:	$4,220.50
October of 2015:	$3,314.16
November of 2015:	$3,081.58
December of 2015:	$1,004.60
January of 2016:	$4,326.46
February of 2016:	$1,898.04
March of 2016:	$3,250.82

(Respondents’ Exhibit D, pp. 14- 20).

24. Between August 21, 2014 and August 21, 2015, the Claimant earned $44,249.77 in gross wages, including bonuses (Respondents’ Exhibit C). The Claimant testified that her earnings included commissions plus sales bonuses. For the first 3 months, the Claimant earned a base salary of at least $2,000.00 with Employer, in addition to any sales bonus that she made, then it switched to the purely commission + sales bonus model. The Claimant testified that she made less money the first 3 months and then more after her first three months when her compensation structure was changed to commissions plus bonuses.

25. The Claimant testified that in order to maximize earnings in car sales, it is important to be onsite, if you are not there, people will go somewhere else and you will not make sales. However, the Claimant testified that, after her September 1, 2015 injury, she would miss 4-8 hours per week during work hours for appointment. While the Claimant would try to schedule appointments for medical providers outside of her normal work hours, she nevertheless had to miss some work since the medical providers were generally open during the same time as her normal work hours. Claimant testified that she worked approximately 50 hours per week prior to her injury. The Claimant believed that she was working 42-44 hours per week, which was less that she normally did, and this cost her sales which were the basis of her earnings.

26. The Claimant also testified concerning the monthly variability in wages in the automobile sales industry. She testified that the fall and early winter months are poor months for car sales. She testified that sales can begin to pick up in February and March with tax season, then May is generally slow and the summer months are typically good months until sales generally start to slow down in September or October. The Claimant testified that sales also depend upon how many cars are present on the lot at any given time.

27. Employer owner Kimberley Massa also testified at the hearing. She agreed with the Claimant that car sales fluctuate depending upon the time of year, with the winter months being the worst. Ms. Massa further testified that some months are bad for inexplicable reasons, and some years are also better than others due to normal fluctuation in the level of business. Ms. Massa testified that 2016 has overall been a poorer sales year for Employer. Ms. Massa testified that there were times when sales were referred to Claimant when she was not in the office, and telephone numbers of potential customers were taken for Claimant to return. Ms. Massa testified that she did

not regularly monitor Claimant in the office, but did not think that she missed as much as four-eight hours per week for medical appointments. She testified that Claimant's wages after September 1, 2015 were within the normal variations for the business. She testified that some employees of Employer made less than the Claimant, and some made more.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Calculation of Claimant's Average Weekly Wage

Under Colorado's Workers' Compensation Act, the "average weekly wage" is a key part of the formula used to calculate compensation for injured workers, and it is based upon the definition of "wages" provided at section 8-40-201(19). *Industrial Claim Appeals Office v. Ray,* 145 P.3d 661 (Colo. 2006). To determine a claimant's AWW, the ALJ may choose from two different methods set forth in section 8-42-102. The first method, referred to as the " default provision," provides that an injured employee's AWW " be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." § 8-42-102(2), C.R.S. The default provision in § 8-42-102(2)(a)-(f), C.R.S lists six different formulas for conducting this calculation. Per § 8-42-102(5)(a), the phrase "at the time of injury" in subsection (2) requires the AWW to be determined using the wage earned on the date of the employee's accident when using this method. The second method for calculating a claimant's AWW, referred to as the "discretionary exception," applies when the default provision will not fairly compute the employee's AWW. § 8-42-102(3), C.R.S. In such a circumstance, the ALJ has discretion to compute the AWW of a claimant in such other manner and by such other method as will, based upon the facts presented, fairly determine the employee's AWW. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office,* 841 P.2d 335 (Colo.App.1992). Because the default method will not fairly compute the Claimant's AWW in this case, the discretionary method is appropriate to use in order to arrive at a fair approximation of the Claimant's wage loss. An ALJ has the discretion to take seasonal fluctuations in work into account when determining a claimant's average weekly wage. *See, e.g., Reyes v. LVI Environmental Services, Inc.*, Work Comp. No. 4-425-155 (2001) (holding that ALJ did not abuse his discretion in calculating claimant's wages over several months where the work was seasonal in nature).

Both the Claimant and Employer testified that claimant's earnings were subject to seasonal fluctuation independent of her injury status. Therefore, both sides urge the ALJ to use the discretionary method of calculating the AWW, albeit each party has a different approach to the calculation.

Respondents argue that due to these seasonal variations, using one year of wages to calculate Claimant's average weekly wage would most accurately taken into account the seasonal fluctuation in income that the Claimant could expect to experience. Respondents calculated that this resulted in an average weekly wage of

$850.96 [$44,249.77 ÷ 52]. However, this calculation is problematic as the annual gross wage of the Claimant from August of 2014 to August of 2015 includes a 3 month period when the Claimant did not earn wages according to a commission + bonus structure, but rather made a base wage of $2,000.00 per month + bonuses, as it is presumed that employees would otherwise make less that the base wage as they are new and still learning the job. The Claimant also testified credibly that this was the case. This annual gross wage amount also includes the time period from August 2014 through December 2014 when the Claimant worked at a different location with three employees onsite which made it more competitive in terms of making sales and therefore earning commissions and bonuses. Only from January of 2015 ongoing, was the Claimant working at the Employer's Northglenn location where she was normally the only employee.

The Claimant argues that, to avoid including the period of time in the first three months of her job with the lower salary of $2,000.00 a month plus bonuses, a different time period should be used to calculate AWW. The Claimant further argues that the months of November, December and January are months that car salespersons make less money due to natural fluctuations and they should not be used. However, if these are natural fluctuations in earnings, then using these months to average out earnings would actually assist in determining a fair approximation of the Claimant's wage loss and diminished earning activity.

Therefore, the preference would have been to calculate the Claimant's AWW using January 2015, once she was working at the Employer's Northglenn location with her permanent pay structure, up to the date of the Claimant's injury on September 1, 2015. This would have taken natural income fluctuations into account but would not have included the time period when the Claimant was not working alone at the Northglenn location. Unfortunately, neither Claimant nor Respondents provided specific testimony or documents in evidence for the Claimant's gross wages earned from January 2015 through February 2015. As a result, only information from March of 2015 through August 2015 is available for the time period prior to the Claimant's work injury. Since incomplete information is available for computations, the ALJ concludes the next best time period for the calculation of a fair approximation of the Claimant's wages would be from March 2015 through August 2015. Respondents inexplicably argue that if a shorter time period is used, it should only run from May 2015 through August 2015, presumably to eliminate earnings months that the Claimant and owner Ms. Massa testified are generally higher earning months. The ALJ finds that this would artificially lower the Claimant's AWW. While the inclusion of January 2015 and February 2015 would have allowed for typically slower earnings months to have naturally balanced out the typically higher earnings months, this was not provided as an option since neither party presented the earnings for these months. Yet, it does not make sense to arbitrarily eliminate March and April from the calculation.

Thus, the ALJ concludes that, based on the evidence that both parties presented, the best way to determine a fair approximation of the Claimant's AWW would be to use the earnings from March of 2015 through August 2015, the 6 months (or 26 weeks and 2 days) prior to injury:

$9,057.35 + $6,660.17 + $1,540.58 + $2,850.18 + $6,645.16 + $5,757.64 = 32,511.08

32,511.08 ÷ 26 2/7 (26.0285) = $1,2,49.06 AWW

Temporary Disability Benefits

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

Here, the Claimant has not proven medical incapacity, nor has she proven impairment of wage earning capacity. First, the Claimant did not prove that she sustained medical incapacity as evidenced by loss or restriction of bodily function. Dr. Olsen credibly testified that the Claimant does not have any objective functional deficits as a result of her September 1, 2015 injury, and is essentially fully functional at her baseline function levels after her prior 2009 work injury. Dr. Olsen argued that the Claimant does not have any distinct diagnosis which supports the conclusion that she is physically limited. The MRI’s taken of her back, including the SI joint, and neck show no acute injury. Further, and more persuasive, to the extent that Claimant has any loss or restriction of bodily function, she did not prove that is a result of her September 1, 2015 injury, as opposed to her pre-existing limitations. The pain diagrams that the Claimant completed at Dr. Cain’s office following her September 1, 2015 are largely consistent to the ones that she filled out in the year preceding her workplace injury. She was already on permanent restrictions from Dr. Artist from her 2009 injury, which limited to her 20 pounds of lifting, with a 5-pound limit for frequent lifting. To the extent that Claimant’s snow removal duties conflicted with her restrictions from Concentra, more severe restrictions were already in place from Dr. Artist. Ultimately, the Claimant did not prove that any functional limitations she had were related to her September 1, 2015 injury, as opposed to her significant pre-existing issues. The medical records support the conclusion that the Claimant was having continual flare ups and pain complaints after being refused further narcotic pain medication and struggling to find a new workers’ compensation physician and then agreeing to wean off all opioid medications. . The records from Dr. Cain and Dr. Schakaraschwili's office do not show any significant or sustained notes of improvement in pain level. While Claimant alleges that her pre-injury back pain was at the L3 level, she was previously diagnosed with subjective coccydynia, and initially told Dr. Ramsey that her 2009 injury involved her sacroiliac joint. The medical records from her pre-existing injury noted by Dr. Olsen indicate left SI joint pain.

Second, the Claimant did not prove that her restrictions impaired her ability to effectively and properly perform her regular employment duties. While the Claimant testified that she had to remove snow from vehicles and this was difficult, she never alleged or proved that this act violated her lifting restrictions. By the time that winter came, Claimant was cleared to lift up to 15 pounds constantly and push and pull up to 30 pounds constantly. There was no evidence that Claimant's snow removal duties required her to lift more than fifteen pounds, or push and pull more than 30 pounds. When she was asked by her counsel to identify the functional deficits that she suffered from her September 1, 2015 injury, she pointed to her inability to play volleyball and wear high heels, rather than any work-related difficulties.

Because the Claimant has not proven that she suffered a disability in this case, she is not entitled to TPD benefits, even if her medical appointments caused her to lose wages, which itself is not established (see below)

Looking at all of the evidence as a whole, the Claimant also failed to prove that she suffered a wage loss as a result of her industrial injury. Claimant is not considered disabled for purposes of recovering temporary disability benefits if she does not sustain an actual wage loss as a result of her injury. *See, e.g., Whitney v. Metro West Fire Protection Dist.*, 4-920-012 (ICAO August 27, 2014). While the Claimant's income in the six months prior to her injury was lower than the seven months following her injury, consistent testimony from both the Claimant and the owner of the Employer established that there are seasonal fluctuations in car sales and, thus, commission and bonus earnings based on care sales. The wage records in evidence show the following:

Monthly wages before the injury:

March of 2015:	$9,057.35
April of 2015:	$6,660.17
May of 2015:	$1,540.58
June of 2015:	$2,850.18
July of 2015:	$6,645.16
August of 2015:	$5,757.64

Monthly wages after the injury:

September of 2015:	$4,220.50
October of 2015:	$3,314.16
November of 2015:	$3,081.58
December of 2015:	$1,004.60

January of 2016:	$4,326.46
February of 2016:	$1,898.04
March of 2016:	$3,250.82

Both the Claimant and Ms. Massa testified that March and April are typically good months for car sales and then the summer months are also good months for sales. Typically the sales drop, but may still be good in earlier autumn, but then as winter months approach, sales usually go down. The Claimant's wages after her admitted workplace injury were within the normal seasonal fluctuations attendant to her position as an automobile salesperson. Claimant's drop off in earnings following her September 1, 2015 injury were a result of normal seasonal downturn, as well as a general fluctuations inherent to her position. In most of her post-injury months, she earned more money than she did in May and June of 2015. Ms. Massa credibly testified that some employee of Employer made less money than Claimant did, and some made more.

Additionally, while the Claimant may have missed some time while at medical appointments, the Claimant did not identify any sale that she lost at work as a result of attending medical appointments. Based on the credible testimony of Ms. Massa, auto sales dropped significantly at all of her sales locations in the time period after the Claimant's September 1, 2015 injury, in addition to the normal seasonal fluctuations which are likely to have reduced sales and income. Thus, the Claimant did not meet her burden of establishing, that, at least in part, there was a causal connection between her work-related injury and a subsequent wage loss.

Therefore, the Claimant has failed to establish entitlement to temporary partial disability benefits as she has not proven either (1) medical incapacity evidenced by loss or restriction of bodily function or (2) impairment of wage earning capacity as demonstrated by her inability to resume his prior work.

ORDER

It is, therefore, ordered that:

1. The Claimant's Average Weekly Wage (AWW) is $1,249.06

2. The Claimant's claim for temporary partial disability from September 2, 2015 to May 19, 2016 is denied and dismissed.

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

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

DATED: September 15, 2016

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence, that he sustained a compensable low back injury during his January 21, 2016 motor vehicle accident.

II. If Claimant suffered a compensable low back injury on January 21, 2016, whether he has proven by a preponderance of the evidence that the treatment recommended by Dr. Paz is causally connected to the work injury on January 21, 2016.

FINDINGS OF FACT

Based upon the evidence presented, including the parties hearing exhibits along with the testimony of Claimant and Dr. Olsen, the ALJ enters the following findings of fact:

1. In April, 2014, Claimant commenced his employment with Qwest/Century Link in Trinidad, Colorado, as a network technician. Prior to starting this job, he had not experienced any problems with his low back and there is no medical documentation to indicate he received treatment focus to the lumbar spine. Claimant testified that he had no difficulties performing his job duties with Qwest/Century Link prior to his work related injury on January 21, 2016.

2. On January 21, 2016, Claimant was the restrained driver of a 12,000 to 18,000 gross vehicle weight bucket truck. He was stopped at an intersection when he was rear ended by a truck driven by his supervisor. The force of the impact pushed the bucket truck into the intersection. Claimant testified that the force of the collision threw him forward and backwards.

3. After impact, Claimant excited his vehicle and inspected the damage. He testified that his adrenaline was rushing. He did not notice any immediate symptoms and continued working. Approximately three hours after the crash, Claimant developed pain and soreness in his neck and low back. He took Ibuprofen that evening. The following day, Friday, January 22nd, he had pain is his neck and a pinch like sensation between his shoulder blades, as well as low grade pain in the lumbar spine. Over the weekend, the neck pain became worse.

4. On January 25, 2016, Claimant was seen in the emergency room (ER) at the Spanish Peaks Regional Health Center in Walsenburg, Colorado, where he was examined by Dr. Dunnam-Smith. Claimant testified that at the time of his examination, his low back pain was mild and that his neck injury had become worse with numbness

extending into his right hand. He reported only neck pain and did not indicate problems with his low back.

5. The medical records of Dr. Dunnam-Smith indicate that imaging studies were performed of the cervical and thoracic spine. The diagnosis was cervical and neck strain with radiculopathy and thoracic back pain. Claimant was placed on restrictions and returned to modified duty and it was suggested that he follow-up with a workers' compensation provider in 1 week. (Cl. Ex. 1, pg. 6).

6. Claimant was also prescribed a seven day tapering dose of Prednisone in addition to muscle relaxants. (Cl. Ex.1, pg. 5 and 17).

7. Claimant testified that after he completed his course of Prednisone and muscle relaxants, he felt much better, his symptoms were dramatically improved and he thought he had recovered from the injuries sustained in the automobile accident.

8. Per instructions, Claimant was examined by Dr. Schwender, the Respondents' designated workers' compensation physician on February 4, 2016 at the Colorado Center for Occupational Medicine office located in Pueblo, Colorado. Dr. Schwender noted a history of pain in the neck as well as numbness in the right hand. Dr. Schwender noted Claimants treatment with Prednisone and documented that Claimant was feeling much better despite a continued pinching sensation at the base of his neck. There was no report of problems with the low back and Dr. Schwender's physical examination appears limited to the cervical spine only. Dr. Schwender returned the Claimant to modified duty with no lifting greater than 25 pounds. (Cl. Ex. 2, pg. 22).

9. Claimant testified that after completing the course of steroids and muscle relaxants, his neck pain returned. He also had a return of his previously mild low back pain sufficiently intense that it interfered with his work duties. The low back pain was aggravated by his job duties, such as riding in his work vehicle and bending. Gradually, the pain in his low back extended into his right buttock and he experienced loss of feeling in the toes of his right foot.

10. Claimant requested a change to an employer designated physician closer to his home. This medical treatment was transferred to Dr. David Paz at Mr. Carmel Health and Wellness in Trinidad, Colorado. Claimant was evaluated by Dr. Paz for the first time on February 25, 2016. Dr. Paz incorrectly noted an auto accident occurring in the State of Kansas. In addition to the problems with the cervical spine, Dr. Paz noted back pain extending into the thigh and numbness in the right toes. He noted the Claimant had been placed on light duty but riding in the truck aggravated the low back pain. Physical examination demonstrated that the right lower extremity was "jerky" on extension as compared to the left. Dr. Paz also noted decreased sensation in the right upper extremity. He recommended an MRI of both the cervical and lumbar spine. Mr. James was taken off work and prescribed Naprosyn and Hydrocodone-Acetaminophen. (Cl. Ex. 3, pgs. 37-39). Dr. Paz provided an assessment of "interveterbral disc with

myelopathy and radiculopathy." In addition to recommending an MRI of the lumbar spine, Dr. Paz referred Claimant to Dr. Murad for a neurosurgical evaluation. (Cl. Ex. 3, pgs. 33-34).

11. Reports prepared by Physician Assistant (PA) Andrew Glass working under the direction of Dr. Murad were also submitted post hearing. The ALJ finds the reports of PA Glass potentially outcome determinative and admits the reports as Claimant's Exhibit 8.

12. The initial examination on March 30, 2016, notes a history of a motor vehicle accident with resulting cervical and lumbar pain, post-accident. The low back pain radiated into the right lower extremity. Claimant's pain increased with walking and was relieved when lying down. He had no issues with the lumbar spine prior to the accident. Concerning the low back, PA Glass provides an assessment of "back pain" and "lumbar radiculopathy". Claimant was provided with an additional "medrol (Pak), 4 mg to be taken orally along with a referral to anesthesiology for evaluation concerning the efficacy of epidural steroid injections. Claimant also underwent an MRI of the lumbar spine on this date.

13. On June 1, 2016, Claimant returned to PA Glass for review of lumbar spine MRI findings. The MRI demonstrated no significant nerve compression. There was mild bilateral recess stenosis at the L4-L5. X-rays of the lumbar spine of the lumbar spine demonstrated degenerative disc disease. Claimant was advised that there were no structural defects that could be resolved by surgery and that the most likely cause of his symptoms was nerve root irritation, possibly at the L4 level. An assessment of lumbar radiculitis is provided and lumbar epidural steroid injections were recommended.

14. Claimant was examined at the request of Respondents counsel by Dr. Nicholas Olsen. In a report dated April 28, 2016, Dr. Olsen notes that Claimant provided a history to him of feeling a little pain in his lower back over the weekend after the accident. As the weekend passed, the lower back did not seem as it was bothering him too much. When he went to the emergency room on the following Monday, January 25th, he did not report a problem with his low back. Once he commenced a regiment of steroids and muscle relaxants, Claimant reported that he started feeling better. After the course of medication was completed, the pain returned and progressively worsened. (Cl. Ex. 4, pg. 101). Lumbar flexion, extension and bi-lateral bending elicited complaints of pain. A supine straight leg raise test aggravated right lower back pain. (Cl. Ex. 4, pg. 107). Dr. Olsen opined that Claimant had complaints consistent with axial back pain along with a "mild physiologic examination involving the right lower extremity with a stocking loss of sensation." Dr. Olsen questioned Claimant's alleged lumbar spine injury based on the history provided to him. He noted that Claimant is a poor medical historian and questions why the lumbar complaints were not initially presented to Dr. Dunnam-Smith. (Cl. Ex. 4, pg. 110).

14. As noted, the parties took the evidentiary deposition of Dr. Olsen post hearing. During his deposition, Dr. Olsen testified that, based on his review of the medical records, the first mention of low back pain did not occur until February 25, 2016, when Claimant saw Dr. Paz (Olsen's Depo. Tr. p. 13). Dr. Olsen also testified that between what Claimant told him as to when he first had low back pain and what the medical records document, he would rely on the medical records rather than Claimant's historical statements made during the April 28, 2016 independent medical examination (IME). (Dr. Olsen's Depo. Tr. p. 14). Again, Respondents submit that Claimant's testimony at hearing is consistent with what the medical records document in that Claimant did not have the onset of low back symptoms until sometime after he saw Dr. Schwender on February 4, 2016. Consequently, Respondents submit that the greater weight of evidence establishes that, to the extent that Claimant has low back pain at the present time, those low back symptoms began sometime between February 4, 2016 and February 25, 2016.

15. Dr. Olsen testified that there is a generally accepted medical analysis involving a temporal relationship between a trauma and the eventual onset of pain at a certain body location (Olsen's Depo. Tr. pp. 15-16). Specifically, Dr. Olsen stated that when "somebody has a trauma, one would expect that person to have pain within a certain period of time, within a few days. The longer the period of time between the reports of the pain and the inciting event, the less likely that the source of pain is related to the event." Dr. Olsen explained further that a traumatic event causes a physiological change within 2-3 days following the incident and may cause a 3/10 pain level initially. According to Dr. Olsen that pain level could increase to a 6-7/10 level two later because it's progressed; however, to have no pain for a number of days and in the instant case for a couple of weeks leads to the conclusion that Claimant's current low back pain is unrelated to the original motor vehicle accident (MVA) occurring on January 21, 2016. Consequently, Dr. Olsen was of the opinion that the January 21, 2016 injury did not cause Claimant's eventual onset of low back pain (Olsen's Depo. Tr. pp. 17-19).

16. Because of the lack of low back symptoms for at least two weeks following the motor vehicle accident, Dr. Olsen was almost of an "absolute certainty" that the onset of low back problems between February 4, 2016 and February 25, 2016 is not causally related to the motor vehicle accident. Rather, the more likely explanation for Claimant's low back pain, according to Dr. Olsen, is that the onset of symptoms represents "natural back pain" that either developed in the absence of any kind of trauma or alternatively a lumbar sprain/strain event unrelated to the January 21, 2016 MVA. In support of his opinions regarding the cause of Claimant's low back pain, Dr. Olsen notes that over 80% of individuals who have back pain severe enough to see a physician have that onset without any indication of trauma.

17. Based upon the evidence presented as a whole, the ALJ finds Dr. Olsen's testimony unconvincing. The ALJ infers and finds from Dr. Olsen's testimony that he believes that Claimant had no pain in his low back between January 21, 2016 and February 4, 2016 merely because the available medical records do not document the same. The ALJ finds from Claimant's testimony that while he had pain it was not severe

enough to report. In reconciling the competing testimony of Dr. Olsen and Claimant, the ALJ credits Claimant's testimony to find that he likely had low back pain at a level (3/10) which he did not feel required medical attention and was not disabling. Consequently, he did not report it. The decision not to report low level pain which did not require medical treatment and which was not disabling does not mean that Claimant had no pain as is suggested by Dr. Olsen. Moreover, the ALJ finds it probable that the Prednisone Claimant was prescribed was effective in curing and relieving both Claimant's neck and low back pain. The evidence presented persuades the ALJ that when the course of steroids was complete, Claimant, more probably than not had a return of his back pain intense and disabling enough to report to Dr. Paz. Finally, the ALJ finds the dearth of evidence supporting prior problems with his low back, substantially under minds Dr. Olsen's opinion that the cause of Claimant's low back pain represents "natural" back pain which arose simply because 80% of the population will experience low back pain at some time in their lives. Dr. Olsen's alternate opinion that the cause of Claimant's low back symptoms are due to a sprain/strain event unrelated to the January 21, 2016 MVA is speculative and unfounded based upon the evidence presented. Accordingly the ALJ finds it equally unconvincing.

18. The preponderance of the evidence presented persuades the ALJ that the described mechanism of injury (MOI), i.e. the MVA is the cause of Claimant's low back symptoms and current need for treatment. Accordingly, the ALJ finds that Claimant has met his burden of proof to establish that he suffered a compensable industrial injury on January 20, 2016.

19. Based upon the evidence presented, the ALJ also finds the treatment rendered to Claimant by in the ER and by Drs. Paz and PA Glass to be reasonable, necessary and related to his January 21, 2016 low back injury. Moreover, the evidence presented convinces the ALJ that the recommendation for a lumbar MRI was reasonable and related to Claimant's low back injury.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

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

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found here, Claimant's testimony is credible, consistent and convincing. Moreover, the opinions of Dr. Olsen regarding diagnosis, causality and treatment not persuasive or convincing.

Compensability

D. A "compensable injury" is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*.* *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injuries occurred within the time and place limits of his employment relationship with Employer and during an activity, specifically driving a bucket truck to a job site for Employer. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" his employment must be resolved before the injury is deemed compensable.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that Claimant sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). As found, the ALJ credits Claimant's testimony to find that he likely had low back pain at a level (3/10) which he did not feel required medical attention and was not disabling. Consequently, he did not report it. The decision not to report low level pain which did not require medical treatment and which was not disabling does not mean that Claimant had no pain as is suggested by Dr. Olsen. The evidence presented also persuades the ALJ that when the course of steroids was complete, Claimant, more probably than not had a return of his back pain intense and disabling enough to report to Dr. Paz. Finally, the ALJ finds the dearth of evidence supporting prior problems with his low back, substantially under minds Dr. Olsen's opinion that the cause of Claimant's low back pain represents "natural" back pain which arose simply because 80% of the population will experience low back pain at some time in their lives. Dr. Olsen's alternate opinion that the cause of Claimant's low back symptoms is due to a sprain/strain event unrelated to the January 21, 2016 MVA is speculative and unfounded. Accordingly the ALJ finds it equally unconvincing. In this case, the evidence presented persuades the ALJ that a logical causal connection exists between Claimant's work duties, the January 21, 2016 MVA, his low back symptoms and his need for treatment. Consequently, the ALJ finds Claimant's low back injury compensable.

Medical Benefits

G. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO

April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back. The evidence presented persuades the ALJ that this compensable "injury" is the proximate cause of Claimant's need for medical treatment and diagnostic imaging, including a lumbar MRI. Taken in its entirety, the ALJ finds the evidentiary record to contain substantial evidence to support a conclusion that Claimant's MVA and not a "natural" episode of back pain or an unrelated sprain/strain event caused his current symptoms and need for treatment. Consequently, the ALJ concludes that Claimant has established that his need for treatment in the ER and by Dr. Paz and PA Glass was causally related to his work-related MVA on January 21, 2016. Moreover, the totality of the evidence presented establishes that the care, including the diagnostic testing, i.e. lumbar MRI was reasonable and necessary given Claimant's continued pain and functional decline. Consequently, the ALJ concludes that Respondents are liable for Claimant's care at Spanish Peaks Regional Health Center as well as the treatment provided by Dr. Paz and PA Glass.

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that he suffered a compensable injury to his low back as a consequence of an MVA occurring in the course and scope of his employment on January 21, 2016.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation fee schedule, to cure and relieve Claimant from the effects of his low back injury, including the care provided at Spanish Peaks Regional Health Center as well as the treatment provided by Dr. Paz and PA Glass.

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

DATED: September 20, 2016

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

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

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

ISSUES

- Did Claimant suffer a compensable injury to his left shoulder and left biceps on January 15, 2016 arising out of and in the course of his employment?

- Did Claimant suffer a compensable injury to his left biceps on January 28, 2016 arising out of and in the course of his employment?

- What was Claimant's average weekly wage?

- If Claimant sustained a compensable injury, is he entitled to temporary total disability benefits from January 29, 2016 and continuing?

- If compensable, is Claimant entitled to medical benefits to cure and relieve the effects of his industrial injury?

STIPULATION

The parties stipulated Claimant's AWW was $1,161.00 per week.

FINDINGS OF FACT

1. Claimant has worked as a roofer for over thirty (30) years.

2. Claimant's medical history was significant in that he previously suffered a left shoulder injury on February 26, 2013 while working for another roofing company. He injured his shoulder after falling on the ice.

3. Medical records from Michael McKenna, D.O. for the 2013 injury were admitted at hearing. Claimant underwent conservative treatment consistent primarily of medications. Plain x-rays were taken which showed no fractures or dislocations. On March 5, 2013, Dr. McKenna evaluated Claimant and found full range of motion ("ROM") in the left shoulder. Claimant was placed at MMI with no impairment and given a full-duty release. An M-164 was completed at that time.

4. Claimant returned to Dr. McKenna on June 11, 2013, reporting a worsening of symptoms. Claimant denied an intervening injury and noted he was doing more supervisory tasks in his job. At that time, Dr. McKenna noted marked weakness, crepitans and reduced ROM (abduction) in Claimant's left shoulder. An MRI was ordered. The ALJ infers Dr. McKenna believed Claimant's condition was related to the February 26, 2013 injury and, on that basis, he ordered the MRI and continued to treat Claimant. Dr. McKenna's opinion was persuasive to the ALJ.

5. On June 20, 2013, an MRI was done on Claimant's left shoulder at Platte Valley Medical Center. The films were read by Vincent Herlihy, M.D., whose impression was complete full-thickness tear of the supraspinatus tendon insertion with 2cm of retraction of the form fibers and no muscle belly atrophy; moderate tear of cranial subscapularis insertion with mild to moderate underlying tendinosis; moderate medial subluxation of the long head of the biceps tendon into this defect; small area of irregular partial-thickness tearing of the articular side of the anterior infraspinatus insertion without significant tendon retraction or muscle atrophy; mild to moderate acromioclavicular osteoarthritis with mild subacromial tearing.

6. On June 25, 2013, Dr. McKenna reviewed the MRI results and diagnosed Claimant with a rotator cuff tear. Claimant was referred for an orthopedic evaluation with Kosta Zinis, D.O., who previously performed surgery on Claimant's right shoulder. Dr. McKenna issued work restrictions for Claimant, which included no use of the left arm above the shoulder.

7. Claimant was examined by Dr. Zinis on July 18, 2013. Claimant described 5/10 pain, occasional numbness, tingling, along with pain radiating down his arm. He had pain/weakness in the supraspinatus muscle; and positive empty can, lift-off and Hawkins tests. Surgery was discussed as an option and Claimant wanted to proceed with the procedure. The ALJ infers Dr. Zinis was of the opinion surgery was necessary to repair the torn rotator cuff and retraction of the supraspinatus.

8. Claimant returned to Dr. McKenna on July 25, 2013. Surgery was noted to be scheduled for November 4, 2013. Claimant was noted to be working as a helper and the restriction of no working above the left shoulder was continued.

9. Dr. McKenna evaluated Claimant on August 27, 2013, at which time it was noted there were issues with the insurance carrier and approval of the surgery. Claimant reported no new injuries and no improvement. Dr. McKenna continued Claimant's restrictions of no reaching overhead and no reaching away from the body.

10. In the office note of October 3, 2013, Dr. McKenna noted things were still on hold regarding approval of the surgery. There were references to an imminent hearing and the fact Claimant was working with a different company. The October 31, 2013 note was similar and, at that time, Claimant was adamant about the need to have his shoulder fixed.

11. James Lindberg, M.D. performed an IME on Claimant on November 19, 2013. In the report of the same day, Dr. Lindberg concluded Claimant had an intervening event and that the torn rotator cuff was not a compensable injury. His report stated:

> "IMPRESSION: My impression is that he had significant shoulder pain from the slip and fall on February 26, 2013. This completely resolved by March 5, 2013. Then he again began complaining of pain somewhere in the first week of June 2013 for which he was seen on June 11, 2013. Two possibilities exist. Either he

> had serious pre-existing damage to his shoulder but was still functional and had a temporary aggravation that resolved completely by March 5, 2013, in which case this was all pre-existing. There was a temporary aggravation that resolved itself. The other possibility is that there was another injury that took place between March 5, 2013 and June 5, 2013 that caused this sudden deterioration. This was not documented nor did [Claimant] say anything about another injury. If he had a pre-existing injury, one could expect him to have significant findings, and such a rapid resolution of his symptoms on March 5, 2013, could be consistent with a pre-existing injury. My best guess is that he had an intervening incident that caused his significant problems that were found on the MRI done on June 20, 2013."

The ALJ was not persuaded by this opinion, as there was no evidence that an intervening event caused Claimant's symptoms in 2013. In fact, Dr. McKenna asked Claimant about a subsequent injury and ruled this out. The ALJ notes Dr. Lindberg's use of the phrase "best guess" raises the question whether this was an opinion within a reasonable degree of medical probability and reduced the cogency of Dr. Lindberg's opinion.

12. Claimant returned to Dr. McKenna on December 3, 2013, who noted Claimant continued to have pain in the left shoulder, which was a cause of sleep disruption. Claimant's work restrictions were continued. There was no evidence in the record that Claimant returned to Dr. McKenna after this appointment.

13. Claimant testified he received injections through Kaiser, which helped the pain in his shoulder.[1] There were no medical records admitted at hearing which showed Claimant received treatment from December 4, 2013 to January 30, 2016. There was no evidence Claimant suffered another injury during this time.

14. Claimant testified that although he had pain in the left shoulder, he did not receive treatment from 2013 through January 2016. He said he was able to perform his regular job duties for various roofing companies, which included lifting buckets of tar, roll roofing, tools and shingles. The ALJ found Claimant to be credible on this point and no contrary evidence was admitted at hearing. Claimant testified since he was still able to work and chose to settle his W. C. case (D.O.I. 2/26/13) on a full and final basis. The ALJ concludes Claimant's 2013 rotator cuff injury did not prevent him from working through the end of January 2016.

15. In January, 2016, Claimant was working as a service tech for Employer. His job duties included loading materials on roofs, fixing leaks, along with inspecting roofs.

16. On January 15, 2016, Claimant was working for Employer at the Silver Reef Apartment complex. He was loading roofing materials through a roof hatch when the ladder kicked out from under him. He caught himself with his right hand and left

[1] Those records were not admitted at hearing.

upper arm and was able to brace himself. Claimant testified he felt pain in his left shoulder, both in the front and back. He sat in his car for one-half hour and finished his work at the job site that day. The ALJ infers the act of catching his left arm after the ladder kicked away caused force to be placed on Claimant's upper am, including the rotator cuff.

17. Claimant did not report the January 15, 2016 incident to his supervisor. Claimant understood he was supposed to report this incident to Employer.

18. Claimant continued to work until January 28, 2016, when another incident occurred at work. The ALJ credited Claimant's testimony that he experienced pain, but continued working because he needed the money.

19. On January 28, 2016, Claimant was rolling up the window on the company truck when he felt pain in his left biceps. Claimant testified that he felt the biceps slide over and his wife noticed bruising on his left biceps over the weekend.

20. Claimant presented for treatment at Platte Valley Medical Center on January 31, 2016 and was evaluated by Lane Looka, N.P. He complained of left shoulder/humerus pain after a near fall, while on ladder, "the ladder began falling and he hung on the roof with his lft [sic] shoulder and upper arm he notes pain at that time to then on Thursday was rolling down window and felt pop with immediate deformity and pain to left Bicep area he notes since then has had increased pain and bruising to left Bicep". Onset was described as gradual. The medical records from Platte Valley Medical Center further noted that Claimant had "no headache, no neck pain and no dislocation". Claimant's 2013 left shoulder injury was not listed in the medical history section. Claimant was given discharge instructions.

21. While at Platte Valley Medical Center, an MRI was performed on Claimant's left upper extremity. The films were read by Trystain Johnson, M.D. whose impression was complete full-thickness tear of the supraspinatus without thickened fatty atrophy of the muscle belly, no significant change since 6/20/13; full-thickness tearing now extends into the anterior infraspinatus distal 13 mm. There was also a full-thickness tearing of the distal 9 mm of the upper subscapularis, no fatty atrophy of the rotator cuff muscle bellies. The ALJ notes these changes, including the subscapularis tear, were not noted in the first MRI. Last, an interval long head biceps tendon rupture with retraction was noted.

22. A handwritten, undated Report of Injury (RMS)[2] gave the same account of the January 15 and 28 incidents as was provided to NP Looka on January 31, 2016. This document noted the date of injury as 1/15/2016 and the work activity was described as: "getting into roof hatch for repairs"; how injury occurred: "ladder teedered [sic]-lost balance-caught r hand and l upper arm". The medical provider was Platte Valley Medical Center. The ALJ infers the report was made by a representative of Employer to Insurer.

[2] Exhibit 9.

23. An Employer's First Report of Injury was made on February 1, 2016. This report stated the injury occurred while Claimant was getting into a roof hatch for repairs. The injury was listed as a contusion to the right hand.

24. On February 2, 2016, Claimant was evaluated by Helen Voag, M.S., PA-C and Michael Ladwig, M.D. Claimant reported that he was going up the ladder to work on a skylight, the ladder fell and he grabbed on with his left elbow in the hatch. He injured his left shoulder and left arm. Claimant thought the arm was improving, but the on January 28, 2106, when he was rolling up the company car window he felt his biceps slide over and experienced bruising the next morning. The handwritten notes specified there were no prior injuries to the affected of body part. These notes were prepared, at least in part by Helen Voag, M.S. PA-C.

25. On examination, purple bruising was noted throughout left bicep, with tenderness noted over the biceps and supraspinatus. Claimant had reduced ROM on flexion and abduction. The ALJ notes both the handwritten notes were signed by Pa-C Voag and counter-signed by Dr. Ladwig, as was the written report. The assessment/impression was: strain of muscles and tendons of the rotator cuff of left shoulder, strain of muscles, facia and tendon of long head of the biceps left arm. The written report stated there was a greater than 51% probability that this was a work-related injury or condition. On the M-164, Dr. Ladwig answered affirmatively that the injury/illness was work-related. Dr. Ladwig stated Claimant was unable to work from February 2, 2016.

26. On February 5, 2016, Claimant was evaluated by Mitchel Robinson, M.D., who reviewed the MRI results. Dr. Robinson noted the MRI showed a chronic full-thickness tear of the rotator cuff involving the supra, infra and upper subscap with an acute biceps tendon rupture. The plan was to move forward with surgery, but Dr. Robinson noted due to the chronicity of the tear, it might not be repairable.

27. A Worker's Claim for Compensation, dated February 8, 2016 was completed by Claimant. Claimant stated he was "loading materials threw [sic] hatch for roof repairs" just before the accident occurred. The injury occurred when a ladder kicked out from under his legs and Claimant "caught himself with right hand and left upper arm; got ladder back on feet before falling". Claimant described the injury as torn RC and neck pain. The document stated he reported the injury to supervisor/Robert Burger.

28. Andrew Parker, M.D. issued a record review opinion, dated February 12, 2016. He noted that Claimant's rotator cuff tear had not appreciably increased in size compared to its status in 2013. Dr. Parker observed that Claimant had settled his 2013 claim and elected not to proceed with surgery. Dr. Parker believed that the patient's current rotator cuff pathology should be treated though private insurance, since he closed the 2013 claim. Dr. Parker stated Claimant's biceps rupture was not a surgical problem and should be treated with rehabilitation.

29. Claimant returned to Dr. Ladwig on February 16, 2016, at which time he noted constant left shoulder pain, as well as neck/back pain. Claimant also reported numbness and tingling in the left arm. Significantly, the handwritten treatment note documented Claimant's past medical history of a left rotator cuff tear from an on-the-job injury three years ago, which was never repaired.[3] Claimant was noted to have received intermittent shoulder steroid injections for the 2013 injury. The ALJ infers Dr. Ladwig was aware of Claimant's 2013 injury and believed Claimant's 2016 condition was work-related.

30. Medications were prescribed and Dr. Ladwig issued restrictions. Specifically, it was noted Claimant could return to modified duty with no lifting, repetitive lifting, carrying, pushing/pulling greater than 0 pounds for the left arm. Claimant was also restricted from reaching overhead or away from his body with the left arm.

31. Claimant returned to Dr. Ladwig on March 1, 2016. At that time, Dr. Ladwig's work-related diagnoses were fall; left rotator cuff tear; left biceps tendon tear. Dr. Ladwig continued Claimant's work restrictions, which were the same as from the 2/16/16 evaluation.

32. Claimant received treatment for the rotator cuff tear through his personal doctors at Kaiser Permanente. These records detail a patient visit with Patrick Martin, D.O. on February 29, 2016. The health problems reviewed included: parasthesias; traumatic left rotator cuff tear, subseq; and left biceps injury, subseq. Claimant was scheduled for surgery on May 12, 2016 with James MacDougall, M.D. at Good Samaritan.

33. Dr. Lindberg performed a second IME on March 8, 2016. At that time, Dr. Lindberg's impression was that Claimant had progression of disease of his rotator cuff which was not acute. Dr. Lindberg opined this was a chronic tear and the biceps tendon rupture was a result of his long-standing rotator cuff tear. He agreed with Dr. Parker that the biceps tendon rupture was non-surgical and the rotator cuff tear, as well as other findings were pre-existing. Dr. Lindberg opined Claimant should seek care under Kaiser. He did not believe the January 2016 incident were compensable and would not award any impairment for the shoulder injury.

34. Claimant confirmed he underwent surgery to repair his rotator cuff and biceps. The Kaiser Permanente records also documented a follow-up appointment with Dr. MacDougall, along with physical therapy.

35. A bill from Good Samaritan was admitted into evidence.[4] Claimant testified this bill was related to the rotator cuff surgery.

36. Dr. Lindberg testified as an expert in orthopedic surgery on behalf of Respondents. He reviewed additional medical records after performing the IME on

[3] Exhibit 2, p. 58; Exhibit G, p. 77.

[4] Exhibit 7.

Claimant. He testified that following the January 15, 2016 incident, Claimant had no real disability, as he continued to work. Dr. Lindberg testified that Claimant's 2016 MRI was largely identical to the MRI that was taken in 2013, with the exception of the biceps tendon. The ALJ notes there were differences in the MRIs (i.e. full-thickness tearing now extends into the anterior infraspinatus distal 13 mm; a full-thickness tearing of the distal 9 mm of the upper subscapularis), which were not discussed by Dr. Lindberg. He testified that Claimant had no new injury to his rotator cuff in 2016. Dr. Lindberg testified that there was nothing that would have changed Claimant's pre-existing need for rotator cuff surgery between the 2013 injury and January 15, 2016.

37. Dr. Lindberg testified Claimant had damage to the biceps tendon in 2013, which included tendinitis and subluxation. He stated the long head of the biceps tendon tore, which is where Claimant had subluxation in 2013. Dr. Lindberg testified that the biceps tendon is protected by the rotator cuff from impinging upon the acromion, a bone on top of the shoulder. Dr. Lindberg said once the rotator cuff is taken away, this causes the humeral head to rub against the acromion, tearing the biceps tendon and eventually resulting in rupture.

38. Dr. Lindberg testified the biceps tendon could have torn at any time, including with the lifting of Claimant's arm or waving goodbye, and did not require any special event or force to tear. He testified the typical mechanism of injury for a healthy biceps tendon involves use of excess force, such as weight lifting. Dr. Lindberg opined Claimant had a chronically damaged subluxing biceps tendon with tendonitis, which combined with his rotator cuff tear, resulted in his biceps tendon being susceptible to tear with minimal force. Dr. Lindberg testified that he would have expected Claimant's biceps tendon to deteriorate naturally given its status in 2013. The ALJ credited Dr. Lindberg's expertise and his explanation of the anatomy of a shoulder. The ALJ was persuaded by Dr. Lindberg's testimony that the rupture of the biceps tendon could have happened anywhere. There was nothing intrinsically related to Claimant's work duties or a risk present at the workplace which caused the biceps tendon tear.

39. Claimant proved it is more probable than not he suffered an aggravation of his preexisting left shoulder condition on January 15, 2016. This aggravation was a cause of Claimant's disability

40. Claimant's use of the window crank on January 28, 2016 did not constitute a special hazard related to his employment.

41. Claimant has not worked since January 29, 2016.

42. There were no medical records introduced into evidence which documented Claimant was at MMI or had been released by an ATP.

43. Based upon the stipulated AWW of $1,161.00 per week, Claimant's TTD benefits are payable at a rate of $774.00 per week.

44. There was no evidence before the ALJ that Claimant's biceps tendon rupture required surgery.

45. Based on a totality of the evidence, it was the combination of the January 15, 2016 injury to Claimant's rotator cuff and the January 28, 2016 rupture of the biceps tendon which caused Claimant to stop working. Claimant underwent surgery on his rotator cuff and has not returned to work, nor have his restrictions been lifted. Claimant's injury to his left rotator cuff was one of the proximate causes of his disability.

46. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

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

General

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

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

Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

Compensability

Claimant contends that he sustained a compensable injury on January 15, 2016 and January 28, 2016. Claimant acknowledged he previously suffered an injury to his left shoulder, but was able to work full time thereafter. Even though surgery was recommended in 2013, Claimant argued that the events which occurred in January 2016 while working for Employer arose out of and were in the scope of his employment. Claimant asserted these injuries directly caused him to be disabled from working.

Respondents put forth several arguments as to why the claim was not compensable, starting with the fact that Claimant had previously been diagnosed with a rotator cuff tear and surgery was recommended in 2013. Respondents averred this pre-existing condition degenerated and this was the cause of Claimant's need for treatment in 2016, as well as the cause of the biceps tendon rupture. Respondents relied upon the expert opinions of Dr. Lindberg to support these contentions. Respondents also argued that Claimant was not a credible witness, as he failed to report the January 15, 2016 incident, arguing this raised the question whether this incident actually occurred. Respondents also pointed to the lack of history found in the Platte Valley Medical Center records and those of Dr. Ladwig to support their contention Claimant was not credible.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing a service for Respondent-Employer arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. §§ 8-41-301(1)(b) & (c), C.R.S.; *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); § 8-41-301(1)(c), C.R.S. The Workers' Compensation Act creates a distinction between the terms "accident" and "injury". The term "accident" refers to an "unexpected, unusual or undesired occurrence". § 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); see also § 8-40-201(2) (injury includes disability resulting from accident).

A "compensable" injury is one which is disabling and entitles the Claimant to compensation in the form of disability benefits. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). Conversely, no benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury". *Id*.; § 8-41-301, C.R.S. The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

January 15, 2016

As determined in Findings of Fact 2-10 and 12, Claimant was injured in 2013 as a result of falling at work and was diagnosed with a torn rotator cuff. Surgery was recommended at that time, however, the surgery was not authorized. Claimant did not proceed with the surgery and settled the workers' compensation claim associated with the 2013 injury. There was no evidence the torn rotator cuff prevented Claimant from working or that he was disabled as a result of the 2013 injury. In fact, Claimant's testimony established the opposite, namely that he continued working up to the incidents which formed the basis of this claim. (Finding of Fact 14).

Turning to the events of January 15, 2016, the ALJ found Claimant's description of what occurred that day credible. Specifically, Claimant proved he was working for Employer at the location specified and was loading roofing materials through a hatch. When the ladder kicked out from beneath his feet, he braced himself with his right hand and left arm. Claimant’s description of what occurred was consistent, both through his sworn testimony and in what he reported to physicians. (Findings of Fact 16, 20 & 22). A reasonable inference derived from this event is that it put force on Claimant's already torn rotator cuff and the surrounding structures of the left shoulder.

Furthermore, although Claimant felt pain after the incident on January 15, 2016, he continued working. (Finding of Fact 18). The ALJ declined to find that Claimant's failure to report the injury led to the conclusion that this event did not occur. Even though Claimant knew he was supposed to report such an injury, the ALJ credited Claimant's testimony that he needed the money and continue to work. As such, Claimant's explanation regarding failure to report this injury was credible. Accordingly, the evidence before the Court led the ALJ to conclude that the January 15, 2016 incident aggravated Claimant's pre-existing condition.

The ALJ's analysis comports with the principles articulated by the Colorado Supreme Court in *Colorado Fuel and Iron Corp. v. Industrial Commission*, 380 P.2d 28, 30 (Colo. 1960) in which it held Respondents can be liable for the aggravation of a pre-existing condition, which results in the need for medical treatment. Where Claimant had a dormant pre-existing physical condition, which had not interfered with his ability to do work ,"a direct causal connection between a precipitating event and the resulting disability can be proved by lay testimony and without affirmative medical testimony”. *Id.*

Subsequent decisions reinforced the precept that when a pre-existing condition is aggravated by an employee's work, the resulting disability is a compensable industrial injury*. Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. App. 1990). As the Court of Appeals held in *Cowin & Co. v. Medina,* 860 P.2d 535, 538, an employer must take an employee as it finds him/her, “so that the employer is responsible for any increased disability resulting to an injured worker from a preexisting weakened condition”. *Id.*

As the Court in *Siefried v. Industrial Commission*, 736 P.2d 1262, 1263 (Colo. App. 1986) postulated: “If a disability were 95% attributable to pre-existing, but stable, condition and 5% attributable to the occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling”. There must be a direct causal relationship between the precipitating event and the resulting injury. *Id.*

As found, the January 15, 2016 incident caused Claimant to experience symptoms in his shoulder which were referable to the rotator cuff. These symptoms included now constant pain, numbness and tingling. (Finding of Fact 29). Claimant ultimately required surgery to repair the rotator cuff. Prior to the January 15, 2016 incident, there was no evidence Claimant required medical treatment for more than two years for his shoulder. (Finding of Fact 13). Claimant's testimony and the medical records established the injury on January 15, 2016 aggravated his preexisting condition and was a cause of his disability. *Colorado Fuel and Iron Corp. v. Industrial Commission*, *supra*, 380 P.2d at 30.

The ALJ considered Respondents' contentions and specifically, Dr. Lindberg's expert testimony on both the question of whether Claimant was injured and on the causation issue. The ALJ was not persuaded by Dr. Lindberg's testimony for two reasons. First, Dr. Lindberg originally concluded (in 2013) that Claimant's torn rotator cuff was not work-related. This conclusion was derived from a faulty premise, namely, Claimant suffered an intervening injury after being released by Dr. McKenna. Dr. Lindberg described this as his "best guess". There was no factual support for this conclusion by Dr. Lindberg, as it was equally possible that Claimant's symptoms related to the torn rotator cuff simply increased after a period time. As found, Dr. McKenna excluded the intervening event as a potential cause after discussing it with Claimant. As Claimant's ATP for the 2013 injury, Dr. McKenna's opinion was more persuasive to the ALJ. (Finding of Fact 4).

By virtue of his role as the independent medical examiner in connection with the prior claim, Dr. Lindberg had already come to a decision about some of the underlying facts in this case, including his belief that the 2013 injury was not work-related. While testifying, Dr. Lindberg's opinions that Claimant's symptoms came only from degenerative changes arising out of the original injury took on an intractable quality. This hurt Dr. Lindberg's credibility on whether the January15, 2016 incident aggravated the underlying condition of Claimant's rotator cuff. Dr. Lindberg gave the impression while testifying that he would never agree that Claimant's underlying condition could be aggravated by an incident at work.

Second, Dr. Lindberg testified the January 15, 2016 incident did not appear to be much of an injury, while not having analyzed whether it could have caused additional symptoms related to Claimant's rotator cuff. Dr. Lindberg testified there was no real disability, although Claimant had pain. Last, Dr. Lindberg said the subsequent MRI was "identical", but as found, there were differences noted by the radiologists. (Finding of Fact 21). Dr. Lindberg spent no time explaining whether the differences were significant, noting only that believed these were a result of a degenerative process.

Contraposed against Dr. Lindberg's opinion was the opinion of Dr. Ladwig, who while noting Claimant's history, found Claimant's injury was work-related. (Findings of Fact 25 & 29). The ALJ credited this opinion and concluded Claimant aggravated his rotator cuff tear, which preexisted this incident.

January 28, 2016

The evidence before the ALJ established that an incident occurred on January 28, 2016. More particularly, Claimant was in a company vehicle and operated the manual window crank, which caused pain in his biceps. Although Respondents argued Claimant was not credible, as the emergency room recorded he was rolling up the window and he testified he was rolling down the window, this was not determinative for the ALJ.

An injury which results from the aggravation of a preexisting condition, which then combines with a hazard of employment is compensable*.* *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). However, to be considered an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. *See Ramsdell v. Horn*, 781 P.2d 150, 151 (Colo. App. 1989).

A special hazard of employment is one which increases either the risk of injury or the severity of injury when combined with the pre-existing condition, which is the direct or precipitating cause of the injury. *Id.* Stated another way, the question in this case was whether Claimant proved he was exposed to an employment hazard that he did not generally encounter outside the workplace. *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992).

As determined in Findings of Fact 37 & 39, the act of operating the manual window crank was not unique to Claimant's work as a roofer that day. This injury could have occurred either on the job or away from it. As such, it did not meet the "arising out of" test for compensability and Claimant is not entitled to benefits under the Colorado Workers' Compensation Act for the biceps tendon injury.

Medical Benefits

Since Claimant proved he suffered an aggravation of his preexisting condition (torn rotator cuff), he is entitled to medical benefits to cure and relieve the effects of the January 15, 2016 injury. This includes the surgery Claimant underwent to repair the torn rotator cuff. Respondents are required to provide reasonable and necessary medical benefits to Claimant.

Temporary Total Disability Benefits

As found, Dr. Ladwig issued work restrictions when he examined Claimant on February 2, 2016. There was no evidence in the record that Dr. Ladwig or another ATP released Claimant to regular duty or that he was at MMI. (Finding of Fact 42). As determined in Finding of Fact 44, it was the combination of Claimant's preexisting rotator cuff tear, the incident on January 15, 2016 and the incident on January 28, 2016 that caused his disability.

Even though only one of these incidents was found compensable, nevertheless, Claimant met his burden and proved that he was disabled and suffered a wage loss, which was due in part to the industrial injury. *PDM Molding v. Stanberg,* 898 P.2d 542 (Colo. 1995) ["If a claimant establishes that his or her work-related injury contributed to some degree to the wage loss, the claimant is eligible for temporary total disability benefits pursuant to section 8-42-105"]. Claimant was disabled as a result of these incidents. Accordingly, Claimant is entitled to TTD benefits from February 2, 2016 and continuing, until terminated by law.

As noted above, the parties stipulated Claimant's average weekly wage was $1,161.00 per week. Therefore, TTD benefits are payable at a rate of $774.00 per week.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury to his left shoulder on January 15, 2016 while working for Employer and is entitled to benefits under the Colorado Workers' Compensation Act.

2. Respondents shall provide medical benefits to Claimant to cure and relieve the effects of the January 15, 2016 injury. This includes the medical bill from Good Samaritan Hospital, which is to be paid pursuant to the Colorado Worker's Compensation Fee Schedule.

3. Respondents shall pay Claimant TTD benefits at a weekly benefit rate of $774.00 from January 29, 2016 and continuing, until terminated by law.

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

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

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

You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 15, 2016

Digital signature

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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 13, 2015 until terminated by statute.

2. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Concrete Architectural Design performs commercial and residential concrete projects. The company is owned by Leo Urbina. Leo Urbina's brother is Jessie Urbina. Jessie Urbina supervises concrete projects and performs administrative functions, including bookkeeping, for Concrete Architectural Design.

2. On June 9, 2015 Claimant began working for Concrete Architectural Design as a Laborer. On October 9, 2015 he injured his back during the course and scope of his employment when he stumbled while lifting a cement form.

3. Employer was the general contractor on the job site where Claimant was injured. Concrete Architectural Design was the subcontractor and lacked Workers' Compensation insurance coverage. Employer accepted liability as the statutory employer.

4. Claimant explained that he reported his injury to Leo and Jessie Urbina. He was permitted to obtain medical treatment from the physician of his choice. On October 13, 2015 he visited Platte Valley Medical Center for an examination. Emergency Room physician R.M. Tharayll, M.D. excused Claimant from work. On October 14, 2015 Claimant returned to Platte Valley Medical Center. He was diagnosed with a lumbar strain and prohibited from regular work until "seen by occupational health."

5. Claimant testified that, after he was discharged from Platte Valley Medical Center, the billing department informed him that Concrete Architectural Design lacked Workers' Compensation insurance coverage. He was thus responsible for making other financial arrangements for the payment of medical bills. Claimant explained that he could not visit occupational health because he lacked the financial resources to pay for medical treatment. He has thus not been released to work by a physician or reached Maximum Medical Improvement (MMI). Claimant noted that he has not worked since October 13, 2015 because of his October 9, 2015 industrial injury.

6. Claimant explained that he earned $16.00 per hour while working for Concrete Architectural Design. He typically worked 40 hours each week plus 5-6 hours of overtime.

7. On June 29, 2016 the parties conducted the post-hearing evidentiary deposition of Jessie Urbina. Jessie Urbina testified that Claimant earned $16.00 per hour Claimant was not promised any set number of regular or overtime hours each week. He noted that Claimant earned time and one-half pay for working in excess of 40 hours per week. Payroll records reveal that Claimant's did not consistently work 40 hours each week or earn overtime pay. Jessie Urbina commented that the busiest season for concrete work is during the summer months and the number of jobs decreases during the fall.

8. Payroll records reveal that for the 10 week period from June 19, 2015 through October 9, 2015 Claimant earned a total of $5,350.75 from Concrete Architectural Design. Dividing $5,350.75 by 10 yields an Average Weekly Wage (AWW) of $535.00. An AWW of $535.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

9. On May 25, 2016 Respondents filed a General Admission of Liability (GAL) in which they acknowledged liability for Claimant's medical treatment. Respondents subsequently admitted liability for TTD benefits based on an AWW of $90.00.

10. Jessie Urbina testified that he learned from a co-worker that Claimant had worked for an entity named "Big D" subsequent to his October 9, 2015 back injury. He explained that he contacted the bookkeeper for Big D about Claimant's employment with the company. After confirming Claimant's social security number, the bookkeeper sent Jessie Urbina a report reflecting that Claimant worked for two weeks for Big D in January 2016 and earned a total of $298.38.

11. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period October 13, 2015 until terminated by statute. On October 9, 2015 Claimant suffered an admitted injury to his back during the course and scope of his employment with Concrete Architectural Design. On October 13, 2015 he visited Platte Valley Medical Center for an examination. Dr. Tharayll excused Claimant from work. On October 14, 2015 Claimant returned to Platte Valley Medical Center. He was diagnosed with a lumbar strain and prohibited from regular work until "seen by occupational health." Claimant subsequently learned that he was responsible for the payment of medical bills. However, he explained that he could not visit occupational health because he lacked the financial resources to pay for medical treatment.

12. Claimant's October 9, 2015 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Moreover, Claimant has not been released to work by a physician or reached MMI. Accordingly, Claimant is entitled to receive TTD benefits

for the period October 13, 2015 until terminated by statute. However, the record reveals that Claimant earned $298.38 while working for Big D in January 2016. Respondents are thus entitled to an offset of TTD benefits in the amount of $298.38.

CONCLUSIONS OF LAW

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

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

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

Temporary Total Disability Benefits

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant

must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

5. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period October 13, 2015 until terminated by statute. On October 9, 2015 Claimant suffered an admitted injury to his back during the course and scope of his employment with Concrete Architectural Design. On October 13, 2015 he visited Platte Valley Medical Center for an examination. Dr. Tharayll excused Claimant from work. On October 14, 2015 Claimant returned to Platte Valley Medical Center. He was diagnosed with a lumbar strain and prohibited from regular work until "seen by occupational health." Claimant subsequently learned that he was responsible for the payment of medical bills. However, he explained that he could not visit occupational health because he lacked the financial resources to pay for medical treatment.

6. As found, Claimant's October 9, 2015 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Moreover, Claimant has not been released to work by a physician or reached MMI. Accordingly, Claimant is entitled to receive TTD benefits for the period October 13, 2015 until terminated by statute. However, the record reveals that Claimant earned $298.38 while working for Big D in January 2016. Respondents are thus entitled to an offset of TTD benefits in the amount of $298.38.

Average Weekly Wage

7. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007). An AWW of $535.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

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

1. Claimant shall receive TTD benefits for the period October 13, 2015 until terminated by statute.

2. Respondents are entitled to an offset of TTD benefits in the amount of $298.38.

3. Claimant earned an AWW of $535.00.

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

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

DATED: September 16, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-626-898-02

ISSUES

The issues presented for determination were:

1. Whether the Claimant has proved by a preponderance of the evidence that future medical benefits are reasonably necessary to relieve the effects of his injury or prevent deterioration of her condition.

2. Whether the Claimant's Average Weekly Wage (AWW) should be increased or whether the issue is barred by C.R.S. §8-43-203(2)(b)(II)(A).

FINDINGS OF FACT

1. The Claimant worked for Employer at an inpatient resident treatment facility for high risk juveniles who had been discharged unsuccessfully from other programs. She started working there in June of 2002.

2. The Claimant testified credibly that she was injured on March 5, 2003 when she was kicked repeatedly in the head and jaw by a student who she had to physically restrain while taking her to a quiet room.

3. The Claimant testified that she had suffered prior assaults while working at this facility for Employer, specifically,

- a January 8, 2003 assault when she was bit in the left arm and punched in the eye;
- a January 10, 2003 assault when she was hit in left jaw that caused popping in her jaw;
- and a February 12, 2003 assault when she in her right jaw.

The Claimant testified that she didn't initiate claims were for these, and other assaults, because she stated that if she filled out forms every time, she would have constantly been filling out forms. Additionally, the Claimant was seen by the on-site nurse who determined whether to send employees to a doctor.

4. On November 18, 2013, Dr. Kristin Mason performed a Division IME, including a thorough medical records review. Dr. Mason opined that the Claimant was at MMI for her psychiatric and physical issues (Respondents' Exhibit A, p. 31). The parties agree that the Claimant is at MMI.

5. Respondents filed a Final Admission of Liability on January 14, 2014 admitting for post-MMI medical care and claiming an overpayment (Claimant's Exhibit 7; Respondents' Exhibit A).

6. The Claimant stipulated at hearing that a Hearing Application filed in response to the January 14, 2014 Final Admission included as issues permanent total disability and the overpayment claimed by Respondents but it did not specifically list the AWW issue.

7. On May 23, 2014, the Claimant's office sent defense counsel a letter that outlined the amount of Social Security disability payments the Claimant had recently been awarded. The letter outlined the amount that the Claimant's counsel felt was appropriate for any offset or overpayment, including the amount owed to Claimant in AWW when including COBRA benefits. The letter included a copy of the COBRA letter which showed that the Claimant's AWW increased to $525.06 with inclusion of the COBRA benefit. Defense counsel was asked to correct the overpayment information and pay the Claimant the amount owed. This letter was to defense counsel again on May 14, 2015. The Claimant testified that, as of the date of hearing, the amount the Claimant outlined as an offset has not been corrected by Respondents or paid to the Claimant.

8. Respondents filed a second Final Admission on an unknown date in December, 2014 in which they again admitted for post-MMI medical care. This Final Admission also claimed an offset and overpayment due to the Social Security award (Claimant's Exhibit 8). The Claimant filed an objection to the Final Admission on January 21, 2015 stating that it was invalid due to an incomplete date (Claimant's Exhibit 9).

9. Respondents filed an application for hearing on January 21, 2016 which listed the issue of medical benefits, authorized provider and reasonably necessary, modification of maintenance care and request to de-authorize a treating physician (Claimant's Exhibit 10).

10. In response to that Application, the Claimant listed the issues raised by Respondents. The Claimant also added the issues of AWW, and stated that she wanted "her AWW calculated to include her medical benefits and her TT & PP benefits adjusted accordingly" (Claimant's Exhibit 11).

11. The Claimant testified that since her March 2003 work injury, she has had the following problems/symptoms: slow and confused thinking and speech; sleeping difficulties due to pain and nightmares; headaches that are worse than any before work injury; anxiety and depression; eye pain that may be related to her jaw condition; blurry vision, possibly due to use of Topomax; jaw pain with noise and limited jaw movement; diet limited and difficulty speaking due to jaw pain and inability to open jaw very far; dizziness and nausea; neck pain with popping and limited range of motion; and upper back pain that radiates down into shoulders and arms to her hands.

12. The Claimant testified that her physician recommended a taper off from narcotics in May of 2012 and by May of 2013, the Claimant's pain levels were lower and she had better function and her narcotic use was down. She testified that by October 2013, she was off the narcotics and doing better. The Claimant testified that, contrary to the DIME doctor's recommendation in her November 18, 2013 report that Claimant be weaned off narcotics, she was not on narcotics at the time of the DIME. The medical records from Boulder Community Hospital support a gradual tapering of the Claimant narcotics and reduction of all medications (Claimant's Exhibit 2, pp. 34-41).

13. The Claimant testified that her current medications are: Remeron and Cymbalta for depression and pain; Topomax for headaches; Maxalt for jaw pain; Flexeril for pain; Lorazepam for anxiety; Tamazepam for sleep; Phenegren for nausea; and 2 topical compounds for pain. The medications she takes every day are Remeron, Cymbalta, Topomax. She also uses the Alpha hot/cold stimulator and her jaw splints daily. The rest of the medications are taken as needed, but the Claimant testified that, when she receives her injections, she requires fewer medications. When she does not have the injections, her medication needs increase.

14. The Claimant testified that physical therapy with ultrasound, infrared and passive exercises help her to open her mouth more and increase her jaw strength. She has not had the latest physical therapy that was prescribed by her doctors because it has not been authorized by Insurer. The Claimant testified that she needs the physical therapy both after her injections to increase their effectiveness, as well as sometimes between injections.

15. The Claimant testified that she receives Hyalgan injections for jaw pain; epidural steroid injections for neck, upper back and arm pain; and Botox injections for headaches and some neck pain. About 1 month after her DIME examination, Claimant had her first Hyalgan injection series of 3 injections. Claimant testified that these injections, combined with her Botox injections, increased her functioning dramatically. Her sleep improved, her pain was reduced, her jaw movement increased for 2 to 3 months, and her medication use was decreased. The Claimant that specific functional gains include being able to wash dishes and do laundry and she is sleeping more normally so she can complete tasks because she is able to keep track of what she is doing.

16. The Claimant had her second set of Hyalgan injections in February, 2015 and a third set in July, 2015. The Claimant testified that they provided the same relief for the same duration of time. The Claimant stated that she has not had any Hyalgan injections authorized by Respondents since July, 2015, and her functioning has decreased. It is harder to eat, her jaw is very painful, and her sleep cycle is confused. She can eat salads and vegetables after the injections, but her diet is limited to soups and smoothies when she is unable to have Hyalgan injections authorized because she cannot open her mouth due to pain.

17. The Claimant's Botox Injections, which provide headache relief and some neck pain relief, have not been authorized by the Respondents since December, 2015. The benefits of the injection wore off recently and the Claimant's functioning has declined. She has more pain, she is more tired, and her sleep is more disrupted. Instead of being able to fall asleep at 1:00AM or 2:00AM, now she cannot fall asleep until 4:00AM and so she is tired during the day.

18. The Claimant testified that the Hyalgan injection taken in connection with the Botox injections provided the most significant increase in functioning. It helped with her headaches and jaw pain. The Claimant testified that, after having both in close proximity, her function improved enough that she was able to clean her house.

19. With respect to reporting increases in her function from the injections, the Claimant testified that she would tell the doctors about her increase in functional ability, but she did not have control over what the doctors wrote in the medical reports. In any event, the Claimant testified about some of the medical documentation of functional improvement, specifically:

- 4/21/2015 note of Dr. Dent where she reported that "she has been more active in the last week doing spring cleaning and has been better able to tolerate activity overall. For example, putting the dishes away is no longer painful, and she made it to all her appointments last week"

- 5/19/2015 note of Dr. Dent where she reported "decreased pain levels and increased activity tolerance…

20. Overall, the Claimant testified that the treatment she believes she needs to stay at an increased functioning level includes: Hyalgen injections, epidural steroid injections, Botox injections and physical therapy. She testified that the injections work best when done in the same general time frame about every 2-3 months and the physical therapy works best after a series of the Hyalgen injections and occasionally in between injections when there is a flare. On cross-examination, the Claimant also testified that she needs the medications she currently takes in addition to the injections. Even with the injections, she testified that she cannot stop taking the medications.

21. On May 7, 2014 the PCP at Boulder Community Hospital CNS Bonnie Wilensky noted that the Claimant reported, "Increased pain in the head and neck area. She reports that it has been a long time since she has received injections in the cervical region as well as TMJ injections, which she realizes have been very helpful for her and is likely responsible for the increase in pain she is experiencing. I support her continuing to get this modality, as it is an efficacious part of her treatment plan" (Claimant's Exhibit 2, p. 49). At the hearing, the Claimant testified that this is an accurate statement of the effect on her when she was not receiving the Botox and Hyalgan injections.

22. On November 11, 2015, Dr. Marc Steinmetz performed a medical records review of the Claimant's case. He did not perform a physical examination or meet with

the Claimant. For this review, Dr. Steinmetz was asked to determine if it was reasonably necessary for medical maintenance for the Claimant to receive Botox injections. Dr. Steinmetz reviewed a limited number of records from Dr. Dent and Dr. Leimbach along with the DIME report from Dr. Mason. He noted that the DIME physician did not recommend the Botox injections and recommended discontinuing them (Respondents' Exhibit B, pp. 34-35). Dr. Steinmetz opined that continued Botox injections were not reasonably necessary for this claim. He also noted that the Medical Treatment Guidelines do not recommend Botox injections for cervical headaches and attached the relevant section which states,

> "botulinum injections are no longer generally recommended for cervicogenic or other headaches based on good evidence of lack of effect. There is good evidence that botulinum toxin is not more effective than placebo for reducing the frequency of episodic migraines. It may be considered in a very small subset of patients with 12-15 days/month who have failed all other conservative treatment, including trials of at least three drug classes, and who have committed to any life style changes related to headache triggers.
>
> (Respondents' Exhibit B, pp. 36-36)

In citing to the Medical Treatment Guidelines, Dr. Steinmetz did not distinguish that the Guidelines are for pre-MMI care and the Claimant was receiving maintenance care. The Medical Treatment Guidelines state on page 4: "However, some patients may require treatment after MMI has been declared in order to maintain their functional state. The recommendations in this guideline are for pre-MMI care and are not intended to limit post-MMI treatment."

23. On November 24, 2015, Dr. Steinmetz was asked to provide a second medical records review on the question of whether or not it is reasonably necessary for the Claimant to receive cervical epidural steroid injections for maintenance medical care. Dr. Steinmetz notes that the DIME physician does not recommend epidural injections. He also finds that there is a relative lack of objective independent documentation of functional improvement after prior injections. Based on this, and the DIME physician's opinion, Dr. Steinmetz opined that cervical epidural steroid injections for maintenance medical care were not reasonably necessary for this claim Respondents' Exhibit C).

24. With respect to the Guideline recommendations related to botox injections, the December 9, 2015 report of the Dr. Chloe Dent stated that the Claimant had been tried on amitriptyline, valproic acid, ibuprofen, gabapentin, magnesium, and Lyrica for her neck pain and headaches. The Claimant testified that, to the best of her recollection, she had tried these medications unsuccessfully before beginning to receive Botox injections.

25. With respect to the Guideline recommendations related to epidural steroid injections, the Claimant testified that she received her first ESI on March 25, 2015 and her second one on July 8, 2015. She experienced reduction in neck pain and popping; her upper back/shoulder pain went away; and the numbness and tingling in her arms and hands was significantly better. The effects lasted for 2 to 3 months. The Claimant testified that she has not had any ESI's since July, 2015 because of Insurer denial. As with the denial of her other injections, the Claimant testified that this has resulted in decreased function and increased pain, which is confirmed in the medical records of Dr. Dent.

26. Dr. Leimbach, one of the Claimant's treating physicians, testified as an expert in the areas of physiatry and as to Level II accreditation matters. He has been treating the Claimant since June 3, 2005. Dr. Leimbach took over as PCP when Dr. Cambe retired from the Mapleton Pain Management Center at Boulder Community Hospital. He testified that Dr. Dent has now assumed the role of Claimant's PCP at that program. With reference to Claimant's Exhibit 1, p. 1, his June 3, 2005 medical report, Dr. Leimbach testified that he diagnosed the Claimant with jaw and cervical pain, TMJ joint injury, headaches of mixed migraine/tension type, and cervico-thoracic pain because of jammed facets in the neck which created myospasms. The doctor began treatment with IMS/trigger point dry needling. Dr. Leimbach stated that it is similar to acupuncture but the results are transient. When the Claimant had no significant or progressive change the doctor tried occipital blocks. These also had transient results. In 2006 Dr. Leimbach stated that he switched to Botox injections for the migraine headaches and muscle spasm to try to obtain longer relief. The Botox injections have helped by providing 3-4 months of reduction of headaches and relief from cervical pain/spasm. He noted the relief can vary and overall can be about 2-4 months of actual relief. Dr. Leimbach testified that reasons to continue the Botox injections are that they provide longer relief and that the Claimant was able to reduce her medications and wean off narcotics completely, which Dr. Leimbach believes supports the efficacy of the Botox injections. Specifically, he opines that getting the Claimant off previous high daily doses of OxyContin is a significant benefit warranting continuation of the Botox injections. Dr. Leimbach also testified that the Claimant had functional gains from the Botox injections with the reduction in headaches and muscle spasm. She is not pain free but she has had substantial improvement. When she does not have the injections, her headaches are debilitating. He testified that the Claimant is not working, so those types of gains are not measured, but her increase of function is shown in her ability to engage in more household activities. Dr. Leimbach testified that he doesn't believe he has documented the increases in function in the medical records because this was maintenance treatment at that point, but he specifically recalls discussing these with the Claimant each time. Overall, Dr. Leimbach testified that the Claimant is at a substantial improvement from her baseline condition. He acknowledges that none of the injections are curative, but they are palliative and allow the Claimant to increase her function from day to day. Dr. Leimbach also testified that the DIME doctor was wrong when she stated that the Claimant needed a narcotic taper because she was opioid dependent. Dr. Leimbach testified that Claimant was already off of narcotics at the time of the DIME. Also, the DIME doctor wanted to see a decrease in medication utilization with

the Botox injections, but it had already happened before the DIME when the Claimant tapered off of her narcotics. Dr. Leimbach stated that support for the injections could be found in the range of motion measurements for the Claimant's cervical spine that were obtained at the time of the DIME. At the time of the DIME, Claimant was off of all her narcotics, she had not begun the Hyalgan or ESI injections, and it had been months since her last Botox injection. After the DIME, when the Claimant received her injections, Dr. Leimbach found the Claimant's range of motion to be better than at the time of the DIME. Dr. Leimbach testified that he has never seen permanent weakness from Botox injections because the effects are temporary and wear off. He disagreed with Dr. Steinmetz' opinion to deny Botox and ESI's. Both the Botox and ESI injections have proven helpful for the Claimant for 2 to 3 months, which allowed her to stop her opioids. The ESI's are only done 2 to 3 times a year when the Claimant's radicular symptoms increase. Dr. Leimbach disagrees with Dr. Steinmetz' opinion that Botox is not recommended for headaches or cervicothoracic symptomology. Dr. Leimbach stated that the Claimant has a multifactorial headache with a TMJ factor and migrainous headaches. Botox at low doses reduces muscular spasms and decreases tension. It does not affect cervical discs. Dr. Leimbach testified that there is no placebo effect from the Botox injections. He has seen a reduction in the Claimant's muscle spasms, which is an objective effect that cannot be controlled by the Claimant. Dr. Leimbach stated, that contrary to Dr. Steinmetz' opinion, the Claimant meets the criteria for Botox injections under the MTG. She has tried multiple medication classes that have been unsuccessful. Also, the MTG are guidelines, not dictates for care. They do not apply to the Claimant since MMI on 2/25/13, over 2½ years before Dr. Steinmetz' first report, because the MTG do not apply to maintenance care. Dr. Leimbach stated that the need for Botox, ESI and Hyalgan injections is related to the Claimant's injury and the injections are reasonable and necessary to maintain or improve the Claimant's condition. When done close in time, the Hyalgan injections decrease jaw spasms and pain and the Botox injections decrease spasms and headaches. Dr. Leimbach stated that physical therapy is also necessary to improve the Claimant's function, especially after she has the Hyalgan injections. The doctor recommends 2 to 3 visits for the jaw post Hyalgan injection and 6 to 8 visits to increase general functioning.

27. Dr. Leimbach testified that nothing is permanent for controlling the Claimant's spasms and pain, but if she does not receive the injections her condition will deteriorate. He stated that, if the Claimant is not provided with the injections, she could again require narcotics which are more of a risk to Claimant than the injections. Dr. Leimbach testified that, during the time he has treated the Claimant, he has seen significant improvement in her functioning. She has more cognitive and emotional stability. Although she is still on multiple medications, there has been a decrease in frequency. Some of the medications cannot be decreased in dosage as they are at the lowest levels that can be prescribed. Dr. Leimbach stated that the Claimant's medication regimen is stable, and she must continue to take her medications because the injections cannot take the place of the current medications, such as the ones for anxiety or sleep.

CONCLUSIONS OF LAW

Generally

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

Medical Maintenance Treatment after MMI

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

"If the evidence in a particular case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that he will suffer a greater disability than he has sustained thus far, such medical treatment, irrespective of its nature, must be looked upon as treatment designed to relieve the effects of the injury or prevent deterioration of the claimant's present condition." *Milco Construction v. Cowan*, P.2d 539, 542 (Colo. App. 1992)

In this case, there was conflicting evidence presented about whether or not the Claimant's continued prescription medications along with Botox, Hyalgan and epidural steroid injections are reasonably necessary to prevent the deterioration of her condition.

The Respondents argue that the Claimant is still on a variety of medications with no tapering during the maintenance care and that none of the maintenance care in dispute has improved her functioning. They further argue that the Botox injections are not recommended or supported by the Medical Treatment Guidelines. The Respondents rely on the opinion of Dr. Steinmetz. The Respondents argue that Dr. Leimbach's testimony is not medically credible. They further rely on Dr. Mason's DIME report for the position that there is no support for the Botox injections as medical maintenance care. Similarly, the Respondents argue there is no medical support for the request for epidural steroids as medical maintenance care. The Respondents also dispute the efficacy of the Hyalgan injections, arguing that they have not given the Claimant relief in the form of increased function. Therefore, the Respondents argue there is not sufficient medical support for the Hyalgan injections as medical maintenance care.

The DIME doctor's opinion is not as persuasive as the testimony and medical records of the treating physicians because Dr. Mason was under the mistaken belief that the Claimant was still on opioids so the injections were unnecessary. However, the Claimant had tapered off of the opioids at the time of the DIME examination and she was unable to obtain Botox injections due to Insurer denials. Dr. Steinmetz' opinions are also not as persuasive as the opinions of the treating physicians. He relied on the Medical Treatment Guidelines for his opinion that the Botox and ESI injections were not reasonable and necessary maintenance medical care, but he disregarded the section of the Medical Treatment Guidelines that supported the use of Botox injections under the facts in the Claimant's case. Additionally, Dr. Steinmetz did not address that the Medical Treatment Guidelines may not apply strictly to maintenance care situations.

The ALJ finds the testimony of Dr. Leimbach more persuasive. It was supported by the medical records in part. Further, in terms of the lack of documentation of functional gains, Dr. Leimbach confirmed that the Claimant was reporting her functional gains consistently even where Dr. Leimbach was not comprehensively documenting the same. He also provided specific instances of objective evidence of the positive effects of the medical treatment being offered to the Claimant, including a reduction of her cervical spasms.

In viewing all of the evidence and testimony presented, the Claimant has established by a preponderance of the evidence that, "but for" the medications and the Botox, Hyalgan and ESI injections, her condition can reasonably be expected to deteriorate. Dr. Leimbach has testified that he has seen objective evidence that the injections have improved Claimant's physical condition, and Claimant has testified that the injections have improved her pain and functioning. The medical records from doctors Leimbach, Dent and Aragon support Claimant's statements about the necessity of receiving the injections and the effect on her pain and functioning.

Average Weekly Wage

In this case, with respect to AWW, the issue is whether Claimant is able to pursue an increase of the Average Weekly Wage at the hearing. Respondents have argued that "Neither . . . 8-43-203(2)(b)(II) nor any other provision in the Act states or implies that a claimant may file an objection to an FAL without identifying a contested issue. Likewise, no provision states or implies that issues admitted in an FAL without identifying a contested issue. Likewise, no provision states or implies that issues admitted in an FAL may remain open indefinitely until the claimant identifies a disputed issue and requests a hearing." *Peregoy v. Industrial Claims Appeals Office,* 87 P.3d 261 (Colo. App. 2004). Further, "giving effect to the plain language of § 8-43-203(2)(b)(II), giving consistent, harmonious, and sensible effect to all parts of the statute, and refraining from a strained interpretation, we conclude that a claimant has thirty days after the date the employer files an FAL to file an application for a hearing." *Peregoy v. Industrial Claims Appeals Office, supra.*

Here, the Claimant only endorsed the issue of Average Weekly Wage on the Response to this Application for hearing as filed by Respondents. However, the Respondents filed their Admission of Liability on January 14, 2014. The Claimant did not file an Application for Hearing on AWW within thirty days. The Claimant's Application for Hearing was filed on the sole issue of PTD, for preservation. Thus, the AWW was not a disputed issue subsequent to the Final Admission of Liability. Further, the second Final Admission of Liability did not generate an Application for Hearing subsequent to its filing either.

Section 8-43-203(2)(b)(II)(A) states, in pertinent part:

> "An admission of liability for final payment of compensation must include a statement that this is the final admission by the workers' compensation

> insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation, to whom the claimant should provide written objection, and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing, including the selection of an independent medical examiner pursuant to section 8-42-107.2 if an independent medical examination has not already been conducted."

Further, under the same section:

> "The claimant has thirty days after the date respondents file the admission or application for hearing to file an application for hearing, or a response to the respondents' application for hearing, as applicable, on any disputed issues that are ripe for hearing."

As noted above, the law is clear that the Final Admission of Liability required, and triggered, an Application for Hearing on the issue for it to be considered. Otherwise, the Claimant could continue to assert any issue she wanted subsequent to the filing of the Final Admission of Liability. Unlike the medical benefits issue noted above, this is not a fluid ongoing issue and should been resolved by this point.

Although the Claimant argues the second admission is invalid, there is no evidence to support this assertion, nor evidence the Claimant or her counsel failed to receive it. Further, such alleged "void" second admission does not the vitiate the argument above. The Claimant had thirty days after the January 14, 2014 FAL to file for resolution of the issue of AWW. It remains undisputed she only endorsed it on the Response to this Application for Hearing filed by Respondents. The Claimant also did not seek to reopen the matter by petitioning on the grounds of mistake or error.

Therefore, the ALJ is precluded from considering the issue of an increase to the Claimant's Average Weekly Wage.

Reimbursement of Medical Expenses and Mileage

The Claimant raised arguments in her post-hearing brief for reimbursement of medical expenses and mileage. The Claimant also included Exhibit 13 with correspondence regarding mileage and receipts which was admitted into evidence with no objection. However, this issue was not endorsed on the Respondents' Application for Hearing dated January 21, 2016. Nor was the issue endorsed on the Claimant's Response to the January 21, 2016 Application. The issue was also not listed on either party's Case Information Sheet. The issue was not tried by consent at the hearing.

Therefore, while the Respondents are to reimburse the Claimant pursuant to C.R.S. section 8-43-203(3)(c)(IV), for “mileage expenses for travel to and from work related medical care and to and from pharmacies to obtain medical prescriptions for work-related medical care,” it is not appropriate to consider the issue where the Respondents did not have a full and fair opportunity to present a defense to the issue. The ALJ declines to consider this issue due to a lack of proper notice to the opposing party.

ORDER

It is therefore ordered that:

1. The Respondents shall be liable for reasonably necessary and related post-MMI treatment recommended by the Claimant’s authorized treating physicians, including Drs. Leimbach and Dent, and specifically including Botox, Hyalgan and epidural steroid injections in conjunction with specifically timed physical therapy.

2. The ALJ is precluded from addressing the issue of an increase to the Claimant’s Average Weekly Wage pursuant to 8-43-203(2)(b)(II)(A) and this issue is denied and dismissed.

3. The issue of reimbursement of mileage and expenses was not properly endorsed nor was it tried by consent and this issue is denied and dismissed.

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

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

DATED: September 19, 2016

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

ISSUES

1. Whether the Claimant proved by a preponderance of the evidence that she sustained a worsening of her condition that would entitle her to a reopening of W.C. Case No. 4-909-490 under Section 8-43-303(1), C.R.S.

2. If the Claimant proved that her condition worsened, whether the Claimant proved, by a preponderance of the evidence, that the bilateral L5-S1 microdiscectomies recommended by Dr. DeWitt are reasonably necessary and causally related to the Claimant's January 13, 2013 admitted work injury.

FINDINGS OF FACT

1. The Claimant's date of birth is August 10, 1966, and she is currently 50 years old.

2. The Claimant was employed by Employer as a flight attendant from January 2012 to November 2013. Claimant stopped working as a flight attendant on January 13, 2013 and resigned in November 2013 (Respondents' Exhibit V, p. 0123).

3. The Claimant sustained an admitted work-related injury on January 13, 2013. At that time, she was in Durango, Colorado for an overnight between flights when she woke up at 3:00 a.m. to the hotel's fire alarm. She picked up her suitcase that was on the floor and flung it onto the bed to get dressed. She estimated the weight of her suitcase to be approximately 100 pounds. She did not experience any symptoms at that time. The next morning when she arrived at the airport, her legs gave out and she fell to the floor. She was experiencing pain in her low back with radiation down into her legs. She flew back to Denver but was not able to get to the emergency room. She then flew to Wisconsin, where she resides, to seek medical treatment.

4. The Claimant was initially seen on January 14, 2013 at St. Agnes Hospital in Fond Du Lac, Wisconsin. She was seen by Brenda Brusky, APNP who diagnosed a back strain (Respondents' Exhibit T). APNP Brusky prescribed medications and ice.

5. The Claimant had an MRI of the lumbar spine without contrast on February 12, 2013. Robert Garofalo, MD reviewed the MRI and stated under Impression, "Moderate-sized L5-S1 disc protrusion contacting the S1 nerve roots bilaterally with mild central canal stenosis" (Respondents' Exhibit S).

6. On April 2, 2013, Dr. Mann diagnosed a disc protrusion at L5-S1 with narrowing of the lateral recess bilaterally. He recommended a repeat epidural (Respondents' Exhibit N, p. 0075).

7. On February 15, 2013, the Claimant underwent lumbar interlaminar epidural steroid injection at L5-S1 administered by Dr. Hord (Respondents' Exhibit M, p. 0061).

8. On April 23, 2013, Dr. Mann noted that Claimant did not achieve any relief from the epidural injection and recommended surgical decompression through bilateral L5-S1 laminotomy (Respondents' Exhibit N, p. 0073).

9. On May 8, 2013, the Claimant had an X-ray of the lumbar spine that showed instrumentation at the lumbosacral junction and mild degenerative disc disease (Respondents' Exhibit R).

10. On May 10, 2013, Dr. Mann performed bilateral L5-S1 laminotomy and excision of herniated nucleus pulposus (Respondents' Exhibit Q).

11. The Claimant participated in post-surgery physical therapy with Brooke Roth, DPT, LAT, on May 20, 2013. At that time, the Claimant complained of constant pain that was at best 4/10 when medicated and 9/10 at worst. It was also noted that the Claimant had a history of fibromayalgia (Respondents' Exhibit P).

12. On June 11, 2013, the Claimant was evaluated by Dr. Elizabeth Bensen. The Claimant reported ongoing lower back pain and leg pain. After discussing the options for treatment, the Claimant elected to continue physical therapy (Respondents' Exhibit O).

13. The Claimant returned to Dr. Mann on June 27, 2013 complaining of back pain and leg spasms. He recommended she continue with physical therapy (Respondents' Exhibit N, p. 0067).

14. On July 16, 2013, Dr. Mann noted that the Claimant's leg pain was resolved but she experienced some residual low back pain that bothered her when she rolls over. Dr. Mann felt that the Claimant's pain was related to facet irritation at the L5-S1 level. He recommended steroids and stretching exercises (Respondents' Exhibit N, p. 0065).

15. On August 9, 2013, the Claimant underwent bilateral L5-S1 facet joint injection with fluoroscopy administered by Dr. Hord (Respondents' Exhibit M, p. 0056).

16. An MRI was repeated on August 28, 2013 showing no evidence of any residual disc or recurrent disc (Respondents' Exhibit L).

17. On August 29, 2013, Dr. Mann wrote to Dr. Bensen indicating that the the Claimant's MRI did not show any evidence for nerve compromise. Dr. Mann reported the Claimant was in a great deal of pain on the left on palpation of the sciatic notch and suspected piriformis syndrome. Dr. Mann recommended an injection into the left prirformis for diagnostic purposes (Respondents' Exhibit K).

18. On September 12, 2013, Dr. Mann noted, "She has done quite a bit of exercise and muscle stretching which has helped with her symptoms and she states that they improved to the point where she didn't feel the need to proceed with the piriformis injection. At this point, since she is relatively pain free, we are going to return her to work without restriction." (Respondents' Exhibit J).

19. On March 31, 2014, Dr. Aschberger, a Level II physician in Denver, Colorado perform a permanent impairment evaluation. At the appointment, the Claimant completed a pain diagram complaining of pain on a scale of 1-10 at 4 with 10% recovery as of March 31, 2014. Dr. Aschberger placed the Claimant at maximum medical improvement with 13% whole person permanent medical impairment. Under assessment, Dr. Aschberger noted, "No neuromuscular deficits are identified with the examination. Provocative maneuvers are mildly indicative of irritation. Range of motion demonstrates some mild restriction only." Dr. Aschberger opined that the Claimant's physical examination looked good for postop recovery and he did not recommend a fusion when asked by the Claimant. He further opined that if she experienced objective deterioration, then further workup may be considered but was not warranted at that time (Respondents' Exhibit H).

20. The Claimant requested a Division Independent Medical Examination that was performed by Dr. Striplin on September 30, 2014. Dr. Striplin noted that the Claimant was not under medical care for her lumbar spine and that she complained of constant low back pain with intermittent bilateral lower extremity pain that was worse on the left side. He also noted incontinence with laughing and sneezing that he felt were not work-related. He further opined, "With regard to her low back pain, she has undergone appropriate treatment, has residual symptoms with no focal neurological abnormalities noted on examination, and has undergone a postoperative lumbar MRI scan with no recurrent or residual L5-S1 disc abnormality being found. . . I see no need for consideration of further diagnostic testing, further surgery, maintenance medical care, or formal pain management." He placed the Claimant at maximum medical improvement on September 12, 2013 with 13% whole person permanent impairment (Respondents' Exhibit G).

21. On October 16, 2014, Respondents filed a Final Admission of Liability based on Dr. Striplin's Division IME report admitting to 13% impairment rating for the Claimant's low back and for reasonable and necessary maintenance medical care (Respondents' Exhibit V).

22. At hearing, the Claimant testified that she never fully recovered after surgery in May 2013 (Transcript Hearing p. 31, ll.15-19). The Claimant testified that

within a year, her symptoms worsened. She stated, “The shooting pain in both legs, more so in the left but definitely in both legs. Just the severe back pain. The difficulty in walking and inability to sit for long periods of time and just overall – and just an issue with having to deal with the pain management” (Transcript Hearing p. 33, ll. 4-8). The Claimant testified that she did not sustain any new injuries or accidents (Transcript Hearing p. 34, ll. 7-11). Since being placed at MMI, the Claimant described her worsening symptoms in court: “However, the pain continued. It was –although it was much less than what it was prior to surgery, but again, over time, it has just been coming back and becoming more and more intense. So it’s definitely been a gradual onset, but it is – it has definitely been something that – every day I could definitely feel an increase in what was going on with my body” (Transcript Hearing p. 37, ll. 1-14).

23. On August 7, 2015, the Claimant had a lumbar spine MRI with and without contrast. The findings at L5-S1 showed “mild broad-based disc bulging with right paracentral disc bulge prominence in the right paracentral annulus tear. There is mild mass stenosis in the area of the right lateral recess. Posterior facet arthropathy is mild. There is a minor laminotomy defect. There is no significant foraminal stenosis” (Respondents’ Exhibit F).

24. On September 29, 2015, the Claimant was seen by Dr. DeWitt for complaints of low back and left leg pain. Dr. DeWitt noted that the Claimant’s low back pain was fairly constant and she had difficulty sleeping. He noted that her “left lower extremity pain radiates down the posterolateral leg to the lateral shin/ankle and into the medial foot. She has cramping in the hamstring and ankle to the point where she cannot move. Her left ankle feels swollen lately. She also feels weak in that leg. On the right side, she has been occasionally getting charley horses in the right lateral ankle and to the toes. This happens at night and wakes her up. She cannot sit or stand for any long periods of time. There is no position where she can get comfortable.” Dr. DeWitt’s impression was possible recurrent bilateral L5-S1 disc herniations with bilateral S1 radiculopathies. Dr. DeWitt recommended a S1 selective nerve root blocks to determine if this was her pain generator. He further opined, “I would be inclined to offer her revision bilateral L5-S1 microsurgical discectomies if she has a classic response to selective nerve root blocking” (Respondents’ Exhibit E).

25. On October 1, 2015, Dr. Hendricks performed diagnostic/therapeutic lumbar transforaminal epidural steroid injection/selective nerve root block at bilateral S1 with fluoroscopic guidance (Respondents’ Exhibit D).

26. Jill Buchinger APNP spoke to Claimant by telephone and noted that the Claimant reported 80% improvement in the first several hours after the injections but by 6:00 p.m. the pain had returned (Respondents’ Exhibit C).

27. On October 13, 2015, the Claimant returned to Dr. DeWitt who opined, “She initially had surgery with Dr. Mann. She did very well following that surgery. She is now having recurrent bilateral lower extremity pain. She had selective nerve root blocks of the S1 root and got very good relief from the anesthetic phase and it actually lasted

her most of the day. The pain has now returned. She is interested in surgical options." Dr. DeWitt's impression of the MRI included subtle prominence underneath the traversing S1 roots. Dr. DeWitt felt that the nerve root blocks were indicative of S1 root pathology. He opined that with the subtle findings on MRI and her response to the blocks that she should undergo a revision bilateral L5-S1 microsurgical discectomies (Respondents' Exhibit B).

28. Dr. Allison Fall performed an Independent Medical Examination on April 7, 2016. Dr. Fall opined, "She does report progression of symptoms over the past year and a half. There has been no recurrent trauma or specific event that would account for any new injury or worsening symptoms.She is working in an essentially sedentary position with a standing desk and works four ten-hour shifts. Her only exercise is that she tries to walk and does some stretches. There does not appear to be much in the way of core strengthening exercises. Perhaps a return to more strengthening with stabilization would lead to decrease in symptoms. That would certainly be more favorable than another surgery, which would have no guarantee of benefit and may actually lead to further pain, complications, and possibly fusion. It is for that reason, the subtle MRI findings, and the lack of neurological findings on exam that it is my opinion the surgery recommended by Dr. Dewitt is not reasonable and necessary and related to the work-related injury. Going back through the records, there were comments regarding possible symptoms from a piriformis muscle problem. I have seen this quite often following surgeries. I would certainly recommend addressing muscular issues with core and overall strengthening and possible treatment for piriformis hypertonicity prior to considering any surgery" (Respondents' Exhibit A).

29. Dr. Fall testified at hearing. She was accepted as an expert in physical medicine and rehabilitation. She is also level II accredited at the Division of Workers' Compensation.

30. Dr. Fall testified that her review of the August 28, 2013 and August 7, 2015 MRIs do not show recurrent disc herniation. She further testified that the Claimant's response to the facet injections was not significant for a steroid response, meaning that delayed response that comes on after the steroid acts on the inflammation and takes the inflammation down. Dr. Fall testified that the procedure recommended by Dr. Dewitt is essentially a repeat of the previous procedure. She testified that she evaluated neurological deficits in sensation, strength and reflexes when she evaluated the Claimant, which was normal. She testified Dr. Dewitt tested for neurological deficits and his reported results were normal. Dr. Fall testified that with respect to the Colorado Medical Treatment Guidelines, injections, physical therapy, acupuncture and a trial of medications is treatment that is recommended prior to surgical intervention. Dr. Fall testified the Claimant has had no physical therapy for some time, no acupuncture, no medication trials and no exploration of the potential for piriformis syndrome. In addition, Dr. Fall testified the procedure recommended would not address facet pain. (Transcript of hearing pp. 55, ll. 18-25; pp. 56, ll. 1-25; pp. 57, ll. 1-25; pp. 58, ll. 1-25; pp. 59, ll. 1-18; pp. 60, ll. 1-25; pp. 61, ll. 1-25; pp. 65, ll.1-25).

31. Dr. Fall further testified that there were no objective findings of worsening on the MRI in 2015. When asked if the Claimant's condition has worsened since MMI, she stated, "I would say objectively no, but, you know, subjectively she's reporting that she has, you know, worse pain and worse tolerance. But objectively, an objective exam has not worsened." (Transcript of hearing p. 70, ll. 10-13).

32. Dr. Fall opined that the bilateral L5-S1 microdiscectomies recommended by Dr. Dewitt are not reasonable, necessary or related to the work-related injury of January 13, 2013. She recommended physical therapy, stretching the piriformis, strengthening the core, TENS unit, and discussion of possible facet injections with her treating physician. (Transcript of hearing p. 87, ll. 17-25).

33. During her testimony, Dr. Fall stated that she reviewed the actual MRI films. On May 5, 2016, Dr. Fall authored a letter informing the ALJ and the parties that she was mistaken and had not reviewed the actual films.

34. The Claimant's testimony that her condition has gradually worsened since being placed at MMI is supported by the medical records and is therefore found credible and persuasive.

35. In reviewing Dr. DeWitt's medical records, in conjunction with the Claimant's reports to the other physicians and medical providers that her low back and lower extremity symptoms were increasing, and the Claimant's consistent testimony to that effect, the ALJ finds as fact that the evidence supports that the Claimant's condition has worsened since MMI and the worsening is causally related to the admitted January 13, 2013 work injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

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

Petition to Reopen

The Claimant filed her Petition to Reopen on the ground that her medical condition has worsened. The Claimant initially sustained work injuries on January 13, 2013 when she suffered a herniated nucleus pulposus at L5-S1. The Claimant now seeks medical benefits in the nature of a repeat bilateral L5-S1 microdiscectomies and other care for a worsening low back condition that the Claimant alleges is causally related to her original admitted work injury.

Section 8-43-303(1), C.R.S., provides that an award may be reopened at any time within six years after the date on the ground of a change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. Reopening is not warranted if once reopened, no additional benefits may be awarded. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

As a threshold matter, the Claimant bears the burden of establishing that change in the Claimant's condition is causally related to the original injury. Section 8-41-

301(1)(c), C.R.S.; *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Moreover, medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment, such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *City of Durango v. Dunagan*, *supra*. However, to the extent that the worsening of a condition occurs as the result of an independent intervening cause, then reopening would not be warranted as this is unrelated to the original compensable injury. Whether a particular condition is the result of an independent intervening cause is a question of fact for the ALJ. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002).

The Claimant has established, through her testimony and with the medical evidence, that, subsequent to MMI, her low back condition with symptoms radiating into her lower extremities has worsened. Since being placed at MMI by the Division IME physician on September 12, 2013, the Claimant has experienced a gradual worsening of pain in her low back and legs. At hearing, the Claimant testified that within a year from MMI her symptoms worsened. She stated, "The shooting pain in both legs, more so in the left but definitely in both legs. Just the severe back pain. The difficulty in walking and inability to sit for long periods of time and just overall – and just an issue with having to deal with the pain management" (Transcript Hearing p. 33, ll. 4-8). The Claimant testified that she did not sustain any new injuries or accidents (Transcript Hearing p. 34, ll. 7-11). Since being placed at MMI, the Claimant described her worsening symptoms as follows: "However, the pain continued. It was –although it was much less than what it was prior to surgery, but again, over time, it has just been coming back and becoming more and more intense. So it's definitely been a gradual onset, but it is – it has definitely been something that – every day I could definitely feel an increase in what was going on with my body" (Transcript Hearing p. 37, ll. 1-14).

On August 7, 2015, the Claimant had a lumbar spine MRI with and without contrast. The findings at L5-S1 showed “mild broad-based disc bulging with right paracentral disc bulge prominence in the right paracentral annulus tear. There is mild mass stenosis in the area of the right lateral recess. Posterior facet arthropathy is mild. There is a minor laminotomy defect. There is no significant foraminal stenosis” (Respondents’ Exhibit F).

On September 29, 2015, Dr. DeWitt noted that the Claimant’s low back pain was fairly constant and she had difficulty sleeping. He noted that her “left lower extremity pain radiates down the posterolateral leg to the lateral shin/ankle and into the medial foot. She has cramping in the hamstring and ankle to the point where she cannot move. Her left ankle feels swollen lately. She also feels weak in that leg. On the right side, she has been occasionally getting charley horses in the right lateral ankle and to the toes. This happens at night and wakes her up. She cannot sit or stand for any long periods of time. There is no position where she can get comfortable.” (Respondents’ Exhibit E).

Because the Claimant has proven by a preponderance of the evidence that her condition has changed and she is entitled to benefits, WC Claim No. 4-909-490 is reopened.

Medical Benefits – Reasonably Necessary

Once a claimant establishes the worsened condition is causally related, the claimant must prove the proposed medical treatment is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

Here, the Claimant has failed to establish by a preponderance of the evidence that the revision bilateral L5-S1 microsurgial discectomies recommended by Dr. DeWitt are reasonably necessary to cure and relieve the effects of the January 13, 2013 industrial injury and the worsened condition from which the Claimant is now suffering.

Dr. Fall persuasively opined that the bilateral L5-S1 microdiscectomies recommended by Dr. Dewitt are not reasonable and necessary. She opined that the Claimant has not undergone conservative treatment pursuant to the medical treatment guidelines prior to consideration of surgery. She testified that the Claimant's response to the facet injections was not significant for a steroid response, meaning that delayed response that comes on after the steroid acts on the inflammation and takes the inflammation down. She testified that she evaluated neurological deficits in sensation, strength and reflexes when she evaluated the Claimant, which was normal. She testified Dr. Dewitt tested for neurological deficits and his reported results were normal. Dr. Fall testified that with respect to the Colorado Medical Treatment Guidelines, injections, physical therapy, acupuncture and a trial of medications is treatment that is recommended prior to surgical intervention. Dr. Fall further testified the Claimant has had no physical therapy for some time, no acupuncture, no medication trials and no exploration of the potential for piriformis syndrome. She recommended physical therapy, stretching the piriformis, strengthening the core, TENS unit, and discussion of possible facet injections with her treating physician. Dr. Fall's recommendations for conservative treatment is persuasive.

In weighing all of the evidence presented, the ALJ concludes that the recommended surgery is not reasonably necessary to cure and relieve the Claimant from the effects of her January 13, 2013 work injury at this time. Pursuant to the Colorado Medical Treatment Guidelines and Dr. Fall's opinion, the Claimant has not pursued conservative treatment prior to consideration of surgery.

ORDER

It is therefore ordered that:

1. Workers' Compensation Case No. 4-909-490 is reopened.

2. Insurer is not liable for the revision bilateral L5-S1 microsurgical discectomies recommended by Dr. DeWitt at this time.

3. Insurer is liable for the medical care the Claimant receives that is reasonably necessary to cure and relieve her from the effects of the compensable injury as determined by her authorized treating physician and any authorized referrals per the Act, except as provided in paragraph 2 above.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 19, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-765-705-05

ISSUES

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

- Whether Claimant is entitled to ongoing maintenance with Dr. Gellrick for maintenance medical care, Dr. Wolff for Botox injections, Dr. Torres for psychological maintenance, and Dr. Krause for psychotropic medication maintenance, as well as massage therapy as prescribed by Dr. Gellrick.

- Whether penalties shall be awarded based on Respondent's failure to comply with the DOWC Rule 16-9 and 16-10 and for unreasonable delay of admitted maintenance care, specifically the Botox injections and health club membership.

FINDINGS OF FACT

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

1. On June 5, 2008 Claimant sustained an admitted injury to his right shoulder and neck. Subsequently, on June 17, 2008, Claimant was clinically diagnosed as having suffered a right cerebellar stroke as a result of bilateral vertebral artery dissection. The two claims were consolidated on August 14, 2008.

2. On June 5, 2008, Claimant was working for Employer hanging metal tracks for sheet rock. This required Claimant to use his arms over his head and position his head and neck in an awkward fashion while using a nail gun or similar device. Pictures of Claimant's work activities are attached to the September 5, 2008 deposition of Dr. Wolff. This work activity caused Claimant's neck and shoulder injuries.

3. During Claimant's treatment for his neck and shoulder symptoms, Claimant was observed to have slurred speech, decreased hearing, and blurred vision. He was transported to the emergency department at St. Anthony's Hospital. Imaging studies of Claimant's brain were negative and Claimant was initially diagnosed with Bell's palsy. MRIs taken on July 16, 2008, indicated an evolving ischemic infarct in the right anterior cerebellar hemisphere.

4. Claimant underwent extensive treatment with multiple care providers before being placed at MMI. Claimant was initially treated by Dr. Lon Noel for his physical injury who then referred Claimant to orthopedic surgeon, Dr. James Ferrari. On December 11, 2008, Dr. Ferrari repaired Claimant's labral tear and performed a subacromial decompression of his left shoulder.

5. Claimant was referred to Dr. Mark Wolff who first saw Claimant on June 30, 2008. He confirmed by MRI that Claimant suffered a posterior fossa stroke. He confirmed that the symptoms from such a stroke are dizziness and vertigo and that the symptoms ordinarily improve over time with expected minimal deficit. He also confirmed that a vertebral artery dissection is relatively uncommon. When deposed on September 5, 2008, Dr. Wolff recommended no maintenance care except for a recheck with six months to allow Claimant to continue to heal.

6. Dr. Wolff began treating Claimant's neck and shoulder spasms and headaches with Botox injections. In a letter to Insurer seeking authorization for continuing that treatment Dr. Wolff stated, "We have treated him with Botox for cervical dystonia/post stroke spasticity since 9/2010, with good results. Botox helps the patient improve functioning with improved neck range of motion and less pain, and the response has been consistent over the last 4.5 years."

7. Dr. Wolf was deposed again on January 29, 2016, and testified substantially differently than he did in 2008 regarding Claimant's need for maintenance care. Dr. Wolff's involvement in Claimant's maintenance care has been limited to administering Botox injections. Dr. Wolf testified that although Claimant did not initially have a therapeutic response to Botox, beginning in September 2011 when an increased dose was given, Claimant began experiencing relief. Claimant has been stable at 360 units as of March 2014. Dr. Wolf acknowledged the Medical Treatment Guideline's Botox parameters, but reasonably rejected those Guidelines in this instance because he views Botox is a long-term, rather than curative, therapy. Claimant does not suffer from any of the noted negative side effects from his repeated treatments. Claimant's treatments temporarily eliminate the muscle spasms he experiences in his neck which are associated with cervical dystonia, one of Claimant's work related diagnoses.

8. Dr. Noel referred Claimant to Dr. Lawrence Lesnak who placed Claimant at MMI on July 9, 2009 with a 15% upper extremity impairment.

9. On December 9, 2009, Claimant pursued a Division Independent Medical Examination (DIME) with Dr. Greg Reichhardt. Dr. Reichhardt found Claimant not at MMI, in part because he found Claimant suffered psychological sequelae that required treatment.

10. Dr. Torres first saw Claimant on February 12, 2010 on referral from Claimant's counsel. Dr. Torres performed a psychological evaluation of Claimant after reviewing his medical records and performing a psychodiagnostic interview. Dr. Torres diagnosed Claimant with major depression, post traumatic stress disorder (PTSD) causing claimant to be prone to "severe self-loathing" and "severe depression;" and pain disorder. As of February 12, 2010, Dr. Torres anticipated Claimant needing fourteen sessions of therapy. As of October 19, 2011, Dr. Torres opined Claimant would need approximately two more years of monthly therapy. At hearing, Dr. Torres testified that he anticipated Claimant would need indefinite therapy.

11. Dr. Torres has been providing talk therapy treatment for Claimant. He opined that Claimant's response to treatment had be gradual but positive, and during the hearing suggested that he would like to have an occupational therapist added to Claimant's treatment to improve Claimant's function. Dr. Torres opined that withdrawing his treatment would humiliate Claimant because it would delegitimize his autonomy and generate a sense of insignificance.

12. Dr. Wolff provided Botox injections approximately every three months. Botox relaxes the muscle spasms in Claimant's neck, especially when combined with massage therapy. Dr. Wolff testified by deposition that he had been treating Claimant with Botox injections since September, 2010, and Claimant had good results. Botox helped improve Claimant's function by increasing his cervical spine range of motion and decreasing his pain. Dr. Wolff noted that Claimant experienced consistently good results for the last four and one half years of treatment. Dr. Wolff noted that Botox was safe for chronic long term therapy, that Claimant was not suffering any negative side effects, and that Claimant should continue the Botox treatments indefinitely as he remained with spasticity and decreased range of motion in his neck. Dr. Wolff testified that Botox injections are first-line FDA-approved for cervical dystonia and also provide effective headache relief. Dr. Wolf also explained that the alternative treatment would be oral pain medications which were less effective and had debilitating side effects. The benefits of the Botox treatments are documented in the records of Drs. Gellrick and Torres. Claimant and his wife also testified that the injections decreased Claimant's pain and enabled him to interact with his family more often and at a higher level. Throughout Claimant's massage therapy treatment, he has consistently reported the benefits of massage therapy and injections, including decreased pain and tightness, and increased mobility.

13. Dr. Gellrick documented on March 26, 2015 that Botox injections helped Claimant improve function, neck range of motion and less pain and she recommended that Claimant continue Botox. "With medication management and treatment he is able to get out with the family for outings, school activities with family, to the mall and socialize but without these modalities he cannot do this and tends to isolate totally from the family." She also prescribed massage therapy every three weeks for six months.

14. Claimant also began seeing Dr. Krause who prescribed and continues to manage Claimant's psychotropic medications. Claimant sees Dr. Krause approximately every two months. However, Claimant's medications have stabilized. Medical records from Claimant's personal physician support a finding that while on psychotropic medications, Claimant looked better, seemed calmer, and was more active and alert. Claimant's personal physician also reported that Claimant's major depression and anxiety disorder were stable on medications. Claimant's mood was worse off medications. Dr. Torres' notes also support that psychotropic meds helps Claimant be more focused, with more energy.

15. On June 2, 2015 Dr. Krause reported that Claimant's current medications and psychotherapy are to help Claimant maintain his current level of functioning and prevent relapse. He opined that Claimant will need medication indefinitely.

16. Claimant’s care was eventually transferred to Dr. Gellrick who first began treating Claimant on April 27, 2010 and who placed him at MMI effective February 23, 2011. Dr. Gellrick’s MMI report describes Claimant’s stroke as “right cerebellar consistent with ischemic infarction.” Dr. Gellrick provided Claimant with a 30% whole person impairment. As maintenance care, Dr. Gellrick recommended follow-up with Drs. Torres and Krause on a monthly basis for the next two years and with Dr. Wolff for five years.

17. On July 21, 2015 Dr. Gellrick performed a Medical Record Review Special Report at Claimant’s request. In her report, she stated that Claimant would definitely regress without continued psychotherapy and access to medication. Claimant continues with headaches, as well as trapezius and cervical spasms, which do respond to Botox injections. She noted that there are no adverse side effects, that the Botox injections have been beneficial for Claimant, give him relief, and at this time are permanent. Dr. Gellrick noted that Dr. Wolff agrees with the massage therapy to help Claimant ameliorate symptoms of tenderness, spasm and headaches. Dr. Gellrick stated, "In reviewing all of the consultants on this case, it is clear that the patient has sustained a permanent life threatening event of vertebral artery dissection which could have killed him. He is left with the effects of the stroke, primarily on the cerebellum, which can produce spasms of the cervical spine and trapezius area, as well as headaches. Having gone through this experience, the patient is indeed frightened that without meticulous control, he could have another stroke. Strokes can be precipitated not only by excessive heavy lifting, in this case beyond 25 pounds, but also with factors such as heart disease or hypertension. Therefore, he needs to continue to maintain his wellness as much as he can by not gaining a lot of weight, continuing his exercise program at the local gym, and watching his diet." Dr. Gellrick noted that Dr. Krause highly recommended that Claimant continue with Dr. Torres on a monthly basis, and she concurred. She would keep maintenance treatment down to a minimum, trying to confine rechecks to semi-annual for lab and medication refills.

18. At hearing Dr. Gellrick opined that Claimant’s maintenance care with her, Dr. Torres and Dr. Wolff should continue without change, indefinitely. Dr. Gellrick could foresee Dr. Krause’s prescription writing being limited to semi-annual as Claimant’s medications have stabilized.

19. When Claimant was placed at MMI on February 23, 2011, Claimant’s diagnoses included chronic neck pain with cervical spasms, chronic depression, PTSD, and memory and cognitive dysfunction as a result of his stroke. Dr. Gellrick recommended maintenance medical care which included continued care with Drs. Krause, Torres and Wolff, as well as massage therapy.

- Dr. Gellrick would continue as Claimant's care coordinator;

- Dr. Krause, a neurologist, would continue to prescribe Claimant's psychotropic medications;

- Dr. Torres would continue to provide psychotherapy; and

- Dr. Wolff would continue to provide Botox injections.

20. On March 7, 2011, Respondents filed a Final Admission of Liability (FAL), admitting for medical benefits after MMI, though limiting those benefits.

21. On January 16, 2012, the parties entered into a full and final settlement that was approved on January 20, 2012. By the terms of the settlement Claimant settled all entitlement to workers' compensation benefits listed in paragraph three of the settlement unless those benefits were specifically reserved in paragraph 9A of the settlement agreement. Claimant specifically waived all penalties, interest, costs and attorneys' fees up to the date of the approval of the settlement, but retained the right to seek post-approval penalties for failure to comply with the terms of the approved settlement. In paragraph 9A4 of the settlement agreement the parties agreed that Claimant's post MMI medical benefits shall remain open.

22. Respondents now challenge Claimant's entitlement to medical care generally, and his entitlement to each component of his care.

23. On January 13, 2015, Dr. John Raschbacher performed a Respondent-sponsored medical examination of Claimant. After reviewing available medical records as documented in Dr. Raschbacher's report, Dr. Raschbacher assessed Claimant as suffering from chronic cervical pain, a repaired right shoulder labral tear, a resolved bilateral vertebral artery dissection, and a right cerebellar stroke. Dr. Raschbacher recommended no further care for Claimant's conditions as he opined there was no objective functional improvement secondary to the care. However, objective functional improvement is not required as a result of maintenance care, and is not the standard by which such care is evaluated.

24. Dr. Raschbacher's report opined that Botox injections were not reasonable or necessary under the Medical Treatment Guidelines, or medically aside from the Guidelines. Dr. Raschbacher noted that Claimant was not experiencing or reporting functional gains. He also opined that Claimant did not have a diagnosis that would likely call for indefinite periodic Botox injections. And, in any event, Claimant had exceeded the maximum length of treatment allowed by the Guidelines.

25. Further, Dr. Raschbacher could not attribute any cognitive deficits to Claimant's stroke as the MRI shows Claimant suffered a cerebellar stroke. He explained the cerebellum has no significant role in cognition, memory, or pain. Dr. Raschbacher also did not attribute Claimant's neck pain, cognitive problems,

PTSD, and depression to the injury due to lack of contemporaneous complaints. Dr. Raschbacher noted that Claimant's most optimal level of function after the June 5 and June 17, 2008 injuries probably occurred in late 2008, and that Claimant had clinically worsened over time. Dr. Raschbacher opined that further care from the current medical providers was not reasonably necessary and related to the original injury. With regard to medications, Dr. Raschbacher had difficulty testifying what was reasonably necessary to maintain Claimant's level of function because considering the medications required believing Claimant experienced the symptoms he reported. Dr. Raschbacher did not recommend any further medications, Botox injections, or continued gym membership.

26. On March 16, 2015, Dr. Stephen Moe evaluated Claimant. Dr. Moe opined that a change in Claimant's mental health treatment regimen wais needed. Dr. Moe's opinion is based in part on evidence that Dr. Torres' treatment prior to Dr. Moe's initial evaluation, was ineffective. Therefore, Dr. Moe opined that a change in prospective treatment or treatment provider was needed. Dr. Moe opined that Claimant needs a therapist who will demand more of Claimant than Dr. Torres. Dr. Moe observed an element of dependency between Claimant and Dr. Torres, and opined that cognitive behavioral therapy likely would be more effective than talk therapy. Dr. Moe conceptually rejected the idea that Claimant will necessarily worsen without treatment.

27. On September 17, 2015 Dr. Gellrick noted that Claimant had demonstrated improvement in function with medication management, especially with Dr. Krause's medications, as well as Botox injections with Dr. Wolff and massage therapy. She noted that Claimant is more participatory and interactive with the family. She stated, "Without continued maintenance treatment he tends to regress and isolate at home."

28. Claimant seeks penalties for Respondents' delay in authorizing Botox injections.

29. Claimant's Botox injections scheduled for March 20, 2015 were delayed to April 22, 2015.

30. On July 20, 2015 Dr. Wolff requested authorization for Botox injections every twelve weeks.

31. On July 29, 2015 Respondents issued a letter denying Dr. Wolff's request for authorization for Botox injections every 12 weeks. Attached was Dr. Raschbacher's report as support for the denial; however, they did not provide, nor did Dr. Raschbacher provide the professional credentials for Dr. Raschbacher, as is required in DOWC Rule 16- 10(B)(3)(a). The only credentials reported was that he is Level II accredited. Pursuant to Sec. 8-42-101(3.6)(a)(ll) a Level II qualification is impairment evaluations and does not grant any particular qualification or credential to treat. Also, DOWC Rule 16-10(8)(3)(b) requires a specific cite from the Division's Medical Treatment Guidelines Exhibits to Rule 17. Neither the denial letter nor Dr. Raschbacher's report included a specific cite.

Finally, DOWC Rule 16-10(8)(1) states that the reviewing physician must hold a license and be in the same or similar specialty as would typically manage the treatment under review. Dr. Raschbacher is a family medicine/occupational medicine physician, a specialty that does not normally undertake the treatment of Botox injections. Dr. Wolff is board certified in Neurology in the areas of treatment of strokes, vertebral artery dissections and specialized in treatments with Botox.

32. Claimant seeks penalties for Respondents' delay in paying for Claimant's gym membership.

33. On July 20, 2015, Dr. Adam Wolff requested authorization for Botox injections every twelve weeks. On July 29, 2015 Respondents denied Dr. Wolff's request. Respondents provided a report authored by Dr. Raschbacher as support for the denial; however, they did not provide Dr. Raschbacher's professional credentials as is required in DOWC Rule 16- 10(B)(3)(a). Respondents provided only that Dr. Raschbacher is Level II accredited. Pursuant to section 8-42-101(3.6)(a)(ll), a Level II qualification is required for impairment evaluations and does not grant any particular qualification or credential to treat. Also, DOWC Rule 16-10(8)(3)(b) requires a specific cite from the Division's Medical Treatment Guidelines Exhibits to Rule 17. Neither the denial letter, nor Dr. Raschbacher's report included a specific cite. DOWC Rule 16-10(8)(1) provides that the reviewing physician must hold a license and be in the same or similar specialty as would typically manage the treatment under review. Dr. Raschbacher is a family medicine/occupational medicine physician, a specialty that does not normally undertake the treatment of Botox injections. Dr. Wolff is board certified in Neurology in the areas of treatment of strokes, vertebral artery dissections and specialized in treatments with Botox.

34. On August 27, 2014 Dr. Gellrick issued a prescription for a one-year gym membership. On September 10, 2014 Claimant's attorney's office sent the prescription for gym membership to Respondents requesting that they issue a check to Claimant so he could renew his 24 Hour Fitness membership. On March 2, 2015 Claimant's attorney faxed a letter to Respondents' attorney, advising him that the gym membership had still not been paid, and that Claimant had been unable to continue his exercise program at the gym. On March 26, 2015 Dr. Gellrick noted that Claimant needs to continue his IHEP at the local gym; however, the renewed script had not yet been authorized. On June 12, 2015 Respondents' attorney conceded that Claimant had still not received the gym membership that was requested. On September 21, 2015 (over one year after it was prescribed) Claimant's attorney again provided Respondents with an estimate for the gym membership. On October 21, 2015 Respondents stipulated that they "will pay claimant directly for a health club membership." On January 21, 2016 Dr. Caroline Gellrick issued another prescription for a gym membership, now for 18 months. In fact, Ms. Nancy Gay agreed that she or the adjusters had received the multiple requests for authorization of the gym memberships as well as for Botox injections. She stated that she reviewed the file and had noticed

that claimant had been receiving the gym memberships since being released at MMI.

35. On January 23, 2016 Claimant's attorney sent a copy of Dr. Gellrick's prescription for the 18-month gym membership to Respondents' attorney. On January 25, 2016, Respondents finally issued a check for the gym membership. Claimant and Claimant's wife testified that he received the check for his gym membership finally on February 1, 2016 and was finally able to obtain the membership with 24 Hour Fitness on February 4, 2016. However, she initially received the prescription from Dr. Gellrick in 2014 and it took a long time to get it renewed. She had been getting the gym membership arranged for her husband since 2010.

36. Claimant engages in some household chores, is transportation for the children to and from school, and can drive to run errands or go to the gym. Claimant testifies that he jogs on the treadmill approximately four times a week when he goes to the gym.

37. Ms. Gay, the adjuster, testified that Insurer authorized the most recent Botox injection in December 2015, after the Stipulation, and then denied the recommended one in April 2016. She also confirmed that they did not pay the gym membership prescribed in September 2014 until January 25, 2016.

CONCLUSIONS OF LAW

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

Where an injured worker reaches maximum medical improvement but requires periodic medical care to prevent his condition from deteriorating, it is permissible to leave medical benefits open subsequent to the final award. *Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988).* The parties resolved by specifically leaving medical benefits open pursuant to the Stipulation and Order of January 16, 2012. If the language of the agreement is "plain [and] clear, and no absurdity is involved," it must enforce as written. *Cary v. Chevron U.S.A., Inc.,* 867 P.2d 117, 119 (Colo. App. 1993). Therefore, all treatment prior to Respondents Application for Hearing of October 15, 2015 challenging reasonable necessity of medical care related to the claim was authorized.

WCRP 16-10(B) provides that "the payer shall," within seven business days of the completed request have all the submitted documentation reviewed by a physician and furnish the provider and the parties with either a verbal or written approval, or a written contest that sets forth an explanation of the specific medical reasons for the contest, including the name and professional credentials of the person performing the medical review and a copy of the medical reviewer's opinion. A payer's failure to comply in full with WCRP 16-10 (A) or (B), "shall be deemed authorization for payment of the requested treatment."

WCRP 16-10(B)(3) specifically provides, in relevant part, that the payer must furnish the provider and the parties with a written contest that sets forth the following information: “The specific cite from the Medical Treatment Guidelines Exhibits to Rule 17, *when applicable.” (Emphasis added).*

The ALJ finds that Respondents provided a timely denial after review by medical provider. The respondents’ denial was based on Dr. Dr. Raschbacher’s review. The ALJ finds that Dr. Raschbacher’s opinion focused on the fact that Claimant’s symptoms not changed since he was previously put at MMI and thus did not necessitate further treatment. Under these circumstances a citation to the *Guidelines* was not applicable nor warranted in view of the supporting opinion provided by Dr. Raschbacher as the basis of the denial was apparent. The ALJ also concludes that Respondents’ denial included specific medical reasons explaining that any Botox injections exceeded those allowed in the Guidelines and would not constitute reasonable or necessary treatment for the Claimant’s work injury.

Where the respondents file an FAL admitting for maintenance medical treatment pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), this does not preclude them from later contesting their liability for a particular treatment. Rather, when the respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury. *SeeGrover v. Industrial Commission*, 759 P.2d at 712; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo.App. 1997). Where, however, the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for such modification. Section 8-43-201(1), C.R.S.; *see also Barker v. Poudre School District,* W.C. No. 4-750-735 (March 7, 2012).

On March 7, 2011, Respondents filed a Final Admission of Liability (FAL) under §8-43-201, C.R.S., admitting for medical benefits after MMI. Here, because Respondents had previously filed an FAL admitting for maintenance medical benefits, Respondents have the burden to show why they are no longer responsible for maintenance medical benefits in general. The ALJ is not persuaded by Respondent’s argument that the settlement agreement effectively nullifies their FAL regarding maintenance benefits.

In *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), the court noted that when determining whether the claimant is initially entitled to ongoing maintenance medical benefits the ALJ is tasked with finding “substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary …” *Grover*, 759 P.2d at 711. In such circumstances “substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Woods v. The Home Depot,* W.C. 4-365-829 (Sept. 27, 2001).

In general, the Medical Treatment Guidelines are accepted professional standards for care under the Colorado Worker’s Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for the ALJ to consider the Guidelines in deciding whether medical treatment is reasonable and necessary for claimant's condition. *Logiudice v. Siemens Westinghouse*, W.C. No. 4-665-873 (ICAO January 25, 2011). Appropriate consideration of the Guidelines does not require that they be strictly followed by the ALJ. *Martinez v. Penske Truck Leasing*, W.C. No. 4-938-870 (ICAO January 6, 2015).

Claimant's condition involves chronic pain and is, therefore, governed by the Chronic Pain Disorder Medical Treatment Guidelines found under Rule 17, Exhibit 9 of the Colorado Workers Compensation Rules of Procedure. Claimant's medical treatment has been authorized and provided by Drs. Wolff, Gellrick, Torres and Krause since the parties agreed on these providers after Dr. Reichhardt, serving as a DIME, found claimant was not at MMI. These doctors all have a different role in Claimant's care. Dr. Gellrick has served as an authorized treating physician providing primary care to claimant. For an extended timeframe this is amounted to Claimant's periodic visits with Dr. Gellrick for a checkup and possible blood work. Dr. Gellrick also monitors some of Claimant's prescriptions and will generate prescriptions for things such as a gym membership. Dr. Wolff is a neurologist who only administers Botox injections to claimant. Dr. Torres is a psychologist who engages in monthly therapy with Claimant. Dr. Krause is a psychiatrist who basically provides some prescriptions for Claimant, without engaging in any further therapy, except determine what medications are working for claimant. Claimant's maintenance medical treatment provided by these doctors has exceeded the recommendations for such treatment under the Medical Treatment Guidelines. However, while the ALJ must consider the Guidelines, the ALJ finds and concludes that Claimant's medical care is reasonable, related, and necessary to maintain Claimant at his baseline and to prevent further deterioration of his condition.

The ALJ finds the opinions of Dr. Gellrick, Dr. Torres, Dr. Wolff and Dr. Krause, Claimant's treating providers to be credible, persuasive, and supported by the preponderance of the evidence. The doctors consistently testified that Claimant's current treatments maintain him at a baseline and prevent his condition from deteriorating. Claimant's treatment has increased his ability to perform activities of daily living and interact positively with his family. Their opinions are consistent with the medical records and testimony, which demonstrate a marked improvement from injections which reduce pain in order for Claimant to function, get out of bed and participate in family affairs and the gym activities. The psychological care has assisted Claimant with decreasing his anxiety, moodiness, anger, fatigue, focus, and overall depression. Claimant is entitled to the maintenance medical benefits recommended for him by Dr. Gellrick, Dr. Krause, Dr. Wolff and Dr. Torres.

Even Dr. Moe, Respondent's IME physician, although critical of aspects of Dr. Torres' care, agreed that Claimant requires continuing maintenance care for his psychological and psychiatric care. Based on the totality of the evidence the ALJ finds and concludes that Dr. Torres' care should be maintained.

The ALJ is not persuaded by Dr. Raschbacher's opinion that Claimant does not need any additional medical care. Dr. Raschbacher's opinions are contrary to the great of the evidence that Claimant needs the treatment he is receiving in order to prevent deterioration. They are also based on his apparent disbelief that Claimant actually suffers from any work related injuries, and the ALJ finds them to be unreasonable.

The ALJ is not persuaded by Respondents' argument that Claimant waived penalties as part of the settlement agreement. As found, Claimant specifically waived all penalties, interest, costs and attorneys' fees up to the date of the approval of the settlement, but retained the right to seek post-approval penalties for failure to comply with the terms of the approved settlement. In paragraph 9A4 of the settlement agreement the parties agreed that Claimant's post MMI medical benefits shall remain open.

The ALJ finds and concludes Claimant's penalty claim is not adequately factually supported. Claimant appears to contend that a penalty should be assessed for failing to authorize a gym membership sent by Claimant's counsel in a letter dated September 10, 2014. There is no persuasive evidence that Respondents received the letter. Rather, approximately one year later the adjuster received a note with an 18 month estimate for a gym membership, rather than the ordinary 12 month membership previously provided. This was not a reimbursement request, but an estimate with the apparent expectation that the adjuster simply pay the estimated amount. After it became apparent Claimant was not going to pay for the gym membership and seek reimbursement, efforts were made to try to get the gym to accept payment directly, requiring a W-9. The adjuster was advised that the gym would not provide this document so eventually payment had to be made directly to Claimant. No persuasive evidence supports a finding that the gym membership issue ever involved prior authorization under Rule 16 as there was never a preauthorization request.

The denial of authorization for Botox injections also fails to support a penalty. Respondents filed their hearing application over reasonably necessary and related medical benefits on April 15, 2015. Prior to this, in March 2015, Claimant's counsel sent a letter referencing an appointment Claimant had with Dr. Wolf on March 20, 2015 where no authorization for a Botox injection was given. This was not a prior authorization request by a provider, and thus was not subject to Rule 16 requirements. While Respondent's challenge to the continuance of Botox injections was pending before the Office of Administrative Courts, Dr. Wolff's office faxed a request for prior authorization for Botox to Insurer. The request for a Botox injections was given the proper medical review and denied by a letter sent by fax and certified mail dated July 29, 2015, within the seven business days of receipt of the original authorization request. The same prior authorization request was sent in March 2016 and Insurer dealt with it in the same fashion. Therefore, the ALJ finds and concludes there is an inadequate factual basis for Claimant to claim a penalty as there is no violation of a statute, rule or order identified or proven by Claimant.

ORDER

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

1. Claimant has proven by a preponderance of the evidence that he is entitled to a continuing general award of the requested maintenance care, which is reasonably necessary and related to the injury.

2. Respondents shall provide all reasonably necessary medical care related to the injuries as prescribed by Dr. Gellrick, claimant's primary authorized treating physician; Dr. Wolff, his neurologist; Dr. Krause, his psychiatrist; and Dr. Torres, his psychologist; including Botox injections, psychological therapy maintenance, massage therapy, medications for both Claimant's physical and mental injuries related to his June 5, 2008 accident.

3. Claimant's claims for penalties are denied and dismissed.

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

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

DATED: September 20, 2016

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence, that he sustained a compensable low back injury during his January 21, 2016 motor vehicle accident.

II. If Claimant suffered a compensable low back injury on January 21, 2016, whether he has proven by a preponderance of the evidence that the treatment recommended by Dr. Paz is causally connected to the work injury on January 21, 2016.

FINDINGS OF FACT

Based upon the evidence presented, including the parties hearing exhibits along with the testimony of Claimant and Dr. Olsen, the ALJ enters the following findings of fact:

1. In April, 2014, Claimant commenced his employment with Qwest/Century Link in Trinidad, Colorado, as a network technician. Prior to starting this job, he had not experienced any problems with his low back and there is no medical documentation to indicate he received treatment focus to the lumbar spine. Claimant testified that he had no difficulties performing his job duties with Qwest/Century Link prior to his work related injury on January 21, 2016.

2. On January 21, 2016, Claimant was the restrained driver of a 12,000 to 18,000 gross vehicle weight bucket truck. He was stopped at an intersection when he was rear ended by a truck driven by his supervisor. The force of the impact pushed the bucket truck into the intersection. Claimant testified that the force of the collision threw him forward and backwards.

3. After impact, Claimant excited his vehicle and inspected the damage. He testified that his adrenaline was rushing. He did not notice any immediate symptoms and continued working. Approximately three hours after the crash, Claimant developed pain and soreness in his neck and low back. He took Ibuprofen that evening. The following day, Friday, January 22nd, he had pain is his neck and a pinch like sensation between his shoulder blades, as well as low grade pain in the lumbar spine. Over the weekend, the neck pain became worse.

4. On January 25, 2016, Claimant was seen in the emergency room (ER) at the Spanish Peaks Regional Health Center in Walsenburg, Colorado, where he was examined by Dr. Dunnam-Smith. Claimant testified that at the time of his examination, his low back pain was mild and that his neck injury had become worse with numbness

extending into his right hand. He reported only neck pain and did not indicate problems with his low back.

5. The medical records of Dr. Dunnam-Smith indicate that imaging studies were performed of the cervical and thoracic spine. The diagnosis was cervical and neck strain with radiculopathy and thoracic back pain. Claimant was placed on restrictions and returned to modified duty and it was suggested that he follow-up with a workers' compensation provider in 1 week. (Cl. Ex. 1, pg. 6).

6. Claimant was also prescribed a seven day tapering dose of Prednisone in addition to muscle relaxants. (Cl. Ex.1, pg. 5 and 17).

7. Claimant testified that after he completed his course of Prednisone and muscle relaxants, he felt much better, his symptoms were dramatically improved and he thought he had recovered from the injuries sustained in the automobile accident.

8. Per instructions, Claimant was examined by Dr. Schwender, the Respondents' designated workers' compensation physician on February 4, 2016 at the Colorado Center for Occupational Medicine office located in Pueblo, Colorado. Dr. Schwender noted a history of pain in the neck as well as numbness in the right hand. Dr. Schwender noted Claimants treatment with Prednisone and documented that Claimant was feeling much better despite a continued pinching sensation at the base of his neck. There was no report of problems with the low back and Dr. Schwender's physical examination appears limited to the cervical spine only. Dr. Schwender returned the Claimant to modified duty with no lifting greater than 25 pounds. (Cl. Ex. 2, pg. 22).

9. Claimant testified that after completing the course of steroids and muscle relaxants, his neck pain returned. He also had a return of his previously mild low back pain sufficiently intense that it interfered with his work duties. The low back pain was aggravated by his job duties, such as riding in his work vehicle and bending. Gradually, the pain in his low back extended into his right buttock and he experienced loss of feeling in the toes of his right foot.

10. Claimant requested a change to an employer designated physician closer to his home. This medical treatment was transferred to Dr. David Paz at Mr. Carmel Health and Wellness in Trinidad, Colorado. Claimant was evaluated by Dr. Paz for the first time on February 25, 2016. Dr. Paz incorrectly noted an auto accident occurring in the State of Kansas. In addition to the problems with the cervical spine, Dr. Paz noted back pain extending into the thigh and numbness in the right toes. He noted the Claimant had been placed on light duty but riding in the truck aggravated the low back pain. Physical examination demonstrated that the right lower extremity was "jerky" on extension as compared to the left. Dr. Paz also noted decreased sensation in the right upper extremity. He recommended an MRI of both the cervical and lumbar spine. Mr. James was taken off work and prescribed Naprosyn and Hydrocodone-Acetaminophen. (Cl. Ex. 3, pgs. 37-39). Dr. Paz provided an assessment of "interveterbral disc with

myelopathy and radiculopathy." In addition to recommending an MRI of the lumbar spine, Dr. Paz referred Claimant to Dr. Murad for a neurosurgical evaluation. (Cl. Ex. 3, pgs. 33-34).

11. Reports prepared by Physician Assistant (PA) Andrew Glass working under the direction of Dr. Murad were also submitted post hearing. The ALJ finds the reports of PA Glass potentially outcome determinative and admits the reports as Claimant's Exhibit 8.

12. The initial examination on March 30, 2016, notes a history of a motor vehicle accident with resulting cervical and lumbar pain, post-accident. The low back pain radiated into the right lower extremity. Claimant's pain increased with walking and was relieved when lying down. He had no issues with the lumbar spine prior to the accident. Concerning the low back, PA Glass provides an assessment of "back pain" and "lumbar radiculopathy". Claimant was provided with an additional "medrol (Pak), 4 mg to be taken orally along with a referral to anesthesiology for evaluation concerning the efficacy of epidural steroid injections. Claimant also underwent an MRI of the lumbar spine on this date.

13. On June 1, 2016, Claimant returned to PA Glass for review of lumbar spine MRI findings. The MRI demonstrated no significant nerve compression. There was mild bilateral recess stenosis at the L4-L5. X-rays of the lumbar spine of the lumbar spine demonstrated degenerative disc disease. Claimant was advised that there were no structural defects that could be resolved by surgery and that the most likely cause of his symptoms was nerve root irritation, possibly at the L4 level. An assessment of lumbar radiculitis is provided and lumbar epidural steroid injections were recommended.

14. Claimant was examined at the request of Respondents counsel by Dr. Nicholas Olsen. In a report dated April 28, 2016, Dr. Olsen notes that Claimant provided a history to him of feeling a little pain in his lower back over the weekend after the accident. As the weekend passed, the lower back did not seem as it was bothering him too much. When he went to the emergency room on the following Monday, January 25th, he did not report a problem with his low back. Once he commenced a regiment of steroids and muscle relaxants, Claimant reported that he started feeling better. After the course of medication was completed, the pain returned and progressively worsened. (Cl. Ex. 4, pg. 101). Lumbar flexion, extension and bi-lateral bending elicited complaints of pain. A supine straight leg raise test aggravated right lower back pain. (Cl. Ex. 4, pg. 107). Dr. Olsen opined that Claimant had complaints consistent with axial back pain along with a "mild physiologic examination involving the right lower extremity with a stocking loss of sensation." Dr. Olsen questioned Claimant's alleged lumbar spine injury based on the history provided to him. He noted that Claimant is a poor medical historian and questions why the lumbar complaints were not initially presented to Dr. Dunnam-Smith. (Cl. Ex. 4, pg. 110).

14. As noted, the parties took the evidentiary deposition of Dr. Olsen post hearing. During his deposition, Dr. Olsen testified that, based on his review of the medical records, the first mention of low back pain did not occur until February 25, 2016, when Claimant saw Dr. Paz (Olsen's Depo. Tr. p. 13). Dr. Olsen also testified that between what Claimant told him as to when he first had low back pain and what the medical records document, he would rely on the medical records rather than Claimant's historical statements made during the April 28, 2016 independent medical examination (IME). (Dr. Olsen's Depo. Tr. p. 14). Again, Respondents submit that Claimant's testimony at hearing is consistent with what the medical records document in that Claimant did not have the onset of low back symptoms until sometime after he saw Dr. Schwender on February 4, 2016. Consequently, Respondents submit that the greater weight of evidence establishes that, to the extent that Claimant has low back pain at the present time, those low back symptoms began sometime between February 4, 2016 and February 25, 2016.

15. Dr. Olsen testified that there is a generally accepted medical analysis involving a temporal relationship between a trauma and the eventual onset of pain at a certain body location (Olsen's Depo. Tr. pp. 15-16). Specifically, Dr. Olsen stated that when "somebody has a trauma, one would expect that person to have pain within a certain period of time, within a few days. The longer the period of time between the reports of the pain and the inciting event, the less likely that the source of pain is related to the event." Dr. Olsen explained further that a traumatic event causes a physiological change within 2-3 days following the incident and may cause a 3/10 pain level initially. According to Dr. Olsen that pain level could increase to a 6-7/10 level two later because it's progressed; however, to have no pain for a number of days and in the instant case for a couple of weeks leads to the conclusion that Claimant's current low back pain is unrelated to the original motor vehicle accident (MVA) occurring on January 21, 2016. Consequently, Dr. Olsen was of the opinion that the January 21, 2016 injury did not cause Claimant's eventual onset of low back pain (Olsen's Depo. Tr. pp. 17-19).

16. Because of the lack of low back symptoms for at least two weeks following the motor vehicle accident, Dr. Olsen was almost of an "absolute certainty" that the onset of low back problems between February 4, 2016 and February 25, 2016 is not causally related to the motor vehicle accident. Rather, the more likely explanation for Claimant's low back pain, according to Dr. Olsen, is that the onset of symptoms represents "natural back pain" that either developed in the absence of any kind of trauma or alternatively a lumbar sprain/strain event unrelated to the January 21, 2016 MVA. In support of his opinions regarding the cause of Claimant's low back pain, Dr. Olsen notes that over 80% of individuals who have back pain severe enough to see a physician have that onset without any indication of trauma.

17. Based upon the evidence presented as a whole, the ALJ finds Dr. Olsen's testimony unconvincing. The ALJ infers and finds from Dr. Olsen's testimony that he believes that Claimant had no pain in his low back between January 21, 2016 and February 4, 2016 merely because the available medical records do not document the same. The ALJ finds from Claimant's testimony that while he had pain it was not severe

enough to report. In reconciling the competing testimony of Dr. Olsen and Claimant, the ALJ credits Claimant's testimony to find that he likely had low back pain at a level (3/10) which he did not feel required medical attention and was not disabling. Consequently, he did not report it. The decision not to report low level pain which did not require medical treatment and which was not disabling does not mean that Claimant had no pain as is suggested by Dr. Olsen. Moreover, the ALJ finds it probable that the Prednisone Claimant was prescribed was effective in curing and relieving both Claimant's neck and low back pain. The evidence presented persuades the ALJ that when the course of steroids was complete, Claimant, more probably than not had a return of his back pain intense and disabling enough to report to Dr. Paz. Finally, the ALJ finds the dearth of evidence supporting prior problems with his low back, substantially under minds Dr. Olsen's opinion that the cause of Claimant's low back pain represents "natural" back pain which arose simply because 80% of the population will experience low back pain at some time in their lives. Dr. Olsen's alternate opinion that the cause of Claimant's low back symptoms are due to a sprain/strain event unrelated to the January 21, 2016 MVA is speculative and unfounded based upon the evidence presented. Accordingly the ALJ finds it equally unconvincing.

18. The preponderance of the evidence presented persuades the ALJ that the described mechanism of injury (MOI), i.e. the MVA is the cause of Claimant's low back symptoms and current need for treatment. Accordingly, the ALJ finds that Claimant has met his burden of proof to establish that he suffered a compensable industrial injury on January 20, 2016.

19. Based upon the evidence presented, the ALJ also finds the treatment rendered to Claimant by in the ER and by Drs. Paz and PA Glass to be reasonable, necessary and related to his January 21, 2016 low back injury. Moreover, the evidence presented convinces the ALJ that the recommendation for a lumbar MRI was reasonable and related to Claimant's low back injury.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

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

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found here, Claimant's testimony is credible, consistent and convincing. Moreover, the opinions of Dr. Olsen regarding diagnosis, causality and treatment not persuasive or convincing.

Compensability

D. A "compensable injury" is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*.* *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injuries occurred within the time and place limits of his employment relationship with Employer and during an activity, specifically driving a bucket truck to a job site for Employer. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" his employment must be resolved before the injury is deemed compensable.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that Claimant sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). As found, the ALJ credits Claimant's testimony to find that he likely had low back pain at a level (3/10) which he did not feel required medical attention and was not disabling. Consequently, he did not report it. The decision not to report low level pain which did not require medical treatment and which was not disabling does not mean that Claimant had no pain as is suggested by Dr. Olsen. The evidence presented also persuades the ALJ that when the course of steroids was complete, Claimant, more probably than not had a return of his back pain intense and disabling enough to report to Dr. Paz. Finally, the ALJ finds the dearth of evidence supporting prior problems with his low back, substantially under minds Dr. Olsen's opinion that the cause of Claimant's low back pain represents "natural" back pain which arose simply because 80% of the population will experience low back pain at some time in their lives. Dr. Olsen's alternate opinion that the cause of Claimant's low back symptoms is due to a sprain/strain event unrelated to the January 21, 2016 MVA is speculative and unfounded. Accordingly the ALJ finds it equally unconvincing. In this case, the evidence presented persuades the ALJ that a logical causal connection exists between Claimant's work duties, the January 21, 2016 MVA, his low back symptoms and his need for treatment. Consequently, the ALJ finds Claimant's low back injury compensable.

Medical Benefits

G. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO

April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back. The evidence presented persuades the ALJ that this compensable "injury" is the proximate cause of Claimant's need for medical treatment and diagnostic imaging, including a lumbar MRI. Taken in its entirety, the ALJ finds the evidentiary record to contain substantial evidence to support a conclusion that Claimant's MVA and not a "natural" episode of back pain or an unrelated sprain/strain event caused his current symptoms and need for treatment. Consequently, the ALJ concludes that Claimant has established that his need for treatment in the ER and by Dr. Paz and PA Glass was causally related to his work-related MVA on January 21, 2016. Moreover, the totality of the evidence presented establishes that the care, including the diagnostic testing, i.e. lumbar MRI was reasonable and necessary given Claimant's continued pain and functional decline. Consequently, the ALJ concludes that Respondents are liable for Claimant's care at Spanish Peaks Regional Health Center as well as the treatment provided by Dr. Paz and PA Glass.

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that he suffered a compensable injury to his low back as a consequence of an MVA occurring in the course and scope of his employment on January 21, 2016.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation fee schedule, to cure and relieve Claimant from the effects of his low back injury, including the care provided at Spanish Peaks Regional Health Center as well as the treatment provided by Dr. Paz and PA Glass.

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

DATED: September 20, 2016

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

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

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

ISSUES

➢ Whether claimant has proven by a preponderance of the evidence that the ongoing maintenance medical treatment he receives of prescription Tramadol is reasonable and necessary to maintain claimant at maximum medical improvement (“MMI”).

FINDINGS OF FACT

1. Claimant worked for employer as long-wall mechanic. Claimant sustained an admitted injury to his lower back on September 27, 2004. The injury occurred when the claimant was struck by a coworker’s automobile in the employer’s parking lot. The claimant sought treatment and underwent back surgery in December 2004.

2. Claimant was eventually placed at maximum medical improvement (“MMI”) on August 19, 2005, with a partial permanent disability (“PPD”) rating of 18% whole person. Respondents filed a final admission of liability (“FAL”) on April 11, 2006 admitting to the impairment rating and for general maintenance medical benefits.

3. Claimant moved to California in 2006 and respondents agreed to transfer his post-MMI care to Dr. Laurence Badgley. As demonstrated by the medical records, between 2006 and 2013, Dr. Badgley prescribed various pain medications to claimant including Cymbalta, Lyrica, Oxycodone, and MS Contin. Claimant had varying success with the effectiveness of these medications.

4. Claimant testified at hearing that he had a previous opioid dependence when he was taking Hydrocodone and MS Contin. Claimant also testified that he is aware of the possibility of becoming dependent on Tramadol. As demonstrated by Dr. McCranie’s report, claimant signed an informed consent regarding the use of narcotic medications in June 2009.

5. As demonstrated by the medical records, Dr. Badgley retired in September 2012. Thereafter, Dr. Martin Kernberg became claimant’s physician. Since that time, Dr. Kernberg has prescribed various pain medications to claimant including Hydrocodone, Gabapentin, Lidoderm patches, and Tramadol.

6. As indicated in the medical records, claimant attended an independent medical exam (“IME”) with Dr. Kathy Fine McCranie on August 7, 2013. Dr. McCranie reviewed claimant’s medical records, obtained a medical history, and performed a physical examination of claimant in connection with her IME. Following her IME, Dr. McCranie issued an IME report and opined that the claimant’s use of any opioid is not reasonable and necessary to maintain MMI. Dr. McCranie recommended the claimant use a neurogenic pain medication such as Gabapentin.

7. As demonstrated by claimant's testimony and the medical records, following the recommendation of Dr. McCranie, Dr. Kernberg prescribed Gabapentin to claimant. However, as indicated by the medical records, claimant's use of Gabapentin has been ineffective in treating his pain symptoms. In April 2016, Dr. Kernberg prescribed Tramadol to the claimant. Respondents have denied claimant's prescriptions for Tramadol.

8. Claimant credibly testified at hearing that he is able to function with the use of Tramadol. In addition, claimant testified that his quality of life has improved since beginning the use of Tramadol. Comparatively, claimant testified that he feels "high all the time" when taking Oxycodone and feels "sick" when taking Gabapentin.

9. The ALJ credits claimant's testimony, claimant's medical records, and the medical reports of Dr. Kernberg and finds that it is more likely than not that claimant's use of Tramadol is reasonable and necessary to maintain his MMI.

10. The ALJ credits the reports of Dr. Kernberg as more persuasive than the contrary opinion of Dr. McCranie. Dr. Kernberg has treated the claimant since 2012 and has observed the claimant's success with the use of Tramadol to treat claimant's pain. Furthermore Dr. McCranie's IME was conducted in August 7, 2013, well before claimant's first prescription for Tramadol. The ALJ recognizes claimant's admitted prior opioid dependence. However, the claimant has shown that his continued use of Tramadol is reasonable and necessary to maintain MMI.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

5. As found, claimant has shown by a preponderance of the evidence that the prescription for Tramadol is reasonable and necessary to maintain claimant at MMI. As found, claimant's testimony and the opinion expressed by Dr. Kernberg are more persuasive regarding the reasonableness of claimant's use of Tramadol than the contrary opinion expressed by Dr. McCranie.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the prescription medications from Dr. Kernberg including Tramadol.

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

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

DATED: September 20, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-919-196-02

ISSUE

The sole issue presented for adjudication at the hearing was:

1. Whether Respondent has proven it is entitled to a fifty percent (50%) reduction in compensation because the Claimant's May 16, 2013 work injury was caused by a willful failure to obey a reasonable rule adopted by Employer for the safety of the employee.

FINDINGS OF FACT

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

1. The Claimant has been employed as a network technician for Employer for approximately 21 years and remained employed there as of the date of the hearing. The Claimant's job duties included maintaining the integrity for the company's copper network which require repairing both underground cables and aerial cables. The Claimant operated a bucket truck, that is, a truck with an aerial lift incorporated into the vehicle. The Claimant had a reputation with Employer for being a model employee and had been identified as an example of an employee who understands and follows the rules. Prior to the work injury that is the subject of this case, the Claimant was unaware of any prior write-ups or safety issues with respect to use of the operation of the aerial lift on his company vehicle.

The May 16, 2013 Incident and Events Leading Up to It

2. The day before the Claimant's work injury, his supervisor, Mr. Andrew Frevert, was aware of a low line near the site in question. He had sent another technician out to assess the situation. Apparently a tree was partially blocking Valmont Road and was resting on one of Employer's cables. Mr. Frevert was advised that a line crew should be sent out to tighten up the line.

3. The morning of the Claimant's work injury, Employer received a call about low lines over Valmont Road. The Employer was informed that a truck had just missed hitting the lines. Mr. Frevert confirmed that this was a serious situation. He wasn't personally aware of this complaint, but if he had received this report, he would have gone to the site or sent someone if he were unavailable.

4. At approximately 1:00 p.m., the Claimant was dispatched to raise a low hanging cable that was crossing Valmont Road in Boulder, Colorado. The Claimant had not been informed that another technician had assessed the situation the day before nor was he informed that there had been a complaint earlier in the day that a truck had just missed hitting the low lines.

5. At the hearing, the Claimant testified that his memory of the events of May 16, 2013 is incomplete. He testified that he believes that he properly donned his harness and anchored his lanyard to the aerial bucket before performing aerial work at the worksite. The Claimant testified that his recollection was that while he was in the aerial bucket facing the road, he saw a truck drive under the low hanging cables, the top of the truck caught the low hanging cables, and he recalled being hit from behind. The Claimant could not recall falling out of the bucket to the ground, but he does have some memory of what occurred once he was on the ground. The Claimant testified that he recalls conversation going on around him about removing his safety harness. When he got to the emergency room later, his safety harness was off.

6. The Employer's First Report of Injury was prepared by Mr. Frevert. He described the mechanism of injury as follows:

> APS calling on behalf of EE, [Claimant], alleges EE was up in bucket working on a drop line. A passing vehicle caught the drop line causing the pole to snap and EE fell to ground approx. 12-15 feet. 911 was called and EE was transported to Good Samaritan Hospital.
>
> (Respondents' Exhibit D)

7. Mr. Frevert testified that he was at the scene of the May 16, 2013 incident within 5 to 10 minutes after the incident occurred. Mr. Frevert testified that the Claimant's safety harness and lanyard was lying on the ground behind the Claimant's vehicle at the scene of the accident. The lanyard was not deployed. Mr. Frevert retrieved the harness and lanyard at the scene and maintained custody of the harness until taking photographs of the harness the next day in his office. Mr. Frevert also reviewed Respondents' Exhibits K, L and M, which he stated accurately depicted the scene of the May 16, 2013 work site shortly after the incident. Both Mr. Frevert and Ms. Neher, after reviewing these exhibits, testified that the exhibits demonstrate that the Claimant did not have safety cones deployed, nor did he have wheel chocks deployed.

8. The Respondents have asserted that there are three safety rules while performing aerial work that would have applied relative to the Claimant's May 16, 2013 work injury:

- Placing a minimum of two safety cones around the vehicle
- Deploying a minimum of two wheel chocks to be placed against the tires of his truck.
- Wearing a harness and lanyard that is attached to the bucket

Safety Cones

9. Respondents have a written safety rule involving traffic cones for vehicles parked off of Employer's property (Claimant's Exhibit 18). Specifically, the rule provides that traffic cones are to be used to channel pedestrians or vehicle traffic away from work areas. The Claimant acknowledged that the Employer had a written safety rule involving

the proper use of cones while at worksites, and that he knew of this safety rule at the time of the May 16, 2013 incident. The purpose of safety cones is to set up a “circle of safety.” Safety cones are to let other drivers and pedestrians know that there is a service vehicle in the area, and to take caution to avoid the service vehicle.

10. The Claimant testified that he believes, as a matter of habit and practice, that he would have placed cones out as part of the circle of safety. However, the Claimant testified credibly that he does not have complete memory of the events prior to the work injury and admitted that there were no cones around the vehicle in the photographs of the worksite taken after his work injury.

11. In any event, there was no persuasive evidence presented that the placement of two safety cones near the Claimant’s truck would have prevented the work injury. There was, likewise, no persuasive evidence presented that the lack of placement of two safety cones near the Claimant’s truck had a causal relation to the incident or to the Claimant’s resulting injuries.

Wheel Chocks

12. Respondents, at the time of the May 16, 2013 incident, had a written safety rule in place that required a line technician such as the Claimant to deploy a minimum of two wheel chocks (Respondents’ p. 6). The purpose of deploying wheel chocks is to prevent the service truck from moving while performing aerial work. The Claimant acknowledged that Respondents had a safety rule involving wheel chocks for aerial work. However, the Claimant further testified that he did not understand the wheel chock rule to be applicable under the conditions that he encountered at the Valmont Road job on the day of the incident. The Claimant testified that he believed the wheel chock rule applied if you were stopped on a hill or incline or on ice, snow or a slick surface. His testimony about his understanding of the wheel chock rule was credible.

13. In any event, there was no persuasive evidence presented that the placement of two wheel chocks would have prevented the work injury. There was, likewise, no persuasive evidence presented that the lack of placement of two wheel chocks had a causal relation to the incident or to the Claimant’s resulting injuries.

Harness and Lanyard

14. Respondents have a written safety rule on how to use a harness and lanyard in an aerial bucket situation (Respondents’ p. 6). Specifically, the written safety rule states that in performing aerial lift operations, a technician must wear a full body harness with lanyard attached to the anchorage point and a hardhat must be worn. The Claimant admitted that he knew of this written safety rule at the time of his May 16, 2013 incident.

15. Respondents submitted into evidence Respondents’ Exhibit G, which is a picture of the actual harness and lanyard that Claimant had with him at the time of the May 16, 2013 incident. A harness with a lanyard properly anchored to a bucket is designed to

prevent a line technician from hitting the ground if he were ever to fall out of his bucket. Specifically, the harness contains a lanyard, which is a pocket enclosing strapping stitched together designed to both break the fall if a technician were to fall out of his bucket, and to prevent the technician from hitting the ground. Consequently, if a technician is properly wearing his harness with the lanyard is properly anchored to the bucket, and the line technician were to then fall out of his bucket, it is expected that the lanyard would deploy with the pocket opening and the enclosed strapping would be out of the pocket.

16. Mr. Frevert testified credibly that, prior to taking the pictures of the harness with the lanyard, the harness and lanyard remained in his custody. As such, Exhibit G is a fair and accurate depiction of the condition of lanyard that Mr. Frevert retrieved from the site of the Claimant's work injury. The photograph that is Exhibit G plainly shows that: (a) the lanyard hook that should have been attached to the bucket was hooked back onto the harness, and (b) the lanyard had not deployed.

17. Mr. Frevert testified that because the lanyard had not deployed, he only had two possible explanations for what may have occurred: (a) the Claimant was not wearing his harness at the time that he fell out of the bucket; or (b) If the Claimant was in fact wearing the harness, he had not properly anchored the lanyard to his bucket.

18. Tamara Neher is the area operations manager for the Employer and was in the line of supervision for Claimant. Ms. Neher concurred with Mr. Frevert that Exhibit G demonstrated that the lanyard had not deployed. As such, Ms. Neher also concluded that, at the time of the May 16, 2013 incident, the Claimant had not properly used his harness, either because he never had it on, or, if he had it on, he did not properly anchor his lanyard to the bucket.

19. At the hearing, Mr. Frevert and Ms. Neher were each asked to consider the scenario that the Claimant may have actually been wearing his harness and the lanyard was properly anchored to the bucket, but that the lanyard, for whatever reason, simply did not deploy. Both Mr. Frevert and Ms. Neher testified that if that in fact would be the case, the Claimant still would not have hit the ground when he fell out of his bucket. Rather, Claimant would have been hanging further up in the air outside of his bucket than he would have had it deployed.

20. Exhibit G shows, and Respondents acknowledge, that the harness and lanyard that was at the worksite on May 16, 2013 has parts of the harness that had been clipped away. However, Respondents submit that does not imply that the harness somehow tore while Claimant was falling out of the bucket. First, if the harness had actually torn, then the harness would have been still attached to the bucket after the Claimant fell. Second, the Claimant has testified that, following the incident, individuals at the scene cut the harness off of him. The ALJ finds that it is more likely than not that the destruction to portions of the harness was caused by the harness being cut off the Claimant.

21. The ALJ notes that although photographs of the harness and lanyard that the Claimant wore on May 16, 2013 were admitted into evidence, the actual harness and lanyard were not presented at the hearing either for admission or as a demonstrative

exhibit. It is unknown if the equipment was fully functional at the time of the Claimant's work injury.

The Claimant's Injuries

22. There was significant damage to the aerial bucket where the pole hit it as reflected in some of the photographs in Claimant's Exhibit 9. There was also credible testimony that the aerial bucket for the Claimant's vehicle was replaced after the Claimant's May 16, 2013 work injury.

23. Dr. Nicholas Olsen also testified at hearing. Dr. Olsen testified as to how the contemporaneous medical records were inconsistent with the Claimant being struck by the pole before falling out of the bucket. Specifically, although Dr. Olsen acknowledged that some of the earlier medical records referenced a history in which the Claimant was actually hit by the pole, Dr. Olsen believed that if the Claimant had actually been hit by the pole before he fell out of the bucket, he would have had much more serious injuries than he actually had. Dr. Olsen testified that if the Claimant had actually been hit by the pole as it was actually falling, he would have had compression fractures of his neck and skull, subdermal hematomas, and most likely would have actually died. Dr. Olsen also noted that the emergency room records dated May 16, 2013, only demonstrated that the Claimant was complaining of a mild headache with no loss of consciousness. Dr. Olsen also noted that the CT scan of the Claimant's neck was basically normal except for mild degenerative changes. As a result, based on the Claimant's presentation at the emergency room, as well as the result of the CT scan, it was Dr. Olsen's opinion that it was highly unlikely that the Claimant was struck by the pole as it was falling.

24. Dr. Olsen identified the following as injuries the Claimant sustained as a result of the May 16, 2013 incident:

- Fracture of the T1 transverse process of the right side
- Compression fracture at the T2 level of 20%
- Compression of the T3 vertebrae body at 60%
- Right rib fractures
- Clear evidence of post-traumatic amnesia with potentially a closed head injury

25. Dr. Olsen testified that the mechanism of injury that caused the resulting injuries was when the Claimant fell out of the bucket and landed on the ground. Dr. Olsen then testified that it was his opinion that the Claimant would not have sustained any of the listed enumerated injuries if the Claimant had been properly wearing a harness which was properly anchored to the lift bucket because the Claimant would not have hit the ground.

Disciplinary Proceedings

26. Both Mr. Frevert and Ms. Neher testified that if a network technician was not properly using a harness while performing aerial work in a bucket, that technician would be subject to discipline. Both Mr. Frevert and Ms. Neher testified that at the time that they

have been supervisors, this is the only time in which there was evidence to suggest that a line technician had been performing aerial work without properly using his harness.

27. In April of 2014, the Employer held two investigative meetings with the Claimant, management for Employer, and union representatives all present at the meeting. The first meeting started on April 14, 2014 and was halted and later concluded two days later. The Claimant argues, and Ms. Audrey DeGuio, a union representative testified, the first meeting was stopped when union representatives questioned the company representatives about management's responsibility to assess risk in this case based on the information available to the company prior to dispatching the Claimant to this job. Ms. DeGuio also testified that, during the proceedings, the Claimant and the union representatives were not permitted to touch the Claimant's safety harness. Ms. DeGuio testified that she felt this was unusual.

28. Following the meetings, Ms. Neher, as the decision maker for any potential safety rule violation, determined that the Claimant violated the following safety rules as it pertains to aerial work during the May 16, 2013 incident:

- He had not properly used a safety harness
- He had not properly deployed safety cones
- He had not properly deployed wheel chocks

29. With regards to the failure to properly use a harness during the May 16, 2013 incident, Ms. Neher testified that she relied upon Exhibit G (the picture of the harness and lanyard), which demonstrated that the lanyard had not been deployed, and that the lanyard hook used to anchor the harness to the bucket was still attached to the harness. Ms. Neher stated that the basis for her determination that the Claimant had not properly deployed safety cones and wheel chocks were Exhibits K through M (pictures taken at the scene of the incident). Consequently, Ms. Neher determined that the Claimant would be disciplined in the form of a written warning. The Claimant acknowledged that he received a written warning as a result of the violations of the safety rules pertaining to the proper use of a harness, the proper deployment of safety cones, and the proper deployment of wheel chocks.

30. Based on all of the admitted exhibits and testimony presented at the hearing, the ALJ finds that the Claimant's safety harness and lanyard clearly did not properly deploy. However, the ALJ finds that it is more likely than not that the Claimant was wearing the harness, given that it was cut off of him. Although there is no way to know for certain due to the Claimant's credible and reasonable lack of memory regarding his traumatic work injury, the most likely explanations are that the harness was either (a) not sufficiently hooked to the connection in the bucket, or (b) the hook on the harness failed and the harness disconnected from the connection in the bucket.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. Respondent bears the burden of establishing that Claimant's injury was caused by a willful violation of a safety rule. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. § 8-43-201 (2008) C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

Safety Rule Violation

C.R.S. § 8-42-112(1)(a) provides for a 50% reduction in compensation to a claimant where a respondent proves that the claimant's injury was caused by the willful failure obey any reasonable rule adopted by the employer for the safety of the employee. The Respondents carry the burden of establishing all five elements of a safety rule violation, which are:

1. There must be a specific, unambiguous and definite safety rule adopted by the employer.

2. The safety rule must be reasonable.

3. The safety rule must be "brought home" to the employee and diligently enforced.

4. Violation of the safety rule must be willful.

5. The violation of the safety rule must be a cause of the claimant's injury.

Here, the evidence established that the Employer adopted safety rules about the use of safety cones, wheel chocks and the use of the harness and lanyard equipment when employees are performing aerial work. These rules are reasonable and are designed for the safety of the employees. However, there is some question regarding whether the rules about safety cones and wheel chocks were sufficiently "brought home" to the Claimant. The Claimant credibly testified that he did not understand the wheel chock rule to apply in the conditions at the time of his work injury. Moreover, with respect to the use of safety cones and wheel chocks, Respondents failed to establish that violation of these rules was a cause of the Claimant's injury.

With respect to the use of the harness and lanyard equipment, there were various opinions offered as to what may have occurred. Ultimately, based on the evidence presented, the ALJ concluded that the Claimant's safety harness and lanyard clearly did not properly deploy. However, the ALJ found it more likely than not that the Claimant was wearing the harness, given that it was cut off of him.

Thus, the question turns to whether the Claimant employed the harness and lanyard properly by appropriately attaching it to the connection in his aerial bucket. Although there is no way to know for certain due to the Claimant's credible and reasonable lack of memory regarding his traumatic work injury, the most likely explanations are that the harness was either (a) not sufficiently hooked to the connection in the bucket, or (b) the hook on the harness failed and the harness disconnected from the connection in the bucket. In the first scenario, the Claimant may have been careless or negligent in and attempt to connect his harness. In the second situation, the Claimant would not have had culpability and the equipment simply failed.

However, in any event, the Respondents have failed to establish that the Claimant acted willfully and with deliberate intent. The safety rule penalty is only applicable if the violation is willful. The question of whether the respondents proved willful violation of a safety rule by a preponderance of the evidence is one of fact for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). intention. Violation of a rule is not willful unless the claimant did the forbidden act with deliberate intent. A violation which is the product of mere negligence, carelessness, forgetfulness or inadvertence is not willful. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *Johnson v. Denver Tramway Corp.,* 171 Colo. 214, 171 P.2d 410 (1946); *In re Alverado,* W.C. No. 4-559-275 (ICAO December 10, 2003). Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

Here, even if the Claimant's harness and lanyard safety equipment were not properly attached to the connection in the bucket, the Respondents have failed to establish that the Claimant acted willfully. The Claimant was a long-time employee and had a solid reputation as an employee who followed the rules and was committed to safety. No reasonable explanation was offered at the hearing as to why the Claimant would intentionally and willfully violate the rule about properly attaching his harness and lanyard to the connection in the aerial bucket. The Claimant has no recollection of the relevant events and Respondents have speculated that the Claimant willfully and intentionally failed to wear his harness or that he wore it but failed to connect the harness and lanyard to the bucket connection. However, this action would be inapposite to a record for safety compliance that the Claimant built over more than two decades. The Claimant had no prior safety violations and was, by all accounts, an excellent employee who was held up as an example for other employees in terms of his record for safety. Thus, the ALJ finds that, rather than inferring the Claimant's actions were in any way willful, it was equally plausible that the Claimant was negligent or careless, even if he didn't connect his harness properly. If, the Claimant was merely negligent or careless, which is just as likely, possibly more likely, then the Respondents failed to meet their burden of proof.

As the Respondents failed to establish that the Claimant's injury resulted from his willful failure to obey a reasonable rule adopted by the Employer for his safety, the Claimant's benefits shall not be reduced by fifty percent.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish that Claimant's injury resulted from his willful failure to obey a reasonable safety rule adopted for the safety of the employees and therefore Respondents are not entitled to a reduction in benefits pursuant to §8-42-112(1).

2. Respondents shall pay the Claimant in full for all admitted temporary or permanent disability benefits with no reduction.

3. Insurer shall pay eight percent (8%) per annum on all compensation not paid when due.

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

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

DATED: September 19, 2016

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

ISSUES

The following issues were endorsed and raised for consideration at hearing:

1. Whether the Respondents have proven, by a preponderance of the evidence, that the Claimant has engaged in injurious practice per C.R.S. § 8-43-404(3) by delaying in scheduling surgery for his elbow.

FINDINGS OF FACT

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

1. The Claimant was employed as a sign installer and was repairing and interior sign on December 10, 2014 when he fell from a ladder and hit his elbow on a concrete floor (Respondents' Exhibit A).

2. The Claimant testified that, after the fall, he was taken to the hospital for treatment. The Claimant underwent emergency surgery to address a fracture and dislocation on December 10, 2014 (see Respondents' Exhibit K, p. 157).

3. The Respondents filed the General Admission of Liability on December 24, 2014 and began paying temporary disability benefits from December 11, 2014 and continuing (Respondents' Exhibit B).

4. The Claimant underwent a second surgery on March 24, 2015 performed by Michael P Rusnak, MD. This surgery was a removal of external fixator from the right arm and manipulation under anesthesia of the right elbow. The postoperative diagnosis was a right elbow terrible triad fracture dislocation with involvement of the olecranon through a trans olecranon fracture, status post fixation complicated by instability, status post external fixation placement (Respondents' Exhibit K, p. 162).

5. On April 7, 2015, the Claimant saw Dr. Seiler for evaluation of a post-operative dislocated right elbow that had been subluxed. Dr. Seiler assessed the Claimant with elbow instability. He recommended radial and ulnar collateral ligamentous reconstruction of the elbow (Respondents' Exhibit L, p. 168).

6. Dr. Seiler performed the surgery he had previously recommended on April 23, 2015 (Respondents' Exhibit J). At a follow up evaluation with Dr. Seiler on May 7, 2015, Dr. Seiler commented that the Claimant's elbow joint appeared to be subluxed. Dr. Seiler noted that the surgery had been rather difficult (Respondents' Exhibit L, p. 169). On June 11, 2015, the Claimant saw Dr. Seiler who noted that he continued to have recurrent subluxation events which were very painful and the Claimant had been started again on narcotics. Dr. Seiler discussed that the Claimant's treatment options

were to live with the condition as is or to consider an elbow effusion (Respondents' Exhibit L, p. 172). On July 16, 2015, the Claimant saw Dr. Seiler again reporting that he had been working on range of motion but was still experiencing instability symptoms and pain. The Claimant advised Dr. Seiler that he was moving back to New York where he has more support. He asked for a recommendation for an elbow surgeon in New York for a second opinion. Dr. Seiler provided him with the name and number of Dr. Hotchkiss. The Claimant advised Dr. Seiler that he would like to try to hold off on the elbow effusion surgery, but that he would follow up with Dr. Hotchkiss (Respondents' Exhibit L, p. 173).

7. The Claimant testified that while he was still living in Colorado after his work injury, he moved a couple of times. He testified that Insurer would arrange for his travel for medical treatment or would reimburse him for mileage.

8. The Claimant testified that he subsequently moved to New York on August 8, 2015. The Claimant testified that Insurer facilitated his treatment with Dr. Hotchkiss, the surgeon recommended by Dr. Seiler. Ms. Dawn Lewis of Corvel Corporation was assigned to assist the Claimant with coordinating the transfer of care to Dr. Robert Hotchkiss. Ms. Lewis, the nurse case manager noted that she secured an appointment for the Claimant with Dr. Hotchkiss on September 24, 2015. Ms. Lewis noted that this was the only case management task assigned to CorVel, so on September 21, 2015, she sent a closure letter to the Claimant (Respondent's Exhibit H).

9. The Claimant first saw Dr. Hotchkiss on September 24, 2015. Dr. Hotchkiss noted the following case history from the Claimant,

> He states that he was seen in the emergency room the same day and taken to the operating room the same day for an I&D, open reduction internal fixation of the ulna, and radial head replacement. After the surgery, he returned home to another part of Colorado and due to insurance issues and logistical reasons did not see his surgeon for approximately six weeks after surgery. At this point, he was noted to be, what sounds like, dislocated per his description. At this point, he was placed in a static ex-fix for approximately two months. This was in January or February. There was no intermittent motion while he was in the ex-fix. After two months, he had the ex-fix removed and he was placed in a hinged brace in a locked position. The next morning, he felt his elbow slip out of place. He was seen the next day and taken for an examination under anesthesia with fluoroscopy and placed in a hard cast. He states that he felt his elbow dislocate while in the hard cast. He was referred to another surgeon, Dr. Seiler, who performed a ligament reconstruction with Palmaris autograft from both forearms, and this sounds as though it has failed essentially immediately as they were unable to get good fixation of the bone. After this, his surgeon discussed with him that fusion may be an option, but was uncomfortable recommending it definitively. Therefore, he recommended a second opinion for which the patient presents today. Interval history is that [the Claimant] feels that his elbow is both painful and unstable. It has been slightly better over the last month with less

> noticeable “shift.” He wakes up with significant pain in the morning. He is a very active person and would like to return to his previous level of activity.
>
> (Claimant’s Exhibit 5, p. 6; Respondents’ Exhibit G, p. 19).

At this time Dr. Hotchkiss recommended that he obtain a high-quality CT scan for potential preoperative planning and had discussed with the Claimant the option of a possible interposition arthroplasty as the next surgical step (Claimant’s Exhibit 5, p. 7; Respondents’ Exhibit G, p. 20).

10. On September 25, 2015 a request for authorization was sent to Corvel Corporation Attn: Dawn E Lewis R.N. CCM. This authorization was for the CT scan of the right elbow without contrast (Claimant’s Exhibit 2, p. 2). A letter from Insurer dated October 2, 2015 notes that a request dated September 25, 2015 was received on September 28, 2015 (Claimant’s Exhibit 1, p. 1).

11. On October 22, 2015 the Claimant underwent a CT of the right elbow which showed the “radial head prosthesis in anatomic position. Healed fracture of the proximal ulna with internal fixation. Posttraumatic degenerative changes of the humeral ulnar joint” (Respondents’ Exhibit M, p. 175).

12. On October 22, 2015, the Claimant also saw Dr. Hotchkiss again. After review of the CT scan, Dr. Hotchkiss noted that the joint was a bit open with the radial head implant now abutting/eroding into the capitellum. He also noted loose bodies in the joint and that the ulnohumeral joint was gapping. Dr. Hotchkiss advised the Claimant that this was not an easy problem to solve but that he did not want to perform a total elbow arthroplasty as it would not be durable in a 34-year old. However, because the Claimant was in pain and could not use his arm functionally, he recommended an interposition arthroplasty surgical pan to repair the Claimant’s ligament and do the interposition with an ulnar nerve transposition and application of a hinge ex-fix. The Claimant advised that he was currently studying to be a physicist and would prefer to schedule the surgery the next May. The medical note does not indicate that deferring the surgery to May was not recommended or that it would pose additional risk to the Claimant. Rather, the note indicates that Dr. Hotchkiss’ office would proceed to schedule the surgery in May (Claimant’s Exhibit 6; Respondents’ Exhibit G, p. 21).

13. On October 26, 2015 a request for authorization for surgery in May of 2016 was sent to Corvel Corporation Attn: Dawn E Lewis R.N. CCM. The surgery requested was right elbow interposition arthroscopy with Achilles tendon allograph, right elbow ulnar nerve neurolysis, right elbow application of ex-fix compass hinge and right elbow lateral collateral ligament repair (Claimant’s Exhibit 3, p. 4).

14. The adjuster for Insurer, Nancy A’Hern, testified that she did not receive this request for authorization. She testified that she did receive the medical report from Dr. Hotchkiss in October 2015. On November 13, 2015, Ms. A’Hern sent a letter to Dr. Hotchkiss stating “thank you for your most recent report dated October 22, 2015. In this report you are recommending a surgery due to continued pain in [the Claimant’s] inability to use the arm functionally. The surgery, to accommodate [the Claimant’s]

schedule, is not likely to be done until May. What are [the Claimant's] treatment recommendations between now and this surgery?" She then described MMI and asked if Dr. Hotchkiss agreed that the Claimant was at MMI as of this date until he has surgery in May, and then he could be taken off MMI status for surgery and the recovery period (Respondents' Exhibit N).

15. On December 18, 2015, Dr. James P. McElhinney provided a written opinion which appears to be based on a record review, although there is no indication which medical records Dr. McElhinney may have reviewed. Nevertheless, Dr. McElhinney notes that the Claimant saw Dr. Hotchkiss who recommended a possible interposition arthroplasty but that the Claimant did not want to have surgery until May or June. Dr. McElhinney opined that because the Claimant was waiting for surgery and would be getting no treatment until then, he should be placed at MMI and then the case could be reopened when the Claimant returned for treatment/surgery (Respondents' Exhibit I).

16. The Claimant testified that he did not want to have the surgery until May as he was enrolled in school and didn't want to miss school as a result of the surgery. He testified that he attended school from August 31, 2015 through December 14, 2015 and then again from January 19, 2016 through May 12, 2016. During this time, the Claimant continued to receive TTD benefits of $560.00 per week. The Claimant testified that he was not contacted by a medical case manager about scheduling his surgery sooner.

17. On April 14, 2016 Insurer issued a letter authorizing the surgery requested (Claimant's Exhibit 4, p. 5).

18. On May 17, 2016, the Claimant saw Dr. Hotchkiss for presurgical discussion. After physical examination and review of new radiographs, Dr. Hotchkiss noted that there was no significant deterioration and, "in fact, the joint congruity looks to be a bit improved." Dr. Hotchkiss noted that although the previously recommended interposition arthroplasty had been approved by the Insurer, because the Claimant's daily function had improved, he was now "hesitant to disturb the equilibrium in the elbow with an interposition arthroplasty" and now advised that an arthroscopic debridement of the elbow would be useful to reduce pain and remove the loose bodies that are causing the elbow to lock and grind. Dr. Hotchkiss noted, "the patient is grateful and also relieved to be having a procedure that is not quite as drastic and is hopeful it will reduce some of his pain." A Request for Authorization was sent to Insurer on May 19, 2016 for a right elbow arthroscopic debridement (Respondents' Exhibit O, offered during the deposition of Dr. Seiler and admitted, with no objection, by the ALJ upon review of the transcript).

19. In his deposition, Dr. Steven Seiler, who had treated the Claimant in Colorado, commented on the surgery proposed by Dr. Hotchkiss and opined that the surgery was an appropriate option and one thing that could be done to try to improve the Claimant's elbow condition (Seiler Depo. Tr., May 23, 2016, pp. 9-10). When Dr. Seiler was asked whether the Claimant's condition improved during the delay between the recommendation of surgery and the approval for the surgery. Dr. Seiler first testified

that “that’s what I read…Dr. Hotchkiss’ physical exam findings states that it appears that he’s doing better. So, his function is such that you would not necessarily recommend the interpositional arthroplasty at that time.” He further testified “you know, it’s hard – – I’m just speculating between some notes and not here. So the only thing I can say is Dr. Hotchkiss originally recommended a much more involved procedure and now doesn’t, based on the last time he saw the patient, so you can infer maybe that things got a little bit better” (Seiler Depo. Tr., May 23, 2016, pp. 16-17).

CONCLUSIONS OF LAW

Generally

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

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

Injurious Practice

C.R.S. §8-43-404(3) provides, in pertinent part,

> If any employee persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment or vocational evaluation as is reasonably essential to promote recovery, the director shall have the discretion to reduce or suspend the compensation of any such injured employee.

The employer has the burden of proving that a worker has persisted in engaging in "any unsanitary or injurious practice which tends to imperil or retard his recovery" or has "refused to submit to such medical ... treatment ... as is reasonably essential to promote his recovery and rehabilitation. Absent proof of either a refusal to accept essential medical treatment or persistence in engaging in an injurious practice, the statute is inapplicable. *Neodata Services v. Industrial Claim Appeals Office*, 805 P.2d 1180 (Colo. App. 1991).

Respondents argue in favor of the suspension of benefits from December 28, 2015 through May 23, 2016 and entitlement to an overpayment of $11,840.00 Respondents further argue that they are not required to prove that the Claimant's condition "worsened" as a result of the delay. Rather, Respondents are required to prove that the surgery is "reasonably essential to promote recovery." *Gonzales v. Industrial Claim Appeals Office,* 905 P.2d 16 (Colo. App. 1995). Respondents additionally rely upon *Todd Parks v. Ft. Collins Ready Mix*, W.C. No. 4-251-955 (ICAO, March 31, 1999). In that case, the claimant underwent an unsuccessful talonavicular fusion. A repeat fusion was recommended and that claimant was referred for a second opinion where he was again recommended to undergo the revision surgery. Respondents filed a petition to suspend TTD benefits on grounds that the claimant in that case had refused to submit to further surgery after months of delay. The ALJ found that the claimant "willfully and unreasonably delayed and refused to submit to medical treatment" and had "failed to appear for surgery scheduled for September 2, 1998." *Id*.

This case is distinguishable from the cases cited by the Respondents. Here, in considering the history of the case, the recommendations of physicians, the Claimant's actions, the inaction of the Respondents and the fact that, due to the delay in the surgery, the Claimant's surgeon now recommends a much less drastic surgery than he originally did, it is clear that the Claimant has not engaged in an injurious practice.

From the medical records, it is clear that neither Dr. Hotchkiss nor Dr. Seiler were entirely comfortable with recommending a total arthroplasty, a fusion or right elbow interposition arthroscopy (as the only option remaining after this surgery would be a total elbow arthroplasty). The Claimant's physicians noted that the Claimant is in his early thirties and the more drastic surgical options were not expected to be durable for such a young patient. When the Claimant advised that he was currently studying to be a physicist and would prefer to schedule the surgery the next May, there is no indication that Dr. Hotchkiss recommended against the delay or that deferring the surgery to May would pose additional risk to the Claimant. Rather, quite the opposite, the medical records indicate that Dr. Hotchkiss' office would proceed to schedule the surgery in May.

While the adjuster from Insurer, inquired on November 13, 2015, about the Claimant's treatment recommendations between now and this surgery and she asked if Dr. Hotchkiss agreed that the Claimant was at MMI as of this date until he has surgery in May, she did not inquire if Dr. Hotchkiss advised against delaying the proposed surgery until May. Nor did she appear to have any communications with the Claimant about this or about requests that he schedule his surgery earlier.

On April 14, 2016, Insurer issued a letter authorizing the surgery requested by Dr. Hotchkiss. Then, on May 17, 2016, the Claimant saw Dr. Hotchkiss for presurgical discussion. After physical examination and review of new radiographs, Dr. Hotchkiss noted that there was no significant deterioration and, "in fact, the joint congruity looks to be a bit improved." Dr. Hotchkiss noted that although the previously recommended interposition arthroplasty had been approved by the Insurer, because the Claimant's daily function had improved, he was now “hesitant to disturb the equilibrium in the elbow with an interposition arthroplasty” and now advised that an arthroscopic debridement of the elbow would be useful to reduce pain and remove the loose bodies that are causing the elbow to lock and grind. Dr. Hotchkiss noted, “the patient is grateful and also relieved to be having a procedure that is not quite as drastic and is hopeful it will reduce some of his pain.” In his deposition, Dr. Steven Seiler was asked whether the Claimant’s condition improved during the delay between the recommendation of surgery and the approval for the surgery and he agreed that Dr. Hotchkiss originally recommended a much more involved procedure and now doesn’t, based on the last time he saw the patient, so you can infer maybe that things got a little bit better.

While Respondents are not required to prove that the Claimant’s condition “worsened” to prove injurious practice, when a Claimant’s condition actually improves because of a delay of approximately 5 months, there simply is no injurious practice. This is especially true in this case where the Claimant’s ATP, Dr. Hotchkiss did not recommend the Claimant submit to an earlier surgery, did not recommend against a delay, and the Claimant was not willfully disobeying any recommendation from his treating physicians, nor any requests from Respondents, that he schedule his surgery at an earlier date. Further, the Claimant had already had four surgeries, several of which had failed. The ALJ finds that a delay is reasonable in this situation even if the delay was partly due to accommodate a school schedule. Finally, in this case, the delay actually resulted in the medical decision to proceed with a significantly less drastic surgical procedure which leaves the Claimant with more future treatment options, which is important due to his age. It is even possible that the Claimant may actually achieve MMI status earlier in this case due to undergoing a less drastic surgical option than was originally planned, which may have had a longer recovery or a greater chance of failure requiring additional medical treatment.

Respondents have failed to prove that the Claimant engaged in injurious practice which warrants the exercise of the ALJ’s discretion to reduce of suspend the Claimant’s benefits pursuant to C.R.S. §8-43-404(3).

ORDER

It is therefore ordered that:

1. The Respondents have failed to prove by a preponderance of the evidence that the Claimant has engaged in injurious practice per C.R.S. §8-43-404(3) warranting the exercise of the ALJ’s discretion to reduce or suspend the Claimant’s compensation. As such, the Respondents’ claim under C.R.S. §8-43-404(3) is dismissed and denied.

2. Because the Respondents have not proven injurious practice, they have likewise failed to prove entitlement to an overpayment due to the suspension of benefits.

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

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

DATED: September 21, 2016

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

ISSUE

Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Thomas G. Fry, M.D. that she reached Maximum Medical Improvement (MMI) on April 22, 2015 and left shoulder surgery is not reasonable or necessary.

FINDINGS OF FACT

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

2. Claimant received medical treatment through Concentra Medical Centers. She underwent physical therapy and conservative medical care that included subacromial injections. Because conservative measures failed, Authorized Treating Physician (ATP) Eric McCarty, M.D. sought authorization for a left shoulder arthroscopic subacromial decompression, distal clavicle excision and an evaluation of biceps tenodesis.

3. Respondent denied the surgical request and Claimant sought a hearing. On July 29, 2014 the parties conducted a hearing before ALJ Edwin L. Felter, Jr. on whether the requested left shoulder arthroscopic subacromial decompression, distal clavicle excision and evaluation of biceps tenodesis constituted reasonable and necessary medical treatment. On August 14, 2014 ALJ Felter denied the surgical request but authorized physical therapy. He noted that, after conservative measures were exhausted, Claimant could seek reevaluation as a surgical candidate.

4. Claimant subsequently completed 12 physical therapy sessions. Physical therapy decreased the cracking and popping in her left shoulder.

5. On October 27, 2015 Claimant underwent a DIME with Thomas G. Fry, M.D. After reviewing Claimant's medical history and performing a physical examination, Dr. Fry diagnosed Claimant with the following: (1) subscapular bursitis; (2) pre-existing acromioclavicular arthritis; (3) frozen shoulder; (4) possible posterior labrum tear; (5) mild tendinosis of the supraspinatus and infraspinatus; (6) "inconsistent effort as demonstrated by grip testing;" and (7) "significant frustration and anger issues." He determined that Claimant had reached MMI on April 22, 2015 and did not require additional medical treatment. Based on Claimant's inconsistent effort and significant frustration, Dr. Fry noted that surgical treatment and postoperative therapy were unlikely to be successful. Left shoulder surgery was thus not reasonable or necessary. He

assigned Claimant a 17% left upper extremity impairment or 10% whole person rating based on range of motion deficits. Dr. Fry also assigned permanent restrictions that precluded overhead use of the left arm, repetitive lifting and pushing or pulling in excess of 20 pounds.

6. On April 11, 2016 Claimant underwent an independent medical examination with F. Mark Paz, M.D. Dr. Paz also testified at the hearing in this matter. He agreed with Dr. Fry that Claimant had reached MMI on April 22, 2015. Dr. Paz explained that Claimant did not warrant any additional medical treatment for her left shoulder condition. Relying on the *Workers' Compensation Medical Treatment Guidelines* (*Guidelines*), he detailed that left shoulder surgery was not reasonable or necessary because it would not relieve Claimant's pain or improve her function. Dr. Paz commented that, because Claimant exhibited inconsistent effort during her examination, her subjective complaints were unreliable.

7. Claimant testified at the hearing in this matter. She explained that she would like to undergo left shoulder surgery if it would improve her condition. Claimant noted that she is willing to participate in psychological treatment to address her anger and frustration as part of her Workers' Compensation claim.

8. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Fry that she reached MMI on April 22, 2015 and left shoulder surgery is not reasonable or necessary. After reviewing Claimant's medical history and performing a physical examination, Dr. Fry determined that Claimant had reached MMI on April 22, 2015 and did not require additional medical treatment. Based on Claimant's inconsistent effort and significant frustration, Dr. Fry noted that surgical treatment and postoperative therapy were unlikely to be successful. Left shoulder surgery was thus not reasonable or necessary. Dr. Paz agreed with Dr. Fry that Claimant had reached MMI on April 22, 2015. He explained that Claimant did not warrant any additional medical treatment for her left shoulder condition. Relying on the *Guidelines*, Dr. Paz detailed that left shoulder surgery was not reasonable or necessary because it would not relieve Claimant's pain or improve her function. He noted that, because Claimant exhibited inconsistent effort during her examination, her subjective complaints were unreliable.

9. Claimant explained that she would like to undergo left shoulder surgery if it would improve her condition. She also commented that she is willing to participate in psychological treatment to address her anger and frustration as part of her Workers' Compensation claim. However, Claimant's testimony merely constitutes a disagreement with Dr. Fry about whether she has reached MMI and left shoulder surgery is reasonable and necessary. Claimant has not directly challenged the methodology or validity of Dr. Fry's conclusions. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fry's MMI and surgical determinations were incorrect.

CONCLUSIONS OF LAW

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

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

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

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

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

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by “clear and convincing evidence.” §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's rating is incorrect. *Qual-Med, Inc. v.*

Industrial Claim Appeals Office, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Fry that she reached MMI on April 22, 2015 and left shoulder surgery is not reasonable or necessary. After reviewing Claimant’s medical history and performing a physical examination, Dr. Fry determined that Claimant had reached MMI on April 22, 2015 and did not require additional medical treatment. Based on Claimant’s inconsistent effort and significant frustration, Dr. Fry noted that surgical treatment and postoperative therapy were unlikely to be successful. Left shoulder surgery was thus not reasonable or necessary. Dr. Paz agreed with Dr. Fry that Claimant had reached MMI on April 22, 2015. He explained that Claimant did not warrant any additional medical treatment for her left shoulder condition. Relying on the *Guidelines*, Dr. Paz detailed that left shoulder surgery was not reasonable or necessary because it would not relieve Claimant’s pain or improve her function. He noted that, because Claimant exhibited inconsistent effort during her examination, her subjective complaints were unreliable.

8. As found, Claimant explained that she would like to undergo left shoulder surgery if it would improve her condition. She also commented that she is willing to participate in psychological treatment to address her anger and frustration as part of her Workers’ Compensation claim. However, Claimant’s testimony merely constitutes a disagreement with Dr. Fry about whether she has reached MMI and left shoulder surgery is reasonable and necessary. Claimant has not directly challenged the methodology or validity of Dr. Fry’s conclusions. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fry’s MMI and surgical determinations were incorrect.

ORDER

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

1. Claimant reached MMI on April 22, 2015 and left shoulder surgery is not reasonable or necessary.

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

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

DATED: September 20, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

STIPULATIONS

The parties agreed to the following:

1. Pursuant to a General Admission of Liability (GAL) filed subsequent to the hearing in this matter, Claimant suffered a right shoulder injury during the course and scope of her employment with Employer on February 10, 2016.

2. Claimant is entitled to receive Temporary Total Disability (TTD) benefits for the period February 10, 2016 until terminated by statute.

ISSUE

A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant is employed by Employer as an Assembler. Her duties involve working on an assembly line removing and replacing IDC reels.

2. Claimant is an hourly employee. Since she began working for Employer in 2009 she has consistently received pay raises. Her last pay raise in June 2015 increased her hourly earnings to $13.49. Claimant noted that she was still earning $13.49 on the date of her industrial injury.

3. Claimant testified that she normally worked 12 hour shifts for six to seven days per week. She also earned overtime pay for exceeding 40 hours each week. The following chart reflects Claimant's bi-weekly earnings for the 15 pay periods from July 2015 through January 2016.

Pay Period End	**Gross Pay**
07/12/15	$1,893.20
07/26/15	$2,162.87
08/09/15	$1,197.67
08/23/15	$1,197.68
09/06/15	$1,786.46
09/20/15	$1,885.42
10/04/15	$1,417.39
10/18/15	$1,330.65
11/01/15	$1,377.57
11/15/15	$2,156.81
11/29/15	$1,814.50
12/11/15	$1,893.81
12/25/15	$1,635.35
01/15/16	$1,858.28
01/29/16	$1,409.28
Total	$25,016.94

4. Dividing $25,016.94 by 15 pay periods yields an average bi-weekly pay of $1,667.80. Dividing $1,667.80 by two yields an average weekly pay of $833.90. Claimant's average weekly pay of $833.90 covers the period of time between her June 2015 raise and industrial injury.

5. In contrast, Respondents assert that the proper period for calculating Claimant's wages is to consider all of her earnings for 2015. Respondents reason that

Claimant earned $39,482.54 over 52 1/7 weeks during the year. Dividing $39,482.54 by 52 1/7 yields weekly earnings of $757.20.

6. Although Respondents considered all of Claimant's 2015 earnings to calculate an AWW, the period encompasses the time preceding Claimant's June 2015 pay raise to $13.49 per hour. The calculation thus does not provide an accurate representation of Claimant's earnings because she received a raise in June 2015. Considering the period from when Claimant received her raise until she suffered her industrial injury is a more accurate representation of her earnings at the time of her injury. Accordingly, an AWW of $833.90 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair

approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

5. As found, although Respondents considered all of Claimant's 2015 earnings to calculate an AWW, the period encompasses the time preceding Claimant's June 2015 pay raise to $13.49 per hour. The calculation thus does not provide an accurate representation of Claimant's earnings because she received a raise in June 2015. Considering the period from when Claimant received her raise until she suffered her industrial injury is a more accurate representation of her earnings at the time of her injury. Accordingly, an AWW of $833.90 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

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

1. Claimant suffered a right shoulder injury during the course and scope of her employment with Employer on February 10, 2016.

2. Claimant shall receive TTD benefits for the period February 10, 2016 until terminated by statute.

3. Claimant earned an AWW of $833.90.

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

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

DATED: September 20, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-992-558-01

ISSUES

The issues to be determined are as follows:

- Whether the Claimant's work-related resulted in functional impairment beyond that found in the schedule of impairments or whether Claimant's impairment is limited to his left lower extremity; and

- Whether Claimant is entitled to a disfigurement award.

STIPULATIONS

The parties are not challenging the impairment ratings assigned by the Division Independent Medical Examination (DIME) physician. The parties also stipulated that Claimant's average weekly wage converts to the maximum temporary disability rate of $881.65 based on the date of his injury.

FINDINGS OF FACT

1. The Claimant is a 46-year old male who works for the Employer as a firefighter.

2. On May 25, 2015, the Claimant sustained an admitted injury after he stepped out of an ambulance and a drop down step gave way under his right foot. As Claimant stepped down with his right foot, he held a handrail with his right hand. When the step gave way, the Claimant stated that he twisted to his right, leaned back and put his weight on his left foot. Claimant's left knee was stressed and hyperflexed. Claimant initially experienced pain in his lumbar spine, right hip and right ankle.

3. Dr. David Orgel (of Arbor Occupational Medicine) evaluated the Claimant on May 28, 2015. Dr. Orgel's note reflects that Claimant's right ankle pain had resolved and that Claimant's chief complaints included "some bilateral knee pain, right hip pain and low back pain." Claimant indicated that his worst pain was located in his low back and right lateral hip. Claimant noticed some bilateral knee pain with some swelling when he tried using the elliptical machine on May 27, 2015. Dr. Orgel released the Claimant to work at full duty. Dr. Orgel prescribed therapy and Ultram for pain.

4. Claimant had three physical therapy visits, the last of which occurred on June 5, 2015.

5. On June 8, 2015, Claimant returned to Arbor Occupational Medicine and saw physician's assistant, Richard Shouse. Mr. Shouse noted that Claimant had returned "basically for follow up of his left knee." Claimant reported improvement in his hip, lower back and ankle so Mr. Shouse canceled therapy and massage. Claimant had reported he could do his normal job as a firefighter safely and without harm to other people. Mr. Shouse also noted Claimant was not taking any pain medications. On physical examination, Mr. Shouse observed Claimant ambulate with a normal gait; Claimant had full range of motion in his lumbar spine; full range of motion in the right hip; an unremarkable ankle; and let knee tenderness. Mr. Shouse referred Claimant for an MRI of his left knee and for an orthopedic consultation.

6. The remaining medical records in evidence reflect that Claimant repeatedly followed up with his treatment providers for left knee symptoms only. Claimant's treatment included injections in his left knee and Dr. Greenhow also prescribed a knee brace for stabilization.

7. Claimant worked full duty throughout the medical treatment he received other than one reference to Claimant being restricted from work on June 23, 2015 (the day he had a steroid injection in his left knee).

8. On August 25, 2015, Claimant followed up with Dr. Greenhow's physician's assistant, Brandon Kolodzek. Claimant reported good relief from the Synvisc injections he had undergone. Mr. Kolodzek's notes also reflect that Claimant is more active on a day-to-day basis with less pain. At that time, Claimant was noticing minimal pain if he overdid it and would get relief after 20 minutes of rest or after icing.

9. On August 26, 2015, Dr. Orgel determined that Claimant reached maximum medical improvement (MMI) with a 15% lower extremity rating which converted to a 6% whole person rating. Dr. Orgel observed that Claimant walked with a non-antalgic gait and had some crepitation in the left knee with movement. Claimant reported taking only over-the-counter medications, and working full duty while wearing his knee unloader brace. Dr. Orgel indicated that Claimant could follow-up with Dr. Greenhow for additional injections at Dr. Greenhow's discretion. Dr. Orgel otherwise discharged Claimant from further medical treatment and released him to work at full duty.

10. On December 8, 2015, the Respondents applied for a Division Independent Medical Examination ("DIME").

11. The DIME occurred on January 28, 2016, which Dr. Hendrick Arnold performed. He agreed with Dr. Orgel that Claimant reached MMI on August 26, 2015. Dr. Arnold concluded Claimant sustained an 18% lower extremity impairment rating which converts to a 7% whole person rating. Dr. Arnold opined that Claimant could return to work without restrictions.

12. Claimant reported that his current symptoms included occasional left knee pain, but not daily and not all day, and that the pain depended on activity. Claimant

reported increased pain in his left knee with stair climbing when he has to climb five flights of stairs, especially when carrying heavy gear which weighs about 80 pounds. Crawling on his knees increases his knee pain, but he can continue to perform his job including evacuating victims and fellow employees. Claimant told Dr. Arnold that he has completed and passed the Employer-required biannual physical examinations the first time, every time.

13. Claimant reported to Dr. Arnold that his activities included running two to four miles per week and walking one to two miles daily.

14. Claimant wrote in his own handwriting that his left knee was the affected body part. Claimant did not identify other body parts during Dr. Arnold's examination.

15. Dr. Arnold concluded that after reviewing Claimant's medical records and taking a verbal history from Claimant, the only area for consideration is the left knee.

16. The Respondents filed a Final Admission of Liability on February 19, 2016 and admitted for the 18% lower extremity rating assessed by Dr. Arnold.

17. Claimant followed up with Dr. Orgel on May 13, 2016. Dr. Orgel documented that Claimant has arthritis in his knee which causes him to limp sometimes and that the limping causes some increased back pain. Dr. Orgel, however, noted that none of these symptoms impact Claimant's ability to work full duty. Claimant also reported use of the unloader brace, but that he does not always use the brace when called out on an emergency at work. Claimant reported the brace only mildly reduces his symptoms and that he can do his job whether not he wears the brace. Claimant reported that his left knee pain is 0-1 out of 10. Dr. Orgel observed the Claimant walk with a non-antalgic gait. Claimant was able to squat and duck walk without difficulty.

18. During the hearing, the Claimant testified that when he limps, his low back tightens up and sometimes he experiences an ache in his right hip. He explained that these are his cues to rest. He takes Tylenol and relaxes to get everything to calm down. He sometimes uses ice on his left knee and a TENS unit for his low back.

19. Claimant testified that he now has to plan ahead for activities. For instance, he takes pain medications with him when he hikes. He cannot walk the golf course when golfing 18 holes, and twisting his back while swinging the clubs bothers his back. He can bend and squat but leans on "stuff" to get up. He avoids twisting at the waist.

20. Claimant stated he avoids activities at home so he can safely perform his job duties. He has learned to self-treat to avoid increased symptoms in his back and hip.

21. At work, Claimant wears his brace. He occasionally uses ice and over-the-counter medications. Claimant admitted he can perform all of the functions of his job.

22. Claimant testified that his low back and hip pain is not constant and does not occur on a daily basis.

23. When asked why the medical records indicate that his back and hip were no longer symptomatic, Claimant stated that he felt he was managing the symptoms okay, but now realizes he should have been more open and honest with his medical providers.

24. When asked why he reported to Dr. Arnold that his lumbar spine, ankle and hip felt fine, Claimant explained that he was confused by Dr. Arnold's questions concerning the body parts affected by his May 2015 work injury.

25. Claimant testified that he no longer runs 2-4 miles per week, but does walk between 1 and 2 miles each day throughout the course of the day.

26. Claimant has a history of low back problems which necessitated surgery in March 2012. Claimant testified his low back was symptom free until the May 2015 work-related accident.

27. Claimant displayed his left knee brace which is black. He does not wear it daily though it was prescribed by an authorized treating physician. He walked with a very slight left-sided limp.

CONCLUSIONS OF LAW

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

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102 (1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 593 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

Permanent Impairment

4. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The question of whether the Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996).

5. Pain and discomfort which limit a Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. See *Langton v. Rocky Mountain Healthcare Corp.*, *supra*; *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996).

6. The Claimant has failed to prove that he suffered permanent impairment beyond his left lower extremity. The persuasive and credible evidence demonstrates that Claimant's left knee is the situs of his functional impairment. The Claimant has no work restrictions. He is able to perform all of his job duties, which include heavy lifting, stair climbing, and rescuing people, without any problem. The Claimant repeatedly told medical providers that his low back and hip were asymptomatic, and the Claimant was working full duty during the entire duration he received treatment for his injury. Thus the physical nature of his job does not appear to have produced increased symptoms in his back or hip. In addition, the ALJ is not persuaded by Claimant's assertion that his functional impairment extends beyond his left lower extremity merely because he self-limits his personal activities. Given the Claimant's ability to perform his very physical job, it defies logic that he would be incapable of golfing, hiking or other physical activities. Claimant's testimony lacks credibility in this regard, especially in light of the medical records which do not corroborate Claimant's testimony. As such, Claimant's request for whole person permanent impairment is denied.

Disfigurement

7. As a result of Claimant's work injury, he has a visible disfigurement to the body consisting of a very slight left sided limp, and usage of a medically prescribed knee brace. Claimant has sustained a serious permanent disfigurement to areas of his

body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. The Claimant is entitled to permanent partial disability benefits based upon the left lower extremity impairment rating of 18%.

2. Insurer shall pay Claimant $1,500.00 for this disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

DATED: September 21, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

The issues to be determined by this decision are the following:

1. Whether Claimant overcame the Division independent medical examiner's (DIME's) opinion with regard to impairment rating and/or causation by clear and convincing evidence;

2. Whether Claimant proved by a preponderance of the evidence entitlement to permanent total disability (PTD) benefits;

3. Whether Respondents accrued an overpayment; and

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

FINDINGS OF FACT

Having considered the evidence presented at hearing and the depositions of Dr. Jeffrey Wunder and Katie Montoya, the following Findings of Fact are entered.

1. Claimant is a 62 year old female who has been employed by Employer for 11 years in Fort Collins, CO. On July 16, 2012, Claimant sustained an admitted injury. She testified she tripped over a piece of rubber and fell to her left. She described a hyperextension of her left knee and striking her right hand and right knee on the ground.

2. Claimant has a medical history significant for right upper extremity conditions, specifically, right arm pain, dysesthesias, neuralgia, and carpal tunnel for which she received neurological treatment just days prior to the work injury. Specifically, on July 12, 2012, four days prior to the work injury, Claimant presented to Dr. Curiel to evaluate right hand/arm pain that had resulted in Claimant having trouble at work typing because of right hand pain, which was reported to be aggravated by use. Claimant was prescribed a Gabapentin formulation to control her upper extremity pain.

3. In the months leading to the work injury, Claimant sought treatment for decreased wrist range of motion, a 1.5 year-history of hand numbness and pain, arthritis, and Ehlers-Danlos syndrome. These conditions interfered with her sleep.

4. Ehlers-Danlos is a connective tissue condition which results in joint laxity. Over time, this joint laxity can result in osteoarthritis, nerve pathology, and neuropathies.

5. Claimant's medical history is also significant for a 2011 right carpal tunnel release and a 2000 bilateral total knee replacement.

6. Following Claimant's July 16, 2012, work injury, initial diagnostic testing established unremarkable bilateral knee x-rays, a right wrist x-ray showed no acute abnormality, and a negative brain MRI.

7. An EMG established a C7 radiculopathy without any evidence of an ulnar neuropathy. Subsequently, a cervical MRI was performed, finding degeneration at multiple levels, multilevel neural foraminal stenosis, anterolisthesis of C7 on T11, and development of central canal stenosis from C3 through C6.

Overcoming the DIME with Regard to Causation;
The ulnar nerve, carpel tunnel and the left knee condition

8. The ALJ finds that Claimant did not overcome Dr. Ginsburg's causation opinions by clear and convincing evidence with regard to Claimant's ulnar nerve, carpel tunnel and her left knee condition. In coming to this conclusion, the ALJ finds the opinions of Dr. Ginsburg, Dr. Cebrian, and Dr. Edmonds to be more persuasive and credible than that of Dr. Wunder.

9. Claimant's right ulnar nerve condition, including the need for surgery and ongoing sequelae, is not related to the July 16, 2012, industrial injury. While Claimant's authorized treating physicians (ATPs) initially aimed at conservative treatment of Claimant's right ulnar nerve condition, Claimant was referred to a neurosurgeon for a surgical consultation. Dr. Hans Coester ultimately recommended a C4-C5, C5-C6, and C6-C7 anterior cervical discectomy and fusion. He opined this procedure was partially required due to Claimant's underlying Ehlers-Danlos syndrome. This procedure occurred on September 24, 2013.

10. Claimant testified her first complaints of ulnar issues, including numbness in her ring and middle fingers, occurred after her cervical surgery. She testified she was getting physical therapy for post-operative rehabilitation when the symptoms began.

11. Dr. Jeffrey Wunder, an ATP, opined Claimant's development of an ulnar neuropathy was either related to her time in physical therapy arising from the cervical surgery or the result of positioning during the neck surgery.

12. Dr. Wunder subsequently retracted the positioning argument for causation and opined that Claimant developed ulnar neuropathy during the physical therapy sessions performed as part of her post-operative care arising from the cervical surgery.

13. In deposition testimony, Dr. Wunder conceded that he could not read the handwritten physical therapy notes, so he did not know which activities were performed during these sessions. Because of this, he could not explain if any of those activities met the W.C.R.P. 17 guidelines known to plausibly cause ulnar neuropathy.

14. Dr. Cebrian credibly testified at hearing that Dr. Wunder's causation theory was not medically probable. Specifically, because Claimant spent an insignificant amount of time in physical therapy for a few weeks at the time of the onset of symptoms, those activities would not meet the threshold requirements of a W.C.R.P. 17 causation analysis.

15. Dr. Hope Edmonds, an ATP, agreed with Dr. Cebrian that Claimant's development of ulnar neuropathy was not work related.

16. Dr. Ginsburg, the DIME, also credibly opined that the right carpal tunnel syndrome was not related to the July 16, 2012, work injury. Dr. Wunder agreed with Dr. Ginsburg that there was no aggravation of Claimant's underlying right carpal tunnel syndrome as a result of the July 16, 2012, work injury. Accordingly, the ALJ finds that Claimant failed to overcome the DIME opinion with regard to causation of the Claimant's right carpal tunnel syndrome.

17. The DIME physician opined Claimant's left knee condition was not related to the July 16, 2012, work injury, but rather was a pre-existing condition that did not cause additional difficulty after the work injury.

18. Dr. Wunder initially opined he "could not determine...if there was any additional injury to the left knee as a result of her work related injury." He subsequently retracted this opinion, noting it was a typographical error and he meant there was no ratable left knee injury. He conceded, however, that when he compared the left knee to the right knee, they were "virtually" the same. He also conceded that his opinion regarding causation of the left knee was merely a different opinion than that of the DIME.

19. Dr. Wunder did not point to any specific errors in Dr. Ginsburg's causation analysis. Dr. Wunder reluctantly conceded on cross examination that his opinions with regard to causation of the left knee and right upper extremity conditions were differences of opinion. However, with regard to the left knee, Dr. Wunder persisted in the opinion that the left knee condition was a rateable condition for which Claimant received a 0% impairment.

20. The ALJ finds the opinion presented by Claimant regarding the causal analysis of the left knee condition is merely a difference of opinion from that of the DIME physician and does not amount to clear and convincing evidence that Dr. Ginsburg's opinion is most probably incorrect.

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Maintenance Medical Benefits for unrelated medical conditions

21. The ALJ finds that Claimant failed to prove by a preponderance of the evidence that her request for medical maintenance treatment related to the right ulnar nerve, right carpel tunnel and the left knee condition is for reasonably necessary and

related medical treatment. Since the DIME physician concluded that the right ulnar nerve, right carpel tunnel and the left knee conditions are not related to the work injury, maintenance medical treatment for these condition is not reasonably necessary or related.

22. The DIME physician, Dr. Ginsburg, opined the only condition that was related to the work injury was the cervical condition. Dr. Ginsburg's causation opinion is supported by both the opinion of Dr. Edmonds (ATP) and Dr. Cebrian.

23. Claimant testified that the right ulnar nerve condition, the right upper extremity condition, and the left knee conditions were related to her work injury. In support of that argument, she presented the opinion of Dr. Wunder. However, Dr. Wunder did not point to any specific errors in Dr. Ginsburg's causation analysis. Dr. Wunder reluctantly conceded on cross examination that his opinions with regard to causation of the left knee and right upper extremity conditions were differences of opinion. However, with regard to the left knee, Dr. Wunder persisted in the opinion that the left knee condition was a rateable condition for which Claimant received a 0% impairment.

Overcoming the DIME with Regard to Impairment

24. Dr. Ginsburg, the DIME physician, opined Claimant had a 20% whole person impairment arising out of her cervical condition. The rating arose from a Table 53(II)(D) rating of 9% whole person impairment for the multi-level disc lesion and 12% whole person impairment for range of motion loss. He opined the date of maximum medical improvement (MMI) was December 1, 2014.

25. While Dr. Edmonds' impairment rating of 23% whole person was higher than the DIME, she concurred with a 9% whole person rating for Table 53(II)(D), but found 15% whole person impairment for range of motion loss.

26. Dr. Wunder provided an impairment rating of 26% whole person impairment. His opinion was based on a cervical condition (22% whole person impairment) and an exacerbation of the right wrist condition (8% scheduled impairment). Discounting the right wrist impairment, the sole difference between Dr. Wunder's cervical impairment and the Division IME's opinion is with regard to an additional rating under Table 53(II)(F); Dr. Wunder does not explain in his report how that rating was arrived at, nor did he give an opinion regarding why that rating was incorrectly omitted by the DIME physician.

27. Claimant did not overcome the DIME with regard to causation of the right wrist, thus there can be no impairment for a right wrist condition. The ALJ finds Claimant has not overcome the DIME with regard to impairment arising out of any right wrist condition. The ALJ finds the opinions of Dr. Ginsburg, Dr. Cebrian, and Dr. Edmonds to be more persuasive than that of the opinion of Dr. Wunder.

28. The ALJ also finds that in Claimant's argument to overcome the DIME with regard to cervical impairment, Claimant merely presented a different medical opinion. Claimant did not present significant evidence regarding any error made by Dr. Ginsburg in his impairment rating. Therefore, the ALJ finds Claimant has not overcome the DIME with regard to cervical impairment. In this regard, the ALJ credits the opinion of Dr. Ginsburg, which is supported by Dr. Edmonds and Dr. Cebrian.

29. The ALJ finds that Claimant reached MMI on December 1, 2014, with a 20% whole person impairment arising out of her cervical condition. Claimant failed to sustain her burden of proof to establish by clear and convincing evidence that the DIME physician is most probably incorrect with regard to causation and impairment rating.

PTD

30. Claimant's job history includes accounting work, bookkeeping, paralegal work, performing work as a title clerk at a car dealership, handling the business side of a self-owned business for 10-plus years, performing payroll services, and transcribing and managing a police substation in Fort Lupton, CO.

31. Claimant's job at Employer, prior to her injury, was an office job, where most of the day was spent at a desk typing and answering phones. Additionally, Claimant has significant managerial/supervisory skills; Claimant managed four employees while working for the employer and managed thirty-five employees in a business she operated with her husband for ten years.

32. Claimant is qualified to work in sedentary jobs. Claimant's prior jobs as a bookkeeper, office worker, and legal assistant were all sedentary jobs according to the Dictionary of Occupational Titles. Claimant has good transferable skills for other professions/jobs. Claimant is considered to be in a skilled classification of work.

33. Prior to Claimant's placement at MMI for the work injury, Dr. Edmonds referred Claimant to a functional capacities evaluation (FCE). That FCE was performed over a two day period, on November 21, 2014, and December 4, 2014. That exam reached the following conclusions:

- Claimant was able to sit unrestricted during the intake interview for 85 minutes;
- Stationary standing was limited to 12 minutes prior to a positional change, i.e. walking, in a 30 minute test;
- Walking restricted to 4 minutes 45 seconds; and
- Lifting in the light work classification category (20 pounds from 11.5" to knuckle, 17.5 pounds knuckle to shoulder, 12 pounds shoulder to overhead, and 100 foot bilateral lift carrying 15 pounds).

34. Having reviewed the November 21, 2014, and December 4, 2014, FCE, Dr. Edmonds, the ATP, indicated the sole restriction on Claimant's work was a limitation to a six-hour work day.

35. Dr. Wunder did not assign permanent work restrictions contemporaneous with Claimant's placement at MMI. Rather, almost a year later, on August 10, 2015, Dr. Wunder opined Claimant should have a 10 pound lift/push/pull limitation on an occasional basis and 5 pounds frequently. He also limited Claimant's use of the right hand to occasional use.

36. On October 12, 13 and 14, 2015, Claimant underwent a second FCE at Starting Points, at the request of Claimant's attorney. That FCE concluded Claimant had the ability to lift up to 10 pounds, should take "micro-breaks" during her day, and should be limited to 4 hours of work per day. No physician has adopted the October 2015 FCE. Dr. Wunder specifically rejected the four hour limitation provided by the Starting Points FCE.

37. Dr. Wunder issued a second opinion regarding restrictions on November 12, 2015. There, he noted that many of the restrictions identified by the Starting Points FCE would not be related to the work injury. Specifically, he opined many of the restrictions, including the bending, crouching, squatting, kneeling, and crawling restrictions are in regard to Claimant's longstanding low back and knees problem and are not related to her work injuries.

38. Dr. Cebrian opined that Claimant's claim-related permanent work restrictions were no lifting, pushing, or pulling over 20 pounds. He also opined there would be no requirement for time limitations arising out of the work injury.

39. The Starting Point FCE occurred on October 12-14, 2015; therein, there is no mention of right hip pain. Ms. Montoya performed her vocational evaluation on October 21, 2015. At the time of her interview, Claimant had been taken off work by Dr. Clark for two weeks for an acute onset of AVN/hip pain. Claimant reported to Ms. Montoya that the week prior to the interview, she did not work several days because of this hip pain. Claimant alleged at the hearing that her right hip condition had very little impact on the Starting Point FCE because in the couple weeks prior to that FCE, her hip symptoms resolved. Claimant's testimony is not credible.

40. Despite Claimant's testimony, the record establishes that Claimant sought right hip treatment with Dr. Clark on October 15, 2015, the day after the FCE. Dr. Clark noted that Claimant had a limp and has been unable to work due to hip pain. Dr. Clark noted that activity modification had failed. On October 29, 2015, Dr. Clark reported that Claimant was unable to stand for a couple of minutes and able to walk about a block before the onset of severe pain.

41. Mr. Blythe, Claimants vocational expert, testified he was did not know about the severe hip problem and he was not aware of any work absences arising out of

that problem. Despite not knowing about the hip and its timing of symptoms, Mr. Blythe testified he gave the Starting Point FCE more weight than the FCE performed in 2014.

42. Dr. Cebrian opined that, at the time of the Starting Point FCE, Claimant was being evaluated for severe right hip pain that he opined would significantly impact Claimant's performance on testing and her reported pain levels. Dr. Cebrian testified this condition invalidates the Starting Point FCE and potentially explained the differences in the Starting Point FCE relative to the 2014 FCE. .

43. Ms. Montoya also questioned the Starting Point FCE because Claimant was still symptomatic for the hip and undergoing care and treatment for that condition. She testified it was difficult to separate out the implications of the hip pain and mobility from the other issues examined by the FCE.

44. Ms. Montoya credibly testified the 2014 FCE correctly allowed for a light classification of work, lifting 20 pounds occasionally and that the definition of light work, being able to materially handle (lift) up to 20 pounds occasionally and 10 pounds or less frequently without limitation of the lifting level.

45. Mr. Blythe's opinions regarding Claimant's employability were found less credible than the opinions of Ms Montoya. Based on the inconsistencies in Mr. Blythe's testimony and report, the ALJ finds and determines that his testimony and report are not credible.

46. Ms. Montoya opined in her report that Claimant was able to work within the restrictions put forth by Dr. Edmonds, allowance of six hours per day. Ms. Montoya opined the ongoing job with Employer, performed until December 2015, was appropriate for Claimant as the job was sedentary, and there was no physical reason Claimant could not continue at six hours per day as recommended by the ATP. Ms. Montoya similarly opined the work restrictions as proffered by Dr. Cebrian and Dr. Wunder would allow Claimant to continue her work with the employer. Ms. Montoya opined that, considering the opinions of Dr. Edmonds, Dr. Cebrian, and Dr. Ginsburg, Claimant maintains the capacity to return to work.

47. Ms. Montoya credibly opined that Claimant would be hired due to her good skill base and because she is a desirable candidate and Claimant will be able to maintain employment. Ms. Montoya further credibly opined that this is because Claimant is working within the restrictions she has been provided, frequent absences and/or breaks will not be hindrances to her continued employment.

48. Ms. Montoya credibly testified Claimant was employable in the following fields: reception, general clerical, and customer service. She testified these types of jobs were readily available in the Fort Collins geographical area.   Ms. Montoya testified her opinion was based on the work restrictions opinions issued by the providers, along with consideration of Claimant's relevant vocational background. The ALJ finds Ms. Montoya's testimony that Claimant is employable in her competitive labor market within

her restrictions to be credible and persuasive. In so finding, the ALJ finds Ms. Montoya's employability opinion to be more credible and persuasive than that of Mr. Blythe. Claimant has not met her burden to establish that she is PTD as the result of her July 16, 2012 work injury.

49. It is found that Claimant's continued employment with Employer was not sheltered employment. Claimant worked within her work restrictions as assigned by Dr. Edmonds from the date of maximum medical improvement (MMI) December 1, 2014, until mid-December 2015. Claimant, in her post-MMI work, earned approximately $38,000 per year and maintained her pre-injury job title. Claimant testified that the reason she stopped working for Employer in December 2015 was because she thought her workers' compensation claim settled and that as part of that settlement she agreed to resign. Claimant did not return to Employer after December 2015 to try to work again.

50. Ms. Montoya credibly testified that the job Claimant was performing post-MMI for the employer was not sheltered employment. She testified that she came to this conclusion because (1) Claimant was still performing the work tasks that were required for her position, (2) Claimant was still performing needed work tasks, and (3) the actual work performed, clerical and customer service work, is available in the Fort Collins labor market. Claimant was actually productive during this post-MMI employment and Ms Montoya learned that she did not have excessive or frequent absences.

51. Ty Hendrickson was Claimant's supervisor from July 2012 until July 2015. He testified credibly at hearing. The following is found that in the position post-MMI with Employer: Claimant arranged her schedule given her six-hour-work restriction and that Claimant would schedule her medical appointments around that limitation; Claimant's hour limitation was not a problem because in a call center all employees report at different hours, so there was flexibility; Claimant had average productivity between December 2014 and July 2015 on par with other employees; Claimant performed the same job duties as all other coordinators for the Employer; and Claimant could have continued her job had she not resigned in December 2015.

52. Dave Mueller, Claimant's supervisor from September 2015 through December 2015, testified credibly at hearing. It is found that Claimant's performance during that time was similar to that of other employees and, if Claimant did not cease her employment in December 2015, she would still be working for Employer.

53. Based on the totality of the evidence, the ALJ finds that Claimant failed to establish by a preponderance of the evidence that she is unable to earn any wages. Therefore, it is found that Claimant is not permanently totally disabled.

Overpayment

54. Claimant was originally placed at MMI by Dr. Edmonds on December 18, 2014, with a rating of 23% whole person impairment. Subsequently, the DIME placed Claimant at MMI on December 1, 2014, with a 20% whole person impairment. On September 15, 2015, Respondents filed a Final Admission of Liability, admitting to the DIME opinions on MMI and impairment rating.

55. Payroll records reflect that as of May 9, 2016, Respondents paid $71,106.18 in combined TTD, TPD, and PPD benefit payments. The Final Admission of Liability, dated September 15, 2015, admits to a total of combined TTD, TPD, and PPD benefit in the amount of $78,482, consistent with the benefit cap under Section 8-42-107.5, C.R.S.

56. Respondents concede that any overpayment initially incurred due to the filing a Final Admission of Liability after the placement of MMI has been recouped. The ALJ finds that no overpayment exists.

CONCLUSIONS OF LAW

General Legal Principles

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

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

Overcoming the DIME

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

4. Claimant failed to overcome the DIME with regard to causation or impairment by clear and convincing evidence. Claimant presented the opinion of Dr. Wunder, which was merely a difference of opinion from the DIME on both causation and impairment. Dr. Wunder's opinions are insufficient to meet the clear and convincing standard required for the claimant to overcome the DIME. *Javalera*, *supra*. In reaching this conclusion, the ALJ credits the persuasive opinions of the DIME, which was supported by the totality of the medical record and the opinions of Dr. Edmonds and Dr. Cebrian.

Medical Benefits for Unrelated Body Parts

5. The need for medical treatment may extend beyond the point of MMI, where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). The claimant must prove entitlement to maintenance medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993).

6. As found, Claimant's right wrist condition, right ulnar condition, and left knee condition are not related to the work injury pursuant to the opinion of the DIME. Claimant's request for maintenance medical benefits, including the knee brace and physical therapy, for these body parts is denied.

PTD

7. PTD is defined as the inability to earn "any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S.; *Christie v. Coors Transportation Co*., 933 P.2d 1330 (Colo. 1997). Under this statute, a claimant is not PTD if he is able to earn some wages in modified, sedentary, or part-time employment. *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). *T*he claimant has the

burden of proof to establish PTD by a preponderance of the evidence. The question of whether the claimant has proven PTD is a question of fact for resolution by the ALJ*. Id.* A claimant is required to prove a direct causal relationship between the industrial injury and the resulting PTD, which necessitates a determination of the nature and extent of her residual impairment from the industrial injury. *Seifried v. Indus. Comm'n,* 736 P.2d 1262 (Colo. App. 1986).

8. In determining whether the claimant is unable to earn any wages, the ALJ may consider a number of "human factors." *Christie*, *supra*. These factors include the claimant's physical condition, mental ability, age, employment history, education, and the "availability of work" the claimant can perform. *Weld County School Dist. RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). Another human factor is the claimant's ability to obtain and maintain employment within his physical abilities. *See Professional Fire Protection, Inc. v. Long, 867 P.2d 175 (Colo. App. 1993).*

9. In this case, as found, Claimant failed to sustain her burden of proof to establish that she is PTD as a result of the admitted work injury. The testimony of Dr. Cebrian, and a review of the medical records, is persuasive that Claimant's permanent work restrictions are limited to the cervical spine and would permit a full range of sedentary work, which is the type and kind of work she performed prior to the work injury. Additionally, based on the credible and persuasive opinions of Ms. Montoya, Claimant is able to earn wages in her geographical labor market of Fort Collins and within her work restrictions. *Bymer, supra*.

ORDER

It is therefore ordered that:

1. Claimant failed to overcome the DIME with regard to causation or impairment. Claimant is at MMI as of December 1, 2014, with a whole person impairment of 20%. The right upper extremity, ulnar or wrist, and the left knee complaints are not related to the work injury of July 16, 2012.

2. Claimant failed to establish an entitlement to post-MMI maintenance medical benefits to treat her left knee condition, her right wrist condition, or her right ulnar condition. Claimant's request for medical benefits for those body parts is denied and dismissed with prejudice.

3. Claimant failed to establish that she is permanently and totally disabled as a result of the July 16, 2012, work injury. Claimant's claim for permanent total disability benefits is denied and dismissed with prejudice.

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

All matters not determined herein are reserved for future determination.

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

DATED: September 21, 2016

DIGITAL SIGNATURE:
Margot W. Jones

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-931-088-03

ISSUES

The issue presented for determination is whether the Claimant is entitled to the two-level anterior cervical fusion and discectomy as recommended by Douglas Beard, M.D. Respondents assert the requested medical treatment is not related, reasonable and necessary. Claimant also seeks a change of physician.

FINDINGS OF FACT

1. On September 20, 2013, Claimant was involved in a motor vehicle accident. His vehicle, while at a complete stop, was rear-ended. Claimant was wearing his seatbelt at the time of impact.

2. The Claimant was transported to the emergency room following the accident. Claimant reported a right-sided headache; neck pain from his ear to the midline all the way down his cervical spine into his low back. All of his complaints seemed to be worse on the right side. Claimant reported that his pain was intolerable which is why he was unable to ambulate or extricate himself from his vehicle. Claimant advised the ER physician that he had a history of low back pain after falling off a ladder in 2012 but that his pain had been under control.

3. Following the work-related motor vehicle accident, Claimant continued to complain of neck-related symptoms.

4. On September 24, 2013, Sally Knauer, M.D., evaluated the Claimant. Dr. Knauer noted Claimant's concern that he continued to have significant muscular pain across the posterior neck and shoulders that felt like whiplash. Dr. Knauer's impression was that he had neck-related symptoms, primarily trapezius spasms. Dr. Knauer recommended that Claimant use some topical creams and suggested biofreeze. She also gave him a prescription for Flexeril and recommended physical therapy.

5. Thereafter, the Claimant continued with conservative treatment including a home exercise program, and pain medications.

6. On January 7, 2014, the Claimant reported to Dr. Knauer that his neck is better but it gets sore in cold weather. Dr. Knauer documented no significant pain with active range of motion of the cervical spine. Claimant localized most of his tenderness to the right trapezius. Claimant had no significant radicular symptoms.

7. On February 25, 2014, Lawrence Lesnak, D.O. performed an independent medical examination (IME) at the Respondents' request. Claimant reported "occasional residual right lateral neck/suprascapular discomfort with intermittent right occipital

headaches that occurred several times per week." Claimant reported occasional aching sensations in his right upper arm. Claimant denied any left upper extremity or lower extremity symptoms. Claimant reported no history of previous neck symptoms or injuries.

8. Dr. Lesnak's physical exam revealed full range of motion of Claimant's cervical spine in all planes with some "mild right distal posterolateral distal neck discomfort during cervical extension activities." Claimant also had some tenderness to palpation over his right posterolateral distal neck region and right proximal suprascapular region.

9. Dr. Lesnak's impressions included probable right-sided cervical/trapezius sprain/strain injury by report; no evidence of cortical or thoracic radiculitis, radiculopathy or myelopathy; and probable residual occasional right cervical/trapezius myalgias. Dr. Lesnak stated that "it is certainly feasible that patient sustained an acute right-sided cervical/trapezius strain/sprain injury as a result of the work-related motor vehicle accident on September 20, 2013. However, a CT scan of the patient's cervical spine and head revealed no abnormalities, including any type of acute trauma whatsoever."

10. Dr. Lesnak opined that Claimant's symptoms are purely stemming from a myofascial etiology, and that Claimant need no further diagnostic studies. He indicated that a brief course of physical therapy directed at the cervical spine and suprascapular regions might be reasonable. Dr. Lesnak concluded that Claimant needs no further treatment, including medications, other than eight sessions of physical therapy.

11. Claimant had one additional visit with Dr. Knauer on March 4, 2014 before his care was transferred. The next medical record in evidence is dated August 7, 2014, at which time Claimant presented to Rebekah Martin, M.D. at Colorado Rehabilitation & Occupational Medicine ("CROM"). Claimant reported hot burning pain down the right side of his neck immediately after the September 20, 2013, industrial accident. Dr. Martin noted that although Dr. Knauer tried to place him in physical therapy, he did not do well after even one visit. Claimant reported right-sided cervical spine pain within the upper mid cervical region with associated headaches. Dr. Martin noted "vague" arm discomfort that radiated all the way down and caused his fingertips to "drive him nuts." Dr. Martin noted Claimant's decreased cervical range of motion and opined that he had probable underlying cervical facet syndrome at C2-3 and C3-4 on the right with significant overlying myofascial pain. Dr. Martin recommended pain medication; anti-inflammatories; a TENS unit and that he pursue right C2-3 and C3-4 facet joint injections for both diagnostic and therapeutic purposes.

12. Dr. Martin performed right C2-C3 and C3-C4 facet joint injections on September 15, 2014.

13. On November 4, 2014, Claimant followed-up at CROM with Scott Astley, PA-C, and reported relief for about a week after Dr. Martin administered the C2-C3 and C3-C4 facet joint injections. On examination, Claimant still displayed tenderness directly over his upper and lower trapezius, rhomboids and levator scapula. On the right, Claimant

had palpable pain with pain down his arm as well as to his bicep. Mr. Astley referred Claimant for an MRI without contrast of his cervical spine. Mr. Astley noted concerns over Claimant's lack of significant longstanding benefit from the cervical facet injections.

14. Claimant underwent a cervical spine MRI on November 13, 2014, which revealed a mild to moderate narrowing of the central canal, as well as moderate right and mild left foraminal stenosis due to uncovertebral joint and facet hypertrophy at C4-5. At C5-6, the MRI showed a broad-based disc bulge with central disc protrusion resulting in mild to moderate narrowing of the central canal, and a broad-based disc bulge with central disc protrusion at C6-C7.

15. Scott Astley, PA-C reviewed the MRI results on November 21, 2014, and recommended that Claimant proceed with facet rhizotomies to the right at C2-3, C3-4 facets and that Claimant return once those were completed.

16. On February 3, 2015, the Claimant returned to CROM, and saw Mr. Astley. On exam, Claimant had full range of motion, but tenderness over C2-3 and C3-4 facets. Claimant requested a referral to surgeon, Douglas Beard, M.D. for a consultation. Although Mr. Astley believed Claimant was not a good surgical candidate because he believes Claimant's symptoms are facetogenic and myofascial, Mr. Astley indicated that a second opinion might be effective and therefore made the referral to Dr. Beard.

17. On March 4, 2015, Claimant met with Dr. Beard. Claimant reported that he continued to have substantial neck pain after the motor collision on September 20, 2013. Claimant advised Dr. Beard that his neck became symptomatic and stayed symptomatic following the September 20, 2013, motor vehicle collision. Dr. Beard's examination revealed no evidence of exaggerated pain behaviors and that Claimant had more of an aching sensation to the right trapezial ridge and right shoulder almost in a C5 radiculitis type fashion to the right than to the left. Dr. Beard also reviewed Claimant's November 13, 2014, MRI scan which clearly demonstrated evidence of multi-level disc protrusion. Dr. Beard noted that the most significant levels are at C4-5, where to the right of the midline, there is evidence of effacement and subtle indentation of the anterior aspect of the cord. Dr. Beard also noted evidence of a central disc protrusion at the C5-6 motion segment. Dr. Beard did not believe it appeared to cause near as much cord impact as the C4-5 motion segment. Dr. Beard advised Claimant those could certainly be the culprit in producing his ongoing symptomatology and that many times whiplash mechanisms could be quite chronic and debilitating. Dr. Beard opined that Claimant's cervical disc protrusions at C4-5 and C5-6 were consistent with a whiplash mechanism of injury. Dr. Beard discussed surgical treatments for a disc protrusion and herniation. Dr. Beard recommended that Claimant exhaust a conservative and non-operative program first and thus referred him back to Colorado Rehabilitation & Occupational Medicine for further discussions, otherwise, Dr. Beard would plan to see Claimant in the future should he continue to struggle.

18. Claimant returned to CROM on April 2, 2015. Ryan Mansholt, PA-C, examined Claimant and noted full range of motion with some pain on end range, and significant

tenderness over the C2-3 and C3-4 facet joints on the right side with positive facet loading maneuver in the area. Mr. Mansholt noted Dr. Beard's recommendation that Claimant exhaust a conservative and non-operative program before considering surgery. Claimant elected to undergo occipital nerve, C3, and C4 radio frequency ablation.

19. On April 6, 2015, Claimant underwent the ablation procedure at the right C2 medial branch, right C3 medial branch and right C4 medial branch.

20. Claimant returned to Dr. Beard on May 27, 2015, after having undergone C2-C4 ablation. Claimant reported not much improvement in his overall symptom complex with constant suboccipital headaches; numbness in his neck and pain in the back of his head. Claimant reported greater pain to his right side radiating into the trapezial ridge region and into the scapular region. Dr. Beard stated, "This is certainly consistent with his C4-5 cervical disc protrusion causing cord compression." After discussing ongoing pain management options, such as ongoing and continued injections. Dr. Beard recommended that since Claimant did not find injections to be helpful, then the next option was to consider surgical intervention. Dr. Beard discussed the possibility of an anterior cervical discectomy and fusion at the C4-5 and C5-6 motion segments, the site of most significant cervical cord compression. After discussing his treatment options, Claimant opted to give it thought and consideration and advised Dr. Beard that he would re-contact him in the future should he desire to proceed with surgical intervention.

21. Claimant subsequently transferred his medical care from CROM to Concentra. Claimant saw Dr. Rosalind Pineiro on June 17, 2015. Dr. Pineiro reviewed Dr. Beard's notes with Claimant. Dr. Pineiro and the Claimant both agreed to continue conservative measures and thus made a new referral to a physiatrist to see if additional injections were necessary before surgical intervention was considered.

22. Per Dr. Pineiro's referral, Matthew Pouliot, D.O. examined the Claimant on July 15, 2015. Dr. Pouliot's physical examination revealed limited cervical range of motion with pain on extension, flexion and right-sided rotation with tenderness to palpation in the occiput on the right and in the cervical paraspinal muscles.

23. Dr. Pouliot assessed continued cervical pain, cervicogenic-type headaches, possible occipital neuralgia, and radiating radicular-type pain into the C4 and C5 distributions with disk herniations at C4-5 and C5-6.

24. Dr. Pouliot noted Dr. Beard's recommendation for a possible cervical spine fusion for two-level disk herniations at C4-5 and C5-6 and that Claimant wanted another opinion as to whether a cervical fusion was reasonable. Dr. Pouliot recommended and ordered bilateral occipital nerve blocks as Claimant might have a component of occipital. Dr. Pouliot noted that Claimant was nearly two years out from his original industrial accident, and that he would likely not improve much beyond that point. Ultimately, Dr. Pouliot agreed with Dr. Beard's assessment that a cervical fusion might be necessary.

25. Claimant followed up with Dr. Pineiro on July 28, 2015. Dr. Pineiro agreed with Dr. Pouliot and recommended that if Claimant's symptoms persisted after another injection, surgery was the next option.

26. On July 29, 2015, Claimant underwent bilateral occipital nerve blocks for occipital neuralgia.

27. Claimant returned to see Dr. Pineiro on August 14, 2015, and reported he was pain free for a week following the occipital nerve block; however, 25% of his pain had returned. Dr. Pineiro noted that Claimant would return to Dr. Pouliot in three weeks.

28. On August 19, 2015, Claimant returned to Dr. Pouliot and reported feeling 100% pain relief for 2-3 hours following the occipital nerve block then 50% decrease in his headaches for 1 to 1 ½ weeks. Dr. Pouliot believed radio frequency ablation of the occipital nerves using the pulsed radio frequency procedure would be appropriate.

29. Claimant returned to see Dr. Pouliot on September 16, 2015. Dr. Pouliot noted that Claimant was awaiting authorization of the greater occipital nerve radio frequency ablation. Due to Claimant's report of 100% pain relief through the anesthetic phase of the occipital nerve blocks followed by a 50% decrease in his headaches for one and a half weeks post procedure, Dr. Pouliot concluded that this met the diagnostic criteria for radio frequency ablation. Dr. Pouliot planned to continue to pursue the radio frequency ablation of the greater occipital nerves bilaterally.

30. On September 28, 2015, Claimant followed up with Dr. Pineiro. Claimant reported that he feels worse, and his now having more neck pain with pain at a level 8 out of 10. He stated he is now considering neck surgery. Dr. Pineiro advised Claimant that he needed to undergo repeat injections before considering surgery since two years had passed since his last injections.

31. Dr. Pouliot performed bilateral greater occipital nerve pulsed radio frequency ablation on October 26, 2015.

32. Claimant followed up with Dr. Pouliot two days later on October 28, 2015. Dr. Pouliot reported Claimant had a predictable flare-up of his pain with pressure in the occipital distribution and that Claimant's pain level was at 7 out of 10. Dr. Pouliot reported that he typically would not expect noticeable relief for one to two weeks post procedure other than the local anesthetic and steroid that was injected. Accordingly, Dr. Pouliot planned for Claimant to follow up in six weeks with anticipated improvement in his occipital neuralgia.

33. Claimant returned to Dr. Pineiro on November 11, 2015. Her report indicates that Claimant had good results with the ablation he had over a year ago but it had worn out. Claimant reported that after the second ablation on October 26, 2015, his neck pain is worse at 8-9 out of 10. Claimant described his pain as sharp in nature with

associated headaches, decreased cervical range of motion, muscle spasms and neck stiffness. Dr. Pineiro planned to see Claimant after December 9, 2015, to defer to Dr. Pouliot's treatment plan.

34. Dr. Pouliot re-examined Claimant on December 9, 2015. Claimant reported that the bilateral occipital nerve pulsed radio frequency ablation on October 26, 2015, did not help his pain much. Dr. Pouliot observed that Claimant's pain seemed to be more cervical and radicular, possibly attributable to disc herniations at C4-5 and C5-6. Dr. Pouliot recommended a re-evaluation for possible anterior cervical discectomy and fusion as recommended by Dr. Beard. Dr. Pouliot opined that Claimant exhausted interventional care as he did not experience any long-lasting benefits from them. Dr. Pouliot referred the Claimant back to Dr. Beard.

35. On December 11, 2015, ATP Dr. Pineiro followed up with Claimant and agreed with Dr. Pouliot's re-referral to Dr. Beard for purposes of exploring an anterior cervical discectomy and fusion as Claimant's symptoms returned to their pre-injection state with continued pain and spasms in the right upper extremities. Dr. Pineiro noted that she would wait until Dr. Beard re-evaluated him and that she would ask for any work-ups Dr. Beard requested. Dr. Pineiro concluded that Claimant was not at MMI.

36. Per Dr. Pouliot's recommendation, Claimant underwent a second cervical spine MRI on January 5, 2016. The MRI scan revealed the C4-5 intervertebral disc was decreased in height with a disc bulge and central protrusion flattening the anterior aspect of the cervical cord with central canal stenosis and bilateral neural forminal narrowing. Another annular disc bulge at C5-6 was present with central protrusion with high-intensity zone abutting the anterior aspect of the cervical cord with central canal stenosis and neural foraminal narrowing. Small central protrusions were also revealed at C6-7 and C7-T1.

37. On January 11, 2016, Claimant returned to see Dr. Beard. Claimant reported that injections are not helping him anymore and he "can't live with this anymore." Dr. Beard discussed and reviewed the most recent MRI scan. Dr. Beard noted that the MRI continued to demonstrate evidence of "fairly degenerative disc herniations at C4-5 and C5-6 motion segments. Both of these are relatively large and cause effacement of the central surface of the cord."

38. Dr. Beard opined that if Claimant cannot live with this, then the option was to go forward with the two-level anterior cervical discectomy and fusion. Claimant indicated his willingness to proceed with the two-level anterior cervical discectomy and fusion. Dr. Beard stated, "He has really done quite a rigorous job of trying to avoid surgical intervention, but he feels he is simply at the end of his rope and desires surgical intervention."

39. Dr. Pouliot re-evaluated Claimant on January 13, 2016. Dr. Pouliot reviewed the January 5, 2016 MRI which he opined showed disc herniations at C5-6 and C6-7. Dr. Pouliot noted Dr. Beard's plan to proceed with a two-level anterior cervical

discectomy and fusion pending authorization. Dr. Pouliot's assessment was that Claimant suffered from ongoing cervical disc mediated pain with disc herniations at C5-6 and C6-7 and failure of conservative therapies. Dr. Pouliot planned to continue Claimant's pain management.

40. Claimant returned to Dr. Pineiro on January 25, 2016, who noted that Respondents denied authorization of the two-level anterior cervical discectomy and fusion. Dr. Pineiro opined that Claimant had not reached maximum medical improvement, and that he continued to display neck tenderness and spasms.

41. Claimant followed up with Dr. Pouliot on February 17, 2016. Dr. Pouliot also noted Respondents' denial of the two-level anterior cervical discectomy and fusion. Dr. Pouliot stated, "I do feel [Claimant] is an appropriate surgical candidate. He has failed all other treatments and continues to take opioids for pain control which is now modest at best." Dr. Pouliot's added additional pain medication for better nighttime pain control.

42. On March 30, 2016, Dr. Brian Reiss performed an independent medical examination (IME) at Respondents' request. Dr. Reiss reviewed the medical record and MRI films. Dr. Reiss did not agree with the surgical recommendation. Based upon his review of the MRI images, Dr. Reiss did not believe there was any significant foraminal narrowing, any significant cord compression, or any significant nerve root compression necessitating the need for surgery. Dr. Reiss also explained that the mere presence of degenerative change and bulging discs at C4-5 and C5-6 did not mean that those disks were necessarily the pain generators. Dr. Reiss felt that some records suggested Claimant's pain generator was higher up. For example, Claimant had reported complete pain relief from the greater occipital nerve which according to Dr. Reiss meant his pain generator was in the upper cervical not the C4-5 and/or C5-6 disk. Dr. Reiss also explained that the Worker's Compensation Medical Treatment Guidelines Guidelines require clear identification of the pain generator prior to proceeding with surgical intervention and the pain generator had not been identified this case.

43. Claimant returned to Dr. Pouliot on April 6, 2016, and reported that he was awaiting another surgical opinion regarding the two-level anterior cervical discectomy and fusion. Dr. Pouliot's exam revealed cervical spine guarding with generalized tenderness in all motions and palpable tenderness over the right cervical paraspinal muscles into the trapezius. Dr. Pouliot planned to continue with medication to relieve Claimant's ongoing neck and radicular arm pain.

44. On April 8, 2016, Dr. Pineiro suggested a second surgical opinion with neurosurgeon Hans Coester, M.D. Dr. Pineiro noted that Claimant's neck pain and radicular arm pain was ongoing, and referred Claimant to Dr. Coester.

45. Dr. Coester evaluated Claimant on May 19, 2016. Dr. Coester noted Claimant's very significant neck pain and headaches since his industrial accident. Dr. Coester's physical exam revealed pain aggravation upon neck extension and diminished reflex at the biceps.

46. Dr. Coester reviewed Claimant's MRI scans as well as Dr. Beard's recommendations for a two-level anterior cervical discectomy and fusion. Dr. Coester agreed with Drs. Beard and Pouliot that the MRI scans showed disc protrusions at C4-5 and C5-6 with contact of the spinal cord as a result of those disk protrusions.

47. Dr. Coester opined that a C4-5 and C5-6 anterior cervical discectomy and fusion would probably have a 50% chance of making the Claimant feel significantly better but that it would not make Claimant pain free and comes with many risks.

48. Dr. Coester also opined that Claimant exhausted conservative care and that surgical intervention was reasonable.

49. Brian Reiss, M.D. testified by deposition on June 7, 2016. Dr. Reiss opined that it was unlikely that the two-level anterior cervical discectomy and fusion would help the Claimant because he disagrees that the potential pain generators have been adequately identified. Dr. Reiss testified that the bulges present at C4-5 and C5-6 were degenerative in nature and pre-existed the work injury.

50. Dr. Reiss disagrees that disc bulges at C4-5 are causing cord compression or that the bulges are touching any of the nerve roots.

51. Dr. Reiss later admitted that, "There is touching of the spinal cord, but when you touch the spinal cord with something like that, it usually causes no symptoms whatsoever." Dr. Reiss concluded that, "there's no evidence whatsoever that the bulges at C4-5 and C5-6 caused any symptoms whatsoever."

52. He further explained that Claimant had degenerative findings at four levels with some objective evidence that Claimant's pain generator was coming from a level other than those for which surgery was proposed. He opined that it is essentially "arbitrary" to propose surgery at two of the levels shown on the MRI with no objective evidence that either level was Claimant's pain generator.

53. Dr. Reiss believes Claimant's pain is myofascial, and that a stretching and strengthening program could improve his symptoms. Dr. Reiss opined that surgery may make the Claimant worse.

54. Dr. Reiss explained that minimal contact with the spinal cord could produce symptoms and that Claimant's MRI scans revealed disc bulging in at least four levels, but that the imaging does not show that the discs are touching the cord.

55. Dr. Reiss also admitted that physical therapy would not cause that high-intensity zone to stop contacting the cord; however, Dr. Reiss opined that C5-6 was not the source of his pain and that the MRI scans did not demonstrate nerve root compression although he agreed that, "There's a little bit of touching of the spinal cord anteriorly."

56. John Douthit, M.D., performed a medical records review pursuant to WCRP Rule 16 following the request Dr. Beard made to Insurer to authorize the surgery. Dr. Douthit issued a report dated January 21, 2016. Dr. Douthit's report indicates that Claimant's MRI does not reveal anything significant, thus he declined to endorse Dr. Beard's surgical recommendation. Dr. Douthit concluded that Claimant should obtain a supporting opinion from a Board Certified spine surgeon if he wishes to further pursue surgery.

57. Dr. Beard testified by deposition on June 1, 2016. Dr. Beard explained that the two-level anterior cervical fusion and discectomy was the last treatment remaining to alleviate Claimant's pain in the event that he did not want to live in pain the rest of his life. Dr. Beard also testified that the two-level anterior cervical fusion and discectomy was reasonable and necessary based on Claimant's ongoing neck pain and radiculopathy.

58. Dr. Beard testified that the MRI scan demonstrated some multi-level degenerative changes but that the most significant findings were at C4-5 and C5-6. At both of those levels, Dr. Beard observed that, "there was enough protrusion that the CSF column in front of the spinal cord was completely obliterated and both of those protrusions contacted, if not indented, the - - or effaced the front part of the spinal cord."

59. Dr. Beard explained that the disc protrusions can cause symptoms simply by the fact that normal spinal cords are free-floating and designed to have fluid all the way around them so nothing pushes or impinges upon them. In this particular case, Dr. Beard testified that the bulges/protrusions at C4-5 and C5-6 most certainly contacted the spinal cord.

60. Dr. Beard testified that Claimant's MRI scans certainly revealed multi-level degenerative changes; however, the most significant findings were the disc bulges at C4-5 and C5-6. He opined that the two-level anterior cervical fusion and discectomy is reasonable and necessary to cure and relieve the effects of the industrial injury.

61. Dr. Beard acknowledged that the surgery has its risks, but it is a reasonable undertaking considering Claimant's exhaustion of conservative and non-surgical measures. Dr. Beard clearly believes Claimant has a higher chance of symptom reduction with surgery than without surgery. Dr. Beard explained that after Claimant's symptoms over two years did not alleviate by benign neglect or even active intervention of injections in pain management.

62. Dr. Beard disagreed that Claimant's symptoms are myofascial in nature. He explained that myofascial pain or a strain would improve after two years, and given Claimant's lack of improvement it is more likely the disc bulges at C4-5 and C5-6 are causing Claimant's symptoms.

63. Although Dr. Beard is not a level II accredited physician, he did offer testimony about the Medical Treatment Guidelines. He agreed there was a reasonable likelihood of at least a measureable and meaningful symptom reduction with surgery than without surgery. He also identified the specific sites of disc protrusion which contacted the spinal cord. In addition, Dr. Beard believed that Claimant has very reasonable expectations as it pertains to the outcome of the surgery.

64. Dr. Douthit testified by deposition on June 14, 2016. Dr. Douthit testified that he did not feel a two-level anterior cervical discectomy and fusion was reasonable because there were no objective physical findings, but rather all of Claimant's symptomatology was entirely subjective in nature. Despite Drs. Beard, Pouliot, Pineiro and Coester concluding that Claimant's MRI scan showed clear objective findings of multi-level disc protrusions, Dr. Douthit testified that Claimant's MRI was very ordinary, showing no unusual findings with no evidence of nerve root compression. Dr. Douthit testified that, "It was a chronic pain problem."

65. The ALJ credits the opinions of Dr. Beard as more credible and persuasive than those of Drs. Reiss and Douthit. Dr. Beard credibly explained, and the medical records confirm, that Claimant's MRI scans demonstrate objective findings consistent with Claimant's present symptoms. Dr. Beard established that the Claimant does not suffer from a cervical strain with myofascial pain because cervical strains improve and Claimant's symptoms continued to persist over two years with no improvement. Drs. Reiss and Douthit felt that Claimant's MRI findings were not consistent with his neck pain and radicular symptoms, but they admitted that disc bulges and protrusions and C4-5 and C5-6 were present. Their opinions merely differed in regards to what symptoms should be associated with spinal cord impingement at those levels. The ALJ finds that Dr. Beard, a board-certified orthopedic surgeon specializing in spine surgery, and who is also the Claimant's treating surgeon, has a better understanding of Claimant's condition than Dr. Reiss who examined Claimant one time and Dr. Douthit who completed a one-time record review.

66. Dr. Beard is an authorized treating provider, and his recommendation for a two-level anterior cervical fusion and discectomy is consistent with the Medical Treatment Guidelines, and is reasonable, necessary and related to Claimant's industrial injury.

CONCLUSIONS OF LAW

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

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

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

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

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

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

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

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

6. The Claimant has proven that surgery recommended by Dr. Beard is reasonable, necessary and related to his industrial injury. As found above, the ALJ credits the opinions of Dr. Beard as more credible and persuasive than those of Drs. Reiss and Douthit. Dr. Beard credibly explained, and the medical records confirm, that Claimant's MRI scans demonstrate objective findings consistent with Claimant's present symptoms. Dr. Beard established that the Claimant does not suffer from a cervical strain with myofascial pain because cervical strains improve and Claimant's symptoms continued to persist over two years with no improvement. Drs. Reiss and Douthit felt that Claimant's MRI findings were not consistent with his neck pain and radicular symptoms, but they admitted that disc bulges and protrusions and C4-5 and C5-6 were present. Their opinions merely differed in regards to what symptoms should be associated with spinal cord impingement at those levels. The ALJ finds that Dr. Beard, a board-certified orthopedic surgeon specializing in spine surgery, and who is also the Claimant's treating surgeon, has a better understanding of Claimant's condition than Dr. Reiss who examined Claimant one time and Dr. Douthit who completed a one-time record review.

ORDER

It is therefore ordered that:

1. The Respondents shall be liable for the two-level anterior cervical fusion and discectomy as recommended by Dr. Beard.

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

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

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

DATED: September 22, 2016

DIGITAL SIGNATURE:

L. Broniak

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-006-030-01

ISSUES

The issues to be determined by this decision are:

- Whether Claimant sustained an injury arising out of and during the course and scope of her employment with the Employer on December 2, 2015;

- Whether Claimant is entitled to medical treatment and whether the surgery that Dr. Ciccone recommended is reasonable, necessary, and related to her December 2, 2015 work-related injury; and

- Whether Claimant has proven by a preponderance of the evidence that she is entitled temporary disability benefits from February 3, 2016, through June 1, 2016.

STIPULATIONS

The parties stipulated that Claimant's average weekly wage (AWW) for the purposes of this hearing is $1,380.81. Additionally, the parties stipulated that the temporary disability time period at issue for this hearing is February 3, 2016, through June 1, 2016 if the claim is found compensable. Claimant reserves for future determination her right: a) for ongoing temporary total and/or temporary partial disability benefits from June 2, 2016; and b) to address the AWW for her second job.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as follows:

1. The Claimant works for the Employer as a registered nurse. On December 2, 2015, Claimant, after parking in an employee-designated parking lot, was walking into work when she slipped and fell on ice. Deena Goodman, an employee of the Employer, witnessed the event.

2. On December 2, 2015, Claimant completed an incident report which identified left shoulder pain, a right knee scrape and a right hand scrape.

3. Ms. Goodman also completed an incident report on December 2, 2015, and indicated Claimant fell hard on her shoulder, knee and elbow.

4. Claimant refused medical treatment and continued working. Claimant explained that she felt sore and believed she would improve.

5. On January 19, 2016, Claimant saw her primary care physician, M. Shannon Arnsberger, M.D. Dr. Arnsberger's January 19, 2016 report reflects that Claimant reported a "right shoulder pulled when tried not to fall and grabbed a railing. Feels same as rotator cuff injury from past. Injured Thu 1/14/16." Dr. Arnsberger's report states that Claimant did not request a letter for time off work due to her shoulder pain.

6. On January 29, 2016, Claimant underwent a right shoulder MRI, which revealed evidence of a previous supraspinatus tendon repair and "a suspected bone contusion along the anterior greater tuberosity with full-thickness re-tear of the supraspinatus tendon insertion; [m]ild retraction is evident and mild volume loss of the supraspinatus muscle."

7. Claimant discussed her slip and fall with her Employer in early February. The Employer offered Claimant a list of authorized treating physicians and Claimant chose Centura St. Anthony North.

8. On February 3, 2016, James D. Fox, M.D., with Centura, evaluated the Claimant. His report indicates that Claimant "apparently slipped and fell on the ice several months ago at work. She initially complained of some pain in her shoulder and her right knee but did not immediately seek medical care for various reasons." Dr. Fox added that Claimant reported "she thought her symptoms would resolve with time. When her symptoms persisted, she went to see her primary care physician apparently because she was under the impression that she was unable to see her work comp physician because too much time had elapsed."

9. Dr. Fox noted he asked Claimant "if she had reinjured the shoulder in any way since the initial injury and [Claimant] states that she has not sustained any further injury or trauma." Dr. Fox assigned Claimant work restrictions, including no lifting, pushing, or pulling over ten pounds and no lifting above chest level with the right arm. Dr. Fox referred Claimant to an orthopedic surgeon.

10. On February 5, 2016, the Employer filed a First Report of Injury. The First Report of Injury reflects that on December 2, 2015, at approximately 1:50 p.m., Claimant was crossing the "North parking lot on her way to clock in her for 2:00 p.m. shift [when she] slipped and fell on black ice, injuring her [right] shoulder." The First Report also reflects that Claimant reported her injury on December 2, 2015.

11. Also on February 5, 2016, the Employer completed a Notice of Available Temporary, Modified Duty for Claimant. The modified duty job offer outlined work, which included multiple different tasks, duties, etc., within Claimant's work restrictions, including no overhead reaching and no lifting, pushing, or pulling over ten pounds with her right shoulder. On February 5, 2016, Dr. Fox approved the modified duty job offer. On February 8, 2016, Claimant accepted the modified duty job offer.

12. On February 12, 2016, Claimant treated with William Ciccone II, M.D., who is an orthopedic surgeon. Claimant reported that she injured her right shoulder when she slipped and fell at work on December 2, 2015. Claimant reported right shoulder pain with reaching and lifting. Claimant reported she previously injured in her right shoulder in 2011, underwent surgical repair, and has had no right shoulder problems or restrictions with her right shoulder since. Dr. Ciccone reviewed the MRI and noted that it revealed a previous rotator cuff repair with recurrent full-tearing of the supraspinatus tendon. Dr. Ciccone diagnosed Claimant with a traumatic rotator cuff tear and impingement. Dr. Ciccone recommended surgery.

13. On February 15, 2016, Dr. Ciccone requested authorization for right shoulder arthroscopy with decompression, rotator cuff repair, and biceps tenodesis.

14. On February 17, 2016, Claimant returned to see Dr. Fox, who noted that Claimant was somewhat upset and tearful because she learned that Respondents were likely to deny her claim. Dr. Fox added that Claimant also expressed anxiety about having another shoulder surgery since it took her eight months to recover from her last shoulder surgery. Dr. Fox also noted that Claimant reported significant amounts of pain with even minimal use of her right arm and requested that she be taken off work. Dr. Fox stated that he can give her appropriate work restrictions but that it is not necessary that she be taken off work completely. Dr. Fox assigned Claimant additional work restrictions, including no use of her right upper extremity.

15. Also on February 17, 2016, Respondents filed a Notice of Contest.

16. On February 22, 2016, Dr. Ciccone cleared Claimant for surgery.

17. On February 26, 2016, Claimant told Dr. Fox that the insurance company had denied surgery, but had approved conservative treatment. Claimant reported she feels unable to continue working due to severe anxiety. Dr. Fox noted that Claimant has a preexisting history of anxiety and that Claimant's anxiety is not related to her work injury, thus he is unable to take her off work. Dr. Fox added that he spoke to a representative of the Employer regarding Claimant's work restrictions and that he believes Claimant can continue light duty with the Employer. Dr. Fox maintained Claimant's work restrictions of no use of her right arm and that Claimant must wear a sling on her right arm.

18. On March 1, 2016, Claimant saw Dr. Arnsberger and reported that she was scheduled to undergo right shoulder surgery on February 29, 2016, and "WC canceled this plan." Claimant reported that she feels very anxious about the lack of plan to repair her shoulder. Dr. Arnsberger noted, "HR filed WC because she fell at work," and Dr. Arnsberger added, "[Claimant] had presented to me weeks ago with injury from a 'fall.' She was proceeding with planned care from surgeon until [the Employer] said that WC had to be filed." Claimant reported that she's losing her mind because she knows "what I'm headed into. It took me 8mo to recover from previous work injury due to delay by WC." Claimant reported that she just wanted to recover and heal.

19. In her March 1, 2016 report, Dr. Arnsberger stated that she needs “to find out how to get her true problem resolved. [Claimant] is usually in good health and mentally stable. The source of anxiety needs to be removed.” Dr. Arnsberger added that Claimant’s “main issue is being trapped in worker’s compensation indecision.” Dr. Arnsberger stated that she is completing Claimant’s FMLA paperwork.

20. On March 25, 2016, Claimant returned to Dr. Fox, who noted that Claimant’s primary care physician took her off work due to anxiety and PTSD. Dr. Fox opined that Claimant’s “PTSD diagnosis is not indicated typically for a slip and fall accident. There [were] no significant psychological stressors associated with this incident other than the fact that she was injured and looking at possible surgery.” Dr. Fox added that Claimant continues to have right shoulder pain and limited range of motion. Dr. Fox maintained Claimant’s work restrictions.

21. On April 19, 2016, Claimant applied for a hearing on compensability, reasonable and necessary medical benefits, average weekly wage, and temporary disability benefits.

22. On April 27, 2016, Claimant saw Dr. Fox and reported increased pain and decreased function with her right shoulder. Dr. Fox noted that Claimant most likely needs surgical intervention but that right shoulder surgery continues to be denied by Respondents because they felt Claimant has a preexisting injury. Dr. Fox maintained Claimant’s work restrictions.

23. Claimant has worked as a registered nurse (RN) since 1978 and as an RN for the Employer for a year and a half. Claimant sustained a prior right shoulder injury in December 2011 while skiing with her daughter, who is a ski instructor. Claimant testified it was her first and last time skiing. As a result of the 2011 skiing injury, Claimant underwent right shoulder surgery and it took approximately eight months for her to recover.

24. Claimant testified that she lost her job as a result of the 2011 shoulder injury. Claimant was eventually released back to work full duty with no restrictions. After Claimant returned to work in approximately August 2012, she had no other right shoulder injuries, treatment, restrictions, or limitation until the December 2, 2015 slip and fall.

25. Claimant testified that on December 2, 2015, she parked in the employee parking lot and was walking across the lot, along the side of the building when she slipped and fell on ice and landed on her right side, specifically her right shoulder and right knee. Ms. Goodman ran up to her and asked her if she was okay.

26. Claimant testified that she landed on her right side including her right shoulder. She explained that her right knee was the worst at that time and that she had torn her scrub pants.

27. Claimant initially refused medical care because she just thought she was sore from the fall and because she knew the Employer was short-staffed and she did

not want to miss any time from work or put the Employer in a position to find someone to work for her. After the fall continued to work because she did not want to miss any time from work. Claimant testified she had limited use of her right shoulder and could not raise her right arm over her head while working.

28. On January 14, 2016, Claimant and her husband drove from Colorado to Minnesota to attend her granddaughter's January 16, 2016 baptism. Prior to leaving on her trip, Claimant called her primary care physician (PCP), Dr. Arnsberger, to schedule an appointment regarding her right shoulder because her right shoulder was hurting and she knew something was wrong. Claimant testified that Dr. Arnsberger's earliest available appointment was January 19, 2016.

29. Claimant testified that she did not slip or fall or sustain an injury to her right shoulder on January 14, 2016. Claimant testified that other than the December 2, 2015 right shoulder injury, she did not sustain any other right shoulder injury. Claimant does not know why Dr. Arnsberger's January 19, 2016 report states that she sustained an injury on January 14, 2016. Claimant could not pick up or hold her ten pound granddaughter with her right arm while in Minnesota.

30. Claimant testified that she was traumatized after her last surgery and that she was scared she was going to lose her job if she had to go out of work for another shoulder surgery. Claimant was in a significant amount of pain but could not take any pain medications while working light duty.

31. Claimant asked Dr. Fox to take her off work. Claimant testified that Dr. Fox directed her to her primary care physician regarding work limitations. Claimant saw her PCP, who thought Claimant was suffering from PTSD and took her off work and referred her to a psychologist, with whom Claimant treated.

32. Ms. Goodman testified during the hearing that she witnessed Claimant slip and fall on ice and land on her right side on December 2, 2015. In her written description of the incident, Ms. Goodman did not differentiate between right and left.

33. Bonnie Bates-King works as a Division Coordinator for Workers' Compensation and Safety for the Employer. Ms. Bates-King testified that the Employer has an extensive light duty program and that the Employer provided Claimant with light duty. Ms. Bates-King understood Claimant was off work due to a non-work-related event.

34. Claimant sustained a work-related accident, but no injury to her right shoulder occurred as a result. Despite incident reports completed the day of the accident, there is no record of Claimant injuring her right shoulder until January 19, 2016 when she saw Dr. Arnsberger.

35. Claimant never pursued medical treatment for any other body part she claimed she injured on December 2, 2015, and Claimant missed no time from work as a result of the slip and fall accident.

36. Based on the foregoing the Claimant has failed to prove that she suffered an injury to her right shoulder on December 2, 2015. It is undisputed Claimant slipped and fell in the Employer's parking lot. Claimant testified that her right knee was the worst and she identified a "scrape" on the right knee of the pain diagram she completed the same day of the fall. The same diagram identified pain in her left shoulder, not her right shoulder. It does not make sense for Claimant to mistake right from left on the pain diagram given her experience as an RN and the consistent identification of her right knee as an injured body part. If Claimant were to have simply mistaken right from left on the pain diagram, it would make more sense for her to make the mistake as to both the knee and the shoulder. Further, Dr. Arnsberger's very specific description of when and how Claimant's right shoulder injury occurred is compelling. Claimant also reported to Dr. Arnsberger that her right shoulder symptoms felt like the rotator cuff tear she had previously experienced which is not consistent with the described "natural soreness" Claimant believed she had been experiencing for several weeks. Finally, the timing of Claimant's inability to perform her job duties seems to coincide more with an incident that occurred on January 14, 2016 rather than on December 2, 2015. Claimant worked full duty for two months following the slip and fall then suddenly claimed the complete inability to work in February 2016.

CONCLUSIONS OF LAW

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

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

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

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See id.*

5. The Workers' Compensation Act creates a distinction between the terms "accident" and "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), C.R.S. An "injury" refers to the physical trauma cased by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." A compensable injury requires medical treatment or causes a disability.

6. As found above, Claimant has failed to prove that she suffered an injury to her right shoulder on December 2, 2015. It is undisputed Claimant slipped and fell in the Employer's parking lot, but no injury that produced the need for medical treatment flowed from the slip and fall.

7. Claimant testified that her right knee was the worst and she identified a "scrape" on the right knee of the pain diagram she completed the same day of the fall. The same diagram identified pain in her left shoulder, not her right shoulder. It does not make sense for Claimant to mistake right from left on the pain diagram given her experience as an RN and the consistent identification of her right knee as an injured body part. If Claimant were to have simply mistaken right from left on the pain diagram, it would make more sense for her to make the mistake as to both the knee and the shoulder rather than marking the opposite knee and shoulder. Further, Dr. Arnsberger's very specific description of when and how Claimant's right shoulder injury occurred is compelling. Claimant also reported to Dr. Arnsberger that her right shoulder symptoms felt like the rotator cuff tear she had previously experienced which is not consistent with the described "natural soreness" Claimant believed she had been experiencing for several weeks following her fall. Finally, the timing of Claimant's inability to perform her job duties seems to coincide more with an incident that occurred on January 14, 2016 rather than on December 2, 2015. Claimant worked full duty for two months following the slip and fall then suddenly claimed the complete inability to work in February 2016.

8. Claimant's claim for workers' compensation benefits is denied and dismissed. Respondents are not liable for additional medical benefits including the surgery proposed by Dr. Ciccone nor are they liable for temporary disability benefits.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

2. Respondents are not liable for additional medical benefits including the surgery proposed by Dr. Ciccone nor are they liable for temporary disability benefits.

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

DATED: September 23, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits to cure/relieve the compensable injury.

STIPULATIONS

The issues of average weekly wage and temporary indemnity benefits were reserved by the parties.

FINDINGS OF FACT

1. Claimant works for Employer as a Deputy Sheriff and has been so employed for approximately 11 years.

2. In 2010 Claimant began working at the Van Cise Simonet Detention Center, also known as the downtown detention center. Claimant had previously worked in a different location.

3. At the downtown detention center Claimant worked in the intake area and was responsible for the care, custody, and supervision of inmates. The intake area had places for fingerprinting, interviewing, and booking. Claimant also worked in the housing area where he sent people to court, supervised the area, and oversaw cleaning. Claimant typically worked 12 hour shifts, but could work up to 16 hour shifts with overtime.

4. At the detention center Virex II is used extensively as a disinfectant cleaner and is used to clean most surfaces including cells, walls, mattresses, tables, and chairs. Inmates clean the facility using Virex II while deputies supervise.

5. Virex II is used in spray bottles and in mop solutions. At the detention center it is used in a diluted form with 1 part Virex II to 256 parts water. The detention center has a dispensing station that provides the Virex II in its diluted form for cleaning purposes. Virex II contains quaternary ammonia compounds.

6. Prior to being transferred to the Downtown Detention Center, Claimant had never been exposed to Virex II and Claimant does not use Virex II outside the workplace.

7. On June 23, 2012 while he was working, Claimant experienced a reaction. Claimant broke out in hives, had an itchy feeling on his arms and face, and had swelling in his face, lips, tongue and throat. Claimant went to the emergency room at Denver Health Medical Center.

8. At Denver Health Medical Center Claimant reported his first episode of an allergic reaction was one month prior. Claimant was found to have diffusely red skin with hives and bilateral redness of the sclera. Claimant had no signs of upper or lower airway obstruction and his chest had good breath sounds. Claimant was treated with IV fluids and medication. He was diagnosed with allergic reaction and was given a four-day course of prednisone and an EpiPen injection. The medical records show that Claimant reported eating a breakfast burrito at Sam's diner smothered in green chili three hours prior to his reaction and that he had eaten the same burrito at the same location 2-3 weeks prior and noticed 2-4 hours after eating that he had itchy eyes and itching skin but related it to summer hayfever. *See* Exhibit 8.

9. On June 27, 2012 Claimant was evaluated by Karen Mulloy, D.O. at the Center for Occupational Safety and Health. Claimant reported he was at work and had not come into contact with any new substances or been bit by any insects, but that he suddenly broke out in hives and swelling in his throat and had difficulty breathing. Dr. Mulloy noted that it was unclear whether Claimant had any specific exposure related to work that caused his reaction and that she could not say the reaction was work related. Dr. Mulloy advised Claimant to finish the prednisone course given to him by the emergency department and advised Claimant it would be good to make an appointment with his primary care physician for a referral to an allergist to determine what he might be allergic to in order to avoid future reactions. Dr. Mulloy advised Claimant that if the testing revealed that he was allergic to a substance he is exposed to at work to return. *See* Exhibit 5.

10. On July 6, 2012 Claimant felt sick while at work. Claimant testified that he had trouble breathing, felt weak, and felt his throat swelling. Claimant went home from work, slept most of the day and then went to an after care clinic. Claimant's workup showed a severely high white blood cell count and he was transferred to St. Joseph's hospital for further evaluation. See Exhibit 8.

11. On July 6, 2012 Claimant was evaluated at the emergency department of St. Joseph's hospital by Jeremiah Fletcher, M.D. Claimant reported a one day history of nausea with associated diarrhea 3-4 times. Claimant also reported a sore throat, abdominal pain, fever, and chills. Claimant was found to have high white blood cell count and a low grade fever. A test for strep throat was found to be negative. *See* Exhibit 7.

12. On July 12, 2012 Claimant was evaluated at Kaiser by his primary care physician as a follow up to his hospital visit. Claimant was diagnosed with bacterial enteritis and with an abnormal complete blood count measurement. It was noted that Claimant continued to have diarrhea and weakness. His provider discussed good hand washing to prevent the spread of illness. *See* Exhibit 8.

13. On August 28, 2012 Claimant was evaluated at Kaiser by his primary care physician. Claimant reported two to three weeks of swelling/bumps on his face, lateral to his left eye that seemed to be growing and felt sore. Claimant also reported that he caught a "sinus thing" over the past couple of weeks and that his right nostril was completely plugged with periodic clear drainage. On examination it was noted that Claimant had nodules under his skin and that his right nostril was obstructed by turbinate swelling. Claimant was prescribed an antibiotic for possible infection in his right sinus and was referred to ENT to evaluate the facial nodules. *See* Exhibit 8.

14. On September 19, 2012 Claimant was evaluated at Kaiser. Claimant reported that his sinus symptoms had worsened and that he had sinus pressure, pain, and headache and felt like he had drainage down his throat. Claimant reported he also had a cough and that he had been diagnosed with bronchitis at Swedish and was given an inhaler that helped. Claimant was diagnosed with sinusitis and bronchitis as well as asthma with acute exacerbation. *See* Exhibit 8.

15. On November 6, 2012 Claimant was evaluated at Kaiser. Claimant reported that following his September 19, 2012 visit he started to feel good, joined a gym, and got on a regular exercise program. Claimant reported that approximately two weeks prior he started getting a funny feeling in his throat, a runny nose and drainage and that one week ago he got chest congestion and dyspnea. Claimant was given prednisone and advised to continue his nebulizer treatments. *See* Exhibit 8.

16. On December 26, 2012 Claimant was evaluated at Kaiser. Claimant underwent a CT of his chest on December 20, 2012 and the impression was airway disease with mucous plugging or secretions, tree in bud abnormality and/or clustered micronodules and it was noted that the findings were probably inflammatory such as atypical infection or noninfectious etiology. Claimant also underwent a CT of his sinuses on December 20, 2016 and the impression was mucosal thickening involving all the paranasal sinuses consistent with sinusitis changes, and the presence of air fluid levels in the maxillary and sphenoid sinus air cells implied acute sinusitis. The impression also included mild rightward deviation of the nasal septum. It was noted that Claimant had been diagnosed a few weeks earlier with chronic bronchitis, and that two days prior Claimant was assessed with chronic sinusitis and pneumonia/pulm infiltrates as shown by the chest CT. On December 26, 2012 Claimant was assessed with eosinophilia with no evidence of allergic sensitization, chronic sinusitis, and with reactive airway disease. *See* Exhibit 8.

17. On January 21, 2013 Claimant underwent a bronchoscopy that showed bilateral lung abnormalities. *See* Exhibit 7.

18. On February 5, 2013 Claimant was evaluated at Kaiser. Claimant reported that he had been feeling better, was working out again, and that he had chest congestion primarily at night when he woke up coughing a little bit but that during the day he was feeling much better. *See* Exhibit 8.

19. Claimant continued to be evaluated on numerous occasions from February of 2013 through April of 2014 where he continued to have chronic sinusitis and corresponding symptoms. Claimant was eventually referred for sinus surgery. *See* Exhibit 8.

20. On April 23, 2014 Claimant underwent sinus surgery with septoplasty and turbinate reduction. Claimant had bilateral nasal polyps primarily in the ethmoid sinuses and the pathology report showed polypoid mucosa with edema, and chronic inflammation including numerous eosinophils. *See* Exhibit I.

21. Claimant initially reported feeling better following surgery but again began having an increase in mucus and symptoms and continued to have flare-ups of sinusitis throughout the remainder of 2014. Claimant was referred to National Jewish Hospital for evaluation. *See* Exhibit 8.

22. On February 24, 2015 Claimant was evaluated at National Jewish Hospital by Rohi Katial, M.D. Dr. Katial opined that Claimant's chest congestion and shortness of breath were likely due to adult-onset asthma and he considered associated conditions. Dr. Katial referred Claimant to the occupational medicine clinic for further evaluation due to Claimant's reports of greater symptoms while at work and due to Claimant and Claimant's wife's indications that they believed it was work related and due to chemicals. *See* Exhibit 3.

23. On March 11, 2015 Claimant was evaluated by Karin Pacheco, M.D. Claimant reported that after about four hours of being at work he develops chest congestion, shortness of breath, nasal congestion with diffuse nasal drainage, headache, and itchy eyes, face, and exposed arms. Claimant reported that the symptoms gradually worsen over the course of the work week and improve on his days off and also improve when treated with steroids. Dr. Pacheco assessed recurrent work related allergic reaction associated with asthma (presumed) and chronic rhinosinusitis. Dr. Pacheco opined that Claimant's presentation was consistent with sensitization at work because Claimant's symptoms developed after two years of exposure at work, the symptoms responded to prednisone, and the symptoms recurred on each return to work. *See* Exhibit 3.

24. On March 20, 2015 Claimant underwent a methacholine challenge test. During the test a subject inhales a small amount of a chemical known to cause bronchial tube constriction and then does a spirometry test and a series of spirometries are performed as the amount of the chemical inhaled is increased. A positive test would show an individual having broncho constriction when exposed to a low level of

methacholine. Claimant's test was noted to be positive at a level of 7.27 mg, consistent with mild asthma.

25. On April 8, 2015 Claimant was evaluated by Dr. Pacheco and he had been back at work for approximately two weeks after having been off work for 6 weeks following his surgery. Claimant reported that after two days at work he had a stuffy nose, hoarse voice, chest congestion, upper chest tightness, severe morning headaches, and sinus congestion. Claimant's chest exam showed decreased breath sounds but no wheezes and his spirometry was normal. Dr. Pacheco assessed work related asthma and work related chronic sinusitis with polyposis. Dr. Pacheco asked Claimant to monitor his peak flow rates four times daily. Dr. Pacheco noted a general downward trend in the peak flow rate diary. Dr. Pacheco also ordered a specific inhalation challenge. *See* Exhibit 3.

26. On June 4, 2015 Claimant underwent the specific inhalation challenge(SIC). Claimant sprayed Virex II onto cardboard or soaked a gauze pad to clean surfaces with Virex II during the two 15 minute exposures in a small enclosed room. The spirometry was measured after each exposure and then every 30-60 minutes over the next six hours. Claimant's baseline spirometry before the challenge was 99% of predicted. His spirometry 17 and 32 minutes after exposure was 97% of his normal baseline value and his lowest spirometry value was 62 minutes after exposure and showed a value of 91% of his baseline. *See* Exhibit J.

27. On July 23, 2016 Claimant was evaluated by Dr. Pacheco. Claimant reported that he had not been to work since June 11, 2015 but that his sinus symptoms persisted with some nasal congestion and some clear nasal drainage. Claimant also continued to report chest congestion. Dr. Pacheco opined that Claimant's asthma was documented on the basis of a positive methacholine challenge and peak flow rates at work and that it was also confirmed by a SIC to Virex II. Dr. Pacheco noted that Claimant was also sensitized to some molds and that it was possible that the exposure to mold also contributes to Claimant's symptoms, although the molds would not be expected to contribute an occupational component. *See* Exhibit 3.

28. On August 23, 2015 Claimant was evaluated by Dr. Pacheco. Claimant had not been working for ten weeks prior. Claimant reported that his chest congestion continued and chest examination showed diffuse late rhonchi on auscultation and a normal spirometry. *See* Exhibit 3.

29. On September 8, 2015 Claimant underwent a CT scan of his chest that revealed no change from his July 8, 2013 CT scan. His CT scan of the sinuses showed worsening sinus disease with greater than 50% opacification of the maxillary antra with some residual mild mucosal disease in the remaining ethmoid air cells, sphenoid ethmoid junction mucosal disease predominantly on the left with mild mucosal thickening in the sphenoid sinus, frontoethemoid junction mucosal disease with some minor mucosal thickening in the base of the frontal sinus, and right ostiomeatal complex opacified. *See* Exhibit J.

30. On September 11, 2015 Claimant was evaluated by Dr. Pacheco. Claimant reported still having wheezing that woke him up once per night and he reported more green-brown nasal drainage over the past two weeks. Dr. Pacheco noted that Claimant's last day at work was June 11, 2015 and that since June 11 Claimant's symptoms had gradually improved, however, that on September 11, 2015 Claimant presented with an acute sinusitis that has also aggravated his asthma. Dr. Pacheco noted that although Claimant reported persistent asthma symptoms out of exposure to the workplace, the medical literature suggested that it may require up to two years out of exposure on adequate medical treatment to see improvement or resolution of occupational asthma and so she opined that Claimant's clinical course was consistent. See Exhibit 3.

31. On October 30, 2015 Jeffrey Schwartz, M.D. performed an independent medical examination of Claimant. Claimant reported that he was in good health until June of 2012. Claimant reported that he had seasonal allergic rhinitis as a child. Claimant reported in June of 2012 he developed an allergic reaction while at work, later in the month had weakness and fever at work, and soon thereafter developed sinus congestion with associated chest congestion and cough and had been struggling with the same symptoms for the past three years. Claimant reported the symptoms were variable and that he was diagnosed with chronic sinusitis and had episodes of acute sinusitis. Claimant reported that his chest congestion with cough and shortness of breath usually followed worsening of his sinusitis and that his chest symptoms were under fair control with medication as long as his sinusitis had not worsened. Claimant related his allergic reaction in June of 2012 to his work environment in the downtown detention center. Claimant reported that after time off from work and when he returned to work he experienced gradual worsening symptoms and within four weeks of returning to work following his surgery, he felt as bad as ever. *See* Exhibit M.

32. Dr. Schwartz performed a physical exam and noted that Claimant's head and neck exam showed moderate nasal congestion on the right and good airflow on the left. Dr. Schwartz reviewed the 9/25/25 methacholine challenge test and opined it showed no evidence of hyper reactive airways and also reviewed the 10/30/15 spirometry and opined that it was a normal study. *See* Exhibit M.

33. Dr. Schwartz opined that the peak expiratory flow records for Claimant did not show a work related deterioration in Claimant's airflow. Dr. Schwartz noted the graph suggested a decline in airflow over a 6 week period that Claimant kept the diary but that it did not show correlation between his peak flows during his 3-4 days at work and his 3-4 days off work. Dr. Schwartz noted that in order to be indicative of occupational asthma he would expect the peak flow graph to demonstrate cyclic deterioration and then improvement of airflow when Claimant is at work and away from work, respectively. Dr. Schwartz opined that Claimant's peak flow graph did not show this characteristic pattern. *See* Exhibit M.

34. Dr. Schwartz opined that Dr. Pacheco's interpretations of Claimant's peak flow measures, Claimant's methacholine responsiveness, and Claimant's "positive" SIC were wrong and opined that Dr. Pacheco had no objective evidence to support her conclusions. Dr. Schwartz acknowledged that Claimant had adult-onset asthma and had some evidence of reversible airflow obstruction, but opined that Claimant did not demonstrate sensitization to a causative agent, the Virex II. Dr. Schwartz noted that after Dr. Pacheco had reviewed Claimant's workplace exposures and believed the exposure to Virex II was the probable cause of his occupational asthma she ordered a specific inhalation challenge (SIC). Dr. Schwartz reviewed the 6/4/15 SIC test where Claimant had two 15 minute periods of direct exposure to Virex II that were more direct than what was described during his normal work day and that Claimant experienced only an insignificant fall in his FEV1 levels of 8%. Dr. Schwartz opined that this fall in the level objectively was a negative response to the test as it was not 20% or more which would be required to objectively state that the Virex II was the cause of the asthma. *See* Exhibit M.

35. Dr. Schwartz noted that Dr. Pacheco evaluated Claimant on April 8, 2015 after Claimant had been off work for 6 weeks. Claimant had returned to work on March 24, 2015 and he had specifically worked both on April 7, 2015 and April 8, 2015. Despite reporting that his symptoms had come back within two days of returning to work, Dr. Schwartz opined that Claimant's FEV1 levels were at 103% of predicted and were perfectly normal. *See* Exhibit M.

36. Dr. Schwartz also noted that Dr. Pacheco considered significant the change in results of Claimant's two methacholine challenge tests performed after Claimant had been off work for several weeks, and then when Claimant was back at work. Dr. Schwartz noted that the change in the studies was a 40% change but that the recommendation for that test to be considered significant in diagnosis requires a 400% change, not a 40% change. *See* Exhibit M.

37. Dr. Schwartz concluded that the cause of Claimant's chronic sinusitis with nasal polyps and eosinophilia is unknown, as is often the case, and that there was no evidence that the disorder was work related. Dr. Schwartz opined that there was no evidence that chronic sinusitis with nasal polyps was caused by exposure to Virex II and that such cleaning agents have never been associated with that disorder. Dr. Schwartz opined that while a cleaning agent containing quaternary ammonium compounds like Virex II could cause asthma, there were no studies or reports that showed a quaternary ammonium compound could cause occupational rhinosinusitis and that Dr. Pacheco's opinion that Virex II contained a known sensitizer capable of causing both occupational asthma and rhinosinusitis was only partially correct. *See* Exhibit M.

38. Dr. Schwartz noted that Claimant's primary problem has not been his asthma but has been his chronic sinusitis with nasal polyps which can frequently coexist with asthma and without an allergic basis. Dr. Schwartz noted that the sequence of chronic sinusitis triggering the asthma is a common occurrence and is noted by Dr. Suskin on 12/5/12 when Dr. Suskin opined that Claimant's sinusitis was likely the

ongoing trigger of Claimant's bronchial inflammation. Dr. Schwartz also pointed out that Claimant recognized that the sinusitis was his primary problem and that his chest symptoms always follow a worsening of Claimant's sinusitis. Dr. Schwartz opined that Claimant's asthma was secondary and a less significant disorder than the chronic sinusitis and that this is supported by a September 25, 2015 methacoline challenge study that indicated Claimant did not have present evidence of asthma despite a CT scan that showed extensive chronic sinusitis. *See* Exhibit M.

39. On January 27, 2016 Dr. Pacheco issued a report at Claimant's request to review and comment on Dr. Schwartz's opinions. Dr. Pacheco opined that Claimant became sensitized to the use of sprayed quaternary ammonia compounds used to clean the jail and that he developed disease associated with the workplace exposure to Virex-II. Dr. Pacheco opined that the proper process was followed in establishing Claimant's diagnoses. Dr. Pacheco noted that Claimant underwent three methacholine challenges. On March 20, 2015 after six weeks off work his level was 7.27, then a repeat challenge on April 20, 2015 showed 4.34. Dr. Pacheco then noted that Claimant had been out of exposure since June 11, 2015 and underwent a methacholine challenge on September 25, 2015 that showed a level at 19.4. Dr. Pacheco concluded that the progression of the methacholine challenge doses were consistent with occupational asthma due to a sensitizer in that it could resolve out of exposure and with adequate treatment. Dr. Pacheco noted that Claimant's challenge responsiveness improved on short term removal from work, worsened on his return to the exposure, then resolved when he was out of exposure.

40. Dr. Pacheco also noted that Claimant's peak flows did not show classic changes of occupational asthma with clear cut worsening at work and clear cut improvements while away. However, she opined that Claimant's peak flow rates measured during the six weeks he was off work remained in the 600 to 700 range and that his rates after returning to work became increasingly variable and gradually fell to the 500 to 600 range with a low value of 476 which showed a greater than 20% decrease in overall peak flow rate upon Claimant's return to work. Dr. Pacheco opined that this was significant for consideration of work-related worsening. See Exhibit 3.

41. Dr. Pacheco also disagreed with Dr. Schwartz's statements that there were no reports relating exposure to quaternary ammonia compounds to occupational rhinosinusitis and cited numerous studies reporting upper respiratory symptoms to exposure to quaternary ammonia compounds as well as reporting rhinitis. Based on the reports she reviewed she continued to opine that occupational exposure to quaternary ammonia compounds has been associated with both new onset asthma as well as with nasal symptoms at work and that this applied to Claimant. Thus she continued to conclude that Claimant developed occupational sensitization to quaternary ammonia compounds sprayed in the area where he worked that resulted in chronic rhinosinusitis and asthma. Dr. Pacheco noted that the asthma essentially resolved out of exposure but that the rhinosinusitis persisted and needed further treatment. See Exhibit 3.

42. On May 23, 2016 Sarah Urfer, an expert in forensic toxicology testified by deposition. Ms. Urfer is a board certified diplomat of The American Board of Forensic Toxicology. Ms. Urfer opined that the Virex II, 256 was a highly diluted form of the chemical mixture and had no known respiratory irritant effects.

43. Dr. Schwartz testified at hearing consistent with his IME report. Dr. Schwartz noted that asthma is a variable condition and that airflow levels can change. Dr. Schwartz noted that Claimant had several occasions where Claimant's IGE levels were extremely elevated and that the high levels would occur if Claimant had some type of parasite or allergic reaction. Dr. Schwartz opined that the IGE levels show allergic reactions to molds, pollens, parasites, or complex-proteins but do not become elevated due to chemical exposures. Dr. Schwartz opined that chemical compounds like Virex II (quatroammonia) do not cause rhinosinusitis and that it has never been reported that an ammonia compound like Virex II has caused rhinosinusitis.

44. Dr. Schwartz opined that the SIC is the gold standard test for assessing occupational asthma and that a positive test would have to show a variance of 20% or more for the asthma to be considered occupationally related. Dr. Schwartz opined that Claimant did not meet the condition and that the Virex II did not cause a reduction at the level required to say, more likely than not, that Claimant's asthma is occupationally related. Dr. Schwartz opined that the test would have shown much higher levels if Claimant had occupationally related asthma due to Virex II.

45. Dr. Schwartz opined that with occupational asthma suspicion they will have patients keep peak flow records and that the typical pattern you would see is that a patient would have a normal peak flow on the weekend, go to work Monday and that the peak flow would get worse through the work week and to Friday, then that the peak flow would again improve over the weekend. Dr. Schwartz opined that Claimant's peak flow did not show this pattern and that it showed no improvement over the 3-4 days Claimant was off work versus the 3-4 days Claimant was on shift and working. Dr. Schwartz also opined that currently Claimant has been out of exposure of the Virex II for quite a while as he was moved to a different facility that does not use Virex II yet his symptoms have not gotten better which he would have expected if the Virex II was the cause. Dr. Schwartz noted that despite removal from exposure to Virex II Claimant was still using his inhaler daily and using nasal and sinus medications.

46. Dr. Schwartz is found credible and persuasive. His opinions are consistent overall with the objective medical testing. His opinions are also consistent with the opinions of Ms. Urfer and with those of Dr. Suskin.

CONCLUSIONS OF LAW

Generally

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

litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

"Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned

> by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005).

Claimant has failed to establish, more likely than not, that he suffers from an occupational disease proximately caused by his employment. The opinions of Dr. Schwartz are found more credible and persuasive than the opinions of Dr. Pacheco. Specifically, Claimant's asthma and chronic sinusitis have not been shown to be proximately caused by his exposure to Virex II. The overall objective medical testing supports Dr. Schwartz's opinions that the Claimant's symptoms are most likely not due to a work related exposure or occupational disease developed due to his exposure. Claimant's symptoms throughout the several years of treatment had periods where he reported feeling well and much improved despite his alleged continued contact with and regular exposure to Virex II. Claimant also reported feeling poorly and having symptoms during periods of time when he was off work and not exposed to Virex II. Claimant's peak flow rates did not show improvement on the days that he was off work and worsening on the days he was at work. Further, despite having been off work for a period of approximately three months, Claimant developed once again an acute sinusitis that aggravated his asthma in September of 2015. It also is noted that Claimant is sensitive to molds as a possible alternative source to his continued problems. The opinions of Dr. Schwartz after an extensive review of all of the medical records are found to be persuasive. Claimant has the burden of proof and although possible, the evidence does not establish more likely than not that Virex II caused Claimant's symptoms or complaints. Further, the testimony of forensic toxicologist Sarah Urfer is also persuasive and supports Dr. Schwartz's conclusion that Virex II has no known respiratory irritants. Overall, Dr. Pacheco is not as credible or persuasive.

Medical benefits

Respondents are required to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that he suffers from an industrial injury or an occupational disease. Therefore, his request for medical benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that developed an occupational disease as a result of his employment. His claim is denied and dismissed.

2. As Claimant failed to establish that he sustained a compensable injury, his request for medical benefits is denied and dismissed.

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

DATED: September 22, 2016,

/s/ Michelle E. Jones

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

ISSUE

The following issue was raised for consideration at hearing:

Whether Claimant established by a preponderance of the evidence that she sustained injuries to her left shoulder and that the need for left shoulder surgery as recommended by Dr. Isaacs is reasonable, necessary, and causally related medical treatment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following

findings of fact:

1. On February 26, 2015, Claimant slipped and fell on ice while working for the Employer.

2. Following the slip and fall event, Claimant was seen at the Emergency Room on the date of accident. The ER report describes that Claimant had fallen landing on her buttocks and then hitting the back of her head. Claimant denied any neck or back pain or pain in her extremities.

3. On February 27, 2015, Claimant was evaluated by authorized treating physician, Katherine Drapeau, D.O. Dr. Drapeau's report notes that Claimant described that she had slipped and fallen on ice landing on her buttocks and then striking her head on the ground.

4. Claimant testified that she fell landing straight on her head and then her left side hit the ground. Claimant was adamant that she did not fall landing on her buttocks. Claimant testified that she does not recall how her arms were positioned at the time of the fall. Claimant agreed that she told her doctors about the mechanism of injury, but Claimant denied that she told the ER physician and Dr. Drapeau that she had fallen landing on her buttocks.

5. Claimant testified that she experiences a chronic stabbing pain in her left shoulder and a popping sensation in her left shoulder. Claimant testified that her left shoulder popping onset at least ten months after the February 26, 2015, accident, which was approximately in December 2015. Claimant testified that the stabbing sensation in her left shoulder onset on the date of accident and has been present on a constant basis since the date of accident.

6. Claimant was evaluated by Samuel Chan, M.D. on June 5, 2015. Dr. Chan's report indicates that he performed an objective examination of Claimant's bilateral shoulders. The report indicates that Claimant had no tenderness to palpation over her AC joints and that impingement testing was negative bilaterally. The report does not document any subjective complaints related to the left shoulder and Dr. Chan did not diagnose Claimant with any objective findings related to the left shoulder.

7. Dr. Chan evaluated the Claimant again on June 26, 2015, and July 15, 2015, and Claimant did not report any pain complaints related to her left shoulder. Dr. Chan's objective examination of Claimant's left shoulder again did not reveal any findings.

8. On August 20, 2015, Dr. Chan placed the Claimant at maximum medical improvement (MMI) and assigned her a rating of 6% whole person impairment for injuries to the cervical spine. Dr. Chan's discharge impairment report does not indicate that Claimant reported any pain complaints related to her shoulder and Dr. Chan did not diagnose any findings related to the shoulder. Dr. Chan recommended biofeedback, a home exercise program, and myofascial release as maintenance treatment for Claimant's cervical spine injuries.

9. On September 10, 2015, Claimant returned to Dr. Drapeau who agreed that Claimant was at MMI and recommended six sessions of massage therapy for maintenance treatment. Dr. Drapeau's discharge diagnoses were cervical and thoracic sprains and post concussive syndrome. Claimant reported that she was working full duty and was performing her duties without any problems.

10. The opinions of the treating providers, Drs. Chan and Drapeau, that Claimant did not sustain injuries or impairment to her left shoulder as a result of the industrial accident is credited*.* The persuasive medical evidence supports, and it is hereby found, that the Claimant did not sustain injuries or aggravations to her left shoulders as a result of the February 26, 2015, industrial accident.

11. Respondents filed a Final Admission of Liability on October 21, 2015, admitting to the impairment rating assigned by Dr. Chan. The Final Admission admitted for maintenance medical benefits.

12. On November 2, 2015, Claimant was evaluated by Dr. Oeser and Dr. Oeser noted complaints significant for left upper extremity paresthesias. Dr. Oeser's examination of the Claimant did not reveal findings that correlated with a SLAP tear to the left shoulder*.*

13. On November 23, 2015, Claimant returned to Dr. Drapeau and reported that she was working full duty and that she was following up for pain complaints related to her neck, upper back, and lower back. Dr. Drapeau referred Claimant for more massage therapy. Claimant did not report to Dr. Drapeau a popping or stabbing sensation in the left shoulder.

14. On December 18, 2015, Claimant was evaluated by Paul Raford, M.D. and described that she was feeling terrible with pain fluctuating throughout her left upper extremity, left subnuchal area, and migraines. Dr. Raford diagnosed her with adjustment disorder, delayed recovery, and post concussive syndrome. Dr. Raford referred Claimant for an EMG of her left upper extremity. Dr. Raford's report does not reference that Claimant reported that she was experiencing a popping sensation in her left shoulder or a stabbing pain sensation in the left shoulder.

15. The EMG of the left upper extremity was conducted on December 22, 2015 and revealed normal findings. Dr. Oeser again diagnosed Claimant with left upper extremity paresthesias. Dr. Cebrian explained that the diagnosis of paresthesias refers only to nonspecific subjective complaints in the left arm.

16. On December 23, 2015, Claimant underwent a Division Independent Medical Evaluation with Dr. Yamamoto and complained of blurred vision, headaches, depression, word finding difficulty, memory problems, and pain in her left shoulder and upper back. Dr. Yamamoto opined that he believed Claimant was not at MMI and that she needed additional medical treatment for her headaches. Dr. Yamamoto stated in his report that Claimant had been complaining of left shoulder pain complaints since the date of accident and he recommended that Claimant be referred for an MRI of her left shoulder. It is found that Dr. Yamamoto's characterization of the persistent nature of Claimant's shoulder pain complaints is not supported by the medical records.

17. Respondents are contesting the finding of the DIME that Claimant is not at MMI. A separate hearing is set for adjudication of the request to challenge the DIME. Claimant opted not to consolidate the matters for hearing and instead Claimant chose to proceed to hearing on the surgery request as a maintenance surgery.

18. Claimant returned to Dr. Raford on January 18, 2016, and he noted that Claimant had relatively mild if any objective findings.

19. In February 2016, Claimant underwent neuropsychological testing performed by William Boyd, M.D. Dr. Boyd concluded in his report that the claimant was likely to have a psychological component to her somatic complaints, and he diagnosed her with a somatoform disorder. Dr. Boyd recommended that "medical treatment recommendations not be based on patient report or behavior."

20. On March 17, 2016, Claimant returned to Dr. Raford who reviewed the DIME report from Dr. Yamamoto and noted numerous disagreements with the DIME report. Dr. Raford noted that Dr. Yamamoto did not have numerous medical records in his possession for his review at the DIME.

21. On April 28, 2016, Claimant underwent an MRI of her left shoulder which revealed a SLAP tear of indeterminate age and mild to chronic AC joint arthrosis.

22. On May 26, 2016, Dr. Isaacs evaluated the Claimant, reviewed her MRI, and referred her for right shoulder surgery. Dr. Isaacs report does not reference that he had any of Claimant's prior medical records available for review.

23. Dr. Cebrian performed an IME of the Claimant on March 3, 2016, and authored reports dated April 28, 2016, and June 8, 2016. Dr. Cebrian testified credibly at the hearing that Claimant reported at the IME that when she fell on February 26, 2015, she landed on her head. In contrast to Claimant's testimony at the hearing, the Claimant did not report to Dr. Cebrian that she fell on the left side of her body. The Claimant reported to Dr. Cebrian that her arms were at her side when she fell and that she did not land on an outstretched arm when she fell. At the hearing, Claimant testified that she did not recall how her arms were positioned when she fell.

24. At the IME, Claimant reported widespread diffuse complaints through her upper back, neck, and trapezius region. Dr. Cebrian's examination of the Claimant did not reveal objective findings that correlated with a SLAP tear such as popping or clicking or difficulty with raising the arm above 90 degrees. Dr. Cebrian explained that the Claimant's SLAP tear is not the cause of her specific pain complaints and that Claimant's objective examination does not support the SLAP tear as being the cause of Claimant's pain complaints.

25. Dr. Cebrian opined to a reasonable degree of medical probability that the need for the surgery recommended by Dr. Isaacs is not reasonable, necessary and causally related for maintenance of claimant's industrial injuries at MMI. Claimant reported to Dr. Cebrian that she was initially injured when she fell landing on her buttocks. Dr. Cebrian explained that the mechanism of injury is not consistent with causing a SLAP tear to the left shoulder. In order to cause a traumatic SLAP tear or to have aggravated a pre-existing SLAP tear Claimant would have needed to have landed on her outstretched arm, which would have caused the humeral head to drive into the shoulder joint. Claimant's testimony and her report of the mechanism of injury to her medical providers does not support a mechanism of injury involving Claimant landing on her outstretched arm. Dr. Cebrian's opinion that the mechanism of injury did not cause an injury to the left shoulder is credited as being well supported in the medical records.

26. Dr. Cebrian explained that the MRI finding of a SLAP tear is an incidental degenerative finding that is not causally related to the work injury. The MRI report showed numerous chronic and long standing findings that pre-existed the date of accident in this case.

27. Dr. Cebrian explained that Claimant's clinical presentation following the February 26, 2015, accident is not consistent with the conclusion that Claimant sustained an acute SLAP tear as a result of the work related fall. Dr. Cebrian testified that Claimant's medical records do not document persistent shoulder complaints following the fall, which is what would have been expected with an acute SLAP tear. The medical records document that Claimant initially had some soft tissue contusion type complaints in the region of the left trapezius region, but these complaints resolved

early on in the claim. If Claimant had in fact sustained a SLAP tear as a result of the fall, Dr. Cebrian explained that it is unlikely her shoulder symptoms would have resolved. Claimant's own testimony that her shoulder symptoms worsened over time is not consistent with the medical records. Claimant's report of the onset of popping ten months after her date of accident is further not consistent with the industrial accident causing an injury or SLAP tear. If the industrial fall was the cause of the left shoulder injuries, it is likely the popping would have onset much earlier on in Claimant's course of treatment.

28. Dr. Cebrian testified that Claimant did not report to him at the IME that she was experiencing a popping sensation in her left shoulder. Dr. Cebrian testified that the medical records do not corroborate that Claimant reported to any providers that she was experiencing a popping sensation in her left shoulder until July 2016, the same month the hearing took place.

29. Even if the SLAP tear was caused by the February 26, 2015, work accident, Dr. Cebrian opined that the surgery is not reasonable and necessary for maintenance of Claimant's industrial injuries. Dr. Cebrian explained that the Claimant is not an appropriate surgical candidate. Claimant has been diagnosed with a somatoform disorder, which is a psychological condition that manifests physical complaints, without a true organic or physiologic explanation. Dr. Cebrian explained that the Claimant's physical examination at his IME was extremely non physiologic with inconsistent range of motion movements and limitations that were not explained by the objective examination. Dr. Cebrian explained that it is unlikely Claimant would have a good outcome from surgery based on her somatoform disorder and prior history in the claim which has not established a good response to any treatment modalities.

30. Dr. Cebrian's own examination did not corroborate findings suggestive of a SLAP tear. The Claimant has become fixated on her shoulder because the MRI, which was performed after the IME, revealed a tear, but at the IME Claimant's own report of symptomatology was not focused on the left shoulder. Dr. Cebrian explained that not all SLAP tears require surgical repair and there is no medical reason that Claimant's SLAP tear would require surgical repair.

31. Claimant's testimony that her left shoulder stabbing pain complaints have been present since the date of accident is not credible and is not supported by the medical records. The medical records do not support the onset of symptoms consistent with a SLAP tear temporal to February 26, 2015, date of accident

32. Even if the SLAP tear was caused by the February 26, 2015, work accident, Dr. Cebrian credibly opined that the surgery is not reasonable and necessary for maintenance of Claimant's industrial injuries. Dr. Cebrian explained that the Claimant is not an appropriate surgical candidate. Claimant has been diagnosed with a somatoform disorder, which is a psychological condition that manifests physical complaints, without a true organic or physiologic explanation. Dr. Cebrian explained that Claimant's physical examination at his IME was extremely non physiologic with

inconsistent range of motion measurements and limitations that were not explained by the objective examination. Dr. Cebrian explained that it is unlikely Claimant would have a good outcome from surgery based on her somatoform disorder and prior history in the claim which has not established a good response to any treatment modalities.

33. Claimant's alleged left shoulder injuries are not causally related to the February 26, 2015, work accident and Claimant's request for authorization of left shoulder surgery is not reasonably necessary and is therefore denied.

CONCLUSIONS OF LAW

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

1. Claimant must prove entitlement to benefits by a preponderance of the evidence. However, the facts in a workers' compensation case are not interpreted liberally in favor of either Claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

2. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

3. If a dispute over medical benefits arises after the filing of an admission of liability, respondents may assert that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). This principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. *See Maestas v. O'Reilly Auto Parts*, W.C. 4-856-563-01 (ICAO Aug. 31, 2012).

4. Claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "[a] showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

5. In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. Although a preexisting condition does not disqualify a Claimant from receiving workers' compensation benefits, the Claimant must prove a causal relationship between the injury and the medical treatment Claimant is seeking. *Snyder v. Indus. Claim Appeals Office*, *supra.* Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). And where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

6. An industrial accident is the proximate cause of a Claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

7. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensieck v. Indus. Claim Appeals* Office, 183 P.3d 684 (Colo. App. *2008); Kroupa v. Indus. Claim Appeals* Office, 53 P.3d 1192, 1197 (Colo. App. 2002). The ALJ determines the credibility of the witnesses. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). The fact finder should

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

8. Claimant's testimony that her left shoulder stabbing pain complaints has been present since the date of accident is not credible and is not supported by the medical records. The medical records do not support the onset of symptoms consistent with a SLAP tear temporal to February 26, 2015, date of accident. Claimant has failed to establish by a preponderance of the evidence that she sustained any injuries to her left shoulder as a result of the February 26, 2015, accident and that the need for left shoulder surgery recommended by Dr. Isaacs is reasonable, necessary, and causally related for maintenance of the industrial injuries.

9. The Claimant's argument that the opinion of the DIME physician must be overcome by clear and convincing evidence is without merit. The DIME opinion is not persuasive and not entitled to any deference on the issue of medical benefits. Further, the DIME opinion is contested and disputed by Respondents and Claimant chose to bear the risks of proceeding to hearing before the opinion of the DIME could be adjudicated at a later hearing.

ORDER

It is therefore ordered that:

1. Claimant's left shoulder injuries are not causally related to the February 26, 2015, work accident and Claimant's request for authorization of left shoulder surgery is not reasonable, necessary, and related and is therefore DENIED.

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

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

DATED: _September 23, 2016_____

DIGITAL SIGNATURE:
Margot W. Jones

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-893-631-06

ISSUES

1. Whether Claimant waived her right to contest the validity of the October 20, 2014 24-month Division Independent Medical Examination (DIME) performed by Brian Beatty, D.O. under §8-42-107(8)(b)(2)(A)-(D), C.R.S.

2. Whether Claimant has demonstrated by a preponderance of the evidence that Respondents failed to comply with §8-42-107(8)(b)(II)(B), C.R.S.

3. Whether DIME Dr. Beatty was authorized to address Claimant's permanent impairment.

4. Whether Respondents have established by a preponderance of the evidence that they are entitled to recover an overpayment in the amount of $97,641.12.

FINDINGS OF FACT

1. On May 9, 2012 Claimant suffered admitted industrial injuries during the course and scope of her employment with Employer.

2. On August 14, 2012 Respondents filed a General Admission of Liability (GAL). The GAL specified that Claimant was entitled to receive Temporary Total Disability (TTD) benefits beginning on July 16, 2012 in the amount of $732.57 per week.

3. On July 24, 2014 Respondents filed a Notice and Proposal to Select a Division Independent Medical Examiner. However, on July 28, 2014 Respondents filed a Notice of Failed IME Negotiation.

4. On July 28, 2014 Respondents filed an Application for a 24-Month Division Independent Medical Examinaion (DIME). The Application specified Claimant's left shoulder as the body part to be addressed. Respondents listed Maximum Medical Improvement (MMI) and impairment rating as issues to be considered at the DIME.

5. On October 20, 2014 Claimant underwent a 24-month DIME with Brian Beatty, D.O. Dr. Beatty determined that Claimant had reached MMI on June 15, 2012 for her left shoulder and cervical spine injuries. He assigned a 16% whole person impairment rating.

6. Dr. Beatty subsequently reviewed extensive video surveillance and medical records. On January 27, 2015 he issued a supplemental report concluding that Claimant reached MMI on June 15, 2012 with a 0% whole person impairment rating.

7. On February 13, 2015 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Beatty's MMI date of June 15, 2012 and 0% whole person impairment rating. Because the date of MMI preceded the first TTD payment, Respondents asserted an overpayment of all TTD benefits from July 16, 2012 and continuing for a total of $97,641.12.

8. On March 11, 2015 Claimant filed an Application for Hearing and Notice to Set. Claimant specifically noted in her Application that she was seeking to strike the DIME because of "failure to follow procedures set forth in C.R.S. §8-42-107(8)(b)(II)(A-D)."

9. The record reveals that Claimant did not waive her right to contest the October 20, 2014 24-month DIME performed by Dr. Beatty under §8-42-107(8)(b)(II)(A)-(D), C.R.S. Although Claimant did not object to various pleadings prior to undergoing the 24-month DIME, she filed an Application for Hearing and Notice to Set on March 11, 2015. Claimant specifically noted in her Application that she was seeking to strike the DIME because of "failure to follow procedures set forth in C.R.S. §8-42-107(8)(b)(II)(A-D)." The record reflects that Claimant did not unequivocally express an intent to abandon her right to challenge the 24 month-DIME. She also did not implicitly waive her right to challenge the 24-month DIME by engaging in a course of conduct free from ambiguity concerning her intention. Although Claimant could have objected to the 24-month DIME process at an earlier stage of the proceedings, her conduct did not constitute a waiver. She thus properly challenged the validity of Dr. Beatty's 24-month DIME.

10. Claimant has not demonstrated that it is more probably true than not that Respondents failed to comply with §8-42-107(8)(b)(II)(B), C.R.S. Specifically, Claimant asserts that Respondents failed to request in writing that an Authorized Treating Physician (ATP) determine whether she reached MMI. The plain language of §8-42-107(8)(b)(II)(B), C.R.S. requires the moving party to inquire in writing from an ATP whether a claimant has reached MMI. Inquiring of an ATP in writing is a condition precedent to obtaining a 24-Month DIME. Initially, the record is devoid of evidence that an ATP addressed in writing whether Claimant had reached MMI prior to the 24-month DIME. However, Claimant did not present any documentary evidence or testimony suggesting that Respondents failed to submit a written request to an ATP inquiring whether she had reached MMI. Based on the lack of evidence that Respondents failed to submit a written request to the ATP, it is speculative to assume that Respondents did not make a written request. Accordingly, in the absence of any contradictory evidence, the October 20, 2014 24-month DIME by Dr. Beatty was proper under §8-42-107(8)(b)(II)(A)-(D), C.R.S.

11. Section 8-42-107(8)(b)(III), C.R.S. specifically provides that the 24-month DIME physician is authorized to determine whether a claimant has reached MMI and assign a permanent impairment rating. On January 27, 2015 Dr. Beatty issued a supplemental report concluding that Claimant had reached MMI on June 15, 2012 with a 0% whole person impairment rating. Claimant has not produced unmistakable evidence that Dr. Beatty's MMI or impairment determinations were incorrect.

Accordingly, Claimant reached MMI on June 15, 2012 and suffered a 0% permanent impairment rating as a result of her May 9, 2012 admitted industrial injuries.

12. Respondents have established that it is more probably true than not that they are entitled to recover an overpayment of TTD benefits from Claimant in the amount of $97,641.12. On August 14, 2012 Respondents filed a GAL. The GAL specified that Claimant was entitled to receive TTD benefits beginning on July 16, 2012 in the amount of $732.57 per week. On January 27, 2015 Dr. Beatty issued a supplemental report concluding that Claimant had reached MMI on June 15, 2012 with a 0% whole person impairment rating. However, because of the retroactive MMI determination, Claimant had received TTD benefits from July 16, 2012 and continuing for a total of $97,641.12. The TTD benefits that Respondents paid after June 15, 2012 constituted an overpayment. Claimant's challenge to the $97,641.12 overpayment was predicated on the invalidity of Dr. Beatty's MMI and impairment determinations. However, Claimant has failed to produce unmistakable evidence that Dr. Beatty's MMI and impairment determinations were incorrect. Accordingly, Respondents are entitled to recover an overpayment from Claimant in the amount of $97,641.12.

CONCLUSIONS OF LAW

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

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

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

Waiver

4. Respondents assert that Claimant waived her right to contest the validity of Dr. Beatty's October 20, 2014 24-month DIME under §8-42-107(8)(b)(2)(A)-(D), C.R.S. They reason that Claimant fully participated in the 24-month DIME process and did not raise any objection until after the DIME was completed. Respondents specifically argue that Claimant should have objected to the following pleadings prior to undergoing the 24-month DIME: (1) the Notice and Proposal to Select a DIME; (2) the Notice of failed IME negotiations ; and (3) the Application for a 24-month DIME.

5. Waiver is an affirmative defense that must be established by a preponderance of the evidence. *In Re Quintana,* W.C. No. 3-062-456 (ICAP, Sept. 24. 2007). Waiver is the voluntary, knowing and intelligent relinquishment of a known right. *Jiminez v. Industrial Commission*, 51 P.3d 1090 (Colo. App. 2002). The waiver of a right may be explicit or demonstrated when a party expresses an intent to abandon a known right. Waiver may also be implied based on conduct that is free of ambiguity concerning the party's intention. *Department of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984); *In Re Barnett,* W.C. No. 4-769-486 (ICAP, Mar. 5, 2010). The question of whether a party waived a right is one of fact for determination by the ALJ. *See Johnson v. Industrial Commission*, 761 P.2d 1140, 1147 (Colo. 1988).

6. As found, the record reveals that Claimant did not waive her right to contest the October 20, 2014 24-month DIME performed by Dr. Beatty under §8-42-107(8)(b)(II)(A)-(D), C.R.S. Although Claimant did not object to various pleadings prior to undergoing the 24-month DIME, she filed an Application for Hearing and Notice to Set on March 11, 2015. Claimant specifically noted in her Application that she was seeking to strike the DIME because of "failure to follow procedures set forth in C.R.S. §8-42-107(8)(b)(II)(A-D)." The record reflects that Claimant did not unequivocally express an intent to abandon her right to challenge the 24 month-DIME. She also did not implicitly waive her right to challenge the 24-month DIME by engaging in a course of conduct free from ambiguity concerning her intention. Although Claimant could have objected to the 24-month DIME process at an earlier stage of the proceedings, her conduct did not constitute a waiver. She thus properly challenged the validity of Dr. Beatty's 24-month DIME.

Propriety of 24-month DIME

7. A 24-Month DIME is statutorily authorized pursuant to §8-42-107(8)(b)(II)(A)-(D), C.R.S. Claimant seeks to strike Dr. Beatty's DIME report because Respondents failed to comply with §8-42-107(8)(b)(II)(A)-(D), C.R.S. in proceeding with a 24-month DIME. Section 8-42-107(8)(b)(II)(A)-(D), C.R.S. provides that an insurer may request a DIME if the following criteria have been satisfied:

> (A) At least twenty-four months have passed since the date of injury;
>
> (B) A party has requested in writing that an authorized treating physician determine whether the employee has reached maximum medical improvement;
>
> (C) Such authorized treating physician has not determined that the employee

> has reached maximum medical improvement; and
>
> (D) A physician other than such authorized treating physician has determined that the employee has reached maximum medical improvement.

Notably, the statute provides that at least 24 months must have passed since the date of injury before a party may seek an independent medical examination. §8-42-107(8)(b)(II)(A), C.R.S. The statute also requires a party to request in writing that an ATP determine whether the employee has reached MMI. §8-42-107(8)(b)(II)(B), C.R.S.

8. As found, Claimant has not demonstrated by a preponderance of the evidence that Respondents failed to comply with §8-42-107(8)(b)(II)(B), C.R.S. Specifically, Claimant asserts that Respondents failed to request in writing that an Authorized Treating Physician (ATP) determine whether she reached MMI. The plain language of §8-42-107(8)(b)(II)(B), C.R.S. requires the moving party to inquire in writing from an ATP whether a claimant has reached MMI. Inquiring of an ATP in writing is a condition precedent to obtaining a 24-Month DIME. Initially, the record is devoid of evidence that an ATP addressed in writing whether Claimant had reached MMI prior to the 24-month DIME. However, Claimant did not present any documentary evidence or testimony suggesting that Respondents failed to submit a written request to an ATP inquiring whether she had reached MMI. Based on the lack of evidence that Respondents failed to submit a written request to the ATP, it is speculative to assume that Respondents did not make a written request. Accordingly, in the absence of any contradictory evidence, the October 20, 2014 24-month DIME by Dr. Beatty was proper under §8-42-107(8)(b)(II)(A)-(D), C.R.S.

Permanent Medical Impairment

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

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

Monte Vista Head Start, Inc., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

11. The statute authorizing a 24-month DIME provides, in relevant part:

> If the independent medical examiner . . . finds that the injured worker has reached [MMI], the independent medical examiner shall also determine the injured worker's permanent medical impairment rating. The finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising uner subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence.

§8-42-107(8)(b)(III), C.R.S.

12. As found, §8-42-107(8)(b)(III), C.R.S. specifically provides that the 24-month DIME physician is authorized to determine whether a claimant has reached MMI and assign a permanent impairment rating. On January 27, 2015 Dr. Beatty issued a supplemental report concluding that Claimant had reached MMI on June 15, 2012 with a 0% whole person impairment rating. Claimant has not produced unmistakable evidence that Dr. Beatty's MMI or impairment determinations were incorrect. Accordingly, Claimant reached MMI on June 15, 2012 and suffered a 0% permanent impairment rating as a result of her May 9, 2012 admitted industrial injuries.

Overpayment

13. In 1997 the General Assembly amended §§8-43-303(1), C.R.S. and 8-43-303(2)(a), C.R.S. to permit the reopening of a claim on the grounds of "fraud" or "overpayment" in addition to the traditional grounds of error, mistake or change in condition. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011). The 1997 legislation is designated as an act "concerning the recovery from claimants of Workers' Compensation benefits to which such claimants are not entitled." *Id.* The statutes provide that reopening may not "affect moneys already" paid except in cases of fraud or overpayment. *In Re Stroman,* W.C. No. 4-366-989 (ICAP, Aug. 31, 1999). The statute contemplates that in the case of an overpayment the ALJ has the authority to remedy the situation. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011)

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

15. In *Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (ICAP, July 25, 2013) the DIME physician assigned the claimant a permanent impairment rating lower than that determined by her treating physician. The ATP assigned the claimant a 16% lower extremity impairment rating. The respondents filed an FAL and paid the claimant $8,490.73 in PPD benefits. However, the DIME physician subsequently assigned the claimant a 12% lower extremity impairment rating. The respondents filed an amended FAL and awarded the claimant PPD benefits in the amount of $6,368.05. The respondents filed an application for hearing and sought to recover an overpayment in PPD benefits of $2,122.60. The ALJ agreed with the respondents and ordered the claimant to repay an overpayment of $2,122.60. The ICAP affirmed because an overpayment may result even though it did not "exist at the time the claimant received disability or death benefits." The reasoning and analysis in *Mattorano* is controlling in the present matter.

16. As found, Respondents have established by a preponderance of the evidence that they are entitled to recover an overpayment of TTD benefits from Claimant in the amount of $97,641.12. On August 14, 2012 Respondents filed a GAL. The GAL specified that Claimant was entitled to receive TTD benefits beginning on July 16, 2012 in the amount of $732.57 per week. On January 27, 2015 Dr. Beatty issued a supplemental report concluding that Claimant had reached MMI on June 15, 2012 with a 0% whole person impairment rating. However, because of the retroactive MMI determination, Claimant had received TTD benefits from July 16, 2012 and continuing for a total of $97,641.12. The TTD benefits that Respondents paid after June 15, 2012 constituted an overpayment. Claimant's challenge to the $97,641.12 overpayment was predicated on the invalidity of Dr. Beatty's MMI and impairment determinations. However, Claimant has failed to produce unmistakable evidence that Dr. Beatty's MMI and impairment determinations were incorrect. Accordingly, Respondents are entitled to recover an overpayment from Claimant in the amount of $97,641.12.

ORDER

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

1. Claimant did not waive her right to contest the 24-month DIME performed by Dr. Beatty on October 20, 2014 under §8-42-107(8)(b)(II)(A)-(D), C.R.S.

2. Claimant has not demonstrated that Respondents failed to comply with §8-42-107(8)(b)(II)(B), C.R.S.

3. Claimant reached MMI on June 15, 2012 and suffered a 0% permanent impairment rating as a result of her May 9, 2012 admitted industrial injuries.

4. Respondents are entitled to recover an overpayment from Claimant in the amount of $97,641.12.

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

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

DATED: September 23, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-984-069-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 7, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 9/7/16, Courtroom 3, beginning at 1:30 PM, and ending at 4:00 PM). The official Spanish/English Interpreter was Axel Rangel.

Claimant's Exhibits 1 through 8 were admitted into evidence, without objection. Respondents' Exhibits A through S were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

The evidentiary deposition of Craig Anderson, M.D., taken on August 16, 2016 was filed on September 7, 2016; and the evidentiary deposition of Allison Fall, M.D., taken on August 18, 2016, was filed on September 7, 2016.

ISSUES

The paramount issue to be determined by this decision concerns whether the Claimant suffered a compensable injury to her left shoulder as the result of a fall on

March 29, 2015; or, whether her left shoulder injury is attributable to a pre-existing condition. The Respondents paid the dental expenses arising out of the March 29, 2016 incident, without admitting or denying liability.

The burden of proof rests with the Claimant by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was born on August 2, 1957 and was 59 years of age at the date of the hearing.

2. The Claimant began working at her current position since around January 2015. The Employer provides cleaning services for the Denver metro area.

3. The Claimant was a cleaning person for the Employer. Her job duties included cleaning the office building to which she was assigned. Her cleaning duties encompassed a wide variety of tasks including trash collection, vacuuming, surface cleaning and so forth.

The Incident of March 29, 2015

4. On March 29, 2015, while performing cleaning duties, the Claimant turned her head quite forcefully into a glass door, striking the left side of her face. Her dental records support and corroborate a significantly forceful hitting of the glass door.

5. The Claimant initially experienced facial and dental injuries at the time of the impact. She struck her head around the left periorbital area and sustained mild discomfort of the left eye. She had a dull left front-temporal headache. The Claimant also experienced mild neck pain, posteriorly, and mild stiffness. She struck her upper incisors and experienced initial bleeding along with pain while biting or chewing.

6. Upon subsequent examinations, the Claimant told her medical providers that she also suffered a left shoulder injury as a result of the work-related incident. She was experiencing radiating pain along the left upper trapezius to the left shoulder. The Claimant's left shoulder was mildly tender around the superior deltoid and she experienced tension and tenderness around the left scapula. Although there is no apparent should instability, the Claimant suffers from considerable left shoulder discomfort.

7. Soon after the work-related incident, Claimant reported the injury to her supervisor. The supervisor then reported this incident to his manager, Miriam Saenz, who subsequently reported the incident the Human Resources (HR) manager, Brenda Martinez. Both Saenz and Martinez testified on behalf of Respondents.

8. On direct examination, Saenz testified that the Claimant informed her on March 30, 2015 that the Claimant had hit her face during the work-related incident on March 29, 2015. Saenz stated that the Claimant never mentioned a shoulder injury or shoulder pain. Similarly, Martinez testified that the Claimant never mentioned any shoulder pain or discomfort when discussing the work-related incident. The Respondents heavily premise their theory of non-compensability on the fact that the Claimant did not mention the left shoulder to Saenz and Martinez when reporting the incident of March 29, 2015. The ALJ infers and finds that the Claimant was focused on the immediately more painful consequences of the incident, *i.e.,* her dental injuries, at the time.

9. The Employer covered all dental expenses associated with the initial work-related incident, without admitting or contesting liability. The Employer, however, contests the Claimant's claim that the left shoulder injury arose from the work-related incident. The Claimant further contends that wearing the vacuum backpack at work has aggravated her injury.

Craig Anderson, M.D.

10. The Claimant first saw Dr. Anderson on March 31, 2015 for her left shoulder because he was an Employer's designated provider. Therefore, he became the Claimant's authorized treating physician (ATP). Dr. Anderson was deposed on August 16, 2016 regarding the Claimant's left shoulder on behalf of the Claimant. According to Dr. Anderson, at the time of the injury, the Claimant initially informed him of the facial trauma; however, on April 14, 2015, the Claimant informed him of the left shoulder discomfort. As a result, Dr. Anderson ordered physical therapy (PT). On April 28, 2015, the Claimant felt increased pain while wearing her vacuum backpack and she then began receiving PT. On May 11, 2015, after the Claimant underwent an MRI (magnetic resonance imaging), Dr. Anderson observed a rotator cuff tear from the imagery. On May 27, 2015, Dr. Anderson was of the opinion that the Claimant's left shoulder injury was the result of her March 29, 2015 incident. Dr. Anderson stated that the impact "aggravated the underlying supraspinatus tendinosis and caused the tear which was progressively more and more symptomatic with work activities." Additionally, Dr. Anderson further was of the opinion that there was no preexisting rotator cuff tear of substantial severity.

Allison Fall, M.D., Respondents' Independent Medical Examiner (IME)

11. Dr. Fall was deposed on August 18, 2016 regarding the Claimant's left shoulder injury. Dr. Fall did not physically examine the Claimant. After reviewing the Claimant's medical records, Dr. Fall disagreed with the opinion given by Dr. Anderson regarding the Claimant's left shoulder injury. Dr. Fall was of the opinion that the Claimant's shoulder injury was degenerative and existed prior to the work-related incident. Dr. Fall asserts that the impact from the March 29, 2015 incident would not have caused a rotator cuff tear and she does not believe that there is a temporal relationship between the Claimant's impact with the door and the resulting shoulder injury. The ALJ draws a plausible inference and finds that Dr. Fall's opinion concerning lack of a temporal relationship is based on the statements of Saenz and Martinez herein above in Finding No. 8. Dr. Fall disagrees that the Claimant's impact with the door was anything of significant force. She offers no persuasive underlying rationale for "the lack of sufficient impact" opinion. Dr. Fall's opinions are lacking in persuasive underpinnings. Other than attributing the Claimant's rotator cuff tear to a pre-existing condition, Dr. Fall offered no plausible explanation for the tear other than implying that it must have just happened as a result of the Claimant's pre-existing condition. The ALJ finds Dr. Anderson's opinions on causation more persuasive and credible than Dr. Fall's opinions.

Ultimate Findings

12. The ALJ finds that the Claimant's testimony, including the expert opinion of Dr. Anderson, is credible, convincing, and it persuasively refutes the Respondents' denial of causal relatedness (to work) concerning the incident of March 29, 2015. Thus, the ALJ finds that the Claimant has proven, a work-related aggravation or acceleration of her left shoulder condition that resulted in her injuries as a consequence of her impact with the glass door. While, the Respondents presented Dr. Fall's medical opinion that contradicted Dr. Anderson's opinion, Dr. Anderson's medical opinion is based upon a more thorough familiarity with the Claimant's condition. Dr. Anderson was the ATP for many months while Dr. Fall relied entirely upon medical records, and her ultimate opinion of lack of causal relatedness lacks any persuasive underlying rationale. Dr. Fall's only underlying rationale is temporal relationship (the Claimant did not complain about the left shoulder until a few days later) and lack of significant force in hitting the glass door. The ALJ finds Dr. Anderson's opinions concerning causal relatedness of the left shoulder considerably more persuasive and credible than Dr. Fall's opinions

13. The ALJ makes a rational choice between conflicting medical opinions, based on substantial evidence, to accept the opinion of Dr. Anderson as dispositive and to reject the opinion of Dr. Fall and the Respondents' position that the left shoulder trauma was not caused by the work-related incident. Also, there is no persuasive

evidence of any left shoulder discomfort or pain experienced by the Claimant in the 20 years leading up to the March 29, 2015 incident.

14. The evidence establishes that the Claimant experienced a significant impact on her left shoulder which led to a torn rotator cuff. This condition was worsened by the Claimant's continued work after the initial incident. Therefore, the Claimant has proven, by preponderant evidence that she sustained a compensable injury to her left shoulder on March 29, 2015.

15. The evidence further establishes that Dr. Anderson was the ATP and any referrals he made, including referral for a MRI, were within the chain of authorized referrals. Also, all of the Claimant's medical care and treatment for her compensable left shoulder injury was and is causally related thereto and reasonably necessary to cure and relieve the effects of her injury.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof).

See Young v. Burke, 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony, including the expert opinion of Dr. Anderson, was credible, convincing, and persuasively refuted the Respondents' denial of causal relatedness (to work) concerning the incident of March 29, 2015. Thus, the Claimant proved a work-related aggravation or acceleration of her left shoulder condition that resulted in her injuries as a consequence of her impact with the glass door. As further found, while, the Respondents presented Dr. Fall's medical opinion that contradicted Dr. Anderson's opinion, Dr. Anderson's medical opinion was based upon a more thorough familiarity with the Claimant's condition. Dr. Anderson was the ATP for many months while Dr. Fall relied entirely upon medical records, and her ultimate opinion of lack of causal relatedness lacked any persuasive underlying rationale. Dr. Fall's only underlying rationale was temporal relationship (the Claimant did not complain about the left shoulder until a few days later) and lack of significant force in hitting the glass door. Dr. Anderson's opinions concerning causal relatedness of the left shoulder was considerably more persuasive and credible than Dr. Fall's opinions.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, The ALJ made a rational choice between conflicting medical opinions, based on substantial evidence, to accept the opinion of Dr. Anderson as dispositive and to reject the opinion of Dr. Fall and the Respondents' position that the left shoulder trauma was not caused by the work-related incident. Also, there was no persuasive evidence of any left shoulder discomfort or pain experienced by the Claimant in the 20 years leading up to the March 29, 2015 incident.

Compensability

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant's left shoulder injury, or aggravation of her underlying left shoulder condition of March 29, 2015 arose out of the course and scope of her employment for the employer herein and was, therefore, a compensable injury.

Medical

d. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, all referrals emanating from Dr. Anderson were within the chain of authorized referrals.

e. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v.*

Vasquez, 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the aggravation of her left shoulder condition on March 29, 2015. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of that injury.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the Claimant's compensable left shoulder injury, subject to the Division of Workers' Compensation medical Fee Schedule.

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

DATED this______day of September 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-852-795-04

ISSUES

I. The issue for determination is whether Claimant has met her burden of proving entitlement to an award of penalties based upon Respondents alleged violation of an order.

FINDINGS OF FACT

This matter comes before the Court with an extremely complex and lengthy procedural background, including a remand from the Court of Appeals to the Industrial Claims Appeals Office and there from to the ALJ with direction to enter an order consistent with the views of the Court of Appeals. Based upon the evidence presented, the ALJ enters the following findings of fact:

1. On August 2, 2010, Claimant sustained admitted, compensable injuries to her neck, shoulders, and elbows when she was rear-ended in an automobile accident while she was en route from a client's home to Respondent-Employer's office. In addition to medical benefits, Insurer paid Claimant temporary total disability (TTD) benefits for the period during which she could not work as a result of her compensable injuries. *See* May 1, 2015 Findings of Fact, Conclusions of Law, and Order on Remand ("Order on Remand").

2. Claimant began working for a different employer in November of 2011 but admitted in a prior proceeding that she continued receiving TTD benefits under the instant claim while working. Consequently, Insurer overpaid Claimant in TTD benefits leading up to the time Claimant was placed at maximum medical improvement (MMI).

3. Because Claimant would not cooperate with efforts to determine whether she was working while collecting TTD, the Respondent-Employer could not fully document Claimant's return to work and the Division of Workers' Compensation would not release Insurer from paying Claimant TTD benefits while she was working.

4. Claimant was placed at MMI for her work injuries effective August 15, 2012 by Terrence Lakin, DO, an authorized treating physician (ATP). Dr. Lakin determined Claimant sustained a 10% scheduled rating of the left upper extremity.

5. At the time she was placed at MMI, Claimant had yet to provide requested information regarding her return to work for a different employer. Since the MMI determination compelled Respondents to take a position on the MMI finding, Respondents sought an order compelling claimant to produce the information necessary to determine the details of Claimant's return to work, including wage information. The parties participated in an August 31, 2012 prehearing conference (PHC) regarding the

requested disclosures. The undersigned ALJ, in his capacity as a Prehearing Administrative Law Judge (PALJ) at the time, presided over the prehearing conference.

6. At conclusion of the PHC, the undersigned ordered Claimant to provide releases that would allow Respondents, through counsel, to obtain employment and payroll information from subsequent employers. The undersigned also suspended Respondents' obligation to take a position regarding the MMI determination by the ATP. Respondents' requirement to act on the ATP's MMI report was held in abeyance for sixty (60) days. During this sixty day stay, Claimant was ordered to provide information regarding her return to work, *inter alia.*

7. Claimant complied with the order to compel and it was confirmed that she had been drawing TTD while working for another employer. After the information was received from the subsequent employer, Respondents filed a Final Admission (FAL) consistent with the MMI and impairment rating opinions of ATP Lakin. The FAL is dated October 11, 2012 and reflects that Insurer admitted to a disfigurement award of $300.00. The FAL also reflects that Insurer claimed an asserted overpayment in benefits equaling $5,276.06.

8. In the FAL, Respondents asserted their right to collect the overpayment and/or credit the overpayment against any future benefits payable in the claim.

9. Claimant objected to the October 11, 2012 FAL and pursued a Division of Worker's Compensation Independent Medical Examination (Division IME) with Dr. Timothy Sandell. Dr. Sandell agreed with Claimant's date of maximum medical improvement as assigned by ATP Lakin. However, he reduced Claimant's scheduled rating from 10% of the left upper extremity to 2% left upper extremity impairment and 2% right upper extremity impairment. Insurer filed a FAL consistent with Dr. Sandell's opinion concerning MMI and impairment on July 16, 2013. Because the scheduled ratings provided by Dr. Sandell were less than the 10% scheduled rating provided by Dr. Lakin, the asserted overpayment increased to $8,451.08.

10. In the July 16, 2013 FAL, Respondents specifically reserved their right to credit the $8,451.08 overpayment against future benefits. Since the value of Dr. Sandell's scheduled impairment rating was less than the value of the rating of ATP Lakin, which was previously admitted and paid by respondents and there was already an overpayment, Claimant was not owed additional benefits under the July 16, 2013 FAL.

11. In addition to her workers' compensation claim, Claimant pursued an action against the driver who rear-ended her and caused her injury in this claim through a personal injury claim. After a demand letter was sent to the tortfeasor's insurer, the adverse insurer offered to settle with Claimant for the policy limit of $50,000. Because it had a statutory subrogation right to the compensation/benefits it had paid to Claimant under the workers' compensation claim, Insurer participated in the settlement negotiations with the tortfeasor's insurer and the attorney representing Claimant in the automobile action.

12. At the time of the third-party settlement negotiations, Insurer's lien against the third-party who caused Claimant's injuries totaled $44,739.39. This lien amount represented the total amount of worker's compensation benefits that respondent-insurer had paid to Claimant at the time, including the $8,451.08 overpayment asserted in the July 16, 2013 FAL. The three interested parties to the personal injury action agreed to divide the settlement proceeds reached with the third-party carrier as follows: $18,000 payable to Insurer; $13,000 payable to Claimant; and, the remainder ($19,000) payable to Claimant's personal injury lawyer.

13. The letter memorializing the parties' agreement regarding distribution of the proceeds from the third-party settlement agreement made no mention of the overpayment or how it would impact the overpayment caused by claimant's return to work while continuing to draw full TTD benefits. The letter states: "This letter is to confirm that [the respondent-insurer] has accepted your offer of $18,000.00 for full and final settlement of its third party subrogation lien in the above-matter." The letter went on to invite Claimant to "contact [the respondent-insurer's subrogation counsel] immediately in the event this correspondence does not accurately reflect the terms of our agreement or should you have additional questions/concerns."

14. Claimant objected to the July 16, 2013 FAL and filed an application for hearing on the issues of disfigurement, conversion and overpayment. Respondents filed their response to the application for hearing and requested an order regarding the $8,451.08 asserted overpayment.

15. Hearing on the issues was held before ALJ Donald Walsh on November 14, 2013. A transcript of the hearing is found at Respondents Submissions Bate Stamp Number (BN) 078-130. Evidence was introduced at hearing demonstrating Claimant worked while collecting TTD. Claimant also incorrectly affirmed in checks she received from Insurer that she was not working while collecting TTD. The hearing addressed the issues of PPD (conversion to whole person), disfigurement and overpayment.

16. Claimant argued before Judge Walsh that Respondents had accepted $18,000.00 as full payment for their subrogation lien against Claimant's third-party settlement. Since the overpayment amount was, as admitted by counsel for Insurer in the third party action, included in the lien figure submitted to Claimant's personal injury attorney, the $18,000.00 paid off the claimed overpayment. Consequently, Claimant asserted that requiring Claimant to repay the asserted overpayment would, in essence amount to "double-dipping" on the part of Insurer. This argument was rejected by Judge Walsh who entered a Summary Order in the matter on December 27, 2013. A request for a full order was made. Specific Findings of Fact, Conclusions of Law, and Order ("Specific Findings") were issued by Judge Walsh on January 21, 2014.

17. In his Specific Findings, Judge Walsh determined Judge Walsh determined that Claimant was overpaid $8,451.08. He also concluded that the overpayment was not affected by the third-party settlement. Consequently, Judge Walsh concluded that Insurer was entitled to recoup the overpayment of $8,451.08 against future benefits.

Additionally, Judge Walsh found the overpayment subject to the collection remedies under Section 8-43-306, C.R.S.

18. Judge Walsh also determined that Claimant had proven that her permanent impairment extended beyond the upper extremity. Accordingly, Judge Walsh converted the scheduled impairment to a 2% whole person award. Finally, Judge Walsh concluded that Claimant had disfigurement entitling her to an award of $1,500, which was $1,200 more than Insurer had admitted for in their July 16, 2013 FAL. Because the increased benefits owed to Claimant for the conversion and additional disfigurement was less than the asserted overpayment, Respondents did not pay any additional money to the Claimant following the November 14th hearing.

19. Claimant appealed Judge Walsh's order to the Industrial Claims Appeals Office (ICAO), arguing that the overpayment was previously paid through the settlement of the third-party allocation agreement. After briefing, a panel from the ICAO affirmed Judge Walsh's Specific Findings in a June 11, 2014 Final Order. The ICAO rejected Claimant's assertion that the overpayment was included in the agreement to divide the third-party settlement proceeds. The ICAO agreed there was insufficient evidence of a "voluntary, knowing, and intelligent waiver of the right" to recoup the overpayment. The ICAO determined the matter was a factual dispute and it must defer to Judge Walsh's resolution if supported by substantial evidence in the record.

20. Claimant appealed the ICAO determination to the Court of Appeals. In a February 12, 2015 decision, the Court of Appeals set aside the prior decisions of Judge Walsh and the ICAO and remanded the case with directions. In remanding the case, the Court noted:

> As claimant points out, Pinnacol's subrogation counsel acknowledged that the total lien amount paid by Pinnacol to claimant included the overpayment. In particular, she conceded that the lien amount of $44,739.39 represented all payments Pinnacol made to claimant, including the $8,451.08 overpayment. The settlement of the lien thus necessarily, and "mathematically," incorporated the overpayment.

21. The ICAO issued a remand order on April 2, 2015 to Judge Walsh.

22. Judge Walsh issued his Findings of Fact, Conclusions of Law, and Order on Remand ("Remand Order") on April 30, 2015. Consistent with the opinion of the Court of Appeals, Judge Walsh's Remand Order used the same language mandated by the Court of Appeals' decision.

23. In the Remand Order, Judge Walsh issued the following orders: 1. Respondents' request for reimbursement of the overpayment paid to the claimant in the amount of $8,451.08 is denied and dismissed. 2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due. 3. All matters not determined herein, and not closed by operation of law, are reserved for future determination. Judge Walsh incorporated the language from the Court of Appeals that

indicates the parties' agreement to allocate the third-party settlement proceeds was a full and final settlement. When read in conjunction with the Court of Appeals' opinion, Judge Walsh adopts the Court of Appeals' characterization of the third-party allocation agreement as a resolution of all claims and debts between the parties. The order does not specifically require Respondents to make any additional payment to Claimant.

24. Respondents complied with the order and took no action to recover any overpayment from Claimant following Judge Walsh's remand order. Nonetheless, Insurer did not pay Claimant additional money owed for conversion of the scheduled impairment to impairment of the whole person nor did Insurer pay for the additional disfigurement and interest ordered by ALJ Walsh in his Order dated January 21, 2014.

25. Claimant alleges Respondents violated the April 30, 2015 Remand Order due to Insurer's failure to pay the additional impairment and disfigurement benefits that "should have been paid immediately upon issuance of the April 30, 2015 order" resolving the dispute surrounding Insurer's right to recoup their asserted overpayment. Claimant filed an application for hearing on the issue of Respondents' failure to comply with the April 30, 2015 remand order.

26. In her December 16, 2015 application for hearing, Claimant listed one issue for determination, specifically: "failure to comply with Court Order dated April 30, 2015." Penalties were not listed as an issue. Further, the application for hearing did not specify how the remand order was violated.

27. Respondents claim that the application for hearing was vague and that they were unaware of what Claimant was seeking by filing the application for hearing. Because it was unclear to Respondents what Claimant was seeking, Respondents' requested a PHC to clarify the issues for hearing and discuss whether there was some resolution that might be reached. The parties participated in a PHC with PALJ Craig Eley on March 8, 2016. Respondents' request for a PHC represents the first action by either party to discuss the issue raised in Claimant's December 16, 2015 application for hearing.

28. During the aforementioned prehearing, Respondents learned from Claimant that she did not view the April 30, 2015 remand order as merely removing her obligation to reimburse Respondents for the asserted overpayment, but as an order requiring them to pay additional benefits.

29. Following the PHC, Respondents, without admitting that the Remand Order required additional money to be paid to Claimant, agreed to resolve the dispute by making a full payment to Claimant for the value of her converted impairment rating, less previous permanent partial disability (PPD) paid, in addition to additional disfigurement as ordered by ALJ Walsh, less disfigurement previously paid, plus interest payable on benefits not paid when due. Claimant was paid $3,024.96 for the PPD/disfigurement and $551.30 for interest.

30. On March 10, 2016, or two days after the aforementioned PHC, where Claimant explained her position and while respondents were arranging for payment of the moneys requested, Claimant filed a second application for hearing, this time endorsing the issue of penalties. Claimant provided a detail statement for the requested penalties. The explanation is similar to the explanation provided by Claimant at the PHC two days earlier with Judge Eley where her counsel explained why Respondents should pay her additional PPD, disfigurement and interest.

31. On March 22, 2016 Insurer paid the additional benefits awarded by Judge Walsh in his January 21, 2014 Order. Specifically, Insurer paid $3,024.96 for additional PPD and disfigurement as ordered by ALJ Walsh. A second check in the amount of $551.30 was paid in interest for the improperly withheld PPD and disfigurement.

32. Claimant seeks penalties from the date the April 30, 2015 order became final, or May 20 through March 21, 2016, as the penalty was cured by Respondents on March 22, 2016. The ALJ takes judicial notice of the fact that 305 days exists between May 21, 2015, the first day of penalty exposure and March 21, 2016, the last day of penalty exposure.

33. Respondents assert that even if the order on remand could be read as requiring The imposition of a penalty for non-payment of benefits ordered, the credible and persuasive evidence demonstrates Respondents cured any penalty timely based upon the payments made to Claimant on March 22, 2016; which payments fully satisfied any claim to additional benefits, including interest. The payment was made 12 days after she filed her application for hearing asserting penalties.

34. Based upon the evidence presented, the ALJ finds that Respondents cured the alleged violation of ALJ Walsh's April 30, 2015 remand order and by extension any penalty arising from a violation of the January 21, 2014 order.

35. The credible evidence presented in this case demonstrates Respondents' actions in response to the April 30, 2015 remand order, and by extension the January 21, 2014 order issued by Judge Walsh were not objectively reasonable. Further, the evidence presented persuades the ALJ that knew or reasonably should have known that they were in violation of the orders issues. Consequently, the ALJ is persuaded that Respondents are subject to penalties in this case.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

Penalties

C. Section 8-43-304(1), C.R.S. provides, in pertinent part, that "any employer or insurer . . . who . . . fails, neglects or refuses to obey any lawful order . . . shall . . .be punished by a fine of not more than one thousand dollars per day for each such offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the workers' compensation cash fund created in section 8-44-112(7)(a); except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed."

D. The imposition of penalties under § 8-43-304(1) is a two step process. Before penalties may be assessed the ALJ must first determine whether the disputed conduct constituted a violation of the Act, of a duty lawfully enjoined, or of an order. If the ALJ finds such a violation, he may impose penalties if he also finds that the employer's actions were objectively unreasonable. *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jimenez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The "objective standard" is measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

E. In the instant case, Respondents contend that "a plain reading of the Court of Appeals' order of remand indicates there was a **"**full and final settlement" of "all claims and debts associated with a claim." Consequently, Respondents argue that the claim to additional PPD and disfigurement benefits after the agreement cannot be maintained."

According to Respondents argument, the right to those benefits were claims that arose when Claimant reached MMI and prior to the agreement settling the third party action. Per Respondents, if the parties were deemed to have memorialized the “resolution of the entire dispute between the parties” with the agreement on distribution of the third-party proceeds, Claimant’s later claim for increased PPD and disfigurement were also settled. When that same reasoning is applied to Claimant’s assertion that she is entitled to further benefits for conversion of the scheduled rating and disfigurement, Respondents argue that it is clear these were claims for benefits that accrued at MMI and prior to the “full and final settlement” as found by the Court of Appeals. Thus, Respondents’ contend that if collection of the overpayment is barred, so must be the claim for further PPD and disfigurement benefits. Moreover, because ALJ Walsh incorporated, into his remand order, the language from the Court of Appeals decision that indicates the parties’ agreement to allocate the third-party settlement proceeds was a full and final settlement, Respondents assert that the any claim for additional PPD, disfigurement benefits and interest as ordered by ALJ Walsh on January 21, 2014 is barred. Simply put, Respondents contend that Claimant “settled” all workers’ compensation claims on a “full and final” basis when she negotiated the settlement of Insurer’s subrogation interest in her third party action. The ALJ is not persuaded. Rather, the ALJ finds that the Court of Appeals decision addressed the narrow issue concerning Claimant’s assertion that Respondents’ claimed overpayment was included in Respondents’ agreement to settle their subrogation lien and whether Claimant was obligated to repay the overpayment in the event that it was excluded from the asserted lien. Based upon the evidence presented, the ALJ concludes that the Court of Appeals determined only that “all claims and debts” associated with the third party subrogation lien were settled rather than “all” claims associated with the workers compensation claim. Indeed, the Remand Order from the ICAO notes only that the Court concluded that the third party settlement “unambiguously encompassed all portions of the lien, including the overpayment.”

F. Citing that the first page of the Remand Order wherein ALJ Walsh ordered Claimant to reimburse the respondent-insurer for the asserted $8,451.08 overpayment which was later reversed and remanded by a panel of the Court of Appeals, Respondents also contend that there is no “order” compelling the payment of additional benefits. Instead, the remand order “releases” Claimant from reimbursing Respondents for the overpayment. Thus, Respondents argue that there has been no violation of the April 30, 2015 Remand Order. While the April 30, 2015 order does not specifically indicate that Respondents were ordered to pay additional benefits, the ALJ finds and concludes that the April 30, 2015 remand order removed the barrier, i.e. the claimed overpayment shielding Respondents from having to pay additional PPD and disfigurement benefits pursuant to the order of ALJ Walsh issued January 21, 2014. The ALJ agrees with Claimant that once this shield was removed, Claimant was entitled to the payment of additional PPD and disfigurement previously ordered. Because the only issue on appeal from the January 21, 2014 order involved Claimant’s obligation to repay the claimed overpayment, the ALJ concludes that the obligation to pay additional PPD and disfigurement as set forth in the January 21, 2014 order was subsumed in the April 30, 2015 remand order. Simply put, ALJ Walsh was not required to specifically order Respondents to direct payment of additional benefits again. Indeed, as found, Claimant raises this point in her specific statement regarding penalty claim attached to her application for hearing admitted into evidence. Since the April 30, 2015 order incorporates the January 21, 2014 order, which had become final as to Respondents obligation to pay Claimant additional PPD, disfigurement and interest, the ALJ finds and concludes that Respondents' violated the April 30, 2015 order when they did not pay Claimant the money owed for these additional benefits. Consequently, the ALJ concludes that the first prong of the two part test concerning the imposition of penalties has been met. Nonetheless, Respondents assert that their action in response to the remand order issued April 30, 2015 by ALJ Walsh was "objectively reasonable" and they otherwise cured any violation pursuant to Section 8-43-304(4). Consequently, Respondents urge the ALJ deny and dismiss the claim for penalties.

G. Section 8-43-304(4) provides that any party alleged to have committed any violation categorized above shall have twenty days to cure the violation from the date of mailing of an application for hearing in which penalties are alleged. Section 8-43-304(4) also provides that if the alleged violator cures the violation within the twenty-day period, and the party seeking a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. Accordingly, no penalty may be imposed if, first, the violation is cured within twenty days and, second, the moving party fails to prove by clear and convincing evidence that the violator knew or should have known of the violation.

H. The cure statute adds an element of proof to a claim for penalties in cases where a cure is proven. In the ordinary case, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. All that is necessary is that the party seeking penalties prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965 (Colo.App.2003); *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996). Section 8-43-304(4) modifies this rule and adds an extra element of proof when a cure has been effected. Accordingly, when a cure has been effected the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse,* 942 P.2d 1312 (Colo. App. 1997); *Ray v. New World Van Lines of Colorado* W. C. No. 4-520-251 (October 12, 2004). Here, the evidence presented convinces the ALJ that once Claimant filed her application for penalties, Respondents cured the alleged violation within the twenty (20) day time period provided for by statute. Payment for additional PPD, disfigurement and interest was made to Claimant on March 22, 2015, 12 days after Claimant filed her application for penalties. Consequently, Claimant was required to prove, by clear and convincing evidence, that Respondents knew or reasonable should have know that they were in violation of ALJ Walsh's April 30, 2015 order. Respondent's contend that "given the complexity of the issues and facts, as well as the ambiguous language of the remand order", that it is "not credible or persuasive" to conclude that respondents could have made the "logical leaps and assumptions" to conclude that additional money was due and owing to Clamant and should be paid. The ALJ is not persuaded. While this case clearly has a complex procedural history, the ALJ notes from the evidence submitted that the adjuster assigned to the case has remained consistent and Respondents have been represented at various times during the claim by qualified in house counsel or by attorneys from outside law firms. It is because this case has a complex procedural history, created by the litigation that has ensued, that the undersigned finds it highly improbable that Respondents would not know that they were in violation of ALJ Walsh's directive to pay Claimant additional PPD, disfigurement and interest once the dispute concerning recovery of the overpayment was resolved. In other words, the ALJ is convinced that it is highly probably and free from serious doubt that Respondents knew or should have known that failure to pay Claimant consistent with the January 21, 2014 order following issuance of the April 30, 2015 remand order would constitute a violation of the April 30, 2015 remand order and by extension the January 21, 2014 order.

I. In concluding that Respondents knew or reasonably should have known that they were in violation of the April 30, 2015 remand order, the ALJ finds the claim of *Darren Varga v. A1 Sewer Master Mountain Water and Ace Insurance Company*, W.C. 4-508-548 (ICAO, July 1, 2004) instructive. In *Varga*, Claimant appealed the decision of an ALJ which failed to impose a penalty for respondents' failure to timely file a General Admission of Liability or an application for hearing pursuant to statute. The ALJ denied the penalty based upon respondents' cure and the failure of Claimant to present evidence, such as "testimony from the adjuster", that respondents knew or reasonably should have known of the violation. In remanding the claim, the ICAO noted that the "parties to a workers' compensation claim are presumed to know the applicable law." *Citing Midget Consol. Gold Mining Co. v. Industrial Commission*, 64 Colo. 218, 193 P. 493 (Colo. 1920); *Paul v. Industrial Commission*, 632 P.2d (Colo. App.1981); *cf. Federal Life Insurance Co. v. Wells*, 98 Colo. 455, 56 P.2d 936 (Colo. 1936). Citing Colorado Rule of Evidence 301, the ICAO noted further "that the party against whom the presumption is directed must come forward with evidence to rebut the presumption." Because neither Mr. Varga nor respondents presented evidence concerning the reason for the respondents' violation of a statute, the ICAO determined that the ALJ was "required" to presume that respondents knew the requirements of the statute. The ICAO went on to indicate the "[b]ecause the respondents' knew the rule and did not present any factual or legal argument that their actions did not violate the rule, the record [compelled] the conclusion that the respondents' knew or reasonably should have known that their actions violated § 8-42-107.2", i.e., the statute in question. Like the situation presented in *Varga*, neither party to the instant claim presented testimony concerning Insurers "knowledge" and understanding of the January 21, 2014 and April 30, 2015 orders. While Respondents argued that their "actions in response to the remand order issued by Judge Walsh were "objectively reasonable", they did not present any testimony in support of that position. Argument by counsel is not evidence. *See Subsequent Injury Fund v. Gallegos*, 476 P.2d 71 (Colo. App. 1987). Accordingly, in keeping with the decision announced in Varga, the undersigned ALJ concludes that he was required to presume that Respondents knew the content of both the January 21, 2014 and April 30, 2015 orders and their obligation to pay benefits there under. Consequently, the ALJ agrees with Claimant that:

> There was only one reason why the Respondents were withholding the payment of additional disfigurement money and additional money for a whole-person impairment --- their alleged overpayment. Once the courts reversed the earlier decision on the overpayment issue, the Respondents had no reasonable basis to withhold payment from Claimant. . . . The Respondents were aware that they would have had to pay additional benefits had they not prevailed initially on the overpayment issue. Therefore, once they lost that issue on appeal, there was no rational basis for holding onto money based on an alleged overpayment.

J. Because the ALJ presumes that Respondents knew the content of the January 21, 2014 and April 30, 2015 orders and finds that they otherwise did not have a reasonable argument for their decision to withhold payment to Claimant, the record evidence compels a conclusion that Respondents knew or reasonably should have known of their violation of the April 30, 2015 by virtue of the previous January 21, 2014 order. *See Varga v. A1 Sewer Master Mountain Water and Ace Insurance Company*, *supra*, *citing Schreiber v. Brown & Root, Inc*., 888 P.2d 274 (Colo. App. 1993). As found, Claimant has established that Respondents violated an order subjecting them to penalties in this case.

ORDER

It is therefore ordered that:

1. Respondents shall pay to Claimant a penalty in the amount of twenty-five ($25.00) dollars per day for 305 days for a total penalty of $7,625.00 for their violation of ALJ Walsh’s order(s).

2. Pursuant to § 8-43-304(1) the penalty assessed is apportioned between Claimant and the workers’ compensation cash fund created in section 8-44-112(7)(a). Fifty percent (50%) of the penalty assessed shall be paid to Claimant and the remaining fifty percent of the penalty assessed shall be paid to the workers’ compensation cash fund.

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

DATED: September 28, 2016

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-949-918-02

ISSUE

> Whether the Claimant proved, by a preponderance of the evidence, that he is entitled to continued medical treatment after MMI consisting of osteopathic manipulation and massage therapy.

FINDINGS OF FACT

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

1. The Claimant is a firefighter and hazmat technician who suffered a neck injury on February 3, 2011. He was investigating a fire in a warehouse and an overhead electronic door, a zip door, closed unexpectedly and struck the top of his helmet. Employer admitted liability and provided medical benefits.

2. The Claimant received treatment on the date of the injury with Dr. Dickson and complained of pain in the back of his neck and low back. Neck range of motion was normal. X-rays revealed no fracture. The Claimant saw Dr. Blair on February 7, 2011, stated his neck felt better and was diagnosed with resolving cervical and lumbar strains.

3. On March 15, 2011, the Claimant was referred to Dr. Gridley, a chiropractor. After five visits, Dr. Gridley found that the Claimant was 75% improved.

4. Dr. Blair diagnosed a slowly resolving cervical strain on April 18, 2011 and prescribed six additional chiropractic visits. On August 11, 2011, Dr. Blair noted that the Claimant still complained of some postero-lateral neck pain. An MRI performed on August 25, 2011 showed degenerative disc disease with a left-sided disc protrusion and C6-7.

5. The Claimant then went a year without further treatment for his neck problems. He explained to Dr. Wunder that he still had some symptoms but that he didn't want to miss any work.

6. On September 3, 2012, the Claimant was working out with weights at the fire station. The following morning he had a sensation of left arm tingling and numbness in the first and second digits. The September 3, 2012 claim was administered under W.C. 4-933-652. The Claimant chose Concentra to provide treatment for the September 3, 2012 incident. After he complained of shooting pains and numbness in the left thumb and index fingers, MRIs of the neck and brachial plexus were performed on October 9, 2012. The brachial plexus MRIs were normal and the cervical spine MRI showed the same C7 abnormality and left C6-7 stenosis. The Claimant treated for the September 3,

2012 incident separately and on March 13, 2013 Dr. Burris placed the Claimant at MMI. He found no neurological deficits in the cervical spine and the Claimant continued to perform his usual duties.

7. Dr. Linda Mitchell performed an IME on January 13, 2014. The Claimant complained of neck pain and stiffness with an occasional headache. He had some numbness over the left forearm into the left thumb and index finger. He also complained of occasional numbness in his right arm. He had no upper extremity weaknesses. Dr. Mitchell's spinal examination found tightness in the right splenius capitis, the left posterior scalenes, and the trapezius bilaterally. Sensation and strength were normal in both upper extremities. Dr. Mitchell diagnosed a herniated disc at C6-7 with severe left C6-7 foraminal stenosis and cervical spondylosis. She provided a 6% impairment for specific disorders of the cervical spine under Table 53.II.C and a 9% impairment for loss of cervical spine range of motion. These combined to a 14% whole person impairment rating. Dr. Mitchell explained that the September 3, 2012 weight-lifting incident did not cause any new injuries. She stated that Claimant's progressive radicular symptoms after the 2012 weight-lifting incident were the result of a natural progression of his degenerative disc disease. She further stated that the right arm symptoms were unrelated to the February 3, 2011 or September 3, 2012 incidents at work.

8. The parties reached a Stipulation Regarding Benefits and agreed that for this claim (W.C. 4-949-818), the Claimant reached MMI as of January 13, 2014 and agreed with the 14% whole person impairment rating. Respondent filed a Final Admission of Liability consistent with the parties' stipulation and Dr. Mitchell's report on August 8, 2014. Per the Final Admission of Liability and the Stipulation of the parties, Dr. Blair and Dr. Chan would remain the Claimant's authorized treating physicians for reasonable and necessary post-MMI benefits.

9. The Claimant saw Dr. Blair on January 22, 2015. The Claimant complained continued neck pain and paresthesias and numbness of the left upper extremity. Dr. Blair noted the Claimant continued to slowly improve with osteopathic manipulation and massage therapy. Dr. Blair noted that, "because of the recent episode of paresthesias and numbness, [the Claimant] is starting to think more seriously about the possibility of surgery. However, he does feel that he is making continued slow incremental improvement with the treatments as outlined above and prefers to give this a little more time before considering surgery." Dr. Blair further noted that "the purpose of continued osteopathic manipulation and myofascial release is to maintain the patient at MMI and full duty status and hopefully allow the herniated disc to contract and avoid surgery."

10. The Claimant saw Dr. Samuel Chan on January 28, 2015 for maintenance acupuncture treatments. The Claimant continued to work full-time, full-duty but complained of fluctuation of pain in the cervical and lumbar spine area. At this visit, the Claimant reported no radiating pain, no numbness and no tingling sensation. Dr. Chan diagnosed myofascial type complaints and provided acupuncture treatment for maintenance.

11. From February 18, 2015 to March 18, 2015, the Claimant continued to treat with Dr. Chan for maintenance acupuncture. The Claimant reported that the combination of acupuncture and the osteopathic manipulation therapy continued to offer benefits although the Claimant continued to report pain at 5/10. Dr. Chan noted the Claimant was not using any medications and was working without restrictions.

12. On April 13, 2015, the Claimant saw Dr. Blair and reported that he had recently had a lot of smoke/carbon dioxide calls, which require him to have his neck at full extension while wearing a helmet, and this was causing him increased neck symptoms. The Claimant also reported continued benefit from the maintenance treatment, specifically the osteopathic treatments with Dr. Woessner, which Dr. Blair recommended the Claimant continue.

13. On April 16, 2015, the Claimant saw Dr. Chan and reported the pain complaint was between 4/10 and 6/10 in the cervical spine, lumbar spine and left upper extremity. Dr. Chan noted that the Claimant reported he is able to increase his activity level and continued to be working full-time, full duty with the maintenance care.

14. On May 14, 2015, the Claimant saw Dr. Blair and reported that his maintenance treatment, including osteopathic manipulation, acupuncture, and massage are keeping his symptoms controlled and allowing him to continue to work his full duty job as a firefighter. The Claimant reported that he believed the high-profile helmet that he was wearing frequently would bang into over-hangs in crawl spaces and so he was re-traumatizing his neck, but the Claimant stated that he was on a list to try a new, lighter, low profile helmet and was hoping that this might improve symptoms. The Claimant also reported that while he was continuing to work full duty, he had applied for a transfer to a more administrative type job that would not require wearing all of the heavy, bulky firefighter equipment. Dr. Blair recommended Claimant continue full duty and his continuance maintenance treatment.

15. On June 16, 2015 the Claimant saw Dr. Joshua Krembs for osteopathic manipulation therapy and complained of left arm tingling, neck pain, low back pain, and left foot pain. Dr. Krembs did note, however, that the recent paresthesias likely stemmed from being in an awkward position while weightlifting. The paresthesias stopped when the Claimant changed positions.

16. On June 25, 2015, the Claimant treated with Dr. Blair and reported the most benefit from the osteopathic manipulation. He reported that the medical massage would temporarily improve his symptoms. The Claimant reported that he continued to work full duty and is being careful to avoid traumatizing his neck. The Claimant also reported that he borrowed a upper extremity posture brace device from Dr. Woessner and that was helping with his symptoms. Dr. Blair recommended continued maintenance treatment and asked the Claimant to discuss with Dr. Woessner if she felt that interposing massage therapy in between osteopathic manipulation therapy sessions would be helpful. The Claimant also reported that while he had considered

transferring to another, less strenuous job, it did not appear that would happen any time soon.

17. On July 15, 2015, Dr. Krembs noted that the tension in the low back / sacral area was the area of greatest discomfort. The Claimant reported that there was "sustained benefit" from recent treatments and he was more active around the house and the fire station with minimal symptoms. Osteopathic treatment was directed to the head, cervical spine, lumbar spine, pelvis, the upper extremity, the ribs, and the abdomen. The July 23, 2015 visit to Dr. Krembs, the Claimant reported he was feeling healthier and healthier in response to recent treatments with some tension in his low back and neck and intermittent "burning/stabbing/aching." Dr. Krebs listed the same diagnoses as before, neck strain improving, cervical disc herniation improving, shoulder pain improving, lumbosacral pain improving, and muscle spasms improving. On July 30, 2015, the Claimant's chief complaints were "Bilateral diffuse shoulder / upper back pain. Mild low back pain/tension. Left foot pain." However, the Claimant reported that work was much less of a pain trigger recently.

18. On July 30, 2015, the Claimant also treated with Dr. Blair, who noted that the Claimant continues to receive a benefit from his maintenance treatment, including osteopathic manipulation and medical massage. Dr. Blair added that the conservative treatment has eliminated the Claimant's bilateral upper extremity paresthesia and numbness. Dr. Blair recommended that the Claimant continue to interpose the osteopathic manipulation and medical massage treatments.

19. On August 26, 2015, the Clamant reported to Dr. Krebs that he felt better since his last treatment but "work continues to provide opportunities for exacerbating his pain. Dr. Krebs noted the Claimant had not been sleeping well lately.

20. On August 27, 2015, Claimant treated with Dr. Blair, who noted that the Claimant's treatment regimen, including osteopathic manipulation and myofascial release massage, has eliminated the Claimant's upper extremity paresthesia and numbness. Dr. Blair noted that the Claimant reported to him that a few weeks ago he felt he might not need further treatment, and then he had two intense work calls that flared up his neck symptoms. Dr. Blair noted that the Claimant had tightness and mild pain in the posterior cervical musculature and recommended the Claimant continue his maintenance treatment.

21. On September 1, 2015, the Claimant also advised Dr. Krebs that working big fires had flared his symptoms. He reported that he felt better again due to the OMT, massage and maintaining his stretching program at home. The Claimant reported he was still not sleeping well.

22. The Claimant returned to Dr. Krembs on September 8, 2015 with increased complaints of neck /upper back pain and low back pain after using "jaws of life" tool to extract 2 kids from a care. The tool weighs about 70 pounds, but due to being in a hyper adrenal state, the Claimant was working with it like it didn't weigh

anything. However, the next morning he woke up with a lot of localized discomfort. On September 16, 2015, the Claimant reported that the prior treatment had been very helpful and he felt good for several days until he was working another large fire with heavy gear and his low back and neck pain returned. Dr. Krebs also opined that lack of sleep was a contributing factor to the Claimant's general symptoms at that visit as the Claimant attended a minor fire around 4:30 AM prior to the visit. Dr. Krebs saw the Claimant again on September 22, 2015 and noted the neck and low back pain had returned even though the Claimant did not recall any particularly severe or strenuous incidents at work. The Claimant was still reporting difficulty sleeping and general discomfort was up to 5-6/10 as opposed the 4/10 that it had been at recent visits.

23. On October 8, 2015, the Claimant treated with Dr. Blair and reported that he had a significant setback about three weeks prior with increased neck pain and bilateral hand paresthesia. The Claimant reported that, at that point, he definitely though he needed to proceed with surgery, but then the symptoms calmed down in the interim. Dr. Blair recommended the Claimant follow-up with Dr. Rauzzino to discuss surgery and to continue the maintenance treatment.

24. On October 14, 2015, Dr. Krembs noted that he strongly supported the Claimant avoiding severely exacerbating activities at work. The Claimant reported sleeping 5-6 hours a night which was an improvement over recent visits. Otherwise the diagnoses and treatment were similar to before. Then, the Claimant returned to Dr. Krembs on October 19, 2015 and stated that his low back hurt after exacerbating his pain at a fire 4 days prior where he had to throw around heavy ladders. The Claimant reported that it felt like his kidney hurt, although he denied urinary symptoms. The Claimant was back to sleeping only 3-4 hours nightly with some difficulty. On October 22, 2015, the Claimant told Dr. Krembs that he used his inversion table for the first time in a year and, while gently moving around at a tilted angle, he experienced a very deep "clunk, clunk, clunk" in his lumbar spine. Since then the Claimant reported that he felt "fantastic" with almost no pain in his lumbar spine. On October 28, 2015, the Claimant reported a dramatic response to the last treatment. He reported about 36 hours of feeling very "off" and then he suddenly felt dramatically more resilient and health with only a "shadow" of his low back pain and upper thoracic pain. The Claimant reported that he continued to feel well with no flare in symptoms even after a very heavy work training session on extraction using the "jaws of life." The Claimant attributed this to the result of treatments and taking Dr. Krebs advice to work smart. On November 4, 2015, the Claimant reported a return of some pain around his neck and left upper back/shoulder region with some numbness/paresthesias in his left arm, but the low back continued to feel better than usual. As of November 24, 2015, the Claimant's chief complaints to Dr. Krebs were neck/upper back pain, low back pain which continued to be "tight and vulnerable."

25. On November 24, 2015, the Claimant treated with Dr. Blair and reported continued symptoms and that he exercises considerable caution in terms of sleep posture and when working as a firefighter to try and avoid aggravating his neck. The Claimant reported that he continues to get osteopathic manipulation but that no

additional massage therapy had been approved. Dr. Blair recommended the Claimant continue his maintenance treatment.

26. The Claimant continued to receive osteopathic manipulation treatments with Dr. Krembs through December 2015 and January 2016. On December 21, 2015, the Claimant told Dr. Krembs that the kink in his neck resolved after treatment but that he still had "generalized tension" in his neck and upper back. He attributed this to wearing his normal firefighting gear. Dr. Krembs' December 31, 2015 note stated that the waxing and waning symptoms returned in the neck, thoracic spine, and lower lumbar region after one week. On January 5, 2016, the Claimant complained that his neck, upper back, low back, and foot pain went from a 4/10 to a 6/10 due to fighting a structure fire. On January 14, 2016, the Claimant told Dr. Krembs that the previous treatment help for about 5 days but symptoms of neck, upper back, and low back pain returned due to more effort and stress at work. The Claimant had trouble finding a way to "crack" his low back and reduce tension.

27. On January 13, 2016, the Claimant underwent an independent medical examination with Dr. Jeffrey A. Wunder, M.D. Dr. Wunder noted that he performed a physical examination and reviewed the Claimant's medical records up through October 18, 2015. Dr. Wunder found that the Claimant had chronic neck pain with an undetermined pain generator and age related cervical degenerative disc disease. Dr. Wunder opined that the Claimant did not require any additional osteopathic manipulation or massage therapy treatment. Dr. Wunder added that Claimant has already received more treatment than outlined in the Division of Workers' Compensation Treatment Guidelines and, therefore, has been over-treated. Dr. Wunder recommended Claimant try a home cervical traction machine and opined that the Claimant needs to be more independent with pain management rather than relying on others for pain control.

28. The Claimant saw Dr. Blair on January 14, 2016 and reported that he tried to exercise care when working to avoid traumatizing his neck. Dr. Blair noted the Claimant continued to inquire about being provided with a newer lightweight helmet and that the Claimant was "actively pursuing a job change within the fire department so as to avoid the physical strenuousness of working as a firefighter." Dr. Blair opined that the Claimant continue full duty status and treatment with Dr. Krembs, but that if the Claimant could change job duties to less strenuous work that the neck symptoms would decrease to the point where treatment could be discontinued.

29. On January 20, 2016, the Claimant underwent an osteopathic manipulation session with Dr. Krembs and reported at least four days relief after the last treatment. On February 1, 2016, the Claimant underwent an osteopathic manipulation session with Dr. Krembs and reported the last treatment was very helpful. The Claimant reported that his main area of discomfort is the left side of his neck and upper back; the Claimant reported aching, burning, and tension. The Claimant also reported that when he sleeps on his side, his left thumb and index fingers go numb. On February 10, 2016, the Claimant underwent an osteopathic manipulation session with Dr. Krembs and reported that he did exceptionally well after the last treatment, which completely

resolved his numbness and tingling in his left forearm. The Claimant did report that on February 9, 2016, he was called to a physically challenging fire during the Broncos parade and this fire increased his symptoms. Dr. Krembs recommended Claimant follow-up for additional treatment.

30. On February 16, 2016, the Claimant treated with Dr. Blair who noted that the Claimant continued to have waxing and waning symptoms of neck pain and stiffness with some upper extremity paresthesias and numbness. The flare ups typically occur when he is involved in a particularly strenuous call, such as when he has to extract people from vehicles. Dr. Blair stated that the Claimant finds that osteopathic manipulation and massage in combination will calm his symptoms and allow him to continue with full duty work status. Dr. Blair also noted that he spoke to Dr. Krembs on the phone and reviewed his osteopathic notes. Dr. Blair noted that Dr. Krembs had the same findings, essentially that Claimant can be asymptomatic and then have a significant flare-up of symptoms after a strenuous Fire Department call. Dr. Blair noted that Dr. Krembs recommended continued maintenance treatment, and Dr. Blair additionally recommended the Claimant try a home cervical traction unit.

31. On February 29, 2016, the Claimant applied for a hearing on reasonable and necessary medical benefits; specifically, the Claimant requested chiropractic manipulation and medical massage, as recommended by Dr. Blair.

32. On March 15, 2016, the Claimant treated with Dr. Blair and reported waxing and waning symptoms, including neck pain and stiffness and occasional paresthesia and numbness in both arms. As before, the Claimant reported that his symptoms are aggravated when he has a particularly physically strenuous call. The Claimant reported that the combination of osteopathic manipulation and massage help relieve his symptoms and allow him to continue to work his full-duty job. The Claimant reported that he continues to do his home exercises and stretches and to use his inversion table at home. Dr. Blair stated that he "concur[s] with Dr. Krembs that [the Claimant's condition] does require periodic maintenance treatments with both massage and osteopathic manipulation. The ideal situation would be to have several of these available on account such that when he does have a flare-up he can schedule a visit." Dr. Blair noted that Respondent denied ongoing massage therapy and osteopathic manipulation.

33. On May 5, 2016, the Claimant treated with Dr. Blair and reported continued symptoms. The Claimant stated that he woke up that morning with total numbness in his left index finger and thumb. The Claimant reported that was applying for less strenuous jobs at work. Dr. Blair noted that Claimant has a mild exacerbation of his symptoms and that the Claimant needs continued osteopathic manipulation and massage treatments to control his symptoms so that he can continue to work as a firefighter.

34. At the hearing, the Claimant testified that he has worked for Respondent for 19 years as a firefighter. The Claimant testified that his job duties include multiple

different tasks regarding fighting fires, inspection and motor vehicle accidents. His main duties involve being the truck man on a heavy rescue unit for search and rescue. The Claimant testified that since his injury he has had neck pain, stiffness, and tension as well as numbness and tingling primarily into his left arm. The Claimant testified that he has undergone a number of different treatment options, including injections, acupuncture, osteopathic manipulation, massage, physical therapy, cervical traction unit, home exercises, and stretching. The Claimant testified that throughout this claim, he continued to work full duty. The Claimant testified that his work activities, including vehicle extractions and major fires, aggravate his symptoms and limit his function. The Claimant testified that the osteopathic manipulation and massage therapy really helped him and allowed him to continue working full duty. The Claimant testified that two days prior to the hearing he worked a major fire and that he has had trouble sleeping due to pain and other symptoms in his neck and upper back since that fire. The Claimant testified that he is no longer authorized to undergo osteopathic manipulation and massage therapy and that he is now having to take 800mg Ibuprofen to try and relieve some of his symptoms. Further, the Claimant testified he completes a home exercise program and a stretching routine on a daily basis, as recommended by his therapist. The Claimant testified that of all the different treatment modalities he has undergone, the combination of osteopathic manipulation and massage provides him the most relief. Claimant testified that the treatment combination is awesome, and he is thankful he found it because he is not sure if he will be able to continue to do his full duty job without it. On rebuttal, the Claimant testified that he performs a combination of home exercises he received from his therapist religiously every day. He stated that without these exercises, he could not function, but nothing provides as much relief as the combination of osteopathic manipulation and massage. The ALJ finds the Claimant's testimony credible and persuasive.

35. At Hearing, Dr. Wunder testified as an expert in the field of physical medicine and rehabilitation. Dr. Wunder testified that he performed a physical examination of the Claimant and reviewed the Claimant's medical records. Dr. Wunder testified that the Claimant reported neck pain, headaches, and left upper extremity numbness. Dr. Wunder testified that his physical examination of the Claimant did not reveal much; there was no tenderness over the midline and slight tenderness to the left of C5-6 with no nerve root pain, radiation or facet joint pain. He was not able to determine a specific pain generator for the Claimant. Dr. Wunder testified that the Claimant does not require any additional osteopathic manipulation or massage treatment. Dr. Wunder testified that the Claimant has exceeded the recommendations outlined in the Colorado Medical Treatment Guidelines for both therapy and osteopathic manipulation. Dr. Wunder testified that he recommended the Claimant try using a home cervical traction unit. Additionally, Dr. Wunder testified that home exercises are essential to recovery and that there is no indication that the Claimant has been doing a home exercise plan. Dr. Wunder testified that the Claimant's work activities as a firefighter do not exacerbate the Claimant's condition.

CONCLUSIONS OF LAW

Generally

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

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

Medical Maintenance Treatment after MMI

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

“If the evidence in a particular case establishes that, but for a particular course of medical treatment, a claimant’s condition can reasonably be expected to deteriorate, so that he will suffer a greater disability than he has sustained thus far, such medical treatment, irrespective of its nature, must be looked upon as treatment designed to relieve the effects of the injury or prevent deterioration of the claimant’s present condition.” *Milco Construction v. Cowan*, P.2d 539, 542 (Colo. App. 1992)

Osteopathic Manipulation and Massage

The Colorado Medical Treatment Guidelines for chronic pain provide guidance for physicians for the use of osteopathic manipulation and massage treatments.

For osteopathic manipulation treatment
The Guidelines provide that the maximum duration for osteopathic manipulation is 8 weeks. However, at 8 weeks, the patient may be reevaluated and continuing care may be indicated for certain chronic pain patients in whom manipulation is helpful in improving function, decreasing pain and improving quality of life. In these cases, treatment may be continued at one treatment every other week until the patient has reached MMI and maintenance treatments have been determined. Extended durations of care beyond what is considered “maximum” may be necessary in cases of re-injury, interrupted continuity of care, exacerbation of symptoms, and in those patients with comorbidities. Such care should be re-evaluated and documented on a monthly basis. There is good evidence that a combination of exercise and spinal manipulation is more effective than manipulation alone in relieving chronic neck pain, and that these advantages remain for more than one year after the end of treatment.
WCRP Rule 17, Exhibit 9, 7 CCR 1101-3.

For massage
The Guidelines provide that the maximum duration for massage treatments is 2 months.
WCRP Rule 17, Exhibits 9, 7 CCR 1101-3.

In this case, although number of osteopathic manipulation therapy and massage treatments the Claimant has undergone are in excess of the treatments recommended by the Medical Treatment Guidelines, the treatments have been effective to keep the Claimant stronger and functional and the medical records likewise document that the treatments enabled to Claimant to work full time, full duty. When the Claimant was involved in a particularly strenuous firefighter call, his symptoms would flare, but the combination of osteopathic manipulation therapy and massage allowed him to continue to function at a high level in a strenuous job. After he was no longer authorized to continue with these treatments, the Claimant testified that he needed to take 800 mg of ibuprofen to deal with his pain and be able to function well. Based on the benefit that he received from the manipulation therapy and massage treatments, he would like to receive additional treatments.

The Claimant's testimony is consistent with medical records of Dr. Blair and Dr. Krembs who noted improved/continued function and decreased pain with the osteopathic manipulation therapy and massage sessions. The medical records contain sufficient documentation to confirm functional gains and symptom relief during periods of symptom flare ups. Combined with the Claimant's credible testimony and the recommendations of his medical treatment providers, the ALJ finds there is sufficient basis for extending the duration of treatments.

While the Medical Treatment Guidelines were appropriately considered, the weight of the opinions expressed in the medical records by the Claimant's medical treatment professionals provides sufficient rationale for deviation from the Guidelines. Additional osteopathic manipulation and massage treatments are reasonably necessary to relieve the effects of the injury or prevent deterioration of the Claimant's present condition.

ORDER

It is therefore ordered that:

1. The Claimant proved, by a preponderance of the evidence, that the medical treatment consisting of additional osteopathic manipulation therapy and massage therapy is reasonably necessary to relieve the effects of his February 3, 2011 injury or prevent deterioration of the Claimant's present condition. Respondent shall pay for this medical treatment in accordance with the Official Medical Fee Schedule of the Division of Workers' Compensation.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 27, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-985-283-03

STIPULATION

The parties stipulated that the Claimant's (AWW) is $787.40.

ISSUES

- Whether the Claimant suffered a compensable injury on April 2, 2015;

- If Claimant suffered a compensable injury, whether University Hospital is an authorized treating provider; and

- If Claimant suffered a compensable injury, whether she is entitled to receive temporary total disability (TTD) benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was working as a packer for the Employer on April 2, 2015 when a plastic basket fell and struck her in the lower abdomen and pelvic area. Claimant's job responsibilities as a packer included loading packaged buns into a plastic basket and stacking the plastic baskets filled with buns. Claimant testified the plastic baskets weighed six pounds when empty, and 30 pounds when filled with buns.

2. Claimant worked primarily as a bun guider prior to working as a packer. Claimant began working as packer one week prior to April 2, 2015. Claimant's job responsibilities as a bun guider required her to sit or stand and watch for damaged buns coming down a conveyor belt. A bun guider must dispose of the damaged buns by emptying a 49-pound trash can at least once an hour, and sometimes more often, during a one hour period

3. Claimant testified that she had been experiencing chronic abdominal and low back pain for over one year prior to April 2, 2015, and that her chronic pain began after she gave birth to her son via Cesarean section on February 5, 2014. Claimant testified that her preexisting conditions worsened after April 2, 2015 as a result of her work-related job duties.

4. Claimant testified that she reported her injury to her foreperson Sharon Henry on April 2, 2015.

5. Claimant sought medical care at University of Colorado Hospital (“University Hospital”) on April 2, 2015. The medical record does not reflect that Claimant reported to the providers at University Hospital that a basket struck her abdomen while at work or that her condition was work-related.

6. On April 2, 2015, Claimant told the providers at University Hospital that she had been experiencing chronic abdominal pain and low back pain for over a year. Claimant’s chief complaints were chronic abdominal pain, pain with intercourse for the past two months, and chronic low back pain for the past year. The ER physician, Dr. Druck, noted motion tenderness of the cervix on exam. Dr. Druck planned to treat Claimant for Pelvic Inflammatory Disease, which is an internal disease that affects the uterus and pelvis.

7. Claimant returned to University Hospital on April 13, 2015. She reported that lifting at work increased her pain symptoms.

8. Nicole Ourada is a Product Manager for the Employer and had been Claimant’s immediate supervisor since September 2013. Ms. Ourada testified that the plastic basket in question weighs three pounds empty and between 12.5 and 15 pounds at most when filled with buns.

9. Claimant testified that as of April 2015, her son weighed approximately 25 pounds, and that she enjoyed playing with him and lifting him, and that he was very active.

10. Ms. Ourada testified that Claimant had complained to her of abdominal and vaginal issues related to the birth of Claimant’s child prior to April 2, 2015.

11. Claimant was absent on three different occasions prior to April 2, 2015 for her abdominal issues.

12. On March 28, 2015, Claimant reported to her medical provider at OnPoint Urgent Care that she had been experiencing chronic abdominal and low back pain since her Cesarean section.

13. On May 8, 2015, Claimant completed Family Medical Leave Act paperwork at to University Health for chronic low back pain that began after her Cesarean Section. Dr. Nicholas Brown indicated that Claimant’s chronic pain issues were not work-related.

14. Claimant completed her statement of injury or illness for the Employer on June 11, 2015. Ms. Ourada testified that she heard of Claimant’s work-related injury for the first time at a meeting a few days prior to June 11, 2015. In her statement of injury or illness, Claimant did not report that she injured her back.

15. Claimant selected Workwell Occupational Health Clinic as her authorized provider. During Claimant’s first appointment at Workwell on June 15, 2015, she reiterated to Dr. Paul Ogden that the plastic basket struck her in the abdomen, and that

her position as a packer required frequent bending, twisting, reaching and lifting. She claimed soreness and achiness in the low back, and mild soreness in the pelvic and abdominal muscles. Claimant reported immediate severe pain after the injury happened (the ALJ infers that Claimant meant the basket striking her). Dr. Ogden deferred an opinion on causation until he could review Claimant's medical records.

16. After reviewing Claimant's medical records, particularly records from University Hospital, Dr. Ogden also concluded that Claimant's chronic pain issues were not work-related.

17. On March 7, 2016, Dr. Carlos Cebrian performed an independent medical examination of the Claimant at Respondents' request. Dr. Cebrian took a history from the Claimant, reviewed her medical records, and performed an examination. Dr. Cebrian concluded that Claimant has chronic pelvic pain, chronic abdominal pain, chronic low back pain, diffuse pain complaints, headaches and depression, none of which is related to her workers' compensation claim.

18. During her visit with Dr. Cebrian, Claimant reported that she injured her low back and abdomen due to the basket falling and striking her in the abdomen and by virtue of her being placed in the packer position. Claimant attributed her symptoms to lifting the bread baskets, twisting and bending.

19. During the hearing, Dr. Cebrian reiterated his opinions concerning the work-relatedness of Claimant's pain complaints. He testified to within a reasonable degree of medical probability, that: (1) Claimant's abdominal and pelvic symptoms were not related to Claimant's work activities as of April 2, 2015; (2) Claimant's abdominal and pelvic symptoms were not aggravated or exacerbated as a result of Claimant's work duties as of April 2, 2015; and (3) Claimant's work activities on April 2, 2015, did not aggravate or exacerbate her preexisting chronic low back pain.

20. Dr. Cebrian testified that a plastic basket—even assuming it weighed as much as six pounds—would not have significant enough force to cause any trauma to Claimant's internal pelvic region because female pelvic bones are designed to protect the uterus and reproductive organs. Dr. Cebrian testified that for an external blow to injure these organs, the blow would have to be severe enough to break the pubic bones. A strike from a small plastic basket would not result in trauma to Claimant's internal pelvic region.

21. Dr. Cebrian further testified that Claimant's job duties for one week as a packer were not of a quality or quantity that would cause an injury, or otherwise aggravate or exacerbate Claimant's preexisting chronic pelvic, abdominal and low back pain. Dr. Cebrian explained that females do not use any kind of muscles in their pelvis or uterus when lifting.

22. As Dr. Cebrian explained, the *Colorado Medical Treatment Guidelines* indicate that occupationally related low back pain is the result of repetitive lifting of 50 to 55 pounds over a duration of years.

23. Based on the foregoing, the ALJ finds that Claimant failed to prove that she sustained a work-related injury whether due to a basket striking her on April 2, 2015, or due to a change in the physical nature of her job duties.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as specifically noted below, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. Section 8-43-201.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. It is Claimant's initial burden to prove a compensable injury. To sustain his burden of proof, Claimant is required to establish that the condition for which he sought benefits was approximately caused by an "injury" arising out of and in the course of the employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011). The question of whether Claimant has met his burden of proof is factual in nature and within the province of the ALJ.

4. The Workers' Compensation Act creates a distinction between the terms "accident" and "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), C.R.S. An "injury" refers to the physical trauma cased by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." A compensable injury requires medical treatment or causes a disability.

5. An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990); *H & H Warehouse v. Vicory*, 805

P.2d 1167 (Colo. App. 1990). If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). There must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show merely that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Simply because a claimant experiences symptoms after performing a job function does not necessarily create a causal connection to the work function. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). ICAO has upheld denial of compensability where the mechanism asserted was the mere act of turning and experiencing pain. See *Willis v. Craig Hospital*, W.C. No. 4-627-742 (February 13, 2006).

6. As found above, the Claimant has failed to prove, by a preponderance of the evidence, that she suffered a work-related injury. The medical evidence documents a longstanding history of preexisting abdominal and back pain. Although Claimant testified that she was injured by a plastic basket on April 2, 2015, she did not report this mechanism of injury to the medical providers at University Hospital on that date. Instead, Claimant reported a one year history of chronic pain. In addition, the ALJ is not persuaded by Claimant's reports and testimony that her job duties as a packer worsened or aggravated her preexisting conditions.

7. The ALJ credits the opinion of Dr. Cebrian that a six-pound plastic basket striking Claimant on the outside of the abdomen could not result in an acute, internal pelvic injury. As Dr. Cebrian explained, a six-pound plastic basket falling straight down could not injure the internal cervix or uterus. Dr. Cebrian also credibly opined that the basket striking Claimant's abdomen would not aggravate any preexisting pelvic issues the Claimant had been experiencing.

8. Finally, the ALJ is not persuaded that Claimant's change in job duties from bun guider to packer one week prior to April 2, 2015 aggravated or accelerated Claimant's preexisting chronic pains complaints. As a bun guider, Claimant was required to stand for prolonged periods of time and lift a 49-pound trash can at least once an hour, and sometimes more often. As a packer, Claimant was required to lift a maximum of 15 pounds. Although Claimant may have engaged in some additional bending and twisting as a packer, she worked in the position for one week. As Dr. Cebrian credibly opined, the nature of the work Claimant performed was not of the quality or quantity that would result in an acute low back injury or an aggravation of a preexisting condition.

ORDER

It is therefore ordered that Claimant's claim for workers' compensation is denied and dismissed. Claimant is not entitled to medical benefits or temporary disability benefits as the result of any incident that occurred at work on April 2, 2015.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP.   You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 27, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-968-202-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 14, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 9/14/16, Courtroom 3, beginning at 1:30 PM, and ending at 3:00 PM).

Respondents' Exhibits A through E were admitted into evidence, without objection. Claimant's Exhibits 1 through 9 were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench, granting the Claimant's motion for judgment in the nature of a directed verdict, on the basis that Respondents had not proven their case by preponderant evidence at the conclusion of their case-in-chief. The motion was granted and the ALJ referred preparation of a proposed decision to counsel for the Claimant, which filed, electronically, on September 26, 2016. On the same date, counsel for the Respondents indicated that they had no objections as to form. After a consideration of the proposed decision, the ALJ has modified it hereby issues the following decision.

ISSUES

The matter is before the ALJ at the request of the Respondents to overcome the Division Independent Medical Examination (DIME) opinion of Kenneth Finn, M.D., that the Claimant is not at maximum medical improvement (MMI); and, medical benefits.

The Respondents shoulder the burden of proof by clear and convincing evidence to overcome the DIME. The Claimant bears the burden on medical benefits by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant, Francisco Barrientes, is now a 45 year old employee of the Employer. He was injured on September 12, 2014 in a motor vehicle accident while driving his work vehicle. He was rear-ended by a Ford F-150 pickup truck at approximately 11:00 AM, while stopped at a red light at an intersection in Fort Collins, Colorado. The Claimant sustained a low back/lumbar strain injury.

2. The Claimant completed his work shift that day but reported to the North Colorado Medical Center ER (emergency room) at approximately 7:30 PM that evening, complaining of lower back pain.

3. The Respondents filed a Final Admission of Liability (FAL), dated September 16, 2015, admitting for zero permanent partial disability (PPD), for an MMI date of June 16, 2015, and denying liability for further medical care and treatment, based on the opinions of then authorized treating physician (ATP) Rosalinda Piniero, M.D. The DIME process was initiated and Kenneth Finn, M.D. was selected, performed the DIME on February 5, 2016, and dated his report February 25, 2016. The Respondents requested a hearing to attempt to overcome the DIME by clear and convincing evidence.

Medical

4. The Claimant was seen by Brian E. Cooper, M.D., at the ER. Dr. Cooper ordered x-rays of the lumbar spine, which were read as negative. The Claimant was diagnosed with an injury to the lumbosacral spine and directed to follow up with his primary care physician (PCP), under the mistaken belief that any further medical care

and treatment was not work-related. Dr. Cooper is with Banner Health, which is an authorized medical provider.

5. The insurance carrier referred the Claimant to Concentra, which is also an authorized medical provider.

6. Thereafter, the Claimant reported to the Kaiser Permanente facility in Greeley, Colorado on September 15, 2014 where he was seen by David S. Knechtges, M.D (Claimant's PCP). Dr. Knechtges noted that the Claimant was seen at the ER for a back strain but was also complaining of pain in the upper thoracic area of his back. Dr. Knechtges diagnosed right and left rhomboid strains and recommended an exercise program.

7. Dr. Knechtges saw the Claimant for a follow up appointment on October 2, 2014. Dr. Knechtges noted complaints of both low back and thoracic spine pain. He noted that the lumbar spine was then more sensitive, with decreased range of motion in the back. Dr. Knechtges ultimately diagnosed thoracic and lumbar strains due to the work-related motor vehicle accident and recommended physical therapy.

8. The Claimant was seen on April 3, 2015 by Keith Meier, FNP-C, at the Fort Collins, Colorado Concentra Health Center, after a determination that the motor vehicle accident was work-related. Meier diagnosed a thoracic myofascial strain and a lumbosacral strain. Claimant was referred for additional physical therapy(PT).

9. Concentra physical therapist Brian Busey treated the Claimant from April 3, 2015 to May 21, 2015. The Claimant was seen periodically during that time at Concentra FNP Meier and medical assistant Julia Balderson. The Claimant also received chiropractic treatment from Dr. Scott Parker, D.C. Then authorized treating physician (ATP), Rosalinda Pineiro, M.D., saw the Claimant on June 16, 2015, when she placed him at MMI. She noted that the Claimant's symptoms had improved and that he reported that he was 90 percent better and working regular duty. Dr. Pineiro assigned no impairment and recommended no maintenance treatment.

Division Independent Medical Examination (DIME), Kenneth Finn, M.D.

10. The Claimant was seen by Dr. Finn for a D IME on February 5, 2016. Dr. Finn's diagnoses included chronic lumbosacral spinal pain, with a posterior component. Dr. Finn questioned whether the Claimant's symptoms had a discogenic or a sacroiliac joint component.

11. Dr. Finn found that the Claimant "not at MMI". He recommended a lumbar MRI (magnetic resonance imaging) to determine whether there might be some intervertebral disc pathology. If the MRI were determined to be within "normal limits" he recommended consideration of diagnostic right L4-5, L5-SI facet injections or medial branch blocks with consideration of facet rhizotomy if the Claimant responded favorably.

Respondents' Independent Medical Examination (IME) by Allison Fall, M.D.

12. The Claimant was seen for a Respondents' IME by Dr. Fall on July 20, 2016. Dr. Fall diagnosed temporary myofascial back pain, resolved. Basedc on the totality of the evidence, the ALJ infers and finds that Dr. Fall summarily dismissed the Claimant's complaints after one brief visit. She noted her agreement with Dr. Pineiro that the Claimant was properly placed at MMI on June 16, 2015, with no impairment or need for maintenance treatment.

13. Dr. Fall testified at hearing and stated the opinion that the Claimant had sustained a myofascial thoracic strain, which had resolved. She disagreed with Dr. Finn's assessment of a lumbosacral spinal injury and that the Claimant required additional medical diagnostics and treatment to reach MMI. She testified that her opinions differed from those of Dr. Finn. She indicated that her findings and opinions were within a "reasonable degree of medical probability". Dr. Fall offered no persuasive underpinnings to her opinions and why they differed from DIME Dr.Finn's opinion of "not at MMI."

Ultimate Findings

14. The opinions of DIME Dr. Finn are more credible and persuasive than the opinions of Respondents' IME Dr. Fall because they are more thorough and grounded in medical underpinnings. Additionally, the fact that DIME Dr. Finn would like an MRI is more credible than the opinion of Respondents' IME Dr. Fall that an MRI was unnecessary.

15. The ALJ makes a rational choice between two competing medical opinions, based on substantial evidence, to accept the opinions of DIME Dr. Finn and to reject the opinions of IME Dr. Fall.

16. The testimony of Dr. Fall amounts to a difference of medical opinion with DIME Dr. Finn, but it is not sufficient to overcome Dr. Finn's findings and opinions concerning the nature of the Claimant's injuries and "not at MMI" opinion insofar as Dr. Fall's ultimate opinions do not make it highly probable, unmistakable and free from serious and substantial doubt that Dr. Finn's opinions concerning the Claimant's medical condition and "not at MMI" are in error.. Therefore, the Respondents failed to carry their burden of proof, by clear and convincing evidence, as of the conclusion of their case-in-chief. The MRI recommended by DIME Dr. Finn offers a reasonable prospect of diagnosing or further defining the Claimant's condition so as to suggest a future course of treatment.

17. The medical evidence supports the Claimant's need for continuing medical care and treatment for his low back as long as it is authorized and within the chain of authorized referrals, thus, Claimant has proven this need by preponderant evidence as contained in the documentary medical evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Judgment in the Nature of a Directed Verdict

a. Colo. Rules of Civil Procedure, Rule 41(b) (1), provides that, after a plaintiff in a civil action *tried without a jury* has completed the presentation of his evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief. In determining whether to grant a motion to dismiss or in the nature of a directed verdict, the court is not required to view the evidence in the light most favorable to the plaintiff, as argued by a claimant. *Rowe v. Bowers*, 160 Colo. 379, 417 P.2d 503 (Colo. 1966)*; Blea v. Deluxe/Current, Inc.*, W.C. No. 3-940-062 [Indus. Claim Appeals Office (ICAO), June 18, 1997] (applying these principles to workers' compensation proceedings). Neither is the court required to "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the Claimant. Rather, the test is whether judgment for the respondents is justified on the claimant's evidence. *Amer. National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (Colo. App. 1970); *Bruce v. Moffat County Youth Care Center*, W. C. No. 4-311-203 (ICAO, March 23, 1998). The question of whether the Claimant carried this burden was one of fact for resolution by the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, at the conclusion of the Respondents' case-in-chief, it had failed to prove, by clear and convincing evidence, that DIME Dr. Finn's DIME opinions concerning "not at MMI," diagnosis and related medical conditions were in error, thus, the ALJ granted the Claimant's motion for judgment in the nature of a directed verdict.

Credibility

b. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App.

2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of DIME Dr. Finn were more credible and persuasive than the opinions of Respondents' IME Dr. Fall because they were more thorough and grounded in medical underpinnings. Additionally, the fact that DIME Dr. Finn felt that an MRI was necessary to reasonably diagnose or define a further course of treatment is more credible than the opinion of Respondents' IME Dr. Fall that an MRI was unnecessary, and Dr. Fall's summary dismissal of the Claimant's complaints.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice between two competing medical opinions, based on substantial evidence, to accept the opinions of DIME Dr. Finn and to reject the opinions of IME Dr. Fall.

Maximum Medical Improvement

d. MMI is defined as the point in time when any medically determinable physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 [Indus. Claim Appeals Office (ICAO), October 27, 2011]. .As found, the Respondent failed to overcome, by clear and convincing evidence, the DIME physician's opinions regarding MMI and the causal relatedness of Claimant's condition. As further found, the MRI recommended by DIME Dr. Finn offers a reasonable prospect of diagnosing or further defining the Claimant's condition so as to suggest a future course of treatment.

Overcoming the DIME of Dr. Finn

e. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert, supra*; *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's findings may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush,* *Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the testimony of Dr. Fall amounted to a difference of medical opinion with DIME Dr. Finn, but it was not sufficient to overcome Dr. Finn's findings and opinions concerning the nature of the Claimant's injuries and "not at MMI" insofar as Dr. Fall's ultimate opinions do not make it highly probable, unmistakable and free from serious and substantial doubt that Dr. Finn's opinions concerning the Claimant's medical condition and "not at MMI" opinion are in error. Therefore, the Respondents failed to carry their burden of proof to overcome the DIME of Dr. Finn, by clear and convincing evidence.

Burden of Proof on Medical Benefits

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to medical benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant sustained his burden concerning the need for continuing medical benefits at least until the results from the recommended MRI are known.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Judgment in the Nature of a Directed Verdict is hereby granted in favor of the Claimant.

B. The Respondents failed to overcome the Division Independent Medical Examination of Kenneth Finn, M.D., thus, the Claimant is not at maximum medical improvement.

C. The Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the Claimant's admitted low back injury of September 15, 2014, subject to the Division of Workers' Compensation Medical Fee Schedule.

D. Any and all issues not determined herein are reserved for future decision.

DATED this______day of September 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

STIPULATIONS

At the outset of the hearing, the parties stipulated that Claimant's average weekly wage from June 3, 2015 through June 30, 2016, is $560.00 per week. From July 1, 2016, and continuing, the average weekly wage increases to $667.84, secondary to the value of Claimant's fringe benefits. The stipulation is approved.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that the lumbar decompression and fusion procedure recommended by Dr. Bhatti is reasonable and necessary.

FINDINGS OF FACT

Based upon the evidence presented at hearing, as well as the deposition testimony of Dr. Bhatti and Dr. Reiss, the ALJ enters the following findings of fact:

1. Claimant sustained an admitted injury on June 3, 2015, when she was standing on a milk crate, it slipped and she fell injuring her low back and right hip. Following the event, she was seen at St. Thomas More Hospital complaining of low back and right leg pain. X-rays taken demonstrated degenerative disc disease at L5 and degenerative low lumbar facet arthropathy. There were no acute findings noted. X-rays taken of her right hip were also negative.

2. Claimant testified that following the accident she has been unable to work. She testified to daily sharp right leg pain and numbness in her right foot which hampers her activity level. According to Claimant she has difficulty picking up and holding her 2 ½ year old grandchild. She reported that she can stand for 10 minutes, move and walk for 15 minutes and sit for 30-45 minutes all of which limit her functional capacity, including her ability to travel and keep up with domestic tasks, such as doing dishes and housekeeping.

3. Claimant testified that she has pain in her entire right leg 80-90% the time and rates her pain as 8-9/10. Claimant's leg pain reportedly causes her to limp when she walks. The limp comes and goes. She cannot carry any objects and can only bend about 10° to 15°, but slightly more with pain.

4. Claimant has engaged in conservative treatment modalities including physical therapy (PT), which reportedly aggravated her pain levels resulting in a suspension of further PT after 2 appointments. She has testified that she has been prescribed multiple

medications in an effort reduce her pain with limited success. Epidural steroid injection (ESI) made her sick which also increased her pain levels.

5. On cross examination, Claimant admitted that she has been released to work, modified duty and that she has no specific restrictions as there is no modified duty work available to her.

6. A review of medical records establishes that Claimant was examined by Steven Quackenbush, physicians assistant (PA), on June 11, 2015. Claimant was ambulating with an antalgic gait, had reproducible pain with palpation of the lumbar spine without pain into her right hip or SI joint, and she had no paraspinous muscular spasm. Straight leg was positive on the right at 30° with subjective numbness of the right foot. PA Quackenbush prescribed a “Medrol Dose Pak” and recommended a “stat” MRI.

7. An MRI was performed on June 12, 2015. The MRI report indicated there were “no bulging discs” and “[n]o levels of significant spinal stenosis or neural foraminal compromise seen.” While there was “minimal posterior disk bulge seen at L4-5” this did not cause “significant spinal stenosis or neural foraminal impingement.” The impression reached by the interpreting radiologist was “[m]ild degenerative disc disease. Nothing acute. No levels a significant spinal stenosis or neural foraminal compromise.”

8. On June 18, 2015, claimant continued to complain of 7/10 pain, 90% the time. The Physical therapy was recommended by Mr. Quackenbush. Claimant was seen on June 19, 2015, by physical therapy. The physical therapist noted claimant had negative straight leg raise, negative slump test, and negative prone instability test.

9. On June 25, 2015, claimant was seen by Mr. Quackenbush indicating that she had minimal improvement being off of work and physical therapy was not helpful. Her ambulation was described as a splinting antalgic gait.

10. On July 22, 2015, Claimant was seen by Dr. Leggett. During this encounter, Claimant complained of sharp shooting pain that traveled from her back to her buttocks, back of the right leg into the heel. She occasionally had weakness and instability primarily involving the right leg and over time numbness and tingling into the foot, growing in intensity. She rated her pain as 7/10 typically 5- 9/10.

11. On August 18, 2015, claimant underwent an L5/S1 and S1 transforaminal epidural corticosteroid injection (TFESI).

12. In August 26, 2015, Claimant was seen by Dr. Leggett and indicated that after the TFESI she became ill and her pain intensified to 10/10 the following night. She was overall 0% better after the injections. It was his impression that her pain was greatest in the distribution of S1 on the right. Due to lack of improvement following the injections, he recommended an EMG.

13. Claimant was seen on September 30, 2015, by Dr. Michael Sparr. She reported sharp pain in her back with radiation to the posterior thigh and calf as well as numbness in the plantar foot and toes. She was reporting difficulty with walking. Clinical evidence from the EMG revealed a "normal electrodiagnostic study of the right lower extremity" without "evidence of acute or chronic lumbosacral radiculopathy . . . distal compression neuropathy . . . or generalized peripheral neuropathy." Dr. Sparr opined that there was "no obvious neurologic damage or cause of her current symptoms."

14. Claimant returned to Dr. Leggett for a follow-up visit on October 26, 2015. During this appointment, Claimant reported she felt no better, reported crying throughout the day because of the intense pain and also crying herself to sleep at night. She had tried to increase her activities but this intensified her pain. Dr. Leggett noted a large amount of acute distress on exam which intensified with any sort of movement. Transition from sit to stand was slow and guarded with Claimant utilizing the exam table to stand. Multiple pain behaviors were identified throughout the examination. Dr. Leggett noted that with sitting upright, without slumping forward, extending the right knee from 90° flexion to 60° flexion was reported to greatly intensify shooting sensations traveling from the back to the foot. Claimant was unable to maintain this position. However when going through the process of standing, she was able to maintain a forward flexed position of the hip with her knee in full extension. She was unable to tolerate any sort of examination to the underlying facet joints or trunk extension. During examination into the low back region, pressure was applied to the right low back region to the degree that pushed her overlying sweat shirt down to the skin. With this, she became extremely tearful and reported intense shooting and burning pain which traveled down the posterior aspect of the right leg and into the foot, but also affecting the entire right leg as well. Any sort of touch along the posterior aspect of the leg was reported to have greatly diminished sensation. Observation gait showed extreme antalgia with minimal step length and stride length on the right side, a wide base of support, and very slow ambulation.

15. Dr. Leggett opined that upon review of Claimant's MRI of the spine, he did not have an explanation for her reported progressive back pain. He had no further treatment to offer. He did not believe that physical therapy, chiropractic or massage would be of benefit. Dr. Leggett could not find an anatomical correlation to substantiate her ongoing symptoms.

16. Dr. Nanes referred Claimant to Dr. Sana Bhatti for a surgical evaluation. Dr. Bhatti saw claimant on December 10, 2015. By deposition, Dr. Bhatti testified that he has never performed an examination of claimant. Rather, all physical examinations of Claimant through Dr. Bhatti's office have been performed by his physician's assistant. (PA). The PA's examination showed back tenderness to palpation throughout her lumbar spine. Dr. Bhatti testified this complaint was not specific to anything and non-anatomic. The examination also showed sensation decrease to pin prick over the entire right foot, which Dr. Bhatti also testified was not anatomic. Claimant was able to heel walk but not toe walk. Dr. Bhatti opines that claimant has right sided disc herniation at

L5-S1 with degenerative disease, worse on the right, with right foraminal stenosis for which he recommends an L5-S1 decompression and fusion with instrumentation.

17. Claimant underwent a second opinion with Dr. David Wong on February 11, 2016. Dr. Wong noted non physiologic findings in his examination to include pain with simulated range of motion testing, straight leg raising to 45° on the right 60° on the left but patient had 90° of straight leg raise in the sitting position and cogwheel weakness. Dr. Wong reviewed the MRI findings and noted that there was minor retrolisthesis at L5-S1 and a desiccated disc at L4-L5 with a mild bulge and early facet arthropathy which was not noted on the MRI. Flexion/extension films demonstrated stability at L5-S1. It was Dr. Wong's opinion that Claimant may have some facet pain secondary to degenerative changes primarily at L5-S1 and lesser at L4-L5. Moreover, he felt Claimant clinically had mild right L5 sensory changes despite a normal EMG study. It was his opinion that an L5 differential nerve root block should be done to determine whether the foraminal stenosis at L5-S1 on the right was clinically significant. He also noted that Claimant may be a candidate for facet blocks. Finally, he felt a psychological evaluation would be appropriate due to Claimants non organic pain. Dr. Wong stated that *if* Claimant ultimately had findings that would suggest decompression at L5-S1 on the right, he would not recommend a fusion, although there may be an argument to be made for this.

18. During his deposition, Dr. Bhatti testified that the MRI did not show a large disc herniation, but degenerative arthritis worse on the right at L5-S1. Initially, it was Dr. Bhatti's opinion that surgery would help claimant by greater than 50%. He acknowledged that it was important to identify the pain generator. He testified that he does not rely on EMG findings or diagnostic injections, but only on the patient's complaints in determining the need for surgery. He testified that part of the reason he wanted to perform surgery is that Claimant was reporting 8/10 pain. Nonetheless, he noted that there were at least two findings on examination by his PA that were non-anatomic. It concerned him that other doctors also found non-anatomic findings. He noted that the more non-anatomic findings present, the less chance of a successful operation. Following review of other physicians' reports, Dr. Bhatti changed his opinion and stated that the chances of a successful surgery would be 30% to 40%. He thought the surgery was reasonable, but questioned whether it was necessary. Ultimately, he recommended surgery with the caveat that there is a significant failure rate.

19. Dr. Brain Reiss evaluated Claimant at the request of Respondents. Dr. Reiss preformed a physical examination, reviewed Claimant's records, including the MRI films. and issued a report on April 27, 2016. He did not believe there was significant nerve compression that would be alleviated with surgical intervention, noting that the L5-S1 nerve blocks were not beneficial, that there was no instability of the lumbar spine and a one level fusion procedure at an arbitrary level without evidence that that level was producing the pain was unlikely to help. According to Dr. Reiss, there was no evidence that Claimant had discogenic pain. It was his opinion that Claimant had non-physiologic findings, subjective complaints out of proportion to objective findings with

severe pain complaints and no observed pain behaviors. Consequently, he did not believe that surgical intervention would be appropriate, nor helpful.

20. As noted, Dr. Reiss testified by deposition. He testified that he would not perform surgery without personally examining Claimant, especially without further objective information that the L5 nerve root was the pain generator. He also would not perform surgery based on pain complaints. According to Dr. Reiss, operating on pain complaints alone creates a low likelihood of Claimant getting better. Dr. Bhatti's assessment of a 30% to 40% success rate in this case indicated to Dr. Reiss that Claimant shouldn't undergo the recommended surgery. During his deposition Dr. Reiss was shown surveillance videotape of Claimant. After review of that video, Dr. Reiss testified Claimant's activities, specifically bending and lifting and carrying her grandchild were inconsistent with her pain complaints of 9/10. After review of the videotape Dr. Reiss opined that Claimant did not require further treatment and was at maximum medical improvement.

21. The undersigned ALJ reviewed video surveillance from June 14th and June 26th, 2016. The video surveillance tapes demonstrate that, contrary to Claimant's testimony she is active and functional. Her gait appears normal both barefoot and while wearing sandals. She bears weight on her right leg while ascending and descending stairs, and stoops. She is observed to walk on both level and inclined surfaces without pain behavior noted. Claimant actively bends at the waist 10-15° on numerous occasions while looking into her car. She is able to enter, exit and drive her personal vehicle without apparent difficulty. In the June 14, 2016 video, Claimant is seen lifting her granddaughter into her car and bending to place/secure the child in a car seat in the back of Claimant's car. She does this without apparent pain. Later she is seen carrying this same child in her left arm to the car where she twists and bends slightly to place the child in the backseat. In the June 26, 2016 video, Claimant is observed to lean into a widow of her car for a sustained period. She is later seen carrying a car seat to her car in preparation of taking her grandchildren swimming. Again, the captured video from this date is devoid of noted pain behaviors.

22. Based upon the evidence presented, the ALJ finds Claimant's testimony regarding her asserted pain level and functional decline out of proportion to the objective findings on physical examination and inconsistent with the surveillance video tape.

23. Based upon the testimony presented, the ALJ credits the opinions of Dr. Reiss over the contrary opinions of Dr. Bhatti to find that the proposed surgery is not reasonable or necessary. Accordingly, Claimant has failed to carry her burden of proof and her claim for additional medical benefits must be denied and dismissed.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought, including medical treatment *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony regarding her alleged functional decline is generally inconsistent with her demonstrated capability captured on surveillance video tape. Moreover, her alleged ongoing symptoms are out of proportion to the objective findings on examination and imaging study. Finally, there has been a demonstrated lack of anatomical correlation to Claimant's ongoing complaints during examination, prompting Dr. Wong to suggest completion of a psychological evaluation to determine whether Claimant's is an appropriate surgical candidate. Even Dr. Bhatti expressed concern regarding the existence of non-organic findings during physical examination leading him to change his opinion concerning the percentage chances that the proposed surgery would help Claimant. Consequently, the ALJ finds Claimant's testimony regarding her asserted pain and functional decline, upon which the proposed surgery was recommended by Dr. Bhatti, to be unreliable and unconvincing.

C. In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

D. As noted above, Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

E. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. Rather, the range of compensable consequences of an industrial injury are limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

F. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). The medical reports submitted in this case along with surveillance video tape and the testimony of Dr. Reiss persuade the ALJ that Claimant has failed to prove by preponderance of the evidence that the need for surgery is reasonable and necessary. Dr. Reiss, Dr. Wong and even Dr. Bhatti, have all indicated that it is important to identify the pain generator causing Claimant's ongoing symptoms. The objective testing in this matter does not support Claimant's subjective pain complaints, nor do Claimant's MRI, EMG and nerve blocks adequately identify the L5 nerve root as a pain generator responsible for causing Claimant's pain.

G. Where a party presents expert opinion on the issue of causation, the weight and credibility of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). As found here, the opinions of Dr. Reiss and credible and more persuasive than the contrary opinions of Dr. Bhatti. In this case, Dr. Bhatti is largely basing his recommendation for surgery upon Claimant's pain complaints and asserted functional decline, which for the reasons outlined above are not credible. As noted, Claimant's pain complaints and asserted functional decline are substantially eroded by the non-anatomic/non-physiologic findings documented on physical examination and the content of the surveillance video tape. Indeed, Dr. Leggett and Dr. Sparr could not find anatomical correlation to Claimant's ongoing complaints and Dr. Wong notes that it may be "worthwhile having a psych eval . . . to evaluate nonorganic pain." Dr. Bhatti agrees with Dr. Wong and Dr. Reiss that Claimant's nonorganic/non-physiologic findings raise concerns when assessing Claimant's complaints and the need for surgery. Moreover, the videotape suggests, contrary to Claimant's testimony that she is active and more functional than she has lead her providers and the undersigned ALJ to be. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that the surgical procedure recommended by Dr. Bhatti is not reasonable or necessary. Consequently, Respondents are not liable for it.

ORDER

It is therefore ordered that:

1. Claimant's claim for additional medical benefits in the form of a minimally invasion lumbar decompression and fusion with instrumentation as recommended by Dr. Sana Bhatti is DENIED and DISMISSED.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 30, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

The issues presented for determination are whether the Respondents have overcome the opinions of the Division Independent Medical Examination (DIME) physician regarding maximum medical improvement (MMI). The Respondents assert that the DIME physician erred by including Claimant's right knee, right shoulder, sexual dysfunction and traumatic brain injury (TBI) as components of the original injury. The Respondents also assert that the DIME physician erred by opining Claimant had not reached MMI for his back conditions. If the Respondents successfully prove that the DIME physician erred regarding MMI, the Respondents seek to overcome the DIME opinions with respect to Claimant's impairment ratings for his lumbar and thoracic spine. Claimant seeks reinstatement of temporary total disability (TTD) benefits based upon the opinions of Dr. Ryan that he is not at MMI. The issue of medical benefits was also endorsed for hearing.

FINDINGS OF FACT

1. The Claimant worked for Employer as a roofer. On November 27, 2012, Claimant fell from a third story roof, approximately 30 feet, and landed with his legs striking a fence and then landing in a sitting position onto gravel. Claimant sustained an L1 burst fracture and a T12 compression fracture.

2. According to the Littleton Adventist emergency room record dated November 27, 2012, a witness observed that Claimant briefly lost consciousness for about 30 seconds to one minute. On examination, Claimant's head was "completely atraumatic" despite reports Claimant fell onto his head.

3. Claimant testified that he tried to reach out and grab anything to break his fall. He attempted to grab a gutter with his right hand.

4. Claimant underwent surgery to repair the fractures. On December 1, 2012, Claimant was discharged from Littleton Adventist to Porter Rehabilitation. The discharge note indicates Claimant was able to move all extremities with equal and excellent strength.

5. The records from Porter Rehabilitation were not offered into evidence.

6. On January 2, 2013, Claimant followed up with Dr. Robert Kawasaki. The nurse case manager, Kevin Shea, was present and provided language translation. Claimant did not report reaching out or any other attempt to break the fall. Dr. Kawasaki documented his review of Claimant's medical records. Subjectively, Claimant

described achiness in his low back and pins and needles in his anterior thighs. He reported difficulty with sitting greater than eight minutes, and difficulty standing and walking greater than 15 minutes. On physical examination, Dr. Kawasaki noted normal ambulation. Dr. Kawasaki's impression was L1 burst fracture with T-11-L3 fusion. He noted Claimant was fortunate in that he had no signs or symptoms for head injury or spinal cord compression. Dr. Kawasaki continued to treat Claimant over the next two months and symptoms and impressions remained the same.

7. Claimant began physical therapy in March. A March 25, 2013, physical therapy note documented "ongoing pain in the right shoulder and knee concern him."

8. Dr. Kawasaki saw Claimant on April 4, 2013. Claimant reported right shoulder, right knee, and right hip pain. Claimant estimated that this had started six weeks prior. Claimant reported that his right knee has pain with ambulation and feels stiffer than the left knee. Claimant also reported psychological issues, including disturbed sleep, anxiety about his finances because he was unable to work. Dr. Kawasaki noted that Claimant's physical therapist had contacted Mr. Shea to inform him that Claimant had right knee and right shoulder pain which seemed to be interfering with Claimant's progress. Dr. Kawasaki referred the Claimant to Ricardo Esparza, Ph.D., for psychological counseling.

9. Dr. Kawasaki opined that Claimant's right knee, right hip and right shoulder complaints were not, within medical probability, related to Claimant's November 2012 injury but that if the shoulder and knee were to be worked up, he would recommend MRI scans for each.

10. The MRIs of Claimant's right knee and shoulder occurred on April 9, 2013. RESULTS

11. On April 11, 2013, Dr. Esparza evaluated the Claimant. Dr. Esparza assessed Claimant with a depressive disorder, a cognitive disorder, and relational problems. Claimant continued to receive psychological treatment with Dr. Esparza until September 5, 2013 when Dr. Esparza determined that Claimant had reached maximum medical improvement (MMI) for his psychological condition. Dr. Esparza also completed a psychological impairment rating which was 16%.

12. Dr. Kawasaki determined that Claimant reached overall MMI on September 27, 2013.

13. Claimant's range of motion measurements in his low back were inconsistent requiring Dr. Kawasaki to re-measure Claimant's spine range of motion a second time. The ultimate impairment rating was 32% whole person.

14. The Respondents filed a Final Admission of Liability on November 21, 2013, and an Amended Final Admission of Liability on March 7, 2014.

15. Claimant objected and applied for a DIME. Dr. Christopher Ryan was selected as the DIME physician.

16. The DIME appointment occurred on March 3, 2014. Dr. Ryan took a history from the Claimant, examined him and reviewed the medical records. Dr. Ryan concluded that Claimant had not reached MMI for his work-related injury. Specifically, Dr. Ryan diagnosed a right hyperabduction/flexion injury to Claimant's right shoulder. He also diagnosed right knee medial and lateral meniscal injuries, probably caused by the work-related fall. Dr. Ryan diagnosed a mild TBI, which he noted was "not fully characterized."

17. Dr. Ryan concluded that for Claimant is "probably" at MMI for his thoracic spine injury and fusion from T11 through L3. Dr. Ryan also noted that Claimant has a disc herniation and anterolisthesis at L3-4 and L4-5 with significant spinal stenosis. He stated that Claimant is probably at MMI for this condition but he would suggest another view. Dr. Ryan went on to recommend that Claimant have a second spine surgical evaluation to get another opinion and reasonable treatment for the stenosis. He also recommended a high field MRI. Dr. Ryan's treatment recommendations regarding the spinal stenosis are inconsistent with his finding that Claimant is probably at MMI for that condition.

18. Regarding Claimant's psychological condition, Dr. Ryan indicated that Dr. Esparza recommended neuropsychological testing in Spanish and Dr. Ryan did not believe the testing had been done and he opined Claimant was not at MMI for this condition. Dr. Ryan also stated that Claimant was not at MMI for his post-traumatic stress disorder until "declared so by Dr. Esparza, his attending psychologist." Finally, Dr. Ryan opined Claimant suffered from sexual dysfunction, discussed, but not fully characterized. Dr. Ryan noted that Claimant is not at MMI for sexual dysfunction because it had not been fully evaluated and that it could have a neuropathic component in light of Claimant's spine injury.

19. On June 12, 2014, the Respondents filed an application for hearing and endorsed, among other issues, overcoming the opinions of Dr. Ryan.

20. In preparation for litigation, the Respondents referred Claimant to Dr. Scott Primack for independent medical examinations (IME), the first of which occurred on July 16, 2014. Dr. Primack also conducted and IME on May 10, 2013 concerning causation of Claimant's right shoulder and right knee symptoms.

21. During the IME on May 10, 2013, Dr. Primack took Claimant's history in Spanish. Claimant described the mechanism of injury as he had reported it to Dr. Kawasaki. Claimant also reported to Dr. Primack that had been focusing more on his back than on his right knee and right shoulder at first. Claimant denied previous problems with his shoulder and knee, and reported the shoulder worsened with lifting overhead and placing his hands behind his back. With regard to the knee, Claimant reported worsening when walking and ascending or descending stairs.

22. Dr. Primack reviewed Claimant's medical records including the surgical notes and rehabilitative facility records, and performed a physical examination. He ultimately opined that Claimant required no further medical treatment for any body part

and recommended a functional capacity evaluation to determine any permanent work restrictions. He agreed with Dr. Kawasaki that Claimant's knee, shoulder, and hip complaints were not related to the industrial injury. He noted that in the rehabilitative program, multiple joints would have been utilized to optimize function. In essence, because the rehabilitation notes lack any complaints related to the right knee, right shoulder or right hip, those body parts were not injured during the fall.

23. In conjunction with his second IME on July 16, 2014, Dr. Primack reviewed additional medical records including MRI reports pertaining to the right knee and right shoulder. After examining the Claimant and reviewing the additional medical records which included Dr. Ryan's report, Dr. Primack reiterated his opinions that Claimant did not suffer a right shoulder, right knee or right hip injury when he fell. Dr. Primack also opined that Claimant did not sustain a mild TBI and no sexual dysfunction related to a spinal cord injury. Dr. Primack opined that Dr. Ryan's opinions were clearly in error. Specifically, Dr. Primack disagreed that Claimant suffered a right shoulder, right knee or right hip injury; or that Claimant suffered a mild traumatic brain injury or sexual dysfunction that has any basis other than psychological.

24. On August 5, 2014, at Respondents' request, Dr. Gary Gutterman performed an independent medical examination to determine the extent of Claimant's psychiatric or psychological issues. Dr. Gutterman reviewed Claimant's medical records and met with the Claimant. Claimant told the Dr. Gutterman that he is active all day long, that he takes care of his 3-year old daughter, including going to the park and out for walks. Claimant did express frustration with being unable to do as many things with his daughter as he used to prior to his injury. Claimant also reported that since he is at home, he has various responsibilities including cleaning the home, making lunch and starting dinner. He goes to the store on occasions and drives.

25. Claimant told Dr. Gutterman about his experiences with Dr. Esparza and group therapy. Claimant stated that he is not sure whether any of the treatment was helpful. Claimant also stated that his sex drive is diminished and same with his ability to perform. Claimant expressed that psychologically, he worried about returning to work and about providing for his family. He was worried about his finances as well.

26. Dr. Gutterman concluded that Claimant probably experienced a Depressive Disorder and Anxiety Disorder following the work-related fall. Dr. Gutterman concluded that, based on Claimant's clinical presentation during his examination of Claimant, along with Claimant's reports of daily functioning, and a review of the medical records, he did not believe Claimant suffered a mild TBI leading to cognitive deficits. Dr. Gutterman opined that Claimant's cognitive functioning appeared to be intact throughout the exam, and that he displayed no issues with memory, focus or concentration. Dr. Gutterman opined that Claimant had improved psychologically since he stopped treatment with Dr. Esparza. Dr. Gutterman opined that Claimant's mental impairment rating was 6%. Dr. Gutterman did not believe additional psychological treatment was warranted, and he concurred with Dr. Esparza that Claimant reached MMI from a psychological perspective in September 2013.

27. Regarding his physical complaints, Claimant told Dr. Gutterman that he did not complain about right knee or shoulder pain initially because he was focused on his back and taking pain medications. After he ceased using the pain medications, he noticed the shoulder and knee pain.

28. Claimant sought an IME from Dr. Caroline Gellrick which occurred on February 11, 2015. Dr. Gellrick took a history from the Claimant with the assistance of a Spanish language interpreter, reviewed his medical records and examined the Claimant. Claimant reported continued achiness in his head, pain in the right shoulder, right knee and lower thoracic and lumbar spine. He also reported neck pain. Claimant presented more functionally limited to Dr. Gellrick than compared to other physicians. He reported difficulty with activities of daily living (ADLs), including personal hygiene, yard work and preparing meals.

29. Dr. Gellrick opined that that the impact of Claimant's fall affected his whole body including his right knee and right shoulder:

> He had a back brace on, he was sedated heavily with narcotics. It is noted that when physical therapy started when he was cleared by spine surgery for the spine, that is when he became symptomatic for the shoulder and the knee. This part of immobilization post-traumatic injury would not be inconceivable that the shoulder and knee would not have been painful prior to this time, but just then nature of the fall itself being catastrophic could have induced these injuries. It is notable the patient had right hip pain since day one, especially even in physical therapy, but this seems more localized to the right SI joint.

30. Dr. Gellrick agreed with Dr. Ryan that Claimant suffered sexual dysfunction and should be referred to urology or a neurologist. She ultimately opined that Claimant was not at MMI for his urologic problems, his right knee or right shoulder. Dr. Gellrick pointed out that prior to the work-related fall, Claimant worked full duty as a roofer which involved climbing ladders while carrying heavy materials. Thus, Claimant was able to use both his right shoulder and knee without problems.

31. On July 1, 2015, Dr. Primack issued an addendum report after he reviewed additional medical records and surveillance video of the Claimant. Dr. Primack agrees that Claimant's right knee MRI demonstrates findings of a multi-planar tear within the body of the posterior horn of the medial meniscus; a peripheral tear within the posterior horn; and a horizontal cleavage tear at the anterior horn with a 1.9 cm meniscal cyst. Dr. Primack opined that Dr. Gellrick erred in her assessments of the Claimant, and that Claimant was consciously misrepresenting his physical capabilities.

32. Dr. Gutterman testified by deposition on October 21, 2014. Dr. Gutterman testified that due to the poly-trauma nature of Claimant's injury, it would not have been unusual for Claimant to have post traumatic stress disorder and anxiety. He disagreed

with Dr. Ryan's diagnosis of mild TBI. He noted that there was no reported trauma to Claimant's head, and no reported cognitive difficulties. Dr. Gutterman explained that oftentimes with anxiety and depression, cognitive alterations can be present but that does not mean the patient suffered a mild TBI. Dr. Gutterman disagreed that Claimant was not at MMI for his psychological condition. Dr. Gutterman credibly testified that he disagreed with further psychological treatment and neuropsychological testing.

33. Dr. Kawasaki testified by deposition on February 18, 2015. Dr. Kawasaki disagreed with Dr. Ryan's conclusions that Claimant's knee and shoulder complaints were related to the fall. Dr. Kawasaki noted that these issues were not present on initial exam of the Claimant and neither did the hospital records document knee or shoulder symptoms. Dr. Kawasaki documented in his April 4, 2013, report that Claimant noticed these symptoms approximately six weeks prior. He reviewed his contemporaneous medical report and he did not record knee and shoulder complaints.

34. Dr. Kawasaki ordered MRIs of Claimant's right shoulder and right knee. Dr. Kawasaki concluded that the changes found on the MRI scans were degenerative in nature and not from a traumatic fall. Dr. Kawasaki testified that had Claimant injured his shoulder or knee when he fell, the symptoms would have manifested sooner than when Claimant reported. Dr. Kawasaki agreed with Dr. Primack that Claimant's right knee, hip and shoulder symptoms would have presented themselves in the rehabilitation facility.

35. Dr. Kawasaki addressed the issues of sexual dysfunction as well. He noted that Claimant did not have neurological symptoms. He explained that while spinal cord stenosis exists, there was no spinal cord injury. Dr. Kawasaki opined that Claimant did not experience nerve damage. Dr. Kawasaki noted that Claimant would have presented with neurological deficits present early on, but he did not.

36. Dr. Primack testified during the first hearing held in this matter. He reiterated his opinions that Claimant's right shoulder and right knee complaints were not related to the work injury. Dr. Primack continued to opine that Claimant did not suffer a mild traumatic brain injury or spinal cord injury that would produce sexual dysfunction.

37. Dr. Primack explained that the mechanism of injury did not support the shoulder injury. Dr. Primack went into great detail that had Claimant injured his shoulder on that date of injury, the symptoms would have manifested much sooner than late March 2013. Dr. Primack held the opinion that the emergency room staff or at least at the rehabilitative hospital would have observed Claimant's shoulder problems. Dr. Primack explained, it would have been extremely difficult for Claimant to have completed physical and occupational therapy in the rehabilitative unit with a shoulder and knee injury. Dr. Primack also relied on both Drs. Kawasaki and Gridley's physical examinations of the Claimant which did not initially reveal a shoulder or knee injury.

38. Dr. Primack explained that the act of abducting the shoulder would not result in the shoulder injury asserted. Dr. Primack opined that the MRI findings are degenerative in nature and not traumatic. Both Drs. Kawasaki and Primack disagreed with the

postulation by Dr. Ryan and later Dr. Gellrick that Claimant's focus was his spinal injury and the medications "masked" his symptoms.

39. Dr. Primack testified that signs of cauda equina or other spinal cord issues that would cause erectile dysfunction were not present when he examined the Claimant. Dr. Primack noted that the erectile dysfunction appeared to be psychological in nature.

40. When Dr. Primack examined the Claimant he observed no signs of mild TBI. The Claimant followed directions, and expressed himself without any memory issues.

41. Dr. Gellrick testified by deposition on November 11, 2015. She stated that initially, Claimant's primary pain was located in his back with a diagnosis of a burst fracture. She noted that it is common for someone with an injury of this magnitude to focus on the primary pain source. As Claimant's condition stabilized, other pain sources became apparent. Dr. Gellrick again pointed out that if Claimant had knee instability it would be doubtful he could carry heavy bundles of roofing materials while climbing a ladder. She also discussed that Claimant could have sprained his shoulder when he fell.

42. Dr. Gellrick noted that the MRI scans of the right shoulder showed minor pathology and that surgery would not likely be indicated. She felt steroid injections may be sufficient.

43. Dr. Gellrick recommended Claimant be referred to orthopedics given the MRI findings regarding his right knee.

44. Dr. Gellrick agreed with Dr. Gutterman's opinions concerning the presence of a mild traumatic brain injury and the mental permanent impairment.

45. Dr. Gellrick repeated her written opinion that Claimant is not at MMI for his urologic problems and requires further workup.

46. Dr. Gellrick also opined that Claimant required additional treatment for his spine.

47. Claimant testified that he did not have any right shoulder or knee pain prior to his work-related fall from a roof. He had no problem performing his job as a roofer at full duty prior to the accident. His job duties included carrying materials with his right arm, walking around on uneven surfaces, and climbing ladders.

48. Claimant explained that as he slipped and fell from the roof, he tried to catch himself on anything he could grab onto, but was unsuccessful because it happened too fast. He landed in a seated position then went backward onto gravel. He fainted and regained consciousness, and was in a lot of pain.

49. Claimant initially focused on his back symptoms and treatment. He also was taking a significant amount of pain medications so he did not immediately appreciate his right shoulder and right knee pain.

50. The ALJ observed the video surveillance which depicted Claimant sitting and driving, lifting his daughter into a car seat, carrying groceries and walking. He walked without a pronounced limp. Claimant testified that the groceries weighed less than 10 pounds. His daughter obviously weighs more than 10 pounds. Claimant was also observed carrying a mop and empty buckets. In one video Claimant sat in his vehicle for close to 15 minutes, which is not significantly longer than what he claims he can tolerate.

51. Nothing in the video surveillance is so compelling as to alter this ALJ's findings concerning Claimant's right shoulder and right knee. Further, the ALJ gives no weight to Dr. Primack's opinion, based on approximately 31 minutes of video surveillance, that Claimant was consciously misrepresenting his physical capabilities to his medical providers.

52. Respondents failed to overcome the opinion that Claimant's right knee and right shoulder conditions are related to the work injury. The opinions of Dr. Primack and Dr. Kawasaki that the lack of documentation in the medical records immediately subsequent to the injury does not constitute clear and convincing evidence. Rather, it is more probably true than not that Claimant was focused on his significant back injury and failed to recognize symptoms in other parts of his body until after his back injury had improved. Dr. Primack's opinions concerning the rehabilitation facility are not persuasive. Claimant has proven that he is entitled to receive treatment for the knee and shoulder injuries as recommended by the DIME physician.

53. The Respondents have overcome the DIME opinions regarding Claimant's mild TBI and psychological conditions. Clear and convincing evidence, specifically the opinions of Dr. Gutterman, who is a psychiatrist, indicates that Claimant does not continue to suffer from cognitive deficits related to a TBI. Dr. Gutterman's opinions that Claimant's cognitive problems arose from the anxiety, depression and PTSD rather than a TBI are very persuasive. Dr. Gutterman opined that Claimant had reached MMI for his psychological condition as did Dr. Esparza. Dr. Ryan, who is not a psychiatrist or psychologist, erroneously concluded that Dr. Esparza had not found Claimant at MMI for the psychological component of his injury. Additional medical treatment related to a TBI or for any ongoing psychological issues is not reasonable, necessary or related to the Claimant's work injury. Any opinions rendered to the contrary are specifically rejected.

54. The Respondents have overcome Dr. Ryan's opinions concerning any diagnosis of sexual dysfunction. The medical records lack any specific plausible causation analysis concerning ongoing sexual dysfunction. Claimant reported a decrease in sexual activity secondary to pain or fear of re-injury. He also reported a loss of sex drive. Eventually, he described erectile dysfunction (ED). As Dr. Gellrick indicated, Claimant is no longer taking a significant amount of opioid medications which could have accounted for the ED. Dr. Gellrick stated that she agreed with Dr. Ryan's

opinion that Claimant's ED requires a neurological consultation but then stated Claimant needs a urology evaluation. Dr. Ryan opined that Claimant suffered a spinal cord trauma which could be causing the ED, but the medical records do not support such a diagnosis. The medical evidence does not support a physical reason for Claimant's ED. Instead, the record appears to suggest that it is psychological and Claimant has received appropriate psychological treatment. Claimant has failed to prove that any further psychological treatment is reasonable, necessary or related to his claim. Claimant has also failed to prove that a neurology or urolgy referral related to ED is reasonable, necessary or related to his work injury.

55. Dr. Ryan noted that Claimant has a disc herniation and anterolisthesis at L3-4 and L4-5 with significant spinal stenosis. He stated that Claimant is probably at MMI for this condition but he would suggest another view. Dr. Ryan goes on to recommend that Claimant have a second spine surgical evaluation to get another opinion and reasonable treatment for the stenosis. He also recommended a high field MRI. Dr. Ryan's treatment recommendations regarding the spinal stenosis are inconsistent with his finding that "he is probably at MMI for this . . ." The ALJ rejects the treatment recommendations made by Dr. Ryan. Another spine surgical evaluation and high field MRI are not reasonable or necessary at this time. No persuasive evidence supports Dr. Ryan's recommendations.

56. To the extent Claimant needs any further treatment to maintain his spine condition, such decisions are deferred to Claimant's authorized treating providers, including, but not limited to Dr. Kawasaki, and the surgeon, Dr. Szapiel. The parties did not suggest that the Respondents had denied any specific treatment recommendations made by either Dr. Kawasaki or Dr. Szapiel. Thus, the ALJ declines to find that any specific medical treatment directed at Claimant's spine is reasonable, necessary or related to his industrial injury.

57. Claimant is unable to earn wages in his usual occupation as a roofer. His permanent work restrictions as determined by a functional capacity evaluation include occasional lifting from knuckle to shoulder limited to 15 pounds, 10 pounds frequently and 5 pounds constantly; bilateral carrying limited to 10 pounds occasionally; overhead lifting limited to 5 pounds occasionally; and lift and carry 10 pounds maximum occasionally. Claimant was restricted to no bending at the waist, crouching or crawling; and occasional ladder and stair climbing. In light of the restrictions and because Claimant is not MMI given his right shoulder and right knee problems that have not been adequately addressed, the Claimant is entitled to TTD commencing on September 28, 2013 and continuing until terminated pursuant to law. The Respondent is entitled to credits for indemnity benefits previously paid.

58. Whether Dr. Ryan's impairment ratings were correct is not ripe for determination. Because the Claimant is not at MMI and requires further follow up for his right knee and right shoulder, the issue of permanent partial disability may not be decided. As such, the ALJ declines to make any findings of fact pertaining to the accuracy of Dr. Ryan's permanent impairment ratings.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. “Maximum medical improvement" is defined in section 8-40-201(11.5), C.R.S., as:

> [A] point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

5. Sections 8-42-107(8)(b)(I) and (II), C.R.S., provide that an authorized treating physician shall determine when the injured employee reaches MMI and that, should either party dispute that finding, the disputing party shall request a DIME. Claimant’s authorized treating physician, Dr. Kawasaki, placed the Claimant at MMI in September 2013 despite Claimant’s ongoing complaints of right knee and right shoulder pain. Dr. Kawasaki opined that the right knee and right shoulder were not related to the industrial injury thus Claimant did not receive much, if any, medical treatment for those two body parts. The Respondents filed a Final Admission of Liability, Claimant objected and

requested a DIME. The DIME physician, Dr. Ryan opined that Claimant was not at MMI for several reasons. Dr. Ryan felt that Claimant needed additional treatment directed at his spine, that Claimant need further psychological treatment, that Claimants suffered a TBI, that Claimant had ED related to a possible neurological problem, and that Claimant's right shoulder and right knee were related to the industrial injury. Respondents applied for hearing seeking to challenge Dr. Ryan's opinions.

6. Sections 8-42-107(8)(b)(III) and (c), *supra*, provide that the finding of a DIME selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004).

7. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (Nov. 17, 2000).

8. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id.* The Division IME examiner's determination of MMI and permanent medical impairment inherently require the physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *Leprino Foods Co. v. ICAP*, 134 P.3d 475 (Colo. App. 2005).

9. Respondents failed to overcome the opinion that Claimant's right knee and right shoulder conditions are related to the work injury. The opinions of Dr. Primack and Dr. Kawasaki that the lack of documentation in the medical records immediately subsequent to the injury does not constitute clear and convincing evidence. Rather, it is more probably true than not that Claimant was focused on his significant back injury and failed to recognize symptoms in other parts of his body until after his back injury had improved. Dr. Primack's opinions concerning the rehabilitation facility are not persuasive. Claimant has proven that he is entitled to receive treatment for the knee and shoulder injuries as recommended by the DIME physician.

10. The Respondents have overcome the DIME opinions regarding Claimant's mild TBI and psychological conditions. Clear and convincing evidence, specifically the opinions of Dr. Gutterman, who is a psychiatrist, indicates that Claimant does not continue to suffer from cognitive deficits related to a TBI. Dr. Gutterman's opinions that Claimant's cognitive problems arose from the anxiety, depression and PTSD rather than a traumatic brain injury are very persuasive. Dr. Gutterman opined that Claimant had reached MMI for his psychological condition as did Dr. Esparza. Dr. Ryan, who is not a psychiatrist, erroneously concluded that Dr. Esparza had not found Claimant at MMI for the psychological component of his injury. Additional medical treatment related to a TBI or for any ongoing psychological issues is not reasonable, necessary or related to the Claimant's work injury. Any opinions rendered to the contrary are specifically rejected.

11. The Respondents have overcome Dr. Ryan's opinions concerning any diagnosis of sexual dysfunction. The medical records lack any specific plausible causation analysis concerning ongoing sexual dysfunction. Claimant reported a decrease in sexual activity secondary to pain or fear of re-injury. He also reported a loss of sex drive. Eventually, he described ED. As Dr. Gellrick indicated, Claimant is no longer taking a significant amount of opioid medications which could have accounted for the ED. Dr. Gellrick stated that she agreed with Dr. Ryan's opinion that Claimant's ED requires a neurological consultation but then stated Claimant needs a urology evaluation. Dr. Ryan opined that Claimant suffered a spinal cord trauma which could be causing the ED, but the medical records do not support such a diagnosis. The medical evidence does not support a physical reason for Claimant's ED. Instead, the record appears to suggest that it is psychological (per Dr. Gutterman) and Claimant has received appropriate psychological treatment. Any ED from which Claimant continues to suffer is not related to his industrial injury and no further treatment is reasonable or necessary.

12. Dr. Ryan noted that Claimant has a disc herniation and anterolisthesis at L3-4 and L4-5 with significant spinal stenosis. He stated that Claimant is probably at MMI for this condition but he would suggest another view. Dr. Ryan goes on to recommend that Claimant have a second spine surgical evaluation to get another opinion and reasonable treatment for the stenosis. He also recommended a high field MRI. Dr. Ryan's treatment recommendations regarding the spinal stenosis are inconsistent with his finding that "he is probably at MMI for this . . ." The ALJ rejects the treatment recommendations made by Dr. Ryan. Another spine surgical evaluation and high field MRI are not reasonable or necessary at this time. No persuasive evidence supports Dr. Ryan's recommendations.

13. To the extent Claimant needs any further treatment to maintain his spine condition, such decisions are deferred to Claimant's authorized treating providers, including, but not limited to Dr. Kawasaki, and the surgeon, Dr. Szapiel. The parties did not suggest that the Respondents had denied any specific treatment recommendations made by either Dr. Kawasaki or Dr. Szapiel. Thus, the ALJ declines to find that any specific medical treatment directed at Claimant's spine is reasonable, necessary or related to his industrial injury.

14. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

15. As found above, Claimant's permanent work restrictions impact his earning ability. In addition, the Claimant is not at MMI for the injury. The Claimant is entitled to TTD commencing on September 28, 2013 and continuing until terminated pursuant to law. The Respondent is entitled to credits for indemnity benefits previously paid.

ORDER

It is therefore ordered that:

1. Claimant is not at maximum medical improvement. He is entitled to reasonable and necessary medical treatment for his right shoulder and right knee. Any determination on impairment ratings is premature and is reserved for future decision.

2. Claimant is entitled to ongoing TTD commencing on September 28, 2013 and ongoing until terminated pursuant to law.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 30, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Decedent suffered a heart attack pursuant to §8-41-302 C.R.S. during the course and scope of his employment with Employer on June 30, 2015

2. Whether Claimant has demonstrated by a preponderance of the evidence that Decedent's work for Employer on June 30, 2015 constituted an "unusual exertion" pursuant to §8-41-302(2), C.R.S.

3. Whether Claimant has proven by a preponderance of the evidence that Decedent's death occurred during the course and scope of his employment with Employer on June 30, 2015.

4. Whether Claimant has established by a preponderance of the evidence that Respondents are financially liable for reasonable, necessary and causally related medical expenses for Decedent's June 30, 2015 death.

5. Whether Claimants Kate Stewart, Dominic Stewart and Declan Stewart.are Decedent's dependents for purposes of receiving death benefits pursuant to §§8-42-114 & 8-42-115 C.R.S.

6. A determination of Decedent's Average Weekly Wage (AWW).

7. Whether Claimant is entitled to receive the statutory maximum for Decedent's funeral expenses pursuant to §8-42-123 C.R.S.

FINDINGS OF FACT

1. Decedent initially worked for Employer as a Utility Worker II but was subsequently promoted to the position of T&D Mechanic. His job duties included digging with a shovel to access water lines for repair.

2. Decedent earned $19.70 per hour plus overtime while working for Employer. Decedent's total income for the weeks of May 8, May 15, May 22, May 29, June 5, June 12, June 19 and June 26, 2015 was $10,602.71. Dividing $10,602.71 by 8 weeks yields an Average Weekly Wage (AWW) of $1,325.34. Decedent also received health benefits at a cost of $760 per month or $175.38 each week. Adding $1,325.34 and $175.38 yields a total AWW of $1,500.72. An AWW of $1,500.72 constitutes a fair approximation of Decedent's wage loss and diminished earning capacity.

3. On the morning of June 30, 2015 Decedent, his coworker Daniel and his supervisor Johnny Roybal were fixing a water meter in Denver, Colorado. To effectuate the repair Decedent used a shovel to remove dirt from around the meter. The trio

finished the job at about 11:00-11:30 a.m. and then traveled to a different job location to assist another work crew.

4. At the new jobsite crews were replacing a main water lead line with a copper line. To locate the line Heavy Equipment Operator Mike Smith had excavated a hole approximately 4-6 feet deep and 4-6 feet wide.

5. After eating lunch Decedent entered the service hole and used a shovel to remove some dirt in order to locate the water line. Decedent subsequently exited the hole and asked Mr. Smith to use the backhoe to remove additional dirt.

6. After Mr. Smith removed some dirt from the service hole Decedent used a ladder to descend into the hole. He again removed dirt in order to locate the water line. After approximately 10-15 minutes Decedent stopped digging.

7. Mr. Smith asked Decedent whether anything was wrong. Decedent raised his hand, shook his head and moved toward the ladder in an attempt to exit the service hole. He was unable to get out and collapsed. Various crew members entered the hole and poured water on Decedent because it was a hot summer day. Mr. Roybal called 9-1-1 for an ambulance.

8. Decedent was transported to Denver Health Medical Center by paramedics and pronounced dead. Claimant incurred medical expenses from the Denver Fire Department, Denver General Hospital and Emergency Medical Services as a result of Decedent's treatment on June 30, 2015.

9. The City and County of Denver Medical Examiner prepared an Autopsy Report of Decedent's death. He concluded that Decedent died as a result of idiopathic dilated cardiomyopathy with cardiomegaly and atrial fibrillation. The Medical Examiner noted that obesity was a significant contributing factor.

10. The record reveals that Claimant incurred funeral expenses in the amount of $8,570.38. Respondents shall thus pay the statutory maximum of $7,000 for Decedent's funeral expenses.

11. It is undisputed that Claimant Kate Stewart is Decedent's surviving spouse and was wholly dependent on Decedent at the time of his death on June 30, 2015. Claimants Dominic Stewart and Declan Stewart.were Decedent's minor children and thus also wholly dependent on him at the time of his death. Accordingly, Claimants are entitled to recover death benefits.

12. The record reveals that Decedent suffered from the pre-existing condition of atrial fibrillation or an electrical disorder of the heart. In July 2014 Decedent suffered an episode of atrial fibrillation while at Coors Field in Denver, Colorado. He was eating a hot dog and drinking a beer when his heart began racing. Decedent experienced lightheadedness and lost consciousness for approximately one to two minutes. He was transported by ambulance to a local hospital. Decedent underwent a successful DC cardioversion and received medications.

13. On June 6, 2015 Decedent awoke with a racing heart. He subsequently underwent a medical evaluation and received treatment for a recurrence of atrial fibrillation. Decedent also obtained medications and expressed interest in another DC cardioversion or possible catheter ablation.

14. On August 18, 2016 the parties conducted the pre-hearing evidentiary deposition of Cardiologist Mark W. Keller, M.D. After reviewing the Denver Medical Examiners Autopsy Report Dr. Keller recounted that Decedent had died of idiopathic dilated cardiomyopathy with cardiomegaly and atrial fibrillation. He explained that "dilated cardiomyopathy" means "bad heart muscle" or more specifically "a weak heart or a heart that's too thick or in some other way the muscle of a heart is deranged." Dr. Keller remarked that the Autopsy Report revealed Decedent had normal coronary arteries with no coronary artery disease or atherosclerosis that would cause a myocardial infarction or heart attack. He commented that the term "myocardial infarction" is synonymous with the phrase "heart attack."

15. Dr. Keller explained that "atrial fibrillation" is an electrical disorder of the heart. Normally, the atria or top chambers of the heart receive blood from the veins and then contracts to pump blood down to the ventricle to improve the ventricular filling. The electrical signal passes down to the ventricle. The ventricle then pumps blood to the body through the lungs. When atrial fibrillation occurs, the atria contract irregularly. More specifically, the fibers beat independently and there is no coordinated contraction. The ventricle receives extra electrical impulses that usually accelerate the ventricular heart rate but decrease ventricular filling because the atria are not contracting. Dr. Keller acknowledged that atrial fibrillation is significantly different from a heart attack. He remarked that pure atrial fibrillation does not cause death.

16. Dr. Keller reviewed witness statements from Mr. Roybal and Mr. Smith concerning Decedent's June 30, 2015 work activities. He noted that Decedent was performing manual labor in a hole on a very hot day. Decedent became distressed then collapsed and could not be revived. Dr. Keller summarized that Decedent's work in extremely hot conditions caused him to suffer cardiac arrest. He detailed that "heat caused [Decedent's] body temperature to increase and he then developed hyperthermia, heat exhaustion, heatstroke or hyponatremia as a consequence. The conditions caused a malignant heart arrhythmia leading to cardiac arrest and death."

17. On August 23, 2016 the parties conducted the pre-hearing evidentiary deposition of Edwin M. Healey, M.D. After examining the Denver Medical Examiners Autopsy Report Dr. Healey recounted that Decedent died of idiopathic dilated cardiomyopathy with cardiomegaly and atrial fibrillation. He explained that Decedent had an enlarged heart with dilated chambers and there was something wrong with the heart muscle. Decedent also suffered from atrial fibrillation or an irregular heartbeat. Dr. Healey summarized that Decedent likely developed heat exhaustion as a result of his job duties on June 30, 2015. The heat exhaustion led to his arrhythmia or abnormal heartbeats and death.

18. The definitions of "heart attack" reflect that the ailment is characterized by diminished blood supply because of a blockage that damages the heart muscle. Moreover, a "heart attack" is also known as a "myocardial infarction." The plain and ordinary meaning of "heart attack" thus involves death or heart damage caused by insufficient blood supply to the heart.

19. Dr. Keller's testimony bolsters the determination that a heart attack is limited to a myocardial infarction or heart damage caused by insufficient blood supply to the heart. Dr. Keller remarked that the Autopsy Report revealed Decedent had normal coronary arteries with no coronary artery disease or atherosclerosis that would cause a myocardial infarction. He commented that the term "myocardial infarction" is synonymous with the phrase "heart attack."

20. The Denver Medical Examiner concluded that Decedent died as a result of idiopathic dilated cardiomyopathy with cardiomegaly and atrial fibrillation. The Medical Examiner noted that obesity was a significant contributing factor. Dr. Keller explained that "dilated cardiomyopathy" means "bad heart muscle" or more specifically "a weak heart or a heart that's too thick or in some other way the muscle of a heart is deranged." Dr. Healey remarked that Decedent had an enlarged heart with dilated chambers and there was something wrong with the heart muscle. Decedent also suffered from atrial fibrillation or an irregular heartbeat caused by an electrical disorder. Dr. Keller explained that "atrial fibrillation" is an electrical disorder of the heart. Normally, the atria or top chambers of the heart receive blood from the veins and then contract to pump blood down to the ventricle to improve the ventricular filling. The electrical signal passes down to the ventricle. The ventricle then pumps blood to the body through the lungs. When atrial fibrillation occurs, the atria contract irregularly. More specifically, the fibers beat independently and there is no coordinated contraction. The ventricle receives extra electrical impulses that usually accelerate the ventricular heart rate but decrease ventricular filling because the atria are not contracting. Dr. Keller acknowledged that atrial fibrillation is significantly different from a heart attack.

21. Based on the plain and ordinary meaning or the term "heart attack" as well as persuasive medical testimony, Decedent did not suffer a heart attack pursuant to §8-41-302(2), C.R.S. during the course and scope of his employment with Employer on June 30, 2015. Claimant is therefore not required to demonstrate that Decedent's death "was proximately caused by an unusual exertion arising out of and within the course of employment."

22. Claimant has proven that it is more probably true than not that Decedent's death occurred during the course and scope of his employment with Employer on June 30, 2015. On June 30, 2015 Decedent used a ladder to enter a service hole. He removed dirt in order to locate the water line. After approximately 10-15 minutes Decedent stopped digging. Mr. Smith asked Decedent whether anything was wrong. Decedent raised his hand, shook his head and moved toward the ladder in an attempt to exit the service hole. He was unable to get out of the hole and collapsed. Various crew members entered the hole and poured water on Decedent because it was a hot summer day. Mr. Roybal called 9-1-1 for an ambulance. Decedent was transported to

Denver Health Medical Center by paramedics and pronounced dead. The City and County of Denver Medical Examiner concluded that Decedent died as a result of idiopathic dilated cardiomyopathy with cardiomegaly and atrial fibrillation. The Medical Examiner noted that obesity was a significant contributing factor.

23. Dr. Keller persuasively explained that he reviewed witness statements from Mr. Roybal and Mr. Smith concerning Decedent's June 30, 2015 death. He noted that Decedent was performing manual labor in a hole on a very hot day. Decedent became distressed then collapsed and could not be revived. Dr, Keller summarized that Decedent's work in extremely hot conditions caused his cardiac arrest. He detailed that "heat caused [Decedent's] body temperature to increase and he then developed hyperthermia, heat exhaustion, heatstroke or hyponatremia as a consequence. Then conditions caused a malignant heart arrhythmia leading to cardiac arrest and death." Moreover, Dr. Healey persuasively summarized that Decedent likely developed heat exhaustion as a result of his job duties on June 30, 2015. The heat exhaustion led to his arrhythmia and death. Although Decedent suffered from the pre-existing condition of atrial fibrillation or an electrical disorder of the heart, the record reveals that Decedent's job activities while working for Employer on June 30, 2015 aggravated, accelerated or combined with his pre-existing condition to cause his death.

24. Claimant has established that it is more probably true than not that Respondents are financially liable for reasonable, necessary and causally related medical expenses for Decedent's June 30, 2015 death. On June 30, 2015 Decedent was transported to Denver Health Medical Center by paramedics and pronounced dead. Claimant incurred medical expenses from the Denver Fire Department, Denver General Hospital and Emergency Medical Services as a result of Decedent's treatment on June 30, 2015.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The Heart Attack Statute

4. Section 8-41-302(2), C.R.S. provides that a heart attack is not compensable "unless it is shown by competent evidence that such heart attack was proximately caused by an unusual exertion arising out of and within the course of employment." The statute establishes a two prong test of compensability when the claim for Workers' Compensation benefits is based upon a heart attack. The intent of the legislature in enacting the "unusual exertion" requirement was to replace the law as it existed before a 1965 amendment to the statute that had abolished the requirement. The legislature sought to ensure that only those heart attack related injuries resulting from more than the normal work activities of the claimant were compensable. *See Public Service Co. v. Industrial Comm'n*, 189 Colo. 153, 538 P.2d 430 (1975); *TNT Loveland Chinchilla Ranch, Inc. v. Bourne,* 178 Colo. 65, 495 P.2d 546 (1972). The claimant must not only show that he experienced an "unusual exertion arising out of and within the course of the employment" but also prove that the heart attack was caused by the unusual exertion. *See Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988); *Vialpando v. Industrial Claim Appeals Office*, 757 P.2d 1152 (Colo. App. 1988).

5. The determination of whether an employee has been subjected to unusual exertion requires a comparison between the employee's duties at the time of the heart attack and his typical job duties. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 975 P.2d 1131, 1133 (Colo. App. 1997); *Vialpando*, 757 P.2d at 1153. However, the exertion does not need to be "different in nature" from the usual work of the employee. *See Wackenhut Corp.,* 975 P.2d at 1133; *In Re Carr v. Industrial Comm'n.*, 709 P.2d 52 (Colo. App. 1985) (although employee was performing routine job duties when he suffered heart attack, where amount of work on day of heart attack required significantly greater physical exertion and involved substantially more emotional stress, his job duties constituted unusual exertion). The determination of whether a claimant has sustained the burden of demonstrating an "unusual exertion" is a question of fact to be resolved by the ALJ. *Wackenhut Corp.,* 975 P.2d at 1133.

Principles of Statutory Construction and Definition of Heart Attack Pursuant to §8-41-302(2), C.R.S.

6. Because the phrase "heart attack" is not expressly defined in the Colorado statutes, the principles of statutory construction must be applied to determine and give effect to the intent of the legislature. *See People v. Madden,* 111 P.3d 452, 457 (Colo. 2005). To ascertain legislative intent we must consider the plain and ordinary meaning of the statutory language. *Id.* "A commonly accepted meaning is preferred over a

strained or forced interpretation." *People v. Voth,* 312 P.3d 144, 149 (Colo. 2013). When the intent of the legislature can be determined within reasonable certainty, it is unnecessary to resort to other rules of statutory construction. *Id.*

7. In ascertaining the plain and ordinary meaning of words and phrases courts may consider dictionaries for assistance. *See Voth,* 312 P.3d at 150 (consulting the Merriam-Webster Online Dictionary to define "substance"). The Merriam-Webster Online Dictionary defines "heart attack" as

> an acute episode of heart disease marked by the death or damage of heart muscle due to insufficient blood supply to the heart usually as a result of a coronary thrombosis or a coronary occlusion and that is characterized especially by chest pain — called also *myocardial infarction*.

Merriam-Webster, http://www.merriam-webster.com/dictionary/heart attack (last visited Sep. 29, 2016).

Similarly, Dictionary.com defines "heart attack" as

> damage to an area of heart muscle that is deprived of oxygen, usually due to blockage of a diseased coronary artery, typically accompanied by chest pain radiating down one or both arms, the severity of the attack varying with the extent and location of the damage; myocardial infarction.

Dictionary.com, http://www.dictionary.com/browse/heart-attack (last visited Sept. 29, 2016).

Finally, the Mayo Clinic explains that:

> [a] heart attack occurs when the flow of blood to the heart is blocked, most often by a build-up of fat, cholesterol and other substances, which form a plaque in the arteries that feed the heart (coronary arteries). The interrupted blood flow can damage or destroy part of the heart muscle.
>
> A heart attack, also called a myocardial infarction, can be fatal, but treatment has improved dramatically over the years. . . .

Mayo Clinic, http://www.mayoclinic.org/diseases-conditions/heart-attack/basics/definition/con-20019520 (last visited Sept. 29, 2016).

8. As found, the definitions of "heart attack" reflect that the ailment is characterized by diminished blood supply because of a blockage that damages the heart muscle. Moreover, a "heart attack" is also known as a "myocardial infarction." The plain and ordinary meaning of "heart attack" thus involves death or heart damage caused by insufficient blood supply to the heart. *See In re Rittenhouse,* W.C. No. 4-

817-721 (ICAP, July 19, 2011) (using "heart attack" and "myocardial infarction" synonymously in addressing compensability claim involving §8-41-302(2), C.R.S).

9. In *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985) the Colorado Supreme Court considered whether the decedent's death from a cardiac arrhythmia caused by the combination of a preexisting congenital heart condition, mitral valve prolapse and job-related mental stress constituted a compensable Workers' Compensation injury. In conducting its analysis the Court noted §8-41-108(2-5), 3 C.R.S. (1984 Supp.) provides that death or disability caused by a heart attack is not compensable unless the heart attack was caused by unusual exertion during work activities. *Id.* at 790, n.3. The Court commented that the referee "expressly found that the decedent did not suffer a heart attack" because the referee had determined that a cardiac arrhythmia caused the decedent's death. *Id*. The Court's analysis demonstrates that a "cardiac arrhythmia" is distinct from a "heart attack."

10. As found, Dr. Keller's testimony bolsters the determination that a heart attack is limited to a myocardial infarction or heart damage caused by insufficient blood supply to the heart. Dr. Keller remarked that the Autopsy Report revealed Decedent had normal coronary arteries with no coronary artery disease or atherosclerosis that would cause a myocardial infarction. He commented that the term "myocardial infarction" is synonymous with the phrase "heart attack."

11. As found, the Denver Medical Examiner concluded that Decedent died as a result of idiopathic dilated cardiomyopathy with cardiomegaly and atrial fibrillation. The Medical Examiner noted that obesity was a significant contributing factor. Dr. Keller explained that "dilated cardiomyopathy" means "bad heart muscle" or more specifically "a weak heart or a heart that's too thick or in some other way the muscle of a heart is deranged." Dr. Healey remarked that Decedent had an enlarged heart with dilated chambers and there was something wrong with the heart muscle. Decedent also suffered from atrial fibrillation or an irregular heartbeat caused by an electrical disorder. Dr. Keller explained that "atrial fibrillation" is an electrical disorder of the heart. Normally, the atria or top chambers of the heart receive blood from the veins and then contract to pump blood down to the ventricle to improve the ventricular filling. The electrical signal passes down to the ventricle. The ventricle then pumps blood to the body through the lungs. When atrial fibrillation occurs, the atria contract irregularly. More specifically, the fibers beat independently and there is no coordinated contraction. The ventricle receives extra electrical impulses that usually accelerate the ventricular heart rate but decrease ventricular filling because the atria are not contracting. Dr. Keller acknowledged that atrial fibrillation is significantly different from a heart attack.

12. As found, based on the plain and ordinary meaning or the term "heart attack" as well as persuasive medical testimony, Decedent did not suffer a heart attack pursuant to §8-41-302(2), C.R.S. during the course and scope of his employment with Employer on June 30, 2015. Claimant is therefore not required to demonstrate that Decedent's death "was proximately caused by an unusual exertion arising out of and within the course of employment."

Compensability

13. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. §8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

14. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

15. As found, Claimant has proven by a preponderance of the evidence that Decedent's death occurred during the course and scope of his employment with Employer on June 30, 2015. On June 30, 2015 Decedent used a ladder to enter a service hole. He removed dirt in order to locate the water line. After approximately 10-15 minutes Decedent stopped digging. Mr. Smith asked Decedent whether anything was wrong. Decedent raised his hand, shook his head and moved toward the ladder in an attempt to exit the service hole. He was unable to get out of the hole and collapsed. Various crew members entered the hole and poured water on Decedent because it was a hot summer day. Mr. Roybal called 9-1-1 for an ambulance. Decedent was transported to Denver Health Medical Center by paramedics and pronounced dead. The City and County of Denver Medical Examiner concluded that Decedent died as a result of idiopathic dilated cardiomyopathy with cardiomegaly and atrial fibrillation. The Medical Examiner noted that obesity was a significant contributing factor.

16. As found, Dr. Keller persuasively explained that he reviewed witness statements from Mr. Roybal and Mr. Smith concerning Decedent's June 30, 2015 death. He noted that Decedent was performing manual labor in a hole on a very hot day. Decedent became distressed then collapsed and could not be revived. Dr, Keller summarized that Decedent's work in extremely hot conditions caused his cardiac arrest. He detailed that "heat caused [Decedent's] body temperature to increase and he then developed hyperthermia, heat exhaustion, heatstroke or hyponatremia as a consequence. Then conditions caused a malignant heart arrhythmia leading to cardiac arrest and death." Moreover, Dr. Healey persuasively summarized that Decedent likely developed heat exhaustion as a result of his job duties on June 30, 2015. The heat exhaustion led to his arrhythmia and death. Although Decedent suffered from the pre-existing condition of atrial fibrillation or an electrical disorder of the heart, the record reveals that Decedent's job activities while working for Employer on June 30, 2015 aggravated, accelerated or combined with his pre-existing condition to cause his death.

Medical Benefits

17. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

18. As found, Claimant has established by a preponderance of the evidence that Respondents are financially liable for reasonable, necessary and causally related medical expenses for Decedent's June 30, 2015 death. On June 30, 2015 Decedent was transported to Denver Health Medical Center by paramedics and pronounced dead. Claimant incurred medical expenses from the Denver Fire Department, Denver General Hospital and Emergency Medical Services as a result of Decedent's treatment on June 30, 2015.

Dependents

19. Pursuant to §8-42-114, C.R.S. death benefits are payable to dependents of a decedent in the amount of two-thirds of the AWW subject to the applicable minimum. If there are wholly dependent persons at the time of the employee's death, they are entitled to weekly compensation equal to two-thirds of the decedent's AWW. §8-42-115(1)(b), C.R.S.

20. Section 8-41-501(1), C.R.S. designates classes of persons who are presumed to be wholly dependent on a decedent. Section 8-41-501(1)(a) provides that a widow or widower is wholly dependent "unless it is shown that she or he was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support." The statutory presumption of spousal dependency can thus only be rebutted by demonstrating that the surviving spouse was voluntarily separated and living apart from the decedent or was not dependent upon the decedent for any support. *See Exeter Drilling v. Industrial Claim Appeals Office,* 801 P.2d 20, 21 (Colo. App. 1990); *Michalski v. Industrial Claim Appeals Office,* 781 P.2d 183, 184-85 (Colo. App. 1989).

21. Section 8-41-501, C.R.S. presumes that a decedent's minor children under the age of 18 years are wholly dependent on the decedent. Pursuant to §8-41-501(1)(c), C.R.S. minor children of a decedent who are over 18 years of age and under 21 years of age who are engaged in courses of study as full-time students at accredited schools are also wholly dependent on the decedent. Section 8-42-121, C.R.S. grants discretion to the Director to apportion death benefits among the beneficiaries in the manner the Director deems just and equitable. Because the undersigned ALJ acts on

behalf of the Director in determining appropriate apportionment after a hearing, the ALJ is afforded the same power to apportion benefits.

22. As found, it is undisputed that Claimant Kate Stewart is Decedent's surviving spouse and was wholly dependent on Decedent at the time of his death on June 30, 2015. Claimants Dominic Stewart and Declan Stewart.were Decedent's minor children and thus also wholly dependent on him at the time of his death. Accordingly, Claimants are entitled to recover death benefits pursuant to §§8-42-114 & 8-42-115 C.R.S.

Average Weekly Wage

23. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

24. As found, Decedent earned $19.70 per hour plus overtime while working for Employer. Decedent's total income for the weeks of May 8, May 15, May 22, May 29, June 5, June 12, June 19, and June 26, 2015 was $10,602.71. Dividing $10,602.71 by 8 weeks yields an AWW of $1,325.34. Decedent also received health benefits at a cost of $760 per month or $175.38 each week. Adding $1,325.34 and $175.38 yields a total AWW of $1,500.72. An AWW of $1,500.72 constitutes a fair approximation of Decedent's wage loss and diminished earning capacity.

Funeral Expenses

25. Section 8-42-123, C.R.S. provides that when a work injury proximately causes the death of an employee, a lump sum not to exceed $7,000 shall be paid for burial and funeral expenses within 30 days after the employee's death. As found, the record reveals that Claimant incurred funeral expenses in the amount of $8,570.38. Respondents shall thus pay the statutory maximum of $7,000 for Decedent's funeral expenses.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Decedent did not suffer a “heart attack” pursuant to §8-41-302 C.R.S. during the course and scope of his employment with Employer on June 30, 2015.

2. Because Decedent did not suffer a “heart attack” pursuant to §8-41-302 C.R.S. during the course and scope of his employment with Employer on June 30, 2015.Claimant is not required to demonstrate that Decedent’s work for Employer on June 30, 2015 constituted an “unusual exertion” pursuant to §8-41-302(2), C.R.S.

3. Decedent’s death occurred during the course and scope of his employment with Employer on June 30, 2015.

4. Respondents are financially liable for reasonable, necessary and causally related medical expenses for Decedent’s June 30, 2015 death.

5. Claimants Kate Stewart, Dominic Stewart and Declan Stewart are Decedent’s dependents for purposes of receiving death benefits pursuant to §§8-42-114 & 8-42-115 C.R.S.

6. Decedent earned an AWW of $1,500.72.

7. Respondents shall pay the statutory maximum of $7,000 for Decedent’s funeral expenses pursuant to §8-42-123 C.R.S.

8. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge’s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge’s order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 30, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Determination of Claimant's average weekly wage (AWW).

2. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from 9/14/15 through 11/29/15 and from 12/4/15 through 12/6/15 at an increased AWW.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary partial disability (TPD) benefits.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to a permanent partial disability (PPD) rating of 10% whole person.

STIPULATIONS

1. The issue of mileage reimbursement was withdrawn.

FINDINGS OF FACT

1. Claimant works for Employer as a janitor. On April 9, 2015 Claimant sustained an admitted injury to his right shoulder and arm.

2. At the time of his injury in addition to working for Employer, Claimant also worked as a janitor for Kohl's.

3. Prior to his injury, and from December 28, 2014 through April 4, 2015 Claimant earned a total of $2,957.88 in gross wages from Kohl's. These wages were earned during a 14 week period of time resulting in an average weekly wage from Kohl's of $211.27.

4. For Respondent Employer, Claimant was paid twice per month. In the three months prior to his work injury and from January 1, 2015 through March 31, 2015 Claimant earned gross wages of $4,374.75. These wages were over a 90 day period and amount to an average daily wage of $48.61 which multiplied by 7 days in the week provides an average weekly wage of $340.27.

5. Due to his injury, Claimant underwent an MRI of his right shoulder on July 24, 2015 that was interpreted by Eduardo Seda, M.D. Dr. Seda provided the

impression of supraspinatus and infraspinatus tendinosis and acromioclavicular osteoarthritis. *See* Exhibit 4.

6. On September 14, 2015 Claimant underwent right shoulder surgery performed by John Papilion, M.D. Dr. Papilion performed arthroscopic debridement of the superior labrum and partial thickness, bursal sided rotator cuff, arthroscopic subacromial decompression with release of the coracoacromial ligament, and arthroscopic distal clavical resection. *See* Exhibit B.

7. On September 22, 2015 Claimant was evaluated by Allison Hedien, NP. Claimant reported that he had not yet started physical therapy, that he was taking pain medications which helped, and that he was tolerating symptoms okay. Claimant had sharp pain in the upper right area of his neck and back, sharp pain in the upper right neck/arm area, joint swelling and joint stiffness. Claimant reported moderate neck pain and pain migrating to the upper back area. NP Hedien noted Claimant's activity status was no work. *See* Exhibit 3.

8. On September 24, 2015 Claimant was evaluated by Dr. Papilion. Dr. Papilion noted that Claimant had been in the sling and on the CPM machine and that his pain was under control. Dr. Papilion recommended getting Claimant into a course of physical therapy and provided work restrictions of no use of the right arm and noted that Claimant did not require pain medication and could wean out of the sling in the next 1-2 weeks. *See* Exhibit 3.

9. On October 6, 2015 Claimant was evaluated by NP Hedien. Claimant reported that his pain was improving, that he felt physical therapy was helpful, and that he was only taking Norco a few times at night. NP Hedien noted on examination tenderness in the AC joint, anterior shoulder, lateral shoulder, and posterior shoulder with limited range of motion in all planes. NP Hedien noted the plan was to continue physical therapy, use ice/head/meds as helpful, and continued the work restriction of no use of the right upper extremity. *See* Exhibit 3.

10. Claimant returned to work for Kohl's in mid October. Between October 18, 2015 and October 31, 2015 Claimant worked 59.07 hours. Claimant continued to work at Kohl's in November and December and continued to earn wages consistent with his AWW from Kohl's prior to his injury. Claimant testified credibly that he was able to work at Kohl's despite his work restrictions and that he was able to self-modify his duties. *See* Exhibit 5.

11. On December 3, 2015 Claimant was evaluated by Dr. Papilion. Claimant was noted to be three months post shoulder surgery with improvement in motion through therapy. Claimant reported continued pain with overhead use and difficulty with internal rotation. Dr. Papilion performed a subacromial injection. *See* Exhibit 3.

12. On February 2, 2016 Claimant underwent physical therapy with Angela Wilt, PT. PT Wilt noted that Claimant had continued signs of shoulder impingement and

that they had to modify therapy exercises due to pain complaints and scapular weakness. Claimant reported fatigue in the right shoulder/scapular at the end of the session. PT Wilt noted the follow up plan included a focus on scapular stabilization and strengthening. *See* Exhibit 3.

13. On February 23, 2016 Claimant underwent physical therapy with PT Wilt. Claimant reported he was not having any shoulder pain that day and that he sometimes had shoulder pain at work that comes and goes. PT Wilt noted range of motion deficits and that Claimant was making significant progress toward his goal of being pain free. *See* Exhibit C.

14. On February 25, 2016 Claimant underwent physical therapy with PT Wilt. Claimant reported having no shoulder pain for a couple of days. Claimant reported that repetitive movements increased his pain and that his shoulder was usually sore by the end of the work day. Claimant reported that he was unable to sleep on his right shoulder due to pain. PT Wilt noted that the goal status for pain was 90% achieved as Claimant still had occasional shoulder pain and soreness at the end of the work day. PT Wilt discharged Claimant from therapy services due to the anticipated goals and expected outcomes being achieved. PT Wilt noted that the goal of lifting trash bins weighing 20 pounds was 100% achieved, the goal of push/pull a mop was 100% achieved, the goal of push/pull carpet cleaner with 50 pounds of force was 100% achieved, that the goal of lifting 20 pounds overhead with the right arm was 100% achieved, and that the goal of repetitively lifting 5-10 pounds overhead was 100% achieved. PT Wilt in her evaluation noted that Claimant's impairment list included pain and a pinching feeling at OH end range, impaired joint mobility, impaired motor function, impaired muscle performance, and impaired range of motion. *See* Exhibit C.

15. On February 29, 2016 Claimant was evaluated by Eric Tentori, D.O. Dr. Tentori noted that the surgeon, Dr. Papilion, had indicated that there was nothing more to offer Claimant. Dr. Tentori reviewed the operative report from Dr. Papilion and also performed an examination of Claimant. Dr. Tentori noted that Claimant had well-healed arthroscopic surgical sites with no edema, minimal residual discomfort with palpation of a diffuse nature, and active range of motion deficits. Dr. Tentori noted that the neurovascular systems were grossly intact in the right upper extremity and that there was no significant crepitance with passive range of motion. Dr. Tentori placed Claimant at maximum medical improvement (MMI). Dr. Tentori performed an impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment. Dr. Tentori provided a 7% upper extremity impairment rating for right shoulder active range of motion deficits, a 10% upper extremity impairment rating for the distal clavicle resection, and combined the upper extremity ratings using the combined values chart to provide a total upper extremity rating of 16%. Dr. Tentori noted that, if applicable, according to Table 3 of the Guides, the 16% upper extremity rating would convert to a 10% whole person impairment rating. Dr. Tentori noted that no additional impairment rating was indicated. *See* Exhibits 3, B.

16. Dr. Tentori also placed Claimant on permanent work restrictions for Claimant's bilateral upper extremities with a maximum lifting on an occasional basis limited to 25 pounds and a maximum pushing/pulling on an occasional basis limited to 30 pounds. For Claimant's right upper extremity, Dr. Tentori placed Claimant on permanent work restrictions with a maximum lifting on an occasional basis limited to 5-10 pounds and with no work with the right upper extremity at or above right shoulder height. *See* Exhibits 3, B.

17. On March 7, 2016 Respondents filed a Final Admission of Liability (FAL). In the FAL they admitted to an AWW of $340.27. They also admitted to a scheduled impairment rating of 16% of body code 01. Respondents also admitted to TTD from 9/14/15 through 11/29/15 and from 12/4/15 through 12/6/15 at a rate of $226.85 per week. *See* Exhibit A.

18. Claimant testified credibly at hearing. Claimant missed time from work at both Kohl's and Employer due to his surgery. Claimant continues to have pain in his right shoulder that interferes with sleeping, driving, and his work duties. Claimant's right shoulder has pain that travels from his shoulder in three different points and goes up to his neck and back down. Claimant indicated in court the three main points of pain that he feels with use of his right shoulder. Claimant pointed to the front of his right shoulder, the side of his right shoulder, and the backside of his right shoulder leading to his neck. Claimant has pain and limitations from his shoulder injury that go into his neck and that are outside the glenohumeral joint.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance*

Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Scheduled Injury vs. Whole Person Impairment

Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The question of whether the Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Pain and discomfort which limit a Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Claimant bears the burden of establishing functional impairment beyond the arm at the shoulder and the consequent right to permanent partial disability benefits under § 8-42-107(8)(c), C.R.S., by a preponderance of the evidence. *Maestas v. American Furniture Warehouse,* W.C. No. 4-662-369 (June 5, 2007); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005).

In this case Claimant's testimony, substantiated by the medical records, establish that the Claimant is entitled to a whole person medical impairment rating under § 8-42-107(8)(c), C.R.S. Claimant has established that he suffered a functional impairment to a part of the body that is not contained on the schedule of impairment and that his functional impairment extends beyond the "arm at the shoulder." The credible evidence shows that Claimant's shoulder joint itself is impaired. It does not function as it did before Claimant's work injury. Work activities and other activities of daily living cause pain in his arm, shoulder, shoulder joint, upper right back muscles, and cervical area such that he is unable or limited in his ability to engage in actions requiring overhead movement. His impairment has caused him to make adaptations in the performance of his work duties and activities including driving and sleeping. Claimant's testimony is credible and persuasive that he has pain and limitations over areas that are part of his upper right back and into his neck that are not limited to his arm at the shoulder. Claimant's continued pain and limitations in these areas are consistent with the areas shown on MRI to have tendinosis and are also consistent with the surgical procedure that was done and the later injection that was done. NP Hedien noted pain in the upper right area of Claimant's neck and back consistent with his testimony at hearing. PT Wilt noted scapular weakness and a plan to focus on scapular stabilization which is also consistent with Claimant's testimony at hearing. The MRI, the surgery, and the injection all showed indications that the injury was beyond the glenohumeral joint and support Claimant's continued pain and limitation to areas beyond the glenohumeral joint. Accordingly, the ALJ finds that Claimant has established by preponderant evidence that his impairment is not on the schedule of permanent impairments that he is entitled a rating of 10% whole person.

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on her earnings at the time of injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon her AWW on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Earnings from concurrent employment may be included in a claimant's AWW where the injury impairs earning capacity from such employment. *Jefferson County Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

Claimant has established that earnings from his employment at Kohl's are properly included in the determination of his AWW. Claimant had loss of earning capacity from Kohl's due to his work injury. Claimant has established that his AWW from his concurrent employment at Kohl's was $211.27.

For Respondent Employer, Claimant was paid twice per month. In the three months prior to his work injury and from January 1, 2015 through March 31, 2015 Claimant earned gross wages of $4,374.75. These wages were over a 90 day period and amount to an average daily wage of $48.61 which multiplied by 7 days in the week provides an average weekly wage of $340.27. The objective of calculating AWW is to arrive at a fair approximation of Claimant's wage loss due to his injury. Here, in the months immediately preceding his injury, Claimant was earning the wages listed above. Although it is true that prior to January of 2015, Claimant's average gross pay was generally less over each pay period than it was after January of 2015, the wage records have established that Claimant was earning an average weekly wage of $340.27 at the time of his injury. The ALJ concludes that a fair approximation of Claimant's lost earning capacity includes the wages more close in time to his injury and a fair approximation would not include wages earned prior to January 1, 2015 when he was working fewer hours and making less money. At the time of his injury his average weekly wage for Respondent Employer was $340.27. Adding the AWW from his concurrent employment at Kohl's results in an overall AWW at the time of his injury of $551.54.

Temporary Total Disability (TTD)

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*. TTD benefits shall continue until the employee returns to regular or modified employment. *See* § 8-42-105(3)(b), C.R.S.

Claimant is asking for an increase of TTD benefits due to his increased AWW. Claimant has established concurrent employment from Kohl's and an entitlement to an increase in his overall AWW and thus the corresponding TTD benefits for the period of September 14, 2015 through October 17, 2015. Claimant's testimony, substantiated by the medical records, establishes that he had shoulder surgery and was off work completely for a period of time following the surgery while he recovered and was in a sling. However, Claimant has failed to establish a continued entitlement to TTD benefits from October 18, 2015 through November 29, 2015 and has failed to establish an entitlement to TTD benefits from December 4, 2015 through December 6, 2015. TTD benefits continue until an employee returns to regular or modified employment. The wage records submitted show that Claimant returned to employment at Kohl's and earned wages from October 18, 2015 through November 29, 2015 and from December 4, 2015 through December 6, 2015. Claimant failed to demonstrate an entitlement to TTD and an inability to resume his prior work during these periods of time. Although Claimant had restrictions and impairments that prevented him from working for Respondent Employer, he was still able to work for and earn wages from Kohl's and therefore has not established that he was totally disabled from earning wages during these time periods. Thus, Claimant has failed to establish an entitlement to TTD benefits from October 18, 2015 through November 29, 2015 and from December 4, 2015 through December 6, 2015. Claimant has established an entitlement to TTD benefits based on the higher AWW of $551.54 for the period of time covering September 14, 2015 through October 17, 2015.

Temporary Partial Disability

Section 8-42-106, C.R.S. provides that in cases of temporary partial disability, the employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability. Claimant has established an entitlement to TPD from October 18, 2015 through November 29, 2015 and from December 4, 2016 through December 6, 2016. During these periods of time Claimant was recovering from shoulder surgery and from a shoulder injection. Due to his injury, he had the loss/restriction of use of his injured shoulder/arm and had medical restrictions that made him unable to perform his regular employment with Respondent Employer. During this period of time, Claimant was able to work for Kohl's and so was able to earn his normal AWW from Kohl's. However, as he was impaired from earning wages from Respondent Employer, Claimant has established an entitlement to TPD and sixty-six and two-thirds percent of the difference between his AWW at the time of the injury and his AWW during the continuance of the TPD. Here, Claimant has established an entitlement to sixty-six and two-thirds percent of $340.27 (AWW at time of injury of $551.54 minus Kohl's AWW of $211.27 that he continued to earn) for the periods of time covering October 18, 2015 through November 29, 2015 and December 4, 2015 through December 6, 2015.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence an entitlement to a permanent partial disability rating of 10% whole person.

2. Claimant's average weekly wage is $551.54.

3. Claimant has established an entitlement to temporary total disability benefits from 9/14/15 through 10/17/15 at a rate of $367.71 per week. (sixty-six and two-thirds percent of his AWW).

4. Claimant has established an entitlement to temporary partial disability benefits from 10/18/15 through 11/29/15 and from 12/4/15 from 12/6/15 at a rate of $226.85 per week. (sixty-six and two-thirds percent of the difference between his AWW at the time of the injury and the AWW during his TPD).

5. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 29, 2016,

/s/ Michelle E. Jones

____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-964-128-01

ISSUES

- Did Claimant establish by a preponderance of the evidence that he is entitled to permanent partial disability benefits benefits based upon the impairment rating assigned by the Division IME, Timothy Sandell, M.D.

FINDINGS OF FACT

1. The underlying facts in the instant case were not in dispute. Claimant was employed as a truck driver for Employer. He sustained a compensable injury to his left lower extremity on September 17, 2014, while loading acetylene cylinders onto a truck. Claimant testified he was rolling a cylinder with his leg and experienced a burning sensation in his left knee.

2. Evidence related to a prior MRI of Claimant's left knee was admitted hearing. In particular, an x-ray report from Michael Ball, MD related done on May 5, 2006. Dr. Ball found there was no fracture or dislocation, joint spaces of normal with and alignment and a remarkable soft tissues. His impression was: normal knee. A report of the MRI from May 18, 2006 was also admitted, which showed no evidence of chondromalacia patella, but slight myxoid degeneration within the posterior horn of the medial meniscus and anterior cruciate ligament. A vertically oriented tear of the anterior horn of the lateral meniscus with no free meniscal fragment was noted. No other evidence concerning treatment for the left knee was admitted at hearing.

3. Claimant was initially examined by Elizabeth Arrington, M.D. on September 17, 2014, who diagnosed a left knee strain. Claimant was given a prescription for Ibuprofen and a knee immobilizer. Dr. Arrington reexamined Claimant on September 26, 2014 and referred him to an orthopedic surgeon.

4. On September 26, 2014, an MRI was done on Claimant's left knee. The films were read by Jayson Lord, M.D., whose impression was: ACL strain; patellar and quadriceps tendinitis; intact menisci; no fracture was identified, nor were loose bodies present in the joint spaces.

5. Claimant was then evaluated by Michael Simpson, M.D. (an orthopedic surgeon) on October 7, 2014, who diagnosed a possible tear of Claimant's distal quadriceps tendon after reviewing the MRI. Dr. Simpson recommended bracing and platelet rich plasma injections to help with healing.

6. A repeat MRI was performed on December 26, 2014. The MRI films were read by Michael O'Neill, M.D., whose impression was: no significant interval change since prior study; mild chronic tendinosis involving the distal quadriceps tendon and

proximal patellar tendon without tear; small joint effusion; and no meniscal tear. The ALJ concluded the MRI findings constituted objective evidence of Claimant's knee condition and supported the conclusion he sustained a permanent impairment. Claimant received conservative treatment, including physical therapy, but his symptoms continued. Claimant credibly testified he continued to experience symptoms in his left knee and these limited his activities.

7. Claimant returned to Dr. Simpson on January 28, 2015. Dr. Simpson's diagnosis was partial thickness tear of the distal quadriceps tendon with continued tendinitis and surgery was recommended. However, Claimant decided against surgery, as he was concerned about his Crohn's disease and the potential for infection.

8. There was evidence introduced regarding possible somatization and/or psychological issues potentially impacting Claimant's impairment. More particularly, on January 30, 2015, Claimant was evaluated by Scott Primack, M.D. Dr. Primack conducted various psychosocial evaluations to determine whether there were any factors present which would preclude Claimant from achieving a good outcome. Claimant scored a 42 on the Modified Zung Depression Index and an 18 on the Modified Pain Questionnaire, which placed him in the "distressed/depressed" category for psychological functioning. Dr. Primack also noted a significant component of somatization.

9. On February 25, 2015, Claimant was evaluated by Dale Philip Mann, PhD. Dr. Mann administered several psychological evaluations, all of which had valid results. Dr. Mann concluded Claimant was an individual who was experiencing moderate to above average anxiety, moderate to above average depression, high somatic distress and high functional distress. The ALJ was not persuaded these findings impacted Claimant's impairment ratings, as these were based upon range of motion ("ROM") measurements of his left knee.

10. On March 17, 2015, Claimant was seen by Michael Moore, ABDA, PTA, ATC, MA and Ashley Zimmerman, DPT Xcel Physical and Occupational Therapy for a Functional Capacity Evaluation ("FCE"). The results of the evaluation suggested Claimant gave reliable effort, with 20 of 20 consistency measures within expected limits. Claimant displayed ability to perform and tolerate all activities tested, with the exception of crouching and kneeling. Claimant was found to have 121 degrees of flexion, and 14 degrees of extension of the left knee.

11. On March 30, 2015 (thirteen days after the FCE), John Reasoner, M.D. evaluated Claimant for his impairment rating evaluation. Dr. Reasoner confirmed Claimant was at MMI and, using the range of motion measurements obtained from the FCE, assigned a 12% scheduled rating to Claimant's left knee. There was no evidence Dr. Reasoner independently performed ROM measurements on Claimant.

12. Respondents filed a Final Admission of Liability on April 17, 2015, admitting to pay Claimant $6,914.67 in a permanent partial disability (PPD) benefits based on the 12% scheduled rating assigned by Dr. Reasoner.

13. Claimant presented to Dr. Sandell on August 13, 2015 for a DOWC IME. Dr. Sandell agreed that Claimant was at MMI as of March 20, 2015. Dr. Sandell obtained ROM measurements of the left knee, documenting 100 degrees of flexion and 30 degrees of extension. These measurements equal 18% and 17% ratings respectively, and combined for a 35% left lower extremity rating. Dr. Sandell noted that Claimant's range of motion may vary over time, and that Claimant should continue his range of motion exercises to limit his losses.

14. On December 28, 2015, Linda Mitchell, M.D. performed an IME of Claimant on behalf of Respondents. Dr. Mitchell agreed Claimant was at MMI. Dr. Mitchell found Claimant to have 113 degrees of flexion and 15 degrees of extension in the left knee. This equated to a 19% scheduled rating. Dr. Mitchell compared the contralateral joint (right knee) and found the normalized rating for the left knee to be 6%. The ALJ noted there was no evidence admitted at hearing to show that Dr. Mitchell's ROM measurements on the left knee were invalid.

15. Dr. Mitchell testified as an expert in the Occupational Medicine, the specialty in which she is board certified. Dr. Mitchell is Level II accredited pursuant to the WCRP. She testified that she found Claimant had a 6% impairment rating in his left knee. She reached this result by obtaining range of motion measurements for both knees and then normalized (subtracted) the unaffected side from the affected side, which gave the normalized value. When asked to compare her measurements to those of Dr. Sandell, she agreed the range of motion numbers obtained by Dr. Sandell were "significantly worse" than what she obtained. She acknowledged that neither Dr. Reasoner nor Dr. Sandell normalized for the right knee. When asked whether there is any guidance in the AMA *Guides* for dealing with different ratings from different doctors, Dr. Mitchell testified, "I don't know if there's anything in the *AMA Guides*, but the Division must use some guidance".[1] Dr. Mitchell testified it was within the examining doctor's discretion whether to compare the affected joint with a contralateral joint. The DOWC impairment tip sheet involved the example of an obese patient. There was no evidence before the Court that which persuaded the ALJ that the example in the DOWC tip sheet applied in this case.

16. Claimant testified his left knee affects his functioning, including walking up stairs, standing, lifting and walking.

17. Claimant sustained a permanent medical impairment as a result of his industrial injury.

18. The ALJ found Dr. Reasoner's conclusions regarding Claimant's permanent medical impairment to be less persuasive than the other physicians, as he did not perform ROM measurements, but relied upon those done at the FCE.

19. The ALJ found Dr. Sandell's conclusions regarding Claimant's permanent

[1] (Mitchell Deposition 9:6-7).

medical impairment to be less persuasive than Dr. Mitchell's, as he provided scant analysis and/or explanation as to why the rating was vastly higher than Dr. Reasoner's.

20. The ALJ was persuaded by Dr. Mitchell's opinion regarding Claimant's gross impairment rating, as she had the benefit of all of Claimant's treatment records, as well as the ratings done by Dr. Reasoner and Dr. Sandell.

21. The ALJ was not persuaded that the methodology used by Dr. Mitchell to "normalize" Claimant's impairment, by comparing it with the contralateral joint, accurately reflected Claimant's impairment.

22. The ALJ was persuaded that Claimant was entitled to permanency benefits based upon Dr. Mitchell's gross impairment rating.

23. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of the various health care providers who evaluated Claimant's permanent impairment and the basis of these opinions was the focus of the ALJ's review of the evidence admitted at hearing.

Claimant's Impairment Rating

The Workers' Compensation Act classifies work-related injuries as either scheduled or non-scheduled injuries. Scheduled injuries are those listed in § 8-42-107(2). Claimant's impairment rating was determined pursuant to §8-42-107(1)(a) and (2), C.R.S. For a scheduled impairment rating, a party does not have to overcome the Division IME by clear and convincing evidence. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000). Rather, Claimant has the burden of proof to establish his extremity impairment rating.

The ALJ was asked to resolve the discrepancy between the impairment ratings issued by three physicians, Dr. Reasoner, Dr. Sandell, and Dr. Mitchell. As determined in Findings of Fact 14, 20 & 21, the ALJ was persuaded by Dr. Mitchell's findings and her analysis of Claimant's permanent medical impairment (gross). The ALJ utilized the Introduction section for Chapter 2 of the *AMA Guides*[2], which specified:

> "If two physicians using the *Guides* have obtained similar results and reached similar conclusions, a framework exists within which to resolve the discrepancies. Analysis of records and reports will disclose the differences. In such an instance, the differences will be in the clinical findings, which are matters of fact, not opinion; the latter can be verified by further observation of the claimant in accordance with the procedures and methods of the *Guides*…"[3]

When considering the three (3) medical impairment ratings, the ALJ noted all met the validity criteria, as prescribed by the *AMA Guides*. Applying the Introductory Section of Chapter 2, the ALJ considered each rating separately to determine which had the most clinical support. Although Dr. Reasoner's impairment rating was based on a valid FCE, the ALJ notes his evaluation of Claimant was done 13 days after the FCE. There was no evidence in the record that Dr. Reasoner verified the measurements made by the personnel at Xcel Physical and Occupational Therapy. Also, this appears to be the first time he had evaluated Claimant. Thus, the ALJ was not persuaded that Dr. Reasoner's rating most accurately reflected Claimant's permanent impairment. (Finding of Fact 18).

As found, Dr. Sandell's medical impairment rating, while valid numerically, contained very little analysis of why the range of motion measurements differed so greatly from those obtained in the FCE/Dr. Reasoner. (Finding of Fact 19). As such, Dr. Sandell's opinions were not as persuasive to the ALJ. In fact, when applying the principles articulated in Chapter 2 of the introductory section for the AMA Guides, the ALJ was not able to find a clinical explanation in either the medical records or expert testimony as to why Dr. Sandell's rating was so much higher than the rating of either Dr. Mitchell or Dr. Reasoner. Dr. Sandell's explanation, namely, that sometimes there were

[2] *American Medical Association Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised) in effect as of July 1, 1991.

[3] Exhibit K.

variations between range of motion measurements did not illuminate this issue either. (Findings of Fact 13 & 19). Thus, the ALJ concluded Claimant did not meet his burden of proof to establish Dr. Sandell's rating as the rating that most accurately expressed his medical impairment.

Accordingly, the ALJ concluded Dr. Mitchell, who performed the last evaluation and had the benefit of all available medical records (including both prior ratings) was able to accurately assess Claimant's medical impairment. (Finding of Fact 20). The ALJ was persuaded that Dr. Mitchell's gross impairment rating for Claimant's left knee-19% was accurate because the range of motion measurements were more in line with Dr. Reasoner's findings and the FCE, as opposed to Dr. Sandell's. The ROM findings on flexion and extension provided support for the conclusion that these measurements most accurately assessed Claimant's overall impairment.

In reaching this conclusion, the ALJ was not persuaded by all of Dr. Mitchell's opinions. The ALJ was not persuaded Claimant's medical impairment rating should be reduced by the "normalizing" method employed by Dr. Mitchell. (Finding of Fact 21). As Dr. Mitchell admitted, the *AMA Guides* do not necessarily provide for normalizing impairment ratings with an asymptomatic contralateral body part. Dr. Mitchell testified normalizing might be provided for in the DOWC guidelines, but other than the tip sheet, no authority was cited to provide support for this contention. (Finding of Fact 15). There was insufficient evidence introduced at hearing that subtracting Claimant's ROM in the left knee from that of the right leg was an appropriate measure of Claimant's impairment. Accordingly, Dr. Mitchell's testimony did not persuade the ALJ that subtracting the rating from the contralateral joint was proper. (Finding of Fact 21). Further, no legal authority was provided to the Court by Respondents to support this methodology.

Therefore, the ALJ concluded the proper measure of Claimant's medical impairment rating was Dr. Mitchell's gross impairment rating of 19%, based upon valid range of motion measurements made at the time of the IME. (Finding of Fact 22). Claimant is therefore entitled to permanent partial disability benefits based upon Dr. Mitchell's (gross) lower extremity impairment rating.

ORDER

It is therefore ordered that:

1. Claimant is entitled to permanent partial disability benefits based upon the 19% lower extremity impairment rating issued by Dr. Mitchell.

2. Respondents shall pay PPD benefits based on Dr. Mitchell's gross impairment rating.

3. Respondents are entitled to a credit for PPD benefits previously paid.

4. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 29, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether Claimant is entitled to temporary partial or temporary total disability benefits beyond those admitted in the July 6, 2015 Amended Final Admission of Liability;

- Whether Claimant's left shoulder injury resulted in functional impairment beyond that found in the schedule of impairments or whether Claimant's impairment is limited to his left upper extremity; and

- Whether Claimant is entitled to a disfigurement award.

FINDINGS OF FACT

1. Claimant was born December 6, 1949, and was 66 years of age at the time of the hearing.

2. Claimant worked for the Employer as an ATM technician.

3. On January 29, 2014, Claimant suffered an injury while in the course and scope of his employment when he slipped on some ice and fell backwards landing on his back and left side.

4. The Respondents admitted liability for the injury.

5. Claimant first sought treatment for his left shoulder injury on January 29, 2014. Darla Draper, M.D., at Concentra examined the Claimant. Dr. Draper's assessment was contusion of left shoulder and contusion of back secondary to mechanical fall. She restricted Claimant from working the rest of the day and the next day. Dr. Draper then released the Claimant to return on January 31, 2014 with restrictions of no lifting, pushing, or pulling greater than 10 pounds with the right upper extremity; no bending, squatting, or kneeling; may change positions as needed; should be sitting 50% of the time; unable to drive company vehicle; no use of the left upper extremity; and must wear arm sling.

6. Respondents offered Claimant modified duty and he accepted modified duty beginning January 31, 2014. Claimant worked the modified duty job through May 4, 2014 before undergoing shoulder surgery on May 5, 2014.

7. Claimant was restricted from working beginning on May 5 through May 18, 2014. Respondents admitted for TTD from May 5, 2014, through May 18, 2014. The

admitted average weekly wage was $909.01. Claimant does not challenge the admitted AWW.

8. Claimant returned to work on modified duty beginning on May 19, 2014.

9. Claimant submitted paystubs showing the following earnings from the date of the injury in this claim to September 24, 2014, the date of injury in his other claim:

- 1/20/14 – 2/2/14: $1,711.81
- 2/3/14 – 2/16/14: $1,364.89
- 2/17/14 – 3/2/14: $1,488.30
- 3/3/14 – 3/16/14: $1,533.56
- 3/17/14 – 3/30/14: $1,508.93
- 3/31/14 – 4/13/14: $1,632.09
- 4/14/14 – 4/27/14: $1,463.40
- 4/28/14 – 5/11/14: $1,306.90
- 5/12/14 – 5/25/14: $767.70
- 5/26/14 – 6/8/14: $1,477.45
- 6/9/14 – 6/22/14: $1,432.53
- 6/23/14 – 7/6/14: $1,301.43
- 7/7/14 – 7/20/14: $1,482.63
- 8/4/14 – 8/17/14: $1,621.90
- 8/18/14 – 8/31/14: $1,458.98
- 9/1/14 – 9/14/14: $1,459.08
- 9/15/14 – 9/28/14: $1,186.87

10. Claimant has failed to prove he is entitled to TPD benefits for the following time periods: 4/28/14 – 5/11/14, 5/12/14 – 5/25/14, and 7/21/14 – 8/3/14. Claimant received TTD benefits for part of the 4/28/14 – 5/11/14 and 5/12/14 – 5/25/14 pay periods. It is not possible to calculate TPD for those periods based on the evidence submitted. Claimant did not submit a paystub for the pay period 7/21/14 – 8/3/14. Claimant has failed to prove he is entitled to TPD benefits for the 7/21/14 – 8/3/14 pay period.

11. Claimant credibly testified at hearing that he was unable to work his regular job duties and worked fewer hours from his date of injury until his surgery. He explained that on modified duty, he worked only eight hours per day whereas prior to the left shoulder injury he often averaged 10-11 hours per day. As such, Claimant sustained wage loss causally related to his admitted left shoulder injury.

12. Claimant has established a wage loss for the remaining 15 pay periods in the amount of $5,146.45 ($27,270.30 minus $22,123.85).

13. Claimant did not return to work with Employer after September 24, 2014. Claimant was off work from September 25, 2014 until he was placed at maximum medical improvement on March 12, 2015. At all relevant times while Claimant was off

work, he had work-restrictions involving his left shoulder.

14. Claimant was receiving weekly TTD benefits under his work-related right shoulder injury in the amount of $464.43.

15. As referenced above, on May 5, 2014, Claimant underwent a left shoulder arthroscopy with biceps tenotomy, shoulder debridement, and manipulation under anesthesia performed by Dr. Cary Motz. The post-operative assessment was massive irreparable left rotator cuff tear and left biceps tendon rupture. Claimant now does not have an intact supraspinatus or infraspinatus tendon in his left shoulder.

16. On March 12, 2015, Dr. Motz examined the Claimant. Dr. Motz noted that Claimant's left shoulder pain "does not radiate" and "discomfort does not interfere with sleep and is not present at rest. The patient denies any additional symptoms." He noted Claimant's pain was aggravated with left arm activity. Dr. Motz again noted Claimant's cervical spine/neck range of motion was "full painless arc of motion in all planes." Dr. Motz noted mild shoulder girdle atrophy present.

17. Dr. Motz determined that Claimant reached maximum medical improvement (MMI) on March 12, 2015 with permanent restrictions as set forth above. Dr. Motz issued a 18% permanent impairment rating of Claimant's left upper extremity, which converted to 11% whole person.

18. Respondents filed a Final Admission of Liability (FAL) admitting to the 18% left upper extremity rating. Claimant objected to the FAL and noted that an application for hearing had already been filed.

19. On September 24, 2014, Claimant sustained a right shoulder injury, which is the subject of another claim. The Respondents admitted for TTD for the period of September 25, 2014, through July 1, 2015. But for the right shoulder claim, Claimant would have continued to work modified duty.

20. On November 3, 2014, Claimant underwent a right shoulder arthroscopy with arthroscopic rotator cuff repair, arthroscopic biceps tenodesis, arthroscopic subacromial decompression, and manipulation under anesthesia.

21. On February 12, 2015, Dr. Motz examined Claimant regarding his right shoulder post-op condition. He noted Claimant's cervical spine/neck ROM was "full painless arc of motion in all planes." Dr. Motz recommended physical therapy for the right shoulder and commented that Claimant was at MMI for the left shoulder.

22. Jorge Klajnbart, D.O., performed an independent medical examination of Claimant at Respondents' request on December 30, 2015, and issued a report on January 6, 2016. Claimant reported pain and popping in his left shoulder during normal everyday activities. His pain ranges from 0 to 6 out of 10. Claimant reported difficulty extending his left arm out or especially with any weight. Claimant reported aching primarily in the anterior shoulder and some numbness into the palm of his left hand with no neck pain.

23. Dr. Klajnbart observed supraspinatus and infraspinatus fossa atrophy. Dr. Klajnbart provided impairment for weakness of the supraspinatus and infraspinatus, as well as range of motion loss to arrive at the 23% left upper extremity rating.

24. Dr. Klajnbart noted that Claimant had "full active pain (sic) with cervical range of motion." Dr. Klajnbart explained at his deposition that this should have read "full, active, painless range of motion." Dr. Klajnbart opined, "There is no functional impairment proximal to the arm at the shoulder."

25. Claimant solicited an independent medical examination performed by John S. Hughes, M.D. Dr. Hughes examined the Claimant, took a history from him and reviewed his medical records. Dr. Hughes issued a report on March 14, 2016. Dr. Hughes opined Claimant had left shoulder arthritis and shoulder girdle regional muscular atrophy, post arthroscopic extensive debridement, biceps tenotomy and manipulation under anesthesia done by Dr. Motz on May 5, 2014. Dr. Hughes also opined Claimant has residual left-sided trapezius hypertonicity with measurable decreases in right lateral flexion of the cervical spine.

26. Dr. Hughes performed a physical examination of the cervical spine noting posterior trapezius hypertonicity, worse on left than right. Dr. Hughes also tested Claimant's range of motion in his cervical spine which displayed reduced lateral flexion on the right as compared to the left. Dr. Hughes noted supraspinatus and infraspinatus atrophy on the left side. Dr. Hughes issued a 24% left upper extremity rating based upon range of motion loss and substantial loss in strength of the supraspinatus and infraspinatus musculature.

27. Dr. Hughes opined that he disagreed that Claimant suffered no "loss of function beyond the region of the arm into more proximal regions of the musculoskeletal system." Dr. Hughes reiterated the well-documented muscular imbalances sustained by Claimant over his left shoulder girdle, hypertonicity and dyskinesis of the left trapezius musculature and measurably documented impairment of cervical lateral flexion when performed actively with dual inclinometers.

28. Dr. Klajnbart testified by deposition on July 13, 2016. Dr. Klajnbart is board-certified in orthopedic surgery and is Level-II accredited by the Colorado Division of Workers' Compensation. Dr. Klajnbart was offered and accepted as a medical expert. Dr. Klajnbart testified to his opinion that Claimant's left shoulder injury did not cause functional impairment proximal to the arm at the shoulder. Dr. Klajnbart testified Claimant had full, active, painless range of motion in his cervical spine during his examination of Claimant. Dr. Klajnbart described his examination of a patient's active cervical range of motion. He stated that if a patient goes through the range of motion pain-free, that's how he documents it and goes no further, meaning he does not use a dual inclinometer to measure the range of motion. Dr. Klajnbart testified Claimant complained of no neck pain and the physical examination was normal. Dr. Klajnbart also noted that Dr. Motz documented full painless arc of motion in all planes of Claimant's cervical spine on September 11, 2014, October 9, 2014, February 12, 2015, and March 12, 2015. Dr. Klajnbart further testified that he found no left-sided trapezius hypertonicity

upon examination and none was noted by Dr. Motz. Dr. Klajnbart, however, observed that Claimant displayed supraspinatous and infraspinatous fossa atrophy located above and below his scapula/shoulder blade and that it was medically probably that Claimant’s atrophy was getting worse since he was placed at MMI.

29. Claimant testified at hearing that he is left handed. Claimant credibly testified that he continues to have pain and loss of function involving his left shoulder with activity. Claimant demonstrated his range of motion upon direct examination. Claimant credibly testified to pain and limitation proximal to the glenohumeral joint with range of motion and activities.

30. The ALJ observed that Claimant has a surgical scar approximately ½-inch long and indented on the front of his left shoulder; obvious muscle atrophy and loss of muscle involving the area between Claimant’s scapula, trapezius and left shoulder in the back, and left pectoral and left shoulder in the front. Claimant displayed asymmetry between the muscle tone in his right and left shoulder girdles including a described loss of the left scapula. Claimant did not have this atrophy prior to his injury of January 29, 2014. Claimant has sustained a serious permanent disfigurement to areas of his body normally exposed to public view as a result of his work injury.

CONCLUSIONS OF LAW

General Conclusions

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57

P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

Temporary Partial/Temporary Total Disability

4. To establish entitlement to temporary disability benefits, an employee must prove that the industrial injury, or occupational disease, has caused a "disability," and that he/she suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S. (2009); *PDM Molding, Inc. v. Stanburg*, 898 P.2d 542, 546 (Colo. 1995). The term "disability," as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or reduction of bodily function. "Disability" connotes both medical incapacity and restrictions to bodily function.

5. Claimant has failed to prove he is entitled to TPD benefits for the following time periods: 4/28/14 – 5/11/14, 5/12/14 – 5/25/14, and 7/21/14 – 8/3/14. Claimant received TTD benefits for part of the 4/28/14 – 5/11/14 and 5/12/14 – 5/25/14 pay periods. It is not possible to calculate TPD for those periods based on the evidence submitted. Claimant did not submit a paystub for the pay period 7/21/14 – 8/3/14. Claimant has failed to prove he is entitled to TPD benefits for the 7/21/14 – 8/3/14 pay period.

6. Claimant has established a wage loss for the remaining 15 pay periods. For the other 15 pay periods, Claimant has proven he is entitled to total TPD benefits in the amount of $5,146.45 ($27,270.30 minus $22,123.85). To the extent Claimant seeks additional TTD benefits under this claim, he has failed to prove that he would be entitled to any additional wage loss benefits other than the $5,146.45 in TPD.

7. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751, 753 (Colo. App. 1988). If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant's condition is severed. *See Post Printing & Publishing Co. v. Erickson*, 94 Colo. 382, 384, 30 P.2d 327, 328 (1934); *Vargus v. United Parcel Service*, W.C. No. 4-325-149 at 3 (ICAO Aug. 29, 2002); *Vandenberg v. Ames Construction*, W.C. No. 4-388-883 at 4 (ICAO Dec. 5, 2007).

8. Claimant has failed to prove entitlement to additional temporary disability benefits under his left shoulder claim for any period of time after he sustained his right shoulder injury on September 24, 2014. After September 24, 2014, Claimant was unable to work due to a new industrial injury not because of his left shoulder injury. The causal connection between the left shoulder injury and Claimant's subsequent wage loss beginning on September 24, 2014 was, therefore, severed. Claimant has cited to persuasive authority that would allow an award of TPD under one claim following a subsequent separate industrial injury for which he was receiving TTD. As such, Claimant's claim for TPD following September 24, 2014 is denied.

Permanent Partial Disability

9. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The question of whether the Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 893 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996).

10. Pain and discomfort which limit a Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. See *Langton v. Rocky Mountain Healthcare Corp.*, *supra*; *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996).

11. Claimant has proven by a preponderance of the evidence that the situs of his functional impairment extends beyond the "arm at the shoulder." The credible evidence shows that Claimant's left shoulder joint itself is impaired. It does not function as it did before Claimant's work injury. Thus, the situs of the functional impairment is the shoulder joint, which is not on the schedule of injuries. The mere fact that the shoulder joint affects arm mobility does not mean Claimant sustained only a "loss of arm at the shoulder." In addition, whether Claimant had neck symptoms resulting from his left shoulder injury is only one factor to consider. Claimant credibly testified that he is left handed. He continues to have pain and loss of function involving his left shoulder with activity. Claimant demonstrated his range of motion upon direct examination. Claimant credibly testified to pain and limitation proximal to the glenohumeral joint with range of motion and activities. Accordingly, Claimant's impairment is not on the schedule of permanent impairment.

Disfigurement

12. As a result of Claimant's left shoulder work-related injury, he has a visible disfigurement to the body consisting of has surgical scar approximately ½-inch long and indented on the front of his left shoulder; Claimant displayed obvious muscle atrophy and loss of muscle involving the area between Claimant's scapula, trapezius and left shoulder in the back, and left pectoral and left shoulder in the front. An asymmetry between the muscle tone of Claimant's right and left shoulder girdles was observed, including a described loss of Claimant's left scapula. Claimant has sustained a serious permanent disfigurement to areas of his body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S. Insurer shall pay Claimant $1,700.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant $5,146.45 in temporary partial disability benefits.

2. Claimant's request for additional temporary total benefits is denied and dismissed.

3. Claimant's request for temporary partial disability benefits for any period following his September 24, 2014 work-related injury is denied and dismissed.

4. Claimant's request to convert the scheduled rating of his shoulder to a whole person rating and award PPD benefits based on the whole person rating is granted. Respondents shall pay Claimant a PPD award consistent with the 11% whole person impairment rating assigned by Dr. Motz.

5. Respondents shall pay Claimant $1,700.00 for disfigurement pursuant to § 8-42-108 (1), C.R.S.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 27, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant establish by a preponderance of the evidence that he is entitled to permanent partial disability benefits benefits based upon the impairment rating assigned by the Division IME, Timothy Sandell, M.D.

FINDINGS OF FACT

1. The underlying facts in the instant case were not in dispute. Claimant was employed as a truck driver for Employer. He sustained a compensable injury to his left lower extremity on September 17, 2014, while loading acetylene cylinders onto a truck. Claimant testified he was rolling a cylinder with his leg and experienced a burning sensation in his left knee.

2. Evidence related to a prior MRI of Claimant's left knee was admitted hearing. In particular, an x-ray report from Michael Ball, MD related done on May 5, 2006. Dr. Ball found there was no fracture or dislocation, joint spaces of normal with and alignment and a remarkable soft tissues. His impression was: normal knee. A report of the MRI from May 18, 2006 was also admitted, which showed no evidence of chondromalacia patella, but slight myxoid degeneration within the posterior horn of the medial meniscus and anterior cruciate ligament. A vertically oriented tear of the anterior horn of the lateral meniscus with no free meniscal fragment was noted. No other evidence concerning treatment for the left knee was admitted at hearing.

3. Claimant was initially examined by Elizabeth Arrington, M.D. on September 17, 2014, who diagnosed a left knee strain. Claimant was given a prescription for Ibuprofen and a knee immobilizer. Dr. Arrington reexamined Claimant on September 26, 2014 and referred him to an orthopedic surgeon.

4. On September 26, 2014, an MRI was done on Claimant's left knee. The films were read by Jayson Lord, M.D., whose impression was: ACL strain; patellar and quadriceps tendinitis; intact menisci; no fracture was identified, nor were loose bodies present in the joint spaces.

5. Claimant was then evaluated by Michael Simpson, M.D. (an orthopedic surgeon) on October 7, 2014, who diagnosed a possible tear of Claimant's distal quadriceps tendon after reviewing the MRI. Dr. Simpson recommended bracing and platelet rich plasma injections to help with healing.

6. A repeat MRI was performed on December 26, 2014. The MRI films were read by Michael O'Neill, M.D., whose impression was: no significant interval change since prior study; mild chronic tendinosis involving the distal quadriceps tendon and

proximal patellar tendon without tear; small joint effusion; and no meniscal tear. The ALJ concluded the MRI findings constituted objective evidence of Claimant's knee condition and supported the conclusion he sustained a permanent impairment. Claimant received conservative treatment, including physical therapy, but his symptoms continued. Claimant credibly testified he continued to experience symptoms in his left knee and these limited his activities.

7. Claimant returned to Dr. Simpson on January 28, 2015. Dr. Simpson's diagnosis was partial thickness tear of the distal quadriceps tendon with continued tendinitis and surgery was recommended. However, Claimant decided against surgery, as he was concerned about his Crohn's disease and the potential for infection.

8. There was evidence introduced regarding possible somatization and/or psychological issues potentially impacting Claimant's impairment. More particularly, on January 30, 2015, Claimant was evaluated by Scott Primack, M.D. Dr. Primack conducted various psychosocial evaluations to determine whether there were any factors present which would preclude Claimant from achieving a good outcome. Claimant scored a 42 on the Modified Zung Depression Index and an 18 on the Modified Pain Questionnaire, which placed him in the "distressed/depressed" category for psychological functioning. Dr. Primack also noted a significant component of somatization.

9. On February 25, 2015, Claimant was evaluated by Dale Philip Mann, PhD. Dr. Mann administered several psychological evaluations, all of which had valid results. Dr. Mann concluded Claimant was an individual who was experiencing moderate to above average anxiety, moderate to above average depression, high somatic distress and high functional distress. The ALJ was not persuaded these findings impacted Claimant's impairment ratings, as these were based upon range of motion ("ROM") measurements of his left knee.

10. On March 17, 2015, Claimant was seen by Michael Moore, ABDA, PTA, ATC, MA and Ashley Zimmerman, DPT Xcel Physical and Occupational Therapy for a Functional Capacity Evaluation ("FCE"). The results of the evaluation suggested Claimant gave reliable effort, with 20 of 20 consistency measures within expected limits. Claimant displayed ability to perform and tolerate all activities tested, with the exception of crouching and kneeling. Claimant was found to have 121 degrees of flexion, and 14 degrees of extension of the left knee.

11. On March 30, 2015 (thirteen days after the FCE), John Reasoner, M.D. evaluated Claimant for his impairment rating evaluation. Dr. Reasoner confirmed Claimant was at MMI and, using the range of motion measurements obtained from the FCE, assigned a 12% scheduled rating to Claimant's left knee. There was no evidence Dr. Reasoner independently performed ROM measurements on Claimant.

12. Respondents filed a Final Admission of Liability on April 17, 2015, admitting to pay Claimant $6,914.67 in a permanent partial disability (PPD) benefits based on the 12% scheduled rating assigned by Dr. Reasoner.

13. Claimant presented to Dr. Sandell on August 13, 2015 for a DOWC IME. Dr. Sandell agreed that Claimant was at MMI as of March 20, 2015. Dr. Sandell obtained ROM measurements of the left knee, documenting 100 degrees of flexion and 30 degrees of extension. These measurements equal 18% and 17% ratings respectively, and combined for a 35% left lower extremity rating. Dr. Sandell noted that Claimant's range of motion may vary over time, and that Claimant should continue his range of motion exercises to limit his losses.

14. On December 28, 2015, Linda Mitchell, M.D. performed an IME of Claimant on behalf of Respondents. Dr. Mitchell agreed Claimant was at MMI. Dr. Mitchell found Claimant to have 113 degrees of flexion and 15 degrees of extension in the left knee. This equated to a 19% scheduled rating. Dr. Mitchell compared the contralateral joint (right knee) and found the normalized rating for the left knee to be 6%. The ALJ noted there was no evidence admitted at hearing to show that Dr. Mitchell's ROM measurements on the left knee were invalid.

15. Dr. Mitchell testified as an expert in the Occupational Medicine, the specialty in which she is board certified. Dr. Mitchell is Level II accredited pursuant to the WCRP. She testified that she found Claimant had a 6% impairment rating in his left knee. She reached this result by obtaining range of motion measurements for both knees and then normalized (subtracted) the unaffected side from the affected side, which gave the normalized value. When asked to compare her measurements to those of Dr. Sandell, she agreed the range of motion numbers obtained by Dr. Sandell were "significantly worse" than what she obtained. She acknowledged that neither Dr. Reasoner nor Dr. Sandell normalized for the right knee. When asked whether there is any guidance in the AMA *Guides* for dealing with different ratings from different doctors, Dr. Mitchell testified, "I don't know if there's anything in the *AMA Guides*, but the Division must use some guidance".[1] Dr. Mitchell testified it was within the examining doctor's discretion whether to compare the affected joint with a contralateral joint. The DOWC impairment tip sheet involved the example of an obese patient. There was no evidence before the Court that which persuaded the ALJ that the example in the DOWC tip sheet applied in this case.

16. Claimant testified his left knee affects his functioning, including walking up stairs, standing, lifting and walking.

17. Claimant sustained a permanent medical impairment as a result of his industrial injury.

18. The ALJ found Dr. Reasoner's conclusions regarding Claimant's permanent medical impairment to be less persuasive than the other physicians, as he did not perform ROM measurements, but relied upon those done at the FCE.

19. The ALJ found Dr. Sandell's conclusions regarding Claimant's permanent

[1] (Mitchell Deposition 9:6-7).

medical impairment to be less persuasive than Dr. Mitchell's, as he provided scant analysis and/or explanation as to why the rating was vastly higher than Dr. Reasoner's.

20. The ALJ was persuaded by Dr. Mitchell's opinion regarding Claimant's gross impairment rating, as she had the benefit of all of Claimant's treatment records, as well as the ratings done by Dr. Reasoner and Dr. Sandell.

21. The ALJ was not persuaded that the methodology used by Dr. Mitchell to "normalize" Claimant's impairment, by comparing it with the contralateral joint, accurately reflected Claimant's impairment.

22. The ALJ was persuaded that Claimant was entitled to permanency benefits based upon Dr. Mitchell's gross impairment rating.

23. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of the various health care providers who evaluated Claimant's permanent impairment and the basis of these opinions was the focus of the ALJ's review of the evidence admitted at hearing.

Claimant's Impairment Rating

The Workers' Compensation Act classifies work-related injuries as either scheduled or non-scheduled injuries. Scheduled injuries are those listed in § 8-42-107(2). Claimant's impairment rating was determined pursuant to §8-42-107(1)(a) and (2), C.R.S. For a scheduled impairment rating, a party does not have to overcome the Division IME by clear and convincing evidence. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000). Rather, Claimant has the burden of proof to establish his extremity impairment rating.

The ALJ was asked to resolve the discrepancy between the impairment ratings issued by three physicians, Dr. Reasoner, Dr. Sandell, and Dr. Mitchell. As determined in Findings of Fact 14, 20 & 21, the ALJ was persuaded by Dr. Mitchell's findings and her analysis of Claimant's permanent medical impairment (gross). The ALJ utilized the Introduction section for Chapter 2 of the *AMA Guides*[2], which specified:

> "If two physicians using the *Guides* have obtained similar results and reached similar conclusions, a framework exists within which to resolve the discrepancies. Analysis of records and reports will disclose the differences. In such an instance, the differences will be in the clinical findings, which are matters of fact, not opinion; the latter can be verified by further observation of the claimant in accordance with the procedures and methods of the *Guides*…"[3]

When considering the three (3) medical impairment ratings, the ALJ noted all met the validity criteria, as prescribed by the *AMA Guides*. Applying the Introductory Section of Chapter 2, the ALJ considered each rating separately to determine which had the most clinical support. Although Dr. Reasoner's impairment rating was based on a valid FCE, the ALJ notes his evaluation of Claimant was done 13 days after the FCE. There was no evidence in the record that Dr. Reasoner verified the measurements made by the personnel at Xcel Physical and Occupational Therapy. Also, this appears to be the first time he had evaluated Claimant. Thus, the ALJ was not persuaded that Dr. Reasoner's rating most accurately reflected Claimant's permanent impairment. (Finding of Fact 18).

As found, Dr. Sandell's medical impairment rating, while valid numerically, contained very little analysis of why the range of motion measurements differed so greatly from those obtained in the FCE/Dr. Reasoner. (Finding of Fact 19). As such, Dr. Sandell's opinions were not as persuasive to the ALJ. In fact, when applying the principles articulated in Chapter 2 of the introductory section for the AMA Guides, the ALJ was not able to find a clinical explanation in either the medical records or expert testimony as to why Dr. Sandell's rating was so much higher than the rating of either Dr. Mitchell or Dr. Reasoner. Dr. Sandell's explanation, namely, that sometimes there were

[2] *American Medical Association Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised) in effect as of July 1, 1991.

[3] Exhibit K.

variations between range of motion measurements did not illuminate this issue either. (Findings of Fact 13 & 19). Thus, the ALJ concluded Claimant did not meet his burden of proof to establish Dr. Sandell's rating as the rating that most accurately expressed his medical impairment.

Accordingly, the ALJ concluded Dr. Mitchell, who performed the last evaluation and had the benefit of all available medical records (including both prior ratings) was able to accurately assess Claimant's medical impairment. (Finding of Fact 20). The ALJ was persuaded that Dr. Mitchell's gross impairment rating for Claimant's left knee-19% was accurate because the range of motion measurements were more in line with Dr. Reasoner's findings and the FCE, as opposed to Dr. Sandell's. The ROM findings on flexion and extension provided support for the conclusion that these measurements most accurately assessed Claimant's overall impairment.

In reaching this conclusion, the ALJ was not persuaded by all of Dr. Mitchell's opinions. The ALJ was not persuaded Claimant's medical impairment rating should be reduced by the "normalizing" method employed by Dr. Mitchell. (Finding of Fact 21). As Dr. Mitchell admitted, the *AMA Guides* do not necessarily provide for normalizing impairment ratings with an asymptomatic contralateral body part. Dr. Mitchell testified normalizing might be provided for in the DOWC guidelines, but other than the tip sheet, no authority was cited to provide support for this contention. (Finding of Fact 15). There was insufficient evidence introduced at hearing that subtracting Claimant’s ROM in the left knee from that of the right leg was an appropriate measure of Claimant’s impairment. Accordingly, Dr. Mitchell’s testimony did not persuade the ALJ that subtracting the rating from the contralateral joint was proper. (Finding of Fact 21). Further, no legal authority was provided to the Court by Respondents to support this methodology.

Therefore, the ALJ concluded the proper measure of Claimant's medical impairment rating was Dr. Mitchell's gross impairment rating of 19%, based upon valid range of motion measurements made at the time of the IME. (Finding of Fact 22). Claimant is therefore entitled to permanent partial disability benefits based upon Dr. Mitchell's (gross) lower extremity impairment rating.

ORDER

It is therefore ordered that:

1. Claimant is entitled to permanent partial disability benefits based upon the 19% lower extremity impairment rating issued by Dr. Mitchell.

2. Respondents shall pay PPD benefits based on Dr. Mitchell’s gross impairment rating.

3. Respondents are entitled to a credit for PPD benefits previously paid.

4. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 29, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-979-296-02

ISSUES

- Whether Claimant established by a preponderance of the evidence, that he sustained a compensable injury arising out of and in the course and scope of his employment on or around March 14, 2015.

- Whether the Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) from March 4, 2015 through January 5, 2016.

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable, necessary, and medical treatment stemming from the March 14, 2015 alleged injury, including repayment by Respondents to Claimant's private health insurance carrier in the amount of $20,669.50.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant began working for Employer as an emergency response technician in March, 2014. His job required him to have a class A CDL license, which he would use to haul equipment to and from sites where trains have derailed. When he arrived at job sites, Claimant assembled equipment and assisted in clearing train tracks. Claimant's regular work schedule was Monday through Friday, 8:00 a.m. to 5:00 p.m. He was on-call to respond to emergencies twenty four hours a day every day and when called would respond to the site as quickly as possible.

2. Claimant testified that there was often downtime at these jobsites while he and coworkers waited for railroad officials would ensured the tracks were safe to begin work. Claimant testified that downtime could last a few minutes to six hours. During that time, Claimant would sleep sitting up in the cab of the truck.

3. Claimant testified that at derailments, he and his coworkers would often work for a few hours and then move off the tracks to allow for other trains to pass through. While he was working, his activities involved heavy lifting, crawling, and using a welding/cutting torch. During downtime, Claimant and coworkers would sleep in his truck until they were allowed back on the tracks.

4. On March 12, 2015, Employer dispatched Claimant to a train derailment site in Lusk, Wyoming from his residence in Denver, Colorado. He testified that when he arrived at the site, the heavy machinery was working to rip rail cars off the track. Claimant waited in his truck until he could begin working.

5. Claimant began feeling chest pain while working in Lusk, Wyoming. He informed both his main supervisor, Adam Hinkle, and the on-site corporate supervisor about his chest pain. Mr. Hinkle allowed Claimant to rest in his truck for a few hours. Claimant eventually returned to work and worked the entire evening of March 12 and finished the next day at approximately four or five in the afternoon. Claimant slept in a motel room on March 13 before traveling home the following day.

6. On March 14, 2015 Claimant presented to Porter Adventist Hospital complaining of chest pain and shortness of breath. Earlier in the week, Claimant had begun feeling isolated left leg pain. An ultrasound of Claimant's left leg revealed a left lower extremity deep vein thrombosis. A CT angiography of Claimant's chest revealed a saddle embolus with thrombus extending into the lower lobes and a left pulmonary infarct. Claimant underwent genetic testing which ruled out hypercoagulability. Claimant was discharged on March 17, 2015. The discharge report reflected Claimant reporting "many hours of prolonged truck driving."

7. On March 19, 2015, Claimant followed up with his PCP, Dr. Stephanie Thomas, a family medicine doctor. Claimant reported that he had recently received his CDL and had been driving long trips over the past six months, and Claimant thought his driving was related to his condition. Based on Claimant's report, Dr. Thomas noted that long driving would predispose Claimant to a blood clot.

8. Claimant returned to Dr. Thomas on April 1, 2015. Dr. Thomas ran another genetic test which was negative. Dr. Thomas opined that, because Claimant did not have a genetic predisposition to blood clotting, his clot was likely related to his extended driving periods at work. Dr. Thomas encouraged Claimant to pursue a workers' compensation claim.

9. On May 7, 2015, Claimant was seen by Dr. Cynthia Rubio at Colorado Urgent Care for evaluation of a potential workers' compensation claim. He reported being a long distance truck driver. "Pt drives a semi truck for a living, often for extended periods of time." Based at least in part on Claimant's reported job, Dr. Rubio checked "yes" indicating that her objective findings were consistent with a work related mechanism of injury/illness. Dr. Rubio referred Claimant to Dr. Updike for treatment.

10. On May 12, 2015, Dr. White at HealthONE Occupational Medicine evaluated Claimant and completed an Initial Evaluation report. Again, Claimant described his job as "having to drive quite long distances, a lot of driving. . . He says he pretty much does a lot of driving." Claimant reported "prolonged driving episodes where sometimes he will be on the road for 15-16 hours in a day." Dr. White opined that Claimant's immobility while driving might have caused his DVT and secondary pulmonary embolism.

11. Respondents retained Dr. Jeffrey Schwartz to perform an Independent Medical Examination. This exam took place on June 10, 2015. Claimant reiterated that his job required extensive traveling, and that he often slept sitting up in the driver's seat of his truck when jobsites were in remote areas. Claimant also reported that his PCP

told him the clots were likely related to his work, but that his occupational medicine doctor had said were likely not related.

12. Dr. Schwartz explained that there are three common causes of blood clots: 1) immobility, 2) trauma, and 3) hypercoagulability. Approximately 25% of blood clots “cannot be attributed to any risk factor” and are known simply as idiopathic. Dr. Schwartz recognized that Claimant does not have a blood disorder making him prone to hypercoagulability, and Claimant did not sustain a trauma shortly preceding the clot. He noted that smoking can be a risk factor, but that Claimant’s smoking would only have resulted in a “very small increased likelihood” of developing the clot. Ultimately, Dr. Schwartz opined that Claimant’s blood clot had no known cause and therefore was idiopathic and not work related. Dr. Schwartz criticized Dr. Thomas’ opinion relating Claimant’s injury to work, describing it as “without scientific basis.”

13. Claimant retained Dr. Edwin Healey to perform an Independent Medical Examination. This exam took place on October 9, 2015. Dr. Healey solicited information from Claimant regarding his extended periods of immobility noting Claimant’s report that he would often sleep sitting up in the cabs of trucks from four to six hours until they were able to return to their job duties. Claimant reported in greater detail than in any of his reports to treatment providers that the sleeping conditions were in a “cramped cab,” sitting, with pressure on his left posterior distal thigh and calf with the seat. Claimant reported sleeping with his leg bent over the seat with it being almost impossible to stretch out. Around the time of the incident, Claimant recalled having to sleep in the cab of his truck, again in a seated position with the edge of the seat pushed up against his posterior thigh and calf. Claimant reported working shifts lasting between twenty-four and thirty hours. Claimant’s description to Dr. Healy about the position of his legs in the cab was inconsistent with his in-court demonstration of his leg position.

14. On December 7, 2015, Dr. Thomas released the Claimant without restrictions.

15. When asked to demonstrate in court the position of his leg in the truck, Claimant bent his leg approximately thirty degrees from straight. Thus his leg was partially extended and his lower leg was not tucked under his upper leg and was not even perpendicular to his knee.

16. Dr. Healey diagnosed Claimant with a left lower extremity DVT secondary to prolonged immobilization and sleeping in a sitting position in Employer’s truck. He opined, largely based on Claimant’s reports “that the left lower extremity deep venous thrombosis and subsequent venous thromboembolism to [Claimant’s] lungs were causally and directly related to the work activities [Claimant] was performing at the time he had the onset of symptoms.”

17. Dr. Healey reasoned that Claimant had two significant risk factors that were related to his job. First, Claimant had to travel by driving long distances to job sites and then slept in strained ergonomic positions with pressure on the back of his leg, making him more vulnerable to DVTs. Second, the edges of the particular seats that

Claimant would sleep against were hard, placing extra pressure on the calf and thigh, which would increase stasis in the lower extremities, contributing to the DVT. The reports concerning the condition of the seats was subjectively reported by Claimant. Dr. Healey cited DVT risk factors as listed by the National Heart, Lung. And Blood Institute, the Mayo Clinic, the Centers for Disease Control and Prevention, and an E-Medicine DVT review. All the articles upon which Dr. Healey relied are general, informational information written for a lay audience.

18. Claimant testified that he contacted Employer after the incident to inquire about returning to work. Mr. Hinkle informed Claimant that he would have to be "100 percent" before returning to work. While Claimant was on blood thinners it was too dangerous to work in remote areas.

19. In December, 2015, Employer informed Claimant that he could take a physical to determine if he would be able to return to work. However, Claimant already had a new job beginning approximately January 5, 2016.

20. Dr. Schwartz was admitted as an expert in pulmonology. He testified at hearing that the three known causes of DVTs are prolonged immobility, hypercoagulability, and trauma. Approximately 25% of DVTs have no identifiable cause. Dr. Schwartz persuasively testified that a person's physical position can increase the likelihood that they develop DVT. He discussed a large study conducted on people traveling in the economy section of an aircraft. The study concluded that passengers sitting in the economy section for four hours or longer had a very small increased likelihood of developing DVT – 1.5 people in 1,000,000 did so. Dr. Schwartz performed a medical literature search to determine whether the incidence of DVTs in truck drivers had ever been studied. No such study has been performed. The ALJ infers that if truck drivers had a higher rate of DVTs, such a study would more likely than not have been performed. Dr. Schwartz testified that the risk is extraordinarily low with driving because one's knees are partially extended. He clarified that medically important "immobility" applies to bedridden patients with bathroom privileges, as distinguished from Claimant's level of immobility.

21. Robert Brown, Employer's vice president of human resources, testified that it was company policy and a union requirement that drivers be provided hotel accommodations anytime they were away from home for an extended amount of time. His testimony is corroberated by a log of Employer's lodging provisions. He testified that down time is treated as break time and that employees can use that time to walk around, smoke, and socialize. Mr. Brown testified that employees could wait in the truck cabs, and they could nap. However, extended naps at the job site were in violation of the railroad safety board, and it is unlikely that Claimant was allowed to sleep for longer than 30 minutes.

22. Mr. Brown testified that if employees were responding to a catastrophic event, they might work as long as twelve to eighteen hours, but not in excess of that amount because relief crews would be in place by then.

23. Mr. Brown testified that Employer was in compliance with all state and federal regulations regarding the amount of driving performed in one day and safety regulations. The ALJ finds Mr. Brown’s testimony more reliable and less biased that the testimony of Claimant.

24. Employer’s driving logs of Claimant’s time and mileage for the twelve months prior to the incident were admitted as Respondent’s exhibit G. The logs reflect that in the six months prior to the incident, Claimant drove:

September, 2014	1 hour	8 miles
October, 2014	17.5 hours	831 miles
November, 2014	14.5 hours	516 miles
December, 2014	30.5 hours	1105 miles
January, 2015	53 hours	2278 miles
February, 2015	13.5 hours	407 miles, and
March, 2015	17.5 hours	676 miles

25. During the twelve months prior to the incident, Claimant drove more than four hours on only 19 occasions. Of those, Claimant drove more than 8 hours only once, in January, 2015, and no persuasive evidence supports that that drive time was not interrupted by breaks to refuel or for physical comfort which the ALJ reasonably infers occurred.

26. The ALJ finds that the driving logs are the most persuasive evidence of the times and distances Claimant spent driving, are more credible than Claimant’s testimony and reports to his doctors.

27. The ALJ finds Claimant exaggerated to his treatment providers and to Dr. Healey the amount of time he spent driving and that Employer required him to sleep in the truck cab. Claimant’s demonstration in court of his leg position was inconsistent with how he described his leg position to Dr. Healey rendering Dr. Healey’s causation analysis less persuasive. These exaggerations and inconsistencies were used by the treating providers and Dr. Healey in rendering less persuasive their opinions about whether Claimant’s injuries were work related.

28. The ALJ finds Dr. Schwartz’s opinions on relatedness to be most credible and persuasive. His opinions are based on more persuasive medical studies, reasoning, and training and expertise in the relevant area of medicine.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The injured worker has the burden of proof by a preponderance of evidence establishing entitlement to benefits. C.R.S. § 8-43-201 and 8-43-210. *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A "preponderance of evidence" is a quantum of evidence that makes a fact, or facts, more reasonably probable or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to the lay witness apply to the expert witness as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P.254 (1913). The fact finder should consider among other things the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness of a witness' testimony and/or actions, including whether or not the expert opinions are adequately founded upon appropriate research; the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). The fact finder should consider an expert witness' special knowledge, training, experience or research or lack thereof. *See Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959).

Claimant is a poor historian. Claimant's reports to his treatment providers and medical evaluators is not supported by the Employer's driving log. Claimant's testimony about the number of hours he drove exceeded those allowed by the Federal Department of Transportation, was contradicted by the more credible testimony of Employee's witness, and was also not supported by his driving logs.

Additionally, at each appointment, the amount of time he reported he drove increased. For example, by May 12, 2015, two months later after his initial trip to the ER, Claimant reported that his job was "pretty much a lot of long-distance driving" and that he was on the road for 15 to 16 hours in a day. As testified by Mr. Brown and Claimant, drivers are limited to 11 hours of driving per day per the federal safety standards. Additionally, according to his driving log, Claimant never reached the limit imposed by the safety standards. His longest day of driving was less than nine hours.

Claimant also testified that he frequently slept in the cab of his truck for up four to six hours. However, Mr. Brown testified that sleeping on the job site would be a violation of railroad safety regulations and it was unlikely that Claimant took more than an occasional brief nap.

As found, Dr. Schwartz's opinions on relatedness were more credible and persuasive than those of the other doctors. His opinions are based on more persuasive medical studies, reasoning, and training and expertise in the relevant area of medicine.

For a claim to be compensable under the Act, the claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office, supra; Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The mere occurrence of symptoms does not require the conclusion that the conditions of the employment were the cause of the symptoms. *See Chasteen v. King Soopers, Inc.,* W.C. No. 4-445-608 (ICAO April 10, 2008).

Injuries that are purely idiopathic or personal are generally not compensable under the Act. *City of Brighton v. Rodriguez,* 318 P. 3d 496, 503 (Colo. 2014). The major causes of DVT are immobility, trauma, and hypercoagulability. There is no evidence that Claimant experienced trauma or has hypercoagulability. As Dr. Schwartz testified, immobility is usually thought to be hospitalization where an individual is bedridden except for trips to the bathroom. If Claimant's DVT cannot be attributed to immobility, trauma, or hypercoagulability, it is medically probable that his condition is idiopathic which is very common. Twenty-five percent of all DVT occurrences cannot be attributed to any risk factor.

Dr. Healey opined that Claimant's driving and sleeping in a cab were employment risks which caused Claimant's DVT; however, Dr. Healey relied on Claimant's statements and previous histories given to physicians regarding his employment risks. Claimant exaggerated the amount of time he spent driving and sleeping in the cad. To the extent Dr. Healy relied on Claimant's subjective reports, his opinions are not persuasive. The literature states that there is a slight increased risk of DVT when one is immobile for long periods of time. Certainly driving for 15 to 16 hours would be considered remaining immobile for a long period of time. However, Claimant did not drive this amount. Claimant testified that his driving record may be slightly changed in order to comply with federal regulations which prohibited driving more than eleven hour during a twenty-four hour period. However, no persuasive evidence was presented from which to conclude that Claimant's hours ever approached this limit.

Dr. Schwartz testified that Claimant's DVT and resulting blood clot and pulmonary embolism likely developed in the third or fourth week in February. Claimant's driving record shows that he drove 1.5 hours in the third week of February and 3.5 hours in the fourth week of February. One and a half hours was the longest single drive. The literature establishes an extremely small elevated risk of developing a DVT when an individual is immobile for four or more hours. Claimant's relevant driving record does not support a conclusion that his hours driving more likely than not caused his DVT.

Claimant reported to Dr. Healey that he frequently slept in the cab of his truck for four to six hours; however, this testimony contradicts federal railroad safety rules, Claimant's own statements, and Employer's policy. Claimant testified that a hotel was provided to him in Lusk, Wyoming. Additionally, when Claimant reported he was experiencing chest pain to his supervisor, he was told to go to the hotel and rest. Respondents' exhibits show that hotel rooms were provided on January 14, January 27 through 29, February 19, and March 4 through March 13. These dates correspond with times Claimant was working away from home for extended periods of time. Mr. Brown testified that if naps were taken at the job site, they were likely for short periods of time as sleeping on the job site violated railroad safety rules.

Even if Claimant drove and slept in this truck, Claimant's leg position was not likely to increase his risk of developing DVT. In order to develop DVT, as Dr. Schwartz testified, blood must pool in the back of the leg. Blood pools at the back of leg when the calf is at a 90 degree or lesser angle to the thigh. As Claimant demonstrated at hearing, his leg was extended well beyond 90 degrees when he was in the trucks. Even in an awkward, upright sleeping position, Claimant's legs were extended beyond the 90 degree angle necessary to cause DVT.

Based on the totality of the evidence, it is more likely than not that Claimant's condition was idiopathic and not related to his work. Therefore, Claimant's injury is not compensable.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971).

The ALJ credits Claimant's testimony at hearing and finds that Claimant has established by a preponderance of the evidence that all medical treatment he received was reasonable and necessary. However, because Claimant failed to establish that his medical treatment was related to his employment, Respondents are not liable for that treatment.

To prove entitlement to temporary total disability ("TTD") benefits, the claimant must prove: the industrial injury has caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

Because Claimant failed to establish that his injury is related to his employment, Claimant is not entitled to TTD.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim is hereby denied and dismissed as it has been determined to not be compensable.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 4, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

This order addresses the following issues raised for consideration at hearing:

I. Whether Claimant established by a preponderance of the evidence that he is entitled to ongoing temporary total disability (TTD) benefits beginning November 19, 2015?

II. Whether Respondents established by a preponderance of the evidence that Claimant was terminated for cause on November 22, 2015 for violating Employer's no call/no show policy?

III. If Claimant was terminated for cause, whether he established, by a preponderance of the evidence, that his symptoms worsened on March 7, 2016, entitling him to TTD benefits from this date and ongoing?

STIPULATIONS

Prior to the commencement of hearing, the parties reached the following stipulations:

I. The parties stipulated and agreed that Claimant's average weekly wage is $344.66.

II. If it is found that Claimant is not entitled to TTD benefits, Respondents are entitled to an overpayment of $98.47.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Employer is a large potato packing facility which operates two separate packing lines. Hrg CD 1:27:55, 1:31:35. On one production line, Employer turns out single, individually wrapped microwavable potatoes. *Id.* at 1:28:00. On the other line, Employer bags 3, 5, 10, and 15 pound bags of organic potatoes for distribution. *Id.* at 1:28:10.

2. To prepare the organic potato bags for shipping, the potatoes collect in a large "hopper" that drops potatoes into a pre-set bag size; either 3,5,10 or 15 pound

bags *Id.* at 24:30. Once full, the bag falls onto a long conveyor belt. *Id.* at 1:30:50. At the end of the conveyor belt, the bags fall into a master container. *Id.* at 1:31:05. Once twelve bags fill the master container, the master container is prepared for shipment. *Id.* Occasionally, an empty potato bag or loose potatoes fall onto the conveyor belt which need to be removed. *See, e.g.*, *Id.* at 1:48:22.

3. Claimant was hired on August 11, 2015 as a bagger and was supervised by C.J. Dominguez. *Id.* at 24:19, 1:35:23, 1:54:04.

4. On the date Claimant was hired, Tiffani Barnes, Employer's OSHA safety coordinator and payroll and worker's compensation administrator, explained Employer's policies to him. *Id.* at 1:33:14. This explanation included reviewing Employer's handbook and specifically Employer's no call/no show policy. *Id.* at 1:33:14, 1:36:26. Ms. Barnes testified that the no call/no show policy is a policy that automatically terminates employees if they do not call their supervisors or appear for work on three consecutive days. *Id.* at 1:36:34. The employee handbook confirms this testimony and notes that "[a]n absence of three consecutive days without notifying your direct supervisor is job abandonment and is considered voluntary separation of employment." Respondents' Exhibit C 029. Mr. Dominguez testified that he received the same explanation of Employer's no call/no show policy when he was hired. Hrg CD 1:54:12
.

5. Ms. Barnes also testified that she is responsible for enforcing the no call/no show policy and that she has terminated employees for violating this policy. *Id.* at 1:36:56, 1:37:25. Ms. Barnes explained that the no call/no show policy is important to the Employer's business because when an employee unexpectedly misses work Employer's production slows down resulting in overtime hours to compensate for the lost production, in addition to causing uncertainty about whether to hire another employee. *Id.* at 1:37:00, 1:54:55.

6. In her three years as Employer's workers' compensation administrator, Ms. Barnes has been involved with other claims and has facilitated other injured employees in returning to work. *See, e.g.*, *id.* at 1:32:00-1:32:45. She testified that when an employee returns to work with work restrictions, she notifies the supervisor of the work restrictions and ensures that the work restrictions are being followed. *Id.* at 1:32:40. Once she receives a modified duty letter from a doctor, she discusses the letter with the employee, the employee's supervisor, and the plant manager. *Id.* at 1:38:29.

7. Mr. Dominguez has also been involved with returning injured employees to work. *Id.* at 1:53:30. He testified that when an employee is released to return to work, Ms. Barnes provides him with a copy of the employee's work restrictions. *Id.* at 1:53:21.

8. On October 9, 2015 Claimant was counting bags on the conveyor belt
when he reached out with his left hand and felt a "bite" on his left ring finger. The finger had been grabbed and yanked into the machine, twisting it and amputating a portion of

it. Exhibit 2 016-017; Exhibit K 058. That same day, claimant received treatment at the Regional Occupational Medicine Program ("ROMP") clinic. Exhibit E 039.

9. Claimant was off work and receiving temporary disability benefits as a result of his injury when Employer sent a modified duty offer letter to him on November 9, 2015 (Claimant's Exhibit 10, Respondents' Exhibit A).

10. Per the offer letter, Claimant was to begin modified duty on November 18, 2015. Exhibit A 001. The modified job offered claimant $9.00 per hour for 45 hours a week. *Id.* Dr. Susan Geiger of the ROMP clinic approved two tasks for claimant: placing stickers on a tray and counting potatoes. *Id.* at 002.

11. Claimant acknowledged that he received the modified job offer and understood that he was supposed to place stickers on a tray and count potatoes once he returned to work. Hrg CD 29:11; 31:28. The modified duty tasks were defined as follows: 1. "placing stickers on a tray, involves no lifting, standing and use of one hand to attach stickers; 2. "Counting potatoes – counts bags of potatoes (12) as they go into large container. Involves sitting or standing just counting to 12 and verbally lets another employee know this and the other employee rotates the conveyor belt. No lifting or use of hands is involved."

12. Claimant returned to his modified job on November 18. *See, e.g.* Exhibit B 017.

13. Claimant testified that no one directed him to his modified tasks. While Claimant testified that no one directed him regarding his modified duties tasks, Claimant's actions and the testimony of Ms. Barnes and Mr. Dominguez persuades the ALJ that Claimant was aware of and how to perform his modified duties. For example, Claimant testified that when he arrived at work on November 18, 2015, he went immediately to the bagging station to count potatoes, which was one of the two tasks he was released to perform. Hrg CD 33:17; Exhibit A 002. Ms. Barnes testified that she had discussed Claimant's modified duties with him before he returned to work on November 18. Hrg CD 1:38:54. As in the past, Ms. Barnes told Mr. Dominguez about Claimant's work restrictions. *Id.* at 1:51:29, 1:56:18. Mr. Dominguez testified that on November 18, he was responsible for watching claimant and making "sure he was within his work restrictions and he was comfortable with his job." *Id.* at 1:56:08. Mr. Dominguez testified that he spoke with Claimant on November 18 and told him that employer "needed him to sticker trays or to count bags until the doctor lifted the work release." *Id.* at 1:56:45.

14. Claimant testified that he was able to keep up with counting at the bagging station as long as the operator was dropping one bag at a time. However, once the operator increased the speed and started dropping two bags at a time, Claimant explained that the reason he could not count two potato bags at a time was that "sometimes" loose potatoes would fall directly onto the conveyor belt and he could not knock them off when two bags fell. *Id.* at 35:40. Claimant's testimony that he could

perform the counting potato task when one bag fell, but could not perform the task when two bags fell is not credible. Claimant testified that "sometimes" loose potatoes fell directly onto the conveyor belt and Ms. Barnes testified that "occasionally" a loose bag or loose potatoes fell onto the conveyor belt which the potato counter would have to remove from the belt. *Id.* at 35:40, 1:31:20, 1:48:22. The loose potatoes usually fall off the conveyor belt by themselves, without the aid of the potato counter. *Id.* at 1:48:22. Consequently, the ALJ finds that if loose potatoes only fell onto the conveyor belt occasionally, there would only be an occasional need to remove the empty bags or loose potatoes whether one bag or two were being dropped.

15. Because Claimant could not keep up counting if two bags were dropped simultaneously, the operator returned to dropping one bag at a time. Mr. Dominguez, as floor supervisor, instructed the operator to run the machine dropping two bags at a time. Claimant could not keep up at the two bag pace. Accordingly he was instructed by Mr. Dominguez to "go clean up"; although Claimant testified that he was not given a specific job.

16. Mr. Dominguez and Ms. Barnes rebutted Claimant's testimony that counting potatoes when two bags fell required the use of two hands. Ms. Barnes testified that although an employee could use two hands to count potatoes, the task only requires the use of one hand. *Id.* at 1:48:30-46. Ms. Barnes also testified that even though thirty-seven bags a minute drop onto the conveyor belt, employees who use one arm to count potatoes do not have a problem keeping pace with the bags. *Id.* at 1:50:49. Mr. Dominguez testified that counting potatoes could be performed with one hand or even one arm, and the job is so physically effortless that it can be performed sitting down. *Id.* at 1:58:20. The ALJ finds the testimony of Ms. Barns and Mr. Dominguez regarding the physical capacity necessary to count potatoes more persuasive that the contrary testimony of Claimant.

Claimant followed the direction of Mr. Dominguez and moved onto a table which was overloaded with 15 pound bags of potatoes. He used his uninjured right hand to help the employees at that table get caught up. This was not a job task that was approved by Claimant's authorized treating physician, Dr. Susan Geiger, nor was it on the modified duty job offer, yet Claimant was able to perform this job task.

17. Claimant next moved to placing stickers on trays. Tiffany Barnes described this job as taking a tray holding four potatoes, turning it to the proper side, and applying a nutritional sticker. Claimant testified that he attempted this job but could not hold on to the roll of stickers with one hand only, as it was a large role of stickers, and handle the potato package at the same time. Claimant testified that he attempted to perform this task with his right hand only, but found that it took two hands to hold the large roll of stickers, peel a sticker, turn over the potato container and place the sticker on the back of the food container.

18. Ms. Barnes testified that the tray stickers provide nutritional information for the four potatoes on the tray. *Id.* at 1:35:35. Mr. Dominguez clarified how stickers are placed on trays. He testified that there is "a roll of stickers on a table, you peel them off,

and stick them on a tray, move that tray to the side and then move to the next one." *Id.* at 1:57:12. This job is not physically demanding and can be performed with one hand or even with only one arm. *Id.* at 1:57:08-1:57:24. Stickering trays is an important job that needs to be performed throughout the work day, and there is sufficient work stickering trays to keep an employee busy for nine hours a day. *Id.* at 1:58:30-39. The ALJ credits the testimony of Ms. Barns and Mr. Dominguez to find that "stickering" of trays can be done with one hand.

19. Claimant testified that he left work halfway through the day on November 18th to see "Diane," his hand therapist, at the ROMP clinic. *Id.* at 54:00. He testified that when he arrived to work on November 18th he told the office that he needed to leave work around lunch to attend the appointment. *Id.* at 32:38. He also testified that he filled out a leave form and gave that form to Mr. Dominguez. *Id.* at 32:55. Respondents question whether Claimant had an appointment because Claimant was not receiving physical therapy at the time and there are no documents from the ROMP clinic recording Claimant's attendance at an appointment in their facilities on November 18. *See, e.g.* Exhibits E-J 039-057; Exhibit 2 015-110. Further, Mr. Dominguez testified he never received a doctor's note from Claimant. Hrg CD 1:59:19. Regardless, Claimant did not return to work after November 18, 2015. He admitted that he did not call or show for work after the 18th reportedly because he was under the impression that Employer did not have actual modified duty for him as was approved by Dr. Geiger on November 3, 2015.

20. The evidence presented convinces the ALJ that while Claimant was frustrated by his ability to perform his modified duty as efficiently as he wished, he was provided with modified duty assignments within his physical abilities and approved by Dr. Geiger, namely counting potatoes and applying stickers on pre-wrapped potato trays.

21. Ms. Barnes substantiated Claimant's testimony that he was a no call/no show at work, testifying that Claimant did not contact her between November 19 and November 23 and as a result she terminated his employment on November 30 for violation of the no call/no show policy. *Id.* at 1:42:21. Ms. Barnes did not terminate Claimant earlier because no employee worked during the Thanksgiving holiday. *Id.* at 1:41:55.

22. Claimant testified that he did not call employer because he did not know he was supposed to. *Id.* at 43:16. Based upon the evidence presented, the undersigned ALJ is not persuaded. The evidence presented convinces the ALJ that Claimant was probably aware of the no call/no show policy and the consequences for violating the same. The evidence presented persuades the ALJ that Claimant consciously chose to disregard the no call/ no show policy and effectively abandoned his job.

23. Respondents have established by a preponderance of the evidence that Claimant is responsible for his separation from employment.

24. Claimant timely requested a one-time change of physician and accordingly his care was transferred to Dr. Kent Lofley at the Monte Vista Medical Clinic. Dr. Lofley evaluated Claimant on February 5, 2016, at which time he noted: "He current [sic] has restrictions of the left hand with grip strength and lifting. Patient may not perform repetitive gripping with the right hand and in an 8 hour day he may only perform this motion in less than 1 hour." *Id.* Although Dr. Lofley references Claimant's right hand, it is reasonable to infer that he was providing restrictions for Claimant's left hand because Claimant testified that he saw Dr. Lofley for treatment of his left hand only. Hrg CD 50:45. Dr. Lofley also referred Claimant to Dr. Philip Marin for further assessment.

25. Claimant saw Dr. Marin on March 7, 2016 at which time Dr. Marin Dr Marin noted: "Lonnie is a pleasant individual who suffered a severe injury of his left ring finger with a volar amputation. This has gone on to heal with severe sensitivity, decreased range of motion, and loss of soft-tissue padding. There could be some degree of CRPS present as well. I recommend initiating therapy again. We will obtain some nerve conduction studies to evaluate for the numbness. We will do some topical anti-inflammatory gels. We will obtain an MRI to make sure there is no tendon injury. We will see him back for more definitive recommendations." (Claimant's Exhibit 6, page 97). Dr. Marin did not address Claimant's ability to work with/without restrictions.

26. Claimant had a diagnostic imaging MRI of his right upper extremity on March 16, 2016. The impression of the MRI was, "abnormal soft-tissue signal may be residual edema/contusion. Given the history of severe pain consider reflex sympathetic dystrophy. If this is a consideration a sympathetic nerve block can be diagnostic and therapeutic." (Claimant's Exhibit 9, page 111).

27. Claimant was evaluated by Dr. Marin again on April 5, 2016. Dr. Marin noted "MRI reveals increased signal in the proximal, middle and distal phalanx of the left ring finger consistent with RSD." Dr. Marin recommended a trial of treatment for the RSD with blocks. He stated, "He is unable to work due to the extreme pain in his hand." (Claimant's Exhibit 6, page 98). Claimant's restrictions previously had been no use of his left hand. This was from Dr. Geiger on November 10, 2015. (Claimant's Exhibit 2, page 71).

28. Respondents subsequently wrote to Dr. Marin and posed the following question: "Was your statement that Mr. Walls "is unable to work due to the extreme pain in the hand" simply a recitation of Mr. Walls' subjective reports, as opposed to the imposition of a work restriction?" Dr. Marin responded "no use left hand secondary to RSD/CRPS; extreme pain; must have RSD/CRPS managed first." Dr. Marin signed this on May 24, 2016. (Claimant's Exhibit 6, page 99).

29. Based upon the totality of the evidence presented, including the medical records submitted at hearing, the undersigned ALJ finds that Claimant's physical condition continues to deteriorate and that the symptoms associated with his partial amputation have worsened with time. Moreover, the ALJ finds that Dr. Marin removed Claimant from work as a consequence of his worsening symptoms on April 5, 2016. At the request of Respondents, Dr. Marin specifically addressed Claimant's capacity by

imposing the specific work restriction of no use of the left hand due to pain likely associated with RSD/CRPS.

30. Diagnostic blocks were scheduled for mid-July 2015. As of the hearing date, Claimant had not been referred by any physician for other diagnostic testing for CRPS/RSD, such as a triple phase bone scan or Q-Sart.

31. The ALJ credits the medical records from Dr. Marin to find that Claimant has demonstrated that it is more probable than not that his medical condition worsened by April 5, 2016 to the point where he was incapable of working. Consequently, the ALJ finds that Claimant is entitled to an award of TTD benefits commencing April 5, 2016 and continuing until such benefits can be terminated in accordance with the provisions of the Workers Compensation Act.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the Claimant nor in favor of the rights of Respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

B. Assessing weight, credibility, and sufficiency of evidence in Workers'
Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this case, Claimant's testimony

regarding his inability to perform his modified tasks is unconvincing. Regarding placing stickers on trays, Mr. Dominguez testified this task could be performed with one hand or even one arm and that all the job requires is to peel stickers from a roll and place them on a tray. While the ALJ infers from Claimant's testimony that he could not perform this task one handed, i.e. because of the work restrictions imposed secondary to his industrial injury, the ALJ finds such suggestion unconvincing based upon the credible testimony of Ms. Barns and Mr. Dominguez. Regarding counting potatoes, the undersigned ALJ finds and concludes that Claimant's testimony that he could not perform this task when two bags fell at a time unconvincing because there was consistent testimony that a potato counter would only need to remove empty bags and loose potatoes occasionally. The requirements for counting potatoes when one bag falls are the same as when two bags fall. Even with the increased number of bags dropping, the frequency to remove items from the conveyor belt would arise only occasionally, as claimant and Ms. Barnes testified. It is therefore reasonable to infer that if Claimant could count potatoes when one bag fell, he could count potatoes when two bags fell.

C. In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Claimant's Entitlement to TTD

D. To prove entitlement to TTD benefits, Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, supra. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). In this case, the Claimant suffered an admitted work injury and established that he has missed work and suffered a wage loss. Indeed, Claimant received TTD benefits prior to being released to modified duty. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office*, supra.

Additionally, §8-42-105(4)(a) provides: "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." As Claimant's employment was terminated in this case, it is necessary to address Respondents' contention that the Claimant is precluded from receiving temporary indemnity benefits.

Responsibility for Termination

E. Because Claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply. Those identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Simply put, if claimant is responsible for his/her termination of employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota, Inc.,* W.C. No. 4-465-839 (ICAO February 13, 2002). Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 20 P. 3d 1209 (Colo. App. 2000).

F. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996)(unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO April 9, 2008). "Fault" can include poor job performance, but Claimant is not at fault if the termination is due to claimant's physical or mental inability to perform assigned duties, *Johnston v. Deluxe/Current Corporation*, W.C. No. 4-376-417 (Industrial Claim Appeals Office, June 7, 1999). In this case, Respondents assert that Claimant was terminated because he consciously violated Employer's no call/no show policy. Claimant counters that he is not responsible for his termination because there was no volitional act since Claimant had no degree of control as there was no modified duty job for him to report to. As found, the ALJ is not persuaded by Claimant's assertion. Here, the evidence supports a conclusion that Claimant was provided with modified duty which complied with his physical restrictions. The evidence presented further convinces the ALJ that Claimant, despite his protestation to the contrary, was capable of performing that modified duty. While Claimant may have been frustrated by his inability to use his left hand as he had prior to his admitted injury, the evidence persuades the ALJ that he was aware of the no/call/no show policy and the consequences for violating it. Simply because Claimant was frustrated by his physical abilities and participate in work as efficiently as he had does not condone his conscious decision not to call in or show for work. In short, Claimant took voluntary acts that caused the termination of her employment.

G. The ALJ concludes that Claimant's reliance on *Bookout v. Safeway, Inc.*, W.C. 4-798-629 (ICAO 12/15/2010)(Claimant not at fault for termination for violating "no call – no show" policy when wrongly incarcerated); *Hall v. Wal-Mart Stores, Inc.*, W.C. 4-601-953 (ICAO 3/18/04)(The Respondents cannot adopt a strict liability personnel policy which usurps the statutory definition of "responsibility" for termination where the Claimant engaged in a fight it at work but did not provoke assault); *Bonney v. Pueblo Youth Service Bureau*, W.C. 4-485-720 (ICAO April 24, 2002)(Claimant was not responsible for failure to comply with the employer's absence policy if the Claimant was not physically able to notify the employer); see e.g., *Bell v. Industrial Claim Appeals Office*, 93 P .3d 584, (Colo. App. 2004)(Claimant not at fault for termination for refusing to sign settlement agreement waiving statutory rights) misplaced based upon the distinguishable facts of the present case. Accordingly, Claimant's claim for TTD benefits beginning November 19, 2015 and continuing through April 4, 2016 is denied and dismissed.

Claimant's Entitlement to TTD Beginning April 5, 2016

H. As noted above, termination of employment for cause will sever the causal connection between occupational injury and the subsequent wage loss. However, if a worsening of the Claimant's work-related condition is sufficient to cause a subsequent wage loss, temporary disability benefits are payable even if the termination from employment was for cause. *Anderson v. Longmont Toyota, Inc.*, 102 P. 3d 323 (Colo. 2004). Here, the evidence presented persuades the ALJ that treatment for Claimant's work related condition has been incomplete and as a consequence Claimant has suffered worsened symptoms with the passage of time. As found, Dr. Marin removed Claimant from work on April 5, 2016 and imposed restrictions concerning the use of his left hand. Based upon the evidence presented and as found above, the ALJ concludes that Claimant's worsened condition as of April 5, 2016 caused a disability, and that the disability resulted in an actual wage loss. Accordingly, the ALJ finds and concludes that Claimant is entitled to TTD benefits commencing April 5, 2016 and ongoing.

ORDER

It is therefore ordered that:

1. Respondents have established by a preponderance of the evidence that Claimant was terminated for cause from his employment.

2. The Claimant met the initial threshold to establish he was entitled to temporary disability benefits.

3. Respondents shall pay the Claimant temporary total disability ("TTD") benefits for the time period commencing April 5, 2016 and ongoing until terminated by order, agreement or operation of law pursuant to the statute.

4. Pursuant to the stipulation of the parties, the average weekly wage is $344.66 which results in a corresponding TTD rate of $229.78

5. Insurer shall pay eight percent (8%) per annum on all compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 5, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

The issue presented for determination is whether the Respondents' petition to terminate temporary total disability (TTD) benefits effective October 4, 2015 should be granted. The Respondents allege that Claimant suffered an intervening injury sufficient to sever the causal connection between his work injury and his subsequent wage loss.

FINDINGS OF FACT

1. The Claimant suffered an injury to his left elbow on September 10, 2015, while in the course and scope of his employment. He was lifting bundles of shingles and experienced a pop in the left elbow with immediate pain and swelling.

2. The Respondents admitted liability for the injury, which included an admission for TTD commencing on September 11, 2015.

3. The Claimant has been receiving medical treatment through Concentra Medical Centers. On September 10, 2015, the Claimant demonstrated to Concentra physician, Dr. Lori Ross, that with his elbow at 90 degrees of flexion, he pulled back then forward with full extension/hyperextension at the elbow, felt and heard a pop accompanied by pain. Dr. Ross observed swelling and documented limited range of motion.

4. The Claimant continued to receive treatment including physical therapy, periodic examinations, and medications.

5. Claimant attended physical therapy on October 5, 2015. The physical therapy note indicates that Claimant reported that his elbow flared up over the past weekend after going to the ground with his daughter after she almost fell from monkey bars (hereinafter the "monkey bar incident").

6. On October 29, 2015, the Insurer's third party administrator (TPA) wrote a letter to Concentra to inquire about the monkey bar incident and whether it worsened Claimant's condition. The TPA's claims adjuster also wrote that based on her review of Claimant's medical records, he appeared to be improving prior to the monkey bar incident.

7. On November 2, 2015, a Concentra Physician's Assistant, Jocelyn Cavender, wrote to the TPA that the monkey bar incident did not delay Claimant's care, and that all of Claimant's problems are related to his work injury.

8. A review of Claimant's medical records from September 10 – 30, 2015 does not reveal that Claimant was experiencing any significant improvement in his left

elbow symptoms. On September 30, 2015, the Claimant reported pain at 6 out of 10, down from 7 out of 10. He still was having problems with gripping, but he still had swelling. Claimant's work restrictions on September 30, 2015, included the following: may lift up to 5 pounds occasionally, may push/pull up to 5 pounds occasionally, may not drive company vehicle due to medication, no frank lifting with left hand, no gripping/squeezing/pinching with left upper extremity, no climbing ladders, may not work in safety sensitive position, and may not work at heights. The Employer could not accommodate these restrictions.

9. On October 15, 2015, Claimant's restrictions included the following: lifting up to 5 pounds occasionally, may push/pull up to 5 pounds occasionally, may not drive company vehicle due to medication, no frank lifting with left hand, may squeeze and grip infrequently with the left hand, no climbing ladders, may not work in safety sensitive position, and may not work at heights.

10. Claimant's work restrictions imposed before and after the monkey bar incident were essentially the same. However, *after* the monkey bar incident Claimant's restrictions allowed infrequent squeezing and gripping whereas *before* the monkey bar incident, Claimant was prohibited from gripping, squeezing or pinching with the left upper extremity. Thus his restrictions after the monkey bar incident were slightly less restrictive.

11. An MRI scan done on November 16, 2015 revealed that Claimant has a partial tear in the left superficial common extensor tendon.

12. An EMG performed on December 1, 2015 suggested mild left radial tunnel syndrome.

13. On January 26, 2016, Dr. Anjmun Sharma performed an independent medical examination (IME) at Respondents' request, and wrote a report.

14. Dr. Sharma's report reflects that he took a history from the Claimant, and examined him. Dr. Sharma also reviewed the Claimant's medical records.

15. Dr. Sharma opined that Claimant's problems are chronic and likely ongoing for "quite some time." Dr. Sharma speculated that Claimant's MRI and EMG findings "could be because another work [sic] that he was doing previous[sic], that he injured worker was doing repetitive activity with his left upper extremity, this could have certainly contributed to his symptoms." Dr. Sharma concluded that "the claim should not have been filed in the first place" and that "it would not be the burden of the current insurance carrier to support this claim and to provide medical treatment."

16. Dr. Sharma indicated that the "central question in this claim is what is related and what is not." He then concluded that Claimant's left elbow and forearm injuries are not related.

17. Dr. Sharma issued an addendum report dated February 4, 2016, wherein he states, "The patient was injured at work which we have already clearly established in

the previous original report." This statement is in direct contradiction to his entire January 26, 2016 report. Dr. Sharma goes on to acknowledge the tear in Claimant's common extensor tendon, but states that the tear was old and the pop Claimant heard on September 10, 2015 was probably not the tear occurring. Dr. Sharma attributed the pop to a muscle strain because Claimant "never had any swelling, he never had any pain, and he never had any ecchymosis." Again, Dr. Sharma's comments are in direct conflict with the Concentra records which clearly documented swelling, pain and limited range of motion in Claimant's left elbow.

18. Claimant has had no medical treatment since February 2016.

19. On May 25, 2016, Claimant underwent an IME performed by Dr. Timothy Hall. Dr. Hall examined the Claimant and reviewed medical records including the report and addendum report of Dr. Sharma. Dr. Hall opined that Claimant suffered a traumatic injury at work, he has failed conservative treatment and will likely need surgery.

20. The Claimant testified about the monkey bar incident. Claimant explained that his daughter started to fall and he caught her with his right hand and arm. They went to the ground and he put his left arm on his daughter's back. He noticed a twinge in the left elbow and experienced a temporary increase in his left elbow pain. The ALJ finds the Claimant's explanation credible.

21. Dr. Sharma testified at the hearing in this matter. He continued to reiterate that Claimant suffered no work injury on September 10, 2015, but then testified that Claimant suffered an elbow strain at work which should have resolved by now.

22. Dr. Sharma acknowledged the tear in Claimant's elbow but insisted it was present before September 10, 2015. He also testified that Claimant probably had symptoms before September 10, 2015 although there are no medical records documenting that Claimant sought treatment for left elbow problems before September 10, 2015. Dr. Sharma then testified that it was possible that Claimant tore the elbow tendon on September 10, 2015.

23. Dr. Sharma indicated, and the ALJ finds, that the monkey bar incident as described by the Claimant would not have made Claimant's left elbow worse. The work restrictions before and after the incident (see paragraphs 8-10 above) support that the monkey bar incident did not worsen Claimant's elbow condition.

24. Dr. Hall also testified at the hearing. Dr. Hall reiterated that Claimant's symptoms were not dramatically different before and after the monkey bar incident. He opined that the monkey bar incident did not cause Claimant's ongoing elbow problems. He further explained that it was unlikely that Claimant had an asymptomatic tear prior to September 10, 2015.

25. Regardless, the ALJ finds that even if Claimant had an asymptomatic tear prior to September 10, 2015, it became symptomatic as a result of work-related activities.

26. Based on the foregoing, the ALJ finds that the monkey bar incident in no way severed the causal connection between Claimant’s work injury and his subsequent wage loss. The ALJ finds that Claimant’s admitted work-related injury, and the resulting work restrictions, are the cause of his wage loss.

27. As of the date of the hearing, the Claimant remained on work restrictions and the Employer has not accommodated those restrictions.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). Here, the Respondents seek to modify the general admission of liability as it pertains to the Claimant’s award of TTD, and thus they bear the burden of proof.

5. An intervening injury may sever the causal connection between the injury and a claimant's temporary disability if the claimant's disability is triggered by the intervening injury. *See Standard Metals Corp. v. Ball*, 474 P.2d 622; *Marin v. Compass Logistics*, Inc., W.C. No. 4-520-473 (November 7, 2002), affd, Colo. App. No. 02CA2193 (Oct. 30, 2003). Whether the respondents sustained their burden to prove that the claimant's disability was triggered by an intervening injury is a question of fact for resolution by the ALJ. *City of Aurora v. Dortch*, 799 P.2d 462 (Colo. App. 1990).

6. As found above, the monkey bar incident did not constitute a subsequent intervening event sufficient to sever the causal connection between Claimant’s work injury and his subsequent wage loss. The Claimant’s work restrictions were essentially the same before and after the monkey bar incident, and in fact, his gripping/squeezing restriction was less restrictive after the monkey bar incident. While Dr. Sharma’s opinions were, in large part, unpersuasive given the many contradictions, he and Dr. Hall opined that the monkey bar incident did not worsen Claimant’s work-related elbow conditions. Such a conclusion is supported by the Claimant’s testimony and the medical records.

7. Benefits are precluded only when the work-related injury plays no part in the subsequent wage loss. If the injury contributed in part to the wage loss, temporary partial disability benefits can be denied only if one of the statutory conditions is satisfied. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). It is abundantly clear in this case that Claimant’s wage loss is attributable to the admitted work injury to his left elbow. As such, the Respondents have failed to prove that they are entitled to terminate Claimant’s TTD benefits effective October 4, 2015.

ORDER

It is therefore ordered that:

1. Respondents' petition to terminate Claimant's TTD benefits effective October 4, 2015 is denied and dismissed.

2. Respondents shall continue to pay Claimant TTD at the admitted average weekly wage until terminated pursuant to law.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 5, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-992-534-02

ISSUES

- Did Claimant prove by a preponderance of the evidence that he suffered a compensable injury to his head and neck on August 26, 2015?

- If Claimant suffered a compensable injury, is he entitled to temporary total disability benefits from August 31, 2015 and continuing?

- What was Claimant's average weekly wage?

- If Claimant suffered a compensable injury, what medical benefits is he entitled to in order to cure and relieve the effects of his industrial injury?

STIPULATIONS

1. Claimant's AWW is $778.46, which yields a TTD rate of $518.97.

2. If the instant case is found compensable, TTD is due and owing. The time period that Respondent shall pay TTD is from August 31, 2015 to February 2, 2016 (188 days / 26.86 wks).

The ALJ approved the Stipulations at hearing.

FINDINGS OF FACT

1. Claimant was employed as a forklift operator by Employer. He began his employment in March 2015 as a temporary employee. Employer hired Claimant as a permanent employee in June 2015.

2. Claimant's job duties included driving a forklift. He loaded and checked trucks and trailers for delivery, as well as stacking and moving products. Employer had a written job description which set forth the requirements of a forklift operator. Claimant was required to lift and carry 25 pounds frequently and, on occasion, up to 80 pounds. Claimant was also required to climb in and out of the forklift, including turning around 360°.

3. Claimant's medical history was significant in that he had previously sustained concussions playing sports. He also sustained a prior industrial injury in Ohio in which he injured his lumbar spine. Claimant testified he took Percocet for that injury from 2009-2014. Claimant also treated for depression and anxiety. No prior medical records for these conditions were admitted at hearing. Claimant testified he had no physical restrictions before August 26, 2015.

4. Claimant testified he was injured on Wednesday, August 26, 2015[1]. Claimant began his shift at 6:00 a.m. that day and typically worked a twelve (12) hour shift[2]. When he was operating his forklift early that afternoon, he was loading a truck in the area where Employer pre-stages material or packs that are built. Claimant testified he went over to pick up one of the packs with the forklift and noticed one side of the pack did not have a strap. Claimant got out of the forklift, bent over to put a new strap on it. Claimant said he stood up and he hit his head on a board that was sticking out, which caused him to lose consciousness and fall to the ground. The blow to his head caused a contusion that was red and swelling where he hit his head on the lumber. Claimant stated his neck felt stiff and tense after he hit his head.

5. Claimant testified that he started feeling dizzy and nauseous. Because he was having difficulty performing his regular duties, Claimant said he had to leave work prior to his shift ending on August 26, 2015. The ALJ credited this testimony. He also could not work his full shifts on August 27 and 28, 2015.

6. Chris Paquette is the General Manager for Employer and testified on its behalf. Mr. Paquette testified he did not witness Claimant's injury, but Claimant reported he was hurt that day. Mr. Paquette confirmed he observed a red mark on Claimant's head, which he described as a small red abrasion that was not bleeding.[3] The ALJ credited this testimony, which confirmed Claimant struck his head on August 26, 2015.

7. Mr. Paquette testified Claimant told him that his head hurt and initially, Mr. Paquette testified Claimant worked the rest of the day. However, Mr. Paquette equivocated when shown Respondents' Second Supplemental Responses to Claimant's Interrogatories which confirmed Claimant went home approximately one (1) hour after reporting the alleged incident. Mr. Paquette also definitively stated Claimant did not leave work early on August 27 and 28. On cross-examination, Mr. Paquette confirmed he was actually on vacation and did not work August 28, 2015. He testified he would have approved paperwork the following Monday, which is how he knew Claimant worked a full day. The ALJ found it difficult to credit Mr. Paquette's testimony on whether Claimant worked full days on August 27th and 28th, particularly in light of the fact that Mr. Paquette did not work August 28, 2015 and this was on the eve of the two (2) busiest months in 2015 for Employer.

8. Payroll records from Employer were admitted at hearing. These records documented Claimant worked 80 hours, plus overtime (31.64 hours) in the two weeks prior to and including the date of injury through August 29, 2015. The ALJ notes these were not daily timesheets and no evidence documenting the actual number of hours

[1] The ALJ took administrative notice that August 26, 2015 was a Wednesday, pursuant to C.R.E. 201(b)(2).

[2] This was confirmed by Mr. Paquette.

[3] This was also confirmed by Respondents' Second Supplemental Responses to Claimant's Interrogatories-admitted as Exhibit 6.

Claimant worked on each of the days from August 26-28, 2015 was admitted at hearing. The paperwork which Mr. Paquette said he approved was not submitted to the Court. As noted above, the weight of the evidence leads to the conclusion that Claimant left early on August 26, 2015, yet it was not reflected in the payroll records. Therefore, the ALJ is unable to conclude Claimant worked full days on August 27 and 28, 2015 based upon the payroll records.

9. Claimant testified he waited to seek treatment due to him thinking that the symptoms would go away. However, over the weekend (August 29th & 30th), Claimant's symptoms persisted and grew worse. Claimant testified on Saturday, August 29th, he became disoriented causing him to urinate in his clothes and in his bedroom.

10. On August 31, 2015, Claimant was evaluated by Kathryn Bird, D.O. He was taken to Dr. Bird's office by Tony Delusio, who was the assistant general manager for Employer. Claimant reported he hit his head and everything went fuzzy and black for a few seconds, but he did not have a LOC. After the injury, he experienced blurred vision, headaches, dizziness, nausea (including vomiting once), decreased eye-hand coordination, no appetite, and a feeling of being unbalanced. Claimant also reported that he had urinated on his floor in the middle of the night thinking he was in his bathroom. Upon examination, Dr. Bird found Claimant had impaired balance, which was based on a positive Romberg's sign and an abnormal heel-to-toe test. Dr. Bird documented a pink area on the top of Claimant's scalp that was the size of a quarter and was tender. Dr. Bird's assessment was: concussion with brief loss of consciousness and post concussive syndrome. Dr. Bird prescribed Etodolac, ordered a CT scan, as well as physical therapy ("PT"). Dr. Bird also took Claimant off work.

11. Claimant underwent a CT scan of the head on August 31, 2015. Joseph Morgan, M.D. read the films, noting there were no fractures or hemorrhages. Dr. Morgan's impression was a normal CT scan.

12. Claimant returned to Dr. Bird on September 1, 2015 and reported a headache, with pain running down to his neck. He also felt body weakness, nausea, and tiredness. Dr. Bird noted swelling, identified as two (2) pink lesions on the top of Claimant's scalp, which were tender. Neck tenderness was found over the sides in the back. Dr. Bird's assessment was: concussion, thumb laceration and cervical strain. Dr. Bird ordered physical therapy, as well as referring Claimant to John Sacha, M.D. She also noted that given the mechanism of injury, Claimant's lumbar pain was "less likely than not related to this work injury".[4]

13. PT records for Claimant were admitted from Concentra for the treatments that began on September 1, 2015. In the initial evaluation report authored by Sarah Peck, Claimant was noted to have tightness in the upper trapezius, scalene, levator scapulae and SCM. Ms. Peck also documented impaired joint mobility and motor function. Claimant was scheduled to receive PT two times per week for four weeks. PT

[4] Counsel for Claimant confirmed at the hearing that he was not seeking benefits for an injury to the lumbar spine.

records from September 3-8 were admitted at hearing. These records documented continued symptoms on the part of Claimant.

14. Claimant was reevaluated by Dr. Bird on September 13, 2015. Claimant reported pain and pressure constantly, as well as dizziness. At that time, Dr. Bird’s diagnoses included concussion (with LOC), post concussion syndrome, and cervical strain. Dr. Bird's work restrictions included: may lift up to 1 pound constantly up to 8 hours; sitting 90% of the time; push/pull up to 1 pound constantly up to eight hours; no bending; and maximum three hour work shift. The ALJ infers Claimant could not perform his job duties as a forklift operator with these restrictions.

15. On September 30, 2015, Dr. Bird reevaluated Claimant, at which time he reported fairly constant pain, as well as numbness/tingling in his hands and dizziness. Claimant was taking Tramadol and Gabapentin, prescribed by Dr. Sacha and was referred for acupuncture and chiropractic. On examination, Dr. Bird found no impaired balance, but decreased extension and rotation in Claimant’s cervical spine. Dr. Bird’s assessment was cervical strain, concussion, and post-concussion syndrome. Claimant's PT was discontinued and work restrictions were maintained.

16. Claimant was evaluated by Craig Kozak, D.C. on October 5, 2015. At that time, he was complaining of aching, stabbing and throbbing in his whole head. Dr. Kozak noted diffuse muscle tenderness and decreased manual motor testing. His assessment was myalgia and myositis, neck muscle strain, and psychosocial factors, post concussion syndrome. A course of biomedical acupuncture/dry needling, along with spinal joint mobilization and manipulation was begun.

17. Claimant underwent an MRI of the cervical spine on October 21, 2015 and the films were read by David Solsberg, M.D. Minimal bulging was noted at C5-6, with no stenosis. Dr. Solsberg's opinion was no fracture or ligamentous injury was seen. Mild spondylosis was identified, with no central canal or foraminal stenosis seen.

18. Claimant was examined by Marc Treihaft, M.D. on December 9, 2015. Dr. Treihaft reviewed Claimant's course of treatment and noted he was having headaches, as well as increased depression since the day of injury. Dr. Treihaft's impression was post-concussive syndrome with persistent headaches, dizziness, neurobehavioral symptoms. He felt Claimant’s current headache pattern was consistent with an analgesic rebound syndrome to Tramadol and Midrin, as well as post-concussive symptomatology. Dr. Treihaft recommended tapering programs for the analgesic rebound headaches, anti-depressant therapy and if Claimant did not respond, Dr. Treihaft recommended neuropsychological battery and a brain MRI.

19. Dr. Sacha evaluated Claimant on December 15, 2015, at which time Claimant reported continued headaches. Dr. Sacha noted the claim was being contested. Claimant had marked pain behaviors, with some paraspinal spasm in the upper cervical spine, as well as pain with extension and rotation. Dr. Sacha's assessment was cervical facet syndrome, headaches secondary to the above, opioid dependence and rule out adjustment disorder.

20. Claimant was evaluated by Kevin Reilly, Psy.D. on December 17, 2015. At that time, he was reporting constant headaches. Dr. Reilly stated the results of the evaluation were strongly indicative of non-organic factors contributing to symptom production and/or maintenance. Performance testing indicated negative response bias. Symptom validity testing indicated significant symptom magnification. Dr. Reilly also noted Claimant's description of the injury was potentially consistent with a diagnosis of mild traumatic brain injury/post concessional syndrome. The natural history of such an injury was one of steadily resolving symptoms and Claimant's clinical course appeared to be one of increasing symptoms over time, which was a strong indicator for non-organic factors contributing to this symptom production and/or maintenance. Dr. Reilly thought Claimant would benefit from bio feedback therapy and recommended eight sessions of this treatment.

21. On January 19, 2016, Claimant was examined by Lawrence Lesnak, D.O. at the request of Respondents. Dr. Lesnak noted Claimant exhibited very limited range of motion of cervical spine and he had mild crepitus of his right shoulder joint. Claimant had 5/5 strength in his upper extremity's bilaterally, except for some mild giveway weakness when testing his right shoulder abductor musculature because of increased right-sided suboccipital/proximal right neck pains. Claimant had diffuse tenderness to palpation throughout his right occipital region and right proximal cervical paraspinal musculature, with no distinct trigger points or spasm noted. Dr. Lesnak said Claimant's mood appeared to be depressed and his affect was fairly flattened.

22. Dr. Lesnak's impressions were: subjective complaints of constant global headaches with frequent right-sided occipital/proximal neck pains and occasional right suprascapular discomfort, with occasional very minimal right arm pains associated with occasional dizziness, blurred vision and nausea; possible mild closed head injury reported small left parietal/vertex scalp laceration that occurred during work hours on 8/26/2015 by patient’s report; possible mild cerebral concussion as a result of that reported occupational incident; post injury head CT performed on 8/31/2015 which reported no extracranial or intercranial abnormalities whatsoever; no current clinical evidence of gross or focal cognitive abnormalities; possible post-concussive headache; no clinical evidence of cervical radiculitis, radiculopathy or myelopathy; cervical spine MRI performed on 10/21/2015 that noted mild cervical spondylosis apparently involving the mid to lower cervical spine without other identified abnormalities; possible right-sided proximal cervical paraspinal/trapezius myalgias; no evidence of neurogenic or vascular thoracic outlet syndrome; no clinical evidence of symptomatic shoulder joint pathology or rotator cuff impingement signs; no clinical evidence of greater or lesser occipital neuralgia; no specific clinical evidence of cervicogenic headaches/symptomatic proximal cervical facet joint symptoms; hypertension, asymptomatic GERD, as well as pre-injury depression, anxiety, and migraine headaches; chronic tobacco use; history of previous work-related right knee injury in 2009 for which he underwent surgical intervention in 2010; medical record reported evidence noting that the patient has had numerous closed head injuries in the past relating football to injuries and motorcycle accidents; patient underwent psychosocial screen test today in which the patient was

categorized in the “distressed depressive” category during DRAM testing; this suggests that there are significant psychosocial factors that are influencing his symptoms and recovery as it pertains to the alleged occupational injury of 10/26/15.

23. On February 2, 2016, John Burris, M.D. (ATP) returned Claimant to regular duty. The diagnosis was: strain of muscle, fascia and tendon. No narrative report was included with this record.

24. Dr. Lesnak testified at hearing. He was qualified as an expert in Physical Medicine and Rehabilitation, the specialty in which he is board-certified. He is Level II accredited pursuant to the W.C.R.P. He testified Claimant's course of symptoms did not follow what happens in a mild closed head injury. Dr. Lesnak stated he would expect Claimant's symptoms to have been worse at the beginning and then gradually improved over time. This progression of symptoms “always” occurred when someone suffered a mild closed head injury. Dr. Lesnak noted the CT scan showed no problems or abnormalities, as did the cervical MRI. Dr. Lesnak noted Claimant had a history of depression for which he received treatment and took medications. Dr. Lesnak testified further that while Claimant had a scalp abrasion, there was no evidence Claimant had a closed head injury or scalp concussion on August 26, 2015. This differed from the conclusion in his written report, which he said was due to his receipt of Dr. Reilly’s records. Dr. Lesnak distinguished between what he characterized as Claimant’s subjective complaints and post-concussive symptoms. He testified all of the doctors who diagnosed Claimant with post-concussive syndrome were wrong (“in hindsight”). Dr. Lesnak confirmed Claimant told him he fell to the ground after hitting his head. He opined there was no evidence Claimant had an injury to his cervical spine as a result of hitting his head on a two by eight board. Dr. Lesnak thought Claimant could be somaticizing his pain complaints where there was no objective evidence of injury.

25. There was no evidence before the Court that Claimant’s work restrictions were lifted before February 2, 2016.

26. The weight of the evidence led the ALJ to conclude Claimant suffered a minor traumatic brain injury or concussion on August 26, 2015. The ALJ credited the opinions of Drs. Bird, Sacha and Treihaft (treating physicians) that Claimant was suffering from symptoms related to post-concussive syndrome. These physicians’ opinions were more persuasive than those offered by Dr. Lesnak.

27. The evidence established it is more probably true than not that as a result of hitting his head on August 26, 2015, Claimant suffered a cervical strain.

28. The inferences and evidence inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The instant case requires a credibility determination, not only of the Claimant, but also the medical experts.

Compensability-Closed Head Injury and Cervical Spine

Claimant alleges he sustained a closed head injury and an injury to his cervical spine while working for Employer. Claimant relied on his own testimony and that of Mr. Paquette to support his claimant that he hit his head on August 26, 2015. He continued to experience symptoms secondary to this injury, including headaches and nausea. After August 31, 2015, his doctors issued work restrictions, which Claimant relied on to support his argument that his post-concussive syndrome and cervical strain was disabling.

Respondents focused on Claimant's credibility and questioned whether the injury was as serious as he alleged. Respondents also asserted Claimant's symptoms were related to chronic use of Percocet, which he took up to the time of this alleged injury. Respondent also relied on the opinions of IME physician, Dr. Lesnak, to support the contention no compensable head or cervical injury occurred.

To receive workers' compensation benefits, an injured worker bears the threshold burden of establishing, by a preponderance of the evidence, that he or she has sustained a compensable injury proximately caused by his employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). ("Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded.")

Accordingly, Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing a service for Respondent-Employer arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. *Triad Painting Co. v. Blair* 812 P.2d 638 (Colo. 1991). The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Lay testimony alone may be sufficient to prove causation. However, where medical evidence is presented on the issue of causation it is for the ALJ to determine the weight and credibility of such evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182.

In this case, there was no question Claimant was working for Employer on the day in question and performing the job duties of a forklift driver. There was objective evidence of a head injury sustained by Claimant, starting first with Claimant's testimony. (Finding of Fact 4). This was corroborated by Mr. Paquette, who confirmed he saw an abrasion on Claimant's head that day when Claimant reported his injury. (Finding of Fact 6).

When crediting Claimant’s testimony that he struck his head and was injured, the ALJ considered Respondents argument that Claimant was not credible because he initially testified that he missed no time from work before the accident, provided varying versions of the incident and reported worsening symptoms over an extended period of time. While there were some minor variations in Claimant’s descriptions of his injury, his description of the essential elements of the injury remained consistent throughout. The ALJ found Claimant’s description of how he hit his head credible. Likewise, Claimant’s failure to remember one sick day and three vacation days prior to his injury were not material to the issue of whether he struck his head on August 26, 2015. The ALJ notes some of the same inconsistencies for which Respondents aspersed Claimant were present in Mr. Paquette’s testimony. (Finding of Fact 7).

Further objective evidence of the injury was found in Dr. Bird's records, who recorded an abrasion on Claimant's head on August 31 and September 1, 2015. (Findings of Fact 10 and 12). Respondents did not dispute the existence of this objective evidence of injury. Even Dr. Lesnak initially concluded Claimant probably had a mild closed head injury (although he testified this was simply an abrasion). Based upon the evidence presented, the ALJ concluded Claimant sustained a closed head injury when he struck his head against the 2 x 8 lumber on August 26, 2015.

As determined in Findings of Fact 10-16 and 19, the medical records admitted at hearing support the conclusion that the blow to Claimant's head caused post–concussive symptoms, which were diagnosed by Claimant's ATPs, including Dr. Bird and Dr. Sacha. Respondents have, in effect, argued that all of the ATPs who evaluated and treated Claimant were wrong when they concluded he suffered a minor traumatic brain injury/post concussive syndrome. Notwithstanding these arguments, the ALJ credited the opinions of Claimant's treating physicians in determining he suffered a compensable injury.

It follows from the evidence that an incident occurred that Claimant also sustained a cervical sprain arising out of the same event. The ALJ relied upon Claimant's testimony, as well as the inferences derived from said testimony. As found, It is more probable than not the Claimant sustained a neck strain, after standing up from a squatting position and striking his head forcefully enough to fall to the ground. (Finding of Fact 27). The weight of the evidence led the ALJ to conclude Claimant sustained a cervical strain on August 26, 2015.

The ALJ notes that the medical evidence raised issues concerning Claimant's delayed recovery, as well as possible psychosocial factors which affected his symptoms and treatment. Various healthcare providers, including Dr. Lesnak, raised concerns about the presence of psychosocial factors. These psychosocial factors may provide an explanation as to the length of Claimant's recovery and his symptoms. However, the presence of these factors does not refute the evidence proffered by Claimant, which proved he struck his head on the board and sustained an injury arising out of and in the course and scope of his employment. As such, his claimed injuries were compensable.

There was also evidence in the record Claimant had sustained concussions growing up, also treated for a lumbar injury, as well as depression. A preexisting condition does not disqualify Claimant from receiving benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo.App.1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. See *Subsequent Injury Fund v. Thompson,* 793 P.2d 576, 579 (Colo.1990).

Claimant's preexisting depression and anxiety may have played a role in his overall condition and treatment for his injuries. It may also impact the issue of whether he sustained a permanent medical impairment. However, these preexisting conditions do not preclude the finding that Claimant suffered a compensable injury.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury arising out of and in the course and scope of his employment with Employer.

2. Respondents shall pay TTD benefits to Claimant from August 31, 2015 to February 2, 2016 (188 days / 26.86 wks) at a rate of $518.97 per week.

3. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. Claimant is entitled to medical benefits to cure and relieve the effects of his industrial injury.

5. Claimant's medical care with the following providers is authorized and is reasonable and necessary to cure and relieve the effects of the August 26, 2015 injury:

Kathryn Bird, M.D., John Burris, M.D. and other treating heath care providers at Concentra.

John Sacha, M.D.

Marc Treihaft, M.D.

Kevin Reilly, PsyD.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 4, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Did Claimant sustain his burden to overcome the DIME physician's opinion on maximum medical improvement (MMI) and permanent medical impairment to Claimant's cervical spine[1]?

- If Claimant is at MMI, is Claimant entitled to conversion of the extremity rating to a whole person rating?

- Did Claimant prove by a preponderance of the evidence he was entitled to medical benefits after MMI?

- Did Claimant prove by a preponderance of the evidence he was entitled to a higher AWW?

FINDINGS OF FACT

1. Claimant was hired by Employer on November 26, 2012. He was hired at the rate of $13.26 per hour. Pay records admitted at hearing showed Claimant earned a total of $7,369.60 from June 7, 2013 through August 30, 2013.

2. Claimant testified he was told by Dave Swenson when he was hired that he would receive pay increases after one (1) year with the company. Claimant testified the pay range was anywhere from $14.00 to $30.00 per hour, which was what other employees earned. Other individuals working for the company made $30.00 per hour. Claimant worked less than a year for the company.

3. Claimant's wages at the time of injury understated the impact of the loss of earnings occasioned by his injury. It is probable Claimant would have received a raise had he not suffered his industrial injury. Claimant is entitled to a reasonable increase in his average weekly wage. The ALJ concludes an increase of 33% in Claimant's wages would be reasonable or an increase of $4.38 per hour to $17.64 per hour. Therefore, Claimant's average weekly wage should be increased to $705.43.

[1] The ALJ notes Claimant's Application for Hearing identified this issue as: "Overcome DIME with regard to causation of cervical spine and right shoulder". At the outset of the hearing, counsel for Claimant termed the issue: "overcoming the DIME-Dr. Janssen, maintenance medical benefits and permanent partial disability. If Claimant is not at MMI, the latter issues would be premature". Counsel for Respondents agreed with this statement of issues. In his post-hearing submission Claimant did not argue he was entitled to PPD benefits based upon a permanent impairment to his cervical spine.

4. Claimant suffered an admitted industrial injury on August 30, 2013 while working for Employer. He injured his left shoulder while lifting heavy bags of coins that each weighed 20-50 pounds.

5. The ATP for Employer was Concentra, where Claimant initially received conservative treatment. His left shoulder pain persisted and he was referred to Mitchell Seemann, M.D. for a surgical consult. Dr. Seeman performed surgery (arthroscopy) on January 20, 2014, as well as on May 7, 2014 and July 30, 2014. Claimant's diagnosis was chronic left shoulder pain.

6. In the report related to the evaluation conducted on April 8, 2014, Dr. Seemann noted Claimant continued to have pain and stiffness in the anterolateral aspect of his left shoulder. Dr. Seemann diagnosed post-operative adhesive capsulitis of the shoulder. He reviewed various options, both operative and nonoperative. Claimant elected to undergo surgery. Dr. Seemann noted the procedure would be a left shoulder arthroscopic diagnostic, possible capsular release and lysis of adhesions, with manipulation under anesthesia. The ALJ infers this surgical procedure involved not only the shoulder joint, but also the adjacent tissues.

7. Claimant was evaluated by Samuel Chan, M.D. on September 16, 2014, at which time Claimant rated his pain to be 7/10 in his right shoulder. Dr. Chan noted Claimant was guarded and had restricted range of motion ("ROM") in the left shoulder. Flexion was at 80°, abduction at 80°, external rotation at 20° and internal rotation was at 10°. Claimant cervical spine range of motion was limited on flexion because of pain. No tenderness with extension-rotation of the cervical spine was noted. Dr. Chan's diagnosis was: left shoulder-status post rotator cuff repair and biceps tenodesis on January 20, 2014; repeat arthroscopy performed on May 7, 2014 and repeat surgery on July 30, 2014, with significant scar debridement and manipulation under anesthesia, as well as biceps tendon release; essentially normal EMG of bilateral upper extremities on April 4, 2014; right shoulder rotator cuff tear; cervical and lumbosacral strain; status post chiropractic care. The plan was to follow-up with Dr. Seemann and a repeat EMG study was considered.

8. Dr. Seemann referred Claimant to David Schneider, M.D., who evaluated Claimant on October 3, 2014. Claimant was noted to have "moderate" pain and mild deltoid atrophy. Intact rotator cuff function was noted, as well as only minimal restrictions in his ROM. Dr. Schneider's impression was post-operative infection, symptomatic; chronic shoulder pain. He recommended Claimant undergo a left shoulder arthroscopic inspection and soft tissue cultures times six. He indicated he had the highest confidence in Dr. Seemann and told Claimant to either Dr. Seemann or he would perform the shoulder and culture of soft tissue samples both within the glenohumeral joint and in the subacromial space. As noted *infra*, Dr. Schneider was concerned about infection because of the presence of P. Acnes bacteria.

9. On October 27, 2014, Dr. Schneider performed a revision of arthroscopic partial left shoulder synovectomy on Claimant. The pre- and post-operative diagnosis

was chronic pain, possible infection. After the procedure was performed, various cultures were taken to determine whether bacteria were present.

10. Claimant testified he experienced continued pain after the various surgical procedures. Claimant was referred to Dr. Brent Wieland at Western Infectious Disease Consultants. That office treated him for an infection of Proprionibacterium Acnes ("P. acnes"). Specifically, Claimant was evaluated by Dr. Wieland on November 7, 2014. At that time, Dr. Wieland noted his diagnosis was: P acnes folliculitis, shoulder region pyogenic arthritis, P. Acnes infected orthopedic device. Claimant began IV antibiotics-Ceftriazone.

11. Claimant returned to Dr. Wieland on November 13, 2014. At that time, Claimant's left shoulder was mildly swollen and warm, as well as diffusely tender to palpation. Dr. Wieland's assessment was same as November 7, 2015. Dr. Wieland planned on treating Claimant for minimum of six weeks with IV antibiotics and if Claimant had the hardware removed, would restart the IV antibiotics after the surgery.

12. On December 1, 2014, Claimant was evaluated by Dr. Wieland. At the time, Claimant was found to have little or no improvement, after a 3 1/2 week course of antibiotics. Dr. Wieland opined the surgical screw may have to be removed in the shoulder.

13. Claimant was seen in follow-up on December 18, 2014 by John Burris, M.D. at Concentra. Claimant described his pain at 7/10 in severity and because of a deep wound infection in his shoulder, was receiving daily antibiotics through a PICC line. Dr. Burris deferred a formal examination and talked with Claimant at length regarding the course of his treatment. Dr. Burris' diagnosis was left shoulder strain and he opined Claimant "clearly" had a psychosomatic overlay in his presentation. Dr. Burris felt a referral to a pain psychologist or psychiatrist may be necessary.

14. On January 15, 2015, Dr. Schneider performed a left shoulder arthroscopy, with multiple cultures of the glenohumeral and subacromial space and tenodesis crew and left shoulder hardware removal of tenodesis screw through a separate anterior incision. The operative report noted the glenohumeral joint did not look infected, but cultures were taken. Dr. Schneider's pre-and post-diagnosis was left shoulder infection.

15. Claimant was evaluated by John Burris, M.D. on May 28, 2015. At that time, Claimant had diffuse complaints in his neck and both shoulders. Claimant reported his complaints were due to compensation for his left shoulder injury. Dr. Burris noted an EMG study on April 4, 2014 which was normal, with no evidence of radiculopathy. Dr. Burris also documented the MRI done on the cervical spine on September 2, 2014 was essentially normal with mild degenerative changes. Dr. Burris noted Claimant self-limited all motions, but displayed normal range of motion in his cervical spine.

16. Dr. Burris' diagnosis was left shoulder strain and he determined Claimant was at MMI. He assigned a 10% upper extremity impairment for persistent left shoulder complaints. Dr. Burris stated that Claimant became argumentative and confrontational towards him[2], which was consistent with his prior contact with other providers. Dr. Burris opined Claimant did not require additional treatment.

17. Claimant requested a DIME on July 1, 2015. On the request form, in the section which states: "list specific part(s) of the body and all conditions to be evaluated, including psychiatric where appropriate", Claimant listed: "cervical spine consult per Dr. Schneider"[3].

18. On September 8, 2015, Michael Janssen, D.O. conducted the Division IME. Dr. Janssen noted he did not review all of the medical records as there was in excess of one-thousand pages, plus films. Dr. Janssen noted the time it to review the scans and examine the patient exceeded 2 hours and he was unable to review the materials in the three additional hours allocated in addition to the time it took to prepare the narrative report. Dr. Janssen estimated he reviewed 70% of the records.

19. Dr. Janssen confirmed the Claimant reached MMI in May 2015. The ALJ notes Dr. Janssen did not note a specific MMI date on the Division IME Examiner's Summary Sheet[4], but in the body of his report Dr. Burris placed Claimant at MMI on May 28, 2015. Dr. Janssen cited the 6% impairment rating given by Dr. Burris for the shoulder with approbation, noting it was reasonable approximately two years following a surgery. The report noted: "I did not (and was not requested to) examination [sic] the shoulder regarding an impairment ". The ALJ notes Dr. Janssen's narrative report referenced Claimant's five shoulder surgeries, followed by a biopsy and consideration of infection, as well as infectious disease consultation. No specific reference was made to the P. Acnes infection. Dr. Janssen offered no opinion regarding Claimant's need for additional treatment including whether a further MRI or aspiration of the left shoulder was required.

20. Dr. Janssen assigned a 13% whole person impairment to Claimant's cervical spine. Dr. Janssen opined that the underlying cervical condition was not exacerbated, caused, nor did it have a direct relationship to the pathology of the sub axial cervical spine. This was based upon the timing of the pain complaints, as well as the EMG. The ALJ found this opinion persuasive and notes there was no contrary opinion before the Court. The ALJ notes there was no evidence Dr. Janssen examined Claimant's shoulder.

[2] The ALJ notes there were no other references in the medical records admitted at hearing, which documented Claimant being confrontational with health care providers.

[3] Exhibit E.

[4] Exhibit B, p 1; Exhibit 9, p 1.

21. Respondents filed a Final Admission of Liability ("FAL") on October 6, 2015, which admitted for the impairment rating issued by Dr. Janssen.

22. On October 16, 2015, Dr. Schneider saw Claimant for a follow-up evaluation. The report noted it had been four months since the last appointment and Claimant reported he was experiencing burning/pain in the shoulder; both in the anterior and posterior aspect. Diffuse tenderness was noted on the evaluation, with positive Neer's and Hawkins tests. Claimant had normal range of motion in the cervical spine, with left C6 distribution pain, numbness and weakness. Significant pain and popping were noted with ROM. Dr. Schneider recommended a shoulder aspiration with ultrasound guidance one last time to ensure the cultures were negative, as well as an MRI of the shoulder. If both were negative, Dr. Schneider opined Claimant would be at MMI.

23. In summary, Claimant received extensive medical treatment for the left shoulder, which included conservative treatment and surgeries. Two (2) surgical procedures were performed by Mitchell Seemann, M.D. and three (3) surgeries were performed by David Schneider, M.D.

24. The records admitted at hearing reveal Claimant received no additional treatment after October 16, 2015.

25. Claimant testified he continues to have pain complaints in his left shoulder. The pain he feels extends down his left arm, as well as into his scapula area and neck.

26. The evidentiary deposition of Dr. Schneider was taken on April 20, 2016 and he testified consistently with the findings reflected in the reports of his treatment. The deposition transcript was admitted into evidence. Dr. Schneider testified as an expert in sports medicine and orthopedic surgery, specialties in which he is board-certified. Dr. Schneider stated his Level II accreditation lapsed in January 2016. Dr. Schneider testified the shoulder presented a number of challenges with regard to post-operative infections. Occult infections were hard to detect in the shoulder because of the presence of many sebaceous glands, which host Propionibacterium acnes. A P. acnes infection does not cause a huge effusion, redness or drainage. The only way to determine whether or not the infection is present is to obtain soft tissue cultures. A P. acnes occult infection will cause chronic pain, as was present in Claimant.

27. Dr. Schneider testified the positive results for P. acnes for Claimant was concerning because this bacteria lives in the skin. When surgery is performed, the bacteria can migrate to the joint, particularly the anchors/sutures that are placed in the shoulder joint. Dr. Schneider confirmed the lab results for Claimant on November 7, 2014 were positive for the presence of P. acnes bacteria. After Claimant was treated with antibiotics, the lab values were normal.

28. Dr. Schneider testified he last evaluated Claimant on October 16, 2015. He noted Claimant had pain in his left shoulder and neck. Dr. Schneider confirmed he

had seen Claimant four months prior to the above-referenced visit and did not note a concern about infection at that time. Dr. Schneider agreed Claim's pain complaints were essentially unchanged since May 2015. The ALJ infers Claimant's left shoulder condition was stable since that time. Dr. Schneider agreed that most doctors would find a Claimant at MMI if the patient's symptoms have not changed within six months and agreed that Claimant's pain complaints were essentially unchanged for six months. However, given the Claimant's history, Dr. Schneider opined Claimant would not be at MMI until such time as he had one additional aspiration and an MRI. The ALJ inferred that because the infection was hard to detect, Dr. Schneider felt additional testing was warranted.

29. Dr. Schneider testified that he could not say that Dr. Janssen was clearly wrong in finding Claimant was at MMI and agreed this was a difference of opinion. This was also true for Dr. Burris' conclusion that Claimant reached MMI on May 28, 2015.

30. Based upon totality of the medical evidence admitted at hearing, Dr. Janssen did not conduct a full and complete evaluation of Claimant, as he did not review all of the medical records provided to him. He did not independently analyze whether Claimant was at MMI, nor did he determine whether Claimant sustained a permanent medical impairment to his shoulder.

31. Based upon totality of the medical evidence admitted at hearing, Claimant was at MMI as of May 28, 2015.

32. It is more probable than not that Claimant sustained a functional impairment beyond the arm at the shoulder. The ALJ concludes the five (5) surgeries Claimant underwent impacted not only the shoulder joint, but the adjacent connective tissues (including the biceps tendon). This limited the functional mobility of Claimant's arm and shoulder, as well as impacting his cervical ROM and scapula. In addition, the presence of the P. Acnes infection, as well as treatment for the infection caused pain and loss of function in structures beyond the shoulder itself.

33. Claimant proved it is more probably true than not that he is entitled to an award of post-MMI medical treatment to relieve the effects of his injury or prevent deterioration of his condition.

34. The inferences and evidence inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of various health care providers on the question of MMI and Claimant's need for continuing treatment were the primary areas of dispute to be resolved by the ALJ.

Overcoming the DIME

Claimant contends Dr. Janssen erred in his determination that he was at MMI. Claimant also cited Dr. Schneider's recommendations made when he last saw Claimant, as well as his deposition testimony, and argued because he requires an MRI and an additional procedure to aspirate the joint, he is not at MMI. Claimant also asserted Dr. Janssen did not evaluate his shoulder, nor did he consider the potential presence of the bacteria.

Respondents averred Claimant failed to introduce sufficient evidence to meet the clear and convincing evidence standard. Citing Dr. Schneider's testimony, Respondents contended this was a difference of opinion between the physicians, which did not overcome the DIME physician's conclusions. Respondents also argued that the date of MMI was correct and supported by the evidence. As noted below, the ALJ found Claimant met his burden of proof and overcame Dr. Janssen's opinion. However, based upon the totality of the evidence, the date of MMI was correct and Claimant is entitled to a whole person impairment.

Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance'; it is evidence that his highly probable and free from serious and substantial doubt". *Metro Moving & Storage Co v. Gussert, supra*, 914 P.2d at 414 (citing CJI-Civ. 3d 3:2 (1988); *DiLeo v. Kotlnow*, 200 Colo. 119, 613 P.2d 318 (1980). A party meets this burden only by demonstrating that the evidence contradicting the

DIME's MMI is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002) (citing *DiLeo v. Koltnow, supra*). The enhanced burden of proof imposed by § 8-42-108(b)(III), C.R.S., reflects an underlying assumption that the DIME, having been selected by an independent and unbiased tribunal, will provide a reliable medical opinion. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998). The heightened proof requirement to overcome opinions of DIME physicians, such as Dr. Janssen, evinces the intent of the Colorado Legislature to make these opinions difficult to overcome.

Turning to the question of whether Dr. Janssen's opinion was overcome by clear and convincing evidence, the starting point for the ALJ's analysis was the DIME report itself, which revealed an incomplete evaluation. In Dr. Jansen's own words, he did not review all of the available medical records, as the review of the films and examination of Claimant took 2.0 hours. Rather than preparing a medical records summary, Dr. Janssen instead focused on the issue identified in the DIME request form. The lack of a complete review of the file was compelling evidence that Dr. Janssen's opinions were not determinative.

Second, Dr. Janssen narrowly focused his opinions in that case, spending a majority of the analysis on the issue of Claimant's cervical spine and simply adopting the impairment rating for the shoulder issued by the ATP, Dr. Burris. The ALJ noted that Dr. Janssen's opinions were circumscribed by the DIME request completed by Claimant, which asked for an examination of the cervical spine and for other concerns listed: medical maintenance and permit impairment. This was the basis for the incongruity between some of Dr. Janssen's conclusions and the other evidence presented on the issues set for determination at hearing.

Third, Dr. Janssen's report was issued prior to Dr. Schneider's last evaluation of Claimant in which he made the recommendation for an MRI and one final aspiration of the left shoulder joint. Dr. Janssen did not consider these recommendations and made no specific findings of his own concerning Claimant's permanent medical impairment of the left shoulder or his need for additional treatment. Dr. Janssen simply commented that he felt the finding of MMI and impairment by the ATP was "reasonable".

Based on the evidence before the Court, ALJ determined Dr. Janssen's opinions were overcome, considering the abbreviated nature of his review of the medical records and lack of findings concerning Claimant's permanent medical impairment of the left shoulder. (Findings of Fact 18-20, 30). As such, Dr. Janssen's findings are not binding. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Having concluded Dr. Janssen's opinion were overcome, the inquiry turns to whether Claimant is at MMI. The ALJ considered the opinions of the various physicians in the case, including Claimant's ATPs and Dr. Janssen.

The Act defines MMI as:

> " a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement."
> Section 8-40-201(11.5), C.R.S.

More particularly, the ALJ considered the question of whether the MRI and aspiration procedures, as proposed by Dr. Schneider lead to the conclusion Claimant is not at MMI. There is authority for the proposition that additional diagnostic procedures offer a reasonable prospect for defining the Claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000).

On balance, the ALJ was persuaded Claimant reached MMI as of May 28 2015. The ALJ relied on the fact that the last cultures taken from Claimant's left shoulder were negative, as confirmed by Dr. Schneider in his evidentiary deposition, as well by the findings made by Dr. Burris. The physical findings made by Dr. Burris on May 28th also supported the conclusion Claimant was at MMI. Dr. Snyder did not make specific recommendations for treatment when saw Claimant in June 2015.

In making this determination, the ALJ specifically reviewed Dr. Schneider's recommendations for an additional MRI and aspiration of the shoulder joint. These appear to be recommendations to rule out further issues with the left shoulder. The ALJ construed as these recommendations as post-MMI medical treatment, more in the nature to rule out problems and to ensure there is been no deterioration of Claimant's condition. The procedures proposed by Dr. Schneider are not to cure and relieve the effects of Claimant's industrial injury, but rather are to rule out any potential issues with the left shoulder. Thus, while the ALJ found the proposed treatment to be reasonable, it is more accurately characterized as post-MMI treatment.

Conversion of Medical impairment Rating-Left Shoulder

Claimant argues if the DIME physician's finding on MMI is upheld, the 10% upper extremity impairment rating should be converted to a 6% whole person rating and PPD benefits awarded on this basis. Claimant argued that many of his activities are restricted due to pain and the overall effect on his activities requires conversion of his medical impairment benefits. The ALJ was persuaded Claimant was entitled to PPD benefits based upon a whole person impairment rating

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)." As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself.

Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Pain and discomfort that limit the Claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002).

In this case, the evidence admitted at hearing led the ALJ to conclude Claimant had a functional impairment beyond the shoulder. As found, there was objective medical evidence that connective tissues beyond Claimant's arm and shoulder were affected by the industrial injury. (Findings of Fact 6, 32). In addition, Claimant's pain complaints extended beyond the shoulder (including the scapula and extending to the neck), which provided support for the conclusion his impairment extended beyond the arm at the shoulder. Last, Claimant's treatment for the P. acnes infection, including the IV antibiotics and removal of the hardware affected anatomical structures beyond the shoulder.

Therefore, Claimant's request that he be awarded PPD benefits based in conversion of an upper extremity impairment rating to a whole person is granted.

Cervical Spine

Dr. Janssen calculated Claimant's permanent medical impairment of his cervical spine as part of his evaluation of Claimant. However, he concluded this impairment was not caused by the industrial injury. Claimant has not argued he is entitled to PPD benefits based upon a permanent medical impairment to the cervical spine, nor did he present evidence to overcome Dr. Janssen's opinions on the subject.

Therefore, although there was evidence Claimant had symptoms and received treatment for his cervical spine, the ALJ was persuaded by Dr. Janssen's opinions that Claimant's cervical spine impairment was not the result of his industrial injury. (Finding of Fact 20).

Average Weekly Wage

Claimant alleged he was entitled to a higher average weekly wage than that admitted to by Respondents. Claimant proffered his testimony that he was promised $30.00 per hour by the manager who hired him. Respondents disputed Claimant would be entitled to a higher average weekly wage. The ALJ concluded Claimant met his burden of proof and showed he was entitled to a higher average weekly wage.

Section 8-42-102(2), C.R.S., requires the ALJ to base the Claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the Claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra. Pizza Hut v. Industrial Claims Appeals Office,* 18 P.3d 867 (Colo. App 2001). Where Claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the Claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.* and *Pizza Hut v. Industrial Claims Appeals Office, supra*.

In *Pizza Hut v. Industrial Claims Appeals Office, supra,* 18 P.3d at 869-870*.* Claimant was working part-time for an employer and sustained an industrial injury. Shortly afterwards, Claimant obtained full-time employment at a significantly higher wage, working both jobs for two weeks. The ALJ's determination that Claimant's medical impairment benefits should be paid based upon a higher average weekly wage (which included Claimant's concurrent employment) was affirmed by the Panel and subsequently by the Court of Appeals. Citing Section 8-42-102(3), C.R.S., the Court affirmed the ALJ's findings as within the ALJ's discretionary authority to calculate AWW in an alternative manner, if prescribed methods would not fairly calculated the wage in view of the particular circumstances. *Id.*

As found, Claimant's industrial injury precluded him from receiving at increase in his hourly rate of pay. (Finding of Fact 3). The ALJ determined Claimant's average weekly wage should be increased as the higher wage more fairly compensates him, based upon the specific circumstances of the case. *Pizza Hut v. Industrial Claims Appeals Office, supra,* 18 P.3d at 870.

Based on the totality of the evidence, the ALJ concluded Claimant sustained his burden of proof and established he was entitled to a higher average weekly wage. In this regard, Claimant's industrial injury and the surgeries he underwent (including the complications) prevented him from completing his first year of employment with Employer, after which time he would have secured a raise. As found, a fair assessment of the average weekly wage requires inclusion of the additional amount Claimant would have received. The evidence before the Court showed it was more probable than not Claimant would have received an increase in pay but for the industrial injury. Claimant's unrefuted testimony established he was eligible to receive this increase in pay after his first year of service and there was no contrary evidence in the record.

Although Claimant testified he was eligible to receive up to $30.00 per hour, the ALJ declines to reach that conclusion, as there was no corroboration of Claimant’s testimony to support such a finding. However, since the ALJ found it was more likely than not he would have received a raise, a reasonable increase in Claimant's wages was 33% or an increase of $4.38, since it has been approximately three (3) years since the injury. This increases Claimant’s wages to $17.64 per hour. Therefore, Claimant's average weekly wage should be increased to $705.43.

***Grover* Medical Benefits**

Claimant argued the treatment proposed by Dr. Schneider (MRI and the shoulder aspiration procedure) was reasonable and necessary. He also contended he was not at MMI. Since the ALJ determined he was at MMI, the inquiry turns to whether that treatment fits within post–MMI medical benefits and whether Claimant is entitled to said treatment. The ALJ concludes Claimant is entitled to an award of post-MMI medical benefits.

The need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award of *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As determined in Findings of Fact 5-14, Claimant had extensive treatment for his left shoulder, including multiple surgeries. He experienced complications from the procedures, specifically the P. acnes bacteria infection, which also required extensive treatment. The ALJ credited Dr. Schneider’s testimony that this type of infection is poorly understood. Accordingly, the ALJ finds that an MRI is reasonable to evaluate the current status of Claimant’s left shoulder. A follow-up evaluation with Dr. Schneider is also reasonable and necessary to prevent deterioration of Claimant’s condition. The ALJ concluded this treatment is properly characterized as post-MMI treatment governed by *Grover* and its progeny. Respondents are required to provide said treatment.

ORDER

It is therefore ordered that:

1. On May 28, 2015, Claimant reached MMI for his August 30, 2013 industrial injury.

2. Respondents shall pay Claimant permanent partial disability benefits based upon a six (6) percent whole person impairment for the functional impairment to the left shoulder and surrounding anatomical structures.

3. Claimant's average weekly wage is increased to $705.43.

4. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. Claimant is entitled to maintenance medical treatment, including an MRI and follow-up evaluation with Dr. Schneider.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 29, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-976-657-02

ISSUES

The issue presented for determination is whether the Claimant is entitled to temporary total disability (TTD) benefits from February 3, 2016 through March 24, 2016.

FINDINGS OF FACT

1. On November 4, 2015, ALJ Richard Lamphere entered a Summary Order which found that on February 28, 2015, Claimant suffered a compensable injury to her cervical spine. ALJ Lamphere specifically found that Claimant's "current cervical pain is a consequence of her turning her head suddenly in response to a customer while she was twisting her body in the opposite direction while mopping the floor."

2. ALJ Lamphere determined that Claimant suffered a compensable aggravation of a pre-existing spine condition in the course and scope of her employment. He also found that, "the aggravation of Claimant's pre-existing condition prompted by her work duties caused the need for treatment rather than the natural progression of Claimant's pre-existing condition.

3. ALJ Lamphere also determined that Respondents are liable for reasonable and necessary medical treatment related to cure and relieve the Claimant from the effects of the compensable injury.

4. Claimant's authorized treating provider is Concentra. The record suggests that Claimant had not been receiving consistent medical treatment through Concentra due to the litigation over the compensability of her claim. Several medical records reflect that the Insurer denied referrals for medical treatment while it contested the claim.

5. On December 15, 2015, Claimant returned to Concentra after a six month absence once ALJ Lamphere's found her claim compensable. Claimant continued to complain of neck pain. She reported that her primary care physician had been managing her neck pain.

6. On January 6, 2016, the Claimant returned to Concentra and saw physician's assistant, Kenneth Ginsburg. The record indicates that Claimant continues to experience "much cervical pain with right arm radiculopathy." She stated that all treatments had been denied prompting her to retain an attorney.

7. On January 8, 2016, Mr. Ginsburg documented his receipt and review of ALJ Lamphere's November 4, 2015 order. Mr. Ginsburg noted that, "It appears a neck strain as an exacerbation of an underlying condition is what is covered. We have completed or attempted to complete conservative care for this condition and she may be at MMI,

but would need evaluation and possibly apportionment to determine MMI." Mr. Ginbsurg deferred to "Physical Medicine" to determine if additional conservative treatments were indicated before MMI or to Dr. Hattem who is a delayed recovery specialist.

8. Claimant returned to Concentra on February 3, 2016 and saw Mr. Ginsburg. Claimant reported that her symptoms are much worse and she could hardly move her head. She reported the inability to concentrate due to pain. Mr. Ginsburg offered more conservative treatment, but Claimant declined citing to a specialist who advised her that she needs her "pinched nerve" fixed. Claimant told Mr. Ginsburg that she was not working at that time.

9. Mr. Ginbsurg referred the Claimant to Dr. Hattem for an impairment rating and case closure so Claimant could receive treatment under her personal health insurance.

10. Mr. Ginsburg noted Claimant's activity status as "No work." He also indicated, "OFF WORK UNTIL FOLLOW UP APPOINTMENT AND RE-EVALUATION." Dr. Walter Larimore approved the Mr. Ginsburg's recommendations.

11. On February 12, 2016, Claimant returned to Concentra at which time Dr. Randall Jones evaluated her. Claimant reported she was no better. Dr. Jones noted that Dr. Rauzzino recommended surgery a year earlier and had advised against physical therapy. Dr. Jones and Claimant discussed having her workers' compensation case closed so she could pursue surgery under her private health insurance. Dr. Jones continued the "no work" activity status.

12. Dr. Albert Hattem evaluated the Claimant on March 24, 2016. He noted that after Claimant returned to Concentra in December 2015 after a six month absence, no further treatment was provided because the Insurer had denied all referrals. Claimant requested that her case be closed, and Dr. Hattem indicated he would honor her request.

13. Dr. Hattem determined that Claimant reached MMI effective March 24, 2016. He assigned a 6% permanent impairment rating under Table 53 of the AMA Guides. Dr. Hattem declined to assign an impairment rating for cervical spine range of motion deficits. Dr. Hattem concluded that Claimant's cervical spine range of motion measurements were invalid based on his casual observations of her movements throughout the exam.

14. Dr. Hattem assigned permanent work restrictions, but opined that Claimant did not require further medical monitoring or future follow-up treatment.

15. Claimant has proven that the restriction of "no work" assigned by authorized provider, Mr. Ginsburg, and approved by Dr. Larimore, resulted in her inability to earn wages in her usual occupation.

16. Based on the evidence in the record, the ALJ finds that Mr. Ginsburg determined Claimant could not work due to the effects of her compensable work injury. Mr. Ginsburg acknowledged that he reviewed ALJ Lamphere's summary order then proceeded to restrict Claimant from working. Dr. Larimore approved that restriction and Dr. Jones continued the "no work" restriction. There is no persuasive evidence that the "no work" restriction was related to anything other than Claimant's compensable workers' compensation injury.

17. Even if Claimant's compensable work injury was limited to an aggravation of a pre-existing soft tissue injury as Respondents contend, the medical records do not document any improvement in Claimant's soft tissue injury condition from the date of the injury, February 28, 2015 through the date of MMI. Rather, Claimant attended a few physical therapy sessions then there are significant gaps in treatment through the workers' compensation system due, in part, to Respondents' refusal to authorize treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires a claimant to establish a causal connection between a work-related injury and a

subsequent wage loss in order to obtain TTD benefits. *Id*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

5. As found above, the Claimant has proven entitlement to TTD commencing on February 3, 2016, when her authorized treating provider issued a “no work” restriction related to her compensable work injury. Claimant could not perform her usual job duties when restricted to “no work.” As such, Respondents shall be liable for TTD benefits until Dr. Hattem placed the Claimant at MMI on March 24, 2016.

ORDER

It is therefore ordered that:

1. Respondents shall be liable for TTD benefits commencing on February 3, 2016 until March 24, 2016, at the AWW of $461.35.

2. The Insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 9, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-009-016-01

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on August 31, 2015.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his industrial injuries.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 31, 2015 through November 30, 2015 and Temporary Partial Disability (TPD) benefits for the period December 1, 2015 until terminated by statute.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant is precluded from receiving indemnity benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $1,098.00.

2. The period for temporary disability benefits began on October 31, 2015.

FINDINGS OF FACT

1. Claimant worked for Employer as a Maintenance Supervisor. His job duties required him to perform and supervise the maintenance work at properties owned and operated by Employer.

2. Claimant's job duties involved completing work orders for general repairs in rental units. He was specifically responsible for plumbing, electrical, painting and the preparation of units for new tenants. Claimant also supervised a team of Maintenance Technicians. His management duties specifically included hiring and terminating employees, assigning work orders and confirming completed work orders.

3. Claimant testified that on August 31, 2015 one of his supervisors asked him to assist a resident in transporting boxes that had been delivered to the lobby area.

As he attempted to lift a box that was falling from a dolly, he immediately experienced a pinch and pain in his lower back.

4. On September 12, 2015 Claimant visited Craig Hare, PA-C at Concentra Medical Centers for an evaluation. Claimant reported lower back pain. PA-C Hare diagnosed him with a lumbar strain, assigned work restrictions and implemented a conservative course of treatment.

5. On October 5, 2015 Claimant returned to Concentra and visited Ron Rasis, PA-C for an examination. He reported lower back pain and "aching pain down posterior right leg."

6. On October 29, 2015 Claimant underwent an initial physiatric evaluation with Robert I. Kawasaki, M.D. Claimant reported that he was lifting heavy boxes and felt a pinch in his back. He noted continuing lower back pain and radicular symptoms that extended into his bilateral lower extremities. Dr. Kawasaki diagnosed Claimant with an L4-L5 versus an L5-S1 disc protrusion with some radicular symptoms into the lower extremities.

7. On October 30, 2015 Claimant was terminated from his employment with Employer. The evidence reveals that Claimant began having job performance issues in October 2014. Employer unsuccessfully engaged in ongoing counseling efforts in an attempt to correct Claimant's employment deficiencies.

8. Employer's Office Manager Sandy Bucceri testified that Employer uses a progressive disciplinary system to apprise employees of work performance concerns. She summarized that "we encourage the managers to communicate problems early and often, if you will. So it may start with informal counseling sessions; this might be verbal. And then an e-mail is sent to corporate documenting the conversation, followed by a written counseling session, which is a written warning. If the problem escalates, then it becomes a final written warning."

9. Employer's Property Manager Melody Seitz began counseling Claimant about his job performance in late October 2014. She specifically advised Claimant to leave detailed notes anytime a member of the maintenance crew entered an apartment unit. Ms. Seitz also specified that maintenance team members should leave notes for tenants to advise them of expected repair completion time.

10. On February 12, 2015 Ms. Seitz sent an e-mail to Claimant and other maintenance team members that outlined job concerns. She specifically detailed that work orders must be completed within 48 hours, notes must be left in units about the status of work orders and keys must be ready one day prior to the move-in date.

11. On March 9, 2015 Ms. Seitz completed her first employee counseling form for Claimant. She detailed concerns with "following through when telling me/upper management/coworkers that something will get done…completing work orders and following up with residents & office staff when they are not completed with details of why & when it will be done." Ms. Seitz also outlined areas where Claimant could improve his

work performance. She stated: "I would like to see [Claimant's] communication improve. This includes telling me (and the team) if something that we request cannot be completed in the timeframe we request, communicating with the staff and residents about the status of work orders, following up on work orders that were unable to be completed at initial visits, [and] following up with the office staff and his team on anything that we may need to know."

12. On March 18, 2015 Ms. Seitz drafted an e-mail summarizing a meeting she had with Claimant earlier in the day. She advised Claimant that he had to improve communication "so that when work orders take weeks to complete, our residents are aware of why and an expected time frame for completion."

13. On June 3, 2015 Ms. Seitz conducted a second employee counseling session with Claimant. Ms. Seitz outlined issues including repairs of broken elevator doors, failures to effectively communicate with tenants regarding repairs and continued concerns with having keys in the leasing office the day before a unit was to be rented. Ms. Seitz specifically stated "I would like to see [Claimant] step up to the supervisor role a bit more, and provide more leadership and training for the maintenance technicians. Instead of blaming them when they don't do things, make sure they have the proper training and are capable of doing whatever it is that they need to do…I would also like to see [Claimant's] attention to detail improve. There are numerous things like guest suite reservations, move-in scheduling [and] item ordering that can be improved upon."

14. On June 26, 2015 Ms. Seitz conducted Claimant's annual performance review. The sections of the appraisal that allowed the reviewer to rate Claimant on a scale of 1-5 reflected that Claimant's job performance was satisfactory. However, Ms. Bucceri clarified that the scores on the annual performance review directly correlate to an employee's annual raise. Because managers want to provide better raises for their personnel, scores may not accurately reflect an employee's actual job performance.

15. The written portions of the review included a variety of suggestions for Claimant's improvement. Regarding Claimant's job knowledge Ms. Seitz stated "I would like to see improvement with the supervisor duties." In terms of Claimant's job performance Ms. Seitz noted "[Claimant's] work is normally satisfactory. Would like more follow up on his team's work." Finally, in addressing Claimant's job initiative Ms. Seitz commented "I would like to see a little more follow through when assigned tasks."

16. Because Claimant's work performance failed to improve, Ms. Seitz initiated a third counseling session on September 30, 2015. She explained that "[t]here are currently 173 outstanding work orders in MRI. Either these maintenance items have not been addressed, or the work orders are not being documented properly. Work orders are a primary job duty, so if they are not being addressed that is unacceptable." The note was marked as Claimant's final written warning.

17. The final written warning also included additional comments about Claimant's supervisory duties and professionalism. Ms. Seitz explained that Claimant "needed to take oversight of third party vendors more seriously, especially when they

are performing work on-site. This goes back to the need to step up in the supervisory role documented in previous write ups and the most recent annual review. Specifically, there has been little oversight of involvement with the flood that occurred on 9/13/15." Regarding professionalism Ms. Seitz specifically stated that "[w]hen dealing with residents, vendors, and team members this is an area where huge improvement is necessary. When residents are cc'ed on emails with the team, it is a necessity to be cognizant of the level of professionalism. When office members ask if something has been completed, the complete truth is expected so we are relaying accurate information to residents and vendors." Claimant refused to sign the final written warning.

18. On October 5, 2015 Ms. Seitz authored a second final written warning. She again detailed continuing issues with Claimant's work performance. She remarked that "[p]er previous employee counsellings, apartment turns should be done and move-in keys are expected to be in the office by 3pm the day before the move-in. This has been addressed numerous times and has failed to happen as recently as 9/30/2015." Ms. Seitz reiterated recommendations on improving Claimant's work performance and stated, "Get organized with work orders. Maint. Tech received a service request in his mailbox on 10/1/15 that was from 9/11/15, and a service request entered 9/25/15 is still incomplete without contact on 10/5/15." At the bottom of the final written warning, Claimant was again warned that the failure to adhere to the outlined performance improvement plan would result in termination.

19. On October 14, 2015 Ms. Seitz again sent Claimant an e-mail that outlined ongoing issues with his handling of work orders. Complaints included failing to lock the doors of units after servicing, placing incomplete work orders in the stack of completed work orders and failing to timely respond to requests. Ms. Seitz reiterated that "[w]e need to be able to depend on you and trust the information you give us, especially when we are relaying this information to residents. Please let me know that you received this and understand that these things cannot continue happening."

20. The record reveals that Employer repeatedly discussed and documented job performance concerns with Claimant. Nevertheless, because Claimant's job performance did not improve, he was terminated on October 31, 2015 for the failure to meet performance expectations.

21. On November 11, 2015 Claimant underwent a lumbar MRI. The MRI revealed a mild L5-S1 disc bulge with a left foraminal anular fissure.

22. Claimant did not work from October 31, 2015 until December 1, 2015. On December 1, 2015 Claimant began working at the Colorado History Museum performing maintenance duties. He still works at the Museum. His job duties are less strenuous than when he worked for Employer and are within his work restrictions. Claimant commented that he does not engage in any heavy lifting or intense labor.

23. Claimant explained that on December 15, 2015 he attempted to assist co-workers with snow removal because of a recent storm. He attempted to scoop

approximately two shovels of snow but quickly stopped because of increasing lower back pain.

24. On December 17, 2015 Claimant returned to Dr. Kawasaki for an examination. Dr. Kawasaki recounted that Claimant had undergone chiropractic treatment, acupuncture sessions and an MRI for his lower back condition. Claimant reported that his lower back symptoms were beginning to decrease until he had a flare-up while doing “quite a bit of snow removal.” After reviewing Claimant’s November 11, 2015 MRI and performing a physical examination, Dr. Kawasaki diagnosed Claimant with a lumbar strain and a foraminal disc protrusion with an annular fissure. Dr. Kawasaki anticipated a follow-up visit with Claimant in four weeks if his symptoms continued to improve. However, if Claimant’s radicular symptoms persisted he would consider epidural steroid injections.

25. Claimant continued chiropractic and physical therapy treatment for his lower back symptoms. Because there was no significant change in Claimant’s condition, he underwent an epidural steroid injection with Dr. Kawasaki on May 6, 2016. Claimant reported no extended benefits from the procedure.

26. On June 7, 2016 Claimant underwent an independent medical examination with Marc Steinmetz, M.D. Claimant reported that on August 31, 2015 he injured his lower back at work while helping a resident move a heavy box. He also explained that he had a flare-up of his lower back pain when shoveling snow while working at the Colorado History Museum. Dr. Steinmetz determined that Claimant likely sustained a minor lower back strain while working for Employer on August 31, 2015 that would have resolved within a few months. His symptoms improved until he suffered a permanent aggravation of his lower back condition while shoveling snow during his subsequent employment at the Colorado History Museum on December 15, 2015. Dr. Steinmetz thus determined that Claimant reached Maximum Medical Improvement (MMI) for his August 31, 2015 lower back injury by December 16, 2015. Claimant was thus not entitled to additional medical treatment for his August 31, 2015 industrial injury. The December 15, 2015 incident at the Colorado History Museum constituted a permanent aggravation of Claimant’s pre-existing lower back condition.

27. Dr. Steinmetz also testified at the hearing in this matter. He reiterated that Claimant suffered a lower back strain while working for Employer on August 31, 2015. Claimant then received reasonable and necessary conservative medical treatment and his symptoms improved. Claimant suffered no impairment and is not entitled to medical maintenance treatment as a result of the August 31, 2015 incident. However, Claimant suffered an efficient intervening cause and permanently aggravated his lower back condition while shoveling snow for the Colorado History Museum on December 15, 2015. Dr. Steinmetz specifically remarked that Claimant suffered a muscle strain and had been one “month pain free in the medical records from any leg complaints and was improving by mid-December, per Dr. Kawasaki’s note, until the shoveling and lifting at the museum.” He reasoned that conservative treatment had improved Claimant’s

condition and he did not have any leg complaints for approximately one month from mid-November until mid-December.

28. Claimant has demonstrated that it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his employment with Employer on August 31, 2015. Claimant credibly testified that on August 31, 2015 one of his supervisors asked him to assist a resident in transporting boxes that had been delivered to the lobby area. As he attempted to lift a box that was falling from a dolly, he immediately experienced a pinch and pain in his lower back. He was diagnosed with a lumbar strain as a result of the incident. The medical records consistently support Claimant's testimony and reflect that he injured his lower back area while moving a box at work on August 31, 2015. Moreover, Dr. Steinmetz persuasively explained that Claimant likely suffered a lower back strain while working for Employer on August 31, 2015. Accordingly, the August 31, 2015 lifting incident aggravated, accelerated or combined with Claimant's pre-existing condition to produce a need for medical treatment.

29. Although Claimant suffered an industrial lower back injury on August 31, 2015 his condition resolved through conservative treatment by December 15, 2015. On December 15, 2015 Claimant's back symptoms flared-up when shoveling snow while working for the Colorado History Museum. Dr. Steinmetz persuasively determined that Claimant's symptoms from the August 31, 2015 incident improved until he suffered a permanent aggravation of his lower back condition while shoveling snow during his subsequent employment at the Colorado History Museum on December 15, 2015. He reasoned that conservative treatment had improved Claimant's condition and he did not have any leg complaints for approximately one month from mid-November until mid-December. Finally, when Claimant visited Dr. Kawasaki on December 17, 2015 he reported that his lower back symptoms were beginning to decrease until he had a flare-up while doing "quite a bit of snow removal." Accordingly, the snow shoveling flare-up constituted an efficient intervening cause that severed the causal connection with the August 31, 2015 incident.

30. Claimant has proven that it is more probably true than not that he received authorized, reasonable and necessary medical treatment for his August 31, 2015 industrial lower back injury. Claimant received conservative care through Concentra that included chiropractic treatment, acupuncture sessions, physical therapy, injections and diagnostic testing. Dr. Steinmetz persuasively commented that Claimant received reasonable and necessary conservative medical treatment and his symptoms improved. Claimant's treatment was designed to cure or relieve the effects of his August 31, 2015 industrial lower back strain. However, because Claimant's December 15, 2015 injury at the Colorado History Museum constituted an efficient intervening cause, he is not entitled to additional medical treatment for his August 31, 2015 industrial injury. Accordingly, Claimant's entitlement to medical benefits ceased on December 16, 2015.

31. Claimant asserts that he is entitled to receive TTD benefits for the period October 31, 2015 through November 30, 2015 and TPD benefits for the period December 1, 2015 until terminated by statute. However, Respondents have established

that it is more probably true than not that Claimant is precluded from receiving indemnity benefits because he was responsible for his termination from employment under the termination statutes. The evidence reveals that Claimant began having job performance issues in October 2014. Employer unsuccessfully engaged in ongoing counseling efforts in an attempt to correct Claimant's employment deficiencies. The record reveals that Employer repeatedly discussed and documented job performance concerns with Claimant. Nevertheless, because Claimant's job performance did not improve, he was terminated on October 31, 2015 for the failure to meet performance expectations. Ms. Seitz used Employer's progressive disciplinary system to apprise Claimant of job performance concerns. She extensively detailed deficiencies in Claimant's job knowledge, performance and initiative. Ms. Seitz specifically expressed concerns about Claimant's repeated failures to leave notes for residents about maintenance tasks, incomplete work orders and documentation, lack of available keys for new residents, leadership deficiencies in his supervisory position and lack of professionalism. Claimant thus precipitated his employment termination by a volitional act that he would reasonably expect to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. He is thus not entitled to receive indemnity benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002); *In Re Lang,* W.C. No. 4-450-747 (ICAP, May 16, 2005). No liability exists when a later accident occurs as the direct result of an intervening cause. *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAP, Aug. 29, 2002). However, the intervening event does not sever the causal connection between the injury and the claimant's condition unless the disability is triggered by the intervening event. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAP, Aug. 29, 2002). If the need for medical treatment occurs as the result of an independent intervening cause, then the subsequent treatment is not compensable. *Owens,* 49 P.3d at 1188. The new injury is not compensable “merely because the later accident might or would not have happened if the employee had retained all his former

powers." *In Re Chavez,* W.C. No. 4-499-370 (ICAP, Jan. 23, 2004). The determination of whether an injury resulted from an efficient intervening cause is a question of fact for the ALJ. *Id.*

8. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on August 31, 2015. Claimant credibly testified that on August 31, 2015 one of his supervisors asked him to assist a resident in transporting boxes that had been delivered to the lobby area. As he attempted to lift a box that was falling from a dolly, he immediately experienced a pinch and pain in his lower back. He was diagnosed with a lumbar strain as a result of the incident. The medical records consistently support Claimant's testimony and reflect that he injured his lower back area while moving a box at work on August 31, 2015. Moreover, Dr. Steinmetz persuasively explained that Claimant likely suffered a lower back strain while working for Employer on August 31, 2015. Accordingly, the August 31, 2015 lifting incident aggravated, accelerated or combined with Claimant's pre-existing condition to produce a need for medical treatment.

9. As found, although Claimant suffered an industrial lower back injury on August 31, 2015 his condition resolved through conservative treatment by December 15, 2015. On December 15, 2015 Claimant's back symptoms flared-up when shoveling snow while working for the Colorado History Museum. Dr. Steinmetz persuasively determined that Claimant's symptoms from the August 31, 2015 incident improved until he suffered a permanent aggravation of his lower back condition while shoveling snow during his subsequent employment at the Colorado History Museum on December 15, 2015. He reasoned that conservative treatment had improved Claimant's condition and he did not have any leg complaints for approximately one month from mid-November until mid-December. Finally, when Claimant visited Dr. Kawasaki on December 17, 2015 he reported that his lower back symptoms were beginning to decrease until he had a flare-up while doing "quite a bit of snow removal." Accordingly, the snow shoveling flare-up constituted an efficient intervening cause that severed the causal connection with the August 31, 2015 incident.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

11. As found, Claimant has proven by a preponderance of the evidence that he received authorized, reasonable and necessary medical treatment for his August 31, 2015 industrial lower back injury. Claimant received conservative care through Concentra that included chiropractic treatment, acupuncture sessions, physical therapy, injections and diagnostic testing. Dr. Steinmetz persuasively commented that Claimant received reasonable and necessary conservative medical treatment and his symptoms improved. Claimant's treatment was designed to cure or relieve the effects of his August 31, 2015 industrial lower back strain. However, because Claimant's December 15, 2015 injury at the Colorado History Museum constituted an efficient intervening cause, he is not entitled to additional medical treatment for his August 31, 2015 industrial injury. Accordingly, Claimant's entitlement to medical benefits ceased on December 16, 2015.

TTD and TPD Benefits/Responsible for Termination

12. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability.

13. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination

under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus “responsible” if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep’t of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

14. As found, Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving indemnity benefits because he was responsible for his termination from employment under the termination statutes. The evidence reveals that Claimant began having job performance issues in October 2014. Employer unsuccessfully engaged in ongoing counseling efforts in an attempt to correct Claimant’s employment deficiencies. The record reveals that Employer repeatedly discussed and documented job performance concerns with Claimant. Nevertheless, because Claimant’s job performance did not improve, he was terminated on October 31, 2015 for the failure to meet performance expectations. Ms. Seitz used Employer’s progressive disciplinary system to apprise Claimant of job performance concerns. She extensively detailed deficiencies in Claimant’s job knowledge, performance and initiative. Ms. Seitz specifically expressed concerns about Claimant’s repeated failures to leave notes for residents about maintenance tasks, incomplete work orders and documentation, lack of available keys for new residents, leadership deficiencies in his supervisory position and lack of professionalism. Claimant thus precipitated his employment termination by a volitional act that he would reasonably expect to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. He is thus not entitled to receive indemnity benefits.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable lower back injury during the course and scope of her employment with Employer on August 31, 2015.

2. Claimant received reasonable and necessary medical benefits through December 15, 2015 but is not entitled to any additional medical benefits.

3. Claimant earned an AWW of $1098.00.

4. Claimant’s request for TTD and TPD benefits is denied and dismissed because he was responsible for his termination from employment with Employer on October 31, 2015.

5. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 5, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-975-918-02

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that Dr. David Yamamoto was an authorized treating physician.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant suffered an occupational injury to his shoulder and low back from repetitive climbing of very tall ladders at work.

2. Employer sent Claimant to Workwell Occupational Medicine on December 26, 2014.

3. On February 23, 2015, Workwell decided Claimant's low back symptoms were "not likely work comp. related. He will follow up with PCP for this matter." Dr. Jaramillo at the Salud Clinic was Claimant's PCP. Based on Workwell's referral to his PCP for his low back condition, Claimant went to Salud and Salud then referred Claimant to Boulder Neurosurgery for low back care. Claimant used his private insurance to be seen by Dr. Kara Beasley at Boulder Neurosurgery on March 3, 2015. Claimant treated at Boulder Neurosurgery until January 1, 2016. Dr. Beasley did not personally see Claimant after the first appointment. Claimant's other appointments at Boulder Neurosurgery were with a physician's assistant.

4. Claimant continued treatment at Workwell for his shoulder injury until March 11, 2015. On that date, Dr. Fitzgibbons at Workwell requested authorization for shoulder surgery. Respondents denied the entire claim.

5. Claimant continued to treat for his low back condition with Boulder Neurosurgery.

6. Claimant and his wife testified that after Workwell discharged Claimant for nonmedical reasons, their attorney gave them two doctors' names to consider for Claimant's shoulder treatment. Claimant chose Dr. Yamamoto because his office accepted their insurance. Claimant saw Dr. Yamamoto on March 30, 2015. Dr. Yamamoto referred Claimant to Dr. Eric McCarty for shoulder surgery. Dr. McCarty performed the previously recommended surgery on Claimant's right shoulder on March 30, 2015. The shoulder surgery was paid for by Claimant's private health insurance. Dr. Yamamoto was Claimant's primary treating doctor for his shoulder condition from March 30, 2015 until January 5, 2016.

7. On August 12, 2015, ALJ Margot Jones presided over a hearing on compensability, identity of the authorized provider, and temporary total disability benefits.

8. In her Order issued December 9, 2015, ALJ Jones ordered Respondents liable for workers' compensation benefits for the December 26, 2014 occupational disease for Claimant's right shoulder and low back.

9. ALJ Jones found that Dr. Jaramillo/Salud Clinic was the physician Claimant selected in December 2014, when Claimant reported a work injury because Employer did not comply with C.R.S. § 8-43-404(5)a)(I)A). ALJ Jones concluded Claimant was not entitled to select a second physician, Dr. Yamamoto, as his treating physician.

10. Claimant and his wife credibly testified that Salud Clinic does not accept Workers Compensation cases. Claimant and his wife also testified they knew Dr. Jaramillo was on an extended medical leave and unable to treat Claimant. Consequently, upon receipt of the Compensability Order, Claimant, through his wife who worked at Salud Clinic, asked for a referral to Dr. Yamamoto to obtain workers compensation medical care. Claimant's wife testified that she and Claimant wanted Claimant's ongoing treatment to be handled by Dr. Yamamoto for reasons of continuity of care and because they were happy with Dr. Yamamoto.

11. Claimant's wife testified that after receiving the note from the clinic's director, Linda Deeming, that the clinic did not treat workers' compensation claims, she then spoke with Dr. Hand, a physician at the Salud Clinic, about obtaining a referral for Claimant to Dr. Yamamoto because Claimant needed medical treatment, he was pleased with Dr. Yamamoto's treatment, and he wanted to continue under his care..

12. On December 16, 2015, Salud Clinic referred Claimant to Dr. Yamamoto. Dr. Hand, made the referral, although it was stamped with Dr. Jaramillo's signature. The ALJ reasonably infers that Dr. Hand referred Claimant to Dr. Yamamoto so Claimant could obtain appropriate medical treatment under workers' compensation and to maintain the continuity of Claimant's care. The referral was made in Claimant's best interest and for legitimate medical reasons.

13. On December 22, 2015, Respondents filed a Petition to Review ALJ Jones' Order.

14. Also on December 22, 2015, Respondents' counsel faxed Claimant's counsel a letter rejecting the Salud Clinic referral to Dr. Yamamoto. Respondents noted that Dr. Jaramillo had refused to treat Claimant due to non-medical reasons and re-designated Dr. Cazden at Workwell as Claimant's ATP.

15. Claimant and his wife both testified that Claimant was not happy with his prior treatment at Workwell because Workwell had discharged him when he still needed treatment, and Claimant did not want to return to Workwell for additional treatment.

16. On January 28, 2016, Claimant returned to Boulder Neurosurgical for a follow up appointment regarding his low back condition. Claimant's wife testified that Claimant wanted another referral to Dr. Yamamoto to manage his care in the event the prior referral from Salud Clinic was deemed to be invalid for the reasons cited in Respondent's December 22, 2015 letter. Claimant's wife testified that she explained to the P.A. at Boulder Neurosurgical that Dr. Yamamoto had been managing Claimant's care related to his shoulder since March 2015, and that they wished to continue using him for reasons of continuity of care. The Boulder Neurosurgical P.A. made the requested referral which was automatically stamped with Dr. Beasley's signature as the treating medical doctor. Respondents maintained their position that Dr. Yamamoto was not an ATP.

17. On March 15, 2016, the Industrial Claims Appeals Office issued its final Order. ICAO overturned the ALJ's designation of Salud Clinic as Claimant's ATP and held that Claimant had selected Workwell as his ATP as of the injury date. It further held that when Workwell discharged Claimant for non-medical reasons on March 11, 2015 that the statutorily required certified letter advising the Respondent that Workwell was refusing to provide medical treatment for non-medical reasons had not been sent, and since the certified mail letter had not been sent that Claimant's attempt to nominate Dr. Yamamoto in March 2015 as an authorized treating physician was "to no avail."

18. Respondents deposed Dr. Beasley on June 13, 2016. When asked whether she referred Claimant to Dr. Yamamoto, Dr. Beasley testified that she "had no idea who Dr. Yamamoto is." Dr. Beasley explained that she makes referrals for treatment, not a specific doctor. Dr. Beasley testified that in the context of workers' compensation, her referrals are for treatment and claimants are instructed to contact the workers' compensation carrier to provide a physician for the procedure.

19. Claimant's wife testified that they did not want to use Claimant's private insurance to pay for medical care after the favorable Compensability Order. Claimant tried to return to Workwell under protest in early March 2016, but Workwell refused to treat him because his case was still under denial. On March 25, 2016, after the ICAO Order, Workwell accepted Claimant back as a patient.

20. When Claimant returned to Workwell on March 25, 2016, Workwell referred Claimant back to Boulder Neurosurgery for low back care, and referred Claimant back to Dr. Eric McCarty for shoulder care.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. § 8-40-102(1). A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-42-101. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. C.R.S. § 8-43-20. A Workers' Compensation case is decided on its merits. C.R.S. § 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

It is in the ALJ’s sole prerogative to assess the credibility of the witnesses and the probative value of the evidence to determine whether the Claimant has met his burden of proof. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). It is within an ALJ’s purview to assess the relative weight and credibility of various opinions. See, *Kraft v. Medlogic Global Corp*. *et al*., W.C. No. 4-412-711 (ICAO, Mar. 15, 2001) (citing *Rockwell Internat’l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990)). Additionally, if an individual expert’s opinion contains contradictions or is subject to multiple interpretations, the ALJ may resolve the conflict by crediting only a portion of the opinion, or discrediting the opinion in its entirety. *See Kraft*, W.C. No. 4-412-711; *Johnson v. Indus. Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997).

An ALJ is required to make specific findings only as to the evidence which is deemed persuasive and determinative. An ALJ is not obligated to address every issue raised or evidence which is unpersuasive. *See Riddle v. Ampex Corp.*, 839 P.2d 489 (Colo. App. 1992) (citing *Roe v. Industrial Commission*, 734 P.2d 138 (Colo. App. 1986); *Crandall v. Watson-Wilson Transportation System, Inc.*, 467 P.2d 48 (Colo. 1970)). Furthermore, an ALJ may resolve conflicts in the evidence based upon her credibility determinations. *See*, *Brodbeck v. Too Busy Painting and Pinnacol Assurance*, W.C. No. 4-163-762 (ICAO, Apr. 16, 2002) (citing *Riddle*, 839 P.2d at 489).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

ISSUE PRECLUSION

Respondents argue that Claimant's attempt to have this court determine the validity of referrals to Dr. Yamamoto is barred by the doctrine of issue preclusion. The ALJ is not persuaded.

The law of the case doctrine is a "rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *Verzuh v. Rouse*, 660 P.2d 1301 (Colo. App. 1982)(citing *United States v. United States Smelting, Refining and Minding Co*., 339 U.S. 186(1950)). Additionally, the issue preclusion doctrine "holds that the final decision of a court on an issue actually litigated and determined is conclusive of that issue in any subsequent suit." *Umberfield v. School District No. 11*, 522 P.2d 730 (1974).

Here, the issue previously litigated and decided was whether Claimant had the right to choose Dr. Yamamoto in March 2015 after Respondent's denied Claimant's claim. That is not the same as the issues now before the court: (1) whether Salud Clinic's December 2015 referral to Dr. Yamamoto was valid, and, alternatively (2) whether Boulder Neurosurgery's January 2016 referral to Dr. Yamamoto was valid. The ALJ finds and concludes that these issues have not yet been considered and are appropriately before this ALJ.

VALIDITY OF SALUD CLINIC'S DECEMBER 2015 REFERRAL TO DR. YAMAMOTO

Respondent-insurers retain the right to authorize an additional physician to provide care upon their receipt of knowledge that the previously designated doctor now refuses to provide necessary care for nonmedical reasons. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Specifically, C.R.S. section 8-43-404(10) provides that an employer may designate a new physician within 15 calendar days following receipt of a written notice from the injured employee or his legal representative "than an authorized physician refused to provide medical treatment to the injured employee…for nonmedical reasons…"

The questions of whether a referral was made as part of the normal progression of authorized treatment, and the scope of the referral, are questions of fact for determination by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App.2001).

Respondents argue that based on the ICAO decision, that the Salud Clinic and Dr. Jaramillo were not ATPs and therefore could not refer Claimant to Dr. Yamamoto. The ALJ disagrees. ALJ Jones' December 9, 2015 order identified the Salud Clinic as Claimant's ATP. From the time the order issued until the ICAO decision was issued on March 25, 2016, the parties were bound by the ALJ's order. And during that period the Salud Clinic was the ATP. As such, the Salud Clinic had the capacity during that time period to make referrals.

Respondent next argues that Salud Clinic's referral to Dr. Yamamoto was invalid because it "was not the result of the independent medical judgment." Again, the ALJ disagrees.

The "independent medical judgment" standard upon which Respondents rely was articulated in *Bestway Concrete v. Indus. Claim Appeals Office*, 984 P.2d 680, 684 (Colo. App. 1999). However, in *Sackett v. ICAO,* 15CA0786, a division of the court of appeals expressly disapproved that standard, stating: "The Panel's narrow 'independent medical judgment' standard does not represent a reasonable extrapolation of *Bestway Concrete's* analysis. The division stated the appropriate standard as: "In our view, independent judgment may take many forms, so long as the physician determines, without undue outside influence, that a referral is in the injured worker's best interest."

Here, the Salud Clinic's referral to Dr. Yamamoto was made for the purposes of providing Claimant with a physician who would be able and willing to treat his injuries, maintaining Claimant's continuity of care, and respecting Claimant's preference in who provided his care. Salud Clinic did not simply acquiesce in Claimant's request for a referral. Rather, based on Claimant's and Claimant's wife's testimony, the clinic understood from the ALJ's order that Claimant had sustained compensable injuries, treatment for which fell under the workers' compensation system. Thus, Claimant was in need of medical treatment which they were not able to provide. The ALJ finds, based on the totality of the evidence, that these factors were in Claimant's best interest and are sufficient to support the validity of the referral. Further, the referral was made as part of the normal progression of then-authorized treatment because the ALJ's order identified Salud Clinic as the ATP.

The fact that Claimant requested the referral to Dr. Yamamoto does not require a different result. A claimant's request to be referred to a particular provider did not defeat the validity of such a referral in *Sackett*; *City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997); or *Greager v. Indus. Comm'n*, 701 P.2d 168, 170 (Colo. App. 1985).

Based on this conclusion, the ALJ need not address the validity of other referrals.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The referral made by Dr. Hand to Dr. Yamamoto was valid, and from the Date of ALJ Jone's order, to the date of the ICAO decision, Dr. Yamamoto was an authorized treating physician.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 11, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-975-918-02

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that Dr. David Yamamoto was an authorized treating physician.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant suffered an occupational injury to his shoulder and low back from repetitive climbing of very tall ladders at work.

2. Employer sent Claimant to Workwell Occupational Medicine on December 26, 2014.

3. On February 23, 2015, Workwell decided Claimant's low back symptoms were "not likely work comp. related. He will follow up with PCP for this matter." Dr. Jaramillo at the Salud Clinic was Claimant's PCP. Based on Workwell's referral to his PCP for his low back condition, Claimant went to Salud and Salud then referred Claimant to Boulder Neurosurgery for low back care. Claimant used his private insurance to be seen by Dr. Kara Beasley at Boulder Neurosurgery on March 3, 2015. Claimant treated at Boulder Neurosurgery until January 1, 2016. Dr. Beasley did not personally see Claimant after the first appointment. Claimant's other appointments at Boulder Neurosurgery were with a physician's assistant.

4. Claimant continued treatment at Workwell for his shoulder injury until March 11, 2015. On that date, Dr. Fitzgibbons at Workwell requested authorization for shoulder surgery. Respondents denied the entire claim.

5. Claimant continued to treat for his low back condition with Boulder Neurosurgery.

6. Claimant and his wife testified that after Workwell discharged Claimant for nonmedical reasons, their attorney gave them two doctors' names to consider for Claimant's shoulder treatment. Claimant chose Dr. Yamamoto because his office accepted their insurance. Claimant saw Dr. Yamamoto on March 30, 2015. Dr. Yamamoto referred Claimant to Dr. Eric McCarty for shoulder surgery. Dr. McCarty performed the previously recommended surgery on Claimant's right shoulder on March 30, 2015. The shoulder surgery was paid for by Claimant's private health insurance. Dr. Yamamoto was Claimant's primary treating doctor for his shoulder condition from March 30, 2015 until January 5, 2016.

7. On August 12, 2015, ALJ Margot Jones presided over a hearing on compensability, identity of the authorized provider, and temporary total disability benefits.

8. In her Order issued December 9, 2015, ALJ Jones ordered Respondents liable for workers' compensation benefits for the December 26, 2014 occupational disease for Claimant's right shoulder and low back.

9. ALJ Jones found that Dr. Jaramillo/Salud Clinic was the physician Claimant selected in December 2014, when Claimant reported a work injury because Employer did not comply with C.R.S. § 8-43-404(5)a)(I)A). ALJ Jones concluded Claimant was not entitled to select a second physician, Dr. Yamamoto, as his treating physician.

10. Claimant and his wife credibly testified that Salud Clinic does not accept Workers Compensation cases. Claimant and his wife also testified they knew Dr. Jaramillo was on an extended medical leave and unable to treat Claimant. Consequently, upon receipt of the Compensability Order, Claimant, through his wife who worked at Salud Clinic, asked for a referral to Dr. Yamamoto to obtain workers compensation medical care. Claimant's wife testified that she and Claimant wanted Claimant's ongoing treatment to be handled by Dr. Yamamoto for reasons of continuity of care and because they were happy with Dr. Yamamoto.

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12. On December 16, 2015, Salud Clinic referred Claimant to Dr. Yamamoto. Dr. Hand, made the referral, although it was stamped with Dr. Jaramillo's signature. The ALJ reasonably infers that Dr. Hand referred Claimant to Dr. Yamamoto so Claimant could obtain appropriate medical treatment under workers' compensation and to maintain the continuity of Claimant's care. The referral was made in Claimant's best interest and for legitimate medical reasons.

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14. Also on December 22, 2015, Respondents' counsel faxed Claimant's counsel a letter rejecting the Salud Clinic referral to Dr. Yamamoto. Respondents noted that Dr. Jaramillo had refused to treat Claimant due to non-medical reasons and re-designated Dr. Cazden at Workwell as Claimant's ATP.

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16. On January 28, 2016, Claimant returned to Boulder Neurosurgical for a follow up appointment regarding his low back condition. Claimant's wife testified that Claimant wanted another referral to Dr. Yamamoto to manage his care in the event the prior referral from Salud Clinic was deemed to be invalid for the reasons cited in Respondent's December 22, 2015 letter. Claimant's wife testified that she explained to the P.A. at Boulder Neurosurgical that Dr. Yamamoto had been managing Claimant's care related to his shoulder since March 2015, and that they wished to continue using him for reasons of continuity of care. The Boulder Neurosurgical P.A. made the requested referral which was automatically stamped with Dr. Beasley's signature as the treating medical doctor. Respondents maintained their position that Dr. Yamamoto was not an ATP.

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CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. § 8-40-102(1). A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-42-101. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. C.R.S. § 8-43-20. A Workers' Compensation case is decided on its merits. C.R.S. § 8-43-201.

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The fact that Claimant requested the referral to Dr. Yamamoto does not require a different result. A claimant's request to be referred to a particular provider did not defeat the validity of such a referral in *Sackett*; *City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997); or *Greager v. Indus. Comm'n*, 701 P.2d 168, 170 (Colo. App. 1985).

Based on this conclusion, the ALJ need not address the validity of other referrals.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The referral made by Dr. Hand to Dr. Yamamoto was valid, and from the Date of ALJ Jone’s order, to the date of the ICAO decision, Dr. Yamamoto was an authorized treating physician.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 11, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her right knee on July 23, 2013.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to medical benefits to treat a July 23, 2013 right knee injury including benefits provided by Dr. Irish and the referrals made by Dr. Irish.

3. Whether Claimant has established that she is entitled to an award for disfigurement of her right knee.

4. Whether Claimant has overcome the opinion of the Division Independent Medical Examination (DIME) of Mindy Gehrs, M.D. regarding the date of maximum medical improvement (MMI) of her left ankle injury.

5. Whether Claimant has overcome the opinion of DIME Dr. Gehrs regarding permanent partial disability for her left ankle injury.

6. Whether Claimant has established that she is entitled to an award for disfigurement of her left ankle.

STIPULATIONS

1. An overpayment offset of $2,224.26 exists.

FINDINGS OF FACT

1. Claimant worked for Employer beginning in January of 2012. On February 7, 2012 Claimant was entering work and was in the employee parking lot when she slipped on ice and twisted her left ankle.

2. The February 7, 2012 injury was a compensable injury and Claimant was diagnosed with an ankle sprain. Claimant underwent treatment for her left ankle that included two surgeries, one on December 7, 2012 and one on August 14, 2013.

3. As a result of her two surgeries, Claimant has visible disfigurement to her left ankle. The disfigurement includes a scar measuring approximately 3.5 inches on the back of her left ankle that is red, white, raised, and discolored from her normal skin tone.

4. While treating her left ankle, Claimant at times had both a cast and a boot on her left ankle.

5. On June 21, 2013 Claimant attended physical therapy for her left ankle. Claimant reported that her right knee and right hip pain was increasing and that she believed it was from compensating for her left ankle. *See* Exhibit G.

6. On July 5, 2013 Claimant attended physical therapy for her left ankle. Claimant again reported right knee pain. *See* Exhibit G.

7. On July 10, 2013 Claimant was evaluated by Margaret Irish, D.O. who was her authorized treating physician for her left ankle injury. Claimant reported to Dr. Irish right knee pain at the medial collateral ligament area and Claimant reported that her right knee was hurting because she was walking differently. Claimant also reported mild low back pain for the same reason. Dr. Irish noted on examination that Claimant had tenderness to palpation at the medial collateral ligament. *See* Exhibit H.

8. On July 15, Claimant attended physical therapy for her left ankle. Claimant reported right knee pain that hurt more while she was at work. Claimant reported right knee swelling that she believed was from compensating for her left ankle. *See* Exhibit G.

9. On July 16, 2013 Claimant was evaluated by Dr. Irish. Dr. Irish noted tenderness to palpation over the medial collateral ligament. *See* Exhibit H.

10. On July 18, Claimant attended physical therapy for her left ankle. Claimant reported that her right knee was hurting more each day. The therapist noted that Claimant had noticeable antalgic gait because of the right knee pain and that the right knee pain was interfering with the correct execution of her program. *See* Exhibit G.

11. On July 22, 2013, Claimant attended physical therapy for her left ankle. Claimant reported that her ankle was doing a little bit better but that her right knee was hurting more than her ankle. *See* Exhibit G.

12. On July 23, 2013 Claimant alleges that she was working for Employer in the kitchen when she slipped on water and twisted her right knee. Claimant alleges that she had an immediate increase in pain in her right knee. Claimant was scheduled to see the doctor the next day for her left ankle injury.

13. On July 24, 2013 Claimant was evaluated by Dr. Irish. Claimant reported slipping on water the night prior and twisting her right knee and Claimant reported pain in the medial aspect of the right knee. Claimant reported that she had mentioned her right knee pain to the orthopedic surgeon when they met previously and that he considered getting an MRI of the right knee. Dr. Irish noted on examination that the right knee had no obvious swelling. Dr. Irish continued to note tenderness to palpation

over the medial collateral ligament as well as the anterior medial joint line but noted functional active range of motion and strength throughout the knee with good stability. Dr. Irish noted that Claimant had an aggravation of her right knee pain due to the slip on water on the floor and that she should discuss the right knee pain with orthopedist Dr. Jackson. *See* Exhibit H.

14. On July 29, 2013 Claimant attended physical therapy for her left ankle. Claimant reported that her right knee and left ankle hurt more since she had been off work. Claimant did not report an injury to her right knee and reported that she was not sure why it was hurting more. *See* Exhibit G.

15. On July 30, 2013 Claimant was evaluated by orthopedic doctor Wesley Jackson, M.D. Claimant reported she was getting a little bit of compensatory right anterior knee pain that was not associated with an injury. Dr. Jackson noted that Claimant described her knee pain pointing to the anterior aspect of the knee but that Claimant had full range of motion and a normal gait. *See* Exhibit F.

16. On October 16, 2013 Claimant underwent an MRI of her right knee interpreted by Vincent Herlihy, M.D. Dr. Herlihy provided the impression of longitudinal tearing throughout the body segment and posterior horn of the medial meniscus with a vertical configuration in the body segment and a horizontal configuration throughout the posterior horn; suspected small meniscal flap displaced anteriorly from the free edge of the posterior horn into the joint space; second small suspected meniscal flap displaced inferiorly from the medical meniscal body; mild grade 1-2 chondromalacia in the central weight bearing medial femoral condyle; small joint effusion; mild partial discoid morphology of the lateral meniscus without evidence of discrete tear. *See* Exhibit E.

17. On October 29, 2013 Claimant was evaluated by David Beard, M.D. Claimant reported that she sustained work related injury in February of 2012 where she injured her right knee and her left ankle. Claimant reported having several procedures on her left Achilles but that through the whole time period she continued to have problems with her right knee that had been treated with rest, modified activity, and anti-inflammatory medication. Claimant reported that due to her persistent right knee symptoms she underwent an MRI of her right knee and was referred for orthopedic consultation. Dr. Beard reviewed the MRI and noted that due to persistent symptoms despite conservative management, he recommended Claimant undergo a right knee arthroscopy to address her meniscal pathology. *See* Exhibit 4.

18. On October 31, 2013 Dr. Irish noted that Claimant had been referred for right knee orthopedic evaluation and treatment, that Claimant had seen Dr. Beard, and that surgery for the right knee was being planned. *See* Exhibit 1.

19. On December 2, 2013 Claimant underwent right knee surgery performed by Dr. Beard. Dr. Beard noted that Claimant had injured her right knee back in 2012 in a work related injury and was treated conservatively. *See* Exhibit 5.

20. On December 16, 2013 Claimant was evaluated by Dr. Irish. Claimant reported that she recently underwent right knee arthroscopy with repair of the medial meniscus and that it was starting to feel better. *See* Exhibit H.

21. On June 25, 2015 Claimant underwent an independent medical examination performed by Allison Fall, M.D. Dr. Fall opined that Claimant right knee pain was not due to her left ankle injury and/or overcompensation. Dr. Fall opined that the most likely etiology of the right knee pain was Claimant's age and obesity. Dr. Fall opined that Claimant was carrying 100 excess pounds and opined overall that the right knee symptoms and MRI findings were not causally related to the left ankle injury from July of 2012. *See* Exhibit D.

22. On December 29, 2015 Claimant underwent a second independent medical examination performed by Dr. Fall. Claimant reported to Dr. Fall that she fell in the dish area that was greasy. Claimant reported that she had right knee pain prior to the July 23, 2013 incident from compensating, but that after the July 23, 2013 incident her pain was constant all day and night. Dr. Fall opined that Claimant was appropriately placed at MMI for her left ankle injury and that the right knee was not related. Dr. Fall also opined that there was no acute injury to Claimant's right knee on July 23, 2013. Dr. Fall opined that the right knee MRI showed chronic degenerative changes without acute abnormality most likely related to age and obesity. *See* Exhibit D.

23. On January 8, 2015 Claimant underwent a Division Independent Medical Evaluation (DIME) performed by Mindy Gehrs, M.D. Claimant reported constant pain in her left ankle as well as constant right knee pain. Claimant also reported right hip pain that started with changes in her gait related to her injuries. Dr. Gehrs noted that Claimant was morbidly obese. Dr. Gehrs opined that Claimant was at maximum medical improvement for her left ankle and that there was nothing further recommended from a medical treatment standpoint. Dr. Gehrs opined that Claimant was not at MMI for her right knee as Claimant never had physical therapy for the knee and Dr. Gehrs recommended physical therapy and further evaluations. Dr. Gehrs provided an impairment rating for the left ankle of 9% extremity. *See* Exhibit 2.

24. Dr. Gehrs testified by deposition in this matter. Dr. Gehrs opined that that Claimant was at maximum medical improvement (MMI) for her left ankle at the time of the DIME. Dr. Gehrs opined that Claimant's right knee symptoms were not related to Claimant's left ankle injury and that the right knee was a separate claim from a twisting event that occurred on July 23, 2013. Dr. Gehrs noted that Claimant had no right knee complaints from the date of her February 2012 left ankle injury until June of 2013. Dr. Gehrs noted that what was shown on the right knee MRI was either due to an acute injury or due to normal wear and tear. Dr. Gehrs noted that Claimant did not have right knee pain for over a year following her left ankle injury and that there was no proximate relationship between the left ankle injury and right knee complaints. Dr. Gehrs also opined that given Claimant's age and size, it would not be uncommon to get knee pain and degenerative changes with some meniscal changes in the knee. *See* Exhibit B.

25. Dr. Fall testified at hearing consistent with her written reports. Dr. Fall opined that Claimant did not sustain an acute injury to her right knee on July 23, 2013. Dr. Fall opined that the right knee MRI did not show a large effusion or any acute pathology. Dr. Fall also noted that the right knee would have been swollen when Claimant was examined on July 24, 2013 if the injury had happened the day prior. Finally, Dr. Fall opined that the mechanism of injury did not support the severe damage shown by the right knee MRI.

26. Dr. Fall further noted the inconsistencies in Claimant's reports to providers about the right knee pain, when it started, and mechanism of injury. Dr. Fall also pointed out that Claimant's July 10, 2013 right knee physical exam and her July 24, 2013 exam were very similar despite the alleged injury in between.

27. Dr. Fall opined that the MRI findings which resulted in Claimant's right knee surgery were underlying degenerative changes and were pre-existing and due to age and obesity. Dr. Fall's opinions overall are found credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Workers' Compensation Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undersigned occurrence." *See* § 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Wherry v. City and County of Denver,* W.C. No. 4-475-818 (ICAO March 7, 2002).

Claimant has failed to establish by a preponderance of the evidence that she suffered a work related injury to her right knee on July 23, 2013. Although Claimant reports slipping on water on the floor on this date and "twisting" her right knee, Claimant overall is not found credible or persuasive. Claimant made differing reports to multiple providers about the right knee pain. Claimant reported to Dr. Irish that the right knee pain increased after her slip on water. However, six days after the alleged injury Claimant reported at physical therapy that she was not sure why her right knee was hurting more. Then, seven days after the alleged injury Claimant reported to Dr. Jackson that she was having compensatory pain in her right knee that was not associated with an injury. It is logically inconsistent that Claimant would have suffered an acute incident one week prior to visiting an orthopedic doctor but would tell him that it was just compensatory pain with no injury. Further, in October of 2013 Claimant again failed to report an acute incident when she told Dr. Beard that she had injured her right knee in February of 2012 and that she had been having problems with it throughout her ankle treatment. Also, it is significant that Claimant's right knee examinations prior to the July 23, 2013 alleged injury and after the alleged injury remained very similar. Claimant had no signs of acute injury on the right knee MRI nor did she have any acute swelling the day after the alleged injury to her right knee. The opinions of Dr. Fall are found credible and persuasive that Claimant did not suffer an acute injury to her right knee on July 23, 2013. Any slip on the floor that Claimant may have experienced did not result in an injury to her right knee or the need for medical treatment. As found above, Claimant is morbidly obese and the cause of her underlying right knee pain is more likely than not due to her severe obesity and age. Dr. Gehrs even noted that it would not be uncommon given Claimant's age and obesity to have degenerative changes and meniscal damage that was shown on the MRI. Claimant has failed to present sufficient objective evidence establishing the existence of an injury or the aggravation of an underlying condition. Rather, Claimant appears to have experienced continued right knee pain both prior to July 23, 2013 and after July 23, 2013.

Medical benefits

Respondents are required to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that she sustained an industrial injury on July 23, 2013. Therefore, her request for medical benefits to treat her right knee is denied and dismissed.

Disfigurement right knee

Claimant has failed to establish that she sustained an industrial injury to her right knee on July 23, 2013. Therefore, her request for an award of disfigurement for her right knee is denied and dismissed.

Overcoming DIME on left ankle MMI

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Claimant has failed to establish by clear and convincing evidence that Dr. Gehrs erred in her determination that Claimant reached MMI from the February 7, 2012 left ankle injury as of the date of Dr. Gehrs' DIME. The opinion of Dr. Fall supports the determination of the DIME physician and Claimant has failed to establish by clear and convincing evidence that the DIME physician erred in determining the date of MMI.

Overcoming DIME on left ankle PPD

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Claimant has failed to establish by clear and convincing evidence that the medical impairment rating provided by DIME physician Dr. Gehrs is incorrect. Claimant has failed to establish anything other than a difference of opinion between medical providers. Claimant has failed to show that Dr. Gehrs erred or how the rating provided was incorrect or insufficient for Claimant's permanent partial disability. With nothing more than a difference of opinion, Claimant has not met her burden to overcome the DIME physician's opinion. The permanent partial disability rating of 9 percent (scheduled) that was provided by Dr. Gehrs has not been overcome.

Disfigurement left ankle

As found above and as a result of her two surgeries, Claimant has visible disfigurement to her left ankle. The disfigurement includes a scar measuring approximately 3.5 inches on the back of her left ankle that is red, white, raised, and discolored from her normal skin tone. Claimant has therefore sustained serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. §§ 8-42-108(1), C.R.S (2014); 8-42-108(2), C.R.S. Insurer shall pay Claimant $1,250.00 for the disfigurement outlined above. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury to her right knee on July 23, 2013. Her right knee claim is denied and dismissed.

2. As Claimant failed to establish that she sustained a compensable right knee injury, her request for medical benefits for her right knee as well as disfigurement for her right knee is denied and dismissed.

4. For the left ankle claim, Claimant has failed to overcome the DIME physician's opinion on the date of MMI and the PPD rating.

5. Claimant has established that she is entitled to a disfigurement award in the amount of $1,250.00 for her left ankle.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 11, 2016,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable left knee injury during the course and scope of his employment with Employer on June 26, 2015.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his June 26, 2015 industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 13, 2015 until July 17, 2015 and Temporary Partial Disability (TPD) benefits for the period July 22, 2015 until November 6, 2015.

FINDINGS OF FACT

1. Employer is an auto parts supplier for both retail customers and repair shops in the Denver Metropolitan Area. Claimant worked for Employer as a Delivery Driver.

2. Claimant testified that on June 26, 2015 he was delivering auto parts to Accurate Transmission while working for Employer. Claimant was attempting to park his small truck and sought to engage the emergency brake. Because the emergency brake would not engage, he depressed the pedal to the floor of the truck. While depressing the emergency brake pedal he experienced a "pop" in his left knee. Claimant remarked that he reported the incident to Employer's Dispatcher Shanee Arnold. However, he did not immediately seek medical treatment because he planned to rest his left knee for a couple of days.

3. Ms. Arnold testified through a pre-hearing evidentiary deposition in this matter on June 23, 2016. She remarked that Claimant reported "the emergency brake was hard" and he injured his left knee. She inquired whether Claimant wanted to go home, seek medical treatment or speak to Store Manager Roscoe Abrams. However, Claimant declined. He completed his shift and performed his regular job duties on the ensuing days.

4. Employer's Mechanic Peter Burton testified through a pre-hearing evidentiary deposition in this matter on June 23, 2016. He explained that he is responsible for regular maintenance, inspections and repair of Employer's fleet of motor vehicles. Claimant typically drove small truck No. 68 for Employer. However, on June

26, 2015 Mr. Burton took vehicle No. 68 out of service for routine maintenance. Claimant thus drove replacement vehicle small truck No. 49 on June 26, 2015.

5. Mr. Burton testified about the emergency brake on vehicle No. 49. The emergency brake is engaged by depressing a foot pedal. The pedal pulls a mechanical cable attached to the rear drum brakes and engages the brakes when depressed. Mr. Burton explained that an emergency brake pedal going all the way to the floor would require an adjustment through the brake shoes. He commented that he never had to adjust the emergency brake on vehicle No. 49 during 2015 and 2016. Mr. Burton remarked that he was unaware of any records documenting complaints about vehicle No. 49's emergency brake in 2015 and 2016.

6. Mr. Burton testified that he completes regular maintenance and repairs of Employer's fleet vehicles every four to six weeks. He visually inspects each vehicle's braking system with the wheels off. In addition, Mr. Burton tests the braking system, including the emergency brake, by taking the vehicle on a test drive. He testified he performs the testing "every single time" a vehicle is in for regular maintenance. Mr. Burton specifically tests the emergency brake on a variety of surfaces to ensure that it is in operating condition. He explained that the brakes on vehicle No. 49 were in operating condition each time he tested them.

7. Store Manager Roscoe Abrams also testified through a pre-hearing evidentiary deposition in this matter on June 23, 2016. He noted that Claimant was one of 15 or more delivery drivers who worked at Employer's facility. On July 7, 2015 Claimant called Mr. Abrams to report a left knee injury and sought to visit a doctor. He stated that the emergency brake on vehicle No. 49 would not move when he attempted to depress the pedal and he injured his left knee. Claimant subsequently completed an accident report so he could visit a doctor.

8. Mr. Abrams testified that Claimant's inability to depress the emergency brake pedal likely involved a brake cable. Consistent with Mr. Burton's testimony, Mr. Abrams remarked that the emergency brake cable on vehicle No. 49 was never replaced or repaired. In fact, when vehicle No. 49 was inspected, maintained and road tested after Claimant's June 26, 2015 incident, the emergency brake was not defective.

9. On July 7, 2015 Claimant visited Braden Reiter, M.D. at HealthOne for an evaluation. Claimant reported that he pushed down on the emergency brake on his work vehicle with his left foot and experienced pain and popping in the left knee. Dr. Reiter diagnosed Claimant with a left knee strain. He assigned work restrictions including driving only an automatic vehicle and no lifting, pushing or pulling in excess of 25 pounds. Dr. Reiter referred Claimant to physical therapy and recommended diagnostic testing.

10. On July 13, 2015 Claimant underwent his initial physical therapy evaluation. He reported that he developed left knee pain after repeatedly pressing the emergency brake to stop his work vehicle from moving. The physical therapist noted

that Claimant’s symptoms were consistent with a left knee strain and possible meniscus tear.

11. On July 15, 2015 Claimant underwent a left knee MRI. The MRI revealed a medial meniscus tear and findings suggestive of a possible fracture.

12. On August 7, 2015 Claimant underwent a surgical consultation with Stewart Weinerman, M.D. Claimant reported that he suffered a left knee injury while working for Employer. He remarked that he was having problems with his truck when he had to “hop in and jam on the emergency brake.” Claimant felt a twist and immediately experienced pain and discomfort. Dr. Weinerman concluded that Claimant suffered a left knee torn meniscus. He explained that it was more likely than not that the injury occurred when Claimant “twisted to jam on the brake and had a lot of valgus stress on the knee.” Dr. Reiter remarked that the injury likely did not constitute a pre-existing condition “although given his history he has had a lot of injuries.” He thus summarized that “the most likely scenario is that this is a work-related injury and he would certainly benefit from arthroscopic surgery and a partial medial meniscectomy.”

13. After Insurer filed a Notice of Contest, James Lindberg, M.D. reviewed Claimant’s medical records on August 11, 2015. Dr. Lindberg noted that Claimant’s left knee MRI reflected a loss of articular cartlidge in the posterior medial femoral condyle, a horizontal tear of the posterior medial meniscus and an MCL sprain. He determined that Claimant’s account of pushing on the emergency brake with his left leg was not consistent with the MRI findings. Specifically, the meniscal tear, the MCL sprain, a disorganized proximal ACL and the underlying osteoarthritis were inconsistent with Claimant’s account. Dr. Lindberg summarized that “something else happened, other than this rather innocuous injury that caused his problems, but definitely not pushing down on the emergency brake.”

14. On October 8, 2015 Claimant underwent a left knee arthroscopy with a partial medial meniscectomy through his personal health insurance. Claimant reported significant improvement after the procedure.

15. On February 17, 2016 Claimant underwent an independent medical examination with F. Marc Paz, M.D. Claimant reported that on June 26, 2015 he was delivering auto parts to Accurate Transmission while working for Employer. He explained that he pushed the emergency brake pedal on his work vehicle to the floor with his left foot Claimant fully extended his left knee and then rotated his left leg clockwise but could not “really get a grip on the pedal.” He heard a “pop” in his left knee and immediately experienced pain on the right side of his kneecap at the joint of the left knee. In considering Claimant’s history of the injury, physical examination findings and prior medical records, Dr. Paz concluded that it was not medically probable that Claimant’s left knee medial meniscus tear was causally related to the June 26, 2015 work incident. Dr. Paz explained that Claimant’s mechanism of injury was “inconsistent with a shearing or twisting movement in the joint itself.” Moreover, Dr. Paz remarked that the medical records revealed inconsistent accounts of the mechanism of Claimant’s left knee injury.

16. On April 22, 2016 Claimant underwent an independent medical evaluation with Edwin M. Healey, M.D. Claimant reported that he had been driving a delivery truck in which the emergency brake would not engage and the vehicle would roll backwards. He noted that the scenario had occurred on several occasions prior to June 26, 2015 and he would have to "run to the truck, jump in the truck and forcibly push down on the emergency brake in order to stop the truck from rolling and hitting objects behind it." Claimant explained that on June 26, 2015 he forcibly pushed down on the emergency brake with his left foot and experienced an acute "pop" and immediate pain in his left knee. After conducting a physical examination and reviewing Claimant's medical records, Dr. Healey concluded that Claimant suffered a medial meniscus injury to his left knee on June 26, 2015. The injury ultimately required arthroscopic surgery with Dr. Weinerman. Dr. Healey determined that Claimant had reached Maximum Medical Improvement (MMI) and suffered a 14% left lower extremity impairment as a result of the June 26, 2015 incident.

17. Dr. Paz testified at the hearing in this matter. He maintained that it was not medically probable that Claimant's left knee medial meniscus tear was causally related to the June 26, 2015 industrial incident. Dr. Paz explained that the act of depressing or attempting to depress an emergency brake pedal would not cause a meniscal tear. Instead, meniscal tears are associated with shearing forces as the knee joint moves outside its normal range of motion. Claimant never described any forces sufficient to cause a meniscal tear to Dr. Paz or other providers. Meniscal tears similar to Claimant's are typically caused when a person's foot is planted or unable to move from side-to-side and the knee joint twists. However, Dr. Paz remarked that there is no evidence that Claimant's left foot was planted or locked in place on the pedal. Instead, Claimant commented that his left foot was twisting on the brake pedal. Dr. Paz thus summarized that the lack of a planted or fixed foot position made it improbable that Claimant sustained an injury to his left knee on June 26, 2015.

18. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable left knee injury during the course and scope of his employment with Employer on June 26, 2015. Initially, Claimant has provided inconsistent accounts of the mechanism of his left knee injury to various medical providers. Claimant told Dr. Reiter that he pushed down on the emergency brake on his work vehicle with his left foot and experienced pain and popping in the left knee. During his initial physical therapy evaluation Claimant reported that he developed left knee pain after repeatedly pressing the emergency brake to stop his work vehicle from moving. At his surgical consultation with Dr. Weinerman Claimant remarked that he was having problems with his truck when he had to "hop in and jam on the emergency brake." Claimant felt a twist and immediately experienced pain and discomfort. Claimant subsequently reported to Dr. Paz that he pushed the emergency brake pedal to the floor with his left foot. He fully extended his left knee and then rotated his left leg clockwise but could not "really get a grip on the pedal." Finally, Claimant told Dr. Healey that on several occasions prior to June 26, 2015 he had to run to his truck and depress the emergency brake to prevent the vehicle from rolling backwards. Claimant explained that on June 26, 2015 he forcibly pushed down on the emergency brake with his left foot and experienced an acute "pop" and immediate pain in his left knee. The record thus

reveals that Claimant has thus provided numerous inconsistent accounts of the June 26, 2015 incident. Accordingly, more reliance will be placed on objective and medical evidence than on Claimant's description.

19. The credible testimony of Employer witnesses Mr. Burton and Mr. Abrams demonstrates that the emergency brake on Claimant's vehicle No. 49 was functioning properly on June 26, 2015. Mr. Burton noted that he was unaware of any records documenting a complaint about vehicle No. 49's emergency brake in 2015 and 2016. He regularly tested the braking system on vehicles by performing a test drive on a variety of surfaces. Mr. Burton specifically explained that the brakes on vehicle No. 49 were in operating condition each time he tested them. Consistent with Mr. Burton's testimony, Mr. Abrams remarked that the emergency brake cable on vehicle No. 49 had never been replaced or repaired. In fact, when vehicle No. 49 was inspected, maintained and road tested after Claimant's June 26, 2015 incident, the emergency brake was functioning properly.

20. The medical records also reveal that Claimant likely did not suffer a left knee medial meniscus tear during his employment with Employer on June 26, 2015. Dr. Paz persuasively maintained that it was not medically probable that Claimant's left knee medial meniscus tear was causally related to the June 26, 2015 work incident. He explained that the act of depressing or attempting to depress an emergency brake pedal would not cause a meniscal tear. Instead, meniscal tears are associated with shearing forces as the knee joint moves outside its normal range of motion. Claimant did not describe any forces sufficient to cause a meniscal tear. Specifically, there was no evidence that Claimant's left foot was planted or locked in place on the pedal. Dr. Paz thus summarized that the lack of a planted or fixed foot position made it improbable that Claimant sustained an injury to his left knee on June 26, 2015. Moreover, Dr. Lindberg explained that Claimant's account of pushing on the emergency brake with his left leg was not consistent with MRI findings. Claimant's left knee condition was simply not supported by his description of the mechanism of injury.

21. In contrast, Drs. Weinerman and Healey concluded that Claimant's left knee medial meniscus tear was caused by his June 26, 2015 work activities for Employer. Notably, however, the opinions of Drs. Weinerman and Healey were predicated on Claimant's description of having to run to his work truck, jump in and forcibly push down on the emergency brake in order to stop the vehicle. Moreover, Drs. Weinerman and Healey did not perform an adequate causation analysis to ascertain the origin of Claimant's left knee medial meniscus tear. Accordingly, based on Claimant's inconsistent accounts of the mechanism of injury, the credible testimony of Employer witnesses and the persuasive medical opinions of Drs. Paz and Lindberg, Claimant has failed to demonstrate that his work activities for Employer on June 26, 2015 aggravated, accelerated or combined with a pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18,

2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable left knee injury during the course and scope of his employment with Employer on June 26, 2015. Initially, Claimant has provided inconsistent accounts of the mechanism of his left knee injury to various medical providers. Claimant told Dr. Reiter that he pushed down on the emergency brake on his work vehicle with his left foot and experienced pain and popping in the left knee. During his initial physical therapy evaluation Claimant reported that he developed left knee pain after repeatedly pressing the emergency brake to stop his work vehicle from moving. At his surgical consultation with Dr. Weinerman Claimant remarked that he was having problems with his truck when he had to “hop in and jam on the emergency brake.” Claimant felt a twist and immediately experienced pain and discomfort. Claimant subsequently reported to Dr. Paz that he pushed the emergency brake pedal to the floor with his left foot. He fully extended his left knee and then rotated his left leg clockwise but could not “really get a grip on the pedal.” Finally, Claimant told Dr. Healey that on several occasions prior to June 26, 2015 he had to run to his truck and depress the emergency brake to prevent the vehicle from rolling backwards. Claimant explained that on June 26, 2015 he forcibly pushed down on the emergency brake with his left foot and experienced an acute “pop” and immediate pain in his left knee. The record thus reveals that Claimant has thus provided numerous inconsistent accounts of the June 26, 2015 incident. Accordingly, more reliance will be placed on objective and medical evidence than on Claimant’s description.

8. As found, the credible testimony of Employer witnesses Mr. Burton and Mr. Abrams demonstrates that the emergency brake on Claimant’s vehicle No. 49 was functioning properly on June 26, 2015. Mr. Burton noted that he was unaware of any records documenting a complaint about vehicle No. 49’s emergency brake in 2015 and 2016. He regularly tested the braking system on vehicles by performing a test drive on a variety of surfaces. Mr. Burton specifically explained that the brakes on vehicle No. 49 were in operating condition each time he tested them. Consistent with Mr. Burton’s testimony, Mr. Abrams remarked that the emergency brake cable on vehicle No. 49 had never been replaced or repaired. In fact, when vehicle No. 49 was inspected, maintained and road tested after Claimant’s June 26, 2015 incident, the emergency brake was functioning properly.

9. As found, the medical records also reveal that Claimant likely did not suffer a left knee medial meniscus tear during his employment with Employer on June 26, 2015. Dr. Paz persuasively maintained that it was not medically probable that

Claimant’s left knee medial meniscus tear was causally related to the June 26, 2015 work incident. He explained that the act of depressing or attempting to depress an emergency brake pedal would not cause a meniscal tear. Instead, meniscal tears are associated with shearing forces as the knee joint moves outside its normal range of motion. Claimant did not describe any forces sufficient to cause a meniscal tear. Specifically, there was no evidence that Claimant’s left foot was planted or locked in place on the pedal. Dr. Paz thus summarized that the lack of a planted or fixed foot position made it improbable that Claimant sustained an injury to his left knee on June 26, 2015. Moreover, Dr. Lindberg explained that Claimant’s account of pushing on the emergency brake with his left leg was not consistent with MRI findings. Claimant’s left knee condition was simply not supported by his description of the mechanism of injury.

10. As found, in contrast, Drs. Weinerman and Healey concluded that Claimant’s left knee medial meniscus tear was caused by his June 26, 2015 work activities for Employer. Notably, however, the opinions of Drs. Weinerman and Healey were predicated on Claimant’s description of having to run to his work truck, jump in and forcibly push down on the emergency brake in order to stop the vehicle. Moreover, Drs. Weinerman and Healey did not perform an adequate causation analysis to ascertain the origin of Claimant’s left knee medial meniscus tear. Accordingly, based on Claimant’s inconsistent accounts of the mechanism of injury, the credible testimony of Employer witnesses and the persuasive medical opinions of Drs. Paz and Lindberg, Claimant has failed to demonstrate that his work activities for Employer on June 26, 2015 aggravated, accelerated or combined with a pre-existing condition to produce a need for medical treatment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant’s request for Workers’ Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge’s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge’s order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 11, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-977-019-02

ISSUES

- Whether the Claimant proved by a preponderance of the evidence that he suffered a compensable injury arising out of and occurring within the course and scope of employment with the Employer on or around July 26, 2014.

- If Claimant suffered a compensable injury on or around July 26, 2014, what medical benefits are reasonable, necessary, and related to that compensable event?

- If Claimant suffered a compensable injury on or around July 26, 2014, what temporary disability benefits, is Claimant entitled to as a result of that event?

STIPULATION

The parties stipulate to an Average Weekly Wage of $1,409.00.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 52-year-old "Article 22" worker at UPS. As an Article 22 worker, Claimant performs split duties and works "pick-off" for the first four hours of his shift and drives at tug for irregular carts for the remainder of his shift. In his duties as a tug driver, Claimant arranges irregular carts to be filled with packages and then takes the full carts, arranges them onto a "mother cart," and drives them to their destination belts.

2. Claimant began a shift on July 25, 2014, which ended on Saturday morning on July 26, 2014. On or around the morning of July 26, 2014, Claimant was in a seated position on his tug when he turned/twisted his head and upper body to the right to look behind him. He felt an acute "tug" on the left side of his low back. Claimant described the onset of pain as mild. Claimant completed the rest of his shift and did not report an injury to anyone at UPS.

3. Claimant testified that he awoke on Saturday afternoon, July 26, 2014, and could not move due to painful spasms. Claimant testified that he could not get up or move forward. Claimant also told Dr. Lesnak during his November 23, 2015 IME that he began to experience left leg symptoms as well. Claimant did not report a work injury to UPS.

4. Claimant testified that his back condition did not improve the following day, Sunday, July 27, 2014.

5. Claimant attended a scheduled appointment at the University of Colorado Hospital for a non-related procedure to remove cysts from his scalp on Monday, July 28, 2014. During examination, Claimant reported that he had left-sided low back pain. Claimant denied radicular symptoms or leg weakness. Claimant reported that he had sciatica symptoms for the past 15 years but felt his pain acutely worsen while twisting at work. Claimant testified at hearing that he had not experienced symptoms involving his low back prior to the incident on July 26, 2014, including any soreness, pain, or problems.

6. Claimant did not work on Monday, July 28, 2014, or Tuesday July 29, 2014, as he was recovering from his cyst removal procedure.

7. On Wednesday, July 30, 2014, Claimant reported a work-related injury to his back to UPS. Claimant was referred to Dr. James Rafferty for treatment and presented on this same date. Claimant reported having experienced a "tweak" in the left side of his low back after twisting with the mild onset of pain. Dr. Rafferty noted that Claimant had experienced similar symptoms approximately 10 years prior, which resolved rapidly and without treatment. Claimant indicated symptoms were localized to his left low back and denied any radicular symptoms or weakness into the lower extremities. Dr. Rafferty diagnosed Claimant with a strain of the left hip (gluts) and stated that causation was undetermined because he did not know whether or not the tug placed Claimant at an increased risk of low back pain by turning. There were no work restrictions. At this time, Claimant weighed 219 pounds and stood 5' 5" in height.

8. Claimant was subsequently given light duty by UPS after his visit to Dr. Rafferty. Claimant took two weeks off of work and returned to see Dr. Rafferty on August 7, 2014. Claimant reported that he was "doing great" and was "now back to his usual state of health." Claimant reported that he had no back pain at this time and was ready to return to his usual duties at work. Dr. Rafferty placed Claimant at MMI and discharged him from care with no permanent impairment, permanent restrictions, or need for additional treatment.

9. Claimant worked regular duty and sought no further treatment until December 22, 2014, when he returned to Stapleton Clinic with complaints of renewed low back pain. Claimant saw Dr. Ryan Otten and reported that he had intermittent symptoms in the *right* buttock area after July 2014. Claimant reported that he had originally injured his back while twisting but that his pain had become worse after being on his feet all day. Claimant denied radicular symptoms. Dr. Otten left causation as undetermined and

gave Claimant work restrictions limiting walking and standing duties to 50% of the shift.

10. On January 5, 2015, Claimant returned to see Dr. Otten and again denied radicular symptoms into the legs.

11. On January 26, 2015, Claimant saw Dr. Ricky Lee Artist and complained of low back and *right* hip pain. Dr. Artist noted that Claimant experienced persistent pain at work, increased pain at home in the evenings, pain getting in and out of bed, and marked difficulty getting in and out of his car. Dr. Artist left causation to be determined.

12. On February 2, 2015, Claimant saw Dr. Rick Zimmerman. Claimant reported at "one-year history of slowly progressive low back pain that started insidiously." Claimant reported that, in July 2014, his symptoms became "too much" and that he had attempted to control his symptoms by taking two weeks off from work. Claimant stated that, after several weeks, his symptoms improved but did not totally resolve. Claimant stated that, approximately one month prior, he experienced a "flare-up" with no specific injury. Claimant denied leg pain or paresthesia in the lower extremities. Upon physical examination, Claimant was able to walk without difficulty but Dr. Zimmerman did note that there was a waddling-type gait pattern due to a combination of hip mechanics and general deconditioning. Dr. Zimmerman recommended that Claimant undergo physical therapy and also recommended weight loss to reduce strain on the low back. Dr. Zimmerman referred Claimant for an MRI study.

13. On February 12, 2015, Claimant saw Dr. Brian Williams. Claimant denied radicular symptoms or weakness into the bilateral lower extremities. Claimant was working modified duty at this time.

14. On February 16, 2015, Claimant underwent a lumbar spine MRI. The "Impression" section of the MRI study showed: edema bilaterally at the L4 and L5 pedicles with suspected trabecular stress fractures in the pedicles at these levels; advanced facet arthropathy at L4-L5 with degenerative anterolisthesis; and a broad L5-S1 left paracentral to lateral disc protrusion contributing to moderate left foraminal stenosis.

15. On February 18, 2015, Claimant subsequently began treating with Dr. Tanya Kern at Stapleton clinic.

16. On February 25, 2015, Claimant returned to see Dr. Zimmerman. Dr. Zimmerman noted that Claimant had been off work since February 3, 2015. Claimant complained of some intermittent paresthesia in the left lower extremity, including the lateral knee and foot region. Dr. Zimmerman noted that Claimant went from seated to standing without

hesitation and normal biomechanics. Dr. Zimmerman noted that Claimant ambulated with an upright posture and normal gait pattern. Dr. Zimmerman noted that Claimant could bend forward with only minimal low back discomfort, but that extension recreates axial back pain with stiff rotation and localized pain over the facet joints bilaterally. Dr. Zimmerman reviewed the MRI study and indicated that pain was extension-based and likely facet-mediated. Dr. Zimmerman discussed the findings with the radiologist and indicated that the findings were consistent with a stress reaction type phenomenon. Dr. Zimmerman recommended steroid injections at L4-5 and L5-S1 for diagnostic and therapeutic purposes.

17. On March 11, 2015, Dr. Kern noted that Claimant had taken all of February off of work for soreness. Dr. Kern noted that "sometimes [Claimant] sits and cries because he feels so bad" and that he had difficulties walking. Dr. Kern gave Claimant work restrictions limiting lifting to no more than 5 pounds occasionally, walking/standing no more than 15 minutes per hour, and avoiding repetitive bending and twisting at the waist.

18. On March 18, 2015, Dr. Zimmerman performed bilateral facet steroid injections at L4-5 and L5-S1. Claimant had a diagnostic response and demonstrated improvement with extension of the lumbar spine. Claimant ambulated without difficulty and could touch his toes without hesitation.

19. On April 8, 2015, Insurer's Nurse Case Manager sent a request to Dr. Kern asking whether the finding of trabecular stress fractures on the MRI was related to the mechanism of twisting described by Claimant in July 2014. Dr. Kern issued an undated reply and opined that the stress fractures were not caused by the injury described on July 26, 2014. Dr. Kern stated that such fractures of the lumbar spine are usually caused by repeated extension of the lumbar spine, and that the Claimant could have developed a stress fracture due to repetitive strain over time if his job involved repetitive extension of the lumbar spine.

20. On April 20, 2015, Claimant complained of additional back pain during an appointment with Dr. Zimmerman. Claimant had difficulty ambulating and showed hesitation going from a seated position to standing. Claimant indicated pain with stiffness with extension maneuvers. Dr. Zimmerman recommended medial branch blocks at L4-5 and L5-S1 for further diagnostic purposes. Dr. Zimmerman performed the injections on May 6, 2015. Claimant demonstrated a diagnostic response with pain free extension. Claimant reported complete relief of back pain during his last visit with Dr. Zimmerman, on May 15, 2015. Dr. Zimmerman noted significant improvement with mobility and pain free range of motion with lumbar extension. Dr. Zimmerman noted that Claimant had no evidence of lumbar radicular symptoms. Dr. Zimmerman indicated that further

interventional treatment was not necessary and recommended additional conservative therapy, which could be considered as part of maintenance.

21. Claimant continued pool therapy and saw Dr. Kern for regular follow-up visits. Claimant's complaints of pain continued to fluctuate. Claimant reported continued right hip pain. Claimant also reported ongoing left low back and leg pain.

22. On June 14, 2015, Claimant returned for a trial of full duty but did not believe he could return to his former duties. On June 29, 2015, Claimant reported pain of over 10/10 to Dr. Kern with painful lumbar extension. On or around July 27, 2015, UPS offered Claimant a lighter duty job and Claimant requested to be released to full duty. Claimant's weight fluctuated between 220 and 230 pounds during this time.

23. On August 17, 2015, Dr. Kern placed Claimant at MMI. Dr. Kern gave Claimant no permanent impairment, no work restrictions, and recommended no additional medical care. At the time of MMI Claimant's diagnoses were listed as stress fracture with routine healing and lumbosacral facet arthropathy. The vast majority of medical records admitted into evidence reference July 26, 2014 as the date of injury.

24. On November 3, 2015, Claimant saw Dr. Lawrence Lesnak for an IME commissioned by Respondents. Claimant told Dr. Lesnak that he had injured himself on July 14, 2014 (later clarified to be July 26, 2014) while he was in a seated position driving his tug and turned to the right to look behind him. Claimant stated that the following morning, he awoke with significant left low back pain symptoms and subsequently developed left leg symptoms. Claimant specifically denied any history of low back injuries or similar symptoms prior to the July 2014 alleged work injury. Claimant did not report any injury from pushing a cart on or around December 22, 2014.

25. During physical evaluation, Dr. Lesnak noted that Claimant showed no signs of antalgic gait and could independently heel and toe walk without difficulty. Claimant was negative for Patrick's maneuver.

26. Dr. Lesnak opined that the described mechanism of twisting could possibly cause a temporary strain, but that the findings on the MRI were unrelated to this mechanism. Dr. Lesnak noted that Claimant had initially reported left-sided low back symptoms in July 2014 but that his complaints after December 2014 involved right-sided buttock symptoms. Dr. Lesnak noted that there was no specific inciting event that caused these symptoms and that Claimant had preexisting chronic, intermittent low back and buttock symptoms prior to July 2014. Dr. Lesnak opined that any and all treatment after Claimant was found to be at MMI by Dr. Rafferty, on

August 7, 2014, would be completely unrelated to the alleged occupational injury which occurred in July 2014.

27. On December 2, 2015, Claimant saw Dr. Caroline Gellrick for an IME commissioned by Claimant. Claimant reported a 15-year history of sciatica with pain down his left leg. Claimant described work duties involving lifting, pushing, and pulling. Claimant told Dr. Gellrick that at times, while pushing and pulling carts, his sciatic pain down his left leg would become worse. Claimant told Dr. Gellrick that on or around December 21, 2014, "his back pain suddenly worsened and also pain down the leg." Dr. Gellrick states that, by Claimant's history, he had an injury on approximately "December 21, 2014 when he got up that morning the back pain was severe with pain radiating down the leg." She opined that "the injury itself probably occurred December 20, 2014" as an aggravation of a preexisting condition. Claimant did not describe any specific inciting event. Dr. Gellrick reviewed Claimant's job for extension-type injuries and Claimant stated that he did not recall hyperextension problems on the job, stating that his job involved bending, pushing, and pulling on carts.

28. Dr. Gellrick performed a physical examination and noted "definite weakness on the left." Dr. Gellrick noted that Claimant exhibited pain with a heel and toe walk maneuver. Dr. Gellrick indicated that Claimant tested positive for Patrick's maneuver, bilaterally, with the left worse than the right.

29. Dr. Gellrick opined that "It is clear the patient has two separate work related events that caused flare of symptoms in the low back." RHE I at 31. Dr. Gellrick did not address the mechanism of twisting or turning in regard to analysis of causation of the alleged July 26, 2014 injury. Dr. Gellrick states: "[Claimant's] sciatica that he describes of 15 years at the Family Medicine Clinic at the University of Colorado in July of 2014 he feels is due to repetitive use with lifting, pushing and pulling on his job." Dr. Gellrick opined that that Claimant was not at MMI for his alleged December 2014 work injury, without addressing medical causation. Dr. Gellrick opined that Claimant should have further diagnostic studies of the lower extremity based upon the weakness demonstrated upon evaluation.

30. Claimant testified at hearing that he did a full body turn while on his tug and "felt a tug on my left side" of the low back. Claimant explicitly denied having experienced symptoms involving his low back prior to this time. Claimant subsequently changed his testimony and stated that he had experienced prior low back pain, but that this had not prevented him from work. Claimant thereafter testified that he did not have any low back or leg pain prior to the alleged July 26, 2014 work injury. Claimant testified that he did not experience the onset of pain in July 2014 while lifting or

bending. Claimant testified that he did not have any leg pain at the time he reported back pain to the University of Colorado Hospital, on July 28, 2014, and at the time he was discharged from care by Dr. Rafferty, on August 7, 2014. Claimant testified that his pain had become much more severe after the alleged July 26, 2014 incident.

31. Claimant testified that he subsequently injured himself pushing a cart on December 22, 2014. Claimant testified that he had denied having suffered any injuries subsequent to the alleged July 26, 2014 incident in an interrogatory response sent to Respondents in November 2015. Claimant testified that he experienced the immediate onset of pain pursuant to this alleged event. Claimant testified that his job does not involve any activities requiring bending backwards.

32. Dr. Lesnak testified at hearing as Respondents' expert. Dr. Lesnak testified that twisting could possibly cause a sprain/strain. Dr. Lesnak testified that the mere act of twisting would not be specifically related to any work activities and that he agreed with Dr. Rafferty that causation was therefore undetermined in relationship to work duties. Dr. Lesnak testified that there was no medical evidence to suggest that Claimant would be at any increased risk of developing a strain/sprain by sitting in a tug and twisting. Dr. Lesnak testified that this type of injury, by the mechanism described by Claimant, could have occurred while sitting in a car, sitting at home, or sitting on the couch. Dr. Lesnak testified that none of the work activities described by Dr. Gellrick as the potential cause of the alleged July 26, 2014 work injury, including lifting, pushing and pulling, were related by Claimant to any of his providers as having precipitated his back pain on that date. Dr. Lesnak testified that, based upon the totality of the medical evidence and testimony, it was his medical opinion that the alleged strain from twisting was not work-related.

33. Dr. Lesnak testified that Claimant's testimony that he had no back pain or prior leg symptoms and his report to Dr. Lesnak upon evaluation contradicted the medical records which indicated a history of similar symptoms. Dr. Lesnak testified that sciatica commonly refers to back pain, buttock pain, and leg symptoms, including low back pain. Dr. Lesnak testified that Claimant's symptoms on or around July 25, 2014 would be consistent with a patient who has a history of episodic sciatica and back pain. Dr. Lesnak testified that Claimant's characterization of his pain having become "much more severe" after twisting in July 2014 was not consistent with the medical records at the time of that alleged incident, as these symptoms resolved within a week. Dr. Lesnak testified that, based upon Claimant's weight, his age, and the degenerative findings on the MRI study, he would be expected to have non-related back pain.

34. Dr. Lesnak testified that Claimant did not report any second work-related event to him during his IME evaluation in November 2015. Dr. Lesnak testified that there was no lifting, twisting, pushing or pulling incident reported in connection with an injury or aggravation sustained on or around December 22, 2014, and that Claimant had simply reported experiencing back pain from standing too much at work. Dr. Lesnak noted that Claimant's report of left-sided low back pain pursuant to the alleged July 26, 2014 incident was inconsistent with reports of right-sided low back pain subsequent to December 2014. Dr. Lesnak also testified that Claimant's complaints of leg pain were not consistent in the medical records.

35. Dr. Lesnak testified that the findings on the MRI, including suspected stress fractures of the pedicles at L4-5 and L5-S1, were not causally related to the alleged July 26, 2014 twisting event. Dr. Lesnak testified that extension, described by Dr. Kern as a potential cause of the MRI findings, involves backward bending at the waist. Dr. Lesnak testified that there would need to be a significant extension injury to cause stress fractures. Dr. Lesnak testified that twisting, lifting, pushing, and pulling do not and should not involve extension. Dr. Lesnak testified that none of the work activities that Claimant described to his providers involved repetitive extension and that there was no evidence of an extension-type injury at work. Dr. Lesnak testified that Claimant's weight at the time of the alleged injury would have classified him as overweight and that the increased gravitational forces upon the spine could hasten degenerative changes.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

In determining whether a claimant has met his burden of proof, the ALJ may resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. *Bodensleck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Youngs v. Indus. Claim Appeals Office*, 297 P.3d 964 (Colo. App. 2012). The same principles for determining credibility of lay witnesses apply to expert witnesses as well. *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness, probability or improbability, of the testimony and actions, the motives of the witness; whether the testimony has been contradicted; and bias, prejudice and interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936), *overruled in part*, *Lockwood v. Travelers Ins. Co.*, 498 P.2d 947 (Colo. 1972). The ALJ should consider an expert witness' special knowledge, training, experience, or research, and has broad discretion to determine the weight of evidence on this basis. *See Young v. Burke*, 338 P.2d 284 (Colo. 1959); *see also* Section 8-43-210, C.R.S.; *One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995).

The ALJ determines that Claimant's testimony is not credible. Claimant's testimony is not credible in regard to documented medical evidence in the record of a longstanding history of preexisting back pain and symptoms similar to those reported as part of his alleged July 26, 2014 work injury. Claimant's testimony is not consistent with his own reports to his providers and to the parties' experts regarding the nature of his symptoms, as he reported to Dr. Lesnak that he had leg pain after the alleged July 26, 2014 incident when this was denied in the medical records at that time. Claimant also reported having the onset of leg symptoms to Dr. Gellrick after his alleged December 2014 incident, which was not consistent with the medical records at that time. Claimant's testimony regarding the cause of the reoccurrence of his back pain in December 2014 is not credible, as he claims that he sustained an injury from pushing a cart and felt immediate pain when this mechanism is absent in the entirety of the medical records. Claimant also told Dr. Zimmerman that his pain reoccurred with no specific onset or mechanism of injury, which was contrary to his testimony. Likewise, while Claimant denied having prior back pain or leg pain on multiple occasions during testimony, and to Dr. Lesnak at his IME evaluation, he reported to Dr. Zimmerman in February 2015 a one-year history of similar symptoms which began insidiously and became progressively worse.

The ALJ finds that the opinion of Dr. Gellrick is not credible or persuasive. Dr. Gellrick surmises two separate work-related injuries, in July 2014 and in December 2014. This is contrary to the totality of the medical records, which indicate only a single alleged injurious event occurred at work on or around July 26, 2014. Dr. Gellrick does not address the causal mechanism of twisting in relation to this event and instead posits alternative mechanisms which were not described in the medical records and explicitly denied as a mechanism by Claimant at hearing. Dr. Gellrick likewise does not record any causal mechanism for the alleged December 2014 injury, though Claimant clearly reported at hearing that he injured himself pushing a cart at that time. Dr. Gellrick does not cite or provide supporting documentation in the record to serve as the basis for her opinion. Moreover, Dr. Gellrick explicitly notes that Claimant's job does not involve hyperextension, which Dr. Kern indicated may be a sufficient causal mechanism for the findings on the MRI and which Dr. Lesnak testified may be sufficient to cause stress fractures. Dr. Gellrick's findings upon examination were also markedly different to those of Dr. Lesnak, who had seen Claimant just one month prior to her IME. Dr. Gellrick's opinion regarding causation was largely based upon the report that Claimant, himself, attributed his symptoms to his work duties.

The ALJ finds that the testimony and opinions of Dr. Lesnak are credible and persuasive. The opinions of Dr. Lesnak are most consistent with the opinions of Claimant's providers in the medical records regarding the history of the alleged injury and causation. Dr. Lesnak's opinion regarding of causation of the alleged July 26, 2014 injury is consistent with that of Drs. Rafferty, Dr. Otten, and Dr. Artist. Dr. Lesnak's opinion regarding causation and the relatedness of the findings on the MRI is consistent with that of Dr. Kern.

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). Substantial evidence is that "quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. *See Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). An ALJ's determination of factual findings must be upheld if supported by substantial evidence and plausible inferences of the record. *Eller v. Indus. Claim Appeals Office*, 224 P.3d. 397, 399-400 (Colo. App. 2009).

The ALJ finds that Claimant's testimony and assertion of a work-related injury is not supported by substantial evidence in the record.

A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990). If there is a direct causal relationship between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). There must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show merely that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Simply because a claimant experiences symptoms after performing a job function does not necessarily create a causal connection to the work function. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). ICAO has upheld denial of compensability where the mechanism asserted was the mere act of turning and experiencing pain. *See*

Willis v. Craig Hospital, W.C. No. 4-627-742 (February 13, 2006).

Notwithstanding, if the claimant's injury is precipitated by a preexisting nonindustrial condition, the injury is not compensable unless a special hazard of the employment contributes to the accident or the extent of the injuries sustained. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992). Under the "special hazard" rule, a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by the concurrence of a preexisting weakness and a hazard of employment. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Gates Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo. App. 1985). In such cases, the existence of a special hazard, which elevates the probability of an injury serves to establish the required causal relationship between the employment and the injury. *Ramsdell v. Horn, supra*. A condition is not a special hazard of employment if it is ubiquitous in the sense that it is found generally outside of the employment. *Gates Rubber Co. v. Industrial Commission, supra*.

Notwithstanding Claimant's testimony to the contrary, the medical records establish that Claimant has a significant preexisting history of chronic, intermittent low back pain and sciatica. Claimant alleges that he injured his left low back while sitting on his tug and twisting to look behind him. Claimant was not driving his tug, not lifting, not bending, and not pushing or pulling anything. Dr. Rafferty indicated that he could not state that Claimant had a work-related injury because he did not know whether merely sitting and turning on a tug placed Claimant at increased risk of low back pain. Dr. Lesnak testified that, there was no medical evidence to suggest that a person is at increased risk of developing any strain/sprain injury by sitting in a tug and twisting. Dr. Lesnak testified that the act of sitting and twisting is one which is commonly encountered in everyday situations outside of work, including in one's car, at one's home, and sitting on the couch. Dr. Gellrick did not render any specific opinion concerning the causal relationship between Claimant's asserted mechanism of twisting, his job duties, and his injury. Rather, Dr. Gellrick indicated that Claimant likely developed an injury based upon job duties not reported to be the cause in the medical records or in testimony at hearing. Based upon the testimony, the medical records, and the preponderance of the medical opinion, Claimant's injury did not arise out of his employment duties.

Respondents are liable only for those medical benefits which are reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The record must distinctly reflect the medical necessity of any medical treatment needed to cure and relieve an injured employee from the effects of the industrial injury and any ancillary service, care, or treatment as designed to cure and relieve the effects of such industrial injury. *Public Service Co. of Colorado v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 584 (Colo. App. 1999). The question of whether medical treatment is reasonable and necessary is one of fact for determination by an ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Treatment for a work injury must not only be reasonable and necessary but must also be causally related to that injury. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993). Respondents are permitted to challenge causation and relatedness of the need for any treatment, despite having admitted liability for a claim. *Hanna v. Print Expediters, Inc*. 77 P.3d 863 (Colo. App. 2003). In a dispute over medical benefits that arises after filing an admission of liability, respondents may assert, based upon subsequent medical reports, that a workers' compensation claimant did not establish a threshold requirement of direct causal relationship between the on-the-job injury and need for medical treatment. *Snyder v. Industrial Claim Appeals Office of the State of Colo., supra*. Claimant bears the burden to prove a causal connection exists between a particular treatment and the industrial injury. *Id*.; *see also Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). Causation is a question of fact for resolution by the ALJ. *F.R. Orr Construction v. Rint*, 717 P.2d 965 (Colo. App. 1985).

Claimant has failed to establish a causal relationship between his work duties and his alleged injury on July 26, 2014 and no medical treatment pursuant to that date of injury is reasonable, necessary, or related to an injury which arose out of and occurred within the course and scope of his employment.

While Claimant has recently filed a separate claim for a second injury which he alleges was caused by pushing a cart on or around December 22, 2014, issues concerning that claim are not before this ALJ for resolution.

Because the ALJ has found and concluded that Claimant's claim is not compensable, Respondents are not liable for temporary total disability benefits.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to meet his burden of proof by a preponderance of the evidence that he suffered an acute aggravation of a preexisting condition arising out of and occurring within the course and scope of his employment on or around July 26, 2014. Claimant's claim for compensation is denied and dismissed.

2. 2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 15, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-005-983-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on July 5, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 7/6/16, Courtroom 3, beginning at 8:30 AM, and ending at 10:15 AM). The official Spanish/English Interpreter was Juan Moreno.

Claimant's Exhibits 1 through 3 were admitted into evidence, without objection. Respondents' objection to Claimant's Exhibit 4 was sustained on the basis of the 20-day exchange rule. The Respondents were offered the opportunity to deal with Claimant's Exhibit 4 at a continuation hearing, however, the Claimant withdrew the exhibit. Respondents' Exhibits A through K were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. The Claimant's opening brief was filed on July 21, 2016. Respondents' answer brief was filed on July 25, 2016. The Claimant's reply brief was filed on August 1, 2016, at which time the matter was deemed submitted for decision.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, average weekly wage (AWW), temporary total disability (TTD) benefits from January 15, 2016 and continuing; and, medical benefits.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Stipulations and Findings Based Thereon

1. At the commencement of the hearing, the parties stipulated and the ALJ finds that the Claimant's AWW, if the claim is compensable, is $859.10.

2. Also, at the commencement of the hearing the Respondents made a judicial admission that the authorization of the medical providers at SCL/Good Samaritan, Dean L. Prok, M.D., and his referral to Nicholas K. Olsen, D.O., were authorized, if the claim is compensable, and the ALJ so finds.

Preliminary Findings

3. The Claimant was a 40-year-old general laborer for the Employer where he was employed as a laborer on construction sites with duties that included lifting and carrying 2"X8"X9' pieces of lumber that were used on scaffolding.

4. On January 14, 2016, the Claimant was attempting to lift six, nine foot wooden beams with a coworker when he felt a popping in his lower back and immediately felt sharp pain. At hearing, the Claimant initially indicated that he lifted one wooden plan. Later, the Claimant indicated that he was lifting multiple planks with the assistance of a co-worker. The resolution of this discrepancy is not critical to whether the Claimant aggravated a pre-existing condition by lifting **a** plank or **six** planks.

5. After contemporaneously reporting the incident, the Claimant's supervisor, Luis Cervantes, transported the Claimant to an authorized medical provider, SCL Physicians in Broomfield. The Claimant was initially seen by Physician Assistant (PA) Tara Clemens where he described his mechanism of injury and noted no prior conditions or symptoms in his lower back. Based upon the Claimant's presentation PA Clemens thought he may have suffered a lumbar herniated disc. The Claimant was

prescribed medications and a follow-up appointment was set with Dean Prok, M.D. for the next day (Respondents' Exhibit C, pp.81-84). Dr. Prok is the Claimant's first authorized treating physician (ATP).

Compensability

6. Upon examination, PA Clemens found spasm in the Claimant's lumbar back, as well as weakness with resisted hip flexion and knee extension bilaterally. Her assessment was lumbar herniated disc.

7. PA Clemens was of the opinion that there was a greater than 50% medical probability of work-related injury.

8. Next, the Claimant presented to the Emergency Department (ER) of Good Samaritan Hospital where he continued to report persisting back pain, right lower quadrant abdominal pain, and the decreased sensation extending down his legs. The ER personnel noted a positive right inguinal canal tenderness with a mass appreciated. The Claimant also had positive exquisite tenderness of the right testicle which was high riding. Subsequent imaging was negative for appendicitis, inguinal hernia, femoral hernia or abdominal wall defect in the right lower quadrant and consideration of a bulging disc/sciatica. The final impressions were bilateral low back pain with sciatica, sciatica laterally unspecified; right lower quadrant abdominal pain; testicular pain right. The symptoms at that time were thought to be most consistent with a muscular strain or spasm (Respondents' Exhibit A, pp.10-11).

Dean Prok, M.D.

9. The Claimant was seen by ATP Dr. Prok at SCL on January 18, 2016 and the Claimant presented with ongoing pain and weakness. Dr. Prok reported a greater than 50% medical probability of work-related injury and imposed work restrictions, which consisted of avoidance of any twisting or bending or heavy activity.

10. The Claimant presented his work restrictions to his supervisor, and he was not provided any modified duty after his initial medical treatment, nor was he ever called back to work for the Employer.

11. Dr. Prok continued to impose restrictions on the Claimant that are not further specified in the reports, but the Claimant reported that modified duty was not made available to him.

12. The Claimant has not undertaken any other work since his injury, nor has he received any benefits for being off work. He has received assistance from his family, including his parents and sister.

Nicholas K. Olsen, D.O. and Followup

13. On January 20, 2016, the Claimant was seen by Dr. Olsen, on referral from Dr. Prok. The Claimant reported that his pain kept him awake at night, and he suffered balance issues that had caused him to fall a couple times since his work accident. Dr. Olsen is also one of the Claimant's ATPs.

14. On informational surveys completed by the Claimant for Dr. Olsen, the Claimant indicated that he was very satisfied with his job, but he was now severely anxious and quite irritable.

15. When the Claimant was seen in physical therapy at SCL on March 15, 2016, he was found to have limited lumbar range of motion (ROM) and lower extremity (LE) weakness. Objective findings reported by therapist Cindy Vair included decreased lumbar lordosis, forward trunk lean, a wide base of support and a myotome/strength rating on the L4 tibialis anterior of only 3 on the right, versus 5 on the left.

16. The Claimant's MRI (magnetic resonance imaging) of January 28, 2016 revealed bilateral facet arthrosis resulting in mild bilateral foraminal stenosis at L4-5 and a probable annular fissure at L5-S1.

17. Dr. Olsen administered an epidural steroid injection (ESI) at L5-S1 on April 12, 2016, to address the Claimant's annular fissure. Although the Claimant reported a decreased VAS score after the injection, lumbar extension continued to aggravate his back pain. On April 20, 2016, Dr. Olsen was of the opinion that the Claimant's response to the ESI did not seem to identify his annular fissure as a significant pain generator, so he planned for a bilateral L4-5 and L5-S-1 facet injection.

18. The last report of examination by Dr. Prok was May 20, 2016, at which point a concern for the Claimant's cardiac condition had been resolved, so he might proceed with additional injections. Dr. Prok reported good strength in the Claimant's lower extremities, and the ability to walk on heels, but not toes. Dr. Prok repeated his assessment of a greater than 50% probability of work-related injury, and estimated maximum medical improvement (MMI) in 3-5 months. Dr. Prok has not yet determined whether the Claimant is at MMI.

19. On June 3, 2016, Dr. Olsen administered the facet injections, and the Claimant reported a pre-injection VAS score of 7/10 followed by some 80% reduction of pain to a post-injection score of 2/10 and the ability to flex and extend his lumbar spine to a greater extent without aggravation of pain complaints. Reexamination was to take place within two weeks.

Respondents' Independent Medical Examiner (IME) Kathleen D'Angelo, M.D.

20. IME Dr. D'Angelo stated that the symptoms from a facet problem might or might not have a specific nature, but could include pain in the thigh.

21. Dr. D'Angelo provided Claimant the diagnosis of lumbar myofascial strain due to his work injury (Respondents' Ex. A, p.21). Therefore, Dr. D'Angelo is of the opinion that the Claimant sustained a work-related injury on January 14, 2016, however, she is of the opinion that none of the Claimant's restrictions are attributable to that injury, thus by inference, temporary disability is not attributable to that injury.

22. Dr. D'Angelo offered a diagnosis of Somatic Symptom Disorder for the Claimant, based upon the DSM-5, however she conceded that she is not board certified in psychiatry or neurology, and this assessment is given minimal weight.

23. Dr. D'Angelo was quite clear in stating the opinion that the Claimant is not malingering.

24. With regard to a report of the Claimant experiencing shaking in his leg when asked to stand on only one leg, Dr. D'Angelo also stated that she did not believe he was faking that.

25. Dr. D'Angelo was of the opinion that the Claimant's disc bulges, fissuring, and facet joint arthropathy were not acute structural injuries caused by the work events. Therefore any need for treatment to the discs, or facet joints, according to Dr. D'Angelo were related to the Claimant's underlying, pre-existing and causally unrelated degenerative spine disease. According to Dr. D'Angelo, there was no evidence that the Claimant suffered some chronic aggravation, acceleration or exacerbation of his underlying degenerative spine disease, since these aggravations would normally present as a temporary condition and a limited inflammatory response. According to Dr. D'Angelo, the fact that the Claimant's symptoms have continued for six months in light of his treatment, injections, physical therapy, and medications are indicative of some other condition other than a traumatic or acute injury related to a specific event. Dr. D'Angelo failed to convincingly explain the underlying basis for this opinion.

26. Dr. D'Angelo did not feel that the Claimant needed work restrictions, and that there was no need for further treatment. She specifically did not feel he suffered a work-related back injury during the course of his employment. Rather, according to Dr. D'Angelo, the Claimant's presentation of symptoms was a manifestation of an underlying osteoarthritis and or a somatic symptom disorder. Both of those conditions are systemic diseases and not causally related to work duties or a work injury, according to Dr. D'Angelo. The ALJ finds that Dr. D'Angelo's opinions are categorically made to exclude most potential bases of work-relatedness and they are contrary to the weight of the medical opinions of the treating physicians.

Temporary Total Disability

27. The Claimant presented his work restrictions to his supervisor, and he was not provided any modified duty after his initial medical treatment, nor was he ever called back to work for the Employer.

28. Dr. Prok continued to impose restrictions on the Claimant that are not further specified in the reports, but the Claimant reported that modified duty was not made available to him.

29. The Claimant has not undertaken any other work since his injury, nor has he received any benefits for being off work. He has received assistance from his family, including his parents and sister.

30. The Claimant has neither been able to work at his pre-injury work nor has he earned any wages whatsoever since the date of his injury, January 14, 2016. He continues under medical restrictions that prevent him from working at his pre-injury job. Modified employment has not been made available to him and he has not been declared to be at maximum medical improvement (MMI) by an authorized treating physician. Therefore, the Claimant has been temporarily and totally disabled since January 15, 2016 and continuing.

Ultimate Findings

31. The ALJ finds the opinions of ATPs Dr. Prok and Dr. Olsen more persuasive and more credible than the opinions of IME Dr. D'Angelo. Dr. D 'Angelo's opinion supports a compensable event, however, it does not support continuing restrictions or after-effects as a result thereof, thus, it does not support temporary disability. Dr. Prok's and Dr. Olsen's opinions not only support a compensable event but they support continuing restrictions through the present, which would prevent the Claimant from performing his pre-injury work.

32. Between the conflicting opinions of Dr. D'Angelo versus the opinions of Dr. Prok and Dr. Olsen, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of ATPs Dr. Prok and Dr. Olsen, and to reject the opinions of IME Dr. D'Angelo.

33. The Claimant has proven by a preponderance of the evidence, that he sustained compensable injuries to his back as described herein above by Dr. Prok and Dr. Olsen on January 14, 2016, consisting of a work-related aggravation of pre-existing

back conditions, and these injuries arose out of the course and scope of his employment for the Employer.

34. The Claimant has proven, by preponderant evidence that all of the medical care and treatment for his back injury of January 14, 2016 was authorized, causally related thereto, and reasonably necessary to cure and relieve the effects thereof.

35. The Claimant has further proven, by a preponderance of the evidence that his AWW is $859.10, which yields a TTD rate of $572.73 per week, or $81.96 per day.

36. The Claimant has proven, by preponderant evidence that he has been temporarily and totally disabled since January 15, 2016 and continuing. The period from January 15, 2016 through July 5, 2016, both dates inclusive is a total of 173 days.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of ATPs Dr. Prok and Dr. Olsen were more persuasive and credible than the opinions of IME Dr. D'Angelo. Dr. D'Angelo's opinion supports a compensable event, however, it does not support continuing restrictions, after-effects or temporary disability as a result thereof. Dr. Prok's and Dr. Olsen's opinions not only support a compensable event but they support continuing restrictions through the present, which would prevent the Claimant from performing his pre-injury work.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between the conflicting opinions of Dr. D'Angelo versus the opinions of Dr. Prok and Dr. Olsen, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of ATPs Dr. Prok and Dr. Olsen, and to reject the opinions of IME Dr. D'Angelo.

Compensability

c. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-**

existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant sustained compensable injuries to his back as described herein above by Dr. Prok and Dr. Olsen on January 14, 2016, consisting of a work-related aggravation of pre-existing back conditions, and these injuries arose out of the course and scope of his employment for the Employer.

Medical Benefits

d. As stipulated and found, all of the Claimant's medical care and treatment for the January 14, 2016 event was authorized and within the chain of authorized referrals. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the aggravating injury of January 14, 2016. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relive the effects of that injury.

Average Weekly Wage

e. As stipulated and found, the Claimant's AWW is $859.10, thus yielding a TTD rate of $572.73 per week, or $81.96 per day.

Temporary Total Disability

f. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's separation from employment in this case was because his medical restrictions would not permit him to perform his pre-injury work and his Employer did not offer him modified employment. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*.

g. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring, modified employment is not made available, there is no actual return to work and MMI has not been reached), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant has been temporarily and totally disabled since January 15, 2016 and continuing. The period from January 15, 2016 through July 5, 2016, both dates inclusive is a total of 173 days.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has met his burden with respect to compensability, medical benefits, AWW, and TTD.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of the Claimant's authorized medical care and treatment for his compensable back injury of January 14, 2016, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Respondents shall pay the Claimant $572.73 per week, or $81.96 per day from January 15, 2016 through July 5, 2016, both dates inclusive is a total of 173 days, in the aggregate amount of $14, 179.08, which is payable retroactively and forthwith. From July 6, 2016 and continuing until cessation of temporary indemnity benefits is warranted by law, the Respondents shall continue to pay the Claimant $572.73 per week in temporary total disability benefits.

C. Any and all issues not determined herein are reserved for future decision.

DATED this______day of August 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of August 2016 electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-989-931-02

ISSUES

- Whether Respondent overcame, by clear and convincing evidence, the DIME opinion of Dr. Timothy Hall that Claimant was not at maximum medical improvement (MMI)?

- If Claimant was at MMI, whether Claimant proved by a preponderance of the evidence that her left and right scheduled shoulder ratings should be converted to whole person impairment ratings?

- If Claimant was at MMI and not entitled to conversion, whether Respondent proved by a preponderance of the evidence that the DIME physician's scheduled rating was incorrect?

- Whether Claimant proved by preponderance of the evidence that she was entitled to an average weekly wage of $1,409.75?

- Whether Claimant proved by a preponderance of the evidence that she was entitled to disfigurement compensation for scars on her knees?

ISSUE RESERVED

- Claimant reserved the issue of permanent total disability benefits for future determination because she asserted that she was not at MMI and thus a permanent disability could not be assessed at this time.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On April 15, 2015, Claimant, a 58-year-old female employed with the Employer as a courier, sustained injuries to her upper and lower extremities. Claimant testified that she had worked for the Employer for 19 years and had had her present courier route for the last seven years. According to Claimant, she injured her upper extremities and knees during the course of completing her route using a substitute delivery truck. Specifically, Claimant had to enter and exit the substitute truck by the passenger door because the truck's sliding door was broken and packages could not be accessed by the rear door. As she was "surfing" over packages and attempting to pick up packages, she began to experience soreness in her bilateral shoulders, upper arms, and neck. She also sustained a contusion to her right knee.

2. Claimant notified her employer on April 17, 2015. That same day, she presented to authorized treating physician (ATP), Dr. Robert Dupper. Dr. Dupper

assessed Claimant with sprains of the bilateral shoulders, neck sprain, and right knee contusion. He recommended that Claimant take Ibuprofen, prescribed Flexeril, and removed Claimant from work.

3. On April 23, 2015, Claimant returned to Dr. Dupper. Claimant reported approximately 40% improvement. She denied any continued symptoms with her knee. Claimant reported continued soreness in her neck, but with no neurological deficits or visual changes. Additionally, Claimant denied numbness or tingling in her upper extremities. Dr. Dupper recommended that Claimant return to regular work status. Additionally, he recommended massage therapy.

4. On May 4, 2015, Claimant returned to Dr. Dupper. Claimant reported reduced neck pain following the massage treatment. Claimant reported soreness in her shoulders and upper arms "when she [worked] a long day but otherwise [was] feeling fairly well." Claimant also described some pain under the kneecap of her right knee. Physical examination revealed some swelling on the medial side of the right knee with full range of motion and no tenderness.

5. On May 12, 2015, Claimant returned to Dr. Dupper. Claimant's complaints focused her right arm and shoulder. Physical examination revealed full range of motion of the shoulders with some pain at end points of the range of motion. Due to Claimant's complaints of increased soreness at work, Dr. Dupper recommended restricted duty. He imposed a lifting restriction of 20 pounds and recommended physical therapy.

6. On May 26, 2015, Claimant returned to Dr. Dupper. Claimant described bilateral pain in her shoulders, right greater than left. Dr. Dupper released Claimant to regular work activities. He recommended that she start physical therapy and continue taking Ibuprofen as needed.

7. On June 16, 2015, after a few sessions of physical therapy, Claimant returned to Dr. Dupper. Claimant reported that her left shoulder and right knee were doing quite well. Her complaints focused on pain and soreness in the right shoulder, into the upper arm. Because physical therapy did not resolve the right shoulder pain, Dr. Dupper recommended that Claimant undergo an MRI and an evaluation with an orthopedic surgeon.

8. A right shoulder MRI on July 3, 2016 revealed mild-moderate tearing of the supraspinatus and infraspinatus muscles, labral tear, moderate-severe AC joint arthritis, old trauma to the AC and coracoclavicular joints, and mild-moderate glenohumeral joint effusion.

9. After undergoing the MRI, Claimant presented to Dr. David Beard, orthopedic surgeon, on July 14, 2015. His review of the MRI showed right shoulder rotator cuff tendonitis with possible small partial thickness cuff fraying. Dr. Beard did not recommend surgery as Claimant had improved with conservative management.

10. On July 20, 2015, Claimant returned to Dr. Dupper. Claimant reported improvement but still described difficulty with certain activities of daily living. Claimant remained on work restrictions, requiring her to do office duty only, which did not aggravate her condition.

11. On August 3, 2015, Claimant returned to Dr. Dupper, reporting continued improvement, but that she did notice increased pain in the right shoulder after use. However, when not utilizing the right arm, the pain would dissipate. Dr. Dupper recommended that Claimant return to regular duty. He noted that if Claimant tolerated the return to regular activity, he would likely be placing her at maximum medical improvement (MMI).

12. On August 17, 2015, Dr. Bruce Cazden placed Claimant at MMI. Claimant noted that having returned to full duty two weeks prior, her pain had been manageable. Claimant agreed that she had reached MMI. At the time of the evaluation, Claimant did not require medication. Dr. Cazden did not recommend any permanent work restrictions. Additionally, he did not assign an impairment rating. Regarding future medical treatment, he noted that Claimant might consider a cortisone injection and/or surgical intervention if her condition deteriorated. Claimant agreed with Dr. Cazden that she had likely plateaued regarding treatment.

13. On September 14, 2015, Respondent filed a Final Admission of Liability (FAL) admitting consistent with Dr. Cazden's opinion. Respondent admitted for post-MMI maintenance treatment allowing Claimant to return to her treaters for reasonable and necessary care to relieve the effects of the industrial injury. Claimant objected to the FAL and requested a Division-sponsored IME (DIME).

14. Dr. Timothy Hall performed the DIME. He opined that Claimant was not at MMI but the basis for that opinion is not entirely clear from his report. He stated that should Claimant simply chose to proceed with additional conservative treatment like a corticosteroid injection, she would still be at MMI and such treatment could be provided under medical maintenance care. However, if she chose to have surgery, which had not been recommended by any of her treatment providers, then she would no longer be at MMI. Dr. Hall, who is not a surgeon, did not opine on whether Claimant was a surgical candidate.

15. Dr. Hall clarified his position in his deposition testimony: "If I would have seen [Claimant] on 8/17/15 [the date on which Dr. Cazden placed Claimant at MMI], I would have put her at MMI as well. And that's why I would go back to that date, as I said in my note, if she's determined not to be a surgical candidate." However, he also admitted in his deposition that his physical examination of Claimant was not suggestive of rotator cuff tear or labral pathology, which would support a surgical recommendation.

16. Concerning permanent impairment, Dr. Hall assigned a 19% scheduled rating for Claimant's right upper extremity, which converted to an 11% whole person rating. He also assigned a 4% scheduled rating for Claimant's left upper extremity, which converted to a 2% whole person rating. He did not provide any lower extremity

ratings. The rating worksheet attached to Dr. Hall's report indicates that he combined Claimant's whole person ratings to reach a 22% total whole person rating. However, Dr. Hall clarified in his deposition that this was an error and the correct combined whole person rating was actually 13%.

17. Claimant testified that she did not believe that she reached MMI on August 17, 2015. She disagreed with Dr. Cazden's MMI report indicating that she had reached a plateau acceptable to her; that she was pleased with her progress; and that she felt she had reached MMI. She also disagreed with the record in Dr. Beard's report that her shoulders had significantly improved with conservative treatment.

18. She further testified that her condition had worsened since August 17, 2015. She now had elbow pain, catching and locking in the right shoulder, difficulty lifting overhead, and difficulty with sleep. However, on cross-examination, she acknowledged that she reported difficulty with overhead lifting and problems with sleep to her medical providers even prior to the April 15, 2015 injury.

19. Claimant testified that she would like to go back and receive more treatment. However, although she was free under the final admission of liability to return to her authorized treating physicians for medical maintenance care at any time, she had yet to schedule a follow-up appointment. She testified that she was unaware of her right to maintenance care despite being represented by counsel, and that she did not return to her treatment providers because she felt they could do nothing else for her.

20. Claimant had other inconsistencies in her testimony. At one point, she testified that her left shoulder symptoms never fully resolved following a 2012 attack by a dog. But, at another point during the hearing, she stated that her left shoulder was not bothering her at the time of the August 15, 2015 injury.

21. Concerning conversion, Claimant testified that she has tingling radiating from her right shoulder into her neck and some stiffness with turning. She indicated that she had trouble lifting above her head, mowing the lawn, pulling weeds, scrubbing the sink, throwing a ball, and that her pain increased with activity. She also received massage treatment for her neck. However, on cross-examination, Claimant acknowledged that her difficulty with pushing, pulling, and lifting was localize to her arms and shoulders and no other part of her body prevented her from doing work activities and activities of daily living.

22. Dr. Carlos Cebrian performed an independent medical examination at Respondent's request. Dr. Cebrian is board certified and Level II Accredited since 2001 in physical and rehabilitation medicine with the Division of Workers' Compensation. He asserted working knowledge of the AMA Guides and the Division of Workers' Compensation Medical Treatment Guidelines. Dr. Cebrian was present in the courtroom for Claimant's testimony.

23. Dr. Cebrian agreed that Claimant sustained bilateral rotator cuff strains with tendonitis on April 15, 2015. He further opined that Claimant's course of treatment

was reasonable and appropriate. He stated that the July 3, 2015 right shoulder MRI showed a partial rotator cuff tear, labral tear, and arthrosis of the joint, which were likely degenerative in nature. Dr. Cebrian explained that the mechanism of injury, as described by Claimant, would not cause the pathology indicated on the MRI report. He further explained that, although the MRI did indicate the presence of old trauma to the shoulder joint, Claimant's rotator cuff and labral tears were likely the result of her degenerative shoulder condition. Such changes are an aspect of cellular changes as we age he explained, and it is a misunderstanding of the underlying pathology to say that those changes are merely the result of "wear and tear."

24. Dr. Cebrian also reviewed Claimant's May 1, 2012 left shoulder MRI, taken prior to the date of injury. This MRI also showed degenerative changes consistent with the degenerative disease processes shown in Claimant's right shoulder. Dr. Cebrian explained that, given Claimant's age, such breakdown of the shoulder joint would be normal and expected. He also noted that there would be pain with this degeneration that could be aggravated by the mechanism of injury described here.

25. However, all of the findings were suggestive of chronic conditions that were not caused by the mechanism of injury Claimant described. Rotator cuff or labral tears would be the result of either degenerative processes or a significant trauma to the shoulder, which Claimant did not allege. Accordingly, he concluded that the injuries Claimant sustained on April 15, 2015 did nothing to change the underlying disease processes of her pre-existing arthritis of her bilateral shoulders.

26. He agreed it was reasonable to refer Claimant for an orthopedic evaluation. He noted that the evaluating surgeon, Dr. Beard, did not see tearing on the right shoulder MRI and diagnosed Claimant with right shoulder rotator cuff tendinitis with possible small partial-thickness cuff fraying. He recommended against surgery. Further, Dr. Beard only recommended a corticosteroid injection should Claimant's condition worsen.

27. Based on this, Dr. Cebrian opined that it was appropriate for the ATP to place Claimant at MMI.

28. Concerning the DIME report, Dr. Cebrian opined that it contained opinions inconsistent with the medical records and sound medical research, including that the report attributed much of Claimant's underlying pathology to arthritis but then attributed the arthritis to the work injury and the wear and tear of Claimant's job. But, the medical research shows that movement is actually good for arthritic conditions. Additionally, the DIME based his opinion that Claimant was not at MMI on Claimant proceeding with the surgery. But no surgical recommendation had been made in the case, and Dr. Hall himself was not qualified to make such a recommendation. Finally, Dr. Hall's physical examination did not reveal any findings for rotator cuff tear or labral pathology.

29. Dr. Cebrian did agree with Dr. Hall's deposition testimony that placed Claimant at MMI on August 17, 2015.

30. Dr. Cebrian disagreed with Dr. Hall's assignment of an impairment rating. He opined that an impairment rating was not appropriate because there was no objective evidence of any change in Claimant's underlying degenerative pathology. Essentially, there was no medical evidence that Claimant's underlying degenerative changes had been permanently exacerbated by the injury. Rather, the aggravation of her underlying disease resolved following conservative treatment.

31. Concerning conversion, Dr. Cebrian testified that Claimant's upper extremity ratings should not be converted to whole person ratings. This was so because Claimant returned to regular duty after the injury; her complaints were localized to the upper extremities when she reached MMI; all of her pathology was localized to the shoulder joints; and no shoulder surgery took place.

32. Dr. Cebrian testified on rebuttal that Claimant's testimony did not change his opinion regarding MMI and impairment. He testified that on physical examination there was no weakness in Claimant's left or right shoulder, no impingement, no atrophy of the shoulder and neck muscles, and that the shoulder and neck muscles were symmetric. Claimant did exhibit crepitus on physical examination, which he attributed to Claimant's underlying degenerative condition. He reiterated that he disagreed with Dr. Hall's opinion regarding MMI in the report, but agreed with Dr. Hall's deposition testimony that Claimant was at MMI on August 17, 2015.

33. Claimant did not present any disfigurement evidence.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000). The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Overcoming the DIME concerning MMI

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." C.R.S. § 8-42-107(8)(b)(III); *Peregoy v. ICAO*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (Oct. 4, 2001). Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ. *Id*. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. ICAO,* 984 P.2d 656 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (Jun. 30, 2008).

When a DIME physician issues conflicting or ambiguous opinions concerning whether or not the claimant has reached MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *Magnetic Eng'g, Inc.*, *supra*.

The ALJ concludes that Dr. Hall's deposition testimony clarified his ambiguous DIME report and thus Claimant is at MMI as of August 17, 2015. The medical records support this conclusion. In his DIME report, Dr. Hall expressly stated that the only basis for Claimant to not be at MMI was the need for additional surgery. However, the medical records are devoid of any recommendation for surgery and indeed no one who provided treatment or evaluated Claimant in this case has recommended surgery.

Additionally, Claimant has been working full duty without permanent work restrictions and has not returned to her treatment providers for additional medical maintenance care to address any issues related to the April 15, 2015 injury.

The conclusion that Claimant reached MMI on August 17, 2015 is further supported by Dr. Cebrian's credible testimony that Claimant was appropriately placed at MMI on that date based on his physical examination of Claimant, her treatment history, and the normal progression of her underlying degenerative condition.

Conversion

The question of whether a claimant has sustained a scheduled "injury" measured as a "loss of an arm at the shoulder" under C.R.S. § 8-42-107(2)(a), or a whole person impairment compensated under C.R.S. § 8-42-107(8)(c), depends on whether the claimant sustained "functional impairment" beyond the arm at the shoulder. This is true because the term "injury," as used in C.R.S. § 8-42-107(1)(a)-(b), refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Warthen v. ICAO*, 100 P.3d 581 (Colo. App. 2004). Whether the claimant has sustained a functional impairment beyond the arm at the shoulder is a factual question for the ALJ and depends on the particular circumstances of the individual case. *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997).

Claimant expressly testified that none of her difficulties with worker or daily living was because of a functional impairment beyond the shoulder. She localized her functional difficulties to her arms and shoulders. She acknowledged that she had had sleep disturbance and problems with lifting long before the work injury. The treatment records further support Claimant's account that she experienced not functional impairment beyond the arm because of the industrial injury.

Impairment Rating

The procedures of C.R.S. § 8-42-107(8)(c), which states that a DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such a finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. *Delaney v. ICAO*, 30 P.3d 691, 693 (Colo. App. 2000). Therefore, the ALJ applies a preponderance of the evidence standard when determining whether the DIME applied the correct *scheduled* rating. *Id*.

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. C.R.S. §8-42-101(3.7); C.R.S. §8-42-107(8)(c). The question of whether the DIME physician properly applied the AMA Guides is a question of fact for determination by the ALJ. *See Wackenhut Corp. v. ICAO*, 17 P.3d 202 (Colo. App. 2000). Although deviation from the AMA Guides is not determinative, it constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating is incorrect. *See Wilson v. ICAO*, 81 P.3d 1117 (Colo. App. 2003).

Dr. Cebrian credibly testified that an impairment rating was not appropriate because there was no objective evidence of any change in Claimant's underlying degenerative pathology. Essentially, there was no medical evidence that the injury permanently exacerbated Claimant’s underlying condition. Continued complaints of pain were likely given her condition and do not indicate a change to the underlying pathology. Indeed, any aggravation of her underlying disease resolved following conservative treatment.

Average Weekly Wage

Under Colorado’s Workers’ Compensation Act, the average weekly wage (AWW) is a key part of the formula used to calculate compensation for injured workers, and it is based upon the definition of “wages” provided at section 8-40-201(19). *ICAO v. Ray,* 145 P.3d 661 (Colo. 2006). To determine a claimant’s AWW, the ALJ may choose from two different methods set forth in section 8-42-102. The first method, referred to as the “default provision,” provides that an injured employee’s AWW “be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury.” C.R.S § 8-42-102(2). The default provision in C.R.S. § 8-42-102(2)(a)-(f), lists six different formulas for conducting this calculation. Pursuant to C.R.S. § 8-42-102(5)(a), the phrase “at the time of injury” in subsection (2) requires the AWW to be determined using the wage earned on the date of the employee’s accident. The second method for calculating a claimant’s AWW, referred to as the “discretionary exception,” applies when the default provision will not fairly compute the employee’s AWW. C.R.S. § 8-42-102(3). In such a circumstance, the ALJ has discretion to compute the AWW of a claimant in such other manner and by such other method as will, based upon the facts presented, fairly determine the employee’s AWW. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

Respondents calculated Claimant’s AWW by taking three months of wages immediately prior to the work injury, which equaled $14,265.84 earned over the 91-day period. (Ex. S, pp. 126 & 142-146). This equated to an average of $156.77 per day or and an AWW of $1,097.37. (Ex. S, pp. 126). The ALJ concludes that this is a fair approximation of Claimant’s AWW.

Additionally, the ALJ concludes that Claimant’s AWW calculations are not a fair approximation for her AWW because they are based in part on higher wages earned during the holiday season and because her calculations did not account for the total number of days worked during the period thus resulting in a significantly lower denominator and higher AWW.

Disfigurement

Disfigurement benefits are awarded for the “observable impairment of the natural appearance of a person.” *Arkin v. Indus. Comm’n*, 145 Colo. 463, 358 P.2d 879 (Colo. 1961). The ALJ is afforded great discretion when determining the amount of compensation to be awarded for disfigurement. C.R.S. § 8-42-108.

Claimant did not present any evidence on the issue of disfigurement and therefore she is not entitled to a disfigurement award.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is at MMI as of August 17, 2015.

2. Claimant's request to convert her left and right upper extremity ratings to whole person ratings is denied and dismissed.

3. Respondents request to reduce Claimant's left and right upper extremity ratings to 0% is granted.

4. Claimant's request to adjust her average weekly wage is denied and dismissed and thus her average weekly wage remains $1,097.37.

5. Claimant's request for disfigurement is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. ***For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.***

DATED: August 16, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant established by a preponderance of the evidence that he suffered either an inhalation and/or head injury in the course and scope of his employment on June 4, 2014.

- Whether Claimant has established by a preponderance of the evidence that he is entitled to additional reasonable, necessary, and related medical treatment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

Background

1. Claimant is a former industrial painter who began his employment with Employer around October 2014.

2. Employer manufactures heavy industrial wind turbine towers. Sections of these towers can be as large as 11 feet in diameter and 40-50 feet long.

3. Claimant's responsibility was to use an airless painting system to apply both epoxy paint and a top coat of epoxy to sections of the wind towers manufactured at Employer's plant in Pueblo, Colorado.

4. Painting was done in a series of eight painting lanes and Claimant would normally apply somewhere between 500 to 800 gallons of paint per shift. Claimant's normal working hours were from 6:00 A.M. to 6:30 P.M. for three (3) consecutive days, followed by three (3) days off and then four (4) days on the same shift.

5. Claimant wore latex gloves and a "Tyvek" suit outfitted with a hood as well as a respirator equipped with replaceable filters called a "papper". The suit Claimant and the other painters used is commonly referred by Employer as Personal Protective Equipment ("PPE").

6. Claimant alleges that on June 4, 2015, he inhaled toxic paint fumes despite wearing his protective paint suit/respirator, thereby leading him to pass out and fall to the ground injuring his head.

Claimant's Testimony

7. Claimant testified that he received minimal training to carry out his job duties consisting of one class that lasted one or two weeks involving "the dos and don'ts." He testified he received no training specific to painting.

8. Regarding the PPE, including the respirator, Claimant testified fresh air was pumped into the suit which passed through the replaceable filter. Claimant testified the replacement filters for the PPE were kept in a secure booth, and a supervisor's permission was required to obtain new filters. He testified that painters would be reprimanded for not working hard enough if a replacement was requested. He testified he was not provided instruction on how often the filters should be changed.

9. In addition to the air filtration system in the PPE, there was a filtration system within the paint bays. Claimant testified those filters would become clogged, and he would need to scrape off paint from them. He testified that he complained to various supervisors, including Nick Portaleos and Jason Atayde about the condition of the paint bay filters, but his complaints were ignored.

10. Regarding the mechanism of injury, Claimant contends that the filter in his PPE was no longer functioning properly. Consequently, he testified that he inhaled paint fumes for an indeterminate amount of time on June 4, 2015. Claimant testified as follows: "If the filter gets plugged at a slow rate, you're not realizing that you're smelling it, and I know that's what happened." Claimant testified he did not smell any fumes prior to allegedly passing out and hitting his head. However, Claimant acknowledged the paints had a strong odor which was apparent when not wearing the PPE equipment. He admitted on cross-examination he had no indication his PPE suit was not functioning properly on that date.

11. Regarding the date of injury, Claimant testified he had painted for nearly his entire 12 hour shift prior to passing out. He testified he sprayed top coat paint in paint lanes 7 and 8, and he then returned to lanes 5 and 6 to finish top coat painting in those lanes. He testified that at some point close to the end of his shift he passed out in lane 6 and subsequently came to. There were no witnesses to the incident as Claimant was painting alone in the lane. He alleged he had been feeling tired for about a month prior to the alleged incident, but otherwise he had no symptoms immediately preceding his alleged loss of consciousness. He alleged that when he woke up, he had bit his tongue and had something in his mask, testifying: "I don't know if it was vomit or what inside my mask."

12. After coming to, Claimant testified that he saw his co-worker, Brian Manguso, as he was exiting the paint lane. He told Mr. Manguso he did not feel well, and asked Mr. Manguso to finish painting his tower. Claimant alleged Mr. Manguso said, "No, I'm going home." Claimant then testified that he saw Mr. Atayde when he went back to the employee changing area, and told Mr. Atayde that he bit his tongue and did not feel good. Claimant further alleged he told Mr. Atayde that he "fell out. I

don't feel good. I'm going to the doctor." Claimant alleged Mr. Atayde said, "It's time to go home. I'm going."

13. Claimant testified he sought medical care from Emergicare that night. He testified he was vomiting. He testified he returned to Emergicare the following day complaining of the same symptoms. He testified that on either June 5th or 6th, 2015, both he and his wife left messages with "Gabby," Employer's receptionist, to have Frances Alexander (HR) contact him regarding the alleged accident. He also testified on direct examination that he texted Mr. Portaleos regarding the injury, but he "never got no calls no nothing back." Claimant went on to testify that one day shortly thereafter he tried to call Ms. Alexander 42 times during the day but could not generate a response.

14. Respondents submitted text messages between Claimant and Mr. Portaleos dated from June 5, 2015 and June 11, 2015. *Resps. Ex. L.* Claimant admitted on cross-examination that his June 5, 2015 text stating that he "woke up not feeling good this morning" did not mention the alleged work injury. *See Id.* at p. 81. The following day, Claimant stated to Mr. Portaleos in a text that "Dr. was surprised I didn't pass out during shift . . . multiple things going on and could be contagious. . ." *Id.* at p. 83. When asked whether this was opposite to his allegations at hearing, Claimant responded that he did not believe so because he did not pass out during his shift but towards the end of his shift. He then admitted he was alleging he passed during his normal shift hours.

15. Claimant was asked about a June 11, 2015 text to Mr. Portaleos which stated, "something going on with my heart . . . I had a small stroke wow last day on at work I was ready to pass out but I cooled down. . . went that night to the er." *Id.* at p. 85. Claimant initially admitted he sent that text message. When pressed as to the difference in the text to his current allegations, Claimant stated his wife wrote the text. He testified that his wife would send some texts from her phone and he would send texts from both phones. He testified the black LG phone was his phone, and the white phone was his wife's. The ALJ notes the text messages from June 5, 6, and 11 are shown to be on a black LG phone.

Claimant's Medical Records

16. Claimant was evaluated at Emergicare by Dr. Bradley on June 5, 2015. *Resps. Ex. B*, p. 41. The recorded vital signs note Claimant was evaluated at 4:50 p.m. There are no records showing Claimant was evaluated on the evening of June 4, 2014. Dr. Bradley's records note Claimant complained of dizziness and respiratory complaints of coughing and wheezing for 6 days, onset May 29, 2015. *Id.* He also complained of a sore throat, onset June 4, 2015. *Id.* Claimant denied vomiting. *Id.* Dr. Bradley performed an EKG. *Id.* at p. 43. Claimant had a normal chest examination. *Id.* at p. 42. There is no reference to any loss of consciousness the day prior, or at all. *See Id.* The next record of Claimant's treatment at Emergicare is from June 10, 2015. *Id.* at p. 35. Claimant reported nausea, throat pain, vomiting with an onset of June 9, 2015, along

with an alleged loss of strength in his right hand with a June 9, 2015 onset. *Id.* He was provided an IV and referred for a CT. *Id.* at pp. 37-39. There is again no reference to a work incident. *See Id.* A chest x-ray taken on this day was unremarkable. *Resps. Ex. F.*

17. Dr. Bradley reevaluated Claimant on June 11, 2015 and recorded an onset date for claimant's respiratory complaints, vertigo, and vomiting of May 29, 2015. *Resps. Ex. B*, p. 29. Dr. Bradley specifically wrote, "complaints of vertigo onset 5/29/2015 and emesis onset 6/9/15 . . . contact with mosquitoes. He thinks he may have West Nile." *Id.* It is noted that Claimant denied syncope (loss of consciousness). *Id.* Dr. Bradley on this date noted Claimant's June 5th EKG was abnormal. *Id.* at p. 32. There is no mention of any work related incident or loss of consciousness at work. *See Id.*

18. On June 16, 2015, Dr. Bradley, for the first time documents that Claimant was alleging chemicals at work were the cause of his respiratory complaints. *Id.* at p. 23. However, there is no reference to an alleged loss of consciousness from June 4, 2015. Claimant again had a normal chest examination. *Id.* at p. 25. Dr. Bradley drew blood for laboratory testing for arsenic, lead, and mercury. *Id.* The results of that blood panel were noted on July 17, 2015 to be negative. *Id.* at p. 20.

19. Claimant had a brain MRI on August 12, 2015. *Resps. Ex. G.* It showed scattered small periventricular white matter lesions worrisome for demyelinating plaques, possibly with early chronic ischemic changes, and vasculitis as well as Lyme disease were noted to be possible causes. *Id.*

20. On August 20, 2015, Claimant apparently discussed "previous exacerbation from working in high heat on towers in temperatures up to 120 degrees." *Id.* There is still no discussion of a loss of consciousness or inhalation injury at work in the record generated from this date of visit. However, Dr. Arrington discussed multiple sclerosis and Lyme disease with Claimant. *Id.*

21. Claimant was evaluated by Kimberly Wagner, M.D., neurologist, on September 23, 2015. For the first time in the medical records, it is noted that Claimant complained of a loss of consciousness at work due to exposure to paints. *Resps. Ex. E*, p. 54. Claimant alleged he was vomiting "all night" on the night of the exposure. *Id.* This is contrary to the Emergicare records from June 5, 2015 which reflect he denied vomiting. Claimant's physical examination was normal. *Id.* at pp. 55-56.

22. On October 12, 2015, for the first time, Dr. Bradley referenced an allegation from Claimant that his issues began June 4, 2015, when he passed out at work and hit his head from inhaling paint fumes. *Id.* at p. 8. Dr. Bradley further stated, "His work is now allowing it to be turned into a work comp claim." *Id.*

23. Jeffrey Schwartz, M.D., performed an IME of Claimant on February 25, 2016, on behalf of Respondents. Claimant alleged that he passed out without any warning on June 4, 2015 at approximately 5:30 p.m. *Resps. Ex. A*, p. 1. Dr. Schwartz

also noted Claimant denied any lightheadedness prior to passing out. *Id.* Claimant alleged his loss of consciousness was related to inhaling paint fumes due to inadequate filtering. *Id.* He alleged that he bit his lip and tongue when he passed out, and he went straight from work to urgent care due to vomiting and dizziness. *Id.* He complained of continued nausea, vomiting, headaches, and dizziness since June 4, 2015. *Id.* at pp. 1-2. Dr. Schwartz also recorded that Claimant told him he had changed his filter the morning before the alleged date of injury. *Id.* Claimant admitted to Dr. Schwartz he was not aware of any malfunction of his suit on the alleged date of injury. *Id.*

24. Dr. Schwartz noted he reviewed MSDS sheets for the paints Claimant used while working at Employer. *Id.* at pp. 3-4. Dr. Schwartz found Claimant had no respiratory complaints, but rather, his subjective complaints were more indicative of a head injury. *Id.* at p. 4. Yet, Dr. Schwartz noted the cause of the alleged sudden syncope was unclear, and there was no evidence the filters in his PPE or paint bay failed resulting in an accidental toxic exposure to fumes that could have caused the syncope. *Id.* Importantly, Dr. Schwartz noted there were other potential causes of a loss of consciousness (if one occurred), including that Claimant had a demyelinating disorder, as seen in the MRI of his brain, which could cause seizure activity and secondary syncope. *Id.* He also noted there was no evidence the syncope occurred as a result of an inhalation exposure. He explained that exposure to an inhaled toxin, which led to a loss of consciousness, would have central nervous system effects that would have resulted in the gradual onset of lightheadedness which Claimant specifically denied. Accordingly, Dr. Schwartz did not believe that Claimant had evidence of a work-related accident.

The Testimony of Dr. Bradley

25. Dr. Bradley testified at hearing. He initially testified that he recalled Claimant telling him that he had passed out at work. Dr. Bradley noted a chest x-ray would be used to determine if someone was impacted by a volatile organic compound (VOC). The ALJ notes the June 9, 2015 chest x-ray was normal.

26. Dr. Bradley was asked on direct examination whether he believed Claimant suffered a work-related injury. Dr. Bradley's initial answer did not reference any work related cause for the alleged loss of consciousness. Rather, he stated simply, "yes to the point that he did fall when he was at Vestas and he did have a head injury . . . looking into why did he fall, I don't know on that . . ."

27. Dr. Bradley further testified he felt Claimant's symptoms were due to his alleged fall and a head injury, not due to an exposure. On cross-examination, Dr. Bradley admitted there was no indication of a loss of consciousness, fall, or hitting his head at work in the first few months of treatment notes. Dr. Bradley was asked about the denial of loss of consciousness in the June 11, 2015, and he admitted that any report of loss of consciousness at that time would have been recorded in the records. Dr. Bradley further agreed that October 12, 2015 was the first time Claimant informed him of a head injury. He further admitted that any date of onset of symptoms

documented in the records, including the May 29, 2015 onset as recorded in that report, was obtained directly from Claimant. Dr. Bradley further admitted that he had no reason to consider this a work related issue initially until Claimant began making that claim later on.

The Testimony of Brian Manguso

28. Brian Manguso is a painter with Employer. He worked with Claimant on June 4, 2015. He testified the two of them sanded towers and prepped towers for about 4 hours that morning, contradicting Claimant's testimony he painted the entire day. Mr. Manguso did not recall Claimant telling him that he did not feel good or asking him to finish a tower. He testified any allegation by Claimant regarding that interaction occurring was not accurate. Mr. Manguso specifically denied making the statements Claimant attributed to him. Mr. Manguso had no memory of Claimant ever telling him he did not feel good at work or asking him to finish a tower for him. Mr. Manguso further testified that Claimant did not have blood or vomit on him that day.

29. Mr. Manguso testified about the PPE suits worn by the painters at Employer's plant. He testified he would change his PPE filter "about every week." He testified nobody ever told him not to change filters or otherwise pressured him not to do so. He testified the filters were easily accessible, without permission, by scanning employee cards for the supply cage where replacement filters were located. He testified he was not aware of anyone ever being reprimanded for obtaining replacement filters for change out as necessary. He also testified that he knew when to change the PPE filters, because they would emit an odor as a warning when they were no longer serving their intended purpose. Mr. Manguso also testified that if paint fumes were to leak into the suit it would be readily apparent, because the odor would be strong and unbearable.

30. Mr. Manguso also testified regarding the filter serving the paint lanes. He testified he was involved in changing the filters sometimes. According to Mr. Manguso these filters were changed as needed, being approximately every week or two. He testified they were inspected before every shift. He testified he was never worried about them not working correctly. He testified he never had any concerns about the air quality in the paint lanes.

31. Mr. Manguso was asked about a baking portion of the painting process where the paint bay is heated to about 150 degrees to dry paint. He testified the baking occurs after each layer of paint is applied. On re-direct examination, Mr. Manguso clarified that the painters would leave the paint booth during the baking process.

The Testimony of Jason Atayde

32. Jason Atayde is a Paint Line Lead for Employer. He oversaw the painting department. Mr. Atayde wore a PPE suit while checking/monitoring the paint lines during his shift. He was Claimant's supervisor. He testified he would spend his time primarily walking between the 16 paint lanes.

33. Mr. Atayde testified that he is also a member of the Emergency Response Team ("ERT"), which respond to medical emergencies on the production floor. He testified that as an ERT, his role would be to respond to any workplace injuries depending on the situation. Mr. Atayde further testified that new hires are notified of the identity of the personnel who are members of the ERT and their role on the floor. Mr. Atayde testified Claimant did not report an injury to him on June 4, 2015.

34. Mr. Atayde testified filters for the papper units needed to be changed as necessary. According to Mr. Atayde, painters would typically change the filter every few days and some every week or two. He testified painters are instructed to change the filters as often as they want. He also testified that the replacement filters were located in the corridor next to the paint booths during Claimant's employment. Consistent with the testimony of Mr. Manguso, Mr. Atayde testified that painters would scan their employee badge to obtain access to the filters without permission. He also testified that Claimant never asked him for permission to obtain replacement filters for his papper unit. He testified Claimant never expressed any concerns about the air quality in the paint lanes or concern about the ability to obtain replacement filters. Mr. Atayde also testified that he changed his PPE filter regularly, but sometimes it would emit a charcoal type odor prompting him to change it.

35. Mr. Atayde specifically denied that Claimant told him on June 4, 2015 that he did not feel well. He also testified he did not see Claimant pass out or lying in the paint lane while he was walking the lanes as part of his supervisory duties.

36. Mr. Atayde testified as to the paint bay filters. He testified he monitors the filters to determine when they need to be changed. He noted there was also an RTO system, which is the system that burns off the Volatile Organic Compounds (VOCs,) that will sound off a notification if filters need to be changed. He testified that when the notification sounded, they would change the filters. Mr. Atayde testified that painters would exit the paint booths when the baking process occurred. He testified he was not aware of anyone every passing out due to heat exhaustion or any other cause.

The Testimony of Nick Portaleos

37. Nick Portaleos is a shift supervisor with Employer. His job is to coordinate daily safety meetings, plan out days with line leads, and monitor floor production throughout his shift, including the production in the painting areas of the plant.

38. Mr. Portaleos testified that for the first two months of Claimant's employment he went through training, including classroom training and floor training. He testified Claimant was thereafter timely fitted with his respirator in December.

39. Mr. Portaleos testified regarding certain business records kept to track the location of tower sections being painted as wells as where the section was painted and who painted it. According to Mr. Portaleos the document marked as *Resps. Ex. F*, p. 88

is a manufacturing order document, which identifies what tower section a particular employee is working on. The document shows Claimant's work on the alleged date of injury, identified with an employee ID number for Claimant as 88,574. As to p. 89 of Respondents' Exhibit F, Mr. Portaleos testified that it shows where the work being done, i.e. what paint lane that work was being done in. This document also identifies the paint bay lanes in which Claimant worked by his employee ID number on June 4, 2015. Mr. Portaleos was then asked about p. 90, which he identified as a Daily Status Update sheet. He testified this sheet is used to document status of the painting process for tower sections. It shows where employees work. Mr. Portaleos testified that on the section 230796, which matches the section number assigned to Claimant on June 4, 2015 from previous forms, Claimant was working in paint lane 8 on June 4, 2015. *See Id.*

40. Mr. Portaleos testified that Claimant's allegation he passed out in lane 6 does not match the Employer's documentation of where he was working. Mr. Portaleos then described *Resps. Ex. F*, p. 92. He identified Claimant's employee number of 88574 listed on several occasions next to certain times of the day. He testified this sheet registers climactic readings taken before any work is done on towers because climactic readings need to verified and correct before paint is applied. He testified typically the person spraying paint, identified by employee ID number, will be the one taking the readings. Mr. Portaleos testified that based upon the documentation this sheet shows Claimant was conscious and working at 6:15:49, p.m., 6:18:34 p.m., and 6:20:37 p.m., as those reflect times that climactic conditions were recorded under Claimant's employee ID number. *See Id.*

41. Mr. Portaleos testified that Claimant's employment had been in jeopardy. Prior to his alleged injury. Per Mr. Portaleos, Claimant had attendance issues and was set to be terminated if he missed one more shift. Mr. Portaleos testified as to the text messages received in evidence as *Resps. Ex. L*. At the time he received Claimant's first text on June 5, 2015, Mr. Portaleos was not aware that Claimant was alleging a work injury. *See Id.* at p. 81. He also noted that Claimant had not informed him prior to this time of his reportedly not feeling well week prior, which is indicated in Claimant's text message when he said "also on the 29." *Id.* He testified that throughout those text messages, he was not made aware that Claimant was alleging an exposure or loss of consciousness at work. He testified he had no other types of communications with Claimant during the periods reflected in the text messages. Mr. Portaleos testified he informed Claimant, via test message on June 11, 2015, that he (Claimant) had voluntarily resigned his position, because he was not made aware of Claimant medical status and he had missed multiple shifts without calling in. *See Id.* at p. 85-86.

42. Mr. Portaleos testified that Claimant never complained to him about the air quality of the paint bays or access to replacement filters for his PPE. With regard to the paint booth air filters, he testified supervisors walk through and verify the quality of the paint lane air filters daily, and he is responsible for verifying those sheets are complete. He testified that paint department has a filtration system that burns VOCs, and that this system has a set of filters, and if the filters are not operating at 100% capacity, an alarm

system will go off. The alarm will disable this system and serves to notify painters that the paint pumps will shut down in ten minutes. In the past the system could be bypassed in order for the painters to finish a tower in the middle of production. Mr. Portaleos testified that typically filters are changed weekly so they do not get to a point where the alarm will go off.

43. Regarding replacement PPE filters, Mr. Portaleos testified an employee may obtain filters from a storage area without permission. He testified he liked his painters to change out filters on a weekly basis, but they could change them as they saw fit. He testified that he has never received complaints from employees about not having access to air filters. The ALJ finds Mr. Portaleos' testimony regarding access to replacement filters for the papper units consistent with that of Mr. Manguso and Mr. Atayde.

The Testimony of Earl Spriggs

44. Earl Spriggs is the Health Safety and Environmental Specialist for Employer. He is certified as an environmental specialist through OSHA, has been trained to conduct respirator fit tests, has had chemical training and training on the transportation of hazardous materials through the DOT, and has nineteen years of experience handling dangerous chemicals/materials. He handles the general oversight of the health and safety of employees and environmental programs for Employers manufacturing plant.

45. He testified all employees attend an 8 hour safety class where proper handling of chemicals used on site are discussed and where employees are instructed on where to access MSDS sheets. He testified he conducted new employee training for Mr. Maldonado. He testified Claimant also was provided specialized training for sanders and painters, as are all such employees. He testified that he conducted a respiratory protection/fit test which Claimant attended where his respirator was fitted and assigned, as evidenced by *Resps. Ex. N*, pp. 185-186. Mr. Spriggs testified that employees are trained to replace PPE filters any time it becomes difficult to breath or any time they smell or taste any chemicals. He testified the PPE filters emit a charcoal odor when the filter starts to breakdown, which indicates that the filter is at the end of his useful life and needs to be changed. He testified the smell, if present, does not indicate though that the employee is inhaling fumes. Mr. Spriggs testified the training slide on p. 194 of Respondents exhibits also reflects training provided to employees on this subject. He testified employees are not reprimanded for requesting replacement PPE filters and they do not need permission to obtain such filters to do so.

46. Mr. Spriggs testified that if an employee detects no odor of paint or chemical smell while wearing the PPE, the suit and filter are performing their intended function and there is no evidence that the employee has inhaled paint/chemicals. Mr. Spriggs further testified that Claimant never complained to him about the filters in the paint lanes or the air quality in the paint lanes. He testified the filters in the paint lanes are routinely changed when inspection dictates it.

47. Mr. Spriggs specifically refuted two statements Claimant attributed to him, the first being the allegation that he told Claimant there were only two ways out of Vestas, either death or being fired. He also refuted Claimant's interrogatory response about not having a respirator for his first four months of working, wherein Mr. Spriggs told Claimant, "fuck you, we will get a class when we are ready." *See Resps. Ex. K* at p. 74. The ALJ notes the records reflect Claimant received his respirator approximately two months after his job began anyway, which also draws the reliability of the alleged comment into question.

The Testimony of Frances Alexander

48. Frances Alexander is the Human Resources Business Partner for Employer. She testified that she met with Claimant post-alleged injury for the first time on June 15, 2015, which was scheduled after Mr. Portaleos notified Ms. Alexander that Claimant had missed two or more shifts without justification. Ms. Alexander testified that she spoke with Claimant regarding whether his absences were justified. She testified that Claimant told her he had been out sick and the doctors were not sure what was wrong with him. She testified during this meeting Claimant did not inform her he had passed out at work or otherwise suffer a work related injury. She testified that Claimant did not submit a workers' compensation claim at that time, but he did apply for short term disability benefits. She further testified that she was not aware that Claimant was filing a workers' compensation claim until October 1, 2015. She testified that she spoke with Claimant 2 or 3 times in the time between June 4, 2014 and when he filed his workers' compensation claim during which times Claimant never reported that he passed out at work or otherwise suffered a work place injury.

49. Ms. Alexander testified she did not recall receiving any messages from Claimant directly or from the receptionist Gabby that she did not return. She testified that Claimant did not try to contact her 42 times, or any number of frequent calls, on any date, in contravention to Claimant's allegations. She testified she receives a notification on her email of phone calls to her office, regardless of whether a voicemail is left and no such notifications were received.

The Testimony of Dr. Jeffrey Schwartz

50. Dr. Schwartz testified via telephone at hearing. He was qualified as an expert in the fields of pulmonary medicine and critical care medicine. Dr. Schwartz confirmed Claimant alleged to him that he believed his claimed loss of consciousness was due solely the inhalation of paint fumes. Dr. Schwartz also confirmed that Claimant told him he changed his PPE filter the morning prior to June 4, 2015.

51. Dr. Schwartz also confirmed Claimant told him that he passed out without any preceding symptoms. Dr. Schwartz testified that an inhalation exposure to paint fumes would have precipitated some neurological symptoms, such as lightheadedness or dizziness before one would actually pass out. He testified that the MSDS sheets for

the chemicals contained in the materials Claimant was spraying reference that exposure would lead to increasing symptoms, beginning with headaches, dizziness, and nausea. He testified that he has never treated anyone who suffered loss of consciousness from exposure to paint fumes. Rather, the patients he has treated for paint exposures typically present with more symptoms such as headaches and respiratory irritation. Dr. Schwartz opined that it is improbable that Claimant inhaled a toxic substance that resulted in a loss of consciousness on June 4, 2015. He testified Claimant had no signs of a respiratory injury, nor did he see signs of a respiratory injury in the records.

52. Dr. Schwartz testified that the reports in Dr. Bradley's records regarding symptoms with an onset of May 29, 2015 did not match Claimant's report to him. Dr. Schwartz testified that an exposure to paint fumes could result in a temporary sore throat, but that symptom should not persist for more than a few hours or a day after such exposure. Dr. Schwartz also testified that Claimant's reported loss of strength in his right hand with an onset of June 9, 2015, was not consistent with an inhalation exposure five days prior. He testified that the symptoms Claimant complained of as contained in the medical records were not typical for cases involving inhalation exposure.

53. Dr. Schwartz further testified that he could not identify on examination any objective verification for Claimant's alleged symptoms. Dr. Schwartz noted claimant's brain MRI showed a demyelinating disorder, which could be explained by a number of causes, although not an inhalation exposure.

54. The ALJ finds that Dr. Bradley's testimony established that his initial opinion that Claimant fell at work was based solely upon Claimant's report to him in October 2015, four months after the alleged incident. Prior to that time, Claimant's reports concerning the onset and cause of his symptoms, as well as his specific symptoms are either inconsistent by omission of his current allegations or directly opposite to his current allegations. Dr. Bradley admitted as much during his testimony, noting that he was not considering a work related injury during until Claimant later made such an allegation. Dr. Bradley also admitted that, if there was a loss of consciousness, he could not state what the cause was.

55. Based upon the evidence presented, Claimant has failed to prove it is more probably true than not that he sustained any work related injury on June 4, 2015. Claimant's allegations that he inhaled paint fumes causing him to pass out and hit his head are supported only by his testimony, which the ALJ finds has been credibly, consistently and convincingly contradicted factually by the testimony of Mr. Manguso. Mr. Atayde, Mr. Portaleos, Mr. Spriggs and Ms. Alexander and the exhibits admitted into evidence. The evidence presented persuades the ALJ that it is unlikely that Claimant's papper filter failed and he was unwittingly exposed toxic paint fumes causing him to "pass out." In this case, the medical records are inconsistent with Claimant suffering any inhalation injury likely to cause a loss of consciousness resulting in a head injury on June 4, 2015. To the contrary, for the first several months of Claimant's treatment, he reported onset dates for symptoms which preceded the alleged date of injury, he denied

symptoms which he later claimed existed, and he failed to report to Emergicare what would otherwise be considered a significant event involving a loss of consciousness while working around toxic fumes. Importantly, Claimant's chest x-ray was unremarkable, his EKG was abnormal and imaging of his brain revealed lesions worrisome for demyelinating plaques all of which, according to Dr. Schwartz, can cause episodes of syncope. In addition to the testimony of the various witnesses cited above, the documentary evidence supports that Claimant was, more probably than not, conscious and taking climatic readings in paint lane 8 at the time he alleges he lost consciousness, i.e. "fell out" in paint lane six. The totality the evidence raises questions regarding the reliability of Claimant's testimony. Considering the record evidence as a whole, the ALJ is not persuaded that Claimant actually passed out as he claims. Even if Claimant had established that he actually passed out, the ALJ credits the opinions of Dr. Schwartz to find that the cause of Claimant's sudden syncope "unclear" and likely unrelated to his work duties as a painter for Employer.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found in this case, Claimant's allegations have been contradicted by the credible testimony of fellow painters. In this case, Claimant's testimony generally painted a picture of grave working conditions at Employer where Claimant and other painters were consciously/purposefully exposed to toxic materials through what Claimant primarily alleged was strictly controlled access to replacement filers for his respirator. This allegation was effectively rebutted by all Employer witnesses. Those witnesses credibly testified to Employer's training program, access to filters, and procedures for immediately addressing work-related injuries. Given the multiple inconsistencies between Claimant's testimony and balance of the contrary evidence, including the weight of contradictory evidence to his allegations, the ALJ finds Claimant's testimony unreliable and unconvincing. Here Claimant failed to produce sufficient credible evidence to establish that he suffered a toxic inhalation leading to a loss of consciousness and hitting his head at work on June 4, 2015.

C. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, Dow Chemical Co. v. Industrial Claim Appeals Office, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Schwartz are credible and supported by the medical record. When the evidentiary record is considered in its totality, the opinions of Dr. Schwartz are more persuasive than the testimony of Claimant and to the extent that they are contradictory, the opinions of Dr. Bradley.

D. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

E. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish a compensable injury. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question*

Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

F. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this case there is ample record support to establish that Claimant's alleged injury occurred within the time and place limits of his employment and during an activity connected to his job-related functions, i.e. painting. Rather, the question regarding compensability here is whether Claimant's alleged inhalation and head injury "arose out of" his employment related duties. As noted above, Claimant must prove this element before his injury can be found to be compensable. While the ALJ is not convinced that Claimant actually passed out as he claims, even if he had, he failed to establish that his sudden syncope arose out of his work duties as a painter for Employer. To the contrary, the evidence presented here supports a reasonable inference that if Claimant had passed out, his syncope and subsequent fall were likely caused by a idiopathic condition unrelated to his work duties as a painter. Consequently, Claimant was also obligated to establish that his idiopathic condition combined with a special hazard of employment to result in a compensable injury, which burden he failed to carry.

G. In C*ity of Brighton and Cirsa v. Rodriguez,* 318 P.2d 496, 502 (Colo. 2014), the Colorado Supreme Court clarified the three categories of risks attendant with all work place injuries in determining whether an unexplained fall down a flight of stairs was compensable. The Court set forth the following risk categories: (1) employment risks which are directly tied to the work itself; (2) risks which are inherently personal or private to the employee, (which includes idiopathic conditions or illnesses that are unrelated to the employment, such as epilepsy and fainting spells) and (3) neutral risks that are neither employment-related, nor personal. *Id.* at 503.

H. Under the first category, a fall at work is "typically…only attributable to an employment-related risk if it results from tripping on a defect or falling on an uneven or slippery surface on an employer's premises." *Id.* at 501, quoting from *In re Margeson*, 162 N.H. 273, 27 A.3d 663, 667 (2011); *See also, Miles v. Denver*, W.C. No. 4-961-742-01 (December 15, 2015) Based upon the evidence presented, the ALJ finds insufficient record support to conclude that an employment-related risk caused Claimant's to pass out and fall. To the contrary the evidence demonstrates that Claimant likely had a properly functioning paint suit fitted with a papper equipped with a working filter. His allegation that he suspects that he was inhaling paint fumes at such a low amount over time that he could not smell them is simply unconvincing and rebutted by the more persuasive testimony of Mr. Manguso, Mr. Atayde, Mr. Portaleos and Mr. Spriggs.

I. The second category includes risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to his/her employment. Idiopathic conditions have been defined to mean "self-originated." C*ity of Brighton and Cirsa v. Rodriguez, supra* at 503*.* Purely idiopathic personal injuries generally are not compensable unless an exception applies. *Id.* at 503. One exception is when an idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. *Gates Rubber Co. v. Industrial Comm'n.*, 705 P.2d 6, 7 (Colo. App. 1985); *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

J. The third category includes injuries caused by "neutral risks." *City of Brighton*, *supra* at 503. Such risks are associated neither with the employment itself nor with the employee. *Id.* at 504. "An injury is compensable under the Act if triggered by a neutral source that is not specifically targeted at a particular employee and would have occurred to any person who happened to be in the position of the injured employee at the time and place in question". *Id.* citing *Horodyskyj*, 32 P.3d at 477. Concerning unexplained falls, as Claimant, in his position statement implies happened in this case, the Court noted that injuries resulting from neutral risks arise out of employment only if the employee would not have been injured but for the fact that the conditions and obligations of the employment placed the employee in the position where he was injured. *Id.* at 504. In this case, there is a lack of evidence to support a conclusion that Claimant's fall was "unexplained' and the result of a neutral risk. To the contrary, Claimant himself alleges that he fell and hit his head as a consequence of passing out after inhaling toxic paint fumes for an indeterminate amount of time. Moreover, the ALJ is not convinced that Claimant's syncope and subsequent fall would not have occurred "but for" the conditions and obligations of Claimant's employment, namely to paint sections of wind generator towers manufactured by Employer. In this case, the persuasive evidence establishes that Claimant's syncope/fall was, more probably than not, a consequence of an idiopathic condition rather than a result of his work duties for Employer and was likely to happen anywhere at any time.

K. The ALJ is persuaded by the following evidence in concluding that; had Claimant passed out has he claims, his injuries arose entirely out of a personal condition, i.e. an idiopathic condition unrelated to his work duties (Category 2 risk factors):

- Claimant had no notable respiratory complaints and an unremarkable chest x-ray which is inconsistent with suffering a toxic inhalation injury.

- Claimant did not experience gradually increasing central nervous system effects, i.e. headaches, dizziness, lightheadedness and nausea consistent with those listed on the MSDS sheets for the compounds he claimed contact with during his alleged exposure. Rather, Claimant described a sudden loss of consciousness.

- Claimant's June 5, 2015 EKG revealed abnormalities including evidence of a right bundle branch block, poor R-wave progression and slight ST-elevation likely cardiac in origin which is a known cause of syncope.

- Claimant's August 12, 2015 MRI of the brain revealed changes consistent with demyelinating plaques, vasculitis, chronic ischemic change and/or Lyme disease which Dr. Schwartz noted may account for seizure activity and secondary syncope.

L. The above cited evidence persuades the ALJ that Claimant's asserted injuries do not "arise out of" his employment. Nonetheless, because the ALJ concludes that Claimant's episode of syncope, assuming that it occurred, was idiopathic, the claimed injuries could be compensable if Claimant carried his burden to prove that an exception applied to the general rule that injuries caused by such personal conditions are not compensable. In concluding that Claimant failed to prove that he suffered a compensable work injury, if he had established that he passed out as he claims, the ALJ has considered the "special hazard" rule announced by the Court of Appeals in *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989). Under the "special hazard" rule," a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by "the concurrence of a pre-existing weakness and a hazard of employment." *Id*. The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the employment and the injury. *See National Health Laboratories v. Industrial Claim Appeals Office, supra; Ramsdell v. Horn, supra.*

M. To be considered an employment hazard for this purpose, the
employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. *Gates Rubber Co. V. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985) (hard level concrete floor did not constitute a special hazard because it is a condition found in many non-employment locations); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999) (injury when pre-existing condition caused the claimant to stumble on concrete stairs not compensable because stairs were ubiquitous condition). Here Claimant failed to establish that a special hazard of employment combined with an idiopathic condition to cause his injury. Even if Claimant had proven that he passed out as claimed, his claim must be denied and dismissed on the basis that he failed to establish that his idiopathic condition which caused him to pass out combined with the existence of a special hazard to elevate the probability and/or extent of injury. Accordingly, the remaining claims concerning entitlement to medical benefits need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant’s claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 18, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-989-931-02

ISSUES

- Whether Respondent overcame, by clear and convincing evidence, the DIME opinion of Dr. Timothy Hall that Claimant was not at maximum medical improvement (MMI)?

- If Claimant was at MMI, whether Claimant proved by a preponderance of the evidence that her left and right scheduled shoulder ratings should be converted to whole person impairment ratings?

- If Claimant was at MMI and not entitled to conversion, whether Respondent proved by a preponderance of the evidence that the DIME physician's scheduled rating was incorrect?

- Whether Claimant proved by preponderance of the evidence that she was entitled to an average weekly wage of $1,409.75?

- Whether Claimant proved by a preponderance of the evidence that she was entitled to disfigurement compensation for scars on her knees?

ISSUE RESERVED

- Claimant reserved the issue of permanent total disability benefits for future determination because she asserted that she was not at MMI and thus a permanent disability could not be assessed at this time.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On April 15, 2015, Claimant, a 58-year-old female employed with the Employer as a courier, sustained injuries to her upper and lower extremities. Claimant testified that she had worked for the Employer for 19 years and had had her present courier route for the last seven years. According to Claimant, she injured her upper extremities and knees during the course of completing her route using a substitute delivery truck. Specifically, Claimant had to enter and exit the substitute truck by the passenger door because the truck's sliding door was broken and packages could not be accessed by the rear door. As she was "surfing" over packages and attempting to pick up packages, she began to experience soreness in her bilateral shoulders, upper arms, and neck. She also sustained a contusion to her right knee.

2. Claimant notified her employer on April 17, 2015. That same day, she presented to authorized treating physician (ATP), Dr. Robert Dupper. Dr. Dupper

assessed Claimant with sprains of the bilateral shoulders, neck sprain, and right knee contusion. He recommended that Claimant take Ibuprofen, prescribed Flexeril, and removed Claimant from work.

3. On April 23, 2015, Claimant returned to Dr. Dupper. Claimant reported approximately 40% improvement. She denied any continued symptoms with her knee. Claimant reported continued soreness in her neck, but with no neurological deficits or visual changes. Additionally, Claimant denied numbness or tingling in her upper extremities. Dr. Dupper recommended that Claimant return to regular work status. Additionally, he recommended massage therapy.

4. On May 4, 2015, Claimant returned to Dr. Dupper. Claimant reported reduced neck pain following the massage treatment. Claimant reported soreness in her shoulders and upper arms "when she [worked] a long day but otherwise [was] feeling fairly well." Claimant also described some pain under the kneecap of her right knee. Physical examination revealed some swelling on the medial side of the right knee with full range of motion and no tenderness.

5. On May 12, 2015, Claimant returned to Dr. Dupper. Claimant's complaints focused her right arm and shoulder. Physical examination revealed full range of motion of the shoulders with some pain at end points of the range of motion. Due to Claimant's complaints of increased soreness at work, Dr. Dupper recommended restricted duty. He imposed a lifting restriction of 20 pounds and recommended physical therapy.

6. On May 26, 2015, Claimant returned to Dr. Dupper. Claimant described bilateral pain in her shoulders, right greater than left. Dr. Dupper released Claimant to regular work activities. He recommended that she start physical therapy and continue taking Ibuprofen as needed.

7. On June 16, 2015, after a few sessions of physical therapy, Claimant returned to Dr. Dupper. Claimant reported that her left shoulder and right knee were doing quite well. Her complaints focused on pain and soreness in the right shoulder, into the upper arm. Because physical therapy did not resolve the right shoulder pain, Dr. Dupper recommended that Claimant undergo an MRI and an evaluation with an orthopedic surgeon.

8. A right shoulder MRI on July 3, 2016 revealed mild-moderate tearing of the supraspinatus and infraspinatus muscles, labral tear, moderate-severe AC joint arthritis, old trauma to the AC and coracoclavicular joints, and mild-moderate glenohumeral joint effusion.

9. After undergoing the MRI, Claimant presented to Dr. David Beard, orthopedic surgeon, on July 14, 2015. His review of the MRI showed right shoulder rotator cuff tendonitis with possible small partial thickness cuff fraying. Dr. Beard did not recommend surgery as Claimant had improved with conservative management.

10. On July 20, 2015, Claimant returned to Dr. Dupper. Claimant reported improvement but still described difficulty with certain activities of daily living. Claimant remained on work restrictions, requiring her to do office duty only, which did not aggravate her condition.

11. On August 3, 2015, Claimant returned to Dr. Dupper, reporting continued improvement, but that she did notice increased pain in the right shoulder after use. However, when not utilizing the right arm, the pain would dissipate. Dr. Dupper recommended that Claimant return to regular duty. He noted that if Claimant tolerated the return to regular activity, he would likely be placing her at maximum medical improvement (MMI).

12. On August 17, 2015, Dr. Bruce Cazden placed Claimant at MMI. Claimant noted that having returned to full duty two weeks prior, her pain had been manageable. Claimant agreed that she had reached MMI. At the time of the evaluation, Claimant did not require medication. Dr. Cazden did not recommend any permanent work restrictions. Additionally, he did not assign an impairment rating. Regarding future medical treatment, he noted that Claimant might consider a cortisone injection and/or surgical intervention if her condition deteriorated. Claimant agreed with Dr. Cazden that she had likely plateaued regarding treatment.

13. On September 14, 2015, Respondent filed a Final Admission of Liability (FAL) admitting consistent with Dr. Cazden's opinion. Respondent admitted for post-MMI maintenance treatment allowing Claimant to return to her treaters for reasonable and necessary care to relieve the effects of the industrial injury. Claimant objected to the FAL and requested a Division-sponsored IME (DIME).

14. Dr. Timothy Hall performed the DIME. He opined that Claimant was not at MMI but the basis for that opinion is not entirely clear from his report. He stated that should Claimant simply chose to proceed with additional conservative treatment like a corticosteroid injection, she would still be at MMI and such treatment could be provided under medical maintenance care. However, if she chose to have surgery, which had not been recommended by any of her treatment providers, then she would no longer be at MMI. Dr. Hall, who is not a surgeon, did not opine on whether Claimant was a surgical candidate.

15. Dr. Hall clarified his position in his deposition testimony: "If I would have seen [Claimant] on 8/17/15 [the date on which Dr. Cazden placed Claimant at MMI], I would have put her at MMI as well. And that's why I would go back to that date, as I said in my note, if she's determined not to be a surgical candidate." However, he also admitted in his deposition that his physical examination of Claimant was not suggestive of rotator cuff tear or labral pathology, which would support a surgical recommendation.

16. Concerning permanent impairment, Dr. Hall assigned a 19% scheduled rating for Claimant's right upper extremity, which converted to an 11% whole person rating. He also assigned a 4% scheduled rating for Claimant's left upper extremity, which converted to a 2% whole person rating. He did not provide any lower extremity

ratings. The rating worksheet attached to Dr. Hall's report indicates that he combined Claimant's whole person ratings to reach a 22% total whole person rating. However, Dr. Hall clarified in his deposition that this was an error and the correct combined whole person rating was actually 13%.

17. Claimant testified that she did not believe that she reached MMI on August 17, 2015. She disagreed with Dr. Cazden's MMI report indicating that she had reached a plateau acceptable to her; that she was pleased with her progress; and that she felt she had reached MMI. She also disagreed with the record in Dr. Beard's report that her shoulders had significantly improved with conservative treatment.

18. She further testified that her condition had worsened since August 17, 2015. She now had elbow pain, catching and locking in the right shoulder, difficulty lifting overhead, and difficulty with sleep. However, on cross-examination, she acknowledged that she reported difficulty with overhead lifting and problems with sleep to her medical providers even prior to the April 15, 2015 injury.

19. Claimant testified that she would like to go back and receive more treatment. However, although she was free under the final admission of liability to return to her authorized treating physicians for medical maintenance care at any time, she had yet to schedule a follow-up appointment. She testified that she was unaware of her right to maintenance care despite being represented by counsel, and that she did not return to her treatment providers because she felt they could do nothing else for her.

20. Claimant had other inconsistencies in her testimony. At one point, she testified that her left shoulder symptoms never fully resolved following a 2012 attack by a dog. But, at another point during the hearing, she stated that her left shoulder was not bothering her at the time of the August 15, 2015 injury.

21. Concerning conversion, Claimant testified that she has tingling radiating from her right shoulder into her neck and some stiffness with turning. She indicated that she had trouble lifting above her head, mowing the lawn, pulling weeds, scrubbing the sink, throwing a ball, and that her pain increased with activity. She also received massage treatment for her neck. However, on cross-examination, Claimant acknowledged that her difficulty with pushing, pulling, and lifting was localize to her arms and shoulders and no other part of her body prevented her from doing work activities and activities of daily living.

22. Dr. Carlos Cebrian performed an independent medical examination at Respondent's request. Dr. Cebrian is board certified and Level II Accredited since 2001 in physical and rehabilitation medicine with the Division of Workers' Compensation. He asserted working knowledge of the AMA Guides and the Division of Workers' Compensation Medical Treatment Guidelines. Dr. Cebrian was present in the courtroom for Claimant's testimony.

23. Dr. Cebrian agreed that Claimant sustained bilateral rotator cuff strains with tendonitis on April 15, 2015. He further opined that Claimant's course of treatment

was reasonable and appropriate. He stated that the July 3, 2015 right shoulder MRI showed a partial rotator cuff tear, labral tear, and arthrosis of the joint, which were likely degenerative in nature. Dr. Cebrian explained that the mechanism of injury, as described by Claimant, would not cause the pathology indicated on the MRI report. He further explained that, although the MRI did indicate the presence of old trauma to the shoulder joint, Claimant's rotator cuff and labral tears were likely the result of her degenerative shoulder condition. Such changes are an aspect of cellular changes as we age he explained, and it is a misunderstanding of the underlying pathology to say that those changes are merely the result of "wear and tear."

24. Dr. Cebrian also reviewed Claimant's May 1, 2012 left shoulder MRI, taken prior to the date of injury. This MRI also showed degenerative changes consistent with the degenerative disease processes shown in Claimant's right shoulder. Dr. Cebrian explained that, given Claimant's age, such breakdown of the shoulder joint would be normal and expected. He also noted that there would be pain with this degeneration that could be aggravated by the mechanism of injury described here.

25. However, all of the findings were suggestive of chronic conditions that were not caused by the mechanism of injury Claimant described. Rotator cuff or labral tears would be the result of either degenerative processes or a significant trauma to the shoulder, which Claimant did not allege. Accordingly, he concluded that the injuries Claimant sustained on April 15, 2015 did nothing to change the underlying disease processes of her pre-existing arthritis of her bilateral shoulders.

26. He agreed it was reasonable to refer Claimant for an orthopedic evaluation. He noted that the evaluating surgeon, Dr. Beard, did not see tearing on the right shoulder MRI and diagnosed Claimant with right shoulder rotator cuff tendinitis with possible small partial-thickness cuff fraying. He recommended against surgery. Further, Dr. Beard only recommended a corticosteroid injection should Claimant's condition worsen.

27. Based on this, Dr. Cebrian opined that it was appropriate for the ATP to place Claimant at MMI.

28. Concerning the DIME report, Dr. Cebrian opined that it contained opinions inconsistent with the medical records and sound medical research, including that the report attributed much of Claimant's underlying pathology to arthritis but then attributed the arthritis to the work injury and the wear and tear of Claimant's job. But, the medical research shows that movement is actually good for arthritic conditions. Additionally, the DIME based his opinion that Claimant was not at MMI on Claimant proceeding with the surgery. But no surgical recommendation had been made in the case, and Dr. Hall himself was not qualified to make such a recommendation. Finally, Dr. Hall's physical examination did not reveal any findings for rotator cuff tear or labral pathology.

29. Dr. Cebrian did agree with Dr. Hall's deposition testimony that placed Claimant at MMI on August 17, 2015.

30. Dr. Cebrian disagreed with Dr. Hall's assignment of an impairment rating. He opined that an impairment rating was not appropriate because there was no objective evidence of any change in Claimant's underlying degenerative pathology. Essentially, there was no medical evidence that Claimant's underlying degenerative changes had been permanently exacerbated by the injury. Rather, the aggravation of her underlying disease resolved following conservative treatment.

31. Concerning conversion, Dr. Cebrian testified that Claimant's upper extremity ratings should not be converted to whole person ratings. This was so because Claimant returned to regular duty after the injury; her complaints were localized to the upper extremities when she reached MMI; all of her pathology was localized to the shoulder joints; and no shoulder surgery took place.

32. Dr. Cebrian testified on rebuttal that Claimant's testimony did not change his opinion regarding MMI and impairment. He testified that on physical examination there was no weakness in Claimant's left or right shoulder, no impingement, no atrophy of the shoulder and neck muscles, and that the shoulder and neck muscles were symmetric. Claimant did exhibit crepitus on physical examination, which he attributed to Claimant's underlying degenerative condition. He reiterated that he disagreed with Dr. Hall's opinion regarding MMI in the report, but agreed with Dr. Hall's deposition testimony that Claimant was at MMI on August 17, 2015.

33. Claimant did not present any disfigurement evidence.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000). The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Overcoming the DIME concerning MMI

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." C.R.S. § 8-42-107(8)(b)(III); *Peregoy v. ICAO*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (Oct. 4, 2001). Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ. *Id*. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. ICAO,* 984 P.2d 656 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (Jun. 30, 2008).

When a DIME physician issues conflicting or ambiguous opinions concerning whether or not the claimant has reached MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *Magnetic Eng'g, Inc.*, *supra*.

The ALJ concludes that Dr. Hall's deposition testimony clarified his ambiguous DIME report and thus Claimant is at MMI as of August 17, 2015. The medical records support this conclusion. In his DIME report, Dr. Hall expressly stated that the only basis for Claimant to not be at MMI was the need for additional surgery. However, the medical records are devoid of any recommendation for surgery and indeed no one who provided treatment or evaluated Claimant in this case has recommended surgery.

Additionally, Claimant has been working full duty without permanent work restrictions and has not returned to her treatment providers for additional medical maintenance care to address any issues related to the April 15, 2015 injury.

The conclusion that Claimant reached MMI on August 17, 2015 is further supported by Dr. Cebrian's credible testimony that Claimant was appropriately placed at MMI on that date based on his physical examination of Claimant, her treatment history, and the normal progression of her underlying degenerative condition.

Conversion

The question of whether a claimant has sustained a scheduled "injury" measured as a "loss of an arm at the shoulder" under C.R.S. § 8-42-107(2)(a), or a whole person impairment compensated under C.R.S. § 8-42-107(8)(c), depends on whether the claimant sustained "functional impairment" beyond the arm at the shoulder. This is true because the term "injury," as used in C.R.S. § 8-42-107(1)(a)-(b), refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Warthen v. ICAO*, 100 P.3d 581 (Colo. App. 2004). Whether the claimant has sustained a functional impairment beyond the arm at the shoulder is a factual question for the ALJ and depends on the particular circumstances of the individual case. *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997).

Claimant expressly testified that none of her difficulties with worker or daily living was because of a functional impairment beyond the shoulder. She localized her functional difficulties to her arms and shoulders. She acknowledged that she had had sleep disturbance and problems with lifting long before the work injury. The treatment records further support Claimant's account that she experienced not functional impairment beyond the arm because of the industrial injury.

Impairment Rating

The procedures of C.R.S. § 8-42-107(8)(c), which states that a DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such a finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. *Delaney v. ICAO*, 30 P.3d 691, 693 (Colo. App. 2000). Therefore, the ALJ applies a preponderance of the evidence standard when determining whether the DIME applied the correct *scheduled* rating. *Id*.

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. C.R.S. §8-42-101(3.7); C.R.S. §8-42-107(8)(c). The question of whether the DIME physician properly applied the AMA Guides is a question of fact for determination by the ALJ. *See Wackenhut Corp. v. ICAO*, 17 P.3d 202 (Colo. App. 2000). Although deviation from the AMA Guides is not determinative, it constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating is incorrect. *See Wilson v. ICAO*, 81 P.3d 1117 (Colo. App. 2003).

Dr. Cebrian credibly testified that an impairment rating was not appropriate because there was no objective evidence of any change in Claimant's underlying degenerative pathology. Essentially, there was no medical evidence that the injury permanently exacerbated Claimant's underlying condition. Continued complaints of pain were likely given her condition and do not indicate a change to the underlying pathology. Indeed, any aggravation of her underlying disease resolved following conservative treatment.

Average Weekly Wage

Under Colorado's Workers' Compensation Act, the average weekly wage (AWW) is a key part of the formula used to calculate compensation for injured workers, and it is based upon the definition of "wages" provided at section 8-40-201(19). *ICAO v. Ray,* 145 P.3d 661 (Colo. 2006). To determine a claimant's AWW, the ALJ may choose from two different methods set forth in section 8-42-102. The first method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." C.R.S § 8-42-102(2). The default provision in C.R.S. § 8-42-102(2)(a)-(f), lists six different formulas for conducting this calculation. Pursuant to C.R.S. § 8-42-102(5)(a), the phrase "at the time of injury" in subsection (2) requires the AWW to be determined using the wage earned on the date of the employee's accident. The second method for calculating a claimant's AWW, referred to as the "discretionary exception," applies when the default provision will not fairly compute the employee's AWW. C.R.S. § 8-42-102(3). In such a circumstance, the ALJ has discretion to compute the AWW of a claimant in such other manner and by such other method as will, based upon the facts presented, fairly determine the employee's AWW. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

Respondents calculated Claimant's AWW by taking three months of wages immediately prior to the work injury, which equaled $14,265.84 earned over the 91-day period. (Ex. S, pp. 126 & 142-146). This equated to an average of $156.77 per day or and an AWW of $1,097.37. (Ex. S, pp. 126). The ALJ concludes that this is a fair approximation of Claimant's AWW.

Additionally, the ALJ concludes that Claimant's AWW calculations are not a fair approximation for her AWW because they are based in part on higher wages earned during the holiday season and because her calculations did not account for the total number of days worked during the period thus resulting in a significantly lower denominator and higher AWW.

Disfigurement

Disfigurement benefits are awarded for the "observable impairment of the natural appearance of a person." *Arkin v. Indus. Comm'n*, 145 Colo. 463, 358 P.2d 879 (Colo. 1961). The ALJ is afforded great discretion when determining the amount of compensation to be awarded for disfigurement. C.R.S. § 8-42-108.

Claimant did not present any evidence on the issue of disfigurement and therefore she is not entitled to a disfigurement award.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is at MMI as of August 17, 2015.

2. Claimant's request to convert her left and right upper extremity ratings to whole person ratings is denied and dismissed.

3. Respondents request to reduce Claimant's left and right upper extremity ratings to 0% is granted.

4. Claimant's request to adjust her average weekly wage is denied and dismissed and thus her average weekly wage remains $1,097.37.

5. Claimant's request for disfigurement is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. ***For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.***

DATED: August 16, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues dealt with in this decision concern the following:

- Whether Dr. Amjum Sharma is an authorized treating physician (ATP), upon whose opinions Respondents' may rely to file a Final Admission of Liability (FAL);

- If Dr. Sharma is an ATP, whether the March 2, 2016 FAL, predicating MMI on Claimant's refusal to attend a FCE, is valid;

- If Respondents' March 2, 2016 FAL is invalid, whether Claimant is entitled to temporary total disability (TTD) from January 23, 2016 and ongoing; and,

- Whether Respondents are entitled to an offset for subsequent wages earned and unemployment insurance (UI) compensation benefits received.

STIPULATION

At hearing, Claimant testified that she received $501.00 in weekly unemployment insurance (UI) compensation benefits beginning March 3, 2016. Claimant stipulated that, if she is entitled to TTD benefits from January 23, 2016 and ongoing, Respondents are entitled to offset said TTD benefits by the sum of $501.00 per week for Claimant's receipt of such UI compensation benefits. The ALJ approves the parties' stipulation.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On July 22, 2014, Claimant, an insurance claims adjuster, was in Iowa performing a roof inspection when she fell approximately 12 feet off a roof. Claimant sustained multiple injuries. Upon her return to Colorado, Claimant initially treated with Dr. Siemer, at Premier Urgent Care, who transferred Claimant's care to Dr. Sharma, also at Premier Urgent Care. *Claimant's Exhibit 7, page 118-119*. On October 31, 2014, Claimant had an appointment with Dr. Sharma, who opined that Claimant was not at maximum medical improvement (MMI). *Claimant's Exhibit 8, page 162*. Between November 1, 2014, and February 24, 2015, Claimant did not treat with Dr. Sharma. At hearing, Claimant testified that during this time she requested a change of physician from Dr. Sharma to Dr. William H. Miller, III, M.D. Claimant testified that Respondents granted, or authorized, her request for a change of physician to Dr. Miller.

2. On February 24, 2015, Claimant first treated with Dr. Miller, who noted that he reviewed Claimant's medical records and performed a physical examination. Dr. Miller confirmed the work-relatedness of Claimant's multiple diagnoses and maintained Claimant's work restrictions. Dr. Miller noted possible referrals and recommendations. Dr. Miller instructed Claimant to follow-up in one month. Dr. Miller specifically noted that Claimant is not at MMI. *Claimant's Exhibit 7, pages 118-128*.

3. On March 31, 2015, Claimant treated with Dr. Miller, who maintained Claimant's treatment plan and work restrictions. *Claimant's Exhibit 7, pages 113-117*. On April 28, 2015, Claimant treated with Dr. Miller , who referred Claimant for MRIs of her cervical spine, right shoulder and right knee and referred Claimant to Drs. Barker, Hart, and Torres. Dr. Miller did not place Claimant at MMI. *Claimant's Exhibit 7, pages 107-110*. On May 26, 2015, Claimant treated with Dr. Miller, who maintained Claimant's work restrictions and treatment plan. Dr. Miller did not place Claimant at MMI. *Claimant's Exhibit 7, pages 101-105*.

4. On June 23, 2015, Claimant treated with Dr. Miller, who noted that Claimant is still waiting for the MRIs of her cervical spine, right shoulder, and right knee. Dr. Miller also noted that Claimant was in a motor vehicle accident while heading home from her last appointment on May 26, 2015. Dr. Miller maintained Claimant's work restrictions and treatment plan. Dr. Miller did not place Claimant at MMI. *Claimant's Exhibit 7, pages 87-100*.

5. On July 28, 2015, Claimant kept a demand appointment with Dr. Sharma, who stated that he had "been asked to perform a special report to indicate whether the patient had [reached] maximum medical improvement." Dr. Sharma noted that he spoke with Dr. Miller and that he agreed with Dr. Miller's plan for Claimant to undergo a number of diagnostic tests. Dr. Sharma stated that it was premature to assign MMI. Dr. Sharma added that once the diagnostic tests are completed, he "would like the opportunity once again to review this information and to then discuss this with Dr. Miller and see if there is an alignment in opinion with regard to MMI status." *Claimant's Exhibit 8, pages 158-160*.

6. On October 6, 2015, Claimant treated with Dr. Miller, who referred Claimant for chiropractic treatment, physical therapy and to Dr. Neil Politzer and Dr. James Simon for further evaluation. Dr. Miller maintained Claimant's work restrictions, recommended Claimant continue his treatment plan. He did not place Claimant at MMI. *Claimant's Exhibit 7, pages 69-80*. On November 3, 2015, Claimant treated with Dr. Miller, who maintained Claimant's treatment plan and work restrictions and recommended Claimant follow-up with the pending referrals. Dr. Miller did not place Claimant at MMI. Rather, he noted MMI would be considered pending Claimant's appointments with the specialists. *Claimant's Exhibit 7, pages 53-61*.

7. On December 21, 2015, Claimant kept a second demand appointment with Dr. Sharma, who referred Claimant for a functional capacity evaluation (FCE). He noted that Claimant was not at MMI and that he anticipated permanent impairment. Dr.

Sharma maintained Dr. Miller's work restrictions. *Claimant's Exhibit 8, page 157*.

8. On January 8, 2016, Claimant treated with Dr. Miller, who referred Claimant for neuropsych testing, referred Claimant back to Dr. Politzer, referred Claimant to Dr. Simon for urological conditions and maintained Claimant's work restrictions. Dr. Miller did not place Claimant at MMI. *Claimant's Exhibit 7, pages 46-52*.

9. Also on January 8, 2016, Claimant kept a third demand appointment scheduled by Respondents with Dr. Sharma. In his corresponding January 22, 2016 report, Dr. Sharma stated, "The patient was noncompliant in presenting for [FCE] and noncompliant in her completion of this task. I have, therefore, assigned maximum medical improvement date as of 01/22/2016 with this report serving as the final dictated report for this claim." *Claimant's Exhibit 8, pages 139-156*. Dr. Sharma noted that he last saw Claimant on January 8, 2016 and that he:

> waited for the patient to obtain a [FCE] at my request, which went through her attorney, which went through the adjuster, which was approved by the adjustor and the nurse case manager, both alike; however, the patient did not return phone calls and as a result, I am now closing her claim.

Claimant's Exhibit 8, page 153. Additionally, in regard to MMI and an impairment rating, Dr. Sharma stated:

> I am assigning the date of 01/22/2016. I am assigning this date because this is when I am completing this final permanent partial impairment report. In addition, since the patient is at MMI, an impairment rating is implied; however, in this case because since the patient did not present for [FCE], I am unable to determine what her functional capacities are.

Claimant's Exhibit 8, page 153.

10. On February 2, 2016, Respondents filed a Final Admission of Liability (FAL) based on Dr. Sharma's January 22, 2016 report. Attached to the FAL, Respondents included only Dr. Sharma's January 22, 2016 Physicians' Report of Workers' Compensation Injury (WC164 Form); Respondents did not attach Dr. Sharma's January 22, 2016 Report. Respondents did not mail the FAL to Claimant's attorney. *Claimant's Exhibit 1, pages 1-3*.

11. On February 9, 2016, Claimant treated with Dr. Miller, who noted that Claimant was still awaiting authorization for neuropsych testing, spinal surgery recommended by Dr. Barker, right hand surgery with Dr. Hart, and cystoscopy with Dr. Simon due to issues with incontinence. Dr. Miller added that Claimant should continue her pool therapy and follow-up with Dr. Politzer. Additionally, Dr. Miller noted that he reviewed Dr. Sharma's January 2016 report and that Dr. Sharma made inconsistent determinations of MMI, "none of [which] make medicolegal sense." Dr. Miller also noted that Dr. Sharma stated in his report that he is placing Claimant at MMI for non-

compliance with a FCE. Dr. Miller added that "The Division makes it very clear that a patient cannot be placed at MMI for non-compliance. *Reference Directors Interpretive Bulletin #12, "Non-Compliance does not equal MMI*." Dr. Miller also pointed out that Dr. Sharma made multiple errors in his report, including mischaracterizing Claimant's injuries and that he is treating Claimant for a Division IME at the request of attorney Kim Whiting (Claimant's former attorney). Dr. Miller opined that Claimant is not at MMI. *Claimant's Exhibit 7, pages 34-45*.

12. On March 1, 2016, a Prehearing Conference was held before Prehearing Administrative Law Judge (PALJ) David Gallivan on Claimant's Motion to Strike Respondents' February 2, 2016 FAL. PALJ Gallivan refused to rule on Claimant's Motion, noting the issues raised by Claimant are questions of fact that need to be resolved by a merits judge. PALJ Gallivan did note that pursuant to WCRP 5-6(A), Respondents should have attached Dr. Sharma's January 22, 2016 report to the February 2, 2016 FAL, thus PALJ Gallivan ordered Respondents to refile their FAL. *Claimant's Exhibit 2, pages 4-5*.

13. On March 2, 2016, Respondents filed a second FAL based on Dr. Sharma's January 22, 2016 report; Respondents attached Dr. Sharma's January 22, 2016 report (*Claimant's Exhibit 8, pages 139-156)*. Respondents did not mail he March 2, 2016 FAL to Claimant's attorney. *Claimant's Exhibit 3, pages 6-25*.

14. On March 15, 2016, a second Prehearing Conference was held before PALJ Gallivan on the issues of Claimant's Motion to add striking Respondents' March 2, 2016 FAL as an issue for the March 23, 2016 Hearing (which was set on Claimant's November 25, 2015 Application for Hearing on the issue of medical benefits) and Respondents' Motion to Strike Claimant's November 25, 2015 Application for Hearing. PALJ Gallivan: a) struck Claimant's November 25, 2015 Application for hearing; b) vacated the March 23, 2016 hearing; c) ordered Claimant to file a new Application for Hearing on the issue of striking the FAL; and d) held the DIME process in abeyance pending resolution of Claimant's new Application for Hearing. *Claimant's Exhibit 4, pages 26-28*.

15. On March 16, 2016, Claimant filed an Application for Hearing and endorsed: a) authorized provider; b) temporary total disability benefits from January 23, 2016 ongoing; and c) striking Respondents' March 2, 2016 FAL. *Claimant's Exhibit 5, pages 29-31*.

16. On April 4, 2016, Respondents filed a Response to Claimant's Application for Hearing and endorsed offsets, credits, and recovery of overpayments. *Claimant's Exhibit 6, pages 32-33*.

17. At hearing, Claimant testified that Respondents never provided her with a designated provider list. Claimant testified Respondents instructed her to go to Respondents website and find the closest workers' compensation doctor. Claimant testified that she initially treated with a doctor at Premier Urgent Care (who she found

online) and that this doctor then referred her to Dr. Sharma. Claimant testified that she requested a change of physician from Dr. Sharma to Dr. Miller. Claimant testified that Respondents granted, or authorized, her change of physician request and that she first treated with Dr. Miller on February 24, 2015. Claimant testified that Dr. Miller then took over as her authorized treating physician. Claimant also testified that in 2014 she received two checks, one for approximately $500 and a second for approximately $235, for work done for a private consulting business. Claimant testified that although she was paid after her date of injury, she completed the work prior to her date of injury. Finally, Claimant began receiving unemployment insurance (UI) benefits beginning March 3, 2016.

18. The ALJ finds Claimant's testimony credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, this ALJ draws the following conclusions of Law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. §8-40-102(1). A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-42-101. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) ; *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. C.R.S. §8-43-201. A workers' compensation case is decided on its merits. C.R.S. §8-43-201.

B. The judge's factual findings concern only evidence that is dispositive of the issues involved; the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Eng'g, Inc. v. Indus. Claim Apps. Office,* 5 P.3d 385, 389 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Dr. Sharma's Status as an Authorized Provider and the Validity of Respondents' March 2, 2016 Final Admission of Liability (FAL)

D. Claimant argues that under the current version of C.R.S. section 8-43-404(5)(a)(IV), Dr. Sharma is not an authorized treating physician because she requested, and was granted, a change of physician from Dr. Sharma to Dr. Miller, thus terminating Dr. Sharma as an authorized treating physician. Accordingly, Claimant has moved to strike Respondents' March 2, 2016 FAL, which is based on Dr. Sharma's MMI determination. After additional careful consideration of the statutory provisions cited by Claimant, the ALJ agrees that Dr. Sharma is not a treating provider upon whose opinions Respondents may rely to file a FAL.

E. Under § 8-43-404(5), C.R.S., respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury and this provider becomes legally "authorized" to treat the injury. Indeed "authorization" refers to the provider's legal status to treat the injury at the respondents' expense. *Holt v. First Nat'l Bank of Colorado* 4-809-198 (ICAO Nov. 26, 2010) *citing Popke v. Industrial Claim Appeals Office,* 797 P.2d 677 (Colo.App.1997). Here, the evidence presented convinces the ALJ that Dr. Sharma became Claimant's authorized treating physician (ATP) and that he treated her off and on for a time.

F. Nonetheless, the evidence presented also persuades the ALJ that Claimant requested a change of physician through her legal representative on two occasions. Once respondents have exercised their right to select the authorized treating physician, a claimant may not change physicians without permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). In order to change physicians, a claimant has a statutory obligation to request that change in accordance with section 8-43-404(5)(a)(III) or 8-43-404(5)(a)(IV)(E)(VI), C.R.S. Although Respondents argue that the "addition of Dr. Miller as an ATP was not pursuant to, or in accordance with §8-43-404(5)(a)(III), the undersigned ALJ concludes that the question of whether Claimant made a "proper showing" sufficient to entitle her to a change of physician to Dr. Miller was not before him.[1]

[1] Despite that "change of physician" was not endorsed in either Claimant's application for hearing or Respondents response to the application for hearing, the ALJ finds and concludes that substantial evidence was presented to support a conclusion that Respondents acquiesced to Claimant's request to change physicians to Dr. Miller. Aside from the "selection" of an authorized physician as provided in § 8-43- 404(5)(a), C.R.S. or a recognized change of physician, a specific provider may become authorized upon referral from a previously authorized physician, or if the "employer has expressly or impliedly conveyed to the employee the impression" that a physician is considered to be authorized. *Bestway Concrete v. Industrial Claim Appeals Office,* 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985). In this case, the ALJ concludes that Respondents conveyed an impression to Claimant that Dr. Miller was authorized to treat her.

G. Rather the question presented in this case was whether Dr. Sharma remained an ATP or whether, by virtue of the addition of Dr. Miller as an authorized provider, Dr. Sharma was deauthorized. As noted by Respondents, it has long been recognized that once a physician becomes authorized, the mere selection or designation of another authorized physician does not have the effect of "deauthorizing" the previously authorized physician. *Granger v. Penrose Hospital,* W.C. No. 4-351-885 (July 20, 1999); *Chapman v. The Spectranetics Corp.,* W.C. No. 4-162-568 (May 30, 1997). Rather, "deauthorization" may occur if evidenced by an express agreement under which the claimant waives treatment by the previously authorized physician. *Id*. Absent such agreement, the insurer's approval for a change of physician merely adds another physician to the list of physicians who are legally authorized to treat the injury at the insurer's expense. *Chapman v. The Spectranetics Corp.*, W.C. No. 4-162-568 (May 30, 1997); *Matthews v. United Parcel Service*, W.C. No. 4-325-652 (December 15, 1997); *Nathaniel Granger, Jr., v. Penrose Hospital and Self-Insured*, W. C. No. 4-351-885, 1999 WL 603156, at *2 (July 20, 1999). Consequently, a claimant may have multiple attending physicians. *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997).

H. Claimant’s counsel argues that the current version of §8-43-404(5)(a)(IV), dictates a different result. Asserting that the above referenced case law was decided under a prior version of the statute, Claimant’s counsel argues that the language of §8-43 404(5)(a)(IV)(C), providing that the “treatment relationship” with the initially authorized treating provider terminates at the time of the injured workers initial visit to the new providers, serves to “deauthorize” Dr. Sharma. Claimant asserts that the language of §8-43-404(5)(a)(IV)(C) applies to all situations when a change of physician has occurred. As noted above, Respondents counter by asserting that the change of physician in this case was not made in accordance with §8-43-404(5)(a)(III). Thus, Respondents contend the argument is misplaced.

I. In interpreting a statute, the ALJ must apply the ordinary rules of statutory construction. The purpose of the rules of statutory construction is to effectuate the legislative intent. Because the best indicator of legislative intent is the language of the statute, words and phrases in a statute should be given their plain and ordinary meanings, and phrases should be read in context and construed according to the rules of grammar and common usage. CRS Section 2-4-101, *Weld County School District RE-12 v. Bymer,* 955 P2d 550 (Colo. 1998). Forced, subtle, strained, or unusual interpretation should never be resorted to where the statutory language is plain, its meaning is clear and no absurdity is involved, *People v. Thomas,* 867 P.2d 880 (Colo. 1994). The rules of statutory construction dictate that all words and phrases used in a statute shall be understood and construed according to the approved and common usage and that some meaning shall be given to every word used. *People v. J.J.H.,* 17 P.3d 159 (Colo. 2001). In considering the plain language of C.R.S. §8-43-404(5)(a)(IV)(A) which begins, “When an injured employee changes his or her designated authorized…” the undersigned concludes that §§8-43-404(5)(a)(IV)(A-E) set forth the rules concerning the transfer of medical care from the initially authorized treating physician to the newly authorized treating physician. The ALJ agrees with

Claimant that the plain interpretation of language contained therein makes it clear that the provisions of statute apply to any and all requests for a change of physician. Consequently, the ALJ finds that C.R.S. §8-43-404(5)(a)(IV) applies to all change of physician requests made under the Act and not simply those made under §8-43-404(5)(a) (III). This is consistent with the plain language of the statutory provision. If the legislature wanted C.R.S. section 8-43-404(5)(a)(IV) to apply only to a specific request for a change of physician, it would have specifically stated such limitation. *See Well Augmentation Subdistrict of Cent. Colo. Water Conservancy Dist. V. City of Aurora*, 221 P.3d 399, 419 (Colo. 2009).

J. While the undersigned concludes that the statutory provisions of §8-43-404(5)(a)(IV) applies to all change of physician requests made under the Act and not simply those made under §8-43-404(5)(a)(III), the ALJ is not persuaded that "termination" of the treatment relationship between a claimant and the initially authorized physician subsequently serves to "deauthorize" that initially authorized physician. Termination of the treatment relationship does not equate to deathorization. Thus, while Dr. Sharma's treatment relationship with Claimant "terminated", Respondents retained the legal authority, to send Claimant to Dr. Sharma for additional evaluation in an effort to obtain opinions concerning MMI and/or permanent impairment. While the ALJ concludes that Respondents retained the ability to return Claimant to Dr. Sharma for additional evaluation and comment, the ALJ agrees with Claimant that he is not a physician upon whose opinions they can rely to file an FAL.

K. In support of their FAL, Respondents rely on the above cited case law holding that the addition of another authorized provider does not deauthorize the initially authorized physician.[2] Accordingly, Respondents assert that the addition of Dr. Miller as Claimant's treating physician did not deauthorize Dr. Sharma who remains capable of rendering opinions regarding MMI/impairment upon which they rely. The undersigned ALJ agrees with Claimant that the case law cited by Respondents applies an outdated and inapplicable version of C.R.S. section 8-43-404(5)(a). C.R.S. section 8-43-404(5)(a)(IV)(C) was not part of the statute at the time the *Granger, Chapman, and Matthews* cases were decided, and Respondents reliance on these cases is misguided. Effective July 1, 2008, the legislature amended C.R.S. section 8-43-404(5)(a) to include sections 8-43-404(5)(a)(IV)(A-E), which were not previously part of the statute. The plain language of the sections added to C.R.S. section 8-43-404 provide that when a claimant changes his/her authorized treating physician, the "treatment" relationship with the initially authorized provider terminates, when the claimant first treats with the newly authorized treating physician. Accordingly, the ALJ finds and concludes that the initially authorized treating physician is no longer a "treating" physician for purposes of determining MMI pursuant to C.R.S. section 8-42-107(8)(b)(I) which provides: "An authorized "treating" physician shall make a determination as to when the injured employee reaches maximum medical improvement as defined in section 8-40-201(11.5)." As Claimant's treatment relationship with Dr. Sharma "terminated" pursuant

[2] See also *In re Nathaniel Granger, Jr.*, W.C. No. 4-351-885 (July 20, 1999), *citing Chapman v. The Spectranetics Corp.*, W.C. No. 4-162-568 (May 30, 1997); *Matthews v. UPS*, W.C. No. 4-325-652 (December 15, 1997).

to the change of physician, the ALJ concludes that he is not “an authorized treating physician” and Respondents are not permitted to rely on his MMI determination to file a FAL terminating benefits. Consequently, the ALJ agrees with Claimant that Respondents’ March 2, 2016 FAL is invalid and should be stricken. Because the ALJ concludes that Dr. Sharma is not “an authorized treating physician, it is unnecessary to address the question of whether Dr. Sharma could determine MMI based upon non-compliance.

Claimant’s Request for Temporary Total Disability

L. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that she left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). In this case, Claimant was receiving TTD prior to the filing of Respondents’ March 2, 2016 FAL predicated on Dr. Sharma’s opinions regarding MMI. Consequently, the ALJ finds and concludes that Claimant has proven that she was, prior to the FAL being filed, entitled to TTD benefits. As Claimant has not been placed at MMI by “an authorized *treating* provider” and the March 2, 2016 FAL is invalid, Claimant’s TTD benefits must be reinstated beginning January 23, 2016.

Respondents’ Entitlement to Offsets

M. Claimant’s earnings for work done for a private consulting business predate her injury and entitlement to TTD in this case. Accordingly, these earnings are not subject to being offset.

N. Although it is currently being held in abeyance based upon the Prehearing Conference Order of PALJ Gallivan, the outcome of any DIME in this case may affect Claimant’s entitlement to TTD as well as Respondents’ entitlement to offset the same. Consequently, the undersigned reaches the following conclusions regarding Respondents’ entitlement to offset any potential TTD benefits secondary to Claimant’s receipt of UI compensation benefits: Per the parties’ stipulation, Respondents are entitled to offset Claimant’s TTD based on any unemployment benefits Claimant has received since March 3, 2016 in the sum of $501.00 per week said offset to continue until such time that Claimant’s UI benefits cease.

O. Authority for the above cited UI offset is found in C.R.S. section 8-42-103(1)(f), which provides:

> In cases where it is determined that unemployment compensation benefits are payable to an employee, the aggregate benefits payable for permanent total disability pursuant to this section shall be reduced, but not below zero, by an amount equal as nearly as practical to such unemployment compensation benefits. *In cases where it is determined that unemployment insurance benefits are payable to an employee, compensation for temporary disability shall be reduced, but not below zero, by the amount of unemployment insurance benefits received,* unless the unemployment insurance amount has already been reduced by the temporary disability benefit amount and except that temporary total disability shall not be reduced by unemployment insurance benefits received pursuant to section 8-73-112. (emphasis added).

P. Claimant's admitted AWW is $3,499.91, and her WC disability rate is $881.65 per week. When deducting Claimant's unemployment earnings from her disability rate, Respondents owe Claimant TTD at a rate of $380.65 per week beginning March 3, 2016 and continuing until UI benefits cease. ($881.65 – $501.00 = $380.65).

ORDER

It is therefore ordered that:

1. Dr. Sharma is not an authorized "treating" physician.

2. Respondents' March 2, 2016 Final Admission of Liability is invalid, and Claimant's request to strike the same is GRANTED.

3. Respondents' shall pay Claimant ongoing temporary total disability benefits beginning January 23, 2016 at a rate of $881.65 per week through March 2, 2016. Beginning March 3, 2016, Respondents are entitled to offset Claimant's temporary total disability benefits based on her receipt of UI benefits by $510.00 per week. Consequently, Respondents shall pay TTD benefits beginning March 3, 2016 at a weekly rate of $380.65 and continue said TTD benefits at this rate until UI benefits cease. Thereafter, if Claimant remains temporarily totally disabled, Respondents shall resume payment of TTD benefits at the rate of $881.65 until said TTD benefits can be terminated according to law.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 18, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-980-043-06

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that his prescription for physical therapy from Authorized Treating Physician (ATP) Randall W. Viola, M.D. is reasonable, necessary and causally related to his May 1, 2014 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Concrete Finisher. On May 1, 2014 he suffered an admitted industrial injury to his right upper extremity. While Claimant was operating a hammer drill with his right arm the drill jammed and violently twisted.

2. Claimant subsequently underwent eight surgeries for his right wrist and elbow. He also received physical therapy after each procedure. Claimant has recently been diagnosed with Chronic Regional Pain Syndrome (CRPS).

3. Claimant testified that physical therapy relieved the numbness and tingling in his right wrist. The treatment also reduced his pain levels and increased his range of motion. Claimant remarked that physical therapy prevented further deterioration of his right upper extremity condition. However, Claimant acknowledged that physical therapy has only provided short-term relief and he has not achieved sustained benefits.

4. On February 24, 2016 Authorized Treating Physician (ATP) Thos A. Evans, M.D. recommended that Claimant "continue physical therapy with a focus on desensitization techniques, as well as mirror therapy." Claimant commented that he would like to pursue the treatment to maintain and improve his condition.

5. ATP Randall Viola, M.D. subsequently requested additional physical therapy for Claimant. The request consisted of two sessions per week for six weeks.

6. Respondents timely denied the request for physical therapy pursuant to Rule 16. On March 22, 2016 Moshe Lewis, M.D. determined that additional physical therapy was not reasonable. Dr. Lewis reviewed medical records that showed Claimant had completed 40 physical therapy visits post-operatively but continued to experience pain and weakness in the right forearm and hand. Relying on the *Colorado Medical Treatment Guidelines* (*Guidelines*) Dr. Lewis noted that positive results are defined primarily as functional gains that can be objectively measured. Furthermore, if a specific treatment or modality is not producing positive results within three to four weeks the treatment should be modified or discontinued. Clinical notes did not clearly establish that Claimant achieved functional gains in activities of daily living.

Accordingly, because Claimant had reached a plateau through physical therapy treatment, the request for 12 additional sessions should be denied.

7. Claimant is currently under the care of ATP Robert Wright, M.D. On April 11, 2016 Dr. Wright determined that Claimant was "going to need a spinal cord stimulator to help with his neuropathic pain." He also recommended a titrating dose of Gabapentin for additional therapeutic relief. However, Claimant noted that he does not take any medication because of side effects.

8. On May 23, 2016 Claimant underwent an independent medical examination with Barry A. Ogin, M.D. Dr. Ogin agreed that Claimant had met the diagnostic criteria for CRPS. He thus recommended consideration of medication trials, pain psychology and a spinal cord stimulator trial for pain management.

9. Dr. Ogin did not recommend additional physical therapy sessions. He remarked that, if Claimant's neuropathic pain could be reduced, "he might be able to tolerate more desensitization strategies and strengthen through therapy." Dr. Ogin explained "by this point, [Claimant] has had close to 80 therapy sessions, between his treatments for his fusion and afterwards, without any lasting relief. Additional therapy sessions should only be performed with very specific goals, particularly after he can get better control of his neuropathic pain. In the meantime, he should continue with an independent exercise regimen." Dr. Ogin reasoned that Claimant needs to reduce his pain levels through medication or a spinal cord stimulator before resuming physical therapy.

10. On May 31, 2016 Dr. Ogin issued an addendum to his independent medical examination. He maintained that additional physical therapy was not reasonable and necessary as a result of Claimant's May 1, 2014 admitted right upper extremity injury. Dr. Ogin also reiterated that additional physical therapy sessions "should only be pursued with specific goals in mind, not just short-term pain management."

11. Claimant has failed to demonstrate that it is more probably true than not that his prescription for physical therapy from ATP Dr. Viola is reasonable, necessary and causally related to his May 1, 2014 industrial injury. Claimant's industrial injury occurred over two years ago and has resulted in multiple surgeries. Because of the surgeries, Claimant suffers from debilitating neuropathic pain. Despite extensive follow-up treatment, physical therapy and other modalities Claimant has failed to achieve long-term pain relief or functional improvement. Although the *Guidelines* establish an appropriate standard of medical care, they are not a definitive determination as to the reasonableness and necessity of treatment modalities. Physicians have discretion to act in the best interests of patients.

12. The persuasive medical opinions of Drs. Lewis and Ogin demonstrate that physical therapy sessions no longer constitute reasonable treatment for Claimant's May 1, 2014 industrial injury. Relying on the *Guidelines* Dr. Lewis persuasively noted that positive results are defined primarily as functional gains that can be objectively

measured. Furthermore, if a specific treatment or modality is not producing positive results within three to four weeks the treatment should be modified or discontinued. Clinical notes did not clearly establish that Claimant achieved functional gains in activities of daily living. Accordingly, Dr. Lewis concluded that, because Claimant had reached a plateau through physical therapy treatment, the request for 12 additional sessions should be denied. Moreover, Dr. Ogin persuasively determined that additional physical therapy was not reasonable and necessary as a result of Claimant's May 1, 2014 admitted right upper extremity injury. He remarked that, if Claimant's neuropathic pain could be reduced, "he might be able to tolerate more desensitization strategies and strengthen through therapy." Dr. Ogin explained "by this point, [Claimant] has had close to 80 therapy sessions, between his treatments for his fusion and afterwards, without any lasting relief." He summarized that additional physical therapy sessions "should only be pursued with specific goals in mind, not just short-term pain management." Based on the persuasive medical opinions of Drs. Lewis and Ogin Claimant's request for additional physical therapy sessions is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the

employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. Pursuant to Workers' Compensation Rule of Procedure 17-2(A) health care practitioners are to use the *Guidelines* when furnishing medical care under the Workers' Compensation Act. *See* §8-42-101(3)(b), C.R.S. The ALJ may also appropriately consider the *Guidelines* as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. 4-665-873 (ICAP, Jan. 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the *Guidelines*. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAP, Apr. 27, 2009). The ALJ's consideration of the *Guidelines* may include deviations where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (ICAP, Jan. 25, 2011). There is no requirement for an ALJ to award or deny medical benefits based on the *Guidelines*. *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (ICAP, Apr. 27, 2009); *see Nunn v. United Airlines*, W.C. No. 40785-790 (ICAP, Sept. 9, 2011).

6. Rule 17, Exhibit 7 of the *Guidelines* provides that the primary purpose of the document is "advisory and educational" and "acceptable medical practice may include deviations" from the *Guidelines* based on the circumstances of each case. Moreover, the *Guidelines* specifically recognize that they do not constitute "relevant evidence of a provider's legal standard of professional care." Rule 17, Exhibit 7(A).

7. In addressing a positive patient response to treatment the *Guidelines* provide:

> Positive results are defined primarily as functional gains that can be objectively measured. Objective functional gains include, but are not limited to: positional tolerances, range-of-motion, strength, endurance, activities of daily living, ability to function at work, cognition, psychological behavior, and efficiency/velocity measures that can be quantified. Subjective reports of pain and function should be considered and given relative weight when the pain has anatomic and physiologic correlation. Anatomic correlation must be based on objective findings.

Rule 17, Exhibit 7(B)(6).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that his prescription for physical therapy from ATP Dr. Viola is reasonable, necessary and causally related to his May 1, 2014 industrial injury. Claimant's industrial injury occurred over two years ago and has resulted in multiple surgeries. Because of the surgeries, Claimant suffers from debilitating neuropathic pain. Despite extensive follow-up treatment, physical therapy and other modalities Claimant has failed to achieve long-term pain relief or functional improvement. Although the *Guidelines*

establish an appropriate standard of medical care, they are not a definitive determination as to the reasonableness and necessity of treatment modalities. Physicians have discretion to act in the best interests of patients.

9. As found, the persuasive medical opinions of Drs. Lewis and Ogin demonstrate that physical therapy sessions no longer constitute reasonable treatment for Claimant's May 1, 2014 industrial injury. Relying on the *Guidelines* Dr. Lewis persuasively noted that positive results are defined primarily as functional gains that can be objectively measured. Furthermore, if a specific treatment or modality is not producing positive results within three to four weeks the treatment should be modified or discontinued. Clinical notes did not clearly establish that Claimant achieved functional gains in activities of daily living. Accordingly, Dr. Lewis concluded that, because Claimant had reached a plateau through physical therapy treatment, the request for 12 additional sessions should be denied. Moreover, Dr. Ogin persuasively determined that additional physical therapy was not reasonable and necessary as a result of Claimant's May 1, 2014 admitted right upper extremity injury. He remarked that, if Claimant's neuropathic pain could be reduced, "he might be able to tolerate more desensitization strategies and strengthen through therapy." Dr. Ogin explained "by this point, [Claimant] has had close to 80 therapy sessions, between his treatments for his fusion and afterwards, without any lasting relief." He summarized that additional physical therapy sessions "should only be pursued with specific goals in mind, not just short-term pain management." Based on the persuasive medical opinions of Drs. Lewis and Ogin Claimant's request for additional physical therapy sessions is denied and dismissed. *See Waller v. Waste Connections, Inc.*, W.C. No. 4-775-375 (ICAP, June 4, 2012) (reasoning that there was no error in ALJ's consideration of the *Guidelines* to support his determination that the claimant's surgeries were not reasonable or necessary).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for additional physical therapy as recommended by ATP Dr. Viola is denied and dismissed.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-*

070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 16, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

____
Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-974-821-01

ISSUES

- Did Claimant sustain her burden to overcome the DIME physician's opinion that she sustained a permanent medical impairment to her thoracic spine?

- If Claimant satisfied her burden of proof and overcame Anjmun Sharma, M.D.'s opinion, what is Claimant's medical impairment rating?

- Is Claimant entitled to temporary partial disability benefits from December 31, 2014 to September 2, 2015?

- Are Respondents entitled to recoup what is claimed as an overpayment of temporary partial disability benefits?

FINDINGS OF FACT

1. Claimant has worked for Employer for eighteen (18) years as an interior designer. In that position, her job duties included meeting and greeting customers, as well as assisting them in the store. Claimant testified that the main objective of her employment is to build relationships with her clientele while in the store, so that she could make appointments to go to their homes to help with their interior design needs. After a home visit, Claimant prepared a design to be presented to the customer. Claimant does not earn any wages until the customer makes a purchase.

2. The physical demands of the job required her to climb ladders, walk around the showroom, carry samples, and pick up various items of furniture. When Claimant visited customer's homes, she carried sample books, tape measure and brief cases.

3. Claimant received commissions as part of her remuneration. The paycheck records admitted at hearing documented Claimant received a total of $30,187.62 in commissions for the year ending 12/31/14. Her total gross pay for that year was $69,701.04

3. On December 30, 2014, Claimant sustained an admitted industrial injury while assisting a customer at the store. The customer wanted to see a piece of furniture located in the back of the store. Claimant stepped over a 2 foot long piece of flooring, lost her balance and twisted her body. Although she did not fall to the floor, she twisted her ankle, leg, as well as her neck, back and shoulders.

4. An Employer's First Report of Injury (E-1) was prepared on or about December 31, 2014. It documented that Claimant was injured when she stepped over

a pile of boxes and twisted her ankle, back and neck.

5. On December 31, 2014, Claimant was examined by Daniel Peterson, M.D., the ATP for Employer. At that time, Claimant reported pain in her left foot and ankle, neck and back. Dr. Peterson's assessment was ankle sprain, cervical strain, trapezius strain and foot sprain. Dr. Peterson ordered physical therapy and prescribed medications. In the M–164, Dr. Peterson returned Claimant to regular duty as of December 31, 2014.

6. Claimant's physical therapy ("PT") records from Concentra were admitted at hearing, which documented treatment from January 6, 2015 through March 25, 2015. Claimant received a total of thirty (30) PT sessions at Concentra. The treatment modalities Claimant received included electrical stimulation therapeutic exercises and manual therapy. Claimant's cervical spine, trapezius and ankle/foot received treatment. The ALJ infers Claimant reported pain in the aforementioned areas of her body during her course of PT.

7. Claimant admitted no doctor issued work restrictions while she was treating for her work injury. None of the medical records received by the Court documented any work restrictions issued by Dr. Peterson or other ATP. Claimant testified she receibed help with some of the physical tasks required by her job, some of which was given my customers and some by co-workers. She also limited what she lifted.

8. Claimant testified she spoke to Ms. Spring, the adjuster for Insurer. An e-mail was admitted into evidence in which Ms. Spring explained her calculation of TPD benefits[1]. Ms. Spring stated TPD benefits were paid for the lost income related to time missed by Claimant for appointments.

9. Claimant was evaluated by Syketha Sprague, NP on January 19, 2015, at which time she reported her ankle was fine, but she continued to have soreness in her neck, back and shoulder. NP Sprague noted joint pain, stiffness, but no swelling. Range of motion ("ROM") was limited on left-sided bending and left rotation. NP Sprague's assessment was cervical strain and trapezius strain. Claimant was to continue with physical therapy.

10. On February 10, 2015, Claimant was seen for a follow-up appointment by Jocelyn Cavender, PA-C. Claimant reported she had better motion in her neck, but still had pain/tightness in her left shoulder. Tenderness was noted in the trapezius muscle, with left sided muscle spasm. Claimant had pain with lateral movement and extension. PA-C Cavender's assessment was trapezius strain and cervical strain.

11. On February 25, 2015, Insurer filed a General Admission of Liability ("GAL") on behalf of Employer, admitting for temporary partial disability benefits (from

[1] Exhibit 16.

12/31/14 and ongoing). Claimant's wage records were attached to the GAL. The GAL was filed by Cheryl Spring on behalf of Insurer.

12. Claimant was evaluated by Worley Lynch, PA-C on March 4, 2015. Claimant reported intermittent pain in her neck and upper back, particularly when she turned her head. PA-C Lynch found tenderness in Claimant's cervical spine, right and left trapezius muscles, as well as the paraspinal muscles. The assessment was trapezius strain and cervical strain. Physical therapy was re-started.

13. Claimant was evaluated by Walter Larimore, M.D. on March 25, 2005, at which time she still had intermittent pain in her neck and upper back. Claimant had completed two sessions of massage therapy and PT was requesting chiropractic. Dr. Larimore's assessment was history of sprained foot and ankle; cervical strain; and trapezius strain. Claimant was to continue massage therapy.

14. On April 8, 2015, Dr. Larimore re-evaluated Claimant. Claimant's thoracic spine had full range of motion, as did her lumbosacral spine. She had no upper extremity deficits. Dr. Larimore's assessment was cervical strain and trapezius strain.

15. Claimant was re-examined by PA-C Cavender on May 6 and 27, 2015. At that time, she had continued pain in her shoulder, arm, neck and mid back. PA-C Cavender noted Claimant was reporting deep ache sensations in the thoracic area of the back and bilateral shoulders. Cervical ROM was full, except for the left and right paraspinal and right trapezius muscles. Claimant was to continue with massage therapy.

16. Dr. Larimore reevaluated Claimant on July 15, 2015. Claimant reported continued back pain, with radiation to both arms, as well as upper and mid back pain; all of which were aggravated by work. Limitations in the ROM of upper back were noted, as well as tenderness at T1-6. Dr. Larimore's assessment was: chronic neck and back pain; history of trapezius strain; bilateral arm pain; and degenerative disc disease. An EMG was ordered and chiropractic referral was made. A referral to Albert Hattem, M.D. was also made, along with a psychiatric consult.

18. On July 28, 2015, an MRI was performed on Claimant's thoracic spine. The films were read by Tanweer Khan, M.D. Dr. Khan's impression was: L1-2 space showed a small posterior central to slightly right-sided acute to subacute disc herniation, slightly displaced cranially with minimal neural canal stenosis; minimal degenerative changes of the T9-10 disc space, with anterior osteophytic lipping. No posterior disc bulge or herniation was seen at this level and there was no evidence of nerve root impingement. The ALJ notes the MRI was ordered because of Claimant's continued pain in her neck , back (thoracic spine) and shoulders.

19. On August 12, 2015, Claimant returned to Dr. Larimore, at which time mid-back pain and bilateral shoulder pain was noted. Claimant had bilateral muscle spasms, which included the right and left trapezius muscles. Dr. Larimore's assessment was bilateral arm pain, chronic neck and back pain, degenerative disc disease-cervical,

degenerative joint disease-cervical, cervical disc herniation, degenerative joint disease of the thoracic spine, lumbar disc herniation, adjustment disorder with mixed anxiety and depressed mood, pain disorder associated with psychological and physical factors. Dr. Hattem was to assume Claimant's care and an EMG was scheduled with Dr. Jenks. Claimant was also to continue PT.

20. Claimant received physical therapy, medical massage and dry needling as part of her treatment. Records from Medical Massage of the Rockies from March 17, 2015 to July 28, 2015 were admitted at hearing. Those records reflected Claimant reported symptoms in her neck, as well as left shoulder and back. Decreased ROM in her thoracic spine was noted on March 17, 24, 31; April 6, 8, 13, 15, 20, 22, 27, 29; May 4, 5, 11, 8, 26, 28; June 3, 8, 15, 22, 29; and July 31, 2015. After that time, some improvement was noted and ROM findings were not documented at the appointments. However, the "objective findings/palpatory findings" documented tightness in the thoracic spine and treatment for that area. The ALJ infers the loss of ROM, tightness and restrictions noted in the records was evidence of an injury to the thoracic spine, surrounding musculature and connective tissues.

21. Claimant was evaluated by Brian Polvi, D.C. on August 9, 2015. She complained of bilateral shoulder pain, cervical and thoracic spine pain (bilateral). Dr. Polvi noted limitations in Claimant's range of motion of her cervical spine, diffuse bilateral paracervical pain that was considered mixed myofascial and facetogenic in nature, left fifth posterior rib displacement, superior trapezius contour interscapular and parascapular region active tenderness and trigger point formations. Dr. Polvi's diagnostic impressions were left C5-C6 facet capsulitis with associated diffuse cervicothoracic and bilateral parascapular myofascial dysfunction; multilevel cervical spondylosis without evidence of nerve root impingement or cord compression; MRI finding of L1-L2 disk space right-sided acute subacute disc herniation slightly displaced cranially with minimal neural canal stenosis. Claimant was started on a course of chiropractic manipulation and mobilization, manual therapy, trigger point dry needling, biomedical acupuncture proprioceptive neuromuscular facilitation of stretching and/or passive physical therapy modalities.

22. Claimant received treatment from August 6, 2015 through August 20, 2015. The ALJ noted symptoms referable to Claimant's thoracic spine, including muscle spasm and hypertonicity was found by Daniel Barbuto, D.C. at Dr. Polvi's office. Treatment was provided to the cervical spine (C5-C6) and thoracic spine (T5-T6).

23. Claimant testified there were times she had to leave work to attend medical appointments. She lost income because she could not assist customers when she was away from the store. Claimant continued to work throughout her treatment with various health care providers.

24. On September 3, 2015, Claimant was evaluated by Dr. Hattem. Dr. Hattem found decreased range of motion, with mild paracervical tenderness, good range of motion of the shoulder joints bilaterally and normal motor strength of the upper and lower extremities. Dr. Hattem's diagnoses were upper back and neck pain. Dr.

Hattem offered Claimant the option of a cervical epidural injection, which she declined. He concluded Claimant was at MMI and noted she could pursue the cervical epidural injection as maintenance care. Dr. Hattem concluded Claimant sustained a 0% medical impairment as a result of her injury.

25. Insurer filed a Final Admission Liability ("FAL") on September 22, 2015, based upon Dr. Hattem's rating. The FAL specifically referenced there was a TPD overpayment in the amount of $15,058.20 based on the fact that Claimant was not taken off work by any physician. The FAL was filed by Teresa Manshardt, who was employed by Insurer as a workers' compensation claims professional. Ms. Manshardt testified she replaced Ms. Spring as the adjuster on the case in mid 2015.

26. Ms. Manshardt testified she determined the payment of TPD benefits was a mistake, as Claimant was returned to full duty after her injury. She stated Claimant was not entitled to receive those benefits as she had returned to work with no restrictions. A ledger of TPD payments was admitted at hearing[2]. Ms. Manshardt confirmed that the ledger accurately reflected the total amount paid to Claimant in TPD benefits.

27. Claimant received a total of $8,886.53 in commissions for the year ending 12/31/15. Her total gross pay for that year was $44,853.82. Claimant testified her income was reduced because there were times she could not finish assisting a customer because of medical appointments. She believed there were times when she missed out on completing large sales because she was treating for her injuries. The earnings records for Claimant documented a reduction totaling $24,847.22 in her 2015 income (from 2014), which occurred while she was actively treating for her injury. Claimant attributed the reduction in commissions to her industrial injury. Respondent offered no evidence to contradict this explanation for the reduction in commissions. The ALJ found Claimant's explanation for the reduction in commissions was credible.

28. On January 4, 2016, Claimant underwent a DIME, which was performed by Dr. Sharma. Dr. Sharma concluded Claimant was at MMI and found she sustained a permanent medical impairment to her cervical spine. This included a Table 53 specific disorder impairment of 4% and an 8% impairment for ROM deficits. Dr. Sharma noted Claimant's left ankle sprain and left foot strain were resolved and Claimant had no permanent impairment to the left foot/ankle. Dr. Sharma opined that, although Claimant was complaining of low back pain, this was not part of the claim. Dr. Sharma stated Claimant did not require maintenance treatment. Dr. Sharma found Claimant's thoracic spine was mildly tender, but did not feel this was significant enough to cause an impairment and he did not rate the thoracic spine. There was no indication in the record (including worksheets) that Dr. Sharma performed dual inclinometer measurements on Claimant's thoracic spine. The ALJ notes Dr. Sharma did not provide an explanation why no impairment rating was assigned to this area of Claimant's body where she had scapular/paraspinal symptoms and required extensive treatment to these areas.

[2] Exhibit G.

29. Insurer filed an FAL on February 3, 2016, admitting for Dr. Sharma's impairment rating. This FAL was filed by Ms. Manshardt. The FAL referenced the TPD overpayment and stated "carrier will recover from PPD award".

30. On May 20, 2016, Claimant was evaluated by Jack Rook, M.D. Dr. Rook reviewed Claimant's course of treatment, which documented severe tenderness with severe tenderness with palpation of bilateral scalene muscles. Claimant’s cervical range of motion was decreased in all planes, but especially with extension and turning to the left. Dr. Rook's diagnoses were: neck pain, myofascial pain syndrome; thoracic myofascial pain syndrome.

31. Dr. Rook reviewed Dr. Sharma's report and concluded that the latter did not fulfill his Division Examiner responsibilities correctly. Dr. Rook noted Claimant was most probably complaining of pain in the thoracic spine at the time of the DIME and there were objective findings, including range of motion loss. Dr. Rook opined Dr. Sharma was in error when he found that Claimant's rating should be confined to the cervical spine. Dr. Rook stated the AMA Guides do not limit a rating to the primary area of Claimant's body affected. In this case, Claimant had pain complaints and treatment to her thoracic spine and Dr. Rook reasoned she suffered a permanent medical impairment to the thoracic spine. Dr. Rook opined Claimant was entitled to an impairment rating pursuant to Table 53 of the *AMA Guides.* Dr. Rook noted the fact Claimant’s pain was myofacial in nature did not preclude a rating from being assigned. In this regard, Dr. Rook said Claimant’s injury to her thoracic spine was supported by the clinical findings made by various health care providers. The ALJ credited Dr. Rook’s opinion that Claimant sustained a permanent impairment to her thoracic spine.

32. Dr. Rook assigned a 18% whole person rating, which included a 13% impairment to the cervical spine and 6% impairment to the thoracic spine. The ALJ notes Dr. Rook's range of motion testing done on the thoracic spine was valid and showed a loss.

33. The ALJ takes administrative notice of the AMA Guides, which governs Claimant’s medical impairment. The ALJ also notes that Chapter 1.2 is an explanatory section which directly relates to chapter 2.3, at issue here. This section provides in pertinent part:

> “…Evaluation of impairment using the *Guides* requires integration of previously gathered medical information with the results of a current clinical evaluation. To characterize the impairment fully, the evaluation should be carried out in accordance with the directions in the Guides. Accomplishing this is based on using three fundamental components.
>
> First, Chapter 2 of the *Guides* lists the kinds of information needed to document the nature of an impairment and its consequences; specifies procedures for acquiring the information; and defines a structured format

> for analyzing, recording, and reporting the information. A summary of this material appears at the beginning of each clinical chapter..."[3]

34. In the Introduction section for chapter 2 of the AMA Guides, it specifies:

> "If two physicians using the *Guides* have obtained similar results and reached similar conclusions, a framework exists within which to resolve the discrepancies. Analysis of records and reports will disclose the differences. In such an instance, the differences will be in the clinical findings, which are matters of fact, not opinion; the latter can be verified by further observation of the claimant in accordance with the procedures and methods of the *Guides*…"[4]

35. Claimant is entitled to receive temporary partial disability benefits, as she had a loss of earnings directly caused by her industrial injury.

36. Insurer paid TPD benefits to Claimant pursuant to the GAL filed on 9/22/15, which constituted an overpayment of indemnity benefits. Insurer is entitled to a credit for TPD benefits paid.

37. It is more probable than not that Dr. Sharma, who conducted the DIME, erroneously failed to assign a medical impairment rating to Claimant for her thoracic spine. Claimant sustained a 6% whole person impairment for impairment to her thoracic spine and is entitled to receive PPD benefits based upon said impairment.

38. Claimant failed to prove it is more probable than not that she is entitled to an award of *Grover* medical benefits to maintain MMI and/or prevent deterioration of her condition.

39. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders

[3] The second and third components refer to medical evaluation protocols and reference tables specifically keyed to the evaluation protocols.

[4] *Id.*

the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of various health care providers was one of the primary issues on the question of Claimant's impairment rating.

Overcoming the DIME On the Issue of Impairment

Claimant has the burden of overcoming Dr. Sharma's opinion and argued he erred in his determination that Claimant sustained no permanent medical impairment to the thoracic spine. In this regard, Claimant asserted Dr. Sharma's findings were not supported by the record and relied on the opinion of Dr. Rook, who stated Claimant was entitled to an impairment rating for this area of her body*.*

Respondents contended Claimant failed to meet her burden of proof and argued Dr. Sharma's determination of medical impairment was correct. Respondents averred the evidence submitted by Claimant amounted to a difference of opinion between the doctors.

A DIME physician's finding that Claimant had a permanent medical impairment is binding on the parties unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance'; it is evidence that his highly probable and free from serious and substantial doubt." *Metro Moving & Storage Co v. Gussert, supra*, 914 P.2d at 414 (citing CJI-Civ. 3d 3:2 (1988); *DiLeo v. Koltnow*, 200 Colo. 119, 613 P.2d 318 (1980). A party meets this burden only by demonstrating that the evidence contradicting the DIME's MMI is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002) [citing *DiLeo v. Koltnow, supra*].

The enhanced burden of proof imposed by § 8-42-108(b)(III), C.R.S., reflects an underlying assumption that the DIME, having been selected by an independent and unbiased tribunal, will provide a reliable medical opinion. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998). The heightened burden of proof is evidence of the Colorado Legislature's intent to make these opinions to overcome. Since the DIME physician is required to identify and evaluate all losses resulting from the industrial injury, as part of the DIME's assessment process, the DIME physician's opinion regarding causation of those losses is also subject to the same enhanced burden of proof. *Id.* Furthermore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

For the reasons set forth below, the ALJ concluded it was highly probable Dr. Sharma's conclusions were erroneous concerning Claimant's thoracic spine.
In concluding that it was highly probable Dr. Sharma's opinions were incorrect, the ALJ first considered whether Dr. Sharma fully considered whether Claimant's thoracic spine sustained a permanent impairment. As found, Dr. Sharma did not examine Claimant's thoracic spine. (Finding of Fact 26). Despite a records summary that that was eleven (11) pages in length and contained numerous references to Claimant's treatment to this area of her body, Dr. Sharma summarily concluded only a cervical spine rating was warranted. Dr. Sharma provided no further explanation beyond this despite noting Claimant had radiating pain in this area at the time of his examination. The lack of analysis contained within Dr. Sharma's report led the ALJ to conclude his conclusions were not supported by the medical evidence.

Second, as determined in Findings of Fact 30-31, the AMA Guides (particularly the introductory section to chapter 2) provide a framework for resolving discrepancies between evaluating physicians. In this case, there was a divergence between the findings made by Dr. Sharma, as opposed to the ones made by Dr. Rook. Dr. Sharma noted Claimant's thoracic spine was symptomatic, but opined her pain was myofacial in nature and decided not to rate this area of the body. On the other hand, after reviewing Claimant's clinical course, Dr. Rook based his rating on the treatment records, including the diagnoses made by the ATPs. The ALJ found Dr. Sharma's conclusions were erroneous based upon the clinical evidence of thoracic symptoms and the totality of medical evidence presented. Dr. Sharma did not provide a detailed analysis of all available medical evidence, as such, when he concluded Claimant had only a cervical spine impairment. Therefore, Claimant overcame Dr. Sharma's permanent medical impairment rating by clear and convincing evidence.

Claimant's Impairment Rating

Having decided that Dr. Sharma's opinion was overcome by clear and convincing evidence, the inquiry turns to what, if any, permanent medical impairment Claimant sustained as a result of her industrial injury. The analysis to be used in the case at bench is found in other cases in which a part of the DIME physician's rating was overcome by clear and convincing evidence. See *Deleon v. Whole Foods Market, Inc.,* W.C. No. 4-600-477 (ICAO, November 16, 2006); *Ortiz v. Service Experts,* W.C. No. 4-657-974 (ICAO, January 22, 2009). *Deleon* addressed the proper evidentiary standard for determining a Claimant's impairment rating after an ALJ found that a portion of the DIME physician's impairment rating was overcome by clear and convincing evidence.

In the *Deleon* case, the ALJ determined Respondents overcame by clear and convincing evidence a DIME physician's finding that Claimant sustained 5 percent impairment for lost range of motion in the lumbar spine. However, the ALJ also found that Respondents failed to overcome by clear and convincing evidence the DIME physician's finding that Claimant sustained 5 percent impairment for a specific disorder of the lumbar spine. Consequently the ALJ upheld the specific disorder portion of the rating. The ICAO ruled that once an ALJ determines "the DIME's rating has been overcome in any respect" the ALJ is "free to calculate the Claimant's impairment rating based upon the preponderance of the evidence" standard. See also *Laclay v. Academy Insulation,* W.C. No. 4-693-581 (ICAO June 4, 2009).

First, Claimant showed it more probably true than not that her injury proximately caused a specific disorder of the thoracic spine under Table 53 of the AMA Guides. There were objective findings made by her treating physicians. Objective evidence of a thoracic injury (including the adjacent areas) and therefore a potential impairment was found in the following medical records admitted at hearing:

- Concentra (12/31/14-8/12/15): PA-C/NP and PT records consistently documented symptoms and diagnosis of a trapezius strain.

- Dr. Larimore (3/25/15-8/12/15): Trapezius and paraspinal symptoms noted.

- Absolute/Dr. Polvi (8/3/15-8/20/15): Symptoms in the upper back, including the thoracic spine and trapezius were noted. Treatment provided to those areas.

- Dr. Hattem (9/3/15): Upper back pain noted.

Second, Claimant proved Dr. Sharma was most probably incorrect in not assigning a permanent medical impairment to her thoracic spine in that he did not really address the symptoms and treatment documented in the medical records. As found, the *AMA Guides* require the DIME physician to correlate the available clinical evident with the findings made during the evaluation. It was the omission of this analysis in his opinion which led the ALJ to conclude Dr. Sharma was more probably wrong in his impairment rating.

Finally, Claimant did not argue Dr. Sharma's rating to the cervical spine was incorrect and the ALJ notes no evidence was presented that those findings were incorrect. Respondents paid PPD benefits based on that rating and are entitled to a credit for those payments made.

Temporary Partial Disability Benefits

Claimant alleges she was entitled to receive TPD benefits from December 31, 2014 through September 2, 2015, the date on which she reached MMI. Claimant contends her work injury caused a wage loss, as evidenced by the reduction in her overall earnings. Claimant attributed the wage loss to time spent attending doctor appointments when she could not assist customers, which caused the reduction in her income (specifically commissions), about which she testified at hearing.

Respondents deny they are liable for TPD benefits because Claimant had a full duty release and continued to work even while receiving treatment. Respondents also point to the fact that no ATP issued work restrictions during this time.

The claim for TPD benefits is governed by § 8–42–106, C.R.S.[5], which provides in pertinent part:

> "(1) In the case of temporary partial disability, the employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability..."
>
> (2) Temporary partial disability payments shall continue until the first occurrence of either one of the following:
>
> (a) The employee reaches maximum medical improvement; or
>
> (b) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing and the employee fails to begin such employment.

As a starting point, it was undisputed Claimant returned to work the day after her injury and continued to work full-time for Employer. (Finding of Fact 5). As found, there was no evidence in the record that any treating physician issued work restrictions for Claimant though the date on which she was placed at MMI. (Finding of Fact 7). There was also no question that Claimant experienced a diminution in her wages, specifically her commissions, during the time she was actively treating for her injuries. The question presented by this case is whether Claimant is entitled to receive TPD benefits where she received a full duty release from the ATP and continued to work without restrictions. The ALJ was persuaded Claimant is entitled to TPD benefits under these circumstances.

[5] The ALJ notes this section is similar to § 8–51-103, C.R.S. as it existed prior to 1990, however, that section provided the employee "shall receive sixty-six and two-thirds percent of the impairment of his earning capacity". Under that version of the Act, TPD benefits were paid for the loss of the ability to earn wages, not just the amount of lost wages. *Hendricks v. Industrial Claim Appeals Office,* 809 P.2d 1076, 1078 (Colo. App. 1991); *Vail Associates v. West,* 692 P.2d 1111, 1114 (Colo. 1984).

To decide this issue, ALJ considered the case of *Boddy v. Sprint*, W.C. 4-408-729 (ICAO 2000) cited by Claimant. In that case, Claimant was employed as a delivery driver, which required him to drive from Montrose to Gunnison each day. Claimant was returned to regular employment, however, his condition worsened. He then missed 13 deliveries in order to undergo further evaluation and treatment. At hearing, the ALJ found Claimant suffered a wage loss caused by his treatment for the industrial injury.

Affirming the decision of the ALJ, which awarded temporary disability benefits[6], the Industrial Claim Appeals Office noted the Act does not exclude an award of temporary disability benefits where the Claimant missed work to attend medical appointments. The Panel noted the ATP implicitly imposed "medical restrictions", which precluded Claimant from performing his regular work on the days of appointments. The award of temporary benefits was analyzed under § 8-42-103(1)(b), C.R.S., which required Claimant to prove the industrial injury caused a disability, that he left work as a result of the disability (for more than three regular work days) and this disability caused a wage loss. The Industrial Claim Appeals Office found there was substantial evidence in the record to support the finding that Claimant satisfied his burden of proof.

The ALJ concluded Claimant's reliance on *Boddy v. Sprint, supra,* was unavailing, first because that case involved a claim for TTD benefits under 8-42-103(1)(b). Second, *Boddy v. Sprint* is factually distinct from the case a bench. There was no evidence in the record in the instant case that Claimant's ATP took her off work when she had medical appointments. (In *Boddy v. Sprint*, the ATP took Claimant off work for those appointments.) Also, in *Boddy,* Claimant could not perform one of his job duties, namely driving because of his medical appointments. There was no evidence Claimant was unable to perform her job duties, although she testified she had assistance and also had to leave on occasion because of medical appointments.

Respondents' main contention was that Dr. Peterson's full duty release of Claimant to return to work is dispositive. The ALJ disagrees and notes Respondents cited no authority for the proposition that a return to regular duties precluded an award of temporary partial disability benefits. Indeed, the language of § 8–42–106, C.R.S. does not contain the proviso that TPD benefits terminate upon a release to return to regular employment. Moreover, there is a paucity of caselaw which addresses this factual scenario, namely Claimant's entitlement to TPD benefits where she received a full duty release, but still sustained a wage loss.

The ALJ has analyzed the request for TPD benefits in terms of whether the evidence supports the conclusion that Claimant's industrial injury was disabling and caused a wage loss, even after she returned to work with no restrictions. Indeed, the Court of Appeals case of *Champion Auto Body v. Industrial Claim Appeals Office,* 950 P.2d 671,673-674 (Colo. App. (Colo. App.1997) provides authority that such an award can be made.

[6] Although the decision does not specify TTD benefits were at issue, the statute cited refers specifically to § 8-42-103(1)(b), which governs TTD benefits.

On the one hand, the medical records are replete with references which noted Claimant was able to perform her regular duties. Although Claimant testified she had assistance from coworkers, there was no evidence before the Court which indicated she required any sort of job modifications to complete her duties. However, the ALJ credited Claimant's testimony she missed the opportunity to earn commissions when she went to medical appointments. This evidence led the ALJ to conclude she was not able to work at her pre-injury levels, which caused the wage loss. Also, the wage records admitted at hearing showed a significant reduction in Claimant's earnings, most notable a loss of commissions. This evidence was uncontroverted, as there was no evidence presented by Employer which refuted Claimant's contentions. The evidence established Claimant sustained a wage loss, despite having a full duty release to return to work. Further, the facts showed the wage loss was caused by Claimant's industrial injury. Accordingly, ALJ concludes Claimant is entitled to temporary partial disability benefits.

The ALJ next considered Claimant's contention that she is owed additional TPD benefits for the period of June 29, 2015 through September 3, 2015. The ALJ reviewed the ledger of TPD payments submitted on behalf of Insurer, as well as Claimant's wage records. Despite claiming that the payments made from May 31 through June 14, 2015 and June 14, 2015 through June 28, 2015 were not sufficient, Claimant provided no explanation to support this contention, nor was specific evidence cited to in the record. Thus, the ALJ is unable to conclude those TPD payments were incorrect. However, there was no evidence TPD was paid for the period from June 29, 2015 through September 3, 2015.

Therefore, the parties are ordered to confer regarding the amount owed for this period, in light of the Court's ruling that Claimant is entitled to recover TPD benefits. If the parties are unable to agree on amount, the case shall be set for hearing on the amount of temporary partial disability benefits owed.

Overpayment

Respondents contend they are entitled to recoup the TPD benefits which were paid to Claimant in error, as she was never taken off work. Respondents cited § 8-40-201(15.5), C.R.S., which provides:

> "'Overpayment' means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicative benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles."

Respondents addressed this request for repayment to the authority of the ALJ, who has authority pursuant to § 8-43-207(1)(q), C.R.S. to conduct hearings and require repayment of overpayments. Based upon the evidence presented at hearing, the ALJ was persuaded Claimant was entitled to receive TPD benefits for the loss of earnings occasioned by Claimant's industrial injury. Claimant proved she lost income from December 31, 2014 through September 3, 2015. Therefore, no overpayment exists by virtue of TPD payments made. Respondents shall receive credit for the payments made.

***Grover* Medical Benefits**

The need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award of *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended, nor a finding that Claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

Claimant had the burden of proving that she was entitled to maintenance medical benefits. As found, Dr. Hattem concluded Claimant could pursue cervical epidural injection as maintenance care, but did not require additional treatment. Claimant declined the injection. There was no evidence admitted that any physician specifically recommended maintenance medical treatment. In this regard, Dr. Sharma opined Claimant did not require further medical treatment. Dr. Rook did not recommend any further treatment. Although a DIME physician's or other IME physician's opinion on maintenance medical benefits is not controlling, the ALJ concluded, based upon the evidence in the record, Claimant does not require further medical treatment.

ORDER

It is therefore ordered that:

1. Respondents shall pay PPD benefits to Claimant based upon the 6% whole person impairment to the thoracic spine, as found by Dr. Rook.

2. Respondents shall pay TPD benefits to Claimant from December 31, 2014 through September 2, 2015.

3. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. Insurer is entitled to a credit in the amount of $15,058.20 for the payment of TPD benefits. Insurer is entitled to a credit for the PPD benefits previously paid.

5. Counsel for the parties shall confer regarding TPD benefits owed from June 29, 2015 through September 3, 2015 in an attempt to resolve the issue. If the

parties are unable to agree on amount, a hearing shall be set on the amount of temporary partial disability benefits owed.

6. Claimant's request for *Grover* medical benefits is denied.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 15, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-977-019-02

ISSUES

- Whether the Claimant proved by a preponderance of the evidence that he suffered a compensable injury arising out of and occurring within the course and scope of employment with the Employer on or around July 26, 2014.

- If Claimant suffered a compensable injury on or around July 26, 2014, what medical benefits are reasonable, necessary, and related to that compensable event?

- If Claimant suffered a compensable injury on or around July 26, 2014, what temporary disability benefits, is Claimant entitled to as a result of that event?

STIPULATION

The parties stipulate to an Average Weekly Wage of $1,409.00.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 52-year-old "Article 22" worker at UPS. As an Article 22 worker, Claimant performs split duties and works "pick-off" for the first four hours of his shift and drives at tug for irregular carts for the remainder of his shift. In his duties as a tug driver, Claimant arranges irregular carts to be filled with packages and then takes the full carts, arranges them onto a "mother cart," and drives them to their destination belts.

2. Claimant began a shift on July 25, 2014, which ended on Saturday morning on July 26, 2014. On or around the morning of July 26, 2014, Claimant was in a seated position on his tug when he turned/twisted his head and upper body to the right to look behind him. He felt an acute "tug" on the left side of his low back. Claimant described the onset of pain as mild. Claimant completed the rest of his shift and did not report an injury to anyone at UPS.

3. Claimant testified that he awoke on Saturday afternoon, July 26, 2014, and could not move due to painful spasms. Claimant testified that he could not get up or move forward. Claimant also told Dr. Lesnak during his November 23, 2015 IME that he began to experience left leg symptoms as well. Claimant did not report a work injury to UPS.

4. Claimant testified that his back condition did not improve the following day, Sunday, July 27, 2014.

5. Claimant attended a scheduled appointment at the University of Colorado Hospital for a non-related procedure to remove cysts from his scalp on Monday, July 28, 2014. During examination, Claimant reported that he had left-sided low back pain. Claimant denied radicular symptoms or leg weakness. Claimant reported that he had sciatica symptoms for the past 15 years but felt his pain acutely worsen while twisting at work. Claimant testified at hearing that he had not experienced symptoms involving his low back prior to the incident on July 26, 2014, including any soreness, pain, or problems.

6. Claimant did not work on Monday, July 28, 2014, or Tuesday July 29, 2014, as he was recovering from his cyst removal procedure.

7. On Wednesday, July 30, 2014, Claimant reported a work-related injury to his back to UPS. Claimant was referred to Dr. James Rafferty for treatment and presented on this same date. Claimant reported having experienced a "tweak" in the left side of his low back after twisting with the mild onset of pain. Dr. Rafferty noted that Claimant had experienced similar symptoms approximately 10 years prior, which resolved rapidly and without treatment. Claimant indicated symptoms were localized to his left low back and denied any radicular symptoms or weakness into the lower extremities. Dr. Rafferty diagnosed Claimant with a strain of the left hip (gluts) and stated that causation was undetermined because he did not know whether or not the tug placed Claimant at an increased risk of low back pain by turning. There were no work restrictions. At this time, Claimant weighed 219 pounds and stood 5' 5" in height.

8. Claimant was subsequently given light duty by UPS after his visit to Dr. Rafferty. Claimant took two weeks off of work and returned to see Dr. Rafferty on August 7, 2014. Claimant reported that he was "doing great" and was "now back to his usual state of health." Claimant reported that he had no back pain at this time and was ready to return to his usual duties at work. Dr. Rafferty placed Claimant at MMI and discharged him from care with no permanent impairment, permanent restrictions, or need for additional treatment.

9. Claimant worked regular duty and sought no further treatment until December 22, 2014, when he returned to Stapleton Clinic with complaints of renewed low back pain. Claimant saw Dr. Ryan Otten and reported that he had intermittent symptoms in the *right* buttock area after July 2014. Claimant reported that he had originally injured his back while twisting but that his pain had become worse after being on his feet all day. Claimant denied radicular symptoms. Dr. Otten left causation as undetermined and

gave Claimant work restrictions limiting walking and standing duties to 50% of the shift.

10. On January 5, 2015, Claimant returned to see Dr. Otten and again denied radicular symptoms into the legs.

11. On January 26, 2015, Claimant saw Dr. Ricky Lee Artist and complained of low back and *right* hip pain. Dr. Artist noted that Claimant experienced persistent pain at work, increased pain at home in the evenings, pain getting in and out of bed, and marked difficulty getting in and out of his car. Dr. Artist left causation to be determined.

12. On February 2, 2015, Claimant saw Dr. Rick Zimmerman. Claimant reported at "one-year history of slowly progressive low back pain that started insidiously." Claimant reported that, in July 2014, his symptoms became "too much" and that he had attempted to control his symptoms by taking two weeks off from work. Claimant stated that, after several weeks, his symptoms improved but did not totally resolve. Claimant stated that, approximately one month prior, he experienced a "flare-up" with no specific injury. Claimant denied leg pain or paresthesia in the lower extremities. Upon physical examination, Claimant was able to walk without difficulty but Dr. Zimmerman did note that there was a waddling-type gait pattern due to a combination of hip mechanics and general deconditioning. Dr. Zimmerman recommended that Claimant undergo physical therapy and also recommended weight loss to reduce strain on the low back. Dr. Zimmerman referred Claimant for an MRI study.

13. On February 12, 2015, Claimant saw Dr. Brian Williams. Claimant denied radicular symptoms or weakness into the bilateral lower extremities. Claimant was working modified duty at this time.

14. On February 16, 2015, Claimant underwent a lumbar spine MRI. The "Impression" section of the MRI study showed: edema bilaterally at the L4 and L5 pedicles with suspected trabecular stress fractures in the pedicles at these levels; advanced facet arthropathy at L4-L5 with degenerative anterolisthesis; and a broad L5-S1 left paracentral to lateral disc protrusion contributing to moderate left foraminal stenosis.

15. On February 18, 2015, Claimant subsequently began treating with Dr. Tanya Kern at Stapleton clinic.

16. On February 25, 2015, Claimant returned to see Dr. Zimmerman. Dr. Zimmerman noted that Claimant had been off work since February 3, 2015. Claimant complained of some intermittent paresthesia in the left lower extremity, including the lateral knee and foot region. Dr. Zimmerman noted that Claimant went from seated to standing without

hesitation and normal biomechanics. Dr. Zimmerman noted that Claimant ambulated with an upright posture and normal gait pattern. Dr. Zimmerman noted that Claimant could bend forward with only minimal low back discomfort, but that extension recreates axial back pain with stiff rotation and localized pain over the facet joints bilaterally. Dr. Zimmerman reviewed the MRI study and indicated that pain was extension-based and likely facet-mediated. Dr. Zimmerman discussed the findings with the radiologist and indicated that the findings were consistent with a stress reaction type phenomenon. Dr. Zimmerman recommended steroid injections at L4-5 and L5-S1 for diagnostic and therapeutic purposes.

17. On March 11, 2015, Dr. Kern noted that Claimant had taken all of February off of work for soreness. Dr. Kern noted that "sometimes [Claimant] sits and cries because he feels so bad" and that he had difficulties walking. Dr. Kern gave Claimant work restrictions limiting lifting to no more than 5 pounds occasionally, walking/standing no more than 15 minutes per hour, and avoiding repetitive bending and twisting at the waist.

18. On March 18, 2015, Dr. Zimmerman performed bilateral facet steroid injections at L4-5 and L5-S1. Claimant had a diagnostic response and demonstrated improvement with extension of the lumbar spine. Claimant ambulated without difficulty and could touch his toes without hesitation.

19. On April 8, 2015, Insurer's Nurse Case Manager sent a request to Dr. Kern asking whether the finding of trabecular stress fractures on the MRI was related to the mechanism of twisting described by Claimant in July 2014. Dr. Kern issued an undated reply and opined that the stress fractures were not caused by the injury described on July 26, 2014. Dr. Kern stated that such fractures of the lumbar spine are usually caused by repeated extension of the lumbar spine, and that the Claimant could have developed a stress fracture due to repetitive strain over time if his job involved repetitive extension of the lumbar spine.

20. On April 20, 2015, Claimant complained of additional back pain during an appointment with Dr. Zimmerman. Claimant had difficulty ambulating and showed hesitation going from a seated position to standing. Claimant indicated pain with stiffness with extension maneuvers. Dr. Zimmerman recommended medial branch blocks at L4-5 and L5-S1 for further diagnostic purposes. Dr. Zimmerman performed the injections on May 6, 2015. Claimant demonstrated a diagnostic response with pain free extension. Claimant reported complete relief of back pain during his last visit with Dr. Zimmerman, on May 15, 2015. Dr. Zimmerman noted significant improvement with mobility and pain free range of motion with lumbar extension. Dr. Zimmerman noted that Claimant had no evidence of lumbar radicular symptoms. Dr. Zimmerman indicated that further

interventional treatment was not necessary and recommended additional conservative therapy, which could be considered as part of maintenance.

21. Claimant continued pool therapy and saw Dr. Kern for regular follow-up visits. Claimant's complaints of pain continued to fluctuate. Claimant reported continued right hip pain. Claimant also reported ongoing left low back and leg pain.

22. On June 14, 2015, Claimant returned for a trial of full duty but did not believe he could return to his former duties. On June 29, 2015, Claimant reported pain of over 10/10 to Dr. Kern with painful lumbar extension. On or around July 27, 2015, UPS offered Claimant a lighter duty job and Claimant requested to be released to full duty. Claimant's weight fluctuated between 220 and 230 pounds during this time.

23. On August 17, 2015, Dr. Kern placed Claimant at MMI. Dr. Kern gave Claimant no permanent impairment, no work restrictions, and recommended no additional medical care. At the time of MMI Claimant's diagnoses were listed as stress fracture with routine healing and lumbosacral facet arthropathy. The vast majority of medical records admitted into evidence reference July 26, 2014 as the date of injury.

24. On November 3, 2015, Claimant saw Dr. Lawrence Lesnak for an IME commissioned by Respondents. Claimant told Dr. Lesnak that he had injured himself on July 14, 2014 (later clarified to be July 26, 2014) while he was in a seated position driving his tug and turned to the right to look behind him. Claimant stated that the following morning, he awoke with significant left low back pain symptoms and subsequently developed left leg symptoms. Claimant specifically denied any history of low back injuries or similar symptoms prior to the July 2014 alleged work injury. Claimant did not report any injury from pushing a cart on or around December 22, 2014.

25. During physical evaluation, Dr. Lesnak noted that Claimant showed no signs of antalgic gait and could independently heel and toe walk without difficulty. Claimant was negative for Patrick's maneuver.

26. Dr. Lesnak opined that the described mechanism of twisting could possibly cause a temporary strain, but that the findings on the MRI were unrelated to this mechanism. Dr. Lesnak noted that Claimant had initially reported left-sided low back symptoms in July 2014 but that his complaints after December 2014 involved right-sided buttock symptoms. Dr. Lesnak noted that there was no specific inciting event that caused these symptoms and that Claimant had preexisting chronic, intermittent low back and buttock symptoms prior to July 2014. Dr. Lesnak opined that any and all treatment after Claimant was found to be at MMI by Dr. Rafferty, on

August 7, 2014, would be completely unrelated to the alleged occupational injury which occurred in July 2014.

27. On December 2, 2015, Claimant saw Dr. Caroline Gellrick for an IME commissioned by Claimant. Claimant reported a 15-year history of sciatica with pain down his left leg. Claimant described work duties involving lifting, pushing, and pulling. Claimant told Dr. Gellrick that at times, while pushing and pulling carts, his sciatic pain down his left leg would become worse. Claimant told Dr. Gellrick that on or around December 21, 2014, "his back pain suddenly worsened and also pain down the leg." Dr. Gellrick states that, by Claimant's history, he had an injury on approximately "December 21, 2014 when he got up that morning the back pain was severe with pain radiating down the leg." She opined that "the injury itself probably occurred December 20, 2014" as an aggravation of a preexisting condition. Claimant did not describe any specific inciting event. Dr. Gellrick reviewed Claimant's job for extension-type injuries and Claimant stated that he did not recall hyperextension problems on the job, stating that his job involved bending, pushing, and pulling on carts.

28. Dr. Gellrick performed a physical examination and noted "definite weakness on the left." Dr. Gellrick noted that Claimant exhibited pain with a heel and toe walk maneuver. Dr. Gellrick indicated that Claimant tested positive for Patrick's maneuver, bilaterally, with the left worse than the right.

29. Dr. Gellrick opined that "It is clear the patient has two separate work related events that caused flare of symptoms in the low back." RHE I at 31. Dr. Gellrick did not address the mechanism of twisting or turning in regard to analysis of causation of the alleged July 26, 2014 injury. Dr. Gellrick states: "[Claimant's] sciatica that he describes of 15 years at the Family Medicine Clinic at the University of Colorado in July of 2014 he feels is due to repetitive use with lifting, pushing and pulling on his job." Dr. Gellrick opined that that Claimant was not at MMI for his alleged December 2014 work injury, without addressing medical causation. Dr. Gellrick opined that Claimant should have further diagnostic studies of the lower extremity based upon the weakness demonstrated upon evaluation.

30. Claimant testified at hearing that he did a full body turn while on his tug and "felt a tug on my left side" of the low back. Claimant explicitly denied having experienced symptoms involving his low back prior to this time. Claimant subsequently changed his testimony and stated that he had experienced prior low back pain, but that this had not prevented him from work. Claimant thereafter testified that he did not have any low back or leg pain prior to the alleged July 26, 2014 work injury. Claimant testified that he did not experience the onset of pain in July 2014 while lifting or

bending. Claimant testified that he did not have any leg pain at the time he reported back pain to the University of Colorado Hospital, on July 28, 2014, and at the time he was discharged from care by Dr. Rafferty, on August 7, 2014. Claimant testified that his pain had become much more severe after the alleged July 26, 2014 incident.

31. Claimant testified that he subsequently injured himself pushing a cart on December 22, 2014. Claimant testified that he had denied having suffered any injuries subsequent to the alleged July 26, 2014 incident in an interrogatory response sent to Respondents in November 2015. Claimant testified that he experienced the immediate onset of pain pursuant to this alleged event. Claimant testified that his job does not involve any activities requiring bending backwards.

32. Dr. Lesnak testified at hearing as Respondents' expert. Dr. Lesnak testified that twisting could possibly cause a sprain/strain. Dr. Lesnak testified that the mere act of twisting would not be specifically related to any work activities and that he agreed with Dr. Rafferty that causation was therefore undetermined in relationship to work duties. Dr. Lesnak testified that there was no medical evidence to suggest that Claimant would be at any increased risk of developing a strain/sprain by sitting in a tug and twisting. Dr. Lesnak testified that this type of injury, by the mechanism described by Claimant, could have occurred while sitting in a car, sitting at home, or sitting on the couch. Dr. Lesnak testified that none of the work activities described by Dr. Gellrick as the potential cause of the alleged July 26, 2014 work injury, including lifting, pushing and pulling, were related by Claimant to any of his providers as having precipitated his back pain on that date. Dr. Lesnak testified that, based upon the totality of the medical evidence and testimony, it was his medical opinion that the alleged strain from twisting was not work-related.

33. Dr. Lesnak testified that Claimant's testimony that he had no back pain or prior leg symptoms and his report to Dr. Lesnak upon evaluation contradicted the medical records which indicated a history of similar symptoms. Dr. Lesnak testified that sciatica commonly refers to back pain, buttock pain, and leg symptoms, including low back pain. Dr. Lesnak testified that Claimant's symptoms on or around July 25, 2014 would be consistent with a patient who has a history of episodic sciatica and back pain. Dr. Lesnak testified that Claimant's characterization of his pain having become "much more severe" after twisting in July 2014 was not consistent with the medical records at the time of that alleged incident, as these symptoms resolved within a week. Dr. Lesnak testified that, based upon Claimant's weight, his age, and the degenerative findings on the MRI study, he would be expected to have non-related back pain.

34. Dr. Lesnak testified that Claimant did not report any second work-related event to him during his IME evaluation in November 2015. Dr. Lesnak testified that there was no lifting, twisting, pushing or pulling incident reported in connection with an injury or aggravation sustained on or around December 22, 2014, and that Claimant had simply reported experiencing back pain from standing too much at work. Dr. Lesnak noted that Claimant's report of left-sided low back pain pursuant to the alleged July 26, 2014 incident was inconsistent with reports of right-sided low back pain subsequent to December 2014. Dr. Lesnak also testified that Claimant's complaints of leg pain were not consistent in the medical records.

35. Dr. Lesnak testified that the findings on the MRI, including suspected stress fractures of the pedicles at L4-5 and L5-S1, were not causally related to the alleged July 26, 2014 twisting event. Dr. Lesnak testified that extension, described by Dr. Kern as a potential cause of the MRI findings, involves backward bending at the waist. Dr. Lesnak testified that there would need to be a significant extension injury to cause stress fractures. Dr. Lesnak testified that twisting, lifting, pushing, and pulling do not and should not involve extension. Dr. Lesnak testified that none of the work activities that Claimant described to his providers involved repetitive extension and that there was no evidence of an extension-type injury at work. Dr. Lesnak testified that Claimant's weight at the time of the alleged injury would have classified him as overweight and that the increased gravitational forces upon the spine could hasten degenerative changes.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

In determining whether a claimant has met his burden of proof, the ALJ may resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. *Bodensleck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Youngs v. Indus. Claim Appeals Office*, 297 P.3d 964 (Colo. App. 2012). The same principles for determining credibility of lay witnesses apply to expert witnesses as well. *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness, probability or improbability, of the testimony and actions, the motives of the witness; whether the testimony has been contradicted; and bias, prejudice and interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936), *overruled in part*, *Lockwood v. Travelers Ins. Co.*, 498 P.2d 947 (Colo. 1972). The ALJ should consider an expert witness' special knowledge, training, experience, or research, and has broad discretion to determine the weight of evidence on this basis. *See Young v. Burke*, 338 P.2d 284 (Colo. 1959); *see also* Section 8-43-210, C.R.S.; *One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995).

The ALJ determines that Claimant's testimony is not credible. Claimant's testimony is not credible in regard to documented medical evidence in the record of a longstanding history of preexisting back pain and symptoms similar to those reported as part of his alleged July 26, 2014 work injury. Claimant's testimony is not consistent with his own reports to his providers and to the parties' experts regarding the nature of his symptoms, as he reported to Dr. Lesnak that he had leg pain after the alleged July 26, 2014 incident when this was denied in the medical records at that time. Claimant also reported having the onset of leg symptoms to Dr. Gellrick after his alleged December 2014 incident, which was not consistent with the medical records at that time. Claimant's testimony regarding the cause of the reoccurrence of his back pain in December 2014 is not credible, as he claims that he sustained an injury from pushing a cart and felt immediate pain when this mechanism is absent in the entirety of the medical records. Claimant also told Dr. Zimmerman that his pain reoccurred with no specific onset or mechanism of injury, which was contrary to his testimony. Likewise, while Claimant denied having prior back pain or leg pain on multiple occasions during testimony, and to Dr. Lesnak at his IME evaluation, he reported to Dr. Zimmerman in February 2015 a one-year history of similar symptoms which began insidiously and became progressively worse.

The ALJ finds that the opinion of Dr. Gellrick is not credible or persuasive. Dr. Gellrick surmises two separate work-related injuries, in July 2014 and in December 2014. This is contrary to the totality of the medical records, which indicate only a single alleged injurious event occurred at work on or around July 26, 2014. Dr. Gellrick does not address the causal mechanism of twisting in relation to this event and instead posits alternative mechanisms which were not described in the medical records and explicitly denied as a mechanism by Claimant at hearing. Dr. Gellrick likewise does not record any causal mechanism for the alleged December 2014 injury, though Claimant clearly reported at hearing that he injured himself pushing a cart at that time. Dr. Gellrick does not cite or provide supporting documentation in the record to serve as the basis for her opinion. Moreover, Dr. Gellrick explicitly notes that Claimant's job does not involve hyperextension, which Dr. Kern indicated may be a sufficient causal mechanism for the findings on the MRI and which Dr. Lesnak testified may be sufficient to cause stress fractures. Dr. Gellrick's findings upon examination were also markedly different to those of Dr. Lesnak, who had seen Claimant just one month prior to her IME. Dr. Gellrick's opinion regarding causation was largely based upon the report that Claimant, himself, attributed his symptoms to his work duties.

The ALJ finds that the testimony and opinions of Dr. Lesnak are credible and persuasive. The opinions of Dr. Lesnak are most consistent with the opinions of Claimant's providers in the medical records regarding the history of the alleged injury and causation. Dr. Lesnak's opinion regarding of causation of the alleged July 26, 2014 injury is consistent with that of Drs. Rafferty, Dr. Otten, and Dr. Artist. Dr. Lesnak's opinion regarding causation and the relatedness of the findings on the MRI is consistent with that of Dr. Kern.

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). Substantial evidence is that "quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. *See Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). An ALJ's determination of factual findings must be upheld if supported by substantial evidence and plausible inferences of the record. *Eller v. Indus. Claim Appeals Office*, 224 P.3d. 397, 399-400 (Colo. App. 2009).

The ALJ finds that Claimant's testimony and assertion of a work-related injury is not supported by substantial evidence in the record.

A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990). If there is a direct causal relationship between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). There must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show merely that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Simply because a claimant experiences symptoms after performing a job function does not necessarily create a causal connection to the work function. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). ICAO has upheld denial of compensability where the mechanism asserted was the mere act of turning and experiencing pain. *See*

Willis v. Craig Hospital, W.C. No. 4-627-742 (February 13, 2006).

Notwithstanding, if the claimant's injury is precipitated by a preexisting nonindustrial condition, the injury is not compensable unless a special hazard of the employment contributes to the accident or the extent of the injuries sustained. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992). Under the "special hazard" rule, a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by the concurrence of a preexisting weakness and a hazard of employment. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Gates Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo. App. 1985). In such cases, the existence of a special hazard, which elevates the probability of an injury serves to establish the required causal relationship between the employment and the injury. *Ramsdell v. Horn, supra*. A condition is not a special hazard of employment if it is ubiquitous in the sense that it is found generally outside of the employment. *Gates Rubber Co. v. Industrial Commission, supra*.

Notwithstanding Claimant's testimony to the contrary, the medical records establish that Claimant has a significant preexisting history of chronic, intermittent low back pain and sciatica. Claimant alleges that he injured his left low back while sitting on his tug and twisting to look behind him. Claimant was not driving his tug, not lifting, not bending, and not pushing or pulling anything. Dr. Rafferty indicated that he could not state that Claimant had a work-related injury because he did not know whether merely sitting and turning on a tug placed Claimant at increased risk of low back pain. Dr. Lesnak testified that, there was no medical evidence to suggest that a person is at increased risk of developing any strain/sprain injury by sitting in a tug and twisting. Dr. Lesnak testified that the act of sitting and twisting is one which is commonly encountered in everyday situations outside of work, including in one's car, at one's home, and sitting on the couch. Dr. Gellrick did not render any specific opinion concerning the causal relationship between Claimant's asserted mechanism of twisting, his job duties, and his injury. Rather, Dr. Gellrick indicated that Claimant likely developed an injury based upon job duties not reported to be the cause in the medical records or in testimony at hearing. Based upon the testimony, the medical records, and the preponderance of the medical opinion, Claimant's injury did not arise out of his employment duties.

Respondents are liable only for those medical benefits which are reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The record must distinctly reflect the medical necessity of any medical treatment needed to cure and relieve an injured employee from the effects of the industrial injury and any ancillary service, care, or treatment as designed to cure and relieve the effects of such industrial injury. *Public Service Co. of Colorado v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 584 (Colo. App. 1999). The question of whether medical treatment is reasonable and necessary is one of fact for determination by an ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Treatment for a work injury must not only be reasonable and necessary but must also be causally related to that injury. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993). Respondents are permitted to challenge causation and relatedness of the need for any treatment, despite having admitted liability for a claim. *Hanna v. Print Expediters, Inc*. 77 P.3d 863 (Colo. App. 2003). In a dispute over medical benefits that arises after filing an admission of liability, respondents may assert, based upon subsequent medical reports, that a workers' compensation claimant did not establish a threshold requirement of direct causal relationship between the on-the-job injury and need for medical treatment. *Snyder v. Industrial Claim Appeals Office of the State of Colo., supra*. Claimant bears the burden to prove a causal connection exists between a particular treatment and the industrial injury. *Id*.; *see also Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). Causation is a question of fact for resolution by the ALJ. *F.R. Orr Construction v. Rint*, 717 P.2d 965 (Colo. App. 1985).

Claimant has failed to establish a causal relationship between his work duties and his alleged injury on July 26, 2014 and no medical treatment pursuant to that date of injury is reasonable, necessary, or related to an injury which arose out of and occurred within the course and scope of his employment.

While Claimant has recently filed a separate claim for a second injury which he alleges was caused by pushing a cart on or around December 22, 2014, issues concerning that claim are not before this ALJ for resolution.

Because the ALJ has found and concluded that Claimant's claim is not compensable, Respondents are not liable for temporary total disability benefits.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to meet his burden of proof by a preponderance of the evidence that he suffered an acute aggravation of a preexisting condition arising out of and occurring within the course and scope of his employment on or around July 26, 2014. Claimant's claim for compensation is denied and dismissed.

2. 2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 15, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The sole issue to be determined at hearing was:

1. Whether the Claimant has proven that his request for a spinal cord stimulator trial is reasonable, necessary and related to his work injury of June 8, 2013.

FINDINGS OF FACT

1. The Claimant is 25-year-old male who was hired by Employer in March 2013 to repair and maintain pools and spas.

2. On June 8, 2013, the Claimant was hanging over a pool while unscrewing and opening steel jet covers. He was in the process of removing a metal plate from the jet with the use of a screw driver and when he lifted himself out of the pool, he experienced pain in his left mid back just to the left of his spine.

3. The Respondents initially admitted for injuries including the thoracic and cervical spine, but contested injuries to the lumbar spine which included a herniated disc. Following a hearing on November 21, 2013, ALJ Felter determined that the weight of the medical evidence established that the Claimant's lumbar spine condition was causally related to the admitted injury of June 8, 2013. ALJ Felter ordered that, "Respondents shall pay the costs of medical care and treatment for the Claimant's thoracic and low back injuries of June 8, 2013, subject to the Division of Workers Compensation Medical Fee Schedule."

4. Although Claimant originally received medical care in Colorado, he moved to Connecticut on July 12, 2013 and transferred his care briefly to Concentra Medical Center where he was seen by Dr. Victor Cohen and Dr. Victor Wasilauskas. The Claimant's care was then again transferred to Dr. Bhavesh Patel at US MedGroup who took over as the Claimant's primary care provider in Connecticut. Dr. Patel ultimately referred Claimant to Dr. Karnasiewicz for surgical consideration and both have remained active in Claimant's diagnosis and care for his lumbar spine.

5. After the Claimant's condition did not improve with physical therapy and treatment by Dr. Patel, he returned again to Dr. Karnasiewicz on February 11, 2014 for re-evaluation. At this visit, Dr. Karnasiewicz reviewed the lumbar MRI scan noting it showed a herniated disc that he felt was abutting the left S1 nerve root and a concomitant annular tear. At that point in time, since the Claimant's condition had not improved in spite of considerable conservative care including over 40 sessions of

therapy, a microdiscectomy was recommended. Complications of the surgery were discussed, and the Claimant wished to proceed with surgery.

6. After having the request for microdiscectomy reviewed by multiple physicians in Colorado, the Insurer denied the procedure as not reasonable, necessary, nor related to Claimant's original work-related injury. The matter then proceeded to hearing on July 8, 2014. Following the second hearing on February 6, 2015, it was found that the L5-S1 microdiscectomy recommended by Dr. Karnasiewicz was reasonably necessary to cure and relieve the Claimant from the effects of his June 8, 2013 lumbar spine work injury.

7. On March 23, 2015, Dr. Karnasiewicz performed a microdiscectomy at L5-S1 with a decompression of the left S1 nerve root. At that time he found no evidence of neurological damage (Respondents' Exhibit C, p. 15).

8. Although initially the Claimant noted he felt 20% improved following the surgery, he continued to report numbness in his left leg without significant changes in symptoms postoperatively. The Claimant also continued using narcotic medications (Respondents' Exhibit C, p. 15). By April 23, 2015, the Claimant reported that he had no significant changes after his surgery. By May 1, 2015, Dr. Karnasiewicz indicated that the Claimant still had burning in his left leg with minimal progress. *Id.*

9. On June 19, 2015, the Claimant reported persistent pain to Dr. Barinder Mahal and an updated MRI of the lumbar spine showed epidural scar formation that Dr. Beery noted was causing impingement of the left S1 nerve root (Claimant's Exhibit 2, p. 13).

10. In July and August, Dr. Karnasiewicz, noted persistent radicular pain indicating the Claimant may now be a candidate for spinal cord stimulator. At that time he recommended a spinal cord stimulator trial and referred the Claimant to Ms. Sharon Diaz for psychological counseling (Claimant's Exhibit 4).

11. The Claimant has been under the care of Sharon Diaz, a licensed professional counselor, to help him with his anxiety and depression as a result of his injury. She performed a psychological assessment at the request of Dr. Karnasiewicz. On August 11, 2015, Ms. Diaz assessed whether the Claimant was a good candidate for a spinal cord stimulator from a psychological standpoint. Her assessment, which included self-administered Beck Anxiety Inventory and Pain Catastrophizing Scale, led Ms. Diaz to opine that the Claimant suffered from moderate depression and anxiety as result of his injury. She noted that the Claimant advised her that his expectations were that he was hoping for 50% improvement. Ms. Diaz expressed that in order for the Claimant to take an anti-depressant medication, he must be willing to stop the marijuana use and she recommended this for the depression and anxiety. In regard to the spinal cord stimulator trial, Ms. Diaz opined that "he is a good candidate as it may bring relief for his nerve pain" (Claimant's Exhibit 6).

12. On August 14, 2015, the Claimant was first seen by Dr. Todd Beery, on referral from Dr. Mahal, for a spinal cord stimulator evaluation. At that time, the Claimant's pain rating was 7/10. Dr. Beery recommended decreasing the Claimant's narcotic use. On August 20, 2015, Dr. Beery again discussed the need for the Claimant to decrease his opioid use. He also recommended a psychological evaluation to ensure that there were no contraindications for spinal cord stimulation. Because the Claimant had tested positive for marijuana, Dr. Beery advised he would no longer prescribe opioid medications for the Claimant and advised that the Claimant would have to see another provider for these prescriptions. The Claimant has not denied his marijuana use during the pendency of this claim and his treatment.

13. The Insurer received a request for spinal cord stimulation trial from Concentra Medical Centers and this was ultimately denied on September 3, 2015 after peer clinical review. Respondents also filed an Application for Hearing on September 10, 2015 seeking a determination of whether spinal cord stimulation was reasonable, necessary or related to Claimant's work injury.

14. On September 2, 2015, Dr. Floyd Ring, specialty in interventional pain management and anesthesiology, was asked to review the Claimant's medical history and render a preliminary opinion regarding the requested procedure. He concluded that at the time of his review there remained questions regarding the etiology of Claimant's pain complaints. He acknowledged that the MRI showed granulation tissues, but noted that this is not unexpected following a surgical intervention. He opined that the most recent physical examinations at the time of the request did not support evidence of significant neurological findings on physical examination to warrant the device. He recommended additional physical evaluation through IME and a comprehensive psychological/psychiatric evaluation pursuant to the medical treatment guidelines (Respondents' Exhibit B).

15. In a report dated October 6, 2015, Dr. Karnasiewicz noted that the Claimant had a radicular component to his pain. Dr. Karnasiewicz stated that the leg pain outweighed the back pain, which is an important consideration when recommending a spinal cord stimulator. He stated that the spinal cord stimulator is reasonable and necessary (Claimant's Exhibit 4, p. 19).

16. On November 3, 2015, Dr. Kathy Fine McCranie issued an IME report including a thorough medical record review and narrative of the history she obtained and her physical examination of the Claimant. Based on her evaluation, she opined that the request for the spinal cord stimulator trial was not clinically indicated. In support of this opinion, she noted that the Claimant has never had electrodiagnostic testing to clarify whether his pain was truly radicular. In further support, she opined that the Claimant did not have a demonstrated history of motivation and adherence to prescribed treatments. She also questioned his candidacy from a psychological standpoint, but noted that the Claimant was undergoing a psychiatric or psychological evaluation the following day. Rather than proceed with the recommended spinal cord stimulator trial, Dr. McCranie felt that the Claimant would benefit from a comprehensive

interdisciplinary pain management program to include tapering and discontinuation of opioids and marijuana (Respondents' Exhibit C).

17. The Claimant underwent a psychiatric evaluation with Dr. Robert Kleinman on November 4, 2015. Dr. Kleinman completed his psychiatric review and issued a written opinion on November 6, 2015 regarding psychiatric clearance for spinal cord stimulator trial. Dr. Kleinman opined that the Claimant has a diagnosis of psychological factors that are affecting his medical condition. Dr. Kleinman opines that the psychological factors seem related to emotional and physical dependence and these, in turn, require consideration of secondary gain. He further opines that the Claimant continues to have some evidence of ADHD with a rapid speech pattern which is slightly circumstantial. Dr. Kleinman notes that the Claimant continues to be unable to give an accurate assessment of how much the medications or the marijuana actually helps him. Though the Claimant told Dr. Kleinman that without it he cannot do anything and with it he can dress and bath himself and use the toilet, Dr. Kleinman noted it was difficult to get any further, more specific information about how the Claimant has done. The Claimant reports that without these drugs he can do nothing, but his functioning while on them is not significantly improved and he continues to complain of extensive pain. Dr. Kleinman opines that, with what he finds to be continued non-physiological pain reports, it would be difficult to establish the success of a spinal cord stimulator trial. Dr. Kleinman points out that if the Claimant is not an accurate historian, he is not likely to be able to give a good report of actual benefits from the trial. Dr. Kleinman feels that from a psychological perspective the Claimant is a poor candidate for spinal cord stimulation. Per Dr. Kleinman, the primary support for his opinion is that the Claimant has, at least in part, a somatoform disorder, there is evidence of drug dependence, the Claimant is over idealizing the benefits of the procedure and understating the risks, and the Claimant is prone to invalid responses. In respect to what Dr. Kleinman opines are nonphysiologic and expansive complaints, even if there is some objective pathology, and even if some treatment was reasonable and necessary, he cautions that serious thought needs to be given to how much is enough. In other words, in the process of leaving "no stone unturned," it is Dr. Kleinman's opinion that more harm than good can come in cases like the Claimant's, where the Claimant has not received much benefit despite extensive treatment and high dose opioid use combined with marijuana use.

18. On December 7, 2015, Dr. Michael Rauzzino, a neurosurgeon, reviewed the request for spinal cord stimulation along with conducting a thorough records review, noting that he previously rendered an opinion that surgical intervention would not be successful in relieving the Claimant's symptoms. The Claimant continued with a diffuse syndrome of pain for which no modality of treatment had been effective both before and after the surgery. Dr. Rauzzino noted that, at the time of his report, an EMG/NCV had not been conducted. However, he stated that even if there was a positive EMG, it would not change his position due to the nature of the Claimant's complaints. Dr. Rauzzino opined that it would be a disservice to the Claimant to proceed with a spinal cord stimulator implant which only changes his native anatomy more and exposes him to the risk of more complications. He opined that the risks of spinal cord stimulation are significant. Dr. Rauzzino cited studies which showed: device complications have been

reported to be 25% at 6 months, 32% at 12 months, and 45% at 24 months. In sum, Dr. Rauzzino opined that given the many questions of the actual etiology of Claimant's pain and the fact that his pain has not been significantly responsive to any form of treatment, it is not at all likely that the implanting of a spinal cord stimulator would help him in any way. Rather, he felt it has a much higher likelihood of making him worse (Respondents' Exhibit E).

19. On December 11, 2015, Dr. Beery responded to interrogatories from Claimant's counsel on December 11, 2015 stating:

> [The Claimant] was referred for evaluation for spinal cord stimulator trial after being recommended by his neurosurgeon and a physiatrist, regarding his persistent lumbar and left lower extremity pain after undergoing a left L5-S1 discectomy. Spinal cord stimulation can be beneficial in lumbar radicular pain refractory to surgical intervention. One of the contraindications to pursue the trial can be untreated and underlying psychiatric pathology. Mr. Papanicolaou has sought treatment with psychologist Dr. Sharon Diaz and was diagnosed with depression and anxiety. Despite these conditions he has reportedly been cleared from a psychological perspective to pursue spinal cord stimulation. Despite attempts to obtain documentation supporting this, medical records indicating clearance have not been obtained for my review. There are other concerns in pursuing and having a successful trial given his lack of any response to prior interventional treatments. Past interventional or surgical treatments have demonstrated no benefit or resulted in increased medication requirements. In addition other concerns include, the presence pain behaviors exhibited on physical exam and managing his expectations of the relief provided by spinal stimulation. Given these concerns, an EMG/NCS of the left lower extremity could be considered to evaluate for left lumbar radiculopathy to confirm his symptoms are radicular in nature. If an EMG/NCS confirms a left lumbar radiculopathy and he passes the psychological screening process, then pursuing spinal cord stimulation trial is medically reasonable.
> (Claimant's Exhibit 2)

20. On December 15, 2015, Dr. Mark Paz, performed an independent medical record review (and had previously performed an independent medical evaluation with examination) to address the request for spinal cord stimulation. He cited the Colorado Medical Treatment Guidelines, Rule 17, Exhibit 9, Chronic Pain Disorder, noting that "in order to justify operative interventions, clinical findings, clinical course, and diagnostic testing must all be consistent resulting in a reasonable likelihood of at least measurable and meaningful function and symptomatic improvement." Furthermore, Dr. Paz noted "it is imperative to rule out non-physiologic modifiers of pain presentation of non-operative conditions mimicking radiculopathy or instability prior to consideration of elective surgical intervention." Spinal cord stimulation "may be indicated in a subset of patients who have a clear neuropathic radicular pain." In addition, Dr. Paz opined that patients with severe psychiatric disorders and issues of secondary gain are not candidates for

the procedure. A comprehensive psychiatric or psychological evaluation, which includes standardized detailed personality inventory with validity scales such as MMPI-2, pain inventory with validity measures, clinical interview and complete review of the medical records should be completed before the spinal stimulator trial. Dr. Paz noted there should be no indication of falsifying information or invalid responses on testing, no primary risk factors including addiction, and a demonstrated history of motivation and adherence to prescribed treatment. Dr. Paz opined that prior physical examinations performed by himself, Dr. Rauzzino, and Dr. McCranie were consistent with nonorganic, non-physiologic responses. Moreover the documented physical examination findings by his providers in Connecticut and of Dr. McCranie were inconsistent with a dermatomal distribution. At the time of Dr. Paz' evaluation there had been no electrodiagnostic testing which would confirm a left lower extremity radiculopathy necessary to justify spinal cord stimulation (Respondents' Exhibit D).

21. The Claimant testified at the hearing on January 5, 2016 by telephone. The Claimant's date of birth is June 24, 1991. He is currently living in Connecticut. At the time of his injury he was living in Colorado, working for Employer. While he was working full time, he generally worked 10 hour shifts Monday through Saturday. He testified that he was very active in his free time. However, the Claimant testified that since his work injury he is in constant pain. He has a throbbing, constant, burning pain at his left low back and hip that goes down the back of his quad, down to his calf and down to his left heel. The Claimant testified that it feels as if it is all attached by a cord. He testified that everything he does now is done to take the edge off the pain. The Claimant testified that the pain is affecting him now just as much as it did prior to surgery. Right after the surgery, he felt about 20% better, but once his initial recovery period was over, it was back to the same. He testified that physical therapy and massage helps some because it keeps him more physical, but it is temporary. The Claimant relies on medications for pain relief, including a Percocet every 6 hours and marijuana use. The Claimant testified that he is willing to take the risks associated with a spinal cord stimulator because he does not want to continue taking narcotics at his current levels to escape the pain. On cross-examination, the Claimant responded to questions about his marijuana use and testified that he now uses it to control nausea issues and to help him sleep. He testified that he has a medical marijuana card in Connecticut that he received based on his condition.

22. Dr. Kathy McCranie testified at the hearing on January 5, 2016 as an expert witness in the areas of physical medicine and rehabilitation, chronic pain management and Level II accreditation matters for workers' compensation. Dr. McCranie saw the Claimant for an independent medical examination and she issued a report dated November 3, 2015. Dr. McCranie testified that she concluded that the Claimant is not an appropriate candidate for a trial spinal cord stimulator. She opined that a good candidate is one with clear neuropathy. She testified that the Claimant has very diffuse extremity neuropathy, which she described as similar to fibromyalgia type of pain. Dr. McCranie also testified that it is possible that the Claimant has opioid hyperalgesia which is when medication use causes a sensitization causing multiple places of pain or tenderness. Dr. McCranie testified that she does not believe a spinal

cord stimulator would help the Claimant's condition. She also testified regarding risks associated with stimulator implants including infections, pain in other areas, and a limited time period for the maximum benefit. With respect to whether or not a trial should be conducted, Dr. McCranie testified that patients have a tendency to magnify symptoms during a trial and physicians must rely on a patient's subjective complaints and subjective reports that an implant ins helping. Dr. McCranie also expressed concerns that all prior interventions have not resulted in benefit for the Claimant and his medication use has actually increased. On examination of the Claimant, Dr. McCranie noted 5/5 Waddell's signs present which she opines is significant for a large psychological component to the Claimant's pain presentation. Dr. McCranie testified that if the Claimant had a positive EMG, she would find him to be a better candidate for a trial spinal cord stimulator but still had some reservations. Dr. McCranie recommends tapering opioids and marijuana use and placing the Claimant in a comprehensive pain management program. After further discussion about the Claimant undergoing an EMG, the hearing was continued so that the Claimant could be scheduled to undergo an EMG.

23. On January 6, 2016, the day following the first day of hearing in this matter, Dr. Beery conducted an EMG/NCV evaluation and he noted that the Claimant had a normal study with no electrodiagnostic evidence of left lower extremity radiculopathy (Respondents' Exhibit N).

24. On January 11, 2016, the Claimant saw Dr. Beery who noted that, in spite of an essentially normal EMG, the Claimant continues to have debilitating and severe symptoms in his low back and left lower extremity. Dr. Beery noted the spinal cord stimulation trial that was recommended is still pending approval for authorization. He advised that another treatment option is consideration for a transforaminal approach of the left L5-S1 epidural steroid injection. Dr. Beery continued to recommend this treatment option on January 20, 2016 (Respondents' Exhibit N, pp. 99-106).

25. On January 20, 2016, Dr. McCranie provided a written Rule 16 evaluation discussing the EMG conducted by Dr. Beery and the January 11, 2016 recommendation for a left transforaminal L5-S1 epidural steroid injection. She opined that the Claimant has not met the Medical Treatment Guidelines for a repeat lumbar epidural steroid injection (Respondents' Exhibit N, p. 107).

26. On February 2, 2016, the Claimant saw Dr. Karnasiewicz who noted the Claimant continued to complain of radiating left leg pain. Dr. Karnasiewicz opined that, although the EMG and nerve conduction studies were negative, it remained his opinion that the Claimant has neuropathic symptoms and the best chance for the Claimant's improvement is a trial of a spinal cord stimulator. Dr. Karnasiewicz specifically opined that it has been his experience that, "an EMG is a poor predictive of radiculopathy, and is negative more often than not" (Claimant's Exhibit 8; Respondents' Exhibit P).

27. On February 9, 2016, Dr. McCranie provided a written opinion that, based on the EMG nerve conduction study that was within normal limits, there were no

objective findings of radiculopathy and a spinal cord stimulator was not indicated in this case (Respondents' Exhibit N, p. 110).

28. On March 4, 2016, the Claimant saw Dr. Phillip A. Mongelluzzo who, on examination, commented on "noticeable atrophy in his left quadriceps" and muscle wasting which, Dr. Mongelluzzo attributes to nerve involvement. Dr. Mongelluzzo noted that the Claimant is in need of a spinal cord stimulator (Claimant's Exhibit 7).

29. Subsequent to the Claimant undergoing an EMG, the hearing was continued on March 28, 2016 and Dr. Kathy McCranie continued with her testimony in this case as an expert witness. She noted that the Claimant's EMG came back negative for lumbar radiculopathy. Dr. McCranie testified that a negative finding for radiculopathy indicates that a spinal cord stimulator is not reasonable. Referencing Respondents' Exhibit O, Dr. McCranie also noted that the Claimant reported that he felt worse after an L5-S1 spinal block on December 17, 2013. She testified that if the Claimant's pain generator was at L5-S1, a positive response would be expected. In any event, Dr. McCranie testified that the EMG study is the "gold standard" for lumbar radiculopathy and a negative finding there is the best evidence that there is no radiculopathy because it is more objective that the nerve block response. At the second day of hearing, Dr. McCranie expressed the same concerns as she did before. Again, she recommended the Claimant be tapered off from his pain medications. Ultimately, Dr. McCranie opined that her prior opinion on the Claimant not being a candidate for a spinal cord stimulator was only strengthened because the EMG showed no radiculopathy. However, Dr. McCranie agreed that the Medical Treatment Guidelines do not require positive findings on an EMG or positive findings with an epidural steroid injection for a spinal cord stimulator trial. Nevertheless, Dr. McCranie expressed concerns with going forward with the procedure as the Claimant is in his early 20's and not functioning very well with a dependence on pain medications. She continued to opine that the complications in this case are likely to outweigh the benefit.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Reasonable, Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

In this case, Respondents initially admitted for injuries including the thoracic and cervical spine, but contested injury to the lumbar spine. Pursuant to a December 3, 2013 Order of ALJ Felter, the Claimant’s lumbar spine condition was determined to be causally related to the admitted injury on June 8, 2013. Later in this claim, the Respondents denied recommended surgical intervention and this matter proceeded to hearing. Pursuant to a February 6, 2015 Order of the undersigned ALJ, the proposed L5-S1 discectomy was found to be reasonably necessary to cure and relieve the Claimant from the effects of his June 8, 2013. On March 23, 2015, Dr. Karnasiewicz performed the microdiskectomy with a decompression of the left S1 nerve root. At that time, Dr. Karnasiewicz found no evidence of neurological damage. Ultimately, the surgery was not successful and the Claimant reports that he continues to experience persistent and severe pain in his left low back that radiates down his left leg all the way to his heel. Dr. Karnasiewicz, Dr. Mahal, Dr. Beery and Dr. Mongelluzzo now recommend that the Claimant undergo a trial of spinal cord stimulator to provide up to 50% relief of the Claimant's leg pain symptoms. On the other side, Dr. McCranie, Dr. Rauzzino, Dr. Ring, and Dr. Paz all strongly urge that the surgery be denied because they opine that the Claimant is not a good candidate for the procedure and they feel the risks substantially outweigh the likely benefits in this case.

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury in a compensable case, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. § 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

In considering all of the evidence presented in this case, including, but not limited to the poor results the Claimant has received from prior treatment authorized and/or ordered in this case, the Colorado Medical Treatment Guidelines would support a finding against the use of spinal cord stimulation for all of the reasons outlined by the numerous Respondents' medical experts who have provided opinions. It is unclear if the providers from Connecticut are aware of these guidelines or if they considered them in their analysis. Although the Colorado Medical Treatment Guidelines are not outcome determinative in a claim, they are an evidentiary tool, devised by medical experts who are familiar with the use of neurostimulation. The guidelines on neurostimulation are clear that this procedure should be limited to a subset of patients with a clear identifiable radiculopathy. Indeed, a neuropathic pain generator is the only target of the spinal cord stimulator. Moreover, because of a risk of complication, and the fact that (per the Guidelines) "several studies have shown that workers' compensation patients are less likely to gain significant relief than other patients" it is particularly important that a patient meet all of the indications before proceeding. The evidence in this case establishes that numerous providers have identified invalid responses on testing, psychological issues which are contraindicated, abnormal pain behaviors, and lack of motivation and adherence to prescribed treatment, a failure to identify an objective neurological abnormality, and an unrealistic expectation of the benefits that this procedure may offer. This is not a situation where this Claimant fails to meet one of the prerequisites or a single physician simply disagrees with the efficacy of spinal cord stimulation. Rather, this is a situation where multiple medical experts have expressed significant concerns with this interventional treatment at this time.

In addition to the opinions of the doctors, the ALJ finds persuasive the opinion of Dr. Robert Kleinman who performed a psychiatric evaluation November 4, 2015 and issued a written opinion on November 6, 2015 regarding psychiatric clearance for spinal cord stimulator trial. Dr. Kleinman opined that the Claimant has a diagnosis of psychological factors that are affecting his medical condition. Dr. Kleinman opines that the psychological factors seem related to emotional and physical dependence and these, in turn, require consideration of secondary gain. He further opines that the Claimant continues to have some evidence of ADHD with a rapid speech pattern which is slightly circumstantial. Dr. Kleinman notes that the Claimant continues to be unable to give an accurate assessment of how much the medications or the marijuana actually helps him. Dr. Kleinman also opines that, with what he finds to be continued non-physiological pain reports, it would be difficult to establish the success of a spinal cord stimulator trial. Dr. Kleinman points out that if the Claimant is not an accurate historian, he is not likely to be able to give a good report of actual benefits from the trial. Dr. Kleinman feels that from a psychological perspective the Claimant is a poor candidate for spinal cord stimulation. Per Dr. Kleinman, the primary support for his opinion is that the Claimant has, at least in part, a somatoform disorder, there is evidence of drug dependence, the Claimant is over idealizing the benefits of the procedure and understating the risks, and the Claimant is prone to invalid responses.

While the Claimant offered the opinion of Ms. Diaz who stated that the Claimant was a good candidate for the trial of spinal cord stimulator, Ms. Diaz based this opinion on her hope that a spinal cord stimulator may bring relief for the Claimant's nerve pain. Her written report did not address most of the indications and contraindications for the surgery set forth in the Medical Treatment Guidelines, although she did opinion that the Claimant's expectations were realistic regarding likely outcomes.

Based in part on Dr. Karnasiewicz prior opinion that Claimant's condition and situation was "straightforward" and that he was confident the microdiscectomy he proposed would address the Claimant's symptoms, the previous surgical intervention at L5-S1 was ordered. It is now clear that the surgery at L5-S1 was not successful. The fact that the Claimant received absolutely no relief from the previous surgery at the L5-S1 level now strongly suggests this is not the cause of the Claimant's symptoms. This is further bolstered by the fact that the EMG/NCS testing is negative. At this point, there is no persuasive, objective evidence that the Claimant has a true radiculopathy emanating from the L5-S1 level. Thus, it is more likely than not that spinal cord stimulator implantation at this level will also be unsuccessful in relieving the Claimant's symptoms.

The implantation of a spinal cord stimulator in this young Claimant is not a procedure without significant risk of complication. Multiple physicians and Dr. Kleinman have noted that the Claimant has failed to fully appreciate these risks or the fact that a spinal cord stimulator may not provide relief to his symptoms. Even Dr. Beery has noted that one of his concerns is managing the Claimant's expectations of the relief provided by spinal stimulation. However, more troubling for the Claimant is the fact that should he ultimately move forward with permanent implantation, his ability to undergo future MRIs is significantly limited. This is not a limitation that should be taken lightly considering that the Claimant has an ongoing cervical problem which is actively being treated and an ongoing lumbar problem which has not been fully defined.

The Claimant's reliance on summary statements from Dr. Karnasiewicz and Dr. Mongelluzzo as to the need for spinal cord stimulation is misplaced. First, Dr. Karnasiewicz referred the Claimant to Dr. Beery to address the reasonableness of a trial. Therefore, he should give deference to the statements made by Dr. Beery in his December 11, 2015, letter outlining the need for a positive EMG/NCS test. Although Dr. Karnasiewicz discredits the usefulness of EMG test, Dr. McCranie testified that this is the gold standard for neurological diagnosis. Considering that this is also recommended testing in the Colorado Medical Treatment Guidelines, her opinion carries additional weight. None of the objective neurological testing has supported Dr. Karnasiewicz' conclusions as of today. Moreover, the surgery he recommended previously, and felt confident would provide necessary relief of the Claimant's symptoms was a failure in that respect. Up to this point in the Claimant's treatment, the focus at the L5-S1 segment is not providing any permanent relief. To that extent, Dr. Rauzzino's opinions over the course of this claim have been more accurate and predictive than Dr. Karnasiewicz. As for Dr. Mongelluzzo, his treatment recommendations are currently out of line with the other medical providers in this case. While Respondents' medical experts have noted a significant problem with opioid use, marijuana use and the possible issue of dependence and addiction, he continues to increase the Claimant's dose of these medications. This is even in conflict with the recommendations of Dr. Beery who will no longer prescribe narcotic medications for the Claimant and had previously recommended tapering. Furthermore, this is outside of the recommendations of Claimant's own counselor, Sharon Diaz, who specifically noted that the Claimant has to be willing to stop marijuana use to address his psychological issues. In addition, Dr. Mongelluzzo seems unsure of the locations of the pain generator in Claimant's back as he has now recommended additional imaging diagnostics at this time. Per the Medical Treatment Guidelines and the credible and persuasive opinions of the Respondents' medical experts, proceeding with spinal cord stimulation while you are still searching for the problem is not likely to provide the Claimant with relief from his current symptoms.

Ultimately, based upon the foregoing, the Claimant has failed to prove by a preponderance of the evidence that the trial of spinal cord stimulation is reasonably necessary treatment to cure and relieve him of the effects of his June 8, 2013 admitted industrial injury.

ORDER

Based on the above factual findings and legal conclusions, it is therefore ORDERED that:

1. The Claimant has failed to prove by a preponderance of the evidence that the trial of spinal cord stimulation is reasonably necessary treatment to cure and relieve him of the effects of his June 8, 2013 admitted industrial injury. The Respondents' denial of this procedure is appropriate under the Act.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 17, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-965-833-03

ISSUES

The following issues were raised for consideration at hearing:

I. Whether Claimant overcame the opinions of the Division Independent Medical Examiner (DIME) by clear and convincing evidence;

II. Whether Claimant is entitled to reasonably necessary and related medical benefits, including, but not limited to evaluation and treatment directed at her thoracic spine;

III. Whether Claimant is entitled to a change of physician to Dr. Yamamoto;

IV. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary partial disability benefits(TPD); and

V. What is Claimant's average weekly wage.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered:

1. On February 3, 2014, Claimant sustained admitted injuries during the course and scope of her employment, when she slipped on ice and fell on her buttocks, also hitting her back on the running board of the truck as she fell. On that day, Julia Balderson, PA-C of Concentra noted that Claimant had lower back and mid back pain. Claimant was tender to palpation over the bony processes of the spine in the mid thoracic and the lumbar region. She was also tender to palpation over the paraspinal musculature on the back. Ms. Balderson reviewed x-rays and stated that she questioned a thoracic compression fracture. She ordered a CT scan to rule out further injury. Ms. Balderson assessed Claimant as having a back contusion and questionable compression fracture of thoracic vertebrae. Ms. Balderson stated, "In my professional opinion, with a reasonable degree of medical probability, I conclude that there is consistency to these elements and that the aforementioned diagnosis(es) is/are related to the alleged work-related injury."

2. On February 3, 2014, Dr. Bao Nguyen read Claimant's thoracic spine x-rays as showing no vertebral fracture, compression deformity or focal kyphosis. However, in an addendum report dated June 22, 2016, Dr. Nguyen reviewed the x-rays a second time and stated, "In retrospect, there is a shallow wedge deformity of the

superior endplate of a mid-thoracic vertebral body, possibly T8, visible only on the lateral view."

3. Both the medical staff and the physical therapists at Concentra consistently reported multiple complaints of pain, rigidity and tenderness to palpation in both the lumbar spine and the thoracic spine from the date of injury onward.

4. On March 7, 2014, Dr. Sarah Harvey released Claimant to modified duty with restrictions. On March 19, 2014 Nickolas Curcija, PA-C noted that Claimant was having more pain since she had been back to work. Claimant had pain in the lumbar spine with all range of motion, and was reduced in all directions. He provided work restrictions. During subsequent visits to P.A. Curcija and Dr. Don Aspegren, they noted that Claimant continued to report discomfort in the thoracic, lumbosacral and hip region.

5. On May 20, 2014, Joyce Ziomek, PT, noted that the mechanism of Claimant's injury included thoracic pain and Claimant was diagnosed with lumbar strain and strain of the thoracic region.

6. On May 28, 2014, Ms. Ziomek noted that Claimant's low thoracic and lumbar area felt worse. On July 18, 2014, P.A. Curcija noted that Claimant had tenderness in the thoracic spine.

7. On September 16, 2014, Dr. Ericson Tentori noted that Claimant had tenderness with palpation at the upper thoracic region and lower lumbar/lumbosacral region. Dr. Tentori assessed Claimant as having lumbar and sacral region contusions, myofascial pain/irritation involving the thoracic spine/shoulder girdles, and development of chronic back pain. Dr. Tentori recommended that Claimant be reevaluated by Dr. Kawasaki prior to consideration of case closure.

8. On October 9, 2014, Dr. Mark Winslow noted that Claimant had constant pain primarily central to the upper lumbar and mid-thoracic areas. During subsequent visits, Dr. Winslow documented objective findings of thoracic spine rotation to the right. He noted that Claimant was having increased mid-back pain.

9. On December 4, 2014, Dr. Kawasaki stated that Claimant was at maximum medical improvement. He determined that Claimant had 5% whole person impairment for specific disorders of the lumbar spine.

10. On January 6, 2015, Dr. Tentori noted that Claimant was frustrated with Dr. Kawasaki because a thoracic spine MRI was never obtained during the course of her claim. Dr. Tentori stated it was reasonable to obtain a thoracic spine MRI to ensure that Claimant did not sustain a compression fracture as a result of the original work injury, as an explanation for Claimant's ongoing thoracic spine regional pain.

11. On February 5, 2015, Dr. J. Raschbacher stated that it would be reasonable to obtain a thoracic MRI and see if it had any clear objective findings that

would mandate further care or evaluation or other change in her previously delineated MMI date.

12. On March 3, 2015, Dr. Tentori referred Claimant for a thoracic MRI to rule out disc pathology. Dr. Tentori stated that if the MRI revealed any significant pathology, then it would be potentially conceivable that Claimant's claim would not be at MMI and that Claimant may require additional treatment and/or provision of permanent physical impairment based on thoracic spine-related issues.

13. An MRI of Claimant's thoracic spine, taken on March 9, 2015, revealed subtle rightward disc displacement at T7-8, and a T8 remote compression fracture deformity, about 50%. There was also a tiny hemangioma associated with T8.

14. On March 19, 2015 Dr. Kawasaki noted that Claimant had a thoracic compression fracture at T8. Dr. Kawasaki stated, "Thoracic CT scan revealed the compression fracture seen at this point, and there may be evidence to help determine acuity. With the patient's mechanism of injury and initial evaluation suspecting thoracic fracture, this would be significant."

15. On April 15, 2015 Dr. Bennett Machanic DIME. He opined that Claimant reached maximum medical improvement on December 4, 2014. He noted that there was a recent discovery of a compression fracture of the thoracic spine; however, he stated that because the original films did not show fracture, this occurred subsequent to the on-the-job injury, and is not related. Therefore, Dr. Machanic determined that Claimant's work-related impairment involved only her lumbar spine. He assigned 5% whole person impairment for specific disorders of the lumbar spine, and found 9% impairment for loss of range of motion of the lumbar spine. The combined impairment was calculated as 14% whole person impairment.

16. On April 16, 2015 Dr. Kawasaki reported that there was a typographical error on his last note indicating acute change in the area of the thoracic fracture. Despite reneging on the statement that there was acute change in the area of the thoracic fracture, Dr. Kawasaki opined that the remote compression fracture at T8 is not related to this claim.

17. On April 19, 2015 Dr. Bennett Machanic stated, "assuming that the original plain x-rays were read accurately by a competent radiologist one must assume that the thoracic spine pathology has very little to do with the patient's original on-the-job injury of February 03, 2014." Dr. Machanic stated, "In essence, this leads me therefore to reject my original impairment rating. I would agree with Dr. Kawasaki that probably 5% of the whole person for specific disorder would be a reasonable approach, but the range of motion changes that I find would have to be related to a new issue or indeed a new injury and the presence of the T8 findings on the films done during early March suggest also a new injury subsequent to July of 2014."

18. On June 17, 2015 Dr. Edwin Healey reviewed Claimant's medical records, the thoracic spine films taken on February 3, 2014, at Claimant's request, and concluded that Claimant's diagnoses that are causally related, within a reasonable degree of medical probability, to the February 3, 2014, slip-and-fall on ice at work included: 1. Thoracic compression fracture at T8, approximately 50%, with ongoing chronic mid and lower thoracic spine pain and associated myofascial pain involving the thoracic paraspinals; 2. Lumbar sprain/strain aggravation of preexisting disc and spine disease with chronic low back pain; 3. Coccydynia and sacroiliac joint dysfunction secondary to fall on buttocks on February 3, 2014; and, 4. Right cervical myofascial pain with secondary headaches as a result of pain radiating from her thoracolumbar region. Dr. Healey reported that the thoracic spine x-rays clearly demonstrate a mild compression fracture at T8. He stated that he had Dr. Eduardo Seda, a radiologist, and Dr. Bao Nguyen, the radiologist who originally read the x-rays, review the thoracic spine films, and both radiologists concurred that there was evidence of a thoracic compression fracture on the February 3, 2014, films.

19. Dr. Healey credibly opined, within a reasonable degree of medical probability that Claimant is not at maximum medical improvement. He opined that she requires more aggressive maintenance therapy of her cervical, thoracic and lumbar myofascial pain and coccydynia and sacroiliac joint dysfunction. He noted that she will require ongoing, chronic pain management indefinitely with a muscle relaxant and analgesics. Dr. Healey opined that Claimant may require repeat sacroiliac joint injections, as well as some paracoccygeal muscle blocks in order to gain better control of her chronic pain.

20. On January 7, 2016 Dr. Kawasaki opined that Claimant can benefit from trigger point injections in conjunction with massage therapy. On February 18, 2016, Dr. Kawasaki recommended further sacroiliac joint injections and permanent medical restrictions of limited walking three to four hours a day and alternate positions 15 minutes per hour and only occasional bending, squatting and climbing. On March 3, 2016, Dr. Michael Striplin agreed with Dr. Kawasaki and proceeded to administer to Claimant the third epidural steroid injection for the right sacroiliac joint dysfunction.

21. On March 9, 2016 Dr. Kawasaki stated, "Within medical probability, with her mechanism of injury and initial complaints which included thoracic pain and with the correlating compression fracture in the original x-rays, unless there is evidence that the patient had previous injury to the area, the patient's compression fracture appears to be work-relatable to the injury that occurred on 02/03/14." This reversed his prior opinion on causation.

22. During his deposition, taken on April 21, 2016, Dr. Kawasaki stated that if Claimant had a preexisting thoracic fracture, she would probably have been complaining of pain prior to her February 2014 injury. He stated that he had not seen any preexisting records or any prior history of thoracic spine conditions prior to Claimant's injury. He also stated that it would be unusual for a 47-year-old to have osteoporotic fractures or degenerative fractures. He had not seen any x-ray reports or

images that there was any indication that Claimant has osteoporosis. However, he stated that even if Claimant had underlying osteoporosis, the compression fracture caused by her fall would be an acute injury. Dr. Kawasaki stated, “My opinion is that she does not have an osteoporotic fracture in the thoracic spine.” Dr. Kawasaki testified that he is convinced there was a fracture on Claimant’s original x-ray. He stated, within a reasonable degree of medical probability that Claimant’s mechanism of injury on February 3, 2014, caused an injury to the thoracic spine. He stated, “My opinion has changed as far as the causation in the case as far as the thoracic spine and the fracture of the thoracic spine based on the error and correction of the error on the initial radiograph.” Dr. Kawasaki stated that Dr. Machanic was correct with the information that he had at the time, but that information has changed. He stated that it is all hinging on that incorrect reading by Dr. Nguyen.

23. Claimant testified that she is asking for a change of physician from Dr. Kawasaki to Dr. Yamamoto because she consistently complained of both mid-back and low back pain; however, the doctors only paid attention to the low back, and did not pay attention to the middle of her back.

24. Claimant also testified that she is still working under restrictions, and is working less hours. Claimant’s reduction in hours is partially as a result of medical appointments for her workers’ compensation injury. Claimant testified that she had no difficulties with her work duties prior to the February 3, 2014, injury, and that she had not been involved in any other injuries or accidents since February 3, 2014.

25. It is found that the medical records show that Claimant consistently complained about her thoracic spine. Dr. Healey credibly stated that he disagreed with Dr. Machanic’s opinion and that Dr. Machanic was incorrect with regard to the causality of Claimant’s thoracic spine injury and the impairment rating.

26. Dr. Striplin credibly testified that usually, thoracic spine pain is not an area of referred pain from some other part of the body. Dr. Striplin also testified that he does not typically associate degenerative conditions with thoracic compression fractures and there is no evidence that Claimant has osteoporosis. Dr. Striplin testified that thoracic wedge fractures typically and normally cause pain, and he was not aware that Claimant had experienced any prior episodes of thoracic back pain.

27. At the time of her injury, Claimant’s average weekly wage was $576.84. This is calculated using the paychecks for pay periods ending December 21, 2013, through February 1, 2014. During this eight week period of time, Claimant earned $4,614.72. This amount divided by eight renders an average weekly wage of $576.84. Using this limited period to calculate Claimant’s average weekly wage is the fairest calculation, because Claimant received a raise to $11.25 per hour on December 8, 2013.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

General Legal Authority

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43- 201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 592 P.2d 792 (1979). The facts in a workers' compensation claim must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline,* 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation claim is decided on its merits. Section 8-43-201, C.R.S. Further, factual findings concern only evidence that is dispositive of the issues involved; even if the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to cited findings as unpersuasive. See *Magnetic Engineering, Inc. v. Indus. Claim Apps. Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME Opinion

3. The findings of the DIME must be overcome by clear and convincing evidence. Section 8-42-107(8), C.R.S. Clear and convincing evidence is stronger than a preponderance, and it is evidence which renders a particular proposition highly probable and free from serious or substantial doubt. To satisfy this burden, the challenging party is required to show the ALJ that it is "highly probable" that Dr. Machanic's opinion was incorrect. See *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (1995). Claimant has proven by clear and convincing evidence that the DIME was incorrect with regard to his determination of causation, his finding of MMI and his impairment rating. The DIME incorrectly concluded that Claimant's thoracic spine impairment was not related to the claim based on the radiologist report of February 3, 2014. The evidence established that the radiologist, re-read the films, finding that Claimant did, in fact have a compression fracture at the T8 on February 3, 2014. The DIME's opinion regarding causation was premised on incorrect information regarding whether Claimant had a compression fracture at T8. Dr. Healey's testimony and

medical reports are credible and persuasive in his explanation that the DIME was incorrect.

4. “Maximum medical improvement” is defined in Section 8-40-201(11.5) C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

5. MMI exists when any medically determinable physical or mental impairment caused by the injury has become stable and no further treatment is reasonably expected to improve the claimant’s condition. Section 8-40-201(11.5), C.R.S.; *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). In contrast post-MMI medical benefits are available to relieve the effects of the injury or prevent deterioration of the claimant’s otherwise stable condition. *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

6. The cases suggest that medical “treatment” encompasses both diagnostic and curative medical procedures. *See Merriman v. Industrial Commission,* 120 Colo. 400, 210 P.2d 448 (1949) (exploratory surgery held compensable even where it revealed non-industrial condition); *Public Service Co v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999) (“The record must distinctly reflect the medical necessity of any such treatment and any ancillary service, care or treatment as designed to cure or relieve the effects of such industrial injury.”); *Villela v. Excel Corp.,* W.C. No. 4-400-281 (ICAO February 1, 2001) (reasonable diagnostic procedures are a prerequisite to MMI if they have reasonable prospect for defining claimant’s condition and suggesting further treatment).

7. In this case, Claimant was not at MMI on December 4, 2014, as determined by Dr. Kawasaki and the DIME because the MRI diagnostic had not been completed until March 9, 2015. The PA’s original diagnosis was correct and that Drs. Kawasaki and Tentori as well as the DIME diagnosis were incorrect. Dr. Healey’s opinion regarding care and treatment of Claimant’s injuries related to the February 3, 2014, injury is persuasive.

8. Further, the DIME was incorrect regarding his assessment of the thoracic spine impairment. The DIME did not believe the thoracic spine was causally related and thus did not provide an impairment rating.

Medical Benefits

9. Claimant has proved by a preponderance of the evidence that she requires reasonably necessary and related medical benefits for the thoracic spine injury caused by the February 3, 2014, accident to cure and relieve her from the effects of her injuries. The care received by Claimant for the thoracic spine condition after December 20, 2016, is deemed reasonably necessary and related medical benefits. This includes the MRI of the thoracic spine recommended by both Dr. Tentori and Dr. Raschbacher. However, Claimant's care has not been completed.

10. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant has proved by a preponderance of the evidence that she is entitled to an order for medical treatment to cure and relieve her of the effect of the industrial injury including treatment for her thoracic spine.

Change of Physician

11. The employer is obliged to provide a physician willing to render treatment so long as it is reasonably necessary. *Tellez v. Teledyne Water Pik, I.C.A.O., W.C. No. 3-990-062 (March 24, 1992); aff'd., Teledyne Water Pik v. ICAO, Colo. App. No. 92CA0643, December 24, 1992 (not selected for publication)*. Once respondents are on notice of a need for medical care, they are required to tender a physician willing to treat the claimant based upon medical considerations alone, and not financial considerations. *Dodge v. Burns International Security, W.C. No. 3-935-989, I.C.A.O., December 10, 1993*.

12. Upon the proper showing to the division, the employee may procure its permission at any time to have a physician of the employee's selection attend said employee. C.R.S. 8-43-404(5)(a)(vi). Claimant failed to make a proper showing for a change of physician. Claimant contends that she established that she feels mistrust for Dr. Kawasaki as a result of her opinion that he failed to listen to her complaints about her thoracic spine pain. The evidence established that Dr. Kawasaki was one of a number of physicians that relied on the erroneous radiologist report regarding the condition of Claimant's thoracic spine. Besides this error, Dr. Kawasaki actively provided treatment of Claimant's lumbar spine. Dr. Kawasaki's reliance on a radiologist's report alone does not form the basis for a change of physician.

Average Weekly Wage

13. Claimant has proven by a preponderance of the evidence that her average weekly wage is correctly calculated at $576.84. This is calculated using the paychecks for pay periods ending December 21, 2013 through February 1, 2014. Claimant received a raise to $11.25 per hour on December 8, 2013. Therefore, wages earned

during this eight week period of time, is the fairest calculation. "Wages" is construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied. Section 8-40-201(a), C.R.S.

Temporary Partial Disability Benefits

14. To establish entitlement to temporary disability benefits, the claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss which, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S.; *PDM Molding, Inc. v. Stanberg, 898 P.2d 542 (Colo. 1995)*. The term "disability," as used in workers' compensation cases, connotes two elements. The first element is "medical incapacity" evidenced by loss or restriction of bodily function. There is no statutory requirement that the Claimant present evidence of a medical opinion of an attending physician to establish her physical disability. *See Lymburn v. Symbios Logic, 952 P.2d 831 (Colo. App. 1997)*. Rather, the Claimant's testimony alone could be sufficient to establish a temporary "disability*." Lymburn v. Symbios Logic, supra.* The second element is loss of wage earning capacity. *Culver v. Ace Electric, 971 P.2d 641 (Colo. 1999)*. The impairment of earning capacity element of "disability" may be evidenced by a complete inability to work, or physical restrictions which preclude the Claimant from securing employment. *Barnes v. Anheuser-Busch Sales Co. of Denver, I.C.A.O., W.C. No. 4-548-535, February 24, 2004*.

15. The credible evidence established that Claimant returned to modified duty work under restrictions and missed work due to medical appointments. Claimant earned $25,256.16 for the 42 week period from pay period ending February 15, 2014 through December 20, 2014, including four bonus payments. Claimant should have earned $27,688.56, for a difference of $2,432.40. Therefore, Claimant has established by a preponderance of the evidence that she is entitled to temporary partial disability benefits for her lost wages in the amount of $1,621.60 for the period between February 4, 2014, and December 20, 2014.

ORDER

It is therefore ordered that:

1. Claimant has overcome the opinions of the DIME by clear and convincing evidence on the issues of causation, MMI and impairment rating.

2. Claimant is entitled to reasonably necessary medical benefits, including, but not limited to treatment related to her thoracic spine.

3. Claimant is not entitled to a change of physician.

4. Claimant's average weekly wage is $576.84.

5. Claimant is entitled to TPD from December 4, 2014, until terminated by law.

6. Claimant is entitled to interest at the rate of eight percent (8%) per annum for all benefits which were not paid when due.

7. Any and all issues not determined herein are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 17, 2016

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-990-447-02

STIPULATION

Prior to the commencement of hearing, the parties reached the following stipulation, which is approved by the ALJ:

The parties stipulated that Claimant would be considered a maximum wage earner at the time of his alleged injury. Based on his date of alleged injury the parties stipulated to a TTD rate of $881.65.

ISSUES

The remaining issues addressed in this decision concern compensability and Claimant's entitlement to medical and indemnity benefits. The specific questions addressed are:

I. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back arising out of and in the course of his employment on June 24, 2015.

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable, necessary, and medical treatment stemming from his June 24, 2015 alleged injury.

III. Whether Claimant established by a preponderance of the evidence that Respondents failed to timely designate a treatment provider to attend to Claimant's alleged injuries.

IV. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to TTD benefits in from June 24, 2015 and on-going.

V. Whether Respondents have proven, by a preponderance of the evidence, that Claimant was responsible for the termination of her employment precluding her entitlement to temporary total disability (TTD) benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was hired by Millwrights 4 Hire, Employer, on May 18, 2015. Claimant completed his application for hire online, was subsequently hired and

assigned to travel to and work on a job located outside of Cambridge, Nebraska. The entire application/hiring process was completed on line and by telephone. Claimant's only contact, to whom he spoke with by phone during the hiring process, was "Stephanie," a representative of Employer. Stephanie worked from Employer's headquarters located in Kentucky.

2. On June 24, 2015, Claimant was walking some elevated scaffolding on the project while carrying a 70-80 pound load. As Claimant attempted to pass behind a fellow worker, he stepped on an unsecured piece of metal planking covering a gap in the scaffolding causing his leg and body to fall half way through the void created when the flooring moved. Claimant reportedly fell backward, twisting to the right injuring his low back in the process.

3. Claimant reported the injury to the onsite foreman, Juan Rodriquez and took it "easy" for the remainder of the workday. Claimant returned to his motel room following his shift, took a shower and went to bed. He testified that he experienced increasing low back pain during the evening and into the early morning hours of June 25, 2015. Consequently, Claimant sent a text message at 4:21 AM to Mr. Rodriquez notifying him he would not be reporting to work because his "lower back [was] sore and bruised" from his fall the day before. The original test message was followed by a second test message at 4:32 AM noting Mr. Rodriquez that he intended to soak and rest his back on June 25, 2015 so he could later provide 100% effort on the job. Claimant testified that he was incapable of performing his regular work duties due to the heavy lifting requirements of the job and his ongoing back pain.

4. Mr. Rodriguez is not an employee of Employer.

5. Following his text messages to Mr. Rodriquez, Claimant reportedly called Stephanie informing her that he had been injured and had called off work. According to Claimant, there was no response to his reports of injury, either from Mr. Rodriquez or Stephanie. He testified no one appeared concerned as he was never given a provider list or paperwork to initiate his claim.

6. Claimant returned to Colorado on his regularly scheduled day off following the June 24, 2015 incident. According to a recorded statement provided to the claims representative assigned to the claim, Claimant left Nebraska around June 28, 2015. He did not notify anyone he was leaving the job site. Moreover, Claimant did not return to work following his day off nor did he inform Employer that he had could not work due to his injury and therefore, had no intention of returning to the job site.

7. Claimant sought treatment for low back pain in the Emergency Room (ER) of Parkview Medical Center (hereinafter "Parkview") on July 9, 2015. According to the history provided during this admission, Claimant reported a two week history of low

back pain after some scaffolding gave way and his leg fell through causing an immediate onset of low back pain secondary to "twisting." The ALJ finds that two weeks prior to July 9, 2015 would have been June 25, 2015.

8. While in the ER, Claimant was provided medication, given an x-ray and instructed to follow-up with a primary care physician in "1-2 days."

9. Claimant's x-ray demonstrated "grade I and borderline grade II anterolisthesis of L5 on S1" and "age-related endplate changes" as well as "scoliosis."

10. On July 13, 2015, Claimant sent a test message to Stephanie notifying her that he had gone to the ER with increasing back pain over the last week and a half, that he needed a workman's comp claim number so he could talk to Amy, indicating further that he did not "know anything about workers' comp."

11. On July 14, 2015, Claimant received a text message in response to his July 13, 2015 messages to Stephanie. In her text message responses, Stephanie instructs Claimant to contact the main office in Kentucky and talk to Amy. According to the response, Stephanie informed Claimant that she was simply a "recruiter" and did not deal with workman's compensation issues. She also noted that she had reviewed a phone call from the motel where Claimant was staying informing her that Claimant had left his belongings there.

12. Claimant returned to the ER at Parkview on July 27, 2015 with continued complaint's of low back pain. Concern was raised regarding Claimant's honesty surrounding prior prescriptions for narcotics and his attitude with the ER staff. Despite these concerns, additional prescription medications were provided with a clear indication that future medications would need to be prescribed by a primary care physician as the ER was not a "pain management center."

13. Based upon the evidence presented, the ALJ finds the care claimant received in the ER and through Hanson Family Practice Clinic reasonable, necessary and directly related to his back pain caused by falling through unsecured scaffolding while working for Employer on June 24, 2015.

14. Claimant filed a Worker's Claim for Compensation on August 7, 2015.

15. On September 1, 2015, Lori Watson, the Insurer's claim representative assigned to the claim contacted Claimant and obtained a recorded statement. During his recorded statement, Claimant outlined the details of his telephone conversation with Stephanie the day he called off work on June 25, 2015. Based upon the evidence presented, including the text message exchange between Claimant and Stephanie, the ALJ finds the phone conversation between the two likely occurred sometime on June

25, 2015, after Claimant had sent text messages to Mr. Rodriquez and called off work secondary to low back pain. The detail contained in Claimant's recorded statement concerning his conversation with Stephanie following the June 24, 2015 incident is unrebutted as neither Ms. Watson nor Stephanie testified at hearing.

16. Respondents contend that Claimant's recorded statement indicates that he told Ms. Watson that during his discussion with Stephanie he thought he would get better on his own and no treatment was necessary. The ALJ is not persuaded. Rather, the recorded statement indicates that Claimant told Stephanie that he hoped he was alright, that he was scared about the condition of his back and that he had contemplated going to the ER the night following the incident "[because] it hurt so bad I couldn't even stand up." Moreover, while Claimant felt he could "work it out" and that it might "just be sore" he was "not sure."

17. Respondents, through Ms. Watson, filed a Notice of Contest on September 2, 2015 denying liability for the claimed injury citing the need for "further investigation."

18. Claimant sought additional treatment with Dr. Jeremy Brown of the Hanson Family Medicine Clinic on November 10, 2015. Physical Examination revealed mild to moderate range of motion loss, mild tenderness with chronic spasm in the lumbar left lumbar region and a positive Patrick's test on the left. Dr. Brown referred Claimant for an MRI, initiated therapy and started Claimant on Hysingla for pain management.

19. MRI of the lumbar spine was obtained on November 18, 2015. The MRI demonstrated:

> Mild degenerative disc disease scattered throughout the lumbar spine;
>
> At the L5-S1 level, prominent posterior facet osteoarthropathy, grade-I anterolisthesis and moderate circumferential disc bulge noted. Moderate left and right neuroforaminal narrowing noted. No central canal stenosis. Cannot exclude pars defects at the L5 level. CT imaging may be of additional value.

20. Claimant attended his initial physical therapy (PT) appointment on November 24, 2015. Examination revealed a positive straight leg raise (SLR) on the left with radicular pain into the left lower extremity (L LE) and foot. Claimant was excluded as a candidate for PT due to "radicular/neural symptoms as well as lack of tolerance for weight bearing and table transitions." Follow-up with his primary care physician was recommended.

21. Claimant returned to Dr. Brown on December 22, 2015, who, after reviewing the findings of Claimant's MRI, referred him to Dr. Danylchuk for an orthopedic surgical evaluation.

22. The ALJ concludes Claimant's subjective complaints of pain coupled with the findings on physical examination constitute evidence of injury, including an aggravation of a previously asymptomatic pre-existing low back condition.

23. Tim Conner, Employer's Office Manager testified that Claimant just stopped coming to work. He testified that no accident reports were filed and that he was unaware of Claimant's injury initially because Claimant never contacted him to report it at the time. Moreover, Mr. Connor testified that no one at the job site in Nebraska contacted him to state that Claimant was injured and unable to do his job duties.

24. Mr. Connor testified that generally if an employee simply stops coming to the job site, said worker would be considered to have abandoned the employment opportunity. Mr. Connor testified that Claimant was responsible for the termination of his employment as he "abandoned his position" with Employer since he simply stopped coming to the job site. The ALJ finds Mr. Connor's testimony in this regard supported by the evidence as a whole. The ALJ finds from the evidence presented that Claimant voluntarily quit his job by returning to Colorado and failing to give notice. Claimant is responsible for his termination.

25. While Mr. Conner testified that he was initially unaware of Claimant's injury and that no one, including Juan Rodriquez contacted him to report Claimant's injuries; he conceded that he had spoken with Claimant later as he had called into the office a "couple" of times. Mr. Connor testified that he became aware of the claimed injuries later when the "work comp claim came out." He also noted that Claimant would know to contact Stephanie and/or Amy regarding his claimed injuries, which the ALJ finds Claimant attempted to do. He recognized Stephanie and Amy as employees of the company, noting further that Juan Rodriquez was the job site foreman, but not Employer's employee. Importantly, contradicting Stephanie's July 14, 2015 text message, Mr. Conner testified that Stephanie would direct Claimant on how to make a claim.

26. The evidence presented convinces the ALJ that Claimant initially notified the only person with whom he had contact that he was injured when he fell though some unsecured scaffolding on June 24, 2015. The text messages admitted into evidence support that Claimant had reached out both verbally and by text to Stephanie requesting her help in getting a worker's compensation claim number so he could talk to "Amy" because he "knew nothing about workman's comp." Importantly, Mr. Conner testified

that Stephanie would be the person Claimant would contact as the recruiter for the particular job Claimant was working and that Stephanie would direct Claimant on how to prefect his claim. While Stephanie's text message response to Claimant refutes Mr. Connor's testimony, the evidence presented persuades the ALJ that Mr. Connor, as Employer's office manager was likely made aware of the claim later during conversations with Claimant. Based upon the evidence presented, the ALJ is persuaded that after Stephanie informed Claimant, via text message, that she did not handle workers' compensation issues, Claimant, more probably than not, contacted Employer and was directed to Mr. Connor. Moreover, the evidence presented convinces the ALJ that after Claimant filed his workers' claim for compensation; Mr. Connor, by his own admission, was aware of Claimant's alleged injuries and the claim in general. Based upon the evidence presented, the ALJ finds that Employer had some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation triggering the duty to designate a treating physician. Respondents have not designated a physician to attend to Claimant's injuries despite having knowledge of the same. Accordingly, the ALJ finds that the right of selection passed to Claimant.

27. Claimant has proven by a preponderance of the evidence that he sustained an twisting injury and a contemporaneous aggravation of a pre-existing condition to/of his low back after falling into a void created when unsecured metal scaffolding moved while working for Employer on June 24, 2015.

28. Although Claimant testified in direct examination that he was unable to continue in his job duties due to his alleged injury, he did admit on cross examination that he worked for the rest of the work day on the date of his alleged injury as well as two (2) full days after his injury. Moreover, Claimant's medical records fail to disclose that any provider, including those in the ER imposed any work restrictions or otherwise precluded Claimant from working in any capacity. Consequently, the ALJ finds Claimant's testimony that he was unable to continue his job duties unreliable and unpursuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an “injury” arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers’ compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers’ compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo.App. 2000).*

C. In determining credibility, the ALJ should consider the witness’ manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Compensability

D. A claimant’s right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. The phrases "arising out of” and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v.*

Indus. Claim Appeals Office, 12 P.3d 844, 846 (Colo.App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo.App. 1986).* In this case, there is a question of whether Claimant suffered an acute injury to his back on June 24, 2015 or if his back pain represents the natural progression of a pre-existing non-industrial condition based upon the results of his imaging studies, including x-ray and MRI.

E. A pre-existing condition "does not disqualify a claimant from receiving worker's compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo.App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or the need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo.App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo.App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). Here, the persuasive evidence demonstrates that Claimant sought treatment for his low back pain after falling through the scaffolding on June 24, 2015. Although Claimant has pre-existing degenerative changes in the lumbar spine, confirmed by MRI, the ALJ finds no evidence to establish that Claimant's pre-existing condition was symptomatic or disabling immediately prior to June 24, 2015. Moreover, Claimant's MRI demonstrated disc bulging which the ALJ finds likely explains the objective findings, i.e., positive Patrick's testing, positive straight leg raise testing and spasm on physical examination. Consequently, the ALJ concludes that Claimant has proven, by a preponderance of the evidence that Claimant likely sustained an acute twisting injury to his lumbar spine and a contemporaneous aggravation of his previously asymptomatic lumbar degenerative disc disease when he partially fell through unsecured planking while working for Employer on June 24, 2015. Accordingly, his injury is compensable.

Claimant's Entitlement to Medical Benefits

F. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797

P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo.App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

G. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo.App. 1984). As found here, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury/aggravation to his low back on June 24, 2015. The evidence presented persuades the ALJ that these compensable "injuries" are the direct cause of Claimant's need for medical treatment, including the referral to Dr. Danylchuk for an orthopedic evaluation. Taken in its entirety, the ALJ finds that the evidentiary record contains substantial evidence to support a conclusion that Claimant's work duties and not a pre-existing condition is responsible for his current symptoms and need for treatment. Moreover, the totality of the evidence presented establishes that conservative care, including Claimant's ER room treatment as well as his treatment with Dr. Brown and the initial PT evaluation was reasonable and necessary in the face of Claimant's continued pain and functional decline. Consequently, the ALJ concludes that Respondents are liable for Claimant's ER treatment as well as the limited physical therapy and treatment he had at the hands of Dr. Brown.

Claimant's Right to Select a Treatment Provider to Attend to his Low Back Injury

H. Under §8-43-404(5)(a), C.R.S., the employer or insurer is afforded the right in the first instance to select a physician to treat the injury. The statute requires the employer or insurer to "provide a list of at least two physicians, . . . in the first instance, from which list an injured employee may select the physician who attends said injured employee." Similarly, Workers' Compensation Rules of Procedure, Rule 8-2(A), 7 Code Colo. Reg. 1101-3, states that "[w]hen an employer has notice of an on the job injury, the employer or insurer shall provide the injured worker with a written list . . .." In order to maintain the right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *See Rogers v. Industrial Claim Appeals Office,* 746

P.2d 545 (Colo. App. 1987). The failure to tender the "services of a physician ... at the time of injury" gives the employee "the right to select a physician or chiropractor." The employer's duty to designate is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo.App. 2006); *Jones v. Adolph Coors Co.,* 689 P.2d 681 (Colo. App. 1984); *Gutierrez v. Premium Pet Foods, LLC*, W.C. No. 4-834-947 (Industrial Claim Appeals Office, September 6, 2011). As found here, Mr. Connor testified he became aware of Claimant's injury "later when the work comp claim came out", yet Claimant was not provided with the required WCRP, 8-2 Choice of Physician Form. Consequently, the ALJ concludes that the right of selection to choose his authorized provider passed to and vested with Claimant. Claimant exercised this right by treating with Dr. Brown. There is no evidence that Claimant set and appointment let alone treated with Dr. Castrejon. Rather, he chose to follow with Dr. Brown. Absent a change of physician to Dr. Castrejon, Claimant's treating provider in this case is limited to Dr. Brown and his referrals.

Claimant's Entitlement to Temporary Total Disability (TTD)

I. To prove entitlement to temporary total disability ("TTD") benefits, Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo.App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*. As found here, the evidence is uncontroverted that Claimant worked for at least two and a half days after the alleged injury occurred. During that time he never contacted anyone from Employer to report that he was unable to continue in his job duties. He was not taken off work at this time and there was no evidence that work restrictions were imposed restricting/precluding Claimant from working. Consequently, the ALJ finds and concludes that Claimant has failed to prove entitlement to TTD.

Responsibility for Termination

J. Even if Claimant had proven his entitlement to TTD, a claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (ICAO July 18, 2003).

K. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). “Fault” does not require “willful intent” on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo.App. 1996)(unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO April 9, 2008). “Fault” can include poor job performance, but Claimant is not at fault if the termination is due to claimant’s physical or mental inability to perform assigned duties, *Johnston v. Deluxe/Current Corporation*, W.C. No. 4-376-417 (Industrial Claim Appeals Office, June 7, 1999). In this case, the evidence presented persuades the ALJ that Claimant voluntarily abandoned/resigned his position with the company to return to Colorado. Nevertheless, *Blair v. Art C. Klein Construction Inc.,* W.C. No. 4-556-576 (Industrial Claim Appeals Office, November 3, 2003), held that claimant’s voluntary resignation is not dispositive of the issue of whether he is responsible for termination of his employment. *Blair, supra,* held that the pertinent issue is the reason the claimant quit because the claimant is not "responsible" where the termination is the result of the injury. *See Colorado Springs Disposal v. Industrial Claim Appeals Office, supra; Gregg v. Lawrence Construction Co.,* W.C. No. 4-475-888 (ICAO, April 22, 2002); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (ICAO April 24, 2002). According to *Blair, supra,* “if the claimant was compelled to resign from this employment such that it can be said the termination was a necessary and natural consequence of the injury, rather than the claimant's subjective choice, the claimant would not be at fault for the termination.” In this case, there is a dearth of evidence to establish that Claimant’s injury was the reason he abandoned and otherwise resigned his position. Indeed, Claimant worked, by his testimony for an additional two days after his injury and he presented no evidence to establish that Employer made Claimant’s working conditions so difficult that a reasonable person in Claimant’s position would feel compelled to resign. *Derr v. Gulf Oil Corp*., 796 F.2d 340, 344 (10th Cir. 1986). *Evenson v. Colorado Farm Bureau*, 879 P.2d 402 (Colo.App. 1993). Rather, the convincing evidence establishes that Claimant’s decision to leave the job site was purely a voluntary decision under his volition and control. Accordingly the undersigned ALJ finds and concludes that Respondents have proven by a preponderance of the evidence that Claimant is responsible for the termination of his employment and that Claimant is not entitled to workers’ compensation benefits under the facts presented.

ORDER

It is therefore ordered that:

1. Claimant's June 24, 2015, low back injury is deemed compensable.

2. Respondents shall pay for all medical expenses associated with Claimant's treatment and care received through the ER at Parkview Medical Center.

3. Dr. Brown is Claimant's ATP in this case. Respondent shall pay for all reasonable, necessary and related treatment resulting from Claimants June 24, 2015 injury as provided by Dr. Brown and any of his referrals, including physical therapy.

4. Respondents have established by a preponderance of the evidence that Claimant was terminated for cause from his employment. For this reason and because Claimant otherwise failed to establish his entitlement, Claimant's request for TTD benefits is DENIED AND DISMISSED.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 23, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

The Respondents' application for hearing states that Respondents "request a judicial determination as to what treatment Claimant is currently receiving from her authorized physicians is reasonable and necessary and related to the injury." The Respondents failed to identify any specific treatment with which they take issue. At the commencement of hearing, the Respondents again failed to identify any specific treatment they believed was no longer reasonable, necessary or related to the Claimant's work injury. During opening statement, Respondents' counsel indicated that Respondents have "some issues about what . . . ongoing symptom presentology [sic] may be related to the injury." Respondents also asserted that multiple medications as well as interventional treatment including injections, and diagnostic studies such as MRI arthrogram studies are no longer reasonable and necessary.

Based on the application for hearing, the comments made by counsel, the evidence presented, and the post-hearing position statements filed by the parties, the ALJ finds that the issues to be determined by this decision are whether the Claimant has proven that continued Oxycontin, Percocet, Methocarbamol, Cymbalta, Protonix, and Gabapentin are reasonable, necessary and related to her workers' compensation claim. The ALJ declines the invitation by Respondents to determine whether future diagnostic studies, injections or any other specific treatment recommendations not currently pending are reasonable, necessary or related to Claimant's injury. Such a determination would be speculative, and evaluating the merits of treatment not currently being recommended would be difficult. The ALJ also declines to determine which body parts are causally related to the work injury unless a specific treatment recommendation is pending for that body part.

FINDINGS OF FACT

General Findings

1. The Claimant is a 62-year old woman.

2. On February 17, 1993, ALJ Conway Gandy found that Claimant sustained an occupational disease to her low back.

3. On July 15, 2006, ALJ Gandy found Claimant permanently and totally disabled as a result of the occupational disease, and ordered the Respondents to pay for Claimant's future medical expenses arising out of her compensable injury.

4. In 1992, Claimant had surgery under her workers' compensation claim that consisted of a posterior lumbar interbody fusion with instrumentation done at L4-5 and L5-S1. Claimant still has hardware in her lumbar spine.

5. Claimant testified that she continues to experience low back pain that sometimes radiates up to her neck. She has bilateral leg pain and groin pain. She experiences spasms in her low back and upper back about two to three times per week. Her average pain level is 7 out of 10 with medications.

6. Dr. Harlan Ribnik has been the Claimant's authorized treating physician (ATP) for approximately 18 years.

7. Dr. Ribnik manages Claimant's prescription medications. As of the date of the hearing Dr. Ribnik prescribed the following medications to the Claimant:

Oxycontin
Percocet
Methocarbamol (Robaxin)
Cymbalta
Protonix
Gabapentin (Neurontin)
Senokot
Trazadone

8. The Claimant testified that she feels stable on her medications. She can engage in activities and care for herself.

9. According to Dr. Ribnik's records, the Claimant consistently reports pain at a level of 7 out of 10.

10. Dr. Ribnik testified by deposition. He explained that Claimant has chronic low back pain, some sacroilitis, post laminectomy syndrome, pain in the lower extremities, lumbar spinal stenosis and lumbosacral spondylolysis.

11. Dr. Ribnik described Claimant's symptoms as predominantly back pain, pain her hips and pain in her lower extremities, with the pain greater in her right rather than left lower extremity. Dr. Ribnik associates all of these symptoms with her work injury.

12. There is no pending treatment recommendation for Claimant's lower extremities other than Gabapentin, and no treatment recommendation pending for Claimant's groin or hips.

13. Dr. Ribnik indicated that Claimant suffers from depression and anxiety due to her work injury. He explained Claimant suffers from the sleep issues due to difficulties with finding a comfortable position because of pain. He prescribes Trazadone for sleep.

14. Claimant walks with a marked antalgic gait to the right side and uses a cane. Dr. Ribnik opined that Claimant's symptoms are consistent with the pathology in her lower back associated with the work injury. He explained that it was not uncommon for people who have extensive lumbar surgery to have continued pain in that area and that the lower extremity pain is related to the nerves involved in the low back.

15. Dr. Ribnik indicated that Claimant suffers from some nerve irritation related to her back surgery. He indicated that the hardware "creates an abnormal physiologic and mechanical condition and it occupies a space that can potentially attract scarring or create narrowing of areas against which nerves may rub and become irritated."

16. Dr. Ribnik testified that Claimant's description of her leg pain fits the S1 dermatomal pattern.

17. Claimant is compliant with her medication. She has had no failed drug screens.

18. Dr. Ribnik testified that his treatment goal for Claimant is to maintain a reasonable level of function, control pain and allow Claimant to take care of herself. He does not believe she is symptom magnifying.

19. On February 23, 2015, Dr. Elizabeth Bisgard performed an independent medical examination at Respondents' request. Dr. Bisgard examined the Claimant as well as reviewing the Claimant's medical records prior to issuing a report.

20. Dr. Bisgard indicated that multiple diagnostic studies demonstrate that Claimant's hardware is intact and, therefore, not the source of Claimant's back pain. Dr. Bisgard also indicated that CT myelograms failed to reveal the source of Claimant's back or leg pain.

21. Dr. Bisgard diagnosed the following:

Chronic low back pain secondary to posterior fusion, L4 to S1.
Groin pain bilaterally.
Bilateral leg pain without clear radiculopathy.
Depression.
Chronic constipation secondary to chronic narcotic pain medication.
Narcotic dependency.

22. Dr. Bisgard noted that Claimant has not responded to SI joint injections, radiofrequency ablation of the SI joints or numerous epidural injections.

23. Dr. Bisgard noted that Claimant reports only a 10-20% improvement in her function with medications. She ultimately opined that Dr. Ribnik's records fail to document increased functional activity or decreased pain thus Claimant should be weaned from all pain medications.

24. Dr. Bisgard also opined that Claimant should receive no maintenance medication under her workers' compensation claim, but if it is determined Claimant is entitled medications, the only appropriate medications would be Cymbalta, 30 mg, twice per day, and methocarbamol as needed at the lowest recommended dose of 500 mg.

25. Claimant has been reporting ongoing right leg pain. The medical records reflect that Claimant has been reporting right leg pain since 2004 or earlier.

26. Dr. Ribnik believes that there is objective support for Claimant's right leg pain, and that she carries a diagnosis of S1 radiculopathy.

27. Dr. Bisgard disagrees that objective evidence supports S1 radiculopathy or any right leg symptoms.

28. Dr. Ribnik testified that when Claimant identifies an area of pain (such as her right leg), then he would perform injections to help verify that there is a pain generator at that location and then attempt to do something about it. As reflected in Dr. Bisgard's report, Dr. Ribnik, since January 2008, has performed seven epidural steroid injections in Claimant's low back, with the last injection performed on March 21, 2014. As explained by Dr. Bisgard, the purpose of epidural injections is to determine a pain generator. Specifically, under fluoroscopy, a needle is inserted into a specific level of the spine and injected with both a local numbing medication, as well as a steroid. In order for an injection to be considered diagnostic, there needs to be an 80% or greater reduction of pain in the immediate time period of the anesthetic, and, for a therapeutic response, a lasting benefit from the effect of the steroid.

29. Dr. Bisgard opined that Claimant did not have a diagnostic response to any of the epidural steroid injections.

30. In her report, Dr. Bisgard documented the fact that Claimant's right SI joint radiofrequency ablation in February 2014 resulted in significant benefit in right leg symptoms, but no relief in her back. However, Dr. Bisgard indicated that Claimant's reported response to this procedure was "non-physiologic." As explained by Dr. Bisgard, a radiofrequency ablation performed at the SI joint is not designed to target the nerves that would cause right leg symptomology. Dr. Bisgard opined that it makes no medical sense that Claimant, following a procedure at her SI joint, would experience significant relief in right leg pain.

31. Claimant saw Dr. Ribnik on October 21, 2014. At that time, Claimant had seen Dr. Tolge for an evaluation. Dr. Ribnik explained that he made the referral to Dr. Tolge, a neurologist, for purposes of attempting to determine what may be causing Claimant's ongoing complaints. Dr. Ribnik, in his October 21, 2014 report, made the following comments:

> I had a conversation with Dr. Tolge today about [Claimant's] issues.
> She felt that there wasn't likely any pathology interspinally, but can't rule out retroperitoneal pathology. She suggested that a trial of

> peripheral nerve blocks might be helpful diagnostically, possible ilioinguinal or genitofemoral.
>
> I reviewed the report of the lumbar myelogram dated August 2013 that shows only a mild flattening of the thecal sac at L2-L3 without any compression of the cord or nerve roots or any paravertebral structures. I did a lumbar epidural injection for her at L2-L3 in March 2014. Reviewing the subsequent office notes, she did not get more than a day's relief from that injection, suggesting that it was only a brief local anesthetic effect, and not an effect of the steroid.

32. Dr. Bisgard, after reviewing this clinical note, agreed with Dr. Tolge that there was no interspinal pathology to explain Claimant's ongoing symptom presentation.

33. Dr. Ribnik testified that just because imaging shows the hardware intact does not mean that it cannot be the source of Claimant's pain. Dr. Ribnik explained that the hardware is a foreign substance in the body and can create an abnormal physiological and mechanical condition.

34. In addition to providing a written report, Dr. Bisgard also testified at the hearing. She is Board Certified in Occupational Medicine. She is not Board Certified in anesthesiology, not sub-specialty Board Certified in pain management, not Board Certified in interventional pain medicine, and has no certification of any kind in pain management. She does not specialize in treatment of chronic pain patients. She refers her difficult pain patients to other chronic pain specialists.

35. Dr. Bisgard testified Claimant is a chronic pain patient and The Division of Workers' Compensation Chronic Pain Disorder Medical Treatment Guidelines are applicable. She acknowledges the Division recognizes that acceptable medical practice may include deviation from the Treatment Guidelines as individual changes dictate and she agrees with that statement.

36. Referencing Claimant's Exhibit 15, page 187, Dr. Bisgard testified she agrees with the Guidelines' statement that some healthcare providers, by virtue of their experience and additional training or accreditation by pain specialist organizations, have much greater expertise in the area of chronic pain evaluation and treatment than others and that such patients should be referred to recognized specialists.

37. Dr. Bisgard acknowledges Claimant had an L4-S1 posterior lumbar spinal fusion and, on direct examination, testified that L4-5 and L5-S1 involves nerves that go down the right leg. Dr. Bisgard was unaware of what symptoms Claimant reported following her injury and surgery as she did not have records dating back to that time.

38. When asked if she admits Claimant has chronic low back pain secondary to her fusion, Dr. Bisgard stated: "That's what she has been diagnosed with for the last

20 plus years." She conceded: "I agree she has chronic low back pain, that she is subjectively reporting low back pain. It has been attributed to her posterior fusion….and I understand why that is confusing." Dr. Bisgard then testified Claimant does not have low back and right leg pain secondary to her fusion but then comments: "I will clarify. I am not stating that she is not experiencing pain. I am—I cannot get into her head and tell—and say that she is subjectively not feeling some pain. I am looking at a medical explanation for the pain. There is no medical explanation for the bilateral leg pain and the subjective chronic low back pain."

Oxycontin & Percocet

39. Oxycontin, 20 milligrams, is a sustained release form of oxycodone. Dr. Ribnik is prescribing Claimant Oxycontin in a 20 mg dose one tablet, four times a day.

40. Dr. Ribnik indicated that this dosage is moderate, but Dr. Bisgard opined the dosage is excessive especially because Claimant takes the Oxycontin more frequently inasmuch as she is only taking Oxycontin between 5:00 a.m. and 10:00 p.m.

41. Dr. Bisgard went on to testify that Oxycontin should be prescribed once every 12 hours. Because Oxycontin is a medication that is timed released, the manufacturers have designed and packaged this medication so that there is a 12 hour benefit from it.

42. Dr. Ribnik testified that Percocet (5 mg of oxycodone and 325 mg of Tylenol) is a narcotic pain medication directly related to Claimant's pain and maintenance of function. She takes it every six hours.

43. Percocet is a short-acting narcotic pain medication. Dr. Bisgard noted that because Percocet is a short-acting medication, it is designed only for breakthrough pain to be taken on a PRN basis. According to Dr. Bisgard, there is no need to take a short acting medication (Percocet) while you are taking the long acting medication (Oxycontin).

44. Dr. Ribnik explained that he prescribes the Percocet in a way that is most effective for the patient. In this case, it works best for the Claimant to take it every six hours "when the Oxycontin wears thin." He also explained that Claimant is free not to take the Percocet if she feels she does not need it.

45. Dr. Ribnik acknowledged that the FDA has specifically identified how Oxycontin and Percocet should be taken and that he is not prescribing these medications the way the FDA has recommended. Dr. Ribnik also acknowledged that he has never read the specific FDA provisions for the proper use of Oxycontin and Percocet. Dr. Ribnik, however, opined that the FDA recommendations do not establish the standard of care for treatment by a physician.

46. Claimant testified that she tried tapering or weaning from the opioid medications in the past without much success. She recalled reducing her dosage by

one pill per day for approximately one month. She felt her pain increased from 7 out of 10 to 8-8.5 out of 10.

47. Claimant testified that her function was impacted by the reduction in opioids such that on some days she did not get dressed, she sat in her recliner up to 6 hours rather than 1 to 2 hours, she did not cook or clean her house.

48. The Claimant explained that she became more depressed and her sleep disturbances increased. Once she returned to her normal dosages, her pain levels stabilized and returned to her baseline 7 out of 10.

49. Dr. Ribnik agreed that he tried a reduction of Claimant's narcotic pain medications at the Insurer's request but that Claimant's pain levels increased accompanied by increased anxiety.

50. The Claimant's testimony concerning her pain levels in her back is credible. As found above, Dr. Bisgard acknowledged that Claimant experiences pain, but Dr. Bisgard believes that no objective medical evidence supports the Claimant's pain complaints. Dr. Bisgard has opined that Claimant's pain may be psychogenic. Dr. Bisgard is not a mental health professional and the Claimant has not been evaluated by one.

51. The ALJ is also not persuaded by Dr. Bisgard's opinions regarding the lack of an objective basis for Claimant's back pain. The ALJ credits Dr. Ribnik's opinions concerning the hardware and irritation the hardware can cause. Claimant has experienced ongoing back pain since her work injury and resulting surgery. She has received treatment for her back pain for over 20 years. Respondents' argument would essentially suggest "improvement" in Claimant's condition, which is not supported by the medical evidence.

52. Dr. Bisgard takes issue with the reasonableness of the Oxycontin and Percocet dosages and Dr. Ribnik's "off label" prescriptions of these two drugs. While the reasonableness of the dosages may be questionable and there is little doubt that Claimant's continued use of opioids presents other health risks, a medical utilization review would be the more appropriate avenue for modifying the treatment plan for the Claimant. The "off label" use in and of itself is not a basis to simply discontinue the prescriptions as unreasonable and unnecessary.

53. Based on the evidence, the ALJ finds that Oxycontin and Percocet are reasonable, necessary and related to the claim. The Claimant has proven that she continues to experience pain that is relieved with Oxycontin and Percocet.

Methocarbamol

54. Methocarbamol (also known as Robaxin) is a muscle relaxer used to treat muscle spasms. Dr. Ribnik has prescribed Methocarbamol on a scheduled basis (1-2 tablets 4 times per day) as opposed to a PRN basis.

55. Dr. Ribnik testified that Claimant suffers from “quite a bit” of muscle spasms. However, Dr. Bisgard noted that Dr. Ribnik’s medical records rarely, if at all, document that Claimant is having ongoing muscle spasms in the three year period of time prior to Dr. Bisgard’s evaluation.

56. When asked about lack of documentation of spasms in his reports, Dr. Ribnik admitted that he has not documented spasm consistently.

57. Both Dr. Ribnik and the Claimant believe the Methocarbamol is working to alleviate the spasms. Dr. Ribnik testified that Claimant’s chronic low back pain triggers muscle spasm.

58. Dr. Bisgard opined that Methocarbamol is designed to treat muscle spasms when they are present, as opposed to acting as a prophylactic medication to prevent muscle spasms.

59. Dr. Bisgard does not disagree that Methocarbamol is reasonable, necessary or related to Claimant’s injury. Rather, Dr. Bigard disagrees with the prophylactic use of Methocarbamol. Again, the dosage and prescription indications are subjects more appropriately addressed by a medical utilization review.

60. Based on the credible medical evidence, the Claimant has proven that Methocarbamol is reasonable, necessary and related to her work injury.

Cymbalta

61. Dr. Bisgard conceded that Cymbalta, 30 mg, twice per day, would be appropriate if Claimant were entitled maintenance medications. The ALJ finds that Claimant has proven she is entitled to continued prescriptions for Cymbalta based on the opinions of Dr. Bisgard and Dr. Ribnik. The ALJ makes no finding regarding the specific appropriate dosages.

Protonix

62. Protonix is a medication designed to relieve symptoms of GERD.

63. Dr. Ribnik opined that the Protonix is related to the Claimant’s work injury due to the litigation.

64. According to Dr. Ribnik’s medical records, Respondents began questioning Dr. Ribnik’s ongoing medical care during the summer of 2014. Dr. Ribnik’s records indicate that he has prescribed Protonix since as early as October 4, 2010.

Thus, Dr. Ribnik's opinion that Claimant needs Protonix due litigation stress lacks any foundation.

65. Dr. Ribnik later testified that almost all of Claimant's medications cause some form of gastric irritation. He could not specifically recall Claimant's history of gastric irritation and when he began prescribing Protonix.

66. The medical evidence fails to support that Claimant's work injury or the associated medications cause her to need Protonix. As such, Claimant has failed to prove that Protonix is related to her work injury.

Gabapentin

67. Gabapentin (Neurontin) is a nerve stabilizer designed to treat specific nerve pain.

68. On April 22, 2011 by Dr. Ribnik's physician's assistant started Claimant on Neurontin. The medical record fails to clearly document the basis for the prescription.

69. On June 1, 2011, the Claimant reported "some benefit" from the Nuerontin but her reported pain levels remained the same at 7 out of 10.

70. Dr. Ribnik believes that Claimant suffers from nerve irritation associated with the low back surgery. He characterized the dosages of 600 mg three times per day as mild.

71. Based on a review of Dr. Ribnik's medical records, Dr. Bisgard was unable to identify any reports of neuropathic pain that Claimant would benefit by the ongoing consumption of Gabapentin.

72. Dr. Ribnik's records fail to document any evidence of neuropathic pain generators. The Claimant may have right leg pain but there has been no objective evidence to support that such pain is neuropathic in nature.

73. The ALJ finds that none of the medical records clearly document an objective basis to support the need for Gabapentin. As found above, the initial prescription for Gabapentin lacked support. Claimant has failed to prove that the ongoing need for Gabapentin is reasonable, necessary or related to her work injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

General Legal Principals

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Medical Benefits

Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury.

The Claimant has proven entitlement to ongoing pain medications. Dr. Bisgard admitted that Claimant suffers from pain, but Dr. Bisgard contends there is no objective reason for it. As found above, the ALJ credits Dr. Ribnik's opinions concerning Claimant's pain generator. The Claimant has been complaining of back pain for over 20 years and has consistently received treatment for it, including pain medications. Claimant's ongoing back pain continues to be related to her work injury. To the extent the Respondents argue that the dosages prescribed by Dr. Ribnik are excessive, the Respondents should pursue the appropriate remedy which is a medical utilization review. Claimant has also proven that she is entitled to Cymbalta.

Claimant has failed to prove that the Protonix is related to her industrial injury. Respondents are no longer liable for the Protonix prescription. Claimant has failed to prove that Gabapentin is reasonable, necessary or related to her industrial injury. Dr. Ribnik shall wean the Claimant from Gabapentin within 90 days of the date of this order or Claimant assume responsibility for payment of the Gabapentin beginning on the 91st day from the date of this order.

ORDER

It is therefore ordered that:

1. Claimant is entitled to Oxycontin, Percocet, Methocarbamol and Cymbalta.

2. Claimant is no longer entitled to Gabapentin or Protonix. Dr. Ribnik shall wean Claimant from Gabapentin within 90 days of the date of this order, or Claimant shall assume responsibility for payment of Gabapentin.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 25, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that the treatment recommended by Dr. Kawasaki (left C6-7 TF ESI and left L3-4 TF ESI)[2] is reasonable and necessary?

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on February 6, 2012, when he fell on the ice while working for Employer. Claimant injured his neck, back, right shoulder and elbow.

2. There was no evidence in the record Claimant required treatment for his neck, back, shoulder or elbow prior to February 6, 2012.

3. Claimant testified he received treatment from Dr. Kawasaki, both before and after he reached MMI. He also received treatment from John Papilion, M.D., who treated his shoulder and left elbow, as well as Andrew Motz, M.D., who treated his left elbow and neck.

4. On June 8, 2012, Claimant underwent an arthroscopic chondroplasty of the glenoid, with resection of chondral flaps, debridement of the superior labrum, and subacromial decompression, which was performed by Dr. Papilion. Claimant continued to have symptoms in his right shoulder after this surgery.

5. Claimant was evaluated by Dr. Kawasaki on January 24, 2013. At that time, Claimant had complaints of neck pain and headaches. Claimant had diffuse tenderness to palpation in the posterior cervical musculature, although he had good range of motion. He had tenderness to palpation in the shoulder girdles, worse on the right side. Limitations in his shoulder range of motion were noted.

6. Dr. Kawasaki's impressions were: right shoulder S/P arthroscopic chondroplasty, labral debridement, and subacromial decompression; articular defect in the right shoulder glenoid; low back pain with no radicular symptoms; and unusual symptomotology of pain spasms with fasciculations to the right upper extremity-rule out neuropathic lesion. Dr. Kawasaki referenced the original evaluation by Dr. Bratman, who questioned brachial plexus syndrome, but did not think Claimant's pain complaints had a cervical origin. Dr. Kawasaki stated Claimant had cervical complaints as of February 6, 2012 and the ALJ notes Dr. Kawasaki was of the opinion the cervical spine

[2] In the recitation of issues at the outset of the hearing, counsel for both parties agreed this was the sole issue for determination.

required work-up, including an MRI. Dr. Kawasaki recommended an EMG/nerve conduction study, noting Claimant did not require epidural steroid injections at that time.

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14. Respondents filed a Final Admission of Liability ("FAL") on November 6, 2014 based upon Dr. Hattem's rating. The FAL admitted for "reasonable and necessary medical care, related to this work injury, by an authorized treating physician". No Objection was filed to the FAL.

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17. Claimant was evaluated by Dr. Motz on May 7, 2015. He presented with pain on the right and left side equally, which he said occurred constantly. Dr. Motz reviewed the cervical spine MRI, which had fairly significant disc bulges at C4-5 and C6-7, the latter of which was new from the prior study. Dr. Motz thought this could explain some of the numbness and tingling Claimant was getting in his hand. Dr. Motz concluded Claimant would require the left elbow surgery, but Dr. Motz wanted to wait until after the cervical epidural. Claimant wished to proceed with the epidural injections. There was no evidence in the record Claimant received this medical treatment.

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18. A document entitled “authorization for cervical ESI” (including fax cover sheet, dated May 12, 2015) from Dr. Motz’s office was admitted into evidence.[4]

19. At Respondents’ request, Mark Failinger, M.D. performed an IME on July 10, 2015. In his opinion, there was nothing related to the work incident to explain Claimant’s neck pain, as that appeared to be due to ongoing degeneration. Dr. Failinger recommended a referral back to Dr. Kawasaki so he could compare the new MRI with the previous MRI. The ALJ found Dr. Kawasaki’s opinion regarding the need for the cervical ESI to be more persuasive than Dr. Failinger’s.

20. Claimant returned to Dr. Kawasaki on January 18, 2016, at which time he was complaining of severe low back and left anterior thigh pain. On examination, Claimant's cervical spine showed tenderness to palpation through the posterior cervical musculature and upper cervical region. He had specific tenderness along the lateral epicondyle or region, with pain on wrist extension, finger extension and grip. The lumbar spine examination revealed tenderness to palpation diffusely.

21. Dr. Kawasaki's impressions were: poly-trauma with multiple injuries; dental trauma; cervicogenic headaches with the facetogenic pain generators with diagnostic initial medial branch blocks at C2-3, C3-4 and third occipital nerves; left C7 radiculopathy with a change on MRI taken in July 2015; left lateral epicondylitis; L2-3 stenosis with left L3 radiculopathy. Dr. Kawasaki believed that a diagnostic and potentially therapeutic left C6-7 transforaminal epidural steroid injection would help decipher how much the left C6-7 foraminal disc protrusion was contributing to Claimant's pain. The ALJ infers Dr. Kawasaki made the recommendation for injections due to the findings made on examination.

22. On January 21, 2016, Dr. Kawasaki's office sent a request for authorization for left C6-7 TF ESI and left L3-4 TF ESI.[5]

23. Claimant testified the treatment he previously received from Dr. Kawasaki was helpful and he wished to receive the injections.

24. Dr. Kawasaki's evidentiary deposition was admitted into evidence. Dr. Kawasaki was qualified as an expert in physical medicine rehabilitation, the specialty in which he is board certified. He is Level II accredited pursuant to the WCRP. Claimant's course of medical treatment was reviewed in some detail with Dr. Kawasaki. With regard to the recommendation for the left C6-7 transforaminal epidural steroid injection, Dr. Kawasaki testified this injection was diagnostic and would potentially help determine the source of Claimant's ongoing shoulder issues. Therefore, even though the disc protrusion at C6-7 was a new issue and not related to the 2012 injury, the proposed ESI was reasonable as a diagnostic test to decide whether this was a shoulder issue and therefore compensable, or a neck issue and not causally related. Dr. Kawasaki was also asked about the branch blocks and noted he would not do both the medial branch

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block and the epidural at the same time, as diagnostic clarity would be lost. The ALJ credited Dr. Kawasaki's recommendations for the cervical ESI.

25. Dr. Kawasaki testified that his January 18, 2016 report should have referenced L3-4, as opposed to L2-3. Dr. Kawasaki was recommending the second lumbar injection based upon Claimant's response to the first injection. The ALJ credited Dr. Kawasaki's recommendations for this second lumbar injection.

26. No evidence was presented that the instant claim was closed for purposes of *Grover* medical benefits.

27. Based on the medical records admitted at hearing, the ALJ concludes that Claimant’s right shoulder, right elbow, cervical spine and lumbar spine were part of the industrial injury on 6, 2012.

28. Based upon the medical records admitted at hearing, the ALJ concludes Respondents provided post-MMI medical benefits to Claimant, including the April 25, 2015 cervical spine MRI, the May 7, 2015 evaluation with Dr. Motz, and the January 18, 2016 examination by Dr. Kawasaki.

29. The left C6-7 TF ESI and left L3-4 TF ESI recommended by Dr. Kawasaki are reasonable and necessary.

30. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of various health care providers was implicated on the question of whether Claimant was entitled to maintenance medical benefits.

***Grover* Medical Benefits**

The need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award of *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended, nor a finding that Claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). Even if Respondents admit for *Grover* medical benefits, they retain the right to question the reasonableness and necessity of proposed treatment. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

In the instant case, Claimant had the burden of proof to establish that the treatment proposed by Dr. Kawasaki was reasonable and necessary, as well as related to his industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In *Kroupa,* the ALJ denied Claimant's request for additional knee surgery, which would have been her third procedure. The ALJ found the surgery was not reasonable and necessary, based upon the opinion of Respondents' expert. That decision was affirmed first by the Industrial Claims Appeals Office, then the Colorado Court of Appeals, which noted that the fact there were contrary opinions did not compel the ALJ to reach a different conclusion. The Court of Appeals noted the ALJ was required to make specific findings only as to evidence found persuasive and determinative. *Kroupa v. Industrial Claim Appeals Office, supra,* 53 P.3d at 1197. In this regard, the ALJ is free to credit one medical opinion to the exclusion of a contrary opinion. *Dow Chemical v. Industrial Claim Appeals Office,* 843 P.2d 122, 125 (Colo. App. 1992).

The ALJ considered Respondents' contention that Claimant was not entitled to *Grover* medical benefits because no Petition to reopen was filed. In this case, the medical benefits were never closed, as Claimant continued to receive medical treatment after MMI. As found, Dr. Hattem recommended maintenance medical benefits. (Finding of Fact 13). This included treatment for Claimant's dental condition, as well as returning to Dr. Davis for right elbow surgery. Dr. Hattem also stated Claimant could return to Dr. Papilion if he wished to proceed with additional right shoulder surgery. Respondents filed an FAL admitting for said benefits. (Finding of Fact 14). Respondents continued to provide medical benefits to Claimant after MMI. (Finding of Fact 28).

As determined by Findings of Fact 6-12, 17, 20-21, Claimant required continued evaluation and treatment for his cervical and lumbar spine. Claimant consistently reported symptoms and treatment was provided for his cervical spine, as well as arm symptoms. In this regard, Dr. Kawasaki's testimony established why the cervical ESI was necessary at this time and the ALJ credited his opinion. (Finding of Fact 24). Claimant proved the cervical spine ESI proposed by Dr. Kawasaki was reasonable and necessary. The opinions expressed in Dr. Kawasaki's deposition were concordant with those expressed in the records of Dr. Kawasaki's treatment, as well as the reasonable inferences derived therefrom. The ALJ credited Dr. Kawasaki's opinions that the C6-7 ESI was necessary as a diagnostic test to determine the source of Claimant's continued pain. Therefore, Claimant is entitled to receive the proposed cervical C6-7 ESI.

The ALJ notes Respondents' proposed Findings of Fact, Conclusions of Law and Order referenced the fact that authorization for the cervical ESI had been granted after Dr. Kawasaki's deposition. However, no evidence of that was admitted into evidence before the record was closed. To the extent that medical benefit has now been authorized, this issue is now moot.

Turning to the proposed lumbar epidural steroid injection, based on the totality of the evidence, the ALJ found this treatment was recommended by Dr. Kawasaki and reasonable and necessary. Dr. Kawasaki based the recommendation on Claimant's response to the previous injection. (Finding of Fact 25). In his deposition, Dr. Kawasaki clarified the injection would be at the L3-4 level, as the L3 nerve root was pinched. No contrary medical opinion was introduced into evidence and therefore, Claimant is entitled to said treatment.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of left C6-7 TF ESI and left L3-4 TF ESI injections is granted.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding proceduresto follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 24, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that the treatment recommended by Dr. Kawasaki (left C6-7 TF ESI and left L3-4 TF ESI)[2] is reasonable and necessary?

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on February 6, 2012, when he fell on the ice while working for Employer. Claimant injured his neck, back, right shoulder and elbow.

2. There was no evidence in the record Claimant required treatment for his neck, back, shoulder or elbow prior to February 6, 2012.

3. Claimant testified he received treatment from Dr. Kawasaki, both before and after he reached MMI. He also received treatment from John Papilion, M.D., who treated his shoulder and left elbow, as well as Andrew Motz, M.D., who treated his left elbow and neck.

4. On June 8, 2012, Claimant underwent an arthroscopic chondroplasty of the glenoid, with resection of chondral flaps, debridement of the superior labrum, and subacromial decompression, which was performed by Dr. Papilion. Claimant continued to have symptoms in his right shoulder after this surgery.

5. Claimant was evaluated by Dr. Kawasaki on January 24, 2013. At that time, Claimant had complaints of neck pain and headaches. Claimant had diffuse tenderness to palpation in the posterior cervical musculature, although he had good range of motion. He had tenderness to palpation in the shoulder girdles, worse on the right side. Limitations in his shoulder range of motion were noted.

6. Dr. Kawasaki's impressions were: right shoulder S/P arthroscopic chondroplasty, labral debridement, and subacromial decompression; articular defect in the right shoulder glenoid; low back pain with no radicular symptoms; and unusual symptomotology of pain spasms with fasciculations to the right upper extremity-rule out neuropathic lesion. Dr. Kawasaki referenced the original evaluation by Dr. Bratman, who questioned brachial plexus syndrome, but did not think Claimant's pain complaints had a cervical origin. Dr. Kawasaki stated Claimant had cervical complaints as of February 6, 2012 and the ALJ notes Dr. Kawasaki was of the opinion the cervical spine

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CONCLUSIONS OF LAW

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The need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award of *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended, nor a finding that Claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). Even if Respondents admit for *Grover* medical benefits, they retain the right to question the reasonableness and necessity of proposed treatment. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

In the instant case, Claimant had the burden of proof to establish that the treatment proposed by Dr. Kawasaki was reasonable and necessary, as well as related to his industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In *Kroupa,* the ALJ denied Claimant's request for additional knee surgery, which would have been her third procedure. The ALJ found the surgery was not reasonable and necessary, based upon the opinion of Respondents' expert. That decision was affirmed first by the Industrial Claims Appeals Office, then the Colorado Court of Appeals, which noted that the fact there were contrary opinions did not compel the ALJ to reach a different conclusion. The Court of Appeals noted the ALJ was required to make specific findings only as to evidence found persuasive and determinative. *Kroupa v. Industrial Claim Appeals Office, supra,* 53 P.3d at 1197. In this regard, the ALJ is free to credit one medical opinion to the exclusion of a contrary opinion. *Dow Chemical v. Industrial Claim Appeals Office,* 843 P.2d 122, 125 (Colo. App. 1992).

The ALJ considered Respondents' contention that Claimant was not entitled to *Grover* medical benefits because no Petition to reopen was filed. In this case, the medical benefits were never closed, as Claimant continued to receive medical treatment after MMI. As found, Dr. Hattem recommended maintenance medical benefits. (Finding of Fact 13). This included treatment for Claimant's dental condition, as well as returning to Dr. Davis for right elbow surgery. Dr. Hattem also stated Claimant could return to Dr. Papilion if he wished to proceed with additional right shoulder surgery. Respondents filed an FAL admitting for said benefits. (Finding of Fact 14). Respondents continued to provide medical benefits to Claimant after MMI. (Finding of Fact 28).

As determined by Findings of Fact 6-12, 17, 20-21, Claimant required continued evaluation and treatment for his cervical and lumbar spine. Claimant consistently reported symptoms and treatment was provided for his cervical spine, as well as arm symptoms. In this regard, Dr. Kawasaki’s testimony established why the cervical ESI was necessary at this time and the ALJ credited his opinion. (Finding of Fact 24). Claimant proved the cervical spine ESI proposed by Dr. Kawasaki was reasonable and necessary. The opinions expressed in Dr. Kawasaki's deposition were concordant with those expressed in the records of Dr. Kawasaki’s treatment, as well as the reasonable inferences derived therefrom. The ALJ credited Dr. Kawasaki's opinions that the C6-7 ESI was necessary as a diagnostic test to determine the source of Claimant's continued pain. Therefore, Claimant is entitled to receive the proposed cervical C6-7 ESI.

The ALJ notes Respondents’ proposed Findings of Fact, Conclusions of Law and Order referenced the fact that authorization for the cervical ESI had been granted after Dr. Kawasaki's deposition. However, no evidence of that was admitted into evidence before the record was closed. To the extent that medical benefit has now been authorized, this issue is now moot.

Turning to the proposed lumbar epidural steroid injection, based on the totality of the evidence, the ALJ found this treatment was recommended by Dr. Kawasaki and reasonable and necessary. Dr. Kawasaki based the recommendation on Claimant’s response to the previous injection. (Finding of Fact 25). In his deposition, Dr. Kawasaki clarified the injection would be at the L3-4 level, as the L3 nerve root was pinched. No contrary medical opinion was introduced into evidence and therefore, Claimant is entitled to said treatment.

ORDER

It is therefore ordered that:

1. Claimant’s request for authorization of left C6-7 TF ESI and left L3-4 TF ESI injections is granted.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding proceduresto follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 24, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-964-654-02

ISSUES

1. A determination of whether Division Independent Medical Examination (DIME) physician Stanley H. Ginsburg, M.D. assigned Claimant a 7% or 29% whole person impairment rating.

2. Whether Respondents have produced clear and convincing evidence to overcome the opinion of Dr. Ginsburg that Claimant suffered a 29% whole person impairment as a result of his October 14, 2014 admitted industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a Taxi Driver. On October 14, 2014 he suffered admitted industrial injuries during the course and scope of his employment. While Claimant was stopped at a traffic light in his cab he was rear-ended in a multi-vehicle automobile accident.

2. Claimant underwent medical treatment with Authorized Treating Physician (ATP) Albert Hattem, M.D. Dr. Hattem concluded that Claimant reached Maximum Medical Improvement (MMI) on August 24, 2015. In assigning Claimant's permanent impairment rating Dr. Hattem conducted internally valid lumbar range of motion tests. Based on Table 53, §2B of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) Dr. Hattem determined that Claimant suffered a 5% whole person impairment for six months of medically documented pain with none-to-minimal degenerative changes on structural testing. He also assigned Claimant a 5% whole person rating for abnormal lumbar range of motion based on Tables 60-61 of the *AMA Guides*. Combining the Table 53 and range of motion impairments yields a total 10% whole person rating.

3. Claimant challenged Dr. Hattem's MMI and impairment determinations and sought a Division Independent Medical Examination (DIME) on November 23, 2015. In his Application for a DIME Claimant sought evaluation of the following: cervical spine; thoracic spine; lumbar spine; left leg; lumbar radiculopathy; SI joint pain; lumbo-sacral pain; L5-S1 disk herniation; left hip; left knee; left medial meniscus tear; and several related concerns.

4. On January 28, 2016 Claimant underwent a DIME with Stanley H. Ginsburg, M.D. Dr. Ginsburg conducted a medical records review and performed a physical examination. He explained that Claimant should do the best he could during testing in order to generate accurate data for an impairment rating. Claimant displayed no more than five degrees of cervical rotation and refused to flex or extend his neck. Dr. Ginsburg found no obvious spasms or tenderness in the paracervical or

suprascapular areas or atrophy in the upper or lower extremities. The upper extremity examination revealed normal function and tone with respect to strength, coordination, and cerebellar function. Deep tendon responses were present in the lower extremities. Notably, while undergoing examination in the supine position, Claimant repeatedly cried out in pain with every movement.

5. Claimant demonstrated full extension on a test of knee mobility but exhibited pain behaviors on flexion testing. Dr. Ginsburg found intact reflexes despite continued cries of pain, moaning and groaning. He attempted sensory examination and thought it was "probably normal" but found testing difficult because Claimant constantly "[gave] in" during lower extremity strength testing. Claimant also refused to stand on his heels and toes. Although Claimant stood during lumbar testing, he demonstrated minimal movement on straight leg raising.

6. After concluding a physical examination, Dr. Ginsburg determined that the mobility testing findings were "not at all 'physiological'" and pain behaviors were "prominently present." Dr. Ginsburg explained:

> I will state at this time that I do not believe that the range of motion findings represent a true analysis of the patient's lumbar mobility, but the instruction from the division is to report what we have found and comment on our findings if we so desire. I did tell the patient that I felt there were problems with the measurements I had and I would be happy to reevaluate him, but he should speak about this to his attorney and I did not reschedule him. As one can tell from my report, I reviewed the chart in detail and among all the specific body parts to be evaluated, I believe that the lumbar spine is the appropriate area to be evaluated. I do not believe that any of the other requests are appropriate items to evaluate. . . . I have dealt with MMI, permanent impairment, [and] future medical maintenance . . . . Based on the patient's desire to close his case, he did reach MMI on 08/24/2015 when he was evaluated for MMI and the result of that was 10%. My rating was 29%, but I have stated very clearly above that I do not believe this carries any validity. I do think that [a] specific disorder rating of 7% is appropriate.

Dr. Ginsburg's remarks reflect that he assigned Claimant a rating based on range of motion testing pursuant to instructions from the Division of Workers' Compensation. However, he recognized the range of motion results were invalid and offered Claimant the opportunity for a reevaluation. Because Claimant never returned for a reevaluation, Dr. Ginsburg assigned a 29% whole person impairment rating. However, he maintained that the 29% whole person impairment rating lacked validity.

7. In addition to his report, Dr. Ginsburg prepared a DIME Summary Sheet. He agreed with Dr. Hattem that Claimant had reached MMI on August 24, 2015. Dr. Ginsburg assigned Claimant a 7% whole person impairment rating for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides*. He also assigned Claimant a 24% whole person rating for range of motion deficits. Dr. Ginsburg

specifically reported an 8% impairment for lumbar flexion, noting “valid” on the Figure 83 chart, a 6% impairment for lumbar extension, a 5% impairment for lumbar right lateral flexion and a 5% impairment for lumbar left lateral flexion. The tests were conducted according to the *AMA Guides* in sets of three. Combining the Table 53 and range of motion impairments yields a total 29% whole person rating.

8. Marc Steinmetz, M.D. testified at the hearing in this matter. He agreed with Dr. Ginsburg that Claimant had suffered a 7% whole person impairment rating for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides*. However, Dr. Steinmetz explained that Dr. Ginsburg’s range of motion testing results were invalid pursuant to the *AMA Guides* and Colorado Division of Workers’ Compensation *Impairment Rating Tips* (*Impairment Rating Tips*). Relying on the *Impairment Rating Tips* Dr. Steinmetz explained that, if an examiner is unable to obtain valid results, he must offer the patient the opportunity to return for retesting. If a patient accepts retesting of lumbar motion, the DIME examiner is supposed to schedule a reevaluation. If valid measurements are obtained, the DIME examiner should conclude the DIME and issue an opinion as to impairment. If valid measurements are not obtained on reevaluation, the examiner must note the invalid results. Alternatively, if the patient declines a reevaluation, the examiner should note “invalidity” in his report and on the summary sheet. An examiner may utilize previously valid range of motion tests obtained by another provider to replace invalid range of motion results.

9. Dr. Steinmetz explained that, because Dr. Ginsburg had obtained invalid range of motion results, he should have had Claimant return for repeat testing. Alternatively, Dr. Ginsburg could have relied on the valid range of motion testing results obtained by other examiners. Dr. Steinmetz thus summarized that Dr. Ginsburg’s report was internally inconsistent and invalid. However, he noted that Dr. Hattem’s range of motion measurements were valid and thus his 5% range of motion impairment rating was correct. Combining the 7% whole person impairment rating for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides* with Dr. Hattem’s 5% range of motion impairment yields a 12% whole person rating. Dr. Steinmetz acknowledged that a 12% whole person rating was acceptable and valid pursuant to the *AMA Guides*.

10. Reviewing Dr. Ginsburg’s DIME report and summary sheet reveals that he assigned Claimant a 29% whole person impairment rating for his October 14, 2014 injuries. The 29% whole person rating consists of a 7% whole person impairment for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides* and a 24% whole person rating for range of motion deficits. Although Dr. Ginsburg expressed skepticism about the validity of the range of motion measurements, he nevertheless assigned a 24% rating. Dr. Ginsburg specifically reported an 8% impairment for lumbar flexion, a 6% impairment for lumbar extension, a 5% impairment for lumbar right lateral flexion and a 5% impairment for lumbar left lateral flexion. Accordingly, Respondents bear the burden of proving by clear and convincing evidence that Dr. Ginsburg’s 29% whole person impairment rating was erroneous.

11. Respondents have produced clear and convincing evidence to overcome the opinion of Dr. Ginsburg that Claimant suffered a 29% whole person impairment for his October 14, 2014 admitted industrial injuries. Initially, Dr. Ginsburg assigned Claimant a 7% whole person impairment rating for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides*. He also assigned Claimant a 24% whole person rating for range of motion deficits. Combining the Table 53 and range of motion impairments yields a total 29% whole person rating. However, Dr. Ginsburg's remarks reflect that he only assigned Claimant a rating for range of motion deficits pursuant to instructions in the *Impairment Rating Tips* from the Division of Workers' Compensation. He recognized the range of motion results were invalid and offered Claimant the opportunity for a reevaluation. Because Claimant never returned for a reevaluation, Dr. Ginsburg assigned a 29% whole person impairment rating. However, he maintained that the 29% whole person impairment rating lacked validity.

12. Dr. Steinmetz agreed with Dr. Ginsburg that Claimant had suffered a 7% whole person impairment rating for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides*. However, Dr. Steinmetz persuasively explained that Dr. Ginsburg's range of motion testing results were invalid pursuant to the *AMA Guides* and *Impairment Rating Tips*. Relying on the *Impairment Rating Tips* Dr. Steinmetz explained that, if an examiner is unable to obtain valid results, he must offer the patient the opportunity to return for retesting. If a patient accepts retesting of lumbar motion, the DIME examiner is supposed to schedule a reevaluation. If valid measurements are obtained, the DIME examiner should conclude the DIME and issue an opinion as to impairment. If valid measurements are not obtained on reevaluation, the examiner must note the invalid results. Alternatively, if the patient declines a reevaluation, the examiner should note "invalidity" in his report and on the summary sheet. An examiner may utilize previously valid range of motion tests obtained by another provider to replace invalid range of motion results.

13. Dr. Steinmetz explained that, because Dr. Ginsburg had obtained invalid range of motion testing results, he should have had Claimant return for repeat testing. Alternatively, Dr. Ginsburg could have relied on the valid range of motion testing results obtained by other examiners. Dr. Steinmetz thus summarized that Dr. Ginsburg's report was internally inconsistent and invalid. Based on the persuasive testimony of Dr. Steinmetz, Respondents have provided unmistakable evidence that it is highly probable the Dr. Ginsburg's 29% whole person impairment rating was incorrect.

14. Dr. Steinmetz commented that Dr. Hattem's range of motion measurements were valid and thus his 5% range of motion impairment rating was correct. Combining the 7% whole person impairment rating for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides* with Dr. Hattem's 5% range of motion impairment yields a 12% whole person rating. Dr. Steinmetz acknowledged that a 12% whole person rating was acceptable and valid pursuant to the *AMA Guides*. Because Dr. Ginsburg's 24% range of motion impairment rating was clearly erroneous, it is appropriate to use Dr. Hattem's valid 5% range of motion impairment rating. Combining Dr. Ginsburg's 7% whole person impairment rating for a specific disorder of the lumbar spine with Dr. Hattem's 5% whole person rating for range of motion deficits

yields a 12% whole person rating for Claimant's October 14, 2014 industrial injuries. A 12% whole person rating is valid and correct pursuant to the *AMA Guides* and *Impairment Rating Tips*.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by “clear and convincing evidence.” §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. In addressing spinal range of motion measurements, the *Impairment Rating Tips, Spinal Rating,* §9, p.6 provide that, to invalidate spinal range of motion impairments, claimants must have two visits. Two sets of three measurements must be taken during each visit. When a DIME physician determines that range of motion measurements are invalid, he may “fulfill this requirement by accepting invalidated measurements from other reports in lieu of bringing the claimant back for a second set of measurements. The physician must, however, report his/her own initial sets of measurements.” *See Impairment Rating Tips, Spinal Rating,* §9, p.6.

8. If a party has carried the initial burden of overcoming the DIME physician’s impairment rating by clear and convincing evidence, the ALJ’s determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., W.C. No. 4-600-47 (ICAP, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by clear and convincing evidence. *Id.* When the ALJ determines that the DIME physician’s rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAP, Mar. 19, 2004); *McNulty v. Eastman Kodak Co*., W.C. No. 4-432-104 (ICAP, Sept. 16, 2002);

9. As found, reviewing Dr. Ginsburg’s DIME report and summary sheet reveals that he assigned Claimant a 29% whole person impairment rating for his October 14, 2014 injuries. The 29% whole person rating consists of a 7% whole person impairment for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides* and a 24% whole person rating for range of motion deficits. Although Dr. Ginsburg expressed skepticism about the validity of the range of motion measurements, he nevertheless assigned a 24% rating. Dr. Ginsburg specifically reported an 8% impairment for lumbar flexion, a 6% impairment for lumbar extension, a 5% impairment for lumbar right lateral flexion and a 5% impairment for lumbar left lateral flexion. Accordingly, Respondents bear the burden of proving by clear and convincing evidence that Dr. Ginsburg’s 29% whole person impairment rating was erroneous.

10. As found, Respondents have produced clear and convincing evidence to overcome the opinion of Dr. Ginsburg that Claimant suffered a 29% whole person impairment for his October 14, 2014 admitted industrial injuries. Initially, Dr. Ginsburg assigned Claimant a 7% whole person impairment rating for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides*. He also assigned Claimant a 24% whole person rating for range of motion deficits. Combining the Table 53 and range of motion impairments yields a total 29% whole person rating. However, Dr. Ginsburg's remarks reflect that he only assigned Claimant a rating for range of motion deficits pursuant to instructions in the *Impairment Rating Tips* from the Division of Workers' Compensation. He recognized the range of motion results were invalid and offered Claimant the opportunity for a reevaluation. Because Claimant never returned for a reevaluation, Dr. Ginsburg assigned a 29% whole person impairment rating. However, he maintained that the 29% whole person impairment rating lacked validity.

11. As found, Dr. Steinmetz agreed with Dr. Ginsburg that Claimant had suffered a 7% whole person impairment rating for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides*. However, Dr. Steinmetz persuasively explained that Dr. Ginsburg's range of motion testing results were invalid pursuant to the *AMA Guides* and *Impairment Rating Tips*. Relying on the *Impairment Rating Tips* Dr. Steinmetz explained that, if an examiner is unable to obtain valid results, he must offer the patient the opportunity to return for retesting. If a patient accepts retesting of lumbar motion, the DIME examiner is supposed to schedule a reevaluation. If valid measurements are obtained, the DIME examiner should conclude the DIME and issue an opinion as to impairment. If valid measurements are not obtained on reevaluation, the examiner must note the invalid results. Alternatively, if the patient declines a reevaluation, the examiner should note "invalidity" in his report and on the summary sheet. An examiner may utilize previously valid range of motion tests obtained by another provider to replace invalid range of motion results.

12. As found, Dr. Steinmetz explained that, because Dr. Ginsburg had obtained invalid range of motion testing results, he should have had Claimant return for repeat testing. Alternatively, Dr. Ginsburg could have relied on the valid range of motion testing results obtained by other examiners. Dr. Steinmetz thus summarized that Dr. Ginsburg's report was internally inconsistent and invalid. Based on the persuasive testimony of Dr. Steinmetz, Respondents have provided unmistakable evidence that it is highly probable the Dr. Ginsburg's 29% whole person impairment rating was incorrect.

13. As found, Dr. Steinmetz commented that Dr. Hattem's range of motion measurements were valid and thus his 5% range of motion impairment rating was correct. Combining the 7% whole person impairment rating for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides* with Dr. Hattem's 5% range of motion impairment yields a 12% whole person rating. Dr. Steinmetz acknowledged that a 12% whole person rating was acceptable and valid pursuant to the *AMA Guides*. Because Dr. Ginsburg's 24% range of motion impairment rating was clearly erroneous, it is appropriate to use Dr. Hattem's valid 5% range of motion impairment rating. Combining Dr. Ginsburg's 7% whole person impairment rating for a specific disorder of

the lumbar spine with Dr. Hattem's 5% whole person rating for range of motion deficits yields a 12% whole person rating for Claimant's October 14, 2014 industrial injuries. A 12% whole person rating is valid and correct pursuant to the *AMA Guides* and *Impairment Rating Tips*.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Dr. Ginsburg assigned Claimant a 29% whole person impairment rating.

2. Respondents have produced clear and convincing evidence to overcome Dr. Ginsburg's 29% rating.

3. Claimant suffered a 12% whole person rating as a result of his October 14, 2014 admitted industrial injuries.

4. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 24, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-887-035-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER UPON REMAND

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing Upon Remand in the above-captioned case was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 20, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 5/20/16, Courtroom 3, beginning at 8:30 AM, and ending at 9:30 AM). As a result of the Remand by the Industrial Claim Appeals Office (ICAO), the ALJ set the hearing upon remand to determine more specific findings concerning the Claimant's "release to return to work," and entitlement to temporary disability benefits from the date of the admitted injury, February 13, 2012, through the date of maximum medical improvement (MMI), May 5, 2014., consistent with ICAO's Remand Order.

On December 4, 2015, the Industrial Claim Appeals Office (ICAO) issued a Remand Order, setting aside the undersigned Administrative Law Judge's (ALJ's) order of June 16, 2015 for further findings concerning the Claimant's "release to return to work," and entitlement to temporary disability benefits from the date of the admitted injury, February 13, 2012, through the date of maximum medical improvement (MMI), May 5, 2014. The hearing on remand occurred on May 20, 2016, after which the ALJ established a schedule for the filing of the post-hearing evidentiary depositions of Adam Mackintosh, M.D., (taken on June 30, 2016) and Nurse Practitioner (NP) Paulette Carpenter (also taken on June 30, 2016). Written transcripts of these depositions were subsequently filed; and, a briefing schedule was established. The Claimant's opening brief was filed on August 15, 2016. The Respondents' answer brief was filed on August

19, 2016; and, the Claimant's reply brief was due within two working days, or not later than August 24, 2016. No timely reply brief having been filed, the matter was deemed submitted for a decision upon remand on August 25, 2016.

Claimant's Exhibits1 through 13 were admitted into evidence, without objection. Respondents' Exhibits A through M were admitted into evidence, without objection, at the original hearing of May 21, 2015. No additional exhibits were received at the hearing on remand on May 20, 2016.

ISSUES ON REMAND

The issues to be determined by this decision upon remand concern average weekly wage (AWW), based on multiple employments; and, temporary partial disability (TPD) and temporary total disability (TTD) benefits from February 13, 2012, the date of the admitted injury, through May 5, 2014, the date of maximum medical improvement (MMI). Respondents designated the issue of an unemployment insurance (UI) benefit offset. The Respondents did **not** designate the issue of "responsibility for termination," nor was it an issue. The paramount issue to be determined upon remand is whether authorized attending physician (ATP), Dr. Mackintosh or Dr. Bacon (Dr. Bacon never saw the Claimant), properly authorized NP Carpenter to release the Claimant to return to work without restrictions; and, if so, when was the ratification effective. A corollary is whether or not NP Carpenter fits the definition of "**attending physician.**"

The Claimant bears the burden of proof, by preponderant evidence on all issues, with the exception of the UI offset, wherein the Respondents bear the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT UPON REMAND

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Respondents admitted liability for injuries sustained by Claimant arising out of a slip and fall accident on February 13, 2012.

2. On July 24, 2014, the Respondents filed a Final Admission of Liability (FAL), admitting for an average weekly wage (AWW) of $156.76; zero temporary disability benefits; a maximum medical improvement (MMI) date of May 5, 2014; 14% whole person permanent medical impairment for a total of $5,852.56 (based on the admitted AWW as a component of the formula), however, permanent disability (PPD) was not designated as an issue nor was it an issue at the hearing; PPD was admitted payable at the rate of $150 per week; and, for $40,438.08 in medical benefits to date;

and, for causally related and reasonably necessary post-MMI medical maintenance benefits.

3. The Claimant was working as a school bus driver at the time of her injury. According to the Claimant, she was able to continue to work as a bus driver but had difficulty performing some of the lifting and reaching duties required of her employment. She continued to work for Employer until she was dismissed from employment on May 22, 2013. The ALJ draws a plausible inference that the Claimant was dismissed because she could no longer perform the full range of her school bus driver duties as supported by the Claimant's undisputed testimony. Since temporary disability benefits are based on a strict temporary wage loss concept, the Employer, by terminating the Claimant's employment, increased her temporary wage loss. The issue upon remand is whether the Claimant had been working under proper full releases to return to work during specified periods of time, given by a nurse practitioner, or by a nurse practitioner whose release was properly co-signed or agreed upon by the attending physician.

4. The ALJ takes administrative notice of the fact, and finds, that a **"nurse practitioner"** is not an "**attending physician,"** within the meaning of the Workers' Compensation Act. This issue has never been decided in a precedent-setting opinion of an appellate court. Indeed, § 12-36-106, C.R.S. defines the practice of medicine by "**physicians"** and proscribes the **unauthorized** practice of medicine by "physicians assistants." Despite the respondents lengthy argument on how far physicians' assistants have come, a distinction is made in the Colorado Medical Practice Act, §§12-36-101 *et seq.,* which makes it clear that physicians' assistants cannot be defined as "**attending physicians."** Consequently, NP Carpenter cannot take the place of an "**attending physician.**"

5. Despite the ALJ's determination in the original decision that the Claimant's credible lay testimony that she ultimately had to give up all of her employments because of her work-related injury whereby the holding in *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997), permits the ALJ to find that the Claimant's testimony was more persuasive and credible than the NP Carpenter's testimony and the subsequent so-called ratifications thereof by Banner physicians, Dr. Mackintosh and Dr. Bacon, as well as Dr. Benz, who saw the Claimant once (but for purposes of the law of the case on remand shall be considered an "attending physician"), the ALJ infers that ICAO, in its remand order, has established the law of the case whereby each release to return to full duty must be given effect when ratified by an **attending physician**, regardless of whether the ratifying physician ever saw the Claimant or only saw the Claimant once on referral from Banner.

Chronology

6. From February 13, 2012, the date of injury, until May 7, 2012, the date that Robert Benz, M.D., released the Claimant to full duty, the Claimant was working at

her multiple employments as a bus driver for the Employer herein; at Stops (until December 2012); and at Rita/Quizno's (until April 15, 2012), thus, sustaining no wage loss based on her multiple employments. Her AWW from the Employer was $192.35; from Stops, it was $110.09; and, from Reata/Quizno's, it was $157.16, thus, establishing an AWW of $459.60, based upon multiple employments as of the date of the admitted injury.

7. From April 16, 2012 (the date the Claimant could no longer work at Quizno's because of the effects of her admitted injury) through May 6, 2012, both dates inclusive, a total of 21 days, she experienced a temporary wage loss of $157.16 per week (she was still working for the Employer herein during this time), thus, yielding a temporary partial disability (TPD) benefit rate of $104.77 per week, or $14.97 per day, for an aggregate subtotal amount of $314.37.

8. From May 7, 2012, the date that Dr. Benz released the Claimant to full duty work, until March 1, 2013, the date that Kenneth Pettine, M.D., restricted the Claimant, she experienced no wage loss attributable to the admitted injury.

9. From March 1, 2013 until April 16, 2013 (the date Dr. Bacon released the Claimant to full duty work), both dates inclusive, a total of 47 days, the Claimant continued working as a school bus driver for the Employer, despite her restrictions, until she was terminated by the Employer herein on May 22, 2013. Consequently, she was experiencing a temporary wage loss [having lost her jobs at Quizno's (April 15, 2012) and Stops (December 2012) because of the effects of her admitted injury], based on the AWW of $459.60 minus $192.35 (her then continuing wage with the Employer herein) equaling a temporary wage loss of $267.25, thus, yielding a TPD rate of $178.16 per week, or $25.45 per day, for an aggregate subtotal amount of $1,196.15.

10. From April 16, 2013 (the date that banner Dr. bacon ratified NP Carpenter's releases to full duty although he had not ever seen the Claimant, until September 25, 2013 (the date that Dr. Mackintosh agreed with the restrictions of Gregory Reichhardt, M.D.), the Claimant experienced no temporary wage loss attributable to the admitted injury

11. The Claimant was not working at all because of the effects of her admitted injury from September 26, 2013 through November 24, 2013, both dates inclusive, a total of 60 days. She had been receiving Unemployment Insurance (UI) benefits of $64.50 per week which are subject to a 100% offset against workers' compensation benefits; during which time the Claimant was temporarily and totally disabled during this period and entitled to TTD benefits of 2/3rd of the AWW of $459.60 (the (AWW) or TTD benefits of $305.40 per week. Subtracted from the TTD weekly benefit, a net TTD benefit of $240.90 per week, or $34.41 per day, for an aggregate subtotal amount of $2,064.60, is yielded.

12. From November 25, 2013 through December 1, 2013, both dates inclusive, a total of 6 days, the Claimant was no longer receiving UI benefits and she was temporarily and totally disabled and, thus, entitling her to a TTD benefit of $305.40 per week, or $43.63 per day, in the aggregate subtotal amount of $261.77.

13. From December 2, 2013 until the day before the Claimant reached MMI, May 4, 2014, both dates inclusive, a total of 154 days, she was employed by Stage Stores, earning $129.00 per week, thus, sustaining a temporary wage loss of $330.60 per week, thus, yielding a TPD rate of $220.40 per week, or $31.49 per day, in the aggregate subtotal amount of $4,849.46.

Medical Status

14. After the admitted injury, the Employer sent the Claimant to Banner Health for treatment, where she was seen by Paulette Carpenter, FNP (Nurse Practitioner). NP Carpenter released the Claimant to return to full duty work immediately on February 13, 2012. According to the Claimant, NP Carpenter referred her for an orthopedic evaluation a few months after her injury. Claimant was seen by Robert Benz, M.D., an orthopedic surgeon, on May 7, 2012, who was of the opinion that the Claimant could return to her full duties as a bus driver. According to the Claimant, she was not seen by any physician at Banner until she was seen by Adam Mackintosh, M.D., a Sterling physician, in August 2013. Her testimony is corroborated by the deposition testimony of Dr. Mackintosh. The Claimant denied having been seen by Jeff Bacon, M.D., at Banner Health. NP Carpenter, in her June 30, 2016 deposition, does **not** refute the Claimant's testimony in this regard. Dr. Bacon did not come forward to dispute the Claimant's testimony in this regard. The Claimant was also referred to Kenneth Pettine, M.D., Usama Ghazi, D.O., and Gregory Reichhardt, M.D. All of these physicians were within the chain of authorized referrals and, therefore, authorized.

15. The Claimant's medical records from Banner Health reveal that the Claimant was treated by Paulette Carpenter, FPN, throughout the course of her medical treatment. NP Carpenter released the Claimant to return to full duty as a bus driver almost immediately on February 13 2012, without any co-signature by an attending physician. With the exception of the period from October 25, 2013 until November 17, 2013, FPN Carpenter indicated that the Claimant was able to return to full duty work. Dr. Mackintosh, however, agreed with Dr. Reichhardt's restrictions on September 25, 2013, thus, contradicting and superseding NP Carpenter's full duty release thereafter.

16. The evidentiary deposition of NP Carpenter, taken on June 30, 2016 (after the hearing on remand) reveals that NP Carpenter considered herself to be the treating medical provider and her releases to full duty were not with the ratification of an M.D. physician until Dr. Bacon (never having seen the Claimant) co-signed releases on April 26, 2013. Indeed, NP Carpenter admitted that she did not discuss the releases to full duty with a physician:

> Q. Do you think you would have discussed this with a physician?
>
> A. No. (NP Carpenter 6-30-16 Depo., p. 49, lines 10-13).

Nothing in NP Carpenter's evidentiary deposition contradicts the Claimant's sworn testimony that Banner Dr. Bacon never saw the Claimant.

17. In her evidentiary deposition of June 30, 2016, NP carpenter testified that she did not know what the Claimant's job duties at Stops, Quizno's or Stage Stops entailed nor did she have a clear understanding of the Claimant's lifting requirements as a school bus driver for the Employer herein.

18. As found herein below, the ALJ infers and finds that NP Carpenter's "releases to return to full duty work" were neither co-signed nor agreed upon by a Banner Physician until April 16, 2013. The majority of reports beginning on April 16, 2013 were signed or co-signed by Dr. Bacon (who had never seen the Claimant) or by Dr. Mackintosh. Based on the remand order of ICAO, the ALJ infers that the law of the case indicates that a physician can be an **attending physician** (Dr. Bacon) without ever seeing the injured worker by simply ratifying a nurse practitioner's release to return to work. All medical reports after April 16, 2013 indicated that the Claimant was able to return to full duty work—until September 25, 2013 when Banner Dr. Mackintosh agreed with Dr. Reichhardt's restrictions that establish that the Claimant could not work at any of her pre-injury jobs.

19. In his evidentiary deposition of June 30, 2016, Dr. Mackintosh stated that he did not consider himself the Claimant's attending physician. He stated: "No I would not consider myself that (attending physician). I would consider Nurse Practitioner Carpenter the **attending provider** (emphasis supplied) in this case" (6-30-16 Mackintosh depo., p. 19, lines 3-10).

20. The Claimant was under a full duty release to return to work by Dr. Benz from May 7, 2012, at least through March 1, 2013, when Dr. Pettine restricted the Claimant. This continued until April 16, 2013, when Dr. Bacon, who had never seen the Claimant, co-signed NP Carpenter's releases to return to full duty work. Based on the law of the case, as established by ICAO, the ALJ must consider this attenuated delegation an appropriately delegated release to return to work by an "**attending physician."**

21. In his evidentiary deposition of April 10, 2015, Dr. Mackintosh testified that he first saw the Claimant in September 25, 2013. He stated that Paulette Carpenter, FNP, provided primary care to Claimant prior to this date. Dr. Mackintosh began seeing the Claimant when nurse practitioners required a physician to sign off on treatment. As

of September 25, 2013, Dr. Mackintosh stated that he felt the Claimant could perform the regular duties of a bus driver as he understood them to be, and that he was hesitant to place work-restrictions on patients that could impact their employment. Dr. Mackintosh's statement in this regard is internally inconsistent and he subsequently in the same deposition indicated his agreement with Dr. Reichhardt's permanent restrictions, which the ALJ infers and finds relate back to the date of injury to include temporary restrictions. Dr. Mackintosh stated that there were physical limitations that the Claimant should have avoided after her injury such as heavier lifting. Dr. Mackintosh did not disagree with the permanent restrictions of Dr. Reichhardt "because this was his (Dr. Reichhardt's) area of expertise. Dr. Mackintosh stated that the Claimant had medical incapacity after her date of injury and it would not have been unreasonable for the Claimant to have the permanent restrictions provided by Dr. Reichhardt in place from her date of injury until MMI. The ALJ infers and finds that Dr. Mackintosh deferred to Dr. Reichhardt on the issue of medical restrictions, and Dr. Reichhardt, as subsequently inferred and found herein, permanently restricted the Claimant to limitation of lifting, pushing, pulling and carrying up to 20 pounds occasionally, 10 pounds frequently. Limit bending and twisting at the waist to a rare basis four times per hours. The law of the case requires that **there is no entitlement to** temporary disability benefits during delegated full duty releases to return to work.

Dr. Pettine

22. The Claimant was seen by Kenneth A. Pettine, M.D., on or about March 1, 2013. Dr. Pettine was of the opinion that the Claimant was a candidate for a 2-level fusion procedure. Dr. Pettine also outlined a number of non-operative treatment options. Dr. Pettine stated the opinion that the Claimant should avoid heavy weight lifting, squats and dead lifts as well as extensive lifting, twisting, bending and stooping. The ALJ finds the opinions of Dr. Pettine to be more credible and persuasive than the opinions of Dr. Benz, thus, superseding Dr. Benz's May 7, 2012 release to full duty. Consequently, Dr. Benz's full duty release was effective from May 7, 2012 through March 1, 2013. Consequently, the ALJ infers and finds that Dr. Pettine's restrictions, being later in date, superseded and replaced Dr. Benz's full duty release to return to work. Thereafter, Dr. Bacon (who had never seen the Claimant) ratified NP Carpenter's full duty release to return to work, effective April 16, 2013. This full duty release to return to work, according to NP Carpenter, continued until the Claimant was placed at MMI by Dr. Reichhardt on May 5, 2014. Dr. Mackintosah, however, contradicted this full duty release, effective, September 25, 2013, when he agreed with Dr. Reichhardt's restrictions.

23. The Claimant underwent bilateral L4-5, bilateral L5-S1 facet joint intra-articular injections performed by Scott Hompland, D.O., on September 6, 2012 and December 6, 2012.

24. Claimant was seen by Usama Ghazi, D.O., on or about November 11, 2013. Dr. Ghazi recommended a course of treatment to begin with sacroiliac injections. Dr. Ghazi subsequently performed bilateral sacroiliac injections and a sacrococcygeal joint injection with some improvement. Dr. Ghazi noted that the Claimant was frustrated that her tailbone pain was precluding her from returning to her occupation as a trucker. Although Dr. Ghazi did not specifically comment on work-restrictions, this later evidence of the Claimant's level of function and intensity of treatment is persuasive evidence that she was unable to perform full duty work for the Employer.

Dr. Reichhardt

25. The Claimant was placed at MMI by Dr. Reichhardt on May 5, 2014. Dr. Reichhardt issued a 10% whole person permanent impairment rating for Claimant's cervical spine and 11% whole person permanent impairment rating for Claimant's lumbar spine (later apportioned to 4%). Dr. Reichhardt recommended 3 years of maintenance treatment and provided permanent work-related restrictions of limited lifting, pushing, pulling and carrying to 20 pounds occasionally, 10 pounds frequently. Limit bending and twisting at the waist "to a rare basis four times per hours." Dr. Reichhardt deferred any opinion concerning the Claimant's temporary restrictions prior to MMI to the Claimant's authorized treating physicians. The opinions of Dr. Reichhardt are credible and persuasive. Additionally, Dr. Pettine had prescribed temporary restrictions of avoiding heavy weight lifting, squats and dead lifts as well as extensive lifting, twisting, bending and stooping. All of these restrictions would prevent the Claimant from performing the full range of her job duties with the Employer, with Stops, and with Quizno's.

26. Despite restrictions prescribed by Dr. Pettine, the Claimant continued working some multiple employments in excess of those restrictions, however, the ALJ infers and finds that she was **not** able to properly perform at any of her remaining multiple jobs. The ALJ infers and finds that based on the Claimant's undisputed testimony, she should not have been working, full duty, at any of her multiple employments unless she had been offered modified duties to accommodate those restrictions. She was **not** offered modified duties at any of her employments, and she ultimately was forced to discontinue these employments because of her restrictions.

Multiple Employments as of Admitted Date of Injury

27. The Claimant's gross earnings from the Employer herein for 2011 (Claimant's Exhibit 7) amount to $10, 012.05 divided by 52 = $192.35 per week, as opposed to the admitted AWW of $156.76. The ALJ finds that this basis of calculating the AWW is more equitable and fair to the Claimant than the method utilized by the adjuster who filed the admissions herein. This higher AWW would affect the formula for determining permanent medical impairment, however, permanency was **not** a designated issue. Further, because of multiple, contemporaneous, employments on the

date of the admitted injury, $192.35 is only one component of the Claimant's overall AWW.

28. On the date of her injury, the Claimant also worked as a driver for Stops Enterprises. She began working for Stops in the early part of 2011 and continued to work for Stops until approximately December 2012. As found herein above, the Claimant was under appropriate full duty releases to return to work from May 7, 2012 through September 26, 2013, based on the law of the case, and any temporary disability cannot be attributed to the Claimant's inability to perform job duties during this period of time. Her job duties at Stops included driving patients to their medical appointments. The Claimant was able to do her job duties after her injury, but had some trouble with longer drives. Her employer stopped sending her assignments in December of 2012. The ALJ infers and finds, based on the totality of the evidence, that the Employer stopped sending her assignments in December of 2012 because of her inability to perform the full range of her job duties caused by the admitted injury. After Stops stopped sending the Claimant assignments, her temporary wage loss attributable to the admitted injury increased as of January 1, 2013. The Claimant's wage records from Stop Enterprises from July 5, 2011 until January 5, 2012 reveal gross earnings of $2,909.40 for this 185 day period. The ALJ finds that the most equitable and fair method of determining the Claimant's weekly wage at Stop's is by averaging gross earnings for the Claimant's entire period of employment at Stop's. This would result in a weekly average wage of $110.09 ($2,909.40 divided by 185 x 7= $110.09) at Stops.

29. Also on the date of her admitted injury, the Claimant worked at The Reata Petroleum Corporation, which was a Quizno's sandwich shop located at a truck stop. Her job duties were as a sandwich maker. She was required to be on her feet all day long, which was contraindicated by the totality of her physical restrictions. She started working for Quizno's in June 2011 until she stopped working on April 15, 2012 because her physical limitations arising out of the injury prevented her from performing the full range of her duties for Quizno's. As of the time she stopped working at Quizno's, the Claimant had not yet been released to full duty by Dr. Benz (May 7, 2012). According to the Claimant, she stopped working at Quizno's because she could no longer handle the physical demands of working three (3) jobs. Claimant's employment records from Reata Petroleum Corporation indicate that Claimant started working for Quizno's on June 14, 2011. Her 2011 W-2 from Reata Petroleum (Quizno's) indicates that the Claimant earned $4,512.60 for the tax year of 2011. The ALJ finds that the most equitable and fair method of determining the Claimant's wage at Quizno's should be based on averaging her gross wages during the entire length of her employment at Quizno's. Based on 201 days from June 14, 2011 until December 31, 2011, these gross earnings would result in a weekly average of $157.16 at Quizno's.

Average Weekly Wage (AWW)

30. As of the admitted date of injury, the Claimant had three concurrent, multiple employments. Her gross earnings from the Employer herein for 2011 (Claimant's Exhibit 7) amount to $10, 012.05 divided by 52 = $192.35 per week. Add $110.09 per week from Stops and $157.16 per week from Quizno's, and an overall AWW of $459.60 results. The ALJ hereby finds that the above described methodology for determining AWW from the Claimant's three multiple employments is the fairest and most objective way of determining the AWW herein. Therefore, the ALJ finds that the Claimant's AWW on the date of injury was $459.60, which is the baseline from which temporary partial disability (TPD) is measured, based on temporary wage loss.

Temporary Disability

31. From the date of the admitted injury of February 13, 2012 until the Claimant was terminated from employment by the Employer herein on May 22, 2013, she continued to earn $192.35 per week from the Employer herein. From February 13, 2012 through December 31, 2012, she continued working for Stops, earning an additional $110.09 per week. From February 13, 2012 through April 15, 2012, she continued working for Quizno's at $157.16 per week. Consequently, the Claimant had **no** temporary wage loss from February 13, 2012 through April 15, 2012. From April 16, 2012 (the date she was unable to continue working at Quizno's) through May 6, 2012, both dates inclusive, a total of 21 days, the Claimant was sustaining a temporary wage loss of $157.16 per week during this period of time, yielding a TPD rate of $104.77 per week, or $14.97 per day, in the aggregate subtotal amount of $314.32. From January 1, 2013 through May 22, 2013, both dates inclusive, a subtotal of 142 days, the Claimant no longer worked for Stops at $110.09 per week and she no longer worked at Quizno's at $157.16 per week, all because of the restrictions occasioned by the admitted injury, however, she continued work for the Employer herein.

32. The Claimant was under a full duty release to return to work, by Dr. Benz, from May 7, 2012 through March 1, 2013, when Dr. Petttine restricted her.

33. From April 16, 2013 (when Dr. Bacon ratified NP Carpenter's full duty release) until September 25, 2013, when Dr. Mackintosh agreed with Dr. Reichhardt's restrictions, the Claimant was under a full duty release to return to work.

34. From June 1, 2013 through November 24, 2013, the Claimant was receiving Unemployment Insurance (UI) benefits of $64.50 per week, which are subject to a 100% statutory offset. She was temporarily and totally disabled, attributable to the admitted injury, from September 25, 2016 through November 24, 2013.

35. From November 25, 2013 through November 30, 2013, both dates inclusive, a total of 5 days, the Claimant was no longer receiving UI benefits and she

was still temporarily and totally disabled, thus, her TTD benefit is $306.40 per week, or $43.77 per day, in the aggregate subtotal amount of $218.85.

36. In approximately December 2013, the Claimant started to work retail sales for Stage Stores. She continued to work at Stage Stores, averaging between 12-17 hours/week at $8.60 an hour, or an average of 15 hours per week, or $129.00 per week, until after she was placed at MMI on May 5, 2014. From December 2, 2013 through the date before the MMI date, May 4, 2014, both dates inclusive, a total of 154 days, the Claimant was sustaining a temporary wage loss of $330.60 per week ($459.60 - $129.00= $330.60), thus, yielding a TPD benefit rate of $220.40 per week, or $31.49 per day, in the aggregate amount of $4,849.46.

Releases to Full Duty/Restrictions

37. From February 13, 2012 through May 7, 2012, NP Carpenter had released the Claimant to full duty work without restrictions, and this release was not co-signed or properly ratified by an attending physician, however, the Claimant had continued working at her pre-injury work as a bus driver; at Stops; and, at Quizno's until May 7, 2012. Consequently, she had no temporary wage loss during this period of time.

38. From May 7, 2012 through March 1, 2013, the Claimant was under a full duty release to return to work by NP Carpenter, ratified by Dr. Bacon. Consequently, she had no temporary wage loss attributable to her admitted injury during this period of time.

39. From March 1, 2013 through April 16, 2013, the Claimant was under restrictions from Dr. Pettine. Consequently, she was experiencing a temporary wage loss attributable to her admitted injury during this period of time.

40. From April 16, 2013 through September 25, 2013, the Claimant was under a full duty release to return to work by NP Carpenter, ratified by Dr. Bacon. Consequently, she had no temporary wage loss attributable to her admitted injury during this period of time.

41. From September 25, 2013 through May 4, 2014, the day before the Claimant was placed at MMI by Dr. Reichhardt, she was under restrictions admitted by Dr. Mackintosh, thus, she was experiencing a temporary wage loss, measured against the baseline of her AWW (which is based on multiple employments as of the date of injury).

Unemployment Insurance (UI) Benefit Offset

42. The Claimant received UI benefits of $129.00 every two weeks, or $64.50 per week, from June 1, 2013 until November 24, 2013 (Claimant's Exhibit 6).

Ultimate Findings

43. It is undisputed that Dr. Mackintosh deferred to Dr. Reichhardt on the Claimant's medical restrictions on September 25, 2013. Also, Dr. Pettine imposed temporary restrictions on March 1, 2013, effective until April 16, 2013 (when Dr. Bacon ratified NP Carpenter's full duty release to return to work without ever having seen the Claimant). Dr. Pettine's restrictions would have prevented the Claimant from performing the full range of her duties at any of her multiple employments. Nonetheless, the Claimant worked at her remaining multiple employments despite her medical restrictions, but she could not perform adequately or properly at any of her multiple jobs.

44. The ALJ finds the Claimant's testimony as a whole, credible and un-refuted. Her lay testimony establishes that she could **not** perform properly or adequately at any of her multiple jobs. Also, the ALJ finds the medical opinions of Dr. Pettine and Dr. Reichhardt concerning restrictions persuasive and credible. When she lost the jobs in her multiple employments and she was not under appropriately delegated or appropriate full duty releases to return to work, the Claimant was temporarily disabled.

45. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of Dr. Pettine, Dr. Reichhardt and Dr. Mackintosh's ultimate opinion (as found in paragraph 6 herein above), because they are based on substantial evidence, and to reject the opinion of Dr. Benz and FPN Carpenter, other than giving accord to Dr. Benz's full duty release to return to work, effective from May 7, 2012 through March 1, 2013, that date of Dr. Pettine's restrictions.

46. The Claimant's AWW from her multiple employments on the date of injury is $459.60, which is the baseline measurement for TPD benefits.

47. From the date of injury, February 13, 2012 through April 15, 2012, the Claimant was working at all three multiple employments and sustained **no** temporary wage loss.

48. As found herein above, from April 16, 2012 through May 7, 2012, the Claimant was sustaining a temporary wage loss, attributable to her admitted injury. The details of that wage loss are specified herein above.

49. The Claimant was under a full duty release by an attending physician, Dr. Benz, from May 7, 2012 through March 1, 2013, the date that Dr. Pettine restricted her, thus there was no temporary wage loss attributable to the admitted injury.

50. From March 1, 2013 through April 16, 2013 (the date of NP Carpenter's full duty release, ratified by Dr. Bacon), the Claimant was sustaining a temporary wage loss as specified herein above under Dr. Pettine's restrictions.

51. From April 16, 2013 through September 25, 2013, the Claimant was under a full duty release from NP Carpenter, ratified by Dr. Bacon. Therefore there was no temporary wage loss attributable to the admitted injury.

52. From September 25, 2013 through December 1, 2013, the Claimant was sustaining a 100% temporary wage loss, having lost all of her other employments due to her restrictions and inability to do the jobs, as specified herein above.

53. From December 2, 2013 (when the Claimant began employment with Stage Stops at an average wage of $129.00 per week) through May 4, 2014 the day before her MMI date, the Claimant was sustaining a temporary wage loss as specified herein above.

54. The Claimant received UI benefits of $129.00 every two weeks, or $64.50 per week, from June 1, 2013 until November 24, 2013 (Claimant's Exhibit 6).

RESPONDENTS' ARGUMENTS

The Respondents argue that it is the law of this case that an attending physician may make a blanket delegation to an NP to determine when a claimant may return to work. The question is may a physician who has never seen an injured worker be deemed an "attending physician," and may an attending physician make a retroactive blanket delegation one and a half years after the NP has released the injured worker to return to work. The Respondents concede that there are factual issues "surrounding the status and abilities of nurse practitioners, which should be resolved" with the hearing on remand.

Respondents argue, at great length that nurse practitioners, by necessary implication, should be accorded the status of "attending physicians" for purposes of releasing injured workers to full duty. The Respondents point out that the State of Colorado regulates NP's through the Board of Nursing – a DORA body. The Legislature has established a Nurses Practice Act, §§.12-38-101 to 12-38-133, C.R.S. In general, advanced nurse practitioners are granted wide authority to administer care, including prescriptive authority, work independent of a physician and professional decision making. **NP's are not physicians; physicians are regulated under a separate statutory system.** But the regulation and authority of NP's mirrors the system developed for physicians. As argued in Respondents' earlier briefing, NP's were heralded as an important part of our evolving medical care system under the Affordable Care Act. NP's play and important role in offering care to patients, especially in areas that have fewer providers generally, such as rural locations throughout the country, where access to providers is limited. Nonetheless, the Respondents concede that NP's are not **attending physicians.** Indeed, if the General Assembly had intended for NPs to be in the place of **attending physicians** in the Workers' Compensation Act , it would have said so.

NP Carpenter testified via deposition on June 30, 2016. NP Carpenter has been a nurse for 44 years with Banner Health. In 1997, NP Carpenter became a Certified Family Nurse Practitioner through the ANCC, a national board for advanced nursing. To qualify for the certification, a nurse must possess, at a minimum, a master's degree in nursing, complete a residency program, and a work a significant amount of clinical hours. NP Carpenter completed the requirements while working in northern Colorado – both Greeley and Brush. She worked with physicians and other allied medical professionals during her training to become a NP. She has maintained her board certification for almost 20 years, all the time serving the citizens of northern Colorado.

NP Carpenter has prescriptive authority. She met the requirements for the prescribing controlled medicines through the DEA. This authority was attained after 1500 to 1700 clinical hours of work.

NP's have several specialties, similar to medical specialties. NP Carpenter chose to become a Family NP and earned her certification to hold the title of an FNP.

NP Carpenter is an independent practitioner. She has a scope of practice under the Nurses Practices Act that permits her to work independent of any provider or clinic. Her license permits her to work without the supervision or authority of a physician. NP Carpenter, however, has worked in the Banner system for 44 years. She collaborates with other providers, including physicians and other allied medical professionals.

NP Carpenter explained her practice places her in the role of providing primary care to patients. There may be times when she is the only medical professional treating a patient in a clinic. She will make referrals to specialists, however, when more advanced care is needed.

When a patient wants to see her, they make an appointment. She will take a history and treat them as expected of any medical professional caring for a patient.

Despite NP Carpenter's extensive credentials and activities she is **not** an **attending physician** in the contemplation of the Workers' Compensation Act.

The Claimant and NP Carpenter

The Respondents observe that the Claimant was a patient of NP Carpenter prior to her workers' compensation claim. When the Claimant sustained her admitted injury, Claimant made the appointment with NP Carpenter, as she had treated her previously for non-work related conditions. Claimant made the appointment with NP Carpenter through Occumed. NP Carpenter was the first treater to evaluate and treat the Claimant for her work injury. This fact does **not** make NP Carpenter an **attending physician** as defined by the Workers' Compensation Act.

NP Carpenter explained injured workers are provided the same care by her as she would treated any patient. If additional advice was needed, she had professionals she could reach out to for help. NP Carpenter testified 15 to 20% of her patients are injured workers where she is the primary provider.

Respondents observe that NP Carpenter diagnosed the Claimant with a cervicothoracic muscle strain with lumbar pain. This is a condition NP Carpenter treated regularly. Every day she works, NP Carpenter testified she treats patients for strains, sprains and orthopedic-type complaints. She was trained in nursing to handle these types of injuries and her 44 years of experience in the clinic honed her skills. The injury was straight-forward and a common one in her experience. This does not make NP carpenter an attending physician within the definition of the Workers' Compensation Act. Had the General Assembly intended such a situation, it would have clearly indicated that an **NP** could release an injured worker to return to work instead of limiting this action to an **attending physician.**

Claimant had treated with NP Carpenter prior to the work injury for similar complaints. She had prescribed pain medication and muscle relaxants to claimant prior to the work injury.

NP Carpenter evaluated the Claimant after taking a history. She performed a physical examination and inputted her notes into the medical chart for the Claimant. She charts every day for each patient seen in order to keep records of her work.

Based on the history and examination provided by the Claimant when she first saw NP Carpenter for her work related injury, NP Carpenter felt capable of treating the Claimant's injuries. She had more than 40 years of experience in treating patients like the Claimant for these types of injuries. Nonetheless, this does not make NP Carpenter an **attending physician** within the meaning of the Workers' Compensation Act.

NP Carpenter is the primary caregiver in all her patient relationships. She does not work as a traditional nurse, who carries out the orders of physicians. As a primary caregiver, NP Carpenter provides her own treatment plans and provides care she deems reasonable and necessary. Dr. Mackintosh confirms this in his last deposition.

NP Carpenter's Return to Work Recommendation

Respondents observe that NP Carpenter testified that the Claimant was on a full duty work status for most of the time she treated the Claimant.

When NP Carpenter released the Claimant to full duty work, she believed that she understood the nature of the Claimant's work. As found herein above, NP carpenter did not understand the Claimant's lifting requirements as a school bus driver. Respondents argue that there is no indication in the record that the claimant ever complained about the full duty work status for the job with the Employer or any of the other jobs claimant held during the pendency of her claim. This argument begs the question. Either the Claimant could perform at her multiple jobs or she could not perform. As found herein above, she could not perform at various times. Whether NP carpenter released the Claimant to return to work without restrictions, based on inadequate information, does not mean that the Claimant could perform all of her multiple jobs.

The Respondents argue that the Claimant did not make NP Carpenter aware of other jobs she was working or that the Claimant had any difficulty doing those jobs. It is sheer speculation as to what NP carpenter would have done had she been aware of the Claimant's difficulties with her other jobs. Indeed, the respondents' arguments minimize the extent of the Claimant's injuries, which minimization is belied by subsequent medical opinions. NP Carpenter did provide restrictions for claimant when there was a clinical indication for the restrictions. She in fact did provide restrictions when claimant complained of increased complaints. Claimant was evaluated by Dr. Ghazi during that period. After the evaluation, claimant's condition improved and she was returned to full duty work.

The Respondents argue that the Claimant never asked NP Carpenter for restrictions. This argument is contrary to the "independent professional judgment" of NP Carpenter's extensive discussion of her abilities to independently treat patients.

Despite the extensive arguments to justify NP carpenter's unqualified releases for the Claimant to return to full duty, the ALJ has found on remand herein above that specific physician ratified releases to return to work at full duty by NP Carpenter were sufficient to cause a cessation of temporary disability benefits. The Respondents simplistic argument that NP Carpenter's full duty releases were effective from the beginning, with minor exceptions, does not contemplate the complicated effects, and subsequent restrictions, of the Claimant's admitted injury. The Respondents admitted for 14% working unit permanent partial disability, which flies in the face of pre-MMI minimization of any temporary disability whatsoever. Indeed, the overshadowing tenor of the Respondents argument is that the Claimant is entitled to **no** temporary disability benefits from the date of injury, February 13, 2012, through the date of MMI, May 5, 2014, despite the respondents indicating that NP Carpenter had restricted the Claimant when there was a clinical indication for the restrictions. Respondents indicate that NP carpenter, in fact provided restrictions when the Claimant complained of increased complaints. Despite this, no temporary disability was admitted or paid.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

The Law of the Case

a. ICAO has determined that a full duty release to return to work by a nurse practitioner, if ratified by a physician who has not seen the injured worker, or if retroactively ratified by an attending physician one and a half years after the admitted injury should be given effect. ICAO has, therefore, established the "law of the case," and this ALJ is bound by this determination, absent a clear error or changed circumstance. *See Buckley Powder Co. v. State,* 70 P.3d 547 (Colo. App. 2002); *Giampapa v. American Family Mut. Ins. Co.,* 64 P.3d 230 (Colo. 2003); *Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). As found herein above, there are periods when releases to full duty have been ratified by a physician under the circumstances dictated by the law of the case. Therefore, temporary disability benefits should be denied during these periods of time.

Credibility

b. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony, as a whole, was credible and un-refuted. Also, as found, the medical opinions of Dr. Pettine and Dr. Reichhardt, concerning restrictions, were persuasive and credible. As further found, the opinion of Dr. Benz was lacking in credibility, other than his release of the Claimant to full duty from May 7, 2012 through March 1, 2013 (the date that Dr. Pettine restricted the Claimant). The ultimate medical opinions of Dr. Mackintosh, Dr. Pettine and Dr.

Reichhardt on restrictions are essentially un-contradicted by later opinions; and, they are credible and persuasive. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leeway v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice to accept the opinions of Dr. Pettine, Dr. Reichhardt and Dr. Mackintosh's ultimate opinion of September 25, 2013, because they are based on substantial evidence, and to reject the opinions of FPN Carpenter, when rendered at times un-supported, not co-signed, or not ratified by an **attending physician**.

Average Weekly Wage

d. Where an injured worker has arranged **multiple** employments to earn a living, and the injury precludes work altogether, or in one or more employments, a fair computation of the true AWW encompasses all employments. *St. Mary's Church & Mission v. Indus. Comm'n,* 735 P. 2d 902 (Colo. App. 1986); *Jefferson County Public Schools v. Dragoo,* 765 P.2d 636 (Colo. App. 1988); *Broadmoor Hotel v. Indus. Claim Appeals Office,* 939 P.2d 460 (Colo. App. 1996), *cert. denied* July 14, 1997. An AWW calculation is designed to compensate for temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S
An ALJ has the discretion to determine a claimant's AWW, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, a fair and objective determination of the Claimant's

AWW from her multiple employments at the time of the admitted injury is $459.60, which is the baseline from which to measure temporary wage loss.

Temporary Disability

e. Essentially, temporary disability benefits shall continue until **the attending physician** gives the employee a written release to return to regular work without restrictions § 8-42-105 (2) (c), C.R.S. and § 8-42-106. This provision should be mechanistically applied regardless of whether subsequent medical opinions seem to override these releases. As found, from the date of injury, February 13, 2012 through April 15, 2012, the Claimant was working at all three multiple employments and sustained **no** temporary wage loss.

f. As found herein above, from April 16, 2012 through May 7, 2012, the Claimant was sustaining a temporary wage loss, attributable to her admitted injury. The details of that wage loss are specified herein above.

g. The Claimant was under a full duty release by an attending physician, Dr. Benz, from May 7, 2012 through March 1, 2013, the date that Dr. Pettine restricted her, thus there was no temporary wage loss attributable to the admitted injury.

h. From March 1, 2013 through April 16, 2013 (the date of NP Carpenter's full duty release, ratified by Dr. Bacon), the Claimant was sustaining a temporary wage loss as specified herein above.

i. From April 16, 2013 through September 25, 2013, the Claimant was under a full duty release from NP Carpenter, ratified by Dr. Bacon. Therefore there was no temporary wage loss attributable to the admitted injury.

j. From September 25, 2013 through December 1, 2013, the Claimant was sustaining a 100% temporary wage loss, having lost all of her other employments due to her restrictions and inability to do the jobs, as specified herein above.

k. From December 2, 2013 (when the Claimant began employment with Stage Stops at an average wage of $129.00 per week) through May 4, 2014 the day before her MMI date, the Claimant was sustaining a temporary wage loss as specified herein above.

l. The Claimant received UI benefits of $129.00 every two weeks, or $64.50 per week, from June 1, 2013 until November 24, 2013 (Claimant's Exhibit 6).

m. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses her employment for reasons which are not her responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's termination in this case was not her fault but the result of undisclosed reasons. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant worked at her multiple employments despite her medical restrictions, but she could not perform adequately or properly at any of her multiple jobs.

n. Once the prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring), modified employment is not made available, and there is no actual return to work, TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant is entitled to TTD or TPD benefits as specified herein below.

o. From the date of the admitted injury of February 13, 2012 until the Claimant was terminated from employment by the Employer herein on May 22, 2013, she continued to earn $192.35 per week from the Employer herein. From February 13, 2012 through December 31, 2012, she continued working for Stops, earning an additional $110.09 per week. From February 13, 2012 through April 15, 2012, she also continued working for Quizno's at $157.16 per week. Consequently, the Claimant had **no** temporary wage loss from February 13, 2012 through April 15, 2012. From April 16, 2012 (the date she was unable to continue working at Quizno's) through May 6, 2012, both dates inclusive, a total of 21 days, the Claimant was sustaining a temporary wage loss of $157.16 per week during this period of time, yielding a TPD rate of $104.77 per week, or $14.97 per day, in the aggregate subtotal amount of $314.32. From January 1, 2013 through April 25, 2013, both dates inclusive, a subtotal of 115 days, the Claimant no longer worked for Stops at $110.09 per week and she no longer worked at Quizno's at $157.16 per week, all because of the restrictions occasioned by the admitted injury, however, she continued work for the Employer herein. Consequently, her temporary wage loss during this period of time was $267.25 per week, thus, yielding a TPD rate of $178.16 per week, or $25.45 per day for this period of time. Nonetheless, her temporary wage loss from April 16, 2013 through September 25, 2013 was not attributable to the admitted injury because she had a full duty release to return to work during this time.

p. From June 1, 2013 through November 24, 2013, both dates inclusive, a total of 177 days, the Claimant was receiving Unemployment Insurance (UI) benefits of $64.50 per week, which are subject to a 100% statutory offset, thus, net TTD benefits are $241.90 per week, or $34.56 per day for the TTD period from Sep0tember 25, 2013 through November 24, 2013..

q. From November 25, 2013 through November 30, 2013, both dates inclusive, a total of 5 days, the Claimant was no longer receiving UI benefits and she was still temporarily and totally disabled, thus, her TTD benefit is $306.40 per week, or $43.77 per day.

r. In approximately December 2013, the Claimant started to work retail sales for Stage Stores. She continued to work at Stage Stores, averaging between 12-17 hours/week at $8.60 an hour, or an average of 15 hours per week, or $129.00 per week, until after she was placed at MMI on May 5, 2014. From December 2, 2013 through the date before the MMI date, May 4, 2014, both dates inclusive, a total of 154 days, the Claimant was sustaining a temporary wage loss of $330.60 per week ($459.60 - $129.00= $330.60), thus, yielding a TPD benefit rate of $220.40 per week, or $31.49 per day.

Unemployment Insurance (UI) Benefit Offset

s. Section 8-42-103 (1) (f), C.R.S., provides for a 100% offset for UI benefits. As found, the Claimant received UI benefits of $129.00 every two weeks, or $64.50 per week, from June 1, 2013 until November 24, 2013, and the Respondents are entitled to an offset of $64.50 per week during this period of time. During this period of time, the respondents are entitled to a 100% offset against temporary total and/or temporary partial disability benefits.

Burden of Proof

t. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to an increased AWW and temporary disability benefits through the date of MMI, May 5, 2014.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant's average weekly wage is hereby re-established at $459.60

B. Any and all claims for temporary disability benefits from February 13, 2012 through April 15, 2012 are hereby denied and dismissed.

C. Respondents shall pay the Claimant temporary partial disability benefits from April 16, 2012 (the date she was unable to continue working at Quizno's) through May 6, 2012, both dates inclusive, a total of 21 days, at the rate of $104.77 per week, or $14.97 per day, in the aggregate subtotal amount of $314.32, which is payable retroactively and forthwith.

D. Any and all claims for temporary disability benefits from May 7, 2012 through March 1, 2013 are hereby denied and dismissed.

E. From March 1, 2013 through April 16, 2013, both dates inclusive, a subtotal of 47 days, the Respondents shall pay the Claimant temporary total disability benefits of $306.40 per week, or $43.77 per day, in the aggregate subtotal amount of $2,057.24, which is payable retroactively and forthwith.

F. Any and all claims for temporary disability benefits from April 16, 2013 through September 25, 2013 are hereby denied and dismissed.

G. From June 1, 2013 through November 24, 2013, both dates inclusive, a total of 177 days, the Claimant was receiving Unemployment Insurance (UI) benefits of $64.50 per week, which are subject to a 100% statutory offset, thus, net temporary total disability benefits from September 25, 2013 through November 24, 2013, both dates inclusive, a subtotal of 62 days, are $241.90 per week, or $34.56 per day ,in the aggregate amount of $2,142.72, which is payable retroactively and forthwith.

H. From November 25, 2013 through November 30, 2013, both dates inclusive, a total of 5 days (the Claimant was no longer receiving UI benefits), the Respondents shall pay the Claimant temporary total disability benefits of $306.40 per week, or $43.77 per day, in the aggregate subtotal amount of $218.85, which is payable retroactively and forthwith.

I. From December 1, 2013 through the date before the MMI date, May 4, 2014, both dates inclusive, a total of 153 days, the Respondents shall pay the Claimant temporary partial disability benefits at the rate of $220.40 per week, or $31.49 per day, in the aggregate amount of $4,817.97, which is payable retroactively and forthwith.

J. Aggregate temporary disability benefits (total and partial) from the date of injury through the date of maximum medical improvement equal $9,332.25, which is payable retroactively and forthwith.

K. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

L. Any and all issues not determined herein are reserved for future decision.

DATED this______day of August 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP.   You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease to his left upper extremity during the course and scope of his employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period September 14, 2015 until terminated by statute.

FINDINGS OF FACT

1. Claimant works as a Meat Cutter for Employer. He asserts that he suffered a cumulative trauma injury to his left upper extremity during the course and scope of his employment with Employer. Claimant specifically contends that he injured his left elbow and left wrist as a result of his repetitive job duties. He filed a claim for Workers' Compensation on August 11, 2015.

2. Claimant testified that he cuts a variety of meats. Depending on the type of meat he is cutting, Claimant uses tools including a hook, a saw and a knife. He remarked that he uses both wrists all of the time to perform his job duties.

3. Employer's Production Manager Thomas Griego detailed Claimant's job duties. He explained that Claimant's meat-cutting responsibilities involve alternating between using a knife and a saw. When using a saw, Claimant receives the piece of meat from a conveyor belt onto a table so that he does not have to lift the meat. Mr. Griego commented that the saw is mounted to a table and runs constantly. The table slides back and forth on rollers so that the table "rolls across" the saw. Mr. Griego noted that rolling the table across the saw alleviates the force needed to push the meat. Claimant uses his right hand to hold the piece of meat and his left hand to catch each pork chop as it is cut by the saw. He then places each pork chop on the table. After the entire piece of meat is cut Claimant pushes the pieces of meat back onto the conveyor belt.

4. Mr. Griego explained that Claimant's meat-cutting knife has a plastic handle and weighs approximately four to six ounces. While using the knife, Claimant also holds a hook in his left hand to pull the piece of meat towards him off the conveyor

belt and hold it in place while he cuts. Claimant can adjust the angle at which he holds the meat based on the size of each piece.

5. Claimant is qualified to perform other job duties besides cutting meat, including "processing the meat, being in utility, where you open the product, and wrapping." Claimant's co-worker Salvador Quinones testified that meat cutters are qualified "to do all the jobs they have" at Employer's facility. Claimant commented that, in addition to cutting meat with the saw and knife, he also carries meat to the conveyor belt. Claimant and Mr. Griego testified that Claimant performs processing work that includes pulling meat off the conveyor belt, pushing the meat onto trays and wrapping. Wrapping includes feeding the trays of meat into a machine and putting the wrapped trays into totes for shipment. Claimant remarked that he performs processing work "all the time." Mr. Griego summarized that Claimant's job includes a number of duties involving cutting, sawing, grinding, lifting, pulling and using equipment.

6. Claimant explained that he works approximately 8-10 hours each day for five days per week. He receives an 18 minute break between each one and one-half hour shift as well as a 30 minute lunch break. Claimant noted that meat cutters are scheduled to rotate job stations after each break.

7. Claimant does not cut meat when the conveyor belt or line becomes obstructed. During an obstruction the conveyor belt is turned off. Mr. Griego explained that the conveyor belt is down periodically during the day for approximately two to three minutes each time.

8. Claimant received medical treatment through HealthOne Occupational Medicine and Rehabilitation. On September 14, 2015 he visited Deana Halat, FNP-BC at HealthOne for an examination. FNP-BC Halat reported that Claimant's left hand had a quarter-sized palpable mass that was tender to palpation. Claimant exhibited decreased range of left upper extremity motion with flexion, extension and rotation. He also had decreased sensation to the second digit of the left hand. FNP-BC Halat ordered an MRI and an EMG/nerve conduction study. She concluded that there was a "greater than 50% probablity that this is a work-related injury due to work as a meat grinder for 18 years." FNP-BC Halat also assigned work restrictions including no meat cutting or grinding.

9. On October 3, 2015 Claimant underwent an MRI of his left wrist. The MRI revealed fourth extensor compartment tenosynovitis and edema. There were also findings of ulnar impaction that included degenerative thinning of the central articular disc and cystic degenerative changes in the proximal lunate.

10. On October 13, 2015 Claimant visited Katherine Drapeau, M.D. for an examination. Dr. Drapeau diagnosed Claimant with a ganglion cyst as well as tendinosis of the index and fourth finger of the left hand. She recommended occupational therapy and referred Claimant to Sean Griggs, M.D. She stated that objective findings were consistent with the work related mechanism of injury described by Claimant.

11. On October 13, 2015 Dr. Drapeau also responded to a letter from Respondents. She reported Claimant's primary diagnosis as left hand extensor tendinosis and a ganglion cyst. Dr. Drapeau noted that Claimant had suffered his injuries as a result of his work activities for Employer. She recommended an EMG and a referral to a hand surgeon.

12. On October 20, 2015 Claimant visited Sean Griggs, M.D. for an evaluation. Dr. Griggs noted that, although the MRI revealed some changes consistent with ulnar impaction, Claimant's physical exam findings and complaints were more consistent with radial tunnel syndrome and fourth dorsal compartment cellulitis. Dr. Griggs remarked that "the ulnar impaction may become a significant issue due to the repetitive nature of his job and the fact that he has to ulnar deviate."

13. On October 28, 2015 FNP-BC Halat responded to a letter from Respondents. She noted that Claimant's primary diagnosis was pain in the left hand. FNP-BC Halat explained that Claimant's repetitive work activities as a Meat Cutter for 19 years was the likely cause of his left hand pain and need for medical treatment.

14. On November 17, 2015 Claimant returned to Dr. Griggs for an examination. Dr. Griggs noted that Claimant had pain to resisted supination and there was some tenderness along the dorsal fourth compartment. He diagnosed Claimant with probable bilateral radial tunnel syndrome and bilateral ulnar impaction syndrome. Dr. Griggs recommended physical therapy and assigned work restrictions.

15. On January 7, 2016 Claimant underwent an independent medical examination with Anjmun Sharma, M.D. Claimant reported that on August 11, 2015 he began to experience pain in his left wrist and hand. He also noticed a large lump "distal to the first digit on the dorsal aspect of his hand." Claimant denied any type of trauma, but remarked that he had been a meat-cutter for 18 years. Dr. Sharma reviewed Claimant's medical records and performed a physical examination. He explained that Claimant exhibited normal range of motion and had an excellent prognosis. Dr. Sharma diagnosed Claimant with a left wrist sprain and a left forearm strain that had both resolved. Although Claimant attributed his symptoms to a cumulative trauma condition as a result of his work for Employer, Dr. Sharma determined that there was nothing in the medical records to suggest a causal relationship between his work activities and symptoms. Accordingly, Claimant did not require any additional medical treatment.

16. On April 1, 2016 Claimant underwent an independent medical examination with Edwin M. Healey, M.D. Claimant reported that on August 11, 2015 he began to experience pain in his left wrist and hand. He also noticed a large lump distal to the first digit on the dorsum of his left hand. Dr. Healey determined that the "current diagnoses causally and directly relate to the cumulative trauma disorder [Claimant] has developed as a result of being a meat cutter for 30 years and most recently with increased work load at his present place of employment." His diagnoses included the following: "1. Left radial wrist ganglion cyst; resolved. 2. Left wrist extensor tenosynovitis; improved. 3. Probable bilateral radial tunnel syndrome; still symptomatic. 4. Bilateral ulnar impaction syndrome." Dr. Healey noted that cumulative trauma disorders of the upper extremities

are common in meat cutters. He explained that Dr. Sharma did not follow the *Workers' Compensation Medical Treatment Guidelines* (*Guidelines*) in considering whether Claimant had suffered a cumulative trauma injury while working for Employer. Dr. Healey reasoned that Claimant met the cumulative trauma disorder criteria for force, repetition, duration, awkward posture and repetition, use of hand-held vibratory power tools and working in a cold environment as outlined in the *Guidelines*. He also noted that Claimant had no other risk factors that would predispose him to the development of his symptoms.

17. Dr. Sharma testified at the hearing in this matter. Relying on the *Guidelines*, Dr. Sharma explained that the combination of repetition, force, cycle time and awkward postures in Claimant's duties as a Meat Cutter failed to meet the causation requirements for the development of a left upper extremity cumulative trauma condition. He specifically noted that the amount of force used to push or pull an object is measured by electromyography. The *Guidelines* delineate 3-5 kilograms of force to constitute a primary risk factor for the development of a cumulative trauma disorder. However, there has been no measurement of the force required to perform Claimant's job duties. Moreover, Dr. Sharma remarked that the *Guidelines* characterize an awkward posture as an ulnar deviation of greater than a 45 degree angle for six hours or more than 50 task cycles per minute. However, Dr. Sharma commented that based on Claimant's description of his job duties, he did not exhibit an awkward posture pursuant to the *Guidelines*. Furthermore, Dr. Sharma explained that Claimant's left upper extremity did not reveal any objective evidence of a cumulative trauma disorder. He also remarked that Claimant's wrist swelling could have arisen from any number of sources and appeared to be acute. Accordingly, Dr. Sharma summarized that Claimant's left upper extremity symptoms were not caused by his work activities for Employer.

18. Dr. Healey also testified at the hearing in this matter. He explained that Claimant suffers from ulnar impaction and tenosynovitis in his left upper extremity. Dr. Healey maintained that Claimant's work activities for Employer involved the requisite repetition, force, cycle time and awkward postures to constitute a cumulative trauma condition pursuant to the *Guidelines*. Although Dr. Healey testified that Claimant's job requires repetitive ulnar deviation, he offered no measurement of ulnar deviation as it relates to a cumulative trauma disorder pursuant to the *Guidelines*. Dr. Healey also acknowledged "there's no ulnar impaction syndrome as part of the *Guidelines* for a finding of a cumulative trauma injury." Furthermore, although Dr. Healey noted that Claimant suffers from tenosynovitis, he did not explain how the condition was caused by Claimant's repetitive work activities. Finally, Dr. Healey acknowledged that he was unaware of the amount of force required to perform Claimant's job and Claimant's failure to use vibratory power tools.

19. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force used for at least 50% of a task cycle. The maximum force for most individuals is 3-5 kilograms. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration.

The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, six hours of supination/pronation with task cycles 30 seconds or less, or awkward posture for at least 50% of a task cycle. Other Primary Risk Factors include computer work for more than seven hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than four hours or use of a handheld vibratory power tool for 6 hours or more. Additional risk factors are six hours of lifting 10 pounds greater than 60 times per hour or six hours using hand held tools weighing two or more pounds.

20. Claimant has failed to establish that it is more probably true than not that he sustained a compensable occupational disease in the form of a left upper extremity injury during the course and scope of his employment with Employer. Although Claimant attributed his symptoms to his work activities, a review of his job duties as a Meat Cutter reflects that they lacked the requisite repetition, force or awkward postures to cause his symptoms. Claimant engaged in a variety of tasks throughout his shift. The persuasive reports and testimony of Dr. Sharma reveal that, although Claimant engaged in some forceful activities, his job duties did not meet the minimum thresholds for repetition, force, duration or awkward postures to establish a cumulative trauma condition pursuant to the *Guidelines*.

21. Claimant has not demonstrated that his work involves repetitive duties pursuant to the *Guidelines*. Claimant explained that he works approximately 8-10 hours each day for five days per week. He receives an 18 minute break between each one and one-half hour shift as well as a 30 minute lunch break. Claimant noted that meat cutters are scheduled to rotate stations after each break. Furthermore, Claimant is qualified to perform other job duties besides cutting meat, including “processing the meat, being in utility, where you open the product, and wrapping.” Claimant commented that, in addition to cutting meat with the saw and the knife, he carries meat to the conveyor belt. Claimant also performs processing work that includes pulling meat off the conveyor belt, pushing the meat onto trays and wrapping. Wrapping includes feeding the trays of meat into a machine and putting the wrapped trays into totes for shipment. Mr. Griego summarized that Claimant’s job includes a number of duties involving cutting, sawing, grinding, lifting, pulling and using equipment. Although Claimant may engage in repetitive activities for each one and one-half hour shift, the variety of his responsibilities and intermittent breaks throughout each day reflect that his job duties did not likely cause a cumulative trauma injury to his left upper extremity.

22. Dr. Sharma persuasively explained that the combination of repetition, force, cycle time and awkward postures in Claimant’s duties as a Meat Cutter failed to meet the causation requirements for the development of a left upper extremity cumulative trauma condition. He specifically noted that the *Guidelines* delineate 3-5 kilograms of force to constitute a primary risk factor for the development of a cumulative trauma disorder. However, there has been no measurement of the force required to perform Claimant’s job duties. Moreover, Dr. Sharma remarked that the *Guidelines* characterize an awkward posture as an ulnar deviation of greater than a 45 degree angle for six hours or more than 50 task cycles per minute. However, Dr. Sharma

commented that, based on Claimant's description of his job duties, he did not exhibit an awkward posture pursuant to the *Guidelines*.

23. In contrast, FNP-BC Halat and Dr. Drapeau concluded that Claimant's work activities caused a cumulative trauma condition to his left upper extremity. However, FNP-BC Halat and Dr. Drapeau did not perform a causation analysis pursuant to the *Guidelines*. Moreover, Dr. Healey explained that Claimant suffers from ulnar impaction and tenosynovitis in his left upper extremity. Dr. Healey maintained that Claimant met the criteria for force, repetition, duration, awkward posture and repetition, use of hand-held vibratory power tools and working in a cold environment outlined in the *Guidelines*. Although Dr. Healey testified that Claimant's job requires repetitive ulnar deviation, he offered no measurement of ulnar deviation as it relates to a cumulative trauma disorder pursuant to the *Guidelines*. Dr. Healey also acknowledged "there's no ulnar impaction syndrome as part of the *Guidelines* for a finding of a cumulative trauma injury." Furthermore, Dr. Healey noted that Claimant suffers from tenosynovitis, but did not explain how the condition was caused by his repetitive work activities. Dr. Healey also acknowledged that he was unaware of the amount of force required to perform Claimant's job. Finally, Claimant did not use vibratory hand tools to perform his duties as a Meat Cutter for Employer. Accordingly, Claimant has failed to prove that his work activities for Employer caused a cumulative trauma disorder to his left upper extremity. Claimant's claim for Workers' Compensation benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. When the precipitating cause of an injury is a pre-existing condition that the claimant brings to the workplace, the injury is not compensable unless a "special hazard" of the employment combines with the pre-existing condition to contribute to the injury. *In Re Shelton,* W.C. No. 4-724-391 (ICAP, May 30, 2008). The rationale for the rule is that, in the absence of a special hazard, an injury due to the claimant's pre-existing condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Id.* A condition does not constitute a "special hazard" if it is "'ubiquitous' in the sense that it is found generally outside of the employment." *In Re Booker,* W.C. No. 4-661-649 (ICAP, May 23, 2007).

7. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct.

27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

8. In addressing cumulative trauma conditions, the *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

9. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease in the form of a left upper extremity injury during the course and scope of his employment with Employer. Although Claimant attributed his symptoms to his work activities, a review of his job duties as a Meat Cutter reflects that they lacked the requisite repetition, force or awkward postures to cause his symptoms. Claimant engaged in a variety of tasks throughout his shift. The persuasive reports and testimony of Dr. Sharma reveal that, although Claimant engaged in some forceful activities, his job duties did not meet the minimum thresholds for repetition, force, duration or awkward postures to establish a cumulative trauma condition pursuant to the *Guidelines*.

10. As found, Claimant has not demonstrated that his work involves repetitive duties pursuant to the *Guidelines*. Claimant explained that he works approximately 8-10 hours each day for five days per week. He receives an 18 minute break between each one and one-half hour shift as well as a 30 minute lunch break. Claimant noted that meat cutters are scheduled to rotate stations after each break. Furthermore, Claimant is qualified to perform other job duties besides cutting meat, including "processing the meat, being in utility, where you open the product, and wrapping." Claimant commented that, in addition to cutting meat with the saw and the knife, he carries meat to the conveyor belt. Claimant also performs processing work that includes pulling meat off the conveyor belt, pushing the meat onto trays and wrapping. Wrapping includes feeding the trays of meat into a machine and putting the wrapped trays into totes for shipment. Mr. Griego summarized that Claimant's job includes a number of duties involving cutting, sawing, grinding, lifting, pulling and using equipment. Although Claimant may engage in repetitive activities for each one and one-half hour shift, the

variety of his responsibilities and intermittent breaks throughout each day reflect that his job duties did not likely cause a cumulative trauma injury to his left upper extremity.

11. As found, Dr. Sharma persuasively explained that the combination of repetition, force, cycle time and awkward postures in Claimant's duties as a Meat Cutter failed to meet the causation requirements for the development of a left upper extremity cumulative trauma condition. He specifically noted that the *Guidelines* delineate 3-5 kilograms of force to constitute a primary risk factor for the development of a cumulative trauma disorder. However, there has been no measurement of the force required to perform Claimant's job duties. Moreover, Dr. Sharma remarked that the *Guidelines* characterize an awkward posture as an ulnar deviation of greater than a 45 degree angle for six hours or more than 50 task cycles per minute. However, Dr. Sharma commented that, based on Claimant's description of his job duties, he did not exhibit an awkward posture pursuant to the *Guidelines*.

12. As found, in contrast, FNP-BC Halat and Dr. Drapeau concluded that Claimant's work activities caused a cumulative trauma condition to his left upper extremity. However, FNP-BC Halat and Dr. Drapeau did not perform a causation analysis pursuant to the *Guidelines*. Moreover, Dr. Healey explained that Claimant suffers from ulnar impaction and tenosynovitis in his left upper extremity. Dr. Healey maintained that Claimant met the criteria for force, repetition, duration, awkward posture and repetition, use of hand-held vibratory power tools and working in a cold environment outlined in the *Guidelines*. Although Dr. Healey testified that Claimant's job requires repetitive ulnar deviation, he offered no measurement of ulnar deviation as it relates to a cumulative trauma disorder pursuant to the *Guidelines*. Dr. Healey also acknowledged "there's no ulnar impaction syndrome as part of the *Guidelines* for a finding of a cumulative trauma injury." Furthermore, Dr. Healey noted that Claimant suffers from tenosynovitis, but did not explain how the condition was caused by his repetitive work activities. Dr. Healey also acknowledged that he was unaware of the amount of force required to perform Claimant's job. Finally, Claimant did not use vibratory hand tools to perform his duties as a Meat Cutter for Employer. Accordingly, Claimant has failed to prove that his work activities for Employer caused a cumulative trauma disorder to his left upper extremity. Claimant's claim for Workers' Compensation benefits is thus denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 22, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination are:

- Whether Claimant's average weekly wage (AWW) should be increased to reflect both a pay raise and tip income.

- Whether the cervical spine surgery recommended by Michael Drewek, M.D., reasonable, necessary and related to the November 2, 2015 industrial injury.

STIPULATIONS

The parties entered into a partial stipulation concerning Claimant's AWW. They agreed that without the alleged tips, the Claimant's AWW is $789.48. The ALJ hereby adopts and approves the stipulation of the parties.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ finds as follows:

1. Claimant began working for the Employer as a delivery driver on August 20, 2015. Claimant testified that he continued in this position until November 6, 2015.

2. Claimant's job included picking up and delivering storage pods for both residential and commercial clients. It is undisputed that Claimant earned $15.40 per hour for regular hours worked, and $23.00 per hour for overtime hours worked.

3. Claimant testified that he received tips from his residential customers, testifying that some of them were not home when he delivered or picked up the storage pods, and that his tips averaged $10.00 per tip, as some customers tipped nothing and some tipped as high as $50.00.

4. Claimant testified that he did not specifically track his tips, just kept mental notes of the tips he received. He further testified that he did not initially include the tips or gratuities in his 2015 tax return. Instead, he testified that he amended his tax return on April 21, 2015 to include his estimated tips in the amount of $1,875 over the course of 10 weeks of work for the Employer.

5. Claimant did not submit into evidence a tax return received by the IRS, nor did he submit his initial tax return filed with the IRS into evidence. Rather he submitted portions of a copy of a tax return that does not contain the alleged amended W-2 that he

testified he amended to include his tips, nor was the original W-2 submitted into evidence. Furthermore, the potions of the purported tax return submitted into evidence are not signed or dated.

6. Claimant refused to provide a release to Respondents to obtain his actual tax return filed with the IRS.

7. Claimant was involved in a motor vehicle accident (MVA) on November 2, 2015 while working for the Employer.

8. Respondents filed a General Admission of Liability on December 23, 2015. The Respondents admitted for an AWW of $756.65.

9. Claimant continued working for the Employer for a few days following the accident. By November 6, 2015, Claimant could no longer work because he had difficulty turning his head from side to side to see into his side rear view mirrors. He believed his inability to see into his side mirrors presented a safety hazard.

10. Claimant initially sought treatment with his personal health care physician at Kaiser Permanente on November 6, 2015. The Kaiser records from November 6, 2015 reflect that Claimant complained of pain secondary to a MVA the prior Tuesday. Claimant reported whiplash to the side as a result of the accident. Claimant reported that his neck started to feel stiff and that he was having difficulty looking at his side mirrors. He also reported headache in the occipital region, interscapular pain and some tingling down the back and right arm, but not constant.

11. X-rays taken at Kaiser on November 6, 2015 revealed no fractures, degenerative disease is observed from C4-5 through C6-7, and small cervical ribs are again seen at the C7 level. No acute findings were noted and Claimant was diagnosed with a cervical strain.

12. On November 11, 2015, Claimant returned to Kaiser, and reported neck pain right greater than left, right scapular pain and pain/numbness/tingling in his right humerus, and headaches. Claimant was referred to Kaiser physical therapy to increase his flexibility and improve his stability and posture to address his pain and stiffness in his neck.

13. On December 2, 2015 Claimant underwent an MRI scan of his cervical spine through Kaiser. The MRI revealed the presence of cervical stenosis and multilevel degenerative changes throughout Claimant's cervical spine. The physician interpreting the scan indicated that it revealed cord compression and remodeling at C3-4 and C4-5 with suggestion of increased cord signal likely secondary to chronic compressive myelomalacia.

14. The Employer eventually referred the Claimant to Aviation and Occupational Medicine. On December 4, 2015, the Claimant had an initial visit with Hector Brignoni, M.D. Claimant reported that he was driving a box truck which was struck on the passenger side by pickup truck. He reported that his head hit the driver's

side window, and that he felt fine immediately afterward but noticed his neck started feeling stiff over the ensuing days.

15. Claimant also reported to Dr. Brignoni that he started having low back pain approximately two weeks after the accident. Dr. Brignoni diagnosed Claimant with a head contusion and cervical, thoracic and lumbar sprains. Dr. Brignoni referred Claimant for an MRI due to Claimant's reports of bilateral upper extremity numbness and tingling.

16. Kaiser personnel contacted the Claimant on December 8, 2015 to inform him that the MRI results revealed that "nerves" are being "impinged" and that he could benefit from a neurosurgery consultation.

17. Claimant underwent a second MRI scan of his cervical spine with Health Images on December 14, 2015. The radiologist's impressions included early facet degenerative changes at L3-4, L4-5, and L5-S1; minor disc protrusion at L2-3, with resultant central spinal canal stenosis or neural foraminal compromise at any level; no abnormal distal thoracic cord signal or syrinx.

18. On December 17, 2015, Michael Ladwig, M.D., also with Aviation and Occupational Medicine referred Claimant to Dr. Franklin Shih for further evaluation.

19. Dr. Shih evaluated the Claimant on January 6, 2016. Claimant again reported that as he drove a box truck, a pickup truck hit the passenger side of his truck causing him to hit his head on the driver's side window. Claimant developed neck discomfort within a few hours of the accident. Dr. Shih noted that Claimant developed low back pain and extremity problems within days of the MVA. Claimant reported a "sensation of numbness into the legs predominantly along with posterior aspects" which he associated with prolonged sitting or standing.

20. Dr. Shih noted during that evaluation that Claimant exhibited no pain behaviors, but exhibited mild discomfort. Claimant demonstrated limited range of motion in his cervical spine with regard to side bending and rotation, and exhibited normal flexion and extension. Dr. Shih was unable to elicit neurologic symptoms with cervical motion and compression.

21. Dr. Shih assessed cervicalgia with multi-level multi-factorial degenerative changes with stenosis and possible increased cord signal; and low back pain with multi-factorial, multi-level mild degenerative changes. Dr. Shih did not feel that Claimant presented with significant signs or symptoms of cord involvement although the myelomalacia observed on the imaging concerned Dr. Shih. Dr. Shih referred the Claimant to a surgeon for a consultation.

22. On January 26, 2016, Michael Drewek, M.D. evaluated the Claimant for a surgical consultation. Dr. Drewek's report reflects that Claimant struck the top of his head on the roof of his truck after impact, and has since had aching and pain 8/10 in his cervical and lumbar spine.

23. Dr. Drewek noted the MRI findings and stated that the stenosis had "been present for some time," but also stated that Claimant had "no clinical findings" prior to the injury. Dr. Drewek noted that because of the loss of "CSF" (an abbreviation for cerebrospinal fluid in the central canal of the spinal cord), "the neck injury sustained was enough to cause some increased cord signal." Dr. Drewek opined that the symptoms in Claimant's arms and legs are due to the cervical cord compression and recommended anterior cervical discectomy and fusion at C3-4, C4-5, C5-6, and C6-7.

24. Dr. Shih continued to follow up on a monthly basis with Claimant after his initial evaluation of January 6, 2016. Dr. Shih testified that Claimant's condition essentially remained unchanged with no new problems reported.

25. In late January 2016/early February 2016 Claimant changed authorized treating physicians to David Orgel, M.D. Claimant's initial evaluation with Dr. Orgel occurred on February 9, 2016. Dr. Orgel's note reports his agreement with Dr. Drewek's surgical recommendation. The note also states that Dr. Orgel was concerned enough with Claimant's symptoms that he contacted Claimant's counsel to express that "surgery should not be delayed given the symptoms." Dr. Orgel subsequently issued a second report on March 4, 2016, after the surgery had been denied by Respondents. Dr. Orgel recommended that Claimant proceed with surgery through his health insurance because of the "urgent" need for surgery.

26. Subsequent to receipt of Dr. Drewek's surgical recommendation, Respondents requested that Robert Messenbaugh, M.D. perform a records review pursuant to WCRP Rule 16.

27. On February 21, 2016, Dr. Messenbaugh issued his report. He is board certified in orthopedic surgery. Dr. Messenbaugh documented the history of Claimant's mechanism of injury based on the reports Claimant gave to medical providers. It was consistent with Claimant's testimony at hearing. Dr. Messenbaugh opined that at the time of Claimant's motor vehicle accident, the Claimant likely sustained some degree of cervical spine soft tissue myofascial strain and sprain with resultant stiffness and some associated decreased ability to turn his head fully left and right.

28. Dr. Messenbaugh opined that the MRI findings are chronic. He also stated that, "Under the circumstances, it is my opinion that the surgery as recommended for [Claimant's] cervical spine is in part related to his accident . . . but that the major cause of this need for neck surgery is his severe and advance [sic] cervical spine pathology that certainly pre-dated his accident." Dr. Messenbaugh also opined that Claimant would have needed surgery regardless of the accident. Dr. Messenbaugh further opined that the Claimant's condition may well be worsened rather than improved by such extensive cervical spine surgery. Dr. Messenbaugh's opinions, while equivocal, support that recommended surgery is due, at least in part, to the work-related accident.

29. Respondents referred the Claimant to neurosurgeon Frederic Sonstein, M.D., for an independent medical examination which occurred on March 31, 2016. Dr.

Sonstein again noted a mechanism of injury consistent with that reported to Dr. Shih, Dr. Ladwig, Kaiser and Claimant's testimony at hearing. Dr. Sonstein personally reviewed the MRI scans from Health Images and noted bulges at the C3-4 and C4-5 levels, with spondylotic bars at the C5-6 and C6-7 levels, and mild cord compression at the C3-4 and C4-5 levels. He diagnosed cervical spondylosis at C5-6, C6-7 with cervical disk bulges at C3-4 and C4-5, with mild cord compression at those levels. Dr. Sonstein opined that the MRI scans did not reveal severe stenosis in the cervical spine, contrary to Dr. Drewek's opinion. Dr. Sonstein did not see the need for urgent surgical intervention based on the MRI findings or the Claimant's clinical findings.

30. Dr. Sonstein recommended an EMG study of Claimant's upper and lower extremities in light of his subjective complaints of tingling in his arms and pain down the left leg, as well as a course of epidural steroid injections and therapy for his ongoing neck pain and upper extremity symptoms.

31. Dr. Shih testified by deposition. Dr. Shih indicated that he concurs with the cervical spine surgical recommendation made by Dr. Drewek, and endorsed by Dr. Orgel. Dr. Shih opined that surgery is reasonable and necessary due to the cord compression and myelomalacia. Dr. Shih indicated given the compression noted on the MRI scans, and that the spinal cord is being impacted by that compression, Claimant requires surgery to remove that compression. Dr. Shih testified that while the injections and therapy recommended as an alternative by Dr. Sonstein may reduce Claimant's symptoms, they do nothing to address the compression.

32. Dr. Shih agreed that Claimant's findings on both MRI scans, including the cord compression issues and degenerative changes, all likely pre-dated the work injury. He recommended surgery based on the December 2, 2015 MRI report which indicated an increased cord signal. Dr. Shih further testified that the second MRI taken two weeks later did not reveal any abnormal cord signal, and based on that report surgery would not necessarily be indicated, thus he elected to defer to Dr. Drewek. Dr. Shih testified that the surgery Dr. Drewek was recommending is not emergent rather urgent because the abnormal cord signal suggested damage to the Claimant's spinal cord.

33. Dr. Shih also testified that he was unable to elicit any neurologic symptoms with cervical motion and compression, and that the only evidence of Claimant's symptoms were his subjective complaints.

34. Dr. Shih reviewed the pre-accident Kaiser records prior to his deposition. He testified that nothing in the Kaiser records would change his opinion that Claimant's work-related accident caused the need for the recommended cervical spine surgery. Dr. Shih agreed that the October 28, 2015 Kaiser record corroborates Claimant's claim that he was asymptomatic prior to the industrial accident. Dr. Shih testified that contrary to the opinion of Dr. Messenbaugh, the pre-accident state of Claimant's cervical spine would make him more susceptible to injury.

35. Claimant testified that he has a burning pain in his neck especially after typing, but that his pain has improved, as has the stiffness. His primary complaint is

numbness and tingling in his arms and legs. He is not taking any pain medication, and has no difficulty with bladder or bowel movements.

36. Claimant wishes to proceed with the surgery because he feels like his overall health has declined because he cannot engage in physical activities other than walking his dog.

37. Claimant has failed to prove entitlement to an increase in his AWW beyond the amount to which the parties stipulated, which is $789.48. The Claimant has failed to prove that he properly reported the claimed gratuities to the Internal Revenue Service, or that the amount he allegedly claimed is accurate. The Claimant admittedly did not keep any documentation of the gratuities he received, and relied on "mental notes." Further, the Claimant did not persuasive evidence that he filed the amended tax return.

38. Claimant has proven that the cervical spine surgery recommended by Dr. Drewek is reasonable, necessary and related to his work injury. The ALJ credits the opinions of Drs. Drewek, Shih and Orgel and as the most persuasive in this case. The ALJ finds that Dr. Drewek's mistaken belief that Claimant struck the top of his head rather than the side of his head does not materially alter his opinion or those of Drs. Shih or Orgel. The work-related motor vehicle accident aggravated Claimant's underlying cervical spine condition and has provided the need for medical treatment, including the surgery.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

General

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a

conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Average Weekly Wage

4. Section 8-42-102(2), C.R.S., requires a claimant's average weekly wage to be calculated upon the monthly, weekly, hourly, daily or other remuneration the claimant was receiving at the time of the injury. Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

5. The Workers' Compensation Act states that the term "wages" shall include "gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns*.* §8-40-201(19)(b). C.R.S. The purpose of this requirement is to discourage fraud by requiring reliable documentary evidence to corroborate a claimant's testimony concerning the amount of tips received. *Brimmerman v. Denny's,* W.C. No. 4-396-902 (April 5, 2000); *Dawes v. Colorado Cabana, Inc.,* W.C. No. 4-283-730 (August 1, 2997), *aff'd,* March 5, 1998).

6. As found above, the Claimant did not initially claim any tips on his 2015 IRS income tax return. He testified that he filed an amended return to add the tips, but Claimant produced no credible documentary evidence to substantiate his assertion. While the ALJ is not necessarily finding that Claimant's testimony lacks credibility, the best evidence would be the actual signed and amended tax return filed with the IRS (a document the Claimant failed to produce). In addition, the Claimant testified that he kept mental notes concerning the amount of his tips. Again, the ALJ is not persuaded given the lack of documentation to support Claimant's assertion.

7. The parties entered into a partial stipulation concerning Claimant's AWW. They agreed that without the alleged tips, the Claimant's AWW is $789.48. The ALJ finds that the credible evidence supports that the fairest approximation of Claimant's wage loss results in an AWW of $789.48.

Medical Benefits – Cervical Spine Surgery

8. Section 8-42-101(1)(a), C.R.S., provides:

Every employer … shall furnish … such medical, hospital, and surgical

> supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Id.*

9. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

10. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). Resolution of that issue is one of fact for the ALJ. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

11. Claimant has proven that the surgery recommended by Dr. Drewek is reasonable, necessary and related to his work injury. The credible and persuasive medical evidence, including the opinions of Dr. Sonstein, demonstrates that Claimant has moderate to severe spinal stenosis, foraminal narrowing and cord compression. While the providers agree that these conditions likely pre-existed the admitted work-related MVA, the Claimant had no symptoms. Claimant pursued medical treatment for other issues with his primary care physician just a few days before the accident but did not report any neck or upper extremity symptoms. Thus, the ALJ specifically rejects any contrary evidence that the need for surgery is unrelated to the work injury.

12. The medical evidence also supports that the surgery is reasonable and medically necessary. The opinions of Drs. Drewek, Shih and Orgel are persuasive in that regard. Dr. Drewek explained that the work-related MVA aggravated Claimant’s pre-existing condition and produced the need for surgery. Dr. Shih essentially shared that opinion. Further, Dr. Sonstein did not specifically rule out surgery as unnecessary or unreasonable. Instead, he indicated the surgery was not “urgent” and that other treatment modalities should be pursued first. The ALJ acknowledges that the surgery proposed by Dr. Drewek is invasive and poses risks. Nevertheless, the Claimant wishes to pursue it, and Drs. Drewek, Shih and Orgel agree that it is reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $789.48.

2. The cervical spine surgery recommended by Dr. Drewek is reasonable, necessary and related to Claimant's work-related injury. The Respondents shall be liable for the surgery.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 30, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-940-376-01

ISSUES

- Did Respondents sustain their burden to overcome the DIME physician's (Jeffrey Jenks, M.D) opinion that Claimant sustained a permanent medical impairment?
- If Respondents satisfied their burden of proof and overcame Dr. Jenks' opinion, what is Claimant's medical impairment rating?

FINDINGS OF FACT

1. Claimant was employed as a banquet houseman for Employer, a position he has held for almost five (5) years. In that capacity, Claimant set up for guest events, such as meetings, weddings and conferences. His job duties included moving tables and chairs for the various events at the hotel. Claimant testified the work was physically demanding and hard.

2. Claimant had not injured his back before April 10, 2013.

3. On April 10, 2013, Claimant sustained an admitted industrial injury while moving ten (10) 72" round-top tables. He was working with his supervisor and pulling the cart which held the tables. Claimant was walking backward and was pushed into a storage unit for ice/water. Claimant testified he struck his lower back, just above his waist. In order to get out from behind the cart, Claimant stated he twisted his back and pushed against the cart.

4. An Employer's First Report of Injury was completed on April 10, 2013, which listed Claimant's trunk-lower back area as the part of body affected.

5. Claimant was evaluated on April 15, 2013 by Robert Nystrom, D.O. at Concentra, the ATP for Employer. Claimant was complaining of low back pain and stiffness, which he said had persisted since the injury. Mild diffuse discomfort was noted at the lower thoracic and lumbar spine. Dr. Nystrom's assessment was contusion and strained back. Dr. Nystrom prescribed Ibuprofen and Flexeril and issued work restrictions. Claimant also began physical therapy ("PT") on April 15, 2013.

6. On April 22, 2013, Claimant returned to Dr. Nystrom. At that time, Claimant had diffuse tenderness to palpation, as well as pain with right rotation. Dr. Nystrom's assessment was thoracic and lumbar strain. He made a referral to physiatry and noted a concern over exaggerated pain complaints. A prescription for Tramadol was also given.

7. Claimant was evaluated by Dr. Nystrom on May 13, 2013 and improvement was noted. PA-C Nicholas Curcija saw Claimant on May 20, 2013, after he was examined by Dr. Zimmerman. Claimant reported he felt pain after sitting too long or performing repetitive activities. No palpable bony or muscular tenderness was noted in Claimant's back. Claimant's PT was continued, as were his work restrictions.

8. On June 5, 2013, Claimant underwent bilateral L4-5 intraarticular steroid injections. The injections were performed by Rick Zimmerman, D.O., whose pre-and post-procedural diagnoses were lumbar spondylosis and lumbar facet pain. Dr. Zimmerman noted after the procedure Claimant had none of his pre-procedural axial spine pain and this was a diagnostic response.

9. Claimant returned to PA-C Curcija on June 24, 2013, whose assessment was contusion of back, thoracic pain, lumbar strain, thoracic strain, and back pain. PT was resumed and Claimant ‘s work restrictions were increased to lifting no greater than 25 lbs; pushing and pulling no greater than 35 lbs. PA-C Curcija evaluated Claimant at follow-up appointments on July 11 and July 25, 2013 at which time his assessment was the same and he continued Claimant’s work restrictions. On August 26, 2013, PA-C Curcija noted some improvement and increased Claimant’s lifting restrictions, but reduced the amount he could push/pull.

10. On August 1, 2013, an MRI was done of Claimant's lumbar spine. The films were read by Robert Leibold, M.D, whose impression was mild to moderate multilevel facet arthrosis. No disc herniations were identified at any level.

11. On November 13, 2013, Claimant underwent a functional capacity evaluation (FCE) which was performed by Lauren Politzer, DPT and Sarah Anderson, PTA of Select Physical Therapy. Claimant demonstrated the ability to occasionally lift up to 70 lbs. floor to waist, 50 lbs. waist to shoulder, carry up to 80 lbs, and push/pull up to 170 lbs. of force. He complained of slight back pain following frequent lifting, however, lifting was not limited by pain. Claimant demonstrated consistent performance throughout testing, which in combination with physiological responses indicated the results of the evaluation were considered to be an accurate representation of his functional abilities. The ALJ infers Claimant put forth sufficient effort for the FCE testing results to be valid and he did not appear to exaggerate symptoms during this testing.

12. Claimant returned to Dr. Nystrom on November 22, 2013. Claimant’s pain level was listed as 1-2/10, as he had diffuse discomfort in his lumbar spine. Dr. Nystrom noted the FCE was completed and he found full range of motion (“ROM”) in Claimant’s lumbar spine. There was no evidence Dr. Nystrom performed ROM testing with dual inclinometers. Dr. Nystrom concluded Claimant was at MMI, with no impairment or restrictions.

13. Respondents filed a Final Admission of Liability ("FAL") on February 4, 2014 based upon Dr. Nystrom's findings that Claimant reached MMI as of 11/ 22/13 and sustained a 0% impairment.

14. Claimant objected to the FAL and requested a DOWC Independent Medical Examination ("DIME").

15. Claimant underwent a DIME on May 14, 2014 and was evaluated by John Ogrodnick, M.D. Claimant reported throbbing and stabbing pain, 3-4/10. Claimant indicated his pain increased if he sat for more than two hours and he used a back hugger as lumbar support. Dr. Ogrodnick recorded bending increased Claimant's pain, as did carrying heavy objects. On examination, Dr. Ogrodnick found lumbar extension was painful upon bilateral rotation, very tender over L4-L5 interspace and slightly tender over SI joints bilaterally. Dr. Ogrodnick noted Claimant had thirty-one (31) PT sessions from May through November 2013.

16. Dr. Ogrodnick diagnosed Claimant with a lumbar strain, bilateral SI dysfunction and facet arthrosis. Dr. Ogrodnick concluded Claimant's pain generator was "SI joint dysfunction and this has not been specifically addressed". Dr. Ogrodnick opined that Claimant was not at MMI and gave a provisional impairment rating of 9% whole person. He recommended treatment in the form of chiropractic manipulation.

17. Respondents filed a General Admission of Liability ("GAL") on June 18, 2014.

18. Claimant received treatment following the DIME with Dr. Ogrodnick, including chiropractic treatments.

19. Claimant was evaluated by Dr. Nystrom on July 4, 2014. In a September 27, 2014 amendment, Dr. Nystrom noted he agreed with Dr. Ogrodnick's recommendations as far as the impairment rating and chiropractic treatments, provided the range of motion measurements were reproducible. He referred Claimant for chiropractic treatment, although he was not sure Claimant needed treatment for the length of time recommended.

20. Claimant treated with Don Aspegren, D.C. beginning on October 10, 2014. His pain was characterized as 6/10 aching and stabbing in his lower back region. Long trips created moderate pain. Dr. Aspegren's assessment was thoracic and lumbar sacral strain; contusion, back. Claimant received chiropractic manipulation, along with exercise in the lumbosacral region.

21. Claimant received treatment from Dr. Aspegren from October 10 through November 21, 2014. He reported discomfort from his thoracic to lumbosacral region. Dr. Aspegren noted decreased segmental motion in the thoracic to lumbosacral region. At the time of his discharge, Claimant was noted to be quite proficient in his exercises.

22. On January 9, 2015, Dr. Nystrom evaluated Claimant, who reported back pain for months, that his pain has never gone away, was constant, throbbing and shooting. Dr. Nystrom noted that Claimant had decreased range of motion, that further treatment would include another MRI and physiatry referral.

23. Claimant was examined by Dr. Nystrom on May 1, 2015, at which time he reported intermittent pain in his back. On examination, Dr. Nystrom noted diffuse tenderness to palpation of low back and SI joints. Decreased ROM was noted for the lumbar spine. Dr. Nystrom concluded Claimant was at MMI, "with a permanent impairment per Dr Ogrodnick". Claimant had no permanent work restrictions and no maintenance care was recommended. No ROM worksheets were attached to this report of Dr. Nystrom. The ALJ concludes Dr. Nystrom was of the opinion that Claimant suffered a permanent medical impairment and he deferred to Dr. Ogrodnick for the rating. In the M-164 (dated 5/6/15), Dr. Nystrom checked the box stating Claimant had a permanent medical impairment.

24. On September 7, 2015, Claimant underwent a repeat DIME, which was performed by Dr. Jenks[1], who noted some tenderness and L4-5 and L5-S1 facet regions. Claimant's lumbar flexion was normal, but increased pain was noted with lumbar extension. Dr. Jenks' impression was chronic low back pain, potential facet in origin. Dr. Jenks agreed Claimant was at MMI. He performed range of motion testing and concluded Claimant had a 5% impairment rating for a specific disorder. Taken from Table 53, he had an additional 4% impairment for loss of lumbar ROM, but no neurologic impairment. Dr. Jenks concluded Claimant sustained a 9% whole person impairment. The ALJ notes the range of motion testing done on Claimant's lumbar spine was valid, as evidenced by the impairment worksheet attached to Dr. Jenks' report. Dr. Jenks did not assign an impairment for loss of ROM for lumbar extension or lumbar left and right lateral flexion. The ALJ credited Dr. Jenks' opinion that Claimant was entitled to a specific disorder impairment.

25. Claimant was examined by Lawrence Lesnak, D.O. on September 15, 2015, at the request of Respondents. Claimant was complaining of constant low back pain, which was worse with prolonged standing or sitting. He rated his pain as 20/100 and said over the past six (6) weeks his worst pain was 50/100, but never better than 20/100. A Distress and Risk Assessment Method (DRAM) was completed. Dr. Lesnak stated the results suggested there were psychosocial factors influencing his recovery and symptoms.

26. Dr. Lesnak's impressions were: subjective complaints of constant low back pain, without any buttock or extremity symptoms whatsoever; possible lumbar contusion; no current clinical evidence of lumbar or sacral radiculitis, radiculopathy or myelopathy; no current clinical evidence of symptomatic SI joint dysfunction or

[1] Dr. Jenks performed this DIME, as Dr. Ogrodnick was not performing DIMEs at this time.

sacroiliitis; previous post injury lumbar spine x-rays performed on 4/15/13 that noted no abnormalities; post injury lumbar spine MRI performed on 8/1/13 that reported mild to moderate multilevel facet joint arthrosis without reported abnormalities; previous bilateral L4-L5 and L5-S1 joint injections performed by Dr. Zimmerman that possibly resulted in a positive diagnostic response, but not a long-term therapeutic response; MMI initially on 11/22/13, without evidence of permanent functional impairment or permanent work restrictions; 5/14/13 [sic] DIME by Dr. Ogrodnick, who opined patient had symptomatic SI joint dysfunction; six weeks of chiropractic treatment; patient at MMI on 5/1/15, with no impairment; and psychosocial evaluation, which identified probable psychosocial factors that could be influencing his symptoms and recovery.

27. Dr. Lesnak concurred with Dr. Nystrom that Claimant was at MMI with no impairment. He stated there were no clinical findings of lumbar or sacral radiculitis, radiculopathy, myelopathy, or SI joint dysfunction. Dr. Lesnak opined Claimant had no permanent impairment and no work restrictions.

28. Dr. Lesnak issued an addendum report on October 22, 2015, after he had a chance to review the DIME report prepared by Dr. Jenks. He noted Dr. Jenks assigned a 9% impairment rating, but felt this was based purely on the patient's subjective complaints. Dr. Lesnak opined Claimant had no clear objective findings to support the subjective complaints. He believed there was no medical evidence to suggest that the mild to moderate lumbar facet joint arthropathy was caused by or even potentially aggravated by the incident in which he may have sustained a mild contusion to his low back. Dr. Lesnak did not believe Claimant qualified for an impairment rating.

29. Dr. Lesnak testified on behalf of Respondents at hearing as an expert witness. He is board certified in physical medicine and rehabilitation. He is Level II accredited pursuant to the WCRP. Dr. Lesnak noted he examined Claimant on 9/15/15. Dr. Lesnak performed the Patrick's and Gaenslen's maneuvers, which confirmed Claimant did not have pain from an SI joint. Dr. Lesnak performed ROM testing and Claimant's lumbar flexion was invalid.

30. Dr. Lesnak testified the AMA *Guides* required an examining physician to have reproducible objective findings to support the patient's complaints. Dr. Lesnak disagreed the MRI finding of facet arthropathy was an objective finding, as he characterized this as an MRI finding. The ALJ finds this is a distinction without a difference. Dr. Lesnak stated pain is not ratable under the AMA *Guides*. He opined Dr. Jenks did not follow the AMA *Guides* in that he based the rating on Claimant's subjective complaints and there was no diagnosis which correlated with these complaints. Dr. Lesnak testified under the AMA *Guides* Claimant qualified for a 0% impairment. Dr. Lesnak stated the AMA *Guides* did not address how to resolve a conflict between different ROM testing results.

31. The ALJ took administrative notice of the AMA *Guides*, which governs Claimant's medical impairment, pursuant to Section 8-42-107, C.R.S. The ALJ also

notes that Chapter 1.2 is an explanatory section which directly relates to chapter 2.3, at issue here. This section provides in pertinent part:

> "…Evaluation of impairment using the *Guides* requires integration of previously gathered medical information with the results of a current clinical evaluation. To characterize the impairment fully, the evaluation should be carried out in accordance with the directions in the Guides. Accomplishing this is based on using three fundamental components.
>
> First, Chapter 2 of the *Guides* lists the kinds of information needed to document the nature of an impairment and its consequences; specifies procedures for acquiring the information; and defines a structured format for analyzing, recording, and reporting the information. A summary of this material appears at the beginning of each clinical chapter..."[2]

32. In the Introduction section for chapter 2 of the AMA *Guides*, it specifies:

> "If two physicians using the *Guides* have obtained similar results and reached similar conclusions, a framework exists within which to resolve the discrepancies. Analysis of records and reports will disclose the differences. In such an instance, the differences will be in the clinical findings, which are matters of fact, not opinion; the latter can be verified by further observation of the claimant in accordance with the procedures and methods of the *Guides*…"[3]

33. As a result of his industrial injury, Claimant had more than six (6) months pain and rigidity in his lumbar spine.

34. The ALJ found Dr. Nystrom did not express definitive opinions with respect to Claimant's ROM deficits and there was no evidence he performed testing with dual inclinometers both times he concluded Claimant had reached MMI. He also concluded Claimant was entitled to an impairment rating in May 2015 and deferred to Dr. Ogrodnick regarding the rating.

35. Both DIME physicians (Drs. Ogrodnick and Jenks) concluded Claimant was entitled to a permanent impairment pursuant to Table 53 of the AMA *Guides*.

36. The ALJ was not persuaded by Dr. Lesnak's opinions that Claimant's only diagnosis was pain and that he was not entitled to a specific disorder impairment under pursuant to the AMA *Guides*.

[2] The second and third components refer to medical evaluation protocols and reference tables specifically keyed to the evaluation protocols.

[3] *Id.*

37. The ALJ found the opinions of Drs. Nystrom, Ogrodnick and Jenks to be more persuasive than those offered by Dr. Lesnak. At most, Dr. Lesnak's conclusions constituted a difference of opinion on whether Claimant was entitled to a medical impairment for his lumbar spine.

38. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1), C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of various health care providers was one of the primary issues on the question of Claimant's impairment rating.

Overcoming the DIME On the Issue of Impairment

Respondents have the burden of overcoming Dr. Jenks opinion and argued he erred in his determination that Claimant sustained a permanent medical impairment. In this regard, Respondents asserted Dr. Jenks' findings were not supported by the record, and relied on the opinion of Dr. Lesnak, who stated Claimant was rated for pain which was not ratable under the AMA *Guides.* Respondents asserted the results of Claimant's range of motion testing were unreliable.

Claimant contended Respondents failed to introduce sufficient evidence to meet their burden of proof and argued Dr. Jenks' determination of medical impairment was correct. Claimant relied upon the diagnoses made by the ATPs, as well as both DIME physicians as support for the contention Claimant was entitled to an impairment rating.

A DIME physician's finding that Claimant had a permanent medical impairment is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance'; it is evidence that his highly probable and free from serious and substantial doubt." *Metro Moving & Storage Co v. Gussert, supra*, 914 P.2d at 414 (citing CJI-Civ. 3d 3:2 (1988); *DiLeo v. Kotlnow*, 200 Colo. 119, 613 P.2d 318 (1980). A party meets this burden only by demonstrating that the evidence contradicting the DIME's MMI is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002) [citing *DiLeo v. Koltnow, supra*].

The enhanced burden of proof imposed by § 8-42-108(b)(III), C.R.S., reflects an underlying assumption that the DIME, having been selected by an independent and unbiased tribunal, will provide a reliable medical opinion. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses resulting from the industrial injury, as part of the DIME's assessment process, the DIME physician's opinion regarding causation of those losses is also subject to the same enhanced burden of proof. *Id.* Furthermore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

In this case, the controversy centers on Dr. Jenks' impairment rating and whether he erroneously found Claimant sustained a permanent medical impairment to the lumbar spine. The ALJ's analysis had two parts, beginning with a determination of whether there was objective evidence in the record which supported Dr. Jenks' finding of a Table 53 impairment. Next, the ALJ considered whether it was appropriate under the AMA *Guides* to assign an impairment to the lumbar spine.

Turning to the first consideration, the ALJ found there was objective evidence, including diagnoses made by the ATPs and DIME physicians, which supported the rating. Claimant had a diagnosis of lumbar strain, as found by Dr. Nystrom (an ATP). This diagnosis was reflected in the Concentra records, both when Dr. Nystrom examined Claimant, as well as PA-C Curcija. (Findings of Fact 5-7). Moreover, Dr. Zimmerman's records reflected a diagnosis for Claimant's symptoms for which he provided treatment. (Finding of Fact 8). The diagnoses articulated by Dr. Nystrom and Zimmerman, as well as PA-C Curcija were direct evidence that Claimant's injury was one that warranted an impairment rating. In fact, by 5/1/15 Dr. Nystrom opined Claimant had a permanent impairment. This was a change from his prior opinion that Claimant had no permanent impairment.

There was also objective evidence of injury, which pointed to what was causing Claimant's continued pain complaints. As found, the MRI documented mild to moderate facet arthropathy. (Finding of Fact 8).

Additional support for the conclusion Claimant had a permanent medical impairment was found in the in the opinion of Dr. Ogrodnick, who performed the first DIME. As found, Dr. Ogrodnick also made a specific diagnosis of Claimant's condition, concluded Claimant was not at MMI and required additional treatment. (Findings of Fact 15-16). More importantly, Dr. Ogrodnick opined Claimant was entitled to a specific disorder impairment and he provided a provisional rating when he examined Claimant.

As determined in Finding of Fact 24, Dr. Jenks concluded Claimant suffered an injury for which there was a diagnosis. Dr Jenks referred to the MRI findings and concluded there was objective evidence to support his diagnosis (impression) of chronic low back pain, potential facet in origin. There were sufficient facts in the record to support Dr. Jenks' opinion that Claimant's pain could be facet in origin, which was also supported by the MRI. The ALJ relied upon this support for Dr. Jenks' opinion. Although Dr. Lesnak tried to distinguish this as an MRI finding as opposed to an objective finding, the ALJ was not persuaded. (Finding of Fact 29).

Second, the ALJ considered Respondents' contention that Dr. Jenks' rating was not done pursuant to the AMA *Guides* as stated by Dr. Lesnak*.* More particularly, Dr. Lesnak testified there were invalid ROM measurements for lumbar flexion and noted Dr. Ogrodnick obtained a similar result for lumbar flexion. Dr. Lesnak also testified the computerized assessment performed showed Claimant had various psychosocial factors, which could cause exaggeration of symptoms. Dr. Lesnak opined there were minimal physical findings to support a rating, which should not have been given pursuant to the AMA *Guides.* Dr. Lesnak did not believe Dr. Jenks' rating complied with the Level II accreditation training physicians receive*.*

In *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202, 204 (Colo. App. 2000), the Colorado Court of Appeals noted that under the AMA Guides the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept, the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002). Ultimately, the questions of whether the DIME physician properly applied the AMA *Guide* and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*.

In this case, the ALJ found Dr. Jenks utilized the clinical data from Claimant's treatment records and correlated that with his findings on examination. The ALJ concluded that simply because there were different ROM findings for Claimant's lumbar flexion, this was insufficient to overcome Dr. Jenks' opinion, particularly where his ROM measurements were valid and conformed with the AMA *Guides*. Stated, another way Dr. Lesnak's conclusions did not persuade the ALJ that Dr. Jenks' calculation of the rating was erroneous.

In this case, the ALJ credited Dr. Jenks'opinion with regard to Claimant's entitlement to a Table 53 impairment. Also, although Dr. Lesnak found Claimant lumbar flexion ROM measurements were not valid when he performed an examination, the ALJ was not persuaded that because one aspect of the rating was previously invalid, this invalidated the entire rating.

Based upon the evidence, the ALJ found Claimant qualified for an impairment rating under the AMA *Guides.* Claimant had six months of pain and rigidity; that conclusion that was not overcome by Dr. Lesnak's expert opinion. The ALJ was not persuaded that the presence of some psychosocial factors was a basis to disregard Dr. Jenks' impairment rating

Finally, Dr. Zimmerman described Claimant's response to the injections as diagnostic. Dr. Jenks stated the facet joints were a potential pain generator. Although Dr. Lesnak disagreed, this difference of the opinion did not rise to the level of clear and convincing evidence to overcome Dr. Jenks' opinion.

ORDER

It is therefore ordered that:

1. Claimant sustained a permanent medical impairment to his lumbar spine as a result of his industrial injury and he is entitled to benefits for this impairment.

2. Respondents shall pay Claimant permanent partial disability benefits based upon Dr. Jenks' 9% whole person rating.

3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 30, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-824-206-08

ISSUES

Whether Respondents have established by a preponderance that they are entitled to withdraw their July 13, 2013 Final Admission of Liability (FAL) acknowledging reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's April 29, 2010 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. Employer is a large retail store. Claimant worked for Employer as a Department Manager. On April 29, 2010 Claimant suffered an admitted industrial injury to her cervical spine during the course and scope of her employment with Employer.

2. Claimant received medical treatment from Authorized Treating Physician (ATP) Gregory Reichhardt, M.D. Dr. Reichhardt determined that Claimant had suffered disc protrusions at C4-C5 and C5-C6. He suggested a consultation with a spine surgeon. Dr. Reichhardt also expressed concerns regarding Claimant's psychiatric status and recommended a pain psychology evaluation.

3. On August 23, 2010 Claimant underwent a psychiatric evaluation with Ron Carbaugh, PsyD. Dr. Carbaugh observed signs and symptoms consistent with a pain disorder associated with psychological factors, a general medical condition and depressive disorder. He recommended pain and adjustment counseling.

4. On September 15, 2010 Claimant consulted with Douglas Beard, M.D. about surgical options. On December 6, 2010 Claimant underwent an anterior cervical discectomy and fusion at C4-C5 and C5-C6.

5. Claimant's psychological condition continued to deteriorate after surgery. She thus underwent an independent medical examination with J. Tashof Bernton, M.D. on June 30, 2011. He concluded that Claimant's surgical recovery had been "complicated by very significant psychological issues and strong indications of somatoform disorder on psychological testing."

6. On June 25, 2012 Claimant reached Maximum Medical Improvement (MMI). Dr. Reichardt assigned Claimant a 10% whole person impairment for a specific disorder of the cervical spine, a 9% whole person impairment for range of motion deficits and a 3% psychiatric impairment. Combining the ratings yielded a 21% whole person impairment as a result of Claimant's April 29, 2010 industrial injury. Dr. Reichardt also determined that Claimant was entitled to receive medical maintenance benefits in the form of "monthly follow up visits with a physician, coverage of

medications and any necessary laboratory tests to monitor for side-effects of medications on an as-needed basis over each of the next three years."

7. On November 30, 2012 Claimant underwent a Division Independent Medical Examination (DIME) with John S. Hughes, M.D. After reviewing Claimant's medical history and performing a physical examination he agreed that Claimant had reached MMI on June 25, 2012 with a 21% whole person impairment rating. Dr. Hughes recommended medical maintenance treatment in the form of follow-up visits with Dr. Reichhardt and Gary Gutterman, M.D.

8. On July 13, 2013 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Hughes' MMI and impairment determinations. The FAL also specified that Claimant was entitled to receive reasonable, necessary and related medical maintenance benefits

9. On April 17, 2014 the parties executed a Settlement Agreement. The parties settled the matter relating to all injuries Claimant sustained as a result of the April 29, 2010 work incident. However, the parties agreed that Respondents remained liable "for related, reasonable and necessary benefits by an authorized treating physician."

10. On April 21, 2014 Claimant suffered a stroke. She was hospitalized from April 21, 2014 until April 30, 2014. Claimant was then transferred to a rehabilitation facility for approximately two months. She exhibited persistent symptoms including speech and cognitive deficits.

11. On August 13, 2015 Claimant underwent an independent medical examination with Dr. Bernton. He reviewed Claimant's medical records and perfomed a physical examination. Dr. Bernton explained that Claimant continued to suffer symptoms as a result of her April 21, 2014 stroke that included cognitive deficits, balance problems and coordination difficulties. He noted that, although Claimant had discontinued the medications related to her April 29, 2010 industrial injury, her cervical spine symptoms had improved. Dr. Bernton also commented that Claimant exhibited a diminished somatoform disorder after her April 21, 2014 neurologic event. Although Claimant mentioned diffuse body pain, her levels had decreased. Dr. Bernton thus concluded that Claimant no longer required medical maintenance medications for her April 29, 2010 industrial injury.

12. After reviewing additional medical records Dr. Bernton prepared another report on January 19, 2016. Dr. Bernton recounted the circumstances and treatment surrounding Claimant's April 21, 2014 stroke. He noted that Claimant's condition improved after undergoing a thrombectomy but she still suffered decreased mobility and other deficits. Claimant was ultimately discharged from the hospital to a long-term care facility for continued respiratory and ventilator management. Dr. Bernton explained that the additional medical records he reviewed were consistent with the history he had reviewed at the August 13, 2015 independent medical examination. He remarked that Claimant demonstrated tremendous improvement considering "the serious nature of the

embolic event that she sustained." Nevertheless, Claimant still suffered persistent deficits. Dr. Bernton explained that Claimant had ceased medications for her work-related cervical spine injury as discussed in his August 13, 2015 independent medical examination. He summarized that Claimant did not require further work-related maintenance care or have specific restrictions for her work-related condition because her stroke limitations "clearly" exceeded her work-related impairment.

13. On June 7. 2016 the parties conducted the post-hearing evidentiary deposition of Dr. Bernton. Dr. Bernton maintained that Claimant did not require medical maintenance treatment in the form of medications to relieve the effects of her April 29, 2010 industrial injury or prevent further deterioration of her condition. He recounted that, after Claimant's April 21, 2014 stroke, she no longer required medications for her industrial injury. He commented that Claimant had suffered somatoform complaints but they resolved subsequent to her stroke. Dr. Bernton remarked that unusual behavioral effects can follow strokes and Claimant's stroke had a positive effect because she "was very clear and very emphatic that she didn't feel she needed those medications." Moreover, despite the lack of medications her work-related pain levels decreased. Dr. Bernton summarized that Claimant "was in a better position" regarding her occupational problems subsequent to her stroke and no longer requires medications for her industrial injury. He explained that Claimant has reported lower pain levels since she ceased her medications and does not require medications to maintain her industrial condition. Dr. Bernton concluded that Claimant's work-related condition is stable and it is not medically probable that she will require future medical maintenance treatment.

14. Respondents have established that it is more probably true than not that they are entitled to withdraw their July 13, 2013 FAL acknowledging reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her April 29, 2010 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988). On April 29, 2010 Claimant suffered an admitted cervical spine injury and subsequently underwent surgery for the condition. During Claimant's medical treatment she exhibited symptoms consistent with a pain disorder associated with psychological factors. On June 25, 2012 Claimant reached MMI. DIME Dr. Hughes assigned her a 21% whole person impairment rating. He recommended medical maintenance treatment in the form of follow-up visits with Dr. Reichhardt and Gary Gutterman, M.D.

15. On April 21, 2014 Claimant suffered a stroke. She was hospitalized from April 21, 2014 until April 30, 2014. Claimant was then transferred to a rehabilitation facility for approximately two months. She exhibited persistent speech and cognitive deficits. At an August 13, 2015 independent medical examination Dr. Bernton explained that Claimant continued to suffer symptoms as a result of her April 21, 2014 stroke that included cognitive deficits, balance problems and coordination difficulties. He noted that, although Claimant had discontinued the medications related to her April 29, 2010 industrial injury, her cervical spine symptoms had improved. Dr. Bernton also commented that Claimant exhibited a diminished somatoform disorder after her April 21, 2014 neurologic event. Although Claimant mentioned diffuse body pain, her levels had

decreased. Dr. Bernton thus concluded that medical maintenance medications were no longer required. After reviewing additional medical records Dr. Bernton prepared a report on January 19, 2016. He remarked that Claimant demonstrated tremendous improvement considering “the serious nature of the embolic event that she sustained.” Nevertheless, Claimant still had persistent deficits. Dr. Bernton explained that Claimant had ceased medications for her work-related cervical spine injury as discussed in his August 13, 2015 independent medical examination. He summarized that Claimant did not require further work-related maintenance care or have specific restrictions for her work-related condition because her stroke limitations “clearly” exceeded her work-related impairment. Finally, at his post-hearing evidentiary deposition Dr. Bernton maintained that Claimant did not require additional medical maintenance treatment for her April 29, 2010 industrial injury. Dr. Bernton explained that Claimant did not require medical maintenance treatment in the form of medications to relieve the effects of her April 29, 2010 industrial injury or prevent further deterioration of her condition. He recounted that, after Claimant’s April 21, 2014 stroke, she no longer required medications for her industrial injury. He commented that Claimant had suffered somatoform complaints but they resolved subsequent to her stroke. Dr. Bernton remarked that unusual behavioral effects can follow strokes and Claimant’s stroke had a positive effect because she “was very clear and very emphatic that she didn’t feel she needed those medications.” Moreover, despite the lack of medications her work-related pain levels decreased. Dr. Bernton summarized that Claimant “was in a better position” regarding her occupational problems subsequent to her stroke and no longer requires medications for her industrial injury. Accordingly, Respondents are permitted to withdraw their FAL acknowledging reasonable, necessary and related medical maintenance benefits.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2015), C.R.S. On July 13, 2013 Respondents filed a FAL consistent with Dr. Hughes' MMI and impairment determinations. Respondents also specified that Claimant was entitled to receive reasonable, necessary and related medical maintenance benefits In order to withdraw the FAL Respondents thus have the burden of proving by a preponderance of the evidence that Claimant is not entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her April 29, 2010 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

6. As found, Respondents have established by a preponderance of the evidence that they are entitled to withdraw their July 13, 2013 FAL acknowledging reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her April 29, 2010 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988). On April 29, 2010 Claimant suffered an admitted cervical spine injury and subsequently underwent surgery for the condition. During Claimant's medical treatment she exhibited symptoms consistent with a pain disorder associated with psychological factors. On June 25, 2012 Claimant reached MMI. DIME Dr. Hughes assigned her a 21% whole

person impairment rating. He recommended medical maintenance treatment in the form of follow-up visits with Dr. Reichhardt and Gary Gutterman, M.D.

7. As found, on April 21, 2014 Claimant suffered a stroke. She was hospitalized from April 21, 2014 until April 30, 2014. Claimant was then transferred to a rehabilitation facility for approximately two months. She exhibited persistent speech and cognitive deficits. At an August 13, 2015 independent medical examination Dr. Bernton explained that Claimant continued to suffer symptoms as a result of her April 21, 2014 stroke that included cognitive deficits, balance problems and coordination difficulties. He noted that, although Claimant had discontinued the medications related to her April 29, 2010 industrial injury, her cervical spine symptoms had improved. Dr. Bernton also commented that Claimant exhibited a diminished somatoform disorder after her April 21, 2014 neurologic event. Although Claimant mentioned diffuse body pain, her levels had decreased. Dr. Bernton thus concluded that medical maintenance medications were no longer required. After reviewing additional medical records Dr. Bernton prepared a report on January 19, 2016. He remarked that Claimant demonstrated tremendous improvement considering "the serious nature of the embolic event that she sustained." Nevertheless, Claimant still had persistent deficits. Dr. Bernton explained that Claimant had ceased medications for her work-related cervical spine injury as discussed in his August 13, 2015 independent medical examination. He summarized that Claimant did not require further work-related maintenance care or have specific restrictions for her work-related condition because her stroke limitations "clearly" exceeded her work-related impairment. Finally, at his post-hearing evidentiary deposition Dr. Bernton maintained that Claimant did not require additional medical maintenance treatment for her April 29, 2010 industrial injury. Dr. Bernton explained that Claimant did not require medical maintenance treatment in the form of medications to relieve the effects of her April 29, 2010 industrial injury or prevent further deterioration of her condition. He recounted that, after Claimant's April 21, 2014 stroke, she no longer required medications for her industrial injury. He commented that Claimant had suffered somatoform complaints but they resolved subsequent to her stroke. Dr. Bernton remarked that unusual behavioral effects can follow strokes and Claimant's stroke had a positive effect because she "was very clear and very emphatic that she didn't feel she needed those medications." Moreover, despite the lack of medications her work-related pain levels decreased. Dr. Bernton summarized that Claimant "was in a better position" regarding her occupational problems subsequent to her stroke and no longer requires medications for her industrial injury. Accordingly, Respondents are permitted to withdraw their FAL acknowledging reasonable, necessary and related medical maintenance benefits.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents are permitted to withdraw their FAL acknowledging reasonable, necessary and related medical maintenance benefits.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 30, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

The sole issue to be determined by this decision concerns the causal relatedness of post maximum medical improvement (MMI) or *Grover* medical benefits.

Although the Respondents raised the issue, the Claimant has the burden of proof, by preponderant evidence to establish entitlement to *Grover* medical benefits.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant (d.o.b. March 12, 1959) sustained an admitted injury to his low back on April 14, 2009.

2. The Respondents filed a Final Admission of Liability (FAL), dated October 18, 2010, admitting for an MMI date of April 1, 2010; temporary disability benefits through April 1, 2010; permanent partial disability (PPD) benefits, based on 23% whole person; an average weekly wage (AWW) of $3,057.72; and, reasonably necessary and causally related post-MMI medical maintenance benefits.

3. The Respondents have raised the issue of causal relatedness of present post-MMI medical maintenance benefits.

Medical Chronology

4. The Claimant began treating with John Nordin, M.D., at Exempla Northwest on April 16, 2009. Dr. Nordin diagnosed a low back strain. Dr. Nordin referred the Claimant to Nicholas K. Olsen, D.O., who became the Claimant's authorized treating physician (ATP). Dr. Olsen saw the Claimant on June 8, 2009 and diagnosed: (1) lumbar strain; and, (2) left L5-S1 disc protrusion. As of July 14, 2009, Dr. Olsen added to his diagnosis: 91) status post lumbar sprain/strain, lifting injury at work 4/14/09; and, (2) disc protrusion at L5-S1 with bilateral lower extremity radiculopathy, stable.

5. As of September 28, 2009, Dr. Olsen indicated that the Claimant "notes a 10% aggravation since he was placed at MMI." Dr. Olsen recommended a bilateral S1 transforaminal epidural steroid inject to address the current symptoms.

6. On December 15, 2009, the Claimant underwent back surgery at the hands of Michael Shen, M.D. The procedure consisted of; (1) bilateral L4-5 microdecompression; AND, (2) left L5-S1 microdikectomy. On January 25, 2010, Dr. Olsen assessed "status post laminectomy/discectomy at L5-S1." On April 1, 2010, Dr. Olsen noted that the Claimant had undergone several epidural steroid injections at the left L5-S1. Dr. Olsen noted that the Claimant had reached MMI, and he gave the Claimant permanent restrictions. As of December 23, 2013, Dr. Olsen added to his assessment: probable facet syndrome at bilateral L5-S1, right greater than left; and, "chronic opioid use." On January 23, 2014, Dr. Olsen noted that the Clamant was requesting a refill of his hydrocodone prescription. As of March 12, 2015, the Claimant was indicating a 50% worsening of his symptoms.

7. ATP Dr. Olsen continues to provide the Claimant with post-MMI medical maintenance treatment,

Independent Medical Examination (IME) by Frederick P. Scherr, M.D.

8. On September 2, 2015, Dr. Scherr performed an IME of the Claimant at the behest of the Respondents. Ultimately, Dr. Scherr was of the opinion that the chronic low back pain was probably related to the admitted work injury, but the probable facet syndrome first noted in Dr. Olsen's December 23, 2013 report was not causally related to the admitted work injury. The ALJ infers and finds that Dr. Scherr bases his opinion that the facet syndrome is not causally related entirely upon the temporal gap between the admitted injury and the first mention of the facet syndrome in 2013.

9. Dr. Scherr notes: "While the injury of April 2009 and subsequent surgery of the l4-5 microdecompression, which may have weakened the annulus, has certainly contributed to his natural degeneration process, given [Claimant's] prior degenerative lumbar spine…it is unlikely the original injury and surgery a significant aggravation or material accelerant cause this far removed (temporal)….." Dr. Scherr concedes that the admitted injury and surgery aggravated and accelerated the Claimant's degenerative condition, however, he is of the opinion that the admitted injury was not a **significant** aggravation or acceleration of the Claimant's degenerative condition. The ALJ notes that this minimization of the work-relatedness of the Claimant's back condition is at odds with the Respondents' 23% whole person admission.

10. Dr. Scherr testified at hearing and he re-confirmed the opinions in his Report, conceding that Dr. Olsen's treatment was reasonably necessary to maintain the Claimant at MMI (he would defer any recommendation of additional surgery to a spine surgeon), but it was not causally related to the admitted injury.

Dr. Olsen's Rebuttal of Dr. Scherr's Opinions

11. In a report of November 23, 2015 (Claimant's Exhibit 1, admitted into evidence without objection), ATP Dr. Olsen states:

> There is no indication that [Claimant] was receiving the kind of treatment he has required following his injury of 4/14/09. It remains my opinion that [Claimant's current complaints of both discogenic pain and facetogenic pain are related to his prior injury as he underwent prior discectomies at both L4-5 and L5-S1 as part of his work-related injury.

12. The causality opinions of IME Dr. Scherr and ATP Dr. Olsen are diametrically opposed. Dr. Olsen has dealt with the Claimant's medical case as an ATP over a long period of time. Dr. Scherr saw the Claimant once as an IME physician. As found herein above, a central pillar underlying Dr. Scherr's causality opinion concerns the temporal relationship between the admitted injury and the manifestation of some of the Claimant's pain complaints. Dr. Olsen, on the other hand, has been consistently dealing with the Claimant since 2009 through November 2015, and he places no importance on the temporal relationships.

Ultimate Findings

13. For the reasons stated herein above, the ALJ finds the causality opinions of ATP Dr. Olsen more credible and persuasive than the causality opinions of IME Dr. Scherr. Dr. Scherr's minimization of the effects of the admitted work injury is at odds with the Respondents' admission for 23% whole person PPD. The Claimant's testimony was credible, persuasive and, essentially, undisputed.

14. The ALJ makes a rational choice, based on substantial evidence, to accept the causality opinions of ATP Dr. Olsen, and to reject the causality opinions of IME Dr. Scherr.

15. The Claimant has proven, by a preponderance of the evidence that his current post-MMI medical maintenance treatment by Dr. Olsen is reasonably necessary to maintain the Claimant at MMI and it is causally related to the admitted injury of April 14, 2009 as the product of an aggravation and acceleration of the Claimant's underlying degenerative condition.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the causality opinions of ATP Dr. Olsen were more credible and persuasive than the causality opinions of IME Dr. Scherr. Dr. Scherr's minimization of the effects of the admitted work injury was at odds with the Respondents' admission for 23% whole person PPD. The Claimant's testimony was credible, persuasive and, essentially, undisputed.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the causality opinions of ATP Dr. Olsen, and to reject the causality opinions of IME Dr. Scherr.

Aggravation and Acceleration of Underlying Condition

c. An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a pre-existing condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant's need for post-MMI maintenance treatment up to this point resulted from an aggravation and acceleration of the Claimant's underlying pre-existing back condition.

Causal Relatedness of Post-MMI Medical Maintenance Treatment

d. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). As found, Dr. Olsen's post-MMI treatment and recommended treatment is causally related to the admitted injury and reasonably necessary to maintain the Claimant at MMI.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found. The post-MMI treatment being provided and recommended by Dr. Olsen has been proven to be causally related and reasonably necessary.

ORDER

IT IS, THEREFORE, ORDERED THAT:

The Respondents shall pay the costs of all **causally relqated and reasonably necessary** post maximum medical improvement medical maintenance treatment being provided by Nicholas K. Olsen, D.O., subject to the Division of Workers' Compensation medical Fee Schedule.

DATED this______day of July 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-962-995-01

ISSUES

Whether Respondents proved by a preponderance of the evidence that they were entitled to a 50% offset for Claimant's willful violation of a safety rule pursuant to section 8-42-112(1)(b), C.R.S.

STIPULATIONS

The parties stipulated to an Average Weekly Wage (AWW) of $657.14.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

Introduction

1. Employer hired Claimant in approximately 2002 or 2005 as a laborer. Claimant initially worked in Employer's concrete division but later worked in its waterproofing division. Employer's business involves repairing and protecting commercial structures from water damage.

Accident

2. On September 26, 2014, Claimant was working for Employer in the waterproofing division on a job that involved repairing damaged concrete on an elevated parking structure at the Park Meadows Mall (the job). At that time, Claimant was working as a "lead laborer," and was responsible for the project when the foreman was not on site.

3. Claimant testified that on September 26, 2014, he was working as a laborer and his duties included getting materials, tearing out caulking, chipping and patching concrete, and doing what the foreman asked.

4. The job scope was determined by structural engineers who understood loads and repair methods. The engineers drew up the repair scope and Employer's workers were to execute those work items. The engineering firm remained responsible for identifying the scope of work throughout the course of the job and was responsible for any change in scope.

5. The initial scope for the job involved only the top surface of the parking area. Employers' workers were to remove the approximately six spalls – "amoeba" shaped areas of water and rust damaged concrete. The spalls occurred every several feet along a line where two pieces of concrete were joined by imbedded

rebar. The spalls measured approximately 6 - 12 inches by approximately 12 – 36 inches. The original scope required the workers to use a diamond blade saw to cut out squared-up partial-depth areas surrounding each spall. After work began, it became apparent that some of the spalls went through not just the top surface, but the full thickness of the concrete.

6. On September 25, 2014, the day before Claimant's accident, an engineer came to the site to reevaluate the job scope. The engineer who inspected the site modified the scope to provide that the approximately six spalls were to be individually cut out by making full depth cuts around each spall. The new scope was communicated by the engineer to Employer's foreman, Jeremy Martin. Mr. Martin testified that he did not recall ever discussing cutting out all of the spalls together in one piece either with the engineer or with Claimant. There would not have been reason to because such a scope was not within code and was not within the scope of Employer's contract. Rather, Claimant and a coworker were to drill the pilot holes to mark the perimeter of each small hole that was to be individually cut. Mr. Martin testified that Claimant and his coworker, Jamal Hicks, drilled the pilot holes while the engineer was on site.

7. The best evidence of the original and modified scope of work would be the original and modified engineered plans. However, Respondents did not introduce the engineered plans, and the plans therefore were not admitted as evidence.

8. Mr. Martin testified that he told Claimant what the scope of work was, and that he and Claimant walked to job with the engineer on September 25, 2014. After walking the job, the engineer returned to his office, revised the scope, and sent the revised plans to Mike Padilla, the project manager. Mr. Padilla then sent them to Mr. Saltzman, who brought them out to the jobsite where they remained. Mr. Martin testified that Claimant had the revised plans on the afternoon of September 25, and he and Claimant discussed the plans in detail. He believed Claimant understood the revised scope of work.

9. Claimant acknowledged participating in part of the job walk with Mr. Martin and the engineer. Claimant did not complete the walk, but went back to the top surface and finished some other work.

10. Claimant testified that after the job walk, Mr. Martin told him to drill the pilot holes from underneath the top surface and chalk line around the spalls to identify on the top surface what concrete had been identified as bad from underneath. The chalk lines showed "how much really needed to be taken out full depth." Claimant testified that he was told "to be safe and get the job done."

11. The size and shape of each spall was more visible from the underside of the parking surface. At Mr. Martin's direction, Claimant and Mr. Hicks marked the corners around the perimeter of each spall by drilling pilot holes from the underneath surface up through the top surface, the holes were then marked on

the top surface in spray paint and an outline of the shape to be cut was chalk-lined to form a square or rectangle on the top service. Claimant and Jamal were in the man-basket of a scissor lift to be able to reach the 20’ height of the undersurface. There was no shoring up of the top surface, and Claimant would have been aware of that because he worked on the lower level when he was drilling the pilot holes. Also, the scissor lift would not have fit if shoring were present.

12. Once the squares were marked, the plan called for a worker on the top surface to use a concrete saw with a 14” blade to cut out the individual spalls, creating one or two square-foot, individual holes.

13. Claimant testified that he or one of his coworkers chalk-lined *not* around individual spalls, but rather that they made “a [singular] square or rectangle” of the area he thought needed to be removed. For example, he testified that on the day of his injury, that he had "it [singular] chalked out.” And that he started saw-cutting the line he and his coworkers chalked out. Claimant ultimately testified that as engineered, he was to cut out a series of small rectangles underneath, and then from the top, to cut out the entire area to encompass the perimeter of the area where all the underneath cuts had been made. Claimant testified that Mr. Martin had told him to do it that way.

14. Early on September 26, 2014, Claimant called Mr. Martin because the laborers he was supervising that day, Jamal Hicks and Aaron, were not listening to him and not respecting his authority as lead laborer. The ALJ infers from the timing and context of the call that Jamal and Aaron disagreed with Claimant’s perspective of their scope of work.

15. On September 26, 2014, after the pilot holes had been marked and the individual spalls chalk lined, Claimant did not cut out the individual spalls. Rather, he began to make full depth cuts around the general area that encompassed all of the spalls. That area measured approximately 4’ by 20’, roughly 80 square feet. Claimant cut through both of the 20’ sides and one 4’ side of the area with a saw, but was unable to use a saw on the fourth side due to the proximately of a column. The column occupied approximately 3’ of the 4’ side, with approximately six inches on either side of the column. At that time, the cut, 80square -foot area was supported solely by the uncut 4’ edge.

16. The concrete gave way and the 4’ by 20’ area collapsed, falling with Claimant twenty feet onto the parking level below.

17. On the day of the accident, Claimant was working as the lead laborer and was in charge of the site while Mr. Martin was away at a personal event.

18. Mr. Martin testified that he and Claimant were friends and both were “family men.” Mr. Martin had advocated with Employer’s owner for Claimant to be given raises. Mr. Martin thought Claimant “had potential” and that he tried to help

Claimant at work by encouraging him to take on foreman-type tasks such as the engineer walk on September 25, 2014.

19. Mr. Martin testified that he made Claimant his lead because Claimant had experience with concrete and knew more about it than Mr. Martin did. Mr. Martin trusted Claimant and described him as having the same understanding of the "big picture" as a foreman would.

Safety Rules

CHANGING WORK SCOPE

20. Mr. Martin testified that by making the 20' long cuts, Claimant created a safety hazard that called for use of the fall protection equipment. He further testified that Claimant knew Employer's policy that if a person in charge sees a safety issue they are to immediately call a supervisor. Claimant was aware of the policy because Claimant and Mr. Martin had worked on other projects where safety issues arose and work had been stopped. Further, Claimant had been in a stop work situation on an earlier Park Meadows project. There, a similar but smaller project was stopped, the project was delayed, and shoring was required to brace a six foot cut.

21. Claimant did not consult with or notify Mr. Saltzman or his assistant Levi, Mr. Martin, or Mike Padilla the project supervisor, about his decision to change the way the work was to be performed. Mr. Saltzman testified that Claimant had been trained that anytime the work scope changed, you had to stop the work. He testified that Claimant violated company policy when he decided to change the scope of the project because (1) it greatly increased the cost of the project; (2) it increased the time involved to complete the increased amount of work; (3) it created a risk of fall; and (4) Claimant failed to set up and require his crew to use the fall protection equipment.

22. Mr. Martin testified that on September 25, 2014, he told Claimant to follow the outlines [plural] and to cut out the small areas. Mr. Martin defined the process for how the small holes should be patched. He handed Claimant his paperwork, his notes, and contact information for the engineer. He instructed Claimant, "If there were any questions at all, stop, shut everything down, and wait until someone gives you an answer."

23. Mr. Martin testified on rebuttal that the scope of the project involved making small cuts and that the job was supposed to be a "very small, very quick repair." The scope was not to cut an entire area as Claimant did, but rather to cut small damaged areas approximately 18" on a side. The project was never engineered for the cuts that Claimant made. Mr. Martin never told Claimant to cut out the entire area or that the engineer had approved of such. Mr. Martin further testified that Employer could not have made the cuts Claimant made because it was not approved by code or within the contracted scope for the job.

24. Mr. Martin testified that on September 25, 2014, he told Claimant to follow the outlines [plural] and to cut out the small areas. Mr. Martin defined the process for how the small holes should be patched. He handed Claimant his paperwork, his notes, and contact information for the engineer. He instructed Claimant, “If there were any questions at all, stop, shut everything down, and wait until someone gives you an answer.”

25. Mr. Martin testified that Claimant did call him on the morning of September 26, 2014. Mr. Martin did not understand Claimant to have called to discuss the job scope, but rather Claimant was “really upset” because Jamal and Aaron were not willing to listen to him and were “giving him a bunch of grief.”

26. There would be no need to drill pilot holes around individual spalls if the engineered scope was to cut out the entire area. If the entire area were to be cut out, the area would have been measured from underneath and those measurements would have been transferred to the top surface.

27. Mr. Saltzman testified: “The expansion of the scope created the safety violation because [Claimant] knew that he was going to create a large hole,” and he failed to use or require his crew to use the fall protection equipment that was already on site.

28. Mr. Saltzman testified workers all were trained not to expand the scope of a project and to only perform specified duties and tasks. With respect to changing the scope of a project, all employees are told at the beginning of a project what the scope is and that they are not to deviate without consulting a supervisor.

29. The ALJ finds it more probably true than not that Claimant misapprehended the actual scope of authorized work. Because the ALJ finds that Claimant believed he was performing authorized work, the ALJ is unable to find that Claimant willfully changed the scope of work without authorization.

CREATING A SAFETY HAZARD

30. Claimant testified that when he started using the chipping hammer, there were no openings in the concrete. Claimant testified that he “was not exposed to a fall prior to the concrete falling,” and that he was not ever concerned that there would be a risk of falling when he was cutting or chipping the concrete. He was not concerned because he had done “this” “plenty of times” in his ten to fifteen years working with concrete, and he never had a situation where he cut three sides of concrete and it fell through.

31. Mr. Saltzman testified that Employer recognized a number of safety issues generally and required that protective gear be used in instances of loud noise and risk of falling more than six feet. Employer conducted monthly safety meetings as required by OSHA. Mr. Saltzman testified that on the morning of the accident Employer had done training on general fall protection and the requirement that if a worker was exposed to a risk of falling six or more feet, that

he was required to be tied off to a 5,000 pound anchor and wear full body harnessing. Exhibit D is a sign in sheet indicating that Claimant attended the session. The topic was “Fall Protection: General.” Employer also conducted weekly “toolbox topics” trainings on a variety of safety topics specific to the projects being worked. Mr. Martin testified that “ten sheets were handed out at a time” at the toolbox meetings. One such sheet, admitted into evidence as exhibit G, covered crushing accidents, but dealt with material not relevant to the job such as trenching and materials storage. Mr. Saltzman was the instructor of the April 18, 2014 Job Box Talk, and Claimant signed the attendance sheet for the talk. The April 18 training topic was “Fall Protection Inspection Rigging.” No documentary evidence sets forth what the training encompassed. Mr. Saltzman testified that Claimant had been involved in a similar job but with larger holes within six months of his accident and had been trained on how to set up safety equipment, where to put it, and how to use it. Mr. Saltzman testified that he had done training on a number of topics including fall protection and that he knew Claimant had been present because he had signed the sign-in sheets.

32. With respect to exhibit G, Claimant testified that it did not apply to concrete work but rather to tagging out defective electrical equipment.

33. Claimant was not using any fall protection equipment on the day of the accident. When asked why he did not use a safety harness, Claimant responded,

> Why I didn’t use a harness? We already talked about just to be safe, and it was supposed to be a little fix. And there is no need to be tied off. How are you going to be tied off on a parking structure?

Claimant was not aware of “a specific safety rule for when you’re using a harness while cutting through a concrete floor.” He testified that he had harnesses but no other fall protection gear on site, but that he could have called in if he did not have the gear that he needed.

34. When asked whether he saw “a safety danger” by cutting out three sides of the floor he was on and chipping out the fourth side, and whether he recognized that as a situation which would require fall protection, Claimant answered no. Claimant did not remember where he was standing at the time the concrete collapsed.

35. Claimant testified that he cut three sides of the chalk lined area, but did not saw cut the fourth because a column was too close for him to use the saw. Claimant also testified that there were no pilot holes drilled on the fourth, uncut side. None of the concrete fell out after the three sides were cut, and when asked if he had any reason to believe the concrete would fall, Claimant responded “no.” Claimant and his coworker, Jamal, then began chipping the fourth side of the rectangle.

36. Due to the location of the column, the small amount of space outside of the column, and the proximity of a cement wall (see Exhibit F-2), the ALJ infers that Claimant was inside the area that had already been cut when he began chipping the fourth side with a jack-hammer-like tool.

37. Mr. Saltzman testified that creating fall hazards and not being tied off when there is a risk of falling more than six feet are safety violations. With respect to a fall hazard, Mr. Saltzman testified that the risk of fall existed "once the hole was created," and that once the hole was created, he was obligated to be tied off with a full body harness.

38. On cross-examination Mr. Saltzman was asked: "it was Claimant's position to make the judgment call as to whether or not a safety rule was – whether a safety harness was going to be needed; is that correct?" Mr. Saltzman responded, "Correct."

39. Claimant acknowledged that on the day of his accident, he was working as the lead laborer and that one of his duties was to make sure the worksite was safe for him and other workers. He knew there was no shoring.

40. The ALJ finds it more probably true than not that Claimant misapprehended the risk of fall that existed when he cut out the large section of concrete. Although it seems unlikely that an adult would not perceive the risk, Claimant's behavior of cutting both long sides first, and of standing on the portion of concrete that would fall, support the finding that he actually did not recognize the consequence his action would cause. Because the ALJ finds that Claimant did not apprehend the safety hazard his conduct created, the ALJ is unable to find that Claimant willfully violated Employer's safety rule which prohibited employees from creating safety hazards.

FAILURE TO USE FALL PROTECTION EQUIPMENT

41. Mr. Martin testified that Employer's policy for fall hazards was that if any hazard of falling over six feet existed, employees had to be tied off. Claimant was aware of the policy because it was in the employee handbook, was discussed in safety meetings, and was spoken about often on worksites. Mr. Martin testified that there was no risk of fall with the engineered modified work scope because no holes larger than four square feet were anticipated. Nevertheless, the majority of the fall safety gear, including D-ring plates that are bolted in to 20,000 pound anchors, half-inch cable, and shackles and harnesses were already on site. Additional wire cable was brought to the job site on the afternoon or evening of September 25.

42. Mr. Martin testified that Claimant was aware that the gear was there and that Claimant's harness was with the bulk of the gear. However, Claimant denied being aware of the presence of the safety gear.

43. Although Claimant had installed the same safety equipment on a different area of the site within six months of the accident, he did not install it on the site and did not require his crew to use fall protection equipment.

44. On September 26, Mr. Martin was unable to be at the site, therefore Claimant, as the lead, was in charge of the site. Claimant was responsible that day to make sure his crew understood what hazards might be present, how to avoid the hazards, and to stop work if a safety issue arose.

45. Mr. Saltzman testified that training on September 26, 2014, included the OSHA regulation which requires tie off if a risk exists of falling more than 6 feet. Exhibit 9 documents what the training covered, and includes the language,

> "You must always be tied off with a full body harness if you are exposed to a fall greater than 6' no matter what means of access you are using."

Mr. Saltzman testified that the training covered general fall protection policies "on elevated portions of buildings, ladder safety, scaffolding, man lifts, Boson's chairs, general notes." He acknowledged that the training on the morning of September 26, 2014 did not address holes in parking decks which were "a very specific situation."

46. On cross-examination, Claimant's counsel had Mr. Saltzman identify a copy of Employer's Employee Manual dated August 26, 2015. While the policy post dates the accident, Mr. Saltzman testified that it was the manual that was used at the time of Claimant's injury. Claimant did not move for the admission of the manual into evidence, and therefore the ALJ was not able to consider its contents.

47. Mr. Martin testified that Claimant would have found the safety rule that he violated in the employee handbook. Although Respondents' exhibit A is Claimant's acknowledgement that he received the handbook, Respondents also did not introduce the manual as an exhibit during the hearing, and no such manual was admitted as evidence.

48. Mr. Saltzman testified that Employer enforced the fall protection policy. He gave an example of writing up three workers for not wearing their harnesses when they were working in a stick boom lift. The workers were suspended for three days without pay.

49. However Mr. Saltzman did not write Claimant up for violating company policy. He testified that he did not do so because he was hurt and taken urgently to the hospital and had not returned to work. Mr. Saltzman testified that he thought Claimant's injuries were punishment enough, and that he would not have given Claimant a suspension notice in the emergency room. He stated that if Claimant were to return to work, the policy violations would definitely go on Claimant's record. After Claimant was injured, Mr. Saltzman and Jesus Odonez, Employer's

human resources director, discussed what discipline Claimant might be subject to based on the accident. Employer had discretion to decide what employment action to take. Employer could have terminated Claimant for his conduct, which Mr. Saltzman testified was “one of the worst safety violations in history.” Employer decided, as a humanitarian matter, to not discipline Claimant. The ALJ finds this testimony credible and persuasive and therefore finds that Employer’s decision not to take negative employment action against Claimant does not indicate that Employer di not recognize Claimant’s conduct as violating safety rules.

50. Mr. Saltzman testified that if a safety violation occurred on a project, the person in charge would be written up for allowing an unsafe condition.

51. Claimant was aware, likely through tool box meetings, that you need to use fall protection when you are exposed to a fall of six or more feet. He acknowledged that he was over six feet above the lower level of the garage while he was working, and that circumstances could exist that would require him to be harnessed off.

52. The ALJ finds it more probably true than not that Claimant misapprehended the risk of fall that existed when he cut out the large section of concrete. Because the ALJ finds that Claimant because Claimant did not apprehend the existence of a risk of fall, the ALJ is unable to find that Claimant willfully violated Employer’s safety rule which required employees to use fall protection equipment if they were exposed to a fall of six feet or more.

53. Based on the totality of the evidence, the ALJ finds that Employer had safety rules which (1) prohibited unauthorized changes in the scope of work; (2) prohibited employees from creating hazardous work conditions, and (3) required employees to use fall protection gear when they were exposed to a risk of falling six feet or more.

54. Based on the totality of the evidence, the ALJ finds that Employer’s safety rules were reasonable, specific, and unambiguous. The ALJ further finds that Employer trained Claimant on the safety rules and enforced the rules. The ALJ further finds that Claimant’s violation of any one of the rules would have caused his injuries.

55. Based on the totality of the evidence, the ALJ finds that Claimant’s act of cutting out an 80 square foot area rather than individual spalls, violated Employer’s safety rule which prohibited unauthorized changes of work scope.

56. Based on the totality of the evidence, the ALJ finds that Claimant’s act of cutting out an 80 square foot area rather than individual spalls, violated Employer’s safety rule which prohibited employees from creating unsafe work conditions by creating a risk of falling six feet or more.

57. Based on the totality of the evidence, the ALJ finds that Claimant violated Employer’s safety rule which required the use of fall protection gear when an employee was exposed to a risk of falling six or more feet.

58. Based on the totality of the evidence, the ALJ finds that Respondents have not met their burden of establishing by a preponderance of the evidence that Claimant’s violation of any of the rules was willful.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General

The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The question of whether the claimant met her burden of proof is one of fact for determination by the ALJ. See *Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The ALJ’s factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence/or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Safety Rule Violation

Section 8-42-112(1)(b), C.R.S., provides for a fifty percent reduction in compensation to a claimant where a respondent proves by a preponderance of the evidence that the claimant's injury was caused by the willful failure to obey any reasonable rule adopted by the employer for the claimant's safety. *See In re Claim of Bromirski, 082113 COC, 4-882-047-01.*

Under Section 8-42-112(1)(b), C.R.S. it is the respondents' burden to prove every element justifying a reduction in the claimants' compensation for the willful failure to obey a reasonable safety rule. *Triplett v. Evergreen Builders*, Inc., W. C. No. 4-576-463 (May 11, 2004). The elements the respondents must prove are as follows: 1) There must be a specific, unambiguous and definite safety rule adopted by the employer; 2) The safety rule must be reasonable; 3) The safety rule must be "brought home" to the employee and diligently enforced; 4) Violation of the safety rule must be willful; 5) The violation of the safety rule must be a cause of the claimant's injury. C.R.S. § 8-42-112(1)(b)(2015); *L.B. Cole Produce Co. v. Indus. Com'n.*, 228 P.2d 808, 809 (1951); *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715, 719 (Colo. App. 1995).

Respondents contend that they are entitled to reduce Claimant's compensation benefits by fifty percent for Claimant's willful violation of one or more safety rules, pursuant to Section 8-42-112(1)(b), C.R.S. Respondents bear the burden of establishing Claimant's willful violation of the safety policy by a preponderance of the evidence.

The question of whether the Respondent proved willful violation of a safety rule by a preponderance of the evidence is one of fact for the ALJ. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Violation of a rule is not willful unless the claimant did the forbidden act with deliberate intent. A violation which is the product of mere negligence, carelessness, forgetfulness or inadvertence is not willful. *Bennett Properties Co. v. Indus. Commission*, 437 P.2d 548 (Colo. 1968); *Johnson v. Denver Tramway Corp.*, 171 Colo. 214, 171 P.2d 410 (1946). Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

The first step is to determine whether or not the employer adopted a reasonable "safety rule". A safety rule does not have to be formally adopted, does not have to be in writing, and does not have to be posted. Rather, it is necessary that the safety rule was heard and understood and given by someone generally in authority. *Indus. Commission v. Golden Cycle Corp.*, 126 Colo. 68, 246P.2d 902 (Colo. 1952) *McCulloch v. Industrial Commission*, 109 Colo. 123, 123 P.2d 414 (Colo. 1942).

Respondents allege Claimant violated three possible safety rules. The first alleged safety rule violation is that Claimant changed the scope of work he was directed to do, without authorization. This safety rule is specific and unambiguous. While the rule served several purposes, including cost and time containment, it also addressed safety issues especially as here where engineers had to approve changes because they had specialties in areas such as load bearing capacities, and would only approve changes that did not create unsafe conditions. The ALJ finds and concludes such was the case here.

The ALJ also finds and concludes that Claimant misapprehended the engineered scope of work and that his conduct in cutting out the entire area of spalls rather than individual spalls effectively constituted an unauthorized change in scope.

However, Respondents did not meet their burden of establishing by a preponderance of the evidence that Claimant's violation of the safety rule was done with deliberate intent. Rather, as found, Claimant believed he was performing the modified scope of work. Therefore he could not have acted with the intent to deliberately violate a rule which he believed he was following. Claimant credibly testified that it was his understanding that Mr. Martin directed him to mark and cut out one squared-off section of concrete that encompassed all of the spalls. The ALJ finds that there was simply a misunderstanding between Claimant and Mr. Martin regarding the size and number of areas to remove. A misunderstanding does not constitute a willful violation of a safety rule. The case law is clear, "a finding that Claimant had been momentarily careless or casually negligent does not rise to a finding of willfulness." *American Furniture Warehouse v. Indus. Claim Appeals Office*, 15CA0846 (Colo. App. December 3, 2015)(not published pursuant to CAR 35(f)); *Bennett Properties Co. v. Indus. Com'n*, 437 P.2d 548 (Colo. 1968).

To prove Claimant willfully violated his foreman's direction, Respondents were required to demonstrate the Claimant understood the foreman's direction and then decided to change the scope without proper approval. At a minimum, Claimant did not understand the direction by the foreman. Respondents provided no documentation as to the scope of the work Claimant was directed to perform after the September 25, 2014 job walk.

Respondents allege that Claimant violated a safety rule which prohibited employees from creating safety hazards. Respondents did not meet their burden of establishing that Claimant willfully violated this safety rule. Rather, Claimant's credible testimony supports the finding that Claimant did not apprehend that his conduct created a fall hazard. Claimant's credibility is bolstered by the fact that he was standing on the largely cut out area while he chipped away the four foot portion that was supporting 80 square feet of otherwise unsupported concrete. Because Claimant did not even comprehend that he created a hazard, the ALJ is unable to conclude that Claimant intentionally created a hazard.

Finally, Respondents allege that Claimant violated a safety rule which required that he use fall protection equipment when he was exposed to a risk of falling six or more feet. This rule sets forth an objective standard, and Claimant certainly violated the rule because a risk of falling six or more feet existed before the concrete collapsed with Claimant on it. While Claimant suggests that *American Furniture Warehouse v. Indus. Claim Appeals Office*, 15CA0846 (Colo. App. December 3, 2015)(not published pursuant to CAR 35(f)) applies to these facts, the ALJ disagrees. The safety rule in *American Furniture Warehouse* imposed a subjective standard on whether a risk existed. Here, Employers rule imposed an objective standard and a risk of fall clearly existed. However, this distinction is of little merit because Respondents did not prove by a preponderance of the evidence that Claimant willfully violated this rule. While Claimant's failure to perceive the risk of fall that existed does not prevent the ALJ from finding that Claimant violated this rule, it does preclude the ALJ from finding that the violation was deliberate. Claimant did not perceive a risk and therefore his conduct was not an intentional rule violation.

As Respondents have failed to prove by a preponderance of the evidence that they are entitled to reduced compensation benefits by fifty percent for willful violation of a safety rule pursuant to section 8-42-112(1)(b), C.R.S., Claimant is entitled to payment of back TTD owed based on the stipulated AWW rate plus applicable interest.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's AWW is $657.14 with an equivalent TTD rate of $438.09, based on the party's stipulation.

2. It is therefore ordered that Respondents' request for a safety rule offset is denied and dismissed.

3. Respondents shall pay Claimant any offset withheld for the alleged safety rule violation based on the stipulated AWW.

4. Insurer shall pay Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

6. Issues not expressly decided herein are reserved to the parties for future determination.

7. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 7, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-999-503-01

ISSUES

- The sole issue for determination is the Respondents petition to suspend the Claimant's temporary total disability benefits beginning on February 25, 2016 and ongoing based upon their allegation that the Claimant was terminated for cause.

STIPULATIONS

The parties stipulated that Claimant's average weekly wage is $714.45.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was hired by Employer in July, 2015.

2. Claimant suffered an admitted on-the-job injury on November 7, 2015. Claimant had received temporary total disability benefits from November 8, 2015 until December 7, 2015, and temporary partial disability benefits from December 8, 2015 and ongoing.

3. On February 23, 2016, Respondents filed a petition to terminate temporary partial disability benefits as of February 25 2016. The grounds listed for termination of these benefits were that the Claimant was terminated for cause for "refusing to sign a form required by his employer to continue his employment."

4. Claimant's first language is French. He testified through an interpreter. Claimant's hearing was originally set on April 20, 2016, but was continued because the interpreter did not appear, and Claimant sought and was granted a continuance so he could proceed with an interpreter. However, Claimant does speak limited English and stated that he generally understands the instructions given to him at work which are often accompanied by drawings. He also used an interpreter when he went to medical appointments. Dr. Zimmer stated in his April 29, 2016 letter that the interpreter said he had "relatively good English," and that he seemed to be able to speak English when he was concentrating.

5. Respondents' witnesses testified that Claimant seemed to understand instructions he was given in English and the form they required him to sign.

6. Clamant, however, repeated and credibly testified that he did not understand English well. For example, Claimant testified:

- He understood what tasks he was supposed to do at work because "When they asked me to do something, they draw it on the paper, and I – I follow the drawing and I do it."

- He could read English "a little."

- He always had an interpreter with him at his doctor appointments. "I Can't – I can't speak with the doctor in English."

- At work, if someone said something simple and easy, he could understand. If he did not understand, he would ask and then be shown – not told – what to do.

- When he was assigned paperwork as light duty, his job was to enter numeric data into a computer and to put papers into numeric order. Likewise, Claimant testified that he understood a different letter about his performance because it used numbers and from context because he had been having difficulties with the time clock.

- Claimant was uncomfortable speaking English in a legal context.

- The ALJ also notes that Claimant asked that his earlier scheduled hearing be continued when his interpreter did not appear.

7. After returning to work following his injury Employer presented Claimant with a "Letter of Instruction-Safety Policy Violation."

8. Ms. Sarah Jones testified that she is Employer's personnel supervisor and is responsible for the issuance of the Letter of Instruction. She stated that the letters are done when there is some kind of violation of policy or procedure and that employer required employees to sign such letters for the purpose of showing that they received it and that they've had the letter explained to them.

9. Ms. Jones testified that employees sometimes refuse to sign the letters because they think it is an admission of guilt or wrongdoing, but that most employees eventually sign.

10. Ms. Jones testified that she gave the letter to the freight operations manager, Zach Gibbs, to present to Claimant. Claimant refused to sign the document and she then went through each line of the document with Claimant. When he still refused to sign, they went to Todd Steyer's office. Mr. Steyer also went through the letter line by line but Claimant still refused to sign it. At that point, Claimant was taken off work pending an investigation by the HR department. Shortly thereafter, Employer terminated Claimant for insubordination for his refusal to sign the letter.

11. Ms. Jones admitted on cross-examination that the Letter of Instruction was a disciplinary matter and was part of a "strike policy" in place for unsafe acts or

accidents with employees who drive company vehicles. The letter was generated as a result of the accident which caused Claimant's compensable injury. She also admitted that even without Claimant's signature, there were three witnesses, Mr. Gibbs, Mr. Steyer, and herself, who could state that Claimant received a copy of the letter, thus fulfilling the stated purpose for requiring Claimant's signature. She also stated that Clamant was allowed to take a copy of the letter home with him, but only if he signed it first.

12. Mr. Zachary Gibbs testified that at the time Claimant was terminated, he was Employer's operations manager. He stated that he went through the letter "word for word" with Claimant, that it was not an admission of guilt, but that Claimant refused to sign it the letter. Mr. Gibbs testified that Claimant wanted to take the document home to show his wife who is a native English speaker.

13. The Clamant testified that the letter was read to him by Mr. Gibbs. Claimant was not given an opportunity to read the actual letter himself. Rather, it was read to him by Mr. Gibbs. Claimant asked to take a copy of the letter to his lawyer but he was not allowed to do that. Later he was mailed a copy of the letter and he brought it to his attorney. After that, he was willing to sign it, but Employer had already terminated him.

14. Claimant testified on cross-examination that he signed documents as part of his employment and that he did not have his wife review those. However, he realized that this document was different. He knew that this letter was disciplinary in nature. He had a pending Workers' Compensation claim against Employer, and he was represented by an attorney. He stated that he did not refuse to sign the document, but rather that he wanted to show it to his lawyer. He understood that he could be terminated and that was why he wanted to show it to his attorney prior to signing it. He testified that the letter was read to him by Mr. Gibbs but that he was unclear about the words and that is why he wanted to show it to his attorney.

15. Based on the totality of the evidence, the ALJ finds that Claimant's desire to show the letter to his wife and attorney prior to signing it was reasonable and that doing so prior to signing it would not have had a detrimental effect on the employer. It was also reasonable that the Claimant would not want to sign a document after having it read to him but not having an opportunity to read it himself. Being able to read the document and allow his attorney to read it prior to signing would be particularly important inasmuch as it was disciplinary in nature, the Claimant was involved in a workers' compensation claim to which the Employer was an adverse party, and the Claimant had retained counsel.

16. Based on the totality of the evidence, the ALJ finds that Claimant was not at fault for his termination.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General

1. The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as specifically noted below, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Termination for Cause

4. Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., (termination statutes) provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because the termination statutes provide a defense to an otherwise valid claim for TTD benefits, respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (ICAO July 18, 2003).

5. In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061(Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood prior to the Supreme

Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Consequently, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of a degree of control over the circumstances leading to the termination. *Apex Transportation, Inc. v. Industrial Claim Appeals Office,* 321 P.3d 630 (Colo. App. 2014); *Gilmore v. Industrial Claim Appeals Office, supra*; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.*

6. Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, *supra.*

7. In this case, Claimant was asked to sign a document that was not in his native language and which he was not allowed to read. This occurred during the pendency of his workers' compensation claim. It was reasonable for Claimant to want his wife who is a native English speaker and attorney to read the document prior to signing. It was unreasonable for the Employer to ask Claimant to sign a document without being given an opportunity to read it. Employer contends that the signature was to evidence that Claimant was shown the document and that they read the document to Claimant. English was not Claimant's first language and while he could understand and speak some English, he was being asked to sign a document that he had not personally read. Rather, it was read to him by Employer. Inasmuch as Claimant was represented by legal counsel, it was not unreasonable for Claimant to want his attorney to read the document prior to signing it. In fact, after Claimant showed the letter to his attorney he was willing to sign it.

8. Employer did not demonstrate that it would be prejudiced in any way if it were to allow Claimant to show the document to his wife or attorney prior to signing it.

9. This case does not turn on Claimant's ability to speak English. Even if he were fluent in English, Claimant should still have had an opportunity to read the document for himself. He should have also been able to show it to his attorney prior to signing.

10. Given these circumstances and findings, Respondents have failed to show that Claimant was responsible for his termination or that temporary disability benefits should be terminated.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents’ petition to terminate temporary disability benefits is denied.

2. By stipulation of the parties, Claimant’s average weekly wage is $714.45.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 8, 2016

/s/ Kimberly Turnbow
Kimberly Turnbow, Administrative Law Judg
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right heel injury during the course and scope of his employment with Employer on August 18, 2015.

2. Whether Claimant has proven by a preponderance of the evidence that he received authorized, reasonable and necessary medical treatment for his August 18, 2015 industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period August 20, 2015 through September 28, 2015.

FINDINGS OF FACT

1. Employer is a company that provides transportation services in the Denver, Colorado Metropolitan area. Claimant is an independent contractor who drives a taxicab for Employer.

2. Claimant began working for Employer in 2009 and renewed his contract on August 10, 2015. Claimant executed a contract for hire on August 10, 2015 in which he indefinitely agreed to lease a vehicle from Employer. He was also responsible for additional fees and costs associated with insurance, credit card processing, car accidents and tickets.

3. Claimant's 2015 Federal Income Tax Return reflects that he did not earn wages during the year. However, Lines 12 and 22 of Claimant's 2015 Form 1040 reveal that he earned a gross income of $22,833.00 with expenses of $7,680.00 for a net business income of $15,153.00 for the year. The corresponding Schedule C identified Claimant's business as Babili Book Store. Claimant testified that not all of his self-employment income came from his bookstore. Because Claimant worked as a taxicab driver and owned a bookstore during 2015 an Average Weekly Wage (AWW) incorporating concurrent employment is appropriate. Dividing $15,153.00 by 52 weeks yields an AWW of $291.40. An AWW of $291.40 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

4. Claimant explained that on August 18, 2015 he was driving a passenger from the Sheraton Hotel in Denver to Denver International Airport (DIA). He was

operating a Crown Victoria taxicab that he had leased from Employer. While driving approximately 65-70 miles per hour on Interstate 70 Claimant began to feel heat radiating up from the floor of the vehicle. Claimant specifically felt heat or a burning sensation on the back of his right heel. He remarked that he was wearing thin dress socks and ordinary running or sports shoes. After Claimant dropped his passenger at DIA he examined his right heel and noticed that a large blister had developed.

5. On August 20, 2015 Claimant reported his right heel injury to Employer's Insurance and Safety Manager Barbara Romero. Ms. Romero directed Claimant to Concentra Medical Centers for treatment. Claimant recounted that on August 18, 2015 he picked up a passenger downtown and was driving to DIA. He noticed that his right heel was becoming very hot but he had to keep driving to get the passenger to DIA. After the passenger exited his vehicle, Claimant noticed a large blister on the back of his right heel. Allison Hedien, N.P. diagnosed Claimant with an open wound of the right heel. She assigned Claimant work restrictions that included no driving. N.P. Hedien anticipated that Claimant would reach Maximum Medical Improvement (MMI) by November 20, 2015.

6. Ms. Romero subsequently inspected the Crown Victoria taxicab that Claimant had been driving on August 18, 2015. She did not detect any defects in the vehicle. The Crown Victoria had a heat shield, flooring and a protective rubber mat. Furthermore, photographs of the Crown Victoria did not reveal any evidence of burns, melting or other damage associated with extreme heat. The vehicle has remained in service without alteration and other drivers have not reported problems with interior heat.

7. Based on a referral from Concentra, Claimant visited Parker Adventist Hospital for an evaluation on August 21, 2015. Claimant reported that he experienced a significant pain in his right heel while driving his taxicab. He suffered discomfort and noticed blistering. Michael Emil Bertocchi, M.D. noted that he performed a debridement of the right heel wound over an approximately 24 centimeter area.

8. On August 23, 2015 Daniel M. Peterson, M.D. completed a Physician's Report of Workers' Compensation Injury. He noted that objective findings were consistent with a work-related mechanism of injury. Dr. Peterson placed Claimant on modified duty involving no driving and working only in a seated position until August 25, 2015. He anticipated that Claimant would reach MMI by November 20, 2015.

9. On August 25, 2015 Claimant returned to Concentra for an examination. N.P. Hedien reported that Dr. Bertocchi had performed a wound debridement on Claimant's right heel. She remarked that the current treatment plan involved applying Santyl and dressing the wound at home over the following week. N.P. Hedien commented that Claimant remained restricted from driving and could only work in a seated position with the ability to elevate his right foot as needed.

10. On September 4, 2015 Claimant returned to Concentra for an examination. Rosalie Einspahr, N.P. documented that Claimant's right heel injury was healing well and he had no signs of an infection. She assessed Claimant with an open wound of the heel and recommended Ibuprofen. N.P. Einspahr continued Claimant's work restrictions and anticipated that he would reach MMI by November 20, 2015.

11. On September 8, 2015 Claimant underwent another debridement of his right heel at Parker Adventist Hospital. John Christopher James, M.D. noted that Claimant's right heel wound had a total surface area of 8.64 square centimeters. Claimant tolerated the procedure well.

12. On September 28, 2015 Claimant again visited Parker Adventist Hospital. Dr. James reported that Claimant had suffered a significant burn to his right heel while resting his foot on the floor of his taxicab. He diagnosed Claimant with a deep partial thickness wound/burn of the right heel. Dr. James commented that Claimant had been tolerating his right heel debridement procedures well. He released Claimant to full duty employment.

13. During early October 2015 Claimant underwent two additional debridement procedures on his right heel. On October 10, 2015 Claimant returned to Dr. James for an evaluation. Dr. James commented that Claimant suffered from a full thickness wound/burn of the right heel. He summarized that Claimant had undergone debridements to his right heel and was tolerating the procedures. Dr. James also noted that Claimant's wound was healing well and he had experienced little pain or drainage. He remarked that Claimant did not want to undergo another debridement at the visit.

14. Claimant has demonstrated that it is more probably true than not that he suffered a compensable right heel injury during the course and scope of his employment with Employer on August 18, 2015. Claimant credibly testified that on August 18, 2015 he was driving a passenger to DIA. While moving at approximately 65-70 miles per hour on Interstate 70 Claimant began to feel heat or a burning sensation on the back of his right heel. He remarked that he was wearing thin dress socks and ordinary running or sports shoes. After Claimant dropped his passenger at DIA he noticed a large blister on the back of his right heel. The medical records demonstrate that Claimant consistently maintained the heat from the floor of his taxicab caused a burn on his right heel. Moreover, on August 23, 2015 Dr. Peterson completed a Physician's Report of Workers' Compensation Injury. He noted that objective findings were consistent with a work-related mechanism of injury. Dr. Peterson placed Claimant on modified duty involving no driving and working only in a seated position. Although Ms. Romero inspected Claimant's vehicle and did not detect any defects, Claimant's credible testimony and the persuasive medical records reveal that driving the taxicab on August 18, 2015 caused a right heel injury and produced a need for medical treatment.

15. Claimant has proven that it is more probably true than not that he received authorized, reasonable and necessary medical treatment for his August 18, 2015 industrial injury. The record reflects that Claimant received authorized medical

treatment from Concentra. He subsequently underwent a series of debridement procedures on his right heel from authorized medical provider Parker Adventist Hospital. Claimant's treatment for his right heel full thickness wound/burn was reasonable, necessary and causally related to his job duties of driving a taxicab on August 18, 2015. The medical treatment was designed to cure or relieve the effects of his right heel injury.

16. Claimant has established that it is more probably true than not that he is entitled to receive TTD benefits for the period August 20, 2015 through September 28, 2015. The medical records and Claimant's testimony reveal that he was unable to perform his job duties as a taxicab driver between August 20, 2014 and September 28, 2015. During the period Claimant was prohibited from driving, could only work in a seated position with the ability to elevate his right foot and underwent several debridement procedures to treat his industrial injury. He is entitled to an award of TTD benefits because his August 18, 2015 right heel full thickness wound/burn caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right heel injury during the course and scope of his employment with Employer on August 18, 2015. Claimant credibly testified that on August 18, 2015 he was driving a passenger to DIA. While moving at approximately 65-70 miles per hour on Interstate 70 Claimant began to feel heat or a burning sensation on the back of his right heel. He remarked that he was wearing thin dress socks and ordinary running or sports shoes. After Claimant dropped his passenger at DIA he noticed a large blister on the back of his right heel. The medical records demonstrate that Claimant consistently maintained the heat from the floor of his taxicab caused a burn on his right heel. Moreover, on August 23, 2015 Dr. Peterson completed a Physician’s Report of Workers’ Compensation Injury. He noted that objective findings were consistent with a work-related mechanism of injury. Dr. Peterson placed Claimant on modified duty involving no driving and working only in a seated position. Although

Ms. Romero inspected Claimant's vehicle and did not detect any defects, Claimant's credible testimony and the persuasive medical records reveal that driving the taxicab on August 18, 2015 caused a right heel injury and produced a need for medical treatment.

Medical Benefits

8. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

9. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

10. As found, Claimant has proven by a preponderance of the evidence that he received authorized, reasonable and necessary medical treatment for his August 18, 2015 industrial injury. The record reflects that Claimant received authorized medical treatment from Concentra. He subsequently underwent a series of debridement procedures on his right heel from authorized medical provider Parker Adventist Hospital. Claimant's treatment for his right heel full thickness wound/burn was reasonable, necessary and causally related to his job duties of driving a taxicab on August 18, 2015. The medical treatment was designed to cure or relieve the effects of his right heel injury.

Average Weekly Wage

11. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an

AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

12. As found, Claimant's 2015 Federal Income Tax Return reflects that he did not earn wages during the year. However, Lines 12 and 22 of Claimant's 2015 Form 1040 reveal that he earned a gross income of $22,833.00 with expenses of $7,680.00 for a net business income of $15,153.00 for the year. The corresponding Schedule C identified Claimant's business as Babili Book Store. Claimant testified that not all of his self-employment income came from his bookstore. Because Claimant worked as a taxicab driver and owned a bookstore during 2015 an AWW incorporating concurrent employment is appropriate. Dividing $15,153.00 by 52 weeks yields an AWW of $291.40. An AWW of $291.40 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

13. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

14. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive TTD benefits for the period August 20, 2015 through September 28, 2015. The medical records and Claimant's testimony reveal that he was unable to perform his job duties as a taxicab driver between August 20, 2014 and September 28, 2015. During the period Claimant was prohibited from driving, could only work in a seated position with the ability to elevate his right foot and underwent several debridement procedures to treat his industrial injury. He is entitled to an award of TTD benefits because his August 18, 2015 right heel full thickness wound/burn caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. On August 18, 2015 Claimant suffered a right heel injury during the course and scope of his employment with Employer.

2. Claimant shall receive authorized, reasonable, necessary and causally related medical benefits designed to cure or relieve the effects of his industrial injury.

3. Claimant earned an AWW of $291.40.

4. Claimant shall receive TTD benefits for the period August 20, 2015 through September 28, 2015.

5. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 8, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-969-572-03

ISSUES

- Did Claimant prove by a preponderance of the evidence that his exposure to jet aircraft or other noise in the workplace proximately caused his hearing loss and tinnitus.

- If compensable, did Claimant prove by a preponderance of the evidence that he is entitled to receive medical benefits to cure and relieve the effects of his injury or occupational disease.

PROCEDURAL STATUS

The undersigned issued Findings of Fact, Conclusions of Law and Order on June 3, 2016, which was e-mailed to the parties on June 6, 2016. Claimant filed a Request for Corrected Order and the time for Respondent's Response has not elapsed. The statutory deadline for issuance of a Corrected Order is July 6, 2016.

The Request for Corrected Order seeks identification of the ATP to provide medical benefits. At the outset of the hearing, there was discussion regarding medical benefits, with Claimant stating the issue of authorization had to be addressed, but once compensability was resolved, other medical benefits could be resolved.[1] Counsel for Respondent then stated the issues of authorization of medical benefits, reasonable and necessary could be held in abeyance.[2] Both attorneys then confirmed that the issue of specific medical benefits was held in abeyance.[3]

The Request for Corrected Order is granted by the ALJ, in part, as to the identity of the ATP. This Corrected Order is being issued pursuant to 8-43-302, C.R.S.

FINDINGS OF FACT

1. Claimant, who was born on April 26, 1950, is 66 years old.

2. Claimant began working for Employer in 1975. Claimant's job duties included mechanical work on jet engines and related systems on various types of aircraft. The job description was "generally recognized as technician's work in shops,

[1] Hearing Transcript pages 3:22-4:8.

[2] Hearing Transcript pages 4:20-5:1.

[3] Hearing Transcript page 5:2-7.

maintenance bases and line stations on aircraft (including power plants), parts and other related work"[4].

3. He initially worked as an aircraft mechanic in the San Francisco maintenance center. In this position, Claimant worked around large bead blasting machines and heavy duty solvent cleaning machines.

4. The first record of testing done on Claimant's hearing was May 31, 1977. The testing was done by HPI-National Mobile Health Programs ("HPI") and showed no hearing loss[5].

5. After he was furloughed in San Francisco, Claimant transferred to Denver, working at Stapleton International Airport from 1980-94. While at Stapleton, he worked on the ramp. Claimant testified he was exposed to engine noise and auxiliary power units ("APU") noise at various times during his workday at Stapleton, when airplanes arrived at the gate and departed the gate. He provided maintenance services at the gate area, proximate to the terminal. Employer shared this area with other air carriers. These carriers (including Continental Airlines) would rev up the engines while the aircraft were backing from the jet way to the runway. The ALJ infers this regularly exposed the Claimant to jet engine noise on the ramp.

6. Claimant was exposed to noise from different types of aircraft throughout his employment. Three classifications of aircraft were in service during his employment-Stage 1, 2 and 3. Stage 1 aircraft were the loudest and had no muffling on the engines. Stage 2 aircraft were the second loudest. Claimant testified he thought Stage 2 aircraft's noise level was 180-190 decibels ("dB") in 1990[6]. Claimant testified "hush" kits were put on Stage 1 and 2 aircraft in the 1980s. There was no evidence introduced concerning the decibel levels of Stage 2 jet aircraft engines once the hush kits were installed. Stage 1 and 2 aircraft were slowly phased out. However, Claimant was exposed to noise from aircraft in these classifications up to January 1, 2000, when the FAA required all aircraft to comply with Stage 3 requirements. The ALJ infers Claimant was exposed to noise levels in excess of 110 dB when he was around Stage 1 and 2 aircraft and this was for at least fifteen (10) years.

7. Claimant testified he wore hearing protection throughout his employment, including ear plugs and earmuffs. Employees provided their own hearing protection during the early years of his employment and the hearing protection was not as effective as the current protection. When he worked at Stapleton, Claimant testified he could hear the jet engines through the headsets and the earpieces also housed the radio. When he worked on the ramp, he was within walking distance of all sides of the aircraft

[4] Exhibit 9.

[5] The results of this baseline test were described by the experts as normal.

[6] Claimant agreed this noise level was at take-off and during flight.

and sometimes as close as an arm’s reach. Claimant estimated he would wear hearing protection approximately twenty (20) minutes per hour around the dispatch of a single aircraft, which occurred several times per day. Claimant noted there were times when he removed hearing protection in order to communicate with other mechanics. This occurred throughout his employment up to the present. There were also occasions when he would be surprised by jet engine noise or a noise from aircraft when he wasn’t wearing hearing protection.

8. There was no evidence in the record as to whether testing was done to show the level of noise exposure Claimant received while wearing the older hearing protection during the period 1975-2010.

9. In 1994, Claimant started working at Denver International Airport ("DIA") and worked in the hangar full-time. He has continued to work in the hangar, working on both wide and narrow body aircraft. Claimant testified he is exposed to noise from jet engines and the APUs and he works in close proximity to the APUs, which sometimes are running when the aircraft is in the hangar. Claimant testified there are other noise sources to which he is exposed in the hangar, which include noise from the air conditioning systems, hydraulic pumps and other electrical power devices.

10. HPI hearing testing records for Claimant from 1977, 1979, 1980, 1986 1989, 1990, 1991-1994, 1996-1997, 1999, 2000, 2011-2012, and 2014 were admitted into evidence at hearing. No Standard Threshold Shift (“STS”) was noted in the tests performed through 2012. The tests performed on September 12 and December 5, 2014 confirmed a STS occurred.

11. No hearing testing records for Claimant from 2001-2010 were introduced into evidence. Claimant testified his hearing was not tested during that period of time.

12. Evidence of Employer’s OSHA violations in 2010 were admitted at hearing. On August 6, 2010, OSHA issued a citation to Employer for not obtaining audiograms for each employee exposed at or above 85 dB for an 8 hour Time Weighted Average (“TWA”), including ramp service employees, customer service representatives and mechanics. On August 6, 2010, OSHA issued a citation to Employer on eighteen employees who were subject to long term hearing loss from the lack of a comprehensive hearing conservation program and from a lack of re-testing. Employer also received a citation because audiometric testing was being conducted in a room that did not meet requirements. Employer was also cited for failing to record employees whose audiogram showed a STS shift in the OSHA 300 log and failed to provide audiograms at no cost to employees. Employer also failed to adequately record work-related injuries. The ALJ infers Claimant was within the group of employees exposed to noise in excess of 85 dB when the OSHA testing was done.

13. Claimant testified the quality of hearing protection improved after 2010 when Employer had an OSHA evaluation.

14. Claimant testified that he began noticing some hearing difficulties prior to 2014. Specifically, he had difficulty hearing voices in a crowd and hearing certain segments of speech and understanding people. He also noticed tinnitus intermittently before 2014. Claimant testified the tinnitus is now constant and disturbs his sleep on occasion.

15. Claimant noticed a significant change in his hearing in 2014. He reported his hearing loss to Employer and an Employer's First Report of Injury was prepared by Mark Hofstatter on December 15, 2014. The description of how the injury occurred said: "Cumulative hearing loss sustained over 39 years of working as a mechanic on aircraft. Noise sources include power tools equipment & aircraft engine noise".

16. Claimant stated he was sent to Concentra after he reported his hearing issue to his supervisor. On December 5, 2014, Claimant underwent audiometric testing and was evaluated by Kirk Holmboe, D.O., who noted there was evidence of high frequency hearing loss on the left and right. There was no information in the record which indicated whether Dr. Holmboe believed Claimant's hearing loss resulted from his occupational noise exposure. Dr. Holmboe was an ATP for purposes of this claim. Claimant testified his supervisor told him he was "on his own" for treatment.

17. Claimant discussed the issue of his hearing with other employees and then went on his own to see Alan Lipkin, M.D. Dr. Lipkin evaluated Claimant on February 12, 2015. The intake notes recorded Claimant's history as follows:

> "New patient presents with hearing loss: bilateral. Patient is an airplane mechanic for United Airlines. Patient reports that over the years he has been compliant with hearing test(ing); first test was performed 5/31/2977 with United Airlines. Throughout his employment, the patient has been compliant with hearing protection and hearing tests. Uses hearing protection whenever possible. However, over the last several years the patient has noticed a significant hearing loss in both ears. Although the patient cannot identify one episode of loud noise exposure, he reports that he is consistently around loud engines and airplanes at his job. The patient denies dizziness, otalgia, and otorrhea.
>
> Occasional high pitched whining tinnitus.
>
> Review of serial hearing tests – gradual progressive high frequency loss.
>
> Having problems communicating due to hearing loss.
>
> Nonsmoker, non-diabetic. No other non-work noise exposure. Has been hunting, used ear protections."

18. After the evaluation, Dr. Lipkin reviewed the results of serial hearing tests performed since 1977. The history section noted Claimant had a history of

noise exposure with classic, progressive, sloping sensorineural hearing loss. Dr. Lipkin opined Claimant's hearing in 1977 was essentially normal and his hearing loss progressed over the years, particularly the last fifteen years. Dr. Lipkin concluded: "To a reasonable degree of medical probability, [Claimant] has work related noise-induced hearing loss and tinnitus secondary towards this." Dr. Lipkin's concluded that Claimant's hearing loss had progressed over the years (particularly over the last 15 years) and at this point in time was bilateral significant sloping sensorineural hearing loss, worse in the upper frequencies. The ALJ infers Dr. Lipkin's opinion was based upon the history taken from Claimant of his noise exposure, his extrapolation from the hearing tests and his expertise as an otolaryngologist.

19. The ALJ notes Dr. Lipkin's report recorded Claimant was a non-smoker and not diabetic. The report also excluded non-occupational noise exposures. The ALJ infers Dr. Lipkin considered Claimant's medical conditions when concluding what caused his hearing loss, although not every condition he reviewed was identified.

20. Dr. Lipkin recommended further evaluation/ treatment, including fitting Claimant for hearing aids.

21. Claimant testified he wishes to pursue treatment with Dr. Lipkin.

22. Claimant testified he had a shot a total of ten rounds with his gun over the years, as hunting was not an activity he did on a regular basis. Claimant wore hearing protection when firing the weapon.

23. Terry McGurk ("McGurk") testified at hearing. He is Employer's operations supervisor or manager for United Airlines at Denver International Airport (DIA) and was previously the manager of safety from 2009 to 2011. Mr. McGurk testified OSHA requires employees to wear hearing protection when exposed to TWA noise of 85 dB or greater. He testified regarding Employer's hearing conservation program, which included the choice of a molded earplug, a plastic insert, or an earmuff. Employer requires ear protection to be worn at 80 dB. Additionally, Employer requires any employees who are working outside of the building to have hearing protection on at all times. The various ear protection options include ear plugs and muffs which have a noise reduction rating of 28 dB to 34 dB. Mr. McGurk testified he wore earmuff protectors when he started working for Employer thirty-six (36) years ago and agreed hearing protection has improved over time.

24. Mr. McGurk testified OSHA requires Employer to conduct yearly testing of the hearing of employees exposed to noise at DIA. At present, Employer provides audiometric testing at no cost to employees. For the years 2000-2010, there were no reported test results for Claimant.

25. Mr. McGurk testified testing was done in August of 2010 to measure noise levels at DIA. The testing was done by having certain employees wear noise dosimeters. Dosimeters measure the level of noise that is absorbed over a period of

time. Mr. McGurk stated the measured noise levels on a time weighted average in the areas in which the Claimant worked were all less than 85 dB. The time-weighted average for noise exposure as measured by dosimeters worn by employees ranged from 66.4 dB to 86.1 dB. On cross-examination, Mr. McGurk admitted the highest level of noise exposure to which employees were exposed could exceed the TWA.

26. OSHA also obtained dosimeter noise measurements in August of 2010 which were generally consistent with the results obtained by Employer. The eight (8) hour time TWAs ranged from 58.1 dB (the 57.7dB was not valid) to 87.1 dB, with the latter dosimeter reading taken at B48 Planeside-all functions. None of the dosimeter readings were over 90 dB. No testing has been done since 2010.

27. At the request of Respondent, Edward Jacobson, Ph.D. performed a review of Claimant's medical records, including the results of the audiometric testing. He also reviewed the records of the 2010 testing done at DIA. Dr. Jacobson did not evaluate Claimant, nor did he perform any testing of his hearing. After reviewing available records, Dr. Jacobson opined in his August 20, 2015 report there was nothing that would convincingly establish a job-related hearing loss. Dr. Jacobson noted some issues needed to be clarified in order to determine whether the hearing loss was work-related, including: the reason for inter-aural asymmetry; change in the audiometric configuration as is apparent on the various audiograms; no noise measurements obtained in Claimant's work area relative to his job description as a mechanic, but apparently unknown as to those who have seen him clinically; the use of ear protection, which would further reduce the aforementioned workplace noise levels by 20-30 dB based on known research; workplace noise less in recent years; more effective hearing protection; reasons why the loss progressed to the levels obtained at the time of the ENT visit in a very short period of time and; the lack of mention of presbycusis.

28. On August 27, 2015, Claimant was evaluated by Allison Fall, M.D. at the request of Respondents. Based on the information provided regarding the measured decibel levels and the fact that hearing protection was utilized (which would protect against 20-30 dB), Dr. Fall opined Claimant's levels of exposure at work were within the acceptable range according to OSHA. Dr. Fall believed none of the levels would be near 85 dB, which would be the sound-pressure action level, above which HCP, use of ear protection, and hearing tests become necessary. Dr. Fall also noted hearing loss is known to increase with age and is more common in men. Dr. Fall opined it was more likely that his hearing loss was age-related. The ALJ notes that Dr. Fall's opinion was based upon the decibel level measured at DIA in 2010. Dr. Fall's report did not account for Claimant's noise exposure while working in San Francisco or at Stapleton. Dr. Fall also did not analyze the Claimant's exposure to noise above the 85 dB level when he wasn't wearing hearing protection.

29. Dr. Jacobson issued an addendum report on December 17, 2015, after reviewing medical records from Kaiser Permanente[7]. In this report, Dr. Jacobson noted

[7] The Kaiser Permanente records were not admitted at hearing.

there were many contributors relative to identifiable hearing loss, often greater for the high frequencies. These included vascular disease/hypertension, abnormal lipids, C-spine anomalies, chemotherapy and associated Cisplatin medication, alcohol intake, migraines, and various medications which were documented in the Kaiser records. Dr. Jacobson opined these factors should be taken into consideration as a cause of auditory/vestibular symptoms, including hearing loss and tinnitus. The ALJ notes this opinion falls shorts of a conclusion that these factors caused Claimant's hearing loss.

30. Dr. Fall issued an addendum report on January 5, 2016, after she reviewed medical records from Kaiser Permanente and Dr. Jacobson. Dr. Fall stated there were documented non-work related medical conditions, which further supported her opinion that the hearing loss was not related to his work at Employer.

31. Dr. Fall testified as an expert on behalf of Respondent at hearing. She is board-certified in physical medicine and rehabilitation. She is Level II accredited pursuant to the W.C.R.P. Dr. Fall agreed she had less experience in otolaryngology than Dr. Lipkin. Dr. Fall reviewed the case from a causation standpoint, looking at Claimant's particular risk from the work he did for Employer versus his risk outside of that work. She found the National Institute for Occupational Safety and Health indicated there was an 8% chance of hearing loss when exposed to noise at the 85 dB level for eight hours per day for 40 years. In other words, this represented an 8% percent chance of hearing loss at that decibel level. Since he wore hearing protection, Dr. Fall did not believe Claimant was exposed to levels of 85 db or above for 8 hours per day. Dr. Fall stated she came to that conclusion based upon the data (2010 testing) which was provided and the fact that hearing protection would dampen 20-30% of the noise. Dr. Fall did not think Claimant's noise exposure in his older employment (working in San Francisco or at Stapleton) was greater than the 85 dB level. The ALJ found this opinion to be less persuasive, as Dr. Fall did not specify how she reached it.

32. Dr. Fall testified there were other risk factors for Claimant which could affect his hearing. This included his age, carpal tunnel, high blood pressure, and chemotherapy agents, which added to Claimant's risk of hearing loss. On cross-examination, Dr. Fall agreed that none of the medical records she reviewed concluded these other factors caused Claimant's hearing loss. Dr. Fall did not offer an opinion regarding the cause of Claimant's tinnitus while testifying.

33. Dr. Jacobson testified as an expert in audiology, industrial audiology, and audiometric testing. He is a fellow of the American College of Forensic Examiners and a diplomat at the American Board of Forensic Medicine. Dr. Jacobson is not a physician and does not prescribe medications. He is qualified to confirm hearing problems and identify abnormalities. Dr. Jacobson testified once damage happens to the nerves in the ear, the nerves do not regenerate or grow back. Exposure to noise in the 90-95 dB range may result in hearing loss. Dr. Jacobson testified the permissible level for noise exposure for an 8 hour day for 115 dB is .25 or 15 minutes. He stated the permissible level for an 8 hour day for 110 dB is .5 or 30 minutes. Based on the 2010 testing records, Dr. Jacobson believed Claimant was exposed to noise at the 57.1

dB level. Dr. Jacobson opined the noise Claimant was exposed to while working for Employer did not aggravate or accelerate his hearing loss.

34. Dr. Jacobson believed Claimant's non-occupational medical conditions were the more likely cause of his hearing loss. Dr. Jacobson noted there was nothing in Dr. Lipkin's report which indicated he reviewed the noise level records from the 2010 testing or medical records from Kaiser Permanente. He noted an STS did not necessarily mean an individual had a hearing loss, but did not dispute Claimant had a hearing loss in the higher frequencies. Dr. Jacobson testified regarding Claimant's exposure to gun shots and stated he had never seen anyone wear hearing protection. Dr. Jacobson agreed tinnitus could develop as a result of an occupational exposure, as well as other factors such as over-the-counter drugs. Dr. Jacobson did not believe it correlated to anything Claimant was exposed to at work and did not qualify Claimant for a permanent impairment. By completely excluding any role Claimant's occupational noise exposure may have played in the tinnitus, Dr. Jacobson's testimony was less persuasive to the ALJ. Also Dr. Jacobson's testimony relating his own experience with hearing loss and tinnitus was not persuasive to the ALJ.

35. Based upon the expert opinions before the Court, including the testimony on OSHA standards, exposure to noise above the 85 dB level can cause hearing loss.

36. The ALJ finds Claimant was a credible witness when describing the level of noise he was exposed to and the hearing protection he wore. Based upon Claimant's testimony and extrapolating from the 2010 dosimeter testing, the ALJ finds it is more probable than not Claimant was exposed to noise above the 85 dB level while working at Stapleton, where he worked for fourteen (14) years. This includes exposure to Stage 1 and 2 aircraft. It is more probable than not the accumulated exposure was a cause of Claimant's hearing loss.

37. The ALJ finds it is more probable than not Claimant was exposed to noise above the 85 dB level for short periods of time when he took off his hearing protection. This exposure has continued to the present.

38. The ALJ credited Dr. Lipkin's opinions concerning Claimant's hearing loss, namely that is was progressive and resulted from noise exposure during his employment.

39. The ALJ credited that portion of Dr. Jacobson's testimony concerning the progression of hearing loss, including that exposure over time can cause hearing loss and the nerves in the ear do not regenerate after suffering damage. Dr. Jacobson's testimony was less persuasive when discussing the non-occupational factors which increased Claimant's risk of hearing loss and the failure to include occupational noise exposure at all made Dr. Jacobson less credible.

40. Claimant had non-occupational risk factors for hearing loss. As confirmed by Drs. Fall and Jacobson, these included: his age, hypertension,

chemotherapy (treatment with the cancer drug Cisplatin[8]), anti-inflammatory medications, and exposure to gun shots. There were no medical records admitted at hearing in which a physician concluded Claimant's hearing loss was caused by one of these conditions/factors. Both Dr. Fall and Dr. Jacobson conceded that risk does not equal cause.

41. There is no evidence in the record that Respondent authorized medical treatment for Claimant's hearing loss after December 2014.

42. Claimant pursued treatment with Dr. Lipkin, after being told he was on his own by supervisor.

43. Dr. Lipkin is an authorized treating physician.

44. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S.

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The instant case requires a credibility

[8] The ALJ notes there was nothing in the hearing testing records which showed a hearing loss in 2007 which was potentially attributable to Cisplatin taken in connection with Claimant's chemotherapy.

determination between various medical experts, who have disagreed as to the cause of Claimant's hearing loss and tinnitus.

Compensability-Hearing Loss and Tinnitus

Both Claimant and Respondent agreed the overriding issue in the instant case was whether Claimant's hearing loss constituted a compensable occupational disease. An occupational disease is "a disease which results directly from the employment or conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard which the worker would have been equally exposed outside of the employment." §8-40-201(14), C.R.S. 2014.

A Claimant seeking benefits for an occupational disease must first establish the existence of the disease, then that it was directly and proximately caused by Claimant's employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims,* 989 P.2d 251, (Colo. App. 1999). A Claimant is entitled to recovery for an occupational disease only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate, the disability for which compensation is sought. *Anderson v. Brinkhoff,* 839 P.2d 819, 824 (Colo. 1993)[9].

If Claimant establishes a causal relationship exists between the employment and occupational disease, the burden shifts to Respondents to prove both the existence of non-occupational contributors to the disease and the extent to which these contribute to the disability as well as the need for treatment. *Cowin & Co. v. Medina,* 860 P.2d 535, 537 (Colo. App. 1992). Where the disease for which a Claimant is seeking compensation is produced solely by some extrinsic or independent cause, it is not compensable. *Anderson v. Brinkhoff, supra,* 839 P.2d at 824.

In this regard, Claimant contended he satisfied his burden of proof that his hearing loss was proximately caused by noise exposure he experienced at work. Claimant relied upon his testimony concerning noise exposure, evidence of OSHA violations, along with the expert opinions of Dr. Lipkin to support his contentions. Claimant urged the rejection of Drs. Fall and Jacobson's opinions with regard to causation.

On the other hand, Respondent asserted Claimant failed to meet his burden of proof and did not establish Claimant was exposed to a level of occupational noise which caused his hearing loss. Respondent averred Dr. Jacobson's and Dr. Fall's opinions were more persuasive than those of Dr. Lipkin on this issue. Respondent also argued non-occupational factors were the cause of Claimant's hearing loss.

[9] The ALJ notes *Anderson v. Brinkhoff* was decided under prior version of the definitional section in the Colorado Worker's Compensation Act, however, its holding concerning proof of an occupational disease remains good law.

At the heart of the compensability question was an evaluation of the evidence concerning Claimant's noise exposure while working for Employer and an assessment of the respective expert opinions. The analysis of this issue was divided into two parts. First, did Claimant adduce sufficient evidence to establish that his hearing loss directly resulted from his employment and constituted an occupational disease. The ALJ answered this question in the affirmative.

In the case at bench, there was no dispute Claimant had no hearing loss before starting work for Employer. (Finding of Fact 3). During his forty year employment, Claimant worked in a noisy environment on a daily basis. As found, Claimant was exposed to noise in the workplace in excess of OSHA-prescribed limits threshold for hearing damage. (Finding of Fact 33 and 34).

The evidence admitted at hearing also led the ALJ to conclude Claimant wore hearing protection throughout his employment. (Finding of Fact 7 and 17). The evidence regarding hearing protection during Claimant's early employment from 1975-1994 was that it was not as effective as it is at present. (Finding of Fact 7 and 13). Claimant testified to this fact, which was confirmed by Mr. McGurk, Employer's representative. (Finding of Fact 23).

The most significant area of dispute was the level of Claimant's exposure and whether it was the cause of his hearing loss and tinnitus. Respondent's experts questioned whether Claimant, who was compliant with wearing hearing protection, received a sufficient level of noise exposure to cause his hearing loss and tinnitus. Claimant's testimony established he was exposed to Stage 2 aircraft, whose noise level was 180-190 decibels while working at Stapleton. (Finding of Fact 6). Claimant was also exposed to aircraft revving the engines to pull away from the gate. (Finding of Fact 5). Even assuming hearing protection reduced the noise exposure by 30 dB and he was not directly behind the engines, Claimant's exposure was well above 110 dB limit, which was sufficient to cause hearing damage. The inference drawn by the ALJ from Dr. Lipkin's report was that the level of noise Claimant was exposed to and the efficaciousness of the hearing protection used caused Claimant's hearing loss.

Respondent did not submit sufficient evidence to dispel this conclusion, as both Dr. Jacobson and Fall assumed Claimant's noise exposure was much lower based upon the testing done in 2010. Neither of Respondent's experts persuaded the ALJ that Claimant's noise exposure during his early employment was not the cause of his hearing loss. Dr. Jacobson's admission on cross-examination that he found hearing loss in other ramp employees at Stapleton indirectly helped to prove this point. In short, the ALJ was persuaded by the evidence that the cumulative effect of Claimant's exposure to older aircraft (Stage 1 & 2), the occasions when he took of his hearing protection to communicate with other mechanics and his work on the ramp at Stapleton; all were sufficient to cause hearing loss.

Considering the totality of the evidence, Claimant's noise exposure at work led the ALJ to conclude Claimant was exposed to noise levels which led to the STS and ultimately hearing loss. The ALJ found this occurred over time, as opined by Dr. Lipkin. The ALJ relied on Claimant's testimony, along with Dr. Lipkin's opinion regarding the cause of his hearing loss and was persuaded that the noise levels to which he was exposed caused progressive hearing loss. As determined in Finding of Fact 31 and 36, Dr. Jacobson's testimony concerning nerve damage also supported this conclusion.

As found, Claimant proved his hearing loss resulted directly from his employment as an airline mechanic and was a natural consequence of the work. The exposure to noise levels in excess of the OSHA standards were occasioned by his employment and he was not equally exposed to this hazard outside of his employment. *Cowin & Co. v. Medina, supra,* 860 P.2d at 537. Based upon the evidence before the Court, the ALJ found Claimant's hearing loss was compensable as an occupational disease.

Turning to the second consideration, the ALJ evaluated whether Respondent submitted sufficient evidence to prove Claimant's hearing loss resulted from non-occupational factors or medical conditions. On this subject, Respondent's experts disagreed with the conclusions of Claimant's expert. As noted, *supra*, Respondent's experts disagreed the noise exposure was sufficient to cause hearing loss. Dr. Fall and Dr. Jacobson also both opined that Claimant's hearing loss was also from non-occupational medical conditions. As found, Dr. Jacobson's testimony was less persuasive because he completely excluded Claimant's occupational noise exposure as a factor in his hearing loss. Therefore, Dr. Jacobson's conclusion regarding the etiology of Claimant's hearing loss (that it resulted from non-occupational factors) was not persuasive. (Finding of Fact 33 and 38). The focus of Dr. Fall's opinion was that it was attributable to Claimant's age and other factors. By completely excluding the work exposure, these expert opinions were less credible.

In addition, Dr. Fall did not address the cause of Claimant's tinnitus. (Finding of Fact 32). Dr. Jacobson commented that he had tinnitus was not persuasive to the ALJ regarding the cause of this condition. (Finding of Fact 33). This did not refute Dr. Lipkin's conclusion that Claimant's exposure to work place noise over time caused tinnitus.

On balance, the ALJ concluded while Claimant had non-occupational risk factors for hearing loss, there was insufficient proof that these factors actually caused the hearing loss. Both Dr. Jacobson and Dr. Fall agreed there was no medical opinion within the Kaiser Permanente records that these non-occupational factors were a cause of Claimant's hearing loss. Both experts conceded the presence of non-occupational factors did not necessarily mean these caused Claimant's hearing loss. (Finding of Fact 32 and 38). Accordingly the ALJ concluded Respondent did not meet its burden of proof to show that non-occupational factors or medical conditions caused Claimant's hearing loss. Since Claimant's condition is a compensable occupational disease, he is entitled to receive medical benefits for his hearing loss.

Medical Benefits-Authorized

As found, when Claimant reported his hearing difficulties he was sent to the ATP for Employer, Dr. Holmboe, who then ordered audiometric testing. (Finding of Fact 16). Therefore, Dr. Holmboe is an ATP.

When further discussions ensued between Claimant and his supervisor, he was told he was "on his own" for treatment of the hearing loss. (Finding of Fact 16). Claimant then sought treatment with Dr. Lipkin. (Finding of Fact 17). A Claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990).

Under these circumstances, Employer conveyed the impression that Claimant was authorized to secure treatment on his own. Therefore, Dr. Lipkin is an ATP to treat Claimant's hearing loss.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable hearing loss while working for Employer.

2. Employer shall provide medical benefits to cure and relieve the effects of Claimant's hearing loss.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 6, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-981-802-02

ISSUES

➢ Whether claimant suffered a compensable injury on December 6, 2013?

➢ Whether claimant is entitled to medical treatment, specifically right shoulder surgery, as a result of his alleged injury on December 6, 2013?

➢ Whether Respondents violated C.R.S. § 8-43-103(1) or W.C.R.P. 8-2(A), and if so, whether claimant is entitled to an award of penalties.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer hired claimant on June 9, 2012 and employed his as a foreman.

2. Six months prior to Claimant's accident, he underwent Laterjet right shoulder surgery to stabilize it. Claimant had a history since age 13 of repeated and frequent dislocations. Prior to his surgery, his shoulder would dislocate as many as seven or eight times a day.

3. November 26, 2013 medical records show that Claimant sought treatment for right shoulder pain and that he was being tapered off of Percocet.

4. Claimant alleges that he sustained right shoulder and neck injuries as a result of rear end collision that took place on December 7, 2013.

5. On December 7, 2013, Claimant was working with a crew near San Antonio, Texas. Claimant was seat-belted while driving Employer's Ford F250 work truck. Claimant stopped at a stop sign or red light and the truck was rear-ended by a light weight vehicle. Claimant testified that the impact was severe, that the truck was hit by a vehicle travelling at least 55 miles per hour, and reported to at least one medical provider that he was thrown violently around in the vehicle.

6. Claimant's testimony and reports were contradicted by the testimony of Oliver Singleton who testified live at hearing. Mr. Singleton works as a supervisor for Employer and has worked for Employer approximately four years. Mr. Singleton was in the vehicle with Claimant on December 7, 2013. Mr. Singleton, who was riding unrestrained in the back seat, testified that he would characterize the rear end collision as very minor. The work truck was large and heavy and was rear ended by what he believed was a smaller, light weight SUV. He did not believe the vehicle that rear ended them was traveling at a high rate of speed at impact. Rather, he testified that he did not

even realize they had been hit from behind, instead believing the truck had downshifted. Mr. Singleton did not sustain any injury nor was he moved around the vehicle in any appreciable way. He testified that it would not be accurate if Claimant told medical providers that the vehicle that rear ended them was traveling 55 miles per hour. He also testified that it would not be accurate if Claimant told medical providers that the individuals in the vehicle were thrown around violently when they were rear ended. Finally, there was very minor damage to the truck they were driving as a result of collision.

7. Claimant's testimony and reports also were contradicted by the police report which described a "minor accident" that received a "non emergency" response; and Methodist Hospital records which indicate that the work truck was hit by a "Kia compact car" at moderate speed. Further, Claimant was able to drive the truck back to Colorado without any repairs. The record provides details of a minor collision.

8. Claimant's hearing testimony is also contradicted by his earlier report to Dr. Hattem. Claimant later reported to Dr. Hattem during an October 28, 2015 IME that the driver of the other vehicle pulled up alongside the truck and said that if everyone was okay, he would be leaving. Such would not be the case if the other vehicle sustained damage, and also indicates that neither the driver or passengers, if any, in the smaller car sustained serious injuries.

9. Claimant dropped his coworkers off at the job site, and drove himself to Methodist Hospital. Claimant complained of mild pain and identified the location of his pain as his neck. Claimant presented in no acute distress. Claimant had decreased range of motion in his neck due to pain and was noted to have a mild muscle spasm in the back of his neck. Claimant did not report shoulder symptoms or complain of right shoulder pain at the hospital, yet testified at hearing that his right shoulder was his worst injury. Diagnostics were not necessary. Claimant was diagnosed on examination with a cervical strain. Claimant was given ten Flexeril tablets and was instructed to take ibuprofen. Claimant was taken off work for three days and was not to lift more than ten pounds "until well." Claimant was seen at 8:18 a.m. and discharged at 8:44 a.m.

10. That same day, Claimant retained an attorney after speaking with the insurance carrier for the other driver. The attorney referred Claimant to chiropractor Dr. Graham in Colorado. Claimant saw the chiropractor twenty-four times between February 28, 2014 and February 27, 2015. Dr. Hattem described the chiropractor's handwritten notes as illegible.

11. Claimant rested the day of the accident and the following day. He returned to supervise the work the next day.

12. Employer's pay records show that during the week following the accident, Claimant worked 72.75 hours as a laborer and driller. The following week, Claimant worked 54 hours. No persuasive evidence supports a finding that Claimant worked under any restrictions during that time. Claimant continued to work full time for several months. Claimant's ability to work at heavy labor for extended hours support a finding

that Claimant was not injured.

13. Claimant testified that after he returned to Colorado, he told Employer's owner, Mike Davis, that he had shoulder pain. Claimant did not say that his shoulder pain was a result of the accident. Claimant testified that Employer allowed Claimant to drive a dump truck until that work became unavailable. As an equipment operator, Claimant was paid $19.78, a higher hourly rate that he was paid as a laborer or driller, $15.00 and $16.93 respectively.

14. On December 30, 2013, Claimant sought care at St. Thomas More. He complained of neck pain since the accident, with migraines and restricted neck movement. Claimant had not taken any pain medication for two weeks. Claimant did not report right shoulder symptoms. A CT scan of Claimant's neck was performed and read as negative.

15. Claimant was to follow up with his PCP, Dr. Button. However, Claimant testified that Dr. Button did not treat Claimant because he did not see patients for motor vehicle accidents. Claimant returned to Dr. Button in October, 2014. Dr. Button's October 22, 2014 report notes that Claimant's automobile coverage had ended and that Claimant needed Medicaid coverage.

16. The ALJ reasonably infers from this fact and from the fact that Claimant retained counsel on the day of the accident that Claimant chose to pursue treatment under automobile coverage rather than pursue a claim under workers ' compensation.

17. On February 4, 2014, Claimant sought treatment at Button Family Practice after he fell on ice. The record of that visit notes a "right shoulder injury….this a.m. fell on ice with outstretch[ed] right arm to catch fall."

18. When Claimant was seen by Dr. Graham on February 28, 2014, Claimant did not mention injuring his right shoulder when he fell on ice on February 4, 2014. Rather, he refers only to the rear end collision on December 7, 2013, and mentions right shoulder pain and neck pain.

19. On March 14, 2014, Claimant sought treatment from Dr. Weinstein who documented Claimant "denies any neck pain, numbness, tingling, or motor weakness." Claimant did not mention his February fall on ice. Rather, he reported to Dr. Weinstein that he "had a significant shoulder injury" due to a car accident.

20. Claimant's interrogatory responses, signed and notarized on November 16, 2015, were admitted into evidence at the hearing. Interrogatory no. 7 propounded the following question to Claimant:

> **Question**: Other than your injury in this claim, describe in detail any accidents, physical injuries, diseases, or other health problems, whether or not work-related, that you have sustained, including the date of the injury, the name of any

medical provider who treated the injury, and any permanent disability sustained from the injury.

Claimant answered: "I underwent a surgery with Dr. FitzPatrick in 2013 to fix my right dislocated shoulder. After the accident on December 6, 2013, I underwent another surgery on my right shoulder with Dr. David Weinstein in March 2014. Also, I was involved in a motor vehicle accident on March 14, 2015 and had to undergo right shoulder replacement surgery with Dr. FitzPatrick in June 2015. I'm scheduled to undergo left shoulder surgery with Dr. FitzPatrick on November 20, 2015."

21. Claimant's answer failed to disclose the following events which required emergency room care:

- On January 20, 2009, claimant was assaulted and sustained cervical trauma at C2-3.

- On July 31, 2009, Claimant was riding on the back of a truck which hit a large boulder and claimant was thrown into a rail. Claimant reported chest pain that radiated into his axilla, and subsequent loss of consciousness.

- On February 15, 2010, Claimant fell 8 feet off his truck and dislocated his left shoulder.

- On July 4, 2010, Claimant injured his right shoulder when it popped out of place and he could not move his hand.

- On October 3, 2011, Claimant hit a deer while driving 60 mph. The St. Thomas More Hospital records document neck pain.

- On May 9, 2013, Claimant injured his arm and shoulder when climbing over a horse panel.

- On May 30, 2013, Claimant was seen at Centura Health for "right shoulder recurrent instability."

- On February 4, 2014, Claimant injured his right shoulder when he slipped and fell on ice with his right arm outstretched to catch his fall.

- On September 9, 2014, Claimant sustained a hernia when lifting a car engine.

- On January 9, 2015, Claimant had "left inguinal hernia surgery three months ago, and reinjured himself at work while pulling and straining on heavy machinery."

22. Interrogatory no. 12, propounded the following question:

> **Question**: Describe your current daily activities, including any hobbies, sports, or recreational activities in which you participate. Be sure to include whether you ride bulls or other animals, and if so, whether you have sustained any injuries from this activity.

Claimant answered: "I am very limited with my daily activities. I cannot carry heavy items, or anything over 5 lbs. I have hard time with daily chores: carrying groceries, sweeping, moping; my right arm doesn't work property. I used to go water skiing, tubing behind the boat. And I'm unable to do those activities since the injury. Occasionally, I used to ride horses, and now I'm unable to do that. I never fell from the horse before. I do not ride bulls or other animals, and I never had any injuries from riding horses."

23. Claimant's response is inconsistent with the following:

- On August 26, 2012, medical records from St. Thomas More Hospital document Claimant: "Got bucked off of horse landed on tail bone…..low back pain."

- On cross examination at hearing, after being a shown a picture of himself participating in a "Warrior Dash Race", Claimant acknowledged that it was him in the picture and he participated in the race in August, 2015. The picture shows Claimant doing some type of water crossing with both arms above his head climbing across a rope ladder in an obstacle course. At hearing, Claimant also acknowledged that he posted this picture social media.

24. Mr. Davis testified at hearing that he knew his crew was involved in a rear end collision on December 7, 2013, while were working in San Antonio, Texas. He spoke with Claimant immediately after the accident and Claimant told him that he had called the police to make a report, he was not injured, and that the vehicle sustained only minor damage. Claimant told Mr. Davis that he and a coworker were going to the hospital to be evaluated, and later reported that they were not injured.

25. Mr. Davis testified that if Claimant were to have reported an injury to him, he would have prepared a first report of injury and directed Claimant to see a workers' compensation physician. Mr. Davis testified that he has protocols in place and adheres to the workplace rules regarding reporting work related injuries. Mr. Davis has dealt with other employee's work related injuries with Employer in the past and prepared reports of injury accordingly.

26. Although Claimant testified that Mr. Davis told him the accident was not covered by workers' compensation because Claimant was not "on the clock" when he was injured, Mr. Davis denied making the statement. Further, Mr. Davis testified that he did consider all of his crew in the vehicle on December 7, 2013 to be at work and on the clock, and had handled a previous workers' compensation claim where that was the

case.

27. Mr. Davis testified that Claimant abandoned his job in April of 2014 and, to his knowledge, left to start a business servicing radiators and working on cars. Mr. Davis did not speak to claimant after April of 2014.

28. Mr. Davis first learned that Claimant was reporting a work related injury due to the rear end collision on December 7, 2013, in April of 2015, when he received notice from Pinnacol Assurance that a claim had been filed.

29. On January 20, 2015, Claimant was seen at Valley Wide Health Systems. He reported, "Approximately 1 year ago he was read ended by a car traveling > 55mph and was thrown violently around the car and sustained additional damage to the right shoulder."

30. On March 14, 2015, Claimant was involved in a significant non work-related high speed motor vehicle accident. Claimant was an unrestrained passenger driving with his father and was ejected from the car during a rollover accident. Claimant lost consciousness and sustained multiple injuries including head trauma, a right shoulder fracture, left rib fracture, pelvic fracture, and multiple lacerations.

31. On April 30, 2015, Claimant filed a worker' claim for compensation for alleged injuries that he sustained on December 7, 2013. On the same day, Claimant prepared a first report of injury for the alleged injuries on December 7, 2013.

32. Dr. Albert Hattem, M.D., performed a Respondents Independent Medical Examination (IME), of Claimant and issued a report on October 25, 2015. As part of his IME, Dr. Hattem evaluated Claimant, took Claimant's medical history, and reviewed Claimant's medical records. Dr. Hattem opined:

- It was not plausible that the December 7, 2013 accident could lead to a significant aggravation of the Claimant's preexisting right shoulder condition. It was not likely that the mechanism of injury could even result in any type of shoulder injury.

- The shoulder surgery performed by Dr. Weinstein in 2014 was not related to the December 2013 rear end accident.

- Claimant was involved in a catastrophic second motor vehicle accident in March 2015. But for the second motor vehicle accident, Claimant would not have required a right total shoulder arthroplasty done in 2015.

33. Dr. Hattem attended the hearing. However, due to time constraints, he was unable to testify live and the Judge permitted his post hearing deposition, which took place on May 13, 2016. The deposition transcript was admitted as Respondent's Exhibit W.

34. Dr. Hattem testified as an expert in occupational medicine. He testified that he asked Claimant about his prior injuries and physical problems. Claimant did not disclose to him: injuring his neck in an assault in 2009, injuring his neck injury in 2011 when he hit a deer going in excess of 60 miles per hour, injuring his right shoulder injury in May of 2013 when he fell climbing over a horse panel, injuring his right shoulder in February of 2014 when he slipped and fell on ice.

35. Dr. Hattem opined that based on his review of the medical records, Claimant had a pre-existing history of neck pain and right shoulder pain, which pre-dated the December 7, 2013 accident.

36. Six months prior to the December accident, Claimant had a Laterjet right shoulder surgical procedure, which has complication/failure rates as high as 25-30%.

37. Dr. Hattem testified that when Claimant was evaluated at Methodist Hospital in San Antonio, essentially no treatment was administered and no diagnostics were conducted, and it appeared to be a minor incident.

38. Dr. Hattem would not relate Claimant's need for shoulder surgery to the December 7, 2013 rear end collision for multiple reasons. First, "the mechanism of injury is not consistent with the shoulder condition. His car was just pushed forward." Second, Claimant did not mention shoulder pain or injury at Methodist Hospital. Third, Claimant did not report shoulder injury or pain later at St. Thomas Moore. And fourth, Claimant most likely sustained a non work-related right shoulder injury on February 4, 2014, when he slipped and fell on ice with his right arm outstretched.

39. Dr. Hattem opined that Claimant's fall on February 4, 2014, was the proximate cause for Dr. Weinstein's right shoulder surgery that occurred on June of 2014.

40. Dr. Hattem opined that Dr. Graham and Dr. Weinstein did not have medical records from Claimant's initial hospital visits, and therefore did not have an accurate picture of Claimant's pre-existing medical history, nor an accurate understanding of the severity of the December 7, 2013, accident. Claimant's cervical MRI was normal, and "there was no objective evidence of there being any cervical spine pathology at all." The rear end collision of December 7, 2013 did not aggravate Claimant's preexisting right shoulder condition or neck condition.

41. The testimony of Dr. Hattem is credible and persuasive.

42. The documentary evidence as well as the testimony of Mr. Davis and Mr. Singleton, is more credible and persuasive than the testimony of Claimant.

43. Claimant's testimony is not credible.

44. Claimant has not met his burden of proving by a preponderance of the evidence that he sustained a work-related injury on December 7, 2013.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence dispositive of the issues involved. The ALJ has not addressed every piece of evidence leading to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010). It is the sole province of the fact finder to weigh the evidence and resolve contradictions therein. See *Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001).

When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. Section 8-43-210, C.R.S.

An injury is compensable under Colorado's Workers' Compensation Act if incurred by an employee in the course and scope of employment. § 8-41-301(1)(b), C.R.S.; *Price v. ICAO,* 919 P.2d 207 (Colo. 1996). Claimant must show a connection between the employment and the injury, such that the injury has its origin of the employee's work-related functions, and is sufficiently related to those functions to be considered part of the employment contract. *See Madden v. Mountain W. Fabricators*, 977 P.2d 861 (Colo. 1999).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. ICAO*, 107 P .3d 999, 1001 (Colo. App. 2004). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *Id*. The ALJ finds and concludes that Claimant presented no persuasive evidence that his condition was aggravated, accelerated, or combined with the pre-existing disease or infirmity to produce a disability or need for medical treatment.

Claimant is not credible. His account of the December 7, 2013 accident is contradicted by the vast weight of documentary evidence and the consistent and credible testimony of other witnesses. Also, his reporting of the severity of the accident became exaggerated over time. His interrogatory response about previous injuries was vastly understated, as were his responses about his physical abilities. His account of his work limitations is contradicted by payroll records which show that the worked 72.75 hours as a laborer and driller the week immediately following his accident and 54 hours the following week.

The ALJ credits the opinions of Dr. Hattem as credible and persuasive. Neither Dr. Graham nor Dr. Weinstein had an accurate picture of Claimant's prior medical history, did not possess his medical records, and had only Claimant's subjective reporting to rely on regarding the rear end collision on December 7, 2013. Because the ALJ has found Claimant not credible, she further discredits the opinions of Dr. Graham and Dr. Weinstein as they relied on Claimant's reporting.

The evidence supports the conclusion that Claimant chose not to pursue a workers' compensation claim until long after the incident. Rather, he retained an attorney and deliberately chose to pursue coverage under the other driver's auto policy. His reports to Mr. Davis that he was uninjured, his initial medical evaluation, and other persuasive evidence all support the conclusion that Claimant was not injured in the December 7, 2013 accident.

Therefore, the ALJ concludes that based on the totality of the evidence, Claimant did not meet his burden of proving by a preponderance of the evidence that he sustained a compensable injury. Because the ALJ finds and concludes that Claimant did not sustain a compensable injury, she likewise finds and concludes that Claimant is not entitled to medical treatment, specifically right shoulder surgery.

Claimant has also failed to prove entitlement to penalties based on the alleged violation of 8-43-103(1) or WCRP 8-2. In relevant part, 8-43-103(1) provides:

> Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the division and insurance carrier, unless the employer is self-insured, within ten days after the injury, and, in case of the death of any employee resulting from any such injury or any accident in which three or more employees are injured, the employer shall give immediate notice thereof to the director. If no such notice is given by the employer, as required by articles 40 to 47 of this article, such notice may be given by any person. Any notice required to be filed by an injured employee or, if deceased, by said employee's dependents may be made and filed by anyone on behalf of such claimant and shall be considered as done by such claimant if not specifically

> disclaimed or objected to by such claimant in writing filed with the division within a reasonable time.

As found, Claimant did not report an injury to Mr. Davis due to the rear end collision of December 7, 2013. Rather, when the two spoke the day of the accident Claimant indicated that he was fine, and that there was minor damage to the truck. When Claimant returned from Texas to Colorado he did not report an injury, and if he had, Mr. Davis would have referred Claimant for medical treatment and filled out the appropriate paperwork to file a workers' compensation claim. Mr. Davis first learned that Claimant was alleging an injury from the December 7, 2013 rear end collision in April of 2015, when he received paperwork from Pinnacol Assurance. Claimant's first report of injury states the "Date employer notified" was "4/30/15". The key provision in 8-43-103(1) is notice of an injury, not just an accident. In this matter, Mr. Davis was well aware that an accident occurred on December 7, 2013; however, he was not notified that an injury resulted from the rear end collision. As a result, Employer will not be penalized for failing to file a notice of injury with the Division.

In addition, the penalty allegations claimant has made are barred by the relevant statute of limitations. Notwithstanding the arguments noted above, Claimant's penalty claims are beyond the time period for requesting penalties under 8-43-304(5). In relevant part, 8-43-304(5) provides: "A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty."

Claimant testified at hearing, and in his discovery responses that were entered into evidence, that he reported a work injury to Mr. Davis, on December 7, 2013. As a result, he was required, pursuant to 8-43-304(5), to file his alleged penalty claim with the director within one year after he knew about the possible penalty. Claimant failed to do this, and instead did not file the alleged penalty request until his initial application for hearing which was filed on June 15, 2015, a year and a half after the alleged penalty.

Claimant has failed to bring this requested penalty within the mandatory timeframe of 8-43-304(5). In addition, Claimant has offered no credible evidence that he somehow did not know the facts giving rise to a possible penalty. Rather, Claimant testified that he reported an injury to his supervisor Mr. Davis the same day it occurred, December 7, 2013.

Finally, with respect to the alleged WCRP 8-2 violation, Respondents contend that the same arguments apply, and in any event, a monetary penalty is not the remedy for such a violation; rather, it is that Respondents lose their right to designate, giving claimant the choice of provider.

The penalty allegations were not plead with specificity as required by 8-43-304(4) and, in any event, have been cured pursuant to 8-43-304(4). As noted above, 8-43-103(1) provides: "Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the division and insurance carrier, unless the employer is self-insured, within ten days after the injury, and, in case of the death of any employee resulting from any such injury or any accident in which three or more employees are injured, the employer shall give immediate notice thereof to the director. If no such notice is given by the employer, as required by articles 40 to 47 of this article, such notice may be given by any person. Any notice required to be filed by an injured employee or, if deceased, by said employee's dependents may be made and filed by anyone on behalf of such claimant and shall be considered as done by such claimant if not specifically disclaimed or objected to by such claimant in writing filed with the division within a reasonable time."

In addition, 8-43-304(4) provides: "In any application for hearing for any penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted. After the date of mailing of such an application, an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonable should have known such person was in violation, no penalty should be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation."

Claimant filed a first report of injury on May 7, 2015. As a result, the alleged penalty was cured. Section 8-43-304(1) provides that if no such notice is given by the employer, "such notice may be given by any person." *See* 8-43-304(1). The filing of the First Report of Injury, which was done by Claimant's own attorney, cured the alleged penalty before an application for hearing was ever filed. Moreover, Claimant has not presented any clear and convincing evidence that Employer knew or should have known that they were in violation of any rule regarding reporting injuries at work. As found, Mr. Davis credibly testified that while he was aware of December 7, 2013, accident, Claimant explicitly told Mr. Davis that he was not injured.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for compensation is denied and dismissed.

2. Claimant's claim for penalties is denied and dismissed.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 14, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination are whether the lumbar fusion surgery recommended by either Dr. John Barker or by Dr. John Stanley is reasonable, necessary and related to the Claimant's work injury.

FINDINGS OF FACT

1. The Claimant, who is 42-years old, suffered a low back injury on November 24, 2014 while working for the Employer.

2. On December 9, 2014, Claimant had an MRI of his lumbar spine. The radiologist's impressions were: Multilevel discogenic degenerative changes of the lumbar spine; and right foraminal/far lateral disc protrusion at L5-S1 which results in moderate to severe neural foraminal stenosis and mass effect with possible impingement of the exiting right L5 nerve root. Claimant's MRI showed disc bulges at every level of his lumbar spine from L1 through L5.

3. The Claimant apparently rested for a few weeks and took medications but did not improve. He was eventually referred to Dr. John Barker who is a spine surgeon.

4. Dr. Barker initially evaluated the Claimant on December 15, 2014. Dr. Barker's notes indicate that Claimant's MRI showed degenerative disc disease from the L2 to S1 levels of the spine and foraminal stenosis on the right at L5-S1 from a "far lateral disc herniation."

5. By February 5, 2015, Claimant was reporting to Dr. Barker that physical therapy and an epidural steroid injection (ESI) had not provided significant relief. Claimant reported occasional numbness and tingling in his left leg that was not present in December 2014. Dr. Barker's impressions were: lumbar degenerative disc disease from L2-S1, lumbar stenosis, right-sided disc herniation at L5-S1, lumbar spondylosis, and mild thoracic degenerative disc disease.

6. Claimant continued with conservative treatment until April 15, 2015 when Dr. Barker recommended a discogram and post-discogram CT scan to determine which discs are causing Claimant's symptoms.

7. The Respondents requested that Dr. Michael Janssen perform a review prior to approving or denying the discogram authorization request. Dr. Janssen issued a report dated April 21, 2015. He noted that the MRI failed to demonstrate findings that would warrant discography. Dr. Janssen recommended denying the discography until after Claimant had his scheduled second opinion evaluation with Dr. Stanley. Dr. Janssen noted that "there is some suggestion and general impression (from the medical

records) there may be symptom amplification and the patient has been clearly off work ever since the date of injury."

8. On May 7, 2015, Dr. Stanley evaluated the Claimant. Dr. Stanley concurred with Dr. Barker that a discogram might be helpful. He also recommended facet injections at the L4-5 and L5-S1 levels. Dr. Stanley indicated the injections might be both diagnostic and therapeutic. Dr. Stanley also wanted Claimant to have a CT scan of the lumbar spine to determine if an L5 pars defect was present.

9. On May 12, 2015, Dr. Janssen opined that there was "no clear cut anatomical pathology that was correlated with the November 24th lifting injury." Dr. Janssen noted that Claimant has long standing age-related disc disease to the lumbar spine, facets, discs and possibly even a pars interarticularis defect (spondylolysis). Dr. Janssen opined that there was no exacerbation or "truly an occupationally related injury." Dr. Janssen, therefore, recommended against injections, discography, or invasive workup, but did opine that the CT scan recommended by Dr. Stanley appeared reasonable.

10. Respondents referred the Claimant to Dr. Anant Kumar for an independent medical evaluation which occurred on June 5, 2015. Dr. Kumar noted his review of the imaging studies and took a history from the Claimant. Dr. Kumar concluded that Claimant has axial back pain with no neurological deficits but has occasional left lower limb radiculopathy. Dr. Kumar recommended a non-surgical approach for axial back pain including weight reduction, non-impact exercise such as swimming and land rehabilitation. Dr. Kumar stated that "surgical treatment for axial back pain is fraught with failure and has unpredictable results." He opined that no additional tests are required and no further treatment options are required.

11. On August 17, 2015, Dr. Scott Primack evaluated the Claimant. Dr. Primack administered a Comprehensive Outcome Management Technologies Assessment to determine if any psychosocial factors would preclude a good outcome. The results suggested that Claimant has some significant psychosocial factors which would preclude a good outcome but Dr. Primack opined that the results were understandable given the Claimant's longstanding pain, pathology and lack of progress. Dr. Primack indicated it would be reasonable and appropriate for the Claimant to undergo psychological treatment as he progresses through rehabilitation.

12. Dr. Primack also counseled the Claimant regarding next steps including a fusion procedure. Dr. Primack explained to the Claimant that if he was not prepared for a fusion he should not have it done, and that if the disogram were negative, he would not need a fusion. Dr. Primack explained to Claimant that if he has no interest in a fusion then discography and psychological testing would be superfluous.

13. Dr. Primack indicated that an option other than fusion would be facet injections, and if those provided a good response, a facet joint rhizotomy might be considered.

14. On August 13, 2015, Dr. Stanley wrote a letter to the Insurer in response to a request from the Insurer. Dr. Stanley indicated that he is unaware of any pars defect diagnosis prior to May 7, 2015. Dr. Stanley indicated that the work-related lifting incident could have further displaced the pars defect as well as the bone structure into the foramen causing the lower extremity discomfort. Dr. Stanley agreed with Dr. Kumar that weight reduction and non-impact exercise could be helpful, but he disagreed that surgical treatment for axial low back pain is fraught with failure and unpredictable results. Dr. Stanley indicated that he did not have such experiences with displaced pars fractures. Dr. Stanley opined that Dr. Barker is recommending the proper course of care.

15. On August 20, 2015, Dr. Janssen noted that Claimant was pulling a compressor on the second day of work and sustained non-specific low back pain, and reiterated the injury occurred on Claimant's second day of employment. Dr. Janssen opined that it is highly likely Claimant reached maximum medical improvement "regarding his alleged occupational injury and there is high suspicion that is concurred that surgical intervention in this longstanding degenerative disease may have little value in this particular patient." Dr. Janssen also stated that he would concur with Dr. Stanley that appropriate treatment would either be a referral back to Dr. Kumar for an MMI determination or to Dr. Barker. Dr. Janssen concluded this report by stating the MRI findings demonstrate longstanding multi-level age-related symptomatology that would not be suggestive of a lifting injury that occurred on the second day of employment.

16. On September 18, 2015, Dr. Primack issued a report in which he opined that the odds of a good surgical outcome decrease as the number of levels fused increases. Dr. Primack again offered Claimant the opportunity to undergo facet injections for potential facet syndrome. The Claimant expressed understanding of Dr. Primack's opinions concerning surgical outcomes but he wished to be worked up for a fusion procedure nevertheless. The Claimant elected to follow up with Dr. Barker for a fusion workup.

17. On December 16, 2015, Claimant underwent a CT scan of the lumbar spine, which revealed disc degeneration ranging from grade three to grade five at every level from L1-2 through L5-S1, in addition to confirming the existence of bilateral pars defect at L5 with anterolisthesis of L5 and S1.

18. On December 16, 2015, Claimant also underwent a discography, which was positive for concordant pain from L2-3 through L5-S1. The discography results suggested that L1-2 was negative as the pain elicited was not concordant with the Claimant's usual pain.

19. On December 28, 2015, Dr. Barker recommended a four-level fusion from L2 to S1 spine levels. Dr. Barker noted that the problem with a two-level fusion from L4 to S1 is that Claimant has positive discogram results at levels L3-4 and L2-3, and a fusion below those levels would cause rapid degeneration at those levels and need for a second surgery. Dr. Barker discussed the risks and benefits of the surgery with the Claimant, as well as post-operative restrictions. The Claimant expressed awareness of

the potential complications and restrictions and elected to proceed with the fusion surgery.

20. On January 8, 2016, Dr. Janssen issued a report in which he described the fusion recommendation as a "major intervention" which "may not deal with the underlying anatomical pathology" and was based on "soft criteria (discography) and longstanding spondylosis." Dr. Janssen again opined that Claimant's findings are "most likely congenital and not work-related in any capacity . . ." For these reasons, he recommended against a two-level or four-level fusion.

21. Dr. Barker testified via deposition on May 2, 2016. Dr. Barker identified several potential generators of Claimant's symptoms, including discogenic pain, the pars defect, and facet mediated pain. Dr. Barker testified that Claimant does not have instability or stenosis. Dr. Barker testified that weight loss would be helpful, and although he felt this would be challenging. Besides weight loss and surgery, Dr. Barker does not have any other treatment recommendations. Dr. Barker is worried that if nothing is done, given that Claimant has not improved in 18 months, he will never return to work, he will gain more weight and become unhealthier.

22. Dr. Barker testified that his goal with a fusion would be to relieve seventy-five percent of Claimant's back pain. He recommends a four-level, instrumented, posterolateral and transforaminal interbody fusion. Dr. Barker testified that he agrees with Dr. Kumar "that you have to worry about . . . a four-level fusion on a young guy like this when it is mainly back pain." Dr. Barker testified that a two-level fusion "would be a bad idea" because it would cause rapid degeneration at the levels above the fusion and lead to another surgery "soon."

23. On May 23, 2016, Lance La Certe, Psy.D., performed a pre-surgical psychological evaluation of the Claimant. Dr. La Certe observed Claimant engage in pain behaviors but he did not believe that Claimant was exaggerating. Dr. La Certe documented that Claimant worked for the Employer for 17 years performing repetitive heavy labor.

24. Claimant reported to Dr. La Certe that he experiences nightly, pain-related sleep disruption. Claimant reported the ability to complete activities of daily living, but some activities, such as driving are compromised due to pain. Claimant reported intermittent overeating and weight gain of approximately 60 pounds since the injury. Claimant reported smoking five to six cigarettes per week which he attributed to stress and chronic pain. Dr. La Certe concluded that Claimant is a reasonable surgical candidate from a psychosocial perspective, but he identified litigation, obesity, and smoking as risk factors for a poor recovery.

25. Dr. Janssen testified via deposition on May 26, 2016. He performs spinal fusion surgeries and is board-certified in the fields of spine surgery and orthopedic surgery. Dr. Janssen has never examined or met the Claimant.

26. Dr. Janssen opined that a fusion is not reasonable and necessary due to the dubious objective findings, Claimant's comorbidities, and the low odds of a good outcome. Dr. Janssen also referenced the Division of Workers' Compensation's Medical Treatment Guidelines (hereinafter "*Guidelines*").

27. Dr. Janssen testified that Claimant's pain generators have not been adequately identified and the discography findings are "soft" because "if you have to do four or five levels of discography . . . then the clinician really doesn't know for sure where the pain is coming from." Dr. Janssen explained that four-level fusions are more complicated and riskier than two-level fusions, and are more successful in patients with grossly unstable spines due to deformities such as scoliosis. He further testified that if Claimant undergoes a fusion "it will just be a matter of time in a young patient before he breaks down" at the adjacent levels and requires more surgery. Dr. Janssen stated that, "that's why, in general, in my opinion, consistent with the guidelines, doing low back pain surgery over multiple levels . . . doesn't give great outcomes compared to patients who have one or two single clearcut anatomical problems."

28. Dr. Janssen recommended rehabilitation, weight loss, and psychological care. Dr. Janssen disputes the notion that Claimant cannot lose weight due to his symptoms and explained that he simply needs to decrease his overall caloric intake in comparison to his current activity level.

29. Claimant testified that he continues to occasionally smoke cigarettes. Claimant also testified that he has not yet attempted pool therapy or facet injections.

30. The Claimant testified at hearing that when his back pain is at its worst it is at a level of 7 with 1 being mild pain and 10 being severe pain. He stated that the pain gets to a level 7 on a daily basis.

31. Since the injury, the Claimant has gained approximately 60 pounds of weight due to not working and being sedentary. Claimant testified that he has tried to exercise but doing so causes his back pain to spike, but he seemed to indicate that he exercises an average of 3.5 hours per week.

32. Claimant wants the 4-level fusion with the hope of returning to work.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering

all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

5. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Id.*

6. Health care practitioners shall use the *Guidelines* when furnishing medical care under the Act. Section 8-42-101(3)(b), C.R.S.; *Hall v. ICAO*, 74 P.3d 459 (Colo. App. 2003); however, an administrative law judge is not required to utilize the *Guidelines* as the sole basis for determining whether certain treatment is reasonable, necessary and related to the work injury. Section 8-43-201(3), C.R.S. In this case, the ALJ has considered the relevant portions of the *Guidelines*, and is not persuaded that Dr. Barker's surgical recommendation is expressly prohibited by the *Guidelines.*

7. Claimant has proven by a preponderance of the evidence that the four-level fusion surgery recommended by Dr. Barker is reasonable, necessary and the result of his work-related injury. The ALJ is not persuaded by the contrary opinions of Dr. Janssen and Dr. Kumar that the surgery is not reasonable or necessary. Dr. Janssen has never examined the Claimant, his reports often questioned the existence of an injury, and he seemed to emphasize inaccurate information. Dr. Kumar offered no treatment options other than weight loss. He opined that surgical treatment for axial

back pain is unpredictable, but no surgery offers exact predictability. The ALJ acknowledges Dr. Janssen's concerns regarding the risks associated with the fusion procedure, but the Claimant has expressed an understanding and wishes to proceed. In addition, the Claimant has engaged in conservative treatment and rest, but his condition has not improved such that he can return to work. As Dr. Barker pointed out, the Claimant has not improved in over 18 months, and is likely to continue gaining weight and becoming unhealthier. The Respondents arguments concerning relatedness of the need for surgery are specifically rejected. The credible medical evidence demonstrates that Claimant suffered an aggravation of his pre-existing condition on November 24, 2014 while in the course and scope of his employment.

ORDER

It is therefore ordered that:

1. The Respondents are liable for the four-level fusion surgery recommended by Dr. Barker.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 12, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that she suffered a compensable injury during the course and scope of her employment on February 19, 2015?

- If Claimant sustained a compensable injury, did Respondents prove by a preponderance of evidence that was Claimant terminated for cause by Employer?

- If Claimant sustained a compensable injury, what is Claimant's average weekly wage?

- If Claimant sustained a compensable injury, did Respondents fail to designate the authorized treating physician?

FINDINGS OF FACT

1. Claimant was employed by Employer as a day porter. Employer provides commercial janitorial services, including at two adjacent buildings operated by the City and County of Denver: the Lindsey Flanigan Courthouse and the Van Cise-Simonet Detention Center. Claimant was hired by Employer on January 1, 2015 when Employer entered into a contract to provide janitorial services to the City of Denver.

2. Claimant normally performed janitorial duties at the Van Cise-Simonet Detention Center.

3. Claimant's medical history was significant in that she previously treated at Denver Health on May 15, 2013 for neck pain. She was also evaluated for neck pain on April 28, 2014 by her primary care physician Alicia Appel, M.D. at Denver Health. There was no evidence in the record which showed Claimant sustained a left shoulder injury before February 2015.

4. On February 19, 2015, Claimant was scheduled to work at the Van Cise-Simonet Detention Center. Claimant testified she was injured while working at the Lindsey Flanigan Courthouse, at the request of her supervisor Elvira Bobka.[1] Claimant stated Ms. Bobka asked her to work that morning for Alejandra Melgarejo, who was out of town.

[1] Ms. Bobka, who could have provided corroboration or potentially an explanation, did not testify at hearing.

5. Claimant testified she started work at 7:00 a.m. at the Lindsey Flanigan Courthouse and suffered an injury sometime between 10:00 a.m. and 11:00 a.m. She said she was with a co-worker named Roberto Gutierrez and two law enforcement officers at the time of her injury. Claimant testified she was coming out of the elevator with a cart containing cleaning supplies when one of the cart's wheels became stuck in a gap between the elevator and the floor. Claimant testified the cart started to tip and when she went to catch it, she felt a pull and pain in her left arm and back. Claimant stated that the cart tipped about halfway over on its side.

6. Claimant testified she did not report her injury the same day because her supervisor was not working that day. Claimant testified Ms. Bobka submitted the timesheet for her work that morning under Ms. Melgarejo's name. Claimant filled out and signed a timecard on February 20, 2015 noting that she had worked from 12:00 p.m. to 5:00 p.m. on February 19, 2015.[2]

7. In the employment records (timecards) admitted at hearing, Claimant worked twenty-four (24) hours during the previous month (January) at the Lindsey Flanigan Courthouse.[3]

8. In the video sequence admitted at hearing, Claimant was shown working at the Van-Cise Simonet Detention Center in the afternoon of 2/19/15[4]. Claimant was using her left hand/arm without difficulty, which contradicted her testimony that she had significant pain in her arm and shoulder after the injury.

9. On February 23, 2015, Claimant reported to her immediate supervisor, Ms. Bobka, that she suffered a workplace injury on February 19, 2015 in the morning while she was working at the Lindsey Flanigan Courthouse. Claimant testified Ms. Bobka told her to say the injury occurred when she was working at the Van Cise-Simonet Detention Center.

10. On February 23, 2015, Erma De Paz, Employer's office manager, filled out a First Report of Injury. Ms. Paz noted that Claimant was pushing a restroom cart, and "was getting off of elevator and a front wheel from the restroom cart got jammed in the elevator track. Says she tried to hold the restroom cart so it would not (sic)." The time of injury was noted as 1:15 p.m.

11. Marisol Lopez testified at hearing. She is a manager for the City of Denver account for Employer. Ms. Lopez heard about the injury through her supervisor, Travis Roth. After hearing about the alleged injury from Mr. Roth, Ms. Lopez, who is fluent in Spanish, spoke with Claimant regarding her injuries. Claimant told Ms. Lopez that she was pushing a cart into an elevator when the cart became stuck on the elevator track. Claimant told Ms. Lopez that she was hurt grabbing a mop bucket on the cart to

[2] Exhibit K.

[3] Exhibit J.

[4] Exhibit N.

prevent it from spilling.

12. Travis Roth, the Director of Finance for Employer, testified at hearing. Part of his job duties in this capacity included investigating workers' compensation claims made by employees. Mr. Roth testified he found out on February 23, 2015 that Claimant had sustained a work-related injury, as he was in the office when Ms. De Paz received a call from Claimant. He stated Ms. De Paz issued a First Report of Injury based upon her conversation with Claimant. Mr. Roth testified that he had initial concerns regarding the claim because Claimant waited four days to report her injury. Mr. Roth was told that Claimant was injured at the Van Cise-Simonet Detention Center on her first elevator ride after the start of her afternoon shift.

13. Both Mr. Roth and Ms. Lopez testified Claimant would have been allowed to work at the Lindsey Flanigan Courthouse and would not have gotten in trouble covering that shift for Ms. Melgarejo. The ALJ found Claimant did not provide a credible explanation why subterfuge was required and why the timecard was not submitted under her own name.

14. Claimant testified she never received a list of medical providers for her injury. A designated provider letter, dated February 23, 2015 was admitted into evidence.[5]

15. On February 23, 2015, in the initial evaluation at Midtown Occupational Health Matthew Edwards, PA-C recorded that Claimant alleged to be injured by "pulling a cart out of the elevator, the cart got stuck in the gap between the elevator and the floor, and Ms. Garcia injured her shoulder in a pulling motion". Claimant reported pain from her neck down to her fingers at an 8/10. On examination, limited range of motion-internal and external rotation of the left shoulder was noted. PA-C Edwards found full range of motion for abduction, flexion and extension of the left shoulder. Full range of motion was found Claimant's cervical spine. PA-C Edwards assessment was cervical strain and left shoulder strain. A physical therapy ("PT") program was ordered and Claimant was put on modified duty. This report was also signed by Lon Noel, M.D.

16. At the time of the March 2, 2015 appointment with PA-C Edwards, Claimant was said to have injured her arm/shoulder when pushing the cart into the elevator when it began to tip and she grabbed it. Claimant had diffuse pain to palpation at her shoulder along the trapezius muscle. Tenderness was also noted on the lateral aspect of the shoulder near the insertion point of the supraspinatus. PA-C Edwards' assessment was the same as 2/23/16, along consideration of thoracic outlet syndrome. PA-C Edwards anticipated a more focal pain relationship would be established at this point in time and conservative care was continued.

17. Dr. Raschbacher then took over Claimant's treatment as an ATP. When Claimant was examined by Dr. Raschbacher on March 9, 2015, she reported that she

[5] Exhibit L.

was going into the elevator when one of the wheels got stuck and she reached down and pulled it up with her left hand. Claimant reported pain in her left shoulder and left trapezius. Her symptoms were neither improving, nor worsening. Dr. Raschbacher's assessment was cervical strain and right[6] shoulder strain.

18. In the Worker's Claim for Compensation, dated March 30, 2015 (signed by Claimant), she said the accident occurred "while walking out of the elevator, cart got stuck in gap of the elevator door, tried pulling it out, felt pain in left shoulder". Nothing was said about the cart almost tipping over. The description of the accident in the first Worker's Claim for Compensation also conflicted with what Claimant showed Mr. Roth and Ms. Lopez on March 12, 2015.

19. On March 12, 2015, Claimant met with Mr. Roth and Ms. Lopez at the Van Cise-Simonet Detention Center to discuss her injury. Ms. Lopez acted as a translator for the meeting. Claimant had a cart with her on that day and said it was the same cart she was using on February 19, 2015. She confirmed that the elevators in the rotunda at the Van Cise-Simonet Detention Center were the same elevators that she was riding on February 19, 2015. When demonstrating how she was injured, Claimant said she pushing her cart into the elevator. Claimant testified she continued maintain this version of how she was injured out of loyalty and/or friendship to Ms. Bobka. The ALJ noted Claimant was earnest when providing this explanation. The ALJ infers Claimant may have felt some pressure because of this relationship. However, the ALJ was not persuaded by Claimant's explanation why she was not forthcoming as to what actually happened when she met with Mr. Roth and Ms. Lopez.

20. On March 18, 2015, Claimant returned to Dr. Raschbacher at which time Claimant reported pain in her posterior and dorsal glenohumeral joint, which was causing difficulty sleeping. Dr. Raschbacher noted tenderness at the trapezius muscle, negative impingement sign and no crepitus. Dr. Raschbacher's assessment was cervical strain and strain of the left shoulder. He ordered more PT.

21. Dr. Raschbacher examined Claimant on March 31, 2015, to recheck her left shoulder and neck. Claimant was not making progress in PT. Dr. Raschbacher discussed the possibility of her neck being the source of Claimant's shoulder problems. He noted that Claimant made poor effort with power grip and pinch grip and finger abduction and adduction. Dr. Raschbacher opined Claimant had generalized discomfort at the left shoulder, which did not localize very well. It was not clear why she would have decreased power grip. Claimant had full range of motion in the cervical spine. Dr. Raschbacher's assessment was the same as 3/18/15. He ordered an MRI arthrogram of the left shoulder.

22. Insurer issued a letter on April 1, 2015 which confirmed liability was denied for the claim and payment for treatment would not be authorized.

[6] This appears to be a typographical error, as all other references in the report were to the left shoulder.

23. On April 20, 2015, Claimant was examined by Dr. Appel at Denver Health and she was complaining of pain in her left shoulder. Dr. Appel noted Claimant “was at work and she was pushing a cart that contained a lot of cleaning supplies off the elevator. One of the wheels fell off the cart and started to fall. She tried to hold the cart up and felt like she really pulled the left shoulder.” Claimant was evaluated by Edgar Renteria on the same day. He noted that “the cart she was pushing lost a wheel, she tried to hold it up.” Claimant testified on direct examination that one of the wheels got caught in the gap and the cart started to tip. On cross-examination, Claimant equivocated whether a wheel on the cart fell off or was falling off. The ALJ notes Claimant was not complaining of neck pain when she was seen at Denver Health.

24. Dr. Raschbacher reviewed the video from February 9, 2015 and issued a letter dated April 30, 2015. Dr. Raschbacher noted there was no incident involving the cart depicted on the video. The video showed Claimant raising her arms up and shaking a drink, using both arms to drink out of a bottle. Based on the video, which suggested no injury occurred, Dr. Rascbacher did not believe Claimant required medical treatment.

25. In the Worker's Claim for Compensation, dated May 21, 2015, the description of the accident was: “while trying to catch a housekeeping cart from flipping over, she went to grab it and felt her arm pulled". The latter document was completed by Lupe Olive and the ALJ infers this is what Claimant told Ms. Olive. Claimant’s description of the accident differed than the one she provided on 3/30/15.

26. On June 4, 2015, Claimant was evaluated by James Benoist, M.D. of MSK Medical. She reported on the date of injury, “she was working in housekeeping and was pushing a cart into an elevator when the wheel became wedged in the space in the floor. She pulled the cart with sufficient force to dislodge the cart before the door closed on it”.

27. Dr. Raschbacher testified as an expert in Occupational Medicine. He is also Level II accredited pursuant to the W.C.R.P. Dr. Raschbacher testified Claimant had diffuse pain, meaning it did not generalize to an anatomic structure. He stated this could be a factor in determining whether someone suffered a work-related injury or whether a pain generator had been identified. Dr. Raschbacher was not aware Claimant had previously been evaluated at Denver Health for neck pain, although retrospectively he could not say how much weight he would have given the prior treatment. He had no information which showed Claimant had any restrictions or problems performing her job prior to her injury. Dr. Raschbacher noted there was no medical or physiologic reason for Claimant’s decreased grip strength when he examined her.

28. Dr. Raschbacher reviewed the video taken on 2/19/15 at his deposition. He testified his opinion regarding compensability changed after reviewing the video sent by Insurer. When viewing the video taken on 2/19/15, Dr. Raschbacher noted Claimant pulled the cart out of the elevator with her left hand and he would not expect an individual who had suffered an injury earlier that day to use her arm in that way. Dr.

Raschbacher stated he wouldn't have expected to use her left hand if it was injured earlier that day, especially since she was right-handed. Dr. Raschbacher treated Claimant based upon the history she provided to him. The ALJ credited Dr. Raschbacher's testimony that Claimant showed no sign of injury on the video of February 19, 2015.

29. Claimant provided different descriptions of how the accident happened in the Worker's Claims for Compensation she filed.

30. Claimant provided divergent descriptions of how the accident happened to various health care providers, including Dr. Appel, Dr. Benoist and Dr. Raschbacher.

31. The fact Claimant gave several versions of her injury detracted from her credibility.

32. The ALJ found Claimant to be less credible than Employer's witnesses, particularly Ms. Lopez.

33. Claimant's credibility was undermined further by the video taken on the date she claims she was injured. Claimant was shown using her left arm without difficulty after the time she said the injury occurred.

34. Claimant failed to sustain her burden of proof that she sustained a compensable injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The question of whether Claimant suffered a compensable injury in this case turns of the credibility of the witnesses who testified at hearing.

Compensability

To receive workers' compensation benefits, an injured worker bears the threshold burden of establishing (by a preponderance of the evidence) that he or she has sustained a compensable injury proximately caused by his employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). ("Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded.")

Accordingly, Claimant was required to prove by a preponderance of the evidence that at the time of the injury he or she was performing a service for Respondent-Employer arising out of and in the course of the employment and that the injury or occupational disease was proximately caused by the performance of such service. *Triad Painting Co. v. Blair* 812 P.2d 638 (Colo. 1991). The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

In the case at bench, Claimant alleges she sustained injury while working at the Lindsey Flanigan Courthouse on February 19, 2015. She further claimed the reason there was no record of her working at that facility was her supervisor (Ms. Bobka) submitted the time card under the name of Alejandra Melgarejo. After she was injured, Claimant asserted Ms. Bobka told her to say the injury occurred at her normal job location-the Van Cise-Simonet Detention Center. Respondents disputed Claimant's version of events, relying on the testimony of Mr. Roth and Ms. Lopez, as well as the expert testimony of Dr. Raschbacher.

As determined in Findings of Fact 29-34, the ALJ concluded Claimant failed to prove she sustained an injury arising out of and in the course of her employment. The ALJ found Claimant's testimony she sustained injuries at the Lindsey Flanigan Courthouse on the morning of February 19, 2015 was not credible, nor persuasive. The ALJ was not persuaded by Claimant's explanation that Ms. Bobka asked her to work for Ms. Melgarejo that day and then submitted a timecard under Ms. Melgarejo's name. The ALJ found the evidence that Claimant had worked a total of 24 hours at the Lindsey Flanigan Courthouse the previous month was particularly persuasive and Employer's witnesses confirmed there was no reason why she did not submit a timecard in her own name.

After reporting the injury and then meeting at the location where it allegedly occurred(on 3/12/15), Claimant did not provide full details of the alleged incident. In this regard, Claimant testified she didn't provide correct time and place of her injury because of her friendship with Ms. Bobka or because felt some loyalty to her supervisor. However, at the time when she met with Mr. Roth and Ms. Lopez and was told of the importance of providing accurate details as to how the accident happened, it was incumbent on Claimant to provide accurate details of how the accident happened, including its location. Claimant failed to do so.

In addition, Claimant's description of her injury differed when she discussed it with various healthcare providers. (Finding of Fact 30). Claimant also gave different versions of how she was injured in the Worker's Claims for Compensation she filed. (Findings of Fact 17 and 24). Dr. Raschbacher's expert testimony also supported the conclusion Claimant was not injured as she alleged.

Accordingly, the ALJ concluded Claimant was not a credible witness and based upon the totality of the evidence, the injury did not occur as she claimed. As such, she did not meet her burden of proving that she sustained an injury arising out of and in the course and scope of her employment.

In light of the finding on compensability, the ALJ need not address the issues of liability for medical benefits, average weekly wage and temporary disability benefits.

ORDER

It is therefore ordered that:

1. The claim for worker's compensation benefits in W.C. Case No. 4-979-855-01 is denied and dismissed

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 12, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

PROCEDURAL BACKGROUND

1. *Preliminary Matters / Determination of Issues*: At the outset of the hearing, the parties stipulated and agreed that, to the extent issues were not previously resolved, all five (5) of Claimant's pending Applications for Hearing related to the Claimant for the same work injury, Respondents' corresponding Responses and the Prehearing Conference Orders related to the Applications and Responses, would be consolidated for hearing at the April 29, 2016 hearing. The ALJ approved the stipulation of the parties to consolidate these matters and stated that the various documents would be reviewed, along with the transcript of the hearing, to establish the issues remaining for resolution. The review of the relevant documents and hearing transcript is summarized as follows for the purpose of clarifying the remaining issues:

10/09/2015 Application (Cl. Ex. 9) ***(Consolidated with 10/20/2015 App)*** • Issues: (1) penalties for belated GAL and belated DIME application; CRS 8-43-304(1), 8-42-107.2, 8-42-107(8)(b),(e), and WCRP 11; (2) propriety of DIME Application	**10/28/2015 Response** **(Cl. Ex. 12; R. Ex. A)** • Issues: (1) penalties – CRS 8-43-211(3); (2) other-CRS 8-43-101; 8-42-107(8)(b.5)(I)(D); 8-42-107.2; WCRP 5-2, 11-3; *Reichert v. Maxtor Corp.*
10/20/2015 Application (Cl. Ex. 10) ***(Consolidated with 10/09/2015 App)*** • Issues: (1) other-propriety of DIME selection panel & physician specialties; hold DIME process in abeyance	**11/19/2015 Response** **(Cl. Ex. 14; R. Ex. B)** • Issues: (1) penalties-CRS 8-43-211(3); (2) other-CRS 8-43-101, 8-42-107(8(b.5)(I)(D), 8-42-107.2, WCRP 5-2, 11-3; *Reichert v. Maxtor Corp.*
• 11/13/2015 prehearing order: (1) 10/09/2015 and 10/20/2015 Applications (and corresponding Responses) consolidated; (2) R motion to strike penalty issue denied; (3) briefing schedule set for issue #2-propriety of DIME Application (Cl. Ex. 13) • 12/18/2015 prehearing order: dismissed issue of penalty for late DIME Application as without merit; dismissed issue RE propriety of R's preemptive DIME Application as without merit; denies R's motion to strike Cl's issue of penalty for filing belated GAL due to genuine issue of material fact and reserves R's defenses, including request for specificity; strikes sole issue in 10/20/15 Application RE propriety of DIME selection process & physician specialties (Cl. Ex. 18; R. Ex. H)	

12/07/2015 Application (Cl. Ex. 16) ***(Consolidated with 12/24/2015 App)*** • Issues: (1) Resolve issues raised by R's Motion to Strike Issues dated 11/23/15 pursuant to *Gustavo Lozano v. Front Range Rebar Co. Inc. (ICAO, Aug. 3, 1998, WC 4-285-320)*	**01/04/2016 Response** **(Cl. Ex. 21)** • Issues: (1) penalties- attorney fees for pursuing unripe issues; (2) interlocutory orders not subject to appeal
12/24/2015 Application (Cl. Ex. 19) ***(Consolidated with 12/07/2015 App)*** • Issues: (1) reconsider PALJ's 12/18/2015 order; (2) longstanding pattern of bias/predisposition RE: attorney	**01/22/2016 Response** **(Cl. Ex. 22)** • Issues: (1) penalties-attorney fees for pursuit of unripe issues; (2) interlocutory orders not subject to appeal; (3) collateral estoppel; (4) facial challenge to DIME not reviewable by OAC; (5) failure to state a claim
• 01/04/2016 OAC Order consolidates issues endorsed in 12/07/2015 and 12/24/2015 Applications and corresponding Responses to be heard at hearing set for 02/26/2016 (R. Ex. K) • 02/16/2016 prehearing order: (1) motion that is the subject of the 12/07/15 Application has been ruled on and is resolved, so this issue is stricken; (2) R's motion to strike 12/24/15 Application is denied; (3) R's request for attorney fees and costs is reserved for 02/26/2016 hearing; (4) R's request for specificity to Cl's request for penalties reserved as a defense for 02/26/2016 hearing (Cl. Ex. 24; R. Ex. I)	
02/15/2016 Application (Cl. Ex. 23) • Issues: (1) penalties for requesting attorney fees & relief beyond a PALJ's authority; (2) other-resolve issues raised by the R's prehearing scheduled for 2/16/2016 at 11:00 pursuant to *Gustavo Lozano v. Front Range Rebar Co. Inc. (ICAO, Aug. 3, 1998, WC 4-285-320)*	**03/16/2016 Response (Cl. Ex. 25)** • Issues: (1) attorney fees for pursuit of unripe issues; (2) facial challenge to DIME not reviewable by OAC; (3) collateral estoppel; (4) failure to state a claim
• 04/08/2016 prehearing order: granted R's motion to compel Cl's attendance at DIME with Dr. Thurston on May 25, 2016 at 9:00 AM. Further ordered that Cl's failure to attend DIME will result in sanctions against CL, including up to $1,000 per day penalty and dismissal of her claim (unless vacated by an OAC ALJ) (Cl. Ex. 26; R. Ex. J) • 04/26/2016 prehearing order: granted R's motion to compel Cl to complete R's 3/18/2016 interrogatories (Cl. Ex. 27) • 04/29/2016 hearing: parties stipulated to consolidating remaining issues from all	

five applications and corresponding responses for hearing (Hrg. Tr., pp. 35-36)

- 04/29/2016 hearing: Cl's motion for relief from the 04/08/2016 prehearing order RE compel DIME attendance was granted, in part. Cl. is relieved from attending the DIME with Dr. Thurston on May 25, 2016 at 9:00 AM. However, Cl. must attend a rescheduled DIME appointment with Dr. Thurston to take place between June 10, 2016 and July 10, 2016 unless ordered otherwise (Hrg. Tr., pp. 86-88)

2. *Determination of Attorney Fee and Cost Award:* A preliminary Order dated June 10, 2016 was provided to the parties in this case authorizing an award of attorney fees and costs and holding the record open for evidence to establish the appropriate amount of attorney fees and costs to be awarded. Respondents filed a Motion for Attorney Fees and Costs Pursuant to Order Dated June 10, 2016 on June 21, 2016 and submitted evidence in Exhibit A to the Motion to support the Motion. On July 12, 2016, Claimant filed a Verified Response to Respondents' Motion for Attorney Fees and Costs Pursuant to Order Dated June 10, 2016. No party requested a hearing on the issue of attorneys fees pursuant to C.R.C.P. Rule 121, §1-22(2)(c), nor was discovery on the issue of attorney fees requested pursuant to C.R.C.P. Rule 121, §1-22(2)(b). Sufficient evidence was provided for the ALJ to make an appropriate determination as to the amount of attorney fees and costs to be awarded in the written submissions.

ISSUES

In light of the procedural background summarized above, the following issues remain for resolution by the ALJ in this consolidated matter:

1. Whether the Respondents timely and properly requested a Division Independent Medical Examiner ("DIME") and the effect of such request.

2. Whether the Respondents timely and properly filed a General Admission of Liability ("GAL").

3. If the Respondents failed to timely and properly request a DIME or file a GAL, whether penalties should be assessed against the Respondents pursuant to C.R.S. §§ 8-43-304(1), 8-42-107.2, 8-42-107(8)(b)(e), and WCRP 11.

4. Propriety of DIME panel selection and whether the Claimant is entitled to a DIME physician with a requested specialty.

5. Whether, and for how long, the DIME process is held in abeyance.

6. Reconsideration of the issues raised before PALJ Harr that were addressed in his December 18, 2015 Interlocutory Order.

7. Reconsideration of the issues raised before PALJ Gallivan that were addressed in his February 16, 2016 Prehearing Conference Order.

8. Consideration of the allegation of a longstanding pattern of bias or predisposition with respect to the Claimant's attorney.

9. Whether the Respondents have proven that attorney fees and costs should be assessed against the Claimant's attorney for pursuing unripe issues pursuant to C.R.S. § 8-43-211(3).

10. Whether the Claimant has proven that penalties should be assessed against the Respondents for requesting attorney fees and costs and such other relief beyond a PALJ's authority.

11. Determination of the amount of any attorney fee and cost award.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant has had prior back surgery at the L3-4 level, a laminotmy that took place somewhere in between 2007 and 2009. This was her only previous low back surgery (Hrg. Tr., pp. 59-60).

2. The Claimant was injured at an out-of-state work location on April 9, 2014. On that date, the Claimant testified credibly that she tripped as she was walking through the entrance to a bathroom. She further testified that she did not fall after tripping, but caught herself. The Claimant testified that this resulted in injury to her left low back and hip area (Hearing Tr., p. 55).

3. After the Claimant's work injury, she continued to work full duty for her employer and did not miss time from work due to the work injury until February 5, 2016. After February 5, 2016, the Claimant has not been working (Hearing Tr., pp. 64-65).

4. The Claimant testified credibly that since her injury she has only been free of pain for a two-month period following a rhizotomy and some very temporary relief from some injections (Hrg. Tr., p. 56 and pp. 63-64). The Claimant testified that she continues to have symptoms in her low back, a stabbing pain in her hip area and an intermittent numbness in her feet towards her toes (Hrg. Tr., pp. 56-58).

5. The Claimant treated with John Charbonneau, M.D., Gregory Reichhardt, M.D., Ricardo Nieves, M.D. (also see Claimant's Exhibit 1), Dr. Columbus (also see Claimant's Exhibits 2 and 3), Daniel Bruns, Psy.D., and Dawn Jewell Psy.D. (Claimant's Exhibit 4, p. 474; Respondents' Exhibit E, p. 17). Dr. Charbonneau was the Claimant's primary authorized treating provider and he is an occupational medicine physician and

not a surgeon (Hrg. Tr., p. 61). In addition to treatment and oversight provided by Dr. Charbonneau, the Claimant has undergone a lumbar MRI, physical therapy, injections and a rhizotomy (Claimant's Exhibit 4, p. 474; Respondents' Exhibit E, p. 17). The Claimant testified that Dr. Charbonneau never referred the Claimant to an orthopedic surgeon or neurosurgeon for evaluation for any surgical procedures (Hrg. Tr., p. 60). The Claimant testified that she requested a referral for surgical spine evaluation but that Dr. Charbonneau did not make the referral (Hrg. Tr., p. 61). The Claimant testified that if surgery would provide her with relief from her condition, she would definitely consider undergoing a surgical procedure (Hrg. Tr., p. 63).

6. On August 26, 2014, subsequent to her work injury, the Claimant underwent a lumbar MRI which was compared to the Claimant's prior May 6, 2009 lumbar MRI. The radiologist noted that the comparison study revealed no change, except for evidence of interval improvement in the appearance of the postsurgical changes for her prior non-work-related L3-L4 laminotomy (Claimant's Exhibit 29; Respondents' Exhibit E, p. 20).

7. On July 13, 2015, the Claimant saw Dr. Reichhardt, on referral from Dr. Charbonneau, for evaluation for permanent impairment. Dr. Reichhardt reviewed the history of the Claimant's injury and summarized her treatment up to that date. He noted that the Claimant reported "an aching pain in the low back and left gluteal area, with some numbness extending down the posterior aspect of the thigh." He also noted that the Claimant had symptoms of depression and Dr. Bruns felt she had a ratable psychological impairment. He noted her current pain rating was 4-8/10 but that recent injections provided little relief and a rhizotomy provided only a month of relief. Dr. Reichhardt opined the Claimant was at maximum medical improvement as of July 13, 2015. He recommended maintenance care and provided an impairment rating of 7% whole person for the specific disorder of the lumbar spine combined with a 6% whole person rating for range of motion deficits for a total lumbar impairment of 13% whole person. He further combined this with a 2% psychiatric impairment for a total combined 15% whole person impairment rating. Page 5 of Dr. Reichhardt's report states that the following were cc'd: Insurance Company, Dr. Charbonneau and [Claimant], but there is no certificate of mailing or other indication of when the report was actually mailed. (Claimant's Exhibit 4; Respondents' Exhibit E, pp. 17-25).

8. The Claimant then saw Dr. Charbonneau for a final case closure visit on July 30, 2015. Based on Dr. Reichhardt's impairment evaluation report, Dr. Charbonneau placed the Claimant at MMI as of July 13, 2015, and provided an impairment rating of 15% whole person impairment. He recommended the impairment rating be accepted and specifically noted that he attributed the impairment to her work injury. Dr. Charbonneau also agreed that maintenance care consisting of six follow up visits with him and four follow up visits with a physical therapist and continuing medications of Celebrex and Flexeril were necessary. In reviewing Dr. Charbonneau's medical report of July 30, 2015, it appears that he sent Dr. Reichhardt's July 13, 2015 report to the Claimant after explaining it to her and it also appears that the document was faxed out and received on July 31, 2015 (Respondents' Exhibit E, pp. 13-15).

9. The ALJ finds that it is undisputed that the Respondents received the impairment rating of Dr. Reichhardt via Dr. Charbonneau as of July 31, 2015. However, it cannot be determined from the evidence admitted in this case that the Respondents received a medical report notifying them that the Claimant sustained a permanently physically impairing injury prior to July 31, 2015.

10. The Respondents disagreed with the impairment determination by Dr. Reichhardt and adopted by Dr. Charbonneau and filed a Notice and Proposal to Select a DIME Examiner on August 7, 2015 (Respondents' Exhibit F).

11. On August 26, 2015, the Respondents filed a General Admission of Liability admitting for medical benefits only and specifically denying temporary and permanent disability benefits until deemed otherwise payable in accordance with Rule 5-5(B). It was noted that if the temporary or permanent benefits were sustained, an amended admission would be filed (Claimant's Exhibit 6).

12. The Claimant filed an Application for Hearing on October 9, 2015, on the issues of penalties against Respondents for filing belated General Admission of Liability and for filing a belated DIME Application per 8-43-304(1), 8-42-107.2, 8-42-107(8)(b), (e), and Rule 11 of WCRP; and "to determine the propriety and effect of Respondents' preemptive and belated bogus DIME application" (Claimant's Exhibit 9).

13. The Claimant filed an Application for Hearing on October 20, 2015, on the issues of "propriety of DIME panel selection and physician specialties, contrary to Claimant's DIME rights as expressed in *AFL-CIO v Donlon* and *Whiteside v. Smith*, contrary to the Claimant's true treatment and diagnostic needs and extent of his (sic) occupational impairments and to hold the DIME process in abeyance per *Jesus Munoz v ICAP* and *JBS Swift & Compan*y (Claimant's Exhibit 10).

14. The Respondents filed a Response to the Claimant's October 9, 2015 Application for Hearing on October 28, 2015 asserting defenses to the claims that Respondents filed an untimely admission and an untimely DIME application and Respondents sought attorney fees related to the Claimant's pursuit of unripe issues (Claimant's Exhibit 12; Respondents' Exhibit A).

15. The Respondents scheduled a prehearing conference to request that issues on both Claimant's October 9, 2015 and October 20, 2015 applications for hearing be stricken. The prehearing conference was held before PALJ Michael Harr on November 13, 2015. PALJ Harr requested written briefing by both parties on the issues. The Claimant's October 9, 2015 and October 20, 2015 Applications for Hearing were also consolidated by Order dated November 13, 2015 and set for hearing for February 26, 2016 (Claimant's Exhibit 13).

16. On November 19, 2015, the Respondents filed a Response to the Claimant's October 20, 2015 Application for Hearing asserting defenses to the claim regarding the propriety of the DIME selection process and the Claimant's request to

hold the DIME process in abeyance and also sought attorney fees related to the Claimant's pursuit of unripe issues (Claimant's Exhibit 14; Respondents' Exhibit B).

17. The Respondents submitted a written motion to strike issues endorsed in the Claimant's October 9, 2015 and October 20, 2015 Applications for Hearing on November 23, 2015 (Claimant's Exhibit 15). The Claimant's submitted a written response to Respondents' motion to strike issues on December 14, 2015 (Claimant's Exhibit 17).

18. In the meantime, the Claimant filed another Application for Hearing on December 7, 2015, on the issue of "resolve issues raised by the Respondents' Motion to Strike Issues dated November 23, 2015, pursuant to *Gustavo Lozano v. Front Range Rebar Co., Inc.*" (Claimant's Exhibit 16).

19. PALJ Harr issued an order on December 18, 2015, striking the issues in Claimant's October 20, 2015 Application for Hearing, with prejudice, "because it questions a process that is unripe until a party applies for hearing to overcome the opinion of the DIME physician." As to the Claimant's October 9, 2015 Application for Hearing, PALJ Harr also dismissed the Claimant's penalty allegation for "filing a belated DIME application" as meritless, dismissed the issue of "propriety and effect of Respondents' preemptive and belated bogus DIME application" as meritless. PALJ Harr did not dismiss the Claimant's penalty allegation for "filing and relying on a belated General Admission" as he determined that the Claimant's allegation raises a genuine issue of material fact regarding the timely filing. However, he did find that the allegation was vague and unspecific and reserved to Respondents any defense they have, including lack of specificity (Claimant's Exhibit 18; Respondents' Exhibit H).

20. The Claimant' filed a fourth Application for Hearing on December 24, 2015, on the issues of "to determine propriety, jurisdiction and effect of and to reconsider PALJ's Order of December 18, 2015," and "this longstanding pattern of bias or predisposition vis-à-vis the undersigned" (Claimant's Exhibit 19).

21. The Respondents filed a Response to the Claimant's December 7, 2015 Application Hearing on January 4, 2016 and also requested attorney fees and costs be assessed for pursing unripe issues and raised the defense that interlocutory orders are not subject to appeal (Claimants' Exhibit 21; Respondents' Exhibit C).

22. The Claimant's December 7, 2015 and December 24, 2015 Applications for Hearing were consolidated with issues to be heard at the February 26, 2016 hearing pursuant to an OAC Order granting Respondents' unopposed motion to consolidate dated January 6, 2016 (Respondents' Exhibit K).

23. On January 15, 2016, Lloyd Thurston, DO was confirmed as the Division IME physician (Respondents' Exhibit L). The Claimant agrees that Dr. Thurston is Level II accredited (Hrg. Tr., p. 71).

24. The Claimant filed a fifth Application for Hearing on February 15, 2016, on the issues of penalties against Respondents for requesting attorney fees and costs and such other relief beyond a PALJ's authority and "to resolve issues raised by the Respondents' prehearing scheduled for February 16, 2016" (Claimant's Exhibit 23).

25. A prehearing conference was held on February 16, 2016 before PALJ Gallivan on the issues of Respondents' motions to strike Applications for Hearing, for attorney fees and costs and for specificity regarding the Claimant's request for penalties. PALJ David Gallivan struck the Claimant's December 7, 2016 Application for Hearing, finding that at the time the Application for Hearing was filed, the issues were under review by PALJ Harr, which resulted in an order. This order resolved any issues regarding that motion. He then found that the issue of reconsideration of PALJ Harr's December 18, 2015 order (the issue in the December 24, 2015 Application for Hearing) is proper and would not be stricken. Finally, PALJ Gallivan found that the Claimant had failed to meet her burden of specificity regarding penalties and Respondents preserved that defense for hearing and that Respondents had made the requisite attempt to strike issues in Claimant's applications for hearing and may seek attorney fees and costs at hearing but that the PALJ would not issue an order addressing this request (Claimant's Exhibit 24).

26. The February 26, 2016, docket was heavily scheduled and this case had lower priority than other matters scheduled. As a result, hearing on these matters was rescheduled for April 29, 2016.

27. On March 16, 2016, the Respondents filed a Response to the Claimant's February 15, 2016 Application for Hearing asserting that a facial challenge to the DIME is not reviewable by the OAC, collateral estoppel and that the Claimant failed to state a claim upon which relief may be granted. Respondents also sought attorney fees related to the Claimant's pursuit of unripe issues (Claimant's Exhibit 25)

28. A prehearing conference was held on April 6, 2016 before PALJ Craig Eley on Respondents' Motion to Compel Claimant's Attendance at Division Independent Medical Examination. PALJ Eley noted that the Claimant failed to attend a DIME on March 9, 2016 with Dr. Lloyd Thurston and that Respondents sought an order compelling the Claimant's attendance at a DIME scheduled for April 13, 2016. After considering the argument of counsel, PALJ granted the Respondents' motion with conditions. Namely, he ordered attendance at a rescheduled May 25, 2016 DIME evaluation unless vacated by order of an OAC ALJ. He further ordered that the Claimant's failure to attend the DIME evaluation would result in sanctions, including, but not limited to, a penalty of up to $1,000.00 per day and dismissal of her claim for workers' compensation (Claimant's Exhibit 26; Respondents' Exhibit J).

29. On April 26, 2016 a prehearing conference was held before PALJ David Gallivan on the issue of Respondents' Motion to Compel Responses to Discovery. PALJ Gallivan ordered the Claimant to provide responses to the Respondents' March 18, 2016 Interrogatories on or prior to April 28, 2016 (Claimant's Exhibit 27). The Claimant provided the responses found at Claimant's Exhibit 28 on April 28, 2016.

30. At the hearing held on April 29, 2016, the undersigned ALJ ordered that the Claimant was relieved of compliance with PALJ Craig Eley's Order requiring the Claimant to attend a DIME evaluation with Dr. Thurston on May 25, 2016 in order to provide sufficient time for the parties to submit briefs in this matter and for the ALJ to issue an order. The ALJ ordered that the Claimant must work with Respondents to reschedule a DIME evaluation with Dr. Thurston to be scheduled between June 10, 2016 and July 10, 2016 and that the Claimant shall attend that DIME evaluation unless this order relieves the Claimant of that obligation. Having considered the evidence and arguments presented at hearing and in the post-hearing briefs (see below), the ALJ determines that this order does not change the Claimant's obligation to attend the rescheduled DIME evaluation with Dr. Thurston. The Claimant remains under order compelling her attendance at the most recently scheduled DIME evaluation with Dr. Thurston.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Judicial or Administrative Notice of Adjudicative Facts Pursuant to C.R.E. 201

Counsel for the Claimant requested that the ALJ "take administrative or official notice the contents of the underlying related case computer entries and Office

Administrative Courts' and Division of Worker's Compensation and I.M.E. Unit files in consideration of this matter, pursuant to C.R.E. 201" (Claimant's Position Statement, p. 3). C.R.E. 201 permits the ALJ to use discretion to take judicial notice of adjudicative facts if the fact is not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. It is mandatory for a court to take judicial notice of adjudicative facts covered by Rule 201 if requested by a party and supplied with the necessary information. With respect to information in the files and records of the Division of Workers' Compensation and I.M.E. Unit files, any request is governed by C.R.S. §8-47-203 and WCRP Rule 1-5. Counsel for the Claimant has failed to comply with the requirements of both the statute and WCRP Rule 1-5 for requesting inspection and copying of files and the ALJ will not take judicial notice of facts in the files and records and computer entries of the Division of Workers' Compensation. With respect to the files and computer entries at the Office of Administrative Courts, the Claimant has failed to supply the Court with the necessary information to determine what contents and computer entries are included in the request for judicial notice. Nor has counsel for Claimant provided identification of information to counsel for Respondents for the purpose of providing Respondents' counsel with the ability to ascertain which information is included in Claimant's request, to object to any such information, or to prepare a defense in light of such information. Therefore, the request for the ALJ to take administrative or official notice pursuant to C.R.E. 201 is denied. Only the exhibits which were submitted to the ALJ and the testimony taken at the hearing on April 29, 2016 will be considered evidence in this matter.

Reconsideration of the issues raised before PALJ Harr that were addressed in his December 18, 2015 Interlocutory Order and PALJ Gallivan that were addressed in his February 16, 2016 Prehearing Conference Order

Respondents have raised the defense that interlocutory orders are not subject appeal in two of the Responses to Claimant's Applications for Hearing (Claimant's Exhibits 21 and 22). Panels of the Industrial Claim Appeals Office have held that "orders related to DIME requests are in the nature of evidentiary rulings and are therefore, interlocutory (see *Alvarez v. JBS USA, LLC,* W.C. 4-783-538 (ICAO, July 10, 2012). However, the *Alvarez* case involved review of an order of an OAC ALJ that determined that the Claimant failed to show persuasive authority to support his argument that he had the right to apply for a hearing to contest the selection of the three-physician panel under WRCP 11-3(c) based on a selection process that relied upon the level of accreditation of the physician rather than the physicians' areas of practice. In the present case, the Claimant has endorsed issues in two of the five Applications for hearing requesting the ALJ reconsider the rulings of PALJs pursuant to prehearing conferences.

The Colorado Supreme Court and ICAO panels have issued orders contemplating ALJ review of prehearing orders issued by PALJs. In *Szot v. U.S. Security Associates, Inc.,* W.C. 4-714-229 (ICAO, October 2, 2007), the panel concluded that an ALJ erred by not reconsidering a ruling from a PALJ. The panel stated that an ALJ has jurisdiction to review interlocutory rulings of a PALJ and that further consideration by an ALJ of prehearing orders is anticipated. Although the orders of a PALJ that arise in the context of a prehearing conference are “interlocutory” and “not immediately appealable,” the Colorado Supreme Court noted that, it makes sense to treat a PALJ’s order related a prehearing conference in this manner, “because a prehearing conference, by definition, is followed by a full hearing before the director or an ALJ” and “thus, the propriety of a PALJ’s prehearing order may be addressed at the subsequent hearing.” *Industrial Claim Appeals Office v. Orth,* 965 P.2d 1246, 1254 (Colo. 1998).

While the PALJ orders in question in this case are not deemed to be final, appealable orders as they arose out of a prehearing conference, they are nevertheless subject to review by the ALJ. To the extent that the Claimant has endorsed issues addressed by prehearing orders, or had requested reconsideration of the PALJs orders, the ALJ has authority to review the same and such issues are considered below.

The Claimant has failed to establish that Respondents are subject to penalties for failure to timely file a General Admission of Liability (GAL)

C.R.S. § 8-43-203(1)(a) provides, in pertinent part,

> The employer or, if insured, the employer’s insurance carrier shall notify in writing the division and the injured employee…within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested.

C.R.S. § 8-43-101(1), states, in pertinent part, as follows:

> Within ten days after…the occurrence of a permanently physically impairing injury, or lost-time injury to an employee…the employer shall, upon the forms prescribed by the division for that purpose, report said…permanently physically impairing injury, [or] lost time injury…to the division.

In this case, the Claimant was injured at an out-of-state work location on April 9, 2014. However, after the Claimant’s work injury, she continued to work full duty for her employer and did not miss time from work due to the work injury until February 5, 2016. As a result, prior to August 26, 2015, this was not a lost-time injury to the employee that would require a report pursuant to C.R.S. § 8-43-101(1) which would, in turn, trigger a required filing of an admission of liability for this reason.

Therefore, until the Respondents reasonably understood the Claimant’s injury to be one which was permanently physically impairing to the Claimant, no report or admission was required. Dr. Reichhardt issued a medical report of his evaluation for permanent impairment on July 13, 2015 and provided a total lumbar impairment of 13% whole person which he further combined with a 2% psychiatric impairment for a total combined 15% whole person impairment rating. The Claimant then saw Dr. Charbonneau for a final case closure visit on July 30, 2015. Based on Dr. Reichhardt’s impairment evaluation report, Dr. Charbonneau placed the Claimant at MMI as of July 13, 2015, and provided an impairment rating of 15% whole person impairment. He recommended the impairment rating be accepted and specifically noted that he attributed the impairment to her work injury.

Thus, the earliest arguable date that a report could have been required in this case under C.R.S. § 8-43-101(1) is ten days after July 13, 2015 or July 23, 2015. Then, the earliest arguable date that an admission would be required is twenty days after that, or August 12, 2015. However, the Claimant did not establish that the Respondents actually received a copy of Dr. Reichhardt's July 13, 2015 report on that day. Page 5 of Dr. Reichhardt's report states that the following were cc'd: Insurance Company, Dr. Charbonneau and [Claimant], but there is no certificate of mailing or other indication of when the report was actually mailed.

In reviewing Dr. Charbonneau's medical report of July 30, 2015, it appears that he sent Dr. Reichhardt's document to the Claimant after explaining it to her and it also appears that the document was faxed out and received on July 31, 2015. It is undisputed that the Respondents received the impairment rating via Dr. Charbonneau as of July 31, 2015. If this is the first notice that the Respondents had of a permanently physically impairing injury, then a report would have been required ten days later, or August 10, 2015 and then an admission would be required twenty days after that, or August 30, 2015.

The ALJ specifically determined that it is undisputed that the Respondents received the impairment rating of Dr. Reichhardt via Dr. Charbonneau as of July 31, 2015. However, it could not be determined from the evidence admitted in this case that the Respondents received a medical report notifying them that the Claimant sustained a permanently physically impairing injury prior to July 31, 2015. If July 31, 2015 is the date that ultimately triggered the requirement to file an admission, then the August 26, 2015 GAL would have been timely as it was filed before August 30, 2015.

In any event, pursuant to C.R.S. § 8-43-203(2),

> If such notice is not filed as provided in subsection (1) of this section, the employer, or if insured, the employer's insurance carrier, as the case may be, may become liable to the claimant, if the claimant is successful on the claim for compensation, for up to one day's compensation for each day's failure to so notify….

The penalty statute in for this violation is discretionary and not mandatory. While the ALJ has determined that the Claimant has failed to prove that the GAL was filed late, even if the filing was not timely, the filing was not more than 14 days late. Furthermore, the Respondents disagreed with the impairment determination by Dr. Reichhardt and adopted by Dr. Charbonneau and filed a Notice and Proposal to Select a DIME Examiner on August 7, 2015, putting the Claimant on notice that although the medical benefits were admitted, liability for temporary or permanent disability benefits was disputed. There was no persuasive evidence presented that the Claimant suffered any prejudice due to the failure to accept liability for medical benefits in a timely manner or that the Respondents failed to pay for medical treatment.

To the extent the filing was up to 14 days late, the Claimant also failed to establish that she suffered any harm or prejudice as a result of the late filing with respect to disability benefits. The Claimant did not miss time from work until February 5, 2016, well after the admission was filed on August 26, 2015. Further, the Respondents admitted for medical benefits only and specifically denied temporary or permanent disability benefits and also requested a Division IME for review of Dr. Reichhardt's impairment rating. In this case, any subsequent delay in the completion of the DIME process, and the determination of the Claimant's impairment, and potentially entitlement to benefits for such impairment, is attributable to the Claimant's objections to the DIME process and multiple requests to delay and postpone the DIME evaluation. Therefore, even if the filing was up to 14 days late, the Claimant has delayed the DIME process.

The Claimant has failed to persuade the ALJ that any penalty should be assessed against the Respondents for an untimely filing of the General Admission and no penalty will be assessed for this claim.

The Claimant has failed to establish that Respondents improperly requested the selection of a Division IME or are subject to penalties for failure to timely file a Notice and Proposal to Select an Independent Medical Examiner

Jurisdiction

First, on the matter of jurisdiction of the ALJ, citing *Alvarez v. JBS USA, LLC,* W.C. No. 4-783-538 (ICAO, July 10, 2012), the Respondents have argued that the ALJ does not have jurisdiction to consider the Claimant's October 9, 2015 issue of "determine the propriety and effect of Respondents' preemptive and belated bogus DIME application." The Respondents further argue that the ALJ does not have jurisdiction to review prehearing conference orders that dismissed these issues, but this was addressed above.

The Claimant asserts, to the contrary, that the Office of Administrative Courts and its ALJs have long been statutorily and administratively vested with original jurisdiction to hear and decide all matters arising under articles 40 to 47 of the Colorado Worker's Compensation Act, including "disputes concerning the division IME process that arise in individual cases that cannot be resolved by agreement of the parties...." The Claimant cites a long string of cases and C.R.S. §8-43-201(1); WCRP 11-10 as authority.

Multiple cases before the Industrial Claim Appeals Office have contemplated litigation before an ALJ regarding disputes over the DIME procedure arising in an individual case as distinguished from controversy implicating the DIME system as a whole. *Rodriguez v. Safeway Stores,* W.C. No. 4-712-019 (ICAO, September 10, 2008); *Caro v. Johnson Controls, Inc.,* W.C. 4-786-424 (ICAO, May 12, 2010). Further, the Respondents' reliance on *Alvarez* is misplaced as the ALJ in that case did not decline to rule on a DIME panel selection issue. Rather, the ALJ determined that the Claimant failed to prove entitlement to selection of a DIME physician by practice specialty since WRCP 11-3(c) provides for selection of a three-physician panel based on their accreditation to perform impairment ratings on the body parts or medical conditions designated by the requesting party on the IME application and, as such, failed to state a claim under which relief may be granted. Per WCRP 11-10 and C.R.S. §8-43-201(1), the ALJ has jurisdiction to address the issues related to the DIME process that have arisen in this case. To the extent that an issue alleges a failure to comply with the rules or statutes applicable to commencement of the DIME process or entitlement to commence the DIME process related to the facts of this case, or to review a PALJ order regarding the same, these issues fall within the ALJ's jurisdiction.

Timeliness of DIME Request

In this case, the Respondents disagreed with the impairment determination by Dr. Reichhardt and adopted by Dr. Charbonneau and filed a Notice and Proposal to Select a DIME Examiner on August 7, 2015.

C.R.S. § 8-42-107.2(b) provides that,

> If any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request, on a form prescribed by the division by rule, and shall propose one or more acceptable candidates for the purpose of entering into negotiations for the selection of an IME….Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability or the date of mailing or delivery of the disputed finding or determination…the authorized treating physician's findings and determinations shall be binding on all parties and on the division.

The timing for selection of an IME for an insurer or self-insured is prescribed by C.R.S. § 8-42-107.2(2)(a)(I)(B) as commencing "with the date on which the disputed finding or determination is mailed or physically delivered to the insurer or self-insured employer. Therefore, to contest the impairment rating determination of Dr. Reichhardt which was found to be delivered with the medical opinion of Dr. Charbonneau as of July 31, 2015, the Respondents were required by the statute to request a Division IME on or before August 30, 2015. So, Respondents' August 7, 2015 Notice and Proposal to Select an Independent Medical Examiner was timely[1].

[1] Although the ALJ determined that impairment rating determination of Dr. Reichhardt was delivered with the medical opinion of Dr. Charbonneau as of July 31, 2015, even if the earlier July 13, 2015 date of Dr. Reichhardt's report is used, the Respondents' August 7, 2015 Notice and Proposal to Select an Independent Medical Examiner would have been timely.

"Preemptive" DIME Issue

In addition to disputing the timeliness of the Respondents' Notice and Proposal to Select a DIME Examiner, the Claimant also characterizes the DIME in this case as "preemptive" and "bogus." The Claimant's principle argument with respect to this issue appears to be that when the Respondent seeks a DIME before filing a Final Admission of Liability, this is done in "bad faith" and utilized to preempt the Claimant's ability to seek a DIME and it shifts the burden on the Claimant.

Claimant points out that pursuant to C.R.S. § 8-42-107.2(2)(a)(I)(A):

> For the claimant, the time for selection of an IME commences with the date of mailing of a final admission of liability by the insurer or self-insured employer that includes an impairment rating issued in accordance with section 8-42-107.

and

C.R.S. § 8-42-107.2(c) provides that,

> If the insurer or self-insured employer requests and IME and the examination is conducted before the insurer or self-insured employer admits liability pursuant to section 8-43-203(2)(b), the claimant may not request a second independent medical examination on that issue but may appeal the IME's decision, as set forth in section 8-43-203(2)(b)(II).

As a result, counsel for the Claimant argued at hearing and in her post-hearing brief, that if Respondents seek a Division IME before filing a final admission, the Claimant is unfairly prejudiced as the Respondent is effectively preempting the single opportunity to procure a burden-shifting objective determination as to MMI and the Claimant's impairment rating. The Claimant has argued, without citing any persuasive authority, that the Respondent must have a "good faith" basis for seeking a DIME in this situation or it is inherently unfair that the Claimant may only challenge the IME through appeal and is then subject to a burden of overcoming the DIME by clear and convincing evidence.

The timing for seeking requesting selection of a Division IME is established by the statute. The language is clear and unequivocal. If a Respondent does not request an IME when prescribed by statute, then the ATP's findings and determinations are binding. If the Respondent fails to seek the IME when required, there is no way to challenge determinations of MMI or impairment ratings. Nothing in the statute requires a showing of good faith by Respondents seeking a DIME evaluation prior to filing a Final Admission of Liability.

In filing a Notice and Proposal to Select a DIME Examiner on August 7, 2015, the Respondents complied with statutory requirements and preserved the only method to challenge the impairment rating provided determination by Dr. Reichhardt and adopted by Dr. Charbonneau. The Claimant has failed to show how the Respondents acted in bad faith or that they failed to follow statutorily prescribed procedure to preserve the right to a Division IME in this case. To the extent that the Claimant argues that the statute is unconstitutional, the ALJ lacks jurisdiction to address this contention.

Propriety of DIME panel selection process and whether or not the DIME physician selected meets required qualifications

On August 7, 2015, the Respondents filed a Notice and Proposal to Select a DIME Examiner. Following receipt of this document, the parties have 30 days to negotiate and select an IME pursuant to C.R.S. § 8-42-107.2(3)(a). If the parties are unable to agree, the insurer is to give notice of this fact to the Division within 30 days. Then, C.R.S. § 8-42-107.2(3)(a) provides, in pertinent part,

> The division shall then, within ten days after receiving such notice, select three physicians by a revolving selection process established by the division from the list of physicians maintained by the division.
>
> **…**
>
> The director of the division shall promulgate rules to implement the process of selecting a panel of three physicians from which the parties may select a physician to conduct a division independent medical examination. The selection of a physician panel shall be based on various factors, including, but not limited to, the designation by rule of the fields of specialization authorized to perform independent medical examinations for conditions listed under each medical treatment guideline and measures to prevent the over-utilization of physicians or specialists. The requesting party shall have the opportunity to strike one of the three physicians from the list, followed by the opposing party who shall then be given the opportunity to strike one physician from the list. The remaining IME physician shall be designated by the division to conduct the IME. If one or neither party strike a physician from the list, the division shall select the physician to conduct the IME from the remaining physicians on the list.

Prior to making a determination to strike a physician from the list of IME physicians per C.R.S. § 8-42-107.2(3)(a), a party is entitled to obtain and review a summary disclosure pertaining to any business, financial, employment, or advisory relationship between a listed physician, or any entity affiliated with the physician, and the insurer, self-insured employer, or claimant who is a party to the claim.

The provisions of WCRP, Rule 11-3 (C), as promulgated by the director, require the DIME Unit to select a panel of three physicians based upon the requesting party's designation of geographic area and body parts or medical conditions to be evaluated as listed on the DIME application. Rule 11-3 (C) specifically provides:

> The three-physician panel will be comprised of physicians based on their accreditation to perform impairment ratings on the body part(s) and/or

> medical conditions designated by the requesting party on the IME application.

In this case, prior to the selection of the DIME physician, the Claimant filed an Application on October 10, 2015 listing “propriety of the DIME Application” as an issue. On October 20, 2015, the Claimant filed a second Application for Hearing endorsing the issues of “propriety of DIME panel selection and physician specialties, contrary to Claimant’s DIME rights as expressed in *AFL-CIO v Donlon* and *Whiteside v. Smith*, contrary to the Claimant’s true treatment and diagnostic needs and extent of his (sic) occupational impairments and to hold the DIME process in abeyance per *Jesus Munoz v ICAP* and *JBS Swift & Compan*y.”

The parties ultimately received notice that the Division selected Lloyd Thurston, DO to perform the Division Independent Medical Examination on January 15, 2016. Because Dr. Thurston was not an orthopedic surgeon nor a neurologist and the Claimant’s authorized treating physician was not an orthopedic surgeon nor a neurologist, nor did he refer the Claimant to one of these specialists during her treatment for this work injury, the Claimant has argued that the Claimant has been denied determination of maximum medical improvement by a person who would be competent to render such a decision.

Under C.R.S. § 8-42-107(8)(b)(I), an authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement. It is undisputed that Dr. Charbonneau is the Claimant’s authorized treating physician, and that Dr. Charbonneau determined the Claimant reached maximum medical improvement for this work injury as of July 13, 2015. Contrary to the Claimant’s argument that Dr. Charbonneau was not competent to determine MMI, the Worker’s Compensation Act specifically provides that an authorized treating physician determines maximum medical improvement. The Worker’s Compensation Act consistently provides that no specialist is required to determine MMI in C.R.S. § 8-42-107.2(3)(a), which specifically discourages the overutilization of specialists.

Furthermore, the case cited in the Claimant’s October 20, 2015, application for hearing, *Colorado AFL-CIO v. Donlon*, supports Respondents’ position, stating:

> The claimant's treating physician makes the initial determination of MMI and degree of impairment. Since these two facts are of considerable financial consequence, they have historically been the subject of extensive litigation. The General Assembly sought to decrease such litigation by providing that, if either party disputes the finding of the treating physician as to MMI or degree of impairment, that party may require that an independent medical examination (IME) be performed.
>
> *Colorado AFL-CIO v. Donlon*, 914 P.2d 396, 401 (Colo. App. 1995).

As found, the Respondents timely disputed the impairment rating of Dr. Reichhardt adopted by Dr. Charbonneau. In this case, it does not appear that the

Claimant is not challenging application of the rules. The Claimant presented no evidence or argument that DOWC or the DIME Unit specifically violated any rules. Rather, the Claimant appears to present a facial challenge of the DIME process and is disputing the Worker's Compensation Act and Worker's Compensation Rules of Procedure themselves.

The Claimant provides no legal authority to prevent Respondents' statutory right have Dr. Thurston as the DIME selected to review the authorized treatment provider's impairment rating. In fact, Claimant's counsel has previously raised a nearly identical issue in multiple claims, all of which have dismissed this issue. *See Alfredo Leyva v. NextEra Energy, Inc.,* W.C. No. 4-934-570; *Barrios v. Morgan County Schools*, W.C. No. 4-646-145; *Archuleta v. Hi-tech Auto Body, Inc.*, W.C. No. 4-684-250; *Verdin v. Safeway*, W.C. No. 4-682-903, *Caro vs. Johnson Controls*¸ W.C. No. 4-786-424 (ICAO, May 12, 2010); *Rodriguez v. Safeway Stores, Inc.*, W.C. No. 4-712-019 (ICAO, Sept. 10, 2008); *Hester v. Eco Express, LLC*, W.C. No. 4-838-236 (ICAO, Sept. 10, 2013); *Emily Maestas v. Wal Mart Stores, Inc.,* (ICAO, Jan. 22, 2009).

Having considered the evidence and argument in the context of C.R.S. § 8-42-107.2 and WCRP 11-3, the Claimant failed to show any persuasive authority to support the argument that she has the right to apply for hearing to contest selection of the three-physician panel under Rule 11-3 (C) in this case. As found, Rule 11-3 (C) requires the DIME Unit to select panel physicians based upon the level of accreditation through the division, and not based upon area of practice. There was no persuasive evidence presented that the physicians selected for the three-physician panel were not Level II accredited. During hearing, counsel for the Claimant explicitly agreed that Dr. Thurston is Level II accredited. The Claimant has not produced any evidence to support an inference that the DIME unit failed to comply with its procedures or that Dr. Thurston is not qualified to perform the DIME. Therefore, the Claimant failed to raise an issue upon which an administrative law judge could grant relief.

The DIME process is no longer held in abeyance

The Claimant failed to attend a DIME on March 9, 2016 with Dr. Lloyd Thurston and the Respondents sought an order compelling the Claimant's attendance at a DIME scheduled for April 13, 2016. After considering the argument of counsel, a PALJ granted the Respondents' motion with conditions. Namely, he ordered attendance at a rescheduled May 25, 2016 DIME evaluation unless vacated by order of an OAC ALJ.

At the hearing held on April 29, 2016, the undersigned ALJ ordered that the Claimant was relieved of compliance with PALJ Craig Eley's Order requiring the Claimant to attend a DIME evaluation with Dr. Thurston on May 25, 2016 in order to provide sufficient time for the parties to submit briefs in this matter and for the ALJ to issue an order. The ALJ ordered that the Claimant must work with Respondents to reschedule a DIME evaluation with Dr. Thurston to be scheduled between June 10, 2016 and July 10, 2016 and that the Claimant shall attend that DIME evaluation unless ordered otherwise.

Having considered the evidence and arguments presented at hearing and in the post-hearing briefs (see below), the ALJ determines that this order does not change the Claimant's obligation to attend the rescheduled DIME evaluation with Dr. Thurston. The Claimant remains under order compelling her attendance at the most recently scheduled DIME evaluation with Dr. Thurston.

Consideration of the allegation of a longstanding pattern of bias or predisposition with respect to the Claimant's attorney

ALJs are presumed to be competent and unbiased until the contrary is shown. *Halfmo Salad v. JBS USA, LLC,* W.C. 4-886-842-04 (ICAO, September 23, 2013), citing *Wecker v. TBL Excavating, Inc.,* 908 P.2d 1186 (Colo. App. 1995). In the absence of an allegation that an ALJ had a "personal, financial, or official stake in the decision which would evidence a conflict of interest on his part" a Claimant does not make a showing of bias or predisposition. *Neoplan USA Corp. v. Industrial Claim Appeals Office,* 778 P.2d 312, 314 (Colo. App. 1989).

Other than, potentially, the Claimant's request that the ALJ take administrative or official notice the contents of the underlying related case computer entries and Office Administrative Courts' and Division of Worker's Compensation and I.M.E. Unit files in consideration of this matter, pursuant to C.R.E. 201, which the ALJ declined to do, the Claimant failed to offer any evidence of a longstanding pattern of bias or predisposition of any PALJ or ALJ involved in any of the five consolidated Applications for Hearing in this claim.

In any event, the ALJ lacks jurisdiction to hear this allegation. This is not a matter arising under the Workers' Compensation Act. More precisely, allegations of bias against the Claimant's counsel do not constitute a dispute between an employee and an employer/insurer regarding a work-related injury.

Whether the Respondents have proven that attorney fees and costs should be assessed against the Claimant's attorney for pursuing unripe issues pursuant to C.R.S. § 8-43-211(3).

C.R.S. § 8-43-211 (3) provides,

> If an attorney requests a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, the attorney may be assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing or setting. The requesting party must prove its attempt to have an unripe issue stricken by a prehearing administrative law judge to request fees and costs. Requested fees or costs incurred after a prehearing conference may only be awarded if they are directly caused by the listing of an unripe issue.

This statute authorizes a party to seek its fees and costs incurred before the hearing and without reference to the guidelines for seeking attorney fees and costs provided by other statutes or by court rules. *Youngs v. Industrial Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012). Rather, the amount of attorney fees and costs assessed under C.R.S. § 8-43-211(3) is left to the sound discretion of the ALJ. *Id.* An ALJ does not abuse discretion unless the order is beyond the bounds of reason, as where it is unsupported by the law or contrary to the evidence. *Pizza Hut v. Industrial Claim Appeals Office,* 18 P.3d 867 (Colo. App. 2001); *McMeekin v. Memorial Gardens,* WC 4-384-910 (ICAO November 15, 2012).

The statute does not define "ripe for adjudication." However, the Colorado Court of Appeals has found that "generally, ripeness tests whether an issue is real, immediate, and fit for adjudication." *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006); *also see Silviera v. Colorado Springs Health Partners,* W.C. 4-502-555 (I.C.A.O. November 8, 2011). In general, under the doctrine of ripeness courts will not consider uncertain or contingent future matters because the injury is speculative, may never occur and might resolve prior to the court's determination. See, *Stell v. Boulder County Dep't of Social Svcs*., 92 P.3d 910 (Colo. 2004).

Of the Claimant's five applications for hearing, all of which endorsed issues regarding the DIME directly or indirectly, four were filed before the DIME examiner was confirmed on January 19, 2016 (Applications dated October 9, 2015, October 20, 2015, December 7, 2015 and December 24, 2015). In these Applications for Hearing, the Claimant endorsed issues for hearing contesting the propriety of the DIME and DIME examiner's qualifications prior to the DIME examiner's confirmation. The Respondents argue that these issues were unripe at the time they were filed as they disputed an uncertain future matter, the DIME physician to be selected, and that had not yet been determined and that, furthermore, the DIME examination has still not occurred. Respondents thus contend that it is unknown whether the DIME examiner Dr. Thurston will agree with Dr. Charbonneau's date of MMI and the impairment rating assigned to the Claimant or if he will reach a different determination. Therefore, any allegations of injury to the Claimant related to DIME selection were speculative at the time the Claimant filed the first four Applications for Hearing in this case.

On this issue, the Claimant states in her post-hearing position statement,

> Nor is Respondents' utterly vague, amorphous, specious, and conclusory allegation of "unripeness" in any manner, way, shape, or form compatible with a claim for dispositive relief, since they are mutually repugnant, self-contradictory, and inherently inconsistent and incompatible concepts. Indeed, no manner of substantive adjudication is permissible as to "unripe" claims. Accordingly, as a matter of law and procedure, no unripe claim may even be the subject of a dispositive motion, which necessarily seeks relief on the merits. Rather, an unripe claim is one which by its very nature is not "ripe" for adjudication as a matter of law.

In ruling on the issues related to propriety of DIME panel selection, physician specialties, preemptive DIMEs and the timeliness of the DIME applications related to this individual case, the ALJ has either denied and dismissed the claims for lack of persuasive supporting evidence or found that the Claimant failed to raise an issue upon which relief could be granted. With respect to allegations that went beyond this individual case and alleged that the statute or its administration by the Division is unconstitutional, the ALJ determined that she lacked jurisdiction. While the issues were denied and may, in some instances, be groundless and frivolous, this is distinct from a finding that the issues were unripe. Because the Workers' Compensation Rules of Procedure provide that disputes concerning the DIME process that arise in individual cases may be presented to an ALJ for resolution, there is no legal impediment to immediate adjudication of these disputes. *Rodriguez v. Safeway Stores, Inc.,* W.C. 4-712-019 (ICAO, September 10, 2008). A challenge to the DIME panel is also ripe even where the ALJ ultimately determines there is no jurisdiction to proceed because the DIME has not yet occurred. While the Claimant may not prevail due to lack of jurisdiction, there is no legal impediment to immediate adjudication. *Maestas v. Wal Mart Stores, Inc.,* W.C. 4-717-132 (ICAO, January 22, 2009). Therefore, the Respondents have not established that attorney fees and costs should be assessed against the Claimant's attorney for the issues related to propriety of DIME panel selection, physician specialties, preemptive DIMEs and the timeliness of the DIME applications.

The Claimant also filed two Applications for Hearing for review of issues to be heard at prehearing conferences, before the prehearing conferences took place or a pending order was issued. The Claimant filed an Application for Hearing on December 7, 2016 to, "resolve issues raised by the Respondents' Motion to Strike Issues dated November 23, 2015, pursuant to *Gustavo Lozano v. Front Range Rebar Co., Inc*." This matter was under advisement by PALJ Harr at the time the Claimant's application for hearing was filed and the PALJ had ordered the parties to brief the issues. PALJ Harr did not issue his order until December 18, 2016. The Claimant also filed an Application for Hearing on February 15, 2016 on the issue of "to resolve issues raised by the Respondents' prehearing scheduled for February 16, 2016." Obviously, the prehearing conference of February 16, 2016, had not taken place. There was no disputed issue or actual controversy between the parties as no order had been issued by the prehearing judge. The Claimant's Application for Hearing involved uncertain future matters with speculative injury that, at the time the Claimant filed her Application for Hearing, might never occur. While the ALJ may later review the orders of the PALJ (see above), as long as the matters were being considered by the PALJ, there was no real and immediate issue fit for adjudication before the ALJ. Thus, the ALJ finds that these two issues endorsed by the Claimant were unripe. In the Claimant's Response to the Respondents' Motion for Attorney's Fees and Costs, the Claimant's attorney characterizes the December 7, 2015 and February 15, 2016 Applications for Hearing as "*Lozano* Applications" filed for the "procedural mechanism to accordingly divest the PALJ's jurisdiction over the issue(s) endorsed for prehearing and to place it instead within the jurisdiction of the Office of Administrative Courts ALJs for determination at a duly conducted hearing theron on the record." Claimant's counsel further states that, "it should be noted that the undersigned has been filing countless such *Lozano* Applications for this very purpose in a myriad of Worker Compensation proceedings over the course of the last 18 years. Thus, the Claimant's attorney acknowledges a long-standing practice of filing similar Applications for Hearing containing issues which are not ripe for adjudication at the time such filing is made.

The Respondents endorsed the issue of attorney's fees and costs and the relevant statute, C.R.S. § 8-43-211 (3), on each applicable Response to Application for Hearing. The Respondents also made the requisite attempt to strike the Claimant's unripe issues at prehearings held November 13, 2015 and February 16, 2016. Attorney fees and costs may be awarded for unripe issues endorsed in Applications for Hearing even when other issues raised in the same Applications were ripe for adjudication. *Youngs v. Industrial Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012).

The Claimant's attorney is ordered to pay attorney's fees and costs to Respondents for defense of only the issues endorsed in the Claimant's December 7, 2015 and February 15, 2016 Applications for Hearing related to review of issues pending before Prehearing ALJs prior to the PALJs rulings on the same.

Award of Attorney Fees and Costs Pursuant to C.R.S. § 8-43-211(3)

As found above, the ALJ determined that the Claimant's attorney was ordered to pay attorney's fees and costs related to two of the five Applications for Hearing that Claimant filed in this consolidated case. Respondents filed a Motion seeking attorney fees of $6,749.00 and costs of $169.28. In support of the Motion, Respondents filed detailed billing information. The Claimant did not object to any specific items in the billing information, but rather asserted a blanket objection to any award of fees or costs arguing that the issues endorsed in the Claimant's December 7, 2015 and February 15, 2016 Applications for Hearing were ripe for adjudication.

The ALJ has reviewed the information provided by the parties and has determined that the Respondents seek attorney fee and cost amounts in excess of that permitted by the ALJ's preliminary Order of June 10, 2016 and in excess of that permitted by C.R.S. § 8-43-211(3). No party requested a hearing on the issue of attorneys fees pursuant to C.R.C.P. Rule 121, §1-22(2)(c), nor was discovery on the issue of attorney fees requested pursuant to C.R.C.P. Rule 121, §1-22(2)(b). However, the billing information provided by Respondents is sufficiently detailed for the ALJ to make findings to support a determination of the amount to be awarded as attorneys fees and costs in this case in compliance with the standard of C.R.C.P Rule 121, §1-22(c) and as provided by C.R.S. § 8-43-211(3).

The ALJ has reviewed billing detail provided by Respondents containing 104 unredacted line items of billing entries and has made adjustments to the amounts sought by Respondents. The adjustments were made to reasonably calculate an award for amounts directly related to the endorsement of unripe issues. Certain billing items listed were permitted in their entirety, certain billing items were stricken as unrelated, and certain items were modified. The first two categories are self-explanatory. As for the modified items, the billing appeared to be for preparation and legal work related to all five Applications for Hearing that were a part of the consolidated hearing held on April 29, 2016. The ALJ apportioned these billing items so that only 2/5 of the amount was taxed as costs or attorney fees because the remaining 3/5 of the billing item is attributed to the three Applications for Hearings for which no award of attorney fees and costs was made. The line item review is set forth in *Exhibit A* to this Order. The first part of *Exhibit A* sets forth the line item analysis and any modification to the original amount sought by Respondents. The second part of *Exhibit A* identifies the specific line items by number as the line items were listed in the Respondents' billing information for ease of reference.

Please refer to *Exhibit A* to this Order for detailed analysis of the amounts requested for attorney fees and cost versus the amounts awarded. Based on the line item analysis, the ALJ orders the attorney for the Claimant to pay $3,004.27 to the Respondents pursuant to C.R.S. § 8-43-211(3).

ORDER

It is therefore ordered that:

1. The Claimant has failed to prove the Respondents failed to follow the statutorily prescribed procedure to preserve the right to a Division IME in this case. The Claimant also failed to prove that the DIME unit failed to comply with its procedures or that Dr. Thurston is not qualified to perform the DIME. Therefore, the Claimant failed to raise an issue upon which an administrative law judge could grant relief and the Claimant's issues of propriety of the DIME Application and propriety of the DIME selection and physician specialties are dismissed.

2. The Claimant is ordered to attend the DIME appointment with Dr. Thurston that has been rescheduled for June 22, 2016.

3. The ALJ lacks jurisdiction to consider the Claimant's issue of bias or predisposition toward the Claimant's counsel and this issue is dismissed.

4. The Claimant has failed to prove any penalty should be assessed against the Respondents for an untimely filing of the General Admission or DIME Application or for requesting attorney fees and relief beyond a PALJ's authority and all penalty claims asserted by the Claimant against the Respondents are dismissed.

5. The Claimant's attorney is ordered to pay attorney's fees and costs to Respondents for defense of only the issues endorsed in the Claimant's December 7, 2015 and February 15, 2016 Applications for Hearing related to review of issues pending before Prehearing ALJs prior to the PALJs rulings on the same.

6. The attorney for the Claimant to pay $3,004.27 to the Respondents pursuant to C.R.S. § 8-43-211(3).

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 14, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-981-802-02

ISSUES

➢ Whether claimant suffered a compensable injury on December 6, 2013?

➢ Whether claimant is entitled to medical treatment, specifically right shoulder surgery, as a result of his alleged injury on December 6, 2013?

➢ Whether Respondents violated C.R.S. § 8-43-103(1) or W.C.R.P. 8-2(A), and if so, whether claimant is entitled to an award of penalties.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer hired claimant on June 9, 2012 and employed his as a foreman.

2. Six months prior to Claimant's accident, he underwent Laterjet right shoulder surgery to stabilize it. Claimant had a history since age 13 of repeated and frequent dislocations. Prior to his surgery, his shoulder would dislocate as many as seven or eight times a day.

3. November 26, 2013 medical records show that Claimant sought treatment for right shoulder pain and that he was being tapered off of Percocet.

4. Claimant alleges that he sustained right shoulder and neck injuries as a result of rear end collision that took place on December 7, 2013.

5. On December 7, 2013, Claimant was working with a crew near San Antonio, Texas. Claimant was seat-belted while driving Employer's Ford F250 work truck. Claimant stopped at a stop sign or red light and the truck was rear-ended by a light weight vehicle. Claimant testified that the impact was severe, that the truck was hit by a vehicle travelling at least 55 miles per hour, and reported to at least one medical provider that he was thrown violently around in the vehicle.

6. Claimant's testimony and reports were contradicted by the testimony of Oliver Singleton who testified live at hearing. Mr. Singleton works as a supervisor for Employer and has worked for Employer approximately four years. Mr. Singleton was in the vehicle with Claimant on December 7, 2013. Mr. Singleton, who was riding unrestrained in the back seat, testified that he would characterize the rear end collision as very minor. The work truck was large and heavy and was rear ended by what he believed was a smaller, light weight SUV. He did not believe the vehicle that rear ended them was traveling at a high rate of speed at impact. Rather, he testified that he did not even realize they had been hit from behind, instead believing the truck had downshifted.

Mr. Singleton did not sustain any injury nor was he moved around the vehicle in any appreciable way. He testified that it would not be accurate if Claimant told medical providers that the vehicle that rear ended them was traveling 55 miles per hour. He also testified that it would not be accurate if Claimant told medical providers that the individuals in the vehicle were thrown around violently when they were rear ended. Finally, there was very minor damage to the truck they were driving as a result of collision.

7. Claimant's testimony and reports also were contradicted by the police report which described a "minor accident" that received a "non emergency" response; and Methodist Hospital records which indicate that the work truck was hit by a "Kia compact car" at moderate speed. Further, Claimant was able to drive the truck back to Colorado without any repairs. The record provides details of a minor collision.

8. Claimant's hearing testimony is also contradicted by his earlier report to Dr. Hattem. Claimant later reported to Dr. Hattem during an October 28, 2015 IME that the driver of the other vehicle pulled up alongside the truck and said that if everyone was okay, he would be leaving. Such would not be the case if the other vehicle sustained damage, and also indicates that neither the driver or passengers, if any, in the smaller car sustained serious injuries.

9. Claimant dropped his coworkers off at the job site, and drove himself to Methodist Hospital. Claimant complained of mild pain and identified the location of his pain as his neck. Claimant presented in no acute distress. Claimant had decreased range of motion in his neck due to pain and was noted to have a mild muscle spasm in the back of his neck. Claimant did not report shoulder symptoms or complain of right shoulder pain at the hospital, yet testified at hearing that his right shoulder was his worst injury. Diagnostics were not necessary. Claimant was diagnosed on examination with a cervical strain. Claimant was given ten Flexeril tablets and was instructed to take ibuprofen. Claimant was taken off work for three days and was not to lift more than ten pounds "until well." Claimant was seen at 8:18 a.m. and discharged at 8:44 a.m.

10. That same day, Claimant retained an attorney after speaking with the insurance carrier for the other driver. The attorney referred Claimant to chiropractor Dr. Graham in Colorado. Claimant saw the chiropractor twenty-four times between February 28, 2014 and February 27, 2015. Dr. Hattem described the chiropractor's handwritten notes as illegible.

11. Claimant rested the day of the accident and the following day. He returned to supervise the work the next day.

12. Employer's pay records show that during the week following the accident, Claimant worked 72.75 hours as a laborer and driller. The following week, Claimant worked 54 hours. No persuasive evidence supports a finding that Claimant worked under any restrictions during that time. Claimant continued to work full time for several months. Claimant's ability to work at heavy labor for extended hours support a finding that Claimant was not injured.

13. Claimant testified that after he returned to Colorado, he told Employer's owner, Mike Davis, that he had shoulder pain. Claimant did not say that his shoulder pain was a result of the accident. Claimant testified that Employer allowed Claimant to drive a dump truck until that work became unavailable. As an equipment operator, Claimant was paid $19.78, a higher hourly rate that he was paid as a laborer or driller, $15.00 and $16.93 respectively.

14. On December 30, 2013, Claimant sought care at St. Thomas More. He complained of neck pain since the accident, with migraines and restricted neck movement. Claimant had not taken any pain medication for two weeks. Claimant did not report right shoulder symptoms. A CT scan of Claimant's neck was performed and read as negative.

15. Claimant was to follow up with his PCP, Dr. Button. However, Claimant testified that Dr. Button did not treat Claimant because he did not see patients for motor vehicle accidents. Claimant returned to Dr. Button in October, 2014. Dr. Button's October 22, 2014 report notes that Claimant's automobile coverage had ended and that Claimant needed Medicaid coverage.

16. The ALJ reasonably infers from this fact and from the fact that Claimant retained counsel on the day of the accident that Claimant chose to pursue treatment under automobile coverage rather than pursue a claim under workers ' compensation.

17. On February 4, 2014, Claimant sought treatment at Button Family Practice after he fell on ice. The record of that visit notes a "right shoulder injury….this a.m. fell on ice with outstretch[ed] right arm to catch fall."

18. When Claimant was seen by Dr. Graham on February 28, 2014, Claimant did not mention injuring his right shoulder when he fell on ice on February 4, 2014. Rather, he refers only to the rear end collision on December 7, 2013, and mentions right shoulder pain and neck pain.

19. On March 14, 2014, Claimant sought treatment from Dr. Weinstein who documented Claimant "denies any neck pain, numbness, tingling, or motor weakness." Claimant did not mention his February fall on ice. Rather, he reported to Dr. Weinstein that he "had a significant shoulder injury" due to a car accident.

20. Claimant's interrogatory responses, signed and notarized on November 16, 2015, were admitted into evidence at the hearing. Interrogatory no. 7 propounded the following question to Claimant:

> **Question**: Other than your injury in this claim, describe in detail any accidents, physical injuries, diseases, or other health problems, whether or not work-related, that you have sustained, including the date of the injury, the name of any medical provider who treated the injury, and any permanent disability sustained from the injury.

Claimant answered: “I underwent a surgery with Dr. FitzPatrick in 2013 to fix my right dislocated shoulder. After the accident on December 6, 2013, I underwent another surgery on my right shoulder with Dr. David Weinstein in March 2014. Also, I was involved in a motor vehicle accident on March 14, 2015 and had to undergo right shoulder replacement surgery with Dr. FitzPatrick in June 2015. I’m scheduled to undergo left shoulder surgery with Dr. FitzPatrick on November 20, 2015.”

21. Claimant’s answer failed to disclose the following events which required emergency room care:

- On January 20, 2009, claimant was assaulted and sustained cervical trauma at C2-3.
- On July 31, 2009, Claimant was riding on the back of a truck which hit a large boulder and claimant was thrown into a rail. Claimant reported chest pain that radiated into his axilla, and subsequent loss of consciousness.
- On February 15, 2010, Claimant fell 8 feet off his truck and dislocated his left shoulder.
- On July 4, 2010, Claimant injured his right shoulder when it popped out of place and he could not move his hand.
- On October 3, 2011, Claimant hit a deer while driving 60 mph. The St. Thomas More Hospital records document neck pain.
- On May 9, 2013, Claimant injured his arm and shoulder when climbing over a horse panel.
- On May 30, 2013, Claimant was seen at Centura Health for “right shoulder recurrent instability.”
- On February 4, 2014, Claimant injured his right shoulder when he slipped and fell on ice with his right arm outstretched to catch his fall.
- On September 9, 2014, Claimant sustained a hernia when lifting a car engine.
- On January 9, 2015, Claimant had “left inguinal hernia surgery three months ago, and reinjured himself at work while pulling and straining on heavy machinery.”

22. Interrogatory no. 12, propounded the following question:

> **Question**: Describe your current daily activities, including any hobbies, sports, or recreational activities in which you

> participate. Be sure to include whether you ride bulls or other animals, and if so, whether you have sustained any injuries from this activity.

Claimant answered: "I am very limited with my daily activities. I cannot carry heavy items, or anything over 5 lbs. I have hard time with daily chores: carrying groceries, sweeping, moping; my right arm doesn't work property. I used to go water skiing, tubing behind the boat. And I'm unable to do those activities since the injury. Occasionally, I used to ride horses, and now I'm unable to do that. I never fell from the horse before. I do not ride bulls or other animals, and I never had any injuries from riding horses."

23. Claimant's response is inconsistent with the following:

- On August 26, 2012, medical records from St. Thomas More Hospital document Claimant: "Got bucked off of horse landed on tail bone…..low back pain."

- On cross examination at hearing, after being a shown a picture of himself participating in a "Warrior Dash Race", Claimant acknowledged that it was him in the picture and he participated in the race in August, 2015. The picture shows Claimant doing some type of water crossing with both arms above his head climbing across a rope ladder in an obstacle course. At hearing, Claimant also acknowledged that he posted this picture social media.

24. Mr. Davis testified at hearing that he knew his crew was involved in a rear end collision on December 7, 2013, while were working in San Antonio, Texas. He spoke with Claimant immediately after the accident and Claimant told him that he had called the police to make a report, he was not injured, and that the vehicle sustained only minor damage. Claimant told Mr. Davis that he and a coworker were going to the hospital to be evaluated, and later reported that they were not injured.

25. Mr. Davis testified that if Claimant were to have reported an injury to him, he would have prepared a first report of injury and directed Claimant to see a workers' compensation physician. Mr. Davis testified that he has protocols in place and adheres to the workplace rules regarding reporting work related injuries. Mr. Davis has dealt with other employee's work related injuries with Employer in the past and prepared reports of injury accordingly.

26. Although Claimant testified that Mr. Davis told him the accident was not covered by workers' compensation because Claimant was not "on the clock" when he was injured, Mr. Davis denied making the statement. Further, Mr. Davis testified that he did consider all of his crew in the vehicle on December 7, 2013 to be at work and on the clock, and had handled a previous workers' compensation claim where that was the case.

27. Mr. Davis testified that Claimant abandoned his job in April of 2014 and, to

his knowledge, left to start a business servicing radiators and working on cars. Mr. Davis did not speak to claimant after April of 2014.

28. Mr. Davis first learned that Claimant was reporting a work related injury due to the rear end collision on December 7, 2013, in April of 2015, when he received notice from Pinnacol Assurance that a claim had been filed.

29. On January 20, 2015, Claimant was seen at Valley Wide Health Systems. He reported, "Approximately 1 year ago he was read ended by a car traveling > 55mph and was thrown violently around the car and sustained additional damage to the right shoulder."

30. On March 14, 2015, Claimant was involved in a significant non work-related high speed motor vehicle accident. Claimant was an unrestrained passenger driving with his father and was ejected from the car during a rollover accident. Claimant lost consciousness and sustained multiple injuries including head trauma, a right shoulder fracture, left rib fracture, pelvic fracture, and multiple lacerations.

31. On April 30, 2015, Claimant filed a worker' claim for compensation for alleged injuries that he sustained on December 7, 2013. On the same day, Claimant prepared a first report of injury for the alleged injuries on December 7, 2013.

32. Dr. Albert Hattem, M.D., performed a Respondents Independent Medical Examination (IME), of Claimant and issued a report on October 25, 2015. As part of his IME, Dr. Hattem evaluated Claimant, took Claimant's medical history, and reviewed Claimant's medical records. Dr. Hattem opined:

- It was not plausible that the December 7, 2013 accident could lead to a significant aggravation of the Claimant's preexisting right shoulder condition. It was not likely that the mechanism of injury could even result in any type of shoulder injury.

- The shoulder surgery performed by Dr. Weinstein in 2014 was not related to the December 2013 rear end accident.

- Claimant was involved in a catastrophic second motor vehicle accident in March 2015. But for the second motor vehicle accident, Claimant would not have required a right total shoulder arthroplasty done in 2015.

33. Dr. Hattem attended the hearing. However, due to time constraints, he was unable to testify live and the Judge permitted his post hearing deposition, which took place on May 13, 2016. The deposition transcript was admitted as Respondent's Exhibit W.

34. Dr. Hattem testified as an expert in occupational medicine. He testified that he asked Claimant about his prior injuries and physical problems. Claimant did not disclose to him: injuring his neck in an assault in 2009, injuring his neck injury in 2011

when he hit a deer going in excess of 60 miles per hour, injuring his right shoulder injury in May of 2013 when he fell climbing over a horse panel, injuring his right shoulder in February of 2014 when he slipped and fell on ice.

35. Dr. Hattem opined that based on his review of the medical records, Claimant had a pre-existing history of neck pain and right shoulder pain, which pre-dated the December 7, 2013 accident.

36. Six months prior to the December accident, Claimant had a Laterjet right shoulder surgical procedure, which has complication/failure rates as high as 25-30%.

37. Dr. Hattem testified that when Claimant was evaluated at Methodist Hospital in San Antonio, essentially no treatment was administered and no diagnostics were conducted, and it appeared to be a minor incident.

38. Dr. Hattem would not relate Claimant's need for shoulder surgery to the December 7, 2013 rear end collision for multiple reasons. First, "the mechanism of injury is not consistent with the shoulder condition. His car was just pushed forward." Second, Claimant did not mention shoulder pain or injury at Methodist Hospital. Third, Claimant did not report shoulder injury or pain later at St. Thomas Moore. And fourth, Claimant most likely sustained a non work-related right shoulder injury on February 4, 2014, when he slipped and fell on ice with his right arm outstretched.

39. Dr. Hattem opined that Claimant's fall on February 4, 2014, was the proximate cause for Dr. Weinstein's right shoulder surgery that occurred on June of 2014.

40. Dr. Hattem opined that Dr. Graham and Dr. Weinstein did not have medical records from Claimant's initial hospital visits, and therefore did not have an accurate picture of Claimant's pre-existing medical history, nor an accurate understanding of the severity of the December 7, 2013, accident. Claimant's cervical MRI was normal, and "there was no objective evidence of there being any cervical spine pathology at all." The rear end collision of December 7, 2013 did not aggravate Claimant's preexisting right shoulder condition or neck condition.

41. The testimony of Dr. Hattem is credible and persuasive.

42. The documentary evidence as well as the testimony of Mr. Davis and Mr. Singleton, is more credible and persuasive than the testimony of Claimant.

43. Claimant's testimony is not credible.

44. Claimant has not met his burden of proving by a preponderance of the evidence that he sustained a work-related injury on December 7, 2013.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence dispositive of the issues involved. The ALJ has not addressed every piece of evidence leading to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010). It is the sole province of the fact finder to weigh the evidence and resolve contradictions therein. See *Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001).

When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. Section 8-43-210, C.R.S.

An injury is compensable under Colorado's Workers' Compensation Act if incurred by an employee in the course and scope of employment. § 8-41-301(1)(b), C.R.S.; *Price v. ICAO,* 919 P.2d 207 (Colo. 1996). Claimant must show a connection between the employment and the injury, such that the injury has its origin of the employee's work-related functions, and is sufficiently related to those functions to be considered part of the employment contract. *See Madden v. Mountain W. Fabricators*, 977 P.2d 861 (Colo. 1999).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. ICAO*, 107 P .3d 999, 1001 (Colo. App. 2004). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *Id*. The ALJ finds and concludes that Claimant presented no persuasive evidence that his condition was aggravated, accelerated, or combined with the pre-existing disease or infirmity to produce a disability or need for medical treatment.

Claimant is not credible. His account of the December 7, 2013 accident is contradicted by the vast weight of documentary evidence and the consistent and credible testimony of other witnesses. Also, his reporting of the severity of the accident became exaggerated over time. His interrogatory response about previous injuries was vastly understated, as were his responses about his physical abilities. His account of his work limitations is contradicted by payroll records which show that the worked 72.75 hours as a laborer and driller the week immediately following his accident and 54 hours the following week.

The ALJ credits the opinions of Dr. Hattem as credible and persuasive. Neither Dr. Graham nor Dr. Weinstein had an accurate picture of Claimant's prior medical history, did not possess his medical records, and had only Claimant's subjective reporting to rely on regarding the rear end collision on December 7, 2013. Because the ALJ has found Claimant not credible, she further discredits the opinions of Dr. Graham and Dr. Weinstein as they relied on Claimant's reporting.

The evidence supports the conclusion that Claimant chose not to pursue a workers' compensation claim until long after the incident. Rather, he retained an attorney and deliberately chose to pursue coverage under the other driver's auto policy. His reports to Mr. Davis that he was uninjured, his initial medical evaluation, and other persuasive evidence all support the conclusion that Claimant was not injured in the December 7, 2013 accident.

Therefore, the ALJ concludes that based on the totality of the evidence, Claimant did not meet his burden of proving by a preponderance of the evidence that he sustained a compensable injury. Because the ALJ finds and concludes that Claimant did not sustain a compensable injury, she likewise finds and concludes that Claimant is not entitled to medical treatment, specifically right shoulder surgery.

Claimant has also failed to prove entitlement to penalties based on the alleged violation of 8-43-103(1) or WCRP 8-2. In relevant part, 8-43-103(1) provides:

> Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the division and insurance carrier, unless the employer is self-insured, within ten days after the injury, and, in case of the death of any employee resulting from any such injury or any accident in which three or more employees are injured, the employer shall give immediate notice thereof to the director. If no such notice is given by the employer, as required by articles 40 to 47 of this article, such notice may be given by any person. Any notice required to be filed by an injured employee or, if deceased, by said employee's dependents may be made and filed by anyone on behalf of such claimant and shall be considered as done by such claimant if not specifically

> disclaimed or objected to by such claimant in writing filed with the division within a reasonable time.

As found, Claimant did not report an injury to Mr. Davis due to the rear end collision of December 7, 2013. Rather, when the two spoke the day of the accident Claimant indicated that he was fine, and that there was minor damage to the truck. When Claimant returned from Texas to Colorado he did not report an injury, and if he had, Mr. Davis would have referred Claimant for medical treatment and filled out the appropriate paperwork to file a workers' compensation claim. Mr. Davis first learned that Claimant was alleging an injury from the December 7, 2013 rear end collision in April of 2015, when he received paperwork from Pinnacol Assurance. Claimant's first report of injury states the "Date employer notified" was "4/30/15". The key provision in 8-43-103(1) is notice of an injury, not just an accident. In this matter, Mr. Davis was well aware that an accident occurred on December 7, 2013; however, he was not notified that an injury resulted from the rear end collision. As a result, Employer will not be penalized for failing to file a notice of injury with the Division.

In addition, the penalty allegations claimant has made are barred by the relevant statute of limitations. Notwithstanding the arguments noted above, Claimant's penalty claims are beyond the time period for requesting penalties under 8-43-304(5). In relevant part, 8-43-304(5) provides: "A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty."

Claimant testified at hearing, and in his discovery responses that were entered into evidence, that he reported a work injury to Mr. Davis, on December 7, 2013. As a result, he was required, pursuant to 8-43-304(5), to file his alleged penalty claim with the director within one year after he knew about the possible penalty. Claimant failed to do this, and instead did not file the alleged penalty request until his initial application for hearing which was filed on June 15, 2015, a year and a half after the alleged penalty.

Claimant has failed to bring this requested penalty within the mandatory timeframe of 8-43-304(5). In addition, Claimant has offered no credible evidence that he somehow did not know the facts giving rise to a possible penalty. Rather, Claimant testified that he reported an injury to his supervisor Mr. Davis the same day it occurred, December 7, 2013.

Finally, with respect to the alleged WCRP 8-2 violation, Respondents contend that the same arguments apply, and in any event, a monetary penalty is not the remedy for such a violation; rather, it is that Respondents lose their right to designate, giving claimant the choice of provider.

The penalty allegations were not plead with specificity as required by 8-43-304(4) and, in any event, have been cured pursuant to 8-43-304(4). As noted above, 8-43-103(1) provides: "Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the division and insurance carrier, unless the employer is self-insured, within ten days after the injury, and, in case of the death of any employee resulting from any such injury or any accident in which three or more employees are injured, the employer shall give immediate notice thereof to the director. If no such notice is given by the employer, as required by articles 40 to 47 of this article, such notice may be given by any person. Any notice required to be filed by an injured employee or, if deceased, by said employee's dependents may be made and filed by anyone on behalf of such claimant and shall be considered as done by such claimant if not specifically disclaimed or objected to by such claimant in writing filed with the division within a reasonable time."

In addition, 8-43-304(4) provides: "In any application for hearing for any penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted. After the date of mailing of such an application, an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonable should have known such person was in violation, no penalty should be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation."

Claimant filed a first report of injury on May 7, 2015. As a result, the alleged penalty was cured. Section 8-43-304(1) provides that if no such notice is given by the employer, "such notice may be given by any person." *See* 8-43-304(1). The filing of the First Report of Injury, which was done by Claimant's own attorney, cured the alleged penalty before an application for hearing was ever filed. Moreover, Claimant has not presented any clear and convincing evidence that Employer knew or should have known that they were in violation of any rule regarding reporting injuries at work. As found, Mr. Davis credibly testified that while he was aware of December 7, 2013, accident, Claimant explicitly told Mr. Davis that he was not injured.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant’s claim for compensation is denied and dismissed.

2. Claimant’s claim for penalties is denied and dismissed.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 14, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease in the form of a right shoulder injury during the course and scope of her employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

3. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period December 9, 2015 through January 20, 2016.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $1,260.63.

FINDINGS OF FACT

1. Employer is a government contractor who services the Fort Carson Army Base. In September 2009 Claimant began working for Employer as a Fire Sprinkler Technician. Her primary job duties include inspecting and testing fire alarm and sprinkler systems for approximately 700 buildings at Fort Carson. Claimant's specific duties include turning valves to fill the system, checking gauges, walking throughout the building to visually inspect the pipes for leaks, shutting down the system after a test is finished and completing paperwork. The testing takes approximately 60-90 minutes per building. If there are no problems with the system, Claimant will proceed to test the next building. If there are problems, Claimant makes recommendations regarding repairs. She may perform minor repairs but most repair and installation projects are subcontracted to others. Claimant generally conducts testing of up to six buildings per day. She spends approximately 90% of her time testing fire alarm and sprinkler systems and the remainder of her time on repairs.

2. Claimant's medical history includes autoimmune and connective tissue disorders. She has been diagnosed with rheumatoid arthritis, osteoarthritis, lupus, carpal tunnel syndrome, Raynaud's syndrome, Sjogrens syndrome, chronic fatigue syndrome, sleep disruption, depression and fibromyalgia. Claimant complained of bilateral shoulder pain dating as far back as January 17, 2002. She also has chronic joint pain involving her back, hips, knees, ankles, feet, elbows, wrists and hands.

3. Claimant testified that she works at least 40 hours each week for Employer. Her job duties require her to use a ladder on a daily basis and she engages in significant, almost continuous, overhead work. To perform her job duties Claimant uses pipe wrenches, band saws, reciprocating saws and an air groover. She noted that she is required to use significant force with pipe wrenches to open valves that are part of the fire suppression system.

4. Supervisor of Employer's High Voltage Shop Rick Fisher also testified at the hearing in this matter. He explained that there are approximately 600-700 buildings with fire suppression systems on Fort Carson. Mr. Fisher noted that Claimant is required to turn valves and monitor gauges in order to test the zones in the fire suppression system. She must also conduct a visual walkthrough to detect leaks in the system. Mr. Fisher specified that testing the fire suppression system in a small building takes about two hours and approximately 40% of the time is spent turning valves. He remarked that about 70% of the valves are below shoulder level.

5. Mr. Fisher commented that Claimant spends approximately 20%-30% of her time engaged in overhead work. Claimant also lifts up to 75 pounds and completes paperwork. Mr. Fisher explained that Claimant engages in a variety of tasks throughout each day and approximately 90% of her job duties involve testing fire suppression systems.

6. Claimant explained that in August 2014 she began to develop right shoulder pain while performing her job duties. She specifically commented that her right shoulder symptoms were the most pronounced while she was loading and unloading ladders as well as using force in turning pipe wrenches. Claimant noted that, because her pain increased over time, she visited an urgent care facility in December 2014.

7. On January 27, 2015 Claimant visited Trisha R. Finnegan, NP-C at Front Range Orthopaedics for an examination. Claimant reported that she had been experiencing right shoulder pain and range of motion difficulties for approximately one year. She denied any specific injury or trauma, but noted that her job duties involved significant overhead work. Claimant remarked that she had received a right shoulder cortisone injection at an urgent care facility on December 3, 2014. Her symptoms initially worsened, but subsequently began to improve. X-rays revealed a type II acromion but were otherwise normal.

8. On February 12, 2015 Claimant underwent a right shoulder MRI. The MRI reflected that the AC joint was relatively unremarkable. However, the MRI also revealed a possible small rim rent type tear in the anterior insertion of the supraspinatus tendon.

9. Claimant reported her right shoulder condition as a work-related injury on February 17, 2015. She claimed that years of repetitive motion caused her right shoulder symptoms. Claimant did not report a specific incident or mechanism of injury.

10. On February 17, 2015 Claimant visited Concentra Medical Centers for an examination. She reported that she began to experience right shoulder pain approximately one year earlier. There was no mechanism of injury except for repetitive overhead use of her shoulders. Claimant was diagnosed with tendinits and impingement syndrome of the right shoulder. She received work restrictions that Employer accommodated by providing an assistant to complete the physical aspects of her job including opening and closing valves. Claimant was only required to instruct her assistant, take readings of the gauges and complete paperwork.

11. On March 17, 2015 Claimant returned to Front Range Orthopaedics for an examination with NP-C Finnegan. Claimant reported that approximately one year earlier she had been stretching at work when she developed right shoulder pain. The pain progressively worsened and was aggravated by her overhead work activities. NP-C Finnegan noted that Claimant's right shoulder symptoms had not improved with conservative treatment. After discussing surgical options, NP-C Finnegan recorded that she would schedule a right shoulder arthroscopy with subacromial decompression, debridement and a rotator cuff repair.

12. On August 12, 2015 Claimant underwent an independent medical examination with Jorge O. Klajnbart, D.O. Claimant reported that her right shoulder symptoms began approximately one year and seven months earlier at work in the absence of a traumatic incident. She denied that "windmill" stretching exercises at work caused her symptoms because she was "achy" before stretching. Dr. Klajnbart noted that Claimant's surgical recommendation involved an "arthroscopic subacromial decompression with probable acromioplasty for a type II acromion and to address her rotator cuff pathology."

13. Dr. Klajnbart determined that the requested right shoulder surgery was more likely caused by Claimant's underlying degenerative condition than her work activities for Employer. He explained that Claimant's right shoulder MRI revealed more of a degenerative process than an acute event. Dr. Klajnbart commented that Claimant's job duties involved some overhead activities and the placement of sprinklers but did not include the repetitive stress that is seen in "sports like baseball, tennis, rowing or weightlifting or in someone who performs many hours of overhead activity, to include occupations such as painting or carpentry." He also commented that many daily chores, including overhead activities, can cause overuse tears of the rotator cuff. Dr. Klajnbart thus summarized that, although the request for surgical intervention constituted reasonable and necessary medical treatment for Claimant's condition, it was not related to her work activities. Claimant's right shoulder condition was more likely caused by the "biological development of the rotator cuff changes than to an acute injury pattern from her employment."

14. On August 19, 2015 Claimant underwent an evaluation with Jack L. Rook, M.D. Dr. Rook stated that Claimant's job duties involve the repetitive use of her upper extremities while performing work that is frequently at or above shoulder level. Claimant's right shoulder symptoms developed approximately 18 months earlier while she was performing required morning stretching exercises that involved "windmill"

backwards and forwards range of motion movements. Claimant was not suffering any discomfort when she arrived at work, but after stretching, her right shoulder pain increased while performing her job-related activities. Claimant explained that she spent most of her day using ladders while working on sprinkler systems and pipes that are at or above ceiling level. She estimated that she spends in excess of 50% of her typical day working above shoulder level. Dr. Rook explained that Claimant did not initially file a Workers' Compensation Claim for her right shoulder because she believed her symptoms would improve. However, her condition continually worsened and became aggravated while she was performing her work activities. Dr. Rook remarked that Claimant was eventually diagnosed with right shoulder tendonitis, impingement syndrome and a rotator cuff. tear. Orthopedic Surgeon John H. Pak, M.D. subsequently recommended surgery in the form of a subacromial decompression, a rotator cuff repair and an evaluation.

15. Dr. Rook concluded that Claimant's right shoulder condition was related to her work activities for Employer. He explained that Claimant first noted right shoulder symptoms while performing warm-up exercises at work and her pain increased while completing job duties involving lifting and reaching above shoulder level. Moreover, Claimant's non-occupational activities do not involve repetitive lifting above shoulder level, there were no traumatic events associated with the development of right shoulder symptoms and she had no prior history of right shoulder problems. Accordingly, Dr. Rook determined that Claimant's work activities for Employer caused her right shoulder symptoms. Right shoulder surgery was also reasonable and necessary to relieve her condition.

16. On December 9, 2015 Claimant underwent right shoulder surgery with Dr. Pak. Dr. Pak specifically performed a right shoulder arthroscopy, a subacromial decompression and a rotator cuff repair.

17. Dr. Klajnbart testified at the hearing in this matter. He explained that Claimant suffered from right shoulder pain as a result of rotator cuff impingement or a partial thickness tear of the supraspinatus. Dr. Klajnbart noted that Claimant did not suffer a specific or acute injury at work but instead developed right shoulder pain through a degenerative process. He remarked that Claimant engaged in overhead work less than 30% of each work day.

18. Dr. Klajnbart explained that Claimant suffers from autoimmune disorders including lupus and rheumatoid arthritis that can significantly increase the likelihood of rotator cuff problems. He determined that Claimant would have developed a right shoulder tear regardless of her work activities. In fact, Dr. Klajnbart stated that Claimant's development of additional left shoulder symptoms suggests that her right shoulder condition was caused by a disease process instead of her work activities. Accordingly, he concluded that Claimant's work activities did not cause, aggravate or accelerate her right shoulder symptoms, but instead constitute the natural progression of an underlying condition.

19. On June 17, 2016 the parties conducted the post-hearing evidentiary deposition of Dr. Pak. Dr. Pak remarked that he performed Claimant's December 9, 2015 right rotator cuff surgery. He noted that he did not conduct a causation analysis to determine whether Claimant's right rotator cuff tear was related to her job duties for Employer. After reviewing a list of Claimant's job duties and video of a Fire Sprinkler Technician engaged in work activities, he determined that Claimant's job duties increased the likelihood of a rotator cuff tear. However, Dr. Pak could not state with medical probability that her work activities caused her rotator cuff tear. He commented that rotator cuff tears are degenerative in nature because the incidence of tears increases as individuals age. Dr. Pak explained that he was unaware of Claimant's specific job duties or the length of time she spent performing each of her duties. Dr. Pak thus noted that he was unable to provide a causation analysis regarding the development of Claimant's right rotator cuff tear. He summarized that he could not state within a reasonable degree of medical probability that Claimant's right shoulder problems are work-related.

20. Claimant has failed to establish that it is more probably true than not that she sustained a compensable occupational disease in the form of a right shoulder injury during the course and scope of her employment with Employer. Although Claimant attributed her symptoms to her work activities, a review of her job duties as a Fire Sprinkler Technician reflects that they lacked the requisite force or repetition to cause her symptoms. Claimant engaged in a variety of tasks throughout each shift. The persuasive reports and testimony of Dr. Klajnbart reveal that, although Claimant engaged in some forceful activities, her job duties did not meet the minimum thresholds for force, repetition or duration to establish a cumulative trauma condition pursuant to the *Workers' Compensation Medical Treatment Guidelines*, Rule 17, Exhibit 4 (shoulder) *Cumulative Trauma Conditions* (*Guidelines*).

21. Claimant testified that her job duties require her to use a ladder on a daily basis and she engaged in almost continuous, overhead work. She noted that she is required to use significant force with pipe wrenches to open valves that are part of the fire suppression system. Mr. Fisher specified that testing the fire suppression system in a small building takes about two hours and approximately 40% of the time is spent turning valves. He remarked that about 70% of the valves are below shoulder level. Mr. Fisher recounted that Claimant spends approximately 20%-30% of her time engaged in overhead work. He summarized that Claimant completes a variety of tasks throughout each day and approximately 90% of her job duties involve testing fire suppression systems.

22. Dr. Klajnbart persuasively determined that Claimant's need for right shoulder surgery was more likely caused by her underlying degenerative process than by her work activities for Employer. He explained that Claimant's right shoulder MRI revealed more of a degenerative process than an acute event. Dr. Klajnbart commented that Claimant's job duties included some overhead activities and the placement of sprinklers, but did not involve the requisite, repetitive stress to cause shoulder symptoms. He summarized that, although the request for surgical intervention constituted reasonable and necessary medical treatment for Claimant's condition, it was

not related to her work activities. Claimant’s right shoulder condition was more likely caused by a degenerative process than her work activities for Employer. Accordingly, he concluded that Claimant’s work activities did not cause, aggravate or accelerate her right shoulder symptoms, but instead constitute the natural progression of an underlying condition.

23. In contrast, Dr. Rook concluded that Claimant’s work activities for Employer caused her right shoulder symptoms. He explained that Claimant first noted right shoulder symptoms while performing warm-up exercises at work and her pain increased while completing job duties involving lifting and reaching above shoulder level. However, Dr. Rook did not conduct a causation analysis involving Claimant’s specific job duties or the length of time she spent performing her daily job duties. Moreover, Dr. Pak also explained that he was unaware of Claimant’s specific job duties or the length of time she spent performing her duties each day. He thus noted that he was unable to provide a causation analysis regarding Claimant’s development of a right rotator cuff tear. Accordingly, the persuasive reports and testimony of Dr. Klajnbart reveal that, although Claimant engaged in some forceful activities, her job duties did not meet the minimum thresholds for force, repetition or duration to establish a cumulative trauma condition pursuant to the *Guidelines.* Her symptoms more likely constitute the natural progression of an underlying condition. Claimant’s claim for Workers’ Compensation benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. When the precipitating cause of an injury is a pre-existing condition that the claimant brings to the workplace, the injury is not compensable unless a "special hazard" of the employment combines with the pre-existing condition to contribute to the injury. *In Re Shelton,* W.C. No. 4-724-391 (ICAP, May 30, 2008). The rationale for the rule is that, in the absence of a special hazard, an injury due to the claimant's pre-existing condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Id.* A condition does not constitute a "special hazard" if it is "'ubiquitous' in the sense that it is found generally outside of the employment." *In Re Booker,* W.C. No. 4-661-649 (ICAP, May 23, 2007).

7. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct.

27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

8. The *Guidelines* specifically include factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Vibration can also be considered an additional risk factor pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when addressing the likelihood of cumulative trauma contributing to shoulder pathology.

9. As found, Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable occupational disease in the form of a right shoulder injury during the course and scope of her employment with Employer. Although Claimant attributed her symptoms to her work activities, a review of her job duties as a Fire Sprinkler Technician reflects that they lacked the requisite force or repetition to cause her symptoms. Claimant engaged in a variety of tasks throughout each shift. The persuasive reports and testimony of Dr. Klajnbart reveal that, although Claimant engaged in some forceful activities, her job duties did not meet the minimum thresholds for force, repetition or duration to establish a cumulative trauma condition pursuant to the *Guidelines*.

10. As found, Claimant testified that her job duties require her to use a ladder on a daily basis and she engaged in almost continuous, overhead work. She noted that she is required to use significant force with pipe wrenches to open valves that are part of the fire suppression system. Mr. Fisher specified that testing the fire suppression system in a small building takes about two hours and approximately 40% of the time is spent turning valves. He remarked that about 70% of the valves are below shoulder level. Mr. Fisher recounted that Claimant spends approximately 20%-30% of her time engaged in overhead work. He summarized that Claimant completes a variety of tasks throughout each day and approximately 90% of her job duties involve testing fire suppression systems.

11. As found, Dr. Klajnbart persuasively determined that Claimant's need for right shoulder surgery was more likely caused by her underlying degenerative process than by her work activities for Employer. He explained that Claimant's right shoulder MRI revealed more of a degenerative process than an acute event. Dr. Klajnbart commented that Claimant's job duties included some overhead activities and the placement of sprinklers, but did not involve the requisite, repetitive stress to cause shoulder symptoms. He summarized that, although the request for surgical intervention

constituted reasonable and necessary medical treatment for Claimant’s condition, it was not related to her work activities. Claimant’s right shoulder condition was more likely caused by a degenerative process than her work activities for Employer. Accordingly, he concluded that Claimant’s work activities did not cause, aggravate or accelerate her right shoulder symptoms, but instead constitute the natural progression of an underlying condition.

12. As found, in contrast, Dr. Rook concluded that Claimant’s work activities for Employer caused her right shoulder symptoms. He explained that Claimant first noted right shoulder symptoms while performing warm-up exercises at work and her pain increased while completing job duties involving lifting and reaching above shoulder level. However, Dr. Rook did not conduct a causation analysis involving Claimant’s specific job duties or the length of time she spent performing her daily job duties. Moreover, Dr. Pak also explained that he was unaware of Claimant’s specific job duties or the length of time she spent performing her duties each day. He thus noted that he was unable to provide a causation analysis regarding Claimant’s development of a right rotator cuff tear. Accordingly, the persuasive reports and testimony of Dr. Klajnbart reveal that, although Claimant engaged in some forceful activities, her job duties did not meet the minimum thresholds for force, repetition or duration to establish a cumulative trauma condition pursuant to the *Guidelines.* Her symptoms more likely constitute the natural progression of an underlying condition. Claimant’s claim for Workers’ Compensation benefits is thus denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant’s claim for Workers’ Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge’s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge’s order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 13, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that he suffered a compensable injury to his low back on July 19, 2015?

- If Claimant suffered a compensable injury, is he entitled to temporary total disability benefits from July 20, 2015 and continuing?

- What was Claimant's average weekly wage?

- If Claimant suffered a compensable injury, what medical benefits is he entitled to cure and relieve the effects of his industrial injury?

FINDINGS OF FACT

1. Claimant is 33 years old, with a D.O.B. of May 6, 1983.

2. Claimant's medical history was significant in that he previously injured his low back and required surgery. On February 18, 2015, Claimant was evaluated by Jacob Freeman, M.D. at the University of Colorado Hospital Neurosurgery Department. Dr. Freeman noted Claimant had been suffering progressive back pain with intermittent bilateral lower extremity pain since 2005 after suffering a back injury in a motor vehicle accident. Claimant initially received conservative treatment and his back pain had worsened six or seven months earlier. Dr. Freeman said Claimant was hospitalized at St. Anthony's hospital sometime in July or August 2014 and underwent a lumbar MRI which revealed a large herniated/extruded disc at L4-5.

3. On February 18, 2015, an endoscopic diskectomy was performed by Peter Witt, M.D. at the L4-5 level. Claimant's post-surgery diagnosis was L4-5 herniated/extruded disk fragment. The ALJ notes Claimant was credible when testifying about his medical history.

4. On February 23, 2015, Claimant returned to the University of Colorado Hospital, complaining of back pain and left leg pain/left lower extremity weakness. The MRI revealed a residual extruded disc resulting in compression of the bilateral lateral recesses and possible impingement of the traversing nerve roots bilaterally, left greater than right; tiny fragment of disc at the superior level of the L4 vertebral body extending to the level of the L3-4 disc. Claimant was diagnosed with a postoperative back pain, including radiating pain in his left leg; urinary urgency; and chest pain.

5. Dr. Witt examined Claimant on March 19, 2015, at which time Claimant had some guarding with his gait, difficulty going on heels and toes, with positive SLR on the left at 30 degrees. Claimant was diagnosed with a re-herniation and underwent a

discectomy/lumbar decompression at the L4-5 level on March 25, 2015, which was performed by Dr. Witt. Dr. Witt noted Claimant tolerated the procedure well.

6. On April 16, 2015, Claimant was re-evaluated by Dr. Witt. Claimant reported that his surgery did provide relief for several days, but that the low back and leg pain returned. Dr. Witt noted reduced range of motion ("ROM") and recommended a new MRI.

7. Claimant was evaluated by his family physician, Joseph Lovato, D.O., on April 22, 2015. Dr. Lovato noted Claimant had two surgeries and was potentially headed for a third, as his low back pain had not improved. Dr. Lovato noted tenderness in the lumbar spine, along with moderate pain with motion. He renewed Claimant's prescriptions, including Valium and Percocet.

8. Claimant was seen by Dr. Witt on April 30, 2015, at which time he complained of pain in his back and left leg weakness, as well as increased pain of the right side of the back. Pain on palpation was noted to the right side of the surgical scar, along with decreased ROM on left dorsiflexion. Dr. Witt recommended that Claimant follow-up in 3-4 weeks.

9. On May 7, 2015, Claimant was seen by Dr. Witt at the University of Colorado Hospital, complaining of continued low back pain (at a 9/10 pain level). On examination, Claimant had no tenderness to palpation and reduced ROM. Claimant was referred for physical therapy ("PT") and an injection. The option of a L4-5 fusion was also discussed. A letter, dated May 28, 2015, from Dr. Witt addressed to Dr. Lovato was admitted into evidence. Dr. Witt discussed possible injections and an L4-5 fusion in July 2015, if conservative treatment was unsuccessful.

10. Claimant received PT at Summit Physical Therapy after his second surgery. In the initial evaluation done by on May 14, 2015, Laura Whitson, MSPT, CNHP the goal for the PT program was to reduce pain and return to full functional activities. Claimant was noted to have a history of an automobile accident and prior low back injury while working on a construction site. Claimant reported low back pain with radiating symptoms into bilateral lower extremities and rated his pain 9/10 (at worst). The Oswestry index for low back pain was listed as a 70% disability. As far as functional limitations, Claimant noted he was unable to sit for extended periods and able to sit for a maximum of twenty-five (25) minutes at the time of this initial evaluation. Aggravating factors included sitting, standing, walking, and bending. He also required assistance with bending and lifting objects. Ms. Whitson noted Claimant ambulated with an antalgic gait and had limitations in the ROM of his lumbar spine with all ROM tests.

11. Claimant testified he began work for Employer on May 25, 2015. His rate of pay was $12.50 per hour. He did not work full-time, but averaged anywhere from 28-31 hours per week. He estimated he worked an average of 30 hours per week.

12. Claimant testified his job duties included assisting customers, moving product down from the shelves and straightening shelves. He would also help in other

departments, such as the garden department. In his work for Employer, he was required to lift, as well as climb ladders. Claimant stated he was physically able to perform his job duties, despite his back condition.

13. Claimant received a total of six (6) PT treatments from May 14, 2015 through June 11, 2015. Claimant received manual therapy, massage and iontophoresis. Some improvement in Claimant's condition was noted in the notes of the daily PT sessions. The ALJ notes Claimant was never found to be pain free in the PT records admitted at hearing. In the discharge note, dated July 31, 2015, Claimant was discharged because he was unable to schedule therapy sessions.

14. Claimant testified he was able to twist and bend after receiving PT treatments. Claimant stated he asked both the physical therapist, as well as the neurosurgeon, and was released to return to work without restrictions. The ALJ notes no medical records were admitted to show a full duty release.

15. Dr. Lovato examined Claimant on July 6, 2015. Dr. Lovato's assessment was low back pain, control-poor. Dr. Lovato noted Claimant's medications were reconciled, as he was getting medications from both his office and University Hospital. Claimant's prescriptions were renewed.

16. On July 13, 2015, Claimant returned to Dr. Lovato. Claimant was complaining of abdominal pain and low back pain. Dr. Lovato described the low back pain as acute, although no further explanation was provided in the records admitted at hearing. Claimant's Valium prescription was refilled.

17. Claimant was taking prescriptions for chronic low back pain as of July 19, 2015.

18. Claimant testified he injured his low back while working for Employer on July 19, 2015. That day, he was "front-facing" merchandise on shelves, placing electric drills back in the proper location. He was kneeling on a concrete floor, moved to a squatting position and then stood up. When he stood up, he felt a pop in his low back.

19. Claimant felt pain in his low back, but completed his shift. Claimant stated he applied ice to his back, but felt excruciating pain in the low back, as well as going down his right leg.

20. Claimant testified he called in and told his supervisor the next day and was told to go to the emergency room. He picked the emergency room which was closest to the store location, as he was in a lot of pain.

21. On July 20, 2015, Claimant was seen at the Platte Valley Emergency Department. Claimant was noted to have a history of low back pain, which was improving until he got acute pain when he stood up. Claimant was evaluated by Ryan Maldonado, PA, whose findings were: "32 y.o. male to the ED with acute on chronic

LBP; no indication for emergent MRI”. Claimant was treated with Prednisone, an IM injection and released.

22. Claimant was examined by Robert Massa, M.D. on July 23, 2015. Claimant reported he was at the end of his shift while he was kneeling and lifting boxes that weighed about 25 pounds[1]. When he went from a kneeling to a squatting to a standing position, he felt an onset of severe low back pain after he felt a pop in the back. Dr. Massa noted Claimant walked with an antalgic gait and had loss of normal lumbar lordotic curvature. No frank SI joint, buttock or sciatic notch tenderness was noted. Dr. Massa's assessment was low back pain-acutely subjectively fairly severe, suspicious for lumbar degenerative disease with radiculopathy. Dr. Massa took Claimant off work from July 20-July 30, 2015.

23. Plain x-rays of Claimant's lumbar spine were taken on July 31, 2015. The films were read by Stephen George, M.D., whose impression was no acute lumbar spine abnormalities. Mild to moderate degenerative disc changes at L4-5 were noted.

24. On August 4, 2015, a CT scan was done on Claimant's head, as there was an indication of a head injury. The films were read by Eric Lyders, M.D., who determined there was no hemorrhage or acute intracranial abnormality.

25. Claimant underwent an MRI of his lumbar spine on August 12, 2015. The films were read by Maksym Dymek, M.D. whose impressions were: “post-operative changes of interval partial L4-L5 laminectomy with resection of large extruded disk at L4-L5. On current study, some protruding disc material and/or scar persists at this level however this is significantly smaller than before and only results in mild thecal sac impingement and borderline mild central canal stenosis, much improved from prior study”. Mild bilateral neural foraminal stenosis was noted at L4-5 which appeared slightly worse in some images. However, Dr. Dymek felt this was due to differences in slice selection, as opposed to a progressive intraforaminal disc bulge and facet arthropathy.

26. Claimant returned to Dr. Lovato on August 17, 2015 to discuss a leave of absence and prescription refill. Dr. Lovato’s assessment was acute low back pain. Claimant’s Percocet prescription was not re-filled. Dr. Lovato completed the Certification of HealthCare Provider Form-Associate’s Serious Health Condition, which noted Claimant was unable to complete all of his job duties. The condition commenced on 7/19/15 and was expected to last through 9/22/15, when Claimant was scheduled to see a surgeon.

27. On August 25, 2015, Claimant returned to the Platte Valley Medical Center ED and was evaluated by Thaine Gillaland, PA. He was complaining of pain in his abdomen, after falling at home. PA Gillaland's impression was contusion of abdominal wall and chronic back pain.

[1] This differed from the description given to other health care providers.

28. Claimant was referred by Dr. Massa to Karen Beasley, D.O., who evaluated him on December 14, 2015. At that time, he reported constant low back pain, which was alleviated by lying in a supine position and exacerbated with sitting, standing and walking. Claimant had spasms in his low back, with lower extremity pain and numbness which radiated into his lateral thigh, calf, foot and toe. Dr. Beasley's assessment/impression was herniated nucleus pulposus, bilateral low back pain with right-sided sciatica, lumbar radiculopathy, and degenerative disc disease-lumbar.

29. Dr. Beasley felt it would be reasonable to try an epidural steroid injection at L4/5, along with facet injections. Dr. Beasley noted Claimant may have chronic radiculopathy after multiple traumas that would not respond to further lumbar decompression. Accordingly, she felt an EMG was warranted. The ALJ notes Dr. Beasely did not offer an opinion as to what role, if any, the incident on 7/19/15 played in the progression of symptoms in Claimant’s lumbar spine

30. On January 27, 2016, Claimant underwent a PT evaluation at Platte Valley Medical Center, which was done by Corbin Wierzbinski, PT, DPT. Various modalities of treatment were recommend, which Claimant received on January 29, 2016. No additional records were admitted for this course of PT.

31. Claimant was evaluated by Allison Fall, M.D. at the request of Respondent on March 2, 2016. At that time, Claimant reported a lot of back pain, down his buttocks and down his upper and lower left leg into the foot. He described his pain as 5-6/10. Dr. Fall noted Claimant's range of motion was self-limited. He had complaints of pain in the right sacroiliac area, with superficial tenderness to palpation along the right sacral sulcus. Claimant had “give-way” weakness for great right toe extension and knee extension. The ALJ infers these were positive signs of lumbar pathology.

32. Dr. Fall's impression was S/P lumbar diskectomy L4-5; redo diskectomy, with chronic pain and radicular symptoms without focal neurological deficit. She opined there was no aggravation of his underlying condition, nor did Claimant sustain a new injury on July 19, 2015 while Claimant worked at Home Depot. Claimant’s medical records were consistent with a long-standing problem for which he underwent two surgeries, without resolution of symptomotology. Dr. Fall stated Claimant's current lumbar problems were a result of natural progression of this condition rather than a work-related aggravation. Dr. Fall also felt there might be psychological issues also playing a role in his condition.

33. Claimant received a prescription for a course of PT from Peak Anesthesia and Pain Management on March 10, 2016

34. Dr. Fall testified at hearing and was received as an expert in the area of Physical Medicine and Rehabilitation, the specialty in which she is board certified. Dr. Fall is also Level II accredited pursuant to the W.C.R.P. Dr. Fall characterized Claimant's condition as failed lumbar spine surgery, as he was having fairly significant problems and limitations even after his second microdiscectomy. More particularly, Dr. Fall noted the medical records reflected he was continuing to take pain medications,

including six days before the date of injury. Dr. Fall did not believe Claimant would have been released to full duty two months after his second surgery. Dr. Fall noted Claimant was consistent in his description of the mechanism of injury when she did the IME.

35. Dr. Fall testified the MRI of 8/12/15 did not have any new disc bulges, progression of disc bulging or arthritis of the facet joints. Thus, the MRI did not support any aggravation or further injury to Claimant's lumbar spine.   The ALJ credited Dr. Fall’s opinion that there was no aggravation or worsening or new injury to Claimant's lumbar spine.

36. Claimant testified he continued to experience significant low back pain, which has affected all aspects of his life.

37. The medical records admitted at hearing reflect that in 2015, Claimant had continuous pain in his low back for which he required treatment and took prescription medications, including Percocet. This included the months of May-June when he was working for Employer.

38. There was no evidence of a special hazard present on the premises of Employer when Claimant was injured on July 19, 2015.

39. The ALJ finds Claimant did not sustain a new injury on July 19, 2015. The ALJ finds Claimant did not aggravate, accelerate or worsen his preexisting low back condition on July 19, 2015 while working for Employer. Rather, Claimant’s symptoms were the result of the natural progression of his chronic low back condition.

40. Claimant failed to sustain his burden of proof that he sustained a compensable injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S.   The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S.   Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S.   A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The instant case requires a credibility determination, not only of the Claimant, but also the medical experts.

Compensability-Low Back

Claimant alleges he sustained an injury to his low back while working for Employer. Claimant relies primarily on his own testimony to prove he injured his low back. In this regard, he argued that the incident on 7/19/15 exacerbated his low back condition. Claimant averred he had no restrictions before going to work for Employer. After July 19, 2015, his doctors issued work restrictions, which Claimant relied on to support his argument that his low back condition became disabling.

Respondent focused on the fact that Claimant had extensive treatment to the low back before the date of injury, including two (2) surgical procedures. Respondent asserted Claimant continued to have to symptoms related to this condition, which were not resolved before his alleged injury. Respondent also relied on the opinions of IME physician, Dr. Fall, to support the contention no compensable low back injury occurred and Claimant’s need for treatment was based upon the natural progression of his low back condition.

To receive workers' compensation benefits, an injured worker bears the threshold burden of establishing, by a preponderance of the evidence, that he or she has sustained a compensable injury proximately caused by his employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). ("Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded.")

Accordingly, Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing a service for Respondent-Employer arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. *Triad Painting Co. v. Blair* 812 P.2d 638 (Colo. 1991). The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Lay testimony alone may be sufficient to prove causation. However, where medical evidence is presented on the issue of causation it is for the ALJ to determine the weight and credibility of such evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182.

A preexisting condition does not disqualify Claimant from receiving benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo.App.1990).[2] Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. See *Subsequent Injury Fund v. Thompson,* 793 P.2d 576, 579 (Colo. 1990).

As a starting point, there was no evidence before the ALJ which contradicted Claimant's version of events of July 19, 2015. The ALJ found Claimant to be a credible witness both in his description of the events of that day, as well as the medical history which preceded it. The overriding issue in the case was whether the medical evidence established that the action of sitting up to a kneeling position, then standing up aggravated or accelerated the condition of Claimant's lumbar spine. As determined in Findings of Fact 37-40, the ALJ concluded there was insufficient evidence to show such an aggravation or acceleration.

There were two bases for the ALJ's decision. First, the objective medical evidence admitted at hearing did not show an aggravation or acceleration of the condition of Claimant's lumbar spine. As found, the August 12, 2015 MRI actually documented improvement from the previous study. (Finding of Fact 25). This study showed no evidence of new trauma or an aggravation of the underlying condition. The plain x-rays taken on July 31, 2015 also showed no acute abnormalities. (Finding of Fact 23).

Claimant's treating physicians identified reduced ROM, as well as lower extremity weakness before the date of injury. Dr. Fall's testimony also supported the conclusion Claimant's low back condition was not aggravated or accelerated by his activity at work on July 19, 2015. (Finding of Fact 32). This evidence led the ALJ to conclude, Claimant's need for treatment was a result of his chronic low back condition, as opposed to the events of July 19, 2015.

Second, Claimant continued to require medical treatment, including physical therapy immediately before the accident. Although Claimant testified his symptoms improved and he also told several physicians that his symptoms had improved, the medical evidence documented significant pain complaints for which treatment was required. In fact, there was no evidence before the ALJ which indicated Claimant ever stopped his treatment or ceased taking pain medication. Some examples of this treatment before the injury include:

[2] The ALJ notes both Claimant and Respondent cited *H & H Warehouse v. Vicory,* but neither side argued the special hazard doctrine applied in this instance. The ALJ agrees and views the issue in this as one whether Claimant suffered an industrial aggravation of pre-existing condition or had symptoms as a result of the natural progression of the pre-existing condition. *In Re Claim of Shaffstall v. Champion Tech*., W.C. No. 4-820-016 (Industrial Claim Appeals Office March 2, 2011). In any event, there was no evidence of a special hazard present on 7/19/15, which increased Claimant's risk of injury.

- 4/22/15: Dr. Lovato documented Claimant's pain had not improved. A third surgery was noted as possible.

- 4/30/15: Dr. Witt noted pain and left leg weakness, as well as increased pain in the right side, along with decreased ROM. Dr. Witt noted another surgery was possible.

- 5/7/15: Claimant reported pain at the 9/10 level at the appointment with Dr. Witt, reduced ROM found. Referral for PT and injection.

- 5/14/15: Ms. Whitson noted functional limitations, including Claimant unable to sit for longer than 25 minutes.

- 7/6/15: Dr. Lovato noted significant low back pain and prescribed Valium. Claimant’s pain control was described as poor

As found, Claimant required opiate pain medications in the months preceding 7/19/15 and was in an active PT program to treat chronic low back pain. Claimant had continuous symptoms in his low back. In addition, the physical therapy notes documented Claimant's subjective limitations, which included his report that he required assistance when lifting, as well as an aggravation of his symptoms while walking, standing, and sitting. As found, Claimant continued to take significant pain medication, including Percocet, up to six days before the incident at work

In the case at bench, the ALJ determined Claimant failed to meet his burden of proof that the incident on July 19, 2015 aggravated, accelerated, or combined with a preexisting condition in his lumbar spine. In concluding Claimant failed to adduce sufficient evidence that the incident on 7/19/15 aggravated or accelerated the condition of his lumbar spine, the ALJ considered Claimant’s argument that he had no restrictions or other evidence of disability before he experienced the “pop” in his back while working for Employer. Given the relatively short time since Claimant’s second surgery, his continued symptoms and treatment for those symptoms, it is more likely than not the condition of Claimant’s lumbar spine was disabling before July 19, 2015. Considering the totality of the evidence, the ALJ concluded Claimant’s preexisting condition, as opposed to his work for Employer was the cause of the disability. As such, he did not meet her burden of proving that he sustained an injury arising out of and in the course and scope of his employment.

In light of the finding on compensability, the ALJ need not address the issues of liability for medical benefits, average weekly wage and temporary disability benefits.

ORDER

It is therefore ordered that:

1. The claim for worker's compensation benefits in W.C. Case No. 4-988-344-01 is denied and dismissed

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 18, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable injury in the course and scope of his employment for Employer;

2. Whether Respondents should be permitted to withdraw a improvidently filed General Admission of Liability;

3. Whether Claimant overcame the April 16, 2015, opinion of Dr. Volz, Division Independent medical examiner (DIME), by clear and convincing evidence; and

4. Whether Claimant proved by a preponderance of the evidence that he is entitled to reasonably necessary and related medical benefits.

PRELIMINARY MATTERS

On January 27, 2016, Claimant moved the ALJ to take administrative notice of the January 5, 2016, Findings of Fact, Conclusions of Law and Order (order) of ALJ David Cain. Claimant's motion was granted on March 14, 2016. ALJ Cain's January 5, 2016, order followed a March 5, 2015, hearing pertaining to a claim for temporary total disability benefits (TTD).

On March 3, 2016, Claimant moved to strike Respondents' July 14, 2015, Application for Hearing and Notice to Set. This is the application for hearing which forms the basis of the claim before the undersigned ALJ at the hearing held on November 3, 2015. This hearing concerned overcoming the April 16, 2015, follow-up DIME opinion of Dr. Volz, among other issues.

In ALJ Cain's January 5, 2016, order, in the course of discussing the TTD issue, ALJ Cain found that a February 14, 2014, DIME opinion of Dr. Volz was overcome by clear and convincing evidence. Claimant now contends that the Application for Hearing and Notice to Set in this matter should be stricken because it is "inefficient" and "prejudicial" to require Claimant to relitigate the issues already addressed in ALJ Cain's January 5, 2016, order.

While the undersigned ALJ takes administrative notice of ALJ Cain's January 5, 2016, order, and reaches the same conclusions regarding Claimant's medical condition and the work relatedness of his injury, ALJ Cain's findings do not provide a basis to strike the July 14, 2015, Application for Hearing and Notice to Set. The doctrine of issue preclusion does not apply here where ALJ Cain's January 5, 2016, order considers a February 20, 2014, DIME opinion of Dr. Volz. The matter herein pertains to an April 16, 2015, follow-up DIME opinion of Dr. Volz. Furthermore, ALJ Cain's January 5, 2016, order arises from a claim for TTD, while this claim involves Respondents' attempt to overcome the April 16, 2015, DIME opinion.

FINDINGS OF FACT

Having considered the evidence presented at hearing and the post hearing depositions, the following Findings of Fact are entered.

1. Claimant is a 53-year-old male employee of Employer. Claimant was born in China and lived there until he was 39-years old, when he immigrated to the United States. Claimant speaks Chinese; he does not speak, read, write or understand English. Claimant has worked as a chef cooking Chinese cuisine his adult life. Employer hired Claimant in the winter of 2009. A daily shift lasted nine hours and thirty minutes, and Claimant spent a majority of that time cooking food over the stove. During rush-hour or lunchtime, Claimant cooked in front of the stove for a minimum of one hour and thirty minutes to two hours.

2. On December 20, 2011, Claimant was cooking during rush hour when the kitchen filled with smoke due to a dysfunctional exhaust system over the stove. Claimant experienced pressure in his chest, difficulty breathing and he began to cough. Claimant notified Employer of the ventilation issue several times but it was not rectified, and Claimant continued to work under these conditions and continued to experience respiratory symptoms.

3. Claimant first sought medical treatment with his primary care provider, Nathaniel Moore, M.D. at Rocky Mountain Urgent Care and Family Medicine (RMFM) on March 21, 2012. He complained of cough and chest tightness. Dr. Moore ordered a chest x-ray, which was normal. Claimant returned to RMFM on March 28, 2012 after using prescribed Albuterol, reporting improvement in his symptoms at night but a worsening at work when exposed to smoke.

4. On March 29, 2012, Claimant returned to work for a half day; he reported to Employer that he felt something was wrong with his health, noting that he had not experienced any of these symptoms prior to December 20, 2011. Claimant returned to RMFM on April 4, 2012, and was told to stay off work until he received further evaluation. On April 11, 2012, Claimant returned to RMFM where he was diagnosed with "chronic bronchitis most likely directly attributed to smoke inhalation at his work establishment" and was referred for pulmonary medicine and "GI" consultations.

5. Claimant presented to National Jewish Hospital (NJH) on May 10, 2012, where he was examined by Ahmad Rashid, M.D., and Kasia Hoover, PA-C. Claimant reported "increasing respiratory difficulty" over the past six months due to excessive smoke exposure at work. He complained of cough, chest pain and

dyspnea. Claimant explained that his symptoms improved when he returned home from work at night and worsen upon returning to work. Claimant's spirometry tests revealed reduced airflow and Dr. Rashid opined that Claimant's cough was "smoke/irritant induced from his occupational exposures" and recommended he remain off of work, considering "the hypersensitivity of his airways and aggravation by exposure to smoke at work."

6. On May 30, 2012, Claimant underwent a simple pulmonary stress test at NJH which was interpreted as a "normal study" by Dr. Rashid. Dr. Rashid opined that Claimant "does seem to have underlying small airway obstructive lung disease - cough variant asthma" and that his "symptoms of cough and wheezing do get worse by workplace exposure to fumes and smoke." Dr. Rashid prescribed Advair and referred Claimant to NJH Occupational Medicine Division for further assessment.

7. On July 11, 2012, Claimant was examined by Annyce Mayer, M.D. at NJH for an occupational/environmental consultation. Upon obtaining Claimant's history, discussing his symptoms, and performing a physical examination, Dr. Mayer opined that Claimant's symptoms were suggestive of "airway irritation," and "bronchitis and irritant-induced asthma" were in the differential, and an element of vocal cord dysfunction (VCD) could not be ruled out. A CT scan of Claimant's chest was performed with no significant clinical findings. Dr. Mayer recommended a methacholine challenge (MC) with laryngoscopy. On August 8, 2012, Claimant underwent a maximum multistage exercise test ("stress test") at NJH, and upon review of the stress test in her August 17, 2012, report, Dr. Mayer assessed "chest tightness with exertion that seemed distinct from the symptoms triggered by smoke." Dr. Mayer noted that "Suspicion had been heightened by history of hypertension and metabolic syndrome obtained from Dr. Moore's office; however, there is no suggestion of ischemia on his exercise stress ECG and the chest pain developing after the test and persisting for several days is also not consistent with cardiac pain."

8. On September 13, 2012, Claimant underwent three tests at NJH: an esophagram, an MC, and a rhinolaryngoscopy. The esophagram was performed by Valerie Hale, M.D., and the only impression was mild, spontaneous gastroesophageal reflux. The MC was performed by Amy Olson, M.D., and the finding was "Positive airways hyperresponsiveness to methacholine with a PC[-20] FEV1 of 6/131 mg/mL. The rhinolaryngoscopy was performed by Karin Pacheco, M.D., who reported "Vocal cords closed variably with posterior chink formation, most notably at end expiration and following cough, and often remained closed for several seconds." Dr. Pacheco listed the post procedure diagnoses of vocal cord dysfunction and chronic rhinitis.

9. On September 26, 2012, Claimant complained of hoarseness increased by exposure to wind and air conditioning, chest tightness triggered by physical activity such as going up stairs or inclines, and exposure to smoke from a

barbecue or nearby smoker increased his symptoms. Dr. Mayer assessed the following with respect to this workers' compensation claim: Cough, chest tightness and shortness of breath that by history developed in temporal association with failure of the exhaust ventilation to remove the smoke in the kitchen where he worked as a chef and effectively concentrated the smoke in his breathing zone. His symptoms have improved, but have not resolved, out of exposure. Mild asthma, confirmed by a methacholine challenge PC20 at 6.131 mg/mL. In my opinion, this is contributory to his ongoing symptoms. Vocal cord dysfunction, confirmed on laryngoscopy. In my opinion, this is also contributory to his symptoms. Gastroesophageal reflux disease, mild. Dr. Mayer reported that Claimant's symptoms were due to the "combination of mild asthma and vocal cord dysfunction, both irritant induced on a medically probable basis."

10. Dr. Mayer reported that her environmental medicine case conference group, comprised of an industrial hygienist and occupational pulmonologists, reached a consensus that, "but for the described smoke exposure, it is medically probable that Claimant would not have developed these respiratory symptoms due to asthma and vocal cord dysfunction."

11. On October 10, 2012, Claimant reported significant improvement from the GERD medications of rantidine and omeprazole, but was unable to tolerate QVAR or ProAir due to side effects, mainly head rush. Claimant requested oral medication for asthma and Dr. Mayer prescribed Albuterol. On October 19, 2012, Claimant reported to be about 65% better, but still had cough triggered by barbecue smoke, heavy exhaust, or wind. Dr. Mayer opined that Claimant’s asthma was "symptomatically much improved on the oral Albuterol, indicating airways hyper-responsiveness was contributing to his ongoing symptoms in addition to the VCD." Additionally, she reported Claimant derived benefit from the speech therapy breathing techniques employed to treat his VCD and that his GERD was resolved.

12. Upon request by Respondents, on October 23, 2012, Lawrence Repsher, M.D. performed an independent medical examination (IME) of Claimant where he took a history, reviewed Claimant's treatment records and performed a physical examination. Dr. Repsher noted that the MC was reported to be strongly positive, but opined that Claimant was malingering. Dr. Repsher opined that Claimant was not suffering from any medical condition and thus there was no causality and no need for additional medical care or restrictions. Based on Dr. Repsher's IME, Respondents filed a Notice of Contest on November 2, 2012, and consequently, Claimant was unable to afford medications to treat his condition.

13. On January 16, 2013, Claimant presented to Dr. Mayer through his personal insurance for medical follow up. Dr. Mayer noted continued improvement in Claimant's breathing, although he had some "triggering symptoms" around smoke, stir frying in the home and cold air. Dr. Mayer's diagnoses were unchanged, work related mild asthma and VCD, and she opined that Claimant's

condition had stabilized and that he reached MMI since there was no additional treatment to consider. Dr. Mayer assessed 14% whole person impairment for occupational asthma with permanent restrictions of avoiding exposure to irritant dust, smoke and fumes and physical exertion in cold air. As maintenance, Dr. Mayer recommended follow up visits up to 2-3 times per year for the next year or two, and would again prescribe Albuterol for use as needed.

14. On March 14, 2013, Clarence Henke, M.D. performed an IME of Claimant upon Respondents' request. Dr. Henke reviewed Claimant's medical records provided by Respondents from March 21, 2012 through October 23, 2012, as well as a comprehensive patient medical history form and pain diagram completed by Claimant. Upon examination, Dr. Henke's impressions included "occupational asthma secondary to smoke inhalation" at work, laryngitis secondary to VCD of uncertain etiology and GERD. Dr. Henke opined that Claimant's condition would continue to improve if he could afford medications prescribed at NJH. Accordingly, Respondents filed a General Admission of Liability (GAL) dated April 29, 2013, admitting Claimant sustained a compensable injury and admitted liability for medical benefits.

15. Claimant returned to Dr. Mayer on July 31, 2013, reporting cough and throat tightness. Dr. Mayer remained "concerned that with his ongoing respiratory symptoms from asthma and VCD despite practicing the speech therapy techniques and now dysphagia may be due to GERD." Dr. Mayer prescribed Albuterol and recommended an impedance pH probe and tailored barium swallow for further evaluation of GERD and possible aspiration. On August 7, 2013, Claimant underwent a tailored barium swallow study and a subsequent impedance pH probe on August 9, 2013, both performed at NJH.

16. On September 9, 2013, Claimant reported to Dr. Mayer that he felt "about 30% better," attributing his improvement to the Albuterol. Dr. Mayer reported the tailored barium swallow was mildly abnormal and the impedance pH probe study was negative, stating "[n]o evidence of gastroesophageal reflux diseases that was suspected as a contributor to his ongoing symptoms, and had been suggested by the esophagram." Further, she opined that Claimant's ongoing symptoms are related to VCD.

17. In a letter dated November 12, 2013, Dr. Henke prepared responses to Respondent counsel's questions upon review of additional medical records. Dr. Henke opined that Claimant's ongoing elbow pain, lung nodule, and possible liver cyst were considered to be non-industrial conditions.

18. By December 5, 2013, Claimant had attended four sessions of speech therapy to address his breathing technique in treating VCD. Dr. Mayer opined that there is no additional treatment reasonably likely to improve Claimant’s condition and he is at maximum medical improvement (MMI) on December 5, 2013. Dr. Mayer assessed a combined 19% whole person impairment for asthma and VCD and

restricted Claimant from exposure to irritant dust, smoke, fumes and work in cold air. Dr. Mayer opined that such restrictions would limit Claimant's future employment options, including Claimant's work as a chef in a Chinese restaurant. Again, Dr. Mayer recommended two clinic visits per year as needed an ongoing use of oral Albuterol as medical maintenance treatment.

19. On February 20, 2014, Michael Volz, M.D. performed a DIME. Claimant reported symptoms of cough, chest pain, shortness of breath and chest tightness. Dr. Volz assessed cough, dyspnea, chest pain and chronic pharyngitis and opined the cause(s) of Claimant's symptoms were "unknown" at this time. If there was an "airflow issue at work", Dr. Volz opined that it undoubtedly could have worsened Claimant's "status non-specifically." Dr. Volz opined that a "positive" MC test does not necessarily prove that a patient has asthma, but noted that Claimant's improvement on Albuterol subjectively suggests that asthma may be present. Dr. Volz opined that no evidence existed to support a diagnosis of VCD. Dr. Volz opined that Claimant was not at MMI, and that such issue is a moot point because Claimant's symptoms were not causally related to his work.

20. Respondents did not file a Final Admission of Liability following the submission of Dr. Volz's DIME report, and the case remained on a GAL.

21. Claimant returned for a follow-up visit with Dr. Mayer on December 31, 2014 where he reported he was doing "relatively well" and that he was using his medications. Dr. Mayer recommended Claimant continue to use Albuterol on an as needed basis for asthma and return for follow up in a year unless his conditioned worsened.

22. On April 16, 2015, Dr. Volz performed a follow-up DIME to address MMI and impairment rating. Claimant reported symptoms of shortness of breath, chest tightness, cough from the upper chest and throat areas, and aggravating factors of weather/temperature changes, activity, cold air, and any irritant and indicated no change in frequency, severity, impact, season or any other factor since his prior DIME visit. Dr. Volz assessed cough, dyspnea, chest pain, chronic pharyngitis, chronic rhinitis, GERD, bronchiectasis without acute exacerbation and rash. Again, Dr. Volz opined that Claimant had not reached MMI, noting his overall status had not changed since February 2014. Dr. Volz reasoned, "there are many opportunities that offer a probable chance of being impactful in a positive manner and since none of these have been attempted - either alone or in combination - it is impossible to estimate to what degree [Claimant] might improve." Dr. Volz opined "one could argue he does NOT have asthma and if he does have asthma, there could be other factors aggravating his respiratory status." Dr. Volz concluded Claimant suffered from GERD, cylindrical bronchial dilation or bronchiectasis, and chronic rhinitis.

23. Dr. Volz stated that if Claimant does suffer from asthma, "his treatment has been sub-optimal" because every patient with "persistent asthma should be taking a daily controller medication", and that control has not been achieved with Claimant. Dr. Volz opined that there is a "strong relationship between rhinitis being active and less than optimal control of asthma and when the rhinitis is controlled, oftentimes asthma control improves", and further indicated there was no attempt to treat Claimant’s rhinitis. Dr. Volz opined that several objective tests show that Claimant suffers from GERD and that Claimant does not suffer from VCD, stating, "as part of his GERD, he might have aspiration as well."

24. Dr. Mayer submitted a rebuttal report dated July 28, 2015, in response to the follow-up DIME report prepared by Dr. Volz. Dr. Mayer disagreed with Dr. Volz's opinion that Claimant was not at MMI because he could improve further with more treatment, stating, "[t]hat is not true in this case. [Claimant] was not tolerant of inhaled medications, which precluded further treatment . . . As per the Colorado Workers' Compensation Level II Curriculum on page 25, 'At times a patient may refuse to undergo treatment recommended by their physicians. In this case physicians must rate the individual as they are at the time of maximum medical improvement.'" Dr. Mayer referred to the positive MC to confirm a diagnosis of asthma, explaining that the "presence of non-specific airways hyperresponsiveness was confirmed with PC20 at 6.131 mg/ml. Most sources consider 8 mg/ml or less to be confirmatory of asthma." Dr. Mayer asserted additional factors considered in diagnosing asthma, such as "symptoms being improved with short acting bronchodilator and worsened by exposure to irritants and cold air and return of FEV1 to baseline after administration of Albuterol."

25. Also, Dr. Mayer challenged Dr. Volz's diagnosis of GERD with possible aspiration, stating that upon performance of the pH probe, "[t]he conclusion of the gastroenterologist was that there was no evidence of ongoing acid reflux, nonacid reflux was within normal limits, and that none of his symptomatic complaints were temporally related to reflux events.” Dr. Mayer concluded her report by stating:

> It remains my medical opinion to a reasonable degree of medical probability that [Claimant] developed irritant-induced asthma and vocal cord dysfunction while employed as a chef . . . with an improperly functioning ventilation system that caused the smoke to concentrate in his breathing zone over the course of about 5 months. The diagnosis of asthma was confirmed, based on consistent history and results of the methacholine challenge. The diagnosis of vocal cord dysfunction was confirmed on laryngoscopy. He is not tolerant of inhaled medications, which precludes additional treatment of his asthma, so it remains my medical opinion that he is at maximum medical improvement.

26. Claimant proved it is highly probable and free from serious doubt that he developed symptomatic occupational asthma proximately caused by the admitted industrial accident of December 20, 2011.

27. To the extent Dr. Volz, the DIME physician, opined that Claimant does not suffer from asthma caused by his exposure to smoke in the workplace the ALJ finds his opinions are not persuasive. Dr. Volz's opinions are persuasively refuted by the credible opinions of Drs. Mayer, Rashid and Dr. Henke. Drs Mayer, Rashid and Henke agree that exposure to smoke either caused Claimant to develop asthma or aggravated a prior underlying condition that manifested itself as symptomatic asthma. Moreover, even Dr. Volz admitted that Claimant's "subjective" improvement while taking Albuterol and "objective" tests demonstrating "some degree of airway reversibility" suggest asthma "might be present."

28. Claimant credibly testified that on December 20, 2011, he was performing his duties as a chef when the kitchen became very smoky because of a malfunctioning exhaust system. Claimant credibly testified that this event caused him to experience pressure in his chest and coughing. Claimant continued to experience these symptoms whenever the kitchen filled with smoke, and his symptoms tended to decline when he went home from work. Claimant credibly testified that the ventilation system was not repaired before he left work on March 29, 2012. Claimant credibly testified he had not had any respiratory symptoms prior to the events of December 20, 2011.

29. Dr. Mayer credibly and persuasively opined that Claimant's exposure to smoke at work caused him to develop irritant-induced asthma. Dr. Mayer credibly explained that the methacholine challenge was positive for asthma when considered in the context of Claimant's history. Dr. Mayer credibly and persuasively opined that there is a significant "temporal relationship" between the malfunctioning of the ventilation system at Claimant's place of employment and the development of Claimant's respiratory symptoms. Dr. Mayer's opinion is further corroborated by Dr. Rashid who shared her opinion that Claimant's condition was work related "mild reactive airway disease and bronchospasm."

30. Dr. Mayer's opinion that the work-related exposure to smoke caused Claimant to develop asthma is corroborated by Dr. Henke. In his report of April 4, 2013, Dr. Henke opined that Claimant sustained "occupational asthma" secondary to exposure to smoke. He explained that the diagnosis was supported by sounds of "slight rhonchi and wheezing" on forced exhalation. Even though Dr. Henke changed his opinion concerning whether or not Claimant suffers from VCD, he never changed his opinion that Claimant developed "occupational asthma" caused by exposure to smoke.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are reached.

General propositions of law

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

Issue Preclusion

2. Claimant's motion to take administrative notice of ALJ Cain's January 5, 2016, order was granted. Claimant's motion to strike a July 14, 2015, Application for Hearing and Notice to Set was denied. Claimant contends that ALJ Cain's January 5, 2016, order precludes relitigation of the issues raised in the July 14, 2015, Application for Hearing and Notice to Set of compensability, medical benefits and overcoming the April 16, 2015, +DIME opinion of Dr. Volz..

4. Collateral estoppel, or issue preclusion, is a judicially created, equitable doctrine that operates to bar relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 84 (Colo. 1999); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction* § 4403 (1981). The doctrine serves to relieve parties of multiple lawsuits, conserve judicial resources, and promote reliance on the judicial system by preventing inconsistent decisions. *Bebo Constr*., 990 P.2d at 84. Although originally developed in the context of judicial proceedings, issue preclusion is just as viable in administrative proceedings and may bind parties to an administrative agency's findings of fact or conclusions of law. *Id*. at 85; *Indus. Comm'n v. Moffat County Sch. Dist. RE No. 1*, 732 P.2d 616, 620 (Colo. 1987).

5. Issue preclusion bars relitigation of an issue if: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party

to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Bebo Constr*., 990 P.2d at 85; *Guar. Nat'l Ins. Co. v. Williams*, 982 P.2d 306, 308 (Colo. 1999); *Indus. Comm'n*, 732 P.2d at 619-20. Only when each of these elements has been satisfied are the equitable purposes of the doctrine furthered by issue preclusion. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001).

6. It is settled law that a full and fair opportunity to litigate an issue requires not only the availability of procedures in the earlier proceeding commensurate with those in the subsequent proceeding, *Maryland Cas. Ins. Co. v. Messina*, 874 P.2d 1058, 1062 (Colo. 1994), but also that the party against whom collateral estoppel is asserted have had the same incentive to vigorously defend itself in the previous action, *Salida Sch. Dist. R-32-J v. Morrison*, 732 P.2d at 1166-67; Restatement (Second) of Judgments § 28(5)(c) & cmt. j (1982). These considerations apply equally to the adjudication of workers' compensation benefits. *Sunny Acres Villa, Inc. v. Cooper, supra*.

7. In this case, issue preclusion has no application because there was not a fair and full opportunity to litigate the issues. The matter before ALJ Cain concerned the issue of TTD benefits and the matter before this judge relates to overcoming the DIME. These are different issues for which the parties have different incentive to defend. Furthermore, the issues in the cases are not identical. ALJ Cain’s case pertained to TTD benefits with reference made to ALJ Cain’s determination that Dr. Volz’s DIME opinion dated February 20, 2014, was overcome by clear and convincing evidence. The claim before the undersigned ALJ pertains to Dr. Volz’s April 16, 2015, DIME opinion. The claims are not identical, and ALJ Cain’s conclusions have no preclusive effect, where they pertain to wholly different DIME opinions.

Compensability and Withdrawal of the GAL

8. Respondents seek to withdraw its General Admission of Liability (GAL). *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990), held that an admission may not be withdrawn retroactively unless procured by fraud, but did permit the prospective withdrawal of an erroneous admission. Further, where the insurer seeks to withdraw the GAL on grounds that the claimant did not sustain an injury arising out of and in the course of employment, the burden of proof rests with the claimant to establish that a compensable injury occurred in the first instance. *Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001). To recover workers’ compensation benefits on a compensable claim, there must be a causal relationship between the industrial accident and the injury for which benefits are sought. *Snyder v. Industrial Claims Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

9. The issue to be determined concerns the “threshold” determination of whether the Claimant sustained *any injury* proximately caused by the performance of service arising out of and in the course of employment, the DIME physician’s opinion is not given any presumptive weight and need not be overcome by clear and convincing

evidence. Rather the threshold issue of “compensability” is determined under the preponderance of the evidence standard. *Eller v. Industrial Claim Appeals Office,* 224 P.3d 397 (Colo. App. 2009); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

10. In this case the “threshold” issue of whether the Claimant sustained an injury arising out of and in the course of employment is disputed. Respondents filed a GAL admitting that Claimant sustained a compensable injury on December 20, 2011, and now, in this case, Respondents seek to withdraw that admission. Accordingly, the precise issues presented for determination are whether the Claimant sustained work-related asthma and/or VCD as a result of his exposure to smoke at work, and whether one or both of these conditions caused Claimant to become disabled.

11. It is concluded that Claimant sustained his burden of proof by a preponderance to establish that he suffered a work injury on December 20, 2011, when the ventilation system in the kitchen where he worked broke causing him upper respiratory distress. Since Claimant established that he suffered a work injury in the course and scope of his employment for Employer, the Employer cannot withdraw its General Admission of liability.

Overcoming the DIME by clear and convincing evidence

12. Both parties in this matter raise the issue of overcoming the DIME opinion of April 16, 2015. Claimant’s position is that the DIME physician is incorrect and Claimant proved that his mild asthma and VCD was caused by the work injury, is not at MMI because he requires additional treatment to cure and relieve Claimant of the effect of the injury and has disabled him. By contrast, Respondents take the position that the DIME opinion is incorrect because Claimant condition is not caused by the work injury and therefore medical treatment and disability are not Respondents’ liability.

13. The question of whether the admitted injury caused asthma and/or VCD fell within the DIME physician’s authority to diagnose the Claimant’s medical conditions, determine whether any of Claimant’s medical conditions are work-related, determine whether Claimant’s conditions are stable and determine whether these conditions caused any ratable permanent impairment. It follows that the question presented here is the “extent” of the Claimant’s work-related injury and not the existence of a work-related injury. The “extent” of Claimant’s injury was a question properly submitted to the DIME physician and the ALJ and the parties are bound by the DIME physician’s findings unless overcome by clear and convincing evidence. *Leprino Foods v. Industrial Claim Appeals Office, supra*; *Nielsen-Hernandez v. King Soopers, supra*; *Gianzero v. Final Order Wal-Mart Stores, Inc., supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging a DIME physician's findings concerning MMI and or impairment must produce evidence demonstrating that it is highly probable the DIME physician’s findings are incorrect. The question of whether the party challenging the DIME physician’s findings has overcome them by clear and

convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

14. The ALJ notes that the DIME physician's April 16, 2015, findings concerning the diagnosis of Claimant's injury-related medical conditions and the cause of those conditions are ambiguous. In the April 16, 2015, DIME report Dr. Volz states that Claimant is not at MMI and his DIME opinion includes a discussion of the various medical treatments from which Claimant might benefit. Dr. Volz states that, if Claimant has asthma, VCD, GERD, rhinitis or bronchiectasis, there are many treatments that have not been tried on him that might provide Claimant relief from the symptoms. With regard to causation, Dr. Volz reiterates his opinion contained in the February 20, 2014, DIME report that "one could argue that [Claimant] does NOT have asthma, and if he does have asthma, there could be other factors aggravating his respiratory status."

15. In cases where a DIME physician offers ambiguous or conflicting inferences concerning MMI or impairment, the ALJ must determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Rainwater v. Sutphin*, WC 4-815-042-04 (ICAO September 9, 2014).

16. The ALJ determines as a matter of fact that Dr. Volz's true findings are that Claimant probably does not have asthma, but even if he does have asthma it is not causally related to his exposure to smoke in the workplace. It follows that because the DIME physician in both his February 20, 2014, and April 16, 2015, DIME reports found the Claimant does not have work-related asthma and/or VCD Claimant must overcome the April 16, 2015, findings by clear and convincing evidence. The ALJ concludes Claimant proved by clear and convincing evidence that he has work-related occupational asthma proximately caused by the admitted industrial injury of December 20, 2011.

17. Claimant proved it is highly probable and free from serious doubt that he sustained occupational asthma proximately caused or aggravated by exposure to smoke in the workplace. As found, the ALJ is persuaded by the opinions of Dr. Mayer, Dr. Rashid and Dr. Henke that Claimant has occupational asthma that was either caused by or aggravated by the workplace exposure to smoke. The ALJ is persuaded by Claimant's credible testimony that the asthma was caused or aggravated by the exposure to smoke that resulted from the malfunctioning of the ventilation system in the employer's kitchen. The ALJ finds that the opinions of Dr. Volz are not persuasive. Dr. Volz's opinions are persuasively refuted by the credible opinions of Dr. Mayer, Dr. Rashid and Dr. Henke. Doctors Mayer, Rashid and Henke agree that exposure to smoke either caused Claimant to develop asthma or aggravated a prior underlying condition that manifested itself as symptomatic asthma.

Medical Benefits

18. Claimant contends that he is entitled to medical benefits to cure and relieve him of the effects of the industrial injury. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

19. Since Claimant has proven by preponderant evidence that he suffered an injury in the course and scope of his employment and further proved by clear and convincing evidence that he suffers specifically from asthma, Respondents are liable for medical benefits to cure and relieve him of this condition.

ORDER

It is therefore ordered that:

1. Respondents are liable for Claimant's December 20, 2011, work injury.

2. Respondents' claim for withdrawal of the GAL is denied.

3. Claimant overcame the April 16, 2015, DIME opinion of Dr. Volz by clear and convincing evidence. Claimant proved that he is not at MMI for the occupational asthma proximately caused or aggravated by exposure to smoke in the workplace.

4. Respondents are liable for reasonably necessary and related medical benefits to cure or relieve Claimant of the effects of the occupational asthma.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 15, 2016

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Respondent has demonstrated by a preponderance of the evidence that Claimant did not have a reasonable excuse for filing her Worker's Claim for Compensation more than two years but fewer than three years after the date of her industrial injuries pursuant to §8-43-103(2), C.R.S. and is thus entitled to withdraw its June 30, 2015 Final Admission of Liability (FAL).

FINDINGS OF FACT

1. Claimant worked for Employer as a Paraprofessional. On November 27, 2012 Claimant was struck in the head by a basketball while at work. Employer referred her to Concentra Medical Centers for treatment. She was diagnosed with a cervical strain, a trapezius/rhomboid strain and contusions of the face, scalp and neck. Terrell R. Webb, M.D. assigned work restrictions including no lifting in excess of 10 pounds, no pushing or pulling in excess of 20 pounds of force and no functioning in a safety-sensitive position.

2. On November 28, 2012 Employer completed an Employer's First Report of Injury. The Report noted that Claimant had been struck in the head by a basketball on November 27, 2012 and suffered a concussion.

3. Claimant retained attorneys Mark Rau and Robert James to represent her for her November 27, 2012 industrial injuries. The attorneys entered their appearance on December 12, 2012. Claimant's attorneys subsequently wrote numerous letters to Respondent seeking ongoing medical treatment. The letters specifically sought clarification regarding prescription medications and gym memberships.

4. Claimant continued to receive treatment from Concentra. By May 8, 2013 Joel C. Boulder, M.D. diagnosed Claimant with the following: (1) a cervical strain; (2) chronic pain syndrome; (3) myalgia and myositis, unspecified; (4) scoliosis and kyphoscoliosis, idiopathic; and (5) a trapezius/rhomboid strain. He released Claimant to regular duty employment. Dr. Boulder determined that Claimant had reached Maximum Medical Improvement (MMI) and released her from care. He recommended medical maintenance treatment in the form of a 12-month gym membership for independent exercise.

5. On May 8, 2013 Claimant underwent an impairment evaluation. She received a 7% whole person rating for her November 27, 2012 industrial injuries.

6. On June 25, 2013 Employer issued a letter granting Claimant's request for a health leave of absence. The leave was effective from April 1, 2013 through August

29, 2013. However, the letter noted that Claimant's position would not remain open and she would be required to apply for any available positions when she was able to return to employment.

7. On June 9, 2015 Claimant filed a Workers' Claim for Compensation. Claimant stated that she suffered back, head and shoulder injuries when she was struck in the head by a basketball while working for Employer.

8. On June 30, 2015 Respondent filed a Final Admission of Liability (FAL). The FAL acknowledged that Claimant had incurred medical expenses in the amount of $7,154.54. The FAL only admitted for the medical benefits that had previously been paid. It did not acknowledge continuing medical benefits, temporary disability benefits or permanent disability benefits.

9. Respondent subsequently filed an Application for Hearing. Respondent contended that it erroneously filed its FAL because Claimant failed to file her Workers' Claim for Compensation within the two year period delineated in §8-43-103(2), C.R.S. Moreover, there was no excusable neglect for Claimant to file her Workers' Claim for Compensation more than two years but fewer than three years after the date of her industrial injuries pursuant to §8-43-103(2), C.R.S.

10. Claimant asserts that she was unable to file her claim within the two year statute of limitations period because she suffered from mental incapacitation. Furthermore, she contends that her mental incapacitation constituted a reasonable excuse to justify the filing of her Workers' Claim for Compensation more than two years but fewer than three years after the date of her industrial injuries.

11. Respondent has demonstrated that it is more probably true than not that Claimant did not have a reasonable excuse for filing her Worker's Claim for Compensation more than two years but fewer than three years after the date of her industrial injuries pursuant to §8-43-103(2), C.R.S. Initially, Claimant was aware of the nature, seriousness and probable compensable character of her injuries on November 27, 2012. The record reveals that the injuries were of sufficient magnitude to cause a disability that would lead a reasonable person to recognize that she might be entitled to compensation benefits. Employer referred her to Concentra Medical Centers for treatment. She was diagnosed with a cervical strain, a trapezius/rhomboid strain and contusions of the face, scalp and neck. Dr. Webb assigned work restrictions including no lifting in excess of 10 pounds, no pushing or pulling in excess of 20 pounds of force and no functioning in a safety-sensitive position. On the following day Employer completed a First Report of Injury. The Report noted that Claimant had been struck in the head by a basketball on November 27, 2012 and suffered a concussion. Finally, Claimant hired attorneys within two weeks after the date of her injury and the attorneys wrote numerous letters to Respondent seeking ongoing medical treatment. The letters specifically sought clarification regarding prescription medications and gym memberships. Accordingly, Claimant was aware of the compensable character of her injuries on November 27, 2012 and the statute of limitations was not tolled.

12. Claimant also did not have a reasonable excuse for failing to timely file her claim for Workers' Compensation benefits. Although Claimant contends that mental incapacitation justified the delayed filing of her Workers' Compensation claim, her actions demonstrate that she lacked a reasonable excuse. Claimant sought medical treatment, retained attorneys and received work restrictions. Claimant was not misled by Employer regarding her claim and a reasonable person would have believed that it was necessary to file a claim. The record simply lacks persuasive evidence that Claimant's mental incapacitation delayed the filing of her claim. Respondent has thus established that Claimant did not have a reasonable excuse for failing to timely file her claim for Workers' Compensation benefits. Accordingly, Respondent may withdraw its June 30, 2015 FAL.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Withdrawing the Final Admission of Liability

4. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not

suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2015), C.R.S. On June 30, 2015 Respondent filed an FAL acknowledging medical benefits that had previously been paid. Accordingly, Respondent bears the burden of proving that it is entitled to withdraw the FAL.

5. Respondent did not waive its statute of limitations argument by filing the FAL. In *Williams v. El Paso County*, W.C. 3-961-519 (ICAP, Dec. 17, 1992), the ICAP determined that filing an admission of liability for benefits previously paid does not constitute a waiver of the statute of limitations. The ICAP specified that “[the] respondents were only admitting liability for certain medical expenses that had been paid. If the claimant wished to seek additional benefits, she was required under the statute to file a timely notice claiming such benefits.”

Compensable Character of Injury

6. Section 8-43-103(2), C.R.S. provides that the right to Workers' Compensation benefits is barred unless a formal claim is filed within two years after the injury. However, the statute of limitations does not begin to run until the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). The requirement that the claimant recognize the "seriousness" of the injury contemplates the claimant will recognize the gravity of the medical condition. Finally, a "compensable" injury is one which is disabling and entitles the claimant to compensation in the form of disability benefits. *Romero v. Industrial Commission,* 632 P.2d 1052 (Colo. App. 1981). Therefore, to recognize the "probable compensable character" of an injury, the injury must be of sufficient magnitude that it causes a disability that would lead a reasonable person to recognize that he may be entitled to compensation benefits. *Id.*

7. As found, Respondent has demonstrated by a preponderance of the evidence that Claimant did not have a reasonable excuse for filing her Worker’s Claim for Compensation more than two years but fewer than three years after the date of her industrial injuries pursuant to §8-43-103(2), C.R.S. Initially, Claimant was aware of the nature, seriousness and probable compensable character of her injuries on November 27, 2012. The record reveals that the injuries were of sufficient magnitude to cause a disability that would lead a reasonable person to recognize that she might be entitled to compensation benefits. Employer referred her to Concentra Medical Centers for treatment. She was diagnosed with a cervical strain, a trapezius/rhomboid strain and contusions of the face, scalp and neck. Dr. Webb assigned work restrictions including no lifting in excess of 10 pounds, no pushing or pulling in excess of 20 pounds of force and no functioning in a safety-sensitive position. On the following day Employer completed a First Report of Injury. The Report noted that Claimant had been struck in the head by a basketball on November 27, 2012 and suffered a concussion. Finally, Claimant hired attorneys within two weeks after the date of her injury and the attorneys wrote numerous letters to Respondent seeking ongoing medical treatment. The letters specifically sought clarification regarding prescription medications and gym

memberships. Accordingly, Claimant was aware of the compensable character of her injuries on November 27, 2012 and the statute of limitations was not tolled.

Reasonable Excuse

8. The Act requires that a notice claiming Workers' Compensation benefits shall be filed with the Division of Workers' Compensation within two years following the date of death. However, a claim may be filed within three years after the death if it is determined that a reasonable excuse exists for the failure to file the claim within two years and the employer's rights have not been prejudiced. §8-43-103(2), C.R.S. The claimant bears the burden of proving that a reasonable excuse exists. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Colorado Fuel & Iron Corp. v. Industrial Commission*, 129 Colo. 257, 269 P.2d 696 (1954). A "reasonable excuse" is one which is "legally justifiable." *Armour & Co. v. Industrial Commission*, 149 Colo. 251, 368 P.2d 798 (Colo. 1962); *Morford v. Fresh Express*, W.C. No. 4-209-032 (ICAP, Sept. 29, 1995).

9. A "reasonable excuse" for neglecting to timely file a claim may exist when an employer misleads a claimant regarding compensability. *City and County of Denver v.* Phillips, 443 P.2d 379 (1968). However, a claimant's lack of knowledge of the law or of her legal rights cannot constitute a reasonable excuse. *Ramos v. Sears Roebuck Company*, W.C. No. 4-156-827 (ICAP, Feb. 10, 1994). The applicable standard is whether the claimant, as a reasonable person, believed that it was unnecessary to file a claim for compensation. *Id.* The existence of a reasonable excuse for purposes of neglecting to file a claim within two years is a matter within the discretion of the ALJ. *Emrich v. Jackson Hewitt Tax Service*, W.C. No. 4-241-443 (ICAP, Oct. 27, 1998). Moreover, an ALJ has "wide discretion" in determining whether reasonable excuse exists. *Butler v. Memorial Gardens Cemetery*, W.C. No. 4-589-950 (ICAP, Nov. 9, 2005).

10. As found, Claimant also did not have a reasonable excuse for failing to timely file her claim for Workers' Compensation benefits. Although Claimant contends that mental incapacitation justified the delayed filing of her Workers' Compensation claim, her actions demonstrate that she lacked a reasonable excuse. Claimant sought medical treatment, retained attorneys and received work restrictions. Claimant was not misled by Employer regarding her claim and a reasonable person would have believed that it was necessary to file a claim. The record simply lacks persuasive evidence that Claimant's mental incapacitation delayed the filing of her claim. Respondent has thus established that Claimant did not have a reasonable excuse for failing to timely file her claim for Workers' Compensation benefits. Accordingly, Respondent may withdraw its June 30, 2015 FAL.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Because Claimant's claim for Workers' Compensation benefits was untimely, Respondent is permitted to withdraw its June 30, 2015 Final Admission of Liability.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 19, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-852-135-02

ISSUES

- Whether Claimant established by a preponderance of the evidence that his condition has worsened sufficient to re-open his claim?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On March 28, 2011, Claimant sustained a work-related injury to his lower back while employed by Employer. Claimant received authorized medical care eventually resulting in a two-level lumbar spine fusion surgery at L4-L5 and L5-S1. Claimant was eventually placed at maximum medical improvement on October 23, 2012 and was assigned a whole-person medical impairment rating of 31% after a Division Independent Medical Examination.

2. Prior to undergoing the fusion, Claimant was seen on June 14 and 23, 2011 in consultation by Dr. Gordon G. K. Yee for a consultation at Foothills Orthopedic & Spine Center, P.C. Dr. Yee noted on the June 14 that if Claimant were to undergo a lumbar spine fusion that there would be a significant risk of developing adjacent segment degeneration. He therefore recommended against surgery.

3. On May 19, 2013, Claimant saw Dr. James S. Ogsbury at Rocky Mountain Neurosurgical Consultants, LLC, who recommended an L5-S1 fusion or perhaps a two level fusion.

4. Because of the difference of opinion, Claimant was referred to Dr. Bryan Castro who recommended the two level fusion.

5. After Claimant reached maximum medical improvement, he began experiencing increased pain and sought treatment at the office of the authorized treating physicians at Concentra. On July 27, 2015, Claimant saw Dr. Julia Balderson with the permission of Respondent for evaluation. Dr. Balderson noted that Claimant had increasing back pain over the last one to two years with pain and numbness radiating into the interior thigh. She referred Claimant back to Dr. Castro to determine whether or not the worsening pain was due to the original injury for purposes of reopening of the case.

6. Claimant returned to see Dr. Castro on August 26, 2015. Dr. Castro recommended that Claimant have an additional MRI to evaluate any neural encroachment and referred Claimant to Dr. Meza at Concentra for

evaluation and scheduling of an MRI. Claimant returned to Dr. Meza on August 27, 2015. Dr. Meza ordered a physical medicine and rehab referral to Dr. Tobey.

7. Claimant had previously had an MRI on March 3, 2015 at Boulder Community Hospital when he self-reported with severe back pain. That MRI showed that at the L3-L4 level there was severe canal stenosis as well as tethering of the nerve roots of the central spinal canal and the neural foramina appear moderately narrowed bilaterally secondary to annular bulging. The impression was severe acquired central canal stenosis at L3-L4 with tethering of the cauda equina, primarily secondary to disk bulging ventrally and focal epidural fatty hypertrophy posteriorly.

8. Respondent sent Claimant for an examination by Dr. Michael Madsen, a neurosurgeon in Lonetree, Colorado. On December 2, 2015, Dr. Madsen sent an addendum report addressing the causation of Claimant's symptoms. At that point his diagnosis was severe acquired central canal stenosis at L3-L4 secondary to a disc bulge with epidural hypertrophy (fatty deposit).

> This development of stenosis most likely represents a combination of the natural progression of degenerative change, accelerated by the presence of loads transferred due to fusion. . . . The Colorado Division of Worker's Compensation has no guidelines regarding distinguishing causation between natural degenerative change and degeneration adjacent to prior fusion. My medical opinion is that the findings at L3-4 represent a combination of both. I am unable to quantify the respective contributions further.

9. After receiving this report, Respondent sent Claimant for an additional examination with Lawrence A. Lesnak, D.O. Dr. Lesnak is an osteopath certified in physical medicine and rehabilitation. He opined that Claimant's symptoms, while worsening, were due solely to the fatty deposit at L3-L4. However, he admitted he had not reviewed the addendum report of Dr. Madsen, that there was acquired stenosis due to bulging at L3-L4 in combination with the hypertrophy combined to cause Mr. Violette's ongoing problems.

10. The ALJ finds that the opinion expressed in the reports of Dr. Michael W. Madsen on the issue of relatedness of the Claimant's symptoms to be more credible and persuasive than those expressed by Dr. Lesnak. The Court notes that in this instance Claimant was seen by both Dr. Madsen and Dr. Lesnak at the request of the Respondent. When the report of Dr. Madsen, a neurosurgeon, supported the position that Claimant has had a worsening of his work-related condition, Respondents sent Claimant to Dr. Lesnak who offered the opposite opinion.

11. The Administrative Law Judge finds, based on the totality of the evidence, that Claimant has established by a preponderance of the evidence, that he has had a natural worsening of his work-related injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Once a claim is closed by final admission, it is not subject to further litigation unless it is reopened under § 8-43-303, C.R.S. 2014. To reopen a claim, a claimant must show error, mistake, or change in condition. § 8-43-303(1) C.R.S.; *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270, 272 (Colo. App. 2005).

A 'change in condition' . . . means 'a change in the claimant's physical or mental condition resulting from the compensable injury.' Thus, 'change in condition' refers either to a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury. *Chavez v. Indus. Comm'n*, 714 P.2d 1328, 1330 (Colo. App. 1985).

"Reopening is appropriate when the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted." *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756, 758 (Colo. App. 2000). The party attempting to reopen a claim "shall bear the burden of proof as to any issues sought to be reopened." § 8-43-303(4) C.R.S.

An ALJ has broad discretionary authority to determine if a claimant has met the burden of proof of establishing the change of condition warranting reopening. *Renz v. Larimer Cnty. Sch. Dist.*, 924 P.2d 1177, 1181 (Colo. App. 1996). The statutory reopening authority granted ALJs is "permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ." *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002).

Here Claimant proved by a preponderance of the evidence, specifically the opinion of Dr. Madsen, that Claimant's symptoms are caused by a combination of a natural progression of degenerative change, combined with the presence of loads transferred due to his fusion. Consequently, the petition to reopen is granted.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim is reopened pursuant to § 8-43-303 C.R.S.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 22, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues to be determined by this decision are:

- Whether the Claimant's average weekly wage should be increased to $1101.96 in WC 4-977-328;

- Whether the Respondents properly terminated Claimants temporary total disability benefits in WC 4-977-328 due to her failure to accept a modified duty job;

- Whether Respondents' petition to reopen WC 4-910-076, due to an alleged overpayment of benefits should be granted; and if the claim is reopened, whether the Respondents may recover the overpayment by reducing benefits payable in WC 4-977-328.

- The Claimant asserted that the Final Admission of Liability (FAL) filed in WC 4-910-076 is invalid thus reopening would be unnecessary.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as fact:

1. The Employer operates a hotel and spa located in Avon, Colorado. The Claimant worked at the spa as a massage therapist.

2. On January 28, 2013, the Claimant suffered an admitted work injury to her right wrist (WC 4-910-076). Claimant primarily underwent medical treatment at Vail Valley Medical Center with Lucia London, a certified nurse practitioner. Claimant also had surgery on her right wrist performed by Dr. Viola.

3. On March 24, 2014, Ms. London evaluated the Claimant. She completed a report documenting that Claimant had reached maximum medical improvement with no impairment or restrictions.

4. On April 10, 2014, the Respondents filed a FAL. The FAL states that the date of MMI is March 24, 2014, and in the section entitled "Remarks and basis for permanent disability award" states that, "There are no impairment benefits based on "London's" report of 3-24-14." The report attached to the FAL is the March 24, 2014 report referenced in paragraph 2 above. Ms. London, who is not a physician, signed the

report. There is no indication that an authorized treating physician reviewed Ms. London's recommendations or that the Respondents referred Claimant to a level II accredited physician for an evaluation regarding permanent impairment.

5. On March 9, 2015, the Claimant suffered a work injury to her left shoulder (WC 4-977-328). The Respondents admitted liability, and the Claimant has undergone medical treatment again primarily at Vail Valley Medical Center with Ms. London.

6. Claimant was eventually referred to Dr. William Sterett, an orthopedic surgeon. On July 14, 2015, Dr. Sterett performed surgery on Claimant's left shoulder.

7. On July 31, 2015, Dr. Sterret imposed work restrictions to include no lifting, carrying, pushing, pulling more than 10 pounds; and no overhead lifting. He also indicated Claimant should wear her sling for one more week then wean off of it.

8. On August 20, 2015, the Employer sent a letter to Dr. Sterret asking him to approve a modified duty job as a Spa Front Desk Attendant. The modified duty job was based on the restrictions Dr. Sterret imposed on July 31, 2015, stated in paragraph 7 above. Dr. Sterret signed the letter and dated it August 20, 2015. The Employer indicated that the modified duty job began on August 27, 2015.

9. Dr. Sterret signed the August 20, 2015 letter and faxed it back to the Employer in the morning around 9:48 a.m. according to the date and time fax stamp at the top of the letter.

10. Also on August 20, 2015, the Claimant called Dr. Sterret to report that she had a set back and her pain had increased. She also expressed concern that her work restrictions were not appropriate for her. Dr. Sterret electronically signed the note at 11:41 a.m.

11. The ALJ acknowledges that the timing of the new 2-pound restrictions is suspicious but there was no credible or persuasive evidence, such as testimony from Dr. Sterret or Ms. London, that Claimant deliberately urged either of them to modify her restrictions after receiving the August 20, 2015 modified duty job offer.

12. According to Dr. Sterret's August 28, 2015 record, Claimant recovered from her surgery rather slowly. Dr. Sterret imposed work restrictions to include no lifting of more than 2 pounds more than two times per hour and no overhead lifting or overhead work, and no typing.

13. The Claimant also saw Ms. London on August 28, 2015. Ms. London's report indicates that Claimant was residing in Denver so her family could help her out. Ms. London noted that Claimant's restrictions included lifting, carrying, pushing and pulling 0-2 pounds with her left arm; no reaching away from the body; no overhead work; and no typing.

14. On September 3, 2015, the Insurer had Claimant personally served at her physical therapist's office in Denver with the August 20, 2015 modified duty job offer, which offered her a job at the spa in Avon, Colorado. The letter indicated that Claimant must start the modified duty job three business days from the receipt of the letter which fell on September 8, 2015. The Insurer relied upon the restrictions Dr. Sterret imposed on July 31, 2015.

15. The Claimant testified that she had no notice of the August 20, 2015 modified duty job offer until it was personally served upon her on September 3, 2015, although the original letter states that it was sent by regular mail and e-mail.

16. The Claimant did not report to work to begin the modified duty job on or before September 8, 2015. The Claimant testified that the restrictions included in the September 3, 2015 modified duty job offer were no longer valid. Claimant's attorney sent a letter to Respondents' attorney stating that Claimant had re-located to Denver and that due to the change in work restrictions, the job offer was no longer valid.

17. On September 16, 2015, Dr. Sterret again changed Claimant's restrictions to no lifting more than 15 pounds more than two times per hour, no overhead lifting or work, and no typing. Dr. Sterret also indicated that Claimant should not need to use a sling at work. Dr. Sterret did not examine or talk to the Claimant on September 16, 2015 prior to modifying her work restrictions.

18. The Respondents filed a General Admission of Liability terminating Claimants temporary total disability effective September 8, 2015. Respondents relied upon the modified duty job offer dated August 20, 2015, and personally served upon Claimant on September 3, 2015.

19. On September 28, 2015, Dr. Sterret approved a modified duty job of Spa Desk Agent with no lifting greater than 10 pounds; no overhead lifting; and no typing with her left arm. Dr. Sterret's signature indicated that he agreed the modified duty job was within the restrictions he had imposed on September 16, 2015.

20. On October 2, 2015, the Insurer had Claimant personally served with the modified duty job offer dated September 30, 2015 enclosing Dr. Sterret's approval of the modified duty job dated September 28, 2015. The offer letter informed the Claimant that she must begin the modified duty job three business days after receiving the letter. Three business days after October 2 was October 7, 2015. Claimant did not report for work on October 7, 2015.

21. Paige Bowers, the Employer's spa manager, testified that the Employer closed completely every October for an undetermined amount of time until ski season. The wage records supplied by the Respondents show Claimant earned no wages October 2014.

22. Claimant had moved to Denver just before she had surgery in July 2015 because she needed assistance recovering from the surgery. Claimant owned a home in Eagle County. Claimant testified that she felt she could no longer afford to live there due to her injury.

23. Claimant was undergoing physical therapy in the Denver area but still traveling to Vail for her monthly visits with the physicians. She indicated that she scheduled appointments with both Dr. Sterret and Vail Valley Medical on the same day to avoid multiple trips from Denver to Vail.

24. The Employer has a property in the Denver area that is owned by the same management company. Claimant testified that she would have been able to accept an offer of modified duty employment in the Denver area had it been offered.

25. Dr. Sterett has not yet placed Claimant at maximum medical improvement, and Claimant still has work restrictions.

26. Based on the foregoing, the Respondents have failed to prove that termination of TTD effective September 8, 2015 was appropriate under the circumstances. **While it is true that the September 3, 2015 modified duty job offer letter was valid and in compliance with DOWC Rule 6 when prepared by the Respondents, the ALJ finds that the offer became invalid when Dr. Sterret reduced Claimant's lifting capacity to 2 pounds on August 28, 2015. Dr. Sterret did not review the Spa Desk Agent job with a 2-pound restriction in mind prior to the Employer offering Claimant the modified duty job on September 3, 2015. Thus, the unilateral termination of TTD effective September 8, 2015 was improper.**

27. The ALJ finds that the job offer made on October 2, 2015 was a valid job offer but that Claimant, as a practical matter, could not accept it. As such, Claimant remains entitled to TTD.

28. Respondents admitted for an AWW of $810.04, which the Respondents assert is inflated and Claimant asserts is too low.

29. In WC 4-910-076, the Respondents admitted for an AWW of $1,165.69. Claimant urges the ALJ to adopt a method of calculating her AWW that would result in a wage closer to $1,165.69. Claimant supplied wage information for an eight-week period reflecting that she earned $8,815.71 immediately before her injury. Claimant's wage calculation fails to recognize that the Employer closes for several weeks each year. In 2014, the Employer closed for eight weeks during which Claimant earned no wages. Claimant testified that she had side work during those weeks, but provided absolutely no testimony or evidence as to how much she earned thus that loss of earning capacity cannot be considered.

30. Claimant also alleged that in all of 2014 and 2015 through March 9, 2015, she earned less than normal because she was still recovering from her January 2013

injury. Claimant provided no documentary evidence to support her assertion. The fact that Respondents admitted for a higher wage in WC 4-910-076, does not prove that Claimant's AWW should be higher in her subsequent claim.

31. The Respondents urge the ALJ to calculate Claimant's AWW based on 52 weeks of income Claimant earned from March 8, 2014 through March 6, 2015. Claimant earned a total of $30,781.45 over that period which results in an AWW of $591.95. The ALJ finds that $591.95 more accurately reflects Claimant's average wage.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

WC 4-910-076 –Petition to Reopen and Overpayment

4. Section 8-42-107(8)(b)(I), C.R.S., states that an authorized treating physician shall determine when the injured worker reaches MMI. Because the best indicator of legislative intent is the language of the statute, words and phrases in a statute should be given their plain and ordinary meanings. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The plain language of the statute requires that a *physician* determine when a Claimant as reached MMI. There is no dispute that

Lucia London is not a physician. As such, Ms. London had no authority to determine Claimant had reached MMI on March 24, 2014, and she certainly had no authority to determine permanent medical impairment as she is not a physician, and cannot have obtained the appropriate accreditation by the DOWC. Because no authorized treating physician has placed the Claimant at MMI, the FAL is void and the claim remains open. Further, the overpayment issue is rendered moot because without an MMI determination, the ALJ cannot ascertain whether the Respondents overpaid any benefits to the Claimant.

WC 4-977-328 – Termination of TTD

5. Section 8-43-105(3)(d)(I), C.R.S., requires termination of TTD once the attending physician releases a claimant to modified duty work, the employer offers, in writing, the modified duty work and the claimant fails to begin such employment. Section 8-42-105(3), C.R.S., provides that upon the occurrence of one of four enumerated conditions TTD benefits shall cease. The termination of TTD benefits under any one of the four enumerated conditions is mandatory. *Burns v. Robinson Dairy, Inc., 911 P.2d 661* (Colo. App. 1995).

6. WCRP Rule 6 provides that respondent may unilaterally terminate claimant's TTD without a hearing by filing an admission of liability together with a certified letter to the claimant containing both an offer of modified employment, setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions.

7. While it is true that the September 3, 2015 letter was valid and in compliance with DOWC Rule 6 when prepared by the Respondents, it became invalid when Dr. Sterret reduced Claimant’s lifting capacity to 2 pounds on August 28, 2015. Dr. Sterret did not review the Spa Desk Agent job with a 2-pound restriction in mind prior to the Employer offering Claimant the modified duty job on September 3, 2015. Thus, the unilateral termination of TTD effective September 8, 2015 was improper.

8. The Respondents made a second modified duty job offer on October 2, 2015, when the Insurer had Claimant personally served with the offer dated September 30, 2015 enclosing Dr. Sterret’s approval of the modified duty job dated September 28, 2015. The offer letter informed the Claimant that she must begin the modified duty job three business days after receiving the letter. Three business days after October 2 was October 7. The Claimant failed to report to work on October 7, 2015. The ALJ concludes that the October 2, 2015 modified duty job offer complied with Rule 6 of the DOWC Rules of Procedure.

9. Once it has been established that the offer of modified duty was valid and in compliance with Rule 6 and § 8-42-105(3)(d)(I), C.R.S., the appropriate inquiry is whether the offered employment is reasonably available to the claimant under an objective standard. *See Ragan v. Temp Force*, W.C. No. 4-216-579 (ICAO June 7, 2006).

10. Section 8-42-105(3)(d)(I), C.R.S., creates no explicit prescriptions or restrictions on the type of modified employment Respondents may offer other than that the attending physician must approve the employment. *Ragan, supra.* In *Belanger v. Keystone Resorts*, Inc., W.C. No. 4-250-114 (ICAO October 9, 1997) ICAP acknowledged that the location of a claimant's residence is a relevant factor in determining whether the refusal to accept the employment is reasonable. However, ICAP held that the residence factor must be viewed against the totality of the circumstances, including the claimant's decision to relocate. *See also Loya v. Colorado Roofing Contractors, Inc*., W.C. No. 4-530-597 (ICAO July 22, 2004).

11. As found above, the modified duty job was not reasonably available to the Claimant. The Claimant moved from Vail to Denver due, in part, to her work injury. She needed assistance recovering from the work-related shoulder surgery and she did not have the financial means to continue residing in Vail. In addition, the imminent closure of the Employer's spa following the modified duty job offer would not provide any impetus to the Claimant to move back to Vail. She would have been unemployed within a week or two of commencing the modified duty job, and unable to perform massages for private clients during the shutdown. Under the circumstances presented, the ALJ concludes that Claimant reasonably refused to accept the modified duty job in Vail. Respondents remain liable for TTD commencing on September 9, 2015 and ongoing until terminated by operation of law.

Average Weekly Wage

12. Section 8-42-102(2), C.R.S., requires a claimant's average weekly wage to be calculated upon the monthly, weekly, hourly, daily or other remuneration the claimant was receiving at the time of the injury. Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

13. The Claimant has presented no persuasive evidence that her AWW should be increased whereas Respondents proved by a preponderance of the evidence that they erroneously admitted for an inflated wage. Over a 52-week period from March 8, 2014 through March 6, 2015, Claimant earned a total of $30,781.45. This period of time includes the weeks when the Employer shuts down and Claimant earns no wages. It also reflects the fairest approximation of Claimant's wage loss given that she did not prove that she earned any additional wages during the Employer's shutdown nor did she prove she was earning less than usual due to her 2013 work injury. Thus, Claimant's AWW is $591.95.

ORDER

It is therefore ordered that:

1. Claim number WC 4-910-076 remains open; and the issue of overpayment in that claim is moot.

2. Respondents' unilateral termination of TTD in WC 4-977-328 is reversed. Claimant remains entitled to TTD commencing on September 9, 2015 and ongoing until terminated by operation of law.

3. Claimant's AWW in WC 4-977-328 is $591.95.

4. The Insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the supplemental order, as indicated on certificate of mailing or service; otherwise, the Judge's supplemental order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the supplemental order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. The petition set forth in detail the particular errors and objections relied upon, and shall be accompanied by a brief in support thereof. For statutory reference, see section 8-43-301(6), C.R.S.

DATED: July 22, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

PRELIMINARY ISSUE

1. Whether the applicability of a safety rule violation is an issue ripe and ready to proceed to hearing.

The Claimants assert that pursuant to O.A.C.R.P. 12, parties must appraise the ALJ prior to hearing of the issues and affirmative defenses to be determined by endorsing issues and affirmative defenses in either the application for hearing or the response to application for hearing or by agreement of the parties or pursuant to a judge's order. The Claimants further assert that affirmative defenses must be explicitly pled and that penalties for an employee's willful failure to use a safety device or willful failure to follow a reasonable safety rule are affirmative defenses, and therefore, must be specifically pled or they are waived. The Claimants argue that the Respondents failed to endorse affirmative defenses pursuant to § 8-42-112(1)(a) & (b), C.R.S., in any of the multiple responses to applications for hearing filed in this matter. Respondents did not seek the Claimants' agreement to add the issue or a judge's order allowing them to add the issue for good cause shown subsequent to filing their most recent responsive pleading. Claimant RH further argues that he sought information through discovery regarding the penalties being taken in Respondents' General Admission of Liability pursuant to § 8-42-112, C.R.S. and Respondents objected to providing complete information in response to Claimant RH's discovery requests.

It is the position of the Respondents that, through the Fatal Case - General Admission, Respondents specifically asserted a safety rule violation. Respondents further argue that by Claimant MH endorsing death benefits as an issue for hearing (even though they are being paid through the admission), it is clear that the safety rule violation issue was understood. Otherwise there would be no reason for Claimant MH to proceed in the case disputing benefits paid. Respondents also note that discovery was completed regarding the safety rule violation and multiple documents acknowledged that the asserted safety rule violation was a disputed issue for the set hearing.

Waiver is the intentional relinquishment of a known right. A waiver must be made with full knowledge of the relevant facts, and the conduct should be free from ambiguity and clearly manifest the intention not to assert the right. *Johnson v. Industrial Commission, supra*; *Department of Health v. Donahue,* 690 P.2d 243 (Colo. 1984). In this case, the Respondents did clearly assert the safety rule violation on the Fatal Case – General Admission and took the penalty deduction per calculations of the benefits owed. There was considerable correspondence and multiple motions mentioning the safety rule violation. In addition, all parties indicated that they were prepared to proceed on the safety rule violation at the commencement of the hearing. The ALJ finds that the totality of the evidence shows that the parties understood that safety rule violation was an issue for hearing.

ISSUES

The issues for determination are:

1. Whether the Claimant RH is entitled to death benefits under the Workers' Compensation Act of Colorado as a dependent widower of the Decedent under the doctrine of common law marriage.

2. Determination of the Decedent's average weekly wage ("AWW") including COBRA benefits.

3. Whether Respondents have proven they are entitled to a fifty percent (50%) reduction in compensation because the Claimant's death on January 3, 2014 was caused by a willful failure to obey a reasonable rule adopted by Employer for the safety of the employee.

4. Determination of the offset amount for Social Security Survivor benefits to which the Respondent is entitled.

FINDINGS OF FACT

1. Decedent was hired by Employer as a route sales representative and delivery driver on October 25, 2012 (Claimant RH's Exhibit 34; Respondents' Exhibit H, p. 82, Respondents' Exhibit N; and Hearing Tr., p. 60:16-18).

2. Decedent was working for Employer in the course and scope of her employment when she was involved in a fatal motor vehicle accident on January 3, 2014. On January 3, 2014, the delivery vehicle of Employer's that Decedent was driving was rear ended by a tractor-trailer. The tractor-trailer pushed Decedent's vehicle off the road and caused it to rotate in a counter clockwise direction until Decedent's vehicle rolled one quarter turn onto the passenger side. Decedent was partially ejected out the front passenger side window. Decedent was killed when a portion of her vehicle came down on her head and upper torso.

3. Colorado State Trooper Seth Soukup testified via deposition on December 15, 2015. Trooper Soukup is a level 4 certified accident reconstruction specialist for the Colorado State Patrol. He is also accredited by the Accreditation Commission for Traffic Accident Reconstruction. Trooper Soukup has worked for the Colorado State Patrol since 2008. Trooper Soukup's job duties include going to crash sites, determining contributing factors, determining how the crash occurred, documenting the accident, using momentum calculations, doing computer animations, and concluding what occurred (Soukup Depo. 4:19 – 8:24).

4. Trooper Soukup testified that on January 3, 2014 he received a call to report to the scene of Decedent's accident. Trooper Soukup arrived on the scene and observed Decedent's vehicle laying on the passenger side (Soukup Depo. 9:7 – 10:17). He testified that he found Decedent deceased when he arrived on the scene. Decedent

was partially in her vehicle and partially out of the vehicle. Decedent's torso was out of the passenger window with her head pinned beneath the A-pillar on the vehicle. Decedent's legs and the lower part of her body were still inside the vehicle (Soukup Depo. 13:20 – 14:11). Trooper Soukup opined that the evidence shows Decedent was thrown out the passenger side window of her vehicle because the vehicle was turning left when it was hit from the rear causing it to turn even more sharply to the left. The fact that Decedent was hit from the rear by a vehicle traveling 30 to 40 miles faster than she was pushed her vehicle forward faster than she was and as a result, pushed her forward. Decedent maintained a northern course as the vehicle turned west causing her to be ejected out the passenger window (Soukup Depo. 56:2 – 60:12).

5. At the scene of the accident, Trooper Soukup was able to look into Decedent's vehicle through the broken windshield and observed that the driver's seat belt was fully retracted and had not been in use at the time of the accident. Trooper Soukup also entered into the vehicle and checked the seat belt at the scene to ensure it was functional and was not locked (Soukup Depo. 26:3-11 and 46:3 – 47:25). Trooper Soukup testified that he later inspected Decedent's vehicle at the tow yard and "it was evident that the seat belt was fully retracted and had not been in use at the time of the crash." Additionally, the seat belt was operational. When Trooper Soukup pulled on the seat belt, it was in non-locking mode so he was able to pull it out. The seat belt was able to latch and release and retracted fully (Soukup Depo. 26:3-22).

6. After completing his investigation of the accident, Trooper Soukup completed a Colorado State Patrol Traffic Accident Report. Trooper Soukup noted that Decedent's vehicle was making a left turn at the time of the accident and was traveling at an estimated 5 mph. Trooper Soukup testified that he determined Decedent's vehicle was traveling at 5 mph based on a speed work-up using momentum, weight and speed of the vehicles, roadway evidence, skid marks on the road, path of travel, and distance traveled. These same factors led Trooper Soukup to determine that Decedent was making a left turn at the time of impact (Respondents' Exhibit D, p. 68 and Soukup Depo. 28:1 – 30:12). Trooper Soukup also noted that Decedent's vehicle was equipped with safety equipment of a shoulder and lap belt that was not used at the time of the accident. Trooper Soukup testified that he determined the safety equipment was not used based on looking at the scene and the seat belt position being fully retracted and Decedent's position under the vehicle with her torso being out of the vehicle and under the A-pillar. Trooper Soukup testified that there was evidence the seat belt had not been in use at that time (Respondents' Exhibit D, p. 69 and Soukup Depo. 37:1-20). Trooper Soukup testified that there was no evidence Decedent was at a stop at the time of impact or that she had gotten out if her vehicle to check her stock or check a mechanical issue. This is because the driver of the other vehicle stated that he saw Decedent driving in from of him just moments before the accident (Soukup Depo. 51:7 – 52:2). Trooper Soukup also testified that at the time of impact, the driver's side tires of Decedent's vehicle were near the middle of the road and the passenger side tires were in the right-hand lane, several feet away from the side of the road. Decedent was not on the shoulder or side of the road due to mechanical defects or stopping for some reason. (Soukup Depo. 38:22 – 39:13).

7. In the Accident Narrative section of the report, Trooper Soukup concluded as follows:

> Both vehicles were northbound on Morgan County Road 24. Vehicle #2 [Decedent's vehicle] had slows to make a left turn onto Morgan Count Road U & 5/10 (U.5). Vehicle #1 rear-ended Vehicle #2, causing Vehicle #2 to begin to rotate counter-clockwise. Vehicle #2 traveled approximately 64.8' while it rotated one-quarter time counter-clockwise before rolling one-quarter time onto its right side. The unrestrained driver of Vehicle #2 was partially ejected out the passenger side window and Vehicle #2 came to rest partially on top of its driver. Vehicle #2 came to final rest on its right side facing southwest. Vehicle #1 came to final rest on the roadway on its wheels facing north.
>
> (Respondents' Exhibit D, p. 69)

8. Garrick Mitchell is an accident reconstruction specialist. Mr. Mitchell has a bachelor's degree and a master's degree in mechanical engineering. Mr. Mitchell is a Certified Accident Reconstructionist by the Accreditation Commission for Traffic Accident Reconstruction. Mr. Mitchell has been doing accident reconstructions since 2000. His accident investigations include mechanically inspecting vehicles, performing site inspections, gathering and analyzing data from police reports, photographs, and witness statements, and using digital site mapping (Respondents' Exhibit C, p. 58 and Mitchell Depo. 5:11-23). Mr. Mitchell has had specialized training courses on Traffic Accident Investigation, Traffic Crash Reconstruction, Commercial Vehicle Accident Reconstruction, and Human Factors in Traffic Crashes. Mr. Mitchell has given presentations on vehicle accident reconstruction, how to analyze and photograph vehicle accidents, technology in collision reconstruction, biomechanics of injury causation, and human biomechanics in low-speed vehicle collisions. Some of these courses and presentations, included seat belt training although none of the courses were exclusively on seat belts (Respondents' Exhibit C, p. 60 and Mitchell Depo. 5:24 – 8:5).

9. Mr. Mitchell completed an inspection and partial accident reconstruction of the motor vehicle accident in this matter. On January 3, 2014, Mr. Mitchell inspected the scene of the accident, spoke with the State Patrol, and took some initial photos. (Mitchell Depo. 10:19-53). Mr. Mitchell filled out an inspection form and checklist as part of his investigation to document his inspection of Decedent's vehicle. Mr. Mitchell noted that the seat belt on Decedent's vehicle was stowed, the retractor was okay and passed a functional test, and there was no damaged observed (Respondents' Exhibit A, p. 3 and Mitchell Depo. 17:25 – 19:11).

10. On January 8, 2014, Mr. Mitchell was able to perform a closer inspection of the site and Decedent's vehicle, including the seat belt in Decedent's vehicle. Mr. Mitchell did a digital map of the site, took measurements, and took numerous photos.

Mr. Mitchell took multiple photos of the seat belt to document its condition. Mr. Mitchell took photos of the seat belt depicting the driver's seat buckle, the B pillar (pillar that seat belt retracts into), the seat belt latch plate, the upper and lower D rings, and the seat belt webbing. (Resp. Ex. B p. 11-18 and Mitchell Depo 11:4 – 13:16).

11. Mr. Mitchell testified via deposition on December 7, 2015. Mr. Mitchell testified regarding his inspection of the seat belt. Mr. Mitchell also performed a functional test of the seat belt retractor to ensure that the seat belt would retract into the pillar properly and would lock and not rapidly extend if the seat belt were pulled suddenly. Mr. Mitchell also tested that the seat belt would latch and release properly. Mr. Mitchell concluded that the seat belt in Decedent's vehicle functioned properly. The seat belt was able to be fastened, it clicked into the latch properly, and it did not release improperly. Mr. Mitchell concluded that there were not any malfunctions or errors with the seat belt (Mitchell Depo. 13:20 – 14:15). Mr. Mitchell also testified that there was no physical evidence that the seat belt was being worn at the time of the accident. Mr. Mitchell described the seat belt as being "pristine" with no stains, no wear, no evidence of loading, no transfer of plastic from the D ring to the webbing, no marks on the D ring, and no grittiness in the retractor. Mr. Mitchell testified that what he observed was a seat belt that had been in the stowed position throughout the course of the accident. Mr. Mitchell concluded that Decedent had not been wearing a seat belt at the time of accident (Mitchell Depo. 14:16 – 15:10). Mr. Mitchell testified that he has only investigated one accident where a person wearing a seat belt ended up outside of the driver's seat, like Decedent did in this case. In that particular case, the vehicle hit a guardrail and the impact damaged the seat belt retractor causing the seat belt to unspool. There was severe, obvious damage to the seat belt. This was not the case in Decedent's accident. Decedent's seat belt was undamaged and not in use. (Mitchell Depo. 15:11 – 17:24). In Decedent's case, Mr. Mitchell opined that her body was lifted out of the driver's seat and ejected partially out the passenger window due to the force of the collision while the vehicle was rotating and curving off to the left at the same time. (Mitchell Depo. 36:12 – 37:10).

12. In response to questioning about whether Decedent may have recently reentered her vehicle after stopping to smoke, make a call, or check her inventory levels and may still have been in park, Mr. Mitchell noted that at the time of the accident, Decedent's vehicle was in the middle of a traffic lane. The road Decedent was driving on has a wide shoulder and Decedent was not parked on the shoulder of the road. Furthermore, Mr. Mitchell concluded that Decedent's vehicle was actually in motion at the time of the accident and not in park based on the skid marks on the ground. Decedent's vehicle was "in the northbound lane, turning left when it was rear-ended. It was not parked on the side of the road. It was in a position where it was about to or in the process of making a left turn." Mr. Mitchell could not determine the exact speed of the vehicles from his analysis since he did not do a complete accident reconstruction but he was able to determine that Decedent's vehicle's tires were in motion. Additionally, Trooper Soukup testified that the other driver, who hit Decedent's vehicle, stated he had seen Decedent driving in front of him in the moments prior to the crash. (Mitchell Depo. 33:20 – 34:20, 53:17-19, 54:14 – 55:7, and 58:3-14, Claimant MH's

Exhibit 3, and Soukup Depo. 44:14-18). The Claimants also questioned Mr. Mitchell about whether Decedent's vehicle may have had mechanical failures causing her to be stopped in the road. Mr. Mitchell testified that his examination of Decedent's vehicle lights showed that the left turn signal was illuminated at the time of impact but that the right turn signal was not illuminated at the time of impact. Therefore, Decedent likely had her left turn signal on and not her hazards or emergency lights (Mitchell Depo. 58:15-23 and 62:24 – 63:22).

13. Dr. Burson completed Decedent's autopsy on January 4, 2014. Dr. Burson recorded the following relevant articles of clothing on Decedent: a green rubber bracelet with the phrase "Safe by choice" on the left wrist, a white metal ring on the left thumb, and a yellow metal engagement-type ring with clear stones and a yellow metal band on the left ring finger (Respondents' Exhibit G, p. 76). Dr. Burson noted that the Decedent's death was due to blunt force injuries to Decedent's head and neck that were sustained during a motor vehicle accident. Specifically, Dr. Burson noted that Decedent sustained a severe crush type injury of the skull (Respondents' Exhibit G, p. 75). Dr. Burson noted that Decedent was reportedly the unrestrained driver of a delivery type vehicle that was involved in a motor vehicle accident and Decedent was partially ejected from the passenger side window. Decedent sustained fatal injuries to her head and was pronounced dead at the scene of the accident (Respondents' Exhibit G, p. 76).

14. The Morgan County Coroner's Office completed a personal effects release form for Decedent dated January 10, 2014. The form noted that Decedent was wearing a green wrist band at the time of her death. The form also noted that Decedent was wearing three rings at the time of her death-one white metal ring and two yellow metal rings with clear stones. The personal effects were received by Claimant RH who wrote that his relationship to the Deceased was "husband" (Respondents' Exhibit F). Claimant RH testified that the gold ring was the wedding band he gave Decedent when they reconciled in a church a few weeks after entry of the Divorce Decree. He referred to the rings the Claimant was wearing on her left hand as an "engagement/wedding set" (Hearing Tr. 86:16 – 87:1).

15. This is an admitted claim. Decedent and Claimant RH had one minor biological son, Claimant MH. Respondents filed a Fatal Case-General Admission on January 29, 2014 admitting to death benefits paid solely to Claimant MH, Decedent's minor son. Respondents calculated an average weekly wage of $577.85. Respondents reduced the compensation payable to Claimant MH for a 50% penalty for a safety rule violation (Claimant RH's Exhibit 10; Respondents' Exhibit V). Respondents contest that Claimant RH is entitled to benefits as a surviving spouse.

16. Claimant RH testified that he first met the Decedent on February 3, 2001. He and the Decedent were married on August 29, 2002 in front of a retired judge. There was no formal wedding ceremony at that time. The Claimant RH's credible testimony is supported by a Marriage License (Claimant RH's Exhibit 39). At the time of the marriage, Decedent was pregnant with Claimant MH. After the marriage, Decedent changed her surname from Kinion to Henry which is Claimant RH's surname.

17. Decedent and Claimant RH later separated and a separation agreement with a parenting plan was filed on October 4, 2010. Claimant RH and the Decedent were divorced effective January 4, 2011 (Claimant RH's Exhibit 40; Respondents' Exhibit S). Decedent did not legally change her surname back to Kinion following the divorce.

18. Claimant RH testified that while he and the Decedent were divorced, she moved out of their residence but they continued to see each other and worked on mending the problems they had in the marriage. Claimant RH testified that he and the Decedent reconciled on February 22, 2011 and at that time he presented the Decedent with a gold wedding ring to complete her wedding/engagement set (Hearing Tr. 53:12-18 and 69:8-17 and 86:16-24). At this time, the Decedent moved back into their shared residence. The title to the home and the mortgage remained in both their names the entire time (Hearing Tr. 53:21 – 54:16).

19. After their reconciliation, Decedent and Claimant RH were planning a ceremony in Las Vegas with their family. However, the wedding ceremony never took place (Hearing Tr. 67:25 – 68:4 and 87:7-9). Claimant RH testified that Decedent was allegedly getting pressure from her parents to have a second ceremony because they wanted a traditional kind of marriage and did not look at a marriage in front of a judge as real. He testified their parents are old-fashioned and that a formal ceremony was for their benefit (Hearing Tr. 75:6 – 76:2).

20. The Claimant RH's testimony about his marriage, divorce and subsequent reconciliation and recommitment of their marriage was credible and persuasive. The testimony is supported by evidence in the record.

21. Evelyn Oster, Claimant RH's mother, testified via telephone at the hearing. Ms. Oster testified that she believed Decedent and Claimant RH were married in their hearts in the months preceding Decedent's death. However, she later stated that she knew that they were thinking about having a wedding in Las Vegas in the future. (Hearing Tr. 106:1-8 and 112:14-18).

22. Susan Branom, Decedent's mother, testified at the hearing. Ms. Branom testified that she believed prior to Decedent's death, Decedent and Claimant RH "weren't married. They were just living together" (Hearing Tr. 125:9-13). Ms. Branom testified that Decedent and Claimant RH got divorced and then when Decedent moved back in with Claimant RH, she looked at her as living as an adultress. Ms. Branom said that she would always tell Decedent to go get married (Hearing Tr. 125:19-25). Ms. Branom testified that she did not have any issues with Decedent's marriage to Claimant RH in 2002 that was in front of a judge (Hearing Tr. 126:3-15). Ms. Branom testified that Claimant RH proposed marriage to Decedent after they reconciled by getting down on one knee and proposing marriage. Ms. Branom testified that Decedent wanted to go look for a wedding dress and go to Las Vegas to get married. Ms. Branom believed that Decedent and Claimant RH were engaged, not married, and were going to be getting

married (Hearing Tr. 131:23 – 132:4 and 135:4-25). Ms. Branom testified, however, that she is a Jehovah's Witness and that her religion does not recognize common law marriages regardless of whether they are recognized under the Colorado law. Because of her religious beliefs, she would only recognize a marriage if there is a certificate of marriage (Hearing Tr. 125:12-25).

23. The testimony of Ms. Branom actually supports Claimant RH's testimony that while he and Decedent considered themselves to be married after their reconciliation and held themselves out as married, they were still planning a formal ceremony to appease their families who were more traditional in their views of marriage. The ALJ specifically finds that the Decedent and Claimant RH did not consider themselves merely engaged to be married, in spite of planning an eventual ceremony, but rather they considered and held themselves out as husband and wife.

24. Claimant RH testified that tax returns for the years from 2002 until the Decedent's death were filed jointly. The tax returns submitted at Claimant RH's Exhibit 41 support this testimony.

25. Decedent completed a W-4 for Employer on October 25, 2012 and did not indicate she was married or single on the form. Decedent also claimed only 1 allowance on the tax form, indicating only herself and no spouse or dependents according to the personal allowance worksheet on the W-4 form. (Resp. Ex. U).

26. Claimant RH testified that he and the Decedent jointly held titles to several vehicles, namely a 1999 Chevy pickup, a 2000 Chevy pickup, and a Toyota Yaris.

27. At the time of her death, Decedent had a separate checking account in her name only. It was a single-party account. This account was opened on April 15, 2011. This was after Decedent and Claimant RH had reconciled their relationship. This was the account that Decedent requested Employer deposit her paychecks in. Claimant RH did not have access to this account while Decedent was alive. Decedent also had other checking accounts without Claimant RH's name on them. (Resp. Ex. T; Hearing Tr. 65:3-14). Claimant RH testified that when he and the Decedent first met, they had separate accounts and bills coming out of each that the other person was not responsible for, so they just kept that intact (Hearing Tr. 65:12-22).

28. Claimant RH testified that he relied on the Decedent's income to pay the family bills and that he would not have been able to cover the family bills on his own without her income (Hearing Tr. 66:12-20).

29. Claimant RH testified that when he and Decedent divorced, he began paying child support to her for Claimant MH. Claimant RH continued paying child support to Decedent despite the reconciliation and alleged remarriage (Hearing Tr. 82:8-15). Claimant RH testified that he and the Decedent had looked into terminating the child support payments but did not follow up due to court costs required (Hearing Tr. 83:20-24 and 88:22-89:3).

30. Claimant RH testified that Decedent never allowed Claimant MH to ride in a car without a car seat. Decedent's children wore seatbelts when they rode in the car with Decedent. Decedent wore a seat belt when she rode in the car with Claimant RH and he never saw Decedent not wear a seat belt. Claimant RH said that his family would stop at the edge of the driveway if anybody in the car did not have a seat belt on. Claimant RH testified that he heard Decedent reprimand the children to put on seat belts and that Decedent would stop the car and not go any further until the family had on their seat belts. (Hearing Tr. 70:24 – 71:1, 71:25 – 72:7, and 78:9 – 79:2).

31. Employer had written company rules regarding seat belt usage and all drivers following state driving/traffic laws. Employer's Fleet Safety Policies and Procedures (Respondents' Exhibit I), which requires employees to wear seat belts and follow traffic laws, state as follows:

- Page B-1 (Bates stamp p. 95) – "Obey all federal, state and local traffic laws, rules and regulations."
- Page B-1 (Bates stamp p. 95) – "Wear your seat belt – as a driver, you have a legal duty to wear your seat belt. The Federal Department of Transportation and company policy requires every employee to wear a seat belt. Enforcement will not only be by federal, state and local enforcement but all Schwan's management. You will pay any fines levied against you as a result of not complying with seat belt laws; the company will not reimburse you."
- Page B-6 (Bates stamp p. 100) – Self-Check Questions No. 1 "Both, Federal laws and Schwan's policy dictate that all drivers must wear their seatbelts. a. True b. False"
- Page D-4 (Bates stamp p. 123) – Driver Based Violations – "If the violation is driver based such as HOS, Medical Examiners Card, expired Driver License, seatbelt usage or traffic offenses, the direct supervisor will need to sign the original Inspection report and provide written documentation providing the Disciplinary Action taken to send back with the Inspection form."
- Page I-10 (Bates stamp p. 163) – Identifying High-Risk Safety Concerns – "Each supervisor will be held responsible to identify high-risk safety concerns and correct them on the spot. Although the following list is by no means complete, some safety behaviors which need on-the-spot corrections are: Failure to wear a seat belt."
- Page N-2 (Bates stamp p. 194) – Self-Check Answers No. 1 "Both, Federal laws and Schwan's policy dictate that all drivers must wear their seatbelts. (a) True. Seatbelt use is required by law and mandated by Schwan's policy. Schwan is committed to ensuring your safe return to your home, family, and friends. Using a seat belt helps ensure you're in a position to control the vehicle after impact. Statistics have shown that

> drivers who are belted-in have less severe injuries following an accident and are able to return to work sooner than those drivers involved in an accident who were not wearing a seat belt."
>
> (Respondents' Exhibit I).

32. Decedent signed a form acknowledging receipt and understanding of Employer's Fleet Safety Policies and Procedures on November 6, 2012. The acknowledgement form included a statement that Decedent had read, agreed with and understood she must comply with all federal, state, and local laws which govern the operation and maintenance of company vehicles. (Respondents' Exhibit H p. 83). A second acknowledgement form for receipt of the Employer's Fleet Safety Policies and Procedures was also completed by Decedent on November 26, 2012. (Respondents' Exhibit H p. 84).

33. The Colorado Driver Handbook states that Colorado's Safety Belt Laws (C.R.S. §§ 42-4-237 and 42-2-105.5) require that a fastened safety belt must be worn in all motor vehicles while in operation on public roadways by the driver of the vehicle. (Respondents' Exhibit J p. 211).

34. C.R.S. § 8-42-4-237(2) states that "every driver of and every front seat passenger in a motor vehicle equipped with a safety belt system shall wear a fastened safety belt while the motor vehicle is being operated on a street or highway in this state." (Respondents' Exhibit K).

35. William Vollmer, Employer's Safety Manager for the West Division of Home Service, testified via deposition on December 17, 2015. Mr. Vollmer testified that at the time of Decedent's death, he was safety manager for Colorado (Vollmer Depo. 4:25 – 5:10). Mr. Vollmer testified that Employer has a policy regarding drivers wearing seat belts and had a policy on drivers wearing seat belts at the time of Decedent's death. Employees are required to wear a seat belt while in Employer's vehicles (Vollmer Depo. 5:21 – 6:15). Employees are required to wear a seat belt any time a vehicle is in motion (Vollmer Depo. 7:18-25). Mr. Vollmer testified that employees are trained regarding the policies and rules on seat belt usage. The policy is communicated in the policy and procedure manual and is covered during training of new employees. Training includes computer work to review policies and procedures manuals and a written exam (Vollmer Depo. 6:17 – 7:17). Mr. Vollmer testified that Decedent would have been given a road test when she started work with Employer and not have been allowed to start driving until she passed the road test. A portion of the road test included wearing a seat belt (Vollmer Depo. 16:18 – 17:18). Mr. Vollmer testified that Employer's number one business priority is safety. Safety is a level 10 of importance to Employer on a scale of 0 to 10. Seat belt usage is also a level 10 of importance to Employer on a scale of 0 to 10. This is communicated on posters at every depot and also via monthly safety meetings and weekly power huddles (Vollmer Depo. 11:13 – 12:2, 13:4 – 14:12). Employees are also given green wrist bands that say "Safe By Choice" to wear to remind them to make safe choices while driving so they can come

home to their family at the end of the shift. Mr. Vollmer also testified that employees are given visor organizers in the vehicles that talk about being safe by choice. The visors have a spot for employees to place a photo of their family, kids, or anything important to them so that when they get in the vehicle, they notice the photo and it reminds them why it is important to drive safely (Vollmer Depo. 12:3 – 13:3). Mr. Vollmer also testified that there are permanent signs posted at the exits of the depots so employees can see when they are driving out. The signs remind employees to wear seat belts and buckle up (Vollmer Depo. 13:4-25). Mr. Vollmer also testified that at the time of Decedent's death, if an employee was seen not wearing a seat belt, they would receive a citation and points would be assessed against them. Employees would ultimately be terminated if they accumulated too many points. Since Decedent's death, Employer has decreased their tolerance even further and a violation of the seat belt policy is now automatic termination. (Vollmer Depo. 6:6-15 and 8:1 – 11:12).

36. At the time of her fatal injury, the Decedent was not wearing a seatbelt. Yet, there was no persuasive evidence presented as to the specific reason the Decedent failed to wear her seatbelt immediately prior to her fatal injury. Although it has been established that the seatbelt was in good working order and that the Decedent didn't fail to wear the seatbelt due to malfunction, there was no persuasive evidence to establish whether the Decedent intentionally or willfully failed to wear her seatbelt or whether she negligently forgot to wear her seatbelt or whether there was some other reason for her failure to wear her seatbelt. However based on the testimony from Claimant RH that the Decedent was vigilant about seatbelt use, and based on the evidence establishing that the Employer was adamant and vigilant about enforcement of the seat belt rule, and based on evidence that the Decedent was never disciplined for failure to use her seat belt and was generally known as a compliant employee with a good safety record, who was wearing her "Safe By Choice" bracelet at the time of her death, the ALJ makes the following inference from the evidence. It was more likely that the Decedent failed to wear her seatbelt because she negligently forgot, or for some other reason than it was that she intentionally and willfully failed to wear her seatbelt.

37. Decedent was enrolled in health insurance while employed with Employer. Decedent had elected benefits for herself, Claimant RH, and Claimant MH. Decedent completed the paperwork to obtain the benefits. Health benefits were only available for spouses and dependents of employees. In response to an April 22, 2013 eligibility audit, the Decedent provided a copy of her marriage certificate and the top portion of her most recent Federal 1040 tax return as requested by her Employer Claimant RH's Exhibit 36).

38. Respondents have admitted to an average weekly wage of $577.85. (Respondents' Exhibit V) which is based on Decedent's total earnings from 12/23/2012 to 12/21/2013 of $30,048.20 (Respondents' Exhibit P). The Claimant RH and the Claimant MH dispute this calculation and argue that it does not provide a fair approximation of wage loss and diminished earning capacity resulting from the Decedent's death and the loss of income to the Decedent's family.

39. The Decedent’s first paycheck from Employer was dated November 15, 2012 and the Decedent’s final paycheck from Employer was dated January 23, 2014. Her gross wages were paid approximately every 2 weeks and included the following categories: Product Sales Commission, Daily Base Pay, Daily Service Incentive, Incentive, New Customer Incentive, Ovations AwardperQs, and Vacation Pay. Some of these categories were included with each paycheck and some were only paid intermittently or when earned. All of these categories added up to the gross wage paid to the Decedent. Her gross wages are summarized as follows (taken from Claimant’s Exhibit 33):

Check Date	**Check Amount**
11/15/2012 (Initial Training Pay)	$1,265.00
11/29/2012	$1,137.42
12/13/2012	$1,197.80
12/27/2012	$1,102.21
1/10/2013	$1,078.35
1/24/2013	$977.93
2/7/2013	$1,137.15
2/21/2013	$1,109.64
3/7/2013	$1,212.45
3/21/2013	$1,199.53
4/4/2013	$1,147.44
4/18/2013	$1,176.49
5/2/2013	$1,230.80
5/16/2013	$1,390.79
5/30/2013	$1,335.32
6/13/2013	$1,326.81
6/27/2013	$1,558.17
7/11/2013	$1,141.13
07/25/2013	$981.56
08/08/2013	$1,443.27
08/22/2013	$1,341.03
09/05/2013	$1,238.70
09/19/2013	$1,133.46
10/03/2013	$1,153.07
10/17/2013	$1,212.17
10/31/2013	$1,300.06
11/14/2013	$1,249.13
11/27/2013	$1,315.45
12/12/2013	$1,024.38
12/26/2013	$1,208.72
01/09/2014 (final payout)	$1,383.58

40. Per the wage records, there were regular and natural fluctuations to the Decedent’s gross wages from paycheck to paycheck. Claimants argue that in the six

pay periods or twelve weeks prior to her death, the Decedent was earning increased wages because she was earning more commissions the longer she was on her route as her customer base and sales increased. Claimants argue that the Decedent earned an average weekly wage of $608.13 in this time period and that this is more representative of the wages that the Decedent was earning at the time of the injury.

41. The ALJ finds that there are fluctuations and finds persuasive the Claimants' argument that the last six regular pay periods, encompassing the last 12 full weeks the Decedent worked for Employer prior to her death would result in a fair approximation of her wages. The final paycheck on 01/09/2014 is not a regular paycheck in the ordinary course and is not included for the purposes of calculating the AWW. So, the paychecks from 10/17/2013, 10/31/2013, 11/14/2013, 11/27/2013, 12/12/2013 and 12/26/2013 which are the last 12 regular full weeks of the Decedent's employment are used to calculate AWW.

$1,212.17
$1,300.06
$1,249.13
$1,315.45
$1,024.38
$1,208.72
Total: $7,309.81
÷ 12 = **$609.16**

42. Decedent had group insurance benefits (health, dental, vision, wellness) through Employer covering herself, Claimant RH and Claimant MH at the time of her death. Per her 2014 Enrollment form which was effective January 1, 2014, the Claimant elected Health Plan, Dental and Vision Plan coverage for Employee + Spouse + Child. She did not have the Vision buy-up plan or other options, including the well-being coverage, that were available on the Annual Enrollment Form (Claimant RH's Exhibit 37). Per the COBRA Election Notice sent to Claimant RH on January 6, 2014, these benefits terminated effective January 11, 2014 in connection with the termination of Decedent's employment due to her death (Claimant RH's Exhibit 38, p. 1).

43. Per the COBRA Notice, the full cost of continuing these benefits for Individual + Spouse + Child would be $1,120.21 per month ($1,014.10 for health; $84.24 for dental; and $21.87 for vision) (Claimant RH's Exhibit 38, p. 4). The monthly amount corresponds to a weekly amount of $258.51 per week.

44. Per the COBRA Notice, the cost of continuing these benefits for only Claimant RH and Claimant MH (and excluding the Decedent) would be $739.15 per month ($664.42 for health; $59.78 for dental; and $14.95 for vision)(Claimant RH's Exhibit 38, p. 4). The monthly amount corresponds to a weekly amount of $170.57 per week.

45. As a result of her death, Decedent would no longer be eligible for health, dental and vision insurance benefits as of the date of her death. Thus, there is no actual cost associated with continuing such benefits for Decedent as there is a legal impediment to continuation.

46. Claimant MH was awarded $720.00 per month for Social Security Survivor benefits ("SSS benefits") effective January 2014 (Respondents' Exhibit N). A fifty percent offset of those periodic benefits would equate to an offset of $83.08 per week.

47. Claimant MH was awarded SSS benefits on March 1, 2014 based on the date of the Social Security Award Letter. Neither Claimant MH nor his guardian or representative notified Respondents of his receipt of benefits until September 18, 2015 with his Responses to Interrogatories, which only stated he was receiving benefits and did not provide the award amount. Claimant MH did not provide a copy of his Social Security award letter to Respondents until November 5, 2015 (Respondents' Exhibit N and II).

48. Claimant RH testified that he is also receiving SSS benefits every month. He receives a check for him and a check for Claimant MH each month. Claimant RH testified that he also received SSS benefits in the same amount of $720.00 per month. (Hearing Tr. 85:21 – 86:3 and 87:14 – 88:21). A fifty percent offset of those periodic benefits would equate to an offset of $83.08 per week.

49. Claimant RH did not notify Respondents of his receipt of SSS benefits until March 3, 2015 with his Responses to Interrogatories, which only stated he was receiving benefits and did not provide the award amount. Claimant RH did not notify Respondents of the amount of SSS benefits he was awarded until November 10, 2015 when he testified about his receipt of benefits during the hearing (Hearing Tr. 85:21 – 86:3 and 87:14 – 88:21).

50. In adjusting the Average Weekly Wage in this case, the increase for COBRA was effective on January 11, 2014. However, the SSS offset was effective starting on January 3, 2014 (Respondents' Exhibits L and N).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), C.R.S. §8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits at a reasonable cost to employers, without the necessity of litigation. C.R.S. §8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. §8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Dependent Death Benefits and Common Law Marriage

The payment of death benefits is governed by the Act. In the event of death, the dependents of the deceased who are entitled to benefits shall receive death benefits equal to sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a maximum of ninety-one percent of the state average weekly wage per week, subject to offsets permitted by the statute. C.R.S. §8-42-114. The Act provides that "[d]eath benefits shall be paid to a dependent widow or widower for life or until remarriage…." C.R.S. §8-42-120. Under the Act, a widow or widower is presumed to by wholly dependent unless it is shown that he or she was voluntarily separated from the decedent and living apart at the time of the injury or death or was not dependent in whole or in part on the deceased for support. C.R.S. §8-41-501(a). Children of the deceased under the age of 18 years or who are under the age of 21 and were dependent on the deceased for support at the time of the decedent's death and were or are attending an accredited school are considered wholly dependent as well. § 8-41-501(1)(b)-(c).

A common law marriage may be the basis for the payment of death benefits to a widow or widower under the Act. *Sergio Reyes (Deceased) v. LVI Environmental Svcs., Inc.,* W.C. No. 4-425-155 (ICAO April 5, 2001). The determination of whether a common law marriage is proven turns on issues of fact and credibility. *Estate of Wires v. Medina,* 765 P.2d 618 (Colo. App. 1988); *Larry Baggett (Deceased) v. Don Ward, Inc.*, W.C. No. 4-391-071 (ICAO March 12, 2001).

The issue of the existence of a common law marriage arises in all types of cases. It frequently arises in the context of a dissolution proceeding under the UDMA. *See, In re Marriage of Cargill,* 843 P.2d 1335 (Colo. 1993); *In re Marriage of Gercken,* 706 P.2d 809 (Colo. App. 1985). However, the issue is also resolved in a host of other types of cases. *See, e.g., People v. Lucero,* 747 P.2d 660 (Colo. 1987)(spousal testimonial privilege); *Carter v. Firemen's Pension Fund,* 634 P.2d 410 (Colo. 1981)(entitlement to pension); *Employers Mut. Liab. Ins. Co. v. Indus. Comm'n,* 145 Colo. 91, 357 P.2d 929 (1960)(entitlement to workers' compensation benefits); *In re Estate of Sky Dancer,* 13 P.3d 1231 (Colo. App. 2000)(determination of heirship); *Whitenhill v. Kaiser Permanente, supra* (right to bring wrongful death action).

Common law marriage was first recognized by the Colorado Supreme court in *Klipfel's Estate v. Klipfel,* 92 P. 26 (Colo. 1907), noting that marriage in the State of Colorado is a civil contract or agreement between two consenting parties. A marriage by agreement of two parties with the capacity to consent, followed by other attendant circumstances, may be valid and binding. *Id.* at 28. The seminal case of *People v. Lucero,* 747 P.2d 660 (Colo. 1987) established that the consent or agreement of the parties to a common law marriage must be manifested by conduct that gives evidence of the mutual understanding of the parties. The *Lucero* court held that,

> The two factors that most clearly show an intention to be married are cohabitation and a general understanding or reputation among persons in the community in which the couple lives that the parties hold themselves out as husband and wife. Specific behavior that may be considered includes maintenance of joint banking and credit accounts; purchase and joint ownership of property; the use of the man's surname by the woman; the use of the man's surname by children born to the parties; and the filing of joint tax returns. See Mills, Common Law Marriage in Colorado, 16 Colo. Law. 252, 257 (1987). However, there is no single form that any such evidence must take. Rather, any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife will provide the requisite proof from which the existence of their mutual understanding can be inferred.

Cohabitation is "holding forth to the world by the manner of daily life, by conduct, demeanor, and habits, that the man and woman have agreed to take each other in marriage and to stand in the mutual relation of husband and wife." *Smith v. People*, 64 Colo. 290, 170 P. 959 (1918). The Court of Appeals in *Taylor v. Taylor*, 10 Colo. App. 303, 50 P. 1049 (1897), stated:

> "Cohabitation," as here used, means something more than sexual intercourse. Bouvier defines "cohabit" to be "to live together in the same house, claiming to be married." Webster defines "cohabitation" as "the act or state of dwelling together, or in the same place with another." "It is not a sojourn, nor a habit of visiting, nor even a remaining with for a time. None of these fall within the true idea of cohabitation as a fact presumptive of marriage. To cohabit is to live or dwell together, to have the same habitation; so that, where one lives and dwells, there does the other live and dwell with him."

The *Taylor* court also held that general reputation or repute means the "understanding among the neighbors and acquaintances with whom the parties associate in their daily life that they are living together as husband and wife." *Taylor at* 1049.

Relevant to the determination in this case Claimant RH and the Decedent were married on August 29, 2002 in front of a retired judge. There was no formal wedding ceremony at that time. After the marriage, Decedent changed her surname from Kinion to Henry which is Claimant RH's surname. The Decedent and Claimant RH later separated and a separation agreement with a parenting plan was filed on October 4, 2010. Claimant RH and the Decedent were divorced effective January 4, 2011. Decedent did not legally change her surname back to Kinion following the divorce. Claimant MH, the only child born to both Decedent and Claimant RH also used the surname Henry. While Claimant RH and the Decedent were divorced, she moved out of their residence but they continued to see each other and worked on mending the problems they had in the marriage. Per the credible testimony of Claimant RH, they reconciled on February 22, 2011 and the Decedent moved back into their shared residence, long before the Decedent's fatal injury and before the Decedent even began working for Employer. The title to the home and the mortgage remained in both their names the entire time in spite of the period of separation and divorce.

After their reconciliation, Decedent and Claimant RH were planning a ceremony in Las Vegas with their family. However, the wedding ceremony never took place. Claimant RH testified credibly and persuasively that Decedent was getting pressure from her parents to have a ceremony because they wanted a traditional kind of marriage and that a formal ceremony was for their benefit.

Claimant RH's mother testified that, although she knew they were thinking about having a wedding in Las Vegas in the future, she believed Decedent and Claimant RH were married in their hearts in the months preceding Decedent's death. The Decedent's mother testified that she believed prior to Decedent's death, Decedent and Claimant RH "weren't married. They were just living together." However, Ms. Branom testified that she is a Jehovah's Witness and that her religion does not recognize common law marriages regardless of whether they are recognized under the Colorado law. Because of her religious beliefs, she would only recognize a marriage if there is a certificate of marriage. The testimony of Ms. Branom actually supports Claimant RH's testimony that while he and Decedent considered themselves to be married after their reconciliation and held themselves out as married, they were still planning a formal ceremony to appease their families who were more traditional in their views of marriage. As found, the Decedent and Claimant RH did not consider themselves merely engaged to be married, in spite of planning an eventual ceremony that ultimately did not take place, but rather they considered and held themselves out as husband and wife.

There is considerable support in the record for the determination that the Claimant RH and the Decedent were married at the time of her death, including, but not limited to:

- Claimant RH and the Decedent filing joint tax returns for the years from 2002 until the Decedent's death

- Jointly held titles to several vehicles, namely a 1999 Chevy pickup, a 2000 Chevy pickup, and a Toyota Yaris

- Claimant RH and Decedent relied upon each other to pay joint bills and Claimant RH would not have been able to cover the family bills on his own without the Decedent's income

- At the time of her fatal accident, the Decedent was wearing and engagement/wedding set on her left hand, with both a gold band and a ring with stones, rather than only the engagement ring

- Decedent completed considerable paperwork for her employer noting the Claimant RH was her husband

Based on the foregoing, Claimant RH established by a preponderance of the evidence that he was the Decedent's common law spouse and her dependent for the purposes of C.R.S. §8-42-114 and C.R.S. §8-41-501(a).

Calculation of Average Weekly Wage

Under Colorado's Workers' Compensation Act, the "average weekly wage" is a key part of the formula used to calculate compensation for injured workers, and it is based upon the definition of "wages" provided at C.R.S. § 8-40-201(19). *Industrial Claim Appeals Office v. Ray,* 145 P.3d 661 (Colo. 2006). To determine a claimant's AWW, the ALJ may choose from two different methods set forth in C.R.S. § 8-42-102. The first method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." C.R.S. § 8-42-102(2). The default provision in C.R.S. § 8-42-102(2)(a)-(f), lists six different formulas for conducting this calculation. Per C.R.S. § 8-42-102(5)(a), the phrase "at the time of injury" in subsection (2) requires the AWW to be determined using the wage earned on the date of the employee's accident. The second method for calculating a claimant's AWW, referred to as the "discretionary exception," applies when the default provision will not fairly compute the employee's AWW. C.R.S. § 8-42-102(3). In such a circumstance, the ALJ has discretion to compute the AWW of a claimant in such other manner and by such other method as will, based upon the facts presented, fairly determine the employee's AWW. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No.*

7, W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office,* 841 P.2d 335 (Colo.App.1992). Because the default method will not fairly compute the Claimant's AWW in this case, the discretionary method is appropriate to use in order to arrive at a fair approximation of the Claimant's wage loss.

Respondents have admitted to an average weekly wage of $577.85. which is based on Decedent's total earnings from 12/23/2012 to 12/21/2013 of $30,048.20. The Claimant RH and the Claimant MH dispute this calculation and argue that it does not provide a fair approximation of wage loss and diminished earning capacity resulting from the Decedent's death and the loss of income to the Decedent's family. The Decedent's first paycheck from Employer was dated November 15, 2012 and the Decedent's final paycheck from Employer was dated January 23, 2014. Her gross wages were paid approximately every 2 weeks and included the following categories: Product Sales Commission, Daily Base Pay, Daily Service Incentive, Incentive, New Customer Incentive, Ovations AwardperQs, and Vacation Pay. Some of these categories were included with each paycheck and some were only paid intermittently or when earned. All of these categories added up to the gross wage paid to the Decedent. Per the Decedent's wage records, there were regular and natural fluctuations to the gross wages from paycheck to paycheck (see chart in Findings of Fact).

Claimants argue that in the six pay periods or twelve weeks prior to her death, the Decedent was earning increased wages because she was earning more commissions the longer she was on her route as her customer base and sales increased. Claimants argue that this is more representative of the wages that the Decedent was earning at the time of the injury.

The ALJ found that there were fluctuations and finds persuasive the Claimants' argument that the last six regular pay periods, encompassing the last 12 full weeks the Decedent worked for Employer prior to her death would result in a fair approximation of her wages. The ALJ also found that the final paycheck on 01/09/2014 is not a regular paycheck in the ordinary course because it included amounts paid out due to the termination of the Decedent's employment resulting from her death. Therefore, this paycheck is not included for the purposes of calculating the AWW. So, the paychecks from 10/17/2013, 10/31/2013, 11/14/2013, 11/27/2013, 12/12/2013 and 12/26/2013 which are the last 12 regular full weeks of the Decedent's employment are used to calculate base AWW for the Decedent.

$1,212.17
$1,300.06
$1,249.13
$1,315.45
$1,024.38
$1,208.72
Total: $7,309.81
÷ 12 = **$609.16**

Calculation of the Cost of Insurance Benefits

In this case, a portion of the dispute also centers over whether the Claimants have established that the full value of a health insurance benefit provided by the Employer should be added to Claimant's AWW for a further increase to her AWW.

C.R.S. §8-40-201(19)(a), provides:

> "Wages" shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied.

C.R.S. § 8-40-201(19)(b), provides, as follows:

> The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19). If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in the subsection (19), including the cost of health insurance coverage or the cost of the conversion of health insurance coverage, that advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment.

In interpreting statutes, we must give effect to the intent of the General Assembly, and if the statutory language is clear and unambiguous, we must give the words their ordinary meaning and apply the statute as written. *See Cochran v. West Glenwood Springs Sanitation Dist.,* 223 P.3d 123, 125-26 (Colo. App. 2009). In doing so, we must read and consider the statute as a whole and interpret it in a manner giving consistent, harmonious, and sensible effect to all of its parts. *Lujan v. Life Care Centers,* 222 P.3d 970, 973 (Colo. App. 2009). We should not interpret the statute so as to render any part of it either meaningless or absurd. *Id.* Additionally, nonexistent provisions should not be read into the workers' compensation act. *Kraus v. Artcraft Sign Co.,* 710 P.2d 480, 482 (Colo. 1985).

The Colorado Supreme Court has determined that the plain language of C.R.S. § 8-40-201(19)(b), does not require claimants to actually purchase health insurance in order for the cost of the insurance to be included in the average weekly wage. *Industrial Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006).

However, Respondents argue that they are not required to increase the average weekly wage for the *full* cost of continuing the terminated group insurance benefits because doing so would include premium amounts for Decedent's benefits. Respondents reason that Decedent is dead, and therefore, no longer in need of insurance. Thus, the cost of continuing insurance benefits for Claimant MH and Claimant RH (if the ALJ found him to be a dependent) would be included in the average weekly wage computation, but not the cost for continuing coverage for Decedent.

Claimant RH argues that C.R.S. § 8-40-201(19)(b) mandates that the full cost of the terminated benefits be included in the average weekly wage calculation. Claimant RH further asserts that, whether an injured worker actually uses the increased benefits to purchase health insurance, or their need to do so, has never been taken into account when addressing whether the average weekly wage is to be increased for the full amount of the terminated benefits. *See Industrial Claims Appeals Office v. Ray,* 145 P.3d 661 (Colo. 2006); and, *Restaurant Technologies, Inc. v. Industrial Claims Appeals Office*, 15CA0231 (Colo. App. February 4, 2016)(not selected for publication). Claimant RH argues that the only circumstance where the cost of insurance benefits is not includes is if an employer continues to pay for the benefits; a situation that is inapplicable here. Claimant points out that C.R.S. §8-40-201(19)(b), itself establishes that an injured worker who replaces employer provided group insurance benefits with Medicaid or some other low income medical program would still get the full average weekly wage increase. Claimant RH further argues that the average weekly wage calculation is focused on a fair approximation of the "wage" loss and the "cost" of continuing the benefit as opposed to whether or not benefits actually continue.

Yet, in this instance, it is not merely that Claimants chose to continue benefits or did not choose to continue the benefits for the Decedent. With respect to the Decedent, her death is a legal impediment to continuation of insurance benefits. The Decedent's death prevents the ability to obtain insurance coverage for the Decedent, whether it be through continuation of the employer's group health insurance plan or through the employee's cost of conversion to a similar insurance plan. The intent of the inclusion of the cost of continuing benefits is to provide the ability to continue to purchase the benefits, whether or not benefits are actually continued. In this case, the death of the Decedent means that no further benefits on her behalf would be available and could not continue under any circumstance. The Decedent's dependents could not legally choose to continue the benefits for her and, therefore, there is no cost for continuing coverage. To include this amount in the average weekly wage computation would result in a windfall for the dependents.

The cost for continuing to provide the insurance benefits for Claimant MH and Claimant RH are to be included in the from the date the benefits were terminated, January 11, 2014. However, as there is no cost for continuing coverage for the Decedent, this is not to be included in the calculation of the average weekly wage

As found, the cost of continuing these benefits for only Claimant RH and Claimant MH (and excluding the Decedent) would be $739.15 per month ($664.42 for health; $59.78 for dental; and $14.95 for vision). The monthly amount corresponds to a weekly amount of $170.57 per week.

Offsets

C.R.S. § 8-42-114 provides, in pertinent part,

> In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits. C.R.S. § 8-42-114.

The purpose of the offset is to prevent receipt of the full amount of social security and workers' compensation benefits for the same disability. *Yates v. Sinton Dairy,* 883 P.2d 562 (Colo. App. 1994); See also, *Engelbrecht v. Hartford Accident & Indemnity Co.,* 680 P.2d 231 (Colo.1984).

Claimant MH was awarded $720.00 per month for Social Security Survivor benefits (“SSS benefits”) effective January 3, 2014. A fifty percent offset of those periodic benefits would equate to an offset of $83.08 per week. Claimant RH testified that he is also receiving SSS benefits every month. He testified that he also received SSS benefits in the same amount of $720.00 per month. A fifty percent offset of those periodic benefits would equate to an offset of $83.08 per week.

Respondents established the SSS offset of $83.08 per week against any death benefits paid to Claimant MH and Claimant RH. The benefits are to be reduced by this amount.

Safety Rule Violation

C.R.S. § 8-42-112(1)(a) provides for a 50% reduction in compensation to a claimant where a respondent proves that the claimant's injury was caused by the willful failure obey any reasonable rule adopted by the employer for the safety of the employee. The Respondents carry the burden of establishing all five elements of a safety rule violation, which are:

1. There must be a specific, unambiguous and definite safety rule adopted by the employer.

2. The safety rule must be reasonable.

3. The safety rule must be “brought home” to the employee and diligently enforced.

4. Violation of the safety rule must be willful.

5. The violation of the safety rule must be a cause of the claimant's injury.

Here, the evidence established that the Employer adopted a safety rule requiring employees to be aware of their surroundings and work safely. This is a reasonable rule for the safety of the Employer's employees.

However, the Respondents have failed to establish that the Claimant acted willfully and with deliberate intent. The safety rule penalty is only applicable if the violation is willful. The question of whether the respondents proved willful violation of a safety rule by a preponderance of the evidence is one of fact for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Violation of a rule is not willful unless the claimant did the forbidden act with deliberate intent. A violation which is the product of mere negligence, carelessness, forgetfulness or inadvertence is not willful. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *Johnson v. Denver Tramway Corp.,* 171 Colo. 214, 171 P.2d 410 (1946); *In re Alverado,* W.C. No. 4-559-275 (ICAO December 10, 2003). Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

In the present case, both the investigating Colorado State Patrolmen and the Respondents' retained expert did establish that Decedent was not wearing her seatbelt at the time her delivery truck was rear-ended by the tractor trailer. Both witnesses testified to the physics of the movement of Decedent's body within the cab of her truck after it had been struck from behind by a much larger vehicle. However, neither individual could offer any persuasive evidence or analysis (nor could they be expected to) as to why an employee with a spotless safety record was not wearing her seatbelt when behind the wheel of her work vehicle.

Critically, the Respondents have failed to offer any persuasive evidence that the Decedent's failure to wear a safety belt was somehow "willful." The statute permitting the reduction in benefits requires the alleged failure to "use a safety device" or to follow a "reasonable rule" of the employer to have been "willful." Here, the record is devoid of evidence regarding alleged willfulness.

Although it has been established that the seatbelt was in good working order and that the Decedent didn't fail to wear the seatbelt due to malfunction, there was simply no persuasive evidence to establish whether the Decedent intentionally or willfully failed to wear her seatbelt or whether she negligently forgot to wear her seatbelt or whether there was some other reason for her failure to wear her seatbelt. However based on the testimony from Claimant RH that the Decedent was vigilant about seatbelt use, and based on the evidence establishing that the Employer was adamant and vigilant about enforcement of the seat belt rule, and based on evidence that the Decedent was never disciplined for failure to use her seat belt and was generally known as a compliant employee with a good safety record, who was wearing her “Safe By Choice” bracelet at the time of her death, it was found that it was more likely that the Decedent failed to wear her seatbelt because she negligently forgot, or for some other reason than it was that she intentionally and willfully failed to wear her seatbelt.

Where, as here, the Respondents fail to establish that the Decedent’s injury resulted from her willful failure to obey a reasonable rule adopted by the Employer for her safety, the Respondents are not entitled to a 50% reduction in death benefits to the dependents RH and MH. Death benefits awarded in this case shall not be subject to a 50% reduction.

ORDER

It is therefore ordered that:

1. Claimant RH is entitled to benefits pursuant to §§ 8-42-114 & 8-41-501(1), C.R.S. as Decedent’s surviving common law spouse.

2. The average of Decedent’s paychecks for the last six regular pay periods, encompassing the last 12 full weeks the Decedent worked for Employer prior to her death would result in a fair approximation of her wages. The paychecks from 10/17/2013, 10/31/2013, 11/14/2013, 11/27/2013, 12/12/2013 and 12/26/2013 which are the last 12 regular full weeks of the Decedent’s employment are used to calculate base AWW for the Decedent. This results in a base average weekly wage of $609.16.

3. The cost for continuing to provide the insurance benefits for Claimant MH and Claimant RH are to be included in the average weekly wage calculation from the date the benefits were terminated, January 11, 2014. However, as there is no cost for continuing coverage for the Decedent, this is not to be included in the calculation of the average weekly wage. The cost of continuing these benefits for only Claimant RH and Claimant MH (and excluding the Decedent) would be $739.15 per month ($664.42 for health; $59.78 for dental; and $14.95 for vision). The monthly amount corresponds to a weekly amount of $170.57 per week to be added to the base average weekly wage.

4. Respondents established the Social Security Survivors benefit offset of $83.08 per week against any death benefits paid to Claimant MH and Claimant RH. The benefits are to be reduced by this amount.

5. Respondents have failed to establish that Decedent’s injury resulted from her willful failure to obey a reasonable safety rule adopted for the safety of

the employees and therefore Respondents are not entitled to a reduction in benefits pursuant to §8-42-112(1).

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 22, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that she should be permitted to reopen her March 14, 2014 Workers' Compensation claim prior to March 3, 2016 based on a change in condition pursuant to §8-43-303(1), C.R.S.

FINDINGS OF FACT

1. Claimant worked for Employer as a Concrete Foreman. Her job duties involved setting forms and pouring concrete on large, industrial sites.

2. On March 14, 2014 Claimant was on a jobsite and noticed that a 12 inch I-beam weighing in excess of one ton had tipped over. While stabilizing the beam it fell on her right leg. The I-beam specifically landed on Claimant's lower right leg and twisted her knee.

3. On the day of the incident Claimant underwent right leg surgery with Lance Farnsworth, M.D. She was diagnosed with a Grade 1 open tibial diaphyseal fracture. Dr. Farnsworth inserted a rod in Claimant's right leg that extended from her ankle to her kneecap.

4. After recovering from the right leg surgery Authorized Treating Physician (ATP) Cynthia Lund, M.D. determined that Claimant had reached Maximum Medical Improvement (MMI) on October 10, 2014. Dr. Lung assigned Claimant a 7% right lower extremity impairment rating. Based on a Functional Capacity Evaluation (FCE) Dr. Lund placed Claimant in the medium work category and assigned restrictions including: (1) no lifting or carrying in excess of 50 pounds; (2) no repetitive kneeling, crouching or stair climbing; and (3) no height work in excess of four feet. Dr. Lund also recommended maintenance medical treatment including follow-up care with Dr. Farnsworth over a period of one year or up to three visits if Claimant experienced any problems with the internal fixation or rod of the right tibia. Respondents subsequently filed a Final Admission of Liability (FAL) consistent with Dr. Lund's MMI and impairment determinations.

5. Claimant explained that after reaching MMI her right leg condition worsened. She noted that in January 2015 she was removing concrete forms from a truck bed at work. While stepping backwards one of the forms came out easier than expected and Claimant twisted her right knee. Claimant suffered increased right knee pain and remarked that something with the rod in her leg had "tweaked."

6. After continuing to work for Employer for several months Claimant's right leg condition continued to worsen. She noted that eventually she could no longer stand

and walk to perform her job duties as a Concrete Foreman. By April 2015 Claimant also could not bear weight on her right leg. Claimant thus ceased working for Employer.

7. On May 13, 2015 Claimant visited Dr. Farnsworth for an examination. Dr. Farnsworth recounted that Claimant had been crushed by a large piece of metal on March 14, 2014. She returned for medical treatment because of increased right leg pain and swelling. Dr. Farnsworth noted that approximately four months earlier Claimant had twisted her right knee and has suffered increased pain. Although Dr. Farnsworth did not observe any significant swelling in Claimant's right leg he noted that she had suffered "a torsional injury to the right knee and appears to have an intra-articular injury i.e. meniscus tear with the possibility of involvement of the anterior cruciate ligament." He thus referred Claimant for a right knee MRI.

8. On June 17, 2015 Claimant underwent an MRI of her right knee. At a June 30, 2015 visit with Dr. Farnsworth he evaluated the MRI. He explained "the MRI scan dated 6/17/15 demonstrates postsurgical changes of the tibial tuberosity and distal patellar tendon consistent with placement of the intramedullary rod for tibial shaft fracture. Degenerative changes about the patellofemoral joint are noted. There is significant chondromalacia patellar and slightly laterally set patella." In addressing the cause of Claimant's right knee condition Dr. Farnsworth commented that the "exacerbation of patellofemoral arthrosis with thickening and tendinosis of the patellar tendon was related to her previous surgery" of placing a nail for a tibial shaft fracture.

9. On July 23, 2015 Claimant underwent a right knee outpatient surgery with Dr. Farnsworth. The operative procedures included an arthroscopic chondroplasty, microfracture and lateral retinacular release. Respondents authorized and paid for the surgical procedure.

10. On July 31, 2015 Claimant returned to Dr. Farnsworth for an examination. He noted that Claimant was ambulating without any assistive devices and had no right knee instability. Dr. Farnsworth remarked that Claimant should return on an as-needed basis and had no restrictions on activity. He stated that Claimant had returned to work and was tolerating it well.

11. Because Claimant continued to experience right knee problems she returned to ATP Dr. Lund on September 30, 2015. Dr. Lund noted that the July 23, 2015 surgery was related to Claimant's March 14, 2014 right tibia fracture. She assigned work restrictions including no carrying in excess of 10 pounds and no kneeling, squatting, ladder climbing, repetitive stair climbing, or working on uneven surfaces. Dr. Lund also remarked "at MMI healed." Because Claimant had moved from Colorado Springs to Pueblo, her medical care was transferred to J. Douglas Bradley, M.D. at the Emergicare Clinic in Pueblo.

12. On October 20, 2015 Claimant filed a Petition to Reopen her March 14, 2014 claim. She attached a copy of Dr. Farnsworth's July 23, 2015 surgical report.

13. Claimant first visited Dr. Bradley on December 22, 2015. Dr. Bradley remarked that Claimant was experiencing pain in and around the right knee area with pain going up her lower back. He conducted x-rays of Claimant's right leg and lumbar spine. Dr. Bradley continued Claimant's work restrictions and noted "at MMI since October 10, 2014."

14. On January 19, 2016 Claimant returned to Dr. Bradley for an evaluation. Claimant mentioned stabbing and aching pain throughout her right leg, ankle and foot. Because Dr. Farnsworth's office had closed, Dr. Bradley referred Claimant to Michael Simpson, M.D. for a surgical consultation. Dr. Bradley continued Claimant's work restrictions and noted "at MMI since October 10, 2014."

15. Respondents sent letters to Dr. Bradley on January 19, 2016 and January 29, 2016 in an attempt to clarify his opinions. In an undated typed response to the January 19, 2016 correspondence, Dr. Bradley remarked that he would like Claimant to visit Michael Simpson, M.D. to address possible hardware removal of the right tibia rod and pins. He listed October 10, 2014 as the date of MMI in both the caption and body of the response. In responding to the January 29, 2016 correspondence from Respondents, Dr. Bradley handwrote "[p]atient at MMI until results of consult."

16. On January 27, 2016 Claimant visited Dr. Simpson for an evaluation. Dr. Simpson determined that the hardware in Claimant's tibia was causing significant tendinitis. He explained "I think her nail could safely be removed at this point. I think this would relieve a lot of her patellar tendinitis and a lot of her medial ankle pain… She noticed at least 70% of her pain is in the region of her patellar tendon where her prominent proximal tibial nail resides. An additional 25% of her pain is in the medial distal area with distal interlocking screws." Dr. Simpson summarized that Claimant would be an appropriate candidate for hardware removal.

17. On March 3, 2016 Claimant underwent a third surgery. The surgery involved hardware removal from her right leg. Claimant returned to work for Employer approximately one month after the procedure and has reported steady improvement.

18. On April 22, 2016 the parties conducted the pre-hearing evidentiary deposition of Dr. Bradley. Although Dr. Bradley acknowledged that he lacked complete medical records, he determined that Claimant was no longer at MMI on May 13, 2015 when she visited Dr. Farnsworth or July 1, 2015 when Dr. Farnsworth recommended surgery or July 23, 2015 when she underwent a second right knee surgery.

19. On May 8, 2016 Henry J. Roth, M.D. performed a records review of Claimant's claim. Dr. Roth concluded that Claimant did not suffer a worsening of condition until her hardware removal surgery on March 3, 2016. He thus rescinded Claimant's MMI status effective March 3, 2016. Dr. Roth determined that the July 23, 2015 surgical procedure performed by Dr. Farnsworth addressed an aggravation of pre-existing, non-work-related, degenerative changes in Claimant's right knee. He remarked that the July 23, 2015 surgery did not constitute a worsening of Claimant's March 14, 2014 industrial injury.

20. On May 17, 2016 Respondents filed a General Admission of Liability (GAL). Respondents voluntarily reopened Claimant's claim as of the March 3, 2016 surgery with Dr. Simpson.

21. On June 6, 2016 Dr. Bradley determined that Claimant had returned to MMI.

22. Dr. Roth testified at the hearing in this matter. He reiterated that the March 3, 2016 hardware removal surgery warranted a rescission of Claimant's MMI status. Dr. Roth also noted that the July 23, 2015 surgical procedure addressed degenerative changes in Claimant's right knee and thus did not constitute a worsening of her work-related condition. In fact, there were no objective changes in Claimant's right knee pathology during the spring or summer of 2015 that reflected a worsening of symptoms.

23. Claimant has failed to establish that it is more probably true than not that her condition has worsened and she is entitled to benefits. ATP Dr. Lund concluded that Claimant reached MMI for her March 14, 2014 right leg injury on October 10, 2014. She assigned work restrictions and recommended medical maintenance treatment including follow-up care with Dr. Farnsworth over a period of one year or up to three visits if Claimant experienced any problems with the internal fixation or rod of the right tibia. Claimant explained that after reaching MMI her right leg condition worsened. She noted that in January 2015 she was removing concrete forms from a truck bed at work and twisted her right knee. On May 13, 2015 Claimant visited Dr. Farnsworth and reported increased right knee pain as a result of the January 2015 twisting incident. After a right knee MRI reflected post-surgical changes, Dr. Farnsworth performed a second right knee surgery on July 23, 2015.

24. The July 23, 2015 right knee procedure constituted medical maintenance treatment for Claimant's March 14, 2014 industrial injury. Initially, at the time of MMI Dr. Lund had anticipated that Claimant might require medical maintenance treatment if she experienced any problems with the internal fixation or rod of the right tibia. Moreover, Dr. Farnsworth never suggested that the July 23, 2015 surgery warranted a rescission of Claimant's MMI status. In fact, on July 31, 2015 Claimant returned to Dr. Farnsworth for an examination. He noted that Claimant was ambulating without any assistive devices and had no right knee instability. Dr. Farnsworth remarked that Claimant should return on an as-needed basis and had no restrictions on activity. He stated that Claimant had returned to work and was tolerating it well. Furthermore, on September 30, 2015 Dr. Lund assigned Claimant work restrictions but did not rescind MMI status. She simply noted "at MMI healed." Finally, Dr. Roth testified that there were no objective changes in Claimant's right knee pathology during the spring or summer of 2015 that reflected a worsening of condition.

25. Claimant's care was transferred to Dr. Bradley in late 2015. At his deposition Dr. Bradley acknowledged that he lacked complete medical records but determined that Claimant was no longer at MMI on May 13, 2015 when she visited Dr. Farnsworth or July 1, 2015 when Dr. Farnsworth recommended surgery or July 23,

2015 when she underwent a second right knee surgery. However, at his initial evaluation in December 2015 and a subsequent examination in January 2016, Dr. Bradley continued Claimant's work restrictions and noted that she had remained at MMI since October 10, 2014. Furthermore, in response to letters from Respondents in January 2016 Dr. Bradley maintained that Claimant had remained at MMI since October 10, 2014 pending the results of a consultation. Finally, Dr. Bradley's deposition opinion is not persuasive because he lacked complete medical records but nevertheless provided a variety of possible dates for the rescission of Claimant's MMI status. The numerous dates contradict his medical records and the September 30, 2015 opinion of ATP Dr. Lund. The bulk of the medical records reveal that Claimant did not suffer a worsening of condition after he reached MMI on October 10, 2014. She has thus failed to demonstrate that she has suffered a change in the condition of the original compensable injury or a change in her physical or mental condition that is causally connected to her March 14, 2014 injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving her condition has changed and she is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the

condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAP, Oct. 25, 2006). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

5. As found, Claimant has failed to establish by a preponderance of the evidence that her condition has worsened and she is entitled to benefits. ATP Dr. Lund concluded that Claimant reached MMI for her March 14, 2014 right leg injury on October 10, 2014. She assigned work restrictions and recommended medical maintenance treatment including follow-up care with Dr. Farnsworth over a period of one year or up to three visits if Claimant experienced any problems with the internal fixation or rod of the right tibia. Claimant explained that after reaching MMI her right leg condition worsened. She noted that in January 2015 she was removing concrete forms from a truck bed at work and twisted her right knee. On May 13, 2015 Claimant visited Dr. Farnsworth and reported increased right knee pain as a result of the January 2015 twisting incident. After a right knee MRI reflected post-surgical changes, Dr. Farnsworth performed a second right knee surgery on July 23, 2015.

6. As found, the July 23, 2015 right knee procedure constituted medical maintenance treatment for Claimant's March 14, 2014 industrial injury. Initially, at the time of MMI Dr. Lund had anticipated that Claimant might require medical maintenance treatment if she experienced any problems with the internal fixation or rod of the right tibia. Moreover, Dr. Farnsworth never suggested that the July 23, 2015 surgery warranted a rescission of Claimant's MMI status. In fact, on July 31, 2015 Claimant returned to Dr. Farnsworth for an examination. He noted that Claimant was ambulating without any assistive devices and had no right knee instability. Dr. Farnsworth remarked that Claimant should return on an as-needed basis and had no restrictions on activity. He stated that Claimant had returned to work and was tolerating it well. Furthermore, on September 30, 2015 Dr. Lund assigned Claimant work restrictions but did not rescind MMI status. She simply noted "at MMI healed." Finally, Dr. Roth testified that there were no objective changes in Claimant's right knee pathology during the spring or summer of 2015 that reflected a worsening of condition.

7. As found, Claimant's care was transferred to Dr. Bradley in late 2015. At his deposition Dr. Bradley acknowledged that he lacked complete medical records but determined that Claimant was no longer at MMI on May 13, 2015 when she visited Dr. Farnsworth or July 1, 2015 when Dr. Farnsworth recommended surgery or July 23, 2015 when she underwent a second right knee surgery. However, at his initial evaluation in December 2015 and a subsequent examination in January 2016, Dr. Bradley continued Claimant's work restrictions and noted that she had remained at MMI since October 10, 2014. Furthermore, in response to letters from Respondents in January 2016 Dr. Bradley maintained that Claimant had remained at MMI since October 10, 2014 pending the results of a consultation. Finally, Dr. Bradley's deposition opinion is not persuasive because he lacked complete medical records but nevertheless

provided a variety of possible dates for the rescission of Claimant's MMI status. The numerous dates contradict his medical records and the September 30, 2015 opinion of ATP Dr. Lund. The bulk of the medical records reveal that Claimant did not suffer a worsening of condition after he reached MMI on October 10, 2014. She has thus failed to demonstrate that she has suffered a change in the condition of the original compensable injury or a change in her physical or mental condition that is causally connected to her March 14, 2014 injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request to reopen her March 14, 2014 Workers' Compensation claim is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 20, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-940-803-02

ISSUES

- What is Claimant's Average Weekly Wage (AWW)?

- Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) or temporary partial disability (TPD) benefits?

- Whether Claimant is entitled under section 8-43-301(14), C.R.S. to an award of attorney fees for work performed responding to Respondent's petition to review a non-final order?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On January 2, 2014, Claimant sustained severe work related injuries. At the time of the accident, Claimant was a career agent with Employer.

2. After a previous hearing, ALJ Broniak found that Claimant was an employee and that the injuries he sustained are compensable.

3. Employer petitioned for review of Judge Broniak's order. The ICAO determined the order was not final and therefore was not subject to review. It dismissed the petition without prejudice.

4. Claimant has not worked since January 2, 2014, as the result of the work related injuries he sustained.

5. At the time of the accident, Claimant was a career agent and district manager. At the time of the accident, his compensation included a variable monthly bonus based on the performance of the agents he supervised. During the twelve month period immediately preceding his accident, these included:

March, 2013	$165.00
June, 2013	$1,000.00
July, 2013	$1,250.00
September, 2013	$1,000.00
October, 2013	$2,500.00
November, 2013	$3,000.00
December, 2013	$2,500.00

Claimant's average weekly management bonus is calculated by averaging these monthly amounts, multiplying that amount by 12 months, and then dividing by 52 weeks.

(($11,415 /12) x 12) /52 = $219.52

6. Claimant's compensation also included commissions both on the products he sold and their renewals, and also a smaller commission on products and renewals sold by the agents he supervised. During the twelve month period immediately preceding his accident, these gross commissions totaled $56,373.22.

7. In certain circumstances, the full amount of the commission paid would not be earned, resulting in a "charge back." For example, if an individual purchased a life insurance policy, Claimant would be paid the annual commission for that product. However, if the policy were terminated for non-payment after six months, Employer would charge back half of the commission -- the portion of the commission paid but not earned.

8. During the twelve month period immediately preceding his accident, Employer charged back a total of $18,592.70.

9. Claimant credibly testified that it was his regular practice and procedure to review his charge backs each January to ensure the charge backs taken the previous year were correct, and if not, to challenge them. Claimant testified that because of his injuries, he was unable to perform that review and challenge, resulting in Employer taking improper charge backs.

10. Employer's national sales director, Dani Karrow, testified that agents and managers can audit improper charge backs as they are assessed. Ms. Karrow testified that charge backs can be incorrect due to administrative mistakes at individual insurance companies. Ms. Karrow testified that Employer performs its own charge back audits because it is in Employer's interest to make sure that it was not losing business and revenue due to third party administrative errors.

11. Claimant was unsure of the amount improperly charged back in 2013, but he testified that proportionally lower amounts had been charged back during prior years. In 2012, Claimant was charged back $27,872.79 on a gross commission of $84,375.18, thus the 2012 charge back was 33.03% of his gross commission. In 2013, Claimant was charged back $18,592.70 on a gross commission of $56,373.22, thus the 2013 charge back was 32.92% of his gross commission. The ALJ finds that Claimant has not established by a preponderance of the evidence that the amount of charge backs Employer took in 2013 was inaccurate or the result of his injury.

12. During the twelve month period immediately preceding his accident, Claimant's net commissions totaled $37,780.52. Claimant's average weekly commission is calculated by dividing this amount by 52 weeks, to arrive at $726.55.

13. Claimant’s AWW is the combined amount of his weekly management bonus of $219.52 and his average weekly net commission of $726.55, for an AWW of $946.07.

14. While some evidence was produced that might tend to support a finding that Claimant received some compensation after the date of his accident, the issue of offset was not endorsed for hearing and is not properly before the court at this time.

15. Employer concedes that it was uninsured at the time of Claimant’s accident.

16. Claimant failed to establish by a preponderance of the evidence that Respondent filed the petition to review for an improper purpose, such as to harass, cause delay, or unnecessarily increase the cost of litigation.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. V. *Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Average Weekly Wage

“Wages” are defined as the money rate at which services are paid under the contract for hire at the time of the injury for accidental injuries C.R.S. § 8–40–201 (19)(a). The objective of wage calculation is to reach a fair approximation of the claimant’s actual wage loss and diminished earning capacity. *Campbell v. IBM Corp*. 867 P.2d 77 (Colo. App. 1993). The average weekly wage is generally determined by the wage the injured worker received at the time of the injury. § 8-42-102(2), C.R.S. 2000.

Respondents have suggested a calculation for determining average weekly wage which does not account for Claimant’s compensation as a district sales manager. Claimant has suggested calculating average weekly wage using only Claimant’s last thirteen weeks of compensation. Neither party’s proposal is supported by controlling law.

C.R.S. § 8-42-102(2) describes the various methods of computing a claimant's average weekly wage. While C.R.S. § 8-42-102(3), allows an ALJ to use an alternative method of calculating average weekly wage, the ALJ finds good cause to do so has not been shown. As found, a portion of Claimant's compensation was a variable monthly amount for the work he performed as a district sales manager. Calculating that amount as set forth in § 8-42-102(2)(a) yields an AWW for that portion of Claimant's compensation of $219.52. Another portion of Claimant's compensation was based on commissions. Calculating that amount as set forth in § 8-42-102(2)(e) yields an AWW for the commission portion of Claimant's compensation of $726.55. Combining these two figures yields an AWW of $946.07.

C.R.S. § 8-43-408(1) requires that when an employer does not have insurance coverage as required by the Colorado Workers' Compensation Act, any compensation benefits are to be increased by 50%. C.R.S. section 8-43-408(1) provides "in any case where the employer is subject to the provisions of articles 40 to 47 of this title and at the time of the injury has not complied with the insurance provisions of said articles, … the employee, if injured, … may claim the compensation and benefits provided … and in any such case the amounts of compensation or benefits provided in said articles shall be increased fifty percent."

Claimant's temporary total disability rate is calculated by multiplying his AWW of $946.07 by 2/3. Here, Claimant's temporary total disability rate is $ 630.65. That rate is then increased by the 50% penalty assessed pursuant to section 8-43-408(1), resulting in a TTD rate of $ 945.98.

Temporary Total Disability

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that claimant left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, *supra*. The term "disability" connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office*, *supra*.

The uncontroverted evidence establishes that Claimant's injury is work related, and that Claimant has not been able to return to work as a direct result of his injuries.

Attorney Fees

Claimant requested attorney's fees on the basis that Respondent's Petition to Review Judge Broniak's Order was improper pursuant to C.R.S. § 8-43-301(14) (2015). The section states, in pertinent part,

> The signature of an attorney on a petition to review or brief in support thereof constitutes a certificate by the attorney that such attorney has read the petition or brief; that, to the best of the attorney's knowledge, information or belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification of reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, cause delay, or unnecessarily increase the cost of litigation. If a petition to review or brief is signed in violation of subsection (14), the director, the administrative law judge, or the panel shall award reasonable attorney's fees and costs to the party incurring the fees and costs as a result of the improper actions.

C.R.S. § 8-43-301(14) (2015).

As found, Claimant failed to establish by a preponderance of the evidence that Respondent filed the petition to review for an improper purpose, such as to harass, cause delay, or unnecessarily increase the cost of litigation. As this is an essential of a claim for attorney's fees, its absence defeats Claimant's claim.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Employer shall pay Claimant TTD benefits at the weekly rate of $ 945.98 from the date of injury and ongoing until terminated by the operation of law.

2. Employer shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

3. Claimant's claim for attorney's fees is denied and dismissed.

4. Issues not expressly decided herein are reserved to the parties for future determination.

5. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 26, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on June 15, 2015.

2. Whether Claimant has established by a preponderance of the evidence that the right of medical selection passed to him because Respondents failed to provide a written list of at least four designated medical providers within seven days after receiving notice of his injury.

3. Whether Claimant has proven by a preponderance of the evidence that he received authorized, reasonable and necessary medical treatment for his June 15, 2015 industrial injury.

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 5, 2015 through December 28, 2015.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $1,200.00.

FINDINGS OF FACT

1. Claimant worked for Employer as a Maintenance Manager. His typical job duties involved repairing large vehicles and supervising other mechanics.

2. Claimant testified that on June 15, 2015 he was installing brakes on a bus. The brake drums weighed approximately 200 pounds each. While lifting a brake drum when kneeling Claimant experienced a "pop" or "crunch" in his lower back area.

3. Claimant remarked that on June 16, 2015 he reported his injury to General Manager of Employer Craig Pruett. However, Mr. Pruett responded that Employer could not afford to have Claimant out on "Workers' Comp." Two employees had recently quit, one was terminated and one was out of work with a Workers' Compensation injury. Claimant noted that Employer also did not provide him with a written list of at least four designated medical providers or any other treatment options.

4. Claimant initially sought medical treatment on September 2, 2015. He visited Woodland Park Family Medicine, LLC for an evaluation of his lower back symptoms. Claimant reported that approximately 2.5 months earlier he "was picking up

a very large item and felt a pop in his back." He subsequently experienced pain and pressure in his lower back area. Stacy Concelman, NP diagnosed Claimant with a strain of the lumbar spine. She recommended an MRI and an x-ray to rule out a compression fracture. NP Concelman noted that Claimant's symptoms were 'suspicious" for an annular tear.

5. On October 2, 2015 Claimant visited Jennifer Sullivan, NP at Woodland Park Family Medicine, LLC for a review of his lumbar MRI. NP Sullivan diagnosed Claimant with a protruded lumbar disc. She recommended pain medication and referred Claimant for physical therapy.

6. On October 5, 2015 Claimant ceased working for Employer. Claimant characterized his termination from employment as a forced resignation.

7. On October 5, 2015 Employer filed a First Report of Injury. The document specified that Claimant injured his back while at work on June 15, 2015 and "notified us [on October 5, 2015] the day his employment ended." The First Report of Injury provided that Claimant was engaged in "mechanics work" just prior to the accident.

8. On January 22, 2016 Claimant visited Chris Malinky, M.D. for diagnostic and medial branch blocks at levels L4, L5 and S1. Claimant returned to Dr. Malinky on February 26, 2016 for a rhizotomy. He reported that he had experienced greater than 70% reduction of pain from the previous medial branch blocks. Dr. Malinky noted that the MRI suggested facet related pain and that conservative therapy has failed.

9. Employer's Vice President of New Business Development Craig Pruett testified at the hearing in this matter. Mr. Pruett commented that Claimant did not report his injury on June 15-16, 2015. In fact, replacing brakes was not part of Claimant's job duties. Instead, he oversaw the work of other employees in Employer's shop. Mr. Pruett also denied telling Claimant not to file a Workers' Compensation claim. Finally, Mr. Pruett recalled that at some point Claimant stated he suffered from degenerative joint disease and injured his back while working out.

10. Mr. Pruett recounted that Claimant did not mention a Workers' Compensation claim until approximately 1.5 hours after he resigned on October 5, 2015. Mr. Pruett had asked Claimant to resign because he was verbally abusing other employees. After Mr. Pruett was apprised of the Workers' Compensation claim he directed Claimant to Employer's Human Resources Department.

11. Employer's Safety and Training Manager Andrew Cottrell also testified at the hearing in this matter. He acknowledged filing Employer's First Report of Injury on October 5, 2015. Mr. Cottrell explained that he was first informed of Claimant's injury on October 5, 2015 or just minutes after Claimant's resignation from employment. He remarked that he sent a designated provider list to Claimant through certified mail on October 8, 2015. In fact, the record reveals that in an October 8, 2015 Designated Provider List Notification Letter Mr. Cotrell provided Claimant with a written list of four designated medical providers. Mr. Cottrell stated that he received notice that the letter

had been received by Claimant on October 13, 2015. He knew that Claimant had received the letter because the signature he had on file for Claimant matched the signature on the certified mail receipt.

12. On February 25, 2016 Claimant underwent an independent medical examination with Timothy Hall, M.D. Claimant reported that on June 15, 2015, while he was lifting a brake drum weighing approximately 200 pounds, he experienced a “pop” in his lower back. After conducting a physical examination Dr. Hall diagnosed Claimant with a lumbar strain/mechanical lower back pain and myofascial pain in the lumbosacral area. Dr. Hall determined that Claimant’s work activities on June 15, 2015 could certainly have caused a lower back injury. Dr. Hall did not note any inconsistencies in Claimant’s presentation and believed that he continued to work because he believed his condition would improve over time. He thus concluded that Claimant’s condition and need for medical treatment was causally related to the June 15, 2015 work incident.

13. On March 16, 2016 Claimant underwent an independent medical examination with John J. Raschbacher, M.D. Claimant reported that on June 15, 2015 he was kneeling and crouching to pick up a brake on a vehicle. As he lifted the brake he heard a “pop” but did not experience any pain until the following day. The pain was limited to his lower back and did not extend into his lower extremities. Dr. Raschbacher noted that Claimant’s mechanism of injury is not typically associated with facet arthropathy. He remarked that during an October 2, 2015 evaluation Claimant did not experience pain with a lumbar spine back extension but declined any backward extension at the independent medical evaluation. Dr. Raschbacher characterized Claimant at the independent medical examination as exhibiting decreased range of motion and greater functional limitations. He was thus unable to explain Claimant’s presentation on a physical or physiological basis. Dr. Raschbacher also noted that Claimant’s lumbar MRI reflected degenerative lower lumbar facet arthropathy but was otherwise unremarkable. He thus did not recommend any physical restrictions or additional medical treatment for the June 15, 2015 incident.

14. On June 3, 2016 the parties conducted the pre-hearing evidentiary deposition of Dr. Hall. After his independent medical examination he reviewed additional medical records that included Dr. Raschbacher’s independent medical examination report. Dr. Hall explained that Claimant’s June 15, 2015 lifting incident could have caused a musculoskeletal or discogenic injury. He maintained that Claimant’s symptoms were most likely related to the June 15, 2015 lifting and twisting maneuver. Dr. Hall noted that Claimant’s lower back condition had been progressing over time and was unrelated to a severe mid-back injury caused by a motor vehicle accident on January 27, 2016.

15. Dr. Raschbacher testified at the hearing in this matter. He maintained that Claimant did not suffer an industrial lower back injury on June 15, 2015 during the course and scope of his employment with Employer. Dr. Raschbacher explained that Claimant’s description of his mechanism of injury would not likely produce the described pathology or symptoms. He remarked that Claimant’s MRI did not reflect any acute findings and a left paracentral disc protrusion is a common finding on any MRI of an

individual’s lower back. Dr. Raschbacher also disagreed with Dr. Hall’s independent medical examination report because the analysis was grossly incomplete, did not meet the format designated by the Division of Worker’s Compensation and did not reflect any prior medical history regarding Claimant’s lower back.

16. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his employment with Employer on June 15, 2015. Claimant explained that he injured his lower back while installing an approximately 200 pound brake drum on a bus on June 15, 2015. He stated that he reported his injury to Mr. Pruett on the day of the incident but Mr. Pruett responded that Employer could not have another employee out on Workers’ Compensation. However, Claimant continued to perform his job duties and did not seek medical treatment for his lower back symptoms for approximately 2.5 months. Mr. Pruett specifically testified that Claimant did not report a Workers’ Compensation claim until after his resignation from employment on October 5, 2015. He also recalled that at some point Claimant had stated he suffered from degenerative joint disease and injured his back while working out. Furthermore, Mr. Cottrell explained that he was first informed of Claimant’s injury on October 5, 2015 or just minutes after Claimant’s resignation from employment. He sent a designated provider list to Claimant through certified mail on October 8, 2015. In fact, the record reveals that in an October 8, 2015 Designated Provider List Notification Letter Mr. Cotrell provided Claimant with a written list of four designated medical providers.

17. The medical records also reveal that Claimant did not suffer an industrial lower back injury on June 15, 2015 while working for Employer. Dr. Raschbacher maintained that Claimant did not suffer an industrial lower back injury on June 15, 2015 during the course and scope of his employment with Employer. He explained that the mechanism of injury would not likely produce Claimant’s pathology or symptoms. He remarked that Claimant’s MRI did not reflect any acute findings and a left paracentral disc protrusion is a common finding on any MRI of an individual’s lower back. Dr. Raschbacher specifically commented that during an October 2, 2015 evaluation Claimant did not experience pain with a lumbar spine back extension but declined any backward extension at the independent medical evaluation. He characterized Claimant at the independent medical examination as exhibiting decreased range of motion and greater functional limitations. He was thus unable to explain Claimant’s physical or physiological presentation. Finally, Claimant’s lumbar MRI reflected degenerative lower lumbar facet arthropathy but was otherwise unremarkable. In contrast, Dr. Hall explained that Claimant’s lower back symptoms were most likely related to the June 15, 2015 lifting and twisting incident at work. He noted that Claimant’s lower back condition had been progressing over time and was unrelated to a severe mid-back injury caused by a motor vehicle accident on January 27, 2016. However, Dr. Raschbacher persuasively explained that Dr. Hall’s independent medical examination report was inadequate because the analysis was grossly incomplete, did not meet the format designated by the Division of Worker’s Compensation and did not reflect any prior medical history regarding Claimant’s lower back. Based on the persuasive testimony of Mr. Pruett, Mr. Cottrell and Dr. Raschbacher, as well as the medical records, Claimant’s claim for Workers’ Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on June 15, 2015. Claimant explained that he injured his lower back while installing an approximately 200 pound brake drum on a bus on June 15, 2015. He stated that he reported his injury to Mr. Pruett on the day of the incident but Mr. Pruett responded that Employer could not have another employee out on Workers' Compensation. However, Claimant continued to perform his job duties and did not seek medical treatment for his lower back symptoms for approximately 2.5 months. Mr. Pruett specifically testified that Claimant did not report a Workers' Compensation claim until after his resignation from employment on October 5, 2015. He also recalled that at some point Claimant had stated he suffered from degenerative joint disease and injured his back while working out. Furthermore, Mr. Cottrell explained that he was first informed of Claimant's injury on October 5, 2015 or just minutes after Claimant's resignation from employment. He sent a designated provider list to Claimant through certified mail on October 8, 2015. In fact, the record reveals that in an October 8, 2015 Designated Provider List Notification Letter Mr. Cotrell provided Claimant with a written list of four designated medical providers.

8. As found, the medical records also reveal that Claimant did not suffer an industrial lower back injury on June 15, 2015 while working for Employer. Dr. Raschbacher maintained that Claimant did not suffer an industrial lower back injury on June 15, 2015 during the course and scope of his employment with Employer. He explained that the mechanism of injury would not likely produce Claimant's pathology or symptoms. He remarked that Claimant's MRI did not reflect any acute findings and a left paracentral disc protrusion is a common finding on any MRI of an individual's lower back. Dr. Raschbacher specifically commented that during an October 2, 2015 evaluation Claimant did not experience pain with a lumbar spine back extension but declined any backward extension at the independent medical evaluation. He characterized Claimant at the independent medical examination as exhibiting decreased range of motion and greater functional limitations. He was thus unable to explain Claimant's physical or physiological presentation. Finally, Claimant's lumbar MRI reflected degenerative lower lumbar facet arthropathy but was otherwise unremarkable. In contrast, Dr. Hall explained that Claimant's lower back symptoms were most likely related to the June 15, 2015 lifting and twisting incident at work. He noted that

Claimant’s lower back condition had been progressing over time and was unrelated to a severe mid-back injury caused by a motor vehicle accident on January 27, 2016. However, Dr. Raschbacher persuasively explained that Dr. Hall’s independent medical examination report was inadequate because the analysis was grossly incomplete, did not meet the format designated by the Division of Worker’s Compensation and did not reflect any prior medical history regarding Claimant’s lower back. Based on the persuasive testimony of Mr. Pruett, Mr. Cottrell and Dr. Raschbacher, as well as the medical records, Claimant’s claim for Workers’ Compensation benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant’s request for Workers’ Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge’s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge’s order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 25, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues to be determined by the ALJ are:

1. Whether the claimant has proven by a preponderance of the evidence that her medical condition causally related to her February 9, 2011, injury covered by this claim has worsened since she was placed at maximum medical improvement (MMI) on July 22, 2013, by authorized provider (ATP) Timothy Sandell, M.D. and Division IME (DIME) provider William Watson, M.D. so that she is no longer at MMI, and her claim shall be reopened for additional medical benefits due to a change in condition pursuant to C.R.S. § 8-43-303 (1).

2. Whether the claimant has satisfied her burden of proof by showing by a preponderance of the evidence that she needs additional curative medical benefits that are causally related to her injury covered by this claim;

3. Whether the claimant has proven by a preponderance of the evidence that, if her condition causally related to this claim has worsened and she no longer is at MMI, she is entitled to temporary total disability (TTD) benefits beginning April 30, 2015, and continuing.

PROCEDURAL MATTERS

The parties reached the following stipulations:

1. Scott Stanley, M.D. is an authorized provider effective April 30, 2015. The claimant therefore withdrew the issue of a change of provider endorsed for hearing.

2. Respondents reserved the Workers’ Compensation medical fee schedule for any medical benefit awarded or ordered.

These stipulations were approved and accepted by the ALJ.

FINDINGS OF FACT

1. The claimant sustained an admitted industrial injury on February 9, 2011. The claimant's injury affected her lumbar spine and she also suffered radicular symptoms. As a result of her injury, the claimant underwent a lumbar fusion at the hands of Dr. David A. Wong, M.D.

2. Subsequent to surgery, the claimant continued her treatment with her primary physician, Dr. Timothy Sandell. On February 25, 2013, the claimant reported to Dr. Sandell that she was getting worse. On that date, an EMG was completed, noting the only abnormality was some nerve root irritation, which the doctor found not to be uncommon.

3. Dr. Sandell placed the claimant at Maximum Medical Improvement on July 22, 2013. In so doing, Dr. Sandell noted the July 18, 2013 re-evaluation of Dr. Wong who found that there is no significant surgical lesion and agreed with ongoing rehab and pain management. By report of November 13, 2013, Dr. Sandell addressed permanent impairment and permanent work restrictions. On December 4, 2013, Dr. Sandell noted that despite ongoing symptoms, there are no new treatment options available for the claimant. He continued to monitor her medications. On December 23, 2013, Dr. Sandell notes that the claimant comes in with concerns of worsening symptoms. He noted that while she had previously reported some tingling and numbness in the feet, this has become worse and is described as a burning sensation in the feet. He noted that she felt she was having difficulty walking and has used a cane. He noted that she had gone to the emergency room based on his instructions on December 19, 2013, where a lumbar MRI was performed that showed no acute changes. Dr. Sandell noted that an IME had been scheduled which he felt would be appropriate. In his report of March 18, 2014, Dr. Sandell noted that the claimant complained of six falls since she was last seen and has suffered episodes of not being able to walk.

4. On April 8, 2014, the claimant underwent a Division Independent Medical Examination (DIME) by Dr. William Watson. Dr. Watson stated in the discussions portion that he felt that it was appropriate, as the claimant still had so much pain and disability, to provide a provocative discography at the L4-5, L5-S1 and L3-4 level above. Depending on the results, he opined she may be a candidate for interbody fusion at either L4-5 or L5-S1 or both levels. He further stated that the claimant should return to Dr. Wong after the evaluation. He felt the discography should be done under maintenance care and he also stated that she would not be at Maximum Medical Improvement if it was found that she needed further surgery.

5. Dr. Sandell agreed with Dr. Watson's recommendation for lumbar discogram and possible surgical evaluation. Dr. Sandell referred the claimant to Dr. Mark Meyer for a lumbar discogram on June 2, 2014.

6. On July 31, 2014, Dr. Sandell indicated that he had no idea why the discogram was not approved as he had made the referral. The claimant was noted to have an evaluation with Dr. Wong.

7. The claimant was evaluated by Dr. Wong on August 5, 2014. Dr. Wong opined that other evaluations would be of higher priority than a discography. He recommended an evaluation with a neurologist and a psychological evaluation. The claimant was referred for a neurological evaluation and a psychological evaluation subsequent to her visit with Dr. Wong. On September 24, 2014, Dr. Sandell wrote a letter to Giovonna Maestas, a paralegal with Ritsema & Lyons, outlining that there was really no significant treatment recommendations by the psychologist, Dr. Weingarten. On September 29, 2014, Dr. Sandell made a recommendation for an evaluation by a neurologist. As of November 24, 2014, Dr. Sandell noted the claimant's continued complaints but felt that there was nothing new to offer her in regard to treatment.

8. On or about January 14, 2015, the claimant underwent an evaluation by Dr. Scott Stanley. At that time, Dr. Stanley recommended a CT myelogram as well as an EMG.

9. On a follow up evaluation, Dr. Timothy Sandell made a referral for a CT myelogram and an EMG. On April 30, 2015, Dr. Sandell noted that the claimant had the CT myelogram and the EMG with Dr. Pamela Knight. At that time, noting the new studies, Dr. Sandell referred the claimant to Dr. Stanley for surgical evaluation and likely treatment at his discretion. He further stated that, "Because she is pursuing further treatment and likely another surgery, she is now off Maximum Medical Improvement status until she stabilizes once again," which he anticipated to be post-operatively. On April 30, 2015, Dr. Sandell wrote a letter to Susan Canny, a Strategic Nurse Consultant of Pinnacol Assurance, indicating that we are anticipating another surgery. He further made a referral to Dr. Stanley. On June 4, 2015, Dr. Wong again examined and evaluated the claimant. At that time, he had the CT myelogram and EMG studies completed by Dr. Knight. Dr. Wong was of the opinion that he would need to know whether the finding of Dr. Pamela Knight were chronic or acute. He asked that Dr. Knight clarify acute vs. chronic question in terms of her right L5 changes on the EMG and nerve conductive studies. If more of the right L5 changes are seen, then the more likely that additional decompression might be helpful. Dr. Knight issued an addendum

to her report on August 17, 2015 indicating that the findings on the EMG were sub-acute.

10. The ALJ finds that the claimant has established as more likely than not that her condition has changed and worsened subsequent to MMI. This is based on the medical opinions of Dr. Sandell as well as that of Dr. Scott Stanley and Dr. Pamela Knight. It is also based on the opinion of Dr. Wong. It is noted that for some time after she was placed at MMI Dr. Sandell had nothing further to offer the claimant. However, after further testing and based on a progression of her symptoms post MMI, Drs. Wong, Sandell and Stanley all feel that the claimant would benefit from surgery. A change of her condition is supported by the EMG findings which were noted as sub-acute. The ALJ also credits the testimony of the claimant as to the progression of her symptoms including new symptoms which were noted by Dr. Sandell on December 23, 2013, a point in time subsequent to MMI.

11. The ALJ finds the claimant to be credible in her statements regarding the change in her condition. The ALJ finds that the claimant has established that it is more likely than not that the claimant is entitled to additional and curative care, including surgery, as recommended by Dr. Stanley.

12. The ALJ finds that the claimant has established that it is more likely than not that her case should be reopened as of April 30, 2015.

13. Based on the medical records and claimant's credible testimony, the ALJ finds that claimant's condition has worsened since she was placed at MMI. Her worsened condition has had a greater impact on her capacity to work than when she was placed at MMI. Specifically, after reaching MMI, claimant has suffered an increase in pain and numbness which extends into her entire right lower extremity. The increased pain and numbness have more severely impacted claimant's ability to walk. As noted above, claimant has episodes where she is unable to walk at all. When claimant does walk, she uses a cane. The increased pain and numbness have also caused claimant to fall unexpectedly; while claimant has had such falls since 2012, the falls are occurring with greater frequency. As noted in the paragraphs above, claimant's physicians have also noted a worsening in claimant's condition.

14. Claimant's increased risk of falling, pain and numbness, and need for additional surgery have placed greater physical restrictions on her, which, in turn, have further decreased her ability to effectively perform her regular employment duties as a CNA than when she was placed at MMI.

15. Based on the medical records and evidence submitted the ALJ finds that the claimant has established as more likely than not that she has been temporarily totally disabled from April 30, 2015 and continuing. The claimant testified that she has not earned any wages from at least April 30, 3015 and continuing. Further, the records support that the claimant had physical restrictions at all times which would prevent her from working in her occupation.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102 (1). Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998); C.R.S. § 8-43-201. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102 (1), C.R.S.

2. The question of whether the claimant met her burden of proof is one of fact for determination by the ALJ. See *Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

3. A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true than not. See *Page v. Clark*, 593 P. 2d 792 (Colo. 1979).

4. When determining credibility, the fact finder should consider among other things the consistency or any inconsistencies of the witness' testimony, the fact that the witness' testimony in important particulars was contradicted by other witnesses; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness, and the bias or prejudice of the witness, if any. See *Prudential Insurance Co. of America v. Cline*, 57 P.2d 1205 (1936), CJI Civil 3:16 (2005).

5. After considering all of the evidence, the ALJ concludes that the claimant has met her burden of proof and the ALJ concludes that the claimant has established by

a preponderance of the evidence that her condition changed as of April 30, 2015, a time subsequent to Maximum Medical Improvement as contemplated by section 8-43-303(1) C.R.S. and that her case should be reopened thereunder.

6. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. See § 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* As found, the claimant has established by a preponderance of the evidence that treatment and surgery as recommended by Dr. Scott Stanley is related to this work injury and the ALJ concludes that such is reasonable and necessary to cure and relieve the worker from the effects of her injury.

7. A workers' compensation claimant is eligible for temporary total disability (TTD) benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (2004). This ALJ has concluded that this claim should be reopened as of April 30, 2015. The ALJ further concludes that the claimant's injury has resulted in total disability as of April 30, 2015 and this total disability continues. Therefore the ALJ concludes that the respondents shall pay the claimant temporary total disability benefits starting April 30, 2015 and continuing until terminated by law.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. This claim is reopened as of April 30, 2015.

2. The respondent-insurer is responsible for the payment of the claimant’s reasonable, necessary, and related medical benefits for her low back injury, including the surgical treatment recommended by Dr. Scott Stanley.

3. The claimant is entitled to temporary total disability benefits from and including April 30, 2015 and continuing until terminated by operation of law.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: July 26, 2016

Hollyce Farrell

Hollyce Farrell
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STIPULATIONS

Prior to the commencement of hearing, the parties reached the following stipulation, which is approved by the ALJ:

I. The parties stipulated to an average weekly wage of $870.00.

ISSUES

The remaining issues addressed in this decision concern compensability and Claimant's entitlement to medical benefits. The specific questions addressed are:

I. Whether Claimant established by a preponderance of the evidence, that she sustained a compensable injury arising out of and in the course and scope of her employment on April 13, 2015.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to all reasonable, necessary, and medical treatment stemming from the April 13, 2015 alleged injury.

III. Whether the Respondent-Employer timely designated a medical provider in Michigan once Respondent-Employer had some knowledge of facts that would lead a reasonably conscientious person to believe that the claimant was relocating to Michigan and would require treatment in Michigan.

FINDINGS OF FACT

Based on the testimony and evidence presented at hearing, as well as the post hearing deposition testimony of Dr. Rachel Basse, the undersigned ALJ enters the following findings of fact:

1. Claimant was employed full-time as correctional officer for Respondent-Employer on April 13, 2015, the alleged date of injury.

2. As a correctional officer, Claimant would provide security and direction to various areas of the prison facility. Occasionally, Claimant would be selected for special assignment to guard offenders who were being transferred to and from the local hospital. Such special assignment is known "hospital duty."

3. On April 13, 2015, Claimant was partnered with a fellow correctional officer, Cody

Dillinger to guard an inmate who had recently been admitted to the hospital. Claimant and Mr. Dillinger had never worked together previously.

4. Before proceeding to the hospital, Claimant drove a prison vehicle to the control tower so that she could obtain a firearm.

5. There was no sense of urgency and the two were not in a rush to get to the hospital.

6. Upon arrival at the control tower, Claimant went inside, obtained the firearm, and returned to her employer issued vehicle. Claimant opened the drivers' side door of the vehicle, which she described as being a heavier, reinforced door. As Claimant was entering the vehicle, she testified that she lost control of the door and the corner of it struck her on the left side of her forehead above the eye. Claimant is 5'2 ¾" tall.

7. Mr. Dillinger testified that he did not see the door strike Claimant. Moreover, Mr. Dillinger testified that he did not hear any sound consistent with someone striking their head on a car door. Mr. Dillinger was sitting in the passenger seat of the vehicle. He was not distracted or otherwise occupied.

8. Claimant reported that she stated audibly that she had just hit herself in the head with the door but Mr. Dillinger appeared oblivious to the incident. Mr. Dillinger testified that Claimant never said anything about hitting her head.

9. While Claimant was backing the car, in order to turn around and proceed to the hospital; she hit a retaining wall constructed of railroad ties on the prison grounds. Mr. Dillinger estimated that Claimant was driving less than 5 MPH when she made contact with the wall. There was no damage to the car and neither he nor Claimant hit their head as a consequence of striking the retaining wall.

10. After making contact with the wall, Claimant drove to the hospital and the two proceeded to the inmate patient's hospital room. Mr. Dillinger and Claimant spent approximately four hours together at the hospital, arriving at around 2:00 p.m. According to Mr. Dillinger, Claimant left the hospital between 6:00 and 8:00 p.m. Claimant left the hospital after receiving a phone call from the supervising officer indicating that it was unnecessary for two people to guard the inmate patient.

11. While they were together, Claimant and Mr. Dillinger sat on a couch guarding the inmate. They engaged in small talk. During this time, Claimant never said anything about hitting her head, nor did Claimant appear to be in pain to Mr. Dillinger. Rather, Claimant was happy, coherent and engaged. She did not demonstrate problems with her speech and ate her lunch without trouble.

12. Mr. Dillinger admitted that he had never worked with Claimant before and had no understanding of her baseline cognitive functioning and/or behavior. He also testified that he and Claimant did not engage in any stressful duties while working together.

13. Claimant testified that she felt tired and groggy after being struck by the door, but was able to continue working her shift. She reported that she felt like she needed caffeine to wake up as the day progressed. She testified that she was embarrassed by the incident. Consequently, she did not report it or say anything to anyone the day it occurred. Claimant testified that she noticed worsening symptoms during the evening following the incident; feeling more and more tired and noticing increasing pain in her head. According to Claimant's testimony, she felt "out of it" although she did not relate her worsening symptoms to the incident occurring earlier in the day.

14. By morning on April 14, Claimant's head was hurting even more, she felt dizzy, nauseated, and was experiencing visual disturbances. Consequently, she reported the incident to her Lieutenant, Trevor Bugles.

15. After reporting the incident, Claimant went to the emergency room (ER) at the Sterling Regional Medical Center. The emergency room record provides the following reported history of present illness: "Yesterday she was at work and opened a car door forcefully hitting the left side of her head. She had no LOC.[1] According to the ER report, Claimant complained of ongoing severe HA, blurred vision and nausea. While she had nausea, the ER report specifically documents an absence of vomiting. Indeed, no persuasive evidence was presented that Claimant ever vomited as a consequence of striking her head.

16. Given the described mechanism of injury (MOI), a CT of the head/brain was ordered. CT results were interpreted by Dr. Eric M. Lyders as "normal" without evidence of "hemorrhage or acute finding."

17. Physical examination in the ER revealed Claimant to be in no acute distress. Her skin was warm and dry. She presented with a "mild contusion" on the left forehead, but had no abrasions. There were no deformities, crepitus, battle sign or raccoon eyes noted upon inspection of the head. Claimant's pupils were equal, round and reactive to light and her extraocular movements were intact. Finally neurological examination revealed Claimant to be "[a]lert and oriented to person, place time, and situation." Claimant's cranial nerves (CN) were intact and she demonstrated normal sensation, motor movement, speech and coordination. No focal neurological deficits were observed. Although imaging study (CT) and the physical examination were normal, "concern" for concussion was noted secondary to Claimant's ongoing severe headache. Claimant was given a 30 mg intramuscular (IM) injection of Toradol and provided prescriptions for Ativan, Norco and Zofran and discharged with instruction to follow up with her primary care physician (PCP).

18. Claimant testified that she filled her prescriptions. As evidenced by a April 17, 2015 ER report, the prescribed medications failed to provide relief of her ongoing pain. Consequently, Claimant returned to the ER on April 17, 2015 for additional treatment. The ER record from this date of visit indicates that Claimant reported "left sided pain

[1] The ALJ finds LOC to refer to loss of consciousness.

that starts behind her left eye and radiates to the side of her left head." According to Claimant's report in the ER, her head pain was constant in nature and throbbing. The pain was not consistent with Claimant's pre-existing migraines except that it was on the left side of her head were her typical migraines emanated from. Claimant reported using "ice packs over the left neck because she [thought] she [had] a mild amount of whiplash" from her April 13, 2015 injury. Evaluation failed to reveal any ecchymosis around the eye and Claimant was noted not to be on any anticoagulants. Consequently, occult skull fracture and/or intercranial bleeding were not felt to be the cause of Claimant's ongoing pain. Claimant was given a "migraine cocktail" after which her symptoms improved "significantly." Accordingly, it was felt that Claimant was "most likely suffering from a tension-type or migraine type headache, the trauma to her head being the inciting factor."

19. Claimant has a history of pre-existing migraine headaches. She testified that she has had such headaches off and on since her mid twenties. According to Claimant, her typical migraines were localized, would involve the left eye and she would almost always experience an aura with her migraines. The aura was described as a circle in her vision that would slowly diminish and be followed by a headache. Claimant experienced no such aura after the April 13, 2015 event. She would experience migraines, on average, every month or every other month per her testimony. She would have periods of time where she would go three to six months with no migraines. Since April 13, 2015, Claimant testified that her headaches have occurred almost daily to varying degrees.

20. Claimant also has a pre-existing history of prior closed head injury stemming from a motor vehicle accident in 1998.

21. Currently, Claimant reports symptoms of pain behind the left eye, being tired and needing to nap, poor concentration and difficulty with her focus. Respondent suggests that Claimant's is currently suffering from many of the same symptoms she had before hitting her head with the car door on April 13, 2015 and that these symptoms are related to her prior head injuries and/or migraine headaches rather than any head injury sustained on April 14, 2015. In support of this contention, Respondent cites the following excerpts from Claimant's pre-incident medical records:

> 9/16/2008 – to Stephen R. Hochberg, LpC: "Gives a history of depressive episodes, emotional liability, and several closed HI all as a result of MVAs. First HI 1994, second 10 years ago with sequelae which included vertigo, problems with s/t memory, problems with concentration and organization. More recently she had another 'fender bender' in wh9ich she experienced mild whiplash and is concerned about additional concussive episode."

> 7/10/2009: "Has also had migraine h/a's…. Told Dr. Wiggins that she thought she was bipolar… Currently w/o motivation and doesn't feel like doing anything… the lamictal makes her tired and also feels dizzy…"

7/17/2009: Claimant reported “vegetative sx, ongoing migraines.”

8/26/2009: Claimant reported “extreme fatigue, reports slurred speech, dizziness, and sleepy all the time… running into things, loss of balance and feeling sedated since Lamictal start last year and addition of risperdal causes pt to feel ‘non functional’.”

9/1/2009: Claimant had “lots of problems with focus… having problems with focus and is extra sleepy, lethargic and tired… has down times during the day…”

9/14/2009 & 3/17/2010: Claimant was advised that Lamictal (lamotrigine) for her bipolar disorder, a drug that she has taken for depression and continues to take for depression to the present day (ex. J pg. 10), has side effects including but not limited to tiredness, headache, dizziness, nausea, mild rash…”

11/1/12: “pt has been out of lamictal for the last few days and she is starting to feel bad with HAs and dizziness with some nausea… Pt has been out of her lamictal before and she remembers feeling the same way until she was able to get back on it.”

11/6/13: “Patient is here today with % abdominal pain and headache which started over a week ago.” History: “body aches, HA, sleeping a lot… mild nausea.”

10/3/14: Claimant presented at Salud Family health and gave her history: “39 y/o female % migraine HA with HA, eye pain, neck pain, back pain, and abdominal pain that started yesterday. Trigger from stress, menses, eating pizza…” (Ex. E pg. 1 [sic].) Claimant requested Toradol as well (id.), which was the same treatment she testified she received on the date of alleged injury. Trans. 18:8.

6/3/14: Her physician reported the history of Claimant as “fatigue and exhaustion problems x 2 years… Pt often has naps during the day as she feels like she does not have enough energy… nothing has helped.” (Ex. E, pg. 3 (emphasis added).) Claimant was so concerned she requested a thyroid workup. (Id.)

22. While many of the aforementioned symptoms are similar to those Claimant reports presently, the ALJ finds that Claimant’s reported increased incidence of fatigue, headache, dizziness and nausea between September 1, 2009 and June 3, 2014 are related to Claimant’s pre-existing depression and/or psychotropic medications used to her bipolar disorder and not any lingering effects of a closed head injury or migraine headache complex. Moreover, the ALJ finds Respondent’s assertion that these records

support the conclusion that Claimant's current symptoms are related to a prior head injury or a migraine head ache complex equally unpursuasive. To the contrary, the ALJ finds that the above mentioned records establish that Claimant was having symptoms similar to those she is experiencing now but for substantially different reasons, specifically because she was laboring under the effects of significant depression and untoward side effects of psychotropic medication.

23. On April 20, 2015, Claimant was evaluated by Dr. Keyna Schlup. Dr. Schlup documented that the ER notes had "muddied the water" regarding the case because Claimant had not been forthcoming with the ER doctor regarding her history of depression nor migraine headaches. Dr. Schlup noted further that Claimant's migraine headaches were different than her current headaches. The ALJ finds from these statements, when considered together and in the context of the entire report, that Dr. Schlup was likely upset with Claimant that she did not give a detailed history of her migraine headaches upon initial presentation to the ER on April 14, 2015 because it made it difficult to determine whether Claimant was actually having a typical migraine headache or if her headache was related to the April 13, 2015 incident. Nonetheless, after considering Claimant's reported MOI and having reviewed the ER reports and completing a physical examination, Dr. Schlup diagnosed Claimant as having a head injury without skull fracture and post-concussive symptoms.

24. As part of her evaluation, Dr. Schlup documented that Claimant was concerned about eye "drooping" which Dr. Schlup found to be mild swelling around the eye. Like the contusion documented in the ER report from April 14, 2015, the ALJ finds the mild swelling noted by Dr. Schlup to constitute objective evidence that Claimant was struck in the area of the eye by the corner of the car door on April 13, 2015 as Claimant testified and as she reported in the ER on April 14, 2015.

25. Dr. Schlup documented on May 5, 2015, that Claimant's "physical exam findings" had improved, but she was still symptomatic from a concussive standpoint. Claimant was instructed not to perform throws or tosses during her training at work because it could cause her concussion to worsen. By May 28, 2015, Claimant had experienced some improvement in the post-concussive symptoms, but her vision disturbances had yet to improve. Dr. Schlup noted that the vision disturbances usually took a few weeks or months to resolve after the other symptoms resolve. She referred Claimant to an ophthalmologist for evaluation.

26. Claimant underwent an ophthalmologic evaluation on June 2, 2015. She was diagnosed with post-concussion headaches, ptosis, and myopia.

27. Claimant subsequently moved to Michigan in June of 2015.

28. Claimant testified that she was not able to see a physician again until her first evaluation at McLaren Internal Medicine Associates on September 8, 2015, with Dr. Deborah Richmond. Based upon the evidence presented, the ALJ finds that Claimant obtained this treatment on her own without seeking approval from the carrier. Claimant

had continued her health insurance coverage through Respondent-Employer as part of the Consolidated Omnibus Budget Reconciliation Act (COBRA) and had the bill for services rendered submitted to her health insurance carrier. During this appointment, she continued to complain of left eye vision changes and migraines that had changed in character and frequency since the work incident, as well as ongoing tightness in the back of her head. No assessment was made regarding whether Claimant was suffering from the continued effects of a head injury. Rather, the assessment reached included depression and migraine headache.

29. Claimant was not instructed to see any specific physician by Respondents when she moved to Michigan. Consequently, she asserts that she is entitled to change physicians from Dr. Schlup to Dr. Richmond. Based upon the evidence presented, the ALJ

30. Dr. Rachel Basse performed an Independent Medical Examination (IME) at the request of Respondents' on October 13, 2015. Claimant explained that her only immediate symptoms after the incident were feeling kind of tired, groggy, and "out-of-it." Dr. Basse documented that Claimant was in a motor vehicle accident at age 23 that resulted in a closed head injury.

31. Dr. Basse opined that Claimant's mechanism of injury could have "caused the injury" of which Claimant complains, specifically a "concussive event. However, she noted that Claimant's current symptoms are not related to that injury. Rather, Dr. Basse that any symptoms associated with a mild concussive event would have resolved. According to Dr. Basse, Claimant's ongoing eye symptoms and headaches are "probably a combination of chronic underlying headaches symptoms and acute re-aggravation with daily stress complicated by rebound component from her current medication." Dr. Basse documented that Claimant was taking 200 mg of Lamictal at the time of the IME. This is the same medication which the ALJ finds gave rise to many of Claimant's ongoing symptoms of fatigue, headache, dizziness and nausea between September 1, 2009 and June 3, 2014. Dr. Basse indicated that the treatment Claimant received from Dr. Schlup and the two emergency room visits were reasonable and necessary based upon Claimant's reported symptoms.

32. Dr. Bennett Machanic performed a medical records review at the request of Claimant's counsel and authored a report dated May 10, 2016. He did not perform a physical examination due to Claimant living in Michigan.

33. Dr. Machanic opined, "Based on my review of the medical records, it is clear that the patient suffered [a] closed head injury on April 13, 2015, while employed as a correctional officer." Dr. Machanic explained that although Claimant did have a history of pre-existing migraine headaches, they have worsened and have been less available to control by therapeutic interventions since the incident. He noted that Claimant's emotional state has also been worsened after the incident. Dr. Machanic recommended ongoing maintenance treatment in the form of prophylactic medications for headaches and possibly botox injections.

34. Dr. Rachel Basse testified by post-hearing deposition on June 22, 2016. Dr. Basse testified that Claimant's described mechanism of injury struck her as being odd because she did not understand how Claimant struck the left side of her forehead while opening the car door. (Basse Depo. 4:17 – 5:8). She also explained that it was her opinion that Mr. Dillinger's testimony contradicted what Claimant had indicated happened in the several hours after the injury. (Basse Depo. 5:9-25). Dr. Basse reasoned that since Claimant was able to eat her lunch without trouble, i.e. without vomiting and drive home after the incident, it showed that she was aware, alert and oriented. Consequently Dr. Basse did not think it likely that Claimant had a significant head injury/concussion because such abilities are inconsistent in a person who had just sustained a concussive event. Dr. Basse did not comment on the fact that Claimant backed the Employer's vehicle into a wall immediately after the incident was alleged to have occurred.

35. Dr. Basse concluded that if the incident happened as alleged, Claimant would have required treatment, but would have been at MMI as of June 13, 2015. However, if the incident did not occur as alleged, then Claimant's symptoms would have been caused by nothing more than a migraine. (Basse Depo. 16:1-25).

36. On cross-examination, Dr. Basse testified that Claimant did have a history of at least one prior concussion and that "the primary risk factor for a concussion is a prior concussion" and that those individuals that have suffered from multiple concussions are more likely to develop persistent post-concussive symptoms from each subsequent concussion. She also agreed that individuals that have suffered multiple concussions are more likely to develop depression and other cognitive deficits. (Basse Depo. 18:1 – 19:1).

37. The ALJ finds Claimant to be credible. Based upon the evidence presented as a whole, the ALJ finds that Claimant has proven by a preponderance of the evidence that she sustained a compensable injury on April 13, 2015 when a car door struck her in the head above the left eye. This finding is supported by the objective evidence of contusion documented in the ER the morning following the April 13, 2015 incident. It is further bolstered by documented swelling in the area of the eye as noted by Dr. Schlup on April 20, 2015.

38. As the ALJ finds that the incident occurred as described by Claimant on April 13, 2015, the undersigned credits the opinions of Drs. Basse and Machanic to find that Claimant is entitled to reasonable, necessary, and related treatment for her injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As found, the testimony of Claimant is credible. Claimant testified credibly that she struck herself with the door of her Employer issued vehicle on April 13, 2015. Her claims are supported by the emergency room record from April 14, 2015 and Dr. Schlup's report of April 20, 2015. These reports document the same mechanism of injury as Claimant testified to and provide objective of injury, i.e. contusion and swelling on the left side of her forehead in the area of the eye. The testimony of Cody Dillinger is also found to be credible; however, the fact that he did not see Claimant strike her head or hear anything consistent with Claimant striking her head with the car door does not negate the fact that the incident is found to have occurred. More probably than not, Mr. Dillinger simply did not notice the event taking place, nor would Claimant be expected to draw attention to an embarrassing event to a co-worker that she did not know personally and whom she had never worked with.

Compensability

D. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*.* *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.* The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Based upon the testimony of Claimant and Mr. Dillinger, the ALJ concludes that Claimant was in the course of her employment at the time of the injury. She was clearly engaged in an activity connected to her job-related functions as a prison guard, specifically procuring a duty weapon and preparing to drive to a location to guard a sick inmate. Indeed, Respondent appears to concede this point. Rather, the question presented here is whether Claimant's alleged injury and associated symptoms arise out of her employment or as argued by Respondent, whether said symptoms are related to a pre-existing migraine headache complex.

E. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while or shortly after performing job duties does not mean that he sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the*

United States Court of Appeals, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Moreover, the question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). In this case the ALJ is persuaded that Claimant's injury is compensable because the conditions and obligations of her special assignment placed her in a position where she was struck in the head by a car door after losing control of it while entering the car to drive to the hospital. Here, the totality of the persuasive evidence presented, including the testimony of Dr. Basse and opinion of Dr. Machanic, convinces the ALJ that Claimant's need for treatment was directly and proximately caused by the April 13, 2015 work related event and not the effects of a pre-existing head injury or migraine headache complex. Consequently, the ALJ concludes that Claimant has established by a preponderance of the evidence, that there is a causal connection between her employment related duties and the resulting condition for which medical treatment benefits are sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The claimed injury is compensable.

Medical Benefits

G. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S., Contending that Claimant's current symptoms represent the effects of a preexisting, non-industrial condition that periodically becomes symptomatic, Respondents urge the ALJ to conclude that Claimant's treatment at the ER and with Dr. Schlup is unrelated to her work duties for Employer. As found and concluded above, Respondents' implication is not compelling. Based upon the evidence presented, the ALJ concludes that Claimant's treatment in the emergency room on April 14, April 17, and her treatment with Dr. Schlup, as Claimant's designated provider was reasonable, necessary, and related to the April 13, 2015 industrial incident. Consequently, Respondents are liable for this treatment.

Dr. Deborah Richmond's Status as a Treating Physician

H. The questions of whether the respondents failed to timely tender the services of a physician and the right of selection passed to the claimant are questions of fact for resolution by the ALJ. *See Ruybal v. University Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988); *Buhrmann v. University of Colorado Health Sciences Center,* W.C.

No. 4-253-689 (November 4, 1996); *Tellez v. Teledyne Waterpik,* W.C. No. 3-990-062, (March 24, 1992), *aff'd, Teledyne Water Pic v. Industrial Claim Appeals Office,* (Colo. App. 92CA0643, December 24, 1992) (not selected for publication). 4-674-408 (2011). Under § 8-43-404(5)(a), C.R.S., the employer or insurer is afforded the right in the first instance to select a physician to treat the injury. In order to maintain the right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 545 (Colo. App. 1987). The failure to tender the "services of a physician ... at the time of injury" gives the employee "the right to select a physician or chiropractor." The employer's duty to designate is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.,* 689 P.2d 681 (Colo. App. 1984); *Gutierrez v. Premium Pet Foods, LLC*, W.C. No. 4-834-947 (Industrial Claim Appeals Office, September 6, 2011). The aforementioned principals regarding knowledge of facts to place a reasonably conscientious manager on notice that the case may involve a claim for compensation also apply to situations concerning Claimant seeking medical treatment following relocation to a different jurisdiction, i.e. Michigan. See Sibyl A. Ries, v. Subway of Cherry Creek, Inc., W.C. No. 4-674-408 (ICAO August 4, 2011). Based upon the evidence presented the ALJ is not persuaded that “Respondent-Employer had some knowledge of facts that would lead them to believe that the Claimant was relocating to Michigan and would require treatment in Michigan. Consequently, the ALJ finds and concludes that Claimant’s medical treatment with Dr. Richmond was unauthorized and that the right of selection to select a physician did not pass to her.

ORDER

It is therefore ordered that:

1. Claimant’s April 13, 2015 claim for work related injuries to her head are compensable.

2. Claimant is entitled to all reasonable, necessary, and related care through an authorized treating physician.

3. Claimant has failed to carry her burden to establish that Dr. Deborah Richmond is an authorized treating provider. Claimant’s treatment with Dr. Richmond is unauthorized. Consequently, Respondent-Employer is not liable for it.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 29, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

The issue presented for determination is whether the Claimant is entitled to a general award of maintenance medical treatment.

FINDINGS OF FACT

1. The Claimant sustained an admitted work injury on September 4, 2014.

2. The Claimant's authorized treating physician, Dr. Randall Jones, found that Claimant reached maximum medical improvement (MMI) on June 18, 2015. Dr. Jones determined that maintenance medical treatment was not necessary.

3. The Respondents filed a Final Admission of Liability (FAL) on July 9, 2015, and specifically denied maintenance medical treatment pursuant to the opinions of Dr. Jones.

4. The Claimant objected to the FAL and pursued a Division Independent Medical Examination (DIME) which Dr. Miguel Castrejon performed on November 17, 2015.

5. Dr. Castrejon concurred with the MMI date. Under "Maintenance Care" he stated that Claimant experienced marginal benefit from spinal injections, and that the Colorado Medical Treatment Guidelines do not support repeat injections. Dr. Castrejon also indicated that his physical examination of the Claimant did not reveal "any other specific treatable etiology that would respond to additional spinal injections." Dr. Castejon, however, recommended that Claimant be provided with a six-month gym membership in order to continue with her independent home exercise program.

6. The Respondents agree that the six-month gym membership is reasonable, necessary and related to the work injury. The Respondents have agreed to pay for the membership.

7. On June 13, 2016, Dr. Jones reiterated his opinion that no additional maintenance medical treatment is needed to maintain the Claimant at MMI.

8. No substantial evidence shows that Claimant requires future medical treatment to prevent further deterioration of her condition or maintain her at maximum medical improvement. Despite the lack of substantial evidence, the Respondents have stipulated that the gym membership is reasonable, necessary and related to the Claimant's injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. To prove entitlement to maintenance medical benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of the work-related condition. *Grover v. Industrial Commission,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a Claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

4. Claimant asserts that Respondents should file an amended FAL and admit for a general award of maintenance medical benefits. The Claimant reasons that the recommended gym membership constitutes maintenance medical treatment, and that because the Respondents have agreed that the membership is reasonable, necessary and related to the work injury, a general award of maintenance medical benefits is required. The Respondents agreed to pay for the six-month gym membership but declined to file an amended FAL. The Respondents contend that Claimant is not entitled to a general award of maintenance medical treatment due to a lack of substantial evidence to support such an award.

5. As indicated above, the Claimant maintains the burden of proving entitlement to maintenance medical treatment. The Claimant has failed to meet her burden. Dr. Castrejon merely recommended a six-month gym membership, but he did not recommend additional medical treatment, and Dr. Jones specifically indicated no further maintenance treatment was necessary. Despite the lack of substantial evidence concerning the need for maintenance medical treatment, the Claimant and Respondents essentially stipulated that the Respondents would pay for the six-month gym membership recommended by Dr. Castrejon. The parties did not expressly agree to a general award of maintenance medical benefits, and the ALJ does not construe Respondents' agreement to pay for a gym membership as an agreement (express or implied) to a general award of maintenance medical benefits. The ALJ also rejects the Claimant's argument that the gym membership is necessarily a maintenance medical benefit necessitating an admission for a general award of maintenance treatment. No persuasive legal authority supports the Claimant's argument.

ORDER

It is therefore ordered that:

1. Respondents are liable for payment of a six-month gym membership.

2. Claimant's request for a general award of maintenance medical benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 29, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-988-024-01

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on July 11, 2015 and the quasi-course of his employment on July 16, 2015.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his industrial injuries.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 13, 2015 through October 31, 2015 and Temporary Partial Disability (TPD) benefits for the period November 1, 2015 through June 15, 2016.

FINDINGS OF FACT

1. Claimant worked for Employer as a Flight Attendant. Claimant testified that on July 11, 2015 he was working on a flight from Chicago Midway International Airport to Philadelphia, Pennsylvania. While he was performing a safety demonstration the pilot took off. As he was heading back to the galley area to sit in his jump seat, he lost his balance and fell against the back of the galley. He struck the back of his head and the right side his body. Claimant commented that he did not fall to the ground but twisted his right ankle during the incident.

2. Claimant reported the incident and Employer directed him to Concentra Medical Centers for an examination. On July 13, 2015 he visited Arlene R. Emmons, M.D. for an evaluation. Dr. Emmons diagnosed Claimant with the following: (1) a cervical strain; (2) a shoulder/upper arm strain; (3) an ankle sprain; (4) a thoracic strain; and (5) a lumbar strain. However, Dr. Emmons recorded that Claimant exhibited full range of motion in his cervical spine, full range of motion in his thoracic spine and full range of motion of his lumbar spine. He exhibited normal ankle and foot strength with full range of motion. Claimant's right ankle also appeared to be normal without any evidence of swelling. Notably, Dr. Emmons recorded that Claimant had a "non-contributory" medical history. She assigned work restrictions that included: (1) no stair climbing; (2) occasional bending for up to three hours per day; (3) lifting not to exceed 10 pounds for eight or more hours each day; and (4) pushing/pulling not to exceed 10 pounds for up to three hours each day.

3. In contrast to Dr. Emmons' note about Claimant's lack of medical history, the record reveals that Claimant has suffered a number of significant medical conditions prior to the July 11, 2015 incident. On May 2, 2014 Claimant was involved in a motor vehicle accident. He was transported to Grady Hospital Emergency Room by ambulance and treated for the following complaints: (1) head pain; (2) left hand pain; (3) neck pain; (4) back pain; and (5) bilateral knee pain. A physical examination revealed tenderness at both the C7 level and the right shoulder. Claimant underwent a CT of his brain, a CT of his cervical spine, a CT of his face, an x-ray of his pelvis, an x-ray of his chest, an x-ray of his left hand and wrist and an x-ray of his left elbow. He was discharged with a prescription for Oxycodone.

4. On May 5, 2014 Claimant sought treatment from personal chiropractor, Cleve Taylor, D.C. He reported 10/10 pain in the following areas: neck, right shoulder, mid-back, lower back and head. Dr. Taylor noted that Claimant had severe edema, muscle spasms and pain with limited range of motion in the preceding areas. He diagnosed Claimant with the following:

- Cervicalgia;
- Spondylosis with myelopathy;
- Low back pain – lumbago;
- Pain in upper arm;
- Lumbar intervertebral disc degeneration with myelopathy;
- Displacement of lumbar intervertebral disc without myelopathy;
- Spasm of muscles;
- Knee/leg sprain;
- ISD lower extremities;
- Sprain/strain to cervical area;
- Thoracic sprain/strain;
- Sacral strain/sprain; and
- Adhesive capsulitis of shoulder.

Dr. Taylor determined that Claimant should receive treatment two to three times per week to manage his symptoms.

5. On May 6, 2014 Claimant obtained medical treatment from Kamal Kabakibou, M.D. for his injuries arising out of the motor vehicle accident. Claimant's complaints included: neck pain, back pain, right shoulder pain, numbness in the right leg and right hip pain. Dr. Kabakibou diagnosed Claimant with cervicalgia and lumbago. He ordered MRIs for Claimant's right shoulder, cervical spine, lumbar spine and brain.

6. Claimant subsequently received cervical and lumbar facet blocks. On September 12, 2014 Claimant underwent a right shoulder diagnostic arthroscopy and anterior reconstruction. He remained off work for several months because of the motor vehicle accident and subsequent surgery. Claimant returned to work in approximately late February 2015.

7. Between Claimant's full duty return to work and the July 11, 2015 work incident, or 150 days, Claimant earned total wages of $22,030.46. Dividing $22,030.46 by 150 yields a daily wage of $146.87 and a weekly wage of $1028.09. An AWW of $1028.09 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

8. During early August 2014 Claimant underwent radiofrequency thermocoagulation procedures at L3, L4, L5, C5 and C6. On August 20, 2014 Dr. Kabakibou noted that the procedures were intended to provide long-term relief for Claimant. However, after nine to twelve months he would expect that "the pain eventually will come back in the future because the nerve will grow again" and the procedure would need to be repeated.

9. On September 3, 2014 Claimant returned to Dr. Taylor for an evaluation. Dr. Taylor commented that the likelihood of near complete symptomatic relief within six months was "moderate" because Claimant's prognosis was "guarded." He noted that for Claimant to maintain his level of improvement he would have to return for approximately one to two visits per month.

10. Despite Dr. Taylor's recommendation for maintenance treatment, Claimant did not return for an examination until May 6, 2015. Claimant reported pain in his lower back, upper back, right shoulder and neck.

11. On July 8, 2015, or only three days prior to Claimant's industrial accident, he reported 3/10 pain in his lower back, upper back, neck and right shoulder. Claimant also noted moderate difficulty with bending, looking over his shoulder, driving and lifting. He commented that his difficulties had not changed since the recurrence of symptoms in May 2015. Dr. Taylor assessed Claimant with moderate muscle spasms. He commented that Claimant should continue to receive chiropractic treatment two to three times per week to manage his symptoms.

12. On July 13, 2015, or just two days after Claimant's work incident, he visited Dr. Emmons for an examination. She diagnosed Claimant with a right ankle sprain but remarked that he had normal ankle and foot strength with full range of motion. Claimant's right ankle also did not reveal any evidence of swelling.

13. On July 16, 2015 Claimant was involved in a motor vehicle accident while he was returning from a physical therapy session. The physical therapy note was signed by the therapist after dictation at 9:44 a.m.

14. Claimant sought treatment for his motor vehicle accident at Piedmont Healthcare on July 16, 2015. He arrived at 6:35 p.m. Claimant reported a headache, lower back pain, neck pain, right shoulder pain, left forearm pain and numbness in the bilateral lower extremities. Claimant was discharged with pain medication. Medical providers recorded that the motor vehicle accident occurred just one to two hours prior to the admission.

15. On July 17, 2015 Claimant visited Brice Choi, M.D. based on a referral from Concentra. Dr. Choi assessed Claimant for both the July 11, 2015 work incident and July 16, 2015 motor vehicle accident. He noted that Claimant's primary complaint was neck pain that was related to the work incident. However, Dr. Choi remarked that the following conditions were related to the motor vehicle accident: headaches, vision disturbances, eye pain and pain in the lower and middle spine that radiated to the lower extremities. Notably, Dr. Choi remarked that Claimant had normal range of motion of the major joints of the lower extremities with no areas of focal tenderness. He also noted that Claimant had a "stable" gait and that Claimant was "able to walk on toes and heels, and tandem walk without difficulties."

16. On July 20, 2015 Claimant returned to Dr. Taylor for a chiropractic assessment as a result of the July 16, 2015 motor vehicle accident. Claimant did not mention the July 11, 2015 industrial incident. He informed Dr. Taylor that his main complaints consisted of headaches, pain in the mid-back, neck pain and pain in the lower back. Dr. Taylor recorded that "[Claimant] indicated that he had not experienced prior symptoms similar to his current complaints, and was symptom free at the time of the aforementioned [motor vehicle] accident." He concluded that "based on an assessment of [Claimant's] history, along with his subjective complaints, objective findings, and other test results, it is evident from a standpoint of medical certainty, that his current condition did result from the type of injury/onset described in this report." Dr. Taylor did not address the July 11, 2015 work incident.

17. On June 3, 2016 Claimant visited Kathleen D'Angelo, M.D. for an independent medical examination. Claimant reported that on July 11, 2015 he was working as a Flight Attendant for Employer. While he was performing a safety demonstration the pilot took off. Claimant was heading back to the galley area but twisted his right ankle, fell and struck the back of his neck on the back of the galley. Claimant also recounted the details of his May 2, 2014 and July 16, 2015 motor vehicle accidents. He noted that his current symptoms included headaches, neck pain, back pain, right shoulder pain and hip pain. Claimant remarked that his right ankle was "fine" but he periodically experienced a "little twitch." After reviewing Claimant's extensive medical history and treatment Dr. D'Angelo explained that Claimant's

> present pain symptoms are consistent with his prior extensive history of identical complaints for which the patient was still receiving active treatment as recently as three days prior to his work injury. In fact, [Claimant's] present complaints are almost indistinguishable from his 1-year prior history of medical presentations following his May 2014 MVA.

18. Dr. D'Angelo concluded that Claimant did not suffer "an aggravation, acceleration or exacerbation of his underlying injury process" as a result of the July 11, 2015 work incident. She noted that "medical aggravation" of an underlying disease process is a temporary condition that causes an inflammatory response of limited duration. Dr. D'Angelo explained that she would not expect persistent diffuse pain from the aggravation of an underlying condition after almost 12 months of treatment with physical therapy, pain medications and a brief cessation of work activities. She

determined that Claimant’s symptoms were not related to his general work activities for Employer or a specific acute injury. Accordingly, Dr. D’Angelo concluded that Claimant’s current diffuse symptoms “are not related to any work incident but the need for treatment for those symptoms are independent, unrelated and incidental to the alleged July 11, 2015 work injury.” She specifically noted that Claimant’s right shoulder, right hip, headache complaints and “other symptoms are not due to an acute, chronic or cumulative work related trauma.” Instead, Claimant’s current symptoms were a manifestation of his prior myofascial injuries sustained during his May 2014 motor vehicle accident. Dr. D’Angelo thus determined that no further active or maintenance treatment was warranted through the Workers’ Compensation system.

19. On June 15, 2016 Dr. D’Angelo testified through an evidentiary deposition in this matter. She maintained that Claimant’s work activities on July 11, 2015 did not constitute an aggravation or acceleration of his pre-existing condition. Instead, his symptoms were the natural progression of his underlying, degenerative condition. Nevertheless, Dr. D’Angelo acknowledged that Claimant suffered a right ankle injury on July 11, 2015 that had resolved.

20. Dr. D’Angelo explained that, with the exception of Claimant’s right ankle sprain, his symptoms were similar or “almost identical” to those he had experienced as a result of his May 2, 2014 motor vehicle accident. In fact, there was no diagnostic evidence that Claimant suffered an acute injury while working on July 11, 2015. Radiological studies revealed that Claimant suffered from degenerative changes. Claimant’s physical complaints after the July 11, 2014 industrial incident were consistent with the degenerative changes for which he had been receiving treatment since 2014. Moreover, Dr. D’Angelo remarked that Claimant does not require any additional medical treatment. She specifically agreed with Dr. Kabakibou that the radiofrequency thermocoagulation procedures administered in August 2014 would only provide temporary relief for Claimant’s symptoms. Dr. D’Angelo emphasized that “it’s entirely physiologically predictable that his pain would return in nine to twelve months, because that’s how long it takes for the nerves we destroy in the spine [through ablation] to regrow.” Dr. D’Angelo summarized that Claimant’s only injury as a result of the July 11, 2015 work incident was a right ankle sprain that resolved. She clarified that the only recommendation she would have provided for an ankle sprain was to rest it for 24-48 hours with ice and elevation. Dr. D’Angelo commented that “most ankle sprains do resolve without any interference from the medical community.”

21. Claimant has failed to demonstrate that it is more probably true than not that he suffered compensable injuries during the course and scope of his employment with Employer on July 11, 2015 and the quasi-course of his employment on July 16, 2015. Claimant testified that, while he was performing a safety demonstration in his job as a Flight Attendant, the pilot took off. Claimant walked back to the galley area but twisted his right ankle, fell and struck the back of his neck on the back of the galley. Claimant reported a myriad of diffuse pain complaints involving his back, right shoulder, head/neck and right ankle. He also explained that on July 16, 2015 he was involved in a motor vehicle accident while returning from a physical therapy session. Claimant reported a headache, lower back pain, neck pain, right shoulder pain, left forearm pain

and numbness in the bilateral lower extremities. Although Claimant reported a number of pain complaints after the July 11, 2015 and July 16, 2015 incidents, the record reveals that he has suffered a number of significant medical conditions prior to the July 11, 2015 incident. The July 11, 2015 and July 16, 2015 incidents did not aggravate, accelerate or combine with Claimant's pre-existing condition to produce a need for medical treatment.

22. On May 2, 2014 Claimant was involved in a motor vehicle accident. He received treatment for the following complaints: (1) head pain; (2) left hand pain; (3) neck pain; (4) back pain; and (5) bilateral knee pain. Claimant received extensive chiropractic and medical treatment for his injuries. On July 8, 2015, or only three days prior to Claimant's industrial accident, he reported 3/10 pain in his lower back, upper back, neck and right shoulder. Claimant also noted that he was having moderate difficulty with bending, looking over his shoulder, driving and lifting.

23. After conducting an independent medical examination, Dr. D'Angelo concluded that Claimant did not suffer "an aggravation, acceleration or exacerbation of his underlying injury process" as a result of the July 11, 2015 work incident. Dr. D'Angelo explained that, with the exception of Claimant's right ankle sprain, his symptoms were similar or "almost identical" to those he had experienced as a result of his May 2, 2014 motor vehicle accident. In fact, there was no diagnostic evidence that Claimant suffered an acute injury while working on July 11, 2015. Radiological studies revealed that Claimant suffered from degenerative changes. Claimant's physical complaints after the July 11, 2015 industrial incident were consistent with the degenerative changes for which he had been receiving treatment since 2014. Moreover, Dr. D'Angelo remarked that Claimant does not require any additional medical treatment. She specifically agreed with Dr. Kabakibou that the radiofrequency thermocoagulation procedures administered in August 2014 would only provide temporary relief of nine to twelve months for Claimant's symptoms. Dr. D'Angelo concluded that Claimant's current diffuse symptoms "are not related to any work incident but the need for treatment for those symptoms are independent, unrelated and incidental to the alleged July 11, 2015 work injury." She specifically noted that Claimant's right shoulder, right hip, headache complaints and other symptoms were not caused by an acute, chronic or cumulative work related trauma. Accordingly, based on the medical records and persuasive testimony of Dr. D'Angelo, Claimant's only work injury was a sprained right ankle.

24. Claimant's contention that the injuries he sustained as a result of his July 16, 2015 motor vehicle accident occurred during the quasi-course of employment also fails. Initially, Claimant testified that on July 16, 2015 he was involved in a motor vehicle accident while he was returning from a physical therapy session. However, the physical therapy note was signed by the therapist after dictation at 9:44 a.m. and Claimant sought treatment for his motor vehicle accident at Piedmont Healthcare on July 16, 2015 at 6:35 p.m. Medical providers recorded that the motor vehicle accident occurred just one to two hours prior to the admission. The record thus reveals that Claimant may not have been involved in the motor vehicle accident while driving from his physical therapy appointment. Moreover, Claimant reported a headache, lower back pain, neck

pain, right shoulder pain, left forearm pain and numbness in the bilateral lower extremities. Claimant's symptoms were virtually identical to the degenerative changes for which he had been receiving treatment since the May 2, 2014 motor vehicle accident. Based on the persuasive testimony of Dr. D'Angelo, Claimant did not suffer any compensable injuries during the quasi-course and scope of his employment on July 16, 2015.

25. Claimant has failed to prove that it is more probably true than not that he is entitled to receive authorized, reasonable and necessary medical treatment for his industrial injuries. On July 13, 2015, or just two days after Claimant's work incident, he visited Dr. Emmons. She diagnosed Claimant with a right ankle sprain but remarked that he had normal ankle and foot strength with full range of motion. Claimant's right ankle also did not reveal any evidence of swelling. Furthermore, on July 17, 2015 Dr. Choi remarked that Claimant had normal range of motion of the major joints of the lower extremities with no areas of focal tenderness. He also noted that Claimant had a "stable" gait and was "able to walk on toes and heels, and tandem walk without difficulties." Finally, Dr. D'Angelo summarized that Claimant's only injury as a result of the July 11, 2015 work incident was a right ankle sprain that resolved. She clarified that the only recommendation she would have provided for an ankle sprain was to rest it for 24-48 hours with ice and elevation. Dr. D'Angelo commented that "most ankle sprains do resolve without any interference from the medical community." Based on the medical records and persuasive testimony of Dr. D'Angelo, Claimant's July 11, 2015 right ankle injury did not require medical treatment subsequent to July 13, 2015. Accordingly, his request for additional medical benefits is denied and dismissed.

26. Claimant has failed to establish that it is more probably true than not that he is entitled to receive TTD benefits for the period July 13, 2015 through October 31, 2015 and TPD benefits for the period November 1, 2015 through June 15, 2016. As discussed in the preceding sections, Claimant's only industrial injury was a right ankle sprain. However, his right ankle symptoms had improved by July 13, 2015 or within two days of his July 11, 2015 industrial incident. Claimant has thus not suffered a wage loss that entitles him to temporary indemnity benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. Under the quasi-course of employment doctrine, injuries incurred while undergoing authorized medical treatment for an industrial injury are considered compensable even though they occur outside the ordinary time and place limitations of "normal employment." *Excel Corp. v. Industrial Claim Appeals Office,* 860 P.2d 1393 (Colo. App. 1993). The rationale for the doctrine is that, because the employer is required to provide reasonable and necessary medical treatment and the claimant is required to submit to it or risk suspension or termination of benefits, treatment by the physician becomes an implied part of the employment contract. *See Employers Fire Insurance Co. v. Lumbermen's Mutual Casualty Co.,* 964 P.2d 591 (Colo. App. 1998)*; Shreiber v. Brown & Root, Inc.,* 888 P.2d 274 (Colo. App. 1993).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on July 11, 2015 and the quasi-course of his employment on July 16, 2015. Claimant testified that, while he was performing a safety demonstration in his job as a Flight Attendant, the pilot took off. Claimant walked back to the galley area but twisted his right ankle, fell and struck the back of his neck on the back of the galley. Claimant reported a myriad of diffuse pain complaints involving his back, right shoulder, head/neck and right ankle. He also explained that on July 16, 2015 he was involved in a motor vehicle accident while returning from a physical therapy session. Claimant reported a headache, lower back pain, neck pain, right shoulder pain, left forearm pain and numbness in the bilateral lower extremities. Although Claimant reported a number of pain complaints after the July 11, 2015 and July 16, 2015 incidents, the record reveals that he has suffered a number of significant medical conditions prior to the July 11, 2015 incident. The July 11, 2015 and July 16, 2015 incidents did not aggravate, accelerate or combine with Claimant's pre-existing condition to produce a need for medical treatment.

9. As found, on May 2, 2014 Claimant was involved in a motor vehicle accident. He received treatment for the following complaints: (1) head pain; (2) left hand pain; (3) neck pain; (4) back pain; and (5) bilateral knee pain. Claimant received extensive chiropractic and medical treatment for his injuries. On July 8, 2015, or only three days prior to Claimant's industrial accident, he reported 3/10 pain in his lower back, upper back, neck and right shoulder. Claimant also noted that he was having moderate difficulty with bending, looking over his shoulder, driving and lifting.

10. As found, after conducting an independent medical examination, Dr. D'Angelo concluded that Claimant did not suffer "an aggravation, acceleration or exacerbation of his underlying injury process" as a result of the July 11, 2015 work incident. Dr. D'Angelo explained that, with the exception of Claimant's right ankle sprain, his symptoms were similar or "almost identical" to those he had experienced as a result of his May 2, 2014 motor vehicle accident. In fact, there was no diagnostic evidence that Claimant suffered an acute injury while working on July 11, 2015. Radiological studies revealed that Claimant suffered from degenerative changes. Claimant's physical complaints after the July 11, 2015 industrial incident were consistent with the degenerative changes for which he had been receiving treatment since 2014. Moreover, Dr. D'Angelo remarked that Claimant does not require any

additional medical treatment. She specifically agreed with Dr. Kabakibou that the radiofrequency thermocoagulation procedures administered in August 2014 would only provide temporary relief of nine to twelve months for Claimant's symptoms. Dr. D'Angelo concluded that Claimant's current diffuse symptoms "are not related to any work incident but the need for treatment for those symptoms are independent, unrelated and incidental to the alleged July 11, 2015 work injury." She specifically noted that Claimant's right shoulder, right hip, headache complaints and other symptoms were not caused by an acute, chronic or cumulative work related trauma. Accordingly, based on the medical records and persuasive testimony of Dr. D'Angelo, Claimant's only work injury was a sprained right ankle.

11. As found, Claimant's contention that the injuries he sustained as a result of his July 16, 2015 motor vehicle accident occurred during the quasi-course of employment also fails. Initially, Claimant testified that on July 16, 2015 he was involved in a motor vehicle accident while he was returning from a physical therapy session. However, the physical therapy note was signed by the therapist after dictation at 9:44 a.m. and Claimant sought treatment for his motor vehicle accident at Piedmont Healthcare on July 16, 2015 at 6:35 p.m. Medical providers recorded that the motor vehicle accident occurred just one to two hours prior to the admission. The record thus reveals that Claimant may not have been involved in the motor vehicle accident while driving from his physical therapy appointment. Moreover, Claimant reported a headache, lower back pain, neck pain, right shoulder pain, left forearm pain and numbness in the bilateral lower extremities. Claimant's symptoms were virtually identical to the degenerative changes for which he had been receiving treatment since the May 2, 2014 motor vehicle accident. Based on the persuasive testimony of Dr. D'Angelo, Claimant did not suffer any compensable injuries during the quasi-course and scope of his employment on July 16, 2015.

Medical Benefits

12. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

13. As found, Claimant has failed to prove by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his industrial injuries. On July 13, 2015, or just two days after Claimant's work incident, he visited Dr. Emmons. She diagnosed Claimant with a right ankle sprain but remarked that he had normal ankle and foot strength with full range of motion. Claimant's right ankle also did not reveal any evidence of swelling. Furthermore, on

July 17, 2015 Dr. Choi remarked that Claimant had normal range of motion of the major joints of the lower extremities with no areas of focal tenderness. He also noted that Claimant had a “stable” gait and was “able to walk on toes and heels, and tandem walk without difficulties.” Finally, Dr. D’Angelo summarized that Claimant’s only injury as a result of the July 11, 2015 work incident was a right ankle sprain that resolved. She clarified that the only recommendation she would have provided for an ankle sprain was to rest it for 24-48 hours with ice and elevation. Dr. D’Angelo commented that “most ankle sprains do resolve without any interference from the medical community.” Based on the medical records and persuasive testimony of Dr. D’Angelo, Claimant’s July 11, 2015 right ankle injury did not require medical treatment subsequent to July 13, 2015. Accordingly, his request for additional medical benefits is denied and dismissed.

Average Weekly Wage

14. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant’s wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

15. As found, between Claimant’s full duty return to work and the July 11, 2015 work incident, or 150 days, Claimant earned total wages of $22,030.46. Dividing $22,030.46 by 150 yields a daily wage of $146.87 and a weekly wage of $1028.09. An AWW of $1028.09 constitutes a fair approximation of Claimant’s wage loss and diminished earning capacity.

TTD and TPD Benefits

16. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term “disability,” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*,

971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability.

17. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to receive TTD benefits for the period July 13, 2015 through October 31, 2015 and TPD benefits for the period November 1, 2015 through June 15, 2016. As discussed in the preceding sections, Claimant's only industrial injury was a right ankle sprain. However, his right ankle symptoms had improved by July 13, 2015 or within two days of his July 11, 2015 industrial incident. Claimant has thus not suffered a wage loss that entitles him to temporary indemnity benefits.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. With the exception of a right ankle sprain, Claimant did not suffer compensable Workers' Compensation injuries on July 11, 2015 or July 16, 2015.

2. Claimant's request for additional medical benefits is denied and dismissed.

3. Claimant earned an AWW of $1028.09.

4. Claimant's request for TTD and TPD benefits is denied and dismissed.

5. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 29, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether PALJ Sandberg erred in his denial of Respondents' motion to compel the Claimant to attend a follow up DIME with Dr. Roth.

2. Whether Respondents have proven by a preponderance of the evidence that they are entitled to withdraw a General Admission of Liability by proving by a preponderance of the evidence that the Claimant did not sustain a compensable injury arising out of and in the course of his employment with Employer on June 4, 2014.

3. Whether Claimant has proven he is entitled to the medical benefits recommended by Dr. Hall and Dr. Foster, namely a right SI joint injection and possible follow up lumbar epidural steroid injections.

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability ("TTD") benefits in this claim from June 27, 2014 to November 6, 2014 and from February 28, 2015 to November 3, 2015.

5. If Claimant has proven that he is entitled to temporary disability benefits, whether Respondent has proven by a preponderance of the evidence that Claimant was responsible for his termination.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. The Claimant testified at the hearing on January 14, 2016 by telephone as he lives in Georgia. The Claimant was working for Employer on June 4, 2014 on a highway project in Idaho Springs. His job duties included manual labor involved with expanding tunnels.

2. The Claimant testified that on June 4, 2014, they were getting ready to blast the tunnel and he was directed to move a beam out of the way. He and a coworker went to move it and the Claimant bent down and lifted but found it to be heavier than it looked. The Claimant testified that the felt pain at that moment but he kept working. He stated that it felt bad in the top left side of his buttocks. This testimony varies slightly from the medical record of Dr. Gellrick which was contemporaneous with the event. The Claimant's testimony is generally found to be credible regarding the mechanism of

injury, however, to the extent that there are conflicts between the testimony and the June 5th medical record, the ALJ resolves those conflicts in favor of the medical record.

3. The Claimant testified that after he went home on June 4, 2014, the pain got worse so later he reported it to his supervisor. The Claimant was sent to Dr. Gellrick and continued to treat with her. However, on cross-examination, the Claimant agreed that he did not go back to see Dr. Gellrick after he returned to Colorado from Georgia and didn't attempt to follow up with her.

4. On June 5, 2014, the Claimant saw Dr. Caroline Gellrick for an initial evaluation. The Claimant's chief complaint was right groin pain. He described the mechanism of injury as follows,

> He was working with a co-worker lifting heavy steel beams late yesterday afternoon and last night. The beams weigh about 300 pounds. He did not feel initially any pain but about three hours later he developed pain in the right groin. The pain progressed during the night…the pain radiates into the buttock as well and is right-sided.

On physical examination, Dr. Gellrick noted positive evidence of hernia with a bulge on in the right groin. Dr. Gellrick diagnosed a right inguinal hernia and determined that it was more probable than not that the condition was work related. Dr. Gellrick placed the Claimant on light duty with no repetitive bending, no ladders and no heavy equipment operation and recommended a surgical evaluation (Claimant's Exhibit 3, pp. 76-79; Respondents' Exhibit B, pp. 9-12).

5. The Claimant returned to see Dr. Gellrick on June 6, 2014 due to increased pain during the previous night. The Claimant reported that he had a pain level up to 10 and he reported for duty that day. After examination, Dr. Gellrick opined that the Claimant had a right groin strain with probable hernia along with a hamstring pull at the base of the SI joint. She provided the Claimant with Vicodin for pain to get him through until his surgery consult (Claimant's Exhibit 3, p. 80; Respondents' Exhibit B, p. 13).

6. The Claimant was seen in the emergency department at Exempla Lutheran on June 10, 2014 complaining of right groin pain and difficulty voiding. The Claimant was placed with a Foley catheter until follow up with urology. Dr. Gunter saw no evidence of hernia and felt the Claimant's pain was secondary to hamstring strain (Claimant's Exhibit 3, pp. 93-95; Respondents' Exhibit D, pp. 29-33).

7. The Claimant saw Dr. Gellrick again on June 12, 2014 and she noted that over the weekend before the Claimant had his surgical consult, he developed bladder obstruction of urinary outflow and was seen in the emergency room where he was put on a catheter. The Claimant was then seen for his surgical consult at the beginning of the week and it was determined that the Claimant did not have a hernia but there was a hamstring pull. The Claimant will also follow up with Urology Center of Colorado (Claimant's Exhibit 3, pp. 82-84; Respondents' Exhibit B, pp. 15-17).

8. The Claimant testified at the hearing that the weekend after the incident on June 4, 2014, he was unable to use the restroom due to excruciating pain. He called an ambulance and went to the hospital. He testified that they put in a catheter that remained for a few days. The Claimant testified that he also saw a urologist for this and everything turned out okay.

9. The Claimant was seen on June 16, 2014 for follow up with The Urology Center of Denver on referral from Dr. Gellrick. Dr. Ferdinand Mueller noted that the Claimant had a catheter placed for 8 days but that there was no evidence of a prostate enlargement or issues. The catheter was removed and the Claimant placed on Flomax (Respondents' Exhibit E, pp. 36-37).

10. On June 17, 2014, Dr. Gellrick noted that the Claimant's urinary retention condition was determined to be secondary to an idiopathic reaction to the Vicodin he was given for pain so she found this condition to be a part of the worker's compensation case. The Claimant's catheter had been removed at urology and he was being provided antibiotics to prevent bladder infection from wearing the catheter so long. The Claimant's right hamstring groin strain was slowly resolving (Claimant's Exhibit 3, p. 86; Respondents' Exhibit B, p. 19).

11. On June 19, 2015, the Claimant reported to Dr. Gellrick he was working modified duty but his right posterior thigh continued to hurt and give him problems although he was able to walk and stand and lift a little bit more. Dr. Gellrick noted the groin strain and urinary retention conditions were resolved and the thigh strain was slowly resolving. Dr. Gellrick increased the Claimant's work restrictions to no lifting more than 20 pounds, no pushing/pulling more than 30 pounds, no ladder use, and work standing up to 45 minutes per hour with 15 minutes sitting per hour (Claimant's Exhibit 3, pp. 88-89; Respondents' Exhibit B, pp. 21-22).

12. The Claimant testified that he went back to work light duty, working in the yard moving objects around. Then, on June 26, 2014, the Claimant went to Georgia for vacation and his pain returned and he asked to see a doctor in Georgia. The Claimant testified that he told his work superintendant Ray Beesley that he was going to heal in Georgia. The Claimant testified that none of his supervisors (Ray, John or Bill) told him they had light duty work for him after this. The Claimant testified that he went back to Georgia and treated with Dr. Lofton for about three months. He testified that the treatment and shots helped a little bit. However, he stated that after June 26, 2014, he couldn't do the job that he used to with Employer due to the pain in the low back and right buttocks and hamstring.

13. On cross-examination, the Claimant testified that he said would come back from vacation in Georgia around July 9, 2014 but he did not return to work that day. The Claimant further explained that when he spoke with Ray Beasley, he told him the pain was bad and he wanted to get treated in Georgia. He did agree that Ray Beasley expected the Claimant to come back.

14. The testimony of the Claimant regarding contact with his work supervisors is at odds with testimony provided by Ray Beesley (see below) that the Claimant never contacted him after we went to Georgia for vacation and that he was surprised that the Claimant never returned from vacation. Mr. Beesley's testimony was supported by telephone records that showed no contact with the Claimant and so, to the extent that the Claimant's testimony on this issue is in conflict with Mr. Beesley's, the testimony of Mr. Beesley is found to be more credible and persuasive.

15. On August 1, 2014, the Claimant saw Dr. Beatrice Lofton, a chiropractor in Georgia, for an initial evaluation. The Claimant complained of aching pain in his low back, right groin and leg. The Claimant advised Dr. Lofton of his work injury on June 4, 2014 that occurred while lifting a 300 pound beam with a coworker. After physical examination, Dr. Lofton assessed the Claimant with lumbar strain or sprain with lumbosacral radiculitis and hip or thigh strain and muscle spasm (Claimant's Exhibit 4, 102-103; Respondents' Exhibit K, pp. 80-81). This is the first medical record documenting a lumbar condition since the Claimant's June 4, 2014 work injury. The Claimant continued to treat with Dr. Lofton through August of 2014 with electrical stimulation, ultrasound therapy and myofasical release/manual therapy. Over the course of this month, Dr. Lofton noted "slight improvement" or "slight regression" at each visit (Claimant's Exhibit 4, pp. 201-123; Respondents' Exhibit K, pp. 80-100).

16. On August 6, 2014, Dr. Gellrick noted the Claimant was a no show for appointments on July 9, 2014 and July 23, 2014. She opined that the process of hamstring strain would have resolved by this point and he was anticipated for MMI and case closure with no impairment and a full duty release. The case was closed accordingly on this date (Claimant's Exhibit 3, p. 92; Respondents' Exhibit B. p. 25).

17. The Claimant continued to treat with Dr. Lofton through the month of September and up to October 1, 2014. As of October 1, 2014, the Claimant continued to report intermittent, aching, throbbing, radiating low back pain and aching throbbing pain in the right pelvis. After two months of regular treatment with Dr. Lofton, the Claimant was still showing only "slight improvement" although Dr. Lofton noted "he is progressing as anticipated" (Claimant's Exhibit 4, pp. 143-144; Respondents' Exhibit K, pp. 120-121).

18. On October 6, 2014, the Respondents filed a Final Admission of Liability based on Dr. Gellrick's finding of MMI and no PPD. On October 24, 2014, Respondents filed an amended Final Admission of Liability. The Claimant objected and requested a Division IME (Respondents' Exhibit N and O).

19. On returning from Georgia, the Claimant testified that he came back to Colorado to work at Michels Corporation, a different employer, because they gave him light duty. The Claimant testified that while he worked there he was doing light duty yard work and mostly working the radio. This testimony is contradicted by testimony of Tonya Williams from Human Resources at Michels Corporation (see below). Ms. Williams stated that there was no indication that the Claimant was working light duty and he was

a general laborer performing regular duty work. Ms. Williams' testimony is supported by the Claimant's job application. In his Application for Employment with Michels Corporation, the Claimant stated he was available to work as of November 7, 2014 and was looking for full time work, and would be willing to work overtime, in the tunneling division as a rigger and toplander. The Claimant stated he would be willing to travel (Respondents' Exhibit P). He started this job on November 11, 2014 and stayed there until February 27, 2015 when he was laid off due to lack of work as the job he was working was coming to an end. To the extent there is a discrepancy between the testimony of the Claimant and the testimony of Ms. Williams which is based on the employment records, the dispute is resolved in favor of the records and the testimony of Ms. Williams.

20. On July 6, 2015, the Claimant saw Dr. Henry Roth for a Division IME. Dr. Roth notes that treatment was provided in Colorado through June 19, 2014 and the Claimant is now living in Georgia. Dr. Roth noted that after treatment stopped, the Claimant was placed at MMI but there is no record with respect to impairment or restrictions. Dr. Roth notes that back in Georgia, the Claimant received treatment through chiropractor Beatrice Lofton without any sustained benefit. The Claimant reported that when he went to a Concentra medical center in Atlanta, he was turned away because they did not have authorizing paperwork (Claimant's Exhibit 1; pp. 1-2; Respondents' Exhibit A, pp. 1-2). The Claimant reported to Dr. Roth that he continued to experience discomfort at a 6/10 pain level and he feels that he is worse now than when his symptoms first began. The Claimant identified the regions of pain as midline low back with emphasis to the right-sided paraspinals. The Claimant also identified the right gluteal and right posterior leg extending down to mid-calf. Dr. Roth noted that, other than chiropractic, little to no medical attention was provided to the Claimant and does not have any prescription medications. The Claimant reported some temporary benefit from OTC anti-inflammatory agents and dry needling performed in physical therapy (Claimant's Exhibit 1; p. 2; Respondents' Exhibit A, p. 2). The Claimant reported diminished ability to engage in normal activities such as playing basketball, fishing, running and dancing as he has difficulty lifting, bending, standing or sitting for long periods. As of this date, the Claimant was not working (Claimant's Exhibit 1; p. 2; Respondents' Exhibit A, p. 2). On physical examination, Dr. Roth noted that "discomfort to palpation is evident on the right at L4-5 and also the quadrates lumborum. This discomfort is continuous with right-sided lateral sacrum, gluteal and piriformis. No similar discomfort on the left." Dr. Roth was also unable to rule out the right hip abnormality as the Claimant continues to have mild, very medial groin discomfort even though hernia has been ruled out. Dr. Roth assess right-sided lumbopelvic pain as the claim related issue and opined that the Claimant was not at MMI as the source of his discomfort is not medically determined and his treatment is not complete (Claimant's Exhibit 1; p. 3; Respondents' Exhibit A, p. 3). Based on this, Dr. Roth felt that the Claimant was not currently appropriate for an impairment rating because the body parts to be evaluated were not clear and there was no diagnosis yet (Claimant's Exhibit 1; p. 4; Respondents' Exhibit A, p.4).

21. The Claimant testified that eventually he saw Dr. Hall at Concentra (this would have been in Georgia) and that Dr. Hall sent the Claimant to see Dr. Foster, a specialist. The Claimant testified that he is not working because Dr. Hall had the Claimant on restrictions. The Claimant testified that, at this point when he saw Dr. Hall, he was still feeling a lot of pain, with some days better than others, but he could not have performed his full duty regular work.
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22. On August 10, 2015, the Claimant treated with Dr. Roy Hall at Concentra in Morrow, Georgia. The Claimant reported pain in the lower back and right leg from a June 4, 2014 lifting injury at work. He stated that he has had pain ever since lifting a beam he discovered weighed more than 200 pounds. The Claimant reported that two days prior to the office visit, the pain has been worse and radiated down to the right calf muscle. He reported that he had been seeing a chiropractor for treatment but that it wasn't helping much. He reported a moderate pain level of 6/10. After examination, Dr. Hall assessed a lumbar sprain and chronic lumbar radiculopathy and recommended an MRI and made a referral for physical therapy. Dr. Hall placed the Claimant on modified work/activity limiting lifting, pushing and pulling to 30 pounds and limiting bending to occasionally (defined as up to 3 hours per day)(Claimant's Exhibit 2, pp. 9-11; Respondents' Exhibit L, pp. 122-124).

23. On August 31, 2015, the Respondents filed a General Admission of Liability based on Dr. Roth's DIME opinion that the Claimant was not at MMI (Respondents' Exhibit N and O).

24. On September 2, 2015, The Claimant filed an Application for Hearing on the issues of compensability, medical benefits, TTD and TPD (Respondents' Exhibit N and O).

25. On September 3, 2015, the Claimant saw Dr. Hall reporting that his "symptoms are unchanged." Dr. Hall noted that the Claimant had attended all 6 PT visits but could benefit from 4 more. By this visit, the work/activity restrictions from Dr. Hall were limiting lifting to 30 pounds and pushing and pulling to 50 pounds with no other restrictions (Claimant's Exhibit 2, pp. 45-47; Respondents' Exhibit L, pp. 144-146).

26. The Claimant underwent an MRI of the lumbar spine without contrast on September 22, 2015. The radiologist noted mild disc bulge at L3-4 and disc bulge with left foraminal disc protrusion and suggestions of annular tear at L4-5 with left foraminal disc protrusion. At L5-S1, disc bulge was also noted with suggestion of annular tear. Mild bilateral neural foraminal stenosis was noted at L4-5 and L5-S1 (Claimant's Exhibit 2, p. 58; Respondent's Exhibit H).

27. Respondents' filed their Response to Application seeking to withdraw the General Admission of Liability and challenging medical benefits (Respondents' Exhibit N and O).

28. On September 28, 2015, the Claimant saw Dr. Michael McHenry for electrodiagnostic consultation on referral from Dr. Hall. Dr. McHenry opined that the Claimant had a normal electrodiagnostic examination (Claimant's Exhibit 2, pp. 51-57; Respondents' Exhibit G, pp. 53-54).

29. On October 8, 2015, the Claimant saw Dr. Roy Hall again for a recheck of his injuries. The Claimant reported that his symptoms were unchanged after physical therapy sessions. The Claimant was not working at this time. Dr. Hall continued to assess the Claimant with lumbar strain and chronic lumbar radiculopathy. Work restrictions were maintained occasional lifting up to 30 pounds, occasional pushing/pulling up to 50 pounds, and bending, standing and walking up to 3 hours per day with a need to change positions periodically to relieve discomfort (Claimant's Exhibit 2, pp. 67-68; Respondents' Exhibit L, pp. 160-161). On October 15, 2015, Dr. Hall referred the Claimant to an orthopedic specialist (Claimant's Exhibit 2, p. 70; Respondents' Exhibit L, p. 166).

30. On November 3, 2015, the Claimant saw Dr. John Foster, III, for evaluation of low back pain and right leg pain. On examination, Dr. Foster noted pain over the right SI joint with no tenderness elsewhere, including the midline and left SI joint. Dr. Foster found full active range of motion and no instability. Dr. Foster recommended a right SI injection and placed the Claimant at full duty. Dr. Foster noted that he would see the Claimant back in 3 weeks and if the Claimant gets temporary or partial improvement from the right SI injections, he would consider a series of up to three injections. If there was no improvement and no significant findings on MRI, Dr. Foster opined the Claimant would likely be at MMI (Claimant's Exhibit 2, p. 75; Respondents' Exhibit L, p. 168).

31. On November 10, 2015, PALJ Sandberg denied the Respondents' motion to compel Claimant to attend a follow up DIME with Dr. Roth because no ATP has made a determination as to MMI (Respondents' Exhibit N).

32. The Claimant saw Dr. Foster again on November 24, 2015 and Dr. Foster noted the Claimant still has not had the first right SI injection. The Claimant did bring the MRI films from September 22, 2015 for Dr. Foster's review and Dr. Foster noted mild bilateral neural foraminal stenosis at L4-5 and L5-S1. On examination, Dr. Foster continued to note tenderness over the right SI joint, positive Gaenslen's, positive Patrick's and positive FABER with negative straight leg raise tests. Dr. Foster opined that he still believed the right SI joint was the Claimant's pain generator and continued to recommend that the Claimant undergo the first right SI joint injections. If this didn't work, Dr. Foster also indicated he would like to try a one-time basis lumbar epidural steroid injection. Dr. Foster opined that if he does not have surgically treatable pathology, the Claimant would be at MMI when he has exhausted injection therapy (Respondents' Exhibit L, p. 169).

33. On November 24, 2015, Dr. Jeffrey Wunder provided a written report of his medical record review of the Claimant's prior 2012 injury records and the records for the June 2014 work injury. Ultimately, Dr. Wunder agreed with Dr. Roth that the physical

diagnoses in this case are not clear and he further stated that subjective symptoms seem disproportionate to objective findings. Additionally, Dr. Wunder expressed confidence in Dr. Gellrick's initial findings that the Claimant had only presented with hamstring and gluteal tenderness up to the inferior SI joint but she did not find and SI or lumbar strain. Dr. Wunder also pointed out that only when the Claimant went to the chiropractor in Atlanta, did the focus shift from the groin and hip to the low back. Based on all of this, Dr. Wunder opined there is no indication for epidural steroid injections since there is no leg pain or radicular symptoms plus a normal MRI (Respondents' Exhibit M).

34. Dr. Henry Roth testified by deposition on December 22, 2015. Dr. Roth acknowledged that he performed the Division IME on the Claimant on July 6, 2015 (Roth Depo. Tr., p. 3). Dr. Roth testified that the Claimant complained chiefly of low back pain, discomfort in his right leg and difficulty sleeping. He testified that the Claimant told him that he developed discomfort in his groin and the back of his right leg the night after a day at work handling unusual heavy materials (Roth Depo. Tr., p. 4). Dr. Roth testified that the Claimant denied any similar history of discomfort or disabling difficulties (Roth Depo. Tr., p. 5). After examination, Dr. Roth reached a descriptive diagnosis of "complaint of right-sided low back pain" which is the symptom itself, but was unable to reach a specific claim related diagnosis (Roth Depo. Tr., p. 7). In order to reach a diagnosis, Dr. Roth recommended a lumbar MRI and an EMG nerve conduction study of the right lower extremity and hip x-rays (Roth Depo. Tr., p. 8). Later in the deposition testimony, Dr. Roth reviews the MRI report noting that it is relatively benign and the minor degenerative changes to not correlate with the Claimant's complaints. Namely, there was nothing on the right side in the upper, mid-lumbar spine that would explain pelvic pain (Roth Depo. Tr., pp. 22-23). Dr. Roth also reviewed the EMG from September 28, 2015 which was negative and provided no indication of nerve root irritation to explain the symptoms the Claimant was reporting (Roth Depo. Tr., p. 23). Dr. Roth also reviewed hip x-rays from September 3, 2015 and testified that the right hip is normal and shows no arthritis (Roth Depo. Tr., p. 23). Based on his review of the results from the diagnostic testing Dr. Roth had recommended in his DIME report, Dr. Roth now opined that he had sufficient information to formulate an opinion as to the Claimant's work related diagnosis (Roth Depo. Tr., pp. 23-24). He opined that there is no lumbar or hip diagnosis and no hernia and no evidence of a lesion to explain his symptoms. Rather, going back to Dr. Gellrick's medical records, Dr. Roth testified that there is a presumption of a strain of his hip flexor tendon with some swelling for his work related injury. However, with respect to any work related injury, the Claimant is at MMI without impairment and Dr. Roth now agrees with Dr. Gellrick's date of MMI (Roth Depo. Tr.,pp. 24-25).

35. On cross-examination, Dr. Roth agreed that Dr. Gellrick had released the Claimant from care because he failed to show up for a couple of appointments because he had moved to Georgia. Based on this, Dr. Roth also agreed that Dr. Gellrick's assumption that the Claimant's pain must have resolved and that was why he no longer needed care was probably incorrect (Roth Depo. Tr., pp. 25-26). In reviewing the medical records from the Claimant's September 26, 2012 work injury, Dr. Roth agreed

that as the Claimant was released without impairment and at MMI by October 4, 2012, this injury was likely a minor injury (Roth Depo. Tr., pp. 26-27). Dr. Roth opined that, to the extent that the Claimant is still complaining of right-sided pain in his leg and back, there is no indication that it is due to a work-related disorder and the Claimant should see a primary care provider for additional follow up (Roth Depo. Tr., p. 27). Dr. Roth testified that when he initially prepared his DIME report, he did not feel the Claimant had a complete enough evaluation and he recommended additional studies. He further stated that now that these studies have been completed they revealed nothing and so further medical evaluation and treatment is not likely to provide benefit and, therefore, the Claimant is at MMI (Roth Depo. Tr., p. 28). Additionally, as there is no work-related medical diagnosis in the lumbar spine, continuing lumbar pain and rigidity would not result in an impairment rating. Dr. Roth also opined that it would not be appropriate to rate the buttock and groin pain where there is no physiologic correlation (Roth Depo. Tr., pp. 28-29).

36. A prehearing conference was held on January 7, 2016 in this matter on Respondents' motion to compel attendance at a follow up DIME, for a continuance and Respondents' motion to order Dr. Roth to issue a supplemental DIME report. PALJ Sandberg denied all three of Respondents' motions specifically indicating that Respondents already obtained deposition testimony from Dr. Roth and there is no known authority for the PALJ to order the DIME physician to issue a supplemental report (Respondents' Exhibit O).

37. At the hearing on January 14, 2016, the Claimant testified that he had a prior worker's compensation injury in Texas on September 26, 2012 but that turned out to be nothing and was different from the injury in this case. Per the Claimant's testimony, after the 2012 injury he had no further back problems. Records in Respondents' Exhibit G, pp. 57-69 show that the Claimant's 2012 work injury involved sharp pain in the right side neck area that radiated to the right shoulder and a right mid/lower back pain after lifting a 150-200 pound dump chain (Respondents' Exhibit G, p. 57). The Claimant was initially under work restrictions limiting lifting to no more than 5 pounds for more than 2 hours per day. However, by October 4, 2012, after some physical therapy sessions, the Claimant's work restrictions were lifted and he was returned to work with no restrictions whatsoever (Respondents' Exhibit G, pp. 57-69).

38. The Claimant testified that he also had a motor vehicle accident in 2007 when his car was rear-ended. According to medical records, the Claimant was brought in to Southern Regional Medical Center on October 8, 2007 on a stretcher with complaints of neck and back pain (Respondents' Exhibit F).

39. The Claimant testified at the hearing that right now he feels okay, he has good days and bad days. The problem is mainly with his low back and right buttocks.

40. On February 8, 2016, Tonya Wilson testified as a lay witness. She is employed in Human Resources for Michels Corporation. She is familiar with the Claimant who was an employee of the Michels Corporation as a general laborer (Wilson

Depo. Tr., p. 3). The job description for this position requires a general laborer to move soil, pull, push and lift heavy objects, measure distance, clean tools, use hand trenches, operate pavement breakers/jackhammers, and clear and prepare highway work zones (Wilson Depo. Tr., pp. 3-4). In reviewing the Claimant's employment file there is no information that the Claimant was assigned to work light duty. In order to work light duty, the Claimant would have to report an incident and it would be documented in the system in the risk management department. The reason for termination of the Claimant's employment with Michels Corporation was layoff (Wilson Depo. Tr., p. 5). On cross-examination, Ms. Wilson testified that she never watched the Claimant perform his job duties and that she was only testifying based on the records she had (Wilson Depo. Tr., pp. 5-6).

41. On February 23, 2016, Raymond Beesley testified as a lay witness. He is a general superintendent for Obayashi and has worked for them for about eight years. He directs all the work that is underground on a project (Beesley Depo. Tr., p. 3). In June of 2014, he was working on the twin tunnels project in Idaho Springs, Colorado. He is familiar with the Claimant who had worked for him on that project as well as a prior job in Atlanta (Beesley Depo. Tr., p. 4). Mr. Beesley testified that he had discussions with the Claimant about taking some time off from work. Mr. Beesley recalled that the Claimant had some family business or some type of business to take care of in Atlanta and Mr. Beesley told him that he is welcome to go home and take care of that and then he could return to work (Beesley Depo. Tr., p. 4). Mr. Beesley recalled that this conversation was in June or July of 2014.. Beesley also testified that he recalled the Claimant reporting an injury to him and the safety director. After this, the Claimant was placed on modified duty to accommodate physician restrictions. At some point after this the Claimant left on a scheduled vacation (Beesley Depo. Tr., p. 5). Mr. Beesley testified that there was modified duty available for the Claimant when he returned from vacation, but the Claimant never returned from vacation which surprised Mr. Beesley (Beesley Depo. Tr., p. 6). Mr. Beesley testified that he does not have any idea why the Claimant did not return. However, eventually, he had to terminate the Claimant's employment. Mr. Beesley specifically denied that he had any phone conversation with the Claimant during which the Claimant told him he was in too much pain to return to work. Rather, Mr. Beesley was certain that he never heard anything at all from the Claimant (Beesley Depo. Tr., p. 7). In reviewing phone records between July 8, 2014 and August 7, 2014, Mr. Beesley was able to confirm that he did not receive any phone calls from the Claimant during that time period (Beesley Depo. Tr., pp. 7-8). On cross-examination, Mr. Beesley testified that he did not provide anything in writing to the Claimant that stated the Employer would meet his restrictions and bring him back to work.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Reconsideration of the issues raised before PALJ Sandberg in his November 10, 2015 and January 7, 2016 Prehearing Conference Orders

Respondents have requested review of PALJ Sandberg's Prehearing Orders dated November 10, 2015 and January 7, 2016 which denied the Respondents' Motion to Compel the Claimant to Attend a Follow Up DIME. Panels of the Industrial Claim Appeals Office have held that "orders related to DIME requests are in the nature of evidentiary rulings and are therefore, interlocutory (see *Alvarez v. JBS USA, LLC,* W.C. 4-783-538 (ICAO, July 10, 2012).

However, the Colorado Supreme Court and ICAO panels have issued orders contemplating ALJ review of prehearing orders issued by PALJs. In *Szot v. U.S. Security Associates, Inc.,* W.C. 4-714-229 (ICAO, October 2, 2007), the panel concluded that an ALJ erred by not reconsidering a ruling from a PALJ. The panel stated that an ALJ has jurisdiction to review interlocutory rulings of a PALJ and that further consideration by an ALJ of prehearing orders is anticipated. Although the orders of a PALJ that arise in the context of a prehearing conference are "interlocutory" and "not immediately appealable," the Colorado Supreme Court noted that, it makes sense to treat a PALJ's order related a prehearing conference in this manner, "because a prehearing conference, by definition, is followed by a full hearing before the director or an ALJ" and "thus, the propriety of a PALJ's prehearing order may be addressed at the subsequent hearing." *Industrial Claim Appeals Office v. Orth,* 965 P.2d 1246, 1254 (Colo. 1998).

While the PALJ orders in question in this case are not deemed to be final, appealable orders as they arose out of a prehearing conference, they are nevertheless subject to review by the ALJ.

Respondents have argued before PALJ Sandberg and the ALJ in this case that Claimant should be compelled to return to Dr. Roth for a follow up DIME. Respondents argue that *Williams v. Kunau*, 147 P.3d 33 (Colo. 2006), *Sanco Indus. v. Stefanski*, 147 P.3d 5 (Colo. 2006) and *Favela* v. *Cargill Meat Solutions Corp.,* (ICAO May 3, 2012) support their position. Respondents are incorrect and these cases are factually distinguishable from the current situation. In both *Williams* and *Stefanski,* the Colorado Supreme Court held that "once a claimant has successfully challenged a finding of MMI through the DIME process, the DIME process remains open." In both of those cases, ***after*** an authorized treating physician (ATP) made a second finding of MMI, the respondents were not permitted to file a Final Admission of Liability to close the case prior to returning the claimant to the DIME for a follow up examination and determination of MMI. Here, there is no second finding of MMI by an ATP.

PALJ Sandberg found that, without a requisite determination of MMI by an ATP, either in Colorado or Georgia, there was no authority to compel the Claimant to attend a follow up DIME with Dr. Roth. This position is in line with the statute which provides that "an authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement." C.R.S. § 9-42-107(8)(b)(I). The only determination that the Claimant was at MMI in this case was made by Dr. Gellrick. However, that was effectively nullified by Dr. Roth's DIME opinion. Since the DIME opinion, no ATP has determined that the Claimant is at MMI. There is only Dr. Roth's deposition testimony that now states the Claimant is at MMI.

At this point the Respondents' remedy, where no ATP has determined the Claimant has reached MMI, is through C.R.S. § 8-42-107(8)(b)(II) if all of the conditions are met. The conditions are:

(1) at least 24 months have passed since the date of injury;
(2) a party has made a written request that an ATP determine whether the Claimant has reached MMI;
(3) the ATP has not determined that the Claimant is at MMI; and
(4) a physician other than the ATP has determined the Claimant is at MMI.

At the time of the hearing, 24 months had not elapsed since the date of the injury, but now they have. However, Respondents have not complied with the second requirement that a party makes a written request that an ATP determine whether the Claimant has reached MMI. Therefore, this ALJ agrees with PALJ Sandberg and finds that Respondents motion to compel remains premature and the Respondents have still not satisfied all of the requirements to return the Claimant to Dr. Roth for follow up examination.

Withdrawal of Admissions Made in a General Admission of Liability

C.R.S. § 8-43-201 deals with disputes arising under the Workers' Compensation Act of Colorado. It provides, in pertinent part, that,

> A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; a workers' compensation case shall be decided on its merits; and a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.

Prior to the above modification provision being enacted, case law construing C.R.S. 8-43-203(2)(d) permitted respondents to receive relief from "improvidently filed" admissions. However, under the provisions of Section 8-43-201(1), C.R.S., as amended effective August 5, 2009, the party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. *Rodriguez v. City of Brighton,* W.C. No. 4-782-516 (ICAO August 23, 2011). Under the provisions of § 8-43-201(2), C.R.S. the amendments to subsection 1 of § 8-43-201, C.R.S. are procedural and apply to all claims for workers' compensation regardless of the date of filing of the claim. Here, Respondents seek to modify the issue of compensability determined by General Admission filed by Insurer. Respondents therefore bear the burden of proof, by a preponderance of the evidence, to show that Claimant did not sustain a compensable injury on June 4, 2014.

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). In this case, since Respondents seek to withdraw a General Admission of Liability filed on August 31, 2015 based on Dr. Roth's DIME opinion that the Claimant was not at MMI, the Respondents must establish that the Claimant did not suffer a compensable injury on June 4, 2014.

There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

There is sufficient evidence in the record that the Claimant suffered an injury on June 4, 2015. While there were some discrepancies in the testimony and evidence, overall, the Claimant's testimony regarding his mechanism of injury was generally credible and the medical records of Dr. Gellrick provide support for a determination that there was a compensable injury that required medical treatment.

Although Respondents argue that the deposition testimony of Dr. Roth provides support for the requested withdrawal of the admission, at best, Dr. Roth's deposition testimony supports a conclusion that the Claimant was at MMI as of August 6, 2014. However, Dr. Roth does not testify that the Claimant never suffered a compensable injury. Rather, going back to Dr. Gellrick's medical records, Dr. Roth testified that there was a presumption of a strain of the Claimant's hip flexor tendon with some swelling for his work related injury. Further, in looking at the full deposition transcript for Dr. Roth along with his prior DIME report, Dr. Roth supports a position that certain conditions arising out of the Claimant's work injury resolved and the source of the Claimant's continued pain has not been determined yet. This does not equate with a finding that the Claimant suffered no compensable injury.

Based on the foregoing, the ALJ determines that Respondents have not proven by a preponderance of the evidence that the Claimant's work activities on June 4, 2016 did not cause his current medical conditions or permanently aggravate, accelerate or combine with a preexisting condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date. Respondents may not withdraw the General Admission of Liability.

Medical Benefits –Reasonable and Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

As stated above, the Claimant has not yet been placed at MMI under the Act and is entitled to receive medical treatment for conditions arising out of his work related injury. However, Respondents have challenged whether the proposed treatment recommended by Dr. Foster, namely a right SI joint injection and a lumbar steroid injection.

Claimant initially treated with Dr. Gellrick from June 5, 2014, the day following his work injury, until his last office visit with her on June 19, 2014. The entire time that the Claimant treated with Dr. Gellrick, his complaints were pain and discomfort in the right groin and hip area and his right posterior thigh. There were no low back or lumbar complaints and no treatment was provided for the low back. The Claimant also made no back complaints to emergency room physicians when he was experiencing the urinary dysfunction symptoms. At that point, Dr. Gunter also saw no evidence of hernia and felt the Claimant's pain was secondary to hamstring strain.

The first low back complaint in the Claimant's medical records is to his chiropractor in Georgia, Dr. Lofton, on August 1, 2014, almost two months after the work injury. She assessed the Claimant with low back pain and a lumbar strain or sprain with lumbosacral radiculitis and she provided treatment to the low back over several months. However, the Claimant stated to both Dr. Roth and Dr. Hall that the chiropractic treatment was not helping much. Dr. Lofton's notes are somewhat consistent in that she repeatedly indicated that the Claimant was showing only slight improvement.

Dr. Hall diagnosed the Claimant with lumbar strain and chronic lumbar radiculopathy and Dr. Foster felt the Claimant's pain generator might be the right SI joint. However, neither of these doctors established a causal link between the Claimant's June 4, 2014 work injury and any lumbar or SI joint symptoms.

Dr. Roth had recommended a lumbar MRI and an EMG nerve conduction study of the right lower extremity and hip x-rays. These were ultimately performed on referral from the Claimant's ATP in Georgia, Dr. Hall. At his deposition in December 2015, Dr. Roth reviewed the MRI report noting that it is relatively benign and the minor degenerative changes to not correlate with the Claimant's complaints. Namely, there was nothing on the right side in the upper, mid-lumbar spine that would explain pelvic pain. Dr. Roth also reviewed the EMG from September 28, 2015 which was negative and provided no indication of nerve root irritation to explain the symptoms the Claimant was reporting. Dr. Roth also reviewed hip x-rays from September 3, 2015 and testified that the right hip is normal and shows no arthritis. Based on his review of the results from the diagnostic testing Dr. Roth had recommended in his DIME report, Dr. Roth opined that there is no lumbar or hip diagnosis and no hernia and no evidence of a lesion to explain the Claimant's symptoms.

The Claimant's treatment has been somewhat intermittent in this case, due in large part to the Claimant moving back and forth between Colorado and Georgia and also due to a lack of communication. There have also been multiple treatment providers who have not necessarily had access to the medical records from the other treatment providers. This may explain some of the divergence in the assessments and treatment provided by the various treating physicians. What is clear, nevertheless, is that while the Claimant was initially treated for right-sided groin, hip/buttock and thigh symptoms, his treatment shifted to treatment for a lumbar condition with radiculopathy. Based on the diagnostic testing results, it would appear that the Claimant's ATPs in Georgia are treating the Claimant's subjective complaints of pain as opposed to symptoms that correlate to objective diagnostic findings. Further, the lumbar symptoms were treated in the absence of a comprehensive causation analysis linking the lumbar symptoms to the June 4, 2014 work injury.

In viewing the medical evidence and the Claimant's testimony as a whole, the Claimant has failed to prove that the right SI joint injection and lumbar steroid injection recommended by Dr. Foster are reasonably necessary to cure and relieve the effects of the Claimant's industrial injury. Claimant's medical benefits claim is, therefore, denied and dismissed.

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain temporary disability benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. § 8-42-103(1)(b), C.R.S. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or
- The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

In this case, the Claimant established that he suffered a compensable work injury on June 4, 2014, but he failed to prove that he suffered a wage loss as a result of that injury for the time periods when he claims entitlement to TTD benefits, namely June 27, 2014 to November 6, 2014 and from February 28, 2015 to November 3, 2015.

After his work injury, the Claimant returned to modified employment with his Employer per his testimony and the testimony of his supervisor Mr. Beesley. His TTD benefits therefore, ceased. Then, the Claimant left for a scheduled vacation and never returned to work. In resolving conflicting evidence, the ALJ found that the Claimant never contacted his supervisor or his Employer to explain why he wasn't returning to work. He simply did not return. The Claimant admitted that Mr. Beesley likely expected him to return to work from his vacation. The Claimant also had no reason to believe that he would be returning to full duty. Mr. Beesley testified credibly that light duty would have been available on the Claimant's return from vacation for as long as he required it. The Claimant did not offer contradictory testimony or indicate that he had been advised that he would no longer have the option of light duty/modified employment. The Claimant's employment was subsequently terminated for failing to return to work after his scheduled vacation without contacting his Employer. This is the reason for the Claimant's wage loss.

Additionally, the Claimant returned to Colorado and worked a laborer position for a different employer from November 7, 2014 to February 28, 2015. In his Application for this job, the Claimant stated he was looking for full time work, was willing to work overtime and wanted to work in the tunneling division as a rigger and toplander. He was hired by the second employer and worked until he was laid off due to lack of work as the job was coming to an end. Per the testimony of Ms. Wilson who works in HR for this second employer, there is no information that the Claimant was assigned to work light duty. Rather, because he had not suffered a work injury on this job and did not report any incident, he would not have been assigned light duty by the risk management department. The Claimant worked regular employment which is another event that would terminate TTD benefits. Here the Claimant's wage loss is due to the lay off and is in no way related to a work related disability.

Next, there was no persuasive evidence that the Claimant's work injury related conditions deteriorated after February 28, 2015 such that his work related disability impaired his ability to resume his prior work or impaired his wage earning capacity. Between February 28, 2015 and August 10, 2015, when the Claimant first treated with Dr. Roy Hall, the Claimant was under no work restrictions from a treating physician. While the Claimant testified that he didn't believe he could have worked his regular job, he had just worked for Michels Corporation in a similar type of laborer job and only stopped working there due to layoff. Therefore, the Claimant's testimony about ability to work is not credible or persuasive. Then on August 10, 2015, Dr. Hall diagnosed the Claimant with a lumbar condition and lumbar radiculopathy and based on this, placed the Claimant under work restrictions. However, it has not been established that the lumbar condition is related to his work injury. In fact, Dr. Roth persuasively testified that there is no work-related lumbar condition. Therefore, the Claimant is not entitled to TTD benefits after August 10, 2015 and November 3, 2015.

Finally, on November 3, 2015, Dr. Foster, an ATP in Georgia, placed the Claimant at full duty again and so the Claimant was under no work restrictions from that point forward.

The Claimant has failed to establish that he is entitled to temporary disability benefits in this case and the claim is denied and dismissed.

ORDER

It is therefore ordered that:

1. In reconsidering the prehearing order of PALJ Sandberg, this ALJ concurs that without a requisite determination of MMI by an ATP, either in Colorado or Georgia, there was is authority to compel the Claimant to attend a follow up DIME with Dr. Roth at this time.

2. Respondents have not proven by a preponderance of the evidence that the Claimant did not suffer a compensable industrial injury on June 4, 2014. Thus, the Respondents may not withdraw the General Admission of Liability.

3. The Claimant has failed to prove that the right SI joint injection and lumbar steroid injection recommended by Dr. Foster are reasonably necessary to cure and relieve the effects of the Claimant's industrial injury. Claimant's medical benefits claim is, therefore, denied and dismissed.

4. The Claimant failed to prove his wage loss was due to disability resulting from the work injury and thus, failed to prove he is entitled to temporary total disability benefits and this claim is denied and dismissed.

5. Insurer shall pay the Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's supplemental order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after the certificate of mailing in the supplemental order, as indicated on the certificate of mailing or service; otherwise, the Judge's supplemental order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the supplemental order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. The petition shall be in writing, shall set forth in detail the particular errors and objections relied upon, and shall be accompanied by a brief in support thereof. For statutory reference, *see* § 8-43-301(6), C.R.S. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 28, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-965-603-02

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he sustained compensable injuries to his head, neck, right shoulder and lungs (inhalation injuries) as a consequence of an explosion in Employers steel making facility on September 28, 2014.

II. If Claimant sustained compensable injuries, whether he established, by a preponderance of the evidence that he is entitled to all reasonable, necessary and related medical treatment for his head, neck, right shoulder, and lung conditions, including treatment obtained through St. Mary Corwin Hospital and the Hanson Clinic.

III. If Claimant sustained compensable injuries, whether he is entitled to a change of physician, to Dr. Michael A. Dallenbach.

IV. If Claimant sustained compensable injuries whether he is entitled to temporary total disability benefits from October 25, 2014 through February 15, 2015.

V. Whether Claimant's average weekly wage (AWW) is $1,440.81 or some other figure.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was hired by Respondent-Employer as a mechanical millwright technician (MMT) on July 10, 2006. As an MMT, Claimant performs maintence and repairs in the mill. His duties include welding.

2. On September 28, 2014, Claimant was assigned to weld damaged safety stair rail located on a second floor in the steel making section of the mill. The project location was approximately sixty feet to the northeast and behind the ladle refinery north furnace (LRF) used to melt scrap iron into molten steel.

3. Claimant testified that he was using a gasoline powered portable welding machine mounted to a truck to complete the job. According to Claimant, the welding machine began to sputter as if it was running out of fuel. Consequently, Claimant testified that he elected to use a stationary welder located near the "vacuum tank degasser (VTD) across from the LRF.

4. Claimant testified that he was laying out the stationary welding leads to complete

his work when an explosion occurred at the LRF. It is uncontested that the explosion occurred and that there was a subsequent investigation into the root cause of the blast. Based upon the investigation, it was concluded that steel braided water hoses attached to the LRF hood likely got caught and ripped off during the hood's rotation while processing a batch of steel. In turn, an unknown quantity of water poured into the super heated molten steel and slag causing a steam explosion.

5. Claimant testified that he heard and felt a concussive explosion that slammed his body up against the VTD structure and its attachments (wall piping).

6. The shock wave from the explosion was sufficient to dislodge particulate matter from the steel making buildings rafters and cause the entire facility to go dark due to the dust, smoke, gases and incendiary materials, including molten steel, released into the air.

7. Claimant testified that he was briefly rendered unconscious and when he awoke he inhaled airborne particulate matter. Claimant testified that he was stunned by the concussive force of the blast, which he testified blew off his hard-hat. According to Claimant, the facility was dark but he could hear the popping of molten metal and a voice calling his name over the radio. Claimant testified that he was able to get to his feet and locate the stair way in an effort to exit the building. Claimant reportedly staggered down the stairs with use of the handrail, losing his balance and falling down the stairs to the floor secondary to poor visibility and his disorientation. The floor is constructed of rough grated metal. Claimant further testified to striking various parts of his body on the stairs and floor multiple times as he stumbled down the stairs. Once on ground level, Claimant testified that he saw glimpses of light and flashes of another worker wearing some type of "orange" garment moving away from him. Claimant testified that he was able to escape the building by feeling his way along and attempting to grab onto the person wearing the orange article of clothing.

8. Once outside the building, Claimant was attended to by emergency medical personnel dispatched to the scene. Claimant's vital signs were taken revealing a blood pressure of 160/90, a pulse of 110, respirations of 18 and pupils that were equal and reactive of light (PERL). Claimant testified that he was "in and out", was dizzy, had a headache, and ringing in his ears. The triage/ambulance report provides the following: "53 year old involved in explosion at steel mill – exposed black dust, eyes burning, lungs congested- . . . left side HA (headache). pt (patient) coughing". It goes on to confirm that while his throat was clear and he had a normal heart rhythm, Claimant had objective bilateral "wheezing." The assessment for the objective wheezing was recorded as exposure to "black dust" after explosion. There is no indication in the ambulance report that Claimant reported any injury to his head, neck and/or right shoulder. The record is also devoid of any obvious bumps, bruises or abrasions to Claimant's body. Claimant was transported by ambulance to St. Mary Corwin Hospital Emergency Room where he was attended to by Dr. Jennifer Lynne Carlis.

9. Dr. Carlis documented that Claimant presented with complaints of "mild

shortness of breath" noting further that he reported that he had "been coughing up dust like material." Claimant "[denied] any smoke inhalation or exposure to extreme heat." He denied "any other complaints." Musculoskeletal examination revealed full range of motion in the extremities which were also non-tender. Claimant was alert and oriented x3. He demonstrated a normal affect and his sensory and motor neurological examination was intact. Inspection of Claimant's body failed to reveal any physical injuries, including abrasions, burns, contusions, penetrating wounds or lacerations about the head, neck or extremities. Claimant was given a breathing treatment and at the time of discharge was in "absolutely no respiratory distress." Final diagnosis was "inhalation injury" with recommendation for follow-up.

10. Perry Bourgeois, Safety Supervisor for the maintenance department testified by Telephone. According to Mr. Bourgeois, he was dispatched to pick Claimant up from St. Mary Corwin Hospital emergency room following Claimant's examination. Mr. Bourgeois testified that upon his arrival he made contact with Claimant who appeared shaken by the event. Per Mr. Bourgeois, Claimant appeared nervous and was complaining of having a queasy/upset stomach. Upon discharge from the emergency room, Mr. Bourgeois offered Claimant a ride home. Claimant declined and Mr. Bourgeois drove Claimant back to the plant parking lot where Claimant later retrieved his vehicle and drove home. According to Mr. Bourgeois, Claimant was well enough to drive home. Claimant mentioned nothing to Mr. Bourgeois about being blown into a wall, losing consciousness, falling down stairs, or anything about injuring his neck or right shoulder during their time together.

11. Claimant testified that once he was back at the mill, he proceeded to the shower house where he cleaned himself up, as he was coated in particulate matter. He then drove home. Claimant, who lives alone, testified that he passed out in the hallway of his home. His next recollection is waking up in the hallway covered in vomit and experiencing severe coughing, headaches, and dry mouth. During an independent medical examination (IME) conducted by Dr. Eric Ridings, at Respondent's request, Claimant reported that after arriving home, he had no recollection of the evening. Claimant recalled waking up in his hallway with vomit all over himself. He then showered, and with blurred vision and ringing in his ears, went back to sleep, and slept until the next evening. During this same period, Claimant testified that he had repeated bouts of vomiting. Despite his worsening nausea and other symptoms, Claimant did not call for medical assistance notwithstanding the expressed instruction from the ER to follow up there should his symptoms worsen or other concerns arise.

12. Claimant attempted to return to work on Wednesday, October 1, 2014, but had problems performing his job. According to Claimant he had difficulty holding wrenches, hammers, welding leads, etc. He also reportedly was experiencing memory problems and nightmares. Per Claimant, he felt "locked up." He experienced similar symptoms the next day so was assigned different job duties at the caster. Claimant reportedly had to climb 85 steps in this position, which caused difficulty with breathing.

13. Claimant testified that he complained about his ongoing symptoms to the on-site

nurse evaluator, Sally Stark. Claimant was adamant about having his ongoing symptoms addressed. He wanted to see a "real doctor." According to Claimant, Ms. Stark's response was to give him aspirin, BioFreeze and BenGay. Claimant felt that he had been exposed to heavy metals and other particulates that were poisoning him and causing lock jaw. On October 20, 2014, Claimant reported to the on-site medical clinic for a pulmonary function test so he could be fitted for a respirator. A note for his encounter with Nurse Stark on this date reflects that Claimant wanted a referral to a pulmonologist for a lung biopsy. When Nurse Stark raised the risks associated with a lung biopsy and instead suggested blood testing for heavy metals, Claimant reported that he did not trust the company, suggesting that Respondent-Employer would manipulate the results. Nurse Stark called the medical director for the on-site medical clinic to discuss Claimant's request for a lung biopsy and later Claimant with the outcome of her conversation with Dr. Goren, purportedly informing Claimant that no one would do the requested biopsy given the nature of the exposure and the risks associated with the procedure.

14. On October 24, 2014, Claimant appeared in Respondent-Employer's medical clinic where he was attended to by Nurse Stark. According to a note from this encounter, Claimant appeared psychologically compromised. His speech was pressured and erratic, he was pale, his hands were shaking and he was rocking back and forth in his chair. After discussing the situation with co-employee Kyle Billings and John Sabat, Nurse Stark concluded that Claimant presented a danger to himself and others and that he should be transported to the hospital for further evaluation. An ambulance was summoned and when the emergency medical technicians arrived, they spoke with Claimant. The EMT's agreed that Claimant should be evaluated and asked him to lie down on a stretcher for transport to the hospital. Claimant refused prompting a call to the Sheriff's office. Upon the deputy sheriff's arrival, Claimant agreed to proceed to the hospital as long as he was able to drive his car. Claimant was followed to the hospital by the deputy. Claimant was evaluated in the ER after which it was felt that Claimant should be evaluated by a psychiatrist. Regardless, Claimant was provided with a release to return to work.

15. Claimant left the ER and returned to the mill where he contacted Dave Ryder his supervisor who refused to accept the release paperwork from the hospital and had him escorted off the property. His electronic access to the mill's property was then cut off pending a psychological fitness for duty evaluation.

16. Claimant then testified that he submitted a one-time change of physician form to Nurse Stark, as his treating provider, but Nurse Stark did not act upon it. Consequently, Claimant referred himself to Dr. Michael Dallenbach for treatment. Dr. Dallenbach subsequently evaluated Claimant on May 6, 2015. The record evidence supports that Claimant submitted a "Notice of One-Time Change of Physician & Authorization for Release of Medical Information form to Ms. Stark on November 4, 2014.

17. Claimant was also evaluated by Dr. Robert Kleinman on November 4, 2014 for

purposes of assessing his psychological status and fitness for duty. As part of the history surrounding the explosion, Claimant specifically denied any loss of consciousness to Dr. Klienman. Claimant told Dr. Kleinman that he was doing work repairing the rail when the machine exploded. Dr. Kleinman noted that Claimant believed the "company was trying to cover this up." Though Dr. Kleinman noted that Claimant's justification for his behavior when confronting NP Stark was that he "just wanted to see a doctor," Claimant mentioned nothing about ongoing head, neck, or shoulder pain. Dr. Kleinman noted that Claimant was alert to time, place, and person, and demonstrated no memory or concentration impairments. Dr. Kleinman administered the MMPI-2 evaluation. Based upon the test, Dr. Kleinman noted that "the client's conscious efforts to influence the outcome of the evaluation and to project an overly positive self-image...unrealistic claims of virtue, as shown in this profile, reflect conscious attempts to influence the outcome of the evaluation by giving the appearance of having extremely high moral virtue and honesty." Dr. Kleinman also reviewed a substantial number of prior medical and employment records. Dr. Kleinman concluded that "during the interview, and on psychological testing, [Claimant] misrepresents himself." Dr. Kleinman pointed out that the Claimant cannot be accepted as an accurate historian, and that he had a paranoid personality disorder. He was disqualified from work until he sought psychological assistance.

18. Claimant returned to John Dengler, a counselor whom he had treated with previously for the recommended psychological assistance. On December 22, 2014, Mr. Dengler opined that Claimant was psychologically ready to return to work; however, he was very concerned that Claimant had not been checked out medically since the day of the explosion. Dr. Dengler noted that Claimant had complained of headaches and neck, arm, and hand pain for the entire six weeks he had been seeing him. He noted the pain seemed to getting steadily worse, and Claimant was under the impression that he was prohibited from seeing any medical professional except for one ordered by the mill. Mr. Dengler stated, "I believe Rafael needs to be seen by a medical doctor as soon as possible to ascertain the extent of physical damage has been caused by the explosion. Until this is resolved, Rafael can be expected to experience anxiety of not knowing the extent of his injuries or his prognosis." Mr. Dengler also stated his concern that Claimant not knowing the details of his injuries could result in his accidentally causing further damage to his body.

19. On January 8, 2015 Dr. Charles Hanson noted that he was requested to see Claimant regarding a "work related acute neck injury", that occurred on September 28, 2014 when there was an explosion and he was thrown to the ground. Claimant reported that he thought he lost consciousness and upon "coming to", realized he was face up in darkness. Claimant continued by reporting that he was able to crawl to a doorway; however, in the process of crawling to the door, he "tumbled" down some stairs. Dr. Hanson noted that Claimant was taken by ambulance to the hospital; however, he was not treated for any neck related injury. Over the next couple days, Claimant became aware of gradually and progressively worsening neck pain, which seemed to radiate out over the superior aspect of his right shoulder, down the posterior aspect of the upper arm and volar radial aspect of the forearm to the dorsal aspect of

the thumb, second and third fingers. Also, he became aware of constant headaches, a bump in the right posterolateral paracervical area, dizziness, nausea and sensitivity to light. Dr. Hanson's review of systems revealed eye pain, nausea, neck pain, stiffness, numbness, paresthesias, weakness, and depression. Despite being depressed, Claimant demonstrated no anxiety or confusion. On examination of Claimant's neck, Claimant had tenderness in the right posterior paracervical and upper trapezius areas, limitation in flexion, marked limitation of extension, moderate limitation of lateral bending and moderate limitation of rotation. Claimant's right shoulder had giveaway weakness in all directions. Claimant also had giveaway weakness of all muscle groups and altered sensation of the entire right upper extremity in a global distribution. Dr. Hanson reviewed Claimant's cervical spine x-rays, and reported that they showed straightening of the cervical spine, as well as narrowing of the disc space at C4-5, C5-6, C6-7, and C7-8, with hypertrophic spurring. Right shoulder x-rays revealed hypertrophic spurring along the clavicular portion of the acromioclavicular joint, and some narrowing of the subacromial space with abduction. Dr. Hanson reported his principal diagnoses as: 1) Preexisting mild to moderate degenerative disc disease at the C4-5 level and moderate degenerative disc disease at the C5-6 and C6-7 levels; 2) Approximately 3 1/3 months post work related explosion resulting in a couple of injuries including an acute neck injury; 3) Persistent posttraumatic right posterior paracervical pain which radiates out over the superior aspect of the shoulder, down posterior aspect of the upper arm and volar radial aspect of the forearm to the dorsal aspect of the thumb, second and third fingers in association with dizziness, nausea, fairly constant headaches, sensitivities to light and weakness of the right arm, probably due to acute cervical sprain/strain superimposed upon problem #1. Dr. Hanson requested an MRI of Claimant's neck, as well as his shoulder, because he questioned whether Claimant's pain was radiating solely from the neck, or if there was also some from the shoulder. Per Dr. Hanson, Claimant's work status would be as determined by the medical department at Evraz.

20. An MRI of Claimant's right shoulder, taken on January 16, 2015, showed chronic rotator cuff tendinosis with partial-thickness tears; chronic hypertrophic change of the AC joint with rounded undersurface osteophytes and fluid in the joint; chondral surface wear of the glenohumeral joint; chronic enthesopathic changes at the rotator cuff insertion and bicipital groove; and, trace fluid in the subacromial-subdeltoid bursa. Dr. Hanson reviewed the right shoulder MRI. He concluded on January 26, 2015, that the right shoulder pathology preexisted the work-place event.

21. An MRI of Claimant's cervical spine, also taken on January 16, 2015, revealed chronic central disc osteophyte complex at C2-3. At C3-4 there was a broad-based central disc osteophyte complex, resulting in central canal narrowing. There was also bilateral facet hypertrophy. At C4-5, there was a smooth posterior disc osteophyte complex, resulting in central canal narrowing, as well as facet and uncovertebral joint hypertrophy resulting in chronic bilateral neural foraminal narrowing. At C5-6 there was minimal posterior disc osteophyte complex resulting in central canal narrowing, as well as facet and uncovertebral joint hypertrophy resulting in moderate bilateral neural foraminal stenosis. At C6-7 there was a small posterior disc osteophyte complex resulting in central canal narrowing, as well as facet and uncovertebral joint hypertrophy

with bilateral neural foraminal narrowing. Dr. Hanson reviewed the right cervical MRI, and concluded on January 26, 2015, that the cervical spine pathology pre-existed the work-place event.

22. On January 27, 2015 Dr. Robert Kleinman reported that Claimant was cleared to return to work; however, Claimant did not return to work until February 15, 2015. In his report following a repeat fitness for duty evaluation, Dr. Klienman noted that the objective finding he had observed previously had remitted. Dr. Klienman did not reaffirm that Claimant had a paranoid personality disorder.

23. On January 21, 2015 Dr. Jeffrey Schwartz performed an independent medical examination (IME) to assess Claimant's pulmonary/respiratory status. During this IME, Claimant reported that he was "doing repair work when a nearby machine exploded. He estimated the machine that exploded was approximately 25 feet away from where he was working. This explosion knocked him out. When he awoke, he was covered in metal dust, which he thought came from the above rafters and beams that had collected dust over the years. He described a "cloud of dust" in the work area and he awoke coughing up dust. He stated he had to crawl out of his work area and fell down stairs." Although he reported that he was rendered unconscious, Dr. Schwartz was unable to find "documentation of loss of consciousness in the reports from the two practitioners [Claimant] saw on 09/28/2014." Dr. Schwartz found Claimant's exam "unremarkable." Both spirometry and a methacholine challenge demonstrated normal results and showed he had no evidence of hyper-active airways." Consequently, given the duration of claimant's exposure and his normal spirometry and negative methacholine challenge test, Dr. Schwartz opined that Claimant did not have reactive airways dysfunction syndrome (RADS). He also noted that "the cause of his shortness of breath with exertion is unclear given his normal breathing tests, normal chest x-ray, normal exam and normal oxygen levels." Dr. Schwartz found no evidence of a long term respiratory injury due to Claimant's exposure to dust on September 28, 2014. Rather, Dr. Schwartz opined that Claimant's exposure "would have caused a temporary irritation of his lungs that would have resolved within 1-4 weeks after his exposure."

24. On February 23, 2015 Dr. Charles Hanson reported that Claimant had reached maximum medical improvement on February 12, 2015.

25. On March 2, 2015 Dr. Charles Hanson noted that Claimant reported increased neck and right shoulder pain since using his home cervical traction device. Claimant reported increased tightness over the posterior aspect of his neck as well as more frequent tingling which extended from the right lateral aspect of his neck, down the posterior aspect of his upper arm, down the radial and volar aspect of his forearm and into his thumb, 2nd and 3rd fingers. Also, since using the traction unit, Claimant reported experiencing the spontaneous onset of intermittent shocking sensations over the palmer aspect of his left thumb distal phalange. Further, movement of Claimant's neck purportedly increased his pain, although Dr. Hanson noted what he described as "over reactive guarding" and limitation of cervical range of motion.

26. During the March 2, 2015 appointment, Claimant asked Dr. Hanson if he would place him on light duty, because he was having extreme difficulty performing his job at regular duty. Dr. Hanson responded that regular duty would be "therapeutic." Claimant explained the struggles he was having at work, and that he did not feel safe because of the limitations he had as a result of his injuries. Dr. Hanson stated, "From my standpoint, you can perform your regular duties." Claimant advised Dr. Hanson that he felt he was putting him in danger. Upon leaving Dr. Hanson's office, Claimant was overheard to call Dr. Hanson a "corporate whore" noting further that he had a "greasy hand." At hearing Claimant, first denied than admitted, calling Dr. Hanson a "corporate whore" and a "quack," referring to people who take money from a company, with no justification.

27. On May 6, 2015 Dr. Michael Dallenbach examined claimant for the first time since the explosion occurred. Dr. Dallenbach noted that Claimant was injured in an explosion on September 28, 2014. Dr. Dallenbach documented the following history concerning the event: "[Claimant] states that he was in the process of welding when there was a sudden explosion, and he was thrown across the room into a metal wall and, although he could not recall the exact mechanism of injury, he felt that he briefly lost consciousness. He was covered with an (sic) inhaled dust because the first thing that he remembers was not being able to catch his breath and coughing. When he was finally able to get his wits, he remembers getting to his feet and running for stairs and in the process of trying to escape the area, he tripped and fell down the stairs, and although, once again, he cannot recall the exact mechanism of injury, felt that he may have landed on his right shoulder." Dr. Dallenbach noted Claimant to be alert and oriented to person, place, time and situation. His affect was documented as being within normal limits and he was "quite affable throughout the entire process."

28. On examination, Claimant's cervical active range of motion was significantly diminished in all planes. There was significant hypertonicity in the bilateral cervical and upper thoracic paraspinals and bilateral cervicotrapezius musculature. Claimant was tender at the cervical facet joints bilaterally at C3-4, C4-5, C5-6, and C6-7. There was decreased light touch sensation through the C7 and C8 dermatomes. Both active and passive range of motion of the right shoulder was diminished relative to the left. There was an impingement sign. Claimant was tender at the right acromioclavicular joint. Strength at the right shoulder was 4/5 relative to the left with the exception of external rotation which was 4-/5 relative to the left. There was swelling and tenderness over the biceps tendon. Claimant demonstrated crepitus at the glenohumeral joint. Dr. Dallenbach reported his assessment as: Questionable postconcussive syndrome; cervicogenic headaches; cervical strain; cervical spondylosis; right upper extremity radiculopathy; right shoulder impingement; questionable rotator cuff tear; bilateral tinnitus; questionable benign paroxysmal positional vertigo. Dr. Dallenbach stated, "Within a reasonable degree of medical probability, the aforementioned diagnoses are secondary to the clinical sequela of Rafael's work-related injury 09/28/2014." Dr. Dallenbach recommended that the following should be considered: seven view radiographic series of the cervical spine to rule out instability of the cervical spine; MRI of the brain; neuropsychological evaluation; physiatry referral; MRI arthrogram of the

right shoulder to rule out rotator cuff and/or labral pathology; and, physical therapy for strength, endurance, flexibility and coordination.

29. On June 4, 2015 Dr. Eric Ridings evaluated Claimant at the request of Respondent-Employer. Claimant reported to Dr. Ridings that he was 20 feet away from the explosion when it occurred, that he awakened from a loss of consciousness to find the room so dark with dust that it was "pitch back" and that he "couldn't see [his] hand in front of his face." According to Claimant's history to Dr. Ridings, he took a deep breath when he woke inhaling dust, after which he "crawled to the end of the railing and then went down a set of stairs" by feel. Claimant reported that he lost his footing and 'tumbled down' approximately the last seven steps of the stairs." Again Claimant did not mention any complaints concerning his head, neck or right arm during Dr. Ridings questioning. Physical examination noted Claimant's cognition to be "intact to conversation and history taking. There were not apparent speech or language deficits noted. Although Dr. Ridings completed a physical examination, he did not complete the assessment portion of his report. Rather, he ended his report with a section entitled "Discussion Notes to Self. Consequently, Dr. Ridings was asked to complete the report by providing a formal statement regarding his findings and opinions.

30. Dr. Ridings completed the report by providing an addendum to the June 4, 2015 report on August 23, 2015. In his addendum, Dr. Ridings notes that he was provided with additional materials to review, including employer records and the deposition transcript of Dr. Dallenbach. Following review of these materials, Dr. Ridings summarized the physical examination findings of June 4, 2015 as suggestive of "right shoulder impingement and altered sensation based upon the subjective reports of Claimant. However, because Claimant was an unreliable historian and his sensory complaints "nondermatonal", Dr. Ridings he questioned the findings on examination. Moreover, Dr. Ridings found the opinions expressed by Dr. Dallenbach "entirely unconvincing" primarily because Dr. Dallenbach relied upon the history provided by Claimant, which he (Dr. Ridings) noted to be inconsistent and contradicted by multiple medical records. According to Dr. Ridings, Claimant "inhaled some dust after the explosion which caused him to cough, but which did not result in any ongoing symptoms." Per Dr. Ridings, Claimant "did not sustain any injury to his neck or right upper extremity or other parts of his body in the incident of 09-28-14."

31. On July 30, 2015 Dr. Charles Hanson recommended that Claimant be seen by a neurologist and/or spine surgeon.

32. On October 28, 2015 Micah Johnson, PA, of Parkview Neurosurgery, noted that Claimant complained of neck pain. He noted that Claimant was involved in an explosion and was thrown back injuring his neck. The pain was on the right side of Claimant's neck, radiating into the trap, shoulder and down the right arm. Also up the back of his head to the eye area causing headaches. Claimant complained of dizziness on occasion. Examination of the cervical spine revealed tenderness to palpation diffusely in the paravertebral musculature. Claimant had limited range of motion secondary to pain. The trapezius and scalene muscles were tender to palpation.

Claimant also had tenderness to palpation in the paravertebral musculature in the lumbar spine. Mr. Johnson reported his assessment as cervical radiculopathy and cervicalgia. He stated, "Mr. Rodriguez presents with the above history and found to have symptoms it (sic) may be attributed to the pathologies seen and described in great detail from cervical spine MRI which was reviewed by myself and Dr. Murad." In order to assess whether Claimant's symptoms were emendating from the pathologies seen on MRI, an EMG study was recommended.

33. Claimant was referred, by Respondent-Employer as part of the claimed head injury, for a neuropsychological evaluation by Kevin Reilly, Ph.D. Dr. Kevin Reilly, a licensed clinical psychologist and clinical neurologist, attempted to conduct a neuropsychological evaluation on September 15, 2015. According to Dr. Reilly's report, Claimant demonstrated defensive, obstructive and passive aggressive behavior during the interview and testing procedures employed. Testing was incomplete and that which was took about 300% more time than was usually required for the assessment given. He noted that the Neuropsychological Assessment Battery could not be administered in it's entirely because of Claimant's unreliable performance and that his results were similar to Dr. Kleinman's when he evaluated Claimant. Dr. Reilly noted that the MMPI-2-RF he administered showed the Claimant to be malingering with symptom magnification. Ultimately Dr. Reilly opined "[t]here are no indications of a concussion or head injury in the medical records. If there was a head injury, it would have been documented." Dr. Reilly concluded "there is no objective medical evidence to support Mr. Rodriguez's head injury claims." He emphasized that "You cannot rely upon the patient's self-report as accurate" because there is strong evidence of exaggeration, bias, and a behavioral presentation indicating strong secondary gain motives.

34. Claimant undertook the recommended EMG study on December 22, 2015. The test revealed no cervical radicular pain. Rather, the test revealed findings of "mild slowing of the right median potential consistent with mild right carpal tunnel syndrome.

35. On December 30, 2015, Claimant was evaluated by Dr. Jose Lafosse, Ph.D. at the request of his attorney. Dr. Lafosse was provided the following history concerning the event:

> [Claimant had started working a 12-hour shift at 7 am and around mid-afternoon he was preparing to straighten out some railing and weld it back together. At the time he was running a portable machine and heard it running low on fuel, so he started pulling out welding leads to connect them to a stationary machine when there was a suddenly a loud explosion about 40-60 feet away that threw him back against the machinery. He recalls regaining awareness and hearing people calling him on the radio. He took a deep breath and inhaled a lot of dust, which he reports to have actually been small metal particles that had accumulated in the rafters of the building over many years that were shaken loose in the explosion. He states that the dust was so thick that he couldn't see his hand in front of his face so he started crawling. He didn't know what happened and was afraid. He

eventually found a stairwell and tumbled down the stairs from the second floor to the first, banging his head and right shoulder as he tumbled.

36. Dr. Lafosse opined that Claimant's "current cognitive functioning is generally intact." According to Dr. Lafosse, Claimant's Glascow Coma Scale (GCS) scores in the hospital immediately after the accident supported a conclusion that he would have experienced "nothing more severe than a mild, uncomplicated brain injury that "may" have resulted in a "concussion." Dr. Lafosse concluded that Claimant's "memory difficulties are more likely attributable to significant symptoms of depression and anxiety" rather than any "cognitive problems related to his work-related accident." Dr. Lafosse also stated that there was no strong support for the conclusion that Claimant has paranoid personality disorder. He reported that Claimant does not demonstrate distrust and suspiciousness of other such that their motives are interpreted as malevolent as an enduring pattern that is inflexible and pervasive across a broad range of personal and social situations. Nor do his behaviors appear to be generally withdrawn, cold, suspicious, or irrational. He stated, "While he does show some distrust and suspiciousness, it is directed toward his employer and those with financial connections to his employer rather than pervasive across the board range of personal and social situations. The suspicions that individuals with paranoid personality disorder harbor are unjustified, but those of Mr. Rodriguez appear grounded in specific experiences with his employer over several years that at face value sound reasonable." Dr. Lafosse also stated that there is no evidence to suggest that there is a pattern of distrust and suspiciousness that is stable and of long duration, with an onset that can be traced back at least to adolescence or early adulthood – another key component of paranoid personality disorder and other personality disorders in general. Dr. Lafosse stated, "In fact, the client's self-reported history runs counter to what one would expect in someone with paranoid personality disorder."

37. In his deposition, taken on July 6, 2015, Dr. Michael Dallenbach testified within a reasonable degree of medical probability, that based upon Claimant's history and mechanism of injury, all of his conditions were caused by or aggravated by the September 28, 2014 explosion he was involved in at Evraz. (Depo. pgs. 22-23, lines 18-25 & 1-3; pg. 44, lines 12-18) (Exhibit 14).

38. Dr. Dallenbach testified that he absolutely believed that Claimant was a credible patient. (Depo. pg. 103, lines 15-24) (Exhibit 14)

39. Dr. Dallenbach testified that Claimant's reported symptoms of nausea, vomiting and dizziness the days following the explosion could be a sign of respiratory difficulty, or they could be a sign of closed head injury. He stated that those symptoms would be consistent with the effects of an explosion, and being thrown backward, having the neck hyperextended. He also stated that the concussive dispersement of energy caused by an explosion could have certainly played a role. (Depo. pgs. 104-105, lines 1-25 & 1) (Exhibit 14)

40. Dr. Dallenbach testified that the patient's trust in a provider is important because

the patient is presenting with problems and questions that he is asking the provider to help find the answers to. (Depo. pg. 105, lines 13-19) (Exhibit 14)

41. Dr. Dallenbach testified that he used to be the primary care physician at Evraz (Rocky Mountain), but that he was terminated because they weren't satisfied with the care that he was providing. He stated, "Let me just say first and foremost, I'm glad they fired me...I'm glad they fired me because I felt they wanted me to put employees in positions that I didn't feel they were capable of functioning in safely." He testified that they were asking him to send them back to work to specific tasks before they were able to safely do so. It was his understanding that they wanted him to make decisions based on the company's interests. (Depo. pgs. 96-97, lines 23-25 & 1-2 & pgs. 97-98, lines 21-25 & 1-20) (Exhibit 14)

42. During cross examination, Dr. Dallenbach conceded that he did not know how far Claimant was from the blast. His understanding of the incident causing Claimant's alleged injuries was that Claimant was standing over a pipe, welding when something ignited and an explosion occurred in close proximity to Claimant's chest. Dr. Dallenbach described the details surrounding the distance from the explosion as well as what exploded as minutia, admitting that all he had documented was that Claimant was in the "process of welding." Based upon the evidence presented, the ALJ is persuaded that Dr. Dallenbach had only a rudimentary understanding of the explosion, including the cause and type of the blast and the distance Claimant was from the explosion. Consequently, the ALJ finds Dr. Dallenbach's causation opinions regarding Claimant's alleged injuries unpursuasive. Nonetheless, Dr. Dallenbach understood Claimant to be in the "process" of welding, which the ALJ finds probable given the testimony of Joe Gutierrez.

43. Dr. Dallenbach also agreed during cross examination that the findings on the right shoulder MRI were consistent with degenerative change. He noted that the right shoulder MRI demonstrated a small amount of joint fluid, which could be acute or chronic. Tr. 91. He noted that the joint fluid, which is an inflammatory process, would not arise a month after an acute injury to the shoulder. Depo 91-92. Based upon the evidence presented, including Dr. Ridings' opinion, which is consistent with the medical evidence, coupled with Dr. Dallenbach's observations/testimony, the ALJ finds that the findings on Claimant's right shoulder MRI are likely chronic in nature, pre-existed the blast and are unrelated to the explosion occurring September 28, 2014. Crediting the opinions of Dr. Ridings, the ALJ finds it unlikely that Claimant sustained an acute right shoulder injury in the explosion occurring September 28, 2014.

44. Charles Fink a veteran millwright in the same department as Claimant testified that when he heard the explosion, he also observed debris and smoke billowing out of the building entrance from his location 70-80 feet away. When he attempted to enter the building he could only get 50 to 70 feet inside due to limited visibility. Mr. Fink testified that he tried to go into the building four to five times but could not see anything and he tried to use his two-way radio to summon Claimant five or six times. He testified that it is not unusual for the railings to be damaged by heavy equipment used in the

plant. He testified that the Claimant in his estimation would have been 50 to 60 feet from the epicenter of the explosion and that the distance from the explosion to the steel making pulpit was approximately 8 feet. Lastly, Mr. Fink testified that Claimant did not want to have anything to do with the area involved in the explosion when he returned to work shortly after the event. According to Mr. Fink, Claimant appeared "scared" and "messed up." The ALJ infers from Mr. Fink's testimony that it was challenging from a psychological perspective for Claimant to enter and work in the area of the blast shortly after it occurred.

45. Christian Carrillo, a steel maker with four (4) years of service testified that he was in the pulpit when the explosion occurred. The pulpit is protected by 3 panes of safety glass.[1] According to Mr. Carrillo, the north ladle exploded and the force expelled was so great that it shattered the outer pane of safety glass; cracked the middle pane and bowed in the third pane into the pulpit room itself. The explosion also caused the north pulpit door to fly open. Mr. Carrillo testified that from behind the glass he could not see more than ten (10) feet in front of himself even though he was in an enclosed area. He went onto testify that molten steel splashed out of the ladle and the manifold hood/power hood was destroyed. He estimated that it took was 5-10 minutes before he saw headlights from rescuers coming to guide him out of the pulpit. Mr. Carrillo testified that he saw Claimant as he was evacuating the building.

46. Joe Gutierrez testified that he is a 40 year veteran of the mill and was the VTD operator on the date of the explosion. Mr. Gutierrez was on the top level of the VTD in a "cover car" at the time of the explosion. He was performing a "pump down" on the pot of molten steel. He testified that the explosive impact was such that he "got knocked over and things went black." According to Mr. Gutierrez, "everything was falling down on top of me everywhere, I could not see. I could not see my hand in front of me." Following the explosion he testified that he was crawling on the floor trying to locate the doors that entered into the pulpit. He also testified that it took about 10 or 15 minutes of crawling because he could not see anything in front of him. Mr. Gutierrez testified that the blast was level with the second floor where Claimant was assigned to work. Mr. Gutierrez testified that when the explosion occurred or at least right before, the Claimant was actually welding as he could see sparks from Claimant's welding gun. Mr. Gutierrez, who was standing on the floor above Claimant, explained that "I'd see sparks coming up where he was filling." As noted in ¶ 2 above, the location Claimant was assigned to work was approximately 60 feet away from the LRF and behind the VTD

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47. Thaddeus Atencio, a 25 year employee of mill testified that on the date of the explosion, he had just pulled up to the "caster" in a truck when he heard the blast. He further testified that responded to the location of the blast and tried to help those trapped inside get out of the building from the east side. He testified that it was so dark from the explosion that he had to use the welding leads on Claimant's truck to try and guide him to Claimant's last known location. Mr. Atencio testified that he later observed Claimant sitting in the back of an ambulance getting oxygen. He also testified that

[1] According to Kyle Billings, the pulpit is protected by 3 panes of "explosion" rated safety glass.

Claimant attempted to climb out of the ambulance while gasping for air and vomiting. He felt Claimant appeared to be "disoriented."

48. George Lee, a maintenance electrician and a member of the safety committee with advanced first aid training mill testified that he was in the old mill wright shop about 80 yards south of the LRF and VTD when the explosion occurred. He responded to the location of the blast and observed the Claimant to be in "shock" and "disoriented." He testified that Claimant was having difficulty breathing, was grasping his chest and looked scared.

49. Kyle Billings, Respondent-Employer's Manager of Safety and Security testified that he was not on scene the day of the explosion and did not get there until the following morning at which time he started his investigation with management. He further testified that he did not take any photographs of the area around the explosion[2] nor did he personally interview any of the workers that were in the steel making building when the explosion occurred. He confirmed that the dimensions of the ladle were approximately 15 feet tall by 15 feet wide. The ladle itself weighs between 120-160 tons. He also testified that the LRF/VTD building was approximately 400 yards long and had not been cleaned in five (5) years and that there would have been significant dust and debris that had accumulated on the structural beams of the building. He confirmed that the railings in this area of the facility are regularly damaged and require constant repair. His investigation concluded that "steel braided water hoses likely got ripped off during the hoods rotation" and injected an unknown quantity of water into the super heated molten steel and slag. He also confirmed that the steel making building does not have any mechanical ventilation system to remove smoke and airborne particles in an emergency.

50. Josh Patterson, an EMT who responded to the scene of the explosion testified that he saw 15-20 people outside of the building upon arrival. He testified that he requested that Nurse Stark proceed to the area due to the large number of potential patients to triage. According to Mr. Patterson, he made contact with Claimant who had to be retrieved from and brought to the ambulance from the shower house. Mr. Patterson has received basic training in head injuries testifying that Claimant was alert and oriented x4, i.e. to person, place, time and event. Claimant did not request treatment for his head, nor did he appear in respiratory distress. He drove the ambulance to St. Mary Corwin while Nurse Stark attended Claimant while in route. According to Mr. Patterson, there were no changes in Claimant's condition to the hospital and that he ran "normal", i.e. without code.

51. Scott Bond an EMT/Firefighter with four (4) years of service testified that he felt and heard the explosion from approximately one (1) mile away. He then drove the fire engine to the scene. He was the second emergency responder to get there. He observed 12 to 15 people outside. He entered the building with "bunker gear" and a breathing apparatus and testified that visibility for him was less than 10 to 15 feet. He then attempted to lead people outside of the building. He testified that all of those

[2] Photographs had been taken earlier after the explosion by another management team member.

individuals in the building were covered, "head to toe" with dust due to the explosion. He testified that George Lee was the person that he believed retrieved Claimant from the shower house and brought him back to the ambulance.

52. Claimant was recalled in rebuttal and testified that he was near the southwest corner of the ladle refining furnace (LRF) when this occurred and that he was approximately 50 to 60 feet away from the epicenter of the explosion. He specifically recalled being awakened by someone calling his radio with his head up against sections of parallel pipes.

53. Robert Martin, a mill electrical technician with nine (9) years of service testified on rebuttal that he heard and felt a huge canon like boom approximately two (2) football fields away from his original location. Mr. Martin testified that he proceeded to the scene of the explosion and when he attempted to enter the building, he testified that he could not see "his hand in front of his face" and that it was "pitch black". He testified that he did make radio contact with Claimant who stated "I can't breathe". He later observed Claimant, testifying that Claimant appeared like a "bronze statue" covered in dust and that he "did not know what the hell he was doing" and appeared "scared and confused."

54. Robert Fox was also called to testify in rebuttal. According to Mr. Fox, he was 150-200 yards to the south of the steel making building when he heard and felt the noise and concussion from the explosion. Mr. Fox testified that he found the Claimant in the ambulance triage area 15 minutes after the explosion. He spoke with the Claimant for approximately one minute while he was in the ambulance. Mr. Fox did not observe any blood on Claimant's head. During the minute Mr. Fox spoke with Claimant, he appeared dazed. Mr. Fox described his appearance as "shell shocked." Claimant did not tell Mr. Fox that he hurt his neck, lost consciousness, or fell down a flight of stairs.

55. Mike Rodriguez testified in rebuttal. Mr. Rodriquez is a MMT with 22 years of service. He also testified that he is the past union president, serving in that capacity from 2009 to 2015. He is a longtime friend of Claimant's and confirmed that he spoke with the Claimant within a day or two after the explosion. According to Mr. Rodriquez, Claimant called him to express his fear about having ingested heavy metals following the explosion and his dissatisfaction with the delay in receiving medical care from the mills onsite clinic. Mr. Rodriquez testified he contacted the HR Department, specifically John Sabat six times and also called Nurse Stark after problems arose between Claimant and Nurse Stark. According to Mr. Rodriquez, he was trying to resolve a the conflict between Claimant and Nurse Stark informally; he took no official action and was acting as a "friend" outside of his official capacity as the union president. While he testified that he was contacting the employer about Claimant, he could not recall any specific dates or details of these conversations. Nor did he provide any written evidence of his conversations with Mr. Sabat or Nurse Stark. According to Mr. Rodriquez, Nurse Stark "basically hung . . . up the phone on me."

56. Although he professed concern for Claimant because of Claimant's perceived delay in treatment, Mr. Rodriquez admitted on cross examination that he did not advise Claimant to go to his personal doctor or the ER, despite knowing that an injured worker could go the emergency room for a claimed workers' compensation injury. Further, as noted above, Mr. Rodriguez took no official action as the Union president to assist Claimant with the conflict he was purportedly having with Nurse Stark. He filed no grievance against the Employer. Based upon Mr. Rodriquez' testimony that he was acting as a "friend" outside of his official capacity on Claimant's assertion that his medical care was being delayed, the ALJ is not surprised that Nurse Stark may have refused to discuss the situation concerning Claimant's medical care with Mr. Rodriquez.

57. Kyle Billings testified on surrebuttal that union reps can contact HR regarding issues concerning medical care but that in the case of such contact, HR will reach out to him and he was never made aware of any efforts on the part of Mr. Rodriquez to address problems Claimant was allegedly having in obtaining medical treatment.[3]

58. The evidence presented persuades the ALJ that the magnitude of the explosion occurring on September 28, 2014 was considerable and sufficient to cause an extensive amount of settled dust and particulate matter to disperse into the air. The ALJ is also convinced, based upon the opinions of Dr. Schwartz, that this dust likely irritated Claimant's lungs resulting in his immediate need for treatment in the ER at St. Mary Corwin Hospital. Consequently, the ALJ finds that Claimant's exposure to dust and other particulate matter caused a compensable injury to his lungs. Nonetheless, the ALJ is not persuaded that the Claimant suffers from RADS, based upon the opinions of Dr. Schwartz and the results of his spirometry and methacholine challenge testing.

59. Given the quantity of dust and particulate matter to which Claimant was exposed, the ALJ finds the treatment he required both on site and subsequently at St. Mary Corwin ER reasonable, necessary and related to the September 28, 2014 explosion.

60. Based upon the totality of the evidence presented, the ALJ finds Claimant's assertion that he suffered injuries to his neck and right shoulder as well as a closed head injury unpersuasive. Careful review of the evidence presented persuades the ALJ that Claimant did not begin reporting that he was blown into the VTD and lost consciousness until Claimant was disqualified from work after his confrontation with Nurse Stark and Dave Ryder on October 24, 2014. Claimant's reported history to the various providers who have treated and/or evaluated him are replete with inconsistencies. Claimant variously reported that he crawled to the stairway, while on other occasions he reported he got to his feet and either ran or stumbled to the stairway where he staggered down bumping into the railing and falling down the last seven stairs. Moreover, the reports of claimant's location at the time of the explosion have changed over time. On one hand, Dr. Dallenbach documented that Claimant reported

[3] Mr. Billings testified that out of the 124 injuries last year, he did not receive any real complaints about delayed care. Tr. 290. Mr. Billings explained that, if the Employer received complaints, they would investigate the complaints and refer the individual to an outside clinic. Tr. 291.

that he was in the process of welding, while at hearing Claimant testified that he was laying out welding cables when the explosion occurred. When the Claimant went to Dr. Charles Hanson on January 8, 2015, with his friend Stephen Fischer (who had been recently terminated from the Employer), Claimant told Dr. Hanson that a couple days after the event his neck and right shoulder became progressively worse. Claimant told Dr. Hanson of weakness in the right arm. He also attributed a bump on his cervical spine to the event, but that bump had been on the Claimant's neck for years. He also complained of dizziness and blurred vision. These wide array of symptoms were not in the prior medical records of the EMT who attended to Claimant on scene; nor where they mentioned in the reports of Dr. Carlis. The ALJ finds it highly improbable that trained medical professionals, including NP Stark, EMT Patterson or Dr. Carlis would neglect to include Claimant's other problems if Claimant disclosed them. EMT Patterson noted that Claimant was alert and oriented prior to admission to St. Mary Corwin Emergency Room. His observations and ambulance record are consistent with the September 28, 2014, ER records of Dr. Carlis, and the subsequent records of other providers, including Dr. Lafosse who opined that Claimant's cognition was essentially intact. Finally, it is reasonable to infer that a person who either was blown into a wall with exposed piping or who reportedly staggered and/or fell down seven metal stairs, without a hard hat while striking various body parts on the way down, allegedly landing with sufficient force to cause signs of internal impingement would have at least some evidence of trauma to the head/body. Yet, the ER "Site of Trauma" diagram documents very clearly that the Claimant had "no physical injuries." What is lacking is the medical record submitted is any indication that the Claimant had any head, neck or shoulder injury from being blown backward into a wall or any cuts, bruises, abrasions or contusions from striking railing or from falling down a flight of metal stairs at the time of the explosion.

61. The ALJ credits the opinions of Dr. Klienman and Dr. Reilly to find that Claimant misrepresents himself and cannot be accepted as an accurate/reliable historian. The evidence presented convinces the ALJ that there are no objective indications of a concussion or head injury in this case and that Claimant's claims of head, neck and shoulder claims are likely exaggerated due to secondary gain motives. The contrary opinions of Dr. Lafosse are not persuasive. Indeed, Dr. Lafosse stated only that the explosion "may" have caused a concussion and that Claimant's memory problems are likely attributable to depression and anxiety. Even Dr. Dallenbach, when pressed, agreed that the Claimant was not a credible historian and that the history Claimant provided to him was "incongruous" with the histories contained in the medical records. Consequently, the ALJ rejects Dr. Lafosse's opinions as well as Dr. Dallenbach's opinion that Claimant is a credible patient. Rather, the ALJ finds that Claimant's history of injury to his head, neck and right shoulder is unreliable and contradicted by the more convincing opinions of Drs. Klienman, Reilly and Ridings.

62. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injuries to his head, neck or right shoulder in the industrial explosion of September 28, 2014. Accordingly, his claim for medical benefits to treat a

closed head injury and/or injuries to the cervical spine and right shoulder are denied and dismissed.

63. The totality of the evidence presented persuades the ALJ that Claimant's Inability to safely function in the work place, i.e. his "disqualification" from work arose out of considerable distrust and suspiciousness surrounding Respondent-Employer's motives rather than any compensable injury caused by the September 28, 2014 explosion. Although Dr. Lafosse disputes Dr. Klienman's diagnosis of a paranoid personality disorder, Claimant's distrust of Respondent-Employer is well documented. Claimant has expressed that he does not trust the company, does not trust individuals who work for the mill, including Nurse Stark, that Respondent-Employer will manipulate his lab results, suggesting that the mill is covering up/hiding something surrounding the explosion and the dust particles he was exposed to and that he is being set up. Indeed, Dr. Dengler documented that factors delaying psychological recovery include, Claimant's "fears of continued targeting and retribution upon returning to work" noting further that Claimant "[feels] that he's been targeted by management" since the explosion. Such belief is consistent with Dr. Klienman's notation that "[t]here is a pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent" which, as documented by Dr. Klienman, "interferes with his ability to get along at work." The evidence presented does not persuade the ALJ that Claimant lost time and therefore wages secondary to his lung injury. Moreover, because the undersigned ALJ finds that Claimant's inability to work from October 25, 2015 through February 15, 2016 was unrelated to a compensable injury attributable to the September 28, 2014 explosion, Claimant's claim for temporary total disability benefits for the aforementioned time period is denied and dismissed.

64. Wage records submitted into evidence for the 52 week period extending from September 28, 2013 through September 28, 2014 establish that Claimant earned gross wages of $74,992.30. Consequently, the ALJ calculates Claimant's average weekly wage to be $1,440.81 ($74,992.30 ÷ 52 weeks= $1,440.81). The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his September 28, 2014 compensable work related lung injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* The Claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of*

Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979).* The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S.* A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

A. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). While the evidence presented clearly supports that Claimant was exposed to a precipitous amount of dust which likely irritated his lungs, his testimony regarding head, neck and right shoulder injuries is neither credible nor convincing. As found, the evidence presented supports a conclusion that the claimed head, neck and shoulder injuries are probably being driven by Claimant's inclination to misrepresent his condition for secondary gain. Moreover, when the various expert medical opinions surrounding Claimant's claimed head, neck and shoulder injuries are carefully analyzed against the evidence presented as a whole, including Claimant's pre-injury history and personality characteristics, the ALJ concludes that Dr. Klienman's, Dr. Reilly's and Ridings' opinions are more persuasive than those of Dr. Lafosse and Dr. Dallenbach.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

C. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is sufficient evidence to establish that Claimant's alleged lung injury occurred within the time and place limitation of his work as a MMT for Respondent-Employer and during an activity connected with that position, namely welding damaged safety railing. Consequently, the ALJ concludes that Claimant has met his burden to prove that his alleged lung injury occurred in the course and scope of his employment. Nonetheless, Claimant must still establish that his injury arose out of his employment related duties.

D. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2006; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

E. The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). As found here, Claimant's work duties require him to make repairs to Respondent-Employer's facility. While the ALJ is not persuaded that Claimant was blown into the VTD, lost consciousness and/or fell down seven stairs as he claims, there is little question that the explosion occurred, that Claimant is in the general vicinity of the blast, i.e. 60 feet away welding and that he was exposed to dust and other debris falling from the rafters of the mill. Per the credible and convincing opinion of Dr. Schwartz and incidentally Dr. Ridings, Claimant's exposure to this dust, more probably than not, irritated his lungs causing his need for treatment both on scene by Nurse Stark and EMT Patterson and subsequently in the ER by Dr. Carlis. Consequently, the ALJ concludes that a logical causal connection exists between Claimant's work duties, his lung irritation and his need for treatment. The lung injury is compensable. Conversely, there is insufficient objective evidence to substantiate that Claimant suffered any injury to his head, neck or right shoulder and his subjective reports of the same are not credible for the reasons cited above. Accordingly, claims for injuries to the head, neck and shoulder are denied and dismissed.

Medical Benefits

F. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S.

G. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a Claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury in the form of irritation of his lungs due to exposure and likely inhalation of dust and particulate matter. The evidence presented persuades the ALJ that this compensable lung "injury" is the proximate cause of Claimant's need for medical treatment, including his need for treatment in the ER at St. Mary Corwin. Taken in its entirety, the ALJ finds the evidentiary record to contain substantial evidence to support a conclusion that the explosion exposing Claimant to substantial dust occurring while Claimant's was performing his work duties was responsible for his post explosion symptoms, including his coughing and wheezing for which he received a breathing treatment. Consequently, the ALJ concludes that Claimant has established that his need for the treatment both at the scene and in the ER was causally related to his work-related dust exposure on September 28, 2014. Moreover, the totality of the evidence presented establishes that the care, received at the scene and in the ER was reasonable and necessary given Claimant's respiratory symptoms and the mechanism of injury. Consequently, the ALJ concludes that Respondents are liable for Claimant's care at St. Mary Corwin Hospital ER. As Claimant failed to establish that he sustained a compensable head, neck and/or right shoulder injury, this order does not address his entitlement to additional treatment for these alleged conditions further.

Change of Physician to Dr. Dallenbach

H. The employer is obliged to provide a physician willing to render treatment so long as it is reasonably necessary. *Tellez v. Teledyne Water Pik, I.C.A.O., W.C. No. 3-990-062 (March 24, 1992); aff'd., Teledyne Water Pik v. ICAO, Colo. App. No. 92CA0643, December 24, 1992 (not selected for publication).* Once respondents are on notice of a need for medical care, they are required to tender a physician willing to treat the Claimant based upon medical considerations alone, and not financial considerations. *Dodge v. Burns International Security, W.C. No. 3-935-989, I.C.A.O., December 10, 1993.* W.C.R.P. 8-1(C)(2) states, "If the employer designates an on-site health care facility, the employer must, within seven (7) business days following notice of an on the job injury, provide the injured worker with a designated provider list consistent with the provisions of rule 8-2. While the on-site health care facility shall be the initial authorized treating physician, the injured worker may thereafter change to a physician or corporate medical provider on the designated provider list if the injured worker complies with all statutory and rule requirements for the one-time change of physicians." See Sec. 8-43-404(5)(a)(I)(A), § 8-43-404(5)(a)(II)(B).

I. If the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing. W.C.R.P. 8-2(E). Here, the evidence presented supports Claimant's entitlement for a change of physician to Dr. Dallenbach. Respondent did not provide Claimant with a designated provider list after he complied with the procedural obligations necessary to secure a change to Dr. Dallenbach by completing and serving the required change of physician form to Nurse Stark, who took no further action concerning the request for several weeks until Claimant was referred by Respondent-Employer to Dr. Hanson. Consequently, the undersigned ALJ finds Respondent's suggestion that Claimant selected Dr. Hanson as the ATP in this case following his treatment with Onsite Innovations unpursuasive. Respondent cites no authority for their suggestion that Claimant is not entitled to such change because he was unable to timely schedule an appointment his the requested physician prior to seeing Dr. Hanson on January 8, 2015 and the undersigned ALJ is not aware of any authority holding that a claimant's inability to secure an appointment with the requested physician prior to seeing Respondents later selected physician negates change of physician request made weeks earlier. An ALJ has broad discretion in authorizing a change of physician so long as that decision is supported by substantial evidence. *Brenneman v. McDuff Electronics, I.C.A.O., W.C. No. 3-936-449, November 14, 1991.* The undersigned ALJ finds that such evidence exists in this case.

Temporary Disability Benefits

J. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM*

Molding, Inc. v. Stanberg, supra. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). As found here, Claimant failed to prove that a compensable injury caused his disability. Rather, Claimant "disability" was the direct consequence of a non-work related psychological condition/personality disorder manifesting as extreme distrust and suspiciousness surrounding Respondent-Employer that precluded him from safely discharging his work duties for employer from October 25, 2014 to February 15, 2015. Consequently, the claim for TTD benefits must be denied and dismissed.

K. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).*

L. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), give the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. An AWW calculation is designed to compensate for total temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity comes from the wage records submitted into evidence. The ALJ adopts Claimant's calculation of his average Weekly Wage (AWW) as that figure represents his average weekly earnings for 12 months prior to the September 28, 2014 compensable lung injury. Accordingly, the ALJ determines that Claimant's average weekly wage is $1,440.81. The ALJ concludes that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his compensable work related injury.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable lung injury as a direct consequence of the September 28, 2014 explosion.

2. Respondent shall pay for all reasonable, necessary and related medical Treatment resulting from the Claimants compensable lung injury, including but not limited to the care provided by Respondent-Employer and the providers at St. Mary Corwin.

3. Claimant's claim for injuries to his head, neck and right shoulder are denied and dismissed.

4. Claimant claim for medical benefits for treatment associated with his head, neck and right shoulder is denied and dismissed.

5. Claimant is entitled to a change of physician/ medical provider from Onsite Innovations and Dr. Hanson to Dr. Dallenbach.

6. Claimant's claim for TTD benefits for the time period extending from October 25, 2014 to February 15, 2015 is denied and dismissed.

7. Claimant's average weekly wage for purposes of this claim is $1,440.81

8. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 13, 2016

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 South Circle Drive, Suite 810, Colorado Springs, CO	
In the Matter of the Workers' Compensation Claim of: , Claimant, vs. , Employer, and Insurer, Respondents	□COURT USE ONLY □ CASE NUMBERS: WC 4-967-090-02 4-974-447-02
CORRECTED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	

A hearing in the above captioned matter was held before Administrative Law Judge ("ALJ") Richard M. Lamphere on December 9, 2015. The ALJ digitally recorded the proceeding in the Courtroom of the Office of Administrative Courts (OAC) in Colorado Springs between 9:20 and 11:30 AM. Due to time constraints, the December 9, 2015 hearing was continued to February 19, 2016. The proceeding continued to February 19, 2016 was also digitally recorded in the Courtroom of the Colorado Springs OAC between 9:05 and 10:50 AM. The hearings were held to address issues arising from two claims, which were consolidated for purposes of hearing only. A Division IME was conducted in W.C. No. 4-967-090 only; W.C. No. 4-974-447 is a fully contested claim.

Claimant was present for both hearings and represented by , Esq. Respondents were represented by , Esq. Claimant testified on her behalf. Respondents presented the hearing testimony of James Lindberg, M.D. and Edwin Baca, M.D. In lieu of live testimony, Respondents also lodged the transcripts of the February 4, 2016, evidentiary depositions of Jessica Lopez, Shannon Lemons, Rebecca Manuszak, and Aaron Griffen, Ph.D. Additionally, the parties' Hearing Exhibits (Respondents A-L and Claimant's 1-22) were admitted into evidence, without objection, at the outset of the hearing convened December 9, 2015.

At the conclusion of the February 19, 2016 hearing, the ALJ held the record open through March 7, 2016 to allow counsel time to submit position statements in lieu of closing argument. The parties' position statements were timely received by electronic transmission. The ALJ issued detailed findings of fact, conclusions of law and order on March 31, 2016. Respondents filed a motion for corrected order on April 20, 2016, to which claimant responded. The parties held a conference with the ALJ on May 6, 2016 regarding respondents' motion for corrected order. The ALJ determined additional briefing from the parties was necessary to decide respondents' motion for corrected order. Consequently, any duty to act on the March 31, 2016 order was stayed pending a ruling on respondents' motion for corrected order. Upon additional review, the ALJ grants respondents motion for corrected order and issues these amended findings of fact, conclusions of law and order. The March 31, 2016 Findings of fact, Conclusions of Law and Order are withdrawn, vacated and supplanted with this "Corrected Findings of Fact, Conclusions of Law and Order."

In this order, will be referred to as "Claimant"; will be referred to as "Employer" and will be referred to as "Insurer." All others shall be referred to by name.

Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2014); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3 and "Division IME" refers to Division Independent Medical Examination.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable left shoulder injury on November 12, 2014 as a result of an alleged slip and fall in Employer's parking lot.

II. Whether Claimant produced clear and convincing evidence to overcome Dr. Tyler's Division IME opinion that Claimant's left shoulder complaints were unrelated to the admitted November 4, 2014 workers' compensation claim.

III. Whether Respondents produced clear and convincing evidence to overcome Dr. Tyler's Division IME regarding Maximum Medical Improvement ("MMI") and impairment for her injury sustained on November 4, 2014. (Dr. Tyler is the Division IME for the November 4, 2014 claim only. Consequently, his opinions regarding the November 12, 2014 contested claim are not entitled to any special weight, since he was not the Division IME for that contested claim.)

IV. If Claimant overcame the Division IME regarding non-relatedness of the left shoulder complaints to the November 4, 2014 injury by clear and convincing evidence, or, proved by a preponderance of the evidence that she sustained a compensable injury to her left shoulder on November 12, 2014, whether Respondents are liable for treatment related expenses concerning the left shoulder, including but not limited to out-of-pocket expenses associated with Claimant's left shoulder surgery performed by Christopher Jones, M.D.

V. Whether Respondents have proven, by a preponderance of the evidence, that Claimant was responsible for the termination of her employment precluding her entitlement to temporary total disability (TTD) benefits.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Jessica Lopez, Shannon Lemons, Rebecca Manuszak, and Aaron Griffen, Ph.D., the ALJ enters the following findings of fact:

Claimant's November 4, 2014 Work Related Incident and Her Prior Medical History

1. Claimant worked for Employer from August of 2013 to June 26 of 2015 as an assistant principal.

2. Claimant testified and the persuasive documentary evidence supports that on November 4, 2014, she responded to an altercation involving some students and a security guard on the Employer's educational campus. While attempting to separate the combatants, Claimant was hit from behind and knocked to the floor along with one of the students who fell on Claimant's ankle. According to the security guard on scene, Claimant struck her head on the floor and lost consciousness for approximately thirty seconds. There is a lack of persuasive or credible evidence that Claimant injured her left shoulder as a direct result of the altercation.

3. Emergency medical technicians (EMT) were summoned to the scene and contacted Claimant who was, by the time EMT's arrived, sitting in a wheelchair. Claimant reported right ankle pain and a worsening headache. She specifically denied "dizziness, blurred vision, diplopia, chest pain, back pain, abdominal pain, pain in her right leg, left lower extremity, and bilateral upper extremities. Claimant was noted to have a Glasgow Coma Scale score of 15 and was alert and oriented to person, place, time and event. There is a lack of persuasive evidence that Claimant complained of or reported left shoulder symptoms to the EMT's responding to her injury on November 4, 2014. Claimant alleged she injured her left shoulder in the November 4, 2014 scuffle, but her testimony in this regard is not credible or persuasive.

4. After the scuffle on November 4, 2014, Claimant was transported to Penrose-St. Francis Hospital where she was evaluated in the Emergency Room (ER) by Dr. Christopher Johnson. Claimant's loss of consciousness was noted and it was documented further that she was "amnesic to the event." Claimant reported pain in the right eye, the head, right hip, right ankle and right foot. She again specifically denied any vomiting, diarrhea, altered mentation, numbness, tingling or weakness. Claimant was provided with an aircast for a "potential sprained ankle." It was specifically noted that it was "okay" for Claimant to bear weight. There is a lack of credible or persuasive evidence that Claimant complained of or reported left shoulder symptoms as a result of the November 4,

2014 scuffle while in the ER.

5. The ALJ finds the November 4, 2014 ER records to support the subsequent finding of Dr. Tyler, the Division IME that Claimant's left shoulder complaints are unrelated to the November 4, 2014 work injury. Rather, the ALJ interprets Dr. Tyler's DIME report to indicate that Claimant was "asymptomatic prior to her alleged November 12, 2014 fall in Employer's parking lot. Dr. Tyler determined treatment, including the need for surgery to the left shoulder, "would not have occurred" but for the acute trauma that Claimant sustained on November 12, 2014 as a consequence of the alleged fall. Dr. Tyler's opinion regarding the work relatedness of the left shoulder to the November 4, 2014 injury is unambiguous – the content of Dr. Tyler's report makes it clear that, in his opinion, the November 4, 2014 injury did not cause the left shoulder to become symptomatic. Rather, the left shoulder became symptomatic because of a subsequent fall on November 12, 2014.

6. Following her discharge from the ER on November 4, 2014, Claimant followed-up at Integrity Urgent Care (Integrity), Employers designated provider, on November 5, 2014. Again, the ALJ finds the content of these records to be consistent with the Division IME's finding that Claimant did not sustain an injury to her left shoulder as a result of the November 4, 2014 work injury. At Integrity, Claimant evaluated by Edwin Baca, M.D. Dr. Baca testified at hearing. He credibly testified he performed an "extensive" evaluation during Claimant's first visit on November 5, 2014. He reviewed Claimant's past medical history, evaluated all of her current bodily systems, obtained a history concerning the mechanism of injury (MOI) and performed a formal examination with treatment recommendations. Dr. Baca reported he had no difficulty speaking and communicating with Claimant at this appointment. During this visit, Claimant reported head, neck right hip, right knee, right foot and right ankle pain. Dr. Baca's findings on November 5, 2014 are consistent with the Dr. Tyler's Division IME opinion that the November 4, 2014 work injury did not result in injury to the left shoulder; the findings are consistent with Dr. Tyler's when he (Dr. Tyler) found Claimant's left shoulder was asymptomatic prior to the November 12, 2014 alleged slip and fall in her employer's parking lot. Claimant told Dr. Baca she had a "moderate" headache and "intermittent" vision changes. She also reported "mild" nausea and one episode of vomiting prior to her appointment; however, she denied "current dizziness, nausea, vision changes memory loss or confusion." She had moderate ankle pain and difficulty weight bearing and walking. Claimant was given a prescription for medications and provided with a "lace up" ankle brace and crutches which, according to a November 5, 2014 "Physicians Report of Workers' Compensation Injury", she was to use 100% of the time as she was instructed to engage in no weight bearing with the right leg. Dr. Baca testified throughout his care of Claimant, that he continued to evaluate and monitor her complaints/symptoms. Claimant had no complaints of left shoulder pain on November 5, 2014.

7. Dr. Baca testified that he performed a general examination of Claimant, with focus on the areas where she reported problems during his treatment of Claimant. He testified that he performed an examination of her head for any signs of abrasions, lacerations or trauma. Dr. Baca noted that he performed a “complete” neurological examination to determine whether Claimant had any signs or symptoms of concussion or post-concussive injury. Dr. Baca’s findings on November 5, 2014 and on subsequent examinations were negative for closed trauma to the head. There were no signs of concussion or post-concussive symptoms according to Dr. Baca.

8. On November 13, 2014, Claimant returned to Integrity on a “walk-in” basis. She was evaluated by Dr. Autumn Dean for complaints of intermittent dizziness and forgetfulness and well as shoulder pain which Claimant associated with nine days of crutch use. Contrary to earlier reports to paramedics, emergency room providers and Dr. Baca, Claimant testified that she told Dr. Dean that she injured both shoulders during the November 4, 2014 incident. Claimant completed a pain diagram on this date depicting burning and aching pain in the left shoulder. According to Dr. Dean’s report from this date of encounter, Claimant reported that she thought her “concussion symptoms were improving, but a day or so after her last visit, she started noticing intermittent dizziness and forgetfulness again.” Claimant also specifically reported that the “crutches she is using hurt her left shoulder, which had been injured in a previous accident.”[1] Claimant was then provided with a walker to use for ambulation which took the place of the crutches that she had used for the past nine days.

9. Claimant has a pre-existing history of anxiety and prior injury to the left shoulder resulting in a prior rotator cuff surgery. She also has a pre-existing history of anxiety. According to records from Claimant’s primary care physician (PCP), Dr. Michael Yoesel, Claimant was evaluated for anxiety, likely associated with her high stress job, on April 10, 2014. During this visit, Claimant complained of “fatigue, lightheadedness, difficulty with concentration, headaches and visual disturbances. Dr. Yoesel also noted a prior 1979 left rotator cuff surgery.

10. Careful inspection of the records submitted into evidence from Dr. Yoesel’s office after April 10, 2014, indicates that Claimant received treatment, primarily in the form of medications for her anxiety between April 10, 2014 and September 8, 2014. Claimant’s anxiety symptoms improved with the use of medication and by September 8, 2014, she was denying any anxiety and/or depression. Dr. Yoesel noted that Claimant appeared “alert and cooperative” with “normal mood and affect” and with “normal attention span and concentration.”

[1] Based upon Claimant’s specific pain complaints and history of left shoulder injury/surgery, the ALJ finds Claimant’s reference to “previous accident,” more probably than not, meant her remote car accident occurring around 1980 wherein she injured her left shoulder and not the November 4, 2014 incident.

11. Claimant testified that since the November 4, 2014 incident, she has had difficulty with balance, dizziness, and her short-term memory. Claimant's testimony in this regard is inconsistent with the records and testimony of Dr. Baca. Dr. Baca testified he continued to evaluate claimant for any problems associated with a head injury after the November 4, 2014 fall, including signs of post-concussive syndrome and found none.

Claimant's Alleged November 12, 2014 Slip and Fall and Continued Treatment at Integrity Urgent Care for the November 4, 2014 Work-Related Incident

12. Claimant testified that she fell in the parking lot of the school on November 12, 2014 after lunch as a result of her balance and dizziness issues, which Dr. Baca evaluated and found no objective evidence of on multiple examinations. This fall allegedly injured her left shoulder. She testified that she told Dr. Dean that she injured both shoulders during the November 4, 2014 incident, an allegation inconsistent with the credible and persuasive evidence in the medical records near that date. She testified that told Dr. Dean further that she fell on November 12, 2014 during her appointment with Dr. Dean on November 13, 2014. As noted, Claimant was seen by Dr. Dean on November 13, 2014 in follow-up for injuries sustained during the November 4, 2014 incident. During this visit, Dr. Dean documented that Claimant reported left shoulder pain as a consequence of using crutches secondary to her right ankle injury. The report of Dr. Dean is devoid of any discussion/reference to a left shoulder injury occurring during the November 4, 2014 incident or as a consequence of a fall occurring in Employer's parking lot occurring on November 12, 2014.

13. Claimant testified she hit her shoulder against a vehicle in the parking lot on November 12, 2014 and then landed on the parking lot surface with her outstretched arm. Claimant could not remember whether she had scrapes or bruises on her left shoulder, arm, elbow, wrist or hand when she fell against her car and then landed on the pavement with her outstretched left hand, but she testified the entire left arm hurt. Following physical examination on November 13, 2014, Dr. Dean reported the entire left upper extremity had normal appearance. Examination and testing of the entire left upper extremity revealed normal function. As both to the alleged fall and the crutch use allegedly causing problems, objective evaluations do not support any left shoulder injury. Conceivably, Claimant could have experienced pain from crutch use, but there is a lack of objective evidence supporting that she sustained an aggravation or acceleration of her left shoulder condition as a result of crutch use for nine days or that she fell in the parking lot as she claimed at hearing.

14. In addition to seeing Dr. Dean on November 13, 2014, Claimant evaluated the same day by a physical therapist. Similar to Dr. Dean's report, the initial physical therapy note fails to mention a fall occurring on November 12, 2014 in the parking lot which resulted in injury to Claimant's left shoulder, even

though this appointment was one day after the alleged fall. There is no evidence of any fall onto a parking lot surface in the physical therapist's examination (i.e., no evidence of any scrapes, bruising or other skin changes one would expect to see on a person who fell and landed on her outstretched arm as testified to by Claimant). Claimant did subjectively complain the crutches caused her discomfort and that she had a prior history of a rotator cuff tear. Nonetheless, there is no mention of falling; there is no report of a new injury the day before; and there are no examination findings consistent with Claimant's allegation of a fall injuring her left shoulder on November 12, 2014.

15. On November 21, 2014, Claimant returned to Integrity for follow-up for what she reported was "severe pain from injury received at work when I fell on crutches." Dr. Baca noted that Claimant was "using a cane now b/c she is having a great deal of pain in her left shoulder and it was worse when using the walker." According to Dr. Baca's note, Claimant was "reporting pain in her shoulder secondary to her fall. She fell onto her left shoulder she believes and had immediate pain the day of the injury." Mention is made of Claimant's prior left shoulder surgery from 1980 with indication that Claimant reported no "problems with the shoulder" following that surgery until she fell "again." At face value, Claimant alleges the pain in the shoulder was secondary to a fall on November 12, 2014. However, the report is devoid of any reference to the date of Claimant's alleged fall while using crutches.

16. Claimant completed a pain diagram dated November 20, 2014 depicting pain in the left shoulder caused by what is reported on the diagram as an "injury [occurring] at school when [Claimant] fell on crutches last week." The ALJ finds the date referenced on the pain diagram likely a documentation error as Claimant did not have a medical appointment on November 20, 2014. Rather, Claimant was evaluated on November 21, 2014. During her November 21, 2014 appointment, Claimant's reported pain emanates from a fall in the parking lot, not the experience of continued pain from using crutches or a walker.

17. On December 3, 2014, Claimant was seen in the offices of her PCP for a productive cough of one month duration. She was diagnosed with bronchitis and exacerbation of her asthma. Claimant also complained of left shoulder pain during this appointment, although discussion regarding a specific cause for her left shoulder pain is not included in the record. It was noted that Claimant was using a cane in the right hand. The ALJ finds that Claimant likely held the cane in her right hand secondary to left shoulder pain.

18. Review of the evidence presented persuades the ALJ that Dr. Baca acted on Claimant's subjective complaints, regardless of whether Claimant's allegation of a fall on November 12, 2014 is inconsistent the medical history. His treatment of Claimant reflects thoroughness and an earnest effort to aid Claimant.

19. On December 4, 2014, Claimant was re-evaluated by Dr. Baca who ordered an MRI of the left shoulder for “possible RCT” (rotator cuff tear). Dr. Baca noted that Claimant was to continue use of the cane and “may engage in sedentary activities only. No reaching with L (left) shoulder or arm. Regarding causation, Dr. Baca noted: “ >50% probability for causation.”

20. MRI of the left shoulder was preformed December 8, 2014. The MRI demonstrated what Dr. Baca described as “moderate to severe degenerative changes and rotator cuff tendonopathy, with associated labral fraying and tears.

21. On December 11, 2014, Dr. Baca reviewed the findings of the December 8, 2014, MRI with Claimant. After reviewing the MRI findings, Dr. Baca opined that there was a less than a 50% chance of Claimant’s left shoulder injury being caused by her accident. Nevertheless, Dr. Baca provided Claimant with an ability to treat her shoulder, regardless of whether it was associated with a work accident, by referring her to Dr. Christopher Jones for orthopedic consult.

22. As Claimant’s treatment with Dr. Baca progressed he clarified his opinion concerning the cause of Claimant’s left shoulder condition. On January 1, 2015, Dr. Baca noted that Claimant sustained a “secondary injury” as a consequence of falling while using crutches. Consequently he noted the following regarding causation for Claimant’s left shoulder condition: “>50% probability for causation; however, L (left) shoulder injury is <50% probability for causation for initial injury; however, PT (patient) fell using crutches and landed directly onto L (left) shoulder exacerbating chronic deg (degenerative) changes and causing labral tear.” The ALJ infers from this causality statement that Dr. Baca does not ascribe any left shoulder injury to the November 4, 2014 incident, i.e. “initial injury.” Rather, Dr. Baca’s concluded that Claimant’s left shoulder condition (injury) was caused by a secondary fall in Employer’s parking lot she alleged while using crutches and this fall aggravated chronic pre-existing degenerative changes in the shoulder and a labral tear.

23. As noted above, Claimant previously injured her left shoulder in a car accident resulting in rotator cuff surgery. Claimant testified that her prior left shoulder injury occurred as a consequence of a car accident in 1981. She testified that she had no trouble with her left shoulder after this surgery and the shoulder had time to heal. According to Claimant, her last treatment was likely in 1981. Respondents noted at the first hearing that Claimant’s shoulder surgeon opined that she had “degeneration” and “gout” in her shoulder. Nonetheless, Claimant testified that her shoulder “didn’t really hurt” much before her work accident, but it was a “12 out of ten” after. The ALJ is unable to find record support demonstrating that Claimant obtained treatment or even complained of left shoulder pain/symptoms between 1981 and November 13, 2014.

Dr. Jones’ Treatment

24. As noted above, Claimant was referred to Dr. Christopher Jones for orthopedic consult. Dr. Jones first evaluated Claimant on December 29, 2014. During this visit, Dr. Jones documented what he understood to be the events surrounding Claimant's injuries sustained on November 4, 2014. Regarding those events, Dr. Jones noted that Claimant had been "pushed into a door and struck her shoulder." He does not indicate which shoulder was struck however. Assuming Dr. Jones is referencing the left shoulder, the ALJ finds no record support, outside of Claimant's contention, for such conclusion. Nonetheless, Dr. Jones also documents that following the November 4, 2014 incident, Claimant was using crutches when she fell at "work on 11/10/14, and that is when she really feels like she re-hurt her shoulder." The reference to a date of injury occurring November 10, 2014 is inconsistent with the balance of the record evidence suggesting that Claimant fell and injured her left shoulder on November 12, 2014.

25. Dr. Jones also commented on the findings of Claimant's December 8, 2014 MRI, noting that the MRI demonstrated "a lot of intra-articular debris consistent with possible lose chondral debris and some synovitis associated with that" along with "some tendinopathy of [the] rotator cuff and possibly a partial tear, but I do not see a full-thickness defect."

26. Regarding the cause of Claimant's left shoulder symptoms', Dr. Jones noted: "Given the mechanism of injury, this could certainly be a traumatic injury with impaction of the humeral head onto the glenoid. However, it could also be all chronic with some exacerbation of her previously existing injury." Dr. Jones elected to proceed conservatively by injecting the shoulder with a 2:2:1 solution of Marcaine, Lidocaine and Depo-Medrol.

27. By January 19, 2015, it was evident Claimant had failed conservative treatments such as physical therapy and injections. Dr. Jones requested surgical authorization from Respondents on January 30, 2015. Respondents denied the request on February 11, 2015.

28. Claimant testified to having two surgeries on her left shoulder following her November fall while using crutches. The first surgery took place on February 11, 2015, and the second occurred in March of that year. The second surgery was necessary to correct a "popeye" deformity in Claimant's left biceps caused by the first surgery. During Claimant's February 11, 2015 procedure it was discovered that she had pseudo gout. Claimant's surgery was covered by her private health insurance although she had out-of-pocket costs for the surgery and subsequent physical therapy.

Maximum Medical Improvement, Dr. Lindberg's Evaluation, Dr. Hall's Evaluation and Dr. Tyler's Division Independent Medical Evaluation (DIME)

29. Dr. Baca placed Claimant at maximum medical improvement (MMI)

without permanent impairment on March 3, 2015. At the time he placed Claimant at MMI, Dr. Baca noted she was not working secondary to her left shoulder condition. Claimant testified she missed work from February 11, 2015 through March 20, 2015, as a result of her left shoulder surgery. Dr. Baca's opinion concerning causality of Claimant's left shoulder condition/injury was unchanged from his January 1, 2015 opinion.

30. Respondents sought an opinion from Dr. James Lindberg regarding the cause of Claimant's left shoulder condition. Dr. Lindberg examined Claimant on May 5, 2015 after which he opined that he did not believe Claimant had suffered an injury to her left shoulder as a result of the November 4, 2014 incident. He also concluded that there were multiple inconsistencies surrounding Claimant's alleged second injury stemming from a fall allegedly occurring on or about November 12, 2014.

31. Claimant sought an opinion from Dr. Timothy Hall. Dr. Hall evaluated Claimant on June 19, 2015. Dr. Hall concluded that while Claimant had pre-existing degenerative changes in the left shoulder, the two events in November, i.e. the original incident of November 4, 2014 and particularly the November 12, 2014 fall caused those changes to become symptomatic. Similar to Dr. Tyler's opinion, Dr. Hall found that "but for" the November 12, 2014 fall, Claimant "would not have gone to surgery." Consequently, he opined that Claimant's left shoulder condition/injury was a direct result of the alleged work-related fall on November 12, 2014. Dr. Hall also felt that Claimant needed additional work-up for ongoing symptoms related to a concussion. According to Dr. Hall's independent medical examination (IME) report, Claimant needed referral to a neuro ophthalmologist and testing/treatment for ongoing cognitive complaints.

32. Dr. Hall is the first doctor to find there may be ongoing problems from a concussion. Dr. Hall's report is contrasted with Dr. Baca, who evaluated Claimant multiple times and found no objective evidence for post-concussive problems. Based upon the evidence presented, the ALJ finds the opinions of Dr. Hall regarding Claimant's need for additional treatment for post concussive symptoms credible and persuasive (See paragraph 63 below).

33. Dr. Hall provides multiple opinions regarding the left shoulder – that Claimant injured it on November 4, 2014 (an opinion that is inconsistent with the medical records on or about that date of injury) and he finds that she fell on November 12, 2014 while getting out of her car (again, a opinion that is inconsistent with the totality of the evidence presented, including the medical records from November 13, 2014). Dr. Hall fails to find any preexisting problem with the left shoulder, even though this condition is well documented. Dr. Hall found claimant had some left shoulder symptoms following the November 4, 2014 fall (a fall where he opines claimant hit her left shoulder, but which conclusion is unsupported by the record). He then finds Claimant was "markedly worse" after a fall in the parking lot on November 12, 2014. Dr. Hall's opinion

relies on two pieces of evidence (left shoulder injured on November 4, 2014 and left shoulder injury more significantly on November 12, 2014) that are inconsistent with the credible and convincing evidence in this case. Consequently, the ALJ rejects Dr. Hall's opinions regarding the cause of Claimant's left shoulder symptoms as unpursuasive.

34. Claimant requested a Division Independent Medical Examination (DIME) with Dr. John Tyler for the November 4, 2014 work injury only. Dr. Tyler completed the requested DIME on July 24, 2015, but apparently misunderstood what he was requested to evaluate. He did not complete his report with an impairment rating, despite a request from the Division IME unit for the same. Claimant alleges because Dr. Tyler did not perform an impairment rating, he did not express an opinion concerning causation of Claimant's left shoulder condition. The ALJ is not persuaded. Careful review of Dr. Tyler's DIME report convinces the ALJ that Dr. Tyler has very specific opinions regarding causation pertaining to Claimant's left shoulder and her need for treatment, including surgery. In his DIME report, Dr. Tyler relates Claimant's left shoulder complaints to a November 12, 2014 injury. He specifically rejects that her left shoulder complaints are related to the November 4, 2014 work injury, which was the subject of the requested DIME. As part of his opinion concerning the cause of Claimant's left shoulder symptoms and need for surgery, Dr. Tyler opines: "Claimant was only on crutches because of her work injury. While she may have had an underlying shoulder condition, this fall exacerbated that condition and created a need for surgery. "Whether or not this patient had previous trauma to the shoulder, that trauma went back nearly 34 years ago and was asymptomatic until this event."

35. Dr. Tyler also opined that Claimant was not at MMI for her head injury, agreeing with Dr. Hall that Claimant should be seen by a neuro-optometrist. Dr. Tyler believes Claimant may have a mid-line shift brought on by the trauma of November 4, 2014. Finally, Dr. Tyler opined that Claimant should be evaluated by a psychologist for emotional counseling stemming from the fact that she had become a victim of a violent altercation between a student and a security guard that she unfortunately became entangled in.

The Testimony of Claimant's Co-Workers

36. Aaron Griffen, Ph.D. testified Claimant did not report a left shoulder injury as a consequence of a fall in the parking lot to him on November 12, 2014, the date Claimant asserts it occurred. This contradicts Claimant's report that she immediately told Dr. Griffen of the injury. Had Claimant reported an injury, Dr. Griffen testified he would have followed standard protocol, i.e. provide the employee with medical aide, contact Risk Management, and complete an accident report. Dr. Griffen testified that he did not learn about the alleged November 12, 2014 injury until February of 2015 when Claimant finally reported the injury.

37. Claimant’s report of an injury on February 10, 2015 for the alleged November 12, 2014 fall came after Dr. Griffen counseled her in December of 2014 and January of 2015 on her need to improve her work performance. Claimant was working under restricted duty when Dr. Griffen spoke with her regarding her work. Claimant was missing crucial deadlines necessary and important to the employer and those it served. She was also missing meetings necessary to conduct the business of the school district.

38. Dr. Griffen documented the problems associated with Claimant’s job performance in a running memorandum. He removed some of Claimant’s duties in January of 2015 because of her failure to meet mandatory deadlines which resulted in compliance issues for critical testing. Claimant was also counseled on her failure to respond appropriately to a subordinate challenging her authority. Finally, Claimant was warned to cease gossiping; she was a leader of the employer’s organization and it was important to not undermine the authority structure given the nature of the work (education). On January 15, 2015, Claimant was told she would be put on a corrective action plan to bring her into compliance with the ten standards set by the state for administrators like her.

39. Dr. Griffen met with Claimant to finalize her corrective action plan on February 6, 2015 (four days before Claimant reported the November 12, 2014 alleged fall at work). The corrective action plan was signed on February 9, 2015, one day before Claimant filed her report of a November 12, 2014 work injury. In the corrective action plan, Claimant is put on notice that “Failure to meet the corrective actions mentioned above will result in further disciplinary actions that may lead to termination of your contract.” Claimant testified that she told Dr. Griffen she could not meet her duties because of her worker’s compensation claim. Claimant returned to work following her surgery on March 20, 2015. She testified that she moved slowly as a result of her injuries and that it took her a lot longer to do things because her memory wasn’t that good. According to Claimant, it took her twice as—probably three times as long to get something done. She also testified that she had difficulty remembering things, but later testified that she was never told the meetings she missed were mandatory. Finally she testified that she did not fail to show up for the ACT exam, but instead had informed a co-worker that she had a doctor appointment she had to go to.

40. Dr. Griffen credibly testified to the repeated failure of Claimant to meet identified goals in the corrective action plan. Furthermore, Claimant violated Employer policies/procedures regarding student discipline by extending a delayed suspension consequence to a student. Claimant suggested that she inadvertently reverted back to how things were done at her previous employer as an explanation for her action concerning the extension of a delayed consequence. The ALJ finds Claimant’s testimony in this regard unpursuasive.

41. Claimant’s employment was terminated at the end of the school year

in May of 2015.

42. Based upon the evidence presented, the ALJ finds Claimant's suggestion that she was not a fault for her contract not being renewed unpersuasive. The evidence presented, demonstrates that Claimant's employer went to great lengths to work with her in an effort to ensure her continued success at work. The ALJ is persuaded that Dr. Griffen asked what specific duties Claimant could not meet, since claimant had been working in a modified job approved by her physician, Dr. Baca. Thereafter some of Claimant's work responsibilities were taken from her. Furthermore, the record evidence supports that Claimant was provided with a support person to help her meet her remaining responsibilities. Dr. Griffen reviewed the specific duties Claimant was expected to perform at which point Claimant stated she did not agree to the corrective action plan and would go to her attorney. Claimant left school after the corrective action plan without permission and indicated she was going to see her attorney. The February 6, 2015 meeting is memorialized in Dr. Griffen's memorandum.

43. Based upon the testimony presented, the ALJ finds that Claimant ascribes the problems with her job performance to the effects of a closed head injury. Claimant's testimony that she did not know that the meetings were mandatory is unconvincing. Her suggestion that the effects of a closed head injury explain her failure to attend meetings, complete deadlines in a timely fashion, adequately prepare and attend critical testing and violating district discipline policies is equally unpersuasive given Claimant's position, the inconsistencies in her testimony and length of her employment with the school district.

44. Based upon the evidence presented, the ALJ is persuaded that Claimant exercised a degree of control over her work performance and otherwise committed multiple volitional acts that directly lead to the termination of her employment.

45. As noted above, after the corrective action plan was put into place, Claimant reported her November 12, 2014 fall. Claimant indicated that Jessica Lopez witnessed the fall. She also indicated that she notified Dr. Griffen of the injury on November 12, 2014, the date it allegedly occurred. As noted above, Dr. Griffen contradicts Claimant's assertion.

46. At hearing, Claimant amended her statement that Jessica Lopez witnessed the fall, testifying that she told her about it. She also testified that she could not remember whether her statement about reporting a November 12, 2014 injury to Griffen was correct.

47. Jessica Lopez testified that she did not witness the fall. Rather, Ms. Lopez testified that Claimant told her about the second fall the day after it allegedly occurred. According to Ms. Lopez, Claimant reported to her that she fell

and everything was alright. In response to Ms. Lopez' inquiry as to whether she needed to report an injury, Claimant replied "no", that she was fine a little bumped and bruised, but nothing more than that. As noted above, no physical indications of injury, such as bruises, contusions or scrapes are documented in either the physical therapy or Dr. Dean's notes from November 13, 2014, the day after the alleged fall.

48. Shannon Lemons testified that when Claimant returned to work after the November 4, 2014 incident, a student came into her office early in the morning (between 8:00 a.m. and 8:30 a.m.) asking for a wheelchair. Ms. Lemons asked the student why he needed the chair and he replied he needed it for Claimant. Ms. Lemons responded with the student to Claimant's location. Ms. Lemons found Claimant in a doorway hunched over her crutches. Ms. Lemons knew Claimant had trouble with her lungs and Claimant was breathing heavily as she leaned over her crutches.[2]

49. Ms. Lemons testified that she had Claimant sit in the wheelchair and that she wheeled Claimant to her (Claimant's) office. Claimant indicated she needed the wheelchair after lunch on November 12, 2014 as she fell in the parking lot on her way back into the building after lunch. Ms. Lemons testified that she responded with the wheelchair first thing in the morning as Claimant arrived at work. According to Ms. Lemons she responded with a wheelchair before lunch and offered to help her the rest of the day. Ms. Lemons testified that Claimant used the wheelchair prior to lunch because Claimant called her and asked to be wheeled out to her vehicle for lunch. Per Ms. Lemons, when Claimant returned from lunch, she (Claimant) used her cell phone to call Ms. Lemons to meet her at her car so she could be wheeled from the parking lot back into the school. Ms. Lemons testified there was no fall in the parking lot at lunch time, as she wheeled Claimant to her car, helped her get into the vehicle and helped her get her seatbelt on nor was there a fall in the parking lot after lunch because when Claimant returned from lunch (the time which Claimant reports she fell in the parking lot), Ms. Lemons met her at her car. According to Ms. Lemons, Claimant was still in her vehicle when she arrived with the wheelchair and rolled her into the building. Ms. Lemons witnessed her arrival after lunch and testified there was no fall in the parking lot after lunch as Claimant asserts.

50. During her deposition, Ms. Lemons was asked whether Claimant reported a fall in the parking lot when she arrived at school on November 12, 2014, when Ms. Lemons brought her a wheelchair. Ms. Lemons testified Claimant never reported any fall in the parking lot to her. Ms. Lemons, a health worker for Employer, testified Claimant was having trouble breathing when she responded with a wheel chair to Claimant's location, that Claimant is an asthmatic and that she helped Claimant with her nebulizer. Ms. Lemons believed Claimant's need for assistance upon arrival to school on November 12, 2014 was

[2] The medical records from the office of Claimant's PCP support a conclusion that Claimant was struggling with respiratory conditions and an unspecified exacerbation of her pre-existing asthma.

due to trouble breathing, as there no report or signs of an injury consistent with a fall and there was no report of a fall by Claimant. At the end of the school day, Ms. Lemons testified she wheeled Claimant out to her car around 3:15.

51. After Claimant reported the November 12, 2014 injury to Employer on February 10, 2015, Claimant approached Ms. Lemons and complained about the Insurer's denial of her left shoulder claim. Ms. Lemons responded she was unaware of Claimant hurting her left shoulder. Later, Claimant went to Ms. Lemons again about her denied claim. Claimant told Ms. Lemons she had reported a second injury to her. Claimant stated to Lemons, "I hope you don't get in trouble for this." Ms. Lemons was concerned about Claimant's statement, so she reported it to her supervisor, Rebecca Manuszak. Ms. Manuszak was the District Nurse for Employer at the time. Both Ms. Lemons and Ms. Manuszak no longer work for Employer and were not employed by the school district when they testified. Like Ms. Lemons, Ms. Manuszak was present when Claimant was injured on November 4, 2014. She stayed with Claimant until paramedics arrived.

52. Ms. Manuszak was also aware of Claimant returning to work after the November 4, 2014 admitted work injury. Ms. Manuszak was aware that Ms. Lemons provided wheelchair assistance to Claimant when she returned to work. According to Ms. Manuszak, Ms. Lemons told her that Claimant had a difficult time ambulating on her crutches due to her asthma. Ms. Lemons reported to Manuszak that a student saw Claimant in distress and that Ms. Lemons brought a wheelchair to Claimant and wheeled Claimant around because of Claimant's asthma. Ms. Manuszak saw Claimant later on the day of her alleged fall in the parking lot. According to Ms. Manuszak, Claimant reported to her that it was too difficult to use the crutches because of her asthma. Ms. Manuszak believes the student notified Ms. Lemons of Claimant's distress as Claimant arrived to work, not after lunch as maintained by Claimant.

53. Ms. Manuszak testified that Ms. Lemons told her about Claimant coming to her office and asking her to support Claimant's allegation that she (Claimant) reported a second injury to Ms. Lemons in November of 2014. Ms. Manuszak characterized Claimant's actions as a threat to Ms. Lemons to "change her story" or "her job would be in jeopardy." Ms. Manuszak testified Ms. Lemons was very upset about Claimant's statements. Ms. Manuszak noted neither she nor Ms. Lemons were aware of a second fall. According to Ms. Manuszak, Claimant did not report a second fall to her and did not report a second fall to Ms. Lemons. Ms. Manuszak testified Ms. Lemons was upset because Claimant suggested that she (Ms. Lemons) would be in trouble because she failed to report Claimant's second injury at the time it allegedly occurred as required by Employer policy. Ms. Manuszak reported Claimant's statements to Claimant's supervisor's assistant and to the Risk Manager for Employer. She also went to Claimant's supervisor directly and indicated she would not tolerate an employee threatening Ms. Lemons. Ms. Manuszak testified she did not believe there was a second fall; she remembers Claimant coming into the clinic

and reporting her shoulder began hurting when she was dressing at home one day. Claimant reported a “dislocation” of the left shoulder while “getting dressed for school” on January 21, 2015 according to records from Integrity. According to Dr. Baca’s report from this date, Claimant’s report of dislocation was the second time her shoulder had dislocated. Claimant testified she reduced the dislocation herself based on what she had seen on television.

54. Claimant testified that she believed Ms. Lemons knew about her injury in the parking lot when she mentioned to Ms. Lemons that she (Ms. Lemons) may get in trouble for not handling things right away. Based upon the evidence presented, the ALJ finds Claimant’s explanation regarding the verbal exchange between her and Ms. Lemons unconvincing. The totality of the evidence presented concerning this issue persuades the ALJ that Claimant’s decision to repeatedly approach Ms. Lemons about the denial of the November 12, 2014 claim coupled with the statement suggesting that Ms. Lemons may be in trouble for failing to report the claim constituted a veiled threat to intimidate Ms. Lemons into reporting that Claimant had actually fallen in an attempt to bolster the claim.

55. Based upon the evidence presented, the ALJ finds Claimant’s allegations surrounding her alleged fall on November 12, 2014 inconsistent. When Claimant finally does report a November 12, 2014 injury on February 10, 2015, she provides details that are inconsistent with the testimony of her co-workers and her own later testimony. At hearing, Claimant reported she fell after getting dizzy while trying to use her crutches to get from the parking lot to the school. Claimant told Dr. Lindberg she slipped on ice. Clamant told the Division IME, she became dizzy and fell. In her initial report of injury on February 10, 2015, Claimant asserts an employee (Ms. Lopez) witnessed the fall and that she reported the fall to her supervisor (Dr. Griffen) on the date of alleged injury, November 12, 2014. However, these reports are contradicted by the testimony of both Ms. Lopez and Dr. Griffen.

56. Based upon the totality of the evidence presented, the ALJ finds the reports and testimony of Claimant concerning an alleged fall occurring on November 12, 2014, inconsistent, unreliable and unpersuasive. The evidence presented persuades the ALJ that Claimant has failed to establish by a preponderance of the evidence that she actually fell in Employer’s parking lot injuring her left shoulder on or about November 12, 2014.

Dr. Lindberg’s Testimony

57. Dr. Lindberg testified that there was no initial injury to the left shoulder from the November 4 fall. He testified further that there was no medical evidence to support a fall on November 12, 2014.

58. Dr. Lindberg testified that Claimant has gout or other crystalline disorder that is unrelated to work. Dr. Lindberg testified that “gout can be caused

by— exacerbated by trauma" He also testified that a gout flare-up can be caused by trauma. He testified that he had no knowledge of any of left shoulder symptoms between Claimant's car accident in the 80s, and her injury in November 2014. Dr. Lindberg's hypothesis as to why Claimant had not previously been prescribed medication for gout (if she in fact did have it) was that "[i]It hadn't reached a crescendo point in any joint." According to Dr. Lindberg, Claimant's left shoulder condition/symptoms and need for treatment is unrelated to any work related accident occurring November 4 or 12, 2014 and should be cared for under her health insurance.

Dr. Baca's Testimony

59. Dr. Baca testified that his own medical report from the initial visit documents three different mechanisms of injuries for Claimant's injury on November 4, 2014. Dr. Baca's November 5, 2015 report begins by stating that Claimant "hit her head on a door knob and had loc for 10+ seconds." A few lines down, the report indicates that Claimant fell and hit the left side of her head on the door, not the door knob. The final page of Dr. Baca's report states that the Claimant hit the *right* side of her head on the door, fell to the floor, and then hit the left side of her head and right side of body on the floor.

60. Dr. Baca testified that he did not notice any concussive or post-concussive symptoms when he first examined Claimant. However, he also testified that assessment of her post-concussive or concussive symptoms was difficult due to her "emotional lability, anxiety, and stress." He also testified that if Dr. Tyler was correct, Claimant would require additional evaluation and treatment, but he did not find Claimant failed to attain MMI.

61. As noted, the initial emergency room report notes Claimant was unconscious for around approximately 30 seconds, and she was "amnesic" to the event. While Claimant had no symptoms of concussion on re-evaluation in the ER, the provider noted a concussion as "always possible" for which he recommended monitoring of symptoms and close follow-up with her PCP. Dr. Baca also reported a concussion as a work related medical diagnosis when he examined Claimant on November 5, 2014. As found above, that examination revealed moderate headache and intermittent vision changes as well as an episode of vomiting. The ALJ finds these symptoms consist with concussion.

62. Claimant was still complaining of "intermittent lightheadedness and intermittent headaches" three days after her initial injury on November 4, 2014. She complained of "intermittent dizziness and forgetfulness" on November 13, 2014. Despite these complaints, Dr. Baca testified he did not notice any post-concussive symptoms.

63. Based upon the evidence presented, the ALJ finds that Claimant likely suffered a concussion as a consequence of the November 4, 2014 incident.

While the evidentiary record reveals inconsistencies regarding whether Claimant injured her left shoulder in the incident occurring November 4, 2014, the medical records submitted repeatedly document that Claimant hit her head and lost consciousness. The evidence presented persuades the ALJ that Claimant likely suffers from post-concussive symptoms, including dizziness, visual difficulties and cognitive sequela, i.e. forgetfulness as a direct consequence of hitting her head when she fell to the floor on November 4, 2014. Thus, while Dr. Baca took Claimant's post concussive complaints seriously as evidenced by the completion of multiple evaluations over time, the ALJ credits the opinions of Dr. Hall and Dr. Tyler to find that Claimant is not at MMI for the effects of her head injury suffered on November 4, 2014.

64. Respondents have failed to produce clear and convincing evidence to overcome Dr. Tyler's Division IME regarding Maximum Medical Improvement ("MMI") and impairment for the injuries Claimant sustained on November 4, 2014.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principles

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

C. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability of the Alleged November 12, 2014, Fall in Employer's Parking Lot

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that* *the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989). The question for determination here is whether Claimant's left shoulder symptoms and need for treatment arise out of an alleged work related fall on November 12, 2014 and are sufficiently connected thereto to result in a finding that her left shoulder condition is compensable.

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Whether Claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges, in part, that she sustained an injury to her left shoulder as a consequence of a fall in Employer's parking lot on or about November 12, 2014. Claimant's testimony regarding her alleged November 12, 2014 fall is inconsistent, unreliable and substantially contradicted by the more persuasive testimony of Ms. Lemons, Ms. Manuszak and Dr. Griffen. Although Claimant alleges she sustained an injury in the parking lot on November 12, 2014, when she fell and injured her left shoulder, she was evaluated by Dr. Dean on November 13, 2014 – one day after this fall allegedly occurred. In that November 13, 2014 visit, Claimant makes no mention of a fall in a parking lot and there are no outward signs of injury to her left shoulder, despite Claimant's report to Jessica Lopez that she was "bumped and bruised." Claimant also visited with a physical therapist on November 13, 2014 who makes no mention of a November 12, 2014 work injury to Claimant's left shoulder. This evidence coupled with the testimony of Ms. Lemons persuades the ALJ that Claimant did not fall in the parking lot as she maintains on November 12, 2014. As the ALJ concludes that Claimant likely did not fall, there is no nexus between Claimant's left shoulder condition and that fall. Consequently, the claim for left shoulder injuries occurring as a consequence of an alleged fall in Employer's parking lot must be denied and dismissed.

Overcoming Dr. Tyler's Opinion Regarding the Cause of Claimant's Left Shoulder Symptoms

G. A more difficult question concerning Claimant's left shoulder condition is posed by the Division IME opinion of Dr. Tyler. A plain reading of the report reveals Dr. Tyler failed to comply with standards required of a Division IME. Dr. Tyler is the Division IME for the November 4, 2014 claim only. He was directed to address that one claim, yet reached conclusions concerning the compensable nature of Claimant's alleged November 12, 2014 fall. Dr. Tyler's opinion on the causality of Claimant's left shoulder complaints to the November 4, 2014 is unequivocal. Dr. Tyler does not relate the left shoulder complaints and need for treatment to the November 4, 2014 work related injury or to crutch use following that injury. Rather, Dr. Tyler expressed his opinion that Claimant's left shoulder symptoms and need for surgery were related to a subsequent injury to the left shoulder as a consequence of a fall occurring on November 12, 2014.

H. The law regarding Division IME opinions is clear. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* As found, the ALJ concludes that Dr. Tyler expressed an opinion concerning the cause of Claimant's left shoulder condition and her need for treatment when he completed the requested DIME for the admitted November 4, 2014 injury. As found, he did not causally relate Claimant's symptoms and/or need for surgery to Claimant's November 4, 2014 injury or use of crutches. Rather, he unmistakably related Claimant's left shoulder condition and need for treatment, i.e. surgery to an alleged November 12, 2014 fall in Employer's parking lot. In so doing, Dr. Tyler made certain assumptions about that claimed injury prematurely. Nevertheless, he did express his opinions regarding the cause of Claimant's shoulder condition. Respondents did not challenge Dr. Tyler's opinions in this regard. Even if they had, the undersigned ALJ finds that Dr. Tyler's opinion on the work-relatedness of the alleged second injury is not afforded any special weight because he was chosen as a DIME to address the finding of MMI and impairment by Dr. Baca concerning the first injury occurring November 4, 2014 only, not the compensable nature of an alleged second injury.

I. In this case, the undersigned ALJ agrees with Respondents that the DIME report of Dr. Tyler reflects that he conflated the claim he was appointed to review (the November 4, 2014 claim) with a claim that was contested from November 12, 2014. Regardless, Dr. Tyler's opinion that Claimant's need for left shoulder treatment did not result from the November 4, 2014 work injury is a determination of causation that falls squarely on the DIME doctor to decide. In order to effectively challenge that determination, there must be evidence that the physician's determination is highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt. Simply put, the opinion that Claimant's left shoulder condition and need for treatment is related to the November 12, 2014 fall must be overcome by clear and convincing evidence. In this case, Respondents filed an application for hearing over the Division IME's report because the filing of admission given the structure of Dr. Tyler's report would have been impossible given that the November 12, 2014 claim was fully contested. When Dr. Tyler conflated the November 4, 2014 claim before him with a contested claim, which the ALJ concludes is not compensable, the ALJ must carefully craft an order that reflects the proper burdens for each party. Given the weight provided to Division IME opinions, the relative burdens may lead to an order with unusual results. Under the circumstances presented here, the ALJ concludes that Claimant had the burden of proving, by clear and convincing evidence, that Dr. Tyler's causation determination regarding the cause of Claimant's left shoulder condition, was highly probably incorrect.

J. As noted, Respondents objected to the Division IME conflating the two separate claims; however, they did not disagree with the Division IME's opinion that the left shoulder was not caused by the November 4, 2014 work injury. Rather, Respondents contend that the DIME process veered off course when Dr. Tyler concluded that a second fully contested injury was the primary reason for Claimant not attaining MMI in the only case he was requested to evaluate. Claimant advances theories different from what the Division IME found and, therefore, must overcome Dr. Tyler's causation opinions by clear and convincing evidence. Here, Claimant failed to prove there was a compensable injury occurring on November 12, 2014 and there is no credible evidence that she sustained an injury to her left shoulder on November 4, 2014. Claimant's alternate third theory is that her nine days of crutch use caused the left shoulder complaints, but that is unsupported by the Division IME, who found claimant was "asymptomatic" on before November 12, 2014. In addition to failing to prove, by a preponderance of the evidence that she sustained a compensable injury on November 12, 2014, Claimant failed to prove by clear and convincing evidence that the Division IME was incorrect when he found her left shoulder problems unrelated to the November 4, 2014 work injury.

K. Since claimant has failed to overcome the Division IME's opinion that the November 4, 2014 work injury did not cause her left shoulder condition and/or her need for treatment, her claim for medical benefits, in the form of left shoulder surgery must be denied and dismissed. As found, Claimant underwent two separate surgeries on her left shoulder that were covered by herself and her private insurance. Claimant paid $1,000 out of pocket already and according to her testimony, there is still an outstanding $800 bill pending with Orthopedic Rehabilitation Associates. As Claimant's left shoulder injury on November 12, 2014 is not compensable and she failed to overcome the Division IME's opinion that the November 12, 2014 and not the November 4, 2014 injury is the cause of her need for treatment to the left shoulder, Claimant's request for Respondents to reimburse her for her out-of-pocket expenses of $1,000 and to pay all reasonable and necessary outstanding medical expenses related to treatment of the left shoulder is also denied and dismissed.

Overcoming Dr. Tyler's DIME Opinion Concerning MMI

L. Similar to a DIME physician's findings regarding causation, findings of the DIME doctor regarding MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, *supra*; *Peregoy v. Industrial Claim Appeals Office, supra.*

M. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

N. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). The questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes some evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Adams v. Manpower, supra*.

O. In addition to questions surrounding the cause of Claimant's left shoulder symptoms and her need for surgery related thereto, the instant case involves complex medico-legal questions concerning Claimant's need additional treatment associated with her persistent post concussive symptoms. Here the DIME report of Dr. Tyler reflects that he reviewed medical records from the various providers who evaluated and/or treated Claimant. The DIME considered the opinion of Dr. Lindberg and did not change his opinion regarding MMI. To the contrary, Dr. Tyler rather aggressively, outlined his disagreement with the conclusions reached by both Dr. Baca and Dr. Lindberg. While Dr. Tyler engages in unnecessary rhetoric, the ALJ finds and concludes that his opinions concerning her need for additional treatment to address persistent post concussive symptoms, including Claimant's emotional lability are supported by the record evidence presented. Claimant did fall and lose consciousness on November 4, 2014 which has seemingly affected her vision. While the ALJ is not convinced that her claimed cognitive symptoms adequately explain her poor work performance, Claimant is emotionally labile, which likely emanates from a combination of striking her head and being caught up in a violent confrontation. Dr. Tyler persuasively opines that these conditions require additional treatment, leading the undersigned ALJ to conclude that Claimant's is not at MMI for all conditions related to her November 4, 2014 industrial injury. To the extent that Dr. Tyler's opinions concerning MMI (as a consequence of Claimant's need for additional cognitive and visual evaluation/treatment, in addition to counseling) diverge from those expressed by Dr. Baca, the ALJ concludes that those divergences constitute a professional difference of opinion. A mere difference of opinion between physicians fails to constitute error concerning the findings of the DIME physician. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Consequently, Respondents have failed to prove that Dr. Tyler's opinion regarding Claimant's MMI status from a neuro-cognitive and psychological standpoint was highly probably incorrect as stated in the July 24, 2015 DIME report.

Responsibility for Termination

P. Because Claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42 103(1)(g), C.R.S. apply. Those identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo.App. 2002). Simply put, if claimant is responsible for his/her termination of employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota, Inc.,* W.C. No. 4-465-839 (ICAO February 13, 2002). Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 20 P. 3d 1209 (Colo. App. 2000).

Q. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996)(unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO April 9, 2008). "Fault" can include poor job performance, but Claimant is not at fault if the termination is due to claimant's physical or mental inability to perform assigned duties, *Johnston v. Deluxe/Current Corporation*, W.C. No. 4-376-417 (Industrial Claim Appeals Office, June 7, 1999).

R. In this case, Respondents assert that Claimant was terminated for cause at the end of the academic school year in May 2015 for failure to meet her goals set out in her corrective action plan. Claimant counters that she is not responsible for her termination because she was mentally unable to perform her due to the effects of a closed head injury caused by the November 4, 2014 incident occurring at work. As found above, the ALJ is not persuaded by Claimant's assertion. Here, the evidence supports a conclusion that Claimant knew what was required of her to maintain her employment. She was warned, put on a corrective action plan and given all the tools necessary to do her job. Nonetheless, she continued to miss meetings without a reasonable excuse, she failed to perform important functions of her job, again without reasonable explanation and she directly disregarded the policies of the disciplinary policies of the employer by extending to delayed consequence to a student under suspension. In short, Claimant took voluntary acts that caused the termination of her employment. Accordingly, Claimant's claim for TTD benefits must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits arising out of a fall allegedly occurring on or about November 12, 2014 (W.C. No. 4-974-447-02), is denied and dismissed.

2. Claimant has failed to overcome the Division IME's opinion that the left shoulder condition and subsequent need for treatment is related the above

denied and dismissed November 12, 2014 claim and not a compensable consequence of her November 4, 2014 admitted injury. (W.C. No. 4-967-090-02);

3. As a result of failing to overcome the Division IME's causation determination that the left shoulder was not a compensable consequence of the admitted November 4, 2014 work injury, Claimant's claim for additional medical care to cure and relieve the Claimant from the effects of her left shoulder condition, including the treatment/surgery provided by Dr. Jones and out of pocket expenses associated with Dr. Jones' surgeries is denied and dismissed

4. Respondents request to set aside the DIME opinion of Dr. Tyler regarding MMI and impairment is denied and dismissed. Claimant has not attained MMI for all conditions related to her November 4, 2014 injury.

5. Claimant's request for TTD benefits is denied and dismissed.

6. All matters not determined herein, and not closed by operation of law pertaining to Claimant's November 4, 2014 claim are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 1, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-973-284-01

ISSUE

Whether the claimant has established by a preponderance of the evidence that she is entitled to conversion of her scheduled right shoulder impairment of 18% to impairment of the whole person rated at 11%.

FINDINGS OF FACT

1. On January 1, 2015 the claimant suffered an injury to her right shoulder while serving as a Mental Health Clinician I during her employment with the respondent-employer in Pueblo. The claimant placed her right arm in between two patients who were arguing. She felt pain.

2. One of the claimant's job functions was to engage in restraint training and combative training. The claimant was restricted from performing continuum of therapeutic interventions (CTI) training by Dr. Larsen.

3. The claimant came under the care of Dr. Lakin and was initially seen on January 2, 2015. The claimant underwent an x-ray of the right AC joint which showed no acute findings. The claimant's complaints of pain in the right shoulder were high initially at 10/10. The claimant was released to light duty with lifting restrictions as to the right extremity only. The claimant was also restricted from violent or physical contact with patients. The claimant did return to work light duty but had occasional days of no work due to pain.

4. The claimant underwent an MRI of the right shoulder on January 14, 2015 which showed possible adhesive capsulitis, and a small low-grade partial thickness insertional tear of the anterior supraspinatus and small hi-grade partial thickness tear of the supraspinatus tendon.

5. The claimant's work restrictions were based on limitations related to the use of her right arm for lifting, pushing/pulling, overhead use of right arm including and tactical activities.

6. The claimant was treated conservatively with physical therapy, therapeutic medical massage, and trigger point injections.

7. Specifically, the claimant received trigger point injections by Dr. Lakin on March 31, 2015. There were eight trigger points identified in the right trap, supra and infraspinatus, levator and rhomboid muscles. While some of these muscles are connected to the shoulder joint it is apparent that they also extend away from the shoulder joint beyond the arm.

8. The claimant was referred to Derek Purcell, M.D an orthopedic surgeon on February 5, 2015. He reported the following after reviewing the MRI images. “There was no significant tearing of the rotator cuff. I would not recommend surgical intervention. She should improve with conservative measures alone….” On examination claimant had painless range of motion of her cervical spine. The claimant had no complaints of scapular or neck pain. She did not mention any sleep disturbance.

9. On exam by Dr. Purcell, Spurling’s testing was negative. The claimant had only had trace tenderness over the right AC Joint. Internal rotation behind her back is to her belt line on the right. Loss of range of motion was limited to the right shoulder. Dr. Purcell’s diagnosis was right shoulder myofascial muscle strain rotator cuff.

10. The claimant was referred to Dr. Roger Davis, for an orthopedic evaluation and was seen on June 18, 3015. On examination he found somewhat limited range of motion in the right shoulder but good strength over all. She had mild tenderness at the AC joint and reported her pain at a 3 on exam. The claimant’s pain complaints were limited to her right shoulder. There were no complaints of scapular pain or neck pain. Dr. Davis administered a steroid injection and range of motion exercises. He did not recommend any surgery. The claimant was to return if needed and she never did.

11. The claimant received a course of massage therapy and physical therapy throughout her recovery. Throughout the massage therapy the claimant consistently complained of pain in the muscles extending beyond the arm at the shoulder.

12. Dr. Lakin placed claimant at MMI on November 11, 2015. He assessed 13% upper extremity impairment based on loss of range of motion and 6% joint impairment for mild crepitus of 6% for a total of 18% scheduled impairment. The only restriction imposed is that the claimant not perform any CTI activities.

13. Dr. Lakin’s final work related diagnoses were: Partial tear of the rotator cuff; strain of muscles and tendons of the rotator cuff of right shoulder. The ALJ finds that the rotator cuff muscles extend beyond the arm at the shoulder.

14. Although Dr. Lakin recommended maintenance care, claimant has not returned for any care since reaching MMI.

15. At the time claimant underwent her impairment rating she advised Dr. Lakin that her “activities of daily living are significantly impeded with her right shoulder dysfunction.” The claimant reported to Dr. Lakin that “her hair hygiene is difficult, especially combing and styling her hair. She reports getting dressed slower and painful and she favors her right shoulder greatly with those types of activities.”

16. The claimant testified at hearing that she is able to wash and dry her own hair. She testified at hearing she can dress herself including wearing clothing that goes over her head. At hearing, claimant was wearing a sweater that would have been pulled on over her head. She does experience pain during these activities.

17. The claimant nonetheless suffers from a constant pain and ache that has continued since the date of MMI. This pain and aching radiates into her shoulder and into the right scapula area. The claimant has numerous documented issues with trigger points in the trapezius and scapula area.

18. The claimant testified at hearing she can raise her hand above her head and can use her right arm. She testified she can use her right arm for activities of daily living. The claimant testified she can pick up her youngest child who is about 40 pounds and carry her but does so by holding the child on her hip.

19. The claimant testified she does not take any prescription or over-the counter medications for sleep. She does not have daytime sleepiness or any cognitive problems due to lack of sleep. The claimant has not requested nor received any prescriptions or medical care directed for sleep disturbance.

20. The claimant was recorded on surveillance video on February 22, 2016. The ALJ does not find the video to be of significant probative value.

21. The claimant testified she takes no prescription pain medications or prescription. She’ll occasionally take over the counter pain reliever.

22. The claimant testified she wakes up during the night from time to time as her movements sometime illicit shoulder pain. She also testified she has pain in her upper back near the trapezius muscle and on the right.

23. The ALJ finds that the claimant has established that it is more likely than not that the situs of the claimant's functional impairment extends beyond the arm at the shoulder and that she is entitled to a whole person rating of 11%.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. A claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

3. The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

5. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

6. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S.* However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. Section 8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole

person. This is true because the term “injury” as used in Section 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the shoulder. *Langton v. Rocky Mountain Health Care Corp.* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System, supra.*

7. “Functional impairment” is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or disabled*, Strauch, supra.* Physical impairment relates to an individual’s health status as assessed by medical means. Disability or ‘functional impairment”, on the other hand, pertains to a person’s ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause “functional impairment” or disability. *Lambert & Sons, Inc. v. ICAO, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant’s capacity to meet the demands of life’s activities. *Lambert & Sons, Inc., supra at 658.*

8. “Functional impairment” need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7, 2009); Aligaze v. Colorado Cab Co, W.C. No. 4-705-940 (April 29, 2009); Martinez v. Albertson’s LLC, W.C. No. 4-692-947 (June 30, 2008).* Moreover, “referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person.” *Hernandez, v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005); Latshaw v. Baker Hughes, Inc., W.C. No. 4-842-705 (ICAO, December 17, 2013).* Nonetheless, symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with the claimant’s ability to use a portion of her body to be considered functional impairment. *See Mader v. Popejoy Construction Co., Inc., W.C. No. 4-198-489 (August 9, 1996), aff’d Popejoy Construction Co., Inc., (Colo. App. 96CA1508, February 13, 1997)(not selected for publication)*(claimant sustained functional impairment of the whole person where back pain impaired us of the arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as impairment of the whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant’s body which limits her “capacity to meet personal, social

and occupational demands." *Askew v. ICAO, 927 P.2d 1333 (Colo. 1996).* Consequently, an injury to the structures which make up the shoulder may or may not result in functional impairment beyond the arm at the shoulder. *Walker v. Jim Fucco Motor Co., supra; Strauch v. PSL Swedish Healthcare System, supra; Langton V. Rocky Mountain Health Care Corp., supra.*

9. Whether the claimant has sustained functional impairment beyond the arm at the shoulder is a factual question for the ALJ and depends on the particular circumstances of the individual case. *Walker v. Jim Fuoco Motor Co., supra.* In the instant case, the medical records support that claimant has consistently complained of (and received treatment for) pain, discomfort and functional loss beyond the shoulder joint. She has increased symptoms while completing activities of daily living as well as activities of employment and upon MMI demonstrated loss of active range of motion of the right shoulder. She testified credibly regarding her inability to function in her activities of daily living and in her ability to maintain proper sleep patterns.

10. As found, the claimant has proven by a preponderance of the evidence that she has sustained a functional impairment beyond the arm at the shoulder entitling her to permanent partial disability compensation based upon an impairment rating of 11% whole person.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent shall pay the claimant permanent partial disability payments based upon a whole person rating of 11%

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 2, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-958-503-02

ISSUE

1. Whether Claimant is entitled to a general admission for continued reasonable and necessary medical benefits ("Grover meds").

2. Whether Dr. Burris' maintenance recommendation of a six month health club membership is a recommendation for medical benefits after maximum medical improvement.

FINDINGS OF FACT

1. Claimant is employed by Employer as a plumbing/fire protection inspector.

2. On July 15, 2014 Claimant was so employed. Claimant was walking with another individual when he turned to answer a question, stepped off a curb onto a street, rolled his left ankle, and fell to the ground.

3. On August 27, 2014 Claimant underwent surgical intervention for his left ankle with orthopedic surgeon Dr. Schwappach.

4. Claimant's authorized treating provider, John Burris, M.D. noted that Claimant had numerous other complaints throughout his care including the cervical spine, left upper extremity, left lower extremity, right shoulder, and right knee. *See* Exhibits 1, A.

5. Dr. Burris noted that the cervical spine showed no acute abnormalities associated with the work event and that the MRI of the right shoulder showed no acute abnormalities associated with the work event. Dr. Burris noted the diagnosis for Claimant was left ankle sprain. *See* Exhibits 1, A

6. On October 20, 2015 Dr. Burris evaluated Claimant. Dr. Burris diagnosed left ankle sprain and noted that Claimant had completed approximately 100 sessions of therapy and had been released by the treating specialist after surgical intervention for his left ankle pain. Dr. Burris opined that Claimant was at maximum medical improvement (MMI). Dr. Burris provided a 6% lower extremity impairment rating. Dr. Burris opined that Claimant's other numerous complaints with negative diagnostic workups were not eligible for ratings based on the AMA Guides. *See* Exhibits 1, A

7. Dr. Burris opined that Claimant did not need any permanent work restrictions and that Claimant required no follow up. Dr. Burris encouraged Claimant to remain active with an aggressive home exercise program focused on stretching,

strengthening, and conditioning. Dr. Burris provided Claimant with a six month health club membership to ensure the continuity of Claimant's home program. Dr. Burris opined that the health club membership could be provided through maintenance and that no other maintenance was required. *See* Exhibits 1, A

8. On November 20, 2015 Dr. Burris submitted a Physician's Report of Worker's Compensation Injury to the Division of Workers' Compensation. Dr. Burris noted that Claimant had reached MMI on October 20, 2015 and that Claimant required maintenance care after MMI. Where the document asked to specify the care, Dr. Burris typed, "please see attached dictation" and attached a copy of his October 20, 2015 report and evaluation. *See* Exhibits 1, A

9. On December 3, 2015 Respondents filed a Final Admission of Liability. Respondents stated that their position on medical benefits after MMI was: "we do not admit for medical maintenance."

10. Claimant testified credibly at hearing. Claimant has continued symptoms in his ankle. Claimant attends a health club regularly to perform exercises. Claimant's strength and flexibility in his ankle has increased and his conditioning has improved somewhat with the regular use of his health club membership. At the health club, Claimant continues to perform similar activities to what he performed in physical therapy for this injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The Workers' Compensation Act of Colorado has a beneficent purpose and has consistently been given a liberal construction in favor of the interests of injured workers. *Padilla v. Industrial Comm'n*, 696 P.2d 273 (Colo. 1985).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Every employer shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury. *See* § 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). Employers have been required to provide services which are either medically necessary for the treatment of a claimant's injuries or incidental to obtaining such treatment. *Atencio v. Quality Care, Inc*. 791 P.2d 7 (Colo. App. 1990).

In all claims in which an authorized treating physician recommends medical benefits after maximum medical improvement, and there is no contrary medical opinion in the record, the employer shall, in a final admission of liability, admit liability for related reasonable and necessary medical benefits by an authorized treating physician. *See* § 8-42-107(8)(f), C.R.S. MMI exists when any medically determinable physical or mental impairment caused by the injury has become stable and no further treatment is reasonably expected to improve the claimant's condition. *See* § 8-40-201(11.5), C.R.S.; *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). In contrast post-MMI medical benefits are available to relieve the effects of the injury or prevent deterioration of the claimant's otherwise stable condition. *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

An award for post-MMI medical benefits, or *Grover* medical benefits, is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

Here, Claimant has established by a preponderance of the evidence that he is entitled to a general award for post-MMI medical benefits. The ALJ concludes from the reports of Dr. Burris that Dr. Burris intended Claimant receive the benefits of a health membership to relieve the effects of Claimant's ankle injury and to prevent Claimant's ankle condition from deteriorating. Dr. Burris did not require a specific course of medical treatment for the ankle, but has submitted enough information to show that he believed a health membership would be for the continued treatment of Claimant's ankle and to prevent it from deteriorating. Although Claimant is not receiving any other medical treatment at this time, and although no specific future course of medical treatment has been recommended, the ALJ finds that Claimant has met his burden to show that the health club membership qualifies as a medical benefit to relieve the effects of Claimant's injury and to prevent deterioration of his condition. The ALJ notes the beneficent purpose of the Workers' Compensation Act and the liberal construction in favor of injured workers. Although Respondents argue that a health club membership is not medical "treatment," the health club membership in this case was intended to provide a continued way for Claimant to strengthen, stretch, and condition his ankle following his work injury. The recommendation of this maintenance by Dr. Burris for Claimant's injured ankle will assist in relieving the effects of the injury and preventing deterioration of the injury and therefore constitutes "treatment" aimed at Claimant's injured ankle under a liberal interpretation of the Act. The ALJ concludes that Claimant has met his burden to show that the health club membership recommended as maintenance treatment by Dr. Burris, with no contrary medical opinions, constitutes future treatment necessary to relieve the effects of his injury and prevent further deterioration of his condition.

ORDER

1. Claimant is entitled to a general admission for continued reasonable and necessary medical benefits ("Grover meds").

2. Dr. Burris' maintenance recommendation of a six month health club membership is a recommendation for medical benefits after maximum medical improvement.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 2, 2016,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

The sole issue for determination is the claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. The claimant was an employee of the respondent-employer and worked as a laborer.

2. The claimant was hired by the respondent-employer on October 7, 2015.

3. The claimant had an admitted work related injury on October 20, 2015.

4. The claimant's hourly wage was $16.80.

5. Mary Jo Rees is the Controller for the respondent-employer.

6. Ms. Rees testified that when laborers are hired they are not promised or guaranteed overtime. Nonetheless, the claimant was offered 10 hours a day for six days a week working Monday through Saturday.

7. The claimant's first week of work was a partial week where he began on a Wednesday with 7.5 hours of work and then worked ten hour days the rest of the week, which is consistent with the offer.

8. The claimant's first full week he worked 59 hours, which is again consistent with the offer.

9. The number of hours that the claimant worked each day from the time of hire up to the date of injury is as follows:

DAY	DATE	HOURS WORKED
Wed	10/07/2015	7.5
Thurs	10/08/2015	10.0
Fri	10/09/2015	10.0
Sat	10/10/2015	10.0
Sun	10/11/2015	Off

Mon	10/12/2015	11.0
Tues	10/13/2015	10.5
Wed	10/14/2015	8.0
Thurs	10/15/2015	10.0
Fri	10/16/2015	10.0
Sat	10/17/2015	9.5
Sun	10/18/2015	Off
Mon	10/19/2015	10.0
Tues	10/20/2015	10.0

10. During the claimant's first full week of work (10/12/2015 through 10/17/2015), the claimant earned $1103.10, after working 59 hours. This included 46 hours of regular time and 13 hours of overtime. It is unclear why the claimant was not paid overtime for the 6 hours in excess of 40 hours.

11. The ALJ finds that based upon the offer of employment of 60 hours of work per week and the fact that the claimant's work history, albeit truncated, up to the date of injury was consistent with that offer, that the claimant's average weekly wage is best determined by using 40 hours at regular time ($16.80 x 40 = $672.00) and adding the projected overtime of 20 hours at time and a half (20 x $16.80 x 1.5 = $504.00) to arrive at $1,176.00 as the AWW.

12. The fact that the number of hours is not guaranteed does not affect the outcome because at the time of the injury the claimant was actually working consistent 10-hour days. Additionally, whether the claimant is given the opportunity to work each day is not in the claimant's control, yet he was in fact working in accordance with the offer.

13. The ALJ finds that it is more likely than not that the claimant's AWW is $1,176.00.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See Magnetic *Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. It is the ALJ's sole province to assess the credibility of the witnesses. *Monfort Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993).

4. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo.

5. Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

6. Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

7. Here, the ALJ perceives no reason that the claimant's wages should be determined in any manner other than that provided by statute.

8. Specifically, § 8-42-102(2)(d), C.R.S. states:

> Where the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage

> shall be determined from said daily wage in the manner set forth in paragraph (c) of this subsection (2).

9. § 8-42-102(2)(c), C.R.S. states:

> Where the employee is rendering service on a per diem basis, the weekly wage shall be determined by multiplying the daily wage by the number of days and fractions of days in the week during which the employee under a contract of hire was working at the time of the injury or would have worked if the injury had not intervened.

10. Based upon the credible testimony and persuasive evidence presented, the ALJ concludes as found above, that the claimant has established by a preponderance of the evidence that the claimant's average weekly wage is $1,176.00.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay benefits to the claimant based upon the average weekly wage of $1,176.00.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 3, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-992-247-01

ISSUES

- Did Claimant prove by a preponderance of the evidence that she sustained an accidental injury or occupational disease proximately caused by the performance of service arising out of and in the course of her employment?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability benefits for the period of December 3, 2015 through December 10, 2015?

- What is Claimant's average weekly wage?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable, necessary and authorized medical benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 though 6 were admitted into evidence. Respondents' Exhibits A through D were admitted into evidence.

CLAIMANT'S TESTIMONY

2. Claimant is an insurance agent. She has worked for the Employer since November 2013. Claimant's schedule requires her to work from 7:00 a.m. to 3:15 p.m. During that time she has a 45 minute lunch period and two 15 minute breaks.

3. Claimant's duties require her to sit at a desk and answer "inbound calls" from insured persons and other insurance agents. Claimant receives 50 to 60 calls per day. Claimant's work is transactional and requires constant typing on a keyboard and constant use of a mouse.

4. Claimant testified as follows concerning the events of July 15, 2015. Claimant was at work performing her regular duties answering calls while typing and using the mouse. While working Claimant felt a slight twinge and burning sensation in her right lower shoulder blade. The pain sensation continued throughout the entire work day but stopped after Claimant went home from work.

5. Claimant testified as follows concerning the events of July 16, 2015. Claimant went to back to work on July 16 and the pain she experienced on July 15

returned in the same location. Claimant reported the pain to her supervisor but the supervisor did not refer her to a doctor.

6. Claimant testified that after July 16, 2015 she continued working and the pain increased. The pain then moved up her neck and her right arm "went numb." Claimant then chose to go to her personal care physician, Julie Mullin, M.D.

7. Claimant testified that before July 15, 2015 she never had any symptoms in her neck, arm or shoulder.

8. Claimant testified that Dr. Mullin prescribed medications, physical therapy (PT) and dry needling. Claimant stated that these treatments were beneficial to her and she has returned to her regular duties.

9. Claimant testified that she underwent two ergonomic evaluations through the Employer. Claimant stated that the second evaluation was performed by a "specialist" and was more "in depth" than the first evaluation. Claimant stated the second evaluator recommended various changes in her work station. Claimant stated that the changes to the work station included alteration of her desk height, changes to her chair and alteration of the height of her monitors. The evaluator also recommended changes in Claimant's posture. Claimant opined that these changes helped relieve her symptoms.

10. Claimant testified that the second evaluator also recommended that she use a "vertical mouse." Claimant explained that a vertical mouse is like a "joystick" that eliminates the need to use the wrist to move the mouse side to side. Claimant stated that the Employer did not provide her with a vertical mouse but she eventually purchased one herself. Claimant did not provide the date that she she purchased the vertical mouse but she explained that it helped alleviate her symptoms.

MEDICAL RECORDS AND MEDICAL EVIDENCE

11. Dr. Mullin examined Claimant on July 24, 2015 for a chief complaint of 10 to 14 days of pain that started in the upper back and then moved into the neck and right shoulder. The history of present illness (HPI) reflects that Claimant reported there was no "inciting event or trauma" but she experienced more pain while "working at computer at work." The pain was worse when Claimant was "reaching forward or using computer/mouse." At this time Dr. Mullin suspected strains of the upper trapezius and rhomboid muscles. Dr. Mullen considered a herniated cervical disc and thoracic outlet syndrome to be less likely diagnoses. She noted there were no signs of nerve impingement or radiculopathy. Dr. Mullin prescribed physical therapy (PT) with dry needling, Voltaren, Flexeril and NORCO.

12. Dr. Mullin re-examined Claimant on August 4, 2015. The HPI reflects that Claimant had returned to work after the July 24, 2015 examination and over the next week her pain "worsened to the point of having difficulty picking things up with right hand, keyboarding, mousing." The right thumb was "completely numb." Claimant stated that her supervisor thought Claimant's condition should be treated "under [a]

work comp claim." As a consequence Claimant had not been able to begin PT. Dr. Mullin noted that Claimant's job required frequent "mousing and keyboarding." Dr. Mullin "suspected" upper back and shoulder girdle strains with "radial neuropathy/radiculopathy." Dr. Mullin wrote that Claimant's condition was "at least 50% likely to have been caused by exposure at work." Dr. Mullin continued the previous medications, added gabapentin and again referred Claimant for PT. Dr. Mullin also recommended Claimant undergo a right upper extremity EMG to evaluate numbness and weakness. Dr. Mullin imposed restrictions of no right upper extremity lifting or carrying in excess of 2 pounds and limited Claimant to 15 minutes of "mouse work" in a one hour period. Dr. Mullin opined that a "vertical mouse would be helpful."

13. On September 2, 2015 Dr. Mullin noted that Claimant's pain and numbness were improving with PT and dry needling. Claimant reportedly had not been using the computer at work but experienced immediate numbness in her thumb when she used a computer during a training session.

14. On September 11, 2015 Claimant underwent a right upper extremity electrodiagnostic evaluation by George Leimbach, M.D. Dr. Leimbach reported that the evaluation was "abnormal" and most consistent with C6 radiculopathy.

15. Dr. Mullin referred Claimant for a cervical MRI that was performed on September 24, 2015. The radiologist noted a broad-based "slightly more right-sided disc protrusion at C5-6 with mild bilateral neural foraminal narrowing, right more severe than left with some narrowing along the expected course of the right C6 root."

16. Dr. Mullin referred Claimant to Roberta P. Anderson-Oeser, M.D. for a physical medicine consultation. Dr. Anderson-Oeser examined Claimant on October 12, 2015. Claimant reported to Dr. Anderson-Oeser that she was experiencing "an aching sensation in the posterior cervical region in addition to numbness in the right forearm, thumb and index finger." Claimant gave a history that her pain began as a dull ache in the right shoulder blade that progressed with typing and mousing. Later Claimant experienced numbness in her arm and thumb. She then felt a "pop" in her neck and warmth radiating to the right arm. Dr. Anderson-Oeser's impressions included right C6 radiculopathy, cervicalgia and muscle spasms. In light of the EMG and MRI findings Dr. Anderson-Oeser recommended that Claimant undergo a "diagnostic/therapeutic C5-6 transforaminal epidural steroid injection" (ESI). Dr. Anderson-Oeser also recommended a trial of cervical traction.

17. On October 28, 2015 Claimant reported to Dr. Mullin that she continued to "have pain when seated more than 15 minutes or mousing more than a few minutes." Overall Claimant stated that her pain was improved by PT with dry needling and with the "contracture therapy" recommended by Dr. Anderson-Oeser. Dr. Mullin noted that Claimant wanted to hold off undergoing the ESI because she preferred the "most conservative treatments" and wanted to see whether the contracture therapy helped. Dr. Mullin again recommended Claimant use a joystick mouse.

18. On November 18, 2015 Claimant reported to Dr. Mullin that she felt "80% better" and was no longer having neck symptoms. Claimant denied any continued numbness and parasthesia. However, Claimant had new complaints of bilateral elbow pain and some "crampy pain in right thumb with intermittent twitching." Dr. Mullin prescribed an elbow strap for the elbow pain and again recommended claimant use a joystick mouse.

19. On December 18, 2015 Claimant reported to Dr. Mullin that she felt "80% improved" since the date of injury but did not think she had made much improvement over the last month. Claimant stated she felt she wasn't "doing anything useful at work" and expressed a desire to go back to work without restrictions. Dr. Mullin opined Claimant could attempt to return to work without restrictions but wanted Claimant to limit herself to 4 hours per day for the first week.

20. At the request of Respondents Allison Fall, M.D., performed an independent medical examination (IME) of the Claimant on March 3, 2016. Dr. Fall is board certified in physical medicine and rehabilitation and is level II accredited.

21. As part of the IME Dr. Fall took a history from Claimant, reviewed medical records and performed a physical examination. Claimant gave a history that in mid-July she was at work on the computer when she felt pain "right in the middle of her right shoulder blade" that felt like a "pinched nerve." Claimant reported that over the next few days she experienced "more burning," especially when using the mouse. Claimant also stated that one day she felt a "pop" and the "right deltoid got warm and it went down her arm with numbness." Claimant advised Dr. Fall that she had undergone two in-house ergonomic evaluations and was told everything was fine. Claimant also stated that she had an "independent man" perform an ergonomic evaluation and this man stated that some things "were incorrect." Claimant advised Dr. Fall that had purchased her own "joystick." Claimant reported that she had been diagnosed with cervical radiculopathy and had undergone PT, dry needling and cervical traction until December 2015 when "no more visits were approved." Claimant stated that her residual symptoms included occasional tingling in the arm, neck stiffness and headaches. Claimant had returned to work and was "uncomfortable."

22. Dr. Fall assessed a right-sided "C5-6 disc protrusion with right C6 radiculopathy, improving." Dr. Fall opined that Claimant experienced the "insidious onset of right-sided radicular symptoms secondary to a C5-6 disc protrusion." In support of this conclusion Dr. Fall explained that there was "no specific trauma that led to the disc protrusion, which does happen more often than many realize." Dr. Fall also noted that claimant was initially diagnosed with muscular problem that was thought to be work-related, but workup established that "this was C6 radiculopathy from a disc protrusion which is not caused by sedentary activity." Dr. Fall stated there was "no contraindication to [Claimant] continuing her regular-duty work."

23. On March 15, 2016 Dr. Mullin authored a "to whom it may concern" letter. Dr. Mullin noted that she treated Claimant for "neck pain, right upper extremity pain, [and] right thumb numbness." Dr. Mullin wrote that: "I feel this is a work-related injury

due to [Claimant's] extensive use of the phone, keyboard and mouse at work." In support of this opinion Dr. Mullin noted that when Claimant was first examined on July 24, 2015 she reported "pain in the right shoulder and arm worsened with reaching forward or using computer/mouse while working." Dr. Mullin also noted that Claimant felt a "burning in the right upper back" while working on July 15, 2015. Dr. Mullin stated that the EMG and MRI findings of C6 radiculopathy correlate with Claimant's symptoms of neck pain radiating into the right upper extremity and thumb numbness.

24. Dr. Fall testified at the hearing. Dr. Fall stated that Claimant's testimony about her job duties was consistent with the history Claimant provided at the IME. However, Dr. Fall added that at the IME Claimant reported she wore a headset when talking on the telephone.

25. Dr. Fall opined to a reasonable degree of medical probability that Claimant did not sustain any traumatic injury that caused herniation of the C5-6 disc. In support Dr. Fall noted that Claimant did not report she suffered a specific traumatic event that correlated with the onset of her symptoms.

26. Dr. Fall opined to a reasonable degree of medical probability that Claimant did not suffer a work-related "cumulative trauma injury" that caused or aggravated the C5-6 disc herniation. In support of this opinion Dr. Fall opined that there was no "mechanism of injury" that would cause or aggravate a C5-6 disc herniation. She explained that sitting at a desk while using the hand and arm does not create any "abnormal" force or trauma to the neck that could cause or aggravate a cervical disc herniation. Dr. Fall also explained that the Division of Workers' Compensation Cumulative Trauma Conditions Medical Treatment Guidelines (MTG), found a WCRP Rule 17, Exhibit 5, do not list cervical disc herniation as a type of cumulative trauma diagnosis that is associated with any specific "risk factors" such as force and vibration. Dr. Fall also opined that the fact Claimant experienced symptoms of C6 radiculopathy while working did not mean that her duties caused or aggravated the disc herniation. Dr. Fall explained that sitting in one position for a long period of time can elicit symptoms of a disc herniation without actually causing any physiological change in the disc herniation. By way of analogy Dr. Fall noted that a physician may place a patient's head in a particular position to elicit symptoms of a disc herniation without causing any additional physiological damage to the disc.

27. Dr. Fall opined that ergonomic changes to Claimant's work station, such as the purchase of the joystick, can't logically be credited with the overall improvement in Claimant's symptoms over time. Dr. Fall explained that symptoms of a disc herniation tend to be worst during the first 6 weeks and that Claimant got medical treatment during this period of time. Dr. Fall also pointed out that ergonomic evaluations may also result in improved posture and a consequent reduction of symptoms regardless of changes to the work station.

FINDINGS CONCERNING ALLEGED ACCIDENTAL INJURY

28. Claimant failed to prove it is more probably true than not that he sustained an accidental injury that proximately caused herniation of the C5-6 injury. Specifically Claimant failed to prove that there was any event or occurrence at work that caused the disc herniation and consequent radiculopathy.

29. Claimant did not testify that she experienced any specific event or occurrence that she considers to be the cause of her neck and arm systems. Rather, Claimant credibly testified that she experienced the onset of pain in her right shoulder while performing her regular duties that included talking on the phone, using a keyboard and using a mouse.

30. On July 24, 2016 Dr. Mullin recorded that Claimant gave a history of upper back, neck and right upper extremity pain for which there was no "inciting event or trauma." Rather, Claimant reported that she developed pain while "working at computer at work." Similarly, Claimant did not tell Dr. Fall that she sustained a traumatic event that was correlated with the onset of symptoms.

31. Dr. Fall credibly and persuasively opined that considering Claimant's medical records and history she did not suffer a traumatic injury that caused herniation of the C5-6 disc.

FINDINGS CONCERNING ALLEGED OCCUPATIONAL DISEASE

32. Claimant failed to prove it is more probably true that the disc herniation and consequent radiculopathy can be seen to have followed as a natural incident of her employment and can be traced to her employment as a proximate cause. Rather, the credible and persuasive evidence establishes that the disc herniation and consequent radiculopathy were probably caused by the natural progression of an idiopathic condition uninfluenced by the conditions and circumstances of Claimant's employment.

33. Dr. Fall credibly and persuasively opined that Claimant experienced the "insidious onset of right-sided radicular symptoms secondary the C5-6 disc protrusion" and that this sequence of events happens "more often than many realize."

34. Dr. Fall credibly and persuasively opined to a reasonable degree of medical probability that Claimant did not suffer a work-related "cumulative trauma injury" that caused or aggravated the C5-6 disc herniation. Dr. Fall took an extensive history concerning Claimant's job duties and the circumstances of her employment. Dr. Fall also heard the Claimant's testimony concerning her job duties and the ergonomic conditions under which Claimant performed her job. Considering this evidence Dr. Fall persuasively explained that sitting at a desk and moving the arm to manipulate the mouse did not cause any abnormal force or trauma to the cervical spine that could cause or aggravate a disc herniation.

35. Dr. Fall also credibly and persuasively explained that the MTG do not address cervical disc herniations as "cumulative trauma injuries" likely to result from

exposure to particular types of hazards experienced on the job. The ALJ assigns considerable weight to this evidence and infers from it that cervical disc herniation is not a diagnosis that is recognized as being caused by the specific risk factors set forth in the MTG.

36. Dr. Mullin's opinion or feeling that Claimant sustained a "work-related injury" because of the "extensive use of the phone, keyboard and mouse at work" is not persuasive. Dr. Mullin does not credibly and persuasively specify the mechanism of injury that leads her to believe that using a phone, keyboard and mouse caused the disc herniation or aggravated the disc herniation. Dr. Mullin did not persuasively refute Dr. Fall's arguments that disc herniations may occur insidiously without identifiable cause and that disc herniations are not addressed by the MTG as the type of condition likely to be caused by recognized risk factors such as repetitive awkward posture or force.

37. Dr. Mullin's theory of causation appears to be largely based on the facts that Claimant's symptoms first appeared while she was at work and tended to worsen when she was using the mouse and reaching.

38. However, Dr. Fall persuasively refuted Dr. Mullin's theory of causation insofar as it is based on the temporal relationship between use of the phone, keyboard and mouse and the appearance and progression of Claimant's symptoms. Dr. Fall credibly explained that the mere fact of a temporal relationship between performance of an activity and the experience of a symptom does not establish that the activity caused the symptom. For instance, Dr. Fall pointed out that without regard to mouse or keyboard use merely sitting at a desk for long periods of time may elicit symptoms of a disc herniation. Indeed Claimant told Dr. Anderson-Oeser that sitting for more than 15 minutes caused her to experience symptoms. (Finding of Fact 17). Dr. Fall also pointed out that physicians test for disc herniations by positioning the head so as to elicit symptoms without causing damage to the disc.

39. Dr. Fall also persuasively argued that the temporal relationship between the ergonomic changes to Claimant's work station and the reduction of her symptoms does not establish a causal relationship between the two events. Dr. Fall persuasively argued that the temporal relationship between the ergonomic changes and reduction in symptoms could well have been coincidental. In support Dr. Fall pointed out that the symptoms of a disc herniation are generally the worst during the first 6 weeks. Moreover, Dr. Fall pointed out that during the period of time the ergonomic changes were made Claimant was also receiving admittedly effective medical treatment. (Findings of Fact 8, 13, 17, 18). Moreover, the credible and persuasive evidence demonstrates that Claimant did not purchase and use the vertical mouse until at least the latter part of 2015, after she underwent medical treatment. Claimant testified that she did not purchase the mouse until after the "independent" ergonomic expert recommended it. Moreover, Dr. Mullin was still recommending that Claimant obtain a joystick mouse as late as November 18, 2015. (Finding of Fact 18). By that time Claimant had already told Dr. Mullin on October 28, 2015 that PT, dry needling and cervical traction were improving her symptoms. (Finding of Fact 17).

40. At hearing the parties stipulated that if the claim is found to be compensable Claimant is entitled to an award of temporary total disability benefits from December 3, 2015 through December 10, 2015.

41. Evidence and inferences contrary to or inconsistent with these findings of fact are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

LEGAL PRINCIPLES OF COMPENSABILITY AND CAUSATION INJURY

Although not entirely clear, it appears Claimant is arguing that a preponderance of the evidence supports a finding that she sustained either an accidental injury or occupational disease that proximately caused or aggravated the C5-6 disc herniation and resulted in the consequent radiculopathy. In support of these arguments Claimant relies on the opinions of Dr. Mullin. She also relies on possible inferences derived from the temporal relationship between the onset and continuation of the symptoms and the performance of her normal work duties. Conversely Respondents rely heavily on the opinions of Dr. Fall in support of their contention that Claimant failed to prove she sustained an accidental injury or occupational disease that proximately caused or aggravated the C5-6 disc herniation. The ALJ agrees with Respondents' position.

Claimant was required to prove by a preponderance of the evidence that her "injury" was "proximately caused by an injury or occupational disease arising out of and in the course of" the employment. Section 8-41-301(1)(c), C.R.S. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.* Generally, injuries "arise out of" the employment if the risk of injury is inherent in the employment itself. The causal relationship between these types of risks and the employment is "intuitive and obvious." Examples of such risks include gas explosions that cause burns and malfunctioning machines that amputates a limb.   Injuries also "arise out of" employment if produced by a "neutral risk." Neutral risks are not distinctly associated with the employment nor inherently personal or private to the Claimant. Examples of neutral risks include stray bullets, lightning, murderous attacks and "unexplained falls." However, an injury does not "arise out of employment" if it is caused by risks that are entirely personal or private to the claimant. Such risks include preexisting idiopathic illnesses or medical conditions, such as fainting, heart disease and epilepsy that are completely unrelated to the employment. *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014). Of course, if a "personal risk" such as epilepsy precipitates an event at work and the conditions or duties of the employment create a "special risk" that enhances the degree of injury sustained, the additional injury (beyond that resulting solely from the seizure) is compensable.   *Eg. Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1898) (applies "special hazard" doctrine to injuries caused by fall from 25 foot scaffold that was initiated by epileptic seizure).

Accidental injuries can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). In contrast , occupational diseases result from the conditions under which the work was performed and exposure occasioned by the nature of the employment, can be fairly traced to the employment as a proximate cause and do not come from a hazard to which the worker would have been equally exposed outside the employment. Section 8-40-201(14), C.R.S.; *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999).

Regardless of whether the alleged compensable condition results from an "accidental injury" or an "occupational disease" Claimant must prove by a preponderance of the evidence that the injury or disease was caused by the employment. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, *supra*. A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office, supra*.

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990).

When evaluating this issue of causation the ALJ may consider the provisions of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation and the ALJ may assess the weight to be given the MTG considering the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006); Section 8-43-201(3), C.R.S.

COMPENSABILITY OF ALLEGED OCCUPATIONAL DISEASE

As determined in Findings of Fact 28 through 31 Claimant failed to prove that she sustained an accidental injury arising out of and in the course of her employment that proximately caused herniation of the C5-6 disc. As found, Claimant's testimony concerning the appearance of her symptoms and the histories she provided to Dr. Mullin and Dr. Fall all indicate that the symptoms simply appeared while she was performing her regular job duties and did not result from any traumatic event sufficient to cause a disc herniation. Moreover, Dr. Fall credibly opined that the medical evidence does not support the occurrence of any traumatic event sufficient to have caused a disc herniation.

However, the mere fact that Claimant failed to prove that there was an injury associated with a particular time place and cause does not preclude a finding that she sustained an occupational disease that either caused the C5-6 herniation or aggravated or accelerated a preexisting condition.

COMPENSABILITY OF ALLEGED OCCUPATIONAL DISEASE

As determined in Findings of Fact 32 through 39, Claimant failed to prove it is more probably true that her C5-6 disc herniation and consequent radiculopathy Claimant failed to prove it is more probably true that the disc herniation and consequent radiculopathy can be seen to have followed as a natural incident of her employment and can be traced to her employment as a proximate cause. Rather, the credible and persuasive evidence establishes that the disc herniation and consequent radiculopathy were probably caused by the natural progression of an idiopathic condition uninfluenced by the conditions and circumstances of Claimant's employment.

As determined in Findings of Fact 33 though 35, the ALJ credits Dr. Fall's testimony that cervical disc herniations can occur "insidiously." The ALJ understands Dr. Fall to mean that disc herniations can and do occur as the result of idiopathic weakness or disease of the spine and without regard to external factors such trauma and repetitive motion. Dr. Fall also opined credibly opined that the circumstances of Claimant's employment that involved sitting at a desk and moving her arm did not generate the type of force or trauma necessary to be considered the cause of a cervical disc herniation. Although Dr. Mullin expressed a contrary opinion, the ALJ finds that Dr. Mullin's opinion concerning causation is not persuasive for the reasons stated in Findings of Fact 36 through 39.

At hearing Claimant's counsel cited *Sanchez v. Industrial Claim Appeals Office,* (Colo. App. No. 15CA1481, March 17, 2016) (not selected for publication), as authority for the proposition that this claim should be found compensable. Because the *Sanchez* opinion is not published the ALJ need not consider it to be precedential authority for any legal proposition. C.A.R. 35(f).

In any event, the ALJ concludes that the present claim is factually distinguishable from those in Sanchez. In *Sanchez* case the claimant was found to have sustained a horizontal tear of the medical meniscus, a "mild MCL" knee sprain and "mild posteromedial corner sprains/strains." Claimant testified he never had knee problems prior to May 2014 when he was at work and stood up from a kneeling position and his right knee "popped." A treating physician opined there was a "51% chance" the injuries were work-related. However, the ALJ denied the claim. In so doing the ALJ credited the opinion of Respondents' expert medical witness who opined that the type of meniscus tear suffered by claimant was generally chronic rather than acute and there was only a 10% chance that the tear was caused by standing up and feeling the knee pop. The expert also opined there was a 0% chance the claimant's injuries would have had to have been caused by a "much more significant injury" than "standing up at work and feeling a knee pop."

The *Sanche*z court interpreted the ALJ's reliance on the Respondents' expert as establishing an "implicit finding that claimant's condition was chronic and likely pre-existing." The court inferred from this finding that the ALJ necessarily treated the claimant's injury as arising from a non-compensable "personal risk" as that term is used in *City of Brighton v. Rodriguez, supra*. The *Sanchez* court also stated that it was undisputed that the claimant was asymptomatic before he stood up and experienced the knee pop at work and that he "consistently conveyed the mechanism and onset of symptoms in testimony and to his various providers."

In these circumstances the *Sanchez* court held that the ALJ committed a legal error by placing the claimant's injury in the personal or idiopathic category. The court concluded that the claimant's knee injury fell under the "neutral risk" category as a matter of law and that the "knee would not have 'popped' *but for* his actions at work." (Emphasis in original). Therefore, the *Sanchez* court held that the claimant sustained a compensable injury.

The ALJ understands the *Sanchez* court to have concluded that on the particular facts of that case the ALJ could not have found that the cause of Claimant's knee injuries resulted from a pre-existing idiopathic condition, but was instead legally compelled to find that the cause of the knee injuries was "unexplained." Hence, the injury resulted from a compensable "neutral risk" under the holding in *City of Brighton v. Rodriguez, supra*.

Whatever the merits of the *Sanchez* court's legal analysis, the facts in this claim are distinguishable from those in *Sanchez*. Here, the ALJ has expressly found, based mostly on Dr. Fall's testimony and the medical records that it is more probably true than not that Claimant's disc herniation and consequent radiculopathy resulted from a "personal or idiopathic" weakness of the disc without any causal contribution from the circumstances or conditions of Claimant's employment. The ALJ concludes that these determinations lie fully within his fact finding authority and are supported by the evidence found to be credible and persuasive. Therefore, this case falls within the parameters of that long line of published decisions holding that causation presents a question of fact for determination by the ALJ. *City of Boulder v. Streeb*, *supra*; *Faulkner v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office, supra*; *F.R. Orr Construction v. Rinta, supra*.

In light of the determination that Claimant failed to prove that she sustained a compensable injury or occupational disease the ALJ need not specifically address the other issues.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in WC 4-992-247-01 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 3, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable occupational disease injury to her right upper extremity that arose out of and in the course of her employment with Employer.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary partial disability benefits (TPD) from September 21, 2015 through December 20, 2015.

STIPULATIONS

1. Claimant's average weekly wage at the time of the alleged injury was $611.49.

FINDINGS OF FACT

1. Claimant began working for the Employer as a pet groomer on June 27, 2012.

2. Claimant's duties involved grooming, cleaning, and managing dogs of various sizes. Grooming the dogs involved a variety of individual tasks including shampooing, combing, lifting dogs into and out of the grooming area, rinsing the dogs, clipping the dogs' fur with scissors and clippers, trimming nails, towel drying, and blow drying.

3. Claimant regularly used her hands in performing her job duties. Claimant used a hose with a grip nozzle for bathing/shampooing, used her hands to towel dry the dogs, and used a blow dryer to complete the drying process. Claimant used scissors and vibrational clippers as well as nail clippers. Grooming an average sized dog took a total of approximately 3-4 hours, with periods of inactivity and Claimant typically groomed between 4-8 dogs per shift.

4. On July 28, 2015 Claimant was evaluated by her primary care provider, Sandra Bernard, PA-C. Claimant reported back pain, a lump at the base of her skull, what she believed to be carpal tunnel in her right wrist, and what she believed to be mild depression issues. Claimant reported she worked as a dog trimmer and believed she had tendonitis or carpal tunnel. A note was made of "competitive motion for years." PA Bernard noted a positive Tinnel exam on Claimant's right wrist and assessed wrist pain and carpal tunnel syndrome. PA Bernard recommended Claimant take Aleve and that she buy and wear a special wrist brace for carpel tunnel as much as possible, even while sleeping. *See* Exhibits A, 4.

5. Throughout August and September of 2015 Claimant continued to have symptoms in her right arm and wrist.

6. On September 21, 2015 Claimant reported the pain to Employer. Claimant believed the pain was affecting her ability to perform her duties as a pet groomer and that the pain was work related.

7. On September 21, 2015 Claimant was evaluated at Concentra by Casey McKinney, PA-C. Claimant reported symptoms for about a month and that she began having pain from her elbow into her wrist that was progressing. Claimant reported the pain was diffuse and changed with activities and that she had intermittent swelling. PA McKinney assessed: strain of forearm, right; and strain of wrist, right. PA McKinney recommended a wrist brace, physical therapy, and modified activity work with limited repetitive use of the right hand. *See* Exhibits B, 2.

8. On October 6, 2015 Claimant was evaluated at Concentra by Scott Richardson, M.D. Claimant reported having worked as a dog groomer for 4.5 years and that she had the gradual onset of right elbow/hand/digit pain. Claimant reported she was doing better and seeing improvement in physical therapy. Claimant reported she was working light duty and not grooming dogs and that she was wearing a wrist splint during the day. Dr. Richardson assessed: strain of wrist, right; strain of forearm, right; and pain, hand joint, right. Dr. Richardson referred Claimant for a work site evaluation. Dr. Richardson also noted Claimant could continue to work modified duty but that she was unable to use power/impact/vibratory tools with her right upper extremity, that she had to wear a splint/brace on the right upper extremity constantly, and that she could grip/squeeze/pinch with her right upper extremity occasionally. *See* Exhibits B, 2.

9. On October 20, 2015 Jill Adams, CRC, CCM, CEAS II performed a job demands analysis. Ms. Adams interviewed Claimant, noted and listed the job duties, and observed Claimant performing the position. Ms. Adams also observed other pet stylists performing parts of the job duties as Claimant was still on work restrictions. Ms. Adams noted that Claimant lifted grooming tools such as clippers, shears, combs, brushes, etc. with the frequency of “frequent to constant” with the force required of “simple grasp.” Ms. Adams conducted a one hour study of the hand wrist flexion, extension, or ulnar deviation as well as a one hour study of use of grooming clipper/vibratory tools. Ms. Adams analyzed the frequency and force required for Claimant’s job duties. Ms. Adams concluded that Claimant’s job duties did not meet any primary or secondary risk factors. *See* Exhibit E.

10. On October 26, 2015 Claimant was evaluated by PA McKinney. PA McKinney again assessed: pain, hand joint, right; strain of forearm, right; and strain of wrist, right. PA McKinney noted that an ergonomic evaluation was reviewed with Dr. Villavicencio and that the evaluation noted constant gripping/coupling with the right hand that they believed supported the treatment of strain of the right wrist and forearm. PA McKinney noted, however, that Claimant would be referred to a hand specialist for a

more definitive diagnosis and that the ergonomic evaluation would not support a chronic overuse diagnosis, such as carpal tunnel syndrome, per the CO state guidelines. PA McKinney referred Claimant to a hand specialist for the right hand and wrist pain. *See* Exhibits B, 2.

11. On November 6, 2015 Claimant was evaluated by Tracy Wolf, M.D. Claimant reported her right hand and arm pain started over time from grooming dogs and that the pain varied from day to day. Claimant reported pinching and pain over the volar wrist going toward the thumb and that she also got pain on the dorsal wrist sometimes up to the arms. Dr. Wolf noted tenderness on both the lateral and medial epicondylar regions anteriorly as well as distally at the wrist dorsally over the wrist extensors and the first compartment, over the volar wrist over the carpal tunnel. Dr. Wolf assessed: right medial and lateral epicondylitis, wrist tendonitis; and possible right carpal tunnel/median neuritis. Dr. Wolf noted that Claimant had responded nicely to therapy and splinting and that both would be continued. Dr. Wolf performed an injection into Claimant's right carpal tunnel. *See* Exhibits B, 2.

12. On November 10, 2015 Claimant was evaluated at Concentra by Craig Hare, PA-C. PA Hare assessed: pain, hand joint, right; strain of forearm, right; and strain of wrist, right. PA Hare opined that Claimant had reached maximum medical improvement on November 10, 2015 and noted that the job site analysis results determined there was no causality for Claimant's symptoms. PA Hare noted that Claimant's case would be closed. *See* Exhibits B, 2.

13. On December 20, 2015 Claimant resigned from her employment with Employer.

14. On January 21, 2016 Respondent sent a letter to Dr. Wolf. Dr. Wolf responded by checking a box opining that it was medically probable that Claimant's diagnoses and need for treatment were caused by her exposure at work. Dr. Wolf hand wrote that she did not know if Claimant was at maximum medical improvement and that she did not know how Claimant was doing currently. *See* Exhibit 5.

15. On March 18, 2016 Claimant was evaluated by her primary care physician Oluwaseun Oladiran, M.D. Claimant reported five months of right wrist pain aggravated by movement with joint tenderness. Claimant reported working as a pet groomer when she suffered the injury due to repetitive movements. Dr. Oladiran assessed right wrist pain, worsening. Dr. Oladiran noted that Claimant had cortisone shots without much help and physical therapy that showed improvement but had plateaued. Dr. Oladiran suspected carpal tunnel syndrome and referred Claimant for an EMG and for further physical therapy. *See* Exhibit 1.

16. On April 14, 2015 Claimant was evaluated by Dr. Oladiran. Dr. Oladiran noted that Claimants' EMG testing came back within normal limits. Claimant also reported neck pain. Dr. Oladiran assessed neck pain, ordered an x-ray exam of the neck, and also assessed other chronic pain. *See* Exhibit 1.

17. On April 17, 2016 Henry Roth, M.D. issued an independent medical examination report after performing a record review and assessment at the request of Respondents. Dr. Roth opined that Claimant had no specific work related diagnosis or condition and that her experience of discomfort while a work was the reasonable symptomatic medical expectation for her underlying, idiopathic, personal medical condition. Dr. Roth opined that Claimants' carpal tunnel syndrome symptoms, wrist pain, forearm pain, and elbow pain were due to an idiopathic disorder unique to Claimant and attributed to non-occupational factors (genetics and aging). *See* Exhibit D.

18. Dr. Roth noted that Claimant had multiple right upper extremity complaints with discomfort that was diffuse and nonspecific. Dr. Roth opined that minimum thresholds were necessary before considering an activity to be causal of carpal tunnel syndrome and that Claimants' work activities did not breach those thresholds. Dr. Roth noted the absence of any measurable primary or secondary risk factors per the Colorado Division of Labor Medical Treatment Guidelines to have caused Claimant's symptoms. Dr. Roth recommended against any further medical evaluation, diagnosis, or treatment under workers' compensation. *See* Exhibit D.

19. Dr. Roth testified at hearing consistent with his written report. Dr. Roth opined that that Claimant did not have any work exposure that met the criteria for a primary or secondary risk factor under the Medical Treatment Guidelines and that there were not sufficient forces, repetition, or duration of activity to consider her upper extremity physical discomforts and conditions to be causally related to her work activities.

20. The opinions of Dr. Roth are found credible and persuasive. Dr. Roth performed a causation analysis after fully reviewing the medical records and job demands analysis, which was consistent with Claimant's description of her job duties. There are no primary or secondary risk factors that would provide a causal connection between Claimant's job duties and her symptoms. Although Claimant believes her job duties caused her symptoms, there is insufficient objective evidence to support her belief.

21. The opinion of Dr. Wolf is not found as credible or persuasive. Dr. Wolf's opinion does not provide a full causality assessment or reference specifically the job demands analysis report. It is unclear from Dr. Wolf's opinion whether or not she reviewed the full job demands assessment including the conclusion that the Claimant's job duties met no primary or secondary risk factors under the Medical Treatment Guidelines. The opinion of Dr. Wolf is a mere check box and not as detailed or persuasive as the report and testimony of Dr. Roth.

22. Claimant testified credibly at hearing. Claimant's description of her job duties is similar to what was reported in the job demands analysis. The job demands analysis is a fair and accurate description of Claimant's duties.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See § 8-41-301(1)(b), C.R.S.; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

An accident "arises out of" employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). An "occupational disease" is a disease which results directly from the employment of the conditions under which work was performed, which can be seen to have followed as a natural incident of the work, and as a result of the exposure occasioned by the nature of the employment, and which be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would been equally exposed outside of the employment. *See* § 8-40-201(14), C.R.S. This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.*

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment duties or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P. 2d 251 (Colo. App. 1999). The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999).

The credible and persuasive evidence establishes that there is not a causal relationship between Claimant's alleged injuries and her employment. Specifically, pursuant to the Division's Medical Treatment Guidelines, set forth in Rule 17, a specific set of steps should be followed to determine if the Claimant's conditions are work related. In this instance Dr. Roth performed a causation analysis consistent with the Division's Medical Treatment Guidelines. His conclusions are well-founded and establish that Claimant's job duties did not meet the primary or secondary risk factors risk factors pursuant to the Medical Treatment Guidelines. As found above, several of Claimant's treating providers opined that the job demands analysis did not support the contention that Claimant's condition or symptoms were the result of her employment. Specifically, Dr. Richardson wished to have a job demands analysis performed to aid in causality, PA McKinney and Dr. Villavicencio opined that the ergonomic evaluation did not support a chronic overuse diagnosis or a diagnosis of carpal tunnel syndrome, and PA Hare also opined that the job demands analysis did not support the work related causality of Claimant's symptoms. These opinions are consistent with the opinions of Dr. Roth and are credited. The contrary opinion of Dr. Wolf is not credited. It is unclear whether Dr. Wolf reviewed the entire job demands analysis, whether she was aware of the lack of any primary or secondary risk factors found, and her opinion is not detailed or persuasive. The Claimant has failed to establish that her symptoms were directly and proximately caused by her employment duties or working conditions.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden of proof to establish that she suffers from an occupational disease of her right upper extremity. Her claim is denied and dismissed.

2. As the claim is not compensable, the claim for temporary partial disability benefits from September 21, 2015 through December 20, 2015 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 2, 2016,

/s/ Michelle E. Jones

____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that his exposure to jet aircraft or other noise in the workplace proximately caused his hearing loss and tinnitus.

- If compensable, did Claimant prove by a preponderance of the evidence that he is entitled to receive medical benefits to cure and relieve the effects of his injury or occupational disease.

FINDINGS OF FACT

1. Claimant, who was born on April 26, 1950, is 66 years old.

2. Claimant began working for Employer in 1975. Claimant's job duties included mechanical work on jet engines and related systems on various types of aircraft. The job description was "generally recognized as technician's work in shops, maintenance bases and line stations on aircraft (including power plants), parts and other related work"[1].

3. He initially worked as an aircraft mechanic in the San Francisco maintenance center. In this position, Claimant worked around large bead blasting machines and heavy duty solvent cleaning machines.

4. The first record of testing done on Claimant's hearing was May 31, 1977. The testing was done by HPI-National Mobile Health Programs ("HPI") and showed no hearing loss[2].

5. After he was furloughed in San Francisco, Claimant transferred to Denver, working at Stapleton International Airport from 1980-94. While at Stapleton, he worked on the ramp. Claimant testified he was exposed to engine noise and auxiliary power units ("APU") noise at various times during his workday at Stapleton, when airplanes arrived at the gate and departed the gate. He provided maintenance services at the gate area, proximate to the terminal. Employer shared this area with other air carriers. These carriers (including Continental Airlines) would rev up the engines while the aircraft were backing from the jet way to the runway. The ALJ infers this regularly exposed the Claimant to jet engine noise on the ramp.

[1] Exhibit 9.

[2] The results of this baseline test were described by the experts as normal.

6. Claimant was exposed to noise from different types of aircraft throughout his employment. Three classifications of aircraft were in service during his employment- Stage 1, 2 and 3. Stage 1 aircraft were the loudest and had no muffling on the engines. Stage 2 aircraft were the second loudest. Claimant testified he thought Stage 2 aircraft's noise level was 180-190 decibels ("dB") in 1990[3]. Claimant testified "hush" kits were put on Stage 1 and 2 aircraft in the 1980s. There was no evidence introduced concerning the decibel levels of Stage 2 jet aircraft engines once the hush kits were installed. Stage 1 and 2 aircraft were slowly phased out. However, Claimant was exposed to noise from aircraft in these classifications up to January 1, 2000, when the FAA required all aircraft to comply with Stage 3 requirements. The ALJ infers Claimant was exposed to noise levels in excess of 110 dB when he was around Stage 1 and 2 aircraft and this was for at least fifteen (10) years.

7. Claimant testified he wore hearing protection throughout his employment, including ear plugs and earmuffs. Employees provided their own hearing protection during the early years of his employment and the hearing protection was not as effective as the current protection. When he worked at Stapleton, Claimant testified he could hear the jet engines through the headsets and the earpieces also housed the radio. When he worked on the ramp, he was within walking distance of all sides of the aircraft and sometimes as close as an arm's reach. Claimant estimated he would wear hearing protection approximately twenty (20) minutes per hour around the dispatch of a single aircraft, which occurred several times per day. Claimant noted there were times when he removed hearing protection in order to communicate with other mechanics. This occurred throughout his employment up to the present. There were also occasions when he would be surprised by jet engine noise or a noise from aircraft when he wasn't wearing hearing protection.

8. There was no evidence in the record as to whether testing was done to show the level of noise exposure Claimant received while wearing the older hearing protection during the period 1975-2010.

9. In 1994, Claimant started working at Denver International Airport ("DIA") and worked in the hangar full-time. He has continued to work in the hangar, working on both wide and narrow body aircraft. Claimant testified he is exposed to noise from jet engines and the APUs and he works in close proximity to the APUs, which sometimes are running when the aircraft is in the hangar. Claimant testified there are other noise sources to which he is exposed in the hangar, which include noise from the air conditioning systems, hydraulic pumps and other electrical power devices.

10. HPI hearing testing records for Claimant from 1977, 1979, 1980, 1986 1989, 1990, 1991-1994, 1996-1997, 1999, 2000, 2011-2012, and 2014 were admitted into evidence at hearing. No Standard Threshold Shift ("STS") was noted in the tests performed through 2012. The tests performed on September 12 and December 5, 2014 confirmed a STS occurred.

[3] Claimant agreed this noise level was at take-off and during flight.

11. No hearing testing records for Claimant from 2001-2010 were introduced into evidence. Claimant testified his hearing was not tested during that period of time.

12. Evidence of Employer's OSHA violations in 2010 were admitted at hearing. On August 6, 2010, OSHA issued a citation to Employer for not obtaining audiograms for each employee exposed at or above 85 dB for an 8 hour Time Weighted Average ("TWA"), including ramp service employees, customer service representatives and mechanics. On August 6, 2010, OSHA issued a citation to Employer on eighteen employees who were subject to long term hearing loss from the lack of a comprehensive hearing conservation program and from a lack of re-testing. Employer also received a citation because audiometric testing was being conducted in a room that did not meet requirements. Employer was also cited for failing to record employees whose audiogram showed a STS shift in the OSHA 300 log and failed to provide audiograms at no cost to employees. Employer also failed to adequately record work-related injuries. The ALJ infers Claimant was within the group of employees exposed to noise in excess of 85 dB when the OSHA testing was done.

13. Claimant testified the quality of hearing protection improved after 2010 when Employer had an OSHA evaluation.

14. Claimant testified that he began noticing some hearing difficulties prior to 2014. Specifically, he had difficulty hearing voices in a crowd and hearing certain segments of speech and understanding people. He also noticed tinnitus intermittently before 2014. Claimant testified the tinnitus is now constant and disturbs his sleep on occasion.

15. Claimant noticed a significant change in his hearing in 2014. He reported his hearing loss to Employer and an Employer's First Report of Injury was prepared by Mark Hofstatter on December 15, 2014. The description of how the injury occurred said: "Cumulative hearing loss sustained over 39 years of working as a mechanic on aircraft. Noise sources include power tools equipment & aircraft engine noise".

16. Claimant stated he was sent to Concentra after he reported his hearing issue to his supervisor. On December 5, 2014, Claimant underwent audiometric testing and was evaluated by Kirk Holmboe, D.O., who noted there was evidence of high frequency hearing loss on the left and right. There was no information in the record which indicated whether Dr. Holmboe believed Claimant's hearing loss resulted from his occupational noise exposure. Claimant testified his supervisor told him he was "on his own" for treatment.

17. Dr. Lipkin evaluated Claimant on February 12, 2015. The intake notes recorded Claimant's history as follows:

> "New patient presents with hearing loss: bilateral. Patient is an airplane mechanic for United Airlines. Patient reports that over the years he has been compliant with hearing test(ing); first test was performed 5/31/2977 with United Airlines. Throughout his employment, the patient has been compliant with

> hearing protection and hearing tests. Uses hearing protection whenever possible. However, over the last several years the patient has noticed a significant hearing loss in both ears. Although the patient cannot identify one episode of loud noise exposure, he reports that he is consistently around loud engines and airplanes at his job. The patient denies dizziness, otalgia, and otorrhea.
>
> Occasional high pitched whining tinnitus.
>
> Review of serial hearing tests – gradual progressive high frequency loss.
>
> Having problems communicating due to hearing loss.
>
> Nonsmoker, non-diabetic. No other non-work noise exposure. Has been hunting, used ear protections."

18. After the evaluation, Dr. Lipkin reviewed the results of serial hearing tests performed since 1977. The history section noted Claimant had a history of noise exposure with classic, progressive, sloping sensorineural hearing loss. Dr. Lipkin opined Claimant's hearing in 1977 was essentially normal and his hearing loss progressed over the years, particularly the last fifteen years. Dr. Lipkin concluded: "To a reasonable degree of medical probability, [Claimant] has work related noise-induced hearing loss and tinnitus secondary towards this." Dr. Lipkin's concluded that Claimant's hearing loss had progressed over the years (particularly over the last 15 years) and at this point in time was bilateral significant sloping sensorineural hearing loss, worse in the upper frequencies. The ALJ infers Dr. Lipkin's opinion was based upon the history taken from Claimant of his noise exposure, his extrapolation from the hearing tests and his expertise as an otolaryngologist.

19. The ALJ notes Dr. Lipkin's report recorded Claimant was a non-smoker and not diabetic. The report also excluded non-occupational noise exposures. The ALJ infers Dr. Lipkin considered Claimant's medical conditions when concluding what caused his hearing loss, although not every condition he reviewed was identified.

20. Dr. Lipkin recommended further evaluation/ treatment, including fitting Claimant for hearing aids.

21. Claimant testified he wishes to pursue treatment with Dr. Lipkin.

22. Claimant testified he had a shot a total of ten rounds with his gun over the years, as hunting was not an activity he did on a regular basis. Claimant wore hearing protection when firing the weapon.

23. Terry McGurk ("McGurk") testified at hearing. He is Employer's operations supervisor or manager for United Airlines at Denver International Airport (DIA) and was previously the manager of safety from 2009 to 2011. Mr. McGurk testified OSHA requires employees to wear hearing protection when exposed to TWA noise of 85 dB or

greater. He testified regarding Employer's hearing conservation program, which included the choice of a molded earplug, a plastic insert, or an earmuff. Employer requires ear protection to be worn at 80 dB. Additionally, Employer requires any employees who are working outside of the building to have hearing protection on at all times. The various ear protection options include ear plugs and muffs which have a noise reduction rating of 28 dB to 34 dB. Mr. McGurk testified he wore earmuff protectors when he started working for Employer thirty-six (36) years ago and agreed hearing protection has improved over time.

24. Mr. McGurk testified OSHA requires Employer to conduct yearly testing of the hearing of employees exposed to noise at DIA. At present, Employer provides audiometric testing at no cost to employees. For the years 2000-2010, there were no reported test results for Claimant.

25. Mr. McGurk testified testing was done in August of 2010 to measure noise levels at DIA. The testing was done by having certain employees wear noise dosimeters. Dosimeters measure the level of noise that is absorbed over a period of time. Mr. McGurk stated the measured noise levels on a time weighted average in the areas in which the Claimant worked were all less than 85 dB. The time-weighted average for noise exposure as measured by dosimeters worn by employees ranged from 66.4 dB to 86.1 dB. On cross-examination, Mr. McGurk admitted the highest level of noise exposure to which employees were exposed could exceed the TWA.

26. OSHA also obtained dosimeter noise measurements in August of 2010 which were generally consistent with the results obtained by Employer. The eight (8) hour time TWAs ranged from 58.1 dB (the 57.7dB was not valid) to 87.1 dB, with the latter dosimeter reading taken at B48 Planeside-all functions. None of the dosimeter readings were over 90 dB. No testing has been done since 2010.

27. At the request of Respondent, Edward Jacobson, Ph.D. performed a review of Claimant's medical records, including the results of the audiometric testing. He also reviewed the records of the 2010 testing done at DIA. Dr. Jacobson did not evaluate Claimant, nor did he perform any testing of his hearing. After reviewing available records, Dr. Jacobson opined in his August 20, 2015 report there was nothing that would convincingly establish a job-related hearing loss. Dr. Jacobson noted some issues needed to be clarified in order to determine whether the hearing loss was work-related, including: the reason for inter-aural asymmetry; change in the audiometric configuration as is apparent on the various audiograms; no noise measurements obtained in Claimant's work area relative to his job description as a mechanic, but apparently unknown as to those who have seen him clinically; the use of ear protection, which would further reduce the aforementioned workplace noise levels by 20-30 dB based on known research; workplace noise less in recent years; more effective hearing protection; reasons why the loss progressed to the levels obtained at the time of the ENT visit in a very short period of time and; the lack of mention of presbycusis.

28. On August 27, 2015, Claimant was evaluated by Allison Fall, M.D. at the request of Respondents. Based on the information provided regarding the measured

decibel levels and the fact that hearing protection was utilized (which would protect against 20-30 dB), Dr. Fall opined Claimant's levels of exposure at work were within the acceptable range according to OSHA. Dr. Fall believed none of the levels would be near 85 dB, which would be the sound-pressure action level, above which HCP, use of ear protection, and hearing tests become necessary. Dr. Fall also noted hearing loss is known to increase with age and is more common in men. Dr. Fall opined it was more likely that his hearing loss was age-related. The ALJ notes that Dr. Fall's opinion was based upon the decibel level measured at DIA in 2010. Dr. Fall's report did not account for Claimant's noise exposure while working in San Francisco or at Stapleton. Dr. Fall also did not analyze the Claimant's exposure to noise above the 85 dB level when he wasn't wearing hearing protection.

29. Dr. Jacobson issued an addendum report on December 17, 2015, after reviewing medical records from Kaiser Permanente[4]. In this report, Dr. Jacobson noted there were many contributors relative to identifiable hearing loss, often greater for the high frequencies. These included vascular disease/hypertension, abnormal lipids, C-spine anomalies, chemotherapy and associated Cisplatin medication, alcohol intake, migraines, and various medications which were documented in the Kaiser records. Dr. Jacobson opined these factors should be taken into consideration as a cause of auditory/vestibular symptoms, including hearing loss and tinnitus. The ALJ notes this opinion falls shorts of a conclusion that these factors caused Claimant's hearing loss.

30. Dr. Fall issued an addendum report on January 5, 2016, after she reviewed medical records from Kaiser Permanente and Dr. Jacobson. Dr. Fall stated there were documented non-work related medical conditions, which further supported her opinion that the hearing loss was not related to his work at Employer.

31. Dr. Fall testified as an expert on behalf of Respondent at hearing. She is board-certified in physical medicine and rehabilitation. She is Level II accredited pursuant to the W.C.R.P. Dr. Fall agreed she had less experience in otolaryngology than Dr. Lipkin. Dr. Fall reviewed the case from a causation standpoint, looking at Claimant's particular risk from the work he did for Employer versus his risk outside of that work. She found the National Institute for Occupational Safety and Health indicated there was an 8% chance of hearing loss when exposed to noise at the 85 dB level for eight hours per day for 40 years. In other words, this represented an 8% percent chance of hearing loss at that decibel level. Since he wore hearing protection, Dr. Fall did not believe Claimant was exposed to levels of 85 db or above for 8 hours per day. Dr. Fall stated she came to that conclusion based upon the data (2010 testing) which was provided and the fact that hearing protection would dampen 20-30% of the noise. Dr. Fall did not think Claimant's noise exposure in his older employment (working in San Francisco or at Stapleton) was greater than the 85 dB level. The ALJ found this opinion to be less persuasive, as Dr. Fall did not specify how she reached it.

32. Dr. Fall testified there were other risk factors for Claimant which could affect his hearing. This included his age, carpal tunnel, high blood pressure, and

[4] The Kaiser Permanente records were not admitted at hearing.

chemotherapy agents, which added to Claimant's risk of hearing loss. On cross-examination, Dr. Fall agreed that none of the medical records she reviewed concluded these other factors caused Claimant's hearing loss. Dr. Fall did not offer an opinion regarding the cause of Claimant's tinnitus while testifying.

33. Dr. Jacobson testified as an expert in audiology, industrial audiology, and audiometric testing. He is a fellow of the American College of Forensic Examiners and a diplomat at the American Board of Forensic Medicine. Dr. Jacobson is not a physician and does not prescribe medications. He is qualified to confirm hearing problems and identify abnormalities. Dr. Jacobson testified once damage happens to the nerves in the ear, the nerves do not regenerate or grow back. Exposure to noise in the 90-95 dB range may result in hearing loss. Dr. Jacobson testified the permissible level for noise exposure for an 8 hour day for 115 dB is .25 or 15 minutes. He stated the permissible level for an 8 hour day for 110 dB is .5 or 30 minutes. Based on the 2010 testing records, Dr. Jacobson believed Claimant was exposed to noise at the 57.1 dB level. Dr. Jacobson opined the noise Claimant was exposed to while working for Employer did not aggravate or accelerate his hearing loss.

34. Dr. Jacobson believed Claimant's non-occupational medical conditions were the more likely cause of his hearing loss. Dr. Jacobson noted there was nothing in Dr. Lipkin's report which indicated he reviewed the noise level records from the 2010 testing or medical records from Kaiser Permanente. He noted an STS did not necessarily mean an individual had a hearing loss, but did not dispute Claimant had a hearing loss in the higher frequencies. Dr. Jacobson testified regarding Claimant's exposure to gun shots and stated he had never seen anyone wear hearing protection. Dr. Jacobson agreed tinnitus could develop as a result of an occupational exposure, as well as other factors such as over-the-counter drugs. Dr. Jacobson did not believe it correlated to anything Claimant was exposed to at work and did not qualify Claimant for a permanent impairment. By completely excluding any role Claimant's occupational noise exposure may have played in the tinnitus, Dr. Jacobson's testimony was less persuasive to the ALJ. Also Dr. Jacobson's testimony relating his own experience with hearing loss and tinnitus was not persuasive to the ALJ.

35. Based upon the expert opinions before the Court, including the testimony on OSHA standards, exposure to noise above the 85 dB level can cause hearing loss.

36. The ALJ finds Claimant was a credible witness when describing the level of noise he was exposed to and the hearing protection he wore. Based upon Claimant's testimony and extrapolating from the 2010 dosimeter testing, the ALJ finds it is more probable than not Claimant was exposed to noise above the 85 dB level while working at Stapleton, where he worked for fourteen (14) years. This includes exposure to Stage 1 and 2 aircraft. It is more probable than not the accumulated exposure was a cause of Claimant's hearing loss.

37. The ALJ finds it is more probable than not Claimant was exposed to noise above the 85 dB level for short periods of time when he took off his hearing protection. This exposure has continued to the present.

38. The ALJ credited Dr. Lipkin’s opinions concerning Claimant’s hearing loss, namely that is was progressive and resulted from noise exposure during his employment.

39. The ALJ credited that portion of Dr. Jacobson’s testimony concerning the progression of hearing loss, including that exposure over time can cause hearing loss and the nerves in the ear do not regenerate after suffering damage. Dr. Jacobson’s testimony was less persuasive when discussing the non-occupational factors which increased Claimant’s risk of hearing loss and the failure to include occupational noise exposure at all made Dr. Jacobson less credible.

40. Claimant had non-occupational risk factors for hearing loss. As confirmed by Drs. Fall and Jacobson, these included: his age, hypertension, chemotherapy (treatment with the cancer drug Cisplatin[5]), anti-inflammatory medications, and exposure to gun shots. There were no medical records admitted at hearing in which a physician concluded Claimant’s hearing loss was caused by one of these conditions/factors. Both Dr. Fall and Dr. Jacobson conceded that risk does not equal cause.

41. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S.

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57

[5] The ALJ notes there was nothing in the hearing testing records which showed a hearing loss in 2007 which was potentially attributable to Cisplatin taken in connection with Claimant’s chemotherapy.

P.2d 1205 (1936); CJI, Civil 3:16 (2005). The instant case requires a credibility determination between various medical experts, who have disagreed as to the cause of Claimant's hearing loss and tinnitus.

Compensability-Hearing Loss and Tinnitus

Both Claimant and Respondent agreed the overriding issue in the instant case was whether Claimant's hearing loss constituted a compensable occupational disease. An occupational disease is "a disease which results directly from the employment or conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard which the worker would have been equally exposed outside of the employment." §8-40-201(14), C.R.S. 2014.

A Claimant seeking benefits for an occupational disease must first establish the existence of the disease, then that it was directly and proximately caused by Claimant's employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims,* 989 P.2d 251, (Colo. App. 1999). A Claimant is entitled to recovery for an occupational disease only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate, the disability for which compensation is sought. *Anderson v. Brinkhoff,* 839 P.2d 819, 824 (Colo. 1993)[6].

If Claimant establishes a causal relationship exists between the employment and occupational disease, the burden shifts to Respondents to prove both the existence of non-occupational contributors to the disease and the extent to which these contribute to the disability as well as the need for treatment. *Cowin & Co. v. Medina,* 860 P.2d 535, 537 (Colo. App. 1992). Where the disease for which a Claimant is seeking compensation is produced solely by some extrinsic or independent cause, it is not compensable. *Anderson v. Brinkhoff, supra,* 839 P.2d at 824.

In this regard, Claimant contended he satisfied his burden of proof that his hearing loss was proximately caused by noise exposure he experienced at work. Claimant relied upon his testimony concerning noise exposure, evidence of OSHA violations, along with the expert opinions of Dr. Lipkin to support his contentions. Claimant urged the rejection of Drs. Fall and Jacobson's opinions with regard to causation.

On the other hand, Respondent asserted Claimant failed to meet his burden of proof and did not establish Claimant was exposed to a level of occupational noise which caused his hearing loss. Respondent averred Dr. Jacobson's and Dr. Fall's opinions were more persuasive than those of Dr. Lipkin on this issue. Respondent also argued non-occupational factors were the cause of Claimant's hearing loss.

[6] The ALJ notes *Anderson v. Brinkhoff* was decided under prior version of the definitional section in the Colorado Worker's Compensation Act, however, its holding concerning proof of an occupational disease remains good law.

At the heart of the compensability question was an evaluation of the evidence concerning Claimant's noise exposure while working for Employer and an assessment of the respective expert opinions. The analysis of this issue was divided into two parts. First, did Claimant adduce sufficient evidence to establish that his hearing loss directly resulted from his employment and constituted an occupational disease. The ALJ answered this question in the affirmative.

In the case at bench, there was no dispute Claimant had no hearing loss before starting work for Employer. (Finding of Fact 3). During his forty year employment, Claimant worked in a noisy environment on a daily basis. As found, Claimant was exposed to noise in the workplace in excess of OSHA-prescribed limits threshold for hearing damage. (Finding of Fact 33 and 34).

The evidence admitted at hearing also led the ALJ to conclude Claimant wore hearing protection throughout his employment. (Finding of Fact 7 and 17). The evidence regarding hearing protection during Claimant's early employment from 1975-1994 was that it was not as effective as it is at present. (Finding of Fact 7 and 13). Claimant testified to this fact, which was confirmed by Mr. McGurk, Employer's representative. (Finding of Fact 23).

The most significant area of dispute was the level of Claimant's exposure and whether it was the cause of his hearing loss and tinnitus. Respondent's experts questioned whether Claimant, who was compliant with wearing hearing protection, received a sufficient level of noise exposure to cause his hearing loss and tinnitus. Claimant's testimony established he was exposed to Stage 2 aircraft, whose noise level was 180-190 decibels while working at Stapleton. (Finding of Fact 6). Claimant was also exposed to aircraft revving the engines to pull away from the gate. (Finding of Fact 5). Even assuming hearing protection reduced the noise exposure by 30 dB and he was not directly behind the engines, Claimant's exposure was well above 110 dB limit, which was sufficient to cause hearing damage. The inference drawn by the ALJ from Dr. Lipkin's report was that the level of noise Claimant was exposed to and the efficaciousness of the hearing protection used caused Claimant's hearing loss.

Respondent did not submit sufficient evidence to dispel this conclusion, as both Dr. Jacobson and Fall assumed Claimant's noise exposure was much lower based upon the testing done in 2010. Neither of Respondent's experts persuaded the ALJ that Claimant's noise exposure during his early employment was not the cause of his hearing loss. Dr. Jacobson's admission on cross-examination that he found hearing loss in other ramp employees at Stapleton indirectly helped to prove this point. In short, the ALJ was persuaded by the evidence that the cumulative effect of Claimant's exposure to older aircraft (Stage 1 & 2), the occasions when he took of his hearing protection to communicate with other mechanics and his work on the ramp at Stapleton; all were sufficient to cause hearing loss.

Considering the totality of the evidence, Claimant's noise exposure at work led the ALJ to conclude Claimant was exposed to noise levels which led to the STS and ultimately hearing loss. The ALJ found this occurred over time, as opined by Dr. Lipkin.

The ALJ relied on Claimant's testimony, along with Dr. Lipkin's opinion regarding the cause of his hearing loss and was persuaded that the noise levels to which he was exposed caused progressive hearing loss. As determined in Finding of Fact 31 and 36, Dr. Jacobson’s testimony concerning nerve damage also supported this conclusion.

As found, Claimant proved his hearing loss resulted directly from his employment as an airline mechanic and was a natural consequence of the work. The exposure to noise levels in excess of the OSHA standards were occasioned by his employment and he was not equally exposed to this hazard outside of his employment. *Cowin & Co. v. Medina, supra,* 860 P.2d at 537. Based upon the evidence before the Court, the ALJ found Claimant's hearing loss was compensable as an occupational disease.

Turning to the second consideration, the ALJ evaluated whether Respondent submitted sufficient evidence to prove Claimant's hearing loss resulted from non-occupational factors or medical conditions. On this subject, Respondent's experts disagreed with the conclusions of Claimant's expert. As noted, *supra*, Respondent’s experts disagreed the noise exposure was sufficient to cause hearing loss. Dr. Fall and Dr. Jacobson also both opined that Claimant‘s hearing loss was also from non-occupational medical conditions. As found, Dr. Jacobson’s testimony was less persuasive because he completely excluded Claimant’s occupational noise exposure as a factor in his hearing loss. Therefore, Dr. Jacobson's conclusion regarding the etiology of Claimant's hearing loss (that it resulted from non-occupational factors) was not persuasive. (Finding of Fact 33 and 38). The focus of Dr. Fall’s opinion was that it was attributable to Claimant’s age and other factors. By completely excluding the work exposure, these expert opinions were less credible.

In addition, Dr. Fall did not address the cause of Claimant’s tinnitus. (Finding of Fact 32). Dr. Jacobson commented that he had tinnitus was not persuasive to the ALJ regarding the cause of this condition. (Finding of Fact 33). This did not refute Dr. Lipkin’s conclusion that Claimant’s exposure to work place noise over time caused tinnitus.

On balance, the ALJ concluded while Claimant had non-occupational risk factors for hearing loss, there was insufficient proof that these factors actually caused the hearing loss. Both Dr. Jacobson and Dr. Fall agreed there was no medical opinion within the Kaiser Permanente records that these non-occupational factors were a cause of Claimant's hearing loss. Both experts conceded the presence of non-occupational factors did not necessarily mean these caused Claimant's hearing loss. (Finding of Fact 32 and 38). Accordingly the ALJ concluded Respondent did not meet its burden of proof to show that non-occupational factors or medical conditions caused Claimant’s hearing loss. Since Claimant’s condition is a compensable occupational disease, he is entitled to receive medical benefits for his hearing loss.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable hearing loss while working for Employer.

2. Employer shall provide medical benefits to cure and relieve the effects of Claimant's hearing loss.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 3, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-906-018-02

ISSUES

- The issues for the hearing included overcoming the DIME, conversion, relatedness of the shoulder, permanent partial disability, disfigurement, TTD, TPD, and penalties.

- The parties withdrew the issues of TTD, TPD, and Penalties on the record, as they had been resolved prior to the hearing.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is 54 years old.

2. Claimant suffered a compensable work-related injury to her left wrist on September 10, 2014. Claimant was treated by Dr. John P. Mars and then referred to a surgeon, Dr. Robert Koch, for assessment. She was placed on restrictions on September 14, 2012 and those continued until her surgery. On January 18, 2013, Dr. Koch performed Left de Quervains release surgery on Claimant's left wrist and bone spur removal on Claimant's left thumb to treat her injury.

3. After the surgery, Claimant's left wrist was placed in an Ace wrap and, later in a splint. She was not allowed to work or use her left hand immediately following the surgery until March 12, 2014. Claimant wore her brace at most times, but could not wear it all the time because the brace put pressure on her surgical incision which caused additional pain.

4. Claimant is right handed. Claimant testified that she did not use her left arm except for slight movements when getting dressed while she was off work healing from her surgery. She understood that she was not allowed to use her left hand. For that reason she did not use her arm to reach forward or up, because she was not allowed to grab anything. She did not cook, wash the laundry or walk the dog during this time, her husband performed these tasks. Her husband helped Claimant to wash her hair and get dressed so she did not have to use her left arm in any manner. Rather, it sat in the sling/splint or in her lap.

5. On March 12, 2013, Claimant was released back to work on light duty "with no use of L hand." Claimant testified that she typed right handed and that she would have to have somebody help her unlock her computer for the control/alt/delete function and, if she was alone, she used a chopstick with her mouth to touch the keys.

6. After her surgery Claimant started physical therapy for her left hand and wrist. There is no record in evidence that the physical therapist focused on movement for her left shoulder or elbow at this time. Both Dr. Hughes and Dr. Beatty confirmed that they both reviewed the physical therapy records and did not see any type of therapy for the whole arm or shoulder. Claimant further testified that while in therapy she only performed simple movements with her hand, wrist, and thumb primarily while sitting at a table.

7. After returning to work in 2013, Claimant began feeling achiness in her left shoulder. That progressed to a feeling of stiffness, and then finally her shoulder locked altogether. In March 2013, Claimant began reporting to her outside chiropractor that she was having pain and stiffness in her left shoulder. She also reported her left shoulder pain to her physical therapist and Dr. Mars. On April 27, 2013, Dr. Susskind, Claimant's family doctor, noted that Claimant had left shoulder pain as a result of her wrist and that she was about to get physical therapy for her shoulder through Workers' Compensation.

8. On May 20, 2013, Claimant was evaluated by physical medicine specialist Justin Green, M.D. While the record of that visit was not introduced into evidence, medical experts including Dr. Hughes, Claimant's IME doctor, and Dr. Beatty, the DIME doctor, relied on the record of that particular visit in forming their medical opinions about relatedness. The record is quoted as providing that Claimant had wrist and hand symptoms from a "non-related left shoulder injury she is treating she is treating with outside providers."

9. The ALJ finds that Dr. Green's May 20, 2013 record erroneously refers to Claimant's left shoulder. It is clear from other medical records introduced as exhibits and the general context of Claimant's medical history that Dr. Green was referring to Claimant's *right* shoulder. Claimant sustained a right upper extremity injury in March 2012 which required a right first dorsal compartment release with stabilization of the abductor pollicis longus tendon. This surgery is discussed in Dr. Koch's June 4, 2012 operative report. Claimant reported injuring herself while lifting a five-gallon water jug into a dispenser. Dr. Mars addressed Dr. Green's May 20, 2013, note with Claimant and she denied that she was treating for her left should outside of workers' compensation. Dr. Beatty, in his medical record review, also references Claimant's extensive treatment with Dr. Meyer for right shoulder complaints during that time frame.

10. In his DIME report, Dr. Beatty wrote that Dr. Justin Green, who saw Claimant once for the wrist pain, stated that "Claimant did report that a non-work-related left shoulder injury was being treated by outside providers." Dr. Beatty stated during his deposition that this was important in his causation analysis of adhesive capsulitis and his conclusion that it was not work-related. To the extent that Dr. Beatty relied on Dr. Green's record to conclude that Claimant's adhesive capsulitis was not work related, the ALJ finds that reliance to be misplaced.

11. On June 19, 2014, Dr. Mars wrote in his notes that Claimant "is no[w] reporting reduced range of motion of the left shoulder as she has not been using it. She

had reported some soreness in the shoulder in the past and this seems to have worsened." In his treatment plan, Dr. Mars stated that Claimant "has a frozen shoulder and I want the therapist to start working on this to regain range of motion. She may need to be referred back to the orthopedist for a second opinion." Finally, Dr. Mars stated, "I do feel the frozen shoulder is related to her splinting the left arm due to her wrist pain. Maximum medical improvement remains unknown at this time as this is quite a setback with the adhesive capsulitis."

12. Dr. Mars and Dr. Koch kept Claimant on the same restrictions of no use of the left hand until July 3, 2013, at which time she was able to lift no more than one pound with her left hand and type with her left hand for no more than 10 minutes each hour. She was still unable to pinch or grip with her left hand or reach above her shoulder with her left arm. Claimant testified that when she was allowed to use her left hand she stayed compliant with her restrictions – she still did not reach, grasp, or pull.

13. Dr. Mars referred Claimant to physical therapy for her left shoulder and then back to Dr. Koch for follow-up. Claimant underwent an MRI on her left shoulder. While Dr. Stewart, the radiologist who read the MRI, did not mention capsulitis, Dr. Koch read and reviewed the photos of the MRI, and found capsular thickening. Dr. Koch agreed with Dr. Mars that Claimant's shoulder pain, stiffness, and adhesive capsulitis was in reaction and related to the surgery. Dr. Beatty, the DIME physician, agreed that Dr. Koch would be able to correctly read an MRI.

14. Dr. Beatty stated that there may have been some pre-existing symptoms in Claimant's left shoulder based on Dr. Green's note. However, Dr. Mars specifically addressed a history of left shoulder stiffness. Dr. Mars wrote,

> With some difficulty, I reviewed Kevin Meyer's, DC, Handwritten notes. She had been treated for neck pain, back pain and right shoulder pain on multiple occasions. The first mention of L shoulder pain is 3/3/13 which is 1½ months after her surgery. He notes on 4/8/13 possible "adhesive capsulitis," which appears to be a new DX. This is near 3 months post op. Therefore my position on this is unchanged and I feel her left shoulder adhesive capsulitis is due to restricted ROM post op.

Additionally, Dr. Meyer reported that Claimant had only one incident of left shoulder pain prior to the adhesive capsulitis, and it was two and one half years prior to Claimant's injury and resolved by her next visit. The ALJ finds that Claimant did not have a pre-existing left shoulder injury.

15. Dr. Beatty reported and testified that the adhesive capsulitis was not a direct and proximate result of Claimant's injury because there was no documentation of a direct injury to her shoulder either at the time of the original problem or afterwards. He reported that "symptoms did not show up until about a month or so after surgery." The ALJ finds that Dr. Betty's analysis displays a misapprehension of Claimant's condition as adhesive capsulitis would not exist at the time of her injury. He also stated that her neck could not be a part of the injury because she also only started complaining

of symptoms in that area several months after the injury. Again, the ALJ finds that Dr. Beatty's analysis on this point shows a misapprehension of Claimant's condition. Finally, he stated that the restriction on Claimant's use of her left shoulder was self-imposed and therefore the adhesive capsulitis would not be a natural manifestation of her initial work-related injury. Importantly, he also acknowledged that Claimant's medical notes and history confirm that because she was not allowed to use her left hand to lift, grab, grip, et cetera, that she did not use her left shoulder, and that a person who does not use their left hand may not use their shoulder.

16. In his DIME report, Dr. Beatty assigned Claimant a 4% left upper extremity impairment rating which did not include a rating for Claimant's shoulder, which converts to a 2% whole person rating when applicable. Dr. Beatty's report concluded, "I do not believe the right [sic] shoulder symptoms are related to the date of injury of 9/10/2012." The ALJ finds that Dr. Beatty's reference to Claimant's right shoulder, which was not at issue in this matter, diminishes the persuasiveness of his opinions.

17. Dr. John Hughes performed an IME for Claimant. Dr. Hughes has been a medical practitioner since 1980 and has worked with Workers' Compensation patients since 1984 when he got out of the Navy. He has served on a variety of medical committees and panels for the Colorado Division of Workers' Compensation. Dr. Hughes is also an instructor for Level II certification for the Colorado Division of Workers' Compensation and serves as a Clinical Assistant Professor for the Colorado School of Public Health in the Department of Environmental and Occupational Health. He treats patients and performs IMEs for both claimants and respondents.

18. Dr. Hughes, upon evaluating Claimant, determined that "Claimant's left shoulder adhesive capsulitis and subsequent neuropathic conditions stem from post-surgical immobilization by Claimant of her left arm due to pain." He noted that Claimant reported that she has "a dull ache" under the blade of her posterior left shoulders and that when she has increased symptoms in her left shoulder, she also has headaches and pain that radiates along the left shoulder blade, up the neck, and behind the ear on the left side. Dr. Hughes noted that Dr. Beatty's determination that the shoulder achiness did not show up for a month after the surgery and was therefore not related "does not make sense." Dr. Hughes explained that the temporality of the achiness showing up about one month or more after the surgery, actually suggests a relationship between the surgery and the onset of adhesive capsulitis of the shoulder. Dr. Hughes agreed that the non-use of the left upper extremity may have been self-imposed, but that it was also "a natural manifestation of the severe neuropathic pain documented clearly by Drs. Mars, Koch, and Green" during the period of time that Claimant's left wrist was restricted. "Her left de Quervains surgery followed by neuropathic pain caused her appropriately to avoid left upper extremity use." Dr. Hughes also testified that "whether this restriction was self imposed by fear or prescribed by a medical doctor," the non-use of the shoulder leading to adhesive capsulitis was still "related to the surgery." He further stated that if someone, hypothetically, could not grip or use their wrist, that they would likely guard the use of moving the entire arm, such as by not reaching or lifting, and that in his medical opinion, there would not be a reason to use a left shoulder if one was not allowed to use his or her left hand or wrist. Dr. Hughes'

opinion of the relatedness of the shoulder is consistent with Claimant's treating physicians, Dr. Mars and Dr. Koch, as well as with documentation from the scientific community.

19. Dr. Hughes additionally relied on the Mayo Clinic's report concerning Frozen Shoulder. He testified that the Mayo Clinic's reports are well referenced and are peer reviewed. The Mayo Clinic reports that the "risk of developing frozen shoulder increases if you're recovering from a medical condition or procedure that prevents you from moving your arm." Frozen shoulder typically develops slowly in progresses through three stages: freezing stage, frozen stage, and thawing stage. Doctors are not sure why frozen shoulder happens to some people, but it is more likely to occur in people who recently had to immobilize their shoulder for a long period, such as after surgery. People 40 and older, particularly women, are more likely to have frozen shoulder. Both Dr. Hughes and Dr. Beatty confirmed that the frozen shoulder occurred after Claimant had surgery on her wrist and that she reported that she was not using her shoulder or arm after her surgery due to her understandings of her restrictions. They both also agreed that Claimant was female and over 40, and so she fit into the typical population that was most likely to experience frozen shoulder. Dr. Hughes' testimony concerning relatedness of the shoulder is accepted as credible and persuasive by the ALJ and the ALJ rejects ad contrary medical opinions expressed by Dr. Beatty.

20. Claimant's treating physicians, including her surgeon, diagnosed Claimant with adhesive capsulitis as related to the lack of movement of her left shoulder after her left wrist surgery. This is consistent with Claimant's credible testimony that she did not use her left shoulder for months after her surgery because she was restricted from performing any gripping, pinching, or lifting tasks with her left hand and wrist. The ALJ finds and concludes that Dr. Mars and Dr. Koch's reports are credible as to the relatedness of Claimant's left shoulder injuries.

21. The ALJ finds that Claimant has overcome the DIME with respect to relatedness by clear and convincing evidence.

22. Dr. Mars assigned a combined upper extremity impairment rating of a 19% which included adhesive capsulitis. Dr. Beatty's measurements of Claimant's shoulder, taken almost fifteen months later, are similar. This rating converts to 11% whole person impairment.

23. Claimant continues to have an ache in her shoulder that progresses up to her neck every day. It starts as a dull ache from under her shoulder blade, and then the tightness and stiffness goes up the back of her neck and behind her ear and head. She also has headaches that she believes come "definitely from the shoulder and the stiff neck." She has trouble sleeping because of the stiffness and ache in her left shoulder. She also still has burning, tingling, and numbness in her left hand. Claimant had none of these problems before her surgery in 2013. Dr. Hughes confirmed in his medical opinion that the dull ache in Claimant's shoulder could lead to pain radiating along the left shoulder, up the neck, behind her left ear, and to headaches in light of Claimant's known pathology.

24. The ALJ finds, based upon a preponderance of the evidence, that Claimant is entitled to an impairment rating of 11% whole person.

25. Claimant has scarring from her surgery on her left wrist. The ALJ finds, after viewing Claimant's wrist at the hearing that Claimant has a 2 inch scar with visible suture marks and a slightly discolored area, on a part of her body that normally is exposed to public view.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado is to insure the quick and efficient delivery of disability and medical benefits to injured litigation. § 8-40-102(1), C.R.S.

A workers' compensation case is decided on its merits. § 8-43-201, C.R.S. The requirements of proof for civil non-jury cases in the district courts apply in workers' compensation hearings. § 8-43-210, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that may lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App 2000).

It is the ALJ's sole prerogative to assess the credibility of witnesses and the probative value of the evidence to determine whether a party has met its burden of proof. The weight and credibility to be assigned expert testimony is a matter within the discretion of the *ALJ. Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). It is the ALJ's prerogative to weigh the evidence, and that the ALJ might have reached a contrary conclusion is immaterial on review. *Mountain Meadows Nursing Center v. Indus. Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999). The ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

An employer is responsible for the direct and natural consequences which flow from a compensable injury. *Vanadium Corp. Of America,* 307 P.2d 454 (Colo. 1957); *Hembry v. ICAO,* 878 P.2d 114, 115 (Colo. App. 1995). Whether a causal connection exists between the work-related injury and subsequent injury is a question of fact. *Baca v. Helm,* 682 P.2d 474 (Colo.1984); *Hembry v. Indus. Claim Appeals Office of State of Colo.*, 878 P.2d 114, 115 (Colo. App. 1994).

The DIME physician's finding of impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(c), C.R.S. "Clear and convincing evidence" is evidence which proves that it is "highly probable" the DIME physician's opinion is incorrect. *Metro Moving & Storage Co. v. Gussert, supra*. These are issues of fact for the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Mosley v. Indus. Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003). In workers' compensation cases, the division-sponsored independent medical examination (DIME) physician's “finding” consists not only of the initial report but also any subsequent opinion given by the physician. *Andrade v. Indus. Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

Where the ALJ determines that the DIME physician's rating has been overcome by clear and convincing evidence, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. *DeLeon v. Whole Foods Market, Inc.*, W.C. No. 4-600-477 (Nov. 16, 2006). Once the ALJ determines that the DIME's rating has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Id.* The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence. *Id.*

The DIME doctor determined that adhesive capsulitis was not caused or proximately caused by the original wrist injury. Both of Claimant’s treating physicians, however, including the surgeon who performed the wrist surgery, contend that the adhesive capsulitis is compensable because the healing process after surgery required Claimant to refrain from using her left hand and wrist, which resulted in a lack of motion of Claimant’s left shoulder giving rise to the frozen shoulder. Dr. Hughes also determined that the frozen shoulder occurred in the same way – as a result of the restrictions after surgery -- relying on his extensive years of experience and a peer reviewed report from the Mayo Clinic. Both Dr. Beatty and Dr. Hughes agreed that Dr. Koch, the surgeon, would be able to read and interpret Claimant’s MRI, from which Dr. Koch concluded that Claimant had frozen shoulder as a result of not using her left shoulder. Dr. Beatty’s conclusion that frozen shoulder could not come from a lack of use, but rather only from a direct injury, is in contradiction to all of Claimant’s treating and examining doctors, as well as the testimony of Dr. Hughes and the report by the Mayo Clinic citing restrictions of the arm as the most common predecessor to adhesive capsulitis, and is thus overcome by clear and convincing evidence. The ALJ determines that while she made a prior finding that the shoulder adhesive capsulitis was related to Claimant’s original injury under the preponderance standard, she further finds that Claimant has overcome the DIME doctor’s causation analysis by the clear and convincing evidence standard as well.

Claimant credibly testified that she complied with her restrictions for no use or limited use of the left hand during the healing process after the surgery of her left wrist. This is consistent with the treating doctors’ conclusions that the frozen shoulder stemmed from the wrist surgery.

As a result, the ALJ finds and concludes that Dr. Beatty’s lack of impairment rating for Claimant’s shoulder was unfounded, and that the most appropriate impairment rating was the one performed by the authorized treating physician, Dr. Mars. Dr. Mars treated Claimant for several years and was the most familiar with her condition and her range of motion.

The determination of whether a claimant has sustained a scheduled or nonscheduled injury is “a question of fact for the ALJ, not the rating physician.” *City Market, Inc. v. Industrial Claim Appeals Office of State of Colorado*, 86 P.3d 601, 603 (Colo. App. 2003). In resolving “whether the claimant sustained a ‘loss of an arm at the shoulder’ within the meaning of § 8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S. . . . the ALJ must determine the situs of the claimant’s ‘functional impairment,’ and the site of the functional impairment is not necessarily the site of the injury itself.” *In re Cassius*, W.C. No. 4-732-489 at *2 (ICAO Mar. 26, 2010) (citing *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996)).

The Industrial Claim Appeals Office (“ICAO”) has concluded that pain and discomfort, which interfere with a claimant’s ability to use a portion of the body may be considered functional impairment. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996); *Garcia v. Advanced Component Systems, Inc.*, W.C. No. 4-187-720 (June 21, 1996); *Mader v. Popejoy Constr. Co., Inc.*, W.C. No. 4-198-489 (August 9,1996), *aff’d*, *Popejoy Constr. Co., Inc. v. Industrial Claim Appeals Office*, No. 96CA1508 (February 13, 1997) (not selected for publication).

Claimant credibly testified that every day she has an ache in her shoulder that progresses up to her neck. It starts as a dull ache from under her shoulder blade, and then the tightness and stiffness goes up the back of her neck and behind her ear and head. She also has headaches that she believes come “definitely from the shoulder and the stiff neck.” Dr. Hughes confirmed, in his medical expert opinion that the ache in Claimant’s shoulder could lead to pain radiating along the left shoulder, up the neck, behind her left ear, and to headaches in light of Claimant’s known pathology. As the situs of the pain is above the head of the glenohumeral joint, the ALJ finds that the rating must be converted to whole person impairment rating.

The Act provides for a claimant to be paid benefits if a claimant has a scar or other disfigurement due to an industrial injury or disease on a part of a body normally exposed to public view. § 8-42-108, C.R.S. The ALJ found above and concludes now that Claimant is entitled to compensation in the amount of $700 for the disfigurement to the left wrist caused by the surgery required as a part of this compensable injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The left shoulder adhesive capsulitis is related to the original workers' compensation injury.

2. Claimant is entitled to a whole person impairment rating of 11%.

3. Claimant is entitled to $700 in compensation for her disfigurement.

4. Respondents shall file a Final Admission reflecting the whole person impairment rating within 30 days.

5. Issues not expressly decided herein are reserved to the parties for future determination.

6. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 7, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-954-459-01

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that right shoulder arthroscopy and open rotator cuff repair surgery recommended by Satoru Chamberlain, M.D. is reasonable, necessary, and causally related to his June 18, 2014 work injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a deliveryman with job duties including driving a semi-truck and unloading and delivering large quantities of food items and supplies into restaurants. Claimant has been employed by Employer in this position since approximately 2006.

2. On June 18, 2014 Claimant made a delivery to a Texas Roadhouse restaurant located in Arizona when he sustained an acute injury to his right shoulder and rotator cuff.

3. While attempting to retrieve a five gallon bucket of pickles that was wedged at the bottom of a pallet in the delivery truck, Claimant pulled on the bucket with his right arm. Claimant heard a pop in his right shoulder and felt immediate, sharp, and deep pain.

4. On June 19, 2014 Claimant was evaluated by Nazia Javed, M.D. Claimant reported sharp pain in his shoulder joint and tingling in his right arm. An x-ray was negative for fracture or dislocation. Dr. Javed diagnosed right shoulder injury, rotator cuff sprain, and right arm pain. Dr. Javed placed Claimant on modified duty with work restrictions, instructed Claimant to use a sling, and indicated that if Claimant's symptoms did not improve in a few weeks she would consider ordering an MRI to check for a rotator cuff tear. Dr. Javed believed that the objective findings were consistent with the history and/or a work related mechanism of injury. *See* Exhibit 6.

5. On June 26, 2014 Claimant was evaluated by Dr. Javed. Claimant reported worsened right shoulder pain and Dr. Javed referred Claimant for a right shoulder MRI. *See* Exhibit 6.

6. On July 3, 2014 Claimant underwent an MRI of his right shoulder interpreted by Tanya Tivorsak, M.D. The impression provided was: focal full thickness tear of the anterior supraspinatus tendon at the insertion with up to 1.5 cm retraction of the tendon fibers with the tear gap measuring about .6 cm and no rotator cuff muscle

atrophy; mild intra-articular long head biceps tendinosis; mild arthrosis of thae acromioclaviular joint; and no labral tear. *See* Exhibit 3.

7. On July 14, 2014 Claimant was evaluated by orthopedic specialist Mark Failinger, M.D. Dr. Failinger noted that the MRI showed a significant tear of the rotator cuff with some retraction and possible biceps tearing. Claimant reported wanting to have surgery and that he had this on the other side a long time ago and did fairly well. Dr. Failinger provided the impression of right shoulder rotator cuff tear and right shoulder rule out biceps tendon tear. Dr. Failinger recommended surgery for rotator cuff repair and decompression as well as possibly a biceps tenodesis. *See* Exhibit 5.

8. On August 12, 2014 Claimant underwent right shoulder surgery performed by Dr. Failinger that included: right shoulder subacromial decompression; right shoulder open rotator cuff repair; right shoulder open biceps tenodesis; and right shoulder debridement of labrum and rotator cuff. Dr. Failinger noted a large rotator cuff tear with severely degenerative tendon and that the tear extended back from the supraspinatus into the infraspinatus and split through the infraspinatus tendon. Dr. Failinger also noted an anteromedial hook that he flattened out. *See* Exhibit 4.

9. Following his surgery, Claimant continued to be evaluated by Dr. Javed and Dr. Failinger. Claimant also underwent physical therapy. Claimant reported continued right shoulder discomfort and in November of 2014 Dr. Javed opined that Claimant's progress following surgery was slow and Dr. Javed recommended a repeat right shoulder MRI.

10. November 24, 2014 Claimant underwent an MRI of his right shoulder interpreted by Frank Crnkovich, M.D. The impression provided was: focal 5 mm complete tear of the supraspinatus tendon with bursal to articular surface communication; and postoperative changes of a biceps tenodesis. Dr. Crnkovich opined that there was suggestion of correlation with Claimant's clinical exam. *See* Exhibit 3.

11. On December 3, 2014 Claimant was evaluated by Dr. Failinger. Claimant continued to report pain and discomfort. Dr. Failinger noted that the second MRI demonstrated a persistent area of full thickness tearing or re-tearing of the rotator cuff, recurrent tear of the supraspinatus with postoperative change with a biceps tenodesis. Dr. Failinger opined that Claimant could live with the shoulder pain or pursue a second right shoulder surgery. Claimant was advised that the odds of a second surgery working were not as high as the first surgery and that Claimant had a 50-50 chance, at best, that the surgery would be successful because Claimant's tendon was not in the greatest shape. Dr. Failinger opined that Claimant's tendon was deteriorating and degenerating with time and that there was nothing to be done about the natural process and Dr. Failinger opined that this would be the last time he would even suggest trying surgery to fix Claimant's shoulder condition. Claimant understood and elected to move forward with a second right shoulder surgery in hopes of regaining his pre-injury range of motion. *See* Exhibit 5.

12. On January 5, 2015 Claimant was evaluated by Dr. Javed. Dr. Javed noted that Claimant had an injury that caused a full thickness complex tear to his right supraspinatus tendon and that he underwent arthroscopic repair by Dr. Failinger on August 12, 2014. Dr. Javed noted that a repeat MRI performed on November 24, 2014 showed a re-tear of the supraspinatus tendon and that Dr. Failinger had recommended a second arthroscopic surgery. Dr. Javed kept Claimant on modified duty work restrictions. *See* Exhibit 6.

13. On January 15, 2015 Claimant underwent a second right shoulder surgery performed by Dr. Failinger. Dr. Failinger noted in surgery that there was a recurrent tear of the supraspinatus looked more side to side and looked like the insertion site and greater tuberosity was intact but it was split on the supraspinatus with one fairly large thicker portion retracted posteriorly and somewhat thinner anteriorly. Dr. Failinger noted he shaved down more of Claimant's acromion because Claimant had a mild curve anteriorly. Dr. Failinger noted the operations performed included: right shoulder arthroscopic subacromial decompression; right shoulder mini-open rotator cuff repair with side-to-side closure; right shoulder debridement of rotator cuff and labrum and synovectomy; and right shoulder open removal of foreign body (suture). *See* Exhibit 4.

14. On March 9, 2015 Claimant was evaluated by Dr. Failinger. Claimant reported mild pain. Claimant was evaluated again by Dr. Failinger on April 22, 2015 and reported moderate pain. On June 3, 2015 Claimant was again evaluated by Dr. Failinger and reported moderate pain with a burning and pulling sensation in the right shoulder that was present at rest. Dr. Failinger performed an injection in Claimant's right shoulder. Dr. Failinger noted that Claimant had few options, that Claimant wanted to try the injection, and that Claimant had a low probability of success with another surgery. Dr. Failinger opined that Claimant was nearing maximum medical improvement. Dr. Failinger noted that if Claimant did not improve with the injection, a second surgical opinion would be recommended. *See* Exhibit D.

15. On August 10, 2015 Claimant was evaluated by orthopedic specialist Saturo Chamberlain, M.D. Dr. Chamberlain noted that Claimant came in for a second opinion and that Claimant had undergone two surgeries on the right shoulder - a primary rotator cuff repair and a secondary repair. Dr. Chamberlain noted Claimant continued to have some pain and limitation of range of motion and was worried about a third tear. Dr. Chamberlain performed a physical examination and opined that the findings were in keeping with an ongoing rotator cuff pathology. Dr. Chamberlain opined that Claimant had quite good range of motion but a feeling of discomfort over the right shoulder. Dr. Chamberlain recommended a repeat MRI scan. *See* Exhibit 2.

16. On October 29, 2015 Claimant underwent a third MRI of his right shoulder interpreted by Eric Smith, M.D. Dr. Smith provided the impression of: 10 mm x 8 mm area of essentially full-thickness disruption of the surgically repaired supraspinatus tendon occurring in the critical zone prior to the greater tuberosity attachment site;

biceps tenodesis without evidence of complication; and subacromial decompression with a small amount of fluid in the subacromial subdeltoid space. *See* Exhibit 3.

17. On December 7, 2015 Claimant was evaluated by Dr. Chamberlain. Dr. Chamberlain noted that Claimant had a primary surgery on his right shoulder for rotator cuff disease and that soon thereafter he had a secondary surgery due to the failure of the repair. Dr. Chamberlain opined that repeat MRI scanning showed a sizable rotator cuff tear approximately 1 cm by 1.5 cm. with loose debris from a previous surgery. Dr. Chamberlain opined that definitely Claimant needed to undergo repeat arthroscopic and open surgery and that it may be that he would need grafting to the rotator cuff but that it would be prudent to perform arthroscopic diagnostic procedure of the glenohumeral joint as an adjuvant to the surgery. Dr. Chamberlain noted the treatment plan was to get workers' compensation authority to proceed with a second revision right shoulder rotator cuff repair with GraftJacket. *See* Exhibit 2.

18. On December 31, 2015 Dr. Chamberlain issued a letter to Respondents' counsel. The letter indicated that Claimant had a continued problem with his right shoulder which followed directly from his original workers' compensation claim and followed directly from the previous two surgeries and that a direct consequence and follow up from the prior two surgeries would be related to the worker's compensation claim. Dr. Chamberlain noted that the most recent MRI showed that Claimant had a sizable rotator cuff tear with loose debris from the previous surgery, that he did not see at any time that there was good healing of the rotator cuff muscle, and that Claimant had continued to have poor healing following his original injury and subsequent two surgeries. Dr. Chamberlain opined that surgery was a reasonable procedure and was directly related to the original industrial injury. Dr. Chamberlain noted that as Claimant had two prior surgeries and failed to heal, Claimant's success rate would have to be considered a little less than the average. *See* Exhibit 2.

19. On March 4, 2016 Timothy O'Brien, M.D. issued a report after performing a medical record review. Dr. O'Brien opined that Claimant's current right shoulder rotator cuff tear is a manifestation of Claimant's personal health and is in no way causally related to the work injury of June 18, 2014. Dr. O'Brien opined that the MRI scan and surgery in August of 2014 confirmed that there was a 1.5 cm retraction and that the magnitude of retraction would occur over the course of months or years and that the amount of retraction on MRI and confirmed during the first surgery clearly established the chronic nature of the pre-existing rotator cuff tear. Dr. O'Brien also pointed to the amount of degeneration Dr. Failinger noted during the first surgery. Dr. O'Brien opined that Dr. Failinger's August 2014 surgery did not fail and that where the rotator cuff had been reattached to the bone had healed as found in the January 2015 surgery. Dr. O'Brien opined that the second surgery showed a minor innocuous 5 mm tear that was essentially a separation of the muscle fibers and not a pulling off of the tendon from the bone but that it was nonetheless repaired. *See* Exhibit A.

20. Dr. O'Brien opined that Claimant had a pre-existing rotator cuff tear, that the work injury was quite minor and aggravated and accelerated the pre-existing tear

beyond its normal rate of progression but that the pre-existing condition was what was currently bothering Claimant and that the repair performed in August of 2014 did not fail and was still intact. Dr. O'Brien opined that whatever caused Claimant's pre-existing rotator cuff tear had resulted in another degenerative tear of Claimant's right shoulder rotator cuff tendon-to-bone attachment site and that the pre-existing condition was evidenced by the October 2015 MRI scan. Dr. O'Brien opined that the pre-existing condition was incurable, genetic, and age related and had caused another degenerative tear. Dr. O'Brien opined that the June 18, 2014 injury was addressed by the first surgery and the successful healing following that surgery. Dr. O'Brien opined that Dr. Chamberlain's surgical recommendation was to treat Claimant's pre-existing personal health issues. *See* Exhibit A.

21. Dr. O'Brien further opined that Dr. Chamberlain's surgical recommendation would not be successful. Dr. O'Brien opined that Claimant's tendon failed of its own accord prior to June of 2014, and that Claimant's genetic condition and age had resulted in another attritional failure. Dr. O'Brien opined that this was a manifestation of who Claimant is at a physiologic and anatomic level. Dr. O'Brien opined that it was medically probable that Claimant's tendon would not heal at the attachment site and that regardless of causation he recommended against the surgery. Dr. O'Brien opined that Claimant had excellent function with nearly full range of motion and that the surgery would not likely contribute to improved range of motion. *See* Exhibit A.

22. Dr. O'Brien testified at hearing consistent with his medical record review report. Dr. O'Brien opined that the first MRI taken approximately two weeks after the injury showed retraction of 1.5 cm that from a medical standpoint most likely would have taken a long time to develop. Dr. O'Brien opined that if Claimant had a prior left rotator cuff tear it would show that Claimant had the same type of bilateral condition and had a genetic pre-disposition to developing rotator cuff failure. Dr. O'Brien opined that Claimant's first surgery was successful although he was not sure why Claimant was still having pain. Dr. O'Brien agreed with Dr. Failinger's assessment that there were few options and a low probability of success with another surgery. Dr. O'Brien opined that at the time of the second surgery it showed that the rotator cuff tear was fixed and still holding but that now the tear is back and all sutures are gone or pulled back. Dr. O'Brien opined that a third surgery will not work and that a graft or dead tissue without any blood supply won't contribute to healing at the site, that Claimant genetically had failed previously in the same area, and that surgery would fail no matter what you did to Claimant's shoulder.

23. Dr. O'Brien opined that the procedure was not causally related to the injury and that the current retraction and re-tearing is due to Claimant's genetics despite the first surgery being successful. Dr. O'Brien also opined that no surgery could make Claimant better and that Claimant had almost full range of motion at his examination with Dr. Chamberlain.

24. Dr. Chamberlain testified by deposition. Dr. Chamberlain opined that the mechanism of injury and symptoms that began immediately considering the force would be appropriate to be considered an acute injury to the right shoulder. Dr. Chamberlain opined that Claimant continued to have trouble with his shoulder throughout the claim and that in spite of the two surgeries, Claimant continued to have limitations of function and pain in the shoulder and had never really recovered to his pre-injury state. Dr. Chamberlain opined that the most recent MRI showed that the rotator cuff was re-torn at the insertion very similar to where the initial rotator cuff tear was. Dr. Chamberlain noted that the intermediate MRI scan showed somewhat better attachment, but that the scans showed poor healing throughout in the insertion of the rotator cuff.

25. Dr. Chamberlain disagreed with Dr. O'Brien's assessment that the second surgery showed the rotator cuff had healed and opined that the second surgery showed that the rotator cuff was not completely healed. Dr. Chamberlain opined that there was loose debris in Claimant's shoulder that could cause irritation, inflammation, and a giant cell or body reaction and opined that some of the debris was related to the implants used in the prior two surgeries. Dr. Chamberlain again recommended a third surgery and opined that patients of Claimant's age with a full thickness rotator cuff tear do better with surgery than conservative treatment as well documented in literature and Rule 17 of the Workers' Compensation Medical Treatment Guidelines. Dr. Chamberlain noted that Claimant's success rate would be influenced by the poor healing in the past but that Claimant would benefit from a diagnostic and therapeutic arthroscopy of the shoulder. Dr. Chamberlain opined that augmentation of the rotator cuff repair would be done to add extra bulk and stability to the repair which was a different technique than what Dr. Failinger did in the past. Dr. Chamberlain opined that if the surgery is not performed, Claimant's treatment options at this point would be really palliative with limitation of activities and pain control modalities.

26. Dr. Chamberlain opined that it was unlikely Claimant had a full thickness tear prior to his work injury and noted no documentation of insufficiency in his shoulder or previous right shoulder problems. Dr. Chamberlain opined that with a young and active patient who was performing active work, it was very unlikely that Claimant had a full thickness rotator cuff tear prior to the work injury. Dr. Chamberlain opined that it was medically reasonable to proceed with the third surgery. Dr. Chamberlain noted that although Claimant had excellent function in the right shoulder, Claimant was limited in the ability to return to work and couldn't functionally perform work duties and that Claimant's function would progressively decrease over time.

27. Dr. Chamberlain opined that there was no evidence that could tell them how quickly Claimant's retraction occurred and that it was possible for Claimant to have had an intact rotator cuff tear that retracted more than 1.5 cm in a very short period of time. Dr. Chamberlain opined that an augmentation would aid a patient's ability to heal through their natural tissues. Dr. Chamberlain opined that the use of dermal acellular augmentation in sizable rotator cuff tears was supported by the Workers' Compensation Medical Treatment Guidelines.

28. Claimant testified credibly at hearing. Claimant had a prior left rotator cuff tear and repair surgery more than ten years prior from an acute injury suffered while riding dirt-bikes. Claimant had no symptoms in his right shoulder and had no limitations in use of his right shoulder prior to the June 18, 2014 work injury. Claimant was able to perform his job duties delivering large quantities of products with no known problems prior to June 18, 2014. Claimant continues now to have limitations in the use of his right upper extremity and continues now to have pain in his right upper extremity.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant is required to prove by a preponderance of the evidence that the condition for which he seeks medical treatment was proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden to establish by a preponderance of the evidence that the third shoulder surgery requested by Dr. Chamberlain is reasonable, necessary, and causally related to his June 18, 2014 work injury. The surgery is a both a reasonable and necessary attempt to cure and relieve Claimant from the effects of the industrial injury. The opinion of Dr. Chamberlain is found credible and persuasive. The opinion of Dr. O’Brien has been considered and is rejected and found not as persuasive as the opinion of Dr. Chamberlain.

Claimant suffered an acute injury to his right rotator cuff and his current symptomatology and findings on MRI are more likely than not related to his June 18, 2014 injury. As found above, Claimant was asymptomatic prior to pulling on a five gallon bucket of pickles. Claimant had immediate and acute right shoulder pain after this incident. Claimant continued to have symptoms in his right shoulder throughout the claim including following his first and second surgeries. Dr. Chamberlain is credible and persuasive that the initial mechanism of injury could have caused the large rotator cuff shown by MRI shortly after the initial injury. Although Dr. O’Brien testified that a 1.5 cm retraction shown by MRI shortly after the injury likely took months or years to develop, he also testified it was possible it developed acutely. Dr. Chamberlain opined that the tear and retraction developed acutely. Further, although Claimant had a type II acromion and degeneration in the rotator cuff, Claimant was asymptomatic prior to June 18, 2014 working in a physically demanding job requiring regular delivery of supplies to restaurants. Further, Claimant remained symptomatic following the first surgical repair and the second surgical repair. Dr. Chamberlain is credible and persuasive that the two surgeries failed. Claimant has established, more likely than not, that his current right shoulder complaints were caused by the original injury on June 18, 2014 and the two following unsuccessful surgeries to treat the original work related injury.

Claimant also has established that the proposed surgery is reasonable and necessary to cure and relieve the effects of Claimant's June 18, 2014 injury. Dr. Chamberlain is found credible and persuasive regarding the potential for success and the goals of the surgery. Dr. Chamberlain acknowledges that Claimant has a lower chance of success than a patient undergoing an original rotator cuff repair surgery given his two prior failed surgeries, yet credibly opined that Claimant still had the potential for success to cure and relieve the effects of the injury. Although Dr. Failinger advised Claimant when discussing the second surgical repair that he would not recommend any further surgery after the second attempt, Dr. Failinger has not reviewed the proposed third procedure recommended by Dr. Chamberlain nor has he provided an opinion on the reasonableness or necessity of this third proposed surgery. As found above, the third surgery that Dr. Chamberlain is recommending is a different approach to the repair. Dr. O'Brien has provided a contrary opinion, however, his opinion is not found as persuasive as that of Dr. Chamberlain. Dr. O'Brien noted that Claimant's prior left rotator cuff tear and the current rotator cuff tear that was surgically repaired and then tore again evidences Claimant's genetic predisposition and inability to properly heal or allow the rotator cuff to reattach and that the surgery is unlikely to be successful. However, Dr. O'Brien failed to note that the prior left rotator cuff tear was the result of an acute injury and not due to genetic predisposition. Dr. Chamberlain provided a comprehensive and persuasive opinion regarding the reasonableness and necessity of the third proposed surgery, with a different approach than the first two surgeries. Overall, Claimant has established, more likely than not, that the surgery is not only causally related to his June 18, 2014 work injury but that it is reasonable and necessary to attempt to cure and relieve him of the continued effects of his injury.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that the right shoulder surgery recommended by Dr. Chamberlain is reasonable, necessary, and causally related to his June 18, 2014 work injury.

2. Respondents shall authorize and pay for the recommended surgery.

3. All issues not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 6, 2016,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether the claimant proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment on October 23, 2014; if so,

2. Whether the claimant has proven by a preponderance of the evidence that the medical treatment she received in relation to the injury was reasonable and necessary to cure and relieve her from the effects of the industrial injury; and, if so,

3. Whether the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability or temporary partial disability in relation to the industrial injury.

FINDINGS OF FACT

1. The claimant was formerly employed by the respondent-employer as a farm laborer/herdsman. The claimant indicated that her job was to "be with the baby piglets" and that she "would help the pigs give birth."

2. The claimant testified that on October 23, 2014 she was standing on top of a pig cage, putting up a lamp, and then she fell. The claimant further testified that she has no recollection of what happened following her fall; she only remembers waking up in the hospital the following day.

3. The medical record from the emergency room at Weisbrod Memorial County Hospital indicates that the claimant fell through a crate and sustained very minor bruising to her left leg. After falling through the crate, the claimant went to the break room to elevate her leg. At that time, the claimant was conversing normally with her coworker. The claimant's coworker left the room for a period of time. The coworker reportedly heard a thump and returned to the break room where the coworker observed the claimant lying on her side on the floor.

4. Thereafter, an ambulance arrived on the scene. Upon arrival, paramedics observed the claimant lying on her right side on the floor. She was awake, her eyes were open, and she was responsive. The emergency room record documents that she

was lying on the ground for approximately 20 to 30 minutes. During that time, there was no seizure-like activity, no shaking, and no loss of bladder or bowel control.

5. The claimant was transferred to Weisbrod Memorial Hospital where she was evaluated by PA Dawn Beck. Upon examination, PA Beck noted that the claimant was awake and responsive. Other than a very minor bruise on the left shin, there were no signs of trauma. An x-ray of the left lower extremity showed no evidence of fracture or acute injury and that the soft tissues were unremarkable.

6. Even though there were no signs of head trauma, the claimant presented to the emergency room with subjective complaints of memory loss and dizziness. She claimed she could not remember her own birthday or her daughter's birthday. Accordingly, the claimant was transferred to Memorial Hospital in Colorado Springs in order to undergo a neurological workup.

7. Upon arrival at Memorial Hospital, the claimant was evaluated Dr. Robert Lam. He noted that the claimant was awake and alert. However, the claimant continued to exhibit amnesia about the event. She was unable to recount any details regarding the fall. She could not recall fainting. Accordingly, the claimant was admitted to the hospital for further evaluation.

8. On October 23, 2014, the claimant underwent a CT of the brain without contrast. The results were unremarkable and there were no signs of abnormalities.

9. Upon admission to Memorial Hospital, Dr. Christopher Evilsizer evaluated the claimant. The claimant reported that she felt "fine" and the claimant's friends and family indicated that she was behaving "normal."

10. In addition to the CT scan, the claimant underwent a MRI of the brain and an EEG. The MRI was normal. Specifically, the scan showed no evidence of acute intracranial abnormality or objective findings to correlate with the claimant's subjective complaints. The EEG was also normal and there were no signs of seizure.

11. The next morning, on October 24, 2014, the claimant was evaluated by neurologist, Dr. Drake McDonald. He noted that the claimant's mental status had been normal since being admitted to the hospital around 7:00 p.m. the previous evening. Upon examination, Dr. McDonald found no evidence of scalp or skull trauma. The neurologic examination was completely normal.

12. Dr. McDonald conducted a second neurological evaluation on October 25, 2014. He opined that even if the claimant did have a mild concussion, she was now “back to baseline.” He indicated that the claimant could be discharged.

13. On October 26, 2014, Dr. McDonald performed a third neurological evaluation and review of the MRI. Ultimately, Dr. McDonald assessed the claimant with probable nonspecific dizziness. He also notes, “I doubt there is an abnormality in the nervous system causing this.”

14. On October 26, 2014, the claimant was discharged from the hospital. Upon discharge, it was noted that all objective diagnostic studies were normal. There was no evidence of a neurological disorder to account for the claimant’s dramatic presentation. Providers at Memorial Hospital instructed the claimant to follow up with a primary care provider.

15. The ALJ finds that the totality of the evidence establishes that there was an event. If there was a fall, it is a truly unexplained fall. Clearly, the event is unexplained. Here, the evidence establishes only that the claimant was sitting in a chair conversing normally with a co-worker. After the co-worker departs the room he hears a noise and returns to find the claimant lying on the ground. The claimant agrees that she has no idea as to how this occurred and that she cannot explain it. The co-worker cannot explain it either.

16. Based upon all of the medical testing the claimant underwent, it is clear that there is no known pre-existing medical condition that precipitated the event.

17. The ALJ finds that the initial injury to the lower extremity was of a minor nature not requiring medical treatment in and of itself, and thus not a compensable event.

18. The ALJ finds that the claimant has failed to establish that it is more likely than not that on October 23, 2014 she suffered an injury arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Generally, the claimant shoulders the burden of proving entitlement to benefits by a

preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence to find that a "contested fact is more probable than its nonexistence." *Page v. Clark,* 592 P.2d 792, 800 (Colo. 1979).

2. Whether the claimant sustained her burden of proof is a factual question for resolution by the ALJ. *Cify of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved, the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions, the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. Section 8-43-210, C.R.S.

5. To recover workers' compensation benefits, the claimant must prove she suffered a compensable injury. A compensable injury is one which arises out of and in the course of employment. § 8-41-301(1)(b), C.R.S, *see City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *Triad Painting Co.* v. Blair, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires the claimant to show a causal connection between the employment and the injury such that the injury has its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. See *Triad Painting Co. v. Blain supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968), *see also, Industrial Commission v. London & Lancashire Indemnify Co.,* 135 Colo. 372, 311 P.2d 705 (1957) *(mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of employment).* Rather, it is the claimant's burden to prove by a

preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2006, *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989). When a claimant does not prove the cause of an injury, the claim fails. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968).

6. Initially, the claimant was at work when she fell from the top of a pig crate injuring her left lower extremity. The ALJ concludes, as found above, that the claimant merely sustained a very minor bruise on her left shin, that in and of itself did not require medical attention nor cause a disability. Under *Wherry*, even if there was a minor fall and slight bruise to the claimant's left leg, it was not sufficient to cause a compensable injury that resulted in the need for medical treatment or disability. *Wherry*, W.C. No. 4-475-818.

7. The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by fhe United Sfates Court ofAppeals,* 759 P.2d 17 (Colo. 1988), *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

8. In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Colorado Supreme Court recognized three categories of injuries typically encountered in workers' compensation cases. The first category includes employment risks. The second is personal risks. The third comprises of neutral risks. The first and the third are typically compensable. The category of personal risks, including preexisting idiopathic injuries, were explained to generally not be compensable "unless an exception applies." The exception described is that of a "special hazard." The doctrine was explained to render an injury compensable even if the most direct cause of that injury is a preexisting idiopathic disease or condition "so long as a special employment hazard also contributed to the injury, *In the Matter of the Claim of Keith Murray*, Claimant, No. W.C. No. 4-921-576-02, 2014 WL 2726593 (Colo. Ind. Cl. App. Off. June 10, 2014) citing *City of Brighton v. Rodriguez*, 318 P.3d 496, (Colo. 2014).

9. The ALJ concludes that since this case establishes a truly unexplained fall, it falls within the personal risk. There is insufficient evidence to establish that the claimant was injured due to a positional risk. The ALJ concludes that the 'but for' test is inapplicable because we do not know what caused the claimant to sustain her cognitive deficits. There is insufficient evidence to establish that the claimant struck her head, thus the claimant has failed to establish just exactly what injury may have been suffered, if any.

10. Additionally, the claimant has failed to establish that a special hazard of employment is present.

11. The ALJ concludes based upon the above that the claimant has failed to establish by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant’s claim for benefits under the Workers’ Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 7, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant is entitled to temporary total disability (TTD) benefits from November 5, 2015 through January 24, 2016.

2. Whether Claimant is entitled to temporary partial disability (TPD) benefits from January 25, 2016 and ongoing.

3. Whether Respondents have established that Claimant was terminated for cause on November 4, 2015 and is thus not entitled to TTD or TPD benefits.

4. If Claimant is entitled to TTD or TPD benefits, determination of Claimant's average weekly wage at the time of injury.

FINDINGS OF FACT

1. Employer is a corporation specializing in industrial construction and creates infrastructure for mines, power plants, and oil and gas operations. Claimant is a construction worker who was employed by Employer.

2. Claimant worked for Employer on and off for approximately four years. During this period of time, Claimant attended regular safety meetings conducted in English and regularly communicated with Employer in English.

3. Claimant worked from April 19, 2012 through February 1, 2013 as an iron worker. Claimant was given a leave request for February 4, 2013 through February 6, 2013 and thereafter Claimant did not call in or report back to work. *See* Exhibit G.

4. Claimant again worked for Employer from June 18, 2013 through May 9, 2014 as a foreman. As a foreman Claimant had supervisory duties and took part in Employer's supervisor training program which was conducted in English. Claimant's employment ended based on his "no call, no show." *See* Exhibit G.

5. Claimant again worked for Employer from July 7, 2014 through December 10, 2014 as a carpenter leadman. Claimant left employment to find another job. *See* Exhibit G.

6. On February 18, 2015 Claimant was again hired by Employer as a heavy equipment operator and he worked through July 10, 2015 when he left again to seek another job. *See* Exhibit G.

7. On September 29, 2015 Claimant was again hired as a carpenter and worked through November 4, 2015 and was fired on that date for refusing to follow instructions. *See* Exhibit G.

8. On November 3, 2015 while working for Employer, Claimant suffered a work related injury at a gold mine. Claimant was in the mine moving concrete forms and was taking the forms off a cement area and carrying them to a forklift. The forms weighed approximately 50-60 pounds. Claimant had one form in each hand and was walking up a slight incline when he noted the sudden onset of pain in his right calf.

9. Claimant reported the injury to Employer. Employer's safety manager, Rusty Campagna, took Claimant to a nearby clinic for evaluation.

10. On November 3, 2015 Claimant was evaluated by Robert Leach, NP. Claimant reported pulling and lifting heavy concrete forms when he had pain in the right calf that radiated up his leg. NP Leach assessed strain and released Claimant to modified duty that day with a zero pound lifting, pushing, and pulling restriction. NP Leach noted that Claimant was not to lift or pull until cleared by CCOM and recommended Claimant follow up with CCOM in Colorado Springs. *See* Exhibit 5.

11. Mr. Campagna reported Claimant's injury to Employer's corporate safety director, David Masterson. Mr. Masterson initially advised Mr. Campagna by email at 3:49 p.m. on November 3, 2015 to make arrangements for Clamant to be at his Grand Junction office the next morning by 7:00 a.m. Mr. Masterson sent a later email at 4:29 p.m. that advised Mr. Campagna that Claimant had a 10:00 a.m. appointment.

12. Mr. Campagna advised Claimant that Claimant had an appointment at Employer's Grand Junction facility at 10:00 a.m. the next morning and that Claimant needed to be there for follow up to hopefully get a doctors release and return for work.

13. After seeing NP Leach, Claimant returned to the mine where he had been working and went to the lunchroom trailer. Claimant was asked to straighten up the trailer which Employer believed was within the work restrictions given to Claimant.

14. Claimant sat in the lunchroom trailer for approximately 40 minutes and did not start straightening up the trailer. Claimant was on his cell phone and was also charging it in the trailer. Mr. Campagna walked in to the trailer and asked Claimant if he was going to straighten up the trailer. Claimant replied "I'm no fucking maid."

15. The following day, Claimant had his son drive him from Denver to Grand Junction for the appointment that Mr. Campagna told him he had to be present for. The day was snowy and Claimant arrived at Employer's Grand Junction office at 10:05 a.m. Mr. Masterson terminated Claimant immediately after Claimant's arrival. Mr. Masterson advised Claimant that he was not following orders and that he should have been there at 7:00 a.m. Mr. Masterson told Claimant that he had not followed orders with two

incidents in October, had made inappropriate comments to Mr. Campagna, and had failed to show up on time that morning.

16. Claimant was paid wages through November 4, 2015. From October 3, 2015 through his termination on November 4, 2015 Claimant earned an average weekly wage for taxed wages of $1,396.60. *See* Exhibit 8.

17. Mr. Masterson testified by deposition that Claimant was terminated for not following directions with the biggest problem being breaking the safety rules on two occasions in October of 2015. Mr. Masterson testified that Claimant had training on the proper operation of equipment and that Claimant also attended safety meetings and that the need for spotters while using the equipment is discussed all the time and consistently. Mr. Masterson also testified that Claimant failed on at least one occasion to bring his carpenter belt with him to work which was required. Mr. Masterson testified that Claimant talked to Mr. Campagna in an inappropriate way and that being late to the November 4, 2015 appointment was a continued showing of Claimant's overall patterns. Mr. Masterson's testimony, overall, is found credible and persuasive.

18. Approximately two weeks prior to his termination, Claimant was written up twice for safety violations that occurred when he was operating a skid steer. On October 13, 2015 at approximately 8:30 a.m., Claimant was written up for not following rules and regulations while operating a skid steer. When Claimant turned the machine sideways to dump a load the machine rear went over a bank and caused the machine to slide back and down against a form. *See* Exhibit F.

19. On October 13, 2015 at approximately 10:35 a.m. Claimant was written up again for not following rules or regulations while operating a skid steer. Claimant had been operating the skid steer with a spotter moving fill round concrete peers. Claimant's spotter walked away to put up barricade tape and Claimant continued to operated the skid steer and hit a stub-up breaking it off at ground level. Claimant had been trained not to move any equipment without a spotter and Claimant violated Employer's safety protocols when he moved the skid steer without the spotter. *See* Exhibit F.

20. Several months after his termination, and on March 31, 2016 Claimant underwent an Independent Medical Evaluation performed by Gretchen Brunworth, M.D. Dr. Brunworth noted that an evaluation was attempted earlier in the month but was not completed as a professional interpreter was not present. Claimant reported carrying forms off of cement and to a forklift with one form in each hand when he noted the sudden onset of pain in his right calf. Claimant reported going to a clinic then going back to work and working in the office for approximately an hour and that he was told he needed to be in Grand Junction the next day to be seen at the clinic. Claimant reported that the next day was snowy and that he made it to Grand Junction and was fired without being given a reason and that he had no treatment since.

21. Claimant reported to Dr. Brunworth that he started working for a new construction company on January 25, 2016 and that he was working full time. Dr. Brunworth assessed: low back and leg complaints; subjective complaints; and physical exam with complaints suggestive of a S1 radiculopathy. Dr. Brunworth recommended an MRI be completed. See Exhibit 6.

22. Claimant testified at hearing. Claimant denied that he stated to Mr. Campagna "I'm no fucking maid." Claimant testified that he does not know or understand what the word maid is so could not and would not have used that word. Claimant also testified that he was told by Mr. Campagna to be in Grand Junction by 10:00 a.m. for an appointment on November 4, 2015 and that he arrived only five minutes late.

23. Claimant also testified that he got a new job around January 19 or January 20, 2016 and has been earning wages in that job of $20/hour and works between 35 to 50 hours per week. Claimant reported to Dr. Brunworth that he started a new job on or about January 25, 2016. Claimant did not present any wage records to evidence the new job, start date, or wages earned.

24. Claimant's testimony, overall, is not found credible or persuasive. Claimant has been working for Employer on and off for four years during which he attended regular safety meetings in English, participated in the supervisor program in English, and also communicated with Employer in English. Claimant's report that he does not know the word "maid" and did not make the statement to Mr. Campagna in the lunchroom trailer is not credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Responsible for Termination

Claimant contends that he is owed temporary total disability payments for the period of time following his termination and until he began a new job in January of 2016. Claimant also contends that he is owed temporary partial disability payments from the time he started his new job in January of 2016 and ongoing. Therefore, it is necessary to address Respondent's contention that the Claimant is precluded from receiving temporary benefits because the Claimant is responsible for his termination.

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office, supra; Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). A claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*.

However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

Here, Claimant was not terminated due to his injury. In fact, the evidence shows that Employer drove Claimant to the clinic shortly after Claimant reported the injury, drove Claimant back to the mine, and accommodated his light duty restriction allowing Claimant to sit in the lunchroom trailer and straighten it up. Further, Employer set up a doctor's appointment for Claimant the following day. However, two weeks prior to the work injury, Claimant had two instances of failing to follow instructions where he violated safety rules and was written up. Additionally, the day of the injury Claimant was insubordinate to a supervisor when Claimant stated "I'm no fucking maid."

The evidence shows, more likely than not, that Claimant's termination was not due to his injury but was justified and due to Claimant's overall pattern of behavior that included failing to follow safety instructions twice within the month prior to his injury causing damage, insubordination to his supervisor, as well as a history of no call/no show and failing to show up to work with the required tool belt/tools. Although Employer could have terminated Claimant for cause earlier than November 4, 2015 based on Claimant's behaviors, the fact that they did not terminate him at an earlier date does not take away from the fact that they had sufficient cause to terminate Claimant and had a further reason to terminate him after the remarks he made to his supervisor on November 3, 2015. The evidence establishes that had Claimant's employment performance been satisfactory, it is more probable than not that he would have remained employed by Employer and that he was not terminated due to his injury, but due to his failure to follow safety instructions and his insubordination.

Due to Claimant's poor employment performance, Respondents have met their burden of showing that Claimant's termination was justified. Claimant acted volitionally and had control over his decision two times to violate safety procedures on October 13, 2015 and acted volitionally in making an inappropriate comment to his supervisor. Although the evidence does not establish that Claimant was more than five minutes late to the appointment on November 4, 2015 and shows mixed information as to whether he was told the meeting was at 7:00 a.m. or 10:00 a.m., Employer had sufficient justification to terminate Claimant based on the safety violations, the insubordination, and/or a combination of the two. Based on Claimant's performance, or lack thereof, Respondents have established that the termination was justified. Claimant did not establish any wage loss prior to his termination and the request for temporary benefits is thus denied and dismissed.

ORDER

It is therefore ordered that:

1. The claim for temporary disability benefits is denied and dismissed.

2. Claimant was responsible for his termination and resulting wage loss after November 4, 2015.

3. As Claimant is not entitled to any temporary disability benefits, the issue of average weekly wage is moot.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 8, 2016,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The issues for determination are:

1. Whether the claimant established by a preponderance of the evidence that the situs of her functional impairment is off the schedule and thus entitling her to an order converting her 13% scheduled impairment rating to an 8% whole person; and,

2. The amount of disfigurement benefits to which the claimant may be entitled.

FINDINGS OF FACT

1. The claimant was injured on December 3, 2013 while working as a preschool teacher at Castle Academy. At the time she was working in the 2-year-old room, taking care of children between infancy and 2 years old.

2. The claimant was injured when she tripped over a toy and fell on an outstretched left arm and had immediate pain to her left elbow. She fell awkwardly because she was trying to avoid harming a young student.

3. On December 6, 2013 the claimant underwent surgery with Dr. Steven Morgan. Dr. Morgan attached one plate and multiple screws in the claimant's left arm.

4. On January 15, 2014 the claimant returned to Dr. Morgan's office for a six-week follow-up post-surgery. Dr. Morgan noted in his assessment, "extreme limited range of motion in flexion and extension."

5. The claimant had continued difficulties with stiffness and pain in her elbow. This was noted by Dr. In Sok Yi on May 27, 2014.

6. Because the claimant continued to have difficulty with range of motion in her elbow she underwent a second surgery on October 8, 2014. The procedure performed was "left elbow retained hardware removal and left elbow contracture release, heterotopic bone excision, and radical capsular excision." During the surgery, Dr. Yi noted, "there appeared to be due to the intra-articular comminuted nature of the

fracture, some rotation and flexion of the lateral condyle piece causing mechanical blockage to extension and flexion… but appears to continually have mechanical block within the trochlea to prevent further flexion."

7. The claimant was placed at maximum medical improvement by Dr. Brian Beatty on May 6, 2015. He noted "again postoperatively she has gone through a full course of physical therapy with gradual improvement but continues to have significant loss of range of motion." Dr. Beatty assigned the claimant 8% scheduled impairment at the elbow which converts to 5% whole person impairment.

8. The claimant subsequently requested a Division Independent Medical Exam (DIME), which occurred with Dr. Lloyd Thurston on October 28, 2015. On physical exam Dr. Thurston found "the flexion and extension and points were solid and very consistent. She has been using a JAZ splint to regain range of motion in the elbow. She states there's been essentially no change in the last few months. The range of motion measurements I obtained resulted in a 13% upper extremity impairment which converts to 8% whole person impairment."

9. The claimant was regularly prescribed Percocet for the pain in her elbow from her date of injury through her date of maximum medical improvement.

10. Dr. Thurston specifically commented on the injury's effect on the claimant's day-to-day life. He noted, "[The claimant] has had to change her sleeping position, she is unable to crawl, golf, or swing a bat. When she is driving she must lean forward to roll down her window. She can't swing on a swing set. The most notable and frustrating result of the injury is that she is unable to touch her face with her left hand."

11. The claimant's statements to Dr. Beatty were consistent with her statements at hearing. In the claimant's position taking care of children from newborn to 2 years old, she is required to crawl, lift children, reach overhead and use a swing set among other job duties. Because the claimant does not have full flexion and extension in her elbow, she cannot sit on the swing set and lean forward to swing, nor is she able to crawl on the floor with the children. If she puts her left arm down to crawl, it causes immediate pain in her thoracic and scapular area. The claimant did not attempt to crawl at work prior to maximum medical improvement. The first time her difficulties with crawling were noted in the records was during the DIME exam. She also cannot reach overhead supplies, which as a preschool teacher she is required to either stock, or takedown for use.

12. Because the claimant's elbow is at a permanent angle, the most comfortable position for her to carry her left arm is with it resting across her midsection. When the claimant's left arm is down it causes pain into her scapula and thoracic regions. The claimant cannot simply let her left arm hang by her side without pain into her scapula and thoracic area.

13. The claimant can no longer sleep on her left side. The position she now sleeps in eventually causes her arm and shoulder to go numb, and she wakes with pain in her shoulder blade extending into the middle and upper spine areas. She wakes with this pain and it takes a few hours of moving around for that pain to resolve.

14. The claimant cannot drive a car for any long distance without experiencing pain into her scapula and thoracic area. She has difficulty driving longer stretches because extending the left arm to reach the steering wheel causes pain and discomfort in her scapula, neck and thoracic area. Because of the permanent angle the claimant's elbow remains at, she cannot comfortably rest her left arm in her lap while driving. Reaching the blinker causes a sharp, needle-like pain in the claimant's shoulder blade area.

15. In terms of activities of daily living, the claimant cannot reach her left ear with her left arm, she cannot wash her hair with her left arm, and she cannot wash her face with 2 hands. When the claimant attempts to wash her face with 2 hands or clean her left ear, she experiences aching pain in her neck and upper back.

16. The claimant was never asked by any of her authorized physicians about the effects of her inability to flex or extend her elbow past a specific point. The DIME physician, Dr. Thurston, was the first physician to comment on the injury's effects on the claimant's day-to-day life.

17. The ALJ finds the claimant to be credible.

18. The ALJ finds that the claimant has established that it is more likely than not that the situs of the claimant's functional loss extends beyond the left elbow and into her scapula area, thoracic spine and cervical area as it relates to her inability to wash her face and hair with her left arm, inability to reach her left ear, driving and sleeping which cause pain into her scapula thoracic and cervical areas, crawling or swinging on a swing set as part of her job duties, and reaching overhead.

19. The ALJ finds that as a result of her December 3, 2013 work injury, the claimant has a visible disfigurement to the body consisting of a surgical scar on the outside portion of the left elbow that is approximately eighteen inches in length and

three-quarters of an inch in width at its widest. The scar is discolored when compared to the surrounding tissue. The ALJ finds that the claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to additional compensation.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1)*. The claimant shoulders the burden of proving by a preponderance of the evidence that her injury rose out of the course and scope of his employment, *Section 8-41-301(1);* see *City of Boulder v Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in the favor of Respondent. *Section* 8-43-201.

2. A workers' compensation case is decided on its merits. *Section* 8-43-201. The ALJs' factual findings need only concern evidence that is dispositive of the issues involved. The ALJ does not need to address every piece of evidence that might lead to a conflicting conclusion and reject evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finders should consider, among other things, the consistency or inconsistency of the witnesses' testimony and action; the reasonableness or the unreasonableness (the probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interests. *See Prudential Insurance Company v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

4. The term injury refers to the part of the body that has sustained ultimate loss. *Mountain City Meat Company v. Oqueda*, 919 P.2d 246 (Colo. 1996). In the context of Section 8-42–107(1), the term "injury" refers to the part or parts of the body that have been functionally impaired or disabled as a result of the injury. *Maree v. Jefferson County Sheriff's Department*, WC No. 4–260–536 (ICAO August 6, 1998), citing *Strauch v. PSL Swedish Healthcare*, 917 P. 2d 366 (Colo. App. 1996). Section 8–42–107(1)(a), C.R.S. (2003), limits medical impairment benefits to those provided in

subsection (2) where the claimant's injury is one enumerated on the schedule. The schedule of specific injuries includes, in section 8–42–107(2), the loss of the arm; however, impairment of the scapula, thoracic spine and neck are not listed in the schedule of disabilities. *Maree v. Jefferson County Sheriff's Department*, *supra*. Although Section 8–42–107(2) does not describe a scapula, thoracic or neck injury, our courts have construed that the dispositive issue is whether the claimant sustained a functional impairment to the portion of the body that is listed on the schedule of disabilities. See *Strauch v. PSL Swedish Healthcare*, *supra*. Thus, the ALJ is constrained to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Id*. Pain and discomfort which limit the claimant's use of a portion of her body may be considered functional impairment. *Beck v. Mile High Express, Inc.*, WC No. 4–283–483 (ICAO February 11, 1997).

5. The ALJ concludes, based upon a totality of the evidence, that the claimant has established by a preponderance of the evidence that situs of her functional impairment extends from the left elbow into the thoracic spine region, the scapula area and the neck where the claimant suffers functional impairment restricting her from crawling, reaching overhead, driving for extended periods, washing her face and washing her hair. The claimant established that she experiences pain in the left upper extremity, thoracic spine and left scapula, which causes her to cradle her arm across her midsection and limits her functioning. Since the situs of the claimant's functional impairment does not appear on the schedule of disabilities, the claimant is entitled to a whole person impairment rating.

6. The evidence presented at hearing further established that the claimant is entitled to an 8% whole person impairment of her left elbow injury. This rating is arrived at based on the opinion of Division Independent Medical examiner Lloyd Thurston, M.D.

7. The ALJ concludes that as a result of her December 3, 2013 work injury, the claimant has a visible disfigurement to the body. The ALJ concludes that the claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to additional compensation. Section 8-42-108 (1), C.R.S.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay the claimant permanent partial disability benefits based upon 8% whole person impairment.

2. The insurer shall pay interest to the claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. The ALJ orders that the respondent-insurer shall pay the claimant $1,800.00 for her disfigurement. The respondent-insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 8, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Respondents have met their burden to prove that Claimant's injury resulted from the willful failure to use a safety device or a willful violation of a reasonable safety rule adopted by Employer for Claimant's safety in contravention of C.R.S. §8-42-112(1)(a) and (b), thus entitling Respondents to reduce Claimant's compensation by fifty (50) percent.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Employer is a manufacturing facility that uses heavy industrial forging equipment to produce bolts and screws for the railroad industry. Due to the nature of their business and the machinery used for production, Employer takes safety seriously and considers the wellbeing of their employees to be of paramount importance.

2. Employer has adopted many safety rules, but given the types of machinery used on the factory floor, two rules are heavily emphasized within the facility. The first rule is that all employees must use a lock out/tag out device on any machine before performing any maintenance or repair to that machine (lock out/tag out rule). The second rule is that all employees shall refrain from placing their hands or limbs in the pinch points of machines until the machine is locked out/tagged out (pinch point rule)
.

3. A machine is "locked out" when a locking device is placed on the lever of a power box in the off position. A machine is "tagged out" when an employee places a tag on the lock on the lever indicating "the device may not be operated or energized until the tag is removed." The purpose of lock out/tag out rule is to avoid injuries by "isolat[ing] [the machine] from all potential energy sources" and "physically restrain[ing] [the machine] from being operated or energized." When a machine is locked out/tagged out, it is disconnected from all sources of power that may result in the machine cycling, including mechanical power sources, i.e. compressed air. When a machine is merely off, it still has access to power and may accidentally cycle while under service resulting in serious injury.

4. The purpose of the pinch point rule is to prevent employees from placing their limbs or hands in danger of being severely harmed.

5. Claimant was hired as machine operator for Employer on July 10, 2015. According to Claimant, he had gone through safety classes with Employer and after passing those classes was called back to begin work. Leonard Gonzales, a project

team member with Employer, taught a new employee orientation class to claimant on the day he was hired. During this class, Mr. Gonzales verbally explained lock out/tag out procedures, demonstrated the lock out/tag procedures out on a power box inside the classroom, and explained the dangers of not locking out/tagging out a machine. Mr. Gonzales distributed a pamphlet detailing lock out/tag out procedures to new employees and claimant testified that he watched a series of videos during his class that illustrated photographs of injured industrial workers to reinforce the severity of potential injuries at facilities using heavy industrial equipment similar to that used on Employer's production lines.

6. Claimant also testified that he understood the safety rules that were covered in the new employee orientation and, based on his years of experience with machinery, he knew how to lock out/tag out a machine. At the completion of the class, claimant signed a document acknowledging that Employer's "Lock-Out/Tag-Out Procedures [had] been presented" and that he "understood and that [he] [would] comply with these rules." Mr. Gonzales ensures new employees understand this document by reviewing the document with the employee before the employee signs it.

7. After this class, claimant received individual training on machine safety procedures which reinforced the lock out/tag out rule for the equipment used in Employers manufacturing processes. Each time he received this training, claimant signed a document acknowledging that he understood the dangers of the machine and the safety procedures for it. Claimant also received training regarding the pinch point areas of specific machine on the manufacturing floor.

8. On July 11, 2015, claimant was trained on pointer machines. The training document he signed warned operators to keep their "hands away from the grip area" and to "watch out for pinch points." The document instructed that the machine must be lock out/tagged out before doing maintenance or repairs.

9. On July 13, 2015, claimant was trained on induction machines. The training document he signed stated "Do not place your fingers between the conveyor chains."

10. On July 18, 2015, claimant received training on reshear machines. The training document he signed noted that placing hands or fingers in the pinch point of the machine could result in broken hands or fingers. This machine needed to be locked out/tagged out whenever an employee performed any maintenance or repairs. The document also prohibited employees from placing their hands under the "guide bracket" or "near or on shear dies."

11. On July 30, 2015, claimant received training on the wheelabrator machine. The training document he signed warned of the machine's pinch points: "Keep hands and limbs clear of the door while opening and closing." The document again required the machine to be locked out/tagged out for maintenance and/or repairs.

12. Finally, on August 8, 2015, claimant received training on all header machines.

Header machines have a set of clamps approximately two feet inside the machine. One side of the clamp is called the “upsetter” and the other side of the clamp is called the “grip die.” The grip dies hold a bolt in place as the upsetter presses into the grip die to create the head on the bolt.

13. The training document claimant signed listed the first danger of a header machine as “PINCH POINTS! Do not put hands or fingers where they don’t belong or you risk losing them.” The second danger listed was “Putting hands in machine when it is not turned off properly could result in loss of fingers or other body parts.” The safety procedure for a header machine instructed employees to “Never put hands in between the dies unless the machine is locked-out” and to “know where the lock-out box is and use lock-out/tag out when doing maintenance on machine.” The document also warned that the machine “grips can activate by air pressure without the machine ever running.”

14. Claimant testified that all of his machine specific training took place outside of the factory floor.

15. Jacob Trost, claimant’s co-employee, also received training on Employer’s header machines. He testified that his trainer demonstrated the importance of the pinch points rule concerning this machine by showing him a smashed bolt that had been improperly inserted into the grip dies. As a consequence of his training, Mr. Trost testified that he recognized the grip dies as an obvious danger and pinch point area. Mr. Trost also testified that his trainer explained to him that the machine could cycle inadvertently and showed him the location of the lock out/tag out power box on the factory floor to secure the machine for maintenance and repairs.

16. Mr. Trost testified that he had no knowledge of Claimant’s floor training. The signed safety procedure records submitted at hearing evidence that Mr. Trost had a different trainer than claimant when claimant was trained in the safety aspects of all headers on August 8, 2015. Nonetheless, Mr. Gonzales, who serves on Employer’s safety committee, testified that all employees receive similar floor training. Mr. Gonzales and the plant manager, Brett McIntosh both testified that Employer’s standard procedure is to train employees on the factory floor. Mr. McIntosh testified that the reason the training is conducted on the factory floor is to give employees an opportunity to visualize the potential dangers of and safety procedures for each machine used on the factory floor. Based upon the evidence presented, the ALJ finds that while Claimant may have had a different trainer, who may or may not have used a smashed bolt as an example to demonstrate the representative hazards of the pinch points existing on header machines, Claimant likely received specific safety training on the factory floor regarding the dangers posed by headers with heavy emphasis on not placing his hands in between the upsetter and grip die unless the machine was locked out. Indeed, the Claimant acknowledged as much on August 8, 2015 as evidenced by his signature on Respondents Exhibit D, page 017. The ALJ finds Claimant’s testimony that all of his machine specific training took place outside and off of the factory floor unpursuasive.

17. At hearing, there was a dispute over whether Employer enforces the lock

out/tag out procedure. Claimant testified that on at least 10 occasions, he had performed maintenance and repairs to machines, including changing the grip dies on the header machine during which Employer's lock out/tag out procedures were not followed. He testified that during these incidents the machine would be shut down but not locked out. According to Claimant, he preformed such maintenance with Mr. Trost without locking/tagging the machine out.

18. Mr. Trost testified that he never maintained or repaired any machine or changed the grip dies in the header without locking out/tagging out the machine. He explained he would never maintain, repair, or change the grip dies in a header without locking/tagging it out because of the obvious risk of injury. Regarding the maintenance of machinery, Mr. Gonzales testified that Employer has employees who are specifically tasked with machine maintenance, making it unlikely that claimant performed maintenance on ten different occasions. Moreover, Mr. McIntosh testified that Employer fosters a corporate culture emphasizing safety. Consequently, Mr. McIntosh testified that employees come to him with safety concerns or instances where they have observed safety violations. Thus, Mr. McIntosh testified that he would know if an employee is regularly violating a safety rule. According to Mr. McIntosh, employee's bonuses are linked to their adherence to Employer's safety rules and violations of the rules are routinely dealt with by suspension and/or termination. Documents submitted into evidence establish support Mr. McIntosh's testimony that the company safety rules are enforced and violations of the same are met with disciplinary action.

19. Based upon the evidence presented, the ALJ finds that when violations of the lock out tag out policy or pinch point rule were known to Employer disciplinary action was taken. Consequently, the ALJ finds that in addition to making the specific lock out tag out and pinch point rules/procedures known to employees, Employer enforced the rules by making violations thereto subject to corrective action.

20. On August 30, 2015, claimant was working with Jacob Trost on header machine number 415. As with other machines on the factory floor, the lock out/tag out protocols apply to this header machine. The power box to lock out/tag out is located approximately two feet away from the front of the machine. Operating this machine to finish product is a two man job. Claimant's part in the operation required him to stand in front of a conveyor belt and feed unfinished bolts to Mr. Trost who stood on a platform in front of the header. As the bolts travel down the conveyer belt, an induction heating system heats the top of the bolts to make them malleable. Mr. Trost then used a pair of metal tongs to grab the bolt from the belt and place it into the header machine. Once the bolts were inside the header, Mr. Trost would depress a foot pedal which would engage the upsetter and the grip dies to smash together to form a head on the bolt.

21. Near the end of his shift, at approximately 3:30 AM, Mr. Trost ran a set of five bolts through the header to make sure the upsetters and the grip dies were properly calibrated for the incoming workers. As the last bolt came off the line, claimant noticed what he considered a manufacturing defect on it. According to claimant, the last bolts run by Mr. Trost contained some flashing (lipping) likely caused by improper setting of

the upsetter and grip dies. From his work position, claimant yelled for Mr. Trost in an effort to point out the defect. Shaking his head, Mr. Trost disagreed that the bolts were defective and motioned for his supervisor. In the interim, claimant joined Mr. Trost on the operator's platform where he grabbed a bolt run by Mr. Trost. Claimant pointed out the flashing on the bolt and the two began to argue about the upsets, dies and whether the bolt was made correctly. Claimant testified that the two argued about this. Mr. Trost testified that he and claimant argued a "little bit", however, he characterized the exchange as a "friendly disagreement." The ALJ is not convinced that the verbal exchange between claimant and Mr. Trost constituted a "friendly disagreement." Rather, based upon the fact that Mr. Trost testified that he did not believe that the bolts were defective and had turned away from claimant and was not paying attention to him as he attempted to explain the problem, the ALJ finds that both men were aggressively trying to prove the accuracy of their claims. The ALJ infers and finds from the evidence presented that Mr. Trost likely felt that claimant was interfering with his work and that claimant was equally aggravated with Mr. Trost for his dismissive attitude, prompting claimant to spontaneously reach into the machine to prove his point that the upset and dies were not calibrated properly.

22. The machine was on when claimant extended his hand into it. Claimant admitted that the machine was not locked out/tagged out when he reached into it. Claimant did not turn the header machine off and no one told him the machine was off. Claimant admitted further that he could have explained the problem he felt was causing the defect to Mr. Trost after the machine was locked and tagged out; however, he testified that after attempting to explain the problem to Mr. Trost, who would not listen, that he impetuously stuck his hand/arm into the machine without thinking.

23. While claimant's arm was approximately two feet in the machine and within the "pinch points", it unexpectedly cycled and crushed his hand between the upsetter and the grip die causing serious injuries.

24. Mr. Trost and Mr. McIntosh testified that claimant failed to use the lock out/tag out device because claimant did not lock out/tag out the machine before reaching his arm into the machine and no one told him the machine was locked out/tagged out. Both also testified that claimant violated the pinch point rule by putting his hand in a known pinch point. Based upon the evidence presented, the ALJ agrees with the testimony of Mr. Trost and Mr. McIntosh, specifically that claimant would not have been injured if he had used the lock out/tag out device or obeyed the pinch point safety rule.

25. During hearing, Claimant admitted he put his hand into the pinch point of the header machine to prove to Mr. Trost that there was a problem with the die and that he was injured as a consequence. While admitting that reaching into the pinch point of an unlocked machine was in violation of Employer's safety rules, Claimant maintains that his actions were thoughtless and perhaps careless or negligent, but not willful as must be proven, by statute, before his indemnity benefits can be reduced by 50%.

26. Based upon the evidence presented, the ALJ finds that Respondents failed to

present persuasive evidence that Claimant intended to violate Respondent's lockout/tag out and pinch point safety rules. While claimant undisputedly did not lock and tag the header machine out and further reached his hand into a known pinch point, the evidence presented persuades the ALJ that claimant did so on impulse. The evidence convinces the ALJ that the above referenced argument between claimant and Mr. Trost, despite being downplayed by Mr. Trost as a “friendly disagreement” coupled with Mr. Trost ignoring claimant as he tried to explain himself emotionally provoked claimant sufficiently that he was moved to a sudden, unconscious inclination to reach his hand into the pinch points of the header machine without locking/tagging it out. Consequently, while claimant’s actions were grossly negligent, reckless and manifestly stupid, they were not willful. On the evidence presented, the ALJ finds that Respondents have not met their burden to prove that Claimant’s injury resulted either from the willful failure to use safety devices provided by Employer or violation of a reasonable safety rule adopted by Employer for Claimant’s safety in contravention of C.R.S. §8-42-112(1)(a) and/or (b).

CONCLUSIONS OF LAW

Based upon the forgoing findings of fact, the ALJ draws the following conclusions of law:

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office,* 5 P.3d 385(Colo. App. 2000)

B. Section 8-42-112(1)(b), C.R.S. 2014, provides for a 50 percent reduction in benefits if the employee is injured due to a willful violation of a safety rule. The term "willful" connotes deliberate intent, but mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968). Respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

C. The elements of proving a violation under Section 8-42-112(1)(a) and/or (b) include the following: 1). There must be a safety rule adopted by the employer. 2). The safety rule must be reasonable. 3). The safety rule must be known by the employee; “brought home” to the employee, and diligently enforced. *Pacific Employers Insurance Co. v Kirkpatrick*, 111 Colo. 470, 143 P.2d 267 (Colo. 1943). 4.) The meaning and content of the safety rule must be specific, unambiguous and definite, clear and non-conflicting. *Butland v. Industrial Claim Appeal Office*, 754 P.2d 422 (Colo. App 1988). 5). The violation of the safety rule must be willful, done with deliberate intent by the employee. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App 1990). The question of whether the respondents carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). Here, there is little question that Respondents presented sufficient evidence to meet their burden of proof concerning elements 1-4. Rather, the question presented here is whether Claimant's injuries were caused by his willful failure to use a safety device (lock out equipment) and/or willful failure to adhere to safety rules, i.e. tagging the header and reaching to the pinch points of the machine.

D. Respondents argue that they have met their burden to prove willfulness based on the "obviousness" of the danger posed by an unlocked machine possessing evident, known pinch points. In essence, Respondents argue that obviousness of the risks associated with the equipment in question supports that conclusion that claimant acted with deliberate intent when he reached his hand into the machine without locking/tagging it out. Based upon the evidence presented, the ALJ is not persuaded. In this case, the preponderance of the persuasive evidence establishes that although Claimant's actions may have been careless and negligent, they were not willful, i.e. deliberate. As noted, a violation which is the product of mere negligence, forgetfulness or inadvertence is not willful. *Johnson v. Denver Tramway Corp.*, 171 P.2d 410 (Colo. 1946). While it is true that willfulness can be inferred from the circumstances presented, such as repeated warnings, knowledge of the risks associated with violations of a safety rule, and the degree of carelessness or indifference to obvious risks,[1] the persuasive evidence presented in this case establishes that, more probably than not, in an emotionally charged desire to prove himself correct to Mr. Trost, claimant likely did not act consciously, i.e. deliberately/willfully when he reached into the header toward the upset and dies. Rather, he acted without thinking and his "carelessness" resulted in serious injury. Nonetheless, the ALJ concludes that claimant did not intend to violate Employers safety rules by failing to use safety devices and/or the safety rules concerning lock out/tag out procedures and avoidance of pinch points. As such, the ALJ is not persuaded that Claimant's actions in contravention of Employers safety polices were willful as must be established by Section 8-42-112(1)(a) and (b).

ORDER

It is therefore ordered that:

1. Insurer's request to reduce claimant's compensation benefits by 50% as provided for by Sections 8-42-112(1)(a) and (b), *supra* is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

[1] See *Industrial Commission v. Golden Cycle Corp.,* 126 Colo. 68, 246, P.2d 902 (1952); *Stockdale v. Industrial Commission,* 76 Colo. 494, 232 P. 669 (1925).

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 10, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

PROCEDURAL BACKGROUND

At the outset of the hearing, the parties stipulated and agreed that, to the extent issues were not previously resolved, all five (5) of Claimant’s pending Applications for Hearing related to the Claimant for the same work injury, Respondents’ corresponding Responses and the Prehearing Conference Orders related to the Applications and Responses, would be consolidated for hearing at the April 29, 2016 hearing. The ALJ approved the stipulation of the parties to consolidate these matters and stated that the various documents would be reviewed, along with the transcript of the hearing, to establish the issues remaining for resolution. The review of the relevant documents and hearing transcript is summarized as follows for the purpose of clarifying the remaining issues:

<table>
<tr><td>10/09/2015 Application (Cl. Ex. 9)
<i>(Consolidated with 10/20/2015 App)</i>
• Issues: (1) penalties for belated GAL and belated DIME application; CRS 8-43-304(1), 8-42-107.2, 8-42-107(8)(b),(e), and WCRP 11; (2) propriety of DIME Application</td><td>10/28/2015 Response
(Cl. Ex. 12; R. Ex. A)
• Issues: (1) penalties – CRS 8-43-211(3); (2) other-CRS 8-43-101; 8-42-107(8)(b.5)(I)(D); 8-42-107.2; WCRP 5-2, 11-3; <i>Reichert v. Maxtor Corp.</i></td></tr>
<tr><td>10/20/2015 Application (Cl. Ex. 10)
<i>(Consolidated with 10/09/2015 App)</i>
• Issues: (1) other-propriety of DIME selection panel & physician specialties; hold DIME process in abeyance</td><td>11/19/2015 Response
(Cl. Ex. 14; R. Ex. B)
• Issues: (1) penalties-CRS 8-43-211(3); (2) other-CRS 8-43-101, 8-42-107(8(b.5)(I)(D), 8-42-107.2, WCRP 5-2, 11-3; <i>Reichert v. Maxtor Corp.</i></td></tr>
<tr><td colspan="2">• 11/13/2015 prehearing order: (1) 10/09/2015 and 10/20/2015 Applications (and corresponding Responses) consolidated; (2) R motion to strike penalty issue denied; (3) briefing schedule set for issue #2-propriety of DIME Application (Cl. Ex. 13)
• 12/18/2015 prehearing order: dismissed issue of penalty for late DIME Application as without merit; dismissed issue RE propriety of R’s preemptive DIME Application as without merit; denies R’s motion to strike Cl’s issue of penalty for filing belated GAL due to genuine issue of material fact and reserves R’s defenses, including request for specificity; strikes sole issue in 10/20/15 Application RE propriety of DIME selection process & physician specialties (Cl. Ex. 18; R. Ex. H)</td></tr>
</table>

12/07/2015 Application (Cl. Ex. 16) ***(Consolidated with 12/24/2015 App)*** • Issues: (1) Resolve issues raised by R’s Motion to Strike Issues dated 11/23/15 pursuant to *Gustavo Lozano v. Front Range Rebar Co. Inc. (ICAO, Aug. 3, 1998, WC 4-285-320)*	**01/04/2016 Response** **(Cl. Ex. 21)** • Issues: (1) penalties- attorney fees for pursuing unripe issues; (2) interlocutory orders not subject to appeal
12/24/2015 Application (Cl. Ex. 19) ***(Consolidated with 12/07/2015 App)*** • Issues: (1) reconsider PALJ’s 12/18/2015 order; (2) longstanding pattern of bias/predisposition RE: attorney	**01/22/2016 Response** **(Cl. Ex. 22)** • Issues: (1) penalties-attorney fees for pursuit of unripe issues; (2) interlocutory orders not subject to appeal; (3) collateral estoppel; (4) facial challenge to DIME not reviewable by OAC; (5) failure to state a claim
• 01/04/2016 OAC Order consolidates issues endorsed in 12/07/2015 and 12/24/2015 Applications and corresponding Responses to be heard at hearing set for 02/26/2016 (R. Ex. K) • 02/16/2016 prehearing order: (1) motion that is the subject of the 12/07/15 Application has been ruled on and is resolved, so this issue is stricken; (2) R’s motion to strike 12/24/15 Application is denied; (3) R’s request for attorney fees and costs is reserved for 02/26/2016 hearing; (4) R’s request for specificity to Cl’s request for penalties reserved as a defense for 02/26/2016 hearing (Cl. Ex. 24; R. Ex. I)	
02/15/2016 Application (Cl. Ex. 23) • Issues: (1) penalties for requesting attorney fees & relief beyond a PALJ’s authority; (2) other-resolve issues raised by the R’s prehearing scheduled for 2/16/2016 at 11:00 pursuant to *Gustavo Lozano v. Front Range Rebar Co. Inc. (ICAO, Aug. 3, 1998, WC 4-285-320)*	**03/16/2016 Response (Cl. Ex. 25)** • Issues: (1) attorney fees for pursuit of unripe issues; (2) facial challenge to DIME not reviewable by OAC; (3) collateral estoppel; (4) failure to state a claim
• 04/08/2016 prehearing order: granted R’s motion to compel Cl’s attendance at DIME with Dr. Thurston on May 25, 2016 at 9:00 AM. Further ordered that Cl’s failure to attend DIME will result in sanctions against CL, including up to $1,000 per day penalty and dismissal of her claim (unless vacated by an OAC ALJ) (Cl. Ex. 26; R. Ex. J) • 04/26/2016 prehearing order: granted R’s motion to compel Cl to complete R’s 3/18/2016 interrogatories (Cl. Ex. 27)	

- 04/29/2016 hearing: parties stipulated to consolidating remaining issues from all five applications and corresponding responses for hearing (Hrg. Tr., pp. 35-36)
- 04/29/2016 hearing: Cl's motion for relief from the 04/08/2016 prehearing order RE compel DIME attendance was granted, in part. Cl. is relieved from attending the DIME with Dr. Thurston on May 25, 2016 at 9:00 AM. However, Cl. must attend a rescheduled DIME appointment with Dr. Thurston to take place between June 10, 2016 and July 10, 2016 unless ordered otherwise (Hrg. Tr., pp. 86-88)

ISSUES

In light of the procedural background summarized above, the following issues remain for resolution by the ALJ in this consolidated matter:

1. Whether the Respondents timely and properly requested a Division Independent Medical Examiner ("DIME") and the effect of such request.

2. Whether the Respondents timely and properly filed a General Admission of Liability ("GAL").

3. If the Respondents failed to timely and properly request a DIME or file a GAL, whether penalties should be assessed against the Respondents pursuant to C.R.S. §§ 8-43-304(1), 8-42-107.2, 8-42-107(8)(b)(e), and WCRP 11.

4. Propriety of DIME panel selection and whether the Claimant is entitled to a DIME physician with a requested specialty.

5. Whether, and for how long, the DIME process is held in abeyance.

6. Reconsideration of the issues raised before PALJ Harr that were addressed in his December 18, 2015 Interlocutory Order.

7. Reconsideration of the issues raised before PALJ Gallivan that were addressed in his February 16, 2016 Prehearing Conference Order.

8. Consideration of the allegation of a longstanding pattern of bias or predisposition with respect to the Claimant's attorney.

9. Whether the Respondents have proven that attorney fees and costs should be assessed against the Claimant's attorney for pursuing unripe issues pursuant to C.R.S. § 8-43-211(3).

10. Whether the Claimant has proven that penalties should be assessed against the Respondents for requesting attorney fees and costs and such other relief beyond a PALJ's authority.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant has had prior back surgery at the L3-4 level, a laminotmy that took place somewhere in between 2007 and 2009. This was her only previous low back surgery (Hrg. Tr., pp. 59-60).

2. The Claimant was injured at an out-of-state work location on April 9, 2014. On that date, the Claimant testified credibly that she tripped as she was walking through the entrance to a bathroom. She further testified that she did not fall after tripping, but caught herself. The Claimant testified that this resulted in injury to her left low back and hip area (Hearing Tr., p. 55).

3. After the Claimant's work injury, she continued to work full duty for her employer and did not miss time from work due to the work injury until February 5, 2016. After February 5, 2016, the Claimant has not been working (Hearing Tr., pp. 64-65).

4. The Claimant testified credibly that since her injury she has only been free of pain for a two-month period following a rhizotomy and some very temporary relief from some injections (Hrg. Tr., p. 56 and pp. 63-64). The Claimant testified that she continues to have symptoms in her low back, a stabbing pain in her hip area and an intermittent numbness in her feet towards her toes (Hrg. Tr., pp. 56-58).

5. The Claimant treated with John Charbonneau, M.D., Gregory Reichhardt, M.D., Ricardo Nieves, M.D. (also see Claimant's Exhibit 1), Dr. Columbus (also see Claimant's Exhibits 2 and 3), Daniel Bruns, Psy.D., and Dawn Jewell Psy.D. (Claimant's Exhibit 4, p. 474; Respondents' Exhibit E, p. 17). Dr. Charbonneau was the Claimant's primary authorized treating provider and he is an occupational medicine physician and not a surgeon (Hrg. Tr., p. 61). In addition to treatment and oversight provided by Dr. Charbonneau, the Claimant has undergone a lumbar MRI, physical therapy, injections and a rhizotomy (Claimant's Exhibit 4, p. 474; Respondents' Exhibit E, p. 17). The Claimant testified that Dr. Charbonneau never referred the Claimant to an orthopedic surgeon or neurosurgeon for evaluation for any surgical procedures (Hrg. Tr., p. 60). The Claimant testified that she requested a referral for surgical spine evaluation but that Dr. Charbonneau did not make the referral (Hrg. Tr., p. 61). The Claimant testified that if surgery would provide her with relief from her condition, she would definitely consider undergoing a surgical procedure (Hrg. Tr., p. 63).

6. On August 26, 2014, subsequent to her work injury, the Claimant underwent a lumbar MRI which was compared to the Claimant's prior May 6, 2009

lumbar MRI. The radiologist noted that the comparison study revealed no change, except for evidence of interval improvement in the appearance of the postsurgical changes for her prior non-work-related L3-L4 laminotomy (Claimant's Exhibit 29; Respondents' Exhibit E, p. 20).

7. On July 13, 2015, the Claimant saw Dr. Reichhardt, on referral from Dr. Charbonneau, for evaluation for permanent impairment. Dr. Reichhardt reviewed the history of the Claimant's injury and summarized her treatment up to that date. He noted that the Claimant reported "an aching pain in the low back and left gluteal area, with some numbness extending down the posterior aspect of the thigh." He also noted that the Claimant had symptoms of depression and Dr. Bruns felt she had a ratable psychological impairment. He noted her current pain rating was 4-8/10 but that recent injections provided little relief and a rhizotomy provided only a month of relief. Dr. Reichhardt opined the Claimant was at maximum medical improvement as of July 13, 2015. He recommended maintenance care and provided an impairment rating of 7% whole person for the specific disorder of the lumbar spine combined with a 6% whole person rating for range of motion deficits for a total lumbar impairment of 13% whole person. He further combined this with a 2% psychiatric impairment for a total combined 15% whole person impairment rating. Page 5 of Dr. Reichhardt's report states that the following were cc'd: Insurance Company, Dr. Charbonneau and [Claimant], but there is no certificate of mailing or other indication of when the report was actually mailed. (Claimant's Exhibit 4; Respondents' Exhibit E, pp. 17-25).

8. The Claimant then saw Dr. Charbonneau for a final case closure visit on July 30, 2015. Based on Dr. Reichhardt's impairment evaluation report, Dr. Charbonneau placed the Claimant at MMI as of July 13, 2015, and provided an impairment rating of 15% whole person impairment. He recommended the impairment rating be accepted and specifically noted that he attributed the impairment to her work injury. Dr. Charbonneau also agreed that maintenance care consisting of six follow up visits with him and four follow up visits with a physical therapist and continuing medications of Celebrex and Flexeril were necessary. In reviewing Dr. Charbonneau's medical report of July 30, 2015, it appears that he sent Dr. Reichhardt's July 13, 2015 report to the Claimant after explaining it to her and it also appears that the document was faxed out and received on July 31, 2015 (Respondents' Exhibit E, pp. 13-15).

9. The ALJ finds that it is undisputed that the Respondents received the impairment rating of Dr. Reichhardt via Dr. Charbonneau as of July 31, 2015. However, it cannot be determined from the evidence admitted in this case that the Respondents received a medical report notifying them that the Claimant sustained a permanently physically impairing injury prior to July 31, 2015.

10. The Respondents disagreed with the impairment determination by Dr. Reichhardt and adopted by Dr. Charbonneau and filed a Notice and Proposal to Select a DIME Examiner on August 7, 2015 (Respondents' Exhibit F).

11. On August 26, 2015, the Respondents filed a General Admission of Liability admitting for medical benefits only and specifically denying temporary and permanent disability benefits until deemed otherwise payable in accordance with Rule 5-5(B). It was noted that if the temporary or permanent benefits were sustained, an amended admission would be filed (Claimant's Exhibit 6).

12. The Claimant filed an Application for Hearing on October 9, 2015, on the issues of penalties against Respondents for filing belated General Admission of Liability and for filing a belated DIME Application per 8-43-304(1), 8-42-107.2, 8-42-107(8)(b), (e), and Rule 11 of WCRP; and "to determine the propriety and effect of Respondents' preemptive and belated bogus DIME application" (Claimant's Exhibit 9).

13. The Claimant filed an Application for Hearing on October 20, 2015, on the issues of "propriety of DIME panel selection and physician specialties, contrary to Claimant's DIME rights as expressed in *AFL-CIO v Donlon* and *Whiteside v. Smith*, contrary to the Claimant's true treatment and diagnostic needs and extent of his (sic) occupational impairments and to hold the DIME process in abeyance per *Jesus Munoz v ICAP* and *JBS Swift & Compan*y (Claimant's Exhibit 10).

14. The Respondents filed a Response to the Claimant's October 9, 2015 Application for Hearing on October 28, 2015 asserting defenses to the claims that Respondents filed an untimely admission and an untimely DIME application and Respondents sought attorney fees related to the Claimant's pursuit of unripe issues (Claimant's Exhibit 12; Respondents' Exhibit A).

15. The Respondents scheduled a prehearing conference to request that issues on both Claimant's October 9, 2015 and October 20, 2015 applications for hearing be stricken. The prehearing conference was held before PALJ Michael Harr on November 13, 2015. PALJ Harr requested written briefing by both parties on the issues. The Claimant's October 9, 2015 and October 20, 2015 Applications for Hearing were also consolidated by Order dated November 13, 2015 and set for hearing for February 26, 2016 (Claimant's Exhibit 13).

16. On November 19, 2015, the Respondents filed a Response to the Claimant's October 20, 2015 Application for Hearing asserting defenses to the claim regarding the propriety of the DIME selection process and the Claimant's request to hold the DIME process in abeyance and also sought attorney fees related to the Claimant's pursuit of unripe issues (Claimant's Exhibit 14; Respondents' Exhibit B).

17. The Respondents submitted a written motion to strike issues endorsed in the Claimant's October 9, 2015 and October 20, 2015 Applications for Hearing on November 23, 2015 (Claimant's Exhibit 15). The Claimant's submitted a written response to Respondents' motion to strike issues on December 14, 2015 (Claimant's Exhibit 17).

18. In the meantime, the Claimant filed another Application for Hearing on December 7, 2015, on the issue of "resolve issues raised by the Respondents' Motion

to Strike Issues dated November 23, 2015, pursuant to *Gustavo Lozano v. Front Range Rebar Co., Inc.*" (Claimant's Exhibit 16).

19. PALJ Harr issued an order on December 18, 2015, striking the issues in Claimant's October 20, 2015 Application for Hearing, with prejudice, "because it questions a process that is unripe until a party applies for hearing to overcome the opinion of the DIME physician." As to the Claimant's October 9, 2015 Application for Hearing, PALJ Harr also dismissed the Claimant's penalty allegation for "filing a belated DIME application" as meritless, dismissed the issue of "propriety and effect of Respondents' preemptive and belated bogus DIME application" as meritless. PALJ Harr did not dismiss the Claimant's penalty allegation for "filing and relying on a belated General Admission" as he determined that the Claimant's allegation raises a genuine issue of material fact regarding the timely filing. However, he did find that the allegation was vague and unspecific and reserved to Respondents any defense they have, including lack of specificity (Claimant's Exhibit 18; Respondents' Exhibit H).

20. The Claimant' filed a fourth Application for Hearing on December 24, 2015, on the issues of "to determine propriety, jurisdiction and effect of and to reconsider PALJ's Order of December 18, 2015," and "this longstanding pattern of bias or predisposition vis-à-vis the undersigned" (Claimant's Exhibit 19).

21. The Respondents filed a Response to the Claimant's December 7, 2015 Application Hearing on January 4, 2016 and also requested attorney fees and costs be assessed for pursing unripe issues and raised the defense that interlocutory orders are not subject to appeal (Claimants' Exhibit 21; Respondents' Exhibit C).

22. The Claimant's December 7, 2015 and December 24, 2015 Applications for Hearing were consolidated with issues to be heard at the February 26, 2016 hearing pursuant to an OAC Order granting Respondents' unopposed motion to consolidate dated January 6, 2016 (Respondents' Exhibit K).

23. On January 15, 2016, Lloyd Thurston, DO was confirmed as the Division IME physician (Respondents' Exhibit L). The Claimant agrees that Dr. Thurston is Level II accredited (Hrg. Tr., p. 71).

24. The Claimant filed a fifth Application for Hearing on February 15, 2016, on the issues of penalties against Respondents for requesting attorney fees and costs and such other relief beyond a PALJ's authority and "to resolve issues raised by the Respondents' prehearing scheduled for February 16, 2016" (Claimant's Exhibit 23).

25. A prehearing conference was held on February 16, 2016 before PALJ Gallivan on the issues of Respondents' motions to strike Applications for Hearing, for attorney fees and costs and for specificity regarding the Claimant's request for penalties. PALJ David Gallivan struck the Claimant's December 7, 2016 Application for Hearing, finding that at the time the Application for Hearing was filed, the issues were under review by PALJ Harr, which resulted in an order. This order resolved any issues regarding that motion. He then found that the issue of reconsideration of PALJ Harr's

December 18, 2015 order (the issue in the December 24, 2015 Application for Hearing) is proper and would not be stricken. Finally, PALJ Gallivan found that the Claimant had failed to meet her burden of specificity regarding penalties and Respondents preserved that defense for hearing and that Respondents had made the requisite attempt to strike issues in Claimant's applications for hearing and may seek attorney fees and costs at hearing but that the PALJ would not issue an order addressing this request (Claimant's Exhibit 24).

26. The February 26, 2016, docket was heavily scheduled and this case had lower priority than other matters scheduled. As a result, hearing on these matters was rescheduled for April 29, 2016.

27. On March 16, 2016, the Respondents filed a Response to the Claimant's February 15, 2016 Application for Hearing asserting that a facial challenge to the DIME is not reviewable by the OAC, collateral estoppel and that the Claimant failed to state a claim upon which relief may be granted. Respondents also sought attorney fees related to the Claimant's pursuit of unripe issues (Claimant's Exhibit 25)

28. A prehearing conference was held on April 6, 2016 before PALJ Craig Eley on Respondents' Motion to Compel Claimant's Attendance at Division Independent Medical Examination. PALJ Eley noted that the Claimant failed to attend a DIME on March 9, 2016 with Dr. Lloyd Thurston and that Respondents sought an order compelling the Claimant's attendance at a DIME scheduled for April 13, 2016. After considering the argument of counsel, PALJ granted the Respondents' motion with conditions. Namely, he ordered attendance at a rescheduled May 25, 2016 DIME evaluation unless vacated by order of an OAC ALJ. He further ordered that the Claimant's failure to attend the DIME evaluation would result in sanctions, including, but not limited to, a penalty of up to $1,000.00 per day and dismissal of her claim for workers' compensation (Claimant's Exhibit 26; Respondents' Exhibit J).

29. On April 26, 2016 a prehearing conference was held before PALJ David Gallivan on the issue of Respondents' Motion to Compel Responses to Discovery. PALJ Gallivan ordered the Claimant to provide responses to the Respondents' March 18, 2016 Interrogatories on or prior to April 28, 2016 (Claimant's Exhibit 27). The Claimant provided the responses found at Claimant's Exhibit 28 on April 28, 2016.

30. At the hearing held on April 29, 2016, the undersigned ALJ ordered that the Claimant was relieved of compliance with PALJ Craig Eley's Order requiring the Claimant to attend a DIME evaluation with Dr. Thurston on May 25, 2016 in order to provide sufficient time for the parties to submit briefs in this matter and for the ALJ to issue an order. The ALJ ordered that the Claimant must work with Respondents to reschedule a DIME evaluation with Dr. Thurston to be scheduled between June 10, 2016 and July 10, 2016 and that the Claimant shall attend that DIME evaluation unless this order relieves the Claimant of that obligation. Having considered the evidence and arguments presented at hearing and in the post-hearing briefs (see below), the ALJ determines that this order does not change the Claimant's obligation to attend the

rescheduled DIME evaluation with Dr. Thurston. The Claimant remains under order compelling her attendance at the most recently scheduled DIME evaluation with Dr. Thurston.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Judicial or Administrative Notice of Adjudicative Facts Pursuant to C.R.E. 201

Counsel for the Claimant requested that the ALJ "take administrative or official notice the contents of the underlying related case computer entries and Office Administrative Courts' and Division of Worker's Compensation and I.M.E. Unit files in consideration of this matter, pursuant to C.R.E. 201" (Claimant's Position Statement, p. 3). C.R.E. 201 permits the ALJ to use discretion to take judicial notice of adjudicative facts if the fact is not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. It is mandatory for a court to take judicial notice of adjudicative facts covered by Rule 201 if requested by a party and supplied with the necessary information. With respect to information in the files and records of the Division of Workers' Compensation and I.M.E. Unit files, any request is governed by C.R.S. §8-47-203 and WCRP Rule 1-5. Counsel for the Claimant has failed to comply with the requirements of both the statute and WCRP Rule 1-5 for requesting inspection and copying of files and the ALJ will not take judicial notice of facts in the files and records and computer entries of the Division of Workers' Compensation. With respect to the files and computer entries at the Office of Administrative Courts, the Claimant has failed to supply the Court with the necessary information to determine what contents and computer entries are included in the request for judicial notice. Nor has counsel for Claimant provided identification of information to counsel for Respondents for the purpose of providing Respondents' counsel with the ability to ascertain which information is included in Claimant's request, to object to any such information, or to prepare a defense in light of such information. Therefore, the request for the ALJ to take administrative or official notice pursuant to C.R.E. 201 is denied. Only the exhibits which were submitted to the ALJ and the testimony taken at the hearing on April 29, 2016 will be considered evidence in this matter.

Reconsideration of the issues raised before PALJ Harr that were addressed in his December 18, 2015 Interlocutory Order and PALJ Gallivan that were addressed in his February 16, 2016 Prehearing Conference Order

Respondents have raised the defense that interlocutory orders are not subject appeal in two of the Responses to Claimant's Applications for Hearing (Claimant's Exhibits 21 and 22). Panels of the Industrial Claim Appeals Office have held that "orders related to DIME requests are in the nature of evidentiary rulings and are therefore, interlocutory (see *Alvarez v. JBS USA, LLC,* W.C. 4-783-538 (ICAO, July 10, 2012). However, the *Alvarez* case involved review of an order of an OAC ALJ that determined that the Claimant failed to show persuasive authority to support his argument that he had the right to apply for a hearing to contest the selection of the three-physician panel under WRCP 11-3(c) based on a selection process that relied upon the level of accreditation of the physician rather than the physicians' areas of practice. In the present case, the Claimant has endorsed issues in two of the five Applications for hearing requesting the ALJ reconsider the rulings of PALJs pursuant to prehearing conferences.

The Colorado Supreme Court and ICAO panels have issued orders contemplating ALJ review of prehearing orders issued by PALJs. In *Szot v. U.S. Security Associates, Inc.,* W.C. 4-714-229 (ICAO, October 2, 2007), the panel concluded that an ALJ erred by not reconsidering a ruling from a PALJ. The panel stated that an ALJ has jurisdiction to review interlocutory rulings of a PALJ and that further consideration by an ALJ of prehearing orders is anticipated. Although the orders of a PALJ that arise in the context of a prehearing conference are "interlocutory" and "not immediately appealable," the Colorado Supreme Court noted that, it makes sense to treat a PALJ's order related a prehearing conference in this manner, "because a prehearing conference, by definition, is followed by a full hearing before the director or an ALJ" and "thus, the propriety of a PALJ's prehearing order may be addressed at the subsequent hearing." *Industrial Claim Appeals Office v. Orth,* 965 P.2d 1246, 1254 (Colo. 1998).

While the PALJ orders in question in this case are not deemed to be final, appealable orders as they arose out of a prehearing conference, they are nevertheless subject to review by the ALJ. To the extent that the Claimant has endorsed issues addressed by prehearing orders, or had requested reconsideration of the PALJs orders, the ALJ has authority to review the same and such issues are considered below.

The Claimant has failed to establish that Respondents are subject to penalties for failure to timely file a General Admission of Liability (GAL)

C.R.S. § 8-43-203(1)(a) provides, in pertinent part,

> The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee…within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested.

C.R.S. § 8-43-101(1), states, in pertinent part, as follows:

> Within ten days after…the occurrence of a permanently physically impairing injury, or lost-time injury to an employee…the employer shall, upon the forms prescribed by the division for that purpose, report said…permanently physically impairing injury, [or] lost time injury…to the division.

In this case, the Claimant was injured at an out-of-state work location on April 9, 2014. However, after the Claimant's work injury, she continued to work full duty for her employer and did not miss time from work due to the work injury until February 5, 2016. As a result, prior to August 26, 2015, this was not a lost-time injury to the employee that would require a report pursuant to C.R.S. § 8-43-101(1) which would, in turn, trigger a required filing of an admission of liability for this reason.

Therefore, until the Respondents reasonably understood the Claimant's injury to be one which was permanently physically impairing to the Claimant, no report or admission was required. Dr. Reichhardt issued a medical report of his evaluation for permanent impairment on July 13, 2015 and provided a total lumbar impairment of 13% whole person which he further combined with a 2% psychiatric impairment for a total combined 15% whole person impairment rating. The Claimant then saw Dr. Charbonneau for a final case closure visit on July 30, 2015. Based on Dr. Reichhardt's impairment evaluation report, Dr. Charbonneau placed the Claimant at MMI as of July 13, 2015, and provided an impairment rating of 15% whole person impairment. He recommended the impairment rating be accepted and specifically noted that he attributed the impairment to her work injury.

Thus, the earliest arguable date that a report could have been required in this case under C.R.S. § 8-43-101(1) is ten days after July 13, 2015 or July 23, 2015. Then, the earliest arguable date that an admission would be required is twenty days after that, or August 12, 2015. However, the Claimant did not establish that the Respondents actually received a copy of Dr. Reichhardt's July 13, 2015 report on that day. Page 5 of Dr. Reichhardt's report states that the following were cc'd: Insurance Company, Dr. Charbonneau and [Claimant], but there is no certificate of mailing or other indication of when the report was actually mailed.

In reviewing Dr. Charbonneau's medical report of July 30, 2015, it appears that he sent Dr. Reichhardt's document to the Claimant after explaining it to her and it also appears that the document was faxed out and received on July 31, 2015. It is undisputed that the Respondents received the impairment rating via Dr. Charbonneau as of July 31, 2015. If this is the first notice that the Respondents had of a permanently physically impairing injury, then a report would have been required ten days later, or August 10, 2015 and then an admission would be required twenty days after that, or August 30, 2015.

The ALJ specifically determined that it is undisputed that the Respondents received the impairment rating of Dr. Reichhardt via Dr. Charbonneau as of July 31, 2015. However, it could not be determined from the evidence admitted in this case that the Respondents received a medical report notifying them that the Claimant sustained a permanently physically impairing injury prior to July 31, 2015. If July 31, 2015 is the date that ultimately triggered the requirement to file an admission, then the August 26, 2015 GAL would have been timely as it was filed before August 30, 2015.

In any event, pursuant to C.R.S. § 8-43-203(2),

> If such notice is not filed as provided in subsection (1) of this section, the employer, or if insured, the employer's insurance carrier, as the case may be, may become liable to the claimant, if the claimant is successful on the claim for compensation, for up to one day's compensation for each day's failure to so notify….

The penalty statute in for this violation is discretionary and not mandatory. While the ALJ has determined that the Claimant has failed to prove that the GAL was filed late, even if the filing was not timely, the filing was not more than 14 days late. Furthermore, the Respondents disagreed with the impairment determination by Dr. Reichhardt and adopted by Dr. Charbonneau and filed a Notice and Proposal to Select a DIME Examiner on August 7, 2015, putting the Claimant on notice that although the medical benefits were admitted, liability for temporary or permanent disability benefits was disputed. There was no persuasive evidence presented that the Claimant suffered any prejudice due to the failure to accept liability for medical benefits in a timely manner or that the Respondents failed to pay for medical treatment.

To the extent the filing was up to 14 days late, the Claimant also failed to establish that she suffered any harm or prejudice as a result of the late filing with respect to disability benefits. The Claimant did not miss time from work until February 5, 2016, well after the admission was filed on August 26, 2015. Further, the Respondents admitted for medical benefits only and specifically denied temporary or permanent disability benefits and also requested a Division IME for review of Dr. Reichhardt's impairment rating. In this case, any subsequent delay in the completion of the DIME process, and the determination of the Claimant's impairment, and potentially entitlement to benefits for such impairment, is attributable to the Claimant's objections to the DIME process and multiple requests to delay and postpone the DIME evaluation. Therefore, even if the filing was up to 14 days late, the Claimant has delayed the DIME process.

The Claimant has failed to persuade the ALJ that any penalty should be assessed against the Respondents for an untimely filing of the General Admission and no penalty will be assessed for this claim.

The Claimant has failed to establish that Respondents improperly requested the selection of a Division IME or are subject to penalties for failure to timely file a Notice and Proposal to Select an Independent Medical Examiner

Jurisdiction

First, on the matter of jurisdiction of the ALJ, citing *Alvarez v. JBS USA, LLC,* W.C. No. 4-783-538 (ICAO, July 10, 2012), the Respondents have argued that the ALJ does not have jurisdiction to consider the Claimant's October 9, 2015 issue of "determine the propriety and effect of Respondents' preemptive and belated bogus DIME application." The Respondents further argue that the ALJ does not have jurisdiction to review prehearing conference orders that dismissed these issues, but this was addressed above.

The Claimant asserts, to the contrary, that the Office of Administrative Courts and its ALJs have long been statutorily and administratively vested with original jurisdiction to hear and decide all matters arising under articles 40 to 47 of the Colorado Worker's Compensation Act, including "disputes concerning the division IME process that arise in individual cases that cannot be resolved by agreement of the parties...." The Claimant cites a long string of cases and C.R.S. §8-43-201(1); WCRP 11-10 as authority.

Multiple cases before the Industrial Claim Appeals Office have contemplated litigation before an ALJ regarding disputes over the DIME procedure arising in an individual case as distinguished from controversy implicating the DIME system as a whole. *Rodriguez v. Safeway Stores,* W.C. No. 4-712-019 (ICAO, September 10, 2008); *Caro v. Johnson Controls, Inc.,* W.C. 4-786-424 (ICAO, May 12, 2010). Further, the Respondents' reliance on *Alvarez* is misplaced as the ALJ in that case did not decline to rule on a DIME panel selection issue. Rather, the ALJ determined that the Claimant failed to prove entitlement to selection of a DIME physician by practice specialty since WRCP 11-3(c) provides for selection of a three-physician panel based on their accreditation to perform impairment ratings on the body parts or medical conditions designated by the requesting party on the IME application and, as such, failed to state a claim under which relief may be granted. Per WCRP 11-10 and C.R.S. §8-43-201(1), the ALJ has jurisdiction to address the issues related to the DIME process that have arisen in this case. To the extent that an issue alleges a failure to comply with the rules or statutes applicable to commencement of the DIME process or entitlement to commence the DIME process related to the facts of this case, or to review a PALJ order regarding the same, these issues fall within the ALJ's jurisdiction.

Timeliness of DIME Request

In this case, the Respondents disagreed with the impairment determination by Dr. Reichhardt and adopted by Dr. Charbonneau and filed a Notice and Proposal to Select a DIME Examiner on August 7, 2015.

C.R.S. § 8-42-107.2(b) provides that,

> If any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request, on a form prescribed by the division by rule, and shall propose one or more acceptable candidates for the purpose of entering into negotiations for the selection of an IME….Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability or the date of mailing or delivery of the disputed finding or determination…the authorized treating physician's findings and determinations shall be binding on all parties and on the division.

The timing for selection of an IME for an insurer or self-insured is prescribed by C.R.S. § 8-42-107.2(2)(a)(I)(B) as commencing "with the date on which the disputed finding or determination is mailed or physically delivered to the insurer or self-insured employer. Therefore, to contest the impairment rating determination of Dr. Reichhardt which was found to be delivered with the medical opinion of Dr. Charbonneau as of July 31, 2015, the Respondents were required by the statute to request a Division IME on or before August 30, 2015. So, Respondents' August 7, 2015 Notice and Proposal to Select an Independent Medical Examiner was timely[1].

"Preemptive" DIME Issue

In addition to disputing the timeliness of the Respondents' Notice and Proposal to Select a DIME Examiner, the Claimant also characterizes the DIME in this case as "preemptive" and "bogus." The Claimant's principle argument with respect to this issue appears to be that when the Respondent seeks a DIME before filing a Final Admission of Liability, this is done in "bad faith" and utilized to preempt the Claimant's ability to seek a DIME and it shifts the burden on the Claimant.

[1] Although the ALJ determined that impairment rating determination of Dr. Reichhardt was delivered with the medical opinion of Dr. Charbonneau as of July 31, 2015, even if the earlier July 13, 2015 date of Dr. Reichhardt's report is used, the Respondents' August 7, 2015 Notice and Proposal to Select an Independent Medical Examiner would have been timely.

Claimant points out that pursuant to C.R.S. § 8-42-107.2(2)(a)(I)(A):

> For the claimant, the time for selection of an IME commences with the date of mailing of a final admission of liability by the insurer or self-insured employer that includes an impairment rating issued in accordance with section 8-42-107.

and

C.R.S. § 8-42-107.2(c) provides that,

> If the insurer or self-insured employer requests and IME and the examination is conducted before the insurer or self-insured employer admits liability pursuant to section 8-43-203(2)(b), the claimant may not request a second independent medical examination on that issue but may appeal the IME's decision, as set forth in section 8-43-203(2)(b)(II).

As a result, counsel for the Claimant argued at hearing and in her post-hearing brief, that if Respondents seek a Division IME before filing a final admission, the Claimant is unfairly prejudiced as the Respondent is effectively preempting the single opportunity to procure a burden-shifting objective determination as to MMI and the Claimant's impairment rating. The Claimant has argued, without citing any persuasive authority, that the Respondent must have a "good faith" basis for seeking a DIME in this situation or it is inherently unfair that the Claimant may only challenge the IME through appeal and is then subject to a burden of overcoming the DIME by clear and convincing evidence.

The timing for seeking requesting selection of a Division IME is established by the statute. The language is clear and unequivocal. If a Respondent does not request an IME when prescribed by statute, then the ATP's findings and determinations are binding. If the Respondent fails to seek the IME when required, there is no way to challenge determinations of MMI or impairment ratings. Nothing in the statute requires a showing of good faith by Respondents seeking a DIME evaluation prior to filing a Final Admission of Liability.

In filing a Notice and Proposal to Select a DIME Examiner on August 7, 2015, the Respondents complied with statutory requirements and preserved the only method to challenge the impairment rating provided determination by Dr. Reichhardt and adopted by Dr. Charbonneau. The Claimant has failed to show how the Respondents acted in bad faith or that they failed to follow statutorily prescribed procedure to preserve the right to a Division IME in this case. To the extent that the Claimant argues that the statute is unconstitutional, the ALJ lacks jurisdiction to address this contention.

Propriety of DIME panel selection process and whether or not the DIME physician selected meets required qualifications

On August 7, 2015, the Respondents filed a Notice and Proposal to Select a DIME Examiner. Following receipt of this document, the parties have 30 days to negotiate and select an IME pursuant to C.R.S. § 8-42-107.2(3)(a). If the parties are unable to agree, the insurer is to give notice of this fact to the Division within 30 days. Then, C.R.S. § 8-42-107.2(3)(a) provides, in pertinent part,

> The division shall then, within ten days after receiving such notice, select three physicians by a revolving selection process established by the division from the list of physicians maintained by the division.
>
> **…**
>
> The director of the division shall promulgate rules to implement the process of selecting a panel of three physicians from which the parties may select a physician to conduct a division independent medical examination. The selection of a physician panel shall be based on various factors, including, but not limited to, the designation by rule of the fields of specialization authorized to perform independent medical examinations for conditions listed under each medical treatment guideline and measures to prevent the over-utilization of physicians or specialists. The requesting party shall have the opportunity to strike one of the three physicians from the list, followed by the opposing party who shall then be given the opportunity to strike one physician from the list. The remaining IME physician shall be designated by the division to conduct the IME. If one or neither party strike a physician from the list, the division shall select the physician to conduct the IME from the remaining physicians on the list.

Prior to making a determination to strike a physician from the list of IME physicians per C.R.S. § 8-42-107.2(3)(a), a party is entitled to obtain and review a summary disclosure pertaining to any business, financial, employment, or advisory relationship between a listed physician, or any entity affiliated with the physician, and the insurer, self-insured employer, or claimant who is a party to the claim.

The provisions of WCRP, Rule 11-3 (C), as promulgated by the director, require the DIME Unit to select a panel of three physicians based upon the requesting party’s designation of geographic area and body parts or medical conditions to be evaluated as listed on the DIME application. Rule 11-3 (C) specifically provides:

> The three-physician panel will be comprised of physicians based on their accreditation to perform impairment ratings on the body part(s) and/or medical conditions designated by the requesting party on the IME application.

In this case, prior to the selection of the DIME physician, the Claimant filed an Application on October 10, 2015 listing “propriety of the DIME Application” as an issue.

On October 20, 2015, the Claimant filed a second Application for Hearing endorsing the issues of “propriety of DIME panel selection and physician specialties, contrary to Claimant’s DIME rights as expressed in *AFL-CIO v Donlon* and *Whiteside v. Smith*, contrary to the Claimant’s true treatment and diagnostic needs and extent of his (sic) occupational impairments and to hold the DIME process in abeyance per *Jesus Munoz v ICAP* and *JBS Swift & Compan*y.”

The parties ultimately received notice that the Division selected Lloyd Thurston, DO to perform the Division Independent Medical Examination on January 15, 2016. Because Dr. Thurston was not an orthopedic surgeon nor a neurologist and the Claimant’s authorized treating physician was not an orthopedic surgeon nor a neurologist, nor did he refer the Claimant to one of these specialists during her treatment for this work injury, the Claimant has argued that the Claimant has been denied determination of maximum medical improvement by a person who would be competent to render such a decision.

Under C.R.S. § 8-42-107(8)(b)(I), an authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement. It is undisputed that Dr. Charbonneau is the Claimant’s authorized treating physician, and that Dr. Charbonneau determined the Claimant reached maximum medical improvement for this work injury as of July 13, 2015. Contrary to the Claimant’s argument that Dr. Charbonneau was not competent to determine MMI, the Worker’s Compensation Act specifically provides that an authorized treating physician determines maximum medical improvement. The Worker’s Compensation Act consistently provides that no specialist is required to determine MMI in C.R.S. § 8-42-107.2(3)(a), which specifically discourages the overutilization of specialists.

Furthermore, the case cited in the Claimant’s October 20, 2015, application for hearing, *Colorado AFL-CIO v. Donlon*, supports Respondents’ position, stating:

> The claimant's treating physician makes the initial determination of MMI and degree of impairment. Since these two facts are of considerable financial consequence, they have historically been the subject of extensive litigation. The General Assembly sought to decrease such litigation by providing that, if either party disputes the finding of the treating physician as to MMI or degree of impairment, that party may require that an independent medical examination (IME) be performed.
>
> *Colorado AFL-CIO v. Donlon*, 914 P.2d 396, 401 (Colo. App. 1995).

As found, the Respondents timely disputed the impairment rating of Dr. Reichhardt adopted by Dr. Charbonneau. In this case, it does not appear that the Claimant is not challenging application of the rules. The Claimant presented no evidence or argument that DOWC or the DIME Unit specifically violated any rules. Rather, the Claimant appears to present a facial challenge of the DIME process and is disputing the Worker’s Compensation Act and Worker’s Compensation Rules of Procedure themselves.

The Claimant provides no legal authority to prevent Respondents' statutory right have Dr. Thurston as the DIME selected to review the authorized treatment provider's impairment rating. In fact, Claimant's counsel has previously raised a nearly identical issue in multiple claims, all of which have dismissed this issue. *See Alfredo Leyva v. NextEra Energy, Inc.,* W.C. No. 4-934-570; *Barrios v. Morgan County Schools*, W.C. No. 4-646-145; *Archuleta v. Hi-tech Auto Body, Inc.*, W.C. No. 4-684-250; *Verdin v. Safeway*, W.C. No. 4-682-903, *Caro vs. Johnson Controls*¸ W.C. No. 4-786-424 (ICAO, May 12, 2010); *Rodriguez v. Safeway Stores, Inc.*, W.C. No. 4-712-019 (ICAO, Sept. 10, 2008); *Hester v. Eco Express, LLC*, W.C. No. 4-838-236 (ICAO, Sept. 10, 2013); *Emily Maestas v. Wal Mart Stores, Inc.,* (ICAO, Jan. 22, 2009).

Having considered the evidence and argument in the context of C.R.S. § 8-42-107.2 and WCRP 11-3, the Claimant failed to show any persuasive authority to support the argument that she has the right to apply for hearing to contest selection of the three-physician panel under Rule 11-3 (C) in this case. As found, Rule 11-3 (C) requires the DIME Unit to select panel physicians based upon the level of accreditation through the division, and not based upon area of practice. There was no persuasive evidence presented that the physicians selected for the three-physician panel were not Level II accredited. During hearing, counsel for the Claimant explicitly agreed that Dr. Thurston is Level II accredited. The Claimant has not produced any evidence to support an inference that the DIME unit failed to comply with its procedures or that Dr. Thurston is not qualified to perform the DIME. Therefore, the Claimant failed to raise an issue upon which an administrative law judge could grant relief.

The DIME process is no longer held in abeyance

The Claimant failed to attend a DIME on March 9, 2016 with Dr. Lloyd Thurston and the Respondents sought an order compelling the Claimant's attendance at a DIME scheduled for April 13, 2016. After considering the argument of counsel, a PALJ granted the Respondents' motion with conditions. Namely, he ordered attendance at a rescheduled May 25, 2016 DIME evaluation unless vacated by order of an OAC ALJ.

At the hearing held on April 29, 2016, the undersigned ALJ ordered that the Claimant was relieved of compliance with PALJ Craig Eley's Order requiring the Claimant to attend a DIME evaluation with Dr. Thurston on May 25, 2016 in order to provide sufficient time for the parties to submit briefs in this matter and for the ALJ to issue an order. The ALJ ordered that the Claimant must work with Respondents to reschedule a DIME evaluation with Dr. Thurston to be scheduled between June 10, 2016 and July 10, 2016 and that the Claimant shall attend that DIME evaluation unless ordered otherwise.

Having considered the evidence and arguments presented at hearing and in the post-hearing briefs (see below), the ALJ determines that this order does not change the Claimant's obligation to attend the rescheduled DIME evaluation with Dr. Thurston. The

Claimant remains under order compelling her attendance at the most recently scheduled DIME evaluation with Dr. Thurston.

Consideration of the allegation of a longstanding pattern of bias or predisposition with respect to the Claimant's attorney

ALJs are presumed to be competent and unbiased until the contrary is shown. *Halfmo Salad v. JBS USA, LLC,* W.C. 4-886-842-04 (ICAO, September 23, 2013), citing *Wecker v. TBL Excavating, Inc.,* 908 P.2d 1186 (Colo. App. 1995). In the absence of an allegation that an ALJ had a "personal, financial, or official stake in the decision which would evidence a conflict of interest on his part" a Claimant does not make a showing of bias or predisposition. *Neoplan USA Corp. v. Industrial Claim Appeals Office,* 778 P.2d 312, 314 (Colo. App. 1989).

Other than, potentially, the Claimant's request that the ALJ take administrative or official notice the contents of the underlying related case computer entries and Office Administrative Courts' and Division of Worker's Compensation and I.M.E. Unit files in consideration of this matter, pursuant to C.R.E. 201, which the ALJ declined to do, the Claimant failed to offer any evidence of a longstanding pattern of bias or predisposition of any PALJ or ALJ involved in any of the five consolidated Applications for Hearing in this claim.

In any event, the ALJ lacks jurisdiction to hear this allegation. This is not a matter arising under the Workers' Compensation Act. More precisely, allegations of bias against the Claimant's counsel do not constitute a dispute between an employee and an employer/insurer regarding a work-related injury.

Whether the Respondents have proven that attorney fees and costs should be assessed against the Claimant's attorney for pursuing unripe issues pursuant to C.R.S. § 8-43-211(3).

C.R.S. § 8-43-211 (3), C.R.S. provides,

> If an attorney requests a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, the attorney may be assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing or setting. The requesting party must prove its attempt to have an unripe issue stricken by a prehearing administrative law judge to request fees and costs. Requested fees or costs incurred after a prehearing conference may only be awarded if they are directly caused by the listing of an unripe issue.

This statute authorizes a party to seek its fees and costs incurred before the hearing and without reference to the guidelines for seeking attorney fees and costs provided by other statutes or by court rules. *Youngs v. Industrial Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012). Rather, the amount of attorney fees and costs assessed under C.R.S. § 8-43-211(3) is left to the sound discretion of the ALJ. *Id.* An ALJ does not abuse discretion unless the order is beyond the bounds of reason, as where it is unsupported by the law or contrary to the evidence. *Pizza Hut v. Industrial Claim Appeals Office,* 18 P.3d 867 (Colo. App. 2001); *McMeekin v. Memorial Gardens,* WC 4-384-910 (ICAO November 15, 2012).

The statute does not define "ripe for adjudication." However, the Colorado Court of Appeals has found that "generally, ripeness tests whether an issue is real, immediate, and fit for adjudication." *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006); *also see Silviera v. Colorado Springs Health Partners,* W.C. 4-502-555 (I.C.A.O. November 8, 2011). In general, under the doctrine of ripeness courts will not consider uncertain or contingent future matters because the injury is speculative, may never occur and might resolve prior to the court's determination. See, *Stell v. Boulder County Dep't of Social Svcs*., 92 P.3d 910 (Colo. 2004).

Of the Claimant's five applications for hearing, all of which endorsed issues regarding the DIME directly or indirectly, four were filed before the DIME examiner was confirmed on January 19, 2016 (Applications dated October 9, 2015, October 20, 2015, December 7, 2015 and December 24, 2015). In these Applications for Hearing, the Claimant endorsed issues for hearing contesting the propriety of the DIME and DIME examiner's qualifications prior to the DIME examiner's confirmation. The Respondents argue that these issues were unripe at the time they were filed as they disputed an uncertain future matter, the DIME physician to be selected, and that had not yet been determined and that, furthermore, the DIME examination has still not occurred. Respondents thus contend that it is unknown whether the DIME examiner Dr. Thurston will agree with Dr. Charbonneau's date of MMI and the impairment rating assigned to the Claimant or if he will reach a different determination. Therefore, any allegations of injury to the Claimant related to DIME selection were speculative at the time the Claimant filed the first four Applications for Hearing in this case.

On this issue, the Claimant states in her post-hearing position statement,

> Nor is Respondents' utterly vague, amorphous, specious, and conclusory allegation of "unripeness" in any manner, way, shape, or form compatible with a claim for dispositive relief, since they are mutually repugnant, self-contradictory, and inherently inconsistent and incompatible concepts. Indeed, no manner of substantive adjudication is permissible as to "unripe" claims. Accordingly, as a matter of law and procedure, no unripe claim may even be the subject of a dispositive motion, which necessarily seeks relief on the merits. Rather, an unripe claim is one which by its very nature is not "ripe" for adjudication as a matter of law.

In ruling on the issues related to propriety of DIME panel selection, physician specialties, preemptive DIMEs and the timeliness of the DIME applications related to this individual case, the ALJ has either denied and dismissed the claims for lack of persuasive supporting evidence or found that the Claimant failed to raise an issue upon which relief could be granted. With respect to allegations that went beyond this individual case and alleged that the statute or its administration by the Division is unconstitutional, the ALJ determined that she lacked jurisdiction. While the issues were denied and may be groundless and frivolous, this is distinct from a finding that the issues were unripe. Because the Workers' Compensation Rules of Procedure provide that disputes concerning the DIME process that arise in individual cases may be presented to an ALJ for resolution, there is no legal impediment to immediate adjudication of these disputes. *Rodriguez v. Safeway Stores, Inc.,* W.C. 4-712-019 (ICAO, September 10, 2008). A challenge to the DIME panel is also ripe even where the ALJ ultimately determines there is no jurisdiction to proceed because the DIME has not yet occurred. While the Claimant may not prevail due to lack of jurisdiction, there is no legal impediment to immediate adjudication. *Maestas v. Wal Mart Stores, Inc.,* W.C. 4-717-132 (ICAO, January 22, 2009). Therefore, the Respondents have not established that attorney fees and costs should be assessed against the Claimant's attorney for the issues related to propriety of DIME panel selection, physician specialties, preemptive DIMEs and the timeliness of the DIME applications.

The Claimant also filed two Applications for Hearing for review of issues to be heard at prehearing conferences, before the prehearing conferences took place. The Claimant filed an Application for Hearing on December 7, 2016, "resolve issues raised by the Respondents' Motion to Strike Issues dated November 23, 2015, pursuant to *Gustavo Lozano v. Front Range Rebar Co., Inc*." This matter was under advisement by PALJ Harr at the time the Claimant's application for hearing was filed and the PALJ had ordered the parties to brief the issues. PALJ Harr did not issue his order until December 18, 2016. The Claimant also filed an Application for Hearing on February 15, 2016 on the issue of "to resolve issues raised by the Respondents' prehearing scheduled for February 16, 2016." Obviously, the prehearing conference of February 16, 2016, had not taken place. There was no disputed issue or actual controversy between the parties as no order had been issued by the prehearing judge. The Claimant's Application for Hearing involved uncertain future matters with speculative injury that, at the time the Claimant filed her Application for Hearing, might never occur. While the ALJ may later review the orders of the PALJ (see above), as long as the matters were being considered by the PALJ, there was no real and immediate issue fit for adjudication before the ALJ. Thus, the ALJ finds that these two issues endorsed by the Claimant were unripe.

The Respondents endorsed the issue of attorney's fees and costs and the relevant statute, C.R.S. § 8-43-211 (3), on each applicable Response to Application for Hearing. The Respondents also made the requisite attempt to strike the Claimant's unripe issues at prehearings held November 13, 2015 and February 16, 2016. Attorney fees and costs may be awarded for unripe issues endorsed in Applications for Hearing even when other issues raised in the same Applications were ripe for adjudication. *Youngs v. Industrial Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012).

The Claimant's attorney is ordered to pay attorney's fees and costs to Respondents for defense of only the issues endorsed in the Claimant's December 7, 2015 and February 15, 2016 Applications for Hearing related to review of issues pending before Prehearing ALJs prior to the PALJs rulings on the same. Respondents shall submit a detailed summary of attorney fees and costs within 10 days of this order so that the ALJ may prepare a subsequent or supplemental order providing for the amount of attorney fees assessed against the Claimant's attorney.

ORDER

It is therefore ordered that:

1. The Claimant has failed to prove the Respondents failed to follow the statutorily prescribed procedure to preserve the right to a Division IME in this case. The Claimant also failed to prove that the DIME unit failed to comply with its procedures or that Dr. Thurston is not qualified to perform the DIME. Therefore, the Claimant failed to raise an issue upon which an administrative law judge could grant relief and the Claimant's issues of propriety of the DIME Application and propriety of the DIME selection and physician specialties are dismissed.

2. The Claimant is ordered to attend the DIME appointment with Dr. Thurston that has been rescheduled for June 22, 2016.

3. The ALJ lacks jurisdiction to consider the Claimant's issue of bias or predisposition toward the Claimant's counsel and this issue is dismissed.

4. The Claimant has failed to prove any penalty should be assessed against the Respondents for an untimely filing of the General Admission or DIME Application or for requesting attorney fees and relief beyond a PALJ's authority and all penalty claims asserted by the Claimant against the Respondents are dismissed.

5. The Claimant's attorney is ordered to pay attorney's fees and costs to Respondents for defense of only the issues endorsed in the Claimant's December 7, 2015 and February 15, 2016 Applications for Hearing related to review of issues pending before Prehearing ALJs prior to the PALJs rulings on the same. Respondents shall submit a detailed summary of attorney fees and costs within 10 days of this order so that the ALJ may prepare a subsequent or supplemental order providing for the amount of attorney fees assessed against the Claimant's attorney.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 10, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-998-498-01

ISSUES

The issue presented for determination is whether Claimant sustained an injury while in the course and scope of his employment on November 4, 2015. The parties stipulated that if the claim is found compensable, the Claimant would be entitled to reasonable and necessary medical benefits subject to the fee schedule, that his average weekly wage is $636.07, and that Claimant would be entitled to temporary total disability benefits commencing on November 4, 2015, and ongoing.

FINDINGS OF FACT

1. The Claimant worked for the Employer as an over-the-road truck driver.

2. The Employer is located in Evans, Colorado. The ALJ takes judicial notice that Evans, Colorado is approximately 60 miles from Denver, Colorado.

3. Claimant drove a truck owned by the Employer (truck 35). The truck is equipped with a sleeper cabin and Claimant routinely kept his personal belongings, including tools and clothing, in the truck.

4. On November 3, 2015, Maria Monje, the Employer's operations manager, sent a text message to the Claimant and asked if he would meet with her at the Employer's office the following morning (November 4, 2015). She did not identify a reason for the meeting.

5. The Claimant was not scheduled to work on November 4, 2015, but he reported to the Employer's office at approximately 8:00 a.m. for the meeting with Ms. Monje. Ms. Monje terminated the Claimant's employment during that meeting. She specifically asked him to return his fuel card, but she did not ask him to return the truck keys. The meeting lasted approximately 15 minutes.

6. At the time Ms. Monje terminated Claimant's employment, truck 35 was parked in a lot owned by the Employer at least six miles away from the office awaiting mechanical maintenance. According to Ms. Monje, she asked Claimant to give the truck key to the mechanic after retrieving his belongings.

7. The Claimant did not immediately retrieve his belongings from the truck. Because November 4, 2015 was his day off, the Claimant had other plans to pick up his sister in the Denver metro area to drive her to pick up a new vehicle she had purchased. Claimant had scheduled the meeting with his sister for 10:00 a.m. Claimant also stopped to submit paperwork to a potential new employer given the unanticipated termination of his employment.

8. Claimant testified that he did not have enough time to retrieve his belongings from truck 35 prior to meeting his sister in Denver at 10:00 a.m. The Claimant listed approximately 45 items he had left in the truck.

9. Claimant delayed returning to truck 35 for approximately five to six hours.

10. Once Claimant arrived at truck 35 at around 1:00 p.m., he started unloading his belongings by entering the truck then placing items on the floor of the truck to make it easier to transfer them into his personal vehicle. He then climbed down the truck steps and took the items and placed them into his personal vehicle. On his second trip climbing down out of truck 35, Claimant slipped or lost his balance and fell to the ground and suffered a left hip injury. An ambulance transported him to the hospital, and he eventually underwent hip replacement surgery.

11. Ms. Monje testified that she believed it logical for the Claimant to retrieve his belongings immediately after she terminated his employment, but she admittedly did not instruct him to do so. She made no specific arrangements and provided no specific instructions to the Claimant regarding a process for retrieving his belongings. Ms. Monje did not give Claimant a deadline or otherwise limit his ability to enter the Employer’s property to obtain his belongings. Ms. Monje also did not require someone to escort Claimant to truck 35.

12. The ALJ finds that employment includes a reasonable period of time after termination.

13. The reasonable period of time included the five to six hours after the Employer terminated Claimant’s employment based on the facts found above. Claimant’s decision to delay retrieving his items due to plans he had made prior to the unexpected termination of his employment was not unreasonable especially given the actions of the Employer.

14. The Claimant suffered a wage loss as stipulated by the parties.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Workers' Compensation Act, that he was performing service arising out of and in the course of his employment, and that the injury was proximately caused by the performance of such service. *See* § 8-41-301(1)(a),(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

5. The Claimant can satisfy his burden to prove that he was in the course and scope of his employment if he shows that the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991).

6. Discharging an employee is an integral part of the employment and "employment" includes a reasonable period of time after termination. Accordingly, injuries sustained by an employee while leaving the premises, collecting pay, or gathering clothing or tools have been held to occur in the course of employment. *Alpine Roofing Co. v. Dalton*, 539 P.2d 487 (Colo. App 1975) (citing 1 A. Larson, Larson's Workers' Compensation Law, § 26.00 and *Hill v. Gregg, Gibson & Gregg, Inc.*, 260 So.2d 193 (Fla.1972)). It is undisputed that Claimant sustained his injury as he retrieved clothing and tools following termination of his employment. Thus, the issue is whether the period of time between termination and retrieval of the belongings was reasonable.

7. As found, following the unexpected termination of his employment on his day off, Claimant needed to retrieve his tools and other personal belonging from the Employer's truck located on the Employer's premises. Although delayed by pre-arranged plans entailing a 60-mile round trip to Denver, the Claimant returned on the same day to accomplish this task. In evaluating the totality of the circumstances, the ALJ concludes that such delay was not unreasonable. Employer did not instruct the Claimant to return the truck keys at the time of termination, did not require him to immediately vacate the premises, or otherwise provide any specific instruction regarding a time limitation within which Claimant could retrieve his property from the Employer's

truck. The Claimant could not immediately retrieve his belongings and the Employer conveyed no sense of urgency with regard to that task. His short deviation to drop off paperwork to a new employer also does not compel a different result. Any deviation ended once Claimant returned to the Employer's premises to retrieve his clothes and tools.

8. The ALJ is not persuaded that the decision in *Rios v. AJM Framers, Inc.* WC # 4-546-779 (ICAO December 19, 2003) compels a different conclusion. In *Rios*, the ICAO affirmed the ALJ's findings and conclusions. The ICAO noted that the ALJ found the employer fired the claimant and instructed the claimant to pick up his tools and leave the job site. The claimant ignored repeated requests to leave the job site until his supervisor assaulted him approximately two hours after the termination. The ALJ determined that claimant failed to prove the assault occurred within a reasonable time after his employment was terminated *or while the claimant was collecting his tools, his paychecks or his clothing* [Emphasis added]. The facts in Rios are distinguishable from the facts in this case. Contrary to the findings in Rios, the Claimant, in this case, was retrieving his tools and clothing when he sustained an injury.

9. The Claimant has proven that he was within the course and scope of his employment when he sustained an injury to his left hip on November 4, 2015. As stated above, injuries sustained by an employee while retrieving tools and clothes within a reasonable time subsequent to or at the time of the employee's termination are generally compensable. The ALJ concludes that Claimant's delay in returning to retrieve his clothes and tools was not unreasonable under the circumstances. Respondents' arguments to the contrary are not persuasive.

10. Pursuant to the stipulation of the parties, the Claimant is entitled to reasonable and necessary medical benefits related to the work injury subject to the fee schedule, including but not limited to the emergency room bill in the amount of $731.00. Claimant is also entitled to temporary total disability benefits based on the stipulated average weekly wage of $636.07.

ORDER

It is therefore ordered that:

1. The Claimant's claim for workers' compensation benefits is granted.

2. The Respondents shall be liable for all reasonable and necessary medical expenses related to the work injury subject to the fee schedule, including but not limited to the emergency room bill in the amount of $731.00.

3. The Claimant is entitled to temporary total disability benefits based on the stipulated average weekly wage of $636.07 per week commencing on November 4, 2015, and ongoing until terminated pursuant to law.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 9, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-984-165-01

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that she suffered a compensable injury on May 1, 2015 arising out of and in the course of her employment, and entitling her to reasonable and necessary medical treatment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was a firefighter paramedic with the city of Aurora on May 1, 2015 when she sustained an alleged injury to her low back.

2. Prior to May 1, 2015, Claimant had a complicated history of back problems. Pertinent portions of that history include:

- On August 20, 2014, Claimant sought medical care at Kaiser for low back pain she had been experiencing for one month, and reported recurrent self-limited episodes of low back pain in the past. She was assessed with lumbar strain vs herniated disc. She was prescribed muscle relaxants, physical therapy exercises, and anti-inflammatories.

- Claimant underwent a lumbar spine MRI on September 10 or 11, 2014. The radiologist read the MRI as showing
    - Grade 1 anterolisthesis of L4 on L5 facet degenerative changes
    - Mild to moderate degenerative changes of the lumbar spine facets most pronounced at L4-L5 level
    - L4-5: slight uncovering of the disc space with small circumferential disc bulge with shallow central disc protrusion. Mild bilateral discogenic ridging and degenerative changes of the facets are generating mild bilateral neural foraminal narrowing.
    - L5-S1: Small to moderate-sized central disc protrusion slightly eccentric to the right without significant neuroforaminal narrowing, spinal stenosis or mass effect on the visualized nerve roots.

- On September 15, 2014, Claimant treated with Donald S. Corenman, M.D. Claimant completed a pain diagram at that initial visit indicating aching in her low back, stabbing pain in her sacroiliac area and the top of her *bilateral* buttocks, burning pain in her right buttocks and down the back of *bilateral* thighs, with pain radiating down to the bottom of her calves right greater than left.

- On October 7, 2014 Claimant returned to Dr. Corenman for further evaluation and treatment. Dr. Corenman's notes from that visit provide, "[Claimant] explains that she has Kaiser Insurance and is seeing us out of pocket. She states that there is an option under Kaiser where she can see us through Kaiser yet this would have to be delayed a few months."

- Also at the October 7, 2014 visit, Dr. Corenman noted Claimant's "aching in her axial lumbar spine accounts for 70% of her complaint with spread to the bilateral paralumbar regions, right equal to left and 30% involves pain in the buttocks and posterior thigh described as burning and tightness sensation, 60% right 40% left stopping mainly in the midcalf."

  - Dr. Corenman reviewed Claimant's September 2014 MRI noting a mild degenerative right rotational slip at L4-5. L4-5 also had a significant degenerative facet disease. L5-S1 had a small to medium sized extruded herniation more on the right side that caused some compression on the right S1 root.

  - Dr. Corenman took x-rays which revealed L4-5 degenerative factet, L4-5 garde 1 degenerative spondolysthesis. Mild disc narrowing at L4-5 and moderate disc narrowing at L5-S1.

  - Dr. Corenman's impression was Degenerative spondolysthesis L4-5 with rotary slip, and L5-S1 right herniated nucleus pulposa probably causing buttock and leg pain.

- On October 20, 2014, Claimant treated with Daniel Colonno, M.D. She reported acute onset of back pain on August 17, 2014, and described her symptoms as initially being right greater than left and extending into her *bilateral* lower extremities. Claimant continued to have such significant back pain that she was unable to perform her regular job duties, and had been working light duty since August, 2014. Dr. Colonno reviewed the September MRI and diagnosed lumbar disc herniation with radiculopathy, lumbar spondylosis, and lumbar facet arthropathy. Claimant was offered large volume *bilateral* epidural steroid injections at L5-S1 and the eventual possibility of surgery was discussed.

- On January 6, 2015, Claimant returned to Dr. Corenman and reported an *increase in discomfort in her left leg*. She generally reported slight improvement in her symptoms and again was offered and declined epidural steroid injections.

- On March 18, 2015, Claimant returned to Dr. Corenman continuing to complain of axial low back pain and pain with localization to the *left* superior sacroiliac region with occasional radiation to the *left* buttock and *left* posterior thigh. He stated there was a "reasonable probability that [Claimant's] disc herniation at L5-S1 . . . is causing the majority of her very inferior axial low back/SI region pain." A large volume ESI was again recommended for diagnostic and therapeutic reasons. The possible need for surgery was discussed at this appointment, including microdiskectomy and two level fusion.

- On March 25, 2015 Dr. Corenman's notes report a call from Claimant in which she reiterated that that she had 70% low back pain, 30% pain in the *left* buttock and leg. "Even her axial pain shifts more to the *left* then [sic] right and therefore is truly a central and left-sided low back discomfort as 70% of her pain." The report continues, "She states that she cannot live with her pain anymore," she cannot even do simple activities, and has chronic pain that is affecting all aspects of her life. Claimant requested some type of surgical solution. Dr. Corenman requested a new MRI because Claimant's symptoms had shifted from right to *left* sided and her previous MRI was six months old. Again, microdiskectomy and two-level fusion surgeries were discussed.

- On April 1, 2015 Dr. Corenman wrote a letter to Kaiser explaining that another MRI was needed because Claimant's "symptoms before were mainly right-sided with low back pain *now they are left buttock and leg pain not right*. Because of the change in symptoms we need to have a new MRI because something untoward could have happened such as a new herniation." The letter also provides that Dr. Corenman was setting Claimant up for an injection at that time.

- On April 27, 2015 Dr. Corenman wrote another letter to Kaiser reiterating that Claimant initially had right sided low back pain but now had "*prominently left buttock and leg pain*." Dr. Corenman explained that the new MRI was needed because the previous MRI "does not show significant left-sided pathology and since the symptoms have changed, *obviously there is a different pathological disorder causing her current complaint*."

3. Claimant testified at hearing that prior to May 1, 2015, her symptoms included low back pain, decreased range of motion, and pain in her right leg. She testified that her symptoms were consistent but improving prior to May 1, 2015, and that she was able to increase her activities. When shown Dr. Corenman's March 25, 2015 records in which she reportedly stated that she could not live with the level of pain she was experiencing, Claimant reiterated that she was "getting better" at that time and that her symptoms were improving.

4. The ALJ finds Claimant's testimony about her symptomology prior to May 1, 2015, to be inconsistent with the detailed medical records of a Kaiser provider, Dr.

Colonno, and Dr. Corenman. The ALJ finds Claimant's testimony on this issue not credible or persuasive.

5. Claimant testified that on May 1, 2015, she was working light duty for Employer, putting fire fighters' jackets and pants together for new recruits. The process involved taking bagged, individual items out of a waist-high box, walking approximately fifteen feet, and dropping the item onto the floor. Each item weighed between five and ten pounds. Claimant testified that she did not recall bending to put the items down, but that she dropped them from standing.

6. Claimant testified that she experienced immediate 10/10 pain in her left low back and down her left leg to her foot when she straightened and turned to her left to go back to the box of jackets and pants. Claimant testified that at that time, her severe pain moved from the right to the left side. Claimant testified that after the May 1 incident she experienced decreased range of motion, increased pain, became unable to do all of her physical therapy exercises, experienced increased difficulty lifting items as heavy as a full laundry basket, and could no longer run. Claimant's testimony regarding her pain moving from the right to the left on May 1, 2015, is inconsistent with Dr. Corenman's medical records which indicate Claimant's symptoms began shifting in January 2015 and had progressed by mid-March to being her primary symptoms. By the end of March even Claimant's axial low back pain had shifted to her left side. And by April 27 – four days before Claimant's alleged injury – Dr. Corenman was insisting on a new MRI for what he described as an obvious change in her pathological disorder.

7. Claimant's medical records from before May 1, 2015 indicate that Claimant reported her pain going from 2/10 at rest to 9/10 with activity. Claimant testified that after the May 1 incident that her pain remained worse and was not intermittent as before.

8. Employer's First Report of Injury dated May 5, 2015, indicates that Claimant's lower back, buttocks, and left leg were affected and that her back/leg pain increases with exertion. It reports that Claimant's injury occurred while she was sorting bunker gear, using proper lifting of bunker gear, and resulted in a sharp pain in her left buttock and lower back.

9. On May 5, 2015, Claimant was treated by A. Koval, M.D. Claimant reported that she was sorting and stacking bunker gear in the office when she felt 10/10 pain in her low back and left buttocks. Claimant filled out a pain diagram at the visit which instructed "Mark the areas on your body where you feel discomfort." Claimant indicated aching in her bilateral low back; aching, burning and stabbing pain in her left buttocks; numbness and burning in her upper left thigh; and burning down her left leg to above her ankle. She marked no right side lower extremity symptoms. Claimant reported that the prior August she had experienced right leg pain which she treated with physical therapy and Aleve. She did not report any other medications, although two weeks later she reported to Dr. Fillmore that she was taking Meloxicam, Tramadol, Methocarbanol, and Naproxen. On exam, Dr. Koval noted sacroiliac joint tenderness, left greater than right, and spasm in the lumbar area. Dr. Koval understood Claimant's

August injury involved right-sided symptoms and leg pain, and that the left-sided symptoms were new. Dr. Koval stated, "In the best case scenario, this patient simply has a musculoskeletal strain with severe spasm which is causing her symptoms." Dr. Koval prescribed physical therapy, a pain reliever, and a muscle relaxant. She refrained from definitely assigning causality.

10. On May 11, 2015, Claimant returned to Dr. Koval. The follow-up report of that visit reinforces that Dr. Koval understood Claimant's left sided symptoms to be new as of the May 1 event, and that "in general, [Claimant] was doing reasonably well until this particular injury took place on May 1." Dr. Koval assessed "lumbosacral strain with radicular symptoms in the left leg which are new since this most recent injury on May 1." Dr. Koval ordered a new MRI.

11. On May 11, 2015, Claimant underwent an MRI of her bony pelvis and sacrum. The radiologist who read the MRI found the sacroiliac joints to be normal in appearance with no active arthropathy or sacroiliitis. On the same date, Claimant underwent a second MRI of her lumbar spine.

- At L5-S1 there was a mild asymmetric disc bulge more pronounced to the left with a posterior annular tear noted. There were minimal degenerative changes to the facets bilaterally. There was no significant spinal cord narrowing. There was moderate stenosis of the left neural foramen which could potentially impinge the left L5 nerve root. Small to moderate sized central disc protrusion slightly eccentric to the right without significant neural foraminal narrowing, spinal stenosis or mass effecton the visualized descending nerve roots.

- At L4-5 there was a mild disc bulge with moderate degenerative changes of the facets bilaterally. There was no significant central canal narrowing. There was mild narrowing of the lateral recesses and neural foramina more pronounced on the right side without clear evidence for nerve impingement. A Grade 1 anterolisthesis with facet degenerative changes. Also noted was a slight uncovering of the disc space with small circumferential disc bulge with shallow central protrusion. Mild bilateral discogenic ridging and degenerative changes of the facets were noted to be generating mild bilateral neural foraminal narrowing.

- The impression was mild to moderate facet and discogenic degenerative changes of the lower lumbar spine most pronounced at L4-5 level where there is mild bilateral neural foraminal narrowing with slight grade 1 anterolisthesis of L4 on L5.

12. On May 14, 2015, Claimant returned to Dr. Koval. The follow-up report from that appointment again reflects that Dr. Koval understood that Claimant's "low back pain with left-sided radiculopathic symptoms [ ] are new since an injury that took place on May 1." Based on that perception, Dr. Koval believed that the May1 work-related

event caused the specific findings in her May 11, 2015 MRI. Dr. Koval referred Claimant to Dr. Fillmore for evaluation and to consider epidural steroid injections.

13. On May 19, 2015, Claimant saw Joseph Fillmore, M.D. Claimant reported to Dr. Fillmore that she had midline lumbar pain with pain radiating to her left buttocks and down her left leg to her foot. She reported "This all began on May 1, 2015." Claimant reported pain ranging from 2/10 to 9/10, with an increase in pain with any physical exertion. Claimant reported that she had seen Dr. Corenman in August, 2014 in what was deemed a non-work related injury. She reported that her prior pain had radiated down her right leg, and that her current pain involved her left leg. The ALJ finds that Claimant's reports to Dr. Fillmore are inconsistent with her symptoms and treatment. Claimant's reports that all of her symptoms began on May 1, 205; that her symptoms were right sided prior to the May 1 event, and that she failed to report seeing Dr. Corenman through March 25, 2015, were misleading.

14. Dr. Fillmore assessed acquired sponydylolisthesis, and acute back pain with sciatica. Dr. Fillmore stated, "This is a different problem than she had from her August injury." Because the ALJ finds that Claimant's reports to Dr. Fillmore were inaccurate and misleading, the ALJ finds Dr. Fillmore's opinion that Claimant suffered a new injury on May 1, 2015 not persuasive.

15. On June 1, 2015, Claimant filed a claim for workers' compensation. It indicates she injured her lower back unpacking bunking gear and that the nature of her injury was "strain, disc bulge."

16. On June 16, 2015, Claimant returned to Dr. Koval. Dr. Koval's report of that visit describes Claimant's mechanism of injury as follows: "Despite the fact that it was a seemingly innocuous movement where she bent over to pick up a piece of bunker gear that was not particularly heavy." This reported mechanism of injury is inconsistent with Claimant's testimony that she was injured when she turned after dropping a piece of bunker gear. Dr. Koval remains remained of the opinion that Claimant's left-sided symptoms were new as of May 1. "To be clear, these left leg symptoms were not a part of her original back injury last August nor were they part of her ongoing presentation since then. They are new since May 1." In her report, Dr. Koval describes the May 1 event both as a new injury, and as a "worsening or aggravation of the previous injury." Dr. Koval recommended that Claimant schedule epidural steroid injections with Dr. Fillmore.

17. On June 16, 2015 Claimant also returned to Dr. Corenman. He identified the mechanism of injury as "simply moving and sorting firefighter clothes that could not have been over ten pounds with rotation and flexion." He noted that Claimant had new onset of left lower extremity pain and that she had never had a significant focus there. Dr. Corenman reviewed Claimant's new MRI and took x-rays which he assessed as showing "degeneration mild to moderate at the L4-L5 and L5-S1 disks with a degenerative slip at L4-L5 , which is slightly more pronounced." He opined that injury constituted an aggravation of a preexisting problem that would probably be permanent, but that it was hard to tell at that point.

18. On June 18, 2015, Respondent filed a notice of contest pending investigation.

19. On July 28, 2015, Claimant returned to Dr. Koval. She had undergone an epidural steroid injection by Dr. Fillmore and had not experienced relief. Dr. Koval's report continues to insist that Claimant's left sided symptoms began on May 1 are work related, taking on a tone of advocacy.

20. The ALJ finds that Dr. Koval misapprehended that Claimant's left sided symptoms started on May 1. Dr. Koval was not aware that prior to May 1: Claimant's symptomology was predominantly left sided; Claimant's symptoms had increased to the point that she felt she could no longer live with the pain she was experiencing; and Dr. Corenman had ordered an MRI due to Claimant's change in symptoms. The ALJ does not find Dr. Koval's opinion on relatedness to be persuasive.

21. On August 11, 2015, Claimant followed up with Dr. Koval. Dr. Koval's report notes Claimant did not have relief from the injections and that she and Dr. Fillmore recommend that Claimant follow up with Dr. Corenman for a consultation type of discussion regarding surgical options.

22. On September 29, 2015, Claimant returned to Dr. Corenman.

- Dr. Corenman describes two different mechanisms of injury on May 1: (1) "She was just rotating to hand some clothes to another firefighter and her pain became much more significant." And (2) "She had a Work Comp injury secondary in May where she was working at the firehouse sorting clothes under light duty and she had increased pain."

- Dr. Corenman expressed that He continued to believe that Claimant's *August 2014* injury was work related: "I still feel to this day that that was a Work Comp injury." He also wrote, "I have to state that it appears that both Work Comp's are related and I do believe this is a Work Comp based injury."

- Dr. Corenman provided no explanation for how rotating or sorting could have caused a new injury. Dr. Corenman, without identifying what he reviewed, states, "Further reveal of images indicated her degenerative slip at L4-L5 became a little more significant." Dr. Corenman does not specifically attribute the change to a new injury or distinguish it from the natural progression of Claimant's pre May 1 pathology.

23. Dr. Corenman reported, "I have not scheduled her back obviously because she has Kaiser Insurance but I would be happy to see her back in the future for further consultations or further workup."

24. Dr. Robert Messenbaugh testified at trial as an expert in orthopedic surgery with Level II certification. He performed a records review and report on August

16, 2015, and performed a Respondent sponsored independent medical examination of Claimant on March 10, 2016, issuing his report the next day. Dr. Messenbaugh's history reported by Claimant indicates that after Claimant's alleged injury, she rested for about ten minutes and then returned to distributing gear and continued in that activity until the conclusion of her regularly scheduled shift. He explained that the onset of pain can happen while simply standing, but that the onset of pain does not necessarily indicate a new injury. He opined that Claimant did not sustain a new injury on May 1, 2015, because there was insufficient activity to create new pathology and that her objective findings did not change after May 1. He also testified that were at most "exquisitely minimal" changes on the second MRI.

25. The ALJ finds that Claimant has not met her burden of proving by a preponderance of the evidence that she suffered a compensable injury on May 1, 2015 arising out of and in the course of her employment, and entitling her to reasonable and necessary medical treatment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

A preexisting condition does not disqualify a Claimant from receiving worker's compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). The mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the preexisting condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

Claimant's pre-existing low back pain complaints were documented as increasing in the months prior to the alleged incident of May 1, 2015. Specifically, Dr. Corenman, submitted a letter to Claimant's Kaiser insurance detailing new symptoms of radiation into the left leg and an obvious change in Claimant's pathology in his request for a new MRI mere days before the May 1, 2015 incident. Therefore, the ALJ finds that Claimant's pre-existing low back condition precipitated any alleged increase in symptoms that took place on May 1, 2015. Consequently, the ALJ must assess whether the alleged May 1, 2015 incident caused, aggravated or accelerated this pre-existing condition.

The ALJ finds the testimony of Dr. Messenbaugh as to the issues of causation of the low back pain and left leg pain symptoms credible and persuasive. This ALJ accepts Dr. Messenbaugh's opinion that Claimant's minor activity of moving jackets and pants across a floor without engaging in bending or twisting is an insufficient activity to constitute a causal connection between Claimant's low back pain and her work activities.

The ALJ accepts the opinions of Dr. Messenbaugh as more credible and persuasive than the opinions of Dr. Corenman. In reading Dr. Corenman's reports, it is clear that he believes Claimant had a work-related back injury in August 2014 for which she should have been compensated. However, this injury was never asserted by claimant and was never determined to be compensable. Dr. Corenman does not provide a causation analysis in his report as to how the May 1, 2015 alleged event caused, aggravated, or accelerated Claimant's underlying condition beyond stating that she experienced increased pain and a generalized statement that "her degenerative slip at L4-L5 became a little more pronounced." Dr. Corenman's report does not specifically attribute any alleged changes in the MRI to the May 1, 2015 incident.

Dr. Messenbaugh disagreed with Dr. Corenman’s interpretation of the MRI findings. Dr. Messenbaugh testified that there were no significant changes which would explain claimant’s increase in symptom complaints between the MRIs completed prior to and subsequent to the May 1, 2015 alleged incident.

This ALJ finds that the causation and relatedness opinions expressed by Drs. Koval and Fillmore in their respective reports were predicated, at least in part, on claimant’s inaccurate description of the May 1, 2015 incident and the weight of the items she was allegedly lifting. Further, it was clear during claimant’s testimony, that she was not actually lifting anything at the specific time of the alleged onset of the increase in low back pain. Claimant did not provide any mechanism of actual injury in her testimony as she specifically stated that she was not lifting, bending, or twisting at the time that she experienced the alleged increase in pain.

The ALJ accepts Dr. Messenbaugh’s opinion that the alleged activities of May 1, 2015 did not cause, aggravate, or accelerate claimant’s documented underlying low back condition.

The ALJ finds that claimant has failed to sustain her burden of proof to establish a compensable injury to her low back on May 1, 2015.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for workers' compensation benefits arising out of the alleged May 1, 2015 injury is hereby denied and dismissed.

2. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. ***For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.***

DATED: June 13, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of David Orgel, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) and suffered a 23% whole person impairment for his November 11, 2014 lower back injury.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the request for lumbar fusion surgery as recommended by Michael E. Janssen, D.O. is reasonable, necessary and causally related to his September 11, 2014 admitted industrial injury.

3. Whether Claimant has made a "proper showing" for a change of physician to Michael E. Janssen, D.O. pursuant to §8-43-404(5)(a), C.R.S.

FINDINGS OF FACT

1. Claimant worked for Employer as a Field Welder. On September 11, 2014 he was performing his job duties, slipped on a piece of rebar and twisted his back. Although he did not fall to the ground, he immediately experienced pain in his lower back from the twisting motion.

2. Claimant was diagnosed with a lumbar strain/sprain. He initially underwent medical treatment with Authorized Treating Physician (ATP) Dee Jay Beach, D.O. Claimant received conservative care that included diagnostic studies, medications, physical therapy, numerous injections, a radiofrequency abulation procedure and pool therapy.

3. Nicholas K. Olsen, D.O. subsequently became Claimant's ATP. Dr. Olsen referred Claimant to Brian E. Reiss, M.D. for a surgical consultation. On February 19, 2015 Claimant visited Dr. Reiss for an evaluation. After considering Claimant's history and conducting a physical examination Dr. Reiss diagnosed Claimant with spondylolysis, spondylolisthesis and back pain. He determined that Claimant's physical examination demonstrated "multiple nonphysiologic factors and his psychological screening indicate[d] likely somatic disorder." Dr. Reiss recommended against surgical intervention or any invasive procedures. Instead, he suggested a psychological evaluation and a continued exercise program.

4. On April 28, 2015 Claimant visited Dr. Olsen for a re-examination of his lumbar spine. Dr. Olsen recounted that Claimant had visited Bryan Andrew Castro, M.D. on April 25, 2015 for a surgical consultation. Dr. Castro had concluded that surgery would not be Claimant's "best option" and recommended additional

conservative measures including taking a more active role in improving his condition. Dr. Olsen diagnosed Claimant with a work-related lumbar strain/sprain. He remarked that an MRI had revealed a “grade I spondylolisthesis at L5-S1 with the presence of a possible pars defect” and a “central disc protrusion at L4-L5 lateralizing to the right.”

5. Dr. Olsen determined that Claimant had reached Maximum Medical Improvement (MMI) and assigned a 7% whole person impairment rating for a radiofrequency neurotomy pursuant to Table 53 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)* and the Colorado Division of Workers’ Compensation *Impairment Rating Tips*. However, he deferred assigning a rating for range of motion deficits because range of motion measurements were “not considered physiologic” nor consistent with prior examinations. Dr. Olsen permitted Claimant to return in one week for additional range of motion testing. He released Claimant to light duty work that included restrictions of no lifting, carrying, pushing and pulling in excess of 10 pounds. Dr. Olsen noted that Claimant was entitled to receive medical maintenance benefits that included a repeat EMG/nerve conduction study if his symptoms persisted for one year.

6. On May 12, 2015 Claimant returned to Dr. Olsen for an impairment evaluation. Dr. Olsen conducted range of motion measurements on Claimant’s lumbar spine and assigned a 5% whole person impairment for lumbar extension deficits. Combining Claimant’s 7% rating for a specific disorder of the lumbar spine with the 5% impairment for range of motion deficits yields a total 12% whole person impairment rating.

7. On July 16, 2015 Claimant underwent an evaluation with Michael E. Janssen, D.O. Dr. Janssen reviewed Claimant’s medical records and conducted a physical examination. He diagnosed Claimant with work-related bilateral spondylolysis at L5 and a disc herniation at L5-S1. Dr. Janssen explained that patients suffering from an unstable spine with a pars defect fracture and associated disc pathology have mechanical and neurological instability. He commented that non-surgical modalities were not the “best line of treatment” for Claimant. Dr. Janssen noted that Claimant could undergo surgery to stabilize his unstable spine segment. He remarked that injections and rhizotomies “are of extremely low yield in a patient with a bilateral pars fracture and disc herniation such as this.” He could not comment on the psychiatric aspect of Claimant’s case but suggested that a detailed psychological evaluation might be appropriate to verify that Claimant had realistic surgical goals. Dr. Janssen mentioned that Dr. Reiss’ examination was ‘not enough to hang your hat on when making psychological decisions regarding somatization and indications for surgery.”

8. On September 22, 2015 Claimant underwent a Division Independent Medical Examination (DIME) with David Orgel, M.D. Dr. Orgel recounted that Claimant slipped on rebar and strained his back on September 11, 2014. A September 22, 2014 MRI revealed “an L4-L5 central disc protrusion crowding both lateral recesses and affecting both L5 nerve roots.” Claimant reported continued back pain and numbness throughout his right leg. After conducting a physical examination and reviewing Claimant’s medical history, Dr. Orgel explained that Claimant had a “stable, but

significant, spondylolisthesis" and muscle spasms in his foot that were likely associated with a radiculopathy in his back. He commented that Claimant's symptoms were related to his work for Employer because they began after his work accident on September 11, 2014. Dr. Orgel was uncertain about whether there were other options to reduce Claimant's pain and sought additional information. He thus concluded that Claimant had not reached MMI. He specifically addressed Dr. Janssen's surgical recommendation and noted that "[t]here was apparently some instability on his x-rays, and this would be a surgical problem."

9. Dr. Orgel recommended an "extensive psychological assessment" to determine whether Claimant was an appropriate surgical candidate. Dr. Orgel stated that, if Claimant was deemed a good surgical candidate, he required repeat EMG testing to ascertain whether he had a bilateral radiculopathy and determine the cause of his muscle spasms. Dr. Orgel explained that, if Claimant was suffering from radicular symptoms, he could follow-up with the surgeon of his choice. He assigned Claimant an 8% whole person impairment rating for his spondylolisthesis and a 16% whole person rating for lower back range of motion deficits. Combining the ratings yields a 23% whole person impairment.

10. On October 14, 2015 Claimant underwent a neurological consultation with Patricia Soffer, M.D. EMG testing revealed "both lower extremities and lumbar paraspinals were normal. There was no electrophysiologic evidence of neuropathy or radiculopathy." Claimant also exhibited normal strength and reflexes in both lower extremities.

11. On December 22, 2015 Claimant underwent a psychological evaluation with Stephen A. Moe, M.D. In determining whether Claimant was a candidate for lumbar spine surgery, Dr. Moe interviewed Claimant and reviewed his medical history. Although there were no "strictly psychiatric contraindications" to proceeding with surgery, Dr. Moe expressed significant concerns about a positive outcome. He thus recommended continued discussion of treatment options among individuals with the requisite medical expertise. Dr. Moe recognized that patients deserve autonomy in the decision-making process but was concerned that Claimant's hope of relief from a surgical procedure could distort his judgment about the risk of a negative surgical outcome.

12. On February 1, 2016 Claimant visited Bryan Andrew Castro, M.D. for a surgical consultation. He recounted that Dr. Reiss did not recommend surgery but Dr. Janssen suggested surgical intervention. Dr. Castro noted that Claimant's EMG was negative. He stated that Dr. Orgel concluded that Claimant had not reached MMI and Dr. Moe had concerns about surgical intervention. Dr. Castro determined that Claimant exhibited congenital findings and did not have any lumbar instability. He thus reasoned that Claimant's imaging findings were not caused by the September 11, 2014 industrial incident. Dr. Castro recommended a CT scan of "the bony anatomy in the lower lumbar segments" but deferred additional recommendations pending the imaging studies.

13. On February 12, 2016 Claimant underwent a psychiatric evaluation with Carol M. Newlin, M.D., Ph.D. Dr. Newlin considered Claimant's medical history and conducted an interview. She noted that Claimant was not desperate to "do anything" and hoped that surgery would permit him to engage in former recreational activities and increase his lifting restrictions. Dr. Newlin summarized that Claimant appeared to be a good surgical candidate if surgery was recommended by the orthopedic surgeon.

14. On February 22, 2016 Claimant returned to Dr. Janssen for an examination. Dr. Janssen commented that Claimant's MRI reflected the "loss of structural integrity to the disc and a 'vertical' instability at the L5-S1 level and the L4-L5 level demonstrating two levels of degenerative disc disease and anatomical abnormalities." He explained that when patients exhibit findings similar to Claimant "they tend not to result in an anterior translational instability with a unilateral defect." Dr. Janssen was not convinced that Claimant's findings were truly "congenital" because hyperextension stress can cause a unilateral fracture. He summarized that Claimant was suffering from lower back and leg pain and had realistic goals about possible surgical intervention. Claimant sought pain reduction and improved functionality from lower back surgery. Dr. Janssen concurred with Dr. Orgel's DIME opinion that Claimant had not reached MMI. He also determined that Claimant is a reasonable candidate for a surgical fusion from L4 to the sacrum.

15. On February 24, 2016 Claimant returned to Dr. Castro for a CT scan review. Dr. Castro noted that the CT scan revealed "a pars defect unilaterally left side L5-S1." He specifically explained that Claimant suffered from degenerative changes at L4-L5 and L5-S1 with mild disc desiccation and denervation but without severe neural encroachment at the L4-L5 level. Dr. Castro noted more significant findings that included isthmic spondylolysis at the L5 level and foraminal stenosis on the left side of the L5-S1 level. He explained that Claimant had exhausted conservative treatment and "followed the work comp guidelines up to this point appropriately." Dr. Castro remarked that surgical intervention in the form of a two-level or single-level surgical fusion should be considered.

16. Dr. Reiss testified at the hearing in this matter. He explained that Claimant suffered a lumbar strain/sprain injury at work on November 11, 2014. Dr. Reiss recounted that during his examination Claimant had exhibited exaggerated pain behaviors and a dramatic presentation. He commented that diagnostic studies did not reveal any reasons for the proposed surgical intervention. Dr. Reiss specifically noted that imaging studies did not reflect any instability in Claimant's lumbar spine. Relying on the Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), Rule 17, Exhibit 1 Low Back Pain G.4(e), Dr. Reiss explained that lower back surgery is not appropriate unless the patient has completed appropriate conservative care, a pain generator has been clearly identified, the patient exhibits spinal stenosis with instability or disc pathology, the proposed surgery is designed to yield functional improvement and the patient has undergone a psychological evaluation. However, he commented that Claimant has not exhausted conservative treatment, a clear pain generator has not been identified, non-surgical treatment would provide a better functional outcome, Claimant has not exhibited spinal instability and Claimant's psychological evaluations

were mixed. Dr. Reiss thus summarized that Claimant is not a good surgical candidate. Moreover, he remarked that Dr. Orgel had not reviewed Claimant's medical records that revealed pre-existing symptoms. Accordingly, Dr. Reiss agreed with Drs. Beach and Olsen that Claimant reached MMI in May 2015. Accordingly, he reasoned that Dr. Orgel had erred in concluding that Claimant has not reached MMI.

17. On April 22, 2016 the parties conducted the post-hearing evidentiary deposition of Claimant. Claimant testified that he has difficulty walking because his left leg "gives out" and he loses stability as a result of his September 11, 2014 lower back injury. He recounted that surgeons have proposed either one-level or two-level fusion surgery of his lumbar spine. Claimant explained that he would prefer a two-level fusion because he would not have to undergo a subsequent lower back surgery. He has discussed the risks and benefits of the proposed surgical procedure and does not expect to be pain-free but is hoping to gain functional improvement. Claimant noted that he has requested a change of physician to Dr, Janssen but Dr. Castro would also be fine. Dr. Castro has always been "up front" and straightforward with him.

18. On April 25, 2016 the parties conducted the post-hearing evidentiary deposition of Dr. Olsen. Dr. Olsen determined that Claimant is not an appropriate candidate for either a one-level or two-level lumbar fusion. He explained that Claimant exhibited non-physiologic pain behaviors and the inconsistencies in his physical examination did not suggest that he was someone who required lumbar fusion surgery. Citing a study entitled *Long Term Outcomes For Single Fusions and Workers' Compensation* mentioned in Rule 17, Exhibit 1 Low Back Pain G.4(e) of the *Guidelines,* Dr. Olsen commented that only 26% of Workers' Compensation patients who undergo fusions return to work while 67% of non-operated patients return to work. Therefore, the likely surgical outcome for Claimant is not positive. Moreover, after reviewing Claimant's lumbar flexion and extension x-rays, Dr. Olsen remarked that there was a zero difference or no instability in Claimant's lumbar spine. Regarding Dr. Janssen's theory of "vertical instability," Dr. Olsen agreed with Dr. Reiss that "this is a concept that is not well accepted. There is no discussion of vertical instability anywhere in the Medical Treatment Guidelines, and it has nothing to do with flexion extension films that we described, which ultimately don't demonstrate any instability." Moreover, Dr. Olsen also stated that, because Claimant's pain generator has not been identified, surgery is unwarranted pursuant to the *Guidelines*.

19. Dr. Olsen also disagreed with Dr. Orgel's determinations in his DIME report. He remarked that Claimant has reached MMI and that the EMG recommended by. Dr. Orgel yielded normal results. Dr. Olsen specifically explained that Dr. Orgel was erroneous in concluding that Claimant had not reached MMI because MRI films did not demonstrate any lumbar spine instability. Finally, Dr. Olsen commented that Dr. Orgel erroneously assigned an impairment rating for Claimant's spondylolisthesis because medical records reveal that the condition preceded the September 11, 2014 industrial injury.

20. On April 29, 2016 the parties conducted the post-hearing evidentiary deposition of Dr. Castro. Dr. Castro recounted that he had diagnosed Claimant with a

lumbar strain/sprain and ongoing lumbago. After reviewing additional medical records and Claimant's lumbar MRI he determined that Claimant was not an appropriate candidate for lumbar surgery as recommended by Dr. Janssen. Dr. Castro noted that the reference to "instability" in the *Guidelines* refers to dynamic movement on flexion/extension x-rays. However, he agreed with Drs. Reiss and Olsen that there has never been any "instability" in Claimant's spine. Regarding Dr. Janssen's theory of "vertical instability," Dr. Castro remarked that "[i]t's not a concept. There's no such thing as vertical instability." He remarked that the MRI and CAT scans reveal that Claimant has minimal disc space height loss. Dr. Castro referenced Rule 17, Exhibit 1 Low Back Pain G.4(d)(iii) of the *Guidelines,* in explaining that instability is required to warrant fusion surgery. The section specifically provides that, "[b]ecause surgical outcomes are less successful when there is neither stenosis, nor instability, the requirements of pre-operative indications must be strictly adhered to for this category of patients."

21. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Orgel that Claimant has not reached MMI and suffered a 23% whole person impairment for his November 11, 2014 lower back injury. Dr. Orgel was uncertain about whether there were other options to reduce Claimant's pain and sought additional information. He thus concluded that Claimant had not reached MMI. He specifically addressed Dr. Janssen's surgical recommendation and noted that "[t]here was apparently some instability on his x-rays, and this would be a surgical problem." Dr. Orgel recommended an "extensive psychological assessment" to determine whether Claimant was an appropriate surgical candidate. He stated that, if Claimant was deemed a good surgical candidate, he required repeat EMG testing to ascertain whether he had a bilateral radiculopathy and determine the cause of his muscle spasms. Dr. Orgel also commented that, if Claimant was suffering from radicular symptoms, he could follow-up with the surgeon of his choice. He assigned Claimant an 8% whole person impairment rating for his spondylolisthesis and a 16% whole person rating for lower back range of motion deficits. Combining the ratings yields a 23% whole person impairment.

22. Dr. Olsen disagreed with Dr. Orgel's MMI and impairment determinations. He remarked that Claimant has reached MMI and that the EMG recommended by Dr. Orgel yielded normal results. Dr. Olsen specifically explained that Dr. Orgel erroneously concluded that Claimant had not reached MMI because MRI films did not demonstrate any lumbar spine instability. Finally, Dr. Olsen commented that Dr. Orgel incorrectly assigned an impairment rating for Claimant's spondylolisthesis because medical records reveal that the condition existed prior to Claimant's September 11, 2014 industrial injury. Dr. Reiss also explained that Claimant is not a good surgical candidate. He remarked that Dr. Orgel had not reviewed Claimant's medical records that revealed pre-existing symptoms. Furthermore, Dr. Reiss agreed with Drs. Beach and Olsen that Claimant reached MMI in May 2015. He thus reasoned that Dr. Orgel erred in concluding that Claimant has not reached MMI. Finally, Dr. Castro agreed with Drs. Reiss and Olsen that there has never been any "instability" in Claimant's spine and Claimant was not a surgical candidate.

23. Multiple physicians have disagreed with Dr. Orgel’s MMI and impairment determinations. Moreover, Claimant has undergone additional treatment and diagnostic testing since his DIME. Nevertheless, Respondents have failed to overcome Dr. Orgel’s DIME opinion. Initially, Dr. Janssen concurred with Dr. Orgel’s DIME opinion that Claimant had not reached MMI. He also determined that Claimant is a reasonable candidate for a surgical fusion from L4 to the sacrum. More importantly, doctors Reiss, Olsen and Castro failed to explain how Dr. Orgel’s determination that Claimant has not reached MMI and suffered a 23% whole person impairment for his November 11, 2014 lower back injury is clearly erroneous. The disagreement about whether Claimant is an appropriate surgical candidate does not constitute clear and convincing evidence to overcome Dr. Orgel’s DIME determination. The opinions of Drs. Reiss, Olsen and Castro merely constitute disagreements with Dr. Olsen regarding the remedy for Claimant’s lower back condition. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Orgel’s MMI and impairment determinations were incorrect.

24. Claimant has failed to demonstrate that it is more probably true than not that the request for lumbar fusion surgery as recommended by Dr. Janssen is reasonable, necessary and causally related to his September 11, 2014 admitted industrial injury. Dr. Janssen recommended a two level surgical fusion for Claimant. He commented that Claimant’s MRI reflected the “loss of structural integrity to the disc and a ‘vertical’ instability at the L5-S1 level and the L4-L5 level demonstrating two levels of degenerative disc disease and anatomical abnormalities.” Dr. Janssen explained that when patients exhibit findings similar to Claimant “they tend not to result in an anterior translational instability with a unilateral defect.” Dr. Janssen was not convinced that Claimant’s findings were truly “congenital” because hyperextension stress can cause a unilateral fracture. He summarized that Claimant was suffering from lower back and leg pain and had realistic goals about possible surgical intervention.

25. In contrast, Dr. Reiss commented that diagnostic studies did not reveal any reasons for the proposed surgical intervention. He specifically noted that imaging studies did not reflect any instability in Claimant’s lumbar spine. Relying on the *Guidelines*, Rule 17, Exhibit 1 Low Back Pain G.4(e), Dr. Reiss persuasively explained that lower back surgery is not appropriate unless the patient has completed appropriate conservative care, a pain generator has been clearly identified, the patient exhibits spinal stenosis with instability or disc pathology, the proposed surgery is designed to yield functional improvement and the patient has undergone a psychological evaluation. However, he commented that Claimant has not exhausted conservative treatment, a clear pain generator has not been identified, non-surgical treatment would provide a better functional outcome, Claimant has not exhibited spinal instability and Claimant’s psychological evaluations were mixed. Dr. Reiss thus summarized that Claimant is not a good surgical candidate.

26. Dr. Olsen also determined that Claimant is not an appropriate candidate for either a one-level or two-level lumbar fusion. He explained that Claimant exhibited non-physiologic pain behaviors and the inconsistencies in his physical examination did not suggest that he was someone who required lumbar fusion surgery. Moreover, after

reviewing Claimant's lumbar flexion and extension x-rays, Dr. Olsen remarked that there was a zero difference or no instability in Claimant's lumbar spine. Regarding Dr. Janssen's theory of "vertical instability," Dr. Olsen agreed with Dr. Reiss that "this is a concept that is not well accepted. There is no discussion of vertical instability anywhere in the Medical Treatment Guidelines, and it has nothing to do with flexion extension films that we described, which ultimately don't demonstrate any instability." Finally, Dr. Olsen remarked that, because Claimant's pain generator has not been identified, surgery is unwarranted pursuant to the *Guidelines*.

27. After reviewing additional medical records and Claimant's lumbar MRI Dr. Castro also determined that Claimant was not an appropriate candidate for lumbar fusion surgery as recommended by Dr. Janssen. Dr. Castro noted that the reference to "instability" in the *Guidelines* pertains to dynamic movement on flexion/extension x-rays. However, he agreed with Drs. Reiss and Olsen that there has never been any "instability" in Claimant's spine. Regarding Dr. Janssen's theory of "vertical instability," Dr. Castro remarked that "[i]t's not a concept. There's no such thing as vertical instability." He remarked that the MRI and CT scans reveal that Claimant has minimal disc space height loss. Accordingly, based on the persuasive reports and opinions of Drs. Reiss, Olsen and Castro, Claimant's request for lumbar fusion surgery as recommended by Dr. Janssen is denied and dismissed.

28. Claimant has failed to make a "proper showing" to warrant a change of physician pursuant to §8-43-404(5)(a), C.R.S. Claimant testified that he has requested a change of physician to Dr. Janssen but Dr. Castro would also be fine. He noted that Dr. Castro has always been "up front" and straightforward with him. However, evaluating Claimant's need for reasonable and necessary medical treatment while protecting Respondents' interest in being apprised of the course of treatment for which it may ultimately be liable suggests that Claimant has received reasonable and necessary medical care from his authorized providers. Furthermore, because Claimant has failed to demonstrate that he is entitled to the recommended fusion surgery there is no need to transfer care to Dr. Janssen. Accordingly, Claimant's request for a change of physician is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Orgel that Claimant has not reached MMI and suffered a 23% whole person impairment for his November 11, 2014 lower back injury. Dr. Orgel was uncertain about whether there were other options to reduce Claimant's pain and sought additional information. He thus concluded that Claimant had not reached MMI. He specifically addressed Dr. Janssen's surgical recommendation and noted that "[t]here was apparently some instability on his x-rays, and this would be a surgical problem." Dr. Orgel recommended an "extensive psychological assessment" to determine whether Claimant was an appropriate surgical candidate. He stated that, if Claimant was deemed a good surgical candidate, he required repeat EMG testing to ascertain whether he had a bilateral radiculopathy and determine the cause of his muscle spasms. Dr. Orgel also commented that, if Claimant was suffering from radicular symptoms, he could follow-up with the surgeon of his choice. He assigned Claimant an 8% whole person impairment rating for his spondylolisthesis and a 16% whole person rating for lower back range of motion deficits. Combining the ratings yields a 23% whole person impairment.

8. As found, Dr. Olsen disagreed with Dr. Orgel's MMI and impairment determinations. He remarked that Claimant has reached MMI and that the EMG recommended by Dr. Orgel yielded normal results. Dr. Olsen specifically explained that Dr. Orgel erroneously concluded that Claimant had not reached MMI because MRI films did not demonstrate any lumbar spine instability. Finally, Dr. Olsen commented that Dr. Orgel incorrectly assigned an impairment rating for Claimant's spondylolisthesis because medical records reveal that the condition existed prior to Claimant's September 11, 2014 industrial injury. Dr. Reiss also explained that Claimant is not a good surgical candidate. He remarked that Dr. Orgel had not reviewed Claimant's medical records that revealed pre-existing symptoms. Furthermore, Dr. Reiss agreed with Drs. Beach and Olsen that Claimant reached MMI in May 2015. He thus reasoned that Dr. Orgel erred in concluding that Claimant has not reached MMI. Finally, Dr. Castro agreed with Drs. Reiss and Olsen that there has never been any "instability" in Claimant's spine and Claimant was not a surgical candidate.

9. As found, multiple physicians have disagreed with Dr. Orgel's MMI and impairment determinations. Moreover, Claimant has undergone additional treatment and diagnostic testing since his DIME. Nevertheless, Respondents have failed to overcome Dr. Orgel's DIME opinion. Initially, Dr. Janssen concurred with Dr. Orgel's DIME opinion that Claimant had not reached MMI. He also determined that Claimant is a reasonable candidate for a surgical fusion from L4 to the sacrum. More importantly, doctors Reiss, Olsen and Castro failed to explain how Dr. Orgel's determination that Claimant has not reached MMI and suffered a 23% whole person impairment for his November 11, 2014 lower back injury is clearly erroneous. The disagreement about whether Claimant is an appropriate surgical candidate does not constitute clear and convincing evidence to overcome Dr. Orgel's DIME determination. The opinions of Drs. Reiss, Olsen and Castro merely constitute disagreements with Dr. Olsen regarding the remedy for Claimant's lower back condition. Accordingly, Claimant has failed to

produce unmistakable evidence free from serious or substantial doubt that Dr. Orgel's MMI and impairment determinations were incorrect.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

11. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the request for lumbar fusion surgery as recommended by Dr. Janssen is reasonable, necessary and causally related to his September 11, 2014 admitted industrial injury. Dr. Janssen recommended a two level surgical fusion for Claimant. He commented that Claimant's MRI reflected the "loss of structural integrity to the disc and a 'vertical' instability at the L5-S1 level and the L4-L5 level demonstrating two levels of degenerative disc disease and anatomical abnormalities." Dr. Janssen explained that when patients exhibit findings similar to Claimant "they tend not to result in an anterior translational instability with a unilateral defect." Dr. Janssen was not convinced that Claimant's findings were truly "congenital" because hyperextension stress can cause a unilateral fracture. He summarized that Claimant was suffering from lower back and leg pain and had realistic goals about possible surgical intervention.

12. As found, in contrast, Dr. Reiss commented that diagnostic studies did not reveal any reasons for the proposed surgical intervention. He specifically noted that imaging studies did not reflect any instability in Claimant's lumbar spine. Relying on the *Guidelines*, Rule 17, Exhibit 1 Low Back Pain G.4(e), Dr. Reiss persuasively explained that lower back surgery is not appropriate unless the patient has completed appropriate conservative care, a pain generator has been clearly identified, the patient exhibits spinal stenosis with instability or disc pathology, the proposed surgery is designed to yield functional improvement and the patient has undergone a psychological evaluation. However, he commented that Claimant has not exhausted conservative treatment, a clear pain generator has not been identified, non-surgical treatment would provide a better functional outcome, Claimant has not exhibited spinal instability and Claimant's psychological evaluations were mixed. Dr. Reiss thus summarized that Claimant is not a good surgical candidate.

13. As found, Dr. Olsen also determined that Claimant is not an appropriate candidate for either a one-level or two-level lumbar fusion. He explained that Claimant exhibited non-physiologic pain behaviors and the inconsistencies in his physical examination did not suggest that he was someone who required lumbar fusion surgery.

Moreover, after reviewing Claimant's lumbar flexion and extension x-rays, Dr. Olsen remarked that there was a zero difference or no instability in Claimant's lumbar spine. Regarding Dr. Janssen's theory of "vertical instability," Dr. Olsen agreed with Dr. Reiss that "this is a concept that is not well accepted. There is no discussion of vertical instability anywhere in the Medical Treatment Guidelines, and it has nothing to do with flexion extension films that we described, which ultimately don't demonstrate any instability." Finally, Dr. Olsen remarked that, because Claimant's pain generator has not been identified, surgery is unwarranted pursuant to the *Guidelines*.

14. As found, after reviewing additional medical records and Claimant's lumbar MRI Dr. Castro also determined that Claimant was not an appropriate candidate for lumbar fusion surgery as recommended by Dr. Janssen. Dr. Castro noted that the reference to "instability" in the *Guidelines* pertains to dynamic movement on flexion/extension x-rays. However, he agreed with Drs. Reiss and Olsen that there has never been any "instability" in Claimant's spine. Regarding Dr. Janssen's theory of "vertical instability," Dr. Castro remarked that "[i]t's not a concept. There's no such thing as vertical instability." He remarked that the MRI and CT scans reveal that Claimant has minimal disc space height loss. Accordingly, based on the persuasive reports and opinions of Drs. Reiss, Olsen and Castro, Claimant's request for lumbar fusion surgery as recommended by Dr. Janssen is denied and dismissed.

Change of Physician

15. A claimant is not entitled to medical treatment by a particular physician. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Vigil v. City Cab Co.,* W.C. No. 3-985-493 (ICAP, May 23, 1995). Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* W.C. No. 4-597-412 (ICAP, July 24, 2008). Because §8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (ICAP, May 5, 2006). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.*

16. As found, Claimant has failed to make a "proper showing" to warrant a change of physician pursuant to §8-43-404(5)(a), C.R.S. Claimant testified that he has requested a change of physician to Dr. Janssen but Dr. Castro would also be fine. He noted that Dr. Castro has always been "up front" and straightforward with him. However, evaluating Claimant's need for reasonable and necessary medical treatment while protecting Respondents' interest in being apprised of the course of treatment for which it may ultimately be liable suggests that Claimant has received reasonable and necessary medical care from his authorized providers. Furthermore, because Claimant has failed to demonstrate that he is entitled to the recommended fusion surgery there is

no need to transfer care to Dr. Janssen. Accordingly, Claimant's request for a change of physician is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Orgel.

2. Claimant's request for lumbar fusion surgery as recommended by Dr. Janssen is denied and dismissed.

3. Claimant's request for a change of physician is denied and dismissed.

4. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 10, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-960-175-03

ISSUES

1. Whether Claimant has established that gastric sleeve surgery is reasonable, necessary, and causally related medical treatment for his June 23, 2014 industrial injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as a garden associate. On June 23, 2014 he suffered a compensable injury to his right hip while at work.

2. On July 31, 2014 Claimant underwent an MRI of his right hip that revealed a full-thickness anterior labral tear of 8 to 12 mm very near the midequatorial line. *See* Exhibit 2.

3. On August 19, 2014 Claimant was evaluated by Shawn Karns, PA-C. PA Karns noted that Claimant weighed 270 pounds and was 5 feet 11 inches tall. PA Karns noted that Claimant's MRI was reviewed with Dr. White and that it showed a labral tear. PA Karns noted that Claimant was a candidate for hip arthroscopy moving forward and that he discussed at great length with Claimant weight loss measures to make the hip arthroscopy surgery safe moving forward. PA Karns noted that Dr. White's goal would be to have Claimant around 240 pounds with a pant size of 40 or less. Claimant reported he wanted to go ahead with the surgery scheduling and was aware of the weight loss requirements. *See* Exhibit 3.

4. On October 10, 2014 Claimant underwent an independent medical evaluation performed by Allison Fall, M.D. Dr. Fall noted that Claimant was 308 pounds and Claimant reported to Dr. Fall that he had not been working on losing weight. *See* Exhibit A.

5. On October 22, 2014 Claimant underwent an independent medical evaluation performed by Edwin Healey, M.D. Dr. Healey opined that Claimant required the hip surgery recommended by Dr. White and that if Claimant did not have the hip surgery, Claimant would have increasing, ongoing degenerative changes in the right hip and would eventually need a right hip replacement. Dr. Healey opined that Claimant needed to be referred to a dietician to help with weight loss so that Claimant could reach the 240 pound level of weight recommended by Dr. White and that Claimant also needed a health club membership with a pool so that Claimant could do exercises to help him lose weight. *See* Exhibit 5.

6. On February 27, 2015 Claimant was evaluated by Greg Smith, D.O. Dr. Smith noted that Claimant had a labral tear in the right hip and that the problem was that surgery could not be performed until Claimant lost weight. Dr. Smith discussed that weight loss was not part of the work comp regimen. Dr. Smith opined that Claimant needed to find a surgeon who performed band therapy to assist Claimant with losing weight. Dr. Smith noted that Claimant needed to lose approximately 50 pounds in order to have surgery and noted that Claimant would follow up with Dr. Weaver regarding band surgery. Dr. Smith also prescribed Claimant a six month gym membership to 24 hour fitness for weight loss. Dr. Smith noted he anticipated that Claimant's right hip would worsen. *See* Exhibit 4.

7. On March 11, 2015 Dr. Smith responded to a letter from Respondent. Dr. Smith opined that he agreed to refer Claimant to a nutritionist and provided the information and phone number of a nutritionist. *See* Exhibit 4.

8. On March 30, 2015 Claimant was evaluated by John Weaver, M.D. Dr. Weaver noted that Claimant had been referred by Dr. Smith for consultation regarding the adjustable gastric band surgery as well as vertical gastric sleeve surgery. Claimant reported he had some success at losing weight, but was unable to keep it off and had a yo-yo weight loss fashion. Claimant reported needing help to lose weight to be healthier and to qualify for his hip repair. Dr. Weaver noted that Claimant was currently at his greatest weight and noted his weight to be 318 pounds, 8 ounces. Dr. Weaver opined that Claimant was an excellent candidate for bariatric surgery. Dr. Weaver noted that Claimant had been suffering from weight problems for the past 5-10 years and was currently at the highest weight of his life. Dr. Weaver opined that patients typically lose 70-75% of their excess weight at 6 months to 1 year with the sleeve gastrectomy and 55-65% of their weight with the lapband at 2 years. Dr. Weaver opined that the sleeve gastrectomy would likely result in quicker weight loss and would qualify Claimant for his hip repair much sooner than lapband. Dr. Weaver noted he would submit the paperwork for approval through work comp and that if approved Claimant would be part of a multi-disciplinary preparatory bariatric regimen. *See* Exhibit 6.

9. On July 8, 2015 Claimant was evaluated by Dr. Smith. Dr. Smith noted that Claimant was at 270 pounds and that he needed to lose 20 more pounds to undergo surgery and that Dr. White would like Claimant to be at 260 pounds to schedule the surgery. Claimant reported he was working out two days per week and working with a trainer. Claimant also reported working out at home two to three days per week, and walking around the park four to five times per week. Dr. Smith noted that the plan would be for Claimant to lose 10 more pounds and then schedule the surgery with Dr. White. *See* Exhibit 4.

10. On July 22, 2015 Claimant was evaluated by Brian White, M.D. Dr. White noted Claimant had continued pain. Claimant reported he had been working hard to lose weight but Dr. White noted that Claimant weighed approximately 320 pounds at the appointment based on two separate scales. Dr. White opined that surgery would be challenging given Claimant's body habitus and opined that Claimant really needed to

lose the weight. Dr. White opined that Claimant needed to get to the 250 to 260 pound range before it would be safe to do the surgery and noted that Claimant would keep them posted as to his weight loss. *See* Exhibit 3.

11. On September 18, 2015 Claimant was evaluated by Dr. Bloch. Dr. Bloch noted that it was now approximately 15 months post injury and that Claimant's weight still did not make him a good candidate for surgery. Dr. Bloch noted that Claimant had missed appointments and that Claimant had not shown any reasonable efforts of losing weight. Dr. Bloch noted that Claimant was 8 pounds heavier than he was only two to three months prior. Dr. Bloch opined that Claimant was at maximum medical improvement and would remain there until and unless Claimant could come down in weight and be a candidate for surgery. *See* Exhibit C.

12. On October 7, 2015 Claimant was evaluated by Dr. White. Dr. White noted that Claimant had gotten to the point where Claimant could not effectively lose weight and was frustrated. Dr. White noted that Claimant was considering lab band surgery and opined that was a reasonable consideration. Dr. White again opined that as Claimant started to lose weight it would be fine to schedule him for hip arthroscopy and that he would like Claimant to be in the 240 pound range for the procedure. *See* Exhibit 3.

13. On December 28, 2015 Claimant was evaluated by Kevin Page, PA-C. PA Page noted that both he and Dr. Bloch spoke with Claimant and that Claimant now wanted to undergo bariatric surgery. At the appointment, Claimant weighed approximately 310 pounds. PA Page noted that Dr. Bloch did not necessarily recommend that the surgery be covered through work comp, but had no objections to the surgery and reiterated that Claimant would not be a candidate for hip surgery until Claimant was at least down to 260 pounds and preferably 240 pounds or less. PA Page noted that the hip surgery was still on hold as Claimant had not reached the weight goal and that bariatric surgery might be the only option to get Claimant to the point where they could proceed with the hip labral repair. *See* Exhibit 4.

14. On January 4, 2016 Claimant was evaluated by Dr. Weaver. Dr. Weaver again noted that Claimant needed to lose weight to qualify for hip repair and that Claimant had tried to lose weight over the last 10 months but had not been successful. Claimant reported trying diet, exercise, and a personal trainer. Dr. Weaver noted Claimant's weight to be 322 pounds, 8 ounces. Dr. Weaver again opined that Claimant was a good candidate for sleeve gastrectomy surgery and that Claimant had been unsuccessful with weight loss through diet and exercise. Dr. White opined that patients typically lose 70% of their excess weight at 6 months to 1 year with the sleeve gastrectomy and opined that they would likely be able to get Claimant ready for hip surgery within 3-6 months of weight loss surgery. *See* Exhibit 6.

15. On January 5, 2016 Dr. Weaver submitted a request for surgery authorization for laparoscopic sleeve gastrectomy and EGD. *See* Exhibit 6.

16. On January 6, 2016 Dr. Fall performed a Rule 16 Review regarding Claimant and the request for gastric banding or gastric sleeve surgery. Dr. Fall noted that the medical treatment guidelines discussed occasions where surgery may be contraindicated due to obesity including with hip arthroscopy. Dr. Fall noted that the guidelines provided that where surgery was contraindicated due to obesity, it may be appropriate to recommend a weight loss program if the patient was unsuccessful losing weight on their own and that coverage for weight loss would continue only for motivated patients who demonstrated continued progress with weight loss. *See* Exhibit B.

17. Dr. Fall opined that the sleeve gastrectomy surgery was not medically reasonable, necessary, or related to the work injury. Dr. Fall opined that there was no medical reason why Claimant could not pursue weight loss without surgery. Dr. Fall opined that it did not make sense to perform one surgery with inherent risks in order to pursue hip surgery. Dr. Fall also noted that the medical records indicated Claimant had been able to lose weight and had been successful losing weight, but then regained it back. Dr. Fall opined that if Claimant were unable to lose weight on his own, then under the medical treatment guidelines, a weight management program could be started. *See* Exhibit B.

18. On January 20, 2016 Dr. White issued a letter to Claimant's attorney. Dr. White noted in the letter that Claimant was frustrated about losing weight and that Claimant felt as though he needed to move forward with a gastric bypass procedure. Dr. White agreed with Claimant and opined that Claimant made no progress with regard to diet, weight loss, working out and opined that Claimant's ability to work out to lose weight was adversely affected by his hip. Dr. White opined that Claimant needed the hip surgery and that with Claimant's current body habitus it would be very challenging to access the hip. Dr. White opined that the hip surgery was absolutely necessary and that weight loss was absolutely necessary to be able to make the surgery perfect so that Claimant could have a good long term result. Dr. White opined that as Claimant lived with his hip longer and longer it would only hurt his hip and cartilage more. *See* Exhibit 3.

19. On March 2, 2016 Claimant underwent a Division Independent Medical Evaluation performed by Lloyd Thurston, D.O. Claimant reported that his weight was 290 pounds. Dr. Thurston opined that the labral tear was a work related injury and would not heal without arthroscopic repair. Dr. Thurston opined that the more time that passed without repair would provide further damage and degenerative changes in the hip. Dr. Thurston opined that the bariatric gastric sleeve procedure was appropriate and necessary so that Claimant could have the hip surgery. Dr. Thurston opined that after hip surgery Claimant's impairment rating should be significantly less with significantly less restrictive permanent work restrictions. *See* Exhibit 7.

20. Dr. Healey testified at hearing. Dr. Healey opined that the medical treatment guidelines established by the Division were advisory and education but that practice can deviate as needed based on patients' needs. Dr. Healey noted that Claimant could maybe lose weight on a strict program with a dietician and weekly weigh

ins, but opined that Claimant was confused about the basic tenants of weight loss and was unable to lose weight on his own. Dr. Healey opined that weight loss surgery at this point was reasonable and necessary because of Claimant's deteriorating condition and pain. Dr. Healey opined that it might have been appropriate 1.5 years ago to try weight watchers or an alternative program, but that at this point it was no longer an appropriate option due to Claimant's deterioration. Dr. Healey recognized that the gastric sleeve surgery was a major procedure and listed the risks to include diarrhea, infection, deep vein thrombosis, blood clots, and vitamin deficiencies. Dr. Healey opined that the risks associated with the gastric sleeve surgery were not as great as the risks of continued deterioration with delay in the needed hip surgery.

21. Dr. Fall testified at hearing. Dr. Fall opined that the gastric sleeve surgery was not reasonable, necessary, or related treatment. Dr. Fall opined that Claimant had not yet failed at weight loss and that Claimant could undergo a dietary regimen and eat less and achieve the same results without the need for surgery. Dr. Fall opined that gastric sleeve was a major surgery with risks of infection, diarrhea, malnutrition, and leakage from staples pulling loose. Dr. Fall noted that the medical treatment guidelines say that if someone is unsuccessful losing weight on their own then they should be referred to a weight loss program. Dr. Fall opined that Claimant had not yet been through a weight loss program and that the main part of losing weight is diet. Dr. Fall acknowledged that Claimant could not lose weight on his own and that he should undergo a weight watchers program or undergo a personal program one on one with a nutritionist. Dr. Fall opined that the surgical procedure was not necessary because Claimant could achieve the same results with a much less invasive option. Dr. Fall opined that if Claimant underwent a program with weight watchers or a nutritionist, he would have a similar rate of weight loss as he would have if he underwent the gastric sleeve procedure. Dr. Fall opined that the gastric sleeve surgery would not result in a faster rate of weight loss than a diet if Claimant were on a good diet plan.

22. Claimant also testified at hearing. Claimant testified that he has changed his eating habits, but admitted he did not have a basic understanding of how many calories he needed to consume per day to achieve his weight loss goals. Claimant's testimony included the following changes in his diet: used to eat large bowls of cereal nightly, now eats small bowls; used to drink 2-3 cups of milk at night, now drinks 1 cup; used to eat fast food 2-3 times per week and would order 4 chicken sandwiches, now eats fast food 1-2 times per week and only eats 1 chicken sandwich; used to eat hot cheetos often, now eats them not as much. Claimant has never kept a food log, has never read books, magazines, or articles on weight loss, and has never worked directly with a nutritionist.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of

litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Respondents have been required to provide ancillary “pre-operative treatment” for non-industrial conditions if the evidence establishes that such ancillary care is a reasonably necessary prerequisite to surgery and must be given to achieve optimum treatment of the compensable injury. *Public Service Co. v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999). The question of whether the claimant has established that the need for ancillary treatment is a reasonably necessary prerequisite to achieve optimal treatment is one of fact for the ALJ. *Public Service Co. v. Industrial Claim Appeals Office, supra*.

The Colorado Division of Workers' Compensation has issued Guidelines under Rule 17, W.C.R.P., as evidence of professional standards. *See* Rule 17-1(A), W.C.R.P. Although an ALJ is not bound to the treatment guidelines in the determination of whether a particular treatment is reasonable and necessary, an ALJ may consider the Guidelines in determining the reasonableness and medical necessity of a particular treatment. The Guidelines provide for surgical intervention for labral tears that, "in cases where surgery is contraindicated due to obesity, it may be appropriate to recommend a weight loss program if the patient is unsuccessful losing weight on their own. Coverage for weight loss would continue only for motivated patients who have demonstrated continual progress with weight loss." *See* Rule 17, Exhibit 6, section E.3.h.vi.C.

Claimant has failed to establish that gastric sleeve surgery is reasonable and necessary treatment for his June 23, 2014 work injury. The gastric sleeve surgery proposed is not a reasonably necessary prerequisite to performing right hip surgery for Claimant's compensable injury. Although weight loss generally is a necessary prerequisite for optimum treatment of Claimant's compensable right hip injury, Claimant has failed to establish that the gastric sleeve procedure as a method of weight loss is reasonable or necessary at this time. Rather, the evidence establishes that there are significantly less invasive methods for Claimant to lose weight that would result in the same or similar outcome as the more invasive gastric sleeve procedure.

Although Claimant testified that he has tried to lose weight on his own for over a year without success, the testimony and evidence clearly demonstrates that Claimant lacks understanding of what is required to lose weight and lacks understanding of the basic tenants of weight loss. As found above, Claimant needs right hip surgery and needs to lose a considerable amount of weight before the hip surgeon will perform the procedure. Although gastric sleeve surgery would be one method of losing the required weight, Claimant has not yet attempted a weight loss program that is a more reasonable method of losing weight in order to move forward with the necessary hip surgery. The ancillary treatment that Claimant needs is weight loss. However, weight loss by an invasive surgical procedure with significant risks is not necessary at this time. There are other practical and less invasive methods of weight loss that Claimant has not yet tried. Claimant has failed to establish that the gastric sleeve surgery is reasonable or necessary.

Further, Dr. Fall is credible and persuasive that the gastric sleeve procedure would not result in a much faster rate of weight loss than a diet/nutritionist program if Claimant were to participate in a program. The evidence established that even with the gastric sleeve surgery, the weight loss would still take approximately 3-6 months before Claimant would be at a weight appropriate for undergoing hip surgery. Dr. Fall's testimony that Claimant could lose weight in a weight loss program in a similar timeframe is persuasive. It is clear from the past that Claimant has the ability to lose weight and he has gone up and down in his weight throughout treatment for his right hip injury. Here, the evidence establishes that there are significantly less invasive methods of losing weight besides the gastric sleeve procedure and that a weight loss program without surgery could achieve the same results in a similar time frame. At this time without having tried a weight loss program, Claimant has failed to establish that the proposed gastric sleeve surgery is reasonable or necessary.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that gastric sleeve surgery is reasonable and necessary medical treatment for his June 23, 2014 industrial injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 10, 2016,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that on November 29, 2015 he sustained a compensable injury proximately caused by the performance of service arising out of and in the course of his employment?

- What is Claimant's average weekly wage?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 though 6 were admitted into evidence. Claimant's Exhibit 7 was also admitted into evidence for consideration of questions 2,4,11 and 13 and the Claimant's answers to those questions. Respondents' Exhibits A through G were admitted into evidence.

2. At hearing the parties stipulated that if the claim is found to be compensable the medical treatment provided by Concentra Medical Centers, John Aschberger, M.D., and Don Aspergren, D.C., is authorized.

3. At hearing the parties stipulated that if the claim is found to be compensable Claimant is entitled to temporary total and/or temporary partial disability benefits for the period December 1, 2015 through January 31, 2016.

4. Claimant testified as follows concerning the events of November 29, 2015. On that date Claimant was working two shifts in his capacity as an airline operations agent. At approximately 10:00 p.m. Claimant and his immediate supervisor, Claire Petras (Petras), were lifting a passenger from a motorized wheelchair to an "aisle chair." The "aisle chair," unlike the passenger's wheelchair, was small enough to travel down the aisle of the aircraft and allow the passenger to be moved into his onboard seat. Claimant lifted the passenger from behind and Petras lifted the passenger's feet. As Claimant lifted the passenger he felt a "strain" in his back and immediately told Petras that he had hurt himself. Once inside the aircraft Claimant again told Petras that he had injured himself. After this incident Claimant continued working the shift until he reported the injury to Dave Lester (Lester). When Claimant reported the injury to Lester he filled out some "paperwork" and was referred to Concentra Medical Centers (Concentra) for medical treatment. However, Claimant did not go to Concentra until the next day.

5. Claimant testified that on November 29, 2015 he spoke with Petras prior to the time he reported the injury. Claimant explained that Petras introduced herself as the supervisor for the night and told Claimant to call if he needed her. Claimant also

recalled that Petras came up and gave him a radio. Claimant denied having any other conversations with Petras prior to the alleged injury.

6. Claimant denied that he had any conversations with Lester prior to the time that he reported the injury to Lester.

7. On cross-examination Claimant admitted that in his answers to interrogatories he denied having any low back injury prior to November 29, 2015.

8. Claimant testified that he was involved in a motor vehicle accident (MVA) in January 2015. Claimant testified that as a result of the accident he sustained a minor concussion, confusion and a cut on his right hand. However, Claimant testified that he did not recall the January 2015 MVA caused a back injury. Claimant explained that because of the concussion he does not "remember a lot from that day" and did not recall injuring his back until his attorney showed him documents the day before the hearing.

9. Petras testified as follows. On November 29, 2015 Petras was the ground operations supervisor in the "zone" where Claimant was working. On November 29 and prior to the alleged injury Petras met with Claimant for twenty minutes. The purpose of the meeting was for Petras to discuss with Claimant a "difference of opinion" that Claimant had with a "couple of [the Employer's] customer service agents." Petras also discussed Claimant's failure to report to a flight. Petras opined that during this conversation Claimant was "dismissive" and was "refusing to take responsibility for any of his actions."

10. Petras testified that Claimant called her to a gate to help lift the passenger. Petras stated that when she arrived at the gate Claimant already had the passenger "by the arm pits" and indicated Petras should lift the passenger's feet. Petras then helped Claimant lift the passenger from the wheelchair into the aisle chair. Petras testified that Claimant did not report any injury during the process of transferring the passenger to the aisle chair and then placing the passenger in his seat. Neither did Petras observe the Claimant engaged in any "pain behaviors" while transferring the passenger.

11. Petras stated that Claimant first informed her of the alleged back injury 30 to 45 minutes after the passenger was placed on the aircraft. At that time Petras also noticed Claimant had "his hands on his lower back." Petras recalled that during this 30 t0 45 minute period of time there was a "wind shear" event at the airport and she was "working with the manager of the control center to make sure the aircraft was not pushed off of the gate." Petras stated that after Claimant reported the injury she told Claimant that an injury form would have to be completed. However, before the form could be completed Petras was called to another gate. Petras stated that after Claimant reported the injury she requested Claimant to go to a nearby gate and "drive the jet bridge" to receive an aircraft.

12. On November 29, 2015 Lester was working for the Employer as a ground operations supervisor. He was one of Claimant's supervisors on November 29. Lester testified he called Claimant to "extend" Claimant's shift beyond the scheduled conclusion. Lester explained the Employer has a contractual right to extend employees' shifts based on "operational need." Lester opined that Claimant was "not very in favor" of the extension. Lester stated that he informed Claimant of the shift extension before Claimant reported the alleged injury.

13. Lester testified that at approximately 11:00 p.m. on November 29, 2015 he was "positioned in the command center." At that time Claimant came to the command center and reported that "he had hurt his lower back trying to help a customer with at lift – or assisting to lift a customer." Lester told Claimant that it was necessary to call paramedics. However, Lester recalled that Claimant did not want to call the paramedics and expressed a desire to call his grandmother or mother to pick him up.

14. Lindsey Williams (Williams) testified as follows. Williams is the claims adjuster assigned to handle the claim for benefits. On January 13, 2016 she spoke with Claimant over the telephone and took a "formal statement" concerning the alleged injury. During this conversation Williams took notes concerning Claimant's answers to questions posed by Williams. (These notes were admitted into evidence as Respondents' Exhibit G). Williams has some independent recollection of the January 13 conversation with Claimant but admits Exhibit G is the "best record" of what was said during the conversation.

15. Exhibit G reflects that Williams asked Claimant how the injury occurred. Exhibit G (grammar, spelling and punctuation in the original) reflects that Claimant answered as follows:

> "reported that claire told him to ask her for help if I needed help. Said he had a lift to assist a handicap passenger from the wheelchair to the isle chair from the isle chair to the seat. Passenger told him how to properly due the lift in his most comfort. Said that he asked claire to put his arm around his legs and lift at the same time. when they lifted the first time he was not completely on the aisle chair and they had to lift him again and as they lifted him again he felt pain in his back and completely got him on the chair. He told claire that he hurt his bag. She looked concerned about the plane getting out in time and showed no regard to his injury and she told him to push him into the plane. He pushed him into the plane and was felling pain in his back and she told him to take of jacket and lanyard to do the lift. Said he was still in alot of pain and claire told him that he needed to lift him from the aisle chair to the seat and he lifted him again to the seat. As they walked off the pane he told her again that he injured his back. Said that she told him that he needed to move his 300 lb lift chair to be sent down to the jetbridge and she

> would not help him she made him lift it by himself. Said that she helped him with the lifts but not with the mobility wheelchair. Said that she made him finish the flight for 143 passenger. said she walked away and he finished the flight. He said she asked him to go work another gate and he did as he was going to report the injury. Said that he did the other flight. He went and told Dave and he told him that he told claire and she wouldnt do anything for him and then Dave started the process for him."

16. Williams testified and Exhibit G reflects that Claimant denied sustaining any back injury prior to November 29, 2015. Williams testified and Exhibit G reflects that Claimant reported that he was involved in a motor vehicle accident (MVA) approximately 2 years prior to the interview but was not injured. Williams testified that Claimant never mentioned that he was involved in an MVA in 2015, that he sustained a concussion in the 2015 MVA or that he had trouble recalling some details of the MVA.

17. Claimant's Exhibit 7 is "Claimant's Answers To Respondents' Interrogatories." This document was offered and admitted into evidence for consideration of interrogatory questions and answers numbered 2, 4, 11, and 13. Claimant provided verified answers to these interrogatories on March 8, 2016.

18. In interrogatory 11 Claimant was asked to identify "any health care provider" who has treated his lumbar back "at any time." In response Claimant identified the providers that have treated him for the alleged work related injury since November 30, 2015.

19. In interrogatory 13 Claimant was asked to "describe in detail all motor vehicle accidents in which" he had been involved including a description of the vehicles involved, what body parts were hurt and the names and addresses of all medical providers that treated his injuries. In response Claimant reported that he was involved in an MVA in 2015 where he was driving a Honda and the other vehicle was a PT Cruiser. Claimant stated that his only injuries were "a minor concussion, confusion, and a cut on my hand." Claimant stated that his worst pain "from the accident was a headache for two days." Claimant stated he has had no symptoms since then. Claimant wrote that he received treatment for these injuries at North Suburban Medical Center (NSMC).

20. On November 30, 2015 Nancy Strain, D.O., examined Claimant at Concentra. Claimant gave a history that he was "lifting someone out of a wheelchair last night when he felt a pull in his low back and then low back pain started." Claimant also stated that he had "no previous back injuries." Claimant reported right-sided back pain and stiffness, neck pain and numbness in both arms. On physical examination (PE) Dr. Strain noted diffuse tenderness of the left and right paraspinals. Dr. Strain palpated the lumbar spine and noted "left-sided muscle spasms." Dr. Strain assessed a "lumbar strain." Dr. Strain commented that the "history and mechanism of injury were obtained directly from the" Claimant and appeared "to be consistent with presenting

symptoms and physical exam." She prescribed cyclobenzaprine, ibuprofen and physical therapy (PT). Dr. Strain imposed restrictions of lifting, pushing and pulling no more than 20 pounds occasionally. Dr. Strain also limited Claimant to "occasional bending" and required Claimant to remain sitting for 80% of the time.

21. Claimant underwent PT on November 30, 2015. On PE of the bilateral paraspinal muscles PT Darwin Abrams noted moderately increased muscle tone and tenderness.

22. Claimant underwent PT on December 4, 2015. At that time Claimant reported "a high level of pain and poor standing and sitting tolerance." On PE of the bilateral paraspinal muscles DPT Cody Moldenhauer noted moderately increased muscle tone and tenderness.

23. On December 8, 2015 PA-C Stephanie Missey examined Claimant at Concentra. Claimant reported bilateral lower back pain rated 8 on a scale of 10 (8/10). The pain radiated into the right thigh. The symptoms were reportedly worsening. On PE PA-C Missey noted tenderness in the left lumbar paraspinal muscles and right-sided muscle spasms. PA-C Missey assessed a lumbar strain and referred Claimant for acupuncture and chiropractic treatments. The December 8 records are contradictory with regard to whether or not PA-C Missey imposed any restrictions or released Claimant to return to work without restrictions. The office note indicates that Missey imposed restrictions of occasional bending and walking. The Concentra "Physician Work Activity Status Report" indicates Claimant was released to return to work on December 9, 2015 with "restrictions" of "constantly" bending and walking. The "Physician's Statement" to the Employer indicates that Claimant could stand "occasionally" and was limited to lifting, pushing and pulling 11 to 20 pounds.

24. On December 14, 2015 Candice Sobanski, M.D., examined Claimant at Concentra. Claimant reported experiencing increased back pain after returning to work. Claimant rated his back pain as 9/10 and stated he was having "trouble with shifts because of pain." On PE Dr. Sobanski noted the lumbosacral spinal alignment exhibited a "loss of normal lordosis." There was right and left paraspinal tenderness and on palpation of the lumbar spine Dr. Sobanski noted "bilateral muscle spasms." Dr. Sobanski assessed a lumbar strain, sciatica and muscle spasm. She prescribed ibuprofen and metaxalone. Dr. Sobanski referred Claimant for a lumbar MRI because of "radicular symptoms." Dr. Sobanski imposed restrictions of lifting, pushing and pulling up to 10 pounds occasionally, sitting 50% of the time, frequent breaks and no bending.

25. On December 22, 2015 Claimant underwent an MRI of the lumbar spine. The radiologist reported that the MRI was "normal" with no focal disc herniation, no significant central canal narrowing and no significant neural foraminal narrowing.

26. On December 24, 2015 Dr. Sobanski again examined Claimant. Claimant reported that PT was helpful but acupuncture was not. Claimant reported his pain level was 8/10 and he was observed to be limping. On PE Dr. Sobanski noted tenderness of

the left and right paraspinal muscles. On palpation of the lumbar spine Dr. Sobanski noted “bilateral muscle spasms.” Dr. Sobanski prescribed additional PT, cancelled acupuncture and referred claimant for massage therapy.

27. On January 21, 2016 Amanda Cava, M.D., examined Claimant at Concentra. Claimant reported bilateral lower back pain rated at 4/10. Claimant also gave a history that his symptoms were improving and requested a reduction in his restrictions so that he could return to light duty work. Claimant was not taking his medications as prescribed because of the improvement in his symptoms. On PE Dr. Cava noted tenderness in the upper lumbar spine and tenderness in the left and right paraspinal muscles. On palpation of the lumbar spine Dr. Cava noted bilateral muscle spasms. Dr. Cava imposed restrictions that permitted Claimant to lift 25 pounds frequently, to push and pull 30 pounds frequently, and to bend, stand and walk frequently.

28. On February 24, 2016 Scott Richardson, M.D., examined Claimant at Concentra. Claimant reported bilateral low back pain rated at 4/10. Claimant also reported he was still attending PT and massage therapy and these treatments were helping. On PE of the lumbar spine Dr. Richardson reported there was no tenderness and that Claimant’s range of motion was full except for limited flexion and extension. Dr. Richardson continued PT and massage therapy. Dr. Richardson also referred Claimant to a “delayed recovery specialist” because of “slow progress.”

29. Dr. Cava examined Claimant on March 17, 2016. Claimant reported bilateral low back pain rated at 2/10. There was no radiation and Claimant advised that his symptoms were improving. Dr. Cava noted some tenderness of the lumbar spine but no muscle spasms. Dr. Cava stated that Claimant’s range of motion was full. Dr. Cava stopped PT because Claimant felt it was making his symptoms worse and stopped acupuncture because Claimant reported there was not benefit from this treatment. Dr. Cava released Claimant to a trial of full duty beginning March 20, 2016.

30. On March 17, 2016 John Aschberger, M.D., examined Claimant on referral from Dr. Richardson. Claimant gave a history that he experienced pulling in his back while transferring a passenger from a “chair to aisle seat.” Claimant stated that despite the injury his supervisor had him continue with the transfer and then push out the chair, which resulted in some additional aggravation.” Claimant denied any “previous back injury.” Dr. Aschberger assessed a lumbosacral strain and noted elements of the PE suggested facet irritation. Dr. Aschberger opined Claimant was responding well to treatment. Dr. Aschberger recommended that Claimant continue with his home exercise program and that he receive PT to treat “tight hamstrings.”

31. On April 1, 2016 John Burris, M.D., examined Claimant for evaluation of “delayed recovery issues.” Claimant reported he was experiencing “episodic” low back pain rated at 2/10. On PE of the lumbar spine Dr. Burris noted full range of motion in all planes and no muscle spasm or trigger points. Dr. Burris stated Claimant’s workup had been “negative” and “his examination is benign with no objective findings.” Dr. Burris assessed “low back pain.” He opined Claimant should “remain active” with a home

exercise program and continue rehabilitation. Dr. Burris further recommended that Claimant continue performing “full work duties.”

32. Claimant was involved in a motor vehicle accident (MVA) on January 24, 2015.

33. The Thornton Fire Department (TFD) responded to the accident scene and provided emergency care to Claimant. Emergency response documentation from the TFD reflects that on January 24, 2015 Claimant’s chief complaints were left lateral lumbar pain, left arm pain and midline cervical spine pain on palpation. Claimant also advised that he “may have hit his head” in the accident although there “were no obvious signs of trauma to his head or neck.” Claimant was able to “answer questions appropriately” and denied loss of consciousness. However, Claimant’s overall affect “appeared abnormal.” A member of Claimant’s family who was present at the scene of the accident reported that Claimant’s speech pattern was slower than normal and he was “possibly confused.” Claimant was placed in a cervical collar and a “long spine board” and transported to NSMC for treatment.

34. At the NSMC emergency department (ED) Claimant was treated by PA Cameron Nelson and Julianna Batizy Morley, D.O. Claimant complained of head pain, left lateral back pain, neck pain and left shoulder pain. Claimant’s aunt, who was apparently present in the ED, advised that Claimant was “not acting normally” and was “delayed” when answering questions. Claimant underwent CT scans of the head, cervical spine, lumbar spine and chest. The radiologists reported no abnormalities were shown on the CT scans. An x-ray of the left shoulder showed no fracture or dislocation. Dr. Morley wrote that during treatment at the ED Claimant “became slightly combative and anxious and repeating self – confused.” However, after imaging Dr. Morley noted the Claimant was neurologically intact, alert and oriented. The primary clinical impression was “concussion” and the secondary impressions included lumbar sprain and left shoulder sprain. The Claimant was discharged home in the care of family and given concussion instructions.

35. On January 26, 2015 PA Kari Cao examined Claimant at Clinica. Clinica is Claimant’s family medical provider. PA Cao’s office note reflects Claimant presented for follow-up after an MVA on January 24, 2015. The note states that Claimant’s chief complaint was back pain but there is no mention any head or concussion symptoms. Claimant stated that his back pain was relieved by flexeril, naproxen and Percocet, but he wanted to stop these medications because they made him sleepy. Claimant advised that he was feeling “much better” and needed a letter clearing him to “return to work at airport lifting bags and taxiing airplanes.” PA Cao reviewed the records of the imaging studies performed at NSMC on January 24. PA Cao assessed a strain of the lumbar paraspinal muscles with “Nml exam.” She released Claimant to return to work without restrictions but stated that he should wear a “brace support” in light of “heavy lifting.” PA Cao discontinued Percocet, continued Claimant’s other medications and recommended one or two sessions of physical therapy to teach “preventative exercises.”

FINDINGS OF FACT REGARDING COMPENSABILITY

36. Claimant proved it is more probably true than not that on November 29, 2015 he sustained a low back strain arising out of and in the course of and proximately caused by his employment as a ground operations worker for the Employer's airline.

37. Claimant credibly testified that on November 29, 2015 he and Petras were lifting a passenger from a wheelchair to an "aisle chair" when Claimant felt a "strain" in his low back. Claimant credibly testified that he requested medical treatment for the back injury and was referred to Concentra for treatment.

38. Claimant's testimony that he felt this strain is consistent with the fact that he reported it to Petras within at least 30 to 45 minutes of its occurrence and to Lester within approximately one hour of the occurrence. The ALJ recognizes that the testimonies of Claimant and Petras differ as to whether Claimant reported the injury contemporaneous with its occurrence, but the ALJ does not place great weight on this discrepancy. It is clear from the testimony of Lester and Petras that Claimant's alleged injury occurred during a busy time and Petras may not have recognized Claimant's statements (whatever their precise content) to be a report of injury. In any event, the credible and persuasive evidence establishes that Claimant timely reported the injury to his Employer before he left work late in the shift on November 29, 2015.

39. Claimant's testimony that he sustained a low back injury is generally corroborated by the contemporaneous medical records. When Dr. Strain examined Claimant on November 30, 2015 he gave a history of injuring his back while lifting a passenger out of a wheelchair. Not only did Dr. Strain note subjective complaints of tenderness, she also recorded that she "palpated" the lumbar spine and detected "left-sided muscle spasms." Dr. Strain credibly and persuasively opined that Claimant's history and reported mechanism of injury were consistent with the symptoms and PE.

40. Dr. Strain was not the only medical provider to detect lumbar muscle spasms shortly after the alleged injury. On November 30, 2015 and December 4, 2015 Claimant's physical therapists reported "increased muscle tone" of the lumbar paraspinal muscles. On December 8, 2015 PA-C Missey noted "right-sided muscle spasms" of the right lumbar paraspinal muscles. On December 14, 2015 and December 24, 2015 Dr. Sobanski noted "bilateral muscle spasms" when she palpated Claimant's lumbar spine. Dr. Cava reported bilateral muscle spasms when she examined Claimant's back on January 21, 2016, but not when Dr. Cava re-examined Claimant on March 17, 2016. Based on this medical evidence the ALJ finds that for approximately 2 months after the injury Claimant exhibited objective findings of lumbar muscle spasm that were noted by several qualified medical providers.

41. The ALJ finds there is no credible or persuasive evidence that the Claimant's back symptoms commencing November 29, 2015 were caused by a pre-existing condition or a prior injury. In this regard the ALJ notes that no physician has credibly opined that the Claimant's symptoms of back pain and muscle spasm were caused by some pre-existing degenerative condition. Indeed, the lumbar MRI taken on

December 22, 2015 was reportedly "normal." While there is evidence that Claimant sustained a back injury in the January 2015 MVA, there is no indication that after January 26, 2015 Claimant sought or received any kind of treatment for his low back until he was seen by Dr. Strain on November 29. Rather the evidence is that on January 26, 2015 PA Cao released Claimant to return to regular employment knowing that the employment required "heavy lifting." The ALJ infers from this evidence that there is a persuasive temporal relationship between the onset of Claimant's low back symptoms and the events of November 29, 2015.

42. The ALJ is not persuaded by Respondents' contention that Claimant's testimony should be found incredible because he failed to disclose the January 2015 back injury to the insurance adjuster (Williams), in his answers to interrogatories and to doctors Strain and Aschberger. Although it is clear from the TFD, NSMC and Clinica records that Claimant in fact sustained a back injury as a result of the January 2015 MVA, there is no credible or persuasive evidence that this back injury caused any prolonged symptoms and/or interfered with Claimant's ability to return to his regular job. Thus, the ALJ infers that the January 2015 back injury was not of much significance to Claimant and would not necessarily be recalled nearly a year later. Moreover, when Claimant answered interrogatories he disclosed the January 2015 MVA and that he was treated for the MVA at NSMC. The ALJ finds it improbable that if the Claimant were deliberately trying to conceal the January 2015 back injury from Respondents that he would have disclosed in answers to interrogatories the identity of a provider (NSMC) that possessed specific documentation of the back injury. Moreover, the ALJ declines to discredit Claimant's testimony that he does not recall the back injury because he sustained a concussion and consequent impaired memory from the January 2015 MVA. The ALJ notes that both the TPD records and the NSMC records document that Claimant's appeared to be somewhat impaired after the accident and during his treatment. The TPD documents note that Claimant's "affect" was abnormal and that a relative noticed he was answering questions slowly. At NSMC Dr. Morley specifically documented that during treatment Claimant "became slightly combative and anxious and repeating self – confused." Dr. Morley's "primary" impression was a "concussion" and lumbar strain was merely a "secondary" impression.

43. The ALJ is not persuaded by Respondents' contention that Claimant's testimony should be found incredible because Petras "disciplined" Claimant early in the shift and/or because Lester "extended" Claimant's shift. The ALJ infers that Respondents are contending that Claimant falsely reported the back injury in retaliation for the actions of Petras and Lester. However, the ALJ notes that there is no credible or persuasive evidence that Petras imposed or threatened to impose any kind of significant discipline on Claimant as a result of the issues that she discussed with him. Moreover, Lester credibly testified that the Employer had a contractual right to extend Claimant's shift and that such extensions had occurred in the past based on operational needs. In these circumstances the ALJ is not persuaded that the actions of Petras and Lester were sufficiently offensive to Claimant that they prompted him to make a false report of injury.

FINDINGS REGARDING AVERAGE WEEKLY WAGE

44. At hearing the parties agreed that based on Claimant's earnings during the 90 days prior to the date of injury Claimant's average weekly wage (AWW) would be $412.34. The parties further agreed that based on Claimant's earnings during the year prior to the date of injury Claimant's AWW would be $454.51. The parties disagreed as to which period of time should be used to calculate Claimant's AWW.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY

Claimant contends that he proved it is more probably true than not that on November 29, 2015 he sustained a compensable injury that was proximately caused by the performance of service arising out of and in the course of his employment as a ground operations worker. Respondents contend that Claimant's testimony concerning the alleged injury is not credible. The respondents also assert that if there was an incident on November 29 Claimant failed to prove the incident caused a "compensable" injury.

The Claimant was required to prove by a preponderance of the evidence that at the time of the alleged injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.* The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Act creates a distinction between an “accident” and an “injury.” The term “accident” refers to an “unexpected, unusual, or undesigned occurrence.” Section 8-40-201(1), C.R.S. In contrast, an “injury” contemplates the physical or emotional trauma caused by an “accident.” An “accident” is the cause and an “injury” is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable “injury.” A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

As determined in Findings of Fact 36 through 43, Claimant proved it is more probably true than not that on November 29, 2015 he sustained a low back strain arising out of and in the course of his employment and proximately caused by the employment. Claimant credibly testified that on November 29 he sustained a low back strain while lifting a passenger from a wheelchair to an “aisle chair.” Claimant’s testimony that he sustained a back injury is supported by the credible and persuasive opinion of Dr. Strain that Claimant’s history and reported mechanism of injury were consistent with his symptoms and PE. Claimant’s testimony is also corroborated by the lack of credible evidence showing that Claimant sought any medical treatment for back complaints between January 26, 2015 and November 30, 2015, and the medical records showing that after November 29 multiple medical providers assessed back strain and noted muscle spasms on palpation of the lumbar spine. Insofar as Respondents argue Claimant’s testimony is not credible, the ALJ disagrees for the reasons stated in Findings of Fact 42 and 43.

Respondents argue that even if there was an “incident” on November 29, 2016 Claimant failed to prove that the incident caused a “compensable injury.” In support of this proposition Respondents rely on Dr. Burris’s report stating that Claimant’s workup had been negative and “his examination is benign with no objective findings.” In the first place, the ALJ does not understand Dr. Burris to have opined that Claimant did not sustain a back strain as diagnosed by Dr. Strain, PA-C Missey and Dr. Sobanski and Dr. Aschberger. Rather, the ALJ understands that Dr. Burris opined that Claimant’s workup, including the MRI, did not reveal any structural injury and that there were no objective findings when Dr. Burris examined Claimant on April 1, 2016. Dr. Burris did not state that Claimant never exhibited any objective signs of injury or that Claimant had never sustained any injury. In any event, Dr. Strain credibly opined that Claimant sustained a back strain and credibly and persuasively prescribed treatment for that condition. Based on Dr. Strain's credible opinions the record establishes that the November 29, 2015 injury caused a need for medical treatment and is therefore "compensable."

Moreover, the Respondents stipulated at hearing that if the claim is found compensable then Claimant is entitled to temporary total and/or temporary partial disability benefits, with the amount to be determined, from December 1, 2015 through January 31, 2016. (Finding of Fact 3). The ALJ concludes that this stipulation amounts to an admission by Respondents that the Claimant's injury caused temporary disability and rendered the injury "compensable."

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

The ALJ concludes that Claimant's AWW is most fairly determined based on his earnings for the entire year prior to the date of injury. As established by Lester's testimony, the length of Claimant's shifts and his earnings vary based on the "operational needs" of the Employer. Indeed, the Employer has negotiated for the right to extend the hours of employees based on operational considerations. As a result, Claimant may be required to work extra hours on some days and may leave early on others.

In these circumstances the ALJ concludes that fairness requires that the ALJ consider as many weeks of earnings as possible when determining the Claimant's AWW. Moreover, Respondents have not posed any persuasive argument why Claimant's AWW is best determined by limiting consideration of Claimant's earnings to the 90-day period immediately prior to November 29, 2015. Indeed, the ALJ concludes that limiting consideration to the wages Claimant earned in the 90 days prior to November 29 runs a risk of skewing the AWW by failing to consider seasonal variations in the Employer's demand for Claimant's services. Conversely, consideration of Claimant's entire year of earnings avoids or limits the risk of seasonal variations.

The ALJ determines that Claimant's AWW is $454.51.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. On November 29, 2015 Claimant sustained a compensable injury arising out of and in the course of his employment.

3. Based on the parties' stipulation, Claimant is entitled to temporary total and/or temporary partial disability benefits for the period December 1, 2015 through January 31, 2016. The exact amount of these benefits remains to be determined.

4. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 14, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has proven entitlement to permanent total disability (PTD) benefits by a preponderance of the evidence.

2. Whether the claimant has proven entitlement to disfigurement benefits by a preponderance of the evidence.

FINDINGS OF FACT

1. The claimant is a 51 year-old woman who was employed with the respondent-employer at the time of her July 8, 2009 industrial injury.

2. The claimant had worked for the respondent-employer for more than thirteen years, and on July 8, 2009 the claimant's position entailed that she operate heavy machinery, specifically the claimant operated "triples," which are large forklifts designed to transport large amounts of freight at once. The claimant sustained a compensable injury to her left knee and shoulder on July 8, 2009 when the triple the claimant was driving struck a row of pallets.

3. The claimant underwent a left knee patellofemoral joint replacement on September 28, 2009 with Dr. Matthew P. Simonich.

4. The claimant returned to Dr. Simonich on February 8, 2010. He interpreted a post-surgery-MRI of the knee as being in excellent position with no evidence of loosening. However, this later proved to be in error, requiring revision surgery.

5. The claimant was seen for a Division IME (DIME) with Dr. Gregory Reichhardt on February 3, 2010. Dr. Reichhardt concluded that the claimant's left knee pain and left shoulder pain were related to her accident of July 8, 2009. Dr. Reichhardt did not find evidence of Complex Regional Pain Syndrome (CRPS). He did note a bone scan or stress thermogram would be reasonable, as well as a psychological evaluation. He opined that the claimant was not at MMI, but did provide a provisional rating of 3%

upper extremity for the shoulder and 16% for the knee. He recommended physical therapy for the left shoulder and evaluation with a pain psychologist.

6. The claimant underwent an EMG of the lower extremities which was interpreted to be normal by Dr. Sunku, a neurologist on March 15, 2010.

7. The claimant began treatment with Dr. Melody Denham on September 8, 2010, who ultimately diagnosed her with CRPS.

8. The claimant was evaluated by Dr. John Ogrodnick on September 12, 2012. She reported to Dr. Ogrodnick that she had “incredible pain” rated at 15/10 intensity while seated at rest. The claimant also complained that blue jeans rubbing against her knee was painful.

9. The claimant underwent a revision surgery to the left knee on July 24, 2012 and again on November 8, 2012.

10. The claimant underwent an MRI of the left shoulder which did not show any evidence of a rotator cuff tear, but instead showed mild bursitis and tendinosis with a degenerative cyst.

11. The claimant was seen by Annette Long, Ph.D. on November 12, 2012. The claimant underwent an MMPI, the results of which showed that she “presented with constant physical symptoms without adequate physical pathology.” However, Dr. Long opined that because the claimant had CRPS, her symptoms had an organic etiology rather than an emotional cause or other reason, thereby militating against the resulting profile of the MMPI.

12. The claimant returned to Dr. Reichhardt for a follow-up Division IME on February 13, 2013. Dr. Reichhardt noted the claimant had an EMG after his initial Division IME, which was normal.

13. The claimant returned again to Dr. Reichhardt on May 29, 2013. He opined that it is not medically probable that the claimant had a diagnosis of CRPS.

14. Dr. Reichhardt noted the psychological evaluation of Dr. Long and the results of the MMPI in her November 16, 2012 report. Dr. Reichhardt specifically noted that “contrary to Dr. Long’s assertion that a diagnosis of CRPS has been established, the diagnosis of CRPS has not been established.”

15. Dr. Reichhardt also noted that the claimant continued to take opioids contrary to the provisions of the Medical Treatment Guidelines.

16. Dr. Reichhardt opined the claimant was not at MMI pending his review of additional records regarding her knee surgery and psychological evaluation.

17. The claimant returned again to Dr. Reichhardt on October 2, 2013. The claimant reported to Dr. Reichhardt that:

- it was “impossible” to stand on her left leg.
- worst pain level of “15+”
- used to hunt and ride horses but “all that is gone now”
- inability to stand on leg for more than one minute without increasing pain
- gave up travel activity due to pain
- has to use a wheel chair for any public events

18. Dr. Reichhardt noted the August 21, 2013 evaluation of Dr. Jorge Klajnbart, wherein he noted that although the claimant was sensitive to light touch in her thigh, she is able to wear pants over the skin in the area, and is able to touch her own thigh without difficulty. Dr. Klajnbart also noted no atrophy in the lower extremity and that the claimant’s “vise-grip” sensation is quite subjective and out of proportion to physical findings to document, 15+ pain on a scale of 0-10.

19. Dr. Reichhardt concluded in his examination that there was no atrophy of her left lower extremity. Upon testing for range of motion of her shoulder and left knee, he noted he had concerns about whether the claimant was providing full effort on her examination, as he was unable to find a medically probable explanation for her presentation. Dr. Reichhardt issued a scheduled impairment rating for the left knee (39%), left shoulder (7%), and a mental impairment (6%). Dr. Reichhardt did not find that the claimant had CRPS.

20. The respondent filed a final admission of liability on December 3, 2013, after issuance of Dr. Reichhardt’s report. The claimant timely objected and filed an application for hearing.

21. The claimant presented to OTR Resources (Doris Shriver) at her attorney’s request on February 27, 2014.

22. Ms. Shriver concluded:

> The injuries that [the claimant] sustained on July 8, 2009 have eliminated work in the fork lift driving and home care fields, her work for 17 to 20 years. Any work requiring left upper extremity reaching, handling and fingering would be prohibitive for her due to pain.

> She cannot fully bear weight on her left leg. Her gross motor skills are ion the <0.1st percentile for workers, a score that mostly relates to endurance for work. She has emotional/behavioral challenges that would be evident to coworkers, supervisors and the general public. Workers traits are overall at the 2nd percentile compared to other workers or well below the expected level to earn any wage. When her current functional limitations are considered, [the claimant] is technically not capable of handling the mental and physical demands of a production pace for a full workday doing any work.
>
> At this time, [the claimant] is unfortunately not a good candidate for vocational rehabilitation. Her chronic pain levels and poor tolerance for activity make it impossible for her to engage in the vocational rehabilitation process.

23. The claimant testified at hearing that she experiences up to level “18-20” pain in her leg. She testified that “any pressure, even the slightest touch” to her knee causes an increase in pain. The claimant testified that jeans on her leg cause her “excruciating” pain. The claimant testified that just wearing her pants (not jeans) in the hearing room during her testimony caused her pain. The claimant also testified that sitting in a chair in court was more difficult for her than riding a horse. She further testified her pain simply sitting in court was a “13 out of 10”.

24. In September 2013, less than one month prior to the claimant’s evaluation with Dr. Reichhardt on October 2, 2013, the claimant traveled to Wyoming from Pueblo Colorado for a hunting trip. The claimant was photographed after having successfully taken an antelope. Despite the claimant’s allegation that any pressure caused increased pain her leg, and representation to Ms. Shriver that she only wears slip on shoes and cannot knee or use her left arm, she is photographed holding up the head of a pronghorn, resting on her left knee, smiling broadly for the photograph, and wearing hunting boots, not slip-ons. The claimant testified at hearing that she was “miserable” at the time the photograph was taken in.

25. Surveillance footage was admitted into evidence at the hearing. The surveillance taken on January 22, 2014 shows the claimant wearing jeans, cowboy boots and not using a cane while walking on uneven ground, as well as carrying material in both hands and bending.

26. Surveillance footage was admitted into evidence at hearing from March 18, 2014. The footage shows the claimant walking in what appears to be a barn area, with no cane. She is observed getting in and out of her vehicle without assistance and driving her vehicle even though her husband is with her and capable of driving instead. She is observed helping lift a piece of plywood and does not use a cane. She wears blue jeans and cowboy boots, swings her left arm above her head to put on a coat, and

closes the tail-gate of a pickup truck. She also uses her left hand to reach behind her to grab the seatbelt and laughs and smiles while driving with her husband riding in the passenger seat.

27. The claimant relies upon the opinions of Annette Long, Ph.D. in support of her claim for PTD. Ms. Long is a psychologist. She noted that the claimant tested within the normal range for intelligence. Dr. Long diagnosed the claimant with a mood disorder and opined that she did not believe the claimant was malingering.

28. The ALJ has weighed the testimony of Dr. Long and finds that the persuasiveness of her testimony is buttressed by her agreement with Dr. Reichhardt's analysis of the claimant's psychological condition. While Dr. Long's analyses were premised upon a diagnosis of CRPS, with which Dr. Reichhardt disagrees, the fundamental issue is that the claimant does experience consistent pain as a result of her industrial injury, regardless of how that pain is labeled.

29. Dr. Mann has been a treating physician for the claimant prior to her injury which is the subject of this claim and is an ATP in this matter. He testified regarding his records and treatment of the claimant. He opined regarding the claimant's restrictions, including documents he completed in 2011 for submission to the Social Security Administration (SSA) in support of the claimant's application for Social Security Disability (SSDI). He confirmed that the basis for his assignment of limitations was that the claimant had severe CRPS. He further noted that he issued restrictions for her in conjunction with her Social Security application based on the claimant's subjective report and without any physical exam of the shoulder.

30. The ALJ finds Dr. Mann's ultimate conclusions to be based upon the claimant's consistent pain complaints regardless of the nomenclature used to describe those pain complaints.

31. Dr. Mann testified that his understanding of the claimant's activity level and pain was based on her subjective report and what was memorialized in the reports of other physicians about the claimant's reports of pain and that his opinion is not complete without having an opportunity to review video surveillance of the claimant and photographs documenting her actual activities.

32. Dr. Mann testified that he would have to take into account the video and photographic evidence of the claimant's activities to ultimately determine if her complaints of pain were accurate.

33. Dr. Denham testified by deposition and live at hearing. Dr. Denham testified that the claimant's diagnosis was chronic pain from CRPS. She opined that the claimant actually had more severe limitations than indicated by Dr. Mann in his February 10, 2011 questionnaire submitted in connection with the claimant's application for Social Security benefits. Dr. Denham also endorsed the restrictions set forth in the report of Ms. Shriver.

34. Dr. Denham testified at hearing that the medications she has been prescribing for the claimant are appropriate, and she disagreed with any opinion to the contrary, including that of Dr. D'Angelo, who did not have Dr. Denham's "expertise."

35. The ALJ finds that Dr. Denham's testimony is credible and persuasive. Here again, the ALJ finds Dr. Denham's ultimate conclusions to be based upon the claimant's consistent pain complaints regardless of the nomenclature used to describe those pain complaints.

36. Dr. Kleinman testified as an expert in both psychology and forensic psychiatry. Dr. Kleinman was present for the claimant's hearing testimony, including the review of the video and photographic evidence submitted in the matter. He opined that the claimant has no limitations from a mental health perspective that would prevent her from working.

37. Dr. Kleinman opined that based on the evidence of the claimant's actual level of functioning, she was misrepresenting her capabilities. He noted that contrary to her represented capabilities, she is able to feed and work around horses with no cane, can be in a parade holding a flag with her left arm, and drives even when her husband is with her. Further, Dr. Kleinman noted that even if the claimant is taking the medications recommended by Dr. Denham, the objective evidence shows that she is capable of functioning. Further, he noted that she demonstrated no cognitive impairment, no difficulty remembering dates, was detailed and coherent, knew placement and had no evidence of cognitive impairment in her detailed court testimony.

38. Dr. Kleinman opined that he believed the claimant was consciously misrepresenting her symptoms. The ALJ does not find Dr. Kleinman's analyses and opinions credible or persuasive.

39. The ALJ has considered the totality of the evidence and finds to the extent that the claimant asserts that her medication regimen is hampering her functional/cognitive ability, the ALJ finds this is a work-related consequence of her injury since she does have chronic pain directly related to the industrial injury.

40. Katie Montoya was accepted by the court as an expert in vocational evaluation and assessment. She completed a vocational assessment on March 20, 2014 and issued a report on that date and an addendum on July 16, 2014. She testified that her assessment consisted of meeting with the claimant, reviewing records, completing vocational research and formulating her opinion. She also testified that she had reviewed the video and photographic evidence introduced at hearing in the matter. She testified that after completing her evaluation, it was her opinion that the claimant was capable of working in the relevant labor market. Ms. Montoya based her opinion on the claimant being limited to first Sedentary and later Light work per the opinion of Dr. D'Angelo.

41. The ALJ finds Ms. Shriver's analyses and opinions to be more credible and persuasive than that of Ms. Montoya.

42. The ALJ has also considered the lay witness testimony presented by the claimant apart from the claimant herself. This includes the testimony of the claimant's sister, daughter, husband, Debra Griggs, and Raymond DeViase. The ALJ has weighed the testimony of these witnesses, and finds the testimony is credible and persuasive.

43. The claimant is currently 51 years of age with a GED in 1985. Her employment background reveals that she has always done manual labor involving the ability to ambulate and lift heavy weights. The claimant's past relevant work is that of a housekeeper; personal care assistant; and warehouseman. Furthermore the claimant testified that she cared for an adult foster child for over 20 years who had the intellect of an 18 month old and due to her inability to lift and transfer this individual had to give her up. This was another emotional blow following from the claimant's injury that sent her into a deeper depression.

44. The ALJ finds that the claimant is credible with respect to the portions of her testimony and her presentations to physicians relevant to the finding of her inability to earn wages.

45. The ALJ has considered the evidence and finds the opinions of Drs. Long, Denham, Mann and Ms. Shriver to be more persuasive than the opinions of Drs. D'Angelo, Kleinman and Ms. Montoya. The great weight of the evidence indicates that the claimant is permanently incapable of earning a wage in her previous or other employment. The claimant's demonstrated activities through the video and photographs after her date of injury as observed by the ALJ does not persuasively discredit the claimant's premise that she is permanently and totally disabled pursuant to the Workers' Compensation Act of Colorado.

46. The ALJ finds, based upon a totality of the evidence, that the claimant has established that it is more likely than not that she cannot earn any wages at her former or other employment, and is thus, permanently and totally disabled.

47. The ALJ finds that as a result of her July 8, 2009 work injury, the claimant has a visible disfigurement to the body consisting of a surgical scar traveling vertically over the kneecap approximately 12 inches in length and three-quarters of an inch in width at its widest; the scar is discolored when compared to the surrounding tissue. The claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to additional compensation.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

2. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

3. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S.

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claims Appeals Office,* 5 P.3d 385, 389 (Colo. App. 2000).

5. When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936).

6. In resolving inconsistencies the ALJ may credit all, part or none of an expert's testimony, and the ALJ's failure to cite an expert's opinion inherently reflects that the ALJ did not find it persuasive. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

7. It is within the ALJ's purview as the finder of fact to determine the credibility of the witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

8. Permanent total disability is defined as the inability to earn "any wages in the same or other employment*." § 8-40-201(16.5) (a), C.R.S.; Christie v. Coors Transportation Co., 933 P.2d 1330 (Colo. 1997).* Under this statute, a claimant is not permanently and totally disabled if she is able to earn some wages in modified, sedentary, or part-time employment. *McKinney v. Indus. Claim Appeals Office, 894 P.2d 42 (Colo. App. 1995).* The claimant carries the burden of proof to establish permanent total disability by a preponderance of the evidence. The question of whether the claimant has proven permanent total disability is a question of fact for resolution by the ALJ. *Id.*

9. A claimant is required to prove a direct causal relationship between the industrial injury and the resulting permanent total disability, which necessitates a determination of the nature and extent of his residual impairment from the industrial injury. *Joslin Dry Goods Co. v. Indus. Claims Appeals Office, 21 P.3d 866 (Colo. App. 2001); Seifried v. Indus. Comm'n, 736 P.2d 1262 (Colo. App. 1986*).

10. In determining whether the claimant is unable to earn any wages, the ALJ may consider a number of "human factors." *Christie*, 933 P.2d 1330. These factors include the claimant's physical condition, mental ability, age, employment history, education and the "availability of work" the claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). Another human factor is the claimant's ability to obtain and maintain employment within his physical abilities. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). This is because the ability to earn wages inherently includes consideration of whether the claimant is capable of getting hired and sustaining employment. *See Christie,* 933 P.2d 1330; *Cotton v. Econ. Lub-N-Tune*, W.C. No. 4-220-395 (I.C.A.O., Jan. 16, 1997), *aff'd Econ. Lub-N-Tune v. Cotton*, No. 97CA0193, (Colo. App. July 17, 1997). The test for determining the "availability of work" is whether employment exists "that is reasonably available to claimant under his or her particular circumstances." *Christie,* 933 P.2d 1330*; Bymer*, 955 P.2d 550.

11. The overall objective of this standard is to determine whether, in view of all the other factors, employment is “reasonably available to the claimant under his or her particular circumstances.” *Bymer*, 955 P.2d 550. In order for an industrial injury to be the cause of permanent total disability, the injury must be “significant” in the sense that there is a direct causal relationship between the participating event and the resulting disability. *Seifreid*, 736 P.2d 1262.

12. The respondents are not required to prove the existence of a particular job, which a particular employer has made available to the claimant. *James V. Wetherfred, Affirmed v. Indus. Claim Appeals Office,* No. 96CA0275 (Colo. App. Sept. 5, 1996) (not selected for publication).

13. The ALJ has credited as persuasive the testimony of the claimant regarding her physical and cognitive impairments. As found, the persuasiveness of the claimant’s hearing testimony and reports of subjective symptoms and limitations to medical providers and vocational experts is buttressed by the totality of the evidence*.*

14. As found, Ms. Shriver’s conclusions regarding the claimant’s employability are credible and persuasive.

15. As found, the opinions of Drs. Long, Denham, Mann are credible and persuasive.

16. Ms. Montoya’s opinions identified several positions within claimant’s labor market which Ms. Montoya states are within the claimant’s permanent restrictions. The ALJ rejects these positions as not being “reasonably available to claimant under his or her particular circumstances.” *Christie,* 933 P.2d 1330*; Bymer*, 955 P.2d 550.

17. As stated above, the determination of permanent total disability benefits is based on the claimant’s physical condition, age, employment history, education and availability of work. *Christie*, 933 P.2d at 1330; *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). Using these factors, as found above, the ALJ concludes that the claimant is not capable of earning a wage in her former or other employment.

18. The totality of the evidence, as found by the ALJ, supports that the claimant has established by a preponderance of the evidence, that she is permanently totally disabled. *McKinney v. Indus. Claim Appeals Office, 894 P.2d 42 (Colo. App. 1995).*

19. The ALJ concludes that as a result of her July 8, 2009 work injury, the claimant has a visible disfigurement to the body as found above. The ALJ concludes that the claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to additional compensation. Section 8-42-108 (1), C.R.S. The ALJ concludes that the claimant is entitled to a disfigurement award of $1,200.00 as a result of that disfigurement.

ORDER

It is therefore ordered that:

1. The respondent shall pay the claimant permanent total disability benefits commencing on September 11, 2013, the date of MMI, subject to any applicable credits and offsets.

2. The respondent shall pay the claimant $1,200.00 for disfigurement. The respondent shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. The respondent shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 15, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

Whether the claimant's total right hip arthroplasty as recommended by Dr. Brian White is reasonable, necessary, and related to the claimant's industrial injury of June 14, 2014.

FINDINGS OF FACT

1. This is an admitted claim wherein the claimant suffered injuries to his right shoulder, neck, and hip as the result of a slip and fall on June 14, 2014.

2. On June 14, 2014 the claimant slipped on slick concrete flooring in the respondent-employer's store, landing on his right side. He fell mostly onto his right hip and right shoulder. The claimant felt right hip and right shoulder pain.

3. The claimant was seen at the emergency room at Pikes Peak Regional Hospital that same day. X-rays were performed on the claimant's right hip which revealed a "well corticated osseus fragment along the superior aspect of the acetabulum." The interpreting physician noted that the rim fracture was "well-corticated and . . . likely chronic." He noted there was no acute fracture.

4. The claimant saw Dr. Michael Huang on July 21, 2014 for a surgical consultation. Dr. Huang ordered X-rays and MRIs of the claimant's right shoulder and right hip. With regard to the hip, Dr. Huang noted that the claimant had a superior labral cyst associated with a tear. He indicated that the tear would heal on its own. The ALJ infers that this means the tear was acute and directly related to his industrial injury. Dr. Huang discussed possible surgical treatment of the claimant's hip conditions in order to reduce the claimant's pain. Specifically, he discussed possible hip joint debridement and repair as well as surgery to address the claimant's cam lesion.

5. The claimant underwent arthroscopic shoulder surgery with Dr. Huang on October 16, 2014.

6. The claimant underwent right hip surgery on January 28, 2015. The claimant's January 28, 2015 arthroscopic hip surgery consisted of smoothing out the frayed area of the labrum, removal of a cyst next to the frayed labrum, and removal of

some of the boney degenerative changes in the hip bones.

7. The claimant followed up initially with Dr. Huang about a week later. The first hip surgery helped the claimant's pain for a little while. However, about two months after the surgery, the claimant saw Dr. Huang again and complained of tension and soreness in his hip. The claimant repeated his concerns to Dr. Huang one month after that. Following the hip surgery, the claimant observed that at first things seemed "OK" and he was slowly improving. But after a short period of time, the pain in his right hip joint began to return. His hip was very tender and when he would walk, he would feel a sharp pain in his hip and groin area. His hip pain has increasingly worsened since that time and he has never gotten his strength back. If he sits for long periods of time, his pain worsens. The claimant testified that told his physical therapist when his pain began to return. He also told Dr. Huang when his pain returned and he thought that Dr. Huang spoke with the physical therapist and changed his physical therapy protocol.

8. On January 30, 2015, the respondent-insurer filed an Amended General Admission of Liability (GAL), admitting for temporary disability benefits and medical benefits.

9. On June 22, 2015, the claimant's physical therapist noted that the claimant was at baseline with regard to his hip. The claimant denies that this was a correct assessment.

10. On October 27, 2015, the claimant presented to Dr. Albert Hattem at Concentra regarding his various injuries. The claimant complained of persistent right hip, right shoulder, and neck pain. Dr. Hattem performed a complete review of the claimant's medical history for his admitted injury. Given the claimant's poor recoveries from the hip and shoulder surgeries, Dr. Hattem recommended that the claimant not undergo cervical spine surgery. Dr. Hattem referred the claimant to Dr. Brian White for a second orthopedic opinion.

11. On December 2, 2015, the claimant saw Dr. White per Dr. Hattem's referral. Dr. White opined that another arthroscopic debridement would not likely succeed in improving the claimant's pain. Instead, Dr. White recommended a total hip replacement. With regard to relatedness, Dr. White stated, "I think that this should be authorized by Workers' Compensation because he has had the original surgery authorized and it just did not work."

12. On December 20, 2015, the claimant underwent cervical spine surgery to a C7 herniated disc in order to treat his ongoing shoulder pain.

13. In response to Dr. White's request for right hip replacement surgery, the respondent-insurer submitted the question to Dr. Marc Steinmetz for a peer review. Dr. Steinmetz, on December 24, 2015, issued his report addressing the reasonableness, relatedness, and necessity of the right hip replacement surgery. Dr. Steinmetz opined that the claimant was a poor surgical candidate for a right hip replacement. He noted that the claimant's poor responses to his prior shoulder and hip surgeries, as well as his diabetes, placed him at an increased risk of a poor outcome. Dr. Steinmetz also felt that the claimant's labral tear in his hip was a chronic, degenerative tear that predated the claimant's admitted injury.

14. The parties conducted a pre-hearing evidentiary deposition of Dr. Brian White, examining Dr. White with regard to his opinion as to why he believed a total hip replacement was reasonable, necessary, and related to the industrial injury. Dr. White testified at the request of the claimant. Dr. White opined that the mechanism of injury on 6/14/2014, as described by the claimant, is consistent with a labral tear injury. Dr. White agreed that the claimant probably had preexisting degeneration in his right hip but that this degenerative condition was asymptomatic prior to the fall. He explained "it makes sense to me that even if there was a preexisting condition to some degree, in other words if the labral tear, if it was asymptomatic before the fall and became symptomatic after the fall, then the fall has something to do with where he was functioning".

15. When asked whether it is common to see asymptomatic degenerative labral conditions in individuals who then have a trauma and are thereafter symptomatic, he stated "yes, we do see injuries that create asymptomatic hips-or symptomatic hips from something that was asymptomatic." He also opined that it is not unusual to see labral tears which are asymptomatic and don't cause the individual any problems. He further testified that evidence of a loose body consistent with an acetabular rim fracture also supports his theory that the claimant's preexisting condition was aggravated by the fall at work. He also testified that it is possible that the rim fracture was a result of the fall on June 14, 2014. He opined that if there is a piece of loose body floating in the hip joint (such as from an acetabular rim fracture), it is likely that loose body will cause pain because it is very destructive and can damage the joint more significantly than if it were not present.

16. Dr. White also opined that he would not recommend another revision hip scope on the claimant because the chances of it being successful are very slim. He testified that a revision hip scope is a "massive waste of money." Dr. White disagreed with Dr. Marc Steinmetz, the respondents' IME physician, on many issues. When asked whether he felt the claimant simply contused and sprained/strained his hip, he testified

that “a contusion and sprain wraps up in about two, three, four weeks. Usually doesn’t last beyond that.” He opined that what happened to the claimant’s hip was something greater than simply a strain or sprain.

17. When questioned about Dr. Steinmetz’ opinion that the labral tear was chronic and preexisting, Dr. White opined that the MRI did show that the labral tear was somewhat chronic, which was to be expected. He further stated that “even if the labral tissue appeared degenerative and appeared as though it is chronic....we don’t really have the ability, Number 1, to prove that. And Number 2, it certainly may have been but it certainly was not symptomatic.” He based this opinion on the fact that an MRI was not done prior to the claimant’s fall, so it is impossible to know exactly what was happening in the hip joint prior to 6/14/14. He further opined that the claimant’s fall has to be implicated as one of the causes of the claimant’s hip problems because the claimant was asymptomatic before the fall and became symptomatic after the fall.

18. Dr. White explained that he disagreed with Dr. Hattem’s assessment that the claimant is not a good surgical candidate because of his preexisting diabetic condition as well as his prior poor surgical outcomes. Dr. White testified that although there is a slightly higher increased rate of infection in diabetics, it’s less than 2 or 3 percent. The claimant’s preexisting diabetes does not make surgery a bad idea for him. With regards to Dr. Hattem’s recommendation of a psychological evaluation, Dr. White opined that “it is fine” if the claimant undergoes one but he doesn’t think it will play a big role in whether or not the claimant is a good candidate for surgery.

19. Dr. White also stated that, if the fall had never happened, it is impossible to predict that the claimant’s preexisting hip degeneration would have been progressive over time to the point he would ever need a hip replacement. If this fall had never happened and the claimant’s hip remained asymptomatic, Dr. White testified that he would not have recommended a hip replacement at this time.

20. Finally, Dr. White opined that the one physical therapy note in July 2015 (which stated the claimant had returned to baseline), was not concerning because many times an individual who has undergone hip arthroscopy will have a period where they are doing pretty well and then “it all falls apart.” He had a hard time believing that when he saw the claimant in his clinic that the hip he examined was perfectly normal and perfectly back to baseline three months before.

21. The ALJ finds that Dr. White’s analyses and opinions are credible and more persuasive than medical analyses and opinions to the contrary.

22. The ALJ finds the claimant to be credible.

23. The ALJ finds that the claimant has established that it is more likely than not that the total right hip arthroplasty recommended by Dr. White is reasonable, necessary, and related to the claimant's industrial injury of June 14, 2014.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in §8-40-101, *et seq*. C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. See §8-40-102(1).

2. A workers' compensation case is decided on its merits. §8-43-201(1).

3. Facts in a workers' compensation case must be interpreted neutrally neither in favor of the rights of the claimant nor in favor of the rights of the respondents. See §8-43-201, C.R.S.

4. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved: The ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. The ALJ's decision need not address every item contained in the record. See *Magnetic Engineering, Inc., v. ICAO,* 5 P. 3d 385 (Colo. App. 2000).

5. The claimant has the burden of proof to establish the right to specific medical benefits by a preponderance of the evidence. §8-43-210, C.R.S. See, *Valley Tree Service V. Jimenez,* 787 P.2d 658 (Colo. App. 1990). A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true than not. See *Page v. Clark,* 593 P.2d 792 (Colo. 1979).

6. When determining credibility, the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness; and whether the testimony has been contradicted

and the bias or prejudice of the witness. See *Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936).

7. Whether the moving party has met its burden of proof is a question of fact for resolution by the ALJ whose determinations are to be based upon substantial evidence in the record. See *Suetrack USA v. Industrial Claims Appeals Office,* 902 P.2d 864 (Colo. App. 1995).

8. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Snyder v. Industrial claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis,* 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder,* supra. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before the request benefits are awarded. §8-41-301(1)(c) C.R.S. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). Whether the claimant has sustained his burden is a question of fact of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

9. The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission,* 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210. 236 P.2d 293 (1951). All results flowing proximately and naturally from an industrial injury are compensable. See, *Standard Metals Corp. V. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

10. In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H*

Warehouse v. Vicory, 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

11. The ALJ concludes that the claimant is credible.

12. The ALJ concludes that the analyses and opinions of Dr. White are more credible and persuasive than analyses and opinions to the contrary.

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that the total hip arthroplasty recommended by Dr. White is reasonable, necessary, and related to the claimant's industrial injury of June 14, 2104.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent shall authorize and pay for treatment for the claimant's total right hip arthroplasty as recommended by Dr. White.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 15, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant has established by a preponderance of the evidence that on November 28, 2015 he suffered a compensable injury arising out of and in the course of his employment with the respondent-employer; and,

2. If so, whether the claimant has established by a preponderance of the evidence that the surgeries recommended for his shoulder and biceps conditions are reasonable, necessary, and related to the injury.

3. The parties stipulated to an AWW of $653.85, if the claim is compensable.

FINDINGS OF FACT

1. The claimant began working for the respondent-employer as a chef on April 7, 2015. His job duties as a chef for the respondent-employer consisted of many physically demanding tasks such as lifting cases of potatoes, pots full of water, and other heavy items used in a kitchen to produce large quantities of food. He had no difficulties performing these strenuous duties from the beginning of his employment through November 28, 2015.

2. The claimant testified at hearing that on November 28, 2015, at approximately 5:30 p.m., he was moving items from the prep kitchen to the walk-in freezer. He explained that the primary kitchen used for cooking is upstairs, and that the prep kitchen and walk-in freezer are downstairs.

3. As the claimant was pulling a cart loaded with food into the walk-in freezer, the cart became caught on a small step leading into the freezer, causing him to slip and lose his balance. The claimant attempted to stop his fall by sticking his arm out to grab the large rack next to him. His arm became stuck in the rack, he fell to the ground, and twisted his arm.

4. The claimant immediately felt a popping sensation in his right biceps. He testified that he has had both of his biceps repaired in the past and the sensation he experienced on November 28, 2015 was a sensation he recognized from the past injuries.

5. The claimant did not believe anybody witnessed the actual fall, but a co-worker, Mr. Sean Gore, came to his aid quickly and helped him up off of the floor. The claimant and Mr. Gore had a brief discussion about what had just happened, at which time the claimant showed his arm to Mr. Gore.

6. Mr. Gore testified at hearing regarding his recollection of the events from the evening of November 28, 2015. He had worked with the claimant for the respondent-employer from approximately October through December of 2015 as a prep cook and would interact with the claimant "all the time" at work. Mr. Gore never witnessed the claimant have any physical problems performing activities with his right arm prior to November 28, 2015.

7. Mr. Gore testified that he recalled an event at work where the claimant had fallen in a freezer. He remembered that he had just crossed paths with the claimant on his way back upstairs when he heard the claimant "scream out" as he was turning the corner. Mr. Gore turned around, proceeded back to the freezer, and noticed the door was open and the claimant was on the floor. He helped the claimant up off of the ground.

8. Mr. Gore specifically recalled asking the claimant if he was okay, to which the claimant replied, "No, my arm is hurt."

9. The claimant testified that he immediately went upstairs to tell the manager, Ms. Debbie Neugebauer, about what had just occurred. She filled out a form and instructed the claimant to go to the hospital. The claimant called his wife to come get him to take him to the hospital.

10. The claimant presented to the emergency room at St. Thomas More hospital on the evening of November 28, 2015 and was admitted at 7:18 pm. The report states, "The patient is a 55 year old male, who presents to the ED with his wife complaining of back pain, and right arm pain. He states that he was working in (sic) pulling a food cart into the walk-in freezer when the wheels got caught and he fell, landing with his back against the step and twisting his right arm." It was documented that the claimant was complaining of right arm and mid-back pain. The claimant was forthcoming about the fact that he had previously ruptured his biceps in the past and has had rotator cuff surgery.

11. Pamela Drummond, NP, documented, "Based on the patient's physical assessment, it appears that the right bicep, has torn and ruptured." She advised him to ice the area to decrease the swelling. During a triage assessment at 7:36 pm, another

nurse, Christie Good-Plutt, RN, documented that the claimant was having pain and swelling.

12. Steven Quakenbush, PA-C, examined the claimant at CCOM on December 2, 2015. Mr. Quakenbush referred the claimant for an MRI of the right shoulder and right elbow with attention on the distal biceps, along with an MRI of the lumbar and thoracic spines. He assigned the claimant with restrictions of no lifting more than 1 pound with his right upper extremity and to alternate walking, standing, and sitting every half hour as needed during work.

13. The claimant was first examined by Dr. Richard Nanes during his follow-up to CCOM on December 10, 2015. He explained the same mechanism of injury to Dr. Nanes and that he recalled a “popping sensation” in his distal right biceps at the time of the incident. The claimant also reported to Dr. Nanes that his right shoulder symptoms had worsened by the day after the incident. The claimant further reported to Dr. Nanes that he did have a right rotator cuff repair two years ago and a right distal biceps repair approximately four years ago, both of which resolved without residual problems.

14. Dr. Nanes’ physical examination on December 10, 2015 documented that the claimant was only able to abduct his arm to 90 degrees and was very painful. He also noted that the claimant had tenderness at the right antecubital fossa and that the “Tendon appears to be retracted.” The claimant also had pain with full range of motion of his thoracic spine.” He noted that the claimant was to see orthopedist, Dr. Karl Larsen, on December 16, 2015 and that “he will probably need ortho care for his right shoulder.”

15. An MRI of the right shoulder and right elbow were performed on December 11, 2015. The radiologist believed the right shoulder MRI showed tendinosis and thinning with partial articular surface tear of the supraspinatus tendon, tendinosis and partial articular surface tear of the infraspinatus tendon, and thickening and tendinitis through the subscapularis tendon. The radiologist noted there was some thinning of the right biceps tendon, but did not see a tear.

16. Dr. Karl Larsen examined the claimant for the first time on December 16, 2015. Dr. Larsen documented that the claimant has had pain in the anterior and lateral elbow with limited use of the arm “in terms of gripping and forceful pushing activities.” Physical examination revealed “obvious proximal migration of the biceps compared to the contralateral side.” Dr. Larsen suspected that the claimant had a “delaminating” injury where he has torn through the sutures and previous tendon repair, “which is

certainly visible on the MRI" and which is "clearly evidenced by the proximal migration of the biceps…."

17. Dr. Larsen plainly stated "This is not going to improve on its own and the options are to just live with his deficient biceps or consider a revision repair." On December 22, 2015, Dr. Larsen requested prior authorization for a right arm revision distal biceps repair and possible allograft.

18. The claimant followed up with Mr. Quakenbush on December 21, 2015. It was noted that Dr. Larsen recommended surgery for the right biceps and that he also referred the claimant to Dr. Derek Purcell for evaluation of his right shoulder supraspinatus tendon tear.

19. Dr. Purcell examined the claimant on December 24, 2015. He noted that the claimant has a right sided distal biceps rupture and likely high grade partial thickness tear at the right long head of the biceps. Dr. Purcell personally reviewed the MRI films during the examination and opined that the claimant has a full thickness tear in the supraspinatus and a high grade partial thickness tear of the superior margin of the subscapularis, along with significant tearing at the long head of the biceps within the proximal bicipital groove.

20. Dr. Purcell discussed the claimant's options with him. He explained to the claimant that conservative methods would be futile and that the "rotator cuff will not heal on its own." On December 30, 2015, Dr. Purcell requested prior authorization for a right shoulder arthroscopic rotator cuff repair, subacromial decompression, distal clavicle resection, and biceps tenodesis.

21. Dr. Nanes was sent a letter by the claimant's counsel asking for his opinion regarding causation of the claimant's injuries and his need for surgery. Dr. Nanes opined that the claimant's mechanism of injury was consistent with his physical exam and imaging studies. He also opined that the claimant sustained a compensable injury on November 28, 2015 and that the surgical repairs for both the claimant's right shoulder and right biceps were reasonable and appropriate for the injuries he sustained. Dr. Nanes concluded, "In summary, I am not sure why his surgeries have been denied unless the insurance company has further information that I am not aware of."

22. Dr. Derek Purcell was also sent a letter by the claimant's counsel asking for his opinions in regards to the claimant's injuries. Dr. Purcell explained in detail how the claimant's mechanism of injury causes loading of the shoulder that may lead to rupture/tearing of the rotator cuff, long head of the biceps, or long head of the biceps

insertion at the superior labrum. He also explained that this mechanism of injury was consistent with his findings on physical examination that revealed weakness of the rotator cuff on external rotation, thumbs down abduction, and abduction. Dr. Purcell expressed that his review of the MRI was consistent with a full-thickness tear of the supraspinatus and associated high grade partial-thickness tear of the superior margin of the subscapularis. Dr. Purcell concluded, “Within a reasonable degree of medical probability, [the claimant] sustained this injury to his right shoulder secondary to his fall on 11/28/2015.” Dr. Purcell gave a detailed explanation as to why he was recommending each specific procedure, explained that the claimant’s injuries will not heal on their own, and that the surgeries being requested were reasonable, necessary, and appropriate.

23. Dr. Jack Rook performed an independent medical examination of the claimant on March 29, 2016. Dr. Rook documented the claimant’s mechanism of injury as him falling forwards, getting his right arm caught in the shelving, resulting in his body twisting and falling to the ground. Upon physical examination, Dr. Rook noted an obvious deformity with bunching of the biceps muscle in the distal upper arm. Examination of the right shoulder revealed moderate to severe tenderness of the anterior shoulder capsule, the subacromial space, and the right upper trapezius muscle. Evaluation of the thoracic spine revealed tenderness of the mid thoracic spinous process and tenderness along the right-sided thoracic paraspinal musculature.

24. Dr. Rook diagnosed the claimant as having right shoulder rotator cuff and biceps tendon ruptures, right elbow biceps tendon rupture, thoracic strain, and sleep disturbance related to pain associated with his injuries. Dr. Rook concluded that it was his expert opinion within a reasonable degree of medical probability that he developed an acute on-the-job injury involving his right upper extremity and back when he fell on November 28, 2015. Dr. Rook believes his conclusion was supported by the fact that the claimant developed immediate pain and deformity in his right arm after the slip and fall, that he was having no problems with his right upper extremity prior to this injury, he was having no functional deficits prior to this injury, and that there are no medical records between the treatment for his right upper extremity years ago and the current injury to suggest that his condition is related to his previous injuries. Dr. Rook also noted that multiple physicians, including the claimant’s ATP, have all uniformly agreed that the claimant sustained a compensable injury. He agreed with the surgical procedures requested by the claimant’s treating surgeons as being reasonable, necessary, and related to the work incident.

25. Dr. Jon Erickson performed an IME of the claimant on March 31, 2016 and authored his report on April 13, 2016. His physical examination of the claimant

documented weakness and pain to resisted right elbow flexion and resisted forearm supination. Dr. Erickson also noted that there was “obvious shortening of the biceps muscle.” Dr. Erickson’s interpretation of the MRI results led him to believe that there was no evidence of an acute trauma to the shoulder. He further concluded that none of the claimant’s imaging or physical findings, “save for the shortened distal biceps deformity,” were consistent with an acute rupture of the distal biceps. Dr. Erickson did admit that he has “no explanation for the obvious inconsistency.”

26. The respondents’ Exhibit K is the respondent-employer’s surveillance video taken during the evening of November 28, 2015, when the slip and fall incident occurred. The video spans from 4:52:01 p.m. to 6:12:28 p.m. of that evening. At 4:52:58, the video shows the claimant exiting the elevator pushing a cart into the prep kitchen area downstairs. The video then shows the claimant bring the cart back upstairs in the elevator at 4:58:02. While getting on the elevator it is apparent that the claimant is favoring his right arm and avoids using it to move the cart. At 5:06:26, Mr. Gore is seen exiting the elevator with a mop and bucket. He is then seen at 5:07:06 entering into the prep kitchen area where the walk-in freezer connects to. Mr. Gore remains in this area and the claimant exits the elevator and walks into the prep kitchen area at 5:12:50. Approximately 40 seconds later, the claimant is seen exiting the prep kitchen area back into the view of the surveillance camera. At 5:13:36, the video clearly shows the claimant examining the upper portion of his right arm. A few seconds later, he is seen comparing the right arm to his uninjured left arm. At 5:13:54, the claimant is shown lifting up his sleeve and looking directly at his right biceps. He then goes up the elevator out of view to report the injury to his supervisor.

27. The claimant explained during cross-examination that they have multiple carts that they use at work. The claimant explained that the cart he was pulling that was loaded with food was already in the prep kitchen and it was a completely different cart than the empty one that was seen being brought back upstairs in the elevator. He explained that they had already brought the food downstairs throughout the day and that “We go up and down the…. elevator constantly. There’s food all over the place” and that there is no storage in the upstairs kitchen.

28. Dr. Rook testified at hearing consistently with his written report. He recounted the claimant’s mechanism of injury as, “He started to fall. He got his right arm caught in a metal rack, which caused a traction injury to his arm as he fell to the ground.” Dr. Rook explained that a traction injury causes pulling or tugging on the arm as a result of the claimant’s 200+ pounds trying to be supported by only his right arm. He explained that this mechanism of injury was reasonably likely to cause a rotator cuff tear and biceps ruptures. It also caused a thoracic strain due to the twisting and falling.

29. When asked about whether the specific procedures requested by the claimant's treating surgeons were reasonable, necessary, and related, Dr. Rook expressed that he is not an orthopedic surgeon, but there is obvious deformity in the claimant's arm that needs some sort of procedure to be corrected. Dr. Rook was clear though that if the claimant does need surgery as recommended by both of his treating surgeons and ATP, that it was related to the occupational injury because he was having no functional loss or other problems with the right upper extremity prior to this incident.

30. The claimant's supervisor and the owner of the business, Ms. Debbie Neugebauer, confirmed that the claimant had no problems with the physical demands of his job at any time prior to November 28, 2015.

31. The ALJ finds the analyses and opinions of Dr. Larsen, Dr. Purcell, Dr. Rook, and Dr. Nanes to be credible and more persuasive than medical analyses and opinions to the contrary.

32. The ALJ finds the claimant to be credible.

33. The ALJ finds that the claimant has established that it is more likely than not that on November 28, 2015 he suffered injury to his left upper extremity and his thoracic spine arising out of and in the course of his employment with the respondent-employer.

34. The ALJ finds that the claimant has established that it is more likely than not that the surgeries, as recommended by Dr. Larsen and Dr. Purcell to cure or relieve him from the effects of his injury, are reasonable, necessary, and related to the industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

2. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

3. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S.

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claims Appeals Office,* 5 P.3d 385, 389 (Colo. App. 2000).

5. It is within the ALJ's purview as the finder of fact to determine the credibility of the witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

6. When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936).

7. In resolving inconsistencies the ALJ may credit all, part or none of an expert's testimony, and the ALJ's failure to cite an expert's opinion inherently reflects that the ALJ did not find it persuasive. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

8. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. §8-41-301 (1)(c) C.R.S.; *Faulkner v Industrial Claim Appeals Office*, 12 P 3.d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

9. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no

presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

10. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

11. The claimant has the burden to prove his entitlement to medical benefits by a preponderance of the evidence. §8-43-201, C.R.S. The respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. §8-42-101(1)(a), C.R.S. Even after an admission of liability is filed, respondents retain the right to dispute the relatedness of the need for continuing treatment. This principle recognizes that the mere admission that an injury occurred cannot be construed as a concession that all subsequent conditions and treatments were caused by the admitted injury*. HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997).

12. The claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

13. Although a preexisting condition does not disqualify a claimant from receiving workers' compensation benefits, the claimant must prove a causal relationship between the injury and the medical treatment the claimant is seeking. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). And where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

14. The ALJ concludes that the analyses and opinions of Dr. Larsen, Dr. Purcell, Dr. Rook, and Dr. Nanes are credible and more persuasive than medical analyses and opinions to the contrary.

15. The ALJ concludes, as found above, that the claimant is credible.

16. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with the respondent-employer.

17. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical care to cure or relieve him from the effects of his injury. Specifically, the surgeries as recommended by Dr. Larsen and Dr. Purcell.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable and the respondent-insurer is liable for the benefits flowing therefrom.

2. The respondent-insurer shall authorize and pay for the surgeries as recommended by Dr. Larsen and Dr. Purcell.

3. The respondent-insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 16, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-960-856-02

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the anterior cervical decompression and fusion at C5-C7 recommended by Dr. Wong is reasonable, necessary, and related to his September 24, 2013 work injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a flooring and décor specialist and has been so employed since approximately 2006.

2. On September 24, 2013 Claimant sustained a compensable injury while so employed. On that date, Clamant was assisting another associate with moving a cabinet onto a shelf. They attempted to slide the cabinet from a flat cart onto a shelf when the cabinet slipped and started to fall toward Claimant. The cabinet weighted approximately 150 to 200 pounds. When it slipped, Claimant caught the cabinet with his left arm outstretched and felt it pull his arm downward.

3. Claimant did not immediately report the injury. He knew his arm had been yanked hard but didn't realize it was a serious injury. The following day his pain was worse and when he returned to work for his next scheduled shift on September 26, 2013 he reported the injury.

4. Claimant was referred by Employer for treatment.

5. On September 27, 2013 Claimant was evaluated by Ted Villavicencio, M.D. Claimant reported that a large shelf slipped and that he had the full weight on his left arm and shoulder. Claimant reported sudden pain in his left shoulder and trapezius area that was similar to his right shoulder when he had a rotator cuff in the right shoulder. Claimant reported some numbness from his trapezius to his forearm and that he had no past left shoulder or neck injuries. Dr. Villavicencio assessed: lifting injury, neck and shoulder pain; and exam with radicular findings for left upper extremity but suspicion for primary shoulder disorder and possible rotator cuff tear. Dr. Villavicencio noted that conservative treatment would be started. *See* Exhibit 1.

6. On October 4, 2013 Claimant was evaluated by Dr. Villavicencio. Claimant had decreased radicular symptoms and findings for the left upper extremity and Dr. Villavicencio assessed a primary shoulder disorder and possible rotator cuff tear. *See* Exhibit 1.

7. On October 23, 2013 Claimant was evaluated by Dr. Villavicencio. Claimant had less neck pain and left upper extremity paresthesia and better mobility in

his neck and shoulder. Dr. Villavicencio noted that a cervical spine MRI would be ordered. *See* Exhibit 1.

8. On November 20, 2013 Claimant was evaluated by Scott Richardson, M.D. Claimant reported tingling and numbness in his entire left arm that came and went and that he had pain in the left shoulder area with motion. Dr. Richardson diagnosed cervical strain and left shoulder strain. Dr. Richardson noted he had re-ordered an MRI of the cervical spine.

9. On December 5, 2013 Claimant was evaluated by Robert Kawasaki, M.D. Claimant reported catching a shelf at work that pulled his left arm downward and that he had an ache and pain in the left shoulder and trapezial region with subsequent worsening of soreness in the left shoulder, trapezial region, and into his neck. Claimant reported numbness and tingling down his entire left extremity focused on the small and ring digits and also involving the thumb, index, and middle digits at times. Dr. Kawasaki provided the impression of cervical strain and signs/symptoms of upper extremity parasthesias. Dr. Kawasaki noted that electrodiagnostic testing was completed and showed a negative EMG/nerve conduction study with no evidence of cervical radiculopathy, brachial plexopathy, or compression neuropathy. Dr. Kawasaki opined that symptomatically Claimant may have cervical radiculitis and myogenic thoracic outlet syndrome without evidence of nerve damage on EMG. *See* Exhibit 3.

10. On December 10, 2013 Claimant underwent an MRI of his cervical spine interpreted by Patrick O'Malley, M.D. Dr. O'Malley provided the impression of: multilevel degenerative changes; bone lesion within the T3 vertebral body with sclerotic appearance. *See* Exhibit H.

11. On December 18, 2013 Claimant was evaluated by Dr. Villavicencio. Dr. Villavicencio noted that the cervical spine MRI showed multilevel degenerative changes, and bone lesions within T3 vertebral body- sclerotic. Dr. Villavicencio noted that Claimant had a lifting injury with neck and shoulder pain with persisting possible left upper extremity radicular symptoms and that Claimant likely had a primary shoulder disorder. *See* Exhibit 1.

12. On February 6, 2014 Claimant was re-evaluated by Dr. Kawasaki. Claimant continued to complain of pain in the left side of his neck and down his left upper extremity with numbness and tingling into his triceps area and forearm into his hand. Dr. Kawasaki provided the impression of: cervical spondylosis; signs and symptoms compatible with C6 and potentially C5 radiculopathy; and some symptoms for thoracic outlet syndrome, likely secondary to myofascial irritation. Dr. Kawasaki noted that Claimant would try additional conservative treatment and if no improvement, then he may consider interventional procedures with potentially C5-6 and C6-7 spinal nerve root blocks. *See* Exhibit 3.

13. On March 6, 2014 Claimant was evaluated by Dr. Kawasaki. Claimant reported continued pain in the cervical region down the left upper extremity. Claimant

reported that conservative treatment had not been helpful. Dr. Kawasaki recommended diagnostic and hopefully therapeutic spinal nerve root blocks with four injections at left C4-5, C5-6, and C6-7 to see if they could figure out which nerve root was irritated and responsible for Claimant's symptoms into the upper extremity. *See* Exhibit 3.

14. Claimant continued to be evaluated by Dr. Villavicencio with no major changes in assessment or symptoms from December until April. On April 3, 2014 Dr. Villavicencio noted that Dr. Kawasaki was recommending injections at C4-C7 to help identify the pain generator. Dr. Villavicencio noted the mechanism of injury as well as the temporal relationship with no prior complaints of neck or left upper extremity pain/paresthesia. Dr. Villavicencio opined that the September 24, 2013 injury caused an exacerbation of Claimant's pre-existing cervical spine pathology and was therefore work related. Dr. Villavicencio noted that an EMG had been performed and was negative. Dr. Villavicencio noted that Claimant was planning on injections with Dr. Kawasaki and opined that Claimant's primary pain generator was from the cervical spine and was an exacerbation of pre-existing changes in the cervical spine. Dr. Villavicencio opined that injections would serve to identify if the MRI changes were a pain generator. *See* Exhibit 1.

15. On April 30, 2014 Claimant was evaluated by Dr. Villavicencio. Dr. Villavicencio noted that Claimant had persisting left cervical and left shoulder pain, and noted the plan would be to order an MRI of the left upper extremity. Dr. Villavicencio assessed cervical radiculopathy and shoulder strain. *See* Exhibit 1.

16. On June 17, 2014 Claimant was evaluated by Dr. Villavicencio. Dr. Villavicencio assessed: cervical radiculopathy; labral tear of shoulder; and shoulder strain. Dr. Villavicencio noted that cervical injections had not been approved and that Claimant had persisting cervical and left shoulder pain. *See* Exhibit 1.

17. On July 17, 2014 Claimant was evaluated by John Burris, M.D. Dr. Burris noted that an EMG of the left upper extremity on December 5, 2013 was negative and that an MRI of the cervical spine on December 10, 2013 showed no acute abnormalities. Dr. Burris opined that the MRI showed significant multilevel degenerative changes. Dr. Burris noted that Claimant had undergone physical therapy, chiropractic manipulation, and acupuncture without benefit and that staged nerve root blocks recommended by Dr. Kawasaki had been denied. Dr. Burris noted that Claimant had an MRI of the left shoulder revealing a labrum tear and that Dr. Failinger performed a left shoulder injection that provided temporary relief and that Claimant was awaiting a second opinion on the left shoulder. Dr. Burris diagnosed left shoulder strain. Dr. Burris noted a normal EMG with no acute findings on cervical MRI and no evidence of cervical radiculopathy on examination. *See* Exhibit 1.

18. On September 5, 2014 Claimant underwent left shoulder surgery to repair the torn labrum in his shoulder.

19. On November 6, 2014 Claimant was evaluated by Dr. Burris. Dr. Burris noted Claimant was post surgery to the left shoulder and that Claimant continued to report diffuse pain extending from the left neck region all the way down his arm. Dr. Burris noted that Claimant had significant workup to the cervical spine including MRI showing degenerative changes and an EMG that was negative. Dr. Burris noted that Claimant chose to spend the visit arguing about medication dosage believing he needed the maximum dose, and arguing about his neck pain complaints and the insurer's denial of neck treatment. Dr. Burris noted that the interaction was very confrontational and that Claimant was very argumentative. *See* Exhibit 1.

20. On February 26, 2015 Claimant was evaluated by Caroline Gellrick, M.D. Dr. Gellrick diagnosed evidence of radiculopathy with asymmetrical reflexes left upper extremity with definite evidence of C7 radiculopathy and questioned C5 radiculopathy of the left upper extremity emanating from the cervical spine, although she opined that a brachial plexus lesion could not be excluded. Dr. Gellrick noted that Claimant had semi conservative treatment for his cervical spine and recommended a repeat MRI of the cervical spine and repeat EMG nerve conduction study of the left upper extremity. Dr. Gellrick noted that once the tests were completed, further treatment recommendations could be made. *See* Exhibit 5.

21. On March 13, 2015 Claimant underwent EMG testing performed by Barton Goldman, M.D. Dr. Goldman noted the goal of ruling out left C6 or C7 chronic radiculopathy vs. upper trunk neurogenic TOS. After testing, Dr. Goldman concluded that there was a mildly abnormal study showing left neuropraxic thoracic outlet syndrome involving the upper trunk of the brachial plexus. Dr. Goldman opined that there was no electrodiagnostic evidence for peripheral polyneuropathy, cervical radiculopathy, entrapment mononeuropathy, or myopathy. Dr. Goldman opined that although Claimant may be experiencing referred upper limb pain from the neck, the study and shoulder MRI report suggested that the primary pain generators were within the shoulder joint and were from upper trunk brachial plexus irritation of myogenic origin. *See* Exhibit D.

22. On March 26, 2015 Claimant was evaluated by Dr. Gellrick. Dr. Gellrick noted the EMG/nerve conduction study from March of 2015 showed neurapraxia consistent with thoracic outlet syndrome. Dr. Gellrick referred Claimant to Dr. Hompland for pain management intervention for the cervical spine. *See* Exhibit 5.

23. On April 15, 2015 Claimant was evaluated by Scott Hompland, D.O. Claimant reported a pins and needles sensation in his left shoulder radiating down into the left hand and aching and stabbing in the left side and right side of his neck and aching into his left shoulder. Dr. Hompland assessed: work related injury with symptoms of pain and decreased sensation in the left shoulder and pain radiating down the left upper extremity; MRIs consistent with multilevel foraminal stenosis; and electrodiagnostic studies consistent with brachial plexopathy but not cervical radiculopathy. Dr. Hompland noted that the Claimant had symptoms of sensory abnormalities in the C5 and C6 dermatome in the left upper extremity that could be

consistent with neural foraminal encroachment although he would have anticipated the electrodiagnostic studies to show cervical radiculopathy. Dr. Hompland opined that the physical findings were also consistent with brachial plexopathy identified by Dr. Goldman and opined that the mechanism of injury could have resulted in a stretch of the brachial plexus. *See* Exhibit 4.

24. On May 6, 2015 Jeffrey Smith, M.D. performed a peer review and opined that the request for an MRI of the cervical spine was not medically necessary. Dr. Smith noted that Claimant had a prior MRI of the cervical spine on December 10, 2013 and that Claimant recently underwent an EMG/NCS of the left upper extremity which identified peripheral nerve injuries outside of the neck. Dr. Smith opined that there was no significant rationale to justify a repeat MRI of the cervical spine. *See* Exhibit C.

25. On May 28, 2015 Claimant underwent a second surgery for his left shoulder to repair a new labral tear. Claimant's left shoulder improved with physical therapy but he continued to report numbness and weakness in his left upper extremity.

26. On June 10, 2015 Allison Fall, M.D. performed an independent medical evaluation. Dr. Fall took a statement from Claimant, reviewed medical records, and examined Claimant. Dr. Fall provided the impression of: status post left shoulder surgery x2; upper extremity traction injury causing mild upper trunk brachial plexopathy without evidence of motor loss on EMG; and chronic pre-existing cervical degenerative changes likely unrelated to mechanism of injury and current symptomatology. Dr. Fall opined that Claimant suffered an injury to his left shoulder and to his upper trunk of the brachial plexus that were causally related to his mechanism of injury on September 24, 2013. Dr. Fall opined that the appropriate diagnosis was not cervical radiculopathy but was upper trunk brachial plexopathy. *See* Exhibit A.

27. On August 5, 2015 Claimant was evaluated by Dr. Gellrick. Dr. Gellrick noted that Claimant still had pain in the neck and numbness down his left arm that did not dissipate following Claimant's shoulder surgery. Dr. Gellrick noted that the abnormalities on EMG pointed toward the shoulder and thoracic outlet syndrome. Dr. Gellrick noted that an MRI taken that day of the cervical spine was reviewed and showed multiple levels of degenerative disk change and disk disease with what appeared to be neural foraminal narrowing at C5 and C6. Dr. Gellrick recommended having Dr. Hompland review the new cervical MRI and noted that cervical spine injections would not be attempted until Claimant healed more from his shoulder surgery. *See* Exhibit 5.

28. On August 24, 2015 Claimant was evaluated by Dr. Hompland. Dr. Hompland noted that since the last visit Claimant had an MRI of the cervical spine performed that was slightly worse from the prior MRI. Dr. Hompland assessed: work related injury resulting in left C6 dermatomal pain; electrodiagnostic study suggesting brachial plexopathy; and severe C5-C6 neural foraminal stenosis. Dr. Hompland planned to perform a left C5-C6 transforaminal epidural steroid injection to decrease inflammation and hopefully decrease Claimant's C6 radicular symptoms. Dr. Hompland

also opined that it was possible that Claimant actually had two injuries, one from foraminal stenosis and the second being a traction type injury of the brachial plexus. Dr. Hompland opined that it was possible that Claimant's pain was coming from a stretching injury to the C6 nerve root. *See* Exhibit 4.

29. On September 3, 2015 Claimant was evaluated by Dr. Gellrick. Dr. Gellrick noted that Claimant was going to undergo epidural steroid injections at C5-6 on the left side and she opined that the injections should decrease the C6 radicular symptoms. *See* Exhibit 5.

30. On September 4, 2015 Dr. Hompland performed a left C5-6 transforaminal epidural steroid injection/selective nerve root block. Dr. Hompland noted that Claimant had a positive response to the local anesthetic but no long term response to the steroid from the injection. Claimant reported his pain got worse after the first day and that the injection provided him no benefit. *See* Exhibit 4.

31. On September 22, 2015 Claimant was evaluated by Dr. Hompland. Dr. Hompland opined that Claimant had a positive response to the local anesthetic but no long term response to the steroids from the injection. Dr. Hompland recommended that Claimant follow up with Dr. Gellrick and that future considerations included a C5-C6 neural foraminal decompression. Dr. Hompland noted that an electrodiagnostic evaluation could be done by Dr. Goldman to determine whether the nerve was healing and that it seemed that a severe compressed neural foramen would put Claimant at a risk of a C6 stretch injury which is what seemingly occurred as a result of the work injury. Dr. Hompland recommended a surgical consultation. *See* Exhibit 4.

32. On September 28, 2015 Claimant again underwent nerve conduction studies performed by Dr. Goldman. Dr. Goldman noted that Claimant had a very mild relative delayed left lateral antebrachial cutaneous sensory nerve action and that all other nerve conduction study parameters were normal. Dr. Goldman opined that all EMG parameters were normal including the cervical multifidi. Dr. Goldman concluded that Claimant had a mildly abnormal but stable study with very mild left neuropraxic thoracic outlet syndrome unchanged from the prior study and he again concluded that there was no electrodiagnostic evidence for cervical radiculopathy, entrapment mononeuropathy, peripheral polyneuropathy, or myopathy. Dr. Goldman opined that overall the study was unchanged from March. *See* Exhibit D.

33. On September 30, 2015 Claimant was evaluated by Douglas Wong, M.D. Claimant reported pain since an accident at work in September of 2013. Dr. Wong noted that a previous MRI showed C5-7 degenerative disk disease with foraminal narrowing and C4-5 left foraminal narrowing. Dr. Wong noted that Claimant reported the injury occurred at work and that Claimant reported no previous episodes. Dr. Wong felt that a ACDF C5-7 would be appropriate and noted he would work on getting it approved. *See* Exhibit F.

34. On October 8, 2015 Dr. Fall provided an addendum to her June 10, 2015 independent medical evaluation. Dr. Fall opined that cervical spine surgery was not medically reasonable, necessary, or related to the September 24, 2013 work injury. *See* Exhibit A.

35. On October 8, 2015 Claimant was evaluated by Dr. Gellrick. Dr. Gellrick noted that the repeat EMG with Dr. Goldman continued to reveal evidence of left neuropraxtic thoracic outlet syndrome with no evidence of cervical radiculopathy, and that the EMGs had been negative for the upper extremities. Dr. Gellrick noted that Claimant's shoulder surgeon was pointing to the cervical spine as a pain generator but that shots with Dr. Hompland were unsuccessful. Dr. Gellrick noted, however, that despite the negative EMGs and the unsuccessful shots, Dr. Wong was recommending surgery and she considered the shoulder surgeon to agree with Dr. Wong's recommendation. *See* Exhibit 5.

36. Dr. Gellrick and Dr. Fall testified at hearing consistent with their prior written reports and opinions. Overall, the testimony of Dr. Fall is found more credible and persuasive.

37. Dr. Fall opined that the mechanism of injury did not result in a cervical spine injury and that the evidence pointed to an injury to the left shoulder and upper trunk of the brachial plexus. She noted that the MRIs performed revealed acute tearing in the left shoulder and abnormalities of the brachial plexus but that the objective testing did not reveal an acute cervical injury. Dr. Fall noted that Claimant had degeneration in his cervical spine but that it was not caused by the work injury and that it was not causing Claimant's current symptoms and opined that the current symptoms were caused by the brachial plexus. Dr. Fall disagreed that the mechanism of injury aggravated Claimant's pre-existing cervical spine degenerative condition and pointed to the MRI showing degenerative changes with no acute findings.

38. Dr. Gellrick opined that the mechanism of injury could be consistent with a brachial plexus traction injury, a cervical spine injury, or both. Dr. Gellrick's conclusion that there was a cervical spine injury discounts the objective medical evidence showing thoracic outlet syndrome and no evidence of cervical radiculopathy and her opinion relies heavily on medical records showing a positive response to the spurling's maneuver. Although Claimant had multiple positive spurling's maneuvers he also had multiple negative spurling's maneuvers. The multiple negative spurling's maneuvers noted, the negative EMGs performed, the MRI negative for acute injury, and the negative response to cervical injection all weigh towards showing more likely than not that a cervical injury was not suffered. Therefore, Dr. Fall's opinion is accepted over that of Dr. Gellrick.

39. Claimant also testified at hearing. His testimony surrounding the mechanism of injury was credible. However, his testimony surrounding prior injuries or pain to the same area is not credible or persuasive. The evidence established that Claimant had similar pain complaints several years prior to his work injury. On August

26, 2011 Claimant was evaluated by Brian Wegner, M.D. Claimant reported that his left arm was numb involving all five left fingertips and the whole arm, and that the symptoms began the night prior. Claimant reported ongoing chronic shoulder pain. Dr. Wegner assessed: acute sensory disturbance of the skin; acute cervicalgia; and chronic shoulder pain. Dr. Wegner opined that it seemed that Claimant had nerve root compression/swelling at the left neck of quite possibly a strain of the left brachial plexus and opined that the symptoms should resolve over one week. *See* Exhibit G.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical benefits

Respondents are required to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that he sustained an acute injury to his cervical spine or that he aggravated a pre-existing cervical spine condition on September 24, 2013. Rather, it is more persuasive that Claimant suffered a left shoulder injury and a brachial plexus traction injury on that date. The testimony of Dr. Fall in that regard is found credible and persuasive. Dr. Fall's opinions are also consistent with the objective medical testing. Three EMG tests performed in this case were negative for cervical radiculopathy but the two more recent EMG tests demonstrated abnormalities of the brachial plexus and thoracic outlet syndrome. Additionally, the MRI performed showed no acute injury to the cervical area and showed no evidence of an acute exacerbation or aggravation of the pre-existing degeneration that was present throughout the cervical spine. Further, the cervical epidural steroid injection did not provide Claimant relief, which would be expected if the cervical spine or cervical radiculopathy was the cause of Claimant's ongoing symptoms.

Claimant argues that the positive spurling's maneuvers noted at several appointments demonstrated that he has a cervical radiculopathy. It is noted that at several appointments the spurling's maneuver was noted to be positive. However, it also was noted to be negative at several appointments and whether or not it is noted to be positive or negative depends on Claimant's subjective reports, so the test overall is not as objective as the EMG or MRI tests performed in this case. Additionally, although several providers opined that a cervical injury might also have been suffered and although it is possible that Claimant may have suffered both a cervical injury as well as a brachial plexus injury, Claimant has failed to establish more likely than not that both injuries were suffered. Rather, the credible and persuasive evidence shows that he suffered both a shoulder injury and a brachial plexus injury and that his ongoing symptoms are related to the brachial plexus traction injury and not to cervical radiculopathy. The symptoms Claimant has displayed since the injury could be consistent with either a cervical injury or a brachial plexus injury. However, the objective testing and the persuasive medical opinions establish more likely than not that the symptoms are from the brachial plexus. Therefore, Claimant has failed to meet his burden to establish that medical treatment aimed at his cervical spine including the surgery recommended by Dr. Wong is reasonable, necessary, or causally related to his September 24, 2013 work injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that cervical spine surgery recommended by Dr. Wong is reasonable, necessary, or casually related to his September 24, 2013 work injury. His request for surgery is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 15, 2016,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-985-073-02

ISSUES

The issues to be determined by this decision are:

1. Whether the claimant has proven by a preponderance of the evidence that he sustained a traumatic injury to his left scapula arising out of and in the course of his employment with the respondent-employer on or about January 27, 2015;

2. If so, whether the claimant has proven by a preponderance of the evidence that the medical benefits requested for his left shoulder symptoms and diagnoses, including need for the shoulder surgery proposed by Dr. Jinkins are causally related to his work injury on or about January 27, 2015;

3. If so, whether the motor vehicle accident injuring the claimant on February 16, 2015, is an intervening, superseding cause of his need for medical and indemnity benefits and thus severs the nexus between the industrial injury and his need for benefits for his left shoulder region's symptoms and diagnoses after that date;

4. If so, whether the claimant is entitled to temporary total disability (TTD) benefits beginning February 5, 2015, and ongoing; and,

5. If so, what is the claimant's average weekly wage (AWW)?

PROCEDURAL MATTERS

The parties reached the following stipulations:

1. The claimant withdrew his request for temporary partial disability (TPD) benefits;

2. The claimant stipulated that his authorized provider if the claim is found compensable is Emergicare, and that other medical providers are not authorized; and,

3. The respondents reserved the Workers' Compensation Medical Fee Schedule for any medical benefits awarded or ordered.

These stipulations were approved and accepted by the ALJ.

FINDINGS OF FACT

1. The claimant was employed by the respondent-employer and began employment on September 20, 2013.

2. The claimant testified that on January 19, 2015 he was working as a rough carpenter where he frames walls. The claimant began to walk away from a conversation when a steel beam fell and hit him on his left posterior shoulder and knocked him to the ground. The claimant estimates the beam weight to be over 300 pounds. His coworker John Pace estimates the weight as about 80 pounds. Afterwards the claimant began experiencing pain in his back near the left scapula and numbness down his left arm to his elbow. He did not complain of neck pain.

3. There appears to be some discrepancies in the date of the actual injury, which the claimant currently states as January 19, 2015. On January 30, 2015, Robert Owens, the director of the construction division for the respondent-employer, prepared a First Report of Injury for presentation to the respondent-insurer. This document indicates that the claimant suffered an on-the-job injury to his left shoulder on January 27, 2015. The date of notification was entered as January 29, 2015. The Type of Injury Sustained section indicates: "No injury Really sore."

4. On January 29, 2015 the claimant initially presented to the Emergicare clinic regarding the pain in his shoulder and scapula area and numbness down left arm from elbow down. X-rays were ordered, and there were no fractures. Physical examination during this initial evaluation revealed grossly unremarkable neck exam and full range of motion of the spine. However, physical examination of the muscoskeletal was abnormal over the scapula area. The examination revealed:

> he has tenderness to palpation of the posterior left scapula, with decreased flexion, extension, and abduction of the left shoulder. He has normal radial pulse present. He has no ac joint tenderness, no humeral head tenderness. Biceps is nontender, Elbow with FROM, motor in hand shows he has a previous left thumb tendon injury and cannot fully extend the thumb, but he is able to abduct the fingers, wrist flexion and extension is normal and he can cross fingers.
>
> Median, ulnar, and radial motor function is intact.

5. The claimant was diagnosed with contusion of the scapular region, sprain/strain of back, unspecified fall, accidents occurring in other specified places.

6. The claimant had x-rays done on January 30, 2015 of the thoracic spine and left scapula.

7. The claimant returned to Emergicare on February 4, 2015 for his initial physical therapy appointment with swelling, decreased range of motion, weakness, and difficulty with functional use of his left shoulder.

8. On February 5, 2015, the claimant had a follow-up appointment regarding his shoulder. The claimant was put on work restrictions with max lifting of 15 lbs.

9. The claimant was in a car accident on February 16, 2015 where he was rear-ended and the claimant complained of cervical spine pain at back of head and neck. Additionally, he complained of pain in his chest, abdomen, pelvis, low back, thoracic back, extremities, and other locations. CT scans were ordered; nothing abnormal.

10. On February 20, 2015 the claimant had a follow-up with Dr. Joseph Zaremba. As noted above, four days before, on February 16, 2015, the claimant was in a motor vehicle accident. Dr. Zaremba ordered an MRI of the left shoulder and noted:

> Pt has a new nonwork related injury. I suspect this is the primary cause of his pain. I am requesting MRI of the left shoulder to evaluate further. If he has a tear around scapula, it would be work related. If it is anterior or rotator cuff, it would likely be from the accident and not work related. Depending on the MRI findings, he could be at MMI in 1 week.

11. On March 9, 2015 the claimant met with Dr. Randall Jones of Concentra regarding his left shoulder pain. Dr. Jones noted that the claimant had tenderness at his AC joint and scapula and limited range of motion. Assessment was that the claimant had contusion on left back wall of thorax, rib fractures, and rotator cuff tear. During this encounter the claimant concealed the fact that he had been in a MVA.

12. The claimant met with Dr. Wiley Jinkins, orthopedic surgeon, on March 10, 2015. Anticipated MMI date was moved to May 11, 2015. Dr. Jinkins noted from his exam of the claimant that there is “allodynia and tenderness in all areas along the medial border of the scapula, the deltoid region, and also anteriorly.” Dr. Jinkins administered an injection to the claimant. The claimant was diagnosed with left shoulder contusion with possible internal derangement.

13. On March 17, 2015 the claimant had a follow-up appointment with Dr. Jones. The claimant reported that the injection he received had increased his pain. Additionally, PT was put on hold as "made worse" with 1 session.

14. On March 31, 2015 the claimant had another orthopedic consultation with Dr. Jinkins. A request for MRI of the thoracic spine was submitted on this date.

15. On April 6, 2015 the claimant had a follow-up appointment with Dr. Jones.

16. On April 14, 2015 the claimant had a follow-up appointment with Dr. Jinkins, where the claimant indicated that he was "no better." The physical examination revealed "significant guarding with significant discomfort even to the lightest tactile palpation."

17. On April 15, 2015 a MRI of the claimant was done of the thoracic spine.

18. On May 11, 2015 the claimant reported to the Penrose St. Francis emergency room with chronic lower back pain.

19. On May 12, 2015 the claimant had a follow-up appointment with Dr. Jinkins. The claimant was referred to a chiropractor by Dr. Jinkins.

20. On May 14, 2015 the claimant met with Dr. Albert Hattem, a delayed recovery specialist, who placed the claimant on modified activity with the following work restrictions: no lifting over 5 lbs, no pushing or pulling over 10 lbs of force, no reaching above shoulders. The claimant was referred to Dr. Polvi for up to 6 chiropractic/acupuncture treatments. An MRI was scheduled.

21. On May 21, 2015 the claimant had an MRI of his left shoulder, which found a "small full-thickness tear of the distal anterior supraspinatus tendon" and a "small linear full-thickness tear of the anterior supraspinatus tendon" and a "small partial-thickness tear of the articular surface of the distal supraspinatus tendon."

22. Based upon the results of the MRI and Dr. Zaremba's assessment of February 20, 2015, the claimant would have reached maximum medical improvement for the work-related injury one week after February 20, 2015.

23. On June 9, 2015 the claimant had a follow-up appointment with Dr. Jinkins. The claimant has still had no significant improvement in his left shoulder. Dr. Jinkins recommended considering an arthroscopic subacromial decompression with arthroscopic rotator cuff repair.

24. On August 11, 2015 an Independent Medical Examination of the claimant was completed by Dr. Eric Ridings. Dr. Ridings opined that the claimant's diagnosis was a contusion to the left scapular region. He opined, in accord with Dr. Zaremba, that blunt trauma to the scapula could not be the etiology of the claimant's rotator cuff tear seen on his shoulder MRI. He further opined that the claimant was at MMI for his work injury on February 20, 2015, four or five days after he was rear-ended and provided a zero percent impairment rating.

25. On August 18, 2015 the claimant met with Dr. Hattem. The claimant stated that left shoulder pain persists unchanged. Upon physical examination the claimant withdraws and winces with only very slight palpation over along his left shoulder.

26. On September 14, 2015, Dr. Timothy Hall performed an IME of the claimant.

27. Dr. Hall opined that the claimant still needed more treatment, and recommended an MRI of the brachial plexus and one of the cervical spine. He opined that it was within a "reasonable degree of medical probability that [the claimant's] present symptoms including his parascapular pain, shoulder area pain, and upper extremity symptoms are the direct consequence of a January 27, 2015 fall and that he requires more treatment and is not at maximum medical improvement."

28. On January 20, 2016, Dr. Riding provided an update to his IME report regarding an MRI performed on January 2, 2016. His opinion did not change.

29. A deposition of Dr. Ridings took place on December 21, 2015. During the deposition, Dr. Ridings testified consistent with him IME report. Dr. Ridings testified that the claimant's report of the injury was not credible due to the claimant's lack of memory and inconsistencies.

30. At hearing, John Pace testified that he was with the claimant when the steel beam hit the claimant. He testified that he was facing towards the claimant and one of the poles leaning against the wall fell striking the claimant in the middle of his left shoulder causing the claimant to go down. Mr. Pace testified that he helped get the pole off of the claimant after it hit him and made sure he was alright. He then retracted that on cross-examination stating that the column "kind of rolled off of him to the side onto the floor." Additionally, Mr. Pace indicated that it was a bit between the center and the end of the column that struck the claimant and not the top of the column as indicated by the claimant.

31. The claimant received full pay from February 5, 2015 through February 16, 2015, the date of the MVA. The claimant lost no wages as a result of the compensable injury.

32. The claimant earned $3,840.50 in the 10 weeks of continuous work before his injury in this claim occurred. His AWW is $384.05.

33. The ALJ finds, for the most part, the analyses and opinions of Dr. Ridings are credible and more persuasive than medical analyses and opinions to the contrary.

34. The ALJ finds the analyses and opinions of Dr. Zaremba to be credible and persuasive.

35. The ALJ finds that the claimant has established that it is more likely than not that he sustained an injury to his left scapula arising out of and in the course of his employment with the respondent-employer, sometime on or between January 19, 2015 and January 28, 2015.

36. The ALJ finds that the respondents have established that it is more likely than not that the claimant sustained only a minor contusion to the scapula area.

37. The ALJ finds that the respondents have established that it is more likely than not that the February 16, 2015 motor vehicle accident is a subsequent intervening event which has caused the need for the claimant's current medical care with respect to his left shoulder. Any medical care subsequent to February 16, 2015 is not related to the claimant's industrial injury. This is not to say that the claimant is at MMI for his industrial injury as only the claimant's ATP or a DIME physician can make that initial determination.

38. The ALJ finds that the claimant has failed to establish that it is more likely than not that the claimant is entitled to temporary total disability benefits from February 5, 2015 and ongoing.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

2. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

3. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S.

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claims Appeals Office,* 5 P.3d 385, 389 (Colo. App. 2000).

5. It is within the ALJ's purview as the finder of fact to determine the credibility of the witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

6. When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936).

7. In resolving inconsistencies the ALJ may credit all, part or none of an expert's testimony, and the ALJ's failure to cite an expert's opinion inherently reflects that the ALJ did not find it persuasive. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

8. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. §8-41-301 (1)(c) C.R.S.; *Faulkner v Industrial Claim Appeals Office*, 12 P 3.d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

9. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo*

North, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

10. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

11. The claimant has the burden to prove his entitlement to medical benefits by a preponderance of the evidence. §8-43-201, C.R.S. The respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. §8-42-101(1)(a), C.R.S. Even after an admission of liability is filed, respondents retain the right to dispute the relatedness of the need for continuing treatment. This principle recognizes that the mere admission that an injury occurred cannot be construed as a concession that all subsequent conditions and treatments were caused by the admitted injury*. HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997).

12. The claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

13. Pursuant to §§8-42-103 and 8-42-105, C.R.S., a claimant is entitled to an award of TTD benefits if: (1) The injury or occupational disease causes disability; (2) The injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three (3) regular working days. *See, Lymburn v. Symbios Logic,* 952 P.2d 831(Colo. App. 1997). A claimant must establish a causal

connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. §8-42-103 C.R.S; *Liberty Heights at Northgate v. Industrial Claim Appeals Office,* 30 P.3d 872 (Colo. App 2001). The ALJ concludes that the claimant has failed to meet his burden of proof that he is entitled to temporary disability benefits. The claimant had no wage loss from January 29, 2015 through February 16, 2015, the date of the MVA. The ALJ concludes that the claimant is not entitled to temporary total disability benefits.

14. The ALJ concludes that the analyses and opinions of Dr. Ridings are credible and more persuasive than medical analyses and opinions to the contrary.

15. The ALJ concludes that the analyses and opinions of Dr. Zaremba are credible and persuasive.

16. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that he sustained a contusion injury to his left scapula arising out of and in the course of his employment with the respondent-employer.

17. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical care to cure or relieve him from the effects of his injury. Specifically, the care received prior to February 16, 2015.

18. As found, the ALJ concludes that the respondents have established by a preponderance of the evidence that the subsequent intervening motor vehicle accident of February 16, 2016 severs the causality of the claimant's need for future medical care from his industrial injury such that future medical care is not related to the industrial injury.

19. As found above, the ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that he suffered a wage loss from February 5, 2015 and ongoing that is attributable to his industrial injury.

20. As found above, the ALJ concludes that the claimant's average weekly wage is $384.05.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The respondent-insurer shall pay for all reasonable, necessary, and related medical care to cure or relieve the claimant from the effects of the injury, including the care received prior to February 16, 2015.

3. The claimant's request for temporary total disability benefits is denied and dismissed.

4. The respondents' request to sever liability subsequent to the February 16, 2015 MVA is granted.

5. The claimant's average weekly wage is $384.05

6. The respondent-insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation, if any, not paid when due

7. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 16, 2016

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES TO BE DETERMINED

The following issues were raised for consideration:

- What is Claimant's average weekly wage (AWW)?

- Whether Claimant is entitled to an award of temporary partial disability (TPD) benefits.

- Did Respondents overcome the Division Independent Medical Examiner's (DIME) opinion on maximum medical improvement (MMI) and impairment rating by clear and convincing evidence?

STIPULATIONS OF FACT BY THE PARTIES

The parties entered into the following stipulations of fact.

1. The parties stipulated and agreed that Claimant's average weekly wage (AWW) at Respondent Employer was $528.91.

2. If Claimant proves she had concurrent employment, the AWW for Babytopia was $290.00 and for Duran's Demo Works the AWW was $73.62.

3. The parties stipulated that if Claimant is found to be entitled to an award of TPD, the benefit would end on September 4, 2014, when Claimant was released to full duty work.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant sustained an injury to her low back region on January 16, 2014. At the time she was moving a trash bag and felt pain in her low back. She was later moving a microwave along the counter and felt a second twinge of low back pain.

2. Claimant treated with Dr. Noel for the work injury. She was given work restrictions effective January 17, 2014. As of September 4, 2014, Claimant was released to a full duty work trial.

AVERAGE WEEKLY WAGE

3. On the date of injury, Claimant was employed as a janitor for CCS. The parties stipulated to an AWW of $528.91 based on this employment. Claimant was provided modified duty at CCS and is not seeking TPD based on this employment.

4. On the date of injury, Claimant was also employed as a day care floater at Babytopia using the name Carmen Martinez. Claimant testified she was known as both Nelly Martinez and Carmen Martinez. She worked at Babytopia using the same Social Security number (SSN) she used at CCS. The parties stipulated her AWW at Babytopia was $290. Claimant was concurrently employed at Babytopia on the date of injury.

5. Claimant testified she also worked for Duran's Demo Works before and after the date of injury. The wage records reflect an AWW of $73.62; however, these wage records, for Carmen Martinez, do not reflect Claimant's SSN. The wage records show an Individual Taxpayer Identification Number (ITIN). The ITIN documentation indicates an ITIN is to be used only if the employee does not have a SSN. Claimant had a SSN in 2007 when she began working for CCS. Claimant failed to sustain her burden of proving concurrent employment at Duran's Demo Works.

6. It is found Claimant combined AWW from Respondent Employer and Babytopia was $818.91.

TEMPORARY PARTIAL DISABILITY (TPD)

7. Michael Blackmoon, owner of Babytopia, testified Claimant began working at Babytopia as a day care floater in December 2013. After her injury, Claimant was moved into the baby room to accommodate her restrictions. She was able to perform this work and was considered a good worker. Mr. Blackmoon further testified that Claimant voluntarily terminated her employment effective June 27, 2014, stating she had too much on her plate with school and other work obligations. Mr. Blackmoon testified Claimant said she planned to contact him again after completing educational classes that would allow her to work as a teacher rather than a teacher's aide. At the time of her resignation, Claimant's work restrictions were being accommodated. The testimony of Mr. Blackmoon is found to be credible.

8. Claimant testified she worked as a demonstrator for Duran's Demo Works. After her work injury, she was given a lighter table and products to accommodate her restrictions. Claimant testified she had difficulty performing this job due to standing for several hours at the job. Claimant admitted she did not have any restrictions against standing. The wage records from Duran's indicate Claimant continued to work through at least December 2014. Claimant testified she continued this employment until around May 2015. Claimant had a full duty release in September 2014. Claimant failed to prove she had wage loss from Duran's as a result of her work injury.

9. Claimant is not entitled to an award of TPD because the credible and persuasive evidence at hearing failed to establish that Claimant's inability to work at concurrent employment was caused by her January 16, 2014 work injury.

THE CONFLICTING DIME OPINIONS REGARDING MMI

10. A Division IME was done by John Hughes, M.D. on September 23, 2015. He noted gradually emerging signs and symptoms consistent with left S-1 radiculopathy. He reported the symptoms were consistent with a worsening of condition. He concluded Claimant was not at MMI and recommended further evaluation of possible S-1 radiculopathy.

11. Prior to MMI, Dr. Ghiselli saw Claimant for a surgical consultation. Dr. Ghiselli reported Claimant had pre-existing spondylolisthesis at L4-5. There was mild degenerative disc disease but no disc extrusion or herniation compressing any nerve. He indicated her pain was due to irritation of the facet joints. He did not report evidence of radiculopathy.

12. Claimant saw Dr. Lesnak for a physical medicine evaluation and possible injections. At the first appointment on May 23, 2014, Dr. Lesnak reported Claimant was quite anxious but displayed no pain behaviors or nonphysiologic findings. He recommended a bilateral L4-5 facet joint injection trial.

13. Claimant saw Dr. Lesnak on August 14, 2014. He noted there were no pain behaviors or nonphysiologic findings. Tenderness was localized over her lower lumbar facet joints. He recommended a trial return to work full duty. If she had no significant flare up with return to work, she would be at MMI.

14. On September 18, 2014, Dr. Noel reported Claimant had done very well with a full duty work trial. She was able to use the backpack vacuum. Dr. Noel placed Claimant at MMI with no permanent impairment and no work restrictions.

15. Claimant also saw Dr. Lesnak on September 18, 2014. He reported she had returned to full duty and was actually working some overtime. Dr. Lesnak noted Claimant reported her low back pain had completely resolved. She reported no buttock or leg symptoms whatsoever. Dr. Lesnak reported her overall symptoms and function had dramatically improved and nearly normalized. He agreed she was at MMI with no permanent impairment and no work restrictions.

16. Claimant continued to work regular duty at CCS after being placed at MMI. She did not return for medical treatment until April 3, 2015, when she saw Dr. Noel. He felt she had a thoracic/lumbosacral strain which appeared to be mainly muscular and probably secondary to use of the backpack vacuum.

17. On April 29, 2015, Dr. Lesnak reported Claimant began to develop recurrent low back pain several months after being placed at MMI. She also reported new symptoms involving diffuse neck, upper back and bilateral suprascapular region pain. Also new were pain behaviors not seen in 2014. She had diffuse complaints but

no distinct trigger points or muscle spasm. She had at least 2 of 5 positive Waddells and psychological factors. There was no clear evidence of recurrent lower lumbar facet joint symptoms. There was no evidence of SI joint dysfunction. She had subjective complaints with relatively new onset of diffuse pain. Since there were no localized trigger point sites, she was not a candidate for trigger point injections. At this point, her symptoms were so diffuse Dr. Lesnak did not recommend any repeat facet joint injections. He recommended a brief course of physical therapy. Dr. Lesnak stated Claimant remained at MMI.

18. Claimant had follow up appointments with Dr. Noel. On May 1, 2015, he reported complaints of generalized nonspecific discomfort involving her neck, shoulders and back. On May 22, 2015, he noted lots of subjective pain in her back. He discussed the case with Dr. Lesnak. His diagnosis was recurrent diffuse back pain felt to be myofascial in nature. On May 28, 2015, Dr. Noel again noted many generalized complaints which had been worked up and felt to be myofascial in nature. Dr. Noel confirmed Claimant was at MMI with no ratable impairment. Claimant remained at full duty.

19. After the DIME opinion stating Claimant was not at MMI, Claimant was sent back to the authorized treating physicians, Dr. Noel and Dr. Lesnak for review of the DIME report and further evaluation and treatment.

20. Dr. Lesnak saw Claimant in follow up appointment on November 4, 2015. He performed an EMG on November 12, 2015. The EMG was negative. There was no evidence of S-1 radiculopathy.

21. Dr. Lesnak commented on the DIME report on October 29, 2015. He noted Claimant had never had any evidence of radiculopathy and any new findings of radiculopathy would be unrelated to the work injury. Claimant had a multitude of symptoms entirely unrelated to the work injury. In his office note from November 4, 2015, Dr. Lesnak reported diffuse pain behaviors and nonphysiologic findings including 4 of 5 positive Waddell signs. Claimant reported progressive diffuse symptoms without any objecting findings. He felt she may have a fibromyalgia like syndrome but this would be completely unrelated to her work injury. He confirmed Claimant had reached and remained at MMI since September 18, 2014, with no impairment.

22. On February 11, 2016, Dr. Lesnak reported Claimant was developing progressive pain behaviors and nonphsiologic findings which made no sense as it pertained to a work injury over 2 years ago. Dr. Lesnak concluded Claimant remained at MMI for the work injury, with no impairment and no restrictions.

23. Dr. Noel saw Claimant in follow up on February 25, 2016. He had discussed the case with Dr. Lesnak and noted Claimant developed progressive diffuse pain throughout her entire body, probably secondary to the development of fibromyalgia. This was not considered to be work related and Claimant was advised to see her primary care physician (PCP) for further medical care. Dr. Noel confirmed Claimant was already at MMI for her work injury.

24. Allison Fall, M.D. performed an IME for Respondents on January 6, 2016. Dr. Fall agreed with Dr. Lesnak that Claimant had no findings on EMG to evidence S-1 radiculopathy as suspected by the DIME. Dr. Fall concluded Claimant had sustained a minor lumbar strain on the date of injury which fully resolved by September 18, 2014. Claimant's current complaints were not related to the work injury of January 16, 2014. Without correlating objective findings, there was no basis for treatment or an impairment rating. Dr. Fall agreed that Claimant reached MMI as of September 18, 2014, with no impairment and no restrictions.

25. The DIME physician, Dr. Hughes, testified at hearing. After reviewing the EMG testing done in November, 2015, Dr. Hughes acknowledged there was no objective evidence of S-1 radiculopathy. Dr. Hughes testified that in the absence of positive EMG findings, his diagnosis of possible S-1 radiculopathy could not be supported.

26. After reviewing the medical history, Dr. Hughes withdrew his prior opinion that Claimant was not at MMI. Dr. Hughes concluded Claimant had reached MMI as of September 18, 2014, and remained at MMI.

27. Respondents have overcome the original DIME opinion of "Not at MMI" with clear and convincing evidence. The DIME physician's opinion has been revised and Dr. Hughes testified he agreed Claimant reached MMI as of September 18, 2014.

28. It is found Claimant reached MMI on September 18, 2014.

IMPAIRMENT RATING

29. Dr. Hughes provided a provisional rating of 15% whole person at the time of the DIME appointment. Dr. Hughes acknowledged this rating was done at a time when Claimant was reporting a flare up of her symptoms. Dr. Hughes revised his impairment rating at the time of hearing.

30. Dr. Hughes initially based his Table 53 rating on a possible diagnosis of S-1 radiculopathy. After this was ruled out by the subsequent EMG, Dr. Hughes changed his Table 53 diagnosis to spondylolisthesis at L4-5, which he said would qualify Claimant for a rating of 8% whole person.

31. Dr. Fall testified at the hearing. She explained the difference between spondylolisthesis and facet joint irritation. Spondylolisthesis is present in a small percentage of the population and is a bony abnormality where one vertebra sits off center of the adjoining vertebrae. Facet joint irritation is distinct from spondylolisthesis. Facet joints are between the vertebrae. Treatment includes injections into the facet joints to relieve the irritation of the facet joint. Claimant's spondylolisthesis was pre-existing and not the source of her post injury pain. The etiology of Claimant's work related symptoms was facet joint irritation. This testimony is supported by the medical records of Dr. Ghiselli, Dr. Noel and Dr. Lesnak.

32. Dr. Hughes did not testify that the etiology of the pain was the spondylolisthesis. The DIME report said the source of the pain was S-1 radiculopathy.

33. Dr. Fall testified it was error to use a diagnosis for a Table 53 rating if the diagnosis was not the etiology of the pain.

34. Dr. Hughes' DIME opinion regarding Claimant's impairment rating was shown by clear and convincing evidence to be most probably incorrect. Dr. Hughes testified that Claimant was entitled to an 8% whole person impairment rating consistent with *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Provide) (AMA Guides)*, Table 53 III (A), because of Claimant's L4-5 Grade I spondylolysis. It was established that Dr. Hughes was most probably incorrect because Claimant's Grade I spondylolysis was not related to the work injury but preexisted the injury.

35. Drs. Lesnak, Hughes and Fall agreed that Claimant's lower lumbar facet joints were the pain generators. None of the doctors could address with certainty whether Claimant had six months of medically documented pain. However, the doctors agreed that Claimant was released at MMI by Dr. Noel with a prescription for Tramadol, a narcotic pain medication. Dr. Fall and Dr. Hughes agreed that a narcotic pain medication would not be prescribed by Dr. Noel in the absence of Claimant's complaints of pain.

36. Dr. Fall affirmed that the Level II accreditation course offered to physicians by the Division of Workers' Compensation allowed for a 5% whole person impairment rating under Table 53 II (B) where there is a facet joint pain generator in the lower lumbar spine with six months of medically documented pain and rigidity with or without muscle spasms associated with none to minimal degenerative changes.

37. Dr. Fall testified the Level II accreditation training instructs the rating physician to perform an impairment rating at the time of MMI. If the rating is performed after the date of MMI, the condition must be stable. Since Claimant was reporting a flare up of her symptoms at the time Dr. Hughes performed the impairment rating on September 23, 2015, Dr. Fall testified the impairment rating should have been deferred until it was determined Claimant’s work related condition was stable. Dr. Fall testified that it was an error for Dr. Hughes to base his impairment rating on range of motion measurements done at a time when Claimant’s symptoms were reportedly worse than at MMI.

38. Dr. Noel, Dr. Lesnak and Dr. Fall all agreed Claimant did not have a medical condition to support a rating under Table 53 of the AMA Guides.

39. In his report dated October 29, 2015, Dr. Lesnak concludes there is no objective evidence to support an impairment rating. Claimant’s range of motion limitations were from fear of pain and cannot be utilized for an impairment rating.

40. Respondents have overcome the DIME opinion on impairment by clear and convincing evidence.

41. Once the DIME opinion has been overcome, the Administrative Law Judge must determine the appropriate rating. Dr. Noel, Dr. Lesnak and Dr. Fall have consistently opined that Claimant has no objective findings to support an impairment rating although they identified the initial pain generator as the lumbar facet joints. Dr. Fall testified the AMA Guides would support a rating of 5% whole person based on lumbar facet joints with six months of medically documented pain and rigidity with or without muscle spasms associated with none to minimal degenerative changes.

42. The DIME performed range of motion measurements during a period when Claimant reported a worsening since MMI. The other treating and examining physicians found no loss of range of motion as a result of this work injury. It is found Claimant has no objective findings to support a rating for range of motion deficits.

43. Claimant has permanent impairment of 5% whole person for the lumbar spine related to this work injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

GENERAL LEGAL PROPOSITIONS

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

AVERAGE WEEKLY WAGE

2. To determine a claimant's AWW, the ALJ may choose from two different methods set forth in Section 8-42-102, C.R.S. The first method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." Section 8-42-102(2), C.R.S. The second method for calculating a claimant's AWW, referred to as the "discretionary exception," applies when the default provision will not fairly compute the employee's AWW. Section 8-42-102(3), C.R.S. In such a circumstance, the ALJ has discretion to compute the AWW of a claimant in such other manner and by such other method as will, based upon the facts presented, fairly determine the employee's AWW. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).
3. Claimant has presented the court with wage records using both a Social Security number and an Individual Taxpayer Identification Number. An ITIN is to be used

only if the employee does not have a SSN. The name used with the ITIN is not the same as the name Claimant used during her employment with CCS. The ALJ determines the wages to be used in calculating AWW include those reported under Claimant's SSN. The AWW includes wages from CCS and Babytopia.

4. Based on the wage records from CCS and Babytopia, and the stipulation of the parties, the ALJ concludes Claimant's AWW is $818.91.

TEMPORARY DISABILITY BENEFITS

5. Section 8-42-103(1)(a), C.R.S. requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain temporary total disability benefits (TTD). *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

6. Claimant's employer at Babytopia testified they made accommodations for Claimant's work restrictions by placing her in the baby room. Claimant was able to perform the duties of this job. Mr. Blackmoon testified Claimant voluntarily resigned stating she had too much on her plate but would check back after she had completed her educational classes. Claimant has failed to sustain her burden of proving wage loss from Babytopia was the result of her work injury and restrictions.

7. Claimant testified she continued to work for Duran's Demonstrations into 2015, after the date she had a full duty release. Claimant has failed to sustain her burden of proving wage loss associated with employment at Duran's.

8. Claimant is not entitled to an award of TPD because the credible and persuasive evidence that hearing failed to establish that Claimant's inability to work at concurrent employment was caused by her January 16, 2014, work injury.

MAXIMUM MEDICAL IMPROVEMENT

9. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).
10. If the DIME physician offers ambiguous or conflicting opinions concerning MMI, it is for the Administrative Law Judge to resolve the ambiguity and determine the DIME's

true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385, 388 (Colo. App. 2000). In doing so, the Administrative Law Judge should consider all of the DIME's written and oral testimony. *Lambert & Sons, Inc., v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1988).

11. The DIME physician, Dr. Hughes, testified that medical testing done subsequent to the DIME appointment caused him to change his opinion as to whether Claimant had reached MMI. At hearing, Dr. Hughes testified Claimant reached MMI as of September 18, 2014, and remained at MMI. This is consistent with the medical opinions of Dr. Noel, Dr. Lesnak and Dr. Fall. Respondents have overcome the original DIME opinion that Claimant was not at MMI with clear and convincing evidence.

12. The ALJ concludes Claimant reached MMI as of September 18, 2014.

PERMANENT PARTIAL DISABILITY

13. A DIME physician must apply the *AMA Guides* when determining the claimant's medical impairment rating. Sections 8-42-101(3.7), C.R.S.; 8-42-107(8)(c), C.R.S. The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence presents questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). Not every deviation from the rating protocols of the *AMA Guides* requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the *AMA Guides* constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005).

14. The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* Section 8-43-210, C.R.S; One *Hour Cleaners v. Indus. Claim Appeals* Office, 914 P.2d 501 (Colo. App. 1995).

15. Dr. Hughes initially based his provisional rating on a diagnosis of S-1 radiculopathy. At hearing Dr. Hughes conceded Claimant did not have S-1 radiculopathy as a result of her work injury. Respondents have overcome the DIME's provisional impairment rating by clear and convincing evidence.

16. At hearing Dr. Hughes said he would change his rating so that it would be based on the diagnosis of spondylolisthesis at L4-5. Dr. Hughes agreed the spondylolistheis was pre-existing. He did not refute the medical records and testimony of Dr. Fall which stated the spondylolisthesis at L4-5 was not the pain generator. The medical evidence, in particular the report by Dr. Ghiselli and the testimony of Dr. Fall,

supports the conclusion that the pain generator was irritation of the facet joints, not the pre-existing spondylolisthesis.

17. Dr. Fall affirmed that the Level II accreditation course offered to physicians by the Division of Workers' Compensation allowed for a 5% whole person impairment rating under Table 53 II (B) where there is a facet joint pain generator in the lower lumbar spine with six months of medically documented pain and rigidity with or without muscle spasms associated with none to minimal degenerative changes.

18. Dr. Fall also testified the range of motion measurements are to be done at the time of MMI or if done at a later date, when the condition is stable. Dr. Hughes reported and testified that Claimant was having a flare up of her symptoms at the time he performed range of motion measurements. The ALJ finds Dr. Fall's testimony persuasive and concludes the range of motion measurements by Dr. Hughes should not be used to determine Claimant's impairment rating.

19. The ALJ concludes Claimant has 5% whole person impairment of the lumbar spine as a result of her work injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's average weekly wage is $818.91.

2. Claimant's claim for temporary partial disability is denied and dismissed.

3. Claimant reached maximum medical improvement on September 18, 2014.

4. Claimant has sustained permanent impairment of 5% whole person for the lumbar spine as a result of this injury.

5. Respondents shall pay statutory interest at the rate of 8% per annum on all amounts due and not paid when due.

DATED: June 17, 2016__

DIGITAL SIGNATURE:
Margot W. Jones

MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant sustained a compensable left shoulder injury on September 10, 2014;

2. If so, whether the claimant is entitled to a general award of any and all reasonable and necessary medical benefits for her compensable left shoulder injury; and,

3. If so, whether the claimant's ATP is Dr. Michael Dallenbach.

Based upon the finding and conclusions below that the claim is not compensable, the ALJ does not address the remaining issues.

FINDINGS OF FACT

1. On September 10, 2014, during the course and scope of her employment, the claimant was moving a patient who was in a wheelchair. The wheelchair became stuck in the doorframe. The claimant took a hold of the chair and pulled forcefully. While pulling, the claimant felt a "pop" in her left shoulder area and felt an instant onset of pain. She immediately reported the incident to her supervisor, Al Cole. A report of injury form was then completed. The claimant did not seek medical care at this time.

2. The claimant was provided with a designated provider list.

3. The claimant had a prior work injury of October 21, 2011 to her neck and right shoulder. At the time of the September 10, 2014 incident, she was treating with Dr. Michael Dallenbach and Dr. Scott Bainbridge for the October 21, 2011 injury.

4. The claimant saw Dr. Scott Bainbridge on October 10, 2014 for the 2014 injury. At the October 10, 2014 appointment, the claimant presented with right greater than left C7-T2 facet pattern of pain with approximately one year of relief from prior facet blocks. It was noted her prior medical history was significant for right upper extremity pain and paresthesias of unclear ideology possibly related to soft tissue

tightness and response to pain, which resolved also following the last set of facet injections. There was no mention of the left shoulder incident or left shoulder pain at the appointment of October 10, 2014. Dr. Bainbridge conducted pain provocative maneuvers or positions with the claimant without mention of left shoulder pain.

5. The claimant saw Dr. Michael Dallenbach on November 3, 2014. At the November 3, 2014 appointment, claimant reported the following:

- Since June 18, 2014, claimant developed significant increase in her neck pain for which she presented to Jay Scott Bainbridge, MD.
- The claimant received bilateral C7-T2 facet joint injections on October 10, 2014.
- Within three to four days after the procedure, the claimant noted a significant pain associated with tingling, pins and needles sensation in her left upper extremity as well as significant headaches.
- The claimant told Dr. Dallenbach "he told me that I probably irritated a nerve and gave me Gabapentin and the Dosepak.
- The claimant reported a significant improvement in her left upper extremity symptomology and to a lesser degree her neck pain.
- The claimant has been able to work without restrictions and her neck pain is exacerbated with repetitive head motion, reaching away or overhead. She has no complaints regarding right shoulder.

6. Dr. Dallenbach noted the following with regard to the left shoulder on his report of November 3, 2014.

- There is decrease light touch sensation in the distal anterolateral aspect of her left arm extending through the entirety of the anterolateral of her left forearm.
- Motor, sensory, and deep tendon reflex function and vascular status of the upper extremities are intact, equal, and within normal limits.
- Active range of motion of the right shoulder is within functional limits, however, it is slightly less than that of the left.
- Strength at the right shoulder is 5/5, equal to that of the left.

7. There was no mention of the left shoulder incident of September 10, 2014. Dr. Dallenbach clearly examined the left shoulder as evidenced by his notation in his record. The record indicates that the claimant developed significant pain associated with tingling, pins and needles sensation in her left upper extremity three to four days after the injection by Dr. Bainbridge. The claimant also noted that the Gabapentin and Dosepak prescribed by Dr. Bainbridge resulted in significant improvement in her left upper extremity symptomology.

8. The claimant was seen by Dr. Dallenbach again on February 16, 2015. At that time, she reported development of pain, numbness, pins and needles sensation and tingling into her bilateral upper extremities, left side greater than right. Dr. Dallenbach's notes specifically indicate the claimant denies new injury in two separate sentences in his notation. Dr. Dallenbach also indicates that the strength of the right shoulder is 5/5, equal to that of the left.

9. The claimant was seen by Dr. Dallenbach on March 30, 2015. At that time, Dr. Dallenbach reviewed electrodiagnostic studies that had been performed by Dr. Caughfield. Dr. Dallenbach discussed the carpal tunnel syndrome and requested authorization for her to be seen by hand surgeon Karl Larsen, MD for an evaluation including causality assessment, treatment recommendations regarding bilateral carpal tunnel syndrome.

10. Dr. Dallenbach does not discuss anything about claimant's left shoulder complaints or the incident of September 10, 2014.

11. There is no mention of the September 10, 2014 incident anywhere in Dr. Dallenbach's records.

12. Dr. Carlos Cebrian examined the claimant on two different occasions. The first examination was on July 31, 2015 relative to the October 21, 2011 injury and the carpal tunnel syndrome.

13. Dr. Cebrian determined that the carpal tunnel syndrome was not related to the October 21, 2011 injury. The claimant returned to Dr. Cebrian on March 17, 2016.

14. The claimant told Dr. Cebrian that her left shoulder hurt for two to three days and then resolved.

15. Dr. Cebrian concluded that the claimant's left shoulder supraspinatus tear and need for treatment are independent and unrelated to the September 10, 2014 incident.

16. Dr. Cebrian based his conclusions on the following:

- The claimant indicated that her left shoulder problems resolved after two to three days.

- No medical treatment was required as a result of the September 10, 2014 incident.

- The claimant did not mention the incident to Dr. Bainbridge on October 10, 2014.

- The claimant did not mention the injury to her left shoulder to Dr. Dallenbach on November 3, 2014.

- The examination by Dr. Dallenbach on November 3, 2014 including 5/5 strength in the left shoulder as well as comparison of the right shoulder range of motion to the left shoulder did not indicate a recent injury.

- Dr. Cebrian credibly testified that if an acute tear would have occurred on September 10, 2014, claimant would have had some significant symptoms and would not have had the physical examination results documented by Dr. Dallenbach.

- The claimant continued to work full duty without restrictions.

- Dr. Cebrian opined that it is his opinion that the left shoulder supraspinatus tear is a degenerative finding that predates the September 10, 2014 incident because there were no sign of weakness or impingement.

17. Dr. Dallenbach did not testify within a reasonable degree of medical probability that claimant's left supraspinatus tear was caused by the incident of September 10, 2014. Dr. Dallenbach indicated that he could not tell from the MRI when the tear occurred.

18. The ALJ finds the analyses and opinions of Dr. Cebrian to be credible and more persuasive than medical analyses and opinions to the contrary.

19. The ALJ finds that the claimant has failed to establish that it is more likely than not that the claimant suffered an injury to her left upper extremity arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

2. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

3. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S.

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claims Appeals Office,* 5 P.3d 385, 389 (Colo. App. 2000).

5. It is within the ALJ's purview as the finder of fact to determine the credibility of the witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

6. When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936).

7. In resolving inconsistencies the ALJ may credit all, part or none of an expert's testimony, and the ALJ's failure to cite an expert's opinion inherently reflects that the ALJ did not find it persuasive. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

8. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. §8-41-301 (1)(c) C.R.S.; *Faulkner v Industrial Claim Appeals Office*, 12 P 3.d

844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

9. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

10. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

11. The ALJ concludes that the analyses and opinions of Dr. Cebrian are credible and more persuasive than medical analyses and opinions to the contrary.

12. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury as the result of the September 10, 2014 incident. The ALJ is persuaded by the findings and opinions of Dr. Cebrian, which are credible and supported by the evidence in this case. Specifically, the ALJ concludes based upon the totality of the evidence that the claimant's left shoulder injury did not result from the incident of September 10, 2014.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 17, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Compensability

2. Medical Benefits—Reasonable and Necessary

3. Temporary Partial and Temporary Total Disability, 4/10/15-- ongoing

Based upon the findings and conclusions below that the claim is not compensable the ALJ does not reach a decision on the remaining issues.

FINDINGS OF FACT

1. The claimant was hired by the respondent-employer to work as an over-the-road truck driver on May 2, 2014, and was in that position with the respondent-employer as of April 20, 2015.

2. The claimant wears a prosthetic on his lower extremity and has done so for more than 30 years.

3. Despite advising both Dr. Beatty and Dr. Hall that his injury occurred on March 8, 2015, the claimant testified at hearing that he sustained an injury to his lower back on April 1, 2015 while trying to hook up a trailer to his cab and working a stuck crank to lift the trailer into place.

4. The claimant testified at hearing that the date of injury he provided to various medical providers including Dr. Beatty and Dr. Hall was incorrect because he had trouble recalling dates when he met with these medical providers as he was taking opiates which caused memory issues.

5. The medical records reveal that on March 29, 2015 the claimant was seen at the University of Colorado Emergency Room with complaints of low back pain. The claimant reported that his low back and right groin were painful after driving trucks, no falls were reported. The claimant was diagnosed with musculoskeletal low back pain.

6. Due to complaints of flank pain, the claimant completed a CT scan of his abdominal area on March 29, 2015 with the University of Colorado Hospital which noted mild degenerative changes in the claimant's lower thoracic and lumbar spine, with no kidney, ureters, or bladder stones and no findings to explain the claimant's reported flank pain. The claimant did not undergo an MRI scan at that time. Dr. Beatty observed that a CT scan only reveals bony injuries, while a MRI scan is able to detect soft tissue changes with ligaments, tendons, the spinal cord and tumors, thus a CT scan would not reveal the presence of spinal stenosis.

7. On April 8, 2015 the claimant was evaluated by Dr. Curt Heimbach and PA Evan Jones at the Memorial Regional Medical Center in Mechanicsville, Virginia. At that evaluation, the claimant was diagnosed with sciatica and released back to work on April 10, 2015 with no restrictions. The medical reports do not describe a specific mechanism of injury.

8. On April 14, 2015 the claimant was evaluated by Dr. Amar Bhardwaj at St. Joseph's Medical Center in Joliet, Illinois. The claimant was diagnosed with lumbago or muscular back pain, HTN (Hypertension) and a nodule on his right lung. He was released to regular activity as tolerated and was referred to his primary care physician for his HTN and right nodule issues. These records again do not specify any specific mechanism of injury and do not reveal any spine or back fracture.

9. Thereafter, the claimant returned to the University of Colorado Emergency Department on April 20, 2015. He was evaluated by Dr. Kristen Nordenholz and PA Kristen Devick, and was diagnosed with low back pain. The claimant stated at that evaluation that he sustained low back pain after falling from his truck 4 days prior, or on April 16, 2015. He specifically reported that when he was getting out of his truck that his leg "locked up" and he fell directly on his lower and thoracic back. Dr. Nordenholz does not mention anything related to the claimant having sustained an injury to his low back on April 1, 2015 or any other date while using a crank to hook up a trailer. The claimant underwent a complete workup including x-rays, which did not reveal any back facture. He was diagnosed with acute low back pain and released to regular duties as of April 26, 2015.

10. On April 20, 2015 the claimant reported to the respondent-employer that he had sustained an injury subsequent to falling from his truck on April 8, 2015. The records from the respondent-employer do not reveal that the claimant ever reported to the respondent-employer injuring his back while attempting to work a defective crank on April 1, 2015 or on any other date.

11. The next medical report in the record is dated September 1, 2015 and is an IME from Dr. Timothy Hall, an expert retained by the claimant. In this report, the claimant advised Dr. Hall that he sustained his injury on March 8, 2015 when he was trying to hook up a trailer with a crank. He advised Dr. Hall that he thought he had pulled a muscle so he continued working. He reported that he saw a physician in Virginia 5-6 days later and was diagnosed with sciatica, and then sustained a second injury when he fell out of his truck and landed on his back in Illinois. He reported that he was seen at the emergency room in Joliet, Illinois and was diagnosed with a back fracture. He further advised Dr. Hall that when he returned to Denver, he began treating with a physician at Spine One and was to commence treatment with a physician in Parker, Colorado.

12. No medical records from Spine One or any physician in Parker, Colorado have been produced in the record and have not been reviewed by any of the treating physicians in this case. Furthermore, the claimant did not list any such treating physicians in his Interrogatory Responses served on Respondents on October 5, 2015.

13. Dr. Hall did not review any MRI scan of the claimant's lumbar spine, and has not reviewed all of the medical evidence in this case. Dr. Hall opined that the claimant sustained a specific event on March 8, 2015 while working a trailer crank that caused an injury to his lower back, and he based his conclusions solely on information the claimant reported to him. The ALJ is not persuaded by the opinion provided by Dr. Hall.

14. The claimant moved to Maryland in the fall of 2015 and testified that he commenced treatment with Dr. Tucker at the Medical Health Group. Although the claimant testified that he began treating with Dr. Tucker at the time he moved to Maryland, the first medical report in evidence from Dr. Tucker is dated December 21, 2015. Dr. Tucker's records in evidence begin on December 21, 2015 and end on January 29, 2016. These records address the claimant's back pain, constipation issue, a subsequent fall on ice around the 29th of January, 2016 and contain no work restrictions or release from work of any kind.

15. On December 15, 2015 the claimant completed an MRI scan at the request of Dr. Brian Neuman in Baltimore, Maryland, which revealed spinal stenosis at L3-4, L4-5 and L5-S1. No medical records from Dr. Neuman appear in the record.

16. The claimant was eventually evaluated by Dr. Miele in Maryland, who saw the claimant for an initial consultation on February 4, 2016. Dr. Miele noted that the claimant reported his symptoms starting after a fall at work in April 2015, with no

mention of any incident hooking up a trailer using a defective crank. Dr. Miele diagnosed spinal stenosis and neuroforaminal stenosis bilaterally at L3-4, L4-5 and L5-S1, recommended surgical intervention, and performed bilateral L3-4, L4-5 and L5-S1 medial facetectomoies and foraminotomies on March 1, 2016. At the time the claimant underwent surgery, Dr. Miele noted the claimant had complained of lower extremity radiculopathy symptoms for greater than one year.

17. Dr. Miele released the claimant to light duty work effective March 18, 2016. The claimant testified that he no longer considers himself an employee of the respondent-employer as he has not returned to work since April 20, 2015. He further testified that he is not working or looking for work in Maryland, and was not aware he had been given work restrictions from Dr. Miele.

18. The respondent obtained an IME with Dr. Brian Beatty on November 6, 2015. Dr. Beatty completed an initial report after evaluating the claimant, as well as a follow-up report subsequent to receipt of additional medical information, and testified at the hearing in this matter. After reviewing all of the medical records generated in this case including the December 15, 2015 MRI scan and the operative report from Dr. Miele, Dr. Beatty agreed with the diagnosis of spinal stenosis. He further testified that based on the MRI scan, which ruled out the cause of the claimant's spinal stenosis due to a tumor or acute injury, the claimant's spinal stenosis is degenerative and congenital, and was caused by his spine naturally progressing with age over time and not due to any injury sustained with the respondent-employer.

19. He testified that spinal stenosis is only caused by an acute injury when the trauma results in bone fragmentation that damages the spinal canal, which did not occur in this case based on the MRI findings. He further testified that neither the alleged cranking incident of either March 8, 2015 (the date of injury reported to him by the claimant) or April 1, 2015 (the date of injury testified to by the claimant at hearing), or any alleged falling incident in April was sufficient enough to cause spinal stenosis to develop in his spine. Therefore, Dr. Beatty opined that the claimant did not have a diagnosable work related injury with the employer.

20. The ALJ finds Dr. Beatty's analyses and opinions to be credible and more persuasive than medical analyses and opinions to the contrary.

21. The ALJ finds that the claimant did not suffer an injury, an exacerbation of a prior condition, or an acceleration of the need for medical care of a prior condition as the result of any incident occurring on or between March 8, 2015 and April 20, 2015.

22. The ALJ finds that the claimant has failed to establish that it is more likely than not that he sustained an injury to his back arising out of and in the course of his employment with the respondent-employer at anytime on or between March 8, 2015 and April 20, 2015.

CONCLUSIONS OF LAW

1. The Workers' Compensation Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undersigned occurrence." See §8-40-201(1) C.R.S. In contrast, an injury contemplates the physical or emotional trauma caused by an accident. An accident is the cause and an injury is the result. No benefits flow to the victim of an industrial accident unless the accident causes compensable injury. A compensable injury is one that causes disability or the need for medical treatment. See *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967). See also *Soto-Carrion v. C&T Plumbing, Inc., W.C. 4-650-711 (ICAO Probate 15 2007).* Compensable injuries involve an "injury" which requires medical treatment or causes disability. See *H&H Warehouse v. Victory,* 805 P.3d 1167 (Colo. App. 1990). Whether compensable injury has been sustained is a question of fact to be determined by the ALJ. See *Lou v.* ICAO, 224 P.3d 397 (Colo. App. 2009).

2. The mere fact that claimant experienced pain at work does not necessarily require a finding of a compensable injury. In *Miranda vs. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007) the Panel stated, "pain is a typical symptom caused by the aggravation of a pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury." The occurrence of symptoms at work may represent the result of a natural progression or a preexisting condition that is unrelated to the employment. See *F.R. Orr Construction v. Renta,* 717 P.2d. 965 (Colo.App.1995).

3. A preexisting disease or susceptibility to an injury does not disqualify a claim if the employment aggravates, accelerates, or combines with a pre-existing disease or condition to produce a disability or need for medical treatment. See *Duncan v. ICAO,* 107 P.3d.999 (Colo. App. 2004).

4. Claimant shoulders the burden of proof of proving by a preponderance of the evidence that she sustained an injury arising out of and within the course of her employment and that she is entitled to benefits under the Act. See §8-43-201(1), §8-41-

301(1). See also *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the triar–of–fact, after considering all of the evidence, to find that a fact is more probably true than not. See *Page v. Clark* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. See §8-43-201.

5. It is the claimant's burden to prove that the alleged injury is a "significant" cause of the need for treatment in a sense that there is a direct relationship between the alleged precipitating event and the need for treatment. The claimant must prove a causal relationship between the injury alleged and the medical treatment claimant is seeking. See *Snyder v. ICAO,* 942 P.2d 1337 (Colo. App. 1997.) Treatment for a condition not caused by employment is not compensable. See *Owens v. ICAO*, 49 P.3d 1187 (Colo. App. 2002.) Where an industrial injury does not accelerate the need for treatment for the underlying disease, treatment for the preexisting condition is not compensable. See *Robinson v. Youth Track* 4-649-298 (ICAO May 15, 2007).

6. In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a casual nexus between the need for treatment and the work related injury. See *Singleton v. Kenya Corp.* 961 P.2d. 571 (Colo. App. 1998). It is up to the ALJ, as the fact finder, to determine whether a need for medical treatment is caused by the industrial injury or some other intervening injury. See *F.R. Orr, supra.*

7. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered to resolve conflicts in the evidence, make credibility and determinations, determine the weight to be accorded to expert testimony, and draw reasonable inferences from the evidence. See *Bodensieck v. ICAO,* 183 P.3d 684 (Colo. App. 2008). In determining credibility the fact finder should consider, among other things, the consistency or inconsistency of the witnesses testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936).

8. The ALJ concludes, as found above, that the claimant has failed to establish by a preponderance of the evidence that he suffers from an injury, occurring on or from March 8, 2015 through April 20, 2015 that arose out of and occurred in the course of his employment with the respondent-employer. Neither did he suffer an exacerbation or acceleration of a pre-existing condition as a result of any such incident.

ORDER

It is therefore ordered that:

The claimant’s claim for benefits under the Workers’ Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 17, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the respondents proved, by clear and convincing evidence, that DIME physician Miguel Castrejon, M.D. erred in finding that the claimant has not reached maximum medical improvement (MMI) for the consequences of the April 22, 2014 injury because she requires a left total knee replacement under that claim;

2. If so, whether the respondents proved, by clear and convincing evidence, that DIME physician Miguel Castrejon, M.D., erred in finding that the claimant has a permanent impairment of 27% lower extremity attributable to her April 22, 2014 claim; and,

3. Whether the total knee replacement recommended by Dr. Duffey is reasonable, necessary and related medical treatment for the April 22, 2014 compensable left knee injury.

Based upon the findings and conclusions below that the claimant is not at MMI the ALJ does not reach a decision on the issue of the permanent impairment rating.

FINDINGS OF FACT

1. The claimant is a 55 year old female who worked for the respondent-employer as a head start teacher since 1990.

2. The claimant has a long history of left knee malalignment and pain pre-dating this claim. On May 13, 1999, the claimant was evaluated by Jacob Patterson, M.D., an orthopedic surgeon, who noted that the claimant had bilateral "knock-knees" (valgus deformities) since she was a young girl, and the claimant thought her knee deformities were worsening. The claimant measured at 5'4" in height and 232 pounds. Between January 8, 2001 and March 13, 2008, the claimant complained to her personal physician, Dr. Gary Mohr, of left leg pain and left knee pain issues.

3. On January 15, 2009, the claimant presented to Dr. Mohr with left knee pain at a 10/10 level. She was tender along the lateral collateral ligament and below the patella, and she unable to kneel or squat. A left knee MRI was ordered.

4. The claimant's January 26, 2009 left knee MRI showed a horizontal tear of the lateral meniscus, a parameniscal cyst, mild osteoarthritis most pronounced in the lateral compartment (fissuring down to the bone), and mild patellar tendonitis.

5. On February 9, 2009, the claimant returned to Dr. Patterson, who reported the claimant had a progressively worsening left knee with pain and difficulty getting around. Dr. Patterson's impression was "progressive congenital valgus which ultimately will lead to wear on that lateral side which is premature." He recommended an arthroscopy to repair degenerative tears. In his pre-operative report, Dr. Patterson reported that the claimant "has had left knee pain for years, slowly getting worse."

6. On February 24, 2009, Dr. Patterson performed an arthroscopic partial lateral meniscectomy and chondroplasty of the lateral femoral condyle and of the patella. Post-operative diagnoses included a complex tear of the middle one-third of the lateral meniscus, Grade 3 lesion on the lateral femoral condyle, a stable medial meniscus tear, and Grade 2 patellofemoral chondromalacia.

7. The claimant was kept off work until March 14, 2009, and thereafter she returned to work while still recovering from surgery.

8. Less than three months after her surgery, on May 5, 2009, the claimant was at work when she was kicked in the front of her left knee by a 3 or 4 year old girl. This incident resulted in a compensable workers' compensation claim. On May 7, 2009, the claimant started in care at CCOM, where she was initially diagnosed with a left knee contusion.

9. A May 22, 2009 left knee MRI was read as showing a lateral meniscal tear, probable parameniscal cysts, joint effusion, chondromalacia, and a subtle irregularity of the medial meniscus likely representing a subtle tear.

10. The claimant returned to Dr. Patterson, who recommended surgery and on August 13, 2009, Dr. Patterson performed arthroscopic partial medial and lateral meniscectomies, and a chondroplasty of the medial and lateral femoral condyles.

11. The claimant was followed post-operatively at CCOM and by Dr. Patterson who noted the claimant did well with that surgery. Ultimately, on February 24, 2010, Dr. Julian Venegas of CCOM placed the claimant at MMI with a 14% left lower extremity rating. On February 26, 2010, the insurer for the May 5, 2009 claim filed a final admission consistent with Dr. Venegas' opinions.

12. On October 28, 2010, the claimant returned to CCOM, reporting that she

was having left knee issues that were interfering with her job duties. She was referred back to Dr. Patterson, who subsequently injected her left knee on three occasions. When those injections failed, the claimant was referred to Dr. David Walden for a surgical opinion.

13. On June 7, 2011, Dr. Walden noted the claimant had left knee osteoarthritis affecting the lateral compartment, status post partial meniscectomies, and genu valgus alignment secondary to arthritis, with symptoms likely due to arthritis. He recommended a left knee MRI and opined apportionment would be required if a total knee replacement was needed.

14. On July 1, 2011, the claimant's left knee MRI showed a large partial tear of the lateral meniscus and a small tear of the medial meniscus, with substantial degeneration of the medial meniscus, and probable marrow edema in the posterolateral tibial plateau.

15. On August 18, 2011, Dr. Walden reviewed the MRI and provided impressions of possible new medial and lateral meniscal tears and "significant non-work related underlying osteoarthritis." Dr. Walden recommended arthroscopic surgery despite the osteoarthritis.

16. On September 29, 2011, the claimant suffered a second work-related injury when a child grabbed her right leg; she lost her balance, and fell on her right knee. The claimant's left knee was not injured as part of this accident.

17. On December 1, 2011, Dr. Walden again noted that the July 1, 2011 MRI showed large tearing in the lateral meniscus, a small tear in the medial meniscus, and substantial degeneration in the medial meniscus. Dr. Walden indicated that the claimant understood that all of her problems would not be solved by an arthroscopy given her severe arthritis, and in the future she may need a total knee replacement.

18. On December 2, 2011, Dr. Walden performed a left knee arthroscopic partial medial meniscectomy, partial lateral meniscectomy, and chondroplasty. The postoperative diagnoses included Left knee medoial meniscus tear; left knee lateral meniscus tear; and, left knee severe osteoarthritis affecting primarily the weightbearing surface of the medial femoral condyle (grade 3).

19. On December 9, 2011, the insurer for the May 5, 2009 claim filed a general admission reopening that claim.

20. The claimant had continued left knee issues following surgery. Othovisc

injections were administered through Dr. Walden’s office on February 6, 2012, February 13, 2012, and February 20, 2012. The claimant’s exam findings were consistent with osteoarthritis. The injections did not help.

21. On July 12, 2012, Dr. Nanes placed the claimant at MMI for her May 5, 2009 claim, noting the claimant had a poor outcome with surgery. Dr. Nanes noted that the claimant was aware she could need a total knee replacement several years down the road.

22. Dr. Nanes provided a permanent impairment rating for the partially torn medial and lateral menisci and left knee range of motion deficits. He did not provide a rating for the severe osteoarthritis, indicating that issue was preexisting and unrelated. Dr. Nanes’ full rating was 16% lower extremity, but he apportioned out the prior rating, resulting in a final rating of 6% left lower extremity. Permanent restrictions were continued.

23. On July 18, 2012, the insurer for the May 5, 2009 claim filed a final admission consistent with Dr. Nanes’ opinions.

24. Thereafter, the claimant continued in care for her left leg and knee with Dr. Mohr, her PCP. On January 20, 2014, the claimant was seen by Dr. Mohr seeking Vicodin for issues that included left knee pain. Dr. Mohr noted that, according to Dr. Patterson, the claimant was not a candidate for a for left knee total knee replacement due to her age.

25. On April 22, 2014, the claimant sustained a work-related injury when she tripped over a tree stump that had been holding a door open, landing on both of her knees, her left elbow, and right palm.

26. Following her accident, the claimant came under the care of Dr. Nanes and his physician assistant, Steven Quackenbush, at CCOM. Those providers noted the claimant had bruising (ecchymosis) over her left knee.

27. X-rays taken on April 22, 2014 indicated that the claimant had soft tissue swelling along the prepatellar soft tissues left knee; Moderate degenerative change left knee with lateral compartment narrowing; Minimal medial compartment narrowing right knee; and, Both knees otherwise negative. MRIs were subsequently ordered to rule out internal damage.

28. On April 29, 2014, a left knee MRI was read as showing edema in the lateral tibial plateau, extensive degenerative changes in the lateral joint compartment

with loss of cartilage and probable chronic tear or postsurgical changes of the lateral meniscus, and medial meniscus post-surgical changes or chronic tear. The radiologist noted that the edema in the lateral tibial plateau raised the possibility of microfractures or bone contusions probably related to the fall.

29. On May 9, 2014, the claimant was referred to Keith Minihane, M.D., an orthopedic specialist. On May 14, 2014, Dr. Minihane rendered diagnoses of bilateral knee contusions, bilateral pes anserinus bursitis, bilateral degenerative knee arthritis, and left ACL strain. Dr. Minihane administered a left pes anserinus bursal injection and referred the claimant to therapy.

30. On June 30, 2014, Dr. Minihane reported the claimant's knee contusions had resolved, but he administered additional injections for bursitis. On August 5, 2014, Dr. Nanes noted that the claimant wanted a referral to a surgeon, so he referred her to Dr. James Duffey.

31. On September 2, 2014, Dr. Duffey evaluated the claimant and opined the claimant had advanced end-stage osteoarthritis, and the next step was a total knee replacement. Dr. Duffey indicated causation would need to be determined.

32. On September 15, 2014, Dr. Christopher Isaacs, an orthopedic surgeon, reviewed the total knee replacement request and opined that "the need for that surgery would not be related to her work injury."

33. On March 6, 2015, Dr. Andrew Parker, also an orthopedic surgeon, opined that the claimant's primary diagnosis of degenerative arthritis was longstanding and unrelated to this claim, and the total knee replacement should be denied as the arthritis predated even the first claim.

34. After the claimant's surgery was denied, Dr. Nanes instructed the claimant to complete physical therapy, and he scheduled the claimant for an impairment rating. On August 13, 2015, Dr. Nanes placed the claimant at MMI, and provided a 16% left lower extremity rating, reduced to 2% after apportionment.

35. On September 17, 2015 the respondent-insurer filed a final admission consistent with Dr. Nanes' 2% lower extremity rating and August 13, 2015 MMI date. On October 2, 2015, the claimant objected to the final admission, and filed a notice and proposal for a DIME.

36. In a DIME report dated January 6, 2016, Dr. Miguel Castrejon detailed his review of records available to him, and the history he obtained from the claimant. In his

DIME report, Dr. Castrejon opined that the claimant was not at MMI because she required a total knee replacement. Dr. Castrejon generally cited "medical literature" to support this opinion, indicating that while the osteoarthritis was clearly preexisting, a meniscal tear can lead to the advancement of osteoarthritis, as can meniscectomies.

37. On February 5, 2016, Jon Erickson, M.D., an orthopedic surgeon, reviewed Dr. Castrejon's DIME report, noting that he agreed with Drs. Isaacs and Parker that the claimant's degenerative arthritic changes pre-dated the April 22, 2014 work injury, and the total knee replacement was a consequence of substantial and significant pre-existing, non-occupational factors, and not the work injury.

38. On February 8, 2016, the respondents applied for hearing to challenge the DIME opinions of Dr. Castrejon on MMI, causation and impairment.

39. The respondents had the claimant evaluated by Mark Failinger, M.D., a Level II, board certified orthopedic surgeon who specializes in knee surgeries, and who regularly assesses the causation of the need for total knee replacements. Dr. Failinger reviewed available records, obtained a history from the claimant, examined the claimant, and issued a report dated April 18, 2016. Dr. Failinger's initial impression was left knee degenerative joint disease, status post multiple arthroscopies for chondroplasty and meniscectomy. Dr. Failinger opined the claimant's body habitus and preexisting arthritis began a cascade of events from which she never rebounded, and that the work-related injuries did not cause further acceleration of the arthritis.

40. At the time of his initial report, Dr. Failinger did not have the actual left knee imaging (x-ray or MRIs) for 2009, 2011, or 2014, nor did he have the medical reports from Dr. Patterson. Subsequently, Dr. Failinger was provided those materials, which he reviewed, and then issued an addendum report dated May 2, 2016. In his addendum report, Dr. Failinger opined:

> [i]t is quite clear that the patient had problems dating back to 2009 with congenital valgus as noted by Dr. Patterson. This places a patient at risk for developing lateral compartment increased stress forces which increases the risk of degenerative joint disease. The patient is noted to have had multiple surgeries by Dr. Patterson and she developed the expected progressive natural progression of degenerative joint disease which occurred from 2009 over the next 5 years, with multiple surgeries trying to settle down symptoms that would flare up, for which Dr. Patterson saw the patient. Dr. Patterson's note indicated significant degenerative changes of the lateral compartment prior to 2014.

41. Therefore, with the above noted including preexisting arthritis and body habitus, it is clear, and I agree with Dr. Jon Erickson, that the work incident did not cause any further damage and did not cause any further acceleration of the arthritis, but, rather, caused a temporary exacerbation of preexisting degenerative joint disease which was present and no new tears are noted in my evaluation of the films from 04/29/2014.

42. Dr. Castrejon was deposed by the parties.

43. At the deposition Dr. Castrejon was presented with new medical records that he was able to review for the first time. At the end of direct examination, Dr. Castrejon, having been presented with new medical records for the first time, was somewhat unsure of his ultimate opinion on MMI and the need for additional medical records. The deposition ended prematurely due to commitments of the Dr. Castrejon with cross-examination resuming several days later.

44. During the second part of the deposition, Dr. Castrejon was asked by the claimant's counsel whether he had an opportunity to review the medical records between the first and second part of the deposition. Dr. Castrejon testified that he did have a chance to review the medical records again. Dr. Castrejon testified that in light of the information provided during the first deposition, and his review of the medical records between the two parts of the deposition, the opinions he expressed in his written report had not changed. Dr. Castrejon opined that the claimant is not at MMI for her April 22, 2014 left knee injury and that she needs a total knee replacement to bring her to MMI. Dr. Castrejon opined that "I still think it is a combination, but I do think that the April 22nd was the straw that broke the camel's back . . ."

45. Consistent with the opinions expressed in the January 6, 2016 DIME report, and the opinions expressed by Dr. Castrejon in the two-part deposition, this ALJ finds that it is the ultimate opinion of Dr. Castrejon that the claimant is not at MMI for her April 22, 2014 left knee injury because she needs a total knee replacement.

46. This ALJ finds that Dr. Castrejon's ultimate opinion is that the April 22, 2014 industrial injury is the straw that broke the camel's back causing the need for the total knee replacement to be accelerated. Dr. Castrejon correctly observed in the body of the DIME report that "a preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce the need for medical treatment."

47. Dr. Failinger was likewise deposed by the parties. He explained that

osteoarthritis is a loss of surface cartilage traditionally caused by genetics, and the natural course of the disease, once it becomes symptomatic, is a “relentless march of deterioration; the rate of which is based on multiple things.” Dr. Failinger opined the claimant was a candidate for a total knee replacement due to her osteoarthritis, with other contributory factors, but unrelated to the April 22, 2014 event.

48. He opined that Dr. Castrejon’s deposition opinion that the April 22, 2014 incident was the straw the camel’s back was wrong. Dr. Failinger indicated that prior to April 22, 2014, the claimant had severe osteoarthritis that was bone-on-bone, and a total knee replacement would have been reasonable. The April 22, 2014 incident resulted in surface bruising, but no new internal damage.

49. Dr. Failinger explained that he personally reviewed the April 29, 2014 MRI, and he compared it to the July 1, 2011 MRI, noting the April 29, 2014 MRI showed absolutely no acute damage and no new pathology, and Dr. Castrejon’s opinion that the April 22, 2014 accident resulted in bone bruises or micro-fractures was, in his opinion, absolutely wrong. Dr. Failinger explained that the MRI findings (edema in the posterolateral tibial plateau) which the radiologist interpreted as possibly being bone bruises or micro-fractures, were findings present at the time of the July 1, 2011 MRI. Additionally, the area in question (the tibial plateau) is at the back and mid-portion of the knee, and is not the area of direct impact, which was the front of the knee.

50. The ALJ finds the analyses and opinions of Dr. Castrejon to be credible and more persuasive than medical analyses and opinions to the contrary.

51. The ALJ finds the opinions of Dr. Failinger do not arise to anything other than differences of opinion. Although he has an opinion that Dr. Castrejon is “clearly wrong” it is nonetheless only an opinion.

52. The ALJ finds the opinion of Dr. Duffey to be credible and persuasive that the claimant’s next step is a total left knee arthroplasty.

53. The ALJ finds that the respondents have failed to overcome the DIME physician’s finding, by clear and convincing evidence, that the claimant is not at maximum medical improvement.

54. The ALJ finds that the claimant has established that it is more likely than not that the claimant requires a total left knee arthroplasty as recommended by Dr. Castrejon and Dr. Duffey, and that such surgery is reasonable, necessary, and related to the claimant’s April 22, 2014 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

2. A claimant in a workers' compensation claim generally has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

3. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra*.

4. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S.

5. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claims Appeals Office,* 5 P.3d 385, 389 (Colo. App. 2000).

6. It is within the ALJ’s purview as the finder of fact to determine the credibility of the witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

7. When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936).

8. In resolving inconsistencies the ALJ may credit all, part or none of an expert's testimony, and the ALJ's failure to cite an expert's opinion inherently reflects that the ALJ did not find it persuasive. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

9. In deciding whether a proponent has met their burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

10. Colorado case law clearly establishes that it is the duty of the ALJ to ascertain the true opinion of the DIME physician in cases where the DIME physician’s opinion is challenged. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v .Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's finding of MMI and permanent impairment consists not only of the initial report, but also any subsequent opinion given by the physician. See *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005); see also, *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002). The issue of the DIME physician's actual opinion is a factual one. A reviewing body may not interfere with the ALJ's resolution of these issues if supported by substantial evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, supra.

11. Once the ALJ has determined that DIME physician’s ultimate opinion, the ALJ can determine whether the challenging party has overcome the DIME physician’s opinion.

12. This ALJ concludes that the opinions of Dr. Castrejon and the opinions of Dr. Failinger differ as to whether the April 22, 2014 left knee injury caused the need for the total knee replacement. The ALJ concludes that the difference of opinion between Dr. Castrejon and Dr. Failinger is insufficient to establish that Dr. Castrejon's opinion is clearly erroneous.

13. The ALJ concludes, that based upon a totality of the evidence, the analyses and opinions of Dr. Castrejon are credible and more persuasive than medical analyses and opinions to the contrary.

14. The ALJ concludes, that based upon a totality of the evidence, the analyses and opinions of Dr. Duffey are credible and more persuasive than medical analyses and opinions to the contrary with respect to the claimant's need for a left total knee arthroplasty.

15. The claimant has the burden to prove his entitlement to medical benefits by a preponderance of the evidence. §8-43-201, C.R.S. The respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. §8-42-101(1)(a), C.R.S. Even after an admission of liability is filed, respondents retain the right to dispute the relatedness of the need for continuing treatment. This principle recognizes that the mere admission that an injury occurred cannot be construed as a concession that all subsequent conditions and treatments were caused by the admitted injury. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997).

16. The claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

17. The ALJ concludes, as found above, that the respondents have failed to establish by clear and convincing evidence that DIME physician Miguel Castrejon, M.D. erred in finding that the claimant has not reached maximum medical improvement (MMI) for the consequences of the April 22, 2014 injury because she requires a left total knee replacement under that claim.

18. The ALJ concludes, as found above, that the claimant has established, by a preponderance of the evidence, that the left total knee arthroplasty recommended by Dr. Castrejon and Dr. Duffey is reasonable, necessary, and related to the claimant's industrial injury of April 22, 2014.

ORDER

It is therefore ordered that:

1. The respondents' request to overcome the DIME is denied and dismissed.

2. The respondent-insurer shall authorize and pay for the claimant's left total knee arthroplasty as recommended by Dr. Castrejon and Dr. Duffey.

3. The respondent-insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 20, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant has proven by a preponderance of the evidence that she sustained a traumatic injury arising out of and in the course of her employment with the respondent-employer on July 16, 2015; and,

2. If so, whether the claimant has proven by a preponderance of the evidence that the medical benefits requested and provided are causally related to her work injury on July 16, 2015.

Based upon the findings and conclusions below that the claim is not compensable, the ALJ does not reach a decision on medical benefits.

FINDINGS OF FACT

1. The claimant, a 47 year-old full time employee of the respondent-employer since August 4, 2014, worked at one of the respondent-employer's stores in Pueblo, Colorado as a front end supervisor. On July 16, 2015, the claimant was assisting other cashiers during a busy period by operating a cash register in one of the store's checkout lines. On that date a courtesy clerk, Ms. Janet White, pulled a cart through the space between the claimant and the checkout cashier working behind the claimant at another cash register. The cart contacted the claimant in the low back. The claimant's back was to Ms. White, and the other cash register, and the claimant facing straight ahead and her body was not turned when the incident occurred. The claimant simply felt the cart contact her.

2. The claimant testified that the impact was focal, in the middle of her lower back.

3. The claimant testified at hearing that she felt immediate, intense pain when the accident occurred, with pain felt in her lower back and down both of her legs. She stated at the hearing that the pain was so severe that he legs buckled and she fell to her knees.

4. Dr. Douglas Scott, who testified at the hearing, testified the claimant denied falling to the floor or having her legs buckle when he saw her for the examination

the respondent requested on January 5, 2016. The claimant also did not report this fall when she described the incident and her symptoms to Dr. Paul Merchant at CCOM at her initial visit there on July 17, 2015. While the claimant alleged this incident caused her intense pain, she worked the rest of her scheduled sifts, over six hours, without reporting this injury or claim to anyone at work. Instead, the claimant waited until the end of her shift when Mr. Decesaro and other store managers were no longer working to tell a pharmacist at the store she was injured and give him her report of the injury.

5. Mr. Decesaro explained in his testimony that he did not know why the claimant did not report the injury when, or in the hours after, it occurred. He explained, that the claimant had his cell phone number and would call him frequently to discuss many other issues or problems. He opined that the claimant, as a supervisor at the store, and because she had filed a previous worker's compensation claim, knew well the store's requirements and procedures for reporting injuries after they occurred.

6. The claimant testified that she awoke after sleeping at home on July 17, 2015, with pain in her back and both legs. She testified she wanted to go to the emergency room, but instead went to the store where she met for several minutes with Mr. Decesaro to report this claim and complete the claim's reporting paperwork. She also received the respondent's designated provider list at this meeting and selected CCOM as her designated provider.

7. Mr. Decesaro explained at the hearing that he questioned the claimant's claim. He noted the claimant had a past worker's compensation claim with an identical injury mechanism on January 21, 2015, and that the claimant unsuccessfully tried to reopen that claim before bringing the allegations made in this claim. He also thought it was suspicious that in both claims the claimant stated that a new, inexperienced courtesy clerk was alleged to have caused the injuries, and that he found the claimant had pressured Ms. White to sign the statement the claimant drafted to support the claimant's version of events in this claim. He also noted that claimant had been subject to recent escalating warnings and discipline at work due to mistakes and violations of employer's policies, and had refused to sign the last disciplinary notice on June 28, 2015. He thought the claimant was disgruntled about her work and employment when this claim occurred. Mr. Decesaro also filled out an Employee Incident Questionable Claim form on July 17, 2015, noting that the claimant had unsuccessfully requested time off after her prior January, 21, 2015 claim occurred, and that after this incident she wanted to obtain time off over the weekend.

8. The claimant's subjective symptoms were not, Dr. Scott explained, compatible with the described mechanism of injury, and would not be caused by the

injury as claimed. Dr. Scott testified that the injury mechanism did not cause any anatomic or physiologic injury and that there were no findings on his exam or in the examinations with Dr. Merchant at CCOM that would show any physical trauma. Dr. Scott explained that no physical findings on exam or diagnostic studies supported the existence of any anatomic or physiologic injury, that the claimant's alleged symptoms were not supported by any findings, and that they could not have been caused by the injury claimant alleges in this claim. He noted how the claimant's range of motion testing was not valid and was inconsistent. He felt her motion limitations were not physiologic. Dr. Scott said the claimant's complaints to Dr. Merchant of 10 out of 10 pain were inconsistent with his examination's findings and the claimant's abilities demonstrated during his examinations of the claimant including normal strength.

9. Dr. Scott's conclusions were shared by Dr. Merchant at CCOM. On July 21, 2015, Dr. Merchant wrote in the comments section:

> Based on the information provided by the patient and review of her medical records from Parkview family medicine is unlikely that the described mechanism of injury is responsible for her current symptomatology.

10. At his next appointment with claimant, he opined:

> The patient symptoms are inconsistent with the mechanism of injury. It is unlikely that being struck in the back with a shopping cart would cause her knees to hurt, her pelvis and hips to become stiff and the posterior portion of both thighs to have radiating pain.

11. Dr. Scott credibly explained that the bruise required no medical treatment to resolve or be cured, and that it resolved simply with the passage of time. That bruise was also in a different location on claimant's lower back, lateral to the midline, than in the middle of her spine over her vertebrae where she testified at the hearing that the shopping cart contacted her. The records from CCOM bear out Dr. Scott's opinion that this bruise required no medical treatment to resolve or be treated, for it was gone by the claimant's second appointment at CCOM on July 21, 2015, wherein Dr. Merchant found that on examination of her back he found no edema, erythema or ecchymoses. This bruise also, as Dr. Scott credibly testified, lead to no disability and could not cause the claimant's severe symptoms and subjective limitations. Additionally, Dr. Merchant opined in his July 21, 2015 report that the objective findings are not consistent with the history of a work-related etiology.

12. Dr. Scott explained at the hearing that the claimant's continued back pain and subjective symptoms are not causally related to the July 16, 2015, incident, and are

instead related to and explained by her severe, long-standing degenerative lumbar spine changes seen on the lumbar spine x-ray done January 23, 2015, the MRI done June 13, 2015, and her obesity. Dr. Scott said the claimant's degenerative spine conditions' long chronicity was seen by the MRI's reveal of endplate changes. He testified that those severe degenerative changes develop over years, and were not caused by or aggravated by this claim's injury. He testified they are clearly sufficient to cause and explain claimant's back pain that was symptomatic and requiring medical treatment before this claim's injury occurred and were independent of any injury alleged in this claim. Only Dr. Scott had all of the claimant's medical records available to review and the benefit of focusing on the causation and compensability issues in his report and hearing testimony. His conclusions are not rebutted by any other medical opinion, and are consistent with the medical records and findings of Dr. Merchant and the claimant's other providers.

13. The ALJ does not find the claimant to be credible.

14. The ALJ finds Dr. Scott's analyses and opinions to be credible and more persuasive than medical analyses and opinions to the contrary.

15. The ALJ finds that the claimant has failed to establish that it is more likely than not that the claimant suffered a compensable injury arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

2. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

3. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S.

4. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claims Appeals Office,* 5 P.3d 385, 389 (Colo. App. 2000).

5. It is within the ALJ’s purview as the finder of fact to determine the credibility of the witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

6. When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936).

7. In resolving inconsistencies the ALJ may credit all, part or none of an expert's testimony, and the ALJ's failure to cite an expert's opinion inherently reflects that the ALJ did not find it persuasive. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

8. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. §8-41-301 (1)(c) C.R.S.; *Faulkner v Industrial Claim Appeals Office*, 12 P 3.d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

9. For an injury to be compensable under the Workers’ Compensation Act, it must “arise out of” and “occur within the course and scope” of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm’n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

10. In deciding whether claimant has met his burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

11. The ALJ concludes that the analyses and opinions of Dr. Scott and Dr. Merchant are credible and more persuasive than medical analyses and opinions to the contrary.

12. The ALJ concludes that, although the claimant may have been contacted by the shopping cart, the evidence does not establish that she sustained a compensable injury as a result.

13. The ALJ concludes, as found above, that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury as the result of the July 16, 2015 incident. The ALJ is persuaded by the analyses and opinions of Dr. Scott and Dr. Merchant, which are credible and supported by the evidence in this case.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 21, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The issues for hearing were:

1. Whether the claimant has overcome the DIME physician's 0% impairment rating by clear and convincing evidence; and,

2. Whether the claimant established by a preponderance of the evidence that the claimant is entitled to post-maximum medical improvement medical benefits.

FINDINGS OF FACT

1. The claimant sustained a work related injury on May 27, 2014 when she bent forward to pick up five to six one gallon cans of paint, one at a time.

2. The claimant reported the injury to the respondent-employer, and began treating with Dr. Terrance Lakin ("ATP") at Southern Colorado Clinic, P.C.

3. On August 7, 2014, Dr. Lakin noted that "the severity of [the claimant's] complaints appear excessive for [the] mechanism of injury."

4. On August 8, 2014, Dr. Lakin again stated that "given [the claimants] low mechanism of injury I believe that returning to full duties at next visit, plus or minus on a trial basis and she should be at MMI and closing case in next one to two months."

5. On August 27, 2014 Dr. Lakin indicated that he "anticipate[d] MMI and no impairment."

6. Thereafter, although it is unclear why, the claimant was sent for an MRI of the lumbar spine.

7. On November 19, 2014 the claimant was seen by Dr. Ford for L4-L5 and L5-S1 facet joint injections. The claimant's pre-procedure pain was rated as a 7/10 and post procedure was indicated as a 4/10.

8. The following day, November 20, 2014, the claimant was seen by Dr. Lakin, where she reported with an increased, 6/10 pain level.

9. On January 2, 2015, the claimant reported she was doing great and was in no pain.

10. Despite her zero pain level, the claimant was sent for another injection on January 7, 2015.

11. The claimant was finally placed at maximum medical improvement (“MMI”) on January 27, 2015. Dr. Lakin prepared the impairment rating report and opined that the claimant had sustained a 12% whole person impairment. Dr. Lakin also prescribed medical maintenance of a gym membership for 12 months, and additional facet injections with Dr. Ford every 3-6 months, as needed, for up to 3 years.

12. The respondent admitted on the 12% permanent impairment given by Dr. Lakin. The respondent paid out approximately $11,084.48 on the 12%.

13. The claimant objected to the Final Admission on the 12%, and requested the DIME.

14. The respondent sent Dr. Lakin’s medical maintenance recommendations for peer review by Physician Based Medical Management. Dr. Moshe Lewis reviewed the maintenance requests and indicated that the requested maintenance was not recommended.

15. Dr. Wallace Larson was selected as the physician to perform the DIME.

16. Dr. Larson evaluated the claimant on September 29, 2015, eight months post-MMI, to complete the Division IME.

17. As part of the DIME, Dr. Larson reviewed the claimant’s prior medical records, including Dr. Lakin’s treatment records, Dr. Ford’s facet joint injections, and the October 15, 2014 MRI report.

18. As to the claimant’s prior history, the DIME pointed out that “[The claimant] was noted to have a previous history of depression” by Dr. Lakin “and it was unsure if this may be affecting poor response to therapy.” The note indicates severity of complaints appear excessive for mechanism of injury.

19. The DIME physician also noted that the treatment notes on August 8, 2014 indicated that “given her low mechanism of injury I [Dr. Lakin] believe that returning to full duties at next visit, plus or minus on trial basis and she should be at MMI and closing case in next 1-2 months.”

20. The DIME physician reviewed the claimant’s October 15, 2014 MRI scan of the lumbar spine, and indicated that “there was no evidence of acute abnormality.”

21. The DIME physician also conducted a physical examination of the claimant.

22. Per the physical examination, the DIME physician concluded that “sensory examination is normal bilaterally …. [The claimant] has no external deformities. The spine is straight. Strength is within normal limits. Peripheral pulses are normal. She has no muscle atrophy. Deep tendon reflexes are normal.”

23. The DIME physician further indicated that his “physical examination of the patient does not appear to be consistent with lumbar radiculopathy nor is it highly suggestive of lumbar strain.”

24. This was in contrast to the claimant’s subjective complaints indicating that “she can’t function like a normal person ….has nonstop pain….standing and partial bending ‘kills [her].’”

25. As a result of his medical record review and physical examination of the claimant the DIME physician concluded that “there is no objective indication that [the claimant] had damage to her L5-S1 disc…. The patient does not have a specific identified injury. She does not have a specific ratable impairment….My impairment rating is 0%. She does not require any additional treatment or diagnostic studies and does not require maintenance care.”

26. The respondent filed a Final Admission of Liability admitting on the zero percent (0%) permanent impairment rating. In response the claimant objected and filed an application for hearing.

27. An evidentiary deposition of the ATP, Dr. Terrance Lakin, was taken on March 15, 2016.

28. At the deposition, the ATP testified that the first step to rendering an impairment rating is "to have a mechanism of injury that correlates with the patient's complaints"

29. The ATP further indicated that in his opinions the facet injections "give us pretty good evidence that she was having irritation or inflammation at the facet joints"

30. When asked by counsel for the claimant as to whether the DIME properly performed his impairment rating, Dr. Lakin testified, "I think he came to the conclusion that, you know, she didn't have a mechanism of injury that warranted a permanent change or an impairment rating"

31. When asked whether the DIME ignored the objective evidence and instead made a subjective conclusion, the ATP was unable to answer, and simply indicated that he would hold more to his impairment rating values.

32. The ATP also testified that it would be appropriate to give a zero percent impairment rating when a physician believes that the mechanism of injury was not causing the pain complained of, and noted that "that is probably what Dr. Larson did."

33. When asked: "Why do you think you and Dr. Larson arrived at different conclusions as to an impairment rating?" Dr. Lakin indicated:

34. I think we have different medical opinions about this. These cases are hard. And on a daily basis, there's five or six patients that it's hard to deal with reaching conclusions of causality. You know, we have an older patient base that are in manual labor jobs, and discerning normal aging process or degenerative disc disease or joint disease and what creates their symptomatic pain at the time is hard for us to discern. And that's why, you know, we're – doctors rely on what the patient tells them and the data we can get. But also, I think there needs to be another aspect of investigation or workplace validation of what the mechanism was and when it happened.

35. At the hearing Dr. Lakin testified for the claimant.

36. At that time Dr. Lakin again admitted that the claimant did not have a "severe" mechanism of injury.

37. He also admitted that he has a limited understanding of the facility of the injections.

38. The ALJ finds that the analyses and opinions of Dr. Larsen are credible and persuasive.

39. The ALJ finds that the differing opinions of Dr. Lakin amount only to a difference of medical opinion and does not establish that Dr. Larsen was wrong in his assessments.

40. Dr. Larsen concluded that the claimant had no objectively identifiable injury other than perhaps a relatively minor back strain that would have resolved no later than January 27, 2015.

41. The ALJ finds that without an identifiable injury based on objective findings the provision of a 0% impairment rating is appropriate.

42. Additionally, the ALJ finds that without an objectively identifiable injury no maintenance medical benefits are appropriate as determined by Dr. Larsen.

43. The ALJ finds that the claimant has failed to establish that Dr. Larsen clearly erred in finding that the claimant had a 0% impairment rating.

44. The ALJ finds that the claimant has failed to establish that it is more likely than not that she is entitled to post-MMI maintenance medical benefits.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

2. A claimant in a workers' compensation claim generally has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

3. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-

107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra*. Accordingly, the ALJ is bound by the DIME physician's resolution of the issue in the absence of clear and convincing evidence to the contrary. *Hart v. Century Communications, Inc.,* 2001 Colo. Wrk. Comp. LEXIS 139, *3.

4. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S.

5. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claims Appeals Office,* 5 P.3d 385, 389 (Colo. App. 2000).

6. It is within the ALJ's purview as the finder of fact to determine the credibility of the witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

7. When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936).

8. In resolving inconsistencies the ALJ may credit all, part or none of an expert's testimony, and the ALJ's failure to cite an expert's opinion inherently reflects

that the ALJ did not find it persuasive. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

9. In deciding whether a proponent has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

10. C.R.S. 8-42-107(8)(c) dictates that a "physician shall not render a medical impairment rating based on chronic pain without anatomic or physiological correlation." C.R.S. 8-42-107(8) further provides that "Anatomic correlation must be based on objective findings." Both the DIME and the ATP agree that disc abnormalities are common in even asymptomatic individuals. Here, the DIME physician opined that the claimant's mechanism of injury was not significant enough to have caused the pain and symptoms complained of. While the ATP believed that the claimant's response to the injections provided objective evidence. The DIME Physician found that the claimant's subjective complaints that she could not function and was in constant pain were inconsistent with her physical examination and medical history, especially in light of the mechanism of injury.

11. The DIME physician found that the claimant had sustained a "relatively minor lumbar strain" and that her "symptoms both in terms of severity and chronicity are far out of proportion to the incident at work." The DIME further opined that the "[claimant's] treatment extended far longer than would be reasonable. . . . There is no objective evidence that [the claimant] had damage to her L5-S1 disc." The DIME further indicated that "The patient does not have a specific identified injury. She does not have a specific ratable impairment" and therefore, assigned her a zero percent impairment rating. The DIME's findings were based on both his review of the medical records in this matter, and his physical examination of the Claimant.

12. It is rudimentary that "as a matter of diagnosis, the assessment of impairment requires a rating physician to identify and evaluate all losses and restrictions which result from the industrial injury." *Qual-Med, Inc.,* 961 P.2d *at 592.* Moreover, it is well established that assessing whether the complained of injury was the cause of the claimant's permanent impairment is "an inherent part of the physician's rating and, therefore, is subject to the standard of clear and convincing." *Id. See also Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

13. The ALJ concludes that the claimant has failed to prove by clear and convincing evidence that the DIME's opinion on causation, and subsequently impairment, was mistaken. Instead, the ATP's own testimony was that he and the DIME physician arrived at different conclusions because they have "different medical opinions." Dr. Lakin also acknowledged that dealing with conclusions of causality is hard, that medicine is not an exact science, and that he and Dr. Larson simply went down different paths in reaching their conclusions.

14. The claimant contends that Dr. Larson's failure to abide by the AMA guidelines in rating the claimant's permanent impairment is fatal to his rating. The ALJ concludes that Dr. Larson's initial evaluation on causation, as to whether the mechanism of injury resulted in a ratable impairment, required the result that no permanent impairment resulted. Additionally, assuming *arguendo* that Dr. Larsen did deviate from the *Guides*, it is well established that a DIME's failure to properly apply the AMA guidelines does not require the result that the DIME physician's impairment rating is incorrect. *See Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1119 (Colo App. 2003), *see also In Re: Riffle v. Current USA,* 2009 Colo. Wrk. Comp. LEXIS 109, at * 7 ("Proof that a DIME physician deviated from the rating protocols of the AMA does not compel the ALJ to find that the rating has been overcome by clear and convincing evidence.").

15. "The claimant has the burden to show, by a preponderance of the evidence, that her request for maintenance medical benefits is reasonable, necessary and related to relieve the effects of the claimant's industrial injury or to prevent further deterioration of the claimant's condition." *See Van Meter v. City Market,* 2012 Colo. Wrk. Comp. LEXIS 162, *5-6 (citing to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).)

16. Here, the claimant has failed to offer sufficient evidence that would support her request for maintenance care.

17. As found above, the ALJ concludes that the claimant has failed to establish by clear and convincing evidence that the 0% impairment rating of the DIME physician was clearly wrong.

18. As found above, the ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she requires post-MMI maintenance medical care.

ORDER

It is therefore ordered that:

1. The claimant's request to overcome the DIME physician's opinion on impairment is denied and dismissed.

2. The claimant's request for post-MMI maintenance medical benefits is denied and dismissed.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 22, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury on January 18, 2015.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to medical benefits to treat a January 18, 2015 work injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) from January 19, 2015 through March 18, 2015.

STIPULATIONS

1. Claimant's average weekly wage (AWW) is $1,284.73.

2. The parties agree that Banner Health, Medical Center of the Rockies, Eye Care Center of Northern Colorado, University Hospital, Dr. Hebard, and Dr. Milchak are authorized providers.

FINDINGS OF FACT

1. Claimant worked for Employer beginning in August of 2014. Claimant worked on oil field rigs.

2. As part of his new hire training, Claimant received training on safety including the use of a respirator. Claimant had trouble initially passing the test for wearing a respirator, and after coaching, was able to pass the test.

3. Employees at the drill site were required to wear protective clothing and respirators when working with chemical agents added to hydraulic fracturing fluid and when working with sand particles.

4. Claimant, and all employees, received training regarding the awareness of what constituted a respiratory hazard, ways to mitigate the risk, and the proper use of personal protective equipment including respirators.

5. In addition to the initial training, Employer performed weekly safety meetings that employees were required to attend. The safety topics at those weekly meetings would sometimes include when and how to use a respirator, which cartilage to use (particulate vs. vapor), and inspecting or cleaning the respirator.

6. One of the chemicals that Claimant worked with was Buffer 10, a caustic chemical that contained acetic acid and acetic anhydride which could cause irritation and burning to the lungs if inhaled. Material Safety Data Sheets (MSDS) explaining this chemical and other chemicals was available at each job equipment site.

7. The MSDS sheet for Buffer 10 required use of the respirator if a risk assessment indicated it was necessary. Employer policy for the site required that employees use a respirator when working with Buffer 10.

8. On January 18, 2015 Claimant was working on “rigging down” a process that involved taking down equipment and removing chemicals from pumps.

9. Claimant was working with three other employees in this process. The three other employees were all wearing their respirators. However, Claimant was not wearing his respirator.

10. Claimant provided differing accounts of where he was and how he was assisting in the process to medical providers and in his hearing testimony. Nicholas Smith, a co-worker who was working alongside Claimant on the date in question, testified that Claimant had been assigned to pick up trash and that Claimant was nowhere near the Buffer 10 when they were emptying the valves and “rigging down.” Mr. Smith also testified that Claimant had been fooling around throughout the shift pretending to inhale chemicals and faint before getting up and laughing.

11. At some point in the “rigging down” process, Claimant may have been exposed to Buffer 10 for a very short duration of time and he may have been as close to the Buffer 10 as was needed to hold a bucket to open and check a valve to ensure no chemical remained in the valve. Claimant alleges he was holding a 5 gallon bucket under the valve when he opened it to check it and expected maybe a few drops to come out, but that a large amount came out. Claimant alleges he dropped the bucket after a short period because he felt off and walked away 20 feet and has no memory afterwards.

12. Claimant was discovered passed out by a co-worker and was taken to Employer’s main trailer. After observing Claimant for a period of time, a supervisor drove Claimant to Colorado Plains Medical Center.

13. On January 18, 2015 Claimant was evaluated at Colorado Plains Medical Center. Claimant reported that his chest was burning beginning one hour prior. Claimant was gagging, was agitated, reported he could not breathe, was periodically rolling his eyes back and having brief clonic tonic seizures, and stated he could not stand. The supervisor who drove Claimant to the medical center reported that Claimant may have inhaled Buffer and provided the medical center with a MSDS sheet for Buffer. The supervisor also reported that Claimant’s symptoms were not as bad earlier. Claimant was noted to have labored breathing moderate grunting and mild wheezing breath sounds. Claimant was also noted to be holding his breath and having periodic

jerky intentional deep breaths with chest clutching. Claimant's pulse oxygen levels were normal. A chest radiograph was performed and the impression was: suggestion of mild central airway thickening, a finding which can be seen in the setting of bronchitis or reactive airway disease. The MSDS sheet listed a caustic chemical inhalation and after discussing the case, a doctor recommended transfer to the Medical Center of the Rockies for a higher level of care. Claimant was transported by helicopter. *See* Exhibit 3.

14. Claimant was hospitalized at the Medical Center of the Rockies from January 18, 2015 through January 23, 2015.

15. On January 20, 2015 while hospitalized, Claimant was evaluated by Richard Milchak, M.D. Claimant underwent spirometry testing that Dr. Milchak noted was an unintelligible evaluation. Dr. Milchak opined that Claimant gave poor effort but that there was no obvious intra or extra thoracic obstruction. *See* Exhibit H.

16. On January 22, 2015, Claimant was evaluated by Dr. Milchak. Dr. Milchak performed a pulmonary function test questioning reactive airway distress syndrome due to chemical inhalation. Dr. Milchak opined that Claimant gave poor effort and did not meet the criteria for acceptable or reproducible effort. Claimant reported his chest hurt too much to give full effort. Dr. Milchak opined that the tests were not helpful. *See* Exhibit H.

17. On January 23, 2015 Claimant was discharged from the Medical Center of the Rockies. While hospitalized, Claimant reported a 20 second exposure to chemical fumes followed immediately by extreme shortness of breath. Claimant reported wearing protective eye wear and a chemical gown but not a respirator. Claimant reported his symptoms quickly resolved after breaking away for fresh air, then worsened when he returned to the spill for cleaning and reported that he got very weak and dizzy and subsequently passed out. Claimant reported chest tightness and shortness of breath, gastric pain and nausea, weakness, dizziness, and dysuria. Chest x-rays were performed and were negative. While hospitalized, an RN noted that Claimant was able to take normal deep breaths when he was not aware he was being listened to, but that he took shallow inhalations when being listened to with a stethoscope. On discharge, the final diagnoses were listed as: suspected inhalation injury; weakness of unknown etiology; and microcytosis. It was noted that Claimant had a possible inhalation injury but that chest x-rays were normal, room air saturations were greater than 90 percent, and that spirometry was not a useful test. It was noted to be unclear how possible chemical inhalation could contribute to Claimant's reported painful urination. *See* Exhibit E.

18. On January 27, 2015 Claimant was evaluated by James Hebard, M.D. Claimant reported an inhalation chemical exposure to Buffer 10 while closing down a fracking rig. Claimant reported that he did not have direct contact with the chemical but that he felt burning and tightness in his chest as well as weakness. Claimant reported left sided deep chest pain with breathing and a headache. Claimant's exam was noted

to be normal and unremarkable with clear lungs. Dr. Hebard diagnosed: inhalation of chemical fumes; chest pain with shortness of breath; headache; and dizziness. Dr. Hebard referred Claimant for a pulmonary follow up. *See* Exhibit 5.

19. On February 17, 2015 Claimant was evaluated by Dr. Milchak. Claimant reported continued shortness of breath and chest pain as well as dizziness and visual acuity changes. Dr. Milchak opined that Claimant's symptoms did not necessarily fit well with inhalation of Buffer 10. Dr. Milchak noted that he reviewed the Buffer 10 MSDS sheets and found no cause for Claimant's pleuritic chest pain. Dr. Milchak noted that Claimant reported passing out so theoretically Claimant could have hit his chest causing a traumatic chest wall injury. Dr. Milchak noted that a CT scan of the chest would be done to look for evidence of air trapping, interstitial changes, or chest wall injury. Dr. Milchak also opined that the injury could give way to a reactive airway distress syndrome but noted Claimant had no bronchospasm. Dr. Milchak noted that Claimant's spirometry showed moderate restriction but with very poor effort. Dr. Milchak opined that until the tests were completed he could not determine causality with the inhalation and Claimant's symptomatology. *See* Exhibit C.

20. On February 23, 2015 Claimant was evaluated by Dr. Hebard. Claimant reported continued left chest pain and dizziness. Claimant's bilateral lungs had clear breath sounds, but he breathed very shallow and complained of left sided deep chest pain. Dr. Hebard noted that Claimant was being scheduled for a chest ct, opthamology consult, and a pulmonary function test. *See* Exhibit 5.

21. On February 24, 2015 Claimant underwent a CT of his chest. Claimant's scan was noted to be unremarkable other than decreased liver density compatible with hepatic steatosis. *See* Exhibit G.

22. On February 25, 2015 Claimant underwent an independent medical evaluation performed by Jeffrey Schwartz, M.D. Claimant reported no chest problems until an exposure at work on January 18, 2015. Claimant reported that day was his second day working with chemicals and that he was unable to tolerate wearing a respiratory protective device. Claimant reported the hose draining the chemical Buffer 10 was removed by a co-worker and that he placed a bucket underneath to catch the remaining chemical. Claimant reported that after placing the bucket he quickly backed away and five minutes later felt dizziness, shortness of breath, chest pain, and a cough and thinks he may have passed out. Claimant reported he was then taken to a local hospital and later flown to Loveland. Claimant reported that he still had intermittent dizziness, blurriness of vision, and chronic left anterior chest pain. *See* Exhibit A

23. Dr. Schwartz noted that Claimant had a brief exposure to Buffer 10 and that while the agent can cause respiratory irritation, Claimant's exposure was brief and outdoors so the amount of fumes to which he was exposed seemed fairly limited. Dr. Schwartz opined that all of Claimant's lung exams had been normal as well as chest CT scan and chest x-rays. Dr. Schwartz noted that exposure to a high concentration of chemical with irritating properties can cause reactive airway disease, the diagnosis

would depend on the finding of reversible airflow obstruction of a methacholine challenge test demonstrative hyper-responsive airways and that Claimant was unable to perform the necessary spirometries to allow for the assessment of reversible airflow obstruction or hyper-responsive airways. Dr. Schwartz opined that the cause of Claimant's left pleuritic chest pain remained unclear and that the evaluation showed no pleural or chest wall abnormality. Dr. Schwartz noted that Claimant had a history of what was thought to be a psychosomatic disorder in August of 2014 and opined that since Claimant's chronic severe left chest pain was not consistent with his exposure to Buffer 10 on January 18, 2015 Claimant's reported chest pain may also have a psychosomatic basis. *See* Exhibit A.

24. Dr. Schwartz agreed with Dr. Milchak's assessment that Claimant's symptoms were out of proportion to any objective evidence of an injury and that anxiety could be playing a role. Dr. Schwartz opined that Claimant's extensive evaluation showed no evidence of respiratory disorder or any work related injury occurring on January 18, 2015. *See* Exhibit A.

25. On February 27, 2015 Claimant underwent pulmonary function testing performed by Christopher Hatzis, M.D. Dr. Hatzis opined that there were inconsistent findings and that Claimant had an inability to meet standards for testing so definitive conclusions could not be made. Dr. Hatzis noted that Claimant had difficulty holding his breath or taking deep breaths due to his reported chest pain and that there was marked decreasing lung function after bronchodilator which was likely due to Claimant's effort. *See* Exhibit H.

26. On March 2, 2015 Claimant was evaluated by Dr. Milchak. Claimant reported continued severe left sided chest pain, dizziness, and visual changes. Dr. Milchak opined that Claimant's symptoms were out of proportion to the data that had been obtained. Dr. Milchak reviewed the MSDS for Buffer 10 and opined that there was no reason for Claimant's severe chest wall pleuritic pain. Dr. Milchak noted that a CT scan of the chest wall was unrevealing. Dr. Milchak opined that anxiety could be playing a part and that there was no reason for further testing. *See* Exhibit C.

27. On March 3, 2015 Claimant was evaluated at the Eye Center of Northern Colorado by Randall Smith, M.D. Claimant reported inhalation chemical exposure to Buffer 10 while closing down a fracking unit on January 18, 2015 and that he had blurry vision in both eyes especially in the distance and also was dizzy and had chest pain since the accident. Dr. Smith assessed cataracts, myopia, and loss of vision. Dr. Smith noted he would need to further research the chemical claimant was exposed to and that he would have Claimant return for visual field testing and OCT. *See* Exhibit 6.

28. On March 10, 2015 Claimant was again evaluated by Dr. Smith. Dr. Smith opined that there was no physiological reason for Claimant's loss of vision explained by testing. Dr. Smith explained to Claimant that the PH of the chemical exposed to was an acid that would have caused scarring and burns. *See* Exhibit D.

29. On March 25, 2015 Claimant was evaluated by Dr. Hebard. Claimant reported continued chest pain and dizziness. Dr. Hebard noted than an EKG performed on March 4, 2015 was normal, that the ophthalmologist Dr. Smith concluded there was no physiological reason for vision loss explained by testing, and that pulmonologist Dr. Schwartz found there was no objective evidence that Claimant sustained an inhalation injury. Dr. Hebard noted past medical records reported a similar episode of persistent severe left chest pain with no objective evidence of injury after a low speed motor vehicle accident. Dr. Hebard opined that Claimant did not sustain a traumatic chest injury and that there was no objective evidence of an inhalation injury or respiratory disorder. Dr. Hebard opined that Claimant had no evidence of an ongoing work related injury as a result of his January 18, 2015 exposure and that Claimant was at maximum medical improvement with no impairment as of March 19, 2015. *See* Exhibit 5.

30. Dr. Hebard concluded that it was reasonable that Claimant could have had some initial respiratory irritation from the reported chemical inhalation but that all subsequent and current complaints were out of proportion and lacked objective evidence and that no current condition was reasonably attributable to the January 18, 2015 inhalation injury. *See* Exhibit 5.

31. On August 21, 2014 Claimant was involved in a very low speed motor vehicle accident with very minimal damage to his automobile. Claimant was ambulating at the scene and then had a bizarre event with pseudo-syncope and was taken to the emergency room. A full workup with CT scans of the head, chest, abdomen, and pelvis were performed and were all negative. Claimant's blood work was also all negative. Claimant reported continued pain throughout the night and that his chest pain was so debilitating he thought he would fall down. Claimant had normal vital signs and there was concern for a behavioral component as they could not find anything physiological. *See* Exhibit F.

32. Claimant reported left sided chest pain despite no identifiable injuries by imaging or clinically other than a slight bruise on the left trapezius consistent with a seatbelt. Claimant reported not being able to breath and had shallow irregular breathing despite pulse oxygen on room air being in the high 90s. Given the normal imaging studies, Claimant's behavior was opined to be suggestive of an underlying anxiety disorder and/or psychiatric illness. *See* Exhibit F.

33. Claimant testified at hearing. Claimant reported that on the date of the incident he was working on chem add. Claimant reported he was told to bring a bucket to place under a valve and top open the valve/check to see if anything was left in the blow out process. Claimant thought maybe a few drops might come out but that a large amount of Buffer 10 came out. Claimant testified that he couldn't hold the bucket anymore because he was dizzy and that he dropped the bucket and went out approximately 20 feet away and doesn't remember what happened next until he was at the headquarters trailer of the jobsite. Claimant reported he was in extreme pain, his eyes were dripping, he was coughing a lot, and that nothing was done for approximately 40 minutes when he was then driven to Ft. Morgan to a doctor.

34. Claimant, overall, is not found credible or persuasive. Claimant notably has acted differently at times and has exaggerated his symptoms and complaints to medical providers. When initially taken to a medical center on January 18, 2015 Claimant's supervisor reported that he was not as bad before he arrived and then at the medical center his symptoms increased dramatically. Additionally, a nurse in the initial few days of treatment noted that Claimant was able to breathe much better when he thought he was not being observed. Claimant reported symptoms that providers noted had no possible link to exposure to Buffer 10 and Claimant has throughout the claim exaggerated and/or faked symptoms for unknown reasons. Due to the overall presentation Claimant has presented and the inconsistencies, Claimant's testimony can not be relied upon to any degree of certainty.

35. The opinion of Dr. Schwartz is found credible and persuasive. His opinion that Claimant did not suffer a work related injury on January 18, 2015 is supported by the medical records that show that Claimant did not suffer an inhalation injury and that Claimant does not have a reactive airway disorder or respiratory disorder due to inhalation of Buffer 10. The opinion of Dr. Schwartz is also supported by the opinions of other providers who found no objective evidence of any injury after medical testing was performed. The totality of medical evidence does not support a finding of an injury on January 18, 2015.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Workers' Compensation Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undersigned occurrence." *See* § 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Wherry v. City and County of Denver,* W.C. No. 4-475-818 (ICAO March 7, 2002).

Claimant has failed to establish by a preponderance of the evidence that he suffered a work related injury on January 18, 2015 due to exposure to Buffer 10. Initially, it is unclear as to whether Claimant was even exposed to any degree as testimony and evidence differs. However, even assuming Claimant's testimony is accurate and that he was holding a bucket under a valve when Buffer 10 came out, the exposure was for a minimal amount of time and did not result in any objective injury, irritation, or reason for Claimant's multitude of reported symptoms many of which would not result from an exposure to Buffer 10. The only objective test that supports Claimant's contention of an acute work injury is an initial chest radiograph that showed mild central airway thickening that could be seen in the setting of bronchitis or reactive airway disease. However, later testing showed that Claimant did not suffer from reactive airway disease as a result of inhalation of Buffer 10. Claimant has failed to show that any exposure that he may have suffered resulted in an injury or need for medical treatment resulted in the continued symptoms he reports. As found above, there is insufficient objective evidence establishing the existence of an injury or the aggravation of a prior injury. Although some physicians opined that he possibly could have suffered an initial irritation due chemical inhalation, the mere possibility of irritation is not supported by objective evidence showing no injury or damage to his respiratory functioning beyond his unreliable subjective symptoms. There was no ultimate diagnosis related to inhalation of Buffer 10 and there is no objective evidence to support Claimant's pain complaints and presentation throughout this claim. Dr. Hebard is the only provider to even suggest that Claimant might have had some initial respiratory irritation due to Buffer 10 exposure. However, the majority of the evidence does not support this theory and it is not found persuasive. Claimant's initial bizarre symptoms on January 18, 2015 are not supported by possible inhalation of Buffer 10 and the symptoms that Claimant continued to report during two months of treatment are also not explained by inhalation of Buffer 10. The totality of the evidence does not support the finding that a compensable injury occurred on January 18, 2015. The opinion of Dr. Schwartz is credible and persuasive and his opinion is supported by the ultimate conclusions of Dr. Hebard and Dr. Milchak who similarly could not find that Claimant suffered an injury.

Claimant overall is not credible or persuasive. Claimant reported in his testimony that he was holding a bucket under the valve while checking the valve and that a large amount of Buffer came out and he dropped the bucket, walked 20 feet away, and passed out. If Claimant had dropped a bucket in this process and immediately walked away and passed out, it would seem more credible that his co-workers would have noticed the dropped bucket, the overflowing bucket if indeed a large amount was coming out of the valve as Claimant reports, and that Claimant immediately passed out. Claimant also provided a differing report to the Medical Center of the Rockies when he reported he was exposed to Buffer for twenty seconds, had shortness of breath then got fresh air and improved but returned to clean up a spill and then felt weak and dizzy and passed out. Claimant further reported to Dr. Schwartz a different version of events indicating that he was draining the valves and five minutes afterwards he felt dizzy. The ALJ cannot find Claimant's testimony credible or persuasive and how the potential exposure occurred is unclear. Even if exposure did occur, at most it was minimal and did not result in any injury or medical problems for Claimant.

Medical benefits

Respondents are required to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805

P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that he sustained an industrial injury on January 18, 2015. Although there was an incident at work where Claimant reportedly passed out, the passing out and/or the symptoms Claimant reported later are not related to inhalation of Buffer 10. The objective testing does not support an inhalation injury and Claimant's multiple symptoms are not explained by objective testing or by inhalation. Claimant's multiple symptoms were similar to a prior non-work related episode in September of 2014 and are more likely due to non work related issues.

Claimant has failed to establish that his multiple reported symptoms for which he sought medical treatment on and after January 18, 2015 were, more likely than not, caused by a work related exposure to Buffer 10. The symptoms Claimant reported and the treatment he sought was not due to a work injury arising out of and in the course of his employment. Any exposure to Buffer 10 was at most minimal and objective testing shows there was no injury suffered due to any exposure. Therefore, Claimant has failed to meet his burden to prove a causal nexus between his employment and any need for medical treatment. As there was no industrial injury suffered on January 18, 2015, Respondents are not liable for medical treatment benefits.

Temporary Total Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an

ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Claimant has failed to establish an entitlement to TTD benefits. Claimant did not suffer an industrial injury and suffered no medical incapacity as the result of inhaling Buffer 10. Claimant's bizarre symptoms could not be explained by multiple medical providers and medical testing and the symptoms Claimant reported were not based on a work injury of inhalation. Claimant did not establish that an inhalation injury impaired his ability to earn wages or to resume his prior work. Although Claimant was placed under work restrictions by a provider, the restrictions were based on Claimant's incredible subjective complaints and that were not grounded in an actual work related injury. To be entitled to TTD Claimant must have suffered a work related injury and here he did not.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury on January 18, 2015. His claim is denied and dismissed.

2. Claimant has failed to establish by a preponderance of the evidence that he is entitled to medical benefits. His request for medical benefits is denied and dismissed.

3. Claimant has failed to establish an entitled to temporary total disability benefits. His request for TTD benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 20, 2016,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-963-620-04

ISSUE

The issue whether Claimant proved a spinal cord stimulator trial is reasonable, necessary, and related to his October 1, 2014, work injury was presented for consideration at hearing.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following findings of fact are entered.

1. On October 1, 2014, Claimant suffered injury to his left foot when he was loading produce into a truck and fell into a space between the truck and the dock.

2. Respondents filed a General Admission of Liability which admitted to ongoing temporary total disability benefits and all reasonably necessary medical benefits to relieve or cure Claimant of his October 1, 2014, work injury.

3. Claimant has received treatment for his work injury. Treatment included emergent surgery as a result of compartment syndrome, skin grafts following surgery to relieve the compartment syndrome, injections, physical therapy, and pool therapy, among others. Claimant's pain in the low back and left lower extremity persists.

4. On January 19, 2016, Dr. Christopher Huser noted the failure of previous treatment options to provide significant pain relief for Claimant's low back and left lower extremity pain. In an effort to facilitate another option for pain relief, Dr. Huser requested pre-authorization to proceed with a trial spinal cord stimulator. A spinal cord stimulator is a surgically implanted device about the size of a stopwatch. It delivers mild electrical signals to the epidural space near the patient's spine through one or two leads.

5. Respondents timely filed an Application for Hearing to contest the request for authorization of the spinal cord stimulator trial, which resulted in the subject hearing.

6. At hearing, the parties submitted exhibits which provided varying opinions regarding whether Claimant should undergo a spinal cord stimulator trial, and ultimately a permanent spinal cord stimulator.

7. Dr. Huser's request for pre-authorization outlines the benefits of the spinal cord stimulator. Dr. Huser's request for pre-authorization was pro-device and, at least

in part, the pre-authorization request contained product literature. The ALJ questions whether Dr. Huser exercised independent judgment and analysis of the potential benefits of a spinal cord stimulator for this particular Claimant.

8. Dr. Huser is not the only treating physician to offer opinions as to whether Claimant should undergo a spinal cord stimulator trial. Prior to Dr. Huser's recommendation, both Dr. Michael Ladwig and Dr. Franklin Shih advised Claimant that a spinal cord stimulator is not medically indicated, nor is it likely to provide pain relief. Drs. Ladwig and Shih are individuals who have been Claimant's treating providers for extended periods and are intimately involved with his care. Their consensus regarding the viability and appropriateness of a spinal cord stimulator is persuasive.

9. On September 9, 2015, Dr. Ladwig, Claimant's authorized treating provider, advised Claimant not to pursue the spinal cord stimulator.

10. On September 15, 2015, Dr. Shih also indicated he did not recommend Claimant receive a spinal cord stimulator and also stated, "I did discuss this with Dr. Ladwig and he is also not supportive of the spinal cord stimulator."

11. At hearing, Dr. Castro, Respondents' independent medical examiner, testified consistent with his report, which he issued following an examination of Claimant and his medical records.

12. Dr. Castro opined a spinal cord stimulator (trial or permanent) is not indicated in Claimant's circumstances. Initially, Dr. Castro opined that spinal cord stimulators, overall, fail to provide long-term pain relief. In an April 15, 2016, report Dr. Castro states at page 3, Claimant's "lower extremity pain is quite significant. It is not clear whether some of this CRPS (complex regional pain syndrome) versus primary leg pain from the fasciotomy versus some psychologic overlay. In my opinion, this type of pain will not be effectively treated and I think would not largely be changed by the use of a spinal cord stimulator. In my experience, spinal cord stimulators are poor controllers of pain; and often if they do work, it is generally for a transient period of time. I do not believe this patient will benefit from a spinal cord stimulator."

13. Dr. Castro also credibly opined Claimant's low back pain would not be relieved by a spinal cord stimulator.

14. The July 18, 2015, medical record reflects that Claimant underwent an MRI of the lumbar spine. The MRI revealed "multilevel degenerative disc changes resulting in central canal and foraminal encroachment." (R. Ex. I, bates 318)

15. Dr. Castro credibly opined, "the degenerative process that [Claimant] has I don't think would be fixed or improved by stimulation." (T: 41 21—22)

16. A spinal cord stimulator trial is a phase in the ultimate installation of a permanent spinal cord stimulator. A determination of whether a spinal cord stimulator trial is reasonably necessary necessitates an analysis of whether a permanent spinal cord stimulator is reasonably necessary.

17. A spinal cord stimulator trial does not accurately predict the long-term outcome of a permanent spinal cord stimulator. Dr. Castro credibly testified, "I don't think the trials help improve the long-term predictability of an outcome." (T:37 21-24) "Trials frequently have reasonably good results in the trial. And go on to implantation, and then their—the outcomes are not very good." (T: 38 3-5)

18. Dr. Castro credibly opined, based on his experience, that a permanent spinal cord stimulator presents a considerable risk of worsening Claimant's condition.

19. Dr. Castro credibly testified at hearing that the installation of a permanent spinal cord stimulator requires operating on a healthy body part "doing a laminectomy, which is a major back surgery, which can cause problems in and of itself at where the device goes in. This is an operation at a level that's – that's not problematic now. That's in the T12-L1 thoracic-lumbar junction." (T: 37 6-15)

20. A spinal cord stimulator would substantially impair the ability of medical providers to obtain accurate imaging. If Claimant were to receive a permanent spinal cord stimulator, Claimant will likely be unable to receive an MRI, which means he will need what is called a CT scan or a CT myelogram.

21. Claimant may be unable to receive a CT myelogram due to his previous clotting issues and his need to take anticoagulants.

22. Dr. Castro credibly explained that if additional imaging is necessary and a CT myelogram or CT scan are unsuccessful, the spinal cord stimulator may need to be removed in order to obtain appropriate imaging, including an MRI.

23. Dr. LaCerte, Claimant's psychologist, prepared a report that was made part of the record at hearing. Dr. LaCerte only spoke to Claimant's psychological preparedness for the spinal cord stimulator trial.

24. Claimant also testified he is suffering from a great deal of pain and is willing to try a spinal cord stimulator. Dr. Castro credibly explained that Claimant's willingness to try the spinal cord stimulator is not justification for its authorization.

25. Dr. Castro's medical opinions regarding the efficacy of spinal cord stimulators are persuasive.

26. Claimant is understandably seeking to pursue every option in an effort to obtain significant and long-lasting pain relief. Based on the testimony and exhibits

presented at hearing, however, a spinal cord stimulator is not indicated to provide the relief sought. In fact, the spinal cord stimulator appears to not only provide guarded chances of pain relief, but also creates significant risks of worsening Claimant's condition.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address every piece of evidence that might lead to a conflicting conclusion. The ALJ may reject evidence contrary to the findings above as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Respondents are only liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994).

5. The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the

burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc. v. Industrial Claims Office, supra*.

6. Here, Claimant failed to prove, by a preponderance of the evidence, that the requested spinal cord stimulator trial is reasonably necessary to cure and relieve the effects of the subject industrial injury.

ORDER

It is therefore ordered that:

Claimant’s request for a spinal cord stimulator trial is denied and dismissed

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

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DATED: June 21, 2016___

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-939-006-03

ISSUES

The issue to be determined by this decision concerns whether Respondents have proven that the opinion of the Division Independent Medical Examiner (DIME) was overcome by clear and convincing evidence regarding causation and maximum medical improvement.

FINDINGS OF FACT

Having considered the evidence presented at hearing, including the post hearing deposition of Dr. Lindberg, the following Findings of Fact are entered.

1. On November 21, 2013, Claimant, a 54 year old male who was employed by the Employer as an electrician, suffered an admitted work-related injury. On that day, Claimant slipped on snow and ice and suffered a blow to his bilateral anterior knees in the course and scope of his employment. The work injury was a slip-and-fall on an incline at a construction site that was covered with snow and ice in Carbondale, Colorado. He reported the injury on the same date to the Employer.

2. Claimant credibly testified that he worked for Employer for three years. Employer placed Claimant on job sites for temporary work as an electrician on commercial electrical projects. Claimant's duties required that he wear a tool belt all day weighing 25 to 30 lbs. Claimant's duties also required that he carry extra equipment. Among the extra equipment carried by Claimant were ladders weighing 50 to 175 lbs. and hydraulic benders weighing 175 lbs. Prior to the job site where Claimant suffered the work injury, Claimant worked at a four story building, where his duties required him to walk the four stories up and downstairs all day.

3. Following Claimant's slip and fall on November 21, 2013, Claimant continued to work full duty and overtime on the project until he took Christmas break and returned to Denver. Claimant first requested medical attention for the knees on December 30, 2013, Claimant treated with Marion Wells, a physician's assistant (PA-C) (PA Wells). Claimant's knees bothered him with popping involving the patella. Ms. Wells provided Claimant restrictions and Vicodin. X-rays were taken on this date, which revealed right joint space loss and osteophyte formation in the medial and patellofemoral joint.

3 On January 29, 2014, Claimant returned to see PA Wells who noted that the left knee pain was 10/10 and the right was 8/10. She recommended bilateral MRIs and Claimant's prescription was refilled.

4. On February 7, 2014, Claimant had the recommended MRIs, which revealed moderate to severe degenerative changes in the medial compartment, mild degenerative

changes in the patellofemoral compartment, macerated appearance to the medial meniscus, small Baker's cyst and mild pre-patellar bursitis; on the left advanced degenerative arthrosis of the medical compartment including bare subarticular bone, meniscal degeneration, and degenerative meniscal tearing, abnormal signal pattern in the ACL consistent with low-grade sprain of the ligamentous degeneration

5. On February 13, 2014, Claimant saw Dr. Failinger, an orthopedic specialist, who noted that the MRI showed medial compartment high grade degenerative arthritis in the absence of both medial menisci. Dr. Failinger recommended cortisone injection in the left knee, and if it responded well, cortisone injection in the right knee, and speculated that an unloader brace and viscosupplementation, as possible remedies.

6. On February 27, 2014, Claimant returned to Dr. Failinger who noted that the injection on the left was ineffective, and then recommended viscosupplemenation.

7. On May 1, 2014, Dr. Failinger noted that there was an attempt to get viscosupplementation approved.

8. On May 15, 2014, a record review was completed by Dr. Scott Primack, a physical medicine and rehabilitation specialist, Level II accredited, who stated: "…clear that the patient had an aggravation of his underlying bilateral osteoarthritis of the knees. There was also a strain of the ACL." Dr. Primack stated that: "per the Medical Treatment Guidelines" there was not enough exposure to necessitate knee replacements in the employment with the Respondent. Dr. Primack noted that the Claimant had significant underlying problems and could consider the conservative treatment offered by Dr. Failinger but that the "long-term" need for the patient would be knee replacements, but this would not be considered work-related within a reasonable degree of medical probability. Dr. Primack recommended conservative interventions.

9. Dr. Failinger, who initially treated Claimant, indicated in a June 30, 2014, note in a response to a question by Respondent's counsel that he agreed that any knee replacement surgery would not be related to the knee contusions on the job with Employer.

10. On December 4, 2014, another record review was performed by Dr. Gwendolyn Henke, M.D., a board certified orthopedist who is Level II accredited. Dr. Henke indicated that the work-related fall: "…aggravated his pre-existing advanced medial compartment osteoarthritis." Dr. Henke also found tenderness and swelling over both kneecaps and limitation of flexion. The doctor offered her opinions that Claimant reached maximum medical improvement by December of 2014 and that the Claimant's symptoms at that time reflected the natural history of osteoarthritis of his knees. She also offered her opinion that the knee contusions in the course and scope of employment with the Respondent were a temporary aggravation of his pre-existing arthritis and would not lead to any permanent impairment. Dr. Henke offered her further opinion that
Claimant does need knee replacement surgery, but that would be directly related to "pre-existing, underlying degenerative changes, and not a result of the aggravation by a work injury."

10. On February 10, 2015, Claimant saw Dr. Stull, a treating physician, who felt that a total knee replacement would be appropriate, opining that: "…the physical demands of his job as an electrician over the last 30 years and work-related injury contributed to his knee arthritis and need for joint replacement."

11. On May 5, 2015, Claimant saw Dr. Derrick Johnson, another treating physician, who opined that were it not for the work injury, Claimant would not be presenting for a total knee arthroplasty.

12. Claimant treating physician at Concentra was Theodore Villavicencio. Dr. Villavicencio found Claimant to be at MMI on June 7, 2015. He indicated that he had reviewed the report by Dr. Henke authored on December 4, 2015, and the early report of Dr. Primack on May 15, 2014 and agreed with the orthopedic specialist that the Claimant had an exacerbation of chronic knee problems and had no new identified internal derangement. He indicated that knee replacement surgery was necessary, although "surgery would be related to the underlying chronic problems, rather than the workplace injury." Dr. Villavicencio assigned Claimant a 9% lower extremity rating on both the left and the right sides, equating to an 8% impairment of the whole person, for both knees.

13. On November 16, 2015, Claimant had a Division Independent Medical Examination (DIME) with Dr. Bennett Mechanic, a neurologist, whose objective findings included:

> "…significant knee pain bilaterally." "There is significant crepitance on both sides, I would say right easier to feel than left." "At this point in time, I feel reluctant to declare this man at maximum medical improvement. Granted he does have severe pathology on magnetic resonance imaging studies, but I certainly would wonder whether some type of surgical procedure or injection approach might make a difference. I noted in the records comments by orthopedic surgery that he is either end-stage or could respond to conservative therapy." "There is a question here of a total knee arthroplastic procedure; that is orthopedic judgment, and I cannot disagree or agree with this." "In summary at this point, I think it is best that we consider him not at maximum medical improvement, and due to the profound knee problems, explore the possibility that additional therapeutic intervention might make some sense."

14. On January 26, 2016, an independent medical evaluation was performed on Claimant by Dr. James Lindberg, an orthopedic specialist, at the request of Respondents' counsel. Dr. Lindberg's conclusion was that Claimant had bilateral severe osteoarthritis which pre-existed the work-related incident with the Respondent. He found that the mechanism of injury would have little impact on the Claimant's need for surgery and he found it improbable, within a reasonable degree of medical certainty, that the Claimant's workers' compensation injury caused his need for a total knee replacement. Dr. Lindberg noted the prior opinions of two other orthopedic surgeons

who concluded the same thing, Dr. Failinger and Dr. Henke. He indicated “I would add myself to this group as opining that this is not work-related.” Dr. Lindberg’s opinion was that Claimant would have needed the knee replacement whether or not he had the injury with the Respondent in November 2013.

15. On February 24, 2016, an independent medical evaluation was performed on Claimant by Dr. Joseph Ramos, at the request of Claimant’s counsel. Dr. Ramos’ findings included, in pertinent part: “I have review all of the records extensively, and I do not find anywhere that states [Claimant] had difficulties with his knees prior to this fall. There is no evidence that he has ever seen a doctor for knee pain; used medications for knee pain; or that he had any sort of knee pain that limited his ability to work and do the things he enjoyed in life.” “In sum, [Claimant] is not at MMI at this time, and should be provided with the additional and necessary care as recommended by Dr. Failinger and Dr. Johnson – which include bilateral total knee arthroplasties as part of his workers’ compensation related injury unless there is some identifiable proof of similar symptomology prior to this fall.” “In ending, it is clear that [Claimant] has suffered significant injuries and requires ongoing medical care. Once he has undergone bilateral total knee arthroplasties, he will require ongoing medical care that should be directed by his primary treating physician and his orthopedic surgeon.”

16. Dr. Machanic’s opinions regarding causation and MMI have not been overcome by clear and convincing evidence. Dr. Machanic has offered a well reasoned opinion regarding the cause of Claimant’s need for treatment of his bilateral knees. He has considered the opinions of other medical experts in reaching his conclusions regarding causation. The Judge finds no clear and convincing evidence the DIME opinion on causation is incorrect. Flowing from the determination on causation made by the DIME physician is the conclusion that Claimant requires additional medical treatment to cure and relieve him from the effects of the injury. Dr. Failinger recommends that Claimant be evaluated by an orthopedic specialist who has not previously examined Claimant for determination of the nature of the treatment that Claimant should receive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In most cases, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. In cases such as this one, a DIME physician's findings regarding causation, MMI and impairment are binding on the parties unless overcome by “clear and convincing evidence.” Section 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's opinions regarding causation, MMI and impairment rating are incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

3. In this case, Respondent failed to sustain its burden of proof to establish that Dr. Machanic’s DIME opinion with regard to causation and MMI is most probably incorrect. Respondent relies on the opinions of Drs. Lindberg, Henke, Failinger and Primack. Respondent argues that Claimant’s need for a total knee arthroplastic procedure is not related to the work injury and therefore Dr. Machanic’s conclusion that Claimant is not at MMI because Claimant requires referral to an orthopedic specialist for consideration whether there is treatment to cure and relieve the effects of the work injury is most probably incorrect. Respondent contends that Claimant would require total knee replacement whether or not the work injury occurred.

4. In the DIME report, Dr. Machanic acknowledges the opinions of Claimant’s treating physician, Dr. Villavicencio, orthopedic surgeons, Drs. Failinger and Henke, and a physiatrist, Dr. Scott Primack. Dr. Machanic notes that records indicate that Claimant was seen by another orthopedic surgeon, Dr. Johnston, whose records were not made available to Dr. Machanic. Dr. Machanic comments that he does not understand the opinions of Drs. Failinger, Henke and Primack that Claimant’s need for total knee replacements is not work related. Dr. Machanic opines that the cause of Claimant’s bilateral knee injury and his current need for treatment is work related. Mr. Machanic notes that Claimant was fully able to perform his work duties before the work injury and after the work injury he has been unable to perform his work.

5. Dr. Machanic further comments that the question of the total knee replacement or more conservative treatment is for an orthopedic specialist to make. Dr. Machanic concludes in the DIME report that the opinion of an orthopedic surgeon who has not previously seen Claimant should be authorized to “reassess the situation in terms of what would be appropriate for therapeutic intervention.” Even Respondent’s expert, Dr. James Lindberg, M.D. an orthopedic surgeon who conducted an independent medical evaluation at Respondent’s request, agrees that the DIME’s recommendation for evaluation by another orthopedic surgeon is a reasonable course of action and that the DIME report is not erroneous in this regard.

ORDER

It is therefore ordered that:

1. Respondent failed to overcome the opinion of the DIME physician, Dr. Machanic, by clear and convincing evidence on the issues of causation and MMI.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _June 21, 2016_____

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable left shoulder injury during the course and scope of his employment with Employer on April 29, 2015.

2. Whether Claimant has proven by a preponderance of the evidence that his request for a total left shoulder replacement is reasonable, necessary and causally related to his April 29, 2015 industrial injury.

3. Whether Kaiser Permanente was authorized to perform Claimant's August 19, 2015 total left shoulder replacement.

FINDINGS OF FACT

1. Claimant primarily worked for Employer as a Sheriff's Sergeant at the county jail. He was also a Training Officer on Employer's Special Operations Response Team (S.O.R.T.).

2. Claimant testified that he has suffered degenerative arthritis in his left shoulder for a number of years. He specified that he has had a total of three rotator cuff repairs and a subacromial decompression to his left shoulder. He recounted that in approximately 2005-2006 he began experiencing arthritis pain in his left shoulder. Claimant regularly received left shoulder treatment from Melissa D. Koenig, M.D. at Kaiser Permanente that included medications and injections. Over the years Claimant's left shoulder pain progressed into a constant, dull aching sensation. Although his medications increased, he was able to complete his regular work activities.

3. On September 15, 2008 Claimant visited Dr. Koenig at Kaiser for a left shoulder examination. Claimant had been referred for an evaluation of left shoulder pain and stiffness. He reported that approximately five years earlier he had developed impingement syndrome. He underwent physical therapy, steroid injections and surgical intervention. Claimant recounted that in about January of 2008 he began suffering left shoulder pain after working out. He also experienced pain while sleeping and suffered range of motion deficits. After conducting a physical examination Dr. Koenig diagnosed Claimant with moderate to severe glenohumeral arthritis. She recommended treatment with injections and medications. Dr. Koenig discussed possible surgical intervention but expressed concerns because Claimant was only 37 years old. She noted that Claimant would likely require some type of left shoulder replacement surgery but he sought to delay the procedure for as long as possible.

4. In 2009 Claimant was involved in a motor vehicle accident and sustained a number of injuries including left shoulder symptoms. He acknowledged that he suffered a significant degeneration of his left shoulder joint as a result of the accident. Claimant also explained that his left shoulder condition continued to deteriorate after the motor vehicle accident.

5. Dr. Koenig initially provided Claimant with quarterly cortisone injections for his left shoulder pain. When the injections became less effective she administered a course of viscosupplementation. In a January 12, 2011 note Dr. Koenig documented that she had spoken to Claimant at length regarding left shoulder options. She recounted that she had spoken to six shoulder surgeons and they agreed that she should try Supartz treatment because of Claimant's young age. If Supartz treatment was unsuccessful, they suggested a variety of potential surgical options.

6. On September 12, 2014 Claimant returned to Dr. Koenig for an examination. Dr. Koenig summarized that Claimant had been maintaining his left shoulder pain with periodic fluoro-guided injections and viscosupplementation. Claimant desired to discuss his left shoulder options because viscosupplementation had been discontinued. They considered a variety of surgical options but Dr. Koenig recommended delaying surgery as long as possible because of Claimant's physically demanding job duties.

7. Claimant testified that on April 29, 2015 he was arranging S.O.R.T. team gear in his truck after a day of training. As he moved a box or pelican case in the bed of his truck he heard a "pop" in his left shoulder and experienced immediate pain. The pelican case contained training weapons and weighed approximately 50-60 pounds. Claimant reported his symptoms to Employer on April 30, 2015 and was referred to HealthOne Occupational Medicine and Rehabilitation for treatment.

8. Claimant initially received treatment from Robert Broghammer, M.D. Claimant reported that he felt a sudden "pop" and pain in his left shoulder while lifting a pelican case in his truck bed at work on April 29, 2015. He explained that his left shoulder pain had significantly increased since the incident. Claimant remarked that he had an extensive history of left shoulder pain from degenerative joint disease. He had undergone three rotator cuff repairs and a subacromial decompression. He then developed degenerative joint disease and has received treatment in the form of Synvisc and cortisone injections. Claimant commented that his April 29, 2015 industrial injury elevated his pain from baseline levels. Dr. Broghammer diagnosed Claimant with left shoulder pain and an extensive history of left shoulder arthritis. He stated that Claimant's "objective findings appear[ed] consistent with a work-related mechanism of injury." Dr. Broghammer assigned work restrictions of no more than one pound of lifting, carrying, pushing, pulling or reaching with Claimant's left arm.

9. On June 12, 2015 Claimant returned to Dr. Broghammer for an evaluation. Claimant sought to discuss other options regarding medications for daytime use. Dr. Broghammer diagnosed Claimant with left shoulder pain including a history of severe degenerative changes and a small rotator cuff tear. He modified Claimant's

work restrictions to no more than five pounds of lifting, carrying, pushing, pulling or reaching with his left arm.

10. On July 16, 2015 Claimant visited Kareem G. Sobky, M.D. at Kaiser for a second surgical opinion. Dr. Sobky reported that he was not able to rotate Claimant "internally more than about 70 degrees." When reviewing an MRI, Dr. Sobky noted "there is a very large loose body under the coracoid, as well." After discussing treatment options Dr. Sobky recommended a total left shoulder replacement.

11. On July 17, 2015 Claimant again visited Dr. Broghammer for an examination. Claimant stated that he had been transferred to the records department at work and his left shoulder had improved. He also remarked that he had visited his doctors at Kaiser and they had recommended a total left shoulder replacement. Dr. Broghammer assessed Claimant with "left shoulder pain with significant degenerative changes. Awaiting shoulder replacement."

12. On July 17, 2015 Respondent's Adjuster Kurt Muehler called Dr. Broghammer's office and "advised that [Respondent] had not authorized the 07/17/15 visit under the WC claim," and also "advised that [he was] not authorizing anything further on the claim." Claimant thus explained that Dr. Broghammer's office called him and explained that he could not return after July 17, 2015.

13. On July 29, 2015 Claimant underwent a pre-operative physical evaluation with Nurse Practitioner Nicole B. Adams. NP Adams noted that Claimant had "failed optimal medical management of arthritis" including medications, injections, exercise and weight control. Radiographs had revealed "severe arthritis with joint space narrowing and deformity." NP Adams commented that Claimant elected to proceed with surgery.

14. On August 19, 2015 Claimant underwent a total left shoulder replacement with Dr. Sobky at Kaiser. Claimant did not suffer any post-operative complications including repeat surgery or delayed healing. .

15. On September 10, 2015 Claimant underwent an independent medical examination with Nicholas K. Olsen, M.D. Claimant reported that he injured his left shoulder at work on April 29, 2015 after completing a training day. While moving a pelican box weighing approximately 60 pounds in the back of his truck Claimant "felt a crunch and a pop" in his left shoulder. Claimant recounted a pre-existing history of osteoarthritis in his left shoulder. He noted that with previous "arthritis flare-ups" he would ice his shoulder overnight and his symptoms would decrease. However, when he awoke on April 30, 2015 his arm was "frozen to the side" and extremely painful. After conducting a physical examination and reviewing diagnostic studies Dr. Olsen determined that Claimant did not suffer an industrial injury on April 29, 2015 while moving the pelican case in the back of his truck. Instead, Claimant was simply experiencing symptoms of left shoulder end-stage osteoarthritis. The left shoulder MRI did not reveal any evidence of a traumatic injury to Claimant's rotator cuff but instead reflected pre-existing end-stage osteoarthritis. Dr. Olsen thus concluded that Claimant's

need for left shoulder surgery on August 19, 2015 was not causally related to the events of April 29, 2015 but was attributable to his left shoulder degenerative osteoarthritis.

16. In a May 3, 2016 letter Dr. Sobky addressed Dr. Olsen's conclusions from his independent medical examination. Dr. Sobky acknowledged that Claimant suffered from pre-existing left shoulder osteoarthritis. He occasionally experienced "arthritic flare-ups" that were managed without surgery. Claimant was also able to perform his regular work duties. However, after the April 29, 2015 incident Claimant exhibited a significant decline in function and severe pain inhibited his ability to perform his job duties. Dr. Sobky noted that, if the April 29, 2015 incident had constituted a simple arthritic flare-up, Claimant's symptoms should have improved. Dr. Sobky remarked that Claimant would have required a left shoulder replacement as a result of his pre-existing osteoarthritis. However, the April 29, 2015 incident "exacerbate[d] his pre-existing condition to the point of [a] significant decline in pain control and [a] decline in function of his shoulder that was not improving." The injury "accelerated the timeline" for surgical intervention. Dr. Sobky concluded that a total left shoulder replacement was the only treatment option for Claimant.

17. Dr. Olsen testified at the hearing in this matter. After reviewing Claimant's medical records Dr. Olsen reiterated that Claimant suffered from pre-existing, degenerative left shoulder arthritis. He explained that in 2000 Claimant had undergone left shoulder surgery for a rotator cuff tear. By 2008 imaging studies reflected moderate to severe glenohumeral arthritis in Claimant's left shoulder. Claimant's condition continued to deteriorate and a 2010 MRI revealed structural left shoulder changes that constituted severe osteoarthritis. Dr. Olsen explained that, although Claimant was a candidate for left shoulder replacement surgery in 2011, physicians sought to delay the procedure because of his young age and uncertainty about whether he would require repeat surgery later in life. He reasoned that Claimant was in imminent need of a left shoulder replacement regardless of the April 29, 2015 incident. Dr. Olsen specified that the April 29, 2015 incident did not cause a worsening of Claimant's left shoulder condition or accelerate the need for a left shoulder replacement. The April 29, 2015 accident merely constituted a temporary aggravation or flare-up of Claimant's pre-existing left shoulder osteoarthritis.

18. Claimant has demonstrated that it is more probably true than not that he suffered a compensable left shoulder injury during the course and scope of his employment with Employer on April 29, 2015. Claimant credibly testified that on April 29, 2015 he was arranging S.O.R.T. team gear in his truck after a day of training at work. As he moved a box or pelican case in the bed of his truck he heard a "pop" in his left shoulder and experienced immediate pain. The pelican case contained training weapons and weighed approximately 50-60 pounds. Claimant initially received treatment from Dr. Broghammer at HealthOne. Dr. Broghammer diagnosed Claimant with left shoulder pain and noted an extensive history of left shoulder arthritis. He stated that Claimant's "objective findings appear[ed] consistent with a work-related mechanism of injury." Dr. Broghammer assigned work restrictions of no more than one pound of lifting, carrying, pushing, pulling or reaching with his left arm. Furthermore, surgeon Dr. Sobky noted that prior to the April 29, 2015 incident Claimant was able to

perform his regular work duties. However, after the April 29, 2015 incident Claimant exhibited a significant decline in function. Severe left shoulder pain also inhibited his ability to perform his job duties. Dr. Sobky summarized that the April 29, 2015 incident exacerbated Claimant's pre-existing left shoulder arthritis.

19. In contrast, Dr. Olsen determined that Claimant did not suffer an industrial injury on April 29, 2015 while moving the pelican case in the back of his truck. Instead, Claimant was simply experiencing symptoms of left shoulder end-stage osteoarthritis. However, the record demonstrates that Claimant's work activities aggravated, accelerated or combined with his pre-existing left shoulder osteoarthritis to produce a need for medical treatment. Claimant credibly reported that he felt a sudden "pop" and pain in his left shoulder while lifting the pelican case in his truck bed at work on April 29, 2015. Although Claimant acknowledged a history of left shoulder osteoarthritis, he explained that his left shoulder pain had significantly increased since the incident. Accordingly, Claimant's need for medical treatment subsequent to April 29, 2015 was caused by the industrial aggravation of his pre-existing left shoulder condition.

20. Claimant has failed to prove that it is more probably true than not that his request for a total left shoulder replacement is reasonable, necessary and causally related to his April 29, 2015 industrial injury. Dr. Olsen persuasively explained that Claimant had an extensive history of pre-existing, degenerative left shoulder osteoarthritis. By 2008 imaging studies reflected moderate to severe glenohumeral arthritis in Claimant's left shoulder. Claimant's condition continued to deteriorate and a 2010 MRI revealed structural left shoulder changes that constituted severe osteoarthritis. Dr. Olsen explained that, although Claimant was a candidate for left shoulder replacement surgery in 2011, physicians sought to delay the procedure because of his young age and uncertainty about whether he would require repeat surgery later in life. He reasoned that Claimant was in imminent need of a left shoulder replacement regardless of the April 29, 2015 incident. Moreover, Claimant's left shoulder MRI subsequent to the April 29, 2015 incident did not reveal any evidence of a traumatic injury to his rotator cuff. The MRI instead reflected end-stage osteoarthritis that existed before the April 29, 2015 incident. Dr. Olsen specified that the industrial incident did not cause a worsening of Claimant's left shoulder condition or accelerate the need for a left shoulder replacement. Finally, Claimant's pre-operative evaluation reflects that he had "failed optimal medical management of arthritis" including medications, injections, exercise and weight control. Radiographs had revealed "severe arthritis with joint space narrowing and deformity."

21. In contrast, Dr. Sobky explained that the April 29, 2015 incident exacerbated Claimant's pre-existing condition and caused a significant decline in left shoulder function. He remarked that the injury "accelerated the timeline" for surgical intervention. However, Claimant's history of progressive, degenerative left shoulder osteoarthritis and prior consideration of surgery suggest that the need for a total left shoulder replacement was caused by the natural progression of Claimant's pre-existing condition. Although Claimant suffered an incident at work on April 29, 2015 it did not accelerate his need for left shoulder surgery. Furthermore, Claimant's pre-operative evaluation demonstrates that his total left shoulder replacement was predicated on his

chronic, degenerative osteoarthritis and not an acute injury. Accordingly, based on the extensive medical records of degenerative, pre-existing osteoarthritis, in conjunction with the persuasive opinions of Dr. Olsen, the need for a total left shoulder replacement was not causally related to the April 29, 2015 work accident. Because Claimant's total left shoulder replacement was not reasonable, necessary or causally related to the April 29, 2015 work incident, it is unnecessary to address whether Kaiser was authorized to perform the procedure.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable left shoulder injury during the course and scope of his employment with Employer on April 29, 2015. Claimant credibly testified that on April 29, 2015 he was arranging S.O.R.T. team gear in his truck after a day of training at work. As he moved a box or pelican case in the bed of his truck he heard a "pop" in his left shoulder and experienced immediate pain. The pelican case contained training weapons and weighed approximately 50-60 pounds. Claimant initially received treatment from Dr. Broghammer at HealthOne. Dr. Broghammer diagnosed Claimant with left shoulder pain and noted an extensive history of left shoulder arthritis. He stated that Claimant's "objective findings appear[ed] consistent with a work-related mechanism of injury." Dr. Broghammer assigned work restrictions of no more than one pound of lifting, carrying, pushing, pulling or reaching with his left arm. Furthermore, surgeon Dr. Sobky noted that prior to the April 29, 2015 incident Claimant was able to perform his regular work duties. However, after the April 29, 2015 incident Claimant exhibited a significant decline in function. Severe left shoulder pain also inhibited his ability to perform his job duties. Dr. Sobky summarized that the April 29, 2015 incident exacerbated Claimant's pre-existing left shoulder arthritis.

8. As found, in contrast, Dr. Olsen determined that Claimant did not suffer an industrial injury on April 29, 2015 while moving the pelican case in the back of his truck. Instead, Claimant was simply experiencing symptoms of left shoulder end-stage osteoarthritis. However, the record demonstrates that Claimant's work activities aggravated, accelerated or combined with his pre-existing left shoulder osteoarthritis to produce a need for medical treatment. Claimant credibly reported that he felt a sudden "pop" and pain in his left shoulder while lifting the pelican case in his truck bed at work

on April 29, 2015. Although Claimant acknowledged a history of left shoulder osteoarthritis, he explained that his left shoulder pain had significantly increased since the incident. Accordingly, Claimant's need for medical treatment subsequent to April 29, 2015 was caused by the industrial aggravation of his pre-existing left shoulder condition.

Medical Benefits

9. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

10. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

11. As found, Claimant has failed to prove by a preponderance of the evidence that his request for a total left shoulder replacement is reasonable, necessary and causally related to his April 29, 2015 industrial injury. Dr. Olsen persuasively explained that Claimant had an extensive history of pre-existing, degenerative left shoulder osteoarthritis. By 2008 imaging studies reflected moderate to severe glenohumeral arthritis in Claimant's left shoulder. Claimant's condition continued to deteriorate and a 2010 MRI revealed structural left shoulder changes that constituted severe osteoarthritis. Dr. Olsen explained that, although Claimant was a candidate for left shoulder replacement surgery in 2011, physicians sought to delay the procedure because of his young age and uncertainty about whether he would require repeat surgery later in life. He reasoned that Claimant was in imminent need of a left shoulder replacement regardless of the April 29, 2015 incident. Moreover, Claimant's left shoulder MRI subsequent to the April 29, 2015 incident did not reveal any evidence of a traumatic injury to his rotator cuff. The MRI instead reflected end-stage osteoarthritis that existed before the April 29, 2015 incident. Dr. Olsen specified that the industrial incident did not cause a worsening of Claimant's left shoulder condition or accelerate the need for a left shoulder replacement. Finally, Claimant's pre-operative evaluation

reflects that he had "failed optimal medical management of arthritis" including medications, injections, exercise and weight control. Radiographs had revealed "severe arthritis with joint space narrowing and deformity."

12. As found, in contrast, Dr. Sobky explained that the April 29, 2015 incident exacerbated Claimant's pre-existing condition and caused a significant decline in left shoulder function. He remarked that the injury "accelerated the timeline" for surgical intervention. However, Claimant's history of progressive, degenerative left shoulder osteoarthritis and prior consideration of surgery suggest that the need for a total left shoulder replacement was caused by the natural progression of Claimant's pre-existing condition. Although Claimant suffered an incident at work on April 29, 2015 it did not accelerate his need for left shoulder surgery. Furthermore, Claimant's pre-operative evaluation demonstrates that his total left shoulder replacement was predicated on his chronic, degenerative osteoarthritis and not an acute injury. Accordingly, based on the extensive medical records of degenerative, pre-existing osteoarthritis, in conjunction with the persuasive opinions of Dr. Olsen, the need for a total left shoulder replacement was not causally related to the April 29, 2015 work accident. Because Claimant's total left shoulder replacement was not reasonable, necessary or causally related to the April 29, 2015 work incident, it is unnecessary to address whether Kaiser was authorized to perform the procedure.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. On April 29, 2015 Claimant suffered a left shoulder injury during the course and scope of his employment with Employer.

2. Claimant's request for a total left shoulder replacement is denied and dismissed.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 23, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The parties participated in a prehearing conference with PALJ Gallivan on May 24, 2016. By order dated May 24, 2016, PALJ Gallivan ordered that the parties first have determined the legal issues raised by the respondents' application for hearing. Specifically the issues framed by that Order are:

1. Whether the relief sought by the respondents in the application for hearing is permitted by the settlement agreement;

2. Whether a petition to reopen is required prior to contesting the reasonableness and necessity of medical treatment; and,

3. Who has the burden of proof with regard to the determination of reasonably necessary medical treatment.

FINDINGS OF FACT

1. The claimant sustained two admittedly compensable work-related injuries while working within the course and scope of his employment for the respondent-employer occurring on December 13, 1985 and April 19, 1991 respectively.

2. The parties to those claims entered into a "Stipulation for Full and Final Settlement and Release of All Claims" (hereafter, the "Agreement") which was dated and signed by the parties on October 14, 1994 and approved as an Order of the Department of Labor and Employment, Division of Workers" Compensation on November 14, 1994.

3. Pursuant to the terms of Paragraph 10 of the Agreement, the parties stated that it "contained the entire agreement between the parties, and the terms herein are contractual and not a mere recital."

4. The ALJ finds that the parties pursuant to the execution of the Agreement and its approval by the Department of Labor and Employment, Division of Workers" Compensation entered into a settlement agreement pursuant to the terms of C.R.S. 8-43-204 (1994). This section permits an injured employee to settle "all or part of any claim for compensation, benefits, penalties, or interest."

5. The respondents have now filed an application for hearing pursuant to which the issue endorsed is: “Respondents seek a finding that ongoing medical care is not reasonable necessary and related to the subject injury.” No specific medical care or procedure is cited; thus, the ALJ finds by the terms of the application for hearing, that the respondents seek to terminate all medical going forward under the theory that no possible medical care could be reasonable, necessary, or related to the subject claims.

6. As it relates to medical benefits, the parties in the Agreement devoted a significant portion of the Agreement to the claimant’s ongoing medical needs. Paragraph 5 (d) of the Agreement states as follows:

> The Claimant understands that, under the Workers’ Compensation Act of Colorado, he is entitled to ongoing medical, surgical, and hospital benefits from the Respondents. The Respondents in W.C. No. 4-109-301 [respondent-employer and respondent-insurer], agree to leave medical benefits open for the remainder of the Claimant’s life. The Respondents in W.C. No. 4-109-301, agree to pay for all reasonable and necessary medical, surgical, or hospital treatment required by the Claimant arising out of his work-related injuries on December 13, 1985 and April 19, 1991, including, but not limited to, treatment for Claimant’s head, ears, eyes, neck, back, left hip, left lower extremity, and psychological and emotional injuries. Claimant will not be required to establish whether the care and treatment is causally related to the December 13, 1985 or the April 19, 1991 injuries, as the Respondents in W.C. No. 4-109-301 will be responsible for all ongoing medical care and treatment required by the Claimant’s two work-related injuries…”

7. The ALJ has reviewed the entirety of the Agreement and finds that it is not ambiguous in such a nature as a matter of law that parol or extrinsic evidence is necessary to understand the intention of the parties when entering into the Agreement that was approved as an Order of the Department of Labor and Employment, Division of Workers” Compensation on November 14, 1994.

8. The ALJ finds that the respondent-insurer agreed to leave the claimant’s “medical benefits open for the remainder of the Claimant’s life.” The Agreement provides that the respondent-insurer agrees “to pay for all reasonable and necessary medical, surgical, or hospital treatment required by the Claimant arising out of his work-related injuries on December 13, 1985 and April 19, 1991, including, but not limited to, treatment for Claimant’s head, ears, eyes, neck, back, left hip, left lower extremity, and psychological and emotional injuries.”

9. The ALJ finds that by the terms of the Agreement the respondent-insurer is precluded from contesting all future medical care. Under the Agreement as long as the claimant can establish that care is reasonable, necessary, and related the respondent-insurer is required to provide that care. If the respondent-insurer were allowed to stop all future care without the claimant being given the opportunity to establish that the care is reasonable, necessary, and related then the claimant loses the benefit of the bargain, that is, that medical benefits remain "open for the remainder of the Claimant's life."

10. The ALJ further finds pursuant to the terms of the Agreement that since the issue of medical benefits is "open for the remainder of the Claimant's life" that the respondent-insurer may contest any specific care on the grounds that it is not reasonable, necessary, or related to the admitted claims without having to file a Petition to Reopen. When a specific medical benefit is contested the claimant still has the burden to prove that any specific medical care is reasonable, necessary, and related to one or the other of the claims; although, if the proof is such that the claimant can establish that the care must be related to one or the other of the claims, he need not prove which of the two is implicated.

CONCLUSIONS OF LAW

1. Facts in a workers' compensation case must be interpreted neutrally neither in favor of the rights of the claimant nor in favor of the rights of the respondents. See §8-43-201, C.R.S.

2. A Workers' Compensation case is decided on its merits. §8-43-201(1).

3. The purpose of the Workers' Compensation Act of Colorado in §8-40-101, et seq. C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. See §8-40-102(1)

4. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved: The ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. The ALJ's decision need not address every item contained in the record. See *Magnetic Engineering, Inc., v. ICAO,* 5 P. 3d 385 (Colo. App. 2000).

5. The interpretation of a contract is a question of law. *Ad Two, Inc. v. City and County of Denver,* 9 P.2d 373, 376 (Colo. 2000). The meaning of a contract is found by the examination of the entire instrument and not by viewing clauses or phrases in isolation. *U.S. Fid. & Guar. Co V. Budget Rent-A-Car Sys., Inc.,* 842 P.2d 208, 213 (Colo. 1992. The ALJ must review the document in its entirety with the end in view of seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless. *Copper Mountain, Inc. v. Indus. Sys., Inc.,* 208 P.3d 692, 697; *Preserve at the Fort, Ltd. v. Prudential Huntoon Paige Assocs.,* 129 P.3d 1015, 1017 (Colo. App. 2004).

6. The fact that the parties differ in their understanding of the agreement does not create an ambiguity. *Fiberglas Fabricators, Inc., v. Kylberg,* 799 P.2d 371, 374 (Colo. 1990). An ambiguity permitting resort to extrinsic evidence is established where different provisions of a contract are in irreconcilable conflict. See, *Ryan v. Fitzpatrick Drilling Co.,* 139 Colo. 471, 342 P.2d 1040 (1959). Under certain circumstances, extrinsic evidence may be conditionally admitted to determine whether the contract is actually ambiguous in the first place. *E. Ridge of Fort Collins, L.L.C. v. Larimer & Weld Irrigation Co.,* 109 P.3d 969, 974 (Colo. 2005).

7. The parol evidence rule or the admission of extrinsic evidence to give interpretation to the meaning of a contract is a principle of contract law, rather than a rule of evidence. See, *Restatement (Second) of Contracts Section 213 cmt. a (1979).* Where the rule applies, evidence of prior or contemporaneous agreements or negotiations may not be used to contradict a written agreement or vary the terms thereof. *Neves. v. Potter,* 769 P.2d 1047, 1054 (Colo. 1989); generally, an unambiguous document must be interpreted based only on information contained within its “four corners.” *McGuire v. Luckenbach,* 131 Colo. 333, 281 P.2d 997 (1955). A court should only resort to the admission of parol evidence when the contract between the parties is so ambiguous that their intent is unclear. *Cheyenne Mountain School Dist. #12 v. Thompson,* 861 P.2d 711 (Colo. 1993). In the absence of fraud, accident, or mistake in the formation of the contract, parol evidence may not be admitted to add to, subtract form, vary, contradict, change, or modify an unambiguous integrated contract. *Tripp v. Cotter Corp.,* 701 P.2d 124 (Colo. App. 1985).

8. The ALJ concludes as found above that the Agreement is not ambiguous.

9. The ALJ concludes as found above that the medical benefits issue remains open by the plain meaning of the Agreement. The ALJ concludes therefore that the respondents need not resort to a Petition to Reopen in order to contest medical benefits for a specific medical issue.

10. The ALJ concludes that the respondents are seeking to terminate all medical care. While the filing of a Petition to Reopen is not a requirement, the ALJ concludes that the respondent-insurer is precluded from attempting to terminate all future care by the plain terms of the Agreement.

11. Since no specific medical benefits are at issue the remaining issue concerning the burden of proof is moot.

12. The ALJ concludes that the respondents are precluded from a broad-based challenge of all future medical care by the terms of the Agreement.

13. The ALJ finds that a Petition to Reopen is not required for the respondent-insurer to challenge specific medical care on the grounds that the care is not reasonable, necessary, or related to the admitted claims.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents request to terminate all future ongoing medical care is denied and dismissed.

2. The respondent-insurer need not file a Petition to Reopen to contest specific medical care on the grounds that the medical care is not reasonable, necessary, or related to the admitted claims.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 23, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant met his burden of proof to overcome the Division Independent Medical Examination (DIME) opinions of Dr. Shank regarding maximum medical improvement (MMI) and impairment by clear and convincing evidence.

2. Whether the claimant's scheduled impairment rating should be converted to a whole person rating.

3. Whether the respondents' correctly calculated the claimant's average weekly wage (AWW).

4. Whether the claimant is entitled to additional temporary total disability (TTD) benefits from June 24, 2014 to February 18, 2015.

5. Whether the respondents have failed to provide reasonable, necessary, and related medical care.

6. Whether the claimant is entitled to an award for disfigurement.

STIPULATIONS

The parties stipulated that the claimant is entitled to reasonable, necessary and related post maximum medical improvement (MMI) benefits and the ALJ accepted this stipulation.

FINDINGS OF FACT

1. The claimant was employed by the respondent-employer and was employed as temp to hire. The claimant was working with a dam reconstruction company on June 24, 2014 where his duties included pulling out rebar from a demolished building and piling it up. While engaged in these activities he was entrapped by a closing tailgate on an earth moving truck. The claimant was seen at Pikes Peak Regional Hospital in the city of Woodland Park.

2. The claimant was evaluated by Dr. Michael Simpson on June 25, 2014 who diagnosed the claimant with a fourth metatarsal head fracture to his left foot, a comminuted fracture of the fifth metatarsal head involving the left foot with a displaced fracture of the fourth toe proximal phalanx, left foot, with an avulsion fracture of the interphalangeal joint of the right great toe.

3. On July 3, 2014 the claimant underwent surgery on his left foot.

4. The claimant's care was followed by Dr. Zaremba who found the claimant to be at maximum medical improvement on May 26, 2015.

5. Dr. Zaremba provided the claimant with a 4% impairment for the left lower extremity and a 3% impairment for the right lower extremity.

6. The respondents filed a Final Admission of Liability (FAL) on June 24, 2015. The respondents admitted to Dr. Zaremba's opinions and specifically an MMI date of May 26, 2015 and scheduled impairment of 4% for the left lower extremity and 3% for the right lower extremity. The claimant objected to the FAL and requested a division independent medical evaluation (DIME).

7. On August 25, 2015, prior to the DIME, the claimant underwent a claimant Independent Medical Examination with Dr. Hall. Dr. Hall opined the claimant received excellent care with Dr. Simpson and agreed with the opinions of Dr. Zaremba, however, due to the claimant's ongoing pain complaints he recommended the claimant receive a second opinion with Dr. Shank.

8. Ultimately, the claimant underwent a DIME with Dr. Shank on October 22, 2015. Dr. Shank agreed with Dr. Zaremba's opinion regarding MMI. He found the claimant reached MMI on May 26, 2015. He found a slightly lower impairment rating, however, and opined a 3% left lower extremity impairment and 3% right lower extremity impairment.

9. The respondents filed an amended FAL on November 16, 2015 admitting to the DIME report on MMI and impairment.

10. The claimant objected and filed an application for hearing requesting a hearing on the issues as stated above.

11. The claimant testified that he disagrees with the outcome of his case. He wants the respondent-insurer to acknowledge ligament and tendon damage. Additionally, he believes the damage is not limited to his small toe and 4th toe but also to

the Achilles and plantar tendon to the toes and heel. The claimant believes he should be entitled to a loss of the foot at the ankle. The claimant states that he wants a proper diagnosis and prognosis.

12. The claimant disagrees with the average weekly wage indicating that he rarely worked less than 9 hours.

13. The ALJ finds the analyses and opinions of Dr. Shank to be credible and persuasive. While the claimant has opined that he disagrees with some of Dr. Shank's findings, there are insufficient medical or lay opinions to the contrary that would rise to the level of showing that Dr. Shank clearly erred in his determination of MMI and impairment.

14. The ALJ finds there is insufficient evidence to establish that the claimant's scheduled ratings should be converted to a whole person rating. There is insufficient evidence to establish that there is a loss of function beyond the lower extremities.

15. The respondent-insurer admitted to an average weekly wage (AWW) of $309.00 and a temporary total disability (TTD) rate of $206. This AWW was calculated based upon the gross wages the claimant earned between May 6, 2014 and June 23, 2014. The wage records reflect the claimant earned gross wages of $2,163.01 during the 7 weeks the claimant was employed. The ALJ finds that because the claimant was a temporary employee that this is an appropriate method to determine AWW. The ALJ finds that the claimant's AWW is $309.00.

16. The respondent-insurer admitted for TTD for the period June 24, 2014 through August 24, 2014 as well as for the period December 30, 2014 through February 18, 2015. The ALJ finds that there is insufficient evidence to establish that the claimant was temporarily totally disabled during any other period of time.

17. The ALJ finds that the claimant failed to provide sufficient evidence to establish that the respondents have failed to pay for or provide any reasonable, necessary, and related medical care.

18. The ALJ finds that as a result of his June 24 2014 work injury, the claimant has a visible disfigurement to the body consisting of an amputation of the small toe of the left foot. On the top surface of the left foot is a surgical scar that is approximately two and one-half inches in length and one and one-half inches in width. The fourth toe on the left foot has a hammer toe appearance. On the right foot on the 2d through the 4th toes are areas of scarring. All of the scarring is discolored when compared to the surrounding tissue. The ALJ finds that the claimant has sustained a serious permanent

disfigurement to areas of the body normally exposed to public view, which entitles him to additional compensation.

CONCLUSIONS OF LAW

1. The purpose of the Workers’ Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

2. A claimant in a workers' compensation claim generally has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

3. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by “clear and convincing evidence.” Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant’s medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be “unmistakable and free from serious or substantial doubt.” *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra*. Accordingly, the ALJ is bound by the DIME physician’s resolution of the issue in the absence of clear and convincing evidence to the contrary. *Hart v. Century Communications, Inc.,* 2001 Colo. Wrk. Comp. LEXIS 139, *3.

4. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S.

5. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claims Appeals Office,* 5 P.3d 385, 389 (Colo. App. 2000).

6. It is within the ALJ's purview as the finder of fact to determine the credibility of the witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

7. When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936).

8. In resolving inconsistencies the ALJ may credit all, part or none of an expert's testimony, and the ALJ's failure to cite an expert's opinion inherently reflects that the ALJ did not find it persuasive. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

9. In deciding whether a proponent has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

10. Drs. Zaremba and Shank agreed the claimant reached MMI on May 26, 2015. The impairment ratings assigned were nearly identical. The claimant's own IME doctor, Dr. Hall, did not find any error in Dr. Zaremba's rating and opined the claimant received excellent care from Dr. Simpson.

11. Ultimately, the claimant provided no persuasive testimony and no medical opinion supporting his assertion Dr. Shank erred in his opinions.

12. The ALJ concludes that the claimant failed to prove, by clear and convincing evidence, that Dr. Shank erred.

13. The term injury refers to the part of the body that has sustained ultimate loss. *Mountain City Meat Company v. Oqueda*, 919 P.2d 246 (Colo. 1996). In the

context of Section 8-42–107(1), the term “injury” refers to the part or parts of the body that have been functionally impaired or disabled as a result of the injury. *Maree v. Jefferson County Sheriff’s Department*, WC No. 4–260–536 (ICAO August 6, 1998), citing *Strauch v. PSL Swedish Healthcare*, 917 P. 2d 366 (Colo. App. 1996).

14. Section 8–42–107(1)(a), C.R.S. (2003), limits medical impairment benefits to those provided in subsection (2) where the claimant’s injury is one enumerated on the schedule. The schedule of specific injuries includes, in section 8–42–107(2), the loss of the loss of the leg. *Maree v. Jefferson County Sheriff’s Department*, *supra*. Our courts have construed that the dispositive issue is whether the claimant sustained a functional impairment to the portion of the body that is listed on the schedule of disabilities. See *Strauch v. PSL Swedish Healthcare*, *supra*. Thus, the ALJ is constrained to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Id*.

15. The ALJ concludes that the claimant’s loss in his lower extremities does not extend beyond the leg and thus he is not entitled to a whole person rating.

16. The claimant bears the burden to prove any entitlement to temporary disability benefits. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

17. The claimant endorsed the issue of TTD between June 24, 2014 and February 18, 2015. The respondent-insurer admitted for TTD for the period June 24, 2014 through August 24, 2014 as well as for the period December 30, 2014 through February 18, 2015.

18. The claimant presented no evidence or testimony to show entitlement to any additional TTD between June 24, 2014 and February 18, 2015.

19. The claimant failed to prove, by a preponderance of the evidence that he is entitled to any additional TTD benefits.

20. The respondents assert the claimant’s average weekly wage is $309.00. This is based on the claimant’s gross wages from May 6, 2014 through June 23, 2014.

21. At hearing, the claimant asserted his AWW should be based on earnings of $12 per hour. The claimant, however, did not present any evidence supporting this position. The only evidence presented by the claimant was one paystub reflecting he earned year to date gross wages of $2,163.01. The record is consistent with those wages contained in the respondents’ Exhibit G.

22. The ALJ concludes that the claimant failed to prove, by a preponderance of the evidence, that the respondents incorrectly calculated his AWW and TTD rates.

23. The respondents are only liable for medical treatment reasonably necessary to cure or relieve an employee from the effects of a work injury. C.R.S. §8-42-101 (2015).

24. The claimant offered no persuasive evidence that the respondents failed to pay any reasonable, necessary and related medical treatment for the admitted injury.

25. The respondents stipulated at hearing to reasonable, necessary, and related medical benefits post-MMI as admitted in their FAL dated November 16, 2015.

26. The claimant failed to prove, by a preponderance of the evidence, the respondents neglected to pay any reasonable, necessary and related pre-MMI medical benefits.

27. The ALJ concludes as found above that the claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles him to additional compensation. Section 8-42-108 (1), C.R.S.

28. The ALJ Orders that the respondent-insurer shall pay the claimant $2,500.00 for that disfigurement. The respondent-insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request to overcome the DIME physician's opinions on MMI and impairment is denied and dismissed.

2. The claimant' request to convert the scheduled rating to a whole person rating is denied and dismissed.

3. The claimant's request to change the average weekly wage is denied and dismissed.

4. The claimant's request for additional TTD benefits is denied and dismissed.

5. The claimant's request for additional medical benefits beyond those stipulated to by the respondents is denied and dismissed.

6. The respondent-insurer shall pay the claimant disfigurement benefits in the amount of $2,500.00.

7. The respondent-insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 23, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-969-245-02

ISSUES

- Whether Respondents have proven by clear and convincing evidence that the DIME opinion that Claimant is not at maximum medical improvement is incorrect.

- Whether Respondents have proven by clear and convincing evidence that the DIME opinion that Claimant sustained permanent medical impairment is incorrect.

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to post-MMI medical maintenance benefits.

INITIAL PROCEDURAL MATTER

On April 29, 2016, Claimant filed a written motion for partial summary judgment and attached a copy of Caroline Gellrick, M.D.'s April 20, 2016, deposition. Claimant argued that Respondents had conceded that Claimant was not at MMI based on a statement made by Respondents' counsel at the deposition which Claimant argued should be construed as a judicial admission.

The motion was not ruled on before hearing because the time allowed for Respondents to respond to the motion had not expired. At hearing, Claimant's counsel attempted to argue the motion, but the undersigned ALJ declined to rule on the motion and proceeded to a hearing on the merits. Upon further consideration, the ALJ will address the motion for partial summary judgment.

After Claimant's counsel asked his first question at Dr. Gellricks' deposition, Respondent's counsel objected to the deposition in its entirety, "[b]ecause I've already said we're conceding Dr. Gellrick's opinion that [Claimant] is not at MMI." Respondents' counsel's next words were, "We've had quite a bit of discussion," and that there was only half an hour for the deposition to be concluded. During the deposition, it became clear that Respondents' counsel's statement, taken in context, was part of a larger discussion and agreement, the whole of which is not before the ALJ. During her cross examination of the witness, Respondents' counsel states as part of a question, "When we were off the record, we talked a little bit about why you recommended and then having a physiatrist review the MRI results. We also talked off the record about how the MRI has now been authorized for both the lumbar and cervical spine, and they're scheduled to occur tomorrow."

In order to be successful on a motion for summary judgment, the movant needs to demonstrate that "there is no disputed issue of material fact and that the party is entitled to judgment as a matter of law." OAC Rule 17. Here, based on the evidence submitted with Claimant's motion, the ALJ finds that Claimant has not established that there is no disputed issue of material fact.

Therefore, the ALJ denies Claimant's motion for partial summary judgment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant, a 28 year- old male, sustained injuries in a work-related motor vehicle accident (MVA) on November 28, 2014. The MVA occurred when Claimant applied the brakes in his company vehicle to avoid hitting the car in front of him that had stopped for a deer in the road. While Claimant was able initially to avoid hitting the car in front of him, he was subsequently hit from behind by a vehicle traveling approximately 30 miles per hour. The impact of that collision pushed Claimant's vehicle into the car in front of him.

2. A police report of the MVA states that Claimant's vehicle had minor damage to the front of the vehicle and moderate damage to the rear of the vehicle. Claimant was seat belted and the airbags in his vehicle did not deploy.

3. EMS responded to the scene where Claimant was ambulatory and able to remember the entire accident.

4. At the emergency department, Claimant complained of diffuse cervical, thoracic, and lumbar pain, and right hip pain. Claimant's back was examined and no edema, ecchymosis or step off was found. He initially complained of some right shoulder "numbness and tingling" which then resolved. Claimant denied headache and neurological deficits. Claimant had a negative straight leg raise bilaterally. X-rays taken the day of the accident of the cervical spine, lumbar spine, and pelvis all were negative for fracture or acute pathology. Claimant did not hit his head or experience any loss of consciousness.

5. Claimant came under Dr. Robert Broghammer's care for his work-related injuries. Dr. Broghammer initially evaluated Claimant on December 1, 2014, and assessed right arm pain, cervical strain, and lumbar strain. He reported that Claimant had full range of motion of the cervical spine but with some stiffness on flexion and extension. Dr. Broghammer did not report any muscle spasm in Claimant's cervical spine. Claimant also had some mild, diffuse tenderness in the thoracic and lower back with some mild spasms in the trapezius and lumbar musculature.

6. On December 5, 2014, Dr. Broghammer identified some diffuse tenderness on palpation of the cervical and thoracic back extending into the lumbar spine but he did not report any further muscle spasms. He prescribed physical therapy twice a week.

7. On December 17, 2014, Dr. Broghammer noted that Claimant was feeling 40% worse even though physical therapy had helped "a little bit" to alleviate his symptoms. Dr. Broghammer noted that examination of Claimant's right arm revealed a subjective decrease in sensation throughout the entire upper extremity, inconsistent with a nerve root lesion or a peripheral nerve root injury. The color, temperature, and circulation of the right upper extremity were within normal limits, and Claimant had full range of motion of the hand, wrist, and elbow. Examination of Claimant's lumbar spine revealed no evidence of spasm and no atrophy. Seated straight leg raising was negative for radicular symptoms bilaterally. Dr. Broghammer stated there was "marked overreaction to light palpation throughout the lumbar spine and the paraspinous muscles with light touch causing a significant withdrawal reflex and complaints of pain." Dr. Broghammer stated: "I am unable to explain his plethora of symptoms, which are somewhat vague and protean in nature. There appears to be a component of symptom magnification and additional functional overlay initial worker." Dr. Broghammer recommended additional consults with physiatry and/or neurology and psychiatry.

8. Also on December 17, 2014, three weeks after the MVA in which Claimant did not impact his head, Claimant reported experiencing memory difficulty and concentration issues. An MRI of the head and brain was conducted on December 22, 2014. It identified no acute intracranial abnormality but a few punctate foci of sub-cortical white matter signal abnormality bilaterally, which were nonspecific.

9. On December 29, 2014, Dr. Broghammer noted that there were minimal findings on the MRI brain scan. He could not explain Claimant's high levels of pain given no objective findings. He recommended a physiatry referral. He did not report any muscle spasms in Claimant's cervical or lumbar spine.

10. Claimant received physical therapy from December 11, 2014 through January 7, 2015. Except for the initial evaluation on December 11, 2014 noting "spasm" in an unidentified part of Claimant's body, none of the physical therapy reports identified muscle spasm. The therapist did note numerous areas of complaint and hypersensitivity to touch, and/or that the claimant could not tolerate "hands-on" therapy. The therapist discussed with Claimant "that an MRI for his back is probably not warranted at this time as it is felt that the back is soft tissue in orientation and that the MRI would not give helpful additional information." On the last day of physical therapy, the therapist stated that Claimant presented "without progress (subjectively and objectively)."

11. Claimant underwent massage therapy from April 15, 2015 through August 24, 2015 by Bruce Leibbrandt. The initial findings on April 15, 2015 included restricted range of motion in the cervical and lumbar spine. On palpatory examination, the therapist routinely noted hypertonicity (muscle tension) in many muscle groups. With each consecutive massage session, the therapist noted improvement in the hypertonicity and that Claimant was "progressing well with treatment." The therapist also noted less restricted range of motion in the cervical and lumbar spine with each visit, until August 3, 2015 when the therapist noted that range of motion "revealed nothing apparent." As of the last massage session on August 24, 2015, the therapist

continued to note no range of motion deficit. Importantly, the massage therapist never reported that he detected muscle spasms.

12. On January 12, 2015, Dr. Gretchen Brunworth saw Claimant for neck pain, bilateral shoulder pain, constant low back pain but no leg pain, headaches, and short-term and long-term memory problems. On palpatory examination, Claimant was tender to "very, very light touch diffusely throughout the low back area." Dr. Brunworth was unable to appreciate any muscle spasms. Claimant complained of low back pain with essentially any movement. In both seated and supine positions, Claimant's straight leg raise was negative bilaterally. Dr. Brunworth noted non-physiologic findings regarding Claimant's low back complaints. She also noted some non-physiologic cognitive complaints. In the cervical region, Claimant was tender to mild palpation diffusely throughout the cervical spine.

13. Also on January 12, 2015, Dr. Brunworth conducted a "Computerized Outcome Analysis" which analyzes psychosocial components of pain. Claimant's score placed him in the "distressed somatic category of psychosocial functioning (which was) consistent with his presentation today with some non-physiologic findings." Dr. Brunworth stated, "Certainly this is concerning." Nonetheless, she recommended a diagnostic ultrasound of the right shoulder and an evaluation by a neuropsychologist.

14. On January 13, 2015, Dr. Broghammer reported that Claimant had increasing pain across his collarbone and anterior aspect of his right shoulder girdle musculature. He noted that Dr. Brunworth had recently evaluated Claimant and while doing so, she pressed on his arm which caused increased upper and lower back pain. Dr. Broghammer had "no explanation for how this would have occurred." Passively, Dr. Broghammer was able to "easily move the worker's shoulder to approximately 170 degrees of abduction on the right." Claimant had "diffuse tenderness to palpation of the posterior shoulder girdle musculature on the right, primarily over the trapezius but also over the rhomboid, infraspinatus, levator scapulae, and posterior cervical spine." Except for the tenderness reported by Claimant, Dr. Broghammer's examination was essentially negative. He did not report any finding of muscle spasms or a positive straight leg raise test. Dr. Broghammer referred Claimant for neuropsychiatric testing with Rebecca Hawkins, Ph.D.

15. On January 23, 2015, a MRI of Claimant's right shoulder was performed. The results were "unremarkable."

16. On February 10, 2015, Dr. Scott Primack conducted a sonographic analysis of Claimant's shoulders. The results were negative. There was no evidence of right shoulder impingement syndrome, right partial or full thickness rotator cuff tear, or right shoulder instability. Dr. Primack did not foresee any significant permanent residual impairment.

17. On February 12, 2015, Dr. Broghammer reported that Claimant's multiple complaints with regard to his neck, upper back, right arm, lower back, and central nervous system continued without improvement. Claimant continued "to have a diffuse

array of musculoskeletal symptoms, as well as some central nervous complaints and complaints of being unable to concentrate when driving." Dr. Broghammer did not have an explanation for most of these complaints. His assessment was multiple injuries with a wide variety of complaints, right arm and shoulder pain of unclear etiology, cervical strain, and lumbar pain. He did not report any finding of muscle spasm or a positive straight leg raise test. However, he recommended EMG/nerve conduction studies.

18. On March 5 and March 6, 2015, Claimant saw Rebecca Hawkins, Ph.D. for neuropsychological screening. Claimant reported multiple symptoms related to cognitive functioning, including memory problems. However, the Weschler Adult Intelligence Scale - Fourth Edition (WAIS-IV), Full Scale IQ (FSIQ) placed Claimant's intelligence in the superior range when compared to a normative sample. "As such," Dr. Hawkins said, "there is no indication whatsoever that he has experienced a decline in his overall cognitive/intellectual abilities."

19. In contrast to Claimant's report of short-term memory loss and problems with attention and concentration, Dr. Hawkins noted "that he placed within the superior range for the Immediate and Delayed Memory Indexes on the WMS – IV, and within the high average and superior range for the Visual Working Memory and Working Memory Indexes." Instead, Dr. Hawkins detected evidence of somatization. Claimant's MMPI-2 RF profile suggested somatic dysfunction based on multiple somatic complaints. Claimant appeared to be preoccupied with physical health concerns and was likely prone to develop physical symptoms in response to stress. Dr. Hawkins noted that Claimant portrayed "his life circumstances as unusually difficult at this time, and may have specific psychological concerns…. If psychosocial risk factors are also present, the possibility that symptom magnification is interfering with recovery should be considered." Further, Dr. Hawkins said testing indicated that Claimant's "pain experience considerably exceeds his resources for coping and is perceived as intolerable and disabling. Indeed, (Claimant's) score for Functional Complaints indicated an extremely high level of perceived disability (99th percentile) that would suggest a perception that he is entirely disabled across all domains of life. In fact, only 1% of patients report being more disabled…. In light of the fact that he has not sustained a catastrophic injury, such would certainly be considered disproportionate to what would be expected based on his medical findings. Additionally, that he reports a moderately high level of Muscular Bracing (82nd percentile) suggests that stress related physical reactivity may be contributing to (his) symptomatology…." Furthermore, Claimant "produced an elevation for Compensation Focus, suggesting he is more likely than the average patient to believe he is deserving of compensation for pain and suffering. Such is concerning, as it may pose a barrier in one's efforts at rehabilitation…. (Claimant) designated diffuse aching for the entire back of his head, neck, thoracic, and lumbar regions." He noted a variety of symptoms in other areas of his body as well. "In light of there being several different areas of diffuse numbness that did not appear to follow any particular dermatomes, his (pain) drawing was felt to be abnormal (unless such was explained by the upcoming electrodiagnostic testing)."

20. Dr. Hawkins concluded that the indication of "a significant level of somatic preoccupation, which in tandem with what appears to be a recent emergence of

depression, may indeed contribute to the perception of persisting cognitive difficulties. In addition to reactive muscular tension, (Claimant's) somatic complaints are also likely to contribute to heightened pain sensitivity…. (Claimant) may qualify for a diagnosis of Somatic Symptom Disorder. Last, it is also duly noted that I cannot conclusively rule out the possibility that he may be grossly exaggerating his cognitive complaints for the purpose of secondary gain."

21. On March 17, 2015, Claimant underwent an EMG/nerve conduction study of his neck, bilateral shoulders, and arms by Dr. Carolyn Burkhardt. She reported that the EMG/NCS were all within normal limits. At that appointment, Claimant reported experiencing "muscle spasms *in his entire body* when he is in a relaxed state.

22. On March 24, 2015, Dr. Broghammer once again noted that Claimant's complaints tended to be somewhat diffuse in nature. He noted that the EMG testing was negative. He made no mention of muscle spasms or a positive straight leg raise test. He noted that Dr. Hawkins had completed a neuropsychiatric evaluation, and that she had concluded that Claimant had not only symptom magnification but possible malingering regarding his symptoms. Dr. Hawkins recommended biofeedback sessions. Dr. Broghammer agreed with the recommendation for biofeedback and neurocognitive behavioral therapy. Dr. Broghammer released Claimant to full and unrestricted duties.

23. Respondents admitted liability for Claimant's injury, and paid temporary disability benefits from December 1, 2014 through March 23, 2015.

24. From April 9, 2015 through May 20, 2015, Dr. Hawkins provided counseling and biofeedback sessions. Dr. Hawkins discharged Claimant because he had "acquired an excellent skill set for managing his residual pain complaints and psychosocial stressors."

25. On May 5, 2015, Claimant reported to Dr. Broghammer that he was improving. He had been treating with Dr. Hawkins and had had four massage therapy visits. Dr. Broghammer did not report any findings of muscle spasms or positive straight leg raise test. Claimant was working full duties and continued to use Naprosyn but was no longer taking a muscle relaxant. Dr. Broghammer recommended continued massage therapy and treatment with Dr. Hawkins.

26. On or about May 22, 2015, Claimant was driving in the general area of his MVA when he had to forcefully apply his brakes to avoid hitting a car on the highway that had stopped for a deer. Claimant was driving at approximately fifty miles per hour. Claimant did not seek immediate medical care.

27. On May 28, 2015, Claimant reported to Dr. Broghammer that he was 30% worse, attributing his worsening to the braking incident. Claimant reported increasing "spinal pain and tingling," and requested MRIs. Dr. Broghammer did not think MRIs were medically warranted based upon Claimant's then-current subjective complaints. Dr. Broghammer thought that "more likely than not, the MRI will show chronic changes

that have nothing to do with this recent increase in symptoms and would only give [Claimant] things to worry about." Dr. Broghammer noted that Claimant's new onset spine pain and tingling were likely due to a myofascial source. He noted that if Claimant sought treatment for his "spine pain and tingling," he should file another workers' compensation claim for "this new event."

28. On May 28, 2015, Dr. Broghammer discharged Claimant from his care. He noted that Claimant still had a "variety and plethora of complaints," but the objective findings were minimal. Dr. Broghammer reasoned that "more likely than not, the MRI will show chronic changes that have nothing to do with this recent increase in symptoms and would only give [Claimant] things to worry about." He noted that prior MRIs of Claimant's head and shoulder, which were conducted due to Claimant's subjective complaints, were negative. He noted that Claimant had no evidence of radiculopathy in any of his examinations. Dr. Broghammer did not report any finding of muscle spasm or positive straight leg raise testing. Dr. Broghammer once again noted Dr. Hawkins' concern for possible malingering, and Dr. Broghammer believed that Claimant's subjective symptoms had been "vastly overstated." Dr. Broghammer therefore placed Claimant at MMI with no permanent restrictions and no "permanent or ratable impairment" from his work injuries. With regard to medical maintenance treatment, Dr. Broghammer thought that massage therapy every one to two weeks for the next 2 to 3 months was reasonable. After that, "no other treatment will be medically necessary, recommended, or justified."

29. Based on Dr. Broghammer's May 28, 2015 report, Respondents filed a Final Admission of liability on October 22, 2015 for a MMI date of May 20, 2015, no permanent partial disability, and no medical maintenance benefits.

30. Claimant requested a Division Independent Medical Examination (DIME), which Dr. Caroline Gellrick conducted on October 8, 2015. Dr. Gellrick is board certified in family medicine and addiction medicine.

31. Dr. Gellrick diagnosed Claimant with cervical strain, lumbar strain, right shoulder strain, symptoms of cognitive dysfunction with reactive adjustment disorder and depression, and cepahlalgia (headache) that was cervocogenic in nature. While Claimant required no more treatment for his right shoulder or psychological status, Dr. Gellrick concluded that Claimant had not reached MMI for his cervical and lumbar spine complaints.

32. Dr. Gellrick found Claimant was not at MMI for his cervical spine and lumbar spine complaints for two reasons: 1) Claimant had demonstrated "spasm persistently in the cervical and lumbar spine and this has been documented even in the notes of Bruce Leibbrandt, the massage therapist"; and 2) Claimant demonstrated a positive straight-leg raise for tenderness in the lumbar spine. Based on these two factors, Dr. Gellrick stated that Claimant needed MRIs of the cervical and lumbar spine, and a review of the MRIs by a physiatrist, before Claimant could be placed at MMI. Additionally, Dr. Gellrick testified that she wanted the MRIs because they might identify facet arthropathy which might be amenable to injections or other treatment.

33. Dr. Gellrick assigned 6% whole person (WP) cervical impairment rating; 10% WP lumbar impairment rating, and 1% for the shoulder. Her combined impairment rating was 16 % WP impairment.

34. Dr. Gellrick's statement that that Claimant demonstrated "persistent" spasm in his cervical and lumbar spine is not supported by Claimant's medical records. The medical records include few mentions of muscle spasm. For example, Dr. Broghammer's initial December 1, 2014 examination of Claimant's thoracic and lumbar spine (but not the cervical spine) mentions spasm, and Claimant's physical therapist on December 11, 2014 mentions a spasm but does not identify its location. Muscle spasms were not identified in any of the subsequent treatment records by Dr. Broghammer, the physical therapist, Dr. Brunworth, Dr. Burkhardt, or Dr. Primack. In fact, Dr. Broghammer documented "no evidence of spasm" in Claimant's lumbar spine on December 17, 2014, and on January 12, 2015, Dr. Brunworth was *unable to appreciate any muscle spasms*. Additionally, Dr. Gellrick's statement that Claimant had persistent spasm in his cervical and lumbar spine is not supported by Claimant's reports of testimony. Claimant reported spasm "*in his entire body* when he is in a relaxed state." Other than at his initial and DIME examinations, the records do not support him reporting cervical or lumbar spasms. Finally, Claimant reported to Dr. Gellrick that his had spasms in his cervical and lumbar spine as a result of the braking incident, but that his condition had returned to baseline after massage therapy and the passage of two week's time.

35. Even though Dr. Gellrick stated that the massage therapist, Bruce Leibbrandt, reported persistent muscle spasms, this is not correct. Mr. Leibbrandt's notes referred to hypertonicity, which is muscle tension, not spasms. (See Dr. Allison Fall's testimony in which she testified that hypertonicity is "increased tension in the muscles, a lot of us just have that normally at rest without having any symptoms." Rather, testing by Dr. Hawkins show that Claimant had a "moderately high level of Muscular Bracing (82nd percentile)" which suggested that stress-related physical reactivity may be contributing to Claimant's symptomatology. In other words, Claimant's psychological status may have caused muscle tension which caused him to perceive pain. In any event, Mr. Leibbrandt did not document muscle spasms, contrary to Dr. Gellrick's statement.

36. The only spasm Dr. Gellrick identified in her examination was "mild spasm on the left trapezius." Despite her statement that Claimant had "persistent spasm in his cervical and lumbar spine," her own findings were minimal. She did not report a finding of spasms anywhere other than the left trapezius, and found no spasm herself in Claimant's lumbar spine. She also did not differentiate whether the spasm was attributable to the claimed injury or to the braking incident.

37. Dr. Allison Fall, a physiatrist who conducted an independent medical examination on behalf of Claimant, doubted that Dr. Gellrick had even detected spasms in Claimant's left trapezius. Dr. Fall indicated that a with visible muscle spasm, an observer can see a "quivering back and forth." It was likely that all Dr. Gellrick saw was muscle tightness. In any event, Dr. Fall testified that there was no evidence in her

examination of Claimant or in the medical records that Claimant had persistent spasm in the cervical spine. Even if Dr. Gellrick had actually observed Claimant having a spasm during her examination, Dr. Fall said, "there would be no way to attribute that back to the remote… initial car accident."

38. Dr. Gellrick's statement that Claimant demonstrated a positive straight-leg raise for tenderness in the lumbar spine is likewise incorrect. There were only two comments in the medical records about straight leg raise testing: 1) Dr. Broghammer's December 17, 2014 report that "seated straight *leg raising was negative* for radicular symptoms bilaterally," and 2) Dr. Brunworth's January 12, 2015 report that Claimant's straight leg raise was negative bilaterally in both a seated and a supine position.

39. Although Dr. Gellrick stated that Claimant's straight leg raise test was positive on the left for low back pain, Dr. Fall testified that the characterization of the straight leg raise test as positive was incorrect. When a straight leg raise test elicits low back pain rather than radicular pain that radiates beyond the knee, the test is negative. That is because the test is designed to identify nerve root irritation. If something is irritating a lower lumber nerve, the patient will experience a sharp, shooting pain down the back of the leg during the test. A positive straight leg raise test, where radiculopathy and possible nerve involvement is present, would justify ordering a MRI. However, there is no medical support for the use of a MRI for a soft tissue injury, particularly in a case such as this where there is significant symptom magnification.

40. Dr. Gellrick testified that she wanted the MRIs not so much because she was concerned about radiculopathy or nerve involvement but to identify possible facet arthropathy. However, Dr. Fall testified, MRIs are not normally used to identify facet arthropathy. In any event, in Dr. Fall's review of the MRI scans, she saw no facet arthropathy or any other pathology that might be amenable to further medical treatment.

41. The three premises on which Dr. Gellrick based the need for cervical and lumbar spine MRIs, namely, "persistent cervical and lumbar spine spasms," a positive straight leg test, and possible facet arthropathy, are all unsupported by Claimant's medical records. The medical record does not support the existence of persistent spasms or a positive straight leg test. Rather, the record suggests the opposite. Furthermore, MRIs are not used to identify facet arthropathy. Thus, Dr. Gellrick's decision to delay a finding of MMI until the MRIs could be obtained was clearly erroneous.

42. In her report, Dr. Gellrick summarized Dr. Hawkins' findings regarding her neuropsychological assessment of Claimant. However, Dr. Gellrick did not address or even acknowledge what appeared to all of the treating providers to be significant symptom magnification by Claimant and possible psychological or functional overlay. Dr. Fall testified that it was a mistake not to consider those factors in recommending an MRI of the lumbar and cervical spine. It is necessary, Dr. Fall said, to look at psychological factors when dealing with a patient with chronic pain or pain that seems out of proportion to the injury or objective findings.

43. Dr. Fall did not diagnose Claimant with chronic pain syndrome in light of Dr. Hawkins' report that suggested the likelihood of a somatic symptom disorder, or possible malingering. Dr. Fall thought that Claimant did not have a chronic pain syndrome, "but rather, he has a whole other reason for complaints of pain . . . a psychiatric diagnosis." A somatic symptom disorder is a psychological disorder in which a patient basically manifests physical or somatic complaints based upon psychological stress. It would have pre-existed the injury.

44. Although Respondents challenged the need for MRIs of the lumbar and cervical spine, Respondents nevertheless authorized and the MRIs. They were conducted on April 21, 2016 while litigation on this matter was pending.

45. Dr. Fall reviewed the actual MRIs of Claimant's cervical and lumbar spine along with the radiologist's reports. She said there were "very mild findings of some disc bulges" but these were not significant, "not out of the realm of norm" and nothing that could be considered a pain generator or would suggest the need for treatment. The findings were "benign, unremarkable . . . normal." They would not explain the myriad of symptoms that Claimant was having.

46. The essentially negative results of both the lumbar and cervical spine MRIs confirmed Dr. Broghammer's and Dr. Fall's opinions that there was insufficient medical evidence to justify obtaining the MRIs in the first place.

47. Based on the lack of objective findings over time and all of the negative MRI results including the negative cervical and lumbar spine MRI results, Dr. Broghammer appropriately placed the claimant at maximum medical improvement on May 28, 2015.

48. Dr. Gellrick tentatively rated Claimant's permanent medical impairment as 6% whole person for the cervical spine, 10% whole person for the lumbar spine, and 1% of the right upper extremity for the right shoulder. There was no impairment, she said, for Claimant's headaches or psychological status.

49. Dr. Broghammer opined that Claimant had sustained zero permanent medical impairment because of the minimal objective findings despite Claimant's "variety and plethora of complaints." Dr. Broghammer noted the negative MRIs of the head and shoulder and no evidence of radiculopathy. He believed that Claimant's "subjective symptom complex has been vastly overstated," relying in part on Dr. Hawkins' psychological assessment.

50. Dr. Fall also opined Claimant sustained no permanent medical impairment due to a lack of objective findings consistent with permanent impairment. She noted that Claimant's examinations throughout time had been benign.

51. Dr. Gellrick diagnosed Claimant with cervical and lumbar spine strain. Dr. Fall testified that a strain is a nonspecific term that typically refers to a muscle sprain or a tendon that was strained or overstretched. This type of injury should resolve in six weeks without permanent impairment.

52. Moreover, the diagnosis of lumbar strain as a result of Claimant's rear-end MVA is suspect. A cervical spine whiplash injury occurs because the head can move forward and backward upon impact. However, Claimant's lumbar spine could not move any significant amount. Claimant had support behind his back and was restrained by a seatbelt and shoulder harness. Claimant testified that at the time of impact, he moved approximately ½ inch. Dr. Fall testified that unlike a whiplash injury, the forces are not sufficient to cause a lumbar spine injury.

53. According to the Level II training that physicians receive, Dr. Gellrick should not have provided an impairment rating under Table 53 of the *AMA Guides* or a rating for loss of range of motion because no objective findings support Claimant's subjective complaints. There must be objective findings to match subjective complaints. No specific pain generator has been determined other than the consensus from the treating providers that the pain generator is probably a pre-existing psychological condition. Complaints of pain alone for six months do not warrant a permanent medical impairment rating under Table 53 if there are no objective findings. Without a Table 53 rating, it is improper to measure loss of range of motion or assign any permanent impairment rating. Consequently, Claimant's permanent medical impairment in this case is zero.

54. The difference between the zero impairment ratings offered by Dr. Broghammer and Dr. Fall and the ratings offered by Dr. Gellrick amount to more than a difference of opinion among physicians. There are no objective findings to support a permanent medical impairment rating, but there is substantial evidence of symptom magnification. Dr. Fall concluded that Dr. Gellrick's opinion was clearly erroneous, testifying as follows: "[F]or her to say that this… 28-year-old… person has a permanently impaired lumbar spine from this doesn't make sense given the mechanism of injury and given the… physical examination findings, especially in light of the fact that I saw signs, what we call nonorganic signs, that there were other reasons for the complaints of back pain rather than some physical problem with the spine. So I do think it is obviously an error especially in discounting all the records that she had reviewed."

55. With regard to medical maintenance treatment, Dr. Broghammer stated on May 28, 2015 that "some maintenance treatment of formal massage therapy to occur every one to two weeks for the next two to three months with Bruce Leibbrandt (would be appropriate). After this, no other treatment will be medically necessary, recommended, or justified." Claimant did in fact receive the massage therapy from April 15, 2015 through August 24, 2015.

56. Dr. Fall testified that medical maintenance treatment was not required because there are no objective findings to treat.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

MMI exists at the point in time when “any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” § 8-40-201(11.5), C.R.S. A DIME physician’s findings of MMI and impairment are binding on the parties unless overcome by “clear and convincing evidence.” § 8-42- 107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician’s finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

A finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant’s condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management*, W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co*., W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician’s findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI.

Dr. Gellrick ordered MRIs of Claimant’s cervical and lumbar spine before placing Claimant at MMI despite the lack of any objective evidence of radiculopathy or other pathology that might be amenable to treatment. Dr. Gellrick ignored the diffuse and non-dermatomal pattern of Claimant’s symptoms, including the fact that he had symptoms not over just one or two discrete body parts but over most of his low back, thoracic spine, cervical spine, bilateral shoulders, and bilateral arms. She ignored Dr. Hawkins’ finding of possible somatic pain disorder based on multiple tests that showed complaints that greatly exceeded what would be expected on an objective basis. She ignored that fact that all other diagnostic testing, including MRIs of Claimant’s head and shoulders, EMG/nerve conduction studies which had ruled out cervical spine pathology, and a sonogram were negative. And, her understanding that Claimant had persistent spasms is not supported by Claimant’s medical records.

Dr. Gellrick acknowledged the lack of radiculopathy in Claimant’s cervical and lumbar spine but nevertheless suggested the MRIs might identify facet arthropathy that could be treated with injections. However, MRIs are not necessary to identify facet arthropathy and are not normally used for that purpose.

Thus, it is highly probable and free from serious doubt that Dr. Gellrick erred in delaying MMI so that Claimant could undergo MRIs of his cervical and lumbar spine.

Respondents have proven by clear and convincing evidence that the DIME opinion on permanent medical impairment is in error. With regard to permanent medical impairment, it is highly probable and free from serious doubt that Dr. Gellrick erred in assessing permanent medical impairment in this case. Claimant has a multitude of complaints and symptoms, but there is no persuasive objective evidence of any pathology or physical pain generator. Although Claimant has not been diagnosed with chronic pain syndrome, most likely, he has a psychological condition, or a somatic pain disorder, that causes him to perceive extreme pain despite the lack of pathology. Without persuasive objective evidence of an actual pathology or disorder, permanent medical impairment cannot be assessed.

Claimant has failed to prove by a preponderance of the evidence the he required medical maintenance care after MMI. The need for medical treatment may extend beyond the point of MMI where a claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his or her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). A claimant must prove entitlement to medical maintenance medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993).

In this case, based on the lack of any objective medical condition that can be treated, the claim for medical maintenance benefits must be denied. Claimant’s symptoms most likely are based on pre-existing psychological condition, thus treatment of his symptoms will not be effective and is not warranted.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have proven by clear and convincing evidence that Dr. Gellrick's opinion on MMI was in error.

2. Respondents have also proven by clear and convincing evidence that Dr. Gellrick's opinion on permanent medical impairment was in error.

3. Claimant has failed to prove by a preponderance of the evidence that he requires any medical maintenance treatment.

4. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 24, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-994-781-01

ISSUES

- Claimant's Average Weekly Wage (AWW).

- Claimant also raised the issue of penalties in her Hearing Application. Claimant then dismissed this issue admitting that penalties cannot be imposed over an alleged incorrect calculation of AWW. *See Reves v. McCormick Excavation & Paving, LLC,* W.C. No. 4-835-166-04 (July 19, 2012).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is an employee of Employer. She works as a telephone questionnaire interviewer. Claimant worked for Employer approximately four to five years. Claimant testified that she sustained an injury while in the course and scope on July 8, 2015.

2. Claimant testified she earned minimum wage plus commissions. She testified that she typically worked four days per week, five hours per day. She believed that, depending upon the project, she would receive an hourly commission from $8.23 to $11.00, plus an hourly wage of $8.23. She believed her AWW should be $335.60 based upon her belief that in addition to the amounts shown in the payroll report attached to the General Admission (GA) dated November 20, 2015, she earned an additional hourly commission. (Exhibit A). Claimant provided no documentation to support her unfounded beliefs. Claimant's testimony is found neither credible nor persuasive.

3. Cari Selby testified that she is the Employer's office manager/supervisor. She credibly testified Claimant received an hourly wage which varied depending upon the work she was performing and the client. Ms. Selby explained that Claimant did not receive a commission, only a varied hourly wage. Ms. Selby testified regarding the Payroll Report which was attached to the GA. She explained the 'function code' which determined the preliminary pay rate and, depending upon if the required tasks were timely completed, the actual hourly wage paid to Claimant for the task(s) completed. Per Ms. Selby, the Payroll report reflected Claimant's total wages were $1,874.50 from April 9, 2015 to July 8, 2015, the day of injury.

4. The handwriting (a calculation of AWW) on the Payroll Report shows that in calculating AWW, the date of injury was removed (wages for July 8, 2015 of $42.75) leaving total wages of $1,831.75 from April 9, 2015 to July 6, 2015. The handwriting

also shows that Claimant's daily wage was $20.35 which equaled an AWW of $142.47. This was the AWW admitted to in the November 20, 2015 GA. (Exhibit A).

5. Claimant's paystubs show only regular pay and no commissions. Her pay from March 14, 2015 through July 3, 2015 totaled $2,315.62. Using Claimant's paystubs for this time frame, the AWW is $144.73. On April 14, 2016, Respondents filed a GA admitting for that AWW. (Exhibit B).

6. Based on the data from Respondent's Exhibits A and B, and the credible and persuasive testimony from Ms. Selby, the proper AWW in this matter was in the range of $142.47 to $144.73.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See Magnetic *Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

It is the ALJ's sole province to assess credibility of the witnesses. *Monfort Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1955).

Section 8-42-102(2), C.R.S., requires AWW be based on earnings "at the time of injury." Section 8-42-102(3), C.R.S., grants discretionary authority to alter the statutory formula if for any reason it will not fairly determine a Claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993).

Based upon the credible and persuasive testimony of Ms. Selby and actual evidence in the form of wage records attached to the Gas as Exhibits A and B, Claimant's AWW is $144.73 as admitted in the GA dated April 14, 2016.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's average weekly wage (AWW) is $144.73 as admitted in the GA dated April 14, 2016.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 24, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the medical treatment she received on June 18, 2015, November 2, 2015, December 23, 2015 and December 29, 2015 was authorized, reasonable and related to her August 18, 2014 lower back injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Meat Manager. On August 18, 2014 Claimant suffered an admitted industrial injury to her lumbar spine. While she was lifting a box of meat weighing approximately 50-55 pounds from a pallet she suffered a sharp pain and heard a "pop" in her lower back. Employer directed Claimant to the Banner Occupational Health Clinic for treatment. Claimant initially received care from Authorized Treating Physician (ATP) Laura Caton, M.D. She received medications and underwent massage therapy, pool therapy, physical therapy and injections for her lower back symptoms.

2. Claimant acknowledged that she has a previous history of DVTs or blood clots in her lower extremities. She specifically testified that she had suffered a DVT approximately four years earlier.

3. Claimant explained that on June 18, 2015 she was experiencing pain and swelling in her left leg as a result of decreased activity. Because she had concerns about a possible DVT, she contacted Dr. Caton for medical advice. Dr. Caton referred Claimant for a "STAT" ultrasound of the left lower extremity due to woody pitting edema, limited activity and a prior history of DVTs. Physicians at the Northern Colorado Medical Center conducted an ultrasound of her left leg. Respondent has challenged the June 18, 2015 ultrasound because it did not constitute reasonable, necessary or related medical treatment to cure or relieve the effects of Claimant's August 18, 2014 industrial injury.

4. On August 12, 2015 Allison M. Fall, M.D. provided an opinion about whether Claimant's June 18, 2015 ultrasound constituted reasonable, necessary and related medical treatment for her August 18, 2014 lower back injury. Dr. Fall recounted that she had previously conducted an independent medical examination of Claimant. She noted that she had reviewed a May 21, 2015 report from Dr. Caton in which Claimant exhibited left foot redness, swelling and pain to the touch. Notably, the left foot was red and warm. Claimant also had a history of DVTs. Dr. Caton observed "woody pitting edema with rubor and warmth, and there was a tenderness to palpation in the calf with rubor, swelling and warmth." Dr. Caton recommended an immediate

ultrasound of the left lower extremity “due to noted woody pitting edema, limited activity and history of DVT.”

5. Dr. Fall determined that the June 18, 2015 ultrasound of Claimant’s left lower extremity was not reasonable, necessary or related to Claimant’s August 18, 2014 industrial lower back injury. She reasoned that the swelling in the left lower leg was not related to Claimant’s work-related lumbar spine condition. Moreover, the ultrasound was ordered to rule out a DVT that Claimant had previously experienced. Dr. Fall acknowledged that she “[respect[ed]” Dr. Caton for her concern about Claimant based on a history of DVTs and swelling, but the ultrasound was nevertheless not related to Claimant’s August 18, 2014 industrial injury.

6. Claimant continued to receive treatment from Dr. Caton at Banner Occupational Health Clinic through September 17, 2015. However, following the September 17, 2015 appointment, Dr. Caton took a leave of absence as a result of military service and Claimant’s care was transferred to Cathy Smith, M.D. beginning on November 4, 2015.

7. Claimant remarked that on November 2, 2015 she was experiencing extreme left leg pain. She contacted Banner Occupational Health Clinic and learned that the facility lacked medication to adequately treat her symptoms. Claimant was thus directed to the Northern Colorado Medical Center for treatment. Claimant underwent three MRIs of her spinal cord and received medications. Claimant’s personal health insurance provider Cigna partially paid the bills for the November 2, 2015 diagnostic tests and medications. Respondent contends that it is not responsible for payment of the November 2, 2015 bills because there was no emergency and the treatment was not related to Claimant’s August 18, 2014 industrial injury.

8. Claimant explained that on December 23, 2015 she was again suffering from extreme left leg pain. She contacted Banner Occupational Health Clinic and learned that the facility lacked medications to adequately treat her pain. Claimant was thus directed to the Northern Colorado Medical Center for treatment. She received prescription drug medications for her pain. Claimant’s personal health insurance provider Cigna partially paid the bill for the December 23, 2015 treatment. Respondent contends that it is not responsible for payment of the bill because there was no emergency.

9. Claimant testified that on December 29, 2015 she was experiencing pain and swelling in her left leg. Because she had concerns about a possible DVT, she sought treatment with her primary care physician. Claimant underwent a left lower extremity study at Advanced Medical Imaging. Her personal health insurance provider Cigna partially paid the bill for the December 29, 2015 treatment. Respondent asserts that the care did not constitute authorized, reasonable and necessary medical treatment for Claimant’s August 18, 2014 industrial injury.

10. On May 18, 2016 Claimant’s counsel drafted a letter to Dr. Smith regarding referrals from her office for Claimant’s medical treatment on June 18, 2015,

November 2, 2015, December 23, 2015 and December 29, 2015. Dr. Smith responded that the referrals for treatment on June 18, 2015, November 2, 2015, and December 23, 2015 were from the Banner Occupational Health Clinic. Furthermore, she agreed that the ultrasound, prescriptions and testing constituted reasonable and necessary medical treatment for Claimant's August 18, 2014 industrial injury. However, Dr. Smith responded that the December 29, 2015 treatment at Advanced Medical Imaging was not authorized, reasonable or related to Claimant's work-related lower back injury. She specifically noted that neither she nor Dr. Caton referred Claimant for treatment of a DVT on December 29, 2015.

11. Claimant has demonstrated that it is more probably true than not that the medical treatment she received on June 18, 2015, November 2, 2015 and December 23, 2015 was authorized, reasonable and necessary to cure or relieve the effects of her industrial injury. Claimant credibly testified that on June 18, 2015 she was experiencing pain and swelling in her left leg as a result of decreased activity. Because she had concerns about a possible DVT, she contacted Dr. Caton for medical advice. Dr. Caton referred Claimant for a "STAT" ultrasound of the left lower extremity due to woody pitting edema, limited activity and a prior history of DVTs. Claimant visited the Northern Colorado Medical Center for an evaluation. Physicians conducted an ultrasound of her left leg. Dr. Smith persuasively agreed that the June 18, 2015 ultrasound constituted authorized, reasonable and necessary medical treatment for Claimant's August 18, 2014 industrial injury. In contrast, Dr. Fall concluded that the June 18, 2015 ultrasound of Claimant's left lower extremity was not reasonable, necessary or related to her August 18, 2014 industrial lower back injury. Dr. Fall specifically reasoned that the swelling in the left lower leg was not related to Claimant's work-related lumbar spine condition. Moreover, the ultrasound was ordered to rule out a DVT that Claimant had previously experienced. However, despite Dr. Fall's opinion, the medical records, persuasive opinion of Dr. Smith and credible testimony of Claimant reflect that the June 18, 2015 ultrasound constituted authorized, reasonable and necessary medical treatment to cure or relieve the effects of Claimant's August 18, 2014 industrial injury.

12. Claimant credibly testified that on November 2, 2015 she was experiencing extreme left leg pain. She contacted the Banner Occupational Health Clinic and learned that the office lacked medications to adequately treat her pain. Claimant was thus directed to the Northern Colorado Medical Center for treatment. She underwent three MRIs of her spinal cord and received medications. Claimant also credibly testified that on December 23, 2015 she was suffering extreme left leg pain. She again contacted the Banner Occupational Health Clinic and learned that the office lacked medication to adequately treat her symptoms. Claimant was thus directed to the Northern Colorado Medical Center for treatment. She received prescription drug medications for her pain. Dr. Smith confirmed that her office authorized the November 2, 2015 and December 23, 2015 emergency room visits. Furthermore, Dr. Smith agreed that the prescriptions and diagnostic testing constituted reasonable and necessary medical treatment for Claimant's August 18, 2014 industrial injury. Accordingly, the preceding visits to the Northern Colorado Medical Center constituted authorized, reasonable and necessary treatment to cure or relieve the effects of Claimant's industrial injury.

13. Claimant has failed to demonstrate that it is more probably true than not that the medical treatment she received on December 29, 2015 was authorized, reasonable and necessary to cure or relieve the effects of her industrial injury. Claimant explained that on December 29, 2015 she was experiencing pain and swelling in her left leg. Because she had concerns about a possible DVT, she sought an emergency evaluation. Claimant underwent a left lower extremity study at Advanced Medical Imaging. However, Dr. Smith explained that the December 29, 2015 treatment was not authorized, reasonable or related to Claimant's work-related lower back injury. She specifically noted that neither she nor Dr. Caton referred Claimant for treatment of a DVT on December 29, 2015. Accordingly, Claimant's request for Respondent to cover the costs associated with the December 29, 2015 visit to Advanced Medical Imaging is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment

modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

6. Medical services provided in an emergency constitute an exception to the requirement for prior authorization. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without undergoing the delay inherent in notifying the employer and obtaining a referral or approval. *Gant v. Etcetra,* W.C. No. 4-586-030 (ICAP, Sept. 17, 2004). The "emergency doctrine" mandates the existence of an emergency requiring treatment. *Pope v. Willow Creek Care Center*, W.C. No. 4-779-335 (ICAP, Oct. 27, 2010). However, there is no precise legal test for determining the existence of a medical emergency. *Gant v. Etcetra,* W.C. No. 4-586-030 (ICAP, Sept. 17, 2004). The question of whether an emergency exists is one of fact and is dependent on the circumstances of the particular case. *Hoffman v. Wal-Mart Stores, Inc.*, W.C. No. 4-774-720 (ICAP, Jan. 12, 2010).

7. As found, Claimant has demonstrated by a preponderance of the evidence that the medical treatment she received on June 18, 2015, November 2, 2015 and December 23, 2015 was authorized, reasonable and necessary to cure or relieve the effects of her industrial injury. Claimant credibly testified that on June 18, 2015 she was experiencing pain and swelling in her left leg as a result of decreased activity. Because she had concerns about a possible DVT, she contacted Dr. Caton for medical advice. Dr. Caton referred Claimant for a "STAT" ultrasound of the left lower extremity due to noted woody pitting edema, limited activity and prior history of DVTs. Claimant visited the Northern Colorado Medical Center for an evaluation. Physicians conducted an ultrasound of her left leg. Dr. Smith persuasively agreed that the June 18, 2015 ultrasound constituted authorized, reasonable and necessary medical treatment for Claimant's August 18, 2014 industrial injury. In contrast, Dr. Fall concluded that the June 18, 2015 ultrasound of Claimant's left lower extremity was not reasonable, necessary or related to her August 18, 2014 industrial lower back injury. Dr. Fall specifically reasoned that the swelling in the left lower leg was not related to Claimant's work-related lumbar spine condition. Moreover, the ultrasound was ordered to rule out a DVT that Claimant had previously experienced. However, despite Dr. Fall's opinion, the medical records, persuasive opinion of Dr. Smith and credible testimony of Claimant

reflect that the June 18, 2015 ultrasound constituted authorized, reasonable and necessary medical treatment to cure or relieve the effects of Claimant’s August 18, 2014 industrial injury.

8. As found, Claimant credibly testified that on November 2, 2015 she was experiencing extreme left leg pain. She contacted the Banner Occupational Health Clinic and learned that the office lacked medications to adequately treat her pain. Claimant was thus directed to the Northern Colorado Medical Center for treatment. She underwent three MRIs of her spinal cord and received medications. Claimant also credibly testified that on December 23, 2015 she was suffering extreme left leg pain. She again contacted the Banner Occupational Health Clinic and learned that the office lacked medication to adequately treat her symptoms. Claimant was thus directed to the Northern Colorado Medical Center for treatment. She received prescription drug medications for her pain. Dr. Smith confirmed that her office authorized the November 2, 2015 and December 23, 2015 emergency room visits. Furthermore, Dr. Smith agreed that the prescriptions and diagnostic testing constituted reasonable and necessary medical treatment for Claimant’s August 18, 2014 industrial injury. Accordingly, the preceding visits to the Northern Colorado Medical Center constituted authorized, reasonable and necessary treatment to cure or relieve the effects of Claimant’s industrial injury.

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the medical treatment she received on December 29, 2015 was authorized, reasonable and necessary to cure or relieve the effects of her industrial injury. Claimant explained that on December 29, 2015 she was experiencing pain and swelling in her left leg. Because she had concerns about a possible DVT, she sought an emergency evaluation. Claimant underwent a left lower extremity study at Advanced Medical Imaging. However, Dr. Smith explained that the December 29, 2015 treatment was not authorized, reasonable or related to Claimant’s work-related lower back injury. She specifically noted that neither she nor Dr. Caton referred Claimant for treatment of a DVT on December 29, 2015. Accordingly, Claimant’s request for Respondent to cover the costs associated with the December 29, 2015 visit to Advanced Medical Imaging is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondent is financially responsible for Claimant’s emergency medical treatment at the Northern Colorado Medical Center on June 18, 2015, November 2, 2015 and December 23, 2015.

2. Claimant’s request for Respondent to cover the costs associated with the December 29, 2015 visit to Advanced Medical Imaging is denied and dismissed.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 23, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-977-215-02

ISSUES

The issue to be determined by this decision is whether the claimant proved by a preponderance of the evidence that the surgery performed by Roger Sung, M.D. on October 26, 2015, was reasonable, necessary, and causally related to the industrial injury of March 4, 2015.

FINDINGS OF FACT

1. On March 4, 2015, the claimant was driving the respondent-employer's van when he was struck from behind by a truck as he slowed for a red light. The claimant unbuckled his seat belt and got out of the van to call 911.

2. An American Medical Response ambulance and medics responded to the accident scene and found the claimant walking around outside the van. The claimant reported that he had been traveling approximately 5 mph when he was hit from behind and that he was having right sided neck and shoulder pain. The claimant was asked by medics whether he had sustained any loss of consciousness or was having back pain and he denied these symptoms.

3. The claimant requested to be taken to the Emergency Department at St. Mary Corwin Hospital. Upon his arrival at St. Mary Corwin, the claimant told the attending medical personnel he had been rear-ended at a low rate of speed and that his van was still drivable. He denied hitting his head, losing consciousness or a change in his mental status. The claimant reported having neck pain, and chronic lumbosacral back pain with radiating right leg discomfort that was consistent with his longstanding lumbar radiculopathy. The claimant also reported having paresthesias of both feet that was consistent with his chronic back pain and lumbar radiculopathy.

4. A CT scan of the claimant's cervical and lumbosacral spine showed degenerative changes without acute pathology. The claimant was diagnosed with a cervical strain and an acute exacerbation of his chronic lumbar radiculopathy and discharged from the Emergency Department.

5. The claimant has a long history of low back pain and lumbar radiculopathy which began many years before his March 4, 2015 motor vehicle accident.

6. In April 2000, the claimant started treatment with Dr. Timothy Sandell for various symptoms which the claimant said were related to a July 22, 1999 motor vehicle accident. These symptoms included low back pain that radiated into his right lower extremity. After reviewing the claimant's MRI films, Dr. Sandell's impression was the claimant's low back pain was associated with a L5-S1 disc herniation and right S1 radiculopathy.

7. Dr. Sandell treated the claimant for persistent low back pain and right sided lumbar radiculopathy from April 2000 to July 2009. Dr. Sandell prescribed the claimant Celebrex to address his pain symptoms. During this period, the frequency of the claimant's treatments with Dr. Sandell varied from month-to-month to once per year, depending on the claimant's ability to tolerate his pain.

8. In August 2010, the claimant established a new primary care physician at Southern Colorado Family Medicine, and advised his doctor that he was still having pain from the motor vehicle accident in 1999. At his next visit in December 2010, the claimant clarified that he was having chronic low back pain from the motor vehicle accident and that he had been taking Celebrex to control those symptoms.

9. On July 9, 2012, the claimant was involved in a motor vehicle accident which was very similar to the accident in the present case. In that accident, the claimant was rear ended by a citizen in a personal pickup truck as he stopped for a red light while driving an employer's van. The claimant was taken to Parkview Medical Center Emergency Room, where he complained of neck, right shoulder, and upper and lower back pain. He was diagnosed with cervical, thoracic and lumbar strains and discharged.

10. The claimant did not seek additional medical treatment following the July 9, 2012 injury until October 3, 2012, when he presented to Dr. Douglas Bradley at Emergicare. Dr. Bradley was the authorized treating provider the claimant selected from the list of providers given to him by the respondent-employer following the July 9, 2012 motor vehicle accident. At this first visit with Dr. Bradley, the claimant advised he was having low back pain and that he initially had had pain down both legs but was currently only having pain down his right leg and into his toes.

11. The claimant's treatment with Dr. Bradley remained conservative and Dr. Bradley ultimately placed the claimant at maximum medical improvement (MMI) on December 13, 2012, with no permanent impairment and no restrictions. The records

from that closing visit contain a pain diagram in which the claimant indicated he had continued low back pain that radiated into his right foot.

12. In his December 13, 2012 MMI report, Dr. Bradley recommended the claimant continue taking Celebrex for one year and Methocarbamol for six months. However, his records were not clear regarding the work relatedness of those medications. The claim adjuster drafted a letter to Dr. Bradley and requested clarification as to whether the need for those medications was related to the July 9, 2012 work injury, given that the claimant had a long history of taking Celebrex prior to the injury. On May 31, 2013, Dr. Bradley responded to the adjuster's letter and indicated that the need for the medications was no longer related to the work injury.

13. The claimant objected to Dr. Bradley's MMI report and pursued a Division IME. Dr. Miguel Castrejon was ultimately selected to perform the DIME and did so on December 10, 2013. At the exam with Dr. Castrejon, the claimant complained of neck, low back and sacral pain, and also of pain and numbness extending down his right leg and into his foot. The claimant told Dr. Castrejon that at times his leg pain was worse than his back pain.

14. After reviewing the claimant's medical records and imaging studies, Dr. Castrejon opined the claimant had severe degenerative disc and joint disease that would follow a natural progressive course, and that in all medical probability, the claimant's symptoms were the result of a natural progression of this condition that would require medical care though not on a Work Comp basis.

15. Dr. Castrejon further opined it was medically reasonable to conclude the claimant, at the completion of care with Dr. Bradley, had reached a baseline preinjury status with symptoms thereafter being consistent with his pre-existing moderate-to-severe- degenerative spinal condition as well as the chronic back pain subsequent to the motor vehicle accident of 1999. Dr. Castrejon agreed with Dr. Bradley's December 13, 2012 MMI date and that the claimant required no impairment rating, no work restrictions and no maintenance care related to his work injury.

16. The respondents filed a Final Admission of Liability based on Dr. Castrejon's DIME report. The claimant did not object to the Final Admission of Liability and the claim was closed.

17. Following the closure of his 2012 Workers' Compensation claim, the claimant continued to treat with Southern Colorado Family Medicine for his low back pain and right sided lumbar radiculopathy. In August 2013, the claimant told his doctor

at Southern Colorado Family Medicine his low back pain was severe to his tailbone and he had sciatica running down his right leg and into his right foot.

18. In November 2013, the claimant was evaluated at Parkview Neurosurgical Services by neurosurgeon Dr. Raymond Lilly for neck and back pain, and right leg numbness and weakness. The claimant reported his symptoms began in July 2012, following a motor vehicle accident and continued to get worse. The claimant filled out a pain diagram and indicated pain in the middle of his low back that radiated down his right leg and into his foot. Dr. Lilly assessed claimant with lumbar stenosis and recommended surgery to resolve his symptoms

19. In May 2014, the claimant told his doctor at Southern Colorado Family Medicine that Dr. Lilly had recommended surgery from L4-L6 but he did not want surgery and wanted to pursue other pain relieving modalities.

20. In June 2014, the claimant's doctor noted the claimant had continued pain at L4-L5 and that the claimant had reported his legs would go numb, and his pain and numbness were progressing. Based on these complaints, the claimant was referred for an "URGENT" neurosurgery consult.

21. The claimant underwent a lumbar MRI on August 26, 2014. The radiologist's impression was that there were advanced age-related changes at every level, and most significant at L4-L5 where there was severe spinal canal stenosis and moderate foraminal stenosis. There was a mild broad posterior disc bulge at L3-L4 which combined with facet degeneration and resulted in mild spinal canal stenosis and moderate foraminal stenosis.

22. The claimant returned to Parkview Neurological Services in August 2014, and was evaluated by Dr. Lilly's Physician Assistant, Boyd Larson. The claimant filled out a new pain diagram and complained of bilateral low back pain that radiated down both legs and told PA Larson his pain had worsened over the last 5 months. The claimant also reported constant, severe, numbness in his lower legs and feet bilaterally. PA Boyd again discussed surgery with the claimant and the claimant advised he did not want to pursue surgery at that time. PA Boyd advised the claimant that a delay in surgery could result in permanent nerve damage. The claimant was referred for a lumbar epidural steroid injection with Dr. Douglas Hess.

23. In November 2014, the claimant changed his primary care to Centura Family Care Center. He told Dr. Wendy Richmond he had seen neurosurgeon Dr. Lilly and did not want surgery. The claimant also told Dr. Richmond he had had numerous

falls due to numbness in his bilateral lower extremities. Dr. Richmond assessed the claimant with spinal stenosis of lumbar spine with neurogenic claudication.

24. Dr. Hess administered L4-L5 epidural steroid injections in October, November and December, 2014.

25. The claimant was then involved in the March 4, 2015 accident, which is the subject of this claim. After leaving the Emergency Department, the claimant did not seek treatment for his low back and right side lumbar radiculopathy for a number of months. He eventually returned to Dr. Hess who administered additional L4-L5 epidural steroid injections in June and July, 2015. These injections were at the same level, L4-L5, as the injections administered by Dr. Hess prior to the March 4, 2015 injury.

26. The claimant returned to Dr. Sandell on July 14, 2015, and reported that since their last meeting in 2009 he had been in motor vehicle accidents in 2012 and 2015. He complained of continued low back pain with radiation and numbness into the right lower extremity. Dr. Sandell requested an updated lumbar MRI.

27. An MRI of the claimant's lumbar spine was taken on July 24, 2015 and compared to the August 26, 2014 lumbar MRI. The radiologist noted there was no significant change in the degree of advanced multilevel lumbar spondylitic disease.

28. The claimant returned to Dr. Sandell in August 2015 to review his updated lumbar MRI. Dr. Sandell opined that the new MRI showed severe spinal stenosis at L4-L5 as well as advanced foraminal stenosis on the right at L3-L4, bilateral L4-L5 and bilateral L5-S1. Dr. Sandell referred the claimant to Dr. Roger Sung for surgical evaluation.

29. The claimant presented to Dr. Sung for evaluation on September 24, 2015. In his paperwork, the claimant filled out a pain diagram which was virtually identical to the pain diagram he filled out for Dr. Lilly in August 2014. The claimant told Dr. Sung he had had a multi-year history of low back and right leg pain beginning with an automobile accident in July 2012. The claimant told Dr. Sung his pain from this accident had completely resolved by December 2014, but his symptoms came back after he was in another motor vehicle accident in March 2015. Dr. Sung recommended a L3-S1 decompression and fusion to address claimant's symptoms. Dr. Sung performed this surgery on October 26, 2015.

30. The claimant took the evidentiary deposition of Dr. Sung on March 2, 2016. At the deposition, Dr. Sung reviewed the MRI reports from the claimant's August 26, 2014 and July 24, 2015 lumbar MRIs. Dr. Sung testified the difference between the

two MRIs was the July 24, 2015 lumbar MRI showed a L3-L4 disc herniation that had not been present on the earlier MRI. Dr. Sung testified the most important finding on the July 24, 2015 MRI was the severe spinal stenosis at L4-L5.

31. Dr. Sung testified the claimant told him he had a motor vehicle accident in July 2012, but that his pain had completely resolved by December, 2014. Dr. Sung testified he did not review any medical records aside from the claimant's imaging studies and had limited knowledge of the claimant's medical history aside from what was provided by the claimant.

32. Dr. Sung opined the claimant's March 4, 2015 motor vehicle accident increased his symptoms and caused the need for surgery. Dr. Sung testified that in coming to this conclusion, he relied only on the medical history given by the claimant because his job as a surgeon was to fix the claimant's symptoms instead of questioning what caused them. Dr. Sung agreed the claimant's symptoms could be from the natural progression of a degenerative condition, but he ultimately made his decision based on medical history provided by the claimant.

33. The ALJ finds the persuasiveness of Dr. Sung's opinions are undermined by his limited review and understanding of the claimant's complex medical history. Dr. Sung's opinion regarding the relatedness of surgery was based on an incomplete medical history provided to Dr. Sung by the claimant. Dr. Sung was not aware the claimant's low back pain and lumbar radiculopathy dated back to a 1999 motor vehicle accident.

34. The claimant testified at hearing that he had immediate head, neck and low back pain following the March 4, 2015 accident and that he told the American Medical Response medics he was having these symptoms when they arrived at the scene of the motor vehicle accident.

35. The claimant testified at hearing that his low back pain and right sided lumbar radiculopathy from the 1999 motor vehicle accident had fully resolved, and he had been 85% improved from the July 2012 motor vehicle at the time of the March 4, 2015 motor vehicle accident.

36. The claimant testified that after being placed at MMI by Dr. Bradley in December 2013, he received no medical treatment until July 2014. On cross examination the claimant's extensive medical history between December 2013, and July 2014, was brought to his attention. The claimant testified that he had only been seeing

his primary care physician for low back pain and lumbar radiculopathy and did not consider this “treatment.”

37. The claimant testified that although the pain diagram he drew on August 12, 2014 for Dr. Lilly was virtually identical to the September 23, 2015 diagram he drew for Dr. Sung, they were actually different because he had been in extreme pain on September 23, 2015.

38. The claimant testified that although Dr. Lilly had recommended surgery in November 2013 to address his low back pain and right sided lumbar radiculopathy, the claimant did not think it was necessary and declined the surgery.

39. The ALJ finds that the claimant’s testimony is contradictory to the extensive medical record, is not credible or persuasive.

40. The respondents retained Dr. John McBride to review the claimant’s medical records, imaging studies, and deposition of Dr. Sung and then issue an opinion as to whether the surgery performed by Dr. Sung was reasonable, necessary and related to the March 4, 2015 motor vehicle accident. Dr. McBride conducted this records review and issued an initial report on March 26, 2016. Dr. McBride subsequently received discs containing the claimant’s imaging studies and issued an addendum report on April 6, 2016.

41. Dr. McBride testified it was clear that conservative treatment for the claimant’s stenosis and degenerative joint disease had failed prior to the March 4, 2015 motor vehicle accident. He testified to the significance that Dr. Hess’ numerous L4-L5 epidural steroid injections had failed to provide relief, the claimant was having numbness leading to falls, and that Dr. Lilly had recommended surgery, on two occasions, to relieve the claimant’s symptoms. Dr. McBride testified that it was factually significant the claimant’s August 12, 2014 and September 23, 2015 pain diagrams were identical and both showed 8 out of 10 pain, as it showed the claimant’s symptoms and pain level had remained the same.

42. Dr. McBride testified it was medically improbable the claimant would have been pain free from December 2014 until the time of his motor vehicle accident on March 4, 2015. In reaching this conclusion, Dr. McBride cited the claimant’s 15 year history of low back pain and lumbar radiculopathy. Dr. McBride testified he agreed with Dr. Castrejon that the progression of the claimant’s symptoms showed the advancement of the claimant’s degenerative disc and joint disease and it was predictable the claimant would require surgery to resolve his symptoms.

43. Dr. McBride testified it was important to review the claimant's full medical history showing low back pain and right side lumbar radiculopathy dating back to 1999, in reaching an accurate opinion regarding whether Dr. Sung's surgery was reasonable, necessary and related to the March 4, 2015 motor vehicle accident. Dr. McBride testified that in reviewing Dr. Sung's deposition it was evident Dr. Sung's opinion was based on a less than complete review of the claimant's medical history.

44. At hearing, Dr. McBride used two computer screens to view the claimant's August 25, 2014 and July 24, 2015 lumbar MRI images and conducted a side-by-side comparison for the parties and the ALJ. Dr. McBride testified that the MRI images showed the L3-L4 disc herniation from before, and after, the March 4, 2015 motor vehicle accident was virtually identical.

45. Dr. McBride testified the medical records and MRI images showed that the March 4, 2015 motor vehicle accident had not aggravated or accelerated the claimant's underlying condition.

46. Dr. McBride testified that while the surgery performed by Dr. Sung was reasonable and necessary it was not related to the March 4, 2015 motor vehicle accident. Instead, Dr. McBride testified that within a reasonable degree of medical probability the surgery was related to the claimant's failed treatment for the progression of spinal stenosis and degenerative joint disease.

47. The ALJ finds Dr. McBride's analyses and opinions to be credible and more persuasive than evidence to the contrary.

48. The ALJ finds that the claimant has established that it is more likely than not that the surgery performed by Dr. Sung on October 26, 2015 is reasonable and necessary in light of the claimant's medical condition.

49. The ALJ finds that the claimant has failed to establish that it is more likely than not that the surgery performed by Dr. Sung on October 26, 2015 is causally related to his industrial injury of March 4, 2015.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

2. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

3. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S.

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claims Appeals Office,* 5 P.3d 385, 389 (Colo. App. 2000).

5. It is within the ALJ's purview as the finder of fact to determine the credibility of the witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

6. When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936).

7. In resolving inconsistencies the ALJ may credit all, part or none of an expert's testimony, and the ALJ's failure to cite an expert's opinion inherently reflects that the ALJ did not find it persuasive. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

8. Regardless of the filing of an admission for medical benefits or an order containing a general award of medical benefits, respondents retain the right to dispute liability for medical treatment on grounds that the treatment is not authorized or reasonably necessary. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Williams v. Indus. Comm'n*, 723 P.2d 749 (Colo. App. 1986). The filing of an admission does not prevent respondents from contesting whether a claimant is in need of any continued medical treatment as a result of the compensable injury. *Ford v. Regional Transp. Dist.*, W.C. No. 4-309-217 (I.C.A.O., Feb. 12, 2009). Respondents remain free to dispute the cause of the need for medical treatment, and respondents' election to do so does not shift the burden of proof away from the claimant. *See Snyder, supra*; *Velarde v. Sunland Construction*, W.C. No. 4-412-975 (I.C.A.O., Dec. 4, 2001).

This principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. *Cf. HLJ Mgmt. Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990) (filing of admission does not vitiate respondents' right to litigate disputed issues on a prospective basis).

9. A claimant must prove a causal relationship between the work injury and the medical treatment for which he is seeking benefits. *Snyder,* 942 P.2d at 1339. Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). The claimant shoulder this burden and must establish his entitlement to benefits by a preponderance of the evidence. *Snyder*, 942 P.2d at 1339. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is *more* probably true than not. *Page v. Clark*, 592 P.2d 792 (1979).

10. The ALJ concludes that Dr. McBride's analyses and opinions, concluding that the claimant's surgery of October 26, 2015 is not related to the industrial injury of March 4, 2015, are credible and more persuasive than evidence to the contrary.

11. As found, the claimant has failed to establish by a preponderance of the evidence that the need for the October 26, 2015, L3-S1 fusion performed by Dr. Roger Sung was causally related to the March 4, 2015 industrial injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant’s request for the authorization of, and payment for, the surgery conducted by Roger Sung, M.D. on October 26, 2015, is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 27, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

PRELIMINARY MATTERS

1. This hearing was held based upon the respondent's Application for Hearing filed on December 21, 2015 requesting a hearing as follows:

> Respondent files this Application for Hearing to overcome the DIME report of Anjun {sic} Sharma M.D.'s opinion as to the permanent impairment rating of 16% {sic} scheduled impairment of the lower extremity. Dr. Sharma's opinion on this issue is clearly erroneous. See, 8-42-101(3.7), C.R.S.

2. The claimant filed a response to the Application for Hearing citing, *inter alia*, "Respondents {sic} attempt to overcome DIME as to impairment rating."

3. The claimant did not raise the issue of conversion of the scheduled rating to a whole person rating in the response to the Application for Hearing or at any time during or after the proceedings.

4. At the outset of the hearing the issues were framed such that it appeared that the respondent believed that the burden was their's to overcome the impairment rating of Dr. Sharma by clear and convincing evidence.

5. Subsequent to the proceedings, the ALJ discovered that the recording equipment had malfunctioned and there exists no discernible record of the hearing. The ALJ issued an Order on June 1, 2016 indicating that he would reproduce a substantial record of the hearing from his notes and submit that to the parties for comment and then subsequently would designate the substantial record of the proceedings.

6. On June 9, 2016 the ALJ issued an Order Transmitting Reconstruction of Hearing to the parties, providing the parties five working days to comment upon the reconstruction of the record.

7. On June 14, 2016 the claimant responded to the June 9, 2016 Order indicating that the claimant had no input concerning the reconstruction.

8. On June 15, 2016 the respondent filed their Notice Regarding Reconstruction of Hearing indicating that the respondent did not dispute the accuracy of the reconstructed hearing.

9. Additionally, in their Notice the respondent stated:

> Counsel would state that upon further review and legal research that it is the Claimant who has the burden of proof as to his entitlement to permanent partial disability benefits not awarded in the Final Admission of Liability dated July 31, 2015. Respondent does not bear the burden of proof to overcome the DIME as to the scheduled impairment rating.
>
> The increased burden of proof required by the DIME procedures is inapplicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. Therefore, the procedures which provide that the DIME findings must be overcome by clear and convincing evidence are applicable only to non-scheduled injuries.

10. In their post-hearing position statement filed on June 20, 2016 the claimant argues that the respondent has a clear and convincing burden of proof to establish that the 11% scheduled rating of Dr. Sharma is erroneous.

11. Consistent with their Notice the respondent argued in their post-hearing position statement that the claimant has the burden of establishing by a preponderance of the evidence that the 0% rating of the authorized treating physician, Dr. Merchant was incorrect and that the rating provided by Dr. Sharma was correct.

12. The ALJ finds and concludes that the truth lies somewhere in between.

13. After assessing the evidence and the arguments of counsel it is apparent to the ALJ that the respondent has the burden of establishing by a preponderance of the evidence that the rating of Dr. Sharma is incorrect and that the rating of Dr. Merchant is correct.

14. According to section 8-42-107.2(4)(c):

> Within twenty days after the date of the mailing of the division's notice that it has received the IME's report, the insurer or self-insured employer shall either file its admission of liability pursuant to section 8-43-203 or request a hearing before the division contesting one or more of the IME's findings or determinations contained in such report.

15. In the instant case the respondent chose to request a hearing to contest the IME's finding that the claimant suffered an 11% scheduled impairment. The ALJ agrees with the respondent's counsel that the heightened burden of proof of clear and convincing evidence is inapplicable to scheduled injuries; nonetheless, it is the respondent who is contesting the finding of the DIME and pursuant to section 8-42-

107.2(4)(c) they have the burden of proof. Thus, the burden is on the respondent to establish by a preponderance of the evidence that Dr. Sharma's impairment rating is incorrect and that the ATP's rating should prevail.

PRELIMINARY ORDER

Pursuant to the Order issued by the ALJ on June 9, 2016, after having received the input of counsel, the ALJ hereby designates the substantial record of proceedings as that found in the Reconstruction of Hearing transmitted to the parties on June 9, 2016.

ISSUES

Whether the respondent has overcome, by a preponderance of the evidence, the division independent medical examiner's opinion that the claimant has an 11% scheduled impairment.

FINDINGS OF FACT

1. The claimant works for the respondent-employer as a wildlife conservation biologist. He was a passenger in a motor vehicle involved in a T-bone accident on January 5, 2015. The vehicle in which he was riding was struck on the driver's side.

2. The claimant was treated that same day at emergency room at St. Mary Corwin Hospital for complaints of head pain, left-sided knee pain and pain in the back of his right shoulder. On physical exam it was noted claimant had a raised bump to the right side of his head. An examination of the extremities showed "no pitting edema noted, full ROM, no deformities, contender to palpation, peripheral pulses intact." The neurological examination showed claimant was alert and oriented x 3, cranial nerves grossly intact, normal gait, normal sensation, normal strength x4 extremities". The differential diagnosis was skull fracture, cervical strain, concussion. A CT of the head was negative. The primary impression was acute sprain or strain of cervical region, additional impression was contusion of face, scalp and neck. The claimant was released with Percocet, Robaxin and told to return if symptoms worsen.

3. X-rays of the left knee (4 views) were taken at St. Mary Corwin's on January 8, 2015. The results were normal. There were no fractures, no dislocations, no radiopaque foreign bodies and no significant arthritis.

4. The claimant underwent an MRI of the left knee on January 23, 2015. It showed bone contusion vs. micro-fracture, small joint effusion, mild tendinosis of the proximal patellar tendon without tear, strain of the ACL without tear, Grade 1 strain of the MCL and no meniscal tears.

5. The claimant came under the care of Paul Merchant, M.D who diagnosed him with a contusion of the knee with MCL strain per MRI.

6. Dr. Merchant prescribed physical therapy. The claimant's range of motion and strength improved with the therapy. By April 3, 2016 the claimant continued to complain of pain 4/10 30% of the time. On physical exam that day claimant's range of motion was full in flexion and extension. He was non-tender to palpation throughout the knee. He had normal strength in both extension and flexion. There is no ligamentous laxity in his knee. On that date Dr. Merchant advised the claimant to push himself to walk on uneven terrain to determine limitations.

7. The claimant reported to Dr. Merchant he continued to have pain as of April 27, 2016 20% of the time. The claimant reported he had decreased range of motion but the doctor reported that the claimant "is able to fully extend his knee." Dr. Merchant noted on physical examination that the left knee is "largely unremarkable". Based on the claimant's continued complaints of pain Dr. Merchant referred the claimant to Dr. Nakamura, an orthopedist, for evaluation.

8. The claimant was seen by Dr. Nakamura on June 11, 2015. Dr. Nakamura did not find it necessary to offer any treatment. He suggested that if the claimant didn't get better they could discuss various injections. None were offered at that time.

9. On June 16, 2015 the claimant saw Dr. Merchant who noted the claimant's pain was 1/10 approximately 10% of the pain. Examination of the knee showed the claimant's "range of motion is normal." The claimant was returned to full duty.

10. The claimant was seen by Dr. Nakamura on July 2, 2015. Dr. Nakamura stated that the claimant has a bone contusion and that he continues to get better and has "no major complaints." The claimant reported he continues to do better all the time. He has a little bit of pain on long walks and deep squatting but the rest of his everyday activities are essentially non-painful.

11. On physical examination Dr. Nakamura noted “he has intact flexion, extension, Lachman firm endpoint. Anterior and posterior drawer firm endpoint.”

12. The claimant was put at MMI by Dr. Merchant on July 8, 2015. At that time the claimant reported to Dr. Merchant that he has intermittent 2/10 pain “only with certain movements such as getting down on hands and knees. Otherwise he is able to perform his activities of daily living and work without difficulty.” Dr. Merchant reported that the claimant concurs that he has reached maximum medical improvement and desires to be discharged from further care at this time. Dr. Merchant performed a physical examination of the claimant. Dr. Merchant reported among other things that “pain on motion is not present. Pain to palpation is not present…. Swelling is not present. Range of motion is normal. Strength is normal.” Dr. Merchant also reported that the claimant is “able to move with no difficulty.” Dr. Merchant released the claimant to return to work with no restrictions and assigned no permanent impairment.

13. The respondent filed a Final Admission of Liability dated July 31, 2015 admitting to, *inter alia*, the 0% impairment rating from Dr. Merchant. The claimant objected to the FAL and requested a Division IME. Upon receipt of the DIME report, the respondent filed an Application for Hearing dated December 21, 2015 as to the issue of permanent partial disability benefits and the opinions of DIME Dr. Sharma. The claimant filed a Response to Application for Hearing raising the issues of permanent partial disability benefits, medical benefits and disfigurement. (The issues of medical benefits and disfigurement were withdrawn by the claimant prior to hearing).

14. Anjmun Sharma, M.D. performed the DIME on November 12, 2015. Dr. Sharma was provided the medical reports from St. Mary Corwin, Dr. Merchant and Dr. Nakamura.

15. Dr. Sharma performed a physical examination of the claimant. On physical examination the doctor checked claimant’s ACL, PCL, the medial lateral meniscus and the lateral and medial collateral ligaments, “which were all intact.” Dr. Sharma reported ‘the knee is quite stable. The injured worker reported he had no pain.”

16. Dr. Sharma measured the claimant’s range of motion of the left leg with a goniometer. He determined the claimant has 123 degrees of flexion. Dr. Sharma then assigned 11% range of motion impairment to the claimant.

17. Dr. Sharma testified in his deposition that the claimant’s injury was a contusion to the knee. After treatment the claimant could perform all of his activities of

daily living and was able to walk without difficulty Dr. Sharma testified the claimant's x-rays were normal.

18. Dr. Sharma stated in his report that the claimant's MRI was "completely clean." He also reported that the claimant "did not have any significant findings on his MRI that would account for his current ongoing symptoms."

19. Dr. Sharma testified in his deposition that the MRI did not show anything abnormal. Dr. Sharma testified that the claimant's diagnosis of knee contusion/knee sprain implies this is a relatively mild injury.

20. Upon physical examination by Dr. Sharma reported the claimant was "non-tender to palpation." The claimant had "excellent range of motion." Dr. Sharma confirmed these findings in his deposition.

21. Dr. Sharma reported that the claimant had no pain on physical examination.

22. Dr. Sharma found no atrophy of the quad muscle, thus, indicating the claimant is bending his knee and is using his knee. The lack of quad atrophy indicated to Dr. Sharma that the knee was being used and couldn't have been causing that much pain if it was being used.

23. There was also no evidence of swelling which told Dr. Sharma there were no lingering symptoms from the initial injury. The claimant's skin, hair reflexes and strength were all normal as well.

24. Dr. Sharma also tested the claimant's medial collateral, myocollateral ligaments, the ACL ligaments, the posterior drawer, and the lateral collateral ligament. He did not find any signs of internal derangement or pathology in the knee.

25. Dr. Sharma did not find any objective findings of injury to any of the knee ligaments on physical examination.

26. The claimant did not complain of pain during the physical examination. None of the provocative testing caused him pain.

27. According to Dr. Sharma the claimant's physical examination was completely normal. Dr. Sharma agreed there is no objective evidence of injury to the claimant's knee. Dr. Sharma agrees that the diagnostic tests showed no objective evidence of injury.

28. Dr. Sharma testified the claimant did not have an injury or evidence of injury which would entitle him to a rating under Table 40 of the AMA Guides Third Ed. Rev'd.

29. Even if claimant had complained of pain at the time of the examination, Dr. Sharma testified that "we don't rate pain in the State of Colorado." The claimant did not have a specific disorder of the knee at the time of Dr. Sharma's rating. Although Dr. Sharma found that the claimant had 123 degrees of motion in his left knee, he opined that it is possible that was the claimant's normal or baseline measurement.

30. The claimant did not have any specific disorder of the knee at the time of the DIME according to Dr. Sharma.

31. Dr. Sharma agrees that there is no anatomic or physiologic finding to explain the decreased range of motion. The claimant has no findings on physical examination which could explain the loss of range of motion.

32. Dr. Sharma admitted that can't relate the claimant's loss of range of motion on exam to the on the job injury. Dr. Sharma does not know why claimant has a decrease in range of motion. Since the claimant wasn't in any pain at the time of the exam, pain could not have been restricting his ability to give full range of motion.

33. Dr. Sharma testified that to a reasonable degree of medical probability he could not say that the claimant's loss of range of motion is related to his work injury.

34. Dr. Allison Fall performed a records review at the request of the respondent. Dr. Fall is a physician who specializes in the field of physical medicine and rehabilitation. This involves the diagnosis and treatment of musculoskeletal and neurological disorders with the focus on returning patients back to the highest level of function. Dr. Fall is an active practitioner who has been level II accredited for the past 18 years.

35. Dr. Fall explained that the claimant had a contusion and strain of the left knee. A strain is the overstretching of a ligament or tendon. With the mild type of strain the claimant had on MRI one would expect that that type of injury would heal with time, generally over the course of three or so months.

36. Dr. Fall opined that Dr. Sharma's assignment of 11% impairment is erroneous because he did not provide a specific diagnosis for an injury that would lead to impairment. The second reason the opinion is erroneous is that Dr. Sharma does not find the loss is related to the work injury. Dr. Sharma left out a step. It is not sufficient to

simply measure a body part. Dr. Sharma must measure only impairment that is directly a result of the work-related injury.

37. Dr. Fall opined that since Dr. Sharma testified in his deposition that he could not relate this loss of range of motion to the motor vehicle accident, it was clearly erroneous for him to assign an impairment rating. Because the rating must be related to the date of injury listed on the summary sheet so that is the impairment being calculated.

38. According to Dr. Fall, even if the claimant has ongoing pain as he testified to at the hearing, this would not justify a loss of range of motion impairment because pain is a subjective complaint and there has to be correlating medical objective findings to warrant a permanent impairment. There has to be objective findings, something that can be evaluated and measured.

39. Dr. Merchant did not assign any permanent work restrictions at the time of MMI. Dr. Sharma did not assign any permanent work restrictions. Dr. Nakamura did not assign any permanent work restrictions.

40. Dr. Fall testified the accurate impairment rating for the claimant is 0% impairment. This is consistent with Dr. Merchant's rating of 0%.

41. The ALJ finds the analyses and opinions of Dr. Merchant and Dr. Fall to be credible and more persuasive than that of Dr. Sharma.

42. The ALJ finds that it is more likely than not that the claimant's impairment rating is 0% as found by Dr. Merchant.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

2. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

3. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S.

4. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claims Appeals Office,* 5 P.3d 385, 389 (Colo. App. 2000).

5. It is within the ALJ’s purview as the finder of fact to determine the credibility of the witnesses and resolve conflicts in the evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App 1995).

6. When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936).

7. In resolving inconsistencies the ALJ may credit all, part or none of an expert's testimony, and the ALJ's failure to cite an expert's opinion inherently reflects that the ALJ did not find it persuasive. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

8. According to section 8-42-107.2(4)(c):

> Within twenty days after the date of the mailing of the division’s notice that it has received the IME’s report, the insurer or self-insured employer shall either file its admission of liability pursuant to section 8-43-203 or request a hearing before the division contesting one or more of the IME’s findings or determinations contained in such report.

9. Subsequent to the receipt of the DIME report the respondent chose to contest one of the DIME findings, that being the lower extremity impairment rating of 11%, which is found on the schedule of impairments under section 8-42-107(2).

10. The increased burden of proof required by the DIME procedures is inapplicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "[w]hen an injury results in permanent medical impairment not set forth in the schedule in

subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in § 8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has stated in this respect that: scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. In particular, the procedures of § 8-42-107(8)(c), which states that a DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. See *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

11. When an impairment is subject to a scheduled award pursuant to Section 8-42-107(2), C.R.S. the clear and convincing burden of proof standard does not apply and the usual preponderance of the evidence burden of proof applies. *Burciaga v. AMB Janitorial Services, Inc*. W.C. No. 4-777-882(November 5, 2010) citing *Egan v. Industrial Claim Appeals Office*, 971 P. 3d. 691, (Colo. App. 2000).

12. In this case, the ALJ concludes that Dr. Merchant correctly assessed a 0% impairment rating based on a lack of ratable condition and no loss of range of motion. Dr. Merchant and Dr. Nakamura both found on numerous examinations that the claimant's range of motion was full and he had no objective or physiologic evidence of injury. Dr. Sharma also found the claimant's physical examination was normal and that there was no objective evidence of an injury at the time of the DIME examination. Therefore there is no ratable impairment for a specific disorder.

13. Dr. Sharma admitted that although he found a loss of range of movement in the knee, he could not attribute that loss to the work injury. Dr. Sharma agreed there was no physiologic correlation and no anatomic correlation to explain the claimant's purported loss of motion. Thus, Dr. Sharma's rating violates § 8-42-107(8) (c), C.R.S., which requires that a rating based on chronic pain must have an anatomic or physiologic correlation. Not only did Dr. Sharma admit there was no anatomic or physiologic correlation, he admitted there was no pain on examination. Therefore, there was not any basis to provide a rating at all since there was no underlying condition and no chronic pain.

14. Dr. Sharma could not say the loss was related to the injury nor could he say there was even a true loss of motion because he did not know what the claimant's baseline was.

15. The ALJ concludes that the analyses and opinions of Dr. Merchant and Dr. Fall are credible and more persuasive than that of Dr. Sharma.

16. The ALJ concludes that the respondent has established by a preponderance of the evidence that the claimant's lower extremity impairment rating is 0% as found by Dr. Merchant.

ORDER

It is therefore ordered that:

1. The respondent is not responsible for the payment of permanent partial disability payments to the claimant as the claimant has a 0% impairment.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 28, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The issues presented for determination involve compensability and Claimant's entitlement to medical and indemnity benefits. The questions to be answered are:

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on June 24, 2015.

II. If Claimant sustained a compensable right shoulder injury, whether he established, by a preponderance of the evidence that he is entitled to all reasonable, necessary and related medical treatment concerning the right shoulder, including treatment obtained through Concentra Medical Centers and their provider's referrals.

III. If Claimant sustained a compensable right shoulder injury, whether he is entitled to TTD benefits beginning June 27, 2015 and continuing through January 12, 2016.

IV. Whether Claimant's average weekly wage (AWW) is $1,215.85 or some other figure.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Employer operates a factory manufacturing clothing for the dance performance community. Claimant worked as a fabric cutter for Employer for approximately 13 years until he was laid off on June 24, 2015. He has worked in the industry cutting fabric for 31 years. He is 58 years old.

2. As a "cutter," Claimant retrieves specified rolls of fabric from the shelves of Employer's warehouse, transports it by push cart to a cutting table where he places the fabric roll horizontally on a "spreader" machine suspended above the cutting table. The fabric rolls vary in size and weight. According to Claimant, the rolls can be as wide as 60 inches and weigh upwards of 50 pounds.

3. Once the roll is on the spreader, Claimant pulls the end of the fabric from the roll down onto the cutting table and secures it with a weight. He then proceeds to lay down fabric in multiple layers on the cutting table by pushing the spreader from one end of the cutting table to the other and securing each pass with a similar weight. Once the fabric is laid out in layers, Claimant places a "marker" on the fabric, which contains an outline of the various pieces of a costume to be cut from the fabric and assembled into a complete outfit. As described, the "marker" acts as a pattern which Claimant traces with

a cutting machine to cut the pieces from the fabric to make the garment. He uses his right hand/arm for this task.

4. Claimant described the movements necessary to complete the job duties outlined above. According to Claimant, he repeatedly has to extend his arms above shoulder level to reach fabric on the upper shelves of the warehouse and while lifting fabric rolls onto the spreader machine. He also described the cutting table as being 14 yards long, requiring that he use his arms to push the fabric roll on the spreader back and forth to lay out the layers for eventual cutting. He also uses his right hand and arm to cut the fabric into various components which are later sewn together to make the outfit. Based upon the evidence presented, the ALJ finds that Claimant's job as a "cutter" requires substantial use of the upper extremities for lifting, pushing and pulling.

5. On June 24, 2015, while lifting a roll of fabric onto the spreader, Claimant suddenly developed pain in his right shoulder. In order to get a roll of fabric onto the spreader, a metal bar is placed into the end of a hollow tube around which the fabric is rolled. With the roll resting on his extended and locked right arm/elbow, Claimant than abducted and externally rotated his right arm while lifting upward to get the bar and fabric onto the spreader machine. He experienced sharp shoulder pain in the process of this movement.

6. Claimant's supervisor confirmed the accuracy of his testimony concerning the size and weight of the fabric rolls as well as the activities necessary to complete the job duties of a "cutter" for the company.

7. At the time of Claimant's injury, Employer was going through a mass lay off. Claimant was one of the employees to be laid off. Claimant admitted that he reported his injury after being told he was going to be laid off. In this regard, Claimant testified that he had no opportunity to report the injury before being informed that he was going to be laid off and further that the chance to report the injury after learning of his imminent layoff did not present itself until later during his shift. According to Claimant, he attempted to report his injury shortly after it happened but discovered his supervisor, Scott Mortensen talking to co-employees about being laid off when he attempted to do so. The ALJ understands from Claimant's testimony that after he learned he was going to be laid off, Claimant returned to work and that both he and Mr. Mortensen were busy throughout the balance of the work day precluding his contemporaneous report of injury. Nonetheless, when the occasion to report the injury presented itself later, Claimant reported his shoulder pain, albeit after he was informed of his pending lay off.

8. Mr. Mortensen testified that Claimant was told about his forthcoming lay off between 10:00 am and 12:00 pm the same day of his injury. Per Mr. Mortensen, Claimant did not say anything about being injured at the time he was told he was going to be laid off. Rather, Mr. Mortensen testified that Claimant came to him later in the day, after being informed that he was going to be laid off, to report that he had injured himself earlier during his shift. Mr. Mortensen testified that he was not sure how or when Claimant's injury occurred as there were no details provided by Claimant at the time he reported his injury. Given the circumstances and the timing surrounding the

report of injury in this case, Respondents suggest that Claimant fabricated his shoulder injury to secure a continued source of income under the worker's compensation system after being laid off.

9. Claimant was referred to Concentra Medical Centers following his report of injury. Claimant testified that he reported to the clinic and was told come back on June 26, 2015. Medical records submitted into evidence establish that Claimant was first evaluated by Physician's Assistant (PA) Jennifer Ziegler at Concentra on June 26, 2015, for a "sore right shoulder." According to PA Ziegler, Claimant reported that he had "right shoulder pain when he lifts." Claimant noted that he had "been lifting and doing the same thing for 25 years- states that he cuts fabric, lifts rolls of fabric- states they are about 45 pounds." Claimant further stated that his "pain is mostly when he lifts and has been going on for a while. Physical examination of the revealed "normal range of motion in the right shoulder, 4+/5 rotator cuff strength . . . normal grip strength." Claimant did not demonstrate tenderness upon palpation. There is no indication in PA Ziegler's note that she preformed diagnostic testing maneuvers during her physical examination of Claimant. Claimant was assessed with a strain of the shoulder, given a prescription for Ibuprofen 800 MG tablets and referred to physical therapy. He was also returned to work with restrictions of lifting 10 pounds constantly, up to 8 hours/day and pushing/pulling up to 20 pounds constantly, up to 8 hours/day. Claimant was precluded from overhead lifting.

10. After seeing PA Zeigler, Claimant proceeded to physical therapy where he was evaluated by Aaron Pieffer. Claimant reported a primary complaint of pain while lifting and externally rotating his arm. According to PT Pieffer's note, Claimant reported that his "shoulder has been getting worse after the last two weeks as he has been doing more lifting after a new company took over." Based upon the history provided by Claimant, PT Pieffer concluded that he presented with a "overuse injury of the right shoulder." Pt Pieffer preformed an infraspinatus muscle test and a test to assess the rotator cuff (empty can test), both tests were positive.

11. Claimant tendered the work restrictions imposed by PA Ziegler on June 26, 2015 to Employer. Employer did not extend a modified job to Claimant at that time. Rather, Claimant testified that he was laid off and that he applied for unemployment. Claimant was approved for unemployment insurance (UI) benefits; however, his benefits were held from July 7, 2015 through September 5, 2015 as he received severance pay which precluded his eligibility for UI benefits for the aforementioned time period. (Claimant's Hearing Exhibits, Tab 3, Bate Stamp page 70-71). Claimant received $7,500.00 in severance pay pursuant to a negotiated release and waiver agreement when he was laid off on June 24, 2015.[1] Consistent with the conclusion of the Unemployment Insurance Program, the ALJ finds that the $7,500.00 payment did not constitute remuneration for "wages." Claimant testified that he received $1050.00 in

[1] Although Claimant also received remuneration for his unused vacation time when he was laid off on June 24, 2015, it was determined that the "postponement for this payment would have been before the effective date of [the] claim" for UI benefits. Claimant actually received pay for his unused vacation time in his June 19, 2015 payroll check. Consequently the payment received for unused vacation did not "affect" Claimant's claim for unemployment benefits.

unemployment benefits every two weeks and that he received a final unemployment insurance benefit check in the amount of $500.00 in May 2016.

12. Approximately 3 months after his initial visit to Concentra, Claimant returned to Concentra for a follow-up on September 30, 2015. Claimant was evaluated by PA Shaun Lynch during this visit. PA Lynch noted that Claimant understood his case to be closed so there was a delay in follow-up care for the shoulder. During this visit, Claimant reported ongoing right shoulder pain when "picking up object" (sic). According to the report generated from Claimant's encounter on this visit, he complained of a "deep burning sensation" and feeling "needles" in the right shoulder when picking things up. Physical examination revealed crepitus and painful active right shoulder range of motion; however, special testing, including painful arc, Hawkins, Neer's and empty can testing were all negative. According to PA Lynch's note, Claimant's symptoms and examination were consistent with a "right shoulder strain" without impingement, rotator cuff tear or biceps tendonitis. Claimant was referred back to physical therapy and instructed to take Tylenol as needed.

13. Claimant periodically returned to Concentra and attended physical therapy for his right shoulder complaints between September 30, 2015 and January 13, 2016. During his visits to Concentra, Claimant contained to complain of pain and having "pins & needles sensations in the right shoulder.

14. Claimant also participated in physical therapy (PT) between October 7, 2015 and October 29, 2015. During his October 7, 2015 PT appointment, Claimant was once again evaluated by Aaron Pieffer who prepared a written report outlining the history of injury and his physical findings. During this visit, Claimant reported that "while at work [he] was lifting something heavy and heard a snap with pain in the right shoulder. Mr. Pieffer's note indicates that Claimant's "[w]ork involved a lot of heavy lifting and pushing continuously" and that "pain would come on about after a few hours of work and more often as time went on." Based upon the evidence presented, the ALJ is persuaded that Claimant reported work duties (lifting) which caused an acute onset of symptoms (trauma) to his right shoulder during his initial evaluation with PA Ziegler and later with PT Pieffer the same day. He likely reiterated this mechanism of injury to Mr. Pieffer on October 7, 2015, who documented it more closely to what Claimant reported on this date than on June 26, 2015. The evidence presented also persuades the ALJ that Claimant, in response to questioning by his providers, informed them of his repetitive job duties leading to confusion regarding the exact mechanism of injury and in the case of Mr. Pieffer, a conclusion that Claimant had suffered a "overuse injury" to the right shoulder.

15. On October 29, 2015, Claimant was evaluated by physical therapist Janine Rodriquez who documented a positive Hawkins-Kennedy test, a positive infraspinatus muscle test and a positive Lift off test. O'Brien's testing was negative.

16. On November 12, 2015, Claimant reported to Dr. David Hnida that PT was not helping. Consequently, Dr. Hnida ordered an MRI of the right shoulder.

17. MRI of the right shoulder was preformed November 25, 2015 for "acute posterolateral pain after lifting injury." Impressions based on the findings on the MRI included:

- Rotator cuff tendinopathy, particularly involving the supraspinatus, infraspinatus, and subscapularis, worse involving the supraspinatus.

- Tendinosis of the intra-articular portion of the long biceps with mild medial subluxation without evidence of partial- or full-thickness tearing.

- Moderate osteoarthritis of the acromioclavicular joint.

18. Claimant returned to Concentra on December 3, 2015. He was evaluated by PA Jocelyn Cavender who noted that Claimant's MRI had been performed, that Claimant wanted the results and that his right shoulder pain continued without change. PA Cavender discussed with Claimant the "possibility" of a steroid injection to "resolve" Claimant's tendonitis. Claimant deferred the injection, opting to "take some time to think about it and discuss with family."

19. Claimant was evaluated by Dr. Nicholas Kurz on January 13, 2016. During this encounter he complained of continued "intermittent positional discomfort with ER and abduction." From the evidence presented, the ALJ finds that "ER" likely means external rotation." Claimant described his pain as "dull and aching in nature." According to the note generated for this date of visit, Claimant's pain was 4/10 in intensity, non-radiating and positional. Exacerbating factors included: "shoulder movement and ER. Claimant was provided with a steroid injection and "reported good relief 15 minutes" afterwards. Claimant was returned to full, unrestricted duty on this date.

20. Insurer denied liability for the claim. Consequently, Dr. Kurz administratively closed Claimant's case, terminating further treatment on January 19, 2016.

21. Claimant was evaluated, at Respondents' request, by Dr. Jeffrey Wunder on April 29, 2016. Dr. Wunder found no signs of shoulder impingement upon examination. Following his independent medical examination (IME), Dr. Wunder opined that Claimant's pain was emanating from his right acromioclavicular (AC) joint, which MRI revealed was moderately arthritic. According to Dr. Wunder, the MRI also "showed some age-related thinning (i.e. tendinosis) of the rotator cuff" without other specific rotator cuff findings and without labral tearing, leading Dr. Wunder to conclude that Claimant did not sustain a work related injury. To the contrary, Dr. Wunder opined that Claimant's right shoulder symptoms were a consequence of degenerative age related changes that would have become symptomatic as a "result of any kind of physical activity."

22. Claimant sought an opinion from Dr. Timothy Hall who preformed an evaluation on May 12, 2016. Dr. Hall's physical examination revealed positive right shoulder impingement signs. Dr. Hall also noted that Claimant's right shoulder MRI

revealed moderate acromioclavicular osteoarthritis and tendinosis, in addition to tendinosis of the biceps tendon and degeneration of the glenoid labrum. Following his IME, Dr. Hall noted the following impressions: "1. Probable impingement syndrome, right shoulder; 2. AC joint osteoarthritis, likely symptomatic as well; 3. Bicipital tendinitis. Dr. Hall opined that Claimant's right shoulder symptoms were causally related to his work activities of June 24, 2015 and that while years of doing the type of work he was performing for Employer probably "set him up for the injury", there was a "particular maneuver that led to his present symptoms." The ALJ infers from Dr. Hall's written IME report that he attributes Claimant's current symptoms to lifting a roll of fabric onto the stretcher machine on June 24, 2015, as Claimant described.

23. Claimant has a history of prior injury to the right shoulder occurring 3-4 years ago. At that time, Claimant was getting a roll of fabric from a shelf in Employer's warehouse. Claimant had ascended a ladder to get the fabric when the ladder he was standing on slipped, causing him to reach for and hang from a shelf by his right arm until he was able to secure his footing on the ladder again. According to Claimant, he experienced pain in his right shoulder for approximately two months which pain resolved on its own without medical treatment other than over the counter medication.

24. Despite the changes noted on Claimant's right shoulder MRI, he testified that he had no right shoulder symptoms, other than those he experienced for two months, after hanging from a shelf as referenced above. According to Claimant, he did not know he had arthritis in his right shoulder because he "never felt anything" previously. Following careful inspection of the records submitted into evidence, the ALJ finds a dearth of evidence to suggest that Claimant's right shoulder ever required treatment prior to June 24, 2015.

25. Dr. Wunder testified consistently with his IME report reiterating his opinion that there were no acute findings on Claimant's MRI and that his pain was coming from his arthritic AC joint. Per Dr. Wunder, Claimant's AC joint arthritis was not caused by his work duties. To the contrary, Dr. Wunder testified that Claimant's arthritis was an age related condition characterized by changes caused by normal wear and tear over time. Citing that degenerative arthritis is progressive in nature, Dr. Wunder testified that Claimant would have developed pain in his AC joint whether he worked for Employer or not. Consequently, Dr. Wunder suggested that Claimant's work duties did not aggravate or accelerate his underlying arthritis to cause Claimant's symptoms of June 24, 2015. According to Dr. Wunder, pain associated with osteoarthritis can progress slowly or, as in Claimant's case, can come on suddenly.

26. Dr. Wunder testified that Claimant did not have bicipital tendonosis as opined by Dr. Hall based upon reports of pain only. According to Dr. Wunder, there is no support for a diagnosis of biceps tendonosis in the absence of objective physical testing, which Dr. Wunder testified Dr. Hall did not do. Per Dr. Wunder, outside of the degenerative changes documented in Claimant's AC joint, there was no other condition in the right shoulder likely to cause Claimant pain.

27. Dr. Wunder conceded that there were no medical records substantiating

treatment for the right shoulder prior to June 24, 2015 and that the post injection report from Dr. Kurz reflects that Claimant received relief from the steroid injection administered January 13, 2016.

28. The ALJ finds Claimant credible. His testimony that he had no symptoms in his right shoulder immediately prior to June 24, 2015 is borne out by the lack of medical records documenting any symptoms and/or treatment concerning the right shoulder in the days, weeks, months and years prior to June 24, 2015.

29. The ALJ credits the opinion of Dr. Hall's to find that lifting a roll of fabric from an abducted and externally rotated position with the right shoulder is likely to cause injury because the shoulder is in a compromised position at the outset of the maneuver. More probably than not, this awkward lifting pattern placed sufficient forces on the musculature and structural components of the arm and shoulder to cause Claimant's arthritic shoulder to become symptomatic. Simply put, the ALJ is convinced that lifting the fabric roll onto the spreader machine on June 24, 2015, probably aggravated a pre-existing, yet asymptomatic degenerative AC joint arthritis, causing Claimant's right shoulder pain. The contrary opinions of Dr. Wunder are unpursuasive.

30. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury while lifting a roll of fabric onto a spreader machine on June 24, 2015.

31. Based upon the evidence presented, the ALJ finds Claimant's treatment through Concentra Health Centers between June 26, 2015 and January 13, 2016, including Claimant's physical therapy and steroid injection reasonably necessary to cure and relieve him from the effects of his compensable injury.

32. Wage records submitted into evidence extending from January 3, 2015, through the June 19, 2015 pay period establish that Claimant earned gross wages of $27,866.44 over 167 days.[2] Consequently, the ALJ calculates Claimant's average weekly wage to be $1,168.05 ($27,866.44 ÷ 167 days ×7 days/week= $1,168.05). The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his June 24, 2015 compensable work related injury.

33. Although Claimant sought employment while collecting UI benefits, the ALJ Infers and finds from the evidence presented that he was unable to get work within his physical restrictions. As noted above, work restrictions were imposed on Claimant until January 13, 2016 when Dr. Kurz released him to "full work/activity." Consequently, Claimant asserts entitlement to temporary total disability from June 27, 2015, due to the

[2] Although Claimant received $7,500.00 in severance pay following the June 19, 2015 payroll period, the ALJ considers this a onetime payment for Claimant's separation from his employment due to his layoff. Consequently, the ALJ agrees with the conclusion of the Unemployment Insurance Program that such payment does not constitute wages. Accordingly, the undersigned ALJ has elected to calculate Claimant's average weekly wage based upon wages earned for the first full week in 2015 and extending through the last full week of work performed prior to Claimant's June 24, 2015 injury, a period of 167 days.

imposition of restrictions and the failure of Employer to extend modified duty, through January 12, 2016, as Claimant was released to full duty employment on January 13, 2016.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, Dow Chemical Co. v. Industrial Claim Appeals Office, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). As found in this case, Claimant's testimony is credible and convincing. Moreover, the expert medical opinions of Dr. Hall regarding the cause of Claimant's symptoms are more persuasive than the contrary opinions of Drs. Wunder when the evidentiary record is considered in its totality.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific

Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is sufficient evidence to establish that Claimant's alleged injury occurred within the time and place limitation of his work as a cutter for Employer and during an activity connected with that position, namely lifting a roll of fabric onto the spreader machine. Consequently, the ALJ concludes that Claimant has met his burden to prove that his alleged injury occurred in the course and scope of his employment. Nonetheless, Claimant must still establish that his injury arose out of his employment related duties.

E. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2006; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the

ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). As found here, Claimant's work duties require almost constant use of the upper extremities to obtain and lift material on a spreader machine so as to lay out the fabric on a cutting table for eventual cutting and assembly into dance garments. Per the credible and convincing opinion of Dr. Hall, Claimant's job duties require him to engage the musculature and structures of the upper arm and shoulder to lift from a compromised position placing the shoulder at a heightened risk for injury. More probably than not, the awkward lifting patterns employed by Claimant to lift the fabric roll and spreader bar onto the spreader machine on June 24, 2015, aggravated his underlying, asymptomatic AC arthritis giving rise to his symptoms and need for treatment. Consequently, the ALJ concludes that a logical causal connection exists between Claimant's work duties and his current shoulder symptoms and need for treatment.

G. A pre-existing condition "does not disqualify a claimant from receiving worker's compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or the need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). Here, the persuasive evidence demonstrates that Claimant sought treatment for his shoulder pain and other symptoms caused by a specific activity, i.e. lifting the fabric roll and spreader bar to the spreader machine from abducted and externally rotated position. Although Claimant has significant pre-existing degenerative changes in the right shoulder, confirmed by MRI, the ALJ finds no evidence to establish that Claimant's pre-existing condition was symptomatic or disabling immediately prior to June 24, 2015. Moreover the persuasive opinion of Dr. Hall establishes that the awkward lifting pattern required to get the fabric roll onto the spreader machine likely placed Claimant's diseased shoulder in a compromised position aggravating his pre-existing osteoarthritis giving rise to his symptoms and his subsequent need for treatment. Accordingly, the ALJ concludes that Claimant has proven, by a preponderance of the evidence that his injury is compensable.

Medical Benefits

H. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797

P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*. Contending that Claimant's current symptoms represent the natural progression of a preexisting, non-industrial condition that would have become symptomatic, whether Claimant worked for Employer or not, Respondents urge the ALJ to conclude that Claimant's treatment at Concentra is unrelated to his work duties for Employer. As found, Respondents' implication is not compelling. The suggestion that Claimant's diseased shoulder coincidentally became symptomatic on the very day that he happened to be lifting a roll of fabric in an awkward fashion, without any contribution from that activity strains credulity.

I. Nonetheless, where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that he sustained a compensable aggravation of his previously asymptomatic right shoulder osteoarthritis. The evidence presented persuades the ALJ that this compensable "injury" is the proximate cause of Claimant's need for medical treatment, including his need for physical therapy and the injection provided by Dr. Kurz. Taken in its entirety, the ALJ finds the evidentiary record to contain substantial evidence to support a conclusion that Claimant's work duties and not a pre-existing condition is responsible for his current symptoms and need for treatment, including PT and injection therapy. Consequently, the ALJ concludes that Claimant has established that Claimant's need for right shoulder treatment is causally related to his work-related lifting on June 24, 2015. Moreover, the totality of the evidence presented establishes that the care, including physical therapy and a corticosteroid injection were reasonable and necessary given Claimant's continued pain and functional decline. Consequently, the ALJ concludes that Respondents are liable for Claimant's care at Concentra. As Claimant has not been placed at maximum medical improvement (MMI), Respondents remain liable for all future reasonable, necessary and related care.

Temporary Disability Benefits

J. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). In this case, Claimant credibly testified and the medical records support that he was suffering from a painful shoulder which resulted in the imposition of physical restrictions precluding his ability to perform his usual job from June 27, 2015 and continuing through January 12, 2016 based upon Claimant's release to full duty on January 13, 2016. Moreover, the persuasive evidence establishes that Respondents did not offer Claimant modified duty, likely because Employer had elected to lay Claimant off. Consequently, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and has established a wage loss. Thus he is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Because the period of disability lasted longer than two weeks from the day Claimant left work as a consequence of the injury, Claimant is entitled to recover disability benefits from the day he left work in this case. Section 8-42-103(1)(b), C.R.S. Having worked the entire day on June 24, 2015, Claimant effectively left work on June 25, 2015. Consequently, the ALJ concludes that Claimant is entitled to TTD benefits from June 25, 2015 through January 12, 2016.

Offsets/Credits

K. Section 8-42-103(f), C.R.S. provides in pertinent part:

> In cases where it is determined that unemployment insurance benefits are payable to an employee, compensation for temporary disability shall be reduced, but not below zero, by the amount of unemployment insurance benefits received, unless the unemployment insurance amount has already been reduced by the temporary disability benefit amount and except that temporary total disability shall not be reduced by unemployment Insurance benefits received pursuant to section 8-73-112."

L. As temporary disability benefits have not been paid, the ALJ concludes that those portions of the above referenced statute concerning reduction in unemployment insurance benefits and citation to C.R.S. § 8-73-112 do not apply to the facts of this case. Here, the evidence presented establishes that Claimant began receiving unemployment insurance benefits in the amount of $1050.00 every two weeks starting after September 5, 2015 and continuing through May 2016. As noted above, Claimant is entitled to TTD benefits for the time period June 27, 2015 through January 12, 2016, after which Claimant's entitlement to TTD terminated by virtue of his release to full duty work per the medical report of Dr. Kurz dated January 13, 2016. Based upon the evidence presented, the ALJ concludes that Respondents are entitled to reduce any temporary disability benefits, dollar-for-dollar, but not below zero, by the amount of unemployment insurance benefits received by Claimant for the time period beginning September 6, 2015 and extending through January 12, 2016, when Claimant's entitlement to TTD ended. *See Pace Membership Warehouse v. Axelson, 938 P.2d 504 (Colo. 1997), reversing Axelson v. Pace Membership Warehouse, 923 P.2d 322 (Colo. App. 1996).*

M. Respondents assert that they are entitled to a $7,500.00 credit against any TTD benefits ordered to be paid since the $7,500.00 payment is tantamount to payment of wages despite Claimant being laid off. The ALJ is not persuaded. In *Gallardo v. Sentner Goldfarb and Rice*, W.C. 4-296-754 (June 17, 1997), the Panel held that the Workers' Compensation Act does not contain a provision for the reduction of TTD benefits on account of a claimant's receipt of severance pay. Citing *Kraus v. Aircraft Sign Co*., 710 P.2d 480 (Colo. 1985), holding that the court may not create a remedy not provided for by statute, the Panel expressly declined to create an offset for a claimant's receipt of severance pay where § 8-42-124(2)(a), C.R.S. did not, declining to do so as engaging in judicial legislation. As the ALJ is persuaded that the $7,500.00 payment constituted severance pay and because there is no statutory provision for the reduction of TTD benefits on account of the Claimant's receipt of severance pay, the undersigned concludes permitting such credit would constitute reversible error. Accordingly, Respondents' request for a credit in the amount of $7,500.00 against Claimant's TTD benefits is denied.

Average Weekly Wage

N. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).*

O. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), give the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. An AWW calculation is designed to compensate for total temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity at the time of his industrial injury comes from the wage records submitted into evidence. As found, in the 167 days prior to the injury in this case, Claimant earned a total of $27,866.44 for an average weekly wage of $1,168.05 ($27,866.44 ÷ 167 days × 7 days/week = $1,168.05). The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his June 24, 2015, compensable work related injury. Accordingly, for purposes of this claim, Claimant's AWW is $1,168.05.

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that he suffered a compensable injury to his right shoulder as a consequence of lifting a roll of fabric onto a spreader machine on June 24, 2015.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his right shoulder injury, including the care provided at Concentra Medical Centers and that care provided as a consequence of any referrals from Concentra providers.

3. Respondents shall pay temporary disability benefits in accordance with section 8-42-103(1)(b), C.R.S. at a rate of sixty-six and two-thirds percent of Claimant's AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. As Claimant's disability lasted longer than two weeks from the day that he left work as a result of his injury TTD benefits shall be paid from June 25, 2015 through January 12, 2016, in accordance with Section 8-42-103(1)(b), C.R.S.

4. Pursuant to C.R.S. § 8-42-103(f), Respondents are entitled to reduce any temporary disability benefits, but not below zero, by the amount of unemployment insurance benefits received by Claimant for the time period extending from September 6, 2015 through January 12, 2016, when Claimant's entitlement to TTD benefits terminated given his full duty work release.

5. Respondents' request for a $7,500.00 credit against TTD is denied and dismissed as the ALJ concludes that the $7,500.00 payment constituted severance pay for which there is no statutory offset remedy.

6. Claimant's AWW for purposes of paying TTD associated with this claim is $1,168.05.

7. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 28, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-002-450-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/ Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 23, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 6/23/16, Courtroom 3, beginning at 8:30 AM, and ending at 11:45 AM).

Claimant's Exhibits 1 through 14 were admitted into evidence, without objection, with the exception of exhibit 12, in which case the Respondents' objection was overruled and the exhibit was admitted. Respondents' Exhibits A through H were admitted into evidence, without objection. The evidentiary deposition of Stewart Weinerman, M.D., taken on May 10, 2016, was admitted into evidence.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, on June 27, 2016. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant suffered a compensable injury to both his left and right knee as a result of slipping on ice while stepping over a hose in the course and scope of his employment as a truck driver/grocery deliverer for the Employer on December 18, 2015; if so, whether the medical benefits rendered by HealthOne Occupational Medicine and Rehabilitation, which is the Employer's designated provider, and Colorado Orthopedic Consultants, which is a referral from the Employer's designated provider, as well as their referrals, are reasonably necessary and causally related to the Claimant's injury of December 18, 2015.

The Respondents raised the affirmative defense, pursuant to § 8-42-112 (1)(a) & (b), C.R.S., of a willful failure by the Claimant to obey a reasonable rule adopted by Employer for the safety of the employee.

The Claimant bears the burden of proof, by a preponderance of the evidence on all issues with the exception of "safety violation," in which case the Respondents bear the burden of proof by preponderant evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The parties stipulated, and the ALJ finds as fact, that if the Claimant's injury is found compensable:

a) the Claimant's average weekly wage (AWW) at the time of injury was $987.97;

b) the Claimant would be entitled to temporary partial disability (TPD) benefits from December 19, 2015 until March 23, 2016;

c) the Claimant would be entitled to temporary total disability (TTD) benefits from March 24, 2016 through June 10, 2016; and,

d) that all medical care rendered by HealthOne Occupational Medicine and Rehabilitation, as well as its referrals including that to Colorado Orthopedic Consultants were authorized.

2. The Claimant testified and it is undisputed that he earned $20.50 an hour, based on a 40-hour week, for a total of $820.00 per week. Thus, he sustained a temporary wage loss of $167.97 per week, yielding a TPD rate of $111.98 per week, or $16.00 per day.

Compensability

3. Prior to December 18, 2015, the Claimant had no ongoing symptoms or functional limitations in either his right or left knee and had worked at full-duty since his date of hire on March 17, 2015.

4. On December 18, 2015, the Claimant sustained an injury to his left and right knees in his employment as a driver/grocery deliverer for the Employer while walking around his truck, which he was refueling, stepping over a hose and slipping on the ice, when he felt a pop and severe pain in this right knee.

5. On December 18, 2015 the Respondents' filed a First Report of Injury.

6. The Claimant worked modified-duty following the assignment of restrictions from the Employer's designated provider between December 19, 2015 and March 23, 2016, earning $20.50 an hour for a 40 hour week, which equates to $820 a week, yielding a temporary wage loss of $167.97 per week.

7. On and after March 24, 2016, the Claimant was totally off of work for two surgeries performed by Stewart Weinerman, M.D., an orthopedic surgeon, at Colorado Orthopedic Consultants and did not return to work until June 11, 2016.

Medical

8. Shortly after the injury, which the Claimant reluctantly reported to his supervisor, the Claimant was directed to the Employer's designated medical provider, HealthOne Occupational Medicine and Rehabilitation (HealthOne), where he was evaluated on December 18, 2015 by authorized treating physician ("ATP") Katherine Drapeau, D.O., who diagnosed the Claimant as having "bilateral knee sprain, right worse than left" and who dictated a discussion section stating:

> Patient states that earlier today, as he was walking around his truck, he slipped on the ice. He caught himself but wrenched his right knee. Felt a pop and severe pain. He is currently having difficulty bearing weight. He did notice, after the drive over here and sitting in the waiting room, that his

> left knee is starting to stiffen up and has some pain medially. The pain in the right knee is primarily medial.

See Claimant's Exhibit 6, Bate Stamp ("BS") 9.

9. Following ATP Dr. Drapeau's evaluation, she placed the Claimant on restrictions of "unable to work," from December 18, 2015 through December 22, 2015, and rendered the opinion that the Claimant's objective findings were consistent with a work-related mechanism of injury (*See* Claimant's Exhibit 6, BS 11).

10. On December 22, 2015, Nurse Practitioner ("NP") Deana Halat put a request in for an MRI (magnetic resonance imaging) of the Claimant's right knee, which MRI occurred on January 2, 2016, reflecting a "complex tear of the body and posterior horn of the medial meniscus, and placed the Claimant on temporary work restrictions of "no lifting . . . more than 10 lbs." (*See* Claimant's Exhibit 6, BS 13 and Tab 8, BS 42).

11. The Claimant has remained on temporary work restrictions since his original evaluation with NP Halat on December 22, 2015 until his release to full-duty and his return to full-duty work on July 11, 2016.

12. On January 6, 2016, ATP Matthew Lugliani, M.D., at HealthOne put in a request for an MRI of the Claimant's left knee, which MRI was performed on January 7, 2016, with a finding of a "large horizontal tear of the body and posterior horn of the medial meniscus with peripheral parameniscal cysts, and gave the opinion that the Claimant's objective findings were consistent with a work-related mechanism of injury" (*See* Claimant's Submission Exhibit 6, BS 18-19 and Exhibit 9, BS 45).

13. On January 6, 2016, ATP Dr. Lugliani also made a referral for the Claimant to be evaluated by Stewart Weinerman, M.D., at Colorado Orthopedics (*See* Claimant's Exhibit 6, BS 18).

14. While the Claimant was receiving treating at HealthOne, he was instructed to undergo physical therapy with Patricia "Patty" Dockter, between the dates of December 31, 2015 and February 24, 2016 (*See* Claimant's Exhibit 7, BS 31-41).

15. Prior to ATP Dr. Weinerman's evaluation of the Claimant, the Respondents wrote Dr. Weinerman requesting as follows:

> You are scheduled to see the patient above on 1/26/16. Enclosed is a CD with the video footage from the fueling station at which the injury took place. The video footage was sent to me from the employer, the patient is aware that the accident was captured on video. The incident was on 12/18/15 around 10:52 a.m. and 10:53 a.m. [sic 11:52 a.m. – 11:53 a.m.] when the claimant steps over the fuel hose twice. He appears to visibly have a limp after he steps over the hose for the second time. . . Also enclosed for your review are the medical reports and MRI reports complete

> thus far. Please outline your opinions on diagnosis, causation, and treatment plan in your dictation.

(See Claimant's Exhibit 10, BS 47).

16. ATP Dr. Weinerman evaluated the Claimant on January 26, 2016 where his report notes:

> I have been asked to consult on [Claimant] who presents to my office today as a very pleasant 50-year-old gentleman who is a trucker and has sustained injuries to both knees and has bilateral torn menisci in both knees. Apparently, he has come in for evaluation, causation and possible treatment of his bilateral knee pain. He has been seeing Dr. Lugliani over HealthONE Occupational Medicine. . . . Apparently there is some concern as to whether these are new acute injuries or if they are chronic because he has a past history of bilateral knee scopes. The right knee was scoped 10 years ago. The left knee was scoped about 20 years ago. He did very well after both surgical procedures and had no complaints related to either knee.
>
> * * *
>
> At this time, after reviewing my extensive exam, my review of the MRI scan and the video footage that you sent to me from his employer dated 12/18/2015 and the second video also both just show basically him limping and working under very icy conditions, I believe at this time that his torn menisci are a direct result of a more acute injury due to his twisting and slipping on the ice.
>
> I believe that there is some minor pre-existing condition which involves chondrocalcinosis at a previous surgery but I think this is irrelevant to the current diagnosis of lateral torn medial meniscus.

(*See* Claimant's Exhibit 11, BS 48 and 49).

17. Following the Claimant's evaluation with ATP Dr. Weinerman, the Claimant returned to ATP Dr. Lugliani who noted on February 17, 2016 that the orthopedic consultant "had recommended surgery" (*See* Claimant's Exhibit 6, BS 28).

18. The Claimant underwent surgery on his left knee with ATP Dr. Weinerman on March 25, 2016 (*see* Respondents' Exhibit G, BS 32-33; and, on his right knee on April 29, 2016 (*see* Claimant's Exhibit 14, BS 69).

19. The Claimant credibly testified the pain in his knees that was present following his injury on December 18, 2015 has been resolved by the surgeries and he has now returned to work in a full-duty capacity.

20. The medical records from the Claimant's medical providers at HealthOne all indicate that it is their opinion that the **objective findings are consistent with a history or work related-mechanism of injury.** *See,* for example, Claimant's Exhibit 6, BS 11 (Katherine L. Drapeau, D.O.), BS 14 (Deana Halat FNP-BC), and BS 19 (Matthew R. Lugliani, M.D.).

21. In addition to his written report, Dr. Weinerman was deposed by the Respondents' prior to hearing, and gave an opinion consistent with his medical report of January 26, 2016 that the Claimant's right knee injury and left knee injury were from a work-related event (*See* Claimant's Exhibit 4, BS 108, ll. 17-25 and BS 109, ll. 1-12).

Independent Medical Examiner (IME) Jorge J. Klajnbart, D.O.

22. The Respondents retained the services of Dr. Klajnbart, who was of the opinion that the Claimant's symptoms were degenerative in nature, disagreed with the reasonableness of the surgeries performed by ATP Weinerman, and testified consistently with his report of February 22, 2016 that the Claimant's right and left knee complaints were from a "pre-existing determination" (*See* Claimant's Exhibit 13, BS 60).

23. ATP Dr. Weinerman in his deposition was questioned about Dr. Klajnbart's opinion and gave the following answer:

> I don't feel that these types of tears that we found arthroscopically, which is in evidence in my records and in the pictures that we took, could possibly – you could possibly have a guy living with that and not complain about it before this injury.
>
> So, my feeling is that he probably did have a little bit of degeneration; I agree with that, by the way. But it got a lot worse after the injury.
>
> Q. Okay. Number 2, he provides his opinion about this being a preexisting condition "in that it is more likely than not" – I'm reading the second-to-the-last sentence in that paragraph, "due to previous knee arthroscopy that occurred 15 to 20 years ago."

> A. No, I don’t really think that any reasonable orthopedic surgeon would feel that way. . .

* * *

> -- surgery, you can understand the guy feeling that there’s some degeneration to the knee. But again, the findings that I have from my surgery and form the photos I took that prove it, there’s no way this is all because of something that happened 15 to 20 years ago

(*See* Claimant’s Exhibit 14, BS 110 ll. 1-25).

Safety Rule Violation

24. The Respondents maintain that the Claimant violated a general safety rule by stepping over a hose in icy conditions while performing the job responsibility of refueling his truck. The Respondents relied upon the testimony of Walter Lee Wilson, Jr., the fleet safety and compliance officer for the Employer. Wilson testified that there was no policy or safety rule that forbade the Claimant from stepping over a fueling hose while fueling his truck. Wilson testified, however, that there was a general rule not to act in a negligent fashion and in his opinion the Claimant stepping over a hose instead of turning with the hose on the outside of his body when there were snowy conditions was a safety rule violation. In fact, Wilson, in his unfettered discretion, determined what was negligent and what was not negligent. This is not a knowable or reasonable safety rule.

25. The Claimant credibly testified he was stepping over the hose, he did not hop over it, that he is 270 pounds, 6 feet tall, and individuals his height and weight “do not hop.” He indicated he hopped after he slid on the ice. The ALJ finds the Claimant’s description of the event persuasive and cr4edible.

Credibility

26. The ALJ finds that the opinions of ATP Dr. Drapeau, ATP Dr. Lugliani and ATP Dr. Weinerman are more persuasive and credible than the opinion of Dr. Klajnbart, because the opinions of ATP Dr. Drapeau, ATP Dr. Lugliani and ATP Dr. Weinerman are based on a more thorough analysis of the Claimant’s medical situation. ATP Dr. Drapeau, ATP Dr. Lugliani and ATP Dr. Weinerman connect the mechanics of the Claimant’s injury to the objective medical evidence, thus, their opinions outweigh the opinion of Dr. Klajnbart. The mechanics of injury or inappropriateness thereof, is a critical ingredient of the above injury. ATP Dr. Drapeau, ATP Dr. Lugliani and Dr.

Weinerman were of the opinion that the Claimant's mechanism of injury was consistent with an injury to the Claimant's right knee, which caused the Claimant to place additional weight on the left knee causing he left knee to also become symptomatic, a phenomenon commonly known as "over-compensation."

27. The Respondents' medical evaluator ,Dr. Klajnbart, leaves open the possibility that the Claimant's bilateral knee injuries "may have exacerbated pre-existing conditions," but Dr. Klajnbart maintains that the need for care was from a degenerative process. R. Klajnbart also questions the appropriateness of the surgeries performed by ATP Weinerman. For the reasons articulated herein above, the ALJ does **not** find Dr. Klajnbart's opinions credible.

28. At the time of the December 18, 2015 injury, the Claimant was 6 foot tall and he weighed 270 pounds. There are no medical records or testimony from the Claimant or any other individual of Claimant having knee symptoms or limitations prior to December 18, 2015. Additionally Dr. Klajnbart testified that humans are bipedal individuals and that each lower extremity holds an entire person's body weight when walking.

29. The ALJ finds that the Claimant's testimony is consistent with the medical records; is credible; and, the Claimant presented in a straight-forward and credible manner.

Ultimate Findings

30. The ALJ makes a rational choice, based on substantial evidence, to accept the opinions of ATP Dr. Drapeau, ATP Dr. Lugliani, and ATP Dr. Wienerman, and to reject the opinions of IME Dr. Klajnbart.

31. The Claimant has proven by a preponderance of the evidence that he sustained an aggravation of an asymptomatic preexisting right and left knee condition to his right and left knee on December 18, 2015, arising out of the course and scope of his employment for the Employer.

32. The Claimant has proven, by a preponderant evidence that he was working limited duty following the assignment of restrictions on December 18, 2015 until March 23, 2016 and is entitle to TPD benefits of

33. The Claimant has proven by a preponderance of the evidence that he had not worked from March 24, 2016 through June 10, 2016, returning to work on June 11, 2016. He has not earned any wages during that period of time.

34. The Claimant has not been declared at maximum medical improvement (MMI) and he remained on restrictions until he returned to work in a full-duty capacity on June 11, 2016.

35. The Claimant has proven by a preponderance of the evidence that HealthOne is an authorized medical provider and its referrals for physical therapy with Patty Dockter, MRI's at Health Images, and the two surgeries performed (one on each knee), by ATP Dr. Weinerman were reasonably necessary to cure and relieve the effects of the Claimant's compensable injury, and causally related to the compensable bilateral lower extremity injuries the Claimant suffered in the course and scope of his employment on December 18, 2015.

36. The ALJ finds that the Claimant's AWW is $987.97 and for the period of December 19, 2015 through March 23, 2016 the Claimant missed 96 days of work, suffering a wage loss each week of $167.97, for a temporary partial disability payment of $111.98, which equals $16 a day. For the period of time between December 19, 2015 and March 23, 2016 the Claimant is entitled to $1,536.

37. For the period of time the Claimant was not working between March 24, 2016 and June 10, 2016 the Claimant is entitled to a TTD weekly rate of $658.64, or a daily rate of $94.09. Claimant was out of work for 79 days and, thus, he is entitled to TTD benefits in the amount of $7,433.22.

38. The Respondents have failed to satisfy their burden to establish by a preponderance of the evidence that the Claimant willfully violated a safety rule. The safety rule the Respondents rely on is vague and unknowable, at the discretion of Safety and Compliance Officer Walter Lee Wilson.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254

(1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of ATP Dr. Drapeau, ATP Dr. Lugliani and ATP Dr. Weinerman are more persuasive and credible than the opinions of Dr. Klajnbart, because the opinions of ATP Dr. Drapeau, ATP Dr. Lugliani and ATP Dr. Weinerman are based on a more thorough analysis of the Claimant's medical situation. ATP Dr. Drapeau, ATP Dr. Lugliani and ATP Dr. Weinerman connect the mechanics of the Claimant's injury to the objective medical evidence, thus, their opinions outweigh the opinion of Dr. Klajnbart. The mechanics of injury or inappropriateness thereof, is a critical ingredient of the above injury. ATP Dr. Drape, ATP Dr. Lugliani and Dr. Weinerman were of the opinion that the Claimant's mechanism of injury was consistent with an injury to the Claimant's right knee, which caused the Claimant to place additional weight on the left knee causing he left knee to also become symptomatic, a phenomenon commonly known as "over-compensation." Also, Dr. Klajnbart, leaves open the possibility that the Claimant's bilateral knee injuries "may have exacerbated pre-existing conditions," but Dr. Klajnbart maintains that the need for care was from a degenerative process. For the reasons articulated herein above, the ALJ does **not** find Dr. Klajnbart's opinions credible. Additionally, the Claimant's testimony was consistent with the medical records; was credible; and, the Claimant presented in a straight-forward and credible manner.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of ATP Dr. Drapeau, ATP Dr. Lugliani, and ATP Dr. Wienerman, and to reject the opinions of IME Dr. Klajnbart.

Medical

c. As stipulated and found, all of the medical providers reflected in the evidence were authorized and within the chain of authorized referrals. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the aggravation of his bilateral knee condition on December 18, 2015. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment, as reflected in the evidence, was and is reasonably necessary to cure and relieve the effects of his compensable injury.

Temporary Disability

d. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to work at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. Nonetheless, the Claimant's testimony was corroborated by substantial and credible medical evidence. As found, the Claimant was temporarily and partially and temporarily and totally disabled for the periods specified herein below.

e. Once the prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant was temporarily and partially disabled from December 19, 2015 through March 23, 2016. He missed 96 days of work, suffering a wage loss each week of $167.97, for a TPD benefit of $111.98 per week, which equals $16 a day. For the period between December 19, 2015 and March 23, 2016 the Claimant is entitled to aggregate TPD benefits of $1,536. For the period of time the Claimant was not working between March 24, 2016 and June 10, 2016 the Claimant is entitled to a TTD weekly rate of $658.64, or a daily rate of $94.09. Claimant was out of work for 79 days and, thus, he is entitled to TTD benefits in the aggregate subtotal amount of $7,433.22.

Safety Violation

f. Sections 8-42-112(1)(a) & (b) C.R.S. authorize a 50% reduction in compensation for an employee's "willful failure" to use a safety device or "willful failure to obey any reasonable rule adopted by employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining v. Industrial Claims Appeals Office*, 907 P. 2d 715, 719 (Colo. App. 1995). To establish that a violation of §§ 8-42-112(1)(a) & (b) has been willful, the Respondents must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado*, W.C. No. 4-559-275 [Indus. Claim Appeals Office (ICAO), Dec. 10, 2003]. Willful conduct may be proven by circumstantial evidence including evidence of frequent warnings, and the extent of deliberation evidenced by a claimant's conduct. *Id.* There was no persuasive evidence presented at hearing that the Claimant willfully violated a safety rule. As found, the Claimant was stepping over the hose, he did not hop over it, he weighs 270 pounds and is 6 feet tall, and individuals his height and weight "do not hop." He indicated he hopped after he slid on the ice.

g. The Respondents' theory of the safety violation case is that the Claimant violated a safety rule to "not act in a negligent fashion". The Respondents' opinion of whether the Claimant acted in a negligent fashion relies upon the opinion and unfettered discretion of the Safety and Compliance Manager Wilson, which opinion is too vague and tenuous to be consistent with due process and fundamental fairness concepts. The Respondents cited no written rule, regulation or other document other than the general direction "not to work unsafe," to support their assertion. As further found, there was no persuasive or credible evidence that the Claimant violated a safety rule when stepping over a hose while fueling a cab and trailer.

h. "Willfulness" is not established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAO, Oct. 20, 2003). "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez*, W.C. No. 4-561-352 (ICAP Apr. 29, 2004).

Rather the term “willful” in §8-42-112(1)(b), C.R.S., “connotes deliberate intent and carelessness, [and] negligence, forgetfulness, remissness or oversight do not satisfy that statutory standard.” *Miller v. City and County of Denver*, W.C. # 4-658-496 (ICAO 8/31/06); see *Bennet Properties v. Industrial Claim Appeals Office*, 437 P .2d 548 (Colo. 1968). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori’s Family Dining, Inc*. v. *Industrial Claim Appeals Office, supra* at 719. As found, t0he evidence established that the Claimant did not willfully violate any Employer’s safety rule because the Respondents did not satisfy their burden of establishing what that rule was or how the Claimant violated it. The Claimant credibly testified he has never been written up for any alleged violation in employment with the Employer.

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A “preponderance of the evidence” is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). “Preponderance” means “the existence of a contested fact is more probable than its nonexistence.” *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant satisfied his burden on all issues. The Respondents failed to satisfy their burden on “safety violation.”

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The respondents shall pay the costs of all medical care rendered by the Respondents’ designated medical provider HealthOne Occupational Medicine and Rehabilitation, as well as its referrals to physical therapy with Patty Dockter, MRIs at Health Images, and surgery with authorized treating physician, Stewart Weinerman, M.D., at Colorado Orthopedic Consultants, including the surgeries performed by Dr. Weinerman on March 25, 2016 to Claimant’s left knee and the surgery of April 29, 2016 to Claimant's right knee, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Claimant's average weekly wage of $987.97.

C. The Respondents shall pay the Claimant temporary partial disability benefits for the period between December 19, 2015 and March 23, 2016 in the subtotal amount of $1,536; and, temporary total disability benefits for the period of time between March 24, 2016 and June 10, 2016 in the subtotal amount of $7,433.22, for a grand total of $8,969.22, which is payable retroactively and forthwith.

D. Any and all claims for safety violation are hereby denied and dismissed.

E. The respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

F. Any and all matters not determined herein are reserved for future decision.

DATED this______day of June 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-957-059-02

ISSUE

Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Douglas C. Scott, M.D. that he suffered a 10% whole person impairment for his May 21, 2014 occupational exposure to chemicals that resulted in asthma.

FINDINGS OF FACT

1. Claimant worked for Employer as a Foreman. His job duties included applying waterproofing materials to structures. On May 21, 2014 Claimant was painting in an electrical room. After inhaling vapors he suffered breathing difficulties and eye irritation.

2. Claimant initially received medical treatment at Midtown Occupational Health Services. He was evaluated by Lon Noel, M.D. and Lawrence Cedillo, M.D. Physicians referred Claimant to National Jewish Hospital for a respiratory evaluation.

3. After pulmonary function testing, Claimant visited Pulmonologist Karin Pacheco, M.D. of National Jewish Hospital. Dr. Pacheco diagnosed Claimant with asthma that was caused by a direct or indirect workplace exposure to a two-part caulking and weather stripping compound containing isocyanates.

4. On July 9, 2014 Dr. Cedillo released Claimant from care at Midtown Occupational Health Services. He determined that Claimant had reached Maximum Medical Improvement (MMI) with no permanent impairment or restrictions.

5. On June 8, 2015 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Cedillo's MMI and permanent impairment determinations. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME).

6. On September 28, 2015 Claimant underwent a DIME with Douglas C. Scott, M.D. Claimant reported that on May 21, 2014 he inhaled toxins, suffered breathing difficulties and experienced eye irritation. Dr. Scott reviewed pulmonary function testing and conducted a physical examination. Claimant presented without shortness of breath, with good lung sounds to both bases and without evidence of wheezing, rhonchi or rales. He reported that he was feeling well and his breathing had become better after work modifications. Dr. Scott determined that Claimant's medical condition of occupationally related asthma had improved since his last spirometry testing on March 30, 2015. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)*, Dr. Scott concluded that

Claimant had reached Maximum Medical Improvement (MMI) on September 28, 2015 with a 10% whole person respiratory impairment rating.

7. In calculating Claimant's impairment Dr. Scott relied on Table 8 of Chapter 5 of the *AMA Guides* regarding the Respiratory System. He specifically noted that the pulmonary function testing of March 30, 2015 reflected an FEV1 of 2.02 L or 55% of the predicted value, an FVC of 4.38 L or 83% of the predicted value and an FEV1/FVC of 67% of the predicted value. Class 2 of Table 8 in Chapter 5 of the *AMA Guides* specifies that a 10%-25% mild impairment is appropriate when an individual has an FVC between 60% and 79% of the predicted value or an FEV1 between 60% and 79% of the predicted value or an FEV1/FVC of 60%-69% of the predicted value. Dr. Scott thus placed Claimant into the Class 2 category of pulmonary impairment. Based on the pulmonary function results and Claimant's improvement, Dr. Scott assigned a rating in the lower part of the Class 2 impairment rating range. He therefore determined that Claimant warranted a 10% whole person rating for respiratory impairment.

8. On January 14, 2016 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Scott's MMI and impairment ratings. The FAL also noted that Claimant was entitled to receive medical maintenance benefits.

9. On January 26, 2016 Dr. Pacheco issued a report regarding Claimant's permanent impairment. Dr. Pacheco summarized her analysis using the following reasoning:

> In order to provide an impairment rating, I first consulted the American Thoracic Society Guidelines for the Evaluation of Impairment/Disability in patients with Asthma, published in 1993. This provides the guidelines for evaluating asthma impairment and is incorporated in later editions of the AMA Guides to the Evaluation of Permanent Impairment. In the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, as used in the State of Colorado, the AMA Guides are indirectly referenced and then translated into classes of respiratory impairment.

In determining Claimant's permanent impairment Dr. Pacheco utilized various tables in the *American Thoracic Society Guidelines* (*ATS Guidelines*) that included Claimant's Post-Bronchodilator FEV1, degree of airwaves hyperresponsiveness and minimum medication needs. She then assigned numerical values in each of the preceding three categories. After totaling Claimant's scores, Dr. Pacheco determined that Claimant warranted an impairment rating in Class 3 of Table 8 of the AMA Guides. Noting that Class 3 permits a 30%-45% moderate whole person impairment, Dr. Pacheco then converted her values from the *ATS Guidelines* to a 40% whole person impairment. She based the rating on "the severity of [Claimant's] bronchial hyperresponsiveness and the limited improvement in airflow on adequate treatment and removal from exposure."

10. On February 7, 2016 Pulmonologist Jeffrey Schwartz, M.D. reviewed Dr. Scott's impairment rating. In considering Claimant's described level of function, ability to perform work and spirometry testing from March 30, 2015, Dr. Schwartz concluded

that Dr. Scott properly assigned Claimant a 10% whole person respiratory impairment rating pursuant to Table 8 of Chapter 5 of the *AMA Guides*. He explained that Claimant's respiratory impairment was properly calculated by spirometry and pulmonology testing as opposed to the *ATS Guidelines*. After applying the *AMA Guides* to Claimant's March 30, 2015 spirometry testing he remarked that Claimant's level of impairment clearly fell within the Class 2 range. Dr. Schwartz further commented that the example provided on page 124 of the *AMA Guides* placing the individual in the Class 2 category was remarkably similar to Claimant's testing results.

11. Dr. Pacheco testified at the hearing in this matter. She maintained that she relied on the *ATS Guidelines* in assigning Claimant a 40% whole person impairment. Dr. Pacheco specifically considered Claimant's Post-Bronchodilator FEV1, degree of airwaves hyperresponsiveness and minimum medication needs to determine an appropriate impairment rating. She remarked that Dr. Scott's sole reliance on Claimant's pulmonary function testing in assigning an impairment rating was erroneous.

12. Dr. Pacheco acknowledged that the *AMA Guides* do not specifically delineate factors including Post-Bronchodilator FEV1, degree of airwaves hyperresponsiveness and minimum medication needs in determining an appropriate impairment rating. However, she explained that the *AMA Guides* provided her with discretion to consider factors in addition to the outlined impairment methodology pursuant to language contained in Table 9. She further commented that certain respiratory conditions may cause impairment that is not readily quantifiable from pulmonology tests as utilized under Table 8 of the *AMA Guides*. Because Claimant suffered from a condition that was not adequately captured by Table 8 of the *AMA Guides* she was permitted to utilize an impairment strategy devised by a physician with expertise in lung disease.

13. Dr. Schwartz testified at the hearing in this matter. He maintained that Dr. Scott properly assigned Claimant a 10% whole person respiratory impairment rating pursuant to Table 8 of Chapter 5 of the *AMA Guides*. He explained that Claimant's respiratory impairment was properly calculated by spirometry and pulmonology testing as opposed to the *ATS Guidelines*. He specifically remarked that medication use is not contemplated by Table 8 of the *AMA Guides*. After applying the *AMA Guides* to the March 30, 2015 spirometry testing he remarked that Claimant's level of impairment clearly fell within the Class 2 range.

14. Dr. Schwartz explained that Dr. Scott correctly used Table 8 of the *AMA Guides* and any reliance on Table 9 is inappropriate. He specifically noted that the second paragraph of Table 9 of the *AMA Guides* allows for discretionary impairment in situations where spirometry and pulmonology testing may be inaccurate in the medical office or where a claimant suffers asthma or reduced lung capacity while exposed to various chemical agents on the job. However, Dr. Schwartz noted that Claimant had been doing well since he had been back to work for approximately six months. Any utilization of Table 9 to assign a discretionary impairment rating for Claimant's condition would thus be inappropriate.

15. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott that he suffered a 10% whole person impairment for his May 21, 2014 occupational exposure to chemicals that resulted in asthma. Relying on the *AMA Guides*, Dr. Scott concluded that Claimant had reached MMI on September 28, 2015 with a 10% whole person respiratory impairment rating. In calculating Claimant's impairment Dr. Scott relied on Table 8 of Chapter 5 of the *AMA Guides* regarding the Respiratory System. He specifically noted that the pulmonary function testing of March 30, 2015 reflected an FEV1 of 2.02 L or 55% of the predicted value, an FVC of 4.38 L or 83% of the predicted value and an FEV1/FVC of 67% of the predicted value. Class 2 of Table 8 in Chapter 5 of the *AMA Guides* specifies that a 10%-25% mild impairment is appropriate when an individual has an FVC between 60% and 79% of the predicted value or an FEV1 between 60% and 79% of the predicted value or FEV1/FVC of 60%-69% of the predicted value. Dr. Scott thus placed Claimant into the Class 2 category of pulmonary impairment. He noted that Claimant's condition had improved since the March 30, 2015 pulmonary function testing. Based on the pulmonary function results and Claimant's improvement, Dr. Scott assigned a rating in the lower part of the Class 2 impairment rating range. He therefore determined that Claimant warranted a 10% whole person rating for respiratory impairment.

16. Dr. Schwartz agreed with Dr. Scott's MMI and impairment determinations. In considering Claimant's described level of function, ability to perform work and spirometry testing from March 30, 2015, Dr. Schwartz concluded that Dr. Scott properly assigned Claimant a 10% whole person respiratory impairment rating pursuant to Table 8 of Chapter 5 of the *AMA Guides*. He explained that Claimant's respiratory impairment is properly calculated by spirometry and pulmonology testing as opposed to the *ATS Guidelines*. After applying the *AMA Guides* to Claimant's March 30, 2015 spirometry testing he remarked that Claimant's level of impairment clearly fell within the Class 2 range. Dr. Schwartz further commented that the example provided on page 124 of the *AMA Guides* placing the individual in the Class 2 category was remarkably similar to Claimant's testing results.

17. In contrast, Dr. Pacheco maintained that she relied on the *ATS Guidelines* in assigning Claimant a 40% whole person impairment. Dr. Pacheco specifically considered Claimant's Post-Bronchodilator FEV1, degree of airwaves hyperresponsiveness and minimum medication needs to determine an appropriate impairment rating. She then assigned numerical values in each of the preceding three categories. After totaling Claimant's scores, Dr. Pacheco translated the values to Class 3 of Table 8 in the *AMA Guides.* Noting that Class 3 permits a 30%-45% moderate whole person impairment, Dr. Pacheco then converted her values from the *ATS Guidelines* to a 40% whole person impairment. She remarked that Dr. Scott's sole reliance on Claimant's pulmonary function testing in assigning an impairment rating was erroneous. Dr. Pacheco explained that the *AMA Guides* provided her with discretion to consider factors in addition to the outlined impairment methodology pursuant to language contained in Table 9. She further commented that certain respiratory conditions may cause impairment that is not readily quantifiable from pulmonology tests as utilized under Table 8 of the *AMA Guides*. Because Claimant suffered from a condition that was not adequately captured by Table 8 of the *AMA Guides* she was

permitted to utilize an impairment strategy devised by a physician with expertise in lung disease.

18. However, Dr. Pacheco acknowledged that the *AMA Guides* do not specifically delineate factors including Post-Bronchodilator FEV1, degree of airwaves hyperresponsiveness and minimum medication needs in determining an appropriate impairment rating. Moreover, Dr. Schwartz specifically noted that the second paragraph of Table 9 of the *AMA Guides* allows for discretionary impairment in situations where spirometry and pulmonology testing may be inaccurate in the medical office or where a claimant suffers asthma or reduced lung capacity while exposed to various chemical agents on the job. However, Dr. Schwartz noted that Claimant had been doing well since he had been back to work for approximately six months. Any utilization of Table 9 to assign a discretionary impairment rating for Claimant's condition would thus be inappropriate. Although Dr. Pacheco emphasized that her reliance on the *ATS Guidelines* constituted a better method for determining Claimant's proper impairment rating, she has not demonstrated that Dr. Scott's use of the *AMA Guides* was clearly erroneous. The opinion of Dr. Pacheco thus merely constitutes a disagreement with Dr. Scott regarding Claimant's level of permanent impairment. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Scott's 10% whole person impairment determination was incorrect.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott that he suffered a 10% whole person impairment for his May 21, 2014 occupational exposure to chemicals that resulted in asthma. Relying on the *AMA Guides*, Dr. Scott concluded that Claimant had reached MMI on September 28, 2015 with a 10% whole person respiratory impairment rating. In calculating Claimant's impairment Dr. Scott relied on Table 8 of Chapter 5 of the *AMA Guides* regarding the Respiratory System. He specifically noted that the pulmonary function testing of March 30, 2015 reflected an FEV1 of 2.02 L or 55% of the predicted value, an FVC of 4.38 L or 83% of the predicted value and an FEV1/FVC of 67% of the predicted value. Class 2 of Table 8 in Chapter 5 of the *AMA Guides* specifies that a 10%-25% mild impairment is appropriate when an individual has an FVC between 60% and 79% of the predicted value or an FEV1 between 60% and 79% of the predicted value or FEV1/FVC of 60%-69% of the predicted value. Dr. Scott thus placed Claimant into the Class 2 category of pulmonary impairment. He noted that Claimant's condition had improved since the March 30, 2015 pulmonary function testing. Based on the pulmonary function results and Claimant's improvement, Dr. Scott assigned a rating in

the lower part of the Class 2 impairment rating range. He therefore determined that Claimant warranted a 10% whole person rating for respiratory impairment.

8. As found, Dr. Schwartz agreed with Dr. Scott's MMI and impairment determinations. In considering Claimant's described level of function, ability to perform work and spirometry testing from March 30, 2015, Dr. Schwartz concluded that Dr. Scott properly assigned Claimant a 10% whole person respiratory impairment rating pursuant to Table 8 of Chapter 5 of the *AMA Guides*. He explained that Claimant's respiratory impairment is properly calculated by spirometry and pulmonology testing as opposed to the *ATS Guidelines*. After applying the *AMA Guides* to Claimant's March 30, 2015 spirometry testing he remarked that Claimant's level of impairment clearly fell within the Class 2 range. Dr. Schwartz further commented that the example provided on page 124 of the *AMA Guides* placing the individual in the Class 2 category was remarkably similar to Claimant's testing results.

9. As found, in contrast, Dr. Pacheco maintained that she relied on the *ATS Guidelines* in assigning Claimant a 40% whole person impairment. Dr. Pacheco specifically considered Claimant's Post-Bronchodilator FEV1, degree of airwaves hyperresponsiveness and minimum medication needs to determine an appropriate impairment rating. She then assigned numerical values in each of the preceding three categories. After totaling Claimant's scores, Dr. Pacheco translated the values to Class 3 of Table 8 in the *AMA Guides.* Noting that Class 3 permits a 30%-45% moderate whole person impairment, Dr. Pacheco then converted her values from the *ATS Guidelines* to a 40% whole person impairment. She remarked that Dr. Scott's sole reliance on Claimant's pulmonary function testing in assigning an impairment rating was erroneous. Dr. Pacheco explained that the *AMA Guides* provided her with discretion to consider factors in addition to the outlined impairment methodology pursuant to language contained in Table 9. She further commented that certain respiratory conditions may cause impairment that is not readily quantifiable from pulmonology tests as utilized under Table 8 of the *AMA Guides*. Because Claimant suffered from a condition that was not adequately captured by Table 8 of the *AMA Guides* she was permitted to utilize an impairment strategy devised by a physician with expertise in lung disease.

10. As found, however, Dr. Pacheco acknowledged that the *AMA Guides* do not specifically delineate factors including Post-Bronchodilator FEV1, degree of airwaves hyperresponsiveness and minimum medication needs in determining an appropriate impairment rating. Moreover, Dr. Schwartz specifically noted that the second paragraph of Table 9 of the *AMA Guides* allows for discretionary impairment in situations where spirometry and pulmonology testing may be inaccurate in the medical office or where a claimant suffers asthma or reduced lung capacity while exposed to various chemical agents on the job. However, Dr. Schwartz noted that Claimant had been doing well since he had been back to work for approximately six months. Any utilization of Table 9 to assign a discretionary impairment rating for Claimant's condition would thus be inappropriate. Although Dr. Pacheco emphasized that her reliance on the *ATS Guidelines* constituted a better method for determining Claimant's proper

impairment rating, she has not demonstrated that Dr. Scott's use of the *AMA Guides* was clearly erroneous. The opinion of Dr. Pacheco thus merely constitutes a disagreement with Dr. Scott regarding Claimant's level of permanent impairment. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Scott's 10% whole person impairment determination was incorrect.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a 10% whole person impairment for his May 21, 2014 occupational exposure to chemicals that resulted in asthma.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 30, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **MITCH SALGADO,** Claimant, vs.	▲ **COURT USE ONLY** ▲
THE HOME DEPOT U.S.A., Employer, and **SELF-INSURED, C/O HELMSMAN MANAGEMENT SERVICES,** Insurer, Respondents.	**CASE NUMBER:** **WC 4-975-288-02**

SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing in this matter was held on December 17, 2015 before Kimberly A. Allegretti, Administrative Law Judge. The Claimant was present in the courtroom and represented by Matt Molinaro, Esq., and David Lichtenstein, Esq. Respondent was represented by Sheila Toborg, Esq. The matter was digitally recorded in Courtroom 1 in Denver, Colorado from 1:30 PM to 4:00 PM.

In this order, Mitch Salgado will be referred to as "Claimant," The Home Depot, U.S.A. will be referred to as "Employer," and as it is self-insured, Employer may also be referred to as "Insurer" or "Respondent."

Also in this order, "ALJ" or "Judge" refers to the Administrative Law Judge; "C.R.S" refers to Colorado Revised Statutes (2013); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and "WCRP" refers to the Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

At the commencement of the hearing, Claimant's Exhibits 1-14 were admitted with no objections and Respondent's Exhibits A-D were admitted with no objections.

The parties were permitted to file proposed Findings of Fact, Conclusions of Law and Orders which were received on January 15, 2016.

The Claimant filed a Petition to Review on May 16, 2016 and the parties provided briefs supporting their positions. After reviewing the briefs, the record and the prior Order, the ALJ has determined that a Supplemental Order is necessary and appropriate.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of June 2016, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

____
Court Clerk

Wc.ord

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street Suite, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **ESTEBAN CASILLAS,** Claimant, vs.	▲ **COURT USE ONLY** ▲
AAA WATERPROOFING, INC. Employer, and **PINNACOL ASSURANCE** Insurer, Respondents.	**CASE NUMBER:** **WC 4-957-059-02**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Administrative Law Judge Peter J. Cannici presided at the hearing in this matter on June 7, 2016 at the Office of Administrative Courts in Denver, Colorado. Matthew C. Gizzi, Esq. represented Claimant Esteban Casillas. H. Andrew Rzepiennik, Esq. represented Respondents AAA Waterproofing, Inc. and Pinnacol Assurance. The Judge digitally recorded the proceedings in Courtroom 3 from approximately 1:35 p.m. until 3:45 p.m. The Judge admitted Exhibits 1-11 for Claimant into evidence. He also admitted Exhibits A-I for Respondents. The Judge held the record open until June 21, 2016 so that the parties could submit position statements.

In this order, Esteban Casillas will be referred to as "Claimant," AAA Waterproofing, Inc. will be referred to as "Employer" and Pinnacol Assurance will be referred to as "Insurer." Employer and Insurer will be referred to collectively as "Respondents."

Also in this order, "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2015); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

CERTIFICATE OF SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by United States mail, postage prepaid, or electronic mail addressed as follows:

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Date: __**6/30/2016**____________________

__**Gabriela Chavez**________________
Court Clerk

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS
1525 Sherman Street, 4th Floor, Denver, CO 80203

In the Matter of the Workers' Compensation Claim of:

MITCH SALGADO,
Claimant,

vs.

THE HOME DEPOT U.S.A.,
Employer, and

SELF-INSURED, C/O HELMSMAN MANAGEMENT SERVICES,
Insurer, Respondents.

▲ **COURT USE ONLY** ▲

CASE NUMBER:

WC 4-975-288-02

SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing in this matter was held on December 17, 2015 before Kimberly A. Allegretti, Administrative Law Judge. The Claimant was present in the courtroom and represented by Matt Molinaro, Esq., and David Lichtenstein, Esq. Respondent was represented by Sheila Toborg, Esq. The matter was digitally recorded in Courtroom 1 in Denver, Colorado from 1:30 PM to 4:00 PM.

In this order, Mitch Salgado will be referred to as "Claimant," The Home Depot, U.S.A. will be referred to as "Employer," and as it is self-insured, Employer may also be referred to as "Insurer" or "Respondent."

Also in this order, "ALJ" or "Judge" refers to the Administrative Law Judge; "C.R.S" refers to Colorado Revised Statutes (2013); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and "WCRP" refers to the Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

At the commencement of the hearing, Claimant's Exhibits 1-14 were admitted with no objections and Respondent's Exhibits A-D were admitted with no objections.

The parties were permitted to file proposed Findings of Fact, Conclusions of Law and Orders which were received on January 15, 2016.

The Claimant filed a Petition to Review on May 16, 2016 and the parties provided briefs supporting their positions. After reviewing the briefs, the record and the prior Order, the ALJ has determined that a Supplemental Order is necessary and appropriate.

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW,** AND ORDER by U.S. Mail, or by e-mail addressed as follows:

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Date: _**6/29/2016**______ _**Gabriela Chavez**___________
Court Clerk

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-975-288-02

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable back injury arising out of and in the course of his employment with Employer on January 4, 2015.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability ("TPD) and temporary total disability ("TTD") benefits in this claim from March 19, 2015 ongoing.

3. If Claimant has proven that he is entitled to temporary disability benefits, whether Respondent has proven by a preponderance of the evidence that Claimant was responsible for his termination.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. The Claimant was hired by Employer on June 18, 2014 as a lumber material specialist. His job duties involved sawing lumber for customers, loading up products including lumber, concrete, and mortar mixes, doing special cuts for plywood brought in by customers and handling the returns for the lumber department. The Claimant's supervisors included Joe and Victor who were managers and a lead named Reggie. The Claimant's starting pay rate was $10.50 per hour and that did not change over the course of his employment. The Claimant testified that when he was first hired he was working about 27 hours per week but then by late October or early November, he was working full time which continued until his employment was terminated. The Claimant's testimony regarding the above was uncontroverted, credible and is found as fact.

2. The Employer has an Attendance and Punctuality Policy. Hourly employees are expected to report for work at the assigned time, adhere to the work schedule, work through scheduled shifts, perform assigned duties and take meal periods as scheduled (Respondents' Exhibit D, p. 32). The Employer's Progressive Disciplinary Process policy is that "the discipline process will begin when an associate receives the third unexcused occurrence in a six-month period. Each absence or tardy is considered one occurrence. If there are 3 occurrences in a 6 month period, the managers are to provide a "coaching." After a "coaching" has occurred, if there are 3 additional occurrences, the managers are required to issue a "counseling." After an employee receives a "counseling," if there is 1 additional occurrence, the managers are

required to issue a “final warning.” After an active Final Counseling, and there is 1 additional occurrence, managers are required to administer a “termination” (Respondents’ Exhibit D, p. 33). There are certain absences and tardiness that are considered “excused.” These “excused” absences and tardies include “State-law protected time off.” In this section, the policy refers the reader to “State Exceptions” in the LOA HR SOP and Time-Off Benefits HR SOP for additional details, but this was not offered or admitted into evidence. In reference to the Employer’s disciplinary policy, the term “active” refers to a disciplinary action that is within six (6) months from the date when the action was administered. In tracking “active” disciplinary notices, “a notice remains visible for six months” and “at the end of the six-month period, the notice rolls off and is no longer “active” (Respondents’ Exhibit D, p. 36). When an employee has been employed for fewer than 120 days, then he or she should receive a “final warning” if there are 3 occurrences in the first 120 day period and then proceed to immediate termination for 1 additional occurrence that occurs in the first 120 days. However, if no further occurrence occurs in the first 120 days, then the “final warning” issued during that probationary period is treated as a “coaching” notice (Respondent’s Exhibit D, p. 35).

3. On September 20, 2014, the Claimant received a Progressive Disciplinary Notice for being unexcused absent on 8/24 and tardy on 7/4 and 9/16. He was advised that he should refrain from further violations of the Employer’s Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. All of these attendance occurrences happened prior to the Claimant’s injury and, thus, were unrelated to the Claimant’s work injury. This notice was entitled a “final warning” in the records under the Employer’s Progressive Disciplinary Process as it occurred in the first 120 days of employment. As there were no further occurrences in the first 120 days of employment, this notice was treated as a “coaching” notice per the Employer’s policy.

4. On November 29, 2014, the Claimant received a Progressive Disciplinary Notice for arriving over 3 hours late on 10/6/2014, arriving 13 minutes late on 11/21/2014 and arriving 31 minutes late on 11/23/2014. The Claimant was advised to refrain from further violations of the Employer’s Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. All of these attendance occurrences happened prior to the Claimant’s injury and, thus, were unrelated to the Claimant’s work injury. This notice would be a “counseling” under the Employer’s Progressive Disciplinary Process since the “final warning” issued in the Claimant’s first 120 probationary period had converted to a “coaching” notice. That “coaching” notice would have been less than 6 months prior to the November 29, 2014 notice, so the September 20, 2014 notice would still be “active.”

5. On December 23, 2014, the Claimant received a Progressive Disciplinary Notice for being absent on December 15, 2014 with insufficient sick time to cover his scheduled hours. The notice stated that this violation progressed the Claimant to “final warning. The Claimant was advised to refrain from further violations of the Employer’s Attendance Policy and that further violations will result in additional disciplinary action

up to and including termination. This attendance occurrence happened before the Claimant's injury and is unrelated to the work injury.

6. The Claimant testified that he was injured while at work for Employer when he was called to get his returns. He grabbed a bucket of mortar out of a regular shopping cart and was moving it to a lumber cart. The bucket of mortar weighed approximately 50-60 pounds. The Claimant testified that his arms were about chest high when he was lifting and he turned to place the mortar mix onto the lumber cart. The Claimant testified he felt the onset of pain immediately as he was bent over the cart. He testified that he turned to one of the other employees and stated that he thought he hurt his back. He pushed his cart of returns back to the lumber department and felt pain in his lower back and legs the whole way. After he returned to the department, he left the cart there and told his coworkers that he hurt his back and was going to take it easy with no more lifting for the rest of the day. He told them he would do tags, which involves using the scanner to scan lumber that has no price tags and print out and tag the lumber where the price tag should be. The Claimant testified he continued to experience low back pain while doing tags when he had to reach over his head and as he brought his arms back down he felt more pressure on his back. The Claimant testified that at this point he told his coworkers he was going to take his lunch break and rest his back. As he took a few steps, the Claimant coughed and felt more pain in his buttocks, back and legs. After this he went to the assistant store manager Richard and reported the injury and he clocked out of work. The Claimant was advised by the assistant store manager to fill out an incident report. The Claimant testified that after completing the incident report he was not offered medical treatment and he left work. The Claimant testified that he did not tell his manager that he "reinjured" his back and he did not write down in his incident report that he "reinjured" his back. The Claimant testified that he has not had prior low back injuries or low back pain.

7. On January 4, 2015, the Claimant completed an Incident Witness Statement. The Claimant stated as follows:

> I was picking up returns and I picked up a 5 gal. bucket of flooring mortar when I felt a tweek [sic] in by back. I was taking it easy making signs and I had to strech [sic] and I felt the pain increase. I took it easier but when I was walking to lunch I coughed and my back went out on me. And that's when I told Richard about it.
>
> (Respondents' Exhibit D, p. 24).

8. Also on January 4, 2014, the Claimant's supervisor, Richard Reyes, made an Incident Witness Statement. He stated as follows:

> [The Claimant] came to me around 12:30 saying that he reinjured his back. [The Claimant] had previously injured his back while working. He had been working since his last injury and never went to see a doctor other than a chiropractor. [The Claimant] reinjured his back while lifting a

> 5-gallon bucket of paint. He said that it was a slight tweak & kept working & the pain got progressively worse as the day went on.

(Respondents' Exhibit D, p. 26).

9. In spite of some conflicting evidence, the ALJ finds the Claimant's testimony regarding his mechanism of injury was credible and consistent with medical records in this case and is found as fact. It is further found that the Claimant did not tell his manager that he "reinjured" his back when he reported his injury.

10. The Claimant testified that on January 5, 2015, the day following his injury, he went to see Dr. Wilner for chiropractic treatment. Dr. Wilner's medical records indicate that the Claimant saw Dr. Wilner for treatment on January 5, 2015. The Claimant reported that he injured his back at work while lifting a 5 gallon bucket of mortar mix away from his body when he felt instant pain in his low back. The Claimant reported leaving work after lunch due to pain and stated he used a combination of ice and rest the remainder of the day. The Claimant reported a pain level of 8-9 out of 10 in the lumbar/lumbosacral region. The pain radiated to the gluteal region but did not travel into the hamstrings. The Claimant reported noticeable temporary relief after Dr. Wilner's treatment, taking the pain level report down to 4-5 out of 10 (Claimant's Exhibit 14).

11. Employer's First Report of Injury was completed by the Employer's Risk Manager, Richard Reyes, on January 6, 2016. The report noted the Claimant's injury occurred on January 4, 2016 and that Employer was notified that same day. The nature of the injury listed was a strain to the low back. The description of how the injury occurred states, "[Claimant] was assisting another associate and reinjured a previous injury. He is not seeking medical attention and was offer [sic]" (Claimant's Exhibit 1; Respondents' Exhibit D, p. 25). To the extent that this statement conflicts with the Claimant's testimony and other evidence, the ALJ finds that the Claimant's testimony is credible and the Claimant did not "reinjure" a previous injury.

12. The Claimant's next scheduled work day after his injury was on January 7, 2015. He called in to speak with his supervisor Victor and the Claimant told him he wanted to take the day off, but Victor asked him to come in. The Claimant attempted to come in to work on January 7, 2015 and had someone drive him, but getting out of the car the Claimant realized the pain was too much for him to be able to work. The Claimant told Victor that he would not be able to work and he went home. The Claimant testified that he told Victor the reason he couldn't work was due to back pain from the injury at work. The Claimant testified that after this he had more absences from work due to back pain from his work injury. He testified that he always told them when he called in to miss work that it was due to this. The Claimant testified that he never received any special instructions for calling off work after his work injury. He testified that he was told to give his managers a heads up about upcoming doctor or physical therapy appointments and he offered to provide the papers he received from the medical providers, but his supervisors never collected those papers. The Claimant testified that he missed work or was late to work or had to leave work early because of

his appointments. The Claimant testified that there were also occasions that he was late punching in to work because he had to speak with his managers about his work restrictions. With respect to the testimony related to absences or tardiness occurring after his work injury for the dates prior to March 17, 2015, the Claimant's testimony as to the reasons he was late or missed work or had to leave early subsequent to his work injury is credible and was not contradicted by the testimony of any other witnesses and is found as fact.

13. The Claimant saw Dr. Wilner again on January 8, 2015 for additional treatment. After adjustment, the Claimant reported that he was definitely better. The Claimant returned to see Dr. Wilner again on January 9, 2015 and he reported slight improvement. Dr. Wilner noted the Claimant still had to be driven to the appointment due to pain when sitting and hitting bumps. The Claimant reported his pain level as 6-7 out of 10 and Dr. Wilner noted that forward lumbar flexion increased his pain. At this visit, the pain was radiating into the upper hamstring region. On January 10, 2015, when the Claimant saw Dr. Wilner, he reported he was feeling better and rated his pain level at 5 out of 10. Dr. Wilner noted the Claimant was walking with greater ease. After treatment, the Claimant indicated that he planned on working the following day and he would continue with home care. Dr. Wilner noted that the Claimant called and cancelled his January 14, 2015 appointment and reported he was doing much better overall and the pain was mild. On January 17, 2015, the Claimant returned to treat with Dr. Wilner again reporting he had much more pain the previous 2 days. The Claimant reported he had been working and he exacerbated his condition by lifting materials. After treatment on that same day, the Claimant reported he felt better and his pain level decreased to 3-4 out of 10. The Claimant saw Dr. Wilner again on January 19, 2015 reporting that he hadn't been to work yet and his pain started that day at 2 out of 10 but the pain level was increased to 4 out of 10 after driving over to the appointment (Claimant's Exhibit 14).

14. On January 22, 2015, the Claimant saw Dr. Mark Foster for initial evaluation. The Claimant reported no prior low back pain but stated that he does see a chiropractor for chronic upper back and neck pain. The Claimant described a mechanism of injury to Dr. Foster generally consistent with his testimony at hearing and throughout the medical reports. Dr. Foster noted that the Claimant stated,

> On 1/4/15, [the Claimant] was lifting a bucket of mortar mix for a customer. He had his arms outstretched and twisted, and he felt a pull in his back. He continued to work, and within 15 minutes had severe tightening of the back. He went to tell his manager, and asked to go home for the day. No work comp claim was filed.

The Claimant expressed frustration to Dr. Foster at this visit with his Employer, namely, he stated that "they have discussed terminating him over this incident." He was also asked to mop at work which caused a worsening of his pain. The Claimant reported that he spoke with his manager again and they decided to file a work comp claim. The Claimant reported severe low back pain radiating down to both buttocks but not down to his feet. Yet, Dr. Foster did note a calf cramp during the exam. Dr. Foster noted that the work relatedness of the injury was not yet determined and he wanted to see records from the Claimant's chiropractor. At this point, Dr. Foster felt that the Claimant experienced a lumbar strain that should resolve with conservative care. Dr. Foster provided temporary work restrictions of no lifting, repetitive lifting, carrying over 25 pounds and no reaching over the head or away from the body. The Claimant was scheduled for follow up visit in a week with Dr. Miller (Claimant's Exhibit 10, Respondents' Exhibit C, p. 15).

15. The Claimant saw Dr. William Miller for treatment on January 28, 2015. He reported the same mechanism of injury to Dr. Miller as he had to Dr. Foster. The Claimant reported that he began seeing his private chiropractor Dr. Wilner beginning on January 5, 2015 and was having a good response to the treatment. He had tried to work his next scheduled shift at work but left early secondary to increased symptoms. Dr. Miller noted he reviewed the chiropractic records from Dr. Wilner from January 5, 2015 to January 19, 2015. He noted that he requested prior records for the Claimant's chiropractic treatment. The Claimant was currently complaining of pain and tightness across the central lumbosacral spine that was worse with sitting or prolonged standing or walking. The prior shooting pain to his left gluteal region and posterior thigh was not present as of this visit. The Claimant reported that his sleep was improved with Flexeril. Dr. Miller continued the same temporary work restrictions as Dr. Foster and referred the Claimant for physical therapy (Claimant's Exhibit 11; Respondents' Exhibit C, p. 16).

16. The Claimant saw Dr. Wilner again on January 31, 2015 reporting that he was in a lot of pain and the pain had gradually increased over the previous 2 days. He reported a strong ache in the low back that radiated out to the sides (Claimant's Exhibit 14).

17. On February 4, 2015, the Claimant saw Dr. Miller out of cycle for his normally scheduled appointment for an interim evaluation. The Claimant now reported having pain shooting into both legs. He reported having conflict with his Employer over his work restrictions. The Claimant advised Dr. Miller that his supervisor told him to request "medical leave" and Dr. Miller advised the Claimant to follow up with HR to clarify roles and responsibilities. Dr. Miller advised that it is "ultimately his job to follow the restrictions provided. His employer should be attempting to accommodate him." On examination of the Claimant, Dr. Miller noted a "reduction of motion of the lumbar spine in all planes of movement with associated guarding" and noted "he is diffusely tender overlying the lumbosacral segment." The Claimant's same work restrictions from the prior visit were continued (Claimant's Exhibit 11; Respondents' Exhibit C, p. 17).

18. On February 5, 2015, the Claimant saw Dr. Graves for an initial evaluation. The Claimant's chief complaints were left greater than right lumbar spinal/lumbosacral junction pain, limited range of motion and muscle spasms. The Claimant reported that he did not initially identify this injury as a workers compensation injury and went to his private chiropractor for 7-8 times. The Claimant reported to Dr. Graves that the chiropractic treatment has helped reduce his pain and improve levels of

functions. Since filing a workers' compensation claim and being managed by Dr. Miller, the Claimant reported attending Select Physical Therapy which is helping him make some improvement functionally but he reported stabilization was difficult to obtain. On physical examination, Dr. Graves noted moderate limitations in all planes of motion with pain and stiffness present on end range. He also noted pain and muscle spasms on palpation. The Claimant exhibited a positive Patrick/FABRE test, positive Nachlas test , positive Gaenslen's test, positive Ely's test, positive Yeoman's test, positive Sulty test and positive Milram's test. Dr. Graves impression was a bilateral, left greater than right, lumbosacral sprain/strain, compensatory mechanical dysfunction in the lower lumbar spinal facets, primarily at L4/5 and L5/S1, pelvic unleveling and mild concerns of discogenic disease. Dr. Graves recommended chiropractic/myofascial release treatment, core strength rehabilitation, continued physical therapy and follow up treatment with Dr. Miller (Claimant's Exhibit 12).

19. The Claimant saw Dr. Miller again on February 13, 2015. The Claimant had attended physical therapy and 3 chiropractic sessions with Dr. Graves since his last visit with Dr. Miller. The Claimant reported feeling improved overall. Dr. Miller noted that an MRI of the Claimant's lumbar spine had been ordered but not yet approved. Dr. Miller noted that he personally spoke with Dr. Wilner about obtaining records of the Claimant's care prior to the work injury and Dr. Wilner assured him that the records would be received that day. The Claimant continued to report pain and tightness across the central lumbosacral spine, worse with sitting or prolonged standing/walking. The Claimant reported he was working within his restrictions with less conflict at work. He also reported he missed part of a shift on February 10, 2015 due to discomfort following a treatment session. Dr. Miller continued the Claimant on physical therapy and chiropractic with Dr. Graves. The Claimant was also continued on modified duty with temporary restrictions of no lifting, repetitive lifting, carrying over 25 pounds and change positions frequently (Claimant's Exhibit 11; Respondents' Exhibit C, p. 18).

20. On February 25, 2015, the Respondents filed a Notice of Contest. The reason given for the Notice of Contest was further investigation for prior medical records. There was no other reason checked on the Notice of Contest (Claimant's Exhibit 2).

21. On February 26, 2015, the Claimant saw Dr. Graves who noted he had treated the Claimant 5 times since the initial evaluation and the Claimant was minimally responding to treatment. Dr. Graves noted the Claimant experiences a significant reduction in pain following treatments, however upon returning to work and performing labor intensive activities, the Claimant's "symptom profile returns." Dr. Graves noted that the Claimant reported his job duties had recently changed and he was made a "store greeter" and since then he has not had any significant flare-ups with his symptoms. Dr. Graves continued to assess the Claimant with bilateral, left greater than right, lumbosacral junction strain/sprain, compensatory mechanical dysfunction, and pelvic unleveling, but noted that these conditions were responding to conservative treatment, but not stabilizing. Dr. Graves also noted a mild circumferential disc bulging at L3/L4

and L4/L5 without significant effect on the spinal canal (as evidenced on the February 20, 2015 MRI) (Claimant's Exhibit 12).

22. On February 27, 2015, the Claimant saw Dr. Miller again. The Claimant reported continued pain and tightness across the central lumbosacral spine and described his legs and hips as getting 'tired' easily and as 'dead weight.' As of this visit, Dr. Miller had reviewed the full medical records from Dr. Phil Wilner and he noted there were some visits for low back pain in March – April of 2014. Based on this, Dr. Miller determined that the injury was work related. On reviewing the MRI of the Claimant's lumbar spine, Dr. Miller noted mild disk bulging, but no significant pathology. In the treatment plan under no. 2, Dr. Miller noted to "continue work restrictions." However, on the form, the boxes listing the specific restrictions were not populated and the restrictions were not written out. However, Dr. Miller did indicate the Claimant was on modified duty and that restrictions were continued on the form. Consistent with Dr. Miller's testimony at the hearing and based on reasonable inferences from the form, the ALJ finds as fact that the Claimant's temporary work restrictions through March 18, 2015 were the same as they were at the Claimant's last visit with Dr. Miller, namely, no lifting, repetitive lifting, carrying over 25 pounds and change positions frequently (Claimant's Exhibit 11; Respondents' Exhibit C, p. 18).

23. The Claimant testified that he was about 10-25 minutes late on March 17, 2015 due to car trouble and his car would not start. He worked a full day on that date. Then, the Claimant testified, on March 18, 2015, he clocked in and he was asked if he would like to take the day off because it wasn't expected to be busy. The Claimant testified that he stated that he needed as many hours as possible. Before the Claimant clocked out at lunch time, he was told to go to the office and when he arrived, Victor and Richard advised the Claimant his employment was being terminated due to attendance.

24. On March 18, 2015, the Claimant received a Progressive Disciplinary Notice for tardiness on February 4, 2015, February 18, 2015, February 19, 2015, February 25, 2015, February 26, 2015, February 27, 2015, March 4, 2015 and March 17, 2015 and for work absences on January 7, 2015, January 17, 2015, January 31, 2015, February 3, 2015 and February 5, 2015. The Notice provided that these were violations of the Company's attendance and punctuality standards and the Claimant's employment was terminated (Respondents' Exhibit B, p. 11). The ALJ finds that for the dates prior to March 17, 2015, the reasons the Claimant was absent or tardy or otherwise had an attendance occurrence were related to the Claimant's work injury. However, per the Claimant's prior statements and his testimony at the hearing, the reason the Claimant had an attendance occurrence on March 17, 2015 was due to his car malfunctioning and not related to his work injury. As of March 17, 2015, the Claimant's previous "final warning" disciplinary notice administered on December 23, 2014 for a December 15, 2014 absence would have been considered an "active" notice as it was less than six (6) months prior to March 17, 2015. Per the Employer's policy (see Exhibit D and paragraph 2 above), if there is a one (1) additional attendance occurrence after an active final counseling/warning, then managers are required to administer a termination.

25. The Claimant saw Dr. Graves on March 19, 2015 and Dr. Graves noted the Claimant had seen him 2 times since February 26, 2015 and was making some additional improvement in functional levels but still had a degree of lumbosacral junction tightness/pain. Dr. Graves noted that the Claimant reported that he was fired from his job this week and he was upset about this and felt he was wrongfully terminated. Dr. Graves noted that "apparently, there [sic] some discrepancy with his work restrictions on his WC 164 form, which led towards his termination. Additionally, during the initial stages of his workers compensation injury, he missed work due to increased pain, which was apparently not documented through Exempla Occupational Medicine." The Claimant reported that he was compliant with his independent exercise routine and that it brought him temporary reductions in pain and increases in function, but that the benefit was not lasting. Dr. Graves recommended continued chiropractic care and structured physical therapy (Claimant's Exhibit 12).

26. The Claimant saw Dr. Miller on March 23, 2015 and reported that he was terminated by his employer for cause at the end of the prior week due to the fact his car wouldn't start and he was late for work. Dr. Miller continued to assess the Claimant with lumbar strain and the treatment plan was to continue the work restrictions, physical therapy, chiropractic with Dr. Graves and to consult with a physiatrist if the Claimant made no progress (Claimant's Exhibit 11).

27. The Claimant saw Dr. Miller on March 30, 2015 and he reported a flare of symptoms on March 28, 2015 "after fairly innocuous activity" which included spasm and pain down the left leg. Given the interim flare of symptoms and minimal progress in therapy, Dr. Miller referred the Claimant for a consult for physiatry (Claimant's Exhibit 11).

28. The Claimant saw Dr. Robert Kawasaki on April 20, 2015. Dr. Kawasaki noted that the Claimant's treatment was managed by Dr. Miller and the Claimant had undergone physical therapy two times a week, received chiropractic care from Dr. Graves, received acupuncture and has been engaged in an independent exercise program. The Claimant reported that he felt he was improving overall. The Claimant reported pain decreased when lying on his back and increased with walking, standing, sitting or driving more than 15-20 minutes and with forward flexion. The Claimant reported that he was terminated from his employment for poor attendance. Dr. Kawasaki noted the Claimant's effect was somewhat flattened and his mood appeared somewhat depressed. After examination, Dr. Kawasaki's impression was lumbar strain with primarily muscular strain and no significant disc pathology noted. Dr. Kawasaki noted that some facet arthropathy may be contributory to the Claimant's pain. Dr. Kawasaki discussed treatment options which included facet joint injections but the Claimant advised that he wanted to hold off on any type of injections. Dr. Kawasaki noted "some red flags for delayed recovery potential" and suggested a pain psychologist (Claimant's Exhibit 13).

29. The Claimant saw Dr. Kawasaki again on May 11, 2015 and the Claimant reported overall improvement with physical therapy, chiropractic treatments, and massage. The Claimant reported he had decreased his Flexeril use and felt he was 75-85% better. Dr. Kawasaki diagnosed lumbar strain and sacroiliac joint strain but noted that with the improvements made the Claimant would likely avoid interventional procedures such as facet joint injections and sacroiliac injections (Claimant's Exhibit 13).

30. The Claimant saw Dr. Miller on May 18, 2015. Dr. Miller noted that the Claimant reported improvement since the last visit with him and that Dr. Kawasaki was considering injections but that the Claimant preferred not to undergo injections at that time (Claimant's Exhibit 11).

31. The Claimant saw Dr. Kawasaki again on June 8, 2015 and reported "overall, he is doing much better and feels like he is almost back to normal." Dr. Kawasaki noted the Claimant was doing quite well at this point and was very close to maximum medical improvement. Dr. Kawasaki opined that he did not feel he needed to see the Claimant again, but would follow up if requested, per Dr. Miller's discretion (Claimant's Exhibit 13).

32. The Claimant saw Dr. Miller on June 12, 2015 reporting some improvement, but that physical therapy seems to be making him worse. Dr. Miller noted that the Claimant would finish with physical therapy and continue with chiropractic with Dr. Graves but be "weaning off" (Claimant's Exhibit 11).

33. The Claimant saw Dr. Graves on July 9, 2015. Dr. Graves reported that in addition to the previous chiropractic care, the Claimant was provided with trigger point dry needling and biomedical acupuncture and there was a greater focus on independent core strengthening/rehabilitative protocols. The Claimant reported that he has no significant flare-ups since May 14, 2015. Dr. Graves noted that the Claimant's physical examination changed minimally since that time as well. Dr. Graves recommended release from active chiropractic treatment but continuation of a prescribed TENS unit, the independent core strengthening/rehabilitative protocols and follow up with Dr. Kawasaki for pain management if necessary (Claimant's Exhibit 12).

34. The Claimant saw Dr. Miller on July 10, 2015. Dr. Miller noted that the Claimant finished up with his 30th session of physical therapy and continued maintenance chiropractic with Dr. Graves. Based on a review of the latest physical therapy notes, Dr. Miller recommended extending the physical therapy and he also continued maintenance chiropractic care with Dr. Graves (Claimant's Exhibit 11).

35. On July 30, 2015 the Claimant saw Dr. Lawrence Lesnack for an independent medical examination. Dr. Lesnack authored a written report also dated July 30, 2015. The Claimant described a mechanism of injury on January 4, 2015 to Dr. Lesnack as follows:

> As he was attempting to lift a five-gallon of mortar mix weighing approximately 50-60 pounds out of a shopping care, he developed acute low back /buttock pains. Approximately 20 minutes later, he states that while reaching overhead he ‘stretched’ to apply a tag onto a piece of lumber. His low back and buttock pains seemed to worsen significantly. He states that soon afterward, he was merely standing and suddenly coughed. He states that he then developed ‘horrible pain’ and could hardly move. (Respondents’ Exhibit A, p. 2).

Dr. Lesnack reviewed the Claimant’s course of conservative treatment with the Claimant. Dr. Lesnack notes that the Claimant advised him that as early as January 12, 2015, he was informed that he might be terminated from his employment because of excessive absences without accrued sick leave and that he saw his assistant manager and hr and demanded that a work injury claim be filed on his behalf. After this, the Claimant reported that he treated through the worker’s compensation system including chiropractic treatment and massage per Dr. Graves and physiatry evaluation with Dr. Kawasaki (Respondents’ Exhibit A, p. 2-3). The Claimant reported that on a pain scale rating of 0 to 100, his best pain level is 0 and he was currently at a 10. The Claimant advised Dr. Lesnack that he had received chiropractic care from Dr. Wilner prior to his January 4, 2015 injury for his upper back and neck as well as his low back. The Claimant’s current medications when he met with Dr. Lesnack were 800 mg of ibuprofen and 10mg of Flexeril as needed for muscle spasms (Respondents’ Exhibit A, p. 3). Dr. Lesnack reviewed and summarized medical records dating from January 22, 2015 to June 25, 2015. The report does not indicate that Dr. Lesnack reviewed the chiropractic records of Dr. Wilner from prior to the January 4, 2015 work injury at that point (Respondents’ Exhibit A, pp. 4-7). On examination, Dr. Lesnack noted that the Claimant ambulated with no signs of an antalgic gait and was able to perform lumbar spine range of motion activities. Dr. Lesnack noted the Claimant was able to forward flex to 90 degrees with no symptoms but upon returning to an upright position, the Claimant complained of some mild low back aching sensations. The Claimant was able to perform sitting, supine and reversed straight leg raising maneuvers and Dr. Lesnack noted he had full range of motion in his thoracic spine in all planes without reproduction of symptoms. Dr. Lesnack noted that the Claimant reported, “minimal tenderness to palpation over his left greater than right superior sacrum at its midline” with no tenderness to palpation over either superior sacral sulcus or either greater trochanter or either sciatic notch. Dr. Lesnack found no evidence of specific trigger points or muscle spasm (Respondents’ Exhibit A, pp. 7-8). Based on his review of medical records and the physical examination, Dr. Lesnack opined that, “the patient exhibits pain behaviors and nonphysiologic findings and is very dramatic at times” which Dr. Lesnack found “would suggest that his subjective complaints are unreliable at best.” Based on this opinion, Dr. Lesnack went on to state that, “one must rely solely on reproducible objective findings rather than his subjective complaints.” Because Dr. Lesnack opines that there were “no significant objective findings” to support any type of acute injury to his lumbar spine as a result of occupational activities on January 4, 2015, Dr. Lesnack concludes that the Claimant did not sustain any acute work related injury on that date (Respondents’ Exhibit A, p.9). Dr. Lesnack further opined, that regardless of causality, the Claimant continued to have frequent subjective complaints without objective findings to support them, so he required no further diagnostic testing or interventional treatments. Rather, the Claimant should continue to focus on lumbar spine stabilization and core strengthening. Finally, Dr. Lesnack opined that the Claimant required "no functional limitations or work restrictions whatsoever, regardless of the causality of his current subjective complaints" (Respondents' Exhibit A, pp. 9-10).

36. On August 5, 2015, the Claimant saw Dr. Miller who noted that the Claimant had 3 remaining physical therapy sessions, was discharged from chiropractic care effective earlier this same day and was previously advised to follow up "as needed" with the physiatrist Dr. Kawasaki. The Claimant reported that he is sore and stiff but has had no interim leg symptoms. The Claimant also reported his sleep was well controlled with medications but that he had a sense of anxiety and concerns about his ability to return to work. Dr. Miller referred the Claimant to Dr. Vandorsten for cognitive behavioral therapy regarding the chronicity of his symptoms and return to work issues (Claimant's Exhibit 11).

37. On September 11, 2015, the Claimant saw Dr. Miller reporting that he continued to improve with occasional flares such as a spasm in the middle of the night for which he takes cyclobenaprine. Dr. Miller noted that the Claimant had seen Dr. Vandorsten for psychology twice and that Dr. Vandorsten would like to continue to follow the Claimant. The Claimant reported that he was stiff but had no more leg symptoms. The Claimant reported that he was not comfortable lifting because he did not know his limits (Claimant's Exhibit 11). In the Physician's Report of Workman's Compensation Injury form dated September 11, 2015, Dr. Miller reported that the Claimant was still on modified duty with temporary restrictions of no lifting, carrying, pushing or pulling over 40 pound. He reported the Claimant was discharged from physical therapy after 36+ sessions and discharged from chiropractic with Dr. Graves effective August 5, 2015 and continuing to see Dr. Vandorsten for psychology (Claimant's Exhibit 11 and 12, last page of exhibit 12).

38. The Claimant saw Dr. Miller on October 7, 2015. Dr. Miller noted that the Claimant reported that he continued to improve with occasional flares in symptoms including one spasm episode in the middle of the night since the last visit. The Claimant reported that he was walking and stretching and he just started working at a local golf course. Dr. Miller noted that "MMI will follow on subsequent visits" pending the status of psychology visits with Dr. Vandorsten and the status of a requested gym pass with 6 personal trainer sessions. The Claimant's work restrictions were continued and Dr. Miller noted that he anticipated impairment (Claimant's Exhibit 11).

39. The Claimant testified at the hearing that he provided Dr. Miller's work restrictions to his managers but he often had to do work in his department that did not follow his working restrictions. The Claimant testified that his pain would worsen when he had to complete job duties outside of his work restrictions. The Claimant testified that when he would complain to his supervisors about having to perform work outside of his restrictions that they would just tell him to just do the best he could or to do what he

could. He also testified that he was verbally harassed by his supervisors and called lazy and a sissy and they laughed and said he couldn't do anything after he provided his work restrictions to them.

40. The Claimant testified that he was hired by Broken Tee golf course in late September of 2015 and he works between 10-15 hours per week at a pay rate of $8.50 per hour.

41. Dr. William Miller testified at the hearing. Dr. Miller was an authorized treating physician for the Claimant's worker's compensation injury. Dr. Miller testified that the Claimant was first seen by Dr. Foster in his office on January 22, 2015. Dr. Miller began treating the Claimant at the next visit to the same office on January 28, 2015. Dr. Miller testified that the Claimant told him that his mechanism of injury involved lifting a five gallon bucket of mortar that weighs approximately 50-60 pounds when he experienced the immediate onset of low back pain. The Claimant mentioned that he was leaning forward with his arms outstretched, with a twisting motion. Dr. Miller also testified that he was familiar with the Claimant stating that shortly after the lifting, he developed further pain reaching upward while tagging lumber and then still additional pain when he coughed afterward. Dr. Miller's assessment of the Claimant as of January 28, 2015 was that the Claimant had a lumbar strain and he referred him for physical therapy. Dr. Miller discussed some other considerations in the event the Claimant's condition didn't improve. Dr. Miller testified that the prior chiropractic care that the Claimant received was principally for his neck and upper back. Dr. Foster has initially imposed lifting restrictions of 25 pounds for lifting, carrying, pushing and pulling and Dr. Miller continued more or less the same restrictions and added the ability to change positions frequently. Dr. Mill also testified about the restriction on overhead lifting or reaching away from the body. Dr. Miller testified that by February 4, 2011, the Claimant had continued symptoms so he requested an MRI. At that point, the diagnosis was the same so there was no change to the Claimant's restrictions. As of February 27, 2015, Dr. Miller had the results of the MRI and the prior records from the Claimant's chiropractor. Dr. Miller testified that with respect to the chiropractic notes, the Claimant treated for about a month for his neck, upper back and lower back from March to April of 2014. Then after April 2014 onward, the Claimant had no additional lumbar treatments. Based on those notes, Dr. Miller testified that it was his opinion that the Claimant had no prior back pain problems that were independently disabling as of the date of his January 4, 2015 injury. Once Dr. Miller had those records, Dr. Miller was able to determine that the Claimant's condition resulted from his work-related mechanism of injury. Dr. Miller also testified that although there is some confusion in the February 27, 2015 report about the Claimant's work restrictions, this was an error and the Claimant should have had actual listed restrictions on the form, but the restrictions didn't populate into the form. However, he did check the box that the Claimant was under modified duty and he intended to keep the Claimant on the same restrictions that he had been on previously.

42. Dr. Miller further testified that between March 23, 2015 and October of 2015, the Claimant saw Dr. Miller on a roughly monthly basis. He was referred to Dr. Graves, a chiropractor and for physical therapy at Select PT. He was also referred to

Dr. Kawasaki who recommended some facet based injections. Over this time period, the Claimant reported variable symptoms, sometimes he would have leg symptoms and sometimes he wouldn't and the Claimant would improve for a time then have interim flares. In June, Dr. Kawasaki had discharged the Claimant from his care because the Claimant was not interested in injections and he had been improving. Later, Dr. Miller referred the Claimant to Dr. Van Dorston, a pain psychologist, for a couple of visits. By the Claimant's October 2015 visit with Dr. Miller, Dr. Miller felt that the Claimant was approaching MMI and he was planning on placing him at MMI with an impairment rating and possibly recommending a gym pass and one more visit with Dr. Van Dorston. Dr. Miller ultimately opined that the Claimant did suffer a work related injury on January 4, 2015 and he anticipated that the Claimant would have permanent impairment as a result. Dr. Miller testified that based on table 53 of the AMA Guidelines for Evaluation on Impairment, the Claimant would meet the criteria specific to low back pain with continuous symptoms for greater than six months even without significant findings on the MRI. On cross-examination, Dr. Miller did agree that there would need to be objective findings, but that these could be objective findings on examination such as variable lower extremity symptoms, reduction in motion snd a lack of progression with therapy interventions. Dr. Miller also agreed that the degenerative pathology noted on the MRI report would not be attributed to the Claimant's work injury, but he did attribute the development of symptoms to the work injury. Dr. Miller testified that due to legal proceedings, the Claimant's next visit after October 2015 was delayed, but that his plan had been to place the Claimant at MMI whenever the next visit occurred.

43. Dr. Lawrence Lesnack also testified at the hearing as an expert in the areas of physical medicine and as to Level II accreditation matters. Dr. Lesnack testified that he performed an IME of the Claimant on July 30, 2015. As part of his IME, he reviewed medical records after the evaluation, including the chiropractic records of Dr. Wilner and the Exempla records from Dr. Foster and Dr. Miller. Dr. Lesnack also testified that he was present for Dr. Miller's testimony at the hearing. Dr. Lesnack also obtained a history from the Claimant and conducted a physical examination. Based on all of this, Dr. Lesnack reached the medical opinions contained in his written IME report. Dr. Lesnack testified that for the most part he found the Claimant's physical examination to be normal. He testified that the Claimant complained of some aching sensations after bending forward and then returning to an upright position but found the Claimant's strength and sensation reflexes normal. Dr. Lesnack also found that maneuvers to look at the SI joints and hips were normal. Dr. Lesnack testified that he noted minimal tenderness with palpation. Dr. Lesnack disagreed, in part, with Dr. Miller's previous discussion of the Table 53 rating. Dr. Lesnack opined that Table 53 would require reproducible, objective findings to provide a diagnosis so that you could give a Table 53 rating. Dr. Lesnack opined that there were no objective findings on exam that would qualify for a diagnosis in this case as the Claimant had minimal structural abnormalities on an MRI which are normal findings in a man of the Claimant's age. Dr. Lesnack further testified that there is a section that requires six months of pain and rigidity which also requires objective findings on examination, such as a positive straight leg raise test, a reflex finding or a true neurologic strength deficit. Dr. Lesnack opined that none of this was found. Rather, Dr. Lesnack stated that Dr. Miller talked about subjective

complaints such as tenderness on palpation which Dr. Lesnack argues is not an objective finding. As for the MRI, Dr. Lesnack opines that the Claimant's mild degenerative disk changes are a normal finding for a 33 year old man. Dr. Lesnack testified that on examination, the Claimant was pleasant but "very dramatic" which is not an issue when taken alone, but when considered in the context of the medical records and non-physiologic findings, Dr. Lesnack opines that the reported mechanism of injury doesn't make sense. He opined that the described mechanism of lifting a 50-60 pond bucket of mortar from waist level, even with a twisting motion, doesn't load the lumbar spine. Dr. Lesnack opined that to load the lumbar spine you have to be bent forward at the waist at least 70-90 degrees and leaning over slightly would put the Claimant at 10-20 degrees. Dr. Lesnack further opined that twisting in an upright position, without having that lumbar flexion to it, is not going to load the lumbar spine. Dr. Lesnack also finds that reaching up and tagging something would not load the lumbar spine. The only action described by the Claimant that Dr. Lesnack opines could have possibly loaded the lumbar spine was a forceful cough and that is not work-related. Based on the dramatic presentation of symptoms combined with a normal MRI and non-physiologic findings initially, and a history of being treated for spine pain within the past year, Dr. Lesnack finds that there are no objective findings that the Claimant suffered a specific injury to his lumbar spine on January 4, 2015.

44. On cross-examination, Dr. Lesnack testified that even if the same place is palpated and the same result is reached every time, this is still subjective. Dr. Lesnack did agree that you can feel acute spasms, but a report of "tightness" still refers to subjective patient reporting. In Dr. Lesnack's report, he referred to "minimal tenderness" upon palpation. Dr. Lesnack testified that this means that the Claimant complained of the tenderness, not that Dr. Lesnack could feel the tenderness. Upon reviewing Dr. Wilner's chiropractic records at the hearing, Dr. Lesnack agreed that there was a reference in April 2014 which says that the Claimant's low back symptoms were under control. He further agreed that there were no further references in Dr. Wilner's records after April 2014 regarding low back complaints or treatment until after January 4, 2015 although Dr. Lesnack's written report referenced "frequent symptoms in his low back" just prior to January 4, 2015.

45. Having reviewed and considered all of the medical records in evidence as well as the testimony of the Claimant, Dr. Miller and Dr. Lesnack at the hearing, the ALJ finds the opinions of the Claimant's treating physician, Dr. Miller, which are in part based on, and supported by, the medical records of Dr. Graves, Dr. Kawasaki, and Dr. Wilner, to be more credible and persuasive than the opinions of Dr. Lesnack. The opinions of Dr. Miller as to the work-relatedness of the Claimant's January 4, 2015 injury, the progression of the Claimant's symptoms during treatment and the Claimant's condition are found to be more reliable and persuasive than those of Dr. Lesnack and are found as fact.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial*

Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

There is sufficient evidence in the record that the Claimant suffered an injury to his lower back on January 4, 2015 and the Claimant's testimony regarding his mechanism of injury was credible and no persuasive evidence was presented to contradict his testimony. Although Respondents have argued that the condition was pre-existing, the medical reports in evidence do not support this theory. The Claimant had received some chiropractic treatment prior to the injury, but it was primarily focused on his upper back and neck. The last record of low back chiropractic treatment before the work injury was treatment that Dr. Miller noted had ended in April of 2014. Once the Claimant's authorized treating physician, Dr. Miller, had the opportunity to review the older chiropractic records predating the January 4, 2015 incident, Dr. Miller determined that the injury was work related and that any prior medical history was non-contributory. Dr. Graves and Dr. Kawasaki also provided continuing treatment for the Claimant and noted symptoms and diagnoses similar to Dr. Miller over the course of the Claimant's treatment for the January 4, 2015 work injury.

The ALJ, having reviewed and considered all of the medical records in evidence as well as the testimony of the Claimant, Dr. Miller and Dr. Lesnack at the hearing, found the opinions of the Claimant's treating physician, Dr. Miller, which are in part based on, and supported by, the medical records of Dr. Graves, Dr. Kawasaki, and Dr. Wilner, to be more credible and persuasive than the opinions of Dr. Lesnack. The opinions of Dr. Miller as to the work-relatedness of the Claimant's January 4, 2015 injury, the progression of the Claimant's symptoms during treatment and the Claimant's condition were found to be more reliable and persuasive than those of Dr. Lesnack.

As of the date of the hearing, there was also evidence to establish that the Claimant continued to have symptoms, but that he was approaching MMI and Dr. Miller had anticipated putting the Claimant at MMI soon.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that his work activities on January 5, 2015 caused or permanently aggravated, accelerated or combined with a preexisting condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits – Authorized, Reasonable and Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. The employer's duty to provide designated medical providers is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

Here the Claimant began treating with Dr. Miller and Kawasaki and was also referred to Dr. Graves for chiropractic care. As of the date of the hearing, his treating physicians continued to offer treatment recommendations.

As set forth above, there is evidence to establish that the Claimant continues to have symptoms resulting from injury he suffered on January 4, 2015. Although, Dr. Miller opined that the Claimant was still actively treating for the January 4, 2015 work injury and was still subject to temporary work restrictions, as of the date of the hearing, the Claimant had not been placed at MMI. Thus, the conditions related to the initial injury were still present and may require treatment. To the extent that Dr. Miller has since placed the Claimant at MMI, that may affect medical benefits going forward from that point.

However, prior to being placed at MMI by Dr. Miller, the Respondents shall be liable for the continued medical treatment recommended by Dr. Miller and his authorized referrals which is reasonably necessary to cure and relieve the Claimant from the effects of his January 4, 2015 work injury.

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain temporary disability benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

In this case, the Claimant established that he suffered a compensable work injury on January 4, 2015, but he failed to prove that he suffered a wage loss as a result of that injury. Prior to the termination of his employment, the Claimant was working under lifting, pushing and pulling restrictions imposed by Dr. Miller (and Dr. Foster prior to that) as of January 22, 2015. However, there was not substantial evidence that the Claimant suffered any wage loss until March 18, 2015, the day following the termination of the Claimant’s employment with Employer.

In this case, it was found that the Employer has an Attendance and Punctuality Policy which was communicated to the Claimant and which the Claimant received in writing. Essentially, hourly employees are expected to report for work at the assigned time, adhere to the work schedule, work through scheduled shifts, perform assigned duties and take meal periods as scheduled. Failure to adhere to the attendance and punctuality policy will result in discipline. The Employer's Progressive Disciplinary Process policy is that "the discipline process will begin when an associate receives the third unexcused occurrence in a six-month period. Each absence or tardy is considered one occurrence. If there are 3 occurrences in a 6 month period, the managers are to provide a "coaching." After a "coaching" has occurred, if there are 3 additional occurrences, the managers are required to issue a "counseling." After an employee receives a "counseling," if there is 1 additional occurrence, the managers are required to issue a "final warning." After an active Final Counseling, and there is 1 additional occurrence, managers are required to administer a "termination." There are certain absences and tardiness that is considered "excused." These "excused" absences and tardies include "State-law protected time off." In this section, the policy refers the reader to "State Exceptions" in the LOA HR SOP and Time-Off Benefits HR SOP for additional details, but this was not offered or admitted into evidence. In reference to the Employer's disciplinary policy, the term "active" refers to a disciplinary action that is within six (6) months from the date when the action was administered. In tracking "active" disciplinary notices, "a notice remains visible for six months" and "at the end of the six-month period, the notice rolls off and is no longer "active." When an employee has been employed for fewer than 120 days, then he or she should receive a "final warning" if there are 3 occurrences in the first 120 day period and then proceed to immediate termination for 1 additional occurrence that occurs in the first 120 days. However, if no further occurrence occurs in the first 120 days, then the "final warning" issued during that probationary period is treated as a "coaching" notice. 35).

On September 20, 2014, the Claimant received a Progressive Disciplinary Notice for being unexcused absent on 8/24 and tardy on 7/4 and 9/16. He was advised that he should refrain from further violations of the Employer's Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. All of these attendance occurrences happened prior to the Claimant's injury and, thus, were unrelated to the Claimant's work injury. This notice was entitled a "final warning" in the records under the Employer's Progressive Disciplinary Process as it occurred in the first 120 days of employment. As there were no further occurrences in the first 120 days of employment, this notice was treated as a "coaching" notice per the Employer's policy.

On November 29, 2014, the Claimant received a Progressive Disciplinary Notice for arriving over 3 hours late on 10/6/2014, arriving 13 minutes late on 11/21/2014 and arriving 31 minutes late on 11/23/2014. The Claimant was advised to refrain from further violations of the Employer's Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. All of these attendance occurrences happened prior to the Claimant's injury and, thus, were unrelated to the Claimant's work injury. This notice would be considered a "counseling" under the

Employer's Progressive Disciplinary Process since the "final warning" issued in the Claimant's first 120 probationary period had converted to a "coaching" notice. That "coaching" notice would have been less than 6 months prior to the November 29, 2014 notice, so the September 20, 2014 notice would still be "active."

On December 23, 2014, the Claimant received a Progressive Disciplinary Notice for being absent on December 15, 2014 with insufficient sick time to cover his scheduled hours. The notice stated that this violation progressed the Claimant to "final warning." The Claimant was advised to refrain from further violations of the Employer's Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. This attendance occurrence happened before the Claimant's injury and is unrelated to the work injury.

Subsequent to the Claimant's work injury, the Claimant was absent or tardy on multiple occasions.[1] However, the ALJ found that with respect those absences or tardiness occurring after his work injury but prior to March 17, 2015, the Claimant's testimony as to the reasons he was late or missed work or had to leave early subsequent to his work injury was found as fact and that for the dates prior to March 17, 2015, the reasons the Claimant was absent or tardy or otherwise had an attendance occurrence were related to the Claimant's work injury. However, the Claimant's employment was not terminated for any of these absences or tardies. Until March 17, 2015, none of the injury-related absences resulted in termination. It was not until a non-injury related tardiness on March 17, 2015 that a violation of the Attendance Policy, in connection with prior but still active violation notices, resulted in the Claimant's employment being terminated.

The Claimant himself testified that he was about 10-25 minutes late on March 17, 2015 due to car trouble and his car would not start. He worked a full day on that date. Then, the Claimant testified, on March 18, 2015, he clocked in and he was asked if he would like to take the day off because it wasn't expected to be busy. The Claimant testified that he stated that he needed as many hours as possible. Before the Claimant clocked out at lunch time, he was told to go to the office and when he arrived, Victor and Richard advised the Claimant his employment was being terminated due to attendance.

As of March 17, 2015, the Claimant's previous "final warning" disciplinary notice administered on December 23, 2014 for a December 15, 2014 absence would have been considered an "active" notice as it was less than six (6) months prior to March 17, 2015. Per the Employer's policy, if there is a one (1) additional attendance occurrence after an active final counseling/warning, then managers are required to administer a termination.

[1] On March 18, 2015, the Claimant received a Progressive Disciplinary Notice for tardiness on February 4, 2015, February 18, 2015, February 19, 2015, February 25, 2015, February 26, 2015, February 27, 2015, March 4, 2015 and March 17, 2015 and for work absences on January 7, 2015, January 17, 2015, January 31, 2015, February 3, 2015 and February 5, 2015. The Notice provided that these were violations of the Company's attendance and punctuality standards and the Claimant's employment was terminated.

While the Claimant's counsel argued that the Claimant's attendance issues were related to his injury-producing activity, the weight of the evidence establishes that with respect to the Claimant's termination from employment with Employer, the Claimant violated known and well-communicated attendance policies for reasons other than his work injury. The Claimant's employment was terminated as a result of these violations and he is not entitled to temporary disability benefits since the Claimant failed to prove his wage loss was due to disability resulting from the work injury. Because the Claimant failed to establish that he is entitled to temporary total and temporary partial disability benefits, the remaining issue of responsible for termination is moot.

ORDER

It is therefore ordered that:

1. The Claimant suffered a compensable industrial injury during the scope and course of his employment with Employer on January 4, 2015.

2. The Respondents are liable for medical treatment recommended by Dr. Miller, or by his referrals, which is reasonably necessary to cure and relieve the Claimant from the effects of his January 4, 2015 work injury.

3. The Claimant failed to prove his wage loss was due to disability resulting from the work injury and thus, failed to prove he is entitled to temporary total disability benefits or temporary partial disability benefits and this claim is denied and dismissed.

4. Insurer shall pay the Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's supplemental order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after the certificate of mailing in the supplemental order, as indicated on the certificate of mailing or service; otherwise, the Judge's supplemental order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the supplemental order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. The petition shall be in writing, shall set forth in detail the particular errors and objections relied upon, and shall be accompanied by a brief in support thereof. For statutory reference, *see* § 8-43-301(6), C.R.S. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 28, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-944-295-01

ISSUES

- Did Claimant prove by a preponderance of the evidence that the industrial injury of February 19, 2014 proximately caused injury to her left medial meniscus and/or aggravated pre-existing chondromalacia so as to warrant surgery to treat these conditions?

- Did Claimant prove that surgery proposed by Dr. Jones constitutes reasonable and necessary medical treatment to cure and relieve the effects of the February 19, 2014 industrial injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 though 19 were admitted into evidence. Respondents Exhibits A through S were admitted into evidence. The post-hearing deposition of Dr. Christopher Jones was received into evidence.

2. On February 19, 2014 Claimant sustained an admitted injury to her left knee.

CLAIMANT'S TESTIMONY

3. Claimant testified as follows. On February 19, 2014 she was the retail director of four bookstores and four coffee shops. She had recently undergone surgery to one of her left toes. As a result Claimant was using a "scooter" to keep her left lower extremity elevated when walking. Claimant was using the scooter while crossing one of the Employer's parking lots. The scooter hit a "divot" in the parking lot causing the scooter to fall over. Claimant fell on both knees and both hands. She explained that her left knee was the "first to go down." Claimant felt as though she had hit a "brick wall" and her knee was bleeding badly. She was taken to the emergency room (ER) where the knee was "sewed" up and she was told "there was nothing they could do."

4. Claimant testified as follows concerning the events of February 20, 2014. She woke up and was in so much pain she "couldn't even walk." She went to her family doctor who gave Claimant antibiotics and referred her to Brad Dresher, M.D., the surgeon who operated on the left toe. She went to Dr, Dresher who sent her home.

5. Claimant testified that on February 21, 2014 her knee was "really red" and she could not walk on it. She returned to Dr. Dresher's office and was seen by the doctor's physician's assistant (PA). The PA drew a line around the redness and

advised Claimant that if the redness “streaked” she had cellulitis. Claimant explained that the redness did streak and as a result she underwent surgery “the next day” to “clean out the whole wound.”

6. Claimant testified as follows concerning her medical treatment after surgery. She came under the care of George Johnson, M.D. Claimant received physical therapy (PT), pain management services, an injection to block the saphenous nerve and an injection “in the kneecap.” Claimant testified that none of these treatments really helped her. Eventually Dr. Johnson placed Claimant at maximum medical improvement (MMI). Claimant testified that when Dr. Johnson placed her at MMI she was still experiencing symptoms in the left knee. These symptoms included pain, numbness, burning, popping and locking.

7. Claimant underwent a Division-sponsored independent medical examination (DIME) performed by William Watson, M.D. Claimant testified that Dr. Watson found she was not at MMI because she needed more PT, an MRI, an additional saphenous nerve block, a “PRP injection” and further examination by Dr. Dresher.

8. Claimant explained that after the DIME she returned to Dr. Dresher who arranged for an MRI of the knee, another saphenous nerve block and additional PT. According to Claimant the second saphenous nerve block did not relieve her symptoms. Claimant stated that the request for a “PRP injection” was denied by the Insurer. Claimant testified that Dr. Dresher also referred her to Christopher Jones, M.D.

9. Claimant explained that she went to Dr. Jones who recommended she undergo surgery to repair a torn meniscus. Claimant testified that she would like to undergo this surgery but the request for surgery was denied by the Insurer.

10. Claimant testified that her current symptoms include pain around the kneecap, numbness, burning, popping and locking. Claimant stated that these symptoms prevent her from performing some of her pre-injury activities such as hiking and biking.

11. Claimant testified that in 2008 she sustained a left knee injury while working a Ford Motor Credit. According to Claimant she underwent an MRI as a result of this injury. However, Claimant stated that she fully recovered from the 2008 injury and did not seek “ongoing” treatment.

12. Claimant stated that she suffered another left knee injury when she was in a bicycle accident approximately three years prior to February 19, 2014. Claimant stated that she underwent about six PT sessions but did not seek “ongoing” treatment as a result of this injury. Claimant testified that within a year she fully recovered from this injury.

MEDICAL EVIDENCE PRIOR TO FEBRUARY 19, 2014 DATE OF INJURY

13. On November 14, 2008 Claimant underwent an MRI of the left knee. The purpose of the MRI was to assess a contusion of the patella and a medial collateral

ligament sprain. The radiologist reported there was “less than 50% loss of hyaline cartilage thickness, without exposure of the subchondral bone of the medial femorotibial compartment (Grade II Outerbridge classification). There was hypertrophy of the superficial tibial collateral ligament consistent with a remote MCL sprain. The medial meniscus lateral meniscus were reportedly normal.

14. From October 1, 2012 through August 7, 2013 Claimant underwent approximately 40 sessions of PT at Cornerstone Physical Therapy, P.C. (Cornerstone). The Cornerstone records reflect that Claimant was referred to Cornerstone by her primary care physician (PCP), Frank Barry, M.D.

15. When Claimant first went to Cornerstone on October 1, 2012 she gave a history that she fell off of her bike in July 2012. The physical therapist noted Claimant fell off the bike “in the supinated position onto her left ankle.” Claimant complained of pain on the top of her left foot that radiated into the lateral malleolus when ascending or descending stairs.

16. The Cornerstone notes reflect that during PT sessions in October and November 2012 Claimant reported numbness in the left knee and a “dull ache” in the left knee. (Respondents’ Exhibit D, pp. 13, 14, 17). The physical therapist opined these symptoms were mostly likely caused by muscle tension in the left lower extremity. The Cornerstone notes from June 14, 2013 indicate that Claimant reported left knee pain when walking. (Respondents’ Exhibit D; Respondents’ Exhibit R pp. 321-322).

17. In December 2012 the Cornerstone physical therapist noted Claimant’s diagnoses included left ankle sprain, left leg paresthesias, low back pain and left neck pain and stiffness. The physical therapist opined that some of the “left lower extremity issues” were caused by “sacro-illiac joint dysfunction with associated muscle imbalances as well as Iliotibial band pain.”

18. In January 2013 Claimant reported to the physical therapist that in addition to her other symptoms she was “having bone pain in her big toe.”

19. On March 25, 2013 Dr. Dresher of Colorado Springs Orthopaedic Group (CSOG) examined Claimant on referral from Dr. Barry. Claimant gave a history of a bicycle accident in July 2012. Claimant reported she was experiencing pain in the “left forefoot.” On PE Dr. Dresher noted a “Tinel’s sign over the superficial peroneal nerve midway through the leg that shoots paresthesias into the dorsum of her foot.” Dr. Dresher assessed joint pain in the ankle and foot and left 1st MTP post-traumatic chondral injury. Dr. Dresher injected the toe joint and recommended claimant wear a short cast boot and exercise to prevent ankle stiffness.

20. In April 2013 Dr. Dresher performed a cheilectomy on the Claimant’s great left toe.

21. On August 7, 2013 Dr. Dresher noted Claimant still had an “inflamed 1st MTP with a fair amount of pain” despite undergoing a left “cheilectomy.” On this occasion Dr. Dresher discussed with Claimant the possibility of a 1st MTP fusion.” On

September 10, 2013 Dr. Dresher recommended that Claimant undergo a 1st MTP fusion.

22. On December 30, 2013 PA-C Robert Valdez noted that claimant was "almost one year status-post cheilectomy of her left first metatarsal phalangeal joint." However Claimant reported little or no relief and presented for "fusion of the first status metatarsal phalangeal joint." PA-C Valdes assessed "Hallux-rigidus" and status-post cheilectomy. PA-C Valdez discussed fusion surgery with Claimant and Claimant expressed her desire to undergo the procedure.

23. Medical records indicate that Dr. Dresher performed the MTP fusion surgery on January 10, 2014.

MEDICAL EVIDENCE CONCERNING FEBRUARY 19, 2014 DATE OF INJURY

24. Claimant was seen at St. Francis Medical Center on February 19, 2014. She underwent x-rays of the left foot, left knee and left wrist. No fractures or dislocations were seen by the radiologist.

25. On February 20, 2014 Richard Vu, M.D., examined Claimant. Claimant gave a history that she fell and hurt her left knee and was evaluated at the ER. Claimant reported that since the fall her left knee had become warm and would swell quickly. On physical examination (PE) Dr. Vu noted there was erythema to the left anterior knee and induration of the mid and inferior knee. Dr. Vu did not observe any "obvious intra-articular joint effusion." Dr. Vu expressed concern that Claimant had septic bursitis and prescribed antibiotic medication. Dr. Vu also referred Claimant to CSOG for an orthopedic evaluation.

26. On February 20, 2014 PA Mark Stafford examined Claimant at CSOG. PE PA Stafford noted Claimant was ambulating with crutches and that there was a "laceration over the anterior knee with some skin missing." PA Stafford also observed some erythema about the wound. PA Stafford stated the patellar tendons were intact and Claimant was able to fully extend her knee. Claimant did not complain of any "joint pain." However, extension and flexion of the knee produced pain over the "anterior knee where the laceration was." PA Stafford spoke to Dr. Dresher who wanted operate on Claimant.

27. On February 21, 2014 Dr. Dresher performed surgical procedures described as a left knee debridement, irrigation of the prepatellar bursa and closure of laceration. The pre and post-operative diagnoses were left knee laceration and left knee infection of the prepatellar bursa. The operative report indicates that there "was an abrasion noted on the anterior knee as well as the laceration of 4 cm."

28. On February 25, 2014 occupational medicine physician George Johnson, M.D., examined Claimant at CCOM. Claimant gave a history that 6 days previously she fell in a parking lot and experienced left wrist, left foot and left knee pain. Dr. Johnson noted the left knee wound had been opened, cleaned and sutured by Dr. Dresher. Claimant denied any prior injuries to her left knee. Dr. Johnson noted Claimant

underwent foot surgery 6 weeks previously. On PE of the left knee Dr. Johnson noted a 10 cm laceration over the top of the knee, inflammation around the knee, decreased ROM and tenderness to palpation. There was an abrasion of the right knee. Claimant's gait and stance were normal. Dr. Johnson assessed bilateral knee contusions and a laceration and infection of the left knee. Dr. Johnson prescribed Motrin, Keflex and ice.

29. On April 16, 2014 Dr. Dresher examined Claimant with respect to her left foot and left knee. Claimant reported she was "doing quite well and seeing some nice improvement." On PE of the left knee Dr. Dresher noted the incision was healed and Claimant had great range of motion (ROM). Dr. Dresher did not observe any swelling or erythema. Dr. Dresher assessed Hallux rigidus, left 1st MTP fusion and laceration of the left knee "healed."

30. Dr. Johnson examined Claimant on April 17, 2014. Claimant reported that she was "feeling much better" although she still experienced "moderate pain" that was "relatively frequent." Claimant rated her pain as "7." On PE of the left knee Dr. Johnson noted there was no inflammation, no erythema, no swelling and "pain on motion" was not present. Claimant's ROM was "full with flexion to 140" degrees. Dr. Johnson opined Claimant was "improving nicely with treatment." Dr. Johnson continued PT, continued Motrin and prescribed compression hose.

31. Dr. Johnson examined Claimant on May 5, 2014. Claimant reported that was continuing to have problems with the left knee and was concerned that the knee was not improving. Claimant rated her pain as a "5." Dr. Johnson noted that Claimant had "left knee pain around the patella on the lateral surface and referred her for an "MRI to rule out [a] meniscal tear." Dr. Johnson assessed a strain of the left knee and laceration of the left knee.

32. On May 14, 2014 Claimant underwent an MRI of the left knee. This was a high-field multisequence MRI. The radiologist reported a finding of prepatellar soft-tissue edema or other fluid representing a "possible soft-tissue contusion," bursitis or hematoma. In the medial knee compartment "no meniscal tear or focal chondral defect [was] identified." In the lateral knee compartment "no meniscal tear or focal chondral defect [was] identified." The patellofemoral articular cartilage was "unremarkable."

33. Claimant returned to Dr. Johnson on May 19, 2019. Claimant reported she continued to have "moderate intermittent pain." Dr. Johnson noted the MRI showed "prepatellar soft tissue edema but no meniscal tear or internal injury." He opined the MRI "showed a condition that will probably not need surgery.' Dr. Johnson prescribed home exercise and Motrin.

34. On June 18, 2014 Dr. Dresher examined Claimant for follow-up of her left knee and left 1st MTP fusion. Claimant reported continued discomfort in the left knee. Dr. Dresher noted the MRI ordered by Dr. Johnson "came back with a small amount of bursitis and inflammation." On PE Claimant had "pain to palpation in the medial and lateral joint line, less so over the healed laceration." Claimant also exhibited a "painful McMurray's maneuver." Dr. Dresher noted a small amount of inflammation in the

prepatellar bursa. Dr. Dresher assessed “left knee pain after laceration.” Dr. Dresher performed an injection in the suprapatellar pouch.

35. Dr. Johnson examined Claimant on June 23, 2014. Claimant rated her knee pain as a “3” and felt she was improving. Claimant stated that the pain was “intermittent.” Dr. Johnson noted that Dr. Dresher performed a “steroid injection” in the knee. Dr. Johnson opined that Claimant appeared to be improving and would follow-up with Dr. Dresher for treatment of the knee.

36. On August 18, 2014 Dr. Dresher examined Claimant for follow-up of her left knee and left 1st MTP fusion. Dr. Dresher noted Claimant was having “new symptoms” on the left medial ankle and pain at the base of the great toe. Claimant continued “to have pain at the medial and lateral joint line” of the left knee. On PE Dr. Dresher noted a positive Tinel’s sign “over the medial ankle where the saphenous nerve nears the ankle joint.” Dr. Dresher prescribed a “compounding cream” to “calm down the saphenous nerve” and referred Claimant for an EMG and nerve conduction studies.

37. On September 29, 2014 Kenneth Finn, M.D., examined Claimant and conducted EMG and nerve conduction studies of the left lower extremity. Claimant told Dr. Finn that she had noticed “increasing shocky sensations in the medial aspect of the ankle with occasional numbness and tingling in the medial ankle.” Dr. Finn wrote that based on nerve conduction testing “there is evidence of left saphenous neuropathy.”

38. Dr. Johnson examined Claimant on September 30, 2014. Claimant reported she was experiencing moderate but intermittent knee pain. Dr. Johnson noted that the electrodiagnostic testing showed a saphenous neuropathy. On PE of the left knee Dr. Johnson noted that the laceration was “healing well.” Dr. Johnson did not observe any abrasion, rash or swelling. However, erythema was “present.” Claimant exhibited full ROM with flexion to 140 degrees and there was no pain with motion. Dr. Johnson wrote that Claimant was “describing lateral patellar pain and tenderness that is moderate, and radiates distally.” Dr. Johnson stated that the saphenous neuropathy appeared to “have been caused by [Claimant’s] injury” and prescribed gabapentin. Dr. Johnson also stated that he would refer Claimant to “pain psychology.”

39. Dr. Johnson examined Claimant on October 14, 2014. Claimant reported she was experiencing moderate but intermittent knee pain. Claimant stated that she did not start gabapentin because it was denied. She also reported that she had not been called by “pain psychology.” Consequently Claimant had not undergone psychological evaluation or treatment. The PE of the left knee was essentially identical to that performed on September 30, 2014. Claimant complained of “burning pain” radiating from the lateral knee to the medial ankle. Dr. Johnson stated that he considered gabapentin and pain psychology to be “indicated” and wrote that he would discuss these treatments with “case management.”

40. On October 29, 2014 William Lippert III, M.D., examined Claimant for consideration of a saphenous nerve block. Dr. Lippert diagnosed saphenous neuropathy and “intrinsic left knee injury.” Dr. Lippert also noted “exquisite tenderness”

in the lumbar spine and stated that the differential diagnoses “may also include the possibility of radiculopathy.” Dr. Lippert performed a saphenous nerve block.

41. On November 7, 2014 Claimant underwent an evaluation by clinical psychologist Philip Mann, PhD. Dr. Mann interviewed Claimant, reviewed her history and administered psychological tests. Dr. Mann opined Claimant was “experiencing mild anxiety, mild depression, moderately high somatic distress, and moderately high functional distress.” Dr. Mann recommended Claimant undergo psychological intervention, biofeedback therapy and possibly a chronic pain coping group.

42. Dr. Dresher examined Claimant on November 12, 2014. Claimant continued to “have some burning type pain around the knee.” Claimant stated that she had stopped using “neuormodulator” medications because they “made her feel a bit symptomatic systemically.” On PE of the knee there was “very little swelling” and no erythema. The Claimant was “ligamentously stable.” However, Dr. Dresher noted there was “a little discomfort with patellofemoral manipulation.” Dr. Dresher reviewed the MRI of the left knee and stated that it “showed no meniscal injury or chondral injury.” However, Dr. Dresher noted that Claimant demonstrated a brief but “positive response” to the injection performed in June 2014. Dr. Dresher and Claimant discussed Synvisc versus platelet rich plasma (PRP) injections and Claimant indicated that she would “like to explore” the PRP injections. Dr. Dresher wrote he would “reach out” to Dr. Johnson to see if PRP injections could be “cleared.”

43. Dr. Johnson examined Claimant on November 20, 2014. Dr. Johnson noted Claimant had tried to treat the neuropathy with Neurontin and Lyrica but these drugs were “not helpful.” Dr. Johnson also stated that the PRP injections recommended by Dr. Dresher were “pending approval.” The PE of the left knee was essentially identical to those recorded on September 30, 2014 and October 14, 2014. With regard to the left ankle Dr. Johnson noted Claimant complained of “burning pain radiating from [the] lateral knee to [the] medial ankle.” On PE of the ankle Dr. Johnson noted mild tenderness of the malleolus without swelling, bruising or deformity. The ankle was “stable.” Dr. Johnson recommended continuation of psychological treatment and opined that PRP injections “may also be helpful.” Dr. Johnson prescribed continued PT and use of Motrin when necessary.

44. Dr. Dresher examined Claimant on December 10, 2014. Claimant reported continued “burning type pain around the knee.” Claimant advised Dr. Dresher that she had “maximized her improvement” with PT and there had been no improvement in the last month. On PE of the left knee Dr. Dresher observed no swelling, erythema or signs of infection. He noted the laceration was “healed nicely.” Claimant reported “mild burning pain to palpation on the medial and lateral joint line with patellofemoral manipulation.” Dr. Dresher reiterated that Claimant had a “nice improvement” with the June 2014 steroid injection and again stated he would contact Dr. Johnson for consideration of the PRP injections.

45. On December 15, 2014 orthopedic surgeon Christopher Isaacs, D.O., performed a records review at the request of the Insurer. The purpose of the review

was to evaluate Dr. Dresher's request to perform PRP injections. Dr. Isaacs noted that Dr. Dresher's diagnosis was "simply knee pain" and that the May 2014 MRI was "completely normal" except for soft tissue swelling. Dr. Isaacs noted that it had been 10 months since the date of injury "with really no knee diagnosis." Dr. Isaacs further stated that PRP injections have "only been approved for treatment of epicondylitis." Dr. Isaacs recommended that "any further diagnostic or treatment of the left knee be denied."

46. On December 17, 2014 Floyd Ring, M.D., a specialist interventional pain management and anesthesiology, performed a records review at the request of the Insurer. The purpose of the review was to evaluate requests for further treatment of Claimant's left lower extremity. Dr. Ring noted that medical records showed Claimant had "ongoing pain complaints in the left lower extremity, particularly over the foot and ankle, since 10/01/12." Dr. Ring recommended that further treatment be denied pending "a minimum record review by a specialist in rehabilitation medicine to determine whether these are preexisting pain complaints or are related at all to the work-related injury of 02/19/14."

47. Dr. Johnson examined Claimant on January 12, 2015. Claimant reported her pain level was a "4." She advised Dr. Johnson that PT was "no help" and she was no longer doing it. Claimant also reported that no medication except ibuprofen provided any relief. Dr. Johnson noted that the PRP injections had been denied by the Insurer. On PE of the left knee Claimant reported tenderness along the medial meniscus. Claimant exhibited 125 degrees of knee flexion and 150 degrees of extension. There was no pain on motion and there was not any swelling or crepitus. On examination of the left ankle Claimant complained of burning pain radiating from the lateral knee to the medial ankle and mild medial tenderness of the malleolus. Dr. Johnson assessed a strain of the left knee, laceration of the left knee and saphenous neuropathy of the left leg. Dr. Johnson opined the Claimant was at MMI without any permanent restrictions of need for ongoing medical treatment.

48. On January 20, 2015 Dr. Johnson assigned a 4% lower extremity impairment rating for Claimant's saphenous nerve neuropathy. Dr. Johnson stated there was "no structural injury to the knee joint" and therefore there was "no structural rating or impairment." Dr. Johnson also stated that Claimant had decreased ROM in the knee. However, because the MRI was "negative" and did not show internal derangement Dr. Johnson declined to give an impairment rating for the decreased ROM.

49. On March 3, 2015, Timothy Hall, M.D., performed an Independent Medical Evaluation (IME) of Claimant. The IME was performed at Claimant's request. Dr. Hall reviewed various medical records and performed a PE. On PE Dr. Hall noted that Claimant's mood was stable and her affect "appropriate." Claimant reported "abnormal sensation" in the saphenous nerve. Claimant's left knee ROM was "limited compared to the other side." Dr. Hall assessed the following: (1) Blunt trauma laceration of the left knee with local infection of the bursa; (2) Injury to the saphenous nerve with neuropathic pain; (3) ongoing knee pain related to blunt trauma and possible chondromalacia patellae; (4) Mood issues related to ongoing pain and functional deficits. Dr. Hall opined

that Claimant was not at MMI. He opined Claimant's treatment was "moving along nicely" until Dr. Ring argued that the treatment should be stopped. Dr. Hall opined that Claimant had previous "issues" with her left leg but those symptoms were "nothing like what she is dealing with presently." Dr. Hall thought that might explain Dr. Johnson's "abrupt" closure of the claim. Dr. Hall opined Claimant requires treatment "particularly from the psychological perspective" and also with a pain specialist to reduce ongoing symptoms. Dr. Hall recommended Claimant continue treatment with Dr. Dresher in hopes that he find an intervention to help with her knee pain. Dr. Hall wrote that "just because MRI is normal-appearing does not mean there is nothing wrong with her knee. She obviously has considerable trauma to the knee."

50. On April 9, 2015 orthopedic surgeon Jon Erickson, M.D., performed a records review at Respondents' request. Dr. Erickson is level II accredited. Dr. Erickson agreed with Dr. Johnson that Claimant reached MMI on January 12, 2015. Dr. Erickson disagreed with Dr. Hall's opinions because Claimant's examination did not support the existence of a "significant knee injury" beyond the laceration and because the May 14, 2014 MRI was essentially normal. Dr. Erickson opined the saphenous nerve condition is not related to the industrial injury because the symptoms did not appear until six months after the date of injury.

51. On May 21, 2015 William Watson, M.D., performed a Division-sponsored independent medical examination (DIME). Dr. Watson noted that Claimant's chief complaint was left knee pain that she believed was "emanating from underneath the knee cap." On PE of the left knee Dr. Watson noted that Claimant was tender over the lateral facet of the patella. He also noted tenderness over the lateral and medial joint lines. Claimant displayed a positive Tinel's sign over the infrapatellar branch of the saphenous nerve. Dr. Watson assessed saphenous nerve neuropathy of the left leg and "patellofemoral syndrome." Dr. Watson opined that Claimant was not at MMI for these diagnoses. He recommended Claimant undergo another MRI of the left knee to assess the possible progression of chondromalacia of the patella and should return to Dr. Dresher to be "reevaluated." Dr. Watson further opined that visco supplementation of PRP "may be the best solution" but stated Claimant should undergo additional PT to work on quadriceps strength. With regard to saphenous nerve neuropathy Dr. Watson opined Claimant should have PT for "nerve glides" and possibly nerve blocks.

52. Dr. Johnson again examined Claimant on August 3, 2015. Claimant reported moderate burning left knee pain which radiates down to the inside of the left ankle. She rated her pain at 6/10 and stated that it was not improving. On PE of the left knee Dr. Johnson observed no joint effusion, full ROM in extension and slightly decreased ROM in flexion and tenderness to palpation of the saphenous nerve. Dr. Johnson recorded that McMurray's test was negative. Dr. Johnson diagnosed "sprains and strains of unspecified site of knee and leg," laceration of the left knee and saphenous neuropathy of the left leg. In accordance with the recommendation of Dr. Watson Dr. Johnson ordered a repeat MRI of the left knee and referred Claimant back to Dr. Dresher for consideration of PRP injections or visco supplementation.

53. On August 10, 2015 Claimant underwent another MRI of the left knee. With respect to the menisci the radiologist noted “increased signal intensity in the soft tissues around the meniscocapsular junction of the posterior medial aspect of the medial meniscus.” However, there was no “distinct fluid collection between the meniscus and capsule nor subluxation of the meniscus on the articular cartilage.” The radiologist opined these findings suggested “tear of the posterior oblique ligament.” Otherwise the menisci were “normal size, shape and signal intensity.” The radiologist further opined there was “edema or fluid anterior to the patella and the medial aspect of the patellar tendon.” Miscellaneous findings included “new thickening and intermediate increased signal in the distal semimembranosus tendon,” a “small amount of fluid in the subgastronemius bursa and fluid deep to the Sartorius, gracilis, and semitendinosus tendons.” The radiologist’s impressions were as follows: (1) A posteromedial corner injury includes edema in the posterior oblique ligament, disruption of the posterior aspect of the medial meniscotibial ligament distal semimembranosus tendinopathy without a high-grade tear; (2) Persistent but improved edema anterior to the patella and medial to the patellar tendon, but no drainable fluid collection.

54. On August 19, 2015 Dr. Dresher examined Claimant. Dr. Dresher noted the August 10, 2015 MRI showed a “posteromedial corner injury” involving the oblique tendon, the posterior aspect of the medial meniscotibial ligament and semimembranous tendinopathy. He also opined there was fluid “deep to the pes anserine tendons favor the adjacent fluid is related to the posteromedial corner injury” and improved edema anterior to the patella and medial to the patellar tendon. On PE he noted there was no pain or crepitation at patella femoral articulation, ROM was full on extension and flexion was 120 degrees and painless. Dr. Dresher assessed the following: (1) Chondromalacia of the patella; (2) Left knee pain with posteromedial corner injury and chondromalacia. Dr. Dresher referred Claimant to PT for strengthening of the left knee and to Dr. Lippert for evaluation of the saphenous nerve neuropathy and consideration of nerve blocks. Dr. Dresher also referred Claimant to Christopher Jones, M.D., for evaluation of the posteromedial corner injury. Dr. Dresher noted that Dr. Watson had recommended going forward with PRP or visco supplementation but did so before the August 10 MRI.

55. On October 1, 2015 Dr. Jones performed an orthopedic evaluation Dr. Jones is affiliated with CSOG. Dr. Jones assessed the following: (1) Complex tear of medial meniscus of left knee as current injury; (2) Acute pain of the left knee; (3) Sprain of the medial collateral ligament of the left knee. Dr. Jones requested authorization to perform surgery described as a “medial meniscal repair.”

56. On October 5, 2015 Dr. Johnson examined Claimant. Claimant complained of “moderate burning left knee pain which radiates down to the inside of the left ankle.” Claimant rated the pain 6/10. Dr. Johnson wrote that he “agreed” with Dr. Jones’ recommendation for surgery “to repair the knee.”

57. On October 26, 2015 Dr. Erickson issued a report concerning Dr. Jones’ request to perform surgery. Dr. Erickson stated that the August 10, 2015 showed a “hint of abnormality.” Dr. Erickson stated that he did not believe the August 10 MRI

"clearly" showed a meniscus tear and recommended that the request for surgery be denied until an independent radiologist reviewed both the May 14, 2014 MRI and the August 10 MRI to see if there has been a "substantial change."

58. On October 29, 2015 Dr. Lippert performed a saphenous nerve block.

59. On November 10, 2015 Dr. Erickson authored a letter to the Insurer. Dr. Erickson wrote that he reviewed the August 10, 2015 MRI with an unidentified "MSK expert radiologist." The ALJ infers that the letters "MSK" refer to a musculoskeletal radiologist. According to Dr. Erickson the MRI showed "some mild degenerative signal in the medial meniscus," but no tear and the meniscocapsular junction was intact. Dr. Erickson also stated that the only difference between the May 2014 MRI and the August 2015 MRI was "perhaps slightly more pes anserine bursal fluid in the second study." Dr. Erickson opined that there "is not evidence of a surgical lesion on this most recent MRI" and recommended denial of the request for surgery. He suggested that Claimant's "minor symptoms" are "possibly amenable to a steroid injection to the soft tissues at the posteromedial corner."

60. On November 11, 2015 Dr. Dresher examined Claimant for follow-up of the left knee. Claimant reported she had experienced no improvement in her symptoms. Dr. Dresher noted that Dr. Jones had recommended a "diagnostic arthroscopy with consideration for medial meniscus repair if necessary" and exploration of the posteromedial corner for ligament repair. Dr. Dresher stated that the request for surgery had "been denied and they are now sending the image out for a second opinion." Dr. Dresher opined there "certainly could very well be a medial meniscus repair done if that is found intraoperatively." Dr. Dresher further stated that: "We are not challenging the reading on the MRI that this was missed which is currently what other Worker's Compensation physicians are pursuing."

61. On November 19, 2015 Dr. Johnson noted that Claimant reported the saphenous nerve block performed on October 29, 2015 "did not help." Instead Claimant reported the block caused hip pain. On December 17, 2015 Claimant advised Dr. Johnson that she had completed PT and It "was not helpful."

62. Medical records reflect that from August 3, 2015 through December 17, 2015 Dr. Johnson examined Claimant on eight occasions. On every one of these examinations Dr. Johnson documented that McMurray's test was negative.

63. On January 14, 2016 Dr. Johnson examined Claimant. Claimant reported she had undergone psychological counseling and pain management and these treatments had been "somewhat helpful." Claimant reported moderate burning left knee pain which radiated down to the inside of the left ankle. Claimant rated her pain at 6/10 and also reported "pins and needles in her ankle." On PE Dr. Johnson noted that McMurray's test was "positive over the medial meniscus." Dr. Johnson's diagnoses included the following; (1) Other meniscal derangements, unspecified medial meniscus, left knee; (2) Laceration without foreign body, left knee, subsequent encounter; (3) Unspecified mononeuropathy of left lower limb.

64. On December 17, 2015 Dr. Hall issued another report. It is apparent from this report that Dr. Hall had reviewed some medical records generated after his March 3, 2015 report. The additional records include but are not necessarily limited to Dr. Watson's DIME report, the August 10, 2015 MRI report, a note from Dr. Dresher dated August 28, 2015 and Dr. Jones' recommendation for surgery. Dr. Hall does not mention Dr. Erickson's letter to the insurer dated November 10, 2015 and the ALJ infers he had not seen it at the time he issued the December 17 report. It is unclear whether Dr. Hall actually examined Claimant on December 17. Although the December 17 report does not document any formal examination findings Dr. Hall wrote that Claimant was "still quite symptomatic" and that it is clear from Claimant's "presentation and examination that there is something abnormal in the knee creating local symptoms."

65. In the December 17, 2015 report Dr. Hall wrote that the August 10, 2015 MRI of the left knee was a "slightly different study" that was "more specific and more defined" than the May 2014 MRI. Dr. Hall opined that the August 10 MRI revealed "local pathology potentially amiable to surgical correction." Dr. Hall opined that the August 10 MRI findings "are not new" and there is no reason to believe they are the result of some event that occurred after February 19, 2014. He stated that merely because a patient "has a study that does not unearth specific pathology does not mean there is not pathology." Dr. Hall commented the August 10 MRI findings represent "an improved imaging event, which has unearthed the pathology that has likely been present all along." He opined Claimant "should be allowed to continue her work with Dr. Dresher and Dr. Jones."

66. At Respondents' request Douglas Scott, M.D., performed an IME of the Claimant. Dr. Scott is board certified in occupational medicine and is level II accredited. Dr. Scott estimates that 5% of his practice involves the treatment of knee injuries.

67. Dr. Scott issued a written report on February 10, 2016. On the date of the examination, January 19, 2016, Claimant reported that her symptoms included pain over the left knee cap, clicking in the left knee cap, a sensation of instability over the left knee cap, pain in the back of the left knee and locking of the left knee. Claimant also reported tingling over the left shin. Dr. Scott opined that Claimant's work-related diagnoses included the following: (1) Contusion of both knees; (2) Laceration/abrasion of the left knee followed by infection and antibiotic treatment, "surgical I & D, with resolution and healing by April 16, 2014 when Dr. Dresher noted the wound was healed and there was no swelling; (3) Possible traumatic bursa of the left prepatellar bursa with questionable bursitis by MRI scan and Dr. Dresher's examination on June 18, 2014, probably resolving by November 12, 2014 when Dr. Dresher noted little swelling or discomfort with patellofemoral manipulation.

68. Relying on the opinions of Dr. Erickson and the review of the August 2015 MRI by the "expert radiologist," Dr. Scott opined there "is no injury to the posteromedial meniscus and no tear to repair." Therefore, Dr. Scott opined that the arthroscopic surgery recommended by Dr. Jones is "neither reasonable, necessary or indicated to treat the effects" of Claimant's February 2014 industrial injury.

69. Dr. Scott noted Claimant reported left knee numbness and paresthesias when receiving PT in 2012. Dr. Scott also opined that the left saphenous neuropathy detected by electrodiagnostic testing in September 2014 was “probably the same diagnosis” as Dr. Dresher’s diagnosis of left superficial peroneal nerve paresthesias on March 25, 2013. Dr. Scott further assessed “patellofemoral syndrome” and opined this condition preexisted the February 19, 2014 injury. In support of this opinion Dr. Scott cited the PT records showing that Claimant reported left knee pain on June 14, 2013.

70. On February 26, 2016 Dr. Jones again examined Claimant. On PE of the left knee Dr. Jones noted “no deformity” and “moderate effusion.” He also noted “diffuse medial tenderness” and “mild crepitus of the patellofemoral joint.” Dr. Jones assessed chondromalacia of the left patella and a complex tear of the left medial meniscus as “current injury.” Dr. Jones wrote that he went back through all of Claimant’s studies. Dr. Jones opined that it is “pretty clear on her MRI that she has this posteromedial capsular injury and possibly some mild patellofemoral disease.” Dr. Jones stated that his plan was to “scope” the knee and “be prepared for an inside out meniscus repair or all inside meniscus repair as well as chondroplasty, and just careful examination of her entire knee.” Dr. Jones stated he was “a little baffled why [Respondents] fought this so hard.”

71. Dr. Scott testified at the hearing. Dr. Scott stated that the surgery proposed by Dr. Jones would not address any of the diagnoses that Dr. Scott considers to be related to the February 19, 2014 industrial injury. (See Finding of Fact 67).

72. Dr. Scott testified that he does not know the meaning of the term “posteromedial corner injury” and opined “it is very questionable whether [Claimant] has that diagnosis.” Dr. Scott stated that he relied on Dr. Erickson and the “musculoskeletal radiological expert” who agreed that the August 2015 MRI does not depict “any evidence whatsoever of a posteromedial corner injury and/or a meniscus tear.”

73. Dr. Scott testified he is experienced in treating patients with acute meniscal tears. Dr. Scott opined that a torn meniscus is usually occurs when the foot is planted and the femur twists so as to cause shearing of the medial meniscus. Dr. Scott explained that the common symptoms of a medial meniscus include pain in the medial joint and swelling in the medial joint. Dr. Scott also noted that “a little bit later on” the physician may note a positive McMurray sign. Dr. Scott explained that a positive McMurray’s sign occurs when the physician feels “a snap or click” in the medial joint line while extending the patient’s knee and rotating the foot.

74. Dr. Scott noted that no physician diagnosed a torn meniscus until Dr. Jones made the diagnosis on October 1, 2015, approximately 18 months after the February 2014 injury.

75. On May 5, 2016 Dr. Jones gave a post-hearing deposition. Dr. Jones is board certified in orthopedic surgery and approximately 50% of his medical practice involves the performance of knee surgery. Dr. Jones is not level II accredited.

76. Dr. Jones testified as follows. On October 1, 2015 Dr. Jones examined Claimant's left knee on referral from his "partner," Dr. Dresher. In connection with the examination Dr. Jones reviewed the August 10, 2015 MRI report as well as the actual MRI films. Dr. Jones also had Dr. Dresher's notes. However, Dr. Jones did not have Dr. Watson's DIME report, Dr. Johnson's notes or any information concerning the May 14, 2014 MRI. Dr. Jones' understanding was that the Claimant "fell directly on her knee" and was managed "conservatively." However, the conservative treatment was not successful. At the October 1 examination Claimant's main complaint "was not just anterior pain, but she also had a lot of medial joint-line paint, posterior medial knee."

77. Dr. Jones testified that the MRI conducted in August 2015 "showed a lot of fluid" along the "posterior medial joint" and this caused him to be concerned that Claimant had an "occult meniscal injury." Dr. Jones explained that the presence of "fluid" on the MRI indicates that tissue had been injured. Dr. Jones also explained that an "occult" injury means that "it's kind of hiding" and "you can't see it on the study, but it's still there." Dr. Jones assessed a "likely meniscus tear or just an acute pain of her left knee, possibly a strain of her medial collateral ligament." He recommended arthroscopic surgery to assess the knee with a camera and determine if there was any type of meniscus tear. Dr. Jones opined that considering the consistency of Claimant's symptoms and the failure of conservative treatment he considered surgery to "explore" the knee a "reasonable next step."

78. Dr. Jones opined that it is "medically probable" that Claimant sustained meniscus tear when she fell on her knee in the parking lot. Dr. Jones opined that it is "not common" for a person to suffer a meniscus tear when the fall directly onto a knee. He also opined that it is common for "someone to have a meniscus tear with a mechanism of injury other than planting the foot and pivoting."

79. Dr. Jones testified that the "common initial signs" of a meniscus tear include pain with weight bearing or twisting and turning, pain with flexion, swelling of the knee and sometimes catching and popping. Dr. Jones opined it is "medically probable" that those signs could have been "overshadowed" by the laceration of Claimant's knee and the subsequent infection.

80. On cross-examination Dr. Jones testified that he is "not a work-comp-certified physician" and is "not exactly" familiar with the Medical Treatment Guidelines (MTG). Dr. Jones testified that he disagrees with the MTG if they state that a positive McMurray's test is one of the "indications" one would expect to find with a meniscal tear. Dr. Jones explained that a positive McMurray's test is not common and is a very "nonsensitive test." Dr. Jones testified that if Claimant's McMurray's test went from negative to positive 18 months after the injury the change would be consistent with a "degenerative" meniscal tear. Dr. Jones also stated that such a change in the McMurray's test could also be consistent with an asymptomatic injury to the corner of the meniscus that later "displaces" and becomes symptomatic. Dr. Jones stated that if Claimant had a normal MRI in May 2014 and then the August 2015 MRI showed fluid the circumstances would support the "conclusion that she developed the meniscus tear after the initial MRI in May 2014."

81. Dr. Jones testified that in his February 2016 report he assessed Claimant as suffering from chondromalacia. Dr. Jones explained that chondromalacia is degenerative change of cartilage, and that joint line pain can be consistent with chondromalacia. Dr. Jones opined that if Claimant fell hard enough in February 2014 to "split her skin open" then she "probably aggravated the chondromalacia" in the fall. Dr. Jones admitted on cross-examination that he did not know Claimant had an MRI in 2008 that showed the presence of Grade II chondromalacia. Dr. Jones admitted he did not know Claimant complained of knee pain prior to February 19, 2014 and stated that this information could definitely affect his opinion as to whether the chondromalacia was work-related.

FINDINGS REGARDING CAUSE OF ALLEGED MENISCAL INJURY

82. Claimant failed to prove it is more probably true than not that need for the surgical procedure proposed by Dr. Jones, if any, was proximately caused by the admitted industrial injury of February 19, 2019. Specifically, Claimant failed to prove it is more probably true than not that she has a meniscal injury. Further, even if Claimant has a meniscal injury she failed to prove it was probably caused by the industrial injury of February 19, 2019.

83. Dr. Jones opined that Claimant probably has an "occult meniscal injury" to the left medial meniscus. Dr. Jones explained that this injury is not seen on the August 10, 2015 MRI but he infers its existence from the presence of fluid. (Findings of Fact 70, 77, 78, 81). Dr. Jones desires to "explore" the knee with a camera and repair the inferred meniscal tear when it is discovered during surgery. Dr. Jones' opinion that Claimant probably has an "occult meniscal injury" that requires surgical exploration is not persuasive.

84. Dr. Jones' opinion that the industrial injury "probably" caused a meniscal tear is contradicted by the results of the left knee MRI studies performed on May 14, 2014 and August 10, 2015. No radiologist or other physician has credibly or persuasively opined that the May 14, 2014 MRI depicts a meniscal tear or pathology from which a meniscal tear could be inferred. The radiologist that interpreted the May 2014 MRI expressly found that there was no meniscal tear or focal chondral defect. Dr. Watson, the DIME physician, suggested that Claimant undergo an MRI not to look for a meniscal tear but to check for "progression" of chondromalacia of the patella. Even Dr. Hall conceded that the May 2014 MRI was "normal."

85. No radiologist who has reviewed the August 10, 2015 MRI credibly or persuasively opined that it depicts a meniscal tear or pathology from which a meniscal tear could be inferred. The first radiologist to review the images noted "increased signal intensity in the soft tissues around the meniscocapsular junction of the posterior medial aspect of the medial meniscus." However, that radiologist did not assess a meniscal injury. Rather he interpreted the August 10 images to represent a "posteromedial corner injury include edema in the posterior oblique ligament" and commented the menisci were of "normal size, shape and signal intensity." (Finding of Fact 53). The August 10 MRI was also reviewed by an "expert radiologist" in consultation with Dr.

Erickson. The ALJ infers that the radiologist did not detect any specific or acute injury to the medial meniscus but indentified only “degenerative changes.” (Finding of Fact 59).

86. Dr. Erickson, a level II accredited orthopedic surgeon, credibly and persuasively opined that the August 10, 2015 MRI does not depict a meniscal tear or other surgical “lesion.” (Finding of Fact 59). Dr. Erickson’s opinion is corroborated by the opinions of the radiologists and by the credible opinion of Dr. Scott.

87. Dr. Jones’ opinion that the February 19, 2014 injury probably caused a torn meniscus is undermined by evidence that the Claimant’s reported mechanism of injury is not a probable cause of a meniscal tear. (Finding of Fact 76) Dr. Jones himself admitted that falling forward on the knee is not a “common” cause of a meniscal tear. (Finding of Fact 78). Dr. Scott persuasively testified that a torn meniscus usually occurs when the foot is planted and the knee twists. (Finding of Fact 73). The ALJ finds Claimant did not experience a mechanism of injury that is commonly associated with a torn meniscus.

88. Dr. Jones’ opinion that the February 19, 2009 industrial injury caused a torn meniscus is not consistent with the medical evidence concerning the progress of Claimant’s symptoms. Dr. Scott accurately and persuasively argued that no treating or examining physician diagnosed a torn meniscus until a year and a half after the date of injury (when Dr. Jones made the diagnosis in October 2015).

89. Dr. Scott persuasively testified that that the common symptoms of a medial meniscus tear include swelling in the medial joint, pain in the medial joint line, and a “a little bit later on” a positive McMurray sign (snap or click in the medial joint line when extending the patient’s knee).

90. The initial medical records do not contain any credible or persuasive mention of swelling in the medial joint line. When Dr. Vu examined Claimant on February 20, 2019 he did not observe any “obvious intra-articular joint effusion.” When Dr. Dresher examined Claimant on April 16, 2014 he did not observe any swelling. When Dr. Johnson examined Claimant on April 17, 2014 he did not observe any swelling.

91. The medical records do not reflect any credible or persuasive mention of “medial joint line pain” until Dr. Dresher noted that finding on June 18, 2014, approximately four months after the date of injury. When PA Stafford examined Claimant on February 20, 2014 Claimant did not report joint pain. When Dr. Johnson sent Claimant for an MRI on May 5, 2014 it was because of “pain around the patella on the lateral surface,” not medial joint line pain.

92. The medical records do not reflect any credible or persuasive report of a positive McMurray’s test until Dr. Johnson reported a positive McMurray’s test on January 14, 2016, nearly two years after the date of injury. The January 2016 test occurred after Dr. Johnson documented eight consecutive negative McMurray’s tests

between August 3, 2015 and December 17, 2015. The ALJ recognizes that on June 18, 2014 Dr. Dresher reported that Claimant had “pain” with McMurray’s test. However, Dr. Dresher did not state that this constituted a “positive” McMurray’s test. Indeed, a positive McMurray’s test is evidenced by a palpable click or pop when rotating the foot with the knee in extension, not a report of pain when performing this maneuver. (Finding of Fact 73).

93. Dr. Jones admitted that if Claimant’s McMurray’s test went from negative to positive 18 months after the date of injury that could be consistent with a “degenerative” tear of the meniscus. Dr. Jones admitted that if Claimant had a negative MRI in May 2014 and then an MRI positive for fluid in August 2015 the circumstances would support the inference that the meniscus was torn after May 2014. (Finding of Fact 80). Taken together, the ALJ finds that these admissions undermine the credibility of Dr. Jones’ opinion that the Claimant sustained a meniscal tear caused by the February 19, 2014 industrial injury.

94. To the extent Dr. Jones opined that McMurray’s test is not a reliable diagnostic test for a torn meniscus his testimony is not credible and persuasive. The ALJ takes administrative notice of WCRP 17, Exhibit 6, Lower Extremity Injury Treatment Guidelines, p. 90 (Lower Extremity MTG), concerning “specific physical exam findings” for meniscus injuries. This section specifically identifies a “Positive McMurray’s test” as diagnostic of tears of the medial or lateral meniscus tissues. The ALJ finds that this provision of the Lower Extremity MTG is very persuasive in establishing that McMurray’s test is diagnostic of meniscal tears.

95. For many of the reasons stated in Findings of Fact 83 through 93 the ALJ is not persuaded by Dr. Hall’s opinion that the August 2015 MRI findings represent “an improved imaging event, which has unearthed the pathology that has likely been present all along.” Rather, as found, the 2015 MRI findings do not display credible and persuasive evidence that Claimant has a meniscal tear, or that any such tear was caused by the February 2014 injury rather than natural degenerative change.

FINDINGS REGARDING CAUSE OR AGGRAVATION OF CHONDROMALACIA

96. Claimant failed to prove it is more probably true than not that that the injury of February 19, 2014 caused or aggravated chondromalacia of the patella so as to warrant the chondroplasty recommended by Dr. Jones. To the contrary, the credible and persuasive evidence establishes that to the extent Claimant has chondromalacia of the patella that condition predated the February 2014 injury and was not “aggravated” by the injury.

97. Claimant did not prove that the February 19, 2014 industrial injury caused chondromalacia of the patella. The November 2008 MRI establishes that Claimant had grade II chondromalacia of the patella prior to the February 2014 injury. The Cornerstone PT notes from 2012 and 2013 reflect Claimant complained of knee pain with exercise and numbness in the knee. Dr. Scott credibly opined that Claimant

suffered from “patellofemoral syndrome” prior to February 2014 as documented by the Cornerstone PT records.

98. Dr. Jones testified that even if the February 19, 2014 injury did not cause Claimant’s chondromalacia, it is his opinion that the industrial injury “aggravated” this condition.

99. Dr. Jones’ admitted that he did not know Claimant had a left knee MRI in 2008 that showed the presence of Grade II chondromalacia. Dr. Jones admitted he did not know Claimant complained of knee pain and numbness with activity prior to February 19, 2014. Dr. Jones admitted that if he had known these facts this information could definitely affect his opinion that the chondromalacia is work-related. These admissions undermine the persuasiveness of Dr. Jones’ opinion that there was an “aggravation” of pre-existing chondromalacia.

100. At the time of the injury there is no indication that any physician or provider diagnosed an “aggravation” of pre-existing chondromalacia. Rather, the radiologist read the May 14, 2014 MRI as evidencing prepatellar soft-tissue edema or other fluid representing a “possible soft-tissue contusion,” bursitis or hematoma. The radiologist further opined that the patellofemoral articular cartilage was “unremarkable.” After the May 2014 MRI Dr. Johnson assessed prepatellar soft tissue edema but no meniscal tear or “internal injury.” On June 18, 2014 Dr. Dresher noted the MRI showed a “small amount of bursitis and inflammation.” On April 9, 2015 Dr. Erickson credibly opined that the Claimant’s examination did not support any the existence of a “significant knee injury” and the May MRI was “essentially normal.”

101. The radiologist that reviewed the August 2010 MRI did not report any impression that there had been an “aggravation” of Claimant’s pre-existing chondromalacia. Rather the radiologist noted “improved edema anterior to the patella and medial to the patellar tendon, but no drainable fluid collection.”

102. When Dr. Jones first examined Claimant in October 2015 there is no credible or persuasive evidence that he diagnosed an “aggravation” of pre-existing chondromalacia. Rather at that time Dr. Jones assessed a meniscus tear, acute “pain of the left knee” and a sprain of the MCL. Dr. Jones recommended a “medial meniscal repair” but did not mention any need for a chondroplasty.

103. On November 10, 2015 Dr. Erickson credibly and persuasively opined that the May 2014 and August 2015 MRI studies were not different except for “perhaps slightly more pes anserine bursal fluid in the second study.” Dr. Erickson credibly opined that the August 2015 MRI did not depict any “surgical lesion.”

104. Dr. Scott credibly and persuasively opined that Claimant’s “patellofemoral syndrome” pre-dated the industrial injury of February 19, 2014. He persuasively argued that as late as June 14, 2013 Claimant was complaining of knee pain with exercise.

105. Findings and inferences inconsistent with these Findings of Fact are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

CAUSE OF ALLEGED MENISCAL TEAR

Claimant contends that a preponderance of the evidence establishes that the February 19, 2014 industrial injury caused a torn left medial meniscus and the consequent need for arthroscopic left knee surgery. Claimant relies heavily on the opinions of Dr. Jones as support for this proposition. However, the ALJ concludes that Claimant failed to prove it is more probably true than not that she has a torn meniscus. Moreover, the ALJ concludes Claimant failed to prove it is more probably true than not that if she has a torn meniscus that the tear was proximately caused by the May 2014 industrial injury.

Claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ.

City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

When determining whether the need for proposed medical treatment is causally related to an industrial injury the ALJ may consider the MTG. However, the ALJ is not required to use the MTG as the "sole basis for such determination." Section 8-43-201(3), C.R.S.

The ALJ concludes Claimant failed to prove it is more probably true than not that she has an injury to her left medial meniscus. As found, the ALJ is not persuaded by the opinion of Dr. Jones that the Claimant sustained any injury to the left medial meniscus when she fell on February 19, 2014. Rather, the credible and persuasive medical evidence demonstrates that there is no tear of the meniscus. As determined in Findings of Fact 84 through 86, the credible and persuasive evidence establishes that neither of the MRI studies is consistent with an injury to the medial meniscus. As determined in Finding of Fact 87, the Claimant's reported mechanism of injury in not likely to have caused an injury to the meniscus. As determined in Findings of Fact 88 through 92, the temporal evolution of Claimant's symptoms and examination findings is not consistent with an injury to the medial meniscus on February 19, 2014.

The ALJ also concludes that even if Claimant has an injury to left medial meniscus she failed to prove it is more probably true than not that the injury was caused by the February 19, 2014 industrial injury. As determined in Finding of Fact 93, Dr. Jones admitted that if Claimant had a negative MRI in May 2014 and developed a positive McMurray's test 18 months after the February 2014 date of injury the evidence would be consistent with a "degenerative tear" of the meniscus that occurred after May 2014. As found, these admissions undermine the credibility of Dr. Jones' opinion that the February 2014 accident caused a traumatic injury to Claimant's left medial meniscus.

CAUSE OF ALLEGED AGGRAVATION OF CHONDROMALACIA

Claimant relies on the opinions of Dr. Jones for the proposition that the industrial injury of February 19, 2014 "aggravated" pre-existing chondromalacia so as to cause the need for surgery including a chondroplasty. However, the ALJ disagrees with this argument.

The ALJ concludes that Claimant failed to prove it is more probably true than not the February 2014 injury "aggravated" chondromalacia so as to warrant the surgery proposed by Dr. Jones. As determined in Findings of Fact 97 and 104, the credible and persuasive evidence establishes that Claimant had symptomatic chondromalacia of the patella before the February 2014 injury. As determined in Findings of Fact 100 through 103, the 2014 and 2015 MRI studies do not indicate that Claimant sustained any "aggravation" of chondromalacia as a result of the February 2014 injury. These studies, as well as the contemporaneous medical records, suggest that Claimant sustained a prepatellar soft tissue injury that had improved by August 2015. Dr. Erickson credibly opined that the August 2015 MRI does not depict any type of surgical lesion. Even Dr.

Jones admitted that his opinion concerning the alleged aggravation of pre-existing chondromalacia could change if had known that Claimant had pre-existing chondromalacia and had complained of knee pain prior to February 2014.

In light of the determination that Claimant failed to prove that the industrial injury of February 19, 2014 caused a meniscal injury and/or an aggravation of pre-existing chondromalacia it is unnecessary to determine whether it is now reasonable and necessary to perform surgery to treat these conditions.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Claimant's request for an order requiring Insurer to pay for the surgery proposed by Dr. Jones is denied.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 29, 2016.

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issues presented for hearing are:

1. Whether the issues of causation and relatedness are barred from relitigation by the application of issue preclusion.

2. Whether or not the DIME physician's opinion on causation and the date of MMI is ambiguous, and if so, determination of the DIME physician's true opinion.

3. If the ALJ finds the DIME physician opined that the Claimant's lumbar spine condition is work-related with a permanent impairment, then, (a) whether the Respondent has overcome the DIME opinion by clear and convincing evidence and (b) whether the Claimant has overcome the DIME opinion that the Claimant's migraines and labral tear are related and also deserving of an impairment rating.

OR

4. If the ALJ finds the DIME physician opined that the Claimant's lumbar condition is not work-related or is not entitled to a permanent impairment rating, then whether the Claimant has overcome the DIME opinion by clear and convincing evidence that the lumbar condition is related and deserving of an impairment rating and further that the Claimant's migraines and labral tear are related and deserving of an impairment rating.

5. Whether the Claimant has proven that she is entitled to medical maintenance treatment by a preponderance of the evidence.

FINDINGS OF FACT

1. This case involves an admitted claim for a slip and fall on a wet floor that occurred at one of Employer's retail stores on March 17, 2013. The Claimant testified at the hearing by telephone as she was not able to appear in person at the hearing. On March 17, 2013 and currently, the Claimant is a sales associate. She testified that her job requires her to bend and twist all day long as she helps customers find sleep solutions. She testified that before her March 17, 2013 work injury she typically worked full time plus overtime for the Employer. She testified that more recently she was working regular shifts but sometimes has to leave early.

2. The Claimant has a significant history of preexisting conditions. She suffered a workplace injury on November 15, 1998 while working for a retail department store. As a result of that injury, the Claimant complained of neck pain, numbness in her arms, dizziness, fatigue, and frequent low back pain. (Respondents' Exhibit R, p. 286). The Claimant ultimately underwent cervical laminectomy, discectomy and fusion for a ruptured cervical disc (Respondents' Exhibit R, p. 288). The Claimant continued to report low back pain at a June 21, 2000 visit with her physician, Dr. Bethany Wallace. Dr. Wallace also noted that the Claimant had been in a motor vehicle accident on June 15, 2000 (Respondents' Exhibit R, p. 291).

3. The Claimant was also injured as a result of a March 10, 2004 motor vehicle accident. The medical records evidence that the Claimant had extensive medical treatment from multiple providers for her complaints of pain and/or numbness in her low back, neck, head, vision, left arm, right arm, right leg, right hip, right SI joint and headaches (Respondents' Exhibits M, N, P, S, V, W, X, Y). The Claimant also had regular chiropractic treatments between March 18, and November 30, 2004. The chiropractor treating her for multiple symptoms over 67 visits found her to be at maximum medical improvement on December 1, 2004 but opined that she will continue to have "a permanent injury to her neck and low back" and would require further treatment (Respondents' Exhibit T and U, p. 368). The Claimant also saw Dr. Christopher Pierce, a neuropsychologist and he referred the Claimant for cognitive rehabilitations and opined she was suffering from postconcussive syndrome Respondents' Exhibit Z).

4. The Claimant began receiving treatment from Dr. Adam Wolff of the Denver Neurological Clinic on September 19, 2012. At an initial evaluation, Dr. Wolff summarized the Claimant's medical history as follows,

> [The Claimant] is a 52 year old woman with a complicated history. About 12 years ago, she had a fall with traumatic herniated cervical disc, and she is status post fusion at C5-6. She had a motor vehicle accident about 8 years ago and states that she had a stroke in her right eye related to the trauma, and she has visual loss in the right eye as a result. It seems as though over the last year, she has been having issues with vertigo, which is episodic but worsening. It seems to be related to position. She has increasing pressure in her head and neck with fairly regular headaches. She has memory loss, which is short term, and it does seem to be associated with her vertigo and headache phenomena. She had one episode of right hand numbness. She has chronic low back pain issues and balance issues. She gets regular chiropractic adjustments, and these do help with her headaches and neck pain.
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> (Claimant's Exhibit 1, pp. 7-8; Respondents' Exhibit G, pp. 210-211)

Dr. Wolff continued to treat the Claimant with Botox injections for cervical dystonia through January 9, 2013. The Claimant reported improvement in her neck pain, neck spasm and headaches (Claimant's Exhibit 1, pp. 9-11; Respondents' Exhibit G, pp. 212-214).

5. With respect to her March 17, 2013 work injury, the Claimant did not seek immediate medical attention, but went to the emergency department at Sky Ridge Medical Center on March 21, 2013 complaining of nausea, back pain and a headache. The Claimant reported vomiting two days prior, but none since and occasional left leg numbness. On physical exam, the ER examiner found: "No decreased ROM [range of motion] in the neck. Painless ROM. Non-tender. No vertebral tenderness." Similarly, claimant had full range of motion in her right and left hips. The examiner found: "Oriented X 3. No alteration in mental status. No cranial nerve deficit. No motor deficit. No sensory deficit." Claimant's cervical spine x-ray showed a previous cervical spine fusion, with spondylosis and osteophytes at the C4-5 and C6-7 levels. No acute changes were seen. Claimant's lumbar spine x-ray showed no acute injury, but did show degenerative changes at the L4-5 and L5-S1 levels. A head CT was negative for brain injury. The Claimant was discharged in stable condition with "no seriously abnormal test results." The Claimant was assessed with a head injury, back strain, right hip strain left shoulder strain, right hip strain and contusions (Claimant's Exhibit 5; Respondents' Exhibit C).

6. An Employer's First Report of Injury was completed by the Claimant on March 26, 2013 stating that "her left hip, left shoulder, head and back" were injured when the Claimant fell on a wet floor that another employee had just mopped (Respondents' Exhibit CC).

7. The Claimant selected Elizabeth Bisgard, M.D., as her authorized treating physician. Dr. Bisgard performed an initial evaluation of the Claimant on March 22, 2013. The Claimant told Dr. Bisgard that initially after her fall she felt no immediate pain and she was able to finish work. Over the next couple of days, the Claimant was nauseous and throwing up and was seen at Sky Ridge. The Claimant did not report or complain of any neck pain to Dr. Bisgard. The Claimant reported pain in both hips, both shoulders, pressure around her right eye and ear, photophobia, headaches, numbness in her left arm and difficulty concentrating. The Claimant reported that, in 1999, she underwent a cervical fusion procedure at the C5-6 level of her cervical spine. The Claimant also reported a prior history of treatment for a traumatic brain injury (TBI) with loss of memory and optic nerve stroke due to a motor vehicle accident (MVA) in 2004. Dr. Bisgard diagnosed head contusion, headache, lumbar strain, and cervical strain. Dr. Bisgard referred the Claimant to Dr. Mason because of her prior history of concussions. Dr. Bisgard took the Claimant off work pending reevaluation and referred her for physical therapy (Respondents' Exhibit D, pp. 69-70).

8. When Dr. Bisgard reevaluated the Claimant on March 28, 2013. Dr. Bisgard noted that both she and the physical therapist who had treated the Claimant found positive Waddell signs with excessive pain reaction to light superficial palpation and pain in pseudorotation. Dr. Bisgard noted that the Claimant's pain reaction and high pain levels reported of 9/10-10/10 were in contrast with the Claimant's appearance at

the visit as the Claimant came in “neatly dressed with her hair and makeup done nicely, not indicative of somebody who typically has such high pain levels” (Respondents’ Exhibit D, pp. 73-74). At a follow up evaluation on April 10, 2013, Dr. Bisgard stated, “I remain very concerned regarding her inconsistent presentation and her nonphysiologic findings (Respondents’ Exhibit D, p. 77).

9. On referral from Dr. Bisgard, Dr. Mason first evaluated the Claimant on April 16, 3013, when the Claimant reported the following mechanism of injury:

> There was a wet floor that … was unmarked. [Claimant] slipped and fell. She was holding four bags of trash. She feels that her feet went off to the right of her. Her left knee, hip and shoulder struck the ground. She thinks she may have hit her head. She indicates she jumped up quickly and then noticed she felt somewhat dazed and pain started in her neck and back.

The Claimant’s report to Dr. Mason of pain symptoms at the time of the slip and fall incident is inconsistent with history the Claimant provided to Dr. Bisgard that she did not feel immediate pain but symptoms developed later. Dr. Mason discussed her impressions with Dr. Bisgard and recommended a neuropsychological evaluation in light of the Claimant’s past history of TBI. Dr. Mason noted that the Claimant’s primary complaint was headaches. The Claimant also complained of low back pain in the bilateral sacroiliac area. Dr. Mason assessed the Claimant with probable postconcussive syndrome with prior history of significant TBI, cervical sprain/strain, and lumbar strain that is primarily sacroiliac mediated (Claimant’s Exhibit 2, pp. 20-23; Respondents’ Exhibit E, pp. 86-89).

10. Dr. Bisgard referred the Claimant to Dr. Brent VanDorsten, Ph.D., for neuropsychological testing conducted on May 21, 2013. Dr. VanDorsten reevaluated the Claimant on June 3, 2013. Dr. VanDorsten reported little evidence on psychological testing to support any cognitive deficit. Claimant’s testing results instead suggested her cognitive abilities were “grossly representative of her pre-morbid capacities” and not expected to adversely affect her daily functioning in any meaningful way. Dr. VanDorsten opined that the Claimant did not require supervision or additional intervention (Respondents’ Exhibit L, pp. 261-266).

11. On May 15, 2013, the Claimant saw Dr. Bisgard for follow up. Dr. Bisgard noted the Claimant had a lumbar MRI which showed only minimal degenerative changes although the Claimant was still complaining of significant back pain. The Claimant was also still reporting headaches. Dr. Bisgard informed the Claimant that she was reducing her practice as she was starting to work part-time and Dr. Mason agreed to assume primary care of the Claimant.

12. When the Claimant saw Dr. Mason on June 4, 2013, she reported feeling better and tolerated her return to work. On physical examination, the Claimant was less tender across the SI areas. The Claimant’s pain levels came down from 6-7/10 at the last visit to 3/10 at this visit and the Claimant reported physical therapy and massage

therapy have been helpful (Respondents' Exhibit E, pp. 103-104). By June 18, 2013, the Claimant's pain level was worse at 4/10 and the Claimant reported a headache as well as increased back pain (Respondents' Exhibit E, pp. 107-108). Due to continued pain in the left SI area, Dr. Mason referred the Claimant for a left SI injection on July 23, 2013 (Respondents' Exhibit E, p. 114).

13. On August 12, 2013, the Claimant was referred to Dr. Floyd Ring for bilateral sacroiliac joint injections which he performed that day (Respondents' Exhibit H, pp. 223-224).

14. When the Claimant saw Dr. Mason on August 13, 2013, Dr. Mason noted the SI injection with Dr. Ring the previous day went well and the Claimant reported that the pain in that area was down to 2/10. The Claimant reported that she continued to struggle with headaches. Dr. Mason noted that the Claimant had less tenderness over the SI area and she looked more comfortable (Respondents' Exhibit E, p. 118).

15. Also on August 13, 2013, the Claimant saw Dr. Kathleen D'Angelo for an independent medical evaluation and the Claimant completed a lengthy questionnaire reporting current complaints of headaches in the top and back of her head 2-4 times per week, pain in the low back, hips and buttocks and intermittent pain going down her right leg and buttock (Claimant's Exhibit 3, p. 64; Respondents' Exhibit B; p. 33). Dr. D'Angelo reports that the Claimant provided the following mechanism of injury:

> [She] was the last person left at her worksite and when she left the store she took out a small trash bag. [The Claimant] states that the cleaning crew had just mopped the floor but did not put up a sign. The patient states that she remembers slipping and her feet going up into the air. She remembers hitting her left knee, hip and shoulder but she does not know if she hit her head. [The Claimant] states that she jumped up really fast because she was embarrassed. She continued to put out the trash and then went back into the store to confront the cleaner who had still not put up a sign indicating the floor was wet.
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> (Claimant's Exhibit 3, p. 65; Respondents' Exhibit B; p. 34).

The Claimant related that she called her supervisor and provided notice that she had fallen and she went home. The Claimant told Dr. D'Angelo that she felt worse and tried to call in sick but couldn't reach anyone so she went in to work but developed a severe migraine and went home and was vomiting the entire day. The Claimant advised Dr. D'Angelo that she had a history of migraines prior to the injury, but they were not in the same place. Her preexisting migraines were in the occipital region following her prior cervical fusion. Since the slip and fall, the migraines are in the frontal and vortex region of her head (Claimant's Exhibit 3, p. 65; Respondents' Exhibit B; p. 34). Dr. D'Angelo prepared a detailed summary of the medical records she reviewed from Dr. Bisgard, Sky Ridge Hospital, Dr. Van Dorsten, and Dr. Mason (Claimant's Exhibit 3, pp. 66-72 and 78-83; Respondents' Exhibit B; pp. 36-42 and 49-54). After physical examination and review of the Claimant’s history and select medical records, Dr. D’Angelo opined that the Claimant’s headaches were entirely preexisting as was her degenerative disc disease, facet joint arthropathy, prior rotator cuff tears and repairs, osteoarthritis of the shoulders and hips and cervical pain with surgical intervention for radiculopathy. Dr. D’Angelo attributed only the following conditions to her work injury: myofascial back pain for which she was at MMI, hip contusion for which she was at MMI and shoulder contusion for which she was at MMI (Claimant’s Exhibit 3, p. 73-74; Respondents’ Exhibit B; p. 44). Dr. D’Angelo opined that the Claimant was at MMI for her work related fall based on her determination that “the patient did not originally have symptoms” and that “she went home and went to bed without trouble” only having worsening symptoms when she woke up the next day and over the next 48 hours (Claimant’s Exhibit 3, p. 74; Respondents’ Exhibit B; p. 44). Dr. D’Angelo expressed concern with the fact that the Claimant has informed treatment providers, as well as Dr. D’Angelo, that she has a history of a traumatic brain injury which affected her memory and ability to write and speak correct words although Dr. Van Dorsten’s neuropsychological testing revealed no evidence of cognitive deficits (Claimant’s Exhibit 3, p. 76; Respondents’ Exhibit B; p. 46). Dr. D’Angelo also expressed concern over “the complete disconnect between the patient’s physical presentation and her complaints” along with the “timeline of symptom development displayed by [the Claimant] (Claimant’s Exhibit 3, p. 76; Respondents’ Exhibit B; p. 46). Ultimately, Dr. D’Angelo opined that the Claimant did not aggravate any preexisting condition, including headaches or cervical radiculopathy, that she suffered no permanent impairment as a result of her fall, and that she requires no further medical treatment related for any work-related condition (Claimant’s Exhibit 3, pp. 77-78; Respondents’ Exhibit B; pp. 47-48).

16. On September 3, 2013 Dr. Mason noted that the Claimant was having a severe migraine, was severely photophobic and was in significant pain and appeared to be in acute distress, which Dr. Mason had not seen before. Dr. Mason referred the Claimant to see a neurologist for potential Botox treatment as the Claimant has not tolerated any prophylactic medication for the headaches (Respondents’ Exhibit E, p. 122).

17. On September 18, 2013, Dr. Mason responded to interrogatories from the Claim Specialist in this case after review of Dr. D’Angelo’s August 13, 2013 IME. Dr. Mason noted that she partially agreed with Dr. D’Angelo’s diagnoses but felt that Dr. D’Angelo reached conclusions about the Claimant’s headaches without the benefit of medical records for the preexisting condition. Dr. Mason specifically disagreed with Dr. D’Angelo’s characterization of the Claimant’s back pain as “myofascial in character.” Dr. Mason opined that the back pain “is caused by sacroiliac dysfunction as she did respond quite well to diagnostic/therapeutic SI injections.” Dr. Mason did not agree that the Claimant had reached MMI at that point. Dr. Mason stated that she would like to have more information before concluding one way or another that the Claimant’s headaches were completely preexisting versus exacerbated by her fall. Dr. Mason also felt that the SI injections may require a repeat and felt the Claimant should complete her physical therapy. Dr. Mason anticipated that the Claimant would reach MMI in approximately three months. Dr. Mason felt it premature to make a determination as to

permanent impairment at this point. Dr. Mason did agree that “the patient is a difficult historian and has had some inconsistencies in her presentation” but suspected that “a large portion of that is just her personality style” (Claimant’s Exhibit 14, pp. 179-180; Respondents’ Exhibit E, pp. 126-127).

18. The Claimant saw PA-C Jordan Mast at Dr. Wolff’s office on September 24, 2013 after last being seen in the office on January 9, 2013. The Claimant reported improvement with botox treatments for cervical dystonia. She had a repeat injection scheduled for February/March but the Claimant canceled the injection as she reported that her neck pain had improved considerably. However, the Claimant reported that since a March 2013 slip and fall at work, when she believes she might have hit the back of her head, that she has worsening migraine with occipital pain moving up to the top of her head with associated light sensitivity, sound sensitivity, nausea and vomiting. PA-C Mast noted that the Claimant is now suffering from chronic migraines which did not happen before the fall, per the Claimant. He recommended Botox injections for this condition (Respondents’ Exhibit G, p. 215). The Claimant received a botox injection for her chronic migraines on October 7, 2013 (Respondents’ Exhibit G, p. 217).

19. After she saw Dr. Wolff, the Claimant saw Dr. Mason on September 24, 2013. Dr. Mason noted the Claimant was “somewhat agitated” about Dr. D’Angelo’s IME report. The Claimant reported her headache was currently at a 4/10 and her back pain was a dull ache (Claimant’s Exhibit 2, pp. 26-27; Respondents’ Exhibit E, pp. 128-129).

20. On October 10, 2013, the Claimant reported that she had a Botox injection done under her primary medical insurance with Dr. Wolff but that the benefit had not really kicked in yet. Dr. Mason noted that the Claimant reported her back was feeling well “and she desires to retain her job very strongly” and requested that she be permitted to return to work full duty. Dr. Mason cleared her for a trial of full duty (Claimant’s Exhibit 2, p. 29; Respondents’ Exhibit E, p. 131).

21. On October 22, 2013, Dr. Paul Stanton, an orthopedic spine surgeon, responded to interrogatories from Claimant’s counsel. He noted that the Claimant reported that she did not have her spine related symptoms prior to her fall in terms of the right sided sacroiliac pain and right lower extremity radiculopathy. Dr. Stanton opined that the treatments of sacroiliac injections, epidural steroid injections and spine evaluation were all related to her work fall. Dr. Stanton stated that he could not estimate MMI for all conditions as “we have not finished with our evaluation and treatment phase” (Claimant’s Exhibit 15, pp. 185-186).

22. On November 5, 2013, the Claimant saw PA-C Mast at Dr. Wolff’s office for follow up after the botox injections to treat chronic migraines. The Claimant reported no major side effects and she noticed some improvement although she was still taking Frova/Relpax nearly every day. The Claimant reported that the day before this appointment was the first time she did not have a headache in a very long time. The Claimant was diagnosed with post-concussive syndrome and medication overuse. PA-

C Mast noted that a significant problem is the Claimant's overuse of Frova and Relpax and he requested she discontinue use of these medications and start taking Verapamil at night instead (Respondents' Exhibit G, p. 219).

23. The Claimant also saw Dr. Mason on November 5, 2013 after she had been back at work full duty, which the Claimant reported was hard. The Claimant was continuing to treat with Dr. Wolff for the headaches reporting the Botox worked well for one-two weeks. The Claimant also reported that her back was bothering her again and Dr. Mason noted tenderness over the SI areas, left more than right. She noted decreased range of motion with forward flexion. Dr. Mason referred the Claimant back to Dr. Ring for possible repeat SI injections (Claimant's Exhibit 2, pp. 32-33; Respondents' Exhibit E, pp. 135-136).

24. The Claimant saw Dr. Scott Hompland on November 27, 2013 for evaluation on referral from Dr. Mason. Dr. Hompland noted left low back pain isolated over the sacroiliac joints, left more than right. Dr. Hompland recommended manipulation, chiropractic treatment, a sacroiliac joint injection or a left sacroiliac ligament trigger point injection. Dr. Hompland noted that the sacroiliac joint injection would probably take care of her pain but would likely be short term. He recommended combining this with a core stabilization exercise program to stabilize the area of the sacroiliac joint and possibly short-term use of a sacroiliac belt (Claimant's Exhibit 2, pp. 35-38; Respondents' Exhibit I).

25. On December 10, 2013, the Claimant saw Dr. Mason for follow up. The Claimant reported that care was currently not authorized under Workers' Compensation and the Claimant was concerned about job loss and reluctant to use her private insurance. Dr. Mason noted the left SI was tender and the left iliac crest was elevated. Dr. Mason agreed with Dr. Hompland that the Claimant would benefit from further PT or manipulation, but the Claimant was reluctant to pursue this due to uncertainty with payment (Claimant's Exhibit 2, p. 39; Respondents' Exhibit E, p. 139).

26. After a SAMMS Conference held on December 18, 2013, Dr. Mason advised the Claimant on January 10, 2014 that Insurer was willing to authorize further injections and physical therapy. However, because the Claimant already had three total episodes of steroid use, Dr. Mason agreed the Claimant may need to wait until March for an additional steroid injection. On physical examination, Dr. Mason noted that the Claimant has decreased movement in the right sacroiliac area but reported more tenderness on the left (Claimant's Exhibit 2, pp. 41-43; Respondents' Exhibit E, pp.141-142).

27. When the Claimant saw PA-C Mast at Dr. Wolff's office again on January 7, 2014, she reported mild-moderate improvement in her headaches. She reported that she continues to have headaches around 2-3 times a week but there is some improvement. The Claimant also reported right hip and low back pain. PA-C Mast commented that he believes the Claimant "suffers from a postconcussive headache which is a result from her fall last year. He recommended starting Gabapentin to treat

neuropathic pain as well as her headache and titrating off the Verapamil. He also recommended a follow up Botox injection (Respondents' Exhibit G, p. 221).

28. Dr. Wolff completed a medical checkbox report which is undated but appears to have been faxed out on January 30, 2014. Dr. Wolff opined that the Claimant's March 17, 2013 work injury caused her to need Botox injections and that she will likely need continuing treatment for a chronic condition. He opined that these headaches are of a different character and frequency since her accident. He noted that while she had headaches prior to her fall, they were much less severe and the Claimant was doing well. He opined that the accident caused "a more chronic, severe, new type of headache in this case as well as exacerbating her chronic head and neck pain issues. He recommended chiropractic care and injection therapy (Claimant's Exhibit 12, pp. 172-173).

29. On February 7, 2014, the Claimant saw Dr. Mason who noted that the Claimant was fitted for an SI belt and she was wearing it at work. On physical examination, Dr. Mason noted the Claimant's right SI was moving and that the Claimant was hypertonic in her paraspinals on both sides with some decree of spasm. The Claimant requested a disabled parking placard, but Dr. Mason declined as she did not feel the Claimant met the requirements. Dr. Mason recommended continued physical therapy, use of the SI belt and reserved the possibility of further injections until March (Claimant's Exhibit 2, pp. 45-46; Respondents' Exhibit E, pp. 144-145).

30. On February 20, 2014, Dr. Kristin Mason testified by deposition prior to a May 8, 2014 hearing before ALJ Michael Harr. Dr. Mason testified that the Claimant first came to her as a consult and then primary care was transferred from Dr. Bisgard shortly after (Depo. Tr., Dr. Kristin Mason, February 20, 2014, p. 7). With respect to how the Claimant's pre-injury headaches compared to her headaches after the March 17, 2013 fall, Dr. Mason deferred to Dr. Wolff who treated her before and after the incident (Depo. Tr., Dr. Kristin Mason, February 20, 2014, p. 13). Regarding the Claimant's back pain, Dr. Mason "felt like her pain was more mechanical relevant to sacroiliac joint dysfunction, and multiple other examiners have agreed with me on that. And partly because she responded extremely well to sacroiliac interarticular joint injections" experiencing "both a diagnostic and a therapeutic response" (Depo. Tr., Dr. Kristin Mason, February 20, 2014, pp. 14-15). Dr. Mason specifically opined that the pain the Claimant refers to as hip pain is actually pain in her SI area and that it's related to the sacroiliac joint dysfunction which is from her work-related fall (Depo. Tr., Dr. Kristin Mason, February 20, 2014, pp. 15-16). With respect to the Claimant's SI joint dysfunction condition, Dr. Mason testified that the Claimant was still undergoing treatment, including consideration of repeat SI injections. She anticipated that the Claimant would be at MMI about eight weeks after those repeat injections. Dr. Mason noted the Claimant was continuing to improve with treatment (Depo. Tr., Dr. Kristin Mason, February 20, 2014, p. 19). On cross-examination, Dr. Mason was questioned if the Claimant was maximizing her subjective complaints and disability or if she was trying to get back to full functioning level as quickly as possible. Dr. Mason noted that "she's not typical of some of my chronic pain patients who report being worse at every

visit no matter what." Dr. Mason reported that the Claimant does report improvement in her symptoms, just that there has also been fluctuation (Depo. Tr., Dr. Kristin Mason, February 20, 2014, p. 32).

31. The Claimant saw Dr. Mason on February 25, 2014 reporting that she was experiencing increased pain as she has worked six days in a row without a day off. The Claimant described that "her hip bones feel like they have been hit by a hammer, also her tailbone." The Claimant wanted to proceed with injections with Dr. Ring which Dr. Mason found reasonable and recommended. The Claimant's left SI was tender and the Claimant was not wearing her SI belt that day (Claimant's Exhibit 2, p. 50; Respondents' Exhibit E, p. 147).

32. On February 26, 2014, Dr. Adam Wolff testified by deposition prior to a May 8, 2014 hearing before ALJ Michael Harr. Dr. Wolff testified as an expert in the fields of neurology and neurophysiology (Depo. Tr., Dr. Adam Wolff, February 26, 2014, p. 6). Dr. Wolff treated the Claimant both prior to and after her March 2013 accident neurophysiology (Depo. Tr., Dr. Adam Wolff, February 26, 2014, pp. 6-7). Comparing the pain symptoms the Claimant had prior to the March 2013 to the pain she was describing after the fall, Dr. Wolff testified that the pain was in a different region. Before it was more from the occipital region down into the mid-neck region. After the fall, it was more vertex or top of her head related (Depo. Tr., Dr. Adam Wolff, February 26, 2014, p. 17). Dr. Wolff further described that the Claimant has more of a head pain now rather than the neck-centric pain she experienced before (Depo. Tr., Dr. Adam Wolff, February 26, 2014, p. 19). Dr. Wolff later opined that "the accident caused a more chronic, severe, new type of headache in this case. And then there is always the possibility that the trauma exacerbated her chronic issues as well, which seemed to be doing well, at least reportedly prior to this fall (Depo. Tr., Dr. Adam Wolff, February 26, 2014, p. 27). In response to Dr. D'Angelo's August 13, 2013 report and her opinion that there were no objective findings to support a determination that the Claimant was suffering new and different headaches and that her head and neck symptoms worsened, Dr. Wolff opined that the difficulty with migraine and postconcussive syndrome cases is that most of the time there are not objective findings (Depo. Tr., Dr. Adam Wolff, February 26, 2014, p. 28). On cross-examination, when questioned about other causes besides postconcussive syndrome for the Claimant's headaches, Dr. Wolff agreed that there are many causes for headaches besides falling, but in this case, he did not think it was possible (Depo. Tr., Dr. Adam Wolff, February 26, 2014, pp. 33-34). Although, Dr. Wolff did concede that he is dependent on the Claimant being an accurate historian in terms of her accurately portraying her symptoms and conditions (Depo. Tr., Dr. Adam Wolff, February 26, 2014, p. 37).

33. On March 4, 2014, the Claimant was referred to Dr. Floyd Ring for repeat bilateral sacroiliac joint injections which he performed that day (Respondents' Exhibit H, pp. 225-6).

34. By March 18, 2014, the Claimant reported to Dr. Mason that she felt about 50% better after getting the bilateral SI injections. The Claimant continued with physical

therapy and using the SI belt. In PT, the focus was on core stability and the Claimant felt her back and hip were better. The Claimant was having difficulties tolerating medication prescribed by Dr. Wolff and was having trouble sleeping even with a maximum dose of Lunesta. Dr. Mason noted the Claimant appeared fatigued but that her SI joints were moving well with less tenderness. Dr. Mason recommended biofeedback as a nonpharmacologic technique to moderate symptoms (Claimant's Exhibit 2, pp. 57-58; Respondents' Exhibit E, pp. 150-151).

35. On April 15, 2014, Dr. Mason noted that the Claimant had Botox for her headaches the day before and was using the SI belt but was out of PT visits. Dr. Mason commented that "she is suddenly focused on her cognitive issues indicating problems with that. That had been a focus early on but has not really been a prominent complaint for some time." The Claimant complained of "clicking" in the SI joint, but Dr. Mason was not able to discern that on physical examination (Claimant's Exhibit 2, pp. 59-60; Respondents' Exhibit E, pp. 152-153).

36. On May 8, 2014, Dr. Kathleen D'Angelo testified as an expert in occupational medicine and general medicine and as to Level II accreditation matters (Tr. of May 8, 2014 Hrg., p. 5). Dr. D'Angelo testified that she performed an IME of the Claimant at Respondents' request on August 13, 2013 (Tr. of May 8, 2014 Hrg., p. 6). As a result of the Claimant's presentation at the IME, Dr. D'Angelo testified that, "there was a noticeable disconnect between the complaints being presented by the patient and her activity at the time. She would describe an activity that she wasn't able to do and perform that very activity with no apparent distress" (Tr. of May 8, 2014 Hrg., p. 8). Dr. D'Angelo also testified regarding several "very striking" areas of disconnect between the medical records that she reviewed and what the Claimant was telling her. First, Dr. D'Angelo testified that while the Claimant's neuropsychological evaluations were normal, the Claimant continued to reiterate that she was having cognitive issues, and specifically memory issues (Tr. of May 8, 2014 Hrg., p. 9). The next area Dr. D'Angelo discussed was that Dr. Bennett, the ophthalmologist who examined the Claimant noted a "shallow optic disc" from which he concluded the Claimant had an ophthalmological stroke. However, Dr. Bennett did not record "any vision loss secondary to trauma" even though Dr. D'Angelo found that the Claimant perseverated on this issue (Tr. of May 8, 2014 Hrg., p. 10). Based on these sorts of "disconnects," Dr. D'Angelo notes that the Claimant has a number of features of somatic symptom disorder or SSD, meaning that the Claimant internalizes outward stress as physiological symptoms (Tr. of May 8, 2014 Hrg., pp. 10-11). Dr. D'Angelo testified that "nonspecific, vague complaints" such as headaches, atypical memory loss, dizziness, abdominal pain and nausea, without objective evidence of disease, are the types of complaints typical of patients with SSD (Tr. of May 8, 2014 Hrg., p. 11). Dr. D'Angelo testified that this is further demonstrated by "symptom swapping" which is characterized by the Claimant exhibiting persistent but changing symptoms rather than getting better after an injury (Tr. of May 8, 2014 Hrg., p. 13 and p. 31). Dr. D'Angelo finds Dr. Bisgard's medical note on the second visit particularly relevant as Dr. Bisgard states that the Claimant filled in her entire pain diagram as being painful or showing symptoms diffusely throughout her body. Dr. D'Angelo opines that this is classic for

SSD (Tr. of May 8, 2014 Hrg., pp. 13-14). Dr. D'Angelo testified that she believes the Claimant did, in fact, have a fall and suffer contusions. However, by the time Dr. D'Angelo examined the Claimant, she had a normal examination and her myofascial pain, contusions and bruising had resolved by that time. Dr. D'Angelo noted no objective evidence for neurological compromise (Tr. of May 8, 2014 Hrg., p. 15). Dr. D'Angelo finds further support for her SSD diagnosis in the lack of symptom resolution in spite of the treatment the Claimant received between March 2013 and May 2014 (Tr. of May 8, 2014 Hrg., p. 16). Dr. D'Angelo also testified that she found significance in the Claimant's report of her mechanism of injury and the immediate aftermath. In Dr. D'Angelo's opinion, "patients with severe damage after a fall, be it neurological or muscle, do not jump up, do not walk back and confront cleaners who didn't put up a sign. They don't go driving home by themselves…Symptoms of headaches with pos-concussive syndrome are much worse at the time of injury. We see evidence of post-concussive complications decrease with time, not increase (Tr. of May 8, 2014 Hrg., p. 18). In addition to the foregoing, Dr. D'Angelo further disputes that the Claimant had a concussion due to her normal neuro-cognitive test, normal CAT scan and normal examinations (Tr. of May 8, 2014 Hrg., p. 19). Dr. D'Angelo testified that the Claimant simply reporting that her headaches after her work injury were entirely different from the headaches she had before is not evidence to establish a link between the accident and the headaches the Claimant reported after her fall (Tr. of May 8, 2014 Hrg., pp. 20-21). Dr. D'Angelo later opined that the Claimant would have had the same symptoms she had prior to the fall, headache, cognitive difficulties, low back pain, numbness in her right arm, numbness in her legs, that were present before the fall. And that they are going to be present long after the fall (Tr. of May 8, 2014 Hrg., p. 33). Dr. D'Angelo finds that none of the care provided, recommended and prescribed by Dr. Mason, Dr. Ring and Dr. Wolff since August 13, 2013 was reasonable and necessary to treat the effects of the Claimant's March 17, 2013 fall (Tr. of May 8, 2014 Hrg., pp. 33-35).

37. On cross-examination, Dr. D'Angelo testified that Dr. Wolff has had the "misfortune" of not having all of the Claimant's records and based on this lack of access to the records has erred in his opinions and diagnosis of the Claimant (Tr. of May 8, 2014 Hrg., pp. 40-41). Dr. D'Angelo also opined that she does not defer to Dr. Wolff's opinion and finds it to be a disadvantage that he treated her both before and after the work injury as she thinks that this may have predisposed him to a "certain, specific diagnosis and a certain, specific intervention, and he performed them multiple times" (Tr. of May 8, 2014 Hrg., p. 41 and 43). Dr. D'Angelo also testified that she does not agree with the diagnosis by Dr. Wolff and Dr. Mason that the Claimant has SI joint dysfunction (Tr. of May 8, 2014 Hrg., pp. 44-45). Dr. D'Angelo also testified that the headaches the Claimant describes are characterized as "stress headaches" rather than a migraine. Dr. D'Angelo testified that the location of the symptoms is not important, rather it is the constellation of symptoms that characterizes a classic migraine presentations. She also expressed concern that the Claimant has been treated with medications that are contraindicated for patients with a prior ophthamological stroke (Tr. of May 8, 2014 Hrg., pp. 48-49). Dr. D'Angelo also opined that there is no objective evidence that the Claimant's fall exacerbated her headache condition and she believes the medical records show consistent symptoms before and after the injury (Tr. of May

8, 2014 Hrg., p. 51). With respect to the Claimant's SI joint complaints, Dr. D'Angelo opines that she thinks, "they were present before this fall. They will be present long after this fall" in disagreement with Dr. Mason's opinion (Tr. of May 8, 2014 Hrg., p. 53).

38. On May 28, 2014, Dr. Mason provided a Medical Record Review report after being provided with pre-injury medical records identified in her report. These included records of treatment subsequent to her 2004 motor vehicle accident and records for medical treatment subsequent to the Claimant's 1998 work injury. In comparing the recently reviewed medical records to her initial April 16, 2013 evaluation, Dr. Mason notes that,

> the patient specifically denied any history of low back pain. It seems impossible that she would not remember her very prolonged treatment for the 2004 motor vehicle accident. She was able to report a previous work-related injury to the cervical spine and the right optic artery abnormality from 2004. This does seem to be consistent with her pattern of under reporting her prior medical problems and potentially over reporting her current symptoms. Concern regarding over somatization is something that came up with her prior treatment and is consistent with how she has presented for this injury as well.
>
> (Respondents' Exhibit E, pp. 159-163)

39. On June 10, 2014, Dr. Mason confronted the Claimant with the medical record of fairly prolonged treatment for low back pain, neck pain and headaches following her 2004 MVA. Dr. Mason reported that the Claimant stated that it was so long ago and she could not remember. The Claimant reported that she was feeling better overall and the Claimant was scheduled for SI injections on June 15, 2014. Dr. Mason noted that she advised the Claimant that she was approaching MMI. Dr. Mason anticipated referring the Claimant for an FCE following the next round of SI injections (Respondents' Exhibit E, pp. 164-165).

40. The Claimant received bilateral SI joint injections performed by Dr. Hompland on June 16, 2014 (Respondents' Exhibit I, pp. 231-232).

41. The Claimant saw Dr. Mason again on July 1, 2014 after the SI injections performed by Dr. Hompland on June 15, 2014. The Claimant stated to Dr. Mason that "Dr. Hompland unequivocally thinks all of her back problems are secondary to this injury" and the Claimant continued to be concerned that Dr. Mason had confronted her with prior medical records. For her part, Dr. Mason noted that Dr. Hompland is not usually in the habit of making such emphatic conclusions. The Claimant reported to Dr. Mason that she experienced 100% relief from the left SI joint injection and 50-60% on the right. Dr. Mason noted that the SI joint injections were successful and she referred the Claimant for further physical therapy to work on stabilization. Dr. Mason also referred the Claimant for an FCE and opined that she expected to place the Claimant at MMI in one to two months.

42. On July 10, 2014, the Claimant saw Dr. Hompland for follow up after the bilateral SI joint injections. The Claimant reported that “she did not derive the same level of relief with this injection that she had had previously with Dr. Ring’s injections.” Upon reviewing Dr. Ring’s notes, Dr. Hompland noted that Dr. Ring had performed the injections up into the ligamentous structures as well as the SI joint. The Claimant stated that she wanted the additional injections into the ligamentous structures and Dr. Hompland noted that he would seek authorization. Dr. Hompland specifically noted that he “did not define whether or not this is work related” and deferred this to Dr. Mason (Respondents’ Exhibit I, pp. 233-234).

43. On July 15, 2015, the Claimant was seen by PA-C Martha Schantz on referral from Dr. Stanton to establish care with “Dr. Alex” regarding bilateral labrum tears. The note indicates the Claimant stated that she has pain through the gluteus and groin, an inability to abduct legs, and a sensation of the legs ‘popping like rubber bands’ and ‘catching’ when she walks. The Claimant related this to her work injury in the note. Rather confusingly, the note states that the Claimant reports that “she won a lawsuit regarding care and no longer uses work comp. She now uses her own insurance” (Claimant’s Exhibit 9, p. 130). Two days later on July 17, 2015, the Claimant was evaluated by Dr. Alex Constantinides. After physical examination and evaluation, Dr. Constantinides noted he strongly suspects that the Claimant has an underlying anxiety disorder/somatic dysfunction and that chronic pain has caused increased myofascial pain. He nevertheless opined that if the Claimant did not improve significantly very shortly, he would suggest spinal surgery (Claimant’s Exhibit 9, pp. 134-135).

44. The Claimant followed up with Dr. Mason on July 22, 2014 and in the interim, the physical therapy and FCE recommended at the previous visit were denied by a peer reviewer. On examination, Dr. Mason noted hypertonicity in the right-sided paraspinal muscles and some tenderness over the right SI joint and upper buttock. Dr. Mason also noted that the Claimant is perseverating that her ligaments are torn and that she doesn’t want to settle her claim until her ligaments are fixed. Dr. Mason indicated that she was not sure of the status of Dr. Hompland’s recommendation for an injection. She noted that the FCE that was previously recommended would have helped to complete care for the Claimant and determine the need for permanent restrictions Dr. Mason opined that MMI was pending completion of care requests (Respondents’ Exhibit E, pp. 168-169).

45. Crediting Dr. D’Angelo’s opinion as persuasive in his July 25, 2014 Order, ALJ Harr found that Dr. Wolff’s diagnosis of post-concussive headaches was unsupported by the mechanism of injury. ALJ Harr determined that Dr. Wolff speculated that the slip and fall incident might have aggravated the Claimant’s pre-existing headache condition, but only if she sustained head or neck trauma. He found that, based on Dr. Mason’s testimony, neck pain was not prominent in the Claimant’s claim or complaints. ALJ Harr found that the Claimant did not complain of neck pain so Dr. Mason did not diagnose the Claimant with a concussion, or closed head injury. Therefore, without any neck injury due to this claim, and no concussion, ALJ Harr found that Dr. Wolff’s theory that the Claimant’s headaches are related to the slip and fall

incident because they are post-concussive headaches, or because they are from neck trauma, is medically improbable (Respondents' Exhibit DD).

46. Also in his July 25, 2014 Order, ALJ Harr also credited Dr. D'Angelo's opinion as persuasive support for his determination that the Claimant failed to show it more probably true that she requires treatment after August 13, 2013, to cure and relieve the effects of her slip and fall incident. Citing the medical opinion of Dr. D'Angelo, ALJ Harr also found that treatment of the Claimant's headache and cognitive complaints by Dr. Wolff, treatment of her lower back and SI joint complaints by Drs. Mason and Ring, and ongoing physical therapy are unrelated to the slip and fall incident and are not reasonably necessary to cure and relieve the effects of the slip and fall incident. ALJ Harr found it unlikely that treatment of the Claimant's ongoing headache, cognitive, lower back, and SI joint complaints is related or reasonably necessary to cure and relieve the effects of injuries from the slip and fall incident (Respondents' Exhibit DD).

47. On September 9, 2014, the Claimant saw Dr. Mason for her impairment rating (Respondents' Exhibit I, pp. 170-173). For the Claimant's history, Dr. Mason reports,

> [the Claimant] had a fall at work on 3/21/13 and reported she was taking the trash out, there was an unmarked wet floor and she slipped and fell while holding bags. Her feet went off to the right of her and her left knee, hip and shoulder struck the ground. She jumped up quickly but then she felt dazed and started having pain in her neck and back. She yelled at the person who was mopping. She went on to develop nausea, vomiting and a severe headache. She went to the emergency room approximately four days later.

Somewhat at variance with ALJ Harr's incorporation of her testimony in his order, in this report, Dr. Mason notes that "at the time I saw her, she was complaining of headaches associated with nausea. She was also complaining of low back pain. My impression was probable postconcussive syndrome in patent with prior history of significant TBI with residual short-term memory loss, cervical sprain, strain in patient with history of multilevel degenerative disc disease, lumbar sprain, primarily SI mediated, with pain seemingly emanating from the left SI joint." Dr. Mason managed care for the Claimant's headaches and low back/SI joint pain. She noted that the Claimant tried multiple medications for the headaches until they were more controlled on TopaMax and Frova. Later, the Claimant underwent Botox injections for the headaches with Dr. Wolff under her primary medical insurance. For the low back and SI joint condition, the Claimant underwent physical therapy, biofeedback and injections with Drs. Ring and Hompland. Dr. Mason noted that during this time, through April of 2014, the Claimant was tolerating working full duty using and SI belt, but remained very focused on her pain complaints. In May of 2014, Dr. Mason received pre-injury medical records, mostly related to a 2004 MVA and she confronted the Claimant about these records. Dr. Mason noted that the Claimant had prolonged symptomatology involving the neck, head, TMJ and low back and some somatization type issues with her presentation. Dr. Mason noted that, at that same time, there was a pending recommendation from Dr. Hompland for repeat SI injections. Dr. Mason had recommended an FCE and physical therapy which were denied by a peer reviewer. Subsequent to this, Dr. Mason was forwarded paperwork including ALJ Harr's order finding that the Claimant reached MMI in August of 2013. Dr. Mason was subsequently requested to perform an impairment rating for the Claimant. During range of motion measurements, Dr. Mason noted that the Claimant initially gave invalid range of motion, but after Dr. Mason explained that she would have to throw the measurements out if they were not valid, the Claimant made better effort. The Claimant reports that the most recent injections from Dr. Hompland "didn't take," but she has been doing somewhat better. Although, Dr. Mason noted that the Claimant "continues to perseverate on her torn ligaments." Dr. Mason ultimately found that the second set of range of motion measurements were valid and similar to prior casual observation with the Claimant. Dr. Mason assigned a 5% lumber impairment rating for a category II-B specific disorder and range of motion deficits totaling 4% (2% for flexion and 2% for extension) for a 9% total impairment rating. The final assessment was: headaches preexisting and sacroiliac pain with inconsistent response to conservative treatment.

48. Dr. Beatty performed a Division IME of the Claimant and authored a DIME report dated March 5, 2015 (Claimant's Exhibit 10; Respondents' Exhibit A). The history of the injury summarized by Dr. Beatty was a slip on a wet floor with the Claimant falling and hitting her left knee, left hip and left shoulder. The Claimant reported a concussion and vomiting and developed migraines (Claimant's Exhibit 10, p. 146; Respondents' Exhibit A, p. 4). Dr. Beatty conducted an extensive review of the Claimant's medical records, with preexisting records going back to 1982 going up to a February 21, 2013 hip x-ray (Claimant's Exhibit 10, pp. 146-155; Respondents' Exhibit A, pp. 4-13). Dr. Beatty next reviewed and summarized a substantial amount of records from after the date of the work incident on March 17, 2013. The medical records reviewed start on March 21, 2013 and continue through September 9, 2014 (Claimant's Exhibit 10, pp. 155-165; Respondents' Exhibit A, pp. 13-23). The Claimant reported that her pain is primarily in her hip with radiation of pain down into her bilateral legs and occasionally numbness and tingling in her lower legs. Dr. Beatty noted the Claimant's activities are chronically restricted due to her symptoms (Claimant's Exhibit 10, p. 165; Respondents' Exhibit A, p. 23). After consideration of the foregoing and a physical examination, Dr. Beatty diagnosed the Claimant with left sacroiliac strain and left sacroiliitis. He agreed with Dr. Mason's original opinion that the Claimant was at maximum medical improvement as of September 9, 2014 and provided a 13% whole person impairment rating for a specific lumbar spine disorder and loss of range of motion. He did not find any other areas of impairment associated with the Claimant's work injury. Dr. Beatty also noted that apportionment was not appropriate due to the fact the Claimant was functioning without restriction at the time of her injury. He also recommended maintenance care of up to 3 SI joint injections over the next year provided the Claimant has a positive response (Claimant's Exhibit 10, p. 167; Respondents' Exhibit A, p. 25).

49. On October 14, 2014, Dr. Mason prepared a "SAMMS CONFERENCE/IMPAIRMENT REPORT ADDENDUM." She noted that if the judicially determined MMI date of August 13, 2013 is applied, the Claimant would not meet the requirements for a category II-B diagnosis as it places her medically documented post-injury pain at less than six months. Therefore she would not be entitled to a lumbar impairment rating (Respondents' Exhibit E, p. 177).

50. On October 22, 2015, Dr. Paul Stanton responded to questions from the Claimant's attorney. He noted that the Claimant was a current patient of his and that he is treating her for spinal complaints including right sided sacroiliac pain and right lower extremity radiculopathy. Dr. Stanton opines that these conditions are related to her work-related fall on March 17, 2013. The Claimant's treatment with Dr. Stanton is ongoing. Dr. Stanton stated that at the time of the letter, he was awaiting the results of injection therapy to "fully delineate her pain generator." Dr. Stanton attributes the conditions for which he is treating the Claimant to her work injury, in part, due to the Claimant's representation that she was not having difficulties in these areas before. Dr. Stanton opined that the Claimant may eventually require surgical intervention (Claimant's Exhibit 15).

51. On November 19, 2015, Dr. D'Angelo prepared a written Addendum to her IME report after reviewing the impairment ratings provided by Dr. Mason and Dr. Beatty. She noted her disagreement with Dr. Beatty's impairment rating assignment. Dr. D'Angelo pointed out that Dr. Mason opined that since the Claimant did not have greater than 6 months of lumbar pain, the Claimant was not entitled to a rating for lumbar spine complaints. Dr. D'Angelo further opined that, regardless of the duration of the Claimant's complaints, she would not be entitled to an impairment rating (Claimant's Exhibit 3, p. 62; Respondents' Exhibit B, p. 32-A). More specifically, Dr. D'Angelo opined that the Claimant does not have a medically probable claim-related diagnosis, in part, because her minor degenerative MRI findings are consistent with any patient her age and she did not sustain a work related spine injury due to acute, chronic or cumulative trauma. Dr. D'Angelo further finds no need for maintenance care (Claimant's Exhibit 3, p. 63; Respondents' Exhibit B, p. 32-B).

52. Dr. Beatty testified at the hearing on December 10, 2015 as a board certified physician in the area of occupational medicine. Dr. Beatty has been Level II certified since the initiation of the certification process and has continually maintained his certification. Dr. Beatty was the DIME physician in this case. He testified that he performs approximately 75-100 Division independent medical examinations per year and 100% of the patients that he treats are workers' compensation cases. Dr. Beatty testified that he performed a Division IME of the Claimant on March 5, 2015. He had received medical records and reviewed those after his appointment with the Claimant. Dr. Beatty testified that the Claimant appeared uncomfortable in her chair and she moved around a bit. He testified that she was a thin woman and she had concerns about her ability to stay active. Dr. Beatty testified that the Claimant told him about her prior 2004 injury to her neck and low back and advised him that she had no real ongoing problems from that injury and was basically unrestricted in her work activities.

With respect to her 2012 injury, the Claimant advised that the location of her symptoms was (1) in the inguinal area in front where the leg meets the body; (2) in her back across to her hips/buttocks; and (3) along her calves. Dr. Beatty testified that his understanding of the Claimant's injury is that she went down on a fall with her feet in front of her but she rotated and only fell on her left side. Although the Claimant advised Dr. Beatty that she had bilateral hip pain, because Dr. Beatty determined the injury only impacted her left side, he discounted the right sided pain for the purposes of impairment rating. When asked if it was important for Dr. Beatty to know the Claimant had a lumbar injury in her 2004 motor vehicle accident, he testified that it would be important only if there was some indication of SI joint injury in that prior MVA because there is generally not confusion between low back and SI symptomatology. In referring to page 5 of his DIME report (Respondents' Exhibit A, p. 8), Dr. Beatty notes that a May 5, 2004 lumbosacral X-ray that he had reviewed indicated that "the sacroiliac joints were unremarkable."

53. At the time of his DIME examination and report, Dr. Beatty testified that he was not aware of the prior ruling from ALJ Harr dated July 25, 2014, based in large part on the testimony and opinions of Dr. D'Angelo, that the Claimant's condition that was causally related to the Claimant's March 17, 2013 injury had fully resolved without residual or ongoing symptoms on August 13, 2013. Although Dr. Beatty did review Dr. D'Angelo's IME report as part of his medical record review and was, therefore, aware that she had placed the Claimant at MMI for her work related conditions as of August 13, 2013 (Claimant's Exhibit 10, pp. 160-161; Respondent's Exhibit A, pp. 18-19). However, in opining that the Claimant was at MMI in his summary, Dr. Beatty noted Dr. Mason placed the Claimant at MMI on September 9, 2014 (Claimant's Exhibit 10, p. 167; Respondents' Exhibit A, p. 26). Further, on his Division summary sheet, Dr. Beatty handwrote an MMI date of 9/9/14 indicating that he concurred with Dr. Mason's initial opinion that the Claimant was at MMI on September 9, 2014 (Claimant's Exhibit 10, p. 143; Respondents' Exhibit A, p. 1)

54. Dr. Beatty testified that he provided the Claimant with an impairment rating for her SI impairment which combines a Table 53(II)(B) rating and a rating for loss of spinal range of motion. A Table 53 (II)(b) impairment rating under the AMA Guides and the Division Impairment Rating Tips requires six months of documented pain and rigidity for this specific disorder rating. He further testified that ***if*** the Claimant's symptoms had resolved less than 6 months after her injury, then the impairment rating for the SI joint condition and the spinal range of motion impairment would be 0% and he would agree with Dr. Mason and amend his DIME report. However, Dr. Beatty did not testify that, from a medical standpoint, he opined the Claimant's symptoms ***had*** actually resolved less than 6 months after her injury. This testimony came about in reference to Exhibit E, p. 177 which is an Impairment Rating Addendum prepared by Dr. Mason that stated if the judicially determined MMI date of August 13, 2013 was applied, the Claimant would have less than 6 months of medically documented pain and she would not have a category II-B diagnosis and no lumbar impairment rating.

55. On cross-examination, Dr. Beatty testified that a DIME physician is not bound by the authorized treating physician in any way and can have a different opinion

than the ATP. Dr. Beatty also testified that the best objective testing for an SI joint condition is (1) x-ray/MRI and (2) positive response to an injection of anesthesia into the SI joint.

56. The Claimant testified at the hearing on December 10, 2015 that she very recently underwent back surgery performed by Dr. Stanton because her L4-5 nerve was pressing on her leg and she was having bad cramps, like charlie horses. Dr. Stanton has been providing treatment for her low back condition. She testified that her other symptoms were getting worse and her left hip locked up. She testified that bending and twisting affects her. Following her surgery, the Claimant is currently on bed rest and anticipates starting physical therapy. The Claimant testified that treatment for her current hip symptoms is on hold because of her more urgent need for back surgery. She was receiving physical therapy for the hip condition and through physical therapy, her right hip was unlocked and now the left hip gives her more trouble than the right one. She anticipates that the issue of whether or not she requires hip surgery will be addressed after some level of healing from the back surgery. She treats with Dr. Wong for her hip/labrum condition. The Claimant testified that she is also currently receiving treatment for her migraines.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. §8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Issue Preclusion

Respondents have argued that the issues of causation and relatedness and MMI were fully and finally adjudicated by ALJ Harr in his July 25, 2014 Findings of Fact, Conclusions of Law and Order. It is undisputed that this order was not appealed and became a Final Order. Therefore, Respondents argue, these issues are barred.

Collateral estoppel, or issue preclusion, is a judicially created, equitable doctrine that operates to bar relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 84 (Colo. 1999); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction* § 4403 (1981). The doctrine serves to relieve parties of multiple lawsuits, conserve judicial resources, and promote reliance on the judicial system by preventing inconsistent decisions. *Bebo Constr*., 990 P.2d at 84. Although originally developed in the context of judicial proceedings, issue preclusion is just as viable in administrative proceedings and may bind parties to an administrative agency's findings of fact or conclusions of law. *Id*. at 85; *Indus. Comm'n v. Moffat County Sch. Dist. RE No. 1*, 732 P.2d 616, 620 (Colo. 1987).

Issue preclusion bars relitigation of an issue if: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Only when each of these elements has been satisfied are the equitable purposes of the doctrine furthered by issue preclusion. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001).

It is settled law that a full and fair opportunity to litigate an issue requires not only the availability of procedures in the earlier proceeding commensurate with those in the subsequent proceeding, *Maryland Cas. Ins. Co. v. Messina*, 874 P.2d 1058, 1062 (Colo. 1994), but also that the party against whom collateral estoppel is asserted have had the same incentive to vigorously defend itself in the previous action, *Salida Sch. Dist. R-32-J v. Morrison*, 732 P.2d at 1166-67; Restatement (Second) of Judgments § 28(5)(c) & cmt. j (1982). These considerations apply equally to the adjudication of workers' compensation benefits. *Sunny Acres Villa, Inc. v. Cooper, supra*.

Moreover, on multiple occasions, panels of the Industrial Claim Appeals Office have specifically found that a decision in a prior workers' compensation proceeding determined under a 'preponderance of the evidence' standard will not serve as issue preclusion in the context of a subsequent case where the standard is 'clear and convincing evidence.' The differing standards of proof prevent a finding that the issue sought to be precluded is identical. Furthermore, if issue preclusion were permitted in these cases it would allow for prelitigation of the MMI and impairment rating issues prior to the application of the DIME process, providing a means for parties to obtain a tactical advantage, which would encourage additional litigation in contradiction with the stated statutory purpose of avoiding it. *Vigil v. J.E. Dunn Construction Co.,* W.C. No. 4-773-619-01 (ICAO, May 28, 2014); *Madrid v. Trinet Group, Inc.,* W.C. No. 4-851-315-03 (ICAO, April 1, 2014); *Ortega v. JBS USA, LLC,* W.C. No. 4-804-825 (ICAO, June 27, 2013); *Bekkouche v. Riviera Electric,* W.C. No. 4-514-998 (ICAO, December 30, 2008).

Issues endorsed in this case include the issue of overcoming a DIME opinion regarding impairment that turns on whether the Claimant's low back/SI condition was causally related to the Claimant's work injury. In the first hearing before ALJ Harr, the Claimant had to establish entitlement to medical benefits and temporary disability benefits by a preponderance of the evidence. In the current hearing, the DIME opinion on causation and relatedness must be overcome by clear and convincing evidence. Therefore, the issues were not identical. Moreover, this would render the DIME process without the effect intended by the statute. As a result, ALJ Harr's July 25, 2014 order does not bar litigation of the issues of causation, relatedness, MMI, and impairment in the context of the DIME process. ALJ Harr's order predated the DIME evaluation of Dr. Beatty and per the Workers' Compensation Act and the requirements for the application of issue preclusion, neither Dr. Beatty nor this ALJ is bound by the prior order on the issues of causation or relatedness or MMI.

ALJ Clarification of Conflicting Opinions Issued by the DIME Physician and Burden of Proof to Overcome the Opinion of a DIME Physician

The DIME physician's findings include his or her subsequent opinions, as well as his or her initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). If a Division IME physician issues conflicting or ambiguous opinions concerning whether the claimant's condition is work-related or there is an impairment rating, it is the ALJ's province to determine the Division IME's true opinion as a matter of fact. Once the ALJ clarifies the ambiguous opinion regarding these issues, the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. The Division IME's opinions, therefore, must be overcome by clear and convincing evidence even if the opinion is arguably initially ambiguous. Section 8-42-107(8)(b)(III); *Clark v. Hudick Excavating*, W.C. No. 4-524-162 (November 5, 2004); *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. C.R.S. § 8-42-101(3.7); C.R.S. §8-42-107(8)(c). Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Adams v. Manpower, supra*. Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

As found, Dr. Beatty provided the Claimant with a rating for her SI impairment which combines a Table 53(II)(B) rating and a rating for loss of spinal range of motion. A Table 53 (II)(b) impairment rating under the AMA Guides and the Division Impairment Rating Tips requires six months of documented pain and rigidity for this specific disorder rating. At the December 10, 2015 hearing, Dr. Beatty further testified that ***if*** the Claimant's symptoms had resolved less than 6 months after her injury, then the impairment rating for the SI joint condition and the spinal range of motion impairment would be 0%. However, Dr. Beatty did not testify that the Claimant's symptoms ***had*** resolved less than 6 months after her injury. He responded to a hypothetical, but was not asked, and did not testify, that his opinion had actually changed. The DIME physician is not bound by a prior legal determination of MMI arising out of a medical benefits claim. Since Dr. Beatty did not change his opinion in the current hearing, his opinion, as expressed in the March 5, 2015 DIME report, will stand as it is not ambiguous, nor did Dr. Beatty's subsequent testimony contradict his earlier opinion. Therefore, the Respondent will have the burden to overcome the DIME on causation and impairment on the issue of the lumbar/SI impairment rating.

Challenging a DIME Physician Opinion on Causation and Impairment

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury, including whether the various components of the Claimant's medical condition are causally related to the industrial injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Martinez v. Industrial Claim Appeals Office, 176 P.3d 826*. Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of an impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*.

Challenging a DIME Physician Opinion on the Determination of MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." C.R.S. §8-40-201(11.5), C.R.S. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). Therefore, a DIME physician's finding that a party has or has not reached MMI is binding unless overcome by clear and convincing evidence. Whether a party has overcome the Division IME's opinion as to MMI is a question of fact for the ALJ as the sole arbiter of conflicting medical evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

A finding that the claimant needs additional medical treatment (including surgery) to improve his condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1080 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures which offer a reasonable prospect for defining the claimant's condition or suggesting further treatment are warranted would be consistent with a finding that a Claimant was not at MMI. *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (I.C.A.O. August 11, 2000). However, the requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of MMI per C.R.S. § 8-40-201(11.5), nor does the need for recommended diagnostic testing solely to assist in the maintenance of a claimant's condition. *Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

The Respondents' Challenge to the DIME Physician's Impairment Rating which Included a Rating for a Lumbar/SI Condition

The opinions expressed in Dr. Beatty's comprehensive DIME report dated March 5, 2015 are his true opinion, including a determination of MMI as of September 9, 2014 and a whole person impairment rating of 13% based on a AMA Guides, Table 53(II)(B) rating for a specific lumbar disorder and a rating for loss of range of motion. This opinion is supported by Dr. Mason's initial impairment rating prior to her application of an earlier MMI date based on a judicial determination. This rating is also supported by the medical records in evidence and those summarized by Dr. Beatty in his DIME report as the medical records document greater than six months of pain subsequent to the injury as required by the Impairment Rating Tips (Exhibit HH, p. 3). From the outset, the Claimant reported left hip and low back injuries and she consistently reported having these symptoms, although the symptoms would improve and then worsen, alternatively, over the course of her treatment. Although Respondents have argued that these left sided symptoms are preexisting, the right leg, hip and SI joint were the focus of treatment related to a prior 2004 MVA, not the left side. Dr. Beatty specifically discounted the right-sided symptoms in reaching his impairment rating. With respect to her SI joint symptoms, the Claimant experienced a positive diagnostic and therapeutic response to repeat SI joint injections, with Dr. Ring's injections being more effective than those performed by Dr. Hompland.

Dr. D'Angelo's opinions are in stark contrast. In an Addendum to her original IME report, she specifically opined that she disagrees with Dr. Beatty. She opined that the Claimant did not have greater than 6 months of post-injury lumbar pain and therefore the Claimant is not entitled to a rating for her lumbar spine complaints. In her initial August 13, 2013 report, and in testimony presented in a prior hearing regarding medical benefits, Dr. D'Angelo opined that the Claimant was at MMI as of August 13, 2013 for her work related symptoms which had resolved. Further, she has opined that, regardless of the date the Claimant reached MMI, Dr. D'Angelo does not believe that the Claimant is entitled to an impairment rating. She opined that any current symptoms or conditions the Claimant has were either entirely preexisting or were manifesting as a result of the Claimant exhibiting features of somatic symptom disorder (SSD).

Whether or not Dr. Beatty was in error for providing a 13% lumbar impairment rating to the Claimant turns, in part, on the date the Claimant was at MMI for work related conditions. Dr. Mason initially opined that the Claimant was at MMI as of September 9, 2014. Based on this she provided a 9% whole person impairment rating based on a AMA Guides, Table 53(II)(B) rating for a specific lumbar disorder and a rating for loss of range of motion. Only later at a SAMMS conference when she was asked to apply Dr. D'Angelo's MMI date of August 13, 2013 did Dr. Mason state the impairment rating was 0% because the earlier MMI date meant that there was not more than 6 months of medically documented post-injury pain.

Dr. Beatty did not have the Order from the OAC ALJ when he made his MMI determination of September 9, 2014, but he had reviewed Dr. D'Angelo's report which argued for the August 13, 2013 MMI date. After reviewing this, along with all of the other medical reports, Dr. Beatty placed the Claimant at MMI on September 9, 2014. He also provided his impairment rating after determining, with record support, that there was more than six months of documented pain. Dr. Beatty also made a causation determination and has found that the Claimant's left SI joint condition was caused by, or permanently aggravated by, her slip and fall on March 17, 2013. Dr. D'Angelo's opinion is inconsistent, but represents a difference of opinion, based in large part on an opinion that the Claimant exhibits SSD. This does not rise to the level of establishing that the DIME opinion is in error. The conflicting, and even changing, opinions in this case are not sufficient to overcome, by clear and convincing evidence, Dr. Beatty's true DIME opinion that the Claimant is entitled to a 13% whole person impairment rating. The Respondents have failed to overcome the DIME opinion of Dr. Beatty on the issue of impairment.

The Claimant's Challenge to the DIME Physician's Impairment Rating which Failed to Include Ratings for the Claimant's Migraines and Labral Tear and for his Determination of MMI

The Claimant also seeks to overcome the DIME opinion of Dr. Beatty. The Claimant disagrees that the only condition for which the Claimant is entitled to an impairment rating is her lumbar / Table 53(II)(B) condition. The Claimant has argued that the Claimant's migraines and labral tears are related to her claim. The Claimant offers the opinion of Dr. Wolff with respect to the Claimant's migraines and the opinions of Dr. Stanton and medical records from Dr. Alex Constantinides regarding the relatedness of the Claimant's labral tears.

Dr. Wolff opined that the Claimant's headache symptoms prior to the fall and after the fall were in a different region. Per Dr. Wolff, prior to the fall, the Claimant's pain was more neck-centric and now she experiences more chronic and severe headaches. While there are not objective findings to establish this post-injury differentiation in the type and severity of her symptoms, Dr. Wolff testified that most of the time there are not objective findings with migraine and postconcussive syndrome cases. Dr. Mason did view the Claimant reportedly experiencing a migraine on one of her office visits and Dr. Mason noted a markedly different presentation than on other visits. Dr. Mason was more willing to defer to Dr. Wolff who had treated the Claimant both prior to her work injury and afterwards. However, Dr. D'Angelo discounted any new injury or exacerbation for the headache condition related to the Claimant's March 17, 2013 fall. Dr. D'Angelo found that the Claimant's initial presentation after the injury was not consistent with postconcussive syndrome as she opined that symptoms for this condition are worse at the outset and then they improve. She opined this was not a condition where symptoms develop and worsen over time.

Dr. Beatty had access to the medical records from Dr. Wolff's office before and after the Claimant's work injury, the medical records from the worker's compensation physicians and Dr. D'Angelo's opinion. He reviewed and summarized these records and noted that the Claimant reported a concussion. Nevertheless, Dr. Beatty opined that he found no other area of impairment associated with her work injury except for the lumbar impairment. While differing opinions were presented, none rose to the level of establishing by clear and convincing evidence that Dr. Beatty was in error.

Even less evidence was presented by Claimant with respect to the Claimant's labral tear condition. Again, Dr. Beatty was presented with, and reviewed, a significant amount of medical records from before and after the Claimant's injury. He specifically opined that the Claimant’s fall impacted her left side and discounted right-sided symptoms and conditions for the purposes of establishing a permanent impairment rating for the work injury. While Dr. Stanton noted that the Claimant reported that she did not have her spine related symptoms prior to her fall in terms of the right sided sacroiliac pain and right lower extremity radiculopathy, this is not consistent with the older medical records. The July 2015 medical records from Dr. Constantinides’ office likewise do not sufficiently establish a causal link between the Claimant’s fall and labral tears. The Claimant related a bilateral labral tear condition to her work injury, but Dr. Constantinides did not perform any persuasive causation analysis.

Ultimately, while the Claimant presented some records discussing a labral tear condition, the Claimant did not prove by clear and convincing evidence that there is a causal relationship to her work injury. The Claimant has failed to overcome the DIME opinion of Dr. Beatty on the issue of impairment.

Medical Maintenance Treatment after MMI

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). An award for Grover medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to Grover medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993).

The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. HLJ *Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995).

Based on positive diagnostic and therapeutic responses to SI joint injections, the DIME physician recommended maintenance care of up to 3 SI joint injections over the next year, provided she continues to have a positive response. At the time that Dr.

Mason performed her impairment rating on September 9, 2014, she noted that there was a pending recommendation for repeat SI injections. Overall in the medical records, the Claimant experienced positive responses to repeat SI injections and this helped reduce her pain and maintain her level of function so that she was able to return to work on a full time basis. Based on testimony from Dr. Beatty, Dr. Mason and the Claimant, along with support in the medical records, the Claimant has proven by a preponderance of the evidence that the post-MMI medical treatment recommended by Dr. Beatty is reasonably necessary to maintain the Claimant's level of function and prevent further deterioration of her condition.

ORDER

It is therefore ordered that:

1. The true opinion of the DIME physician based on review of all of her reports, testimony and opinions is that the Claimant's lumbar condition is related to the Claimant's work injury and that she was entitled to a 5% impairment rating for the specific disorder and an 8% loss of range of motion rating for a combined 13% whole person impairment rating.

2. The Respondents failed to overcome the DIME opinion by clear and convincing evidence that the Claimant's lumbar condition was not work related and not ratable. Per the opinion of the DIME, the Claimant did suffer permanent impairment as a result of her March 17, 2013 work injury and is entitled to a 13% whole person impairment rating.

3. The Claimant failed to overcome the DIME opinion by clear and convincing evidence that her migraines and labral tear were caused by or permanently aggravated or accelerated by her work injury and deserving of additional impairment rating

4. The Claimant proved that she is entitled to *Grover* medical benefits as recommended by the DIME physician and her ATP Dr. Mason.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see

Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 29, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-994-436

ISSUES

The issues raised for consideration at hearing were compensability, medical benefits and temporary total disability benefits from December 4, 2015 through March 11, 2016.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a now 58-year old male who alleges two work injuries. One on September 4, 2015, when he allegedly knelt on a broken wheel. Second, Claimant claims a work injury over the course of his 16 plus years of employment as a ramp service worker for United Airlines.

2. Claimant specifically claims that "due to my work on the ramp, I have an occupational disease causing my need to have both knees replaced." Claimant also contends that: "on September 4, 2015, I sustained an additional injury to my right knee that caused the pain in my right knee to become worse."

3. The parties each submitted a 6-page job description with photographs for a United "Hub Station Ramp" employee. Claimant testified that the description depicted his job where he had to engage in frequent and repetitive bending, kneeling, crawling, lifting in order to load and unload luggage from an airplane. Claimant contends that these job duties over the course of 16 years caused or aggravated his underlying end stage degenerative bilateral knee arthritis, causing the need for at least one, but potentially two, total knee replacements.

4. On cross-examination, Claimant acknowledged that the job description does not accurately depict his job duties. Claimant admitted that he rarely performed the job tasks in the first four photos in the job description. There are eight photos on the second page of the job description that were numbered in consecutive order from right to left as Nos. 1-8. Claimant testified that he only performed the tasks depicted in photo Nos. 1 and 5. Claimant did not perform any of the tasks shown in

photos No. 2, 3, 4, 6, 7 or 8. Claimant testified that he performed none of those job duties in the photos that were again marked Nos. 1 – 8 on the third page of the job description.

5. Claimant was engaged in repetitive or frequent bending, kneeling, crawling and lifting when loading and unloading bags. However, Claimant admitted that it took him approximately 10 to 15 minutes to load or unload airplane luggage and that he worked on approximately 6 planes per day. This would equate to 90 minutes per shift where Claimant engaged in the tasks of loading and unloading baggage. Claimant also admitted that these job tasks involve alternating walking to get luggage, then lifting it, loading it, sometimes kneeling, sometimes standing, and sometimes bending.

6. The remainder of Claimant's 8 or more hour shift consists of varied job tasks, including use of a computer, telephone, radios, microphone system; walking to the break room or rest room; checking assignments; walking to gates; and a lot of time waiting for air planes. Claimant admitted that his job duties, including loading and unloading planes, were "varied" and do not consist of sustained, repetitive activity such as those of an individual working an assembly line.

7. Claimant testified his only activities outside of work included walking for exercise and watching television. Claimant denied working out in a gym. But in signed discovery responses, Claimant stated under oath that before the alleged work injury, "I was working out at the gym at my apartment building. I can no longer do this" since the work injury. It appeared to the ALJ that Claimant did not consider the work out area in his apartment to be a "gym," and this seeming inconsistency does not reflect any dishonesty by Claimant.

8. Claimant was first seen at Employer designated medical provider, Scott Richardson, M.D., at Concentra, on September 4, 2015. Dr. Richardson reported that Claimant "presents today with both knees hurting." The physician took a history from Claimant as follows: "Both knees hurting for the past one year, worse in past week. He has worked in the pit of aircraft on his knees moving luggage x 16 years. He denies other injuries to the knees." Dr. Richardson diagnosed bilateral chronic knee pain. While Dr. Richardson's records do not mention that Claimant reported kneeling on a broken wheel; Claimant testified that he did tell the doctor about the incident. On September 11, 2015, Dr. Richardson reported that: Patient

states: “when I was kneeling down by the plane, both of my knees felt pain.” Again, no mention of the alleged wheel incident is made. On September 27, 2015, Claimant was seen again at Concentra and diagnosed with arthritis of the knee with no mention the alleged wheel incident. By October 10, 2015, Dr. Richardson reported that both of Claimant’s knees had been hurting him for the “past one year” prior to the initial September 4, 2015 visit and that Claimant “had been using Aleve until the week before he presented – afraid to keep using it. States has been limping one year.” Claimant was diagnosed with bilateral chronic knee pain and arthritis of the knee. By December 7, 2015, Dr. Richardson noted that exacerbating factors to Claimant’s pain level included jumping, kneeling and walking. The diagnosis of chondromalacia of the knee was added to Claimant’s assessment of bilateral chronic knee pain and arthritis. None of the records from Concentra document a work-related injury or even an allegation by Claimant of a work injury, from kneeling on a broken wheel.

9. Claimant underwent an IME by John Douthit, M.D., on September 29, 2015. Dr. Douthit reviewed X-rays from April 21, 2005, that showed a significant loss of joint space in both lateral compartments from an injury Claimant had on March 5, 2005 (at Employer) in which he hit his knees on the dashboard of a cart during a head on with another baggage cart. Claimant’s right knee was painful at the time and an April 7, 2005, right knee MRI showed significant degenerative changes in the medial lateral compartments with no anterior cruciate ligament (ACL). Dr. Douthit was aware that Claimant was seen on June 21, 2005 by knee surgeon, Michael Hewitt, M.D., for the 2005 injury. Dr. Hewitt opined that Claimant had osteoarthritis which pre-existed the March 2005 work injury and it would have been symptomatic in 2015 “regardless of the work he was doing.” Dr. Douthit also noted that Claimant had a serious condition with ACL tears and meniscus damage prior to the 2005 injury, and that Claimant’s degenerative knees were due to traumatic arthritis and not to the duties at Employer. Dr. Douthit identified the “trauma” as whatever pre-2005 event caused Claimant’s ACL tear and meniscus damage that were identified in 2005. The March 2005 work injury was a temporary aggravation or a flare-up of Claimant’s pre-existing condition. Since this condition pre-existed the 2005 work injury, Claimant would have had the diagnosis before the year 2005, when he was in his 40s and had worked loading plane baggage, for only 4 to 5 years. Dr. Douthit noted further that Claimant himself told his treating physician, Dr. Richardson, that he had

been having knee pain for the past year and on the date of the alleged injury he was doing nothing that would have injured his knee in ordinary activities at work; squatting and kneeling with no particular twisting or trauma that would have caused an "injury.'" Indeed, Dr. Douthit noted that Claimant "himself reports that the knee began hurting as he was squatting in the airplane doing nothing unusual."

10. Dr. Douthit noted that "Claimant concealed severe prior injuries of the knees and had a progressive pernicious deterioration and cascading progression regardless of his activities or whatever job he held, and it was inevitable that he would have end-stage arthritis and require the knee replacements." Claimant's need for a right total knee arthroplasty is, according to Dr. Douthit, "imminent and inevitable. The proximate cause was the long standing traumatic arthritis, not cumulative trauma and aggravation related to his work. Dr. Douthit credibly explained that Claimant's knee pain in September 2015, was "simply a continuum of the problems he has had with the knee and he was undoubtedly having knee pain on and off the job."

11. Claimant was evaluated by knee surgeon John Papillion, M.D., on one occasion, September 17, 2015. Dr. Papillion documented that Claimant presented for evaluation of bilateral knee pain, right greater than left. Claimant "states he has been employed on the ramp service for [Employer] for 16 years. He developed progress[ive] pain in both knees with various deformity. He has some pain at rest, difficulty going up and down stairs." According to Claimant, he was kneeling in the belly of the plane on September 4, 2015, when he felt pain in "both knees." Dr. Papillion went on to state that Claimant "had had no recent injury."

12. Dr. Papillion's diagnosis was "end-stage degenerative osteoarthritis, bilateral knees, right greater than left." Dr. Papillion opined that Claimant "clearly has extensive degenerative arthritis in both knees." Dr. Papillion opined "It is my medical opinion that his work related activities for the last 16 years which involve lots of kneeling, squatting, heavy lifting and crawling on the bellies of the planes has caused him to develop progressive degenerative arthritis." Dr. Papillion based his opinion on causation after he reviewed Claimant's job description and "agreed" that the type of work described involves frequent bending, kneeling, crawling in the bellies of airplanes over the years to stack luggage and this job aggravated Claimant's arthritis if it did not cause it.

13. Dr. Papillion's opinion is not persuasive for several reasons. First, Dr. Papillion incorrectly concluded that the job description accurately defined Claimant's job duties and that Claimant engaged in repetitive bending and kneeling hour after hour and completed all kinds of job tasks depicted in photos that claimant never or rarely performed. Claimant, however, admitted that his job duties varied and he spent at most 90 minutes per day loading and loading planes. Even these job tasks involved alternating positions. Dr. Papillion's opinion does not reflect that he correctly understood Claimant's accurate job tasks on a day-to-day basis.

14. Second, Dr. Papillion's opinion is based upon the false notion that prior to September 4, 2015, Claimant never had any problems with his knees or knee pain, because Claimant told Dr. Papillion that he had not experienced any previous problems with his knees and had no prior knee injuries. Dr. Papillion did not know that Claimant had a right knee MRI in 2005 that revealed significant osteoarthritis that pre-dated a March 2005 work injury, and Dr. Papillion was unaware of the March 2005 work injury. Dr. Papillion was also unaware that Claimant was admittedly symptomatic for one year prior to the alleged September 2015 work injury, that Claimant was limping and taking over the counter pain medication for a year prior to seeing Dr. Papillion. Dr. Papillion was unable to provide a complete and credible opinion because he was unaware of Claimant's bilateral knee condition and symptoms prior to September 2015.

15. Third, Dr. Papillion was unaware that Claimant has suffered from Gout for up to-20 years and had been taking prescription pain and anti-inflammatory medication, Indomethacin. At least since 2006, Claimant was on twice the normal dose of Indomethacin. Claimant acknowledged that this medication helped him with his chronic bilateral knee pain. There is no persuasive evidence that Dr. Papillion reviewed any records concerning Claimant's pre-existing knee conditions, including diagnostic tests or medical records from Dr. Hewitt or Dr. Kawasaki, who also treated Claimant for the March 2005 work injury. Nor did Papillion review reports by Drs. Douthit and Lindberg. Rather, he accepted Claimant's inaccurate report of no knee pain and no knee injuries prior to the alleged September 2015 work injury.

16. On January 19, 2016, Claimant underwent an IME at Respondents' request by knee surgeon James P. Lindberg, M.D. In addition to reviewing the job description, Dr. Lindberg has previously participated in job evaluations at Employer and has observed ramp

workers, like Claimant. Dr. Lindberg has a more realistic understanding of Claimant's actual job duties than Dr. Papillion or Claimant's other medical providers.

17. Dr. Lindberg took Claimant's history that on September 4, 2015, Claimant was on his knees wearing knee pads when he knelt down on a broken wheel and felt pain. Claimant denied any knee problems prior to September 2015. Claimant told Dr. Lindberg that prior to that incident kneeling on the wheel, he "never had any pain." However, Dr. Lindberg reviewed Claimant's medical records and became aware of Claimant's pre-existing knee conditions.

18. Dr. Lindberg concluded that Claimant has significant, severe pre-existing bilateral osteoarthritis, right worse than left. In layperson's terms, Claimant has the knees of a 90 year old, even though he is only in his 50s. The Gout that Claimant has suffered from for the past up to 20 years, is a cause of degenerative arthritis. The condition is also genetic and it occurs with aging and time. We know that prior to the 2005 work injury at Employer, Claimant had "no ACL" in his right knee. This is documented by Dr. Hewitt who treated Claimant for the 2005 work injury and it is documented as a pre-existing diagnosis. Thus, more than ten years ago when Claimant was only 47 years old and after working as a ramp employee for only about 4 years, he already had no right ACL. Dr. Hewitt opined that Claimant's 2005 work injury caused a temporary aggravation of a pre-existing, advanced and non-work related arthritic condition.

19. Dr. Lindberg agreed with Dr. Hewitt's assessment that Claimant had pre-existing osteoarthritis which pre-dated the March 2005 work injury, and which would have been symptomatic regardless of the work he was doing. Dr. Lindberg persuasively explained that a person with end-stage arthritis, like Claimant, experiences constant arthritic pain. Claimant's end-stage arthritis would be symptomatic no matter what he was doing. Claimant's Gout medication would mask Claimant's bilateral knee pain. And, despite the medication, within the one year prior to the alleged work injury, Claimant walked with a limp and took over the counter pain medication. While kneeling can cause "pain" kneeling does not cause any damage to the knee. Kneeling did not cause Claimant's pre-existing, severe condition to worsen or progress. The natural progression of degenerative arthritis is to worsen over time, irrespective of activity. In the past ten years, Claimant's bilateral arthritic condition has gone from "bad"

to “really bad.” Claimant’s arthritis would have progressed regardless of where Claimant worked or whether he did not work. And certainly, kneeling on a broken wheel, especially while wearing knee pads, would not aggravate the underlying condition or render Claimant permanently symptomatic. By Claimant’s own testimony, he was already symptomatic one year prior to this alleged incident with the wheel. The wheel incident, if it occurred, changed nothing. Claimant’s job duties as a ramp worker, changed nothing. Claimant would have the same bone on bone bilateral knee arthritis even if he never worked for Employer.

20. Dr. Lindberg also agreed with Dr. Douthit’s opinion that this was not an aggravation of his arthritis, but was indeed a manifestation of his underlying osteoarthritis. Drs. Douthit and Lindberg agreed that no persuasive studies support the contention that bone on bone arthritis is caused by working on one’s knees as a baggage handler, or that such work would predispose a person to the severe and chronic condition. Dr. Lindberg also testified that there is no persuasive scientific or medical evidence to support Claimant’s claim that his job duties as a ramp employee caused or aggravated his underlying bilateral knee arthritis. Dr. Lindberg testified that nothing in the Colorado Medical Treatment Guidelines supports Claimant’s contention that his bilateral knee arthritis was caused by his job duties. Dr. Lindberg was shown what Claimant represented to be an “epidemiological study” of 1157 patients. Dr. Lindberg testified that he was familiar with the article but it has little credibility as the physicians, including surgeons, who sit on the Colorado Medical Treatment Guidelines Board, chose not to accept or follow the so-called findings because the article did not meet its criteria for reliability.

21. The ALJ finds that Claimant suffered from bilateral knee arthritis that was symptomatic for at least one year before the alleged September 4, 2015 work injury. The ALJ rejects Dr. Papillion’s opinion because it is based upon his misunderstanding that Claimant had no prior knee injuries, pain, or symptoms and in other part on a misunderstanding of Claimant’s job duties.

22. The ALJ credits the opinion of ATP Dr. Robinson who did not note that Claimant complained of increased symptoms after he allegedly kneeled on a broken wheel while wearing knee pads or that such event, if it occurred, caused the need for medical treatment. The ALJ also credits the opinions of Drs. Lindberg and Douthit that Claimant’s bone-on-bone

arthritis was not caused by Claimant's employment and did not become permanently symptomatic because of Claimant's employment.

CONCLUSIONS OF LAW

A workers' compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

For a claim to be compensable under the Act, a Claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the judge. *Faulkner,* 12 P.3d at 846.

A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan* v. *Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a Claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re COs,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

An incident, whether traumatic event or simple overuse, which merely elicits pain symptoms does not compel a finding that the Claimant sustained a compensable aggravation or new injury. The increase in pain or increase in symptoms associated with a prior injury does not compel the finding of a new injury or aggravation. *F.R. Orr Construction v. Rinta*, 717 P.2d 965, (Colo. App. 1985). Rather, to receive medical benefits the Claimant must establish that the need for additional medical treatment is proximately caused by the aggravation, and is not simply a direct and natural consequence of the pre-existing condition. *Merriman v. Indus.*

Comm, 210 P.2d 448, 450 (Colo. 1949); *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990)). The ALJ must examine the totality of the circumstances to determine whether there is a sufficient nexus between the employment and the injury such that the accident may be said to have occurred in the scope of the Claimant's employment. *City and County of Denver School District No. 1 v. Industrial Commission*, 196 Colo. 131, 581 P.2d 1162 (1978).

Claimant has not persuaded the ALJ of a nexus between his need for right or bilateral total knee replacements. The ALJ is likewise not persuaded that a traumatic event or repetitive activity at work over time caused Claimant's bilateral knee arthritis or cause Claimant's underlying, degenerative condition to become permanently symptomatic. Rather, the ALJ concludes that it is more likely true than not that occurrence of Claimant's symptoms is the result of or natural progression of his pre-existing arthritic condition that is unrelated to his employment. *See Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002); *.F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995). Whether a claimant's condition is due to the natural progression of a pre-existing condition or a new industrial accident is a question of fact for resolution by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Here, the ALJ relies on the persuasive opinions of Drs. Douthit and Lindberg.

As found, there is no temporal relationship between any of Claimant's specific job duties working the hub station ramp duties and Claimant's need for bilateral total knee replacements. Dr. Papillion's opinion on occupational disease or aggravation of underlying condition is not supported by credible evidence or a thorough causation analysis. He did not apprehend Claimant's actual job duties and could not identify the nature of Claimant's kneeling, the lack of sustained or repetitive kneeling, or Claimant's varied job duties. Dr. Papillion was misinformed regarding Claimant's true job exposure when he reached his opinions. Contrary to the causation assessment recommendations in the Cumulative Treatment Guidelines, he did not obtain accurate and complete exposure information, he did not consider other non-work exposures, and he did not consider possible genetic causes. Rather he relied on a job title and photographs which Claimant himself testified were not accurate. His opinion on exposure is not persuasive. It is also based upon his incorrect belief that Claimant had no knee pain before the alleged September 2015 injury and his lack of knowledge concerning Claimant's 10-20 years of taking a pain medication and anti-inflammatory for gout, a condition which causes arthritis. Thus, Dr. Papillion's opinion on exposure is not a persuasive basis to relate Claimant's bilateral knee conditions and his need for total right or bilateral knee replacements back to the work he did or varying exposures over time.

As found, Dr. Lindberg took into account Claimant's actual job duties and work exposures when reaching his opinion on causation. Dr. Lindberg specifically attended job site evaluations for ramp workers for Employer and testified that he was familiar with Claimant's actual job duties and the nature of the exposures. Claimant's testimony about his actual exposures on the job, agreeing that his job duties were varied and he did not engage in sustained, repetitive kneeling, was credible and persuasive. Although Dr. Papillion focused on the job title, Dr. Lindberg took into consideration the true exposures documented by his own experiences attending actual job evaluations at Employer and confirmed by Claimant at hearing.

ORDER

It is therefore ordered that the worker's compensation claim is hereby

denied and dismissed.

This decision of the Judge is final, unless a Petition to Review this decision is filed within twenty (20) days from the date this decision is served. Section 8-43-301(2), C.R.S. Pursuant to the June 15, 2007, delegation of the Director of the Division of Workers' Compensation, the Petition to Review shall be filed with the Office of Administrative Courts, 2864 S. Circle Drive, Ste. 810, Colorado Springs, CO 80906. See Rule 26, OACRP for further information regarding the procedure to be followed when filing a Petition to Review.

DATED: May 2, 2016

/s/ Kimberly B. Turnbow
Kimberly B. Turnbow, ALJ
Office of Administrative Court
1525 Sherman Street, 4th Floor
Denver, Colorado 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-956-668-05

ISSUES

➢ Whether Claimant has established by a preponderance of the evidence that a right total hip arthroplasty is reasonably needed and causally related to his July 11, 2014 work injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is 55 years old, and has worked for Employer for eighteen years as a pick-up and delivery driver.

2. Claimant credibly testified that his job duties included driving freight from the warehouse to locations for delivery and unloading the freight, using either a pallet jack or manually delivering the freight to its new location.

3. At the time of Claimant's admitted industrial injury, Claimant also worked a part-time position as a ramp man for United Airlines, approximately eight to twelve hours a week, moving bags.

4. Claimant credibly testified that he was able to physically perform both his job as a pick-up and delivery driver for Employer and as a ramp man for United Airlines, without limitation, prior to July 11, 2014.

5. Claimant credibly testified that before July 11, 2014, he was an active outdoorsman and enjoyed hiking, hunting and fishing.

6. On July 11, 2014, after delivering a windshield, Claimant returned to his trailer to pull down the trailer door. As he pulled the door down, the strap he was holding onto broke. He fell backwards, twisting to the right and landing on his right side and right hip. Claimant fell a distance of approximately 4 to 6 feet.

7. On July 16, 2014, Claimant filled out an "Employee Notice of Injury," indicating that he had injured his hip, as well as other body parts.

8. On July 16, 2014, Employer filed an "Employer's First Report of Injury" indicating that Claimant had lost his balance due to a door strap breaking and fell to the ground landing on his right side.

9. On July 16, 2014, at Claimant's first evaluation with authorized treating provider ("ATP") Annu Ramaswamy, M.D., Claimant informed Dr. Ramaswamy that he had injured his hip. Claimant also filled out a pain diagram circling his right hip and

indicating that his right hip pain was 5/10. Claimant's testimony and other marks on the pain diagram establish that Claimant's hip complaint involved his right hip.

10. Although Dr. Ramaswamy's two medical records after July 16, 2014, and prior to August 13, 2014 do not reflect "hip pain," on August 13, 2014 Dr. Ramaswamy noted: "Pt states he noticed right sided groin pain a few days after his injury," and that Claimant had "discomfort with abduction of the hip."

11. On September 4, 2014 Claimant continued to be diagnosed by Dr. Ramaswamy with "some discomfort with abduction of the hip," and Dr. Ramaswamy added "hip" under work related medical diagnosis.

12. Between September 4, 2014 and December 16, 2015, all of the WC164 forms filled out by Dr. Ramaswamy contain a "work related medical diagnosis" of "right hip."

13. On September 24, 2014 Dr. Ramaswamy noted that of the multiple diagnoses Claimant had following his fall off the back of the trailer, by September 24, 2014 the "main issue now is the right shoulder discomfort along with the right hip and groin discomfort." Dr. Ramaswamy referred Claimant to Philip Stull, M.D., "to evaluate the right hip for potential labral tear."

14. On September 30, 2014, at Dr. Ramaswamy's direction, Dr. Stull evaluated Claimant for right hip pain. Dr. Stull's impression and recommendations included:

> The patient is a very pleasant 54-year-old male with a right hip problem. Symptoms began after he fell out of a trailer, the back of her trailer, at work. This occurred July 11, 2014. He works as a truck driver and a baggage handler and he came down onto the right hip and shoulder area in the fall. He had immediate onset of right hip and thigh pain. Since that time he's had persistent symptoms in the right hip area which include activity related pain in the hip grinding, and pain with motion. He has no reported previous problems with the.
>
> * * *
>
> Impression: Symptoms related to osteoarthritis, right hip, with recent impact injury to hip joint; rule out labral tear.
>
> Plan: I recommend a contrast MRI to fully work him up.

15. On October 8, 2014, Claimant underwent an MRI which reflected "mild to moderate osteoarthritis of the right hip joint, likely on the basis of chronic femoroacetabular impingement, associated with a diffuse tear of the right acetabular labrum."

16. Claimant returned to Dr. Stull who transferred the case to his colleague, Nathan D. Faulkner, M.D. Dr. Faulkner reviewed the October 8, 2014 MRI noting that:

> Reviewed the right hip MRI which shows a diffuse tear of the right acetabular labrum and mild degenerative changes within the right hip joint. There is evidence of femoral acetabular impingement.
>
> There are similar but less traumatic symptoms seen in the left hip joint.
>
> * * *
>
> Impression: Right hip acetabular labral tear, mild arthritis, FAI. The patient was without symptoms prior to the work related injury/fall.

17. On April 12, 2015, Dr. Faulkner recommended Claimant proceed with a "right hip arthroscopy with CAM/pincer debridement and labral repair, but awaiting clearance from his cardiologist [Dr. Reusch]."

18. Before clearance could be obtained from Claimant's private cardiologist, Claimant discussed with Dr. Ramaswamy his concern with a relatively inexperienced physician operating on his hip. Dr. Ramaswamy then referred Claimant to Brian J. White, M.D., at Western Orthopaedics.

19. On April 29, 2015, at the initial patient evaluation, Dr. White opined that Claimant "would no longer be a good candidate for hip arthroscopy surgery and would be a better candidate for total hip replacement in the future if and when he is ready for this; however, due to his age, would hold off on doing this as long as possible."

20. At Claimant's next visit with Dr. White on October 21, 2015, Dr. White opined:

> PLANS & RECOMMENDATIONS:
>
> 1. I do not think he is a great candidate for hip arthroscopy.
>
> 2. I discussed this with him again.
>
> 3. I think at this point, probably a total hip replacement would be a more predictable long-term fit for him and allow him to work a little bit better at what he does, driving trucks.
>
> 4. At this point, he would like to schedule.
>
> 5. I have encouraged him to get his crown work done for his hip replacement.

21. On November 16, 2015 ATP White's request for a right total hip arthroplasty was denied by Respondents. *See* Claimant's Submission Tab 9, BS 160.

22. Respondents retained two physicians to evaluate Claimant's condition.

23. On July 9, 2015, Claimant was first examined and evaluated by Respondents' retained physician John D. Hutcherson, M.D. Dr. Hutcherson noted at the time of his evaluation that Claimant was complaining of right hip pain and that the history of illness included injuries to the right hip, knee, and possibly lower back. After his evaluation Dr. Hutcherson issued a report, where in his "assessment" portion he opined:

> Injuries to the right shoulder with subsequent repair and left shoulder injury which is milder. Also, right hip injury and knee injury and possible injury to the lower spine.

24. On November 15, 2015, Respondents retained a second expert, Wallace K. Larsen, M.D., to perform a records review. It was Dr. Larsen's opinion that Claimant was an "appropriate candidate for right total hip arthroplasty." It was Dr. Larsen's opinion, however, that the need for surgery was not related because "there is no specific indication of trauma to the hip." He also opined that Claimant's labral tear was most likely degenerative.

25. Dr. Ramaswamy's deposition was taken on January 14, 2016. He agreed that his records after the first visit of June 16, 2014 until the visit of August 13, 2014 do not reference tthe hip and, therefore, he testified at points in his deposition that the recommended hip surgery could be work related and at other times in his deposition that the need for surgery was not work related.

26. Claimant credibly testified that he had no hip problems prior to July 11, 2014, was an active outdoorsman, and worked two jobs.

27. Medical records were submitted from Kaiser Permanente. Those records reference two occasions of hip pain, including one on June 13, 2012, and left hip pain on December 5, 2012. No persuasive medical evidence of treatment, symptoms, or functional limitations were presented.

28. Based on the totality of the evidence, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that he did not have daily or constant hip pain or hip symptoms prior to his July 11, 2014 work injury. Although Claimant had two references to hip pain in his medical records, he had no functional limitations and was working two jobs at full duty prior to his injury. Claimant remained active before his injury and those activities included hiking and hunting. Since July 11, 2014, Claimant's activities have not returned to their prior levels.

29. The opinions of Dr. Larsen, and to the extent it can be read as conflicting, a portion of the deposition testimony of ATP Ramaswamy, have been considered and rejected. Respondents' first expert, who actually examined Claimant, opined that Claimant's hip injury was work related. The medical records reflect Claimant complaining of hip pain in his initial report and pain diagram, and his continuing reports of right hip pain thereafter. Dr. Larsen's opinion, based on his medical record review, is

rejected because he opines that Claimant had no specific indication of trauma to the hip, and this opinion is not supported by the great weight of persuasive evidence to the contrary.

30. The opinions of Drs. Stull, Faulkner, White and Hutcherson are found persuasive. The ALJ agrees and the medical records support that Claimant experienced no right hip symptoms and/or pain prior to his work injury, and the injury caused immediate and significant limitations and pain in Claimant's right hip that were not present before the work injury. The injury aggravated Claimant's underlying and preexisting mild to moderate osteoarthritis, and accelerated the Claimant's need for a right total hip replacement.

31. Any determination concerning other issues is premature at this time, as a matter of fact.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers Compensation Act of Colorado" (Act), Title 8, Articles 40 to 47, C.R.S., is to ensure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to the employers without the necessity of any litigation. C.R.S. § 8-40-102(1). A Claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Therefore a claimant must prove by a preponderance of the evidence that his injury arose out of and in the course and scope of his employment. C.R.S. § 8-43-201*; City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). *Industrial Commission v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984). Proof that something happened at work, without more, is insufficient to carry burden of proof. *Finn v. Industrial Commission*, 165 Colo. 106 (1968). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo. App. 1998). Moreover, if an incident is not a significant event resulting in an injury, a claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-181 (March 7, 2002). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12P.3d at 846. A Workers' Compensation case is decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Where relatedness, and/or reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO, April 7, 2003). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden to show, more likely than not, that the right total hip replacement is reasonable and necessary and causally related to his work injury. Although the MRI reflects that Claimant had pre-existing mild to moderate osteoarthritis of his right hip, the work injury on July 11, 2014 aggravated Claimant's underlying osteoarthritis and accelerated his need for a right total hip replacement. Prior to July 11, 2014 Claimant was able to work full duty without restrictions, at his full time job and at his part-time job. He had no pain complaints specific to the right hip, and had not sought any medical treatment specific to his right hip. Claimant also was able to maintain a fairly high activity level outside of work prior to July 11, 2014. Although the records reflect at two medical appointments approximately three years ago that Claimant had pain with flexion in his hip, Claimant has met his burden to show, more likely than not, that he did not have significant limitations or pain in his right hip prior to July 11, 2014. The records show that Claimant did not seek any medical treatment for right hip pain complaints prior to his work-related injury. This supports Claimant's credible testimony that prior to his work injury he was not suffering from right hip pain.

Claimant is also credible in explaining the mechanism of injury involved in falling from the back of his trailer and landing on his right hip. Dr. Larsen's opinion that Claimant "had no specific indication of trauma to the hip," is not supported by either Employer's or Claimant's First Report of Injury, the diagram Claimant filled out at his first evaluation with ATP Ramaswamy, or the conclusions or findings of orthopedic specialists Drs. Stull, Faulkner, and White.

The ALJ concludes that the need for the right total hip replacement is due to Claimant's mild osteoarthritis and labral tear, which were diagnosed following his fall from the trailer, which significantly aggravated his asymptomatic underlying mild arthritis and accelerated his need for treatment. No persuasive medical evidence suggests that Claimant would need a total right hip replacement in the future, based upon mild osteoarthritis and, therefore, Claimant has established that he was asymptomatic in his right hip until his work injury of July 11, 2014. Therefore, the ALJ concludes that Claimant has met his burden to show, more likely than not, that the need for the right total hip replacement was aggravated and accelerated by his work injury and the treatment is causally related.

As a matter of law, any determinations concerning other issues are premature.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has established by a preponderance of the evidence that the right total hip arthroplasty is reasonably needed and causally related to his July 11, 2014 workplace injury.

2. Any issues not determined in this decision are reserved for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 3, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-825-331-05

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 5, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 4/6/16, Courtroom 3, beginning at 1:30 PM, and ending at 3:30 PM).

Claimant's Exhibits 1 through 23 were admitted into evidence, without objection, Respondents' Exhibits A through MM were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. The Claimant's opening brief was filed on April 18, 2016. The Respondents' answer brief was filed on April 29, 2016. The Claimant was given 2 working days within which to file a reply brief. The reply brief was filed on____,at which time the matter was deemed submitted for decision.

ISSUES

The issues to be determined by this decision concern the Claimant's request to overcome the Division Independent Medical Examination (DIME) opinion of Neil L.

Pitzer, M.D., and post maximum medical improvement (MMI) medical benefits (*Grover* medical benefits).

On overcoming the DIME, the Claimant bears the burden of proof by clear and convincing evidence. On *Grover* medical benefits, the Claimant bears the burden by preponderant evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Procedural Posture

1. Ultimately, the respondents filed a Final Admission of Liability (FAL), mailed September 19, 2013, admitting liability for temporary disability benefits through September 12, 2013, an MMI date of September 13, 2013, permanent partial disability (PPD) of 10% as a working unit, and admitting for reasonably necessary and causally related post-MMI medical benefits. The Claimant filed a timely objection to the FAL.

2. The Respondents applied for DIME, and Neil Pitzer, M.D., was selected as the DIME physician. As a result of Dr. Pitzer's follow up DIME of September 18, 2014, Dr. Pitzer expressed the opinion that the Claimant was at MMI as of September 18, 2014. He re-affirmed his previous rating of 10% whole person, attributable to cognitive dysfunction. He stated the opinion that the cervical spine was **not** causally related to the admitted injury; and, he was of the opinion that maintenance care was not indicated for the work injury.

3. Subsequent to Dr. Pitzer's ultimate opinions, the Claimant applied for hearing on the issues of overcoming Dr. Pitzer's DIME opinions; and, to prove that the Claimant should receive post-MMI (*Grover*) medical maintenance benefits.

Preliminary Findings

4. The Claimant's date of birth is April 2, 1956. She resides in Gypsum, Colorado.

5. The Claimant was employed as a paraprofessional and translator with the Employer.

6. On May 20, 2010, the Claimant was traveling with a group of students to a field trip in Denver. She lost her balance and backwards on the bus. She fell backward down a couple of stairs by the door at the front of the bus, and hit the closed door.

She thinks she may have blacked out.

7. After returning home from the field trip on the evening of May 20, 2010, The Claimant went to the emergency room at Vail Valley Hospital in Glenwood Springs. The CT scan of the head revealed bilateral subarachnoid bleeds. A CT of the cervical spine showed degenerative disc disease and osteoarthritic changes. There was no acute injury to the cervical spine. Due to the subarachnoid bleeds, the Claimant was transported to St. Mary's Hospital in Grand Junction for a neurosurgical consult.

8. The Claimant was evaluated by Brian P. Witwer, M.D. (neurosurgeon) at St. Mary's Hospital [Respondents' Exhibit P, pp. 225, 228] The Claimant was reporting a moderately severe headache, 8 out of 10 in intensity. The records reflect that the Claimant denied neck or back pain, and her neck was reported to be nontender on physical exam. A CT angiogram of the brain showed: "1. Stable small bilateral subarachnoid hemorrhage. No evidence of intracranial aneurysm." Surgical intervention was not recommended. The Claimant was placed on medication and discharged on May 22, 2010. She was instructed to follow-up with Dr. Witwer in a month. The Claimant returned to Dr. Witwer on July 19, 2010 and August 19, 2010. [Respondents' Exhibit S] Dr. Witwer noted that a CT of the Claimant's head showed complete resolution of the subarachnoid blood that was secondary to the injury. He noted that the Claimant's post-concussive symptoms should resolve slowly with time.

9. The Claimant began treatment with Edward Dent, M.D., at Colorado Mountain Medical on May 28, 2010 [Respondents' Exhibit Q]. Dr. Dent commented: "She continues to have some headache but is improving…She denied any other injuries. She did not have any neck pain…" [Exhibit Q, p. 235] During the course of the physical exam, Dr. Dent noted that the Claimant had good range of motion in her neck and was nontender to palpation [p. 236]. On September 14, 2010, Dr. Dent reported: "…She has been doing some part-time work. She states that she feels very fatigued and continues to have a headache. She has tried to cut down on her Vicodin use with limited success. She reports no new symptoms. She continues to use oxygen intermittently…I really want her to decrease her Vicodin intake and told her I want her to use no more than two tablets per day."

10. Dr. Dent referred Claimant to J. Bradley Gibson, M.D., for a neurology consult [Respondents' Exhibit W]. Dr. Gibson noted that the Claimant had initially been placed on oxygen by her primary care physician, Angela Ammon, M.D. Dr. Gibson performed trigger point injections and bilateral occipital nerve blocks. He referred the Claimant for physical therapy, therapeutic massage, and chiropractic treatment. Dr. Gibson performed EMG and nerve conduction studies on October 26, 2010, which suggested mild bilateral carpal tunnel syndrome. There was no evidence of cervical radiculopathy [Respondents' Exhibit W, p. 458].

11. On December 3, 2010, Dr. Dent discussed the results of a recent repeat

cervical MRI (magnetic resonance imaging): "The scan is normal for her age. There are some multilevel degenerative changes…" [Respondents' Exhibit W, p. 466].

12. The Claimant subsequently began treating with J. Carlos Cebrian, M.D., and Susan Lan, D.O., at Avon Medical Center / Vail Valley Medical Center [Respondents' Exhibit R]. In a report dated November 10, 2011, Dr. Cebrian recommended against further trigger point injections since the Claimant had indicated that the injections only provided improvement for 1-2 hours. He referred the Claimant to Gregory Thwaites, Ph.D., for neuropsychological testing. Dr. Cebrian indicated that he would like to get the Claimant off of narcotics, since the medication could be negatively impacting her headaches and her overall cognitive function.

13. Dr. Thwaites performed neuropsychological testing in March 2012 Respondents' Exhibit U]. Dr. Thwaites noted that the test results were somewhat confusing. Dr. Thwaites indicated that the Claimant's long-standing (pre-morbid) cognitive baseline was difficult to ascertain, but that he suspected it was in the low average range. Dr. Thwaites noted that around Thanksgiving of 2010, the Claimant had sudden onset of dysnomia and fasciculations and was worried about a stroke**.** She experienced some chronic hypoxia and required nasal oxygen. Dr. Thwaites noted that the Claimant had pre-accident diabetes, which is a risk factor for stroke and small vessel disease. The Claimant was also noted to have body habitus for sleep apnea. Dr. Thwaites voiced concerns that there may be an extraneous neurologic process going on, such as small vessel disease or sleep apnea. He recommended 8-10 sessions of cognitive therapy for the work injury. Dr. Thwaites went on to state: "Outside the scope of the workers' compensation system, I strongly recommend that she pursue a polysomnogram to rule out the possibility of sleep apnea … Additionally, she would benefit from getting a MRI of the brain and a full neurologic work-up (including reversible dementia labs) to rule out the possibility of any extraneous neurologic process in her case) [Respondents' Exhibit U, p. 381].

14. An MRI was performed of the Claimant's brain on June 25, 2012 [Respondents' Exhibit V, p. 422]. The following findings were noted: "Multiple white matter lesions. These areas are consistent with regions of demyelization/gliosis. There is an extensive differential, chronic ischemic changes, MS, among others. This would be an atypical finding following head trauma."

15. The Claimant was seen by Dr. Lan at Avon Medical Center Occupational Health on August 9, 2012. She continued to follow-up with Dr. Lan, who placed her at MMI on September 13, 2013 [Respondents' Exhibit R, pp. 275-316]. Dr. Lan referred the Claimant to David Reinhard, M.D., for an impairment rating of the head injury [Respondents' Exhibit CC].

16. Dr. Reinhard assigned the Claimant a 10% rating for cognitive dysfunction related to what he described as a mild traumatic brain injury with bilateral subarachnoid

hemorrhage. Dr. Reinhard commented: "As per the discussion and Dr. Thwaites' report, the severity of her cognitive dysfunction specific to her brain injury is difficult to ascertain. Her cognitive complaints are likely multifactorial and there is a potential influence from non-injury related issues such as obstructive sleep apnea" [Respondents' Exhibit CC, p. 595]. Dr. Reinhard remarked that musculoskeletal impairment would be addressed by Dr. Lan.

17. Dr. Lan initially assigned an impairment rating to the neck on October 3, 2010 [Respondents' Exhibit R, pp. 318-319].

Division Independent Medical Examination (DIME) of Neil Pitzer, M.D.

18. The Respondents applied for a DIME, which was performed by Dr. Pitzer on January 22, 2014 [respondents' Exhibit GG, pp. 608-620]. On the Application for DIME, the Respondents specifically asked that the question of relatedness of the cervical spine be addressed. In his January 22, 2014 report, Dr. Pitzer noted: "…On evaluation today, [the Claimant] has significant memory deficit and feels her memory is getting worse. She did have testing by Dr. Thwaites almost 2 years ago and I'm concerned that the patient may have some ongoing memory issues or a progressive problem based on her evaluation today and her MRI which showed multifocal demyelination or gliosis…I' m also concerned that the patient may have another problem causing worsening of her memory and at this time I would recommend that she be reevaluated by Dr. Thwaites for followup neuropsychological testing to see if there is a worsening of her condition. There may be very well be another cause of her progressive loss of memory and dysfunction since she did have essentially a normal neurologic exam on 5-28-10 by Dr. Dent but now has significant abnormalities on her peripheral examination such as her facial droop and other findings that could not be explained by her subarachnoid hemorrhage…If the patient shows worsening of her condition I think she needs to be evaluated by neurology for non-work related issues for progressive cognitive dysfunction and other probable central nervous system dysfunction and/or disease…" [p. 619]. Dr. Pitzer indicated that the Claimant was likely at MMI for her injuries of May 20, 2010 but he would be more comfortable placing her at MMI and assigning a rating once the additional issues regarding her cognitive decline had been clarified.

19. In his initial January 22, 2014 DIME report, Dr. Pitzer specifically addressed the question of relatedness of the neck. In reaching his opinion that the cervical spine was not related to the work injury, Dr. Pitzer explained: **"She has degenerative changes of the cervical spine which are not related to the work accident and are likely the cause of her range of motion dysfunction…I think it is unlikely she sustained a significant neck injury at this time** (emphasis supplied) and her injections have been primarily aimed at treating her headaches and not her neck pain. There is also evidence of a intervening disc protrusion at C6-7 which was seen on the second cervical MRI and is clearly not from the work injury and likely the

patient has some other problem causing ongoing cervical spine problems…I do not feel she warrants a cervical spine impairment rating given degenerative changes and only minimal improvement with extensive interventions…I do not feel the patient warrants a cervical spine rating since there is documentation that she did not have neck pain on 5-28-10 and primarily has had headaches of an occipital origin. I think it is likely that her headaches may be causing some cervical myofascial pain but this is not a specific spine disorder related to the work injury…" [Exhibit GG, p. 620].

20. Dr. Pitzer recommended that the Claimant stop taking Vicodin: "I would strongly recommend to Dr. Lan that the Vicodin be discontinued. She clearly has headaches all of the time and the Vicodin is no longer helpful and likely impeding her headache resolution" [Respondents' Exhibit GG, p. 620].

Neuropsychological

21. The Claimant returned to Dr. Thwaites for repeat neuropsychological testing on April 21, 2014 [Respondents' Exhibit U, pp. 387-394] Dr. Thwaites noted that the Claimant had interval diagnoses of hypertension and hypercholesterolemia in addition to the diabetes. He discussed his review of additional records, including the DIME report which referenced the brain MRI from June 2012 which showed multiple white matter lesions. The Claimant told Dr. Thwaites that she had a one year history of left facial twitching, intermittent left facial weakness, and left sided ptosis. The Claimant reported that she was having a gradual worsening of her memory over time, and was also having some episodes of either syncope or going to sleep. Dr. Thwaites discussed the Claimant's extraneous risk factors for cognitive dysfunction, including the following risk factors for small vessel ischemic disease: hypertension, dyslipidemia, and poorly controlled diabetes. He noted that the acute onset of sensorimotor symptoms over time also raised the possibility of cerebrovascular disease. Dr. Thwaites further discussed that the Claimant may have sleep apnea, which can cause headaches, fatigue, mood disturbances, cognitive dysfunction, and hypoxemia.

22. In terms of the work injury, Dr. Thwaites suggested that the Claimant undergo 8 to 10 sessions of cognitive therapy, which would be performed as maintenance care [Respondents'Exhibit GG, p. 393]. He noted that the Claimant had elected not to proceed with such sessions in the past. With regard to impairment, Dr. Thwaites commented: "…I suspect that she does have mild to moderate cognitive deficits related to the brain injury itself and should receive a rating for that. Her neurologic examination has worsened across time, she now has an abnormal MRI and has new neurologic complaints that are, in my opinion, outside the scope of the workers' compensation system. Her neuropsychological test scores have declined over time and that would not be related to this work-related injury."

23. In a report dated May 13, 2014, Dr. Lan stated: "I agree with Dr. Thwaites that recent cognitive decline is not related to the initial injury, and workup should be

undergone outside of the worker's compensation system" [Respondents' Exhibit R, p. 338].

24. Another MRI of the brain was completed on July 15, 2014 [Respondents' Exhibit V, p. 429]. The indication noted for this MRI was "stroke like symptoms." Findings included small vessel ischemic changes.

DIME Dr. Pitzer

25. The Claimant returned to Dr. Pitzer for a follow-up DIME on September 18, 2014 [Respondents' Exhibit GG, pp. 622-626]. Dr. Pitzer reported: "… 58-year-old female with ongoing cognitive problems which she states continues to get worse and worse and she cannot remember things. …I would agree that further neurologic workup outside the workers' compensation system is needed for this patient. She is also now diagnosed with baseline hypoxia by her report and there is no specific etiology as to her hypoxia as well as what appears to be sleep apnea. Further workup for this is likely indicated but again not related to the Worker's Compensation issue…Dr. Thwaites did recommend a psychological assessment for adjustment issues but I think given the patient's extremely poor memory, recall and other issues I think she would be an extremely poor candidate for psychological assessment and treatment such as cognitive behavioral therapy. With all due respect to Dr. Thwaites, I think at this time the patient is not a candidate for psychological intervention due to her extremely poor cognitive functioning…" Dr. Pitzer was of the opinion that the Claimant was at MMI as of the date of the follow-up DIME, and felt that the previously assigned 10% cognitive rating was appropriate. Dr. Pitzer reiterated his opinion that the Claimant's neck problems were not related to the work-injury.

26. The insurance carrier sent a copy of Dr. Pitzer's follow-up DIME report to Dr. Lan. After reviewing it, Dr. Lan handwrote a response dated October 24, 2016 – reflecting that she agreed with Dr. Pitzer that the Claimant would not require maintenance care under this worker's compensation claim [Respondents'Exhibit R, p. 356].

Melissa Henston, Psy.D.

27. The Claimant was evaluated by Melissa Henston, PsyD., in March 2015 at the request of Claimant's counsel for further neuropsychological examination [Respondents' Exhibit HH]. Dr. Henston was of the opinion that the Claimant's pre-morbid intelligence was likely in the low average to borderline impaired range. Dr. Henston stated: "At the present time her scores are in fact reflective of a person with no significant issues of dementia, **and no significant residuals of her fall from May 20, 2010** (emphasis supplied)**.** Her intelligence scores for the most part were consistent with her estimated premorbid intelligence" [Respondents' Exhibit HH, p. 635]. Dr. Henston recommended some therapy to address the Claimant's "perception of her

altered self since the accident" [Respondents' Exhibit HH, p. 637]. The ALJ infers and finds that this therapy is recommended to address the Claimant's perception of her altered self since the admitted injury and causally ties into the Respondents admission of 10% cognitive dysfunction, as well as DIME Dr. Pitzer's impairment rating. Dr. Henston recommended that Claimant continue to follow up with her primary care physician for non-work related conditions such as diabetes and high blood pressure.

Claimant's Independent Medical Examination (IME) BY John S. Hughes, M.D.

28. The Claimant was referred to Dr. Hughes for purposes of an IME. Dr. Hughes evaluated the Claimant on June 15, 2015 [Respondents' Exhibit II]. In his report, Dr. Hughes discussed what records were available to him, and noted that the Claimant "offers a quite impoverished medical history..." The Claimant denied any prior head injuries or neck problems [Respondents' Exhibit II, pp. 638-641]. Regarding physical symptoms, the Claimant reported constant right-sided headaches, and that sometimes the right side of her head "gets hot." She indicated that she had been having problems with balance and sometimes her arms ached. She mentioned some symptoms in her legs and that when she walks, "I stumble like I'm drunk…" The Claimant could not recall any of the names of her medications. On physical exam, Dr. Hughes observed unusual neurological symptoms: "Finger-nose testing findings were bizarre bilaterally, with her seemingly not able to find her nose with her finger for 5-10 seconds each time" [Respondents' Exhibit II, p. 642]. Dr. Hughes stated: "I agree with Dr. Thwaites' opinion that post-traumatic disturbances of complex integrated cerebral function generally stabilize or improve over time. It is clear that [Claimant] has sustained deterioration…" [Respondents' Exhibit II, p. 643]. Dr. Hughes noted that the Claimant was on oxygen and he could find no medical record documentation of a diagnosis that would require this treatment [Respondents' Exhibit II, p. 644].

29. Dr. Hughes did not believe that the Claimant should be taken off of MMI status [Respondents' Exhibit II, p. 643]. He felt that a permanent impairment rating to the cervical spine was warranted, based upon the information available to him at the time of the IME. With respect to cervical range of motion measurements, Dr. Hughes cautioned: "She has range of motion impairment but reports to me that she is acutely worse today. On this basis, I believe today's findings of reduced range of motion should be used for comparison purposes only" [Respondents' Exhibit II, p. 644]

30. During his evidentiary deposition on March 17, 2016, Dr. Hughes acknowledged that he had been aware that the Claimant had a prior worker's compensation claim in 1992 involving her neck. He was unaware that the Claimant had previously received an impairment rating for her cervical spine [Hughes Depo. Tr., p. 27]. Dr. Hughes had not been provided with a copy of a DIME report issued by Frederick Coville, M.D., in that prior claim [Respondents' Exhibit LL]. Had he been aware of the prior claim and rating, Dr. Hughes testified it would have affected his

opinion. At a minimum, he would have addressed apportionment of the prior cervical rating [Hughes Depo. Tr., p. 27].

31. In fact, the Claimant had undergone extensive treatment and diagnostics of her neck following a work-related injury with Western Slope Laundry in 1992. [Respondents' Exhibit KK]. Bruce Lippman, M.D., had diagnosed the Claimant with "cervical root syndrome" and myofascial syndrome. After receiving trigger point injections and physical therapy in 1992, the Claimant believed she was getting worse. [Respondents' Exhibit K, pp. 690-694]. She reported pain in her neck, into her left shoulder, and into the arm. Dr. Lippman referred the Claimant to S. Walker, M.D., (orthopedist), who noted that the Claimant's cervical spine was "painful in all motions, including flexion, extension, lateral rotation, lateral bend with about a 50% limitation in motion in all directions." During a follow-up appointment on June 25, 1992, Dr. Walker noted that Toradol was being prescribed to the Claimant for headaches. He commented on a cervical MRI that had been done recently: "We reviewed the MRI and do find that she does have a slight bulging of the C5-6 intervertebral disc, which undoubtedly is the cause of the pain even though it doesn't look like much on the MRI." In a letter to the adjuster dated August 11, 1992, Dr. Lippman stated: "At this point her symptoms are so chronic in spite of analgesics, anti-inflammatories, physical therapy, orthopedic consultation and even a TENS unit that I am afraid the patient is probably going to remain like this for the foreseeable future…"

The Claimant and Dr. Hughes

32. The Claimant testified at hearing that she did not recall having any prior treatment for her neck before the May 20, 2010 incident. She did not recall having any symptoms in her neck prior to May 20th. At the time of hearing, the Claimant did not recall what medications she was taking.

33. Dr. Hughes agreed that the findings reported on the November 29, 2010 cervical MRI were fairly consistent with what one could expect to see in a 59 year old individual. He agreed that the findings were degenerative in nature [Hughes Depo. Tr., pp. 23-25]. Dr. Hughes had no reason to believe that the new onset of a disc herniation at C6-7 that was present on a follow up MRI in 2012 was related to the May 20, 2010 work injury [Hughes Depo. Tr., pp. 25-26]. .

34. Dr. Hughes stated twice during his deposition testimony that although he disagreed with the rating by Dr. Pitzer, he did not find evidence of clear error in his assessment or impairment determination [Hughes Depo. Tr, pp. 12-13; 35]. Indeed, Dr. Hughes, to his credit, conceded that he had a "difference of opinion" with Dr. Pitzer. The ALJ finds that such a difference is not sufficient to make it highly probable, unmistakable and free from serious and substantial doubt that Dr. Pitzer's DIME opinions were in error.

Respondents' IME by Nicolas Olsen, D.O.

35. Dr. Olsen evaluated the Claimant on August 3, 2015 at the request of Respondents [Respondents' Exhibit JJ, pp. 646-672]. Dr. Olsen concluded: "It is my opinion, within a reasonable degree of medical probability, that [Claimant] remains at maximum medical improvement as assigned by Dr.Pitzer on 09/18/14. It is also my opinion, within a reasonable degree of medical probability, that Dr. Pitzer was correct when he did not assign an impairment rating of the cervical spine, trigger thumbs or left shoulder pain and dysfunction. To the degree that [Claimant] continues to suffer some residuals from her subarachnoid bleed, it is my medical opinion, within a reasonable degree of probability, that no further treatment is necessary or related to the work injury occurring on 05/20/10" [Respondents' Exhibit JJ, p. 672]

36. In discussing the cervical spine, Dr. Olsen commented: "…A CT of the cervical spine was negative. Specifically, there was no fracture. Degenerative disc disease and osteoarthritic changes were noted…Dr. Dent's physical examination on 5/28/10 noted the neck demonstrated good range of motion and was nontender to palpation… Congruent with Dr. Dent's notes are serial evaluations from Brian Witwer, M.D., neurosurgeon, who did not make a diagnosis of a cervical spine disorder" [Respondents' Exhibit KK, p. 669].

37. Dr. Olsen issued an addendum report on March 1, 2016, after reviewing additional records [Respondents' Exhibit KK, pp. 673-676], and he testified at hearing. He was accepted as an expert witness in Physical Medicine & Rehabilitation, electrodiagnostics, and the evaluation of work-related phenomena. Dr. Olsen confirmed that he had previously been provided with a copy of Respondents' hearing exhibit packet, and had a copy of that packet with him for reference. He also confirmed that he had reviewed the transcripts from the depositions of Dr. Henston and Dr. Hughes. Dr. Olsen testified in further detail regarding the basis for his medical opinions set forth in his reports. The ALJ finds the testimony of Der. Olsen highly persuasive and credible.

Maximum Medical Improvement (MMI).

38. No physician is saying that the Claimant is **not** at MMI- including authorized treating physicians (ATPs) such as Dr. Lan; the Claimant's IME physicians Dr. Hughes, Dr. Henston; and Respondents' IME physician Dr. Olsen.

39. No physician is saying that Dr. Pitzer clearly erred in assessing the Claimant's permanent impairment, and his decision not to assign an impairment rating to the cervical spine related to the May 20, 2010 work injury.

Ultimate Findings

40. The ALJ finds all of the ATPs, psychologists and DIME Dr. Pitzer credible and persuasive with respect to MMI. The ALJ finds DIME Dr. Pitzer more credible on the issues of lack of causal relatedness of the cervical spine and degree of permanent impairment than opinions to the contrary. Insofar as the Claimant relates her present physical condition to the admitted injury, the ALJ finds her opinion insufficiently grounded in fact, contrary to the weight of the medical evidence and, therefore, lacking in credibility.

41. The ALJ makes a rational choice, based on substantial evidence, to accept the DIME opinion of Dr. Pitzer, and the corroboration thereof by Dr. Olsen, and to reject all opinions to the contrary.

42. The Claimant has failed to demonstrate that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Pitzer's DIME opinions with respect to degree of impairment, MMI, and causal relatedness of the cervical spine are in error. Therefore, the Claimant has failed to prove, by clear and convincing evidence, that Dr. Pitzer's DIME opinions were erroneous with the exception of his opinion that post-MMI maintenance care is unwarranted. The ALJ finds the opinions of the psychologists more compelling, especially in light of Dr. Pitzer's 10% working unit rating for the Claimant's cognitive impairment.

43. As found herein above, the psychological therapy is recommended to address the Claimant's perception of her altered self since the admitted injury and causally ties into the Respondents' admission of 10% cognitive dysfunction, as well as DIME Dr. Pitzer's impairment rating. The Claimant has proven, by a preponderance of the evidence that post-MMI maintenance care, consisting of cognitive therapy for her admitted 10% working unit cognitive impairment, is warranted to address the work-related aspects of her cognitive impairment.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, all of the ATPs, psychologists and DIME Dr. Pitzer were credible and persuasive with respect to MMI. As further found, was DIME Dr. Pitzer more credible on the issues of lack of causal relatedness of the cervical spine and degree of permanent impairment than opinions to the contrary. Insofar as the Claimant related her present physical condition to the admitted injury, the ALJ found her opinion insufficiently grounded in fact, contrary to the weight of the medical evidence and, therefore, lacking in credibility.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the DIME opinion of Dr. Pitzer, and the corroboration thereof by Dr. Olsen, and to reject all opinions to the contrary.

Overcoming the DIME

c. Under Colorado law, a party disputing a DIME physician's opinion must meet the burden of proof by a showing of clear and convincing evidence*.* *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 38 (Colo. App. 2000). "The finding regarding MMI and permanent impairment of a DIME examiner in a dispute arising under subparagraph (II) of paragraph (b) may be overcome only by clear and convincing evidence. § 8-42-107)8)(III), C.R.S. Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). As found, DIME Dr. Pitzer's opinions concerning MMI, degree of permanent impairment, and lack of causal relatedness of the Claimant's cervical spine to the admitted injury must be given presumptive effect, which can only be overcome by clear and convincing evidence.

d. "Clear and convincing evidence" is defined as, "[T]hat evidence which is stronger than a 'preponderance of the evidence,' and which is unmistakable and free from serious or substantial doubt." *People v. Lane*, 581 P.2d 719, 722 (Colo. 1978); *Metro Moving and Storage Co. v. Gussert; Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). A DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade*, 905 P.2d 21 (Colo. App 1995). As found, the Claimant failed to demonstrate that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Pitzer's DIME opinions with respect to degree of impairment, MMI, and lack of causal relatedness of the cervical spine are in error. Therefore, the Claimant failed to prove, by clear and convincing evidence, that Dr. Pitzer's DIME opinions were erroneous-- with the exception of his opinion that post-MMI maintenance care is unwarranted. The ALJ finds the opinions of the psychologists more compelling, especially in light of Dr. Pitzer's 10% working unit rating for the Claimant's cognitive impairment.

Post-MMI Medical Maintenance Care

e. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care for her cognitive impairment, which is reasonably necessary to address the injury, in the discretion of the treating psychologist (s).

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven entitlement to post-MMI medical benefits for the work related aspects of her cognitive dysfunction.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims to overcome the Division Independent Medical Examination of Neil L. Pitzer, M.D., are hereby denied and dismissed.

B. The latest Final Admission of Liability is incorporated herein by reference as if fully restated.

C. The Respondents shall pay the costs of post maximum medical improvement medical maintenance care for the Claimant's work-related psychological dysfunction, subject to the Division of Workers' Compensation Medical Fee Schedule.

DATED this______day of May 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUE

Whether the Division Independent Medical Examination (DIME) opinion of Albert Hattem, M.D. should be stricken because Respondents failed to comply with §8-42-107(8)(b)(II)(A)-(D), C.R.S. in proceeding with a 24-month DIME and Dr. Hattem initiated communication with Authorized Treating Physician (ATP) J. Scott Bainbridge, M.D.

STIPULATIONS

The parties agreed to the following:

1. Dr. Bainbridge was Claimant's ATP.

2. Dr. Bainbridge's January 28, 2014 medical report was not released by his office until November 24, 2014.

FINDINGS OF FACT

1. Claimant worked as a Cosmetic Counter Sales Manager for Employer. On March 5, 2010 he was bending over to move boxes and retrieve products. When Claimant stood up he experienced lower back pain and a burning sensation down his right leg.

2. Claimant was initially diagnosed with lower back pain and a radiculopathy that was most likely caused by a bulging disc. An April 2, 2010 lumbar MRI revealed a broad-based right foraminal/lateral L4-L5 disc protrusion that impacted the exiting right L4 nerve root. The MRI also reflected mild degenerative changes.

3. On July 16, 2010 Claimant underwent a right L4-L5 far lateral discectomy. He subsequently received physical therapy and epidural steroid injections but continued to exhibit right lower extremity radicular symptoms.

4. On December 11, 2013 Claimant underwent an independent medical examination with Neil Pitzer, M.D. Dr. Pitzer noted that Claimant had undergone lumbar surgery three years earlier with no improvement. Claimant had no response to treatment and remained on chronic opioid medication. Dr. Pitzer suspected that Claimant's continuing symptoms were psychologically based. He concluded that Claimant had reached Maximum Medical Improvement (MMI) and assigned a 10% whole person impairment rating.

5. On January 28, 2014 Dr. Bainbridge determined that Claimant had reached MMI. Relying on Table 53 of the *AMA Guides for the Evaluation of Permanent*

Impairment Third Edition (Revised) (AMA Guides), Dr. Bainbridge assigned Claimant a 10% whole person impairment rating for a specific disorder of the lumbar spine. He also assigned Claimant a 24% right lower extremity rating for strength and sensory deficits. The 24% right lower extremity impairment converted to a 10% whole person rating. Combining the lumbar spine and right leg impairments yields a total 19% whole person rating. However, Dr. Bainbridge's medical report was not released by his office until November 24, 2014.

6. On February 13, 2014 Insurer's Claim Specialist Valerie Burke authored a letter to Dr. Bainbridge inquiring whether he had placed Claimant at MMI. Ms. Burke sought clarification because Insurer had received correspondence from Claimant's counsel suggesting that Dr. Bainbridge may have placed Claimant at MMI. She also inquired about Claimant's permanent impairment rating. Ms. Burke requested a response from Dr. Bainbridge by February 27, 2014 so arrangements could be made if a DIME was required.

7. Dr. Bainbridge failed to respond to Ms. Burke's letter. On July 7, 2014 Respondents filed an application for a DIME.

8. On October 1, 2014 Claimant underwent a Division Independent Medical Examination (DIME) with Albert Hattem, M.D. After reviewing Claimant's medical records and performing a physical examination, Dr. Hattem noted that Claimant had undergone a far right L4-L5 lateral discectomy and suffered from post laminectomy syndrome. He also remarked that Claimant had exhibited nonphysiologic behaviors.

9. Dr. Hattem agreed with Dr. Bainbridge that Claimant reached MMI on January 28, 2014. He remarked that Claimant had undergone a relatively minor operative procedure and received significant conservative treatment but continued to experience pain. Relying on Table 53 of the *AMA Guides,* Dr. Hattem assigned Claimant a 10% whole person impairment for a "surgically repaired disk lesion with residual medically documented pain and rigidity." He also assigned Claimant a 14% lower extremity impairment for a right L4 radiculopathy. The 14% lower extremity impairment converted to a 5% whole person rating. Combining the 10% specific disorder rating with the 5% radiculopathy rating yields a 15% whole person impairment for Claimant's March 5, 2010 industrial injuries.

10. Dr. Hattem commented that Claimant suffered from non-work-related hypertension and a five month history of enuresis. He specifically commented that, because it was unlikely that the conditions were related to Claimant's March 5, 2010 industrial incident, he should address the conditions with his personal physician. Dr. Hattem noted in an October 8, 2014 Addendum to his DIME report that he had telephoned Dr. Bainbridge to advice him of Claimant's enuresis complaints. Although Dr. Bainbridge agreed that it was "highly unlikely" that Claimant's enuresis was related to the industrial incident, he recommended an "urgent lumbar MRI to rule out cauda equina." If the MRI did not document any significant pathology, Dr. Bainbridge agreed that Claimant remained at MMI.

11. The record reveals that at least 24 months had passed between Claimant's date of injury and Respondents' request for a DIME. Moreover, on February 13, 2014 Insurer authored a letter to Dr. Bainbridge inquiring about whether Claimant had reached MMI. However, Dr. Bainbridge failed to respond. Finally, Dr. Pitzer performed an independent medical examination and concluded that Claimant had reached MMI.

12. The central dispute regarding the propriety of the 24-month DIME involves whether Respondents have established that Dr. Bainbridge did not determine whether Claimant reached MMI pursuant to §8-42-107(8)(b)(II)(C), C.R.S. Initially, it is undisputed that Dr. Bainbridge concluded Claimant had reached MMI on January 28, 2014. However, the parties were unaware of his determination until they received his report on November 24, 2014. Based on correspondence from Claimant's counsel Insurer sought clarification on February 13, 2014 about whether Dr. Bainbridge had placed Claimant at MMI in order to determine whether to pursue a DIME. However, Dr. Bainbridge failed to respond to the letter. Absent an affirmative determination that Claimant had reached MMI, Respondents reasonably believed that Claimant had not reached MMI and sought a 24-month DIME. The failure of Dr. Bainbridge to respond to Respondents' February 13, 2014 letter prejudiced Respondents and delayed the DIME process. Respondents attempted to comply with the criteria enumerated in §8-42-107(8)(b)(II)(A)-(D), C.R.S. but were unsuccessful. Accordingly, Respondents substantially complied with §8-42-107(8)(b)(II)(A)-(D), C.R.S. in requesting a 24-month DIME. Based on Dr. Hattem's determinations, Claimant reached MMI on January 28, 2014 and sustained a 15% whole person impairment for his March 5, 2010 industrial injuries.

13. Dr. Hattem's report reveals that he completed his examination and reached his conclusions prior to communicating with Dr. Bainbridge. Dr. Hattem concluded that Claimant reached MMI on January 28, 2014 and completed range of motion worksheets. The Addendum referencing the communication with Dr. Bainbridge appears after Dr. Hattem's signature block and is dated one week after the completion of the DIME. There is no suggestion that Dr. Hattem changed his opinions based on communication with Dr. Bainbridge. Furthermore, a review of Dr. Hattem's report reflects that he contacted Dr. Bainbridge to advise him of Claimant's enuresis complaints. Although Dr. Bainbridge agreed that it was "highly unlikely" that Claimant's enuresis was related to the industrial incident, he recommended an "urgent lumbar MRI to rule out cauda equine." If the MRI did not document any significant pathology, Dr. Bainbridge agreed that Claimant remained at MMI. The discussion did not focus on Claimant's date of MMI or impairment rating, but involved treatment for a non-work-related condition. Accordingly, the communication between Dr. Hattem and Dr. Bainbridge does not warrant striking Dr. Hattem's October 1, 2014 DIME report.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-

40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Propriety of 24-month DIME

4. Claimant seeks to strike Dr. Hattem's October 1, 2014 report because Respondents failed to comply with §8-42-107(8)(b)(II)(A)-(D), C.R.S. in proceeding with a 24-month DIME. Section 8-42-107(8)(b)(II)(A)-(D), C.R.S. provides that, if an ATP has not determined that a claimant has reached MMI, an insurer may request a DIME if the following criteria have been satisfied:

> (A) At least twenty-four months have passed since the date of injury;
>
> (B) A party has requested in writing that an authorized treating physician determine whether the employee has reached maximum medical improvement;
>
> (C) Such authorized treating physician has not determined that the employee has reached maximum medical improvement; and
>
> (D) A physician other than such authorized treating physician has determined that the employee has reached maximum medical improvement.

5. As found, the record reveals that at least 24 months had passed between Claimant's date of injury and Respondents' request for a DIME. Moreover, on February 13, 2014 Insurer authored a letter to Dr. Bainbridge inquiring about whether Claimant had reached MMI. However, Dr. Bainbridge failed to respond. Finally, Dr. Pitzer performed an independent medical examination and concluded that Claimant had reached MMI.

6. As found, the central dispute regarding the propriety of the 24-month DIME involves whether Respondents have established that Dr. Bainbridge did not determine whether Claimant reached MMI pursuant to §8-42-107(8)(b)(II)(C), C.R.S. Initially, it is undisputed that Dr. Bainbridge concluded Claimant had reached MMI on January 28, 2014. However, the parties were unaware of his determination until they received his report on November 24, 2014. Based on correspondence from Claimant's counsel Insurer sought clarification on February 13, 2014 about whether Dr. Bainbridge had placed Claimant at MMI in order to determine whether to pursue a DIME. However, Dr. Bainbridge failed to respond to the letter. Absent an affirmative determination that Claimant had reached MMI, Respondents reasonably believed that Claimant had not reached MMI and sought a 24-month DIME. The failure of Dr. Bainbridge to respond to Respondents' February 13, 2014 letter prejudiced Respondents and delayed the DIME process. Respondents attempted to comply with the criteria enumerated in §8-42-107(8)(b)(II)(A)-(D), C.R.S. but were unsuccessful. Accordingly, Respondents substantially complied with §8-42-107(8)(b)(II)(A)-(D), C.R.S. in requesting a 24-month DIME. Based on Dr. Hattem's determinations, Claimant reached MMI on January 28, 2014 and sustained a 15% whole person impairment for his March 5, 2010 industrial injuries.

Communication with ATP

7. Claimant also seeks to strike Dr. Hattem's October 1, 2014 DIME opinion because he initiated communication with Dr. Bainbridge. Section 8-42-107.2(d)(I), C.R.S. prohibits the DIME from contacting any of the authorized treating physicians. However, the statute does not provide a remedy for any violation.

8. As found, Dr. Hattem's report reveals that he completed his examination and reached his conclusions prior to communicating with Dr. Bainbridge. Dr. Hattem concluded that Claimant reached MMI on January 28, 2014 and completed range of motion worksheets. The Addendum referencing the communication with Dr. Bainbridge appears after Dr. Hattem's signature block and is dated one week after the completion of the DIME. There is no suggestion that Dr. Hattem changed his opinions based on communication with Dr. Bainbridge. Furthermore, a review of Dr. Hattem's report reflects that he contacted Dr. Bainbridge to advise him of Claimant's enuresis complaints. Although Dr. Bainbridge agreed that it was "highly unlikely" that Claimant's enuresis was related to the industrial incident, he recommended an "urgent lumbar MRI to rule out cauda equine." If the MRI did not document any significant pathology, Dr. Bainbridge agreed that Claimant remained at MMI. The discussion did not focus on Claimant's date of MMI or impairment rating, but involved treatment for a non-work-related condition. Accordingly, the communication between Dr. Hattem and Dr. Bainbridge does not warrant striking Dr. Hattem's October 1, 2014 DIME report.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to demonstrate that the October 1, 2014 DIME report of Dr. Hattem should be stricken.

2. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 3, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STIPULATIONS

The parties entered into the following stipulations at the January 26, 2015 hearing:

- Respondents authorized the medical treatment from Dr. Prall, including the surgery that Dr. Prall performed on July 3, 2013.

- Claimant's average weekly wage as of April 11, 2013, is $1,060.00.

- Claimant has received $36,903.63 in temporary total disability benefits and $35,195.56 in permanent partial disability benefits under this claim.

ISSUES

The issues presented for determination are as follows:

- Whether Claimant is permanently and totally disabled;

- Whether Claimant has overcome the DIME determination by clear and convincing evidence that she is not entitled to any medical impairment;

- Whether Claimant is entitled to ongoing maintenance medical treatment; and

- Whether Respondents entitled to an overpayment of $72,099.19 in indemnity benefits.

FINDINGS OF FACT

1. Claimant is a 53 year old female who presently resides in Franktown, Colorado.

2. The Employer hired Claimant on January 1, 2005. Claimant worked as an auto broker which involved working with clients who wanted to purchase a vehicle. Claimant's responsibilities included locating the vehicle, evaluating the vehicle, negotiating deals with car dealerships, pulling credit information for her client, and completing financial paperwork. Claimant described the job as involving primarily sitting, with no significant lifting, 20 minutes of walking at a time, driving for as long as 3 hours at a time, and standing up to 30 minutes at a time.

3. On December 19, 2007, Claimant suffered an injury while she was showing a customer a vehicle. Claimant slipped and fell on ice.

4. Claimant immediately reported the injury to the Employer, and chose HealthOne as the authorized provider. Approximately two hours after her injury, Thanh Chau, PA-C evaluated the Claimant. The medical record states that as Claimant was opening a vehicle door, she slipped on ice, both feet slipped out from under her, and she landed on the left side of her body, on her tailbone, and left arm. Claimant denied numbness, tingling or pain radiating down her legs. Claimant reported a prior left shoulder surgery, and she indicated a second surgery had been planned, but she decided to hold off on surgery to try alternative treatment options. Claimant filled out a pain diagram on which she identified issues at her left shoulder, neck, under her tailbone, and at her left wrist. On examination, PA Chau documented decreased range of motion in Claimant's low back into the coccyx area; pain with flexion at 60 degrees; no pain with extension; good lateral flexion with stiffness to the left; and a mild antalgic gait. PA Chau diagnosed a sacral contusion, a left wrist contusion, a left shoulder strain, and a cervical strain.

5. Claimant then underwent medical treatment for the next 19 months.

6. Prior to her work injury, Claimant received regular massages from Donna Allgood, including one less than three weeks before her work accident. Claimant continued to receive massages after her work injury, specifically for symptoms related to the work injury.

7. On December 21, 2007, Claimant returned to HealthOne where Dr. Elizabeth Bisgard evaluated her. Claimant's pain diagram identified issues at her left shoulder, and in the middle of her buttocks, with no indication of right low back or right leg pain. Dr. Bisgard recommended physical therapy using an e-stimulator unit, noting that if Claimant received relief in her shoulder and sacrum with the e-stimulator unit, she could get a home e-stimulator unit.

8. On January 4, 2008, Claimant notified PA Chau she was having left shoulder pain, she planned on having therapy for her shoulder, and she had been receiving alternative treatments for her rotator cuff tear. Claimant's January 4, 2008 pain diagram identified pain in her right hip region. PA Chau noted that Claimant would get started with physical therapy for her shoulder and low back.

9. On January 30, 2008, Claimant was evaluated by Keith Graves, a chiropractor. Dr. Graves reported that most of Claimant's pain was in the right sacroiliac joint, with referred pain to the buttock and right lower extremity. Claimant complained of achiness, soreness and parasthesias in her right leg.

10. On February 19, 2008, Dr. Graves documented that Claimant's chief complaint was in her right buttock/lateral pelvic areas, noting her right lower extremity symptoms had completely resolved. On March 11, 2008, Dr. Graves documented that Claimant's right lower extremity symptoms were no longer present and that Claimant had responded well to his conservative treatment. Dr. Graves noted that it appeared Claimant had moderate neural irritation of the sciatic nerve as it exits out of the sciatic

notch which was secondary to her myofascial guarding response in her right gluteal musculature.

11. On March 14, 2008, Claimant's pain diagram identified her pain as being in the right buttock region. Claimant indicated she was "still having electric pain through my glutes and a ball of pain in my glute." PA Tranh noted that Claimant's pain was mostly in her right buttock with occasional sharp shooting pain down into the right lower extremity. She told PA Tranh that Dr. Graves' treatment of her gluteal muscles was not benefitting her. He referred Claimant for a lumbar MRI, and referred Claimant to Dr. Barton Goldman for a physiatry evaluation and further treatment recommendations.

12. On March 21, 2008, Claimant had a lumbar MRI which was interpreted as showing L4-5 stenosis. Claimant's medical providers, including Dr. Bisgard and Dr. Goldman all agree that the lumbar stenosis was a pre-existing condition.

13. On March 28, 2008, Dr. Bisgard's report states that even though Claimant's primary symptoms were located in her buttocks and hip, Dr. Bisgard had concerns about the level of foraminal stenosis which might be contributing to Claimant's symptoms.

14. On April 1, 2008, Dr. Barton Goldman examined the Claimant. Claimant reported that her pain "has always been more in the right sacrum, ischium and buttock regions, as well as in the hip with occasional groin pain." Dr. Goldman noted that on Claimant's pain diagram, she documented stabbing pain across the right sacrum with throbbing pain across the mid buttocks and pain radiating down into the posterior thigh with some parasthesias across the plantar foot. He also noted buttock and low back pain varying from 3-9 out of 10. Dr. Goldman noted that Claimant has difficulty lifting her right leg in terms of dressing herself.

15. Claimant reported increased pain with bending forward, but not with extension. Dr. Goldman indicated "I explained to the patient that her MRI scan most likely represents [a] long standing pre-existing condition that probably explains her limited extension range of motion, but does not correlate with her pain, which is more in flexion and seems to more involve the buttock and hip structures." Dr. Goldman diagnosed chronic sacroiliac joint dysfunction with left piriformis syndrome and lumbosacral myofascial pain, left hip strain with greater trochanteric bursitis secondary to her work-related fall in December 2007. Dr. Goldman referred Claimant for an MR arthrogram of her right hip.

16. On April 9, 2008, Claimant's right hip MRI was read as showing bilateral hamstring tendinopathy, with marrow edema in the ischial tuberosities.

17. On April 11, 2008, Claimant's pain diagram identified her painful areas as being at her right lower and upper buttocks.

18. On April 17, 2008, Dr. Goldman reviewed the right hip MRI, and a bone scan, noting that Claimant had a contusion type of injury to the right more than left ischium, with subsequent bursitis and hamstrings tendinosis, and clear myofascial pain

involving the piriformis and glutei. Claimant continued to complain of pain in the right buttock, sacral and thigh region with parasthesias in her right foot.

19. Claimant then went through a conservative medical course directed at her right hip region, her piriformis myofascial area, and her ischial bursa region. This care included a second MRI, which identified a very small, partial thickness tear in her right hip. Claimant then underwent a right hip injection.

20. On April 25, 2008, Dr. Goldman noted Claimant continued to have pain primarily in the right buttock and sit bone area with some radiation toward the iliac crest. Claimant had an active trigger point in her glute, and a less significant piriformis trigger point. Dr. Goldman noted in his record that although he did not believe that the small right hip labral tear was symptomatic, Claimant may wish to have a second opinion. Dr. Goldman suggested that Claimant see Dr. Gary Hess for an orthopedic hip evaluation. Claimant indicated she would make a decision concerning this referral at her next visit with Dr. Bisgard which was scheduled for April 29, 2008.

21. On April 29, 2008, Claimant completed a pain diagram during her visit with Dr. Bisgard that identified her pain as being in her right lower buttock and right hip areas. Dr. Bisgard concurred with Dr. Goldman's referral to Dr. Hess.

22. On May 8, 2008, Dr. Hess noted that Claimant's symptoms centered in the right groin region with radiation from the groin into the buttock area. Dr. Hess examined Claimant, finding "no tenderness noted over the lumbosacral". Dr. Hess's impression was early degeneration of the hip joint, with persistent synovitis.

23. On May 15, 2008, Claimant's pain diagram identified her pain area as her right buttock region.

24. On June 12, 2008, PA Chau examined Claimant, noting her affect was bright, she did not have an antalgic gait, she sat comfortably through her exam, and she could cross her right leg without discomfort. Claimant reported to PA Chau that the frequency of her lower back pain and right hip pain had decreased. PA Chau noted that Claimant responded well to the injection performed by Dr. Hess on May 23, 2008, and the plan included trigger point injections to help with the remaining pain.

25. On June 16, 2008, Dr. Goldman noted that Claimant received a right hip injection from Dr. Hess on May 23, 2008, which helped with her zingers. Dr. Goldman noted Claimant's pain was predominantly in the right buttock region. Dr. Goldman also noted that Claimant had an entirely normal neurologic examination, and that "it does seem unlikely at this point in time that most of her pain, at least from a work related perspective, is due to intra articular or joint issues per se. It now appears to be more of a soft tissue injury." Dr. Goldman recommended additional injections for her buttock and hip pain, and he referred her to physical therapy for treatment in those regions.

26. On June 18, 2008, Claimant started in a course of therapy with Joseph Patton, PT, at Lone Tree Physical Therapy. Mr. Patton noted mild right SI joint dysfunction, tenderness at the ischial tuberosity, greater trochanter and piriformis;

decreased hip mobility into external rotation; and tightness in the piriformis, hamstrings and psoas. Claimant had seven sessions of therapy between June 18, 2008 and July 9, 2008.

27. On June 24, 2008, Dr. Goldman provided a right piriformis injection, a right greater trochanteric bursa injection, and a right ischial injection. Dr. Goldman noted that Claimant's neurological exam of her lower extremities remained normal. Dr. Goldman's impressions included chronic right sacroiliac joint dysfunction with right piriformis syndrome, hamstrings tendinosis, ischial bursitis and greater trochanteric bursitis.

28. On July 1, 2008, Dr. Goldman noted Clamant was delighted with the results of those injections, and while she still had mild buttock pain, the pain across her sit bone was better than she could remember. Dr. Goldman again injected Claimant's right piriformis, and he recommended continued therapy. On July 7, 2008, Mr. Patton reported that Claimant's trochanteric pain and piriformis pain had both improved, but her ischial tuberosity was inflamed.

29. On July 8, 2008, Dr. Bisgard placed Claimant at MMI with no permanent impairment. Claimant's pain diagram identified her pain area as being in her right buttock. Claimant also indicated on that form "no more zingers across my butt or down my butt". Claimant did not identify any right low back or leg pain Claimant told Dr. Bisgard that she would like to wrap things up with her care. She reported significant pain in her right buttock which she said was not interfering with her work. Claimant stated that making it to all of her appointments is causing her too much stress. Dr. Bisgard noted that Claimant was "significantly" better with the injections. Dr. Bisgard also noted that Claimant "reports no neurologic symptoms and no numbness, tingling, or weakness in her legs." On exam, Dr. Bisgard confirmed Claimant was neurologically intact, and her reflexes, strength, sensory and vascular exams were all normal. Finally, Dr. Bisgard indicated Claimant could finish up with Mr. Patton in therapy, and she scheduled Claimant for an October 2008 maintenance visit.

30. Claimant had her last PT visit on July 9, 2008. She still was experiencing pain in the ischial tuberosity although her GT and piriformis had improved.

31. The medical records contain no specific documentation of right lower extremity issues after April 17, 2008 through MMI. At hearing, Dr. Bisgard admitted that she was aware of no medical records between those dates that would support her opinion that Claimant had symptomatic lumbar stenosis during that period. As Dr. Bisgard pointed out, Claimant's complaints, and all of her care, were focused on her buttock and hip regions.

32. Claimant testified that she felt like she had done everything her medical providers had asked her to do, and that much of the treatment gave her only temporary relief. She felt stressed about missing work because her compensation was commission-based. Missing work caused her to lose income. Claimant hoped her symptoms would resolve with time, but they did not. She explained that her symptoms were mainly in her buttock and low back, and did not go all the way down her leg.

33. The Respondents filed a Final Admission of Liability on August 26, 2008. The FAL indicated that the Respondents denied liability for maintenance medical care. The Claimant's claim closed at that time.

34. Claimant returned to HealthOne on October 28, 2008 for the maintenance care visit. There is no indication that Respondents failed to authorize the visit or pay for it. Claimant reported that she had significant improvement and normal range of motion. She denied radiculopathy or radicular symptoms. Either Dr. Bisgard or her PA discharged Claimant from care at that time.

35. Claimant resumed treatment, which the Insurer approved and paid for, under this claim on August 20, 2009 when she saw PA Chau for a one-time visit. She complained of a flare up in her right low back pain. The note specifically states, "Four days ago, she noticed "increased" pain in her right lower back with leg soreness and pain that extends down into the right later foot." The Claimant reported that the symptoms were similar to those she experienced due to her work injury. The Claimant reported that the pain had worsened over the past four days rising to a level 9 out of 10. PA Chau prescribed medications and recommended temporary work restrictions. Dr. Bisgard agreed to the treatment recommendations.

36. On September 22, 2009, Dr. Bisgard evaluated Claimant, noting that she was referring Claimant back to Dr. Hess for a hip injection to get Claimant back to baseline. Dr. Bisgard also recommended additional treatment with Dr. Graves. Claimant's pain diagram that day showed pain going down her right leg.

37. On October 9, 2009, Claimant saw Dr. Hess, who noted that "over the past few weeks, [Claimant] developed significant pain in the right buttock region with radiation down the posterior aspect of the right leg towards the right low foot."

38. On October 13, 2009, Dr. Bisgard noted that Dr. Hess felt they were no longer dealing with a hip issue. She noted that Dr. Hess was concerned about sciatica, and he referred Clamant for a repeat lumbar MRI. Claimant's pain diagram that day again documented pain shooting down Claimant's right leg. On October 13, 2009, a lumbar MRI was obtained that showed central and lateral canal stenosis at L4-5 level caused by a combination of disc protrusion, ligamentum flavum hypertrophy, and facet arthropathy changes.

39. On October 23, 2009, Dr. Goldman evaluated the Claimant. Dr. Goldman noted that Claimant presented to Dr. Bisgard in August 2009 with highly accelerated pain levels. Dr. Goldman noted that Claimant's MRI showed some progression of the L4-5 stenosis. Dr. Goldman's assessment was lumbosacral spondylosis, and stenosis pre-existing and "possibly" aggravated by work related injury; secondary right piriformis syndrome, sciatica and greater trochanteric bursitis, right S1 radiculitis; degenerative joint disease right hip, anxiety, deconditioning, and diabetes. Dr. Goldman recommended staged variable duration epidural steroid injections.

40. On November 10, 2009, Dr. Bisgard stated:

> I understand there may be some concerns about causaility. However, in careful review of her medical records, I have pointed out previously that we thought the symptoms were coming from the hip, but as the hip symptoms resolved, her clinical picture become more suggestive of diskogenic pain and radicular symptoms. In review of her history, it is my opinion based on a reasonable degree of medical probability and certainty that her current symptoms are indeed attributable to a work injury, as there has been no intervening event, and it is likely that symptoms she was experiencing did have some diskogenic/radicular component, but we were focused on the hip portion of his as opposed to the lumbar component.

41. Dr. Bisgard supported Dr. Goldman's recommendations for epidural steroid injections and an EMG. Dr. Bisgard noted that Claimant is highly motivated and did not want to be restricted from working.

42. On December 17, 2009, Dr. Floyd Ring evaluated the Claimant. His impressions included chronic low back pain with radicular symptoms, right; work-related injury; and MRI evidence of degenerative disc changes noted increased at L4-5. He performed a translaminar epidural steroid injection at L4-5.

43. On December 31, 2009, Claimant saw Dr. Goldman again. She reported continued aching and throbbing in the right buttock and piriformis region, down the right posterior and lateral leg. Dr. Goldman performed a lower extremity EMG/NCV test, which he interpreted as being most consistent with a moderately severe sensory motor peripheral polyneuropathy with axonopathy. Dr. Goldman saw no evidence for discreet lumbosacral radiculopathy or plexopathy. Dr. Goldman's diagnoses at that time included lumbosacral spondylosis, and stenosis, not work related; moderate to severe sensory motor peripheral polyneuropathy and axonopathy related to diabetes mellitus type I, not work related; and secondary right piriformis syndrome with sciatica and greater trochanteric bursitis with delayed healing associated with the previous two diagnoses.

44. Dr. Goldman indicated that Claimant's work up and chronicity of pain over the past two years suggested that a combination of the diabetes, peripheral neuropathy, age and lifestyle may be contributing to a fairly significant soft tissue chronic pain and delayed recovery scenario. Dr. Goldman noted it was doubtful Claimant would require surgery for her back, at least from a work related context.

45. Claimant embarked on a course of facet related treatment with Dr. Floyd Ring and Dr. Goldman that included a bilateral L4-5 and L5-S1 facet injections (1/28/10), bilateral L3, L4 and L5 medial branch blocks (2/15/10), bilateral L3, L4 and L5 rhizotomies (3/4/10), three sets of trigger point injections, as well as additional therapy and chiropractic care.

46. On March 15, 2010, the Respondents filed a General Admission of Liability admitting for medical benefits only noting that Claimant continues to treat thus the claim was reopened with MMI and PPD to be determined.

47. On April 29, 2010, Dr. Goldman opined that Claimant's lumbosacral spondylosis and stenosis was aggravated by the work related injury. Dr. Goldman performed trigger point injections.

48. On May 6, 2010, Dr. Goldman noted Claimant had worsened over the previous two days, so he decided to repeat the injections. On May 13, 2010, Dr. Goldman repeated the injections a third time given that Claimant reported good relief with the first two injections.

49. Claimant returned to see Dr. Bisgard on June 16, 2010. She told Dr. Bisgard that on May 14, 2010 she had a significant flare in her back and leg pain. Claimant stated that the pain was so severe that she needed to use a cane for ambulation. The pain lasted three weeks. Dr. Bisgard concluded that Claimant likely had sciatica due to muscle spasms following the injections.

50. On July 6, 2010, the Claimant returned to Dr. Goldman's office. Dr. Goldman referred Claimant for another MRI of her lumbosacral area and pelvis.

51. On August 6, 2010, Claimant's lumbar MRI was read as showing persistent moderate to severe central canal stenosis on a degenerative basis at L4-5, a cyst, and facet degenerative changes at L5-S1.

52. On August 12, 2010, Claimant returned to Dr. Goldman. Claimant reported some improvement in her symptoms, including waxing and waning. Dr. Goldman noted that he spoke to Dr. Lazano, who read the MRI directly to Dr. Goldman. Dr. Goldman stated "Per Dr. Lazano, the lumbosacral MRI is stable compared to April of 2008 with the exception that there appears to be an increase in the size of the left L4-5 synovial cyst impinging on the left L5 nerve root, but this, of course, does not correlate at all with the patient's symptoms". Dr. Goldman's impressions included, "lumbosacral spondylosis and stenosis pre-existing her work related injury December 19, 2007 with L4-S1 facet dysfunction relieved at this time via radio frequency rhizotomy (L4-5 stenosis was stable per Dr. Lazano and most likely not work related)." Dr. Goldman felt that Claimant's increased blood sugars may be to blame for Claimant's increased symptoms. Dr. Goldman indicated that he was hesitant to consider additional injections because the Claimant was "going to be a delayed healer-diabetics often have delayed healing of tendons and strains, and I think this is what is going on here, at least to some degree." Dr. Goldman did not believe surgery was indicated and he felt Claimant was at or near MMI.

53. On August 13, 2010, Dr. Bisgard wrote a letter to Insurer, noting the findings on the recent lumbar MRI. Dr. Bisgard noted that the new MRI findings showed very mild progression, which did not correlate with her clinical findings, and most likely due to her underlying medical condition. She noted that both her and Dr. Goldman

believed Claimant was rapidly approaching MMI. Dr. Bisgard concurred with Dr. Goldman regarding surgery.

54. Over the next several months, Claimant's pain increased, and Dr. Bisgard sent Claimant through another round of care with Bruce Leibrandt, CMT, Dr. Graves, and Dr. Ring. On November 16, 2010, Dr. Ring performed repeat bilateral L3, L4 and L5 medial branch rhizotomies.

55. On October 19, 2010, the Insurer sent Claimant's available medical records to Dr. Henry Roth for a medical record review to address causation. Dr. Roth documented the medical records he reviewed from the workers' compensation providers. Dr. Roth's opinion, following his review of records up to August 20, 2009, indicated:

> "On 12/19/07, [Claimant] slips and falls on ice. She has discomfort low back, right gluteal and right hip. [Claimant] is then treated conservatively with exercise, stretching, diagnostic study, therapy and medication. Modalities specifically applied include but were not necessarily limited to physical therapy modalities, chiropractic adjustments, acupuncture, trigger point injections, right trochanteric injection and right hip injection. Diagnostic studies include MRI of the low back and hip revealed no associated lumbar pathology. There is moderate stenosis seen at L3-4. This is preexisting degenerative change and does not correlate with symptom presentation. Likewise, there was no radiculopathy.
>
> The right hip reveals degenerative change as evidence by decreased motion, osteophytes, subchondral bone change, joint space narrowing. [Claimant's] symptom presentation is that of right lumbopelvic myofascial pain. Her positive examination treatment response and clinical course point only to involvement of gluteal, piriformis, ischial tuberosity and trochanter. [Claimant] has a regional myofascial enthesiopathy presentation.
>
> [Claimant] is placed at maximum medical improvement on 7/8/08 by Dr. Bisgard. At that time there are confounding psychological features identified but the condition for which treatment was pursued has resolved. At closing examination condition appeared to have been resolved.
>
> At Claimant's maintenance follow up exam on 10/28/08 there was no tenderness or swelling in the back. There was full lumbar range of motion with no discomfort. Lower extremities neurological exam was normal. Dr. Bisgard issued a final discharge with no impairment and no maintenance.

> As of 10/28/08, there is no future to [Claimant's] claim. [Claimant] does not have an ongoing condition as a result of injuries sustained on 12/19/07 is limited to the notion of sprain/strain and contusion. As of [10/18/08] any sprain/strain or contusion that may been sustained is resolved. Sprain/strains and contusions are not sustained biological processes. They don't lie dormant and reappear. They don't spread. They don't metastasize. Once healed the condition is resolved.

56. Dr. Bisgard subsequently wrote Insurer, taking issue with Dr. Roth's opinions. Dr. Bisgard noted Dr. Roth did not evaluate Claimant, she found Claimant to be forthright, all care done to that date had been authorized, and it was "not fair" to retroactively say these symptoms were not work related.

57. On January 5, 2011, Dr. Bisgard evaluated the Claimant for an impairment rating. Her final medical assessment was "lumbar strain with underlying stenosis, hip strain." Dr. Bisgard also noted, "[i]n October 2008, [Claimant] returned for a maintenance visit and reported that she had been doing well. She remained at MMI. [Claimant] returned in August 2009 for reevaluation. She had a flare of her low back pain. The soreness that she had previously had in her back had resolved with a home program but in mid-August she had increased pain in her lower back, which extended down into her right foot." Dr. Bisgard then provided an 11% whole person rating related to Claimant's rhizotomies and decreased lumbar range of motion.

58. Rather than applying for a DIME at that time to challenge Dr. Bisgard's opinions concerning MMI and permanent impairment, on January 14, 2011, Insurer filed a final admission consistent with Dr. Bisgard's opinions on MMI and impairment. The Insurer paid Claimant in full for this rating.

59. The Claimant did not object to the January 14, 2011 Final Admission and the claim closed as to all issues admitted.

60. Between January 15, 2011, and December 5, 2012, Claimant continued to work full time, while receiving medical care through Kaiser. During this 23 month period, Claimant also received ongoing care for her shoulder (osteoarthritis), right wrist (carpal tunnel syndrome ultimately requiring a carpal tunnel release), rheumatoid arthritis, feet, migraines, eyes, neck, right foot (diabetic wounds), and fatigue, as well as other diabetes related issues.

61. Also during this almost two year period, Claimant regularly received maintenance pain medications (Nucynta) through Kaiser, and she apparently received maintenance chiropractic care with Dr. Graves. With this care, Claimant was able to manage her condition until approximately four months prior to December 5, 2012, when Claimant's pain increased, and she started having significant difficulty walking. Claimant was never 100% since being discharged by Dr. Bisgard on January 5, 2011, she always had some level of pain, but as of December 2012, that pain was increasing.

62. On December 5, 2012, Claimant returned to Dr. Bisgard for the first time in almost two years. Dr. Bisgard documented that in the interim, Claimant had been diagnosed with rheumatoid arthritis, and was now taking steroids (leflunomide) for that condition. Claimant reported that over the last three to four months, her pain gradually increased to the point where she was having difficulty walking. Claimant reported walking in a forward flexed position. She stated that she has always had some level of pain since being discharged from care and that it has been increasing. Claimant indicated that she had cut back on her hours at Employer, she and her husband had purchased a tanning salon, and she was working there part time.

63. On January 11, 2013, Claimant reported to Dr. Goldman that her back pain has waxed and waned and is very similar and consistent with the symptoms she presented with in 2008. Dr. Goldman documented those symptoms as pain in the right low back and sacral region with radiation into the posterior leg. Claimant confirmed that she received massages after Dr. Bisgard discharged her from care. Claimant reported feeling stable from 2010 to 2011, but she was now deteriorating feeling unable to walk longer than two blocks. Dr. Goldman documented that Claimant's pain diagram on January 11, 2013 was similar to past pain diagrams, but had advanced somewhat.

64. Dr. Goldman indicated, "right now based on the patient's history as given without any intervening events, it would appear that this is the occasional and rare, but nevertheless documented accelerated degenerative disc disease type of condition that precipitated apparently by the work related injury."

65. Dr. Goldman admitted that he and Dr. Bisgard could not be sure that the current presentation was due to the work injury from five years ago until they looked at records from Kaiser, Dr. Graves, and the massage therapist. Dr. Goldman commented that if there have been no intervening injuries, and if there has been a fairly consistent presentation of the exact same symptoms, but slowly getting worse and then recently getting much worse, then it probably is a progression of the work injury.

66. On January 15, 2013, Dr. Bisgard determined Claimant had spondylolisthesis with progressive stenosis that was causing neuroclaudication. Dr. Bisgard indicated that she and Dr. Goldman were trying to sort out how much impact the work injury had on the increased back pain. Dr. Bisgard concluded that Claimant never reported resolution of her symptoms throughout her maintenance care with Dr. Graves. Dr. Bisgard reiterated her opinions that Claimant's work injury precipitated the need for medical treatment to Claimant's low back.

67. Dr. Graves did not see Claimant at all between March 2008 and September 2009.

68. Claimant's January 21, 2013 lumbar MRI showed significant foraminal stenosis at the L4-5 level affecting the L5 nerve root, with bilateral pathology.

69. On February 1, 2013, Dr. Goldman indicated that Dr. Bisgard reviewed the Kaiser and chiropractic records, and those records comported with Claimant's history.

Dr. Goldman indicated that the January 21, 2013 MRI showed a progression of bulge at L4-5, and clearly accelerated hypertrophy and inflammation at L4-5 facets is causing moderate to severe canal and foraminal stenosis. He recommended additional epidural steroid injections. Dr. Goldman also indicated that the issue of causation is debatable but he ultimately concluded that the need for medical treatment is substantially due to the 2007 work injury assuming Claimant's symptoms have never resolved.

70. On February 8, 2013 Claimant saw Dr. Bisgard who noted that Claimant was still able to work full duty and still wanted to work full duty. Claimant's symptoms had not changed, and she decided to pursue the injections recommended by Dr. Goldman.

71. Claimant returned to see Dr. Bisgard on March 14, 2013, following the injections performed by Dr. Ring. Claimant reported feeling better for several days following the injections but then her symptoms returned back to pre-injection baseline. Dr. Bisgard referred the Claimant to Dr. John Prall.

72. Claimant was referred to John Prall, M.D., a neurosurgeon, who evaluated Claimant on April 4, 2013. Dr. Prall noted that Claimant had a 5-year history of lumbar degenerative symptoms since a slip and fall accident at work. Dr. Prall opined that Claimant had progressive and refractory spinal claudication related to stenosis at L4-5 which was seen in association with spondylolisthesis. Dr. Prall recommended surgery consisting of a one level decompression and stabilization at L4-5. Claimant wanted to proceed with surgery because she felt she had no other options given her pain levels.

73. On April 10, 2013, Insurer physician advisor, Andrew Castro, M.D., an orthopedic surgeon, issued a report in which he addressed Dr. Prall's surgery recommendation. Dr. Castro noted that over the past year Claimant had developed progressively severe claudication symptoms, which were a new set of symptoms, and a change from her prior symptoms. Dr. Castro indicated the surgery was theoretically indicated, but he questioned the causal relation between these new symptoms and the claim. He recommended denying the surgery from a causality standpoint. He recommended an independent medical examination to address the issue of causality.

74. On April 17, 2013, Dr. Bisgard questioned whether Dr. Castro had complete records, noting medical records "clearly" showed Claimant had ongoing back pain since her date of injury that never resolved. Dr. Bisgard opined that Claimant's condition is "not a natural progression of an underlying disorder but in fact permanent aggravation of a preexisting condition as a result of her fall."

75. On April 15, 2013, Rebecca Hawkins, Ph.D. evaluated the Claimant for a psychological opinion concerning Claimant's psychological readiness for surgery. Claimant told Dr. Hawkins that for years she had never had to take time off of work, she could work from home as needed, she could schedule around her medical appointments, she could sit down as needed, and pace her activities. However, three weeks earlier she realized she could not walk the distance required to do her auto broker position, and thus was placed on TTD benefits. Claimant reported the inability to

perform household tasks. Claimant reported that she and her significant other owned a tanning salon. Dr. Hawkins cleared Claimant for surgery.

76. The Respondents referred the Claimant to Deborah Saint-Phard, M.D, for an independent medical examination, which occurred on May 24, 2013, for the purpose of determining whether the surgery recommended by Dr. Prall was related to the Claimant's work injury. Dr. Saint-Phard reviewed Claimant's medical records and examined the Claimant. Dr. Saint-Phard's physical examination showed that Claimant's feet are clawed, no evidence of a normal heel strike with a grossly abnormal gait. Dr. Saint-Phard also observed the skin on Claimant's feet was shiny and she had diminished sensation to light touch on her lower extremities bilaterally.

77. Dr. Saint-Phard's assessments included possible arterial insufficiency of the limbs, sensory motor neuropathy related to diabetes which had significantly impeded Claimant's gait ability, high steppage gait, significant atrophy and sensory loss of the lower extremities, and loss of dorsal pedis pulses and the appearance of arterio-insufficient lower limbs especially in the feet.

78. Dr. Saint-Phard indicated there were a myriad of confounding factors, including a diagnosis of rheumatoid arthritis in 2009 for which Claimant took prednisone and Leflunomide for pain control, which could not be ignored as accelerating Claimant's lumbar stenosis.

79. Dr. Saint-Phard opined that the main thrust of Claimant's complaints were due to neuropathic pain from the likely exacerbation of her underlying diabetic condition induced sensorimotor axonal peripheral neuropathy, now with superimposed L4-5 instability causing neurogenic claudication, which was at most minimally related to the work injury. Dr. Saint-Phard opined that Claimant's neuropathic pain was not claim related.

80. Dr. Saint-Phard indicated that Claimant clearly has lumbar spondylolisthesis that is unstable and she would benefit from the stabilization/fusion and decompression Dr. Prall recommended.

81. With regard to Claimant's history, Dr. Saint-Phard noted that Claimant "insists that she continued to actively treat herself for the back pain after she achieved MMI and to the present day." Dr. Saint-Phard pointed out that "this presentation is at odds with the documentation per the medical record review as documented by Dr. Bisgard noting that when she placed her at MMI her symptoms had resolved with the treatment that she had gotten at that time." Dr. Saint-Phard noted Claimant's issues were multi-factorial, but based on Claimant's subjective history, the work injury contributed 20% of the need for the fusion.

82. On May 31, 2013, Dr. Bisgard noted that Claimant met with Dr. Saint-Phard, and that she felt Claimant needed surgery. Dr. Saint-Phard also made recommendations concerning a foot drop Claimant was experiencing, another EMG and a vascular consultation. Dr. Bisgard indicated that the AFO or vascular consultation

would not be claim related. Finally, Dr. Bisgard noted that Claimant was unable to work for Employer because her job required her to be out and about and on her feet. However, Dr. Bisgard noted that Claimant was assisting her significant other with setting up computers at home.

83. On June 19, 2013, Dr. Bisgard noted that based upon Dr. Saint-Phard's report and opinions, Insurer had authorized the surgery.

84. On June 25, 2013, the Respondents again filed a General Admission of Liability which admitted for medical benefits and temporary total disability benefits. The Respondents voluntarily reopened Claimant's claim and authorized the surgery recommended by Dr. Prall.

85. On July 3, 2013, Claimant underwent surgery by Dr. Prall, which included a partial laminectomy, medial facetectomy, and foraminotomy bilaterally at L4 and L5, posterior spinal instrumentation at L4-5, interbody cage fusion at L4-5, and posterior lateral fusion at L4-5.

86. Claimant had temporary good results from the surgery, but eight days after the surgery, she developed significant pain in her left buttock and left knee, for which she went to the emergency room on July 15, 2013. A July 15, 2013 MRI was then obtained. Claimant received an ESI at L3-4 and L4-5.

87. On July 22, 2013, Claimant returned to the emergency department with severe left-sided radicular pain issues. Claimant was sent back to surgery with Dr. Prall, which included a removal of the posterior lumbar hardware, re-exploration of the partial laminectomy and discectomy at L4-5, with removal of a far lateral disc herniation on the left, and posterior instrumentation and fusion at L4-5.

88. On July 29, 2013, Dr. Prall documented Claimant's post July 22, 2013 surgical course, noting her pain had returned in a pre-operative distribution. On August 8, 2013, Dr. Prall again noted Claimant's pain had returned to the severe level it was at prior to the second surgery. On August 15, 2013, Dr. Prall noted that Claimant had been improving over the past week, she was walking without difficulty, and was fairly comfortable, but with pain radiating from the left buttock down the thigh to the knee and shin.

89. Claimant returned to see Dr. Goldman on August 15, 2013. Claimant reported feeling better and Dr. Goldman observed improved posture. Claimant, however, was taking a significant amount of opioids. Dr. Goldman stated that he was, "certain that the extruded disc on the left was an unfortunate, but unavoidable post operative event is contributing to the patient's radiculitis on the left . . ."

90. On September 4, 2013, Dr. Bisgard noted that Claimant had a selective nerve root block from Dr. Ring on August 26, 2013, and the following morning she could not lift her right foot, but her left leg was starting to feel better. Claimant was anxious about these new problems.

91. On September 17, 2013, Dr. Prall noted Claimant had a new right foot drop, but her left leg pain had essentially resolved. He also noted a new lumbar MRI did not show any new findings.

92. Dr. Goldman saw Claimant on September 12, 2013, noting that her symptoms were unusual for the presentation, it was perplexing, and did not make sense. Claimant indicated her pain levels overall were substantially better and her only real complaint was increased pain in her right leg and the foot drop. Claimant was distressed and fixated on her opinion that her recent epidural steroid injection caused her new symptoms. She felt like she could at least walk prior to the injection. Dr. Goldman noted that the foot drop may be related to her diabetes, as "diabetic mediated or autoimmune inflammatory neuropathies or plexopathies do not always correlate with blood sugar control." Dr. Goldman reiterated to the Claimant that her pain is multi-factorial and unlikely due to the epidural steroid injection.

93. On September 20, 2013 Dr. Bisgard noted that Claimant continued to have right lower extremity symptoms and pain, and she was seen by her primary care physician who noted that she had some evidence of small vessel disease in her lower extremities. Dr. Bisgard indicated Claimant had right foot drop of unclear etiology; spinal stenosis L4-5 and spondylolisthesis status post fusion; and recurrent disk herniation L4-5, left sided. Dr. Bisgard released Claimant to work with restrictions.

94. On September 27, 2013, Claimant returned to Dr. Goldman who again noted that Claimant's presentation was perplexing. Claimant's right lower extremity pain had resolved for unknown reasons, her foot drop improved, but suddenly her left lower extremity sciatica became severe. Dr. Goldman indicated Claimant presented with a less than typical type of peripheral poly neuropathic finding.

95. On October 24, 2013, Dr. Goldman indicated that after talking with Dr. Prall, he suspected that Claimant has some underlying L5 radiculopathy probably of a biochemical or inflammatory etiology in the presence of underlying evolving peripheral neuropathic conditions or an auto-immune condition because the Claimant has juvenile diabetes and a history of rheumatoid arthritis. Claimant admitted to Dr. Goldman that she did not take care of her diabetes many years ago. Dr. Goldman noted that if sugars are highly uncontrolled in juvenile diabetics it predisposes the patient to more degenerative or inflammatory neuropathic conditions 10-20 years later. Dr. Goldman prescribed a rolling walker for the Claimant.

96. On November 6, 2013, Claimant saw Dr. Bisgard. Claimant reported significant ongoing issues with her back and legs noting that the left leg symptoms are worse than the right leg. She reported four falls due to the left leg, use of a cane, and recent purchase of a wheelchair device that allows her to walk but also sit and be pushed when she cannot handle standing or walking. Dr. Bisgard noted that Claimant was working hard in physical therapy and continuing to follow up with Dr. Hawkins. Dr. Bisgard and Dr. Goldman agreed to keep Claimant off work due to her fall risk.

97. On November 27, 2013 Claimant was seen by Dr. Marc Treihaft who specializes in neurology, neuromuscular disorders and electromyography. Dr. Treihaft's focus was Claimant's post-surgery issues. Dr. Treihaft noted that Dr. Prall performed surgery on July 3, 2013 and seven days later the Claimant developed severe left lower extremity sciatica and had a second procedure two weeks later to remove disk and bony fragments. Claimant developed a right foot drop subsequent to nerve blocks performed on August 28, 2013. Dr. Treihaft noted Claimant had developed bilateral foot drop issues, in a person who had been Type 1 diabetic for more than 40 years with mild numbness in her feet for several years. Dr. Treihaft noted the major issue in this complex case would be differentiating L5 root disorders, structural or metabolic, versus diabetic peripheral neuropathy. Dr. Treihaft's impressions were lumbosacral spondylosis and stenosis, status post surgery on July 3, 2013, repeat surgery on July 23, 2013 with residual left lower extremity sciatica and bilateral foot drop; right greater than left foot drop without impingement on MRI; L4-5 fusion, unresponsive to selective nerve root blocks and epidural steroids; MRI on September 10, 2013 shows residual right foraminal and recess stenosis at L4-5. Dr. Treihaft recommended Claimant undergo EMG/nerve conduction studies.

98. On December 18, 2013, Dr. Treihaft obtained those studies, which showed severe sensorimotor polyneuropathy with axonal features possibly related to Claimant's diabetes. He also documented bilateral L4-5 radicular changes. He stated it may be from residual scarring.

99. On December 27, 2013, Claimant returned to see Dr. Goldman. Her symptoms remained essentially unchanged with pain primarily down the left leg. Dr. Goldman indicated that he reviewed Dr. Treihaft's notes, and he repeated Dr. Treihaft's findings and opinions as follows: Dr. Treihaft stated that the EMG/NCV studies showed further neuropathic damage associated with Claimant's diabetes or some other non-accident related neuropathic etiology; Dr. Treihaft indicated that there may be residual L4-5 radiculopathic pain superimposed on the diabetic neuropathy what would have been of a chronic nature (which Dr. Goldman noted was consistent with his own interpretation of Claimant's symptoms); and Dr. Treihaft believes that Claimant's foot drop is due to a combination of Claimant's L5 chronic radiculopathy and diabetic neuropathy which is consistent with what both Drs. Goldman and Prall believed.

100. Dr. Goldman discharged Claimant from his practice, and strongly recommended she get with a pain specialist. She was also referred to Dr. Moe for a psychiatric evaluation.

101. On January 3, 2014 Dr. Bisgard noted that Claimant's symptoms continued to alternate between her left and right leg. Dr. Bisgard concluded that they were now dealing with a chronic pain issue, and she referred Claimant to Dr. Joseph Fillmore for pain management.

102. On February 24, 2014, Claimant underwent an IME with neurologist Eric Hammerberg, M.D., on February 24, 2014. As part of his IME, Dr. Hammerberg performed an extensive record review. Dr. Hammerberg's impression was chronic pain

syndrome, lumbar disc disease, status post L4-5. Dr. Hammerberg concluded that Claimant's lower extremity symptoms are "characterized by referred pain from her lower back and weakness due to diabetic neuropathy." Dr. Hammerberg indicated that the electrodiagnostic studies Dr. Treihaft performed showed slightly greater chronic partial denervation in the L5 myotome, such findings were more likely the result of diabetic lumbosacral plexopathy, or bilateral peroneal neuropathy due to compression at the head of the fibula. Dr. Hammerberg opined that Claimant had not reached MMI for the December 19, 2007 work injury, and that Claimant needed chronic pain management in order to reach MMI. Dr. Hammerberg suggested work restrictions. In response to the question, "Are the restrictions solely related to the 12/19/07 injury or do her other conditions impact the restrictions?" Dr. Hammerberg replied that they were primarily related to the diabetic neuropathy.

103. On March 7, 2014, Claimant reported to Dr. Bisgard that she was not doing better. Dr. Bisgard opined Claimant would not be able to go back to her normal duties with Employer, and she recommended that Claimant have a Functional Capacity Evaluation ("FCE").

104. On April 7, 2014, Claimant underwent a FCE evaluation from Mary Horacek, OTR, at HealthOne. As a result of her testing, Ms. Horacek concluded that Claimant was functioning in the sedentary work category, with frequent postural weight shifting to include short periods of standing. Ms. Horacek further opined that Claimant had the strength to move towards the light work category if her pain levels were better controlled. The FCE was interpreted as being valid.

105. On April 16, 2014, Dr. Bisgard noted her disagreement with Dr. Hammerberg's opinion that Claimant's need for work restrictions was due primarily to her diabetic neuropathy. Dr. Bisgard noted that Claimant's FCE put her in a sedentary position. Dr. Bisgard noted that Claimant had been doing some bookkeeping work for the tanning salon business, which Claimant tolerated at a limited basis.

106. On May 7, 2014, Dr. Bisgard placed Claimant at MMI, with a 20% whole person rating related to her specific disorders of the lumbar spine, including surgeries, a 19% whole person related to lumbar range of motion deficits, and an 11% whole person rating related to neurological disorders. Dr. Bisgard apportioned out the January 5, 2011 rating, but she otherwise related all of the permanent impairment to the work injury.

107. Dr. Bisgard imposed work restrictions as follows: Claimant's carrying was limited to 5 pounds, walking and standing were limited to 10 minutes, sitting no more than 90 minutes, and at times she needed to take breaks to lie down or change positions. Dr. Bisgard also indicated Claimant was restricted to no kneeling, crawling, squatting, or climbing, and her bending was limited to occasional only. Dr. Bisgard had spoken to the therapist who performed the FCE who apparently reported that Claimant was unable to complete a large portion of the FCE due to pain. Dr. Bisgard related all of the work restrictions to the work injury.

108. Dr. Bisgard's final diagnoses were: lumbar spondylosis and stenosis, pre-existing but permanently aggravated by work-related injury in 2007. Status post L4-5 fusion with revision and disk excision; diabetic polyneuropathy, not claim related; residual L5 radiculopathy with foot drop; chronic narcotic use. Dr. Bisgard continued to recommend pain management with Dr. Fillmore as maintenance care.

109. On June 2, 2014, Insurer filed a Notice and Proposal for a DIME. Dr. Robert Kawasaki was selected as the DIME physician for this claim.

110. On August 13, 2014, Dr. Kawasaki issued a comprehensive DIME report, which included a detailed medical record review, and was over 45 pages long. Dr. Kawasaki noted that as part of the DIME he reviewed several pages of Claimant's notes that Claimant included in her paperwork, and he obtained an oral history directly from Claimant. Dr. Kawasaki also performed a physical examination.

111. Dr. Kawasaki noted in his report that Claimant told him following her injury she was never back to baseline, and she continued with pain in her low back over the years that continued to increase. Claimant expressed concern about her back when her case closed in 2011. Dr. Kawasaki documented that Claimant reported increased and worsening pain in October 2012.

112. Dr. Kawasaki opined that Claimant was appropriately treated through MMI on July 8, 2008 for symptomatology related to the work injury, and he agreed with Dr. Bisgard's decision to place Claimant at MMI on that date with no impairment.

113. Dr. Kawasaki noted that while Claimant's lumbar MRI showed underlying L4-5 stenosis, "the patient had no signs or symptoms or neurologic findings for claudication or radiculopathy." Dr. Kawasaki explained his opinion that Claimant's post MMI conditions were not relatable to the work injury. He opined that Claimant had an abrupt onset of symptomatology 13 months post-MMI, and that such four-day onset of pain prior to August 20, 2009 would not be related to her work injury. He opined that the stenotic symptomatology related to the progression of the lumbar stenosis and having underlying risk factors including severe diabetes mellitus with complications including polyneuropathy and arterial insufficiency but also hypertension. He concluded that the symptomatology that presented in August 2009 and progression of the lumbar stenosis would have developed in this patient regardless of the work injury.

114. Dr. Kawasaki stated that Claimant's medical treatment between August 20, 2008 and January 11, 2011 focused on facetogenic pain which is part of spondylosis. He noted that Claimant did not have evidence of facetogenic pain up to the date of MMI, July 8, 2008. Dr. Kawasaki opined that Claimant was essentially symptom free at MMI. Dr. Kawasaki apparently did not credit Claimant's subjective reports to the contrary.

115. Dr. Kawasaki opined that the treatment Claimant received was appropriate for her now symptomatic lumbar spondylosis and stenosis with therapies, chiropractic treatments, injections, even rhizotomy procedures. However, the need for these

treatments within medical probability is not related to the original December 19, 2007 workers' compensation injury.

116. Dr. Kawasaki noted that in December 2012, Claimant presented again to Dr. Bisgard's office with clearly progressive stenosis, spondylolisthesis, neural claudication, and progressive polyneuropathy. He indicated that "the progression of stenosis, development of spondylolisthesis, development of neural claudication, and worsening of diabetes mellitus/polyneuropathy with medical probability cannot be attributed to the patient's original 2007 injury, which is a different complex of symptomatology at the time of the 07/08/2008 maximum medical improvement with no impairment."

117. Dr. Kawasaki acknowledged that this is a very difficult case, and he is sympathetic to Claimant, but he had a duty as a DIME provider to first assess causation, and the causation of Claimant's symptoms resulting in treatment which started on August 20, 2009, within a reasonable degree of medical probability, was unrelated to the work injury.

118. Dr. Kawasaki opined that the work injury is a sacral contusion, left wrist contusion, lumbar strain, and left shoulder strain, which was properly treated and brought to MMI on July 8, 2008, and that Claimant's L4-5 spondylosis, stenosis, spondylolisthesis, and neural claudication, are not relatable to the December 19, 2007 injury. Dr. Kawasaki ultimately concluded Claimant reached MMI July 8, 2008, with no impairment, and that Claimant's impairment ratings as documented by Dr. Bisgard were for a progression of Claimant's spinal disorder, and not relatable to her work injury or claim.

119. Dr. Kawasaki noted Claimant's "current restrictions and need for medical care related to her non-work-related lumbar stenosis, neurogenic claudication, radiculopathy, and polyneuropathy are not relatable to the original injury."

120. On September 17, 2014, Insurer filed a FAL consistent with the opinions of Dr. Kawasaki. Respondents admitted for a retroactive MMI date of July 8, 2008. As a result, Respondents claimed an overpayment in the amount of $72,099.19 which represented temporary and permanent partial disability benefits paid after July 8, 2008.

121. Claimant testified that since the September 17, 2014 FAL was filed, she has had to receive her prescription pain medications related to her injury from KP. She testified that she has had out-of-pocket expenses related to her prescription drugs and that she would like to be reimbursed.

122. Throughout the Claimant's workers' compensation claim, she pursued medical treatment with her primary care physician for treatment of her non-work related medical conditions. Between May 2009 and August 2009, Claimant had several visits at Kaiser Permanente (KP). These medical records do not document reports of low back or right leg pain. The ALJ gives this lack of documentation little weight for the following reasons:

- Claimant saw Dr. Alijani for her shoulder on February 13, 2008 and did not report buttocks or back pain yet on February 1 and 22, she reported back and buttocks pain to HealthOne providers and completed pain diagrams documenting such complaints. Again on March 12, 2008, Claimant saw Dr. Alijani and there no documented reports of back or buttocks pain despite the fact she was simultaneously receiving treatment for those problems at HealthOne.

- On May 11, 2009, Claimant had a preventative physical examination at KP. KP documented her "Active Problem List" as premenstrual tension syndrome, arthritis, hypertension, DM1 with diabetic neuropathy, depression, osteoarthritis of the hand, anxiety, asthma, retinal drusen, rhinitis, shoulder impingement syndrome, shoulder osteoarthritis, and a rotator cuff tear.

- At her August 17, 2009 KP visit, Claimant did not report any symptoms other than eye symptoms because that was the apparent reason for the visit.

- During her August 3, 2009 KP visit, Claimant reported as the reason for her visit "foot injury." There is no mention of any symptoms related to her other alleged active problem list noted above.

- On August 14, 2009, Claimant had a KP visit with OB/GYN. There is no mention of the eye problem she presented with just three days later.

- When Claimant returned to HealthOne on August 20, 2009, she did not report all of the symptoms for which she had just received treatment at KP.

- On May 2, 20008, Dr. Elder documented Claimant's low back pain, but on subsequent visits he did not.

- On May 24, 2008, while still receiving treatment for low back and buttock pain, Claimant presents at HealthOne with complaints of chest pain. There is no mention of the buttocks symptoms.

123. Between July 2008 and August 2009, Claimant also had physical therapy for a diagnosis of "Right C7 cervical radiculopathy" made by Dr. Elder. There is no mention of low back or right leg pain in the physical therapy records. Again, the ALJ gives such absence of documentation in the records little weight for the reasons set forth above. Based on the records in evidence, the ALJ cannot infer that because a medical record is silent about any of Claimant's conditions that Claimant is not experiencing symptoms related to those conditions.

124. On September 24, 2014, Claimant applied for hearing. Within her hearing application, Claimant stated: "Claimant will attempt to overcome the DIME impairment rating". Claimant also endorsed the issue of PTD.

125. During the hearing, Dr. Bisgard explained that Claimant appeared stoic during her medical examinations. At times, the Claimant minimized her symptoms

when Dr. Bisgard would ask the Claimant how she was doing. Dr. Bisgard testified that she believed Claimant's symptoms never fully resolved following the first time she placed Claimant at MMI in July 2008.

126. Dr. Bisgard explained that initially all of Claimant's treatment providers directed treatment at Claimant's hip when it was actually her lumbar spine causing Claimant's symptoms. Dr. Bisgard credibly opined that Claimant's work injury aggravated her pre-existing underlying spinal stenosis.

127. Dr. Bisgard also commented on Claimant's left lower extremity symptoms. She explained that Claimant had no previous left lower extremity symptoms until after the surgery Dr. Prall performed on July 3, 2013. Dr. Bisgard testified that that the surgery caused sudden disc extrusion on the left side, and that this problem is not at all related to Claimant's pre-existing diabetes.

128. Dr. Roth testified during the hearing. He reiterated the opinions he set forth in his November 15, 2010 report. Dr. Roth also testified that he reviewed new information and records obtained since November 2010 and reassessed causation. He opined that as a result of the December 19, 2007 work injury, the Claimant sustained a right gluteal contusion. Dr. Roth testified that Claimant's improvement in her symptoms by July 8, 2008 supports the diagnosis of a sprain/strain or contusion.

129. Dr. Roth agreed with Dr. Kawasaki's opinions that Claimant received appropriate treatment for her work-related fall and with the July 8, 2008 MMI determination with no permanent impairment.

130. Dr. Roth agreed with Dr. Kawasaki that Claimant's onset of symptoms in August 2009 was not related to her work injury, but was due to progression of diabetic polyneuropathy, lumbar spondylosis and symptomatic spinal stenosis, and that those conditions are not work-related. Dr. Roth further opined that Claimant met many of the risk factors for development of L4-5 spinal stenosis, and that she would have become symptomatic regardless of the work injury. Dr. Roth stated that Claimant did not suffer a direct spinal trauma that changed Claimant's anatomy nor did her fall aggravate or accelerate the degenerative process.

131. Dr. Roth concurred with Dr. Kawasaki's opinions that all of the treatment Claimant received subsequent to October 2008 was unrelated to the December 2007 work injury.

132. Dr. Roth admittedly never examined or talked to the Claimant.

133. Dr. Roth also testified that based on Claimant's initial response to the July 3, 2013 surgery it was probable that the pathology at L4-5 was the pain generator for Claimant's low back and right leg symptoms. He also agreed that Claimant did not have "excruciating left leg pain" prior to the July 3, 2013 surgery, and the surgery resulted in a disc fragment in the left side at L4-5 which caused the onset of the left lower extremity symptoms. He agreed that Claimant's diabetes did not cause development of her left lower extremity symptoms.

134. The Claimant credibly testified, and the ALJ finds that her symptoms never fully resolved after MMI in 2008 or after MMI in 2011.

135. The credible and persuasive evidence demonstrates that Dr. Kawasaki's opinion that Claimant sustained zero impairment is incorrect. From a legal perspective, the ALJ cannot credit Dr. Kawasaki's opinions concerning causation or permanent impairment related to any treatment prior to January 5, 2011. The FAL filed on January 5, 2011 closed the issue of causation of Claimant's low back symptoms, including L4-5 stenosis, facetogenic pain, and reduced lumbar range of motion. With respect to Dr. Kawasaki's opinions regarding the cause of Claimant's conditions once the claim was reopened on June 25, 2013, clear and convincing evidence demonstrates that he was incorrect regarding his causation analysis. Both Drs. Bisgard and Goldman related the Claimant's need for surgery to her work injury, and even Dr. Saint-Phard attributed the need for the surgery, in part, to the work injury. Regardless, the July 3, 2013 surgery was a procedure authorized by the Insurer and it worsened Claimant's condition by bringing on brand new symptoms. From a legal perspective, the worsening due to the authorized surgery represents a compensable causally-related component of Claimant's injury which Dr. Kawasaki understandably did not consider.

136. The ALJ adopts the permanent restrictions imposed by Dr. Bisgard. Dr. Bisgard's restrictions are based upon the FCE findings and Claimant's subjective reports of pain and limitations which the ALJ finds credible, and the most accurate representation of her functional abilities.

137. Claimant, a high school graduate, completed two additional years of college. Claimant's work history is significant for skilled, and semi-skilled sedentary work, including work in the following occupations: cashier, retail sales, bank teller, bank teller supervisor, telephone collections representative; manager, supervisor and trainer of a 150 person call center; and employment staffing agency manager.

138. Claimant's duties included a full array of administrative tasks, including supervising, managing, hiring, firing, and auditing, and through these jobs Claimant developed exceptional customer relation skills, computer skills, and phone skills. Claimant also worked two home-based sales positions, one in cosmetics, and one in jewelry. Claimant often worked autonomously.

139. In 2012, Claimant and her significant other, Patrick Kelley, purchased a tanning salon business in Parker, Colorado. Claimant is identified as an owner of that tanning salon in her medical records, on the company website, and in a testimonial she provided for a training company. Claimant testified that she is no longer an owner of the salon, and she is not deriving any income from the business.

140. Various medical records, all of which pre-date Claimant's 2013 surgery, indicate that Claimant reported working in the tanning salon part time, managing the salon, performing bookkeeping for the salon, performing management, sales, and software upgrades for the salon, performing computer related work for the salon, and marketing for the salon. Mr. Kelley testified that Claimant occasionally assists him with

the salon, but he does not characterize her work as management. Mr. Kelley admitted that neither he, nor Claimant, take a paycheck, or derive a profit, from the salon at this point.

141. Claimant testified that every time she stands up or walks, she has shooting pain down her left leg and in her low back. She explained that at times, her low back pain “grips [her] so bad it can drop [her] to the ground.” Claimant described her pain as 8 out of 10 during the hearing because of the excessive sitting. She explained she would normally never sit for that long. Normally, the Claimant would lie down flat once her pain levels started increasing. Claimant testified that she can sit for about 15-20 minutes at one time then she needs to shift or adjust her body by standing, walking or lying down. She believes she can walk about 15 to 20 steps without her walker and for approximately 10 minutes with her walker. Claimant only drives a car about six times per month for no longer than approximately 20 minutes. Claimant described her sleep patterns as “horrible.” She explained that she sleeps on average three to four hours per night.

142. Claimant cannot clean or cook, but she does attempt some limited household chores such as folding clean clothes and emptying the dishwasher, both of which she does in a seated position. She explained that she can only stack up the dishes on the counter because she cannot put them away.

143. Claimant testified that on bad days she cannot engage in any activities, including reading or watching television, because she focuses on how to alleviate her pain and she needs quiet. She has two or three bad days each week.

144. Katie Montoya performed a vocational evaluation of the Claimant at Claimant’s request. Ms. Montoya interviewed the Claimant and reviewed medical records. Ms. Montoya evaluated Claimant’s work history and concluded that based on the work restrictions imposed by Dr. Bisgard, and the Claimant’s reported limitations, the Claimant would not be able to return to work in any kind of marketable capacity. Ms. Montoya noted that if she relied upon Dr. Kawasaki’s opinions then Claimant’s inability to work would be would be unrelated to her work injury.

145. Cynthia Bartmann, a rehabilitation counselor, preformed a vocational evaluation at Respondents’ request and issued a report. Ms. Bartmann met the Claimant and obtained a work history and discussed Claimant’s physical limitations. Ms. Bartmann also reviewed Claimant’s medical records. Ms. Bartmann noted that Claimant attributes her physical limitations to her work injury but that the “medical documentation indicates overwhelmingly that these symptoms are related to her other medical conditions.”

146. Ms. Bartmann completed market research in customer service (based on Claimant’s transferable skills) and in the sedentary work category. Ms. Bartmann concluded that Claimant has marketable transferable skills and that there are jobs available to the Claimant using the most restrictive work restrictions imposed by Dr. Bisgard. Ms. Bartmann identified several jobs she believed fell within Claimant’s work

restrictions. Ms. Bartmann also commented that Claimant should have no work restrictions for her work injury and that her injury is not a significant factor in her ability to work.

147. Ms. Montoya testified by deposition. She reiterated her opinions that although Claimant has a good strong skill base, she would be unable to maintain a job if she needed to take too many breaks or miss work. She disagreed that Claimant could maintain any of the jobs identified by Ms. Bartmann. Ms. Montoya opined the employers would not tolerate lack of productivity due to frequent breaks which would render her unable to maintain a job even a job Claimant can work from home.

148. When Ms. Montoya met with the Claimant, Ms. Montoya observed that Claimant had lost her composure over having to retrieve her cell phone from her car and the physical pain that resulted from the roundtrip walk to her car.

149. Ms. Montoya admitted that Claimant's transferable skills, work experience, age, education, and the labor market would not prevent the Claimant from obtaining or maintaining employment. Ms. Montoya, however, considered whether Claimant could maintain employment based on Claimant's subjective reports that her pain levels require her to lie down, take breaks or walk around. No medical doctor specifically limited the hours Claimant could work, but Ms. Montoya indicated that Claimant attempted to work for the tanning salon but experienced difficulty with even the limited tasks she performed for the salon.

150. Ms. Bartmann testified by deposition. She reiterated her opinion that Claimant is capable of earning a wage whether based on the FCE results or Dr. Bisgard's restrictions. Ms. Bartmann observed that when Dr. Bisgard issued restrictions at the time of MMI, Dr. Bisgard did not specify for how long the Claimant would need to take breaks to change positions or lie down nor did Dr. Bisgard specifically state that Claimant may miss time from work. Ms. Bartmann indicated that it is standard for an employee to be off task for 10 to 15 percent of the work day and that if Claimant's breaks were short, intermittent breaks, Claimant would be able to maintain employment.

151. Ms. Bartmann disagreed with Ms. Montoya's opinions that Dr. Bisgard's restrictions would preclude Claimant from maintaining employment. Ms. Bartmann explained that she only considered the permanent work restrictions imposed at the time of MMI, and not the additional restrictions Claimant or Dr. Bisgard identified at hearing. Ms. Bartmann agreed that if Claimant called in sick two or three times per week she would not be able to maintain employment.

152. Claimant has a pre work injury medical history significant for diabetes mellitus 1 with neuropathy, diabetic retinopathy, hypertension, hyperlipidemia, high blood pressure, asthma, arthritis, depression, anxiety, sciatica, and a left shoulder injury requiring surgery.

153. Despite any pre-existing conditions, the Claimant was working full duty full time, taking spinning classes, walking and doing Pilates before her work injury. There

are no medical records documenting pre-existing low back or leg symptoms. Claimant enjoyed a normal active life prior to the work injury.

154. The ALJ finds that the work injury, and subsequent authorized medical treatment, substantially impacted the Claimant's life, and represents a significant causative factor in her inability to earn a wage.

CONCLUSIONS OF LAW

General

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

Claim Status

This is a highly complex case spanning over eight years of medical treatment with numerous intertwined legal issues, which will be addressed in turn starting with the legal status of this claim. Respondents admitted liability for Claimant's December 19, 2007 work-related slip and fall. Respondents filed a final admission of liability on August 26, 2008. Claimant did not object and the claim closed as to all issues admitted. The Respondents then voluntarily reopened the claim on March 15, 2010 by filing a general admission of liability. The Claimant received medical treatment and the Respondents filed their second final admission of liability on January 14, 2011. The Respondents admitted for medical treatment directed at symptoms in Claimant's low back and leg, which included treatment directed at Claimant's L4-5 stenosis and facet problems. The Respondents also admitted for permanent impairment related to decreased lumbar range of motion and rhizotomy procedures. The Claimant did not object and the claim closed as to all issues admitted.

Section 8-43-203(2)(b)(II), C.R.S., provides that when a final admission of liability is filed, the claim is "closed as to the issues admitted" if the claimant does not contest the final admission. Section 8-43-203(2)(d), C.R.S., provides that when a claim is "closed pursuant to this subsection (2), the issues closed may only be reopened pursuant to section 8-43-303" which includes, among other bases, a change in the claimant's condition.

After a case is reopened based on a change in condition, the causation issue is limited to whether there is a change in the claimant's physical condition that is causally connected to the original compensable injury. The original finding of causation cannot be challenged in post-reopening proceedings. *See City and County of Denver v. ICAO*, 58 P.3d 1162 (Colo. App. 2002); *Stevens v. Express Personnel Services*, 4-301-502 (ICAO 2001).

But for the March 15, 2010 general admission of liability, in order for the Claimant to reopen her claim, Claimant would have been required to prove by a preponderance of the evidence that her condition had changed since July 8, 2008, and that such change in condition was causally related to the initial industrial injury. Claimant was relieved of that obligation when the Respondents voluntarily reopened, paid benefits, then issued a final admission of liability admitting for treatment and impairment causally related to the industrial injury.

Under § 8-42-107(8)(b) and (c), a treating physician's determination as to MMI and medical impairment cannot be disputed in the absence of an independent medical evaluation. In this case the issues of MMI and medical impairment were resolved by the uncontested final admission of liability filed by the Respondents based upon Dr. Bisgard's findings. Consequently, these matters were closed and not subject to further litigation. Section 8-43-203(2)(b)(II), (d), C.R.S. 2001; *Cibola Constr. v. Indus. Claim Appeals Office*, 971 P.2d 666 (Colo.App.1998). Thus the DIME physician's opinions concerning causation of conditions treated prior to January 14, 2011 are not given any special weight because those issues have been conclusively resolved by the January 5, 2011 FAL, and Claimant would not be required to prove by clear and convincing evidence that his opinions are clearly wrong in order to avoid a reduction in the permanent impairment assigned by Dr. Bisgard on January 5, 2011. The Respondents are bound by that final admission.

Quasi-Course and Scope of Employment

The Respondents again voluntarily reopened the Claimant's claim, and filed a general admission of liability on June 25, 2013, admitting for medical benefits and temporary total disability benefits. Claimant then went on to receive additional medical treatment authorized by the Insurer, including a surgery that actually worsened the Claimant's overall medical condition.

Under the quasi-course of employment doctrine, an injury occurring during authorized medical treatment for an industrial injury is compensable. An employer is required to provide medical treatment, and an injured employee is required to submit to it. *Excel Corp. v. Indus. Claim Appeals Office*, 860 P.2d 1393 (Colo. App.1993). The doctrine holds the employer and insurer liable for injuries caused by authorized medical treatment provided for the original work injury. *Price Mine Service v. Industrial Claim Appeals Office,* 64 P.3d 936 (Colo. App. 2003); *Excel Corp. v. Industrial Claim Appeals* Office, 860 P.2d 1393 (Colo. App. 1993*); Ferrenburg v. Best Western Landmark Hotel*, W.C. Nos. 4-357-688, 4-386-527, 4-390-936, & 4-410-543 (ICAO 2000).

As found above, the authorized surgery Dr. Prall performed on July 3, 2013 resulted in development of left lower extremity symptoms, which Claimant had never before experienced. Dr. Goldman stated that he was certain the extruded disc caused by the surgery contributed to radiculitis in Claimant's left lower extremity. Dr. Roth agreed that Claimant had no left leg symptoms before the surgery, and that the surgery caused development of the left sided symptoms. Dr. Prall even performed a corrective surgery which did little to alleviate Claimant's symptoms. Dr. Bisgard concurred that the surgery brought on new left lower extremity symptoms. The ALJ acknowledges that Claimant's pre-existing diabetes is contributing to her symptom complex, but the opinions of Drs. Bisgard, Goldman and Roth agree that the new left lower extremity symptoms are not related to Claimant's diabetes. Rather, they are directly due to the authorized surgery.

To the extent Respondents assert that the need for the July 3, 2013 surgery was not related to the Claimant's initial injury, the ALJ is not persuaded. As found above, the Claimant's credible testimony concerning her ongoing symptoms after July 2008 combined with the opinions of Drs. Bisgard and Goldman persuasively establish that the Claimant's need for ongoing treatment after January 2011 was causally related to her industrial injury. Both physicians opined, and the ALJ agrees, that the work injury caused an aggravation of Claimant's underlying stenosis and spondylolisthesis, which was the reason for the surgery. However, the Claimant need not even prove that the need for her surgery was related to the injury. She must merely prove the surgery was authorized, which, in this case, is undisputed. In *Tanner v. Synthes USA*, W.C. 4-714-037 and 4-717-509 (ICAO 2008,), the Industrial Clams Appeals Panel upheld an ALJ's decision that an injury resulting from authorized treatment is compensable even if the body part being treated was not a compensable component of the claim. The ALJ concludes that the injuries Claimant suffered as a result of the July 3, 2013 surgery are the liability of the Insurer pursuant to the "quasi-course of employment doctrine."

Permanent Total Disability

In order to prove permanent total disability, claimant must show by a preponderance of the evidence that he is incapable of earning any wages in the same or other employment. Section 8-40-201(16.5)(a), C.R.S. A claimant therefore cannot receive PTD benefits if he or she is capable of earning wages in any amount. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. See, *Lobb v. ICAO,* 948 P.2d 115 (Colo. App.

1997); *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. R.E. 12 v. Bymer*, at 550, 556, 557. The critical test is whether employment exists that is reasonably available to a claimant under his particular circumstances. *Id.*

The claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages. Rather the claimant must demonstrate that the industrial injury is a "significant causative factor" in her permanent total disability. *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). Under this standard, it is not sufficient that an industrial injury create some disability which ultimately contributes to permanent total disability. Rather, *Seifried* requires the claimant to prove a direct causal relationship between the precipitating event and the disability for which the claimant seeks benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), *rev'd on other grounds*, *Askew v. Industrial Claim* Appeals Office, 927 P.2d 1333 (Colo. 1996).

The opinion of a DIME physician carries no extraordinary weight in regard to issues not assigned by statute to a DIME determination. Those determinations are limited to MMI and the permanent impairment rating. Section 8-42-107(8)(b)(II) & (c), C.R.S. The opinions of a DIME physician have only been given presumptive effect when expressly required by the statute. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 190 (Colo. App. 2002), (DIME opinion not given deference regarding the right to reopen), *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). (DIME opinion concerning causation need not be overcome by clear and convincing evidence where dispute involved the "threshold requirement" that the claimant establish a compensable injury); *Story v. Indus. Claim Appeals Office*, 910 P.2d 80 (Colo.App.1995)(DIME determination of MMI did not preclude change of physician order where only "Grover" medical benefits sought). The determination then, by the ALJ that the claimant is entitled to PT benefits, is to be made by considering the preponderance of the evidence. The determination of the DIME physician as to which body parts and resulting work restrictions were related to the work injury can be considered, but they are not entitled to additional weight by the statute. The ALJ may consider them on the same basis as other expert opinions regarding work limitations. There is no procedural reason that a hearing cannot feature simultaneous arguments over both the DIME physician determinations and eligibility for PT benefits.

The Claimant has proven that she is unable to earn a wage, and that her work injury is a significant causative factor in her inability to earn a wage. As found, the work restrictions imposed by Dr. Bisgard most accurately reflect Claimant's physical limitations and abilities. The ALJ credits the opinions of Dr. Bisgard that the restrictions are all attributable to Claimant's industrial injury. The Claimant also credibly testified that she experiences extreme pain most of the time requiring her to lie flat to alleviate the pain. She also has difficulty with household chores and activities of daily living. The ALJ appreciates that Claimant has a pre-existing history of diabetes, and other health conditions, that are likely contributing to Claimant's chronic problems, but prior to the admitted work injury and authorized surgery, the Claimant was working full time at full duty, exercising regularly and living a normal and productive life.

Although the Claimant has gained significant transferrable job skills, Ms. Montoya credibly and persuasively opined that the work restrictions and her physical condition would hinder Claimant's ability to maintain employment. Ms. Montoya admittedly did not research the availability of specific jobs the Claimant could perform because after meeting the Claimant and evaluating the medical records, Ms. Montoya concluded that Claimant would have serious difficulty maintaining a job rendering it meaningless to research specific jobs.

Ms. Bartmann relied only on the work restrictions imposed by Dr. Bisgard at the time of MMI and refused to consider Claimant's subjective complaints. Ms. Bartmann also had the opinion that Claimant's physical limitations were unrelated to the work injury, an opinion shared by Drs. Kawasaki and Roth. However, the ALJ has considered all of the medical opinions in this case and concludes that both Drs. Kawasaki and Roth are incorrect for the reasons set forth herein. As such, Ms. Bartmann's opinions are not as persuasive as those of Ms. Montoya. Claimant has proven that she is permanently and totally disabled as a result of her work-related injuries.

Overcoming the DIME

To the extent that it is necessary to determine whether Claimant overcame the DIME opinions of Dr. Kawasaki, the ALJ concludes that the Claimant has met her burden. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Id.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

The Respondents assert that Claimant failed to properly endorse the issue of overcoming the DIME opinions regarding maximum medical improvement, making Dr. Kawasaki's opinion as to MMI binding. As stated above, Dr. Kawasaki's opinion regarding MMI cannot be legally binding in light of the uncontested January 14, 2011 FAL. At the earliest, Claimant reached MMI on January 5, 2011.

Regarding Dr. Kawasaki's opinions on permanent impairment, the credible and persuasive evidence demonstrates that Dr. Kawasaki's opinion that Claimant sustained zero impairment is incorrect. Dr. Kawasaki's opinions concerning causation or permanent impairment related to any treatment prior to January 14, 2011 are not credited. The FAL filed on January 14, 2011 closed the issue of causation of Claimant's low back symptoms, including L4-5 stenosis, facetogenic pain, and reduced lumbar range of motion. With respect to Dr. Kawasaki's opinions regarding the cause of Claimant's conditions once the claim was reopened on June 25, 2013, clear and convincing evidence demonstrates that he was incorrect regarding his causation analysis. Both Drs. Bisgard and Goldman related the Claimant's need for surgery to her work injury, and even Dr. Saint-Phard attributed the need for the surgery, in part, to the work injury. Regardless, the July 3, 2013 surgery was a procedure authorized by the Insurer and it worsened Claimant's condition by bringing on brand new symptoms. From a legal perspective, the worsening due to the authorized surgery represents a compensable causally-related component of Claimant's initial injury which Dr. Kawasaki understandably did not consider. As such, Dr. Kawasaki clearly erred when assigning a zero percent impairment.

Maintenance Medical Treatment

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of the condition. *Grover v. Industrial Commission,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a Claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a Claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

The Claimant has proven entitlement to ongoing maintenance medical care. As credibly opined by Dr. Bisgard, Claimant needs chronic pain management to maintain her condition or prevent further deterioration. The opinions of Drs. Roth and Kawasaki to the contrary are not persuasive because they have erroneously concluded that all treatment after July 8, 2008 was unrelated to the work injury.

Claimant has also been receiving pain medications through her private health insurer. She stated in her testimony that she would like to be reimbursed for out-of-pocket expenses related to the maintenance prescription medications but this issue was not identified at the commencement of hearing, and there was no specific evidence as to the amounts. As such, the ALJ declines, at this time, to order the Respondents to reimburse her for any out-of-pocket expenses associated with maintenance medications.

Overpayment

The issue of overpayment is rendered moot. The Respondents cannot prove an overpayment because they were liable for all of the TTD and PPD paid to the Claimant thus far.

ORDER

It is therefore ordered that:

1. The Claimant is permanently and totally disabled as a result of her work injury.

2. The Claimant is entitled to maintenance medical care.

3. The Claimant is entitled to an increased award of TTD based on the recent stipulated AWW.

4. Respondents are entitled to all applicable offsets and credits.

5. Respondents' claim for overpayment is denied.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 4, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits from August 12, 2015 thought October 29, 2015?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable, necessary and related medical benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing the parties stipulated that if the claim is found to be compensable the Respondents will pay temporary total disability benefits at the maximum rate from August 12, 2015 through October 29, 2015. The parties also stipulated if the claim is found to be compensable the Respondents will pay reasonable, necessary and related medical expenses including the cost of treatment provided by Swedish Hospital, Seattle, Washington Fire Department and Dr. Alan Ng.

2. On August 10, 2015 Claimant was employed as a co-pilot in the Employer's airline business.

3. Claimant credibly testified as follows. On August 10, 2015 he was co-piloting an aircraft that landed in Seattle, Washington. Claimant was scheduled to spend the night in Seattle and fly to Denver, Colorado the following day. After arriving at the hotel where he was scheduled to stay overnight Claimant made arrangements with the captain to meet for dinner. The captain suggested meeting at 4:00 p.m. but Claimant wanted to exercise so the dinner was "pushed back" to 5:00 p.m. Claimant left the hotel at approximately 4:00 p.m. and jogged to Seattle's "harbor steps" located approximately one-half mile from the hotel. Claimant explained that when he went to the harbor steps he was "mainly exercising" but also "sightseeing." As Claimant was running up the harbor steps he slipped and heard a "pop" in his left lower extremity and was immediately unable to walk. Later that day Claimant was diagnosed with a ruptured Achilles tendon.

4. Claimant credibly testified as follows concerning the policies and procedures governing overnight layovers. After an aircraft lands and the parking and "termination" procedures are complete, pilots are transported to a hotel for the overnight

stay. Pilots do not receive “flight time pay” during the layover. Pilots receive flight time pay only from the moment they release an aircraft’s brakes until they reset the brakes at the point of destination. However, pilots do receive a per diem for overnight stays.

5. Claimant credibly testified as follows concerning a pilot’s status and responsibilities while on layover. During the time a pilot is at the hotel on layover the pilot is not considered to be “on duty.” In fact, federal regulations require that pilots be off duty after completing a certain number of hours in flight. The Employer does not mandate, and in fact cannot mandate, that pilots perform exercise when they are “off duty” during a layover. Pilots are free to choose how they spend layover time and decide for themselves whether and when to exercise, see a movie, sightsee, rest or perform some other activity.

6. Claimant credibly testified that there is a contract between the pilot’s union and the Employer that requires layover hotels to maintain exercise facilities for use by pilots. Claimant stated that the majority of pilots exercise but admitted some do not. Claimant stated that when he reports for duty he must certify that he is physically and mentally fit to fly. Claimant explained that this certification includes the assurance that he is rested and healthy enough to operate the aircraft.

7. Claimant credibly testified that when he is at home in Littleton, Colorado he works out. Claimant stated that when he is at home he usually runs 1 to 2 “vigorous miles” per day.

8. Mr. Robert Early (Early) testified on behalf of Respondents. Mr. Early is the Employer’s “assistant chief pilot” in Denver, Colorado. He has supervisory authority over the Claimant and is familiar with layover procedures for pilots.

9. Early credibly testified that a pilot is considered to be “on duty” from the time the pilot arrives at the airport until 15 minutes after the flight is over. However, a pilot is not considered to be “on duty” while at a hotel during a layover. Early agreed with Claimant that pilots receive “flight time” pay from “brake to brake” and for 15 minutes after the end of the flight.

10. Early credibly testified that the Employer does not require pilots to exercise while on layover and that pilots are “free to do what they want” when they are not on duty. Early opined that a pilot who exercises during a layover does so voluntarily. Early explained that the Employer does not “mandate” that layover hotels have exercise facilities. Rather, the requirement that layover hotels have exercise facilities is a product of the negotiated contract between the pilots’ union and the Employer.

11. Claimant failed to prove it is more probably true than not that he sustained an injury arising out of and in the course of his employment. Rather, the credible and persuasive evidence establishes that it is more probably true than not that while running the harbor steps claimant was voluntarily performing a recreational activity that fell outside the scope of his employment. The credible and persuasive evidence also

establishes it is more probably true than not that when Claimant was injured he was engaged in a “substantial deviation” from the scope of his employment.

12. The credible and persuasive evidence establishes that at the time Claimant injured his Achilles tendon he was engaged in a “recreational activity.” Specifically, the Claimant was primarily engaged in exercise, and to a lesser degree sightseeing, intended to refresh his mind and body.

13. The credible and persuasive evidence establishes that Claimant’s action in running the stairs did not occur during regular work hours. Rather, Claimant credibly testified that he was not “on duty” while staying at the hotel and was not being paid wages while he was at the hotel. Claimant’s testimony is corroborated by Early’s credible testimony that a pilot is “off duty” while staying at the hotel on layover.

14. The credible and persuasive evidence establishes that Claimant’s exercise and consequent injury did not occur on the Employer’s premises. However, the ALJ does not assign much weight to this factor since the very nature of Claimant’s job causes him to be away from the Employer’s premises for long periods of time.

15. The credible and persuasive evidence establishes that the Employer did not “initiate” Claimant’s exercise on August 10, 2015. Claimant admitted that he usually exercises, even when he is at home. Claimant admitted that the Employer does not mandate, and in fact cannot mandate, that a pilot perform exercise while on a layover. Claimant and Early agreed that after a flight has ended and a pilot is on layover the pilot is free to choose what activities he or she will or will not perform, including exercise.

16. There is no credible or persuasive evidence that the Employer exercised any control or direction over Claimant’s decision to exercise on August 10, 2015, or that the Employer exercised control over the method of Claimant’s exercise. To the contrary, Claimant testified that he wanted to exercise when he arrived at the hotel and even “pushed back” dinner plans with his captain in order to have time to run. Early credibly testified that the Employer does not “mandate” any type of exercise program. The ALJ is not persuaded that the contract provision requiring that hotels have exercise facilities demonstrates that the Employer exercised direction and control over Claimant’s exercise. Rather, Early credibly and persuasively testified that the contract requiring that layover hotels maintain exercise facilities is the product of a negotiated contract between the union and the Employer.

17. The credible and persuasive evidence establishes that the Employer probably receives some benefit from the Claimant’s decision to maintain an exercise program. The Claimant’s exercise probably makes it more likely Claimant will be available to fly on assigned dates. However, this fact is not given much weight. The Claimant admitted that it is his responsibility to certify before every flight that he is physically and mentally able to fly. Claimant also testified that he knows that health risks, including the risk of heart attack, increase if a person does not exercise. Indeed, Claimant stated that pilots risk their livelihoods if they do not exercise. The ALJ infers from this evidence that Claimant’s decision to exercise on August 10, 2015 resulted

much more from Claimant's personal desire to stay healthy than it did from any Employer compulsion or influence.

18. The credible and persuasive evidence establishes that Claimant's action in the running the harbor steps was "voluntary." In reaching this determination the ALJ recites Findings of Fact 13 through 17 as if fully set forth. Considering these factors together the ALJ finds that Claimant's decision to run the harbor stairs on August 10, 2015 was a product of and motivated by his own free will. Claimant's decision to run the steps was in no way mandated by the Employer, and was in no was initiated, organized sponsored or financially supported the Employer.

19. At hearing Claimant's Exhibits 1 through 8 were received in evidence. Respondents Exhibits A through F were received in evidence.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY OF ACHILLES TENDON INJURY

Claimant contends that a preponderance of the evidence establishes that the injury to his Achilles tendon sustained during the layover in Seattle, Washington arose out of and in the course of his employment as an airline co-pilot. Claimant reasons that the injury is compensable because he was in "travel status" on August 10, 2015 at the time the injury occurred. He further argues that running up the harbor steps was reasonably incidental to his travel because he was "ministering to personal needs." In contrast the Respondents argue the Claimant's injury did not arise out of and in the course of his employment. Respondents argue the Claimant was not performing "employment" "at the time of injury because running up the harbor steps constituted "voluntary" participation in a "recreational activity." Respondents further argue that Claimant's injury did not occur within the scope of his employment because the act of running up the stairs constituted a "personal errand" that substantially deviated from the employment relationship. The ALJ agrees with Respondents.

In order to recover benefits Claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his "employment." Section 8-41-301(1)(b) & (c), C.R.S*.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

An injury sustained during travel initiated at the direct or implied request of the employer is sufficient to satisfy the arising out of and in the course of employment test because such travel is contemplated by the employment contract. *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). An employee traveling at the direction of the employer is in "travel status" and is considered to be within the course of the employment continuously during the trip. *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995); *Tatum-Reese Development Corp. v. Industrial Commission*, 30 Colo. App. 149, 490 P.2d 94 (1971). The travel status doctrine holds that during employer-directed travel the "risks associated with the necessity of eating, sleeping and ministering to personal needs away from home are considered incidental to and within the scope of the traveling employee's employment." *Phillips Contracting, Inc. v. Hirst*, 905 P.2d at 12.

However, an employee in travel status can engage in some types of "personal errands" that so deviate from employment that the activity falls outside the scope of the employment. The test is whether the activity giving rise to the injury constituted a deviation from the employment so substantial that the activity was removed from the employment relationship. *Silver Engineering Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973); *Phillips Contracting, Inc. v. Hirst*, *supra.*

Section 8-40-201(8), C.R.S., provides that when the term "employment" is used in the Act it "shall not include the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." Similarly, § 8-40-301(1), C.R.S., provides that when the term "employee" appears in the Act it "excludes" any person "while participating in recreational activity, who at such time is relieved of and is not performing any duties of employment…"

In *McLachlan v. Center for Spinal Disorders, P.C.,* WC 4-780-747 (ICAO July 2, 2010) the claimant was in "travel status," but was injured during his voluntary participation in a recreational street hockey game. The ALJ found the injury was not compensable because participation in the hockey game constituted a substantial deviation from the employment, and because the Claimant's participation in the game was "excluded" from his "employment activity" pursuant to § 8-40-201(8). On appeal the claimant did not dispute the ALJ's determination that his participation in the hockey game involved voluntary participation in a recreational activity. Rather, the claimant argued that he remained in travel status "in the broader sense" and the injury should be found compensable. The ICAO affirmed the ALJ's order. The ICAO reasoned that the clear legislative intent of § 8-40-201(8) and § 8-40-301(1) is "to remove the participation in a voluntary recreational activity from the employment relationship." In order to give effect to the legislative intent of these statutes the ICAO stated that the case presented the "type of injury incurred during a deviation from employment so substantial as to remove it from the employment relationship."

The ALJ is persuaded by the ICAO's reasoning in *McLachlan*. As the ICAO observed, § 8-40-201(8) and § 8-40-301(1) define the terms "employment" and "employee" to exclude voluntary participation in recreational activities. Because the legislature has chosen to define voluntary participation in recreational activities as outside the scope of covered "employment," it would make no sense to conclude the legislature intended a different definition if the injured worker happened to be in "travel status" while participating in the recreational activity. It makes far more sense to hold that the legislature has determined that the risks associated with voluntary participation in recreational activities fall outside the risks associated with employer mandated travel. Therefore, as determined in *McLachlan*, voluntary participation in a recreational activities represents a deviation from travel status that is substantial enough to remove the participation from the scope of employment.

It follows from this discussion that if Claimant's action in running up the harbor steps constituted "voluntary participation" in a "recreational activity" for the purposes of § 8-40-201(8) and § 8-40-301(1), the tendon injury is not compensable. The statutory term "recreational activity" has been defined as an activity that "has a refreshing effect on either the mind or the body." *White v. Industrial Claim Appeals Office,* 8 P.3d 621, 624 (Colo. App. 2000). Participation in physical exercise may be a "recreational activity" depending on the circumstances. When determining whether exercise is a recreational activity the ALJ may consider various factors including the following: (1) Whether the injury occurred during working hours; (2) Whether the injury occurred on the employer's premises; (3) whether the employer initiated the employee's exercise program; (4) Whether the employer exerted any control or direction over the employee's exercise program; and (5) Whether the employer stood to benefit from the employee's exercise program. *Id.* at 623, 624.

The question of whether participation in a recreational activity was "voluntary" for purposes of § 8-40-201(8) requires the ALJ to determine the claimant's "motive" for participating in the recreational activity. The ALJ may consider various factors including the following: (1) Whether the activity occurred during working hours; (2) Whether the activity occurred on or off the employer's premises; (3) Whether the employer required the employee to participate in the activity; (4) Whether the employer initiated, organized, sponsored or financially supported the activity; (5) Whether the employer derived a benefit from the activity. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998).

The ALJ notes that § 8-40-301(1) does not state that a person's participation in a recreational activity must be "voluntary" in order to exclude the person from being considered an "employee." However, § 8-40-301(1) does provide that in order for the exclusion to apply the person must be "relieved of" and "not performing any duties of employment." Thus, § 8-40-301(1), like § 8-40-201(8), invites consideration of the injured worker's reasons for participating in the recreational activity. This in turn requires consideration of the degree to which the worker's participation was "voluntary" rather than a product of the employer's compulsion. Thus, the ALJ infers that the five factors described in the *Dover Elevator* case are relevant to and may be considered when determining if the injured employee was relieved of and not performing duties of employment while participating in the recreational activity. *Cf. Dunavin v. Monarch Recreation Corp.,* 812 P.2d 719 (Colo. App. 1991) (decided under predecessor to § 8-40-301(1)).

As determined in Findings of Fact 11 through 18 the credible and persuasive evidence demonstrates that when Claimant was running the harbor steps in Seattle, Washington on the afternoon of August 10, 2015 he was not performing any service arising out of and in the course of his employment. Rather, after considering the relevant legal factors as set forth in Findings of Fact 13 through 18, the ALJ concludes that Claimant was voluntarily participating in a recreational activity within the meaning of § 8-40-201(8), and that he was relieved of and not performing any duties of employment within the meaning of § 8-40-301(1). Consequently, the Claimant by definition was not within the scope of his "employment" at the time he was injured and he was not legally an "employee" for purposes of workers' compensation. Moreover, running the steps constituted a "substantial deviation" from the Claimant's employment so as to render the resulting injuries not compensable. *McLachlan v. Center for Spinal Disorders, P.C., supra.* The claim for workers' compensation benefits must be denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in WC 4-991-007-01 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 6, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that he suffered a functional impairment contained off the schedule of injuries set forth at C.R.S. § 8-42-107(2), C.R.S. and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

FINDINGS OF FACT

1. The Claimant is currently employed as a paramedic lieutenant with Employer and is in his 5th year in this position. The Claimant's job is very physically demanding and requires periodic testing to ensure the Claimant meets the physical requirements of the job. The Claimant suffered an admitted injury to his right shoulder in the course of a horse rescue. The horse was trapped in a retention pond at the bottom of a ravine. The Claimant was sent down to cut and clear brush. On the way down into the ravine and he slipped. The Claimant arrested his fall by using his right arm.

2. The Claimant was taken to the Emergency Department at Littleton Adventist Hospital on October 16, 2014. The Claimant reported that he was on a horse rescue in a muddy ravine. While climbing down into the ravine, the Claimant slipped in the mud. The Claimant reported he extended his arm and jammed his right shoulder. The Claimant reported right shoulder pain that was worse with palpation and movement. The Claimant had very limited range of motion of his shoulder and he was sent for an MRI. The right shoulder MRI showed (1) supraspinatus tendon tear; (2) small joint effusion and moderate bursal fluid; (3) fraying and heterogeneity of the superior and anterosuperior glenoid labrum (Claimant's Exhibit 4; Respondents' Exhibit B).

3. The Claimant testified that he treated with his authorized treating physician Sharon Walker. He was initially evaluated by Dr. Walker on October 17, 2014. Dr. Walker reviewed the MRI images and agreed with the findings. She anticipated that the Claimant would undergo surgery for his torn supraspinatus (Respondent's Exhibit C, pp. 10-13). The Claimant underwent surgery performed by Dr. Michael Hewitt on October 28, 2014. The procedures performed included: (1) right shoulder arthroscopic rotator cuff repair; (2) arthroscopic subacromial decompression; (3) distal clavicle co-planing; and (4) examination under anesthesia (Claimant's Exhibit 6; Respondents' Exhibit D).

4. Dr. Walker provided an impairment rating on June 17, 2015. The Claimant reported to Dr. Walker that he was doing good and he had completed physical therapy, finding it helpful. The Claimant reported he was still doing his home exercise program which also helped. He reported that "he still gets discomfort with some overhead activity" such as when he used a chainsaw over head, when was welding overhead and

when he had to pull ceiling tiles during a fire. The Claimant also reported occasional sharp pain if he does something unusual and occasionally he wakes up in the morning with his entire right arm numb. (Claimant's Exhibit 2, p. 4; Respondents' Exhibit C, p. 15). Dr. Walker obtained range of motion measurements and noted a 2% UE impairment for flexion and a 2% UE impairment for abduction and a 1% impairment for external rotation. His range of motion impairments resulting in a 5% UE rating. She also assigned 10% rating for the specific disorder of the distal clavicle excision. Dr. Walker combined these ratings for a 15% upper extremity impairment rating, which, if converted, would be a whole person impairment rating of 9% (Claimant's Exhibit 2, pp. 5-6; Respondents' Exhibit C, pp. 15-16).

5. The Claimant testified that his pain is currently located in his right shoulder, throughout the trapezius and throughout the lower back. The Claimant testified that the pain affects his ability to sleep. The Claimant also testified that other activities of his daily life are also affected including "thinning" or "lemming" activities at his family logging/forest property in Wisconsin. The Claimant testified that now he fatigues more easily and uses a chainsaw slower than before. He estimates that because of this he loses 1 day out of 10 due to his slowness with the chainsaw. The Claimant testified that his activities with the fire department are also impacted. As an example he pointed to instances when he in involved in assisting in out-of-state non-structural wild land fires. He testified that he tires more easily now and has to swap out. The specific fire-fighting activities where the Claimant testified he is impacted due to his include: pulling hose lines, advancing hose lines, pulling ceilings and chainsaw use (such as in the ventilation of roofs – opening soffits). The Claimant testified that although he still meets the standards for his annual physical ability test, his performance is decreased from before the injury. His push-up and pull-up score is lower and his time is slower. His pre-injury time was 2:45 and his post-injury time is around 3:30-3:40. Before the injury, the Claimant was able to do 45 push-ups and after the injury he can do 32. Before the injury, he could do 18 pull-ups and after the injury, only 12 pull-ups.

6. On July 21, 2015 a Final Admission of Liability was filed by Respondents admitting for a 9% scheduled impairment (Respondents' Exhibit A).

7. On August 24, 2015, a Final Admission of Liability was filed by Respondents admitting for a 15% scheduled impairment

8. At the hearing, Dr. Swarsen testified as an expert in the areas of occupational medicine and as to Level II accreditation matters. Dr. Swarsen has not physically examined the Claimant but has reviewed the Claimant's medical records that are admitted exhibits in this case. Dr. Swarsen testified that the shoulder is the scaffolding with which the arm articulates with the rest of the body and it is distinctly different from the arm, although the arm does not function properly without the shoulder. However, the shoulder does have function without the arm as it can have function in terms of scaffolding the body. Dr. Swarsen, referenced the Claimant's operative report at Claimant's Exhibit 6 (Respondents' Exhibit D), while simultaneously referencing illustrations of the anatomy of the shoulder (which was admitted as Claimant's Exhibit

10, including color-coded marks made by Dr. Swarsen during testimony). First, Dr. Swarsen marked the glenohumeral joint on the illustration with a green marker. Then, turning to the operative report, he noted that there was a tear to the supraspinatus tendon which was debrided as part of the procedure. Dr. Swarsen drew a box shape with an orange marker showing the approximate location of the tear and the repair to the supraspinatus. He noted that this repair is located above the glenohumeral joint and within the area of the shoulder complex. Turning back to the operative report, Dr. Swarsen noted that a subacromial decompression (subtotal bursectomy, resection of the coracoacromial ligament, with resection of 5-mm of anterior acromial spur) was also a part of the procedure. Dr. Swarsen colored the location of this repair in blue marker on the illustration and noted that this is in an area above the arm in the shoulder complex. Finally, Dr. Swarsen noted that a distal clavicle co-planing was a part of the procedure. Dr. Swarsen used a red marker to show on the illustration where this took place. He noted that this is above the glenohumeral joint. As a result of the procedures that the Claimant underwent to repair the damage from his work injury, Dr. Swarsen opined that it is typical to experience trapezius muscle problems as a result of the injury, repair and rehabilitation of the rotator cuff with residual loss to the shoulder girdle. Dr. Swarsen testified that conversion from 15% upper extremity rating would result in a 9% whole person impairment rating. Dr. Swarsen opined that the impairment in the Claimant's case should be a whole person rating as opposed to a scheduled loss because it is a loss at the shoulder.

9. On cross-examination, Dr. Swarsen agreed that as he did not physically examine the Claimant, he has not measured any loss of range of motion in this case. Dr. Swarsen also testified that the purpose of the shoulder is really to move the arm and if an arm is not attached to the shoulder, he is not sure if the shoulder has any function.

10. Dr. Allison Fall testified at the hearing as an expert in the areas of physical medicine and rehabilitation and as to Level II accreditation matters. Dr. Fall performed an IME of the Claimant on December 15, 2015 and prepared a written report based on that IME. Dr. Fall testified that in her opinion, the Claimant had a successful rotator cuff repair with some minimal ongoing symptoms. Dr. Fall testified that the Claimant's neurological examination was normal with no pain or crepitus present during provocative maneuvers. On palpation, Dr. Fall did note some tenderness of the trapezius. The Claimant described some ongoing right shoulder pain and limited range of motion without pain. Based on the activities that the Claimant has described that he is able to do, he has a high level of function. Dr. Fall testified that she was not surprised that the Claimant's physical testing scores declined due to the injury, recovery and aging process which can all impact this. However, Dr. Fall opined that it is expected that over time the Claimant can improve strength and conditioning. Dr. Fall opined that, to the extent that the Claimant is experiencing any loss of function, it is at the arm. She opined that the loss of function she observed and measured for the Claimant was related to flexion, extension and abduction of the arm and overall use and function of the arm. With reference to Claimant's Exhibit 10, Dr. Fall testified that the glenohumeral joint and parts described and noted by Dr. Swarsen are all part of the shoulder girdle and the purpose of the shoulder girdle is articulation of the upper extremity. The

purpose of the glenohumeral joint is to allow for articulation of the humerus so the arm can be used and it is not just hanging at the side. Dr. Fall opined that the supraspinatus tendon attaches muscle to bone and is used in rotation of the arm. She opined the acromion is the bony bump at the top of the shoulder that connects the clavicle with the AC joint. Here the Claimant had bone spur from the acromion which was shaved off to give more room for the humeral head which allows for more room in the shoulder to move the arm and avoid impingement.

11. On cross-examination, Dr. Fall agreed that the measurement of abduction, flexion and extension is performed by the shoulder and the trapezius and the point of origin of the trapezius is on the neck and insertion is on the scapula. She agreed that this is on the trunk and not the arm. On re-direct examination, when questioned if the Claimant exhibited any loss of function on the neck or trapezius, Dr. Fall testified that there was a slight registration of pain, but this doesn't equate with a loss of function.

12. The Claimant's credible testimony of pain in his right shoulder, trapezius, and throughout the lower back, along with evidence of impairment, including supporting medical records, and the opinion of Dr. Swarsen, which is persuasive on this issue, is consistent with functional impairment of the Claimant's right upper extremity as well as functional impairment extending past the arm. The functional impairment is evident in the Claimant's range of motion deficits and limitations with overhead work. Specifically, Dr. Walker obtained range of motion measurements and noted a 2% UE impairment for flexion and a 2% UE impairment for abduction and a 1% impairment for external rotation, resulting in a 5% UE impairment rating. His impairments require him to make adaptations in the performance of work duties affect his ability to perform his activities of daily living. Although the Claimant is still at a high level of physical fitness, he has suffered functional impairment as compared to his abilities prior to his injury. Therefore, it is found as fact that, as a result of his October 16, 2015 work injury, the Claimant has a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Disability Compensation Based on Scheduled Injury vs. Whole Person Impairment

The claimant bears the burden of establishing functional impairment beyond the arm at the shoulder and the consequent right to permanent partial disability benefits under§ 8-42-107(8)(c), C.R.S., by a preponderance of the evidence. *Maestas v. American Furniture Warehouse,* W.C. No. 4- 662-3 69 (June 5, 2007); *Johnson-Wood v. City of Colorado Springs,* W. C. No. 4-536-198 (ICAO June 20, 2005).

The question of whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S. is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996); *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004).

There is no requirement that functional impairment take any particular form in order to be compensable under § 8-42-107(8)(c), C.R.S. Evidence of pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered impairment for this purpose*.* Aligaze *v. Colorado Cab Co. / Veolio Transportation*; W.C. No. 4-705-940 (ICAO April 29, 2009); *Chacon v. Nichols Aluminum Golden, Inc.,* W.C. No. 4-521-005 (ICAO November 29, 2004); *Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-878 (ICAO November 20, 2001), aff'd., *Pinnacle Glass Co. v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA2386, August 22, 2002) (not selected for publication). The courts have held that damage to structures of the "shoulders" may or may not reflect a "functional impairment" enumerated on the schedule of disabilities. *See Walker v. Jim Fouco Motor Company,* supra*; Strauch v. PSL Swedish Healthcare System,* supra, *Langton v. Rocky Mountain Health Care Corp.,* supra*; Price v. United Airlines,* W.C. No. 4-441-206 (ICAO January 28, 2002); *Johnson-Wood v. City of Colorado Springs,* supra.

In this case, the Claimant’s testimony, substantiated by the medical records, and the opinion of Dr. Swarsen, establish that the Claimant is entitled to a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S. because he has suffered a functional impairment to a part of the body that is not contained on the schedule. The Claimant has proven by a preponderance of the evidence that the situs of his functional impairment extends beyond the arm at the shoulder. Work activities and other activities of daily living cause pain in his shoulders, trapezius, and throughout the low back such that the Claimant is limited in his ability to engage in actions requiring overhead movement. His impairment requires him to make adaptations in the performance of work duties and in his activities of daily living. Therefore, the Claimant suffered a functional impairment contained off the schedule of injuries set forth at Section 8-42-107(2), C.R.S. and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

ORDER

It is therefore ordered that:

1. The Claimant suffered a functional impairment contained off the schedule of injuries set forth at C.R.S. § 8-42-107(2), and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 4, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained an injury or occupational disease proximately caused by the performance of service arising out of and in the course of his employment?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits from July 9, 2015 through November 8, 2015?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable, necessary and authorized medical benefits?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of disfigurement benefits?

- What is Claimant's correct average weekly wage?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 though 3 were admitted into evidence. Respondents' Exhibits A though C were admitted into evidence.

2. Claimant contends he sustained a C6-7 disc herniation proximately caused by the performance of service arising out of and in the course of his employment.

3. Claimant was hired by the Employer on May 18, 2015 to perform the job of Senior Systems Engineer II.

4. On June 6, 2015 the Employer dispatched Claimant to Abu Dhabi to perform services connected to the installation of a computer system. Claimant credibly testified that this job involved "tracing" and "pulling" computer cables. Claimant explained that the cables ran along a rack located approximately 8 feet above the ground. He explained that in order to handle the cables he had to stand on the "back of the rack" and reach overhead with his dominant right hand while "twisting" and "turning" and "looking down." Because the installation project was on a deadline to be completed by July 4, 2015 Claimant was working 10 to 12 hours per day.

5. Claimant testified as follows concerning the events of July 2, 2015. He was at the job site tracing cables and reaching above his head when he felt a "pinch, or a pop or something like that" in his right upper extremity. This incident resulted in "instant pain." He "put [his] shoulder down" and it relaxed. Claimant "didn't think twice about it" and continued working. After work Claimant returned to his hotel and went to bed.

6. Claimant testified as follows concerning the events of July 3, 2015. He woke up at the hotel and experienced pain that radiated from the base of his neck all the way to his elbow. He went to the job site and informed the manager that he was experiencing "intense pain" and "there was something going on." Claimant was referred to a local hospital where he saw an orthopedic surgeon who performed an x-ray the shoulder. According to Claimant the orthopedic surgeon saw "osteoarthritis" and prescribed Naproxen.

7. Claimant testified that the next day (July 4, 2016) the pain was all the way down to his fingers and he "knew something was wrong." Claimant called Virginia and spoke to the Employer's chief medical officer. Claimant stated that he told the chief medical officer what the local orthopedic surgeon had said. However, the chief medical officer didn't think the problem was Claimant's shoulder but was "something different." Claimant was authorized to fly back to fly back to Colorado for treatment. However, the Employer did not refer him to any specific physician.

8. Prior to the alleged incident of July 2, 2015 Claimant had a significant medical history of treatment for his right upper extremity. Claimant testified that in the early 1980's he injured his right shoulder during military training. As a result Claimant was assessed with a "ten percent disability rating" by the VA. Claimant testified that over the "last couple of years" the VA has treated his right shoulder with "arthritic medicine" and injections.

9. Medical records from November 7, 2008 reflect that in November 2007 Claimant re-injured his right shoulder in a motor vehicle accident (MVA). Following the MVA Claimant reportedly experienced "right shoulder pain after activities." (Dr. Fall's medical records review, Respondents' Exhibit A p. 8).

10. A primary care provider (PCP) note from April 21, 2014 reflects that Claimant was seen for a complaint of right shoulder pain. The physical examination (PE) was consistent with a rotator cuff disorder. (Dr. Fall's medical records review, Respondents' Exhibit A p. 8).

11. On January 20, 2015 Claimant underwent an MRI of the right shoulder that revealed subacromial/subdeltoid bursitis, mild hypertrophic degenerative arthritis of the right AC joint, synovial hypertrophy, mild impingement and mild tendinopathy. (Dr. Fall's medical records review, Respondents' Exhibit A p. 8).

12. On March 11, 2015 Claimant was seen at the VA orthopedic Clinic for evaluation of chronic right shoulder pain and decreased function "following a MVA in

1983 with a few months of symptoms and then return of symptoms over the past 18 months." Claimant was given an injection, presumably to the shoulder. (Dr. Fall's medical records review, Respondents' Exhibit A p. 7).

13. On April 22, 2015 Claimant was examined (presumably at the VA) for a complaint of a "flare up" of right shoulder pain "since 10 days." Claimant's pain level was reportedly 9 on a scale of 10 (9/10). (Dr. Fall's medical records review, Respondents' Exhibit A p. 8).

14. On May 8, 2015 an orthopedic surgeon evaluated Claimant at the VA. Claimant had reportedly experienced right shoulder pain for over one year. The pain "came on gradually after starting to lift weights." The physician noted a "positive Spurling's test with pain shooting into [Claimant's] right trapezius." The physician noted it was too soon for another injection and ordered cervical radiographs because the PE was "concerning for right-sided radic." (Dr. Fall's medical records review, Respondents' Exhibit A p. 8).

15. On May 8, 2015 Claimant underwent x-rays of the cervical spine for an "indication" of "right cervical radiculopathy." The x-rays reportedly showed mild degenerative changes at multiple levels. (Dr. Fall's medical records review, Respondents' Exhibit A p. 3).

16. Claimant testified that when he returned to the United States from Abu Dhabi he went to the VA medical facility for treatment. Claimant explained that he went to the VA because he thought his symptoms had "something to do with the shoulder impingement."

17. VA medical records indicate that on July 9, 2015 Claimant was seen at the emergency department (ED) for a complaint of "worsening right shoulder pain." Claimant did not report any "specific injury." Claimant's pain reportedly radiated "to the upper arm and right-sided neck." It was noted that Claimant had a history of right shoulder pain secondary to AC degenerative joint disease and impingement. On examination there was tenderness "over the right SCM and trapezius." X-rays of the shoulder were taken and "showed no change." (Dr. Fall's medical records review, Respondents' Exhibit A p. 8).

18. On July 11, 2015, Claimant sought treatment at Sky Ridge Medical Center emergency ED with a chief complaint of right shoulder pain. The pain ranged from Claimant's neck to his lateral shoulder. The ED report indicates Claimant presented to the ED with "atraumatic right shoulder pain for the past several days." Claimant also reported that he "initially felt a pop or click while overseas and exerting himself." A "diagnosis of radicular pain from a nerve impingement was favored." The radicular pain was thought to result from a "disc protrusion sustained during [Claimant's] exertional work overseas." (Dr. Fall's medical records review, Respondents' Exhibit A p. 2-3).

19. On July 13, 2015, Claimant sought treatment at the Medical Center of Aurora ED for complaints "arm pain and swelling." It was noted that Claimant had been

seen at the VA, Kaiser Permanente (KP) and Sky Ridge Medical Center. Claimant reported he had been given narcotics, muscle relaxants and steroids without relief. Claimant underwent a CT scan that revealed mild facet arthropathy, most significant at C4-5, right apical curvature and mild reversal of the cervical lordosis. There was no evidence of a "traumatic injury." (Dr. Fall's medical records review, Respondents' Exhibit A p. 2, 6).

20. On July 14, 2015 Claimant went to KP where he was seen by his PCP, Kevin Gordon, M.D. Dr. Gordon assessed severe right cervical radiculopathy and referred Claimant for a cervical MRI.

21. On July 17, 2015 Claimant underwent a cervical MRI. The radiologist's impressions included the following: (1) Severe right-sided foraminal stenosis at C6-7 from disk; (2) Mild spinal stenosis seen at C6-7 and C4-5 from disk osteophyte complex.

22. On July 19, 2015 Dr. Gordon advised Claimant that the MRI detected severe nerve root compression that might require surgery. Dr. Gordon referred Claimant for a neurosurgical consultation.

23. On July 23, 2015 Claimant was evaluated by neurosurgeon, Saul Schwarz, M.D., and PA Julie Berk. Claimant gave a history that on July 3, 2015 he "woke up with pain in R shoulder." Claimant did not recall a "specific injury." Claimant reported he was experiencing neck pain down the right arm to his hand with numbness in the arm and all fingers. No treatments reduced Claimant's symptoms. Dr. Schwarz noted the MRI revealed a "focal acute disc rupture R C6-7 with impaction on R C7 root." Dr. Schwarz prescribed physical therapy (PT) with traction and offered an epidural steroid injection (ESI). Dr. Schwarz noted that if these therapies failed claimant would consider an anterior cervical microdiscectomy fusion at C6-7.

24. Claimant underwent a course of PT and acupuncture but these treatments did not relieve his symptoms.

25. On August 21, 2015 Dr. Schwarz performed surgery described as a C6-7 anterior microdiscectomy, instrumented interbody fusion.

26. On August 31, 2015 Dr. Schwarz noted Claimant would need to be off work for approximately 6 weeks to recover from surgery.

27. Claimant credibly testified the surgery has provided good relief of his symptoms.

28. On October 13, 2015 Allison Fall, M.D., performed a medical records review. Dr. Fall is board certified in occupational medicine and rehabilitation and is level II accredited. Dr. Fall reviewed medical records through August 31, 2015, but apparently not Dr. Schwarz's operative report of August 21, 2015. Dr. Fall opined the C6-7 disc protrusion resulting in cervical radiculopathy was a condition that pre-dated Claimant's travel overseas. In support of this opinion Dr. Fall noted that cervical radiculopathy "was even questioned at the visit prior" to Claimant leaving on June 1,

2015. Dr. Fall further opined there was “no specific traumatic injury” that occurred while Claimant was overseas and that the need for a cervical discectomy “would not be due to [Claimant’s] job duties.”

29. On October 20, 2015 Dr. Gordon authored a letter to Claimant’s counsel. Dr. Gordon wrote that Claimant gave a history of an old right shoulder injury while in the service but “did not relate any neck injury history.” Dr. Gordon specifically noted that Claimant did not “report [the] 7/3/15 injury” and that no such report was found during Dr. Gordon’s chart review. However, Dr. Gordon allowed that such a report “could be hidden in there somewhere.” Dr. Gordon wrote that Claimant’s diagnosis was right “cervical radiculopathy due to severe right-sided foraminal stenosis at C6-7 from disk protrusion.” Dr. Gordon stated that Claimant did not report any “mechanism of injury” that would explain his symptoms.

30. On November 5, 2015 Dr. Schwarz released Claimant to return to work with restrictions of no steady or repetitive work above shoulder height, no lifting of more than 30 pounds occasionally, and freedom to stand or walk from a sitting position every 20 minutes as needed. Dr. Schwarz stated these restrictions would be in effect for 12 weeks and then Claimant could return to “unrestricted work activities.”

31. Claimant testified he returned to work on November 9, 2015 and as of the date of hearing was waiting for a security clearance to begin his next assignment.

32. On January 7, 2016 Dr. Fall performed an independent medical examination (IME) of the Claimant. Dr Fall took a history, reviewed additional medical records and performed a PE. Claimant gave a history that he had been in Abu Dhabi for “approximately one month” when his right shoulder symptoms began. Claimant reportedly felt “burning” in the shoulder and thought the symptoms were caused by arthritis. Claimant stated there was nothing “traumatic like a fall” but “after working with his arms overhead” he “felt a slight pinch.” Claimant also reported that after experiencing these symptoms he slept at a hotel and “the next morning his neck to upper arm was burning.” On PE Dr. Fall noted cervical range of motion was restricted consistent with a one-level fusion and that there were no radicular signs. Claimant reported diminished sensation over the tip of the right index finger. Dr. Fall assessed the following: (1) C6-7 disc protrusion with right C6-7 radiculopathy status post anterior cervical discectomy and fusion; (2) Right shoulder AC joint degenerative joint disease.

33. In the IME report Dr. Fall stated that there was “no specific acute traumatic event that occurred while Claimant was in Abu Dhabi.” Rather, Claimant “woke up one morning with burning in his shoulder and lateral neck area.” Dr. Fall also recognized that before the alleged injury Claimant had “chronic” right shoulder symptoms that were treated by the VA. In May 2015 Claimant returned to the VA with “increasing right shoulder symptoms.” Dr. Fall observed that in May 2015 the VA physician recorded a positive “Spurling’s sign.” Dr. Fall explained that a Spurling’s sign results from movement of the neck so as to cause “referred symptoms into the right upper trapezius.” She further noted that Claimant was referred for cervical x-rays “with a notation of radiculopathy.” In these circumstances Dr. Fall opined that Claimant’s C6-7

disc protrusion was a “pre-existing problem” not attributable to Claimant’s work in Abu Dhabi.

34. Dr. Fall testified at the hearing on behalf of Respondents. Dr. Fall opined to a reasonable degree of medical probability that Claimant did not suffer any injury or occupational disease involving his cervical spine or right upper extremity as a result of his employment in Abu Dhabi. Dr. Fall reiterated her opinion that the symptoms Claimant experienced in Abu Dhabi were the same symptoms for which he sought treatment at the VA in May 2015. Dr. Fall explained that the Spurling’s maneuver that the VA physician performed in May 2015 was designed to elicit symptoms indicative of cervical radiculopathy. Dr. Fall opined that the symptoms Claimant experienced in Abu Dhabi were consistent with the natural progression of the pre-existing degenerative spinal process that resulted in herniation of the C6-7 disc. Dr. Fall emphasized that there was no record of any “acute injury” while Claimant was in Abu Dhabi and stated that a disc may herniate as part of degenerative process without any mechanism of injury. Dr. Fall also explained that while Claimant was in Abu Dhabi performing work he may have placed his neck in a position that would elicit the symptoms of cervical radiculopathy, but that does not mean Claimant made the disease process worse or changed the underlying anatomy of the cervical spine.

35. On cross-examination Dr. Fall stated that she had been paid for preparing her reports and for attending and testifying at the hearing. Dr. Fall also stated that she had “testified fairly frequently” for Respondents’ attorneys.

36. Claimant failed to prove it is more probably true than not that he sustained an injury or occupational disease proximately caused by the performance of service arising out of and in the course of his employment. The credible and persuasive evidence establishes it is more probably true than not that Claimant’s herniated disc and consequent disability and need for treatment were proximately caused by the natural progression of Claimant’s degenerative spinal condition that pre-dated the alleged injury/occupational disease. Further, the credible and persuasive evidence establishes that the progression of Claimant’s symptoms was not aggravated or accelerated by any on-the-job injury or the by the conditions of Claimant’s employment in Abu Dhabi.

37. Dr. Fall credibly and persuasively testified to a reasonable degree of medical probability that the C6-7 disc herniation was the result of a degenerative condition that existed before Claimant went to Abu Dhabi, and that the herniation was not caused or aggravated by Claimant’s working conditions in Abu Dhabi. Dr. Fall persuasively opined that Claimant was already experiencing cervical radiculopathy before he was dispatched to Abu Dhabi. Dr. Fall’s opinion is corroborated by the May 8, 2015 VA medical records. The VA medical records document that on May 8, 2015 Claimant reported gradually increasing shoulder pain for more than a year. The May 8 VA records also document the Claimant exhibited a positive Spurling’s test and that his PE was suspicious for cervical radiculopathy. Dr. Fall credibly explained that the Spurling’s test is designed to elicit symptoms of cervical radiculopathy.

38. Dr. Fall also credibly and persuasively argued that the symptoms Claimant experienced in Abu Dhabi were consistent with the natural progression of the pre-existing spinal disease and not the result of an acute injury or exposure to some hazard of employment. Dr. Fall credibly explained that there was no documentation of any acute injury or event that would explain the development of Claimant's symptoms. Indeed, Claimant himself admitted to Dr. Fall that there was no traumatic event associated with the occurrence of his shoulder pain on July 2, 2015. The absence of an acute injury is also supported by the history Claimant provided to the VA on July 9, 2015, to Sky Ridge Medical Center on July 11, 2015, to Medical Center of Aurora on July 13, 2015 and to Dr. Gordon.

39. Dr. Fall's opinion that Claimant did not suffer any acute injury or aggravation of his condition while working in Abu Dhabi is corroborated by credible opinion of Claimant's PCP, Dr. Gordon. Dr. Gordon persuasively stated that Claimant did not report any "mechanism of injury" that could explain the development of the symptoms.

40. Dr. Fall credibly and persuasively opined that the symptoms Claimant experienced at work on July 2, 2015 do not prove that the duties of his employment caused or aggravated claimant's cervical spine disease. Dr. Fall credibly opined the symptoms occurred when Claimant placed his neck in a position that elicited radicular symptoms, just as a physician can elicit such symptoms by performing the Spurling's test. Claimant's testimony that on July 2, 2015 he experienced a "pop or pinch" that faded when he put his arm down is consistent with Dr. Fall's opinion. Indeed, Claimant testified that he continued to work after the incident and did not give it a "second thought."

41. The ALJ credits Dr. Fall's opinions despite the facts that she was paid for her testimony and has appeared on behalf of Respondents' attorneys in other cases. Dr. Fall is found to be credible because she based her analysis on rational conclusions and inferences drawn from the medical records and her examination of Claimant. Moreover, Claimant did not produce any credible or persuasive expert opinion to refute Dr. Fall's opinions. While Claimant need not introduce any expert medical opinion to prove causation, the absence of such evidence in this case is a significant factor in the ALJ's decision to assign weight to Dr. Fall's opinions.

42. The ALJ recognizes that on July 11, 2015 someone at Sky Ridge Medical Center opined that Claimant's radicular symptoms are probably the result of a disc protrusion sustained during "exertional work overseas." The qualifications and identity the author of this opinion are not made clear by the evidence. Moreover, there is no indication that whoever expressed this opinion studied Claimant's medical records, particularly those from the May 8, 2015 VA visit. For these reasons the Sky Ridge Medical Center opinion is not credible and persuasive insofar as it addresses causation.

43. Evidence and inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

PROXIMATE CAUSE OF ALLEGED INJURY/OCCUPATIONAL DISEASE

Claimant alleges that the C6-7 disc herniation and consequent radicular symptoms were proximately caused by an injury or occupational disease arising out of and in the course of his employment in Abu Dhabi. Respondents argue Claimant failed to prove that the disc herniation and symptoms were proximately caused by the performance of his duties. Rather, Respondents argue the credible and persuasive evidence demonstrates that the Claimant's symptoms are the result of the natural progression of a pre-existing condition uninfluenced by the Claimant's duties in Abu Dhabi. The ALJ agrees with Respondents.

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment and disability benefits was proximately caused by an injury or occupational disease arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.

With respect to an alleged industrial injury a claimant must prove a causal nexus between the claimed disability and need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Similarly, in order to prove a compensable occupational disease a claimant must prove the disease was proximately caused, aggravated or accelerated by the employment or working conditions. Section 8-40-201(14), C.R.S.; *Wal-Mart Stores, Inc. v. Industrial Claim Office,* 989 P.2d 251 (Colo. App. 1999); *Patton v. K and C RV Camping World,* WC 4-615-226 and 4-788-086 (ICAO July 5, 2011).

However, the mere occurrence of symptoms at work does not require the ALJ to find that the conditions or duties of employment caused a claimant's symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Office, supra*. Causation need not be proven by expert medical opinion. However, where expert medical opinion is presented it is for the ALJ to assess the weight and credibility of such evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990); *Maestas v. O'Reilly Auto Parts*, WC 4-856-563-01 (ICAO August 31, 2012).

As determined in Findings of Fact 36 through 42 Claimant failed to prove it is more probably true than not that he sustained an accidental injury that proximately caused or aggravated his pre-existing spinal disease so as to result in disability and the need for treatment. Further, Claimant failed to prove that the conditions of employment proximately caused, aggravated or accelerated his pre-existing cervical disease process so as to result in disability and the need for medical treatment.

As found, the ALJ is persuaded by the opinions and testimony of Dr. Fall that Claimant had a degenerative condition of the cervical spine that caused radicular symptoms before the Employer sent Claimant to Abu Dhabi. Dr. Fall's opinion is corroborated by the May 8, 2015 VA medical records. Further, the ALJ is persuaded by Dr. Fall's opinion that the medical records and other evidence do not document a work-related accidental injury sufficient to have caused Claimant's C6-7 disc herniation and consequent symptoms. As explained in Findings of Fact 38 and 39 Dr. Fall's opinion is corroborated by the medical records. Similarly, Dr. Fall credibly opined that the evidence does not support the conclusion that the conditions of Claimant's employment in Abu Dhabi caused or aggravated Claimant's spinal condition. Rather, Dr. Fall credibly opined that Claimant's disc herniation and consequent symptoms are the result of the natural progression of the pre-existing disease process. Moreover, as determined in Finding of Fact 41, the ALJ is persuaded to give substantial weight to Dr.

Fall’s opinions because Claimant did not present any expert medical opinion to refute Dr. Fall’s opinions.

At hearing Claimant’s counsel argued that Claimant was in “travel status, to the extent that makes any difference.” The ALJ concludes that whether or not Claimant was in “travel status” is of no legal significance to the outcome of this case.

In order to prove compensability a claimant must prove both that the injury arose out of the employment and that it occurred in the course of employment. Section 8-41-301(c); *City of Brighton v. Rodriguez,* 318 P.3d 496, 502 (Colo. 2014). The “arising out of” and “in the course of” employment elements are not synonymous. *Younger v. City and County of Denver,* 810 P.2d 647 (Colo. 1991). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of the employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Triad Painting Co. v. Blair*, *supra.*

Generally the “travel status” doctrine is concerned with the “course of employment” requirement. The doctrine contemplates that where the employment requires the employee to travel away from the employer’s place of business the employee is continuously within the “course of the employment” during the trip. *See Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9 (Colo. App. 1999).

In contrast, the “arising out of” requirement concerns itself with the origin of the risk that causes injury to the claimant. Where injury results from a risk that is entirely “personal” to the claimant the injury does not arise out of employment. Included within the “personal risk” category are injuries caused by an “employee’s preexisting idiopathic illness or medical condition that is completely unrelated to his or her employment, such as fainting spells, heart disease, or epilepsy.” *City of Brighton v. Rodriguez,* 318 P.3d at 503.

Here, the ALJ has found that the “risk” which caused Claimant’s “injury” was caused by a preexisting disease process that was personal to Claimant and not in any way related to or aggravated by his employment. Thus, the ALJ has found Claimant’s injury did not “arise out of” his employment as contemplated by the statute. In these circumstances it does not matter for the purpose of compensability that Claimant may have experienced symptoms of his personal disease process while “in the course of” his employment. *Cf. Lobato v. Warning Lites and Equipment, Inc.*, WC 4-438-262 (ICAO March 2, 2001) (where ALJ found that claimant was not in “travel status” at the time she was assaulted the injury did not occur in the “course of” her employment and it was unnecessary to determine whether the assault arose out of a compensable “neutral risk”).

In light of the determination that Claimant did not sustain a compensable injury the ALJ need not address the issues of medical benefits, temporary disability benefits, average weekly wage and disfigurement.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in WC 4-989-362-01 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 3, 2016

DIGITAL SIGNATURE:
David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-788-738-03

ISSUES

Whether the respondents have established by a preponderance of the evidence that the claimant no longer requires any form of post-MMI (maximum medical improvement) maintenance medical care for her admitted industrial injury of February 9, 2009.

FINDINGS OF FACT

1. The claimant is a 32-year old woman with an April 30, 1983 date of birth.

2. The claimant was injured in an admitted injury February 9, 2009 accident in the course and scope of her employment with the respondent-employer, when she was lifting a 25-pound box of books and felt a "tweak" in her back.

3. The claimant underwent comprehensive treatment for the February 9, 2009, injury, including pain medications, physical therapy and epidural steroid injections. The claimant did not improve with any of the conservative care provided.

4. Eventually, the claimant was referred to orthopedic surgeon, Dr. Eric Jamrich. Dr. Jamrich recommended a microdiscectomy at L4-5, L5-S1. Dr. Jamrich performed the surgery on December 21, 2009. The claimant reported no improvement from the surgery, instead reporting progress of discomfort with increasing back and leg pain.

5. Dr. Barton Goldman evaluated the claimant on June 3, 2010, for purposes of an independent medical examination. Dr. Goldman noted multiple Waddell's signs. He recommended core strengthening, walking, swimming and weight loss. Dr. Goldman also suggested the claimant be seen by a psychiatrist to manage her psychiatric medications. He opined the claimant was not a good surgical candidate.

6. The claimant continued with chronic complaints of "innumerable kinds and locations of pain."

7. In June 2010, the claimant underwent a discogram, which according to Dr. Jamrich was not positive for spinal instability. Nonetheless, Dr. Jamrich opined that a fusion operation would be a “last resort.” He recommended weight loss and exercise.

8. Dr. Barry Ogin performed an IME on September 13, 2010. In connection with his IME, Dr. Ogin had the claimant complete a Battery for Health Improvement-II Test. Dr. Ogin indicated this test is designed to assess whether biopsychosocial complications may be affecting the patient’s medical condition. In responding to the test, the claimant disclosed an extremely high level of psychological and life problems. The claimant’s self-disclosure score was higher than that seen in 99% of patients and even higher than levels reported by 96% of patients who were asked to “fake bad.” In Dr. Ogin’s opinion, the claimant presented with what she described as ongoing debilitating back pain. However, the claimant had multiple non-physiologic pain behaviors on examination. The claimant had failed to improve with any treatments, including a microdiscectomy. Further, her condition was complicated by her morbid obesity and muscle deconditioning. Dr. Ogin opined that the claimant was extremely depressed and demonstrated extremely high levels of somatic complaints, pain and functional complaints consistent with the somatoform disorder. According to Dr. Ogin, the claimant’s primary problem was depression, which was feeding the claimant’s back pain and not the other way around. The claimant is a young female with mildly degenerative discs. She has diffuse leg pain, which cannot be explained on the basis of her MRIs. Notably, the claimant has failed to get any relief from any treatments.

9. On September 20, 2010, Dr. McFarland noted the claimant had been taking more medications than she was supposed to and had problems with opioid dependence. She had treatment at an inpatient program, but reported not being able to work because of increased pain. The claimant reported a traumatic brain injury from a head injury on February 3, 2010 that injury occurred at her apartment. The claimant reported a history of bipolar disorder and was being treated with Abilify, Klonopin, Ativan and trazodone. Dr. McFarland took the claimant off work temporarily until he could determine how to control her pain better.

10. On October 14, 2010, Dr. McFarland indicated it was difficult to evaluate the severity of the claimant’s pain or quantify her restrictions because of the claimant’s background of cognitive and psychiatric problems.

11. Following a Division independent medical evaluation (DIME), the claimant was placed at maximum medical improvement (MMI) on August 30, 2011, with 20% whole person impairment. The respondent-insurer filed an August 16, 2012, Final Admission of Liability (FAL) admitting liability consistent with the Division Examiner’s

opinions on MMI and permanent physical impairment. The respondents stipulated the claimant was entitled to medical treatment by, or at the direction of an authorized treating physician, which is reasonable, necessary and related to the February 9, 2009 accident to maintain the claimant's condition at MMI.

12. The claimant was seen at Southeast Colorado hospital between April 28, 2014 and June 27, 2014 with depression, visual and auditory hallucinations and suicidal ideation.

13. Dr. Robert Kleinman performed a psychiatric Independent Medical Evaluation on September 17, 2014. At the time of his evaluation, the claimant's complaints included back pain to the point that she could "hardly walk". Dr. Kleinman reviewed the claimant's medical records, took a history from her and performed a mental status evaluation and administered an MMPI-2. The claimant responded to the MMPI-2 in an exaggerated manner, endorsing a wide variety of symptoms and attitudes. According to Dr. Kleinman, the results stem from a number of factors, including indiscriminately claiming extreme psychological problems, low reading level, a "plea for help" or severe psychological deterioration or psychosis. Dr. Kleinman stated that the claimant's responses were probably not random because she was consistent in her item responses. Based on his evaluation Dr. Kleinman diagnose the claimant with schizoaffective disorder, psychological factors affecting medical condition, multiple medical problems with ongoing pest injuries, wrist/back injury, past concussion, GERD, asthma, pituitary adenoma. Dr. Kleinman indicated that none of the claimant psychiatric diagnosis were related to her work injuries. Dr. Kleinman credibly opined, the claimant's psychiatric and psychological condition is causing her impairment and dysfunction. The claimant views herself as disabled. This was identified early on at the mental health center, which saw long-term employability is a problem. Now the claimant attributes her disability to her physical complaints. The secondary gain she receives is motivating her to continue and to enhance her complaints. The secondary gain from her multiple illnesses and injuries leads to dependency and the gratification she gets from dependency fosters more illness and injury related behaviors. According to Dr. Kleinman, that secondary gain refers to the benefits that are derived by being a patient. Dr. Kleinman credibly opined the claimant is manipulating her physical complaints in order to appear more physically impaired than she is.

14. Dr. Brian Reiss evaluated the claimant on October 1, 2014. During his evaluation of the claimant, she complained of extreme pain and yet displayed no pain behaviors. The claimant's psychological screening indicated a definite possibility of depression and somatic disorder. Dr. Reiss noted the claimant is not doing any significant exercise. She is doing a minimal amount of walking but absolutely no core

strengthening, substantial aerobic conditioning or stretching. According to Dr. Reiss, the simple exercises are the only treatment that the claimant needs. If she were cooperative these exercises would be beneficial to the claimant. They could be performed as an independent program. Dr. Reiss noted the medical records document the fact that the claimant has multiple subjective complaints unsubstantiated by any objective findings. At his exam, the claimant complained of a lot of pain and yet appeared to be comfortable and functional. Prior to being placed at maximum medical improvement, the claimant had multiple forms of treatment, including physical therapy, injections and even the surgical intervention. Despite treatment, the claimant's subjective complaints were essentially unchanged. Dr. Reiss opined it makes no sense to suggest repeating any of these treatments in the future if they have been ineffective in the past. Finally, Dr. Reiss noted the claimant's imaging studies do not identify a good reason for the claimant to have lower extremity pain. The degeneration of the lower two discs of the claimant's lumbar spine would not account for her upper lumbar or thoracic pain. Her non-physiologic physical examination would further make it difficult to substantiate the claim that the claimant has discogenic pain. The fact that the claimant had prior surgery on her lumbar spine without a positive response would also tend to point away from the lower two discs being responsible for her pain. According to Dr. Reiss, all-in-all, the claimant has widespread subjective complaints without good objective findings to substantiate her symptomatology.

15. Dr. Jerald Flynn evaluated the claimant on June 9, 2015. On that date the claimant reported worsening symptoms. Dr. Flynn noted an MRI was declined. However, he also indicated he did not "think pursuing this is worthwhile".

16. On July 30, 2015, Dr. Flynn recommended the claimant "follow up with her attorney as this case should really be closed by now (she is otherwise disabled at any rate and will never be able to go to work because of mild mental retardation combined with psychiatric disease". While Dr. Flynn referred the claimant to follow up with Dr. Wisman in six weeks the referral was for "this and her other issues".

17. Dr. Carlos Cebrian evaluated the claimant on September 3, 2015, for purposes of an Independent Medical Examination. Dr. Cebrian also testified at hearing. At the time of his examination, the claimant reported her back "hurts a lot with pain that goes up her back and down her back to her hips and legs." The claimant stated when she gets up in the morning she is stiff and "cannot move her back and is unable to walk" the claimant stated it "kills her back" to walk. However, the claimant was able to walk briskly without any difficulty and get up and off the exam table without difficulty. Dr. Cebrian documented, and credibly testified to, the claimant's non-physiologic findings on physical exam, including, diffuse and superficial tenderness to light touch,

hypersensitive pain response, positive axial compression, give-way weakness on motor testing of the legs and self-limited range of motion of the lumbar spine.

18. Dr. Cebrian credibly testified, consistent with the opinions of Dr. Goldman, Dr. Ogin, Dr. Van Dorsten, Dr. McFarland, and Dr. Kleinman, the claimant suffers from a non-work-related somatoform disorder. Dr. Cebrian credibly opined that there is no future medical treatment, which is reasonable, necessary and related to the February 9, 2009 injury. Dr. Cebrian credibly testified the claimant's presentation of the last few years has been the result of her pre-existing and non-claim related psychiatric disorders. There is no mechanical lesion that correlates with the claimant's current symptoms and non-physiological presentation. Dr. Cebrian credibly testified that no amount of further medical evaluation, diagnosis, therapy, medications or interventions will have any effect on the claimant's condition other than to reinforce her maladaptive and non-physiological/organic behavior.

19. The claimant reported taking the medications tramadol, Flexeril and gabapentin in connection with the February 9, 2009 work injury. The records of the claimant's primary care provider suggest she takes an additional 20 medications for non-work-related conditions. Dr. Cebrian credibly testified the ongoing provision of the medications tramadol, Flexeril and gabapentin under the February 9, 2009, worker's compensation claim is not reasonable and necessary. Dr. said bring credibly testified there are dangerous interactions between the claimant's medications and the medication she is being prescribed for her psychiatric conditions, in particular with tramadol and gabapentin Dr. Cebrian explained that both tramadol and gabapentin can interact with the medications being prescribed for the claimant psychiatric conditions and cause a condition known as "serotonin syndrome", which can in some instances be fatal. The interaction of these medications can also decrease a patient seizure threshold, cause cognitive issues and or dizziness. Dr. Cebrian credibly testified it is not reasonable and necessary to continue to prescribe these medications in conjunction with the medications being prescribed for the claimant psychiatric conditions, particularly given the lack of any functional improvement.

20. Dr. Cebrian testified as a Level II accredited physician. He explained that Colorado's Medical Treatment Guidelines, Rule 17, WCRP, Exhibit 1, recommend against prescribing medications for pain control, without demonstrable functional improvement. Dr. Cebrian opined there is no reason in this case to deviate from the Guidelines. Dr. Cebrian also testified that the medical records document the claimant's extensive history of mental health problems with multiple suicide attempts. Colorado's Medical Treatment Guidelines address, and recommend against, the prescription of

habituating medications, such as tramadol, Flexeril and gabapentin, to patients with a history of psychiatric problems and suicide attempts.

21. Dr. Cebrian outlined a reasonable schedule to wean the claimant off of the Flexeril, Tramadol and Gabapentin currently being prescribed to her in connection with the February 9, 2009 work injury.

22. As found, the opinions expressed by Dr. Brent Van Dorsten, Dr. Brian Reiss, Dr. Robert Kleinman and Dr. Carlos Cebrian are credible and persuasive.

23. The claimant's somatoform disorder is the current cause of her symptoms, dysfunction and need for medical treatment. The secondary gain she receives is motivating her to continue and to enhance her complaints. The secondary gain from her multiple illnesses and injuries leads to dependency and the gratification she gets from dependency fosters more illness and injury related behaviors.

24. The respondents' have established that it is more likely than not that the claimant's need for future medical treatment is not related to the February 9, 2009 industrial injury.

25. The respondents' request to withdraw their stipulation that the claimant remains entitled to medical treatment by, or at the direction of an authorized treating physician, which is reasonable, necessary and related to the February 9, 2009 accident to maintain the claimant's condition at MMI, is granted.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102 (1), C.R.S.

2. It is well settled that where the respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), the respondents are not precluded from later contesting their liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Moreover, when the respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission, supra; Snyder v. Industrial Claim Appeals Office, supra*. Where, as here, however, the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for such modification.

Section 8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the statute in 2009 and provides, in pertinent part:

> ... a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.

3. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is probably more true than not. *Page v. Clark,* 197 Colo. 306, 591 P.2d 792 (1979).

4. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

5. The judge's factual findings concern only evidence that is dispositive of the issues involved; the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

6. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936).

7. The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). Section 8-42-101(3)(b), C.R.S. provides that the Medical Treatment Guides (MTG) "shall be used by health care providers for compliance with this section."

8. Rule 17 of the Workers' Compensation Rules of Procedure contains the Low Back Pain Medical Treatment Guidelines. The Introduction to Rule 17, at subsection A provides, as relevant:

> This document has been prepared by the Colorado Department of Labor and Employment, Division of Workers' Compensation (Division) . . .
>
> . . . . [T]hese guidelines are enforceable under the Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

9. The stated purpose of the Guidelines is:

> 17-1. STATEMENT OF PURPOSE
> In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the Director of the Division has promulgated these "Medical Treatment Guidelines." This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost.

10. Per Rule 17-2(A), W.C.R.C.P., all health care providers shall use the medical treatment guidelines adopted by the Division. Per Rule 17-2(B), W.C.R.C.P., all payers shall routinely and regularly review claims to ensure that care is consistent with the Division's medical treatment guidelines.

11. Section 8-43-201(3) C.R.S., provides that it is “appropriate” for an ALJ to consider the MTG “in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury.” However, the statute further provides that the ALJ “is not required to utilize the medical treatment guidelines as the sole basis for such determinations.”

12. As demonstrated by WCRP 17-5 (C) the MTG themselves recognize that deviations from the guidelines are reasonable in individual cases. *Madrid v. TRTNET Group, Inc*., WC 4-851-315-03 (ICAO April 1, 2014). Consequently, evidence of compliance or non-compliance with the treatment protocols of the MTG has not been considered dispositive when determining whether medical treatment is reasonable and necessary. *Madrid v. TRTNET Group, Inc*., *supra*. The ALJ may weigh evidence of compliance or non-compliance with the MTG and assign such evidence an appropriate weight considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC*., WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

13. As found, the respondents have proved, it is more probably true than not, the ongoing provision of medical treatment is not related to the claimant’s February 9, 2009 work injury, but is instead related to her somatization disorder, as opined by multiple physicians, including a psychiatrist, with insufficient opinion to the contrary presented.

14. The ALJ concludes that the respondents have established by a preponderance of the evidence the claimant’s current need for medical treatment is not reasonable, necessary or related to the February 9, 2009 work injury.

15. The ALJ concludes that the claimant should be appropriately weaned from the Tramadol, Flexeril, and Gabapentin now being prescribed in connection with the February 9, 2009 industrial injury.

ORDER

It is therefore ordered that:

1. The respondent-insurer shall be permitted to withdraw its stipulation admitting to medical treatment by, or at the direction of, the authorized treating physician, which is reasonable, necessary, and related to the admitted February 9, 2009, work injury.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 8, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-947-921-01

ISSUES

Whether the claimant has established by a preponderance of the evidence that he is entitled to treatment for Complex Regional Pain Syndrome (CRPS), to include, but not limited to, a repeat sympathetic block.

FINDINGS OF FACT

1. On April 4, 2014, the claimant was delivering food to a house that had potholes in the driveway leading up to the house. While walking down the driveway, he slipped on mud and fell in a pothole, twisting his right knee, right hip and shoulder. Eventually his hip and shoulder issues resolved, but his right knee pain has persisted.

2. The claimant had three previous Workers' Compensation injuries involving the right knee, including one in 1985, one in 2004 and one in 2008.

3. The 2008 injury resulted in excision of 30% of the meniscus and a 15% permanent impairment rating, including 10% allocated for chondromalacia due to crepitus and locking.

4. The impairment rating report referenced an MRI documenting chondromalacia and also noted the claimant's surgical history, which included chondroplasty of the right medial femoral condyle.

5. The claimant's treating physician requesting the medical treatment at issue, Gretchen Brunworth, M.D., was unaware of the claimant's prior ratings, chondromalacia and permanent impairment.

6. The medical records from the date of injury to present show substantially similar symptoms and complaints of pain and lack of improvement, with periods of catching and locking.

7. During the claimant's initial examination with Jack England, D.O. on the date of injury, there is evidence that the claimant felt like his right knee was popping and locking.

8. On June 13, 2014, David M. Oster, M.D. continued to document "catching sensation as he extends his knee."

9. During the claimant's initial consultation with Gretchen Brunworth, M.D., on April 20, 2015, the claimant reported having persistent pain with no improvement. The claimant reported locking and popping.

10. Since the date of injury, the claimant's right knee mobility has been restricted due to use of crutches and a brace.

11. At an April 9, 2014 office visit with Dr. England, the claimant was not able to bear weight on his right side.

12. The claimant was prescribed a knee brace April 23, 2014.

13. According to a May 13, 2014 addendum from Dr. England, the claimant was using a knee brace and crutches.

14. During the claimant's final visit with Dr. Wente, March 25, 2015, the claimant was still wearing his knee brace and using crutches.

15. As of his most recent available note on February 18, 2016, Dr. England continued to note the claimant's use of crutches and chronic pain.

16. On December 10, 2014, Dr. Wente noted the claimant had evidence of "moderate disuse atrophy noted of quadriceps and calf musculature."

17. During her initial examination on April 20, 2015, Dr. Brunworth reviewed the claimant's treatment history, complaints and symptoms. She noted the claimant reported no improvement despite surgery and injections. It appeared the claimant was approaching maximum medical improvement; however, an additional MRI was ordered "just to make sure we are not missing anything before his case is closed. If the MRI is negative, we will most likely be proceeding with a functional capacity test and case closure." She also noted she would like to get him off crutches before case closure, despite the fact he had been using them for over a year.

18. At the follow-up appointment on May 21, 2015, Dr. Brunworth referred the claimant for a functional capacity test in order to work towards case closure.

19. Five days later, Dr. Brunworth recommended a QSART and thermogram to evaluate for CRPS or sympathetically mediated pain.

20. However, at the examination less than a week earlier, she noted "[t]emperature of the knees is symmetric bilaterally. He has no sensitivity to touch."

21. The Colorado Treatment Guidelines require the following to properly diagnose CRPS:

> Continuing pain, which is disproportionate to any inciting event.
>
> At least one symptom in three of the four following categories:
>
> - Sensory (reports of allodynia);
> - Vasomotor (reports of temperature asymmetry and/or skin color changes and/or skin color asymmetry);
> - Sudomotor/edema (reports of edema and/or sweating changes and/or sweating asymmetry);
> - Motor/trophic (reports of decreased range of motion and/or motor dysfunction such as weakness, tremor, dystonia or trophic changes of the hair, nail and skin)
>
> At least two positive confirmatory tests from the following list:
>
> - Trophic tests (comparative x-rays of both extremities and/or a triple phase bone scan);
> - Vasomotor (infrared stress thermogram);
> - Sudomotor test (QSART testing);
> - Sensory/Sympathetic Testing (response to sympathetic blocks)
>
> No other diagnosis that better explains the signs and symptoms.

22. The claimant had two reportedly positive confirmatory tests, but did not have a positive response to a sympathetic block. He is also lacking evidence of objective symptoms and there is an explanation of his signs and symptoms.

23. Dr. Brunworth opined that CRPS in proximal joints "don't show like it shows distally in the hand or foot." However, she does not clarify or explain why there would be a discrepancy in the presentation.

24. In fact, Dr. Brunworth confirmed she is not aware of any studies that outline a knee should be treated differently, or would have different signs or symptoms than an upper extremity, with regard to CRPS.

25. Rule 17, Exhibit 7, does not differentiate between diagnosing CRPS distally or proximally.

26. A diagnosis of CRPS in the knee is essentially the same under the guidelines of Rule 17.

27. As Rule 17 alludes to, these guidelines are in place to protect the claimant. "Significant harm can be done to individuals by over-diagnosing CRPS and subjecting patients to side effects and potential morbidity of multiple sympathetic blocks, invasive procedures or chronic medication, as well as psychological effects from the diagnosis."

28. An April 14, 2014 x-ray revealed degenerative changes, consistent with chronic arthritis.

29. David Oster, M.D. interpreted the claimant's April 21, 2014 MRI and noted there was "thinning of the articular surface over the central portion of the patella."

30. Dr. Brunworth refused to acknowledge the presence of chondromalacia, but contradictorily conceded that chondromalacia, if previously present, would not resolve. She also conceded that it is generally a progressive and degenerative condition.

31. Dr. Oster was also perplexed by the claimant's ongoing pain complaints, and like Dr. Steinmetz, he attributed this to likely chondromalacia or fat pad impingement. Dr. Oster commented "He seems to have significant pain along the medial retinaculum and along the anterior medial fat pad. This could be secondary to some chondromalacia in the femoral trochlea which may not appear on the MRI. It also could be due to some fat pad impingement."

32. Dr. Wente reiterated the other physicians' concerns that the claimant's symptoms were not related to CRPS. In a December 10, 2014 report, he commented that "most of his pain is probably patellofemoral-related and this fits with his advanced and marked atrophy of the lower extremity, particularly the quadriceps. The exam suggests that the nerve supply is intact…" The claimant's fat pad impingement test was also noted to be markedly positive.

33. In a note from August 8, 2014, Dr. Oster related the claimant's pain to "some impingement of the synovium. He has a long tongue of synovium along the medial facet of the patella which certainly could be getting impinged. The fact that it seems to hurt more with extension as well as flexion of the knee would go along with

this."

34. Dr. Wente attributed periodic inflammation to "a combination of gait pattern, lack of normal ROM, and the continued atrophy."

35. Dr. Steinmetz opined that there are chronic changes on the x-ray and MRI, with minimal degenerative changes and edema around the kneecap, patellar tendon and the MRI shows some patellar tendonitis. This is consistent with the claimant's swelling.

36. The evidence shows that the claimant does not have "mysterious nerve swelling." He has pain from the kneecap inflammation, attributable to chondromalacia.

37. During Dr. Wente's initial examination on December 10, 2014, he noted "[t]he knee itself shows no redness, erythema…no significant effusion…neurologically intact distally. Nerve function to quads and calf appears in tact as well."

38. During a May 21, 2015 examination, Dr. Brunworth noted, "[t]emperature of the knees is symmetric bilaterally. He has no sensitivity to touch."

39. The claimant's own IME, Timothy Hall, M.D., conceded "there is really little that would point you in the direction [of a diagnosis of CRPS], other than the fact that he has pain out of proportion to local pathology."

40. Dr. Brunworth ultimately agreed that visually, the claimant's knee does not have any unusual presentation. There was neither redness nor temperature change observed on her examinations.

41. She also conceded there were no vasomotor changes, no effusion, no sweating changes or asymmetry, no tremor not dystonia and no trophic changes.

42. Dr. Brunworth also confirmed the claimant does not have hyperalgesia to pinprick.

43. On physical examination and diagnostic testing, there was an absence of findings consistent with CRPS.

44. The QSART test showed no evidence of sweating changes.

45. There are no muscle abnormalities or trophic changes.

46. The claimant's weakness is attributable to disuse/atrophy and the

decreased range of motion is consistent with patellar inflammation, synovial inflammation and inflammation around the fat pad.

47. Dr. Steinmetz, like Dr. Brunworth, also confirmed that there was no motor dysfunction with tremor or dystonia and no trophic changes.

48. Dr. Brunworth stated that the claimant had allodynia, which is pain due to a non-noxious stimulus. However, during the hearing, Dr. Brunworth examined the claimant's knee, touching, poking and prodding it. During this time, the claimant did not present with any pain response.

49. This examination at trial showed that the claimant is not sensitive to touch.

50. The claimant has been using crutches and bracing since the initial injury. He was advised by Dr. Oster that the straight leg brace he was given October 31, 2014 "may cause some quadriceps atrophy…"

51. Dr. Wente also documented "advanced and marked atrophy of the lower extremity, particularly the quadriceps."

52. The Guidelines recognize that "resting temperature asymmetry differences may be due to a variety of reasons other than CRPS."

53. Dr. Steinmetz advised that temperature changes, such as coolness on the affected side, can be attributed to disuse and atrophy.

54. If the claimant had CRPS, there would be abnormal findings in the distal foot. Hair, nails and skin would be abnormal with obvious swelling and discoloration. There would be stiffness extending beyond the area of the kneecap, sensitivity to touch and a diagnostic functional response to the sympathetic block.

55. Pursuant to Rule 17, "For a positive response, pain relief should be 50% or greater for the duration of the local anesthetic and pain relief should be associated with demonstrated functional improvement."

56. The claimant did not have the appropriate pain relief following the injection. Usama Ghazi, D.O. administered the injection and noted the claimant "still reports that he had some 7/10 pain that was unchanged deep within the knee, which is more of a bony arthritic and pressure like sensation…"

57. Dr. Brunworth also documented "pain persisted" and "improvement was not long lasting" following the injection.

58. The claimant did not have appropriate pain relief and increase in functionality, which is the basis for determining whether the claimant had a diagnostic response.

59. It is evident from the records that the claimant did not have a diagnostic response to the injection.

60. Dr. Brunworth was equivocal regarding the need for a second sympathetic block. She stated "I think it's at least worth a try…We don't have a lot of options…I think one more block…might be an option. I think second blocks sometimes are better…I think it's possible that it would help."

61. However, the claimant did not have a positive response to the first injection.

62. Dr. Steinmetz noted that even if the claimant had CRPS, he would not recommend another injection.

63. The ALJ finds that the analyses and opinions of Dr. Steinmetz are credible and more persuasive than medical analyses and opinions to the contrary.

64. The ALJ finds that the claimant has failed to establish that it is more likely than not that he suffers from CRPS.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102 (1), C.R.S.

2. It is well settled that where the respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), the respondents are not precluded from later contesting their liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Moreover, when the respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission, supra; Snyder v. Industrial Claim Appeals Office, supra*.

3. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is probably more true than not. *Page v. Clark,* 197 Colo. 306, 591 P.2d 792 (1979).

4. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

5. The judge's factual findings concern only evidence that is dispositive of the issues involved; the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

6. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936).

7. The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). Section 8-42-101(3)(b), C.R.S. provides that the Medical Treatment Guides (MTG) "shall be used by health care providers for compliance with this section."

8. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000). The ALJ must assess the credibility of the witnesses and the probative value of the evidence. *Dover Elevator Co. v. ICAO*, 961 P.2d 1141 (Colo. App. 1998).

9. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the motives of the witness; whether testimony has been contradicted; and bias, prejudice, or interest. *See, Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

10. It is within an ALJ's purview to assess the relative weight and credibility of various opinions. *See, Kraft v. Medlogic Global Corp. et al.*, W.C. No. 4-412-711 (ICAO, March 15, 2001) (citing *Rockwell Internat'l v. Turnbull*, 802 P.2d 1182 (Colo. App.

1990)). Additionally, if an individual expert's opinion contains contradictions or is subject to multiple interpretations, the ALJ may resolve the conflict by crediting only a portion of the opinion, or discrediting the opinion in its entirety. *See Kraft*, W.C. No. 4-412-711; *Johnson v. ICAO*, 973 P.2d 624 (Colo. App. 1997). Finally, it is the prerogative of the ALJ to credit one medical opinion to the exclusion of a contrary medical opinion. *Dow Chemical Co. v. ICAO*, 843 P.2d 122 (Colo. App. 1992).

11. The claimant bears the burden of proving, by a preponderance of the evidence that the current and ongoing need for medical treatment or disability is proximately caused by an injury arising out of and in the course of the employment. *See Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

12. The claimant is no longer entitled to benefits where the medical condition at issue is no longer related to or caused by the compensable work injury. *Id.* (*see also Cooper v. Industrial Claim Appeals Office*, 1999 WL 976657 (Colo. App. 1999); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986) (a claimant is entitled to compensation only for the disability caused by the industrial injury).

13. A diagnosis of CRPS is governed by Rule 17, Exhibit 7, of the Medical Treatment Guidelines. These Guidelines are applicable regardless of the alleged inflicted extremity. There is no distinction in the Guidelines for a CRPS diagnosis involving the knee, which would warrant abandoning the proffered requirements.

14. The claimant has failed to establish, by a preponderance of the evidence that he suffers from CRPS. Specifically, claimant has not exhibited at least one symptom in three of the four following categories:

- Sensory (reports of allodynia);
- Vasomotor (reports of temperature asymmetry and/or skin color changes and/or skin color asymmetry);
- Sudomotor/edema (reports of edema and/or sweating changes and/or sweating asymmetry);
- Motor/trophic (reports of decreased range of motion and/or motor dysfunction such as weakness, tremor, dystonia or trophic changes of the hair, nail and skin)

15. Dr. Brunworth conceded there is no exception for diagnosing CRPS of the knee when applying Rule 17, Exhibit 7.

16. Dr. Brunworth also conceded claimant does not present with at least one symptom from three of the above four categories, which is a prerequisite for diagnosing CRPS.

17. Although the claimant appeared to have two positive confirmatory tests, Dr. Steinmetz credibly explained why the tests should not have been completed in the first instance, and the probability of a false positive given the claimant's overall presentation.

18. The claimant did not have a diagnostic response to the sympathetic block, and in fact the medical records indicate the claimant's pain increased following the initial injection.

19. Dr. Steinmetz and the majority of the claimant's treating physicians have credibly outlined potential causes of the claimant's ongoing complaints of pain, in the absence of significant objective findings.

20. During the hearing, the claimant did not exhibit tenderness to touch, despite Dr. Brunworth's great reliance in this reported symptom in her diagnosis.

21. An employer must provide an injured employee with reasonable and necessary medical treatment to "cure and relieve the employee from the effects of the injury." C.R.S. § 8-42-101(1)(a) (2013). The employee must prove a causal relationship between the injury and the medical treatment for which he is seeking benefits. *Snyder v. ICAO*, 942 P.2d 1337, 1339 (Colo. App. 1997).

22. Claimant has failed to prove he suffers from CRPS. The medical records do not support this diagnosis, and any further treatment for CRPS is not appropriate.

23. The Guidelines expressly warn against over diagnosing CRPS because of the potential side effects and potential morbidity of multiple sympathetic blocks and chronic pain medications.

24. Dr. Brunworth was neither credible nor persuasive in her basis for requesting an additional injection or the compound cream. Simply because there are not a lot of options for treatment, or a modality is not likely to cause harm to a claimant, is not an appropriate reason to make treatment recommendations or authorize treatment.

25. Dr. Steinmetz credibly testified that the claimant did not have a positive response to the initial sympathetic block, and given the potential for adverse side effects, an additional injection is not warranted, nor is it being approved.

26. Further treatment for CRPS would be in vain as it is evident claimant does not suffer from the diagnosis.

27. The evidence shows the claimant's ongoing complaints of pain and symptoms are related to his underlying conditions which have been examined by his treating physicians and Dr. Steinmetz.

28. The ALJ concludes that the analyses and opinions of Dr. Steinmetz are credible and more persuasive than medical analyses and opinions to the contrary.

29. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that he suffers from CRPS.

ORDER

It is therefore ordered that:

1. The claimant's request for treatment for a diagnosis of CRPS is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 8, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the C6-C7 cervical fusion surgery recommended by Dr. Castro is reasonable, necessary, and related to his February 11, 2014 work injury.

FINDINGS OF FACT

1. Claimant works for Employer as a Baker/Lead Mixer and has been so employed for approximately 3.5 years.

2. On February 11, 2014 Claimant was at work mixing batter when he pulled a paddle from a large mixing bowl and felt a pop and pain in his mid back that shot up to his head. Claimant reported the injury to Employer and was referred for treatment.

3. On February 11, 2014 Claimant was evaluated at Arbor Occupational Medicine by Lori Long, M.D. Claimant filled out a diagram indicating pain in his lower back, central back, and numbness in his left arm. Claimant reported he was pulling out large mixing paddles from the dough in the mixer which required a lot of force when he felt a pop in his mid back that shot up to his head like a lightning bolt. Claimant reported he then developed pain below his left shoulder blade and in his left lower back with some pain radiating into his left posterior shoulder and left posterior arm with numbness. Claimant reported a prior history of cervical radiculopathy that resolved with epidural steroid injections. Dr. Long opined that the injury was work related from lifting the heavy mixer blades and assessed: thoracolumbar strain with left arm symptoms, most likely related to trigger point/muscular injury and not radicular. *See* Exhibit 1.

4. Claimant was evaluated at Arbor Occupational Medicine on February 19, 2014, February 24, 2014, February 27, 2014, and March 19, 2014 where his pain complaints were centered on his thoracic and lumbar pain. The assessment at each of these evaluations was thoracic and/or lumbar strains. *See* Exhibit 1.

5. On April 2, 2014 Claimant was evaluated at Arbor Occupational Medicine by Lorraine Scott, PA-C. Claimant reported symptoms primarily in the left shoulder region as well as in the left low lumbar region. PA Scott opined that after reviewing the initial mechanism of injury, the pain affecting all of the areas Claimant reported would be inconsistent. PA Scott opined that she could attribute the left low back pain and the left shoulder pain to his injury. PA Scott noted that Claimant had marked exacerbation of left shoulder symptoms with overhead activity or with lifting anything which was inconsistent with even with a rotator cuff tear as generally the symptoms of rotator cuff tear would be more exacerbated with overhead activities, or activities to the side or reaching forward. Claimant reported pain in the left shoulder affecting the scapular

region primarily but also on top of the shoulder when performing overhead activities. PA Scott assessed low back pain and left shoulder strain query rotator cuff tear versus tendinitis. PA Scott recommended an MRI of the left shoulder and of the lumbar spine. *See* Exhibit 1.

6. On April 10, 2014 Claimant was evaluated by Dr. Long. Claimant reported pain around the left shoulder blade and the entire length of the left side of his back. Claimant reported no benefit from physical therapy, dry needling, or massage therapy or from his medication. Dr. Long noted that the left shoulder MRI showed a full-thickness tear of the supraspinatus tendon and that the lumbar spine MRI showed mild degenerative changes throughout with no disc herniation or central canal narrowing. Dr. Long opined that the lumbar spine MRI did not explain Claimant's lateral left back pain and opined that it was unclear how Claimant sustained a supraspinatus tendon tear of the shoulder with no specific complains of anterior shoulder pain. Dr. Long opined that Claimant possibly could have an atypical presentation and referred Claimant for a second opinion on work relatedness of the shoulder as well as for case review and treatment recommendations. *See* Exhibit 1.

7. On May 9, 2014 Claimant was evaluated by Dr. Long. Dr. Long noted that Claimant's EMG studies and thoracic MRI showed no electrodiagnostic evidence of ongoing left lower extremity radiculopathy, lexopathy, or nomoneuropathy and no evidence to support any left thoracic radiculopathy with the thoracic MRI showing mild degenerative changes. Dr. Long noted there was nothing to explain Claimant's thoracic pain and that the results confirmed that there was no additional cause for Claimant's back pain. In light of the normal studies, Dr. Long recommended going ahead with a rotator cuff repair scheduled with Dr. Hsin. *See* Exhibit 1.

8. On May 22, 2014 Claimant underwent surgical repair of his left shoulder rotator cuff performed by Dr. Hsin.

9. Following his surgery, Claimant continued to have follow up appointments at Arbor Occupational Medicine with Dr. Long. On June 12, 2014, June 26, 2014, and July 10, 2014 Claimant reported continued left sided back pain and was assessed with: status post left shoulder arthroscopic surgery on May 22, 2014 and with left thoracic pain.

10. On July 31, 2014 Claimant was evaluated by Dr. Long. Claimant reported having an impacted infected molar and that he was having left ear and neck pain as well as lymph node enlargement due to the tooth pain. Dr. Long assessed left shoulder rotator cuff repair, acromioplasty and bursectomy May 22, 2014, and left thoracic back pain, improving. *See* Exhibit 1.

11. On August 15, 2014 Claimant was evaluated by Dr. Long. Claimant reported having some lateral neck pain as well as ongoing dental pain. Dr. Long noted that the pain did not seem to be radicular but musculature and noted that Claimant had

radiculopathy in the left cervical area in 2009 and had epidural steroid injections. *See* Exhibit 1.

12. On August 29, 2014 Claimant was evaluated by Dr. Long. Claimant reported that his thoracic back pain was essentially gone. Dr. Long noted that Claimant had a history of cervical radiculopathy and that there was some concern as to whether there was a recurrence of the radicular symptoms on the left that may be inhibiting Claimant's shoulder abduction. Dr. Long opined that the neck radiculopathy was not related to the work injury, but that they may need to pursue a cervical MRI to define whether or not the cervical radiculopathy was the reason that Claimant had a loss of shoulder abduction. *See* Exhibit 1.

13. On September 12, 2014 Claimant was evaluated by Dr. Long. Dr. Long noted that Dr. Hsin was generally pleased with Claimant's recovery from the left shoulder rotator cuff repair surgery but that Dr. Hsin had no explanation as to why Claimant was stuck in abduction of 90-100 degrees. Dr. Long opined that it was not clear whether this was from poor muscle activation on the left or whether it was from a flare up of a prior cervical problem that Claimant had in 2010. Dr. Long suspected that the range of motion deficit was due to cervical radiculopathy based on Claimant's weak wrist extensor. Dr. Long recommended a cervical MRI to see what was inhibiting Claimant's recovery. *See* Exhibit 1.

14. On September 18, 2014 Claimant was evaluated by Dr. Long. Claimant reported neck pain of 10/10 that was impairing his physical therapy. Dr. Long noted that the causality was unclear as they did not MRI his neck with his February 2014 injury and that he had a pre-existing cervical disc herniation several years ago. Dr. Long noted that it appeared Claimant's recovery was being inhibited from cervical radicular type symptoms, but not at all clear that it was related to Claimant's original injury. *See* Exhibit 1.

15. On September 20, 2014 Claimant underwent an MRI of his cervical spine that was interpreted by Tanya Tivorsak, M.D. Dr. Tivorsak noted at C6-C7 moderate to severe degenerative disc disease with a broad annular bulge and prominent disc osteophytes as well as severe left and moderate to severe right neural foraminal narrowing. *See* Exhibit 3.

16. On September 22, 2014 Claimant was evaluated by Dr. Long. Dr. Long noted that Claimant's cervical MRI showed moderate to severe degenerative disc disease at C6-C7 with a broad based annular bulge and prominent disc osteophytes causing severe left foraminal narrowing and moderate to severe right foraminal narrowing. Dr. Long opined that this pinpointed the cause of Claimant's wrist extensor weakness which was specific to C6. Dr. Long noted that Claimant's shoulder and back pain was so severe post injury that they never investigated Claimant's neck. Dr. Long said she could not clearly say that the neck problem was not caused or flared by Claimant's injury and noted it was possible that the neck problem was flared by being in a shoulder immobilizer postoperatively and by performing physical therapy. Dr. Long

noted that she thought the neck issue was related to the injury and that Claimant should pursue epidural steroid injections and that if they did not resolve Claimant's symptoms, that Claimant should proceed with surgical evaluation. Dr. Long opined that the cervical issues appeared to be limiting Claimant's recovery of shoulder abduction. *See* Exhibit 1.

17. On October 17, 2014 Claimant was evaluated by Dr. Long. Dr. Long noted that Claimant had not yet been approved to have the epidural steroid injection. Dr. Long noted that Claimant had a preexisting cervical problem at the C6 level for which injection resulted in resolution of symptoms. Dr. Long opined that Claimant's original injury may have caused a flare up, that his physical therapy and recovery could have caused a flare up, that possibly his positioning in surgery could have caused a flare up, and that there were many reasons that the current flare up was related to the current injury. *See* Exhibit 1.

18. On November 14, 2014 Claimant was evaluated by Dr. Long. Dr. Long noted that Claimant still had not been approved for epidural steroid injections despite the September 22, 2014 request and opined that Claimant's symptoms were progressing and included worse range of motion in the shoulder. Dr. Long opined that Claimant needed to see a surgeon and that she was doubtful that an epidural steroid injection would be of benefit. *See* Exhibit 1.

19. On November 26, 2014 Claimant was evaluated by Sander Orent, M.D. Dr. Orent noted that Claimant felt an electrical sensation from his neck down into his arm in February of 2014. Dr. Orent noted that it appeared there were two injuries that occurred, the first being a tear of the rotator cuff and the second being the electrical shooting pain down into the arm from the neck. Dr. Orent opined that the neck was involved in the initial injury and opined that the combination of the actual injury along with the prolonged immobilization that Claimant underwent following his rotator cuff repair surgery were good explanations for the neck involvement. Dr. Orent opined that Claimant had a history of cervical radiculopathy but obviously was doing fine up until this event. *See* Exhibit 1.

20. On January 12, 2015 Claimant was evaluated by Dr. Long. Claimant reported no benefit from the epidural steroid injection. Dr. Long noted that Claimant would see Dr. Castro for surgical evaluation. Dr. Long noted that it was unclear whether Claimant would have recovery of strength as his C6 disc herniation has been present for a long time and that it was possible Claimant had permanent denervation. Dr. Long noted Claimant's shoulder was getting progressive loss of range of motion and that no one was clear as to why Claimant was having the progressive loss of range of motion. *See* Exhibit 1.

21. On January 14, 2015 Claimant was evaluated by Bryan Castro, M.D. Claimant reported that on February 12, 2014 he was pulling some mixing equipment when he felt the sudden onset of a popping in his neck and had a shock sensation in his left face, arm, neck, and shoulder. Claimant reported he was diagnosed with a rotator

cuff tear which was repaired and that he had ongoing weakness in the arm as well as numbness and tingling down the left upper extremity. Claimant reported increasing pain in his left arm, circumferential numbness, tingling, and pain all the way around his arm shoulder blade and neck. Claimant reported an epidural injection in December of 2014 gave him no relief. Claimant reported a vigorous activity level that included skiing, golf, frisbee golf, mountain biking, and hockey. Dr. Castro noted that Claimant had ongoing neck and arm symptoms that were not getting better with some weakness to lifting his arm up that did not seem to be physiologic in presentation. Dr. Castro noted a very confusing clinical picture. Dr. Castro opined that Claimant should undergo a transforaminal C6-C7 injection for diagnostic purposed. Dr. Castro noted that Claimant was a heavy smoker and surgical intervention of ACDF would not be a consideration if Claimant is smoking but that it would be in the reasonable treatment parameters if Claimant had findings suggestive of C6-C7 radiculopathy. *See* Exhibit 2.

22. On January 20, 2015 Claimant was evaluated by Dr. Long. Dr. Long noted that Claimant's left upper extremity EMG studies were normal indicating lack of denervation but that she still could not explain Claimant's left upper extremity weakness. Dr. Long opined that a repeat shoulder MRI would be a good idea. Dr. Long noted Claimant's progressive range of motion loss after surgery could indicate scar tissue and she worried Claimant had developed a frozen shoulder. *See* Exhibit 1.

23. On February 3, 2015 Claimant was evaluated by Dr. Long. Dr. Long noted that Claimant had been evaluated by Dr. McCarty who noted postsurgical changes in the left shoulder, a possible focal high grade partial tear, and scar tissue in the shoulder. Dr. Long noted that Dr. McCarty was not sure why Claimant could not abduct the left shoulder and questioned whether it was related to Claimant's neck or whether it was psychological. Dr. Long noted that Claimant was found to have good range of motion except with abduction. Dr. Long also noted that Dr. Castro opined that Claimant had good upper extremity strength with weakness in abduction but nothing that would correlate with C6 radicular symptoms. Dr. Long noted that Dr. Castro thought it was a very confusing clinical picture as did the rest of the providers. Dr. Long noted that Dr. Castro recommended a repeat C6-7 transforaminal epidural steroid injection for diagnostic purposes and an EMG/nerve conduction study. Dr. Long noted they already had performed an EMG/nerve conduction study that was normal and recommended proceeding with an epidural steroid injection. *See* Exhibit 1.

24. On February 20, 2015 Claimant was evaluated by Dr. Long. Claimant reported no benefit from the epidural steroid injection. Dr. Long noted that Claimant had made no gains in physical therapy and that the physical therapist was as confused as the rest of them were. Dr. Long noted that Dr. McCarty's report was received and that Dr. McCarty was as confused as the rest of them. Dr. Long noted the question of whether this could be psychological. Dr. Long noted that Dr. Castro did not advise surgery and that Claimant wanted to see Dr. Villavicencio. *See* Exhibit 1.

25. On March 11, 2015 Claimant was evaluated by Dr. Castro. Claimant reported an inability to extend his arm above 45 degrees from the floor with essentially

no active elevation or abduction. Dr. Castro noted that the EMG performed showed a normal nerve conduction study of the upper extremity. Dr. Castro opined that Claimant's exam revealed inconsistent weakness to shoulder abduction and external rotation. Dr. Castro opined that he was at a loss in explaining Claimant's symptoms but that certainly the symptoms and level of weakness were not from Claimant's cervical spine. Dr. Castro opined that Claimant would not benefit from cervical spine surgery. *See* Exhibit 2.

26. On March 27, 2015 Claimant was evaluated by Dr. Long. Dr. Long noted that Dr. Castro did not recommend cervical spine surgery and did not find a cause for the lack of motion of Claimant's left shoulder with abduction. Dr. Long noted that Claimant saw Dr. Villavicencio's PA who recommended physical therapy, and neck x-rays that were pending results. Claimant reported continued left sided neck pain and pain radiating into the arm but Dr. Long noted that the EMG/nerve conduction studies were normal. Claimant reported that Dr. Primack felt Claimant probably had a repeat rotator cuff tear and that Claimant might require surgery for the scar tissue and lack of range of motion. See Exhibit 1.

27. On April 27, 2015 Claimant was evaluated by Eric McCarty, M.D. Claimant reported continued difficulty raising his arm. Dr. McCarty noted that Claimant continued to have some symptoms of some kind of nerve issue as Claimant described tingling with different neck motions. Dr. McCarty noted that Claimant's biggest issue was abduction to the side. Dr. McCarty opined that it appeared to be a neuromuscular issue and not an issue with the rotator cuff and did not recommend shoulder surgery. *See* Exhibit 4.

28. On May 6, 2015 Claimant was evaluated by Eric Bush, PA-C to Dr. Villavicencio. PA Bush noted that Claimant was unable to lift his arm laterally since having his rotator cuff fixed. PA Bush noted that Claimant had pathology at C6-C7 which could be contributing to Claimant's neck pain and sensory changes in the arms. PA Bush noted that Dr. Villavicencio did not feel that Claimant's left arm weakness was related to the cervical spine issues but was related to the prior rotator cuff surgery. PA Bush opined that Claimant was a candidate for C6-C7 ACDF due to the severe degenerative joint disease and bilateral foraminal stenosis with worsening neck pain and right arm parasthesias and noted that Claimant understood this would not address Claimant's pre-existing left arm weakness related to the rotator cuff surgeries. PA Bush opined that the surgery was medically necessary in part due to significant functional impairment for greater than two years. *See* Exhibit 5.

29. On May 8, 2015 Claimant was evaluated by Dr. Long. Dr. Long noted that two shoulder surgeons felt that shoulder surgery was not indicated. Clamant advised Dr. Long that he had cervical surgery scheduled with Dr. Villavicencio.

30. On May 18, 2015 Insurer issued a denial of the request for authorization of a C6-7 ACDF procedure as not being related to the February 11, 2014 injury. Donald Cally, M.D. provided an opinion that the request for C6-7 ACDF was not related to the

February 11, 2014 injury but that Claimant had not reached MMI yet as he had continued left shoulder abduction weakness after the rotator cuff repair. Dr. Cally opined that Claimant should continue to see his shoulder surgeon. Dr. Cally agreed with Dr. McCarthy that there may be a psychological component and suggested a neurological evaluation and noted that there was no etiology for Claimant's problem that had been identified. *See* Exhibit D.

31. On June 8, 2015 Claimant was evaluated by Dr. Long. Dr. Long noted that Claimant had been denied the C6-7 ACDF after a medical records review for the C6 radiculopathy with weakness being unrelated to the February 2014 injury. Dr. Long noted that the Claimant was found to have a rotator cuff tear which was repaired surgically and that after surgery Claimant began to develop clear C6 radicular symptoms and weakness. Dr. Long noted Claimant's history of prior neck problems that had resolved with epidural steroid injections in 2009 and 2010. Dr. Long opined that she did not know if Claimant's radicular symptoms were worsened by the injury in February of 2014, but that it was likely that Claimant not only suffered the rotator cuff tear, but also easily could have caused injury and irritation to his neck. Dr. Long noted that Claimant at present had progressive loss of left shoulder range of motion, but that both shoulder surgeons did not want to do a repeat procedure and Dr. Long noted the question of whether the C6 radiculopathy could possibly be contributing to Claimant's symptoms. Dr. Long opined that the cervical radicular symptoms were most likely related to Claimant's injury. *See* Exhibit 1.

32. On June 12, 2015 Claimant was evaluated by Dr. Orent. Dr. Orent opined that he was not confident cervical surgery would fix Claimant's issues and opined that further diagnostic testing was needed. Dr. Orent opined that there were probably both cervical and shoulder structures involved. Dr. Orent opined that Claimant needed an MRI of his shoulder, MRI of his neck, and an EMG/nerve conduction study. *See* Exhibit 1.

33. On June 19, 2015 Claimant underwent an MRI of his cervical spine that was interpreted by Tanya Tivorsak, M.D. Dr. Tivorsak noted at C6-C7 broad annular bulge and prominent disc osteophytes with mild central canal narrowing as well as severe left and moderate right neural foraminal narrowing. See Exhibit 3.

34. On August 3, 2015 Claimant was evaluated by Dr. Long. Dr. Long noted that the repeat shoulder MRI showed post rotator cuff repair with slight progression of the tear from the prior study with a focal full thickness tear and that the repeat cervical MRI was unchanged. Dr. Long opined that Claimant needed cervical surgery on the left. Dr. Long opined that the left sided radicular symptoms were related to the February 2014 injury. Dr. Long also opined that there seemed to be progression of the rotator cuff repair on the left and that Claimant needed to be reevaluated by Dr. McCarty. *See* Exhibit 1.

35. On August 19, 2015 Claimant was evaluated by Dr. Orent. Dr. Orent noted that Claimant's cervical surgery was denied. Dr. Orent noted that Claimant had

clear evidence of cervical radiculopathy. Dr. Orent noted that the peer review needed to be invalidated because the provider was not licensed in Colorado. Dr. Orent felt strongly that they needed to move forward and opined that Claimant was very straightforward with surging pain levels. *See* Exhibit 1.

36. On August 20, 2015 Claimant was evaluated by Dr. McCarty. Dr. McCarty noted that after his last visit, Claimant had undergone another MRI of the left shoulder and of the cervical spine. Dr. McCarty noted that the MRI of the cervical spine showed significant changes at the lower cervical levels and that Claimant had seen a neurosurgeon who recommended surgery. Dr. McCarty noted that the repeat shoulder MRI demonstrated a full-thickness tear of the rotator cuff. Dr. McCarty opined that it was clear now that Claimant had two problems: one with regard to the neck, the other with the shoulder. Dr. McCarty recommended that Claimant get his neck taken care of and that subsequent to that, the shoulder. Dr. McCarty opined that the cogwheel rigidity Claimant had could not be explained except by the combination of both and Dr. McCarty hoped that the two surgeries would take care of the issue. Dr. McCarty noted the plan would be to do an arthroscopy, fix the rotator cuff, likely a subacromial decompression and evaluate the biceps after Claimant got his neck taken care of. *See* Exhibit 4.

37. On August 26, 2015 Claimant was evaluated by Dr. Castro. Dr. Castro noted that Claimant had an inability to extend his arm from a lateral abduction or forward extension. Dr. Castro noted that Claimant had an odd neurologic exam. Dr. Castro noted Claimant's cervicalgia disease with an onset in February of 2010 where he had neroforaminal stenosis causing radiculopathy. Dr. Castro opined that Claimant had failed to respond to conservative management and that surgical intervention could be considered. Dr. Castro opined that Claimant's lateral arm motions in abduction and forward flexion were not related to Claimant's C7 radiculopathy. Dr. Castro noted that Claimant was an active smoker and needed to cease smoking before considering a cervical fusion. *See* Exhibit 2.

38. On September 30, 2015 Claimant was evaluated by Dr. Orent. Dr. Orent noted that Claimant needed two surgical procedures. The first being a repair of the rotator cuff due to severe impingement in the shoulder. The second being a cervical fusion. Dr. Orent noted that Claimant's medical issues of chest pain, smoking, and hypertension needed to be resolved before undertaking the two surgeries.

39. On November 25, 2015 Claimant was evaluated by Dr. Castro. Dr. Castro noted on examination that Claimant had profound weakness to abduction of the arm on command, but that Claimant was able to talk with his hands and move his elbow while touching the top of his head and scratching his face with no deltoid weakness. Dr. Castro opined that Claimant's current weakness pattern could not be explained. Dr. Castro noted that Claimant had cervicalgia status post an injury at work in February of 2010 with neuroforaminal stenosis causing radiculopathy and that Claimant had been seen in the past by Dr. Tobey for epidural injections as well as by neurosurgery. Dr. Castro assessed cervical radiculopathy and noted that any surgical intervention would be to consider the cervical radiculopathy as the present weakness Claimant displayed

could not be attributed to the C6-C7 level. Dr. Castro noted that the weakness was somewhat of a question as it did not seem to be dermatomal or myotomal in nature or related to any single nerve root. Dr. Castro opined that the ACDF surgery at C6-C7 could be considered because of Claimant's advanced degenerative changes and because of Claimant's cervical radiculopathy. Dr. Castro opined that surgery would only correct the radicular type complaints due to the significant foraminal narrowing. Dr. Castro opined that it was reasonable to consider surgical intervention. *See* Exhibit 2.

40. On December 9, 2015 Claimant underwent an MRI of the cervical spine interpreted by Frank Crnkovich, M.D. Dr. Crnkovich noted at C6-C7 that Claimant had uncovertebral and disc osteophytic ridging causing moderate to severe bilateral foraminal stenosis, left greater than right with more severe changes on the left where the left neural foramen was near completely obliterated. Dr. Crnkovich noted correlation with Claimant's clinical exam along the left C7 nerve root distribution. *See* Exhibit 3.

41. On December 16, 2015 Claimant was evaluated by Dr. Orent. Dr. Orent opined that perhaps a foraminotomy might be a procedure that would be less aggressive than an arthrodesis but that if Dr. Castro felt arthrodesis was necessary than they should proceed because the longer they waited the more possibility there was for permanent nerve damage. Dr. Orent opined that the shoulder joint was functional and that it was not a structural issue they were dealing with but was a neurologic issue and that he believed the nerve was not adequately innervating the left arm. Dr. Orent opined that Claimant had worsening cervical radiculopathy and that the longer treatment was delayed the more likely it was that permanent nerve damage could occur. Dr. Orent opined that it was also possible that some of the residual they were seeing was due to the rotator cuff surgery but that he thought it was really the cervical radiculopathy. Dr. Orent noted that Dr. McCarty had opined that Claimant needed an additional surgical procedure on his shoulder and that Dr. McCarty recommended that Claimant do the neck first and then address the shoulder. Dr. Orent noted that Dr. McCarty and he both found that the type of rigidity and loss of function Claimant had was consistent with both a rotator cuff and a neurologic issue in the neck. *See* Exhibit 1.

42. On December 29, 2015 Claimant was evaluated by Dr. Long. Claimant reported that his attorney did not want him to follow up with Dr. Castro. Dr. Long noted that Claimant would need to follow up with Dr. Orent to discuss another spine surgeon referral. *See* Exhibit 1.

43. On December 30, 2015 Claimant was evaluated by Dr. Orent. Dr. Orent noted that Claimant was still having a good deal of pain in the arm and the neck. Dr. Orent opined that Claimant's problems were almost certainly neurologic, in combination with the rotator cuff tear. Dr. Orent opined that Claimant had a structural problem in the left shoulder and a substantial cervical radiculopathy presenting neurologic problems into the left arm. Dr. Orent noted there were substantial delays in the case that were harming Claimant who had been completely straightforward throughout his presentation. Dr. Orent opined that Claimant needed surgery as soon as possible and

that they needed to address his neck and then move right into his shoulder. *See* Exhibit 1.

44. On January 22, 2016 Brian Reiss, M.D. performed a medical records review. Dr. Reiss noted that Claimant had ongoing cervical symptoms in June of 2010 with a noted two year prior history of cervical problems. Dr. Reiss noted that after June of 2010 it was unclear what happened with regard to Claimant's treatment of symptoms but that his MRI from that time was essentially the same as his MRI findings currently. Dr. Reiss opined that Claimant's cervical complaints and request for surgical surgery at C6-C7 was not related to his work injury. Dr. Reiss opined that the request may be reasonable, but also opined that treatment of Claimant's shoulder might obviate the need for any treatment for the cervical spine. Dr. Reiss opined that ongoing treatment for Claimant's shoulder was probably appropriate and that Claimant was not at maximum medical improvement for his work injury since he still had a shoulder issue. *See* Exhibit A.

45. On February 17, 2016 Dr. Orent authored an IME rebuttal. Dr. Orent noted he reviewed the IME by Dr. Reiss and that he disagreed. Dr. Orent opined that in the initial injury Claimant felt a pop in his mid back that shot up into his head like a lightning bolt with pain below the left shoulder blade and Dr. Orent opined that neck pain with radiculopathy can indeed radiate to this area so why Dr. Reiss felt it was not consistent with the mechanism of injury escaped him. Dr. Orent opined that Claimant had clear C6 radiculopathy and for Dr. Reiss to say otherwise was to naysay the physical examination and MRI findings. Dr. Orent noted that Claimant had a prior history of cervical radiculopathy that was successfully treated. Dr. Orent opined that Dr. Reiss was completely inaccurate in his assessment and did not adequately evaluate Claimant. Dr. Orent opined that there were significant radicular complaints on the first visit with radiation of pain into the inferior aspect of the shoulder. Dr. Orent opined that he did not think the shoulder surgery would fix Claimant's neck. Dr. Orent noted that Dr. Reiss believed the shoulder to be the primary problem and he disagreed and opined that the primary problem was cervical radiculopathy. *See* Exhibit 1.

46. On February 24, 2016 Claimant was evaluated by Dr. Orent. Dr. Orent noted he had written an extensive rebuttal to Dr. Reiss' IME and considered Dr. Reiss to be in error in virtually all the statements he made. Dr. Orent opined that Claimant was getting worse. Dr. Orent opined that Claimant urgently needed cervical and shoulder surgery and that both were occupationally related. *See* Exhibit 1.

47. Claimant testified at hearing. Claimant reported that he had one prior injury to his cervical area in 2010 when a case fell onto his shoulder blade area. Claimant reported that after injections and approximately 8 weeks of treatment he was fine and had no ongoing symptoms or pain thereafter. This testimony is not credible or persuasive and is inconsistent with prior medical records and reports.

PRIOR CERVICAL TREATMENT:

48. On July 19, 2009 Claimant was evaluated by Andrew Bridget, PA. PA Bridget noted that Claimant complained of a history of left lateral neck and arm pain with radiculopathy radiating down his left shoulder, and from the arm to wrist for the past year with an onset in May of 2008. Claimant reported no history of trauma. Claimant reported difficulty sleeping due to the pain and that his left arm sometimes felt weaker than his right arm. PA Bridget noted that Claimant had an MRI performed in July of 2009 that showed at C6-C7 moderate degenerative joint disease and severe left neural foraminal stenosis. PA Bridget noted that Claimant was open to specialty referral or consultation with neurosurgery or neurology. *See* Exhibit O.

49. On August 3, 2009 Claimant underwent an MRI of his cervical spine interpreted by Gustavo Isuani, M.D. Dr. Isuani noted Claimant's history of neck pain and left upper extremity pain. Dr. Isuani provided an impression of C6-C7 moderate degenerative disk disease with left uncovertebral osteophytes and bilateral facet arthropathy resulting in severe left neural foraminal stenosis, moderate right neural foraminal stenosis, and mild central canal stenosis. *See* Exhibit N.

50. On September 11, 2009 Claimant was evaluated by Alan Villavicencio, M.D. Claimant reported neck pain and left upper extremity radiculopathy symptoms. Claimant reported approximately 1.5 years of neck pain radiating down into his mid back as well as into his left upper extremity which began without any precipitating event. Claimant reported more recently that his pain had been worsening and that his primary care provider ordered an MRI of his cervical spine and referred him for neurosurgical consultation. Claimant reported being unable to ride his mountain bike as it exacerbated his symptoms. Claimant reported while lying down, the pain shoots down his left lateral upper arm and into his posterior forearm. Claimant reported that while sitting, he develops paresthesias in his left upper extremity. Claimant reported neck pain radiating to his left trapezius muscle and clavicle as well as subscapularly. Claimant rated his pain at 6/10 in his neck and 5/10 in his arm. Dr. Villavicencio discussed with Claimant the goal of relieving Claimant's symptoms non-surgically with the options of undergoing a possible left C7 transforaminal epidural steroid injection, beginning a course of physical therapy 2-3 times per week for 6-8 weeks, and beginning a Medrol Dosepack prior to any possible injection. Dr. Villavicencio prescribed Percocet for pain management. *See* Exhibit L.

51. On September 24, 2009 Claimant was evaluated by John Tobey, M.D. Dr. Tobey noted that Claimant had been referred to him for consultation for evaluation of his left neck and upper back pain with left arm radiations ongoing since May of 2008 and for consideration of an epidural steroid injection. Claimant reported to Dr. Tobey that he had pain in the left side of his neck and upper back with left arm radiation that began in May of 2008 when he was hit by a car while biking. Claimant reported that he flew over his handle bars and hit his head on the curb. Claimant reported that he was not wearing a helmet and was knocked out. *See* Exhibit M.

52. Dr. Tobey noted that Claimant underwent MRIs of the cervical spine in both August of 2009 and in August of 2008 and that he had the films and reports

available for review. Dr. Tobey noted that Claimant had tried physical therapy, ice, head, and medications. Claimant reported constant pain worse in the evening with radiations in the left trapezius, scapula and left upper arm and tingling/numbness in the left arm. Dr. Tobey assessed cervical radiculopathy and cervical disc degeneration and noted that Claimant had chronic left C7 radiculopathy with mild weakness and neural tension. Dr. Tobey noted that Claimant had tried conservative management options and was an appropriate candidate for a left C7 transforaminal injection. Dr. Tobey noted that future considerations included repeating the injection if Claimant obtained good but short-lasting benefit and opined that if Claimant did not improve, Claimant might require surgical intervention. Dr. Tobey performed a left C7 cervical transforaminal epidural steroid injection and noted that Claimant tolerated the procedure well. *See* Exhibit M.

53. In February of 2010 Claimant had a work related injury where a case fell on his shoulder blade area. *See* Exhibit B.

54. On June 1, 2010 Claimant was evaluated by Anjoli Dixit, M.D. Dr. Dixit noted that Claimant was there requesting a Percocet prescription refill for Claimant's cervicalgia. Dr. Dixit noted that Claimant had an abnormal MRI of his cervical spine in August of 2009 that showed at C6-C7 moderate degenerative disk disease with left uncovertebral osteophytes and bilateral facet arthropathy as well as severe left neural foraminal stenosis, moderate right neural foraminal stenosis, and mild central canal stenosis. Dr. Dixit assessed chronic cervicalgia due to Claimant's cervical disc disease with recent re-injury as well as neuroforaminal stenosis and radiculopathy. Dr. Dixit referred Claimant to physical therapy and neurosurgery and refilled Claimant's pain medications and muscle relaxants. *See* Exhibit O.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder

should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).). Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition, by a preponderance of the evidence. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007); C.R.S. §8-43-201, *HLJ Management Group, Inc. v. Kim,* 804 P. 2d 250(Colo. App. 1990).; *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993).

Respondents have been required to provide ancillary “pre-operative treatment” for non-industrial conditions if the evidence establishes that such ancillary care is a reasonably necessary prerequisite to surgery and must be given to achieve optimum treatment of the compensable injury. *Public Service Co. v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999). The question of whether the claimant has established that the need for ancillary treatment is a reasonably necessary prerequisite to achieve optimal treatment is one of fact for the ALJ. *Public Service Co. v. Industrial Claim Appeals Office, supra*.

Claimant has failed to establish by a preponderance of the evidence that the C6-C7 surgery recommended by Dr. Castro is causally related to his work injury. The medical records establish that Claimant suffered a significant injury to his cervical spine in a bicycle accident in May of 2008. The medical records also demonstrate that in February of 2010 Claimant suffered a second injury to his cervical spine when a box fell onto his shoulder blade area. From 2008 to 2010 Claimant received significant treatment for his cervical spine and for the two separate injuries that included physical therapy, MRI scans, and an epidural steroid injection. Despite this significant treatment and after an injection that Claimant reported not to be helpful, Claimant continued to have significant ongoing pain in his cervical spine in June of 2010 and was at that time referred back to physical therapy and referred to neurosurgery for an evaluation. The medical records during this period of time show that Claimant had severe left foraminal stenosis at C6-C7.

Claimant did not report two separate injuries to his cervical spine to the medical providers in this case who evaluated him for the February 11, 2014 injury. Claimant testified that he only suffered one prior injury when a box fell onto his shoulder blade. This is inconsistent with prior medical records. Further, Claimant's testimony that after his single injury he was pain free and had no ongoing symptoms after 8 weeks of treatment, physical therapy, and epidural steroid injections is also inconsistent with the prior medical records. Here, the records establish that Claimant's second cervical injury occurred in February of 2010. Claimant was evaluated four months later in June of 2010 after undergoing an epidural steroid injection and reported continued pain and symptoms. At the June 2010 evaluation Claimant requested a refill of pain medications and his pain and symptoms were severe enough that his prescription was refilled and he was referred back to physical therapy and was referred to neurosurgery for an evaluation. His symptoms at that time had not resolved completely and Claimant was not completely pain free. Rather, in June of 2010 his symptoms were severe enough to prompt a referral for neurosurgical evaluation.

Additionally, both Dr. Castro and Dr. Villavicencio opine that the ACDF surgery at C6-C7 would be due to the cervical radiculopathy and advanced degenerative changes and that the surgery would only be to address or fix the radicular complaints that are due to the severe left foraminal narrowing at that level. Claimant has had severe left foraminal narrowing dating back to 2008 that remains unchanged. The hope is that the surgery will address the symptoms caused by the severe left foraminal narrowing at C6-C7 and Claimant's symptoms in this area date back to 2008 and are unrelated to the February 11, 2014 work injury. Although the surgery may be a reasonable option, the surgery is aimed at treating a pre-existing condition not caused, aggravated, or exacerbated by the February 11, 2014 work injury.

For unclear reasons, Claimant did not seek further treatment following his June, 2010 evaluation where he reported significant ongoing pain and where he was referred to neurosurgery. Although no further treatment records exist after this date and until his February 2014 injury, Claimant's contention that he was pain free and symptom free shortly after his February 2010 injury is not logically credible or persuasive. It is logically incredible to conclude that in 2010 and after 2 years and 1 month of reported consistent and constant cervical pain with radiculopathy into his left upper extremity that was not improved that Claimant suddenly became symptom free. Rather, Claimant appeared to have significant ongoing symptoms in June, 2010 that caused a referral to neurosurgery and that did not go away after the injection that was performed.

Claimant's testimony overall is not credible or persuasive. Further, the medical providers that opine that Claimant's current C6-C7 symptoms and need for treatment are related to the February 11, 2014 work injury are based on inaccurate information that Claimant was fine and was asymptomatic from 2010 until the February 11, 2014 work injury. These opinions are based on incomplete medical records and inaccurate statements/reports made by Claimant. The opinions provided by Dr. Orent and Dr. Long are based on Claimant's incredible reports that he was asymptomatic in his cervical spine from 2010 until the February 11, 2014 work incident. Therefore, the opinions by Dr. Orent and Dr. Long that find a causal relationship between the February 11, 2014 work injury and Claimant's current cervical symptoms cannot be relied upon and are rejected.

Claimant has failed to establish, more likely than not, that his ongoing symptoms in the C6-C7 area and his need for surgery is related to his work injury. The findings on his current MRI are almost identical to his findings on past MRIs prior to the February 11, 2014 injury. Further, his current C6-C7 symptoms are consistent with symptoms he complained of dating back to May of 2008 following a significant bicycle injury and are consistent with symptoms noted still in June of 2010 when Claimant, for unknown reasons, stopped treatment. Claimant's work injury did not aggravate or accelerate his symptoms or imaging which remains the same now as it did several years prior to this new work injury. It is clear that C6-C7 surgery was contemplated back in 2010 as an option for Claimant. The surgery is still an option to treat Claimant's continued symptoms that have been ongoing since 2008 and it may be a reasonable option for him at this time. However, the need for surgery is not related to his February 11, 2014 work injury and his severe left foraminal stenosis at C6-C7, radiculopathy, and constant pain has been ongoing since 2008. Dr. Reiss' opinion that the surgery is not work related is found credible and persuasive.

Although Claimant does not directly argue that the C6-C7 surgery should be approved as ancillary treatment for Claimant's February 11, 2014 work injury, the ALJ notes that it has been recommended that the C6-C7 surgery be performed prior to a repeat left rotator cuff repair surgery by Dr. McCarty. As found above, Claimant's C6-C7 condition is not work related. However, the need for surgery could still be found the responsibility of Respondents if Claimant establishes that the surgery is a reasonably necessary prerequisite to his shoulder repair surgery and that it must be performed to achieve optimum treatment of his compensable shoulder injury. Here, Claimant has failed to establish that the C6-C7 surgery is a reasonably necessary prerequisite to achieve optimal treatment of his left shoulder. It has not been established, more likely than not, that the cervical surgery needs to be performed prior to any surgery to repair Claimant's rotator cuff in order for Claimant to achieve optimal treatment of his shoulder. Rather, the opinion of Dr. Reiss is persuasive that there are no contraindications to performing the shoulder surgery prior to the cervical surgery and that nothing in Claimant's cervical spine would preclude the safety of a shoulder surgery. Although Dr. McCarty recommended the cervical surgery go first, Dr. McCarty did not provide a detailed or persuasive analysis showing that the cervical surgery is a reasonably necessary prerequisite to the repeat shoulder surgery.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that the C6-C7 cervical fusion surgery recommended by Dr. Castro is reasonable, necessary, and related to his February 11, 2014 work injury. His request for surgery is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 9, 2016

_**Michelle E. Jones**_____________
Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The issues presented involve compensability and Claimant's entitlement to medical and indemnity benefits. The questions to be answered are:

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his left knee on February 27, 2015.

II. If Claimant sustained a compensable left knee injury, whether he established, by a preponderance of the evidence, that his medical appointment at Premier Orthopedics on February 27, 2015 should be covered by workers' compensation under the "emergency doctrine."

III. If Claimant sustained a compensable left knee injury, whether he is entitled to TTD benefits beginning May 7, 2015 and continuing to May 29, 2015.

IV. Whether Claimant's Average weekly wage is $399.60, $397.18 or some other figure.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

The February 27, 2015 Incident

1. Claimant is a long time employee of Respondent-Employer having worked for the school District for approximately 22 years. He is currently employed in the capacity of a school security guard.

2. Claimant's primary responsibility as a security guard is to ensure the safety of staff and students alike. To that end, Claimants' duties include monitoring the movement of buses, cars and students in and around the parking lots, streets and student drop off zones prior to the start of the school day.

3. On February 27, 2015, Claimant was holding a group of students at a crosswalk in order to clear the walkway of traffic when a fight erupted between a couple of male students.

4. Claimant intervened and while attempting to separate the combatants, he slipped on ice, twisted his left knee and fell, with one of the young men to the ground. According to Claimant, he was pulling the two fighters apart when he slipped. Claimant

testified that as he fell he pulled one of students down with him and the boy fell on his left knee. Claimant testified that he normally completes his outside duties and returns to the building by 9:00 AM. The ALJ infers from this testimony that Claimant's slip and fall occurred sometime prior to 9:00 AM.

5. Claimant was able to get to his feet[1] and escort the two young men to the school office where he reported the incident to "Ms. Squires", prompting completion of an "Employee Accident or Illness Report" (hereinafter the "incident report"). The incident report provides that Claimant was "trying to separate 2 boys from fighting", which caused him to [injure] a (sic) already injured knee." There is a section on the incident report questioning: "Do you feel you need medical treatment?" The "Yes" box is checked and a statement follows indicating: "Lacy already had appointment before reinjuring knee." The incident report is dated February 27, 2015 and is signed by both Clamant and his supervisor, Sherry L. Kalbach.

Claimant's Pre-Existing Medical History

6. Claimant has a considerable history of right knee pain. Medical records admitted into evidence document complaints of right knee pain, secondary to degenerative joint disease, as far back as February 25, 2010. Claimant has tried "exercise, physical therapy, nonsteroidal anti-inflammatory medications and corticosteroid injections" in an effort to ameliorate his persistent right knee symptoms. The aforementioned treatment modalities failed to produce lasting benefit. Consequently, Claimant's treatment for the past several years has been limited to providing pain relief while avoiding or delaying surgical intervention by administering visco-supplementation injections.

7. Claimant's began to experience pain in his left knee left sometime prior to his February 27, 2015 slip and fall. According to a report authored by Physician Assistant (PA), Kimberly Shenuk dated January 9, 2015, Claimant presented with complaints of left knee pain which had "been going on for quite a long time." Although Claimant's left knee had become symptomatic, he had "not tried any treatment for it", according to PA Shenuk. Consequently, X-rays of the left knee were obtained. X-rays demonstrated degenerative changes throughout the joint. Consequently, a corticosteroid injection was recommended and administered by PA Shenuk. Based upon the evidence presented, the ALJ finds that Claimant's degenerative arthritis pre-existed his February 27, 2015 slip and fall and was the likely source of his symptoms.

8. During the January 9, 2015 appointment, PA Shenuk noted that visco-supplementation, similar to that provided for Claimant's right knee pain, may be necessary if his left knee symptoms persisted.

9. Claimant's left knee pain continued despite the corticosteroid shot

[1] Claimant testified that adrenaline helped him get into the office where he carried out his duties for an additional 20 minutes after his slip and fall.

administered January 9, 2015. Therefore, on February 20, 2015, Claimant returned to PA Shenuk where he was provided with his first visco-supplementation injection to the left knee. Claimant was scheduled to return for his second injection in one week, i.e. February 27, 2015, the same day he slipped and fell.

Claimant's February 27, 2015 Appointment with PA Shenuk

10. As noted above, Claimant had been scheduled to see PA Shenuk for his second visco injection to the left knee the same day he slipped and fell. According to Claimant, he presented for his scheduled February 27, 2015 appointment between 10:00 and 10:30 AM, after he fell. Claimant testified that after he fell and reported the incident to his supervisor, he drove his pickup truck equipped with a manual transmission home where he picked up his wife and swapped the truck for his automatic transmission car.[2] He then proceeded to his scheduled appointment. Claimant testified that he was seen by PA Shenuk at his scheduled appointment.

11. Claimant testified further that he informed PA Shenuk that he slipped and fell before arriving for his appointment and that he had increased pain in his left knee as a consequence. He testified that he was worried about having the second visco injection because of his fall and his increased pain. Claimant accepted the injection nonetheless.

12. Diane McDonald (Claimant's wife) testified that she generally accompanies Claimant to all of his medical appointments and she went with him to his February 27, 2015 appointment with PA Shenuk. According to Ms. McDonald, Claimant told PA Shenuk about his fall and that his knee was swollen. She testified further that PA Shenuk did not take notes during the appointment and that she has a history of not taking notes during her appointments with Claimant.

13. A medical report from Claimant's February 27, 2015 appointment with PA Shenuk notes that Claimant presented in the "office today for his 2nd visco injection." PA Shenuk preformed a physical examination documenting the following concerning Claimant's knees bilaterally: "No abnormalities or deformities. No rashes, erthyema, warmth, or skin breakdown. Neurovascularly intact." The record is devoid of any mention of a new injury reported by Claimant or his wife.

14. Claimant testified that had he not have already had a scheduled appointment at Premier Orthopedics, he would have proceeded to the emergency room for medical attention after his February 27, 2015 slip and fall.

Claimant's Subsequent Medical Treatment

15. A third visco injection was administered by PA Shenuk on March 6, 2015.

[2] Claimant testified that he was able to depress the clutch in his truck for the short drive from his work place to his house despite the increased pain it caused.

Claimant's physical examination during this appointment was unchanged from the previous visit. In fact, PA Shenuk documented exactly the same observations she had during Claimant's February 27, 2015 visit.

16. Claimant returned to Premiere Orthopedics for follow-up on April 15, 2015 after completing his visco-supplementation injection series. He was evaluated by PA Shenuk on this occasion and complained of continued pain. For the first time since Claimant was seen initially on February 27, 2015, PA Shenuk documented that Claimant "did have a fall about two months ago and sustained a twisting injury to his knee." PA Shenuk completed a comprehensive physical examination noting "significant medial joint line tenderness" and "[p]ain with McMurray's" testing. Concerned that Claimant may have a medial meniscus tear, PA Shenuk ordered a MRI.

17. Claimant underwent MRI of the left knee on April 22, 2015. In addition to findings consistent with moderate osteoarthritis, Claimant's MRI demonstrated "[a]ttenuation, degeneration, and free edge fraying of the medical meniscus which may reflect the sequel of remote meniscal tear." No acute meniscal tear or meniscal flap was identified.

18. Claimant continued to experience unrelenting left knee pain. Consequently, he was taken to surgery by Dr. Michael Simpson on May 7, 2015. Dr. Simpson performed a pre-surgical history and physical noting that Claimant sustained a twisting injury to his left knee at work and that an MRI failed to show evidence of a discrete tear. Nonetheless, Dr. Simpson noted that Claimant's failure to improve with conservative treatment warranted a recommendation for surgical intervention.

19. Surgical intervention revealed a "tear to the posterior horn of the medial meniscus with a displaced flap fragment underneath the articular surface." The flap fragment was pulled out from the articular surface and a partial medial meniscectomy and arthroscopic synovectomy preformed.

20. Claimant returned Premier Orthopedics on May 8, 2015 following surgery at which time he was referred to post-surgical physical therapy (PT). Claimant presented for his initial PT evaluation on May 18, 2015 at which time he reported that he had "injured his left knee while breaking up a fight at work, when he fell and a student fell on top of it."

21. Although the report of PA Shenuk from May 8, 2015 and subsequent notes from Premier Orthopedics dated June 24, July 29, August 24, October 16, October 23 and October 30, 2015 do not impose specific work restrictions, Claimant testified he was unable to work for 2 ½ months following his May 7, 2015 surgery. The ALJ credits Claimant's testimony and the testimony of PA Shenuk to find that Claimant was unable to engage in his usual occupation as a security guard for the School District as a direct consequence of his left knee injury and subsequent surgery beginning May 7, 2015.

The Deposition Testimony of Physician Assistant Kimberly Shenuk and Dr. Michael Simpson

22. PA Shenuk testified by deposition on November 30, 2015. PA Shenuk testified that there was no way to determine the cause of the fraying demonstrated on Claimant's left knee April 22, 2015 MRI. She testified further that there was no way to establish the age of the pathology Dr. Simpson discovered during Claimant's May 7, 2015 surgery. Regarding specific restrictions imposed following surgery, PA Shenuk testified that standard protocol following meniscectomy is to "just limit running and jumping" for a period of six weeks. PA Shenuk testified that "[o]n May 4, 2015, . . . [Claimant] was given work restrictions because that was his preoperative appointment" and he was "undergoing surgery on the 7th." According to PA Shenuk Claimant was "formally given a release without restrictions on August 13th."

23. Based upon the evidence presented, the ALJ finds that Claimant, more probably than not, returned to work without restriction on August 13, 2015. Nonetheless, Claimant's claim for lost wage benefits extends only to May 29, 2015, probably because this date reflects the end of the 2014-2015 academic year. As found at paragraph 21 above, Claimant was disabled from engaging in his usual occupation as a security guard on May 7, 2015. Crediting Claimant's testimony, the ALJ finds that Claimant's disability continued though May 29, 2015.

24. Despite returning to work , Claimant continued to have symptoms associated with his pre-existing, non-work related osteoarthritis bilaterally. He received additional bilateral visco-supplementation injections through October 2015. Based upon the evidence presented, the ALJ finds this treatment unrelated to the February 27, 2015 slip and fall.

25. Dr. Simpson testified by deposition on November 30, 2015. Consistent with the testimony of PA Shenuk, Dr. Simpson testified that there was no way to determine the age or the cause of the meniscal tear he discovered during Claimant's May 7, 2015 surgery. Nevertheless, Dr. Simpson testified that the meniscal pathology found during surgery on May 7, 2015 would be consistent with a twisting mechanism and that "most people who slip on ice twist their knee as they do it." Consequently, Dr. Simpson testified that the "torn meniscus could have occurred as a result of the fall and slipping on the ice."

The Independent Medical Examination of Dr. Michael Sparr

26. Claimant was evaluated by Dr. Michael C. Sparr on January 26, 2016 at the request of Respondent. Since there were inconsistencies between Claimant's described mechanism of injury (MOI) and Claimant's report that he fell onto his knee as provided for in his Workers Claim for Compensation form, Dr. Sparr was tasked with evaluating "whether Claimant's meniscal tear was caused directly by the work related fall or it was the result of normal wear and tear in a mild to moderately arthritic knee." In order to address this question, Dr. Sparr took a history and reviewed records, including employer claim notes and deposition transcripts. He also performed a physical

examination. Following his independent medical examination (IME), Dr. Sparr noted that Claimant had been receiving visco-supplementation injections into the right knee for years with benefit. He opined that there would have been "no reason to believe that the patient would not have a similar benefit from the same injections in an arthritic left knee." Because Claimant did not respond to visco-supplementation, Dr. Sparr noted that consideration was given over to another cause of Claimant's ongoing symtomatology, including meniscal tearing which was ultimately confirmed though surgical intervention. The ALJ infers from the totality of Dr. Sparr's IME report that the he concluded that Claimant's left medial meniscal tear was caused by his work related fall and not the natural progression of his non-work related osteoarthritis. Consequently, if became necessary for Dr. Sparr to address a secondary question, specifically "whether falling and landing on one's knee [was] a reasonable explanation for the cause of a partially torn medial meniscus."

27. While Dr. Sparr noted that a moderately arthritic knee predisposes the meniscus to tearing, he credited the history provided to him by Claimant during the IME, specifically that Claimant "did not fall forward directly onto his knee but rather backwards in the course of pulling a fighting child away from the fight and slipping on the ice, to conclude that the described MOI was a "reasonable cause of a partial medial meniscal tear." Based upon a complete and careful analysis of Dr. Sparr's IME report, the ALJ finds that Dr. Sparr concludes that Claimant's torn meniscus was caused by the February 27, 2015 incident. The ALJ finds the opinions of Dr. Sparr regarding the cause of Claimant's left medial meniscus tear to be consistent with the opinion expressed by Dr. Simpson and supported by the record evidence presented. Dr. Sparr's opinions concerning the likely cause of Claimant's left medical meniscal tear and his subsequent need for surgery are credible and convincing.

The Testimony of Melissa Denoo

28. Melissa Denoo testified at hearing. Ms. Denoo is the Claims Adjuster for Respondent-Employer. She has worked for Respondent-Employer for approximately 4 years.

29. Ms. Denoo testified that she called Claimant the same day he slipped and fell. She did not make contact with Claimant so she left a message for Claimant, requesting that he call her. As she did not receive a return call, Ms. Denoo testified that she called Claimant a second time and again left a message the following week. According to Ms. Denoo, she made ultimately made contact with Claimant on March 5, 2015. Ms. Denoo testified that during her conversation with Claimant on March 5, 2015, Claimant declined treatment.

30. Ms. Denoo testified that 11 days later (March 16, 2015) she spoke with Claimant during which time, he requested treatment under Workers' Compensation. According to Ms. Denoo's testimony, she then explained to Claimant that he would need to complete a medical records release form so that medical records surrounding the care of his knees could be sent to the workers' compensation doctor. Ms. Denoo requested the release because the notation in the Employee Accident or Illness Report

form reflected that Claimant had "injured an already injured knee." Ms. Denoo testified that following this exchange, Claimant again declined treatment.

31. Claimant denied that he ever declined treatment. Rather, Claimant testified that he was told that it would take two weeks before he could get an appointment with the workers' compensation doctor. Claimant could not recall the name of the person who told him it would take two weeks to see a workers' compensation provider and there is no written notation in the evidentiary record that anyone told him that it would take two weeks to see a worker's compensation provider. Claimant testified that he told the party to whom he was speaking that he already had an appointment with his doctor so he was going to keep it.[3]

32. Ms. Denoo testified that she did not tell Claimant it would take two weeks to see a workers' compensation doctor and has no idea who would have informed Claimant of the same. According to Ms. Denoo appointments with the Employer's designated providers can be scheduled the day of the injury on a walk in basis.

33. Ms. Denoo testified that on May 1, 2015 she received a call from Premier Orthopedics notifying her that Claimant was scheduled to proceed to surgery on May 7, 2015 and that Claimant had provided their office a worker's compensation claim number. Ms. Denoo informed the staff at Premier that Claimant did not have an open worker's compensation claim. Claimant proceeded with surgery under his health insurance.[4]

34. On May 5, 2015, Ms. Denoo spoke with Claimant regarding his scheduled surgery. The claim notes submitted into evidence reflect that May 5, 2015 is the first documented instance where Ms. Denoo actually obtained a statement from Claimant regarding the circumstances surrounding his left knee injury. On cross examination, Ms. Denoo admitted that she was aware that Claimant was injured on February 27, 2015, that she did not know how or even whether Claimant's left knee had been injured previously and that she made no attempt to interview any one about the incident nor did she obtain a recorded statement from Claimant prior to May 5, 2015.

35. Based upon the evidence presented, the ALJ finds inconsistencies between the testimony of Claimant and Ms. Denoo surrounding the claim, including the suggestion that Claimant was told it would take two weeks to see a worker's compensation provider. Nonetheless, the ALJ credits Claimant's testimony and the

[3] When asked why he did not pursue treatment with a workers' compensation providers for the School District during his IME with Dr. Sparr, Claimant reported that "he was already treating at Premier and was told he would have to wait two weeks for an appointment with a Worker's Compensation doctor and already had an appointment with Dr. Simpson, so he kept it.

[4] Claimant admits that he was provided with a designated provider list on February 27, 2015. Thus, he concedes that all treatment obtained after February 27, 2015 was unauthorized and properly not covered under worker's compensation. Consequently, Claimant is not seeking that the surgery performed May 7, 2015 be covered by worker's compensation.

record evidence to find that he, more probably than not, slipped, twisted his left knee and then fell with a student while trying to break up a fight in furtherance of his duties as a school security guard on February 27, 2015.

36. The ALJ credits the opinions of Dr. Simpson and Dr. Sparr to find that Claimant, more probably than not, tore his left medial meniscus when he slipped and twisted his knee while breaking up a fight between two students on February 27, 2015. The evidence presented persuades the ALJ that Claimant has proven, by a preponderance of the evidence, that he sustained a compensable injury to his left knee on February 27, 2015 and that this injury directly resulted in his need for treatment, including the surgery performed by Dr. Simpson on May 7, 2015.

Claimant's Wage Loss and Average Weekly Wage

37. Claimant is paid according to a 12 month contract with Employer. He is paid monthly and his pay varies depending on the hours he works. In addition to pay for hours worked, Respondent-Employer allows their employees to accrue and utilize "comp time." Claimant testified that he accrues "comp time" for irregular overtime work associated with extracurricular activities held on school grounds. As explained by Claimant, the ALJ finds that "comp time" is paid time off from work given to Claimant, in lieu of paying overtime, for the extra hours he works during school sponsored events. Claimant testified that he "trades" comp time for overtime pay because it is hard to secure overtime pay. According to Claimant he can elect to use comp time accrued for regular hours that he otherwise would have worked if he needed to be away from work attending to other business, i.e. attending to his sick mother, attending his or his wife's medical appointments and the like.

38. Claimant testified that following his surgery on May 7, 2015 and through May 29, 2015, he told "Jamie" that he was going to use his comp time for his injury so his pay would not be "docked." Consequently, Claimant testified that while he was paid for the time period of his disability extending from May 7, 2015 through May 29, 2015, his available comp time hours were reduced. Based upon the evidence presented, the ALJ finds that Claimant was required to use his accrued comp time in lieu of being paid temporary total disability (TTD) benefits. As such, the ALJ determines that Claimant suffered an actual wage loss, since his comp time is an earned benefit he "trades" for overtime pay and without this benefit Claimant would not have been paid during the time period of May 7, 2015 through May 29, 2015. The ALJ finds Claimant's situation regarding his payment of "comp time wages" akin to those injured workers who's sick or vacation time is docked instead of being paid TTD.

39. Respondents presented persuasive evidence which establishes an average weekly wage of $397.18. Documentation entered into evidence regarding this issue consists of the wage records demonstrating Claimant's gross wages for the twelve month period extending from February 28, 2014 through January 31, 2015. The injury in this case occurred on February 27, 2015. The wage records submitted establish that Claimant earned $20,653.17 leading up to the date of injury. Completing the necessary calculation yields an average weekly wage of $397.18 at the time of Claimant's injury

($20,653.17 / 52 (weeks) = $397.18. The ALJ finds and concludes that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his February 27, 2015 compensable work related injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As found, the opinions of Dr. Sparr regarding the cause of Claimant's torn meniscus are credible and persuasive. Dr. Sparr clarified the record regarding how Claimant fell and likely injured his left knee. Based upon Dr. Sparr's IME report, the ALJ concludes that Claimant's notation that he "fell onto left knee" as reflected in his Worker's Claim for Compensation does not support the entry of a finding that Claimant is incredible merely because this report is inconsistent with his more fully described MOI given to Dr. Sparr. Here, Respondent, based upon their interpretation of Claimant's Worker's Claim for Compensation, suggests that Claimant reported that he fell forward landing directly onto the front of his knee. This interpretation injects material not included in the simple statement that Claimant "fell onto left knee." Indeed this statement does not indicate what part of the knee Claimant fell "onto." With additional questioning (by an unbiased medical examiner), Dr. Sparr was able to clearly ascertain the exact nature of the MOI. Moreover, the fact that the described MOI does not appear in the medical record of PA Shenuk from February 27, 2015 does not compel a finding that Claimant is incredible and/or that he did not sustain a torn meniscus as a consequence of the February 27, 2015 incident. Rather, the ALJ finds and concludes that PA Shenuk likely did not document that Claimant slipped and fell on February 27, 2015. Her note from April 15, 2015 indicating that Claimant "did have a fall about two months ago and sustained a twisting injury to his knee" supports this conclusion and the opinion of Dr. Sparr that Claimant's torn meniscus was caused by this slip and fall. As found above, Claimant's testimony regarding the MOI is credible and persuasive.

Compensability

E. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment relationship with Employer and during an activity, specifically breaking up a fight between two students which is connected to his duties and position as a security guard for Employer. Nonetheless, the question of whether the alleged injury "arose out of" Claimant's employment must be resolved before the injury is deemed compensable.

G. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while performing job duties, does not mean that she sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Here, the evidence presented persuasively establishes that Claimant intervened in an effort to stop a fight between two students while in the course of his employment. In the process of pulling one student off of the other, Claimant slipped on the ice, twisted his knee and fell with the young man onto his left knee. Claimant's report of injury was documented contemporaneously with the incident. Although reported as a new injury, the incident report form references that Claimant had "injured and already injured knee" raising the question of whether Claimant's torn meniscus is a consequence of his slip and fall sustained while Claimant was carrying out his duties as a security guard or whether the torn meniscus represents a natural progression of Claimant's pre-existing, non-work related left knee osteoarthritis. In this case, the ALJ concludes that the totality of the objective medical evidence presented supports a reasonable inference that the torn meniscus, including the displaced flap visualized during surgery on May 7, 2015, is the likely aftermath of an acute tear suffered when Claimant slipped, twisted his knee and fell with the weight of one of the combatants to the fight on him on February 27, 2015. More probably than not, the tear was caused by Claimant's slip, twist and fall, as supported by the opinion of Dr. Sparr, rather than the natural progression of his pre-existing, non-work-related osteoarthritis as suggested by Respondent's. Claimant's left medial meniscus tear is compensable.

Medical Benefits

H. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). However, respondents are only liable for authorized or emergency medical treatment. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973). As indicated above, Claimant concedes that all treatment after February 27, 2015 is unauthorized. Regarding the February 27, 2015 treatment provided by PA Shenuk, Claimant asserts that the evidence presented supports a conclusion that this care is covered under the "emergency doctrine" articulated in *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

I. As correctly noted by Claimant, medical services provided during a bona fide emergency are an exception to the normal requirement that a claimant obtain authorization for all treatment of the industrial injury. Larson's Workers' Compensation Law, § 94.02[6] (1999); *Sims v. Industrial Claim Appeals Office, 797 P.2d 777* (Colo. App. 1990). There is no precise legal test for determining the existence of a medical emergency.[5] Rather, the question of whether a claimant has proven a bona fide emergency is dependent on the particular facts and circumstances of the claim. *Timko v. Cub Foods,* W. C. No. 3969-031 (June 29, 2005). In this case, Claimant asserts that his treatment with Premier Orthopedics on February 27, 2015 should be considered a bona fide emergency because his pain was so severe that he would have gone to the emergency room had he not been scheduled to see PA Shenuk previously. The ALJ is not persuaded. Here, Claimant's actions following his slip and fall belie his assertion that his pain was so bad as to constitute the need for emergent care. Rather the evidence presented establishes that Claimant worked for sometime after his slip and fall. Moreover, when the opportunity to drive directly to the ER to obtain treatment for "severe pain" arose, Claimant did not take it. Nor did Claimant call anyone for transportation to the ER. Instead, Claimant chose to drive his manual transmission truck home to get his wife (who attends all scheduled medical appointments with him) and swap vehicles for the subsequent drive to his scheduled appointment. Even giving Claimant the benefit of the doubt that he wanted to get home to advise his wife what was happening, one cannot reconcile the fact that he did not proceed to the ER thereafter with his claim of pain so severe that a trip to the ER would have been warranted had he not have had a scheduled appointment. Moreover, when he arrived at his scheduled appointment there is no record evidence that Claimant informed PA Shenuk or anyone else that he needed emergent care. Simply put, the ALJ is not convinced that a pre-scheduled doctor's appointment would prevent someone from proceeding to the ER if they had pain so severe that a trip to the ER was necessary.

Claimant's Entitlement to Temporary Total Disability Benefits

J. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by

[5] The exception is not limited to situations where life is threatened. *Bunch v. Industrial Claim Appeals Office of State of Colorado,* 148 P.3d 381 (Colo.App.2006).

restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). As found here, Claimant has proven that was unable to work as a direct consequence of his compensable work related injury beginning May 7, 2015 and continuing through May 29, 2015 and that he suffered an actual wage loss as a result. Consequently, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and is entitled to TTD benefits for the time period extending from May 7, 2015 through May 29, 2015. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999).

K. In keeping with the holding announced in *Public Service Co. of Colorado v. Johnson*, 789 P.2d, 487 (Colo. App. 1990) the ALJ concludes that Claimant is entitled to receive full TTD for the aforementioned period of time even though he received payment of his "comp time." As noted in the *Public Service Co.* decision, such payment does not constitute double compensation because vacation, sick and other similar benefits, i.e. "comp time" are earned by past services unrelated to the occupational injury. The Court concluded that the legislative determination of § 8-42-124(4) "reflects a legislative determination that an injured employee should not be required to sacrifice earned benefits in order to obtain statutorily mandated workmen's compensation benefits." *Public Service Co., supra.* Thus, just as the employer in *Public Service Co.* was required to pay both the claimant's sick and vacation time and full TTD, Respondent-Employer in the instant case is obligated to pay Claimant for the required comp time he depleted from his account in addition to his full TTD.

Claimant's Average Weekly Wage

L. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).*

M. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), give the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. An AWW calculation is designed to compensate for total temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity comes from the wage records submitted into evidence. The ALJ adopts Respondent's calculation of Claimant's average Weekly Wage (AWW) as that figure represents his average weekly earnings for 12 months prior to the February 27, 2015 injury. Accordingly, the ALJ determines that Claimant's average weekly wage is $397.18. The ALJ concludes that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his February 27, 2015 compensable work related injury.

ORDER

It is therefore ordered that:

1. Claimant's February 27, 2015 left medial meniscus injury is compensable.

2. Claimant's request for medical benefits, specifically his claim for coverage of and reimbursement for the February 27, 2015 appointment at Premier Orthopedics is denied and dismissed.

3. Claimant's AWW is $397.18.

4. Claimant's request for reimbursement of "comp time" used is denied and dismissed. Rather, Respondent-Employer shall pay temporary total disability benefits (TTD) in accordance with C.R.S. § 8-42-103(1)(b), beginning May 7, 2015 and continuing through May 29, 2015 at a rate of sixty-six and two-thirds percent of the above ordered AWW.

5. Respondent-Employer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 11, 2016

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-981-841-02

ISSUES

- Whether Claimant established by a preponderance of the evidence that psychological treatment, including prescription medications, are reasonably necessary and related to her workplace injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant did not appear at the hearing. She testified by telephone, but did not otherwise participate in the hearing.

2. Prior to her admitted April 24, 2015 work injury, Claimant had been receiving psychological treatment for depression and anxiety from Mr. James Newman, a licensed social worker. Her psychiatric records show that she was depressed and anxious as early as her teenage years. Claimant's treatment with Mr. Newman began in the late 1980s or early 1990s. At that time, she began taking psychotropic prescription medications prescribed by her primary care physician, Dr. Thumin. At the time of her injury she was taking citalopram for anxiety and depression. Claimant testified that Dr. Thumin prescribed the citalopram at 40 mg a day "because he knew [her] financial situation," but that she took the drug at 20 mg per day. She also testified inconsistently that she took the citalopram at 40 mg a day. On October 10, 2015, Dr. Thumin refilled Claimant's prescription for citalopram at the dosage of 40 mg per day.

3. Claimant was working as a store manager for Employer at the time of her accident which occurred before the store opened. She described her accident as occurring when she fell from a stepladder while putting away stock, hitting her head on a display riser behind her. Claimant did not seek immediate care, but presented to NextCare Urgent Care before noon.

4. Claimant was initially seen by a physician's assistant, and later by Erick Gomer, M.D. She was diagnosed with a closed head injury based on her subjective reports of symptoms. She was eventually referred to Dr. Reinhardt, an occupational medicine doctor, for symptoms of a head injury, with a negative MRI of her brain. Claimant was evaluated and cleared by an ear doctor and an eye doctor for subjective symptoms she reported. Dr. Reinhardt placed her at MMI for the head injury on August 24, 2015, assigning no impairment, and concluding that her psychiatric medications should be prescribed outside of workers' compensation.

5. Claimant was later referred to Dr. William Boyd. Dr. Boyd performed neuropsychological testing for a neuropsychological evaluation and began providing eight treatment visits for cognitive behavioral therapy.

6. Dr. Boyd performed neuropsychological testing for cognition and found that Claimant did not have a cognitive disorder. He also did psychological testing which indicated that Claimant exaggerated her complaints. Dr. Boyd diagnosed Claimant with somatoform disorder, a condition where a person's psychological conditions become manifest physically.

7. Claimant reported having a panic attack after her fourth visit with Dr. Boyd which took place two days after her step-father's burial. Claimant testified that Dr. Boyd was "abusive," and that she would not subject herself to that, so she stopped treating with him. She reported that she became suicidal as a result of the appointment. Immediately after that appointment, Claimant went to a previously scheduled appointment with Dr. Joshua Krembs who was treating her by providing osteopathic manipulation. She additionally saw Mr. Newman in September 2015, "because of the trauma [she] experienced after seeing Dr. Boyd."

8. Dr. Robert Kleinman testified as an expert in the field of psychiatric medicine. Having reviewed Dr. Boyd's records and based on his familiarity with Dr. Boyd, and with the testing and treatment Dr. Boyd was providing Claimant, Dr. Kleinman opined that most likely, Claimant perceived Dr. Boyd's explanation of her test results, which diagnosed Claimant with a somatoform disorder, as confrontational. Dr. Kleinman testified that when Claimant was explaining to him what happened at the appointment with Dr. Boyd, she reported that Dr. Boyd had been critical of her response that her son made her happy, because he wanted her to say that sunrises made her happy. Because of that conversation, she reported that she no longer liked Dr. Boyd. Dr. Kleinman explained:

> I would summarize by saying that in the course of her treatment with Dr. Boyd, she got anxious. The anxiety was likely over his confronting her on some issue. And then she didn't want to go back anymore. To have anxiety in psychotherapy is not --- is not inappropriate. It's almost expected.

9. Claimant earned a master's degree in psychology, summa cum laude. Her work experience includes teaching classes at the college level from 2007 through January 2015. However, she testified that she does not know what somatoform disorder is. Given her education, that fact that she was diagnosed with somatoform disorder, and Dr. Boyd's discussion of her diagnosis with her, the ALJ finds Claimant's testimony incredible.

10. Dr. Kleinman testified that Claimant had been abused by her biological father leaving her prone to feeling traumatized. She had a close relationship with her stepfather who had just passed. Dr. Kleinman testified that it was more likely that

Claimant's panic attack was a delayed expression of emotions she felt about her step father's burial two days earlier, which was a much more significant event than a reaction to Dr. Boyd's discussion of what made Claimant happy.

11. Claimant's medical records refer to other anxiety attacks Claimant had reported. These included an attack while she was working at the Waldorf School which was triggered by someone throwing a pencil in her direction; an attack in 2011 or 20112 which Claimant described as the worst anxiety attack of her life which occurred when she was fired from a job; and a past history of an alleged brain injury in about 2011 when she fell off of a doctor's examining table.

12. Dr. Kleinman described Claimant as being "no worse now than she was before," the injury. He attributed her need for current treatment and medication to stressors outside the scope of the occupational injury.

13. In his report, Dr. Kleinman noted that Claimant was worried and anxious about money, the possibility of losing her home, and "not being sure where she stood" with Employer. Claimant's counsel attempted to establish that this anxiety was related to Claimant's claim and was sequelae of her injury. The report also noted that Claimant was not returning to work because she could not figure out the process, not because she was medically unable to return to work. Claimant's counsel attempted to establish that Claimant's anxiety about work for the Employer was a result of her injury.

14. Claimant reported to Dr. Kleinman that she was attempting to file bankruptcy. She had six figure student loan debts, and had been unemployed for approximately one year before her injury. She was receiving Medicaid and food stamps, her mother was paying her mortgage, and her son was paying most of her other expenses.

15. Claimant reported to Dr. Kleinman that she experienced panic attacks once a month, lasting thirty to sixty minutes. Claimant's primary care physician prescribed Xanax for anxiety, but Claimant rarely if ever used it. On January 27, 2016, Dr. Gomer prescribed bupropion, 75 mg, half tablet twice a day, through Workers' Compensation. No persuasive evidence was presented to support a finding that Claimant actually took the bupropion, as Claimant reported to Dr. Kleinman that she had not taken the medication, and that she was waiting for Dr. Gomer to consult with a Dr. Disorbio, whom she had recently seen for a psychological assessment outside of workers' compensation, on her attorney's referral.

16. Dr. Kleinman performed a Respondents' sponsored independent psychiatric evaluation of Claimant on February 17, 2016. The evaluation consisted of a medical record review, an interview, a mental status evaluation, and some further cognitive testing. He formed his opinions based on Claimant's medical records and his evaluation of her. Dr. Kleinman opined that Claimant's need for psychological treatment and medication, specifically citalopram, Xanax, and bupropion, is not related to her work injury.

17. Dr. Kleinman diagnosed Claimant with recurrent major depressive disorder. He explained that over the course of Claimant's thirty plus year treatment, it was not unusual that her medication would be adjusted, such as by the addition of bupropion. It was also not unusual for someone suffering from anxiety to have a tranquilizer, like Xanax, and that he was surprised given her history of panic attacks that it had not been prescribed earlier. Further, Claimant would not have been as resilient as one would expect at the time of her injury because she was only taking half of her prescribed dose of citalopram.

18. The ALJ credits Dr. Kleinman's opinions as credible and persuasive.

19. The ALJ finds that Claimant failed to establish by a preponderance of the evidence that her need for continued psychological treatment is related to her work injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Insurer is liable for medical care that is reasonably needed to cure and relieve the claimant from the effects of the compensable injury. Section 8-42-101(1), C.R.S. The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999).

Claimant has failed to establish that psychological treatment is related to a compensable injury. There is not substantial, reliable medical evidence in the record to support Claimant's claim for additional medical benefits. Dr. Kleinman, Dr. Gomer, and Dr. Boyd were unable to link Claimant's current depression and anxiety with the compensable injury. Mere speculation in conjure is not enough to support Claimant's entitlement to medical treatment in this case. There is not substantial evidence to support an award of medical benefits. To the contrary, here the substantial evidence supports a denial of psychological treatment.

The mere occurrence of a compensable injury does not require an ALJ to find that the need for subsequent medical treatment was caused by the industrial injury. The range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013. Respondents may challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Claimant has an extensive history of anxiety and depression. Therefore, the psychological treatment is not authorized, and the condition does not relate to the industrial injury.

Claimant argues that while she had preexisting psychological issues, her current anxiety and depression are worse due to her treatment with Dr. Boyd. Claimant also will point out that she has increased anxiety from her injury as she is worried about money and her job.

Dr. Kleinman credibly and persuasively testified that Claimant's panic attack at Dr. Boyd's office was more likely related to the death of her stepfather two days prior. Dr. Kleinman testified that Claimant had an anxiety attack over questions Dr. Boyd was asking her regarding what made her happy. Dr. Boyd also informed Claimant that she had no neurological issues from the injury and diagnosed her with somatoform disorder. Dr. Kleinman credibly testified that while the session with Dr. Boyd may have caused the panic attack it is more likely that the attack was related to the passing of her stepfather.

Claimant's increased anxiety over money issues and litigation stress are not compensable. In *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002), a division of the the court held that problems resulting from a claimant's negative psychological reaction to the litigation process are not compensable. The ALJ also finds and concludes that Claimant's anxiety regarding money is related to her student loan debt and her recent history of unemployment. Claimant's psychological issues must be directly related to the industrial injury and not to her emotional reaction to treatment. In *Malloy v. Lincoln Community Hospital*, W.C. No. 4-148-045 (March 2, 2005), an ALJ found that the aggravation of a Claimant's stress was not caused directly by the industrial injury but rather, by the claimant's emotional reaction to the respondents' adversarial actions in adjusting the claim. Claimant's current psychological issues are not directly related to her fall injury at work.

Claimant was not a credible witness. The medical records indicate that Claimant failed to inform her workers' compensation providers of her complete psychological history. Claimant testified that Dr. Boyd was abusive. While the testimony of Dr. Kleinman and the medical records indicate that Dr. Boyd was simply asking Claimant what made her happy or discussing her diagnoses.

It is more logical and more likely that Claimant's current psychological issues are related to the death of her stepfather and her preexisting depression and anxiety for which she has been receiving treatment since the late 1980s or early 1990s than it is from her work injury.

The credible evidence and testimony presented at the hearing in this matter lead to the conclusion that Claimant has not established by the preponderance of the evidence that psychological treatment and medications are related to the workplace injury.

Respondents are not liable for Claimant's psychological treatment.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to prove the psychological treatment is reasonable, necessary, and related to her work place injury. Claimant's request for psychological treatment is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 10, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period December 4, 2015 until terminated by statute.

FINDINGS OF FACT

1. Claimant worked for Employer as a Journeyman Electrician. On September 2, 2015 Employer was working as an electrical subcontractor at a water treatment plant. The general contractor of the project was conducting high pressure testing of the water system. While Claimant was standing on a ladder wiring a motor there was a sudden, extremely loud noise. A flange and cap had blown off a high pressure water source approximately six feet away from Claimant. Claimant suffered admitted industrial injuries to the left side of his face and left ear.

2. On September 3, 2015 Claimant visited Authorized Treating Physician (ATP) Frank D. Polanco, M.D. for an examination. Claimant reported that while he was working on September 2, 2015 a pipe exploded approximately eight feet away from him and he felt the blast on the left side of his face. Because his left ear began to hurt, he visited an urgent care center but they were unsure whether he had punctured his eardrum. After reviewing Claimant's medical records and performing a physical examination Dr. Polanco concluded that Claimant did not require any additional diagnostic testing or treatment. He determined that Claimant had reached Maximum Medical Improvement (MMI) with no impairment or restrictions. Dr. Polanco authorized 10 days of medical maintenance care in the form of follow-up treatment.

3. Claimant testified that he returned to work for Employer and performed his regular job duties. However, he expressed safety concerns because of the September 2, 2015 incident. Employer's Safety Manager Bill Vaughan acknowledged that the general contractor on the project failed to follow proper safety procedures in conducting the high pressure water testing on September 2, 2015. However, he explained that he offered to transfer Claimant to a position in another part of the water treatment project that was overseen by a different general contractor. However, Claimant declined the transfer.

4. Claimant explained that on September 16, 2015 the general contractor conducted another high pressure water test without evacuating any of the workers in the building. The testing blew off an improperly installed pressure gauge. Because of the episode Claimant continued to express safety concerns about the job site.

5. On September 17, 2015 Claimant resigned from his position with Employer. He remarked that his sole reason for resigning was safety concerns. Claimant's Termination Notice specifically provided that he "quit because of safety concerns."

6. Claimant subsequently continued to suffer symptoms in the form of hearing loss and debilitating headaches as a result of the September 2, 2015 incident. On October 28, 2015 Claimant returned to Dr. Polanco for an examination. In a patient questionnaire Claimant remarked that "I don't think I could do my job with my current headaches." He also noted continuing tinnitus and ringing. Claimant mentioned that noise, bright lights and working increase his pain. Dr. Polanco commented that Claimant's MMI date was unknown because he "remain[ed] symptomatic." He then referred Claimant for a neurological evaluation.

7. In early December 2015 Claimant requested a change of physician and Respondents agreed. On December 4, 2015 Claimant visited ATP Miguel Castrejon, M.D. for an evaluation. Claimant reported that on September 2, 2015 he was working for Employer when a pipe flange and cap blew off as a result of pressure testing. Claimant noted that the "tremendous explosion" primarily impacted the left side of his face and head. He remarked that testing revealed that his eardrum was not damaged but he suffered left-sided hearing loss. He continued to experience ringing in his left ear and headaches. Dr. Castrejon determined that Claimant's symptoms were directly related to the September 2, 2015 industrial incident. He expressed concerns that Claimant was suffering from "extreme hypersensitivity" overlying the area of the left temple and was thus concerned about temporal arthritis. Dr. Castrejon diagnosed Claimant with the following: (1) post-concussive syndrome; (2) possible temporal arthritis or trigeminal neuralgia; (3) left ear post-trauma tinnitus; and (4) an abnormal left ear audiogram. He prescribed new medications including Cymbalta, Predisone and Nortriptyline to alleviate Claimant's symptoms. Dr. Castrejon assigned restrictions providing that Claimant should not be exposed to high sounds and recommended light duty employment.

8. Mr. Vaughan acknowledged that Claimant resigned from Employer because of safety concerns. He noted that Claimant simply did not feel safe working on the project. Mr. Vaughan explained that he offered to accommodate Claimant's restrictions with modified employment in the form of office or warehouse work that did not involve loud noises. However, Claimant declined. Notably, Employer did not provide Claimant with any written offer of modified employment.

9. On February 9, 2016 Claimant visited Lawrence J. Adams, M.D. for a neurological evaluation. Dr. Adams diagnosed Claimant with the following: (1) occipital neuralgia; (2) tinnitus and left ear hearing loss. He explained that "I suspect that this is primarily an occipital neuralgia. He also has hearing loss. I [will] inject his left occipital nerves today."

10. On February 19, 2016 Dr. Adams authored a letter stating that Claimant's "working diagnosis, I believe, is occipital neuralgia, traumatically induced, with

migrainous features." He remarked that "this type of pain can be quite significantly severe and difficult to work with."

11. During the Winter of 2016 Claimant continued to visit Dr. Castrejon. On March 28, 2016 Dr. Castrejon again diagnosed Claimant with the following: (1) post-concussive syndrome; (2) possible temporal arthritis or trigeminal neuralgia; (3) left ear post-trauma tinnitus and (4) an abnormal left ear audiogram. He remarked that Claimant did not receive any benefits from occipital nerve blocks and was unable to sleep because of headaches. Dr. Castrejon recommended facet joint injections to decrease Claimant's headaches. He reiterated that Claimant should not be exposed to high sounds and authorized light duty employment.

12. Claimant testified at the hearing in this matter. He explained that it would be impossible to work in his trade and avoid loud noises. Claimant noted that his current symptoms include hearing loss, inability to sleep, dizziness and ringing in both ears. He maintained that the combination of work restrictions and continuing symptoms has prevented him from earning wages. Claimant noted that he has not been employed since the date of his resignation because of his continuing symptoms, medications and work restrictions.

13. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period December 4, 2015 until terminated by statute. On September 2, 2015 Claimant suffered admitted industrial injuries to the left side of his face and left ear when a flange and cap were blown off a high pressure water source during testing. Claimant initially received medical treatment from ATP Dr. Polanco. He determined that Claimant had reached MMI with no impairment or restrictions and authorized 10 days of medical maintenance care in the form of follow-up treatment. On September 17, 2015 Claimant voluntarily resigned his position with Employer because of safety concerns. By October 28, 2015 Dr. Polanco noted that Claimant's MMI date was unknown because he "remain[ed] symptomatic." He then referred Claimant for a neurological evaluation.

14. Claimant subsequently continued to suffer symptoms in the form of hearing loss and debilitating headaches as a result of the September 2, 2015 incident. On December 4, 2015 ATP Dr. Castrejon diagnosed Claimant with the following: (1) post-concussive syndrome; (2) possible temporal arthritis or trigeminal neuralgia; (3) left ear post-trauma tinnitus; and (4) an abnormal left ear audiogram. He stated that Claimant should not be exposed to high sounds and recommended light duty employment. On February 19, 2016 Dr. Adams authored a letter stating that Claimant's "working diagnosis, I believe, is occipital neuralgia, traumatically induced, with migrainous features." He remarked that "this type of pain can be quite significantly severe and difficult to work with." By March 28, 2016 Dr. Castrejon commented that Claimant had not received any benefits from occipital nerve blocks and was unable to sleep because of headaches. Dr. Castrejon recommended facet joint injections to decrease Claimant's headaches. Claimant's continuing symptoms and work restrictions thus prevented him from returning to regular employment.

15. Claimant credibly testified that his current symptoms include hearing loss, inability to sleep, dizziness and ringing in both ears. He maintained that the combination of work restrictions and continuing symptoms has prevented him from earning wages. Claimant has been unable to perform his regular employment, has not reached MMI and has not been released to work without restrictions. He has thus suffered a 100% wage loss since December 4, 2015. Although Claimant voluntarily resigned on September 17, 2015 his continuing symptoms and work restrictions reflect that he suffered a worsening of condition that reestablished the causal connection between his industrial injury and wage loss. He sustained a wage loss because the worsening of his condition resulted in physical restrictions that did not exist at the time of his resignation and limited his temporary earning capacity. Accordingly, Claimant is entitled to receive TTD benefits for the period December 4, 2015 until terminated by statute.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual

wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

5. Respondents assert that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") when he voluntarily resigned from employment on September 17, 2015. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). A wage loss is caused by a worsened condition if the worsening results in physical limitations or restrictions that did not exist at the time of the termination and the restrictions cause a limitation on the claimant's temporary earning capacity that did not exist when the claimant caused the termination. *Martinez v. Denver Health,* W.C. No. 4-527-415 (ICAP, Aug. 8, 2005). Whether such a worsening caused the claimant's wage loss is a factual determination for the ALJ. *Fantin v. King Soopers,* W.C. No. 4-465-221 (ICAP, Feb. 15, 2007).

6. In *Anderson v. Longmont Toyota, Inc.,* 102 P.3d 323 (Colo. 2004) the Colorado Supreme Court concluded that the termination statutes are not a permanent bar to temporary disability benefits when the worsening of a prior work-related injury causes the claimant's wage loss. The claimant in *Anderson* returned to modified light duty after having sustained a compensable back injury. After returning to work he resigned his position due to a dispute with the employer and began work with a subsequent employer under the same physical restrictions. However, his condition worsened and he received more severe restrictions that required him to resign his subsequent job. The respondents denied temporary total disability benefits because the termination from employment was a permanent bar to the receipt of benefits. However, relying on the legislative history of the termination statutes, the remedial policies underlying the Workers' Compensation Act and the procedure for reopening claims where there has been a change of condition, the Supreme Court in *Anderson* determined that the bar to receipt of temporary disability benefits is not permanent. The Court remarked that the bar was intended only to weed out wage loss claims

subsequent to voluntary or for-cause terminations of modified employment that do not involve a worsened condition. The Court summarized that "section 8-42-105(4) bars TTD wage loss claims when the voluntary or for-cause termination of the modified employment causes the wage loss, but not when the worsening of a prior work-related injury incurred during that employment causes the wage loss." *Anderson*, 102 P.3d at 326; *see Zorayma Gutierrez-Delgado v. North Star Foods, LLC.* W.C. No. 4-857-384-03 (ICAP, Dec, 19, 2012); *see also Grisbaum v. Industrial Claim Appeals Office,* 109 P.3d 1054 (Colo. App. 2005) (claimant was entitled to an award of TTD benefits even though his resignation was voluntary because his condition worsened after his termination from employment).

7. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period December 4, 2015 until terminated by statute. On September 2, 2015 Claimant suffered admitted industrial injuries to the left side of his face and left ear when a flange and cap were blown off a high pressure water source during testing. Claimant initially received medical treatment from ATP Dr. Polanco. He determined that Claimant had reached MMI with no impairment or restrictions and authorized 10 days of medical maintenance care in the form of follow-up treatment. On September 17, 2015 Claimant voluntarily resigned his position with Employer because of safety concerns. By October 28, 2015 Dr. Polanco noted that Claimant's MMI date was unknown because he "remain[ed] symptomatic." He then referred Claimant for a neurological evaluation.

8. As found, Claimant subsequently continued to suffer symptoms in the form of hearing loss and debilitating headaches as a result of the September 2, 2015 incident. On December 4, 2015 ATP Dr. Castrejon diagnosed Claimant with the following: (1) post-concussive syndrome; (2) possible temporal arthritis or trigeminal neuralgia; (3) left ear post-trauma tinnitus; and (4) an abnormal left ear audiogram. He stated that Claimant should not be exposed to high sounds and recommended light duty employment. On February 19, 2016 Dr. Adams authored a letter stating that Claimant's "working diagnosis, I believe, is occipital neuralgia, traumatically induced, with migrainous features." He remarked that "this type of pain can be quite significantly severe and difficult to work with." By March 28, 2016 Dr. Castrejon commented that Claimant had not received any benefits from occipital nerve blocks and was unable to sleep because of headaches. Dr. Castrejon recommended facet joint injections to decrease Claimant's headaches. Claimant's continuing symptoms and work restrictions thus prevented him from returning to regular employment.

9. As found, Claimant credibly testified that his current symptoms include hearing loss, inability to sleep, dizziness and ringing in both ears. He maintained that the combination of work restrictions and continuing symptoms has prevented him from earning wages. Claimant has been unable to perform his regular employment, has not reached MMI and has not been released to work without restrictions. He has thus suffered a 100% wage loss since December 4, 2015. Although Claimant voluntarily resigned on September 17, 2015 his continuing symptoms and work restrictions reflect that he suffered a worsening of condition that reestablished the causal connection

between his industrial injury and wage loss. He sustained a wage loss because the worsening of his condition resulted in physical restrictions that did not exist at the time of his resignation and limited his temporary earning capacity. Accordingly, Claimant is entitled to receive TTD benefits for the period December 4, 2015 until terminated by statute.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant shall receive TTD benefits for the period December 4, 2015 until terminated by statute.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 11, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-943-342-01

ISSUES

- Is the ALJ prohibited from considering the reasonableness, necessity and cause of the need for left shoulder surgery because maximum medical improvement is at issue and Claimant has not yet undergone a requested Division-sponsored independent medical examination?

- If the ALJ is not prohibited from considering the issue of medical benefits did the Claimant prove by a preponderance of the evidence that left shoulder surgery is reasonable, necessary and causally-related to the industrial injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 through 4 were admitted into evidence. Respondents' Exhibits A through L were admitted into evidence.

2. Claimant sustained an admitted injury on February 14, 2014.

3. On February 17, 2014 Alan Ruff, M.D., evaluated Claimant. Claimant gave a history of "injury to left shoulder which happened Fri morning pushing up trailer tracking system which jammed." Claimant reported that he "felt immediate pain" and thought he might have pinched a nerve. Claimant also explained that he had previously experienced a "similar injury on the right side" while using the trailer tracking system. On physical examination (PE) Dr. Ruff noted tenderness of the C5-6 spinous process with some associated paracervical tenderness. He also noted tenderness with palpation of the supraspinatus into the area of the deltoid. Dr. Ruff recorded that abduction of the shoulder caused discomfort in the deltoid area and that there was decreased sensation to light touch and cold down the lateral aspect of the left arm. Dr. Ruff diagnosed a sprained shoulder, cervical radiculitis and disturbance of skin sensation. Claimant did not want to use pain medications. Oral steroids were prescribed and Claimant was taken off work through February 21, 2014 with instructions to follow up with Dr. Ruff or with "work comp" on February 24, 2014.

4. On February 27, 2014 Sharon O'Connor, M.D., examined Claimant at Concentra. Claimant's "chief complaints" were left-sided neck, scapular and arm pain and weakness. Claimant reported that the "incident on the 14th was what seemed to make his pain very severe, but he has indeed had pain in the same location and similar pain over the last 2 years." Claimant reported that he received some initial relief of the numbness in his left arm from the steroids prescribed by his primary care physician. However, when Claimant stopped the steroids the numbness started to "come back,

especially in the thumb and the radial aspects of his of his forearm." On PE Dr. O'Connor noted there was "no point tenderness over the cervical spine with good range of motion" (ROM). On PE of the left shoulder Dr. O'Connor noted Claimant had pain with ROM and was unable to abduct past 120 degrees without significant pain. Dr. O'Connor also recorded that internal and external shoulder rotation were painful. Dr. O'Connor opined that Claimant "possibly" had "two things going on and they may be of a more acute-on-chronic nature than originally thought." Specifically Dr. O'Connor opined that Claimant had signs and symptoms of "significant radiculopathy in the left arm" and "some primary shoulder pathology" that needed to be addressed. Dr. O'Connor's plan was to start Claimant on Medrol and refill Percocet and Robaxin. Dr. O'Connor ordered urgent MRI studies of the cervical spine and the left shoulder.

5. On March 27, 2014 Claimant was examined by physiatrist Robert Kawasaki, M.D. Dr. Kawasaki recorded that Claimant had a history of smoking "eight packs of cigarettes per week." On PE Dr. Kawasaki noted "cervical tenderness in the musculature with some restrictive" ROM. Dr. Kawasaki also noted "restricted left shoulder" ROM with tenderness in the trapezius and intrascapular region. Dr. Kawasaki assessed a "left shoulder strain with probable intraarticular pathology, potential rotator cuff tear, cervical and shoulder girdle strain with myofascial irritation." Dr. Kawasaki referred Claimant for an open MRI of the shoulder. (Respondents' Exhibit A, pp. 8-9).

6. Dr. Kawasaki examined Claimant on May 8, 2014. Dr. Kawasaki wrote that Claimant had undergone a left shoulder MRI. Dr. Kawasaki stated the shoulder MRI evidenced moderate supraspinatus and infraspinatus tendinopathy with some small "partial thickness tears" and that the humeral head was "minimally subluxed." Dr. Kawasaki further noted Claimant had undergone a cervical MRI that showed the following: (1) C4-5 left-sided disc osteophyte complex with severe left foraminal narrowing; (2) C5-6 disc osteophyte complex and left-sided disc protrusion with moderate spinal canal and foraminal narrowing; (3) C6-7 posterior disc bulge with moderate spinal canal narrowing and moderate bilateral foraminal narrowing. Dr. Kawasaki also stated that he performed a left upper extremity EMG that evidenced "some acute finings in a left C6 distribution with cervical radiculopathy." Dr. Kawasaki opined that the cervical spine "may be more of the culprit as far as the pain as well as the paresthesias in the left upper extremity." He further opined that the cervical spine "may also be the main nidus for the shoulder and shoulder girdle pain." Dr. Kawasaki recommended an epidural steroid injection (ESI) and stated that if Claimant demonstrated an "excellent result" then "the focus would be more on cervical spine treatment."

7. May 16, 2014 a medical records review was completed by John Raschberger, M.D. Dr. Raschberger agreed with Dr. Kawasaki that the medical records supported "a likely diagnosis of left C6 radiculitis" and that it was "appropriate" for Claimant to undergo a C6 ESI. Dr. Raschberger further opined Claimant had not yet reached maximum medical improvement (MMI) and the date of MMI depended on Claimant's response to the ESI. Dr. Raschberger opined it was reasonable to impose physical activity restrictions including a 30 pound weight lifting restriction, limiting the

use of narcotics to bedtime only and the avoidance repetitive or strenuous use or “yanking” or similar ballistic activity with the left arm.

8. On May 20, 2014, orthopedic surgeon Cary R. Motz, M.D., evaluated Claimant for a “left shoulder injury.” Dr. Motz noted that Claimant experienced left shoulder pain on the date of injury but his pain was “mainly in the neck at this point.” Dr. Motz reviewed the cervical MRI. The left shoulder MRI images were not available for review, but Dr. Motz considered the MRI report. On PE Dr. Motz noted that Claimant had good ROM of the neck with “some discomfort.” Dr. Motz also noted limited ROM of the left shoulder with “some discomfort with an impingement test.” Dr. Motz observed that Claimant’s rotator cuff strength was 5/5. Subjectively Claimant reported decreased sensation over the entire left hand. Dr. Motz recorded his impressions as left shoulder rotator cuff tendinopathy and cervical radiculopathy. Dr. Motz opined that Claimant’s symptoms seemed “to be more related to his cervical radiculopathy than his shoulder” and that it was “unlikely” the shoulder was a significant cause of the symptoms. Dr. Motz recommended that the neck be “taken care of before we even consider surgical intervention on the shoulder.” Nevertheless, Dr. Motz performed a steroid injection into the subacromial space. The injection reportedly improved Claimant’s symptoms “a little.”

9. On June 6, 2014, Dr. Kawasaki performed a left “C5-6 transforaminal epidural steroid injection/C6 spinal nerve root block.” Dr. Kawasaki recorded that Claimant’s “pre-injection VAS pain score of 5/10 was reduced to 0-1/10 in recovery indicating reduction of neck and left arm pain.” Claimant was instructed to follow up with Dr. Kawasaki in one to two weeks.

10. On June 17, 2014, returned to Dr. Motz for a follow-up examination. Dr. Motz noted that Claimant continued to complain of shoulder pain. Claimant reported that the steroid injection performed by Dr. Motz had not improved his symptoms to any extent. Claimant also reported that the cervical ESI performed by Dr. Kawasaki had not improved his symptoms. Dr. Motz wrote that he still did not have the shoulder MRI disc and was therefore was unable to review it to determine the extent of tearing in Claimant’s rotator cuff. Dr. Motz assessed a left shoulder partial-thickness rotator cuff tear with tendinopathy and cervical radiculopathy. Dr. Motz stated he was “not sure” whether Claimant’s persistent shoulder discomfort was “related to his neck or the shoulder.” Dr. Motz discussed with Claimant that he “may need a shoulder arthroscopy to evaluate the rotator cuff and possibly repair this.” However, Dr. Motz recorded that Claimant smoked two packs of cigarettes per day. Dr. Motz advised Claimant that he would have to stop smoking prior to consideration of surgery to repair the rotator cuff. Claimant replied there was “no chance” he would stop smoking and that was “not interested in quitting.” In these circumstances Dr. Motz wrote there was no point in treating Claimant’s shoulder surgically “if he was not willing to give himself the best chance of improvement.” Dr. Motz explained to Claimant that no further treatment was recommended and discharged Claimant from care.

11. On June 26, 2014 Dr. Kawasaki reevaluated Claimant. Claimant gave a history that the shoulder injection performed by Dr. Motz seemed to help. However, Dr. Motz had advised Claimant that shoulder surgery would not be an option unless he

stopped smoking. Claimant told Dr. Motz that he could not stop smoking and Dr. Motz discharged Claimant from care. Claimant also reported that his pain had improved since the ESI performed by Dr, Kawasaki on June 6, 2014. Dr. Kawasaki advised Claimant that unless he stopped smoking a surgeon probably would not operate on his cervical spine. Because Claimant reported improvement in his symptoms Dr. Kawasaki prescribed physical therapy (PT) for four weeks. Dr. Kawasaki wrote that Claimant might be “closing in on” MMI after four weeks.

12. On August 28, 2014 Dr. Kawasaki again examined Claimant. Dr. Kawasaki assessed the following: (1) Left C6 radiculopathy that “would be rated as part of the injury;” (2) Left shoulder strain with rotator cuff tendinopathy; (3) Heavy smoker with COPD. Dr. Kawasaki wrote that “with poor oxygenation and likely COPD” Claimant was not a candidate for surgery “of his shoulder or neck.” Dr. Kawasaki placed Claimant at MMI. Dr. Kawasaki assessed 12% whole person impairment based on a specific disorder of the cervical spine and lost ROM in the cervical spine. Dr. Kawasaki also assigned 7 percent impairment of the left upper extremity based on reduced ROM in the left shoulder and left C6 distribution sensory loss. Dr. Kawasaki stated that the 12% upper extremity impairment rating converted to 4% whole person impairment. The Claimant’s overall whole person impairment rating was 16%. Dr. Kawasaki stated Claimant would be seen and Concentra “for final case closure and MMI.”

13. After Dr. Kawasaki’s August 28, 2014 MMI report Claimant continued to obtain treatment from Concentra and Dr. Ruff. On October 27, 2014 Claimant underwent a Functional Capacity Evaluation (FCE) that showed he was working at “the heavy work level.”

14. On April 13, 2015 Claimant was evaluated at Concentra by Kirk Holmboe, D.O. Claimant complained of “cracking in his neck and shoulder and pain in his neck and with radiation into his upper arms.” Claimant reported that “when he was first released from care” he was able to work five days a week but over time his tolerance for activities decreased to the point where he was frequently working only 3 days per week because of pain. On PE Claimant demonstrated “relatively full” cervical ROM with “pain and some crepitus in the neck at end range.” There was some tenderness to palpation in the lower paracervical musculature. Claimant’s shoulder ROM was “good” but there was pain. Dr. Holmboe assessed a cervical strain with a history of cervical radiculopathy and left shoulder pain. He opined that Claimant might need a repeat cervical MRI and a second ESI and recommended that Claimant return to Dr. Kawasaki for reevaluation. Dr. Holmboe further opined that Claimant appeared to “have some difficulty with the shoulder itself” but PE did “not bear out a significant rotator cuff injury.” Dr. Holmboe wrote that he recommended some “activity limits” but returned Claimant to work at full duty.

15. On April 27, 2015 Claimant returned to Dr. Kawasaki for “follow-up post MMI.” Dr. Kawasaki noted that he placed Claimant at MMI on August 28, 2014. Claimant reported that he eventually returned to work but later his pain gradually increased. The pain increased “in [Claimant’s] neck into his bilateral upper extremities into his left shoulder into the left arm but also some radicular symptoms into the right

arm." Claimant advised that he had been trying to get healthier by losing weight and cutting back on smoking from two packs per day to one pack per day. On PE of the cervical spine Claimant demonstrated diffuse tenderness. He also demonstrated a "positive Spurling's test towards the left but also towards the right." On PE of the left upper extremity Claimant demonstrated some limitation of left shoulder ROM and "some weakness with shoulder strength" left greater than right. He also evidenced decreased sensation in the C6 distribution left greater than right. Dr. Kawasaki opined that Claimant's condition remained stable with no change in impairment. However, considering the return of Claimant's symptoms, particularly the radicular symptoms, Dr. Kawasaki recommended Claimant undergo a bilateral C5-6 ESI.

16. On June 18, 2015 Claimant returned to Dr. Kawasaki. Dr. Kawasaki noted that on June 5, 2015 Claimant underwent bilateral C5-6 transforaminal epidural blocks. Claimant's pain level reportedly improved after the blocks. Claimant reported that his smoking had increased but he "was not very interested in surgery anyway."

17. On June 22, 2015 Dr. Holmboe saw Claimant for a neck and shoulder "recheck." Dr. Holmboe noted Dr. Kawasaki "was looking into surgery" but Claimant was required to stop smoking before surgery. Claimant reportedly was "working on" the smoking issue. Claimant had both neck and left shoulder pain and found driving especially bothersome. Dr. Holmboe assessed "cervical radiculopathy" and noted that Dr. Kawasaki was managing treatment "under maintenance care." Dr. Holmboe opined that Claimant had reached MMI for his "injury (ies)." Dr. Holmboe assigned no permanent impairment for the February 2014 injury and stated that "activity status" was to be at Dr. Kawasaki's discretion.

18. On August 6, 2015 Respondents filed a Final Admission of Liability (FAL). Relying on Dr. Holmboe's June 22, 2015 report, the FAL admitted Claimant reached MMI on June 22 with zero permanent impairment. The FAL also admitted for reasonable, necessary and related medical benefits after MMI.

19. At hearing Respondents conceded that Claimant filed a timely objection to the FAL and filed a timely Notice and Proposal (N&P) to select a Division-sponsored independent medical examination (DIME) physician. Respondents also conceded that they are not arguing that the claim was "closed" by Claimant's failure timely to object to the FAL or failure timely to file an N&P to select the DIME.

20. On July 30, 2015 Dr. Kawasaki again examined Claimant. Claimant reported continuing left shoulder pain and pain radiating into the left upper extremity. Claimant reported he had reduced his smoking from two packs per day to one pack per day but he was unable to cut back further. Claimant questioned whether "Work Comp would pay for smoking cessation." Dr. Kawasaki prescribed Chantix, refilled Oxycodone and recommended medium work with a 50 pound lifting restriction. (Respondents' Exhibit A, p.12).

21. Dr. Kawasaki referred Claimant to orthopedic surgeon Michael Hewitt, M.D., for an evaluation of the left shoulder. Dr. Hewitt examined Claimant on October

19, 2015. Claimant reported “pain with certain reaching positions felt in the lateral aspect of the shoulder” with “intermittent numbness in the extremity.” Dr. Hewitt noted Claimant injured his left shoulder on February 14, 2014 and had been diagnosed with a “partial-thickness rotator cuff tear.” Dr. Hewitt recorded that shoulder surgery had been discussed but postponed “secondary to [Claimant’s] smoking status.” The Claimant advised that he “recently quit smoking in August.” Dr. Hewitt performed a PE and reviewed the April 23, 2014 MRI of the left shoulder. Dr. Hewitt assessed left shoulder rotator cuff tendinopathy with low-grade partial-thickness subscapularis tear.” Dr. Hewitt noted that it had been 18 months since Claimant’s injury and he was still experiencing “persistent symptoms.” Dr. Hewitt stated Claimant’s shoulder had been treated appropriately with physical therapy, medications and a cortisone injection. Dr. Hewitt opined that given the duration of Claimant’s left shoulder symptoms, the physical examination and MRI findings surgery was the appropriate treatment. Dr. Hewitt stated surgery would proceed “once authorized.”

22. On October 29, 2015 Dr. Hewitt requested Insurer to authorize surgery described as a shoulder scope with “subscapularis and rotator cuff repair with related procedures.”

23. On November 4, 2015 Respondents filed an Application for Hearing listing the issues as “medical benefits” and “reasonably necessary.” The application also listed the issues that the claim was “closed by Final Admission of Liability” and whether the “surgery recommended by Dr. Hewitt is reasonable, necessary and related to the industrial injury.”

24. On November 6, 2015 Prehearing Administrative Law Judge DeMarino (PALJ) conducted a prehearing conference at the Respondents’ request. On November 12, 2013, nunc pro tunc November 6, 2015, the PALJ issued a Prehearing Conference Order. The order stated that the issue for determination was “Respondents written motion to Hold DIME in Abeyance.” In this order the PALJ noted that on October 29, 2015 Respondents received “a request for surgery from Dr. Hewitt.” The PALJ further noted that Respondents were seeking an independent medical examination (IME) “concerning the reasonableness, necessity and relationship of the surgery and an Application for Hearing was filed November 4, 2015.” The PALJ accepted Respondents’ representation that they did not receive a medical release from Claimant’s counsel until November 5, 2015, despite the fact that the industrial injury occurred “nearly two years ago.” The PALJ concluded that Respondents are “entitled to have their day in Court, which includes getting a medical opinion on the issue of whether the proposed surgery is reasonable, necessary and related” to the February 2014 industrial injury. Consequently, the PALJ granted Respondents’ “CONTESTED MOTION TO HOLD DIME IN ABEYANCE.”

25. On November 12, 2015 Kawasaki examined Claimant. Dr. Kawasaki wrote that when Claimant was placed at MMI “it was felt that he had some surgical indications both in the cervical spine with left C6 radiculopathy as well as the left shoulder rotator cuff.” Dr. Kawasaki stated that he advised Claimant at the “time of MMI” that surgery for the shoulder and neck might be considered if Claimant “would

come off his cigarettes." Dr. Kawasaki noted Claimant "held up his end of the bargain" and had been "off cigarettes for a couple of months." Dr. Kawasaki reviewed Dr. Hewitt's recommendation for surgery and opined it was "very reasonable." He also noted Claimant was to be seen by Dr. Castro the following week. Dr. Kawasaki wrote the insurer had denied authorization for the recommended shoulder surgery and he was unsure why. Dr. Kawasaki explained that shoulder surgery was "part of the plan all along, even since MMI," but the surgery "was on hold" until Claimant quit smoking.

26. On November 13, 2015 Respondents filed an Amended Application for Hearing listing the same issues contained in the original application. On November 19, 2015 Claimant filed a Response to 11/4/15 Application for Hearing. The response listed the issues of "compensability," medical benefits, reasonably necessary, MMI, need for surgery and "termination of benefits."

27. On November 18, 2015 orthopedic surgeon Bryan Castro, M.D., examined Claimant. Claimant reported ongoing pain in the left shoulder and intermittent pain, numbness and tingling in the lateral arm, dorsal forearm, and first, second and third digits. Dr. Castro reviewed Claimant's cervical MRI and stated that it showed "degenerative changes and perhaps foraminal disc bulging at C4-5, C5-6 on the left side greater than right." However, Dr. Castro stated the MRI was "extremely limited by artifact" and that it was "very difficult to actually see whether there [was] any neurological encroachment." Dr. Castro assessed cervicalgia and cervical neuropathy and suggested Claimant undergo another MRI prior to making further recommendations for treatment.

28. On December 8, 2015 Brian Lambden, M.D., performed an IME at Respondents' request. Dr. Lambden is board certified in physical medicine and rehabilitation and is level II accredited. In connection with the IME Dr. Lambden took a history from Claimant, reviewed medical records and performed a PE. Based on this information Dr. Lambden wrote that in his opinion the need for the shoulder surgery proposed by Dr. Hewitt is not causally related to the industrial injury of February 14, 2014. Dr. Lambden explained that Claimant has "underlying bilateral shoulder tendinitis" and that there was "no specific injury as it relates to" Claimant's shoulders. Dr. Lambden further opined that it is "more likely than not that [Claimant's] cervical problems are related to his work incident or at least exacerbated by them." However, Dr. Lambden expressed concern regarding cervical surgery because Claimant did not present "with radiculopathy at this time."

29. On January 6, 2016 Claimant underwent another cervical MRI. The radiologist's impressions were as follows: "Multilevel degenerative changes, with mild to moderate spinal canal stenosis from C3-4 through C6-7 moderate left foraminal stenosis at C3-4 and C4-5, and mild to moderate bilateral foraminal stenosis at C5-6."

30. Claimant returned to Dr. Castro on January 20, 2016. Dr. Castro reviewed the January 2016 MRI. Dr. Castro also noted that Claimant's predominant complaint was "neck pain" and the left upper extremity pain was "now intermittent and largely just some numbness and tingling in his index, long and ring fingers." Dr. Castro informed

Claimant that surgical intervention was "not a great idea for neck pain." Dr. Castro also noted that on the recent MRI the C4-5 level evidenced the "predominant foraminal stenosis." Dr. Castro recommended Claimant undergo a C4-5 transforaminal injection. Dr. Castro stated that if the injection was not helpful in "removing" Claimant's symptoms then Dr. Castro would not consider surgical intervention to be an option.

31. On January 27, 2016 Dr. Lambden issued a second report after reviewing Dr. Castro's report recommending that Claimant undergo a C4-5 transforaminal injection. Dr. Lambden opined this procedure would not be reasonable and necessary because Claimant's upper extremity symptoms had "largely resolved" and the tingling in Claimant's first three fingers is "not a C4 or C5 root distribution."

32. On February 16, 2016 Dr. Lambden testified by deposition. Dr. Lambden stated that he agreed with Dr. Motz's May 20, 2014 opinion that Claimant's post-injury symptoms were caused by injury to the cervical spine and not to any separate shoulder injury. Dr. Lambden explained that although Claimant had left shoulder pain after the injury, shoulder pathology would not cause the type of radiating pain described by Claimant. Dr. Lambden also opined that Claimant's symptoms are explained by the cervical MRI and the C6 ESI performed by Dr. Kawasaki. Finally, Dr. Lambden stated that Claimant currently exhibits intermittent numbness in the first three digits which is within the C6 nerve root distribution.

33. Dr. Lambden reiterated the opinion that on February 14, 2014 Claimant aggravated a preexisting degenerative cervical condition. Dr. Lambden opined Claimant received appropriate treatment for this injury and is not a surgical candidate as a result of the cervical injury. Dr. Lambden further opined that Claimant "remains" at MMI for the February 2014 injury and that the proposed shoulder surgery is not reasonable, necessary and related to the injury.

34. At hearing Respondents argued that Claimant has the burden of proof to establish by a preponderance of the evidence that the need for the shoulder surgery is reasonable, necessary and causally-related to the industrial injury of February 14, 2014. Claimant argued that he timely contested the FAL by requesting a DIME and that a hearing to determine the reasonableness, necessity and relatedness of the proposed surgery cannot go forward until the requested DIME occurs and the DIME physician addresses MMI and impairment. The ALJ elected to proceed with the hearing but added the issue of whether any ruling on the reasonableness, necessity and relatedness of the shoulder surgery is premature until the DIME is completed.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as noted below, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

WHETHER DETERMINATIONOF REASONABLENESS, NECESSITY AND RELATEDNESS OF SHOULDER SURGERY MUST AWAIT COMPLETION OF THE DIME

As an initial matter the ALJ must decide whether determination of the reasonableness, necessity and relatedness of the shoulder surgery proposed by Dr. Hewitt must await completion of the DIME requested by Claimant. Claimant, citing *Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003), argues that the DIME procedure is the only method for challenging an authorized treating physician’s (ATP) determination that a claimant has reached MMI. Claimant further argues that inherent in the MMI determination is the requirement that the DIME physician evaluate the cause of the various components of the Claimant’s medical condition. Claimant reasons that if the ALJ determines the cause of the need for the proposed shoulder surgery he would “usurp” the function of the DIME physician.

Respondents concede that § 8-42-107(8)(b), C.R.S., “requires a DIME prior to any hearing disputing the validity of the authorized treating physician’s finding of MMI,” and that absent a DIME “the ALJ has no jurisdiction to resolve such a dispute.” However, the Respondents argue the in this case the ALJ is “not being asked to determine the validity of the ATP’s finding of MMI.” The Respondents assert that at “the time of MMI in this case, the claimant had not been seen by Dr. Hewitt, and had not been diagnosed with a new shoulder pathology and no surgery had been recommended.” In these circumstances the Respondents contend that the issues of the reasonableness, necessity and relatedness of the shoulder surgery are not issues that were “before the DIME doctor at the time the DIME was requested.” Respondents also argue that it is “not the role of a Division independent medical examiner to determine in the first instance whether an injury is compensable and whether surgery is reasonable and necessary medical care.”

Section 8-42-107(8)(b)(I), C.R.S., provides that an ATP "shall make a determination as to when the injured employee reaches maximum medical improvement as defined in section 8-40-201(11.5)." Section 8-42-107(8)(b)(II), C.R.S., provides that if either party disputes a determination by an ATP "on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2." Section 8-42-107(8)(b)(III), C.R.S., provides that the independent medical examiner's finding regarding MMI "may be overcome only by clear and convincing evidence," and that a "hearing on this matter shall not take place until the finding of the independent medical examiner had been filed with the division."

Section 8-42-107.2(2)(a)(I)(A), C.R.S., provides that the time for selecting a DIME to dispute a determination of MMI by an ATP "commences with the date of mailing of a final admission of liability by the insurer or self-insured employer that includes an impairment rating issued in accordance with section 8-42-107." Section 8-42-107.2(2)(b), C.R.S., provides that unless a N&P "are given within thirty days after the date of mailing of the" FAL the ATP's "findings and determinations shall be binding on the parties." A party's failure timely to request a DIME to contest an ATP's finding of MMI causes the ATP's finding to become binding and deprives the ALJ of jurisdiction to adjudicate MMI. *Eller v. Industrial Claim Appeals Office,* 224 P.3d 397 (Colo. App. 2009); *Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995).

Here, Respondents agree that Claimant timely objected to the August 6, 2015 FAL, and that Claimant timely filed the N&P to dispute Dr. Holmboe's finding that Claimant reached MMI on June 22, 2015. However, the Respondents appear to contend that because shoulder surgery had not yet been recommended at the time Claimant filed the N&P the issues of reasonableness, necessity and relatedness of the surgery fell outside the purview of the DIME procedure for determining MMI. The ALJ disagrees with this argument.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S.

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO March 2, 2000). Thus, an ATP's findings concerning the diagnosis of the claimant's medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the ATP's findings concerning these issues become binding unless challenged in accordance with the stuatuory DIME procedure. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The ALJ disagrees with Respondents' assertion that the issues of the cause of Claimant's shoulder condition and the reasonableness and necessity of surgery to treat the shoulder fall outside the purview of the DIME process and may now be decided by the ALJ under the preponderance of the evidence standard. When the question submitted to the ALJ is whether a claimant proved a compensable injury "in the first instance," the issue involves a "threshold" question of compensability that the ALJ must resolve under the preponderance of the evidence standard. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). However, where a compensable injury has already been proven or admitted and the ATP is considering the question of MMI, the underlying issues of whether a particular component of the Claimant's medical condition is causally-related to the injury and whether that component requires additional treatment are matters for the ATP to determine subject to the DIME procedure. *Eller v. Industrial Claim Appeals Office, supra*; *Gianzero v. Wal-Mart Stores, Inc.,* WC 4-669-749 (ICAO May 5, 2010).

The Respondents' arguments notwithstanding, when Dr. Holmboe placed Claimant at MMI on June 22, 2015 Dr. Holmboe necessarily found that the Claimant did not have any injury-related shoulder condition, or that any injury-related shoulder condition was stable and did not need require further treatment in order to reach MMI, or both. When Claimant timely objected to the FAL and filed the N&P to select a DIME he clearly sought to invoke the DIME process to challenge Dr. Holmboe's MMI determination including the underlying factual issues of causation and the need for further treatment. In these circumstances the ALJ currently lacks jurisdiction to consider whether or not the Claimant has an injury-related shoulder condition, and if so whether surgery is a reasonable and necessary treatment for that condition. Section 8-42-107(8)(b)(III); *Eller v. Industrial Claim Appeals Office, supra; Story v. Industrial Claim Appeals Office, supra.*

The mere fact that Dr. Hewitt had not yet recommended shoulder surgery at the time Dr. Holmboe placed Claimant at MMI does not change the result. The filing of the FAL triggered Claimant's duty to seek a DIME or accept the finality of Dr. Holmboe's finding of MMI. However, Dr. Holmboe's finding of MMI did not freeze the evidence or foreclose the Claimant from obtaining additional medical evidence, such as Dr. Hewitt's opinion, to show that he was not at MMI. To the contrary, the DIME process remains "open" and litigation to overcome the DIME physician's ultimate finding regarding MMI remains a substantial possibility. *See Williams v. Kunau*, 147 P.3d 33 (Colo. 2006).

The ALJ concludes that Claimant must undergo a DIME prior to the ALJ's consideration of the general issue of MMI and the underlying issues of the reasonableness, necessity and cause of the proposed shoulder surgery. The

Respondents' Application for Hearing is dismissed without prejudice. In light of this conclusion the ALJ need not address the other arguments raised by the parties.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Respondents' Application for Hearing is dismissed without prejudice because the ALJ currently lacks jurisdiction to consider the requested relief.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 11, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-734-795-02

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that Respondent failed to comply with Administrative Law Judge Margot Jones' February 9, 2015 Findings of Fact, Conclusions of Law, and Order.

2. If so, whether penalties pursuant to 8-43-304(1), C.R.S. are appropriate and what amount of penalties are appropriate based on Respondents' failure to comply.

PROCEDURAL

This matter was consolidated for purposes of hearing with the case of John Ferrara vs. Lags Exploration, d/b/a/ Waterboyz International, L.L.C., non-insured, by an Order dated March 24, 2016. Mr. Ring represented both Claimants simultaneously at hearing. A separate order addresses the consolidated case.

FINDINGS OF FACT

1. On August 31, 2006 Claimant sustained a compensable injury to his lumbar spine and left lower leg while working for Employer. Claimant ultimately underwent a below the knee amputation. *See* Exhibit 6.

2. At the time of Claimant's injury, Employer was non-insured for Workers' Compensation in the state of Colorado.

3. On July 7, 2009 ALJ Margot Jones issued a Final Order determining Employer was liable for all reasonably necessary medical expenses for the work related injury. ALJ Jones also ordered Employer to pay temporary total disability benefits with an added 50% penalty pursuant to 8-43-408(1) for Employer's failure to carry workers' compensation insurance. ALJ Jones required Employer to either pay the compensation directly to Claimant, to deposit the sum with the Division of Workers' Compensation as trustee, or to file a bond with the Division of Workers' Compensation. *See* Exhibit 8.

4. On March 15, 2011 ALJ Michael Harr issued Findings of Fact, Conclusions of Law, and an Order that determined Claimant had met his burden of proof to establish that Respondent should pay a penalty pursuant to 8-43-408(4) for a failure to comply with ALJ Jones' July 7, 2009 Order. *See* Exhibit 6.

5. On December 30, 2011 ALJ Harr issued Findings of Fact, Conclusions of Law, and an Order that determined Claimant had met his burden to show that Respondent was liable for medical care, temporary total disability and permanent partial disability benefits, permanent mental impairment benefits, and penalties. ALJ Harr ordered that Respondent pay all amounts due under the order, pay a deposit, or file a bond as required by 8-43-408, C.R.S. *See* Exhibit 5.

6. On February 9, 2015 ALJ Margot Jones issued Findings of Fact, Conclusions of Law, and an Order that determined that Claimant had met his burden to show that Respondent failed to comply with ALJ Harr's March 15, 2011 Order. ALJ Jones ordered penalties under 8-43-304, C.R.S. in the amount of $67,400 for the failure to comply from April 5, 2011 through December 12, 2014. ALJ Jones ordered that Respondent pay 25% of the penalty to the subsequent injury fund and ordered that Respondent pay 75% of the penalty to the Claimant. *See* Exhibit 3.

7. Respondent did not appear or participate in the March 6, 2016 hearing despite proper notice of the proceeding. A Notice of Hearing for this matter was served on Larry Willis, manager of Respondent Corporation, by a Deputy with the Lee County Sheriff's Office in Lee County, Florida on April 19, 2016. In addition, the Order consolidating this claim with the claim of John Ferrara for hearing purposes that also noted the hearing date and time was sent to Respondent by Certified Mail on March 28, 2016. *See* Exhibits 1, 2.

8. Other than a statement of the case/argument made by Claimant's counsel, Claimant presented no evidence as to whether or not the February 9, 2015 Order of ALJ Jones was violated. There was no testimony from Claimant regarding lack of payment of penalties and no evidence from the subsequent injury fund as to lack of funds paid.

9. Although it appears from the evidence that Respondent has previously ignored orders of this court and has failed to participate in multiple proceedings, Claimant has not presented sufficient evidence for the undersigned to determine whether or not the February 9, 2015 Order was violated and whether or not penalties are appropriate for a failure to comply with that specific order.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and ***sufficiency of evidence*** in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Penalties

Section 8-43-304(1), C.R.S. authorizes the imposition of penalties of not more than $1000 per day if an employer or insurer "fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles." This provision has been construed as applying to violation of an order issued by an ALJ. *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001). An order is defined as including "any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge." *See* § 8-40-201(15), C.R.S. The fine shall be apportioned in whole or part at the discretion of the director or administrative law judge between the aggrieved party and the workers' compensation cash fund created in § 8-44-112, C.R.S. with the amount apportioned to the aggrieved party being a minimum of fifty percent of any penalty assessed. *See* § 8-43-304, C.R.S.

Statements of counsel may not substitute for that which must appear of record. *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo. App. 1987). The reason for this rule is that due process considerations require that parties be notified of the evidence to be considered, and they must be afforded an opportunity to confront and rebut adverse evidence. *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo. App. 1990).

Here, there is evidence that ALJ Margot Jones entered an order on February 9, 2015 requiring that Respondent pay penalties. Other than statements of counsel there is no further evidence as to what happened (or what did not happen) in response to ALJ Jones' order. Statements of counsel are not evidence and cannot constitute a sufficient record for this ALJ to base findings of fact. No evidence, testimonial or documentary, was entered in the record in this matter to establish that a violation of the February 9, 2015 Order occurred. Therefore, the evidence is insufficient for this ALJ to find a violation of the February 9, 2015 order or to order penalties for such a violation as requested by Claimant under § 8-43-304, C.R.S.

ORDER

It is therefore ordered that:

1. Claimant failed to present evidence establishing that the February 9, 2015 Order of ALJ Margot Jones was violated.

2. Claimant's request for penalties for a failure to comply with the February 9, 2015 Order is thus denied and dismissed without prejudice.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 12, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

PROCEDURAL HISTORY and ISSUES

On September 1, 2015, the Claimant filed an application for hearing on the issues of compensability, medical benefits, average weekly wage, temporary total and temporary partial disability, payment of related medical bills and mileage, and change of physician. Respondents filed a response to the application for hearing endorsing a number of defenses. Later, Respondents' sought a pre-hearing conference to add the issue of attorney fees pursuant to §8-43-211(3), C.R.S., based on Claimant's endorsement of medical benefits. Pre-hearing ALJ Goldstein granted the Respondents' motion and struck the issue of medical benefits from the application for hearing. He also ordered that the issue of attorney fees and costs be bifurcated. Thus, the only issue remaining for determination is whether Claimant suffered a compensable injury to his cervical spine on March 18, 2015.

FINDINGS OF FACT

1. Claimant is a 35-year old male who has worked for the Employer since January 11, 2013. He has worked as welder doing pipe fitting and at the time of the hearing, he was working in the plumbing department.

2. On March 18, 2015, Claimant was attempting to tighten a chain vice onto a portable rotator. The rotator weighs approximately 800 pounds. Claimant testified that as he was "jerking" back on the bar to tighten the chain vice, the portable rotator moved or slipped and he felt a pop and a burning pain in his neck.

3. Claimant testified that the injury occurred towards the end of his shift and he did not immediately report it. He believed his symptoms would go away and felt he could "tough it out." Claimant testified that he finished his shift but that his neck continued to hurt through the remainder of his shift and through the night.

4. On March 19, 2015, Claimant still felt neck pain. Once he arrived at work on March 19, 2015, he reported the injury to his foreman, Ron Hudson.

5. Claimant recalled that the Employer asked him if he wanted to see a doctor but he declined. Claimant indicated that although his neck continued to be symptomatic, he thought it was going to get better and wanted to continue working.

6. The Claimant signed a Designated Medical Provider form on March 19, 2015. He circled "Midtown Occupational Health Services."

7. Claimant took March 20, 2015 (a Friday) off from work in the hopes he would feel better by Monday. He did not feel better on Monday and the Employer

allowed him to work light duty. Claimant continued to decline medical treatment thinking if he took it easy for a couple of weeks, his symptoms would go away.

8. After two weeks of light duty, Claimant attempted to return to regular duty on April 8, 2015. Claimant was unable to return to full duty because of his neck pain so he requested medical care.

9. On April 8, 2015, the Employer filed a First Report of Injury indicating that Claimant injured his neck on the portable rotator while welding pipe.

10. On April 8, 2015, Claimant went to Midtown Occupational Health Services where Dr. Lawrence Cedillo, evaluated him. Kirk Schoech, the Employer's Safety Superintendent, drove the Claimant to the medical appointment and sat in on the medical evaluation.

11. Dr. Cedillo took a history from Claimant that he has "neck problems secondary to trying to secure a chain vice onto non-fixed rotator weighing approximately 700-800 pounds, using a [sic] manual tools, and in the process, the rotator moved, and he experienced pain in regard to the neck at that time." Dr. Cedillo documented some range of motion limitations in Claimant's neck. Dr. Cedillo opined that Claimant likely had myofascial discomfort, mechanical in nature, and "more likely than not related to date of injury occurring above as described above through his present employer and thus work related." Dr. Cedillo completed an M-164 form and indicated that the injury was work-related.

12. Dr. Cedillo also released Claimant to work with no restrictions. Dr. Cedillo testified at the hearing that the Employer has a light duty work program and he trusts the Employer will provide light duty so he does not issue formal restrictions in any claim involving this Employer.

13. On April 15, 2015, Claimant had an MRI at Denver Integrated Injury South. The MRI revealed mild spondylostenosis most notable at C3-4 level due to leftward disc osteophyte complex and moderate left foraminal stenosis and rightward stenosis most notable also at the C3-4 level.

14. Claimant continued to receive medical treatment managed by Dr. Cedillo. The treatment included Advil, Biofreeze, home exercises, massage therapy and self massage using a Theracane. Dr. Cedillo continued to diagnose Claimant as having a cervical strain with some involvement of the cervicothoracic junction that appeared myofascial and mechanical in nature.

15. Dr. Lawrence Lesnak evaluated the Claimant on May 20, 2015. Dr. Lesnak documented Claimant's complaints of constant distal neck pain, and intermittent tingling sensations throughout his left arm. Dr. Lesnak noted that Claimant exhibited no pain behaviors or non-physiologic findings. Dr. Lesnak also performed an EMG on May 20. His overall impressions were that Claimant had a probable cervical strain/sprain that occurred during work hours reportedly on March 19, 2015; clinical evidence of left cervical radiculitis most likely involving the left-sided C6-7 nerve roots; no clear

evidence of cervical radiculopathy or myelopathy, but he could not exclude an occult abnormality; and probable cervical and left scapular myalgias. The EMG was essentially normal. Dr. Lesnak recommended medications and physical therapy.

16. On June 4, 2015, Dr. Lesnak evaluated the Claimant. His report indicates that Claimant exhibited occasional pain behaviors and that he appeared to be in moderate distress due to his progressive symptoms. Claimant reported that his symptoms on the left side of his neck had been progressing. Dr. Lesnak expressed concerns over the progressive symptoms despite treatment and minimal findings and recent diagnostic testing. Dr. Lesnak suggested facet injections but Claimant stated he was fearful of needles so Dr. Lesnak recommended chiropractic treatment. Dr. Lesnak also wanted Claimant to undergo a formal psychological evaluation.

17. On July 23, 2015, Dr. Cedillo stated that all of Claimant problems appear myofascial in nature with lack of objective correlation to his subjective complaints. He had reviewed the video reenactment of Claimant's mechanism of injury. Dr. Cedillo released Claimant at maximum medical improvement with no restrictions and no impairment. Dr. Cedillo "directed patient to follow-up outside W.C. system for further care as deemed necessary."

18. On August 26, 2015, Claimant followed up with his private physician, Anton Zaryanov, D.O. Dr. Zaryanov documented pain at the base of the neck with pain radiating to the left upper extremity. Dr. Zaryanov recommended physical therapy and dry needling and set Claimant up for a transforaminal injection.

19. On October 1, 2015, Claimant saw Dr. Peter Ruesswig outside of the workers' compensation system. Dr. Reusswig's report indicated a long history of low back pain, but no pre-existing cervical problems. Dr. Reusswig notes a positive MRI and physical findings. Dr. Reusswig assessed cervical radiculopathy, cervical disc disorder with radiculopathy, and lumbar radiculopathy.

20. The Employer created a video reenactment of the injury which shows the forces and power needed to tighten the chain vice onto the portable rotator.

21. The ALJ viewed the Employer's video reenactment of Claimant's mechanism of injury during the hearing. Claimant testified that the video was "for the most part" an accurate depiction of the job task he was performing when he injured his neck.

22. Claimant explained that he held the cheater bar with both hands while cranking on the bar to properly tighten the chain vice. Claimant simulated his body position in the reenactment video. The video shows Claimant's right hand on top and his left hand is on the bottom of the cheater bar and the Claimant is standing with his left leg back and his right leg bent in almost a lunge position while he simulated the act of pulling on the bar with all of his body weight. Claimant testified that the machine slipped as he pulled on the cheater bar.

23. Rick Gurley is a superintendent for the Employer. He was one of the employees performing the reenactment. Gurley attempted to force the machine to move while cranking on a cheater bar but was unable to make it move. The Claimant appears physically larger than Gurley although no one questioned Gurley about his body weight. The Claimant is also younger than Gurley.

24. It is apparent from his behavior (both body language and verbal comments) in the video that Gurley does not believe the Claimant's version of the events. One employee was able to make the machine move by pulling it from the chain vice. Thus, the ALJ is not persuaded by the suggestion that it is impossible to move the 800-pound rotator.

25. Gurley also explained that although the 800-pound rotator was portable for at least the past five years, the Employer has bolted down the rotator since Claimant's injury. He admitted that bolting down the machine was a corrective action in direct response to Claimant's workers' compensation claim although he does not believe the rotator can move.

26. Claimant admitted that he worked on this very same portable rotator prior to the alleged injury at least "25 times" but it never moved or shifted on him prior to March 19, 2015.

27. Claimant testified that prior to March 18, 2015 he has never had neck problems. No medical records exist showing a history of prior cervical spine complaints.

28. Claimant testified at hearing that he had lower back problems in the past which he was actively treating for with his private physician. Claimant takes narcotic medications to treat his lower back pain. Claimant is not alleging his low back is related to his work injury on March 18, 2015.

29. Dr. Cedillo testified at the hearing that he was unable to determine the source of Claimant's symptoms through the date of MMI. None of the diagnostic studies revealed the pain generator and no treatment improved his symptoms. Dr. Cedillo reiterated his opinion that Claimant reached MMI on July 23, 2015 because there is no objective evidence to support a work injury. He explained that the MRI findings are difficult to correlate to Claimant's subjective symptoms. Dr. Cedillo essentially opined that if Claimant sustained a strain on March 19, 2015, he should have improved over the ensuing four months, and because Claimant did not improve, he did not sustain a work-related injury.

30. Dr. Cedillo also testified that based on the force shown in the video re-enactment and the description of the injury provide by the Claimant, that such mechanism of injury did not cause Claimant's problems.

31. Dr. Cedillo admitted that Claimant's MRI findings might be causing his symptoms and that a person might be more susceptible to injury if they have an underlying condition. He opined that the MRI findings show degenerative disc disease, and not an injury. Dr. Cedillo did not specifically comment on whether the mechanism

of injury may have aggravated or accelerated Claimant's underlying degenerative disc disease.

32. Dr. Cedillo admitted that he verbally relays work restrictions to the Employer then indicates "no restrictions" on the M-164 and in his report because he trusts the Employer to comply with his verbal instruction on restrictions.

33. Dr. John Hughes, Claimant's independent medical examiner, viewed the reenactment video and rendered an opinion as to whether this work activity could cause injury. On December 1, 2015, Dr. Hughes opined that, "The activity that I reviewed on the video involves an injurious physical activity in the process of tightening the chuck using a 2-foot breaker bar. The individual was seen to be tugging hard on the breaker bar, and I feel that this type of tugging force could cause a superimposed sprain/strain injury with development of facet joint arthropathy." Dr. Hughes further opined that the MRI showed that Claimant has a significant degenerative preexisting condition which made Claimant "exceptionally prone to a cervical spine injury sustained in the course and scope of tugging and using a breaker bar."

34. Dr. Hughes did not perform a physical examination of the Claimant. Dr. Hughes was asked to render an opinion as to whether the forces exerted by the individual in the video reenactment were significant enough to injure Claimant's neck. Dr. Hughes testified at hearing that tugging on the breaker bar while tightening the chain vice onto the portable rotator puts stress on the shoulder and neck.

35. On December 15, 2015, Dr. Carlos Cebrian performed an independent medical examination of the Claimant at Respondents' request. Dr. Cebrian issued a report dated January 14, 2016. He examined the Claimant, reviewed his medical records and viewed the video reenactment of the mechanism of injury. He concluded that Claimant's multi-level cervical spine, congenital stenosis, and cervical degenerative disc disease, current symptoms and need for treatment are unrelated to any work activities Claimant performed for the Employer.

36. Dr. Cebrian testified during the hearing consistent with his December 15, 2015 report. He explained that the activity Claimant performed on March 18, 2015 could not have caused injury to the cervical spine. Dr. Cebrian opined that Claimant's ongoing problems are not work related. Dr. Cebrian opined that the spontaneous onset of symptoms that Claimant is experiencing is ordinary. Most pain from cervical disc disease presents spontaneously, and most commonly begins upon waking in the morning without any precipitating event.

37. Dr. Cebrian opined that just like his lumbar spine, Claimant has pre-existing "widespread multi-level degenerative disk disease." This anatomy is revealed by Claimant's cervical MRI and "is not a reflection of anything that did or did not happen on March 18, 2015." He opined that Claimant suffers from chronic lumbar spine pain, chronic opioid dependence, multi-level cervical spine stenosis and degenerative disc disease.

38. Dr. Cebrian also testified that Claimant's neck condition was asymptomatic due to his use of opioids for his low back for the past five years.

39. According to Dr. Cebrian, it is medically probable that Claimant woke up on March 19, 2015, and had neck pain. He stated that when a person wakes up in pain, that person logically will think back to what could have caused that pain. Claimant most likely thought back to using the rotator at work the day before and believed that it must have been the rotator that caused his symptoms because his neck never hurt before like it did when he woke up on March 19th. So in looking for an explanation, like most people do when they awake with unexplained pain, Claimant attributed his neck pain to using the rotator at work the day before. The ALJ is not persuaded by Dr. Cebrian's opinions in this regard.

40. Dr. Cebrian agreed with Dr. Cedillo's ultimate conclusion that with the benefit of hindsight and being able to identify the cause of Claimant's symptoms, Claimant's cervical condition is not work-related. Instead, Claimant's symptomatic multi-level cervical spine congenital stenosis and cervical degenerative disc disease and the need for medical treatment is independent, unrelated and incidental to work activities on March 19, 2015.

41. Dr. Cebrian testified that finding Claimant at MMI on July 23, 2015 was appropriate, but that Claimant suffered no work injury or an aggravation of a pre-existing condition.

42. Claimant has proven that on March 18, 2015, he aggravated his pre-existing cervical spine condition while in the course and scope of his employment. The ALJ credits the testimony of Claimant and the opinions of Dr. Hughes as more credible and persuasive than those of Drs. Cebrian or Cedillo.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S*.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

5. Claimant has proven that on March 18, 2015, he aggravated his pre-existing cervical spine condition while in the course and scope of his employment. The Claimant has consistently reported that as he was "jerking" back on the cheater bar to tighten the chain vice, the portable rotator moved or slipped and he felt a pop and a burning pain in his neck. The video reenactment shows Gurley forcefully jerking on the bar to tighten the chain vice. The Respondents placed great significance on the fact that Gurley could not get the portable rotator to move in the video; however, the Claimant is physically larger, younger and may have pulled on it harder than Gurley. In addition, there is no persuasive evidence that it was the movement of the rotator itself that produced Claimant's neck pain. The credible evidence shows that Claimant was jerking on the cheater bar, the rotator happened to move and he felt pain.

6. In addition to Claimant's credible testimony, the ALJ credits the opinions of Dr. Hughes. Dr. Hughes opined that the type of force exhibited on the video reenactment could cause injury to Claimant's neck, particularly in light of the pre-existing degenerative pathologies described by the radiologist. Dr. Hughes' opinion that the preexisting condition made the Claimant more susceptible to cervical injury is credible and persuasive.

7. Dr. Cedillo also initially related Claimant's neck symptoms to the mechanism of injury Claimant had described. Dr. Cedillo initially opined that Claimant suffered a cervical strain. He later changed that opinion stating that because he could not find a pain generator and because Claimant failed to improve, he did not sustain a work-related injury. Dr. Cedillo's reasoning is flawed. The ALJ is not persuaded that a lack of improvement or the inability to determine a pain generator suggest that symptoms are

automatically not work-related. Dr. Cedillo presented no reasonable explanation as to his changed opinion regarding the work relatedness of Claimant's symptoms.

8. Finally, the ALJ is not persuaded by Dr. Cebrian's opinions that the mechanism of injury could not have produced the neck symptoms or the need for medical treatment. As found above, the mechanism of injury was sufficient to aggravate or combine with Claimant's pre-existing asymptomatic condition to produce the need for medical treatment. The Claimant's testimony in that regard was credible. Thus Dr. Cebrian's opinion that Claimant awoke with pain on March 19 then sought out an explanation is not credited. The ALJ agrees with Dr. Cebrian that Claimant suffers from pre-existing cervical degenerative disc disease, but the ALJ is not persuaded that he may have been symptomatic but for the opioid use. That opinion is speculative and not reliable. As such, the Claimant has proven that the work activities on March 18, 2015 aggravated or combined with his pre-existing condition to produce the need for medical treatment.

ORDER

It is therefore ordered that:

1. The Claimant's claim for workers' compensation benefits is GRANTED.
2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 13, 2016

DIGITAL SIGNATURE:

L. Broniak

Laura A. Broniak
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant sustained a compensable left knee injury on December 5, 2015;

2. If so, whether the claimant is entitled to a general award of any and all reasonable and necessary medical benefits for her compensable left knee injury; and,

3. If so, whether the surgical procedure recommended by Dr. Alex Romero is reasonable and necessary medical care for the compensable left knee injury.

Based upon the findings and conclusions below that the claim is not compensable, the ALJ does not reach a decision on the remaining issues.

FINDINGS OF FACT

1. The claimant is a 53-year-old female who has 15 years of service with the respondent-employer. The claimant was and is employed by the respondent-employer as a correctional officer.

2. In late 2009, the claimant sustained a non-occupational left knee injury. The claimant initially injured her left knee while riding her horse and this was then aggravated by her children while they were rough housing.

3. On March 5, 2010, the claimant underwent surgery. The surgical report was entered into evidence and shows that the 2010 left knee procedure was an arthroscopy of the left knee with debridement of articular cartilage and lateral retinacular release. MRI imaging indicated there was a meniscal tear and loose bodies in the knee joint; however, the surgical report establishes that there was no meniscal tear at that time and no loose bodies in the joint. The surgeon cleaned up some areas of degeneration. The claimant recovered from this procedure and she had no additional trouble with her left knee prior to the date of injury that forms the basis of this claim.

4. On December 5, 2015, the claimant was in the course and scope of her employment when she sustained an acute left knee injury. She was walking with a coworker, Sgt Allen, doing rounds, when she exited the gym building. After leaving

through the doors from that part of the gym building there is a cement sidewalk with a transition from a flat surface to a gently sloping ramp. As the claimant was walking over this transition point, the claimant states, “My knee went backwards, I said a few choice words, which I don’t do, which was a cussword.”

5. At that time Sgt Allen turned around and asked the claimant if she was OK. The claimant told her that she had buckled her knee. Sgt Allen stated, “Well what do you think?” To which, the claimant indicated to Sgt Allen that she was going to try to walk it out. The claimant indicated that she buckled her knee, that it popped, and that it hurt, but that she was going to try to continue the rounds.

6. When the claimant stepped wrong she agreed with her counsel that the left knee hyperextended and she experienced an immediate onset of pain.

7. As the day went on, she experienced increasing swelling, stiffness, and pain.

8. The claimant reported the injury to the proper supervisory personnel. She was immediately sent for treatment at St. Mary Corwin Hospital. She reported that she “stepped and my knee buckled backwards.” The claimant was treated, released, and referred to Centura Centers for Occupational Medicine (CCOM) for additional treatment. CCOM is the respondent-employer’s designated health care provider for purposes of Workers’ Compensation.

9. On December 7, 2015, the claimant was seen at CCOM. She stated the mechanism of injury to be “walking out of gym doing rounds stepped wrong on the flat to ramp area.”

10. On December 18, 2015, a left knee MRI showed a MCL strain, an ACL strain, a meniscus tear, and possible loose bodies in the knee. On the same day, the claimant returned to CCOM. The MRI was reviewed and based upon the objective findings and the claimant’s clinical presentation, the claimant was referred to Alex Romero, MD of the St. Mary Corwin, Physician Partners – Orthopedics.

11. On January 13, 2016 the respondents filed a Notice of Contest asserting that the injury/illness is not work-related.

12. On January 18, 2016, Dr. Romero examined the claimant for the first time. With respect to the mechanism of injury she informed Dr. Romero that she was about to walk down a ramp where there is about a 45 degree angle when her knee hyperextended and gave way on her.

13. The ALJ finds that the angle was much less than 45 degrees based upon the photographic evidence admitted.

14. Dr. Romero visualized the MRI and x-rays and performed a physical evaluation of the left knee. Dr. Romero recommended conservative treatment initially which consisted of a steroid injection and physical therapy. The claimant participated in the recommended therapy.

15. On February 24, 2016 the respondent sent the claimant to an independent medical exam, which was performed by Dr. Timothy O'Brien. Dr. O'Brien issued a written report in which he opined that the claimant did not sustain a work-related injury because "[w]alking is not an injury mechanism."

16. Dr. O'Brien further opines that the claimant's symptoms in 2015 are simply a progression of her underlying degenerative condition.

17. The ALJ finds that the claimant had significant osteoarthritis that predated December 5, 2015. This is demonstrated by the prior X-rays, MRI films, Surgical Report and photographs taken of the 2010 surgery. Dr. O'Brien opined that the claimant has fairly severe osteoarthritis in 2 out of the 3 compartments of the patella femoral joint. Dr. O'Brien opined that this is an incurable condition that progresses as long as a person lives. Dr. O'Brien testified that the osteoarthritis is actually worse now that it was in 2010 and that is completey expected.

18. Dr. O'Brien also testified that osteoarthritis causes symptoms such as pain, stiffness, giving way, catching, and feelings of hyper-extension. These are the same symptoms that the claimant reported when getting treatment in early 2010 and these are identical symptoms that claimant currently reports. Dr. O'Brien testified that the claimant's sensation that "my knee doesn't hold me" is simply osteoarthritis acting the way you would have expected. It is not an injury from a misplaced foot.

19. Dr. O'Brien further testified that there was no work related aggravation of pre-existing arthritis. The claimant's osteoarthritis is simply flaring up, as he would expect with any person who has osteoarthritis like the claimant. It is "just the disease." Sometimes people experience a flare while walking or even while sleeping or standing too long in one place. Just because this happened while the claimant is at work, does not mean anything at work caused a flare up.

20. The ALJ finds that the sidewalk outside the gym where the claimant experienced her flare up of symptoms is ubiquitous and does not constitute a special hazard of the workplace.

21. The ALJ finds that the claimant is credible.

22. The ALJ finds that the claimant's credible statement of the incident in question does not, as a matter of law, establish a compensable injury.

23. The ALJ finds that the claimant was engaged in walking while conducting her rounds.

24. The ALJ finds that the analyses and opinions of Dr. O'Brien are credible and persuasive.

25. The ALJ finds that the claimant has failed to establish that it is more likely than not that she sustained an injury arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P .2d 792 (1979); *People v. M.A.,* 104 P .3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on its merits. §8-43-201, C.R.S.

2. In deciding whether Claimant has met her burden of proof, the ALJ is empowered to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

3. To prove compensability, a claimant must demonstrate both an “Accident” and Resulting “Injury.” There is a distinction between the terms “accident” and “injury”. The term accident refers to an “unexpected, unusual or undesigned occurrence.” Colo. Rev. Stat. § 8-40-201(1) (2015). In contrast, an “injury” refers to the physical trauma caused by the accident. In other words, an “accident” is the cause of and an “injury” is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). No benefits flow to the victim of an industrial accident unless an “accident” results in a compensable “injury.”

4. In order to recover benefits Claimant must prove that she sustained a compensable injury arising out of and in the course of her employment. §8-41-301(1)(b), C.R.S. “In the course of” employment refers to the time, place, and circumstances of the injury. *Id.* The “arises out of” test is one of causation. It requires that the injury have its origins in an employee’s work-related functions. *Schepker v. Daewoo North*, W.C. No.: 4-528-434 (ICAO April 22, 2003). There is no presumption that an injury which occurs in the course of employment arises out of the employment. *Finn v. Indus. Comm’n,* 165 Colo. 106, 437 P.2d 542 (1968).

5. A pre-existing condition “does not disqualify a claimant from receiving workers' compensation benefits.” *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A claimant may be compensated if his or her employment “aggravates, accelerates, or combines with” a worker's pre-existing infirmity or disease “to produce the disability for which workers' compensation is sought.” *H&H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). An industrial accident is the proximate cause of a claimant’s disability if it is the necessary precondition or trigger of the need for medical treatment. *Sarvestani v. Dale A. Wall, DDS*, W.C. Nos. 4-206-040; 4-464-407 (ICAO October 16, 2001).

6. There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver,* 810 P.2d 647 (Colo. 1991). The mere fact the claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO August 18, 2005). Rather, such symptoms could represent the “logical and recurrent consequence” of the preexisting condition. *See Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO April 10, 2008); *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO October 27, 2008), simply because claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation between the claimant’s

work and her symptoms exists, it does not mean there is a causal connection between claimant's injury and her work. *Id.*; *Gomez v. SMG Denver Convention Complex*, W.C. Nos. 4-237-047 and 4-423-132 (October 23, 2001).

7. In this case, claimant experienced the sensation of pain while walking. This is not an "accident" for purposes of the Workers' Compensation Act. Furthermore, walking in these circumstances did not create enough force to cause a physical or anatomical injury to the claimant. Claimant's sensation of pain was simply a manifestation or symptom of her pre-existing injury. As such, there is no "injury."

8. Claimant's left knee condition is not causally related to any of her work activities. *See Horne v. St. Mary-Corwin Hospital*, W.C. No. 4-205-014 (April 14, 1995); *Crass v. Cobe Laboratories,* W.C. No. 3-960-622 (October 10, 1991); *Gutierrez v. Wal-Mart Stores, Inc.*, W.C. No. 4-432-838 (November 30, 2000). The origin and cause of Claimant's sensation of hyper-extension while walking on December 5, 2015 was not due to her employment or her employment duties. Rather, the origin and cause of her symptoms and complaints was her significant preexisting arthritis. The opinions of Dr. O'Brien in this regard are credible and persuasive.

9. In *City of Brighton*, the Colorado Supreme Court identified three categories of risk that cause injuries to employees: (1) employment risks directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which are neither employment related nor personal. 318 P.3d 496 (Colo. 2014). The precipitating cause of the onset of pain was claimant's pre-existing condition (i.e. her Grade II osteoarthritis in 2 out of 3 compartments of the knee). Dr. O'Brien's opinion that the cause of the feeling of hyper-extension of the knee was a result of claimant's pre-existing osteoarthritis is credible and persuasive. As such, under *City of Brighton*, this is a purely personal injury which is not compensable unless an exception applies. *Id.; See also Miles v. City and County of Denver*, W.C. No. 4-961-742 (December 15, 2015).

10. The third risk category only applies if the application of a but-for test reveals that any employee would have been injured if they were in the course and scope of employment. *Id.* The most common example is if an employee is struck by lightning- i.e. any employee performing the job duties at that time would have been struck by lightning. Nor can walking be considered an employment risk directly tied to the work itself, especially in light of the determination that the claimant's pre-existing condition was the precipitating factor for the sensation that claimant's

11. When an injury is precipitated by a pre-existing condition brought by the claimant to the workplace, the injury is not compensable unless a “special hazard” of the employment combines with the pre-existing condition to cause or increase the degree of injury. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). To be considered an employment hazard, the employment condition must not be a ubiquitous one. It must be a special hazard not generally encountered. *Id.; see also, Gates Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo. App. 1985). Unless a special hazard of employment increases the risk or extent of injury, an injury due to a pre-existing condition does not bear sufficient causal relationship to the employment to “arise out of” the employment. *Id.; Gaskins v. Golden Automotive Group, LLC,* W.C. No. 4-374-591 (August 6, 1999); *Alexander v. Emergency Courier Services*, W.C. No. 4-917-156 (October 14, 2014). Claimant did not testify that any particular flaw in the sidewalk caused her left knee injury and the medical records do not support any such mechanism of injury. Although claimant did report that she stepped wrong when the sidewalk transitioned from the flat surface to the decline, she failed to testify that there was anything special or unusual with regard to this transition. This is supported by photographs submitted into evidence. This decline or ramp is not a special hazard of employment but a ubiquitous condition which Claimant could have encountered off the job. *See Horne v. St. Mary-Corwin* Hospital, W.C. No. 4-205-014 (April 14, 1995) and *Crass v. Cobe Laboratories*, W.C. No. 3-960-622 (October 10, 1991).

12. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury to her left knee arising out of and in the course and scope of her employment with Employer. The persuasive evidence establishes that Claimant’s left knee surgery was not reasonable, necessary or related to the work injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant’s claim for benefits under the Workers’ Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 16, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

Whether the stool from which the claimant fell subsequent to his asthma attack was a special hazard of employment, thus establishing a compensable claim as the claimant's injury would have arisen out of his employment.

FINDINGS OF FACT

1. The claimant was employed by the respondent-employer as a high school teacher in the Science Department.

2. On October 21, 2014, the claimant was attending a Science Department meeting after school in the classroom of the Science Department Chair, Claire Bueno-Rael. During the meeting, the claimant suffered an asthmatic coughing fit which caused him to lose consciousness and fall from the stool on which he was seated to the floor, resulting in an injury to his right shoulder.

3. The claimant suffers from a preexisting condition of asthma. The parties stipulated that the asthma attack/coughing fit was due to the claimant's preexisting, idiopathic condition, and that it did not arise from the claimant's employment. The respondent does not contest that the claimant suffered an injury to his right shoulder; the parties agree that the issue regarding compensability of this claim is whether the stool on which the claimant was seated rises to the level of a special hazard of the claimant's employment.

4. The claimant presented a photograph of a stool that he testified is a fair and accurate depiction of the type of stool he was sitting on.

5. The claimant testified to his belief that the stool on which he sat was 30" high.

6. The claimant offered no testimony or other evidence that the stool in question was defective or in any way tended to precipitate or aggravate the asthma/coughing fit and loss of consciousness.

7. Claire Bueno-Rael was the Science Department Chair at the high school on October 21, 2014 and remains in that position today.

8. On October 21, 2014, teachers in the science department at the high school presented to Ms. Bueno-Rael's classroom for a Department meeting.

9. Ms. Bueno-Rael observed that on October 21, 2014, during the Department meeting she observed the claimant seated on a stool situated at one of the lab tables in her classroom. She believes that the stool on which the claimant sat was not 30" high but was set at a lower height.

10. Dale Johnson is the respondent-employer's Environmental Health and Safety Officer. He has been employed in this position with the District for 22 years.

11. At hearing, both Mr. Johnson and Ms. Claire Bueno-Rael both testified that the stool on which the claimant was seated on October 21, 2014 could not have been 30" high. Specifically, both testified that the stools are used for the lab tables in the classroom. The bottom of the lab tables measured 30" from the ground. Thus, if a stool was set at 30" high, no one sitting on the stool would be able to put their legs under the lab table.

12. Mr. Johnson further testified that in the course of his job duties, he is regularly inside the classrooms, including the science classroom in question at the high school, and that he has regularly observed the stools used in the classroom in question. In his experience, the stools in the science classrooms, including the stools in the classroom in question, are set at 24" so that the students can comfortably sit at the lab tables and fit their legs underneath while doing their class work.

13. Ms. Bueno-Rael similarly testified that the stools in her classroom were set lower than 30" in order that the students could sit on the stools and comfortably put their legs under the lab tables; a stool set at 30" would not allow the students or anyone else, to put their legs under the lab tables.

14. The ALJ finds that the stool in question is a standard stool encountered regularly in the school setting and that the use of the stool does not constitute a special hazard in the work place of the high school. This is true whether the stool is 24" in height or 30" inches in height.

15. The ALJ finds that the claimant has failed to establish that it is more likely than not that he suffered an injury arising out of and in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The claimant bears the burden to prove by a preponderance of the evidence that he sustained an injury arising out of and within the course of his employment and that he is entitled to benefits under the Act. §§ 8-43-201(1) and 8-41-301(1), C.R.S.; *see City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202 (Colo. App. 2012).

2. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 492 P.2d 792 (1979); *People v. M.A.,* 104 P.3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (Indus. Claim Appeals Office, March 20, 2002). *Also see Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

3. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on its merits. §8-43-201, C.R.S.

4. In deciding whether the claimant has met his burden of proof, the ALJ is empowered to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

5. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

6. In order to recover benefits the claimant must prove that he sustained a compensable injury arising out of and in the course of his employment. §8-41-301(1)(b), C.R.S. “In the course of” employment refers to the time, place, and circumstances of the injury. *Id.* The “arises out of” test is one of causation. It requires that the injury have its origins in an employee’s work-related functions. *Schepker v. Daewoo North*, W.C. No.: 4-528-434 (ICAO April 22, 2003). There is no presumption that an injury which occurs in the course of employment arises out of the employment. *Finn v. Indus. Comm’n,* 165 Colo. 106, 437 P.2d 542 (1968).

7. Where the precipitating cause of an injury is a pre-existing condition which the claimant brings to the workplace, the injury is not compensable unless a "special hazard" of the employment combines with the pre-existing condition to cause or increase the degree of injury. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 763 (Colo. App. 1992). This principle is known as the "special hazard" rule. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of" the employment. *Gates v. Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo. App. 1985); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374- 591 (August 6, 1999) (injury when pre-existing condition caused the claimant to stumble on concrete stairs not compensable because stairs were ubiquitous condition). A condition does not constitute a “special hazard” if it is ’ubiquitous’ in the sense that it is found generally outside of the employment.” *In Re Booker,* W.C. No. 4-661-649 (ICAP, May 23, 2007).

8. A ubiquitous condition is one that is found in all places, on the job as well as off the job. *See Gates Rubber v. Industrial Commission*, 705 P.2d 6 (Colo. App. 1985) (concrete floor is a ubiquitous condition encountered on sidewalks, parking lots, streets and homes); *Geist v. Liberty Mutual Group,* W.C. No. 4-839-225 (October 11, 2011); *Kidwell v. City of Denver*, W.C. No. 4-601-057 (December 15, 2004). If a condition is ubiquitous, it usually is not considered to be a special hazard of employment since it generally is found outside of the employment. *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999) (injury when pre-existing condition caused the claimant to stumble on concrete stairs not compensable because stairs were ubiquitous condition). For example, in *Crass v. Cobe Laboratories*, W.C. No. 3-960-662 (October 10, 1991), the claimant suffered a knee injury while getting out of a chair when at work. The claimant's claim was held to be not compensable. The ALJ found that the chair did not precipitate the claimant's injury, and disbelieved the only evidence that was offered to show that the conditions of

employment combined with or aggravated the claimant's condition so as to cause the injury. The ALJ instead concluded that the chair was a ubiquitous condition. In a similar matter, *Horne v. St. Mary-Corwin Hospital*, W.C. No. 4-205-014 (April 14, 1995), the claimant was seated on a stool during the course of her employment. When she stood from the stool she felt her knee pop. Noting that the claimant suffered from a preexisting weakened knee that she brought in to the workplace, the ALJ found that the stool was not a special hazard but rather a ubiquitous condition which the claimant could have encountered off the job as well as on the job. Thus, the ALJ determined claimant's claim was not compensable as it did not arise out of her employment.

9. In the present matter, the claimant has failed to prove by a preponderance of the evidence that he sustained an injury that arose out of his employment. The stool on which the claimant was seated when he experienced the idiopathic asthma attack is not a special hazard of his employment at the high school.

10. The claimant testified, and the parties stipulated, that the claimant's asthma is an idiopathic condition which he brought into the workplace. The asthmatic coughing fit that resulted in the claimant's brief loss of consciousness is what caused claimant to fall to the floor. The stool, whether 30" high, 24" high, or somewhere in between, did not precipitate, cause or in any way aggravate or accelerate the asthmatic coughing fit the claimant suffered, nor was there any defect in the stool that contributed to the claimant's coughing fit or fall to the floor.

11. The ALJ concludes that regardless of whether the height of the stool was 24" or 30", the stool on which the claimant was seated is ubiquitous and not a special hazard of the claimant's employment. Neither did the stool precipitate, contribute to, or aggravate the claimant's idiopathic asthmatic condition. Accordingly, the injury the claimant sustained did not arise out of the claimant's employment.

12. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with respondent-employer.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 16, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-974-965-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 5, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 5/5/16, Courtroom 4, beginning at 8:30 AM, and ending at 10:10 AM).

Respondents' Exhibits A through J were admitted into evidence, without objection. Respondents' Exhibit K (surveillance films were not offered). Claimant's Exhibits 1 through 15 were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, on May 12, 2016. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the Respondents' request to overcome the Division Independent medical Examination (DIME) of Kristin Mason, M.D., which determined that the Claimant was not at maximum medical improvement

(MMI); and, medical benefits, either pre or post-MMI medical benefits depending on whether or not the Respondents overcome the DIME.

On overcoming the DIME, the respondents bear the burden of proof by clear and convincing evidence. On medical benefits, the Claimant bears the burden by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant was employed as a produce clerk for the Employer on February 3, 2015. She was taking two pots of coffee and walking to the counter when she slipped on a greasy tile floor. Her feet went out from under her, and she landed on her back with both hands outstretched on the ground (Claimant's Exhibit 7, p.25). Hiep Ritzer, M.D. became an authorized treating physician (ATP). Dr. Ritzer noted in her assessment on February 3, 2015 that the Claimant had a cervical strain, right shoulder strain, lumbosacral strain, bilateral buttock contusion, right greater than left, and bilateral hip contusion, right greater than left (Claimant's Exhibit.7, p.26). Dr. Ritzer was of the opinion that the Claimant's objective findings on examination were consistent with a work-related mechanism of injury (Claimant's Exhibit 7, p.26).

2. The Respondents filed a General Admission of Liability (GAL) for the injury on February 23, 2015, and began paying temporary total disability (TTD) benefits (Claimant's Exhibit.2, p.2).

3. The Claimant continued to be treated by Dr. Ritzer, who in turn referred the Claimant to Samuel Y. Chan, M.D., and to Sean Griggs, M.D., for further evaluation and treatment.

4. An MRI (magnetic resonance imaging) of the Claimant's right shoulder, taken February 5, 2015, showed rotator cuff tendinopathy, a shallow articular surface partial thick tear distally and a Type IV SLAP lesion (Claimant's Exhibit 5, p.13).

5. Dr. Griggs examined the Claimant on February 19, 2015. He stated that the Claimant had positive impingement as well as pain to biceps provocative maneuvers in her right shoulder. He diagnosed a right shoulder injury with partial thickness rotator cuff tear and a SLAP type IV lesion and referred the Claimant to physical therapy for range-of-motion (ROM) exercises (Claimant's Exhibit 6, pp.15-24). Dr. Griggs felt that right shoulder surgery might be necessary if the Claimant continued to have pain (Claimant's Exhibit 6, p.17).

6. The Claimant also was seen again by Dr. Chan. Although the right shoulder MRI showed objective findings of a SLAP lesion, among other problems, Dr. Chan discounted it, without explanation, saying only “imaging studies fail to reveal any significant pathology” (Respondents’ Exhibit E, p.23). Under the circumstances, the ALJ finds Dr. Chan’s “observation” lacking in credibility.

The Video Surveillance Films

7. Respondents conducted video surveillance of the Claimant on April 9, 2015, April 10, 2015, May 11, 2015 and May 12, 2015 and provided a film of Claimant’s activities to Dr. Chan. On June 14, 2015, Dr. Chan wrote a report entitled “Video Surveillance” (Respondents’ Exhibit E, pp.32-33). Dr. Chan stated, “One can conclude that there is an attempt for misrepresentation of her symptoms, *i.e.* malingering.” Without further exposition of Dr. Chan’s credentials, the ALJ finds Dr. Chan’s moral/credibility judgments of marginal credibility.

8. On June 25, 2015, Dr. Chan discussed with the Claimant that he had seen videos of her helping a medium-sized dog out of her car and carrying “what appeared to be a file cabinet” with another person. Dr. Chan termed this “an unsophisticated attempt to misrepresent her symptoms.” He stated that because “we are treating pain and there is no credibility on patient’s part, I do not feel that further treatment will alter any kind of outcome.” Dr. Chan put the Claimant at MMI with no work restrictions. He provided a zero percent medical impairment rating (Respondents’ Exhibit E, p.35).

9. The Claimant plausibly explained that she was simply guiding her son’s black dog, and she was handling an empty box that weighed very little. The ALJ infers and finds that Dr. Chan’s characterization of the videos made things seem far worse than they really were and for whatever reason, Dr. Chan developed a strong reaction to and bias against the Claimant. For this reason, the ALJ infers and finds that Dr. Chan’s medical objectivity whereby he essentially “blew off” real MRI findings.

10. The Respondents filed a Final Admission of Liability (FAL) on July 9, 2015, admitting for a maximum medical improvement (MMI) date of June 25, 2015 and a zero percent impairment rating (Respondents’ Exhibit A, p.1; Claimant’s Exhibit 3, p.3]. The ALJ infers and finds that the “hasty” FAL, was based, in great part, upon Dr. Chan’s rush to judgment after seeing the videos.

Allison Fall, M.D.

11. At the Respondents’ request, the Claimant was examined by Dr. Fall on September 30, 2015. Dr. Fall reported that the Claimant had diffuse degenerative changes in her cervical, lumbar, shoulder and wrists. She said Dr. Chan had “appropriately indicated that her presentation in the clinic was inconsistent with what he

saw in the video surveillance," even though, at that time, Dr. Fall had not reviewed the video herself. The ALJ finds that this observation by Dr. Fall is based on un-mitigated hearsay, without any objective analysis by Dr. Fall. Dr Fall also categorically agreed that the Claimant had reached MMI, had no permanent impairment, needed no work restrictions and required no further medical care (Respondents'.Exhibit.D, pp.11-16).

12. Dr. Fall issued a second report, "Surveillance Video Review and Report," on October 12, 2015. She found the Claimant's filmed activities "quite concerning," and contended that Claimant was presenting herself differently at medical appointments than she did in other places (Respondents' Exhibit D, pp.9-10). The ALJ is not exactly sure to which "other places" Dr. Fall was referring,

Division Independent Medical Examination (DIME) BY Kristin Mason, M.D.

13. The Claimant saw Dr. Mason as part of a DIME on November 16, 2015. In her examination, Dr. Mason found positive impingement signs in the right shoulder. She elicited "a big posterior pop or clunk to passive abduction at about 90 degrees" in Claimant's right shoulder. Dr. Mason also noted the MRI findings of rotator cuff tendinopathy, shallow articular surface partial-thickness tear distally and a type IV SLAP lesion (Claimant's Exhibit 4; Respondents' Exhibit F).

14. Dr. Mason also reviewed the video surveillance of Claimant and stated:

> "The patient has a type IV SLAP tear which is generally speaking a surgical lesion. Her physical exam is quite consistent with that diagnosis. I did not see anything on her surveillance video that was inconsistent with a type IV SLAP tear. She certainly seemed to avoid flexion and abduction. . . [H]ow she presented to me today is somebody with an unstable shoulder due to a SLAP tear."
>
> (Claimant's Exhibit .2, p.9; Respondents' Exhibit F, p.42).

15. Dr. Mason found Dr. Chan's evaluation of the Claimant to be lacking. She took note of Dr. Chan's failure to examine the Claimant's shoulder thoroughly and not to comment on the SLAP tear other to reference it in his report. Dr. Mason pointed out that despite demonstrated abnormalities on MRI, Dr. Chan claimed there were no abnormalities. It also was clear that Dr. Chan failed to pay attention to the Claimant's pain diagram that consistently indicated posterior shoulder pain, neck pain and right buttock pain, erroneously calling her complaints "nonfocal."

16. The ALJ finds Dr. Mason's analysis and observations considerably more compelling, persuasive and credible than Dr. Chan's and Dr. Fall's analyses. Indeed,

Dr. Mason confirms what the ALJ already observed concerning Dr. Chan's inadequate evaluation of the Claimant.

Dr. Fall Redux

17. Dr. Fall issued a third report, "Medical Record Review and Addendum," on March 18, 2016, and in an adversarial mode, criticized Dr. Mason's DIME report as having discounted and "downplayed" the activities of the Claimant in the surveillance video. Again, the ALJ infers and finds that Dr. Fall, like Dr. Chan, has blown the video observations out of proportion, without regard to the Claimant's plausible explanations. Such an observation on Dr. Fall's part barely rises to the level of a difference of opinion concerning the import of the videos, much less does it support a proposition of clear error on Dr. Mason's part.

18. Dr. Fall testified in person at the hearing. At hearing, she agreed that the surveillance video showed the Claimant protectively guarding her right upper extremity by holding the arm in front of her body as she walked. This does not show up in any of her written reports, thus, undermining her credibility even more. Dr. Fall found it difficult to examine the Claimant's right shoulder because of pain. Dr. Fall testified that she believed there was no acute injury to the Claimant's shoulder and that the MRI findings **"could be"** (emphasis supplied) consistent with degenerative changes. Dr. Fall conceded, however, that she had reviewed no medical records or MRIs of the Claimant's right shoulder taken before this occupational injury. She agreed that she knew of no work restrictions for Claimant during her 28-year employment at Safeway nor during her seven-year employment with the Employer herein. The ALJ finds the opinions of Dr. Fall neither persuasive nor credible.

19. Dr. Fall testified that her primary disagreement with the DIME report was that she felt Dr. Mason did not consider Dr. Chan's opinion as to the Claimant's alleged malingering (the ALJ infers and finds that "malingering" is more of a moral/psychological judgment than an objective medical finding and Dr. Chan has failed to demonstrate appropriate credentials in either field –such as a doctorate in Divinity or a board certification in psychiatry). On cross-examination, however, Dr. Fall agreed that Dr. Mason in her report indeed had considered, but rejected, Dr. Chan's opinion.

The Claimant, Surgical Recommendation and Ultimate Opinion of DIME Dr. Mason

20. The Claimant was a credible and persuasive witness. The ALJ finds that she is able to use her right arm if she keeps it straight down at her side with the elbow bent. She was advised by Dr. Griggs not to wear the sling if she was having increased pain in her right shoulder. She has not used her right arm overhead, nor is there any reference in the reports of Dr. Fall or Dr. Chan that the surveillance videos show Claimant performing any overhead movements. There was no credible or persuasive evidence that Claimant has returned to work.

21. Dr. Griggs, an ATP, has recommended surgery for the Claimant's SLAP IV lesion. Dr. Mason, the DIME physician, determined that the Claimant is not at MMI. She recommended consideration of surgery after an orthopedic evaluation, reimaging of the right shoulder, preferably with an arthrogram and a psychological consultation.

22. Dr. Chan failed to adequately evaluate the Claimant's right shoulder injury as a treating physician, and he ignored the MRI findings that documented the Type IV SLAP tear resulting from this occupational injury. His moral characterization of the Claimant as "malingering" and misrepresenting her symptoms is rejected as not credible or persuasive. Because Dr. Chan misapprehended the Claimant's activities on video surveillance and failed to provide medical treatment that relieved the Claimant from the effects of the SLAP tear, his opinion that Claimant could work without any work restrictions is rejected as not credible or persuasive.

23. The Claimant remained under work restrictions given by ATP Dr. Ritzer of no use of the upper right extremity through at least June 16, 2015 (Claimant's Exhibit 8, pp.28-44), when she released Claimant to lifting and carrying no more than 5 pounds and no use of her right arm to reach overhead, away from her body or for repetitive motion (Claimant's Exhibit 8, p.44). The full work release given by Dr. Ritzer on June 25, 2015 (Claimant's Exhibit 8, p.45) was based solely on Dr. Chan's opinion and, thereby, is also rejected as not credible or persuasive evidence as to the Claimant's work abilities prior to MMI.

Ultimate Findings

24. For the reasons articulated herein above, the ALJ finds the opinions of Dr. Chan and Dr. Fall lacking in credibility. On the other hand, the ALJ finds the opinions of DIME Dr. Mason well articulated, with an underlying thorough and persuasive medical analysis of the Claimant's case. Therefore, the ALJ finds DIME Dr. Mason's opinions highly persuasive and credible. Also, the ALJ finds the Claimant's explanation of what is depicted on the videos plausible, persuasive and credible. The Claimant presented in a straight-forward and honest manner. For this reason, the ALJ finds her testimony highly credible.

25. The ALJ makes a rational choice, based on substantial evidence, to accept the testimony of the Claimant and the opinions of DIME Dr. Mason, and to reject the opinions of Dr. Chan and Dr. Fall.

26. The Respondents have failed to demonstrate that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Mason's opinion that he Claimant is **not** at MMI is erroneous. Therefore, the Respondents have failed to overcome DIME Dr. Mason's opinion that the Claimant is **not** at MMI by clear and convincing evidence.

27. The Claimant has proven, by a preponderance of the evidence that the surgery recommended by ATP Dr. Griggs is causally related to the admitted injury and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Chan and Dr. Fall lacked credibility. On the other hand, the opinions of DIME Dr. Mason were well articulated, with an underlying thorough and persuasive medical analysis of the Claimant's case. Therefore, as found, Dr. Mason's opinions were highly persuasive and credible. Also, as found, the Claimant's explanation of what is depicted on the videos was plausible, persuasive and credible. The Claimant presented in a straight-forward and honest manner. For this reason, the ALJ found her testimony highly credible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the testimony of the Claimant and the opinions of DIME Dr. Mason, and to reject the opinions of Dr. Chan and Dr. Fall.

Overcoming the DIME –"Not at MMI"

c. Section 8-42-107 (8) (b) (III), C.R.S., requires that the opinion of MMI, or lack thereof, given by a DIME physician selected by the Division of Workers' Compensation must be overcome only by clear and convincing evidence. "Clear and convincing evidence" is an evidentiary standard of proof that is established by showing that the truth of a contention is highly probable, unmistakable and free from serious or substantial doubt. *Askew v. Sears, Roebuck & Co.*, 914 P.2d 416 (Colo.App. 1995); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995). The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office***,** 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert, supra*; *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office, supra*; *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). A DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute "clear and convincing evidence" to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). The question of whether a party meets the "clear and convincing" burden of proof is a question of fact for the ALJ. *McLane Western, Inc. v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo.App. 1999). As found, the Respondents have failed to overcome the DIME opinion of Dr. Mason that the Claimant is **not** at MMI. The ALJ concludes that the key dispute Dr. Fall has with the DIME opinion is a matter of personal opinion - - that Dr. Mason failed to defer to Dr. Chan's conclusions concerning Claimant's presentation to him versus what she is shown doing on video. This mere difference of opinion does not rise to the standard of clear and convincing evidence required by statute. Dr. Mason found the Claimant to be credible in her complaints, which in turn were documented objectively by the MRI results.

Burden of Proof on Recommended Surgery

d. The injured worker has a continuing burden of proof, by a preponderance of the evidence, of establishing entitlement to medical benefits, when challenged. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven, by a preponderance of the evidence that the surgery recommended by ATP Dr.

Griggs is causally related to the admitted injury and reasonably necessary to cure and relieve the effects thereof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant is **not** at maximum medical improvement.

B. The respondents shall pay the costs of all causally related and reasonably necessary medical expenses to cure and relieve the effects of her admitted injury, including the surgery recommended by Sean Griggs, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

C. Any and all issues not determined herein are reserved for future decision.

DATED this______day of May 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

- Did Claimant prove by clear and convincing evidence that he needs additional medical treatment to reach maximum medical improvement?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of ongoing medical benefits after maximum medical improvement?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1, 2 and 8 were admitted into evidence. Respondents' Exhibits A through C were admitted into evidence.

2. Claimant sustained an admitted industrial injury on May 27, 2014. The injury occurred when Claimant was operating a mechanical lift and pushed the "wrong" button. Claimant testified that he injured his back when the lift pinned him against a bridge.

3. On May 28, 2014 Claimant was examined at Midtown Occupational Health Services. Claimant gave a history that he injured the posterior mid and lower rib cage when a machine pushed him against a concrete beam. Thoracic range of motion (ROM) was reduced by "localized left posteroinferior rib pain." The lumbar spine and muscles were not tender. Claimant was diagnosed with a "posterior rib cage contusion." (Respondents' Exhibit A p. 4).

4. Claimant began massage therapy on June 9, 2014. At that time he completed a pain diagram indicating that he had pain in the thoracic and lumbar spine. (Respondents' Exhibit A p. 4).

5. On June 25, 2014 Craig Anderson, M.D., examined Claimant. Dr. Anderson noted Claimant's pain was no longer centered in the left posterolateral rib cage but was instead extended into the left perithoracic area and on into the left part of the neck. There is no credible or persuasive evidence that Claimant reported lumbar pain on this occasion. Palpatory examination showed diffuse perithoracic muscle tension. Cervical x-rays showed mild degenerative disc disease (DDD) and thoracic x-rays showed kyphosis. Dr. Anderson believed Claimant had aggravated some pre-existing degenerative changes. (Respondents' Exhibit A p. 4).

6. On July 9, 2014 Claimant reported he was about "50% better" and that he experienced some improvement with massage therapy. His primary area of pain was "was less perithoracic, posterolateral." Pain radiated to the neck only.

7. On July 23, 2014 Claimant gave a history that at work he had been pressured to perform "heavier lifting than he was comfortable with." Claimant was now "localizing his area of discomfort to the left low back." Claimant was referred to Dr. Lesnak.

8. Dr. Lesnak examined Claimant on August 7, 2014. Claimant primarily complained of low back pain which Dr. Lesnak attributed to left SI joint dysfunction. Dr. Lesnak scheduled an EMG and an MRI. Dr. Lesnak prescribed tramadol for pain.

9. Claimant underwent a lumbar MRI that revealed mild DDD, facet hypertrophy contributing to mild multilevel foraminal narrowing and no disc herniation or nerve impingement. Dr. Lesnak performed an EMG that reportedly showed no pathology. (Respondents' Exhibit A p. 5).

10. On August 18, 2014 Dr. Lesnak noted Claimant "had a great many issues with his employer and a multitude of subjective complaints." Claimant had not improved despite extensive treatment. Dr. Lesnak recommended a one-time diagnostic/therapeutic bilateral SI joint injection. (Respondents' Exhibit A p. 5).

11. Claimant underwent the SI joint injection on September 19, 2014. On October 6, 2014 Claimant reported that the injection did not provide any relief, not even temporarily. (Respondents' Exhibit A p. 5).

12. On October 16, 2014 Claimant underwent a bone scan of the lower thoracic and lumbar spine. The bone scan revealed a probable fracture of the mid posterior left eleventh rib. Dr. Lesnak believed this fracture might be the cause of Claimant's report of ongoing pain. (Respondents' Exhibit A p. 5).

13. Claimant underwent a functional capacity evaluation (FCE). On the Oswestry Low Back Pain Disability Index Claimant scored himself as "crippled." The FCE indicated that Claimant was limited to lifting 30 pounds occasionally and 10 pounds frequently. The FCE further indicated Claimant was limited to occasionally lifting 20 pounds from waist to shoulder and frequently lifting 10 pounds from waist to shoulder. Claimant's "bilateral carry" was limited to 10 pounds for 50 feet. (Respondents' Exhibit A p. 5).

14. On November 20, 2014 Dr. Lesnak noted that Claimant felt he was being discriminated against at work and that his primary low back pain was progressing. Dr. Lesnak observed that Claimant was exhibiting "pain behaviors." Dr. Lesnak opined that psychosocial and financial stresses were playing a large role in Claimant's symptoms. Dr. Lesnak placed Claimant at maximum medical improvement (MMI) and stated Claimant could continue medications for 6 months. (Respondents' Exhibit A p. 6).

15. Dr. Anderson also examined Claimant on November 20, 2014. Dr. Anderson assessed an eleventh rib fracture by bone scan imaging. He opined that the FCE results did not reflect Claimant's actual capabilities. Dr. Anderson placed Claimant at MMI with no permanent impairment. Dr. Anderson also indicated that Claimant did not require any maintenance care after MMI. (Respondents' Exhibit C).

16. On February 9, 2015 Kristin Mason, M.D., performed a Division-sponsored independent medical examination (DIME). Dr. Mason took a history, reviewed pertinent medical records and performed a physical examination (PE). Claimant reported that he was experiencing midline lumbar pain, left-sided to midline thoracic pain and "stabbing pain from the occiput to the lumbosacral junction." Claimant also described "scattered areas of tingling" and "pins and needles down the inside of his thighs and calves and inside of his arms."

17. Dr. Mason opined that Claimant "appeared to give very poor effort" during lumbar ROM testing. Dr. Mason assessed the following: (1) Status post thoracic sprain/strain with isolated left eleventh rib fracture; (2) Later development of lumbar complaints with no objective evidence to indicate a lumbar injury either at the time of injury or on any of the diagnostic workup; (3) Probable pain disorder with both psychological factors and a general medical condition; (4) No evidence of any impairment to the bilateral lower extremities, neck or chest.

18. In the DIME report Dr. Mason agreed with Dr. Lesnak and Dr. Anderson that Claimant reached MMI on November 20, 2014. Dr. Mason declined to assign an impairment rating for the lumbar spine. She explained there was "no mechanism of injury for [Claimant's] lumbar spine and the complaints did not appear until later." However Dr. Mason assessed 7% impairment of the thoracic spine. Dr. Mason stated that she did not believe Claimant presented in a "straightforward fashion." Nevertheless, Dr. Mason gave the Claimant the "benefit of the doubt" and assessed the thoracic impairment rating because Claimant experienced "enough trauma to have a rib fracture." Dr. Mason agreed with Dr. Anderson that the FCE "severely" underestimated Claimant's physical capabilities. Dr. Mason opined Claimant did not need any "further directed medical care."

19. On April 9, 2015 Dr. Mason issued an addendum to her DIME report. Dr. Mason wrote that pursuant to a court order she reviewed surveillance video of Claimant taken on three occasions in September 2014. Dr. Mason noted that the video depicted Claimant performing numerous activities including bending in a crouch, forcefully utilizing a wrench while on his knees, twisting repeatedly from his knees and squatting through his thoracic and lumbar spine. Based on the video Dr. Mason stated that Claimant's "functional deficits" were "much less that what he demonstrated" on Dr. Mason's PE. Dr. Mason reiterated that she did not believe Claimant presented in a straightforward and honest fashion and rescinded the impairment rating for the thoracic spine. Dr. Mason opined that Claimant had fully recovered from his injury at the time of the video and that Claimant's activities on the video "would not be consistent with how he was presenting to his providers at that time."

20. At hearing Claimant testified that he feels pain in the center of his back approximately one inch above the belt line. Claimant also testified that he experiences numbness and tingling in his hands and feet and numbness in his legs.

21. Claimant testified that doctors have told him that he has “inflamed discs” because of the accident and because of “arthritis.” Claimant testified that he wants to receive additional medical treatment to relieve his back pain.

22. Claimant admitted that after the injury he continued to work until he was fired on February 11, 2015. Claimant stated that he currently receives treatment under Medicare and takes the drugs Tramadol and Meloxicam.

23. Claimant’s wife Lucilla Coronado testified at hearing. Ms. Coronado testified that Claimant has been a carpenter all of his life and has never been hurt before. She testified that since May 2014 she has observed that Claimant’s pain has gotten worse and worse.

24. At the conclusion of the hearing the parties were permitted to make closing arguments. During closing arguments Claimant did not clarify the legal theory or theories under which he seeks to obtain additional medical treatment. However, the ALJ infers Claimant is arguing either that he has overcome the DIME physician’s opinion that he has reached MMI, or that he is entitled to an award of ongoing medical benefits after MMI. The ALJ concludes that Claimant has not met his burden of proof under either theory.

25. Claimant failed to prove it is highly probable and free from serious doubt that Dr. Mason erred in finding he reached MMI on November 20, 2014. Specifically, Claimant failed to prove it is highly probable and free from serious doubt that he needs additional medical treatment to reach MMI from the effects of the May 27, 2014 industrial injury.

26. Dr. Mason, the DIME physician, credibly and persuasively opined Claimant reached MMI on November 20, 2014. In so doing Dr. Mason reviewed the Claimant’s medical history detailing the workup and treatment of his various complaints. Specifically Dr. Mason noted that Claimant had undergone cervical and thoracic x-rays, EMG studies, a lumbar MRI, a bilateral SI joint injection, massage therapy and treatment by Dr. Anderson and Dr. Lesnak. Ultimately Dr. Mason found Claimant did not sustain any injury to the lumbar spine and that he “recovered” from his other injuries such that additional treatment is not necessary for him to reach MMI. Dr. Mason also credibly opined that “further directed medical care” is not likely to assist Claimant given his presentation.

27. Dr. Mason’s opinions are supported by Claimant’s medical records and corroborated by the opinions of Dr. Lesnak and Dr. Anderson. Both Dr. Lesnak and Dr. Anderson agreed Claimant reached MMI on November 20, 2014.

28. Claimant did not present credible or persuasive medical evidence or testimony to refute the opinions of Dr. Mason, Dr. Lesnak and Dr Anderson.

29. Insofar as Claimant testified that he needs additional medical treatment for the effects of the May 2014 industrial injury his testimony is not credible and persuasive. Claimant's credibility is undermined by Dr. Mason's credible and persuasive observation that Claimant's activities depicted in the surveillance video conflicted with his presentation to the treating physicians. Claimant's credibility is further undermined by Dr. Mason's observations that at the DIME Claimant did not present in a straightforward manner and failed to give full effort on lumbar ROM testing.

30. To the extent that Ms. Coronado's testimony would support the contention that Claimant needs additional medical treatment to reach MMI Coronado's testimony is not credible and persuasive. Her testimony is contradicted and refuted by the credible and persuasive testimony of Claimant's treating physicians and Dr. Mason.

31. Claimant failed to prove it is more probably true than not that he will need future medical treatment to relieve the effects of or prevent deterioration of any condition causally-related to the industrial injury of May 27, 2014.

32. Dr. Mason credibly and persuasively opined Claimant does not need and is unlikely to benefit from further medical treatment. Dr. Mason credibly opined Claimant has "recovered fully" from the effects of the May 27, 2014 injury. Dr. Mason's opinion is corroborated by Dr. Anderson's opinion.

33. The ALJ notes that Dr. Lesnak found Claimant reached MMI on November 20, 2014, but recommended that Claimant continue medications for 6 months. Insofar as Dr. Lesnak's recommendation can be considered evidence of a need for ongoing medical treatment after MMI it is not persuasive. In the April 2015 "addendum" to the DIME report Dr. Mason persuasively opined that the surveillance video taken in September 2014 shows Claimant performing activities that were not consistent with "how he was presenting to his providers at that time." Because Dr. Lesnak was one of Claimant's providers in September 2014 the ALJ infers that Dr. Lesnak's recommendation for ongoing medications was based on an invalid presentation by Claimant. Moreover, Dr. Mason credibly and persuasively opined that Claimant did not present in a "straightforward and honest" manner at the DIME. Dr. Lesnak's recommendation for 6 months of post-MMI medication is not sufficiently persuasive to prove by a preponderance of the evidence that Claimant is entitled to an award of ongoing medical benefits after MMI

34. Insofar as Claimant's testimony and Ms. Coronado's testimony would support an award of ongoing medical treatment to relieve or prevent deterioration of Claimant's condition after MMI their testimony is not credible and persuasive. Their testimony is refuted by the credible and persuasive opinions of Dr. Mason.

35. Evidence and inferences contrary to or inconsistent with these findings of fact are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as noted below, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

ADDITONAL MEDICAL TREATMENT TO REACH MMI

To the extent Claimant contends that he needs additional medical treatment to reach MMI, the ALJ concludes he failed to meet his burden of proof.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra.*

Under § 8-40-201(11.5) MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that a claimant needs additional medical treatment to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO March 2, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

As determined in Findings of Fact 25 through 30, Claimant failed to prove by clear and convincing evidence that Dr. Mason was incorrect in finding that he reached MMI on November 20, 2014. Specifically, Claimant failed to prove it is highly probable and free from serious doubt that he needs additional medical treatment to cure and relieve the effects of the May 27, 2014 industrial injury. As found, Dr. Mason credibly and persuasively opined that Claimant did not suffer any lumbar injury as a result of the May 2014 injury and that Claimant does not need additional medical treatment for any injury-related condition in order to reach MMI. Dr. Mason's opinions in this regard are corroborated by the opinions of Dr. Lesnak and Dr. Anderson. Claimant failed to present any credible and persuasive medical evidence tending to refute Dr. Mason's opinion. Insofar as the testimonies of Claimant and Ms. Coronado are relevant to this issue their testimony is not credible for the reasons stated in Findings of Fact 29 and 30.

MAINTENANCE MEDICAL TREATMENT

Claimant failed to prove it is more probably true than not that he needs or will probably need medical treatment to relieve the ongoing effects of the industrial injury after MMI or to prevent deterioration of his condition.

The need for medical treatment may extend beyond the point of MMI where a claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is not contingent upon a finding that a specific course of treatment has been recommended. Neither is such an award dependant on a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

For the reasons stated in Findings of Fact 31 through 34, Claimant failed to prove it is more probably true than not that he needs or will ever need medical treatment to relieve or prevent deterioration of any condition that is causally-related to the industrial injury of May 27, 2014. Rather, the ALJ credits the opinions of Dr. Mason that Claimant has “recovered fully” from the effects of the May 2014 injury and is not likely to need any future medical treatment that is causally-related to the injury. To the extent that Dr. Lesnak’s opinions could be construed as support for the proposition that Claimant needs or probably will need additional treatment after MMI, those opinions are not credible and persuasive for the reasons stated in Finding of Fact 33.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The Claimant’s request for additional medical treatment on account of the May 27, 2014 industrial injury is denied and dismissed.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 16, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-913-124-05

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Jade Dillon, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) for his January 3, 2013 lumbar spine injury.

FINDINGS OF FACT

1. Claimant worked as a Warehouse Chemist at Employer's cement mixing operation. His job duties involved moving hoses and lifting heavy bags of cement weighing between 50-75 pounds. On January 3, 2013 Claimant injured his left wrist, lower back and right knee when he slipped on a wet floor.

2. Claimant underwent conservative treatment for his industrial injuries that included medications, physical therapy, diagnostic testing and injections. The medical records and diagnostic testing revealed that Claimant suffered significant symptoms in his knees and lower back prior to the January 3, 2013 accident.

3. On September 25, 2013 Claimant underwent a total left knee replacement. Claimant acknowledged that the surgery was not related to his January 3, 2013 industrial injuries.

4. On October 16, 2013 Claimant underwent an independent medical examination with J. Carlos Cebrian, M.D. Dr. Cebrian determined that, as a result of the January 3, 2013 fall, Claimant sustained "contusion/sprain/strain" related "aggravations" to his left wrist, lumbar spine and right knee. He commented that the injuries were of "limited duration" and Claimant reached MMI on April 18, 2013. Dr. Cebrian explained that the anatomy of Claimant's right knee, lumbar spine and left wrist as reflected on MRI's constituted a "preexisting and genetically proscribed degenerative change." He noted that the MRI's did not reveal any cumulative or acute effects related to Claimant's work activities.

5. Dr. Cebrian explained that the January 3, 2013 incident did not change Claimant's underlying and pre-existing degenerative spine disease. He noted that, although Claimant had initial complaints of back pain following the accident, his spinal examinations were essentially normal after a few weeks. Dr. Cebrian further commented that Claimant did not develop any "prominent" spinal symptoms until April 2013. He concluded that the "lumbar spine complaints that occurred three months after the fall [we]re due to the underlying lumbar degenerative disc disease" and not caused or aggravated by the work accident.

6. On October 29, 2014 the parties participated in a hearing before ALJ David P. Cain at the Office of Administrative Courts. The issues involved whether Claimant's need for a total right knee replacement and all medical treatment was caused by the January 3, 2013 accident. In a March 6, 2015 Findings of Fact, Conclusions of Law and Order ALJ Cain denied Claimant's request for a right total knee replacement. ALJ Cain also rejected Respondents' attempt to terminate additional medical treatment for Claimant's left wrist, lower back and right knee.

7. On December 16, 2014 Dr. Cebrian issued a Supplemental Report. He maintained that Claimant did not sustain any permanent impairment as a result of his January 3, 2013 fall. Dr. Cebrian summarized that Claimant's injuries were of "limited duration which did nothing to change the underlying disease process of his pre-existing osteoarthritis of his right knee, osteoarthritis of his left wrist or degenerative disc disease of his lumbar spine."

8. Claimant subsequently received additional conservative treatment for his industrial injuries. Because he did not reach MMI Respondents sought a 24-month DIME.

9. On July 16, 2015 Claimant underwent a 24-month DIME with Jade Dillon, M.D. Dr. Dillon reviewed Claimant's medical history and conducted a physical examination. She initially noted that no treating physician had determined that Claimant reached MMI. Dr. Dillon also remarked that Claimant had a history of multiple, significant right knee injuries. She commented that as far back as 2006 Claimant exhibited a "virtually complete erosion" of the articular cartilage and physicians recommended bilateral knee replacements. Dr. Dillon explained that Claimant suffered a contusion and possible right knee strain on January 3, 2013 but there was no anatomical disruption of the knee structures. She detailed that there was no evidence that the January 3, 2013 incident "caused any significant long-term worsening of his significant underlying degenerative condition." Instead, Claimant's symptoms were consistent with progressive, degenerative changes in someone who had already reached right knee end-stage osteoarthritis. Accordingly, Dr. Dillon concluded that the January 3, 2013 industrial incident did not cause or exacerbate Claimant's degenerative right knee condition.

10. Dr. Dillon also concluded that Claimant's left wrist symptoms were not related to the January 3, 2013 industrial incident. She explained that Claimant's symptoms were likely caused by significant osteoarthritis throughout his left wrist. Furthermore, the timeframe between Claimant's industrial injury and the documentation of significant osteoarthritis suggested that his symptoms were not caused by the January 3, 2013 accident. The incident would likely only have caused transient left wrist symptoms that would have resolved. Accordingly, Dr. Dillon concluded that the January 3, 2013 industrial incident did not cause or exacerbate Claimant's degenerative left wrist condition.

11. Dr. Dillon determined that Claimant suffered a "significant exacerbation" of his underlying lower back condition on January 3, 2013. She noted that Claimant had

not reached MMI because he required additional conservative treatment in the form of physical therapy. Moreover, authorized medical providers had recommended additional treatment. Relying on Table 53 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)*, Dr. Dillon assigned Claimant a 7% whole person impairment rating for a specific disorder of the lumbar spine and a 26% whole person impairment for range of motion deficits. Combining the ratings yields a 31% whole person impairment.

12. On December 15, 2015 Dr. Dillon testified through a pre-hearing evidentiary deposition in this matter. She maintained that Claimant's left wrist and right knee symptoms constituted degenerative conditions that were not causally related to the January 3, 2013 industrial incident. However, she explained that on January 3, 2013 Claimant suffered a lumbar strain with the exacerbation of a disc herniation. After reviewing a lumbar MRI Dr. Dillon specifically noted that Claimant suffered a "significant exacerbation" of his lumbar spine condition that was likely acute based on his symptoms. Dr. Dillon recommended physical therapy, epidural steroid injections and a surgical consultation.

13. On February 25, 2016 John T. McBride Jr., M.D. performed an independent medical examination. After considering Claimant's medical history and conducting a physical examination Dr. McBride diagnosed Claimant with a mild L5 left-sided radiculopathy, left wrist osteoarthritis and right knee osteoarthritis. He concluded that Claimant's right knee arthritis, left wrist arthritis, radiculopathy, lower back degenerative disc disease and foraminal stenosis were not caused by the January 3, 2013 industrial incident. Therefore, Claimant had reached MMI. Relying on Table 53 of the *AMA Guides*, Dr. McBride commented that Claimant would have a 5% whole person impairment for a specific disorder of the lumbar spine. However, considering Claimant's medical records from 2006 and lack of lower back symptoms immediately after the January 3, 2013 incident, Dr. McBride determined that Claimant did not have a "ratable" Workers' Compensation injury.

14. Dr. McBride testified at the hearing in this matter. He maintained that Claimant's right knee arthritis, left wrist arthritis, radiculopathy, lower back degenerative disc disease and foraminal stenosis were not caused by the January 3, 2013 industrial incident. Dr. McBride noted that Claimant did not exhibit evidence of a radiculopathy because his left leg did not reveal any atrophy. In addressing his disagreement with Dr. Dillon regarding Claimant's lumbar spine, Dr. McBride remarked that Claimant suffered chronic degenerative disc disease in his lower back that preceded the January 3, 2013 incident. He explained that Claimant's lumbar MRI did not reveal any evidence of an acute lower back injury but was instead consistent with the degenerative process in the form of bilateral foraminal narrowing.

15. Dr. McBride specifically disagreed with Dr. Dillon's conclusion that Claimant suffered an exacerbation of his underlying lower back condition for the following reasons: (1) Dr. Dillon did not note anywhere in her DIME report that Claimant had no spinal tenderness the day after his industrial injury; (2) a soft tissue injury, such as a muscle strain, would have resolved; (3) the degenerative changes in Claimant's

lumbar spine would not resolve in six weeks; (4) physical therapy would not remedy the underlying arthritis or degenerative disc disease; and (5) Claimant's lower back pain had been well-documented dating back to 2006. Dr. McBride remarked that, if Claimant had suffered a work-related lower back injury, it would have resolved approximately six weeks after the incident. Dr. McBride summarized that Dr. Dillon appeared to base her opinions on Claimant's subjective report of complaints instead of the records and objective findings. Furthermore, Dr. McBride commented that Claimant did not require any additional physical therapy because he had undergone numerous physical therapy visits during 2013 and 2014 without improvement. He specifically noted that Dr. Dillon was incorrect in her assessment that Claimant had received inadequate conservative treatment. Finally, Dr. McBride stated that a repeat lumbar MRI would not be related to Claimant's January 3, 2013 industrial injury. Accordingly, Dr. McBride determined that Claimant had reached MMI in February or March 2013 with no permanent impairment.

16. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Dillon that Claimant has not reached MMI for his January 3, 2013 lumbar spine injury. After reviewing Claimant's medical records and performing a physical examination Dr. Dillon determined that the January 3, 2013 industrial incident did not cause or exacerbate Claimant's degenerative right knee or left wrist conditions. However, Dr. Dillon explained that Claimant suffered a "significant exacerbation" of his underlying lower back condition on January 3, 2013. After reviewing a lumbar MRI Dr. Dillon specifically noted that Claimant suffered a "significant exacerbation" of his lumbar spine condition that was likely acute based on his symptoms. She noted that Claimant had not reached MMI because he required additional conservative treatment in the form of physical therapy, epidural steroid injections and a surgical consultation. Relying on Table 53 of the *AMA* Guides, Dr. Dillon assigned Claimant a 31% whole person impairment.

17. Drs. Cebrian and McBride agreed with Dr. Dillon that the January 3, 2013 industrial incident did not cause or exacerbate Claimant's degenerative right knee or left wrist conditions. However, in addressing Claimant's lumbar spine, Dr. Cebrian explained that the January 3, 2013 incident did not change Claimant's underlying and pre-existing degenerative spine disease. Dr. Cebrian noted that, although Claimant had initial complaints of back pain following the January 3, 2013 incident, his spinal examinations were essentially normal after a few weeks. He further commented that Claimant did not develop any "prominent" spinal symptoms until April 2013. Dr. Cebrian concluded that the "lumbar spine complaints that occurred three months after the fall [were] due to the underlying lumbar degenerative disc disease" and not caused or aggravated by Claimant's fall.

18. Dr. McBride commented that Claimant suffered chronic degenerative disc disease in his lower back that preceded the January 3, 2013 incident. He explained that Claimant's lumbar MRI did not reveal any evidence of an acute lower back injury but was instead consistent with the degenerative process in the form of bilateral foraminal narrowing. Dr. McBride specifically disagreed with Dr. Dillon's conclusion that Claimant suffered an exacerbation of his underlying lower back condition for the following reasons: (1) Dr. Dillon did not note anywhere in her DIME report that Claimant had no

spinal tenderness the day after his industrial injury; (2) a soft tissue injury, such as a muscle strain, would have resolved; (3) the degenerative changes in Claimant's lumbar spine would not resolve in six weeks; (4) physical therapy would not remedy the underlying arthritis or degenerative disc disease; and (5) Claimant's lower back pain had been well-documented dating back to 2006. Dr. McBride remarked that, if Claimant had suffered a work-related lower back injury, it would have resolved approximately six weeks after the incident. Furthermore, Dr. McBride commented that Claimant did not require any additional physical therapy because he had undergone numerous physical therapy visits during 2013 and 2014 without improvement. He specifically noted that Dr. Dillon was incorrect in her assessment that Claimant had received inadequate conservative treatment. Accordingly, Dr. McBride determined that Claimant had reached MMI in February or March 2013 with no permanent impairment.

19. Although Drs. Cebrian and McBride attributed Claimant's lumbar spine condition to a degenerative process, they failed to explain how Dr. Dillon's determination that the January 3, 2013 incident caused a "significant exacerbation" of his underlying lower back condition was clearly erroneous. The opinions of Drs. Cebrian and McBride merely constitute disagreements with Dr. Dillon regarding the cause of Claimant's lumbar spine symptoms. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Dillon's MMI determination was incorrect.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002); *In Re Clickner* W.C. No. 4-798-331 (ICAP, Apr. 30, 2015). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

6. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Dillon that Claimant has not reached MMI for his January 3, 2013 lumbar spine injury. After reviewing Claimant's medical records and performing a physical examination Dr. Dillon determined that the January 3, 2013 industrial incident did not cause or exacerbate Claimant's degenerative right knee or left wrist conditions. However, Dr. Dillon explained that Claimant suffered a "significant exacerbation" of his underlying lower back condition on January 3, 2013. After reviewing a lumbar MRI Dr. Dillon specifically noted that Claimant suffered a "significant exacerbation" of his lumbar spine condition that was likely acute based on his symptoms. She noted that Claimant had not reached MMI because he required additional conservative treatment in the form of physical therapy, epidural steroid injections and a surgical consultation. Relying on Table 53 of the *AMA* Guides, Dr. Dillon assigned Claimant a 31% whole person impairment.

7. As found, Drs. Cebrian and McBride agreed with Dr. Dillon that the January 3, 2013 industrial incident did not cause or exacerbate Claimant's degenerative right knee or left wrist conditions. However, in addressing Claimant's lumbar spine, Dr. Cebrian explained that the January 3, 2013 incident did not change Claimant's underlying and pre-existing degenerative spine disease. Dr. Cebrian noted that, although Claimant had initial complaints of back pain following the January 3, 2013 incident, his spinal examinations were essentially normal after a few weeks. He further commented that Claimant did not develop any "prominent" spinal symptoms until April

2013. Dr. Cebrian concluded that the “lumbar spine complaints that occurred three months after the fall [were] due to the underlying lumbar degenerative disc disease” and not caused or aggravated by Claimant’s fall.

8. As found, Dr. McBride commented that Claimant suffered chronic degenerative disc disease in his lower back that preceded the January 3, 2013 incident. He explained that Claimant’s lumbar MRI did not reveal any evidence of an acute lower back injury but was instead consistent with the degenerative process in the form of bilateral foraminal narrowing. Dr. McBride specifically disagreed with Dr. Dillon’s conclusion that Claimant suffered an exacerbation of his underlying lower back condition for the following reasons: (1) Dr. Dillon did not note anywhere in her DIME report that Claimant had no spinal tenderness the day after his industrial injury; (2) a soft tissue injury, such as a muscle strain, would have resolved; (3) the degenerative changes in Claimant’s lumbar spine would not resolve in six weeks; (4) physical therapy would not remedy the underlying arthritis or degenerative disc disease; and (5) Claimant’s lower back pain had been well-documented dating back to 2006. Dr. McBride remarked that, if Claimant had suffered a work-related lower back injury, it would have resolved approximately six weeks after the incident. Furthermore, Dr. McBride commented that Claimant did not require any additional physical therapy because he had undergone numerous physical therapy visits during 2013 and 2014 without improvement. He specifically noted that Dr. Dillon was incorrect in her assessment that Claimant had received inadequate conservative treatment. Accordingly, Dr. McBride determined that Claimant had reached MMI in February or March 2013 with no permanent impairment.

9. As found, although Drs. Cebrian and McBride attributed Claimant’s lumbar spine condition to a degenerative process, they failed to explain how Dr. Dillon’s determination that the January 3, 2013 incident caused a “significant exacerbation” of his underlying lower back condition was clearly erroneous. The opinions of Drs. Cebrian and McBride merely constitute disagreements with Dr. Dillon regarding the cause of Claimant’s lumbar spine symptoms. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Dillon’s MMI determination was incorrect. *See In Re Patterson,* W.C. No. 4-874-745 (ICAP, Feb. 14, 2014) (reasoning that respondents had failed to overcome DIME physician’s conclusion that claimant had not reached MMI because contrary determinations that claimant had reached MMI constituted mere differences of opinion); *In Re Arszman*, W.C. No. 4-798-406 (ICAP, May 18, 2011) (concluding that, where medical evidence tending to challenge DIME opinion constituted mere difference of opinion, respondents had failed to produce clear and convincing evidence to overcome DIME determination that claimant had not reached MMI).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has not reached MMI for his January 3, 2013 lumbar spine injury.

2. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 16, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STIPULATIONS

1. The parties stipulate that the Claimant's Average Weekly Wage (AWW) is $665.27

2. The parties stipulate that an issue regarding potential adjustments to TTD may exist with regard to COBRA and due to offsets for short term disability and long term disability payments. The parties stipulate that this issue is reserved.

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to low back arising out of and in the course of his employment with Employer on October 11, 2014.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits and that treatment he received was authorized, reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

3. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary disability benefits from November 6, 2014 ongoing.

FINDINGS OF FACT

1. The Claimant was employed at VI Highlands Ranch as a Certified Nurse's Aide (CNA) for 5 years as of October 11, 2014.

2. The Claimant's job was physically demanding and he was responsible for many aspects of patient care. The Claimant credibly testified that his job duties included getting residents out of their beds in the morning, grooming the residents, assisting them to use the restroom, assisting them with showers, taking them to the dining hall, usually in wheelchairs, tidying and cleaning the residents' rooms while they were dining, taking the soiled laundry to the utility room, cleaning up the trash and assisting some residents to the salon. When lifting residents, the Claimant testified their weight would range from 90 to 275 pounds. Sometimes he would lift residents by himself, and other time he would get assistance from other aides and sometimes assistive lift devices were employed.

3. Once the residents were back in their rooms, the Claimant testified he would perform charting. The charting work involved keeping track of the patients' activities of daily living through notes and later data entry at a computer station.

4. The Claimant testified that in the evening shift he would gather the laundry into a cart and push the laundry. He would then open it, take the bag out and walk it to the laundry room, where there was a special bin. The Claimant testified that on average the laundry would weigh 100 to 120 pounds. He testified that after moving the laundry, he would sit and chart again.

5. The Claimant first presented for low back treatment at East West Health Centers with on May 9, 2013. The form notes that the Claimant was referred by "Dr. Michael B," who is likely Dr. Michael Bathke, a chiropractor who is also affiliated with East West Health Centers. In the Initial Patient History form, the reason for the Claimant's visit was listed as "chronic" and "severe lower back pain." The form states that sharp pain in the lower back that radiates across the low back and limbs started on April 4, 2013. The Claimant reported that the pain was sharp and "very severe" when he sat for a very long time (Respondents' Exhibit E, p. 38). On the "Consultation / History Review" page of the initial intake documents, it is noted that the Claimant had been experiencing "pain in lower back" for 4 weeks and that he had seen a chiropractor for this. The pain was noted as "sharp" and "throbbing" and worse when sitting down (Respondents' Exhibit E, p. 42).

6. The Claimant also had a previous admitted back injury on May 14, 2013 while working for Respondent/Employer. He was helping lift a patient when he had acute back pain. He was treated for three months and released with no permanent impairment or work restrictions.

7. On September 22, 2014, the Claimant received chiropractic care at East West Health Centers. On that day, the Claimant reported moderate-severe bilateral lower back pain with bilateral leg pain. On a scale of 1-10, the Claimant described his pain as an 8-9. The treatment provider noted objective findings including nerve pressure, muscle spasm, edema and ROM at the lumbar and SI regions (Respondents' Exhibit E, p. 37).

8. On September 25, 2014, the Claimant received chiropractic care at East West Health Centers. On that day, the Claimant reported severe bilateral lower back pain with bilateral leg pain. On a scale of 1-10, the Claimant described his pain as a 7-9. The treatment provider noted objective findings including nerve pressure, muscle spasm, edema and ROM at the lumbar and SI regions (Respondents' Exhibit E, p. 36).

9. On October 2, 2014, the Claimant received chiropractic care at East West Health Centers. On that day, the Claimant reported bilateral lower back pain, moderate right sided hip pain and bilateral leg pain. The treatment provider noted objective findings including nerve pressure, muscle spasm, edema, tenderness to palpation and ROM at the lumbar and SI regions (Respondents' Exhibit E, p. 35).

10. Pursuant to the Claimant's time card, he worked a double shift on October 11, 2014, starting at 6:11 a.m. and ending at 2:30 p.m. and restarting a second shift at 2:30 p.m. clocking out at 10:30 p.m. (Claimant's Exhibit 9, p. 85). The Claimant testified credibly that the Employer was not fully staffed on October 11, 2014.

11. The Claimant testified that the laundry on October 11, 2014 was heavier than usual. All of the soiled laundry was gathered from the patients' rooms. It was placed in a bin that was then pushed to the laundry area. He was required to lift the laundry out of the bin. While doing this, the Claimant felt a sharp pain in his low back upon lifting the laundry out of the bin. The pain subsided fairly quickly. He did not report the incident that night to his Employer because it was at the end of his shift and the pain had subsided so quickly. The Claimant testified that he specifically remembered the incident of lifting the laundry because it was "an unusual pain."

12. The Claimant did not work the following day on October 12, 2014. (Claimant's Exhibit 9 p. 85).

13. Claimant was concurrently employed at Wind Crest in October of 2014. The Claimant testified that he did not know whether he worked at Windcrest on October 10, 2014, or October 12, 2014. His main duties at this second job consisted of dispensing medications, light cooking and visiting with patients. He usually did not lift more than 10 pounds at that job.

14. The Claimant reported to work as normal on October 13, 2014. He began his day performing his normal duties of patient care. The Claimant had his notes regarding the "activities of daily living" that he needed to enter into the computer. He went to sit down at the computer to enter his notes and he testified that he had immediate and debilitating pain in his low back. He testified that the pain was so intense that it brought him down to the floor. The Claimant was found lying on the floor in pain by another employee who helped him up.

15. The Claimant's supervisor, Lisa Nolan, also arrived at the scene and found the Claimant lying on the floor moaning in pain reporting lower back pain and numbness in his left leg as well (Claimant's Exhibit 9 pp. 83-84; Respondents' Exhibit J, pp. 94-95). Ms. Nolan stated that the Claimant was unable to attribute any particular incident/event to the onset of the lower back pain that was radiating to his leg, but made note of the fact that the Claimant reported that the pain was "first noticed" on October 11, 2014. Ms. Nolan also makes note of the Claimant working with soiled laundry on October 13, 2014 (Claimant's Exhibit 9 p. 84; Respondents' Exhibit J, p. 95). The laundry activity is consistent with the Claimant's testimony. However, the Claimant testified that he was doing the laundry on October 11, 2014 and "charting" on October 13, 2014, so the dates in Ms. Nolan's statement are different than those provided by the Claimant.

16. Suzanne McFarland also prepared an Employee Incident Report on October 13, 2014. She testified at hearing that she took a statement from the Claimant on October 13, 2014. She was not exactly sure where she was at the time she received the statement but was certain she got the information directly from the Claimant. Ms. McFarland's incident report noted that the date of injury was October 11, 2014. The "Exact Location of Occurrence" was noted to be "A.L. Activity Room—sitting and charting." Under the "Employee's Statement of Incident," Ms. McFarland noted: "Pain started Saturday as a mild pain around noon. When pain first came on—sitting in activity room trying to chart, AL" (Respondents' Exhibit J, p. 96). Ms. McFarland testified that the Claimant did not tell her about any incident lifting laundry as the cause of his pain.

17. The Claimant testified credibly that a driver took him to Concentra on October 13, 2014 for medical treatment and then back to his place of work afterwards. The Claimant testified that after this, he worked with work restrictions.

18. The Claimant was seen at Concentra in Highlands Ranch on October 13, 2014 by Hanna Bodkin, PA-C. The medical report from that date notes under "Chief Complaint": "DOI: 10/11/14; patient was sitting at a table charting and felt a sharp pain in left leg, buttock and lower back." Further in the report under "History of Present Illness," the Claimant described the location of his pain as the left low back and in the left SI region. He reported "onset was sudden" and "the pain is constant" at a pain level of 10/10. The Claimant reported that he "sat down to do computer charting ADLS on residents and left lower back became painful, he had sharp pain, now pain is going from right lower back into buttock and right leg" (Claimant's Exhibit 5, p. 43; Respondents' Exhibit A, p. 1). Nowhere in the report on October 13, 2014, is it noted that the Claimant injured his back while lifting laundry (Claimant's Exhibit 5, pp. 43-45; Respondents' Exhibit A, p. 1). Additionally, the injury date is noted as 10/4/2014 (Claimant's Exhibit 5, p. 43; Respondents' Exhibit A, p. 1).

19. On October 15, 2014, the Claimant presented to Concentra in Littleton and was seen by Luisa Long for his initial physical therapy appointment. Ms. Long noted that the Claimant reported that he was "sitting at a table, charting, when felt sharp pain in L LE, buttock and lower L/s. Severity of pain and locations of pain far different from last year's injury." Ms. Long noted that the Claimant's restrictions limited lifting, pushing and pulling to 10 lbs. and limiting bending with no bending 2/3 of the time and limiting standing and sitting each to 50% of his shift. The Claimant reported that he had a low back injury about a year prior with occasional lasting pain that comes and goes. Ms. Long noted that therapy was indicated for the Claimant and that he was a good candidate for therapy with a good prognosis for improvement (Respondents' Exhibit A, pp. 4-6).

20. On October 16, 2014, the Claimant returned for a recheck of his lumbar back strain following his initial physical therapy assessment and appointment the previous day. The Claimant reported taking ibuprofen every 4 hours and Flexeril multiple times per day. He reported continued pain in his lower back into the buttock

and left leg. The Claimant advised Hanna Bodkin, PA-C that he would like an MRI to assess his lower back. Ms. Bodkin noted that the Claimant was to continue with physical therapy and that an MRI would be considered at the next visit if the Claimant's symptoms were not improving (Claimant's Exhibit 5, pp. 10-11; Respondents' Exhibit A, pp. 7-8).

21. The Claimant also saw Dr. Bathke for chiropractic care at East West Health Centers on October 16, 2014. He reported bilateral moderate-severe lower back pain. The treatment provider noted objective findings including nerve pressure, muscle spasm, edema, tenderness to palpation and ROM at the lumbar and SI regions (Respondents' Exhibit E, p. 34).

22. The Claimant returned to Concentra as a walk-in on October 17, 2014 complaining of severe 10/10 pain and difficulty walking and sitting. The Claimant was seen by Dr. Mark Monano who referred the Claimant to physiatry and for an MRI and prescribed Percocet (Claimant's Exhibit 5, pp. 13-14; Respondents' Exhibit A, pp. 10-12).

23. The Claimant was examined and treated by Concentra until October 22, 2014 when his claim was determined not work related and he was referred to his primary care physician (Claimant's Exhibit 5, p. 53).

24. On October 23, 2014, The Claimant saw Dr. Bathke for chiropractic care at East West Health Centers. He reported bilateral moderate-severe lower back pain and moderate right hip pain. The treatment provider noted objective findings including nerve pressure, muscle spasm, edema, tenderness to palpation and ROM at the lumbar and SI regions (Respondents' Exhibit E, p. 33).

25. On October 24, 2014, the Claimant underwent an MRI of the lumbar spine without contrast. The radiologist, Dr. Phillip Gunther noted pathology at the L4-5 level and the L2-3 level. At L4-5, a left paracentral broad-based disc protrusion with an annular fissure was noted, as was Mild to moderate encroachment on the spinal canal, left lateral recess and left neural foramen. Dr. Gunther noted probable impingement on the left L5 nerve root within the lateral recess. At L2-3, Dr. Gunther noted a mild disc bulge, facet degenerative change and ligamentum flavum hypertrophy. He also noted a signal at L2-3 which suggested a subdural collection of fluid resulting in displacement and compression of the nerve roots posteriorly and to the left (Claimant's Exhibit 6, pp. 57-58; Respondents' Exhibit B, pp. 13-14).

26. On October 27, 2014, The Claimant saw Dr. Bathke for chiropractic care at East West Health Centers. He reported bilateral moderate-severe lower back pain and mild right hip pain. The treatment provider noted objective findings including nerve pressure, muscle spasm, edema, tenderness to palpation and ROM at the lumbar and SI regions (Respondents' Exhibit E, p. 32).

27. Also on October 27, 2014, the Claimant was evaluated by Sarah Neguse at the recommendation of Dr. Bathke. Ms. Neguse noted that the Claimant has been having “acute low back pain for the past two weeks that has not gotten better. Prior to this, he was not having any pain and has no history of LBP.” Ms. Neguse noted that the Claimant went to the ER at SkyRidge after his wife called 911 because he could not walk or sand due to severe back pain. Ms. Neguse reports that “he was given IV pain medication and advised to see a spine specialist because this was probably a ‘disc problem.’ He also had another visit to a Concentra ER (he thinks about a week ago but can’t remember if it was actually prior to the other ER visit to SkyRidge) because while sitting down at work he felt a very sharp pain going down the left leg.” The Claimant advised that he decided not to see a spine specialist but instead decided to start therapy with Dr. Bathke, but he is not seeing any improvement in his pain (Claimant’s Exhibit 7, p. 62; Respondents’ Exhibit E, p. 29). Ms. Neguse reviewed the October 24, 2014 MRI with the Claimant and noted that there was disc protrusion with annular fissure at L4-5 that was probably impinging upon the left L5 nerve root. She also noted that there was “a well circumscribed focus in the L3-4 region that was still unclear what this is but could be epidural collection compressing thecal sac.” Due to the latter finding, Ms. Neguse recommended an MRI with contrast. Ms. Neguse contacted Spine One to determine if the Claimant could be urgently evaluated this same day by a spine specialist (Claimant’s Exhibit 7, p. 63; Respondents’ Exhibit E, p. 30).

28. The Claimant went to Spine One on October 27, 2014. He completed a “Patient Questionnaire” with Spine One, reporting the date symptoms appeared began for his back pain with a date that was scratched out and rewritten as October 11, 2014. When asked in a question the “date of event/activity,” the Claimant wrote “10/25/14.” He also wrote “last year I injured my back on the job – not sure if this experience is directly related to that injury (Respondents’ Exhibit H, p. 75). The Claimant was evaluated by Dr. Hashim Kahn and PA-C Jadon Redington. Under “History of Present Illness,” the report notes “His pain began on October 11, 2014, with back pain, which has progressed particularly in the last few days. He does not recall any specific event or activity that occurred recently to cause his back pain, although approximately 1 year ago he did hurt his back on the job, and he is unsure if this is related to that or if it is a separate issue.” It is noted that the original report noted that the pain began on October 13, 2014, but was then crossed out and handwritten in as 11 October 2014. The Claimant reported a pain level of 3-4 out of 10. However, the Claimant described a pain that can become so severe at times that he has to crawl up the stairs and to the bathroom. The Claimant reported that 4 sessions of chiropractic care provided some symptom relief but he continued to have significant pain (Claimant’s Exhibit 8, p. 78; Respondents’ Exhibit H, p. 71). On examination, it was noted that the Claimant reported tenderness from L2-L5 in the midline and to a lesser degree over the sacroiliac joints. Moderate paraspinal muscle spasm was noted in the lumbar spine with tender points in the piriformis muscles bilaterally. After also reviewing the October 24, 2014 MRI, the Claimant was assessed with being in the subacute stages of lumbar IVD, lumbago, facet syndrome, sciatica, erectile dysfunction and muscle spasm. An MRI with contrast was ordered (Claimant’s Exhibit 8, p. 80; Respondents’ Exhibit H, p. 73).

29. On October 28, 2014, the Claimant underwent an MRI with contrast which showed multilevel degenerative disc disease and congenital stenosis. There was also a finding at L2-3 of “right ventral paramedian extradural lesion with rim enhancement” that was “most consistent with a fluid collection. Epidural abscess must be considered, although the adjacent disc shows relatively minimal degenerative changes. Hematoma also might be considered. The appearance is not typical of an extruded fragment given the signal characteristics” (Claimant’s Exhibit 6, pp. 55-56; Respondents’ Exhibit C, pp. 15-16).

30. The Claimant was referred to Dr. Mariel Szapiel, and the record of Dr. Szapiel dated October 31, 2014, notes that the Claimant “presents with three-week history of severe low back pain. He states his symptoms first presented while he was sitting at work.” The Claimant reported that about two weeks prior, the Claimant started developing severe low back pain and now bilateral lower extremity pain. Dr. Szapiel’s report makes no reference to the Claimant injuring his back while lifting laundry. (Claimant’s Exhibit 3, p. 34; Respondent’s Exhibit G, p. 60). Dr. Szapiel noted that based on the October 28, 2014 MRI he was referred by Spine One to see her “emergently” and he was started on Toradol yesterday. The Claimant reported that his pain improved significantly since starting the Toradol and is now averaging a 2/10. Dr. Szapiel noted concern over infection in the form of abscess and opined that the Claimant’s low back pain and bilateral lower extremity pain was “most likely secondary to the L2-3 level where he has what appears to be an epidural collections versus atypical disc right ventral aspect which is probably complicated by the disc herniation at L4-5 on the left” Claimant’s Exhibit 3, p. 35; Respondents’ Exhibit G, p. 61).

31. The Claimant saw Dr. Szapiel again on November 3, 2014 to discuss lab results and surgery for the L2-3 lesion and L4-5 disc. Dr. Szapiel noted that “the laboratory studies do not point to a grossly infected patient but yet they are still not completely normal.” She noted that clinically, the Claimant’s symptoms have not improved beyond some improvements due to oxycodone. Dr. Szapiel opined that,

> because of the length of the symptoms and the findings on the MRI and the continued weakness, I think the most prudent course of action would be to explore the L2-3 space and see what this lesion is. It would be an L2-3 hemilaminotomy on the right side. Because we also know that he has possible disc herniation at L4-5 on the left side and he does have also some weakness on that leg and other muscle groups, I think also it would be advisable to just go ahead and perform the discectomy at L4-5 while he is under general anesthesia (Claimant’s Exhibit 3, pp. 31-32; Respondents’ Exhibit G, pp. 58-59).

32. Dr. Szapiel performed an L2-L3 hemilaminectomy with excision of lesion on November 6, 2014 (Claimant’s Exhibit 3, pp. 22-24; Respondents’ Exhibit F, pp. 47-49). At the time of surgery, Dr. Szapiel was concerned about infection at the L2-3 level and therefore did not do surgery on the L4-L5 disc herniation. The pathology report

following surgery showed there was no infection and there was no bacteria. Rather, the report "showed disc degeneration, no acute inflammation. It did show focal reactive changes. All together these findings tell he had an ongoing process causing irritation/inflammation at this level. There was no acute inflammation on pathology but he also had bony overgrowth at fact joint, what appeared to by a synovial cyst which burst in surgery and large amounts of granulation tissues. These constellation of findings again point towards a longer acting inflammatory process (Claimant's Exhibit 1).

33. The Claimant reported to Dr. Szapiel on December 22, 2014 that his leg symptoms had improved but he was still experiencing issues with back discomfort (Claimant's Exhibit 3, p. 21; Respondents' Exhibit G, p. 57).

34. On February 12, 2015, Dr. Szapiel noted that the Claimant was still complaining of low back pain closer to the L4-5 region which ranges from 0/10 to 5-6/10 and had been flaring up more recently. The Claimant wanted to proceed with further interventions. Dr. Szapiel recommended a Medrol dose pack and referral for an injection at Spine One at the L4-5 level (Claimant's Exhibit 3, p. 15; Respondents' Exhibit G, p. 54).

35. The Claimant received a lumbar epidural steroid injection at L4-5, L5-S1 bilaterally at Spine One on February 23, 2015. As of March 9, 2015, the Claimant reported that all of his radicular symptoms have resolved but there is continuing low back pain at a 5/10 pain level. Due to the ongoing symptoms, Dr. Salahuddin and PA-C Schneider recommended lumbar facet injections (Claimant's Exhibit 8, p. 71; Respondents' Exhibit H, p. 67).

36. On March 31, 2015, the Claimant saw Dr. Franklin Shih for an independent medical evaluation. The Claimant reported to Dr. Shih that "he had no problems prior to May of 2013" with low back complaints. The Claimant reported that he was lifting a resident on May 14, 2013 when he had acute pain complaints in the low back and he treated for these from May to July when he was discharged. The Claimant reported that his symptoms improved but would flare up a few times per week. The Claimant reported that on October 11, 2014 "he was going to sit down and noted acute pain into the left lower extremity." The Claimant reported that he underwent surgery with Dr. Szapiel at the L2-3 level. His lower extremity complaints improved significantly, but his low back symptoms have been consistent (Claimant's Exhibit 2, p. 5; Respondents' Exhibit D, p. 19). After taking a history and conducting a physical examination, Dr. Shih opined that the Claimant, "had an initial work injury on May 4, 2013 with localized back pain. Per his history there was ongoing intermittent back pain. On 10/11/2014 [the Claimant] reports onset of acute radicular pain. The symptoms of 10/11/2014 are possibly but not probably related to the injury of 5/4/2013." Dr. Shih noted that "whether or not this is considered to be a work injury is more of a legal question than medical. The onset of complaints occurred in the scope of [the Claimant's] regular work activities although not associated with a specific injury or supra-physiologic load" (Claimant's Exhibit 2, p. 7; Respondents' Exhibit D, p. 21).

Dr. Shih felt that given the increase of right leg complaints, there was concern that the Claimant re-herniated at the operative site (Claimant's Exhibit 2, p. 8; Respondents' Exhibit D, p. 22).

37. The Claimant returned to Spine One on May 13, 2015 reporting that although his left leg feels good, he has low back pain and buttock pain and a numb feeling traveling down his right leg. Dr. Salahuddin and PA-C Schneider recommended epidural steroid injections and indicated those would be scheduled, but they did not rule out the possibility of a surgical intervention (Claimant's Exhibit 8, pp. 69-70; Respondents' Exhibit H, pp. 65-66).

38. Dr. Szapiel reevaluated the Claimant on May 14, 2015 and stated that although the February 23, 2015 injection gave the Claimant very limited relief from his symptoms, she was not opposed to the Claimant proceeding with conservative treatment and the ESIs at the L4-5 level. She noted that the Claimant may still require further intervention if he does not have improvement with the conservative therapies (Claimants' Exhibit 3, p. 14). On June 8, 2015, Dr. Szapiel noted the Claimant continued to have issues with his low back and was failing conservative management. She opined it would not be unreasonable to have one more attempt at a steroid injection and possibly a new MRI. She opined that the Claimant "may require decompression at the L4-5 level (Claimant's Exhibit 3, p. 13).

39. On June 2, 2015, the Claimant saw Dr. Rachel Basse for an independent medical examination. The Claimant reported "two recent work-related low back injuries, the first occurring 05/14/2013 and the most recent occurring 10/11/2014. Dr. Basse noted that the Claimant reported an injury on 05/14/2013 that occurred when he was at work as a CAN and was assisting another person lift a client that was sitting on the floor. Dr. Basse noted that the Claimant reported, "it was his first low back pain event ever." The Claimant reported that he was treated and placed at MMI with no impairment and released to full duty work on July 1, 2013. The Claimant reported that he would have intermittent flare ups of back pain with muscle spasms. The Claimant reported that he never missed work because of this and received no additional treatment, although he did see a chiropractor through his PCP's office on one or two occasions (Respondents' Exhibit M, p. 104). With respect to the second on the job pain event, the Claimant reported to Dr. Basse that

> "on the prior day, 10/10/2014, he had worked two shifts for a total of 16 hours in the skilled area of the retirement community care center where it was the most physically demanding of the three floors and he did not notice any significant difference in his symptoms at that time, maybe just some small aches. He got up at 5:00 AM the next morning and left for work by 5:30 AM and started work at 6:00 AM. He again at that time noted no significant difference in his symptoms, just the usual lower grade ache. On this day, 10/11/2014, he did all his usual full work. On this day, he was working in the independent living area of the retirement community care center. He notes it is usually higher functioning patients,

> but that they had been declining. She was in a sitting walker and had to step down. He wheeled her back to her room and did all his usual duties, getting people up, assisting with personal care, making their beds, filling oxygen tanks, getting patients to and from breakfast. Toward the end of his shift he walked into the room to do charting, reached back for a chair, had not yet sat down but was in the process of when he developed severe sudden sharp pain in his low back going down his right leg that dropped him to the floor (Respondents' Exhibit M, p. 105).

The Claimant described his current pain as primarily low back pain at the L4-5 level. He advised Dr. Basse that it is present any time he is not lying down on his back or walking. The Claimant reported that he had no left leg symptoms since his surgery, other than residual weakness, but symptoms in the right leg. Dr. Basse also provided a summary of the Claimant's medical records through the IME report of Dr. Shih dated March 31, 2015 (Respondents' Exhibit M, pp. 106-112). She also performed a physical examination in which she noted some range of motion limitation with flexion but not extension and tenderness to what she described as "very light palpation." She noted, "some nonorganic findings" (Respondents' Exhibit M, pp. 113-114). In addressing the issue of causation, Dr. Basse noted the Claimant "currently has two levels of involvement in the lumbosacral spine: The L2-3 level where he has had surgery and the L4-5 level with question of left L5 nerve root impingement and where he is anticipating a second surgery." She felt that more information was needed to determine causality where the reports from the employer, the Claimant and the medical records are "confusing" as to the date of the onset of the symptoms and the activity in which the Claimant may have been engaged when the symptoms arose. Specifically, Dr. Basse felt it was important to have chiropractic records and the first MRI ordered by Dr. Bathke, prior treatment records from the Claimant's PCP to determine the Claimant's baseline condition, and the pathology report from the surgery related to the potential underlying infection (Respondents' Exhibit M, pp. 115-116). Dr. Basse opined that the Claimant "had what seems to be an extensive underlying infection at the L2-3 level that has involved the L5 and S1 nerve roots as well as the right L3 nerve root." Dr. Basse further opined that it was unlikely that he had a separate mechanical lesion at L4-5, however, she noted that the additional medical records she requested were necessary for any more definitive finding with respect to causation (Respondents' Exhibit M, pp. 116-117).

40. On July 1, 2015, Dr. Shih reviewed the medical evaluation of Dr. Basse and provided a supplemental opinion to address this. Dr. Shih noted that, although Dr. Szapiel had suspected the presence of an infection and the MRI report of 10/28/2014 indicated that an epidural abscess must be considered, the final pathology report did not bear this out and the Claimant was not treated post-operatively for an active infection. Thus, Dr. Shih states that, Dr. Basse's report notwithstanding, "the opinions expressed in my original report are unchanged" Respondents' Exhibit D, p. 18).

41. On July 20, 2015, the Claimant reported that after the June 17, 2015 epidural steroid injection at L4-5, he feels like he has had good results and now he has

more good days than bad days. In reviewing an MRI performed on July 15, 2015, Dr. Szapiel noted, “it is without evidence of congenital narrowing of the lumbar canal from L1 through L304. There was some evidence of disc degeneration at L2-3 and L4-5 and some facet degeneration at these levels too. However, Dr. Szapiel did recommend additional neurosurgical intervention at this point. She opined that, “it is possible that later in the future he may require further interventions but as long as he keeps himself relatively healthy he may be able to avoid any other surgical interventions for at least the next two to five years” (Claimant’s Exhibit 3, p. 12).

42. On October 14, 2015, Dr. Szapiel was asked to answer several questions. When asked what she found at the time of surgery, Dr. Szapiel explained, “large amounts of tissue which appeared reactive inflammatory process (the granulation described in the OP report). There was also what looked like a synovial cyst on the adjacent facet joint. The joint itself appeared overgrown. The disc itself was much degenerated.” Dr. Szapiel further responded that the pathology report came back negative, so there was no infection. However, she also noted that “the posterior longitudinal ligament (back wall of disc space) did show a defect in surgery. There was also a large amount of granulation tissue over this region.” Therefore, based on the surgery findings and the pathology, this pointed to “a process that has been prolonged in nature.” Later in her report, Dr. Szapiel noted that, “there was disc degeneration, no acute inflammation” and “what appeared to be a synovial cyst which burst in surgery and large amounts of granulation tissues.” Taken altogether, Dr. Szapiel saw a “constellation of findings” which “point towards a longer acting inflammatory process.” While Dr. Szapiel stated that it was possible that the Claimant had a mechanical injury over the last few months that could have caused the L4/5 disc herniation, she stopped short of stating this was the probable cause. She noted that possible etiologies could include: heavy lifting or twisting forces, trauma or plain degenerative process. The mechanical injury possibility would be more reasonable “if [the Claimant] did not experience significant problems with his back prior to being employed in this job” (Claimant’s Exhibit 1).

43. The Claimant’s leg symptoms improved following surgery. However, he has continued to have back pain at the L4-L5 level. He has been receiving conservative care for his back at the L4-L5 level consisting of medications, physical therapy and steroid injections. The Claimant may ultimately require further surgical repair. The Claimant worked modified duty for Respondent/Employer until he underwent surgery on November 6, 2014. The Claimant was unable to return to his employment at Respondent/Employer following surgery. Claimant continues on work restrictions.

44. In reviewing the medical records and the surgical findings of Dr. Szapiel, it is more likely than not that the Claimant had a history of severe lower back pain that was most severe when the Claimant was required to sit for a long period of time and that existed long before any pain experience on October 11, 2014 or October 13, 2014. Based on her operative findings and the pathology, Dr. Szapiel opined that the constellation of findings pointed toward a longer acting inflammatory process. Even

predating the Claimant's May 2013 work injury, the Claimant was obtaining treatment for sharp low back pain that radiated across his low back and limbs that was described as "chronic" in nature as of May 9, 2013 and which Claimant reported starting on April 2, 2013. After his reported May 14, 2013 low back injury, the Claimant received treatment until being placed at MMI with no restrictions. However, from September 22, 2014 through October 2, 2014 (all prior to the current alleged work injury with an onset of symptoms reported on October 11, 2014 and October 13, 2013), the Claimant was reporting moderate to severe low back pain and bilateral leg pain. Although the Claimant has inconsistently reported an onset of pain while performing laundry duties on October 11, 2014, he admitted that he did not report any incident until October 13, 2014 and he testified that pain from the October 11, 2014 event subsided quickly. It was not until a pain event occurred as he sat down to perform charting duties on October 13, 2014 that the Claimant reported an injury at work. There is no indication that sitting down to complete charting involved heavy lifting or twisting forces or any type of trauma. Rather, pain occurring while sitting is the type of chronic pain that the Claimant had reported in medical records even prior to his May 14, 2013 work injury. Based on a review of all of the medical records and employment records in evidence in this case, the weight of the evidence establishes that the Claimant did not suffer an acute mechanical injury on either October 11, 2014 or October 13, 2014. Nor did the activity of sitting down to chart on October 13, 2014 aggravate, accelerate or combine with a preexisting condition resulting in a need for medical treatment that did not already exist to the same extent it would have existed without the work related activities described by the Claimant.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents, and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Ctr. v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant’s right to compensation initially hinges upon a determination that “at the time of the injury, the employee is performing service arising out of and in the course of the employee’s employment.” C.R.S. § 8-41-301(1)(b). The “arising out of” test is one of causation which requires that the injury have its origins in an employee’s work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* supra; *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The totality of the evidence does not support that the Claimant suffered a compensable injury on either October 11, 2014 while lifting laundry or October 13, 2014 while sitting down to perform charting duties. Although there was some confusion about when the Claimant performed the laundry duties, he testified that he didn't even report an incident since any pain he felt at the time of the laundry lifting incident subsided quickly. He did not report a low back incident until engaged in work activities on October 13, 2014 when he sat down to perform charting. Yet, as the records in evidence showed, the Claimant had been treating for moderate to severe low back pain in the days and weeks prior to October 11, 2014, and indeed, had sought treatment for low back pain radiating into his limbs even prior to a previously admitted work injury on May 14, 2013 where the low back pain was most severe when the Claimant was sitting.

The Claimant's surgeon, Dr. Szapiel, stated that taken all together, she saw a "constellation of findings" which "point towards a longer acting inflammatory process." While Dr. Szapiel stated that it was possible that the Claimant had a mechanical injury over the last few months that could have caused the L4/5 disc herniation, she stopped short of stating this was the probable cause. She noted that possible etiologies could include: heavy lifting or twisting forces, trauma or plain degenerative process. The mechanical injury possibility would be more reasonable "if [the Claimant] did not experience significant problems with his back prior to being employed in this job." In fact, the Claimant did report low back pain prior to his May 2013 admitted injury and his pain events in October of 2014. Records date his low back pain radiating into his limbs as far as April 2013. Based on this and the findings on the Claimant's MRIs, the operative report, and the medical records, it is more likely than not that the Claimant had a low back condition at both the L2-3 and L4-5 levels that required medical treatment prior to any incidents in October of 2014.

Although the Claimant has inconsistently reported an onset of pain while performing laundry duties on October 11, 2014, he admitted that he did not report any incident until October 13, 2014 and he testified that pain from the October 11, 2014 event subsided quickly. It was not until a pain event occurred as he sat down to perform charting duties on October 13, 2014 that the Claimant reported an injury at work. There is no indication that sitting down to complete charting involved heavy lifting or twisting forces or any type of trauma. Rather, pain occurring while sitting is the type of chronic pain that the Claimant had reported in medical records even prior to his May 14, 2013 work injury. The weight of the evidence in this case establishes that the Claimant did not suffer an acute mechanical injury on either October 11, 2014 or October 13, 2014. Nor did the activity of sitting down to chart on October 13, 2014 aggravate, accelerate or combine with a preexisting condition resulting in a need for medical treatment that did not already exist to the same extent it would have existed without the work related activities described by the Claimant.

The Claimant has failed to meet his burden of proving that he suffered a compensable injury while performing services arising out of and in the course of his employment in this case. The work duties performed by the Claimant on either October 11, 2014 or October 13, 2014 did not cause, aggravate, accelerate, or combine with a preexisting disease or infirmity to produce the need for treatment.

Remaining Issues

Because the injury is not compensable, the remaining issues regarding medical benefits and disability benefits are moot.

ORDER

Based on the above factual findings and legal conclusions, it is therefore ORDERED that:

1. The Claimant has failed to meet his burden of proving a compensable injury by a preponderance of the evidence by establishing that his lower back condition was caused by a work injury occurring on October 11, 2014 or October 13, 2014

2. The Claimant's claim for benefits under the Workers' Compensation Act of Colorado is therefore denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 16, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. WC 4-726-134-07 & WC 4-712-263

ISSUES

The following issues were raised for consideration on remand:

1. What does the Industrial Claims Appeal Panel (ICAP) Order of Remand dated September 8, 2015, direct the Judge to do in regards to Claimant's claims in cases numbered W.C. 4-726-134-07 and W.C. 4-712-263; and

2. Whether Claimant proved by preponderance of the evidence that he is entitled to an order awarding penalties under Section 8-43-304, C.R.S.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the Judge enters the following Findings of Fact.

1. On September 8, 2015, ICAP entered a Remand Order in consolidated cases number WC 4-726-134-07 and 4-712-263. ICAP remanded this matter to the ALJ to conduct a hearing and determine whether Claimant is entitled to an order awarding penalties under Section 8-43-304, C.R.S., in WC 4-726-134-07.

2. On December 11, 2015, at Respondents' request, a prehearing conference was held before Prehearing Administrative Law Judge (Prehearing ALJ) Michael Harr. PALJ Harr ruled that on remand Claimant could proceed to hearing in WC 4-726-134-07 on the limited issue of penalties under Section 8-43-304, C.R.S.

3. In WC 4-726-134-07, Claimant alleged a work related injury to his left hip. A penalties hearing was held on February 17 and April 15, 2016, to determine whether Claimant proved by a preponderance of the evidence that he is entitled to an award of penalties against Respondents for their alleged failure to respond to a previous order issued by the Division of Workers' Compensation dated March 29, 2007.

4. In WC 4-712-263, Claimant alleged an injury to his right shoulder. In regards to WC 4-712-263 and WC 4-726-134-07, the Remand Order addressed the issue of Claimant's right to file and pursue a claim for workers' compensation benefits without legal representation. ICAP stated in the Remand Order that Prehearing ALJs and hearing ALJs are not judges of general jurisdiction and, therefore, the authority to enjoin Claimant from participating in an administrative proceeding without legal counsel is not a power allocated to them. While ICAP's discussion of this

topic was detailed in the Remand Order, ICAP did not direct the Judge to take any particular action in regards to WC 4-712-263.

5. At the February 17, 2016, hearing the ALJ had a file containing the December 11, 2015, Order of the Prehearing ALJ and Claimant's "case information sheet." A "case information sheet" is a docket management tool used by OAC to manage that office's resources. It is not considered a pleading. However, attached to Claimant's "case information sheet" was a letter dated March 29, 2007, regarding case number WC 4-712-263 from the Claims Management Unit of the Division of Workers' Compensation, Department of Labor and Employment, a Final Admission of Liability dated March 20, 2007, regarding case number WC 4-712-263 and a MRI report dated November 1, 2006, regarding Claimant's right shoulder.

6. At hearing, Claimant represented that he would present no evidence and that the only relevant document was the September 8, 2015, Remand Order. Claimant argued that, on the basis of the Remand Order, the ALJ must award penalties under Section 8-43-304, C.R.S., in claim number WC 4-726-134-07 for Respondents' alleged failure to respond to an order of the Director of the Division of Workers' Compensation dated March 29, 2007. Claimant offered the Court a copy of the September 8, 2015, Remand Order.

7. At the February 17, 2016, hearing, Respondent did not move documents into evidence, but offered an array of certified documents pertaining to these consolidated cases for the judges' perusal. These documents included: a December 3, 2014, Application for Expedited Hearing in WC 4-726-134-07; the September 8, 2015, Remand Order in WC 4-726-134-07 and 4-712-263; an April 1, 2015, Director's Order in WC 4-726-134-07 and WC 4-712-263; and Prehearing Conference Orders dated November 5, 2009, January 8, 2015, February 4, 2015, March 13, 2015, and December 11, 2015, in WC 4-726-134-07 and WC 4-712-263.

8. At the February 17, 2016, hearing, the ALJ ruled from the bench granting Respondents' Motion for Directed Verdict concluding that Claimant failed to sustain his burden of proof in consolidated cases number WC 4-726-134-07 and WC 4-712-263 and judgment was entered for Respondents.

9. The following day, on February 18, 2016, the ALJ vacated the bench order entered the previous day on the grounds that Claimant's case required further consideration. The parties were directed to reappear for a hearing on April 15, 2016, at which the parties could endorse documentary evidence for consideration at hearing in support of their respective positions on the issues addressed in the Remand Order. The ALJ ruled that in WC 4-712-263 involving the Claimant's alleged right shoulder injury, the matter was before the ALJ pursuant to the September 8, 2015,

Remand Order and the ALJ would entertain argument regarding the parties' respective positions on this claim.

10. At the April 15, 2016, hearing, where Claimant appeared via telephone, the Court prompted Claimant to offer Exhibit 1 into evidence in support of his claims in WC 4-726-134-07 and WC 4-712-263. Claimant's Exhibit 1 is the above described "case information sheet" with attachments regarding the right shoulder claim in WC 4-712-263: a letter dated March 29, 2007, regarding case number WC 4-712-263 from the Claims Management Unit of the Division of Workers' Compensation, Department of Labor and Employment, a Final Admission of Liability dated March 20, 2007, regarding case number WC 4-712-263 and a MRI report dated November 1, 2006, regarding Claimant's right shoulder. These documents were admitted into evidence.

11. On April 15, 2016, Claimant reiterated accusations regarding his mistreatment by OAC and Division of Workers' Compensation personnel, his entitlement to penalties based solely upon the September 8, 2015, Remand Order, his lack of documentary evidence in support of his claims being due to the fact that he deposited the evidence with the numerous Prehearing ALJs he appeared before and they did not return the documents to Claimant and Claimant's pursuit of justice.

12. On April 15, 2016, Respondents moved for a directed verdict at the conclusion of Claimant's case. Respondents relied on a packet of documents attached to a March 3, 2016, Motion for Reconsideration of the February 18, 2016, Order. The packet of documents were marked and admitted as Respondents' exhibits A through Q. Respondents' motion for a directed verdict was taken under advisement. Respondents rested their case on the Exhibits marked A through Q.

13. In WC 4-726-134-07, Claimant did not present evidence and rested upon the September 8, 2015, Remand Order. Claimant contended that the Remand Order, without more evidence, required the Court to impose penalties. It is found that Claimant failed to sustain his burden of proof to establish that he was entitled to penalties under Section 8-43-304, C.R.S. Claimant presented no evidence that there was a violation of the Act or director's order justifying a penalty under Section 8-43-304, C.R.S. Therefore, the claim for penalties in WC 4-726-134-07 is denied.

14. The documents in Exhibit 1 refer to the Claimant's alleged right shoulder injury in WC 4-712-263 and do not have relevance to Claimant's alleged left hip injury or the claim for penalties in WC 4-726-134-07. Claimant did not offer testimony or make argument regarding the right shoulder claim in WC 4-712-263. Claimant took no position with regard to the right shoulder injury and focused his attention on his claim for penalties in the left hip claim.

15. Respondents contended that the September 8, 2015, Remand Order only ordered the ALJ to consider the Claimant's claim for penalties in WC 4-726-134-07. Respondents maintained that no order was entered regarding the right shoulder injury.

16. The Court agrees and finds that in the Remand Order of September 8, 2015, in WC 4-712-263, ICAP did not direct the Court to consider the claim. Further, the ALJ finds that if WC 4-712-263 is a claim before the Court no credible or persuasive evidence was presented to support a claim for workers' compensation benefits for Claimant's right shoulder or an award of penalties, if a penalties claim exist. Accordingly, it is found that the claim in WC 4-712-263 is denied and dismissed.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. In this case, the Judge has been ordered on remand from ICAP to consider the question of whether Claimant is entitled to award of penalties under

Section 8-34-304, C.R.S. for the left hip injury in WC 4-726-134-07. Claimant contends that ICAP has found that Respondents failed to comply with an order of the director and, without more evidence, this judge should enter an order awarding penalties. Whether statutory penalties may be imposed under Section 8-43-304(1), C.R.S., involves a two-step analysis. The statute provides for the imposition of penalties of up to $1000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (I.C.A.O. August 2, 2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

4. The question of whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. If the claimant makes such a prima facie showing the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra, Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

5. In WC 4-726-134-07, Claimant failed to make a prima facie showing that the insurer violated an order made by the director. There is reference made in the September 8, 2015, ICAP Remand Order to a March 29, 2007, order of the Director that is alleged to be violated. And, Exhibit 1 does contain a copy of a letter dated March 29, 2007, from the Claims Management Unit in WC 4-712-263. However, Claimant did not present evidence of an order of the director in the left hip injury case in WC 4-726-134-07 or evidence that such an order was violated by Respondents. Furthermore, it is noted that the letter from the Claims Management Unit dated March 29, 2007, does not constitute an order of the director. It is a letter on Department of Labor and Employment, Division of Workers' Compensation, Compensation Services stationary which is unsigned by the "Claims Management Unit, TERM6." There is no credible or persuasive evidence here that the "director" issued an order in this case that was not complied with by Respondents. In the absence of such evidence, Claimant has failed to sustain his burden of proof.

ORDER

It is therefore ordered that:

Claimant's claim for an award of penalties in WC 4-726-134-07 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 16, 2016__

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law
Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-937-471-05

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the artificial disc replacement surgery recommended by Michael Janssen, D.O. is reasonable, necessary, and casually related for the treatment of Claimant's admitted industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On December 12, 2013, Claimant Steven Morgan, Jr. was employed with Swift Transportation. Claimant was a local driver, which required him to retrieve loads of goods using his tractor trailer and transport the load to its designated delivery location.

2. In the early evening on December 12, 2013, Claimant was stopped in eastbound traffic on Interstate 70 near the Golden, Colorado in his fully loaded tractor trailer. Just prior to resuming forward movement as traffic began to proceed, another fully loaded tractor trailer rear-ended Claimant's vehicle with great force.

3. The collision between the two vehicles was forceful enough to jolt Claimant forward, to cause the vehicle's gear shifter to dislodge from the vehicle's transmission, and to cause a computer to fall from the dash of Claimant's vehicle.

4. Claimant immediately began to experience sever spasms in his back that made it extremely difficult to move and breathe.

5. After removing his vehicle from the roadway and securing it, Claimant was transported to the hospital by ambulance.

6. Michael E. Jannsen D.O., performed two earlier surgeries on Claimant's back related to unrelated motor vehicle accidents in 1999 and 2006. Claimant's low back was asymptomatic since undergoing a decompression surgery for the L4-5 and L5-S1 levels in 2008.

7. Dr. Janssen became one of Claimant's authorized treating physicians in the instant matter. Dr. Janssen has opined that the artificial disc replacement surgery he is recommending at the L5-S1 level is necessary and reasonable to alleviate Claimant's symptoms. He has also opined that the recommended surgery is causally related to Claimant's December 12, 2013, industrial injury because he had been asymptomatic since 2008. Respondents challenge those opinions.

8. Brian Reiss, M.D. performed a Respondents' IME on December 2, 2015. Dr. Reiss performed a physical examination of claimant. Claimant stated that he had central lower back pain from 4-7/10. Claimant also complained of bilateral buttock burning/pain left more than right. Claimant had some symptoms to the posterior thigh, which included tingling and burning, with the left side constant and the right side intermittent. Claimant described his lower extremity symptoms at 3-4/10. Dr. Reiss diagnosed Claimant with low back pain and degenerative change. Dr. Reiss opined that Claimant needed to complete additional physical therapy. Dr. Reiss opined that claimant had some physical therapy, but Claimant did not have a significant amount of core strengthening or aerobic conditioning. Dr. Reiss noted that the Colorado Division of Workers' Compensation Treatment Guidelines ("Guidelines") require identification of the pain generator prior to proceeding with the surgical intervention. Dr. Reiss opined that, in this particular case, the pain generator could be the L5-S1 disc, the L4-L5 disc, or that Claimant's pain may not even be from any of the low back discs. Dr. Reiss opined that the pain generator has not been identified. Dr. Reiss opined that the Guidelines require that surgery have a greater likelihood of improving Claimant's condition then continuing with nonsurgical intervention. Dr. Reiss testified that the surgery, at this point, was not reasonable and necessary.

9. Claimant has undergone diagnostic procedures, including, but not limited to, multiple MRIs of his cervical and lumbar spine and an EMG nerve study.

10. Claimant participated in chiropractic treatment from approximately December 14, 2013, through the end of January 2014.

11. Claimant also completed physical therapy for more than two months following the December 12, 2013, industrial injury. During physical therapy, Claimant participated in a variety of exercises he believed were designed to improve his core strength. These exercises included, but were not limited to, resistance training with an abdominal machine, utilizing elastic bands, stretching, and leg lifts. Claimant's physicians discontinued his physical therapy shortly after it began due to Claimant's reports of increased pain. While Claimant's treatment providers may have intended that Claimant resume physical therapy once his symptoms/condition improved; no further therapy was provided.

    - Dr. Janssen opined that Claimant's disc at the L5-S1 level is collapsed and has no structural integrity, an anatomical change causing Claimant's symptoms. He thus opined that fixing the anatomical change will provide Claimant with the most relief, whereas additional physical therapy to strengthen his core will do nothing to fix the anatomical change.

    - Dr. Reiss opined that Claimant's complaints of back pain without significant decompression would be best treated with physical therapy , including core strengthening, stretching, and aerobic conditioning.

12. On October 1, 2015, Dr. Janssen noted vertical instability at L5-S1. However, no instability was noted on Claimant's September 28, 2015 lumbar MRI, which specified that the findings at L4-L5-S1 all are "stable," with the impression being, "Stable multilevel disc bulging and slight nerve root abutment." Also, the January 2, 2014 MRI indicated normal lumbosacral height.

13. Claimant asserts (1) that the Guidelines mandate that patients reflecting clear pathology "should be definitively treated within six months because . . . their chances of returning to work and getting the best functional outcome is interven[tion] in less than six months;" and (2) that Claimant has been with symptoms for over two years.

14. Claimant's pain generator has not been conclusively identified – a requirement for treatment. Claimant had a positive response to transforaminal epidural steroid injections at right L5-S1, and S1. He also had a positive response to November 11, 2014 facet injections for "painful facet arthropathy" at right L4-L5 and right L5-S1; reporting that his pain decreased from 6/10 pre injection, to 0/10 post injection. Similarly, PA-C Brasfield noted that Claimant likely had facetogenic pain on the right at L5-S1 and L4-L5. She also noted possible SI joint dysfunction on the right. Dr. Wunder also assessed "probable bilateral sacroiliac joint dysfunction."

15. Dr. Reiss testified that there were multiple possible pain generators, and that the true pain generator had not been identified. Dr. Reiss testified that Claimant had degenerative change at L4-L5 and L5-S1 and that some people would look at the L4-L5 level and note that Claimant had a high intensity zone and that could be the cause of the pain. Dr. Reiss testified that high intensity zones are possibly associated with pain. He also testified that Claimant had degenerative change at L3-L4. Dr. Reiss testified that Claimant could have myofascial pain, SI joint pain, and/ or multiple possible pain generators.

16. Dr. Reiss further testified that Claimant had epidural steroid injections which temporarily relieved his pain, and that epidural injections are not designed to identify discogenic pain. They are designed to help with nerve pain. Dr. Reiss also testified that Claimant had facet blocks, which also temporarily relieved his pain. Dr. Reiss testified that Claimant had two different tests, the facet and the epidurals, that took away his pain. However, that would negate the findings as far as how can they both, the facet or the nerve pain, be a pain generator. Dr. Reiss also testified that the positive response to the facet blocks was a contraindication for doing a disc replacement because the disc replacement does not take into account the movement through the joint. Dr. Reiss testified that if claimant had facet mediated pain and then there is a disc replacement, it would be a contraindication because the facet would still move and cause pain.

17. Dr. Reiss testified that Claimant did not have one level of involvement in his lower spine, but has at least two and perhaps other levels of lesser degree of degeneration, and two levels that he had previous surgery. Dr. Reiss testified

that Dr. Janssen is choosing one level arbitrarily, and that is illogical given Claimant's multiple levels of degeneration, with two levels being particularly bad, and other that are less bad. Dr. Reiss testified that the degree of degenerative change does not indicate whether one level versus another is the source of pain. Dr. Reiss testified that a disc with no degeneration might be painful; a disc with a little degeneration may or may not be painful; and a disc with a lot of degeneration may or may not be painful. Dr. Reiss testified that none of Claimant's discs may be the source of his pain. The pain generator was not clearly identified. Dr. Reiss testified that if Dr. Janssen were stating that because Claimant had previous surgery at L5-S1, that that level is now the source of the pain; the same argument would apply to L4-L5, and there would be a 50-50 chance that one of those discs was the pain generator. Dr. Reiss testified that Dr. Janssen has not explained or documented why the pain generator is at L5-S1, and that Dr. Janssen has not established a foundation why the pain generator is at L5-S1.

18. Dr. Reiss testified that the disc replacement in the lumbar spine is not a good surgery. Dr. Reiss testified that a disc replacement in the lumbar spine is an alternative to performing a fusion, but that both procedures have limited success at treating axial, or non-nerve root pain, in the low back. Dr. Reiss testified that a disc replacement in the low back is not generally used for radiculopathy into the extremities. Dr. Reiss further testified that he does not believe Claimant will have a successful outcome with the artificial disc replacement surgery because lumbar fusions and lumbar artificial disc replacements do not work particularly well.

19. Dr. Janssen did not address how or whether he had Claimant's disc at L5-S1 as Claimant's only pain generator. He did not discuss how Claimant's responses indicated that facet generated pain were ruled out. He also testified that numbness or tingling in Claimant's scrotum would be findings that did not match L5-S1 pathology. But he did not explain how Claimant's testimony and numerous medical records documented that he felt like his testicles were constantly being squeezed were consistent with pathology at that level.

20. Dr. Janssen testified that disc replacement at Claimant's L5-S1 level is more advantageous for Claimant than undergoing a fusion at that level for the following reasons:

- replacing the disc will preserve movement in Claimant's spine, resulting in fewer future problems at the L4-5 level that has a small annular tear;

- the recommended disc replacement surgery would be performed by entering through the Claimant's abdomen rather than through his back. As a result, there is no chance of adding additional scars because the surgery will not be on the spinal canal itself, like a fusion;

- Claimant’s expected recovery time is between two and three months for the recommended disc replacement surgery, as opposed to a fusion surgery’s recovery time of between nine and twelve months; and

- patients who undergo disc fusion surgery are two to three times more likely to require a future fusion surgery at an adjacent level than those that undergo a disc replacement surgery. As a result, the disc replacement surgery being recommended for Claimant will likely lead to less surgery over all.

21. The ALJ credits Dr. Reiss’s testimony and reports and the Rule 17 Treatment Guidelines to find that the L5-S1 total disc replacement is not reasonable and necessary. Dr. Reiss credibly testified that Claimant could have multiple pain generators, which should be identified before the L5-S1 artificial disc replacement could occur. Dr. Reiss testified that the pain generator could be the L5-S1 disc, could be the L4-L5 disc, could be the facets, could be myofascial pain, or it might not even be pain from any of the discs in claimant’s low back. Clamant testified that he had pain and tingling going down into his right lower extremity, which could be nerve pain. Additionally, Dr. Reiss testified that Claimant had two different sets of injections, epidural steroid injections and facet injections, in which both injections temporarily relieved Claimant’s pain. The epidural steroid injection was to treat nerve pain and the facet injection was to treat facet pain. Given that Claimant had a positive response to both types of injections is a contraindication that the artificial disc replacement at L5-S1 should be performed because the pain generator could be nerve pain or could be facet pain. It would not be disc pain. Nonetheless, if Claimant’s nerve pain and/or facets are the pain generators that would negate the reasoning for an L5-S1 artificial disc replacement because an artificial disc replacement does not help nerve pain or facet pain. Moreover, Claimant also had two facet injections on November 11, 2014 at the L4-L5 and L5-S1 level. By undergoing injections at two different levels, there is the possibility of at least two different pain generators. Artificial disc replacements are used to only replace one level in the spine, not two.

22. The ALJ does not find Dr. Janssen’s testimony to be persuasive. Dr. Janssen did not follow the Treatment Guidelines in identifying a pain generator or explain why he believes that L5-S1 is the pain generator. Dr. Janssen did not rule out nerve pain or facet pain, which should be completed pursuant to the Treatment Guidelines.

23. The ALJ credits the August 11, 2008 medical record in which Dr. Janssen opined that Claimant would likely need a fusion surgery at some point in time in the future. Although there was some testimony that related the need for the L5-S1 total disc replacement to the December 12, 2013 work related accident, Dr. Janssen already thought -- as far back as August 11, 2008 -- that Claimant would need a fusion surgery. Dr. Janssen noted that Claimant would need some sort of back surgery in the future, regardless of whether claimant was involved in an

accident. If there is a need for the L5-S1 artificial disc replacement, it is not causally related to the December 12, 2013 work accident because low back surgery was already being contemplated as of August 11, 2008.

24. Claimant has not met his burden of establishing that the recommended L5-S1 artificial total disc replacement is reasonable, necessary, and related to his December 12, 2013 work related motor vehicle accident. Claimant's claim for medical benefits is denied.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2015. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, the employee must prove a causal relationship between the injury and the medical treatment for which she is seeking benefits. *Snyder v. Indus. Claims Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. ICAO*, 49 P.3d 1187, 1189 (Colo. App. 2002).

W.C.R.P. Rule 17, Exhibit 1 sets forth the treatment guidelines for low back conditions. Rule 17 sets forth care that is generally considered reasonable for most injured workers. Further, while an ALJ is not required to utilize Rule 17 as the sole basis for making determinations as to whether medical treatment is reasonable, necessary and related to an industrial injury, it is appropriate for the ALJ to consider Rule 17 in making such determinations. § 8-43-201(3), C.R.S.

W.C.R.P. Rule 17, Exhibit 1, Section G 11 states the requirements for proceeding with an artificial disc replacement, which include:

- symptomatic one-level degenerative disc disease established by objective testing (CT or MRI scan followed by [positive provocation discogram]);
- symptoms unrelieved after six months of active non-surgical treatment;
- all pain generators are adequately defined and treated;
- all physical medicine and manual therapy interventions are completed;
- spine pathology limited to one level; and
- psychosocial evaluation with confounding issues addressed.

Some of the contraindications for the artificial disc replacement pursuant to the Guidelines are symptomatic facet joint arthrosis-if imaging findings and physical exam of pain on extension and lateral bending are present, exploration of facet originated pain should be completed prior to disc replacement; evidence of nerve root compression, multiple-level degenerative disc disease; and morbid obesity.

Rule 17 also provides that all health care providers shall use the guidelines. In this case, Dr. Janssen did not follow the Guidelines in recommending artificial disc replacement. Dr. Janssen did not identify and treat the pain generator. There are multiple pain generators that could be the cause of claimant's pain. The pain generator could be the L5-S1 level; however, the pain generator could also be the L4-L5 disc, facet pain, myofascial pain, or nerve pain, given that claimant is complaining of tingling and pain down his lower extremity. In this instance, there is the possibility of symptomatic multi-level degenerative disc disease, not the symptomatic one-level degenerative disc disease required by the Guidelines. The degenerative disc disease was confirmed through MRIs. Additionally, given that there was a positive MRI, Dr. Janssen was required to perform a discogram, which was not performed. The spine pathology has not been limited to one level. There is the possibility of spine pathology at L4-L5 and even at L3-L4. Dr. Janssen did not follow the Rule 17 Guidelines in recommending the artificial disc replacement at L5-S1.

Moreover, pursuant to Rule 17 Guidelines, Dr. Janssen has not ruled out facet joint arthrosis. Claimant underwent facet injections, which relieved his pain. This is an indication of facet mediated pain, which would not be relieved by the L5-S1 artificial joint replacement. Additionally, a contraindication for the artificial disc replacement is multilevel degenerative disc disease, which has been diagnosed by Dr. Reiss and Dr. Janssen. The multilevel degenerative disc disease is also pronounced on the MRI evaluations. Claimant is also obese, which is a contraindication. Dr. Janssen failed to look at the contraindications when recommending and asking for prior approval of the L5-S1 artificial disc replacement surgery.

As found, the totality of the evidence is that the pain generator has not been clearly identified pursuant to the Rule 17 Guidelines. Additionally, claimant's spine pathology has not been limited to one level. Claimant also has multilevel degenerative disc disease, which can preclude the L5-S1 artificial disc replacement. As such the ALJ determines and finds that claimant has not met his burden of proof in establishing the reasonableness and necessity of the L5-S1 total disc replacement. Claimant has also not met his burden in proving that the alleged need for the L5-S1 total disc replacement is causally related to the December 12, 2013 motor vehicle accident.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for medical benefits in the form of L5-S1 total disc replacement is denied and dismissed.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 16, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-958-125-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 10, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 5/10/16, Courtroom 4, beginning at 2:30 PM, and ending at 4:15 PM).

Claimant's Exhibits1 through 3 were admitted into evidence, without objection. Respondents' Exhibits A through K were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents. The proposed decision was filed, electronically, on May 17, 2016. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the Claimant's entitlement to temporary total (TTD) and/or temporary partial disability (TPD) benefits from October 19, 2015 through November 15, 2015; and, medical benefits, specifically, whether the bone graft surgery recommended by William Sterett, M.D., is reasonably necessary, absent an indication that the Claimant has stopped smoking for a reasonably acceptable period of time prior to the recommended surgery.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The parties stipulated and the ALJ finds that Claimant is entitled to a closed period of TTD benefits between October 19, 2015, when his employment with the Employer was terminated, and November 15, 2015 when he returned to work full time with a new employer. The parties further stipulated, and the ALJ finds that Claimant is not entitled to TPD benefits to date.

2. The Respondents filed a General Admission of liability (GAL), dated October 26, 2015, admitting for reasonably necessary and causally related medical benefits; an average weekly wage (AWW) of $1,422.44; and, TTD benefits of $881.65 per week (the maximum rate, from August 12, 2014 through July 5, 2015. The GAL is currently in effect.

3. The Claimant is a forty-one-year-old man formerly employed by the Employer as a journeyman plumber.

4. The medical records reveal that the Claimant smoked over a pack of cigarettes per day since 1998. The Claimant also admitted that he chews tobacco as well.

The Injury

5. On August 11, 2014, the Claimant set up his ladder too close to a hole in the floor. The ladder tipped into the hole causing Claimant to fall approximately 10 feet. He experienced immediate symptoms in his left lower extremity (LLE). He was taken by ambulance to the emergency room (ER) where he was diagnosed with a displaced tibial and fibular fracture. He underwent surgery for open reduction and internal fixation of the fractures.

6. The Claimant was warned by Dr. Sterett at the time of his initial surgery that his smoking created a risk of non-union of the fractures, but the Claimant declined assistance to stop smoking.

Aftermath

7. The Claimant followed up with the surgeon, Dr. Sterett, on August 20, 2014. The Claimant was still having a great deal of pain and had developed fracture blisters. Dr. Sterett again encouraged the Claimant to stop smoking. Dr. Sterett recommended a smoking cessation program. The Claimant continued to smoke and did not request the smoking cessation program.

8. The Claimant had another appointment with Dr. Sterett on September 22, 2014. Dr. Sterett again urged the Claimant to stop smoking immediately.

9. At his Concentra appointment on October 7, 2014, the Claimant stated that he had stopped smoking two weeks previously.

10. The Claimant had a second orthopedic opinion with David B. Hahn, M.D., on December 3, 2014. The x-rays did not show much evidence of healing of the tibial fracture. The Claimant resumed smoking at some point following this appointment.

11. The Claimant had an appointment with Dr. Sterett, on July 13, 2015. The Claimant was still having pain in his leg with mild complaints of instability. It was noted that the Claimant was very slow to heal. A CT scan from December was reviewed and showed 60%-70% healing of the fracture.

12. The Claimant was evaluated by Samuel Y. Chan, M.D., on July 28, 2015. Dr. Chan noted in the social history that Claimant smokes a pack per day.

13. On January 18, 2016, the Claimant was re-evaluated by Dr. Sterett. The Claimant continued to have anterior shin pain. X-rays showed persistent non-union of the proximal tibia. Dr. Sterett recommended a second surgery for bone grafting and placement of a bone stimulator. He counseled the Claimant that he would need to give up smoking before any additional surgery could be performed.

Independent Medical Examination (IME) by Timothy O’Brien, M.D.

14. Dr. O’Brien performed an IME on February 15, 2016. The Claimant admitted he was still smoking a pack or more of cigarettes a day, but he was willing to stop if it meant he could get his leg fixed. It was Dr. O’Brien’s opinion that the Claimant was not a candidate for another surgery until he discontinued smoking. Dr. O’Brien testified consistently with his report. He stated the opinion that nicotine in any form (smoking or chewing) interfered with the healing process. Dr. O’Brien was of the opinion that a second surgery was not reasonably necessary if the Claimant continued to smoke or use chew. Dr. O’Brien stated that the Claimant should demonstrate he has stopped smoking and chewing for a minimum of three months prior to any additional

surgery. It was Dr. O'Brien's recommendation that the Claimant submit to nicotine testing every two weeks. Surgery could be performed if the nicotine testing was negative for three months. The ALJ finds Dr. O'Brien's opinions in this regard highly persuasive and credible.

15. Dr. O'Brien made it clear that the Claimant had to be off nicotine for three months before surgery could help the Claimant's condition (and the procedure would most likely fail again if the Claimant was using nicotine).

The Claimant

16. The Claimant adamantly testified initially that he stopped smoking several months before the hearing. He later admitted that he continued to smoke occasional cigarettes after he was confronted with surveillance showing him smoking on May 6, 2016 (four days before the hearing). The Claimant also admitted that he was still chewing tobacco.

Ultimate Findings

17. Dr. O' Brien's testimony that a second surgery is not reasonably necessary unless the Claimant stops smoking for a minimum of three months prior to surgery is highly credible and persuasive. Dr. O'Brien's testimony is supported by the medical records of Dr. Sterett which indicate that the Claimant would have to give up smoking before he would perform any additional surgery. The Claimant's testimony that he had stopped smoking is not credible because he admitted he is still smoking after being confronted with recent surveillance. Additionally, the Claimant admitted that he is continuing to chew tobacco.

18. The Claimant has failed to sustain his burden of proof, by preponderant evidence, to show the bone graft surgery recommended by Dr. Sterret is reasonably necessary unless the Claimant stops smoking for a minimum of three months prior to surgery.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684

(Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Sterett and IME Dr. O'Brien are highly credible and persuasive and, therefore, dispositive of the issue at hand at this time.

Reasonable Necessity of Recommended Surgery

b. Section 8-42-101 (1) (a), C.R.S., makes the Respondents liable for reasonably necessary medical procedures necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the surgery recommended by Dr. Sterett is **not** reasonably necessary **to cure and relieve the effects of the injury** until the Claimant has stopped smoking for at least three months prior to the surgery.

Burden of Proof

c. The injured worker has a continuing burden of proof, by a preponderance of the evidence, to establish entitlement to medical benefits challenged by the Employer. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain his burden, at this time, with respect to the surgery recommended by Dr. Sterett.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The request for the surgery recommended by William Sterett, M.D., is hereby denied and dismissed at this time.

B. If the Claimant desires the recommended surgery at a future time, he must demonstrate that he has stopped smoking for at least three months, by testing for nicotine every two weeks and coming out negative for nicotine each time.

C. Any and all issues not determined herein are reserved for future decision.

DATED this______day of May 2016.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

Whether Claimant has proven by a preponderance of the evidence that the artificial disc replacement recommended by Dr. Bhatti is reasonable, necessary, and casually related to the treatment of Claimant's admitted industrial injury.

FINDINGS OF FACT

1. On September 18, 2013 while working for respondent-employer, the claimant was putting away hangers when a table and ladder fell and struck her from behind, landing on her neck. The claimant was transported to St. Mary-Corwin Emergency Room where she complained of posterior neck pain that went into her left arm. The claimant underwent a CT scan, which was negative. The claimant was diagnosed with a closed head injury, concussion, and cervical spine contusion.

2. The respondent-insurer admitted liability for the incident.

3. The claimant continued to seek treatment through workers' compensation. Throughout her claim, the claimant received extensive conservative treatment including physical therapy, medications, chiropractic care, pain management, massage therapy, acupuncture and injections, all of which did not reportedly provide the claimant with any relief.

4. On November 7, 2014 the claimant was evaluated by Dr. David Wong, a spine surgeon. After examination, Dr. Wong opined, that the claimant was not a surgical candidate, should continue conservative treatment, and undergo injections.

5. On March 5, 2015 Dr. Kathleen D'Angelo performed an independent medical evaluation (IME) of the claimant. After examination, Dr. D'Angelo opined that the claimant's preexisting diagnoses were myofascial syndrome, degenerative disc disease, and impingement syndrome of the shoulder. The claimant's work-related diagnoses were a contusion of the cervical and thoracic region that had resolved. Dr. D'Angelo opined the claimant was at maximum medical improvement (MMI) and did not sustain permanent physical impairment.

6. On June 3, 2015 the claimant attended a follow-up exam with her authorized treating physician (ATP), Dr. Daniel Olson. Dr. Olson noted, “I personally have not recommended surgery in her case due to the diffuse nature of her degenerative discs. Also, the EMG did not show radiculopathy.”

7. On August 10, 2015 the claimant was evaluated by a second spine surgeon, Dr. Stephen Johnson. Upon examination, Dr. Johnson noted that he did not see a clear focal neurological deficit on the MRI and degenerative changes were noted at C5-6. Dr. Johnson opined that he was not optimistic that surgical intervention directed at the C5-6 disc would significantly improve her symptoms.

8. After the claimant’s evaluation with Dr. Johnson, the claimant was evaluated by Dr. Sana Bhatti on October 1, 2015. Dr. Bhatti opined the claimant presented with neck and left arm pain with numbness and paresthesias. Dr. Bhatti opined that the claimant had a left radiculopathy and recommended the claimant undergo either a fusion or receive an artificial disc replacement at C5-6.

9. Dr. Bhatti’s diagnosis of left radiculopathy was not substantiated by the claimant’s EMG or any other diagnostic testing.

10. The claimant underwent an IME with Dr. Michael Rauzzino on December 19, 2015 at the request of respondents. After reviewing the claimant’s medical records and performing an examination, Dr. Rauzzino opined, “Based on my examination and the documentation from the other treating physicians including Dr. Johnson and Dr. Wong, [the claimant] does not have a C6 radiculopathy; she has primarily axial neck pain with a 10% radicular symptom which are not necessarily in the C6 dermatome. She has degenerative changes at C5-6. She does not have a left sided C5-6 disc herniation on current imaging. She is not a surgical candidate…EMG is negative. I would add that based on her scores with COMT testing, one would have to be concerned about psychological overlay or somatization given her severe subjective complaints, which do not necessarily correlate with her radiographic findings and the prolonged nature of her complaints since the injury over two years ago.”

11. Dr. Olson testified via deposition for the claimant on March 11, 2016. At his deposition, Dr. Olson was admitted as a level II accredited physician and an expert in occupational medicine. Dr. Olson is not an orthopedic specialist and does not perform orthopedic surgery.

12. Dr. Olson initially testified that he agreed with Dr. Bhatti’s recommendation for surgery, however his testimony was not strongly in favor of the surgery nor did he

provide any independent rationale for his agreement with Dr. Bhatti over the opinions of the three other orthopedic surgeons who have evaluated the claimant. When Dr. Olson was then asked to review his report dated June 3, 2015 which agreed the claimant was not a surgical candidate, he testified, “I think the – the – I guess the wrench that throws things off is that when she did see Dr. Bhatti, he was so positive that that was her problem that she feels like that he can fix it and that will solve the problem. I just wish the other surgeons were at least close to that.”

13. Dr. Olson was asked if he was “a little on the fence” regarding Dr. Bhatti’s surgical recommendation, Dr. Olson replied, “Yes.” Dr. Olson acknowledged Dr. Wong and Dr. Johnson, the two orthopedic surgeons he originally selected for referral and evaluation of the cervical condition, did not recommend surgery. Dr. Olson testified that he had referred the claimant to both of these surgeons, and that he had confidence in their skills and opinions.

14. Dr. Rauzzino testified via deposition for respondents on March 8, 2016. Dr. Rauzzino was admitted as a level II accredited physician and an expert in medicine and neurosurgery. Dr. Rauzzino testified that he had performed a number of artificial cervical disc replacement surgeries.

15. When asked about Dr. Olson’s assessment of the EMG and nerve conduction testing, he testified, “The EMG did not confirm a C6 radiculopathy. So it would be -- would state that the proposed surgery would not likely relieve her symptoms. The EMG only showed some mild carpal tunnel disease, but no evidence of a cervical radiculopathy.”

16. Dr. Rauzzino reviewed both Dr. Wong’s and Dr. Johnson’s surgical consultations regarding the claimant’s diagnosis and testified that neither surgeon had diagnosed a cervical lesion at C5-6 or a disc herniation. He further testified that neither Dr. Wong nor Dr. Johnson had recommended surgery at C5-6.

17. With regards to Dr. Bhatti’s diagnosis of the claimant, Dr. Rauzzino testified, “When I look at the pictures myself, I don’t really think that there’s a soft disc herniation. I think she has osteophytic disease and not an acute soft disc herniation. And it’s not to the left side, with all due respect to Dr. Bhatti.” There are substantial differences between Dr. Rauzzino’s interpretation of the MRIs of the claimant’s spine and Dr. Bhatti’s. Drs. Wong and Johnson, by their opinions that the claimant was not a surgical candidate, support Dr. Rauzzino’s interpretation of the MRI films.

18. Dr. Rauzzino disagreed with Dr. Bhatti's diagnosis and request for surgery and testified, "I don't think she has a left-sided disc herniation…she has some bone spurring on the left side; but she doesn't have a soft disc herniation that would require a decompression…She also doesn't have a C6 radiculopathy. So with all due respect to Dr. Bhatti, I don't agree that he's identified the C5-6 level as the root cause for her pain or symptoms.

19. In determining whether the claimant was a candidate for an artificial cervical disc replacement at C5-6 Dr. Rauzzino testified, "At C5-6 you'd expect to have a diminishment in sensation in a specific part of the hand. You might find weakness of specific muscles which are innervated by the C6 nerve root. On my examination, I didn't find any evidence of any specific nerve that was being impinged upon, let alone the nerve at C5-6 on the left."

20. Dr. Rauzzino then testified that the claimant did not meet the criteria for surgery. When asked to explain his opinion he testified, "In order to have a fusion of C5-6 through workmen's compensation, the guidelines would suggest that you have to appropriately identify there's a pain generator. And the fact that she has neck pain and has degenerative changes at that level, that's not sufficient…And in order for her to have surgery through workers' compensation or really any other system, you have to identify that level which would be surgically treated as the root cause for pain, and that's not been accomplished." Dr. Rauzzino highlights the significant concerns regarding approval of a surgery as substantial as an artificial disc replacement where the pain generator has not been identified through objective diagnostic testing.

21. Surgeons, Dr. Wong, Dr. Johnson, and Dr. Rauzzino have all reviewed the claimant's diagnostic tests, physically evaluated the claimant, and have all determined that she is not a surgical candidate. Dr. Bhatti is the sole surgeon that believes the claimant has a condition that requires surgical intervention.

22. Dr. Rauzzino credibly testified that the C5-6 artificial cervical disc replacement surgery was not a reasonable, related, or necessary procedure. The ALJ finds Dr. Rauzzino's analyses and opinions to be credible and more persuasive than medical analyses and opinions to the contrary.

23. The claimant has failed to establish that it is more likely than not that the need for the artificial cervical disc replacement surgery as recommended by Dr. Bhatti is reasonable, necessary, or related to the September 18, 2013 industrial accident.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. A claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

3. The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable, necessary, and causally related is one of fact for determination by the ALJ. *Kroupa v. Indus. Claim Appeals Office, supra; Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990).

5. Determining the reasonableness and necessity for treatment may involve various considerations including assessment of the risks associated with the procedure, the cost of the treatment when compared to expected benefit, and the duration of expected symptomatic relief. *Kroupa v. Mercy Medical Center*, W.C. No. 3-113-588 (ICAO January 7, 2002) citing *City of Durango v. Dunagan,* 939 P.2d 436 (Colo. App. 1997).

6. In determining whether treatment is reasonable the Treatment Guidelines are, "regarded as accepted professional standards for care under the Workers' Compensation Act." *Rook v. ICAO,* 111 P.3d 549 (Colo. App. 2005). The Treatment

Guidelines are also to be used by physicians when furnishing treatment under the Workers' Compensation Act and should be relied on by a claimant's authorized treating physician. *Hernandez v. ICAO,* Colo. App. No. 08CA0211 (August 28, 2008 (unpublished)).

7. The claimant is not entitled to medical care that is not causally related to her work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

8. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

9. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

10. As found, the ALJ concludes that Dr. Rauzzino, Dr. Wong and Dr. Johnson's analyses and opinions are credible and more persuasive than the medical analyses and opinions of Dr. Bhatti.

11. The ALJ concludes that the requested surgery is not reasonably necessary as the risks associated with the procedure outweigh any potential relief for the claimant; the cost of the treatment outweighs any potential expected benefit, as three surgeons have determined that the claimant is not a surgical candidate; and claimant would not receive any relief from her symptoms if she were to undergo surgery.

12. The ALJ concludes that the requested surgery is not reasonable per the Treatment Guidelines as Dr. Rauzzino credibly testified that in order to proceed with a

surgery of this magnitude, a pain generator has to be identified. Throughout claimant’s treatment, including various diagnostics, a pain generator has failed to be identified.

13. Based on the preceding findings of fact, the ALJ concludes that the claimant has failed to demonstrate by a preponderance of the evidence that the artificial cervical disc replacement surgery is reasonable, necessary, or related to the September 18, 2013 industrial accident.

ORDER

It is therefore ordered that:

1. The claimant’s request for authorization of artificial cervical disc replacement surgery as recommended by Dr. Bhatti is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 20, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the left shoulder surgery recommended by Dr. Parker is reasonable, necessary, and causally related to her April 13, 2015 work injury.

2. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant is currently employed by Employer as an Assistant Principal. Claimant has been employed by Employer since August of 1986 in various capacities.

2. Claimant had gross earnings of $93,495.28 in 2014. Claimant continued in 2015 to earn the same gross salary as she did in 2014 and was earning that salary at the time of her injury.

3. On April 13, 2015 while so employed, Claimant sustained a work related injury. The school that Claimant was working at had an unplanned and unexpected fire alarm go off. Claimant assisted in evacuating the building. As the fire alarm was not a pre-planned drill, Claimant was in a hurry to evacuate the building.

4. While going from the third floor of the school to the second floor of the school, Claimant went through a heavy door with a bar. When pushing the bar of the door, Claimant felt pain in her left pinky, left hand, and up into her left shoulder.

5. Claimant continued to evacuate the building and went outside. After waiting approximately twenty minutes, the school was cleared for re-entry. Claimant went inside and told the school secretary and principal about her injury. Claimant filled out an incident report and went to Health One to be evaluated.

6. On April 13, 2015 Claimant was evaluated at Health One by Deana Halat, NP. Claimant reported jamming her left pinky finger into a door during a fire drill. Claimant reported pain and lack of motion in the pinky finger that radiated into her wrist. NP Halat noted bruising on the left small finger and that the left small finger was swollen and tender, particularly on the tip. NP Halat also noted on examination that Claimant's left shoulder was achy but had good range of motion. NP Halat diagnosed pain in limb and recommended no use of the left hand or arm for one week. NP Halat opined that there was a greater than 51% probability that the injury was work related. *See* Exhibits A, 5.

7. On April 21, 2015 Claimant was evaluated at Health One by Paul Raford, M.D. Claimant reported little improvement with pain from the ulnar aspect over the palmar aspect of the forearm and even up to the lateral aspect of the upper arm. Dr. Raford assessed left 5th finger sprain, suspicion for ligament disruption. Dr. Raford noted restrictions that included no use of the left upper extremity. *See* Exhibits A, 5.

8. On April 28, 2015 Claimant underwent an initial evaluation for occupational therapy (OT). Claimant reported achiness in her left small finger with pain in the under arm of the left elbow as well as some left shoulder pain. *See* Exhibit 8.

9. On May 5, 2015 Claimant was evaluated by NP Halat. Claimant reported continued left pinky pain and dorsal hand and thumb pain that radiated up the posterior arm to the shoulder. NP Halat planned to refer Claimant to a hand specialist for further evaluation and planned to add Claimant's shoulder and upper arm to the therapy schedule. *See* Exhibits A, 5.

10. On May 8, 2015 Claimant underwent OT. On examination it was noted that Claimant had pain in the left shoulder with resisted external rotation at the insertion of the external rotators. *See* Exhibit 8.

11. On May 19, 2015 Claimant was evaluated by Tracy Wolf, M.D. Claimant reported small finger and hand to elbow pain that was going into her left shoulder. Dr. Wolf assessed left small finger pain, probable sprain of DIP joint with no obvious fracture and left medial epicondylitis and musculature pain into the shoulder. Dr. Wolf provided Claimant with a splint and recommended Claimant try not to use her left side/extremity. *See* Exhibit 6.

12. On May 19, 2015 Claimant underwent OT. Claimant again reported left shoulder pain. Claimant continued to go to OT appointments for several months. Claimant reported shoulder pain and received shoulder treatment at her OT appointments. *See* Exhibit 8.

13. On May 27, 2016 Claimant was evaluated at Health One by Katherine Drapeau, D.O. Dr. Drapeau noted that Claimant was in for follow up of her left 5th finger, arm, and shoulder pain. Claimant reported her main complaint was the left shoulder and triceps area. Claimant reported that the fire drill at work happened very quickly and that she did not remember if when she struck the door with her hand her entire arm was jarred. Dr. Drapeau noted some tenderness on examination of Claimant's left shoulder distal to the acromion and AC joint and noted a positive impingement sign of the left upper arm. Dr. Drapeau assessed right 5th finger strain and right upper arm and shoulder strain, possible bursitis. Dr. Drapeau noted Claimant was scheduled to be on vacation from June 12, 2015 through July 20, 2015 and noted that they would hold off on any orthopedic referral for the shoulder until Claimant returned. *See* Exhibits A, 5.

14. On June 9, 2015 Claimant was evaluated again by Dr. Wolf. Dr. Wolf noted that Claimant's small finger was mostly better, that Claimant's elbow was better, but that Claimant's left shoulder was still bothering her some. Dr. Wolf noted some pain with shoulder motion. Dr. Wolf emphasized that Claimant should continue with stretches and exercises. *See* Exhibit 6.

15. On June 10, 2015 Claimant was evaluated by Dr. Raford. Claimant continued to report left shoulder pain that Dr. Raford noted was located in the anterior AC area on the left and occurred with any elevation of the shoulder above chest level. Dr. Raford noted on examination that Claimant could only flex to 90 degrees and abduct to 85 degrees before having pain in the anterior AC area. Dr. Raford assessed left 5th finger crush, nearly resolved and left shoulder pain of uncertain etiology but lacking support for occupational association. Dr. Raford noted that Claimant would be gone for almost 5 weeks and would recheck when she returned. Dr. Raford noted that if Claimant had persistent shoulder problems, because of the reported mechanism of injury, he would consider referring Claimant for private physician follow-up as the work etiology was not clearly established. *See* Exhibits A, 5.

16. On July 27, 2015 Claimant was evaluated by NP Halat. Claimant reported that her left shoulder continued to be extremely painful and that she had difficulty with limited range of motion. NP Halat noted that originally the shoulder pain was thought to be from Claimant's elbow radiating into her shoulder but now that it appeared to be centrally located in Claimant's shoulder. NP Halat noted that Claimant's left shoulder had minimal range of motion and decreased flexion as well as a limited lift-off test. NP Halat noted that Claimant had a positive cross-arm test and a slight drift with her left shoulder as compared to her right. NP Halat assessed left shoulder pain, left elbow pain, and left 5th finger pain. NP Halat referred Claimant for an MRI of the left shoulder. NP Halat noted that Claimant's left shoulder appeared to be bothering Claimant more than the left elbow and that the left elbow could have been reasonably injured when Claimant jammed her finger during the fire drill. NP Halat noted it was unclear as to the exact etiology of the left shoulder. *See* Exhibits A, 5.

17. On August 3, 2015 Claimant underwent an MRI of her left shoulder interpreted by Mark McGehee, M.D. Dr. McGehee's conclusion was impingement with tendinopathy and small undersurface supraspinatus tear, and longitudinal split tear biceps tendon. *See* Exhibit 4.

18. On August 10, 2015 Claimant was evaluated by NP Halat. NP Halat noted that the MRI of Claimant's left shoulder showed impingement with tendinopathy and small undersurface supraspinatus tear as well as longitudinal split tear of the biceps tendon. Claimant reported her shoulder felt better with pain rated at 2-3/10 and sometimes shooting down the middle of her upper arm. NP Halat noted mild tenderness in the left biceps insertion and mid-left upper arm as well as good range of motion of the left upper arm with mild pin in full extension and lift-off. NP Halat assessed left shoulder pain, left elbow pain improving, and left 5th finger pain improving.

NP Halat noted that Claimant would be evaluated by orthopedics for the left shoulder. *See* Exhibits A, 5.

19. On August 18, 2015 Claimant was evaluated at Orthopedic Associates by Andrew Parker, M.D. and Keith Stoetzer, PA-C. Claimant reported that she caught her pinky and initially felt pain radiating from the pinky into the lateral and anterior aspect of the shoulder and that she was having ongoing difficulty with pain in the shoulder. Claimant reported no history of prior shoulder problems. Dr. Parker reviewed the MRI of Claimant's left shoulder and noted it showed some thinning and fairly significant partial undersurface tearing of the cuff. Dr. Parker provided the impression of: significant partial thickness cuff tear, left shoulder; biceps tendinitis, left shoulder, with a split tear of the biceps; and component of early adhesive capsulitis. Dr. Parker opined that Claimant warranted operative treatment but recommended that Claimant start with an injection and physical therapy. Dr. Parker injected Claimant's left shoulder subacromial space. *See* Exhibit C.

20. On August 24, 2015 Claimant was evaluated by NP Halat. Claimant reported that the shoulder injection was helpful but that she had aching pain in the left shoulder that she rated as 3/10. NP Halat noted that Claimant had tenderness over the AC and trapezius area in the left shoulder. NP Halat assessed pain in limb, left arm, shoulder, elbow, and little finger. NP Halat noted that Claimant had the possibility of surgery in the future. *See* Exhibits A, 5.

21. On October 12, 2015 Claimant was evaluated by Dr. Parker. Claimant reported relief from the subacromial injection but that it only helped for about one week. Dr. Parker recommended left shoulder scope, decompression, cuff repair, and biceps release. Dr. Parker noted Claimant would be scheduled accordingly for surgery. Dr. Parker requested authorization for surgery. *See* Exhibit C.

22. On October 14, 2015 Dr. Raford issued a letter regarding causality. Dr. Raford opined that Claimant's left shoulder pain was not related to her left 5th finger crush work injury based on his review of records and the mechanism of injury. Dr. Raford opined that the reported force and mechanism of injury of opening a door with both hands affecting the left finger would not cause either problems in her elbow, and much less her shoulder findings. Dr. Raford also opined that the shoulder condition noted on Claimant's MRI would not take weeks to months for Claimant to register and mark on pain drawings. Dr. Raford opined that the initial exam in April found no shoulder complaints, no pain drawing markings, no patient report of shoulder issues, and no positive exam findings. Dr. Raford opined that the proximal shoulder issues that apparently developed after the injury could not be reasonably described as caused by the reported mechanism of injury. Dr. Raford recommended that Claimant seek left shoulder treatment from her private insurance. *See* Exhibit A.

23. On October 20, 2015 John Aschberger, M.D. issued a letter noting that he had reviewed records forwarded to him by Respondent including notes from Dr. Raford and from Dr. Parker. Dr. Aschberger reviewed Dr. Raford's note that there were no

initial complaints of pain at the shoulder verified through physical exam, pain drawings, or complaints. Dr. Aschberger also reviewed Dr. Parker's note that there was an onset of irritation in the left shoulder early in the course of the injury. Dr. Aschberger noted that Dr. Raford and Dr. Parker had inconsistent reports of the onset and noted that he did not have the early treatment notes/records to verify. Dr. Aschberger noted he had no reason to doubt Dr. Raford's accuracy and thus opined that surgery for Claimant's left shoulder did not appear to be warranted under workers' compensation. *See* Exhibit B.

24. On October 27, 2015 Respondent denied the request for surgery as not related to the workers' compensation claim based on the reports of authorized treating provider Dr. Raford. *See* Exhibit C.

25. On October 30, 2015 Claimant was evaluated by Dr. Drapeau. Dr. Drapeau noted that on Claimant's first visit with Health One Claimant did not mention the shoulder pain on the pain diagram but that on the next visit on April 21, 2015 Claimant did mention the shoulder and entire bottom of her arm being achy and that Claimant continued to mention that on every visit since then. Claimant reported to Dr. Drapeau that she had never had any prior injuries of pain in her left shoulder. Dr. Drapeau noted that Dr. Parker had recommended surgery that was pending authorization. Dr. Drapeau assessed left shoulder injury and left finger sprain. *See* Exhibits A, 5.

26. On November 11, 2015 Claimant was evaluated by Sadie Sanchez, M.D. Dr. Sanchez noted that Claimant had a history of a symptomatic partial thickness rotator cuff tear and biceps tendonitis of the left shoulder. Dr. Sanchez noted that Claimant reported pain in the left 5th finger radiating into the arm and that on the second visit for the injury Claimant reported left shoulder pain as well. Dr. Sanchez noted that Dr. Parker recommended left shoulder surgical decompression, tear repair, and biceps release. Dr. Sanchez noted that the surgery was denied by the insurance company and that Claimant denied pain in the left elbow or shoulder prior to the incident. Dr. Sanchez diagnosed: incomplete rotator cuff tear or rupture of the left shoulder, not specified as traumatic; strain of muscle, fascia, and tendon of the long head of the biceps in the left arm, and pain in the left finger. Dr. Sanchez opined that surgery was indicated for Claimant's left shoulder but noted that workers compensation was not accepting the surgery. Dr. Sanchez opined based on the history and examination that it was greater than 51% probable that the injury was a work related injury. *See* Exhibits A, 5.

27. Claimant was evaluated by Dr. Sanchez on November 30, 2015, December 14, 2015, and January 4, 2016 where Dr. Sanchez continued to express the same opinions. *See* Exhibit 5.

28. On February 9, 2016 Claimant underwent an independent medical evaluation performed by Rachel Basse, M.D. Claimant reported heading out doors when she pushed a door quickly and had the immediate onset of left fifth finger discomfort, swelling, and pain radiating up her arm into her elbow and within the next

one to two days her shoulder also started to hurt. Claimant reported having no pain before the incident in her shoulder. Dr. Basse noted that Claimant guarded her left arm against her chest and did not use it spontaneously as much as her right arm. Dr. Basse provided the impression of on the job injury with a sprain/strain of the left fifth DIP, resolved and sprain/strain of the left shoulder with probable infraspinatus and/or teres minor involvement, improved, but ongoing. *See* Exhibit D.

29. Dr. Basse noted that Claimant was straight-forward with a consistent history throughout the medical records. Dr. Basse noted that an MRI of the left shoulder showed mild arthritis and tendinosis with a small supraspinatus tear and biceps tendon tear and noted the recommendation for surgery by Dr. Parker. Dr. Basse opined that the degenerative changes on the MRI were not the cause of Claimant's clinical pain and opined that surgery would not be beneficial and would make any myofascial pain components and the sprain/strain worse. Dr. Basse recommended reassuring Claimant of the normalcy of the MRI findings in a woman of her age and reassuring Claimant that the generally low-level of symptoms she had with her strength and range of motion did not necessitate surgical intervention. Dr. Basse also opined that the mechanism of injury was not one that would be expected to cause a supraspinatus tear or aggravate an underlying supraspinatus tear. Dr. Basse opined that the infraspinatus tendinitis may have been aggravated. Dr. Basse opined that if a partial rotator cuff had occurred or had been acutely aggravated on April 13, 2015, Claimant would have had immediate, significant, and localized shoulder pain. Dr. Basse opined that it was unclear as to why a sprain/strain or tendinitis of the rotator cuff muscle had not resolved. Dr. Basse opined that Claimant flared tendinitis in her shoulder in the work incident. *See* Exhibit D.

30. Claimant's testimony at hearing is found credible and persuasive. Claimant had never suffered a prior left shoulder injury and never had any left shoulder medical treatment prior to this work related injury. Claimant had immediate soreness and developed pain in her left shoulder shortly after the work related injury. Claimant continues to experience pain and problems with her left shoulder including difficulties performing activities of daily living.

31. The opinions of Dr. Sanchez are found credible and persuasive. Dr. Sanchez's opinion that the left shoulder is related to the April 13, 2015 work injury is consistent with the medical records which note left shoulder symptoms immediately and continually throughout the claim. The surgeon, Dr. Parker also requested authorization for surgery through workers' compensation and thus believed the need for surgery to be work related. Additionally, Dr. Drapeau pointed out that Claimant did mention her left shoulder early on in the claim and mentioned it consistently throughout. The medical records overall support Dr. Sanchez's opinions.

32. The opinions of Dr. Raford and Dr. Aschberger are not found credible or persuasive. Dr. Raford based his opinion that the left shoulder is not related to the April 13, 2015 work injury on mostly the belief that Claimant's shoulder pain developed later, was not reported initially, and would not take weeks or months to recognize and report.

However, his conclusions are inconsistent with the medical records which show at the first appointment on the date of injury, Claimant's shoulder was noted to be achy and that at subsequent appointments shortly thereafter, Claimant reported shoulder pain consistently. Dr. Aschberger noted that Dr. Raford and Dr. Parker had inconsistent reports of when Claimant's shoulder pain started, but for unknown reasons, Dr. Aschberger decided to follow the report of Dr. Raford in coming to his conclusion that the left shoulder was not related. Dr. Aschberger does not explain why he chose to follow the report of Dr. Raford over the report of Dr. Parker. The report of Dr. Raford, however, is inaccurate as to when the onset of left shoulder symptoms began and the report of Dr. Parker is more persuasive and consistent with the medical records history. As Dr. Aschberger based his opinion on Dr. Raford's inaccurate report, Dr. Aschberger's opinion cannot be relied upon.

33. The opinions of Dr. Basse are also not found credible or persuasive. Dr. Basse disagrees that the surgery is reasonable and necessary and opines that Claimant simply needs to be reassured that her MRI findings are normal for her age. This is inconsistent with the surgical opinion of Dr. Parker and is not persuasive. Further, Dr. Basse also opined that the surgery is not related to the work injury and concludes that if Claimant suffered a rotator cuff tear, Claimant would have had immediate pain in her left shoulder. However, despite believing that Claimant did not report immediate pain in her left shoulder, Dr. Basse opined that Claimant suffered either flared tendinitis of her rotator cuff on the date of injury or that she suffered a sprain of the rotator cuff on the date of injury. These opinions, overall, are not consistent with the medical records and Claimant's credible testimony showing she did have immediate pain.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has established by a preponderance of the evidence that the left shoulder surgery recommended by Dr. Parker is reasonable, necessary, and related to her April 13, 2015 work injury. At the time of her injury, Claimant had immediate pain up into her left shoulder. On examination the day of her injury, NP Halat noted that Claimant’s left shoulder was achy. At OT on April 28, 2015 it was noted that Claimant had pain in her left shoulder. On May 5, 2015 NP Halat added Claimant’s left shoulder to the OT schedule. It has been shown, more likely than not, that Claimant had immediate left shoulder symptoms that continued throughout her claim. The opinion of Dr. Raford is not credible or persuasive and is based mostly on his incorrect belief that Claimant’s shoulder symptoms developed later in the claim, were not reported immediately, and would not take weeks to months to develop. As pointed out by Dr. Drapeau and Dr. Parker, this is not the case. Claimant had shoulder symptoms very shortly after her injury that were consistently reported. Further, the opinions of Dr. Basse have been considered and rejected. Dr. Basse opined that the surgery was not reasonable and necessary and that Claimant’s minimal degenerative findings on MRI were normal for her age and with Claimant’s function, surgery would not be recommended. This is inconsistent with the more credible opinion of the surgeon, Dr. Parker that surgery is reasonable and necessary and will relieve Claimant’s symptoms. Further, Dr. Basse also opined that if Claimant had suffered a tear in the left shoulder on April 13, 2015 then Claimant would have had immediate pain in the shoulder. Here, it is found credible that Claimant had immediate pain and symptoms in her shoulder.

Dr. Basse's opinion also appears to be inconsistent in opining that Claimant did not have immediate pain in the shoulder but nonetheless opining that Claimant suffered either a strain/sprain of her rotator cuff or flared tendinitis in her left shoulder on April 13, 2015. The opinions of Dr. Sanchez are found credible and persuasive in this matter. Dr. Sanchez's opinions are consistent with the medical records and Claimant's credible testimony.

Average Weekly Wage

Wages are the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied. The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. *See* § 8-42-102(3); *Campbell v. IBM Corporation, supra; see Williams Brother, Incorporated v. Grimm,* 88 Colo. 416, 197 P.1003 (1931); *Vigil v. Industrial Claim Appeals Office,* 841 P.2d 335 (Colo. App. 1992). Section 8-42-102(3), C.R.S. states that "Where the foregoing methods of computing the average weekly wage of the employee…will not fairly compute the average weekly wage, the division, in each particular case, may compute the average weekly wage of said employee in such other manner and by such other method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's average weekly wage." According to *Washburn v. Academy School District No.20*, W.C. No. 4-491-308 [Industrial Claim Appeals Office (ICAO), September 16, 2002], § 8-4-102(3) "grants the ALJ authority to use discretion in calculating that average weekly wage when the prescribed methods will not, for any reason, fairly compute the claimant's wage."

Here, Claimant has established that her average weekly wage at the time of her injury was $1,797.99. Claimant was paid gross wages of $93,495.28 in the year 2014. Although her injury occurred in April of 2015, Claimant has established that her salary in 2015 and rate of pay was consistent with her 2014 earnings. Therefore, taking her gross wages from 2014 and dividing them by 52 weeks yields an average weekly wage of $1,797.99 and Claimant has established that this is a fair approximation of her pay at the time of her injury.

ORDER

1. Claimant has established by a preponderance of the evidence that the left shoulder surgery recommended by Dr. Parker is reasonable, necessary, and causally related to her April 13, 2015 injury. Respondents shall authorize and pay for the surgery.

2. Claimant has established that her average weekly wage at the time of her injury was $1,797.99.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 20, 2016,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

Did Claimant prove by a preponderance of the evidence that the surgery proposed by Dr. Janssen is reasonable and necessary, as well as related to her injury of September 15, 2010.

FINDINGS OF FACT

1. Claimant's medical history was significant in that she previously sustained a low back injury on March 19, 2010. On April 9, 2010, x-rays were taken of Claimant's lumbar spine. Randy Mound, M.D. noted spondylolisthesis at L5-S1, but otherwise the alignment of Claimant's spine was normal.

2. Claimant was evaluated by Hugh McPherson, M.D. on April 12, 2010. At that time, she reported low back pain after lifting cases of water and boxes at work. Dr. McPherson found Claimant could forward flex and extend without difficulty. His assessment was acute low back pain, normal disc morphology on x-ray. He ordered physical therapy ("PT"), but did not think an MRI was necessary.

3. Claimant was seen in follow-up by Dr. McPherson on April 30, 2010. Her pain complaints had improved and in the absence of radicular symptoms, no MRI was warranted. Dr. McPherson noted Claimant could continue with PT and he would see her in follow-up, if necessary. The ALJ notes there was no evidence in the record which showed Claimant had further treatment for the 3/19/10 injury before September 2010.

4. Claimant suffered an admitted industrial injury on September 5, 2010 while working for Employer. She was helping students tear down a homecoming float and pulled on wood with a hammer while squatting down. She felt a sharp pull in her low back.

5. There record did not contain evidence documenting what treatment, if any, Claimant received for September 5, 2010 through January 9, 2011.

6. On January 10, 2011, x-rays were taken of Claimant's lumbar spine. The films were read by Bradford Robinson, M.D., who noted likely pars defects at L5, but no spondylolisthesis was seen.

7. Claimant was initially evaluated by Ruth Beckham, R.N., M.S.N., A.N.P.-C. ("NP") at Dr. Janssen's office (Center for Spinal Disorders) on January 18, 2011. She presented with low back pain, but denied any numbness. On examination, NP Beckham found significantly decreased range of motion in the lumbar spine in flexion, extension, and side bending. Full range of motion was found in Claimant's hips and

lower extremities. No neurological or sensory abnormalities were noted. An MRI was ordered because of continued pain in the left lower extremity and hip.

8. An MRI was performed on Claimant's lumbar spine on January 20, 2011. The films were read by Craig Stewart, M.D. Dr. Stewart's impression was bilateral pars interarticularis defects at the L5 level. There was no current evidence of spondylolisthesis; no significant disc herniation, canal stenosis, or neural foraminal narrowing within the lumbar spine; a 4 cm. cystic structure was present in the region of the right adnexa, likely a simple ovarian cyst.

9. Dr. Janssen evaluated Claimant on January 20, 2011, at which time the MRI scan was reviewed. Dr. Janssen stated Claimant had a bilateral osteolysis with a bilateral pars fracture at the L5-S1 level. Dr. Janssen stated Claimant also needed a further diagnostic workup, including a CT scan, as well as a bone scan.

10. On February 7, 2011, a nuclear medicine bone scan of Claimant's lumbar spine was performed. There was no evidence of a pars defect. Very mild uptake at the disc levels suggested mild degenerative disc change, as found by Stephen George, M.D.

11. A CT scan was done on Claimant's lumbar spine on February 8, 2011 and read by Dr. Stewart. Dr. Stewart's impression was bilateral L5 pars interarticularis defects. Mild bony hypertrophy surrounding the left L5 pars interarticularis defect was noted, which contributed to a relatively mild left-sided neural foraminal narrowing. A small broad-based posterior disc protrusion was suspected at L5/S1. Claimant's facet joints were unremarkable.

12. Claimant returned to Dr. Janssen on February 8, 2011. Dr. Janssen stated the CT scan documented a bilateral pars fracture at L5-S1. Claimant reported her symptoms were altering her quality of life and activities of daily living. Dr. Janssen opined Claimant could live with the level of symptoms, she could continue to treat the symptoms with injections, medications, braces, yoga etc., or treat the structural pathology with osteosynthesis or surgery. Dr. Janssen recommended an anterior interbody fusion at L5-S1.

13. Andrew Castro, M.D. reviewed Claimant's treatment course on February 9, 2011 as a physician advisor for Insurer. Dr. Castro noted x-rays did not initially reveal problems, however, an MRI highlighted a pars defect at L5 bilaterally. Dr. Castro said pars defects commonly occurred in anywhere from 2-6% of the population and very rarely resulted from acute traumas. He opined it was very unlikely that a lifting, bending injury caused the pars defect and felt it predated the injury.

14. On April 7, 2011, Claimant was evaluated by Alicia McCown, PA-C at Dr. Janssen's office. Claimant complained of severe low back pain, noting her symptoms were progressively worsening. She had a feeling of instability, as well as radiating pain into her right lower extremity. PA McCown noted limitations in the lumbar range of motion due to pain. Normal sensation was present in her bilateral lower extremities,

including no gross sensory deficits in all major muscle groups. There was no evidence of neuralgia. PA McCown's assessment was: occupational-related injury with vertical instability pathology at L5-S1; continued axial low back pain; new right lower extremity radiculitis. PA McCown expressed her belief (along with Dr. Janssen's) that an anterior lumbar interbody fusion would be the Claimant's best alternative.

15. On July 13, 2011, Claimant underwent an independent medical evaluation at the request of Respondents, which was performed by Brian Reiss, M.D. Claimant was reporting lower back and right buttock pain, with intermittent spasms. Her pain level was described at a 7/10 level, which increased to 9 or 10/10 level at night or in the morning. Dr. Reiss noted x-rays showed spondylolyses, with a small listhesis at L5-S1. The MRI showed fairly well preserved discs and no major nerve compression. On examination, she had normal alignment of the spine, was tender bilaterally at the SI joint and right sciatic area. Dr. Reiss noted there was a distinct lack of documentation of any real physical therapy or attempts by the patient to do a core strengthening program and therefore the suggestion for surgery was premature. He recommended a far more intensive rehabilitation program, including eight weeks of course strengthening.

16. Claimant was next evaluated by Dr. Janssen on August 16, 2011. Dr. Janssen noted it was his professional opinion Claimant had a bilateral pars fracture and required surgery. Dr. Janssen stated Claimant was seen by an orthopedic surgeon, who found she was deconditioned and required an intensive rehabilitation program. He concurred generalized conditioning could help with postoperative care, but felt it was not going to alter the natural history of her underlying occupational-related injury and need for surgery.

17. A review of the proposed surgical procedure was done on August 19, 2011 on behalf of Insurer by William Ogsbury, M.D., who also agreed Claimant did not have much non-surgical treatment, although he sympathized with her wish to go forward with the surgery. Dr. Ogsbury recommended a psychosocial evaluation and authorization of the surgery, as well as additional PT. He opined the surgery was medically necessary and causally related to the second work-related injury.

18. On September 16, 2011, a bone scan was done, which was read by Brian Burke, M.D. Dr. Burke stated it was a normal bone density study.

19. Claimant was seen by NP Beckham on October 4, 2011. At that time she had continuing low back pain, provoked with activity. On a chronic level, her pain was described as 7-8/10 and on an acute level her pain was 10/10. NP Beckham noted plain radiographs showed "significant" degenerative disc disease along with a pars defect of L5. The plan was to do an anterior spine fusion of L5 to the sacrum.

20. After what was described as “failed” conservative treatment[1], Claimant underwent an anterior L5-S1 discectomy, decompression and fusion on October 18, 2011. The surgery was performed by Dr. Janssen. The preoperative diagnoses were:

[1] Although there were references to PT evaluations and some treatment, the record was unclear regarding the amount of treatment Claimant received prior to the fusion surgery.

bilateral pars fracture-L5; instability-L5; translational instability; degenerative disc disease; and low back pain.

21. Claimant returned to Dr. Janssen's office on November 29, 2011 and was evaluated by NP Beckham. She was described as "miserable" and was having incapacitating back pain and spasms. A pars injection at L-5 was scheduled with Dr. Leimbach and a request for authorization for posterior spinal fusion was going to be made to Insurer.

22. Claimant underwent a repeat CT scan of her lumbar spine on December 6, 2011, following her anterior fusion at L5-S1. Dr. Stewart read the CT films and his impression was: interval anterior fusion at L5-S1, without evidence of immediate postoperative complication; findings consistent with bilateral sacroiliitis.

23. On December 6, 2011, George Leimbach, M.D. saw Claimant for the first time and performed bilateral L5 pars interarticularis injections. Claimant had a pre-procedural pain level of 6-7/10, post procedural pain level of 3/10.

24. On December 14, 2011, Claimant was evaluated by NP Beckham, at which time she was noted to have incapacitating back pain. The plan was to do an L5-S1 posterior spinal fusion (with allograft) and the risks of the procedure were reviewed.

25. A posterior L5-S1 fusion and discectomy was performed by Dr. Janssen on December 26, 2011. The preoperative diagnoses were: previous attempted anterior fusion; occupational injury; delayed healing of the anterior fusion; bilateral pars fracture; need for posterior tension band and fusion. The surgical procedures performed included microscopic dissection of spine; intraoperative fluoroscopy; bone graft harvest; open treatment of bilateral pars fracture with instability; posterior segmental instrumentation spanning L5-S1; posterior foraminotomy with bilateral foraminal decompression underneath the spur of the bilateral pars interarticularis defect of L5; bilateral S1 foraminotomy; and posterior and posterolateral arthrodesis.

26. Claimant's post-surgical course was followed by Dr. Janssen's office. On January 2, 2012, Claimant reported unrelenting back pain and NP Beckham changed her medications.

27. A General Admission of Liability (“GAL”) was filed on January 30, 2012 for wage and medical benefits.

28. On March 15, 2012, Claimant was examined by NP Beckham, who noted restricted range of motion on flexion, decreased range of motion on extension and restricted range of motion on side bending/rotation. The assessment was status post anterior-posterior spinal fusion with consolidated fusion with probable painful implants. Claimant was to be seen in six months.

29. NP Beckham's evaluation on July 26, 2012 was similar to the one on 3/15/12 (including the range of motion testing) and Claimant was reporting difficulty

sleeping secondary to back pain. Consideration of a hardware block was given at that time.

30. On August 28, 2012, Dr. Leimbach performed bilateral hardware blocks at L5 and S1. His diagnoses were: status post lumbar fusion; possible painful retained hardware; and lumbar spondylosis. Claimant had a pre-procedural pain level of 3/10, post-procedural pain level of 3/10.

31. Claimant returned to NP Beckham at the Center for Spinal Disorders on October 17, 2012, after the hardware block. She reported a 24 hour period of relief, but wanted to have the implants out. NP Beckham noted a CT would be ordered and they would proceed with removal of the hardware at L5-S1. A request for authorization was made on 10/24/12.

32. Another CT scan of Claimant’s lumbar spine was done on October 25, 2012 and read by Kurt Husum, M.D. Dr. Husum's impressions were: interval posterior fusion at L5-S1; anterior and posterior spinal fusion at that level appeared intact with good incorporation of the bone graft anteriorly; incomplete incorporation of the bone graft noted posteriorly at that level; stable bilateral sacroiliitis.

33. On February 12, 2013, a CT scan of Claimant's lumbar spine was performed. The films were read by Jeffrey Guay, M.D., whose impression was stable anterior and posterior surgical fixation at L5-S1; stable osseous integration of the interbody fusion graft at L5-S1, with incomplete incorporation of bone graft material seen posteriorly at the L5-S1 level; stable bilateral sacroiliitis.

34. Because of continued back pain localized over the hardware, hardware removal surgery was performed on February 27, 2013 by Dr. Janssen. The surgical procedures performed included microscopic dissection of spine for decompression of L5 nerve roots; intraoperative fluoroscopy; removal of segmental hardware, including the nuts, the collars, the rods, the screws at the bilateral L5 and S1 levels from the USS pedicle screw system; detailed exploration of the fusion; bilateral L5 foraminotomy; bilateral S1 foraminotomy.

35. Claimant returned for an evaluation on April 12, 2013 with NP Beckham, who reported Claimant had increasing back pain and fullness in her dorsal lumbar spine. A CT scan was ordered, as well as massage therapy. Claimant was seen by Dr. Janssen on July 23, 2013, who reported Claimant was “miserable” and had severe back pain. Dr. Janssen recommended facet blocks in L4-5.

36. On July 5, 2013, a CT was done on Claimant's lumbar spine. David Weiland, M.D. read the films and noted interval removal of posterior fusion hardware from L5-S1; stable anterior fusion L5-S1; apparent bilateral foraminotomies at L5-S1 with probable granulation/scar tissue partially filling the right neural foramen; mild degenerative arthritis and degenerative disc disease at L4-5 resulting in at most mild foraminal narrowing; stable bilateral sacroiliitis.

37. Dr. Leimbach performed bilateral L4-5 intraarticular facet injections on August 7, 2013. The pre-and post-procedural diagnoses were: postlaminectomy syndrome; painful facet arthropathy, L4-5. Claimant had a pre-procedural pain level of 8/10, post-procedural pain level of 4/10. The ALJ infers that the improvement in Claimant's pain supports the L4-5 facet joints as possible pain generators.

38. A handwritten note on August 23, 2013 from NP Beckham documented Claimant had no relief with facet block and reported severe back pain. On August 27, 2013, NP Beckham documented bilateral sacroiliitis, with some radicular symptoms on the right. She set Claimant up for bilateral SI joint injections and then a right L5-S1 nerve root block.

39. Claimant returned to NP Beckham at the Center for Spinal Disorders on October 22, 2013 having bilateral SI joint pain. On examination, Claimant's lumbar spine had restricted range of motion in flexion, side bending and rotation. She had full range of motion in the hips and lower extremities, with no SI joint restriction. Claimant had no gross sensory deficit and no evidence of neuralgia. NP Beckham's assessment was bilateral sacroiliitis, positive Faber, and SI joint pain.

40. On November 6, 2013, Dr. Leimbach performed bilateral SI joint injections/sacral branch blocks at levels S2, 3, 4. Claimant had a pre-procedural pain level of 4-5/10, post-procedural pain level of 4/10.

41. On December 3, 2013, Claimant returned to NP Beckham, who noted Claimant was "miserable" and not sleeping. She had bilateral lower extremity pain and did not benefit from the SI joint injection. Some adjacent level disease at L4-5 was noted. Claimant was set up for a facet block of L4-5 to see if this would alleviate her symptoms.

42. Dr. Leimbach continued to follow Claimant and examined her on January 2, 2014. Claimant had persistent low back pain with pain in the hip girdle and buttock region. Tenderness was noted over the lumbosacral junction area. Dr. Leimbach's impression was: status post L5-S1 fusion; status post hardware removal; and possible adjacent level disc disease at L4-5. He recommended an MRI scan of the lumbar spine.

43. An MRI was done on Claimant's lumbar spine on February 8, 2014 and read by Dr. Weiland. Dr. Weiland's impression was: interval anterior fusion at L5-S1,with new bilateral pedicle screw tracks at L5 and S1; new L5-S1 laminectomy; mild degenerative arthritis and degenerative disease at L4-5 progressing since the prior study and resulting in mild foraminal narrowing. There was no significant central canal stenosis or nerve root compression.

44. On February 17, 2014, Claimant was re-evaluated by Dr. Leimbach. She was complaining of low back pain with extension into the proximal leg and hip girdle area. Dr. Leimbach's impression was the same as 1/2/14, with the addition of lumbar radiculitis. Dr. Leimbach recommended a bilateral transforaminal epidural steroid

injection at L4-5, which was performed on February 25, 2014. Claimant's pre-procedural pain level was 4/10, her post-procedural pain level was 3/10. Claimant returned to Dr. Leimbach on March 13, 2014, at which time he noted she received only nominal relief from the transforaminal injection. He recommended physical therapy and altered her medications.

45. On April 22, 2014, Claimant was seen by Mary Brassfield, PA-C, who documented she had no relief with physical therapy. Her low back pain was 6/10 and she was not interested in receiving steroid injections. PA Brassfield's impression was status post L5-S1 lumbar fusion; status post hardware removal; adjacent level disc disease at L4-5; and lumbar radiculitis. A discogram was to be scheduled.

46. Claimant returned to Dr. Janssen on May 1, 2014, who noted that she continued to deteriorate and was “miserable”. She had interior column disease, vertical instability, and pathology at the L4-L5 level. Dr. Janssen stated Claimant’s MRI demonstrated pathologic changes and what appeared to be adjacent segment disease. Dr. Janssen recommended an L3-4 and L4-5 discogram and post-discographic CT scan.

47. Dr. Leimbach also saw Claimant on May 21, 2014, at which time lumbar discography at L3- 4 and L4-5 was performed. Claimant had no provocation of pain at L3-4. Claimant had provocation of pain at L4-5, which was concordant with her normal distribution of pain across the lower back and into the hip girdle area. Dr. Leimbach concluded there was no evidence of disc disruption or annular tear at L3-4. There was a mildly disrupted disc at L4-5, but no evidence of an annular tear.

48. NP Beckham evaluated Claimant on May 27, 2014, at which time Claimant reported incapacitating back pain, which was even worse than before. NP Beckham's assessment was degenerative disc disease at L4-5 with an increase in symptoms since discogram. The plan was to set Claimant up for an artificial disc replacement at that level.

49. A request for authorization of the disc replacement surgery was made by Dr. Janssen’s office on June 2, 2014.

50. Dr. Leimbach evaluated Claimant on July 25, 2014, at which time she reported severe, unrelenting back pain symptoms. Tenderness was noted above the incision at the L4-5 motion segment, with pain on flexion and extension. Dr. Leimbach's impression was: status post lumbar L5-S1 lumbar fusion; status post hardware removal; adjacent level disc disease at L4-5; and lumbar radiculitis. Dr. Leimbach noted Claimant had positive discography at L4-5 with significant disc disruption syndrome. Claimant's medications were adjusted at that time. Claimant returned to Dr. Leimbach on September 29, 2014, who made similar findings at the evaluation. He recommended consideration of a fusion or disc replacement.

51. Dr. Castro performed an independent medical examination on behalf of Respondents on August 22, 2014. At that time, Claimant described her pain as 10/10

and she reported aching, sharp throbbing pain. The pain was aggravated by activity. Dr. Castro found Claimant had good lumbar range of motion with forward bending, extension, lateral bending, and rotation. Claimant's deep tendon reflex was within normal limits and Hoffman sign was negative. Dr. Castro noted the diagnostic studies showed the previous anterior spinal fusion L5-S1, with anterior plate instrumentation. Mild disc desiccation at L4-L5 just above this was noted, but there was no severe central or foraminal encroachment noted. No instability patterns were appreciated. There was mild facet arthritis at L4-L5, but fairly well maintained disc space height.

52. Dr. Castro's impression was 36-year-old female who had undergone multiple surgical interventions for treatment of back pain. He noted her symptoms were quite severe and that it was difficult to fully assess her chronic, significant pain. Dr. Castro felt it was unclear whether Claimant would have appropriate outcomes with any further surgical intervention, as she had significantly bad outcomes with the initial surgical interventions. Dr. Castro did not believe this patient would benefit from further surgical intervention and stated the proposed surgery was not reasonable, nor necessary. He did not believe Claimant required further diagnostic studies. Dr. Castro deferred to Claimant's physiatry team to see if there were other non-surgical treatments that would be available to her.

53. A lumbar spine CT was done on May 21, 2014. An anterior fusion and solid osseous union at L5-S1 was noted. At L3-L4, contrast material remained confined to the nucleus, consistent with a grade 0 annulus. At L4-L5, contrast extended to the posterior margin of the outer third of the annulus and also spread concentrically along the posterior margin of the disc, consistent with a grade four tear. The other disc spaces had normal height and no evidence of stenosis.

54. On January 30, 2015, Ron Carbaugh, Psy.D. examined Ms. Oliver for pre-surgical psychological screening. Dr. Carbaugh stated Claimant’s behavioral presentation argued against any acute anxiety or depressive symptomatology. Her psychiatric testing was similar to what was seen in 2011. Dr. Carbaugh’s diagnostic impressions were: probable psychological factors affecting medical condition; other diagnoses deferred. Dr. Carbaugh determined Claimant was a reasonable candidate for the disc replacement surgery strictly from a psychological standpoint.

55. Dr. Leimbach reevaluated Claimant on April 16, 2015 and noted she had severe, limiting axial back pain symptoms. Dr. Leimbach noted tenderness at the L4-5 motion segment and opined the only beneficial treatment would be an L4-5 disc arthroplasty or a fusion procedure. He doubted whether further injections would be helpful. Claimant's follow-up appointment with Dr. Leimbach on April 23, 2015 had many of the same findings, including Dr. Leimbach’s impressions/diagnoses. Dr. Leimbach described Claimant as “miserable”, as she had a flare-up of back pain, with pain down the right leg. Dr. Leimbach recommended an MRI and a course of steroids.

56. Dr. Leimbach testified by way of evidentiary deposition on April 30, 2015. He was qualified as an expert in physical medicine and rehabilitation and was Level II accredited pursuant to the W.C.R.P. Dr. Leimbach reviewed the proposed disc

replacement and/or a fusion at the L4-5 level. He testified the idea was to maintain her motion at the L4-5 level, as it would be less likely that she would subsequently develop stresses in the disc above that and have the disc deteriorate over time. Dr. Leimbach opined the proposed disc replacement surgery was reasonable and necessary, as well as related to the 9/15/10 injury. It was his opinion the procedure would be successful, as Claimant was a motivated patient. He disagreed Claimant's pain was related to her facet joints, as she got very nominal relief when facet injections were done. Dr. Leimbach testified Claimant's pain generator was at the L4-5 level and agreed there were degenerative changes at that level. Dr. Leimbach testified he would defer to the opinions of the surgeons in this case.

57. On May 4, 2015, a lumbar spine MRI was done and the films were read by Craig Jonas, M.D. Dr. Jonas' impression was: stable post operative fusion at L5-S1, without significant change compared to 2/8/14; stable shallow protrusion at L4-L5, without significant change; hypertrophic facet arthrosis at L4-L5 causing mild bilateral neural foraminal stenosis without significant change; no neural foraminal stenosis was present at any other level and no central canal stenosis at any level; no adverse change compared to 2/8/14 detected. The ALJ infers this study confirmed there were no significant changes at the L4-5 and L5-S1 level between 2014-2015, as reflected in the MRI-s.

58. Dr. Castro testified as an expert in orthopedic surgery, a specialty in which he is board-certified. He is Level II accredited pursuant to the W.C.R.P. In his first deposition, which was taken on May 8, 2015, Dr. Castro testified there was not a significant change from the most recent MRI when comparing it to the previous MRI. He stated there did not appear to be any findings of nerve compression at any level and there was a solid fusion at L5-S1. Dr. Castro opined Claimant would not receive additional benefit from the proposed disc replacement surgery. She did not receive benefit from any of the surgery up to this point and the disc replacement surgery was contraindicated by the facet arthritis, as shown by the MRI. Dr. Castro noted the only positive test was the discogram, which is somewhat subjective in nature. Dr. Castro testified it was an "educated guess" that the L4-5 level was going to be improved by the proposed surgery and he did not believe that would be the case. While Dr. Castro thinks Dr. Janssen is an excellent surgeon, he did not believe Claimant would get significant relief from a pain or functional standpoint from the surgery.

59. On June 23, 2015, Dr. Leimbach performed a bilateral L4 medial branch block and bilateral L5 medial branch block. Claimant's pre-procedural pain level was 7/10, post-procedural pain level of 8/10. Dr. Leimbach opined Claimant's anesthetic response strongly pointed away from facetogenic pain.

60. Claimant was evaluated by Dr. Leimbach on July 9, 2015, who described her as functionally impaired by her back pain. Dr. Leimbach noted she had an equivocal response to intraarticular facet injections and no relief from medial branch blocks. He concluded the pain generator was at L4-5 where the annular tear[2] was

[2] This was a change from his opinion expressed on May 21, 2014. [Exhibit E, p. 132].

present. Claimant returned to Dr. Leimbach on August 31, 2015, at which time she reported her pain symptoms had significantly worsened. Dr. Leimbach concluded the only treatment that would benefit Claimant was surgery.

61. Dr. Janssen issued a report dated September 10, 2015, which outlined Claimant's treatment to date. It stated: "She [Claimant] has done well, but unfortunately now has progression of adjacent level symptomotology that appears to be correlated clearly with the initial work related injury and the subsequent need for treatment. Over a year ago it was my professional opinion that this patient had adjacent level symptomatology, vertical instability affecting the L4-5 disc and was really a candidate for consideration of additional surgery since this was altering her quality of life and activities of daily living. Treatment was going to consist of a disc arthroplasty and/or a second fusion at L4-5 level. She has gotten the complete run around from her insurance company who sent her to an orthopedic surgeon (Dr. Castro), who has been trying to come up with a variety of different ways to continue to delay her getting definitive and an ultimate treatment." Dr. Janssen also referred to 'an insurance "bad faith" issue' in this letter. The ALJ infers Dr. Janssen was expressing frustration at the delays in securing approval of the proposed disc replacement surgery, however, the reference to insurance bad faith is troubling as this is not within the ambit of his role as an ATP.

62. Dr. Castro issued a supplemental report on September 28, 2015. As part of the report, he reviewed the various surgical procedures Claimant had undergone and made the observation that none of the surgeries significantly improved her pain and function. Dr. Castro noted Claimant had mild disc desiccation at L4-L5, but no instability at this level. He stated the term vertical instability was utilized, but there was no biomechanical data or prognostication for any objective values. Dr. Castro noted Claimant's providers felt they were acting on her behalf, but this did not change his opinion that further surgical intervention was not likely to alter her present scenario. Dr. Castro noted further intervention could result in complications and other risks, including degenerative levels at another adjacent segment. The ALJ credited Dr. Castro's opinions regarding the lack of improvement on the part of Claimant.

63. Dr. Janssen testified as an expert in an evidentiary deposition taken on January 19, 2016. Dr. Janssen was accepted as an expert in orthopedic spine surgery. The ALJ notes he is Level II accredited pursuant to the W.C.R.P. Dr. Janssen testified that Claimant was originally going to have an L5-S1 disc replacement, but it was determined she also had a stress fracture in the back of her spine called a spondylosis. He therefore stabilized the front of the spine with the fusion and then stabilized the back of the spine with a posterior fusion two months later. Subsequent to that, Claimant underwent a hardware removal.

64. Dr. Janssen recommended the disc replacement surgery over a fusion, as the former procedure had a longer rehabilitation and also it decreased the motion at that segment. Dr. Janssen ran the FDA clinical trials for the U.S. government over 10 years

ago for disc replacement surgery. Dr. Janssen testified Claimant had L4-5[3] pathology and it was associated with her previous injury and treatment at the L5-S1 level and met the criteria for disc replacement surgery. He opined that the pathology was affecting her function. Dr. Janssen thought Claimant injured the L4-5 level at the time she injured the L5-S1 level and it took longer for the symptoms to manifest. Dr. Janssen testified the proposed artificial disc replacement surgery was reasonable and necessary.

65. A second deposition of Dr. Castro was taken on January 29, 2016. He had reviewed additional imaging and medical records, as well as the deposition of Dr. Janssen, taken 10 days before. Dr. Castro testified when considering whether a patient is a candidate for surgery, you have to consider what their pathology is and if it is surgically treatable. Next the patient's symptoms need to comport with the pathology. Dr. Castro testified he did not see a dramatic difference in the L4-5 disc space, which would necessitate surgery. Dr. Ramos noted spondylosis or stress fracture was present on x-ray. He noted the discogram called for a subjective response from Claimant with regard to pain. This was distinguished from an MRI or CT scan which demonstrated the presence of pathology. Also, there was a question whether it was performed under the proper protocols. Dr. Castro reviewed the records related to the discogram and noted there didn't seem to be a clear annular tear, nor was there clear travelization of the disc material. There was not a clear indication that L4-5 was the problem. He noted there were minimal degenerative changes. Dr. Castro described these as very small, very minimally positive findings, which did not support the decision to perform disc replacement surgery. Dr. Castro testified the Oswestry Disability Index was used to evaluate improvement after a procedure. Dr. Castro did not question Dr. Janssen's technical expertise performing the artificial disc replacement surgery.

66. No testimony was offered by Claimant.

67. The ALJ finds Dr. Castro's opinions regarding the proposed surgery were credible and more persuasive than the other medical opinions offered. More particularly, Dr. Castro's testimony elucidated the difference between subjective and objective findings in this case. The ALJ also credited Dr. Castro's opinion that Claimant did not have pathology which warranted the proposed surgery. Finally, the ALJ credited Dr. Castro's opinion that the potential risks of the surgery outweighed the potential benefits.

68. The ALJ credited Dr. Jonas' opinion that the 5/4/15 MRI showed no adverse change compared to 2/8/14 MRI.

69. As found, Claimant failed to establish the proposed disc replacement surgery was reasonable and necessary.

70. Evidence and inferences contrary to these findings were not credible or persuasive.

[3] In his deposition, Dr. Janssen initially identified L5-S1 pathology (which appears to be an error), then referred to L4-5 pathology as Claimant's pain generator.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The instant case requires a credibility determination between various medical experts, who have offered diametrically opposed views on whether the proposed surgery is reasonable and necessary.

Medical Benefits-Artificial Disc Replacement

Claimant argued that she established the proposed artificial disc replacement at L4-5 was reasonable and necessary, as well as related to the industrial injury. She relied primarily on the testimony of Dr. Janssen, who requested authorization for said procedure. In this regard, Dr. Janssen opined Claimant's pain generator was at the aforementioned level and testified the proposed treatment was within the Medical Treatment Guidelines ("Treatment Guidelines"). Claimant also cited the opinions of Dr. Leimbach in support of her request for medical benefits. Claimant asserted Drs. Janssen and Leimbach, as her primary authorized treating physicians, were in the best position to make treatment recommendations.

Respondents argued Claimant failed to meet her burden of proof with regard to the proposed surgery. Respondents averred Claimant's previous surgical procedures had not been successful and the evidence was unclear regarding the source of

Claimant's pain complaints. To support their contentions, Respondents relied upon the testimony of Dr. Castro and his analysis of Claimant's course of treatment.

In the instant case, Claimant has the burden of proof to establish that the treatment proposed by Dr. Janssen is reasonable and necessary, as well as related to her industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In *Kroupa,* the ALJ denied Claimant's request for additional knee surgery, which would have been her third procedure. The ALJ found the surgery was not reasonable and necessary, based upon the opinion of Respondents' expert. That decision was affirmed first by the Industrial Claims Appeals Office, then the Colorado Court of Appeals, which noted the fact there was contrary opinion did not compel the ALJ to reach a different conclusion. The Court of Appeals noted the ALJ was required to make specific findings only as to evidence found persuasive and determinative. *Kroupa v. Industrial Claim Appeals Office, supra,* 53 P.3d at 1197. In this regard, the ALJ is free to credit one medical opinion to the exclusion of contrary opinion. *Dow Chemical v. Industrial Claim Appeals Office,* 843 P.2d 122, 125 (Colo. App. 1992). In the instant case, the ALJ determined Claimant failed to meet her burden of proof and credited the opinions of Dr. Castro over those expressed by Dr. Janssen.

The determination of whether the proposed artificial disc replacement surgery was reasonable and necessary was based on a review of the treatment Claimant received and an analysis of whether the proposed procedure has a reasonable chance of success. As evidenced in the voluminous medical records admitted into evidence, Claimant has had extensive treatment for her low back injury, including a posterior/anterior fusion at L5-S1, which included implantation of hardware. The hardware was subsequently removed in 2013, as Claimant alleged she was suffering intractable pain. Since that time, Claimant received multiple injections, facet and medial branch blocks, treatment with steroids and non-steroidal medications, as well as PT and massage therapy.

The ALJ determined, on balance, Claimant failed to prove the proposed surgical procedure is reasonable and necessary. First, insufficient evidence was adduced to prove the proposed surgery was reasonable and necessary. The ALJ concluded there was not sufficient objective evidence of pathology or a lesion which required surgery. In this regard, the following findings were confirmed by CT/MRI scans:

- No stenosis or nerve root compression. [MRI-2/8/14; CT scan-5/21/14[4]]

- No severe foraminal encroachment. [CT scan-7/5/13; MRI-5/8/15]

[4] In this study, the radiologist opined there was an annular tear, however, Dr. Castro did not concur there was an annular tear. Also, Dr. Leimbach's opinions were equivocal on this issue.

- Mild facet/degenerative arthritis. [CT scan-7/5/13; MRI-2/8/14; MRI-5/8/15]

These objective tests raised the question whether there was specific pathology which required surgery. Dr. Castro's opinion that Claimant did not have a surgical lesion or pathology requiring surgery was persuasive to the ALJ. (Finding of Fact 62, 65). The objective medical evidence before the Court led the ALJ to conclude the degenerative changes at L4-5 were minimal. (Finding of Fact 68). As found, there was not a significant difference between the MRI scans done in 2013 and 2014. (Finding of Fact 57). Accordingly, Claimant failed to demonstrate by the objective medical evidence admitted at hearing that the artificial disc replacement surgery was reasonable and necessary.

Second, the ALJ found the surgery recommendation was based more on Claimant's subjective reports of pain, as opposed to objective tests. The ALJ found the Medical Treatment Guidelines-Low Back Pain, W.C.R.P. 17, Exhibit 1 ("Treatment Guidelines") have application to the proposed disc replacement surgery. The Treatment Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria).

However, an ALJ is not required to award or deny medical benefits based on the Treatment Guidelines. In fact, there is generally a lack of authority as to whether the Treatment Guidelines require an ALJ to award of deny benefits in certain situations. Thus, the ALJ has discretion to approve medical treatment even if it deviates from the Guidelines*. Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014).

W.C.R.P. 17-5(C) provides in relevant part:

> "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate. For cases in which the provider requests care outside the guidelines the provider should follow the procedure for prior authorization in Rule 16-9."

In the case at bench, the Treatment Guidelines provided parameters for the ALJ to consider when evaluating the proposed surgery, starting with the General Guideline Principles found in W.C.R.P., Rule 17, Exhibit 1. As noted on page 3:

B. GENERAL GUIDELINE PRINCIPLES

…

"**9. Surgical Interventions:** Surgery should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief. The concept of "cure" with respect to surgical treatment by itself is generally a misnomer. Clinical findings, clinical course, and diagnostic tests must be consistent in order to justify operative interventions. A comprehensive assimilation of these factors must lead to a specific diagnosis with positive identification of pathologic conditions."

As found, Claimant's continued pain complaints were a significant factor in the surgery recommendation. Both Dr. Leimbach's and Dr. Janssen's records are replete with references to Claimant's description of being "miserable", with no relief reported after she received various treatment modalities. More particularly, Claimant reported unrelenting pain that was minimally reduced by any of the treatment modalities tried. (Finding of Fact 35, 38, 40-41, 44-46, 48, 50, 55 and 60). In support of the surgical recommendation, Drs. Leimbach and Janssen also relied heavily on the results of the discogram, which were subjective in nature. Although both physicians found Claimant did not exaggerate her complaints and both believed the surgery would probably resolve her pain. The ALJ was not persuaded that the surgery would receive these pain complaints, however, given the lack of results with both the surgical and non-surgical treatment Claimant received.

The ALJ was persuaded by Dr. Castro's testimony on this subject and finds that the proposed surgery was recommended to resolve Claimant's continued pain. This is an insufficient reason to perform surgery, particularly given the lack of correlation between the pathology and pain complaints.

Third, the potential contraindications for the proposed surgery were not addressed in any detail by Drs. Leimbach and Janssen. The Treatment Guidelines have application related to this issue, as well.

Section G. THEREPEUTIC PROCEDURES-OPERATIVE applies to the case at bench, as noted *infra:*

11. Artificial Lumbar Disc Replacement:

"**a. Description:** This involves the insertion of a prosthetic device into an intervertebral space from which a degenerated disc has been removed, sparing only the peripheral annulus…

…

"General selection criteria for lumbar disc replacement includes symptomatic one-level degenerative disc disease. The patient must also meet fusion surgery

> criteria, and if the patient is not a candidate for fusion, a disc replacement procedure should not be considered. Additionally, the patient should be able to comply with the pre-and post-surgery protocol."
>
> **Contraindications** for the disc replacement surgery include:
>
> - Symptomatic facet joint arthrosis-if imaging findings and physical exam of pain on extension and lateral bending are present, exploration of facet originated pain should be completed prior to disc replacement.
>
>   …
>
> - Spinal instability at the pathologic or adjacent level requiring fusion.
> - Any contraindications to an anterior abdominal approach (including multiple prior abdominal procedures).
>
>   …
>
> - Multiple-level degenerative disc disease (DDD).
>
>   …
>
> - Spondylolysis
>
>   …
>
> - Generalized chronic pain.

The potential contraindications of the proposed disc replacement surgery were not fully reviewed. Given Claimant's extensive treatment and the fact she has had unremitting pain complaints since 2014, she is properly characterized as a chronic pain patient. As found, Drs. Leimbach and Janssen did not fully consider this issue. Rather, both of the ATPs were of the opinion that Claimant was a motivated patient and therefore she should have good result from the surgery. However, Dr. Castro's opinion that the risks of a surgical procedure outweighed the potential benefit of such a procedure was persuasive to the ALJ.

On balance, the ALJ was not persuaded that a further surgical procedure would ameliorate Claimant's substantial pain complaints. As found, Claimant failed to meet her burden of proof on the request for authorization of disc replacement surgery at L4-5.

ORDER

It is therefore ordered that:

1. Claimant’s request for authorization of lumbar disc replacement surgery is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 18, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-981-757-01

ISSUE

Whether Claimant has established by a preponderance of the evidence that the left hip arthroscopy recommended by Dr. Johnson is reasonable, necessary, and related to his April 16, 2015 work injury.

FINDINGS OF FACT

1. On April 16, 2015 Claimant sustained an admitted work related injury while working for employer installing sheetrock. On this date, Claimant had been working for employer as a carpenter for approximately one year and one month. Claimant was carrying a ladder down a ramp, slipped on snow, and both of his feet came out from under him. Claimant landed hard on his buttocks.

2. Claimant had been working in construction type jobs for approximately 14 years prior to this incident and had job duties that included using ladders and regular lifting of heavy items.

3. After the fall, Claimant had pain in his back and right hip and his left hip was sore.

4. On April 21, 2015 Claimant was evaluated by Lawrence Cedillo, D.O. Claimant reported back pain and discomfort in his right hip. Dr. Cedillo assessed slip and fall with a contusion of the coccyx with questionable contusion of the sacrum and strain/sprain to the thoracolumbosacral spinal region. Dr. Cedillo noted no signs of bony compromise per x-rays taken on April 16, 2015 but noted that Claimant was subjectively worse since his initial visit on April 16, 2015. Dr. Cedillo recommended Claimant continue with a lumbar support belt, home exercises, and also provided a physical therapy and massage therapy referral. *See* Exhibit J.

5. On April 23, 2015 Claimant was evaluated by Dr. Cedillo. Claimant reported back pain and right leg symptoms with pain and tingling down the right lower extremity to the foot. *See* Exhibit J.

6. On April 23, 2015 Claimant underwent an MRI of his lumbar spine interpreted by Todd Greenberg, M.D. due to his reported pain from the upper back to the buttocks as well as right lower extremity pain. Dr. Greenberg concluded that Claimant had a L5-S1 subtle rightward protrusion crowding the right lateral recess without overt neural compression. *See* Exhibit 2.

7. On April 29, 2015 Claimant was evaluated by massage therapist Anne Shiramizu. Claimant reported that his lower back was very sore and that his left leg was

sore. Ms. Shiramizu noted that Claimant was unable to tolerate massage. *See* Exhibit 3.

8. On April 30, 2015 Claimant was evaluated by Dr. Cedillo. Claimant reported persistent discomfort in the back area, occasional symptoms down the right lower extremity and sometimes the left lower extremity. Dr. Cedillo assessed slip and fall with contusion of the coccyx and questionable contusion of the sacrum and subsequent sprain/strain of the thoracolumbosacral spinal regions. Dr. Cedillo recommended Claimant continue with home exercise, physical therapy, and massage and referred for acupuncture chiropractic care. *See* Exhibit 4.

9. On May 7, 2015 Claimant was evaluated by Jason Gridley, D.C. Claimant reported back pain with numbness extending down the right leg into the foot as well as achiness extending from the lumbosacral spine up into the occiput and back of the head. Dr. Gridley noted pain behaviors that made some maneuvers difficult to perform on examination. Dr. Gridley also noted full motional guarding and inhibitory pain behaviors with light to moderate palpation in the thoracic region. Dr. Gridley noted that Claimant was observed slowly forward bending with fingertips to the shins and had diffuse nonfocal lower back pain extending from the lower thoracic spine to the upper gluteals and laterally to the hips. Dr. Gridley noted that lumbar extension was self limited just beyond neutral with diffuse pain in a similar pattern. Dr. Gridley assessed lumbosacral strain, thoracic myofascial strain, sacral region somatic dysfunction, and myalgia and myositis. Dr. Gridley opined that there was a guarded prognosis moving forward with Claimant based on Claimant's continued pain levels, significant pain behaviors that appeared out of proportion with objective findings, and conflicting examination findings. *See* Exhibit K.

10. On May 8, 2015 Claimant was evaluated by Dr. Cedillo. Claimant reported constant pain worst in regard to his back, but pain and paresthesias down his right lower extremity. Dr. Cedillo referred Claimant to Dr. Lesnak for evaluation and treatment. *See* Exhibit 4.

11. On June 19, 2015 Claimant underwent an MRI of his right hip interpreted by Eduardo Seda, M.D. Dr. Seda found that a survey view of the pelvis showed a normal bony pelvis, SI joints, and pubic symphysis. Dr. Seda found that the intrapelvic soft tissues appeared normal and that the left hip appeared normal. Dr. Seda noted that views of the right hip showed a normal femoral head and acetabulum with rounded contour. Dr. Seda found that the labrum showed a subtle tear at the chondral labral junction at the anterior superior quadrant. His impression was right hip small superior lateral quadrant labral tear. *See* Exhibit G.

12. On July 2, 2015 Claimant was evaluated by Scott Resig, M.D. Claimant reported right hip pain localized to the groin region of the joint. Dr. Resig noted an MRI revealed a labral tear of the right hip and that on examination Claimant's right hip had limited range of motion due to pain. Dr. Resig also examined the left hip and noted full and painless range of motion and no abnormalities. Dr. Resig opined that Claimant had

a labral tear of the right hip and that Claimant may benefit from steroid injection or may need a hip arthroscopy if the injection failed to give him long term relief. *See* Exhibit F.

13. On August 4, 2015 Claimant was evaluated by Dr. Resig. Dr. Resig noted Claimant's continued right hip complaints and noted that an injection performed provided slight help for one hour and only short term relief. Dr. Resig opined that Claimant may benefit from a hip scope and referred him to a hip scope specialist. *See* Exhibit F.

14. On August 6, 2015 Claimant was evaluated by Derek Johnson, M.D. Claimant was noted on examination to have limited range of motion in his right hip and normal range of motion in the left hip. Claimant reported pain in the groin on the right hip. Dr. Johnson assessed hip pain, labral tear of hip, and pincer type femoroacetabular impingement. Dr. Johnson ordered arthroscopy of the hip with femoroplasty (treatment of cam lesion), acetabuloplasty (treatment of pincer lesion), and labral repair. Dr. Johnson opined that Claimant was a candidate for arthroscopic hip surgery for femoral acetabular impingement. *See* Exhibit F.

15. On August 28, 2015 Claimant underwent right hip surgery for labral repair, femoral osteoplasty, and acetabuloplasty performed by Dr. Johnson. Dr. Johnson noted that the MRI was consistent with labral repair and combined cam and pincer femoroacetabular impingement. *See* Exhibit 7.

16. On September 10, 2015 Claimant was evaluated by Dr. Johnson's PA, Mandy Petry for a two week follow up following right hip arthroscopy with labral repair, osteoplasty, and acetabuloplasty. PA Petry noted that Claimant's pain was well controlled, Claimant had painless range of motion, and that the portal sights were benign. *See* Exhibit F.

17. On October 13, 2015 Claimant was evaluated by Dr. Johnson for a six week follow up for the right hip arthroscopy. Dr. Johnson noted that Claimant's pain was moderately controlled but that Claimant had mild pain with range of motion and had not been able to advance to weight bearing without one or both crutches. Claimant reported to Dr. Johnson that his left hip started hurting about two weeks after surgery and felt similar to the way his right hip felt before surgery. Dr. Johnson instructed Claimant to begin more aggressive strengthening to increase range of motion with physical therapy and that in two months time he would like to see Claimant walking without ambulatory aids. Dr. Johnson opined that Claimant's symptoms were much more severe than anticipated for someone six weeks post-op. Dr. Johnson also noted that Claimant was hypersensitive to light touch which was concerning. Dr. Johnson noted that if Claimant's left hip symptoms persisted they would re-assess as the left hip pain may be due to altered gait and recovery of right hip surgery. *See* Exhibit F.

18. On November 10, 2015 Claimant was evaluated by Dr. Johnson. Dr. Johnson noted exquisite localized tenderness present over the hip flexors on the right hip examination and significant pain and guarding with flexion and internal rotation on

the left hip examination. Dr. Johnson ordered an MRI of the left hip for evaluation of labral pathology. *See* Exhibit F.

19. On November 20, 2015 Claimant underwent an MRI of the left hip interpreted by Scott Lowe, M.D. Dr. Lowe found a prominent bony protuberance at the lateral femoral head neck junction which likely pre-disposes to a cam-type of femoral acetabular impingement. Dr. Lowe found abnormal signal traversing the anterosuperior labrum suggestive of a labral tear, mild thinning of articular cartilage overlying the superolateral femoral head and acetabulum. His impression was a mild cam type of femoral acetabular impingement with evidence for tearing of the anterosuperior labrum, and mild chondral degeneration within the weight bearing portion of the left hip. *See* Exhibit G.

20. On December 3, 2016 Claimant was evaluated by PA Petry. PA Petry assessed labral tear of left hip and left femoroacetabular impingement. PA Petry ordered arthroscopy of the hip joint with labral repair, acetabuloplasty (treatment of pincer lesion), and femoroplasty (treatment of cam lesion). PA Petry opined that Claimant was a candidate for arthroscopic hip surgery for femoral acetabular impingement and noted that they would begin the authorization process for surgery with workers' compensation. *See* Exhibit F.

21. On December 30, 2015 Allison Fall, M.D. performed an independent medical evaluation. Dr. Fall reviewed medical records, spoke with Claimant, and performed a physical examination of Claimant. Claimant reported low back pain, pain as well as cramps and a pins and needles sensation in the right hip, and left hip pain. Dr. Fall noted that examination was difficult due to significant pain behaviors. Dr. Fall noted positive Waddell's signs with pain to very light touch in the lower lumbar area and pain in the low back that reportedly limited Claimant's bilateral shoulder range of motion which Dr. Fall opined was non-physiologic. Dr. Fall noted inconsistencies in Claimant's self-limitations on exam. Dr. Fall assessed: fall leading to lumbosacral contusion and right hip injury; complaints of low back pain without correlating objective findings and with subjective complaints greatly out of proportion; and complaints of left hip pain with MRI revealing findings consistent with femoroacetabular impingement and possible associated labral tear and mild chondral degeneration. *See* Exhibit D.

22. Dr. Fall opined that Claimant's left hip condition was the result of a non-work related underlying condition. Dr. Fall opined that overcompensation and using the left leg while on crutches for the right hip surgery would not lead to intrinsic hip pathology and that compensation does not result in increased wear and tear of the contra lateral joint. Dr. Fall noted that typically there is less activity and stress on the uninvolved extremity as overall general activity is decreased following surgery. *See* Exhibit D.

23. On January 14, 2016 Claimant was evaluated by Dr. Johnson. Claimant reported the pain in his left hip was getting worse and was primarily in the groin region with a pain rating of 9-10/10. Dr. Johnson assessed left hip pain and left labral tear of

hip with femoroacetabular impingement – cam. Dr. Johnson noted that Claimant was a candidate for hip arthroscopy for the left hip and that they were working with workers' compensation for authorization. *See* Exhibit 7.

24. On February 26, 2016 Claimant underwent an independent medical evaluation performed by Edwin Healey, M.D. Dr. Healey reviewed medical records, spoke with Claimant, and performed an examination. Claimant reported continued chronic disabling pain involving both his low back and right hip as well as left hip pain that started two weeks after the right hip surgery that gradually increased in intensity and was now greater than his right hip pain. Claimant attributed his left hip pain to the fact that he was on crutches with minimal weight bearing on his right lower extremity from the surgery in late August until mid December, then on one crutch until mid January. Claimant reported that by this favoring, he developed pain in his left hip almost identical to the similar pain in his right hip and groin that resulted in his need for surgery. Dr. Healey noted pain behaviors on examination, and opined that Claimant appeared to be mildly depressed and anxious. *See* Exhibit 9.

25. Dr. Healey opined that Claimant's left hip pain and the abnormal MRI demonstrating mild cam type femoroacetabular impingement with evidence of tearing of the anterior superior labrum was causally and directly related to Claimant's April 16, 2015 work injury. Dr. Healey noted that Claimant had no history of pre-existing hip pain and opined that the requirement for left hip arthroscopy and surgery was reasonable, necessary, and causally and directly related to the April 16, 2015 injury. Dr. Healey opined that although Claimant has a congenital abnormality of both hips that predisposes him to developing chronic hip pain and degenerative arthritis and labral tears of the hip, the slip and fall injury resulted in permanent aggravation of the underlying asymptomatic right hip congenital abnormality and the fact that Claimant had to compensate by bearing most of his weight on the left lower extremity for four months after the right hip surgery resulted in permanent aggravation of the left hip pre existing cam femoroacetabular impingement and the labral tear of the left hip. Dr. Healey opined that Claimant probably would have eventually required the surgical procedures recommended by Dr. Johnson even if he had not sustained the April 16, 2015 injury but that the injury resulted in requiring the surgical procedures prematurely. *See* Exhibit 9.

26. On March 14, 2016 Michael Ladwig, M.D. and Hector Brignoni, M.D. authored a letter to Respondent's counsel. The doctors opined that an MRI of the left hip cannot determine the age of a tear. The doctors opined that it was possible based on Claimant's mechanism of injury that a tear occurred in the left hip on April 16, 2015 and that the symptoms did not manifest until the right hip began to improve after the right hip surgery. *See* Exhibit 8.

27. Claimant's testimony is found credible and persuasive. Claimant had been working in construction type jobs for 14 years prior to this injury without any prior problems in his back or hips. After the fall on April 16, 2015 Claimant had immediate soreness in his left hip and reported symptoms consistent with that to Dr. Cedillo and to massage therapist Shiramizu. Claimant also developed significant left hip pain shortly

after his right hip surgery which he reported to Dr. Johnson. Following his right hip surgery, Claimant had to bear his entire weight on his left hip and leg. Claimant was using crutches, one crutch, and a cane for several months where he was bearing most all his weight on his left leg and hip. Claimant's left hip was asymptomatic prior to his work injury, was slightly sore and had some pain following his April 16, 2015 injury, and developed into significant pain a few weeks after bearing his entire weight on it following his right hip surgery. This pain and the left hip symptoms would not have existed but for his work related injury.

28. The opinions of Dr. Healey and Dr. Johnson are found credible and persuasive. As a result of Claimant's April 16, 2015 injury, Claimant's left hip became symptomatic. Although Claimant was predisposed to developing left hip symptoms due to his underlying and asymptomatic femoroacetabular impingement, Claimant did not develop pain or symptoms requiring treatment until he bore full weight on his left hip and leg for several months following his right hip surgery. The overcompensation and use of his left hip during this time caused his left hip to become symptomatic.

29. The opinion of Dr. Fall is not found as persuasive. Although Dr. Fall disagrees that Claimant's left hip symptoms could be due to overcompensation or overuse, the studies and literature referenced by her do not pertain to someone who has a pre-existing femoroacetabular impingement in the hip. Here, Claimant's underlying and non work related condition would make him more susceptible to labral tears from increased weight bearing or overuse. The opinions of Dr. Healey and Dr. Johnson are more credible that Claimant aggravated his underlying asymptomatic condition in the left hip by overuse following his right hip surgery.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).). Where relatedness, and/or reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO, April 7, 2003). A pre-existing condition does not disqualify a Claimant from receiving workers' compensation benefits. *Duncan v. ICAO*, 107 P.3d 999 (Colo.App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siefried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Indus. Comm'n v. Newton Lumber & Mfg. Co.,* 314 P.2d 297 (Colo. 1957).

Although Claimant had a pre-existing congenital condition of his left hip, femoroacetabular impingement, which predisposed Claimant to developing hip pain, Claimant did not have hip pain and was asymptomatic in his left hip until his work related injury. His pre-disposition to developing left hip symptoms or tears due to his congenital condition was exacerbated when he spent several months following his right hip surgery bearing weight primarily on his left leg and hip which had the congenital abnormality. Several months placing all of his weight onto his congenitally abnormal left hip led Claimant to developing left hip symptoms and pain which are found, more likely than not, to be related to his work injury. Claimant reported the left hip pain within a few weeks of his right hip surgery and within a few weeks of having to bear all of his weight onto his congenitally abnormal left hip due to his work injury. Although Claimant overall was less active following his right hip surgery, all of his activity and movement required him to bear his entire weight onto his left leg and left hip. This aggravated his underlying left hip congenital abnormality, caused him pain, and caused his current need for left hip treatment including surgery.

The opinions of Dr. Johnson and Dr. Healey are found credible and persuasive in this regard. The opinion of Dr. Fall is not found as credible or persuasive. Dr. Fall's opinion on overcompensation following Claimant's right hip surgery did not take into account the full weight bearing that Claimant had to place on his left hip which had an underlying congenital abnormality. Although Dr. Fall opined that Claimant would be less active overall following his right hip surgery, the requirement of placing his full body weight onto his left hip is found significant. Further the literature cited by Dr. Fall discrediting an overcompensation injury to the contra lateral side was not based on studies where a person had a congenital abnormality on the contra lateral side that would pre-dispose them to developing an injury on the contra lateral side. Here, Claimant did have an underlying congenital abnormality that predisposed him to developing an injury on his left hip when he was required to bear his full weight on that hip for several months. The ALJ does not find persuasive that Claimant's left hip condition was the same prior to his April 16, 2015 injury as it is now. Rather, the ALJ finds persuasive the opinion of Dr. Healey that Claimant's right hip surgery and work injury caused an injury to and aggravation of Claimant's underlying asymptomatic left hip condition and is the reason for Claimant's current need for left hip treatment.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that treatment of his left hip is causally related to the April 16, 2015 work injury.

2. Respondents are liable to provide medical treatment reasonably necessary to cure and relieve Claimant from the effects of the left hip labral tear and aggravation of his pre-existing femoroacetabular impingement, including the left hip surgery recommended by Dr. Johnson.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 19, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-975-235-03

ISSUES

➢ Whether Claimant has proven by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment with Employer on November 18, 2014?

STIPULATIONS

✓ The parties have agreed to hold in abeyance the issues of temporary total and temporary partial disability benefits.

✓ The parties have agreed that should the claim be found compensable, Claimant's average weekly wage is $1,198.57.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer hired Claimant on March 31, 2014, as a material handler, to work the 6:00 a.m. to 6:00 p.m. shift.

2. Claimant's job duties included transferring chemicals from incoming railroad tank cars and tanker trucks into mobile storage tanks. Claimant used hoses to perform the transfers which could involve climbing up onto the railroad cars to connect and disconnect the hoses.

3. On November 17, 2014, Claimant was reprimanded by William Bell, his immediate supervisor, for drinking a beverage in the "solvent fill area" in violation of Employer's policy. Claimant did so in front of a new employee. When Mr. Bell asked Claimant why he was drinking in that area, Claimant reportedly shrugged his shoulders and said, "Go ahead and write me up," and continued drinking his beverage. Mr. Bell wrote up the incident as a verbal warning which Claimant refused to sign at the beginning of his shift on November 18, 2014.

4. Claimant testified that during the middle of his shift on November 18, 2014, he was on a ladder on the side of a railroad tank car removing a hose he had disconnected. As he climbed down from the top of the car, he slipped off of the ladder and fell approximately six to eight feet to the ground, landing on his buttocks. Claimant did not seek immediate medical treatment, but rather finished working the remainder of his shift. Claimant's fall was not witnessed. Claimant testified that when he awoke the next morning, he "could hardly move." Again, he did not seek medical treatment. He testified that he told his "lead" about the fall the following day, and did not mention it to anyone else. Claimant continued

to work until February 8, 2015, when he reported to Employer that he had injured multiple areas of his trunk.

5. Claimant testified that before the alleged November 18, 2014, incident, he had no injuries to his back. This testimony is inconsistent with the medical records of Stephanie Canada, DC. Claimant initially saw Dr. Canada on June 21, 2014, for low back pain which he described as constant and greater than 5/10 on a pain scale. Her records dated July 21, 2014, document an extensive examination of Claimant based on his reports of low back pain beginning in mid-June, 2014; bilateral hip pain; bilateral shoulder pain; and neck pain. Dr. Canada diagnosed Claimant with Lumbar/Lumbosacral segmental dysfunction and cervical segmental dysfunction. Claimant returned to Dr. Canada on August 1, 2014, for continued treatment. Dr. Canada's objective findings included joint restrictions in the spine and aberrant mobility in the lumbar spine. Claimant continued to complain of soreness in his low back, tenderness in his upper-mid back, aching in his hips, and stiffness in his neck. Claimant reported that each of his complaints was worsened by his work activities. Claimant experienced a flare of symptoms on July 25, 2014, and sought additional treatment. Despite these medical records, Claimant argues that in retrospect, his alleged fall on November 18, 2014, was the beginning of all of his back problems.

6. Claimant testified that sometime between December 5, 2014 and December 12, 2014, he spoke to his supervisor, Matt Cubbison, telling him that he had "messed up [my] back at work." According to Claimant, Mr. Cubbison advised him to use short term disability for his time off work rather than file a Workers' Compensation claim.

7. On December 12, 2014, Claimant's primary care physician, Dr. Erin Shore, referred Claimant for an MRI of his lumbar spine. The MRI showed at L4-5 mild disc narrowing with a left lateral disc bulge extending into the left foramen with mild foraminal narrowing but no deformity to the nerve root. There were no abnormal findings at any other level.

8. On December 28, 2014, Claimant sent a text to his supervisor at work saying he would be unable to work that night as he had thrown his back out shoveling his driveway.

9. On January 28, 2015, Claimant sought treatment with a spine specialist, Dr. Barker. Claimant reported to Dr. Barker that his low back and right leg pain had come on gradually but had become more severe. He reported that the pain began about 6 months earlier – which would be June 2014 – and that he treated with a chiropractor and took over the counter pain medication and the muscle relaxant Flexeril. Dr. Barker read the lumbar spine MRI, noting a large facet cyst on the right at L5-S1 which was causing compression on the right L5 nerve root in the foramen. Dr. Barker believed Claimant's right leg pain was caused by the foraminal stenosis he saw at the level on the MRI, and attributed Claimant's back pain to degenerative disc disease and severe facet arthropathy at L4-L5, L5-S1.

10. On February 4, 2015, Claimant was again disciplined by his supervisor with a written warning for reporting to Matt Cubbison that he had :buttoned everything up" at the end of his shift, when in fact he had left a dome lid open and had not secured a bottom cap on a half-full tank car in violation of FRA rules. Employer put Claimant in a Performance Improvement Plan which notified him that

    - Immediate improvement was required in his work performance;

    - Employer required him to make immediate and significant progress toward improving his work performance; and

    - Failure to meet Employer's expectations would result in additional corrective action up to and including termination of his employment.

11. Claimant testified that in February 2015, he consulted with an attorney to determine whether he should file a claim for workers' compensation or for short term disability. He decided to pursue a workers' compensation claim.

12. The first notice to management of an alleged injury was on February 8, 2015.

13. On February 8, 2015, Claimant sought additional medical care, reporting an incident in early January 2015 in which he "missed two basement steps" with low back pain worsening to 8/10. He also reported that his back pain worsened that morning when his left leg gave out as he got out of bed.

14. Claimant underwent physical therapy on Dr. Barker's prescription beginning on February 6, 2015 for approximately eight sessions. At his first appointment, Claimant reported that his back pain had had a gradual onset over the past four months. On February 12, 2015, Claimant told his physical therapist that his back pain had begun to interfere with his ability to work on January 1, 2015 and had been a problem every day since then. Dr. Ashworth, a physical therapist, recommended that Claimant not work "at this time." The letter is undated and addressed "to whom it may concern."

15. On February 17, 2015, the third party adjuster of this claim filed an Employer's First Report of Injury. The date of injury provided was November 18, 2014. The First Report did not identify a fall at work, but rather indicated the cause of injury was "work related duties."

16. On March 2, 2015, Insurer filed a Notice of Contest stating that the claim required further investigation.

17. On April 6, 2015, Claimant was again evaluated by Dr. Barker. Claimant stated that he had back pain since the summer of 2014. Claimant added that he was injured at work in November 2014 when he slipped and fell while he was on a rail car and that his pain had worsened since then.

18. On August 5, 2015, Claimant received an epidural steroid injection at L-5 area from Dr. Dobrow. Claimant reported pain of 8/10 both pre- and post-injection.

19. From the beginning of his evaluation and treatment of Claimant, Dr. Barker noted lumbar stenosis, lumbar spondylosis and lumbar degenerative disease. After physical therapy was essentially ineffectual, Dr. Barker stated that if the steroid injection failed that Claimant would be unable to return to work and would likely need an L4-S1 decompression and fusion operation.

20. Claimant testified that he has continued to suffer low back and leg pain of sufficient strength that he has been unable to continue to work and was placed on SSDI in January 2016.

21. The ALJ finds that Claimant is not a credible or persuasive witness. He variously reported when his back pain started, and medical records support that he sought treatment for lumbar back pain prior to the alleged date of injury. Claimant variously reported that his back pain came on gradually and that he attributes all of his back pain to an alleged, unwitnessed fall. The ALJ finds it highly unlikely that Claimant, who consistently sought treatment for his health problems, did not seek treatment after falling six to eight feet and landing on his back. The ALJ also finds the timing of Claimant's alleged fall and the timing of the filing of his claim to be suspiciously coincidental with his verbal reprimand and his performance improvement plan.

22. Claimant has not proven by a preponderance of the evidence that any of his back pathology is related to his alleged fall or other work duties.

23. Nor has Claimant established by a preponderance of the evidence that any of his work duties or his alleged fall aggravated, exacerbated, or accelerated his pre existing back symptoms and caused the need for additional medical treatment.

24. Claimant has not proven by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment with Employer on November 18, 2014.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The injured worker has the burden of proof by a preponderance of evidence of establishing entitlement to benefits. C.R.S. § 8-43-201 and 8-43-210; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A "preponderance of evidence" is a quantum of evidence that makes a fact, or facts, more reasonably probable or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The ALJ determines the credibility of a witness. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The fact finder should consider among other things the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony, and actions; the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005).

The ALJ has found Claimant not to be a credible witness. He variously reported when his back pain started, and medical records support that he sought treatment for lumbar back pain prior to the alleged date of injury. Claimant variously reported that his back pain came on gradually and that he attributes all of his back pain to an alleged, un-witnessed fall. The ALJ finds it highly unlikely that Claimant, who consistently sought treatment for his health problems, did not seek treatment after falling six to eight feet and landing on his back. The ALJ also finds the timing of Claimant's alleged fall and the timing of the filing of his claim to be suspiciously coincidental with his verbal reprimand and his written reprimand and performance improvement plan.

For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner*, 12 P.3d at 846. A claimant is required to prove by a preponderance of the evidence that the alleged injury was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999).

Claimant provided no persuasive evidence that his back pathology was related either to his work or to a specific work injury. His testimony was not credible.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim is denied and dismissed.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 18, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

This is a fully contested disfigurement hearing wherein the respondent asserts there is no disfigurement.

FINDINGS OF FACT

1. On September 22, 2014, the claimant was getting close to the end of the work day when she slipped and fell with one leg ending up under the other leg like a 'pretzel.'

2. The claim was admitted and the claimant underwent treatment for her injury.

3. On November 30, 2015 Dr. Dwight Leggett, the authorized treating physician (ATP), released the claimant at maximum medical improvement (MMI), with a work-related diagnosis of left hip contusion and left knee contusion, per the WC 164. The claimant's date of MMI was June 12, 2015 (although the WC 164 states the date of MMI as June 12, 2014, this date predates the date of injury and the ALJ finds this to be a typographical error; additionally the body of the report dated October 30, 2015 identifies the date of MMI as June 12, 2015).

4. The claimant underwent a functional capacity evaluation (FCE) on June 2, 2015. The claimant was found to exert poor effort resulting in borderline FCE results.

5. The claimant was released on June 12, 2105 with no impairment and with permanent restrictions of no lifting greater than 20 pounds, no ladder use, and limited kneeling and crawling.

6. The claimant was captured on video surveillance on June 2 and June 3, 2015. The ALJ finds that the claimant was walking with a normal gait for the vast majority of the video; although on occasion it appears that there is a slightly perceptible altered gait.

7. The claimant demonstrated her gait at the hearing. The ALJ observed at the hearing that the claimant had a very slight alteration of gait favoring the left leg.

8. The ALJ finds that the video surveillance is more credible and persuasive than the in-court demonstration.

9. In addition to the gait the ALJ observed that the claimant's left knee had a swollen appearance when compared to the right knee.

10. The ALJ finds that the claimant has failed to establish that it is more likely than not that she sustained a permanent alteration of gait.

11. The ALJ finds that the claimant has established that it is more likely than not that, as a result of her September 22, 2014 work injury, the claimant has a visible disfigurement to the body consisting of a left knee that is permanently swollen in appearance when compared to the right knee. Thus, the claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to additional compensation. Section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P .2d 792 (1979); *People v. M.A.,* 104 P .3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P .3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The respondent is liable for payment to the claimant for serious permanent disfigurement to areas of the body normally exposed to public view. Section 8-42-108 (1), C.R.S.

5. As found above, the ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she sustained a permanent alteration of gait.

6. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that she sustained a permanent swelling of the left knee which entitles the claimant to additional compensation. Section 8-42-108 (1), C.R.S.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant’s claim for disfigurement benefits for an altered gait is denied and dismissed.

2. The respondent shall pay the claimant $800.00 for disfigurement to the left knee for its swollen appearance.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 22, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

Whether the claimant has established, by a preponderance of the evidence, that the surgery recommended by Dr. Fitzpatrick is reasonable and necessary.

FINDINGS OF FACT

1. The claimant was injured on March 9, 2014. He suffered an injury to his right shoulder and right knee.

2. The claimant underwent a surgery to his right shoulder on May 8, 2014. That surgery was performed by Dr. Jennifer Fitzpatrick.

3. That surgery was successful and the claimant was well on the way to recovering from the industrial injury when his shoulder worsened. The claimant believes the shoulder worsened as a result of the repetitive nature of the light duty work he was placed on after the surgery.

4. The claimant returned to Dr. Fitzpatrick for additional treatment after his condition worsened. The claimant complained of increased pain in the shoulder.

5. Dr. Fitzpatrick determined that the claimant suffered from increased pain as well as tendinitis with associated bursitis. Dr. Fitzpatrick recommended another surgery to repair the claimant's right shoulder.

6. Dr. Fitzpatrick believes that the surgery she recommended was reasonable and necessary and would relieve the effects of the industrial injury. Dr. Fitzpatrick also observed that the claimant underwent a diagnostic injection and that the injection indicated that an additional surgery would be helpful to relieve the effects of the industrial injury. Dr. Fitzpatrick had seen the claimant at all stages of his recovery.

7. Dr. Failinger testified by deposition. Dr. Failinger has misgivings about the nature and extent of the proposed surgery, indicating that he believes the intended surgery would have a low medical probability of success. He acknowledges, however, that the longer the time lapse without improvement the less likely it is that the pain would subside in the future.

8. The ALJ finds Dr. Fitzpatrick's testimony and analyses to be credible and more persuasive than medical opinions and analyses to the contrary.

9. The ALJ finds that the claimant has established that it is more likely than not that the surgery recommended by Dr. Fitzpatrick is reasonable and necessary to relieve the claimant from the effects of the industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P .2d 792 (1979); *People v. M.A.,* 104 P .3d 273, 275 (Colo. App. 2004).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on its merits. §8-43-201, C.R.S.

3. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P .3d 385, 389 (Colo. App. 2000).

4. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

5. In deciding whether claimants have met their burden of proof, the ALJ is empowered, "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from

the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

6. The question of whether the claimant met his burden of proof is one of fact for determination by the ALJ. *See Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988)

7. The claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

8. As found, the ALJ concludes that Dr. Fitzpatrick's analyses and opinions are credible and more persuasive than medical analyses and opinions to the contrary.

9. The ALJ concludes that the claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Fitzpatrick is reasonable and necessary to cure or relieve the claimant from the effects of his industrial injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent shall authorize and pay for the surgery as recommended by Dr. Fitzpatrick.

2. The respondent shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 22, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The issue to be determined is whether the claimant has established by a preponderance of the evidence that the request for 12 additional acupuncture sessions is reasonable and necessary treatment to cure or relieve the claimant from the effects of his industrial injury.

FINDINGS OF FACT

1. The claimant was a patient representative for the respondent-employer who incurred a compensable work-related injury on March 6, 2006. The claimant was putting away x-ray jackets that weighed about 20 to 40 pounds, when he felt a pull in his groin.

2. The claimant suffered a right sided hernia for which he has a surgical repair.

3. The claimant then suffered from back pain. He went through physical therapy and it was ultimately determined that the back pain also emanated from the work-related injury. The claimant underwent back surgery in 2008.

4. The claimant's symptoms have included right sided low back pain; aching; pain; throbbing, as well as right leg numbness; pain; and tingling, with aching on the inner thigh down to the toes.

5. The claimant had been prescribed Vicodin, muscle relaxers, and nerve medications.

6. The claimant was placed at maximum medical improvement in June 2009.

7. The claimant continued to suffer pain in his leg subsequent to his back surgery. The claimant recommended to Dr. Olson, the authorized treating physician, that he undergo a regimen of acupuncture. While initially not inclined to do so, Dr. Olson ultimately prescribed such treatment for the claimant as post-MMI maintenance treatment.

8. The claimant eventually had over 100 sessions of acupuncture from March 4, 2010 through September 5, 2015.

9. On January 26, 2011 the claimant underwent an independent medical evaluation (IME) with Dr. David Richman.

10. Dr. Richman noted the claimant’s work injury from lifting in March 2006.

11. The claimant has experienced low back pain radiating to the right root.

12. Over the intervening years the claimant has had physical therapy, injections, medications (including narcotics), discectomy back surgery, and a rhizotomy.

13. These treatments have offered occasional relief. However, claimant continues to experience chronic pain. As of 2009 no treatment had completely relieved the claimant’s pain condition.

14. Starting in March 2010 the claimant began a regimen of acupuncture prescribed by ATP Daniel Olson.

15. Dr. Richman found that the acupuncture treatments had allowed the claimant to work and had eliminated the need for pain medication.

16. Dr. Richman concluded his IME report by saying, “I think it is reasonable to continue with the medical acupuncture because of its apparent clinical effect on reduction of pain and his continued high level of functional status in continuing to work full time.”

17. In August 2013 the respondents again challenged claimant’s acupuncture treatment. The respondents obtained an IME from L. Barton Goldman.

18. Dr. Goldman conducted an IME of the claimant. He ultimately opined that he would recommend continuing acupuncture sessions if they were used in conjunction with other modalities of treatment.

19. In Dr. Goldman’s August 12, 2013 IME report he references the previous IME reports of Dr. Richman and Dr. Pitzer (who both recommended continued acupuncture). Additionally, ATP Dr. Olson continues to recommend ongoing acupuncture.

20. Dr. Goldman concluded his IME report by saying, “Consistent with the above discussion, this examiner does not find that there is absolutely no rationale for further acupuncture from a maintenance perspective in [the claimant’s] case as it relates to his work related injury of 2006, ...”

21. Subsequent to Dr. Goldman’s recommendation, Dr. Olson continued to prescribe

acupuncture but without the adjunct therapies.

22. Dr. Olson opined in a letter dated November 3, 2015 that the claimant was benefiting from ongoing acupuncture as it was reducing his pain and decreased his need for pain medications.

23. The ALJ finds Dr. Olson's analyses and opinions to be credible and persuasive and they are supported by other medical practitioners as found above.

24. The ALJ finds that the claimant has established that it is more likely than not that the acupuncture treatments as recommended by Dr. Olson are reasonable and necessary treatment related to the claimant's work-related injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. A claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

3. The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

5. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

6. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable, necessary, and causally related is one of fact for determination by the ALJ. *Kroupa v. Indus. Claim Appeals Office, supra; Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990).

7. Medical benefits after MMI may be ordered when they are necessary to cure or relieve the employee from the effects of the injury. *§ 8-42-101, C.R.S.; Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988)*. Before an Order for Grover medical benefits may be entered, there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease*. Grover Id.*

8. Determining the reasonableness and necessity for treatment may involve various considerations including assessment of the risks associated with the procedure, the cost of the treatment when compared to expected benefit, and the duration of expected symptomatic relief. *Kroupa v. Mercy Medical Center*, W.C. No. 3-113-588 (ICAO January 7, 2002) citing *City of Durango v. Dunagan,* 939 P.2d 436 (Colo. App. 1997).

9. The claimant is not entitled to medical care that is not causally related to her work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

10. As found, the ALJ concludes that Dr. Olson’s analyses and opinions are credible and more persuasive than medical analyses and opinions to the contrary.

11. The ALJ concludes that the requested regimen of acupuncture is reasonably necessary to cure or relive the claimant from the effects of his industrial injury.

12. The ALJ concludes that the claimant has established by a preponderance of the evidence that the acupuncture treatments as recommended by Dr. Olson are reasonable and necessary treatment related to the claimant’s work-related injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall authorize and pay for the acupuncture treatment as recommended by Dr. Olson.

2. The respondent-insurer shall pay statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 23, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUE

Whether the claimant proved, by a preponderance of the evidence, that the spinal cord stimulator trial, for which Dr. Robert Kawasaki has requested prior authorization, is reasonable and necessary.

FINDINGS OF FACT

The ALJ finds and concludes the spinal cord stimulator trial should be denied for the following reasons.

1. The claimant's testimony that she does not want the procedure, and even if the procedure were authorized, she would not proceed is credible and persuasive, especially in light of Dr. Shih's credible and persuasive testimony that a patient's feelings about a procedure affect the outcome of the procedure by up to approximately 30 percent according to recent literature.

2. Dr. Shih testified as an expert in physical medicine and rehabilitation. His testimony was credible and persuasive that a Chronic Regional Pain Syndrome (CRPS) diagnosis is based on three criteria. First, the pain is generally greater than expected based on the mechanism of injury. Two, nonspecific pain findings are present. Three, there are dystrophic changes in the skin, hair and nails, together with asymmetries in the sweat patterns and discoloration of the skin.

3. Dr. Shih performed an April 6, 2016 IME of the claimant. While other medical providers found dystrophic changes present on their examinations of the claimant, he did not note them during his examination.

4. A spinal cord stimulator trial involves surgically placing wires near the claimant's spinal cord, implanting a battery and receiver. A spinal cord stimulator works by creating a stimulus that may create a perception in the patient of decreased pain. The procedure of implanting a spinal cord stimulator has some risks, although infrequent, of life-threatening consequences. It also bears the risks associated with surgery next to the spinal cord. The ALJ finds the risks outweigh the likely outcome of potentially having no effect and that the risk, given the claimant's history, of greatly worsening her symptoms.

5. Colorado's Medical Treatment Guidelines require two positive diagnostic tests to diagnose CRPS. The claimant had one positive test, which was a thermogram performed by Dr. Tashof Bernton. Another diagnostic test was

the stellate ganglion block, which is usually the “gold standard”, and was performed on the claimant, but the results were non-diagnostic. In addition, the claimant reported a dramatic increase in her symptoms following the stellate ganglion block. Dr. Shih does not recommend a spinal cord stimulator trial whether or not the claimant were diagnosed with CRPS, one because of the low success rate of the procedure and two because of the claimant’s negative response to the stellate ganglion block. These same factors reinforce the claimant’s position that she would not receive the procedure even if it were approved

CONCLUSIONS OF LAW

Given the above Findings of Fact, and the pertinent case law, the ALJ finds and concludes the claimant has not met her burden of proving, by a preponderance of the evidence, that the request for authorization of a spinal cord stimulator trial is reasonable and necessary.

ORDER

It is therefore ordered that:

1. The request for prior authorization of a spinal cord stimulator trial is denied.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. (Please note the new address for the Denver Office, effective November 12, 2013, is: 1525 Sherman Street, 4th Floor, Denver, CO 80203). You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE:

/s/ Kimberly Turnbow:

Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

ISSUES

The issues to be determined by this decision are the following:

I. Whether Claimant has proven, by a preponderance of the evidence, that he sustained a compensable work injury to his left shoulder on June 25, 2015.

II. Whether Claimant has proven, by a preponderance of the evidence, his entitlement to reasonable, necessary and related medical benefits, including surgery recommended by Dr. Geoffrey Doner.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a long time employee of Employer, having worked for the company for approximately 20 years. Claimant works as a machine operator and materials handler. Claimant's duties consist, in part, of moving products on and off various machines in order to process and package inventory. In performing his job, Claimant is frequently required to pick up and move wooden pallets.

2. On June 25, 2015, Claimant was lifting a 3 x 5 foot pallet[1] up off the floor to put it on a waist high table. In doing so, Claimant gripped the pallet from the top with his hands on opposite sides of the pallet and picked it up. Once the pallet was a little above waist level, Claimant twisted his body and extended, i.e. flexed and abducted his arms to the left while at the same time crossing his right arm across the front of his torso in an attempt to set the pallet down on the table. Claimant's elbows were slightly flexed as the pallet was too heavy to hold with his arms fully extended out from his body. While attempting this maneuver, Claimant felt a pop in his shoulder and experienced immediate pain in the center of his biceps extending up into his left shoulder. The pain was severe enough that he dropped the pallet onto the table. A co-worker turned around when he heard the pallet drop onto the table.

3. Claimant notified his supervisor, Marco Rivera within "minutes" that he was injured. Mr. Rivera then transported Claimant to Centura Centers for Occupational Medicine (CCOM) for evaluation.

[1] The pallet frame was constructed of several 2x4's and had 1x3 inch top plates. According to Claimant, the pallet weighed approximately 20 to 30 pounds.

4. At CCOM, Claimant was seen by the physician's assistant (PA) Joseph Mullen. Claimant gave PA Mullen a history of "[lifting] a pallet in front of his body and [feeling] a sudden pop and pain in the left upper arm." Claimant described the pain as dull, becoming "sharp if he moved wrong, specifically lifting his arm forward or to the side." Claimant denied previous injury to his left shoulder or arm but advised the doctor of a previous right rotor cuff repair. Physical examination revealed "[tenderness] to direct palpation over the proximal biceps." No ecchymosis was observed, although "resisted elbow flexion [caused] proximal biceps pain." Speed's Test was negative. PA Mullen also noted "internal rotation to T10 with a positive lift off test." External rotation was limited to "45 degrees with anterior shoulder pain." Abduction was limited to "75 degrees with anterior shoulder pain." "Empty can test was negative", and "O'Brien's testing caused "some pain" in both the "thumb up" and "thumb down" positions. PA Mullen diagnosed an upper left arm and shoulder strain, along with left biceps tendonitis. PA Mullen opined that Claimants diagnoses were related to the work incident, noting specifically that the "cause of this problem is related to work activities." Claimant was instructed to ice the area and initiate pendulum exercises.

5. On July 1, 2015, Claimant returned to CCOM for follow-up. Claimant advised PA Mullen that his pain had "gotten worse with constant aching, and sharp pain with reaching overhead or away from the body" despite the recommended treatment, including home exercises. PA Mullen referred Claimant for an MRI.

6. An MRI of the left shoulder was done on July 14, 2015. The MRI revealed the following findings: a biceps pulley mechanism dysfunction with medial subluxation of the long head of the biceps tendon from the bicipital groove into a longitudinal split tear of the subscapularis tendon; moderate to severe subscapularis tendinosis; partial tear of the supraspinatus tendon centered at the greater tuberosity; 27 mm intramuscular cyst within the supraspinatus likely dissecting through articular surface tendon perforations; moderate infraspinatus tendinosis with articular surface tendon fraying, no tear; moderate to severe acromioclavicular joint osteoarthritis; mild atrophy to the lateral deltoid muscle.

7. Claimant returned to CCOM on July 15, 2015. During this appointment, Claimant continued to complain of pain in his proximal biceps into the sub deltoid area and over the scapula posteriorly. Physical exam revealed tenderness to direct palpation over the proximal biceps a positive Speed's test, and proximal biceps pain with restricted elbow flexion. External rotation was 50 degrees with anterior shoulder pain, abduction was 70 degrees with shoulder pain, and the empty can test was positive for pain. PA Mullen noted the findings on Claimant's left shoulder MRI and diagnosed Claimant with a "left biceps strain with biceps tear, and subluxation in addition to a left shoulder and upper arm strain. Because Claimant's symptoms had failed to resolve and because of the left arm/shoulder MRI findings, PA Mullen referred Claimant to orthopedic surgeon Dr. Geoffrey Doner for evaluation and treatment.

8. On July 23, 2015, Claimant presented to Dr. Doner with pain in his left shoulder and arm. The office note of July 23, 2015 reveals a history of a work related injury to Claimant's left shoulder occurring on June 25, 2015. According to this note, Claimant heard a "pop" and has had "moderate pain ever since." The context of

Claimant's injury was listed as a "lifting work injury." Factors aggravating Claimant's pain included: "lifting; pushing/pulling; ROM; and weight bearing." Physical examination of the left arm/shoulder revealed the following findings: "tenderness of the acromioclavicular joint, the greater tuberosity, and the bicipital groove upon bony palpation; soft tissue palpation on the left revealed tenderness of the supraspinatus, the infraspinatus, the glenohumeral region, and lateral cuff insertion; passive range of motion of the left shoulder was limited, i.e. 90 degrees of forward flexion as compared to the right which was noted to be normal; Hawkin's test, Neer's test, and O'Brien's test were all positive. After reviewing the X-rays and MRI images, Dr. Doner documented the following diagnoses: shoulder pain, disorder of tendon of the biceps, and partial thickness tear of the rotator cuff. Dr. Doner recommended Claimant undergo a course of physical therapy and consider an intra-articular injection.

9. Claimant returned to Dr. Doner on September 3, 2015, after having gone to physical therapy several times. On this date, Claimant was experiencing the same symptoms as documented during his prior office visit. Dr. Doner's examination findings during this visit were essentially unchanged from the July 15, 2015 examination. Following Claimant's consent, Dr. Doner administered a corticosteroid injection into the left shoulder.

10. Claimant returned to Dr. Doner on October 2, 2015 with continued complaints of left shoulder pain. Claimant informed Dr. Doner that the injection gave him short term relief. Because Claimant failed to improve with physical therapy and the injection, Dr. Doner noted as follows: "I believe he has exhausted his nonoperative options and it is prudent to proceed with left shoulder arthroscopy with a subacromial decompression, distal clavicle resection, extensive debridement, and biceps tenodesis to help decrease pain and improve function."

11. Based upon the evidence presented, the ALJ finds that Claimant has not returned to his baseline level of functioning since the June 25, 2015 incident despite substantial conservative care. The record evidence presented, including Claimant's failure of conservative care combined with Claimant's continued need for modified duty persuades the ALJ that the surgery recommended by Dr. Doner is reasonable and necessary.

12. Claimant was scheduled for surgery on October 23, 2015; however, Claimant's surgery was cancelled. According to the Exhibits submitted into evidence at hearing, Claimant received a call from the adjuster assigned to the file, during which time, Claimant reported that his surgery was cancelled and "as it [was] being investigated due to too many work comp claims." The claim notes reflect that Claimant was called by Karen Claussen, Sr. Claims Adjuster for Insured on October 23, 2015, during which Ms. Claussen "asked [Claimant] about all his comp claims in the past and the auto claims in the past and he got really defensive as to why I am bring (sic) up the past." According to this note, Ms. Claussen then told Claimant that his previous claims/injuries were "history and [she] needed to investigate further."

13. On October 26, 2015, Ms. Claussen forwarded an e-mail message to Nina

M. Stupeck, a representative of Employer, informing her that she had concerns about this “Douglas Brown” given that he had “at least 14 hits to the index either with auto claims or work comps (sic) claims.” Of these claims, Ms. Claussen noted that there were “6 auto claims and one injury was a rotator cuff tear unknown which arm” and “8 work comp claims back, neck shoulder.” Ms. Claussen then recommended “denial for further investigation” and to “get [Claimant’s] prior medical records as this guy appears to make a claim every year or so, since 2002.” Ms. Claussen then forwarded correspondence to Dr. Doner notifying him that his “request for authorization for repair of the left shoulder received on October 21, 2015 [was] being denied for the following reasons, but not limited to, not reasonable and necessary and may not be related to the admitted injury.” The letter went on to indicated that the “claim [was] denied for further investigation and until compensability and related (sic) is determined the claim is denied.” The ALJ finds Claimant’s assumption that his left shoulder claim/surgery was being investigated/denied for having “too many” work comp claims reasonable given the content of the claims file notes authored by Ms. Claussen. Prior to the denial, Claimant’s medical care had been covered by Insurer on a medical only claims basis.

14. Claimant testified regarding his pre-existing medical conditions and the injuries he sustained in prior workers compensation and motor vehicle accidents. Claimant testified that prior to the June 25, 2015 work incident he had no problems with his left arm and shoulder. Claimant acknowledged that he had numerous auto accidents prior to the June 25, 2015 work injury. Nonetheless, Claimant maintained that the injuries he sustained in his auto accidents were mainly to his back and neck. Citing the substance of Claimant’s prior chiropractic records, Respondents dispute Claimant’s contention. As support for the assertion that Claimant had prior left shoulder “problems,” Respondents note that Claimant complained of bilateral shoulder pain on November 12, 2005, after a motor vehicle accident (MVA) and again on December 8, 2007, after a second MVA. Claimant sought chiropractic treatment with Dr. Dee. Elliott following his car accidents. Careful review of Claimant’s chiropractic records fails to persuade the ALJ that Claimant had any left shoulder condition requiring treatment on the aforementioned date. Indeed, inspection of Dr. Elliott’s records from July 2, 2004 to June 11, 2010, fails to reveal mention of any specific left shoulder problems requiring treatment.

15. Dr. Elliot’s record of April 9, 2008 reveals that Claimant was having pain in his neck that radiated to his right shoulder. There is no mention of left shoulder pain in this record. According to Dr. Elliot's records, Claimant complained of waxing and waning right shoulder pain from April 2, 2008 through September 29, 2008 but again, there is no mention of any left shoulder symptoms/conditions. Dr. Elliot's office notes of June 22, 2009 reflect Claimant was involved in another automobile accident and was now experiencing pain in his right shoulder region. There was no mention of any problems with Claimants left shoulder in this note. Dr. Elliot’s notes from June 22, 2009 through June 11, 2010 reflect problems with increased pain in the shoulder “area,” which the ALJ finds were associated with Claimant’s right rather than the left shoulder. Based upon the chiropractic materials submitted into evidence, the ALJ is not persuaded by Respondents suggestion that Claimant’s chiropractic records support a

finding/conclusion that he had left shoulder "problems" prior to June 25, 2015. Rather the ALJ finds that Claimant's chiropractic records demonstrate extensive treatment directed to Claimant's spine and occasional referred pain into the shoulder(s) from the neck.

16. Regarding Claimant's prior worker's compensation injuries, the medical records from CCOM dated June 23, 2005, reflect that Claimant slipped and fell working for Employer injuring his low back, right ankle, and sustaining a bruise to his left shoulder. According to this record, Claimant was released at maximum medical improvement (MMI) on this date with no impairment, work restrictions, or need for further care. The next record from CCOM is dated March 2, 2012 and reflects an instance where Claimant sustained a work injury to his right shoulder. The CCOM record from March 2, 2012 reveals no problems with Claimant's left shoulder.

17. On May 24, 2005 Claimant was seen at Penrose Hospital for an acute onset sharp shoulder pain radiating to the neck. Claimant told the doctor on this date he was standing at a machine while at work when he had a sudden onset of sharp pain located right under his left clavicle which radiated into his left neck and jaw. A physical examination was done, including an EKG. Claimant was diagnosed with "pain- non-traumatic body pain", treated, and released.

18. Claimant testified that he had a prior right shoulder injury while on-the-job with Employer. Claimant testified that the mechanism of injury (MOI) to his right shoulder was essentially the same as the MOI in the instant claim in that it occurred while lifting a pallet and trying to put it on a waist high table. Claimant went on to testify that he ended up having a shoulder surgery, after which he obtained significant relief of his right shoulder symptoms. Claimant was placed at MMI for his right shoulder injury on December 4, 2012 and returned to unrestricted work.

19. On November 8, 2014, Claimant developed pain in his right forearm, which he described as feeling like a "bug bite" (spider). He developed swelling and pain and was diagnosed with cellulitis from an abscess on the right forearm. The abscess was lanced, drained and cleaned. Claimant was placed at MMI for this injury without impairment and no lost time from work on November 20, 2014.

20. Medical records from Claimant's primary care physician (PCP) Dr. Steven Barrick from October 27, 2011 through July 28, 2015 reflect Claimant was being seen for various medical problems including poorly controlled hypertension, gout, asthma and diabetes[2] during the pendency of his right shoulder claim. Review of Dr. Barrick's records fails to reveal mention of problems concerning Claimant's left shoulder.

21. As noted above, Claimant's work for Employer requires lifting pallets on a regular basis. Claimant testified that prior to the June 25, 2015 work injury; he was able to perform all of his job duties without limitation. After the June 25, 2015 work injury Claimant has continued to work for Employer, however, in a modified capacity. Claimant's testimony in this regard is corroborated by the medical records. Claimant

[2] Claimant testified that he has had Type II diabetes for approximately 10 years.

also testified that he had no injuries to his left shoulder between 2012 and his June 25, 2015 work injury. The medical record evidence presented fails to establish that Claimant required any left shoulder treatment during these same years, i.e. 2012 and 2015. As Claimant's testimony is buttressed by the documentary evidence as a whole, the ALJ finds Claimant credible and persuasive.

22. At the request of Respondents, Claimant was examined by Lawrence Lesnak, M.D, on February 23, 2016. Dr. Lesnak's report reveals a history of Claimant sustaining a work injury on June 25, 2015. According to this record, Claimant lifted an empty wooden pallet (approximately 3X5 feet) off the floor, and attempted to place it onto the left table at waist level when he felt an acute "pop" in his left upper arm in the area of his left mid biceps brachia region. Claimant told Dr. Lesnak that he developed acute pain in his left upper arm that seemed to radiate proximally into his left anterior shoulder. On this date, Claimant was having constant left upper arm (at its mid portion) aching, pain, and pulsing sensations. Claimant advised Dr. Lesnak that the symptoms worsened with any type of lifting activities involving his left upper extremity, reaching away from his body with his left arm, and any internal rotation activities such as reaching behind his back. In addition, Claimant told Dr. Lesnak that he has some mild achy and pulling sensations involving his left shoulder with abduction on forward flexion when performing overhead activities. Claimant denied having prior left arm or shoulder injuries, similar symptoms, or having had any treatment for these body parts in the past.

23. As part of his independent medical examination (IME), Dr. Lesnak reviewed medical records from the physicians who evaluated and/or treated Claimant since the June 25, 2015 date of injury, including the MRI of the left shoulder. Dr. Lesnak also completed a physical examination during which he noted full passive range of motion in all planes without specific symptom reproduction. Claimant's active range of motion was limited because of increased pain in his right upper arm area in the region of his right biceps brachia muscle/tendon complex. Rotator cuff impingement signs were negative as were Hawkin's sign, Neer's sign, and crossed shoulder adduction maneuvers. Speed's signs reproduced some increased pain in the left mid upper arm region in the area of the left biceps brachia muscle/tendon complex. There was also tenderness to palpation in the area of Claimant's left mid upper arm, specifically the left biceps brachia muscle. Dr. Lesnak documented an absence of tenderness to palpation involving Claimants left glenohumeral joint, the acromioclavicular (AC) joint, and the left shoulder girdle. Dr. Lesnak's impressions were "probable left bicep muscle/ tendon strain/ sprain injury that occurred during work hours on June 25, 2015", post incident left shoulder MRI done on July 14, 2015 which noted chronic degenerative changes of the left shoulder with a small partial tear of the supraspinatus tendon and a disruption/dysfunction of the biceps pulley mechanism with medial subluxation of the long head of the biceps tendon with associated severe biceps tendinosis and no current clinical evidence of symptomatic left shoulder/ rotator cuff pathology including left impingement signs, clinical evidence of probable persistent tendonitis involving the left biceps brachia muscle/ tendon complex , with a non-diagnostic left shoulder steroid injection. Dr. Lesnak opined that the mechanism of injury, as he understood it, would not put any significant stressors on the left shoulder and that most of Claimant's left

shoulder problems, other than the noted left biceps sprain/strain, were not related to the June 25, 2015 work incident. Dr. Lesnak felt that the surgery recommended by Dr. Doner was not reasonable or necessary as it relates to the June 25, 2015 work injury and that Claimant is at maximum medical improvement without impairment, work restrictions, or need for further care.

24. As noted above, Dr. Doner testified by deposition on April 5, 2016. Dr. Doner is a fellowship trained, board certified orthopedic surgeon specializing in treatment of disorders of the knees, hips, and shoulders. Dr. Doner was provided with a history of how Claimant injured his left shoulder specifically, that Claimant was lifting a 3x5 pallet weighing from 20 to 30 pounds up to waist height and twisted his upper body slightly to the left while extending his left arm out at an angle over the table and in doing so felt a pop in his arm.

25. Dr. Doner testified that Claimant's present shoulder problems and need for surgery are related to the June 25, 2015 work incident. Dr. Doner explained that while Claimant had significant osteoarthritis and other evidence of degeneration in his left shoulder as shown by the MRI, Claimant's left shoulder was asymptomatic and that the work incident made it symptomatic[3].

26. Dr. Doner explained that many people, as they age, develop degenerative changes in their shoulder without any pain symptoms or problems. Dr. Donner testified that lifting like Claimant described likely caused a strain in the biceps tendon which tore the pulley system, which then caused the bicep muscle to move. Insofar as the rotator cuff tendonitis, tendonosis, and the chronic tear of the rotator cuff and arthritis, is concerned, Dr. Donor testified that these were exacerbated by the work injury because in lifting something and swinging it to your side, you are not just using the biceps muscle, you are also using the muscles comprising the rotator cuff which helps move the shoulder. Challenging the opinion of Dr. Lesnak that the MOI, as described, would not put any significant stressors on the left shoulder, Dr. Doner testified that lifting weight with the arm extended puts stress on the rotator cuff muscles and that is probably what happened to cause Claimant's shoulder symptoms.

27. Dr. Doner also testified that the degenerative changes in Claimants shoulder and arm weakened it such that it took less force to injure it. Dr. Doner opined that it is not uncommon for someone who is Claimant's age to have asymptomatic degenerative changes in their shoulder that require no treatment at all. Dr. Doner opined further that the absence of any pain or left shoulder problems, prior to the work incident, in conjunction with the above mentioned facts, lead him to the conclusion that Claimant's left arm and shoulder problems as well as his need for surgery are related to his June 25, 2015 work injury. Dr. Donor felt that history is important in determining causation.

[3] Dr. Doner specifically testified that Claimant had an "acute injury when he was lifting that box, and once he felt a pop and pain, he states prior to that he did not have symptoms in that upper shoulder and biceps region, and then after that he did have pain and the findings as stated on MRI and physical exam I found on him." He went on to testify that the June 25, 2015 incident could have "exacerbated" Claimant's pre-existing osteoarthritis causing his symptoms.

Specifically, it is important to determine when symptoms first appeared and what the patient was doing when they appeared. To that end, Dr. Doner discounted the causative role of Claimant's development of symptoms to his having diabetes and moderate obsesity.

28. Dr. Doner opined that the surgery he is recommending is reasonable and necessary because Claimant did not receive any lasting relief from the physical therapy and the injection. Dr. Doner testified that the reason for such an extensive surgery was to correct the various problems in Claimant's shoulder, including the preexisting degenerative changes, so as to maximize Claimant's chances of recovering from his injuries.

29. Dr. Lawrence Lesnak was qualified as an expert in physical medicine and rehabilitation (PM&R). Dr. Lesnak testified consistently with the opinions expressed in his IME report of February 23, 2016. Dr. Lesnak testifies that there is nothing on the MRI scan of Claimant's left shoulder that appears to be acute. Rather it shows all chronic changes that are fairly typical for someone who is 60 years old. Dr. Lesnak explained, when referring to Claimant's bicep issue, that if something were acute, you would find blood or some sort of acute edema, which is not seen at all in claimant's MRI.

30. Dr. Lesnak opined that the mechanism of injury as described by Claimant did not cause his shoulder problems. Rather, Dr. Lesnak testified that Claimant's left shoulder condition/symptoms are a consequence of the natural progression of his pre-existing degenerative osteoarthritis and that lifting a weighted object with a fully extended arm and pivoting to the side would not put any stress on the musculature or other structures of the shoulder. According to Dr. Lesnak, the injection that was performed by Dr. Doner was a non-diagnostic and non-therapeutic injection confirming that the symptoms were not coming from inside the shoulder joint. Because Claimant's shoulder symptoms are not causally related to the June 25, 2015, incident, Dr. Lesnak testified that his need the surgery recommended by Dr. Doner is also not causally related to the June 25, 2015 incident, but rather his chronic degenerative changes.

31. Dr. Lesnak testified that Claimant's actions in lifting the pallet as described would put stress on the biceps muscle. Consequently, he did admit that Claimant could have sustained injury to the bicep as opposed the shoulder, but there is no indication on the MRI that there was an acute injury or sub-acute injury to the biceps either. Nonetheless, Dr. Lesnak testified that if Claimant's MOI happened the way he described, then he could have irritated an already degenerative condition in his biceps.

32. Dr. Lesnak explained that if Claimant did sustain a temporary injury to his biceps tendon that it would be healed by now and there would be nothing to do about it. Dr. Lesnak explained that once all the unrelated degenerative changes in the shoulder joint are excluded from a causality standpoint, the only remaining condition related to the June 25, 2015 incident is chronic biceps tendinosis with chronic medial subluxed tendon with biceps tendonesis which he opined, standing alone, is not treated with

surgery. Consequently, surgical treatment of the one condition that Dr. Lesnak agrees is arguably related to the June 25, 2015, work incident is, according to Dr. Lesnak, neither reasonable nor necessary.

33. The ALJ finds the opinions of Dr. Doner that lifting the pallets in the fashion described by Claimant likely placed sufficient forces on the musculature and structural components of the arm and shoulder to tear the biceps pulley mechanism (resulting in medial subluxation of the tendon) and otherwise aggravate the pre-existing degenerative changes revealed on MRI, causing the left shoulder to become symptomatic credible and more persuasive than the contrary opinions of Dr. Lesnak..

34. Based upon the evidence presented, the ALJ finds that Claimant had pre-existing degenerative changes in the left shoulder prior to June 25, 2015. Nonetheless, after careful review of the medical record evidence, the ALJ finds no evidence to suggest that Claimant's left shoulder was symptomatic, that he was actively engaged in ongoing treatment for his left shoulder or that his left shoulder was functionally limiting in the weeks and months prior to June 25, 2015. Consequently, the evidence presented persuades the ALJ that Claimant's pre-existing left shoulder osteoarthritis was, more probably than not, asymptomatic and non-limiting until he aggravated it when he lifted a pallet in furtherance of his work duties on June 25, 2015. The evidence presented also persuades the ALJ that in addition to aggravating his underlying left shoulder osteoarthritis, Claimant likely sustained an acute injury to his left biceps on June 25, 2015. Finally, the evidence presented convincingly establishes that conservative care has failed to return Claimant to his previous baseline level of function. Consequently, Claimant has proven by a preponderance of the evidence that he suffered a compensable aggravation of a pre-existing condition and an acute injury to his biceps arising out of and in the course and scope of his work for which additional treatment is warranted.

35. Crediting the opinions of Dr. Doner, the ALJ finds that, in addition to a finding that the proposed left shoulder surgery is reasonable and necessary, the record evidence supports a finding that the need for the left shoulder/arm (biceps) surgery is a direct consequence of his June 25, 2015 work related injury rather than the natural progression of any pre-existing condition. Accordingly, the ALJ finds that Claimant has proven by a preponderance of the evidence that his need for left shoulder/arm surgery is reasonable, necessary and related to his June 25, 2015 work injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). As found, Claimant's testimony regarding the condition of his left shoulder, pre and post injury is supported by the record evidence of his treating providers. Consequently, the ALJ finds Claimant's testimony credible and persuasive.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this case, the ALJ concludes that the opinions of Dr. Doner regarding the cause of Claimant's shoulder/biceps condition and need for surgery are credible and more persuasive than the contrary opinions of Dr. Lesnak.

Compensability

E. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*.* *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(l)(b), C.R.S.*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment relationship with Employer and during an activity, specifically lifting a pallet, which is connected to his duties as a machine operator/material handler for Employer. Rather, based on the testimony presented and the records submitted, the undersigned ALJ understands Respondents contention to be that Claimant's asserted injury did not "arise out" of his employment, i.e. Claimant's left arm/shoulder condition was not caused by his work related functions.

G. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Based primarily on the testimony of Dr. Lesnak, Respondents contend that Claimant's left shoulder, and to a lesser degree his left biceps symptoms[4] are a consequence of the natural progression of pre-existing degenerative conditions of the left shoulder and arm.

H. A pre-existing condition "does not disqualify a claimant from receiving workers

[4] Regarding the compensable nature of Claimant's left biceps condition; Respondents argue that because the MRI failed to establish pooling blood or edema, there is no evidence of "acute" injury other than Claimant's "word" that he was injured in the fashion he claims, which according to Dr. Lesnak could have caused a traumatic injury to the biceps. Nonetheless, without addressing Respondent's argument concerning the reasonableness and necessity of biceps surgery, Respondents assert that because Claimant's is not credible, his "word" regarding the mechanism of injury is not believable. Consequently, in addition to dismissing the claim for injuries to the left shoulder, Respondents urge the ALJ to similarly dismiss the claim for benefits based upon an acute injury to the left biceps.

compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a pre-existing infirmity or disease to produce disability or the need for treatment for which workers' compensation is sought. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by employment related activities and not an underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

I. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, as asserted here, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). In this case, the ALJ credits the opinions of Dr. Doner to find and conclude that Claimant's left biceps/shoulder pain, more probably than not, arose from a traumatic tearing of the biceps pulley mechanism resulting in the medial subluxation of the biceps tendon from the bicepital groove as well as an aggravation of Claimant's left shoulder osteoarthritis. The evidence presented persuades the ALJ that these conditions/symptoms are a direct result of the duties associated with Claimant's work as a machine operator/material handler for Employer. It is undisputed that Claimant was called upon to frequently lift and manipulate 3x5 foot wooden pallets. While these pallets are not particularly heavy, the ALJ concludes that their size makes lifting them cumbersome, especially for Claimant who is 5' 3" tall. As found, the ALJ credits the opinions of Dr. Doner to conclude that lifting the pallets in the fashion described by Claimant likely placed sufficient forces on the musculature and structural components of the arm and shoulder to tear the biceps pulley mechanism (resulting in medial subluxation of the tendon) and otherwise aggravate the pre-existing degenerative changes revealed on MRI, causing the left shoulder to become symptomatic. Dr. Lesnak's opinions to the contrary, including the suggestion that Claimant's symptoms are a consequence of the natural progression of his pre-existing osteoarthritis are unconvincing. Based upon a totality of the evidence presented, the ALJ concludes that Claimant has established the requisite causal connection between his employment duties and his left arm/shoulder injuries. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988)(the determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Consequently, the injury is compensable.

Medical Benefits

J. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

K. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that he sustained an acute injury to his left biceps pulley mechanism in addition to a compensable aggravation of his previously asymptomatic left shoulder osteoarthritis. The evidence presented persuades the ALJ that these compensable "injuries" are the proximate cause of Claimant's need for medical treatment, including his need for surgery as recommended by Dr. Doner. While it is true that Dr. Doner's medical reports do not specifically state that the recommended shoulder surgery is related to Claimant's June 25, 2015 lifting event, Dr. Doner testified convincingly that the June 25, 2015 incident likely caused the tear to the biceps pulley mechanism and "exacerbated" Claimant's left shoulder osteoarthritis. Taken in its entirety, the ALJ finds that the evidentiary record contains substantial evidence to support a conclusion that Claimant's work duties and not a pre-existing condition is responsible for his current symptoms and need for treatment, including surgery. Consequently, the ALJ concludes that Claimant has established that the recommended surgery is related to the June 25, 2015 lifting incident. Moreover, the totality of the evidence presented establishes that conservative care, including physical therapy, therapeutic exercise and a corticosteroid injection failed to yield long-term results leading Dr. Doner to recommend surgical intervention. The evidence presented persuades the ALJ that the recommended surgical procedure is reasonable and necessary given Claimant's continued pain and functional decline in the face of failed conservative care. Consequently, the ALJ concludes that Respondents are liable for the surgery recommended by Dr. Doner.

ORDER

It is therefore ordered that:

1. The June 25, 2015 injury to Claimant's left arm (biceps) and left shoulder is compensable.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his left upper extremity conditions, including, but not limited to the surgery proposed by Dr. Doner.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 24, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-979-168-02

ISSUES

- Did Claimant prove by a preponderance of the evidence that she sustained an injury proximately caused by the performance of service arising out of and in the course of her employment?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of authorized, reasonable and necessary medical benefits?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 through 8 were admitted into evidence. Respondents' Exhibits A through M were admitted into evidence. The parties stipulated that if the claim is found to be compensable that the Claimant's average weekly wage is $ 588.50.

2. Claimant began work for Employer on February 9, 2015. Claimant was hired as a salesperson to perform duties that included cleaning areas of the store, walking the sales floor and selling furniture to customers.

3. Claimant testified as follows concerning the events of March 8, 2015. Claimant began her shift at approximately 11:00 a.m. Sometime between 2:00 p.m. and 3:00 p.m. she was assisting a customer that was interested in purchasing a dining set and chairs. Claimant explained that the dining set was located on the upper level of the store and that the chairs were located on the lower level of the store. While on the lower level of the store the customer found some chairs that he wanted to see next to the dining set on the upper level. The customer picked up a chair and started up the stairs to the second level of the store. Claimant picked up a second chair and followed the customer up the stairs. As Claimant was ascending the stairs her foot slipped off the stair and her heel struck the stair immediately behind and beneath her. At the same time she dropped the chair, leaned or tipped to the left, hyperextended the left knee and then "landed" on the left knee and hip. Claimant then picked up the chair and went slowly up the stairs. Claimant found another sales person to assist with checking out the customer. Claimant does not recall the name of this person.

4. Claimant testified as follows concerning the events immediately after the alleged incident. As Claimant was returning to the checkout or "horseshoe area" she

passed the office door of the assistant manager, Ms. Jessica Schuetz (Schuetz). Schuetz saw Claimant limping and asked if she was okay. Claimant replied that "it hurts like hell, but I'm going to help my customer and I'll talk to you in a minute." Claimant checked out the customer. Claimant then told Schuetz about the injury on the stairs and requested to sit down for awhile because she was hurt. Schuetz agreed to allow the Claimant to sit down.

5. Claimant testified that on March 8, 2015 she also told sales manger Mr. Douglas Dietel (Dietel) about her injury. Claimant testified that Dietel asked her what happened and she replied that she hurt her foot and banged her leg on the stairs while helping a customer. Claimant told Dietel that she wanted to "take it easy" and Dietel agreed that would be okay. Claimant also testified that she asked Dietel if she needed to "fill anything out." Dietel replied "no, not unless it gets worse."

6. Claimant testified that she took a half-hour break after the incident but worked most of the remainder of the shift that ended at 7:00 p.m. However, Claimant left a "little early" and did not help close the store.

7. Claimant testified that she worked her scheduled shift on March 9, 2015. Claimant testified that she could not perform her full duties and that an unidentified manager told her to "take it easy." Claimant explained that she tried to stay in areas where she could stand on one foot and lean on something or in areas where she could sit with her foot up. Claimant also testified that she worked on March 10, 2015 and was limited in the same way she was on March 9.

8. Schuetz testified as follows. She is an assistant manager at the Employer's furniture store. She worked with Claimant on March 8, 9 and 10, 2015. At no time did Claimant ever tell Schuetz anything about injuring herself at work. If Claimant had reported an injury to Schuetz then Schuetz would have immediately completed paperwork regarding the alleged injury. Schuetz passed by Claimant many times on March 8, 9 and 10. Schuetz never observed the Claimant limping and Schuetz believes she would have noticed if Claimant had been limping.

9. Dietel testified as follows. He is a sales manager at the Employer's furniture store. He estimated that employees working in sales probably walk 5 miles per day. Dietel worked with Claimant on March 8 and 9, 2015. Dietel did not speak with Claimant on March 8 or 9 and Claimant never reported any work-related injury to Dietel. Dietel saw the Claimant "dozens to hundreds of times" on March 8 and March 9. Dietel did not notice that Claimant had any physical limitations on either day and believes he would have noticed. It is the Employer's policy that a report must be completed within minutes of the time an employee reports a work-related injury.

10. Wednesday, March 11, 2015 was Claimant's scheduled day off work.

11. Claimant was scheduled to work on Thursday, March 12, 2015, but did not do so. Claimant testified that she called Doug Major (Major), then the store manager, and told him "what was going on." According to Claimant Major responded that he had

been told Claimant wasn’t feeling well and that something happened. Major then asked Claimant what happened and how she was feeling. Claimant testified that she explained “everything” to Major and that she was doing poorly and needed “to be seen.” Claimant further testified that she asked Major for human resources’ (HR) number “just in case it was a work comp incident.”

12. Claimant did not work on Friday March 13, 2015 because she was scheduled to be off on that day.

13. Claimant was scheduled to work on Saturday, March 14, 2015, but did not do so. Claimant explained that Major had not yet provided her with HRs’ number. Claimant further testified that she called Major on March 14 and told him she had not been able to see her regular doctor and was going to the emergency room (ER) for treatment. Claimant also told Major she would keep him posted regarding the results of the ER visit.

14. Claimant testified that her ankle was swollen and became black and blue after the incident on the stairs. She explained the ankle was still swollen and bruised when she went to the ER on March 14, 2015, although the “color” was not as bad as it had been.

15. Claimant arrived at the Sky Ridge Medical Center (Sky Ridge) ER at 11:21 a.m. on March 14, 2015. The Sky Ridge ER records indicate that Claimant complained of pain in the left foot. The history of present illness reflects that Claimant reported she was at work and “stepped down on her left foot wrong approx 1 week ago and hit heel on step above.” According to these records Claimant reported that there was “no fall.” Claimant underwent an x-ray of the left foot that was “negative for acute bony abnormality.” On Physical examination (PE) of the left foot Claimant was “tender” to the posterior aspect of the left heel at the attachment of the Achilles tendon. However, the Achilles tendon was intact. There was no “swelling, erythema or open wounds.” Examination of the ankle was “normal.” The Claimant’s calf was supple and “nontender.” The examining physician’s assistant’s primary impression was “contusion of heel” and a secondary impression of possible tendonitis. There is no indication in this note that Claimant reported left knee pain or that the left knee was examined. Claimant was discharged with instructions to follow up with her “pcp and or work comp in 3-5 days.” The records indicate Claimant departed the ER at 12:08.

16. Claimant testified that the “nurse” who performed the x-ray at Sky Ridge told her that the x-ray showed a “bone spur” on the heel.

17. Claimant testified that after she was treated at the ER she again called Major on the evening of March 14, 2015. Claimant recalled that she told Major the ER was “not sure” about the nature of her problem but she needed an appointment to see a workers’ compensation doctor or Kaiser or someone. According to Claimant, Major replied that the following Monday he would contact Becky Lambert (f/k/a Becky Rouse) in Human Resources (HR) regarding Claimant’s need for medical treatment. Claimant

also stated that she advised Major she would need to be off work for at least another week.

18. On March 19, 2015 Claimant sought treatment from her private health care provider, Kaiser Permanente (Kaiser). At Kaiser Claimant was examined by NP Joann Sorrentino. NP Sorrentino recorded that Claimant complained of "continued pain" in the "back of her heel." Claimant gave a history that she was going up the stairs at work "and had the ball of her foot placed on the step but it slipped and she came down hard on the step below landing on her heel." Claimant reported that the employer was "aware" of the injury. On PE NP Sorrentino noted point tenderness over the Achilles tendon and pain with flexion at the ankle joint. Claimant's heel was "minimally tender" and the ankle joint was "intact." NP Sorrentino assessed Achilles tendon tendonitis. She prescribed a "CAM boot with heel cup" to take pressure off the Achilles tendon. NP Sorrentino also recommended that Claimant apply ice to the "back of the leg" when not wearing the boot, to take ibuprofen for pain and follow up with a "Work Comp doctor before returning to work." There is no indication in this note that Claimant reported left knee pain or that NP Sorrentino examined the left knee.

19. Major testified as follows. On March 8, 2015 Major was the Employer's store manager at the site where Claimant worked. However, Major did not work on March 8 and 9, 2015. Major worked on March 10, 2015. Major recalled that he saw Claimant at the March 10 morning sales meeting and probably three or four more times during the day. On March 10 Major did not recall observing the Claimant standing in one place on one foot and did not recall that Claimant was limping.

20. Mr. Major testified that on Thursday, March 12, 2015 Claimant called him around 11:00 a.m. and stated that her ankle was swollen and that she needed to stay off of it. Claimant also advised that she would probably have her doctor check the ankle. Major testified that he asked Claimant "what happened?" Major recalled that Claimant stated she "didn't know" what had happened. Major stated that on this occasion Claimant did not tell him that she had sustained a work-related injury.

21. Major testified that Claimant called him on Saturday, March 14, 2015 and stated she was unable to work. Major recalled that Claimant said her doctor had diagnosed a "heel spur" and restricted her from returning to work until Friday, March 20, 2015. Major testified that Claimant then asked whether she could return to "light duty" work as a cashier. Major stated that he told Claimant she was a salesperson and that she needed to be able to do her job before she could come back to work. Consequently, Major told Claimant to follow her doctor's instruction and return to work on Friday, March 20, 2015. Major stated that on this occasion Claimant did not tell him she had sustained a work-related injury.

22. Major testified that his next contact with Claimant occurred on Thursday, March 19, 2015. Major stated that he called Claimant to "check in" because he expected Claimant to return to work Friday, March 20, 2015. However, Major did not reach Claimant and left a message. Major recalled that on the evening of March 19 Claimant returned his call and stated that she had seen a doctor and her foot was now

in a boot. Claimant further stated that the doctor recommended she see an Employer doctor. Major testified that he was a little confused and surprised because this was the first time Claimant mentioned that she injured herself at work. He stated that he emailed Becky Lambert (Lambert), Employer's HR manager, the next day (Friday, March 20) regarding this issue.

23. Claimant testified that she finally was able to speak with Lambert. Claimant recalled that Lambert said the injury was "not workers' comp" and that Claimant would need to see her own doctor. Claimant stated that Lambert offered to write a "denial letter" so that Claimant could receive treatment at Kaiser. However, Claimant insisted that Lambert make a referral to a workers' compensation doctor. Lambert then referred Claimant to Concentra Medical Centers (Concentra).

24. Lambert testified by deposition on March 25, 2016. Lambert testified that she is the Employer's "HR director" and "risk manager."

25. Lambert testified as follows concerning a conversation with Claimant. On March 23, 2015 Lambert called Claimant in order to obtain information to complete a first report of injury form. Lambert went through the form and asked Claimant questions regarding dates, times and other details concerning Claimant's alleged injury. According to Lambert, Claimant reported that on March 8, 2015 she sustained a "left foot Achilles tendon injury" when she miss-stepped "going up the stairs from the lower level to the upper level of the shore she works at." Lambert stated that Claimant did not report any knee injury or that she had fallen or tipped to the side landing on her left knee. Lambert testified that during the conversation she did not tell Claimant that the claim would be denied or that a "denial letter" would be sent. Lambert explained that she does not decide whether to accept or deny claims. According to Lambert the decision to admit or deny is made by the Employer's third-party administrator.

26. Lambert testified that Claimant told her that two store managers, Schuetz and Dietel, knew about her claim. Ms. Lambert testified she then contacted Schuetz and Dietel and both denied having any knowledge that Claimant was injured at work. Schuetz and Dietel told Lambert that Claimant had been "calling off" due to "some personal injury."

27. On March 27, 2015 Carrie Burns, M.D., examined Claimant at Concentra. Dr. Burns recorded a history that Claimant was "running up the stairs from the basement when she hyperextended her knee and hyperdorsiflexed at the ankle." Claimant explained that she was able to complete her shift "but her pain increased to the point where she had tremendous pain when walking." Claimant also related that her "work felt she did not have an OJI and wanted her to see her PCP," but the "PCP felt this was an OJI and wouldn't see her." Claimant advised that her knee hurt more than the "foot/ankle." On PE Dr. Burns noted Claimant's left leg was tender "on posterior aspect entire length of gastrocnemius." Claimant's left knee appeared normal and there was diffuse tenderness of the posterior knee and medial tibial plateau. There was no crepitus and Claimant exhibited a full ROM. Claimant's left ankle appeared normal. There was tenderness at the Achilles tendon insertion. The ankle ROM was "full" but

dorsiflexion was "painful." Dr. Burns assessed Achilles tendinitis, a gastrocnemius strain and a knee sprain. Dr. Burns imposed restrictions of seated duty 90% of the time, no walking on uneven terrain, no climbing stairs and no climbing ladders. Claimant could walk and stand "occasionally." Dr. Burns referred Claimant for physical therapy (PT) and for an MRI of the left knee. Dr. Burns also prescribed Norco and Naproxen.

28. On cross-examination Claimant testified that she experienced a "fall" when she was on the stairs at work. Claimant testified that when she went to Sky Ridge, Kaiser and Concentra she advised each of them of what happened to her ankle and that she "tipped left" and landed on her knee. Claimant stated that if none of these records mentions a "fall" on the stairs then the issue is one of "semantics."

29. On March 27, 2015 Claimant gave a recorded statement to the insurance adjuster assigned to the claim. Claimant told the adjuster that she was going up the stairs with a chair when "she caught [her] foot on the step and overextended my leg." Claimant stated that she "was only able to put one hand down to not fall, cause I had the chair in the other hand." Claimant stated that after the incident her ankle hurt right away and the knee hurt but she didn't think anything of it. Claimant explained that it "wasn't until I got off of it and was able to sit for a bit that my knee stared to hurt the most." Claimant stated she could not remember who she told about the incident, but she commented to "Doug or Jessica" that she hurt herself on the stairs. Claimant also stated that when she went to Sky Ridge she was asked "what was the most sore." Claimant replied: "Well, my foot and my knee."

30. On April 9, 2015 Insurer issued a Notice of Contest on the ground that the alleged injury was not work-related. Claimant testified she has not received treatment for her left lower extremity since the Notice of Contest was filed. She further stated that no physician has released her to return to work since Dr. Burns imposed restrictions

31. Claimant testified that she still experiences symptoms of the March 8, 2015 injury. She explained that climbing stairs aggravates the ankle and the knee, and that the knee becomes swollen and painful if she sits in a car for too long. Claimant stated that she believes the Achilles injury is 70 to 80% better than it was at the time of the injury but the knee is "a lot worse."

32. On September 14, 2015 Robert Messenbaugh, M.D., performed an independent medical examination (IME) of Claimant at the request of Respondents. Dr. Messenbaugh is board certified in orthopedic surgery and level II accredited. Dr. Messenbaugh issued a written report on January 16, 2016. In connection with the IME Dr. Messenbaugh took a history from Claimant, reviewed medical records and "various legal documents" and performed a PE. Dr. Messenbaugh noted that in answers to interrogatories Claimant stated that her injury occurred when she "caught the step wrong" and overextended her ankle and "hyperextended the leg and knee." On PE Dr. Messenbaugh recorded Claimant exhibited full ROM of the left knee but some "posterior and anterior discomfort" with full extension. Dr. Messenbaugh also noted "some tenderness" around Claimant's distal quadriceps and proximal patellar tendons. No ligamentous instability was observed. Claimant reported tenderness about the lateral

posterior aspect of he left calf but Dr. Messenbaugh did not observe any swelling. Dr. Messenbaugh noted the Achilles tendon was intact but recorded that there was tenderness around the distal Achilles tendon and at its insertion into the heel. Claimant exhibited "somewhat guarded but full" ROM of the left ankle. However, Claimant complained of pain in the posterior calcaneal region, the distal Achilles tendon region and the posterolateral calf region on "maximum dorsiflexion and plantarflexion."

33. In the written IME report Dr. Messenbaugh opined to a reasonable degree of medical probability, that Claimant's diagnoses include Achilles tendinitis and "to some degree" a strain of the "left gastrocnemius and posterior knee." Dr. Messenbaugh further opined that it is "plausible" the Achilles tendinitis and gastrocnemius strain "could have been caused by [Claimant] having experienced a direct blow and hyperextension positioning to the back of her left calcaneus and Achilles tendon *if events happened as described by [Claimant]*." (Emphasis added). Dr. Messenbaugh also opined that it was "improbable" that Claimant could have worked several days after the injury "with no known complaint." However, Dr. Messenbaugh noted Claimant said she complained from the "moment of her accident and thereafter."

34. Dr. Messenbaugh opined Claimant's condition had not yet resolved and required further evaluation and treatment. He also stated that Claimant's recovery had been "prolonged and difficult to totally explain." However, Dr. Messenbaugh stated that Claimant did not undergo a "consistent treatment program" after the injury and this could partially explain her failure to recover more promptly.

35. On January 29, 2016 Edwin Healey, M.D., performed an IME at Claimant's request. Dr. Healey is board certified in occupational medicine and neurology and is level II accredited. In connection with the IME Dr. Healey took a history from Claimant, reviewed medical records and performed a PE. Dr. Healey wrote that Claimant gave a history that she "tripped as she was stepping up on a step." Claimant reported that she "initially hyperextended her left knee and strained her left Achilles tendon fell backwards and hyperextended her left knee and sprained her ankle and then fell on her left side." Claimant also advised Dr. Healey that she was "unable after slipping to regain her balance or prevent her fall because she was carrying a dining room chair in both hand [sic] as she walked up the stairs." Claimant told Dr. Healey that after the injury she "immediately had some pain and swelling over particularly her left ankle and left Achilles." Claimant also stated she had "some bruising and swelling of both her ankle and left knee." Claimant told Dr. Healey that she had "mild knee pain initially" but had increasing knee pain particularly after wearing the CAM boot.

36. Dr. Healey opined that Claimant's "diagnoses causally and directly related to the slip-and-fall injury of March 8, 2015 include the following: (1) Left Achilles tendon strain with acute Achilles tendinitis; improved but still mildly symptomatic; (2) Hyperextension of the left knee and calf; caused by injury but significantly aggravated while wearing the walking boot for the Achilles tendinitis; (3) Left quadriceps strain, with evidence of myofascial pain over the distal quadriceps. Dr. Healey recommended that Claimant undergo additional treatment to include an MRI of the left knee and distal

quadriceps to rule out internal derangement or evidence of chondromalacia or inflammation of the quadriceps tendon. Dr. Healey also recommended additional PT for the quadriceps, left knee, calf and Achilles tendon.

37. In the IME report Dr. Healey wrote that it is "his experience from evaluating injured workers from" the Employer that "the company is extremely reluctant to take responsibility for work related injuries and will go to great lengths to deny work injuries that employees have incurred while working" for the Employer.

38. Dr. Healey testified at the hearing. On direct examination Dr. Healey testified that as an occupational medicine physician he took a very detailed history from Claimant concerning the injury of March 8, 2015. Dr. Healey stated that Claimant told him she was going up the stairs with a chair in her hands when she stepped "wrong" causing her left foot to "go down" and her knee to "go back." This misstep caused the left foot to "hyperflex." Claimant further related that because she had the chair she fell "over on the side" on her left knee. Dr. Healey stated that Claimant did not report that she fell "down the stairs." Instead Claimant reported that she "fell over." Dr. Healey testified that Claimant reported a similar history to Dr. Burns.

39. Dr. Healy testified that ordinarily he would have expected Claimant's symptoms to have resolved by the time he examined her. However, in Dr. Healey's opinion the symptoms had not resolved because Claimant did not receive consistent treatment for the injury, she was overweight and she was diabetic. Dr. Healey also opined that wearing the boot for her Achilles injury aggravated the knee injury she sustained on March 8, 2015. Dr. Healey further opined that the injury to Claimant's ankle caused an "altered gait" that ultimately produced a left quadriceps strain.

40. Dr. Healey testified that he agreed with Dr. Messenbaugh's diagnoses of Achilles tendonitis and left gastrocnemius strain, although Dr. Messenbaugh did not mention Claimant's left knee. Dr. Healey also stated that he agreed with Dr. Messenbaugh that Claimant's reported "mechanism of injury" was consistent with the injuries Claimant ultimately sustained.

41. On cross-examination Dr. Healey testified that he believes the Claimant is a credible historian concerning the alleged injury. However, Dr. Healey admitted that he did not interview the Employer witnesses who disputed much of Claimant's testimony concerning the injury and subsequent events.

42. On cross-examination Dr. Healey stated that he reviewed the March 14, 2015 Sky Ridge ER records. Dr. Healey admitted the ER records do not contain any "objective" evidence of pathology and that the PE was "benign." Dr. Healey agreed that if Claimant had hyperextended her knee and injured her ankle in the manner she described to him he would have expected the ER records to contain objective signs of pathology.

43. Dr. Healey testified on cross-examination that he was "initially" concerned that the history provided to him by Claimant described a fall but there was no mention of

a fall in the Sky Ridge ER records. At first Dr. Healey explained the discrepancy by stating that the ER is hectic and that ER providers trying to rule out serious and life threatening conditions often fail to take a complete history. However, Dr. Healey did not realize, until it was pointed out to him during cross-examination, that the ER records explicitly state that Claimant sustained "no fall." Dr. Healey then opined that the term "no fall" is "ambiguous" because the word fall can have multiple meanings. Dr. Healey then admitted that when Claimant filled out a questionnaire prior to the January 29, 2016 IME she wrote: "I fell on stairs @ work – hyper-extended ankle, heel & knee."

44. On cross-examination Dr. Healey admitted that contrary to his testimony on direct examination Dr. Burns' March 27, 2015 note does not mention any history that Claimant fell.

45. Dr. Healey testified that he reviewed surveillance video that was taken of Claimant on February 11 and 12, 2016. Dr. Healey stated that nothing he saw on the video was inconsistent with his examination of Claimant or called her veracity into question. Dr. Healey stated that the video showed no impairment at all.

46. Dr. Messenbaugh testified at the hearing. Dr. Messenbaugh agreed with Dr. Healey that ER providers are more concerned with triage and treatment of injury than obtaining and recording the exact details of how an injury occurred.

47. Dr. Messenbaugh also testified that in his experience people go to ER's because they have experienced some event and discomfort. Dr. Messenbaugh stated that normally there is some observable and objective finding that evidences the event and discomfort and none was recorded at the Sky Ridge ER on March 14, 2014.

48. Dr. Messenbaugh testified that he agreed with Dr. Healey that the word "fall" can have different meanings. Dr. Messenbaugh opined that there is some confusion in the medical records and reports as to whether Claimant fell down and "went boom" or merely tipped over on her left side. Dr. Messenbaugh opined the question of whether and how Claimant fell is not important to determining the real issues of whether Claimant sustained an injury at work, and if so what was the nature of the injury. Dr. Messenbaugh explained that based on his review of the records, including Dr. Healey's report, no one is asserting that Claimant sustained any injury from falling or tipping over. Rather, Claimant is alleging that she sustained injury by hyperdorsiflexion of the ankle and hyperextension of the knee.

49. Dr. Messenbaugh testified that he watched the surveillance video taken of Claimant on February 11 and 12, 2016. Dr. Messenbaugh stated that the video showed Claimant moving without evidence of a limp, hesitation, or evidence of any injury. He noted that Claimant reported to Dr. Healey that she had difficulty getting in and out of a car, but the video shows Claimant getting into a car with no detectable problem. Dr. Messenbaugh further stated that the video does not depict the Claimant performing any activity that is beyond the restrictions imposed by Dr. Burns.

50. Claimant failed to prove it is more probably true than not that she sustained any injury proximately caused by the performance of service arising out of and in the course of her employment with the Employer.

51. Claimant's testimony that on March 8, 2015 she miss-stepped while climbing the stairs at work and injured her left ankle, left calf and left knee is not credible and persuasive.

52. Claimant's alleged injury was not observed by any other witness who testified at the hearing. Therefore, the alleged incident was essentially un-witnessed.

53. Schuetz and Dietel credibly and persuasively refuted Claimant's testimony that on March 8, 2015 she reported the alleged injury shortly after it occurred. Schuetz and Dietel also credibly and persuasively contradicted Claimant's testimony that she suffered injury-related physical limitations when she worked on March 9 and 10, 2015. Contrary to Claimant's testimony, Schuetz credibly testified that Claimant never reported any work-related injury to her and that she did not observe Claimant limping on March 8, 9 or 10, 2015. Dietel credibly testified that Claimant never reported any work-related injury to him and that he did not observe Claimant having any physical difficulties at work on March 8 and 9, 2015. Claimant's testimony that she reported an injury to Schuetz and Dietel on March 8 is further undermined by Claimant's own statement to the insurance adjuster. Claimant told the adjuster on March 27, 2015, fifteen days after the alleged injury, that she could not recall who she told about the injury but said she described it to "Doug or Jessica."

54. Major credibly and persuasively refuted Claimant's testimony that on March 12 and 14, 2014 she reported a work-related injury. Major credibly testified that Claimant did not report any work-related injury until March 19, 2015, the day before Claimant was expected to return to work.

55. Claimant's testimony that on March 14, 2014 she called Major both before and after she visited the Sky Ridge ER is not credible and persuasive. Major credibly testified he received only one call from Claimant on March 14 in which Claimant stated that she would not be able to work, that she had been to the doctor and was diagnosed with a heel spur and told to stay off work until March 20, 2014. Major also credibly testified that during this phone call Claimant asked if she could do light duty work and he told her that she would have to be released to full duty as a sales person.

56. Based on the evidence, the ALJ finds that the most probable scenario is that on March 14, 2014 Claimant called Major only once and the call was placed *before* Claimant went to the Sky Ridge ER and reported the history of a work-related injury. The Claimant herself admitted that she placed at least one call to Major *before* she went to the ER on March 14. (Findings of Fact 13 and 17). Major credibly testified that during the single phone call Claimant stated that she had been diagnosed with a heel spur and that the doctor had taken her off work until March 20, 2015. However, the x-rays taken at Sky Ridge ER show that there was no bony abnormality in Claimant's ankle and that the actual diagnoses included a "contusion" of the heel and possible

tendonitis. Further, there is no indication in the Sky Ridge ER notes that Claimant was restricted from returning to work until March 20, 2015. Instead, the ER notes reflect that Claimant was given an “ace wrap” at the time of discharge and told to follow up with her PCP or a workers’ compensation doctor within 3 to 5 days.

57. The ALJ infers from the circumstances set forth in Findings of Fact 55 and 56 that that Claimant was strongly motivated to invent and report a work-related injury when she went to the Sky Ridge ER just before noon on March 14, 2014. By the time Claimant went to the Sky Ridge ER Major had already told Claimant that no light duty work, such as cashiering, was available and that she would have to be able to perform the sales job in order to return to work. The ALJ infers that Claimant probably reported the work-related injury to Sky Ridge either because she did not like working long hours on her feet, or because she had sustained a non-work-related injury or condition and did not feel able to continue performing the sales job. In either event, the ALJ infers from Claimant’s inquiry to Major about the availability of light duty work that Claimant desired financial compensation but did not want to continue performing the sales job. The ALJ infers that Claimant probably decided that the best way to obtain both of these objectives was to report a work-related injury.

58. The ALJ finds it improbable that Schuetz, Dietel and Major all gave false testimony about what Claimant did and did not tell them about the alleged injury. There is no credible or persuasive evidence that the Employer either directly or indirectly attempted to influence these witnesses to give false testimony. Neither does the ALJ find it plausible that all three of these witnesses decided to testify falsely out of a sense of loyalty or duty to the Employer.

59. Claimant’s testimony that she sustained a work-related injury is also incredible because it is significantly inconsistent with several aspects of the medical records. Claimant testified that when she went to the Sky Ridge ER her ankle was still swollen and bruised. (Finding of Fact 14). However, the Sky Ridge ER records reflect that the ankle examination was “normal” and there was no swelling.

60. Claimant testified that during the alleged incident of March 8, 2015 she hyperextended her left knee. On March 27, 2015 Claimant told Dr. Burns that her knee hurt more than the “foot/ankle,” and Claimant told the insurance adjuster that her knee “hurt the most.” (Findings of Fact 26 and 28). Claimant told Dr. Healey that the injury caused bruising and swelling of both her ankle and left knee. However, the March 14, 2015 Sky Ridge ER records and the March 19, 2015 Kaiser records do not mention any complaints of left knee pain, nor do they reflect any examination of the left knee. (Findings of Fact 15 and 18). The ALJ finds it is improbable that Claimant sustained a painful left knee injury on March 8, 2015, but failed to report it at Sky Ridge and Kaiser. The ALJ also finds it improbable that if Claimant had reported left knee symptoms to Sky Ridge and Kaiser that both failed to note the symptoms and failed to document any examination of the knee.

61. Dr. Healey and Dr. Messenbaugh agreed that the Sky Ridge ER records do not contain any objective evidence of pathology. Dr. Healey credibly testified that

the Sky Ridge ER examination was “benign.” Dr. Healey credibly opined that if Claimant had injured herself in the manner she described he would have expected the Sky Ridge ER records to contain objective signs of pathology.

62. Dr. Healey’s opinion that Claimant is a credible historian is not persuasive. For the reasons stated above the ALJ finds Claimant is not a credible historian. Because Dr. Healey’s opinions are largely dependent on the accuracy of the history Claimant reported to him, Dr. Healey’s opinions are given little weight except as described in Finding of Fact 61. Further, Dr. Messenbaugh’s opinion that Claimant sustained work-related injuries is expressly dependent on the assumption that Claimant accurately described the circumstances of the injury. (Finding of Fact 33). However, the ALJ finds that Claimant did not accurately describe the history of a work-related injury on March 8, 2015.

63. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers’ Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY OF INJURY

Claimant alleges that she proved by a preponderance of the evidence that on March 8, 2015 she sustained injuries to her left ankle, left calf and left knee that were proximately caused by an incident on the stairs at work. Respondents contend that the

Claimant's proof is largely dependent on the credibility of her testimony about the events that allegedly occurred on March 8. Respondents argue and that the weight of the credible evidence demonstrates that Claimant's testimony is not credible and that she failed to meet her burden of proof. The ALJ agrees with Respondents.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of her employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

As determined in Findings of Fact 50 through 62, Claimant failed to prove it is more probably true than not that she sustained any injury proximately caused by the performance of service arising out of and in the course of her employment. As found, Claimant's testimony that she sustained an injury to her left knee and ankle while going up stairs at work is not credible and persuasive. No witness that appeared at the hearing, other than Claimant, testified that they observed the alleged incident of March 8, 2015. As determined in Findings of Fact 53 through 56, Claimant's testimony that she immediately and repeatedly reported a work-related injury to her Employer was credibly refuted by the testimony of Schuetz, Dietel and Major. For the reasons stated in Finding of Fact 57, the ALJ finds that Claimant's reporting of the alleged work-related injury is not credible because it was probably motivated by Claimant's desire to receive financial compensation without performing the rigorous walking and standing required by her sales job. Claimant's testimony is also incredible because it is significantly inconsistent with the medical records as described in Findings of Fact 59 though 61.

The Claim for workers' compensation benefits must be denied. In light of this determination the ALJ need not address the other issues raised by the parties.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in WC 4-979-168-02 is denied.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 23, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-988-098-01

ISSUES

Whether Claimant proved, by a preponderance of the evidence, that the spinal cord stimulator trial, for which Dr. Robert Kawasaki has requested prior authorization, is reasonable and necessary.

FINDINGS OF FACT

The ALJ finds and concludes the spinal cord stimulator trial should be denied for the following reasons.

1. Claimant's testimony that she does not want the procedure, and even if the procedure were authorized, she would not proceed is credible and persuasive. This is so especially in light of Dr. Shih's credible and persuasive testimony that a patient's feelings about a procedure affect the outcome of the procedure by up to approximately 30 percent according to recent literature.

2. Dr. Shih testified as an expert in physical medicine and rehabilitation. His testimony was credible and persuasive that a Chronic Regional Pain Syndrome (CRPS) diagnosis is based on three criteria. First, the pain is generally greater than expected based on the mechanism of injury. Two, nonspecific pain findings are present. Three, there are dystrophic changes in the skin, hair and nails, together with asymmetries in the sweat patterns and discoloration of the skin.

3. Dr. Shih performed an April 6, 2016 IME of Claimant. While other medical providers found dystrophic changes present on their examinations of Claimant, he did not note them during his examination.

4. A spinal cord stimulator trial involves surgically placing wires near the claimant's spinal cord, implanting a battery and receiver. A spinal cord stimulator works by creating a stimulus that may create a perception in the patient of decreased pain. The procedure of implanting a spinal cord stimulator has some risks, although infrequent, of life-threatening consequences. It also bears the risks associated with surgery next to the spinal cord. The ALJ finds the risks outweigh the likely outcome of potentially having no effect and that the risk, given Claimant's history, of greatly worsening her symptoms.

5. Colorado's Medical Treatment Guidelines require two positive diagnostic tests to diagnose CRPS. The claimant had one positive test, which was a thermogram performed by Dr. Tashof Bernton. Another diagnostic test was the stellate ganglion block, which is usually the "gold standard", and was performed on Claimant, but the results were non-diagnostic. In addition, Claimant reported a dramatic increase in her symptoms following the stellate ganglion block. Dr. Shih does not recommend a spinal

cord stimulator trial whether or not Claimant were diagnosed with CRPS, one because of the low success rate of the procedure and two because of Claimant's negative response to the stellate ganglion block. These same factors reinforce Claimant's position that she would not receive the procedure even if it were approved.

CONCLUSIONS OF LAW

Given the above Findings of Fact, and the pertinent case law, the ALJ finds and concludes the claimant has not met her burden of proving, by a preponderance of the evidence, that the request for authorization of a spinal cord stimulator trial is reasonable and necessary.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The request for prior authorization of a spinal cord stimulator trial is denied.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 24, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has established by clear and convincing evidence that the Division independent medical examiner (DIME), Dr. John M. Tyler, erred in finding that the claimant has reached maximum medical improvement (MMI);

2. Whether the claimant has established by clear and convincing evidence that the DIME, Dr. John M. Tyler, erred in calculating the claimant's impairment rating; and,

3. Whether the claimant has established by a preponderance of the evidence that she requires the surgery recommended by Dr. Timothy Hart.

Based upon the findings and conclusions below that the claimant is not at MMI, the ALJ does not render a decision on the impairment rating.

FINDINGS OF FACT

1. On December 7, 2013 the claimant suffered a compensable industrial injury while working for the respondent-employer.

2. On that date the claimant reached up to a get a 40lb tote off a 6 foot pallet as she was unloading stock. While bringing the tote down she injured her left arm, where she felt a sharp pain in the middle of the arm, from the wrist to the elbow. She noticed that her arm was sore about 15 minutes later. She experienced pain shooting up to her elbow.

3. The claimant was initially seen by Dr. Autumn Dean at EmergiCare on December 10, 2013 regarding her arm and elbow injury. She was provided with pain medications, work restrictions, and physical therapy.

4. An x-ray was ordered which indicated that there was a possible 1 mm loose joint body of the elbow and an enthesopathic at the common extensor tendon attachment of the lateral epicondyle. However, there were no acute findings.

5. On December 11, 2013 the claimant reported to Ashley Zimmerman to begin physical therapy. The claimant also attended physical therapy on 12/16/13, 12/20/13, 12/27/13, 12/31/13, 1/2/14, 1/6/14, 1/13/14, 1/17/14, 1/24/14, and 2/7/14. The claimant consistently reported that her elbow was still sore and physical therapy was not helping with the symptoms.

6. On December 17, 2013 the claimant saw Dr. Autumn Dean, reporting that her symptoms remained the same.

7. On December 31, 2013, the claimant continued to report that physical therapy was not working to Dr. Dean. Dr. Dean then ordered an MRI scan of the elbow.

8. On January 3, 2014 the claimant had an MRI performed on her left elbow. The impression from the MRI was that the claimant had mild medial epicondylitis and a "very small elbow effusion."

9. On January 20, 2014 the claimant had a follow-up with Dr. Dean, where she informed the doctor that despite physical therapy, she was not noticing much improvement with her elbow.

10. On January 28, 2014 the claimant saw Diane Johnson, OT, CHT, complaining of localized numbness and tingling at medial aspect of left elbow. She has left grip strength of 50%. Since the claimant was having minimal improvement with physical therapy, she was referred to orthopedics for further treatment.

11. On February 3, 2014 Dr. David Walden, an orthopedic surgeon, provided Dr. Dean with the recommendation of an EMG test "to evaluate the integrity of the ulnar nerve and the cubital tunnel" for the claimant. He believed that "the symptoms are likely coming from a cubital tunnel problem," and believed that the claimant should then be referred to orthopedic surgeon, "Dr. Hart for evaluation of cubital tunnel and/or medial epicondylar procedures."

12. On February 10, 2014 Dr. Dean ordered and EMG.

13. On February 20, 2014 the claimant underwent an EMG study with Dr. Stephen Scheper. His impression was that the EMG "failed to reveal any significant nerve dysfunction of the ulnar nerve across the wrist or elbow." He opined that the claimant was "suffering from medial epicondylitis which is rather severe and she is likely experiencing involvement of the adjacent ulnar nerve with inflammatory neuritis." The EMG was considered to be normal at the time.

14. On March 3, 2014 the claimant had a follow-up appointment with Dr. Dean, who noted that the claimant's EMG was unremarkable, and an injection was recommended.

15. After the epicondyle injection the claimant felt better for approximately six weeks.

16. On March 31, 2014 and April 21, 2014 the claimant had follow-up appointments with Dr. Dean.

17. At a follow-up appointment with Dr. Dean on May 12, 2014 the claimant was still doing better, but was experiencing a dull ache.

18. On a follow-up with Dr. Dean on June 3, 2014 Dr. Dean noted that the claimant "is performing all of her regular work duties without difficulties" and placed the claimant at maximum medical improvement (MMI) with potential maintenance care for further injections.

19. On August 5, 2014 the claimant saw Dr. Walden. In his report he notes that the claimant reports that her elbow still hurts. Dr. Walden notes that there "is pain over the medial epicondyle and over the common flexor tendons with decreased grip strength on that side." The claimant underwent another injection of 2cc lidocaine and 1 cc of dexamethasone.

20. The claimant's second injection did not help. She then had a follow-up appointment with Dr. Walden on August 19, 2014.

21. On that same day, Dr. Walden referred the claimant to Dr. Timothy Hart, an elbow specialist, to evaluate her for possible medial epicondylor debridement.

22. On August 25, 2014 Dr. Hart noted that the claimant's numbness and tingling symptoms persist with posterior medial left elbow pain. He opined that it was reasonable to repeat the EMG and referred her to Dr. Katherine Leppard.

23. On September 12, 2014 the claimant underwent testing with Dr. Leppard. Dr. Leppard found the study to be abnormal and that the claimant had a "left ulnar mononeuropathy at the elbow, moderate in severity" and "a left median mononeuropathy at the wrist, mild in severity."

24. On September 22, 2014, after the claimant's second EMG, Dr. Hart provided to Dr. Dean that the EMG showed moderate left cubital and mild left carpal. He noted that if the claimant "remains symptomatic in four weeks upon return we are

likely to “more seriously consider surgical management for left elbow ulnar nerve decompression subcutaneous transposition and the left wrist carpal tunnel release.”

25. On October 6, 2014 the claimant’s symptoms still persisted and had worsened. Dr. Hart put in for authorization to proceed with a left elbow ulnar decompression subcutaneous transposition and the left wrist carpal tunnel release.

26. On October 14, 2014 Dr. Thomas Mordick performed a record review of the claimant’s case. He opined from his review, that the claimant “had a non-specific, non-reproducible examination after her injury” and that he does not feel that “her recently diagnosed cubital and carpal tunnel can be attributed to her 12-07-13 injury.” He stated that the claimant remained at MMI even after requiring additional injections.

27. On October 16, 2014 Dr. Hart’s request for authorization of surgery for the claimant was denied due to Dr. Mordick’s record review.

28. The claimant underwent a DIME evaluation on January 22, 2015 with Dr. John Tyler. Dr. Tyler notes in his evaluation that the only abnormality he sees from Dr. Leppard’s EMG study is that “there is distinct slowing of the ulnar nerve through the ulnar groove but no other evidence of any type of ulnar neuropathy” and considers it to be only a “mild” ulnar neuropathy. Dr. Tyler gave the claimant a 0% permanent partial impairment rating. He then agreed that the claimant had reached MMI, but moved that date to August 5, 2014, the date of the claimant’s last injection procedure completed by Dr. Walden.

29. On March 27, 2015 the claimant had her third cortisone injection with Dr. Scheper.

30. On June 26, 2015 the claimant had an IME performed by Dr. Rook. Dr. Rook is board-certified in physical medicine and rehabilitation, electrodiagnostic medicine, pain management, and addiction medicine. Dr. Rook was admitted as an expert in the field of physical medicine and rehabilitation at the deposition. Dr. Rook is Level II Accredited. Dr. Rook has been Level II Accredited for 23 years.

31. Dr. Rook opined that the claimant is not at MMI and requires the surgery recommended by Dr. Hart. At the time of the IME, the claimant continued to suffer from symptoms regarding her left upper extremity and her condition continued to deteriorate since she was put on MMI.

32. Dr. Rook diagnosed the claimant as having left elbow pain, and the following:

Medial epicondylitis.

Forearm myofascial pain involving flexer musculature.

Ulnar neuropathy at the left elbow.

Range of motion loss left elbow.

Weakness of left-aided grip strength.

33. On October 23, 2015 the claimant was referred to Dr. Scott Primack for a second opinion. Dr. Primack is board-certified in electrophysiology.

34. The claimant met with Dr. Primack on November 18, 2015. According to Dr. Primack, the valgus and varus stress testing was positive on the left. Tinel's was positive on the left elbow compared to the right. Dr. Primack diagnosed the claimant as having documented medial epicondylitis and documented left ulnar neuropathy. He stated that "given her history, clinical examination, and review of the medical records, I do believe surgical intervention would be considered reasonable and appropriate" and added that he "believed she should get better quite easily" from the surgery.

35. Dr. Primack disagreed with the interpretation that the EMG performed in February 2014 was within normal limits. When asked if he agreed that the EMG was normal, Dr. Primack responded with:

> No, not really. I mean, in looking at this, and this being the first time I have done this, and also being board-certified in electrophysiology, it is interesting that the dorsal ulnar cutaneous nerve latency was prolonged with a decreased amplitude when compared – when in of itself --- and the dorsal ulnar cutaneous nerve is a marker for an ulnar nerve entrapment at the elbow. And it's got both a decrease in its prolongation or latency as well as its amplitude, which indicates there's an entrapment above that.

36. When asked if there was any change between the February 2014 EMG and the September 2014 EMG, Dr. Primack observed that both EMG's show slowing of the ulnar nerve; the ulnar nerve is not normal at the elbow. Dr. Primack explained that slowing of the ulnar nerve is "indicative of an entrapped nerve or nerve that is injured, at least for the ulnar nerve, in what's called the cubital tunnel or that area that sits the medial epicondyle."

37. Dr. Primack disagrees with Dr. Tyler's assessment that the February EMG results were "normal." Dr. Primack testified that "because it wasn't normal. I mean, I don't know if Dr. Tyler does EMGs, but all you've got to do it look at the raw data. But if

you-re not used to doing EMGs, you would never be able to look at the raw data. I mean, you can see how complicated it is."

38. When asked if he disagreed with Dr. Tyler's opinion that the claimant's EMG findings were mild, Dr. Primack explained his rationale for his opinion that the findings are moderate by stating:

> Yeah, I would. I mean, again, I'm - - I go strictly by the book, so I go with the American Academy of Neuromuscular and Electrodiagnostic Medicine, and that's how we classify it.

39. Dr. Primack testified that Dr. Tyler erred in finding that the claimant does not require surgery. According to Dr. Primack, this is more than a difference of opinion. Dr. Primack stated:

> Because you, you know, you don't treat the lab test. So you treat a person. So this data is not as good as the clinical examination. The data is only as good as the clinical examination, meaning that if you've got consistent findings and consistent clinical examination, a loss of function, the number doesn't indicate whether you operate or not. I guess if it was normal, it could be. But severity is not just based on an electrical number. It's based upon an exam and a person behind it.
>
> So if you've exhausted conservative measures, you have definable pathology, you have good psychosocial perception and expectations of the operation, that's an indication for the operation. I don't think anyone could say, well, the numbers aren't bad to indicate an operation.

40. Dr. Primack testified that the claimant was not at maximum medical improvement on August 5, 2014. He testified that based upon his review of the claimant's records and his recent examination of the claimant she is not at MMI. He testified that he disagrees with Dr. Tyler's assessment that the claimant is at MMI because you cannot place someone at MMI based upon an electrical number, which is what Dr. Tyler did in his DIME report.

41. At the deposition of Dr. Primack, he commented on Dr. Mordick's record review report. Dr. Mordick misinterpreted the February 2014 EMG results by relying on results from the median nerve and not the ulnar nerve in his assessment. According to Dr. Primack, Dr. Mordick was incorrect in reading Dr. Scheper's February 2014 EMG report. Dr. Primack testified that Dr. Mordick does not know how to read the tests.

42. Dr. Primack testified that the claimant has exhausted conservative measures and given the electrical data it's reasonable to perform surgery. Dr. Primack testified that Dr. Tyler erred in finding that the findings were mild. He testified that the claimant's symptoms were severe and her electrical findings were in the moderate category because she has loss of conjunction velocity. Dr. Primack testified that he based his opinion strictly by the American Academy of Neuromuscular and Electrodiagnostic Medicine to make his classifications.

43. Dr. Primack testified that "based upon the data I have, again, just seeing her in November and looking through all of the information, I don't think she was at MMI."

44. Dr. Rook testified that steroid injections sometimes get patients "over the hump" and they never have a problem again. On the other hand, sometimes the steroid injection only provides temporary relief, and when the patient goes back to using the muscles that insert to the tendon, which inserts on the bone, the inflammation comes back which aggravates it again. Dr. Rook testified that the steroid injection that the claimant received was like a "partial Band Aid." Dr. Rook explained that the steroid injection "didn't eliminate her condition, so it certainly didn't cure the condition, and the symptoms recurred even worse, so it was just a temporizing measure that provided her with partial pain relief.

45. Dr. Rook testified that the claimant was not at MMI on June 3, 2014. He explained that the claimant:

> continued to be very symptomatic. Her condition, after she returned to full-time duty, resulted in a deterioration in her clinical condition. And I think if you're at maximum medical improvement, you would like to at least maintain the improvement that you achieved at the best point in time, which was shortly after the steroid injection, but that was not the case. Her condition deteriorated and, as a result, further diagnostic workup was performed and further clinical studies were performed which showed a worsening condition that required further treatment.

46. Dr. Rook opined that the claimant was not at maximum medical improvement when she returned to Dr. Walden in August 2014. He opined that the claimant was not at MMI because Dr. Walden referred the claimant to see an elbow specialist, Dr. Hart, due to lack of improvement.

47. Dr. Rook agrees with Dr. Hart's recommendation that the claimant requires ulnar nerve decompression surgery.

48. Dr. Rook testified that he agrees with the opinions of Dr. Primack and commented that his opinions are very similar to Dr. Primack's opinions.

49. Dr. Rook testified that the February 20, 2014 EMG appeared abnormal to him. He testified that "There's slowing across the elbow on the motor study, and there's slowing of the sensory nerve action potential to the dorsal ulnar cutaneous nerve, and a decreased amplitude, so it seems to suggest ulnar nerve entrapment." Dr. Rook further testified that he agrees with Dr. Primack's statement that it would be difficult to say there was a worsening of condition on the second EMG. He opined that the EMGs were performed by two different people using two different machines and the standardization is going to be off. He noted that the two studies appeared to be abnormal.

50. The claimant continues to experience pain in her left arm from her wrist past her elbow. The claimant cannot use her left harm to lift things, or to push and pull objects.

51. Since being place on MMI, the claimant testified that she has not done anything that could have re-injured her arm or aggravated it.

52. The ALJ finds that the medical opinions and analyses of Dr. Primack, Dr. Rook, and Dr. Hart are credible and more persuasive than medical analyses and opinions to the contrary.

53. The ALJ finds that the persuasive evidence establishes that Dr. Tyler clearly erred in determining that the claimant had reached MMI as of August 5, 2014. Dr. Primack, Dr. Rook, and Dr. Hart collectively establish that Dr. Tyler clearly erred in his interpretation of the claimant's condition based upon his reading of the EMG of February 2014 as being a normal EMG.

54. The ALJ finds that the claimant has established that Dr. Tyler clearly erred in determining that the claimant was at MMI as of August 5, 2014.

55. The ALJ finds that the claimant has established that it is more likely than not that the claimant required the surgery as recommended by Dr. Hart and supported by Dr. Primack and Dr. Rook.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in § 8-40-101, et. seq. C.R.S. (2015), is to assure the quick and efficient delivery of disability and

medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. § 8-40-102(1), C.R.S.

2. Facts in a workers' compensation case must be interpreted neutrally neither in favor of the rights of a claimant nor in favor of the rights of the respondents. § 8-43-201, C.R.S.

3. The Judges' factual findings concern only evidence that is dispositive of the issues involved: the Judge cannot address every piece of evidence that might lead to a conflicting result. See *Magnetic Engineering, Inc. v. ICAO*, 5. P.3d 285 (Colo. App. 2000).

4. When determining credibility the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness: and whether the testimony would have been contradicted and bias, prejudiced, or in any. See *Impure Prudential Insurance Co. v. Coin*, 57 P.2d 1205 (1936)

5. The findings of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. § 8-42-107(8)(c), C.R.S. "Clear and convincing" evidence is stronger than a preponderance, is unmistakable, and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.*, W.C. 4-595-741 (ICAO October 8, 2008). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools,* W.C. 4-782-625 (ICAO May 24, 2010).

6. The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). "[A] mere difference of medical opinion does not constitute clear and convincing evidence that the DIME physician's opinion is incorrect or in error." *Patterson v. Comfort Dental East Aurora*, W.C. No. 4-874-745-01 (ICAO February 14, 2014).

7. The claimant has demonstrated that Dr. Tyler unmistakably erred in finding that the claimant is not at maximum medical improvement. Dr. Tyler misinterpreted the EMG results to find that the claimant had mild electrodiagnostic findings. According to Dr. Rook and Dr. Primack who are both electrophysiologists, both of the claimant's EMGs were abnormal and showed signs of slowing at the elbow. The steroid injections that were performed acted only temporarily. When the injection wore off the symptoms returned and were more severe.

8. Dr. Tyler erred in finding that the claimant was at MMI on August 5, 2014. His finding is flawed by the fact that at that visit Dr. Walden performed a second steroid injection, a second temporary measure. That second injection failed to provide any relief and Dr. Walden referred the claimant to a specialist, Dr. Hart, just two weeks later. That referral ultimately resulted in Dr. Hart later recommending surgery.

9. The record clearly demonstrates that Dr. Tyler's opinions regarding the EMG results and need for surgery is clearly and convincingly erroneous. Dr. Mordick performed a records review. He did not perform a physical examination on the claimant. According to both Dr. Rook and Dr. Primack "you don't treat the electrical results, you treat the patient." Not only did Dr. Mordick misinterpret the February 2014 EMG results, he also did not actually examine the claimant. Therefore, his opinions on the need for surgery are diminished.

10. The ALJ concludes that the claimant has established by clear and convincing evidence that Dr. Tyler erred in finding that the claimant reached MMI on August 5, 2014. The claimant has not yet reached MMI for her December 7, 2013 injury.

11. For a compensable injury, an employer and its insurance company must provide all medical benefits which are reasonably necessary to cure and relieve the injury. C.R.S. 8-42-101 (2010). The respondents are liable for reasonable and necessary medical treatment by a physician to whom a claimant has been referred by an authorized treating provider. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987).

12. Dr. Hart, Dr. Primack and Dr. Rook all recommend that the claimant undergo ulnar nerve surgery. The record clearly establishes that the need for surgery is related to the December 7, 2013 injury. The claimant has had ongoing symptoms and was provided short temporary relief by a temporary injection. It is clear that the claimant has failed conservative treatment and requires surgery. The evidence has established that the claimant is a good candidate for surgery. There is nothing in the record to suggest otherwise.

13. The surgery was found reasonable and necessary by both, Dr. Primack and Dr. Rook. The DIME physician, Dr. Tyler, erred in interpreting the February 2014 EMG results. He also erred in finding that the claimant suffered from mild epicondylitis. There is clear evidence that both EMGs were abnormal. The claimant did not suffer a new injury at work which is the cause for the recommended surgery. Rather, the evidence establishes that the steroid injection wore off and the claimant has failed conservative treatment.

14. The ALJ concludes that the claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Hart is reasonable, necessary, and related to treat the December 7, 2013 injury.

ORDER

It is therefore ordered that:

1. The claimant is not at maximum medical improvement and requires further medical treatment to cure or relieve her from the effects of her injury.

2. The respondent-insurer shall authorize and pay for the surgery recommended by Dr. Hart.

3. The respondent-insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 25, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-857-744-04

ISSUES

1. Whether the respondents have produced clear and convincing evidence to overcome Dr. Watson's Division IME opinion regarding MMI, causation, and relatedness of the claimant's right knee injury and left shoulder injury, to the work injury;

2. Whether the claimant has established by a preponderance of the evidence that the claimant's need for treatment of the right knee, and the left shoulder are reasonable, necessary and related to the claimant's industrial injury; and,

3. Whether the claimant is entitled to temporary total disability payments from November 10, 2014 and onward until MMI.

FINDINGS OF FACT

1. On June 3, 2011 the claimant was employed by the respondent-employer as a driver of a semi-tractor trailer truck. The claimant was driving on Highway 40 between Kremmling and Steamboat Springs. He was driving over Rabbit Ears Pass at about 50-60 miles per hour when a gust of wind hit his truck. The claimant lost control of the vehicle and it ran off the road and rolled over onto the right side of the truck. The claimant was belted into his seat at the time of the accident. When the truck stopped, he was hanging in his seatbelt. The claimant released his seatbelt in order to get out of the truck as he was fearful that the truck might catch fire. The claimant estimated that he fell between 4 and 5 feet across the cab of the truck, landing on his right side on the passenger side door of the truck.

2. The claimant had immediate severe right thigh pain and he could not walk. He was transported by ambulance to Kremmling Memorial Hospital. He had injuries to the right side of his body. The claimant had a cut and contusion on his occipital bone above the right eye. He had pain on his right side and doctors were concerned with possible rib fractures and/or liver damage. There were swelling and abrasions on his right wrist and hand. His right Femur was fractured with displacement below a previous ORIF. The Kremling records note that Flight for Life was called to transport the claimant to Swedish Hospital in Denver, and they did not have time to perform X-rays of his right

wrist or elbow. The claimant was still in a C-collar. He was released for transportation via Flight for Life in stable but guarded condition.

3. The claimant was admitted to Swedish Medical Center in Denver with the following diagnosis: Closed fracture of the right femur, open wound on forehead, sprain to hand, abrasion of forearm, contusion of elbow. It was noted that he had a "previous right femur fracture, treated with intermedullary rod about 15 years ago and then followed by hardware removal and then a right total hip replacement." X-ray was preformed of his right shoulder. The medical report notes "swelling to his right leg, it is extremely rotated and shortened. It additionally, notes an abrasion to his right knee, and also noted that "He is slightly tender over the superolateral patellar area." It was determined that the claimant was a good candidate for open reduction and internal fixation of the right femur, and that the surgery should be scheduled "expeditiously".

4. The claimant underwent surgery for his broken leg with Craig Davis, M.D. at Swedish Hospital. Dr. Davis performed open reduction internal fixation of the right periprosthetic femur fracture with allograft putty bone grafting along with a long side plate and cerclage wiring. The claimant then followed up with orthopedic surgeon Dr. Steven Myers, who had also performed his previous right leg surgery and his previous right hip replacement. Dr. Myers noted the chief complaint was "follow up right femur fracture."

5. The claimant remained hospitalized until June 11, 2011 and then was transferred to rehab care from June 11, 2011 to July 18, 2011. On July 9, 2011 the Physical Therapy Evaluation records note a "goal" as "< pain in R knee". On July 11, the claimant had an initial Occupational Therapy Evaluation performed. The therapist noted ambulation was unsteady and unsafe. The therapist assessed a need for strengthening of the right quads and hamstrings and a need for increased ROM in the right knee.

6. The claimant continued to receive physical therapy with the final physical therapy record, from July 29, 2011, noting lowering pain in the right knee as a goal.

7. On November 13, 2012, the claimant was seen by Dr. William Watson for a Division Independent Medical Examination (DIME). Dr. Watson noted the history of the accident stating, "The examinee told me that when the seatbelt was released he fell and he believes he may have broken his leg at that time but he is not sure." Medical records indicate that the claimant was still walking with crutches on January 6, 2012, which was 6 months after the accident. By June 4, 2012, when he saw Dr. Myers one year after the accident, he was "walking with a more level even gait." Dr. Watson was

concerned with possible loosening of the hip arthroplasty. He determined that the claimant was not at MMI. He recommended a three-phase bone scan and asked to review the MRI of the spine to evaluate whether his low back was contributing to the gait pattern. He noted that the AMA Guides Third Edition should be used for the rating.

8. On July 29, 2013, the claimant went to his personal physician's office for treatment after a fall at home, where he was seen by NP Christine Briggs. Records indicate, "Pt. fell in soft dirt and hurt left side X1 week." The notes say, "Patient ambulates with a prominent limp and frequent imbalance is noted." NP Briggs ordered an X-ray of the left shoulder. The Impression was of no derangement of the shoulder bones, but a "left seventh rib abnormality suggesting the possibility of a rib fracture."

9. Per agreement of the parties, the claimant was sent to treatment with Dr. Castrejon as his ATP. Dr. Castrejon first examined the claimant on September 10, 2013. He prepared an exhaustive report with a very detailed description of the accident and the mechanism of injury. He noted that the claimant released his seatbelt after the rollover and "dropped onto the opposite side of the interior of the cab." Dr. Castrejon reviewed the medical records and provided an analysis of the medical treatment. Under the discussion section, Dr. Castrejon noted, "Following the rollover the claimant has been provided with treatment primarily directed to the right femur fracture. There has been very limited treatment to the lower back and right knee. There has been no workup for the right lower limb weakness that has resulted in several falls."

10. Dr. Castrejon stated,

> With regard to his left shoulder and chest, these complaints and findings are related to the recent fall that occurred as a result of buckling to his right lower extremity. As a result of the weakness that is evident on examination today, the patient is experiencing buckling and giving way that has resulted in injury to the left shoulder and chest for which medical care is indicated on an industrial basis. The claimant will be referred for an MRI of the left shoulder based upon findings that are worrisome for a rotator cuff tear.

11. Dr. Castrejon recommended physical therapy for the deconditioning in the right lower leg, and also an MRI of the right knee, "given the length of presentation of symptoms which worsened following his recent fall." At the follow up appointment Dr. Castrejon noted that an MRI of the left shoulder had been performed showing, "a full thickness tear of the supraspinatus with retraction and partial thickness tear of the subscapularis. There is also a full thickness tear of the long biceps tendon with distal retraction and advanced degenerative changes of the AC joint." Dr. Castrejon made referrals to Dr. Michael Simpson for the left shoulder and right knee.

12. Dr. Simpson saw the claimant on October 21, 2013. He felt that "far and away his biggest problem right now is that of his massive rotator cuff tear…..this appears to be all acute from his recent fall. He has absolutely no atrophy which would suggest a chronic nature of his tear." Dr. Simpson recommended proceeding with arthroscopic rotator cuff repair with probable debridement of the shoulder. With regard to the right knee, Dr. Simpson stated that the MRI showed the claimant had a "degenerative meniscal tear which definitely can be causing some pain and causing his knee to buckle and get out on him", which he wanted to try to treat with physical therapy and injections.

13. Dr. J. Raschbacher, M.D. performed a records-review IME on the respondent's behalf on October 27, 2013. Dr. Raschbacher concluded that the claimant began to report new symptomatology after seeing doctors Myers and Leppard in 2012. He noted pre-existing pathology in medical records concerning the claimant's lower back, and determined that the lower back complaints were not related to the claim. Dr. Raschbacher recommended against any further treatment of any kind for the work injury and commented, "Certainly his shoulder surgery and treatment for the back would not be appropriate on the basis of his 2011 injury claim. Given the degree of preexisting nonwork-related pathology in the lumbar spine it may well be reasonable to treat it, but certainly there is no clear support in the medical record for this being done on a work-related basis. The same is true for the left shoulder. This is also true for the right knee."

14. In his deposition on March 13, 2014, Dr. Simpson was asked if his characterization of the medial meniscal tear in the claimant's knee was consistent with the mechanism of injury of the work comp injury. Dr. Simpson stated, "Yes, it's consistent with something that could occur from his work comp injury."

15. Dr. Castrejon was also asked in his deposition on February 21, 2014, about the relatedness of the right knee and the left shoulder injuries. He stated, "Well, the left shoulder is not directly related to the actual rollover that he experienced; it's related to the buckling of the knee, which is, in my opinion, an industrial-related condition given the fracture that he sustained, the weakness, the atrophy, the buckling. And as a result of that, he experienced a fall. As a result of the fall, he sustained rib fractures and he injured his shoulder." Dr. Castrejon testified that he believed that shoulder surgery by Dr. Simpson to repair the rotator cuff injury would be reasonable and necessary surgery related directly to the work comp case.

16. Dr. Castrejon also made a referral to orthopedic surgeon Dr. Rahill. Dr. Rahill examined the claimant on July 14, 2014 and prepared a report. Dr. Rahill

recommended arthroscopic partial medial meniscectomy for the claimant's right knee injury. He commented, "He walks with an antalgic gait utilizing a cane for ambulatory assist. I observed him walking out of the clinic and he almost fell down as his right knee gave way. He was using the cane which stabilized his fall."

17. On November 10, 2014, Dr. Raschbacher reviewed the follow up DIME by Dr. Watson and performed another records review. Once again, he opined that the claimant was at MMI and no further treatment should be considered in association with the work comp claim. He felt that the falls seemed to have developed at quite some time removed from the date of injury.

18. The claimant's medical records and testimony indicate that he had a long and slow recovery from the surgery for his broken femur, during which time he was on crutches for approximately the first six months until the end of 2011. It is not unusual that he was not suffering from falls or the knee "giving way" at that point, since he was on crutches. During this period, the medical treatment from Dr. Meyers was primarily directed at the broken femur. Dr. Meyers did not appear to address the knee symptoms, which are well documented in the records of the physical therapists and others, from the time the claimant was released from the hospital. Since the time he was off the crutches, the claimant has been using a cane, but he was also having issues with his right knee giving way.

19. The ALJ finds that the analyses and opinions of Dr. Castrejon, Dr. Simpson, and the DIME physician Dr. Watson that the injury to the claimant's right knee originated in the initial workers' compensation accident are credible and more persuasive than medical analyses and opinions to the contrary.

20. Significant medical evidence exists in the record in support of the DIME physician's opinion that the right knee injury occurred as a result of the truck accident. The claimant's testimony and statements to examiners indicate that he was able to successfully perform his job as a semi tractor trailer truck driver for 40 years prior to the injury. This job would require the claimant, who is five feet two inches tall, to be able to step up approximately 20 to 24 inches onto the step, and climb into the cab of the truck. The job also would require the claimant to be able to use his right leg to run the gas and brake pedal in the truck.

21. The claimant testified credibly that he was able to perform all these job duties without a problem, prior to the accident, but that since the accident he could no longer drive a truck. The claimant also testified that since the accident, he has not been able to walk over approximately 25 feet at a time without assistance of a cane.

22. The ALJ finds that Dr. Raschbacher's opinion regarding causation of the claimant's right knee and left shoulder injuries constitutes a difference of opinion from the DIME doctor, Dr. Watson. It does not establish that Dr. Watson erred in his causation analysis.

23. The respondents have failed to prove that the DIME physician Dr. Watson clearly erred in his opinions with regard to causation and relatedness of the claimant's right knee injury and left shoulder injury as being related to the work injury. Accordingly, the respondents have failed to overcome the DIME physician's opinion with regard to MMI, as the right knee treatment has not been completed.

24. The claimant has established that it is more likely than not that the claimant's left shoulder surgery was reasonable, necessary, and related to the industrial injury of June 3, 2011.

25. The claimant has established that it is more likely than not that the treatment for the claimant's right knee condition, as recommended by Dr. Simpson, is reasonable, necessary, and related to the industrial injury of June 3, 2011.

26. Determining the TTD benefits is not straightforward. The only general admission of liability admitted at hearing indicates that the respondent-insurer began paying TTD benefits on June 15, 2011, with no date of termination. Additionally, Dr. Castrejon indicated in his WC 164 dated October 22, 2014 that the claimant was returned to light duty. There is insufficient evidence to establish that the claimant was offered a modified duty position. Therefore, since the claimant is not at MMI and the claimant has not been offered modified duty, the claimant's wage loss is attributable to his industrial injury. Therefore, as requested by the claimant, temporary total disability payments should resume from November 10, 2014 and onward until the claimant reaches MMI.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in § 8-40-101, et. seq. C.R.S. (2015), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. § 8-40-102(1), C.R.S.

2. A claimant in a worker's compensation claim generally has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101,

C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

3. The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address every piece of evidence that might lead to a conflicting conclusion. The ALJ may reject evidence contrary to the findings above as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

5. When determining credibility the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness: and whether the testimony would have been contradicted and bias, prejudiced, or in any. See *Impure Prudential Insurance Co. v. Coin*, 57 P.2d 1205 (1936)

6. The findings of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. § 8-42-107(8)(c), C.R.S. "Clear and convincing" evidence is stronger than a preponderance, is unmistakable, and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.*, W.C. 4-595-741 (ICAO October 8, 2008). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools,* W.C. 4-782-625 (ICAO May 24, 2010).

7. The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). "[A] mere difference of medical opinion does not constitute clear and convincing evidence that the DIME physician's opinion is incorrect or in error." *Patterson v. Comfort Dental East Aurora*, W.C. No. 4-874-745-01 (ICAO February 14, 2014).

8. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the

course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable, necessary, and causally related is one of fact for determination by the ALJ. *Kroupa v. Indus. Claim Appeals Office, supra; Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990).

9. To recover workers' compensation benefits, the claimant must prove he suffered a compensable injury. A compensable injury is one which arises out of and in the course of employment. C.R.S. §841-301(1)(b).

10. The "arising out of" test is one of causation. It requires the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968).

11. It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. C.R.S. §8-43-201. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

12. The "threshold question" regarding compensability of an injury is one of fact for the ALJ to determine under the preponderance of the evidence standard as set forth in cases such as *Leprino Foods v. Industrial Claim Appeals Office,* 134 P.3d 475 (Colo. App. No. 04CA1379, Dec. 1, 2005); *Moore v. Cobb Mechanical Contractors and American Ins.*, W.C. No. 4-599-920 (April 12, 2006).

13. The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

14. Temporary disability benefits are based on a worker's lost or impaired earning power and are designed to protect against actual loss of earnings as a result of an industrial injury. *Univ. Park Holiday Inn/Winegardner & Hammons, Inc. v. Brien*, 868 P.2c 1164 (Colo. App. 1994). To receive temporary disability benefits, a claimant must

establish a causal connection between the injury and the loss of wages. *See* § 8-43-103(1)(a), C.R.S. The claimant bears the burden to prove any entitlement to temporary disability benefits. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). When applying the preponderance of the evidence standard, the ALJ must decide whether the existence of a contested fact is more probable than its nonexistence. If a party has the burden of proof by a preponderance of the evidence, and the evidence presented weighs evenly on both sides, the finder of fact must resolve the question against the party having the burden of proof. *Town of Castle Rock v. ICAO*, 2013 COA 109 (Colo. Ct. App. 2013)

15. The respondents have the burden of proof to overcome the DIME by clear and convincing evidence. § 8-42-101(3)(a)(I), C.R.S.; *Metro Moving & Storage, Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

16. Whether a worsened condition caused the claimant's wage loss for purposes of determining entitlement to TTD benefits is a factual question to be determined by the ALJ. *Apex Transp., Inc. v. ICAO*, 2014 COA 25 (Colo. Ct. App. 2014). The weight to be assigned evidence of a worsening condition is a matter for the ALJ. *Id*.

17. The ALJ concludes that the respondents have failed to prove with clear and convincing evidence that the DIME physician Dr. Watson erred in his opinions with regard to causation and relatedness of the claimant's right knee injury and left shoulder injury as being related to the work injury. Accordingly, the respondents have failed to overcome the DIME physician's opinion with regard to MMI, as the right knee treatment has not been completed.

18. The ALJ concludes that the claimant has established by a preponderance of the evidence that the claimant’s left shoulder surgery was reasonable, necessary, and related to the industrial injury of June 3, 2011.

19. The ALJ concludes that the claimant has established by a preponderance of the evidence that the treatment for the claimant’s right knee condition, as recommended by Dr. Simpson, is reasonable, necessary, and related to the industrial injury of June 3, 2011.

20. Determining the TTD benefits is not straightforward. The only general admission of liability admitted at hearing indicates that the respondent-insurer began paying TTD benefits on June 15, 2011, with no date of termination. Additionally, Dr. Castrejon indicated in his WC 164 dated October 22, 2014 that the claimant was

returned to light duty. There is insufficient evidence to establish that the claimant was offered a modified duty position. The ALJ concludes, therefore, since the claimant is not at MMI and the claimant has not been offered modified duty, the claimant's wage loss is attributable to his industrial injury. Therefore, as requested by the claimant, temporary total disability payments should resume from November 10, 2014 and onward until the claimant reaches MMI.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents' request to overcome the DIME as to MMI is denied and dismissed.

2. The respondent-insurer shall pay for the medical treatment for the claimant's left shoulder including the surgery by Dr. Simpson.

3. The respondent-insurer shall pay for the medical treatment for the claimant's right knee including the treatment recommended by Dr. Simpson.

4. The respondent-insurer is ordered to resume TTD payments effective November 10, 2014 and to continue payment until terminated by operation of law.

5. The respondent-insurer shall pay statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

6. All matters not determined herein, and not closed by operation of law, are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 26, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-999-063-01

ISSUES

- Whether Claimant established by a preponderance of the evidence the compensability of a left knee injury on October 1, 2015 and, if found compensable, whether medical benefits are authorized and reasonably needed.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant began working as a freight handler for Employer, formerly Pinnacle, on September 15, 2015. Claimant's job duties included working with pallets and moving boxes of freight.

2. On October 1, 2015, Claimant reported to Robert Shufelt, Employer's site operations manager, that she began feeling symptoms in her left knee after bending down at work. Mr. Shufelt documented the report in the Employers First Report of Occupational Injury or Disease. The document, filled out by Mr. Shufelt on October 2, 2015, describets that the injury occurred when Claimant was bending down, without any products in her hands. The incident was described as occurring when "Jennifer was bending down to pick up a product to place on a different pallet, when she went up on knees her knee gave out and she almost fell to the floor. She was able to stand back up and began to try to work again when the dock lead stopped her and reported the incident. Jennifer was at the end of her shift and stated she would be fine. This other report was started in case it was needed."

3. Kedrick Washington was Claimant's supervisor at the time of the alleged incident. Mr. Washington filled out the Employee's Incident Report. Under Description of Incident, he provided, "Jennifer was working in the repack area and went to bend down when her knee went out and she fell to the floor. She thought she was okay reported this to the team lead on the dock. She completed her shift and went home. After she was at home she went to the Urgent Care and is pending follow up."

4. When Claimant returned to work on October 2 she brought documents to Mr. Shufelt including a release from regular work and a release to work with modified duty. Based upon this, and the fact that Claimant's knee was wrapped in an ace bandage, Mr. Shufelt watched the video of the area from the night before to ascertain what, if anything, had occurred. Mr. Shufelt testified, and his testimony is found credible, that what he observed on the video was not a pallet falling on

Claimant's knee as Claimant testified but, rather, Claimant bending down and then going to the floor.

5. Dr. Burris testified as a medical expert in occupational medicine, Level II accredited. Dr. Burris specifically testified that the actions documented by Employer and as testified to by Mr. Shufelt are activities of daily living which the Division of Workers' Compensation has specifically instructed Level II doctors are not "compensable." In addition, Dr. Burris testified that the documentation contained in Dr. Parker's note of September 9, 2015, coupled with the medical evidence on the MRI established that Claimant had preexisting issues with her left knee which were not aggravated, accelerated or exacerbated by what Employer documented as occurring on October 1, 2015. Dr. Burris specifically testified the meniscal tear pathology would not be caused by what Claimant alleges occurred nor by what Employer documented occurred but, rather, would be caused by a torsion or twisting injury. No persuasive evidence supports that such an injury occurred.

6. The ALJ credits the testimony of Mr. Shufelt and Dr. Burris to be more credible and persuasive that that of Claimant concerning what happened at work on October 1, 2015 to cause her injury.

7. Claimant failed to establish by a preponderance of the evidence that she injured her left knee when a falling pallet struck it.

8. The ALJ finds Claimant's knee problems, as documented in the healthcare records, were not a direct and proximate result of what Employer documented occurred on October 1, 2015. There was no "mechanism of injury" to cause the pathology documented by the MRI. In fact, Dr. Failinger even documented "lower chance of pain generators coming from the knee. There is not a high probability or possibility of a scope helping the situation."

9. Respondents are not liable for the healthcare Claimant availed herself from Medical Center of Aurora, HealthOne Occupational Medicine & Rehabilitation, Denver Integrated Imaging, and Denver Vail Orthopedics.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (ACT) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *See Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. See §8-43-201(1), C.R.S. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. See §8-43-201, C.R.S. The judge's factual findings concern only evidence and inferences found to be crucial of the issues involved; the judge has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and as rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. Industrial Claims Appeals Office, 5* P.3d 385 (Colo App) 2000.

In order to prove a compensable injury and entitlement to benefits, a claimant must show by a preponderance of the evidence that her injury was caused by activities that arose out of and in the course of her employment. *See* §8-43-201, C.R.S. and §8-41-301(1) (c) C.R.S. "Proof by a preponderance of the evidence requires claimant to establish that the evidence of a "contested fact" is more probable than its non existence." *See Matson v. CLP, Inc.*, W.C. No. 4-722-111 (ICAO August 13, 2009).

The claimant must prove by a preponderance of the evidence that the alleged injury was proximately caused by an injury arising out of and in the course of her employment with the employer. See §8-41-301(1)(b-c) C.R.S. See also *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The "arising out of" element requires claimant to show a casual connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. See *Triad Painting Co. v. Blair.*

The question of whether the claimant met her burden of proof to establish a compensable injury is one of fact for determination by the judge. See *Faulkner v. ICAO*, 12 P. 3d 844(Colo. App. 2000).

The Workers' Compensation Act creates a distinction between an "accident and an "injury." An "accident" is the cause and an "injury" is the result. No workers' compensation benefits are awarded to an employee unless he or she proves by a preponderance of evidence that the "accident" caused a compensable injury. A compensable injury is one that causes disability or the need for medical treatment. *See City of Boulder v. Payne* 162 Colo. 345, 426 P. 2d 194 (1967).

Merely feeling pain at work in and of itself is not "compensable." See Miranda v. Best Western Rio Grande Inn W.C. No. 4-663-169 (ICAO April 11, 2007) "An incident which merely elicits pain symptoms caused by a preexisting condition does not compel a finding that the claimant was sustained a compensable injury." See also F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App 1995).

Claimant has failed to meet her burden of proof and did not show it more probably true than not that a causal connection existed between her employment activities and her injury. Claimant failed to present credible evidence that her injury is compensable. The exact cause of the pain being based upon inconsistent information cannot be found to be credible and persuasive.

The ALJ concludes that Claimant failed to prove by a preponderance of the evidence that her injury was caused by her employment, that the accident caused a disability, or that the October 1, 2015 incident caused an "injury" requiring healthcare.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 26, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

PROCEDURAL MATTERS

Claimant had two workers' compensation claims. The first occurred on June 18, 2011 and was assigned case number, WC 4-859-517. The second injury occurred on February 19, 2014 and was assigned case number, WC 4-968-070. The claims were consolidated into WC 4-859-517.

ISSUES

The issues presented for determination are as follows:

- Respondents' attempt to overcome the Division Independent Medical Examination (DIME) performed by Dr. Joseph Fillmore on the issue of maximum medical improvement (MMI) and causation of Claimant's neck symptoms;

- Whether the Claimant should have neck surgery recommended by Dr. Choi; and

- Whether the Claimant is owed TTD benefits from February 13, 2015, and ongoing.

- The parties reserved the issue of Social Security disability offset.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 62-year old woman who worked for the Employer as a certified nurse assistant. Claimant began working for the Employer in April 1991.

2. On June 18, 2011, the Claimant suffered an admitted work injury to her right arm and shoulder. Claimant also complained of neck symptoms at that time.

3. The Claimant saw Dr. John Sacha on July 13, 2011, who diagnosed cervical radiculopathy and shoulder impingement. He recommended an MRI of the right shoulder and considered C-6 and C-7 transforaminal epidural injections/spinal nerve blocks staged to a right shoulder subacromial bursa injection.

4. Dr. John Davis evaluated the Claimant on July 28, 2011, for a surgical consultation. He noted the MRI showed a C-5/6 right femoral disc protrusion with a right-sided C-6 foraminal stenosis. He noted that the MRI of her right shoulder showed a tear of the rotator cuff and subluxation of her biceps tendon. He recommended a subacromial decompression, possible distal claviculectomy, repair of her rotator cuff, and tenodesis or release of her biceps tendon. He stated: "If this fails, she may be a candidate for a C5-6 discectomy." The Claimant then had a rotator cuff repair with Dr. Davis.

5. On August 29, 2011, Claimant reported to Dr. Davis that the numbness in her fingers had disappeared following the shoulder surgery.

6. Dr. Sacha ultimately determined that Claimant's right upper extremity symptoms were related to the shoulder condition. He opined that Claimant did not sustain a neck injury on June 18, 2011.

7. Dr. Sacha determined that Claimant reached maximum medical improvement (MMI) as of January 11, 2012. Dr. Sacha noted she had a rotator cuff tear with surgical intervention. She was released to full duty. On musculoskeletal examination, Dr. Sacha noted, "Negative Spurling test of the neck. No paraspinal spasm." He gave her a 14% upper extremity impairment for the shoulder but did not diagnose a neck problem or give a neck impairment.

8. By the time Dr. Sacha placed the Claimant at MMI for the June 18, 2011 injury, the medical records document improvement in her neck symptoms.

9. Claimant had a post-MMI visit with Dr. Sacha on September 26, 2012. Claimant complained of a flare in pain localized to the right anterior shoulder and right anterior arm with some intermittent numbness and tingling. He documented no pain with extension and flexion of the cervical spine but a positive thoracic outlet syndrome maneuver.

10. On October 10, 2012, Dr. Sacha documented a re-tear of Claimant's right rotator cuff as revealed by an MRI. Dr. Sacha referred the Claimant back to Dr. Davis for a surgical evaluation.

11. Dr. Davis performed a second right shoulder surgery on November 1, 2012.

12. Following the second surgery, Dr. Sacha found the Claimant reached MMI as of June 5, 2013. He assessed a 17% upper extremity impairment rating for the right shoulder. Claimant did report occasional tingling in the right hand and some stiffness around the shoulder blade. Dr. Sacha did not specifically document neck pain and did not assess permanent impairment for her neck. Dr. Sacha returned Claimant to full duty work.

13. Claimant suffered a second injury on February 19, 2014. The First Report of Injury indicates that Claimant reported feeling left sided neck pain after lifting an

obese patient. The Respondents admitted liability for this claim. As found above, the Claimant was still receiving treatment for her right shoulder.

14. The Claimant initiated medical treatment with Dr. Darrel Quick on February 19, 2014. Claimant reported acute onset of sharp left shoulder pain which spreads into the deltoid and biceps up into the left shoulder girdle and neck. Claimant reported some prior neck pain with the prior right shoulder injury and surgery. On examination, Claimant reported mild to moderate tenderness of the left cervical paraspinals with limited range of motion. Dr. Quick assessed acute left shoulder injury, and associated left shoulder girdle and cervical pain. Dr. Quick recommended that Claimant remain off of work.

15. Dr. Quick referred Claimant back to Dr. Davis. On March 6, 2014, Claimant complained that wearing a sling as a result of her left shoulder injury aggravated her neck symptoms. Dr. Davis recommended left shoulder surgery which he performed on April 11, 2014.

16. Following the left shoulder surgery, Claimant continued to complain of periscapular pain, and anterior chest pain which Dr. Davis attributed to Claimant's C4-5 disc disease. He noted on June 9, 2014, that Claimant's cervical spine problems were "markedly holding her back in terms of her rehabilitation." He further noted Claimant's MRI scan which showed advanced degenerative disc disease at C4-5. Dr. Davis stated that he thinks "she needs a spine evaluation."

17. On June 30, 2014, Dr. Sacha evaluated the Claimant. He noted Dr. Davis' opinion that Claimant's symptoms were originating in her neck. Dr. Sacha noted positive Waddell testing, and no diminished range of motion in the cervical spine. He documented mild trapezius spasm on the left greater than right side, and minimal pain with extension rotation bilaterally but no segmental dysfunction throughout the cervical spine. Dr. Sacha opined that Claimant's injury is related only to the left shoulder, and that "there is cervical complaint here." He also noted that Claimant's examinations have become more and more non-physiologic. Dr. Sacha recommended an EMG to rule out any neck issues. Dr. Sacha adamantly disagreed that there was a cervical component to Claimant's left shoulder injury.

18. The Claimant's EMG produced no evidence of acute or chronic denervation, and no evidence of acute or chronic radiculopathy or neuropathy.

19. Claimant initially saw Dr. William Choi on July 11, 2014. She reported a chief complaint of neck pain shooting into the left shoulder that radiates in the left hand with a burning sensation in the hand. Claimant stated it started about two years ago when she was lifting and moving a patient at work. Of note, no medical records document complaints of left-sided neck symptoms following the June 2011 work injury.

20. Dr. Choi's physical examination of the Claimant appears to be normal other than slightly diminished strength on the left side upon upper extremity motor

testing. Dr. Choi recommended a repeat MRI due to the age of the initial cervical spine MRI.

21. On July 21, 2014, Dr. Davis noted limited range of motion in Claimant's cervical spine.

22. The Claimant had a second MRI of her cervical spine on August 7, 2014. It showed moderate to severe bilateral neural foraminal stenosis at C6-7; moderate to severe bilateral neural foraminal stenosis at C5 and C6; and mild to moderate central canal stenosis at C5-6 and C6-7.

23. Claimant saw Dr. Choi on August 7, 2014. Dr. Choi noted Claimant had cervical radiculopathy, pain and burning in the left arm, and fingers. He noted slightly diminished grip strength on the left side, dull headache on the left side, right posterior cervical pain and limited range of motion. The new MRI showed C4-6 stenosis. Dr. Choi recommended "fixing, spinal cord is kinked." He recommended conservative treatment including physical therapy and injections, but stated "surgery will be needed."

24. Dr. Choi tentatively scheduled the Claimant to undergo a C5-7 anterior cervical discectomy and fusion for November 26, 2014.

25. Claimant returned to see Dr. Sacha on August 18, 2014. Dr. Sacha commented on Dr. Choi's cervical spine surgical recommendation. Dr. Sacha acknowledged Claimant's cervical MRI findings. He noted that Dr. Choi recommended a bilateral C4 to C6 transforaminal epidural steroid injection prior to the surgery. Dr. Sacha essentially concurred with the injection recommendation but changed it to the C5-6 and C6-7 levels of the spine. Dr. Sacha noted that Claimant had marked pain behaviors in the severe category.

26. Dr. Robert Dixon began treating the Claimant on September 8, 2014 for her left shoulder injury. In his report of September 8, he noted that Claimant has left sided neck pain, left shoulder pain and numbness in the left palm. He stated she was scheduled for neck surgery in November. He documented limited range of motion in her neck, and diffuse tenderness. Dr. Dixon commented that Claimant had an acute left shoulder injury with associated left shoulder girdle and cervical pain. He recommended Claimant remain off of work.

27. On September 18, 2014, Dr. Sacha performed the injections. Claimant reported less than 60% relief which indicated a non-diagnostic response. Dr. Sacha did note that Claimant had somewhat tight foramina and narrowing of the neural foramina at all four locations but that she did not necessarily have a diagnostic response to the injection.

28. Dr. Sacha evaluated the Claimant again on September 29, 2014. Claimant reported to him that she relates her cervical pain to her first injury to her right shoulder. Dr. Sacha opined that Claimant did not sustain a neck injury as a result of either shoulder injuries. He based his opinion on Claimant's demonstration of the first mechanism of injury and his review of her medical records pertaining to the second

work injury. He also indicated that during treatment for the first injury, Claimant did not have neck symptoms for the most part, and had no radicular symptoms. Dr. Sacha noted he was uncomfortable with Claimant's progressive non-physiologic presentation, and that he was "certainly not comfortable with this patient getting a multilevel anterior cervical discectomy and fusion, which was proposed." Dr. Sacha discharged the Claimant to the physicians at CCOM (Dr. Dixon's practice).

29. On November 7, 2014, Dr. Dixon indicated that there is now a question as to whether the Claimant's neck pain is related to her work injuries. He noted that Dr. Sacha opined that it was not related, and that a second opinion may be required.

30. Apparently, a note exists documenting a conversation between Dr. Dixon and Dr. Sacha dated November 21, 2014. According to Dr. Sacha, Claimant's did not start complaining of cervical spine issues until far into her care for the left shoulder injury. Dr. Sacha also noted Claimant's non-physiologic presentation. Both Drs. Sacha and Dixon agreed that Claimant should not have neck surgery under the workers' compensation claims.[1]

31. Claimant returned to Dr. Dixon on December 1, 2014. His report indicates that after he spoke to Dr. Sacha he would "be following her mainly for her shoulder injury. Dr. Sacha felt strongly that the neck pain is not related to this injury."

32. On February 6, 2015, Dr. Davis continued to diagnose "persistent degenerative disc disease, cervical spine with bilateral upper extremity radicular signs and symptoms, moderately severe." He stated that Claimant was at MMI for her shoulder rehabilitation but that she still had limitations in motion and strength. Dr. Davis attributed Claimant's lack of progress to her cervical spine issues.

33. On February 13, 2015, Dr. Dixon found that Claimant had reached MMI for the February 19, 2014 work injury. His final diagnoses included left biceps tendon tear, left rotator cuff tear and AC arthropathy with acromioplasty/postoperative repair. Dr. Dixon assigned permanent impairment of 23% for the left shoulder.

34. Dr. Dixon imposed permanent work restrictions of no lifting over ten pounds with the left arm. Claimant has never returned to work even with the restrictions.

35. The Respondents filed a Final Admission of Liability on March 30, 2015 and admitted for the permanent impairment rating assigned by Dr. Dixon with February 13, 2015 as the date of MMI. Respondents also admitted for TTD through the date of MMI based on the admitted average weekly wage of $671.14.

36. Claimant objected to the Final Admission and requested a DIME. Dr. Fillmore performed the DIME on August 6, 2015. Dr. Fillmore noted that he received 3.5 inches of medical records but because he did not receive additional payment for the

[1] This note was referenced in Dr. Fillmore's report but the original was not offered into evidence.

time required to review all of the records, he did not do so. He indicated that his inability to review all of Claimant's medical records may impact his opinions.

37. Dr. Fillmore reviewed medical records that document Claimant's neck symptoms after both the first and second injuries including the inaccurate note from Dr. Choi referenced in paragraph 19 above.

38. Dr. Fillmore examined the Claimant and noted her neck range of motion was notable for "clear cogwheeling" and Spurling's maneuver could not be tested due to guarding. Dr. Fillmore noted that Claimant displayed a significant amount of pain behavior such as moaning and overreaction to palpation. Claimant had tenderness to palpation on the left greater than right cervical paraspinal muscles, no occipital tenderness and significant pain to neck palpation in the paraspinals and scalenes. Dr. Fillmore measured Claimant's cervical range of motion and noted her limitations.

39. Dr. Fillmore's impressions, as relevant to these proceedings, were cervical radiculitis and non-physiologic findings. Dr. Fillmore noted that Dr. Sacha had referenced cervical radiculopathy in July 2011, and that Claimant had a cervical MRI within the first five weeks of the June 18, 2011 work injury. Dr. Fillmore agreed with Dr. Sacha that Claimant has non-physiologic findings and significant pain behaviors, both of which made him question whether further treatment, including neck surgery, would benefit the Claimant.

40. Dr. Fillmore acknowledged the normal EMG, but stated that Claimant could still have radiculitis with a normal EMG. He ultimately opined that Claimant is not at MMI for her cervical spine. Dr. Fillmore recommended a surgical re-evaluation and surgery if the surgeon deemed it appropriate. He indicated that Claimant may benefit from a surgical procedure but he expressed concern about the non-physiologic findings. As such, he recommended a psychological evaluation to rule out any factors that may prevent the Claimant from having a good surgical outcome prior to any surgical re-evaluation.

41. Respondents filed an application for hearing to overcome Dr. Fillmore's opinion that Claimant's neck symptoms are related to either of the work injuries. Respondents argue that Claimant remains at MMI for both injuries which they assert should be limited to her bilateral shoulders.

42. Claimant seeks approval for neck surgery but she has not been evaluated by a surgeon since August 2014 which is contrary to Dr. Fillmore's recommendations. He specifically recommended a re-evaluation with a surgeon.

43. Claimant received psychological treatment with Dr. John Disorbio, who is a licensed clinical psychologist. She had several visits with Dr. Disorbio and on January 15, 2016, he opined that Claimant was a good candidate to undergo the cervical spine surgery recommended by Dr. Choi.

44. Claimant retuned to see Dr. Dixon on February 16, 2016 for a one-time evaluation. Claimant complained of worsened neck pain, limited range of motion, and

pain and tingling in her left arm. Dr. Dixon noted that Claimant's neck was not covered under the left shoulder claim with "coverage of the neck to be determined by the courts." He opined that Claimant remained at MMI for her left shoulder injury.

45. Claimant testified that she continues to experience neck pain and symptoms in her arms. She had no neck symptoms prior to June 18, 2011. The Claimant feels she would benefit from surgery and hopes the surgery would allow her to return to work.

46. Dr. Dixon testified by deposition. He opined that after reviewing the medical records in his possession, after speaking with Dr. Sacha and the Claimant, "there is not a left neck injury that is related to this case that I was seeing her for." In support of his opinions concerning the neck, Dr. Dixon indicated that Claimant initially complained of right arm radicular-type symptoms after the 2011 injury then later started complaining of left arm symptoms. He also felt Claimant's non-physiologic findings were concerning, and that the EMG results and lack of a diagnostic response to the injection Dr. Sacha performed all supported his opinions that Claimant's neck symptoms are unrelated to the work injuries. The ALJ is not persuaded by Dr. Dixon's opinions as stated below.

47. Respondents have failed to overcome the DIME opinions concerning relatedness of Claimant's neck condition to the industrial injuries and her MMI status. The opinions of Drs. Dixon and Sacha do not constitute clear and convincing evidence that Dr. Fillmore was incorrect in his assessment of the causal relatedness of the neck to the admitted work injuries or that she has not reached MMI for that condition. Dr. Fillmore opined, and the ALJ finds, that Claimant's neck condition is related to her work-related injuries, and she is not at MMI for that condition. There is no persuasive evidence that Dr. Fillmore relied solely upon the inaccurate note produced by Dr. Choi. It is evident that he relied upon several medical records in addition to his examination of the Claimant. Further, his opinions are supported by the medical records. The Claimant complained of left-sided neck pain the day of the February 16, 2014 left shoulder injury rather than "far into the claim" as Dr. Sacha indicated. She continued to complain of neck pain throughout the claim. Dr. Dixon's opinions are not persuasive because he merely echoed Dr. Sacha. It does not appear from his records or his testimony that he rendered an independent judgment concerning causation of Claimant's neck condition to her work.

48. The Claimant has failed to prove entitlement to the surgery recommended by Dr. Choi approximately two years ago. Dr. Fillmore clearly stated that Claimant required a re-evaluation by a surgeon and clearance from a psychological perspective. Based on the evidence in the record, the Claimant has not proven that Respondents should authorize surgery now.

49. Claimant has proven entitlement to TTD. She has not returned to work, and she is not at MMI. Her work restrictions have impaired her ability to work.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

General Legal Principals

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Overcoming the DIME

4. Sections 8-42-107(8)(b)(I) and (II), C.R.S., provide that an authorized treating physician shall determine when the injured employee reaches MMI and that, should either party dispute that finding, the disputing party shall request a DIME. Sections 8-42-107(8)(b)(III) and (c), C.R.S., provide that the finding of a DIME selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by “clear and convincing evidence.” Section 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004).

5. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been

proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Id*. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (Nov. 17, 2000).

6. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id.* The Division IME examiner's determination of MMI and permanent medical impairment inherently require the physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *Leprino Foods Co. v. ICAP*, 134 P.3d 475 (Colo. App. 2005).

7. As found above, the Respondents have failed to overcome the DIME opinions concerning relatedness of Claimant's neck condition to the industrial injuries and her MMI status. The opinions of Drs. Dixon and Sacha do not constitute clear and convincing evidence that Dr. Fillmore was incorrect in his assessment of the causal relatedness of the neck to the admitted work injuries or that he was incorrect concerning whether Claimant's neck condition is at MMI. Dr. Fillmore opined that Claimant's neck condition is related to her work-related injuries, and she is not at MMI for that condition. The ALJ rejects Respondents' arguments that Dr. Fillmore's failure to review the entire packet of medical records or his reliance on Dr. Choi's renders his opinions incorrect. There is no persuasive evidence that Dr. Fillmore relied solely upon the inaccurate note produced by Dr. Choi. It is evident that he relied upon several medical records in addition to his examination of the Claimant. Further, his opinions are supported by the medical records. The Claimant complained of left-sided neck pain the day of the February 16, 2014 left shoulder injury rather than "far into the claim" as Dr. Sacha indicated. She continued to complain of neck pain throughout the claim. Dr. Dixon's opinions are not persuasive because he merely echoed Dr. Sacha. It does not appear from his records or his testimony that he rendered an independent judgment concerning causation of Claimant's neck condition to her work. Based on the opinions of Dr. Fillmore, Claimant's neck condition is related to her industrial injuries, and she has not reached MMI for that condition.

Medical Benefits

8. Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

9. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Id.*

10. The Claimant has failed to prove she is entitled to undergo the surgery recommended by Dr. Choi. Dr. Fillmore recommended that Claimant be *re-evaluated* by a surgeon, and then have surgery if the surgeon deemed it appropriate. He did not state that Claimant should have surgery now. As such, the ALJ adopts the recommendations of Dr. Fillmore, and Claimant may be re-evaluated by a surgeon.

Temporary Total Disability

11. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *Id*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

12. Claimant has proven entitlement to TTD since she is not at MMI and could not perform the essential functions of her job as a certified nurse assistant based on the restrictions imposed by Dr. Dixon. As found above, there was no evidence concerning modified duty job offers, and Claimant had been receiving TTD through February 12, 2015 (the date of MMI) implying that she had not returned to work.

ORDER

It is therefore ordered that:

1. The Claimant’s cervical spine condition is related to her industrial injuries per the opinions of Dr. Fillmore.

2. Claimant is entitled to a surgical re-evaluation.

3. Claimant’s request that the Respondents authorize the surgery recommended by Dr. Choi is denied without prejudice.

4. Claimant is entitled to TTD from February 13, 2015, and ongoing until terminated pursuant to law at the AWW of $671.14.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 26, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-999-438-01

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that medical benefits for her left hip including, but not limited to, left hip labral surgery are reasonable, necessary, and causally related to a June 17, 2015 work related injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a nurse practitioner (NP) and has been an NP since approximately 2010. Claimant has been working for Employer in internal medicine since 2013. As part of her duties she works directly with patients, trains other medical associates, and mentors NP students.

2. Prior to June 17, 2015 Claimant commonly jogged for exercise and jogged 1.5 to 3 miles without problem. Claimant was continuing to jog in the months leading up to June of 2015.

3. Prior to June 17, 2015 Claimant had never received medical treatment for either of her hips and had no traumatic injuries to either of her hips. Claimant had no symptoms in her hips and no pain in her hips.

4. On June 17, 2015 Claimant was working for Employer and was scheduled to work the late shift, from approximately 9:30 a.m. to 6:15 p.m. At approximately 5:45 p.m. the clinic's doorbell rang. Claimant and a nurse went outside and observed a female patient (FP) and her husband. The FP was in a wheelchair, slumped over, with her eyes closed.

5. Claimant clapped her hands and got the FP to open her eyes and respond. The FP indicated she wanted to die and Claimant was able to gather information that the FP had been brought to the clinic straight from dialysis and that the FP had pain all over and was feeling fatigued. Claimant performed a quick examination of the FP in the wheelchair and noted that the FP had a chest portal that was not properly covered.

6. Claimant went into the office to call the FP's dialysis nurse for more information. Claimant gathered from the FP that she no longer wanted dialysis, had end stage renal disease, and was ready to die or switch to hospice care. Claimant recommended the FP go to the emergency room at the hospital.

7. A nurse at the clinic assisted in wheeling the FP out to the parking lot while the FP's husband went to get their car. Claimant became worried about the FP's

chest portal and the transfer into the car while protecting the chest portal. Claimant also wanted to get vitals on the FP before the FP departed. At this point, Claimant went from a walk to a run to get to the car to assist in the transfer and to get vitals before the FP left.

8. While transitioning from a walk to a run in order to quickly get to the FP, Claimant felt a vibrational tearing sensation in her left lateral hip. Claimant had immediate pain in her hip but continued outside to assist with the FP.

9. The FP advised Claimant and the nurse that she could stand. Claimant and the nurse assisted her in standing and after first supporting herself, the FP suddenly stated that she couldn't do this anymore and gave way. Claimant and the nurse both had their arms under the FP when this happened and bore the brunt of the FP's weight. Claimant and the nurse then lowered the FP to the ground by squatting. Claimant then had a medical assistant from the clinic call 911 to have an ambulance take the FP to the emergency room.

10. When the FP gave way and her weight was on the Claimant and nurse, and while lowering the FP to the ground, Claimant felt the pain in her left hip become even more severe. The pain was a searing pain. On the ride home from work shortly thereafter, Claimant felt swelling in her hip and had difficulty going up or down the stairs in her home. Claimant assumed the pain was from a soft tissue injury and she treated herself with ice, rest, and ibuprofen.

11. After the incident, Claimant was not scheduled to work again until June 23, 2015 as she had a trip planned to celebrate her father's birthday. Claimant went on the trip but experienced continued pain in her left hip. Claimant did not suffer any additional injury while traveling. On June 22, 2015 before returning to work, Claimant reported the injury to Employer and was referred for treatment.

12. On June 22, 2015 Claimant was evaluated at Concentra by Michael Noce, M.D. Claimant reported that while running to a situation, she pushed of the left leg and felt vibrational tears and felt intense pain in the left hip. Claimant reported some limping especially while walking through airports over the last 4 days. Dr. Noce noted that Claimant was very tender with palpation of the left trochanter and that left hip x-rays showed no fracture. Dr. Noce assessed left hip pain and trochanteric tendinitis and referred Claimant for physical therapy. *See* Exhibit 6.

13 On June 23, 2015 Claimant was underwent physical therapy at Concentra with Joshua Simon, PT. PT Simon noted that Claimant was tender to palpation of the left greater trochanter and over distal fibers of the gluteus med. PT Simon noted light bruising over the distal fibers of the gluteus med approximately 1.5 inches in diameter.

14. On June 25, 2015 Claimant was evaluated at Concentra by Hanna Bodkin, PA-C. Claimant reported that her hip pain had become more localized over the past week with more focal pain over the iliac crest with a small area of bruising.

Claimant reported attending physical therapy which she believed helped some. Claimant reported continued pain with abduction lying on the right hip, that she was okay when walking straight, and that at work she had been using the elevator instead of stairs. Claimant reported most of her pain was while going up stairs. PA Bodkin noted on examination that Claimant had full range of motion in the left hip without pain while standing, but pain with laying right side and with adduction and rotation of left hip. PA Bodkin assessed left hip pain and recommended that Claimant continue with physical therapy. *See* Exhibits D, 6.

15. On June 30, 2015 Claimant underwent physical therapy with PT Simon. It was noted that Claimant was feeling much better, was able to walk a lot over the weekend with minimal pain, and that Claimant was starting to do more stairs at work. It was noted that Claimant was able to perform stairs but with a 2/10 pain level and that the goal would be to ascend and descend stairs with no pain. PT Simon continued to assess left hip pain and trochanteric tendinitis. PT Simon noted that Claimant was demonstrating progress toward functional goals but required moderate cues for hip positioning and lacked muscular endurance. PT Simon noted that Claimant would benefit from more therapy to address her decreased muscle hip strength and increased pain during her workday. *See* Exhibit 6.

16. On July 7, 2015 Claimant underwent physical therapy with Candace Godwin, PT. Claimant reported that she went bike riding on July 3, 2015 and started to feel pain in her hip again. Claimant reported being frustrated because she was not able to return to her full level of recreational activity. It was noted that Claimant had soreness with ascending stairs but that she was able to negotiate stairs with no pain. It was noted that Claimant had improved strength in hip abduction. Claimant was advised to avoid long duration resisted activity like biking for the next 1-2 weeks to allow full healing of injured tissues. Claimant was noted to have reached therapy goals. *See* Exhibits D, 6.

17. On July 20, 2015 Claimant was evaluated by Nicole Leitch, PA-C. PA Leitch noted that Claimant had continued to improve, but slowly. Claimant reported she had not been able to return to full activities of daily living including running. PA Leitch noted that Claimant had full range of motion of the left hip without pain while standing but continued pain laying right side and with adduction and rotation of left hip felt to be the proximal portion of the hip. PA Leitch referred Claimant to an orthopedic specialist for evaluation due to Claimant's continued pain in the left hip/buttocks and due to her inability to return to full activities of daily living. *See* Exhibit 6.

18. On September 9, 2015 Claimant was evaluated by William Peace, M.D. at Panorama Orthopedics and Spine Center. Dr. Peace recommended an MRI of Claimant's left hip to evaluate for a gluteus medius tear based on the history, physical examination, radiographic studies, and failure of conservative treatment. Dr. Peace noted on exam that Claimant's left hip strength was decreased and that she was tender over the greater trochanter. *See* Exhibits B, 7.

19. On September 16, 2015 Claimant underwent an MRI of her left hip interpreted by Frank Crnkovich, M.D. Dr. Crnkovich provided the impression of: chondrolabral separation of the superior to posterosuperior labral margins, a thin linear cleft developing with intrasubstance degenerative change of the labrum as well, minimal condral degeneration grade I/grade II of the acetabular margin and femoral head noted far laterally, alpha angle of 58 to 60 degrees, small joint effusion; and gluteus medius muscle edema and myotendinous junction edema greater than the gluteus minimus with throcanteric bursal fluid present but no focal disruption of the gluteus medius or minimus noted. *See* Exhibit E.

20. On September 21, 2015 and because the left hip MRI revealed a left acetabular labrum tear, Dr. Peace referred Claimant to Brian White, M.D. Claimant was called and advised of the tear and that the MRI showed inflammation of the gluteus muscle, but not a muscle tear. Dr. White was noted to specialize in hip arthroscopy for labral tear which was the reason for referral. *See* Exhibit 7.

21. On November 4, 2015 Claimant was evaluated by Brian White, M.D. Claimant reported left hip pain since June 17, 2015 when she went to run to try to catch a patient and also tried to keep the patient from hitting the ground and tweaked her hip. Claimant reported that since the incident she had pain in the groin and deep o the lateral hip. Claimant reported being frustrated as she cannot be active at the level she wants or needs to be. Dr. White noted that Claimant used to run 3 times a week and now could not do that at all. Dr. White noted that Claimant had significant discomfort with the anterior impingement maneuver of her hip which recreated the pain Claimant typically feels. The rest of the physical examination was insignificant. Dr. White noted that Claimant had coxa profunda femoroacetabular type impingement and he noted that the MRI showed a labral tear. Dr. White assessed combined impingement with labral tear, acute on chronic injury. Dr. White opined that due to the chronicity of Claimant's symptoms and failure of conservative treatment, Claimant was a candidate for hip arthroscopy moving forward. *See* Exhibits C, 8.

22. Dr. White requested pre-authorization for left hip scope and labral repair reconstruction and femoral acetabular osteoplasty. *See* Exhibits 4, 5.

23. On November 20, 2015 Respondents denied the requested surgical treatment for non medical reasons. *See* Exhibits G, 5.

24. On February 11, 2016 Claimant underwent an independent medical examination performed by Brian Lambden, M.D. Dr. Lambden opined that Claimant would ultimately need arthroscopic surgery to repair the labral separation to resolve her deep hip aching symptoms and to prevent further degeneration. Dr. Lambden opined that this should be done through her regular health insurance and that he had a hard time relating this to any incident that occurred at work. Dr. Lambden opined that there was no occupational exposure that could explain the type of injury going from walking to a fast walk or jog and that it appeared to be an idiopathic worsening of the degeneration that was due to Claimant's underlying hip pathology that was previously asymptomatic.

25. Dr. Lambden noted that Claimant's reported history matched the medical records. Dr. Lambden noted that the incident on June 17, 2015 was likely consistent with an acute muscle tear on top of some underlying tendinopathy based on the MRI scan evidence for edema in the gluteus minimus, gluteus medius, and greater throchanteric insertion area as well as edema adjacent to the iliac crest in the gluteus medius. Dr. Lambden opined that the tear and tendinitis had resolved. Dr. Lambden opined that the labral tear was not due to the work injury. *See* Exhibit A.

26. On March 17, 2016 Claimant underwent an independent medical examination performed by John Hughes, M.D. Dr. Hughes opined that Claimant sustained an acute labral tear of her left hip on June 17, 2015 and endorsed the recommendations for surgical care made by Dr. White and Dr. Lambden. Claimant reported to Dr. Hughes that while starting to run on June 17, 2015 she felt the sudden onset of a searing quality pain in her left lateral hip and that it was a pain she had never felt before. Dr. Hughes noted that Claimant's history was consistent with medical records documentation beginning on June 22, 2015. Dr. Hughes assessed: occult impingement anatomy of the bilateral hips with no symptoms prior to June 17, 2015; left hip sprain/strain with development of a symptomatic labral tear of the hip; leg length discrepancy with a 2-cm shortening of the left lower extremity compared to the right; thoracolumbar scoliosis; and right Achilles tendinitis. *See* Exhibit 1.

27. Dr. Hughes reviewed the report of Dr. Lambden that concluded there was really no occupational exposure that could explain Claimant's type of injury and that the labral tear recommended an idiopathic worsening of degeneration due to underlying hip pathology that was previously asymptomatic. Dr. Hughes opined that while Claimant had impingement anatomy of her hips, that it was clear from her history that she sustained an acute left hip injury on June 17, 2015. Dr. Hughes disagreed with Dr. Lambden and opined that the labral tear could have occurred as a result of breaking into a run without a warm up period and that it constituted sufficient trauma to cause an acute labral tear. Dr. Hughes noted that the Division of Workers' Compensation Lower Extremity Injury Medical Treatment Guidelines note that while impingement abnormalities are usually congenital, that labral tears may be aggravated by repetitive rotational force or trauma. *See* Exhibit 1.

28. Dr. Hughes and Dr. Lambden both testified via deposition consistent with their written independent medical examination reports.

29. Dr. Hughes opined that Claimant has a slightly deep hip socket which predisposed her to impingement. Dr. Hughes noted that although Claimant was pre-disposed to injury in her hips, that Claimant had an injurious activity on June 17, 2015 and suffered an acute injury that day. Dr. Hughes opined that Claimant's acute tear and range of motion limitations following the injury were consistent with a labral tear. He continued to opine that the labral tear and the left hip injury was work related.

30. Dr. Lambden opined that Claimant had the congenital finding of femoroacetabular impingement which predisposed her to labral tears and that both the labral tear and femoroacetabular impingement were pre-existing and that the only acute injury suffered on June 17, 2015 was a gluteus medius muscle tear. Dr. Lambden opined that the acute muscle tear was consistent with Claimant's symptoms following the injury and was consistent with the findings of edema and swelling. Dr. Lambden opined that the muscle tear had resolved. Dr. Lambden continued to opine that the mechanism of injury did not support a labral tear and that there was no rotational force to the hip and no trauma to the hip during the June 17, 2015 incident.

31. The opinions of Dr. Hughes are found more credible and persuasive than the opinions of Dr. Lambden. The opinions of Dr. Hughes concerning causation are consistent with the mechanism of injury reported by Claimant and are consistent with her medical examinations and symptoms following the injury. Additionally, the opinion of Dr. White and his request for surgery indicate his belief as well that Claimant suffered an acute injury related to her employment on this date which is consistent with Dr. Hughes' opinion.

32. Claimant's testimony at hearing is found credible and persuasive. Claimant had never suffered a prior left hip injury and had no prior left hip symptoms or treatment prior to this work related injury. Claimant had immediate pain in her left hip when she went from a walk to a run and again when she was attempting to transfer the FP to the car. Claimant continues to experience pain in her left hip.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the

testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The claimant is required to prove by a preponderance of the evidence that the condition for which she seeks medical treatment was proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has established by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment for her left hip, including but not limited to left hip labral repair surgery. Claimant has established, more likely than not, that she suffered an acute injury including a labral tear and a muscle tear on June 17, 2015 while assisting with a patient at and outside Employer's clinic. The opinion of Dr. Hughes that an acute injury occurred that was consistent with a labral tear is found credible and persuasive. Although Claimant had a pre-existing condition that pre-disposed her to developing labral tears, Claimants was asymptomatic prior to and leading up to the work injury and she has established more likely than not that her labral tear was suffered acutely on June 17, 2015. Immediately after her acute injury, Claimant had pain in her hip and limitations in her normal activities that has continued to date. The pain and limitations did not exist prior to June 17, 2015. Her symptoms, reported mechanism of injury, and limitations in range of motion on examination shortly after the injury are consistent with an acute tear having been suffered and Dr. Hughes is found credible in this regard. Claimant has established a causal connection between her work duties and the injury suffered as she was assisting a patient at the time she experienced the acute tear and acute pain. Respondents are liable for reasonable and necessary medical treatment including the labral repair surgery which has been opined by multiple providers to be reasonable and necessary treatment for the labral tear and Claimant's continued pain and limited function.

ORDER

1. Claimant has established by a preponderance of the evidence that medical benefits for her left hip including, but not limited to, left hip labral surgery are reasonable, necessary, and causally related to her June 17, 2015 work related injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 31, 2016 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-994-357-01

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury on September 18, 2015.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits from September 18, 2015 and ongoing until terminated by operation of law.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to reasonable and necessary medical benefits.

4. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant was employed by Employer as a head cashier with duties that included cashiering, supervising the front end of the store, and closing the store. Claimant began employment with Employer in approximately September of 2013. Claimant earned approximately $300.00 to $350.00 per week depending on her schedule.

2. On September 18, 2015 Claimant went into the front end office to get a box of quarters for the cash registers. Claimant squatted down, opened the safe, and lifted the box of quarters. The box of quarters was approximately 10 inches by 5-6 inches and weighed approximately 25 to 35 pounds.

3. When Claimant lifted the box of quarters she felt a sliding/grinding sensation in her lower back and had the immediate onset of severe pain in her lower back. Claimant felt dizzy and decided to lie down on the floor of the office. Claimant had never felt a similar sensation in her lower back before. Claimant's co-worker called an ambulance and Claimant was taken by ambulance to the hospital.

4. Claimant was evaluated at St. Anthony North Hospital on September 18, 2015 by Eric Bryant, M.D. Dr. Bryant noted that Claimant developed a sudden onset of mid low back pain radiating into her mid buttocks. Claimant reported lifting a box of quarters when she felt a popping sensation, lowered herself to the floor, and had not been able to get up and bear weight since. Dr. Bryant obtained an MRI of Claimant's lumbar spine and noted that the results showed a L4-L5 disc herniation with placement of the right nerve root. Dr. Bryant provided a prescription for Norco and Flexeril and discharged Claimant home. Dr. Bryant noted that Claimant needed to follow up with the

workers' compensation provider designated by her employer and that she needed clearance from that provider before returning to work. *See* Exhibits 6, A.

5. On September 18, 2015 Claimant underwent an MRI of her lumbar spine that was interpreted by Robert Leibold, M.D. Dr. Leibold provided the impression of: mild to moderate L3-4 central stenosis; and mild to moderate L4-5 central stenosis with a disc herniation present mildly displacing the traversing right L5 nerve root posteriorly and to the right. *See* Exhibits 7, B, C.

6. On September 21, 2015 Employer filled out an Employer's First Report of Injury form indicating that Claimant was injured on September 18, 2015 at 2:30 p.m. The form indicates that Claimant was reaching in the safe when she picked up a box of quarters, turned with them, felt a pop in her back, and went to the floor. Employer referred Claimant for treatment. *See* Exhibits 1, E.

7. On September 22, 2015 Claimant was evaluated at OccMed Colorado by Monica Fanning, NP. Claimant reported squatting to grab a box of quarters from the safe at work when she felt a sliding sensation in her spine. Claimant reported when she got up she felt intense pain, dizziness, and muscle spasms and that she went to the emergency room at St. Anthony North. Claimant reported still having significant pain rated at 10/10 that went down into her butt. NP Fanning noted that Claimant had a tailbone fracture years ago. NP Fanning noted diffuse, left greater than right, myofascial trigger points in Claimant's lumbar spine and she was unable to perform range of motion due to Claimant's pain and guarding. NP Fanning noted that if Claimant did have an L4-5 herniation, Claimant could not be treated with epidural steroid injections and NP Fanning referred Claimant to Dr. Oeser for evaluation and treatment recommendations. NP Fanning kept Claimant off work and assessed low back strain and L4-5 disc displacement. NP Fanning opined that Claimant needed rest and recommended she start physical therapy for gentle range of motion and modalities. NP Fanning opined that the injury appeared work-related in causation. *See* Exhibits 6, F.

8. On September 26, 2015 and September 27, 2015 Claimant attended the Colorado Tattoo Convention. Claimant's boyfriend, with whom she has lived for approximately four years, owns a tattoo shop. Claimant attended the convention and assisted at her boyfriend's booth. During the convention, Claimant took Percocet every four hours.

9. Surveillance video of the Claimant taken on the two days of the convention show her walking slowly around the convention center, sitting at her boyfriend's booth, standing at the booth, leaning forward multiple times, and bending at the waist multiple times. Notably, in the video, Claimant bends forward almost to 90 degrees at 21:40, 25:12, 32:49, and 34:52. At 19:10 Claimant is observed lifting the hatch to the trunk of an SUV and places an item into the trunk. The item appears to be a small bag/box and Claimant did not lift it above her shoulder. At the end of the

convention, surveillance video also shows Claimant descending stairs with extremely slow and cautious movement. *See* Exhibits K, L.

10. On September 29, 2015 Claimant was evaluated by Roberta Anderson-Oeser, M.D. Claimant reported that as she was picking up a box of quarters from the safe she felt a sliding sensation and a pop in her lower lumbar region followed by severe pain. Claimant reported lying on the ground for approximately 20 minutes before her supervisor called 911 and that she was then taken by ambulance to St. Anthony's North Emergency Room. Claimant reported a stabbing and aching sensation in the lower lumbar region in addition to aching and numbness in her left lower leg. Claimant reported her pain at a 10/10 and that at best it was a 9/10. Claimant reported no lumbar back pain prior to this incident other than a prior history of a coccygeal fracture. Dr. Oeser provided the impression of: lumbar strain; left lumbar radiculitis; displacement of lumbar intervertebral disc without myelopathy; and muscle spasms. Dr. Oeser noted that Claimant was not a candidate for injection therapy due to Claimant's history of anaphylactic reaction to steroids. Dr. Oeser noted the importance of an active therapy program to avoid further problems with pain and muscle spasms and loss or range of motion and opined that Claimant could benefit from a trial of pool therapy. Dr. Oeser also advised Claimant that it was imperative that Claimant begin with a home stretching program. Dr. Oeser noted that Claimant was to remain on restricted work duty per NP Fanning. *See* Exhibit 10.

11. On September 30, 2015 Claimant was evaluated at OccMed Colorado by Gary Zuehlsdorff, D.O. Claimant reported squatting down in the store to pull quarters out of safe when she reached in, pulled them out, and stood up feeling a pop and immediate pain in the low back that she rated as 10/10. Dr. Zuehlsdorff noted to Claimant that 10/10 pain meant that the pain was so horrible that she would not be able to live for more than a few minutes, and Claimant agreed stating that the pain was a 10/10 and continued to be a 10/10. Claimant reported a prior injury when she fractured the tip of her coccyx. Claimant reported that the pain was in her low back and going down the back of her left leg. Dr. Zuehlsdorff noted on examination that when standing, Claimant could not bend even 5 degrees forward which did not make sense. Dr. Zuehlsdorff assessed: low back strain with left leg symptoms, question radiculopathy with supposed left L4-5 disc displacement; and supposed history of 10 years ago coccyx fracture with treatment for four to five months. Dr. Zuehlsdorff opined that the injury appeared work compensable but that Claimant's presentation was concerning. Dr. Zuehlsdorff opined that it was somewhat non-physiologic that Claimant could sit on the edge of the table but when standing could not bend more than 5 degrees. Dr. Zuehlsdorff also opined that Claimant had Wadell signs of positive pain with axial compression and truncal rotation even to a minimal degree which were not physiologic either. Dr. Zuehlsdorff noted Claimant would continue with physical therapy and pool therapy per Dr. Oeser. *See* Exhibits 9, I.

12. On October 1, 2015 Respondents filed a Notice of Contest indicating that liability for the claim was contested or denied as not work related. *See* Exhibit 3.

13. On November 17, 2015 Claimant was evaluated by Darbi Invergo, D.O. Claimant reported an acute onset of low back pain after lifting a box at Sprouts. Dr. Invergo noted that Claimant's lumbar MRI showed mild chronic degenerative disc disease throughout the lumbar spine that was worst at L3/4 and L4/5. Dr. Invergo opined that a majority of Claimant's low back pain was likely from the annular tear at L4/5 and may have lead to some mild gait abnormalities and that now Claimant had left SI joint pain. Dr. Invergo assessed: sacro ilial pain, left; lumbar degenerative disc disease; lumbar disc disease with disc bulging at L3/4 and L4/5 with an annular tear at L4/5; lumbar back pain, left leg pain with antalgic weakness; lumbar facet arthropathy throughout the lumbar spine; and annular tear of lumbar disc. Dr. Invergo referred Claimant to Bryan Wernick for consultation. *See* Exhibit 12.

14. On December 16, 2015 Claimant had radiographs of her lumbar spine that were ordered by Gary Wernick, M.D. It was noted that the films showed no evidence of fracture or dislocation. *See* Exhibit 13.

15. On December 23, 2015 Dr. Wernick referred Claimant to physical therapy 1 to 2 times per week for 4 to six weeks. *See* Exhibit 15.

16. On February 23, 2016 Dr. Wernick requested that Claimant undergo a medial branch block surgery at L3-L5 with a surgery date of March 1, 2016. *See* Exhibit 18.

17. On March 1, 2016 Claimant underwent bilateral medial branch blocks at L3, L4, and L5 performed by Dr. Wernick with fluoroscopic guidance performed by Ken Hirasaki, M.D. *See* Exhibits 19, 20.

18. Claimant testified credibly at the hearing in this matter. Claimant continues to have severe lower back pain, left leg numbness and tingling, and has limitations in her activities of daily living. Claimant did not have similar issues prior to her September 18, 2015 work injury.

19. Claimant had a prior injury to her tailbone/coccyx in approximately 2009 when she had a probable fracture with inflammation that was treated for 4-6 months and resolved. With her prior injury, Claimant missed approximately one day from work and was better with no ongoing symptoms after a few months of treatment. The pain from the coccyx fracture in 2009 was different from the pain Claimant is currently experiencing.

20. Claimant's boyfriend Gary Dressler testified at the hearing in this matter. Mr. Dressler has lived with Claimant for approximately 4 years. Mr. Dressler testified credibly that he has observed a big difference in Claimant's activity level since the September 18, 2015 injury. Mr. Dressler has observed that Claimant walks slower, can't do strenuous activities, and Mr. Dressler has had to take on many chores and activities of daily living that Claimant can no longer do. Mr. Dressler testified that Claimant assisted him at the tattoo convention in September and that she helped set

up/straighten business cards, stickers, and books. Mr. Dressler testified that Claimant walked around a little bit and was able to socialize but that she was physically limited that weekend. Mr. Dressler compared the convention to a convention a year prior in Phoenix, Arizona where Claimant was much more active.

21. Claimant's testimony, overall, is found credible and persuasive. Claimant suffered an acute injury at work while attempting to lift a box of quarters. Although Claimant reports to medical providers an extremely high level of pain inconsistent with surveillance, Claimant is credible that she is in pain and that she has limitations in her movement and abilities following the work injury. This is shown by her slow walking on surveillance and by her limitations in descending stairs shown on surveillance. Although Claimant is more capable than she reports to her medical providers, she is nonetheless in pain and limited in her normal function due to her September 18, 2015 injury. Further, the testimony of Mr. Dressler is found credible and persuasive in explain the differences in Claimant's abilities following the September 18, 2015 injury.

22. The opinions of NP Fanning and Dr. Zuehlsdorff that the injury is work related are found credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim*

Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of employment, and that the alleged injury was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her lower back on September 18, 2015. On that date Claimant was working for Employer as a cashier and was performing her normal job duties when she was removing a box of quarters from the safe and when she suffered an acute injury to her lower back. Claimant felt a grinding/sliding sensation in her lower back when she attempted to lift the quarters and she had the sudden onset of severe pain. Prior to this injury, Claimant had been employed by Employer in the same position with no difficulty performing her normal job duties. The opinions of NP Fanning and Dr. Zuehlsdorff that the injury appeared to be work related after examining Claimant and reviewing the reported mechanism of injury are credible and persuasive. Claimant has established that she suffered an acute injury.

Temporary Total Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Claimant has established both through medical reports of several treating providers and through her lay testimony that she continues to suffer from medical incapacity and impairment of wage earning capacity. Claimant credibly testified that she is unable to return to her regular duties as cashier because she is incapable of bending, twisting, lifting, and standing for longer periods of time. Claimant's medical providers have documented her limitations and further placed Claimant on restricted duty and advised Claimant she could not return to manual labor. Due to her injury, Claimant has been unable to resume her prior duties as cashier and has suffered an impairment of wage earning capacity. Claimant has not reached maximum medical improvement, has not returned to regular or modified employment, and has not received a written release to return to regular employment. Therefore, Claimant has established an entitlement to ongoing temporary total disability benefits from September 18, 2015 and ongoing for the wage loss incurred as a direct result of her compensable injury.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Here, Claimant has established by a preponderance of the evidence that the medical treatment she has received to date for her L4-L5 disc herniation and radiculopathy has been reasonable and necessary to cure and relieve the effects of her September 18, 2015 work injury. Respondents shall be liable for the medical treatment received to date and for continued reasonable and necessary medical treatment.

Average Weekly Wage

Wages are the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied. The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. *See* § 8-42-

102(3); *Campbell v. IBM Corporation, supra; see Williams Brother, Incorporated v. Grimm,* 88 Colo. 416, 197 P.1003 (1931); *Vigil v. Industrial Claim Appeals Office,* 841 P.2d 335 (Colo. App. 1992). Section 8-42-102(3), C.R.S. states that "Where the foregoing methods of computing the average weekly wage of the employee…will not fairly compute the average weekly wage, the division, in each particular case, may compute the average weekly wage of said employee in such other manner and by such other method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's average weekly wage." According to *Washburn v. Academy School District No.20*, W.C. No. 4-491-308 [Industrial Claim Appeals Office (ICAO), September 16, 2002], § 8-4-102(3) "grants the ALJ authority to use discretion in calculating that average weekly wage when the prescribed methods will not, for any reason, fairly compute the claimant's wage."

Here, at the outset of hearing, average weekly wage was identified as an issue for hearing. However, other than Claimant's testimony that she earned between $300 and $350 per week, there was no evidence submitted for the ALJ to make a fair calculation of her average weekly wage at the time of her injury. There were no wage records, paystubs, detailed testimony, etc. that could allow the ALJ to fairly compute her average weekly wage or to determine whether it was closer to $300 or closer to $350 or somewhere in between. The ALJ finds there is insufficient evidence to make a determination as to Claimant's average weekly wage at the time of her injury. Therefore, the ALJ declines to make a finding or issue an order as to Claimant's average weekly wage.

ORDER

1. Claimant has established by a preponderance of the evidence that she sustained a compensable injury on September 18, 2015.

2. Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits from September 18, 2015 and ongoing until terminated by operation of law.

3. Claimant has established by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment, including but not limited to the treatment received to date for her September 18, 2015 work related injury.

4. Claimant has failed to present sufficient evidence for the ALJ to make a determination of her average weekly wage.

5. Insurer shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 31, 2016,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-998-903-01

ISSUES

- Whether Respondents established by a preponderance of the evidence that Claimant did not sustain his injuries during the course and scope of his employment?
- Whether Claimant established by a preponderance of the evidence that his average weekly wage differed from that admitted to by Respondents in their general admission of liability?

FINDINGS OF FACT

Background

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant worked as a taxi cab driver under a lease agreement with Employer beginning June 25, 2015.

2. On Thursday, October 29, 2015, Claimant was involved in a motor vehicle accident.

3. Claimant filed his claim for compensation on November 5, 2015, alleging an average weekly wage (AWW) of $800.00.

4. Insurer admitted liability for medical and temporary total disability (TTD) benefits effective October 30, 2015 and continuing. Insurer admitted to an AWW of $316.27 based on Claimant's net income beginning on his first day of driving, June 25, 2015, though the day before his accident, October 28, 2015.

5. On December 16, 2015, Claimant filed a hearing application on the issues of AWW and additional TTD benefits based on a claimed higher AWW. On December 28, 2015, Respondents responded to Claimant's application seeking to withdraw their admission of liability, asserting that Claimant was not within the course and scope of his employment at the time of his injury.

Liability

6. Claimant testified he was driving his leased cab on the day of the motor vehicle accident, taking a fare from Denver International Airport (DIA) to a downtown hotel. He logged into Employer's dispatch system on the day of the accident. He reported the accident that day or the next day to "Jenny," Ms. Romero's assistant.

7. Employer does not dispute that Claimant was in a motor vehicle accident, incurred medical bills, and lost time from work due to injuries he sustained in the accident. Employer's insurance safety manager, Barbara Romero, testified that Claimant reported he was driving his cab at the time of the accident; that he had a paying passenger named "Johnny Black" in the cab at the time of the accident, and that the other driver was at fault.

8. Respondents contend that Claimant was not logged into Employer's dispatch system at the time of the accident. Employer further contends that a provision of the lease agreement required Claimant to be logged in to its dispatch system for Employer to consider Claimant to be acting within the course and scope of his employment for Employer to consider Claimant eligible for workers' compensation coverage.

9. The language at issue provides:

> C. SOME OF YOUR CONTRACTUAL OBLIGATIONS AND ACKNOWLEDGEMENTS.
>
> > 9. Workers' Compensation. Pursuant to Colorado Revised Statutes 40-11.5-102, YOU acknowledge that during the TERM of this Agreement, YOU agree to be covered by a workers' compensation policy arranged by [Employer] which provides workers' compensation coverage for YOU while operating the Leased Property as a taxicab (only). This policy provides no coverage for accidents, injuries or other events when the Leased Property is being used for other or personal purposes. Under Colorado Public Utilities Commission regulations, YOU are operating the Leased Property as a taxicab any time that YOU make the Leased Property available to the public as a taxicab. Any time that YOU are making the Leased Property available to the public for taxicab services, Colorado Public Utilities Commission regulations require that YOU be logged into [Employer's] computerized dispatch system, even if YOU are only intending to accept "hails" from passengers. YOUR failure to log into [Employer's] computerized dispatch system will be evidence that YOU were not operating the Leased Property as a taxicab (and thus not eligible for workers' compensation insurance) at the time of any accident or event for which YOU may make a workers' compensation claim. You acknowledge that YOU are responsible for all premiums and/or payments due under the workers' compensation policy arranged by [Employer].

10. Respondents presented no persuasive evidence that Claimant was not "operating the Leased Property as a taxicab," and no persuasive evidence that Claimant was using his leased taxicab "for other or personal purposes." While the language provides, "Any time that YOU are making the Leased Property available to the public for taxicab services, Colorado Public Utilities Commission regulations require that YOU be logged into [Employer's] computerized dispatch system," Respondents point to no such regulation, and the ALJ likewise finds none.

11. Rather, the PUC regulations regarding logging on to a dispatch system appear to apply to Employer and not Claimant. For example, 4 CCR 723-6-6255 (a)(III, IV, and V) all require carriers such as Employer to employ a dispatch system that tracks and records a driver's hours of service, logs a driver as "on duty" when within a certain distance from Denver International Airport, and locks out a driver who has exceeded on duty hours of service maximums. These regulations do not apply to drivers such as Claimant.

12. Further, 4 CCR 723-6-6103(c)(II)(D) requires Employer to:

> maintain and retain accurate and true time records, including all supporting documents verifying such time records, for a period of six months showing: (i) the time(s) the driver reports for duty each day; (ii) the time(s) the driver is released from duty each day; (iii) the total number of hours the driver is on duty each day; and (iv) for a driver who is off duty for an entire day, an indication to that effect.

The ALJ finds that given Claimant reported his injuries on or about October 29, 2015, and given Employer's duty to maintain and retain such records for six months, Employer should have had such records of Claimant's on duty times at the April 13, 2016 hearing. The ALJ draws a negative inference from Respondents' failure to produce such evidence at hearing.

13. Ms. Romero testified at hearing that she taught new drivers about Employer's position that drivers be logged into the dispatch system for Employer to consider them acting within the course and scope of the employment. Respondents' Exhibit G documents her training. The exhibit, which has a cartoon at the top of the page, provides:

> Workers' Compensation Insurance. Independent Contractors qualify for Worker's [sic] Compensation Insurance (WC). [Employer] offers and provides this coverage for its contracted drivers at a rate of $50 per week. Workers' Compensation covers medical expenses and lost time benefits as a result of an Occupational injury or disease.
>
> Please Note: The Independent contracted driver must be logged in (as per the requirement of the PUC, 4 Code of Colorado Regulations (CCR) 723-6… (Digital Dispatch System that tracks and records driver's hours of service) AND per WC requirement, the Independent contractor must be performing the duties within the course and scope of the contract agreement, when an Occupational Injury or Disease occurs.

14. The ALJ finds that the language used in the training materials is ambiguous in that

- It refers variously to “Independent Contractors,” “contracted drivers,” “Independent contracted driver,” and “driver.”

- It refers to an incomplete and unidentifiable section of the Code of Colorado Regulations.

- Its reference to “WC” in paragraph 2 seems to refer to the Workers’ Compensation statutes, rather than Worker’s Compensation Insurance as the abbreviation is defined in paragraph 1.

15. Ms. Romero testified at hearing that she understood the lease agreement to require that drivers had to be logged in to Employer’s dispatch system to be considered as operating within the course and scope of their employment. She further testified that she had run a report that indicated Claimant was not logged in on the day of his injury. However, Employer did not introduce any such report into evidence, even though the actual report would be the best evidence of what the report contained. Ms. Romero testified that she had an IT employee review the report, however that employee did not testify. Ms. Romero testified that her report showed that Claimant did not log in at all during the week of his accident. Again, Respondent offered no such report.

16. Ms. Romero testified that Employer does not set schedules, routes, or areas for drivers. She also testified that she thought Claimant had a special airport lease. However nothing in the lease agreement, which was introduced into evidence as Respondents’ exhibit E, identifies it as an airport lease.

17. Claimant testified that he worked three days a week: Tuesdays, Thursdays, and Fridays, because he was assigned by “Jose” in Employer’s operations department, to work at the airport on those days. Ms. Romero testified that Jose does not direct drivers where to work, but that rather he offers what runs are available on a particular day, which could possibly include airport runs.

18. Claimant testified that the process for airport drivers was to wait in a holding area at DIA until receiving a ticket and moving forward to collect passengers. The majority of passengers paid by credit card. Claimant testified that he was logged in to Employer’s dispatch system in the airport holding area, and that after a certain period of no activity, the system would automatically log drivers off. Once logged off, the system would not automatically log back on. Claimant was unsure whether the system had automatically logged him off and whether he re-logged into the system prior to his accident.

19. Ms. Romero testified that Employer’s requirement that drivers be logged into the dispatch system allowed Employer to accurately report drivers’ hours to the PUC and ensure that drivers were not exceeding the PUC’s hour limitations. She also testified that Drivers who were not logged in could pick up “flags,” passengers not referred through dispatch. Ms. Romero testified that a taxi cab’s meter worked even if a driver was not logged on.

20. A large majority of passengers paid by credit card. Claimant testified that he reported all of his credit card revenue to Employer. Respondents processed Claimant's credit card payments, charged Claimant the processing fees, and credited Claimant's account with the remainder of the payment. Respondents produced no persuasive evidence that they did not process credit card payments made to Claimant on or before the motor vehicle accident.

21. The ALJ credits Claimant's testimony as credible and persuasive. He spoke with precision about how he operated as a driver and the events which occurred on the day of the accident in which he sustained injuries.

22. Employer had access to evidence that, if produced, would have tended to support their case. However, Employer did not produce such evidence. The ALJ reasonably infers from Respondent's failure to produce such evidence as its reports of whether Claimant was logged in to its dispatch system at the time of the accident, its failure to produce testimony of the IT employee who checked that report, and its failure to produce reports of credit card processing on behalf of Claimant, that such evidence, if produced, would not have supported Respondents' position.

23. The ALJ finds that Respondent's have not met their burden of proving by a preponderance of the evidence that Claimant was not working within the course and scope of his employment at the time of the motor vehicle accident.

Average Weekly Wage

24. Claimant relies on Exhibit 5, a Form 1099-K form, to support his argument that his 2015 earnings from Employer for June 25, 2015 through October 29, 2015, were $12,917.09, for an average weekly wage of $723.36.

25. Attached to Respondents' general admission as Exhibit B, were summaries of driver tender or revenue and expenses. The revenue summary identifies credit card revenue of $12,917.09 (which was identical to the corresponding 2015 form 1099-K) and voucher income of $1,461.50 for a total of $14,378.59. The second page identifies expenses paid by Claimant in the amount of $8,685.64. A comparison of the two shows net earnings to Claimant in the amount of $5,692.99 of which $2,075.97 was paid by check and $3,617.02 in cash. Dividing Claimant's net earnings of $5,692.99 by 18, the number of weeks between June 25, 2015 and October 29, 2015, yields an average weekly wage of $316.28.

26. A cashier receipt dated August 26, 2015 reflects receipts from credit cards in the amount of $428.68 and vouchers in the amount of $65.75, a total of $494.43 between August 17 and August 25, 2015. His documented expenses during that same time period were $127.88, resulting in net income for that week of $366.55.

27. The ALJ finds Claimant's average weekly wage to be $366.55. This amount reflects Claimant's actual earnings at the time immediately before his injury. The amount is also reasonable in light of Claimant's average weekly wage calculated over the course of his employment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

In re Pierce, 042616 COWC, 4-950-181-01.

Typically, a claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Here, because Respondents admitted liability, the burden shifts and Respondents are required to prove by a preponderance of the evidence that at the time of the injury Claimant was not performing service arising out of and in the course of the employment, and that the injury or occupational disease was not proximately caused by the performance of such service. This was a holding of the supreme court in City of Brighton v. Rodriguez, 318 P.3d 496 (Colo. 2014) ("Under section 8-43-201(1), a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order has the burden to prove by a preponderance of the evidence that such a modification should be made.").

Respondents contend that they should be allowed to withdraw their admission of liability because was acting outside of the scope of his employment as defined by the Lease Agreement.[1] As an initial matter, although the ALJ has found that a provision in the lease agreement defined Claimant only to be acting within the course and scope of his employment when he is logged onto Employer's dispatch system; such a finding is not determinative.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

[1] Respondents offered some evidence at hearing that could tend to support a finding that Claimant was an independent contractor, and Claimant did not object to the admission of such evidence. However, Respondents do not pursue the independent contractor issue in their proposed findings of fact and conclusions of law. Rather, Respondents framed the issue for consideration as "Whether Respondents have proven, by a preponderance of the evidence, that Claimant was not within the course and scope of his employment at the time of the October 29, 2015 accident?". Thus, the ALJ does not address an independent contractor issue.

In some cases the claimant's disobedience of the employer's instructions concerning *what* is to be done and *when* it is to be done negates the requisite causal relationship between the employment and the resulting injury. In such circumstances the employer's instructions are said to limit the "sphere" of the employment. However, some employer instructions are concerned with the employee's conduct of the work while acting within the "sphere" of the employment. The employee's violation of the employer's instructions governing the "sphere" of employment severs the causal relationship between the employment and the injury, rendering the injury non-compensable. In contrast, employee violation of the employer's instructions concerning the conduct of the work does not sever the causal relationship with the employment, and any resulting injury is compensable, although possibly subject to other action. *Industrial Commission v. Funk,* 68 Colo. 125, 191 P.2d 125 (Colo. 1920); *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

Illustrative of this distinction is the court's holding in *Bill Lawley Ford v. Miller,* 672 P.2d 1031 (Colo. App. 1983). In *Bill Lawley Ford* the decedent-employee, who was intoxicated, was instructed by the employer to spend the night in Glenwood Springs, at the employer's expense, rather than attempt to recover a disabled truck and tow it to the employer's place of business in Meeker. The decedent disobeyed the employer's instruction and, while towing the disabled truck, was killed in a traffic accident the same night. The court cited with approval authority from a foreign jurisdiction stating that the employer has the "unqualified right to limit the scope of a servant's employment and activity and to determine what an employee shall or shall not do," and also "the unqualified right to determine *when* an employee shall do a certain thing." (Emphasis in original.) The *Bill Lawley Ford* court ruled, as a matter of law, that that "the employer's order limited the sphere of the [the decedent's] employment and that, in acting in violation of that order, [the decedent] was not acting within the course of his employment." *See also, Escobedo v. Midwest Drywall Co., Inc.,* W.C. No. 4-700-124 (ICAO July 13, 2007) (affirming denial of compensation to employee who was injured in fall from scaffold while violating employer's instruction not to work on scaffold until it was repaired).

In contrast, the supreme court reversed an order of a district court denying death benefits in the case of *Industrial Commission v. Funk, supra.* In *Funk*, the decedent was instructed not to perform mining activities beneath an overhanging silica bank until he caved off the top of the bank. The decedent disobeyed the instruction and the overhang collapsed killing him and his son. The court noted that the decedent was not entirely prohibited from working beneath the overhang. Consequently, the court reasoned that violation of the employer's instruction did not limit the sphere of the employment, but was instead concerned "only with the conduct of the workman within his sphere of employment." *See also, Ramsdell v. Horn, supra* (instruction not to work "up high" did not evidence intent to cause cessation of employment relationship even on a temporary basis).

Here, Respondents did not meet their burden of establishing by a preponderance of the evidence that Claimant was not within the course and scope of his employment at the time of his accident. Employer did not introduce evidence of Claimant's on duty time which it was required by the PUC to maintain and retain through the date of hearing. Additionally, while Employer's witness testified about a report she ran which she claimed showed that Claimant was not logged in on the day of the accident, the actual report was not produced, nor was a witness familiar with such report called on to testify. Claimant's testimony that he logged in on the date of the accident and was unsure whether the system automatically logged him out is persuasive. Based on the totality of the evidence, the ALJ concludes that Respondents did not establish by a preponderance of the evidence that Claimant was not logged in at the time of the accident.

Further, whether Claimant was or was not logged onto Employer's dispatch at the time of the accident is only *some* evidence of whether Claimant was operating in the course and scope of his employment. Here, the weight of credible evidence supports the conclusion that Claimant was operating within the course and scope of his employment and that Respondents did not prove otherwise.

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Here, the evidence supports a conclusion that at the time of his accident Claimant's average weekly wage was $366.55. This amount reflects Claimant's actual earnings at the time immediately before his injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents' request to withdraw their general admission of liability is denied.

2. Claimant's Average Weekly Wage is $366.55.

3. Issues not expressly decided herein are reserved to the parties for future determination.

4. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 31, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether the right shoulder arthroplasty proposed by Stewart Weinerman, M.D. is reasonable, necessary and related to Claimant's injury.

FINDINGS OF FACT

1. Claimant worked as baggage handler for Employer from approximately 1985-2006. He also worked as a supervisor. His job required heavy lifting, which he did on a daily basis.

2. Claimant's medical history was significant in that he previously suffered an industrial injury on October 8, 2002[1]. He injured his left shoulder while working for Employer and required surgery. Claimant testified he returned to work full duty after the surgery on his left shoulder.

3. Claimant sustained an admitted industrial injury to his right shoulder on July 7, 2005. The injury occurred while he was lifting a bag onto a plane. The bag should have been marked "heavy", but was not. Claimant heard a pop in his shoulder.

4. On July 7, 2005, Claimant was evaluated by Rick Artist, M.D. Dr. Artist's assessment was strain-right shoulder; question rotator cuff injury. Claimant was treated conservatively with medications and given work restrictions. The ALJ infers Claimant required treatment for the right shoulder after the injury, although specific reports relating to said treatment was not in the record.

5. An MRI arthrogram on July 27, 2005 revealed severe AC osteoarthritic changes, articular side tendinits, advanced osteoarthiritic changes at the glenohumeral joint and a probable small SLAP tear in Claimant's right shoulder[2]. JoAnne Halbrecht, M.D. reviewed the MRI arthrogram and stated Claimant's symptoms were more consistent with osteoarthritis, bursitis and impingement[3]. The ALJ infers the osteoarthritis in Claimant's right shoulder had been present for some time, as it was described as "advanced" in this note.

6. Dr. Halbrecht found Claimant to be at MMI on November 18, 2005. Dr. Halbrecht stated: "given that his osteoarthritis is bilateral, I discussed with him a genetic component for this".[4] Dr. Halbrecht stated Claimant would require bilateral shoulder replacements. There were no medical records admitted at hearing from August 2005

[1] That case was assigned W.C. case no. 4-584-139.
[2] The MRI arthrogram was referenced in Exhibit 1, p.3-Findings of Fact, Conclusions of Law and Order issued by ALJ Friend on April 3, 2008.
[3] Exhibit 1, p. 3.
[4] *Id.*

through February 2006 which showed what treatment Claimant received for his right shoulder from any of his ATP-s, including Drs. Artist and Halbrecht.

7. Claimant was initially evaluated by Peter Weingarten, M.D. on March 28, 2006. Claimant's injury was reviewed, including the arthroscopic surgery performed on his left shoulder, as well as visco-supplementation treatment, which was temporarily helpful. Claimant had moderate discomfort at the extremes of his range of motion ("ROM"). There was mild diffuse weakness on abduction. Dr. Weingarten noted x-rays of the shoulder demonstrated moderately advanced arthritis. His impression was degenerative arthritis of the shoulder, exacerbated by the accident in question. Dr. Weingarten recommended treatment to include change of work status, such that Claimant did not do repetitive heavy lifting. He felt Claimant would ultimately require total shoulder arthroplasty, but felt this should be delayed until the symptoms warranted the surgery. The ALJ notes this record related to treatment of the left shoulder and Dr. Weingarten did not offer any opinions regarding the right shoulder.

8. On March 30, 2006, Claimant was evaluated by Jon Erickson, M.D. Dr. Erickson noted Claimant had persistent, significant pain in the right shoulder and what was described as "horrible" range of motion on both sides. X-rays taken of both shoulders revealed essentially identical end-stage degenerative arthritic changes on both sides. Claimant had almost 45° of glenoid retroversion, which was described as a significant challenge at the time of a surgical procedure or total shoulder replacement, including potential grafting. The ALJ notes Dr. Erickson did not offer an opinion regarding the impact, if any, the glenoid retroversion had on Claimant's osteoarthritis.

9. On May 25, 2006, Dr. Erickson saw Claimant in follow-up for a consultation concerning the shoulder arthroplasty. At that time, the potential complications of the procedure, including eventual loosening of the glenoid was discussed. Dr. Erickson also discussed the lack of wear and tear phenomenon in the shoulder. Claimant was advised against doing luggage handling in the future.

10. Dr. Weinerman issued a report to Insurer, dated July 24, 2006. Dr. Weinerman noted he had been asked by Dr. Weingarten (his partner) to evaluate Claimant for purpose of giving him an impairment rating for the work-related injuries to his shoulders and back. Dr. Weinerman assigned a 25% extremity impairment to Claimant's left shoulder and 14% scheduled impairment to the right shoulder.

11. Dr. Erickson issued an addendum report on or about August 10, 2006. Dr. Erickson noted Claimant continued to have significant pain and limitation in his range of motion. He had end-stage degenerative arthritis in both glenohumeral joints, with approximately 45° of glenoid retroversion. Dr. Erickson noted he would not do both procedures in one sitting and would usually do the dominant side first.

12. On October 3, 2006, Dr. Weinerman issued a supplemental report to Insurer regarding Claimant's rating and the dates of MMI for his various injuries. Dr. Weinerman noted Claimant reached MMI as of July 20, 2006 for the right shoulder. Dr. Weinerman said he was in agreement with the diagnoses and conclusions made by Dr.

Halbrecht and Dr. Erickson. He offered his opinion that Claimant's previous arthritic condition was due to his employment as a baggage handler. He opined the first surgery on 12/20/02 and his eventual need for total shoulder replacement was due to his employment over 20 years as a baggage handler, which was described as "heavy work". Dr. Weinerman limited Claimant from doing any overhead lifting. He also stated Claimant would require medical maintenance, including medical monitoring.

13. Claimant testified he stopped working for Employer in 2006.

14. Claimant was evaluated by Rolf Kirby, M.D. on April 10, 2007. Claimant told Dr. Kirby that his left and right shoulders were deteriorating from lifting and stacking bags for 22 years. On examination, Dr. Kirby noted decreased range of motion in the lumbar spine and especially the shoulders. Dr. Kirby noted Claimant had no cartilage left in his shoulders, with degenerative arthritic changes on both sides. Claimant had almost 45° of glenoid retroversion. Dr. Kirby's diagnostic impression and functional assessment was: end stage significant degenerative arthritis in both shoulders. He considered Claimant’s shoulders to be actively inflamed, with decreased range of motion due to end stage degenerative arthritis. For restrictions, Dr. Kirby noted Claimant could carry up to 20 pounds, but nothing over 5 pounds anywhere above the waist and was completely impaired from any activity with the arms above his shoulders.

15. Claimant returned to Dr. Artist on October 29, 2007. He reported his symptoms were about the same, continuing to have pain in both shoulders and in his back. He also reported trouble staying in certain positions. Dr. Artist’s assessment was bilateral shoulder sprains and back strain. From these medical records, the ALJ infers Claimant had persistent bilateral shoulder pain.

16. Respondents filed a Final Admission of Liability (“FAL”) on April 9, 2008, admitting for a permanent medical impairment rating of 8% (whole person)[5], as well as maintenance medical benefits, provided these were reasonable, necessary and related to the injury. There were no records admitted at hearing which documented additional treatment Claimant received after 2008, other than follow-up evaluations.

17. Claimant returned to Dr. Artist on May 13, 2008, who noted poor range of motion of the shoulders, with obvious discomfort. Claimant’s back had poor range of motion in all parameters. Dr. Artist’s assessment was persistent bilateral shoulder and back pain. He referred Claimant to Dr. Weinerman.

18. Claimant was seen in consultation by Dr. Weingarten on May 21, 2008 for bilateral shoulder and low back pain. Claimant was able to elevate his arms a maximum of ninety-five degrees. Dr. Weingarten noted Claimant had undergone extensive physical therapy for both shoulders without improvement and he did not

[5] The whole person rating was paid pursuant to the Findings of Fact, Conclusions of Law and Order [4/3/08] issued by ALJ Friend-Exhibit 1. At that hearing, the issues of permanent total disability and permanent partial disability benefits were adjudicated. Although he noted bilateral shoulder replacements were recommended, ALJ Friend made no findings as to the relatedness of the proposed arthroplasty.

desire surgical intervention. Dr. Weingarten advised Claimant he should be re-checked on an annual basis.

19. Claimant returned to Dr. Weinerman on May 22, 2009. Dr. Weinerman stated he was suffering from “really” severe post traumatic osteoarthritis of the shoulders and had given up most activities. Claimant was also described as unemployable, as he had a real difficulty finding work. In the physical examination, Claimant could not raise his arms overhead. His forward flexion was to about 90° and abduction was to about 80°. Internal and external rotation were both markedly decreased bilaterally. Dr. Weinerman opined Claimant was an excellent candidate for total shoulder replacement surgery, if he wanted to consider it.

20. Dr. Weinerman also evaluated Claimant on August 26, 2010. Claimant had very limited range of motion and it was noted his situation had not changed much, but his range of motion was decreasing. Dr. Weinerman said Claimant may be a candidate for a bilateral shoulder arthroplasties and recommended an MRI.

21. Claimant was seen by Dr. Weinerman on April12, 2011, at which time they discussed total shoulder arthroplasty. Dr. Weinerman noted Claimant had forward flexion to 90° and abduction to 80°. Claimant had limited internal external rotation. Claimant wished to go forward with surgery and Dr. Weinerman felt the rotator cuff was intact. Dr. Weinerman indicated he would probably go forward with the left shoulder first.

22. On December 4, 2012, Dr. Weinerman examined Claimant for what was described as left shoulder pain. Limitation in Claimant’s ROM was noted. The x-ray of the shoulder showed a complete loss of glenohumeral joint space with peripheral osteophytes around joint-bilaterally. The diagnosis was osteoarthritis. Dr. Weinerman recommended Claimant undergo total right shoulder arthroplasty. Dr. Weinerman’s office requested authorization of the surgery by Insurer. On December 17, 2012, Insurer authorized Dr. Weinerman’s request for authorization for a right total shoulder arthroplasty. The approval had a limitation providing if the date of service exceeded thirty (30) days, a new review may be necessary.

23. Claimant did not undergo the proposed surgery, which was scheduled for January 28, 2013 because his diabetes was not controlled. Dr. Weinerman indicated Claimant was not to undergo surgery until the diabetes was well-controlled.

24. Claimant returned to Dr. Weinerman on September 10, 2013. At that time, it was noted his pain was greater on the left shoulder, as opposed to the right. Dr. Weinerman's findings were moderate glenohumeral joint space narrowing on right, complete loss of glenohumeral joint space with peripheral osteophytes around joint on the left. Claimant needed to get his diabetes under control and surgery was noted as pending PCP preoperative clearance.

25. Dr. Fall performed an IME on behalf of Respondents on January 23, 2014. At that time, Claimant described his pain level as 8/10 and noted he could not reach over his head. On examination, Claimant had flexion to 115°, abduction to 80° with scapular crepitus, extension 50° and internal and external rotation 40° each. Pain was noted while range of motion testing was done. Dr. Fall's impression was bilateral end stage glenohumeral arthritis; multilevel lumbar degenerative disc disease.

26. Dr. Fall noted Claimant had early onset osteoarthritis involving both shoulders and the arthritis was in the joint. She opined this condition was most likely was hereditary, as he had uncommon positioning of his glenoid. Dr. Fall disagreed with Dr. Weinerman that shoulder arthritis was an occupational disease. Dr. Fall observed the etiology of the arthritis was hereditary at Claimant's young age. The x-rays indicated long-standing degenerative processes, which were bilateral. This was also an indication that this was hereditary. Dr. Fall disagreed with Dr. Weinerman that the repetitive nature of his job over the years led to arthritis, as well as the surgery. Dr. Fall observed the surgery did not add to his arthritis, as merely a debridement was done. Dr. Fall observed arthritis can be post-traumatic; this was more commonly seen after severe injury such as a dislocation or fracture, which did not occur here. Dr. Fall concluded while bilateral shoulder arthoplasties may be appropriate, these were not work-related. Dr. Fall also recommended the total shoulder arthroplasties should not be undertaken without addressing Claimant's poorly-controlled diabetes.

27. Dr. Weinerman issued a report, which had a date stamp of April 7, 2014, and reviewed his history of treating Claimant as well as his findings in the case. He noted Claimant reached MMI for all three injuries on July 20, 2006. He stated Dr. Halbrecht, Dr. Erickson and he were in agreement that Claimant was in need of bilateral shoulder replacements as a consequence of his work related injuries. The ALJ notes the medical records admitted at hearing do not contain such a clear expression of opinion on the part of Drs. Halbrecht and Erickson. The ALJ infers Dr. Weinerman believed these other physicians were in agreement with his opinion. However, the record contained no evidence this was the case. In fact, there is evidence Dr. Halbrecht believed Claimant's shoulder condition was hereditary.

28. Dr. Weinerman reiterated his opinion that Claimant's symptoms and need for the surgery was a direct consequence of his work activities, specifically his work as a baggage handler for over 20 years and the heavy lifting involved in that job. He previously advised Claimant to wait as long as possible before pursuing bilateral shoulder replacements, but the time was now. Dr. Weinerman also documented the right shoulder replacement surgery was first approved by Insurer on 12/17/12, but they were forced to postpone the surgery due to Claimant's underlying diabetic condition. As soon as clearance was received from his PCP, he recommended proceeding with bilateral shoulder replacements. Dr. Weinerman concluded by stating it remained his medical opinion that the recommendation for bilateral shoulder replacements was reasonable, necessary and related to Claimant's work related condition and injuries. The ALJ notes Dr. Weinerman did not address the 45° of glenoid retroversion present in Claimant's right shoulder. The failure to do so made his opinion less persuasive.

29. On September 8, 2015, an MRI was done on Claimant’s right shoulder. The films were read by Bao Nguyen, M.D. Dr. Nguyen noted the presence of diffuse glenohumeral arthritis (with extensive cartilage loss) and an overlying anteriorly downsloping and curved acromion. This was “consistent with a chronic SLAP lesion and glenohumeral instability”. Dr. Nguyen's impression was advanced glenohumeral arthritis, with diffuse labral degeneration, probably a reflection of chronic glenohumeral instability; concurrent central cuff tendinosis but no partial/full thickness spinal tendon tear.

30. On September 14, 2015, Claimant was evaluated by Dr. Weinerman. Dr. Weinerman's impression was: problem number one-osteoarthritis. After that evaluation, Dr. Weinerman requested authorization for a right total shoulder replacement.

31. Dr. Fall performed a W.C.R.P. Rule 16 review on September 22, 2015 concerning the request for authorization of right shoulder arthroplasty. Dr. Fall opined the bilateral shoulder osteoarthritis was not work-related. She recommended that authorization for the procedure be denied.

32. On November 12, 2015, Claimant was evaluated by his family physician, James Yeash, M.D. Dr. Yeash’s assessment was type 2 diabetes mellitus, hyperlipidemia, hypertension and shoulder joint pain. Dr. Yeash noted Claimant was under consideration for bilateral shoulder surgery. Dr. Yeash opined Claimant's diabetes should be in “at least reasonable” control prior to proceeding with surgery. His diabetes was not in control, but had improved, as he had a hemoglobin A1C at 8.4%. Dr. Yeash described this as “not completely out of control” and “is not preclude him from having surgery” [sic]. His platelet count was stable at 106,000, which “would not necessarily preclude him from surgery”, but that would be at the discretion of the orthopedic surgeon. His lipids were not abnormal enough to preclude him from having surgery. Dr. Yeash opined Claimant's overall condition, labs and physical status should not preclude Claimant “from being considered” for surgery. The ALJ notes that Dr. Yeash did not clear Claimant for surgery; rather he noted these conditions did not preclude Claimant from being considered for surgery. Dr. Yeash deferred to the surgeon. Significantly, Dr. Yeash saw Claimant after the request for authorization of the surgery was made. There was no indication in the record that Claimant was seen by Dr. Yeash since the November 2015 evaluation.

33. Dr. Fall testified as a medical expert at the hearing. She is board-certified in physical medicine and rehabilitation and is Level II accredited, pursuant to the W.C.R.P. Dr. Fall opined the proposed surgical procedure was reasonable and necessary, however, it was not related to Claimant's industrial injury. Dr. Fall testified Claimant had previously been diagnosed with osteoarthritis. More particularly, he was diagnosed with severe early onset osteoarthritis and the diagnostic studies showed his glenohumeral joints had rare positioning of the ball going into the socket. This predisposed him to develop arthritis and end stage osteoarthritis was seen at the time of the injury. Dr. Fall noted Claimant’s need for surgery was because of the congenital

condition[6]. Dr. Fall opined the work injury did not alter or speed up the progression of the underlying arthritis. Even if Claimant had not suffered an injury on 7/7/05, Dr. Fall believed Claimant would require total shoulder replacement because of the osteoarthritis. Dr. Fall also expressed concerns regarding Claimant's complicating health issues (diabetes, low platelets) which led her to question whether surgery was in Claimant's best interest. The ALJ credited Dr. Fall's testimony regarding whether Claimant would have needed a total shoulder replacement for his right shoulder, even if he had not been injured on 7/7/05. The ALJ also credited Dr. Fall's opinions regarding Claimant's complicating health issues.

34. Claimant continued to treat with Dr. Weinerman as an ATP since he was placed at MMI. He testified Dr. Weinerman would recommend at various times that he have the total shoulder replacement. Claimant testified his right shoulder is stable, although he believed it has gotten worse over the last ten (10) years. Claimant said he received clearance and the ALJ infers he wishes to have the surgery.

35. The ALJ was not persuaded by Dr. Weinerman's opinion that Claimant's work as a baggage handler caused or accelerated the bilateral osteoarthritis present in his shoulders.

36. There was no evidence in the record which persuaded the ALJ that Claimant's diabetes was under control as of February 2016.

37. There was no opinion provided by Dr. Weinerman concerning Claimant's low platelet count.

38. The ALJ found Dr. Fall's opinions credible and persuasive. While the arthritis in Claimant's right shoulder required treatment in the acute phase of the injury, his need for a total shoulder arthroplasty is because of the end stage osteoarthritis, which was present at the time of the injury. The ALJ was persuaded the injury did not alter or speed up the progression of the underlying arthritis. The ALJ was persuaded Claimant would have required undergo a right shoulder arthroplasty, even if he had not been injured on July 7, 2005.

39. Evidence and inferences contrary to these findings were not credible or persuasive.

[6] Dr. Fall initially used the word "hereditary", which was also used by Dr. Halbrecht. On cross-examination, she explained her use of the words "hereditary and congenital". Dr. Fall stated Claimant was born with the condition.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The instant case involves a credibility determination between the medical experts, Dr. Weinerman and Dr. Fall.

Medical Benefits

Claimant argued the osteoarthritis in his right shoulder became symptomatic after he sustained the injury on July 7, 2005. Claimant asserted his work as a baggage handler aggravated and/or accelerated the osteoarthritis in his shoulder, which necessitated medical treatment. He contended the treatment he now requires was caused by the industrial injury. To support this argument, Claimant relied upon the opinions of Dr. Weinerman and, to a lesser extent, Dr. Weingarten. Claimant also pointed to the fact that the surgery was previously approved by Insurer, but did not go forward because his diabetes was not under control. Now that his diabetes is stable, Claimant requested the arthroplasty be authorized.

Respondents argued Claimant failed to meet his burden of proof that a causal relationship existed between the July 7, 2005 admitted right shoulder injury and his advanced, end-stage osteoarthritis. Respondents also argued the fact that the surgery was previously approved several years before does not compel a finding that the surgery should have been approved a second time. Respondents argued they are entitled to challenge the reasonableness of current or newly requested treatment notwithstanding their position taken with regard to previous medical treatment. Respondents relied upon Dr. Fall's opinions that Claimant would have required the arthroplasty for his advanced osteoarthritis whether or not he had sustained an injury.

In the instant case, Claimant has the burden of proof to establish that the surgery proposed by Dr. Weinerman is reasonable and necessary, as well as related to his industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

A pre-existing condition “does not disqualify a Claimant from receiving workers' compensation benefits". *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A Claimant may be compensated if the work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease “to produce the disability for which workers' compensation is sought". *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990).

As a starting point, there is no dispute that Claimant was diagnosed with bilateral end stage osteoarthritis in the glenohumeral joint in both shoulders, as early as 2005. As found, the osteoarthritis in Claimant's right shoulder was not caused by his industrial injury, although it was probably initially aggravated by the injury. Claimant required treatment and was placed at MMI for the right shoulder injury. (Finding of Fact 4, 6). As conceded by Respondents’ expert, Dr. Fall, the proposed total arthroplasty for the right shoulder was reasonable and necessary. However, the overriding question was whether the proposed surgery was related to Claimant’s admitted industrial injury. Dr. Fall also questioned whether the proposed arthroplasty was in Claimant’s best interest given some of his health conditions. Based upon the totality of the evidence, the ALJ determined Claimant failed to meet his burden of proof on the issue of relatedness. As found, Claimant requires the surgery because of the end stage arthritis in his right shoulder, as opposed to the work-related injury. (Finding of Fact 36). The medical evidence documented the presence of endstage osteoarthritis in the right shoulder joint, which arthritis was present at the time of the injury in 2005. The ALJ concluded this was not caused by the industrial injury.

As found, Dr. Fall's testimony was persuasive; first with regard to her opinion Claimant would have required the surgery, even if he had not suffered the industrial injury. The ALJ was not persuaded by Dr. Weinerman’s opinion that Claimant’s work activities over time caused the osteoarthritis. Rather, the ALJ credited Dr. Fall’s opinion that post-traumatic arthritis most often develops after a fracture or dislocation, which did not occur here. Inferentially, Dr. Erickson’s opinion regarding the lack of wear and tear in the shoulder also supported Dr. Fall’s opinion.

Second, Dr. Fall's explanation regarding the location and angle of Claimant's glenoid as a cause of osteoarthritis was persuasive to the ALJ. Dr. Fall’s opinion was supported by one of Claimant’s early treating physicians, Dr. Halbrecht. (Finding of

Fact 6). In this regard, Dr. Weinerman did not address this latter issue, although he disagreed with Dr. Fall's opinion regarding the cause of Claimant's osteoarthritis. Dr. Weinerman appeared to only believe Claimant's work activities as the cause of his need for surgery, excluding all other potential causes. However, his failure to address the 45° of glenoid retroversion made his opinion less persuasive.

In making this determination, the ALJ also considered what impact, if any, the prior authorization of the arthroplasty had on the issue before the Court. Implicit in this analysis is consideration of the question whether Insurer waived its right or should be estopped from contesting whether the proposed procedure was reasonable and necessary, as well as related to the injury by its prior approval. The equitable doctrines of waiver and estoppel have been applied to workers' compensation hearings. *Johnson v. Industrial Commision of the State of Colorado,* 761 P.2d 1140,1145-1146 (Colo. 1988).

No authority was proffered by either party on this issue, but under the specific circumstances, the ALJ concluded Respondents were within their rights to require additional approval if the surgery was not performed within 30 days. The prior authorization of the right shoulder arthroplasty had a specific condition; namely, if the procedure was performed beyond 30 days, further approval had to be secured. (Finding of Fact 22). Under the circumstances of this case, almost 3 years elapsed until the next request for authorization was made. Respondents were within their rights to deny the requested authorization. Accordingly, there was no evidence Respondents voluntarily and intentionally relinquished a known right, giving rise to a waiver of their right to contest to the proposed surgery. *Johnson v. Industrial Commision of the State of Colorado,* 761 P.2d at 1147.

In addition, the equitable doctrine of estoppel does not apply, as there were additional relevant facts (i.e. the opinions of Dr. Fall) that were not known at the time the surgery was initially approved. Moreover, there was no showing by Claimant that he detrimentally relied upon the original approval decision made by Insurer. Indeed, the arthroplasty did not go forward because of Claimant's diabetes, not anything that had to do with Respondent-Insurer.

Finally, the ALJ was not persuaded Claimant's diabetes was stable. As found, Dr. Yeash did not unequivocally clear Claimant for surgery. (Finding of Fact 30). Based upon the evidence, the ALJ was unable to conclude Claimant's diabetes was under control and therefore there remains a significant chance for complications.

In this regard, the ALJ considered the Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 4-Shoulder Injury [effective February 1, 2015] ("Treatment Guidelines") when evaluating the proposed shoulder arthroplasty. The Treatment Guidelines were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. (2008). In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the Court noted that the Treatment Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. (2008).

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005).

However, an ALJ is not required to award or deny medical benefits based on the Treatment Guidelines. In fact, there is generally a lack of authority as to whether the Guidelines require an ALJ to award or deny benefits in certain situations. Thus, the ALJ has discretion to approve medical treatment even if it deviates from the Treatment Guidelines*.* *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014).

In the case at bench, the ALJ considered the application of the Treatment Guidelines, specifically with respect to potential complications. The section entitled: "**General Guideline Principles**" addresses surgical interventions. In particular, the section provides in pertinent part:

> "Surgical Interventions should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief. The concept of "cure" with respect to surgical treatment by itself is generally a misnomer. All operative interventions must be based upon positive correlation of clinical findings, clinical course, and diagnostic tests. A comprehensive assimilation of these factors must lead to a specific diagnosis with positive identification of pathological conditions."

More particularly, Section G (6) addresses **Shoulder Replacement (Arthroplasty)**. Subsection (b) is concerned with the occupational relationship and provides that it is "Usually from post-traumatic arthritis, or from trauma resulting in severe humeral head fractures."

This was not present in the case at bench and comports with Dr. Fall's opinion that significant trauma is what generally causes post-traumatic arthritis. Given the facts of the case, the ALJ determined Claimant failed to establish a relationship between his occupation and the osteoarthritis. Absent such a showing, Claimant did not make a sufficient showing under the Treatment Guidelines.

In addition, at least one surgeon (Dr. Erickson) raised the possibility that Claimant would require grafting before implantation of the glenoid component. Nothing in the record indicated this issue was addressed by Dr. Weinerman. There were also potential complications which could arise related to Claimant's diabetes and the surgery may be contraindicated. As found, Claimant's diabetes may not be under control and surgery would be contraindicated if it was not. Pursuant to the Treatment Guidelines, operative interventions must be based upon a positive correlation of clinical findings, clinical course, and diagnostic tests; without such a correlation, Claimant failed to satisfy his burden of proof regarding the proposed surgery.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the right shoulder arthroplasty is DENIED.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 15, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-761-359-03

ISSUES

- Was Claimant's right to seek additional medical benefits and temporary disability benefits foreclosed by the failure to appeal ALJ Harr's finding that the Division-independent medical examination physician placed Claimant at maximum medical improvement on February 28, 2013?

- Is the Claimant entitled to an award of medical benefits to treat her right knee symptoms?

- Is Claimant entitled to an award of temporary total disability benefits commencing February 28, 2013 and continuing?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 though 13 were received in evidence. Respondents' Exhibits A through AA were received in evidence.

2. On November 1, 2007 Claimant sustained an admitted injury to her left knee. She slipped on a wet or greasy floor and twisted her left knee.

3. On December 1, 2008 Claimant underwent left knee surgery described as a plica resection of the medial compartment and a lateral retinacular release. On December 11, 2009 Claimant underwent a second left knee surgery described as a microfracture of the left medial femoral condyle chondral lesion.

4. On June 16, 2010 authorized treating physician John Hughes, M.D., placed the Claimant at maximum medical improvement (MMI). Dr. Hughes assessed left knee sprain, left knee arthrosis post microfracture and persistent postsurgical patellofemoral arthritis.

5. Claimant requested a Division-sponsored independent medical examination (DIME) to review Dr. Hughes's findings.

6. William Watson, M.D., performed the DIME on November 23, 2010. During the course of the DIME Dr. Watson noted that claimant walked with an "antalgic gait, quick on the left." In addition to examining Claimant's left knee Dr. Watson examined Claimant's *right* knee. With regard to the right knee Dr. Watson noted pain on patellar compression, grinding and crepitation with flexion/extension and tenderness over the lateral patella. Dr. Watson assessed the following: (1) Status post lateral

release and plica resection of the left knee; (2) Status post chondroplasty and microfracture of the medial femoral condyle; chondral lesion; (3) Chondromalacia patella of the right knee, rule out internal derangement. Dr. Watson opined Claimant was not at MMI. With regard to the left knee Dr. Watson recommended Claimant undergo a repeat MRI to assess the medial condylar cartilage defect. With regard to the right knee Dr. Watson noted Claimant had first complained of right knee pain to Dr. Robinson on February 10, 2010, to Dr. Hughes on May 5, 2010 and to Dr. Parry on August 10, 2010. Dr. Watson opined Claimant's right knee symptoms were attributable to her altered gait and excessive weight bearing that were caused by the November 1, 2007 accident. Dr. Watson opined Claimant should undergo x-rays and an MRI of the right knee and follow-up with her orthopedic surgeon.

7. Dr. Watson's November 2010 finding that Claimant had not reached MMI was not contested by either Claimant or Respondents.

8. On January 4, 2011 Claimant was seen by Dr. Hughes. Dr. Hughes wrote that Claimant's "emerging right knee symptoms" were consistent with degenerative chondromalacia patella and not attributable to the November 1, 2007 industrial injury.

9. On January 7, 2011 Claimant returned to her surgeon, Walter Robinson, M.D. Dr. Robinson recommended Claimant undergo bilateral MRI's of her knees to assess chondral defects.

10. In September 2012 Charles Gottlob performed a third surgery on Claimant's left knee. Dr. Gottlob had intended to perform a unicompartmental resurfacing arthroplasty but decided against the procedure upon detecting significant chondromalacia on the central weight bearing portion of the lateral femoral condyle.

11. On February 28, 2013 Dr. Gottlob noted Claimant had undergone an Orthovisc injection with minimal relief. Dr. Gottlob placed Claimant at MMI.

12. On May 28, 2013 Claimant returned to Dr. Watson for a follow-up DIME. Dr. Watson issued a written report in which he listed his impressions as: (1) Status post arthroscopy of the left knee times 3 with the most recent arthroscopy showing grade 4 chondromalacia of the lateral compartment and chondral defect in the medial compartment; (2) Chondromalacia of the patella of the right knee. Dr. Watson wrote that he agreed with Dr. Gottlob's finding that Claimant reached MMI on February 28, 2013. He further stated that his opinion was "unchanged on the right knee from my previous report." Dr. Watson assessed a 21% lower extremity rating for Claimant's left knee. On February 28, 2013 Dr. Watson also completed a Division IME Examiner's Summary Sheet on which he indicated Claimant reached MMI on February 28, 2013 with 21% lower extremity impairment.

13. On June 13, 2013 the Insurer filed a Final Admission of Liability (FAL). The FAL admitted for temporary total disability (TTD) benefits from December 1, 2008 through February 27, 2013. The FAL admitted Claimant reached MMI on February 28,

2013 and admitted for permanent partial disability (PPD) benefits, based on Dr. Watson's 21% lower extremity impairment rating, commencing February 28, 2013. The FAL also admitted for ongoing medical benefits "as related to the injury post MMI."

14. On June 18, 2013 Claimant filed an Application for Hearing listing the issues as medical benefits, TTD benefits commencing March 1, 2013, PPD benefits, and permanent total disability benefits. Claimant also endorsed "other issues" including whether she was at MMI, whether her right knee problems were related to the November 2007 injury and whether additional medical treatment was reasonable and necessary.

15. On October 23, 2013 ALJ Harr conducted a hearing concerning Claimant's application for hearing. ALJ Harr issued Findings of Fact, Conclusions of Law, And Order (FFCL) dated January 2, 2014. In the FFCL ALJ Harr listed the issues as follows: (1) Whether Dr. Watson determined that Claimant's right knee condition was a component of her admitted left knee injury; (2) Whether Claimant proved by clear and convincing evidence that her "altered gait or excessive weight bearing during treatment of the left knee injury aggravated the chondromalacia patella of the right knee; (3) Whether claimant proved by a preponderance of the evidence that she was entitled to an award of medical benefits, temporary disability benefits and PPD benefits related to the right knee condition.

16. In the January 2, 2014 FFCL ALJ Harr determined as fact that it is more probably true than not that Dr. Watson, the DIME physician, found Claimant's symptoms of right knee chondromalacia patella are not related to the left knee injury. In support of this determination ALJ Harr initially found that Dr. Watsons' reports "were equivocal regarding causation of [the] chondromalacia patella disease process in claimant's right knee." Specifically, ALJ Harr noted that in the November 23, 2010 DIME report Dr. Watson recommended diagnostic tests and an evaluation to rule out symptoms of (right knee) internal derangement. However, in the May 28, 2013 follow-up DIME report Dr. Watson no longer recommended evaluation of the right knee, placed the Claimant at MMI, rated the injury based only on left knee impairment and "did not condition MMI upon treatment of the right knee." ALJ Harr inferred from this evidence that Dr. Watson determined that the "chondromalacia patella disease affecting claimant's right knee is not a component of her left knee injury."

17. ALJ Harr next found that Claimant failed to prove it is highly probable that Dr. Watson "was incorrect in his determination that claimant reached MMI, with no permanent impairment of the right knee." In support of this determination ALJ Harr credited the opinion of Dr. Hughes that Claimant's "right knee symptoms are the result of a concurrent and unrelated degenerative condition that was not in any way accelerated or aggravated by the work related left knee injury." Having determined Claimant failed to overcome by clear and convincing evidence Dr. Watson's DIME finding that Claimant was at MMI, ALJ Harr denied the claim for medical benefits, temporary disability benefits and PPD "related to [Claimant's] right knee condition."

18. Claimant appealed ALJ Harr's FFCL to the ICAO. Claimant argued in her brief that, among other things, ALJ Harr misinterpreted the follow-up DIME report and that Dr. Watson's "ultimate opinion" was that the right knee symptoms were caused by the admitted left knee injury. In support of this assertion Claimant explicitly cited that portion of the follow-up DIME report in which Dr. Watson stated that his opinion concerning the right knee was unchanged from the November 29, 2010 DIME report. As a corollary to this argument Claimant reasoned that ALJ Harr mistakenly found she was at MMI because she never received any treatment for the injury-related right knee symptoms. In a Final Order dated June18, 2014 the ICAO affirmed ALJ Harr's FFCL and concluded that ALJ plausibly interpreted the evidence to mean that Dr. Watson found Claimant to be at MMI and her right knee symptoms were not related to the left knee injury.

19. Claimant appealed the ICAO's June 18, 2014 Final Order to the Court of Appeals.

20. On December 11, 2014 the Court of Appeals issued its opinion in *Samuels v. Industrial Claim Appeals Office,* Colo. App. No. 14 CA1281 (not selected for publication). On appeal Claimant argued that ALJ Harr "erred as a matter of law in determining that the follow-up DIME report was ambiguous and that the DIME physician had changed his opinion and no longer considered claimant's right knee problems to be related to the admitted lift knee injury." The court rejected this argument finding that "when viewed in the context of the surrounding circumstances" the follow-up DIME report (May 28, 2013 report) was "ambiguous." Specifically the court concluded that the follow-up DIME could be interpreted as "determining an impairment rating solely as to claimant's left knee, while reiterating that claimant's right knee was still to be evaluated and treated." Alternatively, the court stated that the report could be interpreted as "suggesting that the DIME physician had decided to exclude claimant's right knee symptoms as a component" of the left knee injury. Thus, the court concluded that resolution of the ambiguity presented in the follow-up DIME presented a question of fact for the ALJ.

21. The Court of Appeals next considered whether the record supported ALJ Harr's finding that "the DIME physician had ultimately excluded the right knee symptoms as a component of the left knee injury." In so doing the court noted that a DIME physician's "opinions concerning MMI and permanent impairment inherently require him or her to assess as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the work injury." The court found "no evidence in the record to support [ALJ Harr's] finding that the DIME physician had ultimately excluded the right knee symptoms as a component of the left knee injury." The court explained that ALJ Harr's finding that in the follow-up DIME report Dr. Watson "changed" his opinion concerning the cause of the right knee symptoms was "directly at odds with [Dr. Watsons's] statement that his opinion was *un*changed from his previous report." (Emphasis in original). The court also concluded the record did not support ALJ Harr's "choice to adopt one possible interpretation of the follow-up DIME report over other possible interpretations." The court explained that the mere fact the follow-up DIME report was susceptible to more than one interpretation did not alone support

ALJ Harr's finding that "one possible interpretation versus any other reflected the DIME physician's true opinion."

22. In light of these conclusions the court set aside the ICAO's Final Order affirming ALJ Harr's January 2, 2014 FFCL. The court remanded the case with directions to "reconsider and make record-supported findings regarding the meaning of the follow-up DIME report" and "conduct such additional proceedings as may thereafter be necessary and appropriate." The court specifically authorized the taking of "such additional evidence as is necessary to carry out the requirements" of its order.

23. Subsequently the ICAO entered an Order of Remand setting aside ALJ Harr's January 2, 2014 order and remanding the matter for "further proceedings consistent with the opinion of the Court of Appeals."

24. By the time the matter was remanded to the OAC ALJ Harr had retired. Consequently the matter was reassigned to ALJ Cannici to carry out the instructions of the Court of Appeals.

25. On March 30, 2015 ALJ Cannici entered Findings of Fact, Conclusions of Law, and Order on Remand (Order on Remand). ALJ Cannici did not conduct any additional evidentiary proceedings prior to issuing the Order on Remand. ALJ Cannici described the issue to be determined as whether Dr. Watsons' May 28, 2013 follow-up DIME report "reflects that Claimant's right knee injury was a component of her admitted left knee injury."

26. In the Order of Remand ALJ Cannici found that Dr. Watson's May 28, 2013 follow-up DIME report was "ambiguous." In support ALJ Cannici found the May 28 follow-up DIME report placed Claimant at MMI on February 28, 2013, awarded only a "left knee impairment rating" and did not contain any language conditioning MMI on provision of further treatment for the right knee. PALJ Cannici also found that in the May 28 follow-up DIME report Dr. Watson wrote that his opinion concerning Claimant's right knee "was unchanged from his November 23, 2010 report." ALJ Cannici then resolved the "ambiguity" in the follow-up DIME report. He found that because Dr. Watson stated in the follow-up DIME report that his opinion concerning Claimant's right knee was "unchanged" from the November 2010 report Dr. Watson "maintained that Claimant's right knee symptoms were related to the altered gait and excessive weight-bearing that was caused by the November 1, 2007 left knee injury." Thus, ALJ Cannici concluded that Dr. Watson's "ultimate DIME opinion was that Claimant's right knee injury was component of her admitted left knee injury." However, ALJ Cannici's Order on Remand did not purport to award or deny any specific benefits.

27. On April 17, 2015 Claimant filed a Request for Corrected Order or Petition to Review Order on Remand. This pleading requested ALJ Cannici to issue a "corrected, revised or amended" order to reflect that "any issue not addressed by the [Order on Remand] is reserved for determination at a later date." Apparently ALJ Cannici declined to issue a corrected order and the matter was transmitted to the ICAO for consideration of Claimant's petition to review.

28. On May 29, 2015 Dr. Gottlob referred Claimant to Sheba Shah, M.D., for further treatment. Dr. Shah is located in Arizona and the ALJ infers that Dr. Gottlob made the referral because Claimant had moved to Arizona.

29. On September 29, 2015 the ICAO entered an Order concerning the Claimant's petition to review the Order on Remand. Citing § 8-43-301(2), C.R.S., the ICAO ruled that it lacked jurisdiction to review the Order on Remand because it "did not award or deny specific benefits." However, the ICAO went on to state that the parties were disputing "the effect of the [Order on Remand] on future litigation." The ICAO stated that this dispute was "hypothetical and speculative" and any order that it might issue would be "merely advisory." Finally, the ICAO concluded that ALJ Harr's January 2, 2014 FFCL and ALJ Cannici's Order on Remand did not constitute "awards" of benefits that would serve to close the claim in the absence of a "reservation clause." The ICAO reasoned that ALJ Harr's order had been set aside and therefore was not an "award." The ICAO also explained that the Order on Remand was not an "award" because it did not grant or deny any benefits.

30. On June 23, 2015, while the petition to review the Order on Remand was still pending, Claimant filed an application for hearing listing the issues as medical benefits, TTD benefits commencing February 28, 2013 and "entitlement to benefits in light of" ALJ Cannici's finding that the right knee symptoms are causally related to the left knee injury. On July 23, 2015 Respondents filed a response to the application for hearing listing additional issues that included the following: (1) The claim was closed; (2) Issue preclusion; (3) Claim preclusion; (4) The ALJ did not reserve any issues for future determination in the prior findings of fact conclusions of law and order which closed the claim; (5) Claimant was at MMI pursuant to DIME.

31. Dr. Shah examined Claimant on August 11, 2015. Dr. Shah opined that Claimant "developed compensatory pain in the right knee as a consequence of the left knee issues." Dr. Shah noted Claimant had relocated to Arizona to care for her parents and had not had "active care" since leaving Colorado. Dr. Shah recommended Claimant undergo an x-ray and MRI of the right knee. She also referred Claimant for an orthopedic evaluation for "further recommendations on surgical versus non-surgical care."

32. At the hearing held on November 5, 2015 Claimant's counsel stated that Respondents had authorized an MRI of the right knee and this study had been carried out. However, according to Claimant's counsel Claimant has not had an orthopedic evaluation since the MRI study was done.

33. At the hearing held on November 5, 2015 Claimant's counsel stated that the issues include Claimant's entitlement to TTD benefits and medical benefits for treatment of the right knee. Claimant's counsel explained that from Claimant's perspective PALJ Cannici had determined the Claimant's right knee symptoms are causally related to the left knee injury but did not address the issue of what benefits were owed as a result of the right knee condition. Respondents' counsel stated that from Respondents' perspective Claimant's request for additional benefits cannot be

granted because the claim is "closed." Respondents' counsel argued that in the follow-up DIME Dr. Watson found Claimant had reached MMI. Respondents' counsel interpreted ALJ Cannici's Order on Remand as finding that although the right knee symptoms are related to the left knee injury the Dr. Watson found that no additional treatment is necessary. Therefore, Respondents' counsel reasoned that is at MMI.

34. It is Dr. Watson's opinion as the DIME physician that Claimant has not reached MMI for all conditions causally related to the industrial injury of November 1, 2007 industrial injury. PALJ Cannici has determined that Dr. Watson's true opinion, as evidenced by the follow-up DIME report, is that Claimant's right knee symptoms are causally related to the underlying industrial injury.

35. It is Dr. Watson's opinion as the DIME physician that Claimant needs additional medical treatment for the right knee injury. In the November 23, 2010 report Dr. Watson opined Claimant needed treatment of the right knee to include x-rays, an MRI and follow-up with an orthopedic surgeon. In the follow-up DIME report Dr. Watson indicated his opinions concerning the right knee were unchanged from the November 2010 DIME report. The ALJ infers from the follow-up DIME report that Dr. Watson is still of the opinion that Claimant needs treatment for his right knee.

36. The ALJ understands from comments of Claimant's counsel that some of the right knee diagnostic studies recommended by Dr. Watson have been performed. However, the evidence establishes that Claimant has not undergone an orthopedic evaluation of the right knee. As late as August 2015 Dr. Shah credibly opined that Claimant still needs orthopedic evaluation of the right knee.

37. Taken together, Dr. Watson's opinions that Claimant's right knee symptoms are causally related to the November 2007 left injury and that Claimant needs additional treatment for the right knee constitute a DIME finding that Claimant *has not* reached MMI for the industrial injury. Specifically, Dr. Watson has found Claimant needs additional evaluation of the injury-related right knee condition. Respondents did not argue at the hearing nor do they argue in their position statement that the undersigned ALJ should alter ALJ Cannici's finding that Dr. Watson's true opinion is that Claimant's right knee condition is causally related to the industrial injury. Neither do Respondents assert that they have presented clear and convincing evidence to overcome Dr. Watson's opinion that the right knee symptoms are causally related to the industrial left knee injury. Respondents do not argue they have presented clear and convincing evidence to overcome Dr. Watson's DIME opinion that Claimant needs further treatment for the right knee. Consequently, the Respondents have not sought to overcome Dr. Watson's true opinion that Claimant is not at MMI.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as specifically noted below, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

MMI AND RESPONDENTS' "CLOSURE" ARGUMENTS

Claimant contends that she is entitled to an award of TTD benefits commencing February 28, 2013 and an award of medical benefits for treatment of her right knee. Claimant reasons that the Court of Appeals decision effectively determined that the May 28, 2013 DIME report was "ambiguous" regarding the question of whether the right knee is a component of the 2007 left knee injury. Claimant construes the court's order to mean ALJ Harr's finding that Claimant reached MMI because the DIME found the right knee symptoms were not causally-related to the left knee injury has been set aside and is of no force and effect. Claimant reasons that neither ALJ Harr's FFCL nor the opinion of the Court of Appeals has "closed" the issues of MMI and Claimant's right to additional benefits. Moreover Claimant construes ALJ Cannici's Order on Remand as favorably resolving the question of the cause of the right knee symptoms. However, Claimant contends that the Order on Remand failed to resolve the underlying questions of MMI and her consequent right to additional benefits.

In contrast, Respondents contend that Claimant is not entitled to any additional medical or TTD benefits because these issues have been "closed" and Dr. Watson's DIME finding that Claimant reached MMI is binding on the ALJ and the parties. Respondents argue that ALJ Harr found Claimant is at MMI and Claimant "did not appeal that determination." Consequently Respondents assert that the opinion of the Court of Appeals "in no way impacted the MMI determination from the DIME physician or Judge Harr's order pertaining to MMI." According to Respondents the only real effect of the court's order and ALJ Cannici's Order on Remand was to render Respondents liable for post-MMI medical treatment of the right knee. (Respondents' Position Statement at p. 13).

As a corollary Respondents contend that Claimant mistakenly argues the "finding of causation regarding Claimant's right knee is a determination that Claimant's work-related injuries are not at MMI." Respondents reason that there is a distinction between determining that a condition is related to a compensable injury and a determination the condition is at MMI. Respondents assert that ALJ Cannici's Order on Remand merely determined the causation issue with regard to the right knee but did not alter ALJ Harr's finding that Claimant reached MMI.

Considering the facts and procedural posture of this case the ALJ agrees with Claimant's arguments and rejects Respondents' arguments. The ALJ concludes that ALJ Harr's determination that Dr. Watson found the right knee symptoms are not causally related to the left knee injury was integral to ALJ Harr's finding that Dr. Watson placed Claimant at MMI on February 28, 2013. Further, because the Court of Appeals set aside ALJ Harr's finding that the right knee is unrelated to the left knee injury the court necessarily set aside ALJ Harr's finding that Claimant reached MMI.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Hence, A DIME physician's finding concerning MMI is entitled to presumptive weight when the opinion is challenged by either party.

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005). A finding that a claimant needs additional medical treatment to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining a claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's "true opinion" concerning MMI. *MGM Supply Co. v. Industrial Claim Appeals Office, supra*; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. An ALJ may consider all statements made by a DIME physician for the purpose of determining the DIME physician's true opinion concerning MMI. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005); *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

Respondents' assertions notwithstanding, Claimant has consistently appealed ALJ Harr's finding that the Dr. Watson placed her at MMI. As determined in Findings of Fact 15 through 17, the matter originally went to hearing before ALJ Harr concerning Claimant's request for additional medical and temporary disability benefits. ALJ Harr necessarily recognized that the question of MMI turned on a determination of Dr. Watson's true opinion concerning the cause of the right knee symptoms. Indeed, ALJ Harr wrote that the first issue for his determination was whether Dr. Watson found Claimant's right knee symptoms are a component of the admitted left knee injury. As determined in Finding of Fact 16 ALJ Harr found Dr. Watson's follow-up DIME report was "equivocal" concerning the cause of Claimant's right knee symptoms. ALJ Harr interpreted the follow-up DIME report to mean that Dr. Watson concluded Claimant's right knee symptoms are not related to the left knee injury, but instead to degenerative chondromalacia. That ALJ Harr based his order on the relationship between the cause of the right knee symptoms and MMI is evidenced by the fact that he placed the burden on Claimant to prove by clear and convincing evidence that her "altered gait or excessive weight bearing during treatment for her left knee aggravated the chondromalacia patella condition of her right knee."

As determined in Findings of Fact 20 through 22, the Court of Appeals ultimately agreed with ALJ Harr that the Dr. Watson's follow-up DIME report was "ambiguous" concerning whether or not Claimant's right knee symptoms are causally related to the industrial injury. However, the Court found that ALJ Harr's "choice to adopt one possible interpretation of the follow-up DIME report over other possible interpretations" was not supported by the record. Consequently the court set aside the ICAO's order affirming ALJ Harr's FFCL and remanded the matter to "reconsider and make record-supported findings regarding the meaning of the follow-up DIME report" and to conduct "such additional proceedings as may thereafter be necessary" including the taking of additional evidence.

It is clear from the Court's opinion that it considers the cause of Claimant's right knee symptoms to be a matter for initial determination by the DIME physician as part of the statutorily mandated process for determining MMI. Indeed, the court explicitly noted that MMI determinations require the DIME physician to determine whether various components of the claimant's medical condition are causally related to the work injury and that the DIME physician's causation findings can be overcome only by clear and convincing evidence. Moreover the court emphasized that resolution of the MMI issue in this case depends on "record-supported findings" resolving the ambiguity in the May 28, 2013 follow-up DIME report. As the court explained the "ambiguity" in the follow-up DIME arises because the follow-up DIME can be read in two ways concerning whether or not the right knee symptoms are related to the left knee injury. Because the court recognized that the causation issue is at the very core of the DIME physician's ultimate opinion concerning MMI it necessarily set aside ALJ Harr's finding that the DIME physician placed the Claimant at MMI.

It follows that the Respondents' incorrectly argue that the issues of additional TTD and medical benefits have been been "closed" by Claimant's alleged failure to appeal ALJ Harr's determination that she reached MMI. To the contrary, Claimant contended all the way through the Court of Appeals that ALJ Harr incorrectly found the DIME physician placed her at MMI for all injury-related conditions. The basis of Claimant's argument was that the DIME physician's true opinion was that she was not at MMI because the right knee symptoms are causally related to the left knee injury and she needs additional treatment for the right knee. The court agreed with Claimant to the extent it concluded ALJ Harr's determination that Dr. Watson placed Claimant at MMI for all injury-related conditions is not supported by ALJ Harr's findings of fact

To the extent that Respondents argue that ALJ Harr's order is of any current legal significance on the issue of MMI, the ALJ disagrees. The Court of Appeals explicitly set aside the ICAO's order affirming ALJ Harr's order and remanded for new findings of fact on the issue of MMI and for additional proceedings, including the taking of additional evidence. The court's order constitutes a "general remand" that authorizes entirely new findings and conclusions with respect to MMI so long as they do not conflict with the court's order. *See Musgrave v. Industrial Claim Appeals Office*, 762 P.2d 686 (Colo. App. 1988).

EFFECT OF ALJ CANNICI'S ORDER ON REMAND

Respondents also contend that in the Order of Remand ALJ Cannici found Claimant reached MMI. Therefore, Respondents reason Claimant is not entitled to an award of additional benefits. As support for this argument Respondents cite that portion of the Order on Remand in which ALJ Cannici found that the follow-up DIME report contained no recommendation for treatment for the right knee, did not condition MMI on further treatment for the right knee, placed Claimant at MMI and provided a rating for the left knee only. The ALJ disagrees with this argument.

Respondents' argument misconstrues ALJ Cannici's findings. Consistent with the opinion of the Court of Appeals, ALJ Cannici found the follow-up DIME report was "ambiguous" with regard to the cause of the right knee symptoms. In support of this finding ALJ Cannici noted that the follow-up DIME report did not expressly recommend any treatment for the right knee, did not condition MMI on treatment of the right knee and appeared to place Claimant at MMI for the left knee. Conversely ALJ Cannici also found that in the follow-up DIME report Dr. Watson wrote that his opinions concerning the right knee were unchanged from the opinions expressed in the November 23, 2010 DIME report. Of course, in the November 2010 DIME report Dr. Watson had opined the right knee symptoms were causally-related to the left knee injury and that Claimant needed treatment for the right knee. Thus, ALJ Cannici recognized, as did the Court of Appeals, that the follow-up DIME report was ambiguous because it is subject to conflicting inferences concerning whether or not the DIME physician found the Claimant's right knee symptoms are related to the left knee injury. ALJ Cannici resolved this conflict and found as a matter of fact that "Dr. Watson's ultimate DIME opinion was that Claimant's right knee injury was a component of her admitted left knee injury."

Further, ALJ Cannici's Order on Remand does not contain any *explicit* finding purporting to determine whether or not Claimant has reached MMI. Rather ALJ Cannici limited the Order on Remand to resolving the "ambiguity" in the follow-up DIME report.

MMI DETERMINATION AND CLAIM FOR MEDICAL BENEFITS TO TREAT RIGHT KNEE

Claimant contends she is entitled to an award of additional medical benefits to treat the right knee condition. Claimant contends that her entitlement to additional medical treatment (other than maintenance treatment) is dependent on a finding that she is not at MMI. The Claimant contends that authority to determine she has not reached MMI is inherent in the remand order issued by the Court of Appeals. The ALJ agrees with Claimant's arguments.

As set forth above, Claimant has always maintained that she has not reached MMI because the right knee symptoms are causally related to the industrial injury and because she needs additional treatment for the right knee to cure and relieve the effects of the 2007 industrial injury. ALJ Harr denied the request for medical treatment of the right knee because he found that the DIME physician opined the right knee symptoms were not causally related to the injury and Claimant failed to overcome that determination by clear and convincing evidence. Claimant ultimately appealed to the Court of Appeals ALJ Harr's conclusion that the DIME physician "changed" his November 2010 opinion concerning the cause of the right knee symptoms. The court remanded the case for new "record-supported findings" to resolve the ambiguity in the follow-up DIME report and for such additional proceedings as might prove necessary and appropriate.

As determined above, a DIME physician's finding concerning whether or not a claimant has reached MMI is binding unless overcome by clear and convincing evidence. A DIME physician's finding concerning MMI necessarily includes determinations of whether the claimant's medical conditions were caused by the industrial injury and whether additional treatment is likely to improve the claimant's condition.

Here, ALJ Cannici has already determined, pursuant to the instructions of the Court of Appeals, that it is Dr. Watson's DIME opinion that Claimant's right knee symptoms are causally related to the industrial injury. As determined in Finding of Fact 37, Respondents do not argue that the undersigned ALJ should interfere with ALJ Cannici's determination. Neither do Respondents argue that they have overcome Dr. Watson's causation finding by clear and convincing evidence. Similarly Respondents do not argue they presented clear and convincing evidence to overcome Dr. Watson's opinion that Claimant needs additional treatment for the right knee including an orthopedic evaluation.

As determined in Finding of Fact 37, Dr. Watson's findings that the right knee symptoms are causally related to the November 2007 industrial injury and that Claimant requires additional treatment are tantamount to a finding Claimant has not reached MMI. Because Respondents do not contend that they have presented clear and convincing evidence to overcome Dr. Watson's finding that Claimant has not reached MMI that finding is binding on the parties and the ALJ. *Cordova v. Industrial Claim Appeals Office, supra.*

In these circumstances Claimant is entitled to an award of additional medical benefits to treat the right knee symptoms including referral to and treatment by an orthopedic specialist.

CLAIM FOR ADDITOINAL TTD BENEFITS

Claimant contends she is entitled to an award of TTD benefits commencing February 28, 2013 until she is determined to have reached MMI. The ALJ agrees with this argument.

Where respondents file an admission of liability admitting for TTD benefits they are bound by that admission and must pay accordingly. Section 8-43-203(2)(d), C.R.S. The filing of an admission for TTD benefits amounts to an admission that Claimant has sustained the initial burden of proof to establish a right to TTD benefits. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000). Once admitted TTD benefits must ordinarily continue until the occurrence of one of the events listed in § 8-42-105(3), C.R.S., including the occurrence of MMI. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997).

Here, Respondents filed an FAL admitting Claimant was entitled to TTD benefits commencing December 1, 2008. The FAL terminated the TTD benefits on February 28, 2013, the date Claimant reached MMI according to Respondents' interpretation of Dr. Watson's follow-up DIME report. However, as determined above, Dr. Watson's true opinion was that Claimant did not reach MMI on February 28, 2013, and Respondents have not overcome that opinion by clear and convincing evidence. Consequently, Respondents have not shown any legal basis for terminating Claimant's TTD benefits on February 28, 2013. Consequently, Claimant is entitled to an award of TTD benefits commencing February 28, 2013 and continuing until terminated in accordance with law or order. TTD benefits shall be paid at the statutory rate based on the admitted average weekly wage.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. Insurer shall provide reasonable and necessary medical benefits for treatment of Claimant's right knee condition including the provision of an orthopedic evaluation.

3. Insurer shall pay temporary total disability benefit at the statutory rate and based on the admitted average weekly wage commencing February 28, 2013 and continuing until terminated in accordance with law or order.

4. Issues not determined by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 14, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he is entitled to a general award of post-MMI, medical maintenance benefits for his right elbow/ hand condition.

II. Whether the Claimant has sustained disfigurement as a result of his work injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is currently employed by Respondent-Employer as a welding instructor for the Colorado Department of Corrections. He was promoted from welder to a welding teacher in February 2015.

2. Claimant sustained a compensable injury to his right elbow on July 22, 2010, which was ultimately diagnosed as right cubital tunnel syndrome, or right ulnar neuropathy.

3. The claim is complicated by the fact that Claimant sustained a separate and distinct compensable injury to his right shoulder, during the pendency of his elbow claim. Although the shoulder claim is separate from the right elbow injury, Claimant treated concurrently for both injuries by Dr. Richard Nanes, Respondent-Employer's authorized treating physician (ATP). Consequently, both injuries are frequently addressed in the medical records. While the condition of Claimant's right shoulder is mentioned frequently throughout the medical records, this order addresses Claimant's entitlement to maintenance medical treatment benefits for his right elbow claim only.

4. Following his right elbow injury, an electrodiagnostic study of the right elbow was ordered. The EMG was performed October 1, 2010 by Dr. Scott Ross and revealed mild ulnar neuropathy of the right elbow (right cubital syndrome). By the time of this EMG study, Claimant had been evaluated by Dr. Richard Idler on the referral of Dr. Nanes.

5. On October 29, 2010, Dr. Idler opined that Claimant was a candidate for decompression of the right ulnar nerve at the elbow.

6. Claimant underwent an in situ surgical decompression of the ulnar nerve at the right elbow on November 16, 2010 with Dr. Idler.

7. Subsequent to the surgery, Claimant continued to experience symptoms associated with entrapment/compression of the ulnar nerve at the elbow. As of January 11, 2011, Claimant continued to report numbness in the right fourth and fifth fingers, and he had some concerns about incomplete recovery.

8. In December 2011 Claimant still had paresthesias of the right fourth and fifth fingers and pain in the right hand. Claimant saw Dr. Idler on February 24, 2012 for right ulnar sided wrist pain. The etiology was uncertain. Dr. Idler recommended an MRI.

9. A March 22, 2012 MRI suggested a small metallic foreign body in the soft tissues in the wrist, and a ganglion cyst. Dr. Idler administered an injection for the ulnar carpal ganglion cyst.

10. Claimant saw Dr. Donald Luebke on July 2, 2012. Dr. Luebke noted despite Dr. Idler's injection for a ganglion cyst, Claimant continued to have right wrist symptoms. Dr. Luebke saw no clinical evidence of a ganglion cyst by the time he saw Claimant. Dr. Luebke released Claimant from his care without restrictions.

11. As noted above, Claimant injured his right shoulder while working when he slipped off of the bumper of a truck on March 25, 2013. In an effort to keep from falling, Claimant caught himself with his outstretched arm injuring the shoulder in the process. The focus of Claimant's treatment switched from the right elbow to the right shoulder at this time. Nonetheless, Claimant continued to experience right elbow/hand symptoms.

12. On August 1, 2013, a repeat EMG evaluation performed by Dr. Katherine Leppard revealed a right mononeuropathy at the elbow. Claimant returned to Dr. Nanes who referred him to Dr. Karl Larsen for further evaluation.

13. Dr. Larsen evaluated Claimant on September 9, 2013. At this appointment, Claimant reported that the numbness and tingling in his right ring and small fingers did not improve following his November 16, 2010 surgery with Dr. Idler. Dr. Larsen reviewed the results of the electrodiagnostic study performed by Dr. Leppard. He noted the EMG to be "consistent with severe ulnar neuropathy at the elbow isolated to the level of the medial epicondyle." Dr. Larsen recommended a right "revision ulnar neuroylsis at the elbow" with transpositioning and "collagen wrapping" if the nerve was heavily invested with scar tissue.

14. On April 19, 2014, Dr. Wallace Larson conducted an independent medical examination (IME) at Respondents request to address the reasonableness of repeat elbow surgery as proposed by Dr. Larsen. In his IME report, Dr. Larson opined as follows: "[r]epeat neurolysis with anterior transposition of the ulnar nerve does appear to be a reasonable opinion as long as the patient understands that the likelihood . . . of having a completely normal result is relatively low."

15. On August 5, 2014, Claimant underwent surgery by Dr. Larsen for a right recurrent ulnar neuropathy.

16. On September 22, 2014, Dr. Larsen reported that Claimant had complete resolution of his numbness and tingling. According to the clinic note from this date, Claimant had no pain, and was "doing very, very well" and was "very pleased." The clinical examination revealed negative findings in all respects.

17. On September 30, 2014, Dr. Nanes stated that Claimant was "doing extremely well."

18. Claimant returned to work after the surgery around October 1, 2014. (Resp. Exh B-1; Claimant's testimony). Approximately two months later, on December 3, 2014, Claimant returned to Dr. Nanes' office for further evaluation. At this appointment, Claimant reported "swelling of his right elbow" the night before. He also reported a pain level of 3. Outside of his swelling and pain, Claimant was noted to be "doing extremely well." In the report generated from this encounter, Dr. Nanes noted that Claimant had full range of motion in the right elbow and did not have any paresthesias of the right fourth and fifth fingers. Dr. Nanes noted: "The patient has really had a nice response to his right cubital tunnel release surgery." Dr. Nanes placed Claimant at maximum medical improvement and released him from medical care. As part of the WC164 form completed December 3, 2014, Dr. Nanes stated that maintenance care after MMI was not required. (Resp. Exh. C-0).

19. Claimant underwent a Division Independent Medical Examination (DIME) by Dr. William Watson on July 7, 2015.

20. Dr. Watson documented Claimant's report of weakness in the right hand with intermittent numbness in the fourth and fifth fingers. Dr. Watson also documented that Claimant had "full range of motion of the right elbow with normal two-point sensation and strength." Consequently, Dr. Watson did not feel there was any medical impairment associated with Claimant's right elbow injury. Furthermore, Dr. Watson said that no restrictions or maintenance care was indicated, despite Claimant's report of persistent "weakness and numbness in the fourth and fifth fingers of the right hand."

21. Based on the DIME report, Respondents filed a final admission of liability (FAL) on September 17, 2015 for zero permanent partial disability benefits. Liability for medical maintenance treatment was denied.

22. On November 17, 2015, Respondents requested an opinion from Dr. Wallace Larson regarding Claimant's need for maintenance medical treatment.

23. On December 9, 2015, Dr. Wallace Larson wrote the following with regard to the elbow injury:

> Mr. Normandin does not require medical maintenance treatment. Recommendation of medical maintenance treatment would imply the need for intervention or some type of treatment program to

> retain benefit which was achieved from his initial surgical treatment and subsequent rehabilitation. He was seen for right elbow cubital tunnel syndrome and had subsequent surgical treatment. There is no medical standard of care that suggests any type of intervention or treatment is needed to preserve benefits achieved by surgical decompression and subsequent therapy. Physiologically his condition is stable and will not be affected by any type of treatment or intervention. Medical literature does not support the need for any type of active follow-up care to maintain the benefits of ulnar nerve decompression. Additionally, the surgeon who treated this disorder has not recommended any type of medical maintenance plan.

24. Claimant testified that his right hand/elbow felt better at the time he was placed at MMI, because he had not returned to work yet. Claimant testified that once he returned to work around October 1, 2014, the pain in his elbow and tingling in his fingers returned. He testified to electric shock like sensations in the right arm extending into the right shoulder. Citing Dr. Nanes December 3, 2014 MMI report, Respondent-Employer contends that Claimant's complaints of recurring pain, numbness and tingling of the right elbow/ring and small fingers are not credible. As noted on December 3, 2014, two months after Claimant returned to work as a welder, Dr. Nanes placed Claimant at MMI noting that he was "doing extremely well." However, at the time Claimant was placed at MMI he had not been promoted to his current position as a welding instructor which subsequently required considerable hand writing.

25. As a welding instructor, Claimant spends 2 ½ - 3 hours of the day hand writing reports and completing paperwork. He is right hand dominate and works five days a week. Consequently, the ALJ finds that Claimant uses his right hand to write reports and/or complete paperwork between 12 ½ - 15 hours per week. Claimant testified that there was no writing associated with his job prior to being promoted to a welding instructor in February 2015.

26. Claimant testified that his right hand/elbow pain has been worsening secondary to the amount of writing he has to do and he has missed time from work as a consequence. Respondent-Employer challenges Claimant's assertion that his current elbow/hand symptoms could be caused by hand writing on the grounds that writing is less strenuous than the welding Claimant performed prior to his promotion in February 2015. Respondent-Employer also disputes Claimant's contention that he writes upwards of three hours per day citing common access to word processors and computers in the current work place.

27. Claimant admitted during cross examination that he has not reported increased pain and recurring numbness and tingling in his right elbow/fingers due to writing to his employer since being placed at MMI. He also admitted that he has not sought medical treatment for the recurring symptoms that he now alleges. This is in stark contrast to the continued symptoms Claimant reliably reported subsequent to his first surgery in

2010, prompting a reopening of his case for additional surgery which was performed on a maintenance basis. Consequently, Respondents argue that Claimant's failure to report his recurring worsening symptoms since being placed at MMI the second time implies that Claimant is not credible regarding his purported symptoms and/or that his symptoms are not significant enough to warrant additional medical attention.

28. Based upon the evidence presented, the ALJ finds Claimant's report of increasing pain in the right hand/elbow secondary to extensive writing duties credible and convincing. While the ALJ finds the physical demands associated with welding significant, Respondent's argument that writing is not as strenuous as welding and therefore not causative of Claimant's recurring elbow/hand pain is unpursuasive. The evidence presented persuades the ALJ that the constant handling and gripping of a writing instrument for prolonged periods of time associated with Claimant's position as a welding instructor are likely aggravating the condition of his right hand/elbow causing increased pain and dysfunction, i.e. a deterioration of Claimant's condition subsequent to MMI. Consequently, the ALJ finds Claimant's current right upper extremity and hand symptoms are, more probably than not, related to his July 22, 2010 industrial injury. Moreover, the medical history presented persuades the ALJ that Claimant's request for additional medical treatment to determine the etiology of and treat his ongoing pain, numbness and tingling is reasonable and necessary. Simply put, the ALJ finds substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury and to prevent further deterioration of the claimant's present condition.

29. Claimant has established by a preponderance of the evidence that he is entitled to maintenance treatment for his right elbow/hand as a consequence of his July 22, 2010 industrial injury.

30. Claimant has a visible disfigurement to the body consisting of a seven (7) inch long by ⅛ inch wide, rough appearing, pink surgical scar located on the flexor surface of the right forearm/elbow.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found above, Claimant's testimony regarding his current symptoms is credible and convincing.

C. A workers' compensation case is decided on its merits. *Section 8-43-201*. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Maintenance Medical Benefits

D. A claimant is entitled to ongoing medical benefits after MMI if he/she presents substantial evidence that future medical treatment will be reasonably necessary to relieve the him/her of the effects of the injury or prevent deterioration of the claimant's condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

E. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents still retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

F. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; he/she must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). Here, the ALJ concludes that Claimant has met his burden to establish his entitlement to maintenance medical treatment. Substantial persuasive evidence demonstrates that there is a need to treat Claimant's ongoing chronic pain caused the injuries sustained in this admitted claim and his current job duties. Claimant was injured in excess of five years ago and has undergone two elbow surgeries, yet he continues to have persistent pain which he credibly testified is related to the hand writing demanded in his current position as a welding instructor. Given that Dr. Wallace Larson, Respondent's retained medical expert noted that the "likelihood of having a completely normal result with repeat neurolysis is relatively low," which was likely reduced further by his age, the ALJ is not surprised that Claimant remains symptomatic and that his symptoms are worsening with exposure to extensive hand writing which he was not performing when he was placed at MMI. Without ongoing treatment, Claimant's present condition will likely deteriorate further. Claimant has proven, by a preponderance of the evidence that there is a probable need for post MMI treatment, to maintain MMI and otherwise prevent deterioration of his current condition. Accordingly, Claimant is entitled to an order for ongoing medical benefits.

Disfigurement

G. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found in this case, Claimant has surgical scarring located on the right forearm/elbow which alters the natural appearance of his right arm. The ALJ concludes Claimant's visible scarring constitutes a disfigurement provided for by Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he is entitled to ongoing medical treatment reasonably necessary and related to his July 22, 2010 industrial injury to maintain MMI.

2. Respondent-Employer retains the right to dispute any treatment recommended on the basis that the need for treatment is not causally related to Claimant's July 22, 2010 work injury and/or is not reasonable and necessary.

3. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles him to additional compensation. Respondent-Employer shall pay Claimant $1,800.00 for that disfigurement and shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 16, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-872-559-04

ISSUES

- Did Claimant prove by a preponderance of the evidence that he suffered a worsening of condition related to the admitted work injury?

- Did Claimant prove the cervical surgery recommended by Jeffrey Donner, M.D. is reasonable, necessary, or related treatment for this claim?

PROCEDURAL STATUS

The ALJ issued Findings of Fact, Conclusions of Law and Order on February 12, 2016 (mailed on February 17, 2106). Respondents filed a Motion for Corrected Order on or about March 1, 2016. Claimant filed an Objection to the Motion for Corrected Order on March 8, 2016, opposing the Motion. The undersigned ALJ issued a Procedural Order, which granted the Motion for Corrected Order (in part) and denied the motion (in part).

Respondents have conceded they are obligated to provide maintenance medical benefits. As found, *infra,* Claimant has adduced sufficient evidence to demonstrate his condition has worsened and he requires treatment. However, there is insufficient evidence in the record to establish the nature and extent of this treatment. Accordingly, the ALJ has found Respondents are required to return Claimant to his ATP for this determination.

FINDINGS OF FACT

1. Claimant was employed by Employer as a construction site supervisor. On December 21, 2010, Claimant suffered a compensable industrial injury when he was involved in a motor vehicle accident ("(MVA") while travelling to a job site. He testified his vehicle was struck by a car travelling approximately 50 m.p.h.

2. Claimant's medical history was significant in that he had a history of degenerative changes in his low back for which he received treatment, including a low back laminectomy. Claimant took Vicodin for arthritis for a number of years[1]. There was no evidence Claimant sustained an injury or required treatment to his cervical spine prior to 12/21/10.

3. Claimant was initially seen at the Windsor Family Clinic by D. McGuire, PA-C on December 23, 2010, two days after the collision. At that time, Claimant

[1] See Dr. Mason's office note, dated 7/25/11.

complained of neck pain and stiffness, as well as describing numbness in the 3rd, 4th and 5th fingers in his left hand. The finger numbness had resolved. Claimant was diagnosed with a cervical strain, provided with pain medication and told to use alternating ice and heat on his neck.

4. On December 28, 2010, Claimant returned to the Windsor Family Clinic and was seen by R.A. Mason, M.D. Claimant reported pain on the left side of his neck, with a lot of popping and stiffness. Dr. Mason noted tenderness over the trapezius muscle, some muscle spasm but good range of motion ("ROM") in the neck. Dr. Mason diagnosed a cervical strain, recommended rest, stretching exercises and moist heat. Naprosyn and physical therapy ("PT") were also prescribed.

5. Claimant received PT from Silvia Sorensen, LPT at Ft. Collins Physical Therapy and Sports Center beginning on April 11 through April 28, 2011. He received multiple modalities of treatment including ultrasound, traction and manual treatments.

6. Claimant was examined by Jeffrey Donner, M.D. on May 5, 2011. He complained of left-sided neck pain along with occasional radicular arm pain and numbness in his fingers. Claimant's history of low back surgery was referenced. Cervical spine x-rays showed disc space narrowing. Claimant completed a Neck Oswestry index (which was a questionnaire that documented the effect of neck pain on everyday activities) at that time and was assessed a score of 18%. Dr. Donner's assessment was cervical disc degeneration and neck pain. Dr. Donner opined Claimant's neck pain was most likely related to an inflamed facet joint at C5-6. He recommended a course of chiropractic care and if that was not effective, an MRI and facet injection.

7. Claimant returned to Dr. Mason on July 25, 2011, complaining of persistent pain on the left side of the neck. He had received PT and underwent an orthopedic evaluation in which it was noted there were some facet joint problems. Dr. Mason found good strength and ROM in the neck. Claimant was to continue rest, stretching exercises, anti-inflammatory medications and moist heat. Dr. Mason prescribed Vicodin.

8. Claimant testified that he did not have health insurance and did not treat in the intervening nine (9) months. There were no records admitted at hearing which showed Claimant received any treatment during this period.

9. Insurer filed a General Admission of Liability ("GAL") for medical benefits on April 9, 2012.

10. On April 20, 2012, Claimant was examined by William Basow, M.D. to whom he was referred by his attorney. Claimant's course of treatment was reviewed, including nine (9) PT sessions which he reported did not relieve his symptoms. Claimant was having intermittent symptoms in the forearm and fingers, as well as pain

in the left neck and trapezius. Claimant had normal strength and sensation upon examination, with no neurological abnormalities noted. Dr. Basow's assessment was chronic neck pain without radicular symptoms. Claimant was to begin PT and chiropractic treatments. Claimant had no work restrictions.

11. Claimant returned to Dr. Basow on May 7, 2012, at which time he was note to have mild limitations in cervical flexion, extension and left rotation. Dr. Basow's assessment was chronic neck strain with a good initial response to PT and traction. A home traction unit was prescribed, along with chiropractic treatment. Dr. Basow noted Claimant had no work restrictions.

12. Dr. Basow saw Claimant on June 1, 2012 and made essentially the same clinical findings as the 5/7/12 exam. Claimant was to resume chiropractic treatments and physical therapy. Claimant remained at full duty.

13. Kevin O'Connell, M.D. assumed Claimant's treatment as of July 3, 2012 when the latter had complaints of intermittent left arm pain and paresthesias. Claimant was noted to have a 110-120 mile per day commute and was taking Vicodin at bedtime. Dr. O'Connell's assessment was cervical sprain, cervical arthropathy and left paracervical muscle spasms. Dr. O'Connell prescribed Flexeril, PT and recommended a cervical MRI. Claimant had no work restrictions.

14. An MRI was done on Claimant's cervical spine on July 12, 2012, which was read by Mark Reese, M.D. Dr. Reese found mild facet and uncovertebral degenerative changes at C4-5; a posterior broad based disc protrusion with an osteophyte formation contributing to severe right-sided neural foraminal narrowing at C5-6; and posterior broad-based disc protrusion with facet hypertrophic changes and severe bilateral neural foraminal narrowing with stenosis of the left aspect of the canal at C6-7. Dr. Reese characterized these as spondylitic changes, significant at C5-6 and C6-7. The ALJ drew the inference that these were degenerative changes in Claimant's cervical spine.

15. Dr. O'Connell evaluated Claimant on July 30, 2012, at which time the MRI results were reviewed. Claimant had tenderness in the left paracervical musculature at the midpoint and restrictions in his ROM. His DTR, motor and sensory nerves were intact. Dr. O'Connell's assessment was left cervical strain, cervical spondlylosis at C5-6 and C6-7. Flexeril was discontinued and Skelaxin prescribed. Claimant was to continue use of home TENS unit and receive massage therapy.

16. On September 10, 2012, Dr. O'Connell examined Claimant and he reported improvement. Claimant was having intermittent radicular symptoms into the left finger. Dr. O'Connell's assessment was cervical strain, cervical degenerative disc disease and left C7 radiculitis. Claimant was to continue with medical massage and home cervical traction. He could return to work full duty.

17. Claimant was next seen by Dr. O'Connell on October 8, 2012. He had tenderness and trigger point discomfort on palpation in the paracervical musculature. His ROM on extension was 50% of normal and his neurological exam was normal. Dr. O'Connell's assessment was cervical strain, underlying cervical spondylosis-exacerbation.

18. Claimant returned to Dr. O'Connell three times over the next three months. At the November 12, 2012 evaluation, Claimant was improved. Dr. O'Connell's assessment was left paracervical strain, cervical degenerative disc disease with foraminal stenosis triggering left cervical radiculitis. Claimant also saw Dr. O'Connell on January 14, 2013 at which time he denied radicular symptoms, but had referred pain into the scapula. Claimant was to continue conservative treatment. On February, 19, 2013, Dr. O'Connell re-examined Claimant and found no arm weakness, with minimal and sporadic left arm radicular symptoms. Dr. O'Connell assessment was the same as the 2/19/13 appointment. In each of these follow-up appointments, Claimant had no work restrictions

19. Dr. O'Connell evaluated Claimant on March 19, 2013 and his pain level on this day was 4/10. Dr. O'Connell determined Claimant was at MMI and assigned a 21% whole person impairment pursuant to the AMA Guides. Dr. O'Connell noted treatment with home cervical traction and medical massage provided Claimant relief and he required massage visits (7) as his only maintenance. Dr. O'Connell further noted Claimant's left arm symptoms "receded over time with conservative treatment, so neurosurgical consultation was never pursued." The ALJ notes throughout Claimant's treatment with Dr. O'Connell he had no work restrictions.

20. Respondents requested a Division Independent Medical Examination, which was performed by Richard Stieg, M.D. on July 30, 2013. Dr. Stieg's impression was severe cervical degenerative disease with persistent myofacial pain and pain disorder (chronic). Dr. Stieg agreed with Dr. O'Connell's MMI date and determined Claimant sustained a 27% whole person impairment under the AMA Guides. Dr. Stieg noted Claimant had no pre-existing history of neck or upper extremity problems prior to the motor vehicle collision on 12/21/10. Dr. Stieg recommended maintenance treatment in the form of continued physiatric visits on a p.r.n. basis and projected Claimant would likely have continued mild to moderate pain which would require maintenance treatment. The ALJ credited Dr. Stieg's DIME findings.

21. A Final Admission of Liability ("FAL") was filed on or about December 5, 2013, admitting for the impairment rating of Dr. Stieg. The FAL was filed pursuant to an agreement between the parties, which resolved issues set for determination at hearing. As part of the agreement, Claimant did not object to the FAL and received a payment of permanent partial disability benefits based upon Dr. Stieg's rating. In its FAL, Insurer stated: "We admit for reasonable and necessary and related medical treatment and/or medications after MMI."

22. Claimant testified at hearing his pain has gradually worsened and he was having more frequent radicular complaints. He was less functional both at work and in his activities of daily living. Claimant was a credible witness, as he did not appear to overly exaggerate his symptoms.

23. Claimant returned to Dr. Donner on April 4, 2014. At that time, he was complaining of continued neck pain on a scale from 3 to 5/10 and described an aching, burning, and stabbing sensation in the left side of his neck and into his left scapular area. He described radiating pain into his left arm, with numbness in his third and fourth fingers. Claimant said the driving he was doing for work "markedly aggravated" his neck and left arm symptoms. Claimant was not in severe pain and had mild tenderness on the left side of the neck. However, Claimant completed a neck Oswestry index at this evaluation and had a score of 42%, which leads to the inference that Claimant believed his level of functioning had decreased. Claimant said he was not smoking cigarettes, but had in the past. Dr. Donner recommended a cervical MRI, but also stated Claimant was a reasonable surgical candidate for a two-level anterior cervical fusion or disc replacement.

24. Dr. Donner authored a letter, dated on April 4, 2014, in which he opined Claimant's neck related complaints were directly related to the motor vehicle collision of 12/21/10, despite preexisting degenerative changes. Dr. Donner believed a majority of the MRI findings from the initial MRI performed in 2012 were directly related to the motor vehicle collision. Dr. Donner noted Claimant continued to have symptoms of intractable neck pain and radiculopathy related to herniated discs and stenosis at C5-6 and C6-7 and he recommended obtaining an updated MRI scan of the cervical spine. Dr. Donner said Claimant was not at MMI.

25. Claimant testified he is currently employed by St. Aubyn Homes as a supervisor for residential home building and was working at this job when he was evaluated by Dr. Donner in April 2014. In that capacity, he had to drive up to seventy (70) miles per day. Claimant admitted that driving long distances sometimes caused his neck to hurt.

26. On May 21, 2014, Claimant underwent a second MRI which was read by Willis Chung, M.D. Dr. Chung said the MRI showed degeneration in the discs at C5-6 and C6-7 of Claimant's cervical spine with a 5mm right lateral disc herniation at C5-6, as well as a 3mm right lateral disc herniation at C6-7 and prominent bilateral C6-7 neural foraminal narrowing from lateral disc bulging at that level. Claimant had no central spinal stenosis. The ALJ notes that it is difficult to compare the findings of this MRI with the one of 7/12/12, as the former did not provide measurements of the disc bulges.

27. Claimant returned to Dr. Donner on May 21, 2014, who reviewed the results of his MRI. Dr. Donner noted he had very limited neck movement. Claimant was noted to be smoking cigarettes. Dr. Donner's assessment was progressive severe neck pain with radiculopathy at C5-6 and C6-7, where there were degenerative

changes, stenosis and herniated discs. Dr. Donner recommended and noted Claimant wanted to proceed with a two-level anterior cervical discetomy, nerve root decompression and placement of artificial discs.

28. Andrew Castro, M.D. (orthopedic spine surgeon) performed a physician advisor review of the request for surgery. In his note dated June 11, 2014, Dr. Castro said two level disc replacement was not cleared by the FDA and by extension the Colorado Worker's Compensation Medical Treatment Guidelines. He opined that cervical surgical intervention for primarily neck pain was questionable, as it had unpredictable outcomes. He also noted Claimant's gap in treatment from prior to the surgical recommendation raised the issue of a possible new injury or intervening event which should be investigated. Dr. Castro recommended authorization for the surgery be denied.

29. Alicia Feldman, M.D. performed an IME[2] of Claimant on June 27, 2014. Dr. Feldman noted Claimant complained of pain in his cervical spine which radiated into his left shoulder, rarely into the left upper extremity, but experienced some paresthesias down his left arm into his third and fourth fingers. Claimant was working a new job as a site supervisor which required he do a lot of driving and repetitive movement of his neck at times, which caused fatigue. Claimant had limited and painful cervical spine extension and rotation to the left. Dr. Feldman's assessment was left-sided neck pain, cervical spondylosis, left upper extremity parasthesias and foraminal stenosis of the cervical spine.

30. Dr. Feldman stated Claimant's imaging studies showed chronic degenerative changes without acute pathology and neurological compromise. Dr. Feldman stated there were no findings of acute or subacute injury in the 7/12 MRI. She believed he had a cervical sprain/strain injury which should have resolved over several months. The cervical degeneration was longstanding. Dr. Feldman believed any residual pain was likely secondary to the underlying cervical spondylosis and degenerative conditions. Claimant had reduced his chronic pain medication, which was indicative that his pain was less than it was pre-accident. Dr. Feldman found Claimant could continue to work full duty. The ALJ notes Dr. Feldman did not make any recommendations concerning Claimant's treatment.

31. Dr. Feldman produced an addendum report, dated August 4, 2014. Dr. Feldman reviewed deposition transcript for Claimant in which he said his neck got fatigued after work when he did inspections. Claimant described using his eyes when he was driving to compensate because he couldn't turn his head. He said he was very fatigued a lot of times at night in his cervical area and shoulder. Dr. Feldman made no significant changes to her previous opinion.

[2] This IME was not requested by either party to the worker's compensation case, but rather was requested in the third party case arising out of the 12/21/10 MVA.

32. Claimant filed a Petition to Reopen alleging a worsening of condition on November 8, 2014. Dr. Donner's 4/4/14 report was attached.

33. Claimant returned to Dr. Donner on February 3, 2015, but no change was reported in Claimant's condition. Claimant reported continued neck pain with radiation to his left arm and hand.[3] Claimant was noted to be smoking. Dr. Donner reiterated his surgical recommendation and described it as Claimant's best option.

34. On March 18, 2015, Dr. Donner reevaluated Claimant. He noted Claimant had primarily neck pain radiating into his trapezial and suprascapular muscles and shoulder. Claimant was smoking cigarettes at this time. He had normal use and function of his upper extremities without any sensory or motor deficits. He once again recommended that Claimant undergo surgery.

35. Scott Primack, D.O. performed an IME on behalf of Respondents on March 30, 2015. Dr. Primack noted Claimant complained of "far more neck pain than arm pain"; that Claimant initially had facetogenic pain, but his current pain appeared to be more discogenic. Dr. Primack opined the two MRIs from 2012 and 2014 indicated that Claimant was suffering from ongoing degenerative changes, as opposed to a worsening of the injuries from the auto accident. He also noted Claimant's cervical spondylosis could be aggravated by his ongoing driving duties. Dr. Primack believed Claimant was at MMI and he had a high level of functioning given the condition of his cervical spine. He noted Claimant's condition would result in some level of ongoing discomfort, but the majority of his discomfort would be secondary to his underlying cervical spondylosis and not his work injury.

36. Dr. Primack issued an addendum report (after reviewing Dr. Feldman's IME report), dated April 20, 2015, which noted Claimant had longstanding cervical degeneration. Dr. Primack cited Dr. Feldman's conclusion the MVA caused a temporary aggravation of Claimant's underlying spondylosis and any residual pain was like secondary to the underlying degenerative condition. Dr. Primack believed Dr. Feldman's opinions supported his opinion.

37. On August 12, 2015, Brian Reiss, M.D. performed an IME on behalf of Respondents. Dr. Reiss noted Claimant had neck pain at a 4/10 level at the time he reached MMI and his only maintenance treatment was finishing his massage treatments. Dr. Reiss stated he would have recommended an isometric strengthening and conditioning program to continue on a long term basis to maintain Claimant's condition. Dr. Reiss felt Claimant's current symptoms were very similar to his symptoms at MMI, when Claimant stated his pain level was 5/10. The ALJ infers that Dr. Reiss' opinion regarding additional treatment was for Claimant to maintain MMI.

38. On examination, Dr. Reiss noted Claimant was not in any apparent distress. He had 0 degrees of neck extension, with full flexion, right rotation 70% of

[3] Claimant's Neck Oswestry Index was 36% at this appointment, indicating a slight lessening of symptoms. Claimant was smoking cigarettes at the time of this appointment.

normal and left rotation 50% of normal. Dr. Reiss noted Claimant's symptoms were primarily axial neck pain and opined that Claimant's symptoms were a continuation from his original injury. Dr. Reiss did not recommend a 2 level disc replacement procedure for Claimant's pain complaints. The ALJ credited the opinions of Dr. Reiss, particularly with regard to his conclusion that this procedure was not likely to help Claimant's symptoms.

39. Dr. Primack testified at hearing. He was qualified as an expert in physical medicine and rehabilitation, a specialty in which he was board certified. He was Level II accredited pursuant to the W.C.R.P. He restated his belief that Claimant's current pain was discogenic in nature, as opposed to facetogenic. He described the anatomical basis of facetogenic pain, noting the disc area was a three joint process including ligaments in the front of the vertebral bodies, the disc, ligaments and facet joints on the posterior side of the bodies. He described facetogenic pain as emanating from the facet joints, which is very common with whiplash disorders after vehicle accidents and opined this was the type of pain suffered in the immediate aftermath of the 12/21/10 MVA.

40. Dr. Primack stated Claimant's reports of pain have remained largely consistent, but there was a shift from facet-based neck pain to cervical spondylosis symptoms, which included more radicular findings. Dr. Primack further testified the MRI-s showed multiple changes over time not associated with the original work injury. Specifically, he noted with the 2014 MRI, facet changes had resolved and were listed as normal at C4-7. He felt there was a new disc herniation at C3-4 and there was also a new herniation at C4-5. The disc herniation at C5-6 previously identified was more lateral than previously identified as central and the disc heights had decreased which compressed the holes where the nerve roots exited, thereby increasing Claimant's stenosis and discogenic pain.

41. Finally, Dr. Primack reviewed the findings on the 2014 MRI, which showed edema at C6-7. This was either associated with an acute injury, endplate and compression fractures, or degenerative conditions. Dr. Primack testified that if the edema was a result of the underlying work injury, it would have developed within 4-5 months after the accident and have been visible in the 2012 MRI. He further testified the edema was more apparently related to an endplate fracture from ongoing degenerative conditions, as the progression of the underlying degenerative disease could further be seen from the new disc protrusions. The reasonable inference from Dr. Primack's testimony was that any treatment Claimant required was related to the degenerative process in his spine as opposed to the MVA.

42. Dr. Donner testified by way of evidentiary deposition. He was qualified as an expert in orthopedic surgery, a specialty in which he is board-certified. He also has a board certification in spine surgery, which has been the focus of his practice for twenty-five (25) years. He was involved in clinical trials related to artificial discs. Dr. Donner estimated he had been involved in close to one hundred cervical surgeries involving artificial discs. The ALJ credited Dr. Donner's extensive experience in performing surgeries of this type.

43. Dr. Donner stated when he first saw Claimant in May, 2011, he felt there was an inflamed facet joint at C5-6. Dr. Donner noted Claimant did not have any of the injections and when he returned in April, 2014, he was having symptoms of neural irritation and nerve root irritation. Dr. Donner opined 100% of Claimant's neck complaints were related to the 12/21/10 MVA. He believed the cause of Claimant's pain was discogenic and related to the facets, as well as nerve compression. Dr. Donner opined Claimant had chronic pain, which was unresponsive to conservative treatment and he was good candidate for cervical disc replacement. Dr. Donner noted with disc replacement there was a quicker recovery and less adjacent segment deterioration. In the absence of the artificial disc replacement surgery, the alternative was a two-level fusion procedure. Dr. Donner did not feel pain management was as good a treatment option as surgery.

44. Dr. Donner was asked about conservative treatment to maintain MMI, but returned to his opinion that surgery was more "realistic and cost effective" for Claimant. Dr. Donner did not believe Claimant should have to continue to exhaust conservative treatment or try every possible modality. Dr. Donner did not have Dr. O'Connell's treatment records or the DIME report when Claimant returned in 2014, although he subsequently reviewed Dr. Stieg's report. Dr. Donner reviewed the Treatment Guidelines and acknowledged these endorse one level disc replacement. Dr. Donner did not address the question of whether the surgical criteria were met under the Treatment Guidelines. He testified the FDA cleared two-level disc replacement, which was also validated by the North American Spine Society's treatment guidelines. (The ALJ overrules any objection and denies the Motion to Strike Dr. Donner's testimony at page 42:12-25.) The ALJ notes Dr. Donner did not consider several conservative treatment options, which could potentially ameliorate Claimant's symptoms.

45. Claimant testified he believed his symptoms have worsened over time. However, his report of pain has stayed in the 3, 4, 5/10 range. The ALJ found Claimant's pain complaints, as reported to his physicians were not appreciably worse than when he was evaluated by Dr. O'Connell and Dr. Stieg. The ALJ concludes that Claimant has not exhausted conservative treatment options, which may relieve these symptoms and/or maintain MMI.

46. The ALJ finds Claimant's need for treatment is result of his industrial injury as opposed to degenerative processes in his cervical spine.

47. The ALJ notes that although Claimant has been evaluated on several occasions since he reached MMI, he has not received active treatment since that time. The ALJ finds Claimant should be reevaluated regarding his need for additional treatment. Claimant is entitled to medical benefits, at a minimum, to maintain MMI.

48. The ALJ finds Dr. Donner made his surgical recommendation after Claimant was determined to be at MMI by the ATP, Dr. O'Connell and the DIME examiner, Dr. Stieg.

49. The ALJ concludes the proposed surgical procedure is not reasonable and necessary at this time.

50. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Worker's Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Reopening

Claimant sought to reopen his claim and alleged his condition worsened. Claimant pointed to his worsening symptoms (including radiculopathy) and Dr. Donner's records to support his Petition to Reopen. Claimant testified at his hearing that his symptoms had worsened. Respondents argued that any increase in Claimant's symptoms were related to degenerative changes in his cervical spine which have progressed, as opposed to his industrial injury. Based on the evidence before the ALJ, Claimant met his burden to reopen the claim.

Section 8-43-303(1), C.R.S., authorizes an ALJ to reopen any award on the grounds of, *inter alia*, change in condition. *Heinicke v. Indust. Claims Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008). The reopening authority under the provisions of Section 8-43-303, C.R.S. is permissive and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996).

Claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the Claimant's physical or mental condition that can be causally related to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

As found, Claimant's degenerative condition in his cervical spine was asymptomatic before 12/21/10 and then developed symptoms as a direct result of the MVA. Claimant adduced evidence that his level of functioning was worse and he had increased pain, as shown by the Oswestry cervical spine index survey he completed in 2014. The ALJ drew the reasonable inference that Claimant's increased pain in his cervical spine required additional treatment. Accordingly, the ALJ was persuaded that Claimant's condition has worsened and his claim should be reopened.

In the initial Findings of Fact, Conclusions of Law and Order, the ALJ noted there was no evidence presented as to when the last medical benefit was "due and payable", under 8-43-303(2)(b), C.R.S. That is still the case. In addition, Respondents 12/5/13 FAL admitted for *Grover* medical benefits, but Claimant has not been in active treatment since approximately March, 2013. Thus, it was unclear whether a Petition to Reopen was required in the case at bench[4]. These Corrected Findings of Fact, Conclusions of Law and Order have been issued to confirm Claimant's entitlement to medical benefits.

At this time, Respondents are obligated by the FAL to provide *Grover* medical benefits to maintain MMI. Respondents are also obligated to provide these benefits by this Order. As found, Claimant requires medical treatment, at a minimum, to maintain MMI. At least one physician (Dr. Reiss) made specific treatment recommendations and characterized this treatment as maintenance treatment. In addition, since Claimant has not been in active treatment since March, 2013 and has not completed several modalities of conservative treatment, there needs to be further evaluations by his authorized treating physicians and to what type of treatment he requires. There was no

[4] The initial Findings of Fact Conclusions of Law and Order noted at p. 13: "Assuming, *arguendo* that it has been longer than two (2) years since Respondents provided the last medical benefit, Claimant has made the requisite showing of a worsening of condition."

evidence before the ALJ on this subject and the ALJ declines to make any findings as to particular treatment Claimant may require. Therefore, the ALJ is limited his ruling to the finding that Claimant is entitled to continuing medical benefits to maintain MMI. Under this ruling, Claimant is not precluded from claiming he is not at MMI and seeking additional medical benefits to cure and relieve the effects of his industrial injury. However, those issues were not before the Court.

Based upon the totality of the evidence, the ALJ has determined Claimant requires additional treatment to maintain MMI. Respondents are required to provide those medical benefits.

Medical Benefits

Claimant seeks authorization of a two-level anterior cervical discetomy, nerve root decompression and placement of artificial discs. In the instant case, Claimant has the burden of proof to establish that the surgery proposed by Dr. Donner is reasonable and necessary, as well as related to his industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant asserted the MVA of 12/21/10 caused his previously asymptomatic cervical spine to develop symptoms and require treatment. Claimant argued the degenerative condition of his cervical spine has worsened over time and his need for surgery is a direct consequence of the 12/21/10 MVA. Claimant proffered the opinions of Dr. Donner to support his contentions. The ALJ concluded that Claimant did not meet his burden of proof in this instance.

There were three bases for the ALJ's conclusion that the proposed surgery is not reasonable and potentially not related to the 12/21/10 MVA; first, the ALJ was not persuaded that less invasive treatment options had been exhausted. Some examples of these available treatment options were identified by expert witnesses. These included:

5/5/11: Dr. Donner recommended a facet joint injection.

3/19/13: Dr. O'Connell recommended completion of therapeutic massage. (Claimant did not complete the treatments.)

7/30/13: Dr. Stieg recommended maintenance treatment in the form of continued physiatric visits on a p.r.n. basis.

8/12/15: Dr. Reiss recommended an isometric strengthening and conditioning program to continue on a long term basis to maintain Claimant's condition.

Given the amount of time that has transpired since Claimant's last treatment (over 2 ½ years) and the fact that non-surgical modalities are available, the ALJ determined that surgery is not reasonable at the time.

Second, the ALJ was persuaded by Respondents' argument the criteria under the Medical Treatment Guidelines were not met and did not support the proposed surgery. Respondents also cited Drs. Reiss' and Primack's opinions, both of whom noted the proposed surgery was not warranted and might not relieve Claimant's symptoms.

The ALJ considered whether the Medical Treatment Guidelines-Cervical Spine Injury, Rule 17, Exhibit 8 ("Treatment Guidelines") applied to the requested cervical surgery. The Guidelines are contained in W.C.R.P. 17, 7 Code Colo. Regs. 1101-3, and provide that health care providers shall use the Guidelines adopted by the Division of Workers' Compensation ("Division").

The Division's Guidelines were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. 2008. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. 2008.

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria).

However, an ALJ is not required to award or deny medical benefits based on the Guidelines.[5] In fact, there is generally a lack of authority as to whether the Treatment Guidelines require an ALJ to award of deny benefits in certain situations. The decision to award or deny medical benefits is addressed to the sound discretion of the ALJ. *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014).

In this case, the ALJ considered Rule 17, Exhibit 8 Section 3, which governs Total Artificial Cervical Disc Replacement (TDR). It provides in pertinent part:

> "Involves the insertion of a prosthetic device into the cervical intervertebral space with the goal of maintaining physiologic motion at the treated cervical segment. The use of artificial discs in motion-preserving technology is based on the surgeons preference and training" …[citing two reviews]…"There is strong evidence that in patients with single level radiculopathy or myelopathy cervical

[5] See W.C.R.P. 17-5(C), which states: "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate.

artificial disc produces 2 year success rates at least equal to those of anterior discetomy and fusion (ACDF) with allograft interbody fusion and an anterior plate…"

"**a. Description**

…

General selection criteria for cervical disc replacement includes symptomatic one level degenerative disc disease with radiculopathy."

"**c. Surgical Indications:** Patient meets one of the 2 sets of indications:

1) Symptomatic one-level degenerative disc disease (on MRI) with established radiculopathy and not improved after 6 weeks of therapy; **and**

Radiculopathy or myelopathy documented by EMG or MRI with correlated objective findings or positive at one level; **or**

2) **All of the following:**

- Symptoms unrelieved after six months of active non-surgical treatment and **one** painful disc established with discogram; **and**
- All pain generators are adequately defined and treated; and
- All physical medicine and manual interventions **are** completed; and
- Spine pathology limited to one level; **and**
- Psychosocial evaluation with confounding issues addressed.

The proposed surgical procedure involves disc replacement on two levels, which is beyond what is recommended in the Treatment Guidelines. In addition, there were significant gaps in Claimant's treatment and Claimant did not complete 6 weeks of therapy. (There was an indication in the record that because of his work schedule, Claimant was not able to complete the treatment which was previously recommended by his doctors.) Claimant should complete a full course of conservative treatment, including physical therapy and possibly the treatment recommended by Dr. Reiss before surgery is performed. Also, there were no findings of myelopathy, so the surgical indications under section 1) have not been met.

Furthermore, not all of the indications in Section 2) were met, including 6 months of active treatment, completion of all physical medicine and manual interventions and spine pathology limited to one level. Accordingly, Claimant did not establish disc replacement surgery was indicated under the Treatment Guidelines.

In addition, this procedure has contraindications, as noted *infra.*

"**d. Contraindications**:

…

- Symptomatic facet joint arthrosis-If imaging findings and physical finds of pain on extension and lateral bending are present, exploration of facetogenic pain should be completed prior to disc replacement for axial pain.

…

- Multiple-level degenerative disc disease.
- Spondylolisthesis greater than 3mm."

In this case, at least one physician (Dr. Primack) was of the opinion that Claimant's symptoms were originally facetogenic in nature. Dr. Donner opined that Claimant's pain was discogenic, related to the facets and nerve compression. As found, the source of Claimant's pain should be clarified.

Also, Claimant had pain on extension and lateral bending. There is also a question whether Claimant has neurological compromise and symptoms that warrant surgery, as noted by Dr. Feldman. Further exploration of these issues is warranted before an invasive surgical procedure is performed. Moreover, Claimant has degenerative changes in his cervical spine, including spinal stenosis on multiple levels in the cervical spine, as shown on MRI. In addition, the 2014 MRI revealed at least one disc herniation which was greater than 3mm. Surgery is contraindicated under these circumstances.

The ALJ also notes that the alternate procedure (ACDF) is contraindicated at this time, since Claimant was smoking as of the last evaluations with Dr. Donner. In addition, since a fusion would be at two levels the risk of adjacent segment deterioration is a significant risk.

Thus, some of the contraindications indentified by the Treatment Guidelines militate against the disc replacement surgery, as well as the ACDF procedure. In short, the ALJ considered the Treatment Guidelines, which raise a question whether proposed surgery is reasonable and necessary.

Third and finally, the ALJ found that there was a question whether the proposed medical treatment would address the symptoms from the spondylitic changes in Claimant's cervical spine and reduce his symptoms. Dr. Castor questioned whether the proposed surgery would ameliorate Claimant's symptoms. Dr. Reiss' opinion was also persuasive on this subject. Dr. Donner's testimony did not refute this or establish that the benefits were outweighed by some of the contraindications of surgery. The ALJ was not persuaded that is reasonable and necessary at this time. For these reasons, Claimant failed to prove that the surgery proposed by Dr. Donner was reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant’s Petition to Reopen is GRANTED.

2. Pursuant to Respondents’ 12/5/13 FAL and this Order, Respondents shall provide medical benefits to Claimant, who may return to Dr. O’Connell or other ATP for treatment.

3. Claimant’s request for authorization of a two-level cervical discectomy, nerve root decompression and disc replacement is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP.   You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 18, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-875-010-10

ISSUES

- Whether the claim should be reopened?

- Whether Dr. Desai is an authorized treatment provider?

- Whether the surgical procedure recommended by Dr. Desai is related, reasonable, and necessary to cure and relieve the effects of Claimant's industrial injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On February 12, 2011, Claimant, a 49 year old female EMT/paramedic, hyper extended her left big toe at work when she exited an ambulance and slipped on ice. Later that day, Claimant aggravated her injury ascending stairs.

2. On February 14, 2011, Dr. Elizabeth Bisgard preformed an initial evaluation. While Dr. Bisgard notes a chief complaint of left foot pain, her history of present illness discusses "right" foot and "right" toe injuries. Dr. Allison Fall, who eventually became one of Claimant's treatment providers, also discusses Claimant's "right" foot. It is clear from the vast majority of other credible evidence that Dr. Bisgard's and Dr. Fall's reference right foot and right toe is erroneous.

3. Claimant received conservative care for several months with limited improvement.

4. On December 20, 2011, Dr. Thelander performed a bunionectomy with osteotomy at the first MP joint of Claimant's left foot. Claimant reported increased pain as a result of that surgery. On May 16, 2012, Dr. Scott Resig performed a second surgery in which he removed the hardware implanted during the first surgery and performed a partial joint replacement. Post surgery, Claimant began experiencing nerve pain in addition to "mechanical pain," and was diagnosed with CRPS (INSERT DEFINITION.)

5. On May 24, 2013, Claimant consulted with Dr. Bharet Desai.[1] The consultation outside the chain of referral and Claimant paid for the appointment through her personal insurance. Dr. Desai recommended a neurectomy of the dorsal medial and dorsal plantar sensory nerve on the first metatarsal shaft and shave down the incongruence of the plantar surface. Whether this recommended surgery is related,

[1] Dr. Desai's notes indicate that he previously saw Claimant, but lost the dictation from that visit.

reasonable, and necessary to cure and relieve the effects of Claimant's work injury is one of the issues raised by Claimant.

6. On June 12, 2013, Dr. Elizabeth Bisgard reported that Claimant had reached maximum medical improvement (MMI) and referred Claimant to Dr. Bart Goldman for a permanent impairment rating. Dr. Bisgard expressed her displeasure that Claimant had elected to see Dr. Bharat Desai, as opposed to her or Dr. Goldman, whom she expressed had "been with [Claimant} through this course of treatment and have essentially bent over backward accommodating her multiple requests for treatment." Dr. Bisgard also discussed with Claimant that she and Dr. Goldman had gone "above and beyond the medical treatment guidelines as far as extending her physical therapy and providing treatment." Dr. Bisgard noted that Dr. Desai was not a designated providers, nor was he the surgeon that she would have chosen for a second opinion, and that Claimant elected to see him on her own. Dr. Bisgard placed Claimant on permanent restrictions of no running, no climbing, and walking/standing to thirty minutes per hour.

7. On July 1, 2013, Dr. Frances Faro reviewed Dr. Desai's proposed surgery with Claimant. While Dr. Faro considered Dr. Desai's reasoning for addressing the intrinsic issues within Claimant's foot to be sound, Dr. Faro stated he was "not at all sure" that Dr. Desai's surgery would improve Claimant's range of motion issues related to the inflexibility of the tendinous structures between the sesamoids and the base of the proximal phalanx, as well as the periarticular scarring that occurs with CRPS. He considered surgery "tricky in the setting of CRPS" and instead recommended a metatarsophalangeal joint fusion to create a stiff joint that has no intrinsic pain generators. "This would then allow her CRPS to be managed and calm down without having additional contributors from the first MTP." Dr. Faro cautioned Claimant that Dr. Desai's surgery would give Claimant numbness at the first metatarsophalangeal joint and could interfere with balance necessary for her high-demand job. He encouraged Claimant to consider a first MTP fusion "as the more surgeries she has on this foot the more dysfunctional it will become with respect to her CRPS, and doing 1 definitive surgery is likely a better option for her overall health and wellbeing."

8. On July 18, 2013, Dr. Bart Goldman agreed that Claimant reached MMI as of June 12, 2013. He rated Claimant with a 7% lower extremity impairment which correlates to a 3% whole person rating. Dr. Goldman's eleven page report contains an exhaustive and comprehensive analysis of Claimant's history, treatment, and recommendations for additional care.

- He noted that both he and Dr. Bisgard were "perplexed as to why Tanya had not brought up her desire for what would be essentially a fourth opinion from a surgical perspective regarding her foot having previously been seen by Dr. Thelander, Dr. Sharp and Dr. Resig at various times (as well as having been seen for physiatric consultation prior to my initial consultation on December 27, 2012 by Dr. Primack in April of 2012)."

- Dr. Goldman disagreed with Dr. Desai's recommendation for surgery and commented that "Dr. Desai's hypothesis is that the sesamoid congruency with a plantar surface proximal to her implant would be a potential pain generator with secondary sensitivity over the dorsal sensory nerve on the median plantar surface of the metatarsal phalangeal joint.

- Dr. Goldman did not agree with Claimant's request for a referral to Dr. Desai.

- Dr. Goldman noted that Claimant's report of increased symptoms of her whole body aching did not make sense. Dr. Goldman noted that when distracted, Claimant was not hyperpathic or at least very minimally so.

- Dr. Goldman concluded that Claimant would not benefit functionally or symptomatically from surgery and that Claimant was at risk for more full blown CRPS should she undergo such procedures.

- Additionally, Claimant's desire to get back to pre-accident status was not particularly pragmatic or realistic and actually could be holding her back. "It is also clear that Tanya is also not completely comfortable with taking full ownership in terms of potential adverse outcomes that may occur from her decisions." Dr. Goldman recommended maintenance care in the form of medications suggested by Dr. Hompland such as Topamax, Zonegran, amitriptyline, nortriptyline, and Vimpat. He recommended nerve blocks without lumbar sympathetic blocks; pool therapy; and up to 15 physical therapy sessions.

9. On September 20, 2013, Dr. Bisgard noted that surgery presented a risk of worsening Claimant's sympathetically mediated pain. Dr. Bisgard's notes reflect her discussion with Claimant in which she related her concerns that "additional surgery would cause Claimant's sympathetically mediated pain to flare and would not provide Claimant with substantial relief.

10. On October 30, 2013, Dr. Hompland treated Claimant and discussed Claimant's treatment options under medical maintenance care, including a Bier block, restarting a particular medication, adding a particular medication, and compression. Claimant mentioned during the visit that she might seek medical attention from Dr. Desai.

11. On November 5, 2013, Dr. John Raschbacher preformed the Division independent medical examination (DIME). Dr. Raschbacher agreed with Dr. Bisgard and Dr. Goldman that Claimant reached MMI on June 6, 2013. Dr. Raschbacher rated Claimant with a 9% lower extremity impairment that correlates to a 4% whole person impairment. Dr. Raschbacher was aware of Dr. Desai's recommendations, but did "not see any indication for further surgery." Dr. Raschbacher concluded "there is no other ratable impairment including at the back, knee, pelvis, hip or elsewhere. The medical record simply does not support there being clear evidence of work-related injury other

than at the left foot." Claimant completed a pain questionnaire and reported "intense unrelenting pain/burning, sensitivity in L foot/leg. Deep aching bone pain, cold intolerant – breezes set it off. L Knee hip and thoracic discomfort ongoing from altered gait. Suffered a lumbar back sprain in work hardening. Also feel like my L lower leg & foot is in a vice grip being clamped down on. Also experience severe muscle spasms and contractions of L let/foot. Sleep varies – the pain is very disrupt[ive] and if the sheets and/or wt of blankets brush against my foot it will set off the pain response frequently." Dr. Raschbacher was provided 6 ¼ inches of medical records to review. His request for extra time to review the records was denied. Therefore, Dr. Raschbacher was not able to perform a formal record review with dictation.

12. On December 11, 2013, Respondents filed a Final Admission consistent with Dr. Raschbacher's report. Respondents admitted for medical maintenance care.

13. On February 20, 2014, Dr. Daniel Ocel reported that he explained to Claimant his concerns about Dr. Desai's surgical recommendation for a debridement of the first MTP joint in the face of an overstuffed first MTP joint and that the surgery "may potentially not be that fruitful for her." Dr. Orcel also expressed concern that with her underlying diagnosis of CRPS, Claimant might not receive significant relief from this particular surgery, and would ultimately end up with a first MJTP fusion." He further opined that if Claimant had a successful fusion surgery, he would not restrict any of her physical activities. He also opined that with fusion, she would only have one surgery and that fusion would "potentially give her the best possibility of resolving the regional pain syndrome."

14. Claimant focuses on an introductory sentence in Dr. Orcel's report: "I have explained to [Claimant] that in my humble opinion she is in excellent hands with Dr. Desai." Context makes clear that this sentence is a pleasantry and not an endorsement of the surgery recommended by Dr. Desai.

15. Dr. Allison Fall was designated as the treating physician for medical maintenance care. In that capacity, she referred Claimant to Dr. Hompland for lumbar sympathetic blocks and to Dr. Gurdley for acupuncture.

16. On April 2, 2014, Dr. Scott Hompland reported, in what appears to be responses to Respondents' interrogatories, that

- Nerve blocks provided Claimant with 50% increase in standing duration and walking distance; 50+% increase in sleeping duration; reduction in hyperalgesia and leg spasms; psychological improvement; and allowed Claimant to spend 20 – 60 minutes per day 4-6 times a week exercising.

- Claimant's left foot injury and the neuropathic component of her left foot injury were her only work related conditions.

- He was not clear how Dr. Goldman had arrived at the diagnosis of medial plantar neuritis.

- Claimant fulfilled the clinical components for CRPS and the diagnostic components to complete the diagnosis of CRPS.

- He opined that Claimant more closely fulfilled the components of CRPS that of medial plantar nerve neuritis.

17. On June 23, 2014, Dr. Desai noted that Claimant was "functionally okay, pretty much at baseline." Nevertheless, he recommended surgery to increase Claimant's function; an arthrotomy, synovectomy, debridement, and capsular release of adhesions and possible tenotomy of the proper dorsal sensory nerve. Dr. Desai noted that he explained to Claimant that the surgery "may not alleviate her CRP but it will definitely hopefully help her with her function of her great toe with her gait, and she understands the risks and benefits and potential aggravation of her CRP."

18. On August 13, 2014, Dr. Fall referred Claimant to Dr. Desai making him an authorized treatment provider as of that date.

19. On December 18, 2014, Dr. Desai reported that he planned to perform surgery that included MTP arthrotomy, synovectomy, and debridement of the inner sesamoid interval and also inspect her dorsal sensory nerve on her left great toe. He also proposed that "if the dorsal sensory nerve were impaired at all and does not have an ability to self-repair or if there are adhesions, we would do a neurectomy. . . . She knows fully well that this may exacerbate her CPS syndrome and her CPRS." The note mentions that Claimant wants to do the surgery despite its inherent risks. However, the note she only decided to proceed with surgery after "a good discussion was had" and "she changed her opinion."

20. On December 8, 2014, Dr. Saint-Phard performed a Respondents' independent medical examination and prepared a report on December 29, 2014.

- Dr. Saint-Phard noted that Claimant's pain was greatly reduced for two to three months by nerve blocks, and that Claimant's pain was 1/10 when she wore supportive footwear. However, Claimant explained that she did not like to wear anything but a "regular" shoes draw attention and she does not like to explain her foot problem.

- Dr. Saint-Phard concluded that the surgery recommended by Dr. Desai was not medically reasonable, necessary or indicated. She opined that surgical intervention is very aggressive treatment because when Claimant wears rocker-bottom shoes or steel-shank shoes or her clogs, she is essentially pain free and quite functional. Dr. Saint-Phard recommended Claimant wear the rocker-bottom shoes and steel-shank shoes she was provided because Claimant reported she was essentially pain free when she wore them.

- Further, surgery would likely increase Claimant's neuropathic and sympathetically-mediated pain and not provide any improvement in function. For those reasons, Dr. Saint-Phard concluded surgery was not supported by the Treatment Guidelines.

- Dr. Saint-Phard opined Claimant remained at MMI.
- Dr. Saint-Phard also opined that Claimant's knee and back conditions were "not at all related to her left toe injury."

21. On January 9, 2015, Claimant filed a Petition to Reopen based on a change in medical condition.

22. On April 8, 2015, Claimant reported to Dr. Fall that she did not have special rocker bottom shoes and when she was active she wore her walking boot or air cast. Claimant wore a soft sandal type shoe to the appointment. Claimant reported increased stiffness and decreased mobility. Dr. Fall switched one of Claimant's medications.

23. Medical records reflect Claimant's condition was stable or improved without surgery. For example:

- On June 17, 2015, Chiropractor Jason Gridley reported Claimant "is doing quite well" and reported very good response to the sympathetic block for her low back pain and lower leg pain.
- On June 25, 2015, Dr. Fall noted that Claimant said blocks by Dr. Hompland significantly help and she still had relief five weeks later. Claimant was reported to be stable on her medications. Claimant again wore soft sandals to this appointment.
- On September 9, 2015, Claimant returned from vacation; she was active on vacation which improved her mobility for low back as well as her lower leg and Claimant responded well/favorably to her last visit with decreased pain and spasm in the low back as well as the left lower let below the knee and she felt the last sympathetic block had been quite effective.
- On September 14, 2015, Claimant reported improvement with decreased cramping and muscle spasm.
- On December 12-14 Claimant reported temporary relief of her leg cramping and pain below the knee and improvement in her lower back.
- On December 7, 2015, Claimant "states that she is stable with respect to back pain and her left lower leg, foot/ankle pain and CRPS symptoms." Objective findings reveal no obvious changes to range of motion of the left ankle/foot, and no decreased tenderness of the ankle, foot, or lower half of the left leg below the knee. The patient exhibits consistent tender

symptomatic and homeostatic acupoints below the left knee and just proximal to the ankle consistent with previous visits.

24. Claimant testified at hearing. She is 49 years old. She is independent with her home exercise program, warm water therapy, activities of daily living, and she walks without assistive devices. She presents with two main issues in her left lower extremity: orthopedic pain that feels like her foot is broken or a nail is driven up to her shin; and CRPS that manifests with intense pain/burning, temperature and touch sensitivity in her left foot and leg, deep bone pain, muscle spasms, and contractions of her left foot. Claimant cannot wear regular shoes but did wear clogs to court. Claimant has rocker bottom shoes but doesn't wear them because they no longer fit. Claimant wears an air cast that helps resolve her orthopedic pain when she increases her physical activity. Claimant testified that physical therapy/chiropractic care and medication also help with the orthopedic pain and that Dr. Hompland's blocks provide relief for the CRPS. Claimant admitted that her current treatment keeps her medically stable. Nevertheless, Claimant wants Dr. Desai to perform surgery in the hope of resolving her orthopedic pain; an MTP arthrotomy, synovectomy, and debridement of the inner sesamoid interval and possible neurectomy. Claimant first saw Dr. Desai outside the work comp system in 2013. At that time he recommended the same surgery that he recommends now. Claimant clarified that other doctors recommend a fusion surgery but Claimant only wants the court to consider the surgery recommended by Dr. Desai. Claimant understands that all of the doctors, including Dr. Desai, reported that surgery may exacerbate her CRPS.

25. Claimant, a paramedic, was articulate discussing her medical status and symptoms. Claimant described her current condition/symptoms essentially the same as she described her condition/symptoms in a November 4, 2013, pain questionnaire that Claimant prepared for Dr. Raschbacher's Division IME. Specifically, Claimant reported in both instances that she felt Intense unrelenting pain/burning and temperature and touch sensitivity in her left foot and leg, deep aching bone pain, cold intolerance, pain like a vice grip is clamped down on her leg, severe muscle spasms and contractions of her left leg and foot, and difficulty sleeping because the sheets and/or blankets will brush against her foot and set off the pain response. Claimant, however, experienced some difficulty when she attempted to describe how her conditions worsened since MMI. Claimant admitted her sleep pattern remains the same and she gave vague responses regarding any change or worsening of her pain.

26. Dr. Saint-Phard testified at the hearing. Dr. Saint-Phard reviewed medical records, evaluated Claimant, prepared a report dated December 29, 2014, and reviewed additional medical records generated after the December 29, 2014, report. Dr. Saint-Phard agreed with the division Independent medical examiner, Dr. Raschbacher that there is no indication for further surgery. Dr. Saint-Phard opined that Dr. Desai's recommended surgery is not reasonable or necessary and, in fact, is contraindicated for multiple reasons.

- Claimant responded quite well to treatment.

- Her clinical examination reflected an intact neurologic exam to light touch throughout the affected extremity; strength testing was normal in both feet; there was no atrophy in ankle muscles; ankle range of motion was unrestricted.

- Claimant was very functional for someone with CRPS: she is independent with activities of daily living; independent in her home exercise program and warm water therapy; she spends 20 – 60 minutes per day 4-6 times a week exercising; she walks without assistive devices and is close to pain free when she wears the air cast or rocker shoes.

- Surgery is very aggressive treatment and is contraindicated for a patient with CRPS when, as in this case, the patient is quite functional without surgery and when surgery will likely increase Claimant's neuropathic and sympathetically-mediated pain and not provide any improvement in function.

- Also, Dr. Desai's recommended surgery is, in part, exploratory and, as a result, the outcome uncertain.

- Any surgery for this patient is risky; however, Dr. Saint-Phard agreed with Dr. Ocel and Dr. Faro that if Claimant proceeds with surgery, a fusion surgery makes more sense because a fusion will support the foot and take away the pain similar to wearing a steel shank shoe.

Dr. Saint-Phard agreed with Dr. Goldman that Claimant's desire to get back to pre-accident status is not particularly pragmatic or realistic and that, in and of itself, does not support proceeding with surgery. Finally, Dr. Saint-Phard pointed out that surgery in this case is not supported by The Medical Treatment Guidelines that note that surgical interventions should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief. The concept of "cure" with respect to surgical treatment by itself is generally a misnomer. Instead of surgery, Dr. Saint-Phard recommended Claimant continue with her current and successful treatment that includes rocker-bottom shoes and steel-shank shoes, medications, lumbar sympathetic blocks, and therapy.

27. Dr. Saint-Phard testified that Claimant remains at MMI. Dr. Saint-Phard reviewed the medical records at the time of MMI and the medical records generated after MMI and heard Claimant testify in court. Dr. Saint-Phard concluded that Claimant's condition has not changed for the worse since the time of MMI.

28. The ALJ credits the opinions of Dr. Saint-Phard, Dr. Bisgard, Dr. Goldman, and Dr. Raschbacher, that Dr. Desai's recommended surgery is not reasonable or necessary over the opinion of Dr. Desai. The ALJ finds the opinions of Dr. Saint-Phard, Dr. Bisgard, Dr. Goldman, and Dr. Raschbacher to be based on a fuller and more accurate understanding of Claimant's medical situation. Dr. Desai's surgery is unlikely to result in functional gain and there is a real risk of worsening Claimant's CRPS.

Therefore, the ALJ finds the opinions of Dr. Saint-Phard, Dr. Bisgard, Dr. Goldman, and Dr. Raschbacher to be more credible and persuasive than the opinion of Dr. Desai. Claimant has not established by a preponderance of the evidence that Dr. Desai's recommended surgery is reasonable or necessary to cure and relieve the effects of her industrial injury.

29. Claimant's has not established by a preponderance of the evidence that her condition has worsened entitling her to reopening.

30. Dr. Desai is an authorized treating physician as of Dr. Fall's referral on August 13, 2014.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201. A Workers' Compensation case is decided on its merits. § 8-43-201.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

Surgery is not reasonable or necessary.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury or prevent further deterioration of the claimant's condition. § 8-42-101, C.R.S.; *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609, 611 (Colo.App.1995).

Claimant failed to demonstrate that Dr. Desai's recommended surgery is reasonable or necessary. The ALJ credits the opinions of Dr. Saint-Phard, Dr. Bisgard, Dr. Goldman, and Dr. Raschbacher, that Dr. Desai's recommended surgery is not reasonable or necessary and in this case is contraindicated. Specifically, Dr. Goldman concluded that Claimant would not benefit functionally or symptomatically from surgery and that Claimant is at risk for more full blown CRPS should she undergo such procedures. Dr. Bisgard concluded that surgery presents a risk of worsening Claimant's sympathetically mediated pain. Dr. Raschbacher, the Division IME, did not see any indication for further surgery. Dr. Saint-Phard concluded that the surgery recommended by Dr. Desai was not medically reasonable, necessary or indicated because surgery is a very aggressive treatment for Claimant who responded well to non-surgical treatment and that surgery would likely increase Claimant's neuropathic and sympathetically-mediated pain and not provide any improvement in function. Dr. Saint-Phard pointed out that surgery in this case is not supported by The Medical Treatment Guidelines. Also, the ALJ credits Dr. Faro's opinion that Dr. Desai's surgery may not improve Claimant's range of motion and would lead to numbness and balance issues and could worsen the CRPS and credits Dr. Ocel's opinion that Dr. Desai's surgical recommendation may not provide significant relief and could worsen the CRPS. The ALJ credits Dr. Hompland's opinion that Claimant "more closely fulfills the criteria of complex regional pain syndrome, in my opinion, than does she fulfill the criteria of a medial plantar nerve neuritis."

The ALJ finds the opinions of Dr. Saint-Phard, Dr. Bisgard, Dr. Goldman, and Dr. Raschbacher to be based on a fuller and more accurate understanding of Claimant's medical situation. Dr. Desai's surgery is unlikely to result in functional gain and there is a real risk of worsening Claimant's CRPS. Therefore, the ALJ finds the opinions of Dr. Saint-Phard, Dr. Bisgard, Dr. Goldman, and Dr. Raschbacher to be more credible and persuasive than the opinion of Dr. Desai.

The ALJ finds and concludes that Claimant failed to meet her burden of proof and demonstrate that additional surgery proposed by Dr. Desai is reasonable or necessary.

Reopening

Claimant bears "the burden of proof as to any issues sought to be reopened." § 8-43-303(4), C.R.S. 2015; *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008). To warrant reopening of an award on the ground of a "change in condition," a claimant must demonstrate a change in physical or mental condition, and not merely a change in economic condition. *Lucero v. Climax Molybdenum Co.,* 732 P.2d 642 (Colo. 1987). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted as a result of the worsened condition. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Claimant failed to meet her burden of proof and demonstrate that her condition worsened or that her case should be reopened.

Claimant filed a Petition to Reopen due to an alleged “change in medical condition” supported by Dr. Desai’s medical records. Dr. Desai’s records, however, do not reflect any change in treatment recommendations. Dr. Desai’s proposal for surgery was initially made at or before Dr. Raschbacher’s November 4, 2013, Division IME and Dr. Desai’s recommendation has not changed since.

Likewise, Claimant’s condition/symptoms remain stable. On November 4, 2013, Claimant completed a pain questionnaire as part of the Division IME performed by Dr. Raschbacher. Claimant, a paramedic, was very well spoken regarding her medical status and symptoms. Claimant’s description of her condition at hearing was essentially the same as her description of her condition in the November 4, 2013, pain questionnaire. In both instances, Claimant reported that she felt Intense unrelenting pain/burning and temperature and touch sensitivity in her left foot and leg, deep aching bone pain, cold intolerance, pain like a vice grip is clamped down on her leg, severe muscle spasms and contractions of her left leg and foot, and difficulty sleeping because the sheets and/or blankets will brush against her foot and set off the pain response. Also, Claimant admitted that her current treatment keeps her medically stable. Claimant experienced some difficulty when she attempted to describe how her conditions changed for the worse since maximum medical improvement. Claimant admitted her sleep pattern remains the same and she gave vague responses regarding any change or worsening of her pain. Claimant did not credibly testify that her condition changed for the worse.

Other medical records support that Claimant’s condition remains stable or improved. On April 2, 2014, Dr. Hompland reported that Claimant spends 20 – 60 minutes per day 4-6 times a week exercising. On June 23, 2014, Dr. Desai noted that Claimant “is doing functionally okay, pretty much at baseline.” On June 17, 2015, Chiropractor Jason Gridley reported Claimant “is doing quite well” and reported very good response to the sympathetic block for her low back pain and lower leg pain. On September 9, 2015, Claimant returned from vacation; she was active on vacation which improved her mobility for low back as well as her lower leg and Claimant responded well/favorably to her last visit with decreased pain and spasm in the low back as well as the left lower leg below the knee and she felt the last sympathetic block had been quite effective. On December 7, 2015, Claimant “states that she is stable with respect to back pain and her left lower leg, foot/ankle pain and CRPS symptoms.” Objective findings revealed no obvious changes to range of motion of the left ankle/foot, and no decreased tenderness of the ankle, foot, or lower half of the left leg below the knee. The patient exhibited consistent tender symptomatic and homeostatic acupoints below the left knee and just proximal to the ankle consistent with previous visits. The ALJ credits the opinion of Dr. Saint-Phard who credibly reported and testified that that

Claimant’s condition has not changed for the worse since the time of MMI and that Claimant remains at MMI.

Claimant briefly mentioned symptoms in her back, knee, pelvis, and hip. Claimant did not meet her burden of proof that these conditions were related to the work injury or that they worsened. Dr. Raschbacher, the Division IME, concluded “there is no other ratable impairment including at the back, knee, pelvis, hip or elsewhere. The medical record simply does not support there being clear evidence of work-related injury other than at the left foot.” Claimant may not circumvent Dr. Raschbacher’s determination of relatedness or non-work relatedness of her back, knee, pelvis, hip or elsewhere at this time. Dr. Saint-Phard agreed that Claimant’s knee and back conditions are “not at all related to her left toe injury.” On February 23, 2015, Dr. Fall agreed that Claimant’s left knee and low back conditions are not at all related to her left toe injury.

The ALJ finds and concludes that Claimant failed to meet her burden of proof and demonstrate that her conditions changed for the worse and the claim should reopen.

Authorized Provider

Pursuant to C.R.S. §8-43-404(5), the employer /insurer has the right at the first instance to select the physician who attends the injured worker. Further, pursuant to C.R.S. §8-43-404(7), an employer/insurer is not liable for treatment unless treatment has been prescribed by an authorized treating physician or an emergency situation occurs.

In this case, Claimant treated with Dr. Desai outside of the workers’ compensation system until August 13, 2014, when Dr. Fall referred Claimant to Dr. Desai. Respondents are not liable for treatment provided by Dr. Desai prior to August 13, 2014.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for an MTP arthrotomy, synovectomy, and debridement of the inner sesamoid interval and inspection of the dorsal sensory nerve surgery recommended by Dr. Desai is denied.

2. Claimant's request to reopen her claim is denied.

3. Respondents are liable for treatment provided by Dr. Desai after Dr. Fall's August 13, 2014, referral.

4. Issues not expressly decided herein are reserved to the parties for future determination.

5. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 4, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues addressed by this decision involve Claimant's entitlement to medical benefits. The questions to be answered include:

I. Whether Claimant produced clear and convincing evidence to overcome Dr. Sollender's Division IME opinion that Claimant reached MMI on March 9, 2015.

II. Whether Claimant's claim should be reopened based on an alleged worsening of condition related to Claimant's January 8, 2013 industrial injury.

III. Whether Claimant's need for additional surgery should be authorized as maintenance care, in the event that re-opening is denied, on the grounds that the additional surgery recommended by Dr. Phillip Marin is reasonable, necessary and related to Claimant's industrial injury.

FINDINGS OF FACT

Based upon the evidence presented, including the hearing testimony of Claimant and the deposition testimony of Dr. Larson the ALJ enters the following findings of fact:

1. Claimant sustained a compensable work injury to his right hand on January 8, 2013, while employed with Bridgestone Retail Tire Operations after being bitten by a large dog.

2. Claimant's attending treating physician ("ATP") for the claim is Daniel Olsen, M.D., who works as a physician at the Centers for Occupational Medicine.

3. Claimant underwent three surgical procedures to treat the effects of his work injury. All three surgeries were performed by Dr. Phillip Marin.

4. Dr. Marin requested authorization for a fourth surgery to include operative exploration of the dorsal fifth CMC region for debridement of the joint as necessary, synovectomy, and possible neuroma excision.

5. Respondents requested an opinion from Dr. Wallace Larson, to determine whether this fourth surgery was reasonable, necessary and related to the work injury. Dr. Larson had examined claimant at Respondents request on June 17, 2014, less than a month before Dr. Marin's request for surgery. Dr. Larson noted that the back of claimant's right hand was still very sensitive.

6. Dr. Larson issued a report on August 11, 2014, in which he opined that any additional surgeries would be unlikely to help claimant's pain and limitation. Dr. Larson also concluded that there was no indication that a specific correctable condition had been identified and any additional surgery would not be beneficial to relieving or curing the effects of the industrial injury. In addition to the procedure recommended to address Claimant's right ring and little finger/CMC symptoms, due to suspected neuroma, Dr. Larson recommended against carpal tunnel release surgery based upon borderline EMG/NCV test results and lack of carpal tunnel symptoms.

7. Respondents filed an Application for Hearing, asserting that Dr. Marin's request for the fourth surgery was not reasonable, necessary and related to the industrial injury.

8. The parties proceeded to hearing on December 4, 2014, in Pueblo, to determine whether the requested surgery was reasonable, necessary and related to the work injury. ALJ Donald Walsh presided at the December 4, 2014 hearing.

9. ALJ Walsh issued his Findings of Fact, Conclusions of Law and Order on January 8, 2015. The undersigned ALJ adopts and incorporates the findings of fact set forth in ALJ Walsh's January 8, 2015 herein.

10. In denying and dismissing Claimant's request for the recommended surgery, ALJ Walsh concluded that the requested procedure was not reasonable or necessary. ALJ Walsh noted that Claimant had already undergone three surgeries by Dr. Marin and despite those procedures his condition continued to worsen. According to ALJ Walsh, another surgery, which posed a high risk of increasing Claimant's pain and suffering, was not reasonable or necessary medical treatment. ALJ Walsh found the medical opinions of Dr. Larson more credible and persuasive than medical opinions to the contrary. He also concluded that Dr. Marin ignored the recommendations of Dr. Sachar that no further surgery was indicated.

11. Following that December 4, 2014 hearing, Claimant continued to undergo medical treatment from his ATP, Dr. Daniel Olson. Respondents' expert, Dr. Larson, determined that Claimant was at MMI on June 17, 2014. Consequently, Respondents filed a Notice and Proposal for a twenty-four (24) month Division IME. The Application for a twenty-four (24) month Division IME was submitted on January 14, 2015.[1]

12. The Division exam with Dr. Sollender took place on May 19, 2015. During the Division exam, Dr. Sollender offered Claimant a trial anesthetic injection to see if further intervention would be curative in relieving Claimant's alleged ongoing right hand/wrist pain. The trial injection did not provide the degree of relief Dr. Sollender would have

[1] While Claimant endorsed the issue of whether Respondents were entitled to a 24 month Division IME for hearing, he did not make that argument in his opening statement, did not present evidence on the issue at hearing and did not raise the issue in his post-hearing position statement. Consequently, the undersigned ALJ finds that Claimant has not met his burden of proof on the issue of whether Respondents were entitled to a 24 month DIME in the first instance.

anticipated if his condition was purely from a neuroma. Physical examination also reveled a negative Tinel's test over the right median and ulnar nerve at the wrist, negative median nerve compression tests of the wrists bilaterally and no evidence of thenar or hypothenar wasting. Dr. Sollender agreed that Claimant had reached MMI. He assigned an MMI date of March 9, 2015. As Claimant reported only a 20% reduction in pain after the anesthetic injection, Dr. Sollender opined that it would be more than just a neuroma causing him pain. Dr. Sollender went on to state that while he had previously considered that burying the nerve would be advisable, the results of the trial injection changed his opinion. Accordingly, Dr. Sollender agreed that any further surgery would not likely improve his condition.

13. Dr. Sollender assigned a 28% hand impairment, which converts to a 25% upper extremity impairment. He also provided 2% upper extremity impairment for ulnar nerve sensation and another 4% upper extremity impairment for his wrist.

14. Dr. Sollender did not address Claimant's need for additional maintenance medical treatment for the work injury.

15. Subsequent to the Division examination, Respondents filed a Final Admission of Liability (FAL) based on the Division examiner's recommendations and permanent impairment ratings. The FAL was filed December 7, 2015.

16. Claimant filed an Application for Hearing on August 26, 2015 endorsing the following issues: medical benefits, reasonable and necessary medical treatment, disfigurement, permanent total disability benefits, Grover medical benefits, worsening of condition, claimant may no longer be at MMI, overpayment, and whether Respondents were entitled to a 24 month Division IME. Subsequent applications for hearing were filed on September 25, 2015 and October 28, 2015 specifically requesting authorization for a fourth surgery. As a consequence of Claimant's objection to Respondents' December 7, 2015 FAL and request for hearing, the ALJ finds that the claim has never closed.

17. Dr. Marin authored a report dated February 9, 2016. In this report he again recommends further surgery. Specifically, Dr. Marin noted:

> He also has had progressively worsening pain in the small finger CMC joint, which appeared to be progressively more sensitive and consistent with traumatic arthropathy from the crush injury. Due to his persistent symptoms I do recommend performing the carpal tunnel procedure as the crush injury could lead to subsequent carpal tunnel syndrome and neuritis which may give him some pain relief in the wrist and hand region as well as transection of the dorsal sensory branch of the ulnar nerve and bearing (*sic*) the stump and muscle as described by A. Lee Dellon for treatments of neuroma in his nerve surgery textbook.

18. As noted, Dr. Marin indicated that the contemplated fourth surgery would include

a full resection of the nerve. He previously did not recommend a full resection because he wanted to preserve sensation. However, Dr. Marin now indicates that he would bury the entire nerve into the muscle which would result in permanent numbness and pain relief.

19. Dr. Marin commented on the difference in the previously recommended surgery denied by ALJ Walsh and the recommended surgery currently at issue. Regarding the difference, Dr. Marin noted that the he performed a more "conservative initial procedure" because complete transection of the dorsal sensory nerve would have resulted in complete numbness of the dorsal surface of the ulnar portion of the hand.

20. The ALJ finds Dr. Marin's current request for a fourth surgery more aggressive than that which he recommended previously. Presently, the surgical goal is to effectuate the complete loss of sensation in the ulnar portion of the hand, including the CMC joint of the little finger encompassing the area of Claimant's greatest degree of subjective complaint.

21. As noted the Division IME specifically disagrees with Dr. Marin's request for a fourth surgery. In his June 29, 2015 DIME report, Dr. Sollender opines:

> While I had earlier considered that burying the nerve would be advisable, when the results of a trial injection was considered, it changed my opinion on treatment. I would not recommend nerve resection and burying the nerve ending of the dorsal branch of the ulnar nerve, as I do not think it will be curative or helpful in his recovery. His pain is from other factors that are not easily defined or identifiable. I agree, therefore, with Dr. Larson that further surgery will not likely improve his condition."

22. Dr. Larson testified via deposition on February 24, 2016. His testimony is consistent with his prior reports that Claimant is at MMI and requires no further surgery. Dr. Larson explained that Claimant's problems did not appear to primarily be coming from a neuroma or the nerve that was suspected by Dr. Marin. Instead, he explained that Claimant's pain was multifactorial and not fully explained. Careful review of the medical records submitted fails to establish that Dr. Marin addressed ALJ Walsh's concern at hearing regarding the true source of Claimant's ongoing pain. Consequently, the ALJ shares ALJ Walsh's expressed concern that Dr. Main has not identified with specificity that Claimant's pain is emanating from the 5th CMC joint.

23. Dr. Larson testified that Claimant is at MMI and no further surgery is necessary. He indicated that the surgery would not be expected to help Claimant's condition and instead would put the claimant at risk of further complications and additional pain. Indeed, in the face of failed symptom relief following three surgeries, Claimant was treated with injection therapy and the specter of a diagnosis of type II CRPS was raised by Dr. Leggett, a chronic pain specialist.

24. Dr. Larson's testimony is consistent with the opinions provided by Dr. Sollender

as expressed in his Division IME report. Dr. Larson indicated that any contrary medical opinions would simply be a difference of opinion between providers.

25. Dr. Larson's opinions were also consistent with Dr. Sachar's reports. Specifically, with Dr. Sachar's opinion that no further surgeries were indicated after Claimant's first procedure was completed.

26. While the undersigned ALJ finds that the January 8, 2015 Order of ALJ Walsh does not specifically address Claimant's entitlement to carpal tunnel surgery, the January 8, 2015 order was not appealed. Moreover, careful review of the evidence presented persuades the ALJ that the recommended carpal tunnel release procedure is not currently reasonable or necessary. To the contrary, the ALJ credits Dr. Larson's opinion to find that the results of Claimant's electrodiagnostic study and his physical examination do not support proceeding with a fourth surgical procedure in a gentleman whose symptoms worsened following three prior procedures and for whom a diagnosis of Type II CRPS was been raised.

27. Claimant did not present live medical testimony to rebut the conclusions reached by Dr. Sollender in his Division IME report or by Dr. Larson's in his deposition testimony. Claimant's contrary opinions regarding the source of his pain and the necessity and reasonableness of additional surgery are not convincing. While Claimant subjectively reports worsening pain, the record evidence submitted fails to support that assertion. Rather, the record evidence presented supports a continued belief in Claimant that his pain, which is likely mutifactorial in nature and which has failed to respond to three prior surgeries, will respond to forth surgery.

28. Dr. Larson's opinions are credible and consistent with the facts and evidence in this case.

29. Dr. Sollender's opinions concerning MMI and claimant's need for additional surgery are credible, persuasive and supported by the record evidence presented to him for consideration during his DIME.

30. Claimant has failed to demonstrate, by clear and convincing evidence, that Dr. Sollender's opinion that Claimant reached MMI on March 9, 2015 was highly probably incorrect. Accordingly, Claimant has failed to overcome Dr. Sollender's MMI determination.

31. Based upon a totality of the evidence presented, the ALJ finds the opinions of Drs. Larson and Sollender concerning the reasonableness and necessity of the proposed amended forth surgery more credible and persuasive than opinions to the contrary.

32. Claimant has failed to establish, by a preponderance of the evidence, that the proposed surgery, specifically transection of the dorsal branch of the ulnar nerve and carpal tunnel surgery is reasonable and necessary to cure and relieve him from the effects of his industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME Opinion of Dr. Sollender Regarding MMI

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). The instant case involves complex medico-legal questions regarding Claimant's MMI status in light of Dr. Marin's recommendation for additional surgery. As found here, the persuasive evidence supports Dr. Sollender's MMI determination as expressed in his Division IME report. Specifically, the Division IME opinion that Claimant reached MMI and does not require additional surgery is supported by the following:

- The Division IME physician is a respected hand surgeon and does not believe that the procedure would be helpful based upon objective measures, including his physical examination;

- Dr. Sachar (another hand surgeon) opined that Claimant should not proceed with any further surgeries after Dr. Marin's first procedure was completed. His opinion has been borne out and supported by the fact that Claimant continues to report worsening pain despite two additional procedures;

- Another hand surgeon (Dr. Larson) also opined that Claimant is at MMI and another surgery would not be helpful. As a result, three different surgeons would not recommend additional surgical procedures;

- Both the Division IME and Dr. Larson have found that claimant's pain is not significantly caused by a neuroma so Dr. Marin's request to bury the nerve will not work;
- A diagnostic injection has proven that Claimant's pain is not significantly caused by a neuroma and Claimant failed to offer any credible/convincing evidence to dispute that fact.

To the extent that Claimant's and/or Dr. Marin's opinions concerning MMI diverge from those expressed by Dr. Sollender and Dr. Larson, the ALJ concludes that those divergences constitute a professional difference of opinion. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Consequently, Claimant has failed to prove that Dr. Sollender's opinion regarding MMI was highly probably incorrect.

Reopening of the Claim and Claimant's Entitlement to Additional Medical Benefits

G. Pursuant to § 8-43-303 (1) C.R.S., a claim may be reopened based on a change of condition which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The burden to prove that a claim should be reopened rests with the Claimant to demonstrate that reopening is warranted by a preponderance of evidence. Pursuant to §8-43-303(1), C.R.S., a "change of condition" refers to a "change in the condition of the original compensable injury or a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). Reopening may be appropriate where the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000); *Brickell v. Business Machines, Inc.*, 817 P.2d 536 (Colo. App. 1990) (reopening is appropriate if additional benefits are warranted). Regardless, the record evidence presented persuades the ALJ to find and conclude that this claim has never closed, rendering the need to "reopen" it for additional medical treatment contrary to the procedural posture of the claim and unnecessary. Rather, the ALJ finds the questions presented concerning Claimant's entitlement to medical benefits are whether, based on Claimant's assertions of worsening symptoms, he is at MMI and if not, whether he is entitled to additional reasonable, necessary and related medical treatment to cure and relieve him from the effects of his industrial injury or if Claimant is at MMI, whether he is entitled to maintence treatment which is designed to relieve the effects of the injury or to prevent deterioration of Claimant's present condition. As the found, Claimant has failed to establish that Dr. Sollender's opinion regarding MMI is highly probably incorrect. Consequently, the ALJ finds/concludes that Claimant is at MMI. Thus the issue concerning Claimant's entitlement to additional medical treatment becomes a question of whether Dr. Marin's recommendation for additional surgery is properly considered maintence treatment.

H. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the court stated that the ALJ should enter "a general order, similar to that described in *Grover*."

I. Nevertheless, *Grover* provided, "[B]efore an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." While claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment, claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). Here, Claimant argues that the fourth amended surgical recommendation by Dr. Marin is maintenance in nature. The ALJ is not persuaded. Rather, the evidence presented persuades the ALJ that the fourth surgery is curative care to relieve Claimant's alleged ongoing pain. It is not a minimal maintenance type procedure. Moreover, even if the fourth surgery recommended by Dr. Marin could be properly deemed maintenance medical care, Claimant failed to prove, by a preponderance of evidence, that performing the recommended surgery is reasonable and necessary. As detailed above, three different hand surgeons have indicated that the procedure is not recommended. As noted in the January 8, 2015 order of ALJ Walsh, "[i]t is clear that Claimant has some type of pain problems. However, any operation in that area tends to trigger some very aggressive pain responses and will make the pain worse." Although, the surgery is designed to transect the nerve and result in complete loss of sensation, the ALJ concludes, consistent with Dr. Larson's opinion that additional surgery will cause more adjacent scar tissue and more irritation to the surrounding nerves which will likely result in reduced motion of the tendons and increased stiffness and pain in an injured worker who has had aggressive pain responses to three prior surgeries prompting injection therapy and consideration for a diagnosis of Type II CRPS. The credible evidence is that the requested surgical procedure is not reasonable and necessary. Consequently and consistent with the prior conclusion of ALJ Walsh, Claimant has failed to prove that he is entitled to a fourth surgical procedure as ongoing medical maintenance treatment.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside Dr. Sollender's opinion regarding MMI is denied and dismissed.

2. Claimant's request for medical benefits, including a forth surgery recommended by Dr. Marin is denied and dismissed as Claimant failed to prove that the recommended treatment is reasonable or necessary to cure or relieve Claimant from the effects of his industrial injury or designed to maintain Claimant at MMI.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 11, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained functional impairment beyond the arms at the shoulders so as to justify conversion of his scheduled impairment ratings to a whole person impairment rating?

- Did Claimant prove by a preponderance of the evidence that he is entitled to a general award of ongoing medical benefits after maximum medical improvement?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 through 20 were admitted into evidence. Respondents' Exhibits A through J were admitted into evidence.

2. On April 23, 2013 Claimant sustained admitted injuries to both of his shoulders. The injuries occurred when Claimant fell from a ladder and tried to stop his fall by grabbing onto the ladder with both hands.

3. The left shoulder injury was diagnosed as a comminuted fracture of the greater tuberosity of the humerus, a Bankart lesion of the anterior inferior labrum, multiple glenoid labral tears and high-grade tears of the left supraspinatus and subscapularis tendons. Claimant underwent conservative treatment for these injuries and no surgery was ever performed.

4. The right shoulder injury was diagnosed as a torn rotator cuff.

5. On November 11, 2013 Claimant received a prescription for a left shoulder brace. The diagnoses for the brace were listed as fracture of the left greater tuberosity and "chronic" subluxation. At hearing Claimant described the brace as made of cloth that wraps around the entire shoulder as well as his ribs and both sides of his neck.

6. On November 15, 2013 Joseph Hsin, M.D. performed surgery to repair the torn right rotator cuff. The procedure was described as a right glenohumeral arthroscopy with limited debridement, right shoulder subacromial arthroscopy, acromioplasty and decompression and arthroscopic rotator cuff repair. During surgery Dr. Hsin noted Claimant had a "full-thickness supraspinatus tear right near the biceps."

7. The April 23, 2013 injury also caused a tear of the right distal biceps tendon. Dr. Hsin surgically repaired this tear on May 16, 2013.

8. Dr. Hsin examined Claimant on March 3, 2014. Dr. Hsin noted Claimant was 5 months out from rotator cuff surgery and was making "slow progress" in rehabilitation. Dr. Hsin described Claimant's shoulder range of motion (ROM) as "acceptable at this point post operatively." Dr. Hsin also reported that the Claimant's left shoulder was "slowly improving." Dr. Hsin recommended Claimant "be weaned to a home program of strengthening." Dr. Hsin opined Claimant "likely will need permanent restrictions."

9. On May 5, 2014 authorized treating physician (ATP) Lloyd Thurston, D.O., of Arbor Occupational Medicine (Arbor) placed Claimant at maximum medical improvement (MMI). On May 5 Claimant told Dr. Thurston that he could only tolerate 4 hours of work per day, was very limited and could not lean on the left upper extremity because it felt as though the left shoulder would dislocate. Dr. Thurston imposed permanent restrictions of a maximum 10 pounds lifting using both arms, repetitive lifting of 5 pounds using both arms, and carrying /pushing/ pulling 15 lbs. with both arms. Dr. Thurston further stated that Claimant cannot reach overhead and cannot reach away from his body. Dr. Thurston assessed 10% impairment of the right upper extremity based on reduced ROM. The right upper extremity impairment rating converted to 6% whole person impairment. Dr. Thurston assessed 33% impairment of the left upper extremity based on reduced ROM and "moderate" joint crepitus. The left upper extremity impairment rating converted to 20% whole person impairment. Combining the left and right whole person impairments Dr. Thurston assessed an overall whole person rating of 25%. Dr. Thurston stated that he had "not asked for medical maintenance care."

10. On August 5, 2014 Claimant underwent a Division-sponsored independent medical examination (DIME) performed by Scott Hompland, D.O. Dr. Hompland noted Claimant completed a pain diagram showing that he had burning, aching and pins and needles with an arrow pointed to the right shoulder and aching, throbbing and numbness with an arrow directed to the left shoulder. Claimant reported his best pain level was 2 on as scale of 10 (2/10) and the pain would go to 6/10 "with anything that takes the elbows away from his sides, especially pulling or pushing."

11. Dr. Hompland agreed with Dr. Thurston that Claimant reached MMI on May 5, 2014. Dr. Hompland explained that Claimant's right biceps and right rotator cuff repair had stabilized and that "it was agreed by all parties that he is not a candidate for left shoulder surgery with the understanding that this would most likely make his general condition and functional recovery worse." Dr. Hompland added that "it may be determined in the future that [Claimant] needs surgery on his left shoulder" and that Claimant could "re-visit this through his maintenance care with the assistance of his attorney."

12. Dr. Hompland assessed 8% impairment of the right upper extremity based on reduced ROM. The right upper extremity impairment rating converted to 5% whole

person impairment. Dr. Hompland assessed 17% impairment of the left upper extremity based on reduced ROM and “moderate” joint crepitus. The left upper extremity impairment rating converted to 13% whole person impairment. Combining the left and right whole person impairments Dr. Hompland assessed an overall whole person rating of 17%.

13. On December 2, 2014 Insurer filed a Final Admission of Liability (FAL). The FAL admitted liability for permanent partial disability (PPD) benefits based on Dr. Hompland’s scheduled upper extremity impairment ratings and denied liability for medical treatment after MMI.

14. Claimant testified that in May 2015 he was at work when he reached for something and experienced pain and swelling in the area of his left lower ribs. These symptoms occurred in the same area where the shoulder brace wraps around his trunk. Claimant testified that he talked to someone at the Insurer who referred him to Arbor for treatment of this problem. Claimant went to Arbor and expected to see Dr. Thurston. However, Dr. Thurston was no longer working at Arbor.

15. On May 8, 2015 Claimant went to Kaiser Permanente (Kaiser) where he was seen by Adam Carewe, M.D. Claimant complained of left shoulder pain, kidney pain and “flank” pain. Claimant explained his left shoulder was still “bothersome” despite the fact he had been placed at MMI for the “workers comp case.” Claimant also explained he wore a left shoulder brace in order to prevent the left shoulder from subluxing. The left flank pain was below the strap for the shoulder brace.

16. On May 8, 2015 Dr. Carewe authored a “to whom it may concern” letter. Dr. Carewe opined that Claimant’s left flank pain represented a “superficial musculoskeletal injury likely caused from compression of the shoulder strap around his upper waist.” Dr. Carewe stated he was “limited” in what he could do since this injury was likely caused by “the shoulder bracing as part of” Claimant’s workers’ compensation case.

17. On May 19, 2015 Claimant reported to Arbor where he was examined by PA-C Paul Springer. Claimant gave a history that on May 8 he was at work “on the floor doing some work under a desk” when he experienced pain in the left side of his rib cage. Claimant reported that the pain was “aggravated by a brace he is supposed to wear for his shoulder.” PA-C Springer’s impression was “may be a bruised rib.” PA-C Springer commented that he could not tell if the irritation on the left side was “partially caused by the brace or not. PA-C Springer stated physical therapy was to look at the brace to “see if they can do some adjustment.”

18. On May 21, 2015 Claimant returned to Arbor where he was examined by Sander Orent, M.D. Dr. Orent completed a Physician’s Report of Worker’s Compensation Injury (M 164) and listed the date of injury as May 8, 2015. The M 164 stated that Claimant was referred to “Dr. Gottlob” for a consultation. Claimant was also referred for 2 weeks of PT. Dr. Orent placed a check next to a box indicating that the date of MMI was unknown, but the handwriting next to this box is illegible.

19. Dr. Orent saw the Claimant again on June 16, 2015. Dr. Orent stated he was examining the Claimant “regarding [the] claim from 4/23/13.” In the office note Dr. Orent noted that Arbor had received a “denial” of the request for Claimant to consult with Dr. Gottlob. Dr. Orent stated that he mistakenly submitted the request for the consultation under the May 8, 2015 date of injury rather than the April 23, 2013 date of injury. Dr. Orent explained that Claimant continued to have “an unstable shoulder” that was “subluxing” and that Dr. Orent wanted Dr. Gottlob to examine Claimant under the April 2013 claim. Dr. Orent also placed Claimant at MMI for the May 8, 2015 injury because Claimant’s symptoms of chest pain and ribcage discomfort had completely resolved.

20. At hearing Claimant testified that he desires “maintenance treatment” for his left shoulder.

21. Claimant explained that he never saw Dr. Gottlob and has not seen Dr. Orent since June 2015.

22. On December 22, 2015 Anjmun Sharma, M.D., performed an independent medical examination (IME) of the Claimant. The IME was performed at the request of Respondents. Dr. Sharma is level II accredited and board certified in family medicine. Dr. Sharma took a history from Claimant, reviewed pertinent medical records and performed a PE.

23. In the IME report Dr. Sharma commented that Claimant was “uncooperative” with ROM measurements. Consequently, Dr. Sharma adopted Dr. Hompland’s ROM measurements. Dr. Sharma opined the no whole person impairment rating should be assigned for the Claimant’s shoulder injuries. With respect to the right shoulder Dr. Sharma stated that Claimant underwent successful right shoulder surgery and has “good” ROM with “no complaints.”

24. With regard to the left shoulder Dr. Sharma opined Claimant was “symptom focused.” Dr. Sharma further opined the Claimant’s pain was “focused in the shoulder itself and in the upper extremity and not proximal to the glenohumeral joint.” Dr. Sharma further started that there is “no impairment for physical dysfunction in either of the proximal glenohumeral joints.”

25. Dr. Sharma was asked to comment on whether he believes Claimant needs any “maintenance medical care” as a result of the industrial injury. Dr. Sharma commented that Claimant had been using the left shoulder brace and his ROM is “somewhat better.” Dr. Sharma recommended Claimant continue using the brace for one to two years. Dr. Sharma recommended Claimant be given a gym membership to strengthen the left shoulder. Dr. Sharma opined Claimant’s left shoulder is “stable” and does not require surgery. Dr. Sharma opined that any treatment having to do with Claimant’s preexisting rheumatoid arthritis (RA) “needs to be outside the comp system” because RA is an “erosive degenerative arthritis.”

26. Ronald Swarsen, M.D., was retained by the Claimant to review medical records and offer testimony at the hearing. Dr. Swarsen practices occupational medicine and is level II accredited. Dr. Swarsen did not conduct a PE of Claimant.

27. Dr. Swarsen testified that the “shoulder” is not the “arm.” He explained the “arm” begins at the head of the humerus and is located distal to the glenohumeral joint. Dr. Swarsen stated the scapula and clavicle are parts of the “shoulder girdle” which is located “above” the arm. Dr. Swarsen opined the “shoulder girdle” forms the “scaffold” that allows the arm to articulate.

28. Dr. Swarsen reviewed the operative reports and other medical records pertinent to Claimant’s right shoulder injury. Dr. Swarsen explained that the right shoulder surgery performed by Dr. Hsin involved repair of the distal end of the supraspinatus tendon. Dr. Swarsen interpreted the operative report to mean that the tendon was debrided and surgically reattached to a groove in the greater tuberosity of the humerus. Dr. Swarsen explained that anatomically the distal end of the supraspinatus tendon is located “over the top of” and perhaps partially distal to the glenohumeral joint. He further explained the supraspinatus tendon is attached to the supraspinatus muscle that originates on the back of the scapula. Dr. Swarsen explained that the acromioplasty involved surgical removal of a part of the acromion in order to provide more space for the tendon to “glide” and to avoid future problems. He explained the acromioplasty occurred above the glenohumeral joint.

29. Dr. Swarsen opined that Dr. Hompland’s right upper extremity impairment rating should be converted to the equivalent whole person impairment rating because all of the functional problems involving Claimant’s right shoulder are located above the glenohumeral joint. On cross-examination Dr. Swarsen opined the “functional impairment” of the right upper extremity consists of discomfort and pain in the muscles of the shoulder girdle. He explained that the pain and discomfort in these muscles has reduced the ability of the shoulder girdle to move the right arm.

30. Dr. Swarsen reviewed the medical records pertinent to Claimant’s left shoulder injury. Dr. Swarsen noted the injury caused a fracture of the greater tuberosity of the humerus and a dislocation of the humerus. Dr Swarsen explained the fracture of the humerus was an injury to the left arm. Dr. Swarsen also opined there were injuries to structures above the left glenohumeral joint consisting of the following: (1) Rotator cuff tears of the subscapularis and supraspinatus tendons; (2) Bankart lesion described as injury to the anterior inferior glenoid labrum; (3) Multiple labral tears.

31. Dr. Swarsen opined to a reasonable degree of medical probability that Dr. Hompland’s left upper extremity impairment rating should be converted to the equivalent whole person impairment rating. Dr. Swarsen explained Claimant has poor function of the left shoulder that is consistent with the degree of injury to the shoulder. Dr. Swarsen explained that the Bankart lesion causes instability of the shoulder and creates the sensation that the arm will dislocate.

32. Dr. Swarsen opined that the condition of Claimant's left shoulder should be "monitored" because Claimant uses a shoulder brace for stability. Dr. Swarsen opined the use of the brace is "consistent" with the degree of injury to the left shoulder, particularly the Bankart lesion. Dr. Swarsen noted that Claimant's use of the brace should be monitored because braces tend to wear out and need to be replaced.

33. Dr. Sharma testified at the hearing. Dr. Sharma explained that RA is a severe degenerative and erosive condition that affects the synovium or soft tissue around the joints. RA can also affect the joints themselves, particularly the hands and feet.

34. Dr. Sharma testified that at the time of the IME Claimant complained of pain in both shoulders and that the left was worse than the right. Claimant indicated he had pain in the area between his neck and the outer part of the shoulders. Claimant was also wearing a "bulky" left shoulder brace and reported that the brace gave him a feeling of stability.

35. Dr. Sharma opined that at the time the April 2013 injury there was evidence Claimant already had arthritis in his shoulders. In support of this statement Dr. Sharma cited a right shoulder MRI that was performed in September 2013. According to Dr. Sharma the MRI depicted osteoarthritis and a prominent acromion without a labral tear. Dr. Sharma explained the MRI findings were suggestive of impingement of the subacromial space, which was likely a congenital condition.

36. Dr. Sharma testified to a reasonable degree of medical probability that Claimant has no "functional impairment" proximal to the right glenohumeral joint. In support of this opinion Dr. Sharma testified that Claimant underwent a subacromial decompression to relieve the effects of the acromion impinging on the supraspinatus tendon. Dr. Sharma stated that this surgery occurred between the acromion and the humeral head. He further opined that the subacromial decompression and the relief of the compression occurred distal to the glenohumeral joint, as did the supraspinatus tendon repair. Dr. Sharma noted good ROM on the right although he admitted there was some ROM impairment.

37. Dr. Sharma testified to a reasonable degree of medical probability that Claimant has no "functional impairment" proximal to the left glenohumeral joint. Dr. Sharma noted that during the examination of the left upper extremity Claimant exhibited "pain behaviors" such as holding onto the shoulder, complaining about pain and exhibiting very limited ROM. Dr. Sharma explained Claimant suffered a fracture of the humeral head that is clearly distal to the glenohumeral joint. Dr. Sharma opined that the fracture of the humeral head is the primary cause of Claimant's left upper extremity pain complaints. Dr. Sharma opined that the Bankart lesion involves the glenohumeral joint "itself."

38. Dr. Sharma testified that on examination of Claimant he did not find any functional impairment to muscles or other "structures" proximal to the glenohumeral joints. He further testified he did observe note any atrophy of the shoulder muscles.

39. Dr. Sharma testified that Claimant should discontinue use of the left shoulder brace. Dr. Sharma explained that typically a brace is used as a temporary measure to immobilize the shoulder in cases of a bone fracture or after surgery. The brace is then discontinued to prevent atrophy and allow the rotator cuff muscles to strengthen. Dr. Sharma admitted that he did not detect any muscle atrophy on PE of the claimant.

40. Dr. Sharma testified that Dr. Hompland's statement that in the future the Claimant may need surgery on the left shoulder and that this could be addressed through his "maintenance care" was reasonable. Dr. Sharma further testified that Dr. Hompland's statement regarding surgery appears to "assume" that maintenance care will be granted and that Dr. Hompland did not appear to recommend any specific maintenance treatment.

41. Dr. Sharma testified that pain is "not necessarily" the same as dysfunction and that pain can't be "rated."

42. At hearing Claimant completed a pain diagram (Claimant's Exhibit 19) to show where he currently experiences symptoms. The Claimant marked the diagram to show that he experiences burning and aching pain from his neck across the top of the right shoulder to the right glenohumeral joint. Claimant also indicated he experiences some "pins and needle" sensations and numbness in this area. Claimant further marked the diagram to indicate he experiences stabbing and aching pain on the top of the left shoulder between the neck and the left glenohumeral joint. Claimant also indicated he experiences some "pins and needle" sensations in this area.

43. Claimant testified as follows concerning the condition of his right shoulder. The shoulder becomes painful if he is required to reach above shoulder level for any length of time. He can carry up to 15 pounds on the right shoulder. He is limited to lifting 15 pounds overhead.

44. Claimant testified as follows concerning the condition of his left shoulder. Pain prevents him from carrying any weight on the left shoulder. He cannot lift objects overhead using the left shoulder because of pain and because the shoulder "dislocates." On average the left shoulder dislocates approximately once per week. Claimant wears a brace for the left shoulder that is meant to pull the shoulder "in and down."

45. Claimant testified that the condition of his shoulders prevents him from performing all of the movements that he could perform before the injury. The restricted movement sometimes affects how he uses tools at work. Claimant explained that the left shoulder is more problematic that the right shoulder. Claimant testified he cannot perform all activities of daily living without assistance from his father or sister. Claimant explained that the problems with the left shoulder require him to get assistance with washing and braiding his hair and when taking a shower.

46. Claimant testified that he needs additional medical treatment for his condition. He explained that he has not seen Dr. Gottlob pursuant to the referral of Dr. Orent, and has not seen Dr. Orent since June 16, 2015. Claimant stated that he believes he needs additional treatment because of ongoing symptoms that sometimes cause him to miss work a period of days.

FINDINGS OF FACT CONCERNING CONVERSION OF EXTREMITY RATINGS TO WHOLE PERSON RATING

47. Claimant proved it is more probably true than not that he sustained functional impairment beyond the arms at the shoulders. Therefore, Claimant proved it is more probably true than not that his upper extremity impairment ratings should be converted to Dr. Hompland's combined whole person impairment rating of 17%.

48. Claimant credibly testified that the industrial injuries of April 23, 2013 have resulted in limitations affecting the use of both his right and left shoulders. Claimant credibly demonstrated through completion of the pain diagram that he experiences pain in the areas between the neck and both shoulders. He credibly explained that this pain contributes to his inability to lift more than 15 pounds overhead or carry more than 15 pounds with the right upper extremity. Claimant also credibly testified he is limited to carrying 15 pounds on top of the right shoulder. Claimant credibly testified that pain and the sensation of "dislocating" renders him unable to lift anything overhead with the left shoulder. He also credibly explained that he cannot carry any weight on top of the left shoulder. Claimant credibly testified that the conditions of his shoulders restricts his ability to perform certain motions as well as limits his ability to perform functions of daily living including washing and braiding his hair and taking a shower.

49. Claimant's testimony is corroborated by the medical restrictions imposed by Dr. Thurston on May 5, 2014. Dr. Thurston imposed restrictions that limit Claimant to carrying no more than 10 pounds with either hand or reaching overhead and away from the body with either hand.

50. Claimant's testimony is also corroborated and supported by Dr. Swarsen's credible and persuasive testimony. Dr. Swarsen credibly explained that the scapula and clavicle are parts of the "shoulder girdle" that form the "scaffold" which allows the arm to articulate.

51. Dr. Swarsen credibly and persuasively opined that Claimant's right shoulder impairment should be converted to whole person impairment because the industrial injury has caused pain and discomfort in the shoulder girdle muscles. This pain and discomfort has in turn reduced the ability of Claimant's right shoulder girdle to move the right arm.

52. Dr. Swarsen credibly and persuasively testified that the arm begins at the humeral head and that the humeral head is "distal" to the glenohumeral joint. Dr. Swarsen persuasively explained that the right shoulder acromioplasty was performed "above" the glenohumeral joint and that the repair of the supraspinatus tendon occurred "over the top of" and partially distal to the glenohumeral joint. The ALJ infers from Dr. Swarsen's testimony that much of the right shoulder surgery was to structures entirely or partially proximal to the humeral head and, therefore, beyond the arm at the shoulder.

53. Dr. Swarsen credibly and persuasively explained that, although the fracture of the humeral head involved an injury to Claimant's left arm, the other injuries occurred above the left glenohumeral joint. The injuries to structures proximal to the glenohumeral joint include the tears of the subscapularis and supraspinatus tendons, the Bankart lesion (tear of the glenoid labrum) and multiple labral tears.

54. Dr. Swarsen credibly and persuasively opined that the injuries beyond the left glenohumeral joint have caused "poor function" of the left shoulder that is consistent with the degree of injury. Dr. Swarsen credibly explained that the Bankart lesion produces the sensation of "instability" which limits Claimant's use of the left upper extremity.

55. Dr. Sharma's opinion that all of Claimant's "functional impairment" is to his arms is not as persuasive as Dr. Swarsen's contrary opinion. Dr. Sharma did not persuasively refute Dr. Swarsen's opinion that the "arm" begins at the humeral head and that most of Claimant's injuries were to structures that are proximal to the glenohumeral joint. While Dr. Sharma argued that repair of the right supraspinatus tendon occurred distal to the arm at the shoulder, he did not deny that the supraspinatus tendon is attached to the supraspinatus muscle that originates at the scapula, well beyond the glenohumeral joint. Dr. Sharma admitted that lost ROM is a form of dysfunction, and does not deny that Claimant has reduced ROM in both shoulders. Dr. Sharma did not deny that pain can produce dysfunction, but skirted the issue by arguing that pain is not "ratable." Of course, as more fully explained below, Claimant's pain in this case constitutes a form of "functional impairment" regardless of whether it is "ratable" under the AMA Guides.

FINDINGS OF FACT CONCERNING POST-MMI MEDICAL TREATMENT

56. Claimant proved by a preponderance of the evidence that future medical treatment will be needed to relieve and/or prevent deterioration of his shoulder conditions.

57. Claimant credibly testified that he continues to experience disabling symptoms and believes he needs additional treatment.

58. Dr. Swarsen credibly opined that Claimant's left shoulder condition should be monitored, particularly in light of Claimant's continued use of the brace. Dr. Swarsen credibly explained that monitoring use of the brace is necessary because braces wear out and need to be replaced. Dr. Swarsen's opinion that Claimant's use of the brace should be monitored is supported by evidence that the brace may have caused a superficial flank injury that was treated by Dr. Carewe in May 2015.

59. Dr. Swarsen's opinion that Claimant's condition should be monitored is also corroborated by the opinion of Dr. Hompland, the DIME physician. Although Dr. Hompland opined that Claimant is not currently a candidate for left shoulder surgery, he suggested that the issue of surgery could be "re-visited" in the context of Claimant's "maintenance care." Dr. Hompland did not explain what specific "maintenance care" he

thinks is appropriate, but the ALJ infers from Dr. Hompland's statement that he believes Claimant's condition should at least be monitored with a view towards determining if surgery may become necessary in the future.

60. Dr. Swarsen's opinion that Claimant should undergo medical monitoring is also corroborated by the opinions and actions of Dr. Orent. Dr. Orent opined in June 2015 that Claimant had a subluxing left shoulder as a result of the April 2013 injury and this condition warranted a referral to Dr. Gottlob.

61. Insofar as Dr. Sharma testified that Claimant should discontinue use of the brace that testimony is not persuasive. Dr. Sharma's testimony contradicts his written opinion in which he stated Claimant should continue using the brace for one to two years. Dr. Sharma also recommended Claimant be given a gym membership to strengthen the left shoulder.

62. Although Dr. Thurston did not recommend post-MMI maintenance treatment, his opinion is outweighed by the opinions of Dr. Swarsen, Dr. Hompland and Dr. Orent.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

CONVERSION OF SHEDULED IMPAIRMENT RATINGS TO WHOLE PERSON RATINGS

Claimant contends that the scheduled impairment ratings for each shoulder should be converted to the whole person ratings found by Dr. Hompland. Specifically, Claimant argues that he established by a preponderance of the evidence that he sustained functional impairment beyond the arm at the shoulder. Relying heavily on the opinions of Dr. Sharma, Respondents contend that Claimant failed to prove he sustained functional impairment beyond the arm of either shoulder. The ALJ agrees with Claimant.

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)." If the claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides the claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.*

Section 8-42-107(2)(a), C.R.S., provides for scheduled compensation based on "loss of an arm at the shoulder." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to medical impairment benefits awarded under § 8-42-107(8)(c). Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs, supra.*

Under the "situs of the functional impairment" test there is no requirement that the functional impairment take any particular form. Functional impairment is not assessed by medical means only but can involve "an overall assessment of the effect the injury has had on the claimant's ability to function in terms of movement and the performance of activities at work and daily living." *Martinez v. Pueblo County Sheriff's Office,* WC 4-806-129 (ICAO December 7, 2011). Therefore, pain and discomfort that limit the claimant's ability to use a portion of the body may constitute functional impairment. *Aligaze v. Colorado Cab Co.,* W.C. 4-705-940 (ICAO April 29, 2009); *Johnson-Wood v. City of Colorado Springs,* W.C. 4-536-198 (ICAO June 20, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. 4-452-408 (ICAO October 9, 2002). Although a physician's impairment rating may be considered in determining the situs of the functional impairment, the AMA Guides' definitions of where the torso ends and the extremity begins are of no consequence in resolving the issue. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System, supra.*

As determined in Findings of Fact 47 through 55, Claimant proved it is more probably true than not that he sustained functional impairment beyond the arms in both shoulders. As found, the ALJ credits Dr. Swarsen's opinion that the arm begins at the head of the humerus, and that the April 2013 accident caused injury to Claimant's "shoulder girdles" located beyond the "arms" of the shoulder. Dr. Swarsen credibly and persuasively opined that Claimant's right shoulder impairment should be converted to whole person impairment because the industrial injury has caused pain and discomfort in the shoulder girdle muscles. This pain and discomfort in turn reduced the ability of Claimant's right shoulder girdle to move the right arm. Dr. Swarsen credibly and persuasively opined Claimant has poor function of the left shoulder that is consistent with the degree of injury to that shoulder. Dr. Swarsen explained that the Bankart lesion, located proximal to the glenohumeral joint, causes instability of Claimant's shoulder and creates the sensation that the arm will dislocate. Moreover, Claimant credibly testified that he experiences pain between his shoulders and neck that affects his ability to lift, reach overhead and perform activities of daily living. Claimant's testimony is corroborated by the permanent restrictions imposed by Dr. Thurston. Dr. Sharma's opinion that all of Claimant's functional impairment is in the arms is not persuasive for the reasons stated in Finding of Fact 55.

Permanent partial disability benefits shall be awarded based on Dr. Hompland's 17% whole person impairment rating and paid in accordance with the formula established in § 8-42-107(8)(d), C.R.S. In this regard the ALJ notes Respondents have not argued that they overcame Dr. Hompland's whole person rating by clear and convincing evidence.

POST-MMI MEDICAL TREATMENT

Claimant contends he is entitled to a "general award" award of ongoing medical benefits after MMI. Claimant argues that the need for such care is supported by Dr. Swarsen's opinion that Claimant should receive medical monitoring of his condition. Respondents contend Claimant failed to prove by a preponderance of the evidence that post-MMI medical treatment is or will be needed to relieve and/or prevent deterioration of Claimant's condition. The ALJ Agrees with Claimant.

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As determined in Findings of Fact 56 through 62, Claimant proved by a preponderance of the evidence that he needs ongoing post-MMI medical treatment to relieve the effects of his shoulder injuries and prevent future deterioration of his condition. As found, the ALJ credits Dr. Swarsen's opinion that Claimant's use of the left shoulder brace warrants medical monitoring. The ALJ considers Dr. Swarsen's opinion that Clamant needs medical monitoring to be supported by the opinions of Dr. Hompland and Dr. Orent. To the extend Dr. Sharma and Dr. Thurston opined that Claimant does not need medical monitoring, their opinions are not persuasive for the reasons stated in Findings of Fact 61 and 62.

Claimant is entitled to a general award of post-MMI medical benefits. Respondents retain the right to challenge the compensability, reasonableness, and necessity of any specific post-MMI medical treatment. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. Insurer shall pay medical impairment benefits based on Dr. Hompland's 17% whole person impairment rating and the statutory formula contained in § 8-42-107(8)(d), C.R.S.

3. Claimant is entitled to an award of post-MMI medical benefits.

4. Any issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 26, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-931-259-01

ISSUES

The issues presented for determination are whether the Claimant is entitled to the decompressive laminectomy, an epidural steroid injection and a back brace all of which were recommended by Dr. Anje Kim. Respondents assert none of the proposed treatment is reasonable, necessary or related to the industrial injury.

FINDINGS OF FACT

1. On September 27, 2013, Claimant sustained an injury to his low back in the course and scope of his employment. Claimant was driving a tractor trailer in the mountains when he tried to pull over. The road was foggy and he missed the pull off and the vehicle rolled down the mountain. Claimant climbed up to the road and got help from a passing motorist.

2. Claimant declined to receive medical treatment at the scene of the accident, but Claimant began to experience pain in his left hip, thoracic spine and left upper arm as the day progressed. He eventually went to HealthReach in Wyoming on September 27 for "a drug screen per protocol." At the time of the evaluation, Claimant reported he was experiencing 10/10 pain in the affected body parts.

3. Although the Claimant denied loss of consciousness, the nurse practitioner noted that Claimant's speech was slurred and he appeared to stare off into space. His speech was deemed slow. Claimant's examination was positive for limited range of motion and tenderness to palpation in his upper arm, thoracic spine and hip. Claimant's gait was slow and his movements were guarded. Claimant was referred to the emergency room.

4. Claimant then went to the Cheyenne Regional Medical Center emergency room. He reported left arm, back, head and hip pain. A CT scan of Claimant's low back showed an "acute-appearing fracture of the left transverse process of L3."

5. Claimant presented to Willow Creek Family Medicine on September 30, 2013, and stated that he broke his tail bone in a rollover accident on Friday. He stated that at the hospital he was diagnosed with a fracture of his tailbone and bruising of his left upper arm/bicep. Claimant noted that he was feeling stiff and having muscle spasms. Claimant was given a prescription for Naprosyn and Percocet and instructed to follow-up in ten days or sooner if needed.

12. On October 7, 2013, Claimant reported to Willow Creek with complaints of bilateral toe numbness associated with prolonged sitting in certain positions. He reported falling three times over the prior weekend. He also complained of left hip and

coccyx pain but noted overall that his pain has not changed much in quality or intensity since the accident. His rated his pain at 8 out of 10.

13. Claimant returned to Willow Creek on October 16, 2013. Claimant stated that he has been out of flexeril since last night and having a lot of muscle spasms. He also complained that the toes on both his feet are going numb on and off. Claimant's diagnoses included closed fracture of sacrum and coccyx without spinal cord injury, lumbago and parasthesias of bilateral lower extremities.

6. On October 28, 2013 a lumbar MRI revealed a torn annulus fibrosus of the L4-5 disc, associated with disc protrusion centrally. This results in canal diameter stenosis. There was no fracture or subluxation.

7. On November 7, 2013, Claimant returned to Willow Creek. He complained that his middle back pain was rose than his lower back. Claimant was still suffering from numbness and cold in his bilateral feet. Claimant asked for stronger pain medication. Claimant was referred to a "back specialist."

8. On November 20, 2013, Dr. Steven Beer, a spine surgeon, evaluated the Claimant. Dr. Beer's assessments included lumbar stenosis, L3 transverse process fracture - left, and thoracic spine pain. He recommended a thoracic MRI, L4-5 epidural steroid injection, and L4-5 facet joint injections if pain persists.

9. Claimant underwent the L4-5 facet injections and reported some relief. An epidural steroid injection at L4-5 was performed on December 2, 2013 by Dr. Girardi.

10. Dr. Beer recommended chiropractic care and physical therapy.

11. Dr. Beer's notes are silent concerning a surgical recommendation.

12. Dr. Girardi performed bilateral L4-5 intraarticular facet joint injections on February 7, 2014.

13. Claimant presented to Dr. Beer on February 24, 2014, for a follow-up appointment. Claimant stated that he was doing better and wished to return to work without restrictions. He was afraid of losing his job because the Employer could not offer modified duty within the restrictions imposed.

14. Claimant testified that he did not like Dr. Beer, but he was never asked to provide an explanation as to why.

15. On March 18, 2014m Claimant's physical therapist discharged him after five visits. Treatment consisted of therapeutic exercises for lumbar stabilization and education for a home exercise program. "This patient made excellent progress with his pain relief as well as strengthening. He has returned to work driving truck without increased pain, only reported stiffness." The record also noted that Claimant had returned to the gym without problems.

16. An x-ray of the lumbar spine was obtained on June 12, 2014. The x-ray showed no fracture, subluxation, or bone destruction. There was a very mild broad lumbar curvature convex to the left centered at L3-4.

17. Claimant presented to an urgent care clinic on September 27, 2014, complaining of constant back pain for approximately 10 days. He reported his pain levels were 8 out of 10. He stated that he could not sleep last night, but planned to be seen by a workers' compensation doctor in Colorado. The exam showed one positive Waddell's sign which was "distracted straight leg raise while sitting on the right." Claimant was given a toradol injection and discharged.

18. Claimant sought authorization from the Insurer to see another surgeon. Thereafter on October 6, 2014, Claimant attended care with a board certified neurosurgeon in Casper, Wyoming named Anje Kim. At hearing, Respondents did not contest whether Dr. Kim was an authorized treating physician.

19. By the time Claimant attended his initial consultation with Dr. Kim, his first facet injection administered on February 7, 2014 had worn off and his lower extremity symptoms had returned. Dr. Kim requested an updated MRI.

20. Her colleague in the same clinic, Dr. Todd Hammond, administered Claimant's second bilateral L4-5 facet injections on October 15, 2014. Claimant's pain diagram documented a reduction in symptoms following this second round of facet injections.

21. On October 30, 2014 Claimant's second lumbar MRI revealed a central and left paracentral protrusion at L4-5 with lateral recess stenosis – to be correlated with a L5 radicular pattern. It also revealed L4-5 foraminal narrowing – to be correlated with a L4 radicular pattern. There was also L4-5 arthrosis.

22. On November 17, 2014 Dr. Kim reviewed the MRI results and advised Claimant that "he ha[d] a degenerative disc as well as central and canal stenosis." She recommended a CT SPECT which came back normal indicating that Claimant was not experiencing inflammatory activity on the date of the scan.

23. On December 17, 2014 Claimant returned to Dr. Kim who recommended "a L4-5 laminectomy with microlumbar discectomy to address the disc bulge that is causing impingement of the descending exiting nerve roots in the canal."

24. Dr. Brian Reiss evaluated the Claimant on February 25, 2015, at Respondents' request. Claimant told Dr. Reiss that he was driving a truck on September 27, 2013, going over Rabbit Ears Pass in fog and snow. He said that he was turning into a turnout area and ended up going off the side of the mountain. He said he rolled down the mountain but was able to climb up to the road. Apparently, his wife then picked him up and took him to the hospital in Cheyenne. Claimant said he wants to avoid a fusion and complained of central lower back pain. He also complained that sometimes he has pain in his right anterior thigh and numbness in his toes. Dr. Reiss recommended reinstituting a physical therapy program including core

strengthening, stretching, aerobic conditioning, and perhaps mobilization. He did not believe that laminectomy decompression would provide any benefit. He also stated that he would not suggest a fusion at this point.

25. Claimant returned to Dr. Kim's clinic on May 11, 2015. Claimant complained of back pain and leg pain. Dr. Kim reviewed Dr. Reiss's report and disagreed with his opinions. She then stated that she would review the file and make her own recommendations. Claimant was released to return to work without restrictions.

26. On May 26, 2015 Dr. Kim authored a letter appealing Dr. Reiss's denial of the surgery. Dr. Kim correlated Claimant's lower extremity symptoms with radiculopathy originating from his lumbar spine pathology demonstrated by two MRIs; she vehemently disagreed with Dr. Reiss's opinion that Claimant's symptoms were limited to axial back pain because he had well documented radicular symptoms; she opined that further conservative measures recommended by Dr. Reiss would merely kick the can down the road and would not remove the structural lesions documented by the two MRIs; she opined that she was "highly confident" that her proposed laminectomy surgery will alleviate Claimant's symptoms "and allow him to return to full duty work without restrictions."

27. On August 27, 2015 Dr. Hammond administered a third round of L4-5 facet injections.

28. Claimant returned to see Dr. Kim on August 31, 2015. Claimant reported marginal benefit from the injections. Dr. Kim recommended a lumbar epidural steroid injection, a back brace and non-narcotic pain medications.

29. Dr. Kim made a request for the injection and back brace on September 22, 2015. The Respondents, through counsel, wrote a letter to Dr. Kim dated September 20, 2015 denying the injection and back brace. The letter stated the "claim is closed."

30. On October 6, 2015, Dr. Kim referred Claimant to Dr. Steven D. Newman for a pre-surgical psychological consultation. On October 12, 2015, Dr. Newman evaluated the Claimant and opined that Claimant "suffers from no psychological conditions that would negatively affect his candidacy for surgical intervention or recovery."

31. Dr. Reiss testified by deposition on November 23, 2015. He opined that Dr. Kim's request for low back injections and a decompression laminectomy were not reasonable, necessary or related to the September 27, 2013 injury. He testified that Claimant's MRI does not show severe stenosis, Claimant's primary complaint was back pain which is not treated with a laminectomy decompression, and there was no instability. Dr. Reiss explained that Claimant would be having an operation designed to alleviate someone's lower extremity symptoms. Dr. Reiss noted that Claimant has not consistently complained of lower extremity symptoms, but then later admitted that the medical records document Claimant's complaints of lower extremity symptoms. He also

testified that Claimant does not have much nerve compression to even explain any lower extremity symptoms although there are findings on Claimant's MRI scans. Ultimately, he testified that performing an operation designed to alleviate someone's lower extremity symptoms, not their back pain, would not likely be helpful to Claimant.

32. Dr. Reiss explained that the Colorado Medical Treatment Guidelines indicate that surgery should only be performed after the pain generator is identified and that there is a likelihood that surgery will be helpful and better than continued nonsurgical care. Dr. Reiss opined that Claimant's pain generator is his low back, and that the recommended surgery does not treat low back pain. Dr. Reiss also testified that additional injections were not likely to help Claimant because they had been performed in the past without providing sustained relief.

33. Dr. Reiss opined that Claimant was at MMI on October 13, 2015. He recommended additional physical therapy and core strengthening, but acknowledged that therapy will not decompress an impinged nerve. Dr. Reiss acknowledged that Claimant has mild to moderate central canal stenosis, and that stenosis causes radiculopathy. He also acknowledged that Claimant has some mild radicular symptoms; and he acknowledged that a laminectomy is designed to treat radiculopathy caused by stenosis.

34. Dr. Kim also testified by deposition. She explained that the surgery was the last treatment remaining to help alleviate Claimant's pain. She further testified that the surgery was reasonable and necessary based on Claimant's ongoing complaints of radiculopathy.

35. Dr. Kim testified that the October 28, 2013 lumbar MRI performed one month after the industrial accident demonstrated neurological compression at L4-5 which had advanced by the time the second MRI was performed a year later on October 30, 2014. She explained that lumbar stenosis causes back pain and pain into the limbs due to compression of the nerves. In Claimant's particular case, his pain is caused by a combination of his spinal canal and foraminal stenosis causing neurological impingement; degenerative disc disease and facet arthritis.

36. Dr. Kim testified that the industrial accident aggravated preexisting degenerative changes that Claimant had in his lumbar spine. She opined that the laminectomy; back brace and lumbar epidural steroid injections were reasonable and necessary to cure and relieve the effects of the industrial injury.

37. Dr. Kim acknowledged that the surgery would not resolve all of Claimant's back pain, but the surgery would likely resolve some of his back pain. Dr. Kim expressed confidence that the laminectomy had a high probability of improving Claimant's symptoms. Dr. Kim also testified that the other non-surgical options were reasonable and necessary. She provided little explanation for her opinions concerning the injection or brace.

38. Although Dr. Kim is not a level II physician, she did offer testimony about the Medical Treatment Guidelines. She agreed that there was a "reasonable likelihood of at least a measurable and meaningful functional and symptomatic improvement" if she performed the laminectomy. She stated that the laminectomy "has a chance of providing that pain relief and has a long history of being successful without causing long-term issues, such as a lumbar fusion." She identified the "specific site of nerve root compression." In addition, the Claimant cleared a pre-surgical psychological evaluation.

39. Dr. Kim praised Claimant for having the character and work ethic to seek full duty work where her other patients had historically requested work restrictions.

40. Claimant had a prior workers' compensation injury on August 18, 2009 to his low back. Claimant was digging a hole and hit rocks. After taking a break, his pain worsened. Claimant presented to Willow Creek Family Medicine, complaining of 10/10 pain in his low back. It appears that this was a Wyoming workers' compensation case. Prior to Claimant's industrial accident, he sought medical treatment for lower back pain in 2009 that lasted approximately one week and then resolved. After three years of being asymptomatic, Claimant sought chiropractic treatment for lower back pain beginning in August 2012. By January 2013 Claimant's back pain was near asymptomatic and he discontinued medical treatment. He did not seek medical attention thereafter until the September 2013 industrial accident. Claimant testified that his preexisting lower back symptoms were in a different area of his back than the symptoms caused by his subsequent industrial accident.

41. The ALJ credits the opinions of Dr. Kim as more credible and persuasive than those of Dr. Reiss. Dr. Kim credibly explained, and the medical records confirm, that Claimant has reported both leg and low back symptoms throughout his treatment. She opined that Claimant has presented with neurological symptoms, and the MRI shows nerve compression. Dr. Reiss felt that Claimant's findings on MRI were not "terribly consistent" with Claimant's lower extremity symptoms, but he admitted it is possible that the stenosis visualized on the MRI is causing Claimant's lower extremity symptoms. Dr. Reiss and Dr. Kim differ in their opinions concerning the reasonableness and necessity of the surgery and the ALJ finds that Dr. Kim, who is the treating physician, has a better understanding Claimant's condition than Dr. Reiss who examined him one time.

42. Dr. Kim's referral to Dr. Newman for a pre-surgical psychological evaluation was consistent with the Medical Treatment Guidelines, and is reasonable and necessary medical treatment. This ALJ finds that Dr. Newman is an authorized treating medical provider. This ALJ finds that Dr. Kim's proposed laminectomy surgery is consistent with the Medical Treatment Guidelines.

43. Claimant has failed to prove that the epidural steroid injection and back brace are reasonable, necessary or related to the claim.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

5. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Id.*

6. Claimant has proven that the surgery recommended by Dr. Kim is reasonable, necessary and related to his work injury. The Claimant credits the opinions of Dr. Kim as more credible and persuasive than those of Respondents’ expert, Dr. Brian Reiss. Dr. Kim credibly explained, and the medical records confirm, that Claimant

has reported both leg and low back symptoms throughout his treatment. She opined that Claimant has presented with neurological symptoms, and the MRI shows nerve compression. The Claimant understands that the laminectomy will not eliminate his back pain but he still wishes to relieve his leg symptoms and undergo the procedure. The Claimant has been cleared for surgery from a psychological perspective.

7. Dr. Reiss opined that the surgery will not benefit the Claimant because the Claimant's chief complaint is back pain with "little in the way of lower extremity problems." Dr. Reiss felt that Claimant's findings on MRI are not "terribly consistent" with Claimant's lower extremity symptoms, but it is possible that the stenosis visualized on the MRI is causing Claimant's lower extremity symptoms. Dr. Reiss, however, indicated that the MRI does not show much nerve compression to account for Claimant's symptoms. He and Dr. Kim differ in their opinions concerning the reasonableness and necessity of the surgery and the ALJ finds that Dr. Kim, who is the treating physician, has a better understanding Claimant's condition than Dr. Reiss who examined him one time.

8. The Respondents' contended that Dr. Beer "refused to recommend surgery." Such a contention is inaccurate and unsupported by the medical records. It is true that the records contain an absence of a surgical recommendation by Dr. Beer but there is no persuasive evidence that he refused to make one. Thus, the ALJ considered the absence of a surgical recommendation by Dr. Beer, but given the lack of documentation in Dr. Beer's records, it is difficult to ascertain the basis for his opinions. He obviously wanted Claimant to pursue more conservative treatment first which is not unusual. Dr. Kim provided a similar opinion.

9. In addition, the ALJ is not persuaded by Respondents' argument that Claimant's release to full duty work or his ability to return to exercising suggests that he is symptom free, and not in need additional treatment including the surgery Claimant has requested. Claimant requested full duty work over fears of losing his job. In addition, no treatment providers have prohibited Clamant from engaging in exercise. To the contrary, Dr. Beer recommended physical therapy, and Dr. Reiss recommended core strengthening and additional physical therapy.

10. The Claimant has also proven that Dr. Kim, who is an authorized treating physician, referred him to Dr. Newman for a pre-surgical psychological evaluation. The psychological evaluation is consistent with the Medical Treatment Guidelines. In addition, because the surgery is authorized, the Respondents are liable for the cost of the psychological evaluation subject to the Colorado fee schedule.

11. The Claimant's request for a back brace and epidural steroid injections is denied especially in light of the order authorizing surgery. There was little evidence or testimony concerning whether Claimant would continue to need a back brace or epidural steroid injections if he were to undergo surgery.

ORDER

It is therefore ordered that:

1. Respondents shall authorize the surgical procedure recommended by Dr. Kim.

2. Respondents are liable for the psychological evaluation performed by Dr. Newman.

3. Claimant's request for authorization of a back brace and epidural steroid injection is denied.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 25, 2016

DIGITAL SIGNATURE:

L. Broniak

Laura A. Broniak
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- What is the DIME physician's true opinion concerning the date of maximum medical improvement?

- Did Claimant overcome by clear and convincing evidence the DIME physician's finding that Claimant reached maximum medical improvement on October 9, 2014?

- Did Claimant overcome by clear and convincing evidence the DIME physician's finding that Claimant did not sustain any injury related permanent impairment of the cervical and lumbar spine?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of permanent total disability benefits?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits from July 11, 2014 until October 16, 2014?

- What is Claimant's average weekly wage?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 though 3 were admitted into evidence. Respondents' Exhibits A through DD were admitted into evidence. The deposition testimony of Jeff Raschbacher, M.D., was admitted into evidence.

CLAIMANT'S TESTIMONY

2. Claimant operated an incorporated masonry business. He sustained an admittedly compensable injury on July 15, 2013 when he fell while trying to find a fuel pump in a pile of spare parts. Claimant claimed that he injured his left knee, neck and low back as a result of this fall.

3. Claimant testified as follows. He continued to work after the July 15, 2013 injury and did not seek any medical treatment for his injuries until October 29, 2013. He did not seek treatment because he had experienced prior injuries and was able to "work through" them. However, by October 29, 2013 his pain had increased to the point that he decided he needed treatment. On October 29, 2013 he was examined by Brian J.

Beatty, D.O. Claimant continued to work until approximately November 1, 2013 when he closed his masonry business. He explained that he closed the business because the economy had "tumbled" and the construction industry was depressed. Claimant noted there was no longer any profit in the business. Claimant has not worked since the masonry business was closed.

4. Claimant testified that the insurer denied his claim for workers' compensation benefits. Consequently he was required to go to hearing to establish compensability of the claim. Claimant did not seek or obtain any medical treatment for his injuries from the time the claim was denied until the claim was found compensable by an order issued in June 2014.

5. Claimant testified that he believes he is capable of working on a part-time basis. Claimant explained that he could do construction "office work" such as estimating and project management. However, Claimant stated that he experiences continuing neck and back pain and these symptoms might force him to be off work for an hour and a half at time. Therefore, Claimant considers it questionable whether he would be able to maintain employment.

MEDICAL RECORDS EVIDENCE AND RELATED ISSUES

6. On October 29, 2013 Dr. Beatty first examined Claimant. Dr. Beatty is board certified in occupational medicine and is level II accredited. On October 29 Dr. Beatty diagnosed Claimant with a left knee sprain and meniscus tear, a lumbar strain and a cervical strain. On physical examination (PE) of the Claimant's back Dr. Beatty noted bilateral paralumbar "tightness." Dr. Beatty also recorded that Claimant's back exhibited normal spinal curvature and that there was no deformity, ecchymosis, erythema or lesions. Dr. Beatty recorded lumbar range of motion (ROM) measurements. Dr. Beatty further noted there was some tenderness to palpation of the paraspinal neck musculature, but Claimant exhibited full cervical ROM. Dr. Beatty recommended an MRI of the left knee and wrote that Claimant would "follow through" with "some stretches for his neck and low back."

7. On October 29, 2013 Dr. Beatty completed a form WC M164 releasing Claimant to return to work at full duty. Dr. Beatty also marked a box on the M164 indicating that his "objective findings" were consistent with "history and/or work-related mechanism of injury."

8. Dr. Beatty next examined Claimant on November 5, 2013. Claimant reported that he had "a little bit of stiffness in his neck and his back [was] much better." Dr. Beatty noted that an MRI of the left knee had detected a tear of the posterior horn of the medial meniscus. Dr. Beatty wrote that he would refer Claimant for an orthopedic evaluation and probable surgery to the left knee. Dr. Beatty continued to release Claimant to return to work at full duty.

9. On December 1, 2013 Claimant was taken to the Castle Rock Adventist Hospital emergency department (ED) by his family. The ED report indicates that a

horse pushed Claimant backwards causing him to roll down a hill and strike his head. Claimant's wife reported that Claimant was not acting normally and he had a headache. Cervical tenderness was also reported on PE. CT scans of the brain and cervical spine were performed and were unremarkable. Claimant was assessed as suffering from a concussion and discharged home.

10. On December 30, 2013 Bruce Morgenstern, M.D., evaluated Claimant for "symptoms following a concussion." Claimant gave a history that he was continuing to experience intermittent headaches and right sided neck pain. However, the neck pain had reportedly been present since Claimant's "accident at work in July." Dr. Morgenstern did not document any complaints of back pain. On PE Claimant's neck was "supple" with normal cervical ROM. Dr. Morgenstern assessed a "mild postconcussive syndrome" from which Claimant was "largely recovering." However, Dr. Morgenstern noted depressive symptoms and prescribed Paxil.

11. Respondents denied liability for Claimant's alleged injury of July 15, 2013. On March 25, 2014 the matter proceeded to hearing before ALJ Allegretti on issues including compensability, medical benefits and temporary total disability (TTD) benefits. ALJ Allegretti issued Findings of Fact Conclusions of Law, and Order on June 20, 2014. Crediting Claimant's testimony ALJ Allegretti found that on July 15, 2013 Claimant sustained a compensable injury when he "slipped on some steel" and fell causing injuries to his left knee, back and neck. ALJ Allegretti concluded that Dr. Beatty's medical records and Claimant's credible testimony established that previously recommended treatment "for the Claimant's neck, back and left knee conditions, including but not limited to, evaluation by an orthopedic surgeon for surgery for the torn medical meniscus," were reasonable and necessary to treat the effects of the July 15, 2013 work injury. However, ALJ Allegretti denied the claim for TTD benefits commencing October 29, 2013. In support ALJ Allegretti found that Claimant did not seek medical treatment for his injuries until October 29, 2013, and that no doctor imposed work restrictions until Dr. Morgenstern took Claimant off work "after the horse incident." ALJ Allegretti also found that the effects of the injury did not cause Claimant to stop working on October 29, 2013. Rather, ALJ Allegretti found that Claimant's wage loss after October 29 was caused by his decision to close the business because it was "not competitive."

12. On July 9, 2014 Dr. Beatty examined Claimant for the first time since November 5, 2013. Dr. Beatty noted Claimant had gone to a hearing and "his neck, back, and left knee have been accepted as part of this injury." Claimant reported symptoms of intermittent neck pain, severe low back pain, left knee pain and "some right knee pain." Dr. Beatty diagnosed a meniscus tear of the left knee and lumbar and cervical strains. He recommended Claimant undergo x-rays of the lumbar and cervical spines and referred Claimant to John Davis, III, M.D., for orthopedic consultation concerning the left knee. Dr. Beatty also imposed work restrictions of no lifting, carrying, pushing and pulling in excess of 10 pounds, no repetitive lifting in excess of 5 pounds, no walking for more than one hour per day, no standing for more than one hour per day and no crawling, kneeling, squatting and climbing.

13. On July 11, 2014 Dr. Davis examined Claimant' left knee. Claimant reported that since his injury in July 2013 he had experienced persistent joint line pain, swelling and feelings of instability. Dr. Davis assessed a complex tear of the posterior horn of the medical meniscus and patellofemoral arthritis. Dr. Davis recommended Claimant undergo arthroscopic surgery to repair the meniscal tear. In connection with the July 11, 2014 visit Dr. Davis completed a Physician's Report of Workers' Compensation Injury. On this form Dr. Davis checked a box indicating that Claimant was "unable to work" from "DOI to present." The ALJ infers that the "DOI" refers to the date of injury. However, Dr. Davis also checked a box indicating Claimant had "temporary restrictions" of no lifting greater than 30 pounds, no repetitive lifting greater than 20 pounds, no carrying more than 20 pounds, no pushing and pulling, no walking and standing more than 4 hours per day and no crawling, kneeling, squatting and climbing. Resolving the apparent inconsistency in this form, the ALJ infers that Dr. Davis intended to release Claimant to work with the limitations set forth in the form.

14. On July 15, 2014 the Insurer filed a General Admission of Liability (GAL) admitting that Claimant sustained an injury on July 15, 2013. The GAL admitted for medical benefits only.

15. Dr. Beatty examined Claimant on July 23, 2014. Dr. Beatty noted Claimant had undergone x-rays of the cervical spine that showed C5-6 disc degeneration with osteophyte formation. Dr. Beatty further noted Claimant had undergone lumbar spine x-rays that showed disc degeneration at L2-3, L3-4, L4-5 and L5-S1. Dr. Beatty diagnosed a left knee meniscus tear, lumbar strain, cervical strain and added the diagnosis of degenerative disc disease (DDD). Dr. Beatty planned to initiate physical therapy (PT) following knee surgery. Dr. Beatty continued the restrictions he imposed on July 9, 2014.

16. On August 15, 2014 Dr. Davis operated on Claimant's left knee. Dr. Davis performed a transarthroscopic partial medical meniscectomy and transarthroscopic patellar shaving. On August 29, 2014 Dr. Davis noted Claimant had minimal pain and "essentially no swelling." Dr. Davis assessed a "good early result from" surgery and referred Claimant for PT. On August 29, 2014 Dr. Davis Completed a Physician's Report of Workers' Compensation Injury which indicated Claimant was unable to work from "DOS to 6-8 weeks." The ALJ infers that "DOS" refers to the date of service, August 29. Dr. Davis also completed a section of the form listing restrictions of restrictions were no lifting greater than 10 pounds, no repetitive lifting greater than 10 pounds, no carrying more than 10 pounds, no walking and standing more than 4 hours per day and no crawling, kneeling, squatting and climbing. Resolving the apparent inconsistency in this form the ALJ infers that Dr. Davis intended to release Claimant to work with the limitations set forth in the form.

17. Between September 2, 2014 and October 10, 2014 Claimant underwent a course of PT to treat his left knee, neck and back symptoms.

18. Dr. Beatty examined Claimant on October 3, 2014. Claimant reported that he had been going to PT and his knee was continuing to improve. Claimant also

reported neck pain with intermittent headaches and continuing low back pain. Claimant advised that he experienced morning "stiffness" and that he "had to use a cane for a while." On PE of the cervical spine Dr. Beatty noted tenderness of the paracervical musculature on the right and along the occipital ridge with "good" ROM. On PE of the lumbar spine Dr. Beatty noted mild tenderness to palpation. Claimant exhibited 40 degrees of lumbar flexion, 0 degrees of lumbar extension and 20 degrees of right and left bending. Dr. Beatty opined that there appeared to be a "facet component to [Claimant's] symptomatology." Therefore, Dr. Beatty decided to refer Claimant to "Dr. Primack for evaluation and further recommendations." Dr. Beatty continued the restrictions he imposed on July 9, 2014.

19. Dr. Davis examined Claimant on October 9, 2014. Dr. Davis noted Claimant was pain free and his activities were not limited. Claimant's ROM, strength and gait were normal. Dr. Davis assessed an "excellent" surgical result and released Claimant to return to work without restrictions.

20. On October 21, 2014 Levi Miller, D.O., examined Claimant for the purpose of evaluating the neck and low back pain. Dr. Miller is board certified in physical medicine and rehabilitation. Claimant gave a history that in July 15, 2013 he "slipped on a pile of scrap and landed backwards on his back and neck." Claimant reported that he did not have any neck or back pain before this fall. Claimant reported that his pain was relieved by "infrequent" use of Norco, a medication he had left over from his knee surgery. Dr. Miller reviewed the x-rays taken in June 2014. On PE of the cervical spine Dr. Miller noted pain with rotation to the right and tenderness of the cervical paraspinals and occiput. Cervical ROM was full. On PE of the lumbar spine Dr. Miller noted mild right low back pain with extension and rotation and flexion to the right. Claimant was able to forward flex with "hands to the shins and extend "roughly 10 degrees." Dr. Miller assessed "chronic cervical neck pain, likely due to posterior element etiology" and chronic low back pain with a possible right S1 radicular component. Dr. Miller opined Claimant had evidence of "mild arthritic changes" on the cervical and lumbar films that were "likely present prior to the industrial injury." Dr. Miller further opined that Claimant's current symptoms likely represented an injury-related aggravation of the arthritic changes. Dr. Miller recommended Claimant undergo a cervical MRI and medial branch blocks for cervical spondylosis at C2, C3, C4 and C5. Dr. Miller also prescribed an anti-inflammatory medication.

21. Dr. Beatty examined Claimant on October 23, 2014. Claimant reported his left knee continued to improve and he experienced only "rare pain." However, Claimant reported that his *right knee* was bothering him and had bothered him since the date of the injury. Claimant also reported continuing neck pain with intermittent headaches and low back pain. Dr. Beatty noted that the MRI and facet injections recommended by Dr. Miller had not yet been approved. Dr. Beatty completed a WC 164 and imposed restrictions of no lifting, carrying, pushing and pulling in excess of 10 pounds and no repetitive lifting in excess of 5 pounds. Dr. Beatty did no place any restrictions on walking, standing, crawling, kneeling, squatting and climbing.

22. Dr. Beatty examined Claimant on November 21, 2014. Claimant gave a history that his left knee continued to improve but the *right knee* had continued to bother him since the July 2013 injury. Dr. Beatty noted Claimant had undergone MRI's of the cervical spine and right knee. Dr. Beatty referred Claimant to Dr. Davis for evaluation of the right knee and to Dr. Miller to review the cervical MRI and recommend treatment. Dr. Beatty imposed restrictions of of no lifting, carrying, pushing and pulling in excess of 10 pounds, no repetitive lifting in excess of 5 pounds and no crawling, kneeling, squatting and climbing.

23. On December 15, 2014 Claimant returned to Dr. Davis complaining that since July 2013 his right knee had bothered him. Claimant reported medial joint line pain and feelings of instability. Dr. Davis noted that a previously completed MRI showed "ACL deficiency and advancing degenerative changes in the patellofemoral joint, but more importantly the medial compartment." Dr. Davis performed x-rays that reportedly showed "advanced degenerative arthritic changes involving the patellofemoral and medial compartments of a marked degree." Dr. Davis assessed progressive severe degenerative arthritis of the right knee and opined Claimant will eventually require joint arthroplasty.

24. Dr. Miller examined Claimant on January 8, 2015. Dr. Miller noted Claimant declined to undergo the previously recommended medial branch blocks because he preferred "to avoid interventional procedures unless his symptoms" worsened. Dr. Miller reviewed a cervical MRI performed on October 30, 2014. Dr. Miller wrote that the MRI revealed a loss of cervical lordosis, degenerative disc changes from C2-3 to C7-T1, "mild to moderate facet arthritis" and C3-4 to C5-6 central narrowing without cord signal changes. Dr. Miller listed his impressions as follows: (1) Chronic cervical pain, "likely due to posterior element etiology greater than diskogenic source." Dr. Miller observed the degenerative changes likely pre-existed the July 2013 fall but opined the fall "aggravated" the changes; (2) Chronic low back pain, possible right S1 radicular component due to the industrial injury; (3) Multilevel cervical DDD; (4) Multilevel cervical spondylosis/facet arthritis; (5) Cervical canal stenosis C3-4 to C5-6. Dr. Miller prescribed Norco for pain.

25. Dr. Beatty examined Claimant on February 25, 2015. Claimant reported that he had neck pain, low back pain, right knee pain and "hammertoes involving the right foot." Claimant expressed the opinion that his right knee problems were the result of an "abnormal gait" caused by the left knee injury. Claimant also opined the hammertoes problem was related to the low back injury. Dr. Beatty disagreed with Claimant's opinions concerning the cause of the right knee symptoms and the hammertoes issue. According to Dr. Beatty Claimant became "upset" over this disagreement and remained "adamant" that the right knee and hammertoes were related to the industrial injury.

26. Dr. Miller examined Claimant on March 5, 2015. Claimant reported little change in his symptoms except that he now reported "hammertoes in his bilateral feet." Dr. Miller referred Claimant to a podiatrist to determine whether the hammertoes problem was related to the industrial injury. Dr. Miller also referred Claimant for

chiropractic treatment of his neck and low back. Dr. Miller prescribed Percocet because Norco was upsetting Claimant's stomach. On March 7, 2015 Dr. Miller noted the Insurer denied the referral to the podiatrist. Dr. Miller opined that Claimant was approaching MMI and discussed the issue with Dr. Beatty.

27. On April 9, 2015 Claimant was apparently examined by Dr. Miller and also by Scott Primack. D.O. Both of these physicians signed an office note concerning the April 9 visit. Claimant's symptoms remained essentially unchanged. The physicians' impressions included: (1) Cervicalgia with pre-existing arthritis aggravated by the July 2013 industrial injury; (2) Chronic low back pain with possible S1 radiculitis related to the industrial injury; (3) Multilevel DDD; (4) Multilevel cervical spondylosis/facet arthritis; (5) Central canal stenosis; (6) Bilateral hammertoes "not industrial related."

28. On May 20, 2015 Dr. Beatty completed a WC 164 and imposed restrictions of no lifting, carrying, pushing and pulling in excess of 10 pounds and no repetitive lifting in excess of 5 pounds. Dr. Beatty also imposed restrictions of no walking in excess of 1 hour, no standing in excess of 1 hour, no walking, no standing, no crawling, no kneeling, no squatting and no climbing.

29. On June 4, 2015 Dr. Miller noted Claimant's symptoms remained little changed from his previous visit. Claimant advised he had undergone multiple chiropractic treatments but received "little benefit from these and stopped." Dr. Miller prescribed Percocet for pain and opined that Claimant appeared to be at MMI.

30. Dr. Beatty examined Claimant on June 10, 2015. Dr. Beatty assessed a left knee meniscus tear, lumbar strain, cervical strain and DDD. Applying the *American Medical Association Guides to Evaluation of Impairment, Third Edition (Revised)* (AMA Guides) Dr. Beatty assessed a combined 41% whole person impairment attributable to the July 15, 2013 injury. Breaking the rating into its component parts, Dr. Beatty assessed 16% for cervical spine impairment based on 4% for a specific disorder and 12% for lost ROM. Dr. Beatty assessed 21% for lumbar spine impairment based on 5% for a specific disorder and 17% for lost ROM. Dr. Beatty assessed 12% lower extremity impairment for the left knee which converted to 5% whole person impairment. Dr. Beatty stated that the lower extremity impairment rating was based on 7% impairment for lost ROM and 5% for a partial meniscectomy.

31. On June 10, 2015 Dr. Beatty completed a WC 164 and imposed permanent restrictions of no lifting, carrying, pushing and pulling in excess of 10 pounds and no repetitive lifting in excess of 5 pounds. Dr. Beatty also imposed permanent restrictions of no walking in excess of 1 hour, no standing in excess of 1 hour, no crawling, no kneeling, no squatting and no climbing.

32. Following Dr. Beatty's MMI and rating report Respondents sought a Division-sponsored independent medical examination (DIME).

33. Jeff Raschbacher, M.D., was selected as the DIME physician. Dr. Raschbacher performed the DIME on August 5, 2015 and issued a DIME report on

August 10, 2015. In connection with the DIME Dr. Raschbacher took a history from Claimant, reviewed medical records and performed a PE.

34. In the DIME report Dr. Raschbacher noted that Claimant gave a history that on July 15, 2013 he slipped on a piece of steel and landed on "iron with his neck and his back." Claimant reported he was asymptomatic prior to July 15, 2013, but since then had suffered with headaches, neck pain, back pain and his "right knee is pretty much shot." Claimant also reported paresthesias at the fronts and backs of both thighs and at the lower portion of the low back. Claimant stated that he could not sit, stand walk, lift or bend over.

35. Dr. Raschbacher noted that he reviewed medical records from March 10, 2005 revealing that Claimant had undergone an MRI of the lumbar spine, the indications for which were low back pain and foot drop. The MRI revealed a disc extrusion at L3-4 and "degenerative changes" at other levels. Claimant also underwent an epidural steroid injection (ESI) at L5-S1. Dr. Raschbacher further noted that he reviewed a June 15, 2007 record from Ranch Family Medicine noting a "chief complaint of low back pain and depression." (*See also*, Respondents' Exhibit W, p. 371).

36. Dr. Raschbacher assessed a history of a slip and fall with cervical, lumbar and left knee pain and status post-surgical procedure to repair a tear of the left medial meniscus. Using Table 40 of the AMA Guides Dr. Raschbacher assessed 5% impairment of the left lower extremity for the torn medial meniscus. Dr. Raschbacher noted that 5% lower extremity impairment converts to 2% whole person impairment.

37. Dr. Raschbacher opined that it was not appropriate to "include left knee active range of motion for the purposes of rating" Claimant's impairment. In support of this conclusion Dr. Raschbacher noted that at the time of the DIME Claimant demonstrated "great limitation of motion and much expression of pain at the left knee." However, Dr. Raschbacher observed that on October 9, 2014 Dr. Davis recorded that Claimant's left knee was pain free and that Claimant's gait and ROM were normal. Dr. Raschbacher further noted when Claimant was placed at MMI on June 10, 2015 Dr. Beatty recorded that Claimant exhibited 130 degrees of knee flexion. Dr. Raschbacher stated that Dr. Beatty's flexion measurement was "grossly inconsistent" with the flexion measurement taken at the time of the DIME. (Dr. Raschbacher measured 99 degrees of flexion according to his lower extremity ratings sheet, Respondents' Exhibit K, p. 105).

38. Dr. Raschbacher declined to assign a permanent impairment rating based on Claimant's cervical and lumbar spine complaints. Dr. Raschbacher explained that at the DIME Claimant exhibited "pain behaviors" that were "fairly remarkable." However, Dr. Raschbacher opined that this level of cervical and lumbar symptomatology was "not consistent with the medical record." Dr. Raschbacher explained that the medical records show Claimant's level of symptomatology was "variable" but at times appeared "quite benign." Moreover, Dr. Raschbacher opined that the medical records do not substantiate an objective cervical spine lesion or lumbar spine lesion that is "clearly attributable to" the July 15, 2013 injury. Dr. Raschbacher also noted Claimant had pre-

injury lumbar symptomatology that was “severe enough that an MRI was ordered and an epidural injection was done and [Claimant] was described as having foot drop, indicating a significant radicular process.” However, Dr. Raschbacher observed that Claimant’s pre-injury history of lumbar problems was “not offered to or obtained by subsequent examiners including Dr. Beatty and the physiatry consultants.”

39. Dr. Raschbacher opined that Claimant reached MMI for the July 15, 2013 injury at the time of the “orthopedic visit with Dr. Davis on 08/15/14 [sic].” Dr. Raschbacher stated that on that date Claimant had an impairment of the left knee based on the diagnosis of medial meniscus tear. Dr. Raschbacher further opined the medical records document “so much variation and inconsistency” that it is likely that if Claimant suffered a neck injury and/or low back injury then they “would have been at MMI at the same time” as the left knee. Dr. Raschbacher added that his “reasons” for reaching these conclusions were the same as the reasons for finding there was no permanent impairment of the neck and back. (See Finding of Fact 38).

40. On October 30, 2015 Anjmun Sharma, M.D., performed an independent medical examination (IME) at Respondents’ request. Dr. Sharma was qualified as an expert in family and occupational medicine and is level II accredited. In connection with the IME Dr. Sharma examined Claimant and reviewed numerous medical records

41. Dr. Sharma issued two written reports concerning the IME. Dr. Sharma reviewed the reports of Dr. Beatty and Dr. Raschbacher. Dr. Sharma opined that the question presented is whether Claimant has “cervicolumbar spine degeneration that is related to the July 15, 2013 injury.” Dr. Sharma wrote that he agreed with Dr. Raschbacher’s conclusion that Claimant’s spinal condition is not causally related to the July 2013 injury. Dr. Sharma stated that here is no doubt that Claimant fell at work and injured his back, neck and left knee. However, Dr. Sharma opined the neck and back did not result in “long term injuries.” In support of these conclusions Dr. Sharma noted that in 2005 Claimant was obtaining medical treatment for his lumbar spine and that the March 10, 2005 lumbar MRI showed “chronic degenerative changes.” Dr. Sharma stated that he felt “confident that the cervical spine” would demonstrate structural changes “similar” to those in the low back.

MEDICAL TESTIMONY

42. Dr. Raschbacher testified by deposition on November 15, 2015. Dr. Raschbacher testified that his DIME report contained an error insofar as it states Claimant reached MMI on August 15, 2014, the date Claimant underwent knee surgery. Dr. Raschbacher stated that the correct date of MMI was October 9, 2014, the date of Claimant’s last orthopedic visit with Dr. Davis.

43. Dr. Raschbacher testified that determining “causation” is always a part of the DIME process when assessing whether or not a claimant has “ratable impairment.”

44. Dr. Raschbacher testified that in his opinion Claimant suffered no ratable impairment of the lumbar spine that resulted from the July 15, 2013 industrial injury. In

support of this conclusion Dr. Raschbacher relied on the following factors: (1) Claimant's 2005 lumbar MRI documented "objective findings" of moderate to severe "degenerative change" and Dr. Beatty did not appear to have been aware of this history; (2) After the July 2013 injury Dr. Raschbacher did not see any "new clear findings on MRI" that could be attributed to the injury; (3) There was "not a lot of support medically" for the lumbar spine symptomatology; (4) At the DIME Claimant presented with "florid pain behaviors." Dr. Raschbacher testified that he observed Claimant engage in "pain behaviors" that included moving very slowly and grunting and clutching body parts during the straight leg raising test. Dr. Raschbacher also observed Claimant using a cane at the DIME. Dr. Raschbacher opined that Claimant should not have needed a cane; therefore Dr. Raschbacher considered the use of the cane to be a "pain behavior." Dr. Raschbacher opined that Claimant's pain behaviors at the DIME tended to "undermine" Claimant's subjective reports of symptomatology.

45. Dr. Raschbacher testified that in his opinion Claimant suffered no ratable impairment of the cervical spine that resulted from the July 15, 2013 industrial injury. In support of this conclusion Dr. Raschbacher relied on the following factors: (1) There was not "clear substantiation" for a cervical spine impairment in the medical record; (2) Claimant's pain behaviors "carried a reasonable amount of weight" in the determination that Claimant did not have ratable cervical impairment.

46. Dr. Raschbacher also testified that if there were significant injuries to the cervical spine and lumbar spine on July 15, 2013 he would have expected Claimant to seek treatment much sooner than he did. Dr. Raschbacher would not have expected Claimant to wait for two or three months before seeking treatment.

47. Dr. Raschbacher testified that during the DIME he did not tell Claimant that Claimant's "exhibition of pain" was not "helping [Claimant's] cause." Dr. Raschbacher further stated that he did not think it was his "role" to disclose his opinions concerning the significance of Claimant's pain behaviors. Rather, Dr. Raschbacher explained that his "role" was to record Claimant's "presentation and then to deal with it."

48. Dr. Raschbacher reiterated his view that ROM should not be included in the impairment rating for Claimant's left knee. Dr. Raschbacher explained that Claimant's ROM in the left knee was "grossly discrepant with that seen when he was under orthopedic care and actually as also measured by Dr. Beatty, who had a flexion of 130 degrees." Dr. Raschbacher further explained that the 99 degrees of flexion that he measured was not "physiologic" meaning that it did not "make a great deal of sense" and would not "be a true and accurate description of the actual level of impairment."

49. Dr. Beatty testified at the hearing. Dr. Beatty stated that the lumbar ROM measurements he recorded on October 29, 2013 were relatively normal.

50. Dr. Beatty testified that there are several steps necessary to complete an impairment rating for the spine. He explained the rating physician must first obtain a history of how the injury occurred in order to determine whether it is work-related. The

physician must then evaluate the course of treatment to the date of MMI. Finally the physician must assess the degree of impairment in accordance with the AMA Guides.

51. Dr. Beatty opined the Claimant met all criteria for the cervical and lumbar impairment ratings under the AMA Guides. Dr. Beatty opined the Claimant's cervical and spinal symptoms are causally related to the fall Claimant sustained at work in July 2013. Dr. explained that in his opinion the industrial injury caused a permanent aggravation of Claimant's pre-existing DDD. Specifically, Dr. Beatty opined that the fall aggravated Claimant's pre-existing cervical facet problems and lumbar degenerative disc disease. Dr. Beatty inferred the July 2013 injury caused these problems because Claimant has a history of a specific injury followed by chronic problems that failed to resolve despite treatment. Dr. Beatty stated that his opinion concerning causation was not altered by evidence that Claimant underwent evaluation and treatment of the lumbar spine in 2005. In support of this opinion Dr. Beatty explained that there are no medical records documenting treatment for the back between 2005 and the July 2013 industrial injury. Further, Dr. Beatty observed Claimant was asymptomatic at the time of the July 2013 injury.

52. Dr. Beatty opined Claimant met the criteria for specific disorder impairment ratings of the cervical and lumbar spines under Table 53 II B of the AMA Guides. Dr. Beatty explained that he did not use Table 53 II (C) because in his opinion the Claimant's moderate to severe degenerative changes were not caused by the July 2013 injury.

53. Dr. Beatty testified that only 80% of injuries to the spine are shown on MRI. Dr. Beatty explained that MRI studies may not document some injuries to the facet joints and some disc injuries. Further, an MRI may not reveal fibrous muscle changes that sometimes develop after an untreated back injury.

54. Dr. Beatty testified that when he examined Claimant on June 15, 2015 he believed Claimant displayed the requisite effort needed to complete the impairment rating. However, Dr. Beatty stated that if he had believed Claimant was not giving full effort the Claimant would have been told of this impression and advised that lack of effort could affect the impairment rating.

55. Dr. Beatty testified that he assessed impairment of the Claimant's left lower extremity by using Table 40 of the AMA Guides (Impairment Ratings of the Lower Extremity For Other Disorders of the Knee) and assessing impairment for lost ROM (flexion and extension) in the knee joint. Dr. Beatty stated that although the AMA Guides do not contain ROM validity criteria for joints, he believes his measurements were "accurate and valid." Dr. Beatty agreed that there was a "significant difference" between his measurement of knee flexion (130 degrees) and Dr. Raschbacher's measurement of knee flexion (99 degrees). Dr. Beatty explained that the difference in flexion measurements might be accounted for by several factors including a worsening of Claimant's condition between the two measurements, variant weather conditions, a "bad day" or lack of effort.

56. Dr. Beatty opined that Claimant did not reach MMI until June 10, 2015 because Dr. Beatty believes the Claimant's ongoing cervical and lumbar symptoms are causally related to the industrial injury and Claimant did not complete all necessary treatment for those conditions until June 10. Dr. Beatty acknowledged that he has a difference of opinion with Dr. Raschbacher, who placed Claimant at MMI on October 9, 2014. Dr. Beatty acknowledged that the difference results from Dr. Raschbacher's opinion that the cervical and lumbar symptoms after October 9, 2014 were not causally related to the industrial injury.

57. On cross-examination Dr. Beatty was asked why on May 20, 2015 he re-imposed restrictions on walking, standing, crawling, kneeling, squatting and climbing when these restrictions had not been in place since October 2014. Dr. Beatty answered that Claimant had experienced a subjective increase in pain.

58. Dr. Beatty acknowledged that in October 2014 Claimant reported using a cane. Dr. Beatty testified that he never prescribed a cane and was not aware that any other physician had prescribed a cane.

59. Dr. Beatty testified that it is not his opinion that Claimant is permanently and totally disabled from performing any work.

60. Dr. Sharma testified at the hearing. Dr. Sharma reiterated that he does not believe the July 15, 2013 injury caused any permanent aggravation of Claimant's pre-existing cervical and lumbar spinal disease. Dr. Sharma explained that Claimant's post-injury diagnostic imaging does not show the type of acute pathology, such as a ruptured disc, nerve compression or fractured vertebra that could result from a fall. To the contrary, Dr. Sharma opined a fall would not cause the spondylosis, spondylolisthesis and degenerative disc changes depicted on Claimant's imaging studies.

61. Dr. Sharma testified that Dr. Raschbacher's DIME impairment rating was done correctly in accordance with the AMA Guides and teachings of the level II accreditation course. Dr. Sharma explained that prior to assessing an impairment rating under Table 53 or for reduced ROM the examining physician must first determine that there is an injury-related diagnosis. Dr. Sharma testified that he disagrees with Dr. Beatty that Claimant has any cervical and/or lumbar diagnoses that are causally related to the July 2013 industrial injury. Dr. Sharma stated that a patient may have a temporary aggravation of a pre-existing condition without sustaining any permanent ratable impairment from the injury.

62. Dr. Sharma testified that he disagrees with Dr. Beatty that Dr. Raschbacher acted improperly because Raschbacher did not inform Claimant that "florid pain behaviors" might affect the impairment rating. Dr. Sharma explained that nothing in the level II teachings or the AMA Guides requires a rating physician to give the Claimant such advice. Rather, Dr. Sharma stated that an examining physician is to require a patient to actively move the body until the patient reports pain. Dr. Sharma also opined that the Division of Workers' Compensation (DOWC) "Impairment Rating

Tips" (Rating Tips) pertaining to unassisted active ROM did not require Dr. Raschbacher to tell Claimant that Dr. Raschbacher considered Claimant's ROM measurements to be "non-physiologic" and that this "impression" might affect the Claimant's impairment rating. Dr. Sharma testified that Dr. Raschbacher's observations of Claimant's "pain behaviors" pertained to the question of the cause of Claimant's impairment in the first instance and not the actual ROM measurements themselves.

VOCATIONAL EVIDENCE

63. Vocational specialist Katie Montoya (Montoya) conducted a vocational assessment of the Claimant. The assessment was done at the request of Respondents. In connection with the assessment Montoya interviewed Claimant, reviewed pertinent medical records and performed vocational research.

64. Montoya issued a report dated December 22, 2015. Montoya wrote that Claimant was 62 years of age at the time of the evaluation. Claimant had a high school degree and two years of junior college. Claimant started his masonry business in 1983. He incorporated the business in 1986 and by the late 1990's the company employed up to 250 workers. Claimant reported that he "left the field" in 1989 and no longer performed manual labor. Instead, Claimant supervised 18 managers and "looked over the work." Claimant also sought out jobs for the company, estimated costs, prepared bids and conducted contract negotiations. He used a computer to prepare estimates and bids. Claimant explained that he spent most of his time in the office at a desk. In 2008 and 2009 Claimant began to lay off workers but kept enough so that he would not have to work in the field. Claimant closed the business at the end of 2013 or the beginning of 2014 because he was not securing any jobs and there was "not enough to sustain the business." Claimant stated that he was earning about $159,000 per year at the time he closed the business.

65. Claimant told Montoya that he was not looking for work. He explained that he was taking pain medications that made him feel "dopey" and did not believe he "could provide 100% to an employer." Claimant stated that he did not think he would be hired if he told a contractor that he took prescription pain killers and that he needed to take breaks "for a few hours to get rid of pain."

66. Montoya opined that Claimant is a "skilled individual" with experience in negotiation, estimating, and bidding that can be utilized in work similar to that he performed before the injury. Montoya stated that if the opinions expressed by Dr. Raschbacher and Dr. Sharma are considered valid Claimant can return to any of his past relevant work. Montoya stated that even if the permanent restrictions imposed by Dr. Beatty are considered valid Claimant can "perform some management responsibilities within his prior industry." Montoya further opined that even if the permanent restrictions imposed by Dr. Beatty are considered valid Claimant can perform some semi-skilled and unskilled positions such as cashier, counter attendant, customer service and security worker.

FINDINGS REGARDING MMI

67. Dr. Raschbacher, the DIME physician, made conflicting statements concerning the date of MMI. In the DIME report Dr. Raschbacher listed the date of MMI the "last orthopedic visit" with Dr. Davis on August 15, 2014. However, Dr. Raschbacher later testified that August 15 was the date of surgery and the correct date of MMI is October 9, 2014, when Claimant was last examined by Dr. Davis. Dr. Raschbacher's "true opinion" is that Claimant reached MMI on October 9, 2014 when he last saw Dr. Davis.

68. Claimant failed to prove by clear and convincing evidence that Dr. Raschbacher erred in finding Claimant reached MMI on October 9, 2014.

69. The ALJ interprets Dr. Raschbacher's opinion to be that Claimant reached MMI on October 9, 2014 because treatment was complete for the injury-related knee problem and because on that date Claimant did not have any cervical or lumbar medical conditions that were causally related to the July 15, 2013 injury. It was further Dr. Raschbacher's opinion that *even if* the Claimant had suffered neck and low back injuries as a result of the July 2013 injury those injuries stabilized by October 9, 2014 and did not require any further treatment.

70. Dr. Raschbacher offered credible and persuasive reasons in support of his opinion that the industrial injury did not cause any injuries to Claimant's neck and back, and that any need for treatment after October 9 cannot be attributed to the July 2013 industrial injury. Those reasons included the Claimant's failure to seek treatment for the alleged neck and back injuries until more than 3 months after they allegedly occurred, the absence of medical records documenting cervical or lumbar lesion(s) that could be attributed to the July 2013 injury, the variability and inconsistency of Claimant's symptoms over time, and the "florid pain behaviors" displayed at the DIME which called into question the reliability of Claimant's reported symptoms.

71. Dr. Raschbacher's opinion that the medical records do not document any cervical or lumbar lesions that can be attributed to the July 2013 industrial injury is corroborated by Dr. Sharma's credible opinion that the Claimant's post-injury diagnostic imaging studies do not show the type of acute pathology, such as a ruptured disc, nerve compression or fractured vertebra that could result from a fall.

72. Dr. Raschbacher's opinion that over the life of the case Claimant has reported widely varying levels of symptomatology is supported by reference to the medical records themselves. When Dr. Beatty examined Claimant on October 29, 2013 Claimant exhibited some cervical "tenderness" and normal cervical ROM. Claimant also demonstrated some lumbar paraspinal "tightness" and essentially "normal" lumbar ROM. On November 5, 2013 Claimant reported to Dr. Beatty that his neck was "a little" stiff and his back was "much improved." On December 30, 2013 Dr. Morgenstern recorded that Claimant's neck was "supple" and that cervical ROM was normal. On July 9, 2014 Claimant reported to Dr. Beatty he was experiencing intermittent neck pain and "severe" low back pain. On October 3, 2014 Claimant told Dr. Beatty that his left knee

was improving but he had neck pain with headaches and continuing low back pain. Claimant advised that he had morning “stiffness” and “had to use a cane for awhile.” Despite Claimant’s October 3 report of continuing neck pain, Dr. Beatty recorded that Claimant had good cervical ROM. However, by June 10, 2015 Dr. Beatty determined that Claimant had 12% whole person impairment because of reduced cervical ROM and 17% whole person impairment because of reduced lumbar ROM. As documented by Dr. Raschbacher, at the time of the DIME in August 2015 Claimant reported that he was experiencing neck and back pain and exhibited “florid pain behaviors.”

73. Dr. Beatty’s opinions that the injury caused cervical and lumbar injuries, and that these injuries required treatment subsequent to October 9, 2013 are not sufficiently persuasive to overcome Dr. Raschbacher’s contrary opinions. Dr. Beatty acknowledged that he did not use Table 53 (II) (C) to rate Claimant’s specific disorders because the degenerative changes were not caused by the injury. Instead Dr. Beatty’s opinion concerning MMI appears to be that July 15, 2013 caused permanent “aggravations” of Claimant’s pre-existing cervical and lumbar degenerative conditions. Dr. Beatty’s opinion appears to be based largely on the assumption that Claimant reliably reported the history of his symptoms. (Findings of Fact 50 and 51).

74. However, Dr. Beatty’s opinion did not persuasively refute Dr. Raschbacher’s opinion that if the Claimant sustained significant cervical and spinal injuries on July 2013 it is likely Claimant would have sought treatment for those injuries sooner than 3 months after the date of injury. (Finding of Fact 46). Dr. Beatty did not persuasively refute Dr. Raschbacher’s argument that Claimant’s reporting of symptoms had been inconsistent and unreliable over the course of the claim. Consequently, Dr. Beatty’s reliance on Claimant’s history as the basis for his opinion that there was an aggravation of Claimant’s pre-existing degenerative changes is not persuasive. Moreover, Dr. Beatty acknowledged that 80% of lumbar and cervical injuries can be detected by MRI, while some 20% may not be detected. (See Findings of Fact 51 through 53). In this respect Dr. Beatty’s testimony tends to support Dr. Raschbacher’s opinion that the Claimant’s objective imaging studies indicate only degenerative changes. Therefore, it is probable that there is no credible and persuasive objective medical documentation of a “permanent aggravation” caused by the 2013 incident.

75. To some extent Dr. Beatty’s opinion concerning the date of MMI is supported by the opinions of Dr. Primack and Dr. Miller that Claimant sustained an “aggravation” of pre-existing degenerative arthritis. However, these opinions do not reflect a thorough evaluation of Claimant’s history and reporting of symptoms, nor do they identify any specific cervical or lumbar lesions that were allegedly caused by the injury of July 15, 2013. Therefore, the opinions of Dr. Primack and Dr. Beatty are not sufficiently persuasive to overcome Dr. Raschbacher’s opinion concerning the date of MMI.

FINDINGS REGARDING WHOLE PERSON IMPAIRMENT OF NECK AND LUMAR SPINE

76. As determined in Findings of Fact 38, 44 and 45, Dr. Raschbacher found that Claimant did not sustain any permanent ratable impairment of the cervical and/or lumbar spine that was caused by the July 2013 injury. Dr. Raschbacher's reasons for reaching these conclusions are essentially identical to the reasons he found that Claimant reached MMI on October 9, 2014. Specifically, Dr. Raschbacher found that Claimant did not sustain any cervical and/or lumbar injuries on July 15, but if he did those injuries did not cause any permanent impairment of the cervical and/or lumbar spine.

77. Dr. Raschbacher's credibly and persuasively opined that the July 2013 injury did not cause any permanent impairment of the cervical and/or lumbar spine. Specifically, Dr. Raschbacher relied on the absence of any objective medical evidence that the 2013 injury caused an acute injury to the spine, that Claimant's reporting of symptoms has been variable and that Claimant displayed "florid pain behaviors" at the DIME. (Findings of Fact 38, 44 and 45).

78. Dr. Raschbacher credibly and persuasively opined that it is within his authority as the DIME physician to consider the evidence and determine whether the industrial caused any ratable impairment. (Finding of Fact 43). Dr. Beatty agreed with Dr. Raschbacher that the rating process requires the DIME physician to determine the cause of any impairment as a first step in the rating process. (Finding of Fact 50).

79. Dr. Beatty agreed with Dr. Raschbacher that a rating physician must take a history to determine if the injury is "work-related."

80. Dr. Beatty's opinions do not rise to the level of clear and convincing evidence to refute Dr. Raschbacher's opinion that Claimant did not sustain any permanent cervical and or lumbar impairment caused by the July 2013 injury. Dr. Beatty's opinion did not persuasively refute Dr. Raschbacher's opinion that if the Claimant sustained significant cervical and spinal injuries on July 2013 it is likely Claimant would have sought treatment for those injuries sooner than 3 months after the date of injury. (Finding of Fact 46). Moreover, Dr. Beatty did not persuasively refute Dr. Raschbacher's argument that Claimant's reporting of symptoms had been inonsistent and unreliable. Consequently, Dr. Beatty's reliance on Claimant's history as the basis for his opinion that there was a permanent aggravation of Claimant's admittedly pre-existing degenerative changes is not persuasive. Moreover, Dr. Beatty acknowledged that 80% of lumbar and cervical injuries can be detected by MRI, while some 20% may not be detected. (See Findings of Fact 51 through 53). In this respect Dr. Beatty's testimony tends to support Dr. Raschbacher's opinion that the Claimant's objective imaging studies indicate only degenerative changes. Therefore it is probable that there is no credible and persuasive objective medical documentation of a "permanent aggravation" of the cervical and/or lumbar spine caused by the July 2013 injury.

FINDINGS REGARDING SCHEDULED IMPAIRMENT OF LEFT LOWER EXTREMITY

81. It is more probably true than not that Claimant is entitled to PPD benefits based on Dr. Raschbacher's scheduled impairment rating of 5% impairment of the left lower extremity.

82. Dr. Davis noted that on October 9, 2014 the Claimant was pain free and exhibited "normal" gait and "normal" ROM in the left lower extremity.

83. Dr. Raschbacher credibly stated that upon his examination Claimant exhibited "great limitation of motion and much expression of pain at the left knee." Dr. Raschbacher credibly and persuasively opined that his observations at the DIME were inconsistent with Dr. Davis's observations in October 2014. Dr. Raschbacher also noted that at the DIME Claimant demonstrated 99 degrees of left knee flexion. Dr. Raschbacher opined that his measurement of knee flexion was "grossly inconsistent" with Dr. Beatty's measurement of 130 degrees of flexion. Dr. Raschbacher credibly and persuasively opined that under these circumstances it was inappropriate to assess impairment based on lost ROM because 99 degrees of flexion was not physiologic and was not a true and accurate description of the level of impairment. Dr. Raschbacher credibly opined that Claimant's lower extremity impairment rating is 5% based on the performance of the meniscectomy.

84. Dr. Beatty's opinion that Claimant's lower extremity impairment rating should include 7% for reduced ROM is not persuasive. Dr. Beatty agreed that there was a "significant difference" between his measurement of knee flexion and Dr. Raschbacher's flexion measurement. Dr. Beatty also stated that the AMA Guides do not establish "validity criteria" for establishing knee joint ROM measurements. Dr. Beatty conceded that ROM measurements might vary based on "lack of effort." Dr. Beatty did not persuasively explain why Claimant exhibited "normal" knee ROM in October 2014 but exhibited restricted and ratable ROM measurements in June 2015.

FINDINGS CONCERNING PERMANENT TOTAL DISABLITY

85. Claimant failed to prove it is more probably true than not that he is entitled to permanent total disability (PTD) benefits. Rather, the credible and persuasive evidence establishes Claimant retains the ability to earn wages in the same or other employment

86. Montoya credibly and persuasively explained that Claimant is a skilled worker with well-established history of construction management responsibilities including estimating, bidding, negotiating and contracting. According to the information that Claimant provided to Montoya, his work as owner of the masonry business has not for many years involved "field work" and "manual labor," but instead was mostly performed at a desk. In these circumstances the ALJ credits Montoya's opinion that Claimant could perform some construction management-type jobs without running afoul of Dr. Beatty's restrictions. Similarly, the ALJ credits Montoya's opinion that considering

Dr. Beatty's restrictions Claimant can perform some semi-skilled or unskilled jobs such as cashier, counter attendant, customer service and security worker.

87. Although a claim for permanent total disability benefits can be proved without presenting expert opinion in support of the claim, the ALJ considers it significant in weighing the evidence that Claimant has not produced any credible and persuasive vocational expert to support his claim for PTD benefits. Neither has Claimant produced any credible and persuasive vocational expert to refute Montoya's opinions.

88. Dr. Beatty credibly and persuasively opined that despite the permanent restrictions he has imposed it is not his opinion that Claimant is permanently and totally disabled from performing any work.

89. On the one hand, Claimant testified that he is unlikely to be able to find and maintain employment because he takes prescription pain medications and may take time off to manage his pain. On the other hand, Claimant testified that he thinks he could perform part-time work including construction management "office work." In response to interrogatories Claimant wrote that he does not consider himself "totally" disabled. Claimant's testimony and opinions regarding his ability to obtain and maintain employment are ambiguous and somewhat self-contradictory. Insofar as Claimant testified that he is unable to return to work that testimony is not credible and persuasive.

FINDINGS CONCERNING TEMPORARY TOTAL DISABILITY BENEFITS

90. Claimant failed to prove it is more probably true than not that he is entitled to an award of temporary total disability (TTD) benefits commencing July 11, 2014.

91. It is true that on July 11, 2014 Dr. Davis imposed the restrictions set forth in Finding of Fact 13. Indeed, by July 11, 2014 Dr. Beatty had already imposed even greater restrictions than those set forth by Dr. Davis. (See Finding of Fact 12).

92. Although restrictions were in place on July 11, 2014, Claimant failed to prove it is more probably true than not that these restrictions prohibited or limited his ability to perform his pre-injury employment. As determined in Finding of Fact 64, Claimant told Montoya that at the time of his injury he was not working "in the field" and was not performing "manual labor." Rather, Claimant told Montoya that he was essentially working at a desk performing duties such as construction management, estimating and bidding. Moreover, Claimant admitted that after the July 2013 injury he continued working until he closed the masonry business in November 2013 because it became unprofitable due to an economic downturn in the construction business. The ALJ infers from all of this evidence that the restrictions imposed by Dr. Beatty and Dr. Davis in July 2014 did not prohibit Claimant from performing his pre-injury duties, nor did they impair Claimant's ability to perform his regular duties.

93. Respondents apparently concede in their position statement that Claimant became temporarily totally disabled on August 15, 2014 when Dr. Davis performed arthroscopic surgery on Claimant's left knee. (Respondents Position Statement at pp. 28-29). However, to the extent Respondents do not concede this point the ALJ finds

that Claimant became totally disabled from performing his regular duties on August 15, 2014 when he underwent knee surgery to repair the injury-related torn meniscus.

94. Claimant's argument notwithstanding, his right to TTD terminated on October 9, 2014 when he reached MMI for the industrial injury.

FINDINGS CONCERNING AVERAGE WEEKLY WAGE

95. The parties agree that at the time of the injury Claimant was earning sufficient income to entitle him to the maximum TTD rate of $875.42. The ALJ infers from this agreement that the parties agree that on the date of the injury Claimant's wages exceeded 91% of the state average weekly wage (AWW). *See* § 8-42-105(1), C.R.S. (in case of TTD employee to receive 66 & 2/3% of AWW, not to exceed 91% of state AWW).

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as noted below, a claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

OVERCOMING DIME PHYSICIAN'S FINDING OF MMI

Claimant contends that clear and convincing evidence establishes that Dr. Raschbacher, the DIME physician, erred in finding that Claimant reached MMI on October 9, 2014. In support of this proposition Claimant relies heavily on the opinion of Dr. Beatty that Claimant's cervical and lumbar symptoms are causally related to the July 15, 2013 injury, and that Claimant needed treatment for these symptoms after October 9, 2014. Respondents contend that Claimant failed to overcome by clear and convincing evidence Dr. Raschbacher's finding of MMI.

MMI exists at the point in time when “any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” Section 8-40-201(11.5), C.R.S. A DIME physician’s finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant’s condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant’s medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO March 2, 2000). Thus, a DIME physician’s findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician’s opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician’s finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician’s finding concerning MMI is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician’s finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

When a DIME physician issues conflicting or ambiguous opinions concerning the date of MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician’s true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). An ALJ may consider the contents of the DIME report as well as a DIME physician’s subsequent deposition testimony when resolving the inconsistency. *See Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005); *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

As determined in Finding of Fact 67, Dr. Raschbacher's true DIME opinion is that Claimant reached MMI on October 9, 2014. Therefore, in this matter Claimant has the burden of proof to establish it is highly probable and free from serious doubt that Dr. Raschbacher was incorrect when he found Claimant reached MMI on October 9.

As determined in Findings of Fact 68 through 75 it is Dr. Raschbacher's opinion, as the DIME physician, that Claimant reached MMI on October 9, 2014 because treatment was then complete for the left knee injury. Further, it was Dr. Raschbacher's opinion that Claimant did not sustain any work-related injuries to his cervical and/or lumbar spine as a result of the July 2013 injury, but if he did those injuries did not cause any need for medical treatment after October 9. As determined in Finding of Fact 70, Dr. Raschbacher offered credible and persuasive reasons to support his opinions that Claimant did not sustain any work-related injuries to his cervical and/or lumbar spines in July 2013, but if he did those injuries stabilized by October 9 and were not the need for additional treatment.

As determined in Findings of Fact 68 through 75, Claimant failed to overcome Dr. Raschbacher's finding of MMI by clear and convincing evidence. Specifically, the opinions of Dr. Beatty, Dr. Miller and Dr. Primack are not sufficiently persuasive to render it highly probable and free from serious doubt that Dr. Raschbacher erred in placing Claimant at MMI on October 9, 2014. Dr. Raschbacher determined, within the scope of his authority as the DIME physician, that the industrial injury did not cause any cervical or spinal injuries, but if it did these injuries stabilized and did not warrant any treatment after October 9, 20145.

The ALJ finds and concludes that Claimant reached MMI on October 9, 2014, as determined by the DIME physician.

OVERCOMING DIME ON WHOLE PERSON IMPAIRMENT

Claimant contends that he proved by clear and convincing evidence that Dr. Raschbacher was incorrect in finding that Claimant did not sustain any injury related permanent impairment of the cervical and lumbar spines. Claimant relies heavily on the opinions of Dr. Beatty for the proposition that Dr. Raschbacher "failed to comply with the AMA Guides, specifically Table 53 II (B), in Finding Claimant had not suffered a ratable injury." The ALJ disagrees with Claimant's contention.

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating may be overcome only by clear and convincing evidence. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's impairment rating is incorrect. *Metro Moving and Storage Co. v. Gussert*, *supra*.

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office, supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, WC 4-350-356 (ICAO March 22, 2000).

As determined in Findings of Fact 76 though 80, Claimant failed to prove by clear and convincing evidence that Dr. Raschbacher erred in finding that Claimant's lumbar and cervical impairments, if any, are not causally related to the industrial injury of July 2013. Dr. Raschbacher credibly testified, and Dr. Beatty agrees that it is the rating physician's responsibility to determine from an evaluation of the Claimant's history, medical records and examination whether any ratable impairment was caused by the industrial injury. As determined in Finding of Fact 77, Dr. Raschbacher provided credible and persuasive reasons to support his conclusion that Claimant's cervical and lumbar impairment, if any, is not causally related to the July 2013 injury. For the reasons stated in Finding of Fact 80, Dr. Beatty's opinions were not sufficiently persuasive to constitute clear and convincing evidence to overcome Dr. Raschbacher's opinion.

In his position statement Claimant argues that Dr. Beatty, Dr. Raschbacher and Dr. Sharma "all agreed that Claimant meets the diagnosis under Table 53 (II) (B) for ratable impairment." Regardless of the factual accuracy of this contention, it misses the point that Dr. Raschbacher opined that Claimant's impairment, if any, is not causally related to the July 2013 industrial injury. As noted, the mere fact that some ratable impairment exists does not create a presumption that the impairment was caused by an alleged industrial injury. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra.* In this case a finding that Claimant has some ratable impairment did not require Dr. Raschbacher to find that the impairment was caused by the July 2013 injury. In fact, Dr. Raschbacher performed the requisite causal analysis and rejected the possible inference that Claimant's impairment, if any, was caused by the July 2013 injury.

Insofar as Claimant argues that Dr. Raschbacher did not comply with the AMA Guides because he did not tell Claimant that his pain behaviors might affect the rating, the ALJ disagrees. Dr. Sharma credibly testified the AMA Guides do not require a DIME physician to disclose to a Claimant his impressions about the validity of the Claimant's symptoms and complaints. Dr. Sharma also credibly opined that insofar as the Rating Tips address the DIME physician's disclosure of his or her impressions the Rating Tips are concerned with the performance of ROM measurements and not the over-arching issue of whether the industrial injury has *caused* any ratable impairment. (*See* Finding of Fact 62).

Moreover, even if Dr. Raschbacher had committed some hypothetical violation of the rating protocols of the AMA Guides by failing to tell Claimant that his pain behaviors might affect the rating, the ALJ infers that such violation would not have affected the validity of Dr. Raschbacher's ultimate finding that the July 2013 injury did not cause any of Claimant's neck and back impairment. If Dr. Raschbacher had told Claimant at the DIME that Dr. Raschbacher thought Claimant was exhibiting "florid pain behaviors" and this could affect the rating, and then Claimant suddenly displayed fewer or less dramatic pain behaviors, the ALJ infers this sequence of events would only have reinforced Dr. Raschbacher's doubts about the genuineness of Claimant's pain behavior.

Respondents argue at length that ALJ Allegretti's finding that the July 15, 2013 incident caused injury to Claimant's neck and back does not constitute "issue preclusion" with respect to Dr. Raschbacher's finding that Claimant did not sustain any permanent impairment of the neck and back. Claimant's position statement does not overtly address this issue and it is not clear that Claimant is arguing that ALJ Allegretti's order precludes Dr. Raschbacher's causation findings. However, to the extent Claimant is making this argument the ALJ disagrees with it for the reasons set forth in *Ortega v. JBS USA, LLC,* WC 4-804-825 (ICAO June 27, 2013) (because of differences in the applicable burdens of proof ALJ's finding of causation when determining issue of compensability did not impose issue preclusion on DIME physician's reconsideration of the issue when determining cause of permanent impairment) .

IMPAIRMENT RATING FOR LEFT KNEE

Claimant argues he overcame by clear and convincing evidence Dr. Raschbacher's 2% whole person impairment for the left knee injury. Claimant asserts that the left knee rating should be based on Dr. Beatty's 5% whole person impairment rating. Conversely, Respondents contend that since Claimant failed to overcome Dr. Raschbacher's 0% rating for the neck and back Dr. Raschbacher's 5% lower extremity rating for the knee is "binding unless overcome by clear and convincing evidence. Contrary to the assumptions of both parties, Dr. Raschbacher's left knee rating is not binding on the parties unless overcome by clear and convincing evidence. Rather, in the circumstances presented by this case Claimant must prove by a preponderance of the extent of his lower extremity impairment.

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, “the employee shall be limited to the medical impairment benefits as specified in subsection (2).” If the claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides the claimant shall “be limited to medical impairment benefits as specified in subsection (8),” or whole person medical impairment benefits. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.*

Moreover, the clear and convincing standard of proof mandated by the DIME procedure applies only to non-scheduled (whole person impairment) injuries, not to scheduled injuries. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691, 693 (Colo. App. 2000); *Maestas v. American Furniture Warehouse,* WC No. 4-662-369 (June 5, 2007). Section 8-42-107(2)(w), C.R.S., provides for scheduled compensation based on “loss of a leg at the hip or so near thereto as to preclude the use of an artificial limb.” When a claimant seeks to convert a scheduled impairment rating for “loss of the leg at the hip” to the equivalent whole person impairment rating the claimant bears the burden of proof by a preponderance of the evidence to establish “functional impairment” beyond the leg at the hip. Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* supra; *Maestas v. American Furniture Warehouse, supra*.

Here, Claimant has not even argued that he presented evidence sufficient to establish that it is more probably true than not that the left knee injury caused “functional impairment” beyond the leg at the hip. Consequently, the ALJ concludes that the Claimant is not seeking conversion of the left knee extremity rating to its whole person equivalent. In any event, if the issue had been raised the ALJ would conclude there is no credible and persuasive evidence to establish that Claimant’s left knee injury caused functional impairment beyond the left leg at the hip. Indeed, even if Claimant’s right knee problems could constitute “functional impairment” beyond the left leg at the hip Dr. Beatty persuasively and credibly opined that Claimant’s right knee problems are not causally related to the July 2013 left knee injury. (*See* Finding of Fact 25).

Because Claimant has sustained only a scheduled injury he bears the burden of proof to establish by a preponderance of the evidence the extent of the lower extremity impairment. *Maestas v. American Furniture Warehouse, supra.* Scheduled impairment ratings must be calculated in accordance with AMA Guides. Section 8-42-101(3.7), C.R.S.; *Kolar v. Industrial Claim Appeals Office*, 122 P.3d 1075 (Colo. App. 2005).

As determined in Findings of Fact 81 through 84, the credible and persuasive evidence establishes it is more probably true than not that Claimant is entitled to PPD benefits based on a scheduled impairment rating of 5% of the left lower extremity. The ALJ has credited the opinion of Dr. Raschbacher that Claimant’s knee ROM measurements are not reliable and have been inconsistent over time. Therefore, the ALJ credits Dr. Raschbacher's opinion under the AMA Guides Claimant's ROM should not be included in the scheduled impairment rating. *Cf. Otero v. Industrial Claim Appeals Office,* WC 4-346-007 (ICAO May 4, 2000), *aff'd., Otero v. Industrial Claim Appeals Office*, (Colo. App. No. 00CA0963, November 30, 2000) (not selected for publication) (otherwise valid ROM measurements properly discounted under AMA Guides where, based on history and examination, DIME physician found claimant was not giving full effort and thus ROM impairment was not "caused" by the industrial injury). The ALJ is not persuaded by Dr. Beatty's rating that included ROM impairment for the reasons stated in Finding of Fact 84.

PERMANENT TOTAL DISABLITY

Claimant alleges that he proved by a preponderance of the evidence that he is entitled to an award of PTD benefits. The ALJ disagrees.

To prove the claim that he is entitled to PTD benefits, Claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*.

The question of whether the claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995). In this regard the ALJ acting as fact finder determines the weight and credibility assigned to expert vocational evidence. *Burchard v. Preferred Machining*, WC 4-652-824 (ICAO July 23, 2008).

As determined in Findings of Fact 85 though 89, Claimant failed to prove it is more probably true than not that he is entitled to an award of PTD benefits. Rather, the credible and persuasive evidence establishes that Claimant is capable of obtaining and maintaining employment. As determined in Finding of Fact 86, the ALJ credits Montoya's expert opinion that Claimant is capable of working in jobs similar to that he had at the time of the injury as well as other semi-skilled and unskilled positions. Montoya's opinions were not refuted or contradicted by any credible expert testimony. Claimant's own treating physician, Dr. Beatty, opined that from a medical perspective

Claimant is not totally disabled. Insofar as Claimant's testimony might support the inference that he is incapable of earning wages in any employment, the testimony is not credible and persuasive for the reasons stated in Finding of Fact 89.

TEMPORARY TOTAL DISABILITY BENEFITS

Claimant contends he is entitled to an award of TTD benefits from July 11, 2014 through October 16, 2014. Claimant reasons that on July 11, 2014 Dr. Davis took him off of work and did not release him to return to work until October 16, 2014.

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As determined in Findings of Fact 90 through 92, Claimant failed to prove it is more probably true than not that he is entitled to an award of TTD benefits commencing July 11, 2014. Specifically Claimant failed to prove that the restrictions imposed by Dr. Beatty and Dr. Davis prohibited or limited his ability to perform the duties of his regular employment at the time of injury. Thus, Claimant failed to prove that his "earning capacity" was limited by the temporary restrictions.

However, as determined in Finding of Fact 93, Claimant proved that he was temporarily totally disabled on August 15, 2014 when he underwent surgery. Claimant's entitlement to TTD benefits continued until October 9, 2014 when he reached MMI for the industrial injury. Section 8-42-105(3)(a), C.R.S.

AVERAGE WEEKLY WAGE

Respondents do not dispute that at the time of injury in July 2013 Claimant earned in excess of 91% of the state AWW, and that based on these earnings Claimant would be eligible to receive TTD benefits at the applicable maximum weekly rate of $875.42. However, citing *Kittelson v. City and County of Denver*, WC 4-923-057 (February 24, 2015), Respondents contend the ALJ should exercise the statutory discretion afforded by § 8-42-102(3), C.R.S., to fairly calculate Claimant's AWW. The ALJ is not persuaded.

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *partially overruled on other grounds, Benchmark/Elite v. Simpson*, 232 P.3d 777 (Colo. 2010) *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993),. Specifically, § 8-42-102(3) grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.*, *supra*.

Here, Respondents argue that when Claimant became temporarily disabled on August 15, 2014 he was "voluntarily not working." Respondents cite *Kittelson v. City and County of Denver, supra* as authority for the proposition that in these circumstances it would be "fair" to reduce Claimant's AWW below the maximum permitted by § 8-42-105(1), C.R.S. (91% of the state AWW). Respondents assert that $656.56 represents a "fair" AWW. If Respondents argument is valid the Claimant's TTD rate would be reduced to $437.26 per week.

Kittelson is a death benefits case in which the decedent firefighter voluntarily retired several years before the onset of his fatal occupational disease and consequent death. The decedent was not earning any wages at the time of his death and had not done so for some time. The ALJ exercised the discretion afforded by § 8-42-102(3) to conclude that for purposes of calculating death benefits under § 8-42-114, C.R.S., decedent's AWW could be "fairly" calculated by using his earnings just prior to his retirement. The ALJ also found that the minimum death benefit authorized by § 8-42-114 (25% of the maximum weekly benefit) did not fairly calculate the decedent's AWW. The ICAO noted that death benefits are designed to replace loss of income to dependents resulting from the "work induced death" of the employee. The ICAO ruled that the ALJ made insufficient findings of fact to explain how the decedent's earnings prior to the voluntary retirement fairly approximated the loss of income to the dependent long after decedent's voluntary retirement. The ICAO also held that the ALJ failed to explain why the minimum allowable benefits would not fairly compensate the dependent's loss of income resulting from decedent's post-retirement death.

Respondents' argument notwithstanding, this case is not analogous to *Kittelson*. Unlike the decedent in *Kittelson* Claimant has not voluntarily withdrawn from the labor force in order to retire. Rather, Claimant credibly testified that the reason he closed his masonry business was because it was not profitable in the depressed economic environment. Such economic loss of earnings does not sever the causal relationship between a compensable injury and subsequent temporary wage loss. This is true because a temporarily disabled worker searching for employment after an economic lay-off is relatively disadvantaged when compared to other workers. *Schlage Lock v. Lahr,* 870 P.2d 615 (Colo. App. 1993); *Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989).

In these circumstances the ALJ declines to exercise his discretion to find that the Claimant's earnings at the time of the injury do not fairly reflect his earning capacity at the time of the disability. This is not a case in which the Claimant voluntarily withdrew from the labor market and thus chose not to earn any wages. Moreover, the Respondents have not offered any credible and persuasive evidentiary basis to explain why $656.56 would "fairly" approximate Claimant's injury-related wage loss. The Claimant's AWW and consequent TTD rate of $875.42 shall remain unchanged.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. Claimant reached maximum medical improvement on October 9, 2014.

3. Insurer shall pay permanent partial disability benefits based on a 5% impairment of Claimant's left lower extremity.

4. Insurer shall pay temporary total disability benefits in accordance with the statutory formula and at the maximum allowable rate for the period of August 15, 2014 through October 8, 2015.

5. Respondents' request to modify the average weekly wage is denied.

6. Any issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 14, 2016

DIGITAL SIGNATURE:
David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Claimant proved by a preponderance of the evidence that he is unable to earn wages and therefore is permanently totally disabled; and

b. Whether Claimant proved by a preponderance of the evidence that he is entitled to a general award of maintenance medical benefits.

c. Claimant withdrew the issue of disfigurement.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered:

1.Claimant is 27 years old. Claimant has been married for nine years and he lives with his wife and two children, ages nine and two years old. Claimant sustained admitted injuries to his head, neck and back in the course and scope of his employment on November 18, 2013, when he was setting forms for an elevator and the ceiling platforms fell on top of him.

2. Claimant was first evaluated on the date of his accident at Denver Health Medical Center where he reported having 60 pounds of wood fall 10 feet onto his head at work, with loss of consciousness. Claimant's friend reported that Claimant had multiple episodes of vomiting, and "not acting normal." Claimant had complaints of headache and neck pain. X-rays of Claimant's thoracic spine showed subtle anterior wedging of one of the vertebral body in the upper lumbar region. Based on MRI findings of Claimant's lumbar spine, Claimant had a shallow, broad-based central protrusion at L5-S1, as well as straightening of the normal lumbar lordosis, which can be seen with muscular spasm.

3. Claimant's psychologist, Dr. Ricardo Esparza, diagnosed Claimant with cognitive disorder, as well as adjustment disorder with depression and anxiety.

4. The neurologist, Dr. Bennett Machanic, reported that Claimant suffered closed-head trauma with a rather significant cerebral concussion, and a posttraumatic brain injury, with a Rancho Los Amigos scale somewhere around 5 or 6*. Dr. Machanic reported that Claimant had pseudobulbar affectual disorder. He also had cervical strain, lumbosacral strain with right L4 radiculopathy. He had vestibular dysfunction, which perhaps was inner ear and associated with the head trauma. Dr. Machanic reiterated

that this was a very complex multisystem posttraumatic situation. Dr. Machanic stated, "At this point in time, the prognosis is indeed very guarded and I do not think this man is going to be returning to his previous occupational [sic] in the foreseeable future. Indeed I am quite concerned about permanent cognitive and emotional dysfunctions." (Exhibit 5) *Rancho 5 = Confused, Inappropriate, Non-Agitated: Appears alert; responds to commands; distractible; does not concentrate on task. Rancho 6 = Confused, Appropriate: Good directed behavior, needs cuing; can relearn old skills; serious memory problems; some awareness of self and others.

5. Dr. Laura Rieffel reported that Claimant's working memory was poor, stating that questions had to be repeated to him multiple times when details were involved. Claimant's speed of mental processing was noticeably slow. She also noted that Claimant ambulated slowly, cautiously and stiffly. Claimant complained of blurry vision during the peripheral vision exam. During sensory perceptual exam, Claimant became teary from tactile stimulation, of face in particular, some with touch of his hand.

6. On April 8, 2014, Dr. James Trevor McNutt reported that Claimant's EEG was abnormal due to the presence of sharp dysrhythmia noted in the left frontal and temporal regions. Dr. McNutt stated that this may indicate an underlying region of cortical hyperirritability.

7. Dr. Peter Reusswig performed multiple cervical and lumbar epidural, facet, transforaminal and rhizotomy injections throughout the course of Claimant's treatment.

8. On July 3 and 8, 2014, Claimant underwent speech/language pathology cognitive/communicative evaluation at Spalding Rehabilitation with Lois McCarthy. Claimant displayed significant deficits in cognition in terms of short-term memory, attention, and insight into his situation. He had severe deficits in oral motor skills, with significant neurogenic stuttering and weak, slow, and irregular lingual functioning. Claimant had moderate to severe deficits in visual/spatial functioning. He had difficulty with trails, symbol cancellation, clock drawing, design memory and design generation. Claimant had moderate to severe deficits in memory, as well as attention and processing. Claimant also had moderate to severe deficits in executive functions. Claimant displayed poor deficit awareness, and he also denied stuttering behavior. It was reported that Claimant required skilled speech/language therapy to address neurogenic stuttering and to initiate education and treatment for deficits in linguistic and cognitive areas.

9. Claimant was also evaluated by Dr. Steven Wilk on July 29, 2014. He diagnosed Claimant as having bilateral myalgia, bilateral anterior disc displacement with reduction, capsulitis of the bilateral temporomandibular joint, bilateral muscle spasm, and bilateral side injury to the face and neck. Dr. Wilk stated, "Patient presents with direct trauma. In my opinion, to a reasonable degree of medical certainty this disorder resulted from the accident of 11/18/2013." On November 13, 2014, Dr. Wilk reported mandibular range of motion measurements taken on 11/05/2014 were 36 mm opening, 2 mm right lateral excursion and 3 mm left lateral excursion. Normal range of motion is

44-52 mm opening and 12 mm lateral excursion. Dr. Wilk stated that due to excessive witnessed bruxism activities, he would suggest a trial of Buspirone. Dr. Wilk reported that Claimant's prognosis was unknown. However, Dr. Wilk stated, "A joint which has suffered soft tissue damage with the resultant disc dysfunction will never be normal again. It can be anticipated that the patient will have exacerbation throughout his lifetime which will require additional evaluation and treatment." Dr. Wilk also reported that Claimant continued to suffer from severe muscle spasm in the masseter muscles.

10. Dr. Brian Beatty conducted an IME for Respondents and stated, "Based on my examination, there did not appear to be any overt symptom magnification or pain behavior and overall his examination was consistent and valid."

11. About a year after Claimant's accident Dr. Machanic stated, "I have to say at this point not sure how much improvement we can achieve, and this man is very close to, if not at, maximum medical improvement." Only a few months later, on February 17, 2015, Dr. Machanic stated, "I am concerned about this man's situation. I think he has significant lingering impairments. They would include encephalopathy, neck and back pain. Not sure as to what kind of work he could do at this point."

12. Claimant participated in a Functional Capacity Evaluation on March 16, 2015, with Christine Couch. Claimant was able to demonstrate a maximum sustained sitting tolerance of 66 minutes. He was able to demonstrate a sustained standing tolerance of 28 minutes. Claimant was able to complete one of 10 laps (100 feet each). He ambulated with an antalgic gait pattern. Claimant demonstrated the ability to lift 25 pounds occasionally at all levels, with the exception of shoulder to overhead, which was limited to 5 pounds. Claimant was able to carry 25 pounds bilaterally, but only 10 pounds in either the right or left hand individually. Claimant could push 23.4 pounds of force, and pull 25 pounds of force. Claimant demonstrated consistency in 20 of 20 tests. Claimant was able to complete 10 of 40 steps of the stair climbing test, using the handrail, with antalgic gait. Claimant requested several changes of position during the evaluation due to aggravation of his symptoms. These involved seated rest breaks following standing/walking tasks and standing/walking breaks following seated tasks. Claimant had errors during testing, despite being provided with verbal instructions and demonstration. Claimant had increased heart rate during testing, and was observed as diaphoretic following testing.

13. Claimant underwent neuropsychological evaluation with Dr. Rieffel on April 21, 23, 24, and May 4, 2015. Claimant's performance was best described as slow and inaccurate with significant variability across the length of the test, suggestive of sustained attention problems. Dr. Rieffel noted that Claimant's use of a mnemonic strategy of clustering, a problem solving strategy that aids in memory recall, was actually quite ineffective for him because of his slowed mental process. Dr. Rieffel stated, "I don't know if this is a strategy that he was taught in cognitive rehab or if it was his own problem solving attempt, but unfortunately for him, it is not an effective strategy. That is, I noticed that he was expending so much energy and focus trying to cluster items on a word list, that many items were 'falling through the cracks because he

couldn't process the information quickly enough." Dr. Rieffel stated that although Claimant presented as much less distraught and depressed than on his initial presentation, mood and behavioral disturbances are still a significant impediment to gainful employment. Dr. Rieffel noted that during the feedback, Claimant's positive façade quickly dissipated, and his agitation and cognitive rigidity quickly surfaced when situations became confusing to him. The degree of Claimant's disintegration during this conversation strongly suggested that he is likely to become easily confused and consequently, irritable, perhaps acting in ways that are not typical for him, when faced with situations that are outside the norm for him. Further, although Claimant's problem solving is low normal, these skills quickly become further impaired when he is required to act/react in a stressful situation. Dr. Rieffel stated her impression that Claimant will need assistance from trusted others when making complex decisions as he is likely to have difficulty mentally managing and considering all of the variables involved. Dr. Rieffel recommended a trial of stimulant medication, if it had not already been attempted. She also recommended that Claimant continue with individual psychotherapy with a shift in focus towards what he is able to do, so that he can work against the negative self-expectations he was generating. Dr. Rieffel opined that there was enough information on the basis of Claimant's prior evaluation and current behavioral observations to diagnose him with Major Neurocognitive Disorder Due to Traumatic Brain Injury with behavioral disturbance (including disturbances of mood and agitation/irritability).

14. Claimant has treated with many different providers from the date of his injury until now and is currently being treated by David Yamamoto, M.D. On June 17, 2015, Dr. Yamamoto placed Claimant at maximum medical improvement but noted that Claimant had ongoing problems secondary to his traumatic brain injury. He continued to have headaches and dizziness. He was also still having anger issues. Claimant continued to have difficulty with his memory, as well as problems with stuttering. Claimant had ongoing problems with posterior neck pain and lower back pain. He also still had TMJ problems. Dr. Yamamoto assessed Claimant as having traumatic brain injury with ongoing symptoms including memory loss, mild confusion, mood changes, headaches, anxiety and stuttering. He also assessed Claimant as having cervical strain; lumbar strain, status post L3, L4 and L5 neurotomies; and TMJ with bruxism. Dr. Yamamoto utilized the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*, to determine Claimant's impairment. For the traumatic brain injury, Dr. Yamamoto assigned 15% impairment for complex integrated cerebral function disturbances. He opined that Claimant could also receive 15% from language disturbances and emotional disturbances. For specific disorders of the cervical spine, Claimant was assigned 4% whole person impairment. For range of motion loss, he was assigned 9% whole person impairment. These combined to equal 13% cervical spine impairment. For specific disorders of the lumbar spine, Dr. Yamamoto assigned 8% whole person impairment. For range of motion loss, Claimant received 8% whole person impairment. These combined to equal 15% lumbar spine impairment. The spine impairments were combined to equal 26% whole person impairment. This was combined with the 15% traumatic brain injury impairment to equal 37% whole person impairment. Dr. Yamamoto gave Claimant a 37% whole person

impairment, and he stated that the 37% was representative of Claimant's overall clinical picture. Dr. Yamamoto recommended that Claimant be seated for at least one hour per 8 hour day, and stated that he should change positions every 30-60 minutes as needed. Dr. Yamamoto stated that Claimant would need ongoing counseling, ongoing medications for the foreseeable future, and maintenance visits every 2-4 months.

15. On July 16, 2015, Respondents filed a Final Admission of Liability, admitting liability for Medical Benefits after MMI "Per Dr. Yamamoto's report dated June 17, 2015… for related reasonable and necessary medical benefits by an authorized treating physician."

16. On August 17, 2015, Dr. Rieffel credibly reported that it is possible that further neuropsychological care will be needed as Claimant nears old age. She noted that research suggests that Claimant may experience deterioration of cognitive function at a faster rate than usual due to the loss of his cognitive reserve. If this were necessary, she would anticipate another full neuropsychological evaluation and follow ups would be needed at that time. Dr. Rieffel anticipated that Claimant will need some level of ongoing psychotherapy as well as family therapy secondary to the stress generated by his cognitive disorder and personality changes. Dr. Rieffel stated, "Due to the chronic nature of these problems, there will likely be an ebb and flow of psychological exacerbations and family/personal problems that will need to be addressed in treatment."

17. Claimant's vocational expert, Doris Shriver, reported that observations, exams and standardized tests showed Claimant had a maximum lift of 20 pounds and confirmed limitations with sitting, standing, walking, climbing, stooping, kneeling, crouching, crawling, and trunk movements when standing and sitting. Decreased range of motion, strength and motor coordination testing supported the findings. Ms. Shriver reported that Claimant's head injury, sleep deprivation and chronic pain created mental challenges. As a worker, Claimant is below the 1st percentile when compared to over 20,000 workers. Over 30 reliable and valid tests showed Claimant's traits and aptitudes to be below the 1st percentile compared to average workers. Ms. Shriver reported Claimant's weaknesses as: 1. Status-post head, neck and low back injuries; 2. English as a second language; 3. Reduced tolerance for daily tasks, leisure and work; 4. Impaired far visual acuity; 5. Impaired near visual acuity; 6. Impaired binocularity (no near depth perception); 7. Receptive language below the 1st percentile; 8. Impaired tolerance for climbing, balance, stooping, crouching, kneeling, crawling, and trunk movements when standing; 9. Positive vestibular-ocular reflexes; 10. Lifts up to 20, 15, and 15 pounds from floor to waist, waist to shoulder, and waist to overhead respectively one time; Safe lifts are 50% less when frequency is considered; 11. Impaired range of motion (trunk, neck, shoulders, hips and knees); 12. Impaired strength (bilateral upper and lower extremities); 13. Impaired light touch sensation in posterior distal arms; 14. Impaired right hand touch discrimination; 15. Scattered scores on Haptic; 16. Reading at grade level 1.6; 17. Sentence comprehension below grade level K.0; 18. Spelling at grade level K.6; 19. Arithmetic at grade level 3.5; 20. Fine motor coordination at the 0.1st percentile; 21. Gross motor coordination at the 0.1st percentile; 22. Below average

bilateral palmar pinch strength; 23. Below average right hand lateral pinch and tip pinch strength; 24. Impaired tolerance for sitting, standing, walking and lifting; 25. Emotional behaviors at the 0.2nd percentile; 26. Adaptive behaviors at the 1st percentile; 27. Clinically observed severe chronic pain; 28. Disturbed sleep due to pain. Ms. Shriver reported the following validity factors: Increase in heart rate of 20 bpm indicating valid effort with lifting; Involuntary nystagmus (jerking movement of the eyes); Limitations in ADLs consistent with impaired range of motion, strength and motor coordination; and, Chronic pain consistent with observed behaviors, loss of activity, adaptations, reliance upon others, emotional/mental challenges, pain medications and sleep disturbance. Ms. Shriver noted that many of Claimant's weaknesses were consistent with left brain hemisphere damage. Ms. Shriver recommended provisions for continued medical care and therapies, cognitive therapy and testing, emotional support for anger and frustration tolerance, complimentary alternative medicine for pain relief, essential services for self-care, shopping, cooking and household management tasks at least 2 hours per day, and a driver for medical appointments.

18. On January 19, 2016, Dr. Yamamoto noted that he had changed Claimant's lifting limits to maximum lift of 25 pounds, as his back had been bothering him more. He noted that the limits were now in line with the FCE. Also, Dr. Yamamoto noted that he did test Claimant's lifting ability and he struggled with over 25 pounds. Dr. Yamamoto reported that he did not agree with Dr. Overholt regarding weaning Claimant's medications. He also stated, "He still has some depression and in my opinion it would be a mistake to 'wean him off' antidepressants as it would likely make his depression worse." Dr. Yamamoto concluded that "If he is to work he would need constant supervision."

19. Claimant's wife and three other lay witnesses credibly testified that Claimant changed drastically after the accident. They testified that since the accident, Claimant has become intolerant, impatient, frustrated, and gets angry with everyone. He can only be around others for short periods of time before he draws away, isolates himself or goes to lie down. He has problems with concentration, comprehension and understanding since his accident. He has difficulties putting words and sentences together or engaging in conversation. Claimant has frequent headaches, at least three times a week, which are very unpredictable and can last from a day up to three days. Claimant does not get out of bed when he has the really bad headaches. Claimant's wife credibly testified at hearing. She testified that if she is not home, her mother will generally supervise Claimant and the children. Claimant's wife stated that she believes that Claimant requires constant supervision. Claimant's wife also testified that Claimant enrolled in GED classes, but that he called her during the break, halfway through the three hour class, to come pick him up because of his headaches.

20. Dr. David Yamamoto, Claimant's primary authorized treating physician, testified that he treated Claimant since January 2014, two months after his accident, and continues to treat him for maintenance care for his neck, back, depression and the traumatic brain injury (TBI). He prescribes medications for muscle spasms, neck and back pain, headaches, depression and PTSD, bruxism for TMJ, concentration and memory loss as well as medications to control his anger issues. Some of these

medications cause drowsiness, loss of appetite and jitteriness. He is taking from 10 to 12 medications at any given time. They can cause fatigue and difficulty with concentration. He is unable to control the headaches, even with medications. He has problems with concentration, focus and spatial reasoning. Claimant has problems with emotional disturbance and depression. All of these are impediments to Claimant's return to the work force. However, the major problems for Claimant are problems with memory, following instructions, confusion, concentration and staying on task. Claimant is very self-conscious due to the stuttering. He resists answering directly. Dr. Yamamoto confirmed that the medical records identify Claimant has problems with anger management, which is why he is on medication for the problem. Dr. Yamamoto stated that anger issues are common for patients with PTSD and TBI. Claimant had a significant brain injury and anger is a consequence of the brain injury. Claimant does not do well with stress.

21. Dr. Yamamoto last saw Claimant on January 19, 2016, and reviewed all the medications that Claimant is currently taking. They are important for Claimant's maintenance care. He credibly opined that Dr. Overholt was incorrect in recommending termination of maintenance medications. Dr. Yamamoto based his opinion on his evaluations, examinations and knowledge of Claimant. He also stated that Claimant's injections with Dr. Reusswig are to reduce pain and increase function. Claimant has had radiofrequency ablations that may need to be repeated as part of maintenance care. Dr. Yamamoto also does laboratory testing regarding narcotics. Dr. Yamamoto prescribes Claimant narcotics for pain and severe headaches. Dr. Yamamoto has not observed drug seeking behavior by Claimant and testing reveals that the levels of medication were appropriate. Claimant continues to be at MMI and Dr. Yamamoto opines that the treatment that Claimant is receiving now is reasonable and necessary. Dr. Yamamoto testified that Claimant's condition is chronic and that he does not anticipate that Claimant's condition will heal. Claimant requires ongoing maintenance medical care.

22. Dr. Yamamoto placed Claimant's restrictions at occasional lifting, carrying, pushing and pulling of 25 lbs., which is in addition to prior restrictions of standing and sitting up to 7 hours a day, and changing positions every 30 to 60 minutes as needed. Claimant should also avoid heights and also needs supervision because he does not have the capacity to work independently, and must be monitored or watched at all times. Claimant could do some of the jobs identified by Respondents' vocational expert so long as he was assisting someone else that was doing the jobs, could take frequent 10 minute breaks, and was allowed off when his headaches are intense. Claimant continues to report headaches consistently. He would not be able to be a car wash worker as it is very strenuous due to the bend and scrubbing of cars. Attendant car wash worker would be eliminated by the fact that he would need supervision and could not handle money. Sheltered employment might be a possibility because he needs constant supervision.

23. Dr. Yamamoto had originally given higher restrictions in order not to limit Claimant's employment search and options, but he tested Claimant personally and observed Claimant's ability to lift only up to 25 lbs. with difficulty, and with limited repetition, which was in line with the FCE evaluation performed by Christine Couch, P.T.

The FCE was a valid, consistent evaluation and Claimant was also consistent with all of Dr. Yamamoto's evaluations. Dr. Yamamoto placed him in the light to sedentary category of physical work. However, he opined that increased headaches will affect his cognitive abilities.

24. Dr. Yamamoto expected changes in the patient's traumatic brain injury between six months and a year due to the natural progression of healing. While Claimant is able to take direction, as demonstrated by his ability to take medication, those are very simple daily routines, as opposed to going to work, and very different from being in a working environment every day. Dr. Yamamoto testified that the only job Claimant could probably do is one that is around family members, in a family business, where Claimant would have people to give him specific instructions to perform different activities, though he may not be able to perform the same activities every day. Claimant has not achieved the level of recovery that would allow him to go out and work. At this time, Dr. Yamamoto opined that Claimant is not able to return to any kind of work.

25. Ms. Shriver testified as a vocational expert on behalf of Claimant. She has experience with traumatic brain injury patients, as she worked at the facility that developed the Rancho Los Amigos TBI scale and applied it in her work. A traumatic brain injury patient can have a very significant and complex array of symptoms that may include loss of range of motion, weakness, fatigue, confusion, loss of learning, inability to concentrate, inability to multitask, all of which are specifically affected by auditory and visual stimuli. Depression also affects cognition, as in this case. Claimant is unable to hide his traumatic brain injury, which is one of the reasons why Claimant is unable to obtain employment.

26. While at the hearing, Ms. Shriver observed Claimant change position frequently, lifting his buttock off of the chair by putting his weight on his arm, rubbing his head, closing his eyes, and had a nystagmus. During his FCE with Ms. Shriver, Claimant performed at the 20 lb. range. He had objective observations of demonstrated pain. He was consistently limping, showing limitation of the right leg. She observed his antalgic gait, even going into the court house, though Claimant did not know she was watching him. His loss of range of motion of the neck and low back caused foreshortening of the muscles that affect his vocational capacity, as they have limited his ability to stoop or crouch. Coordination was also assessed and gave another look at how his brain is functioning, consistent with his left brain injury. While Claimant has always been restricted to obtaining work with employers that accept primarily Spanish speaking workers, his traumatic brain injury makes his potential for employment even more difficult. Ms. Shriver, after considering all of Claimant's limitations and background, including the traumatic brain injury, testified that Claimant would be limited to a sheltered employment situation. She reviewed all of the jobs identified by Respondents' vocational expert. She stated that, in addition to his other limitations, none of the employers could handle the absenteeism that would be caused by Claimant's impairments and medical conditions, especially his headaches. Claimant does not have the skills to locate and sustain work or retain work. Claimant's wife's testimony that Claimant could not handle GED classes was expected and consistent with his testing and medical records. This brain injury is catastrophic for Claimant.

27. Ms. Shriver testified that none of the community resources or programs identified by Respondents' vocational expert effectively put people back to work, nor could they successfully rehabilitate and provide vocational retraining for Claimant due to the myriad problems facing Claimant caused by his brain injury. The only program that Ms. Shriver knows that has been of value to TBI patients is the Colorado Brian Injury Association. Also, Claimant does not have the skills required to go through any programs identified on his own. Someone would have to assist Claimant through the process. Neither is Claimant a candidate for assistance through the Division of Vocational rehabilitation. They use the McCarron Dial assessment and Claimant scored so low that they would not provide services.

28. Ms. Shriver was deemed more credible and persuasive that Respondents' vocational expert because overall she has more education, experience and training than Respondents' vocational expert and has assessed all of Claimant's physical, mental and vocational skills in reaching her ultimate opinions, not just transferable skills as Ms. Harris. Ms. Shriver testified that Claimant may be able to obtain sheltered employment and, at best, he would need to be accommodated so that he may come and go home as needed, he would need transportation when necessary and someone to help Claimant and his wife to access any kind of community support. Claimant's testing was very consistent with the diagnosis of a left brain injury. Claimant's test results could not be faked. She stated that Dr. Yamamoto's testimony at hearing only served to confirm her own opinion with regard to Claimant. Ms. Shriver further stated that, given Claimant's current functional capacity, education, background, experience, mental disabilities, she credibly opined, within a reasonable degree of vocational probability, that Claimant is not employable.

29. Finally, Claimant testified at hearing at which time he could not state his address as he could not recall it, nor could he recall the date of his injury, though he remembers that his injuries were to his back, neck, and head, and that he suffered from dizziness, headaches, and pain in his back. Claimant indicated that he has memory problems and depression. He is not allowed to be the only one with his youngest two year old daughter because he gets angry easily. Claimant believed it was due to the depression and the pain. Claimant testified that he looked for work at many places. Claimant went to school in Mexico through middle school and went to a year and a half of high school in the USA. Claimant is unable to drive any significant distances due to his physical and emotional impediments, and only to those areas that are familiar and routine to him. He cannot access the commutable labor market, not just because he does not hold a driver's license, but because well documented severe headaches make him a danger to himself and others.

30. The ALJ observed at hearing many aspects of Claimant's limitations, both physical and mental, to which his witnesses testified. Claimant could be observed crying off and on throughout the two day hearing.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

Generally

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43- 201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 592 P.2d 792 (1979). The facts in a workers' compensation claim must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness of unreasonableness (probability or improbability) of the testimony; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline,* 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation claim is decided on its merits. Section 8-43-201, C.R.S. Further, factual findings concern only evidence that is dispositive of the issues involved; even if the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to cited findings as unpersuasive. See *Magnetic Engineering, Inc. v. Indus. Claim Apps. Office*, 5 P.3d 385 (Colo. App. 2000).

Permanent Total Disability Benefits

3. Claimant proved by a preponderance of the evidence that he is permanently and totally disabled (PTD) as defined by Section 8-40-201(16.5), C.R.S., and has proven that he is unable to earn wages in the same or any other employment. To prove a claim for permanent and total disability, a claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). For purposes of permanent total disability, "any wages" means more than zero. See *Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Apps. Office*, 894 P.2d 42 (Colo. App. 1995). A claimant is not required to prove that an industrial injury is the sole cause of his inability to earn wages. However, a claimant must demonstrate that the industrial injury created some disability that ultimately contributed to the claimant's permanent total disability. *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo. App. 1986). A claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo.

App. 2001). The question of whether a claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

4. Here, Claimant provided overwhelming evidence that he suffered injuries to his head, neck and low back. The consequences of the injuries involve a traumatic brain injury and consequent depression. Claimant has significant symptoms of persistent headaches, dizziness, muscle spasms, neck and back pain, an antalgic gait, PTSD, TMJ, problems with concentration and memory loss as well as anger issues. Claimant is taking between 10 to 12 medications at any given time which also cause side effects, including fatigue and loss of concentration. Claimant also has problems with concentration, focus and spatial reasoning, and major problems with memory, following instructions, slowed learning, confusion, staying on task and stuttering. All of these are impediments to Claimant's return to the work force. This is consistent within the medical reports issued by Dr. Machanic and Dr. Rieffel, and as evidenced by Dr. Yamamoto and Ms. Shriver's testimony. This is also supported by the testimony of the lay witnesses.

5. The determination whether a claimant is permanently and totally disabled is made on a case-by-case basis and varies according to a claimant's particular abilities and circumstance. In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). Ms. Shriver testified that considering Claimant's work restrictions as provided by Dr. Yamamoto and Claimant's left brain TBI, Claimant might be able to access some sheltered employment but only under specifically accommodated situations where he was allowed to work on good days alone and was allowed to come and go as necessary, dictated by his continuing debilitating headaches. She further testified that employers in competitive employment situations would not accommodate Claimant's particular situation.

6. Where the possibility of being retrained for employment exists, and where respondents have not offered vocational rehabilitation services, and where the injured worker would need professional assistance to be vocationally rehabilitated, and such retraining is not feasible or accessible, a finding of permanent total disability is proper. *Drywall Products v. Constuble*, 832 P.2d 957 (Colo. App. 1991) (cert. denied). See also *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). Ms. Shriver testified that Claimant does not have the skills required to go through any vocational rehabilitation programs on his own. Someone would have to assist him in the process. Neither is Claimant a candidate for assistance through the Division of Vocational Rehabilitation. The Division uses the McCarron Dial assessment and Claimant scored so low that they would not provide any services.

7. One human factor is Claimant's ability to maintain employment within his physical abilities. This is because the ability to earn wages inherently includes consideration of whether the claimant is capable of getting hired and sustaining

employment. Furthermore, a claimant's occasional performance of physical activities which are useful in the labor market does not preclude a finding of permanent total disability if the evidence indicates that the Claimant is unable to sustain the activities for a sufficient period of time to be hired and paid wages. *Moller v. North Metro Community Services, W.C. No. 4-216-439, I.C.A.O., August 6, 1998*. Ms. Shriver credibly opined that, given Claimant's current functional capacity, education, background, experience, mental disabilities, within a reasonable degree of vocational probability, Claimant is not employable. She stated that Dr. Yamamoto's testimony during hearing only served to confirm Ms. Shriver's opinion with regard to Claimant. Claimant's witnesses were more credible and persuasive than Respondents' witness.

8. The crux of the inquiry is whether employment exists that is reasonably available to the claimant given his or her circumstances. This inquiry can only be answered on a case-by-case basis, and will necessarily vary according to the particular abilities and surroundings of a claimant. The factors to be considered may include consideration of the Claimant's commutable labor market or other analogous concepts which depend upon the existence of employment that is reasonably available to the claimant under his particular circumstances. The Judge is capable of making a reasoned judgment concerning a claimant's employability based on the physical restrictions, the claimant's capacity to travel, the availability of transportation, and the scope of the labor market in the claimant's community. *Weld County School District RE-12 v. Bymer, supra.* Here, Claimant is unable to drive any significant distances due to his physical and emotional impediments, and only to those areas that are familiar and routine to him. He cannot access the commutable labor market, not just because he does not hold a driver's license, but because well documented severe headaches make him a danger to himself and others.

9. The ALJ may also consider the claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County*, W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Weld County School Dist. Re-12 v. Bymer, supra.* Because the burden of proof rests with the claimant, the respondents are not obligated to find a specific job or job offer for the claimant in order to defeat a claim for permanent total disability benefits. *Moua v. Datex Ohmeda,* WC 4-526-873 (ICAO January 30, 2004); *Chavez v. Southland Corp.,* WC 4-139-718 (ICAO September 4, 1998). The ALJ may consider the failure to identify specific employment opportunities when assessing the credibility of a vocational expert's opinion that a claimant is employable and can earn wages. *Gomez v. MEI Regis,* WC 4-199-007 (ICAO September 21, 1998), aff'd., *Gomez v. Industrial Claim Appeals Office,* (Colo. App. No. 98CA1998, June 3, 1999) (not selected for publication). Here, even though Respondents' vocational expert did identify several employment options for Claimant, the fact that Claimant applied to each one and was rejected, as well as Ms. Shriver's opinion that she would not expect any of those employers to accept Claimant as an employee given his limitations is more persuasive.

10. Section 8-40-201(16.5), C.R.S. does not mandate that a claimant produce a medical opinion that he is permanently and totally disabled because a physician does

not normally determine industrial loss of use, economic loss, or any other type of loss giving rise to disability payments. However, Claimant's authorized treating physician, Dr. Yamamoto, credibly opined that claimant is not employable. Claimant's need for constant supervision, as evidenced by the totality of his symptoms caused by his work related injuries and sequelae, is a persuasive and convincing factor in Claimant's permanent total disability.

11. A claimant's ability to earn wages within the meaning of Section 8-40-201(16.5) is not purely a medical question. Rather, in evaluating a claim for permanent total disability, the ALJ is called upon to consider the effects of the industrial injury upon the claimant's ability to earn any wages considering the claimant's physical condition, educational background, vocational history and other relevant factors. *Best-Way Concrete Company v. Baumgartner, 908 P.2d 1194 (Colo. App. 1995)*. Further, in *Roop v. Estes/Hi-Flier, W.C. No. 4-121-928, I.C.A.O., February 17, 1994*, the I.C.A.O. held that "the claimant's testimony alone which the ALJ credited…, constitutes substantial, credible evidence of permanent total disability." In this case, lay witnesses testified that Claimant is rarely able to tolerate social interactions with family members and friends that have known Claimant for a long time. Claimant is unable to tolerate more than a limited amount of time even with his children. He has problems with frustration, anger and self-esteem, and he has a significant stutter which causes problems with communication. He is unable to tolerate stressful situations for extended periods of time including interaction with the public. This is even evidenced by Claimant's inability to continue his GED classes because of headaches caused by his TBI .

12. To the extent that a vocational counselor's testimony may be a reflection on the degree of industrial disability, such testimony cannot properly be excluded merely because it embraces an ultimate issue to be decided by the trier of fact. *Chambers v. CF&I Steel Corp., 757 P.2d 1171 (Colo. App. 1988)* (The hearing officer erred in ruling that the counselor could not testify as to which of the restrictions caused Claimant to be totally disabled from a vocational standpoint.) Respondents' vocational expert is less persuasive than Claimant's expert regarding whether Claimant has available resources that provide him access to rehabilitation that in turn would allow him to be able to earn wages in the same or other employment. Ms. Shriver was more persuasive in her opinion that any resources that may be generally available are not accessible to Claimant without significant assistance. And even if Claimant was able to access them, they would not increase his employability due to his other catastrophic limitations, including the need for supervision and the headaches that would cause excessive absenteeism. This is also supported by Claimant's wife's testimony regarding the severity of Claimant headaches.

13. Claimant proved by a preponderance of the evidence that he is unable to earn any wages and he is permanently totally disabled. Claimant's witnesses were more credible and persuasive than Respondents' witness. The ALJ observed first hand at hearing many aspects of Claimant's limitations, both physical and mental, to which his witnesses testified. Claimant has proven by a preponderance of the evidence that he is unable to earn any wages as a result of his November 18, 2013, injuries to his head, neck and low back, including his TBI and depression.

General Award of Continuing Maintenance Medical Benefits

14. Where an injured worker reaches maximum medical improvement but requires periodic medical care to prevent his condition from deteriorating, it is permissible to leave medical benefits open subsequent to the final award. *Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988)*.

15. Once the claimant establishes the probability of need for future treatment, the claimant is entitled to a general award of future medical benefits, subject to the respondent's right to contest the compensability of any particular treatment on grounds that the treatment is not authorized or not reasonably necessary. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Here, Claimant has proven by a preponderance of the evidence that he continues to require maintenance care to cure and relieve him of the effects of the November 18, 2013, injuries and their sequelae. Dr. Yamamoto opined and credibly testified that the treatment that Claimant is receiving now is reasonable and necessary. Dr. Yamamoto's opinion that Claimant's condition is chronic, that he does not anticipate that Claimant's condition will heal, and that Claimant will require ongoing maintenance medical care is credible and persuasive.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant is permanently and totally disabled. Respondents shall pay Claimant permanent total disability benefits at the admitted rate commencing June 17, 2015, and continuing until terminated by law or order.

2. Claimant continues to require maintenance medical care to cure and relieve him of the work injuries and their sequelae and is entitled to a general award of maintenance medical benefits. Respondents shall pay for the Claimant's reasonably necessary medical care that is related to his November 18~~, 2103,~~2013, injuries.

3. Respondents shall pay statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

4. Any and all issues not determined herein are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: April 22, 2016

DIGITAL SIGNATURE:

Margot W. Jones

Margot W. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Claimant proved by a preponderance of the evidence that he is unable to earn wages and therefore is permanently totally disabled; and

b. Whether Claimant proved by a preponderance of the evidence that he is entitled to a general award of maintenance medical benefits.

c. Claimant withdrew the issue of disfigurement.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered:

1.Claimant is 27 years old. Claimant has been married for nine years and he lives with his wife and two children, ages nine and two years old. Claimant sustained admitted injuries to his head, neck and back in the course and scope of his employment on November 18, 2013, when he was setting forms for an elevator and the ceiling platforms fell on top of him.

2. Claimant was first evaluated on the date of his accident at Denver Health Medical Center where he reported having 60 pounds of wood fall 10 feet onto his head at work, with loss of consciousness. Claimant's friend reported that Claimant had multiple episodes of vomiting, and "not acting normal." Claimant had complaints of headache and neck pain. X-rays of Claimant's thoracic spine showed subtle anterior wedging of one of the vertebral body in the upper lumbar region. Based on MRI findings of Claimant's lumbar spine, Claimant had a shallow, broad-based central protrusion at L5-S1, as well as straightening of the normal lumbar lordosis, which can be seen with muscular spasm.

3. Claimant's psychologist, Dr. Ricardo Esparza, diagnosed Claimant with cognitive disorder, as well as adjustment disorder with depression and anxiety.

4. The neurologist, Dr. Bennett Machanic, reported that Claimant suffered closed-head trauma with a rather significant cerebral concussion, and a posttraumatic brain injury, with a Rancho Los Amigos scale somewhere around 5 or 6*. Dr. Machanic reported that Claimant had pseudobulbar affectual disorder. He also had cervical strain, lumbosacral strain with right L4 radiculopathy. He had vestibular dysfunction, which perhaps was inner ear and associated with the head trauma. Dr. Machanic reiterated

that this was a very complex multisystem posttraumatic situation. Dr. Machanic stated, "At this point in time, the prognosis is indeed very guarded and I do not think this man is going to be returning to his previous occupational [sic] in the foreseeable future. Indeed I am quite concerned about permanent cognitive and emotional dysfunctions." (Exhibit 5) *Rancho 5 = Confused, Inappropriate, Non-Agitated: Appears alert; responds to commands; distractible; does not concentrate on task. Rancho 6 = Confused, Appropriate: Good directed behavior, needs cuing; can relearn old skills; serious memory problems; some awareness of self and others.

5. Dr. Laura Rieffel reported that Claimant's working memory was poor, stating that questions had to be repeated to him multiple times when details were involved. Claimant's speed of mental processing was noticeably slow. She also noted that Claimant ambulated slowly, cautiously and stiffly. Claimant complained of blurry vision during the peripheral vision exam. During sensory perceptual exam, Claimant became teary from tactile stimulation, of face in particular, some with touch of his hand.

6. On April 8, 2014, Dr. James Trevor McNutt reported that Claimant's EEG was abnormal due to the presence of sharp dysrhythmia noted in the left frontal and temporal regions. Dr. McNutt stated that this may indicate an underlying region of cortical hyperirritability.

7. Dr. Peter Reusswig performed multiple cervical and lumbar epidural, facet, transforaminal and rhizotomy injections throughout the course of Claimant's treatment.

8. On July 3 and 8, 2014, Claimant underwent speech/language pathology cognitive/communicative evaluation at Spalding Rehabilitation with Lois McCarthy. Claimant displayed significant deficits in cognition in terms of short-term memory, attention, and insight into his situation. He had severe deficits in oral motor skills, with significant neurogenic stuttering and weak, slow, and irregular lingual functioning. Claimant had moderate to severe deficits in visual/spatial functioning. He had difficulty with trails, symbol cancellation, clock drawing, design memory and design generation. Claimant had moderate to severe deficits in memory, as well as attention and processing. Claimant also had moderate to severe deficits in executive functions. Claimant displayed poor deficit awareness, and he also denied stuttering behavior. It was reported that Claimant required skilled speech/language therapy to address neurogenic stuttering and to initiate education and treatment for deficits in linguistic and cognitive areas.

9. Claimant was also evaluated by Dr. Steven Wilk on July 29, 2014. He diagnosed Claimant as having bilateral myalgia, bilateral anterior disc displacement with reduction, capsulitis of the bilateral temporomandibular joint, bilateral muscle spasm, and bilateral side injury to the face and neck. Dr. Wilk stated, "Patient presents with direct trauma. In my opinion, to a reasonable degree of medical certainty this disorder resulted from the accident of 11/18/2013." On November 13, 2014, Dr. Wilk reported mandibular range of motion measurements taken on 11/05/2014 were 36 mm opening, 2 mm right lateral excursion and 3 mm left lateral excursion. Normal range of motion is

44-52 mm opening and 12 mm lateral excursion. Dr. Wilk stated that due to excessive witnessed bruxism activities, he would suggest a trial of Buspirone. Dr. Wilk reported that Claimant's prognosis was unknown. However, Dr. Wilk stated, "A joint which has suffered soft tissue damage with the resultant disc dysfunction will never be normal again. It can be anticipated that the patient will have exacerbation throughout his lifetime which will require additional evaluation and treatment." Dr. Wilk also reported that Claimant continued to suffer from severe muscle spasm in the masseter muscles.

10. Dr. Brian Beatty conducted an IME for Respondents and stated, "Based on my examination, there did not appear to be any overt symptom magnification or pain behavior and overall his examination was consistent and valid."

11. About a year after Claimant's accident Dr. Machanic stated, "I have to say at this point not sure how much improvement we can achieve, and this man is very close to, if not at, maximum medical improvement." Only a few months later, on February 17, 2015, Dr. Machanic stated, "I am concerned about this man's situation. I think he has significant lingering impairments. They would include encephalopathy, neck and back pain. Not sure as to what kind of work he could do at this point."

12. Claimant participated in a Functional Capacity Evaluation on March 16, 2015, with Christine Couch. Claimant was able to demonstrate a maximum sustained sitting tolerance of 66 minutes. He was able to demonstrate a sustained standing tolerance of 28 minutes. Claimant was able to complete one of 10 laps (100 feet each). He ambulated with an antalgic gait pattern. Claimant demonstrated the ability to lift 25 pounds occasionally at all levels, with the exception of shoulder to overhead, which was limited to 5 pounds. Claimant was able to carry 25 pounds bilaterally, but only 10 pounds in either the right or left hand individually. Claimant could push 23.4 pounds of force, and pull 25 pounds of force. Claimant demonstrated consistency in 20 of 20 tests. Claimant was able to complete 10 of 40 steps of the stair climbing test, using the handrail, with antalgic gait. Claimant requested several changes of position during the evaluation due to aggravation of his symptoms. These involved seated rest breaks following standing/walking tasks and standing/walking breaks following seated tasks. Claimant had errors during testing, despite being provided with verbal instructions and demonstration. Claimant had increased heart rate during testing, and was observed as diaphoretic following testing.

13. Claimant underwent neuropsychological evaluation with Dr. Rieffel on April 21, 23, 24, and May 4, 2015. Claimant's performance was best described as slow and inaccurate with significant variability across the length of the test, suggestive of sustained attention problems. Dr. Rieffel noted that Claimant's use of a mnemonic strategy of clustering, a problem solving strategy that aids in memory recall, was actually quite ineffective for him because of his slowed mental process. Dr. Rieffel stated, "I don't know if this is a strategy that he was taught in cognitive rehab or if it was his own problem solving attempt, but unfortunately for him, it is not an effective strategy. That is, I noticed that he was expending so much energy and focus trying to cluster items on a word list, that many items were 'falling through the cracks because he

couldn't process the information quickly enough." Dr. Rieffel stated that although Claimant presented as much less distraught and depressed than on his initial presentation, mood and behavioral disturbances are still a significant impediment to gainful employment. Dr. Rieffel noted that during the feedback, Claimant's positive façade quickly dissipated, and his agitation and cognitive rigidity quickly surfaced when situations became confusing to him. The degree of Claimant's disintegration during this conversation strongly suggested that he is likely to become easily confused and consequently, irritable, perhaps acting in ways that are not typical for him, when faced with situations that are outside the norm for him. Further, although Claimant's problem solving is low normal, these skills quickly become further impaired when he is required to act/react in a stressful situation. Dr. Rieffel stated her impression that Claimant will need assistance from trusted others when making complex decisions as he is likely to have difficulty mentally managing and considering all of the variables involved. Dr. Rieffel recommended a trial of stimulant medication, if it had not already been attempted. She also recommended that Claimant continue with individual psychotherapy with a shift in focus towards what he is able to do, so that he can work against the negative self-expectations he was generating. Dr. Rieffel opined that there was enough information on the basis of Claimant's prior evaluation and current behavioral observations to diagnose him with Major Neurocognitive Disorder Due to Traumatic Brain Injury with behavioral disturbance (including disturbances of mood and agitation/irritability).

14. Claimant has treated with many different providers from the date of his injury until now and is currently being treated by David Yamamoto, M.D. On June 17, 2015, Dr. Yamamoto placed Claimant at maximum medical improvement but noted that Claimant had ongoing problems secondary to his traumatic brain injury. He continued to have headaches and dizziness. He was also still having anger issues. Claimant continued to have difficulty with his memory, as well as problems with stuttering. Claimant had ongoing problems with posterior neck pain and lower back pain. He also still had TMJ problems. Dr. Yamamoto assessed Claimant as having traumatic brain injury with ongoing symptoms including memory loss, mild confusion, mood changes, headaches, anxiety and stuttering. He also assessed Claimant as having cervical strain; lumbar strain, status post L3, L4 and L5 neurotomies; and TMJ with bruxism. Dr. Yamamoto utilized the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*, to determine Claimant's impairment. For the traumatic brain injury, Dr. Yamamoto assigned 15% impairment for complex integrated cerebral function disturbances. He opined that Claimant could also receive 15% from language disturbances and emotional disturbances. For specific disorders of the cervical spine, Claimant was assigned 4% whole person impairment. For range of motion loss, he was assigned 9% whole person impairment. These combined to equal 13% cervical spine impairment. For specific disorders of the lumbar spine, Dr. Yamamoto assigned 8% whole person impairment. For range of motion loss, Claimant received 8% whole person impairment. These combined to equal 15% lumbar spine impairment. The spine impairments were combined to equal 26% whole person impairment. This was combined with the 15% traumatic brain injury impairment to equal 37% whole person impairment. Dr. Yamamoto gave Claimant a 37% whole person

impairment, and he stated that the 37% was representative of Claimant's overall clinical picture. Dr. Yamamoto recommended that Claimant be seated for at least one hour per 8 hour day, and stated that he should change positions every 30-60 minutes as needed. Dr. Yamamoto stated that Claimant would need ongoing counseling, ongoing medications for the foreseeable future, and maintenance visits every 2-4 months.

15. On July 16, 2015, Respondents filed a Final Admission of Liability, admitting liability for Medical Benefits after MMI "Per Dr. Yamamoto's report dated June 17, 2015… for related reasonable and necessary medical benefits by an authorized treating physician."

16. On August 17, 2015, Dr. Rieffel credibly reported that it is possible that further neuropsychological care will be needed as Claimant nears old age. She noted that research suggests that Claimant may experience deterioration of cognitive function at a faster rate than usual due to the loss of his cognitive reserve. If this were necessary, she would anticipate another full neuropsychological evaluation and follow ups would be needed at that time. Dr. Rieffel anticipated that Claimant will need some level of ongoing psychotherapy as well as family therapy secondary to the stress generated by his cognitive disorder and personality changes. Dr. Rieffel stated, "Due to the chronic nature of these problems, there will likely be an ebb and flow of psychological exacerbations and family/personal problems that will need to be addressed in treatment."

17. Claimant's vocational expert, Doris Shriver, reported that observations, exams and standardized tests showed Claimant had a maximum lift of 20 pounds and confirmed limitations with sitting, standing, walking, climbing, stooping, kneeling, crouching, crawling, and trunk movements when standing and sitting. Decreased range of motion, strength and motor coordination testing supported the findings. Ms. Shriver reported that Claimant's head injury, sleep deprivation and chronic pain created mental challenges. As a worker, Claimant is below the 1st percentile when compared to over 20,000 workers. Over 30 reliable and valid tests showed Claimant's traits and aptitudes to be below the 1st percentile compared to average workers. Ms. Shriver reported Claimant's weaknesses as: 1. Status-post head, neck and low back injuries; 2. English as a second language; 3. Reduced tolerance for daily tasks, leisure and work; 4. Impaired far visual acuity; 5. Impaired near visual acuity; 6. Impaired binocularity (no near depth perception); 7. Receptive language below the 1st percentile; 8. Impaired tolerance for climbing, balance, stooping, crouching, kneeling, crawling, and trunk movements when standing; 9. Positive vestibular-ocular reflexes; 10. Lifts up to 20, 15, and 15 pounds from floor to waist, waist to shoulder, and waist to overhead respectively one time; Safe lifts are 50% less when frequency is considered; 11. Impaired range of motion (trunk, neck, shoulders, hips and knees); 12. Impaired strength (bilateral upper and lower extremities); 13. Impaired light touch sensation in posterior distal arms; 14. Impaired right hand touch discrimination; 15. Scattered scores on Haptic; 16. Reading at grade level 1.6; 17. Sentence comprehension below grade level K.0; 18. Spelling at grade level K.6; 19. Arithmetic at grade level 3.5; 20. Fine motor coordination at the 0.1st percentile; 21. Gross motor coordination at the 0.1st percentile; 22. Below average

bilateral palmar pinch strength; 23. Below average right hand lateral pinch and tip pinch strength; 24. Impaired tolerance for sitting, standing, walking and lifting; 25. Emotional behaviors at the 0.2nd percentile; 26. Adaptive behaviors at the 1st percentile; 27. Clinically observed severe chronic pain; 28. Disturbed sleep due to pain. Ms. Shriver reported the following validity factors: Increase in heart rate of 20 bpm indicating valid effort with lifting; Involuntary nystagmus (jerking movement of the eyes); Limitations in ADLs consistent with impaired range of motion, strength and motor coordination; and, Chronic pain consistent with observed behaviors, loss of activity, adaptations, reliance upon others, emotional/mental challenges, pain medications and sleep disturbance. Ms. Shriver noted that many of Claimant's weaknesses were consistent with left brain hemisphere damage. Ms. Shriver recommended provisions for continued medical care and therapies, cognitive therapy and testing, emotional support for anger and frustration tolerance, complimentary alternative medicine for pain relief, essential services for self-care, shopping, cooking and household management tasks at least 2 hours per day, and a driver for medical appointments.

18. On January 19, 2016, Dr. Yamamoto noted that he had changed Claimant's lifting limits to maximum lift of 25 pounds, as his back had been bothering him more. He noted that the limits were now in line with the FCE. Also, Dr. Yamamoto noted that he did test Claimant's lifting ability and he struggled with over 25 pounds. Dr. Yamamoto reported that he did not agree with Dr. Overholt regarding weaning Claimant's medications. He also stated, "He still has some depression and in my opinion it would be a mistake to 'wean him off' antidepressants as it would likely make his depression worse." Dr. Yamamoto concluded that "If he is to work he would need constant supervision."

19. Claimant's wife and three other lay witnesses credibly testified that Claimant changed drastically after the accident. They testified that since the accident, Claimant has become intolerant, impatient, frustrated, and gets angry with everyone. He can only be around others for short periods of time before he draws away, isolates himself or goes to lie down. He has problems with concentration, comprehension and understanding since his accident. He has difficulties putting words and sentences together or engaging in conversation. Claimant has frequent headaches, at least three times a week, which are very unpredictable and can last from a day up to three days. Claimant does not get out of bed when he has the really bad headaches. Claimant's wife credibly testified at hearing. She testified that if she is not home, her mother will generally supervise Claimant and the children. Claimant's wife stated that she believes that Claimant requires constant supervision. Claimant's wife also testified that Claimant enrolled in GED classes, but that he called her during the break, halfway through the three hour class, to come pick him up because of his headaches.

20. Dr. David Yamamoto, Claimant's primary authorized treating physician, testified that he treated Claimant since January 2014, two months after his accident, and continues to treat him for maintenance care for his neck, back, depression and the traumatic brain injury (TBI). He prescribes medications for muscle spasms, neck and back pain, headaches, depression and PTSD, bruxism for TMJ, concentration and memory loss as well as medications to control his anger issues. Some of these

medications cause drowsiness, loss of appetite and jitteriness. He is taking from 10 to 12 medications at any given time. They can cause fatigue and difficulty with concentration. He is unable to control the headaches, even with medications. He has problems with concentration, focus and spatial reasoning. Claimant has problems with emotional disturbance and depression. All of these are impediments to Claimant's return to the work force. However, the major problems for Claimant are problems with memory, following instructions, confusion, concentration and staying on task. Claimant is very self-conscious due to the stuttering. He resists answering directly. Dr. Yamamoto confirmed that the medical records identify Claimant has problems with anger management, which is why he is on medication for the problem. Dr. Yamamoto stated that anger issues are common for patients with PTSD and TBI. Claimant had a significant brain injury and anger is a consequence of the brain injury. Claimant does not do well with stress.

21. Dr. Yamamoto last saw Claimant on January 19, 2016, and reviewed all the medications that Claimant is currently taking. They are important for Claimant's maintenance care. He credibly opined that Dr. Overholt was incorrect in recommending termination of maintenance medications. Dr. Yamamoto based his opinion on his evaluations, examinations and knowledge of Claimant. He also stated that Claimant's injections with Dr. Reusswig are to reduce pain and increase function. Claimant has had radiofrequency ablations that may need to be repeated as part of maintenance care. Dr. Yamamoto also does laboratory testing regarding narcotics. Dr. Yamamoto prescribes Claimant narcotics for pain and severe headaches. Dr. Yamamoto has not observed drug seeking behavior by Claimant and testing reveals that the levels of medication were appropriate. Claimant continues to be at MMI and Dr. Yamamoto opines that the treatment that Claimant is receiving now is reasonable and necessary. Dr. Yamamoto testified that Claimant's condition is chronic and that he does not anticipate that Claimant's condition will heal. Claimant requires ongoing maintenance medical care.

22. Dr. Yamamoto placed Claimant's restrictions at occasional lifting, carrying, pushing and pulling of 25 lbs., which is in addition to prior restrictions of standing and sitting up to 7 hours a day, and changing positions every 30 to 60 minutes as needed. Claimant should also avoid heights and also needs supervision because he does not have the capacity to work independently, and must be monitored or watched at all times. Claimant could do some of the jobs identified by Respondents' vocational expert so long as he was assisting someone else that was doing the jobs, could take frequent 10 minute breaks, and was allowed off when his headaches are intense. Claimant continues to report headaches consistently. He would not be able to be a car wash worker as it is very strenuous due to the bend and scrubbing of cars. Attendant car wash worker would be eliminated by the fact that he would need supervision and could not handle money. Sheltered employment might be a possibility because he needs constant supervision.

23. Dr. Yamamoto had originally given higher restrictions in order not to limit Claimant's employment search and options, but he tested Claimant personally and observed Claimant's ability to lift only up to 25 lbs. with difficulty, and with limited repetition, which was in line with the FCE evaluation performed by Christine Couch, P.T.

The FCE was a valid, consistent evaluation and Claimant was also consistent with all of Dr. Yamamoto's evaluations. Dr. Yamamoto placed him in the light to sedentary category of physical work. However, he opined that increased headaches will affect his cognitive abilities.

24. Dr. Yamamoto expected changes in the patient's traumatic brain injury between six months and a year due to the natural progression of healing. While Claimant is able to take direction, as demonstrated by his ability to take medication, those are very simple daily routines, as opposed to going to work, and very different from being in a working environment every day. Dr. Yamamoto testified that the only job Claimant could probably do is one that is around family members, in a family business, where Claimant would have people to give him specific instructions to perform different activities, though he may not be able to perform the same activities every day. Claimant has not achieved the level of recovery that would allow him to go out and work. At this time, Dr. Yamamoto opined that Claimant is not able to return to any kind of work.

25. Ms. Shriver testified as a vocational expert on behalf of Claimant. She has experience with traumatic brain injury patients, as she worked at the facility that developed the Rancho Los Amigos TBI scale and applied it in her work. A traumatic brain injury patient can have a very significant and complex array of symptoms that may include loss of range of motion, weakness, fatigue, confusion, loss of learning, inability to concentrate, inability to multitask, all of which are specifically affected by auditory and visual stimuli. Depression also affects cognition, as in this case. Claimant is unable to hide his traumatic brain injury, which is one of the reasons why Claimant is unable to obtain employment.

26. While at the hearing, Ms. Shriver observed Claimant change position frequently, lifting his buttock off of the chair by putting his weight on his arm, rubbing his head, closing his eyes, and had a nystagmus. During his FCE with Ms. Shriver, Claimant performed at the 20 lb. range. He had objective observations of demonstrated pain. He was consistently limping, showing limitation of the right leg. She observed his antalgic gait, even going into the court house, though Claimant did not know she was watching him. His loss of range of motion of the neck and low back caused foreshortening of the muscles that affect his vocational capacity, as they have limited his ability to stoop or crouch. Coordination was also assessed and gave another look at how his brain is functioning, consistent with his left brain injury. While Claimant has always been restricted to obtaining work with employers that accept primarily Spanish speaking workers, his traumatic brain injury makes his potential for employment even more difficult. Ms. Shriver, after considering all of Claimant's limitations and background, including the traumatic brain injury, testified that Claimant would be limited to a sheltered employment situation. She reviewed all of the jobs identified by Respondents' vocational expert. She stated that, in addition to his other limitations, none of the employers could handle the absenteeism that would be caused by Claimant's impairments and medical conditions, especially his headaches. Claimant does not have the skills to locate and sustain work or retain work. Claimant's wife's testimony that Claimant could not handle GED classes was expected and consistent with his testing and medical records. This brain injury is catastrophic for Claimant.

27. Ms. Shriver testified that none of the community resources or programs identified by Respondents' vocational expert effectively put people back to work, nor could they successfully rehabilitate and provide vocational retraining for Claimant due to the myriad problems facing Claimant caused by his brain injury. The only program that Ms. Shriver knows that has been of value to TBI patients is the Colorado Brian Injury Association. Also, Claimant does not have the skills required to go through any programs identified on his own. Someone would have to assist Claimant through the process. Neither is Claimant a candidate for assistance through the Division of Vocational rehabilitation. They use the McCarron Dial assessment and Claimant scored so low that they would not provide services.

28. Ms. Shriver was deemed more credible and persuasive that Respondents' vocational expert because overall she has more education, experience and training than Respondents' vocational expert and has assessed all of Claimant's physical, mental and vocational skills in reaching her ultimate opinions, not just transferable skills as Ms. Harris. Ms. Shriver testified that Claimant may be able to obtain sheltered employment and, at best, he would need to be accommodated so that he may come and go home as needed, he would need transportation when necessary and someone to help Claimant and his wife to access any kind of community support. Claimant's testing was very consistent with the diagnosis of a left brain injury. Claimant's test results could not be faked. She stated that Dr. Yamamoto's testimony at hearing only served to confirm her own opinion with regard to Claimant. Ms. Shriver further stated that, given Claimant's current functional capacity, education, background, experience, mental disabilities, she credibly opined, within a reasonable degree of vocational probability, that Claimant is not employable.

29. Finally, Claimant testified at hearing at which time he could not state his address as he could not recall it, nor could he recall the date of his injury, though he remembers that his injuries were to his back, neck, and head, and that he suffered from dizziness, headaches, and pain in his back. Claimant indicated that he has memory problems and depression. He is not allowed to be the only one with his youngest two year old daughter because he gets angry easily. Claimant believed it was due to the depression and the pain. Claimant testified that he looked for work at many places. Claimant went to school in Mexico through middle school and went to a year and a half of high school in the USA. Claimant is unable to drive any significant distances due to his physical and emotional impediments, and only to those areas that are familiar and routine to him. He cannot access the commutable labor market, not just because he does not hold a driver's license, but because well documented severe headaches make him a danger to himself and others.

30. The ALJ observed at hearing many aspects of Claimant's limitations, both physical and mental, to which his witnesses testified. Claimant could be observed crying off and on throughout the two day hearing.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

Generally

1. The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43- 201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 592 P.2d 792 (1979). The facts in a workers' compensation claim must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness of unreasonableness (probability or improbability) of the testimony; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline,* 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation claim is decided on its merits. Section 8-43-201, C.R.S. Further, factual findings concern only evidence that is dispositive of the issues involved; even if the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to cited findings as unpersuasive. See *Magnetic Engineering, Inc. v. Indus. Claim Apps. Office*, 5 P.3d 385 (Colo. App. 2000).

Permanent Total Disability Benefits

3. Claimant proved by a preponderance of the evidence that he is permanently and totally disabled (PTD) as defined by Section 8-40-201(16.5), C.R.S., and has proven that he is unable to earn wages in the same or any other employment. To prove a claim for permanent and total disability, a claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). For purposes of permanent total disability, "any wages" means more than zero. See *Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Apps. Office*, 894 P.2d 42 (Colo. App. 1995). A claimant is not required to prove that an industrial injury is the sole cause of his inability to earn wages. However, a claimant must demonstrate that the industrial injury created some disability that ultimately contributed to the claimant's permanent total disability. *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo. App. 1986). A claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo.

App. 2001). The question of whether a claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

4. Here, Claimant provided overwhelming evidence that he suffered injuries to his head, neck and low back. The consequences of the injuries involve a traumatic brain injury and consequent depression. Claimant has significant symptoms of persistent headaches, dizziness, muscle spasms, neck and back pain, an antalgic gait, PTSD, TMJ, problems with concentration and memory loss as well as anger issues. Claimant is taking between 10 to 12 medications at any given time which also cause side effects, including fatigue and loss of concentration. Claimant also has problems with concentration, focus and spatial reasoning, and major problems with memory, following instructions, slowed learning, confusion, staying on task and stuttering. All of these are impediments to Claimant's return to the work force. This is consistent within the medical reports issued by Dr. Machanic and Dr. Rieffel, and as evidenced by Dr. Yamamoto and Ms. Shriver's testimony. This is also supported by the testimony of the lay witnesses.

5. The determination whether a claimant is permanently and totally disabled is made on a case-by-case basis and varies according to a claimant's particular abilities and circumstance. In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). Ms. Shriver testified that considering Claimant's work restrictions as provided by Dr. Yamamoto and Claimant's left brain TBI, Claimant might be able to access some sheltered employment but only under specifically accommodated situations where he was allowed to work on good days alone and was allowed to come and go as necessary, dictated by his continuing debilitating headaches. She further testified that employers in competitive employment situations would not accommodate Claimant's particular situation.

6. Where the possibility of being retrained for employment exists, and where respondents have not offered vocational rehabilitation services, and where the injured worker would need professional assistance to be vocationally rehabilitated, and such retraining is not feasible or accessible, a finding of permanent total disability is proper. *Drywall Products v. Constuble*, 832 P.2d 957 (Colo. App. 1991) (cert. denied). See also *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). Ms. Shriver testified that Claimant does not have the skills required to go through any vocational rehabilitation programs on his own. Someone would have to assist him in the process. Neither is Claimant a candidate for assistance through the Division of Vocational Rehabilitation. The Division uses the McCarron Dial assessment and Claimant scored so low that they would not provide any services.

7. One human factor is Claimant's ability to maintain employment within his physical abilities. This is because the ability to earn wages inherently includes consideration of whether the claimant is capable of getting hired and sustaining

employment. Furthermore, a claimant's occasional performance of physical activities which are useful in the labor market does not preclude a finding of permanent total disability if the evidence indicates that the Claimant is unable to sustain the activities for a sufficient period of time to be hired and paid wages. *Moller v. North Metro Community Services, W.C. No. 4-216-439, I.C.A.O., August 6, 1998*. Ms. Shriver credibly opined that, given Claimant's current functional capacity, education, background, experience, mental disabilities, within a reasonable degree of vocational probability, Claimant is not employable. She stated that Dr. Yamamoto's testimony during hearing only served to confirm Ms. Shriver's opinion with regard to Claimant. Claimant's witnesses were more credible and persuasive than Respondents' witness.

8. The crux of the inquiry is whether employment exists that is reasonably available to the claimant given his or her circumstances. This inquiry can only be answered on a case-by-case basis, and will necessarily vary according to the particular abilities and surroundings of a claimant. The factors to be considered may include consideration of the Claimant's commutable labor market or other analogous concepts which depend upon the existence of employment that is reasonably available to the claimant under his particular circumstances. The Judge is capable of making a reasoned judgment concerning a claimant's employability based on the physical restrictions, the claimant's capacity to travel, the availability of transportation, and the scope of the labor market in the claimant's community. *Weld County School District RE-12 v. Bymer, supra.* Here, Claimant is unable to drive any significant distances due to his physical and emotional impediments, and only to those areas that are familiar and routine to him. He cannot access the commutable labor market, not just because he does not hold a driver's license, but because well documented severe headaches make him a danger to himself and others.

9. The ALJ may also consider the claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County*, W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Weld County School Dist. Re-12 v. Bymer, supra.* Because the burden of proof rests with the claimant, the respondents are not obligated to find a specific job or job offer for the claimant in order to defeat a claim for permanent total disability benefits. *Moua v. Datex Ohmeda,* WC 4-526-873 (ICAO January 30, 2004); *Chavez v. Southland Corp.,* WC 4-139-718 (ICAO September 4, 1998). The ALJ may consider the failure to identify specific employment opportunities when assessing the credibility of a vocational expert's opinion that a claimant is employable and can earn wages. *Gomez v. MEI Regis,* WC 4-199-007 (ICAO September 21, 1998), aff'd., *Gomez v. Industrial Claim Appeals Office,* (Colo. App. No. 98CA1998, June 3, 1999) (not selected for publication). Here, even though Respondents' vocational expert did identify several employment options for Claimant, the fact that Claimant applied to each one and was rejected, as well as Ms. Shriver's opinion that she would not expect any of those employers to accept Claimant as an employee given his limitations is more persuasive.

10. Section 8-40-201(16.5), C.R.S. does not mandate that a claimant produce a medical opinion that he is permanently and totally disabled because a physician does

not normally determine industrial loss of use, economic loss, or any other type of loss giving rise to disability payments. However, Claimant's authorized treating physician, Dr. Yamamoto, credibly opined that claimant is not employable. Claimant's need for constant supervision, as evidenced by the totality of his symptoms caused by his work related injuries and sequelae, is a persuasive and convincing factor in Claimant's permanent total disability.

11. A claimant's ability to earn wages within the meaning of Section 8-40-201(16.5) is not purely a medical question. Rather, in evaluating a claim for permanent total disability, the ALJ is called upon to consider the effects of the industrial injury upon the claimant's ability to earn any wages considering the claimant's physical condition, educational background, vocational history and other relevant factors. *Best-Way Concrete Company v. Baumgartner, 908 P.2d 1194 (Colo. App. 1995)*. Further, in *Roop v. Estes/Hi-Flier, W.C. No. 4-121-928, I.C.A.O., February 17, 1994*, the I.C.A.O. held that "the claimant's testimony alone which the ALJ credited…, constitutes substantial, credible evidence of permanent total disability." In this case, lay witnesses testified that Claimant is rarely able to tolerate social interactions with family members and friends that have known Claimant for a long time. Claimant is unable to tolerate more than a limited amount of time even with his children. He has problems with frustration, anger and self-esteem, and he has a significant stutter which causes problems with communication. He is unable to tolerate stressful situations for extended periods of time including interaction with the public. This is even evidenced by Claimant's inability to continue his GED classes because of headaches caused by his TBI .

12. To the extent that a vocational counselor's testimony may be a reflection on the degree of industrial disability, such testimony cannot properly be excluded merely because it embraces an ultimate issue to be decided by the trier of fact. *Chambers v. CF&I Steel Corp., 757 P.2d 1171 (Colo. App. 1988)* (The hearing officer erred in ruling that the counselor could not testify as to which of the restrictions caused Claimant to be totally disabled from a vocational standpoint.) Respondents' vocational expert is less persuasive than Claimant's expert regarding whether Claimant has available resources that provide him access to rehabilitation that in turn would allow him to be able to earn wages in the same or other employment. Ms. Shriver was more persuasive in her opinion that any resources that may be generally available are not accessible to Claimant without significant assistance. And even if Claimant was able to access them, they would not increase his employability due to his other catastrophic limitations, including the need for supervision and the headaches that would cause excessive absenteeism. This is also supported by Claimant's wife's testimony regarding the severity of Claimant headaches.

13. Claimant proved by a preponderance of the evidence that he is unable to earn any wages and he is permanently totally disabled. Claimant's witnesses were more credible and persuasive than Respondents' witness. The ALJ observed first hand at hearing many aspects of Claimant's limitations, both physical and mental, to which his witnesses testified. Claimant has proven by a preponderance of the evidence that he is unable to earn any wages as a result of his November 18, 2013, injuries to his head, neck and low back, including his TBI and depression.

General Award of Continuing Maintenance Medical Benefits

14. Where an injured worker reaches maximum medical improvement but requires periodic medical care to prevent his condition from deteriorating, it is permissible to leave medical benefits open subsequent to the final award. *Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988)*.

15. Once the claimant establishes the probability of need for future treatment, the claimant is entitled to a general award of future medical benefits, subject to the respondent's right to contest the compensability of any particular treatment on grounds that the treatment is not authorized or not reasonably necessary. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Here, Claimant has proven by a preponderance of the evidence that he continues to require maintenance care to cure and relieve him of the effects of the November 18, 2013, injuries and their sequelae. Dr. Yamamoto opined and credibly testified that the treatment that Claimant is receiving now is reasonable and necessary. Dr. Yamamoto's opinion that Claimant's condition is chronic, that he does not anticipate that Claimant's condition will heal, and that Claimant will require ongoing maintenance medical care is credible and persuasive.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant is permanently and totally disabled. Respondents shall pay Claimant permanent total disability benefits at the admitted rate commencing June 17, 2015, and continuing until terminated by law or order.

2. Claimant continues to require maintenance medical care to cure and relieve him of the work injuries and their sequelae and is entitled to a general award of maintenance medical benefits. Respondents shall pay for the Claimant's reasonably necessary medical care that is related to his November 18, 2103, injuries.

3. Respondents shall pay statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

4. Any and all issues not determined herein are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: April 11, 2016

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has presented substantial evidence to support a determination that medical maintenance treatment in the form of SI joint injections with sciatic nerve blocks as recommended by Usama H. Ghazi, D.O. are reasonably necessary to relieve the effects of her December 13, 2013 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

STIPULATION

The parties agreed that Respondents are financially responsible for payment of medical bills from Cherry Creek Imaging for services as delineated in Exhibit 5 and Denver Area First Assistants, LLC for services as detailed in Exhibit 6.

FINDINGS OF FACT

1. Claimant worked for Employer as a Paramedic. On December 13, 2013 she suffered an admitted industrial injury to her right knee. Claimant slipped on ice and twisted her right knee while performing her job duties for Employer. She was diagnosed with a right knee sprain.

2. Claimant initially received medical treatment at HealthOne with Authorized Treating Physician (ATP) Braden J. Reiter, D.O. She subsequently underwent conservative treatment for her right knee symptoms. A December 20, 2013 right knee MRI reflected that Claimant did not suffer an ACL tear, a meniscal tear or a medial collateral ligament injury.

3. Claimant received physical therapy, medications and injections. However, the conservative treatment failed to improve her symptoms.

4. Dr. Reiter referred Claimant to Pain Specialist Usama H. Ghazi, D.O. for an evaluation. On January 21, 2014 Dr. Ghazi evaluated Claimant for Chronic Regional Pain Syndrome (CRPS). A thermogram and QSART testing revealed that Claimant did not have CRPS.

5. On March 13, 2014 Claimant underwent an arthroscopic debridement of her right knee. She reported an approximately 70% improvement in her right knee symptoms.

6. On September 22, 2014 Claimant returned to Dr. Ghazi for an evaluation. Dr. Ghazi noted that Claimant had undergone a right patellar debridement because an arthroscopic evaluation had revealed severe fraying and tethering with an intact meniscus. Dr. Ghazi mentioned that Claimant had also received a right SI joint

injection. Claimant reported that her sciatic nerve block had alleviated her sciatica symptoms. However, although Claimant's SI joint pain significantly improved for a couple of days, it returned and she suffered severe pain. Dr. Ghazi administered right knee injections and Claimant experienced 100% pain relief. He recommended continued massage therapy and medications.

7. On November 3, 2014 Claimant returned to Dr. Ghazi for an examination. Claimant reported that she did well with her first right knee bursa injection but was still experiencing residual pain. Dr. Ghazi thus administered a repeat right knee bursa injection.

8. On January 19, 2015 Claimant reached Maximum Medical Improvement (MMI). Claimant did not receive any permanent impairment rating for her right knee or any other body part. Respondents filed a Final Admission of Liability (FAL) consistent with the January 19,2015 date of MMI and 0% permanent impairment rating.

9. Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME). On March 25, 2015 Stanley H. Ginsburg, M.D. was selected to perform the DIME.

10. On July 30, 2015 Claimant underwent a DIME with Dr. Ginsburg. Claimant reported continuing right knee pain as well as ongoing spasms in her back, groin, calf and thigh since her December 13, 2013 accident. Dr. Ginsburg explained that Claimant warranted a right knee permanent impairment rating but he did not assign any other rating for her right lower extremity symptoms because she only experienced intermittent spasms. He specifically remarked that Dr. Ghazi had proposed various explanations for Claimant's peripheral symptoms, but there was "no suggestion that this is lumbar radicular and a lumbar MRI was not obtained." Dr. Ginsburg also commented that "[t]here is a suggestion that SI joint problems were present, but this was not well established." He summarized that "he found no reason to rate" Claimant's psychological, chronic pain, gait abnormality, range of motion or CRPS. He emphasized that he was only assigning an impairment rating for Claimant's right knee because there was no basis for rating any other symptoms.

11. Because Claimant underwent right knee arthroscopic surgery, Dr. Ginsburg assigned an extremity impairment rating of 10% based on category 5 of Table 40 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)*. Based on Claimant's right knee range of motion deficits, he also assigned an 18% extremity impairment rating. Combining the specific disorder and range of motion impairments yields a 26% lower extremity or 18% whole person rating. Dr. Ginsburg concluded that Claimant had reached MMI on February 1, 2015. He remarked that, if there were concerns about a lumbar radiculopathy "an MRI might be considered, but this would be up to the treating physician." Dr. Ginsburg concluded that medical maintenance treatment would be appropriate for the following 12 months if the treating physician determined it would decrease Claimant's pain.

12. On August 21, 2015 Respondent filed a FAL consistent with Dr. Ginsburg's DIME determinations regarding MMI and permanent impairment. Claimant did not object to the FAL.

13. On September 16, 2015 Claimant visited Dr. Ghazi for a follow-up evaluation. She reported that she had been pain free for about five months but on August 20, 2015 she began to experience hypersensitivity in her right leg. Claimant also developed muscle spasms in the buttock area and sciatic referral pain down to her right thigh. She sought repeat SI joint injections with sciatic nerve blocks to alleviate her symptoms. Dr. Ghazi commented that Claimant had been "doing remarkably well last time I saw her, but right now she is so flared up, she looks like she has come back to square one." He scheduled Claimant for a right-sided SI joint injection with a sciatic nerve block.

14. On October 14, 2015 Claimant returned to Dr. Ghazi for an examination. Dr. Ghazi reported that Claimant's patellar debridement had caused severe knee pain. The pain caused her to walk with an abnormal gait and she developed an SI joint strain with severe gluteal spasms. Dr. Ghazi noted that Claimant experienced long-term benefits from SI joint injections with sciatic nerve blocks. He stated that he had requested authorization for repeat SI joint injections with nerve blocks on September 16, 2015 but the request had been denied. Dr. Ghazi specified that he had requested the injections to "treat the gluteal spasms and the effects of gluteal spasms on the sciatic nerve where it tunnels through the gluteal region. I believe these [we]re injured as a direct result of her knee injury secondary to gait abnormalities and left-sided side-bending and excessive use of Trendelenburg to clear the right leg."

15. On December 30, 2015 F. Mark Paz, M.D. conducted a records review of Claimant's claim. He recounted that Claimant had sustained a right knee injury at work on December 13, 2013 when she slipped on ice. After reviewing Claimant's medical records that included physical examinations and diagnostic imaging, Dr. Paz determined that Claimant's right knee patellofemoral chondromalacia was not caused by the December 13, 2013 accident. He reasoned that the chronology of Claimant's right lower extremity symptoms, including a flare-up then the resolution of symptoms, suggested that her right leg symptoms constituted a pre-existing condition. Moreover, he remarked that there had been no diagnosis of a right lower extremity peripheral nerve injury, a lumbar radiculopathy, a sympathetic mediated pain condition or CRPS. He concluded that Claimant's right lower extremity symptoms were not causally related to her December 13, 2013 industrial injury. Dr. Paz summarized that the treatment recommendations from Dr. Ghazi for right SI joint injections with sciatic nerve blocks did not constitute reasonable, necessary and causally related medical care for Claimant's December 13, 2013 industrial injury.

16. Claimant testified at the hearing in this matter. She explained that she currently suffers pain in her lower back and SI joint region. The pain causes spasms in her right lower extremity. Claimant noted that she experiences significant pain by the end of her work shift as a Paramedic because she is on her feet for an extended period

of time. She requested the SI joint injections with nerve blocks recommended by Dr. Ghazi because they had provided past pain relief.

17. Claimant has failed to present substantial evidence to support a determination that medical maintenance treatment in the form of SI joint injections with sciatic nerve blocks as recommended by Dr. Ghazi are reasonably necessary to relieve the effects of her December 13, 2013 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988). On December 13, 2013 Claimant suffered an admitted industrial injury to her right knee. After a course of conservative treatment, Claimant underwent a right knee arthroscopic debridement on March 13, 2014. She subsequently received treatment that included SI joint injections, sciatic nerve blocks and right knee bursa injections. On July 13, 2014 Claimant underwent a DIME with Dr. Ginsburg. He explained that Claimant warranted a right knee permanent impairment rating but he did not assign any other rating for her right lower extremity symptoms because she only experienced intermittent spasms. He specifically remarked that Dr. Ghazi had proposed various explanations for Claimant's peripheral symptoms, but there was "no suggestion that this is lumbar radicular and a lumbar MRI was not obtained." Dr. Ginsburg summarized that the medical records did not reflect that Claimant had SI joint problems or gait abnormalities and thus no impairment rating other than for her right knee was warranted.

18. On September 16, 2015 Dr. Ghazi requested authorization for a right-sided SI joint injection with sciatic nerve blocks, but Respondents denied the request. Dr. Ghazi noted that Claimant had experienced long-term benefits from the procedures and specified that he had requested the injections to "treat the gluteal spasms and the effects of gluteal spasms on the sciatic nerve where it tunnels through the gluteal region." He noted that the preceding areas were injured as a direct result of her right knee injury secondary to gait abnormalities and left-sided bending. However, Dr. Paz persuasively maintained that Claimant's right knee patellofemoral chondromalacia was not caused by the December 13, 2013 accident. He reasoned that the chronology of Claimant's right lower extremity symptoms, including a flare-up then the resolution of symptoms, suggested that her right leg symptoms constituted a pre-existing condition. Moreover, he remarked that there had been no diagnosis of a right lower extremity peripheral nerve injury, a lumbar radiculopathy, a sympathetic mediated pain condition or CRPS. Dr. Paz summarized that the request for right SI joint injections with sciatic nerve blocks did not constitute reasonable, necessary and causally related medical treatment for Claimant's December 13, 2013 industrial injury.

19. Although Dr. Ghazi has recommended medical maintenance treatment in the form of sciatic nerve blocks with SI joint injections, the persuasive reports and testimony of Drs. Ginsburg and Paz reflect that the proposed treatment is not related to Claimant's December 13, 2013 right knee injury. Dr. Ginsburg summarized.that Claimant only injured her right knee and no additional ratings were warranted. Furthermore, Dr. Paz remarked that there had not been a diagnosis of a right lower extremity peripheral nerve injury, a lumbar radiculopathy, a sympathetic mediated pain condition or CRPS. Therefore, Claimant's right lower extremity symptoms were not causally related to her December 13, 2013 industrial injury. Accordingly, Claimant has

failed to present substantial evidence that any need for additional SI joint injections with sciatic nerve blocks is reasonably necessary or related to her work activities on December 13, 2013.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. As found, Claimant has failed to present substantial evidence to support a determination that medical maintenance treatment in the form of SI joint injections with

sciatic nerve blocks as recommended by Dr. Ghazi are reasonably necessary to relieve the effects of her December 13, 2013 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988). On December 13, 2013 Claimant suffered an admitted industrial injury to her right knee. After a course of conservative treatment, Claimant underwent a right knee arthroscopic debridement on March 13, 2014. She subsequently received treatment that included SI joint injections, sciatic nerve blocks and right knee bursa injections. On July 13, 2014 Claimant underwent a DIME with Dr. Ginsburg. He explained that Claimant warranted a right knee permanent impairment rating but he did not assign any other rating for her right lower extremity symptoms because she only experienced intermittent spasms. He specifically remarked that Dr. Ghazi had proposed various explanations for Claimant's peripheral symptoms, but there was "no suggestion that this is lumbar radicular and a lumbar MRI was not obtained." Dr. Ginsburg summarized that the medical records did not reflect that Claimant had SI joint problems or gait abnormalities and thus no impairment rating other than for her right knee was warranted.

6. As found, on September 16, 2015 Dr. Ghazi requested authorization for a right-sided SI joint injection with sciatic nerve blocks, but Respondents denied the request. Dr. Ghazi noted that Claimant had experienced long-term benefits from the procedures and specified that he had requested the injections to "treat the gluteal spasms and the effects of gluteal spasms on the sciatic nerve where it tunnels through the gluteal region." He noted that the preceding areas were injured as a direct result of her right knee injury secondary to gait abnormalities and left-sided bending. However, Dr. Paz persuasively maintained that Claimant's right knee patellofemoral chondromalacia was not caused by the December 13, 2013 accident. He reasoned that the chronology of Claimant's right lower extremity symptoms, including a flare-up then the resolution of symptoms, suggested that her right leg symptoms constituted a pre-existing condition. Moreover, he remarked that there had been no diagnosis of a right lower extremity peripheral nerve injury, a lumbar radiculopathy, a sympathetic mediated pain condition or CRPS. Dr. Paz summarized that the request for right SI joint injections with sciatic nerve blocks did not constitute reasonable, necessary and causally related medical treatment for Claimant's December 13, 2013 industrial injury.

7. As found, although Dr. Ghazi has recommended medical maintenance treatment in the form of sciatic nerve blocks with SI joint injections, the persuasive reports and testimony of Drs. Ginsburg and Paz reflect that the proposed treatment is not related to Claimant's December 13, 2013 right knee injury. Dr. Ginsburg summarized that Claimant only injured her right knee and no additional ratings were warranted. Furthermore, Dr. Paz remarked that there had not been a diagnosis of a right lower extremity peripheral nerve injury, a lumbar radiculopathy, a sympathetic mediated pain condition or CRPS. Therefore, Claimant's right lower extremity symptoms were not causally related to her December 13, 2013 industrial injury. Accordingly, Claimant has failed to present substantial evidence that any need for additional SI joint injections with sciatic nerve blocks is reasonably necessary or related to her work activities on December 13, 2013.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for medical maintenance benefits in the form of SI joint injections with sciatic nerve blocks is denied and dismissed.

2. Respondents are financially responsible for payment of medical bills from Cherry Creek Imaging for services as delineated in Exhibit 5 and Denver Area First Assistants, LLC for services as detailed in Exhibit 6.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 6, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

a. Whether issue preclusion is applicable in this matter;

b. Whether Respondents overcame the opinion of the Division independent medical examiner (DIME) on the issue of maximum medical improvement (MMI) by clear and convincing evidence;

c. Whether Claimant is entitled to reasonably necessary and related medical benefits to cure and relieve her left upper extremity of the effects of the December 13, 2013, industrial injury; and

d. Whether Claimant established by a preponderance of the evidence that she is entitled to an order awarding temporary disability benefits.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a 54 year old female who worked for Employer as a wheelchair attendant. Claimant first sought treatment on December 17, 2013, reporting that she lifted heavy luggage on December 13, 2013, and experienced pain in her bilateral hands. Claimant also reported that she squeezed pulls or handles to release the brakes on the wheelchairs which caused increased pain, swelling and catching.

2. Claimant was previously diagnosed with carpel tunnel syndrome bilaterally years earlier. Surgery was planned but the symptoms improved so surgery was never performed. Claimant reported that she had no trouble with her wrists until December 2013 when Claimant's left ring finger and right middle finger was catching and getting stuck. Claimant was diagnosed with bilateral hand tenosynovitis and trigger fingers. Claimant was referred to occupational therapy, given 800 mg ibuprofen and placed on work restrictions. Claimant also had seven sessions of physical therapy. Dr. Sachar administered trigger point injections in both trigger fingers.

3. On January 31, 2014, Claimant saw Dr. Aschberger for EMG/NCV evaluation. Claimant returned to Dr. Sachar on February 3, 2014, who noted that Claimant continued to experience bilateral numbness and tingling despite the trigger point injections and Dr. Aschberger recommended and sought authorization for surgery for trigger finger release and carpel tunnel surgery, bilaterally.

4. In February 2014, Claimant underwent an independent medical evaluation (IME) with Dr. Wallace Larsen. Dr. Larsen opined that the trigger finger and bilateral carpel tunnel was not work related and therefore, surgery was not reasonably necessary or related to the work injury. Dr. Larsen opined that Claimant's conditions were idiopathic and trigger finger could not be caused by an occupational lifting incident.

5. Respondents filed a Notice of Contest in this matter. Claimant filed an Application for Hearing on April 21, 2014. The matter proceeded to hearing on October 9, 2014, in Denver, Colorado. The matter was heard and decided by Administrative Law Judge Edwin L. Felter (ALJ Felter). A Findings of Fact, Conclusions of Law and Order was issued by ALJ Felter on October 21, 2014, on the issues of compensability and medical benefits. ALJ Felter found that the right trigger finger release surgery was a reasonably necessary and related medical benefit. ALJ Felter further ruled that the right carpel tunnel surgery may be a reasonably necessary and related medical benefits if it is a necessary and ancillary prerequisite to the right trigger finger release procedure. He ruled that Claimant's left upper extremity condition was not work related.

6. Claimant did not appeal ALJ Felter's Order denying the compensability of the left upper extremity condition. A Final Admission of Liability was filed on May 12, 2015, after the treatment for Claimant's right hand was completed.

7. Claimant objected and requested a Division Independent Medical Examination (DIME). Claimant's Application for the DIME listed the left hand and left upper extremity as issues to be addressed by the DIME doctor.

8. Respondents objected to Claimant's request that the DIME physician considered the left upper extremity. Respondents requested a prehearing conference to strike Claimant's request that the DIME physician consider the left upper extremity. Respondents contended that it was judicially determined in ALJ Felter's October 21, 2014, Order that the left hand and left upper extremity were not causally related to her work injury. Following the prehearing conference, the prehearing administrative law judge (PALJ) permitted the left hand and left upper extremity to be addressed by the DIME physician, Carolyn Burkhardt.

9. Dr. Burkhardt issued her DIME report on August 13, 2015, concluding that Claimant is not at MMI because she requires treatment for the left carpel tunnel syndrome and left trigger finger.

10. Respondents filed an Application for Hearing challenging the DIME report. Specifically, Respondents listed as an issue, "Overcoming DIME report indicating Claimant is not at MMI, even though body part in dispute has been judicially determined to not be a work related injury."

11. Prior to a hearing on the Respondents' Application, Respondents again requested a Prehearing conference and it was ordered. The PALJ issued an October 8, 2015, order requesting the DIME physician review ALJ Felter's orders of October 2014 which found that Claimant's left hand was not causally related to her work incident.

12. Dr. Burkhardt issued an Addendum to her DIME report on November 20, 2015, affirming that Claimant's left upper extremity condition is casually related to the work injury and that Claimant is not at MMI and the left carpel tunnel surgery and left trigger finger release are reasonably necessary and related medical benefits.

13. At the March 8, 2016, hearing in this matter, Respondents contend that it was Claimant's burden of proof to establish by clear and convincing evidence that Dr. Burkhardt's opinion regarding worsening of condition was most probably incorrect. Respondents took the position that issue preclusion prevented redetermination of the question whether Claimant's left upper extremity is a component of the work injury since that issue was already judicially determined. Respondents argued that the judicial determination by ALJ Felter in October 2014 that the left upper extremity was not causally related to the work injury is the law of the case and cannot be relitigated here. Thus, Respondents did not present clear and convincing evidence that the MMI determination is most probably incorrect.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are reached.

GENERAL LEGAL AUTHORITY

1.The purpose of the "Worker's Compensation Act of Colorado" (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Worker's Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Sections 8-43-201 and 8-43-210, C.R.S. See *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 12985); *Faulkner v. Industrial Claim Appeals Office*, 12 P. 3d 844 (Colo. App. 2000). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Worker's Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. A Worker's Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See Prudential Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

3. The Findings of Fact only concern evidence that is dispositive of the issues involved. Not every piece of evidence that would lead to a conflicting conclusion is included. Evidence contrary to the findings was rejected as not persuasive. *See*

Magnetic Engineering, Inc., v. ICAO, 5 P.3d 385(Colo. App. 2000); *Boyer v. Wal-Mart Stores, Inc.*, W. C. No. 4-460-359 (Industrial Claim of Appeals Office, August 28, 2001).

ISSUE PRECLUSION

4. Respondents contend that the issue whether Claimant's left upper extremity is work related has been judicially determined in ALJ Felter's order of October 21, 2014. The hearing before ALJ Felter concerned the issues of compensability and medical benefits. Respondents argue that on the grounds of issue preclusion the determination that Claimant's left upper extremity condition is not related to the work injury cannot be relitigated. Respondents further contend that the conclusion reached by ALJ Felter in the October 21, 2014, order that Claimant's left upper extremity condition was not work related controls the DIME determination. Respondents argue an order should be entered here finding that the DIME determination on MMI is incorrect and that Claimant is at MMI for all components of the work injury.

5. Collateral estoppel, or issue preclusion, is a judicially created, equitable doctrine that operates to bar relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 84 (Colo. 1999); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction* § 4403 (1981). The doctrine serves to relieve parties of multiple lawsuits, conserve judicial resources, and promote reliance on the judicial system by preventing inconsistent decisions. *Bebo Constr.*, 990 P.2d at 84. Although originally developed in the context of judicial proceedings, issue preclusion is just as viable in administrative proceedings and may bind parties to an administrative agency's findings of fact or conclusions of law. *Id.* at 85; *Indus. Comm'n v. Moffat County Sch. Dist. RE No. 1*, 732 P.2d 616, 620 (Colo. 1987).

6. Issue preclusion bars relitigation of an issue if: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Bebo Constr.*, 990 P.2d at 85; *Guar. Nat'l Ins. Co. v. Williams*, 982 P.2d 306, 308 (Colo. 1999); *Indus. Comm'n*, 732 P.2d at 619-20. Only when each of these elements has been satisfied are the equitable purposes of the doctrine furthered by issue preclusion. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001).

7. It is settled law that a full and fair opportunity to litigate an issue requires not only the availability of procedures in the earlier proceeding commensurate with those in the subsequent proceeding, *Maryland Cas. Ins. Co. v. Messina*, 874 P.2d 1058, 1062 (Colo. 1994), but also that the party against whom collateral estoppel is asserted have had the same incentive to vigorously defend itself in the previous action, *Salida Sch. Dist. R-32-J v. Morrison*, 732 P.2d at 1166-67; Restatement (Second) of Judgments § 28(5)(c) & cmt. j (1982). These considerations apply equally to the

adjudication of workers' compensation benefits. *Sunny Acres Villa, Inc. v. Cooper, supra*.

8. An Industrial Claim Appeal Panel (the Panel) in *Jose Ortega v. JBS USA, LLC and Zurich American Insurance Company, W.C. No.4-804-825 (June 27, 2013*) addressed a similar issue as is raised in this case applying the analysis of *Sunny Acres Villa, Inc. v. Cooper, supra,* and concluding that issue preclusion was inapplicable because the issues of compensability and the DIME's MMI determination were not identical. The Panel in *Jose Ortega, supra,* concluded since the standard of review in the compensability case is by a preponderance of the evidence and the standard of review of the DIME determination is by clear and convincing evidence issue preclusion cannot be applied to constrain either the decision of the DIME physician or the administrative law judge. The Panel explained that,

> The difficulty with the respondents' position lies in the extent it would allow for the prelitigation of the MMI and impairment rating issues prior to the application of the DIME process. Those issues would be determined at hearing by a preponderance of the evidence standard, the statute, however, provides that a DIME determination of those issues is to be reviewed at a hearing by a clear and convincing standard. The tactic of litigating those issues, by either party, as a means of obtaining an advantage in the DIME process is inconsistent with the aim of the statute.

DIME PHYSICIAN'S DETERMINATION OF MMI

9. Respondents contend that the DIME determination of MMI is incorrect. Respondents' argument is premised on the proposition that ALJ Felter's October 2014 judicial determination that Claimant's left upper extremity condition is not related to the work injury is controlling in the DIME process. Respondents argue that issue preclusion prevents relitigation of the issue of the relatedness of the left upper extremity condition. Respondents did not present medical evidence to prove that the DIME physician's MMI determination was incorrect. Respondents simply assert that the relatedness of the left upper extremity condition has already been determinate and therefore the DIME determination of MMI is incorrect.

10. Sections 8-42-107(8)(b)(III) and (c), *supra*, provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*,

supra. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

11. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

12. In this case, the DIME physician determined that Claimant's left upper extremity is part of the compensable work injury of December 13, 2013, and that Claimant is not at MMI because the left upper extremity requires additional medical treatment to cure and relieve Claimant from the effect of the industrial injury. Respondents failed to present clear and convincing evidence that the DIME physician's MMI determination is most probably incorrect.

MEDICAL BENEFITS

13. Claimant contends that she proved by a preponderance of the evidence that she requires reasonably necessary and related medical benefits for the left upper extremity condition. The DIME physician recommended that Claimant receive medical treatment for the left upper extremity. The DIME physician recommended treatment for the left carpel tunnel syndrome and trigger finger.

14. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

15. It is concluded that Claimant proved by a preponderance of the evidence that she is entitled to an order for medical treatment to cure and relieve her of the effect of the industrial injury for left upper extremity.

TEMPORARY TOTAL DISABILITY BENEFITS

16. No argument was made by Claimant in support of her claim for TTD benefits. Respondents' view of the case is that Claimant is not entitled to TTD because any incapacity or wage loss because of the left upper extremity is not compensable. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal

connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in Section 8-42-105(3), C.R.S. *City of Colorado Springs v. Industrial Claim Appeals Office, supra*. In this case, Claimant did not present evidence that she is disabled from her usual employment, thus evidence in support of an award of temporary disability benefits has not been established..

ORDER

It is therefore ordered that:

1. Issue preclusion is not applicable in this matter.

2. Respondents failed to establish by clear and convincing evidence that the DIME physician’s determination of MMI is most probably incorrect.

3. Respondents shall be liable for reasonably necessary and related medical benefits to cure and relieve Claimant of the effects of the industrial injury in the left upper extremity.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _April 20, 2016_

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law
Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-947-316-03

ISSUES

1. .Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' violation of W.C.R.P. 16-11(G) by failing to timely reimburse him for medical mileage expenses.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period January 15, 2016 until terminated by statute.

FINDINGS OF FACT

1. On October 24, 2013 Claimant sustained an admitted industrial injury to his left shoulder during the course and scope of his employment with Employer in case number WC 4-947-316-01.

2. On November 22, 2013 Claimant suffered additional injuries while working for a second employer in case number WC 4-935-813. The second employer admitted liability for foot and ankle injuries but denied liability for any aggravation of Claimant's left shoulder condition.

3. In a March 4, 2015 Summary Order ALJ Broniak dismissed Claimant's claim for additional benefits in case number WC 4-947-316-01. ALJ Broniak also denied and dismissed Claimant's claim for Workers' Compensation benefits in case number WC 4-935-813.

4. On July 31, 2015 the Industrial Claim Appeals Office (ICAP) affirmed ALJ Broniak's Order except in regard to additional medical benefits in case number WC 4-947-316. The ICAP reasoned that ALJ Broniak had incorrectly implicitly determined that Claimant reached Maximum Medical Improvement (MMI) in case number WC 4-947-316-01 in the absence of a finding of MMI by an Authorized Treating Physician (ATP) or a Division Independent Medical Examination (DIME) physician. The ICAP thus concluded that Claimant was not precluded from obtaining future medical benefits in case number WC 4-947-316-01 subject to Respondents' ability to challenge any particular treatment.

5. On September 4, 2014 Claimant submitted medical mileage reimbursement requests to Respondents based on his initial October 24, 2013 left shoulder injury. After Respondents requested additional information about the reimbursement, Claimant submitted a mileage log and accompanying medical records regarding his left shoulder injury.

6. On October 19, 2015 Insurer sent a letter to counsel for Claimant stating that "mileage will only be paid from 10/25/13 to 11/6/13. Mileage submitted beginning 12/17/13 through 12/18/14 will be denied. It is not clear if the mileage submitted is related solely or in part to your initial date of injury of 10/24/13 or if it is related to the subsequent injury that occurred in November 2013."

7. On November 5, 2015 Claimant responded to the October 19, 2015 letter by submitting additional details and information about the medical mileage reimbursement request. Insurer replied that the issue was whether Claimant's mileage reimbursement request pertained to his October 24, 2013 left shoulder injury or the November 22, 2013 incident.

8. On December 16, 2015 Claimant filed an Application for Hearing in the present matter or case number WC 4-947-316-03. He noted that he was seeking penalties. Claimant recited a medical mileage dispute with Insurer and detailed the correspondence between the parties. However, Claimant did not cite to the statute or a specific subsection of W.C.R.P. 16-11 on which penalties were predicated. Claimant also did not specify the dates on which the violations occurred.

9. On February 8, 2016 the employer in case number WC 4-935-813 filed a Final Admission of Liability (FAL) reflecting that Claimant had received TTD benefits for the period November 23, 2013 until January 14, 2016. The employer noted that Claimant had reached MMI in case number WC 4-935-813 on January 15, 2016 and terminated TTD benefits.

10. Claimant has not reached MMI for his October 24, 2013 industrial injury in case number WC 4-947-316-03. However, he has not received TTD benefits since January 14, 2016.

11. Claimant's Case Information Sheet in the present case only stated that he was seeking penalties based on a violation of "Rule 16-11." At the hearing in this matter Claimant requested penalties pursuant to W.C.R.P. 16-11(G) for Respondents' failure to timely pay mileage reimbursement.

12. Claimant has failed to establish that it is more probably true than not that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' violation of W.C.R.P. 16-11(G) by failing to timely reimburse him for medical mileage expenses. The record reveals that Claimant has failed to plead his request for penalties with specificity as required by 8-43-304(4), C.R.S. Claimant has sought penalties in a variety of fashions at various points in the proceedings. His Application for Hearing noted that he was seeking penalties. Claimant recited a medical mileage dispute with Insurer and detailed the correspondence between the parties. However, Claimant did not cite to the statute or a specific subsection of W.C.R.P. 16-11 on which penalties were predicated. Moreover, Claimant's Case Information Sheet only noted that he was seeking penalties based on a violation of "Rule 16-11." Finally, at the hearing in this matter Claimant requested penalties pursuant to W.C.R.P. 16-11(G) for Respondents' failure to timely pay mileage reimbursement.

13. Claimant's general penalty allegations did not provide Respondents with adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. He did not mention Rule 16-11(G) until the hearing in this matter. Claimant also failed to apprise Respondents of the "grounds" on which he was seeking penalties as required under §8-43-304(4), C.R.S. Because of Claimant's lack of specificity, Respondents did not receive the opportunity to properly present evidence and argument in support of their position. Accordingly, Claimant's request for penalties is denied and dismissed.

14. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period January 15, 2016 until terminated by statute. Claimant's TTD benefits were discontinued when he reached MMI in case number WC 4-935-813.on January 14, 2016. However, Claimant has not reached MMI in case number WC 4-947-316-03, he has not returned to regular or modified employment and the attending physician has not provided him with a written release to return to regular employment. Furthermore, the attending physician has not given Claimant a written release to return to modified employment, the employment was not offered in writing and Claimant did not fail to begin the employment. Because none of the criteria for terminating TTD benefits pursuant to §8-42-105(3)(a)-(d), C.R.S. has been satisfied, Claimant is entitled to receive continuing TTD benefits. Accordingly, Claimant shall receive TTD benefits in case number WC 4-947-316-03 for the period January 15, 2016 until terminated by statute.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Penalties

4. A party may be penalized under §8-43-304(1), C.R.S. for up to $1,000 day for any failure, neglect or refusal to obey and lawful order made by the director or panel. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. Ct. App. 2003). The moving party for a penalty bears the burden of proving that a party failed to take an action that a reasonable party would have taken. *City of County of Denver v. Indus. Claim Appeals Office*, 58 P.3d 1162, 1164-65 (Colo. Ct. App. 2002). Once the prima facie showing of unreasonableness has been made, the burden of persuasion shifts to the party who committed the alleged penalty to show that the conduct was reasonable under the circumstances. *See e.g. Pioneers Hosp. of Rio Blanco County v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Postlewait v. Midwest Barricade*, 905 P.2d 21, 23 (Colo. App. 1995).

5. The imposition of penalties under §8-43-304(1), C.R.S. requires a two-step analysis. *See In re Hailemichael,* W.C. No. 4-382-985 (ICAP, Nov. 17, 2004). The ALJ must first determine whether the disputed conduct violated a provision of the Act or rule. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623, 624 (Colo. App. 1995). If a violation has occurred, penalties may only be imposed if the ALJ concludes that the violation was objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 907 P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of an insurer's actions depends upon whether the action was predicated on a "rational argument based in law or fact." *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998).

6. Pursuant to §8-43-304(4), C.R.S. the party seeking penalties "shall state with specificity the grounds on which the penalty is being asserted." The failure to state with specificity the grounds on which a penalty is asserted subjects the claim to dismissal. *In Re Claim of Horiagon*, W.C. No. 4-985-020 (ICAP, Mar. 15, 2015); *see Salad v. JBS USA, LLC,* W.C. No. 4-886-842-04 (Mar. 5, 2014). The requirement for specificity serves two functions. First, it notifies the potential violator of the basis of the claim so that the violator may exercise its right to cure the violation. Second, the specificity requirement ensures that the potential violator will receive notice of the legal and factual basis for the penalty claim. *In Re Claim of Lovett*, W.C. 4-808-092-04 (ICAP, Aug. 30, 2013); *see Major Medical Insurance Fund v. Industrial Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Jakel v. Northern Colorado Paper Inc.*, W.C. No. 4-524-991 (Oct. 6, 2003).

7. The fundamental requirements of due process are notice and an opportunity to be heard. Due process contemplates that the parties will be apprised of the evidence to be considered and afforded a reasonable opportunity to present evidence and argument in support of their positions. Inherent in the due process

requirements is the concept that parties will receive adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. *In Re Claim of Horiagon*, W.C. No. 4-985-020 (ICAP, Mar. 15, 2015); s*ee Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo. App. 1990); *Carson v. Academy School District # 20*, W.C. No. 4-439-660 (Apr. 28, 2003).

8. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' violation of W.C.R.P. 16-11(G) by failing to timely reimburse him for medical mileage expenses. The record reveals that Claimant has failed to plead his request for penalties with specificity as required by 8-43-304(4), C.R.S. Claimant has sought penalties in a variety of fashions at various points in the proceedings. His Application for Hearing noted that he was seeking penalties. Claimant recited a medical mileage dispute with Insurer and detailed the correspondence between the parties. However, Claimant did not cite to the statute or a specific subsection of W.C.R.P. 16-11 on which penalties were predicated. Moreover, Claimant's Case Information Sheet only noted that he was seeking penalties based on a violation of "Rule 16-11." Finally, at the hearing in this matter Claimant requested penalties pursuant to W.C.R.P. 16-11(G) for Respondents' failure to timely pay mileage reimbursement.

9. As found, Claimant's general penalty allegations did not provide Respondents with adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. He did not mention Rule 16-11(G) until the hearing in this matter. Claimant also failed to apprise Respondents of the "grounds" on which he was seeking penalties as required under §8-43-304(4), C.R.S. Because of Claimant's lack of specificity, Respondents did not receive the opportunity to properly present evidence and argument in support of their position. Accordingly, Claimant's request for penalties is denied and dismissed. *See In Re Claim of Lovett*, W.C. 4-808-092-04 (ICAP, Aug. 30, 2013) (affirming the ALJ's denial of penalties for the claimant because the claimant'srequest for penalties under Rule 16 "in a variety of fashions at various points in the proceedings" constituted a deficient basis for penalties because it did not "state with specificity the grounds" on which the penalties were sought).

TTD Benefits

10. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits shall continue until the first occurrence of any

of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

11. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period January 15, 2016 until terminated by statute. Claimant's TTD benefits were discontinued when he reached MMI in case number WC 4-935-813.on January 14, 2016. However, Claimant has not reached MMI in case number WC 4-947-316-03, he has not returned to regular or modified employment and the attending physician has not provided him with a written release to return to regular employment. Furthermore, the attending physician has not given Claimant a written release to return to modified employment, the employment was not offered in writing and Claimant did not fail to begin the employment. Because none of the criteria for terminating TTD benefits pursuant to §8-42-105(3)(a)-(d), C.R.S. has been satisfied, Claimant is entitled to receive continuing TTD benefits. Accordingly, Claimant shall receive TTD benefits in case number WC 4-947-316-03 for the period January 15, 2016 until terminated by statute.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for penalties is denied and dismissed.

2. Claimant shall receive TTD benefits for the period January 15, 2016 until terminated by statute.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 12, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Respondents overcame the opinion of the Division independent medical examiner (DIME) by clear and convincing evidence on the issue of maximum medical improvement (MMI);

b. Whether Claimant proved by a preponderance of the evidence that the medical benefits recommended by Dr. Snyder, revision hip arthroscopy and possible micro-fracture, are reasonably necessary and related medical benefits;

c. Whether Claimant was disabled from his usual employment by the work injury and therefore entitled to an order awarding temporary total disability benefits (TTD) beginning January 20, 2015, through August 16, 2015;

d. Whether Claimant was partially disabled from his usual employment and therefore entitled to an order awarding temporary partial disability benefits (TPD) beginning August 17, 2015, and continuing until terminated by law; and

e. Whether Claimant's average weekly wage (AWW) should be increased by COBRA as of March 1, 2015.

STIPULATIONS

The issue of permanent partial disability and, specifically, the issue of conversion is reserved for later determination.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant was employed by United Parcel Service on January 30, 2014, as a delivery driver.

2. On January 30, 2014, he was unloading the back of a truck. He bent over to lift a bag weighing approximately 70 lbs. out of the truck and as he came up from a flexed position at the hip, he had immediate pain in his right groin area.

3. Claimant was diagnosed with a labral tear, femoral acetabular impingement and psoas tendon impingement. On June 9, 2014, he underwent a hip arthroscopy, decompression/reshaping of the hip socket. A labral reconstruction was attempted but the graft that was utilized would not hold. Claimant also had a cartilage injury on his femoral head and a microfracture of that was performed. The surgery was performed by Joshua Snyder, M.D.

4. On August 25, 2014, Claimant underwent a labrum reconstruction.

5. Kevin O'Toole, D.O. placed Claimant at MMI on January 20, 2015. He recommended maintenance medical care consisting of follow up examinations with the surgeon, Dr. Synder.

6. Respondents filed a Final Admission of Liability on February 4, 2015, in accordance with Dr. O'Toole's report. Respondents terminated Claimant's TTD on January 19, 2015, based upon the determination of MMI by Dr. O'Toole. Claimant requested a DIME.

7. While the DIME process was in progress, Claimant followed up with Dr. Snyder on March 26, 2015. He was still using a cane and having more pain than would be expected following a labral reconstruction. Dr. Snyder therefore ordered another MRI.

8. The MRI showed that there was "increase of chondral damage along an area that was previously damaged in the acetabulum along the fovea."

9. Dr. Snyder recommended a repeat revision hip arthroscopy.

10. Claimant was examined by Dr. O'Toole on May 21, 2015. He referred Claimant back to Dr. Snyder for repeat hip arthroscopy and recommended case reopening. Dr. O'Toole changed Claimant's permanent work restrictions back to temporary work restrictions. He intended to see Claimant again after surgery.

11. Franklin Shih, M.D. performed a DIME on June 11, 2015. He determined Claimant was not at MMI. Dr. Shih wrote, "I would consider the progressive pathology in the hip to be related back to the original injury and treatment to be reasonable and necessary associated with the original injury."

12. Respondents had a Rule 16 review of the request for authorization of surgery done by Eric O. Ridings, M.D. on June 2, 2015. He opined surgery should not be authorized because the chondral injury was "minor" and the chances of success of the surgery relieving Claimant's current complaints is low.

13. Claimant began a new job as of August 17, 2015. He is working at a restaurant called Nick's as a pizza cook.

14. Claimant lost his health insurance benefits as of March 1, 2015.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact the following Conclusions of Law are entered.

GENERAL LEGAL AUTHORITY

1.The purpose of the "Worker's Compensation Act of Colorado" (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Worker's Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Sections 8-43-201 and 8-43-210, C.R.S. See *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 12985); *Faulkner v. Industrial Claim Appeals Office*, 12 P. 3d 844 (Colo. App. 2000). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Worker's Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. A Worker's Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See Prudential Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

3. The Findings of Fact only concern evidence that is dispositive of the issues involved. Not every piece of evidence that would lead to a conflicting conclusion is included. Evidence contrary to the findings was rejected as not persuasive. *See Magnetic Engineering, Inc., v. ICAO,* 5 P.3d 385(Colo. App. 2000); *Boyer v. Wal-Mart Stores, Inc.*, W. C. No. 4-460-359 (Industrial Claim of Appeals Office, August 28, 2001).

DIME DETERMINATION

4 Respondents failed to meet their burden of proof of overcoming the DIME's opinion by clear and convincing evidence that Claimant is not at maximum medical improvement.

5. Section 8-42-107(8)(b)(III), C.R.S., provides that the determination of the DIME with regard to MMI shall only be overcome by clear and convincing evidence. In order to prove a fact or proposition by "clear and convincing evidence," the trier of fact, after considering all of the evidence, must find it to be highly probable and free from

serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

6. The Division Independent Medical Examiner, Franklin Shih, M.D., determined Claimant was not at MMI. He credibly opined: "I would consider the progressive pathology in the hip to be related back to the original injury and treatment to be reasonable and necessary associated with the original injury." Dr. Shih's DIME determination includes his opinion that Claimant's chondral condition is related to the work injury.

7. Dr. O'Toole, Claimant's primary authorized treating physician, credibly opined that Claimant should be not be considered at MMI due to his need for surgery. Dr. Snyder requested authorization to perform a revision hip arthroscopy. He testified that the request was made to evaluate the labrum. He explained that sometimes MRI's do not detect small injuries of the labrum. The surgery would also evaluate the cartilage injury. Dr. Snyder would perform either a chondroplasty or proceed with a second microfracture.

8. When an industrial injury leaves the body in a weakened condition and the weakened condition causes additional physical injury, the additional injury may be considered the result of the industrial injury. *See Standard Metals Corp. v. Ball,* 474 P.2d 622 (Colo. 1970). Dr. Snyder was asked to explain how Claimant developed the chondral injury. He testified that Claimant could have developed the injury in physical therapy. He also testified that it could have happened during the original injury and developed slowly over time. Dr. Snyder credibly testified that it would not have developed in an individual with a normal hip during their active daily living routine. "In someone that's had surgery on their hip, has had an injury to their hip, has had a previous pincer lesion, those patients or those people are at risk for something like that, but somebody that has a normal hip just normal daily activities you would not necessarily see a chondral injury." Dr. Snyder went on to explain that he frequently sees people with a pincer lesion that have no pain and then a labral tear often is the inciting factor for the onset of symptoms.

9. The reports of Eric Ridings, M.D., the medical records, and Joshua Snyder, M.D.'s reports and deposition testimony, did not constitute clear and convincing evidence that Dr. Shih's MMI determination was most probably incorrect.

MEDICAL BENEFITS

10. Claimant contends that he proved by a preponderance of the evidence that he requires medical treatment to cure and relieve him of the effects of the industrial injury. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

11. Claimant established by a preponderance of the evidence the medical benefits sought are reasonably necessary and related. Dr. Snyder credibly testified that the revision hip arthroscopy is reasonable and necessary. Dr. Shih agreed with this recommendation. Dr. Snyder credibly testified that the recommended surgery is reasonable and necessary because: a) Claimant had a good result from his prior two surgeries, he just did not have a full recovery; b) The surgery is necessary despite the fact that injury is "small" or "mild"; and c) The surgery is necessary because there is a lesion that is identified on the MRI and can be treated. Dr. Snyder further credibly opined that the surgery will likely improve Claimant's pain level and his function. Dr. Snyder noted that the natural history of the injury, without surgery, is that it will get bigger over time and Claimant will eventually progress to osteoarthritis and likely need a hip replacement.

TTD/TPD

12 . Claimant contends that he proved by a preponderance of the evidence that he is entitled to TPD and TTD. On April 13, 2016, Claimant filed a Motion to Reconsider the Summary Order in this matter. In the Motion to Reconsider, Claimant contends that the award of TTD should commence on January 20, 2015, and not on May 21, 2015, as reflected in the Summary Order. The Motion to Reconsider is granted, as follows.

13. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits

ordinarily continue until one of the occurrences listed in Section 8-42-105(3), C.R.S. *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

14. The DIME determined that Claimant is not at MMI. Dr. Kevin O'Toole, the authorized treating physician, originally determined Claimant was at MMI as of January 20, 2015. Dr. O'Toole later determined Claimant was not at maximum medical improvement as of May 21, 2015. Dr. Shih opined that he was in agreement with Dr. O'Toole's assessment with regard to MMI. Claimant had work restrictions and was disabled from his usual employment commencing January 20, 2015. His disability continued until Claimant started work at Nick's on August 17, 2015. Claimant is entitled to temporary total disability benefits starting January 20, 2015, through August 16, 2015. Claimant is entitled to temporary partial disability benefits from August 17, 2015 and continuing until terminated by law.

AWW

15. Claimant has failed to meet his burden of proof regarding an increase in his average weekly wage due to his loss of health insurance benefits. The Workers' Compensation Act (Act) defines wages as follows:

> (a) "Wages" shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied.
>
> (b) The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or less insurance plan. If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage or the cost of the conversion of health insurance coverage, the advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment.

Section 8-40-201(19), C.R.S. 2015.

16. A claimant's AWW may include the cost of continuing the employer's health coverage pursuant to the Consolidated Omnibus Budget and Reconciliation Act of 1985 (COBRA). *Stegman v. Sears*, W.C. No. 4559482 & 4483695 (ICAO July 27, 2005).

17. Claimant testified that he lost his employer provided health insurance as of March 1, 2015 and became eligible for COBRA. The cost of COBRA coverage forms the basis of the calculation for an increase in the average weekly wage. There was no evidence presented by either party regarding the cost of COBRA and therefore the average weekly wage is not increased at this time.

ORDER

It is therefore ordered that:

1. Respondents failed to establish by clear and convincing evidence the DIME determination regarding MMI is most probably incorrect.

2. Respondents shall be liable for reasonably necessary and related medical benefits

3. Respondents shall be liable for TTD benefits from January 20, 2015, through August 16, 2015, and TPD from August 17, 2015, and continuing until terminated by law.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 21, 2016

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-948-656-03

ISSUES

- Whether Claimant overcame the DIME's impairment rating by clear and convincing evidence?
- Whether Claimant overcame the DIME's MMI determination by clear and convincing evidence?
- The issues of disfigurement, medical benefits, and average weekly wage were withdrawn.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On July 9, 2013, Claimant sustained a compensable occupational injury while performing duties arising out of the course and scope of her employment for Employer. Claimant was lifting a heavy piece of luggage onto a conveyor belt when she lost her balance and fell, hitting her right hip, right buttocks, and her low back. Immediately after the injury, Claimant experienced pain in her lower back and right hip.

2. The same day, Claimant sought medical treatment for her lower back and right hip at OccMed Colorado. David Williams, M.D., initially diagnosed Claimant with a right hip contusion, a lumbar strain, and radiculitis. Dr. Williams also recommended obtaining MRIs of the lumbar spine and right hip which were performed on July 16, 2013.

3. The MRI of the lumbar spine revealed evidence of chronic disc desiccation and degeneration with slight loss of disc height. A broad based concentric mild annular disc bulge was present without focal protrusion of disc material. The MRI also identified that Claimant had a congenitally small spinal canal at that level and that the mild annular bulge caused minor compression of the lateral recesses, mildly abutting the L5 nerve root. No other abnormality was detected in Claimant's lumbar spine.

4. The MRI of the right hip was read to show, "mild degenerative changes in the right hip with enlargement and degeneration and tearing of the acetabular labrum superiorly, chondral thinning and mild subchondral marrow edema superiorly in the right hip, and a small right hip joint effusion."

5. On July 23, 2013, Dr. Williams referred Claimant to physical therapy for both her hip and her back. On August 6, 2013, Dr. Williams authored a progress note indicating that Claimant had "minimal discomfort" in her low back, mostly on the *left* side. He discontinued physical therapy for her hip, and continued it for her back. Dr. Williams referred Claimant to Dr. Craig Davis for her hip pain to explore whether her small labral tear might be the symptomatic pain generator.

6. Although Claimant continued to report pain in her right hip, physical therapy notes from August 2013 indicate that she regained full range of motion in her hip, that her right hip was "better" and "still better", and that she was working double shifts. Notes from August 20, 2013 state that Claimant was continuing to feel better with much less right leg pain.

7. Dr. William's exam notes from August 20, 2013 report that Claimant's "lumbar spine is asymptomatic today." Dr. Williams also had become aware that Dr. Davis did not specialize in hips and referred Claimant to Jeffrey A. Arthur, M.D., instead.

8. Dr. Arthur evaluated Claimant on August 26, 2013, diagnosing her with hip bursitis, hip sprain/strain, and pelvis/thigh joint pain. He performed a right hip trochanteric bursal injection during the appointment which did not result in significant improvement of Claimant's symptoms.

9. A September 23, 2013 progress note authored by Dr. Williams indicated Dr. Arthur was of the opinion that Claimant's protruding disc was the cause of her symptoms, and that Dr. Chan concurred.

10. On September 23, 2013, Claimant saw Samuel Chan, M.D., for evaluation and treatment of her back. Although he considered Claimant's discogenic findings to be mild, given her continued symptoms he recommended an epidural steroid injection in an attempt to identify her pain generator. Dr. Chan's report notes that Claimant had discussed the injection with "her friend," Dr. Prusmack, who felt it would be appropriate. On October 10, 2013, Claimant underwent a right L4-L5 transforaminal epidural steroid injection which afforded her significant relief. A progress note dated October 21, 2013 by Dr. Williams noted that Claimant did not have any pain on that date.

11. Claimant underwent a second epidural steroid injection on January 2, 2014, but it provided little relief. Greg Smith, D.O., authored a January 8, 2014 progress note that indicating Claimant's right leg complaints followed the dermatomal region associated with the broad based annular disc bulge at L4-L5. Dr. Smith discussed surgical options with Claimant, including a microdiscectomy to remove the part of the disc that was bulging. He provided the names of surgeons to consider. Claimant again referred to a friend who was a back surgeon she wished to consult. That surgeon was Dr. Prusmack, whom she insisted she be referred to. At hearing, Claimant testified that Dr. Prusmack was "God to [her]."

12. Dr. Prusmack evaluated Claimant on March 19, 2014. It appears from Dr. Prusmack's discussion that he may not have had Claimant's medical records. Rather than refer to specific records, he appears to rely on Claimant's reports that the epidurals only helped transiently and that her hip MRI showed significant labral tearing omitting that the condition was described as degenerative, both statements being somewhat inaccurate. He also refers to her *hip* MRI showing a very small herniated disc at L4-L5, when that finding was on the *lumbar* MRI. Dr. Prusmack found Claimant to have a normal neurologic exam. His report states, "I do not think that [Claimant's debilitating groin buttock and hip pain] is from her back or radiculopathy. I was able to reproduce the pain that went from her hip to her knee with internal adduction. Therefore, my recommendation is for her to be evaluated by Orthopedic Surgery. There are no neurosurgical issues at this time." Claimant was working full time without restrictions at the time. Dr. Prusmack referred Claimant to James Genuario, M.D.

13. On March 7, 2014, Dr. Wakeshima performed an EMG which was read as normal.

14. Dr. Smith evaluated Claimant on March 21, 2014, two days after Dr. Prusmack. Claimant, who appeared in no acute distress, reported pain of 8/10, controlled by Excedrin and naproxen.

15. On May 1, 2014, Claimant underwent right hip arthroscopic acetabuloplasty with labral refixation, femoroplasty, debridement of the acetabular chondrocalcinosis, capsulorrhaphy, and intraoperative fluoroscopy. Claimant pursued post operative physical therapy with good results.

16. Notably, on June 17, 2014, Dr. Genuario discussed that during physical therapy for her right hip, Claimant reported the onset of left sided sciatic type symptoms with numbness and tingling in her left leg. Although Dr. Genuario encouraged Claimant to return to Dr. Prusmack for reevaluation of her lumbar spine, she failed to do so.

17. On November 24, 2014, Dr. Smith placed Claimant at MMI and issued an impairment rating report. He found Claimant to be having no difficulties at that time and that she was able to do her full activities of daily living and all of her job duties. Dr. Smith assigned the following impairments:

    - 2% impairment for lumbar flexion
    - 3% impairment for lumbar extension
    - 1% impairment for right lateral flexion
    - 2% impairment for left lateral flexion
    - TOTALING 8% whole person impairment for the lumbar region, plus

- 7% for a deficit of disc space for six months[1]
- TOTALING **14% whole person impairment for the lumbar system**.
- 10% impairment for sensory and numbness of the lateral femoral cutaneous nerve[2]
- 7% lower extremity impairment for right hip flexion
- 2% lower extremity impairment for right hip extension
- Totaling 9% for right hip range of motion combining with the 10% lateral cutaneous nerve
- TOTALING **18% lower extremity rating**, which converts to a 7% whole person impairment
- This 7% whole person impairment combined with the 14% whole person impairment TOTALS 20% whole person impairment.

18. Dr. Smith also awarded Claimant maintenance care in the form of follow up visits with Drs. Prusmack, Arthur, Chan, and himself. He continued her medications for one year.

19. Claimant testified at hearing that following Dr. Smith's MMI determination, she continues to experience pain in her hip that radiates into her right leg, as well as pain in her lower back. Claimant began experiencing pain in her left leg after her hip surgery and it occurs when she sits on a hard surface or is standing for a long time. Claimant testified that prior to her July 9, 2013 occupational injury, she had never had any problems with her lower back and hip, and she had never experienced pain or tingling in either lower extremity.

20. Claimant also testified that at some point in 2014, she noticed left leg symptoms, which she "noticed the most" after flying to El Paso on a hard airplane seat and driving back to Denver on a hard truck seat. Claimant also notices pain when she rides on the hard seat of the motorcycle her husband drives.

21. At Respondents' request, Claimant underwent a DIME with Joseph Fillmore, M.D., on May 21, 2015. Dr. Fillmore's DIME report contains certain inconsistencies regarding whether he considered Claimant's potential back impairment. Specifically, the following facts indicate that Dr. Fillmore did not consider rating Claimant's back:

[1] Dr. Smith described this as a lower extremity impairment, but correctly calculated it as a whole person impairment.

[2] A lateral femoral cutaneous nerve injury is a lower extremity impairment, not a whole person impairment as indicated by Dr. Smith. Dr. Smith correctly calculated the impairment as a lower extremity impairment.

- In his introductory statement which frames the report he writes, “I have been asked to evaluate the right hip.”

- The same sentence frames the discussion potion of his report.

- Dr. Fillmore also only included the 18% lower extremity rating assigned by Dr. Smith as the previous physician’s rating, and not Claimant’s 14% whole person impairment for the lumbar system.

- Although Dr. Fillmore mentions that Claimant developed back pain as the result of her injury and that she received three epidural steroid injections, the bulk of that section of his report focuses on her hip symptoms and treatment.

- The only underlined portion of Dr. Fillmore’s review of medical records is Dr. Prusmack’s March 19, 2014 note, “He did not believe the pain was coming from her back or radicular process.”

- The “Impairment Rating” section of Dr. Fillmore’s report only specifically discusses Claimant’s hip.

However, the following facts indicate that Dr. Fillmore did consider rating Claimant’s back:

- Dr. Fillmore’s review of medical records discusses records of both Claimant’s hip and back symptoms and treatment.

- Claimant’s Review of Symptoms reflects, “She reports joint stiffness, back pain.”

- Dr. Fillmore’s physical examination notes include that Claimant had no pain with lumbar flexion, pain with extension of her spine, and on right rotation; pain to palpation over the right lower back; some pain in the back with hip abduction; and that her lumbar range of motion was tested using dual inclinometer, what those measurements were; and that the measurements were valid.

- Dr. Fillmore included “lumbar radiculitis” in his impression.

- Dr. Fillmore stated that “it appears that the majority of the patient’s pain is from her right hip issues,” and adopted Dr. Prusmack’s opinion that Claimant’s pain issues were more hip related; and that based on his own examination that Claimant did not need to follow up with Dr. Chan.

- Although Dr. Fillmore measured Claimant’s lumbar ranges of motion, he did not fill out the impairment rating box on the Figure 83 form indicating whether a percentage rating applied. The ALJ, taking judicial notice of the

AMA Guides, finds that Claimant's lumbar extension measurements could support an impairment rating, and none was given.

22. Resolving the ambiguities in the DIME report, the ALJ finds based on a totality of the evidence that Dr. Fillmore's report did not evaluate all of Claimant's conditions. As such, it does not comply with the AMA Guides as it is not clear, accurate, or complete.

23. Following the DIME, Claimant underwent a defense medical examination with Marc Steinmetz, M.D. on November 17, 2015. Dr. Steinmetz authored a report based on that examination and also testified at hearing as an expert in the field of occupational medicine.

    - He noted that Claimant has always maintained that her fall involved injuries to both her hip and her lower back.

    - Dr. Steinmetz attributed Claimant's bilateral leg pain to sitting on her thighs, or preexisting arthritis in her back, or activities since the work injury; but not to her work injury. He also opined that her leg symptoms were at the wrong level to be associated with an aggravation of her degenerative discs.

    - He opined that the first epidural steroid injection provided relief because it relieved the pain in Claimant's buttock where she had a bruised nerve, and that the follow up injections were not beneficial because the bruise had resolved.

    - Dr. Steinmetz did not address whether Claimant's L4-L5 nerve impingement was caused or aggravated by her work injury.

    - Dr. Steinmetz agreed with Dr. Fillmore's rating of Claimant's hip impairment. With respect to Claimant's back, Dr. Steinmetz opined, "So it was very clear that he addressed [Claimant's back] and didn't feel it was – needed treatment."

    - Dr. Steinmetz agreed with the November 24, 2014 MMI date.

    - Dr. Steinmetz acknowledged that Claimant was still experiencing pain and other symptoms in her hip, low back, and lower extremities.

    - Dr. Steinmetz opined that Claimant's work injury did not aggravate any of Claimant's preexisting conditions. He suggested that she see her OB-GYN to have her back checked again.

24. With respect to Claimant's back pain, Dr. Steinmetz testified that his diagnosis would be a temporary bruise to the sciatic nerve that quickly healed. Dr. Steinmetz opined that following the healing of Claimant's sciatic nerve bruise, all

ongoing complaints of back pain have been caused by degenerative changes on the MRI. As such, he did not assign an impairment rating for the lower back. However, he testified that if the ongoing back complaints were caused by the July 9, 2013 injury, an impairment rating for the lower back could be warranted.

25. The ALJ finds that the following factors reduced Dr. Steinmetz's credibility and persuasiveness: On cross examination by Claimant's counsel, Dr. Steinmetz was non cooperative. When a simple answer could have been provided, he choose to answer, "I clarified that multiple times in my report and today . . . ." And when a yes or no answer would have been sufficient, he responded, "It's on the written report." He often began answering questions while they were still being asked. And his testimony often was not stated medically. For example, when asked about the degree of Claimant's hip arthritis, he stated, "It wasn't like there were – like, things sticking out or anything like that." And when discussing Claimant's congenital stenosis, he testified, "And one thing to not – interestingly enough, I thought that I recall some other people referring to it. Oh, yeah, congenital – some congenital stenosis too. Some of that was because of the congenital structure being kind of small spaces." Finally, contrary to Dr. Steinmetz's opinion that the DIME clearly addressed Claimant's back, the ALJ found that that issue was actually not addressed.

26. Chad J. Prusmack, M.D., a specialist in neurosurgery, testified by deposition dated January25, 2016.[3] He evaluated Claimant on March 19, 2014 for low back pain and right lower extremity symptoms. His notes reflect that Claimant complained of "significant pain in the right hip, buttock, and interior groin" beginning in July of 2013, and caused by a fall at work. Based on his exam and other data that he had, including her hip MRI and her lumbar MRI, he felt she had an issue with her hip. "I did not feel that it was primarily her back or her nerve, but that it was her hip that needed to be evaluated." Dr. Prusmack acknowledged that stenosis could predispose one to having an acute neural injury. Dr. Prusmack explained that radiculopathy meant symptoms from nerve impingement which could include weakness, sensory loss or alteration, or pain. He further explained that treatment for symptomatic chronic degenerative disc disease could include decompression surgery. When Dr. Prusmack saw Claimant in March, 2013, he was unable to make a treatment recommendation because he felt that her problem was orthopedic and related to her hip.

27. Dr. Prusmack testified that the information in a chart note dated November 17, 2015, was most likely from a phone call or an email, and was not the result of another evaluation of Claimant. The note mentions that Claimant had a successful repair of her hip but had persistent symptoms which seemed to be nerve related and needed to be further evaluated. The note also attributed both injuries to relate back to her work injury. Dr. Prusmack testified that that information "would have . . . come directly from the patient."

[3] Although Claimant expressed a friendship with Dr. Prusmack, his conduct and involvement in the case reflected only a professional relationship.

28. Dr. Prusmack reviewed Dr. Steinmetz's November 17, 2015 IME report.

- He commented that Dr. Steinmetz's description of Claimant's back symptoms being caused by a bruise of her sciatic nerve "just doesn't make sense" and that he would not use that terminology in a discussion with another neurosurgeon "because it has no real meaning."

- He was critical of Dr. Steinmetz for concluding that the lumbar MRI showed an acute back injury, because MRIs are not used to determine acuteness or chronicity.

- Dr. Steinmetz's discussion of the EMG being normal was not helpful because it is irrelevant in identifying pain and it could not determine whether Claimant's pain could be attributed to her work injury.

- Dr. Prusmack stated that Dr. Steinmetz was wrong in stating that a back injury would need to be at a lower lumbar level than L4-L5 to correspond to Claimant's leg symptoms.

29. When asked about causation and the need for any additional medical treatment, Dr. Prusmack answered that he did not have enough information to make a determination, and that he would need "a clinic history and physical and personal opinion, medical professional opinion." He acknowledged that aggravation of a chronic degenerative disc disease and stenosis could cause symptoms in the legs, including pain, numbness, and tingling. He acknowledged that it was possible to have symptoms in both lower extremities.

30. When asked specifically about Claimant's case, Dr. Prusmack did not give an opinion about whether Claimant's lower extremity symptoms were caused by her chronic degenerative disc disease and stenosis or aggravation of those two issues. Rather, he explained that he had not had the opportunity to make his own assessment of Claimant and her current complaints. When Claimant's counsel pressed on the issue, Dr. Prusmack stated that he thought Claimant's degenerative disc disease had "absolutely nothing to do with it." He explained that he thought Claimant's stenosis predisposed her to having a nerve syndrome and a back syndrome which, in part, was caused by the fall. The context of his testimony makes clear that Dr. Prusmack was speaking in terms of possibility and not expressing opinions to a reasonable degree of medical certainty.

31. Dr. Prusmack opined that Claimant's positive response to Dr. Chan's first epidural injection supported a conclusion that Claimant's back pain and/or radiculopathy stemmed from her L4-L5 area. He was not asked about epidural steroid injections to which Claimant did not have a positive response. When asked if additional treatment could improve her condition, Dr. Prusmack stated it was possible, but that he could not say it was probable without seeing her for evaluation.

32. Based on the totality of the evidence, the ALJ finds that Dr. Fillmore's DIME report does not comply with the AMA Guides, and thus does not credit it. The ALJ also finds that Dr. Steinmetz's opinions were not particularly credible or persuasive. The ALJ also finds that although credible, the opinions of Dr. Prusmack are limited because he evaluated Claimant only once and early in the course of her treatment.

33. The ALJ finds the Dr. Smith's report, establishing MMI on November 24, 2014, is credible and persuasive. Although Claimant complains of current symptoms, they are more likely than not, not related to her work injury.

34. The ALJ finds that Dr. Smith's impairment ratings of 14% whole person impairment for the lumbar system and 18% lower extremity rating are credible and persuasive and most accurately reflect her impairment at the time she was placed at MMI.

35. The ALJ finds Claimant failed to produce sufficient evidence to meet her burden of converting her lower extremity rating into a whole person rating.

36. The ALJ finds that Dr. Smith's recommendations for maintenance care are credible and persuasive and finds that Claimant is entitled to such benefits. These include: follow up with Dr. Prusmack in regards to her lumbo sacral region three to four times a year for two years; follow up with Dr. Arthur in regards to her hip three to four times a year for two years; follow up with Dr. Chan for psiatry treatments three to four times a year for one year; and follow up with Dr. Smith for medication refills and pain management three to four times a year for one year; all periods of time running from the date of MMI.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

The DIME procedure is the "only way for an injured worker to challenge the treating physician's findings – including MMI, the availability of post-MMI treatment, degree of non-scheduled impairments, and whether the impairment was caused by an on-the-job injury . . ." *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003). The courts have long held that the DIME process contemplates that the DIME physician will evaluate *all* components of the claimant's condition and determine the cause and impairment created by each of those conditions. *See Gray v. Dunning Construction*, W. C. No. 4-516-629 (Feb. 14, 2005); *Oldenberg v. First Group America*, W.C. No. 4-640-886 (Sept. 3, 2008); see also *Qual-Med, Inc., v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

The opinion of a DIME examiner is given special weight over the opinions of other physicians in a workers' compensation claim. *Askew v. Sears Roebuck & Co.*, 914 P.2d 416 (Colo. App. 1995). In fact, a medical impairment rating assigned by a DIME examiner is binding unless it is overcome by a showing of clear and convincing evidence. § 8-42-107(8)(c); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). "Clear and convincing evidence" is an evidentiary standard of proof higher than "preponderance of the evidence," yet not as high a standard of proof as "beyond a reasonable doubt." Clear and convincing evidence is established by showing that the truth of a contention is highly probable and free from serious or substantial doubt. *DiLeo v. Koltnow*, 200 Colo. 119, 613 P. 2d 318 (1980). Put more simply, in order to overcome a DIME examiner's opinion regarding permanent impairment a party must prove that it is highly probable that the DIME physician's opinions are incorrect. *Metro Moving & Storage Co.* at 411. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indus. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

The question of whether a party meets the "clear and convincing" burden of proof is a question of fact for an administrative law judge. *McLane Western, Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999). In determining whether the DIME examiner's opinion has been overcome, one factor for consideration is whether the DIME physician complied with the AMA Guides. *Kirschenman v. Eastman Kodak*, E.C. No. 4-361-035 (July 31, 2000); *Rivale v. Beta Metals, Inc.*, W.C. No. 4-265-360 (April 16, 1998).

However, if the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Stephens v. North and Air Package Express Services*, W. C. No. 4-492-570 (February 16, 2005), affd, *Stephens v. Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006) (not selected for publication).

Insofar as the ALJ finds that the DIME physician made one error with respect to his or her opinions regarding impairment, the ALJ is not required to dissect the overall opinion into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence. *Deleon v. Whole Foods Market, Inc.*, W.C. No. 4-600-477 (November 16, 2006), *citing Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). Where the ALJ determines that any part of the DIME physician's rating has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). Thus, once the ALJ determines that the DIME's rating has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (March 19, 2004). The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols.

Considering all of the evidence, the ALJ concludes that the opinions of the DIME physician are ambiguous and has determined that they do not comply with the AMA Guides. It is the duty of the DIME examiner to evaluate all components of the claimant's condition and determine the cause of each of those conditions as well as any impairment created by them. Dr. Fillmore failed to do so in this case. Dr. Fillmore's DIME report clearly indicates that he was aware of the back complaints and treatment, and he even lists "lumbar radiculitis" as a diagnosis in the impression section of his report. However, after referencing the symptoms and diagnosis, he failed to discuss whether those symptoms and diagnoses relate to the July 9, 2013 injury and/or whether they entitle Claimant to an impairment rating. This frustrates the purpose of a DIME examination, and constitutes substantial error on the part of Dr. Fillmore. Dr. Fillmore's opinions have been overcome by Claimant, and as such the question of Claimant's correct medical impairment rating is now a question of fact for this ALJ.

Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission,* 491 P.2d 106 (Colo. App. 1971). Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985).* An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952); *Indus. Comm'n v. Havens,* 136 Colo. 111, 134 P.2d 698 (1957).

The mere existence of a pre-existing condition does not prevent an injury from "arising out of" an injured worker's employment. An injury is compensable if work causes, aggravates, accelerates or combines with nonindustrial factors to result in disability or the need for medical treatment. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. App. 1990).

There is a great deal of evidence in this case to suggest that Claimant either suffered from a new injury or an aggravation of a preexisting injury/condition involving her lower back as a part of the July 9, 2013 incident, and that Claimant's ongoing symptoms in the lower back and left lower extremity are a result of that injury or aggravation. Claimant's primary authorized treating physician, Dr. Smith, believed that Claimant's back symptoms and radicular pain were caused by her July 9, 2013 fall, and the medical records submitted into evidence indicate that every other treating physician agreed. Dr. Prusmack, Claimant's neurosurgeon, stated that Claimant's back problems are a result of the work-related accident, and that while she may have had degenerative changes in her lower back prior to the injury, those degenerative changes only increased the likelihood of a pain-generating injury to the back following a fall. Likewise, Dr. Chan believed that Claimant suffered from an injury to her lower back, and treated that injury with epidural steroid injections. The ALJ credits the opinions of Claimant's authorized treating physicians in this case.

While the defense medical examiner, Dr. Steinmetz, opined that Claimant did not suffer from anything more than a transient bruise of the sciatic nerve that quickly healed and left no ongoing symptoms, his opinion is inconsistent with the opinions of other physicians in this case. Dr. Steinmetz credits his opinion to be in accordance with that of the DIME examiner, but this ALJ is not persuaded of that. The DIME examiner failed to discuss whether Claimant's back injury was caused by her July 9, 2013 injury and/or whether that injury caused permanent impairment. His failure to discuss the issue does not constitute a corroboration of Dr. Steinmetz's opinion. In fact, The DIME examiner's report notes a diagnosis of "lumbar radiculitis" in the impressions section, which indicates that he believes that Claimant did suffer from more than a short-lived bruise to the sciatic nerve, as asserted by Dr. Steinmetz. The opinions of Dr. Steinmetz regarding relatedness of Claimant's back symptoms are found unpersuasive and are not credited.

Medical impairment ratings are the basis for permanent partial disability awards. Ratings must be made pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition (revised). § 8-42-101 (3.7), C.R.S.

Permanent impairment is determined at the time of MMI. *Dziewior v. Michigan General Corporation*, 672 P.2d 1026, 1030 (Colo. App. 1983).

As stated above, the DIME examiner erred in his failure to evaluate Claimant's lower back and her accompanying radicular symptoms. As such, this ALJ reverts back to the opinions of Claimant's primary authorized treating physician, Greg Smith, D.O., and adopts the impairment ratings assigned by him at the time of maximum medical improvement. Claimant is entitled to a 14% whole person impairment rating for her lumbar spine. For the hip and lower extremity, she is entitled to a 10% rating for a lateral femoral cutaneous nerve sensory dysfunction, and a 9% rating for limited range of motion, which combines to an 18% extremity rating. These impairment ratings were assigned at the time of MMI and were made pursuant to the AMA Guides.

Section 8-42-107(1)(a), C.R.S. limits a claimant to a scheduled disability award if the claimant suffers an injury or injuries described in section 8-42-107(2), C.R.S.; *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). The term "injury," as used in § 8-42-107(1)(a), refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself. *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997). The term "injury" refers to the manifestation in a part or parts of the body that have been functionally impaired or disabled as a result of the industrial accident. *Warthen v. Indus. Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004). It is not the location of physical injury or the medical explanation for the “ultimate loss” which determines the issue. *Blei v. Tuscorora,* W.C. No. 4-588-628 (June 17, 2005).

Whether a claimant has suffered an impairment that can be fully compensated under the schedule of disabilities is a factual question for the ALJ. *Walker v. Jim Fuoco Motor Co.,* supra. In determining whether an impairment can be fully compensated under the schedule of disabilities, the ALJ is not limited to the medical evidence. A claimant’s testimony, if credited, may be utilized to support a finding on the nature and extent of the claimant’s functional impairment. *Savio House v. Dennis*, 665 P.2d 141 (Colo.App. 1983).

Claimant credibly testified at hearing that she continues to suffer from pain that radiates from her hip into her right lower extremity, which is consistent with Dr. Smith’s diagnosis of lateral femoral cutaneous nerve sensory dysfunction. Although Claimant’s hip injury has caused an issue with the nervous system, the situs of Claimant’s impairment is restricted to the lower extremity. Given that Claimant’s functional impairment does not extend beyond her lower extremity, her injury can be fully compensated under the schedule of disabilities.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay Claimant permanent partial disability benefits based on the impairment ratings assigned by Dr. Smith on November 24, 2014, the date Claimant reached MMI, of 14% whole person impairment for the lumbar system and 18% lower extremity rating. Any permanent partial disability benefit payments previously made to Claimant by Respondents in this case may be credited against the amount of permanent partial disability benefits owed pursuant to this Order.

2. Claimant is entitled to maintenance care as follows: follow up with Dr. Prusmack in regards to her lumbo sacral region three to four times a year for two years; follow up with Dr. Arthur in regards to her hip three to four times a year for two years; follow up with Dr. Chan for psiatry treatments three to four times a year for one year; and follow up with Dr. Smith for medication refills and pain management three to four times a year for one year; all periods of time running from the date of MMI, acknowledging that some have expired by the date of this order.

3. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

4. Issues not expressly decided herein are reserved to the parties for future determination.

5. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 11, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-950-674-03

ISSUES

I. Whether Claimant has proven, by a preponderance of the evidence, that she is entitled to a general award of maintenance medical care following maximum medical improvement (MMI).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant, is a 20 year old female who was hired as a certified nursing assistant ("CNA") by Employer on September 16, 2013.

2. Claimant sustained a low back injury on May 17, 2014, when, as she was assisting a patient from her bed to a bedside commode, the patient lost her balance and began to fall. Claimant caught the patient and supported the patient's weight to get her to the commode.

3. Liability for the injury was admitted and Claimant was referred to Michael Dallenbach, M.D. for treatment.

4. Claimant's initial appointment with Dr. Dallenbach occurred on May 19, 2014. Thereafter, Dr. Dallenbach reevaluated/reexamined Claimant numerous times between May 19, 2014 and November 24, 2014, when he placed her at MMI.

5. During the aforementioned treatment period, Dr. Dallenbach referred Claimant or various diagnostic tests, including lumbar x-rays, cervical x-rays, two lumbar MRIs, a cervical MRI, a thoracic MRI, a lower extremity EMG/NCV test, and a contrast enhanced CT scan of the abdomen and pelvis. He consistently prescribed and monitored medications, including Ibuprofen and Cymbalta. He also referred Claimant for two different courses of physical therapy and referred her to several specialists, including Dr. Scott Bainbridge for pain management and injections, Dr. D.K. Caughfield for an EMG/NCV testing and evaluation, Dr. David Hopkins for a psychological evaluation and therapy, Dr. William Beaver for biofeedback therapy, and Dr. Ali Murad for a neurosurgical evaluation. Finally, throughout this time period, Dr. Dallenbach outlined and adjusted Claimant's work restrictions and conducted a job site analysis, all in an effort to effectuate Claimant's safe return to work.

6. As noted, Claimant was referred for multiple MRIs of the spine. She underwent a

lumbar MRI on May 30, 2014 which revealed mild intervertebral disc dissection at L4-L5 and L5-S1, a mild disc bulge without significant central canal stenosis or neural foraminal narrowing noted at L4-L5 and a broad based disc bulge and minimal anterolisthesis at L5-S1 without significant central canal stenosis or neural foraminal narrowing. The MRI was interpreted by Dr. Robert Abbott on May 31, 2014.

7. Claimant returned to Dr. Dallenbach on June 2, 2014 complaining of constant neck pain, headaches, upper extremity pain, and numbness and tingling, along with similar symptoms in her low back and legs. She quantified her pain as a 9/10 in severity. She continued with physical therapy and remained out of work.

8. On June 4, 2014,Claimant was referred to Dr. D.K. Caughfield for an electrodiagnostic study (EMG/NCV) because of her continued complaints of bilateral upper and lower extremity numbness, tingling and weakness.

9. On June 9, 2014, Claimant was returned to modified duty work. Her shifts were limited to four hours and she was to perform 100% seated work, moving about only as needed for comfort.

10. Claimant returned to Dr. Dallenbach on June 17, 2014 complaining of increased back pain. She no longer complained of symptoms' in her arms or legs. Consequently, her EMG study with Dr. Caughfield was cancelled. Because of the deterioration of her condition, Claimant's restrictions were modified. Her shifts were limited to 2 hours and she was limited further to 3 days of work. Dr. Dallenbach referred Claimant to J. Scott Bainbridge, M.D. for evaluation and treatment recommendations.

11. Claimant was evaluated by Dr. Bainbridge on July 7, 2014. Dr. Bainbridge reviewed Claimant's lumbar MRI after which he noted: "There is some question of a small disc fragment in the L5-S1 disc with caudal migration and right S1 impingement." Contrary to Claimant's suggestion, the ALJ finds that Dr. Bainbridge did not actually diagnose Claimant's with an extruded disc fragment at L5-S1. Rather he noted his suspicions for the same based upon his review of the May 30, 2014 MRI of the lumbar spine. Dr. Bainbridge recommended injection therapy and reconsideration of an EMG. Claimant underwent bilateral SI joint injections on July 18, 2014. Dr. Bainbridge noted improvement in Claimant's pain following injections.

12. On July 24, 2014, Claimant presented to Dr. Dallenbach's office complaining of increased back pain despite having undergone bilateral SI joint injections only 6 days previously. Claimant reported her belief that the injections increased her low back pain and that as a consequence; she was more dysfunctional, could sleep and was becoming depressed. She was tearful and exhibited a "somewhat flat affect." Psychological referral was discussed, but Claimant "respectfully declined." Claimant did report a remote history of depression which was successfully treated with Citalopram. Consequently, Dr. Dallenbach added this anti-depressant to Claimant's medication regimen.

13. On July 30, 2014, Claimant underwent a EMG/NCV study performed by Dr. Caughfield. The study demonstrated findings consistent with a S1 radiculopathy with an absent gastroc-H reflex, but with no axonal loss noted on needle exam. Additionally, there were no findings consistent with peripheral nerve entrapment in the right lower limb.

14. On August 6, 2014, Dr. Dallenbach attended a "Parkview Case Review" meeting regarding Claimant. The meeting was also attended by Tisha DeNiro, RN the Head of Employee Health Services, Coordination of safe and therapeutic return of the injured worker to the work environment and optimal patient care. Following that meeting Dr. Dallenbach noted that a job site analysis would be scheduled. Claimant suggests that Dr. Dallenbach was unduly influenced by Employer during this meeting to terminate Claimant's care and that as a result of his effort to "curry favor" with Employer, he would later intentionally misrepresent the results of Claimant's diagnostic testing and her treatment progress to Dr. Bainbridge so that future care through his office, including injection therapy would be cancelled.

15. On August 7, 2014 the job site analysis was conducted with Claimant present. Following the job site analysis, Ms. DeNiro forwarded to Dr. Dallenbach a modified duty position for his consideration. The modified job duty offer is dated August 11, 2014.

16. Claimant returned to Dr. Dallenbach's office on August 11, 2014 at which time she appeared tearful and angry. Based upon the content of Dr. Dallenbach's August 11, 2014 medical report, the ALJ finds that Claimant was upset by the outcome/results of the job site analysis and Dr. Dallenbach's opinion that she was capable of returning to modified work. In discussing the job site analysis, Claimant repeatedly told Dr. Dallenbach that she felt he cornered her, lied to her and stabbed her in the back. Claimant was able to sit without shifting in her chair or supporting herself with her arms for the duration of the appointment which occurred over the period of approximately one hour. She did not demonstrate difficulty standing or sitting down. Because of Claimant's depression and disability self labeling combined with her fear and anxiety regarding returning to work, Dr. Dallenbach removed her from work from a psychiatric standpoint. He also made a referral to David Hopkins, PhD. for evaluation and treatment.

17. After additional consideration, Dr. Dallenbach felt that a change in Claimant's treatment plan would best meet her therapeutic needs. Consequently, he cleared Claimant to return to modified duty on August 13, 2014. Claimant was to start her modified duty position on August 15, 2014; however, scheduling conflicts precluded Claimant's scheduled return until August 18, 2014. Prior to reporting for her scheduled shift on August 18, 2014, Claimant presented to Dr. Dallenbach's office on an urgent basis. She was accompanied to the appointment by her mother and father. She complained of worsening back pain and "a dead sensation all through [her] right leg." Regarding the cause of her pain, Claimant reportedly went to the mall with her parents on August 16, 2014, where she walked around for about a half an hour. According to Claimant, about four hours after getting home she experienced pain so intense that she had to present to the emergency room.

18. Claimant was treated with 4 mg of Morphine IM, 5 mg of diazepam and two 5/325 tablets of Narco and discharged home with a diagnosis of "lumbar spasms." While Dr. Dallenbach was able to state with reasonable medical certainty that Claimant sustained an injury on May 17, 2014, he was unable to explain the precipitous increase in her back pain and corresponding decrease in her function. Dr. Dallenbach ordered a repeat MRI.

19. Claimant's repeat lumbar MRI was preformed August 19, 2014. The images were interpreted by Scott Smiley. The impression reached by Dr. Smiley was: "No significant abnormality. Very minimal disc bulge at L5-S1. No change from May 30, 2014." X-rays of the lumbar spine, also read by Dr. Smiley, failed to reveal "significant abnormality."

20. On August 20, 2014, during a follow-up appointment with Dr. Dallenbach, Claimant reported that her medication regimen was not helping her. It is noted that by this date, Claimant was taking: Citalpram, Hydromorphone (Dilaudid), diazepam (Valium) and Ibuprofen. While Claimant reported that these medications were not helping her, Dr. Dallenbach chose to keep the medication regimen in place. He also added Lidoderm. Dr. Dallenbach also noted that Claimant was scheduled to see Dr. Bainbridge on August 22, 2014 for bilateral SI transforaminal epidural steroid injections (TFESIs). Dr. Dallenbach placed a call to Dr. Bainbridge's office to discuss Claimant's condition.

21. On August 21, 2014, Dr. Bainbridge's documented that he spoken with Dr. Dallenbach[1] noting that Dr. Dallenbach had "another MRI done which was read as normal by three radiologists and there are concerns about Rebecca's psychological status, her motivation to return to work, and her recent EMG shows only old findings of S1 radiculopathy." Based upon the discussion with Dr. Dallenbach, further pain management and injection care was discontinued by agreement of Dr. Bainbridge and Dr. Dallenbach.

22. Claimant also presented to the offices of David Hopkins, PhD. on August 20, 2014 for her psychological evaluation. After examination and testing, Dr. Hopkins noted that patients with the type of diagnostic profile demonstrated by Claimant's Millon Behavioral Diagnostic testing results:

> [G]enerally seek to appear proper, conventionally and socially conforming with a calm, controlled, and low-key exterior. However, ambivalent feelings are often under the surface and can emerge quickly in stressful circumstances. At times the underlying ambivalence with prolonged illness may give way to blaming others, although with any open acting out, there is often followed a period of guilt and constriction. Psychophysiological ailments are frequent with this type of vacillating and constrained emotional expression. Patient with this profile are

[1] It is difficult to discern from this note when the discussion took place as the note contains both dates of August 20th and 21st on it. Regardless, the note reflects that the physicians in question spoke about Claimant's condition.

> often somewhat preoccupied with bodily functions and symptoms and tend to overreact to changes and to respond with catastrophic thinking. Exhaustion and apathy are not unusual with low energy, lassitude and malaise . . . There is also a high level of pain sensitivity. Anticipatory anxiety is also a part of the pain sensitivity and can lead to guarding and avoidance. Patient with this profile also have a high fear of complications from illness.

Dr. Hopkins recommended 4-6 sessions of verbal counseling in addition to 6-8 sessions of biofeedback. Dr. Hopkins referred Claimant to William Beaver for biofeedback.

23. On August 28, 2014, Claimant returned to Dr. Dallenbach office for follow-up. Claimant was accompanied by her mother and sister. Claimant's reply to how she was doing was simply noted as "pain" which she reported had gotten "worse." In the report generated from this date of visit, Dr. Dallenbach addresses Dr. Bainbridge's indication that three radiologists had read Claimant's recent MRI as normal. Concerning this note, Dr. Dallenbach documented the following:

> It should be noted that the follow-up MRI was read by three radiologists but by one only, however, the initial MRI obtained 05/30/2014 demonstrated, as per the interpreting radiologist, no evidence for disk migration. After Rebecca's sudden inexplicable deterioration, I placed a call to a different radiologist who inspected the MRI performed 05/30/2014 and he too was unable to find any evidence of any caudal disk migration. I then spoke in depth with Dr. Smiley, the interpreting radiologist of the MRI performed 08/19/2014 who found, "there is no evidence of significant disk protrusion or extruded fragment.

24. Based upon the content of his August 28, 2014 report, the ALJ finds that Dr. Dallenbach spoke to two radiologists regarding the findings on Claimant's May 30 and August 19, 2014 lumbar MRIs and that the reason he did so was to clear up whether there was evidence of caudal migration of disk material causing right S1 nerve impingement given Claimant's sudden worsening of symptoms in the absence of a precipitating mechanism of injury around August 16, 2014. The ALJ finds Dr. Dallenbach's decision to discuss the findings of the MRIs with Dr. Bainbridge reasonable in light of Dr. Bainbridge's initial concern from July 8, 2014 that there was "some question of a small disk fragment from the L5-S1 disk with caudal migration and right S1 nerve impingement" on the May 30, 2014 MRI. Based upon a totality of the evidence presented, the ALJ is convinced that Dr. Bainbridge, more probably than not, misunderstood Dr. Dallenbach when he, that is Dr. Bainbridge documented that the repeat MRI had been read by three radiologists. Consequently, the ALJ dismisses, as unpursuasive, Claimant's suggestion that in order to curry favor with Employer and to rid himself of further responsibility for Claimant's care, Dr. Dallenbach intentionally misrepresented that Claimant's August 19, 2014 MRI had been read as normal by three radiologists. The ALJ is also not convinced that Dr. Dallenbach told Dr. Bainbridge that Claimant's EMG study only demonstrated "old" findings of an S1 radiculopathy for similar reasons since the evidentiary record supports that Dr. Dallenbach continued to treat Claimant for approximately three additional months to November 24, 2014 when he placed her at MMI.

25. On September 5, 2015, William Beaver authored a report outlining Claimant's progress with biofeedback therapy. In his report, Mr. Beaver reported Claimant's continued complaints of 9/10 back pain she attrreibuted to sleeping in a new bed and with a pillow between her legs. Claimant also reported a fist fight with her sister over her sisters concern that Claimant was attempting to commit suicide by abusing pain medication. Claimant denied abusing pain medication and/or suicidal ideation.

26. Dr. Dallenbach spoke to Claimant's physical therapist following her PT session on September 8, 2014. In a September 10, 2014 follow-up treatment note, Dr. Dallenbach outlined the substance of the conversation as follows:

> I spoke with Mr. Brown after his evaluation of Rebecca, and he stated, "I really do not think that she is going to buy into this. She complained of pain without provocation and she really did not put forth any effort. It is interesting to note when she was leaving she seemed to be walking better than when she came in and one of the assistants verbalized this to Rebecca, and right after that, she started walking in a more abnormal fashion. I went to the door and watched her leave, and at first as she was leaving, she had a really abnormal gait, but as she and her mom got closer to the car, she was moving, using her hands and talking with her mom, laughing, and did not seem to have any pain at all. She got into the car without any apparent difficulty and then must have dropped something because she had to get out and had no problem whatsoever."

27. In response to Mr. Brown's comments, Claimant simply noted: "I really do not think he believes me and he did not seem to have any interest in what was going on with me." Claimant reported continued pain and substantial dysfunction. According to Dr. Dallenbach's treatment note from September 10, 2014, Claimant reported that she was "almost able to take a shower by [herself] and wash my hair, but everything I do causes the pain to get worse." Nonetheless, Claimant also reported the following regarding participation in additional physical therapy: "I will do anything you tell me to. You can throw a brick at me, but I really do not think I'm going to get anything out of it." Due to Claimant's persistent complaints of back pain and dysfunction, Dr. Dallenbach referred her to Dr. Ali Murad for a neurosurgical evaluation.

28. On September 24, 2014, Claimant's second course of physical therapy course was discontinued because Claimant "exhibited no capacity for advancement of therapeutic activity during treatment."

29. Claimant proceeded with neurosurgical evaluation with Dr. Murad per Dr. Dallenbach's referral on October 1, 2014. In a report dated October 1, 2014, Dr. Murad opined that Claimant was not a surgical candidate and that there was "no contraindication to increasing activity, doing physical therapy etc." Claimant then sought a second surgical opinion from Dr. Joseph Illig on a self referred basis. In a report dated October 27, 2014, Dr. Illig noted that "except for subtle sensory abnormalities the neurological examination [was] benign and that Claimant's diminished right Achilles reflex was consistent with a negative Hoffmann reflex on EMG. According to Dr. Illig, Claimant had no evidence of compressive radiculopathy

and no evidence of myelopathy. Dr. Illig agreed that there was no indication for neurosurgical intervention. 30.

30. Based upon the content of Dr. Illig's report, the ALJ finds any suggestion that Claimant needs additional low back treatment because of a diminished/absent right Achilles reflex unpursuasive.

31. Claimant was discharged from biofeedback therapy on October 23, 2014. No further biofeedback has been recommended.

32. Claimant was returned to modified duty work on November 3, 2014 by Dr. Dallenbach.

33. Claimant was discharged from psychotherapy on November 12, 2014. No further psychotherapy has been recommended.

34. Although Claimant received continuous medical care under this claim between May 19, 2014 and November 24, 2014, she also went to the emergency room ("ER") at Parkview Medical Center on at least six occasions during that period, including five visits between August 16, 2014 and September 10, 2014. On the majority of these visits Claimant sought additional pain medications, including additional Dilaudid and Valium. When Claimant was seen at the ER on August 30, 2014, the ER physician raised concern for secondary gain and narcotic dependence. On September 6, 2014, after appearing at the main ER of Parkview on 9/5/2014 and deciding not to wait, Claimant presented to the ER department of Parkview in Pueblo West during the early morning hours. During this visit for a gradual onset of throbbing lower back pain, Claimant reported that she was getting no relief from over the counter medications and that her doctor had stopped her pain meds. Claimant was provided with injection of 2 mg of Dilaudid for her pain. Four days later, September 10, 2014, Claimant returned to the ER for ongoing back pain. During this visit, Claimant reported having gone through "multiple rounds of physical therapy and SI joint injections. Claimant reported severe, i.e. 10/10 pain. Physical examination of the back revealed aiming other things, normal range of motion, no scoliosis and no pain with straight leg raise testing. Claimant reported tenderness anywhere on her back distal to her scapulas bilaterally and proximal to her hips. Minimal palpation (fingertip pressure) caused pain in the musculature of the back in the region described above, i.e. distal to the scapulas and proximal to the hip. Claimant was noted to be sitting in a severely kyphotic position with her legs crossed and rocking back and forth without additional pain. She had a negative straight leg raise test, but reported could not stand because it was too painful. The ER physician noted Claimant's complaints were not consistent with her examination findings. Nonetheless, Claimant requested that she be given "Dilaudid to make it through the night."

35. In a report entitled "Follow-up Evaluation", dated November 24, 2014, Dr. Dallenbach noted that Claimant continued to complain of low back pain, and she now claimed it had become worse since returning to modified work. That day, Dr. Dallenbach reviewed Claimant's modified duty tasks, and the nominal hours she had

worked since last being seen. Dr. Dallenbach noted that Claimant was able to move without objective signs of discomfort or limitations. Dr. Dallenbach explained to Claimant that it was not only safe, but important to become more aggressive in the rehabilitation process, which included lightening her restrictions allowing her to work more hours. During the discussion centered around increasing her hour hours, Claimant became angry questioning Dr. Dallenbach on how he expected her to do that when she continued to have severe pain. Claimant confronted Dr. Dallenbach, was profane and rose from her chair without difficulty. She exited the exam room with a normal gait, followed by her sister who accompanied her to the appointment. Dr. Dallenbach placed Claimant at MMI noting that permanent impairment would be assessed, and that an impairment rating report forthcoming. Dr. Dallenbach noted Claimant had been given a six month gym membership, but he recommended against post MMI maintenance care under this claim.

36. Between November 24, 2014 and December 8, 2015, Claimant returned to the ER on one occasion, again seeking medications, and she also obtained medications from her PCP at Southern Colorado Clinic on numerous other occasions. Claimant complained that medications prescribed by her PCP did not help, often requesting stronger medications.

37. On February 10, 2015, Claimant presented to the ER requested that a prescription for Cymbalta be refilled. During this visit, Claimant reported "no change to her baseline back pain."

38. On March 4, 2015, Dr. Dallenbach faxed Insurer a second November 24, 2014 report, but this report was entitled "REPORT OF MAXIMUM MEDICAL IMPROVEMENT AND IMPAIRMENT RATING IN ACCORDANCE WITH AMA GUIDES OF THE EVALUATION OF PERMANENT IMPAIRMENT, THIRD EDITION, REVISED." Within this report, Dr. Dallenbach specifically detailed the entire history of medical care and work-up Claimant received under this claim. This history includes numerous examples of Claimant's inconsistent clinical presentation, when compared to observations by medical professionals outside of the clinical setting. Dr. Dallenbach's final diagnosis was low back pain, not work related. With regard to maintenance care, Dr. Dallenbach opined:

> "Medical maintenance is defined as that post MMI treatment and/or care which is considered reasonable and necessary which a patient may require in order for them to maintain the functional status that they demonstrate at the time they are placed at MMI. In [Claimant's] case, because there is no work related diagnosis, there are no specific post MMI treatment recommendations which would be considered reasonable and necessary regarding her work injury of 05/17/2014. Regarding her usage of Cymbalta, at the time that she was placed at MMI, she was utilizing Cymbalta 60 mg q. day. In order to facilitate a safe transition off of the medication, she will be issued one additional prescription for Cymbalta 30 mg to be taken 1 q day with #30 to be dispensed with no authorized refills."

39. On March 6, 2015, Insurer filed a final admission of liability (FAL) consistent with Dr. Dallenbach's opinions. Maintenance care was denied.

40. Based upon the evidence presented, the ALJ finds that Dr. Dallenbach is the physician most familiar with Claimant's condition and the care she has received related to this claim. He is in the best position to determine if post MMI medical care is reasonably necessary. Dr. Dallenbach's opinion that post MMI care is not reasonable and necessary is based upon his treatment of Claimant over the course of months and a thorough consideration of Claimant's entire medical record. Consequently the ALJ finds his opinions credible and persuasive.

41. Claimant objected to the FAL, and requested a Division Independent Medical Examination ("DIME"). Dr. Anjum Sharma was selected as the DIME physician.

42. On August 6, 2015, Dr. Anjum Sharma evaluated Claimant for her DIME. As part of the DIME, Dr. Sharma obtained a detailed history from Claimant. He examined Claimant and thoroughly reviewed her medical records. Following his examination, Dr. Sharma documented that Claimant's physical examination was "completely benign", i.e. it was a normal physical examination. He also documented an absence of pain behaviors, noting that Claimant was not shifting her weight while sitting nor did she have an antalgic gait, despite Claimant's report of having 10/10 pain that day. With regard to maintenance care, Dr. Sharma opined that "nothing can be supported from the medical record to sustain the patient's ongoing need for care." Dr. Sharma's opinion that Claimant did not require maintenance care was based upon a thorough review of the medical records and his own clinical examination. Based upon the evidence presented, the ALJ finds Dr. Sharma's opinion concerning post MMI maintence treatment consistent with Dr. Dallenbach's opinion. The ALJ finds Dr. Sharma's opinion concerning Claimant's need for post MMI medical care supported by the record evidence. For these reasons, the ALJ finds Dr. Sharma's opinions concerning Claimant's need for post MMI medical care credible and convincing.

43. On August 25, 2015, Insurer filed a Final Admission of Liability consistent with Dr. Sharma's DIME opinions regarding MMI and impairment. Insurer denied maintenance care under this claim, consistent with the opinions of Dr. Sharma and Dr. Dallenbach. Claimant challenged this denial of maintenance care seeking resolution of the issue by hearing.

44. Claimant testified that she believed that she required ongoing medications to function, but she admitted that as of the date of hearing, there were no physicians recommending maintenance care under this claim.

45. Claimant has failed to prove, by a preponderance of the evidence, the requisite causal connection, and reasonableness and necessity, between her claim of need for maintenance treatment and her May 17, 2014 work injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). As found here, the opinions of Drs. Dallenbach and Sharma regarding Claimant's need for post MMI medical benefits are credible and more persuasive than Claimant's contrary testimony.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office,* 5 P.3d 385(Colo. App. 2000).

Maintence Medical Benefits

D. Once a claimant has established the compensable nature of his/her work injury, as in this case, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

E. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment. If the claimant reaches this threshold, the court stated that the ALJ should enter "a general order, similar to that described in *Grover*."

F. Nevertheless, *Grover* provided, "[B]efore an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." While claimant does not have to prove the need for a specific medical benefit and respondents remain free to contest the reasonable necessity of any future treatment, a claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact for resolution by the ALJ. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984).

G. In this case, Claimant is not seeking particular medical treatment; rather, she requested a general order awarding maintenance care. As found, there is insufficient evidence in the record to establish, by a preponderance of the evidence, that Claimant is in need of post-MMI, *Grover*-type treatment. Undeniably, no physicians have recommended maintenance care under this claim. The only physicians to fully consider Claimant's clinical course through MMI and address Claimant's need for maintenance care are Dr. Dallenbach and Dr. Sharma. Both of these physicians have provided detailed reports, and thorough opinions, concluding that maintenance care under the circumstances of this claim is not reasonable and necessary. As found, Dr. Dallenbach's opinion on this matter is particularly credible given that Dr. Dallenbach is the physician most familiar with Claimant's course of care. Here, he followed Claimant's progress from two days after her injury through her date of MMI, and he constantly evaluated and re-evaluated Claimant's condition, her diagnostic results, her response to care, and her need for additional and different care. Accordingly, Dr. Dallenbach's opinion that Claimant does not require maintenance care is credible and persuasive.

H. Claimant's contrary assertion that she needs medications, including pain medication or neurolyptics (Cymbalta), to function is not convincing. Careful review of the medical records submitted fails to establish that even when Claimant was provided with prescription medication and/or sought additional potent pain medicine through the ER there was no lasting improvement in her pain or ability to function. Indeed, the record evidence establishes that even when Claimant was provided with such medications she was never able to increase her ability to work beyond 2 hours/shift and that she continued to have, what she described was debilitating pain with activity despite access to and use of such medications. The record evidence presented persuades the ALJ that it is not reasonable to continue to provide medications under this claim, especially narcotics, given Claimant's failure to demonstrate functional improvement with their use. Based on the evidence presented, the ALJ is persuaded that no additional medical care is reasonable, necessary or related to Claimant's May 17, 2014 work-related injury.

ORDER

It is therefore ordered that:

1. Claimant's request for a general order of maintenance care is denied and dismissed.

2. All maters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 7, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-963-545-02

ISSUE

Whether Claimant has proven by a preponderance of the evidence that the microdecompression and laminoplasty recommended by Dr. David A. Wong, M.D. is reasonable, necessary, and casually related to the treatment of Claimant's admitted industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

General

1. Claimant was employed with Employer as a supervisor of fresh bread. On September 22, 2014, Claimant sustained an admitted injury while moving a stack of prepared baking trays. His movement involved lifting and twisting. Claimant felt a "pop" in his back and was unable to straighten his back. He immediately experienced pain in both lower extremities and developed numbness in his right thigh.

Prior Back Injury

2. Claimant had a previous episode of back pain for which her received treatment at the University of Colorado Emergency Department on September 1 and 9, 2013. On September 1, 2013, Claimant reported to the emergency department complaining of left lower back pain radiating into the front of both of his legs to below his knees for several days with back stiffness that had worsened. Claimant was unable to stand up straight because of pain. He complained of having experienced similar symptoms in the past. Claimant denied any numbness or weakness, but was positive for tingling. An x-ray of Claimant's lumbar spine revealed "Mild degenerative disc disease and facet arthrosis of L5-S1." There was no evidence of radiculopathy. Claimant was given Valium and Oxycodone and discharged.

3. On September 9, 2013, Claimant returned to the emergency department complaining of continued left lower back pain radiating to his left lower extremity, left testicle, and down his left hip. Claimant was given Dilaudid for pain and discharged.

4. Prior to September 22, 2014, Claimant's only treatment for the lower back was confined to two trips to an emergency room on September 1, 2013, and September 9, 2013. No persuasive evidence supports a finding that Claimant's

symptoms continued or that he sought any treatment after the September 9, 2013 episode.

Course of Treatment

5. Claimant first sought treatment for his work injury on September 22, 2014, from Richard Shouse, PA-C at Arbor Occupational Medicine. Mr. Shouse noted some radicular symptoms down both legs. Claimant reported no previous back injury. Claimant is six feet five inches tall and weighs approximately 360 pounds with an approximate BMI of 42. By the next day, Claimant reported pain in his bilateral groin region and that NORCO was not strong enough to control his pain. He had limited flexion and extension.

6. Claimant's initial reports of radicular symptoms primarily to the back part of the right leg and also to the front part of the left leg into the groin caused PA Shouse to suspect disc involvement.

7. Claimant began physical therapy in October 2014 and an MRI was ordered.

8. Dr. Lloyd Thurston, D.O., examined Claimant on October 3, 2014. By that date, Claimant stood with his lumbosacral spine flexed at approximately 10 degrees, his deep tendon reflexes at his knees and ankles were trace, and standing on his heels caused low back pain and was asymmetric.

9. On October 10, 2014, Claimant showed marked improvement in his left leg, with continued numbness on the back and side of his right thigh which Dr. Thurston thought was either maraligia paresthesia or lateral femoral cutaneous nerve compression. Claimant was able to stand up straight, and to stand on his toes and heels. Claimant's MRI was reviewed to show degenerative changes, borderline central stenosis which is congenital shortness of the pedicles, and a small leftward protrusion at the L5-S1 and L4-L5 junction which was thought to be the likely cause of Claimant's resolving left leg pain.

10. On October 15, 2014, Claimant had a recurrence of severe pain and numbness down his entire right leg, left lower extremity symptoms which had been resolving flared, and Claimant resumed his forward flexed posture. Dr. Thurston increased his pain medications, continued physical therapy, and semi-urgently referred Claimant to Dr. Sorensen. Dr. Thurston noted that the MRI did not correspond with Claimant's severe symptoms, specified that he believed Claimant's symptoms were "absolutely legitimate," and wondered if Claimant had a sequestered disc that was not visible on MRI.

11. On November 4, 2014, Dr. Wernick performed a lumbar epidural steroid injection and assumed Claimant's pain management care. Claimant was able to stand straighter and had less pain. The following day Dr. Thurston noted continued numbness over the back and side of Claimant's right thigh and radicular symptoms back and side of the left thigh to the calf. Claimant's deep tendon reflexes were ¼ bilaterally, and he was able to toe/heel stand.

12. On November 19, 2014, Claimant presented at University Hospital because after returning home from physical therapy, he tried to get up off of his couch but felt a pop in his back, was unable to extend his spine, and experienced severe pain. On November 21, 2014, Dr. Sander Orent examined Claimant and opined that Claimant had experienced an acute disc herniation and was reporting new radicular symptomology. Dr. Orent requested an urgent MRI.

13. A second MRI was performed on November 24, 2014. The radiologist who read the MRI concluded:

    - Small central rightward disc protrusion at the L3-4 level with mild central canal stenosis;
    - Central left shallow protrusion at the L4-5 level;
    - Small central protrusion at the L5-S1 level; and
    - Compared to the October 7, 2014 MRI, the L4-5 protrusion was reduced in size and mass effect in the left lateral recess was read to be improved.

    In a report dated November 24, 2014, Dr, Orent suspected Claimant might have a severe facet syndrome which could benefit from chiropractic treatment.

14. On December 8, 2014, Claimant's symptoms remained unchanged. Mr. Shouse noted that Claimant was referred to Dr. Bryan Castro by Dr. Orent for a surgical consultation, and had declined chiropractic treatment.

15. On February 11, 2015, Dr. Castro evaluated Claimant. Dr. Castro reviewed the November, 2014 MRI which he noted to have minimal findings. Dr. Castro recommended an EMG, noting that a negative EMG would confirm that no surgical intervention was required.

16. On February 24, 2015, Claimant underwent an EMG with Justin D. Green, M.D. The study showed "borderline electrodiagnostic evidence for the presence of a possible, early, left L5 radiculopathy with minimal ongoing denervation." The findings did not meet definitive electrodiagnostic criteria because there were no other muscles in the myotomes which contained abnormal spontaneous activity.

17. On March 17, 2015, Claimant returned to Mr. Shouse reporting that his back had popped the day before when he turned over in bed to get his cell phone card. After his back popped, he felt sharp pain shooting down both legs. Claimant sought pain medication refills and was scheduled to see Dr. Orgel the next day.

18. On March 18, 2015, Claimant reported increased pain in his left leg extending into his lateral thigh and knee. A closed MRI is discussed that showed a shallow right paracentral disc protrusion unchanged but with persistence described as mild bilateral foraminal stenosis. Dr. Orgel "suspect[s] that there is a change in his disc bulge or other anatomic changes that occur when [Claimant] stands

which explains why his symptoms are dramatically increased by standing." Dr. Orgel wrote, "In my mind this is a pretty clear bilateral L3 radiculopathy although the MRI is not showing a substantial impingement." Dr. Orgel referred Claimant back to Dr. Castro.

19. On March 30, 2015, Claimant returned to Dr. Castro for further evaluation. Dr. Castro reviewed the second MRI and noted a lateral protrusion at the L3-4 level of the spine, but that there was no indication that any nerve roots were being displaced. Because Dr. Castro considered Claimant to be slowly improving with intermittent setbacks with increasing pain, he opined that Claimant would not benefit from surgical intervention. Dr. Castro deferred to Dr. Sorensen regarding the possibility of additional epidural injections – Claimant had already received three.

20. Dr. Orgel referred Claimant for a second surgical opinion with David Wong, M.D., who first evaluated Claimant on May 1, 2015. Dr. Orgel referred Claimant because he had continued complaints of low back pain and right leg pain with leg and foot numbness and tingling, and right quadricep weakness. Dr. Wong noted that "the patient denies significant back or lower extremity symptoms prior to his present difficulties." Among other things, Dr. Wong concluded Claimant had a "possibly multifactorial symptom complex, mechanical back pain secondary to degenerative changes at the lower three lumbar levels but no instability on flexion/extension, and likely having radicular irritation." Dr. Wong agreed with Dr. Castro and felt it was too early to conclude Claimant was a surgical candidate. He recommended that Claimant

    - lose weight;

    - Consider a selective nerve root block at L3-4 on the right side;

    - If that did not provide significant relief, to consider an injection of the lateral femoral cutaneous nerve; and

    - Identified Claimant as a potential candidate for facet blocks at the lower three lumbar levels.

21. Claimant proceeded to receive additional injection treatments. Joshua Ward, M.D., provided Claimant with a facet joint injection on June 26, 2015. Dr. Ward noted "I do note that the L5-S1 facets may be involved as well and is worth consideration pending the outcome of this injection trial." After receiving relief from the facet joint injection, Dr. Ward recommended and proceeded with medial branch block injections for facet joint dysfunction. After Claimant received moderate benefit from the medial branch blocks, Dr. Ward recommended and performed a radiofrequency ablation on September 4, 2015. However, that provided no relief. Dr. Ward also performed a L3 epidural steroid injection on September 29, 2015.

22. On October 7, 2015, Dr. Wong noted that Claimant continued to have persistent buttock and predominantly right thigh pain with numbness, tingling, and weakness. Facet blocks had provided temporary relief, but rhizotomies had not helped. An L3-4 epidural had provided a temporary 50% reduction in Claimant's pain symptoms. Dr. Wong assessed Claimant with radicular irritation to the right thigh with stenosis at L3-4 and L4-5 more on the right, and mild right quads weakness which suggested right L3 and/or L4 radicular changes. Dr. Wong concluded that Claimant was at the point where he was a candidate for a microdecompression of the L3/4 and L4/5 discs on the right side, less likely with laminoplasty to the left. Dr. Wong did not address whether the need for the recommended surgery was caused by or related to the September 22, 2014 work injury. Dr. Wong requested authorization from Insurer to proceed with the back surgery on October 15, 2015. Insurer denied that request.

23. On November 16, 2015, Douglas Scott, M.D., performed a Respondents' sponsored independent medical examination. Dr. Scott had previously examined Claimant at Respondents' request pursuant to Rule 8 and reviewed the claim, issuing reports on February 6, 2015 and April 19, 2015. At the November 16, 2015 IME, Claimant complained of bilateral leg pain, greater on the right than left. Claimant reported pain in and weakness in the back of his right thigh, with pain radiating into his right groin and right anterior leg. Claimant was working for Employer in a sedentary job with restrictions on lifting more than ten pounds. Dr. Scott concluded that Dr. Wong's October 15, 2015 request for surgery authorization satisfied the Colorado Medical Treatment Guidelines. However, he testified that the admitted September 22, 2014 work injury was to Claimant's facet joints, based on Claimant's inability to stand up straight after the September 22, 2014 incident, which Dr. Scott thought was "very suggestive of" a facet subluxation. He discussed that Claimant's facet joint injections, medial branch blocks, and rhizotomies were specifically for facet generated pain. Thus, the surgery recommended Dr. Wong was not needed to treat the effects of the work related injury. Rather, the recommended surgery would be an effort to treat Claimant's preexisting structural problems of L3 discopathy and foraminal stenosis at the L3-4 and L4-5 levels. Dr. Scott qualified his opinion by stating that it "wasn't clear to [him]" what surgery Dr. Wong was recommending, and that he based his testimony at least in part on Claimant's testimony about what surgery Claimant understood was being recommended.

24. Dr. Scott testified at hearing as an expert in occupational medicine. Dr. Scott testified that in his opinion, Claimant's work related diagnosis is facet joint dysfunction based on Claimant's inability to stand up straight immediately after the September 22, 2014 injury and the resulting pain relief Claimant received following facet joint injections and medical branch blocks.

25. Dr. Scott testified stenosis is a term used for an anatomical condition of narrowing – narrowing of the central canal which protects the spinal cord is central canal stenosis, and narrowing of the outlet where nerves come out of the back is neuro foraminal stenosis. Dr. Scott described Dr. Wong's recommended

surgery as one to relieve Claimant's back pain caused by neuro foraminal stenosis and that symptoms relating to shooting pain down the leg are connected to spinal canal stenosis, not the facet joints. Radiculopathy can be caused by a disc bulge if there is compression on the nerve root.

26. Dr. Scott explained what an annular tear is and that he did not think Dr. Wong's recommended surgery was intended to relieve Claimant's symptoms related to his annular tear. Rather, he explained that the recommended surgery was "to relieve symptoms of compression on nerve roots that might be causing [Claimant's] right leg pain [and] also the weakness in his right thigh." He opined that Claimant's annular tear diagnosis was irrelevant to whether the recommended surgery was needed. He further opined that the recommended surgery could provide Claimant some relief for what he identified as congenitally short pedicles.

27. Dr. Scott initially testified that the three MRIs of Claimant's lumbar spine showed a progressive protrusion of the L3-L4 disc, most recently to the right of center. Later in his testimony he acknowledged that he did not see the actual MRI scans and, based on the MRI reports, he could not really tell whether the disc protrusion had actually progressed.

28. Dr. Scott testified based on the University of Colorado Hospital's records that Claimant had a history of chronic low back pain with pain extending into both lower extremities, and that "most people always have some type of prior low back pain." Dr. Scott confirmed that Claimant's symptoms as reported on September 1 and 9, 2013 to the physicians at the University of Colorado Hospital were consistent with bilateral foraminal stenosis at L3-L4. He defined chronic back pain as six months of sustained back pain and that he assumed from what Claimant reported at the emergency room that he probably had six months of back pain even before he went to the emergency room in 2013. Because Claimant received no treatment and reported no symptoms between September 9, 2013 and the September 22, 2014 date of injury, the ALJ does not credit Dr. Scott's opinion that Claimant suffered from chronic back pain. Further, at the time of the injury on September 22, 2014, Mr. Hayes was working full duty, and there is no indication in the personnel records or insurance company file that his work performance or daily activities were in any way affected by the emergency room visits in 2013. Dr. Scott opined that the narrowing of the central canal or foramen existed prior to September 22, 2014. And that it was common for patients with a canal stenosis condition to experience flare-ups of pain, including pain radiating into both legs, with certain bending and twisting movements. Dr. Scott testified that flare-ups of pain with bending and twisting are to be expected, and that flare ups could be caused by simple acts such as walking, standing, and sitting. Dr. Scott testified that did not mean that the activity engaged in at the time of the flare necessarily caused the condition.

29. Dr. Scott testified there were two incidents subsequent to the September 22, 2014 work injury that required Claimant to seek medical treatment, and where

additional medical treatment was prescribed. Apparently these two factors – seeking and receiving medical treatment – take simple acts which would otherwise not be causative, such as getting up from a couch and rolling over in bed, and make them causative of separate injuries. Except that rule apparently would not apply to Claimant's work injury. First, Dr. Scott opined that the November 19, 2014 incident where Claimant felt a "pop" in his lower back while getting up from his couch at home constituted a new acute injury that could possibly be considered a permanent aggravation that required medical treatment. Second, Dr. Scott opined that the March 16, 2015 incident where Claimant felt a "crack" and a "pop" while turning over in bed at home to reach for a cell phone cord constituted a new injury. Dr. Scott also testified that the March 16, 2015 incident constituted a permanent aggravation of Claimant's underlying condition.

30. Dr. Scott acknowledged that a paracentral disc bulge at L3-L4 could compress that nerve root, and that leg weakness and numbness were nerve root type problems. He also acknowledged that radiculopathy, which is pathology of a nerve root, causes leg pain, tingling, and numbness and that Dr. Orgel diagnosed Claimant with L3-L4 radiculopathy. Dr. Scott also acknowledged that he did not know what level facet Claimant injured, and that he did not know where the compression was coming from. Dr. Scott could not tell whether Claimant's disc protrusion at L3-L4 preexisted his work injury. Dr. Scott also acknowledged that Claimant's symptoms "seem to be what they call radicular symptoms" and suggested irritation of the L3 or L4 nerve roots on the right side, although Dr. Green's EMG did not find evidence of a specific radiculopathy. Dr. Scott also acknowledged that the epidural steroid injections were not done for facet problems or for spinal stenosis. He acknowledged that Claimant's positive response to the epidural steroid injection at L4-L5 indicated that Claimant probably had nerve root irritation at that level. Dr. Scott thought that Claimant's degenerative disc disease caused him to develop stenosis. Claimant had not presented with right leg symptoms that required surgery prior to his work injury.

31. On February 3, 2016, the parties took the evidentiary deposition of Claimant's authorized treating physician, David Orgel, M.D. Dr. Orgel is board certified in internal medicine and occupational medicine. Dr. Orgel discussed that Claimant presented with certain classic indications of spinal stenosis, including walking in a bent forward posture and weakness with standing. Dr. Orgel was concerned with Claimant's right side thigh numbness; complaints of weakness in his quadriceps, and objective atrophy and weakness on extension which he thought were caused by radiculopathy with denervation at L3-L4. Dr. Orgel also testified that Claimant's March 13, 2015 MRI showed persistent mild bilateral foraminal stenosis at L3-4. Dr. Orgel opined that the reasons for performing the requested surgery would be to reduce Claimant's progressive symptoms by decompressing the nerve root. Dr. Orgel noted that Claimant's symptoms and weakness had been worsening and that if they were not timely addressed, there would be long-term consequences and delayed recovery. Dr. Orgel explained that he attributed Dr. Castro's opinion that Claimant was not a surgical candidate to his being very conservative and to the early timing of that opinion before additional testing and

symptom progression had occurred. Dr. Orgel testified that the surgery recommended by Dr. Wong, whom he also described as a conservative surgeon, would improve Claimant's right thigh weakness. Dr. Orgel ultimately opined that the surgery recommended by Dr. Wong was reasonable.

32. With respect to relatedness, Dr. Orgel testified that Claimant's symptoms were not the result of his "congenital issue," and that his injury was work related. He persuasively explained that backs are not strong against compression with a twist which causes an acute annular tear as seen on the October 7, 2014 MRI at L4-L5. The disc weakens and becomes flatter and then bulges. Dr. Orgel testified that Claimant had an acute annular tear at L4-5 consistent with his mechanism of injury and objectively noted on MRI. Dr. Orgel testified that Claimant's need for surgery was related to the September 24, 2014 work injury. "I think there was an acute event that caused this problem and that the event led to a permanent exacerbation of an underlying probably somewhat chronic condition, which could be a disease."

33. On cross examination by Respondents' counsel, Dr. Orgel testified

- Claimant's anatomy and weight contribute to putting him at risk for his work related injury;
- Findings on the three MRIs were "fairly mild";
- EMG findings objectively demonstrated radiculopathy only on the left; and
- Claimant received some pain relief as a result of the epidural steroid injection at L3-L4.

34. Dr. Orgel was not aware of Claimant's treatment at the University of Colorado emergency department on September 1 and 9, 2013, at which Claimant reported pain in his left low back with pain radiating into his left testicle and into the front of both legs without evidence of radiculopathy. Dr. Orgel expressed that such previous symptoms were not unexpected, and that Claimant had been relatively asymptomatic from September of 2013 until his work injury a year later. Dr. Orgel opined that Claimant's work injury was an acute event that caused a permanent exacerbation of his condition, and that the records from September 2013 did not change his causation opinion. However, Dr. Orgel also made clear that he would be reluctant to change his causation opinion because he did not think it was "fair or reasonable to start questioning causality" and that he thought "fairness should be part of the process."

35. Dr. Orgel was also not aware of Claimant's November 16, 2014 visit to the University Hospital emergency department after getting up from his couch. He testified that Claimant's symptoms can flare up or be aggravated by standing up from a seated position or rolling over. He also testified that the November 16 incident could possibly have been a new acute injury or an aggravation of a previous underlying condition. Dr. Orgel clarified that facet joint dysfunction typically results in pain in the back; spinal stenosis typically results in pain that shoots down the legs with activity.

36. Dr. Orgel clarified that the surgery recommended by Dr. Wong is for Claimant's radiculopathy and associated thigh abnormalities at the L3 and possibly L4 levels, and is not intended to fix Claimant's facet joints. The micro-decompression at L3/L4 and L4/L5 level, and potential laminoplasty on the left, recommended by Dr. David A. Wong, M.D., are not intended to treat facet joint dysfunction. The procedure consists of decompressing the nerve roots at L3/L4 and L4/L5 levels to decompress the discs and open the canals on both sides of the discs, particularly on the right side. The purpose of the procedure is to relieve right leg pain and address the numbness and weakness in Mr. Hayes's right thigh.

37. Dr. Orgel and Dr. Wong opined that Claimant's back problems are multifactorial.

38. Dr. Orgel opined that if a follow up EMG were performed, he would expect to see greater findings because Claimant's symptoms have worsened. He also explained that EMGs were often read as normal when there was a pinched nerve in the back. In addition, progressive weakness is of even greater concern, because strength may not return.

39. Respondents' counsel asked whether Claimant's March 16, 2015 incident could possibly be a new acute injury to Claimant's back, and whether it could possibly be an aggravation of a preexisting underlying condition in Claimant's spine. While Dr. Orgel answered yes to these questions, the ALJ finds he was expressing agreement with a possibility – not offering an opinion to a reasonable degree of medical certainty.

40. Claimant testified at hearing. The ALJ finds his testimony to be credible and generally consistent with his medical records. Significantly, he testified that:

- His symptoms were relieved when he was in traction which took the compression off of his back.

- His right thigh symptoms of weakness pre-dated subsequent incidents on November 19, 2014, and March 17, 2015; and his right thigh weakness has gotten increasingly worsened since the date of his work injury.

- He received significant relief from a lumbar transforaminal epidural steroid injection done on September 29, 2014.

- He did not experience any relief in thigh numbness and weakness after the facet joint injections.

- He only experienced twelve-hour relief on the right side after medial branch blocks.

- On November 16, 2014 when he was at home after physical therapy he experienced what “felt like the same thing that happened on September 22.”

- He received multiple injections at different levels in his back to try to relieve the symptoms in his right leg.

- Claimant understood that the surgery recommended by Dr. Wong was to take care of whatever was compressing the nerve root that went to his right thigh and was causing the weakness and numbness in his thigh.

41. Based on the totality of the evidence, the ALJ finds that Dr. Scott’s credibility and the persuasiveness of his testimony are limited by the following factors:

    - His causation analysis is superficial and based primarily on the single factor of Claimant’s inability to stand following the work injury;

    - His acknowledgement that he did not have a clear understanding of Dr. Wong’s recommended surgery;

    - His assumption that Claimant ad chronic back pain from an emergency room record which only indicate a prior history of symptoms but do not mention the duration of symptoms;

    - The conflict between his testimony that it was common for patients with a canal stenosis condition to experience flare-ups of pain, including pain radiating into both legs, with certain bending and twisting movements, yet concluding that such flares were new acute injuries or otherwise intervening events when Claimant experienced same on March 16, 2015 and November 19, 2015.

42. Based on the totality of the evidence the ALJ finds that Dr. Orgel’s testimony was more credible and persuasive than that of Dr. Scott. Dr. Orgel was more familiar with Claimant’s condition as a treating provider, was more thorough and comprehensive in his causation analysis, showed a better understanding of the recommended surgery and why it was related to Claimant’s work injury, and his opinions were more consistent with Claimant’s medical course and other medical providers’ opinions.

43. Based on the totality of the evidence, the ALJ finds that Claimant met his burden of establishing by a preponderance of the evidence that the microdecompression and laminoplasty recommended by Dr. David A. Wong, M.D. is reasonable, necessary, and casually related to the treatment of Claimant’s admitted industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201 C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury. Respondents are liable for authorized medical treatment that is reasonable, related and necessary to cure the effects of the industrial injury. CRS 8-42-101(I)(a); *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Employers also are liable for their employees' medical treatment for work related injuries that aggravate, accelerate, or combine with a pre-existing condition. C.R.S. § 8-42-101(1)(a); *see also Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Respondents argue that while all results flowing proximately and naturally from an industrial injury are compensable, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002)(citing *Post Printing & Publishing Co. v. Erickson*, 94 Colo. 382, 30 P.2d 327 (1934)). Whether a particular condition is the result of an independent intervening cause is a question of fact for resolution by the ALJ. *Id.* at 1189. "An efficient intervening injury may sever the causal relationship between the claimant's work injury and resulting disability." *Lancaster v. Arapahoe County Sheriff*, W.C. Nos. 4-744-646 and 4-746-515 (ICAO, May 12, 2010) (citing to *Post Printing & Publishing Co. v. Erickson*, 94 Colo. 382, 30 P.2d 327 (1934)).

The ALJ weighs the evidence and determines the credibility of expert witnesses based on the expert's special knowledge, training, experience or research, and other factors, such as the consistency and the reasonableness of a witness' testimony, motives, bias, prejudice or interest. *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 973 (Colo. App. 2012); *see also Young v. Burke*, 338 P.2d 284 (1959).

The ALJ concludes that it was common for patients with a canal stenosis condition to experience flare-ups of pain, including pain radiating into both legs, with certain bending and twisting movements. This conclusion is likewise supported by Dr. Orgel's testimony that Claimant's symptoms can flare up or be aggravated by standing up from a seated position or rolling over. The ALJ finds and concludes that it is more likely true than not that Claimant's experiences on March 16, 2015 and November 19, 2015 constituted flare ups and not new injuries or intervening aggravating events.

Respondents also argue that Claimant's condition is preexisting. The ALJ finds and concludes otherwise.

Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether an industrial injury is the cause of a subsequent need for medical treatment is largely one of fact for determination by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 497 (Colo. App. 1997).

Respondents argue that Claimant's work related injury was a facet injury, and that the recommended surgery is not treatment for a facet problem. The ALJ disagrees.

The ALJ concludes that Dr. Scott's opinion that Claimant's work related diagnosis is facet joint dysfunction based on Claimant's inability to stand up straight immediately after the September 22, 2014 injury and the resulting pain relief Claimant received following facet joint injections and medical branch blocks is not persuasive. Dr. Scott's opinion on causation is found to be based on a fairly superficial analysis and his testimony that Claimant responded well to medial branch blocks which was contradicted by more persuasive testimony by Claimant and medical records. Further, although objective testing was not as compelling as expected, several doctors diagnosed work related diagnoses which Dr. Wong's surgery would correct. For example: (1) on the date of injury Mr. Shouse noted some radicular symptoms down both legs; (2) on November 4, 2014, Dr. Wernick performed a lumbar epidural steroid injection and the following day Dr. Thurston noted continued radicular symptoms; (3) Claimant's EMG showed "borderline electrodiagnostic evidence for the presence of a possible, early, left L5 radiculopathy with minimal ongoing denervation"; (4) on March 14, 2015, Dr. Orgel wrote, "In my mind this is a pretty clear bilateral L3 radiculopathy although the MRI is not showing a substantial impingement"; (5) on May 1, 2015, Dr. Wong concluded Claimant likely had radicular irritation at the lower three lumbar levels; (6) Dr. Scott acknowledged that Claimant's symptoms "seem to be what they call radicular symptoms"; (7) Dr. Orgel testified he was concerned with Claimant's right side thigh numbness; complaints of weakness in his quadriceps, and objective atrophy and weakness on extension which he thought were caused by radiculopathy with denervation at L3-L4; and (8) Dr. Orgel testified that the surgery recommended by Dr. Wong is for Claimant's radiculopathy.

Finally, Respondents argue that the surgery recommended by Dr. Wong is for Claimant's spinal canal stenosis which they argue is degenerative and not work related.

The ALJ has found persuasive Dr. Orgel's testimony that Claimant's symptoms were not the result of his "congenital issue," and that his injury was work related. He persuasively explained that backs are not strong against compression with a twist which causes an acute annular tear as seen on the October 7, 2014 MRI at L4-L5. The disc weakens and becomes flatter and then bulges. Dr. Orgel testified that Claimant had an acute annular tear at L4-5 consistent with his mechanism of injury and objectively noted on MRI. Dr. Orgel testified that Claimant's need for surgery was related to the September 24, 2014 work injury. "I think there was an acute event that caused this problem and that the event led to a permanent exacerbation of an underlying probably somewhat chronic condition, which could be a disease." Therefore, the ALJ concludes that Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Wong is related to her September 22, 2014 work injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The surgery recommended by Dr. David Wong is necessary, reasonable and related to the industrial injury, sustained by Claimant Christian Hayes on September 22, 2014. Therefore, Respondents are liable for the recommended surgery.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 27, 2016

/s/ Kimberly B. Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Respondents proved by a preponderance of the evidence that they are entitled to withdraw the General Admission of Liability.
- Whether the hip surgery proposed by Raymond Kim, M.D. is reasonable, necessary and related to Claimant's injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a territory manager, starting on June 16, 2008. In that capacity, she worked with commercial accounts, making sure their trash pick-up, recycle services and other programs were going smoothly. Her job required her to be in the field and meet with customers.

2. Claimant's medical history was significant in that she had multiple prior injuries, including an injury to her lumbar spine, cervical spine and left shoulder. Her left shoulder injury required surgery and Claimant also underwent two (2) prior left knee surgeries. Claimant testified she had very bad scoliosis and when she was injured, this caused her to be "off kilter" and she would experience spasms in her back. *However, this condition did not limit her activities, which included back-country skiing, hiking, rafting, and biking.

3. On December 16, 2004, Claimant suffered an industrial injury when she fell on the ice, falling first to the right, then falling to the left and hitting a car. As part of that claim, Claimant underwent an open subacromial decompression, open distal clavicle resection on her right shoulder on September 15, 2015. An MRI was done on Claimant's lumbar spine on November 16, 2005 and the films were read by Margaret Montana, M.D. Dr. Montana's impression was mild rotolumbar scoliosis with convexity to the right; minimal left paracentral disc protrusion T12-L1; and multilevel small bulges and disc degeneration and dehydration, but without canal stenosis or other focal disc herniation confirmed. On July 18, 2006, Claimant underwent a DIME that was performed by Darrel Quick, M.D. for the 12/16/04 injury, who referred to a record from a Dr. Chisholm noting Claimant had a contusion on her right hip after her fall. Dr. Quick diagnosed left shoulder contusion/sprain, right shoulder contusion/sprain, cervical strain, left sacroiliac sprain with chronic left sacroiliac pain; left knee sprain.

4. Claimant received treatment for left sacroiliac pain on December 19, 2008 at High Country Health Care and returned to that facility for back pain on February 15, 2009. She was evaluated by Genevieve Syed, M.D. on December 3, 2010, after experiencing pain in her groin, right quad, and right knee after cross country skiing. Dr. Syed noted tenderness and muscle spasm over right SI joint and mild tenderness of

right hip. She received a prescription for massage therapy and medications. Claimant was injured in a bike accident and was seen on August 17, 2011 by Tanja Britton, M.D. at High Country Health Care. Claimant indicated that she had fallen off her bike landing on her left elbow. Claimant stated she felt better, received some chiropractic treatment, then went dancing and experienced right SI joint pain. She had radiating pain into the right posterior thigh. The examination revealed Claimant's right sided SI joint was tender, causing discomfort with side bending. Dr. Britton's assessment was sacroiliac pain and she prescribed medication.

5. Claimant returned to High Country Health Care on August 10, 2012 for complaints of back pain following a hiking accident. Claimant stated that she tripped over a root while hiking. Claimant complained of a low back strain and some pain in her right leg related to strain. Claimant also treated for low back pain and symptoms on March 30, 2014. She was diagnosed with scoliosis and chronic back pain by Randall Nations, M.D. That treatment continued through June 2014.

6. After a review of the medical records admitted at hearing, the ALJ finds Claimant suffered from chronic low back pain and right SI joint pain/dysfunction prior to November 5, 2014. The ALJ also finds Claimant had symptoms in her right lower extremity, including the right hip, thigh and groin prior to November, 2014. She required treatment for these conditions.

7. Both Claimant and Respondents' witnesses testified the incident which is the subject of the instant claim occurred on November 5, 2014 at Employer's office, located in Silverthorne, Colorado. Present at the office was Claimant, Amy Thompson, Richard Clemens, Peter Sims and Ms. Thompson's dog.

8. Claimant testified she was injured on November 5, 2014 in the afternoon when Ms. Thompson's dog, Louie, ran into her. Claimant heard the dog bark periodically throughout the day. She estimated his weight to be between eighty-five (85) and eighty-eight (88) pounds. That afternoon, she was walking to her office from the copier when a customer appeared at the doorway to the main office area[1]. She heard Louie barking and growling; then saw him run down the hallway. The dog ran down the hallway and "launched", hitting her on the right side of her body from the knee up to the hip area. Claimant stated the dog hit her with his head and chest.

9. Claimant also testified the customer had to catch or brace her to keep her from falling. Ms. Thompson remained in her office. Claimant testified she went to Ms. Thompson's office and told Mr. Clemens she had just "taken one for Waste Management". Given the evidence that the dog weighed at least 80 lbs and Claimant weighed 124 pounds[2], the ALJ infers it is more likely Claimant would have been knocked over if the collision occurred as she described.

[1] Depicted in Exhibit 53.

[2] Claimant's weight was listed in Dr. Nation's report-Exhibit 1, p. 97.

10. Claimant completed a statement in the form of an e-mail, which was sent to Brad Hansen on November 7, 2014. Significantly, in this document, Claimant stated the incident occurred on "Tuesday, November 4" when Ms. Thompson brought her dog to work. Claimant said the dog ran down the hall and collided with her right leg, at knee and thigh height. She said she "thought" Ms. Thompson remained in her office. Claimant did not offer any testimony to explain the discrepancy regarding the date of injury. The ALJ notes that Claimant's testimony was more definite than her statement with regard to whether Ms. Thompson remained in the office. The ALJ also notes Claimant did not reference falling back into the customer in her written statement. Claimant said she did not think she was hurt badly, but developed pain later that evening when her right side "seized" up.

11. Claimant testified she measured the dimensions of the office and hallway, which was the situs of the incident. The measurements were done in May on a Saturday morning. Claimant testified it was 99 inches from Ms. Thompson's chair to the door. The hallway was approximately 13 feet long and 40 inches wide. Claimant prepared a drawing, which documented her location in relation to Ms. Thompson's office, the hallway and the door where the customer was located[3].

12. Ms. Thompson testified on behalf of Employer and provided a different version of the incident. She is employed by the Employer as an operation specialist. In that capacity, she supports the route managers, and drivers, as well as working in the daily operations of the office. She has worked with Claimant for approximately two (2) years. Ms. Thompson, who is a massage therapist, said Claimant spoke to her on 2-3 occasions about massage therapy for hip and low back problems. She also observed Claimant limping on occasion.

13. On November 5, 2014, in the afternoon, Ms. Thompson was working in her office which is on the second floor of the building. It is also known as the dispatch office. Ms. Thompson was in the process of checking out Mr. Clemens and Mr. Sims (both of whom are drivers). They were in her office, as was her dog. Ms. Thompson was seated in her chair with her back to the door and the dog was positioned directly underneath the chair. Mr. Clemens was down on the floor next to the chair, petting the dog. Mr. Sims was sitting in a chair right next to the desk. Ms. Thompson confirmed Louie was a large dog, weighing eighty (80) lbs and described him as "very friendly". Claimant's office is located just to the left of Ms. Thompson's and there is a hallway which runs to both offices.

14. Ms. Thompson testified someone walked into the main part of the office on the first floor and she could hear that person walking up the stairs. The visitor said: "Hello, hello…" He came into the main office area at the other end of the hallway. There was a mirror in the corner of Ms. Thompson's office and she could see down the hallway. Ms. Thompson saw Claimant walk down the hallway to where the visitor was. Louie started barking and trotted down the hallway. Ms. Thompson said he was

[3] Exhibit 58.

moving at a “fast trot” and she ran after him, trying to grab his collar. Ms. Thompson said she was able to stop her dog before he made contact with the visitor or Claimant, although he was very close to Claimant. Claimant did not cry out, nor did she say she was hit by the dog. Ms. Thompson thought Claimant assisted the visitor, who left shortly afterward. Claimant did not tell Ms. Thompson she was injured that afternoon.

15. Ms. Thompson drafted a statement (in the form of an e-mail sent to Kevin Richards-District Manager) dated 11/6/14, in which she described her dog going down the hall and she went after him to make sure the customer was not scared. Ms. Thompson’s statement goes on: “As I reached for my dog’s collar; Jeannie Severson unexpectedly put her leg out to block my dog from the customer. I do not believe that my dog and her made contact, it did happen very fast though”. Her statement puts Claimant’s leg in close proximity to the dog, even though she testified that to her nothing happened. The ALJ infers Ms. Thompson tended to minimize the incident, as Louie was her dog. The ALJ also drew the inference that Ms. Thompson would have been unable to get out of her chair, turn, run down the hall and grab the dog by the collar before he reached Claimant. Accordingly, the ALJ did not find Ms. Thompson to be credible.

16. Mr. Clemens testified regarding his recollection of the events of November 5, 2014. He was in the dispatch office, standing in the doorway. He had a clear view down the hallway. Mr. Clemens testified that when a customer entered the main part of the office Louie started barking and trotted towards the customer. Mr. Clemens stated Louie made it out of the office and into the main room before Ms. Thompson was able to grab him. Mr. Clemens testified Louie never ran into the Claimant. Additionally, he never saw the Claimant lose her balance, nor did he see the visitor reach out to grab her. Claimant never made any comment that the dog had hit or run into her and Mr. Clemens did not refer to any comment about taking one for Waste Management. Mr. Clemens also signed Ms. Thompson’s written (e-mail) statement, which also related there was no contact between Claimant and the dog.

17. The ALJ notes there is a question where Mr. Clemens was located, as his testimony conflicted to a certain extent with Ms. Thompson. However, his testimony was consistent with Mr. Sims in that Claimant never said anything about the dog running into her or causing her to fall into the customer. Given Claimant’s description that the force of the impact caused her to fall into the customer, the ALJ infers she would have said something to Mr. Clemens.

18. Mr. Sims testified that he was also in Ms. Thompson’s office on November 5, 2014. Mr. Sims was sitting in a chair next to Ms. Thompson’s desk, where he could see out the door. Mr. Sims testified that a customer entered the main area of the building and was looking around for help. He saw when the customer turned the corner. Mr. Sims stated he saw Claimant go over to help the customer, as Louie realized there was someone in the office. Mr. Sims said Louie trotted over to the customer. Mr. Sims testified that Louie never made physical contact with the Claimant. Mr. Sims further testified Claimant did not say anything when Ms. Thompson grabbed

Louie. Mr. Sims also signed the written statement prepared by Ms. Thompson. The ALJ credited Mr. Sims testimony as he could see what transpired from his vantage point.

19. On November 7, 2014, an Employer's First Report of Injury was completed by Kevin Richards, the Employer's District Manager. It listed the date of injury as 11/5/14. Under "Tell us how the injury occurred" it states "EE SUFFERED ALLEGED INJURY AFTER TRYING TO STOP A CO-WORKER'S PET FROM GREETING A CUSTOMER, EE CLAIMS LEG PAIN". Under "Tell us the nature of the injury/illness", it states "STRUCK BY".

20. Claimant was initially examined on November 10, 2014 by Dr. Nations at High Country Healthcare. In the history section, Claimant stated that she had just walked into the office when a co-worker's dog launched at her. Claimant said she was hit by the dog and was struck on the right /hip/groin/knee. Claimant's chief complaint was of back pain. The examination revealed normal range of motion in her right hip and knee. No neurological abnormalities were found. Claimant's history of chronic low back pain was noted. Claimant was diagnosed with a lumbar strain, neck strain, and knee strain. Dr. Nations' impression was this was all likely just strain; neck strain; low suspicion for significant injury to knee. The M-64 he completed said the injury occurred when a co-worker's dog charged running at Claimant and slammed into right side. It listed the diagnoses as lumbar strain, neck strain and knee strain. The ALJ notes no bruising was noted on Claimant's right hip.

21. Claimant underwent an initial PT evaluation at AXIS Physical Therapy on November 11, 2014. She reported the injury occurred when an 80 lb dog ran into her upper thigh region and pain arose 7-8 hours later in the evening. Claimant reported pain in her right lateral thigh into her right knee joint, wrapping up and around the gluteal region; intermittent lower back pain and more right-sided lower back pain; right lower cervical pain with some associated stiffness. The referring diagnosis was lumbar strain, neck strain, and knee strain. She received various modalities of physical therapy including exercises, tissue and joint mobility and stretching, as well as a home exercise program. The note indicated Claimant was guarded and had an antalgic gait. Her presentation was consistent with the diagnoses, including a contusion to the thigh and hip joint. The treatment goal included increasing Claimant's range of motion. The ALJ notes it was significant that Claimant was not reporting right hip pain in the initial PT evaluation.

22. Claimant returned to High Country Health Care on November 25, 2014 and was examined by Elizabeth Winfield, M.D. In the history section, it was noted Claimant "was not sure how she landed-the guy behind her may have caught her a little, she didn't hit the floor". However, the M-164 notes: "struck by 85lb dog, fell". Dr. Winfield's assessment was neck strain, knee strain, lumbar strain, and sacroiliac joint dysfunction of right side. Claimant was referred for physical therapy ("PT") and chiropractic treatments. The ALJ notes this initial evaluation did not contain a diagnosis related to the hip.

23. Claimant received chiropractic treatment from John Asthalter, D.C. beginning on November 26, 2014. Dr. Asthalter noted by history Claimant's scoliosis seized up immediately after being struck by a large dog. Claimant complained of right-sided groin, hip, low back and knee pain. Claimant was reluctant to have any sort of leg manipulation and reported spasm. Dr. Asthalter assessment included possible labral involvement, or an interstitial tear that might be through the different angles of hip flexion and abduction, "given this seemingly inconsistent pattern of pain". Claimant was to receive chiropractic treatment and manipulation to the abductor, as well as low back.

24. Claimant received additional chiropractic treatments with Dr. Asthalter on December 2, 2014. In the subjective section, it was noted the treatment was for her hip and low back. Claimant's ability to move without spasm was incrementally better.

25. On December 4, 2014, a General Admission of Liability ("GAL") was filed for medical benefits only.

26. Claimant also received treatments from Dr. Asthalter on December 5, 2014. In the subjective section, it was noted the treatment was for her right hip and low back. Claimant returned to Dr. Asthalter on December, 12, 16, 19 and 30, 2014, as well as on January 2, 13, 26, 23, 28 and 30 and February 3 and 5, 2015. The balance of Dr. Asthalter's records documented subjective symptoms in the right hip, thigh and low back. In these records, Claimant reported muscle spasm and was guarded in her movements.

27. There is a chart note dated December 12, 2014[4] in which Dr. Winfield noted she discussed the right hip with Dr. Asthalter. Her assessment included right hip pain and sacroiliac joint dysfunction of the right side. Dr. Winfield recommended an MRI of the right hip.

28. On December 24, 2014 an MRI was performed on Claimant's right hip. The films were read by Kelly Lindauer, M.D., who noted a large right hip effusion and scarring of the capsule. There was scarring of the ligamentum teres and chronic fraying /tearing of the right acetabular labrum. Dr. Lindauer's impression was severe right hip osteoarthritis and chronic degenerative fraying/tearing of the right acetabular labrum. Dr. Lindauer also observed moderate osteoarthritic changes in the left hip. The ALJ infers the osteoarthritis in Claimant's right hip was a chronic degenerative condition.

29. On January 19, 2015, Andrew Kim (an orthopedic surgeon) examined Claimant, who was struck by a 80 lb dog on the posterolateral aspect of her hip. Claimant's chief complaint was right hip pain and she also had "severe" pain in her right groin, as well as right knee pain. Dr. Kim noted Claimant had an antalgic gait and full range of motion in the lumbar spine. X-rays were taken that day, which Dr. Kim reviewed. The films showed severe right hip end-stage arthritis with complete joint space narrowing and periarticular osteophytes, cystic changes about the acetabulum

[4] The record was unclear whether Dr. Winfield evaluated Claimant that day.

and femoral head, pelvis obliquity secondary to scoliosis. Dr. Kim opined Claimant would be a reasonable candidate for total hip arthroplasty. The ALJ notes Dr. Kim did not tie Claimant's injury to her need for surgery, nor did he provide an opinion whether the incident of 11-5-14, aggravated or accelerated the degenerative condition of Claimant's right hip.

30. A request for authorization of right arthroplasty was sent on January 19, 2015. Respondents filed an Application for Hearing on February 4, 2015, listing as issues the reasonableness and necessity of the surgery for Claimant's hip.

31. On April 9, 2015, Eric Ridings, M.D. performed an IME of Claimant on behalf of Respondents. Claimant complained of pain in her right hip and limitations in her ability to move. The area below her right hip to her knee sometimes "seizes" and she had pain near the patella with activity. She also had neck pain since the injury. On examination, Dr. Ridings noted a significant right convex lumbar scoliosis, with a milder left convex scoliosis. She had significant limitation in active right hip range of motion, with no catching or crepitus. Her knee range of motion was fluid, without catching or crepitus.

32. In his report, Dr. Ridings opined Claimant aggravated preexisting osteoarthritis in her right hip as a result of the 11/5/14 work injury. He concluded she sustained a sprain/strain of at the right knee and a cervical strain injury. Dr. Ridings believed the total hip arthroplasty was reasonable, necessary and related to this injury. Claimant was not at MMI. In Dr. Ridings' opinion, Claimant's low back complaints (except as related to the hip) were not worsened by the incident, as she had a long history of chronic low back pain going back to 2004.

33. Dr. Ridings testified at hearing. He has been in practice since 1989. Dr. Ridings was qualified as an expert in physical medicine and rehabilitation, a specialty in which he is also board-certified. He is Level II accredited, pursuant to the W.C.R.P. At the hearing, Dr. Ridings heard the testimony of the percipient witnesses to the incident of 11/5/14, including the statements there was little or no contact between Claimant and the dog. This altered his opinion, as it differed from the history given to him by Claimant. Dr. Ridings testified he had based his previous opinion based upon the history given to him by Claimant. Dr. Ridings stated he would have expected an immediate onset of symptoms, if an 85 lb dog would have struck Claimant in the leg, causing her to stumble. Dr. Ridings testified he now did not believe the incident aggravated or accelerated the condition of Claimant's right hip after he heard the description of the incident from various witnesses. The ALJ infers that Dr. Ridings believed that in addition to trauma, osteoarthritis and other conditions could be a cause of Claimant's hip effusion noted on the MRI. Dr. Ridings also did not believe Claimant, who had previously experienced chronic low back symptoms, would have woken up with new and dramatic symptoms.

34. Dr. Ridings offered his opinion that the dog did into come into contact with Claimant. This comported with the factual findings and inferences drawn by the ALJ.

Dr. Ridings explained he generally accepts what a patient tells him as true, unless it isn't medically reasonable or there is a direct contradiction in the medical records. The ALJ credited this explanation. Therefore, while Dr. Ridings' change in opinion hurt his credibility, his explanation that this change related to a change in his understanding of a crucial underlying fact was accepted by the ALJ. The ALJ was persuaded by Dr. Ridings' expert testimony, particularly his finding that Claimant would have had an immediate onset of symptoms in her right hip.

35. The ALJ finds the absence of medical records immediately following the incident significant.

36. The ALJ finds Claimant's testimony was not credible or persuasive, both in her description of the incident, as well as in her failure to explain the discrepancy regarding the date of injury.

37. Given the testimony of the witnesses, the physical layout of the offices and the conclusion Claimant would have been knocked over by the dog, the ALJ finds Claimant did not sustain a compensable injury arising out of and in the course and scope of her employment.

38. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The credibility of Claimant, as well as Employer's witnesses regarding what happened on November 5, 2014 was the overriding issue in this case.

Withdrawal of GAL

Respondents seek to withdraw the GAL filed on 12/4/14, which they argued was promptly filed after the injury was reported in order to provide medical treatment to Claimant and before all the facts were known. They now seek an order allowing withdrawal of the GAL based upon information developed after the claim was admitted. In this regard, Respondents argued Claimant did not suffer a compensable injury, disputing her version of the accident and relying upon the percipient witnesses who were present at the office on November 5, 2014. In addition Respondents argued Claimant's failure to fully provide the details of her injury and medical history affected her credibility.

Claimant asserted Respondents failed to meet their burden of proof for a withdrawal of the admission. In this regard, Claimant argued there were both minor inconsistencies and major discrepancies in Respondents' witnesses' testimony. Claimant argued the evidence led to the conclusion she suffered a compensable injury to her right hip. Further, Claimant argued that her description of the incident was the most credible, given the layout of the offices. She also contended that her need for a right hip arthroplasty was reasonable and necessary, as well as related to her injury.

Respondents' request to withdraw the GAL is governed by Section 8-43-201(1), C.R.S. and the recent holding by the Colorado Supreme Court in *City of Brighton v. Rodriquez*, 318 P.3d 496, 508 (Colo. 2014). Respondents have the burden of proving by a preponderance of the evidence that the modification to the GAL is warranted in this instance. *Id.*

In *City of Brighton,* the Court considered the withdrawal of an admission by Respondent where Claimant suffered an unexplained fall. More particularly, the Court addressed the issue of whether a truly unexplained fall was compensable under the Colorado Worker's Compensation Act. As a starting point, the Supreme Court noted there must be a causal connection between Claimant's employment and the injury. See also *Madden v. Mountain West Fabricators,* 977 P.2d 861, 863 (Colo. 1999). The Court then analyzed when a fall would arise out of Claimant's employment and reviewed the three categories of risk that caused injuries to employees. The first category encompassed risks inherent to the work environment itself (direct); the second category contained risks which are entirely personal or private (which included idiopathic injuries); and the third category included injuries caused by neutral risks (risks generally not associated with work or the Claimant). *City of Brighton v. Rodriquez*, 318 P.3d at 503-504.

The Court concluded Claimant's unexplained fall fell within the third category which contained neutral risks. Reversing the Court of Appeals, the Supreme Court held Claimant suffered a compensable injury because Claimant would not have been injured, "but for" her employment. The Court also held that Respondent City of Brighton had the burden to prove by a preponderance of the evidence that Claimant's injuries were not compensable in order to withdraw the GAL. Under the facts of the case, the Court found Claimant's injury was compensable; therefore, Respondents failed to meet their burden of proof and were not allowed to withdraw the admission.

Pursuant to the holding in *City of Brighton v. Rodriquez*, at the heart of the issue of whether Respondents should be allowed to withdraw their admission of liability in this case is whether Claimant suffered a compensable injury while working for Employer. Respondents have the burden of proof to show the injury was not compensable. The ALJ determined while an incident occurred involving Claimant and the dog, Louie, Claimant did not suffer a compensable injury. Therefore, based upon the totality of the evidence, Respondents satisfied their burden of proof. The ALJ's reasoning was two-fold. First, the evidence before the ALJ did not establish Claimant suffered a compensable injury. Claimant's description of how her injury occurred was exaggerated. (Findings of Fact 8-10, 37). Claimant's testimonial version of these events also diverged from her written statement given right after the incident. In this regard, there was confusion about the date of injury, as Claimant's testimony conflicted with the written e-mail statement sent two days after the incident. Claimant's failure to correct or explain this discrepancy hurt her credibility.

As found, Claimant's testimony regarding the actual contact between Louie and the right side of her body also was not credible. Her description of an 80 (plus) pound dog launching into her right knee/thigh and yet she did not fall to the floor was not credible. Her description of falling into the customer was not noted in her written statement, nor was it viewed by any other witness. Moreover, she never told any of the Respondents' witnesses, nor Dr. Nations that she fell into the customer who was nearby. Claimant did not talk to any of Employer's witnesses about what happened. Thus, although Respondents' witnesses have credibility issues, they were consistent about what was not said by the Claimant. Claimant's version of this incident was the least believable.

Second, the medical evidence supports the conclusion Claimant's right hip condition was not compensable, albeit for reasons different than what was suggested by Respondents. There is no question that Claimant had chronic low back pain and was treated for SI joint dysfunction prior to November 2014. Claimant did not always fully relate the details of her medical history to health care providers who evaluated and treated her. However, that standing alone, does not rule out the possibility she sustained a compensable injury. The MRI of Claimant's hip showed severe osteoarthritis and chronic degenerative fraying/tearing of the right acetabular labrum. As found, Claimant more probably than not would have had immediate pain and significant symptoms in the right hip had the events occurred as she alleged. In fact, there was a delay before Claimant sought treatment. Immediate pain and symptoms were not documented when she was first seen.

As determined in Findings of Fact 20-21, Claimant did not initially report symptoms in her right hip. This seems unlikely, given the specificity with which she reported low back (including SI joint), thigh and leg complaints. In this regard, Dr. Nations, who initially examined Claimant immediately after the incident found normal range of motion in the right hip. Dr. Nations made no diagnosis related to the right hip. (Finding of Fact 20). Claimant also did not report right hip symptoms in the initial PT evaluation. (Finding of Fact 21).

The physicians who treated Claimant after Dr. Nations, including Dr. Winfield and Dr. Kim based the treatment recommendations on their understanding of a significant contact between the dog and Claimant. Dr. Ridings also testified that he based his initial opinion on Claimant's version of events. As found, it is more likely than not Claimant would have had immediate pain or fallen to the floor, had the dog struck her leg with the force she described. While there was an incident involving Louie the dog, the ALJ was not persuaded this constituted a compensable injury. The ALJ was not persuaded the events occurred as alleged and therefore, there is a significant issue whether Claimant requires an arthroplasty because of this incident as opposed to the degenerative changes in her hip.

In short, the question before the ALJ was whether, given the circumstances of the incident, the medical evidence supported the conclusion that this incident caused, aggravated or accelerated the condition of Claimant's right hip. Since it was determined that Claimant's version of the events was not credible, it was more likely than not she was not struck by the dog as alleged. Claimant's lack of reporting of hip symptoms as shown in the record supports the conclusion this was not a compensable injury. Thus, Claimant's subjective symptoms were more probably the result of the degenerative condition in her hip, as opposed to what happened on November 4 or 5, 2014 at work.

Medical Benefits

In the instant case, Claimant has the burden of proof to establish that the surgery proposed by Dr. Kim is reasonable and necessary, as well as related to her industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The ALJ notes that in light of the finding Claimant did not suffer a compensable injury, the request for medical benefits, specifically the hip surgery, is moot.

ORDER

It is therefore ordered that:

1. Respondents request to withdraw the 12/4/14 GAL is GRANTED.

2. Claimant’s request for authorization of right hip arthroplasty is DENIED.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 11, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

SSUES

The issues for adjudication at hearing were:

1. Whether the Claimant proved by a preponderance of the evidence that the left knee surgery proposed by Dr. Knackendoffel is reasonably necessary to cure and relieve the Claimant from effects of her November 6, 2014 work injury.

2. Whether the Claimant proved by a preponderance of the evidence that the left knee offloader brace and left shoe wedge orthotic recommended by Dr. Matsumura are reasonably necessary to cure and relieve the Claimant from effects of her November 6, 2014 work injury.

3. Whether the Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits from April 1, 2015 ongoing.

4. If the Claimant establishes that she is entitled to temporary total disability benefits, whether the Respondents have established, by a preponderance of the evidence, that the Claimant is responsible for her termination of employment and, therefore, barred from recovering temporary disability benefits under the Act.

FINDINGS OF FACT

1. The Claimant's date of birth is October 27, 1961 and she is currently 54 years old. She was initially hired in September 2011 as a cashier at the Employer's Restore where the Employer sells donated products to help fund the Employer's mission of providing affordable housing to people in need.

2. The Claimant later became an administrator in the Employer's executive office working as a human resources professional and as an assistant to the Executive Director for the Employer. In this position, the Claimant's job duties were to help with the training of other employees, filing, computer work, letters, enterprise zone processing, mail, supplies, research, and HR work (employee packets, insurance, process workers' compensation paperwork).

3. The Claimant does have a medical history of prior left and right knee pain. On August 15, 2010, the Claimant was seen at St. Mary's Medical Center with a chief complaint of "left and right knee pain" after a slip that occurred the day prior. The

Claimant was diagnosed with acute bilateral knee sprain and the right knee, which was causing more discomfort, was placed in an Ace wrap (Respondents' Exhibit D, p. 23). She returned to St. Mary's Hospital and Medical Center on August 16, 2010 reporting that 2 days prior she had spilt some cooking oil accidentally while working for a client and she slipped on the oil and "started to twist her left knee. She felt a pop in the left knee." Her right foot then got caught on a drawer and she fell onto her right side (Respondents' Exhibit D, p. 26). On examination, there was left knee tenderness over the medial collateral ligament with no effusion. There was some swelling on the right knee with tenderness over the medial collateral ligament and medial joint line. She was assessed with "bilateral knee sprains, right greater than left" (Respondent's Exhibit D, pp. 27-28). The Claimant continued to treat for the August 14, 2010 slip for her right and left knees as well as for shoulder and lumbar back pain for a year. On July 21, 2011, Dr. Stagg noted that the Claimant had right knee surgery on July 7th and now her left knee was bothering her with grinding noises. On examination, Dr. Stagg noted the right knee had fairly good range of motion and the left knee had some crepitation (Respondents Exhibit D, p. 38). On August 17, 2011, the Claimant reported still having pain in her right and left knees and Dr. Stagg again noted slight crepitation for the left knee (Respondents' Exhibit D, p. 39).

4. At the hearing, the Claimant testified that on November 6, 2014 she was trying to close up the office for the day at approximately 5:00 PM when she tripped. She tried to catch herself and she didn't fall all the way down, but rather only fell partially and grabbed and held onto a small counter. She immediately felt a loud pop and her left leg hurt right away. Both Miriam Blozvich and Janet Brink were in nearby offices. They did not witness the incident but came over to her soon after. Ms. Blozvich got ice for the Claimant. The Claimant could not walk and went to the hospital that evening. The Claimant testified that Ms. Brink had advised her to get her leg checked. The Claimant testified that her daughter took her to Community Hospital in the evening of November 6, 2014.

5. The Claimant was examined by Nina West, PA-C at Community Hospital on November 6, 2014 complaining of left knee and ankle pain. She could not put any weight on the leg and reported severe shooting pain with any movement of the left side (Claimant's Exhibit 7, p. 166). On examination, the Claimant had limited range of motion due to pain, soft tissue tenderness and swelling (Claimant's Exhibit 7, p. 167). The Claimant was provided a brace and crutches and discharged with instructions to follow up with her primary care provider (Claimant's Exhibit 7, p. 168). An x-ray of the Claimant's left knee showed no fracture, dislocation, osseous lesion, foreign body or significant joint effusion (Claimant's Exhibit 7, p. 171; Respondents' Exhibit E, pp. 40).

6. On November 11, 2014, the Claimant was initially evaluated by Dr. Richard A. Knackendoffel who noted that the Claimant was transitioning from emergency care for her left knee. On examination he noted the Claimant was unable to tolerate flexion beyond 30 degrees. He assessed the Claimant with derangement of the medial meniscus, sprain of the medial collateral ligament of the knee, osteoarthritis of the knee, internal derangement of the knee and lateral meniscus tear. He

recommended an MRI of the left knee (Claimant's Exhibit 2, pp. 41-42; Respondents' Exhibit F, pp. 46-48).

7. The Claimant underwent an MRI of the left knee without contrast on November 14, 2014. The report noted the exam was limited to due to body habitus. The impression was: (1) horizontal cleavage tear of the medial meniscus; (2) moderate joint effusion; (3) chondromalacia of the patellar facets (Claimant's Exhibit 7, pp. 172-173; Respondents' Exhibit E, pp. 41-42).

8. The Claimant saw Dr. Knackendoffel again on November 19, 2014 reporting that her pain was improving. At this visit, Dr. Knackendoffel notes the Claimant described her specific injury as resulting following a twisting motion that occurred when she was walking in new shoes when she tripped on carpet and caught herself with her left leg. Dr. Knackendoffel reviewed the November 14, 2014 MRI with the Claimant and noted that the treatment options available "include physical therapy, injections, and possible knee arthroscopy to address the meniscus tear." However, Dr. Knackendoffel also opined that "at this time I think she is too stiff to consider surgery safely. Her morbid obesity also presents a significant risk for elective surgery" (Claimant's Exhibit 2, pp. 45-47; Respondents' Exhibit F, pp. 49-51). As of November 19, 2014, the Claimant was released to return to work with restrictions limiting her to 4 hours of work per day and the use of crutches as needed (Claimant's Exhibit 2, p. 51). As of December 3, 2014, the Claimant reported to Dr. Knackendoffel that her symptoms of pain and weakness occurred intermittently and were improving. Dr. Knackendoffel noted that the Claimant's treatment included physical therapy, crutches and a home exercise program. She discontinued the use of her knee immobilizer. In discussing treatment options, Dr. Knackendoffel noted that he offered a steroid injection or continuing with physical therapy. He noted that "surgery would be the last choice due to weight, increased risk of DVT, infection, or continued pain at this time." He noted that the Claimant's arthritis is a significant pain generator. He further noted that the Claimant decided to have the depo-medrol injection and that she tolerated the procedure well. He recommended the Claimant continue physical therapy and wean from crutches. He modified her work restrictions to allow for her to work up to 6 hours per day (Claimant's Exhibit 2, pp. 54-56; Respondents' Exhibit F, pp. 52-54).

9. On December 15, 2014, the Claimant received a written warning from her supervisor Janet Brink. The warning referenced a verbal counseling that the Claimant received in June 2014 for "aggressive and unfriendly interactions with office personnel at [Employer]. The written warning also referenced a change of policy to close the office from 12-1 every day that Ms. Brink instituted because the Claimant was working through lunch and did not have permission for overtime. The warning also noted that the Claimant had been argumentative with Ms. Brinks on November 10, 2014 when the Claimant was asked not to fill out paperwork on her workman's compensation claim but did it anyway and then on December 8, 2014 when the Claimant called in sick within one hour of her work start time. Finally a December 10, 2014 incident was noted when Ms. Brinks noted the Claimant became "combative" when she was told again that she could not work over 5 hours without taking a lunch break. Ms. Brink noted that this

discussion was done in public and was “a direct challenge to [her] authority” and put the Employer’s reputation at risk. Under “Corrective Action,” Ms. Brink stated that if the Claimant feels she “cannot or will not curb [her] argumentative and combative behavior and speak to me and all those you interact with while at work respectfully and professionally and follow rules that are presented to you then will need to separate your employment with [Employer].” She further noted that “since the lunch issue and the way you speak to staff has been discussed verbally & now in a written warning the next step for noncompliance will be termination of employment from [Employer].” The Claimant requested a chance to write a written response to the written warning that would also be placed in her file as she did not agree with what was written. She did sign the written warning, as did Ms. Brinks (Claimant’s Exhibit 12, pp. 200-201; Respondents’ Exhibit I, pp. 94-95).

10. On December 16, 2014 at 12:26 PM, Ms. Miffie Blozvich sent an e-mail to the Family Selection Committee members, including the Claimant, which stated that there would definitely be a meeting of the committee on Monday, December 22 at 8 AM (Respondents’ Exhibit K, p. 96).

11. On December 22, 2014 at 9:05 AM, the Claimant sent an e-mail to Ms. Brink and Ms. Blozvich stating, “I am SO sorry! I totally forgot that this morning was the meeting” (Claimant’s Exhibit 12, p. 202).

12. On December 23, 2014, the Claimant received written notice of a Verbal Warning. The reason for the warning was due to the Claimant missing the Family Selection Committee meeting on Monday, December 21, 2014 (although the meeting was on December 22, 2014). The notice indicated the Claimant is responsible for taking minutes and it is the second one the Claimant had missed without notification. The Corrective Action listed was that “if you fail to make another meeting without an excused absence you will be removed from this committee and could result in less hours scheduled in your work week” (Claimant’s Exhibit 12, p. 203; Respondents’ Exhibit I, p. 99).

13. On January 14, 2015, the Claimant saw Dr. Knackendoffel for a recheck, reporting that after the injection she had at the last visit she had dizziness and rapid heart rate, but she got over it and the injection seemed to help. She reported that the injection seems to be wearing off as the pain returned. The Claimant further reported that her motion has improved and she is using one crutch, but she feels she has plateaued. Dr. Knackendoffel offered a Synvisc injection without anesthetic due to her previous reaction that he assumed was due to the anesthesia. He opined that “her arthritis was aggravated by her work related injury.” However, he continued to note that he did “not think that she is a great surgical candidate for the meniscus due to her arthritis and body habitus” (Claimant’s Exhibit 2, pp. 59-61; Respondents’ Exhibit F, pp. 55-57).

14. On January 22, 2015 at 2:30 PM, Ms. Blozvich sent an e-mail to the Family Selection Committee members, including the Claimant, which stated that there

would be a meeting of the committee on Monday, January 26 at 8 AM (Respondents' Exhibit I, p. 100).

15. On Monday, January 26, 2015 at 8:31 AM, the Claimant sent an e-mail to Ms. Brink and Ms. Blozvich stating, "I am so Sorry, I did not get my reminder for the meeting this morning. Usually I get it on Friday but since I was out sick, I totally forgot about the meeting today. Ms. Brink responded to the Claimant's e-mail at 10:55 AM stating, "this is something you need to personally address with me & not by an e-mail. You did get here @ 8:00 & could have come over? Also, does your cell phone have a calendar that you could put your regularly scheduled meetings on it? We will discuss this later today" (Claimant's Exhibit 12, p. 204).

16. On January 27, 2015, the Claimant submitted a written letter of resignation stating that, "I am terminating this full time employment to take the time needed to heal. I will be seeking part time employment that will accommodate a schedule that will allow me to pursue other avenues, once I have recovered." She indicated her resignation was effective February 24, 2015, but that if four weeks' notice was not necessary, she would leave that up to Employer (Claimant's Exhibit 12, p. 205).

17. On January 30, 2015, the Claimant sent Ms. Brink an e-mail to ask if she would have time to talk that day. The Claimant also suggested the idea of her working at the ReStore instead of her current position (Claimant's Exhibit 12, p. 206). Per testimony, apparently, the Claimant resumed working at the Employer's administrative office after some time off.

18. On February 11, 2015 the Respondents filed a General Admission of Liability for medical benefits and temporary partial disability (Claimant's Exhibit 12, pp. 209-210; Respondents' Exhibit A).

19. On February 16, 2015, the Claimant was released to return to work with no restrictions (Claimant's Exhibit 2, p. 64).

20. On February 23, 2015, the Claimant reported her intermittent symptoms were unchanged from her last visit with Dr. Knackendoffel. She proceeded with a Synvisc injection and the Claimant was counseled that she needs to give the injection up to 6 weeks to start feeling the benefits. The Claimant was continued on physical therapy. Dr. Knackendoffel again opined that the Claimant, "is a poor surgical candidate because of her morbid obesity" (Claimant's Exhibit 2, pp. 65-68; Respondents' Exhibit F, pp. 58-61).

21. The Claimant was initially evaluated by Dr. James McLaughlin on referral from Dr. Knackendoffel on March 11, 2015. The mechanism of injury reported to Dr. McLaughlin was that "there was an irregular surface to the floor and the carpet there and she tripped over that injuring her left knee." He noted the Claimant had an MRI that showed a degenerative tear and that her treatment to date included physical therapy and two injections. The Claimant reported that the physical therapy has been helpful but

she is still in pain. She was using one crutch for short amounts of walking and two crutches for long walks. She advised that she has no previous left knee disorder. On examination, Dr. McLaughlin noted that the Claimant was tender at the left knee medial joint line. Because of her prior gastric bypass surgery, the Claimant does not take NSAIDS, but Dr. McLaughlin suggested that she may do well with a topical NSAID such as Voltaren gel (Claimant's Exhibit 1, pp. 1-3; Respondents' Exhibit G, pp. 65-67+).

22. On March 31, 2015, Ms. Brink prepared a written notice of termination of employment. She indicated that the Claimant had missed three Family Selection Committee meetings on February 24, 2014, December 22, 2014 and January 26, 2015. The letter stated that the Claimant was "warned after missing the last meeting on Monday, January 26, 2015 to not miss another Family Selection Committee meeting." The notice goes on to state that, "on Monday, March 30, 2015 you did attend the meeting but you were tardy with no acceptable excuse" (Claimant's Exhibit 12, p. 211; Respondents' Exhibit I, p. 102).

23. On April 6, 2015, the Claimant saw Dr. Knackendoffel with no change in symptoms in spite of a previous steroid injection and Synvisc injection. The Claimant was ambulating with crutches again at this point. Dr. Knackendoffel opined that the Claimant has had persistent pain for the past 6 months and she has failed conservative treatment. He did note that "her medial collateral ligament has healed" and that updated weight bearing radiographs indicate that her "osteoarthritis does not appear to have progressed." Dr. Knackendoffel acknowledged that the only option remaining option he has to offer is arthroscopy of the left knee, but cautioned that it "is risky due to the patient's morbid obesity." He explained to the Claimant that she is "at increased risk for infection and deep vein thrombophlebitis, as well as continued left knee pain." The Claimant nonetheless advised Dr. Knackendoffel that she was willing to accept the risks and wanted to proceed with the left knee arthroscopy for arthroscopic chondroplasty and partial medial and lateral menisectomy (Claimant's Exhibit 2, pp. 70-72; Respondents' Exhibit F, 62-64).

24. On April 7, 2015, Dr. Knackendoffel submitted an authorization request for "left knee arthroscopy with chondroplasty and partial medial and lateral menisectomies due to osteoarthritis and medial and lateral meniscal tears of the left knee" (Claimant's Exhibit 2, p. 73).

25. The Claimant saw Dr. McLaughlin again on April 13, 2015. She reported that she was terminated from her employment at the end of March for being 5 minutes late for a meeting. She advised Dr. McLaughlin that Dr. Knackendoffel was recommending surgery and she was waiting for that to be authorized. She reported continued pain in the left knee but the Voltaren gel was helping. She was elevating the leg more now that she was not working and noted the swelling had gone down. Dr. McLaughlin noted that the Claimant's orthopedic surgeon initially preferred a non-surgical course of treatment due to the comorbid issues, but noted that since the Claimant's condition has not improved, he now recommends surgery. Dr. McLaughlin likewise recommends the surgery, stating that it was his opinion that "it is reasonable

and necessary and related directly to her work injury of 11/06/2014." Dr. McLaughlin also recommended that the Claimant see Dr. Bowen, a psychologist, to evaluate and treat her for chronic pain issues (Claimant's Exhibit 1, pp. 12-13).

26. On April 15, 2015, the Claimant sent a letter to Ms. Brink and Kevin Chesney, the Board President for the Employer. She disputed certain allegations contained in the March 31, 2015 termination letter. The Claimant registered a dispute with her termination for cause because she "did not perform an act that [she] knew or should have known would lead to [her] termination." She disputed that arriving five minutes late for the meeting is grounds for termination. The Claimant pointed out that she is on work restrictions and using crutches to ambulate which is the reason she was five minutes late (Claimant's Exhibit 12, pp. 212-213).

27. The Claimant met with Dr. Bowen for a psychological evaluation on April 30, 2015. The Claimant advised Dr. Bowen that she was injured and working with restrictions and was moving slower as she was ambulating with crutches. After missing a couple of meetings at work, she reported she was a few minutes late to a meeting and her employment was terminated. The Claimant expressed that she was discouraged and frustrated with both her physical limitations and about being terminated and feeling that she was targeted because she was injured. The Claimant advised Dr. Bowen that she has diminished appetite and trouble with sleep as well as feelings of frustration, helplessness and hopelessness with frequent crying spells and a sense of shame because of her fall and because she has never been fired before. Dr. Bowen diagnosed the Claimant with "adjustment disorder with depressed mood." Dr. Bowen opined that the Claimant "appears to be insightful and well-motivated" and he felt that the Claimant would respond well to treatment. Dr. Bowen recommended a course of cognitive behavioral therapy with about ten sessions focused on treating depression as well as presenting psychological tools to help with pain management (Claimant's Exhibit 4; Respondents' Exhibit H).

28. On May 4, 2015, the Claimant saw Dr. McLaughlin and cleared up issues raised about whether or not she was working. The Claimant reported that she is associated with Two Rivers Birth Cooperative as a midwife but was not currently working and she was let go from Employer so she is not working there either. The Claimant continued to report left knee pain and felt that her left knee is going to give way on her. She was using crutches to ambulate. Dr. McLaughlin recommended a repeat MRI to determine if there was any change in the medial meniscus. He also referred the Claimant to Dr. Duree for evaluation and acupuncture treatments (Claimant's Exhibit 1, pp. 20-21).

29. The Claimant saw Dr. Duree for an initial evaluation and treatment on May 6, 2015. The goal for the acupuncture treatments was to reduce swelling of the knee and to help with the pain (Claimant's Exhibit 5, p. 93).

30. On May 12, 2015, the Claimant underwent an MRI of the left lower knee. The MRI images were reported and also compared to the prior November 14, 2014 MRI

images. The radiologist, Dr. Randall Gehl, noted that the "degenerative medial meniscus unchanged from November 14, 2014. Multicompartment medial and patellofemoral DJD moderate." The ACL and PCL and collateral ligaments appeared intact and the severe medial compartment DJD and degenerative meniscus signal abnormality was unchanged. In the lateral compartment, a small joint effusion was noted with minimal DJD and a normal meniscus. Collateral ligaments were intact and there were no loose bodies noted (Claimant's Exhibit 8, p. 177; Respondents' Exhibit E, p. 45).

31. On May 12, 2015, after reviewing the MRI of the Claimant's knee (presumably the November 14, 2014 MRI and not the one performed on May 12, 2015, although his note does not indicate this), Dr. James Lindberg opined as to the reasonableness and necessity of the proposed left knee arthroscopy. He noted that his reading of the MRI disc showed, "a varus deformity of the knee with medial meniscal extrusion, loss of the medial edge of the cartilage, and the medial tibial plateau and medial femoral condyle with a horizontal cleavage tear, likely chronic, of the medial meniscus." He further noted significant chondromalacia of the patellofemoral joint with complete loss in the medial patella and medial trochlea. Based on this reading, Dr. Lindberg opined that "a scoped medial menisectomy and chondroplasty would be of no benefit." He also found "it is unlikely to a reasonable degree of medical certainty that the trip on the carpet caused the medial meniscal tear or the preexisting significant osteoarthritis." He recommended denial of the surgery due to lack of benefit and because it "would probably hasten the development of further arthritis" (Respondents' Exhibit B, p. 8).

32. On May 13, 2015, the Claimant reported to Dr. McLaughlin that seeing Dr. Duree has definitely helped with the pain and she felt less soreness. The Claimant also reported that her visit with Dr. Bowen was helpful and a follow up visit is scheduled for June. Dr. McLaughlin also reviewed the reports from Dr. Duree and Dr. Bowen. He also reviewed the MRI performed on May 12, 2015. Dr. McLaughlin noted that the Claimant was working on losing weight and had gone from 283 pounds to 276 pounds in the 2 months she had been treating with him. In discussing the MRI findings, Dr. McLaughlin did note that "the guidelines are somewhat against operating on a meniscus if the main issue is degenerative." He recommended the Claimant see Dr. Knackendoffel again to obtain his opinion on whether arthroscopy is an appropriate step at this point. Dr. McLaughlin recommended that the Claimant continue to treat with Dr. Duree for acupuncture and that she see Dr. Bowen for 10 visits (Claimant's Exhibit 1, pp. 24-27; Respondents' Exhibit G, pp. 69-72).

33. The Claimant saw Dr. Knackendoffel again on May 18, 2015 and she reported that her current symptoms included "pain, instability, swelling, weakness, decreased range of motion, stiffness and sleep disturbance due to pain. The Claimant reported that her pain was improving some with the acupuncture treatments that she had been receiving for 2-3 weeks and she continued to lose weight (note: the Claimant had weighed 291 pounds on November 19, 2014 and her current weight on May 18, 2015 was 276 pounds). Dr. Knackendoffel noted that the Claimant was still waiting

approval for left knee arthroscopy. He again opined that "arthroscopy of the left knee remains an option but is a risky surgical procedure for the patient. She should continue her weight loss efforts. She will follow up with Dr. McLaughlin, unless arthroscopy of the left knee is preapproved through workers comp" (Claimant's Exhibit 2, pp. 74-76).

34. On May 21, 2015, the Claimant saw Dr. Duree for her fifth visit and the Claimant reported that she was very happy with the results of the acupuncture and that it has really helped her (Claimant's Exhibit 5, p. 97). She continued to see Dr. Duree through June of 2015 and reported benefit from the acupuncture. On June 22, 2015, the Claimant reported that the swelling in her leg had gone down by an inch and that the reduced swelling also reduces her pain (Claimant's Exhibit 5, p. 103).

35. On June 3, 2015, the Claimant saw Dr. Mark Failinger for an independent medical examination. She described her mechanism of injury to Dr. Failinger as follows: "she was trying to close up the office one afternoon and she had a pair of shoes on that she states got stuck on a carpet. She tripped with her right foot and she tried to grab an object to stabilize herself and she put her left leg, she states, at 'an odd angle.' She did not fall. She did feel a loud pop. She thinks her left knee was twisted, but, she does not recall exactly what position it was in." The Claimant reported to Dr. Failinger that the pain was severe right away and she felt her knee swell (Respondents' Exhibit C, p. 9). On physical examination, Dr. Failinger notes that the Claimant uses crutches to ambulate and does not appear to straighten the knee fully with ambulation. He noted it was difficult to appreciate any effusion due to the size of the knee. He noted tenderness to touch even slightly on the skin on the medial aspect, with pain he found to be significantly out of proportion to anything demonstrated on examination and the reported MRI. He noted very limited range of motion but found that pain behaviors limited his examination (Respondents' Exhibit C, p. 12). Dr. Failinger opined that the Claimant's presentation was unusual and the Claimant's reported pain "appears to be significantly out of proportion to any pathology created by the incident." He stated that he had not seen the Claimant's MRI and that this would be most helpful. Nevertheless, he opined that the Claimant appeared to have "an exacerbation of preexisting degenerative joint disease without an obvious new acute injury." He felt that all of Dr. Knackendoffel's treatments were directed toward treatment of an arthritic flare up and there was a low probability that the proposed arthroscopy would help. He further opined that based on the Claimant's pain behaviors, it reduced the probability that the arthroscopy would help and the Claimant's knee function would be improved (Respondents' Exhibit C, pp. 13-14).

36. On June 8, 2015, Dr. Failinger prepared an addendum to his IME report. He had reviewed additional medical records. On June 16, 2015 he reviewed still further additional medical records, including the November 14, 2014 MRI report. After reviewing these additional records, he opined that the Claimant's symptoms are "significantly out of proportion to the MRI, which is not definitive for a meniscus tear, but, does in fact show high-grade chondromalacia (degenerative joint disease) of the patella." He noted that his opinion did not change and still maintained that "there is a lower than medical probability given her presentation and this MRI that arthroscopy

would be of help with her symptomatology and it is likely that the incident created an exacerbation of preexisting patellofemoral disease, although either extension of a previous meniscus tear or creation of a possible new meniscus tear is not entirely excluded (Respondents' Exhibit C, pp. 16-18).

37. On June 24, 2015, the Claimant saw Dr. McLaughlin, reporting that the acupuncture with Dr. Duree has been helpful for pain and increased function. Dr. McLaughlin recommended 6 more visits with Dr. Duree which brought the total to 18 visits, which he felt was within the guidelines as the Claimant reported increased function and decreased pain. Dr. McLaughlin also recommended that the Claimant see Dr. Matsumura, a physical medicine rehab specialist as he was not certain if much more acupuncture would be authorized given the guidelines. Dr. McLaughlin continued the Claimant's activity restrictions to standing and walking 1 hour at a time (Claimant's Exhibit 1, pp. 34-35).

38. The Claimant continued to treat with Dr. Duree for acupuncture through July of 2015. As of July 20, 2015, the Claimant was having problems with left leg swelling. She had been showing improvement until the prior week when the leg gave out on her and she almost fell. The Claimant stated that the acupuncture helps keep the swelling down (Claimant's Exhibit 5, p. 109a).

39. At an initial evaluation with Dr. Matsumura on July 21, 2015, Dr. Matsumura noted that the Claimant has undergone conservative management which has not improved her pain and surgery had been recommended but not authorized and is in litigation. After review of records and examination, Dr. Matsumura recommended a medial offloading knee brace or a lateral wedge in the Claimant's shoe to try to offload the medial knee. She recommended an aquatic exercise program to assist with weight reduction and due to difficulty with exercise because of knee pain. Dr. Matsumura also recommended a home TENS unit and a prescription for Duloxetine for both chronic pain and depression (Claimant's Exhibit 3, pp. 77-81).

40. The Claimant saw Dr. McLaughlin again on August 24, 2015 and he noted marked tenderness of the medial and lateral joint line of the left knee with no extension and limited flexion. Dr. McLaughlin also reviewed Dr. Failinger's IME report with the Claimant. In response he opined that "based on degenerative issues alone, arthroscopy would be low probability to improve her condition, but she is in such pain with so much limitation, it changes the risk/benefit ratio (Claimant's 1, pp. 40a-40b).

41. The Claimant saw Dr. Matsumura again on September 1, 2015 reporting that the request for the left offloading brace and/or wedging was denied by insurance. The claimant also reported that the aquatic physical therapy was helpful in working on range of motion and she was ready to transition to an independent program. Dr. Matsumura continued to recommend the medial offloading knee brace to help prevent further buckling and falls and to allow the Claimant to transition away from crutch use (Claimant's Exhibit 3, pp. 89c-89g).

42. On September 15, 2015, the Claimant saw Dr. Matsumura again reporting that she obtained a left medial offloading knee brace on her own as it was not approved through Workers' Compensation. She reported a significant overall improvement in walking with the brace and she feels more secure and has less knee buckling. The Claimant reported continued knee pain, but improved with the brace use. The Claimant reported that she has continued her home exercise and aquatic program and feels that her leg is getting stronger. Dr. Matsumura continued to recommend left knee surgery and while the surgery issue remains pending due to litigation, continue use of the knee brace to prevent falls. She noted that the Claimant "has been through several months of conservative management treatment and I really have nothing else to add other than continuing in her exercise programs. Again, I do think that the best treatment option for her given her goals to return to work ambulating without assistive devices and orthotics would be surgical management" (Claimant's Exhibit 3, pp. 89m – 89p).

43. The Claimant saw Dr. McLaughlin on October 16, 2015, reporting that her knee was doing better functionally with the brace, her TENS unit, her home program and a pool program. She still reported a lot of pain and expressed continued interest in surgery. Dr. McLaughlin reviewed options for proceeding with surgery with the Claimant, including proceeding under Medicaid and possibly with Dr. Copeland as the surgeon as he did her right knee surgery (Claimant's Exhibit 1, pp. 40j-40k; Respondents' Exhibit G, pp. 74-75).

44. The Claimant testified at the hearing that since her injury, she can't do full weight-bearing, she has gait issues and she can't support her own weight or any other weight. She testified that prior to her November 6, 2014 injury, she was not having these issues. The Claimant testified that her expectation from surgery is to clean up her meniscus, relieve her of pain and relieve her of instability. She testified that she understands that her weight presents a risk, but feels that the overall benefits of the proposed surgery outweigh the risks.

45. The Claimant testified that she was terminated from employment due to issues related to attendance at meetings. The Claimant testified that Employer terminated her on March 31, 2015. In the weeks leading up to her termination, she was on work restrictions issued by Dr. McLaughlin, including mostly sit down duty, and was using at least one crutch to ambulate. The Claimant testified that as part of her work, she was required to attend meetings held by various committees affiliated with Employer. According to Employer's "roster" of committees dated November 13, 2014 (created by the Claimant herself), the Claimant was required to attend four different meetings for the following committees: Board of Directors, Re-Store Advisory, Safety, and Family Selection (Respondents' Exhibits, p. 90). The Claimant testified that the schedules for the Board of Directors, Re-Store Advisory, and Safety Committee meetings were set at one meeting per month on a standing date. She testified that these meetings' times and dates were firm, and did not change. She testified that she was never late or absent for any of those meetings. Ms. Brink confirmed in her testimony that the Claimant was required to attend all of those meetings, and was never late or absent (without prior notice) for any of those meetings. She testified that she was

five minutes late to a Family Selection Committee meeting. Although a March 31, 2015 letter states she missed 3 meetings, the Claimant disputes this. With respect to a February 24, 2014 family selection committee meeting, the Claimant testified that she was not initially part of the Family Selection Committee and she doesn't remember that her attendance was required at this meeting. With respect to a December 22, 2014 meeting, the Claimant testified that she was not aware of the meeting due to confusion on her part as to whether or not the meeting was definitely going to occur. The Claimant testified that she stopped to retrieve mail on the way in to the office, and when she arrived, the office was empty, but this was not unusual. Later on December 22, 2014 when she checked her e-mails, she saw the meeting confirmation. By this time the meeting was about half over and she did not want to interrupt. With regard to a January 26, 2015 meeting, the Claimant testified that the meeting confirmation was sent at 2:30 PM on January 22, 2015 and she was sick and left work early that day, so she did not see the confirmation e-mail in time. Then on March 30, 2015, the Claimant testified that she was five minutes late for the meeting because she stopped at the post office to get mail but was on 2 crutches at the time and it took her longer to get to the meeting because of this. On cross-examination, the Claimant testified that her role at the Family Selection Committee meetings, which were generally held on the 4th Monday of the month, was to record the proceedings. If she did not attend the meeting, then another participant would be required to record the meeting. The meetings were held in the conference room around the corner from the Claimant's desk. On redirect examination, the Claimant further testified that the Family Selection Committee meetings did not actually take place every 4th Monday. Sometimes the meeting would not occur and whether or not there would be a meeting was up in the air until the Friday before at times. The Claimant testified about a conversation in front of her desk between Ms. Brink and Ms. Blozvich where they discussed whether there an upcoming FSC meeting would take place. The Claimant testified that Ms. Brink told Ms. Blozvich that "this had to stop" because "the confusion was too much." The Claimant testified she asked both Ms. Brink and Ms. Blozvich whether there was a meeting, because she was confused. The Claimant testified Ms. Brink told her to "not pay attention to our conversation," and that the Claimant would be told whether there would be a meeting or not.

46. The Claimant also discussed a prior written warning from Ms. Brink dated December 15, 2014 regarding a lunch hour policy (Claimant's Exhibit 12, p. 200). The Claimant testified that when she first began working at the executive office, there was not a set lunch hour. The Claimant testified that she would customarily take her lunch break around other employees' schedules so that there was appropriate coverage at the office. The Claimant testified that at some point Ms. Brink changed the lunch break policy and set a defined lunch hour from 12:00 to 1:00 p.m. The Claimant testified that Ms. Brink disciplined her because, at times, she would work into the defined lunch hour due to longer than anticipated phone calls or the press of other business, including meeting with Employer's clients. The Claimant disagreed with Ms. Brink's written statement that Claimant was "argumentative and combative." The Claimant testified that when she would ask a question for clarification of Ms. Brink, then Ms. Brink would often become "very upset," and that Ms. Brink would not understand why Claimant would need to ask questions. That written warning also referenced conduct surrounding a claim form relating to this workers' compensation claim: "[Y]ou were asked not to fill out

paperwork concerning your workman's comp claim and did it anyway. I asked you not to do your own paperwork…and deleting the file in front of me does not correct your insubordinate action." The Claimant testified that she requested a copy of Employer's First Report of Injury regarding the November 6, 2014 injury, but did not receive a copy, and so was filling out her own copy of the report with her recollection of how the injury happened for her own records, and not for filing with Employer or Insurer.

47. The Claimant also discussed a letter of resignation she had previously submitted. The Claimant testified that she submitted her written resignation to Ms. Brink on January 27, 2015 (Claimant's Exhibit 12, p. 205). The Claimant testified that she told Ms. Brink that she could not imagine working for anyone but Employer because she believed in its mission, but she needed to resign because she needed time to rest and heal her knee. The Claimant testified that Ms. Brink offered concessions regarding scheduling so that the Claimant could continue working, including taking sick leave first before leaving Employer. The Claimant testified that she took leave time, but then returned to her normal job. She testified she returned to work because after speaking with supervisors, including Ms. Brink, she felt as if she was a valued employee.

48. Dr. Failinger testified at the hearing as an expert in the areas of orthopedic surgery, sports medicine and Level II accreditation matters. In addition to meeting with the Claimant, Dr. Failinger reviewed medical records dating back to an August 2010 injury through 2011 when that case was closed. He also reviewed records from November 2014 to the present. In reviewing the Claimant's left knee MRI dated November 14, 2014, Dr. Failinger opined that there were no acute findings and the pathology was the result of degenerative joint disease. In reviewing the Claimant's May 12, 2015 MRI of the left knee, Dr. Failinger again opines that the pathology seen in the imaging is degenerative changes with no evidence of acute injury. Specifically, Dr. Failinger opined that a "horizontal cleavage tear" is not really a "tear." Rather, especially in overweight patients, this is the nature of the meniscus, it is a sign that the meniscus has disintegrated, crumbling over time until it collapsed. This is a degenerative process. Going back to the November 14, 2014 MRI and the reference to chondromalacia of the patellar facets, Dr. Failinger notes that this indicates the facet has lost it surface cover of cartilage, this is an arthritic process and is almost always a degenerative process. In terms of the reference to "moderate joint effusion," Dr. Failinger explained that in the synovial fluid there are components that dissolve particles. If particles are present, fluid will occur. Per the imaging, Dr. Failinger opines that the Claimant has a preexisting left knee condition including both degenerative joint disease and a degenerative meniscus. He opines that genetics is one factor, and obesity and age are other contributing factors in this case. In looking at the Claimant's age, body habitus and the pathology, Dr. Failinger opined that it is medically probable that the Claimant had symptoms in her left knee regardless of whether she sought medical treatment or not. With the description of a "pop," the physicians would look for evidence of acute or new pathology, but in the Claimant's case there is none, the pathology is all degenerative. Dr. Failinger opined that the surgery proposed by Dr. Knackendoffell is to address pre-existing degenerative pathology. Further, Dr. Failinger opined that there are other concerns about the reasonableness of surgery in this case as well. Dr. Failinger testified that there are a number of factors to indicate that the Claimant is likely to have a poor result from this

proposed surgery. Dr. Failinger opined that arthroscopy in the face of arthritis doesn't improve the condition better than conservative treatment. He also opined that in the face of morbid obesity, outcome is poor as this is a mechanical problem. Dr. Failinger also opined that poor range of motion already exists in this case and surgery could make this worse. Dr. Failinger also finds the diffuse nature of the Claimant's pain problematic for the proposed surgery as this is an indicator that the pain may not even be caused by the pathology that is present. Additionally, Dr. Failinger has concerns that the Claimant's mood disorder / depression is another contraindication for surgery. Finally, Dr. Failinger points to the Medical Treatment Guidelines for lower extremity surgical indications/considerations (Respondents' Exhibit J, p. 108 - MTG Rule 17, Exhibit G, p. 61) and notes that the guidelines specifically state that it is not clear that a partial menisectomy for a chronic degenerative meniscal tear is beneficial. Ultimately, Dr. Failinger opined that the proposed surgery is not intended to address a condition related to the Claimant's work injury, but rather a preexisting condition. The brace and shoe wedge, likewise, are intended to address the preexisting condition and not any acute injury that happened on November 6, 2014.

49. On cross-examination at the hearing, Dr. Failinger testified that, not only was there no sign of an acute injury, there is no aggravation as there were no new signs of pathology created in the November 6, 2014 event. In terms of exacerbation, Dr. Failinger agreed there was an increase in symptoms after the Claimant felt a "pop" on November 6, 2014 and she had not received any medical treatment between 2011 and 2014 for her lower extremity. He agreed that the Claimant did not undergo any MRIs and had received no recommendations for knee surgery prior to the November 6, 2014 event. In terms of whether the recommended surgery is reasonable and necessary, Dr. Failinger continued to testify that he did not believe the Claimant was a good candidate. Dr. Failinger agreed that the Claimant had undergone prior right knee surgery with a good result. He also conceded that the Claimant was over a year out from the incident and she cannot ambulate without a brace and crutches which means that she is not doing well without the surgery. However, Dr. Failinger continued to opine that proceeding with the proposed surgery may make her condition worse.

50. On redirect examination at the hearing, Dr. Failinger was asked whether the high level of the Claimant's pain changes the risk/benefit ratio in this case and he responded that he does not believe it changes the risk/benefit ratio, rather it changes the Claimant's tolerance for risk. Further, Dr. Failinger opines that the failure of conservative treatment in this case does not bode well for successful surgery because if the therapy did not help with range of motion, the surgery is also not likely to help an arthritic patient. Unless there is an acute problem such as a loose body in the joint that can be removed, an arthroscopy is not likely to help. In readdressing the issue of "exacerbation," Dr. Failinger clarified that any exacerbation that the Claimant experienced due to her November 6, 2014 event was not permanent, it was a temporary "flare up." He noted that as to this issue, the April 6, 2015 medical note of Dr. Knackendoffel (Respondents' Exhibit F, p. 64) indicates that the Claimant's "medial collateral ligament has healed" and that this could be an explanation for the pain from the temporary exacerbation. In any event, on re-cross examination, Dr. Failinger

reiterated that his recommendation is that the Claimant should not proceed with the arthroscopy as he has strong concerns.

51. The Executive Director for the Employer and the Claimant's supervisor, Janet Brink, testified at the hearing. She testified that she has held this position for 2 years and 7 months and she is familiar with the Claimant. The Employer is a non-profit, Christian-based group that provides housing to people in need who perform work as a prerequisite. The Claimant's normal work hours up through November 6, 2014 were 8:00 am – 5:00 pm. Sometime after this, the policy changed and on Fridays the hours were changed to 8:00 am – 12:00 pm. Ms. Brink testified that the Claimant's employment was terminated on March 31, 2015 because she missed three family selection meetings and was late to a fourth one. The family selection meetings are scheduled from 8:00 am – 9:00 am and are where applications from families seeking housing are brought to the meeting and decisions are made to approve, deny, or request more information. The meetings are also for updates on families that are already selected to discuss their progress towards "sweat equity" in the program. Ms. Brink testified that the Claimant was 15 minutes late to the March 30, 2015 meeting. She testified that she knew the time because she had to take notes of the meeting since the Claimant was not there. The Claimant is the recording secretary for the family selection meeting and it is her duty to take minutes, type them and then turn them in to Ms. Brink and to Miffie Blozvich, the chairwoman of the family selection committee. The family selection committee meetings are held the 4th Monday of the month and participants are notified about the meetings by e-mails from Ms. Blozvich. Ms. Brink testified that for each of the 3 meetings that the Claimant missed and the one when she was late, there were notification e-mails sent and the Claimant was listed as a recipient of these e-mails. Ms. Brink testified that whether the e-mail was addressed to the Claimant individually or to "Admin," the Claimant would have received the e-mail. During the relevant time period, Ms. Brink testified that she was not aware of any problems with the e-mail system. Ms. Brink testified that, in addition to the e-mail notification, the Claimant would have access to the Google calendars for Ms. Brink and Ms. Blozvich at home and at work, and these calendars would also have shown the meetings. Ms. Brink testified that the Claimant's desk is located at the front door of the office and is down a hall from the conference room where the meetings are held, about 25 yards away. The meetings are always held in this lower level conference room. Ms. Brink testified that if the Claimant does not attend the meetings, Ms. Brink has to take notes and this limits her participation in the meetings. She testified that this is problematic because, as the Executive Director for Employer, it is important for her to be able to interject in the meetings. Ms. Brink testified that after the Claimant missed the third meeting, she was counseled about her poor planning and she was told to put the meetings into her phone calendar and that missing the meetings could affect her continue employment with Employer. Ms. Brink testified that when the Claimant was counseled about missing the first three meetings, her response was that she "forgot." Ms. Brink testified that the Claimant did not say that she didn't receive notice of the meetings or that she was confused about whether or not the meetings were proceeding. Ms. Brink also testified that when she counseled the Claimant that if she continued to miss meetings, she might be terminated, that the Claimant agreed that she understood this. Ms. Brink testified that

the letter terminating the Claimant's employment was provided to the Claimant in Ms. Brink's office on March 31, 2015 and was discussed with the Claimant. Ms. Brink testified that the Claimant was angry but not surprised about the termination and the Claimant stated that she suspected it. In looking at the Claimant's mileage reports (Respondents' Exhibit K), Ms. Brink noted that they indicate that between November 6, 2014 and the beginning of January of 2014, there were no mileage reports as the Claimant did not do post office runs. Ms. Brink testified that during that time period, she did the post office runs. Ms. Brink also testified that she had recollection of the Claimant walking slowly and gingerly in the office before November 6, 2014 and that she was in obvious pain.

52. On cross examination during the hearing, Ms. Brink initially testified that she had no recollection of indicating to Insurer that Claimant's claim should be denied, or that Claimant had preexisting knee problems. She initially testified she did not recall having any conversations with Insurer about whether the claim should be admitted or denied. She testified that she did recall that Claimant's claim was denied for several months. However, in a First Report of Injury completed by Ms. Brink, she noted that Employer was questioning liability. Ms. Brink specifically noted that Claimant's left leg "had non work related problems" (Claimant's Exhibit 12, p. 197). Ms. Brink testified that she had in fact given the Claimant a copy of the First Report. However, when asked why the Claimant would be filling out her own copy if she had a copy of the First Report filed by Ms. Brink, Ms. Brink testified that she did not have an answer. Ms. Brink testified that she did not recall whether Claimant told her she was filling out the report for her own records, but testified that she would have had a problem with a duplicate First Report because there might have been a conflict. When asked why there would be a conflict if Ms. Brink had indeed given the Claimant a copy of the original First Report, Ms. Brink testified that she did not know. Although Ms. Brink initially testified that she was aware that the Claimant's claim was denied for a period of months, Ms. Brink testified that she "didn't know" whether the claim was denied when she issued the written warning on December 15, 2014. The ALJ notes that Ms. Brink warned the Claimant to not fill out a First Report of Injury for Claimant's own records at approximately the same time when Ms. Brink filled out her First Report of Injury, noting: "Employer Questioning Liability" (Claimant's Exhibit 12, p. 197). Ms. Brink also testified that the mileage records showed that the Claimant did post office runs on 9/22/2014, 8/25/2014, 7/28/2014and 6/23/2014. She testified that there would have been a family selection meeting on at least one of those days, but she is not sure if there were meetings on all of those days. If there were not enough applications, then the meeting might not happen. Ms. Brink testified that the Claimant never missed a Board of Director meeting, a ReStore Advisory Committee meeting or a Safety meeting with the exception of one Board meeting that was an excused absence. After reconsideration, Ms. Brink testified that it was possible that she was not at the March 30, 2015 family selection meeting and may not have personal recollection of the exact time the Claimant arrived. Instead, Ms. Brink testified it is possible she was at the ReStore and that Ms. Blozvich told Ms. Brink that the Claimant was late to the meeting. On redirect testimony, Ms. Brink elaborated that she had just returned from a week-long conference trip to Atlanta

at the time of the March 30, 2015 meeting and she may have relied on the report of Ms. Blozvich that the Claimant was late to the meeting.

53. In rebuttal testimony at the hearing, the Claimant testified again and stated that the testimony of Brink was not accurate about the Claimant having knee symptoms prior to November 6, 2014. The Claimant testified that she was having right knee problems before November 6, 2014 and not left knee problems. The Claimant also testified that Ms. Brink did not ever tell her that if she missed another meeting, the Claimant would be fired. Rather, Ms. Brink just counseled her that it was important to be there. As for the March 30, 2015 family selection meeting, the Claimant testified that Ms. Brink was not present at that meeting and her earlier testimony that she was there taking notes was not true. The Claimant testified that Ms. Blozvich approached her at the meeting and asked if Ms. Brink had reminded her about the meeting, and the Claimant told Ms. Blozvich that she had not. The Claimant further testified that she was not 15 minutes late but only 5 minutes late and the meeting participants were still going over the minutes of the last meeting when she arrived.

54. In sur-rebuttal testimony, Miriam Blozvich was asked to testify. She stated that she has worked for Employer for 2 years and her position is Development Director. She is the Chairwoman of the family selection committee. She testified that the Claimant did attend the March 30, 2015 meeting which began at 8:00 am, but that the Claimant arrived approximately 15 minutes late. Ms. Blozvich testified that Ms. Brink was also present at the meeting and was taking minutes for the meeting until the Claimant arrived. On cross-examination, Ms. Blozvich testified that she did not tell Ms. Brink the Claimant arrived late after the meeting. Rather, Ms. Blozvich recalls that it was part of the meeting. Ms. Blozvich testified that it was possible that the Claimant was only 10 minutes late and not 15 minutes late, but it was not likely that she was only 5 minutes late.

55. There was a considerable amount of conflicting testimony surrounding the issues relate to the reason for the Claimant's termination. In taking all of the testimony into account and in considering the related documentary evidence, the ALJ finds that the Claimant's testimony is more credible and persuasive than that of Ms. Brink and Ms. Blozvich with regard to the Claimant's attendance at the March 30, 2015 Family Selection Committee meeting. Specifically, the ALJ finds that the Claimant was, more likely than not, approximately five minutes late for the meeting. The ALJ also finds that while the Claimant had received warnings in the past that conduct such as missing a meeting or failing to comply with company policy regarding taking lunch at the correct time or refraining from improper communication with staff could result in discipline, up to the termination of employment, the Claimant was not ever advised that arriving late to a meeting would result in termination. Moreover, on December 23, 2014, the Claimant received notification of a verbal warning that indicated that failing to attend another Family Selection Committee without an excused absence would result in the Claimant being removed from the committee and "could result in less hours scheduled in your work week." This is a considerably lesser discipline than termination of employment. Further, even this discipline was not imposed when the Claimant missed the scheduled

January 2015 meeting, which was the next meeting after the missed December meeting. Thus, the ALJ finds that, more likely than not, neither the Claimant nor any reasonable person would have understood that arriving late for a committee meeting was a violation of company policy that would result in termination of employment.

CONCLUSIONS OF LAW
Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits - Reasonable, Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury in a compensable case, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. § 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

The Claimant’s testimony and the medical records establish that prior to her November 6, 2014 work injury, to the extent that the Claimant had a preexisting arthritic condition in her left knee, it was largely asymptomatic. There was a prior incident in August of 2010 when Claimant worked for a different employer where she was diagnosed with acute bilateral knee sprain. However, after 2011, the Claimant did not receive any treatment for the left knee. The Claimant underwent surgery in July 2011 for the right knee, but not the left. In August of 2011, the Claimant was still reporting pain in her right and left knees and her physician did not slight crepitation in her left knee. Nevertheless, there was no further active treatment per the medical records in evidence.

Since November 6, 2014, the Claimant has treated at Community Hospital, and with Dr. Knackendoffel, Dr. McLaughlin, Dr. Duree and Dr. Matsumura. She also received evaluation and treatment with Dr. Bowen for psychological matters. The Claimant’s medical records were evaluated by Dr. Lindberg and the Claimant underwent an IME with Dr. Failinger. Each of these treaters and evaluators were presented with a consistent mechanism of injury of a trip on carpet in the office that did not result in the Claimant falling to the ground, but resulted in a pop of her left knee as the Claimant caught herself. There were MRIs of the left knee performed on November 14, 2014 and May 12, 2015.

On the one hand, Dr. Knackendoffel, McLauglin and Matsumura specifically attribute the pain, swelling and other symptoms the Claimant is currently experiencing to an exacerbation or aggravation of the Claimant's preexisting degenerative joint disease and significant osteoarthritis. On the other, Dr. Lindberg finds no acute injury whatsoever and Dr. Failinger, to the extent he finds an exacerbation of the preexisting condition, also finds that the exacerbation was temporary and has resolved and current treatment is now being directed solely to the preexisting condition. Both Dr. Lindberg and Dr. Failinger opine that the MRI of the Claimant's left knee shows no overt pathology providing evidence that the Claimant's current knee pain was caused, aggravated or accelerated by her work injury.

Nevertheless, due to persistent pain, swelling, lack of range of motion, and the Claimant's difficulty with ambulation, the Claimant's treating physicians Dr. Knackendoffel, Dr. McLaughlin and Dr. Matsumura recommend that the Claimant recommend that the Claimant proceed with left knee arthroscopy. Initially, Dr. Knackendoffel was not in favor of the surgery, stating that the Claimant was not a good candidate for surgery and that it would be the last choice due to the Claimant's morbid obesity, increased risk of DVT, infection and continued pain. Later, on April 7, 2015, Dr. Knackendoffel submitted the request for left knee arthroscopy with chondroplasty and partial medial and lateral menisectomies. He continued to acknowledge that the procedure would be risky but opined that due to failed conservative treatment, it was the only remaining option. Dr. McLaughlin and Dr. Matsumura agreed that the best remaining treatment option for the Claimant was the proposed surgery as they had little more to add to the conservative management treatment for the goal of returning the Claimant to ambulation without assistive devices and orthotics. With respect to the medial offloading knee brace and lateral wedge in the Claimant's shoe recommended by Dr. Matsumura, this was denied by insurance. The Claimant obtained the left medial offloading knee brace on her own as it was not approved through Workers' Compensation. She reported a significant overall improvement in walking with the brace and she feels more secure and has less knee buckling. The Claimant reported continued knee pain, but improved with the brace use. The Claimant reported that she has continued her home exercise and aquatic program and feels that her leg is getting stronger. Dr. Matsumura continued to recommend left knee surgery and while the surgery issue remains pending due to litigation, continue use of the knee brace to prevent falls.

In contrast, Dr. Failinger opines that the lack of acute or traumatically induced pathology on the MRI means that the chronic degenerative pathology is the more likely source of the Claimant's current pain. If the Claimant's treating physicians are treating the arthritis, then they are not treating the Claimant for the effects of her work injury. In his medical record review, Dr. Lindberg provided an opinion consistent with Dr. Failinger.

In addition to the issue of relatedness of the proposed surgery to the medical condition resulting from the work injury, Dr. Failinger presented very strong opinions as to the reasonableness of the proposed surgery. In referring the Medical Treatment Guidelines, Dr. Failinger points out that there are a number of factors to indicate that the Claimant is likely to have a poor result from this proposed surgery. Dr. Failinger opined that arthroscopy in the face of arthritis doesn't improve the condition better than conservative treatment. He also opined that in the face of morbid obesity, outcome is poor as this is a mechanical problem. Dr. Failinger also opined that poor range of motion already exists in this case and surgery could make this worse. Dr. Failinger also finds the diffuse nature of the Claimant's pain problematic for the proposed surgery as this is an indicator that the pain may not even be caused by the pathology that is present. Additionally, Dr. Failinger has concerns that the Claimant's mood disorder / depression is another contraindication for surgery. In referencing the Medical Treatment Guidelines for lower extremity surgical indications/considerations (Respondents' Exhibit J, p. 108 - MTG Rule 17, Exhibit G, p. 61) he notes that the guidelines specifically state that it is not clear that a partial menisectomy for a chronic degenerative meniscal tear is beneficial. Ultimately, Dr. Failinger opined that the proposed surgery is not intended to address a condition related to the Claimant's work injury, but rather a preexisting condition. The brace and shoe wedge, likewise, are intended to address the preexisting condition and not any acute injury that happened on November 6, 2014.

In considering the conflicting medical opinions, on the issue of causation and whether or not the Claimant's work injury exacerbated or aggravated her preexisting condition, the opinions of the Claimant's treating doctors are more persuasive than that of Dr. Failinger and Dr. Lindberg. The medial offloading knee brace and orthotics recommended by Dr. Matsumura are successfully relieving the Claimant from the effects of the aggravation of her preexisting condition, and are reasonably necessary medical treatment in this case.

With respect to the proposed surgery, crediting the persuasive opinion of Dr. Failinger, it is more likely than not that the surgery is treatment directed solely to the preexisting osteoarthritic condition and degenerative joint disease, and not to any exacerbation or aggravation caused by the Claimant's November 6, 2014 work injury. In addition, crediting the opinion of Dr. Failinger and with reference to the Medical Treatment Guidelines, more likely than not, the proposed surgical intervention is not likely to be beneficial. In light of the numerous and serious risks posed by this surgery for the Claimant in this case, the proposed surgery is not reasonably necessary to cure and relieve the Claimant of the effects of her work injury.

In sum, the Claimant has proved by a preponderance of the evidence that the left knee medial offloading brace and shoe wedge orthotic are reasonably necessary to cure and relieve the Claimant of the effects of her November 6, work injury. However, the Claimant has failed to establish that the proposed left knee arthroscopy is reasonably necessary to cure and relieve the Claimant of the effects of her November 6, work injury.

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

In this case, the Claimant established that she has missed work and suffered a wage loss effective April 1, 2015. The issue is whether or not the loss of income is causally related to her work injury. Here, the Claimant had submitted a letter of resignation on January 27, 2015 to Employer stating that she needed to terminate her full time employment there in order to seek part time employment that would give her time to heal. Within a few days, the Claimant's letter of resignation was withdrawn and per the credible testimony of the Claimant, the Claimant was offered some scheduling concessions and the ability to take some sick leave time. After this, the Claimant did return to her full time position with the Employer. On February 16, 2016, the Claimant was released to return to work with no restrictions by Dr. Knackendoffel. However, subsequent to that, the Claimant has remained on crutches and later obtained a medial offloading brace due to instability of the knee and buckling of the knee which put her at risk for falls and further injury.

The Claimant testified at the hearing that since her injury, she can't do full weight-bearing, she has gait issues and she can't support her own weight or any other weight. She testified that prior to her November 6, 2014 injury, she was not having these issues. Her treating physician Dr. Knackendoffel, who was originally not in favor of the Claimant pursuing surgery, changed his mind due to the Claimant's failure to improve in spite of considerable conservative treatment. Per medical records and testimony, the Claimant now requires a medial offloading brace to help prevent instability and buckling of her knee. Her symptoms have become worse since February 16, 2016 and she requires assistive devices to ambulate.

As found, on Monday, March 30, 2015, the Claimant was approximately five minutes late for a required committee meeting. Crediting the Claimant's testimony, the Claimant was five minutes late due to difficulty ambulating with a crutch while retrieving mail prior to the meeting. The Claimant's position required her to manage the

Employer's mail and, although the Claimant's supervisor Ms. Brink had performed the post office runs for the Claimant for a time, as of March 30, 2015, the Claimant was back to doing these. Additionally, while there is some confusion about whether Ms. Brink did or did not attend the March 30, 2015 committee meeting, in looking at the testimony as a whole, it would appear that Ms. Brink was not at the meeting, but was at a different location that morning. So, the post office duties would have been the Claimant's that day (and the prior week while Ms. Brink was out of town at a conference). Thus, while the Claimant is no longer under medical restrictions from her treating physician, the medical records and the Claimant's testimony establish that she is still ambulating with difficulty and with crutches due to effects of her work injury and this requires that the Claimant have additional time to perform her work duties. As a result of being five minutes late for the committee meeting after retrieving mail from the post office, the Claimant's employment was terminated. Therefore, there is a causal relationship between the work-related injury and the Claimant's subsequent wage loss because she was unable to perform her work duties sufficiently due to the effects of her work injury.

Therefore, it is necessary to address Respondents' contention that the Claimant is precluded from receiving temporary indemnity benefits because the Claimant is responsible for her termination.

Responsible for Termination

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

Alternatively, for the purposes of this claim, the totality of the circumstances must be considered in determining whether the Claimant committed a volitional act warranting termination. The fact that an employer discharged an employee, even in accordance with the employer's policy, does not establish that the Claimant acted volitionally, or exercised control over the circumstances of termination for the purpose of barring the Claimant from receiving TTD benefits pursuant to the Workers' Compensation statutes. See *Gonzalez v. Industrial Commission,* 740 P.2d 999 (Colo. 1987); *Goddard v. EG&G Rocky Flats, Inc*., 888 P.2d 369 (Colo. App. 1994*)(*cited with approval in *Kneffer v. Kenton Manor,* W.C. 4-557-781 (ICAO 3/17/04); *Bookout v. Safeway, Inc.,* W.C. 4-798-629 (ICAO 12/15/2010)(claimant not at fault for termination for violating "no call – no show" policy when wrongly incarcerated); *Hall v. Wal-Mart Stores, Inc.,* W.C. 4-601-953 (ICAO 3/18/04)(The respondents cannot adopt a strict liability personnel policy which usurps the statutory definition of "responsibility" for termination where the claimant engaged in a fight it at work but did not provoke assault); *Bonney v. Pueblo Youth Service Bureau,* W.C. 4-485-720 (ICAO April 24, 2002)(Claimant was not responsible for failure to comply with the employer's absence policy if the claimant was not physically able to notify the employer); *see e.g., Bell v. Industrial Claim Appeals Office, 93 P .3d 584,* (Colo. App. 2004)(The claimant not at fault for termination for refusing to sign settlement agreement waiving statutory rights).

The Claimant's employment file with Employer is rife with inconsistent messages and treatment with respect to several employment transgressions and the resulting discipline. In reviewing the employment record as a whole, there is nothing to clearly indicate that arriving late, whether it be five minutes or fifteen, would be a policy violation that the Claimant, or a reasonable person, would expect to lead to termination of employment.

On December 15, 2014, the Claimant received a written warning from her supervisor Janet Brink. The warning referenced several transgressions: (1) a verbal counseling that the Claimant received in June 2014 for aggressive and unfriendly interactions with office personnel; (2) a change of policy to close the office from 12-1 every day that Ms. Brink instituted because the Claimant was working through lunch and did not have permission for overtime; (3) an incident in which Claimant was allegedly argumentative with Ms. Brinks on November 10, 2014 when the Claimant was asked not to fill out paperwork on her workman's compensation claim but did it anyway; (4) an incident on December 8, 2014 when the Claimant called in sick within one hour of her work start time; and (5) a December 10, 2014 incident when Ms. Brinks noted the Claimant became "combative" when she was told again that she could not work over 5 hours without taking a lunch break. Under "Corrective Action," Ms. Brink stated that if the Claimant feels she “cannot or will not curb [her] argumentative and combative behavior and speak to me and all those you interact with while at work respectfully and professionally and follow rules that are presented to you then will need to separate your employment with [Employer].” She further noted that “since the lunch issue and the way you speak to staff has been discussed verbally & now in a written warning the next step for noncompliance will be termination of employment from [Employer].” The Claimant requested a chance to write a written response to the written warning that would also be placed in her file as she did not agree with what was written. She did sign the written warning, as did Ms. Brinks. At the hearing, the Claimant testified that when she first began working at the executive office, there was not a set lunch hour. The Claimant testified that she would customarily take her lunch break around other employees' schedules so that there was appropriate coverage at the office. The Claimant testified that at some point Ms. Brink changed the lunch break policy and set a defined lunch hour from 12:00 to 1:00 p.m. The Claimant testified that Ms. Brink disciplined her because, at times, she would work into the defined lunch hour due to longer than anticipated phone calls or the press of other business, including meeting with Employer's clients. The Claimant disagreed with Ms. Brink's written statement that Claimant was “argumentative and combative.” The Claimant testified that when she would ask a question for clarification of Ms. Brink, then Ms. Brink would often become “very upset,” and that Ms. Brink would not understand why Claimant would need to ask questions. With respect to the conduct surrounding a claim form relating to this workers' compensation claim, the Claimant testified that she requested a copy of Employer's First Report of Injury regarding the November 6, 2014 injury, but did not receive a copy, and so was filling out her own copy of the report with her recollection of how the injury happened for her own records, and not for filing with Employer or Insurer. In any event, while the Claimant may have disagreed with the allegations in the December 15, 2014 written warning, the warning did put the Claimant on notice that certain types of activity could result in termination of employment. However, being late for a meeting was not one of the transgressions listed.

On December 16, 2014 at 12:26 PM, Ms. Miffie Blozvich sent an e-mail to the Family Selection Committee members, including the Claimant, which stated that there would definitely be a meeting of the committee on Monday, December 22 at 8 AM. The Claimant missed this meeting and on December 22, 2014 at 9:05 AM, the Claimant sent an e-mail to Ms. Brink and Ms. Blozvich stating, “I am SO sorry! I totally forgot that this morning was the meeting.” On December 23, 2014, the Claimant received written notice of a Verbal Warning. The reason for the warning was due to the Claimant missing the Family Selection Committee meeting on Monday, December 21, 2014 (although the meeting was on December 22, 2014). The notice indicated the Claimant is responsible for taking minutes and it is the second one the Claimant had missed without notification. The Corrective Action listed was that “if you fail to make another meeting without an excused absence you will be removed from this committee and could result in less hours scheduled in your work week.” Based on this notice, the expected discipline for missing a meeting was that the Claimant would be removed from the committee and as a result would be scheduled to work fewer hours. There is no mention that missing a meeting could result in termination of employment. Nor is there mention of the potential for discipline for being late for a meeting.

On January 22, 2015 at 2:30 PM, Ms. Blozvich sent an e-mail to the Family Selection Committee members, including the Claimant, which stated that there would be a meeting of the committee on Monday, January 26 at 8 AM. The Claimant missed this meeting. On Monday, January 26, 2015 at 8:31 AM, the Claimant sent an e-mail to Ms. Brink and Ms. Blozvich stating, "I am so Sorry, I did not get my reminder for the meeting this morning. Usually I get it on Friday but since I was out sick, I totally forgot about the meeting today." The Claimant was not removed from the committee nor were her hours reduced, nor was she terminated for missing the January 22, 2015 meeting.

Rather, on January 27, 2015, the Claimant submitted a written letter of resignation stating that, "I am terminating this full time employment to take the time needed to heal. I will be seeking part time employment that will accommodate a schedule that will allow me to pursue other avenues, once I have recovered." She indicated her resignation was effective February 24, 2015, but that if four weeks' notice was not necessary, she would leave that up to Employer. At the hearing the Claimant testified credibly and persuasively that when she submitted her written resignation to Ms. Brink on January 27, 2015 she told Ms. Brink that she could not imagine working for anyone but Employer because she believed in its mission, but she needed to resign because she needed time to rest and heal her knee. The Claimant testified that Ms. Brink offered concessions regarding scheduling so that the Claimant could continue working, including taking sick leave first before leaving Employer. The Claimant testified that she took leave time, but then returned to her normal job. She testified she returned to work because after speaking with supervisors, including Ms. Brink, she felt as if she was a valued employee. Per testimony, apparently, the Claimant resumed working at the Employer's administrative office after some time off.

On February 16, 2015, the Claimant was released to return to work with no restrictions. However, the Claimant testified that she was terminated from employment due to issues related to attendance at meetings. The Claimant testified that Employer terminated her on March 31, 2015. In the weeks leading up to her termination, she was on work restrictions issued by Dr. McLaughlin, including mostly sit down duty, and was using at least one crutch to ambulate. The Claimant testified that she was five minutes late to a Family Selection Committee meeting. The Claimant testified that the reason she was five minutes late for the meeting was because she stopped at the post office to get mail but was on crutches at the time and it took her longer to get to the meeting because of this.

The written notice of termination prepared by Ms. Brink dated March 31, 2015, states that the Claimant had missed three Family Selection Committee meetings on February 24, 2014, December 22, 2014 and January 26, 2015. The letter stated that the Claimant was "warned after missing the last meeting on Monday, January 26, 2015 to not miss another Family Selection Committee meeting." The notice goes on to state that, "on Monday, March 30, 2015 you did attend the meeting but you were tardy with no acceptable excuse." Looking at the employment records in evidence in this case in conjunction with the testimony, there is no persuasive evidence to establish that the reason for termination stated in the March 31, 2015 notice is a actually violation of company policy that would result in termination for cause.

In the alternative, there is also an issue as to whether or not the Claimant committed a *volitional act* resulting in termination. There was also considerable amount of conflicting testimony surrounding the issues relate to the reason for the Claimant's termination. In taking all of the testimony into account and in considering the related documentary evidence, the ALJ found that the Claimant's testimony is more credible and persuasive than that of Ms. Brink and Ms. Blozvich with regard to the Claimant's attendance at the March 30, 2015 Family Selection Committee meeting. Specifically, the ALJ finds that the Claimant was, more likely than not, approximately five minutes late for the meeting. The ALJ also finds that while the Claimant had received warnings in the past that conduct such as missing a meeting or failing to comply with company policy regarding taking lunch at the correct time or refraining from improper communication with staff could result in discipline, up to the termination of employment, the Claimant was not ever advised that arriving late to a meeting would result in termination. Moreover, on December 23, 2014, the Claimant received notification of a verbal warning that indicated that failing to attend another Family Selection Committee without an excused absence would result in the Claimant being removed from the committee and "could result in less hours scheduled in your work week." This is a considerably lesser discipline than termination of employment. Further, even this discipline was not imposed when the Claimant missed the scheduled January 2015 meeting, which was the next meeting after the missed December meeting. Thus, the ALJ finds that there was no persuasive evidence that the Claimant, nor any reasonable person, would have understood that arriving late for a committee meeting was a violation of company policy that would result in termination of employment.

For the alternative reasons stated above, the Respondents have not established that the Claimant was responsible for her termination and she is not barred from receiving temporary disability benefits.

ORDER

It is, therefore, ordered that:

1. The Respondents shall pay the Claimant temporary total disability ("TTD") benefits for the time period commencing April 1, 2015 and ongoing until terminated by law.

2. The Respondents shall pay for the medical treatment reasonably necessary to cure and relieve the Claimant from the effects of her work injury, including, but not limited to, the left knee offloading brace and left shoe wedge orthotic recommended by Dr. Matsumura. Medical benefits shall be paid in accordance with the Division medical fee schedule.

3. The left knee surgery recommended by Dr. Knackendoffel is not reasonably necessary to cure and relieve the Claimant from the effects of her work injury and this specific claim for a medical benefit is denied and dismissed.

4. Insurer shall pay eight percent (8%) per annum on all compensation not paid when due.

5. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 6, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issue presented for determination is whether the Claimant failed to use a safety device provided by her employer thereby subjecting her to a 50 percent reduction in her benefits.

FINDINGS OF FACT

1. The Claimant worked as a self-employed taxi cab driver. She entered into a lease purchase agreement with Yellow Cab to purchase a vehicle, and is considered an independent contractor. The vehicle is equipped with safety belts.

2. On November 23, 2014, while driving the taxi cab, the Claimant was involved in a motor vehicle accident (MVA). The Respondents admitted liability.

3. The Claimant was wearing a safety belt prior to the MVA. She admittedly removed the safety belt just prior to the impact with the other vehicle leaving her unrestrained although the passenger side airbags deployed.

4. Claimant advised the paramedics that she had not been wearing a safety belt. As a result, she was thrown forward into the front passenger seat. She denied loss of consciousness, and stated her right lower leg was most painful. She later admitted to pain in the left thigh and right upper posterior flank.

5. At the emergency room, Claimant complained of right knee pain with swelling, right shoulder pain, left hip pain, right posterior upper rib pain, and chest pain.

6. Since being injured, Claimant has treated with a variety of health care providers including Dr. Shimon Blau. On January 19, 2015, Claimant told Dr. Blau that she had been wearing a safety belt but disengaged it as she lost control of her vehicle because she had previously been trapped in a car. Claimant was thrown around the passenger compartment and hit her head on the interior roof.

7. According to the most recent medical records in evidence, the Claimant's chief complaints include neck and shoulder pain. The other pain complaints appear to have either improved or resolved.

8. It is unknown from the medical records which injuries may have been sustained due to Claimant's failure to wear a safety belt, and the Claimant did not testify at the hearing. In the testimony Claimant gave at a prior hearing held on May 19, 2015, the Claimant did not admit that her injuries would have been different or minimized had she kept her safety belt on prior to impact. In actuality, there was little testimony provided concerning the nature of her injuries at the prior hearing.

9. The ALJ finds that no credible or persuasive evidence, medical or otherwise, proves that Claimant's injuries are due to her failure to wear a safety belt.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Pursuant to §8-42-112(1)(a), C.R.S., compensation provided by the Workers' Compensation Act shall be reduced by 50 percent, "Where injury is caused by the willful failure of the employee to use safety devices provided by the employer."

5. In this case, the Respondents have not proven that Claimant's failure to use a safety belt caused her injuries. While it is true that Claimant willfully removed her safety belt prior to the MVA, the Respondents offered no persuasive evidence that Claimant would not have sustained the same injuries had she kept her safety belt on throughout the accident.

ORDER

It is therefore ordered that:

1. Respondents failed to meet their burden of proof that Claimant's will failure to use her seat belt caused her injuries. As such, Respondents are not entitled to reduce Claimant's compensation by 50 percent.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 15, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that she suffered a compensable injury to her right hip and temporomandibular joint ("TMJ") on October 16, 2014.

- If compensable, is Claimant entitled to reasonable and necessary medical treatment to cure and relieve the effects of injuries to the TMJ and hip?

FINDINGS OF FACT

1. Claimant was employed as a manager for Employer, which is a residential cleaning company. She was required to drive to various locations in this job.

2. Claimant's medical history was significant in that she was involved in a motor vehicle accident in 1996[1], in which she injured her cervical, thoracic and lumbar spine, as well as her temporomandibular joints. Claimant testified she dislocated her jaw in this accident, which was not discovered for a period of time. Records from Kaiser Permanente (California) were admitted into evidence, which documented treatment from 2008-2011. In particular, Claimant was evaluated by Lam Hoang, M.D. on October 6, 2008, who noted Claimant received conservative treatments for TMD and myofascial pain, but had continued pain complaints. Claimant was complaining of frequent headaches, nighttime clenching, as well as tenderness in the bilateral TMJ. Dr. Hoang's impression was myofascial pain and internal derangement of TMJ, bilaterally. Claimant underwent a Botox injection at that appointment.

3. On September 23, 2010, Claimant underwent an arthrocentesis (bilateral), which was performed by Dr. Hoang. The pre-op diagnosis was TMJ arthralgia, as was the post-op diagnosis. Dr. Hoang noted Claimant was able to open her jaw and complete range of motion exercises, during which she reported no pain.

4. Claimant was evaluated by Dr. Hoang on January 21, 2011. At that time, severe tenderness at the TMJ (bilateral) was noted, along with moderate pain at the muscles of mastication. The occlusion was stable without splint. Dr. Hoang's impression was TMJ derangement with arthralgia, myofascial pain. A bilateral modified condylotomy was discussed.

5. Claimant underwent a mandible osteotomy (modified condylotomy) on February 25, 2011. She was seen by Dr. Hoang for a follow-up on March 7, 2011.

[1] Claimant testified the accident was in 1997, but other documents admitted into evidence indicated it occurred in 1996.

Claimant reported her TMJ area felt better, but the incision areas were tender bilaterally. Claimant was also seen by Dr. Hoang on March 18, 2011, whose diagnoses were TMJ arthralgia-primary; TMJ disorder. At that time, Claimant's pain symptoms were much improved, but she felt like the arch bar on the upper left was pulling her canine out.

6. Claimant testified her TMJ symptoms improved after the surgery; in fact, her jaw felt “perfect”. For the period of 2011-14, she would feel intermittent pain in her jaw muscles, however, Claimant testified she did not experience popping or clicking. Claimant testified she held stress in her jaw, which she described as muscle pain. She estimated this occurred once per week.

7. Claimant received massage therapy at Elephant Moon Massage starting on February 4, 2013. She sought treatment for TMJ pain and neck pain. Claimant received massage therapy on February 4, 2013 (for TMJ and neck pain); March 1, 2013 (for neck pain at spine, rib); March 22, 2013 (mid-back, jaw, neck); May 10, 2013 (jaw, neck); October 8, 2013 (jaw, sitting); July 2, 2014 (jaw up into ear); and October 15, 2014 (starting to feel sick/coughing, some jaw, left shoulder). Each of the sessions was 90 minutes. The ALJ infers Claimant continued to have TMJ pain from 2011- 2014 for which she required treatment.

8. On October 28, 2013, Claimant was evaluated by Philip Rhoades, M.D. for a physical. At that time, she complained of neck pain, as well as left hip pain occurring over the past 1.5 months. She had chronic low back problems and was noted to be seeing a chiropractor. Dr. Rhoades' examination was positive for dizziness and headaches, as well as joint pain.

9. Claimant returned to Dr. Rhoades on November 25, 2013, at which time it was noted she had consistent pain in the left hip for the past three months. On examination, Dr. Rhoades noted pain in the left lateral hip, distal to the iliac crest, deep on palpation. He discussed topical treatment, as well as physical therapy.

10. Claimant returned to Dr. Rhoades on February 3, 2014, after she had seen a rheumatologist. Claimant was noted to have significant muscle and joint pain (constant), which affected her sleep. Dr. Rhoades prescribed amitriptyline. The ALJ notes Claimant's musculoskeletal and joint pain was significant before the subject accident and infers that this was a chronic condition.

11. Mr. Macchia was the owner of the Employer and supervised Claimant. He saw Claimant at the office at least once a week. Prior to the accident, Mr. Macchia testified Claimant complained of jaw pain and observed her with jaw pain, as she would put her hand on her jaw and move it back and forth. He was aware that she had been receiving massage treatments for her jaw before the accident and Claimant told him she was glad to find someone who could perform massage on her jaw.

12. Claimant testified she went to the dentist approximately ten (10) days

before the accident. She thought her appointment was at Comfort Dental[2]. She said her jaw was aligned at that time.

13. Claimant suffered an admitted[3] industrial injury on October 16, 2014 when she was involved in a motor vehicle accident while working for Employer. The accident occurred at Martin Luther King Blvd. and Colorado Blvd. when she was rear-ended while waiting for a red light. No police responded to the scene, however, Claimant testified she went to the police station and completed a report.

14. In the accident report, Claimant specified she was driving a 2006 Scion and the other vehicle was a 2000 Honda CRV. Both vehicles were stopped at the light, when the other vehicle behind Claimant started going forward, which caused the impact. The Honda had no damage other than a bent license plate. Claimant estimated the Honda's speed to be 5-10 mph and testified she felt immediate pain in her jaw. Since this report was completed immediately after the accident, the ALJ infers Claimant's estimate of the speed of the vehicle which struck her was more accurate than estimates she made later. The ALJ was not persuaded that it was her treating physicians who concluded the accident occurred at a higher speed.

15. Claimant testified she had no experience estimating vehicle speeds. Photographs of Claimant's vehicle were admitted at hearing, which documented minor damage to the rear of the vehicle[4].

16. On the day of the accident, Claimant sought treatment at the Emergency Department of Presbyterian/Saint Luke's Medical Center. She was complaining of neck, low back, left shoulder, and jaw pain. The spinal x-rays were reviewed by Garret Ganuch, M.D., who characterized these as normal. A CT of the cervical spine revealed no fractures, but degenerative changes were noted. No acute signs of trauma were noted on examination. Stephen MacDade, M.D. did not believe a serious injury resulted from the MVA.

17. Claimant returned to Presbyterian/St. Luke's Medical Center on October 20, 2014. At that time, she reported her pain had not improved and she now had tingling in the top of her feet and leg when she crossed her legs. She also had left shoulder pain radiating down her arm. No swelling of extremities was noted and Claimant had good range of motion in the shoulders. She had mild soft tissue tenderness in the left upper back around scapula. Normal range of motion of both hips and knees was noted. The primary clinical impression was lumbar strain, with a secondary impression of strain of thoracic spine. Cynthia Kelmenson, M.D. did not feel Claimant needed an MRI.

[2] These records were not admitted at hearing.

[3] Although the General Admission of Liability was not admitted into evidence, both Claimant and Respondents' Position Statements referred to this as an admitted claim.

[4] Exhibit E.

18. Claimant was examined by Deidre Dietz, M.D. on November 4, 2014. Dr. Dietz noted Claimant had been seen by a PA the week before, but the PA felt it was too complicated and felt best for M.D. to see her. Claimant's main concern was fibromyalgia pain, not controlled by medications. She also complained of sharp, severe, shooting pain along the entire spine from the sacrum to the neck. No lower extremity numbness or weakness was noted. Dr. Dietz' assessment/plan was: fibromyalgia for which the Gabapentin prescription was increased; back pain-MRI spine pending; GERD-prescription.

19. Claimant returned to Dr. Dietz on November 25, 2014. Her fibromyalgia pain was improved with increased Gabapentin, but she still had low back pain with radiculopathy. She complained of pain and numbness in the right lower extremity, with constant pain radiating from low back to right buttocks. The results of the MRI were reviewed, which showed mild DJD and moderate spinal stenosis in the lumbar spine. Dr. Dietz' assessment included fibromyalgia-improved; spinal stenosis stable, but pain not controlled; right lower quadrant pain-intermittent, for which an ultrasound evaluation of the ovaries was ordered.

20. Mr. Macchia testified he did not see a change in Claimant’s symptoms after the MVA. Mr. Macchia testified Claimant told him the accident was not that bad and her car did not have much damage. He also stated Claimant told him she was going to pursue a recovery against the at-fault driver and when asked about her preexisting TMJ condition, she said: “they don’t know that.” Mr. Macchia admitted he could pay premium costs if the claim was found compensable. The ALJ did not conclude that this fact made him less credible as to whether this statement was made by Claimant. Likewise, the fact Claimant made this statement does not lead to the inference that she was not credible with regard to her TMJ symptoms.

21. Claimant filed a Worker's Claim for Compensation on December 3, 2014. Claimant stated she was injured in a motor vehicle accident. She reported the injury to Pat Bullard and Greg Macchia. She specified the parts of her body affected included lower back, jaw, left shoulder.

22. Claimant was evaluated by Greg Hare, PA-C at Concentra on December 5, 2014. She complained of pain in the left posterior shoulder, low back bilaterally and pain in the jaw. She reported treatment from her PCP for back and jaw pain after the accident. PA Hare's assessment was lumbar strain, lumbago, jaw pain, left shoulder pain and motor vehicle accident. Claimant had full ROM of the cervical and thoracic spine, as well as the left shoulder. Bilateral muscle spasms were noted in the lumbosacral spine. A referral to an orthopedic specialist and for physical therapy (“PT”) was given, as well as work restrictions.

23. Claimant was next seen on December 19, 2014 by Valerie Maes, PA-C and she was complaining of pain in the left anterior shoulder, which was described as moderate. She also had mid and low back stiffness (bilateral) and decreased spine range of motion. PA Maes' assessment was left shoulder pain and lumbar strain. An acupuncture referral was made.

24. Following the accident, Claimant returned to Elephant Moon Massage on December 23, 2014 at which time it was noted she was involved in a car accident on 10/16 and "everything aggravated". Claimant also received massage therapy on January 7, 2015, at which time it was noted she was still having pain from the accident.

25. Claimant testified the pain in her jaw continued to worsen. She did not see the results of the accident until approximately January 2015. Claimant testified that she has pain when she eats, laughs, talks; almost any activity causes her pain. The ALJ notes Claimant was very specific when describing her pain complaints. Claimant said she experienced pain in her low back and hip immediately after the accident. She initially denied having any hip pain before the accident, but then amplified her answer to say the pain she felt in her right hip was different, “very, very deep in the ball and joint area”. This hurt her credibility.

26. Claimant was evaluated at Concentra by Ron Rasis, PA-C on January 2, 2015. She reported ongoing lower back pain, gluteal spasm, left shoulder pain, neck and TMJ pain. On examination, tenderness was noted on her left shoulder, as well as left paraspinal muscle. PA Rasis' assessment was motor vehicle accident, jaw pain, left shoulder pain, lumbar strain, back pain, temporomandibular joint-pain-dysfunction syndrome, and bilateral temporomandibular joint pain. A referral to a physiatrist was ordered, as well as PT.

27. Claimant returned to PA Rasis on January 12, 2015 for a reevaluation. She had seen a chiropractor, received manipulation of the left shoulder without relief and was complaining of pain, soreness in her scapular region. She had ongoing lower back pain, including a sensation of numbness on the tops of her feet. On examination, tenderness was noted in the rhomboid and scapula, but no crepitus. Claimant had decreased sensation to light touch on the left lower leg. PA Rasis' assessment was the same as the 1/2/15 appointment, with the addition of lumbago. Pending Claimant's relocation to Fort Collins, her care was being transferred. She was to be evaluated by Dr. Sacha and to undergo a TMJ evaluation.

28. On January 16, 2015, Claimant was examined by Robert Nystrom, D.O. She had pain in her neck, left shoulder, jaw and low back, as well as reporting a loss of feeling in both legs, numbness and tingling on top of both feet. No prior neck or back injury was reported. Dr. Nystrom noted her MRI showed some bilateral foraminal stenosis. He noted bilateral jaw tenderness on examination. Claimant had a normal gait, as well as ROM within normal limits. Dr. Nystrom's assessment was lumbar strain, temporomandibular joint-pain-dysfunction syndrome, left shoulder pain, bilateral temporomandibular joint pain, motor vehicle accident, back pain and neck pain. He prescribed Cyclobenzaprine and made a physical medicine and rehab referral. Claimant was noted to be working and no work restrictions were issued.

29. Claimant was evaluated by Richard Keller, D.D.S., M.P.S. on February 1, 2015 for her TMJ discomfort. He noted Claimant said she was rear-ended by a vehicle traveling at 35-40 mph. The ALJ also notes that this is the first estimate of speed at this

range provided by Claimant. Claimant noted the following symptoms since the MVA: headaches, pain in temples, neck and bilateral shoulder pain, ringing in the ears, dizziness hot/cold sensitivity in molars. Dr. Keller found a class 1 occlusion, as her teeth not longer had contact, except on the back molars. Dr. Keller opined a trauma as the one described could cause Claimant‘s TMJ injury. Dr. Keller diagnosed late effect MVA, trauma to TM joint, myalgia, capsulitis, cervicalgia, cervical lordosis, synovitis, tinnitus, TMJ sounds open/close, degenerative joint disease, headaches. He recommended manipulation of the right TMJ joint with an appliance, neural therapies, and ozone therapy.

30. Claimant returned to Dr. Nystrom on February 2, 2015. At that time, Claimant was reporting joint pain, as well as muscle, back, neck and jaw pain. Range of motion was noted to be within normal limits, although her left shoulder was diffusely tender with decreased ROM. Increased muscle tightness and tenderness was noted in the lumbar spine. Dr. Nystrom's assessment was the same as the prior appointment and Claimant was given a prescription for Odansetron.

31. Claimant was evaluated by Alicia Feldman, M.D. at Colorado Rehabilitation & Occupational Medicine on February 11, 2015. She documented that Claimant reported being a seat-belted driver when she was rear-ended by another vehicle going approximately 35-45 miles per hour. Claimant complained of jaw pain, back pain and neck pain, but not hip pain. On examination, Dr. Feldman noted Claimant had pain free full range of motion of her bilateral hips. Dr. Feldman recommended an injection for Claimant’s lumbar spine, as well as consideration of an MRI for the cervical spine. The ALJ notes this record documented an absence of pain complaints in the hip, as well as pain free objective evaluation four months after the accident.

32. On February 17, 2015, Dr. Keller wrote to Pinnacol stating the MVA contributed 80% to her diagnosis, 20% because she was predisposed to such an injury. Dr. Keller opined 100% need for treatment was due to the MVA, and he noted in support of same that based upon her dental records, Claimant had been clinically functional and without pain prior to the accident.

33. On March 2, 2015, Claimant was examined by Dr. Nystrom for a follow up on her neck, jaw and back. Claimant reported treatment had not been approved and she was worsening. Dr. Nystrom noted no tenderness or swelling of extremities and her ROM was within normal limits. Dr. Nystrom's assessment was the same as in February, with the addition of left shoulder pain. He referred Claimant for chiropractic treatment and massage therapy.

34. Claimant was evaluated by Matthew Pouliot, D.O. (physiatrist) on April 1, 2015. At that time, her chief complaints were neck, back and right hip pain. The ALJ notes this is the first specific reference to right hip pain. Claimant reported she was a seatbelted driver when she was rear-ended by another vehicle going 35-45 mph.

35. Dr. Pouliot observed Claimant walked with asymmetric non-antalgic gait and her cervical range of motion was within normal limits. She had evidence of a subluxed rib at the left medial scapular border and mid thoracic spine and her back was nontender. Manual muscle testing was 5/5, bilateral hip flexion, knee extension, dorsiflexion, and plantar flexion. She had reproducible pain with active and passive internal rotation of the hip. Dr. Pouliot's assessment was a 35-year-old female, post MVA with neck, back, and bilateral leg pain; paresthesias and mostly right hip pain, which he felt was most probably caused by impingement as opposed to a labral tear. Dr. Pouliot gave her a prescription for Hydrocodone and ordered a right hip injection.

36. A request for authorization for right hip joint injection was made on April 1, 2015 by Dr. Pouliot.

37. On April 2, 2015, Claimant was seen by Dr. Nystrom and stated her right hip pain was her worst complaint. Acupuncture provided temporary relief. Dr. Nystrom noted Claimant's left shoulder was diffusely tender on examination, with decreased ROM. Decreased ROM of the lumbar spine was also found, with some increased muscle tightness in the neck. Dr. Nystrom's assessment was back pain, cervical strain, bilateral temporomandibular joint pain, jaw pain, lumbar strain, temporomandibular joint-pain-dysfunction syndrome, and hip pain. He made an acupuncture referral.

38. An MRI was done on Claimant’s TMJ on April 10, 2015. The films were read by Gregory Beyer, M.D. Dr. Beyer’s impression was: near complete absence of the right mandibular condyle with a disc fragment, anterior to the condyle on both closed and open mouth views; mild degenerative change about the left temporomandibular joint disc, but the disc was in proper position with normal anterior translocation along with the condyle on open mouth views.

39. Claimant was evaluated by Keith Meier, FNP on April 24, 2015. She reported her joint pain and back pain were still present. She stated that her jaw doctor (Keller) wanted her to see a surgical specialist for a disc tear in her TMJ. Two names were given to FNP Meijer, whose assessment was jaw, hip and back pain; cervical strain, temporomandibular joint-pain-dysfunction syndrome, left shoulder pain. A referral to an oral surgeon was given.

40. On April 29, 2015, Dr. Pouliot saw Claimant for a follow-up evaluation. Dr. Pouliot noted he received a report from the claims representative in which Claimant indicated she was rear-ended by a car traveling 5-10 mph, but she now maintained the car was traveling at 40 mph. Claimant had an orthotic applied to the mouth, which Dr Pouliot noted she was able to open her jaw within functional limits. No audible or palpable clicking or popping was noted at the TMJ bilaterally. She was tender at the lumbosacral junction and sacroiliac joint. Dr. Pouliot's assessment was: 35-year-old female with continued low back and right hip pain, with occasional paresthesias post MVA; disc herniation at L3-4; jaw pain bilaterally with reported "disc rupture" of TMJ on the right side, with surgical appointment pending.

41. Claimant received treatment at Dr. Keller’s office from March 17 through

May 6, 2015. The treatments included heat, ultrasound, TM injection and shoulder trap injection.

42. Anjmun Sharma, M.D. performed an independent medical examination ("IME") of Claimant on May 12, 2015 at the request of Respondents. Dr. Sharma noted Claimant originally reported a low speed collision, which then changed to a 35-45 mph collision. He stated he concurred it was likely a low impact collision based upon the nature of her injuries and with his understanding that the vehicle she was driving required very little repairs. Dr. Sharma noted Claimant reported having "no symptoms" to her jaw up until the accident. Dr. Sharma stated that her jaw appeared to be a chronic, stable myofascial condition without the need for surgical repair. He also noted that a 5-10 mph accident could cause some mild symptoms, but he was perplexed by the length of her symptoms resulting from an accident that was so minor. Dr. Sharma also stated that he did not find any evidence to suggest her hip complaints were related to the accident as well. Dr. Sharma opined the left shoulder, cervical spine and the lumbar spine were conditions injured in the accident and subject to an impairment rating. He opined that Claimant was at MMI with respect to her compensable injuries. She did not require surgery for her cervical spine, lumbar spine or left shoulder. Dr. Sharma did not believe Claimant required maintenance medical care.

43. Dr. Nystrom evaluated Claimant on May 14, 2015 for follow-up on her neck, back, jaw, shoulder and hip. Claimant had been going to acupuncture, massage and chiro with improvement noted. Dr. Nystrom's assessment was TMJ pain-dysfunction syndrome, neck pain, left shoulder pain, lumbar strain, cervical strain, hip pain. Dr. Nystrom referred Claimant for a second opinion concerning her neck and back and ordered additional chiropractic treatment.

44. On June 18, 2015, Claimant returned to Dr. Nystrom, who noted the insurance was denying most treatment based upon the recent IME. That IME was based on an accident occurring at the speed of 5-10 mph, but Claimant insisted the speed was in the 35-45 mph range. Dr. Nystrom agreed that a speed of 5-10 mph was not likely, based upon her injuries and thought 35-45 was more reasonable based on her injuries. Dr. Nystrom's assessment was the same as the 5/14/15 appointment, excluding left shoulder pain. After reviewing the IME report, Dr. Nystrom opined that this evaluation was based on a slower speed collision and he was in agreement with the other physicians, recommending further evaluation and treatment of Claimant's spine. Claimant was given a prescription for Norco.

45. Dr. Nystrom also saw Claimant on July 16, 2016, at which time she reported she received no treatment for nine months. Her back and hip were doing better, but jaw and neck were getting worse. Dr. Nystrom did not make any referrals pending further investigation of the case.

46. On August 5, 2015, Claimant was evaluated by Rosalinda Pinero, M.D. for a recheck of her back. Dr. Pinero's assessment was back pain, bilateral TMJ pain, cervical strain, hip pain, and motor vehicle accident. She referred Claimant for a physical medicine and rehab evaluation.

47. Claimant was seen by Dr. Nystrom on August 27, 2015 for a recheck. Claimant reported joint pain and stiffness; headaches, back (sciatic) and neck pain, as well as numbness in all extremities. Dr. Nystrom's assessment was back pain, bilateral TMJ pain, cervical strain, hip pain, and left shoulder pain. He referred Claimant for chiropractic and massage therapy.

48. On September 2, 2015, Claimant returned to Dr. Pouliot, who had not examined her since April. She was complaining of left shoulder and low back pain; diffuse lower extremity pain and paresthesias. Dr. Pouliot found normal, nontender ROM in Claimant's cervical spine, normal ROM in the shoulders, with no tenderness to palpation or crepitus in the left shoulder and normal ROM in her hips. Claimant's lumbar spine had reduced ROM with diffuse parasthesias. Dr. Pouliot's assessment was: 35-year-old female with ongoing pain in the left shoulder, which he thought was myofascial; multilevel disk herniations at L3-4, L4-5 and L5--S1. Dr. Pouliot ordered dry needling and core evaluation at Alliance Physical Therapy. Treatment records for that facility were introduced at hearing, which documented nine (9) treatments as of November 9, 2015.

49. Dr. Nystrom evaluated Claimant on September 17 and October 8, 2015, noting with the same assessment and Claimant was to continue chiropractic and massage. On November 2, 2015, Claimant returned to Dr. Nystrom after receiving an ESI by Dr. Pouliot. She reported two (2) days of relief, but her pain had returned. Claimant said she was having a lot of headaches. Dr. Nystrom prescribed Hydrocodone and Tizanidine.

50. Claimant returned to Dr. Pouliot on November 4, 2015, complaining of pain in the shoulder girdle causing daily headaches and migraines. Dr. Pouliot's assessment was ongoing muscle spasms, myofascial pain primarily in the threats again cervical spine; TMJ joint pain; multilevel disc herniations. He ordered Botox injections and an Atenolol prescription.

51. On November 25, 2015, Claimant was evaluated by Jeffrey Winkler, PA at which time she was complaining of neck pain and headaches at a level 10/10 after returning from a vacation cruise. The assessment was cervical strain, headache. Claimant was to follow-up with Dr. Nystrom.

52. Claimant was evaluated by Dr. Nystrom on December 1, 2015, who recorded she had a major flare-up of pain over the weekend which caused her to go to the ER twice. Dr. Nystrom assessment was: back, bilateral TMJ, jaw, and neck pain; headache and cervical strain. He made a referral for massage therapy.

53. On December 9, 2015, Claimant was seen by Dr. Pouliot. A repeat MRI was performed on 11/25/2015, which Dr. Pouliot said showed changes, including worsening at C5-6. Dr. Pouliot's assessment was acute ongoing, chronic cervicalgia, with radiating pain likely causing discogenic pain, with evidence of disc protrusion

versus bulge at C5-6 and failure of oral steroids to treat the pain; chronic stable lumbar pain with multiple level disc herniations L3-4, L4-5 and L5-S1; motor vehicle accident on 10/16/14.

54. Claimant was examined by Aaron Liddell, D.M.D., M.D., F.A.C.S., on September 9, 2015 and a TMJ surgical evaluation was done. Claimant told Dr. Liddell she had a near complete resolution of her symptoms after her last TMJ surgery, until she was involved in another MVA on 10/16/2014. No popping or clicking of either joint was found by Dr. Liddell. His assessment was progressive osteoarthritis of the right TMJ with disc maceration and likely perforation, in addition to arthralgia associated with the left TMJ. He recommended a sleep study, right sided joint replacement, possibly left sided joint replacement, and Lefort 1 advancement, as well as decompensating orthotics to level, align, and upright her dentition. The ALJ notes Dr. Liddell did not comment on the cause of the degenerative changes in the TMJ seen on the MRI. There was nothing introduced at hearing which indicated Dr. Liddell requested authorization for the specific treatments outlined in his report.

55. Dr. Liddell responded to questions posed by counsel for Respondents in a letter dated November 13, 2015. Dr Liddell noted it was difficult to comment on the condition of Claimant's discs without having the imaging done before the MVA, however, he frequently saw discs like Claimant's resulting from a degenerative process. Likewise, in order to assess the nature and extent of Claimant's degenerative joint changes prior to the accident the imaging from before the accident needed to be reviewed. Dr. Liddell stated condylar resorption was poorly understood and was idiopathic. Trauma and surgery can aggravate it. Dr. Lidell opined Claimant would require decompensating orthodontics if she had surgery, but did not offer an opinion whether she would have required surgery even if the accident had not occurred. Dr. Liddell said he can't comment on any variation in severity (of injuries) related to speed at the time of impact, except a higher speed would correlate to more severe trauma. Dr. Liddell noted it was not uncommon for patients with TMD to have massage therapy even without overt joint symptoms. Regardless of the etiology of Claimant's malocclusion, Dr. Lidell's surgical recommendations would remain the same.

56. Dr. Keller testified as an expert at hearing. The focus of his practice is TMJ and sleep issues, as well. Dr. Keller testified the dental records shortly before the 2014 motor vehicle accident documented Claimant had a fully functioning jaw with significant degenerative features likely stemming from the motor vehicle accident in 1996. Dr. Keller stated he reviewed dental records from a few days prior to the motor vehicle accident in 2014 which showed Claimant's jaw was completely in alignment and the subjective section of the records did not indicate any complaints of jaw pain. The x-rays taken at that time were normal. Dr. Keller agreed that sometimes general dentists did not record malocclusion in their records. However, Dr. Keller opined there was a structural change in Claimant's jaw after the MVA. Dr. Keller testified the degenerative changes noted on MRI, which were from the prior surgery, predisposed Claimant to suffer a more serious injury from the MVA of 10/16/14. Dr. Keller opined the motor vehicle accident caused Claimant's jaw to change quickly from asymptomatic and high

functioning to no functioning.

57. Dr. Sharma testified at hearing as an expert in the fields of occupational and family medicine. He is Level II accredited pursuant to the W.C.R.P. Dr. Sharma testified he did not believe there was sufficient evidence to find the motor vehicle accident caused or aggravated Claimant's symptoms in her TMJ or right hip. He based his findings on the premise the vehicle accident occurred at 5-10 mph and the fact Claimant's soft tissue injuries appeared mild. He also noted it did not appear plausible to him that a vehicle which had been stopped behind Claimant at a light could accelerate to 35-45 mph before striking her, and then only having damage limited to a bent license plate from such a collision. Dr. Sharma believed Claimant would have had pain in her hip immediately after the accident if it had been injured, as it is a weight bearing joint. Dr. Sharma would have expected movement to cause pain in the hip joint, if there had been an injury to the hip. The ALJ credited this opinion of Dr. Sharma on whether Claimant sustained a right hip injury.

58. Dr. Sharma testified he had experience in his practice evaluating and treating TMJ complaints. Dr. Sharma did not examine Claimant's mouth, nor did he make any measurements at the time of the IME. Dr. Sharma noted he would refer a case like this to an oral maxillofacial surgeon. He testified his report noted that Claimant had not been provided a surgical option for treatment and since then she had since been provided a surgical option by Dr. Liddell. However the change in her treatment recommendations did not change his causation analysis. Dr. Sharma testified he believed Claimant had a chronic pre-existing TMJ condition after having the opportunity to review the Elephant Moon Massage records, listening to the testimony of Mr. Macchia, and reviewing the other evidence developed since his IME. He noted Claimant's reports to the treating physicians that she had no pain after her last surgery did not appear accurate. He also testified Claimant did not inform him at the IME that she had jaw or TMJ massage treatments prior to the accident; that information would have been relevant and responsive to the questions he had asked her at the IME. Dr. Sharma heard Dr. Keller's testimony at hearing. He discussed the presence of a malocclusion, which he described as a "snapshot" in time and could be the result of degenerative changes. Dr. Sharma testified the amount of degeneration shown on the MRI indicated she had a chronic condition which had been ongoing for some time and predisposed her to her current condition without an acute trauma. However, the ALJ notes the MRI was done in April, 2015 (almost six months post-accident), so he is unable to draw the inference that the MRI would have shown evidence of acute trauma. Dr. Sharma agreed Claimant's jaw had been fairly static since the accident.

59. The ALJ notes the physicians at Concentra treating Claimant for her musculoskeletal complaints made no reference to her prior treatment with Dr. Dietz, Dr. Rhoades and Elephant Moon Massage. The ALJ infers the ATP-s at Concentra did not have those treatment records.

60. Claimant has had extensive conservative treatment for her musculoskeletal complaints including multiple courses of PT, massage therapy, an ESI, along with multiple courses of chiropractic treatments and acupuncture.

61. The ALJ concludes it is more probable than not the MVA on 10/16/14 was a low speed accident.

62. Claimant failed to prove by a preponderance of the evidence she suffered a hip injury in the 10/16/14 MVA.

63. The ALJ credited the opinion of Dr. Keller that a low speed collision could cause an aggravation of Claimant's TMJ condition, as Claimant was predisposed to such an aggravation.

64. The ALJ found Dr. Liddell, as an oral surgeon, had the expertise to evaluate Claimant's TMJ condition and provide an opinion on her need for treatment. The ALJ credited his opinion regarding what treatment Claimant required for this condition.

65. There was insufficient evidence adduced to establish Claimant was entitled to treatment for condylar resorption.

66. There was insufficient evidence adduced to establish that Claimant's Obstructive Sleep Apnea was related to her industrial injury and thus, she was not entitled to testing in the form of polysomnography.

67. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The instant case requires a credibility determination, not only of the Claimant, but also the medical experts.

Compensability-Hip

Claimant alleges she sustained an injury to her hip as a result of the motor vehicle accident. Claimant relies primarily on her own testimony to establish she sustained a hip injury. She also argued that she reported pain complaints to her treating physicians.

Respondents focus primarily on the fact that Claimant did not report hip pain in the immediate aftermath of the MVA. Respondents also relied on the findings of IME physician, Dr. Sharma to support their contention no compensable hip injury occurred.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he or she was performing a service for Respondent-Employer arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. An injury occurs "in the course" req uires Claimant to demonstrate the injury occurred within the time and place limits of his/her employment and during the activity that had some connection with his/her work-related functions. *Triad Painting Co. v. Blair* 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires Claimant to show the causal connection between the employment in the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Lay testimony alone may be sufficient to prove causation. However, where medical evidence is presented on the issue of causation it is for the ALJ to determine the weight and credibility of such evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182. The ALJ determined Claimant failed to meet her burden of proof to show a causal connection between the MVA and her claim of a hip injury.

In concluding Claimant failed to adduce sufficient evidence that her hip was injured, the ALJ's reasoning was two-fold. First, Claimant did not report an injury to her hip immediately after the accident. In fact, there was a delay of almost 5 1/2 months before she started complaining of hip pain. The absence of hip symptoms was significant. The lack of hip pain/complaints was seen in the following medical records:

10/16/14: Presbyterian St. Luke's Med. Ctr.-no reference to hip pain.

10/20/14: Presbyterian St. Luke's Med. Ctr.-no reference to hip pain.

11/4/14: Dr. Dietz- Fibromyalgia evaluation,complaints of spinal pain, no reference to hip.

11/25/14: Dr. Dietz –Fibromyalgia, no reference to hip pain.

12/3/14: Worker's Claim for Compensation-no reference to hip injury.

12/5/14: Concentra (PA Hare)-no reference to hip pain.

12/19/14: Concentra (PA Maes)-no reference to hip pain.

1/2/15: Concentra (PA Rasis)-no reference to hip pain.

1/12/15: Concentra (PA Rasis)-no reference to hip pain.

1/16/15: Concentra (Dr. Nystrom)-no reference to hip pain or injury.

2/2/15: Concentra (Dr. Nystrom)-no reference to hip pain.

2/11/15: Dr. Feldman-no hip complaints and pain-free ROM.

3/2/15: Concentra (Dr. Nystrom)-no reference to hip pain.

In addition, Claimant testified she did not have hip pain before the subject accident and then distinguished between the type of hip pain she experienced before and after the accident. This was not persuasive to the ALJ. (Finding of Fact 24). The ALJ also credited Dr. Sharma's opinion that he would have expected Claimant to report hip pain immediately, as it is a weight bearing joint. (Finding of Fact).

In this regard, the ALJ considered whether Claimant's complaint of low back pain also included pain in the hip, which Dr. Sharma felt was possible. As found, Claimant was very specific about the locations on her body where she had pain. The ALJ concluded it was more probable than not Claimant would have been specific as to the existence of hip pain and reported this pain immediately after the accident.

Second, based upon the inferences drawn from the evidence, the ALJ considered it unlikely Claimant would have suffered a hip injury as a result of what was a minor accident. As found, Claimant was wearing a seatbelt at the time and it is more probable than not that this was an accident which occurred at speeds lower than 20 mph. The facts of the accident, coupled with the initial lack of reporting the hip injury to health care providers led the ALJ to conclude Claimant did not suffer a compensable injury to her hip. Therefore, the claim for medical benefits (including the request for authorization of hip injection) for the hip injury is denied and dismissed.

TMJ

The question of whether the TMJ condition is compensable is a much closer one. As found, there is a question whether a low-speed impact would be sufficient to cause an aggravation of Claimant's preexisting condition. More particularly, the issue with regard to Claimant's TMJ condition is whether the MVA aggravated or accelerated the condition to the extent that treatment was required.

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits". *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A Claimant may be compensated if the work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease "to produce the disability for which workers' compensation is sought". *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990).

Respondents disputed the Claimant's need for treatment resulted from the accident, arguing she would have required the treatment because of the degenerative process in her temporomandibular joints. Respondents also averred Claimant failed to provide accurate information to healthcare providers by not advising of the TMJ treatment she received immediately before the accident and by exaggerating the seriousness of the collision.

Claimant contended that she was symptom-free immediately prior to the accident; she had what she described as muscular pain for which she received periodic treatments. As found, the ALJ did not find Claimant to be credible on this point, as the treatment records from Elephant Moon Massage documented TMJ treatment. Claimant asserted that her TMJ pain caused headaches and other symptoms after the accident. Finally, Claimant argued the MVA caused her TMJ condition to deteriorate and become symptomatic. Once again, this represents a close question because the evidence in the record showed the degenerative changes in the temporomandibular joints that was not the result of this subject automobile collision.

On balance, the ALJ was persuaded by Dr. Keller's opinion that even a low-speed MVA could cause the mandible to dislocate and the disk to be displaced. (Findings of Fact 55 and 61). Dr. Keller noted this was confirmed by the MRI and Claimant's pre-existing condition predisposed her to suffer such an injury or aggravation. Dr. Keller opined Claimant's need for treatment was caused by the subject accident. (Finding of Fact 31). In addition, Dr. Keller noted Claimant's jaw was in alignment immediately before the accident and although these records were not admitted at hearing, his testimony was both credible and persuasive on this point. As found, Claimant reported pain in her jaw after the accident and she consistently reported those symptoms to various treatment providers. (Findings of Fact 15, 19, 20).

In this regard, Respondents' expert, Dr. Sharma is not a dentist and had no specific dental expertise, although he has treated patients with TMJ dysfunction. (Finding of Fact 57). Dr. Sharma confirmed the degenerative nature of Claimant's condition, however, his testimony did not refute Claimant's expert's opinion regarding the exacerbation of her underlying TMJ condition.

The ALJ concluded that Claimant's TMJ condition was aggravated by the subject accident. In particular, what was variously described as TMJ dysfunction, including the misalignment of Claimant's jaw or TMD symptoms were aggravated as a result of the MVA.

Medical Benefits

In the instant case, Claimant has the burden of proof to establish that the treatment proposed by Dr. Keller is reasonable and necessary, as well as related to her industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant failed to meet her burden of proof with regard to her hip injury and is therefore not entitled to medical benefits. (Finding of Fact 62).

As found, Dr. Liddell made several recommendations for treatment. Dr. Keller testified these treatment recommendations were reasonable. Claimant testified she wishes to receive treatment for her TMJ dysfunction. However, the ALJ notes there was not a specific treatment authorization request before the Court. As found, some of the testing and treatment proposed by Dr. Liddell were not related to the subject accident. (Findings of Fact 63 and 64). However the Claimant proved she is entitled to treatment for TMJ dysfunction, including the proposed surgery and decompensating orthodontics.

ORDER

It is therefore ordered that:

1. Claimant's claim for medical benefits for an injury to her hip, including injections, is denied.

2. Respondents shall provide medical/dental benefits to cure and relieve the effects of Claimant's injury to her temporomandibular joints, including the proposed surgery and decompensating orthodontics.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 28, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Did the claimant's condition worsen subsequent to being placed at maximum medical improvement (MMI)?

2. If so, whether the medical benefits for the claimant should be approved as reasonable and necessary?

3. At hearing the parties stipulated to an average weekly wage of $972.00.

FINDINGS OF FACT

1. The claimant worked as an auto mechanic for the respondent-employer beginning in August 2013.

2. The claimant was injured in a work-related industrial accident on December 17, 2014, when he was in the process of removing a starter and using a high powered pneumatic tool and the tool jammed the claimant's hand. The claimant injured the front and back of his right index finger as well as the palm of his right hand. The immediate accident caused the claimant to experience excruciating pain.

3. The claimant was treated at Memorial Hospital and was referred to Dr. Devanny.

4. On December 23, 2014 Dr. Devanny diagnosed an acquired trigger finger and provided an injection to the claimant's right index finger and long finger. The claimant had a follow-up visit with Dr. Devanny on January 22, 2015 and was diagnosed with acquired trigger finger and carpal tunnel syndrome and again received an injection in the index finger. Also on January 22, 2015 the claimant had an injection of the carpal tunnel.

5. These injections provided the claimant with some relief but it was not long lasting. The claimant's right index finger was locked up to 80% of the time and his hand would get numb.

6. On February 20, 2015 the claimant was released from Dr. Devanny's care with the proviso that if the symptoms return he would like to see the claimant again.

7. During the third week of March 2015 the claimant left the employ of the respondent-employer to start his own automotive shop business. This business began operations on April 1, 2015.

8. On April 2, 2015 Dr. Jones placed the claimant at maximum medical improvement for his industrial injury with no permanent impairment and no maintenance medical care.

9. The respondent-insurer filed a final admission of liability (FAL) on April 8, 2015 in conformance with Dr. Jones' report. The claim closed on May 8, 2015 when the claimant did not object.

10. At the time of MMI the claimant felt his condition was tolerable. The claimant's condition remained tolerable until mid-June 2015 when he began dropping things and his finger locked up. The claimant believed he could return for treatment if needed, not realizing that the claim had been closed through the FAL.

11. The claimant attempted to get treatment when he learned the claim was closed, but insurer's adjustor Darren Carlsen indicated that the claimant must have injured his hand in his new employment. The claimant indicated that the symptoms returned because the injections wore off.

12. The adjustor did not authorize a one-time evaluation or any other treatment.

13. The claimant sought treatment on his own with Dr. Devanny.

14. On August 11, 2015 Dr. Devanny reported he last saw claimant on February 20, 2015 with a diagnosis of carpal tunnel syndrome and trigger finger. The doctor noted, "…He was released for full duty at that time. He has had continued recurrence of problems of numbness and tingling as well as locking, catching of the index finger." Dr. Devanny opined that the claimant's continued recurrence of his symptoms was work related and due to his job duties when he worked in his previous employment setting in December (with respondent-employer) and that the treatment should be covered by workers' compensation. Dr. Devanny then referred the claimant to Dr. Finn for further evaluation.

15. On September 17, 2015 Dr. Finn diagnosed the claimant with moderately severe right carpal tunnel syndrome.

16. The ALJ finds the claimant is credible.

17. The ALJ finds that the claimant did not suffer any new injury to his right upper extremity subsequent to his December 17, 2014 industrial injury and that the claimant's condition has worsened since being placed at MMI on April 2, 2015.

18. The ALJ finds claimant has established that it is more likely than not that his conditioned has worsened.

19. The ALJ finds that the claimant has established that it is more likely than not that the respondent-insurer is responsible for payment of the claimant's medical costs for his treatment of his industrial injury.

20. The ALJ finds that the claimant has established that it is more likely than not that the treatment specifically received by the claimant from Dr. Devanny and Dr. Finn was reasonable, necessary, and related to his industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P .2d 792 (1979); *People v. M.A.,* 104 P .3d 273, 275 (Colo. App. 2004) The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P .3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of thee witness; whether the testimony has been contradicted; and bi-as, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P .2d 1205 (1936); CJI, Civil 3:16 (2007)

REOPENING

4. C.R.S. §8-43-303 provides in pertinent part that;

> At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition…If an award is reopened on grounds of an error, a mistake, or a change in condition, compensation and medical benefits previously ordered may be ended, diminished, maintained, or increased.

5. C.R.S. §8-43-303(1) C.R.S. authorizes an ALJ to reopen any award within six years after the date of injury on a number of grounds, including error, mistake, or a change in condition. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). A change in condition refers either "to a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Comm'n*, 714 P.2d 1328, 1330 (Colo. App. 1985); accord *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 330 (Colo. 2004).

6. The reopening authority granted ALJs by §8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ." *Cordova v. Industrial Claim Appeals Office*, 55 P.3d at 189. The party seeking reopening bears "the burden of proof as to any issues sought to be reopened." §8-43-303(4).

7. The ALJ concludes that the claimant has established by a preponderance of the evidence that his condition caused by his work injury of December 17, 2014 has materially worsened and that he is entitled to have his claim reopened.

Medical Benefits

8. The Claimant has the burden of proof to establish the right to specific medical benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; see *Valley Tree Service v. Jimenez*, 787 P. 2d 658 (Colo. App. 1990). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

9. The ALJ concludes that the claimant has established by a preponderance of the evidence that he requires further medical treatment to cure or relieve him from the effects of his industrial injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim under the Workers' Compensation Act of Colorado is reopened.

2. The respondent-insurer is liable for the additional medical treatment necessary to cure or relieve claimant of the effects of the industrial injury, including the treatment the claimant received from Dr. Devanny and Dr. Finn.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: April 15, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Timothy O. Hall, M.D. that Claimant sustained a 15% whole person impairment rating as a result of her September 3, 2013 lower back injury.

2. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant works for Employer as a Certified Nursing Assistant (CNA). Claimant's job duties involve caring for patients and helping them with their activities of daily living.

2. Claimant worked on a part-time basis from October 2012 until she took maternity leave in March 2013. She returned to work as a CNA for Employer on a full-time basis in August 2013. Claimant .earned $12.69 per hour while working for Employer.

3. On September 3, 2013 Claimant was transferring a patient to the bathroom when the patient began falling. Claimant caught the patient with a gait belt but suffered lower back pain.

4. Employer directed Claimant to Workwell Occupational Medicine for treatment. She visited Authorized Treating Physician (ATP) Lloyd Thurston, D.O. Dr. Thurston diagnosed Claimant with myofascial syndrome of the lumbar spine. He determined that Claimant's lower back symptoms were caused by her work activities for Employer on September 3, 2013. Dr. Thurston assigned Claimant work restrictions and referred her for physical therapy.

5. After several physical therapy sessions Claimant returned to Dr. Thurston for an evaluation on October 1, 2013. She reported that her lower back was about "80% recovered." Dr. Thurston remarked that Claimant was comfortable working without restrictions and discontinuing physical therapy. He thus concluded that Claimant had reached Maximum Medical Improvement (MMI) with no impairment or restrictions. Dr. Thurston recommended up to four weeks of medical maintenance treatment.

6. From October 2, 2013 to the week of November 23, 2014 Claimant worked as a full-time CNA for Employer. She explained that the pain from her September 3, 2013 injury never completely resolved. Claimant reported that her lower

back pain flare-ups waxed and waned but never reached the point where she sought medical treatment

7. On November 30, 2014 Claimant was performing her regular job duties when she experienced the sudden onset of lower back and left leg pain. She did not report a specific event that caused her symptoms but had spent an active morning lifting at work. Claimant's continuing back pain increased and she developed left leg pain.

8. On December 11, 2014 Claimant returned to Workwell and sought medical treatment for her latest onset of lower back pain. Thomas Dickey, PA-LVD, noted Claimant's left-sided lower back and left leg pain. He ordered an MRI to rule out a disc herniation and/or nerve impingement at L4. PA-LVD Dickey also assigned a 15-pound lifting/pushing/pulling restriction.

9. On December 27, 2014 Claimant underwent an MRI of her lower back. The MRI revealed serial left paracentral subarticular disc extrusions at L4-L5 and L5-S1 that resulted in moderate foraminal stenosis.

10. On December 29, 2014 Claimant visited Robert Dupper, M.D. at Workwell for an examination. She reported that she continued to suffer from lower back and left leg pain. Dr. Dupper concluded that Claimant's symptoms appeared to be at least partially related to her work activities for Employer. He assigned work restrictions and referred Claimant to a back surgeon.

11. On January 13, 2015 Claimant visited William D. Biggs, M.D. for a surgical consultation. After considering Claimant's medical history and reviewing her lower back MRI, Dr. Biggs diagnosed Claimant with disc degeneration and disc herniation. He recommended physical therapy and an epidural steroid injection.

12. On March 23, 2015 Dr. Dupper examined Claimant to determine whether her current lower back and left leg symptoms and diagnoses were related to her work incident on September 3, 2013 or some other activity. He explained that he asked Claimant about the time period from when she reached MMI on October 1, 2013 until December 11, 2014. She responded that she continued to intermittently experience lower back pain. Starting on approximately November 23, 2014 the pain worsened and began to radiate down her left leg. Dr. Dupper concluded that "[t]he objective findings are consistent with the history of a work-related etiology." He also limited Claimant to working no more than six hours each day.

13. On April 13, 2015 Claimant underwent a left L4-L5 transforaminal epidural steroid injection. Claimant remarked that within two days of the injection she achieved 100% improvement. She noted full resolution of her radicular symptoms and lower back pain.

14. On June 2, 2015 Claimant returned to Dr. Dupper for an evaluation. Claimant reported that she had been working within her restrictions and her lower back symptoms had resolved. Dr. Dupper determined that Claimant reached MMI on June 2,

2015 with no impairment or restrictions. He also noted that Claimant could return to regular employment.

15. On June 11, 2015 Claimant underwent an independent medical examination with Nicholas K. Olsen, D.O. Claimant reported that she initially injured her lower back while transferring a patient on September 3, 2013. She underwent physical therapy and reached MMI on October 1, 2013. Claimant returned to full-duty employment and did not suffer any additional back injuries. Nevertheless, she occasionally experienced lower back pain after working for several days. On November 30, 2014 Claimant suffered significant lower back pain and acute radicular symptoms in her left leg at work in the absence of a specific traumatic event. After performing a physical examination and reviewing Claimant's medical records, Dr. Olsen determined that Claimant suffered lower back myofascial syndrome on September 3, 2013. Dr. Olsen explained that Claimant developed radicular symptoms on November 30, 2014 that were consistent with the L4-L5 and L5-S1 disc extrusions revealed in a lumbar MRI.

16. Reasoning that Claimant did not have disc extrusions on September 3, 2013, Dr. Olsen determined that "[t]here are no objective findings to relate the diagnoses of the disc extrusions or lumbar radiculopathy" from November 30, 2014 with the initial onset of back pain on September 3, 2013. He attributed Claimant's disc extrusions to "the natural aging process and degenerative disc disease with associated risk factors rather than any specific injury or event that occurred" during her work activities for Employer. Dr. Olsen summarized that Claimant's September 3, 2013 symptoms were "independent and separate from the symptoms that acutely developed" on November 30, 2014. He commented that the "markedly different physiologic process can be attributed to an idiopathic onset of left lower extremity radiculopathy." There was thus no evidence of any permanent impairment or disability caused by the November 30, 2014 lumbar radiculopathy. Accordingly, Dr. Olsen agreed with Dr. Thurston that Claimant reached MMI on October 1, 2013 with no impairment or restrictions.

17. On June 26, 2015 Respondents filed a Final Admission of Liability (FAL) for Claimant's September 3, 2013 injury. Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME).

18. On October 26, 2015 Claimant underwent a DIME with Timothy O. Hall, M.D. Claimant reported that she initially injured her lower back on September 3, 2013 while transferring a patient at work. She noted that the pain never completely resolved and she developed the sudden onset of lower back and left leg pain without an acute incident while at work on November 30, 2014. Dr. Hall explained that the development of radicular symptoms was simply the progression of her September 3, 2013 injury as opposed to the natural degenerative process. He reasoned that, because Claimant's lower back pain had persisted since September 3, 2013 and there was no specific inciting event on November 30, 2014, her radicular symptoms constituted a progression of her original lower back injury. However, Dr. Hall agreed that Claimant reached MMI on October 1, 2013. Relying on sections 2C and 2F of Table 53 in the *AMA Guides for the Evaluation of Permanent Impairment Third Edition* (*Revised*) (*AMA Guides*), Dr. Hall assigned Claimant an 8% whole person impairment rating for a specific disorder of the

lumbar spine. He also assigned Claimant an 8% whole person impairment rating for range of motion deficits. Combining the preceding impairments yields a 15% whole person rating for Claimant's September 3, 2013 industrial injury. Dr. Hall also noted that, because there was no clinical evidence of a radiculopathy, no additional impairment rating was warranted. He recommended medical maintenance treatment in the form of 2-3 epidural steroid injections per year, medication management and maintenance follow-up visits for two years.

19. Dr Olsen testified at the hearing in this matter. He agreed with Dr. Hall that Claimant reached MMI on October 1, 2013. However, Dr. Olsen determined that Dr. Hall's 15% whole person impairment rating was erroneous. He commented that Dr. Hall failed to comply with the *AMA Guides* and DOWC *Impairment Rating Tips*. Pursuant to the General Principles of the *Impairment Rating Tips*, impairment ratings should only be given "when a specific work related diagnosis and objective pathology can be identified." Dr. Hall failed to identify any objective pathology to support a permanent impairment for Claimant's September 3, 2013 industrial injury. A rating was thus not consistent with the *AMA Guides* or the *Impairment Rating Tips*.

20. Dr. Olsen specifically addressed Dr. Hall's determination that Claimant reached MMI on October 1, 2013. On the date of MMI Claimant had only been diagnosed with myofascial pain syndrome and there were no signs of discogenic pathology or a radiculopathy. More succinctly, Claimant had not suffered a specific disorder of the lumbar spine at the time she reached MMI. Although Claimant may have suffered a radiculopathy by November 30, 2014, it was not related to her September 3, 2013 work activities.

21. Dr. Olsen explained that Dr. Hall violated Table 53 II B of the *AMA Guides* by assigning an 8% whole person impairment rating for a specific disorder of the lumbar spine. Table 53 II B requires "an intervertebral disk or other soft tissue lesion, un-operated, with medically documented injury and a minimum of six months medically documented pain and rigidity." Dr. Olsen testified that Claimant did not have an "intervertebral" disc or other soft tissue lesion with respect to her lumbar or cervical spines at the time of MMI. Claimant simply did not exhibit any evidence of a disc protrusion on October 1, 2013. She also did not have six months of pain and rigidity between her September 3, 2013 industrial injury and when she reached MMI on October 1, 2013. Consequently, Claimant did not have a Table 53 II B diagnosis for her lumbar spine. Dr. Olsen explained that, without any impairment for a Table 53 specific disorder of the lumbar spine, Claimant could not receive an impairment rating for range of motion deficits. Accordingly, Dr. Olsen concluded that Dr. Hall's lumbar spine and range of motion impairments were erroneous and did not comply with the *AMA Guides*.

22. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Hall that Claimant sustained a 15% whole person impairment rating as a result of her admitted September 3, 2013 lower back injury. Dr. Hall explained that, because Claimant's lower back pain has persisted since September 3, 2013 and there was no specific inciting event on November 30, 2014, her radicular symptoms constituted a progression of her original lower back injury. Relying on

sections 2C and 2F of Table 53 in the *AMA Guides*, Dr. Hall assigned Claimant an 8% whole person impairment rating for a specific disorder of the lumbar spine. He also assigned Claimant an 8% whole person impairment rating for range of motion deficits. Combining the preceding impairments yields a 15% whole person rating for Claimant's September 3, 2013 industrial injury.

23. However, Dr. Olsen determined that Dr. Hall's 15% whole person impairment rating was erroneous. He commented that Dr. Hall failed to comply with the *AMA Guides* and the *Impairment Rating Tips*. Pursuant to the *Impairment Rating Tips*, impairment ratings should only be given "when a specific work related diagnosis and objective pathology can be identified." Dr. Hall failed to identify any objective pathology to support a permanent impairment for Claimant's September 3, 2013 industrial injury. A rating was thus not consistent with the *AMA Guides* or the *Impairment Rating Tips*. Moreover, Dr. Olsen explained that Dr. Hall violated Table 53 II B of the *AMA Guides* by assigning an 8% whole person impairment rating for a specific disorder of the lumbar spine. Table 53 II B requires "an intervertebral disk or other soft tissue lesion, un-operated, with medically documented injury and a minimum of six months medically documented pain and rigidity." Dr. Olsen testified that Claimant did not have an "intervertebral" disc or other soft tissue lesion with respect to her lumbar or cervical spines at the time of MMI. Claimant simply did not exhibit any evidence of a disc protrusion on October 1, 2013. She also did not demonstrate six months of medically-documented pain and rigidity between her September 3, 2013 industrial injury and when she reached MMI. Consequently, Claimant did not have a Table 53 II B diagnosis for her lumbar spine. Dr. Olsen explained that, without any impairment for a Table 53 specific disorder of the lumbar spine, Claimant could not receive an impairment rating for range of motion deficits. Accordingly, Dr. Olsen concluded that Dr. Hall's lumbar spine and range of motion impairments were erroneous and did not comply with the *AMA Guides*.

24. The persuasive reports and testimony of Dr. Olsen reflect that Dr. Hall failed to comply with the *AMA Guides* and the *Impairment Rating Tips* in assigning Claimant a 15% whole person impairment rating. Dr. Hall did not identify any objective pathology to support a permanent impairment for Claimant's September 3, 2013 industrial injury. He specifically violated Table 53 II B of the *AMA Guides* by assigning an 8% whole person impairment rating for a specific disorder of the lumbar spine. Claimant did not have an "intervertebral" disc or other soft tissue lesion with respect to her lumbar or cervical spines at the time of MMI. She simply did not exhibit any evidence of a disc protrusion on October 1, 2013. Finally, Claimant also did not demonstrate six months of medically-documented pain and rigidity as specified in Table 53 II B. Accordingly, Respondents have provided unmistakable evidence that it is highly probable the Dr. Hall's 15% whole person impairment rating was incorrect.

25. On October 1, 2013 Dr. Thurston concluded that Claimant reached MMI with no impairment or restrictions. Dr. Olsen agreed with Dr. Thurston that Claimant reached MMI on October 1, 2013 with no impairment or restrictions. Because Respondents have overcome Dr. Hall's 15% whole person impairment rating, the

persuasive evidence reveals that Claimant suffered a 0% permanent impairment rating as a result of her September 3, 2013 industrial injury.

26. In ascertaining Claimant's Average Weekly Wage (AWW) Respondents contend that relying on the six pay periods or 12 weeks from January 5, 2013 through August 27, 2013.is most appropriate. Excluding the short pay period ending March 2, 2013 when Claimant began her maternity leave, Claimant worked 256.25 hours during the 12 weeks. Multiplying her hourly wage of $12.69 by 256.25 hours yields gross wages of $3,251.81 for the 12 week period. Dividing $3,251.81 by 12 yields an AWW of $270.98. However, the preceding calculations do not properly account for Claimant's wage loss and diminished earning capacity.

27. For the period August 17, 2014 until November 22, 2014, or prior to Claimant's subsequent lower back flare-up and date of disability for lost time from work, Claimant's gross earnings totaled $8,488.16. Dividing $8,488.16 by the time period from August 17, 2014 until November 22, 2014 or 14 weeks yields an AWW of $606.30. An AWW of $606.30 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002); *In Re Clickner* W.C. No. 4-798-331 (ICAP, Apr. 30, 2015). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

6. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *In Re Clickner* W.C. No. 4-798-331 (ICAP, Apr. 30, 2015). Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

7. If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., W.C. No. 4-600-47 (ICAP, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by clear and convincing evidence. *Id.* When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAP, Mar. 19, 2004); *McNulty v. Eastman Kodak Co*., W.C. No. 4-432-104 (ICAP, Sept. 16, 2002);

8. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Hall that Claimant sustained a 15% whole person impairment rating as a result of her admitted September 3, 2013 lower back injury. Dr.

Hall explained that, because Claimant's lower back pain has persisted since September 3, 2013 and there was no specific inciting event on November 30, 2014, her radicular symptoms constituted a progression of her original lower back injury. Relying on sections 2C and 2F of Table 53 in the *AMA Guides*, Dr. Hall assigned Claimant an 8% whole person impairment rating for a specific disorder of the lumbar spine. He also assigned Claimant an 8% whole person impairment rating for range of motion deficits. Combining the preceding impairments yields a 15% whole person rating for Claimant's September 3, 2013 industrial injury.

9. As found, however, Dr. Olsen determined that Dr. Hall's 15% whole person impairment rating was erroneous. He commented that Dr. Hall failed to comply with the *AMA Guides* and the *Impairment Rating Tips*. Pursuant to the *Impairment Rating Tips*, impairment ratings should only be given "when a specific work related diagnosis and objective pathology can be identified." Dr. Hall failed to identify any objective pathology to support a permanent impairment for Claimant's September 3, 2013 industrial injury. A rating was thus not consistent with the *AMA Guides* or the *Impairment Rating Tips*. Moreover, Dr. Olsen explained that Dr. Hall violated Table 53 II B of the *AMA Guides* by assigning an 8% whole person impairment rating for a specific disorder of the lumbar spine. Table 53 II B requires "an intervertebral disk or other soft tissue lesion, un-operated, with medically documented injury and a minimum of six months medically documented pain and rigidity." Dr. Olsen testified that Claimant did not have an "intervertebral" disc or other soft tissue lesion with respect to her lumbar or cervical spines at the time of MMI. Claimant simply did not exhibit any evidence of a disc protrusion on October 1, 2013. She also did not demonstrate six months of medically-documented pain and rigidity between her September 3, 2013 industrial injury and when she reached MMI. Consequently, Claimant did not have a Table 53 II B diagnosis for her lumbar spine. Dr. Olsen explained that, without any impairment for a Table 53 specific disorder of the lumbar spine, Claimant could not receive an impairment rating for range of motion deficits. Accordingly, Dr. Olsen concluded that Dr. Hall's lumbar spine and range of motion impairments were erroneous and did not comply with the *AMA Guides*.

10. As found, the persuasive reports and testimony of Dr. Olsen reflect that Dr. Hall failed to comply with the *AMA Guides* and the *Impairment Rating Tips* in assigning Claimant a 15% whole person impairment rating. Dr. Hall did not identify any objective pathology to support a permanent impairment for Claimant's September 3, 2013 industrial injury. He specifically violated Table 53 II B of the *AMA Guides* by assigning an 8% whole person impairment rating for a specific disorder of the lumbar spine. Claimant did not have an "intervertebral" disc or other soft tissue lesion with respect to her lumbar or cervical spines at the time of MMI. She simply did not exhibit any evidence of a disc protrusion on October 1, 2013. Finally, Claimant also did not demonstrate six months of medically-documented pain and rigidity as specified in Table 53 II B. Accordingly, Respondents have provided unmistakable evidence that it is highly probable the Dr. Hall's 15% whole person impairment rating was incorrect.

11. As found, on October 1, 2013 Dr. Thurston concluded that Claimant reached MMI with no impairment or restrictions. Dr. Olsen agreed with Dr. Thurston

that Claimant reached MMI on October 1, 2013 with no impairment or restrictions. Because Respondents have overcome Dr. Hall's 15% whole person impairment rating, the persuasive evidence reveals that Claimant suffered a 0% permanent impairment rating as a result of her September 3, 2013 industrial injury.

Average Weekly Wage

12. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

13. As found, in ascertaining Claimant's AWW Respondents contend that relying on the six pay periods or 12 weeks from January 5, 2013 through August 27, 2013.is most appropriate. Excluding the short pay period ending March 2, 2013 when Claimant began her maternity leave, Claimant worked 256.25 hours during the 12 weeks. Multiplying her hourly wage of $12.69 by 256.25 hours yields gross wages of $3,251.81 for the 12 week period. Dividing $3,251.81 by 12 yields an AWW of $270.98. However, the preceding calculations do not properly account for Claimant's wage loss and diminished earning capacity.

14. As found, for the period August 17, 2014 until November 22, 2014, or prior to Claimant's subsequent lower back flare-up and date of disability for lost time from work, Claimant's gross earnings totaled $8,488.16. Dividing $8,488.16 by the time period from August 17, 2014 until November 22, 2014 or 14 weeks yields an AWW of $606.30. An AWW of $606.30 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have overcome the DIME opinion of Dr. Hall that Claimant sustained a 15% whole person impairment rating. Based on the persuasive medical reports and testimony of Drs. Thurston and Olsen, Claimant suffered no permanent impairment as a result of her September 3, 2013 lower back injury.

2. Claimant earned an AWW of $606.30.

3. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 6, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-973-429-04

ISSUES

1. Determination of Claimant's Average Weekly Wage (AWW)

2. Whether any temporary total disability benefits (TTD) admitted shall be updated to reflect a new AWW.

3. Whether statutory interest of 8% is due on any potential additional benefits.

STIPULATIONS

After the ALJ determines Claimant's base AWW, the base AWW shall be increased by $117.12 to reflect an agreed upon COBRA rate.

FINDINGS OF FACT

1. Claimant began working for Employer in November of 2010 as a volunteer. Claimant volunteered for Employer approximately 15 hours per week from 2010-2014.

2. In June of 2014 Claimant learned through the volunteer coordinator that Employer would be hiring certified nursing assistant (CNA) positions.

3. On June 20, 2014 Claimant submitted an Application for Employment to Employer. Claimant indicated she desired either full time or part time work for the CNA position. Claimant listed only two prior employers: Amadisys Healthcare from February of 2014 through May of 2014; and Manor Villa Care Home from 1983 to 1988. *See* Exhibit E.

4. On July 1, 2014 Claimant was offered the position of Full Time CNA for Employer at a rate of $14.00 per hour plus a mileage stipend. This offer was made by email from Kelly Bastian, Employer's Managing Director. Claimant was advised she would be offered a full benefits package including medical, dental, vision, and disability coverage. The offer indicated that Claimant would accrue paid time off to equate to 3 weeks of paid time off by the end of the first year of her employment, that Claimant would be paid for 6 holidays, and that Claimant would have 3 floating holidays to utilize per year. *See* Exhibit E.

5. On July 2, 2014 Claimant replied to Ms. Bastian's email. Claimant thanked Ms. Bastian for the email regarding the float CNA position. Claimant asked if there was flexibility to increase the hourly rate to $16.00 per hour, asked if the float

schedule was considered full time or part time and whether it included the benefit package (medical, etc), and advised Ms. Bastian that she would be out of town with her sons the week of August 2-8 but that she could start on July 14. *See* Exhibit E.

6. On July 3, 2014 Ms. Bastian emailed Claimant. Ms. Bastian offered Claimant $15.00 per hour and verified that the position would be considered full time and would entail benefits including health insurance. Ms. Bastian stated "the float is primarily covering vacations and filling holes so as with all positions there has to be the census to support 40 hrs a week but generally nt a problem to get." *See* Exhibit E.

7. On July 3, 2014 Claimant emailed Ms. Bastian accepting the CNA position at $15.00 per hour with a scheduled start date of July 14, 2014. *See* Exhibit E.

8. Ms. Bastian's email advised Claimant that they had to have enough census (patient count) to support 40 hours a week, that Claimant would be covering other CNA's who were on vacation, and that although it generally was not a problem to have enough work to make 40 hours a week, it sometimes was a problem to get to 40 hours a week. Ms. Bastian did not guarantee Claimant 40 hours per week nor did Claimant bargain for a guaranteed 40 hour per week position. Claimant was advised that the hours depended on census and accepted the position knowing that it sometimes, although not generally, was a problem to get 40 hours per week.

9. Claimant began employment with Employer as a full time float CNA on July 15, 2014. Employer has multiple CNAs working for them. Employer does not guarantee any CNA 40 hours of work per week and the number of hours worked per week varies based on the number of patients that Employer has. Employer considers employees to be full time and eligible for benefits when an employee works a minimum of 30 hours per week.

10. From July 15, 2014 through July 25, 2014 Claimant primarily was attending orientation and completing administrative duties for Employer. Claimant worked a total of 58 hours these two weeks completing the orientation and administrative tasks. These two weeks are not representative of the job duties Claimant was hired to perform as these two weeks involved mainly administrative and orientation tasks. Therefore, these two weeks and the number of hours worked are not representative of Claimant's regular work schedule or earnings.

11. The week beginning Saturday July 26, 2014 Claimant began performing her regular float CNA job duties of providing patient care. When hired, Claimant had advised Employer that she already had a week where she would be unavailable. Claimant did not work the following week beginning Saturday, August 2, 2014 and Employer allowed her to have that week off without pay due to her previously scheduled vacation. Claimant returned to work the week beginning Saturday, August 9, 2014. Employer's wage record time sheets indicate that Claimant worked the following number of hours in the following work weeks:

7/26/14 – 8/1/14	**31 hours**

8/9/14 – 8/15/14	**40 hours**	
8/16/14 – 8/22/14	**21 hours**	
8/23/14 – 8/29/14	**48 hours**	
8/30/14 – 9/5/14	**38.5 hours**	(30.5 hours actually worked plus an additional 8 hours paid on 9/1/14 for Labor Day)
9/6/14 – 9/12/14	**40 hours**	
9/13/14 – 9/19/14	**14.5 hours**	

12. On September 19, 2014 Claimant worked 11.5 hours. This day was the highest number of hours Claimant had worked for Employer since starting her Employment. This was also the last day of the time period for that week.

13. On September 19, 2014 Claimant suffered an injury when she hyper flexed her ring and middle finger on a hospital bed frame in a patient's home. Claimant testified that her injury occurred on that morning and that she returned to work after her injury on Monday. However, Employer records show that Claimant had patient visits that day at 9:30 a.m., 2:00 p.m., 5:00 p.m., 7:00 p.m., and at 8:00 p.m. and show that Claimant continued to work that day despite her injury and that she worked a larger number of hours that day than she had in her entire time employed by Employer. Employer records also show that Claimant worked the next day on September 20, 2014.

14. Following her injury, Claimant was paid for the following number of hours in the following work weeks:

09/20/14 – 09/26/14	**39 hours**	
09/27/14 – 10/03/14	**33.5 hours**	
10/04/14 – 10/10/14	**34 hours**	
10/11/14 – 10/17/14	**31.75 hours**	
10/18/14 – 10/24/14	**33.5 hours**	
10/25/14 – 10/31/14	**32.5 hours**	
11/01/14 – 11/07/14	**37.5 hours**	(21.5 hours actually worked plus an additional 16 hours paid for paid time off)
11/08/14 – 11/14/14	**40.5 hours**	
11/15/14 – 11/21/14	**47 hours**	
11/22/14 - 11/28/14	**39 hours**	(31 hours actually worked plus an additional 8 hours paid on 11/27/14 for Thanksgiving)
11/29/14 – 12/05/14	**37.5 hours**	
12/06/14 – 12/12/14	**43 hours**	
12/13/14 – 12/19/14	**40 hours**	

15. Claimant's employment with Employer was terminated on December 19, 2014.

16. From the start of her employment through September 19, 2014, excluding the first two weeks of orientation/administrative tasks, Claimant was paid for a total of 233 work hours. This was over a period of 7 work weeks and averages out to 33.29 hours of paid work hours per week.

17. From the day following her injury through her termination, Claimant was paid for a total of 488.75 work hours. This was over a period of 13 weeks and averages out to 37.6 hours of paid work per week.

18. When combined, Claimant's average number of paid work hours per week during her 20 weeks of employment (excluding the two weeks of orientation/administrative tasks) averages out to be 36.09. This multiplied by her hourly pay rate of $15.00 per hour comes out to an average weekly wage of $541.35.

19. Claimant testified at hearing. Claimant testified that she expected that the CNA job offered to her was for 40 hours per week, that she needed 40 hours per week, and that after orientation she understood the average number of hours per week would be 40. Claimant testified that she was injured on Friday, September 19, 2014 in the morning and returned to work on Monday in the same position but with restrictions. Claimant testified that 40 hours per week was not promised to her but was alluded to when she was told the position was full time.

20. Claimant's testimony, overall, is not found credible or persuasive. Claimant was never guaranteed nor did she bargain for a guaranteed 40 hours per week of work. Claimant worked several weeks well under 40 hours with no clear explanation as to why. Claimant sought either full time or part time employment when filling out her employment application. Claimant was aware of the position, that sometimes due to census numbers she would not get 40 hours per week, and accepted the position.

21. Kelly Bastian, Employer's Managing Director, testified at hearing. Ms. Bastian testified that Employer provides home hospice care and that Claimant was hired as a float CNA to cover for other CNAs who were on vacation, sick, etc and that the number of hours worked would depend on the census and number of patients that Employer had per week. Ms. Bastian testified that full time means 30-40 hours per week and makes an employee eligible for benefits. Ms. Bastian testified that none of Employer's CNAs are guaranteed 40 hours of work per week because the work hours depend on the patient census. The testimony of Ms. Bastian is found credible and persuasive.

22. Lisa Woods, Employer's Human Resources Coordinator, testified at hearing. Ms. Woods testified that full time employment is 30 hours of work per week or more and makes an employee eligible for benefits. Ms. Woods testified that no one is guaranteed 40 hours per week of work at Employer and that all employees are hourly and that their hours depend on patients' needs and patient census. Ms. Woods explained to Claimant at Claimant's orientation that Claimant was eligible for benefits

and was expected to work 30-40 hours per week as a full time employee. The testimony of Ms. Woods is found credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2014). Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2014).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

The ALJ concludes that the best way to reach a fair approximation of Claimant's wage loss in this matter is to use the discretionary authority granted by § 8-42-103(3), C.R.S. (2014) and to use the total gross wages earned by Claimant in the 20 weeks that she performed CNA duties. This excludes the first two weeks of her employment where she was engaged in orientation/administrative tasks. This also excludes one week for which she earned zero wages as she had a pre-planned vacation that Employer accommodated when she was hired.

For the 20 weeks worked as a CNA for Employer, Claimant was paid for a total of 721.75 work hours. Divided by 20 weeks she worked, it equals 36.09 hours of paid work on average per week. With her hourly paid rate of $15.00 per hour, Claimant's average weekly wage over the 20 weeks that she worked was $541.35. Claimant's argument that certain weeks should be excluded from the calculation as "anomalies" where she worked a lower number of total hours is rejected. Claimant's position was noted to be a float position where the hours worked would vary based on patient census. There were weeks where Claimant's hours were less and weeks where her hours were more. This was the nature of the position and Claimant has not offered any persuasive justification for excluding certain work weeks from the AWW calculation. Additionally, it is noted that the day of her injury was the final day of the week of work and Claimant did not establish that she suffered any lost hours or wages due to her injury or that any reason exists to exclude the week that included her injury, the day of her injury, or the week following her injury. Employer's wage records show that the injury did not cause a reduction in the hours worked by her.

Claimant's argument that she should be paid a base AWW of $600 as she bargained for and had a contract for 40 hours per week at $15.00 per hour is rejected. Claimant did not have such an agreement. Although Claimant mistakenly may have assumed she would be working 40 hours per week, Claimant did not have a contract for 40 hours per week nor was she reasonable in her assumption that she would get 40 hours per week. Claimant was advised at orientation that full time employment meant a minimum of 30 hours per week, and Claimant was aware that her position of "float CNA" was covering for regular CNAs who were out and that her hours would be based on both that and the overall patient census. Claimant was specifically advised in email communications from Ms. Bastian that it generally wasn't a problem to get 40 hours a week. This directly told her that it was sometimes a problem to get 40 hours per week. Claimant was aware of the position, accepted it, and did not bargain for a guaranteed number of hours per week nor was she guaranteed a certain number of hours per week.

ORDER

It is therefore ordered that:

1. Claimant's Average Weekly Wage is $658.47. This includes a base Average Weekly Wage of $541.35 plus a stipulated increase to reflect COBRA costs of $117.12.

2. The Average Weekly Wage previously admitted to shall be modified to reflect this wage and any TTD benefits owed shall be adjusted accordingly.

3. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 26, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right rotator cuff and right biceps on August 26, 2014.

2. Whether Claimant has established by a preponderance of the evidence that the right rotator cuff repair surgery and the biceps re-tensioning surgery recommended by Dr. Hatzidakis is reasonable, necessary, and related to an August 26, 2014 injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a sales associate in the paint department and has been so employed for approximately 15 years. Claimant's job duties include taking care of customers, stocking paint on shelves, and moving paint and displays from shelves.

2. As a part of his job duties, Claimant regularly lifts and moves quarts, gallons, and 5-gallon buckets of paint. The larger paint buckets can weigh on average 50-75 pounds depending on the type of paint contained in the bucket.

3. On August 26, 2014 Claimant was asked by the assistant store manager to remove a display on an end aisle and to move it to the back of a different aisle. Claimant moved the display and began re-building it in the new location.

4. While lifting a high solvent 5 gallon bucket of paint that weighed approximately 75 pounds, Claimant heard a pop and felt pain shoot in his right shoulder. Claimant had been standing over the paint bucket and lifting it with both hands when he heard the popping sound.

5. Prior to this incident, Claimant regularly moved 5 gallon buckets of pain with no problem and had no pain or functional limitations with his job or outside job activities.

6. Since this incident, Claimant has had a constant low level pain in his right shoulder that is aggravated and shoots to a high level of pain with certain movements. Claimant also now has pain and spasm in his right biceps with use and has developed a bunched "popeye" appearance in his biceps. Since the incident, Claimant has a diminished capacity to use his right arm.

7. Claimant reported the injury to the assistant store manager and was referred to Concentra Medical Center for evaluation.

8. On August 26, 2014 Claimant was evaluated by Craig Hare, PA-C. PA Hare assessed shoulder sprain and recommended physical therapy. *See* Exhibit 1.

9. On August 29, 2014 Claimant was evaluated by Casey McKinney, PA-C. PA McKinney assessed shoulder sprain and biceps tendon rupture. PA McKinney noted that Claimant reported not as much pain in the day but that he felt it when agitated. PA McKinney referred Claimant for consultation with an orthopedic surgeon. *See* Exhibit 1.

10. On September 11, 2014 Claimant was evaluated by orthopedic surgeon Mark Failinger, M.D. Claimant reported lifting a 5 gallon bucket of paint when he had a pop, pain, and discomfort in his right shoulder. Claimant reported minimal pain. Dr. Failinger noted a "popeye muscle" and what appeared to be a ruptured long head of the biceps. Dr. Failinger provided an impression of rupture of the long head of the biceps and right shoulder probable rotator cuff tear. Dr. Failinger noted he was not worried with the rupture of the long head of the biceps but was concerned with the possible rotator cuff tear. Dr. Failinger noted that in most all cases with ruptured long head of the biceps, they are not fixed and that in most cases it is just a cosmetic deformity. Dr. Failinger planned to get an MRI on Claimant's right shoulder to determine if there was a rotator cuff tear or tendinosis. *See* Exhibit 3.

11. On September 24, 2014 Claimant underwent an MRI of his right shoulder that was interpreted by Cameron Bahr, M.D. Dr. Bahr's impression was: large full thickness tear of the entire supraspinatus and the anterior most portion of the infraspinatus tendon with retraction of the tendon to the level of the glenoid and mild volume loss in the associated muscles; non-visualization of the long head of the biceps tendon that was likely torn and retracted and may be a chronic abnormality as there is no edema around the tendon sheath; small joint effusion and narrowing of the acromiohumeral distance with slight remodeling of the undersurface of the acromion; mild to moderate degenerative changes in the acromioclavicular joint; and mild to moderate tendinosis of the distal subscapularis tendon. *See* Exhibit 7.

12. On September 25, 2014 Claimant was evaluated by Dr. Failinger. Dr. Failinger noted that the MRI showed a massive retracted supraspinatus and anterior infraspinatus tears, long of the biceps tear, and degenerative labrum. Dr. Failinger noted that Claimant still had some pain and discomfort. Dr. Failinger opined that he did not believe the tears were fixable and that Claimant may need a reverse total shoulder replacement. Dr. Failinger opined that the rotator cuff tear was not fixable because of the retraction that was all the way to the glenoid. Dr. Failinger recommended Claimant get more opinions to see what he wanted to do and provided a request for a second opinion. *See* Exhibit 3.

13. On October 10, 2014 Claimant was evaluated by Alireza Alijani, M.D. Dr. Alijani noted that Claimant had minimal strength in the right arm with mild tenderness and pain. Claimant reported that without use of his right arm/shoulder he had pain at a level of 1-2/10 and that with use he had a pain level of 9-10/10. Dr. Alijani opined that Claimant had a massive cuff tear of the right shoulder with associated right long head of the biceps tendon rupture. Dr. Alijani went over the possibility of a surgical repair of the massive cuff tear and the uncertain nature of a repair with a higher risk of re-tear or inability to repair the tendon at the time of surgery as well as the higher risk of infection with massive tears. Dr. Alijani also discussed with Claimant that there was no reason to address the biceps tendon rupture which he opined was a stable issue. Dr. Alijani noted that Claimant wished to proceed with an attempted repair and Dr. Alijani opined that he did not think that was unreasonable. Dr. Alijani requested approval for a right scope open rotator cuff repair surgery. *See* Exhibit 4.

14. On October 16, 2014 Allison Fall, M.D. conducted a Rule 16 Medical Records Review. Dr. Fall opined that based upon her review of the medical records, it appeared that Claimant injured his right shoulder while lifting at work with a tear described as large, full thickness, and massive. Dr. Fall noted that Dr. Failinger did not believe that the tear was fixable. Dr. Fall opined that although surgery would be related to the work injury, the surgery to repair the rotator cuff was not medically reasonable and necessary and was unlikely to lead to any functional benefit. Dr. Fall opined that Claimant's current subjective symptoms and examinations noted good range of motion and that Claimant would not have any gain from the proposed surgery. Dr. Fall noted Dr. Alijani's request for surgery and opined that if an orthopedic surgeon from a different group felt there was at least a moderately good chance of fixing the tear, then the surgery may be medically reasonable and necessary but that at the time she did not consider it so. Dr. Fall opined that consideration could be given for another orthopedic evaluation. *See* Exhibit B.

15. On November 11, 2014 Claimant was evaluated by Theodore Villavicencio, M.D. Dr. Villavicencio noted that Dr. Failinger and Dr. Alijani opined that Claimant needed surgery. Dr. Villavicencio noted that Claimant had minimal pain while at rest but that Claimant was unable to do any overhead reaching or lifting more than 10 pounds without significant pain. Dr. Villavicencio opined that Claimant had persisting pain with activities and limited functional status due to pain and weakness and opined that Claimant would likely benefit from a surgical procedure. Dr. Villavicencio noted he would send Claimant for a second opinion. *See* Exhibit 1.

16. On December 11, 2014 Claimant was evaluated by Armodios Hatzidakis, M.D. Claimant reported lifting a heavy bucket at work which resulted in some shoulder pain. Dr. Hatzidakis noted that Claimant had seen Dr. Alijani and Dr. Failinger who had discussed trying to do arthroscopic repair versus a reverse shoulder arthroplasty. Dr. Hatzidakis assessed traumatic work-related right shoulder injury with a full-thickness large rotator cuff tear of the supraspinatus and infraspinatus, subacromial impingement, and biceps tendon rupture. Dr. Hatzidakis opined that at this point, Claimant did not need a reverse shoulder arthroplasty. Dr. Hatzidakis discussed with Claimant the

possibility of doing an arthroscopic debridement and at least a partial repair of the rotator cuff along with possible re-tensioning of the biceps tendon. Dr. Hatzidakis opined that Claimant was a good candidate for arthroscopic surgery and opined that even a partial rotator cuff repair can provide some benefit. Dr. Hatzidakis noted that Claimant had pain in his biceps area with biceps type activities and that an open re-tensioning biceps tenodesis could be of benefit. Dr. Hatzidakis opined that Claimant's supraspinatus was probably not fully repairable but that there was a good chance that at least a partial repair of the infraspinatus could be possible and opined that Claimant could have significant benefit with arthroscopic surgical management. Dr. Hatzidakis opined that the surgery would give Claimant the best chance to return to his previous level of activity even if the rotator cuff was not fully repairable. Dr. Hatzidakis noted that an order would be placed in the chart. *See* Exhibit 5.

17. On January 5, 2015 Claimant was evaluated by Dr. Villavicencio. Dr. Villavicencio noted that Claimant had recently seen Dr. Hatzidakis who was recommending an attempt at rotator cuff and bicep repair and that he had reviewed Dr. Hatzidakis' notes. Dr. Villavicencio opined that he agreed with Dr. Hatzidakis' plan of right shoulder surgery. *See* Exhibit 1.

18. On February 9, 2015 Claimant was evaluated by Dr. Villavicencio. Dr. Villavicencio noted that the surgery was not approved for unclear reasons. Dr. Villavicencio opined that Claimant had a specific workplace injury lifting a bucket on August 26, 2014 and that Claimant remained unable to advance his modified duty status. *See* Exhibit 1.

19. On March 11, 2015 Claimant was evaluated by Sharon Walker, M.D. Dr. Walker opined that Claimant's complaints were a result of his work. She assessed acute sprain of the right rotator cuff and acute traumatic rupture of the biceps tendon. *See* Exhibit 6.

20. On March 17, 2015 Claimant was evaluated by Dr. Walker. Dr. Walker had reviewed all of Claimant's medical records relating to this injury on March 13, 2015. Dr. Walker discussed her medical records review with Claimant. Dr. Walker noted that at the time of the denial of Dr. Hatzidakis' requested surgery, Claimant was already 4.5 months out from injury with an MRI demonstrating a very large rotator cuff tear and that Claimant had undergone physical therapy without substantial improvement. DR. Walker opined that Claimant had functional deficits which interfered with his activities of daily living and/or job duties after 6-12 weeks of non-operative therapy. Dr. Walker, after reviewing all the records, opined that the surgery requested by Dr. Hatzidakis should be approved. She opined that Claimant was unable to perform his prior job duties and activities of daily living comfortably including washing his hair and putting on his seatbelt. She recommended referral to Dr. Hatzidakis. *See* Exhibit 6.

21. On March 31, 2015 Claimant underwent an independent medical evaluation performed by Lawrence Lesnak, D.O. Dr. Lesnak provided an impression of: probable right shoulder strain/sprain injury that occurred during work hours; post-injury

MRI that reported chronic findings of a large full thickness rotator cuff tear involving the supraspinatus tendon and the anterior portion of the infraspinatus tendon with an associated mild to moderate tendinosis of the subscapularis with a rupture of the long head of the proximal biceps brachia tendon; no current clinical evidence of right shoulder rotator cuff impingement signs; no evidence of neurogenic or vascular thoracic outlet syndrome; no evidence of cervical radiculitis, radiculopathy, or myelopathy; and no evidence of intrinsic symptomatic elbow or wrist joint pathology. *See* Exhibit A.

22. Dr. Lesnak opined that Claimant may have suffered a right shoulder strain/sprain injury and possibly a proximal right biceps brachia tendon rupture as a result of the August 26, 2014 injury but opined that there was no evidence to suggest that any of Claimant's reported right shoulder MRI findings of a large full thickness supraspinatus tendon tear and partial thickness infraspinatus tendon tear, and tendinosis of the subscapularis tendon were in any way related to the August 26, 2014 incident. Dr. Lesnak opined that lifting a 60 pound bucket from floor to waist level was not a force sufficient to cause significant rotator cuff tears or to aggravate pre-existing pathology. Dr. Lesnak opined that the sudden pop Claimant felt in his right anterior shoulder likely correlated with Claimant's proximal long head biceps tendon rupture. Dr. Lesnak opined that surgical intervention for the right proximal biceps tendon rupture was not indicated and would merely be performed for cosmesis. Dr. Lesnak opined that regardless of causality, Claimant did not appear to be a good candidate for an extensive right shoulder surgery with attempted rotator cuff repairs. *See* Exhibit A.

23. On June 4, 2015 Claimant was evaluated by Dr. Hatzidakis. Dr. Hatzidakis noted that Claimant had two distinct areas of pain: one directly in his shoulder and radiating to the lateral deltoid, and one in the biceps where Claimant routinely had severe spasm with supination/screw driving type activity. Dr. Hatzidakis opined that arthroscopic surgery was a reasonable option for Claimant and disagreed with Dr. Lesnak. Dr. Hatzidakis opined that Claimant's right shoulder pain had a reasonable chance of being well addressed with an arthroscopic procedure for debridement, possible partial versus full rotator cuff repair depending on the tissue that was found, and possible smoothing subacromial decompression. Dr. Hatzidakis agreed with Dr. Lesnak that if a long head of the biceps rupture was asymptomatic then there would clearly not be a need for surgery. However, Dr. Hatzidakis opined that Claimant's biceps rupture was clearly symptomatic and therefore opined that it would be helpful to perform open re-tensioning of the long head of the biceps. Dr. Hatzidakis re-submitted a request to proceed with surgery. *See* Exhibit 5.

24. Claimant's testimony at hearing is found credible and persuasive. Claimant reported the mechanism of injury and symptoms consistently throughout his first report of injury and his ongoing treatment. Claimant is credible that he doesn't use his right arm much so has low pain but that when he uses his right arm, his pain level shoots up. Claimant did not have the current daily symptoms he has now prior to August 26, 2014. Claimant is credible explaining that in October of 2013 he had tightness in his right shoulder and trouble sleeping but that the symptoms resolved after he began sleeping on his back and he had no ongoing symptoms leading up to his

injury and leading up to his injury was able to move 5 gallon buckets of pain at work on a daily basis without problem.

25. Dr. Lesnak testified at hearing consistent with his written report. Dr. Lesnak opined that Claimant's MRI showed that his rotator cuff pathology was not acute or sub-acute. Dr. Lesnak opined that the retraction seen in the rotator cuff takes 6 months to 1 year to develop and that the fatty infiltrate takes 1 to 2 years to develop. Dr. Lesnak opined that Claimant's symptoms in 2013 would be explained by his current shoulder pathology. Dr. Lesnak opined that if someone has a normal shoulder, they would not have pain sleeping on their stomach or their side. Dr. Lesnak opined that if someone has a shoulder problem, then sleeping on their stomach or side will cause pain due to pressure put on the glenoid. Dr. Lesnak opined that Claimant's 2013 pain demonstrates that he likely had a problem then. Dr. Lesnak opined that the rotator cuff and supraspinatus tendon is usually injured when an arm is overhead or twisted and that lifting from the floor to the chest level doesn't cause a supraspinatus tear and that the supraspinatus muscle actually shuts down after 5-8 pounds and other muscles take over. Dr. Lesnak opined that lifting a 75 pound bucket with two arms does not engage the rotator cuff at all. Dr. Lesnak opined that Claimant tore his biceps at the time of injury and did not injure his supraspinatus. Dr. Lesnak opined that Claimant's pain and inability to function is due to Claimant's biceps that is not fixable with surgery.

26. Dr. Lesnak opined that the proposed surgery is to fix the rotator cuff, but opined that it is probably not fixable. Dr. Lesnak believed that Dr. Hatzidakis was arrogant in believing that he could fix the rotator cuff and opined that the proposed surgery was not reasonable or necessary. Dr. Lesnak noted that neither Dr. Walker nor Dr. Villavicencio had performed a causality assessment and that Dr. Hatzidakis did a poor causation analysis. Dr. Lesnak noted that if Claimant was lifting paint, it would make sense that he tore his biceps and the pain reported by Claimant makes sense but that the mechanism of injury does not support a rotator cuff tear.

27. The opinions of Dr. Lesnak differ from the majority of medical providers in this case and the opinions overall are not persuasive. Although Dr. Failinger's opinion that the rotator cuff is not repairable supports Dr. Lesnak's position, several physicians opine otherwise and recommend the proposed surgery. Further, Dr. Lesnak is not persuasive that the mechanism of injury does not support a right rotator cuff tear and his opinion is contradicted by several providers who opine that the injury is work related.

28. Dr. Hatzidakis testified by deposition consistent with his written reports and request for surgery. Dr. Hatzidakis opined that Claimant's injuries were consistent with the mechanism of injury and that moving the bucket at worked caused Claimant's right shoulder injury. Dr. Hatzidakis opined that Claimant has weakness lifting his right arm over head and has pain as well as painful spasms in his bicep muscle with activity and stress of the biceps. Dr. Hatzidakis opined that Claimant's good range of motion makes his prognosis improved for rotator cuff surgery. Dr. Hatzidakis opined that with the proposed procedure and Claimant's situation he would estimate an 80 percent chance of significant improvement and that Claimant had a high likelihood that he would

be improved following surgery. Dr. Hatzidakis noted that Claimant had a relatively well functioning shoulder and that it was logical to assume that the work injury had something to do with Claimant's symptoms. Dr. Hatzidakis disagreed with Dr. Lesnak's opinion that lifting a 60 pound bucket from the floor to the waist was not sufficient to cause significant rotator cuff tears or to aggravate pre-existing pathology. Dr. Hatzidakis opined that when you lift something from the ground, your shoulder is active and that when positioning you rotate the muscles in your shoulder to stabilize your shoulder and arm when you lift a bucket or something heavy. Dr. Hatzidakis opined that when you are lifting a bucket, it's awkward and requires lifting forward, lifting to the side, and rotating your arm and that the rotator cuff would be active with all of those motions. Dr. Hatzidakis opined that many patients have had that type of injury and that the mechanism of injury was plausible.

29. Dr. Hatzidakis opined that it is difficult to assess on MRI whether something is chronic or acute or what portion may be chronic or acute. Dr. Hatzidakis opined that it was plausible that Claimant had an element of a rotator cuff tear but that with this injury it was exacerbated or the tear worsened. Dr. Hatzidakis opined that one could have a smaller tear that becomes a bigger tear with an injury and that it was possible Claimant had a pre-existing tear. Dr. Hatzidakis noted that Claimant did not have signs of the tear being chronic and didn't demonstrate a clear chronic issue. Dr. Hatzidakis classified Claimant's injury as an acute injury. Dr. Hatzidakis noted that Dr. Failinger opined that the rotator cuff was not fixable because of the retraction and opined that it was more difficult to repair when retracted but that even if the rotator cuff was not completely repairable, it could be partially repairable giving Claimant a chance of improvement. Dr. Hatzidakis opined that the surgery would provide Claimant less pain and improved functionality and that the surgery was reasonable and necessary.

30. Dr. Hatzidakis' opinions overall are found credible and persuasive. His opinion that the proposed surgery is reasonable, necessary, and related to the work injury are consistent with similar opinions provided by Dr. Alijani, Dr. Walker, and Dr. Villavicencio. Additionally, the opinion of Dr. Fall that it might be reasonable and necessary if another physician recommended also supports the overall conclusion that the surgery is reasonable and necessary. Dr. Hatzidakis' opinion on the mechanism of injury supporting a work related injury is also credible and persuasive and supported by the opinions of the majority of the providers who opine similarly.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden of proof to establish that he suffered a compensable injury to his right rotator cuff and right biceps tendon on August 26, 2014 while lifting a 5 gallon bucket at work. Prior to August 26, 2014 Claimant had one period of time in October of 2013 where he had some pain/stiffness in his right shoulder while sleeping that went away after he started sleeping on his back. Claimant was able to, on a daily basis, lift buckets of paint including heavy 5 gallon buckets without problem. After August 26, 2014 Claimant was unable to lift heavy buckets at work and had limitations in using his right arm and shoulder that were not present prior to his injury. Claimant felt a pop and immediate pain on August 26, 2014 and has established with evidentiary medical support that he suffered an acute injury to both his right rotator cuff and his right biceps tendon on that date.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

Claimant has established that he sustained a work related injury to his right rotator cuff and his right biceps tendon. Claimant has established that the surgery recommended by Dr. Hatzidakis is both reasonable and necessary to cure and relieve the effects of his injury. The opinions of Dr. Hatzidakis, Dr. Walker, and Dr. Villavicencio support the recommended surgery. Further, Dr. Fall's opinion provides that if another orthopedic surgeon thought the surgery might work, then it may be reasonable and necessary. After reviewing the subsequent opinion that the requested the surgery, her opinion ultimately is that the surgery may be reasonable and necessary. Dr. Alijani, although he had concerns, also requested an arthroscopic rotator cuff repair surgery and found it to be a reasonable treatment option for Claimant. Although Dr. Lesnak and Dr. Failinger opine that they believe the surgery will be unsuccessful, Claimant has established with multiple providers providing contrary opinions, that the surgery will more likely than not provide him relief from the effects of his industrial injury. Further, the opinion of Dr. Hatzidakis is found credible and persuasive that the biceps repair surgery is also reasonable and necessary as Claimant has ongoing symptoms and spasms in that area. Although typically thought to be a cosmetic procedure, Claimant has symptoms that he has established are more likely than not capable of being improved with this procedure. Therefore, the surgery recommended by Dr. Hatzidakis to repair both the right rotator cuff and the right biceps tendon is found to be reasonable and necessary and supported by a majority of the medical evidence.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right rotator cuff and his right biceps tendon on August 26, 2014.

2. Claimant has established by a preponderance of the evidence that the right rotator cuff repair surgery and the biceps re-tensioning surgery recommended by Dr. Hatzidakis is reasonable, necessary, and related to his August 26, 2014 injury.

3. Any issues not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 25, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the C5-C6 cervical spine disc arthroplasty requested by Dr. Rauzzino is reasonable, necessary, and causally related to her January 9, 2015 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a kitchen specialist.

2. On January 9, 2015 Claimant was exiting her vehicle in Employer's parking lot when she slipped and fell on ice.

3. Claimant completed a report of injury on that date that stated she slipped on ice in the parking lot and that her first foot was out of the car when she slipped on the ice and fell out of the car. Claimant reported that her left forearm, right elbow, and right knee were affected. *See* Exhibit A.

4. On January 9, 2015 Claimant was evaluated by Annu Ramaswamy, M.D. Claimant reported right forearm, right knee, left forearm, neck, and low back pain after slipping on ice getting out of her car that morning. Claimant reported that her right arm and right knee hurt the most. Dr. Ramaswamy noted on examination of Claimant's cervical spine that there was tenderness in the left trapezius musculature with mild trigger point activity and that the tenderness extended to the left rhomboid region. Dr. Ramaswamy noted range of motion of the cervical spine to be: flexion 70 degrees; extension 40 degrees; right rotation 40 degrees; and left rotation 30 degrees. Dr. Ramaswamy diagnosed right forearm strain, right knee strain/contusion, cervical/lumbar strains, and left ulna contusion. Dr. Ramaswamy recommended icing, stretching for the neck and low back, and braces for the right elbow and right knee. *See* Exhibit G.

5. On January 27, 2015 Claimant underwent cervical spine radiographs interpreted by Paul Hsieh, M.D. Dr. Hsieh provided the impression of mild degenerative disc disease at C5-C6 and noted that the radiographs were negative for acute abnormality in the cervical spine. Dr. Hsieh noted no fracture, dislocation, or acute bone lesion and that the mild degenerative disc disease at C5-C6 was chronic. *See* Exhibit J.

6. Claimant was evaluated by Thomas Vavrek, D.O. on February 18, 2015, February 23, 2015, February 26, 2015, March 2, 2015, and March 4, 2015. At each evaluation, Dr. Vavrek noted that Claimant had no numbness, tingling, or parasthesias and that she had no evidence of radiculopathy with her cervicothoracic pain. Dr. Vavrek opined that Claimant's paracervical and scapular tone and tenderness were associated

with soft tissue pain or myalgias post strain. Dr. Vavrek assessed myofascial pain and dysfunction and somatic dysfunction and also noted that Claimant's medical history was positive for reactive depression. *See* Exhibit K.

7. On March 10, 2015 Claimant was evaluated by Dr. Ramaswamy. Claimant reported continued neck and low back pain. Dr. Ramaswamy opined that Claimant was making slow progress. Claimant denied numbness and tingling in her upper and lower extremities. Dr. Ramaswamy anticipated maximum medical improvement within two months. *See* Exhibit L.

8. Claimant was evaluated by Dr. Vavrek on March 11, 2015, March 19, 2015, April 1, 2015, and April 6, 2015. Again, at each evaluation, Dr. Vavrek noted that Claimant had no numbness, tingling, or parasthesias and that she had no evidence of radiculopathy with her cervicothoracic pain. Dr. Vavrek opined that Claimant's paracervical and scapular tone and tenderness were associated with soft tissue pain or myalgias post strain. Dr. Vavrek noted that Claimant had no neurological signs or symptoms. *See* Exhibit M.

9. On April 9, 2015 Claimant underwent an MRI of her cervical spine interpreted by Charles Wennogle, M.D. Dr. Wennogle provided an impression of: C5-C6 disc degeneration, with mild left uncovertebral joint hypertrophy, left foraminal protrusion, and mild to moderate left foraminal stenosis; C6-C7 disc degeneration with broad-based disc bulge but no stenosis; and C7-T1 mild disc degeneration with focal central protrusion causing no stenosis. *See* Exhibit N.

10. On April 13, 2015 Claimant was evaluated by Dr. Ramaswamy. Claimant reported a sore neck and back. Dr. Ramaswamy reviewed Claimant's MRI reports and noted that Claimant had evidence of cervical and lumbar spondylosis. Dr. Ramaswamy referred Claimant to Dr. Ogin to see if facet inflammation was a consideration given Claimant's chronic pain. Dr. Ramaswamy noted that if Dr. Ogin felt Claimant's pain was myofascial, then Claimant would be at maximum medical improvement. Dr. Ramaswamy noted that if injections were recommended, then maximum medical improvement would be delayed. *See* Exhibit O.

11. On April 28, 2015 Claimant was evaluated by Dr. Ogin. Claimant reported a chief complaint of left sided back pain. Claimant reported pain worse on the left side with predominance in the left lower neck into her upper shoulder and her left lower back into her buttock. Claimant reported no radicular pain, numbness, or weakness into her arms or legs. On examination Dr. Ogin noted that Claimant had full cervical range of motion to the right and good flexion but that to the left, her motion was about 60% of the right side and that she had increased pain during left cervical rotation. Dr. Ogin reviewed the MRI of the cervical spine and noted a left-sided lateral disk bulge, C5-6 into the foramen and a central disk bulge at C6-C7 with mild neural foraminal and central stenosis at that level. Dr. Ogin provided the impression of cervicothoracic strain injury with myofascial dysfunction, possible left lower cervical facet syndrome, and left sided disk protrusion C5-6, query clinical significance. *See* Exhibit P.

12. On May 12, 2015 Claimant underwent left C4-C5, C5-C6, and C6-C7 intraarticular facet joint injections performed by Dr. Ogin. Dr. Ogin noted that given the persistence of Claimant's pain complaints and a failure to respond to conservative measures, Claimant was referred for the facet blocks for diagnostic and therapeutic purposes. Post injection, Claimant was monitored and reported that her pre-injection pain level of a 7/10 had been reduced to 6/10 post injection. Dr. Ogin opined this was a negative diagnostic response. *See* Exhibit Q.

13. On May 26, 2015 Claimant was evaluated by Dr. Ogin. Claimant's chief complaint was neck pain worse on the left side. Dr. Ogin opined that Claimant had a negative diagnostic response and negative therapeutic response to a left lower cervical facet joint injection. Dr. Ogin noted on examination that Claimant had tenderness along the left lower cervical paraspinal muscles with increased pain with extension more than flexion and left rotation more than right rotation. Dr. Ogin noted that the Spurling maneuver on the left reproduces pain into Claimant's parascapular region but not down her arm. Dr. Ogin noted that given the disk protrusions present on MRI, coupled with a negative diagnostic response to facet blocks, the pain refractory to treatments including PT, OMT, acupuncture, and medication management, and the fact that Claimant has a parascapular referred component, Claimant was a candidate for a one-time trial of an epidural steroid injection. Dr. Ogin noted that it would be performed at the C7-T1 level to the left which should address the lower disk bulges at C5-6, and C6-7. Dr. Ogin opined that if Claimant failed to get relief, she would not be a candidate for any further cervical injections. *See* Exhibit T.

14. On June 2, 2015 Dr. Ogin performed a C7-T1 interlaminer epidural steroid injection. Dr. Ogin noted that pre-injection Claimant had a pain level of 5-6/10 and that her pain was aggravated by flexion, extension, and rotation. Post-injection Dr. Ogin noted that Claimant's pain level was 5/10 with continued pain in flexion and extension. Dr. Ogin opined that Claimant had a negative diagnostic response to the epidural injection. *See* Exhibit T.

15. On June 18, 2015 Claimant was evaluated by Dr. Ramaswamy. Claimant reported continued neck discomfort. Claimant reported developing a migraine headache after the epidural steroid injection, then the next day she felt great all over, then her neck pain went back to baseline state. Dr. Ramaswamy noted that Dr. Ogin recommended a consultation with Dr. Rauzzino based on the C5-C6 disc bulging. *See* Exhibit V.

16. On July 6, 2015 Claimant was evaluated by Michael Rauzzino, M.D. Claimant reported neck pain that radiated from the back of her neck and down her shoulders, occasionally into her left arm and hand greater than the right arm and hand. Claimant reported weakness in her forearms, hands, and fingers bilaterally as well as intermittent numbness in her hands. Claimant reported temporary relief from an epidural steroid injection but that her symptoms quickly returned and Claimant reported no relief from the facet injections. Dr. Rauzzino noted the disc herniation at C5-6 more

off to the left which was the side of Claimant's worse arm symptoms. Dr. Rauzzino noted that Claimant had completed conservative therapy and that Claimant should either be placed at MMI and be given a rating, or that Claimant could consider surgery. Dr. Rauzzino opined that the best surgical option would be a C5-C6 disc replacement with removal of the disc herniation and decompression of the spinal cord. He opined that this would not place stress on the C6-C7 level which showed some chronic degenerative changes. *See* Exhibit X.

17. On July 10, 2015 Claimant was evaluated by Dr. Ogin. Dr. Ogin opined that given Claimant's clinical exam findings and her MRI results, he suspected her pain was discogenic and that she would benefit from a disc replacement. He noted that he would set her up for a left C5-6 selective nerve root block and that if it took away her pain it would be a good prognosticator that she would do well with a disc replacement. *See* Exhibit 4.

18. On July 27, 2015 Claimant was evaluated by Dr. Ramaswamy. Dr. Ramaswamy noted that Claimant had been evaluated by Dr. Ogin who did not recommend an EMG since Claimant's left arm symptoms were minimal, but that he did recommend a selective nerve root block. Dr. Ramaswamy opined that if the nerve block was non-diagnostic, it was likely that Claimant would have exhausted treatment and MMI would follow. If the nerve block was diagnostic, then Claimant would need to be followed to determine if the block was therapeutic. *See* Exhibit Y.

19. On August 4, 2015 Claimant underwent a left C6 selective nerve root block/transforaminal epidural steroid injection performed by Dr. Ogin. Dr. Ogin noted that Claimant's motion turning her head left and right was improved after the nerve block and that Claimant reported her prior pain level of 8/10 had been decreased to 5/10 following the nerve block injection. Dr. Ogin noted that when asked separately, Claimant estimated 50% pain relief. Dr. Ogin opined that Claimant had an equivocal pain response. *See* Exhibit Z.

20. On August 17, 2015 Claimant was evaluated by Dr. Ramaswamy. Claimant reported that after the selective nerve root block she had improved range of motion by 50% and better with pain for a few days before the pain returned. Dr. Ramaswamy noted that it appeared Claimant had a partial response but no significant relief after the block. Dr. Ramaswamy noted that Dr. Ogin recommended the cervical disc replacement based on the nerve root block and given that Claimant had exhausted treatment options. Dr. Ramaswamy also noted that a second opinion on surgery would be reasonable based on Claimant's clinical course. *See* Exhibit 8.

21. On September 3, 2015 Claimant was evaluated by Michael Janssen, D.O. Claimant reported falling onto her buttocks, and smashing her head in a violent fall on January 9, 2015. Dr. Janssen noted full and unrestricted range of motion in Claimant's cervical spine, no sensory deficits in the right or left upper extremity, and positive lhermitte sign with pain radiating into the left upper extremity. Dr. Janssen assessed: C6 radiculopathy; failure to respond with a conservative program for the last 9 months;

and C5-C6 cervical pathology with C6 radicular findings. Dr. Janssen opined that to treat the problem, Claimant required surgical reconstruction at the C5-C6 level either with fusion or a total disc replacement. He opined that total disc arthroplasty was a reasonable option. *See* Exhibit 16.

22. On September 21, 2015 George Schakaraschwili, M.D. performed a Rule 16 Record Review. Dr. Schakaraschwili noted that Dr. Rauzzino had requested authorization on September 10, 2015 for C5-6 disc replacement surgery. Dr. Schakaraschwili opined that Claimant was a poor surgical candidate and opined that the proposed surgery was unlikely to alleviate Claimant's symptoms. Dr. Schakaraschwili also opined that it was unlikely that the disc protrusion at C5-6 was caused by the fall. Dr. Schakaraschwili opined that Claimant had a tendency to multiply symptoms as her treatment progressed and that the symptoms Claimant reported of arm numbness, tingling, and weakness were severely out of proportion to the symptoms she reported to all other providers throughout her treatment. Dr. Schakaraschwili opined that Claimant failed to respond to an intralaminer cervical epidural injection and that her response to a selective nerve root block on the left at C6 was non-diagnostic and that her level of responses indicate a poor prognosis for relief of her symptoms following the proposed surgery. *See* Exhibit BB.

23. On October 2, 2015 Claimant was evaluated by Dr. Ramaswamy. Dr. Ramaswamy reviewed Dr. Schakaraschwili's recommendation for denial. Dr. Ramaswamy agreed that Claimant did not respond significantly to epidural steroid injections. Dr. Ramaswamy noted that the Colorado Medical Treatment Guidelines indicate that an individual meets the criteria for a cervical disc arthroplasty procedure if a clinical radiculopathy was noted at one level and if an individual was symptomatic for a prolonged period of time. Dr. Ramaswamy noted that some of the physicians who had treated Claimant believed that a cervical radiculopathy was present based on Claimant's objective examination findings. *See* Exhibit CC.

24. On December 16, 2015 Brian Reiss, M.D. completed an independent medical evaluation. Dr. Reiss opined that Claimant had a totally negative response to the epidural steroid injection, and that Claimant did not have radicular symptomatology. Dr. Reiss opined that Claimant had myofascial pain unlikely to respond to a single level cervical disc replacement and opined that Claimant had at least two levels of significant disc degeneration and that the procedure would be quite unlikely to resolve Claimant's symptoms. Dr. Reiss opined that Claimant did not have true radiculopathy and that Claimant did not meet the criteria for surgical intervention for radiculopathy. Dr. Reiss opined that for her myofascial neck pain, she should resume physical therapy, consider isometric exercise, and pain management with potential medications and other modalities. Dr. Reiss opined that based on surveillance and examination, Claimant appeared quite functional. *See* Exhibit EE.

25. Dr. Reiss opined that even assuming Claimant's pain was discogenic rather than myofascial, Claimant still had as much abnormality at C5-6 as she had at C6-7and opined that there was no evidence indicating one level versus the other as the

source of her pain. Dr. Reiss noted that the guidelines require identification of the pain generator prior to surgical intervention. *See* Exhibit EE.

26. On January 14, 2015 Claimant was evaluated by Dr. Ramaswamy. Claimant reported a pain level of 9.5/10. Claimant denied numbness and tingling in her upper extremities. Dr. Ramaswamy noted that Claimant's discomfort may represent some nerve irritation along the left C5/C6 nerve roots and that electrical studies may be helpful to evaluation the possibility. Dr. Ramaswamy noted that given that Claimant did not complain of absolute radicular symptoms in the left upper extremity, Dr. Reiss may opine that surgical intervention would not be beneficial. *See* Exhibit FF.

27. On February 4, 2016 Claimant was evaluated by Dr. Ramaswamy. Dr. Ramaswamy opined that Claimant did not have true radicular symptoms and Dr. Ramaswamy noted that Dr. Ogin also indicated that electrical studies would not be helpful as Claimant had not presented with distal symptomatology. Dr. Ramaswamy recommended additional visits to work on Claimant's myofascial pain. Dr. Ramaswamy opined that the risk of surgical intervention likely would outweigh the benefit. *See* Exhibit HH.

28. Claimant testified at hearing that she did not report the numbness or tingling in her upper extremities to her providers because she didn't have symptoms on a daily basis and only had them 1-2 days per week for approximately one hour. Claimant testified that the symptoms went down her arm and into her fingers and thumb and that she was not sure when the numbness and tingling started.

29. Claimant's testimony, overall, is not found credible or persuasive. Claimant failed to report to multiple providers over a significant treatment period that she had symptoms of radiculopathy in her left arm. Only when evaluated by Dr. Rauzzino did she first report these symptoms. Dr. Ramaswamy, Dr. Reiss, Dr. Schwakaschwili, and Dr. Vavrek noted no symptoms of radiculopathy.

30. Dr. Reiss testified at hearing consistent with his written report. Dr. Reiss opined that Claimant did not have signs or symptoms of radiculopathy at the C6 nerve root. Dr. Reiss opined that Claimant has myofascial pain and that surgery was not appropriate. Dr. Reiss opined that you could not identify one disc as being the probable cause of Claimant's pain and that C5-6, C6-7, or C7-T1 could all equally as likely be sources of pain. Dr. Reiss disagreed with Dr. Rauzzino's assessment that his examination of Claimant was incomplete and explained that he did not perform a Spurling's maneuver because Claimant reported she had no numbness or tingling into her arms. Dr. Reiss noted that Dr. Ogin agreed that there were no upper extremity symptoms warranting an EMG study. Dr. Reiss opined that Claimant's neck pain was unlikely to get better with the surgery and that the nerve root block confirmed that the C6 nerve root was not the cause of Claimant's pain. Dr. Reiss opined that the surgery requested by Dr. Rauzzino was not reasonable or necessary and that Claimant's pain was myofascial and should not be treated with surgery. Dr. Reiss opined that the

proposed surgery would only fix the occasional numbness/tingling that Claimant reported.

31. Dr. Reiss is found credible and persuasive.

32. Dr. Rauzzino testified by deposition. Dr. Rauzzino opined that Claimant had a left foraminal protrusion producing foraminal stenosis compromising the exiting nerve root at the C5-C6 level. Dr. Rauzzino opined that Claimant had pre-existing degenerative disease at that level with some bony foraminal stenosis but that he believed she had a newer injury with the disc protrusion, both of which combined to irritate the nerve root as it exited the spine on the left. Dr. Rauzzino opined that Claimant had cervical radiculopathy at C5-6 on the left related to her January 2015 work injury. Dr. Rauzzino opined that Claimant had radiculopathy since he could produce symptoms with a Spurling's maneuver on the left and because of Claimant's report of neck pain radiating down her arm and into her thumb. Dr. Rauzzino opined that given Claimant's radiographic findings pointing to the C5-6 level, her physical exam, and the diagnostic relief Claimant had with injection, they all combined to suggest that Claimant would have good relief with the recommended surgery.

33. The opinions of Dr. Rauzzino are not found as credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S. (2014); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant’s entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S.

Claimant has failed to establish by a preponderance of the evidence that the C5-C6 cervical spine disc arthroplasty recommended by Dr. Rauzzino is reasonable, necessary, and causally related treatment for her January 9, 2015 industrial injury. The opinions of Dr. Reiss, Dr. Ramaswamy, and Dr. Schakaraschwili that Claimant is not an appropriate candidate for the disc arthroplasty procedure are found credible and persuasive and are supported by the Colorado Workers’ Compensation Medical Treatment Guidelines and the majority of the Claimant’s medical records and evidence. Claimant’s reports of radiculopathy in her left arm are not credible and not consistent with the overwhelming medical evidence establishing multiple visits where findings of radiculopathy were specifically noted to not exist. Dr. Rauzzino’s opinion that Claimant is a surgical candidate is based, in part, on her report during the evaluation performed by Dr. Rauzzino that she has symptoms into her left arm. Despite this report to Dr. Rauzzino, Claimant reported the exact opposite to multiple providers over her course of treatment prior to being seen by Dr. Rauzzino. Further, his recommendation is also based, in part, on his finding that Claimant had a positive Spurling's on the left side. However, Dr. Ogin also performed a Spurling's maneuver when evaluating Claimant and Dr. Ogin noted no radiating symptoms into Claimant's left arm with the maneuver. Three physicians in this case have recommended surgery and three have recommended against surgery. Of the three physicians recommending the surgery, Dr. Ogin recommended surgery despite noting that Claimant has no radiculopathy. Dr. Rauzzino recommended surgery, in part, based on Claimant's reported pain and radiculopathy although Dr. Rauzzino is the first physician that Claimant reported symptoms of radiculopathy to and Claimant was evaluated by Dr. Rauzzino 2-3 times. Dr. Janssen also recommended surgery opining that Claimant had radiculopathy. Dr. Janssen evaluated Claimant one time.

The more persuasive evidence shows that Claimant does not have true radiculopathy. Claimant was evaluated at numerous appointments by multiple providers where she did not report any symptoms of radiculopathy and where radiculopathy was not found on examination. Dr. Ramaswamy, Dr. Reiss, Dr. Schwakaschwili, Dr. Vavrek, and Dr. Ogin all opined that she does not have radiculopathy. Further, Dr. Ramaswamy, Dr. Reiss, and Dr. Schwakaschwili all opined that surgery is not reasonable or necessary in this case. Their opinions are consistent with the overwhelming medical evidence that shows at multiple evaluations Claimant had no concern with, reports of, or objective evidence of radiculopathy. The opinion of Dr. Reiss is persuasive that Claimant has myofascial pain that should be treated without surgical intervention. Further, objective testing by nerve block also established persuasively that Claimant received at best an equivocal response that was not diagnostic for the C6 level being her pain generator making the requested surgery an unreasonable and unnecessary option. The opinion of Dr. Vavrek, who saw Claimant multiple times early in her treatment, is persuasive that Claimant has myofascial pain and dysfunction as well as somatic dysfunction and a noted history positive for reactive depression. Similarly, Dr. Schakaraschwili's opinion is credible and persuasive that Claimant's reported symptoms to Dr. Rauzzino of arm numbness, tingling, and weakness were severely out of proportion to the symptoms she reported to all other providers throughout her treatment. Although differences of medical opinion exist in this case, Claimant has failed to establish more likely than not that surgery is reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden of proof to establish that the C5-C6 cervical spine disc arthroplasty is reasonable, necessary, and causally related to her January 9, 2015 industrial injury.

2. All other issues are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 12, 2016 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether the Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his right eye on December 28, 2014 while performing services arising out of and in the course of his employment.

2. Whether the Claimant has proven that the requested right eye surgery recommended by Dr. Tim James is reasonable, necessary, and related to his work related injury of December 28, 2014.

3. Whether the Claimant has proven that Dr. Tim James is an Authorized Treating Physician for to his work related injury of December 28, 2014.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. The Claimant works for Employer with the job title of Electrician A. His job duties include repair of electrical equipment at Employer's facility.

2. The Claimant was working in the course and scope of his employment on December 28, 2014. On that date, the Claimant testified that as he was descending on a scissor lift next to a fence, a coworker located below him was cutting/grinding bolts creating sparks. The Claimant testified that while he was stopped at a platform he was standing towards the front of the lift holding the control and he felt the sparks coming up from beneath his safety glasses into his right eye, as the lower part of the safety glasses did not provide a barrier. The Claimant's testimony regarding his mechanism of injury was credible and is found as fact.

3. Subsequent to the December 28, 2014 date of injury Respondents' facility was closed for the holiday break. The Claimant testified credibly that he believed he needed to first seek treatment at the Employer's onsite clinic so he waited until the Employer's facility reopened after the holiday break. The Claimant testified that he sought treatment at the Respondents' in-house clinic on January 6, 2015. The Claimant was evaluated by PA David Solis, who noted that the Claimant reported irritation in his right eye and noted redness. PA Solis states in his report that "another worker was grinding metal, and some debris went into his Right ocular conjunctive" (Respondents' Exhibit C, p. 8). PA Solis provided Claimant treatment in the form an eye flush and Tylenol.

4. Following the injury, on January 15, 2015 the Claimant was suspended from employment without pay, pending investigation into the Claimant engaging in inappropriate behavior towards the individual responsible for cutting the bolts that created sparks below the Claimant on the scissor lift. On January 27, 2015, it was determined that the Claimant had a confrontation with the coworker and engaged in behavior including inappropriate language and profanity (Respondents' Exhibit E).

5. The Claimant testified credibly that subsequent to being suspended he was not allowed to return to the onsite clinic. The Claimant testified that as a result of his suspension Respondents took away his badge, and denied access to the Waterton facility where the on-site medical clinic was located. There was no persuasive testimony or evidence presented to refute the Claimant's credible testimony on this issue.

6. Subsequent to denying the Claimant access to their on-site facility, Respondents failed to provide the Claimant with a choice of alternative physicians. The only physician offered to Claimant by Respondents had been the onsite facility. (Respondents' Exhibit E, p. 22).

7. Subsequent to being suspended and denied access to the onsite medical clinic, the Claimant sought evaluation with Dr. Tim James, his personal eye doctor. Dr. James' report of January 26, 2015 states that "a foreign body sensation is experienced" by the Claimant (Claimant's Exhibit 5, p. 26). Dr. James further states that the Claimant's eyes developed extreme redness, watered excessively, had a photophobic sensation, and his episodes were persistent and his discomfort was described as very bothersome (Claimant's Exhibit 5, p. 26). The Claimant advised Dr. James that he was working around someone who was grinding metal and he believes he may have gotten some debris in his eye. Dr. James initially provided Claimant conservative treatment in the form of artificial tears.

8. The Claimant returned to Dr. James due to persistent symptoms as the artificial tears did not resolve Claimant's condition.

9. Dr. James provided a diagram of Claimant's right eye with an arrow that indicates the presence of a foreign body debris that is "whiteish in color" (Claimant's Exhibit 4, p. 22). In a letter that precedes the before mentioned diagram, Dr. James explains himself further and indicates that his opinion is that the Claimant suffered an injury at work when was next to a metal grinder and a foreign body struck his eye. Dr. James notes that the Claimant was seen by a Physicians' Assistant at the in-house clinic where he received an eye flush that did not resolve his symptoms.

10. In his report of January 26, 2015 Dr. James notes that the Claimant suffers from a significant epithelial abrasion (Claimant's Exhibits 4 & 5). As a result of the ongoing foreign body sensation and awareness of pain in the Claimant's right eye with significant epithelial abrasion with dots and lines of superficial punctate keratitis, Dr. James recommends an epithelial debridement procedure (Claimant's Exhibits 4 & 5). Dr. James states: "it is my opinion that the [Claimant] did suffer an injury at work when

he was next to a metal grinder and a foreign body struck his eye" (Claimant's Exhibit 4 pg 20).

11. In 1994 the Claimant suffered an industrial injury to his right eye. The record demonstrates that the Claimant's complaints related to his 1994 injury included blurring, glare sensation, and seeing halos around lights at night when he drives his car (Claimant's Exhibit 3). However, there is no indication of the Claimant reporting symptoms of pain, irritation, or the presence of a foreign body sensation in his right eye. Furthermore, the Claimant did not require the ongoing use of medication attributed to his 1994 injury.

12. There are no medical records submitted related to the right eye after the 1994 records until a 2011 eye exam with Dr. Daniel Hock. In his January 21, 2011 evaluation of the Claimant, Dr. Hock describes Claimant's symptoms in his right eye as sporadic blurriness. However there is no indication that there is irritation, or the presence of a foreign body sensation (Respondents' Exhibit B). The unresolved issues related to the Claimant's 1994 injury are that of blurriness.

13. In 2012, the Claimant was evaluated by Dr. James as part of a routine eye examination. In the corresponding report, the Claimant reports blurred vision at a distance; however, no headaches, no double vision, no visual floaters, and no visual flashes. There is nothing in Dr. James' 2012 report that indicates that the Claimant was complaining of irritation, redness or foreign body sensation (Claimant's Exhibit 5).

14. The ALJ finds that the current symptoms that the Claimant is experiencing, as outlined in Dr. James' appeal letter, are the direct consequence of his work related injury of December 28, 2014 (Claimant's Exhibit 4). Although Claimant did not receive treatment at the on-site clinic until January 6, 2015, the Claimant was credible in explaining the delay caused by Respondents' holiday closure.

15. The first report of injury does indicate that the Claimant notified Respondents on January 6, 2015 that he was "exposed to some debris, another worker was grinding metal and some debris went into his right eye" (Claimant's Exhibit 2, p. 5).

16. The ALJ finds Dr. James' opinions to be credible persuasive and the recommended corneal epithelial debridement procedure is reasonable, necessary, and related to the Claimant's December 28, 2014 industrial injury. Dr. James is the only optometrist to have evaluated the Claimant, and there was no evidence submitted that contradicts the recommendation of Dr. James. Therefore, the right eye corneal epithelial debridement procedure is reasonably necessary to cure and relieve the effects of Claimant's December 28, 2014 work injury.

17. The Claimant credibly testified that he was denied access to the Waterton on-site medical facility due to non-medical reasons. Respondents denied the Claimant access to the only medical provider they offered to the Claimant. Respondents failed to provide the Claimant a designated provider list with alternative physicians within 7 days.

18. Subsequent to denying the Claimant access to the on-site medical facility, Respondents again failed to designate a new authorized treating physician nor did Respondents provide Claimant a designated provider list that contained non-onsite providers. Nor did Respondents offer any persuasive testimony or evidence to establish that the Claimant could have continued to access the onsite provider. As a result, the Claimant sought treatment with Dr. James. As Claimant was denied medical treatment for non-medical reasons and Respondents effectively failed to designate a treatment provider that the Claimant could actually access for treatment, Dr. James is found to be the Claimant's authorized treating physician.

19. The Claimant testified credibly that he continues to have ongoing symptoms in his right eye including irritation and blurriness.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. Industrial Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* supra; *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The Claimant's testimony is credible and persuasive regarding the mechanism of injury to his right eye incurred on December 28, 2014. The Claimant's testimony regarding the mechanism of injury is substantiated by the medical report from Employer's onsite heath clinic (Respondents' Exhibit C), the subsequent medical reports of Dr. Tim James (Claimant's Exhibits 4 & 5); and the disciplinary letter of January 27, 2015 (Respondent's Exhibit E, pg 21). As a result of December 28, 2014 injury, the Claimant continues to suffer from the effects thereof and his eye requires further medical treatment. Much was made of the fact that there was some delay in the Claimant seeking medical care. However, the Claimant provided a reasonable and adequate explanation for the delay in initial treatment. The evidence viewed as a whole, and set forth in greater detail above in the Findings of Fact, nevertheless, supports a finding that the Claimant's eye condition was work-related and that the Claimant sustained a compensable work injury on December 28, 2014.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that her work activities on December 28, 2014 caused or permanently aggravated, accelerated or combined with a preexisting condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits

Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

In this case, the Claimant first sought treatment at the Respondents' in-house clinic on January 6, 2015. The Claimant was evaluated by PA David Solis, who noted that the Claimant reported irritation in his right eye and noted redness. PA Solis states in his report that "another worker was grinding metal, and some debris went into his Right ocular conjunctive." PA Solis provided Claimant treatment in the form an eye flush and Tylenol.

Subsequent to being suspended and denied access to the onsite medical clinic, the Claimant sought evaluation with Dr. Tim James, his personal eye doctor. Dr. James' report of January 26, 2015 states that "a foreign body sensation is experienced" by the Claimant. Dr. James further states that the Claimant's eyes developed extreme redness, watered excessively, photophobic sensation, as his episodes were persistent and his discomfort was described as very bothersome. Dr. James initially provided Claimant conservative treatment in the form of artificial tears. The Claimant returned to Dr. James due to persistent symptoms as the artificial tears did not resolve Claimant's condition. Dr. James provided a diagram of Claimant's right eye with an arrow that indicates the presence of a foreign body debris that is "whiteish in color." In a letter that precedes the before mentioned diagram, Dr. James explains himself further and indicates that his opinion is that the Claimant suffered an injury at work when was next to a metal grinder and a foreign body struck his eye. In his report of January 26, 2015 Dr. James notes that the Claimant suffers from a significant epithelial abrasion. As a result of the ongoing foreign body sensation and awareness of pain in the Claimant's right eye with significant epithelial abrasion with dots and lines of superficial punctate keratitis, Dr. James recommended an epithelial debridement procedure.

The opinions of Dr. James are credible and persuasive regarding the recommendation of the right eye corneal epithelial debridement. In his medical reports and appeal letter Dr. James clearly outlines his opinions regarding the reasonableness and necessity of the surgery. Dr. James opinion regarding the relatedness of the procedure to Claimant's injury of December 28, 2014 is persuasive. Furthermore, there are no medical opinions offered that contradict Dr. James' opinions regarding the reasonableness, necessity, or relatedness of the recommended procedure. However, the Claimant has not seen Dr. James or any other optometrist or ophthalmologist for a significant period of time prior to the hearing. As a result, the Claimant should first be reevaluated to determine that the surgery remains reasonably necessary to cure and relieve the Claimant of the effects of his December 28, 2014 work injury. The Claimant has established that he is entitled to further evaluation of his right eye condition to determine if he requires any additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act, including the surgery previously proposed by Dr. James, if, after further evaluation, Dr. James determines the surgery is still necessary.

Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least two designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43- 404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least two physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list in compliance with C.R.S. §8-43- 404(5)(a)(I)(A)." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

W.C.R.P. Rule 8-1 (C) states that if an employer has a qualified on-site health care facility, the employer may designate that facility as the authorized treating physician. W.C.R.P. Rule 8-1 (C)(2) states that If the employer designates an on-site health care facility, the employer must, within seven (7) business days following notice of an on the job injury, provide the injured worker with a designated provider list consistent with the provisions of rule 8-2.

The only medical provider offered by Respondents was that of the onsite clinic. (Respondents' Ex E, pg 22). Subsequent to his injury Claimant was suspended and denied access to the facility that housed the onsite clinic designated by Respondents. At no time did Respondents provide Claimant with another option for a treating physician or clinic. By denying Claimant access to the onsite medical clinic they denied

Claimant treatment for non-medical reasons. Respondents further violated Rule 8 by not providing Claimant any alternative authorized treating physician options and pursuant to W.C.R.P. Rule 8-2(E), the Claimant may select an authorized treating physician of his choosing. Therefore, Claimant's designation of Dr. James as the authorized treating physician is granted. Dr, James will remain as the authorized treating physician for Claimant's December 28, 2014 industrial injury.

ORDER

It is therefore ordered that:

1. The Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his right eye on December 28, 2014 while performing services arising out of and in the course of his employment.

2. Claimant has proven that Dr. Tim James is an Authorized Treating Physician related to the Claimant's work related injury of December 28, 2014.

3. The Claimant has proven that he requires further medical treatment of his right eye condition and Respondents are liable for treatment that is reasonably necessary to relieve the Claimant from the effects of his December 28, 2014 injury, including the surgery previously proposed by Dr. James, if, after further evaluation, Dr. James determines the surgery is still necessary.

4. The insurer shall pay interest to the Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 6, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-975-288-02

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable back injury arising out of and in the course of his employment with Employer on January 4, 2015.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability ("TPD) and temporary total disability ("TTD") benefits in this claim from March 19, 2015 ongoing.

3. If Claimant has proven that he is entitled to temporary disability benefits, whether Respondent has proven by a preponderance of the evidence that Claimant was responsible for his termination.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. The Claimant was hired by Employer on June 18, 2014 as a lumber material specialist. His job duties involved sawing lumber for customers, loading up products including lumber, concrete, and mortar mixes, doing special cuts for plywood brought in by customers and handling the returns for the lumber department. The Claimant's supervisors included Joe and Victor who were managers and a lead named Reggie. The Claimant's starting pay rate was $10.50 per hour and that did not change over the course of his employment. The Claimant testified that when he was first hired he was working about 27 hours per week but then by late October or early November, he was working full time which continued until his employment was terminated. The Claimant's testimony regarding the above was uncontroverted, credible and is found as fact.

2. The Employer has an Attendance and Punctuality Policy. Hourly employees are expected to report for work at the assigned time, adhere to the work schedule, work through scheduled shifts, perform assigned duties and take meal periods as scheduled (Respondents' Exhibit D, p. 32). The Employer's Progressive Disciplinary Process policy is that "the discipline process will begin when an associate receives the third unexcused occurrence in a six-month period. Each absence or tardy is considered one occurrence. If there are 3 occurrences in a 6 month period, the managers are to provide a "coaching." After a "coaching" has occurred, if there are 3 additional occurrences, the managers are required to issue a "counseling." After an employee receives a "counseling," if there is 1 additional occurrence, the managers are

required to issue a “final warning.” After an active Final Counseling, and there is 1 additional occurrence, managers are required to administer a “termination” (Respondents’ Exhibit D, p. 33). There are certain absences and tardiness that is considered “excused.” These “excused” absences and tardies include “State-law protected time off.” In this section, the policy refers the reader to “State Exceptions” in the LOA HR SOP and Time-Off Benefits HR SOP for additional details, but this was not offered or admitted into evidence. In reference to the Employer’s disciplinary policy, the term “active” refers to a disciplinary action that is within six (6) months from the date when the action was administered. In tracking “active” disciplinary notices, “a notice remains visible for six months” and “at the end of the six-month period, the notice rolls off and is no longer “active” (Respondents’ Exhibit D, p. 36). When an employee has been employed for fewer than 120 days, then he or she should receive a “final warning” if there are 3 occurrences in the first 120 day period and then proceed to immediate termination for 1 additional occurrence that occurs in the first 120 days. However, if no further occurrence occurs in the first 120 days, then the “final warning” issued during that probationary period is treated as a “coaching” notice (Respondent’s Exhibit D, p. 35).

3. On September 20, 2014, the Claimant received a Progressive Disciplinary Notice for being unexcused absent on 8/24 and tardy on 7/4 and 9/16. He was advised that he should refrain from further violations of the Employer’s Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. All of these attendance occurrences happened prior to the Claimant’s injury and, thus, were unrelated to the Claimant’s work injury. This notice was entitled a “final warning” in the records under the Employer’s Progressive Disciplinary Process as it occurred in the first 120 days of employment. As there were no further occurrences in the first 120 days of employment, this notice was treated as a “coaching” notice per the Employer’s policy.

4. On November 29, 2014, the Claimant received a Progressive Disciplinary Notice for arriving over 3 hours late on 10/6/2014, arriving 13 minutes late on 11/21/2014 and arriving 31 minutes late on 11/23/2014. The Claimant was advised to refrain from further violations of the Employer’s Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. All of these attendance occurrences happened prior to the Claimant’s injury and, thus, were unrelated to the Claimant’s work injury. This notice would be a “counseling” under the Employer’s Progressive Disciplinary Process since the “final warning” issued in the Claimant’s first 120 probationary period had converted to a “coaching” notice. That “coaching” notice would have been less than 6 months prior to the November 29, 2014 notice, so the September 20, 2014 notice would still be “active.”

5. On December 23, 2014, the Claimant received a Progressive Disciplinary Notice for being absent on December 15, 2014 with insufficient sick time to cover his scheduled hours. The notice stated that this violation progressed the Claimant to “final warning. The Claimant was advised to refrain from further violations of the Employer’s Attendance Policy and that further violations will result in additional disciplinary action

up to and including termination. This attendance occurrence happened before the Claimant's injury and is unrelated to the work injury.

6. The Claimant testified that he was injured while at work for Employer when he was called to get his returns. He grabbed a bucket of mortar out of a regular shopping cart and was moving it to a lumber cart. The bucket of mortar weighed approximately 50-60 pounds. The Claimant testified that his arms were about chest high when he was lifting and he turned to place the mortar mix onto the lumber cart. The Claimant testified he felt the onset of pain immediately as he was bent over the cart. He testified that he turned to one of the other employees and stated that he thought he hurt his back. He pushed his cart of returns back to the lumber department and felt pain in his lower back and legs the whole way. After he returned to the department, he left the cart there and told his coworkers that he hurt his back and was going to take it easy with no more lifting for the rest of the day. He told them he would do tags, which involves using the scanner to scan lumber that has no price tags and print out and tag the lumber where the price tag should be. The Claimant testified he continued to experience low back pain while doing tags when he had to reach over his head and as he brought his arms back down he felt more pressure on his back. The Claimant testified that at this point he told his coworkers he was going to take his lunch break and rest his back. As he took a few steps, the Claimant coughed and felt more pain in his buttocks, back and legs. After this he went to the assistant store manager Richard and reported the injury and he clocked out of work. The Claimant was advised by the assistant store manager to fill out an incident report. The Claimant testified that after completing the incident report he was not offered medical treatment and he left work. The Claimant testified that he did not tell his manager that he "reinjured" his back and he did not write down in his incident report that he "reinjured" his back. The Claimant testified that he has not had prior low back injuries or low back pain.

7. On January 4, 2015, the Claimant completed an Incident Witness Statement. The Claimant stated as follows:

> I was picking up returns and I picked up a 5 gal. bucket of flooring mortar when I felt a tweek [sic] in by back. I was taking it easy making signs and I had to strech [sic] and I felt the pain increase. I took it easier but when I was walking to lunch I coughed and my back went out on me. And that's when I told Richard about it.
>
> (Respondents' Exhibit D, p. 24).

8. Also on January 4, 2014, the Claimant's supervisor, Richard Reyes, made an Incident Witness Statement. He stated as follows:

> [The Claimant] came to me around 12:30 saying that he reinjured his back. [The Claimant] had previously injured his back while working. He had been working since his last injury and never went to see a doctor other than a chiropractor. [The Claimant] reinjured his back while lifting a

> 5-gallon bucket of paint. He said that it was a slight tweak & kept working
> & the pain got progressively worse as the day went on.

(Respondents' Exhibit D, p. 26).

9. In spite of some conflicting evidence, the ALJ finds the Claimant's testimony regarding his mechanism of injury was credible and consistent with medical records in this case and is found as fact. It is further found that the Claimant did not tell his manager that he "reinjured" his back when he reported his injury.

10. The Claimant testified that on January 5, 2015, the day following his injury, he went to see Dr. Wilner for chiropractic treatment. Dr. Wilner's medical records indicate that the Claimant saw Dr. Wilner for treatment on January 5, 2015. The Claimant reported that he injured his back at work while lifting a 5 gallon bucket of mortar mix away from his body when he felt instant pain in his low back. The Claimant reported leaving work after lunch due to pain and stated he used a combination of ice and rest the remainder of the day. The Claimant reported a pain level of 8-9 out of 10 in the lumbar/lumbosacral region. The pain radiated to the gluteal region but did not travel into the hamstrings. The Claimant reported noticeable temporary relief after Dr. Wilner's treatment, taking the pain level report down to 4-5 out of 10 (Claimant's Exhibit 14).

11. Employer's First Report of Injury was completed by the Employer's Risk Manager, Richard Reyes, on January 6, 2016. The report noted the Claimant's injury occurred on January 4, 2016 and that Employer was notified that same day. The nature of the injury listed was a strain to the low back. The description of how the injury occurred states, "[Claimant] was assisting another associate and reinjured a previous injury. He is not seeking medical attention and was offer [sic]" (Claimant's Exhibit 1; Respondents' Exhibit D, p. 25). To the extent that this statement conflicts with the Claimant's testimony and other evidence, the ALJ finds that the Claimant's testimony is credible and the Claimant did not "reinjure" a previous injury.

12. The Claimant's next scheduled work day after his injury was on January 7, 2015. He called in to speak with his supervisor Victor and the Claimant told him he wanted to take the day off, but Victor asked him to come in. The Claimant attempted to come in to work on January 7, 2015 and had someone drive him, but getting out of the car the Claimant realized the pain was too much for him to be able to work. The Claimant told Victor that he would not be able to work and he went home. The Claimant testified that he told Victor the reason he couldn't work was due to back pain from the injury at work. The Claimant testified that after this he had more absences from work due to back pain from his work injury. He testified that he always told them when he called in to miss work that it was due to this. The Claimant testified that he never received any special instructions for calling off work after his work injury. He testified that he was told to give his managers a heads up about upcoming doctor or physical therapy appointments and he offered to provide the papers he received from the medical providers, but his supervisors never collected those papers. The Claimant testified that he missed work or was late to work or had to leave work early because of

his appointments. The Claimant testified that there were also occasions that he was late punching in to work because he had to speak with his managers about his work restrictions. With respect to the testimony related to absences or tardiness occurring after his work injury for the dates prior to March 17, 2015, the Claimant's testimony as to the reasons he was late or missed work or had to leave early subsequent to his work injury is credible and was not contradicted by the testimony of any other witnesses and is found as fact.

13. The Claimant saw Dr. Wilner again on January 8, 2015 for additional treatment. After adjustment, the Claimant reported that he was definitely better. The Claimant returned to see Dr. Wilner again on January 9, 2015 and he reported slight improvement. Dr. Wilner noted the Claimant still had to be driven to the appointment due to pain when sitting and hitting bumps. The Claimant reported his pain level as 6-7 out of 10 and Dr. Wilner noted that forward lumbar flexion increased his pain. At this visit, the pain was radiating into the upper hamstring region. On January 10, 2015, when the Claimant saw Dr. Wilner, he reported he was feeling better and rated his pain level at 5 out of 10. Dr. Wilner noted the Claimant was walking with greater ease. After treatment, the Claimant indicated that he planned on working the following day and he would continue with home care. Dr. Wilner noted that the Claimant called and cancelled his January 14, 2015 appointment and reported he was doing much better overall and the pain was mild. On January 17, 2015, the Claimant returned to treat with Dr. Wilner again reporting he had much more pain the previous 2 days. The Claimant reported he had been working and he exacerbated his condition by lifting materials. After treatment on that same day, the Claimant reported he felt better and his pain level decreased to 3-4 out of 10. The Claimant saw Dr. Wilner again on January 19, 2015 reporting that he hadn't been to work yet and his pain started that day at 2 out of 10 but the pain level was increased to 4 out of 10 after driving over to the appointment (Claimant's Exhibit 14).

14. On January 22, 2015, the Claimant saw Dr. Mark Foster for initial evaluation. The Claimant reported no prior low back pain but stated that he does see a chiropractor for chronic upper back and neck pain. The Claimant described a mechanism of injury to Dr. Foster generally consistent with his testimony at hearing and throughout the medical reports. Dr. Foster noted that the Claimant stated,

> On 1/4/15, [the Claimant] was lifting a bucket of mortar mix for a customer. He had his arms outstretched and twisted, and he felt a pull in his back. He continued to work, and within 15 minutes had severe tightening of the back. He went to tell his manager, and asked to go home for the day. No work comp claim was filed.

The Claimant expressed frustration to Dr. Foster at this visit with his Employer, namely, he stated that "they have discussed terminating him over this incident." He was also asked to mop at work which caused a worsening of his pain. The Claimant reported that he spoke with his manager again and they decided to file a work comp claim. The Claimant reported severe low back pain radiating down to both buttocks but not down to his feet. Yet, Dr. Foster did note a calf cramp during the exam. Dr. Foster noted that the work relatedness of the injury was not yet determined and he wanted to see records from the Claimant's chiropractor. At this point, Dr. Foster felt that the Claimant experienced a lumbar strain that should resolve with conservative care. Dr. Foster provided temporary work restrictions of no lifting, repetitive lifting, carrying over 25 pounds and no reaching over the head or away from the body. The Claimant was scheduled for follow up visit in a week with Dr. Miller (Claimant's Exhibit 10, Respondents' Exhibit C, p. 15).

15. The Claimant saw Dr. William Miller for treatment on January 28, 2015. He reported the same mechanism of injury to Dr. Miller as he had to Dr. Foster. The Claimant reported that he began seeing his private chiropractor Dr. Wilner beginning on January 5, 2015 and was having a good response to the treatment. He had tried to work his next scheduled shift at work but left early secondary to increased symptoms. Dr. Miller noted he reviewed the chiropractic records from Dr. Wilner from January 5, 2015 to January 19, 2015. He noted that he requested prior records for the Claimant's chiropractic treatment. The Claimant was currently complaining of pain and tightness across the central lumbosacral spine that was worse with sitting or prolonged standing or walking. The prior shooting pain to his left gluteal region and posterior thigh was not present as of this visit. The Claimant reported that his sleep was improved with Flexeril. Dr. Miller continued the same temporary work restrictions as Dr. Foster and referred the Claimant for physical therapy (Claimant's Exhibit 11; Respondents' Exhibit C, p. 16).

16. The Claimant saw Dr. Wilner again on January 31, 2015 reporting that he was in a lot of pain and the pain had gradually increased over the previous 2 days. He reported a strong ache in the low back that radiated out to the sides (Claimant's Exhibit 14).

17. On February 4, 2015, the Claimant saw Dr. Miller out of cycle for his normally scheduled appointment for an interim evaluation. The Claimant now reported having pain shooting into both legs. He reported having conflict with his Employer over his work restrictions. The Claimant advised Dr. Miller that his supervisor told him to request "medical leave" and Dr. Miller advised the Claimant to follow up with HR to clarify roles and responsibilities. Dr. Miller advised that it is "ultimately his job to follow the restrictions provided. His employer should be attempting to accommodate him." On examination of the Claimant, Dr. Miller noted a "reduction of motion of the lumbar spine in all planes of movement with associated guarding" and noted "he is diffusely tender overlying the lumbosacral segment." The Claimant's same work restrictions from the prior visit were continued (Claimant's Exhibit 11; Respondents' Exhibit C, p. 17).

18. On February 5, 2015, the Claimant saw Dr. Graves for an initial evaluation. The Claimant's chief complaints were left greater than right lumbar spinal/lumbosacral junction pain, limited range of motion and muscle spasms. The Claimant reported that he did not initially identify this injury as a workers compensation injury and went to his private chiropractor for 7-8 times. The Claimant reported to Dr. Graves that the chiropractic treatment has helped reduce his pain and improve levels of

functions. Since filing a workers' compensation claim and being managed by Dr. Miller, the Claimant reported attending Select Physical Therapy which is helping him make some improvement functionally but he reported stabilization was difficult to obtain. On physical examination, Dr. Graves noted moderate limitations in all planes of motion with pain and stiffness present on end range. He also noted pain and muscle spasms on palpation. The Claimant exhibited a positive Patrick/FABRE test, positive Nachlas test , positive Gaenslen's test, positive Ely's test, positive Yeoman's test, positive Sulty test and positive Milram's test. Dr. Graves impression was a bilateral, left greater than right, lumbosacral sprain/strain, compensatory mechanical dysfunction in the lower lumbar spinal facets, primarily at L4/5 and L5/S1, pelvic unleveling and mild concerns of discogenic disease. Dr. Graves recommended chiropractic/myofascial release treatment, core strength rehabilitation, continued physical therapy and follow up treatment with Dr. Miller (Claimant's Exhibit 12).

19. The Claimant saw Dr. Miller again on February 13, 2015. The Claimant had attended physical therapy and 3 chiropractic sessions with Dr. Graves since his last visit with Dr. Miller. The Claimant reported feeling improved overall. Dr. Miller noted that an MRI of the Claimant's lumbar spine had been ordered but not yet approved. Dr. Miller noted that he personally spoke with Dr. Wilner about obtaining records of the Claimant's care prior to the work injury and Dr. Wilner assured him that the records would be received that day. The Claimant continued to report pain and tightness across the central lumbosacral spine, worse with sitting or prolonged standing/walking. The Claimant reported he was working within his restrictions with less conflict at work. He also reported he missed part of a shift on February 10, 2015 due to discomfort following a treatment session. Dr. Miller continued the Claimant on physical therapy and chiropractic with Dr. Graves. The Claimant was also continued on modified duty with temporary restrictions of no lifting, repetitive lifting, carrying over 25 pounds and change positions frequently (Claimant's Exhibit 11; Respondents' Exhibit C, p. 18).

20. On February 25, 2015, the Respondents filed a Notice of Contest. The reason given for the Notice of Contest was further investigation for prior medical records. There was no other reason checked on the Notice of Contest (Claimant's Exhibit 2).

21. On February 26, 2015, the Claimant saw Dr. Graves who noted he had treated the Claimant 5 times since the initial evaluation and the Claimant was minimally responding to treatment. Dr. Graves noted the Claimant experiences a significant reduction in pain following treatments, however upon returning to work and performing labor intensive activities, the Claimant's "symptom profile returns." Dr. Graves noted that the Claimant reported his job duties had recently changed and he was made a "store greeter" and since then he has not had any significant flare-ups with his symptoms. Dr. Graves continued to assess the Claimant with bilateral, left greater than right, lumbosacral junction strain/sprain, compensatory mechanical dysfunction, and pelvic unleveling, but noted that these conditions were responding to conservative treatment, but not stabilizing. Dr. Graves also noted a mild circumferential disc bulging at L3/L4

and L4/L5 without significant effect on the spinal canal (as evidenced on the February 20, 2015 MRI) (Claimant's Exhibit 12).

22. On February 27, 2015, the Claimant saw Dr. Miller again. The Claimant reported continued pain and tightness across the central lumbosacral spine and described his legs and hips as getting 'tired' easily and as 'dead weight.' As of this visit, Dr. Miller had reviewed the full medical records from Dr. Phil Wilner and he noted there were some visits for low back pain in March – April of 2014. Based on this, Dr. Miller determined that the injury was work related. On reviewing the MRI of the Claimant's lumbar spine, Dr. Miller noted mild disk bulging, but no significant pathology. In the treatment plan under no. 2, Dr. Miller noted to "continue work restrictions." However, on the form, the boxes listing the specific restrictions were not populated and the restrictions were not written out. However, Dr. Miller did indicate the Claimant was on modified duty and that restrictions were continued on the form. Consistent with Dr. Miller's testimony at the hearing and based on reasonable inferences from the form, the ALJ finds as fact that the Claimant's temporary work restrictions through March 18, 2015 were the same as they were at the Claimant's last visit with Dr. Miller, namely, no lifting, repetitive lifting, carrying over 25 pounds and change positions frequently (Claimant's Exhibit 11; Respondents' Exhibit C, p. 18).

23. The Claimant testified that he was about 10-25 minutes late on March 17, 2015 due to car trouble and his car would not start. He worked a full day on that date. Then, the Claimant testified, on March 18, 2015, he clocked in and he was asked if he would like to take the day off because it wasn't expected to be busy. The Claimant testified that he stated that he needed as many hours as possible. Before the Claimant clocked out at lunch time, he was told to go to the office and when he arrived, Victor and Richard advised the Claimant his employment was being terminated due to attendance.

24. On March 18, 2015, the Claimant received a Progressive Disciplinary Notice for tardiness on February 4, 2015, February 18, 2015, February 19, 2015, February 25, 2015, February 26, 2015, February 27, 2015, March 4, 2015 and March 17, 2015 and for work absences on January 7, 2015, January 17, 2015, January 31, 2015, February 3, 2015 and February 5, 2015. The Notice provided that these were violations of the Company's attendance and punctuality standards and the Claimant's employment was terminated (Respondents' Exhibit B, p. 11). The ALJ finds that for the dates prior to March 17, 2015, the reasons the Claimant was absent or tardy or otherwise had an attendance occurrence were related to the Claimant's work injury. However, per the Claimant's prior statements and his testimony at the hearing, the reason the Claimant had an attendance occurrence on March 17, 2015 was due to his car malfunctioning and not related to his work injury. As of March 17, 2015, the Claimant's previous "final warning" disciplinary notice administered on December 23, 2014 for a December 15, 2014 absence would have been considered an "active" notice as it was less than six (6) months prior to March 17, 2015. Per the Employer's policy (see Exhibit D and paragraph 2 above), if there is a one (1) additional attendance occurrence after an active final counseling/warning, then managers are required to administer a termination.

25. The Claimant saw Dr. Graves on March 19, 2015 and Dr. Graves noted the Claimant had seen him 2 times since February 26, 2015 and was making some additional improvement in functional levels but still had a degree of lumbosacral junction tightness/pain. Dr. Graves noted that the Claimant reported that he was fired from his job this week and he was upset about this and felt he was wrongfully terminated. Dr. Graves noted that "apparently, there [sic] some discrepancy with his work restrictions on his WC 164 form, which led towards his termination. Additionally, during the initial stages of his workers compensation injury, he missed work due to increased pain, which was apparently not documented through Exempla Occupational Medicine." The Claimant reported that he was compliant with his independent exercise routine and that it brought him temporary reductions in pain and increases in function, but that the benefit was not lasting. Dr. Graves recommended continued chiropractic care and structured physical therapy (Claimant's Exhibit 12).

26. The Claimant saw Dr. Miller on March 23, 2015 and reported that he was terminated by his employer for cause at the end of the prior week due to the fact his car wouldn't start and he was late for work. Dr. Miller continued to assess the Claimant with lumbar strain and the treatment plan was to continue the work restrictions, physical therapy, chiropractic with Dr. Graves and to consult with a physiatrist if the Claimant made no progress (Claimant's Exhibit 11).

27. The Claimant saw Dr. Miller on March 30, 2015 and he reported a flare of symptoms on March 28, 2015 "after fairly innocuous activity" which included spasm and pain down the left leg. Given the interim flare of symptoms and minimal progress in therapy, Dr. Miller referred the Claimant for a consult for physiatry (Claimant's Exhibit 11).

28. The Claimant saw Dr. Robert Kawasaki on April 20, 2015. Dr. Kawasaki noted that the Claimant's treatment was managed by Dr. Miller and the Claimant had undergone physical therapy two times a week, received chiropractic care from Dr. Graves, received acupuncture and has been engaged in an independent exercise program. The Claimant reported that he felt he was improving overall. The Claimant reported pain decreased when lying on his back and increased with walking, standing, sitting or driving more than 15-20 minutes and with forward flexion. The Claimant reported that he was terminated from his employment for poor attendance. Dr. Kawasaki noted the Claimant's effect was somewhat flattened and his mood appeared somewhat depressed. After examination, Dr. Kawasaki's impression was lumbar strain with primarily muscular strain and no significant disc pathology noted. Dr. Kawasaki noted that some facet arthropathy may be contributory to the Claimant's pain. Dr. Kawasaki discussed treatment options which included facet joint injections but the Claimant advised that he wanted to hold off on any type of injections. Dr. Kawasaki noted "some red flags for delayed recovery potential" and suggested a pain psychologist (Claimant's Exhibit 13).

29. The Claimant saw Dr. Kawasaki again on May 11, 2015 and the Claimant reported overall improvement with physical therapy, chiropractic treatments, and massage. The Claimant reported he had decreased his Flexeril use and felt he was 75-85% better. Dr. Kawasaki diagnosed lumbar strain and sacroiliac joint strain but noted that with the improvements made the Claimant would likely avoid interventional procedures such as facet joint injections and sacroiliac injections (Claimant's Exhibit 13).

30. The Claimant saw Dr. Miller on May 18, 2015. Dr. Miller noted that the Claimant reported improvement since the last visit with him and that Dr. Kawasaki was considering injections but that the Claimant preferred not to undergo injections at that time (Claimant's Exhibit 11).

31. The Claimant saw Dr. Kawasaki again on June 8, 2015 and reported "overall, he is doing much better and feels like he is almost back to normal." Dr. Kawasaki noted the Claimant was doing quite well at this point and was very close to maximum medical improvement. Dr. Kawasaki opined that he did not feel he needed to see the Claimant again, but would follow up if requested, per Dr. Miller's discretion (Claimant's Exhibit 13).

32. The Claimant saw Dr. Miller on June 12, 2015 reporting some improvement, but that physical therapy seems to be making him worse. Dr. Miller noted that the Claimant would finish with physical therapy and continue with chiropractic with Dr. Graves but be "weaning off" (Claimant's Exhibit 11).

33. The Claimant saw Dr. Graves on July 9, 2015. Dr. Graves reported that in addition to the previous chiropractic care, the Claimant was provided with trigger point dry needling and biomedical acupuncture and there was a greater focus on independent core strengthening/rehabilitative protocols. The Claimant reported that he has no significant flare-ups since May 14, 2015. Dr. Graves noted that the Claimant's physical examination changed minimally since that time as well. Dr. Graves recommended release from active chiropractic treatment but continuation of a prescribed TENS unit, the independent core strengthening/rehabilitative protocols and follow up with Dr. Kawasaki for pain management if necessary (Claimant's Exhibit 12).

34. The Claimant saw Dr. Miller on July 10, 2015. Dr. Miller noted that the Claimant finished up with his 30th session of physical therapy and continued maintenance chiropractic with Dr. Graves. Based on a review of the latest physical therapy notes, Dr. Miller recommended extending the physical therapy and he also continued maintenance chiropractic care with Dr. Graves (Claimant's Exhibit 11).

35. On July 30, 2015 the Claimant saw Dr. Lawrence Lesnack for an independent medical examination. Dr. Lesnack authored a written report also dated July 30, 2015. The Claimant described a mechanism of injury on January 4, 2015 to Dr. Lesnack as follows:

> As he was attempting to lift a five-gallon of mortar mix weighing approximately 50-60 pounds out of a shopping care, he developed acute low back /buttock pains. Approximately 20 minutes later, he states that while reaching overhead he 'stretched' to apply a tag onto a piece of lumber. His low back and buttock pains seemed to worsen significantly. He states that soon afterward, he was merely standing and suddenly coughed. He states that he then developed 'horrible pain' and could hardly move. (Respondents' Exhibit A, p. 2).

Dr. Lesnack reviewed the Claimant's course of conservative treatment with the Claimant. Dr. Lesnack notes that the Claimant advised him that as early as January 12, 2015, he was informed that he might be terminated from his employment because of excessive absences without accrued sick leave and that he saw his assistant manager and hr and demanded that a work injury claim be filed on his behalf. After this, the Claimant reported that he treated through the worker's compensation system including chiropractic treatment and massage per Dr. Graves and physiatry evaluation with Dr. Kawasaki (Respondents' Exhibit A, p. 2-3). The Claimant reported that on a pain scale rating of 0 to 100, his best pain level is 0 and he was currently at a 10. The Claimant advised Dr. Lesnack that he had received chiropractic care from Dr. Wilner prior to his January 4, 2015 injury for his upper back and neck as well as his low back. The Claimant's current medications when he met with Dr. Lesnack were 800 mg of ibuprofen and 10mg of Flexeril as needed for muscle spasms (Respondents' Exhibit A, p. 3). Dr. Lesnack reviewed and summarized medical records dating from January 22, 2015 to June 25, 2015. The report does not indicate that Dr. Lesnack reviewed the chiropractic records of Dr. Wilner from prior to the January 4, 2015 work injury at that point (Respondents' Exhibit A, pp. 4-7). On examination, Dr. Lesnack noted that the Claimant ambulated with no signs of an antalgic gait and was able to perform lumbar spine range of motion activities. Dr. Lesnack noted the Claimant was able to forward flex to 90 degrees with no symptoms but upon returning to an upright position, the Claimant complained of some mild low back aching sensations. The Claimant was able to perform sitting, supine and reversed straight leg raising maneuvers and Dr. Lesnack noted he had full range of motion in his thoracic spine in all planes without reproduction of symptoms. Dr. Lesnack noted that the Claimant reported, "minimal tenderness to palpation over his left greater than right superior sacrum at its midline" with no tenderness to palpation over either superior sacral sulcus or either greater trochanter or either sciatic notch. Dr. Lesnack found no evidence of specific trigger points or muscle spasm (Respondents' Exhibit A, pp. 7-8). Based on his review of medical records and the physical examination, Dr. Lesnack opined that, "the patient exhibits pain behaviors and nonphysiologic findings and is very dramatic at times" which Dr. Lesnack found "would suggest that his subjective complaints are unreliable at best." Based on this opinion, Dr. Lesnack went on to state that, "one must rely solely on reproducible objective findings rather than his subjective complaints." Because Dr. Lesnack opines that there were "no significant objective findings" to support any type of acute injury to his lumbar spine as a result of occupational activities on January 4, 2015, Dr. Lesnack concludes that the Claimant did not sustain any acute work related injury on that date (Respondents' Exhibit A, p.9). Dr. Lesnack further opined, that regardless of causality, the Claimant continued to have frequent subjective complaints without objective findings to support them, so he required no further diagnostic testing or interventional treatments. Rather, the Claimant should continue to focus on lumbar spine stabilization and core strengthening. Finally, Dr. Lesnack opined that the Claimant required "no functional limitations or work restrictions whatsoever, regardless of the causality of his current subjective complaints" (Respondents' Exhibit A, pp. 9-10).

36. On August 5, 2015, the Claimant saw Dr. Miller who noted that the Claimant had 3 remaining physical therapy sessions, was discharged from chiropractic care effective earlier this same day and was previously advised to follow up "as needed" with the physiatrist Dr. Kawasaki. The Claimant reported that he is sore and stiff but has had no interim leg symptoms. The Claimant also reported his sleep was well controlled with medications but that he had a sense of anxiety and concerns about his ability to return to work. Dr. Miller referred the Claimant to Dr. Vandorsten for cognitive behavioral therapy regarding the chronicity of his symptoms and return to work issues (Claimant's Exhibit 11).

37. On September 11, 2015, the Claimant saw Dr. Miller reporting that he continued to improve with occasional flares such as a spasm in the middle of the night for which he takes cyclobenaprine. Dr. Miller noted that the Claimant had seen Dr. Vandorsten for psychology twice and that Dr. Vandorsten would like to continue to follow the Claimant. The Claimant reported that he was stiff but had no more leg symptoms. The Claimant reported that he was not comfortable lifting because he did not know his limits (Claimant's Exhibit 11). In the Physician's Report of Workman's Compensation Injury form dated September 11, 2015, Dr. Miller reported that the Claimant was still on modified duty with temporary restrictions of no lifting, carrying, pushing or pulling over 40 pound. He reported the Claimant was discharged from physical therapy after 36+ sessions and discharged from chiropractic with Dr. Graves effective August 5, 2015 and continuing to see Dr. Vandorsten for psychology (Claimant's Exhibit 11 and 12, last page of exhibit 12).

38. The Claimant saw Dr. Miller on October 7, 2015. Dr. Miller noted that the Claimant reported that he continued to improve with occasional flares in symptoms including one spasm episode in the middle of the night since the last visit. The Claimant reported that he was walking and stretching and he just started working at a local golf course. Dr. Miller noted that "MMI will follow on subsequent visits" pending the status of psychology visits with Dr. Vandorsten and the status of a requested gym pass with 6 personal trainer sessions. The Claimant's work restrictions were continued and Dr. Miller noted that he anticipated impairment (Claimant's Exhibit 11).

39. The Claimant testified at the hearing that he provided Dr. Miller's work restrictions to his managers but he often had to do work in his department that did not follow his working restrictions. The Claimant testified that his pain would worsen when he had to complete job duties outside of his work restrictions. The Claimant testified that when he would complain to his supervisors about having to perform work outside of his restrictions that they would just tell him to just do the best he could or to do what he

could. He also testified that he was verbally harassed by his supervisors and called lazy and a sissy and they laughed and said he couldn't do anything after he provided his work restrictions to them.

40. The Claimant testified that he was hired by Broken Tee golf course in late September of 2015 and he works between 10-15 hours per week at a pay rate of $8.50 per hour.

41. Dr. William Miller testified at the hearing. Dr. Miller was an authorized treating physician for the Claimant's worker's compensation injury. Dr. Miller testified that the Claimant was first seen by Dr. Foster in his office on January 22, 2015. Dr. Miller began treating the Claimant at the next visit to the same office on January 28, 2015. Dr. Miller testified that the Claimant told him that his mechanism of injury involved lifting a five gallon bucket of mortar that weighs approximately 50-60 pounds when he experienced the immediate onset of low back pain. The Claimant mentioned that he was leaning forward with his arms outstretched, with a twisting motion. Dr. Miller also testified that he was familiar with the Claimant stating that shortly after the lifting, he developed further pain reaching upward while tagging lumber and then still additional pain when he coughed afterward. Dr. Miller's assessment of the Claimant as of January 28, 2015 was that the Claimant had a lumbar strain and he referred him for physical therapy. Dr. Miller discussed some other considerations in the event the Claimant's condition didn't improve. Dr. Miller testified that the prior chiropractic care that the Claimant received was principally for his neck and upper back. Dr. Foster has initially imposed lifting restrictions of 25 pounds for lifting, carrying, pushing and pulling and Dr. Miller continued more or less the same restrictions and added the ability to change positions frequently. Dr. Mill also testified about the restriction on overhead lifting or reaching away from the body. Dr. Miller testified that by February 4, 2011, the Claimant had continued symptoms so he requested an MRI. At that point, the diagnosis was the same so there was no change to the Claimant's restrictions. As of February 27, 2015, Dr. Miller had the results of the MRI and the prior records from the Claimant's chiropractor. Dr. Miller testified that with respect to the chiropractic notes, the Claimant treated for about a month for his neck, upper back and lower back from March to April of 2014. Then after April 2014 onward, the Claimant had no additional lumbar treatments. Based on those notes, Dr. Miller testified that it was his opinion that the Claimant had no prior back pain problems that were independently disabling as of the date of his January 4, 2015 injury. Once Dr. Miller had those records, Dr. Miller was able to determine that the Claimant's condition resulted from his work-related mechanism of injury. Dr. Miller also testified that although there is some confusion in the February 27, 2015 report about the Claimant's work restrictions, this was an error and the Claimant should have had actual listed restrictions on the form, but the restrictions didn't populate into the form. However, he did check the box that the Claimant was under modified duty and he intended to keep the Claimant on the same restrictions that he had been on previously.

42. Dr. Miller further testified that between March 23, 2015 and October of 2015, the Claimant saw Dr. Miller on a roughly monthly basis. He was referred to Dr. Graves, a chiropractor and for physical therapy at Select PT. He was also referred to

Dr. Kawasaki who recommended some facet based injections. Over this time period, the Claimant reported variable symptoms, sometimes he would have leg symptoms and sometimes he wouldn't and the Claimant would improve for a time then have interim flares. In June, Dr. Kawasaki had discharged the Claimant from his care because the Claimant was not interested in injections and he had been improving. Later, Dr. Miller referred the Claimant to Dr. Van Dorston, a pain psychologist, for a couple of visits. By the Claimant's October 2015 visit with Dr. Miller, Dr. Miller felt that the Claimant was approaching MMI and he was planning on placing him at MMI with an impairment rating and possibly recommending a gym pass and one more visit with Dr. Van Dorston. Dr. Miller ultimately opined that the Claimant did suffer a work related injury on January 4, 2015 and he anticipated that the Claimant would have permanent impairment as a result. Dr. Miller testified that based on table 53 of the AMA Guidelines for Evaluation on Impairment, the Claimant would meet the criteria specific to low back pain with continuous symptoms for greater than six months even without significant findings on the MRI. On cross-examination, Dr. Miller did agree that there would need to be objective findings, but that these could be objective findings on examination such as variable lower extremity symptoms, reduction in motion snd a lack of progression with therapy interventions. Dr. Miller also agreed that the degenerative pathology noted on the MRI report would not be attributed to the Claimant's work injury, but he did attribute the development of symptoms to the work injury. Dr. Miller testified that due to legal proceedings, the Claimant's next visit after October 2015 was delayed, but that his plan had been to place the Claimant at MMI whenever the next visit occurred.

43. Dr. Lawrence Lesnack also testified at the hearing as an expert in the areas of physical medicine and as to Level II accreditation matters. Dr. Lesnack testified that he performed an IME of the Claimant on July 30, 2015. As part of his IME, he reviewed medical records after the evaluation, including the chiropractic records of Dr. Wilner and the Exempla records from Dr. Foster and Dr. Miller. Dr. Lesnack also testified that he was present for Dr. Miller's testimony at the hearing. Dr. Lesnack also obtained a history from the Claimant and conducted a physical examination. Based on all of this, Dr. Lesnack reached the medical opinions contained in his written IME report. Dr. Lesnack testified that for the most part he found the Claimant's physical examination to be normal. He testified that the Claimant complained of some aching sensations after bending forward and then returning to an upright position but found the Claimant's strength and sensation reflexes normal. Dr. Lesnack also found that maneuvers to look at the SI joints and hips were normal. Dr. Lesnack testified that he noted minimal tenderness with palpation. Dr. Lesnack disagreed, in part, with Dr. Miller's previous discussion of the Table 53 rating. Dr. Lesnack opined that Table 53 would require reproducible, objective findings to provide a diagnosis so that you could give a Table 53 rating. Dr. Lesnack opined that there were no objective findings on exam that would qualify for a diagnosis in this case as the Claimant had minimal structural abnormalities on an MRI which are normal findings in a man of the Claimant's age. Dr. Lesnack further testified that there is a section that requires six months of pain and rigidity which also requires objective findings on examination, such as a positive straight leg raise test, a reflex finding or a true neurologic strength deficit. Dr. Lesnack opined that none of this was found. Rather, Dr. Lesnack stated that Dr. Miller talked about subjective

complaints such as tenderness on palpation which Dr. Lesnack argues is not an objective finding. As for the MRI, Dr. Lesnack opines that the Claimant's mild degenerative disk changes are a normal finding for a 33 year old man. Dr. Lesnack testified that on examination, the Claimant was pleasant but "very dramatic" which is not an issue when taken alone, but when considered in the context of the medical records and non-physiologic findings, Dr. Lesnack opines that the reported mechanism of injury doesn't make sense. He opined that the described mechanism of lifting a 50-60 pond bucket of mortar from waist level, even with a twisting motion, doesn't load the lumbar spine. Dr. Lesnack opined that to load the lumbar spine you have to be bent forward at the waist at least 70-90 degrees and leaning over slightly would put the Claimant at 10-20 degrees. Dr. Lesnack further opined that twisting in an upright position, without having that lumbar flexion to it, is not going to load the lumbar spine. Dr. Lesnack also finds that reaching up and tagging something would not load the lumbar spine. The only action described by the Claimant that Dr. Lesnack opines could have possibly loaded the lumbar spine was a forceful cough and that is not work-related. Based on the dramatic presentation of symptoms combined with a normal MRI and non-physiologic findings initially, and a history of being treated for spine pain within the past year, Dr. Lesnack finds that there are no objective findings that the Claimant suffered a specific injury to his lumbar spine on January 4, 2015.

44. On cross-examination, Dr. Lesnack testified that even if the same place is palpated and the same result is reached every time, this is still subjective. Dr. Lesnack did agree that you can feel acute spasms, but a report of "tightness" still refers to subjective patient reporting. In Dr. Lesnack's report, he referred to "minimal tenderness" upon palpation. Dr. Lesnack testified that this means that the Claimant complained of the tenderness, not that Dr. Lesnack could feel the tenderness. Upon reviewing Dr. Wilner's chiropractic records at the hearing, Dr. Lesnack agreed that there was a reference in April 2014 which says that the Claimant's low back symptoms were under control. He further agreed that there were no further references in Dr. Wilner's records after April 2014 regarding low back complaints or treatment until after January 4, 2015 although Dr. Lesnack's written report referenced "frequent symptoms in his low back" just prior to January 4, 2015.

45. Having reviewed and considered all of the medical records in evidence as well as the testimony of the Claimant, Dr. Miller and Dr. Lesnack at the hearing, the ALJ finds the opinions of the Claimant's treating physician, Dr. Miller, which are in part based on, and supported by, the medical records of Dr. Graves, Dr. Kawasaki, and Dr. Wilner, to be more credible and persuasive than the opinions of Dr. Lesnack. The opinions of Dr. Miller as to the work-relatedness of the Claimant's January 4, 2015 injury, the progression of the Claimant's symptoms during treatment and the Claimant's condition are found to be more reliable and persuasive than those of Dr. Lesnack and are found as fact.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial*

Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

There is sufficient evidence in the record that the Claimant suffered an injury to his lower back on January 4, 2015 and the Claimant's testimony regarding his mechanism of injury was credible and no persuasive evidence was presented to contradict his testimony. Although Respondents have argued that the condition was pre-existing, the medical reports in evidence do not support this theory. The Claimant had received some chiropractic treatment prior to the injury, but it was primarily focused on his upper back and neck. The last record of low back chiropractic treatment before the work injury was treatment that Dr. Miller noted had ended in April of 2014. Once the Claimant's authorized treating physician, Dr. Miller, had the opportunity to review the older chiropractic records predating the January 4, 2015 incident, Dr. Miller determined that the injury was work related and that any prior medical history was non-contributory. Dr. Graves and Dr. Kawasaki also provided continuing treatment for the Claimant and noted symptoms and diagnoses similar to Dr. Miller over the course of the Claimant's treatment for the January 4, 2015 work injury.

The ALJ, having reviewed and considered all of the medical records in evidence as well as the testimony of the Claimant, Dr. Miller and Dr. Lesnack at the hearing, found the opinions of the Claimant's treating physician, Dr. Miller, which are in part based on, and supported by, the medical records of Dr. Graves, Dr. Kawasaki, and Dr. Wilner, to be more credible and persuasive than the opinions of Dr. Lesnack. The opinions of Dr. Miller as to the work-relatedness of the Claimant's January 4, 2015 injury, the progression of the Claimant's symptoms during treatment and the Claimant's condition were found to be more reliable and persuasive than those of Dr. Lesnack.

As of the date of the hearing, there was also evidence to establish that the Claimant continued to have symptoms, but that he was approaching MMI and Dr. Miller had anticipated putting the Claimant at MMI soon.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that his work activities on January 5, 2015 caused or permanently aggravated, accelerated or combined with a preexisting condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits – Authorized, Reasonable and Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. The employer's duty to provide designated medical providers is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

Here the Claimant began treating with Dr. Miller and Kawasaki and was also referred to Dr. Graves for chiropractic care. As of the date of the hearing, his treating physicians continued to offer treatment recommendations.

As set forth above, there is evidence to establish that the Claimant continues to have symptoms resulting from injury he suffered on January 4, 2015. Although, Dr. Miller opined that the Claimant was still actively treating for the January 4, 2015 work injury and was still subject to temporary work restrictions, as of the date of the hearing, the Claimant had not been placed at MMI. Thus, the conditions related to the initial injury were still present and may require treatment. To the extent that Dr. Miller has since placed the Claimant at MMI, that may affect medical benefits going forward from that point.

However, prior to being placed at MMI by Dr. Miller, the Respondents shall be liable for the continued medical treatment recommended by Dr. Miller and his authorized referrals that is reasonably necessary to cure and relieve the Claimant from the effects of his January 4, 2015 work injury.

Temporary Disability Benefits

To prove entitlement to temporary total disability (“TTD”) benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

In this case, the Claimant established that he suffered a compensable work injury on January 4, 2015, but he failed to prove that he suffered a wage loss as a result of that injury prior to the termination of his employment. The Claimant was working under lifting, pushing and pulling restrictions imposed by Dr. Miller (and Dr. Foster prior to that) as of January 22, 2015. However, there was not substantial evidence that the Claimant suffered any wage loss until March 18, 2015, the day following the termination of the Claimant’s employment with Employer.

Therefore, it is necessary to address Respondents' contention that the Claimant is precluded from receiving temporary indemnity benefits because the Claimant is responsible for his termination on March 17, 2015.

Responsible for Termination

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

The Employer has an Attendance and Punctuality Policy which was communicated to the Claimant and which the Claimant received in writing. Essentially, hourly employees are expected to report for work at the assigned time, adhere to the work schedule, work through scheduled shifts, perform assigned duties and take meal periods as scheduled. Failure to adhere to the attendance and punctuality policy will result in discipline. The Employer's Progressive Disciplinary Process policy is that "the discipline process will begin when an associate receives the third unexcused occurrence in a six-month period. Each absence or tardy is considered one occurrence.

If there are 3 occurrences in a 6 month period, the managers are to provide a “coaching.” After a “coaching” has occurred, if there are 3 additional occurrences, the managers are required to issue a “counseling.” After an employee receives a “counseling,” if there is 1 additional occurrence, the managers are required to issue a “final warning.” After an active Final Counseling, and there is 1 additional occurrence, managers are required to administer a “termination.” There are certain absences and tardiness that is considered “excused.” These “excused” absences and tardies include “State-law protected time off.” In this section, the policy refers the reader to “State Exceptions” in the LOA HR SOP and Time-Off Benefits HR SOP for additional details, but this was not offered or admitted into evidence. In reference to the Employer’s disciplinary policy, the term “active” refers to a disciplinary action that is within six (6) months from the date when the action was administered. In tracking “active” disciplinary notices, “a notice remains visible for six months” and “at the end of the six-month period, the notice rolls off and is no longer “active.” When an employee has been employed for fewer than 120 days, then he or she should receive a “final warning” if there are 3 occurrences in the first 120 day period and then proceed to immediate termination for 1 additional occurrence that occurs in the first 120 days. However, if no further occurrence occurs in the first 120 days, then the “final warning” issued during that probationary period is treated as a “coaching” notice. 35).

On September 20, 2014, the Claimant received a Progressive Disciplinary Notice for being unexcused absent on 8/24 and tardy on 7/4 and 9/16. He was advised that he should refrain from further violations of the Employer’s Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. All of these attendance occurrences happened prior to the Claimant’s injury and, thus, were unrelated to the Claimant’s work injury. This notice was entitled a “final warning” in the records under the Employer’s Progressive Disciplinary Process as it occurred in the first 120 days of employment. As there were no further occurrences in the first 120 days of employment, this notice was treated as a “coaching” notice per the Employer’s policy.

On November 29, 2014, the Claimant received a Progressive Disciplinary Notice for arriving over 3 hours late on 10/6/2014, arriving 13 minutes late on 11/21/2014 and arriving 31 minutes late on 11/23/2014. The Claimant was advised to refrain from further violations of the Employer’s Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. All of these attendance occurrences happened prior to the Claimant’s injury and, thus, were unrelated to the Claimant’s work injury. This notice would be a “counseling” under the Employer’s Progressive Disciplinary Process since the “final warning” issued in the Claimant’s first 120 probationary period had converted to a “coaching” notice. That “coaching” notice would have been less than 6 months prior to the November 29, 2014 notice, so the September 20, 2014 notice would still be “active.”

On December 23, 2014, the Claimant received a Progressive Disciplinary Notice for being absent on December 15, 2014 with insufficient sick time to cover his scheduled hours. The notice stated that this violation progressed the Claimant to “final warning. The Claimant was advised to refrain from further violations of the Employer's Attendance Policy and that further violations will result in additional disciplinary action up to and including termination. This attendance occurrence happened before the Claimant's injury and is unrelated to the work injury.

The Claimant testified that he was about 10-25 minutes late on March 17, 2015 due to car trouble and his car would not start. He worked a full day on that date. Then, the Claimant testified, on March 18, 2015, he clocked in and he was asked if he would like to take the day off because it wasn't expected to be busy. The Claimant testified that he stated that he needed as many hours as possible. Before the Claimant clocked out at lunch time, he was told to go to the office and when he arrived, Victor and Richard advised the Claimant his employment was being terminated due to attendance.

On March 18, 2015, the Claimant received a Progressive Disciplinary Notice for tardiness on February 4, 2015, February 18, 2015, February 19, 2015, February 25, 2015, February 26, 2015, February 27, 2015, March 4, 2015 and March 17, 2015 and for work absences on January 7, 2015, January 17, 2015, January 31, 2015, February 3, 2015 and February 5, 2015. The Notice provided that these were violations of the Company's attendance and punctuality standards and the Claimant's employment was terminated. The ALJ found that for the dates prior to March 17, 2015, the reasons the Claimant was absent or tardy or otherwise had an attendance occurrence were related to the Claimant's work injury. However, per the Claimant's prior statements and his testimony at the hearing, the reason the Claimant had an attendance occurrence on March 17, 2015 was due to his car malfunctioning and not related to his work injury. As of March 17, 2015, the Claimant's previous "final warning" disciplinary notice administered on December 23, 2014 for a December 15, 2014 absence would have been considered an "active" notice as it was less than six (6) months prior to March 17, 2015. Per the Employer's policy, if there is a one (1) additional attendance occurrence after an active final counseling/warning, then managers are required to administer a termination.

While the Claimant's counsel argued that the Claimant's attendance issues were related to his injury-producing activity, the weight of the evidence establishes that with respect to the Claimant's termination from employment with Employer, the Claimant violated known and well-communicated attendance policies for reasons other than his work injury. The Claimant's employment was terminated as a result of these violations and he is not entitled to temporary disability benefits.

ORDER

It is therefore ordered that:

1. The Claimant suffered a compensable industrial injury during the scope and course of his employment with Employer on January 4, 2015.

2. The Respondents are liable for medical treatment recommended by Dr. Miller or by his referrals, that is reasonably necessary to cure and relieve the Claimant from the effects of his January 4, 2015 work injury.

3. The Claimant is responsible for termination and the Claimant’s claim for total temporary disability benefits is denied and dismissed.

4. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 18, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether Claimant has established by a preponderance of the evidence that a weight loss program is reasonable, necessary, and causally related treatment for his February 19, 2015 industrial injury.

STIPULATIONS

The parties stipulated that Respondents would admit for temporary partial disability (TPD) benefits beginning July 24, 2015, with interest, in exchange for Claimant withdrawing the issue of penalties with prejudice.

FINDINGS OF FACT

1. Claimant works for Employer as a warehouse/forklift driver and has been so employed by Employer for approximately 15 years. Claimant is 52 years old.

2. On February 19, 2015 Claimant sustained a compensable right knee injury after slipping on ice while unloading products from his work truck.

3. On February 19, 2015 Claimant was evaluated by Matthew Miller, M.D. Claimant reported that he was unloading windshields when he slipped on ice and twisted his right knee. Claimant reported no prior right knee injuries. Claimant reported a pain level of 8/10, limping, popping sounds, stiffness, swelling, and tenderness in his right knee. Dr. Miller assessed knee strain and ordered a right knee MRI to rule out meniscus tear. *See* Exhibit C.

4. On February 26, 2015 Claimant underwent an MRI of his right knee interpreted by Eduardo Seda, M.D. Dr. Seda provided an impression of: complex tear of the body and posterior horn of the medial meniscus with the posterior meniscal root markedly attenuated; and degenerative cartilage changes in the patellofemoral compartment. *See* Exhibit F.

5. On March 5, 2015 Claimant was evaluated by Dr. Miller. Dr. Miller noted that an MRI performed one week prior showed a torn medial meniscus in the right knee. Dr. Miller noted Claimant was still in pain and couldn't walk very well without crutches. Dr. Miller assessed acute meniscal tear of the knee and referred Claimant to an orthopedic specialist for evaluation for meniscectomy. *See* Exhibit C.

6. On March 16, 2015 Claimant was evaluated by orthopedic surgeon Michael Hewitt, M.D. Claimant reported no prior history of knee injury. Claimant reported medial and lateral knee pain with catching and popping. Dr. Hewitt noted

Claimant was ambulating with crutches. Dr. Hewitt reviewed the MRI of Claimant's right knee as well as x-rays of Claimant's right knee. Dr. Hewitt noted that Claimant understood that he had degenerative change within the knee but that Claimant noted an acute onset of pain after the slip at work. Dr. Hewitt discussed treatment options that included knee arthroscopy. Dr. Hewitt explained to Claimant that the knee arthroscopy would not significantly alter the natural history of his arthritis. Claimant elected to proceed with surgery. *See* Exhibit I.

7. On April 7, 2015 Claimant underwent right knee surgery performed by Dr. Hewitt. The preoperative diagnoses included: right knee medial meniscal tear; and right knee arthritis. The postoperative diagnoses included: right knee medial meniscal tear; diffuse grade IV chondromalacia central patella; localized grade II chondromalacia medial femoral condyle; and localized grade III chondromalacia lateral femoral condyle. Dr. Hewitt also noted moderate sized peripheral osteophytes in the medial femoral condyle. *See* Exhibits 11, K.

8. On April 28, 2015 Claimant was evaluated by Dianne Adams, D.O. Dr. Adams noted that Claimant was there for a recheck of his right knee following his April 7 surgery. Claimant reported a pain level of 6/10. Dr. Adams noted that Claimant had functional improvement and was attending physical therapy. *See* Exhibit C.

9. On May 18, 2015 Claimant was evaluated by Dr. Hewitt. Dr. Hewitt noted Claimant had a relatively non-antalgic gait, no significant knee effusion, and that his incisions were healing well. Dr. Hewitt noted Claimant was six weeks post knee arthroscopy where he was found to have moderate knee arthritis. Dr. Hewitt performed a cortisone injection into Claimant's right knee. *See* Exhibit D.

10. On May 26, 2015 Claimant was evaluated by Virginia Hrywnak, D.O. Claimant reported that he was not feeling better and that he had a lot of pain in his right knee. Claimant wanted to get a second opinion from orthopedics. Dr. Hrywnak referred Claimant to orthopedics for a second opinion per Claimant's request. *See* Exhibit C.

11. On June 2, 2015 Claimant was evaluated by William Ciccone, M.D. Claimant reported a work related injury in February for which he underwent a knee arthroscopy with partial meniscectomy. Claimant reported some persistent pain over the anterior aspect of the knee and somewhat medially as well. Claimant reported pain along the patellofemoral joint with grinding noted and that a recent steroid injection to his knee provided minimal relief. Dr. Ciccone opined that radiographs showed moderate degenerative changes in the right knee more significant in the patellofemoral joint. Dr. Ciccone assessed right knee degenerative joint disease. Dr. Ciccone noted that he discussed with Claimant that Claimant had pain in his knee prior to his workers' compensation injury and that continued physical therapy would be appropriate. Dr. Ciccone discussed that he felt Claimant was not doing any damage to his knee, but that Claimant had some exacerbation of his arthritic symptoms. *See* Exhibits 9, B.

12. On June 16, 2015 Claimant was evaluated by Dr. Ciccone. Claimant reported persistent pain in his right knee associated with locking. Dr. Ciccone noted diffuse pain about the knee mostly in the patellofemoral joint and significant pain with patellofemoral grinding. Dr. Ciccone assessed right knee pain with degenerative changes, and right knee degenerative joint disease. Dr. Ciccone opined that the majority of Claimant's symptoms were coming from the degenerative changes within Claimant's knee. Dr. Ciccone opined that given the significance of Claimant's disease from an operative perspective, the only reasonable procedure would be a total knee replacement. *See* Exhibits 9, B.

13. On August 3, 2015 Claimant was evaluated by Dr. Hewitt. Claimant reported no significant long term benefit from the May cortisone injection. Dr. Hewitt noted that Claimant had a mildly antalgic gait. Dr. Hewitt discussed treatment options with Claimant and noted that Claimant had a meniscus tear with underlying degenerative arthritis. Dr. Hewitt opined that the meniscal tear was addressed with the knee scope surgery, but that the natural history of arthritis was not significantly altered by the surgery. Dr. Hewitt noted that Claimant's future treatment options included optimizing body weight, a strengthening program, anti-inflammatories, repeat cortisone injection, and/or viscosupplementation injections. Claimant reported that he wanted to consider total knee replacement. Dr. Hewitt opined that Claimant's arthritis did not appear to be far enough advanced for a total knee replacement. Dr. Hewitt opined that Claimant would need to pursue a total knee replacement through Claimant's own insurance. *See* Exhibits 12, D.

14. On August 28, 2015 Claimant was evaluated by Caroline Gellrick, M.D. Claimant reported to Dr. Gellrick that prior to his February, 2015 work injury he was 100% able to do full duty work and had no problems before with his right knee. Dr. Gellrick opined that Claimant had failed conservative treatment postoperatively for a meniscectomy for a meniscus tear and that Claimant aggravated underlying preexistent chondromalacia with his fall. Dr. Gellrick opined that with Claimant feeling unstable with his knee, a repeat MRI was warranted. Dr. Gellrick also opined that Claimant had become severely depressed as a result of his knee condition and recommended a psychological evaluation to help with depression and pain management. *See* Exhibit 6.

15. On August 31, 2015 Claimant underwent a right knee MRI interpreted by Bridget Lauro, M.D. Dr. Lauro noted a history of right knee pain, swelling and instability status post meniscal surgery in April of 2015, and concern for recurrent meniscal tear. Dr. Lauro provided an impression of: evidence of interval partial medial meniscectomy without convincing evidence for a re-tear; re-demonstration of lateral patellar subluxation with advanced patellofemoral compartment arthrosis; and small joint effusion and small Baker's cyst. *See* Exhibit 6.

16. On September 9, 2015 Claimant was evaluated by Dr. Gellrick. Dr. Gellrick noted that Claimant underwent an MRI that showed evidence of partial medial meniscectomy without convincing evidence of a re-tear, re-demonstration of lateral patellar subluxation with advanced patellofemoral compartment arthrosis and small joint

effusion and a small Baker's cyst. Dr. Gellrick noted that there was probably not a re-tear of the meniscus. Dr. Gellrick referred Claimant to Dr. Schneider for an additional orthopedic opinion to consider the new MRI and further knee treatment. *See* Exhibit 6.

17. On September 22, 2015 Claimant was evaluated by Ron Carbaugh, Psy.D. Claimant reported a work injury in February and that he underwent meniscus repair on April 7, 2015 with no subjective benefit. Claimant reported that physical therapy provided no benefit, a TENS unit provided no benefit, a cortisone injection provided no benefit, and a home exercise program provided no benefit. Claimant reported that medications provided some benefit. Dr. Carbaugh opined that Claimant had several relevant cognitive/psychological issues including probable borderline cognitive functioning and probable chronic moderate depression that both likely impacted Claimant's understanding of his medical condition and Claimant's interpretation of his symptoms and responses to treatment. Dr. Carbaugh provided diagnostic impressions of somatic symptom disorder, probable persistent depressive disorder, and Axis II diagnosis deferred- but suspected avoidant personality traits/disorder. *See* Exhibit H.

18. On September 23, 2015 Claimant was evaluated by David Schneider, M.D. Claimant reported being involved in a slip on ice on February 19, 2015 while at work. Claimant reported that prior to his work injury he had no complaints in his right knee, had not sought medical care for his right knee, and never had surgery on his right knee. Claimant reported that following his injury he saw Dr. Hewitt and underwent knee arthroscopy and partial meniscectomy and that his knee pain had persisted. Dr. Schneider noted that x-rays showed severe patellar tilt and arthritis with evidence of medial compartment arthritis and that the MRI showed those issues with degenerative knee throughout. Dr. Schneider assessed pain in limb and symptomatic osteoarthritis of the right knee. Dr. Schneider opined that Claimant had an interesting presentation and that Claimant was symptom free before surgery and had never sought medical care for his right knee. Dr. Schneider noted that since the work injury, Claimant's knee had become very symptomatic and painful on a daily basis. Dr. Schneider recommended that Claimant undergo right total knee arthroplasty. Dr. Schneider opined that there was clearly a component of a pre-existing condition but that there was also clearly acute exacerbation of a pre-existing condition. *See* Exhibit 7.

19. On September 30, 2015 orthopedic surgeon Robert Mack, M.D. provided a medical record review report. Dr. Mack opined that Claimant was not a surgical candidate based on his obesity and Dr. Hewitt's note that Claimant's degenerative arthritis was not bad enough to require a total knee replacement. Dr. Mack also opined that Claimant's right knee arthritis was clearly pre-existing as manifested by objective findings of osteophytes in his knee at the time of his surgery and as noted by MRI which indicated a chronic situation predating the February 19, 2015 injury. Dr. Mack opined that the work injury did not cause the condition that is causing the recommendation for total knee joint replacement. *See* Exhibits 10, A.

20. On October 1, 2015 Claimant was evaluated by Dr. Gellrick. Dr. Gellrick noted that Claimant was seen by Dr. Schneider. Dr. Gellrick noted that both Dr. Ciccone and Schneider recommended a right total knee replacement. Dr. Gellrick noted that Claimant was symptom free before surgery and had never sought care for his right knee before his work accident and that now his knee was very symptomatic on a daily basis. Dr. Gellrick noted that Claimant's osteoarthritis was asymptomatic prior to the work injury and noted that Dr. Schneider felt there was clearly an acute exacerbation of a preexistent condition. *See* Exhibit 6.

21. On October 29, 2015 Claimant was evaluated by Dr. Gellrick. Dr. Gellrick again noted that Claimant reported being symptom free before his right knee surgery and that he had never sought care for his right knee until he had this work related injury and that now he had pain on a daily basis. Dr. Gellrick noted that both Dr. Ciccone and Dr. Schneider had recommended total knee replacement. Dr. Gellrick opined that weight reduction would be beneficial to Claimant before proceeding with knee surgery. *See* Exhibit 6.

22. On November 4, 2015 Claimant was evaluated by Dr. Gellrick. Dr. Gellrick noted that she was in receipt of a review from orthopedic surgeon Dr. Mack. Dr. Gellrick noted that three orthopedic surgeons were recommending total knee replacement for end stage osteoarthritis that was previously asymptomatic. Dr. Gellrick disagreed with the opinions of Dr. Mack and opined that Claimant was asymptomatic prior to his slip and fall on the job and that Claimant did not have problems with his right knee. Dr. Gellrick opined that weight loss was necessary. *See* Exhibit 6.

23. Although Claimant reported to multiple providers that he had no right knee pain or issues prior to his February 19, 2015 work injury, the medical records demonstrate otherwise.

24. On July 11, 2011 Claimant was evaluated by James Weingart, M.D. Claimant reported that his right knee was popping out of place as well as catching and grinding. Claimant reported a two week history of popping in his right knee, that he saw a workers' compensation doctor for a laceration with a knife on his right knee, and that he was going to get an orthopedic referral. Claimant reported that an x-ray showed some rough under patella. Dr. Weingart noted tenderness in Claimant's patellar on examination and assessed patella-femoral syndrome. Dr. Weingart discussed lifestyle management and treatment options. Dr. Weingart prescribed diclofenac sodium. *See* Exhibit L.

25. On August 24, 2011 Claimant was evaluated by James Johnson, M.D. at Panorama Orthopedic & Spine Center. Claimant reported right knee pain with symptoms that began in July with walking. Claimant reported a dull ache with a pain level of 4/10 that was accompanied by popping and clicking. Claimant reported his pain was exacerbated by use/movement, walking, and ascending/descending stairs. Claimant reported that his pain was primarily located over the anterior aspect of his right knee. Dr. Johnson assessed osteoarthritis of the right knee and degenerative joint

disease, uncontrolled status. Dr. Johnson discussed treatment options with Claimant that included weight control, lower impact activities, use of glucosamine with MSM, occasional use of an anti-inflammatory, and occasional aristospan injection and/or visco supplementation injection to treat Claimant's arthritic symptoms. Dr. Johnson opined that ultimately, Claimant would likely need to have a total knee replacement as his symptoms warranted. Dr. Johnson noted that physical therapy would be initiated for a strengthening program and to use the anti-inflammatory and ice as needed for flare ups. Dr. Johnson injected Claimant's right knee with lidocaine, marcaine, and aristospan. *See* Exhibit G.

26. On March 30, 2012 Claimant was evaluated by Dr. Johnson. Dr. Johnson noted that Claimant was there for follow up of his right knee pain. Dr. Johnson noted that Claimant received an injection 9 months ago that provided Claimant with good relief but that the pain had slowly returned. Claimant reported pain primarily in the patellofemoral region with mild medial pain. Dr. Johnson provided an impression of right knee degenerative joint disease and osteoarthritis. Dr. Johnson performed another injection in Claimant's right knee. Dr. Johnson recommended continuing aggressive home physical therapy and opined that when Claimant's pain returned they would consider further treatment including possible arthroscopic debridement with tibial tubercle transfer or arthroplasty. *See* Exhibit G.

27. Claimant testified at hearing. Claimant reported that he had problems with his right knee popping in 2011 but that his problems resolved with icing and with injections. Claimant reported that before his work related injury he could walk and run without problems. Claimant reported that he did not tell his doctors about his prior right knee problems or injections because he had forgotten about them. Claimant testified he had already lost weight on his own and joined a weight loss program and that he was feeling better and felt a little less pressure on his right knee. Claimant testified that he didn't remember his prior right knee problems or doctors' appointments until his attorney told him. Claimant testified he did not remember being told that he would need a total knee replacement and did not remember having x-rays of his right knee.

28. Claimant's testimony is not credible or persuasive. It is not logically credible that Claimant went from complaining of daily right knee pain in 2011 and from a diagnosis of degenerative joint disease and osteoarthritis of the right knee with a recommendation that he would need a total knee replacement in the future as his symptoms warranted to being entirely asymptomatic until his work injury. It is also not credible that Claimant forgot about his prior right knee treatment that was only a few years prior. It is not logically credible that Claimant forgot undergoing right knee x-rays or that he did not remember being told that he would need a total knee replacement. Logically, undergoing x-rays and being told that you would need a total joint replacement are things that one would remember.

29. Dr. Mack testified at hearing. Dr. Mack opined that Claimant had pre-existing degenerative arthritis prior to his work injury clearly demonstrated by MRI. Dr. Mack opined that Claimant's current symptoms were due to Claimant's pre-existing

degenerative condition and that Claimant's current symptoms were typical of arthritis. Dr. Mack opined that Claimant's need for weight loss treatment was not work related and that Claimant's overall current knee condition was not related to the February 19, 2015 work injury but that the current condition is related to Claimant's pre-existing degenerative arthritis. Dr. Mack's opinions are found credible and persuasive.

30. The opinions of Dr. Schneider and Dr. Gellrick are not credible or persuasive. Both physicians opined that Claimant's current condition was related to the February 19, 2015 work injury and that the need for treatment, including a weight loss program, would be related treatment. However, both based their opinions on their incorrect belief that Claimant had no prior injuries or symptoms in his right knee and that he had never had prior right knee treatment. Dr. Schneider noted specifically that there was clearly a component of a pre-existing condition but an acute exacerbation of that pre-existing condition. The pre-existing condition of severe right knee arthritis, however, was not acutely exacerbated by the work injury. Claimant had been symptomatic dating back to 2011 when he underwent multiple right knee injections and was told he would ultimately need a total knee replacement.

31. The opinions of Dr. Mack, Dr. Hewitt, and Dr. Ciccone are found more credible and persuasive in this matter. Dr. Hewitt specifically explained to Claimant prior to surgery that the surgery would only fix the torn meniscus and that the surgery would not alter the Claimant's pre-existing arthritis. Dr. Ciccone's opinion that the majority of Claimant's symptoms following his surgery were coming from the degenerative changes in his knee is also persuasive and consistent with Dr. Hewitt's explanation to Claimant prior to surgery. Prior to surgery, Claimant could only ambulate with the use of crutches. Claimant then had surgery, the meniscus tear he suffered was repaired, and Claimant was able to ambulate without crutches again. Claimant continued to have right knee pain after surgery that was similar to the same right knee pain he had complained of in 2011 with both pain and grinding.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment are proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Respondents have been required to provide ancillary “pre-operative treatment” for non-industrial conditions if the evidence establishes that such ancillary care is a reasonably necessary prerequisite to surgery and must be given to achieve optimum treatment of the compensable injury. *Public Service Co. v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999). The question of whether the claimant has established that the need for ancillary treatment is a reasonably necessary prerequisite to achieve optimal treatment is one of fact for the ALJ. *Public Service Co. v. Industrial Claim Appeals Office, supra*.

Claimant has failed to establish by a preponderance of the evidence that his need for weight loss treatment is causally related to his February 19, 2015 work injury. Claimant has failed to establish that the injury he suffered on February 19, 2015 aggravated his underlying pre-existing arthritis. Rather, the ALJ credits the opinions of Dr. Mack and Dr. Hewitt. Claimant had symptoms of severe degenerative arthritis in his right knee at medical appointments in 2011 and 2012. Claimant underwent right knee injections then for the symptoms he reported. Claimant was told then that he would likely need a total knee replacement and was advised to lose weight. Claimant is not credible that he was asymptomatic leading up to his February 19, 2015 work injury. Rather, in 2011 and 2012 Claimant received significant treatment for his symptomatic right knee degenerative condition. Claimant had reported symptoms dating back to 2011, had right knee injections, was told to lose weight, and was told he would likely need a total knee replacement. Although Claimant suffered a meniscal tear in the work injury in 2015, that tear was repaired. Claimant showed functional gain following the 2015 surgery to repair his meniscus and is back to his baseline status with similar pain complaints and symptoms now as he had in 2011 and 2012. Claimant has failed to show that the February 19, 2015 injury aggravated or accelerated his underlying degenerative arthritis in any way.

Claimant was told several years ago that he likely needed a total knee replacement due to his severe arthritis. Claimant had symptoms of daily pain in his right knee with catching and locking and had been told to lose weight. Claimant still needs a total knee replacement due to his severe arthritis, still has daily pain with catching and locking, and still needs to lose weight. The February 19, 2015 work injury has not been shown, more likely than not, to have accelerated his need for a weight loss program as ancillary treatment for his right knee condition. Although multiple providers agree that a weight loss program is reasonable and necessary prior to undergoing a right total knee replacement, Claimant has failed to establish that a weight loss program is related to his February 19, 2015 work injury. Rather, Claimant's current right knee condition and need for weight loss treatment is causally related to the natural progression of his pre-existing degenerative condition and is not causally related to his work injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden to show that a weight loss program is reasonable, necessary, and causally related to his February 19, 2015 work injury. His request for a weight loss program is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 18, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The issues presented for determination are whether Claimant sustained a compensable industrial injury arising out of and in the course of his employment. If the claim is found compensable, whether Claimant is entitled to medical treatment to cure and relieve the effects of the industrial injury; whether Claimant was responsible for termination of his employment; whether Claimant willfully mislead Employer concerning his physical ability to perform his job; whether Claimant is entitled to temporary total disability (TTD) benefits; an determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant was born on April 17, 1986 and was 29 years of age at the time of the hearing.

2. On April 1, 2015, Claimant worked for the Employer as a stock supervisor. Claimant's job responsibilities included assisting in all areas of stock, shipping, receiving protocol/policies, procedures, and all shipping/receiving related paperwork and participating in inventories.

3. On March 25, 2015, Claimant went to the Walgreens Healthcare Clinic and was treated by Ann Ambrose, APN. Claimant complained of "right lower back pain after playing football 4 days ago". (Four days prior was Saturday, March 21, 2015.) Claimant said his back felt tight like a rock and he had "pain down back of right leg that is intermittent". Claimant was diagnosed with "sprain of lumbar". Ms. Ambrose prescribed Naprosyn 500 mg tablets and Flexeril 10 mg tablets. Ms. Ambrose also restricted Claimant from prolonged sitting and that "[o]nce pain has subsided, no lifting over 15 lbs for one week." She also advised ice and heat and provided back exercises for Claimant to do two times per day for a week.

4. Claimant testified that the pain that he had when he went to the Walgreens Healthcare Clinic on March 25, 2015 was in his upper buttocks right side, shooting down his right leg, consistent with his pain at the time of the hearing.

5. Claimant also testified that his ear symptoms prompted him to go to the Walgreen's Healthcare Clinic rather than any back pain. He also testified that he told Ms. Ambrose that he felt a muscle spasm and stiffness in his low back, and the he mentioned to her that he played college football. He denied that he injured his back playing football on March 21, 2015.

6. Claimant testified that he did not work the next three days (March 26, 27, and 28, 2015) because he took vacation time to attend a friend's wedding in Las Vegas,

Nevada.

7. Claimant testified that when he returned to work on April 1, 2015, he knowingly lifted more than 15 pounds and did not self-limit his physical activity despite his restrictions from Ms. Ambrose. Claimant testified he did not believe Ms. Ambrose had provided work restrictions, and that his impression was that he should "just take it easy for a couple of days."

8. On April 2, 2015, Claimant saw Kimberly Farber, CNP, at Himalaya Family Medicine Center and reported that his low back pain started "last Sunday." Claimant stated that the back pain worsened on "Monday."

9. Claimant testified that the Monday referenced by Ms. Farber was on March 30, 2016 and that on that day, he was in Las Vegas. Claimant testified that he flew home to Colorado on Tuesday, March 31, 2015, and he returned to work the following day, April 1, 2015.

10. Ms. Farber's April 2, 2015 report does not mention any injury to Claimant's back from lifting at work just one day prior.

11. On April 1, 2015 at approximately 11:00 a.m., Claimant testified that he picked up a 30-pound box of purses off of another box, turned to the right and felt a pop and extreme pain radiating down his legs, mostly the right leg. He continued to work the rest of the day.

12. Cami Reynolds, the assistant store manager for Employer and Claimant's direct supervisor, testified that she spoke with Claimant several times throughout the day on April 1, 2015. Ms. Reynolds recalled that Claimant complained of back pain and observed Brittany Wickard rubbing Claimant's low back on April 1, 2015, but that Claimant never reported hurting his low back at work.

13. As a retail business, Employer has a CCTV system in its stores, including the one in which Claimant worked, which records business activities. The recordings are made in the regular course of business, and the CCTV system recorded Claimant on April 1, 2015.

14. In particular, there are four videos taken on April 1, 2015 covering 10:55 a.m. to 11:15 a.m. showing Claimant at work in the stock room from four different camera angles. The videos depict the following:

> Camera 8, video # 1:
> Claimant walks toward the camera carrying a small sack that he puts into a small refrigerator. He walks a few feet away and begins looking at a small device in his hands with his back to the camera and then walks back and forth in front of the camera several times. Claimant then stands next to the desk bent forward at the waist forward with both wrists on desk top

while typing on the keyboard and looking at the computer screen.

Claimant then lifts/pushes a box from his chest height to his right onto the floor, bends over and opens a box with some type of cutting device. Claimant removes a piece of cardboard and places it on top of some boxes. Claimant then crouches down with his knees bent while bent at the waist and removes approximately five handbags from the box. Claimant stands, and carrying several handbags in each hand walks down the hallway out of camera view. Claimant exhibits a normal walk. A few minutes later, Claimant returns into view.

A female (Cami Reynolds) then appears and begins talking to Claimant during which time Claimant puts items in his back pocket. A second female appears and Ms. Reynolds moves towards the desk while still in view. The second female leaves and a third female (Brittany Wickard) arrives. At the time Ms. Wickard arrives, Claimant leans over with his hands on his thighs.

Claimant moves to a stack of boxes, flips the top box over and leans against it with his head on the box while Ms. Wickard rubs his low back.

Claimant then returns to opening a box when the Ms. Reynolds leaves. Claimant removes handbags from the box. Claimant then appears to be looking at a cell phone while Ms. Wickard hugs Claimant as they are face to face and Claimant continues to look at a cell phone while pressing various buttons. Ms. Wickard appears to be rubbing Claimant's back while hugging him. The hugging/rubbing continues for approximately a minute. Ms. Wickard and Claimant then walk together out of camera view.

Camera 5, video #1 shows the same interaction from a different angle.

Camera 8, video # 2
Claimant can be seen removing handbags from boxes and bending several times at the waist during this time in the distant background. Claimant then carries the handbags out of view. He then breaks down the empty boxes and is observed bending over at the waist picking up papers off of the ground. Claimant empties an additional box then walks out of view.

The video next shows Ms. Reynolds carrying nine boxes (one at a time) of the same type Claimant had been working with. She creates two stacks of boxes with the top of each stack reaching the top of her head. Ms. Reynolds is alone and stacks the boxes herself.

Camera 10, video # 1:
Claimant is shown carrying individual purses in each hand down a hallway

and returning several times during the interactions previously described. When the second female appears she and Claimant "high five" each other with Claimant using his right hand/arm. The video shows the interaction previously noted in the other security videos but from a different angle.

15. None of the videos show Claimant falling, almost falling, or with his knees buckling.

16. Claimant testified that his injury occurred prior to the video starting although it appears Claimant was just arriving to work or returning from a break. As the video starts at 10:55 a.m., the Claimant is observed carrying a sack into the backroom and putting into the refrigerator. He then filled up a cup with water as if he were starting his work day as Ms. Reynolds pointed out.

17. Beginning April 15, 2015, Claimant attended more than 20 physical therapy sessions, more than 20 Concentra visits, and more than 10 chiropractor visits, paid for by Respondents. Claimant also had the following treatment: massage therapy, a May 12, 2015 MRI, an EMG nerve conduction study, and SI joint injections. Claimant admitted that at all of those appointments, he denied having back pain before April 1, 2015. Thus, any opinions from the treating physicians that Claimant suffered a work injury are not persuasive. Those providers did not have an accurate history of Claimant's symptoms.

18. Claimant testified that the spasm he experienced on March 25, 2015 was not at all the same or relevant. He also felt it was not a "major problem" although he did have a little leg pain. He tried massaging it with a baseball but it did not improve.

19. Claimant testified that he felt fine when he traveled to Las Vegas from March 27-30, 2015, which is inconsistent with his reports to the nurse practitioner at Himalaya on April 2, 2015 that he felt worse on March 30, 2015.

20. At the request of Respondents, Claimant saw Tashof Bernton, MD, on November 2, 2015. Claimant said he was injured at work on April 1, 2015, when he lifted a box and felt a pop in his lower back, and his knees buckled, he fell to the ground. Claimant told Dr. Bernton that he had no back pain prior to this episode and no medical or chiropractic care for back pain. He had current pain in his mid and low back that he rated 4-7/10 over the last 4 weeks. Dr. Bernton noted Claimant took Norco 2 to 4 times a day, ibuprofen 800 mg 3 times a day and Tizanidine at bedtime. Claimant said he had a 20-pound lifting restriction. Dr. Bernton opined that he "would not regard the patient as having a work-related injury."

21. On December 29, 2015, Dr. Bernton issued a second report after review of additional medical records and the CCTV video. Dr. Bernton wrote that the "assessment made in my report indicating the history in total is not consistent with an occupational injury remains after reviewing the additional records." He also stated the "records submitted for review contain additional information consistent with the

assessment of the patient's lumbar complaints are not work-related." Dr. Bernton opined that Claimant does not require further medical care on a work-related basis.

22. During a post-hearing deposition, Dr. Bernton reiterated his opinion that Claimant did not suffer a work related injury. Dr. Bernton stated that Claimant's subjective history is the only thing that weighs in favor of him having suffered a work injury. Dr. Bernton, however, testified that Claimant's subjective history is inconsistent with the medical records. Dr. Bernton stated that Claimant's history was clearly not accurate given that Claimant specifically denied prior back problems but had just received treatment for back problems just before the date of the alleged occupational injury.

23. Dr. Bernton acknowledged that occasionally there may be minor inconsistencies in the medical records, but that in this case, the Claimant's denial of back pain prior to April 1, 2015, was simply not true.

24. Dr. Bernton also acknowledged that Claimant displayed some pain behaviors in the CCTV videos, but Claimant's behavior in the videos does not mean that Claimant suffered a work injury on that day.

25. On August 14, 2015, Claimant resigned from employment with Employer.

26. Based on the foregoing, Claimant has failed to prove he suffered a compensable work related injury to his low back on April 1, 2015. The Claimant had pre-existing low back pain just days prior to the alleged work-related incident, and Claimant was less than truthful concerning his symptom history when visiting with authorized treating providers. In addition, the CCTV videos do not show the incident Claimant alleged, and none of his co-workers corroborated his version of the events. The ALJ finds that Claimant's job duties did not cause his low back condition nor did they aggravate or accelerate any pre-existing condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of

the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

5. The question of whether Claimant met his burden of proof to establish a compensable injury is one of fact for determination by the judge. *See Faulkner v. I.C.A.O.*, 12 P. 3d 844 (Colo. App. 2000).

6. Merely feeling pain at work in and of itself is not "compensable." *See Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (I.C.A.O. April 11, 2007). "An incident which merely elicits pain symptoms caused by a preexisting condition does not compel a finding that the Claimant was sustained a compensable injury." *See also F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App 1995).

7. Claimant has failed to meet his burden of proving that it is more probably true than not that he suffered an injury to his low back while in the course and scope of his employment on April 1, 2015. The Claimant has also failed to establish that he suffered an aggravation of a pre-existing injury on April 1, 2015. The persuasive and credible evidence shows that Claimant's low back symptoms arose several days prior to April 1, 2015. In fact, a note from Walgreen's Healthcare Clinic dated March 25, 2015 reflects that he had low back pain as a result of playing football four days earlier. Further, Employer's CCTV video also does not show the injury as Claimant described with a fall or near fall to the ground after lifting a box. Claimant also denied prior low back pain to all of the medical providers he has seen throughout this claim, but admitted he had been suffering back pain just a few days earlier than April 1, 2015. The Claimant's version of the events lacks credibility.

8. Because the Claimant has failed to prove that he suffered an injury in the course and scope of his employment, the Claimant's claim for benefits, including medical treatment and TTD, is denied and dismissed. The remaining issues are

rendered moot.

ORDER

It is therefore ordered that Claimant’s claim for workers’ compensation benefits is hereby denied and dismissed. As such, any request for additional medical treatment or temporary disability benefits is also denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 19, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she sustained a traumatic injury to left and right foot arising out of and in the course and scope of her employment with employer on October 10, 2014;

II. Whether claimant, if she has proven she sustained a compensable injury, has proven by a preponderance of the evidence that the medical benefits requested for her left and right foot symptoms and diagnoses are causally related to her work injury on October 10, 2014;

III. Whether, if claimant has proven the she sustained a compensable injury, respondents have proven by a preponderance of the evidence that claimant's indemnity benefits should be reduced by 50% due to claimant's willful failure to obey a reasonable safety rule or willful failure to use safety devices pursuant to C.R.S. Section 8-42-112 (1) (a) and (b).

Because the ALJ concludes that Claimant failed to establish, by a preponderance of the evidence, that she sustained a compensable left and right foot/ankle injury on October 10, 2014, this decision does not address the remaining issues raised at hearing.

PROCEDURAL MATTERS

Prior to the commencement of hearing, the parties advised the ALJ of the following procedural matters which the ALJ finds and concludes constitutes stipulations reached concerning issues endorsed for hearing:

I. Claimant withdrew her request for TTD and TPD benefits, without prejudice. Claimant also withdrew the issue of average weekly wage without prejudice. Respondent voiced no objection.

II. Claimant withdrew, with prejudice, the issue of whether respondent had timely and appropriately designed the authorized medical providers for this claim. Respondent voiced no objection.

III. Claimant stipulated that the medical treatment she received before she reported this claim as a workers' compensation claim to respondent on March 17, 2015, was not authorized and therefore Respondent was not liable for the costs of this care should the claim be deemed compensable by the ALJ.

IV. Respondents requested that, if the claim is found compensable, any medical benefits awarded be paid in accordance with the Division's medical fee schedule. Claimant voiced no objection to the request.

The parties' stipulations/agreements were approved by the ALJ.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a general merchandise manager for Respondent-Employer. She has worked for Employer for approximately 23 years.

2. On October 10, 2014 Claimant was pulling an empty merchandise pallet onto a truck trailer for reclamation when she fell into the space between the loading dock and the bed of the trailer. Claimant did not notice that the docket plate, which covers the gap between the loading dock and the trailer, was not in place. Claimant's left leg slipped into the breach and she proceeded to fall onto her left side. Claimant's left ankle was pinned between the loading dock and the trailer. She required assistance to free her leg and get up.

3. Approximately 15 minutes later, Claimant completed an incident report with the assistance of Miles Smith, Claimant's direct supervisor. Claimant's written incident report indicates that she injured her "left hand, left knee & left ankle, left elbow and neck.

4. At hearing, Claimant testified that she felt bruised and sore following the incident. She testified that she injured her left side, including her foot, knee and elbow.

5. Miles Smith, testified that when he contacted Claimant in order to complete the incident report he asked Claimant a "couple of times" if she was injured to which Claimant reportedly responded that she thought she would be OK. Claimant refused medical treatment and returned to work.

6. Claimant testified that she returned to work and completed her shift. She reported she did not go to the doctor because she thought she would recover.

7. Claimant's work includes stocking merchandise and requires lifting (50-60 pounds), pushing/pulling, squatting, kneeling and reaching. Claimant testified that she is on her feet "99%" of the time while at work. Scott Anger, "Respondent-Employer's Assistant Store Manager agreed that Claimant's job requires substantial standing/walking estimating the time Claimant would be on her feet to be 90% of her shift.

8. Claimant testified that following the October 10, 2014 incident her left foot and

ankle was sore. It would swell. She would apply ice and heat at the end of her shift and work through the pain. Consequently, Claimant has not lost time from work secondary to the October 10, 2014 incident.

9. Miles Smith testified that in the days and weeks following the October 10,

2014 incident, Claimant never reported an injury nor did she request that she be allowed to see a doctor for any condition stemming from the October 10, 2014 incident.

10. Approximately five (5) months passed between the date of the October 10, 2014 incident and Claimant's first visit to a physician for a foot condition that she now asserts is related to her fall into the gap between the loading dock and the truck trailer.

11. On March 17, 2015, Claimant presented to the offices of her orthopedist, Dr. Kenneth Danylchuk where she was evaluated physician's assistant (PA) Franklin Sloan. Claimant has a long standing patient relationship with Dr. Danylchuk. She has been treating with Dr. Danylchuk since 2004, following the development of post surgical hip pain caused by complications from a major reconstructive jaw surgery. Claimant had bone harvested from both hips for grafting into her jaw and developed chronic hip pain as a consequence.

12. Claimant scheduled the March 17, 2015 appointment approximately two weeks before and she attended the appointment over her lunch hour at work. Claimant made Scott Anger aware she was going to the Doctor. During her March 17, 2015 appointment with PA Sloan, Claimant reported constant sharp pain in the left foot. PA Sloan summarized Claimant's history of present illness as follows:

> Approximately 6 weeks ago without any history [of] specific injury she began to notice a spontaneous gradual onset of intermittent pain about the left forefoot with weightbearing and range of motion a (sic) better in the morning and worse towards the end of the day with associated swelling towards the end of the day. This has been getting gradually and progressively worse. . . . She denies a past history of previous injury or problems with the foot.

13. PA Sloan documented that Claimant walked without a limp and that examination of the left foreleg and ankle was "unremarkable". He also noted that Claimant's left foot examination was "unremarkable except for mild tenderness over the mid dorsal aspect of the forefoot just proximal to the secondary fourth metatarsal heads". X-rays of the left foot were obtained which demonstrated "mild degenerative changes left first MTP joint. Left foot otherwise negative. No acute findings". The ALJ finds that reference to "MTP" likely means metatarsal-phalangeal.

14. As noted above Claimant's first visit for a condition that she asserts is related to the October 10, 2014 incident occurring at work was March 17, 2014; however, Claimant saw Dr. Danylchuk on January 22, 2015 during which appointment her "biggest concern is the fact that she is losing her balance and falling a little bit".

Claimant testified that she did not injure either her right or left foot as a consequence of falling.

15. While Claimant denied a past history of previous injury or problems with the

left foot as noted at ¶ 12 above, review of Dr. Danylchuk's medical records reveals that on April 22, 2008 Claimant presented to Dr. Danylchuk's office with complaints of left foot pain of two weeks duration. Similarly to PA Sloan's March 17, 2015 report, Dr. Danylchuk's April 22, 2008 report does not ascribe Claimant's foot pain to an injury. Rather, the April 22, 2008 note specifically states: "No known injury". Also similar to the Claimant's current complaints, the April 22, 2008 note documents that Claimant was having a lot of problems at the end of her day. Dr. Danylchuk was not clear about what was causing Claimant's left foot pain; however, the possibility of a stress fracture was raised. Dr. Danylchuk placed Claimant in a "postop" boot and excused her from work for two days. By May 6, 2008, Claimant's left foot pain was noted to be improving with use of a postop boot per Dr. Danylchuk's records.

16. Claimant could not recall the cause of her 2008 left foot pain, but testified that the nature of her pain was different and the pain in 2008 was in a different location on the foot. Dr. Danylchuk's April 2008 notes pain in the "midfoot." As noted, PA Sloan's March 17, 2015 note reflects complaints of pain/tenderness "over the mid dorsal aspect of the forefoot. Based upon the evidence presented, the ALJ is persuaded that the location of Claimant's left foot pain in April 2008 and March 2015 was very similar.

17. Claimant also has a history of prior right foot pain. On April 17, 2008 Dr. Christian Hulett documented that Claimant was reporting that the dorsum of her right foot was sore. According to Dr. Hulett, Claimant had a "very high instep", i.e. a prominent mid metatarsal region which was probably causing Claimant to develop "a little bit of tendonitis".

18. Claimant testified she was "leery" about saying anything concerning her October 10, 2014 slip and fall and did not ascribe any injuries to her foot to the October 10, 2014 incident, during her March 17, 2015 appointment because filing workers' compensation claims was highly discouraged by Respondent-Employer. According to Claimant, she felt she needed to do everything possible before turning in a claim. She suggested she was afraid to file a claim because of her employer's corporate culture.

19. Claimant returned to work after her March 17, 2015 appointment with PA Sloan. Upon her return, Claimant testified that Scott Anger asked her what she was going to do, i.e. whether she wanted to file a claim. Claimant indicated that she was not going to file a claim. Approximately 45 minutes later, Claimant changed her mind informing Mr. Anger that she wanted to file a claim and see a doctor. Claimant was referred to Centura Centers for Occupational Medicine (CCOM) where she was evaluated by Dr. Paul Merchant the same day.

20. Scott Anger testified that there is no company culture discouraging the filing

of workers compensation claims. Rather, safety is a “core value” for the company and as such injured workers’ are treated fairly. Mr. Anger testified that he was aware that Claimant was going to the doctor on March17, 2015 and that he contacted her after the appointment to find out what was going on with her. According to Mr. Anger, Claimant reported that she had a “hairline fracture”. Consequently, Mr. Anger testified that he asked if she wanted to see a workers’ compensation doctor. Mr. Anger testified that Claimant seemed hesitant, stating that she didn’t know. He then asked a second time if she wanted to see the work comp doctor to which she said “no”. Mr. Anger testified that sometime later, Claimant returned indicating that she wanted to report an injury. Mr. Anger took the claim and referred her to the doctor. Mr. Anger testified he was never hostile to Claimant.

21. Claimant was evaluated by Dr. Merchant on March 17, 2015. He took a history from Claimant that included her report that he left foot became “trapped between a tractor-trailer and loading dock at her store” and that she needed “assistance from other workers to discharge (sic) her foot”. According to this report, Claimant’s “primary problem [was] pain located in the left foot”, specifically pain located in the forefoot at the distal metatarsals.

22. Examination of the left foot/ankle revealed tenderness over the distal heads of the second, third and fourth metatarsals of the foot. Dr. Merchant appreciated no swelling or joint laxity of ankle and documented that Claimant was able to move without difficulty. Claimant’s diagram from this date of visit is devoid of any depiction of pain in the left or right ankle.

23. Claimant returned to Dr. Merchant on March 31, 2015. By this visit the focus of Claimant’s complaints is mixed between her foot and ankle. Physical examination is directed to the left ankle and no mention of any physical examination of the left foot appears in Dr. Merchant’s March 31, 2015 medical report. While Claimant documents mid forefoot pain, she does not depict having pain in the left ankle on this visit.

24. On May 4, 2015, Claimant was re-evaluated by Dr. Merchant after a vacation during which she was able to rest her foot for “lengthy periods of time”. During this appointment, Claimant report continued tenderness in the left foot. Physical examination was directed to the left foot and no mention is made regarding the condition of the left ankle. Claimant was referred to physical therapy (PT).

25. Claimant was seen for her initial PT evaluation on May 4, 2015. During this appointment, Claimant completed a pain diagram depicting 8/10 pain in the left ankle. No mention is made in the initial PT report regarding the status of Claimant’s left ankle or injury thereto.

26. Claimant was evaluated by Dr. Danylchuk on July 30, 2015 for a chief complaint of ankle pain. The report from this date of visit indicates that Claimant was returning to discuss “right foot pain that has progressively worsened over the past month”. Regarding a mechanism of injury (MOI), Dr. Danylchuk notes only that Claimant sustained an injury “several months ago involving the left lower extremity”. He

documented that Claimant felt she was “overusing” the right side. Consequently her right ankle was examined after which revealed “severe pain over the heel lateral to the heel and at the insertion point of the Achilles tendon”. Claimant was placed in a postop boot and an MRI of the right ankle, to specifically evaluate the “distal portions of the Achilles tendon” was ordered. Claimant was diagnosed with a right ankle sprain.

27. MRI of the right ankle performed August 4, 2015 revealed a minimally displaced calcaneus fracture, mild tendinosis of the Achilles tendon, mild tendinitis of the posterior tibialis, moderate tendinosis and strain of the peroneus longus tendon, partial tear of the anterior band of the tibiofibular ligament suggesting high ankle sprain, mild strain of the anterior band of the talofibular ligament and strain of the calcaneofibular ligament without wear.

28. On August 4, 2015, Dr. Danylchuk suggested that Claimant’s right ankle condition may be a consequence of a work related injury due to overcompensating with the right leg. Due to Claimant’s calcaneal fracture and left ankle symptoms, Dr. Danylchuk ordered a bone density study and an MRI of the left ankle.

29. MRI of the left ankle performed September 2015 revealed mild inflammation around the ankle as well as a partial posterior tibialis tendon tear, peroneal tendinopathy with partial tear of the peroneus brevis tendon, strain of the lateral ligaments without tear, plantar fasciitis and Achilles tendinitis without tearing.

30. Claimant’s bone density study showed a T score of -2.2 resulting in a diagnosis of osteopenia for which Claimant was provided supplements including calcium and Vitamin D.

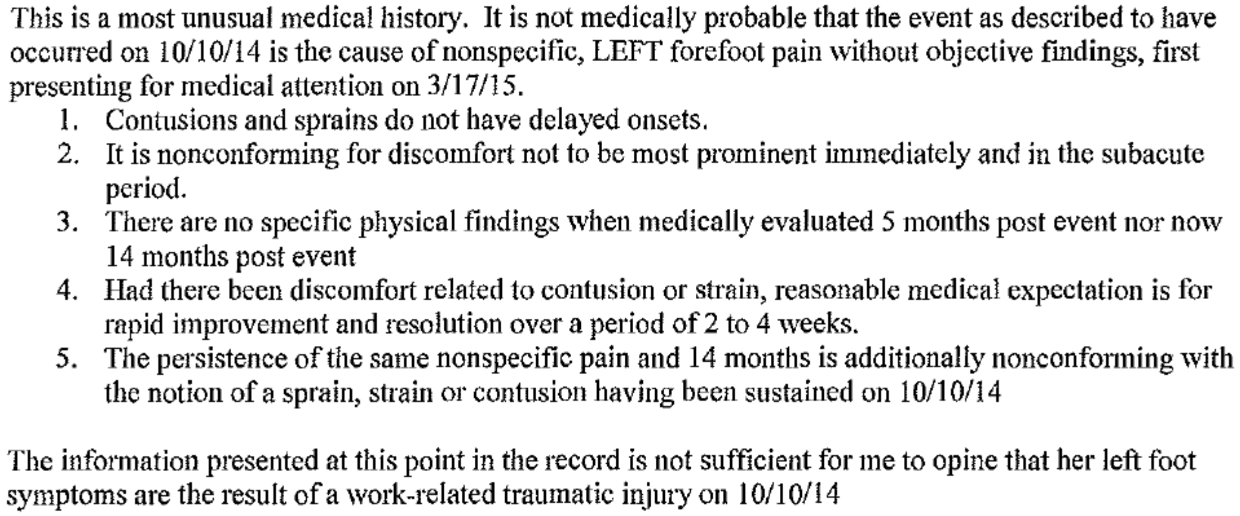
31. The ALJ finds the degree of pathology, i.e. fracture, ligament tears, tendinitis and tendinosis noted on MRI of the right and left ankle extensive and likely to produce symptoms of pain.

32. Claimant was evaluated by Dr. Henry Roth at Respondent-Employer’s request on January 21, 2016. During his independent medical examination (IME), Dr. Roth inquired about the discrepancy between the history provided to PA Sloan and Dr. Merchant on March 17, 2015. Claimant reiterated that she felt intimidated by work and that she initially did not file a claim for this reason. However, Claimant went on to explain that she changed her mind after think about it, noting that after working for Respondent-Employer for 23 years there was no reason not to turn the claim in.

33. Claimant also explained that although she had right foot/ankle pain when she saw Dr. Merchant on March 17, 2015, she did not report it because she has a “high pain tolerance”. Claimant’s medical reports demonstrate that she routinely seeks refills of pain medication for chronic hip pain as a consequence of a surgery dating back to 2004. While the ALJ does not question Claimant’s report of hip pain as a consequence of the bone harvested for grafting into the jaw, the extent of pathology noted on MRI of the right ankle and Claimant’s persuades the ALJ that Claimant, more likely than not would

have reported at least some symptoms of right foot/ankle pain to PA Sloan and Dr. Merchant on March 17, 2015

34. Dr. Roth testified at hearing. He opined that Claimant's left and right foot/ankle problems were not related to the incident occurring on October 10, 2014. In reaching this conclusion, Dr. Roth noted that had Claimant sustained an injury in that incident, she would have experienced symptoms at that time. According to Dr. Roth, the natural healing process of a contusion is to resolve in a few days with the passage of time, and does not require medical treatment. There is, Dr. Roth explained, nothing to show any anatomic injury that is acute and occurring on October 10, 2014. Claimant's left foot has degenerative changes, and the symptoms arising around February 2015 (approximately 6 weeks prior to her March 17, 2015 appointment) are due instead to those degenerative changes, and Claimant's age and obesity. He found Claimant's physical exam did not correlate to any physiologic, anatomic findings or diagnoses. The existence of left foot pain in 2008, which occurred without injury, is, Dr. Roth explained, strong evidence that Claimant's left foot symptoms forming the basis of her March 17, 2015 appointment are not due to the October 10, 2014, incident but to degenerative causes, Claimant's obesity, and her age. Dr. Roth summarized these opinions in his IME report as follows:



This is a most unusual medical history. It is not medically probable that the event as described to have occurred on 10/10/14 is the cause of nonspecific, LEFT forefoot pain without objective findings, first presenting for medical attention on 3/17/15.

1. Contusions and sprains do not have delayed onsets.
2. It is nonconforming for discomfort not to be most prominent immediately and in the subacute period.
3. There are no specific physical findings when medically evaluated 5 months post event nor now 14 months post event
4. Had there been discomfort related to contusion or strain, reasonable medical expectation is for rapid improvement and resolution over a period of 2 to 4 weeks.
5. The persistence of the same nonspecific pain and 14 months is additionally nonconforming with the notion of a sprain, strain or contusion having been sustained on 10/10/14

The information presented at this point in the record is not sufficient for me to opine that her left foot symptoms are the result of a work-related traumatic injury on 10/10/14

35. Dr. Roth's opinions are credible and persuasive. He is the only physician to review the available medical record evidence and comment specifically as to the cause of Claimant's foot/ankle symptoms arising five months after the alleged mechanism of injury in this case. Dr. Danylchuk's contrary opinions regarding causality, to the extent that he opined as such, are not persuasive. The ALJ credits the testimony of Dr. Roth to find that Claimant's left foot/ankle conditions are idiopathic in nature and probably affected by personal factors such as her age and weight.

36. Claimant has failed to prove, by a preponderance of the evidence, that she sustained a compensable left foot/ankle injury on October 10, 2014. Consequently, her claim for a compensatory right foot/ankle injury is also denied and dismissed.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). In this case, Claimant's testimony regarding her alleged left foot is patently inconsistent with what she reported to PA Sloan on March 17, 2014. Claimant, sought to explain this away, not by stating she did not provide these statements to PA Sloan, or that he had recorded them incorrectly, but by saying she fabricated this report to keep the details of the injury from Mr. Sloan so she did not have to report a workers' compensation claim and be the subject of retaliation by Respondent-Employer. As Mr. Anger and Mr. Smith credibly testified, there is no culture of discouraging injured workers not to report claims. To the contrary, the safety of the employer's work force is a core value to the company. The ALJ concludes it makes little sense to discourage employees claiming injuries not to report those injuries while continually subjecting them to potentially greater injury through continued work. This is especially true for Claimant as she performs a physically demanding job requiring her to lift, push/pull, squat, kneel, reach and be on her feet standing/walking at least 90% of her shift. Based upon the totality of the evidence presented, the ALJ concludes that Claimant's report of March 17, 2015 and her testimony asserting that she injured her left foot/ankle during the October 10, 2014 incident at work is incredible and unconvincing.

C. Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). As found here, the opinions of Dr. Roth are credible and persuasive. He is the only physician to review the available medical record and comment specifically on causation. Based upon that review Dr. Roth opined that the cause of Claimant's pain was idiopathic, i.e. arising without cause around early February 2015. Claimant's medical history supports that she has had episodes of foot pain in the absence of trauma previously. Moreover, that pain was located in an area similar to that which Claimant's reports is painful currently. Based upon the record evidence presented, the ALJ concludes that there is substantial record evidence to support Dr. Roth's opinions. Accordingly, his opinions are credible and persuasive.

D. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office,* 5 P.3d 385(Colo. App. 2000).

Compensability

E. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(l)(b), C.R.S.*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of her employment relationship with Employer and during an activity, specifically pulling a empty pallet onto a trailer when her left leg slipped into the gap between the trailer and the loading dock. Nonetheless, the question of whether the alleged foot/ankle conditions, for which Claimant seeks benefits, "arose out of" her employment must be resolved before the injury is deemed compensable.

G. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment duties and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Moreover, the question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

H. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable injury" is one which requires medical treatment or causes disability. *Id.*; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S.

I. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an incident occurring at work without sustaining a compensable "injury." This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where a claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where a claimant involved in motor vehicle accident without resultant injuries suffered no compensable injury). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted, "[C]orrelation is not causation." Thus, merely because a coincidental correlation between a claimant's work and his/her symptoms exists does not mean there is a causal connection between the work duties and the injury.

J. As found, the ALJ conclues the expert opinions of Dr. Roth regarding the cause of Claimant's left foot/ankle are credible and more persuasive than the contrary testimony of Claimant and the opinions of Dr. Merchant and/or Dr. Danylchuk. As presented, the evidence does not support that Claimant sustained any injury to her left foot/ankle in this case. Rather, Claimant's prior episodes of left foot pain arising without cause, the delay in seeking treatment for five months post incident and Claimant's inconsistent report of injury persuades the ALJ that Claimant, more probably than not did not sustain an injury to her left foot/ankle on October 10, 2014 or a compensatory right foot/ankle injury as she now claims; her report of having a high pain threshold notwithstanding. As found, the persuasive medical evidence supports a conclusion that Claimant's foot/ankle symptoms are, more probably than not, idiopathic in nature and affected by personal factors such as her age, weight and unique anatomy, i.e. her very high instep. Consequently, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between her employment and the resulting condition for which medical treatment and indemnity benefits are sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because Claimant failed to establish she suffered a compensable "injury" as defined by the aforementioned legal opinions, her claim is denied and dismissed. Accordingly, the remaining claims for medical benefits and penalties need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for work related injuries to her left and right foot/ankle emanating from an incident occurring at work on October 10, 2014 is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

DATED: April 1, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Did Claimant suffer a compensable injury or cumulative trauma to her left upper extremity arising out of and in the course and scope of her employment?
- If compensable, is Claimant entitled to medical benefits to cure and relieve the effects of her industrial injury?
- If compensable, was the treatment provided by Davis Hurley, M.D. (and his referrals), including the left side carpal tunnel release surgery and post-surgical care, reasonable, necessary, and related to Claimant's compensable left upper extremity condition.

STIPULATION

The parties stipulated Claimant returned to work on December 2, 2015. However, Claimant has not worked full time since December 2, 2015[1]. The stipulation was accepted by the ALJ and incorporated in this order, *infra*.

FINDINGS OF FACT

1. On March 27, 2015, Claimant began working at Employer as an aesthetician. Her job duties consisted of laser body contouring, a procedure to smooth out imperfections in a client's skin. This was a full-time position.

2. Claimant testified her work with the laser required her to move both of her hands constantly while holding her elbows out at awkward angles. She held the laser head in her right (dominant) hand. She applied the laser to a client's desired area of skin (through a protective layer of gel), constantly moving the laser head around the area. Claimant testified she would work on one section of skin and then proceed to another, moving the laser head constantly. If one didn't keep the nozzle moving at all times, the laser would burn the patient's skin. Her left or non-dominant hand held the cord running from the laser head to the machine console. This was the only procedure Claimant performed for Employer.

3. Based upon Employer's timecard records admitted at hearing, from March 27-May 22, 2015, Claimant worked an average of 7.84 hours per shift, not including meal breaks for which she clocked out (219.65 hours divided by 28 days worked). The ALJ notes Claimant worked no hours from May 10th -14th. She worked 4.03 and 4.87 hours on May 20 and May 22, respectively.

[1] The issue of temporary partial disability benefits was reserved, as the parties were awaiting Claimant's wage records.

4. Claimant was also working at European Wax as an aesthetician. She started working there in February 2014 and worked approximately twenty-five (25) hours per week.

5. Claimant testified regarding her job duties at European Wax. She applied hot wax from a pot, which she stirred. Claimant said the wax was applied using her index finger and a stick. She then used her thumb to strip off the wax.

6. On May 11, 2015, Claimant was evaluated by Alexis Anthony, PA at Guardian Urgent Care. Her chief complaint was swelling, pain, tingling and weakness in her right upper extremity. Claimant reported this was the result of holding a laser for skin treatments, which was described as an overuse injury. Claimant said she had been at this job one month prior and did not have these symptoms before. Claimant's wrist was swollen and tender. She was diagnosed with carpal tunnel syndrome ("CTS") and tenosynovitis (de Quervain's) and given a short arm splint. She was told to follow up with an orthopedic surgeon.

7. Claimant was evaluated by Dr. Hurley of Advanced Orthopedic and Sports Medicine Specialists on May 12, 2105. The history of present illness was listed as right wrist pain. She complained of mild to moderate right wrist pain, which she said began one (1) month ago. Claimant's pain over the radial and dorsal aspect of her wrist had increased recently. Active painful range of motion ("ROM") was noted for the right wrist. Active pain free ROM was noted for the left wrist. X-rays of the right wrist were normal. Dr. Hurley's assessment was tenosynovitis (de Quervain's) and CTS-right wrist. Dr. Hurley discussed injections versus surgical intervention and Claimant did not want to pursue the former. An EMG was ordered. Dr. Hurley excused Claimant from work for two (2) days.

8. On May 15, 2015, Claimant returned to work. Claimant testified the pain in her right wrist was so intense, she switched her dominant and non-dominant hands for her laser procedures. By May 22, 2015, Claimant testified her left wrist symptoms increased such that she could no longer perform her work duties.

9. An Employee Incident Report was completed on May 19, 2015. Claimant was noted to have operated the Venus Legacy laser and her wrist became swollen and sore. Claimant's treatment with Dr. Hurley on May 12, 2015 was documented. Claimant's supervisor was listed as Suzanne Biersack, who commented Claimant mentioned she had a problem with her hand/wrist in the past.

10. On or about May 19, 2015, an Employer's First Report of Injury ("E-1") was filed by Caroline Burk, HR Manager for Employer. The E-1 stated Claimant's wrist and hand became swollen and sore after using the laser handpiece multiple times.

11. Steven Gulevich, M.D. authored a letter to Dr. Hurley, dated May 20, 2015, in which he stated the EMG/NCS confirmed the clinical diagnosis of right carpal tunnel syndrome. The test confirmed delays of the median motor distal latency and median sensory responses, as well as abnormal activity in the abductor pollicus brevis.

12. Dr. Hurley excused Claimant from work from May 22-26, 2015.

13. Sean Michael Gallagher testified on behalf of Employer. He was the Director of Human Resources for Sono Bello Contour Centers. He took over for Ms. Burk and in that capacity, he oversaw worker's compensation matters. Mr. Gallagher testified Claimant worked approximately thirty (30) hours per week. According to the company file, Claimant was not working, as she was under the care of a physician and unable to complete her duties and responsibilities. Mr. Gallagher confirmed Claimant's last day of work was May 22, 2015, although she was still employed with the company in an "on- leave" status. Mr. Gallagher testified Claimant worked a total of six (6) days from her initial date of injury.

14. Susan Steckler testified on behalf of Employer. She was employed as the front desk coordinator at the Sono Bello location where Claimant worked. She was previously employed as the aesthetician and trained Claimant. She was present at or near the time when Claimant returned to work after initially receiving treatment. Ms. Steckler did not see Claimant reverse her hands when providing treatment.

15. Claimant returned to Dr. Hurley on May 26, 2015. The history of present illness was right wrist pain. Claimant said her right hand symptoms were moderate to severe and she was experiencing persistent pain/numbness when working. Claimant was unable to sleep, because of numbness and tingling-right worse than left. Active, painful ROM was noted for the right wrist. Active pain-free ROM was noted for the left wrist. Right CTS was confirmed by EMG. Norco (5 mg.) was prescribed and Dr. Hurley recommended a right carpal tunnel and right first extensor compartment release. Claimant wanted to proceed with the surgery. Dr. Hurley's work restrictions were: no lifting more than 3 lbs.; no constant movement or continuous fine motor tasks for four (4) weeks.

16. Claimant underwent surgery on June 3, 2015. Dr. Hurley's pre- and post-operative diagnoses were: right CTS and right de Quervain's tenosynovitis. The right carpal tunnel and right first extensor compartment release was performed by Dr. Hurley.

17. On June 12, 2015, Ms. Burk (as Employer's Practice Manager) completed a physical Job Description and Analysis on Insurer's form. Claimant was noted to work four (4) ten (10) hour shifts per week. Her job included repetitive hand/finger motion-frequently (3-5 hours per day); bending/twisting-occasionally (0-3 hours per day); reaching and stretching-occasionally (0-3 hours per day); use of jarring/vibrating equipment-occasionally (0-3 hours per day); and work in awkward physical position-occasionally (0-3 hours per day).

18. Dr. Hurley examined Claimant on June 15, 2015, approximately two weeks post-surgery. The history of present illness was listed as right hand pain. Left hand symptoms were not documented. Her numbness had resolved after the surgery, but she had mild-moderate pain on the right side. In addition, she fell at a gas station, which increased the soreness in the wrist and forearm. No fracture was seen on x-ray. Her surgical wound was healing well and Dr. Hurley noted minimal pain with ROM. Claimant was to undergo the standard rehabilitation protocol. Claimant's left wrist strength was normal and no edema was noted. Dr. Hurley said Claimant needed a left carpal release and first extensor compartment release. The ALJ notes Dr. Hurley's

records did not provide detail/analysis as to whether Claimant's work activities caused symptoms or the need for the left carpal tunnel release.

19. Claimant returned to Dr. Hurley on July 2, 2015. The history of present illness was listed as right hand pain. Claimant presented with pain on the right side and numbness on the left side. Claimant's right wrist had some soreness, but had improved significantly. On examination, no echymosis was noted in the left wrist, however, there were positive Finkelstein's, Phalen's and median nerve compression tests. Dr. Hurley's assessment was left CTS and de Quervain's. He recommended surgical intervention and ordered an EMG.

20. The ALJ notes Claimant worked approximately one (1) week after May 15, 2015. She was then off for four (4) days per Dr. Hurley's orders. Based on her testimony and the GAL, Claimant did not work at Employer after May 22, 2015.

21. On July 9, 2015, Insurer filed a General Admission of Liability which admitted for wage and medical benefits. TTD was paid from May 12-14 and May 22, 2015 and continuing at the rate of $283.35 per week.

22. Dr. Hurley examined Claimant on July 13, 2015, at which time she was complaining of numbness on the left side, as well as pain on the right and left side equally. She had painful active ROM, but normal strength in left wrist. Dr. Hurley's assessment was the same as on 7/2/15 and Claimant was scheduled for an EMG. Claimant was limited to light duty work (20 lbs maximum); frequent lifting or carrying of objects that weigh up to 10 lbs; walking or standing to a significant degree, or sitting most of the time with pushing and pulling of arm/leg controls; and told to limit repetitive motion/flexion of the wrist.

23. Claimant underwent EMG/NCS studies of her left upper extremity on August 4, 2015. Dr. Gulevich's summary/ interpretation was normal median and ulnar motor study, monopolar electromyogram revealed abnormal spontaneous study. He diagnosed left carpal tunnel syndrome.

24. On September 12, 2015, Dr. Hurley performed a left carpal tunnel and first extensor compartment release.

25. Claimant returned to work at European Wax on December 2, 2015. She has not returned to work at Employer.

26. Dr. Hurley testified as an expert witness and his evidentiary deposition was admitted into evidence. Dr. Hurley is a board certified orthopedic surgeon, with a certificate of added qualification in hand surgery. He is Level II accredited pursuant to the W.C.R.P. in Colorado. Dr. Hurley testified that 95 percent of his clinical work was in hand, wrist, and elbow surgery.

27. Dr. Hurley testified that Claimant was diagnosed with bilateral carpal tunnel syndrome and bilateral de Quervain's (or radial syloid) tenosynovitis. The ALJ notes this diagnosis was different than what was listed Dr. Hurley's records, as his assessments were first focused on the right upper extremity and then on the left. Dr.

Hurley confirmed Claimant had a prior history of numbness and tingling. He testified Claimant's complaints were "mostly" on the right and these symptoms were not relieved by wearing a brace. He performed bilateral carpal tunnel release procedures on the Claimant, first on the right, then on the left. Dr. Hurley stated the carpal tunnel was less severe on the left side. He testified that surgery was recommended not just for pain relief, but also to prevent permanent loss of function due to denervation, resulting in deformity and weakness in the hands. Dr. Hurley described the surgeries were successful and he referred Claimant for physical therapy following the surgery on the left wrist.

28. Dr. Hurley testified that all of this treatment was reasonable and necessary to treat Claimant's hand and wrist pain, numbness, and tingling. Dr. Hurley noted Claimant reported her work activities included posturing and positioning of her wrist and hand. He opined these types of movements and overuse can cause carpal tunnel syndrome. The carpal tunnel diagnosis was confirmed by the EMG, which showed a decrease in the conduction velocity and latency of the nerve. Dr. Hurley testified there was a relationship between the type of work and Claimant's new symptoms, particularly when the symptoms arose. Therefore, he believed Claimant's carpal tunnel syndrome and tenosynovitis were related to her work as a laser therapy technician. Dr. Hurley stated that Claimant's carpal tunnel on the right was potentially caused by her work at Employer, depending on the intensity of the positioning or posturing; or it could have aggravated an underlying condition. Dr. Hurley was not aware of whether Claimant used the laser with one or both of her hands. The ALJ notes Dr. Hurley did not discuss Claimant's work at European Wax, nor did he provide an opinion whether work for less than ten days after May 15, 2015 could have caused an injury or cumulative trauma to Claimant's left upper extremity.

29. In his deposition, Dr. Hurley confirmed Claimant was returned to full duty in the summer of 2015 with regard to her right side. Dr. Hurley released Claimant to full duty work, without restrictions, as of January 4, 2016.

30. No ATP has issued a report stating Claimant is at MMI. However, Dr. Hurley testified Claimant was at MMI, with regard to both the left and right side. He has not done a rating for the right side.

31. Claimant worked an insufficient number of hours /days to cause an injury or cumulative trauma to her left wrist and hand.

32. There was no evidence in the record which showed Claimant received conservative treatment such as injections or PT to the left upper extremity before she underwent surgery.

33. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of Claimant, as well as her medical expert was at the heart of the compensability issue.

Compensability

Claimant contends that she sustained a compensable repetitive use or cumulative trauma injury as a result of her job with Employer. More particularly, Claimant argued that she favored her left arm once she developed symptoms in her right arm. This overuse caused her left arm to become symptomatic and she required treatment for carpal tunnel syndrome and de Quervain's tenosynovitis. Claimant relied upon the testimony of Dr. Hurley to support her claim.

Respondents averred Claimant failed to prove that her left hand condition resulted from her work duties, citing the fact she only worked for five (5) days after she began treating for her right wrist symptoms. Respondents also disputed whether Claimant would have been able to use the laser with her non-dominant hand. The ALJ agrees Claimant failed to satisfy her burden of proof to establish a compensable injury or cumulative trauma.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he or she was performing a service for Respondent-Employer arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

In concluding Claimant failed to adduce sufficient evidence that her left upper extremity was injured, the ALJ's reasoning was two-fold. First, Claimant argued the employment activity of using the laser and then switching to her left or non-dominant hand caused her to develop symptoms in her left upper extremity. As found, even assuming Claimant made that switch, she worked a total of 5 days starting May 15, 2015 (the last 2 of which she worked approximately 4 hours), which was insufficient to cause the onset of symptoms. The ALJ was not persuaded Claimant's return to work for a short period of time caused CTS and de Quervain's tenosynovitis or led those conditions to become symptomatic. (Finding of Fact 31).

Second, the ALJ reviewed the Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 5-Cumulative Trauma Conditions [effective October 30 2010] ("Treatment Guidelines") when determining whether Claimant's work activities were sufficient to cause a cumulative trauma injury to the left upper extremity. The Treatment Guidelines were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. 2008. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the court noted that the Treatment Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. 2008.

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria).

However, an ALJ is not required to award or deny medical benefits based on the Treatment Guidelines. In fact, there is generally a lack of authority as to whether the Guidelines require an ALJ to award or deny benefits in certain situations. Thus, the ALJ has discretion to approve medical treatment even if it deviates from the Treatment Guidelines. *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014). In this case, the ALJ evaluated the risk factors for CTS identified by the Treatment Guidelines as these related to Claimant's work for Employer. Specifically, those risk factors were:

Force and Repetition/Duration

Primary Risk Factor:

6 hrs of: >50% of individual max. force with task cycles of 30 seconds or less or force used for at least 50% of a task cycle-maximum force for most individuals of 3-5 kg. of force.

6 hrs of: lifting 10lbs > 60x per hour.

6 hrs of: use of hand-held tools weighing 2lbs. or greater [2].

Secondary Risk Factor:

4 hrs of: >50% of individual max. force with task cycles of 30 seconds or less or force used for at least 50% of a task cycle-maximum force for most individuals of 3-5 kg. of force.

4hrs. of: lifting 10 lbs. 60x per hour

4hrs. of: use of hand-held tools weighing 2lbs or greater

Awkward Posture and Repetition/Duration

Primary Risk Factor:

4 hrs of: Wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees.

6 hrs of: Elbow-flexion> 90 degrees.

6 hrs of: Supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle.

Secondary Risk Factor:

4hrs of Elbow-flexion > 90 degrees.

4hrs of: Supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle.

Use of handheld vibratory power tools[3] and Duration

Primary Risk Factor:

6 hrs. for more common types of vibration exposure.

Secondary Risk Factor:

[2] The ALJ notes there was no evidence in the record as to the weight of the laser Claimant used.

[3] The evidence was unclear whether the laser used by Claimant constituted a "power tool".

2 hrs. When accompanied by other risks.

As found, Dr. Hurley did not calculate Claimant's cumulative exposure as it related to either primary or secondary risk factors. He did not persuade the ALJ that Claimant's carpal tunnel syndrome diagnosis was related to a workplace exposure involving these risk factors. More particularly, although Dr. Hurley testified generally regarding the Treatment Guidelines, he did not specifically analyze whether her work activities presented primary or secondary risk factors for Claimant to develop CTS (or de Quervain's) in her left upper extremity. Stated another way, the ALJ was not persuaded by Dr. Hurley's testimony that Claimant's work exposure was the cause for her need for treatment in her left upper extremity.

Based upon the totality of evidence, the ALJ concluded Claimant's work for Employer was not of sufficient length or duration to cause a repetitive injury or cumulative trauma to the left upper extremity. (Findings of Fact 10, 13 and 31)[4]. Claimant only worked 5 or 6 days after May 15, 2015. Therefore, Claimant failed to satisfy her burden of proof that the CTS and de Quervain's tenosynovitis was compensable.

Finally, Claimant did not exhaust conservative treatment modalities, as recommended by the Treatment Guidelines. (Finding of Fact 32). This would generally be required before authorization of the surgery to Claimant's left upper extremity was approved.

In light of the ALJ's findings that Claimant did not suffer a compensable cumulative trauma injury, the medical benefits issues are moot. Claimant is not entitled to medical benefits to cure and relieve her left upper extremity condition.

ORDER

It is therefore ordered that:

1. Claimant's claim for worker's compensation benefits for her left upper extremity is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

[4] There was a conflict in the record between Mr. Gallagher's testimony and the time cards whether Claimant worked a total of 5 or 6 days after she returned to work in May.

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he sustained an occupational disease affecting his low back and right leg, arising out of and in the course and scope of his employment as a custom millworker.

II. Whether Claimant established by a preponderance of the evidence that the medical treatment he received in connection with his low back condition, including the care/surgery performed by Dr. Paul Stanton and his referrals was reasonable, necessary and causally related to his alleged occupational disease.

III. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) from June 5, 2015 to August 3, 2015.

IV. A determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a 61 year old custom millworker who has worked for Employer for more than 30 years. Claimant's position requires frequent handling, lifting and manipulation of heavy building materials, including sheets of ply wood, dimensional lumbar and solid surface countertops of various sizes. Additional job tasks include sanding, applying plastic laminate to flat and vertical surfaces without causing bubbles, cutting trim, fabricating cabinet sections, building die walls and using stationary shop tools and power hand tools. Based upon the evidence presented, including the pictures depicting some of Claimant's job duties, the ALJ finds Claimant's work physically demanding.

2. Claimant has a prior history of injury to his low back. In 1994, Claimant suffered an admitted work related injury diagnosed as a large left-sided herniated nucleus pulposus at the L5-S1 lumbar segmental level while performing in the same position he currently holds with Employer. The herniation caused severe canal compromise and left leg radiculopathy. Consequently, Claimant underwent an L5-S1 laminectomy and discectomy. Claimant reached MMI for this injury and was rated as having 8% whole person permanent impairment. He then returned to his position as a custom millworker.

3. Claimant testified that since his 1994 injury he has back pain "all the time." His

back pain has waxed and waned over the years; however, Claimant testified that his back pain worsened while working on a job which was referred to as the "Florida Mall Project." According to Claimant the Florida Mall Project was a very large job requiring fabrication of sections of custom cabinetry with Corian countertops for a coffee bar. Claimant's supervisor, Andrew Hamilton confirmed Claimant's testimony, testifying that the job involved building benches, eating tables and planters to be installed in a Florida mall food court. Per to Mr. Hamilton the job took 2-3 months to complete. The project required that the wooden sections be mocked up, countertops loosely fitted, measurements taken after which adjustments to the section, including the countertops were made. The tops were then replaced and once the section met specs the unit was disassembled for shipping to Florida. Consequently, Claimant testified that he frequently lifted materials weighing as much as 150 pounds while working the Florida Mall Project.[1]

4. Claimant testified that the physical demands, including the lifting associated with the Florida Mall Project increased his back pain in the 30 day period prior to him leaving for vacation on May 22, 2015. Claimant's testimony pinpoints his increased pain to the duties he was performing around April 22, 2015. According to Andrew Hamilton, the last day of the Florida Mall Project was April 29, 2015. Mr. Hamilton testified further that Claimant did not work on the Florida Mall Project at any time during the month of May 2015. Regardless, the evidence presented persuades the ALJ that Claimant continued to work his regular position in increasing pain. Indeed, Claimant worked his regular hours plus some overtime for the entire month of May. He did not report a work injury, or call in sick due to back pain, or otherwise miss time from work because of back pain. He did not seek a change in his job duties. Claimant testified that he did not see a doctor for his increased back pain or report his pain to his supervisor, because he had no disability and no need for treatment. Rather, Claimant testified that he managed his increased pain on his own by getting help on the job, relaxing when he could and taking hot showers after work. Given his prior experience with low back pain, the ALJ finds Claimant's testimony regarding his actions, despite his increasing pain, credible. Moreover, the ALJ finds Claimant's actions to manage his increased pain reasonable.

5. Claimant testified that he traveled to Florida by airplane on May 25, 2015 where he joined his family on vacation until May 31, 2015. Claimant testified that he considered not going on vacation because of his back pain. However, the vacation was already planned and he believed that time off resting his back might improve his pain. Consequently, Claimant decided to travel. He admitted that he was able to walk onto the airplane and then sit on the plane for the 4 to 5 hour flight each way between Colorado and Florida.

6. While on vacation, Claimant testified he felt "lousy." In addition to coping with his increased back pain, Claimant testified that he developed an upper respiratory infection and was suffering from cold symptoms. Claimant testified that as a consequence of his

[1] Steve Krueger, who is also employed as a millworker, testified that the lifting associated with the position can be heavy, noting that a 4 × 12 sheet of 1 ⅛ inch thick particle board weighs as much as 215 pounds, but help is available to lift and manipulate heavy materials.

back pain and cold he was unable to participate in activities with his family. Claimant testified that he spent his time lounging by the pool or the beach. Claimant’s wife, Peggy Harris corroborated his testimony, adding that he watched movies and went to dinner, but did not participate in any walks/hikes and did not suffer any subsequent injuries on vacation.

7. Mrs. Harris also testified that Claimant began complaining of increased back pain about a month prior to leaving for vacation. According to Mrs. Harris, Claimant moved slowly during this time frame. He appeared tired and reluctant to “participate” in activities such as mowing and vacuuming, citing back pain. In spite of not feeling well, Mrs. Harris testified that Claimant decided to go on vacation anyway. Per Mrs. Harris, Claimant was sick the whole time while on vacation. Nonetheless, Claimant did not seek treatment for his back pain or cold while on vacation in Florida.

8. Claimant took an airplane from Florida back to Colorado, ending his vacation as planned, on Sunday, May 31, 2015.

9. On Monday, June 1, 2015, claimant saw his personal care physician, Sean O’Donnell, M.D., for his severe cold and acute sinusitis. Dr. O’Donnell reported that claimant presented with sinus symptoms which have been a problem for the “past 2 weeks,” His symptoms included maxillary facial pressure, headache and nasal congestion. Claimant had no complaints of recent or chronic coughing. Dr. O’Donnell prescribed an antibiotic because an over-the-counter decongestant had not been working.

10. Claimant did not complain of back pain to Dr. O’Donnell during his June 1, 2015 visit. As documented in the June 1, 2015 note from Dr. O’Donnell, review of Claimant’s musculoskeletal system was “negative for back pain.” Claimant testified that he did not raise his increased back pain to Dr. O’Donnell during the June 1, 2015 appointment as he has suffered from chronic back pain in the past and he does not complain about it. The ALJ credits Claimant’s testimony to find that because of the waxing and waning nature of his low back pain over the years, he felt no reason to report to report his pain to Dr. O’Donnell on June 1, 2015. Moreover, the primary purpose of Claimant’s visit to Dr. O’Donnell’s office was to obtain treatment for his cold rather than back pain.

11. Following his appointment with Dr. O’Donnell, Claimant called Employer and asked for two days off to recuperate from his cold. Claimant testified that on the evening of June 2, 2015, he developed severe back and leg pain. Based upon the evidence presented, the ALJ infers that while Claimant had increased back pain prior to June 2, 2015, his pain became much worse than it had been prior to and while he was on vacation.

12. Claimant woke up on June 3, 2015, hardly able to stand or walk. Claimant proceeded to work where he reported a back injury to Andrew Hamilton. Both Claimant and Mr. Hamilton agreed that Claimant could hardly stand or walk when he arrived at work to report his alleged injury. A first report of injury (“first report”) was completed by Stephanie Robinson, Employer’s Financial Controller on June 4, 2015. The first report

of injury documents the date of injury as May 29, 2015.[2] Regarding "how the injury or illness/abnormal health condition occurred," the fist report notes: "Not sure. Jim said it has been coming on for a few months but he has just been going home and resting and it seems to get a little better. Yesterday he came in and couldn't even walk."

13. Claimant was referred to and was evaluated by Employer's designated medical provider, Steve Caste, M.D., on June 3, 2015. This is the first time Claimant saw a medical provider for his alleged work-related back pain. When asked "why is your problem work-related" in paperwork, Claimant responded "back injury over time." Dr. Castle took a history that Claimant has had "discomfort" for about 6 months, which he had been able to manage on his own. He also noted that over the past week, Claimant had been off work on vacation and that Claimant saw his personal care physician due to cold symptoms. Regarding Claimant vacation and increasing back pain, Dr. Castle noted: "After he got home, he had sudden increased back pain radiating his right thigh with numbness past the knee into his foot. He was not engaged in any physical activity at the time. He has a history of previous work related *left*-sided HNP [herniated nucleus pulpous] in 1994 which required surgery, and which resolved. His current symptoms in his *right* leg are similar to previous left-sided HNP." Dr. Castle questioned the compensable nature of Claimant's increased back pain because it appeared to have occurred at home. Nonetheless, Dr. Castle excused Claimant from work on this date.

14. On the physician's report of WC injury which asks: "Are your objective findings consistent with history and/or work-related mechanism of illness, Dr. Castle marked the answer "no." Dr. Castle noted that he would "defer" the decision regarding compensability to the "carrier." He also referred Claimant for a lumbar MRI and a surgical consultation.

15. MRI of the lumbar spine was performed June 8, 2015 and demonstrated "evidence of a relatively large posterior right paracentral acute to subacute disc herniation at L5-S1 displaced cranially causing severe right-sided lateral recess effacement and proximal S1 nerve root compression" in addition to "severe neural canal stenosis with cauda equina compression," also at the L5-S1 level.

16. On June 10, 2015, Dr. Castle noted Claimant's large disc herniation, stenosis and cauda equina compression. He noted further that Claimant had been referred to a spine surgeon and was scheduled to be seen by that specialist on June 11, 2015. Regarding compensability, Dr. Castle noted: "Compensability decision is still pending-he's had pain at work but the radicular component and therefore HNP appears to have occurred while he was off" work. Claimant remained unable to work per Dr. Castle.

17. Insurer sought an opinion regarding the question of whether Claimant's acute disc herniation was causally related to his work duties. On June 10, 2015, Dr. Andrew Castro, an orthopedic spine surgeon completed a physician advisor opinion noting that

[2] In notarized discovery responses, Claimant listed his date of injury as May 29, 2015 (the same date noted on the Employer First Report of Injury. Claimant's date of injury on his application for hearing is May 22, 2015. At hearing, Claimant testified to a June 3, 2015 date of injury.

Claimant “was not actually working” when the symptoms came on. Dr. Castro stated: “While I believe this surgical referral and treatment for the disc herniation is appropriate, I do not feel it is appropriate with regards to the workers’ compensation setting; specifically, this is not causally related to any injury in question. There is no intervening event and no specific event and no lifting injury; indeed the patient was on vacation and/on or off of work when these symptoms presented and he does have an acute disc herniation, which likely occurred when the patient was not at work. I do not think this fulfills the requirements of cumulative injury disorder and I do not believe this is causally related to the injury in question.”

18. Insurer denied liability for the claimed injury and Claimant proceeded with additional care under his private medical insurance.

19. Claimant was evaluated by Dr. Stanton on June 11, 2015. Dr. Stanton noted that Claimant “[had] been having pain for about 8 days”. While he noted that there was “no event/injury,” Dr. Stanton did note that Claimant had a “several month history of increasing right lower extremity symptoms” which came to a “fever pitch” recently. He did not comment further upon whether Claimant’s disc herniation and attendant symptoms, including his leg pain were related to his work as a millworker for Employer. Dr. Stanton diagnosed L5-S1 HNP right side, right-sided radiculopathy, L4-5 central stenosis and multilevel lumbar degenerative disc disease with congenital stenosis.

20. On June 29, 2015, Claimant underwent aL5-S1 laminotomy, partial facetectomy and discectomy performed by Dr. Stanton. Dr. Stanton’s pre-operative diagnoses were lumbar spinal stenosis, lumbar degenerative disc disease, lumbar displaced disc and lower extremity radiculopathy.

21. Based upon the evidence presented, the ALJ finds the treatment rendered in this case, including the surgery performed by Dr. Stanton, reasonable and necessary to cure and relieve Claimant from his ongoing low back and right leg symptoms.

22. Claimant testified that he was unable to work following his June 29, 2015 surgery through August 3, 2015. Based upon the evidence presented, the ALJ finds that Claimant was excused from work on June 3, 2015 and returned to work on August 4, 2015. Claimant testified he earns $26.00/hour and works 6:00 a.m. to 4:30 p.m., Monday through Thursday and from 6:00 a.m. to 2:15 p.m. on Fridays. Review of Claimant’s wage records reflect that between January 1, 2015 and May 24, 2015 (144 days), Claimant earned $24,524.11 for an average weekly wage of $1,192.14 ($24,524.11 ÷ 144 days × 7 days/week = $1,192.14).

23. On November 6, 2015, Dr. Edwin Healey performed an independent medical examination (IME) of Claimant at the request of his attorney. Dr. Healey examined Claimant and rendered an opinion that Claimant had sustained a compensable injury to his low back. Regarding causation, Dr. Healey’s report states: His report states:

> Based on the history that Mr. Harris provided today and a review of his job description, it is my opinion within reasonable degree of

> medical probability that the right-sided L5-S1disc herniation and requirement for lumbar surgery to include L5-S1 revision laminectomy/discectomy was causally related to the work activities that Mr. Harris performed for his employer. He essentially had a severe aggravation of a pre-existing Work Comp injury which occurred initially in 1995 and required a left-sided laminectomy/discectomy. Mr. Harris had a weakened lumbar disc as a result of his initial lumbar injury at L5-S1 and the repetitive lifting, bending, and twisting that he performed subsequently caused the weakened disc to eventually herniate on the right side and necessitated a second lumbar discectomy at the same level as the original injury."

24. At hearing, Dr. Healey reiterated his opinion that Claimant's prior low back injury constituted a risk factor for the development of his subsequent disc herniation. Dr. Healey testified that the prior work-related left sided disc herniation "pre-disposed" Claimant to a right sided HNP which, according to Dr. Healey, was "bound to happen at some point" regardless of any specific job task on any given day or days. According to Dr. Healey, years and years of having to get into awkward positions, twist and lift heavy materials contributed to Claimant's right sided disc herniation. He testified further that there was no activity that was done on vacation which was likely to cause disc herniation.

25. During cross examination, Dr. Healey admitted that Claimant's job falls within the medium duty work category and that there are jobs that exist that are "heavier" than Claimant's job. Regardless, Dr. Healey testified that having to lift heavy items and get into awkward positions for 20 years, from 1995 through May 22, 2015, less 3 years, permanently aggravated Claimant's pre-existing low back condition leading to his subsequent right sided disc herniation and need for surgery.

26. Although Dr. Healey's report lists the date of injury (DOI) as May 2, 2015, he testified that this was an error; the correct DOI according to Dr. Healey is May 22, 2015. Dr. Healey opined that Claimant had increasing low back pain without leg radicular symptoms while performing strenuous work activities since early January 2015. Dr. Healey went on to state that Claimant experienced "the acute onset of low back and left leg pain" on May 22, 2015. This date, is, therefore the date of Claimant's injury, according to Dr. Healey.

27. Respondents contend that Dr. Healey's opinion regarding Claimant's DOI is based upon the wrong facts. Citing that Claimant experienced a severe onset of low back and left leg pain, which caused him to report the injury and seek treatment on June 3, 2015 and not May 22, 2015, Respondents assert that Dr. Healey's opinion concerning the DOI is unsupported by the record evidence, including Dr. Castle and Dr. Stanton's medical records. Consequently, Respondents suggest that because Claimant was not working at the time he experienced severe pain on June 3, 2015, there is no causal connection between his low back/leg pain and his work duties.

28. The exact timing of Claimant's acute disc herniation and the development of associated symptoms is complicated further by Dr. Healey's testimony that symptoms connected with acute disc herniation usually manifest within 24-48 hours of the herniation. Given that Claimant experienced severe low back and leg pain on June 3, 2015; Respondents contend that his disc herniation likely occurred 24-48 hours prior to June 3, 2015 and not May 22, 2015. As Claimant was not at work in the 24-48 hour period prior to June 3, 2015, Respondents reiterate their argument that there is no causal connection between Claimant's acute disc herniation and his subsequent need for low back surgery and his work duties.

29. Noting that Dr. Healey conceded that a simple cough or a sneeze, or the act of walking or sitting on an airplane (or anywhere for that matter) or bending, or any number of activities, could cause disc herniation, Respondents suggest that the most probable cause of Claimant's acute disc herniation would be a cough or a sneeze in the 24 to 48 hour time period prior to the June 3, 2015 when he was suffering from a cold so severe that he sought medical treatment from his family physician on June 1, 2015. The ALJ is not persuaded. While the ALJ is convinced that simple activities, including coughing and prolonged sitting can cause disc herniation, this fact does not support a conclusion that the disc herniation in this case undeniably occurred on the date of such activity, i.e. 24-48 hours before the onset of symptoms. Indeed, as Dr. Healey testified he has seen instances of patients having asymptomatic herniated discs which later become symptomatic while performing simple activities. Consequently, Dr. Healey testified that he could not specifically pinpoint the day Claimant's disc herniated.

30. On February 18, 2016, Amjun Sharma, M.D., conducted a Respondent IME. Dr. Sharma took a history from Claimant that his back "hurt all of the time." Dr. Sharma opined that there is no causal relationship between Claimant's back pain and a specific event or work activity. Dr. Sharma reported that he is in agreement with Dr. Castle and Dr. Stanton that Claimant's back condition and need for treatment, including surgery, is not work-related. Dr. Sharma explained that Dr. Stanton, who was aware of Claimant's previous left sided disc herniation, "would clearly understand that this is a chronic condition that would not have been exacerbated or aggravated by the work activities." Dr. Sharma also reviewed Claimant's job description and a video of Claimant's job duties and stated that: "I concur and opine with Dr. Stanton and Dr. Castle that this is not a claim related condition."

31. Based upon the evidence presented, the ALJ finds Dr. Sharma's opinion that "there is a disconnected time, a significant amount of time that had passed where the injured worker could have been exposed to other activities while on vacation," speculative and contradicted by the more persuasive testimony of Claimant and his wife.

32. Based upon the evidence presented, the ALJ finds Dr. Healey's opinions credible and more persuasive than the contrary opinions of Dr. Castle, Dr. Castro and Dr. Sharma. Consistent with the opinion of Dr. Healey, the evidence presented persuades the ALJ that Claimant, more probably than not, suffered a compensable aggravation of his 1994 low back injury manifesting initially as increased low back pain while engaged

prolonged exposure to frequent heavy lifting during the pendency of the Florida Mall Project. The balance of the persuasive evidence also convinces the ALJ that Claimant likely re-herniated his L5-S1 disc during this same time frame given his progressive right leg pain which culminated in his difficulty in standing and walking on June 3, 2015.

33. Respondent's contrary suggestion, specifically that Claimant's disc herniation and therefore, his disability and need for treatment, including the surgery performed by Dr. Stanton was caused by an intervening event is not supported by the evidence presented. While Respondents established that Claimant did go on vacation and did seek treatment for a cold upon his return, there is a dearth of evidence to support the suggestion that he was injured on that vacation or that his disc herniation was caused by coughing/sneezing.

34. Based upon the evidence presented, the ALJ finds that Claimant's increasing pain and corresponding functional decline over time were, more probably than not, related to the aggravation of his pre-existing back condition and the progression of symptoms associated with an undiagnosed and untreated disc herniation. Consequently, the ALJ finds that Claimant has proven that his need for treatment, including the surgery performed by Dr. Stanton is directly related to and caused his work duties associated with the Florida Mall Project in the weeks prior to leaving for vacation on May 22, 2015. As noted above, those duties aggravated the pre-existing condition of Claimant's low back over time and specifically by May 22, 2015 when claimant left for vacation. Consequently, the ALJ credits the testimony of Dr. Healey to find that Claimant suffered a compensable aggravation of his pre-existing low back condition as a direct consequence of his work duties for Employer.

35. The Claimant's time off work from June 3, 2015 through August 4, 2015 is directly related to this compensable aggravation as Claimant's inability to work was caused by the disability associated with the aggravation directly or with his recovery from surgery necessitated by the compensable work related aggravation. Consequently, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that he is entitled to temporary disability benefits for this time period.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230*

(Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). As noted in this case, Claimant's testimony is credible and convincing. Moreover, the expert medical opinions of Dr. Healey are more persuasive than the contrary opinions of Drs. Castle, Castro and Sharma when the evidentiary record is considered in its totality.

C. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000)*

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries for which benefits are sought. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant argues that the evidence presented supports a conclusion that he suffered a compensable aggravation of a pre-existing condition caused by a 1995 injury to his low back. Claimant asserts further that this aggravation was occasioned by prolonged frequent lifting of heavy materials while working the Florida Mall Project in the weeks/months prior to going on vacation. He did not allege the occurrence of a discrete injury. Rather, he alleges that he suffered an occupational disease as a result of prolonged exposure to heavy lifting, bending and twisting occasioned by his work activities as a millworker for Employer.

G. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

H. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). As found in this case, the totality of the evidence presented persuades the ALJ that Claimant's worsening low back and right leg pain, more probably than not, arose from the duties associated with the Florida Mall Project. It is undisputed that Claimant was called upon to fabricate heavy wooden structures and fit them with Corian countertops. The process required repeated lifting of the countertops to ensure a proper fit and the project took 2-3 months to complete. The ALJ concludes that it is probable that these activities aggravated the underlying condition of Claimant's low back giving rise to worsening symptoms in the weeks prior to May 22, 2015. Here, Claimant testified to worsening pain in the 30 day period before leaving for vacation on May 22, 2015, or around April 22, 2015. According to Mr. Hamilton's testimony this would cover a period of time that the Florida Mall Project was ongoing as the project to not conclude until April 29, 2015. Claimant's testimony regarding his increased pain during this time period is supported by the observations of his wife. According to Mrs. Harris, Claimant's was moving slowly and appeared tired. Furthermore, he was unmotivated to perform household activities citing back pain as the cause. Consequently, the ALJ rejects Respondents' assertion that the evidence generally fails to support a temporal relationship between Claimant's heavy work and/or awkward body positioning and his increasing/worsening low back symptoms on and after May 22, 2015. Furthermore, Respondents suggestion that Claimant's worsening symptoms were caused by a disc herniation which occurred while he was on vacation or after coughing/sneezing due to his head cold is equally unpersuasive. There is simply no convincing evidence to support this conclusion. As found, the evidence presented persuades the ALJ that the aggravation of Claimant's underlying back condition likely resulted in his disc herniation and his progressive symptoms, including his leg pain were a direct result of that undiagnosed/untreated herniated disc. Accordingly, the ALJ is persuaded that Claimant's low back/right leg symptoms arose out of and in the course of his employment as a custom millworker for Employer.

I. As noted above, Claimant asserts that the aforementioned "aggravation" was caused by prolonged exposure to repeated lifting, twisting and assuming awkward position over time, especially in the weeks/months prior to leaving for vacation on May 22, 2015. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the

> conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). On the other hand, an accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). As part of the analysis regarding the compensable nature of Claimant's alleged occupational disease, the ALJ has considered the "peculiar risk test."

J. As the court pointed out in *Anderson v. Brinkhoff,* 859 P.2d 819 (Colo. 1993), the plain language of section 8-40-201 (14) sets forth additional requirements to the requirement that the injury arise out of and in the course of employment. Before a disease can be found to be a compensable occupational disease, it must meet each element of the four-part test mandated by section 8-40-201(14) which, in effect, operates as an additional causal limitation, ensuring that the disease arise out of and in the course of the employment. The court in *Anderson v. Brinkhoff* further noted that the statutory language requiring that the disease "does not come from a hazard to which the worker would have been equally exposed outside of the employment" effectuates what is termed the "peculiar risk" test and requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. In other words, "the plaintiff must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Anderson v. Brinkhoff,* 859 P.2d at 824, *quoting Young v. City of Huntsville,* 342 So.2d 918, 922 (Ala. Civ. App. 1976).

K. The question of whether a claimant has proven that a particular disease, or aggravation of a disease, was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d251 (Colo. App. 1999). The failure to satisfy each element of an occupational disease by a preponderance of credible evidence is fatal to an occupational disease claim. *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988). The evidence presented persuades the ALJ that Claimant has satisfied the peculiar risk test and has otherwise proven that he sustained an occupational disease. Indeed, Claimant was exposed to the risk which caused his symptoms/disease in a measurably greater degree than other persons in other occupations or in everyday life generally. Here, Claimant's position routinely required him to assume awkward positions, bend, twist and repeatedly lift materials weighing 150-215 pounds. In considering the evidentiary record as a whole a reasonable conclusion in this context is that, by comparison, Claimant's non- occupational exposure to the risk factors precipitating his symptoms is not equal to or greater than that present by his work. Given that Claimant has proven that his symptoms can be fairly traced to his employment as a proximate cause, i.e. they arose out of and in the course of his employment, and did not come from a hazard to which he was equally exposed outside of the employment, the undersigned ALJ concludes that Claimant has proven a compensable injury.

Medical Benefits

L. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *Section 8-42-101(1)* (a), C.R.S. The claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). A claimant is only entitled to benefits as long as the industrial injury is the proximate cause of the Claimant's need for medical treatment. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v.* Ball, 172 Colo. 510, 474 P.2d 622 (1970); *Section 8-41-301(1)(c), C.R.S.*

M. Furthermore, any natural development of an intervening, nonindustrial injury, which is separate from and uninfluenced by an earlier industrial injury, is not compensated as part of the original industrial injury. *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). Respondents suggest that such an injury occurred in this case either while Claimant was on vacation or as a consequence of coughing/sneezing due to a head cold. As found, Respondents' implication is not compelling given the lack of persuasive evidence that Claimant suffered an intervening injury and Dr. Healey's testimony regarding the difficulty in establishing the exact date for disc herniation given that some herniated discs can remain asymptomatic until a subsequent triggering event. Because Claimant has proven that his need for low back treatment was directly related to and caused by the compensable aggravation of a pre-existing low back condition and Respondents did not challenge the reasonableness or necessity of such treatment, Respondents are obligated to provide it. *Section 8-42-101(1)* (a), C.R.S.

Temporary Disability Benefits

N. To receive temporary disability benefits, Claimant must prove the injury caused a disability. Section 8-42-103(1), C.R.S. 2001; *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with § 8-42-105(3)(a)-(d), C.R.S. 2014. In this case, Claimant credibly testified and the medical records support that he suffered a large herniated L5-S1 disc causing severe spinal stenosis and cauda equina compression requiring surgery and after care. Claimant's testimony that he was unable to return to his usual job until August 4, 2015, due to the effects of his compensable work related injuries and subsequent surgery is convincing. Moreover, the persuasive evidence establishes that Respondents did not offer Claimant modified duty, likely because Employer could not accommodate his physical limitations. Consequently, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and has established a wage loss. Thus he is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999).

Average Weekly Wage

O. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).*

P. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), give the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. An AWW calculation is designed to compensate for total temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity at the time of his industrial injury comes from the wage records submitted into evidence. As found, in the 144 days prior to the injury in this case, Claimant earned a total of $24,524.11 for an average weekly wage of $1,192.14 ($24,524.11 ÷ 144 days × 7 days/week = $1,192.14). The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his May 22, 2015 compensable work related injury. Accordingly, for purposes of this claim, Claimant's AWW is $1,192.14.

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that he suffered a

compensable injury to his low back and right leg as a consequence of prolonged exposure to heavy lifting, bending, twisting and assuming awkward positions occasioned by his work duties as a custom millworker for Employer on May 22, 2015.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his low back injury, including the surgery performed by Dr. Stanton on June 29, 2015. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987).

3. Respondents shall pay temporary disability benefits in accordance with section 8-42-103(1)(b), C.R.S. at a rate of sixty-six and two-thirds percent of his AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week for the time period extending from June 3, 2015 through August 3, 2015. As Claimant's disability lasted longer than two weeks from the day that he left work as a result of his injury, the three-day waiting period before payment of TTD benefits are to be paid does not apply in this case. Section 8-42-103(1)(b), C.R.S.

4. Claimant's AWW for purposes of paying TTD associated with this claim is $1,192.14.

5. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 20, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-987-724, 4-986-776

ISSUES

- Whether Claimant demonstrated by a preponderance of the evidence that she suffered a compensable inguinal hernia while in the course and scope of her employment for Employer on May 29, 2015.

- If compensable, Claimant requests temporary disability benefits from September 12, 2015 and ongoing. She requests an average weekly wage (AWW) of $904.21. If compensable, Respondents contend Claimant's AWW is $569.12, and request penalties for Claimant's failure to report the May 29, 2015 injury until June 26, 2015.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On April 9, 2015, Employer hired Claimant to work as a furniture salesperson at its Thornton store. As part of her job duties, at the end of her shift Claimant dusted, vacuumed, and organized a portion of the showroom.

2. Claimant testified that on May 29, 2015, at approximately 9:45 p.m., she was vacuuming her work area. She stated that when she picked up the vacuum to get it over a shag rug, she had immediate pain in her right groin which went down her lower back. She stated that the pain was very severe but that after a short time, her pain lessened.

3. Claimant worked the rest of her shift and did not report any injury. She sought no medical care and she lost no time from work.

4. Claimant testified that on June 22, 2015, at about 9:15 p.m., she was walking at work while carrying a spray bottle and cloth when she experienced severe pain. She did not tell her manager that she had a work injury. She told her manager that she did not know what the problem was.

5. At hearing, Claimant testified that her pain on June 22, 2015 was the "same pain" that she previously had on May 29, 2015. Claimant testified that she was not injured on June 22, 2015, but instead experienced pain that day, which she stated was caused by the event on May 29, 2015 when she lifted the vacuum.

6. On June 23, 2015, Claimant went to the Emergency Room at St. Anthony's North. Those records state that Claimant started to have pain in her right lower back on the previous day, with no specific trauma or injury. Claimant was

diagnosed with right leg pain and probable sciatica. The record states that Claimant "had a similar incident one month ago that resolved on its own without any difficulty."

7. At hearing, Claimant testified that this medical record was incorrect because she did not tell the E.R. staff that her pain from the previous month (i.e., on or about May 29, 2015) had resolved.

8. The June 23, 2015 Emergency Room records contain no reference to Claimant's condition being work-related. At hearing, Claimant testified that she told the E.R. staff that her injury was work-related, and that the failure to reflect that fact was an error in the medical records.

9. On June 25, 2015, Claimant saw her personal physician, Dr. Karen Ratner, whose records reflect that Claimant had right back and right leg pain, which had a sudden onset three days ago "pushing heavy furniture at work" (quotation marks in original).

10. At hearing, Claimant testified that this medical record was incorrect, and that she did not tell Dr. Ratner that her pain was due to pushing heavy furniture at work.

11. On June 26, 2015, Claimant met with her store manager, Steve Williams. She testified that this was the first time that she reported an injury to her Employer. Claimant and Mr. Williams filled out an "Incident Report" together; he asked her questions, she answered, and he wrote down the answers. The Incident Report consists of two pages, both of which Claimant signed. It lists Claimant's injury as "sciatic nerve" and the body part as "lower back." It states that Claimant was injured while "reaching into an overhead cabinet to get some cleaning rags." It further notes that Claimant thinks "she may have injured herself vacuuming about a month prior at the Thornton store."

12. Steve Williams testified that he is Employer's store manager and Claimant's supervisor. Claimant called him on June 25, 2015, and asked to meet with him. He met with Claimant on June 26, 2015 to fill out an Incident Report and workers' compensation paperwork. He testified that prior to June 26, 2015, he had no knowledge that Claimant had any work-related injury, or that she had pain between late May and June 26, 2015.

13. Mr. Williams asked the Claimant various questions about her claimed work injury and he wrote down what she told him. On the Incident Report, he wrote "she tweaked her lower back while reaching into an overhead cabinet. This is what [Claimant] explained happened." He also wrote that Claimant "thinks she may have injured herself vacuuming about a month prior at the Thornton store." He stated that Claimant did not tell him that she lifted a vacuum.

14. Mr. Williams testified that Claimant continued to work for Employer through September 4, 2015, and then she stopped coming to work. He stated that

Employer was aware of Claimant's work restrictions and had accommodated them, and that no one at the store told Claimant that she should not come back to work. He stated that if she had continued to show up for work, she would still be working there, and that he did not know why she stopped showing up for work.

15. After meeting with Mr. Williams, Claimant went to see Dr. Michael Striplin. His records dated June 26, 2015 state that Claimant was pushing a vacuum on carpet a month ago and that she said she had some mild symptoms that persisted until June 22, 2015, when she noted the sudden onset of right hip and groin pain with no known injury. He noted she was diagnosed with sciatica at St. Anthony's North Emergency Room. He determined Claimant's pain complaints were not work-related and recommended that she follow-up with her personal care physician.

16. Contained in Dr. Striplin's records is Claimant's handwritten statement which reads, "I was vacuuming one day, I felt the pain while pushing the vacuum but I walked it off, a month later I was walking at work and the pain started again, but this time I could not walk, I went to the E.R."

17. Claimant testified that although her handwritten statement makes no reference to her pain being associated with lifting the vacuum, that she did lift it. She also stated that although she wrote that she had "walked off" the pain associated with vacuuming; her written statement was incorrect, and wrongly phrased.

18. Claimant stopped working for Employer on September 4, 2015. She said this was because she could not walk due to pain. She testified that no one told her she could not come back to work. She provided no documentation, including any medical record, to corroborate her statement that she was not able to continue working.

19. Employer's records show Claimant's last day at work was September 4, 2015, and that Claimant called in sick on September 5, 2015, and did not return.

20. On September 5, 2015, Claimant went to Kaiser and saw Dr. Jennifer Kuhl. Those records state that Claimant's "pain increased two weeks ago while playing with children and her son pulled her arm." At hearing, Claimant testified that her pain had increased the day before she saw Dr. Kuhl, not two weeks before.

21. On July 7, 2015, Claimant went to the North Suburban Medical Center Emergency Room for abdominal pain. This record reflects that Claimant reported "a tearing sensation in her right groin several weeks ago, progressively worse since that time occurred while lifting heavy objects at work at [Employer]." An ultrasound showed that Claimant had a "small defect" within the fascia, which measured 6.1 mm. The defect was referenced as a "small, fat-containing right-sided inguinal hernia."

22. On July 10, 2015, Claimant was seen by Edward Medina, M.D., who noted that he could not palpate Claimant's hernia. His note states that Claimant "lifted up a

vacuum when she felt pain in her right groin." This is the first reference in the medical records which associates Claimant's pain with having lifted a vacuum at work.

23. Medical records from Dr. Karen Ratner show that Claimant was diagnosed with chronic low back pain and arthropathy of multiple sites on three occasions prior to her May 2015 alleged injury. However, in her recorded statement, taken on July 8, 2015, Claimant denied having prior medical treatment to her low back.

24. A Kaiser record dated August 18, 2015 reflects that Claimant asked for a letter "to take to her work" and that her Kaiser physician, Dr. James Hutchings, responded that he had no documentation that Claimant truly had a hernia, and that he could not state that it was work-related. He stated that he could document only that Claimant reported that she had a work-related injury.

25. A Kaiser record from Dr. Karen Black dated November 20, 2015 reflects that Claimant called Dr. Black that day in order to obtain documentation regarding the causes of hernia. These records contain an email from Claimant to Dr. Black dated November 23, 2015 stating "I have never experienced this groin pain until I lifted a vacuum over a shag rug, can you please explain on your note if you think that vacuum could cause or aggravate a hernia." In response, Dr. Black wrote Claimant a letter dated November 25, 2015. This letter contains data on various factors that are associated with hernias. Dr. Black wrote, inter alia, that "the relationship between inguinal hernias and intermittent straining or heavy lifting is not clear; some studies suggest that the incidence of hernia is no higher in professions performing heavy manual labor than in sedentary professions, while others have come to the opposite conclusion." Dr. Black did not state that Claimant's having lifted a vacuum probably caused or aggravated her hernia.

26. At hearing, Claimant testified that no one had told her that there was a relationship between the pain which she felt on or about May 29, 2015 and the pain which she felt on June 22, 2015. Claimant submitted no medical record or report which: a) concluded there was any relationship between her pain on the two dates; b) found that her pain on May 29, 2015 was likely caused by lifting a vacuum at work; or c) found that lifting the vacuum probably caused her hernia.

27. Dr. Lesnak performed an IME for Respondents and testified at hearing. He testified that Claimant's complaints were primarily groin pain, and that while a hernia can cause groin pain, there are other causes, including hip pathology, muscle or nerve pathology, and unknown causes. He stated that an increase in abdominal pressure can cause a hernia and/or hernia pain. He noted that Claimant stated that she had pain while walking, including at work on June 22, 2015. He stated that walking does not cause an increase in intra-abdominal pressure, and that it is not probable that Claimant's pain complaints on June 22, 2015 were related to a hernia.

28. Dr. Lesnak testified that although an ultrasound detected a hernia, it was so small that he could not feel it. He characterized her hernia as a small, fat-filled

defect, which was not likely a pain generator. While Claimant had stated that walking, twisting, sitting, or having her child pull on her arm caused her symptoms, Dr. Lesnak testified that these activities do not cause an increase in abdominal pressure, and would not cause a hernia to become painful. He stated that any pain related to these activities would probably be related to Claimant's preexisting chronic multi-site arthralgia, i.e., joint pain, and was not work-related.

29. Dr. Lesnak stated that it was not medically probable that lifting a vacuum on or about May 29, 2015 caused Claimant's hernia, because lifting in the way Claimant described would not cause an increase in abdominal pressure. Dr. Lesnak testified that it is more probable than not that Claimant's pain on or about May 29, 2015 was due to her preexisting chronic back and joint pain.

30. Dr. Lesnak noted that the record shows multiple histories of how Claimant's purported injury occurred, and that it was not until July 10, 2015 that the records reflect that Claimant said she injured herself by lifting a vacuum at work. He commented that although Claimant testified she did not tell the E.R. personnel on June 23, 2015 that her prior pain from May 2015 had "resolved on its own without difficulty", that the E.R. note is more reliable. He stated that E.R. personnel would be unlikely to concoct such a note.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101*, et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102 (1) C.R.S. The Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of the injured worker or the rights of employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P. 3d 385 (Colo. App. 2000).

Claimant carries the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment. *See City of Boulder v.*

Streeb, 706 P.2d 786 (Colo. 1985). The facts in a workers' compensation case may not be interpreted liberally in favor of either Claimant or Respondents. Section 8-43-201. C.R.S. A preponderance of evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P 2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Claimant alleges that she sustained a work-related hernia on May 29, 2015 while pushing and then lifting a vacuum cleaner over a shag rug at work. She did not report this incident, sought no medical treatment, and lost no time from work. She alleges that her pain from this incident recurred on June 22, 2015 while she was walking at work. She does not contend that she was injured on June 22, 2015. Rather, she states that she felt pain on that day, which she believes was due to a hernia from lifting a vacuum on May 29, 2015. Claimant alleges she was misdiagnosed with sciatica.

When Claimant first sought treatment on June 23, 2015, those records state that while Claimant had pain from a similar incident a month earlier, her pain "resolved on its own and without difficulty." Although Claimant states she did not make this statement, it is improbable that the E.R. staff entered this note into the record without Claimant having made the statement. Claimant's testimony that several of her medical records contain errors or misstatements is not credible.

Prior to her claimed injury of May 29, 2015, Claimant had been diagnosed with chronic back and joint pain. While she may have had a flare of back pain on May 29, 2015 associated with vacuuming, there is no evidence that she sustained a compensable injury that day. She sought no treatment and lost no time from work. Instead, she stated that her pain lessened after a few minutes. The medical records show that this pain resolved on its own. While Claimant had another flare of pain while walking at work on June 22, 2015, she admitted that she was not injured at work on that day.

The evidence shows that Claimant's inguinal hernia is probably not the cause of her pain complaints. It is more probable that her pain complaints are due to her preexisting condition.

The record contains no documentation from any physician indicating that Claimant's pain, whether on May 29 or June 22, 2015, was probably related to her hernia. Claimant has failed to prove the existence of a compensable injury by a preponderance of the evidence.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for compensation is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 9, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has proven, by a preponderance of the credible evidence, that he sustained a compensable injury on May 14, 2015;

2. If so, whether the respondent-insurer is responsible for the reasonable, necessary, and related medical care received by the claimant for the injury; and,

3. If so, whether the claimant was responsible for his wage loss as a result of the termination of his employment.

FINDINGS OF FACT

1. The claimant had been employed for almost three years as of May 2015 in the respondent-employer's warehouse handling shipping and receiving. His shift ran from 6:00 a.m. to approximately 3:30 p.m. The claimant arrived at work at approximately 6:00 am on May 14, 2015. When the claimant arrived at work his right shoulder, his neck, and his arm were feeling fine.

2. At some point between 7:00 and 7:15 a.m. on May 14, 2016, he was "re-palletizing," moving 50 pound bags of flour off of a pallet. During this process, the claimant felt pain mostly in the bicep and continuing up to the right shoulder with a little pain in the neck. The claimant reported the pain sensation to Anthony Copley, his supervisor. They completed some paperwork and the claimant continued working, finishing his shift while continuing to work.

3. The claimant was sore at the end of the day and went home to rest on a recliner.

4. The next day the claimant was still sore and he spoke with Anthony Copley and also reported the incident to another unknown supervisor that day. The claimant was then permitted to do light duty type work, including doing paperwork. While doing the light duty the claimant was hurting somewhat but as long as he was not using the right arm it was not bothersome.

5. Ultimately, the claimant sought treatment when the symptoms did not go away, and increased in severity.

6. The claimant saw Dr. Lakin on May 28, 2015, at the Southern Colorado Clinic.

7. Dr. Lakin's work related injury diagnoses included right biceps tendinitis and a sprain and strain of the right shoulder and upper arm.

8. The claimant received x-rays of his shoulder on May 28, 2015 with the Indication of ruptured bicep tendon and the Findings stating: "No comparison. No bony or joint abnormality is appreciated."

9. The claimant had a follow-up appointment with Dr. Lakin on June 11, 2015 where he requested an MRI.

10. The claimant stated that he was terminated in July 2015 for allegedly violating the respondent-employer's "lockout/tagout" (LOTO) policy. When asked about LOTO, the claimant said there were many types of LOTO. The claimant operated forklifts inside trailers, but never did it in violation of the LOTO policy.

11. For operations within a trailer, employees were supposed to use wheel chocks and that chocks and similar safety measures were meant to keep trailers from moving while at the loading dock.

12. The claimant denies that he violated the LOTO policy.

13. The ALJ finds that the claimant is not particularly articulate but that he is credible with respect to the mechanism of injury and the events surrounding his termination.

14. The ALJ finds that the claimant has established that it is more likely than not that he suffered an injury to his right upper extremity on May 14, 2015 arising out of and in the course of his employment with the respondent-employer.

15. The ALJ finds that the claimant has established that it is more likely than not that he requires medical care to cure or relieve him from the effects of his injury, specifically the care provided by Dr. Lakin and his referrals.

16. The ALJ finds that the respondents have failed to show that it is more likely than not that the claimant violated the LOTO policy, and therefore, they have failed to establish that it is more likely than not that he was responsible for his termination.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.").

2. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

5. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

6. When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

7. The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

8. The claimant has the burden to prove his entitlement to medical benefits by a preponderance of the evidence. §8-43-201, C.R.S. The respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. §8-42-101(1)(a), C.R.S. Even after an admission of liability is filed, respondents retain the right to dispute the relatedness of the need for continuing treatment. This principle recognizes that the mere admission that an injury occurred cannot be construed as a concession that all subsequent conditions and treatments were caused by the admitted injury*. HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997).

9. The claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

10. Although a preexisting condition does not disqualify a claimant from receiving workers' compensation benefits, the claimant must prove a causal relationship between the injury and the medical treatment the claimant is seeking. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). And where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the

preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

11. The ALJ concludes, as found above, that the claimant is credible.

12. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with the respondent-employer.

13. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical care to cure or relieve him from the effects of his injury, specifically that care provided by Dr. Lakin and his referral for an MRI.

14. As found above, the ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that the claimant is responsible for his termination.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant’s claim is compensable under the Workers’ Compensation Act of Colorado.

2. The respondent-insurer shall pay for all reasonable, necessary, and related medical care to cure or relieve the claimant from the effects of his injury.

3. The respondents’ defense of responsibility for wage loss is denied and dismissed.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: April 7, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-988-944-01

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his neck, low back, right shoulder, and left shoulder on March 20, 2015.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits including physical therapy and/or surgery for his left shoulder recommended by Dr. Noonan.

FINDINGS OF FACT

1. Claimant was employed by Employer as a lease operator and began working for Employer in approximately August of 2007. As a lease operator, Claimant's job duties involved taking care of and checking on gas wells. Claimant made sure the wells were running and producing at maximum levels, fixed minor problems he discovered, and reported major problems he discovered. Claimant was required to drive to locations and get in and out of his truck often.

2. On March 20, 2015 Claimant was at Employer's maintenance building picking up snow chains for his company service truck. Claimant attempted to back the truck up to the loading dock to pick up the chains.

3. Claimant was approximately 15-25 feet away from the loading dock when his truck accelerated and slammed into the loading dock. Claimant attempted to stop the truck but was unsuccessful. Claimant is unsure how or why the truck accelerated.

4. When the truck hit the loading dock, Claimant's body was shaken and tossed from side to side and front to back. Claimant's head hit the inside of the cab. Claimant was wearing his seatbelt.

5. When the truck came to a stop Claimant got out and was slightly dazed. Claimant immediately called his supervisor to report what had happened. Claimant felt pain in his right shoulder, lower back, and neck within an hour of the incident.

6. Claimant did not immediately seek medical care and tried to work through his pain. However, on April 2, 2015 Claimant reported to Employer that his pain had increased and that he wanted to see a doctor.

7. On April 2, 2015 Employer submitted an Employer's First Report of Injury. Employer noted that Claimant reported an injury on March 20, 2015 to his neck when he

was backing up a truck and accidentally hit the dock. The report noted that Claimant mentioned his neck and shoulder being sore. *See* Exhibit 12.

8. On May 7, 2015 Claimant was evaluated by Thomas Noonan, M.D. Dr. Noonan noted that Claimant was an established patient at their clinic who had last been seen following a 2011 right shoulder arthroscopic rotator cuff repair and subacromial decompression. Claimant reported that he had been doing well and really had no significant complaints or issues until an accident at work on March 20, 2015. Claimant reported that the truck he was driving struck a loading dock and he had whiplash type injury to his neck and low back and also had bilateral shoulder pain, left worse than right. Claimant reported left shoulder pain that was achy and throbbing as well as having weakness, stiffness, and instability. Claimant reported numbness down his right hand, neck pain, and low back pain. Claimant denied any prior history or trauma to his neck or back. *See* Exhibit 1.

9. Dr. Noonan provided an impression of bilateral shoulder pain, left worse than right; right shoulder status post rotator cuff repair- likely rotator cuff irritation without re-tear; left shoulder pain with possible rotator cuff tearing; cervical spine tenderness with right sided radiculopathy; and lumbar spine with ride sided sciatica type symptoms. Dr. Noonan planned to get Claimant into physical therapy for his right shoulder and planned to obtain an MRI of Claimant's left shoulder to rule out rotator cuff tear. Dr. Noonan planned to refer Claimant to Dr. Bainbridge for evaluation of his cervical and lumbar spine issues. *See* Exhibit 1.

10. On May 7, 2015 Claimant also was evaluated at Denver Back Pain Specialists by Jadon Redington, PA-C. Claimant reported low back pain with radicular pain into the buttocks and lower extremities as well as neck pain and bilateral shoulder pain. Claimant reported that immediately upon impact with his truck and the loading dock, he had significant neck and upper back pain as well as low back pain. PA Redington noted that Claimant had been evaluated by Dr. Noonan earlier in the day for the shoulder pain symptoms. PA Redington performed a physical examination and assessed: brachial neuritis or radiculitis; cervical spondylosis without myelopathy, cervicalgia; degeneration of lumbar or lumbosacral intervertebral disc; displacement of lumbar intervertebral disc without myelopathy; lumbosacral spondylosis without myelopathy; lumbar sprain and strain; neck sprain and strain; and thoracic or lumbosacral neuritis or radiculitis unspecified. PA Redington opined that Claimant's symptoms were related to the motor vehicle accident/trauma work-related injury that occurred on March 20, 2015. PA Redington ordered physical therapy and radiographic imaging studies of the cervical and lumbar spine. *See* Exhibit I.

11. On June 2, 2015 Claimant underwent an MRI of his right shoulder interpreted by Russell Fritz, M.D. Dr. Fritz provided the following impression: large 29mm X 34mm tear of the supraspinatus tendon and anterior aspect of the infraspinatus tendon with moderate to severe atrophy of the supraspinatus and infraspinatus muscles; a 15mm X 23 mm tear of the superior aspect of the subscapularis tendon with moderate atrophy of the superior aspect of the subscapularis muscle; chronic-appearing

tear of the long biceps tendon; tear of the inferior aspect of the anterior labrum and mid to superior aspect of the posterior labrum as well as attrition of the superior labrum; high-grade cartilage loss along the superior glenoid rim and superior lateral aspect of the humeral head; and arthrosis of the acromioclavicular joint with advanced cartilage loss and mild spurring. *See* Exhibit 3.

12. On June 10, 2015 Claimant underwent an MRI of his left shoulder interpreted by Paul Hsieh, M.D. Dr. Hsieh provided the following impression: supraspinatus tendinosis along with a 1.0 X 1.2 cm 75% articular sided partial thickness tear of the distal tendon at the greater tuberosity insertion with no full-thickness rotator cuff tear; infraspinatus tendinosis without tear; mild subacromial-subdeltoid bursitis; chronic degenerative changes in the humerus head and in the acromioclavicular joint without acute bony lesion. *See* Exhibit 4.

13. On July 9, 2015 Claimant was evaluated by Dr. Noonan. Claimant reported continued pain in both shoulders that was fairly severe with the left worse than the right. Dr. Noonan noted that Claimant had recent MRI scans of both shoulders. The right shoulder MRI showed a recurrent massive rotator cuff tear with developing glenohumeral arthritis and high riding of the humeral head. The MRI of the left shoulder showed a high grade partial thickness tear of the supraspinatus measuring about 1 cm. Dr. Noonan provided the impression of right shoulder pain, massive irreparable rotator cuff tear, glenohumeral arthritis, left shoulder pain, high grade partial thickness rotator cuff tear, and impingement. Dr. Noonan recommended a left shoulder arthroscopy for rotator cuff repair, subacromial decompression, and likely biceps release and referred Claimant to Dr. Mayer for consideration of a reverse shoulder replacement on the right shoulder. *See* Exhibit 1.

14. On July 21, 2015 Robert Waltrip, M.D. performed a physician review recommendation for Insurer on the medical necessity of a left shoulder arthroscopy, rotator cuff repair, subacromial decompression, and possible biceps release for Claimant's left shoulder. Dr. Waltrip recommended denying the surgical procedure. Dr. Waltrip opined that the requested left shoulder procedure could not be recommended as medically necessary at this time. Dr. Waltrip noted that Claimant's injury was relatively recent and that Claimant had a partial thickness rotator cuff tear rather than a full thickness tear which might require more urgent surgical treatment. Dr. Waltrip opined that patients with partial thickness tears in general require at least a 3 month conservative treatment plan that includes active patient participation in appropriate shoulder rehabilitation before pursuing surgical intervention. Dr. Waltrip noted that if Claimant underwent a 3 month course of conservative treatment and still had ongoing symptoms, then surgery may be reasonable given the high grade nature of the partial thickness tear but noted that he could not recommend certifying the surgical request at this time. *See* Exhibit K.

15. On July 30, 2015 Frank Polanco, M.D. issued a peer review report. Dr. Polanco opined that a left shoulder arthroscopy, rotator cuff repair, subacromial decompression, and possible biceps release was not medically necessary. Dr. Polanco

noted that the medical records reflect a partial supraspinatus tear with good motion and function of the shoulder and that there was no indication in the records of participation in 3-4 months of rehab. Dr. Polanco noted that the medical treatment guidelines note that surgical indication is considered when functional deficits interfere with activities of daily living after 3-6 months of rehabilitation and opined that the request did not meet the criteria of the guidelines. *See* Exhibit L.

16. In September of 2015 Claimant began physical therapy. After an initial evaluation he ended up not continuing in physical therapy because it was not approved by Insurer. Claimant has not received any treatment for his shoulders, back, or neck since September of 2015.

17. Dr. Noonan testified via deposition in this matter. Dr. Noonan noted that at his May 2015 evaluation of Claimant, he was concerned with a possible left rotator cuff tear because Claimant had pain with testing and weakness. Dr. Noonan noted that Claimant's right shoulder strength was good so he suspected right shoulder rotator cuff irritation without a re-tear at that appointment. Dr. Noonan opined that later it was shown by MRI that Claimant had a very large recurrent rotator cuff tear in his right shoulder and that it is possible to have a large recurrent rotator cuff tear and still have good strength as Claimant did. Dr. Noonan opined that the right shoulder tear was not repairable and opined that physical therapy and surgery on the left shoulder was reasonable and necessary for Claimant.

18. Dr. Noonan opined that Claimant's right and left shoulder problems as well as Claimant's neck and back problems were caused by his March 20, 2015 work injury. Dr. Noonan noted that Claimant was much worse off after the 2015 accident than prior to it even if Claimant was not entirely asymptomatic prior to the accident. Dr. Noonan opined that it was possible for someone to have structural findings, have no symptoms, have trauma of some sort, and then end up with a clinical syndrome and he opined that then he would say that the trauma created the clinical syndrome.

19. Dr. Noonan noted that without an MRI the day prior to Claimant's March 20, 2015 accident, he could not say definitively whether or not Claimant's right shoulder recurrent rotator cuff tear was caused by the accident. He opined that looking at the MRI and seeing the fatty infiltration, those findings are more often seen in cases of chronic tearing and that based on the MRI alone, he would guess that the right shoulder injury was old. Dr. Noonan opined that with Claimant's age, the fact that he had a bad tear in 2011 in the right shoulder that was fixed, and the MRI findings, it was more likely than not that the recurrent right shoulder rotator cuff tear happened prior to the March 20, 2015 trauma.

20. Prior to the March 20, 2015 work incident, Claimant had an injury to his right shoulder that required surgical repair.

21. In April of 2011 Claimant was pulling on a wrench at work overhead when he felt a pop in his right shoulder and had immediate pain. Claimant had difficulty with

lifting or using his arm and high pain. An MRI revealed a full-thickness tear of the supraspinatus extending into the anterior fibers of the infraspinatus. Dr. Noonan evaluated Claimant and on October 3, 2011 Dr. Noonan performed a right shoulder arthroscopy, arthroscopic repair of supraspinatus tear, arthroscopic repair of subscapularis tear, arthroscopic subacromial decompression, right shoulder biceps release, and right shoulder debridement of degenerative tearing of posterior labrum. *See* Exhibit 1.

22. On January 12, 2012 Claimant was evaluated by Dr. Noonan. Dr. Noonan noted that Claimant was three months status post right shoulder arthroscopic rotator cuff repair and biceps release and that Claimant was doing fantastic and continuing in therapy. Dr. Noonan noted that Claimant had good strength and had full active motion in his right shoulder. *See* Exhibit 1.

23. On September 24, 2012 Claimant underwent a Division Independent Medical Examination (DIME) performed by Timothy Hall, M.D. Claimant reported fairly regular shoulder pain and aching with the use of his shoulder. Claimant reported some tightness in his neck but no significant neck pain. Claimant reported some shooting pain and some aching into the right biceps but not past the elbow. Claimant reported sleeping better than before his surgery but that he could not sleep on the right side and that he could not use his right arm as he once did. Dr. Hall noted that the operative report was reviewed and showed that minimal resections were performed on the acromion again due to the size of the rotator, care of potential part of the tear being chronic. Dr. Hall opined that Claimant was at maximum medical improvement and provided a 9 % whole person impairment rating. Dr. Hall opined that Claimant had more than the usual symptomatology including some local weakness and considerable functional deficits. *See* Exhibit N.

24. On January 9, 2013 Claimant underwent an Independent Medical Examination performed by Allison Fall, M.D. Claimant reported that his right shoulder ached all the time and that if he put pressure against his shoulder blade, his shoulder blade hurt. Claimant reported mostly aching pain but occasional sharp pain. Claimant reported his pain was aggravated by lifting of pulling hard or working with his hands above shoulder height. Claimant also reported that his neck ached and that his left shoulder was starting to bother him. Claimant reported that if he did something heavy with his left hand, he would start to feel aching in his left shoulder. On examination Dr. Fall noted that the right shoulder revealed tenderness over the proximal biceps and infraspinatus, no impingement signs, no gross instability, and reduced range of motion with pain at the AC area at adduction and more pain with internal rotation than external rotation. Dr. Fall noted that examination of the left shoulder revealed reported pain at the AC area but that range of motion was within functional limits with good internal rotation and abduction and no impingement signs, signs of bicipital tendinitis, or instability. Dr. Fall noted that the cervical spine lordosis was normal, paraspinal muscle tone was normal, and that Claimant reported tightness with forward flexion and bilateral lateral bending. Dr. Fall opined that Claimant was at maximum medical improvement with a whole person impairment rating of 5% whole person. *See* Exhibit N.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals*

Office, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden of proof to establish that he suffered a compensable injury to his left shoulder, cervical spine, and lumbar spine on March 20, 2015 when his truck struck the loading dock at work. Prior to March 20, 2015 Claimant had occasional aches into his neck, and had some occasional pain with his left shoulder from use. However, after the date of injury, Claimant has had consistent pain in his left shoulder, cervical spine, and lumbar spine. Claimant's examinations also reveal significant differences in symptoms and range of motion deficits and tenderness in his left shoulder and neck from the time he was placed at maximum medical improvement and evaluated for his 2011 injury and at the time he was evaluated following the March 20, 2015 injury. The opinion of Dr. Noonan is persuasive that Claimant's symptoms in the left shoulder, cervical spine, and lumbar spine were different and acutely caused by the March 20, 2015 work injury. PA Redington also provided an opinion after examining Claimant that the cervical and lumbar spine symptoms were related to the March 20, 2015 incident, which is consistent with Dr. Noonan's opinion. As found above, Dr. Noonan's main concerns at the first evaluation of Claimant following the March 20, 2015 incident were with a possible left rotator cuff tear and Claimant's main complaints were surrounding his left shoulder. Claimant had much worse pain and limitations in his left shoulder following the March 20, 2015 incident than he had when he was evaluated for his 2011 injury and mentioned occasional pain from use in his left shoulder.

Claimant has failed to establish that he suffered a compensable injury to his right shoulder in the March 20, 2015 incident. Rather, the medical records including the DIME evaluation and the evaluation performed by Dr. Fall show that Claimant had ongoing pain complaints and weakness in his right shoulder that were similar to the symptoms and reports Claimant made following the March 20, 2015 incident. The opinion of Dr. Noonan is also persuasive that, more likely than not, the recurrent tear of Claimant's right rotator cuff pre-existed the March 20, 2015 incident based on the MRI reports and Claimant's prior history. Further, Claimant has failed to establish that the March 20, 2015 incident aggravated or accelerated his pre-existing right shoulder problems. Rather, the evidence indicates that Claimant's right shoulder and right shoulder complaints and symptoms remained consistent from the time of he reached maximum medical improvement for his 2011 right shoulder injury and through the time he was evaluated following the March 20, 2015 incident. Additionally, it is noted that at his first evaluation with Dr. Noonan, Claimant's main pain concerns were surrounding his left shoulder and Dr. Noonan noted the strength in Claimant's right shoulder was okay which caused Dr. Noonan to be more concerned with the left shoulder than the right shoulder. Although the right shoulder revealed a recurrent right rotator cuff tear on the MRI, Dr. Noonan testified and opined that the recurrent tear more likely than not pre-existed the March 20, 2015 incident. Claimant has failed to establish an aggravation or acceleration of his right shoulder condition or an acute injury to the right shoulder in the March 20, 2015 incident.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

Claimant has established that he sustained a work related injury to his left shoulder, cervical spine, and lumbar spine on March 20, 2015. Claimant is entitled to medical treatment reasonable and necessary to cure and relieve these injuries. Claimant has established that physical therapy for his left shoulder and/or surgery for his left shoulder is reasonable and necessary to cure and relieve the injury as opined by multiple providers.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his left shoulder, cervical spine, and lumbar spine on March 20, 2015.

2. Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable injury to his right shoulder on March 20, 2015.

3. Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits for his left shoulder, cervical spine, and lumbar spine including but not limited to physical therapy for his left shoulder and/or left shoulder surgery recommended by Dr. Noonan.

4. Any issues not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 5, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

STIPULATIONS

At the outset of the hearing, the parties reached the following stipulations, which are approved by the ALJ:

I. The parties stipulated that if this claim is found to be compensable, that Dr. Charles L. Johnson will be the authorized treating physician.

II. The parties stipulated to an average weekly wage of $1,133.68.

ISSUES

The remaining issues addressed in this decision concern compensability, and Claimant's entitlement to temporary disability and medical benefits. The specific questions addressed are:

I. Whether Claimant established by a preponderance of the evidence, that he sustained a compensable injury arising out of and in the course and scope of his employment on April 9, 2015.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary partial disability benefits (TPD) from April 10, 2015 through July 10, 2015.

III. Whether the Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) from July 11, 2015 and continuing.

IV. If Claimant has established entitlement to TTD benefits beginning July 11, 2015, the question becomes whether Respondents have proven by a preponderance of the evidence that Claimant was terminated for cause and is therefore not entitled to TTD benefits on or after July 11, 2015.

V. Whether Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable, necessary, and medical treatment stemming from the April 9, 2015 alleged injury.

FINDINGS OF FACT

Based on the testimony and evidence presented, including the deposition testimony of Wade Johnson and Dr. Carlos Cebrian, the undersigned ALJ enters the following findings of fact:

1. Employer is a full service, family owned automotive repair shop which has been operated by Rylan and Tia Blair for approximately 13 years.

2. Claimant was hired on March 2, 2015 as a heavy line ASE certified auto technician/mechanic. As part of his duties, Claimant worked on engines, brake lines, suspensions, transmissions and differentials. The job was physically demanding and at times required heavy lifting.

3. The Claimant contends that he sustained upper extremity injuries arising out of and in the course and scope of his employment on April 9, 2015 while working overhead separating a transfer case from a transmission on a pickup truck. According to the Claimant, he had split the transfer case from the transmission and as he was working to remove it, the transfer case began to roll off a block sitting on top of a jack holding it up. The 100 pound transfer case rolled to the left pinching Claimant's left hand and arm between the case and the frame rail of the truck. Claimant jerked his left arm out and grabbed the transfer case with his right hand, only to it roll back and pinch his right arm and hand between the case and the opposite frame rail. Claimant immediately hit the hydraulic lever on the bottom of the jack to lower it to a point of being right in front of Claimant's torso.

4. Claimant continued working after the incident which he testified occurred at approximately 10:30 a.m.

5. The Claimant testified that he reported this incident to Wade Johnson, his immediate supervisor, by writing down what happened on a blank piece of paper because the shop did not have incident report forms. According to Claimant, he gave the note to Mr. Johnson, who he believed put it on Mr. Blair's desk. During cross examination, Claimant testified that he thought Mr. Johnson placed the note on Tia Blair's desk.

6. Wade Johnson testified by evidentiary deposition on January 5, 2016. Mr. Johnson worked as a Service Advisor and was then promoted to General Manager for the Employer. He worked from January 12, 2015 through April 17, 2015, when he was diagnosed with cancer and it became necessary for him to terminate his employment with Employer and relocate to Texas for treatment.

7. Wade Johnson was the Claimant's immediate supervisor on April 9, 2015. Mr. Johnson testified that the Claimant did not report a work accident to him on that date or at any other time. Mr. Johnson denied that he had any knowledge concerning the informal accident report, which the Claimant states he completed on April 9, 2015 and gave to him. Mr. Johnson had previously worked at Goodyear and Firestone for over 20 years and was aware of the steps to take should he receive a report of injury. If the Claimant or any other employee had claimed an on-the-job injury, Mr. Johnson testified that the first thing he would have done was to ask if medical attention was needed. According to Mr. Johnson, the Claimant "never told me anything." The ALJ credits Mr.

Johnson's testimony to find, more probably than not, that Claimant did not report an injury to him.

8. Mr. Johnson testified further that he observed Claimant performing his job duties on a daily basis between April 9, 2015 and April 17, 2015. He spoke to the Claimant daily. According to Mr. Johnson, Claimant did not appear to be having any difficulty performing his job duties and he observed no contusions or bruises on Claimant's upper extremities following the claimed injury. Claimant testified that while he did not sustain any brushing, contusions or lacerations, his arm was "swollen and red" from being smashed even days later when he went to see his doctor. However, Claimant did not specify which arm.

9. Mike McWilliams, a co-worker of Claimant testified that he worked with Claimant later in the day on April 9, 2015. Mr. McWilliams testified that he needed assistance with a vehicle so he obtained Claimant's help. While Claimant was helping, Mr. McWilliams observed that he (Claimant) was having difficulty lifting an aluminum intake manifold into the car. It was at this time that Claimant purportedly told Mr. McWilliams that he hurt his arm although he did not go into "specifics on exactly what happened." According to Mr. McWilliams Claimant's right arm was hurting. Mr. McWilliams testified that he did not observe any "contusions or lacerations or blood or nothing like that." Mr. McWilliams testified that he saw Claimant wearing a compression wrap the next day. Mr. McWilliams testified that he and Claimant "converse", that they go out for tacos on Tuesdays and that Claimant has gone golfing since his claimed April 9, 2015 injury.

10. The Claimant has had long-standing significant medical problems. He was determined to be a Disabled Individual entitled to Supplemental Security Income beginning on November 17, 2005, primarily as a consequence of the condition of his shoulders and mental health conditions.

11. Claimant has preexisting medical problems to multiple body parts including, but not limited to, his left shoulder and cervical spine. On February 18, 2005, Dr. Zarian reported that the Claimant had two previous left shoulder surgeries. Claimant's Primary Care Physician (PCP) beginning in December 2012 was Dr. Charles Johnson. Prior to the time Claimant commenced employment for the Employer, Dr. Johnson had treated the Claimant for multiple conditions including, but not limited to, left shoulder impingement syndrome and arthritis, upper back and neck pain, cervical spine myospasm, somatic back dysfunction, gout and chronic pain. Dr. Johnson had treated Claimant with multiple treatment modalities including, but not limited to, physical therapy, massage therapy, and narcotic medication/Oxycodone for chronic pain.

12. On September 29, 2014, Dr. Johnson diagnosed left shoulder impingement syndrome and referred the Claimant for physical therapy for his left shoulder pain. On October 17, 2014, Dr. Johnson referred Claimant for physical therapy for cervical spine myospasm. On December 4, 2014, Claimant underwent a left shoulder x-ray which showed increasing degeneration of the glenohumeral joint with spurring. On January 8, 2015, Dr. Johnson reported that a recent x-ray of the Claimant's right (*sic*) shoulder

showed worsening arthritis of the glenohumeral joint. His assessment at that time was for severe degenerative joint disease of the right (*sic*) shoulder.

13. Claimant saw Dr. Johnson, on April 16, 2015. He reported swelling and pain in both hands, all fingers, radiating into his wrists and forearms. Although he specifically noted his primary complaint to be associated with his hands, wrists and forearms, Claimant did not report an on-the-job cause for his symptoms. Physical examination revealed functional active range of motion (FAROM) in the extremities and a positive Tinel's and Phalen's sign at both wrists. Dr. Johnson assessed Claimant with bilateral carpal tunnel syndrome (CTS) and ordered a electrodiagnostic study, i.e. an EMG with a nerve conduction velocity (NCV) of the upper extremities. He also refilled the Claimant's Oxycodone and noted that Claimant's desire to start Meloxicam for arthritis of the hands and ankles.

14. On April 28, 2015, Claimant sought treatment from an urgent care facility pain in his left arm, arthritis and an injury to his right index finger. The record from this visit documents that Claimant was injured approximately two weeks prior "from transmission falling on arms." The clinical impressions following evaluation included: left F.A. (forearm) sprain; right index (finger) sprain and arthritis.

15. Claimant saw Dr. Drake McDonald, a neurologist, on May 30, 2015 for the EMG/NCV ordered by Dr. Johnson. He reported a history of right greater than left hand numbness, most noticeable early in the morning. The Claimant denied neck or shoulder pain. The Claimant reported that his symptoms started after a day of intense work as a mechanic. The electrodiagnostic study demonstrated very mild, right-sided, carpal tunnel syndrome for which "continued conservative treatment" was recommended.

16. On June 5, 2015, the Claimant was seen by Dr. Johnson for worsening pain in the forearms, hands and feet with associated swelling and erythema at times. While CTS had been diagnosed by EMG, Dr. Johnson felt the Claimant's symptoms were consistent with a worsening inflammatory arthritic condition. Dr. Johnson's assessment was for bilateral carpal tunnel syndrome and rheumatoid arthritis. Claimant did not report a work related cause for his symptoms on this date. Referrals to podiatry and rheumatology were and additional lab work ordered.

17. The Claimant was seen by Robin Leeman, PAC, at Dr. Johnson's office, on June 10, 2015 with complaints of increasing nasal discharge, intermittent nonproductive cough and intermittent low grade fever times two days. PA Leeman reported that the Claimant was slightly sick appearing. No injury or upper extremity complaints were reported.

18. On June 11, 2015, Claimant was excused from work until further notice for "medical reasons" by Dr. Johnson. Dr. Johnson did not provide a reason for Claimant's inability to work.

19. On June 17, 2015, the Claimant received a work excuse for "illness" for periods

covering June 8-12, 2015. The excuse does not provide a reason that Claimant was unable to work during the aforementioned time period.

20. Rylan Blair oversees production, how the technicians are working and helps problem solve. He is out on the work floor at least 20-30 times per day. He is occasionally out in the shop working on vehicles himself. Between April 9 and late May 2015, Mr. Blair observed Claimant performing his work duties on a regular basis. Mr. Blair did not observe any changes in Claimant's work performance. Claimant did not complain about an inability to perform his regular job duties, he did not appear to be in discomfort and did not appear to have any difficulty performing any of his work duties. Claimant was working at his regular pace.

21. During this period Claimant continued to perform his regular work duties full-time. Wage and technician productivity reports show that Claimant worked overtime hours for the weeks ending on April 17, 2015, April 24, 2015, May 1, 2015, May 8, 2015 and May 22, 2015.

22. In late May 2015, Mr. Blair noticed that Claimant showed up to work with a sleeve or brace on his left upper extremity. Mr. Blair asked Claimant what was going on and why he was wearing a brace. Claimant purportedly told Mr. Blair that he had arthritis or carpal tunnel syndrome and that he would be fine. Mr. Blair testified that at no time during this conversation did Claimant report an on-the-job injury. Mr. Blair was aware that Claimant was being seen by neurologist, Dr. McDonald, on May 30, 2015.

23. Following his appointment with Dr. McDonald and before Claimant reported a work related injury to his arms, Employer offered him a modified position as a Service Writer. According to Mr. Blair, he did not know what was wrong with Claimant's left arm and did not want to make anything worse. The Claimant was offered a 40-hour work week consisting of 10 hours per day on Monday, Tuesday, Thursday and Friday. It was Mr. Blair's understanding that Claimant wanted Wednesdays off so he could work on his golf game.

24. Before reporting his injury, Claimant surreptitiously called Wade Johnson to question him about the informal incident report he claims to have filled out. Based upon the timeline, the ALJ finds that the discussion between Claimant and Mr. Johnson probably took place on or about June 15, 2015. This conclusion is based on statements made by Claimant during the recording indicating that he was to start the service writing position in about three weeks. As the service writing position had been set to start the second week of July, i.e., right after the Fourth of July weekend or July 6, 2015, three weeks prior to would be June 15, 2015.

25. During the telephone conversation, Claimant mentioned to Mr. Johnson that he was calling because he wanted to know what had happened with the paperwork he (Claimant) filled out and turned in when he was first injured. Claimant asked Mr. Johnson whether Mr. Blair ever turned it in or if a claim was made. Mr. Johnson stated: I don't know anything about . . . I don't know what he did. The majority of the discussion

revolved around Employer hiring another tech and concern about Employers actions and the amount of work coming into the shop. Claimant expressed concern surrounding being terminated noting that he still had an injury and that Employer could not “fire me just to fire me” prompting Mr. Johnson to ask whether Claimant had done anything that may make Mr. Blair want to terminate him

26. Tia and Rylan Blair testified that Claimant did not report a claim or work reported injury until June 19, 2015. At that time, Claimant told the Blair’s that he had previously reported his injury to Wade Johnson on April 9, 2015 and left an informal accident report on Tia Blair’s desk at that time.

27. Shortly after Claimant reported his claim, Employer contacted Wade Johnson to determine if they could corroborate Claimant’s contention that he had reported his accident to him (Mr. Johnson) on April 9, 2015. Mr. Johnson denied having any knowledge of this claim and denied that Claimant reported an on-the-job injury to him. He denied that he had knowledge of a completed accident report on April 9, 2015 or at any time. Tia Blair searched her desk and the office for the informal accident report that Claimant contends that he completed on April 9, 2015. She was unable to find a report.

28. On July 6, 2015, the Claimant presented Tia Blair with a document entitled, “Workman’s Compensation Work Modification Agreement,” which he asked her to sign. This agreement required that Employer provide Claimant with a one-year employment contract through July 6, 2016 as a service writer. Ms. Blair refused to sign this document.

29. On July 3rd and 10th, 2015, the Blair’s sat down with Claimant to go over his Service Writer role and the pay associated with the position. The Blair’s informed the Claimant that while he would continue to work a 40-hour work week, it was necessary to change his work schedule to five days per week at eight hours per day, Monday-Friday. The Blair’s explained to Claimant that having him out on Wednesday was too disruptive to the business. The Claimant refused to accept the new schedule and raised concerns about the pay. Mr. Blair told Claimant that he would prepare resignation paperwork since he was not accepting the job offer. Claimant then told the Blair’s not to bother, that he would get workers’ comp involved to cover his $1,000.00 paychecks because he would not do 5 days a week. During the July 10, 2015 meeting, the Claimant, for the first time, submitted the June 11, 2015 work excuse note from Dr. Johnson which he suggests was provided due to the alleged April 9, 2015 injury.

30. Claimant returned to Dr. Johnson on July 16, 2015 where he was seen for renewal of his chronic pain medications. Claimant had continued complaints for pain in his forearms and tingling with pain in his hands and fingertips. During that evaluation, Claimant, for the first time, reported a work injury. Dr. Johnson reported that he had, “never seen [Claimant] for this injury as reported”. Dr. Johnson renewed Claimant’s Oxycodone prescription and prescribed physical therapy for Claimant’s bilateral forearms and wrists.

31. Claimant presented for physical therapy at Memorial Hospital on July 22, 2015. Claimant reported that he wanted to proceed with physical therapy with "Mindy" who he stated, "can always stretch me out." Claimant had previously received physical therapy at Memorial for left shoulder pain and impingent syndrome of October 8, 2014.

32. Claimant was seen by Dr. Carlos Cebrian in an independent medical examination on December 4, 2015. Dr. Cebrian issued a report on December 29, 2015. Dr. Cebrian opined that if Claimant had sustained a work-related injury, it was limited to a mild right carpal tunnel condition, which had resolved. Claimant reported left shoulder and cervical pain, which Dr. Cebrian attributed to pre-existing conditions, including chronic pain disorder, degenerative joint disease, and glenohumeral joint arthritis of the left shoulder. Dr. Cebrian noted that according to Claimant's report, his arms did not become trapped, he was able to move them and only made contact with the transfer case for a split second. Dr. Cebrian noted that Claimant was able to continue working and performing his full duties as a mechanic through mid-June 2015. In Dr. Cebrian's opinion, Claimant did not have left-sided lateral epicondylitis.

33. Dr. Cebrian testified by evidentiary deposition on February 24, 2016 that Claimant did not exhibit any symptoms for left lateral epicondylitis on physical exam and there was nothing reported in Claimant's medical records, which would suggest that the he was suffering from left lateral epicondylitis. Dr. Cebrian disagreed with Dr. Hall's diagnosis of myogenic thoracic outlet syndrome (TOS). In Dr. Cebrian's opinion, the mechanics of the accident as described by Claimant, were not consistent with this causing this diagnosis. In Dr. Cebrian's opinion, Claimant's left upper extremity complaints were coming from the cervical spine and left shoulder.

34. Claimant was seen by Dr. Timothy Hall on December 17, 2015. Dr. Hall diagnosed myogenic thoracic outlet syndrome and left lateral epicondylitis. Dr. Hall believes that Claimant's lateral epicondylitis may have come from resistive forces of the wrist. In Dr. Hall's opinion, the Claimant had TOS, which was due to abduction of the wrist, which occurred at the time of the alleged accident.

35. As noted at paragraphs 10-12 above, Claimant has a history of previous upper extremity conditions. In conjunction with his claim for Social Security benefits, Claimant's medical records were reviewed. Claimant reported right upper extremity numbness for which a EMG was performed in 2000. His physical examination at this time suggested irritation of the ulnar nerve at the level of the elbow most notable with extreme elbow flexion while sleeping. In September 2000, Claimant apparently reported continued right ulnar paresthesias. In January 2001, Claimant had a return of his right hand numbness since stopping B complex. He was assessed with having right carpal tunnel and gout.

36. Claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment on April 9, 2015. While the ALJ finds that an incident involving a transfer case likely

occurred while Claimant was attempting to remove it, the evidence presented does not persuade the ALJ that Claimant suffered a compensable injury as a result.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As found, the testimony of Rylan Blair, Tia Blair and Wade Johnson regarding the reporting of an injury is more credible and persuasive than the testimony of Claimant. Claimant's testimony that he reported an injury on April 9, 2015 to Wade Johnson and that he subsequently wrote out an incident report cannot be reconciled with the fact that he did not verbally report a claim to Employer until June 19, 2015, even when specifically approached by the Employer in late May 2015 regarding the condition of his left upper extremity. Moreover, the testimony by Mr. Johnson and the Blair's regarding the reporting of Claimant's alleged injury is supported by Claimant's failure to report an injury to Dr. Johnson. Claimant contends that he reported his injury to Dr. Johnson on April 16, 2015. This does not comport with Dr. Johnson's medical records which demonstrate that Claimant saw him multiple times following the alleged accident but did not report a work injury until July 16, 2015. To the extent that there is medical evidence to the contrary, that evidence is outweighed by the balance of the conflicting medical evidence contained in the record.

Compensability

A. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

B. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment relationship with Employer and during an activity, specifically removing a transfer case from a pickup truck as part of his duties as an ASE certified auto mechanic/technician for Employer. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" his employment must be resolved before the injury is deemed compensable.

C. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while or shortly after performing job duties does not mean that he sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is

compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

D. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable injury" is one which requires medical treatment or causes disability. *Id.*; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S.

E. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from at work without sustaining a compensable "injury." This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where a claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where a claimant involved in motor vehicle accident without resultant injuries suffered no compensable injury). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted, "[C]orrelation is not causation." Thus, merely because a coincidental correlation between Claimant's work and his symptoms exists in this case does not mean there is a causal connection between Claimant's injury and his work duties.

F. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Moreover, the question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001

(Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). In this case, the totality of the evidence presented, including the testimony of Dr. Cebrian, in addition to Dr. Johnson reports and the contents of the Social Security record, persuades the ALJ that Claimant's worsening upper extremity pain/symptoms are, more probably than not, a direct result of the natural progression of his pre-existing arthritis, gout and CTS rather than his work duties on April 9, 2015. Consequently, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between his employment and the resulting condition for which medical treatment and indemnity benefits are sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because Claimant failed to establish he suffered a compensable "injury" as defined by the aforementioned legal opinions, his claim is denied and dismissed. Accordingly, his claims for medical and temporary disability benefits need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's April 9, 2015 claim for work related injuries to his upper extremities, including his hands, wrists, arms and shoulders is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail,

as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 28, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

STIPULATIONS

1. The Claimant's Average Weekly Wage (AWW) is $1,206.00.

2. If the Claimant proves his alleged injury is compensable, the Claimant has not yet reached Maximum Medical Improvement (MMI).

3. If the Claimant proves his alleged injury is compensable, Dr. Sisson is the Authorized Treating Physician (ATP).

4. If the Claimant proves his alleged injury is compensable, TTD benefits from July 30, 2015 to October 19, 2015 are owed. The period beginning October 20, 2015 is disputed by Respondents.

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer on July 6, 2015.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability ("TTD") benefits in this claim from October 20, 2015 ongoing.

3. If Claimant has proven that he is entitled to temporary disability benefits, whether Respondents have proven by a preponderance of the evidence that the Claimant was responsible for his termination.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. The Claimant was employed by Employer as a dump truck driver for about a year and a half. The Claimant testified that his typical work duties involved driving a dump truck and he mostly drove. The Claimant would also operate a "vac" truck. The vac truck duties would involve driving and also operation of the hoses to suck up water, oil and other liquids.

2. The Employer has a "No Call No Show Policy" that the Claimant read and signed on November 5, 2013. The policy states,

> All employees employed with [Employer and other named companies] are expected to show up to work at their scheduled work time. If the employee is unable to work at their scheduled work time, they should notify their supervisor. Failure to notify their supervisor prior to their scheduled start time and/or failure to show up to work at their scheduled work time will result in an automatic self-termination. Employees who self terminate with the no call no show policy will receive their final paycheck on the next pay day.
>
> (Respondents' Exhibit E).

3. The Claimant testified that on the date he was injured, he was working with a vac truck and he was working on a project sucking up water in a cellar, which was different that his usual work. At the hearing, he Claimant testified that he doesn't remember the exact date of his injury, but he believes that it occurred on the 6th on a Monday about one and a half years after he started working for Employer. Employer's First Report of Injury lists July 6, 2015 as the date of injury (Claimant's Exhibit 1, p. 1). An interview statement signed by the Claimant on July 30, 2015 also indicates that the Claimant reported an incident that occurred on July 6, 2015 (Respondents' Exhibit C, p. 4).

4. The Claimant testified that he was in a squatting position while holding the hose and sucking water out of a cellar when the ground "gave way" beneath his left leg. When the ground "gave way," it created a hole and his left leg was sucked into the hole up to his knee. The Claimant stated that everything happened very fast, but he thinks he jumped out. The Claimant testified that at that point, he did not realize he was injured because he did not feel any pain. So, when the safety manager Mr. Wilkinson, who was a witness to the incident, asked the Claimant if he was okay, the Claimant testified he said, "Yes." The Claimant testified that the incident happened about 11:00 AM that day and his work day was normally finished at 1:00PM – 2:00 PM. He testified that he went home from work at the time he normally left. The Claimant's testimony regarding his mechanism of injury is consistent with reports to his medical providers and is found to be credible. The testimony is generally consistent with the statement of an Employer eyewitness who was supervising the Claimant. To the extent that there are differences in the testimony of the Claimant and the supervisor, the Claimant's testimony is found to be more credible and reliable.

5. The Claimant testified that after he left work, a supervisor named Rudy called him and asked that he get the truck somewhere, so at approximately 5:00 PM on the same day as the incident occurred, the Claimant went back in to work briefly.

6. The Claimant testified that after he went back to work the second time, he returned home and relaxed, showered and watched TV. He testified that it wasn't until he went to bed that night that his back started to bother him. He described the sensation as feeling "hot." The Claimant testified that he still didn't really think anything of it though because he didn't have pain.

7. The Claimant testified that the next day when he was at work and started moving hoses around, the pain started and it got worse. He testified that he had lower back pain and a sharp pain in his right knee. The Claimant testified that, in spite of the pain, he completed his work shift the day after the incident. At the end of the work day, the Claimant testified that he told his supervisor Rudy that he needed a day off and he told Rudy what had happened the day before and that his back was hurting.

8. The Claimant testified that the next day, he came in to work and met with Jeff Wilkinson and his supervisor Rudy and Mr. Wilkinson called the Claimant in to his office to make a report. After completing the report, a supervisor named Ash took the Claimant to the doctor.

9. The Claimant testified that he saw Dr. Sisson three times in total and, at the last visit, the Claimant was told he needed an MRI. The Claimant testified that he was provided with work restrictions of "no lifting," and that after this, his work duties changed because he could not lift or drag things.

10. On July 8, 2015, the Claimant saw Eric Hofmann, PA-C for Dr. Bradley Sisson at the Colorado Clinic. The Claimant reported an injury that occurred on July 6, 2015 when he was "holding a hose and the ground gave way under him due to increased ground water in the area. All of his weight went to the right side but he did not maintain his balance. His right leg went into the hole which he states was about knee deep, and he twisted his back to compensate. He denies feeling pain at the time of the injury but that night his left [sic] lateral knee and low back became painful." The Claimant reported pain in his low back and left [sic] knee described as "moderate, constant, sharp, numb and tingling in character and quality." On examination, PA-C Hofman noted, "tenderness to palpation: left iliolumbar. The right paravertebral and left paravertebral muscle groups were noted to be hypertonic." The Claimant's range of motion was noted to be painful with lumbar flexion. PA-C Hofman diagnosed the Claimant with right knee sprain (indicating that prior references to *left* knee pain were likely an error) and muscle spasms and a mild muscle pull of the low back. PA-C Hofman placed no work restrictions on the Claimant (Claimant's Exhibit 4).

11. On July 8, 2015, the Claimant's supervisor, Jeff Wilkinson, who was an eyewitness to the incident on July 6, 2015, submitted a handwritten statement that, "[the Claimant] was using a Zinek hose to suck out the water from inside a cellar ring / while doing this the ground around outside of ring gave way causing left leg to sink into ground" (Claimant's Exhibit 11). At some point, Mr. Wilkinson also signed a typewritten statement that further elaborated. This typewritten statement was undated. It states that, "[the Claimant] was standing with his knees slightly bent holding the hose into the cellar ring so the water could be sucked out. While holding the hose the ground around his left foot gave way causing his leg to drop into the soft dirt up to his knee. [The Claimant] continued to hold onto the hose and stepped up out of the hole. I then asked [the Claimant] if he was ok, [the Claimant] replied he was ok and continued to finish sucking the water out of that ring" (Claimant's' Exhibit 8).

12. On July 13, 2015, the Claimant returned to the Colorado Clinic and met with Dr. Sisson, reporting that his prior symptoms have gotten worse, although the back spasms were noted to be better and the knee pain “is almost all gone.” On examination, the right knee was noted to be tender in the lateral aspect of the knee, but full, normal range of motion was noted. The Claimant was diagnosed with muscle spasms, right knee sprain, lumbago and sciatica or the right leg. The Claimant was provided with lidoderm cream medrox. Dr. Sisson commented that “it seems his symptoms are now almost all LBP and mild right sciatica (Claimant’s Exhibit 3).

13. On July 21, 2015, the Claimant saw Dr. Sisson at the Colorado Clinic again reporting that his prior symptoms remain unchanged and that he was still having low back pain and right leg pain and tingling in his right leg. As the Claimant continued to have low back pain and mild radicular complaints, Dr. Sisson recommended an MRI. Dr. Sisson noted that “the patient may return to work with no restrictions. Patient’s supervisors and patient advised to take precautions regarding lifting, bending, etc. Work as tolerated.” Dr. Sisson also opined that “based on the patient’s history and clinical evaluation, the current problem is a work related injury that is consistent with the work injury described by the patient” (Claimant’s Exhibit 2).

14. On July 30, 2015, the Claimant met with Ronnella Rissler, the HR Director for the Employer for an interview and a written statement was prepared and the Claimant signed that it was, “a true and accurate reflection and documentation” of what was discussed during the interview. The statement describes the mechanism of injury as follows:

1. I was sucking from a cellar ring water and the ring is approximately 4’ high, waist level as I am 5’9”.
2. I was squatting with my knees slightly bent as I don’t like to lean over the edge of the ring and bending over, I prefer the squatting level.
3. Ground gave way on left side via pocket in the dirt and my left foot went into the dirt, it sunk up to midway of my left thigh. I could not grab the ring as I was using both hands on the hose that weighs approximately 3-4 lbs., and a 2” hose.
4. I think I just jumped out of the hole, don’t remember as it happened so quickly, I never let go of the hose when it happened.
5. That evening my back started hurting, felt really hot and I was sweating and didn’t think anything about it.
6. The next day, started to hurt worse and again, did not say anything to anyone.
7. On July 9, 2015, I called Rudy prior to my shift and told him I need a day off as my back was killing me. Rudy asked me if I hurt my back at work or at home, I then told him about my knee sinking in the dirt on Monday and it was hurting from that.
8. I reported and at that time, was asked to come in and report what was going on with me.

9. Also on that day, Jeff Wilkinson, Trucking Field Specialist, was standing behind me approximately 3' to 4' and saw me sink. He asked if I was okay, and I replied yes, I am okay.

(Claimant's Exhibit 10; Respondents' Exhibit C).

15. The Claimant testified that the Employer has a policy for reporting injuries and every day employees have to sign out and indicate if they were not injured on a sheet. On direct examination, the Claimant pointed out that on July 6, 2015 he signed the sheet indicating "no injury" because he thought he was okay that day. He testified that he did not sign the sheet on July 7, 2015 that he had "no injury" because he felt very bad that day (also see Claimant's Exhibit 7). On cross-examination, the Claimant admitted that sometimes the employees did not sign the sign-out sheets indicating "no injury" like they were supposed to do, but not necessarily due to having an injury that day. The Claimant also admitted that he did not tell anyone during his shift on July 7, 2015 that he couldn't work due to pain. Only after the shift did the Claimant tell a supervisor that he couldn't work due to pain.

16. The Claimant testified that he made a request for Paid Time Off (PTO) that was approved by his supervisor Ash. A PTO request for 7/9/2015 and 7/10/2015 was approved by Ash Janssen and entered on 7/13/2015 (Claimant's Exhibit 6). The Claimant's Earnings Statement indicates that he received 8 hours of PTO on July 9, 2015 and July 10, 2015 (Claimant's Exhibit 9). The Claimant's Earnings Statement indicates that the Claimant worked and received payment on July 13, 2015 for 8.43 hour, that he only worked and received payment for 1.65 hours on July 14, 2015 and only .87 hours on July 15, 2015. Then, on July 16, 2015 he worked and received payment for 9.93 hours and on July 17, 2015 he worked and received payment for 8.82 hours. No further paystubs or wage records were provided for the time period between July 18, 2015 and July 29, 2015 (Claimant's Exhibit 9).

17. While the medical record from the final visit with Dr. Sisson indicates there are not formal temporary work restrictions, there is a note that the Claimant and his supervisors are advised to take precautions regarding lifting, bending, etc. and that the Claimant was to "work as tolerated." The Claimant testified that based on this and his inability to lift and drag things, at some point, Employer representatives advised him that they could not accommodate this and there was not work available for him.

18. The Claimant testified that while the MRI request recommended by Dr. Sisson was pending, Ronella, the Employer's HR director, discussed FMLA with the Claimant. The Claimant testified that he understood being on FMLA as being "on hold" while waiting for the insurance company to clear the MRI. The Claimant testified that he understood that Ronella would call the Claimant if he would be permitted to go back to the doctor or if he would be going back to work. The Claimant testified that he had not heard back from Ronella yet and he did not receive any notice of termination of employment.

19. The Claimant testified that he received a notice that he was eligible for FMLA effective July 30, 2015 due to his health condition (Claimant's Exhibit 5, p. 15; Respondents' Exhibit D, p. 5). In the notice form, Ronella, the HR director checked that the Claimant did not need to provide any additional certification or information (Claimant's Exhibit 5, p. 16; Respondents' Exhibit D, p. 6). There is a place to check if the Claimant needed to provide periodic reports or an "intent to return to work" every 20 days, but this section was not checked (Claimant's Exhibit 5, p. 17; Respondents' Exhibit D, p. 7). The Claimant was notified that he had a right to up to 12 weeks of FMLA leave commencing on Thursday, July 30, 2015 (Claimant's Exhibit 5, p. 17, Respondents' Exhibit D, p. 7).

20. The 12 weeks of FMLA leave expired on Wednesday October 21, 2015. The FMLA paperwork provided to the Claimant states that the Claimant has the right to be reinstated to the same or equivalent job with the same pay, benefits, and terms and conditions of employment on his return from FMLA-protected leave. However, if his leave extends beyond the end of his FMLA entitlement, then he does not have return to work rights.

21. The Claimant testified on cross-examination that he did not contact his Employer during the entire time he was off work with FMLA leave. The Claimant testified that he was aware of the Employer's no show/no call policy. However, he didn't call in to the Employer after 90 days of FMLA leave either because he was of the understanding that his Employer would be contacting him and that he was not required to call the Employer. The Claimant testified that his understanding was based on the fact that he was not told to contact Employer or bring in any additional documents per his FMLA paperwork.

22. The Claimant testified that since he stopped working, his back and knee still have pain. The Claimant testified that the pain is very bad even when he is standing still. The Claimant testified that he wants to return to see Dr. Sisson.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

There is sufficient evidence in the record that the Claimant suffered an injury to his lower back and right leg on July 6, 2015 and the Claimant's testimony regarding his mechanism of injury was credible and no persuasive evidence was presented to contradict his testimony. In fact, the medical records and Employer records support the Claimant's testimony. Although Respondents have argued that the condition was pre-existing, the medical reports in evidence do not support this theory. The fact that the Claimant did not have an immediate onset of pain, but rather pain developed later in the evening of his incident and progressively worsened the follow day, does not establish that the injury did not occur when and how the Claimant described. The Claimant provided this information about the delayed onset of pain to his ATP, Dr. Sisson, and Dr. Sisson nevertheless attributed the Claimant's back and radicular symptoms to the described mechanism of injury on July 6, 2015.

The ALJ, having reviewed and considered all of the medical records in evidence as well as the testimony of the Claimant, found the opinions of the Claimant's treating physician, Dr. Sisson to be credible and persuasive. These opinions are based, in part, on the Claimant's history. The Claimant's testimony and the history he provided to his ATP and his employer have remained consistent and the Claimant's testimony is found to be credible. An employer witness provided a description of the incident that did not substantially differ from that of the Claimant and to the extent that it differed, the Claimant's statements are found to be more credible and persuasive.

As of the date of the hearing, there was also evidence to establish that the Claimant continued to have symptoms, and the parties stipulated that the Claimant is not at MMI if the claim is determined to be compensable.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that his work activities on July 6, 2015 caused or permanently aggravated, accelerated or combined with a preexisting condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits – Authorized, Reasonable and Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. The employer's duty to provide designated medical providers is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

Here the Claimant began treating with Dr. Sisson who had last recommended an MRI. Dr. Sisson specifically attributed the Claimant's current symptoms to the work injury the Claimant described happening on July 6, 2016. As of the last visit the Claimant had with his treating physician, Dr. Sisson continued to offer treatment recommendations.

As set forth above, there is evidence to establish that the Claimant continues to have symptoms resulting from injury he suffered on July 6, 2015 and the parties stipulate that if the injury is compensable, then the Claimant is not at MMI. Thus, the Respondents shall be liable for the continued medical treatment recommended by Dr. Sisson and his authorized referrals that is reasonably necessary to cure and relieve the Claimant from the effects of his July 6, 2015 work injury.

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

In this case, the Claimant established that he suffered a compensable work injury on July 6 2015. It further appears that the Claimant was approved for PTO leave and did not work on July 9, 2015 and July 10, 2015 due to the effects of his injury. It is not entirely clear when the Claimant may have worked or not worked between July 11, 2015 and July 30, 2015 and whether or not he suffered any wage loss during this time period due to the injury. There is some evidence of wage loss on certain days during this time period. Namely, per the Claimant's Earnings Statement, he only worked and received payment for 1.65 hours on July 14, 2015 and only .87 hours on July 15, 2015, however, there was no persuasive evidence to establish that any wage loss on those days was due to his injury. No further paystubs or wage records were provided for the time period between July 18, 2015 and July 29, 2015. However, after July 30, 2015, the Claimant was granted FMLA for 12 weeks and he testified that he did not work during this period, which would have expired on Wednesday October 21, 2015. The FMLA was authorized due to the Claimant's own serious medical condition per the terms of the FMLA documents. The Claimant suffered an actual wage loss after July 30, 2015 due to disability related to his industrial injury on July 6, 2015.

Therefore, it is necessary to address Respondents' contention that the Claimant is precluded from receiving temporary indemnity benefits after October 20, 2015 because the Claimant is responsible for his termination as a result of violating the No Show No Call Policy.

Responsible for Termination

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

The Employer has a No Show No Call Policy which was communicated to the Claimant and which the Claimant received in writing and signed. The policy provides,

> All employee employed with [Employer and other named companies] are expected to show up to work at their scheduled work time. If the employee is unable to work at their scheduled work time, they should notify their supervisor. Failure to notify their supervisor prior to their scheduled start time and/or failure to show up to work at their scheduled work time will result in an automatic self-termination. Employees who self terminate with the no call no show policy will receive their final paycheck on the next pay day.

In this case, the Claimant subsequently received a notice that he was approved for FMLA leave of 12 weeks which commenced on July 30, 2015. In the notice form, the HR director for the Employer checked that the Claimant did not need to provide any additional certification or information and did not check the provision that the Claimant needed to provide periodic reports or an "intent to return to work" every 20 days. Per the terms of the FMLA paperwork, the FMLA leave expired on Wednesday October 21,

2015. The FMLA paperwork provided to the Claimant provides that the Claimant has the right to be reinstated to the same or equivalent job with the same pay, benefits, and terms and conditions of employment on his return from FMLA-protected leave. However, if his leave extended beyond the end of his FMLA entitlement, then he did not have return to work rights.

The Claimant testified on cross-examination that he did not contact his Employer during the entire time he was off work with FMLA leave. This was reasonable per the terms of the FMLA documentation. However, the Claimant didn't call in to the Employer after 90 days of FMLA leave expired based on an understanding that he was not told to contact Employer or bring in any additional documents per his FMLA paperwork. While it was reasonable for the Claimant not to call in during the 12 weeks of FMLA leave, the paperwork makes it clear that a return to his position is not guaranteed if he does not return to work on the expiration of his FMLA leave period. At this point, the Claimant, being aware of the No Show No Call policy, should have contacted the Employer. Failure to contact the Employer or show up for work after the expiration of his FMLA leave resulted in the automatic termination of the Claimant's employment per the terms of the Employer's attendance and call in policy. The policy is clear and unequivocal. It was not reasonable for the Claimant to assume that because he did not hear from the Employer that either his MRI was approved or he was to return to work that he was not subject to the No Show No Call policy after the expiration of the FMLA leave. His failure to at least call his supervisor or contact HR at the Employer establishes that, with respect to the Claimant's termination from employment with Employer, the Claimant violated known and well-communicated attendance and call in policies for reasons other than his work injury. The Claimant's employment was terminated as a result of these violations and he is not entitled to temporary disability benefits after the expiration of FMLA on October 21, 2015.

ORDER

It is therefore ordered that:

1. The Claimant suffered a compensable industrial injury during the scope and course of his employment with Employer on July 6, 2015.

2. The Respondents are liable for medical treatment recommended by Dr. Sisson or by his referrals that is reasonably necessary to cure and relieve the Claimant from the effects of his July 6, 2015 work injury.

3. The Claimant is entitled to temporary disability benefits from July 30, 2015 to October 21, 2015.

4. The Claimant is responsible for termination, effective October 22, 2015, for violation of the Employer's No Show No Call Policy after the expiration of his FMLA leave period and the Claimant is not

entitled to temporary total disability benefits from October 22, 2015 ongoing.

5. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 26, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

STIPULATION

1. The parties stipulate to an average weekly wage of $913.65.

ISSUES

Based on the stipulations reached by the parties, the issues remaining for adjudication at hearing are:

> 1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer on July 23, 2015.
>
> 2. If Claimant has otherwise proven that he sustained a compensable injury, whether Respondent has proven by a preponderance of the evidence that Claimant was engaged in 'horseplay' at the time of the injury, such that it created a substantial deviation that removed Claimant from the course and scope of his employment.
>
> 3. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits and that treatment he received was authorized, and reasonable and necessary to cure and relieve Claimant from the effects of the work injury.
>
> 4. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability ("TTD") benefits in this claim from August 1, 2015 ongoing.

FINDINGS OF FACT

1. The Claimant was employed by Employer since November 1, 2001 at the Denver Complex, a women's correctional facility as a CSTS 1, which is a trade supervisor. His job duties are to take offenders authorized with a gate pass outside the detention facilities to teach them lawn and landscaping maintenance skills.

2. The Claimant testified that in the past he has supervised 8-10 offenders, but in the summer season during 2015, he typically only supervised 3-4 inmates. Job duties included ensuring that the lawn in front of the detention facilities was mowed and the Claimant testified that he felt pressure to complete the jobs assigned from his supervisor even though he had fewer workers to get the job done.

3. On July 23, 2015, the Claimant was pushing a lawn mower and he tripped over the lawn mower bag on the grass catcher. The Claimant testified that he went to the right and went over the handles and fell on his extended right arm as he fell and landed.

4. The Claimant's fall as he was pushing the lawn mower was captured on one of the prison's surveillance cameras. In the video, the Claimant and an inmate appear to be lining up to race with their lawn mowers. The Claimant waits for the inmate to complete a row of mowing while he waits at one end and then the inmate turns the mower around and she and the Claimant appear to line up so as to start at the same time. Once the two start to mow, they move at what appears to be a very fast pace for mowing grass and not a normally-paced lawn mowing rhythm. The Claimant then falls to the right and rolls a bit on the grass. The surveillance video does not contain any sound recording (Respondent's Exhibit J).

5. In addition to the surveillance footage, there is some conflicting testimony about what occurred before and up to the Claimant's fall on July 23, 2015 when he landed on his right side injuring his right shoulder and neck.

6. The Claimant testified that due to the pressure he felt to complete the assigned work on the day of his accident, he instructed inmate Garvey to mow in one direction and he went the other direction. Then, he testified that while assisting with the mowing, he got tangled up in the lawn mower bag and tripped on the grass catcher which made him fall to the right and injure himself. He testified that he immediately felt burning pain in the right shoulder, but he tried to get up and shake it off. On cross-examination, the Claimant testified that he did not agree that he and the inmate, Ms. Tessa Garvey were engaging in a "race." The Claimant testified that when a co-worker came out he asked the co-worker to take over supervision of the inmate so that he could go inside and advise his supervisor what happened and seek medical attention. The Claimant testified that he was initially told that he could not go to Concentra on July 23, 2015 and he did not complete a formal report of the injury on that day.

7. On cross-examination, the Claimant disputed that he was in a "rematch" with Ms. Garvey from an earlier race that day that the Claimant had lost. When questioned if the Claimant had a reputation of joking around with Ms. Garvey, the Claimant testified that he treated the inmates with respect and human dignity. He testified that it was not his job to "punish" the inmates because their punishment was being in prison. He testified that he understood his duties as being there to engage the offenders in activities. The Claimant testified that he worked for the DOC for 14 years and was familiar with the Code of Conduct. He agreed that the Code of Conduct (Respondent's Exhibit I, p. AG020) stated that, "DOC employees, contract workers, and volunteers shall not wager or engage in any unauthorized game, contest, or sport with any offender." He further agreed that the Code of Conduct (Respondent's Exhibit I, p. AG020) provided that, "horseplay between DOC employees, contract workers, and volunteers, with each other or with offenders is prohibited. Horseplay includes, but is not

limited to, wrestling, pushing, chasing, or practical jokes." On redirect examination, the Claimant testified that prior to July 23, 2015, he had mowed the lawn before, especially if the inmates were on lockdown and he had no inmates on his crew to perform the mowing.

8. Captain Johnnie Nevin is employed by Employer as a CSLTS maintenance supervisor. His rank is captain and his position is to supervise various departments at the Denver Complex, including the maintenance department. He is familiar with the Claimant and aware that the Claimant injured his right shoulder on July 23, 2015. Captain Nevin testified that the Claimant came in and told him about it on July 24, 2015. Captain Nevin located the camera on which video surveillance of the incident on July 23, 2015 would be located. The video surveillance recorded on the DVD that is Respondent's Exhibit J was played for Captain Nevin and he testified that he recognized the video surveillance and that no changes or alterations to the video were made. Captain Nevin testified that the purpose of giving jobs to offenders at the Denver Complex is so that they can learn skills and earn money. The role of supervisors of the offenders is (1) to make sure the offenders don't leave; (2) to ensure the safety of the offenders; and (3) to train the offenders in skills. Captain Nevin testified that the Code of Conduct for the DOC provides that there is to be no contact with offenders and no horseplay or games. Captain Nevin testified that if the Claimant was racing with an offender, this would constitute a violation of the DOC Code of Conduct as it would be considered "horseplay." Captain Nevin also testified that engaging in racing or games with offenders raises safety concerns in this case since a lawn mower can be a dangerous piece of machinery. Captain Nevin testified that if he saw an employee engaged in horseplay, he would discipline the employee. Captain Nevin also testified that after the Claimant's report, he, along with Life Safety Officer Taylor inspected all 6 lawn mowers at the women's detention facility to ensure that they were all in good working order with no defects. He further testified that all lawn mowers were found to be in good working order with the bags attached correctly. On cross-examination, Captain Nevin agreed that it is important to motivate inmates, but stressed that only as long as it is not through "horseplay." He agreed that mowing lawns was a part of the Claimant's job duties, but, on redirect, Captain Nevin clarified that he did not think that the Claimant was properly supervising the inmate when engaged in the activity shown on the surveillance footage. Captain Nevin testified that it is more important to supervise the inmates than it is to complete jobs assigned.

9. Major Jay Guilliams has been employed by Employer for 25 years. He is the physical plant manager at the Denver Complex. His job duties include managing upkeep of the facility, HVAC, grounds maintenance and projects. He was the Claimant's supervisor from September 2012 until the Claimant's resignation. Major Guilliams testified that the number one priority for the Claimant was to supervise the inmates to do their jobs correctly and safely. He is aware that the Claimant injured his shoulder falling while using a lawn mower. Major Guilliams testified that the lawn mowers used at the facility are residential grade lawn mowers that are serviced and replaced regularly. He testified that there are always new lawn mowers ready to replace old ones as they wear

out. Major Guilliams testified that after the Claimant's injury, an inspection of all lawn mowers was completed and all were found to be in good working order and that there was no equipment failure issue. Major Guilliams also testified that DOC supervisors are advised not to engage in "familiarity" with offenders as this creates a situation that degrades control and supervision and can also create a safety issue. Major Guilliams testified that if the Claimant was "racing" his lawnmower with an inmate, that this would be a violation of Employer policy. Major Guilliams testified that the Claimant had prior instances of engaging in policy violations such as when he gave out Christmas candies and an instance where he left an offender in a running vehicle while he was outside the vehicle at the rear of the truck (also see Respondent's Exhibit G). When questioned whether or not Employer expects its supervisors to be "kind," he testified that supervisors are expected to be "professional and humane."

10. Warden David Johnson has been employed by Employer for 20 years. He is currently the warden of the Denver Complex with overall responsibilities for the facility including personnel and budget matters. Warden Johnson is familiar with the Claimant who he identified as a former employee. As warden, Warden Johnson receives all reports from accident investigations. He testified that he received. A copy of the safety investigation report (Respondent's Exhibit F) from the facilities' Life Safety Coordinator dated July 27, 2015. Based on this short report, Warden Johnson requested more information and Exhibit E was prepared with additional information provided by the Claimant related to his lawn mower injury on July 28, 2015. After receiving this additional information, Warden Johnson testified that he felt that the Claimant was deflecting responsibility. Warden Johnson testified that the later incident report prepared by the Claimant (Exhibit E), was different from the original report of the Claimant and that in this follow up report, the Warden opined that the Claimant was not taking responsibility for his conduct. Warden Johnson testified that he met with the Claimant after receiving the incident report at Exhibit E and asked if the Claimant wanted to add anything. Warden Johnson testified that the Claimant stated he did not want to add anything and so the warden decided to proceed to a 6-10 hearing. As part of the 6-10 hearing, Warden Johnson interviewed offender Garvey to obtain more information. After he interviewed Ms. Garvey, Warden Johnson concluded that the Claimant was "racing" Ms. Garvey with the lawn mower. He determined that this was a safety issue, that it indicated a lack of professionalism for crossing boundaries, it constituted a lack of supervision and that the Claimant diminished his authority by his actions with an offender. Warden Johnson testified that he considers racing with a lawn mower to be "horseplay" under the DOC Code of Conduct. In addition to finding theses violations at the 6-10 hearing, Warden Johnson determined that the manner in which the Claimant presented himself during the investigation and hearing was deceitful and his credibility was tarnished. Warden Johnson testified that the complete results of the investigation and 6-10 hearing were set forth in a notice dated September 1, 2015 (Respondent's Exhibit B). Warden Johnson testified that if the Claimant had not resigned, he would have terminated the Claimant's employment with Employer for the reasons set forth in the September 1, 2015 notice. Warden Johnson testified that there is no level of physical horseplay that is appropriate in the workplace at the Denver Complex. He

testified that when supervisors are responsible for offenders, it is important to maintain a high degree of professionalism to maintain safety and maintain the integrity of the supervision. Warden Johnson, who was present during the Claimant's testimony at the hearing disagreed that it was important that the Claimant finish mowing the grass by a particular deadline. Rather, he testified, the most important part of his duties is offender supervision. On cross-examination, Warden Johnson testified that the biggest factor in the decision to terminate the Claimant's employment was the Claimant's lack of integrity and dishonesty at the 6-10 meeting and throughout the investigation process. Warden Johnson also agreed that under normal circumstances DOC employees should try to complete a task assigned by their supervisor and that the Claimant was mowing the grass at the Denver Complex to benefit the Employer. However, on redirect examination, Warden Johnson clarified that he does not expect employees to use any means possible to complete a job and that it is never appropriate to violate the DOC Code of Conduct to complete a job.

11. A Denver Women's Correctional Facility inmate on July 23, 2015, Ms. Tessa Garvey testified on December 17, 2015. She testified that the Claimant was her boss in charge of outside grounds maintenance. She testified that she recalls mowing the lawn in front of the correctional facility on July 23, 2015. Ms. Garvey testified that she and the Claimant were "competing to get the lawn done." She further testified that they engaged in two races that day and she won the first one so there was a rematch. Ms. Garvey testified that for the second race, they lined up at the beginning and on the count of three they "took off." She testified that, immediately after, the Claimant tumbled over the lawn mower bag that had fallen off and he fell over it. Ms. Garvey testified that when the Claimant fell, she started laughing and fell over in the lawn. Ms. Garvey testified that this was the only time in the 2 months that she was on the maintenance crew that she and the Claimant engaged in lawn mower races. However, she testified that she and the Claimant did joke around verbally. On cross-examination, Ms. Garvey testified that there was a smaller crew working on mowing the lawn than usual as some of the girls had to leave early for appointments. She testified that usually, just the inmates would do the lawn mowing, but on July 23, 2015, the Claimant mowed too. On redirect examination, Ms. Garvey testified that she never recalled any other staff member doing the lawn mowing with the inmates. Ms. Garvey's testimony was credible, corresponded with the surveillance footage and is found to be reliable and persuasive in terms of explaining what occurred on July 23, 2015 prior to, during and after the Claimant falling while mowing the lawn at the Denver Women's Correctional Facility. To the extent that Ms. Garvey's testimony conflicts with the Claimant's testimony, Ms. Garvey's testimony is found to be more credible and persuasive.

12. The Employer has a Code of Conduct that applies to all employees, contract workers and volunteers. The Code of Conduct was provided as Respondent's Exhibit I. The Code of Conduct was applicable to the Claimant per Section III (D) which defined an "Employee." Section IV sets forth a number of rules and standards and states that "violations of these principles may result in corrective and/or disciplinary action." Pertinent to this case, Section IV(D)(2) provides, "DOC employees, contract

workers, and volunteers shall not wager or engage in any unauthorized game, contest, or sport with any offender." Also pertinent to this case is Section IV(E) which provides, "horseplay between DOC employees, contract workers, and volunteers, with each other or with offenders is prohibited. Horseplay includes, but is not limited to, wrestling, pushing, chasing or practical jokes."

13. The Claimant completed an Incident Report on July 24, 2015 describing his injury as follows, "pushing lawn mower / catcher bag fell off / tripped over bag landed on right shoulder" (Respondent's Exhibit D, p. AG009).

14. Employer filed a First Report of Injury or Illness on July 24, 2015 for the July 23, 2015 injury noting the Claimant injured his right shoulder when "employee was pushing the mower, catcher bag fell off, and the employee tripped over the bag and landed on his right shoulder" (Claimant's Exhibit 1, p. 1).

15. On July 24, 2015, the Claimant saw Dr. Sobanski and reported that he "was at work doing grounds maintenance for DOC when the guard of the lawn mower came off and he tripped over it. He fell landing on right shoulder. Dr. Sobanski performed a physical examination of the Claimant's right shoulder and notes tenderness in the deltoid and anterior glenohumeral joint, a limited range of motion in all planes, and pain in all planes. Dr. Sobanski diagnosed a shoulder strain and prescribed the Claimant Tramadol HCL and Cyclobenzaprine, and provided a referral for physical therapy (Claimant's Exhibit 6, pp. 14-15). Dr. Sobanski also provided restrictions on the Claimant's work activity. The restrictions include no reaching above his head with the right arm, limiting any lifting to five pounds, and any pushing or pulling to ten pounds (Claimant's Exhibit 6, p. 17).

16. On July 24, 2015, Warden Johnson places the Claimant on leave after he is notified of the Claimant's work restrictions. In a letter to the Claimant, Warden Johnson writes "Due to the nature of your restrictions, and due to the needs of the facility, it has been determined that a placement cannot be made at this time, which adequately meet your work restrictions" (Claimant's Exhibit 5, p. 12). The Claimant testified that due to his restrictions of no lifting more than five pounds and no pushing or pulling of more than ten pounds he would not be able to perform his full job duties such as mowing the lawn, planting flowers, and lifting bags of fertilizer.

17. On July 24, 2015, the Claimant began physical therapy on his right shoulder with Mr. Darwin Abrams, PT. Mr. Abrams notes the Claimant's severe tenderness, report of ten out of ten for his pain level, and lack of joint mobility in the right shoulder (Claimant's Exhibit 7, pp. 37-38).

18. On July 28, 2015, the Claimant prepared a detailed report of his injury occurring during Incident # 828034. The Claimant stated that he was supervising the grounds maintenance crew of three people on July 23, 2015. He stated that one of the three in his crew had restrictions he had to accommodate. As he felt he could not

complete the task of mowing the DWCF side of the law by Friday with the small crew he had, the Claimant decided to push a lawn mower himself. The Claimant stated that the mowers that he and the grounds maintenance crew were using were not designed for the terrain that they were mowing and that he had previously made his supervisors aware of this. The Claimant stated that due to the type of mower and the terrain, this "caused the wheels to bow and the grass catchers to drag." The Claimant stated that he began pushing the mower in this instance and, as he pushed it, the grass catcher detached itself from the mower and he tripped over it. The Claimant stated he landed and injured his right shoulder. He stated that he declined medical assistance at first, but after a sleepless night due to pain, he reported the injury the next day (Respondent's Exhibit E, pp. AG011 – AG012).

19. On July 31, 2015, the Claimant saw PA-C Amber Payne. Ms. Payne noted the Claimant's limited use of his right arm and difficulty sleeping due to the pain in the right shoulder. She noted that the Claimant reported that initially the pain was not too bad, but it worsened overnight. PA-C Payne also noted that the Claimant had prior right shoulder surgery 7-8 years ago. She ordered a MRI of the Claimant's right shoulder (Claimant's Exhibit 6, pp. 21-22).

20. On August 5, 2015, the Claimant met with Warden Johnson and Major Guillams pursuant to State Personnel Board Rule 6-10 to discuss allegations of violations of the DOC Code of Conduct, Code of Ethics and Individual Performance Objectives identified in the Claimant's Performance Plan. Warden Johnson memorialized his recollection of the August 5, 2015 meeting in letter dated September 1, 2015. In this letter, it provides that, at the meeting it was discussed that the Claimant engaged in a race with an offender while pushing a lawn mower on July 23, 2015 and the Claimant was injured when the grass catcher on the Claimant's mower dislodged and he tripped over it. The report of this meeting indicates that the first report of injury the Claimant completed lacked detail and that the Claimant was asked to prepare a more detailed report. The Warden noted that at the meeting, the Claimant claimed the grass catcher came off the mower due to the equipment being faulty and that he had done nothing to cause the grass catcher to come off the mower. The note states that, at the meeting, the Claimant denied "horse playing" when he tripped over the grass catcher, but rather, that he was moving rapidly in order to get an increased amount of exercise. The Claimant specifically denied that he was "racing" with an offender (Respondent's Exhibit B, pp. AG 002-AG003).

21. The Claimant underwent a multiplanar multisequence MRI of the right shoulder without contrast on August 7, 2015. Dr. O'Malley noted that the Claimant has tendinosis of the distal fibers of the supraspinatus and the infraspinatus tendons, a large full-thickness tear of the distal supraspinatus and infraspinatus tendons, a superior glenoid labrum lesion (SLAP) tear with a paralabral cyst, and a subacromial impingement (Claimant's Exhibit 9, pp. 80-81).

22. On August 13, 2015, the State Personnel Board Rule 6-10 meeting was reconvened with the Claimant, Major Guilliams and Warden Johnson in attendance. Warden Johnson notified the Claimant that he had interviewed the offender that the Claimant was supervising on July 23, 2015 and that she stated that she and the Claimant were racing one another and that the Claimant had initiated the race. Warden Johnson further informed the Claimant that, the offender told him that after the Claimant tripped over the grass catcher, both of them laughed together. Warden Johnson noted that at the August 13, 2015 meeting, the Claimant again denied racing or engaging in horseplay and that the Claimant could not remember laughing. Also at the meeting, the Claimant stated that although he was operating the lawn mower "rapidly," he believed that he was operating it safely. The letter notes that the Claimant agreed that if he had been operating the mower while walking behind it rather than using it rapidly, he would not have fallen over the grass catcher. The Claimant was advised of a safety inspection that found all lawn mowing equipment to be operable with no safety defects, but the Claimant reiterated that the equipment was defective and the terrain on which it was used was hazardous (Respondent's Exhibit B, p. AG003).

23. On August 14, 2015, the Claimant saw PA-C Nicole Leitch reporting that "he had a '610' hearing yesterday with employer d/t concern that pt has injury while 'horseplaying.' Pt denies that he was 'horseplaying.' States he was using a defective lawnmower (which he had reported – wheels bent, bag dragged on ground). Told he was pushing the lawnmower 'too fast' and pt states he may have been going 'rapid' and was under pressure to get task done" (Claimant's Exhibit 6, p. 30). After reviewing the MRI results with the Claimant, Ms. Leitch advises the Claimant he has a right shoulder SLAP tear, a tear of the right supraspinatus tendon, a tear of the right infraspinatus tendon, and a shoulder strain. PA-C Leitch refers the Claimant to orthopedic surgeon Dr. Hewitt (Claimant's Exhibit 6, p. 32).

24. On September 1, 2015 Warden Johnson prepared a written "Notice of Disciplinary Action after Rule 6-10 Meeting" letter to the Claimant. In addition to memorializing the discussions at meetings held on August 5, 2015 and August 13, 2015 (discussed above), Warden Johnson discusses the Employer policy violations and cites the policies in the letter. He finally notes that for the reasons set forth in the complete letter, that he has "decided to separate [the Claimant] from employment with the Department of Corrections effective September 3, 2015" (Respondent's Exhibit B, pp. AG002). While the letter indicates that the intent was to hand deliver the document to the Claimant, there is no signature and date of the Claimant on the letter indicating that the letter was, in fact, hand delivered to the Claimant.

25. On September 3, 2015, Warden Johnson prepared another letter that was sent to the Claimant by certified mail. This letter indicates that the Claimant notified the warden's office manager that he wished to resign from his position as CSTS I. The warden noted that he accepted the resignation effective September 4, 2015. The letter provides that if the Claimant were to re-apply with Employer, he would first have to address the issues that were under consideration at the 6-10 hearing. The warden also

provided information for appeal to the State Personnel Board in the event that the Claimant felt the resignation was coerced or forced (Respondent's Exhibit C).

26. On November 24, 2015, the Claimant went to the Denver VA because he was having significant pain in his right shoulder. Based in part on his review of the MRI images and report from August 7, 2015, Dr. McBryde noted the Claimant has tendinosis of the distal fibers of the supraspinatus and the infraspinatus tendons, a full-thickness tear of the distal supraspinatus and infraspinatus tendons, a SLAP tear with a paralabral cyst, and a subacromial impingement (Claimant's Exhibit 10, p. 82).

27. On December 11, 2015, Dr. Sawyer, at the Denver VA, examined the Claimant and reviewed his MRI. Dr. Sawyer noted that "I consider it is likely [Claimant] will need shoulder surgery" (Claimant's Exhibit 10, p. 85).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents, and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Ctr. v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* supra; *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Because the facts surrounding and leading up to the mechanism of the Claimant's shoulder injury are disputed by other fact witnesses and are called into question due to apparent discrepancies with video surveillance footage, the credibility of the Claimant is a crucial component of this claim. The Claimant's credibility is questioned in light of inconsistent reporting of the mechanism of injury to his supervisors over the course of the claim. While the Claimant has stated and argued that he was not engaged in a race or contest, he has admitted (in the face of video surveillance covering his actions at the time of his injury), that he was operating a lawn mower "rapidly." However, he has also repeatedly stated and argued that the machinery he was operating was either defective/faulty or not intended for the terrain over which it was operated. Alternatively, he provided a written statement that he was moving rapidly in order to get an increased amount of exercise. Alternatively, the Claimant has stated that he felt under pressure to complete assigned lawn maintenance tasks by a deadline. The Claimant's credibility is of increased importance in this case where there is clear interplay with the "horseplay" or "substantial deviation" doctrine which could render the injury not compensable.

Horseplay Doctrine / Substantial Deviation Test

The claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with employer. Section 8-41-301(1)(b) & (c), C.R.S*.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires a claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.* It is not essential to compensability that an employee's activity at the time of the injury result from a job duty if the activity is sufficiently incidental to the work to be properly considered as arising out of and in the course of the employment. *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). In *Panera Bread,* while the Claimant was injured when lifting a leg as if he were going to kick a coworker (who was far enough away that it was apparent he could not actually strike the coworker), the claimant slipped and fell. Yet, the ALJ concluded that the claimant's injuries in that case were compensable because his actions "did not constitute an extensive or serious deviation from his employment duties" and the injuries arose out of a combination of "a slippery floor, his shoes, and his actions in attempting to kick toward his coworker." However, in a case found to be "consistent with the requirements of *Panera Bread*," the Industrial Claim Appeals Office found that where a claimant engaged in the "ill-advised nature of an activity wherein a smaller person runs and jumps at a 6'8" 280 pound coworker" to perform a celebratory "chest bump," this could be seen as a "substantial deviation from work duties" and not integral with the activities of the job, as the claimant in that case argued. *Trujillo v. Lowes,* WC 4-932-395-01 (ICAO, July 29, 2014).

If a claimant's activity at the time of the injury constitutes such a substantial deviation from the circumstances and conditions of the claimant's employment that the activity is for the claimant's sole benefit, the injury does not arise out of and in the course of employment. *Kater v. Industrial Commission,* 728 P.2d 746 (Colo. App. 1986). Where, the alleged deviation from employment involves "horseplay," our Courts apply a four-part test to determine whether the resulting injury is compensable. In *Lori's Family Dining v. Industrial Claim Appeals Office,* 907 P.2d 715, 718 (Colo. App. 1995), the Court of Appeals held that the relevant factors are:

> (1) the extent and seriousness of the deviation;
>
> (2) the completeness of the deviation, *i.e.,* whether it was commingled with the performance of a duty or involved and abandonment of duty;
>
> (3) the extent to which the practice of horseplay had become an accepted part of the employment; and
>
> (4) the extent to which the nature of the employment may be expected to include some horseplay.

No single factor is determinative, and the claimant need not prove the existence of every factor in order to establish compensability. The first two factors have been held to be more critical than the third and forth, which "may be viewed merely as specific methods of proving that a claimant's actions became part of the employment." Ultimately, resolution of the issue is one of fact for determination by the ALJ. *Panera Bread, LLC v. Industrial Claim Appeals Office, supra.*

The Claimant's testimony regarding the mechanism of injury and the facts surrounding a fall over the lawnmower grass catcher was at odds with the testimony of other fact witnesses and did not seem to accurately correspond to activities witnessed on video surveillance. The testimony of a Denver Women's Correctional Facility inmate, Ms. Tessa Garvey was that she and the Claimant were "competing to get the lawn done." She further testified that they engaged in two races that day and she won the first one so there was a rematch. Ms. Garvey testified that for the second race, they lined up at the beginning and on the count of three they "took off." She testified that, immediately after, the Claimant tumbled over the lawn mower bag that had fallen off and he fell over it. After this, both the Claimant and Ms. Garvey were on the ground laughing. Ms. Garvey also testified that she and the Claimant did joke around verbally prior to that. Ms. Garvey's testimony was credible, corresponded with the surveillance footage and was found to be reliable and persuasive in terms of explaining what occurred on July 23, 2015 prior to, during and after the Claimant falling while mowing the lawn at the Denver Women's Correctional Facility. To the extent that Ms. Garvey's testimony conflicted with the Claimant's testimony, the ALJ credited Ms. Garvey's testimony over the Claimant's. This is based in part on the finding that, overall, the weight of the testimony and documentary evidence indicates that the Claimant has been less than credible over the course of his claim and during the hearing. Additionally, although the Claimant also argued that the lawnmower was somehow faulty or defective, a safety inspection of all of the equipment determined that it was in good working order with no defects. Based on the entirety of the evidence presented in this case, the Claimant's actions at the time of his injury involved engaging in a race or contest with an inmate to see who could mow a row of the grass the fastest.

In this particular case, based on the nature of the employment, which involved supervision of offenders at a detention facility, there was no persuasive evidence presented that the practice of horseplay had become an accepted part of the employment or that the nature of the employment may be expected to include some horseplay. Rather, there is a strictly enforced Code of Conduct and Code of Ethics that governs the employees of the Denver Complex, a women's correctional facility, which is in place to protect the inmates as well as all others in the facility. Given the very nature of the employment in this case, and crediting the testimony of Warden Johnson, Major Guilliams and Captain Nevin, the ALJ finds that this is not the type of workplace where horseplay is an accepted practice. In fact, the opposite appears to be true.

Thus, the focus turns to whether or not this lawnmower race constituted such a *substantial* deviation from the circumstances and conditions of the Claimant's employment that the activity is for the Claimant's sole benefit and does not arise out of the Claimant's job duties.

The Claimant has argued that, to the extent that he was operating the lawn mower, which is outside of the norm as a supervisor for the offenders providing grounds keeping maintenance, his actions benefitted the Employer. His argument follows that the task of completing the lawn mowing had to be completed by a specific deadline and he needed to assist with the mowing as he had a smaller work crew, one of whom had work restrictions that he needed to accommodate. However, every one of the Claimant's supervisors who testified, including, Captain Nevin, Major Guilliams and Warden Johnson confirmed that the role of the supervisors for the offenders is to first, ensure they don't leave, second, to ensure the safety of the offenders and others in the facility and third, to train the offenders in skills. Further, while the supervisors are expected to be professional and to treat offenders humanely, they are specifically trained to avoid familiarity and engaging in behavior that diminished authority. Having worked for the Department of Corrections for 14 years, the Claimant was clearly instructed and aware of a strictly enforced Code of Conduct and Code of Ethics that required maintaining professional demeanor at all times, which is critical to ensuring the safety and control of inmates in the detention facility. Interactions with offenders that improperly crossed boundaries and encouraged familiarity were forbidden. Additionally, from the warden to supervisors down the line who testified in this case, it is clear that supervising inmates correctly and safely is always a priority over completing a task list. Warden Johnson specifically and persuasively testified that it would never be more important to finish mowing grass by a particular deadline than it would be to supervise offenders with a high degree of professionalism. He testified that it is never appropriate to violate the Code of Conduct to complete a job. In any event, by engaging in the conduct that he did, the Claimant created a situation where was not only injured, but he lost control of the situation and he and the offender fell on the grass laughing which would have a negative impact on the maintenance of the integrity of his supervision of inmates at this detention facility. As such, the Claimant's injury producing activity was a clear deviation.

As to whether or not the deviation was substantial enough to constitute horseplay and take the injury-producing conduct outside of being compensable, the ALJ notes that racing with a lawnmower is not consistent with the balance of the work required of the Claimant. While the Claimant has argued that he was motivating the offender to work faster so that the job could be completed, it is not clear that racing with lawnmowers would be intended to accomplish this. Rather, if the Claimant had merely assumed control of one of the lawnmowers and quickly, but safely, mowed the lawn alongside the offender, this would be more likely to accomplish the task, to educate the offender in the skill and to maintain the integrity of his supervision over detention facility inmates. To the extent that the Claimant had been mowing safely and stayed behind the lawnmower, he even testified that he would not have tripped over the catcher bag and would not have fallen and injured his shoulder. The Claimant's argument is also at odds with other explanations that he gave over the course of investigation into the accident, such as his statement that he was mowing the lawn rapidly to increase his exercise benefit.

In any event, ultimately, the Claimant's activities in racing the offender do not appear calculated to encourage more efficient and faster completion of a mowing task, which may have had some benefit to the Employer. Rather, the Claimant's activities appear to be calculated to inject a competition and some levity into the work situation. Unfortunately, this is not the type of workplace where this type of behavior can be accommodated. Even if the Claimant and his crew had completed the work more quickly, which is not likely, there is still a greater negative effect due to the Claimant's action; namely, the loss of integrity of the supervision and the negative impact on the authority of a supervisor over a detained offender of the facility. Based upon the Employer's specific and detailed policies, combined with the persuasive testimony of the Claimant's supervisors about the work priorities for supervisors, it is abundantly clear that the negative impact of the Claimant's actions in this case far outweighed any possible benefit of completing an assigned task of mowing the lawn within a deadline. The Claimant's activities in participating in a lawnmower race with an offender being detained at the facility that he was in charge of supervising constitute a deviation from employment so substantial that the activities cannot be considered part of the employment relationship.

Because it is found that the Claimant's injury-producing actions constituted horseplay and a substantial deviation from the Claimant's employment, the Claimant has failed to meet his burden of proving that he suffered an injury while performing services arising out of and in the course of his employment in this case. The Claimant's alleged injury is not found to be compensable. Because the injury is not compensable, the remaining issues regarding medical benefits and temporary disability benefits are moot.

Additionally, although in Claimant's Response to Respondent's Brief, the Claimant argued that Respondent was not entitled to argue that the Claimant was responsible for his termination as this was an affirmative defense that was not properly endorsed or raised at the hearing, this point is also moot given the above findings. As the ALJ found that the Claimant's injury was not compensable under the Act since the injury-producing conduct constituted a substantial deviation from the Claimant's employment, the Claimant is not entitled to temporary disability benefits in this case and so the issue of the Claimant being responsible for termination is not reached.

ORDER

Based on the above factual findings and legal conclusions, it is therefore ORDERED that:

1. The Claimant has failed to meet his burden of proving a compensable injury by a preponderance of the evidence by establishing that an incident occurred on July 23, 2015 arising out of his performance of work duties for his Employer. The Claimant's claim for benefits under the Workers' Compensation Act of Colorado is therefore denied and dismissed.

2. As the injury is found to be not compensable, the Claimant's remaining claims for medical benefits and temporary disability benefits are likewise denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 20, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the right shoulder arthroscopy recommended by Dr. Romero is reasonable and necessary medical treatment for the admitted right shoulder injury.

FINDINGS OF FACT

1. The claimant is employed by the respondent-employer, at the Colorado State Mental Hospital. On May 5, 2015, she reported that she was involved in training on take-downs. Coworkers were holding both of her feet and hands, and her right shoulder was hyperextended.

2. Authorized treating physician Dr. Merchant diagnosed the claimant with "pain, shoulder, right."

3. The only W-164 form in evidence, signed by Dr. Merchant, states that the claimant's work related medical diagnosis is "right shoulder trauma."

4. The respondent ultimately admitted liability for the claimant's injury, and provided medical benefits and ongoing wage loss benefits.

5. The claimant underwent an x-ray of her right shoulder on May 5, 2015. The findings were, "no fracture or dislocation. No radiopaque foreign bodies. No significant arthritis." The impression was "Normal."

6. The claimant underwent an MRI on May 15, 2015. The impression was: 1) Moderate tendinosis along the subscapularis tendon without tear; 2) Mild tendinosis of the supraspinatus tendon without tear; 3) Mild arthrosis in the acromioclavicular joint with mild subacromial bursitis. No severe impingement.

7. ATP Dr. Merchant referred the claimant to orthopedic surgeon Dr. Romero. The claimant's initial visit with Dr. Romero was on August 3, 2015.

8. On August 3, 2015, Dr. Romero had reviewed the report from objective scans of claimant's right shoulder. "I visualized an MRI report from Open MRI which is suggestive of supraspinatus and subscapularis tendinosis."

9. Having reviewed the MRI report and examined claimant, Dr. Romeo opined on August 3, 2015 as follows. "I do not see anything that would require surgical interventions at this point."

10. Dr. Romeo provided the claimant with an AC joint injection, which she would report at her next visit gave her good relief for about a week.

11. Dr. Romeo saw the claimant again on September 15, 2015. On that visit, he stated, "I am recommending the patient undergo an arthroscopy of the shoulder with a biceps tenodesis arthroscopic versus subpect based on intraoperative findings. We will also evaluate her rotator cuff at the time and debride her distal clavicle/AC joint." The record does not state what "intraoperative findings" upon which he was basing this request. The record does not state why Dr. Romero changed his original opinion that claimant had nothing that would require surgical intervention.

12. In response to a letter written to ATP Dr. Merchant, Dr. Schwender wrote that the claimant's request is reasonable. "Pt has significant functional restrictions/ limitations in R shoulder, which is getting worse. Surgery could significantly improve this impairment."

13. Dr. Wallace Larson performed an Independent Medical Examination in this matter. Dr. Larson is a board certified orthopedic surgeon with a subspecialty in hand and upper extremity. Approximately 70-80% of Dr. Larson's practice involves hand and upper extremity surgeries. He performs shoulder surgery approximately once per week. Additionally, Dr. Larson is Level II accredited. He was accepted as an expert in orthopedic surgery.

14. Dr. Larson discussed the three findings on the claimant's MRI. Tendinosis is extra fluid within the tendon. The claimant's tendinosis, as well as her arthrosis in the acromioclavicular joint, "are all very common findings, even in normal middle-aged people that do not have any symptoms."

15. Regarding the claimant's MRI scan, Dr. Larson stated, "There's nothing here on the MRI scan that would indicate the need for surgical repair."

16. Dr. Larson stated that it is very uncommon for subscapularis tendinosis to cause pain. There is not a surgical option for the claimant's subscapularis tendinosis.

17. Dr. Larson further explained that none of the three impressions from claimant's MRI would be related to her work injury. "No, it's clear none of those findings were traumatic in origin. They're really degenerative…As all of us age, our tendons

weaken a little bit….It’s a degenerative change, not a tendinitis. It’s not an inflammation of the tendon. It’s a degenerative change in the tendon. It’s age-related.”

18. Dr. Larson was asked about claimant’s physical or anatomical diagnosis of her right shoulder. “She doesn’t have any established anatomic diagnosis….Nobody has established any anatomic deficiency or traumatic change in her shoulder as a result of the injury.”

19. Dr. Larson stated that the claimant has no objective findings of an anatomic shoulder injury. The objective findings he would expect to see on exam or MRI include: instability; muscle atrophy; crepitus; ligament ruptures; rotator cuff rupture; internal swelling; bone edema, or extra fluid. The claimant has none of these.

20. Dr. Larson understands that Dr. Romero has requested an “exploratory surgery” to look in the claimant’s shoulder joint with an arthroscope to see if something in particular can be identified and repaired.

21. Dr. Larson testified that it is not reasonable to scope into claimant’s shoulder and see if there is anything to fix in there. “The likelihood of surgery either reducing or eliminating symptoms and pain in her shoulder is very, very remote.”

22. Dr. Larson stated that in addition to not being helpful, an unnecessary exploratory surgery presents risks to the claimant. These risks include “the obvious risk of anesthesia…bleeding…infection…some nerve or blood vessel injury.” Additionally, the surgery presents risks to the claimant’s shoulder. The arthroscope produces joint surface injury with its scraping. Moreover, the claimant could have injury to her joint cartilage just from the fluid and local anesthetics.

23. Dr. Larson further explained that in this case it is not reasonable to shave part of claimant’s shoulder joint to make more room for her rotator cuff. “It’s more likely to make her worse than better.” He explained that Dr. Romero’s requested procedure will release ligaments in the front of the shoulder that help stabilize the joint.

24. Dr. Larson further explained that because claimant has no anatomic source of her pain, with an unnecessary surgery, her risk of increasing pain symptoms and risk of longer-term stiffness is significantly increased.

25. Dr. Larson stated that a surgeon should “consider to correlate the imaging findings with the patient’s symptoms and your physical findings on examination to see if all that matches up. And if it does, then they’re probably a good candidate for surgery.

And if it doesn’t match up--in this case, it clearly does not--they are probably a very poor candidate for the surgery.”

26. Dr. Larson testified that claimant does not have an anatomic correlation with her symptoms, but rather, “non-physiologic findings.” A non-physiologic finding is “not a finding that could be explained by any injury or structure deficiency within her shoulder.”

27. Dr. Larson explained that claimant’s mechanism of injury would have resulted in a minor shoulder strain that would get better with or without treatment, in a few weeks or a month. Yet, claimant has a “history of the type of symptoms that she reports that really don’t correlate with any kind of known anatomic deficit and her non-physiologic finding--that she really falls quite clearly into the category. She has persistence of symptoms that are not explained by any anatomic deficit.”

28. Dr. Larson disagrees that the claimant’s purported positive response to Dr. Romero’s injections is reasonable grounds to perform a surgery. “There’s still nothing being identified as an anatomic deficit.”

29. Dr. Larson also disagrees with Dr. Schwender’s statement that surgery is reasonable. He stated the surgeon should identify something that is likely to be corrected with surgical intervention. “Just a persistence of pain symptoms is not an adequate reason for surgical intervention.”

30. Dr. Larson further disagrees with Dr. Schwender’s statement that the proposed surgery is likely to help claimant’s impairment. “Oh, no. I think it’s likely to make it worse.”

31. Dr. Larson’s ultimate opinion as an expert in orthopedic medicine is that Dr. Romero’s surgery recommendation is not reasonable or necessary to cure the claimant from the effects of her work injury.

32. The ALJ finds Dr. Larson’s analyses and opinions to be credible and more persuasive than medical analyses and opinions to the contrary.

33. The ALJ finds that the claimant has failed to establish that it is more likely than not that the surgery recommended by Dr. Romero is reasonable or necessary to cure or relieve her from the effects of her admitted industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40- 101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

2. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence.

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

4. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

5. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected

evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

6. The respondent is liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. Industrial Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

7. In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

8. In this case, it is clear the claimant suffered trauma to her right shoulder during the training accident which forms the basis of this claim. The claimant presented immediately to respondents designated health care providers. She was examined numerous times by CCOM personnel and by Dr. Romero, who specializes in orthopedics.

9. Nonetheless, the ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the surgery being recommended by Dr. Romero is reasonable or necessary.

10. The ALJ concludes that Dr. Larson's analyses and opinions are credible and more persuasive than medical analyses and opinions to the contrary.

ORDER

It is therefore ordered that:

1. The claimant's request for surgery as recommended by Dr. Romero id denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: April 4, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-995-888-01

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on March 12, 2015.

2. Whether Claimant has established by a preponderance of the evidence that the right of medical selection passed to him because Respondents failed to provide a written list of at least four designated medical providers within seven days after receiving notice of his injury.

FINDINGS OF FACT

1. Claimant worked for Employer as an Operator Assistant. On March 12, 2015 he and a coworker were moving an iron pipe by carrying it on their shoulders. As Claimant lowered the bar he experienced a "pop" in his right shoulder area. Claimant completed his work shift and went home about two or three hours after the incident.

2. Claimant testified that at approximately 1:00 a.m. on March 13, 2015 he awoke to excruciating right shoulder pain. He contacted his supervisor and reported his right shoulder injury.

3. On March 13, 2015 Employer directed Claimant to Injury Care of Colorado for medical treatment. Claimant explained that Employer's Safety Manager met him at the facility. Employer did not provide Claimant with a written list of at least four designated medical providers or any other treatment options.

4. At Injury Care of Colorado Claimant reported right shoulder pain. He was diagnosed with a work-related right shoulder strain/sprain. The treating physician released Claimant to full duty, prescribed x-rays and recommended a follow-up visit.

5. On March 15, 2015 Employer completed a First Report of Injury regarding the March 12, 2015 incident. The First Report specified that Claimant suffered a "shoulder strain" on March 12, 2015.

6. On April 22, 2015 Claimant underwent a right shoulder MRI. The MRI revealed an Acriomioclavicular (AC) joint separation.

7. On April 30, 2015 Employer provided Claimant with a Designated Provider List. The document specified that, pursuant to W.C.R.P. 8-2(A), Claimant could obtain treatment from any of the four enumerated providers. Claimant chose Injury Care of Colorado from the Designated Provider List.

8. Claimant continued to receive conservative medical treatment from Injury Care of Colorado. In June 2015 he underwent a second MRI that revealed a right shoulder separation. Claimant was directed to Orthopedic Surgeon James Johnson, M.D. for a consultation.

9. On September 25, 2015 Claimant visited Dr. Johnson for an examination. Claimant reported that he injured his right shoulder while carrying pipes for Employer. Dr. Johnson diagnosed Claimant with inflammation of his AC joint with a grade 1-2 AC joint separation. He administered an intra-articular injection into Claimant's right AC joint. Claimant experienced approximately 90% pain relief from the procedure. Dr. Johnson prescribed physical therapy and recommended a return visit in one month to ascertain whether Claimant required surgery.

10. On October 8, 2015 Claimant visited William Miller, M.D. for an evaluation. Claimant reported that on March 12, 2015 he and a coworker were moving a pipe by carrying it on their shoulders. As Claimant lowered the pipe, he experienced a "pop" in his right shoulder. Claimant remarked that the pipe weighed between 40-75 pounds. Dr. Miller determined that Claimant had suffered a right AC joint injury that was aggravated by his work activities for Employer. He assigned work restrictions and recommended a follow-up appointment in three weeks.

11. On March 3, 2016 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Claimant reported that on March 12, 2015 he and a coworker were carrying an iron bar on their shoulders. As he lowered the bar, he experienced a "pop" in his right shoulder area. After conducting a physical examination and reviewing medical records, Dr. Fall diagnosed Claimant with a grade 1 AC joint right shoulder separation. She concluded that Claimant's work activities on March 12, 2015 caused his right shoulder symptoms and he had not reached Maximum Medical Improvement (MMI). Dr. Fall remarked that shoulder separations typically do not require surgery and thus recommended physical therapy.

12. Dr. Fall testified at the hearing in this matter. She recounted that Claimant heard a "pop" in his right shoulder while carrying an iron pipe on March 12, 2015. He did not initially experience pain but awoke at approximately 1:00-2:00 a.m. with excruciating symptoms. After conducting a physical examination and reviewing Claimant's medical records, Dr. Fall determined that Claimant suffered a grade 1 AC joint right shoulder separation. She maintained that Claimant's right shoulder symptoms were caused by his work activities for Employer on March 12, 2015. Dr. Fall recommended a course of physical therapy before Claimant proceeded with right shoulder surgery.

13. Claimant has demonstrated that it is more probably true than not that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on March 12, 2015. Claimant credibly explained that on March 12, 2015 he and a coworker were moving an iron pipe by carrying it on their shoulders. As Claimant lowered the pipe he experienced a "pop" in his right shoulder area. Claimant was initially diagnosed with a work-related shoulder strain/sprain.

14. The medical records reveal that Claimant has consistently maintained that he injured his right shoulder while carrying a pipe for Employer. Dr. Miller persuasively determined that Claimant had suffered a right AC joint injury that was aggravated by his work activities for Employer. Dr. Fall also noted that Claimant suffered a grade 1 AC joint right shoulder separation. She maintained that Claimant's right shoulder symptoms were caused by his work activities for Employer on March 12, 2015. Accordingly, the overwhelming evidence reflects that Claimant's work activities on March 12, 2015 aggravated, accelerated or combined with his pre-existing condition to cause a right shoulder injury.

15. Claimant has failed to establish that it is more probably true than not that the right of medical selection passed to him because Respondents did not provide a written list of at least four designated medical providers within seven days after receiving notice of his injury. Claimant testified that at approximately 1:00 a.m. on March 13, 2015 he awoke to excruciating right shoulder pain. He contacted his supervisor and reported his right shoulder injury. On March 13, 2015 Employer directed Claimant to Injury Care of Colorado for an examination. On March 15, 2015 Employer completed a First Report of Injury that specified Claimant suffered a "shoulder strain" on March 12, 2015. Employer had thus been notified of an injury because it had some knowledge of the accompanying facts connecting the injury with Claimant's employment and a reasonably conscientious manager would recognize that the case might involve a potential compensation claim.

16. Claimant continued to receive conservative medical treatment from Injury Care of Colorado. On April 30, 2015 Employer provided Claimant with a Designated Provider List. The document specified that, pursuant to W.C.R.P. 8-2(A), Claimant could obtain treatment from any of the four enumerated providers. Claimant chose Injury Care of Colorado from the List. Although Respondents failed to timely supply Claimant with a Designated Provider List pursuant to statute and Rule, Claimant signified through his words and conduct that he had chosen a physician to treat his injury. Claimant has thus already exercised his right of selection and chose Injury Care of Colorado to treat his March 12, 2015 right AC joint injury. His desire to obtain medical treatment from another physician thus requires him to obtain permission from Respondents or the approval of an ALJ.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a

coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on March 12, 2015. Claimant credibly explained that on March 12, 2015 he and a coworker were moving an iron pipe by carrying it on their shoulders. As Claimant lowered the pipe he experienced a "pop" in his right shoulder area. Claimant was initially diagnosed with a work-related shoulder strain/sprain.

8. As found, the medical records reveal that Claimant has consistently maintained that he injured his right shoulder while carrying a pipe for Employer. Dr. Miller persuasively determined that Claimant had suffered a right AC joint injury that was aggravated by his work activities for Employer. Dr. Fall also noted that Claimant suffered a grade 1 AC joint right shoulder separation. She maintained that Claimant's right shoulder symptoms were caused by his work activities for Employer on March 12, 2015. Accordingly, the overwhelming evidence reflects that Claimant's work activities on March 12, 2015 aggravated, accelerated or combined with his pre-existing condition to cause a right shoulder injury.

Right of Selection

9. Section 8-43-404(5)(a)(I)(A), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the respondents must provide injured workers with a list of at least four designated medical providers. §8-43-404(5)(a)(I)(A), C.R.S. The respondents must supply a copy of the written designated provider list to the injured worker "in a verifiable manner within seven (7) business days following the date the employer has notice of the injury." W.C.R.P. 8-2(A)(1). The list must include the insurer's contact information "including address, phone number and claims contact information." W.C.R.P. 8-2(A)(2).

10. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the "services of a physician are not tendered at the time of injury, "the employee shall have the right to select a physician." W.C.R.P. 8-2(E) additionally provides that "[i[f the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician" of his choosing. An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006). However, in those situations where the claimant has signified, by words or conduct, that he has chosen a physician to treat the industrial injury he has made a physician selection. See *Rivas v Cemex* W.C. No. 4-975-918 (ICAP, Mar. 15, 2016); *Tidwell v Spence Technologies,* W.C. No. 4-917-514 (ICAP, Mar. 2, 2015).

11. In *Miller v Rescare, Inc.,* W.C. No. 4-761-223 (ICAP, Sept. 16, 2009) the employer failed to timely supply the claimant with a written list of designated medical providers. However, the claimant treated with one of the employer's available providers for two visits. Because the claimant was dissatisfied with her medical treatment, she sought to designate another treating physician. In rejecting the claimant's contention, the ICAP noted "…the salient point is that she sought treatment with" an authorized provider. The claimant had therefore exercised her right to select a treating doctor. The claimant's desire to treat with a new doctor required her to obtain permission of the respondents or the approval of an ALJ.

12. Similarly, in *Pavelko v Southwest Heating & Cooling*, W.C. No. 4-897-489 (ICAP, Sept. 4, 2015) the employer did not timely provide the claimant with a list of designated providers. However, the claimant treated with one of the doctors recommended by the employer for two years. The choice of physician had thus passed to the claimant and he exercised his right of selection by his "words or conduct."

13. As found, Claimant has failed to establish by a preponderance of the evidence that the right of medical selection passed to him because Respondents did not provide a written list of at least four designated medical providers within seven days after receiving notice of his injury. Claimant testified that at approximately 1:00 a.m. on March 13, 2015 he awoke to excruciating right shoulder pain. He contacted his supervisor and reported his right shoulder injury. On March 13, 2015 Employer directed Claimant to Injury Care of Colorado for an examination. On March 15, 2015 Employer completed a First Report of Injury that specified Claimant suffered a "shoulder strain" on March 12, 2015. Employer had thus been notified of an injury because it had some knowledge of the accompanying facts connecting the injury with Claimant's employment and a reasonably conscientious manager would recognize that the case might involve a potential compensation claim.

14. As found, Claimant continued to receive conservative medical treatment from Injury Care of Colorado. On April 30, 2015 Employer provided Claimant with a Designated Provider List. The document specified that, pursuant to W.C.R.P. 8-2(A), Claimant could obtain treatment from any of the four enumerated providers. Claimant chose Injury Care of Colorado from the List. Although Respondents failed to timely supply Claimant with a Designated Provider List pursuant to statute and Rule, Claimant signified through his words and conduct that he had chosen a physician to treat his injury. Claimant has thus already exercised his right of selection and chose Injury Care of Colorado to treat his March 12, 2015 right AC joint injury. His desire to obtain medical treatment from another physician thus requires him to obtain permission from Respondents or the approval of an ALJ.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. On March 12, 2015 Claimant suffered an industrial injury to his right shoulder during the course and scope of his employment with Employer.

2. Claimant has exercised his right of selection by choosing Injury Care of Colorado to treat his March 12, 2015 right AC joint injury.

. 3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 18, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable injury to her low back/right leg on December 22, 2014 while lifting a portable copy machine; and if so,

II. Whether she established, by a preponderance of the evidence, that the treatment rendered by Employer and his referrals, specifically Dr. Illig was reasonable, necessary and related to that December 22, 2014 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is employed as the office manager for Employer's medical practice. She has worked in this position for approximately the past 6 years.

2. Claimant manages the daily operations of the practice. She oversees billing, handles scheduling and supervises employee relations among other things.

3. On December 22, 2014, at approximately 8:15 a.m., Claimant testified that she bent over slightly to pick up a small copy machine, which she estimated to be 3 feet long by 2 feet wide, off a cart. As Claimant lifted the machine and twisted to the right to place it on a counter, she felt a pop and developed pain in her low back.

4. A co-worker, Laura Hartless was present and Claimant reported to her that she injured her back. Claimant did not report the injury to Employer. Rather, she continued her work hoping that her pain would simply "go away." Claimant's pain did not subside and she worked the balance of her work day in pain.

5. On December 23, 2014, testified that she went to work in pain but still did not report her injury to Employer.

6. On December 24, 2014, Claimant worked a half day in pain. The office closed early in advance of the Christmas Holiday. Although Claimant continued to mention back/leg pain to Ms. Hartless, she did not report it to Employer.

7. Claimant returned to work following the Christmas Holiday on December 29, 2014. According to Claimant, Employer asked her how her time off from work was to which she responded it was "horrible" secondary to pain caused by lifting the copier on December 22, 2014. Claimant's back was then examined by Employer, who is board

certified in internal medicine and also acts as Claimant's primary care provider (PCP) (See generally, Respondents' Exhibit A).

8. Although Claimant was evaluated medically by Employer, no report of a work related injury was completed by either Claimant or Employer on December 29, 2014. Claimant also testified that she was not referred to a designated provider for additional treatment at this time. Rather, Claimant testified that she was examined informally by Employer without a medical file being opened for her injury. Employer corroborated Claimant's testimony, testifying that he examined Claimant's back on December 29, 2014. Employer had no explanation regarding the absence of a treatment record for December 29, 2014, outlining Claimant's symptoms, his examination findings and any treatment rendered despite being aware that the cause of Claimant's pain came from lifting a portable copy machine.

9. Claimant has had sciatic pain, a self described diagnosis, off and on for years prior to December 22, 2014. As Claimant's PCP, Employer has treated flare ups of her sciatic pain previously. According to Employer, Claimant had sporadic flare ups of her sciatica once every couple of years for which he would provide Toradol and anti-inflammatories. Based upon the evidence presented, the ALJ finds that Employer, more probably than not, treated Claimant's report of increased back/leg pain in a similar fashion on December 29, 2014 and as a consequence of his prior treatment of Claimant did not feel it necessary to report a work related injury.

10. Claimant's pain did not improve with time and the limited care provided by Employer. On February 9, 2015, Claimant was seen in a "Follow-Up Visit" by Employer. A clinic noted was generated from this visit. The note reflects that Claimant was being seen for "sciatica" affecting the right leg and for "low back sprain." The note also reflects that Claimant "stooped over to pick up object" causing pain in the low back and down the outside of the right leg to the top of knee and a little bit below. When asked, Employer testified that he would have called the copier Claimant reported lifting an "object" in his medical record.

11. On March 30, 2015, Claimant was seen in follow-up by Employer who documented that Claimant was being seen for upper back pain. Careful review the clinic note generated from this date of encounter persuades the ALJ that Claimant's treatment on this date is unrelated to her low back sprain and right leg pain. Rather, the record reflects that Claimant was experiencing upper back and thorax "musculo-skeletal soreness and tenderness secondary to protracted coughing."

12. On April 17, 2015, Employer re-evaluated Claimant for persistent "sciatic pain." On this date of visit Claimant reported continued right leg pain which was worse for the past week. X-rays of the lumbar spine were ordered and Claimant was referred to physical therapy (PT).

13. X-rays obtained April 20, 2015 demonstrated "disk space narrowing L4-L5 and L5-S1 with moderate facet arthritis at L4-5 and L5-S1." The radiologist's

impression after viewing the x-rays was documented as "chronic changes lumbar spine."

14. Claimant presented for her initial PT evaluation on April 24, 2015. The report generated from this evaluation is devoid of any reference to Claimant experiencing increased back and leg pain secondary to lifting a portable copy machine. Rather, the report documents that Claimant reported a history of sciatic pain for many years that would "[go] away without treatment" most of the time. The report goes on to state that Claimant developed sciatic pain "approximately 2 weeks ago" that had not resolved. Claimant was assessed with having "low back instabilities as well as tight piriformis leading to radicular symptoms."

15. On May 8, 2015, Claimant was evaluated by Family Nurse Practioner (FNP), R. "Casey" Straight, as Employer was out of the office. Claimant testified that she could not stand completely up right by this date and the note generated from this date of visit documents that Claimant could not walk as it was "too painful to bear weight on right leg." FNP Straight assessed Claimant with right sciatica and degenerative disc disease with associated symptoms. He ordered an MRI.

15. MRI of the lumbar spine was performed May 13, 2015. The MRI demonstrated "[d]egenerative disk disease at L4-5 with severe spinal stenosis from a large extruded disk fragment" which had herniated posteriorly and extended caudally in the midline at that level.

16. Claimant testified that she met with Employer to review the findings on her MRI. Employer testified that the nature of Claimant's disc herniation, i.e. centrally and downward likely caused Claimant's leg symptoms. Based upon the MRI findings, Employer referred Claimant to Dr. Joseph Illig for a surgical consultation.

17. On May 15, 2015, Claimant completed a request to obtain a copy of her MRI images maintained on a compact disk (CD). In completing this form, Claimant did not check that a copy of the CD was needed for worker's compensation purposes. Rather, Claimant credibly testified that she checked the box entitled "Further Medical Care" because she was scheduled to see Dr. Illig and wanted to make sure he had a copy of her imaging.

18. Claimant was evaluated by Dr. Illig on May 20, 2015. She reported a chief complaint of "back pain with right leg pain with weakness and numbness." There is no mention of Claimant lifting a portable copy machine as the cause of her back and leg pain. Rather, Dr. Illig's medical record notes that Claimant's pain "began towards the end of March" and was "of gradual onset and without clear precipitating etiology." Dr. Illig noted that Claimant's pain had been "refractory" to medication and PT. He recommended an epidural steroid injection but also discussed the option of a L4-L5 decompression and discectomy. Claimant elected to proceed with surgery.

19. Claimant testified that she told Dr. Illig about picking up a copy machine and explained that the reference to a "gradual onset" was her account that her symptoms from the date of onset to her inability to stand "gradually" worsened with time.

20. Although reference to lifting a copy machine does not appear in the initial PT evaluation or Dr. Illig's consultation report, the ALJ finds from Employer's testimony that Claimant, more probably than not, lifted a portable copy machine and this activity is the likely cause of her symptoms and subsequent need for treatment. Consequently, the ALJ finds Claimant's testimony regarding the mechanism of injury (MOI) and her subsequent symptoms credible and persuasive despite the inconsistencies between her testimony and the content of the PT record and Dr. Illig's reports.

21. Dr. Illig took Claimant to the operating room on June 4, 2015, where he performed a "right L4-L5 partial hemilaminectomy, medial facetectomy, microdiskectomy, foraminotomy, decompression of descending L5 nerve root. The operative report from this date of service reflects that Dr. Illig interpreted Claimant's MRI as demonstrating a "partially calcified central disk bulge at L4-L5 with possible extruded disk fragment inferior to the space" along with "significant recess narrowing at L4-L5 right responsible for compression." Consequently, Dr. Illig noted that the surgery was "deemed reasonable." Based upon the evidence presented, including Claimant's testimony and the content of Dr. Illig's medical reports, the ALJ finds the surgery performed by Dr. Illig reasonably necessary and related to Claimant lifting a small copy machine on December 22, 2014.

22. While performing the aforementioned procedure, Dr. Illig discovered a L4 nerve root crossing the disc space lateral to the L5 nerve root. It was felt that this finding either represented a low take off of the L4 nerve below its pedicle or a conjoined L4 nerve root. Regardless, the procedure performed decompressed this nerve root as well. The report also notes that the thecal sac was decompressed following removal of soft disc material lodged beneath the L4 and L5 nerve roots. Finally the report notes that the more medial aspect of the disc in question was calcified and left alone, because the thecal sac was "nicely decompressed and pulsatile" with removal of the soft disc material found "right underneath" the above referenced nerve roots.

23. Employer testified that the extruded disc fragment was recent and an acute finding. Based upon the testimony of Employer, Dr. Illig's interpretation of the MRI findings and the actual pathology observed during surgery, the ALJ finds that there were both acute and chronic changes located at the L4-L5 level of Claimant's lumbar spine. Based upon the evidence presented, the ALJ finds that the extruded disc fragment causing severe stenosis, more probably than not, represents an acute finding explaining Claimant's sudden onset of intractable back and right leg pain which failed to resolve as it customarily had in the past. The ALJ credits the testimony of Employer to find that the popping Claimant felt when lifting the copier was probably associated with the rupture of her diseased L4-L5 calcified disc causing an extruded fragment to compress the nerve roots in the area leading to Claimant's immediate onset of low back and right leg pain.

24. The majority of costs associated with Claimant's medical treatment, including the costs linked to her MRI and surgery were covered by her personal health insurance. Claimant testified that when she began receiving billing invoices for her care, she approached Employer and asked why the costs of her treatment were not covered by workers' compensation given that the need for treatment was a direct consequence of the December 22, 2014 work related lifting incident. It was discovered that no claim associated with her low back injury had been filed.

25. A document from the Colorado Division of Labor (Division), entitled "First Report Display/Update" reflects that a claim administrator was notified of Claimant's December 22, 2014 injury on August 28, 2015. The document provides that Employer was notified of the injury on December 29, 2014. Despite notification on August 28, 2015, the claim was not received by the Division until October 28, 2015. The description of injury appearing on the First Report Display/Update form is consistent with Claimant's testimony regarding the cause of her pain, namely that she was lifting a copy machine. The documents provides: "strain from lifting or carrying- clmt reports herniated disk from lifting a copy machine. Medical, surgery, and lost time claim."

26. Based upon the evidence presented, the ALJ is persuaded that steps to report Claimant's December 22, 2014 injury were taken by Employer after he and Claimant discussed her receipt of bills associated with her surgery by Dr. Illig despite his knowledge that Claimant had injured her back/leg while lifting a copy machine on December 22, 2014. The evidence presented also convinces the ALJ that Employer delayed sending the claim information to the Division as evidenced by the indication on First Report Display/Update documentation that the claim was not received until October 28, 2015. Consequently, the ALJ finds it probable that Employer delayed sending an initial report of injury to the Division despite Claimant's report of injury to Employer early on. Given these facts and Employer's testimony that he was aware that Claimant was injured while stooping to lift an object he understood to be a copy machine which resulted in his treatment of Claimant on December 29, 2014, the ALJ finds, Respondents' suggestion that Claimant only reported/filed her claim when she became aware she would have out of pocket expenses associated with the treatment she received from Dr. Illig unconvincing.

27. Claimant has established by a preponderance of the evidence that she sustained an injury to her low back/right leg while lifting a portable copy machine as part of her duties as Employer's office manager on December 22, 2014.

27. Claimant has proven by a preponderance of the evidence that her December 22, 2014, work injury caused her need for the medical treatment she received from Employer and his referrals, including Dr. Illig. Specifically, the ALJ finds that Claimant has met her burden of proof to establish that the surgery/treatment provided by Dr. Illig was reasonable, necessary and causally related to her December 22, 2014 industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). As noted in this case, Claimant's testimony is credible, convincing and supported by the testimony of Employer.

C. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000)*

Compensability

D. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(l)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of her employment relationship with Employer and during an activity, specifically moving a portable copier which is connected to her duties and position as office manager for Employer. Nonetheless, the question of whether the alleged injury "arose out of" Claimant's employment must be resolved before the injury is deemed compensable.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while performing job duties, does not mean that she sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

G. In this case, the question is whether Claimant's low back and right leg pain and her subsequent need for treatment was caused by her work related functions of moving a portable copy machine. Here, the evidence presented establishes that Claimant bent at the waist slightly and twisted to the right in an effort to lift and move a small copier from a cart to a counter. In the process, Claimant felt a pop and developed immediate pain in her back and right leg which failed to respond to conservative care. Claimant's testimony regarding the mechanism of injury and her symptoms is largely supported by Employer who is also a physician and Claimant's PCP. Here, the objective medical evidence presented supports a reasonable inference that the extruded disc fragment, compressing the L4 and L5 nerve roots, visualized on MRI and subsequently during surgery, was likely caused by an acute rupture of her diseased L4-L5 disc. More probably than not, the rupture was caused by lifting and twisting with the copier in question rather than the natural progression of a pre-existing, non-work-related condition as suggested by Respondents' counsel. Furthermore, Respondents' suggestion that Claimant fabricated her injury and only reported it after she began to receive billing invoices for the out of pocket expenses associated with her surgery is not supported by the totality of the persuasive evidence. Consequently, the ALJ concludes that a logical causal connection exists between the Claimant's injury/symptoms and her work-related duties on December 22, 2014. The claim is compensable.

Medical Benefits

H. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

I. In this case, the record evidence demonstrates that Claimant's initial care from Dr. Reppert (Employer) and his referrals to physical therapy and Dr. Illig were reasonable, necessary and related to her acute low back/right leg injury. Dr. Reppert's care and treatment was necessary to assess and treat the acute effects of her injury. Additionally, the PT referral was reasonable and necessary to determine if Claimant would respond to directed rehabilitation efforts. Finally, the referral to Dr. Illig was reasonable and necessary given the findings on Claimant's MRI and her failed response to PT. As found, the compressive nature of the pathology noted on MRI made the surgery performed by Dr. Illig a reasonable and necessary modality to ameliorate Claimant's ongoing symptoms.

ORDER

It is therefore ordered that:

1. Claimant's December 22, 2014 low back/right leg injury is compensable.

2. Respondent shall pay for all reasonable, necessary and related medical treatment, resulting from the Claimants compensable low back/right leg injury, including but not limited to the care provided by Employer and his referrals, specifically all diagnostic studies, PT and the surgery performed by Dr. Illig.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 26, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Respondents have produced clear and convincing evidence to overcome Dr. Hall's Division IME opinion that Claimant has not reached maximum medical improvement (MMI).

II. If Respondents failed to prove by clear and convincing evidence that Dr. Hall's opinion regarding MMI is clearly erroneous, whether Claimant established, by a preponderance of the evidence, that the need for the recommended surgeries to her left thumb and left shoulder are causally related to her admitted March 13, 2005 work injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant sustained an admitted injury to her left knee on March 13, 2005, when she overstepped while running down stairs at work. After substantial conservative treatment, Claimant was placed at MMI on July 24, 2005. The claim was subsequently reopened for surgical treatment in the form of a left knee arthroscopy which took place on November 23, 2009.

2. Claimant received little benefit from the arthroscopy. Consequently, Claimant underwent a left total knee replacement on March 5, 2010, as performed by Wallace Larson, M.D. On December 10, 2012, Claimant underwent a revision surgery to the left knee. Following additional post surgery treatment, she was again placed at MMI on April 18, 2013 by Dr. Nanes.

3. Claimant applied for a Division Independent Medical Examination (DIME). On August 26, 2013, prior to the DIME, Dr. Nakamura recommended another revision to the posterior cruciate retaining prosthesis in the left knee.

4. The DIME was performed by Timothy Hall, M.D. on September 5, 2013. Dr. Hall noted Dr. Nakamura's recommendation for another revision surgery and concluded that Claimant was not at MMI with respect to the left knee.

5. At the DIME appointment with Dr. Hall, Claimant reported injuries to her head, neck and arms/hands as a consequence of falling, while standing on a bed to hand some curtains, when her knee buckled on October 21, 2012. Dr. Hall opined that it would not be unreasonable that the knee would buckle causing her to fall, particularly on an unstable surface such as a bed.

6. Respondent challenged Dr. Hall's MMI determination and a hearing was held before ALJ Walsh on January 9, 2014. In a February 25, 2014 order, ALJ Walsh concluded that Respondent failed to establish by that the opinion of Dr. Hall regarding MMI, was "clearly erroneous." Accordingly, ALJ Walsh ordered Respondent to pay for the revision surgery recommended by Dr. Nakamura. Other issues not determined were reserved for future decision.

7. The February 25, 2014 order did not specifically address the relatedness of the need for treatment to the additional body parts raised by Claimant during the September 5, 2013 DIME. Although addressed by Dr. Hall during the DIME, ALJ Walsh's only comment regarding Claimant's asserted low back pain is contained at paragraph 11 of the February 25, 2014 order wherein ALJ Walsh noted that Claimant complained of low back pain on April 24, 2012 and that Dr. Nanes informed her to follow-up with her primary doctor as Dr. Nanes did not feel Claimant's back pain was work related. ALJ Walsh commented on the other body parts in paragraphs 18 and 19 of the order, noting Dr. Hall's opinion, and noting further that Claimant made no mention of pain in the aforementioned additional body parts until January 3, 2013, despite having seen Dr. Nanes on two occasions after the incident of falling on the bed.

8. Claimant underwent the recommended revision surgery to the left knee on June 8, 2014 by Dr. Nakamura, as ordered by ALJ Walsh.

9. A second hearing was held on January 29, 2015 before ALJ Walsh. Among the issues heard by ALJ Walsh at the January 29, 2015 hearing was the question of whether Claimant's head, neck, low back and upper extremity injuries were related to Claimant's March 13, 2005 work injury. In an April 2, 2015 decision, ALJ Walsh found that the "medical issues with [Claimant's] back, head, neck and shoulders [were] related to her industrial injury of March 13, 2005." Consequently ALJ Walsh ordered Respondent to pay for all reasonable, necessary and related medical care to cure and relieve the claimant from the effects of her conditions to her back, head, shoulders, neck and upper extremities." In ordering such treatment, ALJ Walsh noted that these additional body parts were "specifically part of the opinion by the DIME physician" on September 5, 2013.

10. On April 15, 2015, Dr. Larsen evaluated the condition of Claimant's left thumb. After noting that Claimant fell while hanging curtains when her surgical knee buckled which resulted in a "jamming injury", Dr. Larsen reached the following impression:

> Ms. Williams has very severe thumb base arthritis. It sounds like she either has a traumatic injury back in 2012 that progressed to this degree of arthritis or she had arthritis that was developing but not symptomatic to her and sustained a traumatic aggravation of that arthritis that has caused her to have progressive symptoms."

11. On July 27, 2015, Dr. Weinstein evaluated the condition of Claimant's shoulders. In a report following that examination, Dr. Weinstein noted that while Claimant was hanging curtains her surgical knee gave away "causing her to fall on a bedframe, catching all of her weight with both of her hands. She has had issues since that time. Dr. Weinstein noted that the MRI of the right and left shoulder demonstrated rotator cuff tearing. He noted various treatment options including an arthroscopic subacromial decompression with rotator cuff repair and possible biceps tenodesis. Claimant expressed a desire to proceed with surgery. Consequently, Dr. Weinstein, requested prior authorization which request was subsequently denied pursuant to Rule 16 on the opinion of Mark Failinger, M.D. who opined that the need for surgery was not related to Claimant's March 13, 2005 work injury.

12. On July 29, 2015, Karl Larsen, M.D. recommended a suspension arthroplasty for Claimant's left thumb. Respondent denied the request for surgery under Rule 16 based on the August 6, 2015 opinion of Jonathan Sollender, M.D. who opined that the need for surgery was not related to the work injury.

13. In response to Dr. Larsen's July 8, 2015 request for a left thumb CMC arthroplasty, Dr. Sollender commented that it was highly suspect that a fall in October 2012 injured Claimant's left thumb. Nevertheless, recognizing that the ALJ had found that the left thumb injury was caused by the fall on the bed, Dr. Sollender stated that if she had sprained her thumb, "the effects of a sprain are usually temporary, with a short period of disability followed by return to a baseline condition." He stated that Claimant's baseline condition is generalized osteoarthritis and that it was not aggravated, accelerated or otherwise caused by the October 2012 incident. In his opinion, "the fall played no part in the subsequent worsening of her osteoarthritis to the point she is now at with Dr. Larsen." He determined that the left thumb osteoarthritis is not posttraumatic, but is due to the "ravages of time." According to Dr. Sollender, the surgery recommended by Dr. Larsen is necessary to address Claimant's non-work related, non-work aggravated progressive osteoarthritis.

14. In response to Dr. Weinstein's July 27, 2015 request to repair the rotator cuff in Claimant's left shoulder, Dr. Failinger commented that the records did not support the conclusion that the claimant suffered a significant trauma to the left shoulder in the October 21, 2012 fall. Dr. Failinger recognized that Dr. Hall had not recommended treatment for the left shoulder, although he had described right shoulder symptoms. Dr. Failinger concluded that, given the claimant's age of 58, she had a high probability of having a degenerative rotator cuff on both shoulders and Dr. Failinger found no support that the fall caused significant change in pathology at the time of the fall. The symptoms that appeared later were, "with very high probability related strictly to degenerative and aging phenomenon." He stated that any significant pathology would have been symptomatic within a few days of a fall, or at the most within a couple weeks.

15. Claimant applied for hearing on the surgical requests prompting Respondent to seek an opinion from Dr. Elizabeth Bisgard on January 4, 2016. Dr.

Bisgard, assessed Claimant has having bilateral shoulder degenerative joint disease with degenerative rotator cuffs, and left thumb CMC arthritis. Given her review of the records, Dr. Bisgard opined that if claimant did injure her left thumb and shoulders when she fell in October 2012, the injuries were minor. She noted that the MRI findings were consistent with age-related degenerative changes. She noted that Claimant initially reported that the pain in her shoulders was caused by use of a walker and crutches even though the surgery that led to her using these assistive devices occurred after the October 2012 fall. She agreed with Dr. Hall's original DIME report where he made no recommendations for treatment of the left shoulder. With regard to the left thumb, Dr. Bisgard concluded that the mechanism of injury, that of falling on a mattress, would be consistent with a mild sprain at most. Given no reported symptoms to the left thumb for over a year would indicate that falling on a mattress was not the underlying cause of the need for surgery. Dr. Bisgard agreed with Dr. Hall's original DIME report that made no mention of a need for treatment to the left thumb. She agreed with Dr. Nanes that the claimant was at MMI. Dr. Bisgard subsequently would testify consistently with these previously expressed opinions.

16. Prior to requested hearing concerning Claimant's entitlement to the aforementioned surgeries, Dr. Nanes placed Claimant at MMI for a third time on February 16, 2016. Accordingly, Claimant returned to Dr. Hall for a follow-up DIME on April 5, 2016. Dr. Hall again found that Claimant was not at MMI and recommended moving forward with the surgeries recommended by Dr. Weinstein and Dr. Larsen. In his follow-up DIME report, Dr. Hall notes:

> I do not understand what the problem is here as far as getting the shoulder operated. The Division Independent Medical examination has stated that the shoulder is related to the compensable injury. This apparently has been upheld by the ALJ. She needs to have the shoulders treated and it appears this will require surgery. She is therefore not at maximum medical improvement at this time and requires further treatment involving both shoulders."Respondent applied for hearing to overcome Dr. Hall's opinion.

17. The undersigned ALJ finds from the follow-up DIME that Dr. Hall attributes Claimant's need for shoulder surgery to her work related injury which subsequently caused her to fall while hanging curtains.

18. Regarding the left thumb, Dr. Hall noted that Claimant's pain in the thumb is a "consequence" of the fall. The ALJ infers and finds from the evidence presented, including Dr. Hall's DIME report and the report of Dr. Larsen, that Claimant probably aggravated a pre-existing condition in the left thumb casing it to become symptomatic which pain persists giving raise to her current need for surgery.

19. Claimant argues that the issue of Claimant entitlement to surgery was previously decided by ALJ Walsh in his April 2, 2015 order since that order concluded that Claimant's upper extremity conditions were related to her March 13, 2005 work injury. Consequently, Claimant argues that the "Law of the Case Doctrine" applies

concerning the relatedness of Claimant's need for surgery which precludes Respondents from getting a "third bite at the apple" concerning denial of the aforementioned surgeries.

20. Based upon the evidence presented, the ALJ is not persuaded that the issue concerning the relatedness of Claimant's need for surgery to the left thumb and shoulder to the March 13, 2005 injury was before ALJ Walsh at the January 29, 2015 hearing. Indeed at the time of the January 29, 2015 hearing, surgery for the left shoulder and thumb had not yet been recommended. Based upon the evidence presented, the ALJ finds the issue concerning the relatedness of Claimant need for surgery to her work injury to be different than the relatedness of Claimant's shoulder and thumb condition to the work injury of March 13, 2005, which was decided by ALJ Walsh following hearing on January 29, 2015. Consequently, the ALJ is not persuaded that the "Law of the Case Doctrine" or estopple principals preclude Respondents from litigating the question of relatedness of Claimant's need for surgery to her March 13, 2005 industrial injury.

21. Based upon review of Claimant's medical records, the ALJ is convinced that Claimant had likely been informing Dr. Richard Nanes, the authorized treating provider in this case, that she developed symptoms in her shoulders and thumb after her fall while trying to hang curtains. Symptoms in the left thumb are clearly delineated in Claimant's pain diagrams as of November 19, 2013. Respondent questions Claimant's shoulder and thumb symptoms as being related to the March 13, 2005 or October 21, 2012 incidents based upon a lack of markings documenting such complaints on pain diagrams and the absence of documentation of such complaints in Dr. Nanes medical records.

22. In a report following a follow-up examination on September 24, 2015, Dr. Nanes addressed this concern, noting as follows: "There apparently is some discussion that her bilateral shoulder pain was not included in her past pain diagrams. I think this was from the fact that insurance was not covering these injuries and I do recall advising the patient not to include them in her pain diagram as they were not being covered." Because Dr. Nanes admits he told Claimant not to include such complaints in her pain diagrams, the ALJ finds that Dr. Nanes, probably did not include Claimant's complaints of left shoulder and thumb pain in his documentation either.

23. Based upon the evidence presented, the ALJ finds that the opinions expressed by Dr. Hall in his DIME report are generally supported by the content of the medical records presented to him for review. Moreover, the ALJ finds a paucity of evidence to suggest that Dr. Hall erred in the methodology he employed to complete the original DIME and the follow-up DIME in this case. While Dr. Hall clearly noted that he was not making a "separate opinion that [Claimant] needs surgery", he articulated that Claimant's need for left shoulder and thumb surgery were related to her fall which occurred when her knee gave out while hanging curtains.

24. The evidence presented persuades the ALJ that there is a mere difference of opinion between the Dr. Hall as the division independent medical examiner and Respondent's retained medical experts, i.e. Dr. Failinger, Dr. Sollender, and Dr. Bisgard. Consequently, Respondents have failed to meet their required legal burden to set Dr. Hall's opinion regarding MMI aside.

25. Claimant has proven by a preponderance of the evidence presented that her need for surgical intervention concerning the left shoulder and thumb is causally related to her March 13, 2005 industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). As found here, Dr. Hall's opinions are supported by the content of the medical records he reviewed. As such, the ALJ finds Dr. Hall's opinions credible and convincing. There is also a lack of persuasive evidence to support a conclusion that Dr. Hall deviated from the accepted methodology of the AMA Guidelines when he completed both the original and follow-up DIME's in this case. Indeed, Respondent makes no such assertion. Rather, Respondent's contend that the DIME has been overcome based upon inconsistencies in the record and the opinions Dr's. Failinger, Sollender and Bisgard regarding the reason Claimant need surgery on her shoulder and thumb. As found, the evidence presented fails to persuade the undersigned ALJ that

Dr. Hall's opinion regarding the relatedness of Claimant's need for surgery to her industrial injury is "clearly erroneous."

Overcoming the DIME

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

D. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

E. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. Here, the weight of the persuasive evidence demonstrates that Claimant's need for additional surgical intervention is directly related to her industrial injury. Because this treatment presents a reasonable prospect for curing and relieving Claimant of the ongoing effects caused by the traumatic injuries sustained and, in the case of her left thumb, the aggravation of her pre-existing osteoarthritis, Claimant is not at MMI. See *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001), *aff'd. Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA0401, February 14, 2002)(*not selected for publication)* (citing *PDM Molding v. Stanberg,* 898 P.2d 542 (Colo. App. 1995*)* and *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995)]; *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (August 11, 2000).

F. After considering the totality of the evidence presented, including the DIME reports and testimony of Dr. Hall, the ALJ concludes that Respondent has failed to produce unmistakable evidence establishing that the Dr. Hall's determination regarding MMI is highly probably incorrect. Rather, the ALJ concludes that the evidence presented establishes a mere difference of opinion regarding causation between the DIME physician and the medical experts (Dr. Failinger, Dr. Sollender and Dr. Bisgard) retained by Respondent. A professional difference of opinion does not rise to the level of clear and convincing evidence that is required to overcome Dr. Hall's opinion concerning MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents have failed to meet their required legal burden to set Dr. Hall's MMI determination aside.

Relatedness of Claimant's Need for Left Shoulder and Left Thumb Surgery to her March 13, 2005 Work Injury

G. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

H. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

I. Based on the totality of the evidence presented, the ALJ credits the opinions of Dr. Hall, Dr. Weinstein and Dr. Larsen to conclude that Claimant's need for surgical treatment for her rotator cuff/shoulder and left thumb pathology are related to her admitted March 13, 2005 work injury, which subsequently caused her knee to buckle and give out leading to the aforementioned shoulder and thumb conditions described above and in ALJ Walsh's April 2, 2015 order. As found above, the conclusions of Dr's Weinstein and Larsen persuade the ALJ that Claimant likely suffered a traumatic injury to the shoulders in addition to a compensable aggravation of a pre-existing condition in the left thumb. ALJ Walsh concluded similarly. Consequently, the ALJ concludes that Claimant has establish a causal connection between her admitted March 13, 2005 work injury and her need for surgical treatment for the aforementioned conditions. Thus, Respondents are liable to provide payment for such treatment.

ORDER

It is therefore ordered that:

1. Respondents request to set aside the DIME opinion of Dr. Hall regarding MMI is denied and dismissed.

2. Respondents shall pay for all reasonable, necessary and related medical expenses to cure and relieve the Claimant from the effects of her left shoulder and left thumb condition, including surgery recommended by Dr. Weinstein and Dr. Larsen.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 1, 2016

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

➢ Whether claimant had proven by a preponderance of the evidence that the medical treatments recommended by Dr. Price (including occupational therapy with physical therapist Gary Krabbe, an epicondylar arm band, ketamine compound cream, and acupuncture) are reasonable and necessary to cure and relieve claimant from the effects of the March 26, 2015 work injury.

FINDINGS OF FACT

1. Claimant began her employment with employer in 2009 and obtained her teaching license in 2011. Claimant was working as a lead teacher at North Fork Montessori School in March 2015.

2. Claimant suffered an admitted injury to her left wrist, hand, and fingers on March 26, 2015. The injury occurred when claimant was attempting to prevent a confrontational student from exiting a door and potentially assaulting another student. While claimant held the door shut the student grabbed claimant's left thumb and bent it back so that it was touching claimant's wrist. The student also bent claimant's left index finger back during the confrontation. Claimant testified that she felt sharp pain from the bending of her fingers.

3. Claimant testified that immediately after the incident her hand was purple and swollen. In addition her fingers felt like "they were on fire". Claimant testified that although only two of her fingers had been bent by the student, all five of her left fingers were in pain. Claimant testified that she felt pain from her left fingers all the way up to her left elbow.

4. Claimant reported the March 26, 2015 incident and her injury to Todd Markley, Assistant Superintendent for employer. Mr. Markley instructed claimant that if she sought medical care prior to 5:00 p.m. she should go to Dr. Timothy Meilner and if it was after 5:00 p.m. she should go the emergency room ("ER").

5. There was some delay in claimant receiving medical treatment because she had to wait at the school to provide a statement to local law enforcement. It was after 5:00 p.m. when the claimant was able to seek medical care at the ER where she was given a wrist splint and an x-ray was taken. The x-ray showed no fractures or dislocation. Dr. Steve Padua indicated in his report that claimant had a soft tissue injury around the wrist with ligament injury. Claimant's description to ER staff regarding the incident was consistent with her testimony at hearing.

6. Claimant testified that she had arthroscopic surgery to her left elbow when she was 17 years old. Claimant is now 40 years old. Claimant testified that she fully recovered from that prior surgery and at the time of her work injury she had no limitations to with her left fingers, wrist, hand, or elbow. The ALJ finds claimant's testimony in this regard to be credible.

7. Claimant testified that the wrist splint the ER provided partially immobilized the four digits on her left hand, but did not immobilize her left thumb. Claimant returned to work on March 27, 2015 and with the wrist splint provided by the ER she was able to type with her left hand. Claimant testified that when she returned to work her wrist was discolored, swollen and very painful.

8. On April 6, 2015 claimant was treated by her authorized treating physician ("ATP") Dr. Timothy Meilner. Dr. Meilner diagnosed claimant with ligament and nerve damage and provided claimant with a different splint that immobilized claimant's thumb. Dr. Meilner also recommended a magnetic resonance image ("MRI") of claimant's left wrist. The MRI was conducted on April 22, 2015 and showed a small ganglion cyst, no fractures, and possible degenerative cystic changes of the capitate.

9. On May 1, 2015 claimant treated with Dr. Richard Ackerson on the recommendation of Dr. Meilner. Dr. Ackerson diagnosed claimant with intersection syndrome and administered cortisone shots. Claimant testified that these cortisone shots reduced the level of pain she was experiencing.

10. Dr. Meilner referred claimant for electrodiagnositic studies which were ultimately performed on December 23, 2015 by Dr. Logan McDaneld. Dr. McDaneld determined that claimant has a very mild left ulnar nerve injury at the level of her elbow. Dr. McDaneld also noted in his report that it is his opinion that the majority of claimant's symptoms were coming from her ulnar nerve rather than the carpal tunnel.

11. Claimant began treating with Dr. Ellen Price in February 2016 on the recommendation of Dr. Ackerson. Dr. Price testified that it is her opinion that claimant's ongoing pain symptoms are related to the March 26, 2015 work injury. Dr. Price has recommended a number of modes of treatment for claimant that have been denied by respondents; including occupational therapy with physical therapist, Gary Krabbe, an epicondylar arm band, ketamine compound cream, and acupuncture. Dr. Price testified that each of these recommended medical treatments are listed in the Medical Treatment Guidelines for treating chronic pain disorder.

12. Dr. Price testified that acupuncture may be the best treatment for all of claimant's pain symptoms and the epicondylar arm band will treat claimant's tendonitis symptoms.

13. Claimant testified that prior to the denial of occupational therapy with Gary Krabbe she received some treatment with Mr. Krabbe, who is a hand specialist. Claimant testified that during the time she was treating with Mr. Krabbe she felt a

reduction in the level of pain in her left wrist and elbow. Dr. Price testified that treatment with Mr. Krabbe seemed to be one of the only treatments that was helping claimant.

14. Claimant testified that she does not like taking medications. Dr. Price testified that the ketamine compound cream would provide claimant with pain relief without taking oral pain medications.

15. On February 4, 2016 Dr. Kathy McCranie reviewed claimant's medical records and opined that based upon the mechanism of claimant's injury, claimant's cubital tunnel syndrome and carpal tunnel syndrome are not related to the work injury. Dr. McCranie also opined that claimant "is approaching" maximum medical improvement ("MMI").

16. Employer issued a General Admission of Liability ("GAL") March 10, 2016 in which employer admitted for medical benefits only.

17. On March 27, 2016 Dr. Carlton Clinkscales reviewed claimant's medical records. Dr. Clinkscales noted that the April 22, 2015 MRI did not show any specific soft tissue or bony trauma and described claimant's injury as "very mild".

18. Dr. Price referred claimant to Dr. George Schakaraschwili for testing to determine if claimant has complex regional pain syndrome ("CRPS"). On July 8, 2016, Dr. Schakaraschwili performed the recommended CRPS testing. Based upon the tests he performed, Dr. Schakaraschwili opined that there was a "low probability" for the presence of CRPS. Based upon this information, Dr. Price testified that claimant's current diagnoses include intersection syndrome and tendonitis, particularly in her elbow.

19. Dr. Jon Erickson performed a review of claimant's medical records and issued a written report in which he opined that the treatments recommended by Dr Price are not justified. Dr. Erickson agreed that Dr. Price has appropriately applied the Medical Treatment Guidelines for chronic pain disorder in addressing claimant's conditions. However, it is Dr. Erickson's opinion that claimant's symptoms Dr. Price is attempting to treat are not caused by or related to claimant's March 26, 2015 injury. It is also Dr. Erickson's opinion that claimant's symptoms could be caused, in part, by psychosocial issues. Dr. Erickson's testimony was consistent with his report.

20. Dr. Robert Kleinman performed a psychiatric independent medical exam ("IME") of claimant on August 30, 2016. Dr. Kleinman's performed a psychiatric interview of the claimant and reviewed claimant's medical records and opined in is IME report that claimant has post-traumatic stress disorder and psychological factors arising out of the March 26, 2015 work injury. Dr. Kleinman also opines that these psychological factors are affecting claimant's medical condition. Dr. Kleinman's testimony was consistent with his IME report.

21. Dr. Kleinman testified that he agrees with Dr. Price's recommendation that claimant pursue cognitive behavioral therapy to address the psychological factors

impacting her pain disorder. Prior to hearing respondents authorized psychotherapy treatment for claimant.

22. The ALJ credits the claimant's testimony at hearing, Dr. Price's testimony and report, and the medical records, and finds that it is more likely than not that the treatments recommended by Dr. Price (including occupational therapy with Gary Krabbe, an epicondylar arm band, ketamine compound cream, and acupuncture) are reasonable and necessary to cure and relieve claimant from the effects of the March 26, 2015 work injury. The ALJ notes the conflicting medical opinions expressed in this case, but finds the opinions expressed by Dr. Price to be more credible and persuasive than the contrary opinions expressed by Dr. Erickson and Dr. McCranie.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2015). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has proven by a preponderance of the evidence that the medical treatment recommended by Dr. Price, including occupational therapy with physical therapist Gary Krabbe, an epicondylar arm band, ketamine compound cream, and acupuncture, are reasonable and necessary to cure and relieve claimant from the effects of her work injury. As found, the opinion of Dr. Price in this regard is determined to be more credible and persuasive than the contrary opinions expressed by Dr. Erickson and Dr. McCranie. As found, the ALJ credits claimant's testimony at hearing as being credible and persuasive and finds that claimant has proven by a preponderance of the evidence that the requested medical treatment is reasonable, necessary, and related to her work injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical treatments recommended by Dr. Price, including occupational therapy with physical therapist Gary Krabbe, an epicondylar arm band, ketamine compound cream, and acupuncture, pursuant to the Colorado Medical Fee Schedule.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 7, 2016

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-953-561-02

ISSUES

➢ Whether claimant has proven by a preponderance of the evidence that the recommended consultation with Dr. Stephen Annest is medical treatment that is reasonable, necessary, and related to the work injury claimant sustained on May 23, 2014.

➢ Whether Respondents have proven by a preponderance of the evidence that claimant's claim for reasonable, necessary, and related medical treatment is barred by the doctrine of issue preclusion.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to her right shoulder on May 23, 2014. The injury occurred when claimant was lifting a bag of resident laundry and felt and heard a pop in her right shoulder. Respondents admitted liability for claimant's injury. Claimant subsequently underwent two shoulder surgeries to her right upper extremity.

2. Dr. David Lorah placed claimant at maximum medical improvement ("MMI") on May 8, 2015 with an impairment rating of 6% to her right upper extremity. On July 21, 2015, respondents filed a final admission of liability ("FAL") based upon Dr. Lorah's determined date of MMI, impairment rating, and admitted for ongoing maintenance medical benefits. Claimant objected to the FAL and requested a Division-sponsored independent medical examination ("DIME").

3. Dr. Ellen Price performed a DIME of claimant on November 18, 2015. Dr. Price determined that claimant reached MMI on June 9, 2015 and applied an impairment rating of 24% to claimant's right upper extremity.

4. As indicated by the medical records, claimant was treated by Dr. David Lorah on November 30, 2015. At that time, Dr. Lorah referred claimant to physical therapy for thoracic outlet syndrome ("TOS"). In his report, Dr. Lorah indicated that he would consider referral for a TOS consultation. Claimant testified that this was the first time she learned that it was possible that she has TOS.

5. On December 4, 2015, respondents filed a FAL admitting to the MMI date of June 9, 2015, an impairment rating of 24% for claimant's right upper extremity, and ongoing maintenance medical benefits.

6. Claimant objected to the December 4, 2016 FAL and on December 8, 2015, applied for hearing on the issues of whether she was entitled to a conversion to a

whole person impairment rating and disfigurement benefits. A hearing on these issues was scheduled for May 3, 2016.

7. On December 30, 2015, insurer denied continued sessions of physical therapy and the neurological consultation recommended by Dr. Lorah. It is undisputed that claimant's counsel contacted respondents' counsel to discuss endorsing the denial of the neurological consultation for the scheduled May 3, 2016 hearing. Respondents declined to endorse that issue.

8. On January 4, 2016, Dr. Richard Sanders examined claimant and diagnosed right neurogenic thoracic outlet syndrome and right neurogenic pectoralis minor syndrome. In his report, Dr. Sanders recommended claimant complete physical therapy and that if her symptoms did not improve she could be a candidate for surgery for thoracic outlet syndrome.

9. On January 20, 2016, Dr. Lorah concurred with Dr. Sanders' recommendation for physical therapy and opined that by pursuing physical therapy claimant could possibly avoid surgery for thoracic outlet syndrome.

10. On May 3, 2016, the parties proceeded to hearing before ALJ Keith E. Mottram on the issues of whether claimant suffered a functional impairment to part of the body that was not contained on the impairment schedule and whether she was entitled to a disfigurement award. No other issues were endorsed for hearing at that time. Judge Mottram issued his Findings of Fact, Conclusions of Law and Order on June 7, 2016 in which he found that claimant had sustained a functional impairment and was entitled to an impairment rating of 14% whole person. Judge Mottram's order also states "[a]ll matters not determined herein are reserved for future determination."

11. On May 5, 2016, claimant applied for hearing on the current issue of whether the recommended consultation with Dr. Annest is reasonable and necessary medical treatment.

12. The ALJ credits the testimony of claimant and the opinions of Drs. Sanders and Lorah and finds that it is more probable than not that the recommended neurological consultation with Dr. Annest to address the possible diagnosis of TOS is reasonable, necessary, and related to the work injury she sustained on May 23, 2014.

13. The ALJ credits the testimony of claimant and the medical records and finds that she was not aware of the possible diagnosis of TOS until late November 2015, which was after the November 18, 2015 DIME conducted by Dr. Price. The ALJ further notes that respondents did not deny the neurological consultation until December 30, 2015. Therefore, the issue of whether the consultation constitutes reasonable, necessary, and related medical treatment was not yet ripe for hearing when the claimant applied for hearing on December 8, 2015.

14. Respondents argue that the matter before this court regarding the referral to Dr. Annest is an attempt by claimant to circumvent the DIME process. The ALJ finds that the issue of a possible TOS diagnosis was not raised during the DIME process, as

that diagnosis was not suggested until after the completion of the DIME. Furthermore, the possible diagnosis of TOS was not an issue addressed in the DIME. Therefore, there is nothing for the claimant to overcome with regard to the DIME as it relates to a potential diagnosis of TOS. The issue for hearing is simply whether claimant has proven that the recommend medical treatment is reasonable, necessary, and related to her work injury.

15. The ALJ credits the statements made by counsel at the outset of hearing that claimant's counsel proposed the addition of the neurological consultation denial to the issues endorsed for the May 3, 2016 hearing and respondents declined. The ALJ notes that until the present matter, the specific issue regarding the reasonableness and necessity of the neurological consultation with Dr. Annest had not yet been addressed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2013). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2013).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury,

the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

5. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

6. As found, the ALJ concludes that the neurological consultation with Dr. Stephen Annest is medical treatment that is reasonable, necessary, and related to the work injury she sustained on May 23, 2014. As found, claimant's testimony, and the opinions of Drs. Sanders and Lorah are credible and persuasive.

7. Issue preclusion may be invoked in workers' compensation proceedings. *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44 (Colo. 2001). Issue preclusion precludes relitigation of an issue where: (1) the issue to be precluded is identical to an issue determined in the prior proceeding; (2) the party against whom estoppel is sought was a party to or in privity with a party to the prior proceeding; (3) there was a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.* at 47; citing *Bebo Constr. Co. v. Mattox & O'Brien, P.C.,* 990 P.2d 78 (Colo. 1999); *Guar. Nat'l Ins. Co. vs. Williams*, 982 P.2d 306 (Colo. 1999) ; and *Indus. Comm'n v. Moffat County Sch. Dist. RE No. 1*, 732 P.2d 616 (Colo. 1987). See also *Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396 (1973).

8. As found, respondents have failed to prove that there is an identical issue from one that was actually adjudicated at the prior hearing. In the prior hearing, the issues were whether claimant suffered a functional impairment to part of the body that was not contained on the impairment schedule and whether she was entitled to a disfigurement award. The new issue addressed in this case involves whether the recommended surgical consultation with Dr. Annest is medical treatment that is reasonable, necessary, and related to the work injury she sustained on May 23, 2014. As found, the current issue is not precluded under the doctrine of issue preclusion.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the consultation with Dr. Stephen Annest which is reasonable medical treatment necessary and related to the work injury she sustained on May 23, 2014.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 7, 2016

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUE

Has Claimant established by a preponderance of the evidence that he sustained a compensable injury to his right knee on March 3, 2016?

FINDINGS OF FACT

1. Claimant works as a "reload" for the Employer. Claimant's duties primarily involve transferring packages from large trucks to smaller UPS delivery vehicles. To perform that task, he uses movable conveyors with large rollers to load packages onto the delivery vehicles.

2. On March 3, 2016, while performing his regular duties, Claimant was involved in an incident with a roller unit inside a delivery vehicle. The unit broke, and the rollers fell onto Claimant's legs, pinning him to the floor. The rollers are heavy, and Claimant could not extricate himself without assistance.

3. Claimant called out for help, and several of his co-workers came to his aid. The first coworker to arrive was Mary Bueno. She observed Claimant lying on the floor beneath the rollers. Due to the position of the rollers, and their weight, she could not get inside the truck or move the rollers. Therefore, she called another co-worker, Rondale Rush, for assistance. Mr. Rush entered the vehicle and saw Claimant lying on the floor with the rollers on top of him.

4. Mr. Rush and another co-worker, Nate Melbrand, got the rollers off Claimant and helped him up. Mr. Melbrand and Bobby Busardo (the lead supervisor) helped Claimant to the office.

5. Mr. Busardo called the night side manager, Antonio Fisher, to discuss the incident. Claimant spoke with Mr. Fisher on the telephone. Mr. Fisher asked Claimant if he was okay, and Claimant indicated that he was "fine" and just "in a little bit of pain." Mr. Fisher instructed that Claimant could go home, and asked Claimant to speak with him further the next day.

6. Claimant returned to work the following day and spoke with Mr. Fisher in person. Mr. Fisher asked about his condition, and whether Claimant could work. Claimant indicated he was "okay," but his knee was "a little sore." Claimant worked his regular shift and duties that day. During his shift, Mr. Fisher conducted a "safe work methods assessment. Mr. Fisher observed Claimant periodically during his shift. Claimant was able to perform his regular duties, and did not appear limited, nor did he complain of pain in the knee.

7. Claimant worked through the ensuing weekend. He took a pre-planned vacation the following week. During that vacation, Claimant had a telephone conference with Mr. Fisher and Jonathan Peno, the division manager. During that call, Mr. Peno asked Claimant how he was doing and if he needed to see a doctor. Claimant responded he was fine and did not need medical attention.

8. After he returned from vacation, Claimant continued to work his regular shift without limitation until mid-April.

9. Claimant filed a Workers' Claim for Compensation with the DOWC on April 12, 2016, alleging an injury to his right knee as a result of the March 3, 2016 incident.

10. Claimant has a significant prior surgical history involving the right knee. On July 22, 2014, he underwent an arthroscopic medial meniscus repair and a right knee ACL reconstruction using allograft. He recovered relatively quickly, and by September 26, 2014, medical records indicate he was "doing great." He was instructed to continue with physical therapy and follow-up in two months. Dr. Royce testified that he typically expects a patient will have complete recovery approximately six months after the surgery. There is no record of a follow-up visit after September 2014, so the ALJ infers that Claimant fully recovered. There is no indication that Claimant had any residual impairment or permanent restrictions following the ACL reconstruction.

11. Claimant received no further treatment for the right knee until December 22, 2015. On that date, he returned to Dr. Royce with concerns that he reinjured his ACL. Claimant reported he had "returned to an active lifestyle playing basketball," and reinjured his knee approximately one week prior as a result of "an awkward twisting fall." Dr. Royce observed Claimant was "walking with a limp." Physical examination of the right knee revealed swelling, warmth and tenderness to palpation of the lateral and medial joint lines. Active range of motion was limited with crepitus. The knee demonstrated no laxity or subluxation. McMurray's test was positive. X-rays showed no evidence of acute fracture, dislocation or subluxation. Dr. Royce diagnosed right knee effusion and possible reinjury to the right knee ACL reconstruction. He recommended an MRI to investigate the internal condition of the knee.

12. Claimant did not undergo the MRI as requested by Dr. Royce in December 2015. Claimant testified that Dr. Royce's office typically arranged for such tests, and he was not contacted about scheduling the MRI. Claimant further testified that his knee improved, and he did not perceive a need for additional evaluation or treatment.

13. Claimant subsequently continued to work without difficulty or limitation until his accident on March 2, 2016.

14. Claimant underwent an MRI of the right knee on April 8, 2016. The MRI showed that the prior ACL graft was at least partially torn and most likely completely torn. The MRI also showed a tear of the posterior horn of the medial meniscus, a

complex tear of the lateral meniscus, and an “old” lateral femoral condyle impaction fracture.

15. Claimant saw Dr. Royce on April 13, 2016 to review the MRI results. He reported that he had sustained a work-related injury “when a heavy device fell on his right knee causing hyperextension.” Dr. Royce and Claimant decided to proceed with a revision ACL reconstruction. Dr. Royce recommended a right knee CT scan to delineate the specific technique required. Dr. Royce recommended Claimant wear a knee brace, and restricted him to sedentary work to “prevent further injury.”

16. On April 15, 2016, Claimant was evaluated by Dr. Polanco, the Employer’s designated provider. Claimant told Dr. Polanco he was already pending ACL surgery with Dr. Royce. Dr. Polanco indicated Claimant’s condition was consistent with a work-related injury, but there is no indication that Claimant told Dr. Polanco about the December 2015 basketball incident. Dr. Polanco agreed with the recommendation for surgery and took Claimant off work.

17. Dr. John Schwappach performed an orthopedic Independent Medical Examination (IME) at Respondents’ request on August 9, 2016. Dr. Schwappach opined it is medically likely Claimant re-tore his ACL graft in December 2015 playing basketball. Dr. Schwappach agreed Claimant needs surgery to repair the ACL graft, but that surgery is not related to a work injury.

18. Dr. Royce testified in a deposition on September 9, 2016. Dr. Royce opined it is “probable” that Claimant had the ACL tear in December 2015, and the April 8, 2016 MRI simply provided confirmation of the underlying pathology. Dr. Royce opined that it would not be abnormal for Claimant to function well on a torn ACL after December 2015. Dr. Royce also noted that Claimant’s clinical presentation on April 13, 2016 was significantly better than it had been in December 2015.

19. Dr. Schwappach testified at hearing and elaborated on the opinions expressed in his IME report that Claimant did not tear his ACL graft in March 2016. Dr. Schwappach explained that the MRI in April 2016 was not consistent with an acute injury. Dr. Schwappach noted the MRI did not show any bone bruising, which would be expected with a recent injury. Dr. Schwappach testified that “an injury within a month of that MRI scan would have had residual bone contusion almost always evident.” Dr. Schwappach agreed with Dr. Royce that Claimant’s clinical presentation in April 2016 was better than it had been in December 2015 after the basketball incident. Dr. Schwappach also agreed with Dr. Royce that the torn ACL would not necessarily prevent Claimant from performing his job and ADLs. Dr. Schwappach opined that Claimant “tweaked” his knee as a result of the March 3, 2016 incident at work, but the torn ACL preexisted that incident.

20. The opinions of Dr. Royce and Dr. Schwappach that Claimant’s ACL graft was torn before the March 3, 2016 incident are credible and persuasive.

21. The March 3, 2016 accident did not proximately cause the need for medical treatment or disability.

22. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury within the course and scope of his employment on March 3, 2016.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* If an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1), C.R.S. In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not establish a compensable injury. Rather, a compensable injury is one which requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (ICAO Aug. 17, 2016).

The parties agree that Claimant was involved in an incident at work on March 3, 2016. The dispositive question is whether that incident led to a compensable injury. Based on the totality of evidence presented, the ALJ concludes that Claimant did not suffer a compensable injury as a result of his accident on March 3, 2016. Claimant's ACL graft was already torn before the March 3 incident, and the incident did not aggravate, accelerate, or combine with the pre-existing condition to cause a disability or the need for medical treatment. Although Claimant experienced a transient increase in pain immediately following the March 3 incident, he specifically declined medical treatment. In fact, Claimant sought no medical treatment for more than a month following the accident. The March 3 incident temporarily exacerbated his knee pain, but the symptoms returned to baseline without medical intervention. This finding is consistent with Dr. Royce's observation that Claimant's clinical presentation in April 2016 was actually *better* than it had been in December 2015.

Nor did Claimant suffer any "disability" as a result of the accident. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co*., 964 P.2d 595 (Colo. App. 1998).

There is no persuasive evidence that the March 3 accident impaired Claimant's ability to effectively and properly perform his regular employment. The mere fact that Claimant was sent home before the end of his shift on March 3 does not establish that he was "disabled" by the accident, because a "disability" does not arise for compensation purposes until an employee has missed at least three days or work shifts. *Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014). Claimant returned to work the following day and worked his regular duties without limitation until April 13, 2016. He stopped working on that date simply because Dr. Royce imposed work restrictions. There is no persuasive evidence that Claimant's physical condition worsened or otherwise became disabling on April 13. He was given work restrictions as a prophylactic measure for the torn ACL, which was not caused by Claimant's work. Therefore, the ALJ finds that Claimant was not "disabled" by the March 3 incident.

Claimant clearly requires treatment for his right knee, including surgery to reconstruct his ACL graft. But the ACL pathology was not caused or aggravated by the March 3, 2016 incident. There is no persuasive evidence that Claimant requires any medical treatment proximately caused by the March 3, 2016 incident. Consequently, Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury on March 3, 2016.

[Order continues on following page]

ORDER

1. Claimant's claim for compensation and benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 9, 2016

/s/Patrick C.H. Spencer II

Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that prescription Valtrex is reasonable, necessary, and causally related to his July 22, 2003 work injury.

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his left ankle in the course and scope of his employment with Employer on July 22, 2003.

2. As a result of the admitted injury, Claimant underwent multiple surgeries including multiple attempts at ankle fusion. Claimant developed complications with infections and eventually had a below the knee amputation of his left leg on May 2, 2012.

3. Claimant has treated with many different providers from the date of his injury in 2003 until now and is currently being treated by David Linn, M.D.

4. On August 15, 2014 Claimant was evaluated by Dr. Linn. Dr. Linn noted that Claimant's psychiatric review of symptoms was positive for stress with workers' compensation and lawyers and having to jump through hoops. *See* Exhibit B.

5. On February 2, 2015 Claimant was evaluated by Dr. Linn. Dr. Linn noted a chief complaint of workers' compensation stress and possible shingles. Dr. Linn noted that Claimant was much more stressed from workers' compensation issues and trying to get medications covered and straightened out and that Claimant felt the stress from the workers' compensation issues allowed the outbreak. Dr. Linn noted a rash on the lower back/sacrum. Dr. Linn assessed shingles, usually a stress related response, likely related to stress due to workers' compensation issues. *See* Exhibit B.

6. On September 17, 2015 Moshe Lewis, M.D. completed a peer review report commenting on the medical necessity of various medications Claimant was being prescribed. Dr. Lewis opined that Valacyclovir, prescribed September 8, 2015 was not medically appropriate/necessary. Dr. Lewis noted that further documentation in support of the prescription was needed. *See* Exhibit A.

7. On January 19, 2016 Claimant was evaluated by Dr. Linn. Dr. Linn noted that Claimant had herpes simplex virus 2 with a few shingles outbreaks on the left buttocks and that Claimant needed a refill of Valtrex and needed the brand name as generic upset his stomach. Dr. Linn assessed recurrent herpes simplex and ordered a refill of Valtrex tablets noting that the brand name Valtrex had worked well in the past to

resolve outbreaks. Dr. Linn did not mention or note any current stress in the January 19, 2016 visit and noted the only psychiatric condition was insomnia being treated by medications to help Claimant sleep. *See* Exhibit 4.

8. Respondents denied the prescription and Claimant applied for hearing.

9. Claimant paid out of his own pocket for the Valtrex tablets at King Soopers pharmacy and is requesting reimbursement in the amount of $656.69 plus interest.

10. Claimant testified at hearing that he had been experiencing stress for the last couple of years as a result of dealing with his workers' compensation issues. Claimant testified that prior to his work injury he had never experienced a shingles rash and had never used Valtrex. Claimant testified that he believed stress caused the shingles outbreak and that in the past Valtrex had caused the shingles rash to subside.

11. Nicholas Olsen, D.O. testified at hearing. Dr. Olsen testified that shingles is a viral disease characterized by a painful skin rash with blisters involving a limited area and that it was due to a reactivation of dormant herpes zoster virus within a person's body. Dr. Olsen testified that shingles only occurs in people who have had chicken pox in the past and that once the chicken pox resolves the zoster virus remains inactive in nerve cells and can reactivate and cause shingles. Dr. Olsen opined that to have the herpes zoster virus Claimant must have been exposed to chicken pox or had a chicken pox outbreak in the past.

12. Dr. Olsen opined that it is unknown why shingles develops or why the herpes zoster virus reactivates and that the cause of a shingles outbreak is idiopathic. Dr. Olsen opined that a compromised immune system due to cancer or aids could allow the shingles virus to occur, but that Claimant's condition and medication use, even considering all 12 surgeries Claimant had undergone, was not the type of auto-immune system compromise that would trigger a shingles outbreak.

13. Dr. Olsen opined that there was no correlation between stress and a shingles outbreak and opined that there was no empirical medical evidence establishing stress as a factor contributing to the onset of shingles. Dr. Olsen testified that Valtrex is an anti-viral medication used to treat shingles and that Valacyclovir is also a medication to treat shingles. Dr. Olsen opined that the need for Valtrex and that a shingles outbreak was not related to Claimant's work injury or stress.

14. The opinions of Dr. Olsen are found credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of

litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The ALJ concludes that Claimant has failed to meet his burden to show that the prescription Valtrex prescribed by Dr. Linn is reasonable, necessary, and causally related to his July 22, 2003 work injury. Clamant has not established, more likely than not, that the need for Valtrex and his outbreak of shingles is causally related to his work injury or stress from his medications or multiple surgeries. Rather, the opinion of Dr. Olsen is credible and persuasive that shingles outbreaks have not been shown to be related to stress, that they are idiopathic, and that the virus in Claimant's body that causes shingles is due to a prior exposure to chicken pox at some point in Claimant's life. Dr. Olsen is credible that with prior exposure, the virus exists in Claimant's cells and will be dormant at times and can flare up and cause a shingles outbreak at times. Dr. Olsen is credible that no medical evidence supports that stress causes the virus to activate and cause an outbreak. Although Dr. Linn opined previously that stress was likely the cause of an outbreak, the opinion of Dr. Olsen is found more credible and persuasive and Claimant has failed to establish, more likely than not, that stress from his workers' compensation injury is a cause or contributor to the onset of his shingles outbreak.

ORDER

It is therefore ordered that:

1. Claimant's request for reimbursement for prescription Valtrex is denied and dismissed. Claimant has failed to establish that this medication is reasonable, necessary, and causally related to his July 22, 2003 work injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 2, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has overcome the opinion of the Division Independent Medical Examination (DIME) physician by clear and convincing evidence.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to penalties for a failure to pay temporary indemnity benefits.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to penalties for a failure to state a position on indemnity benefits on the April 30, 2015 general admission of liability.

4. Whether Respondents are entitled to reasonable attorneys fees for an endorsement of unripe issues for hearing.

FINDINGS OF FACT

1. Claimant was employed by Employer as a janitor and was working in that capacity on February 24, 2015 when she had pain in her right shoulder and back while pulling a trash bag out of a trash container.

2. On February 25, 2015 Claimant reported the injury to Employer and was referred for medical treatment.

3. On February 27, 2015 Claimant was evaluated by Candice Sobanski, M.D. Claimant was diagnosed with trapezius muscle strain and low back pain and was released to work with a ten pound lifting and a twenty pound push-pull restriction.

4. Claimant continued to work without missing time and was paid her full wages. Claimant continued to receive conservative medical treatment from various providers from February 27, 2015 through August 24, 2015.

5. On April 30, 2015 Respondents filed a general admission of liability (GAL) admitting for medical benefits only. Respondents did not admit for or initiate any temporary disability benefits as Claimant had continued working and had not missed any time or wages due to the injury. Under the remarks, the GAL listed: admitting for medical benefits; lower back pain, lumbar strain, trapezius strain. *See* Exhibit 2.

6. Claimant received the GAL. Claimant testified that she understood the GAL and had an attorney assisting her at the time she received it.

7. On August 24, 2015 Claimant was evaluated by Albert Hattem, M.D. Dr. Hattem noted Claimant's diffuse total body pain and refusal to flex her lumbar spine. Dr. Hattem opined that there was likely a very significant myofascial component to Claimant's pain complaints. Dr. Hattem noted that Claimant had diffuse and migrating pain complaints and also noted her significant dissatisfaction against her Employer. Dr. Hattem opined that considering Claimant's anger, it was not likely that further physical interventions would be helpful. He also noted that the numerous laboratory studies ruled out a medical condition as causing her diffuse pain complaints including a chemistry panel, CBC, TSH, sed rate, and RA factor. Dr. Hattem placed Claimant at maximum medical improvement (MMI) and provided a 5% whole person impairment rating under Table 53 of the AMA Guides to the Evaluation of Permanent Impairment, 3rd Edition Revised, for having six months of medically documented pain with none to minimal degenerative changes on structural test. Dr. Hattem opined that Claimant did not qualify for a range of motion impairment because when instructed to flex or extend her lumbar spine she refused which was not consistent with her essentially normal MRI. Dr. Hattem opined that Claimant was likely self-limiting her motion. Dr. Hattem provided permanent work restrictions of no lifting more than 10 pounds, no pulling more than 20 pounds, and remaining seated 50% of the work day. *See* Exhibit 3.

8. In response to Dr. Hattem's MMI report, Respondents filed a Notice and Proposal to Select an Independent Medical Examination and Application for Division Independent Medical Examination (DIME). Hua Judy Chen, M.D. was selected as the DIME physician.

9. On September 2, 2015 Employer provided Claimant a letter advising her that they could not accommodate her permanent work restrictions and that she was eligible for 84 days of Family Medical Leave Act (FMLA) leave. The letter also advised Claimant that at the end of her FMLA leave, her employment status and eligibility for any other applicable leave under the company's leave of absence policies would be re-evaluated. Claimant declined FMLA leave and her employment with Employer ended. *See* Exhibit 1.

10. On November 3, 2015 Claimant underwent an independent medical evaluation performed by Tashof Bernton, M.D. Dr. Bernton reviewed medical records available. Claimant reported diffuse pain throughout the low back, mid back, cervical area, and right arm and rated her pain as 8 to 9. Dr. Bernton noted Claimant's obvious anger at her Employer and that Claimant reported that they tried to kill her and messed up her life. Dr. Bernton opined that Claimant appeared quite anxious, that she had marked non-physiologic findings on examination, and inconsistencies and marked discrepancies in examination. Dr. Bernton noted that Claimant was over eight months out from what appeared to have been a muscular strain and that she had extensive medical treatment as well as radiographic studies. Dr. Bernton opined that Claimant persisted with diffuse pain complaints of great severity that were inconsistent with findings on physical examination, the nature of the original injury, and radiographic studies. Dr. Bernton opined that there were not any objective abnormalities on examination that would support a finding of permanent physical impairment or

permanent restrictions. He opined that although she was quite angry, there was no reasonable basis to determine a physical impairment was present or that further medical treatment was required. *See* Exhibit A.

11. On November 18, 2015 Dr. Bernton issued a report after reviewing additional records. Dr. Bernton noted he had reviewed a psychological evaluation by Joel Cohen, Ph.D. as well as an impairment rating report by Dr. Hattem. Dr. Bernton opined that his opinion was still that Claimant was at maximum medical improvement and that he strongly agreed that somatoform complaints and non-physically based complaints were contributing to Claimant's pain behaviors. Dr. Bernton continued to opine that there were no objective findings to support a permanent impairment rating. Dr. Bernton noted that Dr. Hattem's physical restrictions were not based upon Claimant's physical limitations. Dr. Bernton noted Claimant had a strain predominantly in the shoulder and that there was no objective physiologic change from that injury that would result in permanent impairment or that would restrict Claimant's activities to the extent noted by Dr. Hattem. Dr. Bernton opined that Claimant continued to have multiple pain behaviors and complaints which he opined were largely somataform and not appropriate to consider or use as the basis for physical impairment or physical limitations. Dr. Bernton noted that although Claimant would probably self-limit, there was no basis for restrictions. *See* Exhibit A.

12. On March 3, 2016 Claimant underwent a DIME performed by Hua Judy Chen, M.D. Dr. Chen opined that Claimant likely had a muscular strain while picking up trash from a container at work. Dr. Chen opined that Claimant had appropriate evaluation including lumbar MRI, and treatment with medication and therapy. Dr. Chen opined that there were no structural lesions identified from examination and test. Dr. Chen opined that Claimant gradually developed non physiological diffuse pain that was out of distribution of her injury and out of proportion to the injury mechanism. Dr. Chen agreed with Dr. Hattem that Claimant had non physiological pain behavior. Dr. Chen opined that on examination Claimant showed diffuse pain behavior. Dr. Chen opined that Claimant reached maximum medical improvement on August 24, 2015. Dr. Chen opined that Claimant showed no pain or limitation in body movement in the office before examination but then dramatic diffuse pain that made her unable to finish the complete motor strength test or perform range of motion testing. Dr. Chen opined that based on examination and diagnosis Claimant had no permanent impairment from the February 24, 2015 work injury and had no physiological deficit that would restrict her function. *See* Exhibit B.

13. On March 23, 2016 Respondents filed a final admission of liability (FAL). Claimant objected to the FAL and filed an application for hearing. In the application, Claimant endorsed temporary partial disability benefits from 9/2/15 to 3/23/16, permanent partial disability benefits, and a penalty for "discharged on September 2, 2015 as a direct result of medical restrictions issued by treating physician, conduct violated 8-43-304."

14. ON July 19, 2016 a prehearing conference was held. Respondents sought to strike Claimant's penalty endorsement as being not ripe for hearing with no redress under the Act. Respondents also sought to endorse attorney's fees and costs as an issue for hearing. The PALJ did not strike the penalty endorsement but added the issue of attorney's fees and costs. At subsequent prehearing conferences the issues of overcoming the DIME as well as penalty cure and penalty statute of limitations were endorsed for hearing.

15. On August 9, 2016 Claimant responded to interrogatories and alleged a penalty pursuant to WCRP 5-5(B) for Respondents'' failure to state a position on temporary disability benefits on the April 30, 2015 GAL. This issue was added for hearing over Respondents' objection.

16. The opinions of Dr. Chen and Dr. Bernton are found credible and persuasive. Claimant has failed to establish any permanent impairment due to her work injury. The opinion of Dr. Chen, the DIME examiner, has not been overcome by clear and convincing evidence. The opinion of Dr. Chen is consistent with the opinion of Dr. Bernton and also, to some degree, with the opinion of Dr. Hattem. All three physicians noted Claimant's extreme and diffuse pain complaints without objective findings to support the complaints. Dr. Chen reviewed all medical records, evaluated and examined Claimant as much as Claimant reported she was able, and came to the same or similar conclusions as other providers.

17. Claimant's testimony and reports to providers are not credible or persuasive and are inconsistent with objective findings in this matter.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME physician's opinion on permanent partial disability

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. *See* § 8-42-101(3.7); § 8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). In *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000), the court noted that under the AMA Guides the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra.* A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Here, Claimant has failed to overcome the opinion of the DIME physician by clear and convincing evidence. The DIME physician Dr. Chen properly rated the Claimant based upon a review of all medical records, a physical examination, and a review of objective testing. Claimant reported to the DIME physician that she was unable to perform certain testing and range of motion maneuvers which the DIME physician found to be inconsistent and lacking an objective basis. The DIME physician's ultimate opinion that Claimant suffered no permanent partial disability due to the work injury is consistent with other providers who noted discrepancies and inconsistencies in Claimant's presentation. Although Dr. Chen did not fully perform range of motion testing due to Claimant's reported inability to perform range of motion tests, this was proper and is not found to be significant. Claimant's failure to perform range of motion testing was not due to her injury or any objective limitation from an injury but was due to Claimant's own decision not to perform the tests. Although Dr. Chen attempted to complete a full examination, Dr. Chen is unable to force or require a Claimant to complete testing. Here, Claimant self limited. Despite Claimant's reported limitations and reported inability to perform range of motion testing, Dr. Chen reviewed all the available evidence and found no objective basis for Claimant's reported limitations and found no permanent impairment existed. This opinion is credible and persuasive.

Claimant argues that Dr. Chen failed to conduct a proper spinal examination in this matter. However, in this case there is insufficient evidence to show that Dr. Chen failed to conduct a proper examination. Rather, Dr. Chen performed a spinal examination and documented Claimant's palpation, pain and pressure, and noted five minutes of examination was performed before Claimant began tearing and refused to go further. The Claimant's failure to continue with range of motion testing was not due to the DIME physician's error, but due to Claimant's self-imposed limitations which are not based on any objective pathology of findings. Dr. Chen's conclusion that Claimant had no permanent impairment and that Claimant had no physiological deficit or reason that would restrict Claimant's function is consistent with other providers and Claimant has failed to show error or that Dr. Chen's opinion has been overcome by clear and convincing evidence. At best, the opinion of Dr. Hattem assigning a 5 % whole person impairment is merely a difference of opinion from the DIME physician and is insufficient to overcome the opinion by clear and convincing evidence.

Penalties

Claimant's request for penalties for a failure to provide temporary indemnity benefits from September 2, 2015 through March 23, 2016 and Respondents request for an award of attorneys fees on this issue

Claimant is seeking a penalty in this case for Respondents' failure to provide temporary indemnity benefits from September 2, 2015 through March 23, 2016. September 2, 2015 was the date Claimant ceased working for Employer and March 23, 2016 is the date that the FAL was filed. Respondents are seeking an award of reasonable attorney's fees for defending this issue.

Claimant has failed to establish an entitlement to any temporary indemnity benefits during this time period and therefore, has failed to establish that a penalty would be appropriate for failure to provide benefits. To prove entitlement to temporary indemnity benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain temporary indemnity benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*. Temporary indemnity benefits continue until an employee reaches maximum medical improvement. *See* § 8-42-105(3)(a); 8-42-106(2)(a), C.R.S.

Initially, it is noted that following her injury Claimant continued to work her regular hours and earned her regular wages. Therefore, she was not entitled to any temporary indemnity benefits as her injury did not cause her a disability that lasted more than three work shifts or that caused her to have actual wage loss. Claimant did not suffer any impairment of earning capacity as she continued to work and earn her full wages after her February 24, 2015 injury. Claimant continued to earn her full wages until the date she was placed at MMI by her treating provider. On August 24, 2015 Dr. Hattem placed Claimant at MMI. Claimant had no entitlement to temporary indemnity benefits prior to this date as she was earning full wages. Further, even if Claimant had been entitled to any indemnity benefits prior to her MMI date, temporary indemnity benefits continue only until an employee reaches MMI. Here, it is clear that Claimant was never entitled to temporary indemnity benefits and that she was placed at MMI on August 24, 2015. Therefore, she has failed to establish an entitlement to temporary indemnity benefits from September 2, 2015 through March 23, 2016 and her argument that penalties should be imposed for the Respondents failure to pay indemnity benefits is not persuasive and without merit.

Respondents request attorney's fees and argue that this issue was not ripe for hearing as there was no violation of the Act in this case and no remedy available to

Claimant. Attorney's fees can be assessed if an attorney requests a hearing on an issue not ripe for adjudication. *See* § 8-43-211(3). An issue is ripe for hearing when it is real, immediate, and fit for adjudication. *Youngs v. Industrial Claim Appeals Office*, 297 P. 3d 964 (Colo. App. 2012). Here, Respondents attempted to have this penalty issue stricken at a prehearing conference. The PALJ found that the issue was ripe for adjudication and whether or not the penalty issue ultimately would be found to have merit would be an issue before the merit judge at OAC. The ALJ agrees with the PALJ's order and interpretation. Here, the penalty issue was ripe, real, immediate, and fit for adjudication. Although the ALJ ultimately concluded that penalties on this ground were not appropriate and the request was without merit, it was ripe for adjudication. Thus, the ALJ declines to award attorneys fees.

Claimant's request for penalties for a failure on the GAL to state the grounds for not paying indemnity benefits and Respondents position of cure and statute of limitations.

Claimant is seeking a penalty in this case for Respondents' failure to state on the April 30, 2015 GAL the grounds for not paying indemnity benefits. Respondents argue that the issue of penalties for this was not listed or endorsed until August 9, 2016, which is after the date that the FAL was filed which provided sufficient information and argue that thus the deficiency was cured prior to the endorsement of the penalty issue. Respondents further argue that the statute of limitations applies as the Claimant reasonably should have been aware of the penalty issue at the time she received the GAL and Claimant did not endorse a penalty issue until August 9, 2016 more than one year after the Claimant received the GAL.

As found above, the GAL filed on April 30, 2015 was filed as a medical benefits only GAL. In the remarks, the GAL listed: admitting for medical benefits; lower back pain, lumbar strain, trapezius strain. Claimant received this GAL, testified that she understood it, and she had an attorney assisting her at the time she received it. Claimant was receiving medical treatment at the time she received it and she was also working and earning full wages. Claimant alleges a violation of WCRP 5-5(B) because the GAL does not state a position on temporary or permanent partial disability benefits. Despite receiving the April 30, 2015 GAL, understanding it, and having an attorney at the time, Claimant did not endorse the violation of WCRP 5-5(B) as a penalty issue for hearing until August 9, 2016, more than one year later. Claimant knew, or reasonably should have known, of the facts giving rise to a penalty for the technical violation of WCRP 5-5(B) on April 30, 2015 and her request for penalties is barred by the one year penalty statute of limitations in § 8-43-304(5), C.R.S. Penalties on this basis are not appropriate and are barred by the statute of limitations. Additionally, in the alternative, the violation was technical in nature with no harm to Claimant as Claimant continued to work earning full wages and was receiving medical treatment during the time period in question when the GAL was filed.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome by clear and convincing evidence DIME physician Dr. Chen's zero permanent impairment rating. The request to overcome the zero impairment rating is denied and dismissed.

2. Claimant has failed to establish by a preponderance of the evidence that penalties are appropriate and her request for penalties is denied and dismissed.

3. Respondents request for attorney's fees is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 31, 2016,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-958-212-03; 4-958-351-03

PROCEDURAL HISTORY/ISSUES

The dispute in the above captioned matters involves two claims that were consolidated for the purposes of hearing. Both claims are contested. The first claim has alleged date of injury of July 18, 2014 (W.C. No. 4-958-212). The second claim has alleged date of injury of August 12, 2014 (W.C. No. 4-958-351). In her opening statement and during her testimony, Claimant noted that it was her position that she did not suffer a second injury on August 12, 2014." Rather, Claimant stated that the symptoms she experienced on August 12, 2014 constitute an aggravation of the alleged July 18, 2014 injury. According to Claimant, she only filed the August 12, 2014 claim because her employer instructed her she must file a claim.

The primary dispute, therefore, is whether Claimant sustained a compensable injury on July 18, 2014 while working for the employer and whether she aggravated the medical condition(s) caused by her alleged July 18, 2014 work injury. Succinctly stated, the issues presented at hearing were:

I. Whether claimant proved by a preponderance of the evidence she sustained compensable injuries on July 18, 2014 and August 12, 2014 while working as a nutrition specialist for the employer.

Although raised by Claimant, Respondents confessed that there is no dispute regarding authorized, reasonable and necessary, and related medical benefits if the claim is compensable. Claimant authorized provider is Concentra and any proper referrals from them for treatment that is reasonably necessary and related. Furthermore, Respondents noted that there is no dispute regarding Claimant's entitlement to temporary total disability (TTD) benefits, if the claim(s) is/are determined to be compensable. Respondents also agreed that Claimant last worked on August 12, 2014 and has not been released back to her regular work. Finally, Respondents agreed that Claimant's average weekly wage is $181.09, a figure higher than that sought by Claimant.

Because the undersigned ALJ finds and concludes that Claimant sustained a compensable injury on July 18, 2014 and because Respondents are not contesting Claimant's entitlement to medical benefits and TTD based upon a higher average weekly wage than asserted by Claimant, this order does not specifically address the analysis concerning Claimant's entitlement to these benefits.

FINDINGS OF FACT

Based upon the evidence presented, including the post hearing deposition testimony of Debbie Clowe, Stephanie Kascak, Tammy Brunnar, and Sherie Shupe, the ALJ enters the following findings of fact:

1. Claimant worked for Employer as a part time nutrition specialist (kitchen worker) since 2010. Claimant's supervisor during the regular school year was Stephanie Kascak, a kitchen manager for Employer. Claimant's supervisor during the summer months was Debbie Clowe, a kitchen manager for Employer at a school. The Director of Nutrition Services for the employer is Tammy Brunnar. Sherie Shupe manages worker's compensation claims for the employer. In the summer of 2014, Claimant worked the summer school session under Debbie Clowe and Ms. Brunnar.

2. Claimant's job duties included preparing meals, washing pots/pans/dishes, setting up and working the food line, empting trash and performing general clean up of the kitchen area.

3. Claimant alleges she sustained an injury on July 18, 2014 while working. On that date, Claimant testified she was washing out an empty 60 gallon trash can. After she applied soap to the can, Claimant testified she was rinsing the can out with a hand held rinser. She held the can with her left arm and the jet spray rinser with her right hand. Claimant testified the trash can started to slip, so she reached around it with her right hand to prevent it from falling to the floor. Claimant testified that after this movement her hand swelled and she developed pain in the hand which extended into the arm, shoulder and neck. According to Claimant, she did not have any immediate symptoms. Rather, Claimant testified that her symptoms started about 30 minutes after she stopped the can from slipping and dropping to the floor. Based upon the evidence presented, the ALJ finds that although Ms. Clowe and another worker (Dolly) were working at the time, they did not witness the incident.

4. Claimant did not report any injury on July 18, 2014. Claimant testified it was late on a Friday (the end of her shift) and she thought it (pain/swelling) would subside after the weekend off work.

5. Claimant returned to work on Monday. She worked her entire shift on this day as well as, Tuesday and Wednesday (July 21, 2014-July 23, 2014). She testified the pain and swelling did not go away. Claimant testified that during these days she wore an old brace while working. According to Claimant, her pain and swelling "really got bad" on Wednesday, so decided to proceed to the Emergency Room (ER) at Memorial Hospital.

6. Claimant testified she mentioned to Ms. Clowe that she was headed to the ER and she would see her tomorrow. Claimant admitted that she did not report her trip to the ER as "work-related" when she spoke with Ms. Clowe on Wednesday, July 23, 2014.

7. Claimant was evaluated in the ER where a history was documented by

Registered Nurse (RN), Jennifer Sullivan. According to RN Sullivan, Claimant had a 3 week history of shoulder pain which was unaffected by extra strength ibuprofen she was taking for a prior knee injury. The history provides that Claimant reported shooting pains down the arm and a swollen wrist; however, the records from this ER visit indicate that Claimant's exam was "negative for neck pain and neck stiffness." Claimant reported that she "works in a lunchroom at school and lifts a lot at work." In other locations in the medical record from this date of encounter it is documented that Claimant "does some heavy lifting because she works at a school cafeteria." A prior history of dislocation to the same shoulder is also documented. Claimant underwent an x-ray of the right shoulder which did not reveal "evidence of fracture, dislocation, joint effusion, or other significant bony or soft tissue abnormality."

8. On July 24, 2014, Claimant was evaluated by Dr. Dennis Phelps at Colorado Springs orthopedic group for ongoing right shoulder and hand pain. Claimant completed a general questionnaire on this date of visit. In her questionnaire, Claimant reported that she was having pain in her hand and shoulder and that she had similar pain in the shoulder previously. (Claimant's Hearing Exhibit 8, bate Stamp page 25) While Claimant indicated that her problem started on July 14th, she noted later that her symptoms had been present for a week. Strictly, one week prior to July 24, 2014 was July 17, 2014.

9. On this date of visit, Dr. Phelps documents the following pertinent history of present illness (HPI): "By history she works at a cafeteria. She is 76 years old and she works 3 hours a day. . . . She is not sure exactly what happened. She was lifting something." Physical examination revealed swelling in the dorsum of the right hand and wrist joint along with painful wrist extension. Concerning the right shoulder, Dr. Phelps documented the presence of "some bicipital tendinitis and limited range of motion. Dr. Phelps assessed Claimant with "calcifying tendenitis of the shoulder", rheumatoid arthritis and pain in joint. Dr. Phelps aspirated Claimant's hand and injected both the hand and shoulder under sterile technique.

10. On July 28, 2014, Claimant returned to Memorial Hospital requesting a letter for her employer. She was evaluated by nurse practitioner (NP), Patricia Burkeen. NP Burkeen noted that Claimant was seen in the emergency department on July 23, 2014 complaining of three-week duration of right shoulder pain. PA Burkeen noted that Claimant's job requires a lot of lifting and Claimant thinks she aggravated it recently when she was cleaning out some large trash bins. PA Burkeen noted that Claimant had referred to orthopedist, Mindy Seigel, whom she had seen twice. It was also noted that Claimant had received an injection to the right shoulder.[1] Finally, it was noted that Claimant had questions about medical leave and workman's comp.

11. According to employer records Employer was notified about Claimant's injury on

[1] As noted at Paragraph 8,Claimant was referred to Colorado Springs Orthopedic Group where she was evaluated and treated on July 24, 2014 by Dr. Dennis Phelps not Dr. Seigel.

July 31, 2014.[2] The first report of injury completed on this date provides that Claimant was washing a trash can at the time of injury. According to the first report Claimant reported that "she was cleaning the trash cans and felt pain in right hand up to the shoulder." Claimant further reported that the injury occurred as a consequence of the "way [she] grabbed it when it was rolling off the sink." Following her reported injury, Claimant was provided with physician designation paperwork. Claimant designated Concentra as the authorized treating clinic and scheduled an appointment for later in the day on July 31, 2014.

12. Claimant reported to Concentra where she was examined by Dr. Randall Jones. Dr. Jones noted that Claimant had presented to Concentra for a chief complaint of "left shoulder and wrist pain" (emphasis added). He also noted that Claimant had been referred to Dr. Siegel and she performed a corticosteroid injection. The record also indicates that Employer had called and spoke to the front desk receptionist prior to Claimant's arrival at Concentra requesting that Dr. Jones be informed that she (Claimant) reportedly said she got hurt while working in her yard.[3] Dr. Jones inquired about this and Claimant denied the same; informing Dr. Jones that she was definitely injured at work and that she was unable to "hold her hose in her yard after the injury."[4] Dr. Jones contacted Employer and spoke with Ms. Shupe. The content of the conversation between Employer and Dr. Jones is not documented and it is not clear in the medical record authored by Dr. Jones when he contacted Ms. Shupe, i.e. before or after Claimant's appointment. Nonetheless, Ms. Shupe's deposition testimony surrounding interrogatory responses attributable to Employer, persuades the undersigned ALJ that the opinions of Dr. Jones regarding medical causation were likely

[2] Tammy Brunner testified that she could not recall the date when she first heard that Claimant was claiming she was injured on July 18, 2014.

[3] Based upon the evidence presented, the ALJ finds the information regarding the suggestion that Claimant hurt her hand/shoulder while working in her yard to come from the deposition testimony of Stephanie Kascak. During her July 20, 2014 deposition, Ms. Kascak testified that she spoke with Claimant toward the end of July, during which conversation Claimant allegedly told Ms. Kascak that she got hurt working in her yard." According to Ms. Kascak, she called Claimant toward the end of July to remind her of the need to attend a meeting and during the conversation Claimant reportedly informed her (Ms. Kascak) that she (Claimant) "fell out in the backyard." While Ms. Kascak clarified that she learned that Claimant was reporting that she was injured at work about a week after this conversation, the ALJ finds the evidentiary record regarding when this alleged fall occurred lacking. Based upon the testimony of Ms. Kascak, the alleged fall could have occurred before the July 18, 2014 kitchen incident or thereafter up to the day before the two spoke toward the end of July. Consequently the ALJ finds Respondents' suggestion that Claimant's symptoms are attributable to a fall in the backyard speculative and unreliable. The evidence presented also persuades the ALJ that once Ms. Shupe, whom the ALJ finds attended the deposition, learned of this suspected fall she directed a call to Concentra to make sure Dr. Jones inquired about the suspected fall at the time of Claimant's initial appointment on July 31, 2014.

[4] During an IME with Dr. Kathy D'Angelo, Claimant clarified that after her injury she tried to use a hoe in her garden and could not hold it. She explained that this statement was later construed as her trying to lift a hose. At hearing, Claimant testified that she never fell in her garden. She testified further that the only statement she made to her coworkers regarding her garden was that she "wasn't able to use the hoe anymore in the garden." Finally, she testified that before the injury she was able to garden and after the injury she was not able to use her right arm to garden. Based upon the evidence presented, the ALJ finds that the misunderstanding likely stems from Dr. Jones' July 31, 2014 noted wherein he documented that Claimant reported that she could not hold a hose in the yard after the injury.

influenced by Ms. Shupe's decision to preemptively contact and then speak to Dr. Jones about the case, particularly when the following statements of Dr. Jones are accounted for: "[I]n regards to causality i (sic) can only say it is possibly work related. [I[t is being investigated by [P]innacle (sic)."

13. Dr. Jones documented that Claimant was a nutritionist for five years and that she "was cleaning out a 50 gal trash container holding with left arm and scrubbing with right. [L]eft arm slipped and she had to grab with the right causing immediate pain in right wrist and right shoulder. [S]he did have continued pain so on [July] 23, [2014] went to [ER]."

14. Dr. Jones referred Claimant to physical therapy and a hand surgeon. He assigned Claimant work restrictions of "no use of right arm" and to wear splint.

15. Claimant testified that on August 12, 2014, the symptoms in her shoulder, hand and neck worsened after lifting cartons of milk. Regarding this increase in symptoms, Claimant testified that she had asked her orthopedists' office for a release to return to work and the secretary faxed over a release with no restrictions. Claimant testified that Tammy Brunnar told her that she had to work without restrictions. She also testified that she wasn't allowed to wear her brace. Claimant testified that her hand and shoulder got worse after lifting the heavy trays. Claimant testified that Tammy Brunnar had her fill out another incident report on August 12, 2014 and she was told to go back to Concentra. Claimant testified that there was a mix up in her paperwork and she was supposed to have work restrictions. Claimant testified that she didn't think she suffered a new injury, rather the original injury worsened.

16. Ms. Brunnar testified that while it was Claimant's responsibility to lift the cartons of milk she was working with Claimant at the time and she (Ms. Brunnar) did it. The ALJ infers from Ms. Brunnar's testimony that she contests Claimant's testimony that she was lifting cartons of milk. Indeed, Ms. Brunner testified that she handwrote a statement wherein she communicated that Claimant did not pick up the milk crate. Rather, she, Ms. Brunner lifted the crate and put it on a cart for Claimant to wheel out. Nonetheless, Ms. Brunner admitted that there were times during the day when she "may not have seen what [Claimant] was doing. Consequently, the ALJ finds Ms. Brunner's blanket suggestion that Claimant did no lifting of milk cartons unpersuasive.

17. Because Claimant reported a second injury and there was question surrounding her need for work restrictions she returned to Concentra on August 13, 2014 where she was seen by Physician Assistant (PA), Kenneth Ginsburg. PA Ginsburg noted that Claimant returned due to a misunderstanding in her work restrictions. He noted that apparently the "orthopedic surgeons secretary had told her employer that she could return to full duty yesterday, which she did, but this exacerbated her pain so she saw Dr. Seigel again yesterday after work and was given a new note with work restrictions." Again, the report of PA Ginsburg is mistaken regarding Claimant being seen by Dr. Seigel. Claimant actually returned to Dr. Phelps on August 12, 2014 at which time Dr.

Phelps assumed responsibility for the miscommunication surrounding Claimant's restrictions and return to work.

18. During the August 13, 2014 appointment, PA Ginsburg clarified Claimant's work restrictions and returned her to work to no lifting over five pounds and no pushing or pulling over five pounds. He also noted that Claimant must wear wrist brace except for hand washing.

19. As part of her treatment with Colorado Springs Orthopedic Group, Claimant was evaluated by Dr. David Nordstrom on August 18, 2014. Dr. Nordstrom assessed Claimant with rheumatoid arthritis and placed her on Methotrexate.

20. Claimant returned to Dr. Phelps on January 6, 2015 with complaints of "intermittent electric shock" in the area of the trapezius and extending into the area of the supraspinatus. Claimant was referred for an MRI of her cervical spine.

21. The MRI of the cervical spine revealed "1. Cervical spondylosis most pronounced at C5-C6 and C6-C7 effacing the ventral subachnoid space and partially effacing dorsal subarachnoid space without cord flattening or abnormal intensity. 2. Severe bilateral foraminal stenosis C5-C6 and C6-C7."

22. On February 10, 2015, Dr. Michael McKisic evaluated Claimant at Memorial Hospital. Claimant reported to Dr. McKisic that on "7/1/2014, she was working as a "heavy worker" in District 2, and was carrying a 60-pound wash can trying to position it on top of a surface when she twisted her shoulder." Regarding Claimant's history and care, Dr. McKisic noted:

> [Claimant] was evaluated in the Neurosurgery Outpatient Clinic today on February 10, 2015. She presented with some right shoulder pain with electrical shock-like symptoms when lifting objects over the lateral aspect of her right trapezius. She has some right hand pain, but this resolved over time. Unfortunately, she was let go from her job due to requirement for recovery. She presents today with an MRI of the cervical spine, which demonstrates some degeneration and some bilateral foraminal stenosis at the C5 and C6 and also C6-7. Before the accident in 7/2014, she had absolutely no symptoms in either arm.
>
> The clinical history in her 60 percent improvement appears to be notable for a shoulder injury which is recovering. I explained that since she is recovering, I would not recommend any surgery in her case. Despite having neural foraminal stenosis potentially affecting C6 and C7 nerve roots on the right and also the left. She has no radicular symptoms and no weakness in those muscle groups. It is my suspicion that she had the stenosis prior to the accident, and the symptoms she experienced since the accident have been related to a shoulder issue (emphasis added).

23. The ALJ finds the opinions of Dr. McKisic regarding the origin of Claimant's neck symptoms credible and persuasive. Specifically, the ALJ finds, based upon Dr. McKisic's report, that Claimant's neck symptoms are likely emanating from her shoulder condition. Accordingly, the ALJ is not convinced that the July 18, 2014 incident caused the pathology noted on MRI of the cervical spine, nor is the ALJ convinced that the July 18, 2014 incident aggravated this underlying degenerative condition to give raise to Claimant's neck symptoms. Simply put, the ALJ is persuaded that Claimant's neck symptoms are referred pain from her shoulder injury.

24. Dr. D'Angelo performed an independent medical examination (IME) at the Respondents' request on June 3, 2015. Dr. D'Angelo authored a lengthy report wherein she concluded that Claimant did not sustain a injury at work on July 18, 2014, that Claimant's symptoms were not causally related to a work injury, and that Claimant is at maximum medical improvement with no restrictions and no impairment or maintenance care. She would later testify consistently with the opinions expressed in her report.

25. After careful review of the record evidence and the 75 page report of Dr. D'Angelo, the ALJ agrees with Claimant that the basis for Dr. D'Angelo's opinions, in large part, rests on what she perceived were inconsistencies regarding Claimant's described mechanism of injury (MOI) from the various providers who documented the same in addition to the unfounded suggestion that Claimant injured herself either while working in her yard or falling in the backyard.[5]

26. On September 9, 2015, Dr. Jack Rook performed an independent medical evaluation at the Claimant's request. Cl. Ex. 13. Dr. Rook opined that Claimant's ongoing complaints of right wrist and right shoulder pain are related to the occupational injury that occurred on July 18, 2014. Dr. Rook based his opinion with medical probability for the following reasons:

> On July 18, 2014 the patient was performing a work activity as described in the body of this [IME] report. Specifically, she was cradling a large garbage can with her left arm whole she was rinsing the can holding a hose in her right hand. The can begin to slide out of her left arm and instinctively she grabbed it with her right hand as it fell. She was able to catch the garbage can before it struck the ground but as it fell it pulled on her right arm and the patient developed immediate pain in her right shoulder, and right hand and wrist. The medical records are consistent with this history provided by the patient;

[5] While Ms. Kascak testified that Claimant told her she fell in the backyard injuring her shoulder, Ms. Clowe testified that the Monday following the July 18, 2014 incident Claimant reported to her that her body was hurting which Ms. Clowe attributed to Claimant having done too much yard work. Again, the record is devoid of any specific indication that Claimant's "shoulder, hand, and/or neck was hurting because she had done too much yard work. Rather, Claimant reportedly told Ms. Clowe that her "body" was hurting. The ALJ finds a paucity of evidence to support Respondents' suggestion that Claimant's hand, shoulder and neck symptoms are a consequence of working in her yard. Accordingly, the ALJ rejects the same as conjecture and speculation.

> When the patient arrived at work on July 18, 2014 she was not experiencing problems with her right shoulder or right hand;
>
> The early medical records are consistent with the history provided by the patient, of an injury that occurred at work while she was attempting to wash the garbage can;
>
> The patient sustained an aggravation of her shoulder and arm condition about two weeks after the occupational injury due to a misunderstanding related to lifting of her physical restrictions. These physical restrictions were not from Dr. Mindy Siegel but rather from a staff member at Dr. Siegel's office;
>
> There were no traumatic events involving her right upper extremity outside of work in the days and weeks prior to the event that occurred at work on July 18, 2014;
>
> The medical records indicate that the patient had a good recovery from the 2010 shoulder injury. There were no medical records indicating that the patient required treatment for her right upper extremity in the years prior to the work-related event that occurred on July 18, 2014;
>
> The patient was performing fairly physical labor given her age and general physical condition when the right upper extremity injury occurred on July 18, 2014; and
>
> The patient denies sustaining any injury to her right upper extremity performing gardening activities as is suggested in some of the medical records.

27. Dr. Rook disagreed with Dr. D'Angelo's principal conclusion that Claimant did not sustain an injury at work on July 18, 2014, that Claimant's symptoms were not causally related to a work injury, and that Claimant is at maximum medical improvement without restriction, without impairment and no need for maintenance care. Dr. Rook explained that there is no doubt that Claimant has a clinical injury involving her right shoulder, hand, and wrist which occurred sometime in July 2014. Dr. Rook explained that "it is insufficient to simply render an opinion that this individual's clinical condition is unrelated to her work. It is the burden of the medical examiner to take this one step further to describe what the patient's clinical condition is indeed related to." Dr. Rook further explained that based upon the patient's history obtained by himself, by Dr. D'Angelo, and through a review of the medical records, there are 3 possible explanations for Claimant's present clinical condition.

28. According to Dr. Rook, the first explanation is that the condition is related to an exacerbation of a shoulder and upper extremity condition that developed following an injury four years prior. He explained that this is unlikely because Claimant had reported significant improvement just four days after the injury in 2010 and she only treated for approximately one month for the shoulder injury in 2010. During her last visit with the

physician in July 2010, Claimant reported no pain and no weakness in her right shoulder. There is no evidence of treatment for a right shoulder condition between July 2010 and July 2014. Dr. Rook concluded that "there is nothing to suggest that [Claimant] had a continuation of right shoulder symptoms which would account for her presentation in July of 2014."

29. Dr. Rook also discussed that suggestion that Claimant injured her shoulder while gardening prior to the described occupational injury of July 18, 2014. Dr. Rook explained that Claimant "denies sustaining injury in this fashion. Additionally, there is no documentation in the medical records to suggest that this was a mechanism of injury. There are records that indicate that the patient's condition began three weeks prior to her initial visit to the emergency room. However, the MOI described by the ER nurse who documented this also suggests that it was a work-related etiology."

30. The third possible explanation provided by Dr. Rook is the patient's history that a work related activity resulted in her right shoulder condition. Dr. Rook explained that "[t]here is no doubt that she has advanced osteoarthritis in her right hand and likely has degeneration involving her right shoulder. However, her history suggests that she sustained a permanent aggravation as a result of work activity performed on July 18, 2014." Dr. Rook went on to state "Therefore, I would disagree with Dr. D'Angelo's opinion that this patient did not sustain an occupational injury on that date. Dr. D'Angelo feels strongly that the patient's condition cannot be work related because of inconsistencies in her history. However, there is no doubt that the patient does have a clinical condition and I believe it is Dr. D'Angelo's burden to take her discussion one step further to define with medical probability what the patient's current clinical condition is related to."

31. Dr. Rook concluded that based upon his review of the records and after obtaining a history from Claimant, he believed that her clinical condition is related to the MOI described as occurring on July 18, 2014. Dr. Rook stated that because Claimant's condition is work-related, she warrants additional treatment, physical restrictions, and an impairment rating regarding her current clinical condition.

32. Based upon the evidence presented, the ALJ finds that Claimant has proven by a preponderance of the evidenced that she suffered a compensable injury to her right hand and shoulder on July 18, 2014. As found above, Claimant has failed to establish that her neck symptoms constitute a separate injury attributable to the July 18, 2014 incident. Rather the opinions of Dr. McKisic convince the ALJ that Claimant's neck symptoms are a consequence of referred pain from her shoulder and not an traumatic injury or compensable aggravation of a pre-existing condition in the cervical spine.

33. While inconsistencies in the record exist, the ALJ is not convinced that Claimant is responsible for these discrepancies as suggested by Respondents and supported by Dr. D'Angelo. The ALJ finds it probable that many of the inconsistencies in the record are attributable to poor/incomplete record taking on the part of the providers to the case. Indeed, Dr. Jones erred when he documented that Claimant had presented initially for

left shoulder pain. He also likely erred when he documented that Claimant told him she could not lift a hose following her injury. Finally, many providers including Dr. D'Angelo mistakenly documented that Claimant had been treated by Dr. Seigel. She had not. Dr. Seigel simply signed off on Dr. Phelps' treatment record much later. Given these errors, the ALJ finds it likely that Claimant's described MOI was also misconstrued and incorrectly documented on several occasions given the number of providers Claimant has seen.

34. Based upon the evidence presented as a whole, the ALJ finds Claimant's testimony credible. Moreover, the opinions of Dr. Rook are more persuasive than the contrary opinions of Dr. D'Angelo when the record is considered in its entirety.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In accordance with § 8-43-215, C.R.S., this decision contains specific findings of *f*act, conclusions of law and an order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo.App. 2000).*

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found here, Claimant’s testimony is credible and convincing. Moreover, the opinions of Dr. Rook regarding causality are supported by Claimant’s testimony and the treatment records. Accordingly, the ALJ finds Dr. Rook’s opinions more persuasive than the contrary opinions of Dr. D’Angelo who simply challenges Claimant’s veracity given what she cites are gross inconsistencies in the record.

Compensability

D. A “compensable injury” is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable “injury.” *Romero*, supra; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an “injury” arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff’d Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of” and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). As argued by Respondents here, there is a question of whether Claimant’s alleged injuries occurred within the time and place limits of her employment relationship with Employer and during an activity, specifically washing a trash can as a nutrition specialist for Employer. Furthermore, there is a question as to whether the alleged conditions, for which Claimant seeks benefits, “arose out of” her employment. As noted above, both questions must be resolved before the injury is deemed compensable.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that Claimant sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). Here, the ALJ concludes that the physical examinations of Claimant contain objective findings consistent with an injury to the right hand and shoulder. The ALJ is convinced, based upon the medical records and the opinion of Dr. Rook that Claimant probably injured her shoulder when she instinctively, but awkwardly grabbed the can as it began to slip out of her hand and fall toward the floor. More probably than not, this quick awkward movement gave rise to Claimant's symptoms and subsequent need for treatment. Consequently, the ALJ concludes that a logical causal connection exists between Claimant's work duties and her right hand and shoulder symptoms and her need for treatment. Claimant's right hand/shoulder injury is compensable.

Medical Benefits

G. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right hand/shoulder. The evidence presented persuades the ALJ that this compensable "injury" is the proximate cause of Claimant's need for medical treatment, including her need for physical therapy as recommended by Dr. Jones. Taken in its entirety, the ALJ finds the evidentiary record to contain substantial evidence to support a conclusion that Claimant's work duties rather than the suggestion of overworking in her yard, falling in her yard or a pre-existing condition caused her current symptoms and need for treatment. Consequently, the ALJ concludes that Claimant has established that her need for treatment with Dr. Jones is causally related to her work-related injury on July 18, 2014. Moreover, the totality of the evidence presented establishes that the care, including physical therapy was reasonable and necessary given Claimant's continued pain and functional decline as evidenced by the imposition of work restrictions by Dr. Phelps and PA Ginsburg. Consequently, the ALJ concludes that Respondents are liable for Claimant's care at Concentra. As Claimant has not been placed at maximum medical improvement (MMI) by an authorized treating provider, Respondents remain liable for all future reasonable, necessary and related care.

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that she suffered a compensable injury to her right hand and shoulder as a consequence of washing a trash can on July 18, 2014.

2. Claimant's claim of injury to the cervical spine is DENIED and DISMISSED.

3. Any claim of injury occurring on August 12, 2014 is DENIED and DISMISSED.

4. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation fee schedule, to cure and relieve Claimant from the effects of her right hand and shoulder injury, including the care provided at Concentra by Dr. Jones in addition to any of his referrals.

5. Respondents shall pay the Claimant temporary total disability ("TTD") benefits for the time period commencing August 13, 2014 and ongoing until terminated by order, agreement or operation of law pursuant to statute.

6. Claimant's average weekly wage is $181.09.

7. Insurer shall pay eight percent (8%) per annum on all compensation not paid when due.

8. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 10, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-013-449-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer /Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 20, 2016 in Denver, Colorado. The hearing was digitally recorded (reference: 10/20/16, Courtroom 1, beginning at 8:30 AM, and ending at 10:30 AM).

Claimant’s Exhibits 1 through 3 were admitted into evidence, without objection, Respondents’ Exhibits A through E were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents. The proposed decision was filed, electronically, on October 21, 2016. No timely objections to the proposed decision were filed, and the matter was deemed submitted for decision on October 26, 2016. After a consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; and, if compensable, medical benefits.

The Claimant bears the burden of proof on all issues, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant was born on January 2, 1988, and was 28 years of age at the date of hearing. He is Type 1 diabetic.

2. The Claimant was hired by the Employer in May 2015, and he worked for the Employer as a line cook from May 2015 thru December 14, 2015.

3. The Employer is a restaurant located on South Broadway in Denver. The Employer's bar area and kitchen are located at street level, and its walk-in cooler is down a flight of stairs in the basement. The Employer has had several workers' compensation claims over the years, and besides this claim, the Employer has never challenged a claim.

4. Matt LaBarge has co-owned the Employer for 13 years, and he was the co-owner of the Employer at all relevant times involving this claim. Ethan Evanchak was a line cook for the Employer, working in the same capacity as the Claimant at all relevant times involving this claim. Garrett Maier is and has been a kitchen manager for the Employer at all relevant times involving this claim. Nathan McGarvey has been the Employers' General Manager from October 2015 thru the date of the hearing.

The Alleged Injury Incident

5. According to the Claimant, on November 24, 2015, he clocked in at work around 9:51 AM, he filled the kitchen sinks with water, turned on the kitchen equipment, and then he went to the basement to the walk-in cooler to get fries to be par cooked. The Claimant stated that while he was in the cooler, a beer vendor from Anheuser Busch came into the cooler with two kegs on a dolly. The top keg fell off of the dolly, and landed on the Claimant's right big toe. The Claimant did not say anything to the beer vendor.

6. According to the Claimant, after this incident, he found a bench in the basement where he sat, he took off his shoe and sock, he examined his right big toe, he noted there were no cuts or bruising, he put his sock and shoe back on, and he then immediately went upstairs to the bar area, where he found McGarvey sitting at the bar working on his laptop. The Claimant stated that he told McGarvey of his alleged work

related keg incident injury, and McGarvey told the Claimant to let him know if it became worse. McGarvey denies that this conversation ever happened.

7. The Claimant stated that he worked in the kitchen alongside Evanchak for most of the rest of that day, but he could not remember if he told Evanchak about the keg incident. The Claimant testified that the following day he came into work and told LaBarge about the keg incident, and LaBarge told the Claimant not to worry about it. The Claimant admitted he did not tell anyone else at the Employer about the keg incident.

8. LaBarge was at Employer's location, working on November 24, 2015. He saw the Claimant ascend from the basement stairs very slowly, while carrying a container of fries. He took the container from the Claimant, and asked him what was wrong. The Claimant explained that he injured his right toe when a couch or pallet was dropped on his foot. The Claimant did not relate this incident to work. He did not report the keg incident or any work injury. LaBarge told the Claimant that he should get his foot looked at by a medical provider.

9. At some point in November 2015, Evanchak noted that the Claimant was limping at work, and he asked him what was wrong. The Claimant told Evanchak that he was at his apartment when someone dropped a couch on his right big toe while he was wearing sandals. There is no evidence of hostility between Evanchak (a co-worker) and the Claimant, and the ALJ can find no plausible motive for Evanchak to fabricate the truth under oath. Indeed, Evanchak, unlike the Claimant, does not "have a dog in the fight"

10. In November 2015, Maier, the kitchen manager, also observed the Claimant limping at work. Maier asked the Claimant what was wrong, and the Claimant told him that the maintenance man at his apartment building dropped a pallet on his right big toe. Maier advised the Claimant that he should tell his landlord. The ALJ can find no plausible reason for Maier to be untruthful. Indeed, the reject Maier's and Evanchak's testimony would require the ALJ to infer a "grand conspiracy" to deny the Claimant's claim of which there is no plausible evidence.

11. McGarvey, the General Manager, did not go into work at the Employer's location on November 24, 2015, as he was at home taking care of his two young children all day while his wife worked a full shift as an ER (emergency room) nurse. The Claimant could not have reported the claim to McGarvey at the Employer's location that morning as the Claimant alleged. McGarvey's work schedule has him marked as "R/O", which stands for requested off (Respondents'. Exhibit A.ii, bates stamp 002) McGarvey confirmed that at no time did the Claimant contact him by any means to report a work injury.

12. On a Wednesday (most likely November 25, 2015, because the Claimant did not work December 2, 2015), McGarvey was putting paychecks into employee mailboxes at the Employer's location when the Claimant slowly came by him limping. McGarvey asked the Claimant what was wrong, and the Claimant told him that a pallet was dropped on his foot at his apartment over the weekend. McGarvey specifically remembered the Claimant identifying the object as a pallet, because it was a unique word. McGarvey testified that at no time did the Claimant report the keg incident or any work related injury to him. Again, the ALJ can find **no** plausible reason for McGarvey to be untruthful.

13. McGarvey and LaBarge credibly testified that Anheuser Busch vendors do not deliver beer to the Employer, and no one delivered any kegs of beer to the Employer the morning of November 24, 2015. On November 24, 2015, Coors Distribution Company delivered alcohol including several kegs of beer to Employer, but that delivery was completed at 1:54 PM (Respondents' Exhibit A.iv, bates stamp 005), and according to McGarvey, the entire delivery would have taken no more than one half hour.

14. The Claimant denied that a pallet or couch was dropped on his right big toe at his apartment. During his case in rebuttal, however, the Claimant admitted that an incident did occur at his apartment when a pallet was dropped on his right leg. He admitted telling co-employees about this incident. He claimed that the pallet only hit his right leg in the shin area, and he claimed the incident did not cause him to limp at all. The Claimant was unable to explain why he told LaBarge, Evanchak, Maier and McGarvey about this incident. In light of the testimony from LaBarge, Evanchak, Maier, and McGarvey, the Claimant's testimony that this pallet incident did not cause an injury to his right big toe which caused him to limp at work is convincingly lacking in credibility.

Claimant's Medical Treatment Post-Alleged Injury

15. The Claimant was evaluated and treated at The Medical Center of Aurora starting on December 14, 2015. He did not seek any medical care prior to that date. The Claimant was diagnosed with a gangrenous right great toe with deep foot infection and abscess formation (Respondents' Exhibit B, bates stamp 023). On December 16, 2015, the Claimant underwent a surgery performed by Jay H. Dworkin, D.P.M., described as a first ray resection (Respondents' Exhibit. B, bates stamp 023-024) On December 21, 2015, the Claimant underwent a second procedure by Dr. Dworkin, described as a debridement of his wound due to an open wound with osteomyelitis, delayed primary closure (Respondents' Exhibit B, bates stamp 025-026).

Ultimate Findings

16. The ALJ finds the Claimant's testimony significantly lacking in credibility. The Claimant's testimony at hearing regarding the date, time, and mechanism of his injury was substantially contradicted by employment records, the vendor receipt, and the Employer's witnesses' testimony. The Claimant claimed the keg incident occurred on the morning of November 24, 2015, around 10:00 AM, and that he immediately reported the incident to McGarvey. No kegs of beer were delivered to the Employer that morning and McGarvey did not work that day. The Claimant identified the vendor who supposedly dropped the keg on his foot as being an employee of Anheuser Busch, but the Employer does not use their products.

17. The Claimant saw LaBarge on the morning of November 24, 2015, but he did not report the incident to LaBarge. The Claimant did not report the incident to. Evanchak, who worked in close proximity to the Claimant that day. The Claimant never reported the claim to Maier, who was a kitchen manager. The Claimant did not report the incident to McGarvey, who was the general manager. The Claimant's version of events is contradicted by all Employer witnesses and in the absence of evidence of a "grand conspiracy" (which there is not) to deny the Claimant's claim, the ALJ finds all of the Employer's witnesses consistent and credible in contra-distinction to the Claimant's testimony, which the ALJ finds lacking in credibility.

18.. LaBarge, Evanchak, Maier and McGarvey all noticed the Claimant limping at work, and when they asked the Claimant why he was limping, he told each of them that he injured his right toe/foot outside of work at his apartment when a pallet or couch was dropped on his right big toe. The Claimant admitted to telling co-workers about this incident, but at hearing he claimed it involved his right shin, and not his right big toe, and he further claimed the incident did not cause him to limp. The ALJ infers and finds that what he Claimant told co-employees and what he testified to at hearing is contradictory and leads the ALJ to infer that the Claimant untruthfully fabricated a different version of events in his testimony at hearing.

19. The ALJ finds that the Claimant failed to present evidence in his case-in-chief sufficient to prove that it was more likely than not that he injured his right big toe at work on November 24, 2015. The Claimant's testimony of the keg incident is heavily outweighed by the employment records, business records, and the testimony of LaBarge, Evanchak, Maier and McGarvey.

20. The ALJ makes a rational choice, based on substantial evidence, to reject the Claimant's testimony, and to accept the testimony of each of the Employer's witnesses.

21. Therefore, in light of the Claimant's unreliable testimony regarding the alleged work injury, his admission of an incident outside of work impacting his right leg,

and the credible and the testimony offered by LaBarge, Evanchak, Maier and McGarvey, the ALJ finds that the Claimant has failed to prove, by a preponderance of the evidence that he sustained a compensable injury arising out of the course and scope of his employment on November 24, 2015.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). As found, for the reasons stated herein above, the Claimant's testimony concerning a work-related incident on November 24, 2015 is **not** credible. The testimony of each of the Employer's witnesses is highly persuasive and credible. Essentially, this credibility finding is dispositive.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to reject the Claimant's testimony, and to accept the testimony of each of the Employer's witnesses.

Burden of Proof

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has **failed** to sustain his burden of proof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this______day of November 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

1. Has Claimant proven by a preponderance of the evidence she has functional impairment not listed on the schedule?

2. What is Claimant's correct AWW?

3. Has claimant proven by a preponderance of the evidence that the referral to Dr. Pak for an orthopedic consultation is reasonable and necessary treatment after MMI?

4. Has Claimant made a proper showing for a change of physician from Dr. Johnson to Dr. Ravin?

5. Have Respondents proven by a preponderance of the evidence that there is an overpayment of indemnity benefits? If so, what is the amount of the overpayment?

6. Claimant withdrew and reserved for future determination the issue of disfigurement, without objection from Respondents.

FINDINGS OF FACT

1. Claimant worked many years for Employer as a coil winder.

2. As a result of her employment, Claimant developed the progressive onset of symptoms in her right upper extremity, right shoulder, upper back and neck. In March 2015, the symptoms intensified and prompted Claimant to seek medical attention.

3. Employer initially referred Claimant to Emergicare, where she came under the care of Dr. Cynthia Lund. Claimant first saw Dr. Lund on April 1, 2015. She reported that for the past several years her elbow, shoulder or wrist would "bother her," but the symptoms typically responded to ibuprofen. She reported that "this time all three hurt at the same time." She also had numbness in the fingers of her right hand. Physical examination findings included decreased right shoulder range of motion, positive Phalen's and Tinel's test at the cubital and carpal tunnels, and tenderness to palpation of the AC joint, and wrist pain over the carpal tunnel. Dr. Lund assessed cumulative trauma injuries of the right shoulder, elbow, and wrist. She referred Claimant for physical therapy, an MRI of the right shoulder, and an EMG of the right upper extremity. Claimant was also given work restrictions.

4. Claimant underwent an MRI of the right shoulder on April 3, 2015. The MRI was interpreted as showing moderate supraspinatus and infraspinatus tendinosis, and mild subscapularis tendinosis, without an appreciable tear of the rotator cuff. There

was isolated muscle atrophy and mild bursitis. The MRI also showed diffuse labral fraying but no discrete labral tear.

5. Claimant returned to see Dr. Lund on April 10, 2015. In addition to ongoing right upper extremity and shoulder symptoms, she reported pain in the trapezius musculature in the right shoulder girdle. She exhibited moderate tenderness on palpation of the trapezius with appreciable spasm of the right trapezius muscle. Based on the MRI results, Dr. Lund referred Claimant to Dr. David Walden for an orthopedic evaluation.

6. Claimant saw Dr. Lund again on April 20, 2015, and reported ongoing right upper extremity, upper thoracic, and cervical pain. On physical examination, she exhibited mild tenderness of the posterior neck and upper trapezius musculature.

7. Claimant saw Dr. Walden on April 21, 2015. Dr. Walden opined that the shoulder MRI was "normal for her age." He gave Claimant a subacromial cortisone injection but did not schedule any follow-up visits.

8. Claimant underwent EMG/NCV testing with Dr. William Griffis on May 5, 2015. The test showed moderate right carpal tunnel syndrome, but no evidence of cubital tunnel or cervical radiculopathy. Dr. Griffis recommended a surgical consultation for right carpal tunnel release. Dr. Griffis also diagnosed right scapulothoracic and right upper trapezius strains from "overuse" at work, for which he recommended physical therapy.

9. Claimant subsequently obtained a change of physician to CCOM and had her initial visit with Dr. George Johnson on May 18, 2015. Dr. Johnson took a detailed history regarding Claimant's problems with her right shoulder, right arm, and upper back. Claimant reported her most significant pain was in her neck and upper back. Physical examination showed tenderness of the right rhomboid muscle with muscle spasm and multiple trigger points. Dr. Johnson's diagnoses included cervical and thoracic strains, right carpal tunnel syndrome, right shoulder AC joint sprain, and thoracic myofascial syndrome Dr. Johnson administered trigger point injections and referred Claimant for physical therapy. He also referred her to Dr. Karl Larsen for consideration of carpal tunnel surgery.

10. Claimant saw Dr. Larsen on June 1, 2015. His evaluation was primarily focused on the right elbow and right wrist. Dr. Larsen diagnosed severe carpal tunnel syndrome on the right and recommended carpal tunnel release surgery.

11. Claimant also saw Dr. Johnson again on June 1, 2015. She reported substantial benefit from the trigger point injections, and also stated therapy had been helpful. Dr. Johnson agreed with Dr. Larsen's surgical recommendation and requested that it be approved.

12. Claimant ultimately underwent right carpal tunnel release surgery on June 30, 2015. Subsequent medical records show that the surgery significantly reduced her

symptoms. She returned to full duty work on August 7, 2015. Dr. Larsen released her from his care regarding her carpal tunnel syndrome on August 10, 2015.

13. Claimant returned to see Dr. Johnson on August 28, 2015. She had returned to full duties, but was having difficulty regaining the ability to work quickly and accurately with the right hand. She reported some concern and depression because of her decreased performance. As a result, Dr. Johnson referred her to Dr. Dale Mann for chronic pain counseling.

14. Dr. Johnson placed Claimant at maximum medical improvement (MMI) on September 25, 2015. On that date, he documented that her symptoms were significantly improved. Dr. Johnson also noted that Claimant had not seen Dr. Mann, but had instead gone to her primary care physician and received a prescription for Wellbutrin. She reported the Wellbutrin was helpful. Dr. Johnson opined that Claimant was at MMI with no permanent impairment and no permanent work restrictions.

15. On November 16, 2015, Claimant returned to CCOM with complaints of worsening right shoulder pain. She denied any specific new injury to the shoulder and attributed the increased pain to her ongoing work duties. On physical examination, she had decreased right shoulder range of motion, decreased strength in the supraspinatus tendon and a positive empty can test. Dr. Johnson provided a cortisone injection, referred Claimant for physical therapy and put her back on “light duty.”

16. Claimant received approximately two weeks of symptomatic relief from the steroid injection. On November 30, 2015, she requested that Dr. Johnson give her additional trigger point injections. Dr. Johnson appreciated scapular muscle tightness with three trigger points. He administered trigger point injections, which decreased Claimant’s pain. Dr. Johnson also recommended a diagnostic MRI arthrogram of the right shoulder.

17. Claimant returned to Dr. Johnson the following day on December 1, 2015. She reported that her pain had increased after four hours of typing. Dr. Johnson opined that her pain was “not physiologic,” and advised that “she needs to see pain psychology to help out with her pain. Dr. Johnson advised Claimant to see Dr. Mann, and prescribed amitriptyline “to see if it is effective.”

18. On December 10, 2015, Dr. Johnson authored a letter answering questions regarding the cause of Claimant’s recurrent right shoulder symptoms and the justification for requesting the MRI arthrogram. The Insurer was apparently persuaded by Dr. Johnson’s opinions because the MRI was subsequently authorized.

19. Claimant underwent the right shoulder MRI arthrogram on December 23, 2015. The radiologist assessed (1) a superior and posterior labral and chondral defect, (2) mild fraying of the superior labrum without a superior labral tear, (3) diffuse fraying of the superior, middle and inferior glenohumeral ligaments, and (4) mild supraspinatus tendinopathy with mild undersurface irregularity or low-grade partial tears, but no full thickness or complete rotator cuff tear.

20. Based on the MRI results, Dr. Johnson referred Claimant to Dr. Pak for an orthopedic evaluation. Initially, Dr. Johnson thought the MRI showed a SLAP tear. In his deposition testimony, Dr. Johnson revised his assessment and stated that the MRI report did not show a SLAP tear. Nevertheless, Dr. Johnson continues to recommend an orthopedic evaluation.

21. Dr. Johnson's records from January 2016 through April 2016 document ongoing right shoulder and upper back pain, which is exacerbated by use of Claimant's right arm.

22. On January 18, 2016, Dr. Peter Weingarten performed an Independent Medical Examination (IME) at Respondents' request. Dr. Weingarten opined that Claimant's carpal tunnel syndrome is causally related to her employment, but the elbow, right shoulder, upper back and neck symptoms are not work-related. Interestingly, Dr. Weingarten reviewed the MRI images and opined that the MRI shows a SLAP tear.

23. Claimant underwent a DIME with Dr. Jenks on January 26, 2016. Dr. Jenks diagnosed right carpal tunnel syndrome and right shoulder pain with probable impingement syndrome as work-related conditions. Dr. Jenks opined that Claimant reached MMI on September 25, 2015. Dr. Jenks stated, "I do not feel she needs another orthopedic opinion as her recent right shoulder MRI arthrogram shows relatively normal degenerative changes with no obvious tears of the rotator cuff or labrum." Dr. Jenks did not personally review the MRI images, but simply relied on the radiologist's report. Dr. Jenks assigned permanent impairment based on residual right carpal tunnel syndrome and right shoulder symptomatology. Dr. Jenks calculated 10% right upper extremity impairment for the right wrist and 14% right upper extremity impairment for the right shoulder. Dr. Jenks recommended maintenance care to include periodic steroid injections for the right shoulder.

24. According to the upper extremity conversion chart, Table 3 on page 16 of the *AMA Guides*, the 14% extremity impairment converts to 8% of the whole person for the right shoulder.

25. Respondents filed a Final Admission of Liability (FAL) on March 15, 2016, based on Dr. Jenks' DIME report. The FAL admitted for scheduled impairment only. Additionally, Respondents admitted liability for reasonable, necessary and related medical benefits after MMI.

26. On April 1, 2016, Dr. Johnson evaluated Claimant and opined that she was at MMI. At that time, she reported continuing right upper back pain in conjunction with her right shoulder pain, worse with movement of her arm. She had reduced shoulder range of motion. O'Brien's test and impingement signs were positive. Claimant's right upper back was tender to palpation in the scapular region, with four trigger points noted. Dr. Johnson administered another series of trigger point injections and told Claimant he could repeat the injections up to three times per year as maintenance care.

27. At hearing, Claimant testified that her right shoulder causes referred pain into the upper back, scapular area, neck and front of her torso along the clavicle. Claimant’s testimony in this regard is consistent with and supported by her medical treatment records.

28. Claimant credibly described multiple ways in which the symptomatology associated with her right shoulder injury interferes with her ability to perform various activities. Claimant has difficulty reaching at or above shoulder level, which limits her ability to perform numerous activities. The pain radiates into Claimant’s neck and causes intermittent headaches. Claimant can no longer drive long distances because she cannot turn her head and neck to the right and left sufficiently to monitor traffic. She has difficulty bathing due to limitations in her ability to reach because of the shoulder injury. Claimant’s sleep is frequently interrupted by pain in her shoulder. After being awakened by pain, Claimant applies ice and heat to her shoulder, neck and upper back.

29. Claimant has proven by a preponderance of the evidence that she has suffered functional impairment to parts of her body not described on the schedule of disabilities.

30. Neither party challenged the DIME’s impairment rating. Therefore, Claimant has 8% whole person impairment for her right shoulder and 10% scheduled impairment for her right wrist.

31. Claimant has failed to prove that the average weekly wage (AWW) of $758.23 should be modified prior to May 1, 2016. The admitted AWW is based on the 13 weeks before the DOI. Claimant earned gross wages of $9,856.97 from January 8, 2015, through the April 2, 2015 pay period, which equates to a base AWW of $758.23 ($9,856.97 ÷ 13 weeks = $758.23). The ALJ finds the admitted AWW fairly approximates Claimant’s wage loss and diminished earning capacity caused by her March 31, 2015 compensable injury.

32. Claimant’s employer-paid health coverage ended on April 30, 2016, and she became eligible for COBRA continuation on May 1, 2016. Claimant had health, dental and vision coverage through Employer, all of which must be included when calculating the cost of continuation. According to the April 26, 2016 COBRA notice, Claimant’s total monthly continuation cost it is $540.71 ($446.98 + $82.56 + $11.17 = $540.71). This converts to a weekly cost of $124.78 ($540.71 x 12 months = $6,488.52 ÷ 52 weeks = $124.78).

33. From the DOI through April 30, 2016, Claimant’s AWW was $758.23. Effective May 1, 2016, Claimant’s AWW increased to $883.01.

34. Claimant has proven by a preponderance of the evidence that the orthopedic evaluation with Dr. Pak recommended by Dr. Johnson is a reasonable and necessary medical treatment after MMI.

35. Claimant has failed to make a proper showing for a change of physician from Dr. Johnson.

36. Respondents have failed to prove that an overpayment of indemnity benefits exists on this claim.

CONCLUSIONS OF LAW

A. Whole Person Impairment

Whether a claimant has sustained a scheduled injury or a whole person impairment is a question of fact for determination by the ALJ. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). In resolving this question, the ALJ must determine "the situs of the functional impairment," which is not necessarily the site of the injury itself. *Id*. The schedule of disabilities refers to the loss of "an arm." Section 8-42-107(2)(a). In other words, if the claimant has a functional impairment to part(s) of his body other than the "arm," she has sustained a whole person impairment and must be compensated under § 8-42-107(8).

Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (ICAO, September 12, 2000).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (ICAO, December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (ICAO, August 9, 1996).

Pain and limitation in the trapezius, neck, and scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (ICAO, January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (ICAO, March 27, 1986) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment).

As found, the preponderance of persuasive evidence shows that Claimant suffers from impairment in areas beyond her "arm." Claimant persuasively testified to multiple ways the symptomatology associated with her right shoulder injury interferes with her ability to perform various activities, including working, cooking, driving, sleeping and bathing. Claimant also experiences episodic headaches as a result of her symptoms.

The medical records corroborate Claimant's testimony, and repeatedly document referred pain from the shoulder into areas such as the scapula, trapezius, and neck. Dr. Johnson administered trigger point injections on several occasions. In his deposition, Dr. Johnson testified that shoulder injuries "frequently" refer pain into nearby areas and "cause tightening of the muscles in the upper back."

The totality of evidence persuades the ALJ that Claimant sustained functional impairment to parts of her body not listed on the schedule. Claimant is entitled to PPD benefits based on the DIME's 8% whole person rating for the right shoulder.

B. Average Weekly Wage

Respondents have paid indemnity benefits based on an admitted AWW of $758.23. As a general rule, the claimant must prove entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1). Furthermore, the party seeking to modify an issue that has been determined by an admission "shall bear the burden of proof for any such modification." *Id*. Therefore, it is Claimant's burden to establish a basis for departing from the admitted AWW.

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly compute" the employee's AWW in any manner that seems most appropriate under the circumstances. In *Campbell v. IBM Corp*., 867 P.2d 77, 82 (Colo. App. 1993), the court held that "the entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity."

As found, the pre-injury period used by Respondents provides a fair and representative sample of Claimant's typical wages at the time of the injury. Consequently, Claimant has not established a basis to modify the admitted AWW of $758.23, before the termination of her health insurance.

Under § 8-40-201(19)(b), the term "wages" includes "the employee's cost of continuing the employer's group health insurance plan." *See also* § 8-42-103(2). The continuation cost is included in the AWW regardless of whether the claimant actually purchases the coverage. *Industrial Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006). As found, the Claimant's health insurance was terminated on April 30, 2016. Therefore, the AWW must be increased to $883.01 to account for her COBRA continuation cost, effective May 1, 2016.

C. Orthopedic Evaluation by Dr. Pak

Respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement (MMI) if the claimant requires periodic maintenance care to relieve symptoms or prevent further deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

The DIME's opinion regarding medical treatment after MMI is not entitled to any special weight, but is simply another medical opinion for the ALJ to consider on that issue. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

As found, Claimant proved by a preponderance of the evidence that the orthopedic evaluation with Dr. Pak, recommended by Dr. Johnson, is reasonable and necessary post-MMI medical treatment. An evaluation with Dr. Pak has a reasonable prospect of revealing a course of treatment that could relieve Claimant's symptoms or prevent deterioration of her condition. Although Dr. Jenks opined that the MRI does not show a SLAP tear, he based that opinion solely on the radiologist's narrative report. On the other hand, Dr. Weingarten reviewed the MRI images and opined there is a SLAP tear. In any event, Dr. Johnson persuasively opined that the orthopedic evaluation is reasonable even if Claimant does not have a SLAP tear. Based on the totality of evidence presented, the ALJ concludes it is reasonable for Claimant to undergo an evaluation by an orthopedist to clarify her diagnosis and assist Dr. Johnson in managing her medical condition.

D. Change of Physician

Section 8-43-404(5)(a) permits the employer to select the treating physician in the first instance. The employee is entitled to a one-time change of physician as a matter of right within the first 90 days following the injury. Thereafter, the claimant may not change physicians without permission from the insurer or "upon the proper showing to the division." *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

Section 8-43-404(5)(a) does not specifically define a "proper showing." Consequently, the ALJ possesses broad discretionary authority to grant a change of physician depending on the particular circumstances of the claim. *See Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Szocinski v. Powderhorn Coal* Co., W.C. No. 3-109-400 (December 14, 1998); *Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (November 16, 1995).

In deciding whether to grant a change of physician, the ALJ should consider the need to ensure that the claimant is provided with reasonable and necessary medical treatment as required by § 8-42-101(1), while also protecting the respondents' interest in being apprised of the course of treatment for which it may ultimately be held liable. *See Yeck v. Industrial Claim Appeals Office, supra*. Moreover, the ALJ is not required to approve a change in physician because of a claimant's personal reasons, including mere dissatisfaction. *See Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

As found, Claimant has failed to make a proper showing for a change of physician. Dr. Johnson's treatment of Claimant has been reasonable and appropriate throughout her course of care. Dr. Johnson has consistently supported Claimant's requests for treatment and has continued to advocate for an orthopedic evaluation despite IME opinions that such an evaluation is unnecessary. Dr. Johnson testified that he does not limit his use of any medication simply because the insurance company may not approve it, and he does not recall Claimant requesting a medication change. Dr. Johnson has indicated a willingness to continue treating Claimant periodically for maintenance care, including trigger point or steroid injections, if necessary.

No persuasive evidence was presented regarding any alternative treatment plan proposed by Claimant's requested physician, Dr. Ravin. The ALJ finds no persuasive evidentiary basis to conclude that Dr. Ravin would provide treatment that is objectively any better — or even substantially different — than that provided by Dr. Johnson.

E. Overpayment

Section 8-40-201(15.5) defines an overpayment as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets." The Respondents must prove their entitlement to an overpayment. *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002).

The March 15, 2016 FAL claims an overpayment of $90.74 but does not explain the basis for that figure. After reviewing the evidence presented, the ALJ finds there is no overpayment. The March 15, 2016 FAL admits a total of $16,274.98 of indemnity benefits. The indemnity payment log submitted by Respondents shows total payments of $16,274.98. Therefore, there is no overpayment.

ORDER

It is therefore ordered that:

1. Insurer shall pay PPD benefits based on 10% scheduled wrist impairment and 8% whole person right shoulder impairment. Insurer is entitled to a credit for any PPD previously paid on this claim.

2. Claimant's AWW is $758.23 from March 31, 2015 through April 30, 2016.

3. Claimant's AWW is increased to $883.01 effective May 1, 2016.

4. Insurer shall authorize and pay for an orthopedic evaluation with Dr. Pak.

5. Claimant's request for a change of physician to Dr. Ravin is denied and dismissed.

6. There is no overpayment of indemnity benefits as of the date of this Order.

7. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein, or otherwise closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

Date: November 15, 2016

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUE

Whether Respondents are entitlement to summary judgment and dismissal on the issue of temporary total disability (TTD) benefits as being closed by operation of statute and as a matter of law.

FINDINGS OF FACT

1. On July 18, 2013 Respondents filed a final admission of liability (FAL) in this matter. Respondents admitted to TTD benefits for September 24, 2012 through October 10, 2012 in the amount of $951.10.

2. On July 24, 2013 Claimant objected to the FAL and filed an application for hearing. The objection clearly stated that an application for hearing on disputed issues would be sent to the Office of Administrative Courts. The application for hearing sent on the same date did not check TTD as an issue for hearing or identify TTD as a disputed issue. Claimant submitted both the objection and the application for hearing with the assistance of legal counsel.

3. On October 14, 2013 Claimant filed an additional application for hearing also with the assistance of counsel. Again, Claimant did not check or identify TTD as an issue for hearing.

4. On February 11, 2014 Claimant filed an additional application for hearing. At this time Claimant had different counsel. For the first time, Claimant checked and identified TTD as an issue for hearing.

5. On July 10, 2014 the matter went to hearing on the issues of overcoming the division independent medical examination (DIME) and change in the authorized treating provider.

6. At the outset of hearing, Claimant's attorney and the ALJ had the following exchange when the ALJ asked if there were any preliminary motions or other matters to discuss:

> Ms. Merkel – "I believe there are, Your Honor. I've spoken with defense counsel, and one of the issues that the Claimant has endorsed for hearing is the issue of temporary total and temporary partial disability benefits. Defense counsel and I have agreed to go ahead and hold that issue pending the outcome of this hearing because today we're going to be obviously asking you to determine whether or not the Claimant has overcome the DIME, and we're also asking for a change in authorized treating physician, you know, because we believe Mr. Norris needs additional care, but we have agreed to go ahead and hold the temporary benefit issue in abeyance until those issues are decided."
>
> ALJ – "Okay. It looks like – I had understood that temporary total disability and permanent partial had been noticed. Am I wrong in that?"

> Ms. Merkel – "Let me see. I believe in my hearing application – no, you're absolutely right. We had endorsed temporary total disability benefits from 5/31/12 til ongoing. And through the course of the process of initiating discovery on that, we came to the realization that some of it is actually temporary partial."
>
> ALJ – "Okay. I'll change that. And those two issues, temporary total and temporary partial are open?"
>
> Ms. Merkel – "yes."
>
> ALJ – "Okay. So as far as you understand it, we're here on which issues?"
>
> Ms. Merkel – "So the main issue we're here on is overcoming the division independent medical examination that was performed by Dr. Cebrian, and within that, we're contesting whether or not Mr. Norris has actually reached maximum medical improvement. And then we're also arguing that he is in need of additional medical benefits, and we'd like a change of his authorized provider."

7. The ALJ then asked Respondent counsel, Ms. Fuller, if that was her understanding as well and Ms. Fuller stated "Yes, Judge."

8. The hearing on November 8, 2016 was set on the singular issue of TTD benefits and Claimant is seeking benefits from October 11, 2012 through January 30, 2013.

CONCLUSIONS OF LAW

An ALJ may enter an order for summary judgment when no disputed issues of material fact exist and when a party is entitled to judgment as a matter of law. *See* OARCP 17, 1 CCR 104-3; CRCP 56. Summary judgment is a drastic remedy and is not warranted unless the moving party demonstrates that it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). Once the moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the opposing party. The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Gifford v. City of Colorado Springs*, 815 P.2d 1008 (Colo. App. 1991).

Pursuant to § 8-43-211(2)(b), C.R.S., a hearing shall only be set on issues which are "ripe for adjudication." Likewise, OARCP 7 authorized parties to request hearing only on those issues which are ripe. If a party requests a hearing on an issue which is not ripe, the non-ripe issue should be stricken. *See* § 8-43-211(20)(d), C.R.S. An issue is not ripe if there is a legal impediment to its adjudication. *Olivas-Soto v. ICAO,* 143 P.3d 1178 (Colo. App. 2006).

Section 8-43-203(2)(b)(II), C.R.S. provides that a Claimant has thirty days after the date that Respondents file a FAL to file an application for hearing on any disputed issues that are ripe for hearing. It also provides that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing. *See* § 8-43-203(2)(b)(II), C.R.S. A failure to timely request a hearing after a final admission is filed creates a jurisdictional bar to the ability to challenge the admission. *Peregoy v. ICAO*, 87 P.3d 261 (Colo. App. 2004). To contest an aspect of an FAL, a claimant must state in the application for hearing the benefit to which he or she is entitled and may not keep his or her case from being closed by filing a general objection to the FAL. *Id.* The language "as to the issues admitted" in subsection (2)(b)(II) of C.R.S. § 8-43-203 does not mean only those issues on which an employer agrees to pay benefits but should be interpreted as referring to issues on which the employer affirmatively takes a position, either by agreeing to pay benefits or by denying liability to pay benefits. *Dyrkopp v. Indus. Claim Appeals Office*, 30P.3d 821 (Colo. App. 2001).

The automatic closure of issues raised in an uncontested FAL is part of a statutory scheme designed to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy. *Id.* Once a case has automatically closed by operation of the statute, the issues resolved by the FAL are not subject to further litigation unless they are reopened pursuant to § 8-43-303, C.R.S. *Berg v. Indus. Claim Appeals Office*, 128 P. 3d 270 (Colo. App. 2005).

It is uncontested that Respondents filed a FAL on July 18, 2013 admitting to a specific amount of TTD benefits for a specific time period. It is also uncontested that in Claimant's objection and application for hearing filed on July 24, 2013 Claimant did not identify TTD as a disputed issue. It is uncontested that Claimant did not identify TTD as an issue at all until February of 2014 and approximately 7 months after the FAL was filed. Claimant's failure to identify TTD as a contested issue within thirty days of the FAL results in an automatic closure of the issue of TTD. The Respondents affirmatively took a position on TTD benefits in the July 18, 2013 FAL. Their position was not contested by Claimant within 30 days and thus the uncontested issue of TTD benefits automatically closed, consistent with the statutory scheme. Claimant's failure results in an automatic closure of the TTD issue pursuant to the terms of the FAL and creates a statutory bar to Claimant's current and pending claim for additional TTD benefits.

Respondents have established that there are no material facts in dispute and that they are entitled to summary judgment as a matter of law. Claimant's response to the motion for summary judgment and dismissal does not establish that any factual dispute exists in this matter. Rather, Claimant's response argues essentially that by the response provided in the July 10, 2014 hearing, Respondents agreed TTD was a valid issue and essentially waived the statutory closure defense. The ALJ disagrees and finds Claimant's arguments non persuasive. Statutory defenses and absolute legal defenses including the closure by operation of statute were not waived in this case.

Here, the issue of TTD closed by operation of statute. The issue of TTD was ripe for hearing after the FAL was issued and was not contested by Claimant. The discussion at the July 10, 2014 hearing did not indicate any knowing or unequivocal waiver of the absolute legal defense of statutory closure.

Respondents are entitled to summary judgment as a matter of law.

ORDER

1. Respondents' Motion for Summary Judgment is GRANTED

2. Claimant's claim for temporary total disability benefits is hereby denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 8, 2016,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-638-588-02

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Claimant established by a preponderance of the evidence that strabismus eye surgery is reasonable, necessary and causally related maintenance medical treatment of her December 23, 2004, industrial injuries;

b. Whether Claimant established by a preponderance of the evidence that the need for hearing aids are reasonable, necessary and causally related for maintenance medical treatment of her December 23, 2004, industrial injuries;

c. Whether Claimant established by a preponderance of the evidence that the need for an herbal rhubarb supplement is reasonable, necessary and causally related for maintenance medical treatment of her December 23, 2004, industrial injuries; and

d. Whether Claimant established by a preponderance of the evidence that the need for ThermaCare wraps are reasonable, necessary and causally.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant sustained injuries to her head, neck and back on December 23, 2004, when she slipped and fell while walking down stairs.

2. Division Independent Medical Examination (DIME) physician, Stanley Ginsberg, M.D., placed Claimant at maximum medical improvement (MMI) on May 14, 2008, and assigned her a rating of 31% whole person impairment. The rating consisted of 7% whole person impairment for psychological disorders and a combined 26% whole person impairment for impairment to the lumbar and cervical spine.

3. Dr. Ginsberg did not offer a rating for cervical spine range of motion (ROM) noting that Claimant had "normal range of motion" under "casual observation" and that other physicians had consistently noted her cervical ROM was "almost normal." Dr. Ginsberg additionally did not provide a rating for impairment of complex integrated cerebral functions related to activities of daily living and he noted that he did not feel her significant psychological disorders were caused by cognitive dysfunction, but rather to post traumatic stress.

4. The parties entered into a full and final stipulation on April 2, 2009, resolving the claim on a full and final basis except for the ongoing admission for medical benefits. Paragraph 8 of the stipulation provided that medical benefits were admitted pursuant to the December 10, 2008, Final Admission, which admitted to reasonable and necessary, related and authorized post MMI treatment in conjunction with the opinion of the DIME.

5. Claimant was not rated at the time of MMI with any impairment for visual or auditory deficits by the DIME physician, Dr. Ginsberg. Dr. Ginsberg's report relates Claimant's industrial injuries as including, "post traumatic stress reaction, cervical strain, and lumbar strain." Dr. Ginsberg did not recommend maintenance treatment for auditory or visual impairments. Dr. Ginsberg further opined that Claimant needs psychological intervention. Dr. Ginsberg did not believe that Claimant's brain injury was significant enough to even warrant an impairment rating.

6. Claimant testified via telephone that she is seeking authorization for strabismus eye surgery as recommended by her ophthalmologist, Dr. Thomas Lenart, for symptomatic control of double vision. Dr. Lenart explained in a March 2, 2016, letter that this surgery would be performed in an effort to recess the medial recti of the Claimant's eyes to resolve the double vision complaints. Dr. Lenart opined that the diplopia or double vision is a result of ocular misalignment. It is found that Dr. Lenart does not relate the cause of the Claimant's double vision to her traumatic brain injuries sustained in the 2004 industrial accident. Further, there is no indication in the records that Dr. Lenart had a full opportunity to review a complete copy of the Claimant's claim related medical records.

7. Dan Gerstenblitt, M.D. testified via telephone as an expert qualified in internal and occupational medicine. Dr. Gerstenblitt performed an independent medical evaluation of the Claimant and spent approximately 10 hours reviewing Claimant's medical records dating back to 2004. Dr. Gerstenblitt authored a report dated July 13, 2016.

8. Dr. Gerstenblitt explained that Claimant's clinical presentation was consistent with a mild traumatic brain injury or TBI. Dr. Gerstenblitt explained that the typical course for a TBI is for the condition to plateau approximately two years after the initial injury. Dr. Gerstenblitt opined that TBIs do not worsen a decade after the initial accident that caused the TBI.

9. Dr. Gerstenblitt testified that a strabismus, or a lazy eye, is a very common eye condition in the general population. Dr. Gerstenblitt testified, and reiterated in his medical report, that he does not believe the need for the surgery recommended by Dr. Lenart is reasonable, necessary, and/or causally related for treatment or maintenance of the Claimant's 2004 industrial injuries.

10. In support of his opinion, Dr. Gerstenblitt explained that the need for the eye surgery recommended by Dr. Lenart either lacks a causal relationship to the

industrial injury or if the need for the surgery was caused by the traumatic brain injury then there was not sufficient medical evidence that the strabismus surgery would be an effective treatment for the Claimant given her TBI. If the strabismus or lazy eye was caused by the traumatic brain injury, Dr. Gerstenblitt opined that a surgery fixing the anatomical alignment of the eye would not fix the vision dysfunction because the problem was in the brain and not with the eye musculature. To the extent that the strabismus may be caused by the traumatic brain injury, Dr. Gerstenblitt further explained that there was not sufficient medical evidence to support that the surgery would be successful given the Claimant's traumatic brain injury. Although Dr. Gerstenblitt is not an ophthalmologist, he testified that he feels qualified to render an opinion that Claimant is not a good surgical candidate based on the lack of solid medical evidence that Claimant would benefit from the proposed eye surgery.

11. The opinion of Dr. Lenart does not support a causal relationship of the strabismus being caused, aggravated, or accelerated by the 2004 traumatic brain injury. Further, Dr. Lenart does not provide an opinion supporting the conclusion that strabismus surgery would be successful in an individual who has a traumatic brain injury where the strabismus is caused by the traumatic brain injury. It is unlikely that the need for the eye surgery would be present more than a decade after the initial accident, especially given that the persuasive medical evidence has only characterized Claimant as sustaining a mild TBI. As such, the opinion of Dr. Gerstenblitt is found to be more credible than the opinion of Dr. Lenart. Further, the need for the strabismus surgery is not within the scope of maintenance medical treatment for body parts and medical conditions found by the DIME physician to be causally related to the 2004 accident. It is found that the need for the strabismus eye surgery is not reasonable, necessary and causally related to the 2004 industrial injuries.

12. Claimant testified that she is seeking authorization of hearing aids in order to help her filter out background noise when she is in loud, busy environments, such as restaurants or at family functions. Claimant agreed that she does not need hearing aids to assist with amplification of hearing. Claimant did not complain of hearing deficits.

13. In support of her request for the hearing aids, Claimant relies on the medical opinion of audiologist, Eileen Freed. Ms. Freed authored a report dated August 24, 2016, wherein she opined that Claimant suffered from "decreased hearing, sensitivity to noise and intermittent tinnitus." Ms. Freed opined that all of the Claimant's audiological complaints were secondary to her head trauma. There is no indication in Ms. Freed's report that she reviewed copies of the Claimant's prior medical records, which have been generated in this claim. In fact, Ms. Freed references the industrial accident as being attributable to a 2005 date of injury. Other than the complaint regarding sensitivity to noise, Ms. Freed's description of the Claimant's audiological complaints does not align with the Claimant's own testimony as to her subjective complaints.

14. Dr. Gerstenblitt testified that he does not believe the need for hearing aids as recommended by Ms. Freed are reasonable, necessary and/or causally related for

maintenance or treatment of the Claimant's 2004 industrial injuries. In support of his opinion, Dr. Gerstenblitt explained that the Claimant's audiogram results do not support the necessity for hearing aids based on hearing loss, which is consistent with the Claimant's testimony regarding her own hearing symptomatology. Dr. Gerstenblitt testified that Claimant's first audiogram did not take place until 11 years after her date of accident, which is evidence of the lack of a temporal relationship between the 2004 date of accident and the onset of Claimant's alleged audiologic complaints. Given that the Claimant is now 12 years post her date of accident, the temporal causal relationship between the necessity for the hearing aids and Claimant's 2004 traumatic brain injury is implausible.

15. Audiologist Freed's recommendation for the hearing aids does not persuasively support a causal relationship to the traumatic brain injury and the need for the hearing aids for background noise reduction. Ms. Freed's opinion is deemed incredible as it is not supported by the Claimant's testimony of her subjective symptomatology. Dr. Gerstenblitt's opinion that the need for hearing aids is not causally related to the 2004 accident is found persuasive and credible.

16. The request for the hearing aids is not a maintenance medical benefit contemplated by the DIME at the time Claimant was placed at MMI. It is found that Claimant failed to establish by a preponderance of the evidence the need for hearing aids is reasonably necessary and causally related for maintenance medical treatment of the 2004 industrial injuries.

17. Claimant seeks authorization for out of pocket expenses for a monthly rhubarb herbal supplement called "Rhubarb 17". Claimant testified that she began taking the rhubarb supplement approximately one year after her traumatic brain injury to assist with digestive issues and constipation caused by her chronic medications that she commenced taking for her chronic pain management. Claimant testified that the rhubarb supplement is purchased online and contains 17 different herbs. Claimant was unable to identify each of the herbs contained in the supplement. Claimant admitted that she is not currently being prescribed the rhubarb by any physician.

18. Dr. Gerstenblitt testified that he is familiar with the Colorado Medical Treatment Guidelines and that herbal supplements are not supported by evidence based medicine in the Medical Treatment Guidelines. Dr. Gerstenblitt explained that herbal supplements, especially one which contains 17 different herbs, can cause potential unknown complications and side effects because the supplement has not been fully tested or vetted through the FDA. Dr. Gerstenblitt testified that the rhubarb supplement that Claimant is utilizing is not reasonable, necessary and/or causally related for maintenance of Claimant's 2004 industrial injuries. The opinion of Dr. Gerstenblitt is unrebutted.

19. Claimant's own admission that she is not being prescribed the rhubarb supplement and that the medication is not being managed by any physician supports the denial of payment for the rhubarb supplement. Respondents should not be liable for

payment of medical benefits that are outside the scope of the Medical Treatment Guidelines, not supported by evidence based medicine, and risk exposure for potential side effects and medical complications.

20. Claimant testified that she is seeking authorization for reimbursement for over the counter ThermaCare wraps, which are disposable heating pads. Claimant testified that she uses the wraps to assist with muscular pain complaints in her neck. Claimant agreed that this product is not being prescribed by any treating physician and that she is simply purchasing this product over the counter and seeking reimbursement from the Respondents through the workers' compensation claim.

21. Claimant relies on a medical record from April 11, 2014 from Robert Sargent, M.D. where he referenced that Claimant was using the ThermaCare neck heat packs. Claimant admitted that Dr. Sargent treats her for both work related and non work related medical conditions. Although Dr. Sargent summarizes the Claimant's personal treatment protocol and prescribed a one-time prescription for ThermaCare, there is no ongoing prescription after this isolated 2014 reference. Claimant's own admission that her doctors are not prescribing the ThermaCare supports the inference that Claimant is self directing the use of the ThermaCare product.

22. Dr. Gerstenblitt testified that the ThermaCare product is not reasonable, necessary and/or causally related for treatment or maintenance of the 2004 industrial injuries. Claimant is using the ThermaCare wraps to provide heat and comfort for muscular discomfort. Dr. Gerstenblitt explained that the causal relationship of the need for this muscular pain relief is not related to the 2004 industrial accident and that Claimant's day to day muscle aches and pains are related to her activities of daily living. The use of a ThermaCare product twelve years after the date of accident is not supported by the Medical Treatment Guidelines.

23. It is found that Dr. Gerstenblitt's opinion as to the ThermaCare product is unrebutted and persuasive. Claimant has failed to establish by a preponderance of the evidence that the need for the ThermaCare product is reasonable, necessary and/or causally related to treatment or maintenance of her 2004 industrial injuries.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. Claimant must prove entitlement to benefits by a preponderance of the evidence. However, the facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

2. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals* Office, 183 P.3d 684 (Colo. App. *2008); Kroupa v. Indus. Claim Appeals* Office, 53 P.3d 1192, 1197 (Colo. App. 2002). The ALJ determines the credibility of the witnesses. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

3. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

4. After an award of post-MMI medical benefits, Respondents retain the right to contest any future claims for medical treatment on the basis that such treatment is unrelated to the industrial injury. If a dispute over medical benefits arises after the filing of an admission of liability, respondents may assert that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). This principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. *See Maestas v. O'Reilly Auto Parts*, W.C. 4-856-563-01 (ICAO Aug. 31, 2012).

5. As found above, the opinion of Dr. Gerstenblitt is credited as being persuasive and supported by a complete review of the Claimant's medical records, an evaluation of the Claimant, and the Colorado Medical Treatment Guidelines.

6. The evidence established that Claimant is using the ThermaCare wraps to provide heat and comfort for muscular discomfort. Dr. Gerstenblitt credibly opined that the need for this muscular pain relief is not causally related to the 2004 industrial accident and that Claimant's day to day muscle aches and pains are related to her activities of daily living. The use of a ThermaCare product twelve years after the date of accident is not supported by the Medical Treatment Guidelines.

7. Dr. Gerstenblitt credibly opined that herbal supplements are not supported by evidence based medicine in the Medical Treatment Guidelines. Dr. Gerstenblitt explained that herbal supplements, especially one which contains 17 different herbs, can cause potential unknown complications and side effects because the supplement has not been fully tested or vetted through the FDA.

8. Ms. Freed's opinion regarding Claimant's claim for hearing aides is deemed less credible and persuasive as it is not supported by the Claimant's testimony of her subjective symptomatology. Dr. Gerstenblitt credibly opined that he does not believe the need for hearing aids as recommended by Ms. Freed are reasonable, necessary, and/or causally related for maintenance or treatment of the Claimant's 2004 industrial injuries. Given that the Claimant is now 12 years post her date of accident, the temporal causal relationship between the necessity for the hearing aids and Claimant's 2004 traumatic brain injury is implausible.

9. Claimant has failed to establish by a preponderance of the evidence that the need for strabismus eye surgery and provision of hearing aids, an herbal rhubarb supplement, and ThermaCare wraps are reasonable, necessary, and/or causally related for maintenance of her 2004 industrial injuries. As found, Claimant's request for authorization of strabismus eye surgery, authorization and provision of hearing aids, and reimbursement for over the counter purchases of an herbal rhubarb supplement and ThermaCare product are denied as the need for these medical benefits are not reasonable, necessary, and/or causally related for treatment or maintenance of Claimant's 2004 industrial injuries.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for authorization of strabismus eye surgery is denied as not reasonable, necessary, and/or causally related for treatment or maintenance of her 2004 industrial injuries.

2. Claimant’s request for authorization and provision of hearing aids is denied as not reasonable, necessary, and/or causally related for treatment or maintenance of her 2004 industrial injuries.

3. Claimant’s request for authorization and reimbursement for over the counter purchases of an herbal rhubarb supplement is denied as not being reasonable, necessary, and/or causally related for treatment or maintenance of her 2004 industrial injuries.

4. Claimant’s request for authorization and reimbursement for over the counter purchases of the ThermaCare product is denied as not being reasonable, necessary, and/or causally related for treatment or maintenance of her 2004 industrial injuries

5. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. ***For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.***

DATED: November 14, 2016

/s/ Margot W. Jones

Margot Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-979-208-02

ISSUES

- Whether the statutory cure provision bars a penalty claim against Respondents, where Claimant did not present clear and convincing evidence that Respondents knew they were in violation of a Stipulation at the time of the alleged violation;

- Whether Claimant proved entitlement to a penalty under C.R.S. § 8-43-304(1), where the persuasive evidence shows that Respondent Insurer acted objectively reasonable in attempting to determine the exact amount of the short term disability lien prior to reimbursing Claimant for the short term disability lien;

- If a violation is found, whether Claimant proved entitlement to a monetary penalty, where the evidence shows the violation caused no harm to the injured worker, who did not appear or testify at hearing; and,

- If a monetary penalty is issued, what the appropriate time period is for the penalty given that the Stipulation merely required Respondent Insurer to pay Claimant a check, as opposed to delivering the check to Claimant by a date certain.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant worked for United Parcel Service as a driver. On March 20, 2015, Claimant alleged sustaining an industrial injury to her left knee as a result of using a clutch. Respondents contested the claim. Over the time period Claimant was off work while the claim remained under contest, Claimant received short term disability benefits. The parties set hearing for March 2, 2016 on the issues of compensability, temporary disability benefits, and medical benefits.

2. The parties subsequently reached a tentative agreement to resolve the issues set for hearing. The initial stipulation ("Stipulation") was signed by Claimant on March 1, 2016, and verified by both Claimant and her attorney. The Stipulation was never finalized and there is no Order approving the Stipulation.

3. Paragraph 5 of the Stipulation required that "Respondents may offset their indemnity payment obligations by the amount of short term disability benefits received by the Claimant. Respondents agree to reimburse TeamCare, A Central States Health Plan, or any other entity providing such short term disability benefits to Claimant related

to her work injury, if and when TeamCare requests reimbursement." TeamCare is the short term disability administrator.

4. Brittany Pintor, Respondent Insurer's claims examiner, testified at hearing that the issue of reimbursement of a short term disability lien arose following the parties' agreement to resolve the hearing issues through the Stipulation. Ms. Pintor credibly testified that, because she knew Respondents intended on admitting liability for the claim, she filed a General Admission of Liability ("GAL") on March 14, 2016. She issued the GAL in an effort to reduce any delays in payment of temporary total disability (TTD) wage loss benefits to Claimant.

5. In issuing a retroactive TTD payment, Ms. Pintor withheld what she tentatively calculated $9,785.51 as the amount of the original short term disability offset in order to repay TeamCare. Ms. Pintor issued a retroactive TTD check in the amount of $16,215.90 to Claimant and her attorney. Ms. Pintor's actions are consistent with the Stipulation. Claimant and her attorney cashed the check on March 16, 2016. Claimant does not dispute this fact.

6. On March 16, 2016, TeamCare sent Claimant's counsel a letter indicating that the short term disability administrator paid $10,884.35 in disability benefits. Debbie Smith Porn, the TeamCare adjuster, stated in a cover letter that $10,884.35 represented "our final lien reports on [Claimant]."

7. Meanwhile, Respondent Insurer began paying bi-weekly TTD checks to Claimant. Claimant does not dispute that Respondent Insurer paid continuous TTD checks after March 16, 2016.

8. Claimant and Respondents subsequently entered into a revised, final Stipulation ("Final Stipulation") on March 24, 2016. Paragraph 6 of the Final Stipulation states that the purpose was to "resolve the TeamCare short term disability reimbursement." Paragraph 6(b) required that "within 15 days of the issuance of the order approving this [Final] Stipulation, Respondents agree to pay the TTD amount owed under the workers' compensation with the exception that the Claimant reimburses TeamCare any and all monies paid for short term disability." The Final Stipulation did not contain an exact date by which Respondent Insurer had to issue payment. The Final Stipulation also did not state a specific date by which Claimant had to receive payment. The Final Stipulation only required that Respondents pay Claimant 15 days after the issuance of the order approving the Revised Stipulation.

9. By March 26, 2016, a GAL had been filed, and TTD benefits, except for payment for the short term disability offset, had been paid. The only remaining benefits to be paid were the payments to Claimant that she needed in order to reimburse TeamCare for the short term disability lien.

10. Ms. Pintor credibly testified that she attempted to contact TeamCare on March 23 and March 25, 2016 by telephone before approval of the Final Stipulation, , in order to verify the lien amount.

11. ALJ Margot Jones signed the Order approving the Final Stipulation (the "Order") on March 25, 2016. Ms. Pintor credibly testified that she received a copy of the Order after March 26, 2016.

12. Once the Final Stipulation was approved, Ms. Pintor made three more attempts to verify the lien amount with TeamCare. She credibly testified that she called the TeamCare adjuster on March 30, 2016; April 1, 2016; and April 12, 2016. TeamCare did not return her calls. She also sent a fax asking the TeamCare adjuster to call her "ASAP." Claimant presented no evidence disputing Ms. Pintor's repeated attempts to reach TeamCare to verify the lien amount. Ms. Pintor calendared the date to pay Claimant as April 13, 2016, consistent with her understanding of her obligation under Paragraph 6(b) of the Final Stipulation. On April 12, 2016, after not receiving any response from TeamCare verifying the lien amount, Ms. Pintor submitted a request to Respondent Insurer for the amount she initially calculated was due, $9,785.91, which would allow Claimant to reimburse TeamCare for the short term disability lien. Claimant does not dispute the accuracy of the amount paid by Respondent Insurer to Claimant.

13. April 9, 2016 was 15 days after ALJ Jones signed the Order, but fell on a Saturday. The credible evidence is that Claimant was not certain whether Respondent Insurer was to perform its obligation by Saturday, April 9, or by Monday, April 11, 2016. Ms. Pintor credibly testified that she accidently miscalculated the date she was supposed to issue the payment to Claimant as April 13, 2016. As of April 12, 2016, Ms. Pintor believed she was in compliance with the Final Stipulation. On April 12, 2016 she attempted to verify the lien amount because there was a $1,098.44 discrepancy between her calculations and the amount stated in the March 16, 2016 letter. On April 12, 2016, Ms. Pintor requested a check be cut, and on April 13, 2016, Respondent Insurer cut the check. Claimant's counsel received the check on April 19, 2016.

14. On April 12, 2016, Claimant's counsel sent Respondents two letters indicating that the benefits, which he stated were due April 11, 2016, had not been received.

15. On April 13, 2016, Respondents filed an Application for Hearing challenging a total knee replacement surgery in this claim. On May 12, 2016, Claimant filed a Response to Respondents' Application for Hearing, requesting a hearing on penalties for Respondent Insurer's failure to pay $9,785.91 timely pursuant to Claimant's interpretation of the Final Stipulation. Claimant does not dispute the amounts paid, and concedes that at least by April 19, 2016, any penalty period would end. Respondents endorsed the cure provision.

16. On April 29, 2016, Respondents received a letter from Claimant's counsel indicating that the short term disability lien had been satisfied. The letter attached a TeamCare letter dated April 28, 2016 stating that a check was received from Claimant in the amount of $8,760.25, satisfying the lien. The amount of $8,760.25 shows a discrepancy in the amount of short term disability payments noticed in the lien and what

amount Claimant paid to satisfy the lien. The amount paid by Claimant to satisfy the lien was $1,025.66 less than what Ms. Pintor paid to Claimant to satisfy the lien.

17. Claimant did not testify at hearing or otherwise appear. Claimant presented no credible evidence that she sustained harm by an alleged violation of the Final Stipulation. Claimant presented no evidence of Respondent Insurer's intent to commit a violation. Claimant presented no credible evidence of a pattern of conduct requiring a penalty to prevent future bad conduct. Other than claiming that a violation occurred, Claimant presented no credible evidence to justify a monetary penalty for a violation of the Final Stipulation.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado ("Act"), C.R.S. § 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. In determining credibility, the ALJ considers the witness's manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *See Colorado Jury Instructions, Civil*, 3:16.

Concerning penalties, section 8-43-304(1) states:

> Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each such offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved

> party and the workers' compensation cash fund created in section 8-44-112(7) (a); except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed.

As seen above, section 8-43-304(1) gives the ALJ discretionary authority to impose a penalty of up to $1,000.00 per day for an insurer's violation of the Workers' Compensation Act or an Order. The imposition of penalties under section 8-43-304 is a two-step process, first requiring the ALJ to determine if the respondents' conduct violated the Act, a rule, or an order. If a violation occurred, the ALJ must then determine whether the party's actions were objectively reasonable. Penalties may only be imposed if the ALJ concludes that the insurer's conduct was not reasonable under an objective standard. *See e.g., Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995). The reasonableness of an insurer's actions depends on whether those actions were predicated on a rational argument based in law or fact. *Diversified Veterans Corporate Ctr. v. Hewuse*, 942 P.2d 1312 (Colo.App.1997). Generally, determination of the reasonableness of the insurer's conduct is a question of fact for the ALJ. *See Id*. It is the moving party's burden to prove that the other party failed to take an action that a reasonable non-compliant party would have taken. *City and County of Denver v. Indus. Claim Appeals Office*, 58 P.3d 1162, 1164–65 (Colo. App. 2002). The appeals courts have long held that the purpose of the penalties statutes is to punish "misconduct." *See, e.g., Sears v. Penrose Hospital*, W.C. No. 4-145-608 (ICAO, May 14, 1996). Claimant argues that a penalty should be imposed because there was a violation. Even if a violation of the Final Stipulation occurred, Respondent Insurer acted in an objectively reasonable manner by attempting to verify the lien amount prior to issuing payment for the short term disability reimbursement. Also, even if a violation occurred, Claimant did not suffer actual harm, and there is nothing in the record to suggest that Respondent Insurer would violate a stipulation in the future. The ALJ therefore concludes there was no misconduct in this case warranting the imposition of penalties.

I. The Cure Provision Bars a Penalty in this case because Respondents did not know they were allegedly in violation of the Stipulation.

Section 8-43-304(4), C.R.S., states:

> In an application for hearing for any penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted. After the date of mailing of such an application, an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed.

The statute also states that "[t]he curing of the violation within the twenty-day period shall not establish that the violator knew or reasonably should have known that such person was in violation." The cure provision applies if the alleged violation was cured prior to the request for a hearing concerning penalties. *Anderton v. Hewlett Packard*, W.C. No. 4-344-781 (ICAO, September 11, 2003).

Here, the violation was cured by Respondent Insurer's issuance of the check on April 13, 2016. The request for hearing on the issue of penalties was not filed until May 12, 2016, after the alleged violation had been cured. As found above, the check Claimant alleges was untimely was a reimbursement check for short term disability benefits. Claimant represented that the check was for temporary disability benefits, but paragraph 6 of the Final Stipulation clearly states that the purpose of that paragraph was to "resolve the TeamCare short term disability reimbursement." (Emphasis added). Paragraph 6(b) required that "within 15 days of the issuance of the order approving this Stipulation, Respondents to pay the TTD amount owed under the workers' compensation with the exception that the Claimant reimburses TeamCare any and all monies paid for short term disability." Respondents, prior to the approval of the Order, filed a GAL and paid $16,215.90 in retroactive TTD benefits. Claimant and her attorney cashed this check on March 17, 2016. Respondents also continued to pay biweekly TTD checks after that date. Ms. Pintor credibly testified that the remaining amount to be paid to Claimant consistent with Paragraph 6 was for the outstanding short term disability reimbursement. The exhibits submitted into evidence, including the TeamCare notifications and lien information, are consistent with Ms. Pintor's testimony and reflect that the money paid was for reimbursement of a disability lien, not for wage replacement benefits as suggested by Claimant.

Ms. Pintor reasonably believed she was in compliance with the Final Stipulation when, on April 12, 2016, she requested a check be cut, which was done on April 13, 2016. Claimant admits receiving the check on April 19, 2016. Claimant asserts a penalty period from April 9, 2016 through April 19, 2016. However, Respondents cured the violation well before Claimant requested a hearing on penalties on May 12, 2016, and before the 20-day grace period to cure the penalty ran.

Claimant bears the burden under section 8-43-304(4) to prove by clear and convincing evidence that the Respondents knew or reasonably should have known that they were in violation of the Final Stipulation. Clear and convincing evidence is the highest standard of proof in a workers' compensation administrative proceeding, which requires the moving party to present evidence that it is "highly probable" that the Respondents knew or should have known of the violation. Here, Claimant presented no credible evidence that Respondents knew or should have known that they were in violation of the Final Stipulation at the time of the actual alleged violation. At the time the alleged violation began – which Claimant stated in a letter was April 11 – Ms. Pintor reasonably believed that she was within the timeframe set forth in the Final Stipulation to send the check to Claimant. Ms. Pintor credibly testified that she miscalculated the date to send the check to Claimant. Her testimony does not indicate that she intentionally disregarded the conditions of the Final Stipulation. To the contrary, she was actively attempting to clarify the lien amount on April 12, 2016 when she tried to contact TeamCare for the fifth time. The purpose of her attempted contacts was to clarify the lien amount with TeamCare to ensure that the short term disability check accurately reflected the lien amount in order to be in compliance with the Final Stipulation. Having received no response from TeamCare after multiple attempts, Ms. Pintor put in a request for payment on April 12, 2016. A human error in the calculation of two days is not per se unreasonable under these facts. Claimant presented no persuasive evidence that it was “highly-probable” that Ms. Pintor knew she was in violation of the Final Stipulation.

Claimant also argues that Respondents were in violation of the Final Stipulation between April 13, 2016 and April 19, 2016 because Claimant interprets the Final Stipulation as requiring that she receive payment on the 15th day after the Order was authorized by the ALJ. However, Ms. Pintor credibly testified that she understood paragraph 6(b) as requiring only that she make a payment consistent with the Final Stipulation. Her interpretation of the FInal Stipulation is reasonable since the Final Stipulation does not state or otherwise indicate that the payment was to be actually received by Claimant within 15 days of the Order. For all of these reasons, Claimant has failed to prove that it is “highly probable” Respondent Insurer knew or reasonably should have known that it was in violation of the Final Stipulation by issuing the check on April 13, 2016, or that the Final Stipulation allegedly required that Claimant have a check “in hand” by that date.

Claimant further argues that the cure provision does not apply as a matter of law pursuant to *Grant v. Professional Contract Services*, W.C. No. 4-531-613 (ICAO, Sept.16, 2005). Claimant argues that, under *Grant*, an experienced adjuster is presumed to have knowledge of the applicable law, and, therefore, the cure provision does not apply. In *Grant*, the issue was whether the respondents timely paid medical bills consistent with a stipulation which complied with Rule 16(K)(2). The ALJ found as a *factual matter* that the claims adjuster had experience with Rule 16, and, therefore, should have known about the obligation to make payment pursuant to the rule. However, the ALJ, after finding claimant was not in any way harmed by the late payment of the medical bills, merely issued a penalty of $5.00 per day for each day respondents remained in violation of the statute.

Unlike *Grant*, there is no persuasive evidence in the record that the claims adjuster in this case had knowledge of or violated any applicable law – she credibly testified that she miscalculated the date for the check to be issued. *Grant* does not stand for the proposition advocated by Claimant that a claims adjuster is *de facto* presumed to have knowledge of the applicable law, thereby meeting the burden of clear and convincing evidence. Reading *Grant* that broadly would effectively eviscerate the cure provision.

II. Assuming A*rguendo* that the Cure Provision Does Not Apply, Claimant has not Proven by a Preponderance of the Evidence that Respondent Insurer Acted Objectively Unreasonable in Issuing Claimant's Short Term Disability Reimbursement Check When it Did.

Respondent Insurer's conduct before and after April 11, 2016 was objectively reasonable. Ms. Pintor issued a GAL and paid Claimant retroactive TTD, less the short term disability lien offset, prior to the Final Stipulation in order to avoid a delay in Claimant receiving her wage loss benefits. Ms. Pintor's conduct is persuasive evidence of Respondent Insurer's intent to ensure that there be no delay in resolving the disputed issues relevant to the claim. Given the discrepancy between the March 16, 2016 TeamCare lien amount notice and Ms. Pintor's calculation of the offset withholding, it was reasonable for Ms. Pintor to attempt to verify the lien amount with TeamCare. As noted above, Ms. Pintor made objectively reasonable, diligent efforts to confer with TeamCare by calling five times and faxing once, asking for an "ASAP" response.

The April 2016 letter from TeamCare stating that the lien was settled by Claimant for an amount less than the amount stated in March 2016 lends credence to the fact that Ms. Pintor believed she should verify the lien amount before issuing a check. It should be noted that in such a situation, a claims examiner is put into a difficult situation because penalties may be imposed for paying an incorrect lien amount. After receiving no response from TeamCare, Ms. Pintor requested that payment be made to Claimant consistent with her calculation of the offset amount previously withheld and her reasonable understanding of her obligations under the Final Stipulation. Ms. Pintor demonstrated diligent efforts to resolve the payment issue and her actions were reasonable under the circumstances.

Claimant argues that it was unreasonable for Respondent Insurer to issue its check payment from either Oregon or Connecticut. The ALJ disagrees. Ms. Pintor testified that she did not know if Respondent Insurer has a facility in Colorado that issues checks. Ms. Pintor reasonably relied upon Respondent Insurer's payment system to ensure the check was properly sent to Claimant. It was not unreasonable for her to rely on Respondent Insurer's internal system.

Claimant suggests that it was unreasonable not to use a courier service to deliver the check to Claimant. However, Ms. Pintor credibly testified that the authorization process required in order to use a courier service possibly could have taken longer than mailing the check, and Claimant presented no persuasive evidence that Respondent Insurer's use of a courier service would have expedited Claimant's receipt of the check.

Claimant argues that the April 14, 2016 post mark on the envelope for the April 13, 2016 check is the date that Respondent Insurer "released" the check. Claimant provided no persuasive evidence that Respondent Insurer placed the post mark on the envelope. It is just as likely that the April 14, 2016 post mark was placed on the envelope by the U.S. Postal Service, as is usually the case with post marks.

Finally, Claimant interprets the Final Stipulation as meaning Claimant was to have the check “in hand” by the end of the fifteenth day. The Final Stipulation does not contain that language or requirement. Ms. Pintor testified that she understood the Final Stipulation’s use of the phrase “to pay” the Claimant to mean to issue the check paying Claimant the disability lien reimbursement amount. Tr. at 90-91. The ALJ concludes her interpretation is reasonable given that that interpretation is a generally common understanding of that term. The ALJ further concludes that although there may be Colorado case law concerning what “payment” means in a technical sense, it is unreasonable to expect Ms. Pintor to know and understand those Colorado cases and apply those cases to the terms of the Final Stipulation when determining the date Respondent Insurer had to pay Claimant.

III. Notwithstanding the Arguments above, this Case Does not Warrant the Imposition of a Monetary Penalty.

The amount of a penalty for a violation such as may have occurred here is based on consideration of several factors, including the extent of harm to the claimant, the duration and type of the violation, the insurer’s motivation for the violation, the insurer’s mitigation, and whether or not the misconduct is representative of a pattern of misconduct. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995). Any penalty amount is within the ALJ’s discretion. *Id*.

No persuasive evidence whatsoever was presented that Claimant was harmed by any alleged violation. No evidence supports a finding that Claimant lost income or was financially damaged. Also, the ALJ concludes the violation was for two days: April 11 through April 13, 2016. In a similar case, an ALJ found no penalty was warranted when an adjuster was late filing an FAL because she was trying to confirm the exact amount of indemnity benefits owed in the claim. *Gonzales v. City of Fort Collins*, W.C. No. 4-365-220 (ICAO 2006). The delay in *Gonzales* was longer than the two days asserted here.

As stated above, the violation ran from April 11, 2016 through April 13, 2016, the date Respondent Insurer issued the payment to Claimant. Assuming *arguendo* that the alleged violation ran until April 19, 2016, the alleged violation was a total of eight days. When compared to cases such as *Grant*, *supra*, where the ALJ imposed a penalty of $5.00 per day because of the insurer’s failure to timely pay outstanding medical bills for a significantly longer period of time according to a stipulation, the violation here is *di minimus*.

Moreover, Claimant failed to prove that Respondent Insurer intended to violate the Order. Rather, Ms. Pintor’s actions of paying Claimant benefits weeks prior to the approval of the Final Stipulation demonstrate her intent to resolve payment issues.

Finally, the intent of the penalties statute is to deter future bad conduct. Claimant provided no persuasive evidence that the type of violation, which caused no harm to Claimant, is conduct requiring a monetary penalty in order to deter in the future.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to meet her burden of proof by clear and convincing evidence under the cure provision that a penalty should be imposed in this matter.

2. Claimant's claim for penalties is denied and dismissed with prejudice.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.
4.

DATED: November 15, 2916

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that a right knee MRI is reasonable, necessary, and related to his August 10, 2015 work injury.

FINDINGS OF FACT

1. Claimant suffered admitted burn injuries on August 10, 2015 while working for Employer in rural Wyoming.

2. On August 10, 2015 Claimant was washing out an oil treatment tank with a power washer when there was an explosion due to gas/oil in the tank. Claimant recalls crawling on the floor to get out of the tank and being on his hands and knees while the tank was burning around him. Claimant sustained severe burns over his face, body, and extremities.

3. Claimant was driven by Employer toward an ambulance. Once they met the ambulance, Claimant was transferred by ambulance the remainder of the way to Cheyenne Regional Medical Center.

4. At Cheyenne Regional Medical Center, Claimant was evaluated by Amy Tortorich, D.O. Dr. Tortorich noted Claimant had 2nd degree bilateral posterior shoulder burns, rupture of blisters, 2nd degree anterior neck burns, 2nd degree bilateral hand burns with both dorsal and palmer involvement and some slumping of tissues, 2nd degree bilateral knee burns, and right anterior calf burns. Claimant was intubated for airway protection and was transported via air to the North Colorado Medical Center burn unit in Greeley, Colorado. *See* Exhibit 10.

5. Claimant does not recall being treated at Cheyenne Regional Medical Center and does not recall the air transfer to Greeley, Colorado.

6. At the burn unit at North Colorado Medical Center Claimant was evaluated by Anne Lambert-Wagner, M.D. Dr. Lambert-Wagner noted that Claimant was intubated and sedated, asleep, and had a sluggish response to loud auditory stimulus. Dr. Lambert-Wagner noted a history that Claimant had been welding in a shack on a large oil field when there was a large flash burn and that Claimant and two others ran out of the shack. It is unclear how Dr. Lambert-Wagner received this history. Dr. Lambert-Wagner opined that Claimant had sustained second degree burns over 26% of his body. *See* Exhibit 11.

7. Claimant was admitted inpatient for approximately two weeks. During this time, Claimant continued to receive treatment from Dr. Lambert-Wagner which included skin graft procedures. *See* Exhibit 11.

8. On August 12, 2015 Claimant underwent physical therapy with Catherine Sterkel, PT. PT Sterkel noted Claimant had bilateral knee discomfort and that he could not use his bilateral upper extremities due to the resting hand splints Claimant was wearing. PT Sterkel noted that Claimant's balance was decreased, coordination was decreased, and that he had gait instability. *See* Exhibit 9.

9. On August 18, 2015 Claimant underwent physical therapy. It was noted that Claimant was able to perform gait training and walk around the burn unit floor two times and approximately 225 feet. Claimant's range of motion with the lower extremities was within normal limits. *See* Exhibit 9.

10. On September 2, 2015 Claimant underwent physical therapy. It was noted that Claimant had spent two weeks in the hospital with skin grafts performed. Claimant reported pain in the left thigh donor site when walking and it was noted that he had a slight limp due to pain. Claimant was aware of the need to exercise and walk at home as walking outside was too risky for his skin burns. *See* Exhibit 9.

11. On October 19, 2015 Claimant was evaluated by Ken Frisbie, PA-C. Claimant reported washing out a treatment tank when an explosion occurred and engulfed him over the face, neck, back, chest and bilateral hands and lower legs and that his bilateral hands and lower legs took the blunt of the fire. PA Frisbie noted that Claimant's gait was nonantalgic, that his bilateral lower extremity range of motion was full and equal bilaterally, but that strength testing was not performed. *See* Exhibit 5.

12. On November 3, 2015 Claimant was evaluated by Kevin Vlahovich, M.D. Dr. Vlahovich noted Claimant had shaking in his hands and legs, worse on the right side. Claimant reported sleep disturbances, tremors, and difficulty coping. Dr. Vlahovich noted nonantalgic gait with normal sit to stand transfers. Dr. Vlahovich noted decreased strength in the bilateral lower extremities with full and equal bilateral lower extremity range of motion. *See* Exhibit 5.

13. On November 11, 2015 Claimant underwent a behavioral health evaluation performed by Daniel Bruns, PsyD. Claimant reported working for Employer when he was attempting to clean out an oil tank and that there was an explosion. Claimant reported that the blast blew him back, that he recalled being on the floor with the ceiling burning and hot molten drops falling on him, and that he somehow crawled out of the building. Claimant reported that he was currently attending hand therapy but that he continued to be told to limit his level of physical activity. Claimant reported that he had very limited grip strength bilaterally and that at the time he was doing nothing for recreation or fun. *See* Exhibit 7.

14. On November 24, 2015 Claimant was evaluated by Dr. Vlahovich. Dr. Vlahovich noted that Claimant had been treated multiple times by the burn wound care clinic as well as having physical therapy and occupational therapy. Dr. Vlahovich noted that Claimant's gait was antalgic and that he leaned to the right. Dr. Vlahovich noted that the bilateral lower extremity range of motion was full and equal but that the strength was decreased. Dr. Vlahovich noted visible tremors in Claimant's legs and hands at rest. Dr. Vlahovich's diagnosis included tremor and he opined that the cause of the problems were work related. Dr. Vlahovich referred Claimant to physiatry for pain and neurological assessment noting the tremor and gait abnormality. *See* Exhibit B.

15. On December 28, 2015 Claimant was evaluated by Dr. Vlahovich. Claimant reported continued pain in the hands along with the knees. Claimant reported increasing weakness in the legs with a dysfunctional gait causing low back pain. Dr. Vlahovich noted that Claimant's gait was antalgic and that he leaned to the right and that the lower extremity range of motion was full and equal bilaterally but that strength was decreased and that Claimant had bilateral weakness in the quads. Dr. Vlahovich noted that Claimant had visible tremors in the legs and hands at rest. *See* Exhibit B.

16. On January 13, 2016 Claimant was evaluated by physiatrist Greg Reichhardt, M.D. Claimant reported a flash explosion while working in the oil field and that he had to crawl out of the area. Claimant reported that about two months prior he developed shaking/tremor in the right arm and right leg. Claimant also reported pain over the anterior aspects of the knees. Dr. Reichhardt noted normal strength in the lower extremities with encouragement. Dr. Reichhardt was concerned with the tremors and ordered a brain MRI that was later read as normal. *See* Exhibit 4.

17. On January 28, 2016 Claimant was evaluated by Dr. Reichhardt. Claimant reported continued pain over both knees and new low back pain. Claimant questioned whether the back pain was caused by his therapy exercises. Dr. Reichhardt noted on physical examination that Claimant had normal gait, balance, and coordination on a casual basis but a positive sway with Romberg and unsteady perhaps ataxic tandem gait. Dr. Reichhardt noted that Claimant was walking with a cane and demonstrated normal balance and coordination with the use of the cane. Dr. Reichhardt opined that it was not clear if Claimant's low back pain related to the injury or therapy. Dr. Reichhardt opined that it was reasonable that crawling out of the accident site could have contributed to Claimant's knee pain. Dr. Reichhardt noted that he did not have the records from Claimant's initial injury and could not state when the knee symptoms started but that Claimant reported first noting knee symptoms when Claimant first started getting active. Dr. Reichhardt ordered bilateral knee x-rays. *See* Exhibit C.

18. On February 22, 2016 Claimant was evaluated by Dr. Reichhardt. Claimant reported continued knee pain and that his tremors had improved. Dr. Reichhardt noted that claimant ambulated with a cane and had normal strength in the lower extremities. Dr. Reichhardt noted that bilateral knee x-rays performed on January 28, 2016 demonstrated mild subcutaneous prepatellar edema. *See* Exhibit 4.

19. On March 7, 2016 Claimant was evaluated by Dr. Reichhardt. Claimant reported that his tremors had resolved, that he continued to have pain over both knees, and that he also had some pain over the low back. Claimant was noted on physical examination to have normal casual gait, Romberg positive for sway, and unsteady tandem gait. Dr. Reichhardt also noted that Claimant had tenderness to palpation over both knees. *See* Exhibit 4.

20. On March 11, 2016 Claimant was evaluated by Dr. Vlahovich. Claimant reported continued pain in the knees and tremors in his arms and legs. Dr. Vlahovich noted that Claimant's gait was antalgic and that he walked with a cane. Dr. Vlahovich noted the bilateral lower extremity range of motion was full and equal bilaterally but with decreased strength and bilateral weakness in the quads. *See* Exhibit 5.

21. On April 8, 2016 Claimant was evaluated by Dr. Vlahovich. Dr. Vlahovich noted pain bilaterally on Claimant's knees mostly around the patellar tendons. Dr. Vlahovich noted that Claimant's tremors appeared increased and more severe on observation than Claimant subjectively felt or reported. Dr. Vlahovich opined that Claimant's bilateral knee pain was most likely due to and injured in the explosion. Dr. Vlahovich noted that Claimant had no reported knee problems prior to the incident and that Claimant could not remember if he fell or was knocked out by the explosion. Dr. Vlahovich noted that it was medically probable that the knee pain was related to the work injury, given that Claimant had no previously reported knee problems. Dr. Vlahovich opined that most likely, Claimant injured his knees in the explosion and was thrown back and knocked down by the blast. Dr. Vlahovich recommended MRIs of the knees and noted that they had been denied by insurance. *See* Exhibit 5.

22. On May 3, 2016, May 11, 2016, May 18, 2016, June 14, 2016, June 15, 2016 Claimant treated with either Dr. Reichhardt and/or Dr. Vlahovich. Claimant reported at each evaluation that he had continued knee pain and it was noted that the knee MRIs continued to be denied by insurance.

23. June 28, 2016 Clamant was evaluated by Dr. Reichhardt. Claimant reported his knee pain was under fairly good control. Claimant had normal casual gait, balance, and coordination and demonstrated a slight sway on Romberg. Dr. Reichhardt noted an impression of right knee pain, rule out internal derangement such as ACL tear. Dr. Reichhardt discussed home exercises for Claimant's knees including quadriceps strengthening exercises, pool exercises, and swimming exercises. *See* Exhibit 4.

24. On July 13, 2016 and August 10, 2016 Claimant was evaluated by Dr. Vlahovich. Claimant reported continued pain in his knees. It was noted that the weakness in the legs and the bilateral anterior knee pain with dysfunctional gait was improving. Dr. Vlahovich noted that the knee MRIs continued to be denied by insurance. *See* Exhibit 5.

25. Claimant testified credibly at hearing. Claimant recalls being on the floor and crawling out after the explosion at work. Claimant testified that the doctors were focused on the burns on his hands initially and that he had skin grafted from his thighs and put onto his hands. Claimant testified that initially the pain in his hands was so severe that he couldn't use his hands at all and that it took a few months after the injury for him to use his hands. Claimant testified that during this time he was unable to feed or bathe himself. Claimant testified that he wasn't asked about his knees initially because the focus was on the burns and mostly the burns to his hands. Claimant testified that prior to the work injury he had no issues with his right knee and that now it gives way and pops. Claimant testified that he noticed the right knee pain approximately three months after the work explosion and that if he had the right knee problems that he has now, he would not have been able to work in the oil field. Claimant testified that the initial hospital history of him running out of the explosion with coworkers was not correct and that he was so out of it and unconscious that he did not provide the emergency department with a history of the event and that he was unsure how the history was obtained. Claimant is found credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The ALJ concludes that Claimant has met his burden to show that the recommended right knee MRI is reasonable, necessary, and causally related to his August 10, 2015 work injury. Claimant's testimony is credible and persuasive that prior to the work injury he had no knee problems. The reports of Dr. Vlahovich and Dr. Reichhardt are also persuasive. Dr. Reichhardt opined that it was reasonable that crawling out of the accident site could have contributed to the knee pain. Dr. Vlahovich opined that it was medically probable that Claimant's knee pain was related to the work injury given that Claimant had no prior reported knee problems and that Claimant most likely injured his knees in the explosion when he was thrown back and knocked down by the blast.

As found above, Claimant was blown back by the blast and crawled out of the burning structure. Claimant had severe burns on his lower extremities in addition to many other body parts. Claimant initially reported knee discomfort two days after the explosion. Claimant remained very limited in his physical activity for several months following the explosion while his severe burns were being treated and evaluated. When he started to become more active, he reported knee pain and discomfort. It is more likely than not that this knee pain and discomfort is causally related to his work injury. His authorized treating providers have recommended a right knee MRI and the ALJ defers to their recommendation that the MRI is a reasonable and necessary step to further diagnose and treat Claimant's right knee pain.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that a right knee MRI is reasonable, necessary, and causally related to his August 10, 2015 work injury. Respondents shall authorize and pay (pursuant to the fee schedule) for the MRI.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 10, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-968-926-01

ISSUES

- Whether Claimant's right shoulder injury and need for surgery is related to her compensable left shoulder injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 54year old who injured her left shoulder on October 24, 2014 while working for Respondent Employer. Claimant was initially seen at Concentra Medical Center on October 29, 2014 and diagnosed with a left shoulder strain.

2. Claimant was given initial work restrictions of no use of the left upper extremity, including no overhead use, and lifting restrictions of 10 pounds for her right upper extremity. Her restrictions were later increased to 5 pounds for her right upper extremity.

3. Claimant continued to treat with Concentra and was eventually diagnosed with a torn rotator cuff and referred to Dr. John Papilion for surgical evaluation and treatment.

4. On March 9, 2015 Claimant underwent surgical repair of her left rotator cuff by Dr. Papilion. After surgery her left arm was immobilized and she was given strict no use instructions for her left upper extremity. Claimant had postoperative physical therapy for her left shoulder beginning in April of 2015 which continued for several months.

5. While performing her regular physical therapy exercises at home, suffered a ruptured long head tear of her left biceps while using a 3 pound weight. An August 22, 2015 MRI confirmed this diagnosis. Dr. Papilion performed a repair of this rupture on September 21, 2015. Claimant's left arm was again immobilized while recovering from this second surgery.

6. Claimant testified credibly at hearing about her activities following her injury. Claimant testified that everything she did, she did with her right, dominant hand. Claimant also testified that some activities went "undone" such as combing/blow-drying her hair and that she had others perform certain tasks for her. She testified that she avoided activities that were too heavy or that she could not perform with one arm. She did try most things once and that she remained a compulsive cleaner throughout her recovery from her left shoulder and biceps injuries. She testified that she followed restrictions imposed by Concentra.

Claimant further testified that she did not do any activities that required lifting her arms above shoulder level.

7. Claimant explained that her right shoulder began hurting in October 2015 and she believed it was due to her increased reliance on the right arm for her activities of daily living. Upon reporting her symptoms to Dr. Papilion, he explained that her right shoulder symptoms were likely related to her increased reliance on her right shoulder for all activities of daily living and his medical records support same. On October 28, 2015 Dr. Papilion injected her right shoulder which temporarily relieved her right shoulder symptoms. Dr. Papilion's work restrictions at that time included a 10-pound overhead lifting restriction.

8. In January 2016, Claimant suffered a torn right biceps while changing her bedding. Dr. Papilion performed a mini open repair of the subscapularis and open biceps tenodesis on February 1, 2016. Dr. Papilion opined that the need for this surgery was causally related to immobilization of her left arm after her left shoulder surgeries. His record states, "it is my opinion that the amount of stress that [Claimant has] had on her right shoulder over the last eight months since her work injury has greatly contributed to this most recent incident, and is directly related."

9. On April 4, 2016 Dr. Mark Failinger performed an independent medical examination on behalf of respondents. Dr. Failinger reviewed Claimant's medical records and examined Claimant for less than one hour. In his report, Dr. Failinger wrote that while the February 1, 2016 surgery was reasonable and necessary it did not appear to be directly related to the effects of the October 24, 2014 injury. Dr. Failinger reasoned that Claimant was not working following the left shoulder rotator cuff surgery and that it did not appear she was using her right upper extremity for major activities. He noted that Claimant had rested in the months following her surgeries. Dr. Failinger further explained "[although] activities of daily living need to be performed and there is little doubt that the right side is performing those, in most all cases there is a dramatic decrease in a patient's activity level overall and, therefore, major stress is not applied unless a patient had returned back to a job that required significant and repetitive or heavy use of the right upper extremity to shoulder level or above."

10. At hearing Dr. Failinger admitted that earlier in his practice he would have come to the same conclusion as Dr. Papilion and would have causally related Claimant's right shoulder symptoms to the immobilization of Claimant's left shoulder surgery. However, he relied on the AMA Guides to the Evaluation of Disease and Injury Causation, *Second Edition*, which, in his opinion dispelled a myth that assumes a correlation between symptoms in the opposite extremity simply because one extremity has been immobilized. Dr. Failinger testified a chapter from the *Second Edition* of the AMA Guides explained that while providers think patients are doing everything with the opposite arm, in fact, almost all patients' activity levels dramatically decrease from their pre-injury activity levels. The ALJ notes that the *Second Edition* of the AMA Guides upon

which Dr. Failinger relied are more than twenty-six years out of date.

11. Dr. Failinger opined that Claimant's right shoulder injuries were more likely degenerative in nature. However, he was unable to identify any medical records to support he opinion.

12. On May 12, 2016 Dr. John Hughes performed an independent medical examination at Claimant's request. Dr. Hughes opined:

> It is my opinion that [Claimant's] right shoulder rotator cuff tear was sustained as a direct consequence of injuries she previously sustained to her left shoulder on October 24, 2014. She has a frail physique and was highly limited with respect to any use of her left upper extremity subsequent to her second surgery in September, 2015. I agree with Dr. Papilion that she sustained right shoulder injuries because of her left shoulder limitations.

13. Dr. Papilion testified on behalf of Claimant by videotaped deposition. Dr. Papilion testified consistently with his medical records that he believed Claimant's activities of daily living after surgery caused her right her shoulder symptoms. He further testified that a rotator cuff tear such as Claimant's does not necessarily require activities of significant frequency or force. Rather, the majority of rotator cuff tears are caused by micro-trauma and wear and tear.

14. Dr. Papilion also testified that he had conducted research and found a study that revealed at least 38% of patients who had undergone rotator cuff repairs had rotator cuff tears on their other shoulders whether symptomatic or not. However, when asked about causation, Dr. Papilion admitted the research did not address whether the concomitant tears were causally related to overuse from the repaired shoulder but merely revealed that the tears were present.

15. The ALJ finds the opinions of Drs. Hughes and Papilion to be more credible and persuasive than that of Dr. Failinger.

16. Based on the evidence presented, Claimant has proven by a preponderance of the evidence that her right shoulder injury and need for surgery is causally related to her left shoulder surgeries.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure thequick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. *C.R.S. § 8-40-102(1)*; *see Specialty Rests. Corp. v. Nelson,* 231 P.3d 393, 398 (Colo.2010).

When determining credibility, the fact finder should consider, among otherthings the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. *Section 8-43-210, C.R.S.* As found, Claimant is a credible witness and her testimony is both persuasive and consistent with the evidentiary record submitted in this case.

In accordance with Section 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Offic*e, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385(Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Respondents are liable for medical benefits as may be reasonably needed "at the time of injury or occupational disease or thereafter to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2015). *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. Id. Whether the claimant sustained her burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

Claimant has alleged that her need for right shoulder surgery is causally related to her left shoulder surgery. Specifically, she has alleged that her reliance on her right arm for the performance of daily activities caused the pre-existing pathology to progress in a way that it otherwise would not have but for the overuse of her right arm due to the immobilization of her left arm. While Claimant acknowledged that she did not perform all activities of daily to the same extent after her injury that she did prior to her injury and denied performing any above shoulder level activities, her testimony as a whole supports that she relied exclusively on her right arm during periods when she was restricted from any use of her left arm.

Claimant's treating doctor, Dr. Papilion, and Dr. Hughes found these activities to be sufficient to have caused her right shoulder injuries, and the ALJ has found the opinion of those two doctors to be more persuasive that the contrary opinion offered by Respondent's retained expert, Dr. Failinger.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has proven by a preponderance of the evidence that her right shoulder injury is causally related to her admitted left shoulder injury. Claimant's right shoulder is therefore deemed a compensable part of this workers' compensation claim.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 15, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether the statutory cure provision bars a penalty claim against Respondents, where Claimant did not present clear and convincing evidence that Respondents knew they were in violation of a Stipulation at the time of the alleged violation;

- Whether Claimant proved entitlement to a penalty under C.R.S. § 8-43-304(1), where the persuasive evidence shows that Respondent Insurer acted objectively reasonable in attempting to determine the exact amount of the short term disability lien prior to reimbursing Claimant for the short term disability lien;

- If a violation is found, whether Claimant proved entitlement to a monetary penalty, where the evidence shows the violation caused no harm to the injured worker, who did not appear or testify at hearing; and,

- If a monetary penalty is issued, what the appropriate time period is for the penalty given that the Stipulation merely required Respondent Insurer to pay Claimant a check, as opposed to delivering the check to Claimant by a date certain.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant worked for United Parcel Service as a driver. On March 20, 2015, Claimant alleged sustaining an industrial injury to her left knee as a result of using a clutch. Respondents contested the claim. Over the time period Claimant was off work while the claim remained under contest, Claimant received short term disability benefits. The parties set hearing for March 2, 2016 on the issues of compensability, temporary disability benefits, and medical benefits.

2. The parties subsequently reached a tentative agreement to resolve the issues set for hearing. The initial stipulation ("Stipulation") was signed by Claimant on March 1, 2016, and verified by both Claimant and her attorney. The Stipulation was never finalized and there is no Order approving the Stipulation.

3. Paragraph 5 of the Stipulation required that "Respondents may offset their indemnity payment obligations by the amount of short term disability benefits received by the Claimant. Respondents agree to reimburse TeamCare, A Central States Health Plan, or any other entity providing such short term disability benefits to Claimant related

to her work injury, if and when TeamCare requests reimbursement." TeamCare is the short term disability administrator.

4. Brittany Pintor, Respondent Insurer's claims examiner, testified at hearing that the issue of reimbursement of a short term disability lien arose following the parties' agreement to resolve the hearing issues through the Stipulation. Ms. Pintor credibly testified that, because she knew Respondents intended on admitting liability for the claim, she filed a General Admission of Liability ("GAL") on March 14, 2016. She issued the GAL in an effort to reduce any delays in payment of temporary total disability (TTD) wage loss benefits to Claimant.

5. In issuing a retroactive TTD payment, Ms. Pintor withheld what she tentatively calculated $9,785.51 as the amount of the original short term disability offset in order to repay TeamCare. Ms. Pintor issued a retroactive TTD check in the amount of $16,215.90 to Claimant and her attorney. Ms. Pintor's actions are consistent with the Stipulation. Claimant and her attorney cashed the check on March 16, 2016. Claimant does not dispute this fact.

6. On March 16, 2016, TeamCare sent Claimant's counsel a letter indicating that the short term disability administrator paid $10,884.35 in disability benefits. Debbie Smith Porn, the TeamCare adjuster, stated in a cover letter that $10,884.35 represented "our final lien reports on [Claimant]."

7. Meanwhile, Respondent Insurer began paying bi-weekly TTD checks to Claimant. Claimant does not dispute that Respondent Insurer paid continuous TTD checks after March 16, 2016.

8. Claimant and Respondents subsequently entered into a revised, final Stipulation ("Final Stipulation") on March 24, 2016. Paragraph 6 of the Final Stipulation states that the purpose was to "resolve the TeamCare short term disability reimbursement." Paragraph 6(b) required that "within 15 days of the issuance of the order approving this [Final] Stipulation, Respondents agree to pay the TTD amount owed under the workers' compensation with the exception that the Claimant reimburses TeamCare any and all monies paid for short term disability." The Final Stipulation did not contain an exact date by which Respondent Insurer had to issue payment. The Final Stipulation also did not state a specific date by which Claimant had to receive payment. The Final Stipulation only required that Respondents pay Claimant 15 days after the issuance of the order approving the Revised Stipulation.

9. By March 26, 2016, a GAL had been filed, and TTD benefits, except for payment for the short term disability offset, had been paid. The only remaining benefits to be paid were the payments to Claimant that she needed in order to reimburse TeamCare for the short term disability lien.

10. Ms. Pintor credibly testified that she attempted to contact TeamCare on March 23 and March 25, 2016 by telephone before approval of the Final Stipulation, , in order to verify the lien amount.

11. ALJ Margot Jones signed the Order approving the Final Stipulation (the "Order") on March 25, 2016. Ms. Pintor credibly testified that she received a copy of the Order after March 26, 2016.

12. Once the Final Stipulation was approved, Ms. Pintor made three more attempts to verify the lien amount with TeamCare. She credibly testified that she called the TeamCare adjuster on March 30, 2016; April 1, 2016; and April 12, 2016. TeamCare did not return her calls. She also sent a fax asking the TeamCare adjuster to call her "ASAP." Claimant presented no evidence disputing Ms. Pintor's repeated attempts to reach TeamCare to verify the lien amount. Ms. Pintor calendared the date to pay Claimant as April 13, 2016, consistent with her understanding of her obligation under Paragraph 6(b) of the Final Stipulation. On April 12, 2016, after not receiving any response from TeamCare verifying the lien amount, Ms. Pintor submitted a request to Respondent Insurer for the amount she initially calculated was due, $9,785.91, which would allow Claimant to reimburse TeamCare for the short term disability lien. Claimant does not dispute the accuracy of the amount paid by Respondent Insurer to Claimant.

13. April 9, 2016 was 15 days after ALJ Jones signed the Order, but fell on a Saturday. The credible evidence is that Claimant was not certain whether Respondent Insurer was to perform its obligation by Saturday, April 9, or by Monday, April 11, 2016. Ms. Pintor credibly testified that she accidently miscalculated the date she was supposed to issue the payment to Claimant as April 13, 2016. As of April 12, 2016, Ms. Pintor believed she was in compliance with the Final Stipulation. On April 12, 2016 she attempted to verify the lien amount because there was a $1,098.44 discrepancy between her calculations and the amount stated in the March 16, 2016 letter. On April 12, 2016, Ms. Pintor requested a check be cut, and on April 13, 2016, Respondent Insurer cut the check. Claimant's counsel received the check on April 19, 2016.

14. On April 12, 2016, Claimant's counsel sent Respondents two letters indicating that the benefits, which he stated were due April 11, 2016, had not been received.

15. On April 13, 2016, Respondents filed an Application for Hearing challenging a total knee replacement surgery in this claim. On May 12, 2016, Claimant filed a Response to Respondents' Application for Hearing, requesting a hearing on penalties for Respondent Insurer's failure to pay $9,785.91 timely pursuant to Claimant's interpretation of the Final Stipulation. Claimant does not dispute the amounts paid, and concedes that at least by April 19, 2016, any penalty period would end. Respondents endorsed the cure provision.

16. On April 29, 2016, Respondents received a letter from Claimant's counsel indicating that the short term disability lien had been satisfied. The letter attached a TeamCare letter dated April 28, 2016 stating that a check was received from Claimant in the amount of $8,760.25, satisfying the lien. The amount of $8,760.25 shows a discrepancy in the amount of short term disability payments noticed in the lien and what

amount Claimant paid to satisfy the lien. The amount paid by Claimant to satisfy the lien was $1,025.66 less than what Ms. Pintor paid to Claimant to satisfy the lien.

17. Claimant did not testify at hearing or otherwise appear. Claimant presented no credible evidence that she sustained harm by an alleged violation of the Final Stipulation. Claimant presented no evidence of Respondent Insurer's intent to commit a violation. Claimant presented no credible evidence of a pattern of conduct requiring a penalty to prevent future bad conduct. Other than claiming that a violation occurred, Claimant presented no credible evidence to justify a monetary penalty for a violation of the Final Stipulation.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado ("Act"), C.R.S. § 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. In determining credibility, the ALJ considers the witness's manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *See Colorado Jury Instructions, Civil*, 3:16.

Concerning penalties, section 8-43-304(1) states:

> Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each such offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved

> party and the workers' compensation cash fund created in section 8-44-112(7) (a); except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed.

As seen above, section 8-43-304(1) gives the ALJ discretionary authority to impose a penalty of up to $1,000.00 per day for an insurer's violation of the Workers' Compensation Act or an Order. The imposition of penalties under section 8-43-304 is a two-step process, first requiring the ALJ to determine if the respondents' conduct violated the Act, a rule, or an order. If a violation occurred, the ALJ must then determine whether the party's actions were objectively reasonable. Penalties may only be imposed if the ALJ concludes that the insurer's conduct was not reasonable under an objective standard. *See e.g., Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995). The reasonableness of an insurer's actions depends on whether those actions were predicated on a rational argument based in law or fact. *Diversified Veterans Corporate Ctr. v. Hewuse*, 942 P.2d 1312 (Colo.App.1997). Generally, determination of the reasonableness of the insurer's conduct is a question of fact for the ALJ. *See Id*. It is the moving party's burden to prove that the other party failed to take an action that a reasonable non-compliant party would have taken. *City and County of Denver v. Indus. Claim Appeals Office*, 58 P.3d 1162, 1164–65 (Colo. App. 2002). The appeals courts have long held that the purpose of the penalties statutes is to punish "misconduct." *See, e.g., Sears v. Penrose Hospital*, W.C. No. 4-145-608 (ICAO, May 14, 1996). Claimant argues that a penalty should be imposed because there was a violation. Even if a violation of the Final Stipulation occurred, Respondent Insurer acted in an objectively reasonable manner by attempting to verify the lien amount prior to issuing payment for the short term disability reimbursement. Also, even if a violation occurred, Claimant did not suffer actual harm, and there is nothing in the record to suggest that Respondent Insurer would violate a stipulation in the future. The ALJ therefore concludes there was no misconduct in this case warranting the imposition of penalties.

I. The Cure Provision Bars a Penalty in this case because Respondents did not know they were allegedly in violation of the Stipulation.

Section 8-43-304(4), C.R.S., states:

> In an application for hearing for any penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted. After the date of mailing of such an application, an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed.

The statute also states that "[t]he curing of the violation within the twenty-day period shall not establish that the violator knew or reasonably should have known that such person was in violation." The cure provision applies if the alleged violation was cured prior to the request for a hearing concerning penalties. *Anderton v. Hewlett Packard*, W.C. No. 4-344-781 (ICAO, September 11, 2003).

Here, the violation was cured by Respondent Insurer's issuance of the check on April 13, 2016. The request for hearing on the issue of penalties was not filed until May 12, 2016, after the alleged violation had been cured. As found above, the check Claimant alleges was untimely was a reimbursement check for short term disability benefits. Claimant represented that the check was for temporary disability benefits, but paragraph 6 of the Final Stipulation clearly states that the purpose of that paragraph was to "resolve the TeamCare short term disability reimbursement." (Emphasis added). Paragraph 6(b) required that "within 15 days of the issuance of the order approving this Stipulation, Respondents to pay the TTD amount owed under the workers' compensation with the exception that the Claimant reimburses TeamCare any and all monies paid for short term disability." Respondents, prior to the approval of the Order, filed a GAL and paid $16,215.90 in retroactive TTD benefits. Claimant and her attorney cashed this check on March 17, 2016. Respondents also continued to pay biweekly TTD checks after that date. Ms. Pintor credibly testified that the remaining amount to be paid to Claimant consistent with Paragraph 6 was for the outstanding short term disability reimbursement. The exhibits submitted into evidence, including the TeamCare notifications and lien information, are consistent with Ms. Pintor's testimony and reflect that the money paid was for reimbursement of a disability lien, not for wage replacement benefits as suggested by Claimant.

Ms. Pintor reasonably believed she was in compliance with the Final Stipulation when, on April 12, 2016, she requested a check be cut, which was done on April 13, 2016. Claimant admits receiving the check on April 19, 2016. Claimant asserts a penalty period from April 9, 2016 through April 19, 2016. However, Respondents cured the violation well before Claimant requested a hearing on penalties on May 12, 2016, and before the 20-day grace period to cure the penalty ran.

Claimant bears the burden under section 8-43-304(4) to prove by clear and convincing evidence that the Respondents knew or reasonably should have known that they were in violation of the Final Stipulation. Clear and convincing evidence is the highest standard of proof in a workers' compensation administrative proceeding, which requires the moving party to present evidence that it is "highly probable" that the Respondents knew or should have known of the violation. Here, Claimant presented no credible evidence that Respondents knew or should have known that they were in violation of the Final Stipulation at the time of the actual alleged violation. At the time the alleged violation began – which Claimant stated in a letter was April 11 – Ms. Pintor reasonably believed that she was within the timeframe set forth in the Final Stipulation to send the check to Claimant. Ms. Pintor credibly testified that she miscalculated the date to send the check to Claimant. Her testimony does not indicate that she intentionally disregarded the conditions of the Final Stipulation. To the contrary, she was actively attempting to clarify the lien amount on April 12, 2016 when she tried to contact TeamCare for the fifth time. The purpose of her attempted contacts was to clarify the lien amount with TeamCare to ensure that the short term disability check accurately reflected the lien amount in order to be in compliance with the Final Stipulation. Having received no response from TeamCare after multiple attempts, Ms. Pintor put in a request for payment on April 12, 2016. A human error in the calculation of two days is not per se unreasonable under these facts. Claimant presented no persuasive evidence that it was “highly-probable” that Ms. Pintor knew she was in violation of the Final Stipulation.

Claimant also argues that Respondents were in violation of the Final Stipulation between April 13, 2016 and April 19, 2016 because Claimant interprets the Final Stipulation as requiring that she receive payment on the 15th day after the Order was authorized by the ALJ. However, Ms. Pintor credibly testified that she understood paragraph 6(b) as requiring only that she make a payment consistent with the Final Stipulation. Her interpretation of the FInal Stipulation is reasonable since the Final Stipulation does not state or otherwise indicate that the payment was to be actually received by Claimant within 15 days of the Order. For all of these reasons, Claimant has failed to prove that it is “highly probable” Respondent Insurer knew or reasonably should have known that it was in violation of the Final Stipulation by issuing the check on April 13, 2016, or that the Final Stipulation allegedly required that Claimant have a check “in hand” by that date.

Claimant further argues that the cure provision does not apply as a matter of law pursuant to *Grant v. Professional Contract Services*, W.C. No. 4-531-613 (ICAO, Sept.16, 2005). Claimant argues that, under *Grant*, an experienced adjuster is presumed to have knowledge of the applicable law, and, therefore, the cure provision does not apply. In *Grant*, the issue was whether the respondents timely paid medical bills consistent with a stipulation which complied with Rule 16(K)(2). The ALJ found as a *factual matter* that the claims adjuster had experience with Rule 16, and, therefore, should have known about the obligation to make payment pursuant to the rule. However, the ALJ, after finding claimant was not in any way harmed by the late payment of the medical bills, merely issued a penalty of $5.00 per day for each day respondents remained in violation of the statute.

Unlike *Grant*, there is no persuasive evidence in the record that the claims adjuster in this case had knowledge of or violated any applicable law – she credibly testified that she miscalculated the date for the check to be issued. *Grant* does not stand for the proposition advocated by Claimant that a claims adjuster is *de facto* presumed to have knowledge of the applicable law, thereby meeting the burden of clear and convincing evidence. Reading *Grant* that broadly would effectively eviscerate the cure provision.

II. Assuming A*rguendo* that the Cure Provision Does Not Apply, Claimant has not Proven by a Preponderance of the Evidence that Respondent Insurer Acted Objectively Unreasonable in Issuing Claimant's Short Term Disability Reimbursement Check When it Did.

Respondent Insurer's conduct before and after April 11, 2016 was objectively reasonable. Ms. Pintor issued a GAL and paid Claimant retroactive TTD, less the short term disability lien offset, prior to the Final Stipulation in order to avoid a delay in Claimant receiving her wage loss benefits. Ms. Pintor's conduct is persuasive evidence of Respondent Insurer's intent to ensure that there be no delay in resolving the disputed issues relevant to the claim. Given the discrepancy between the March 16, 2016 TeamCare lien amount notice and Ms. Pintor's calculation of the offset withholding, it was reasonable for Ms. Pintor to attempt to verify the lien amount with TeamCare. As noted above, Ms. Pintor made objectively reasonable, diligent efforts to confer with TeamCare by calling five times and faxing once, asking for an "ASAP" response.

The April 2016 letter from TeamCare stating that the lien was settled by Claimant for an amount less than the amount stated in March 2016 lends credence to the fact that Ms. Pintor believed she should verify the lien amount before issuing a check. It should be noted that in such a situation, a claims examiner is put into a difficult situation because penalties may be imposed for paying an incorrect lien amount. After receiving no response from TeamCare, Ms. Pintor requested that payment be made to Claimant consistent with her calculation of the offset amount previously withheld and her reasonable understanding of her obligations under the Final Stipulation. Ms. Pintor demonstrated diligent efforts to resolve the payment issue and her actions were reasonable under the circumstances.

Claimant argues that it was unreasonable for Respondent Insurer to issue its check payment from either Oregon or Connecticut. The ALJ disagrees. Ms. Pintor testified that she did not know if Respondent Insurer has a facility in Colorado that issues checks. Ms. Pintor reasonably relied upon Respondent Insurer's payment system to ensure the check was properly sent to Claimant. It was not unreasonable for her to rely on Respondent Insurer's internal system.

Claimant suggests that it was unreasonable not to use a courier service to deliver the check to Claimant. However, Ms. Pintor credibly testified that the authorization process required in order to use a courier service possibly could have taken longer than mailing the check, and Claimant presented no persuasive evidence that Respondent Insurer's use of a courier service would have expedited Claimant's receipt of the check.

Claimant argues that the April 14, 2016 post mark on the envelope for the April 13, 2016 check is the date that Respondent Insurer "released" the check. Claimant provided no persuasive evidence that Respondent Insurer placed the post mark on the envelope. It is just as likely that the April 14, 2016 post mark was placed on the envelope by the U.S. Postal Service, as is usually the case with post marks.

Finally, Claimant interprets the Final Stipulation as meaning Claimant was to have the check “in hand” by the end of the fifteenth day. The Final Stipulation does not contain that language or requirement. Ms. Pintor testified that she understood the Final Stipulation’s use of the phrase “to pay” the Claimant to mean to issue the check paying Claimant the disability lien reimbursement amount. Tr. at 90-91. The ALJ concludes her interpretation is reasonable given that that interpretation is a generally common understanding of that term. The ALJ further concludes that although there may be Colorado case law concerning what “payment” means in a technical sense, it is unreasonable to expect Ms. Pintor to know and understand those Colorado cases and apply those cases to the terms of the Final Stipulation when determining the date Respondent Insurer had to pay Claimant.

III. Notwithstanding the Arguments above, this Case Does not Warrant the Imposition of a Monetary Penalty.

The amount of a penalty for a violation such as may have occurred here is based on consideration of several factors, including the extent of harm to the claimant, the duration and type of the violation, the insurer’s motivation for the violation, the insurer’s mitigation, and whether or not the misconduct is representative of a pattern of misconduct. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995). Any penalty amount is within the ALJ’s discretion. *Id*.

No persuasive evidence whatsoever was presented that Claimant was harmed by any alleged violation. No evidence supports a finding that Claimant lost income or was financially damaged. Also, the ALJ concludes the violation was for two days: April 11 through April 13, 2016. In a similar case, an ALJ found no penalty was warranted when an adjuster was late filing an FAL because she was trying to confirm the exact amount of indemnity benefits owed in the claim. *Gonzales v. City of Fort Collins*, W.C. No. 4-365-220 (ICAO 2006). The delay in *Gonzales* was longer than the two days asserted here.

As stated above, the violation ran from April 11, 2016 through April 13, 2016, the date Respondent Insurer issued the payment to Claimant. Assuming *arguendo* that the alleged violation ran until April 19, 2016, the alleged violation was a total of eight days. When compared to cases such as *Grant*, *supra*, where the ALJ imposed a penalty of $5.00 per day because of the insurer’s failure to timely pay outstanding medical bills for a significantly longer period of time according to a stipulation, the violation here is *di minimus*.

Moreover, Claimant failed to prove that Respondent Insurer intended to violate the Order. Rather, Ms. Pintor’s actions of paying Claimant benefits weeks prior to the approval of the Final Stipulation demonstrate her intent to resolve payment issues.

Finally, the intent of the penalties statute is to deter future bad conduct. Claimant provided no persuasive evidence that the type of violation, which caused no harm to Claimant, is conduct requiring a monetary penalty in order to deter in the future.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to meet her burden of proof by clear and convincing evidence under the cure provision that a penalty should be imposed in this matter.

2. Claimant's claim for penalties is denied and dismissed with prejudice.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.
4.

DATED: November 15, 2916

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STIPULATIUONS

At the commencement of hearing the parties reached the following stipulations approved by the ALJ:

- Claimant's average weekly wage is $1,372.05.

- If Claimant's alleged injury is determined to be compensable, Miguel Castrejon, M.D. is an authorized treating physician. Furthermore, the parties agreed that Dr. Castrejon's referrals, including Dr. Hart, are also authorized providers if the claimed injury is found compensable.

- Claimant agreed that Respondents would be entitled to offset any temporary total disability (TTD) benefits ordered by any payment of short term disability benefits made.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable occupational disease affecting her right upper extremity on December 9, 2015.

II. If Claimant sustained a compensable occupational disease, whether she established by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment to cure and relieve the effects of that disease.

III. If Claimant sustained a compensable occupational disease, whether she established by a preponderance of the evidence that she is entitled to TTD benefits for the period December 10, 2015 through and including June 6, 2016.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant has been employed as a full time property adjuster for Employer for approximately 18 years. Claimant adjusts property claims made by Employer's insured's. She testified that she works in an office setting, spending considerable time on the phone while simultaneously engaging in data entry using a keyboard and track ball mouse 6.5 to 7.0 hours per day. Claimant is right hand dominate.

2. Claimant's testimony is verified by Employer's "Physical Demand Job Analysis"

(hereinafter Job Analysis). The Job Analysis indicates Claimant spends 7.0 hours per day sitting continuously "at desk, at computer" and 1.0 hour per day walking "to meetings, huddles, lunch; to confer with coworkers," though the latter activities are performed on a "seldom" basis. (Claimant's Exbs. pg. 63). The Job Analysis confirms Claimant engages in repetitive motion activity with her "hand-wrist" and "elbow-shoulder" on a continuous basis, 7.0 hours per day. It is noted these activities are performed "at desk, on computer. Uses dual screens." (Claimant's Exbs. pg. 64).

3. Claimant experienced a previous occupational disease affecting her right upper extremity with the same Employer. The date of injury was June 25, 2006. Claimant was initially treated by Dr. Bethany Wallace for this injury. Dr. Wallace referred Claimant to Dr. Castrejon who evaluated her and referred her to hand specialist, Dr. Timothy Hart. Dr. Hart administered two steroid injections to the area of the right lateral epicondyle which provided benefit allowing Claimant to reach maximum medical improvement (MMI) on December 12, 2006. The final diagnosis provided at that time was chronic right lateral epicondylitis. (Claimant's Exbs. pg. 28; Deposition of Dr. Castrejon, pg. 4, lines 11-25 and pg. 5-6, lines 14-25 and 1).

4. Dr. Castrejon would subsequently summarize the previous case as follows: "…Briefly, the claimant was provided medical care for symptoms of right arm pain attributed to her work activities. The onset of symptoms was described as gradual and related to keyboard/data entry. Electrodiagnostic (EMG) testing was negative for peripheral neuropathy.[1] The patient underwent cortisone injections, physical therapy, acupuncture and specialist consultation…" (Id.)

5. Claimant returned to work after Dr. Castrejon placed her at MMI for her prior claim on December 12, 2006. She testified she again began experiencing right upper extremity symptoms over time. According to Claimant, the primary symptoms included numbness in the right wrist, and pain in the inside of the right elbow. Claimant testified she never had problems with right wrist before. She testified that in the 2006 case, the outside of the right elbow was symptomatic.

6. Claimant returned to Dr. Castrejon on August 6, 2015 with complaints of "intermittent to constant dull to sharp pain at the right lateral elbow that extends into the hand and right shoulder."[2] Dr. Castrejon reported:

> "…Following her release in 2006 the claimant states that she continued working regular duty. Regular duty is described as primarily keyboard and data entry. She admits that although her symptoms improved she remained

[1] Dr. Hart noted that EMG testing performed September 9, 2006, as part of Claimant's prior upper extremity claim, was normal. He also noted that Claimant complained of tenderness in the area of the right lateral epicondyle.

[2] During his deposition Dr. Castrejon testified that Claimant reported right elbow symptoms that were "somewhat different" than she had experienced previously and which "started bothering her" over time. According to Dr. Castrejon, Claimant reported that her symptoms had settled into the "medial part of the elbow and she was having some numbness type of sensation with pain in the arm, and at times the pain would include the whole arm to the level of the shoulder just below the shoulder."

> symptomatic attempting to limit use of her right upper limb. Over time she states that despite limiting or modifying her activities the pain gradually worsened with dull to sharp pain that she localizes to the lateral aspect of her right elbow and extending proximally to the shoulder and distally into the wrist and hand. By May of 2015 the claimant states that her symptoms were interfering with her work and non-work activities. She was seen at the company physical therapy department and provided with dry needling and exercises. Treatment did not provide benefit. She has been using a brace at night and icing the forearm with no benefit. She estimates keyboarding a 7 hours per day and has changed mousing to the left hand…" (Claimant's Exbs. pgs. 28, 29).

7. Dr. Castrejon's report regarding Claimant's different and escalating symptoms is consistent with her testimony that she began experiencing worsening symptoms in early 2015, tried to alter and otherwise limit her activities to improve her symptoms, but ultimately reported her problems to Employer in approximately July, 2015. Claimant was then seen in Employer's on-site clinic, and eventually allowed to return to Dr. Castrejon who, as noted above, saw her on August 6, 2015. At the conclusion of the August 6, 2015 visit, Dr. Castrejon prescribed medications, ordered electrodiagnostic testing, and referred Claimant to physical therapy. (Claimant's Exbs. pg. 30).

8. Dr. Castrejon performed electrodiagnostic testing of Claimant's right upper extremity on October 2, 2015. He reported, "…The patient has electrical changes that are consistent with a moderate to severe carpal tunnel syndrome. This condition may be resulting in the generalized arm pain that the patient is experiencing. My recommendation is for orthopedic consultation. The patient will be referred to Dr. Timothy Hart for consultation and will return for follow-up as scheduled." (Claimant's Exbs. pg. 24).

9. Claimant saw Dr. Hart on October 15, 2015. He noted, "…I previously saw her in 2006. At that point in time, she had right lateral epicondylitis. She comes in now with ongoing complaints of hand numbness, tingling, burning, and dysesthesias in the median nerve distribution and continued chronic long-term lateral epicondylar pain of her right elbow…" (Claimant's Exbs. pg. 43)(emphasis added) Dr. Hart reviewed the electrodiagnostic testing. He diagnosed carpal tunnel syndrome and lateral epicondylitis of the right elbow. Dr. Hart reported, "…We are tentatively going to schedule for right carpal tunnel release. However, she also continues to have right lateral epicondylar symptoms. This has been bothering her for a number of years also. Before we schedule for definitive right carpal tunnel release alone, we are going to obtain a MRI of her right elbow to check the health of the right lateral epicondylar region. If this MRI does demonstrate evidence of right lateral epicondylitis and she persists with right lateral epicondylar symptoms, we are likely to combine surgeries for a right carpal tunnel release and right lateral epicondylar release…." (Id. at 44)

10. MRI of the right elbow was performed on October 30, 2015. (Claimant's Exbs. pgs. 52, 53). Dr. Hart reviewed the results on December 2, 2015 and reported, "…Her new MRI of the elbow demonstrates no evidence of any lateral epicondylitis but she

does have evidence of medial epicondylitis of the right elbow...On clinical examination, she does have more significant tenderness to the area of the medial epicondyle or her right elbow than the lateral. She continues to have a positive provocative test of the right wrist with dense numbness and tingling in the median nerve distribution. Her symptoms have been unresolved with activity modifications, splitting [sic] and therapy…" (Claimant's Exbs. pg. 40). Dr. Hart recommended right carpal tunnel surgery, and at the same time a medial epicondylar cortisone injection. (Id.) Dr. Hart's diagnosis was right carpal tunnel syndrome, and medial epicondylitis of the right elbow. (Id. at 41).

11. On December 9, 2015, Dr. Castrejon noted he agreed with Dr. Hart's surgical recommendation. He also reported, "…[Claimant] is having worsening symptoms and difficulty with her work duties. Therefore I am placing her on light duty with no keyboard greater than 15-20 minutes per hour…" (Claimant's Exbs. pg. 19).

12. Claimant testified Employer was unable to accommodate Dr. Castrejon's work restrictions. Accordingly, she stopped working effective December 10, 2015. This is corroborated by Employer's email dated December 10, 2015. (Claimant's Exbs. pgs. 73, 74).

13. Dr. Castrejon examined Claimant on February 3, 2016 and diagnosed right median nerve neuritis; proximal flexor and extensor tendonitis; right medial epicondylitis; and compensatory left elbow pain. He reviewed Dr. Hart's surgical recommendation and reported; "…Surgery, however, has not been authorized. On the basis of worsening pain the patient will be proceeding with surgery through her private insurance…" (Claimant's Exbs. pgs. 15, 16).

14. In a pre-op visit on February 5, 2016, Andrew Domer, PA, noted, "…On examination, the patient does have significant tenderness in the area of medial epicondyle of the right elbow more than lateral. She does have positive provocative testing at the right wrist with dense numbness and tingling in the median nerve distribution…" (Claimant's Exbs. pgs. 38, 39).

15. On February 9, 2016, Dr. Hart performed right carpal tunnel release surgery, and administered an injection to the right medial epicondyle. (Claimant's Exbs. pgs. 36, 37).

16. Claimant submitted the surgical expenses to her private insurance. She also paid various medical treatment co-pays and deductibles out of pocket. (Claimant's Exb. 10).

17. Claimant testified she experienced substantial improvement regarding the numbness and tingling in the right wrist following the surgery performed by Dr. Hart. She testified to being 85-90% better, although she still experiences occasional aching. She returned to regular work on June 7, 2016.

18. On July 13, 2016, Dr. Castrejon reported, "…The patient has undergone right

wrist surgery. She had initial difficulty with pain control but this has continued to improve and at this point is having very mild intermittent symptoms. She has resumed full duty and has been able to tolerate her work activities. She will continue with a home exercise program, regular duty and intermittent use of Naproxen. I will see her back in four weeks. If she remains stable I anticipate that she will be close to MMI…" (Claimant's Exbs. pg. 2)

19. Claimant testified she never experienced problems with her right hand or wrist in the 2006 case, and that the right elbow pain in that case affected the outside of her elbow, whereas in the present case, her elbow pain is more on the inside of the right elbow. Based upon the evidence presented, the ALJ finds Claimant's testimony regarding the difference in the location of her symptoms between the 2006 and 2015 claims to be consistent, credible and convincing.

20. Dr. Castrejon testified regarding the electrodiagnostic testing he performed on October 2, 2015, and explained that the finding of moderate to severe right sided carpal tunnel syndrome was a new finding as compared to the problems Claimant had in 2006. (Dr. Castrejon depo. tr. pg. 12, l. 21 – pg. 13, l. 9). He testified that the EMG in 2006 showed no evidence of carpal tunnel syndrome. (Dr. Castrejon depo. tr. pg. 15, ll. 11-17).

21. Dr. Castrejon testified that Claimant's right carpal tunnel syndrome was more likely than not caused by her work duties noting: "When the patient saw me, we went over any other nonwork-related type of activities that she may have performed. She was not participating in any type of exercise activities, any hand type of sports activities; she was not being followed for any type of a hormonal problem, you know, no diabetes, no thyroid issues; there had been no other injury; her job, essentially, was her life. She's been there 18 years, I believe, and based on the work activities that she performed and my determination that this person had also experienced some level of what I would call an overuse condition even years prior, which in my mind and experience usually indicates to me that down the road that type of an individual is likely more propensed to having some element of repetitive exposure-resultant symptoms. (Dr. Castrejon depo. tr. pg. 14, l. 8 – pg. 15, l. 6)

22. Claimant testified that her computer use at home is limited to rarely checking email.

23. Dr. Castrejon also testified that Claimant's medial epicondylitis is a new finding not present during her 2006 injury noting: "It is a new finding. In fact, I went over the medical records from Dr. Wallace as well as myself and Dr. Hart, and in none of those records did I find any reference to carpal tunnel nor to a medial epicondylitis. The diagnoses that were listed were those of an extensor tendinitis, a radial nerve irritation, and tendinitis. And even Dr. Griffis, I believe, said when he did the nerve test that his clinical impression was that she had a lateral epicondylitis with a recommendation for injection. (Dr. Castrejon depo tr. pg. 17, ll. 5-21).

24. Dr. Castrejon testified regarding the cause of Claimant's medial epicondylitis explaining that, more likely than not, her work duties caused her symptoms. Dr. Castrejon based his opinion on Claimant's length of employment with the company and "on [his] discussion with her in terms of the work activities that she performed, and in light of my experience having worked as medical director for the occupational medicine department at Memorial Hospital wherein we actually did in-service type of, I guess, visits to USAA and to review workstations and actually observed the activities that were performed as part of our interaction with that company. (Dr. Castrejon depo. tr. pg. 17, l. 22 – pg. 18, l. 16).

25. Regarding the surgery and injection performed by Dr. Hart, Dr. Castrejon opined that this treatment was reasonable, necessary and supported by the medical treatment guidelines of Colorado. (Dr. Castrejon depo tr. pg. 19, ll. 8-13).

26. During cross examination, Dr. Castrejon was asked about language contained in his August 6, 2015 report wherein he opined that Claimant's "present condition represents a continuum of the original 2006 injury." In response, Dr. Castrejon testified: "when I saw her on August 6, 2015, . . . I had not preformed any type of testing. I had examined her, and my impression at that time, in the absence of additional testing, was that her symptoms appeared to be similar to or related to or continued from the original symptoms nine years prior."

27. Dr. Castrejon explained that that because he did not have objective documentation to support his diagnoses of carpal tunnel syndrome and medial epicondylitis, he indicated that based upon Claimant's presenting condition, "it appeared that her symptoms were continued." He also explained that after EMG and MRI testing he did not see a basis to explain Claimant's current symptoms on a diagnosis of lateral epicondylitis. Consequently, he opined that Claimant's medial epicondylitis and carpal tunnel syndrome were new conditions unrelated to Claimant's 2006 injury.

28. Based upon the evidence presented, the ALJ finds that Dr. Castrejon did not have sufficient information to make a definitive diagnosis at the time of Claimant's August 6, 2015 appointment. Moreover, while he initially opined that Claimant's symptoms appeared to be a continuum of those experienced as a consequence of her 2006 injury, the MRI and EMG evidence caused him to amend his opinion to conclude that Claimant's current symptoms are due to conditions unrelated to Claimant's 2006 injury.

29. Respondents' counsel also questioned Dr. Castrejon concerning the application of WCRP, Rule 17 to the circumstances presented in this case. Regarding "Rule 17" the following colloquy took place:

> *Q Would you agree that Rule 17, per the risk factor definition, and in those categories those risk factor definitions, that working up to seven hours per day at an ergonomically correct workstation is not a risk factor for development of these two diagnoses?*

> *A Well, I agree with what you're saying, but I also note that in that same review it says no single epidemiological study will fulfill all criteria for causality, and a clinician must recognize that available epidemiological data is based on population results and that risks individual variability. It also indicates that the guidelines are based on current epidemiological knowledge and that they're expected to change, and, therefore, the clinician should remain flexible and incorporate information into their evaluation of their patients.*
>
> *So yes, these are guidelines, but I think the clinician is also somebody that should be able to take that information and formulate whatever conclusion they can. It isn't a model that obviously the physician, from using his mind, could determine what may be going on as a guideline.*
> (Dr. Castrejon depo. tr. pg. 32, l. 15 – pg. 33, l. 15)

30. The ALJ finds Dr. Castrejon's testimony, as Claimant's treating physician in both the 2006 and the instant case, credible, persuasive, and entitled to considerable weight.

31. Based upon the evidence presented, including the testimony of Dr. Castrejon, indicating that an "[ergonomically] correct workstation is not a guarantee that an employee or a person will not develop an overuse condition", the ALJ finds Claimant's right carpal tunnel syndrome and medial epicondylitis to constitute new medical conditions unrelated to the effects of Claimant's prior 2006 injury. The ALJ is also persuaded, based upon the evidence presented, that Claimant's right carpal tunnel syndrome and medial epicondylitis are more probably than not, related to Claimant's work activities for Employer.

32. The ALJ has considered, and rejects as unpursuasive, Respondent's suggestion that Claimant's home computer use as well as her weight lifting/exercise is the cause of her right carpal tunnel and medial epicondylitis. Moreover, the ALJ is not convinced that Claimant's acupuncture treatment between 2006 and July 2015 establishes that Claimant's current symptoms are related to her 2006 injury.

33. Claimant has proven by a preponderance of the evidence presented that she suffered a compensable occupational disease affecting her right upper extremity on December 9, 2015.

34. Claimant has proven by a preponderance of the evidence presented that she is entitled to reasonable and necessary medical treatment to cure and relieve the effects of that disease.

35. Claimant has established by a preponderance of the evidence that she is entitled to TTD benefits for the period December 10, 2015 through and including June 6, 2016.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found in this case, Claimant's testimony is generally consistent with the content of the medical records and the testimony of Dr. Castrejon. Given the consistency between Claimant's testimony and balance of the remaining evidence, the ALJ finds Claimant's testimony credible and reliable. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Castrejon are credible and supported by the medical record. When the evidentiary record is considered in its totality, the opinions of Dr. Castrejon are more persuasive than arguments of Respondents' counsel, which are not evidence.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. Based upon the evidence presented, the ALJ understands Claimant to assert that she suffered a compensable right carpal tunnel and elbow condition caused by prolonged exposure to repeated keyboarding and mousing while performing data entry as an adjuster for Employer. Simply put, Claimant contends that she suffered an occupational disease from overuse of the right wrist and elbow. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

E. This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). On the other hand, an accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). As part of the analysis regarding the compensable nature of Claimant's alleged occupational disease, the ALJ has considered the "peculiar risk test."

F. As the court pointed out in *Anderson v. Brinkhoff,* 859 P.2d 819 (Colo. 1993), the plain language of section 8-40-201 (14) sets forth additional preconditions to the requirement that the injury arise out of and in the course of employment. Before a claimed occupational disease can be found to be compensable, it must meet each element of the four-part test mandated by section 8-40-201(14) which, in effect, operates as an additional causal limitation, ensuring that the disease arise out of and in the course of the employment. The court in *Anderson v. Brinkhoff* noted further that the statutory language, requiring that the disease "does not come from a hazard to which the worker would have been equally exposed outside of the employment", effectuates what is termed the "peculiar risk" test and requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. In other words, "the plaintiff must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Anderson v. Brinkhoff,* 859 P.2d at 824, *quoting Young v. City of Huntsville,* 342 So.2d 918, 922 (Ala. Civ. App. 1976).

G. The question of whether a claimant has proven that a particular disease, or aggravation of a disease, was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The failure to satisfy each element of an occupational disease by a preponderance of credible evidence is fatal to an occupational disease claim. *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988). Here, the evidence presented persuades the ALJ that Claimant has satisfied the peculiar risk test and has established that her right wrist and elbow condition “followed as a natural incident” of her work as a property adjuster for Employer. Concerning the “peculiar risk” test, the record evidence presented convinces the ALJ that Claimant’s engagement in cardio exercise and weight lifting, primarily involving the lower extremities and back did not expose Claimant to the risk factors likely to precipitate her symptoms in an equal or greater degree than that present by her computer work as an adjuster. Moreover, the evidence presented persuades the ALJ that Claimant’s right medial epicondylitis and carpal tunnel symptoms are likely related to her data entry and mousing duties. Citing sections of the Colorado Medical Treatment Guidelines (MTG’s), Dr. Castrejon credibly testified, that in his opinion, Claimant’s job duties likely resulted in overuse of the right arm giving rise to Claimant’s carpal tunnel syndrome and medial epicondylitis.

H. The Medical Treatment Guidelines are regarded as the accepted professional standards for care under the Workers’ Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this directive, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2015). Nonetheless, they carry substantial weight. Moreover, the MTGs have been accepted in the assessment of the cause of cumulative trauma conditions such as medial/lateral epicondylitis and carpal tunnel syndrome (CTS). *See, Flores v. Safeway Store, Inc.*, W.C. No. 4-799-270 (ICAO November 2, 2011).

I. Rule 17 Exhibit 5 of the MTGs specifically addresses causation of carpal tunnel syndrome. In determining whether treatment for carpal tunnel syndrome is due to a work related exposure or injury, the MTGs require that a provider identify “non-occupational” diagnosis/exposures as well as avocational activities in order to establish their contribution to symptoms and the need for treatment. According to the Guidelines the pertinent question to be answered is: “Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place? If the answer is "yes," then the condition is not work-related. If the answer is "no," then the condition is most likely work-related. The following non-occupational factors are to be considered when determining the occupational relationship regarding the need for treatment in cases involving carpal tunnel: age, sex, high BMI (obesity), the presence of other upper extremity musculoskeletal diagnosis, diabetes, rheumatologic diseases, hypothyroidism, smoking history and whether the patient is pregnant. Rule 17 Exhibit 5, D.1(c)(v)(A-G). Although cursory in fashion, the evidence presented convinces the ALJ that Dr. Castrejon addressed these non-occupational risk factors. Based upon the record evidence presented as a whole, the ALJ is convinced that Claimant likely would not have needed the treatment recommended by Dr. Hart if her work place exposure had not taken place. In the face of the abovementioned evidence, the ALJ is not convinced by Respondents' suggestion that Claimant's carpal tunnel syndrome (CTS)/medial epicondylitis is explained by age, gender, weight, rare home computer use and/or exercise. Moreover, the ALJ finds that Dr. Castrejon persuasively explained the factors that make it more-likely-than-not that Claimant's right CTS and medial epicondylitis was caused by her work. The evidence presented persuades the ALJ that Claimant's duties as a property adjuster requires at least 6.5 to 7 hours of repetitive keyboarding and mousing.

J. Even if Claimant's job does not fall precisely within the primary or secondary risk factors outlined in the causation matrix of the MTGs, the ALJ finds and concludes that the particular facts in her case based upon the evidence presented makes it more like than not that right CTS/medial epicondylitis was caused by her work. While the MTGs provide for specific steps in analyzing whether there is sufficient proof to causally connect medial epicondylitis and CTS to a claimant's need for additional treatment, the Court is not bound by the MTGs in deciding individual cases on the MTGs or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

K. As noted, Respondents position regarding compensability and Claimant's entitlement to medical benefits is based upon argument alone. In this case, the ALJ concludes that Respondents' causation argument is founded solely upon a rigid application of the MTGs' causation matrix. No specific evidence to support Respondents' causation argument was presented, other than suggesting that Claimant's work does not meet the requirements of the MTGs. Therefore, Respondents' argument necessarily rests upon the assumption that the causation matrix is absolute, and provides the only source of information to which we should turn to determine causation in this case. Such assumption is misplaced. Here, the detailed opinions of

Dr. Castrejon regarding the cause of Claimant's right carpal tunnel syndrome and right medial epicondylitis are credible and persuasive. Claimant's testimony regarding her symptomatology and onset of symptoms is similarly credible and persuasive. The evidence presented persuades the ALJ that Claimant has established a causal connection between her work duties and her right CTS/medial epicondylitis. Accordingly, the ALJ concludes that Claimant has proven that she suffered an occupationally induced disease occasioned by the nature of her work, which did not come from a hazard to which she was equally exposed outside of her employment. Consequently, the injury is compensable.

Claimant's Entitlement to Medical Benefits

L. The Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

M. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury.

N. The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo. App. 1999). Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). In this case, the totality of the evidence presented persuades the ALJ that Claimant likely suffers from two separate conditions afflicting the right upper extremity, namely right carpal tunnel syndrome and medial epicondylitis. Crediting the opinions of Dr. Castrejon and Dr. Hart, the undersigned ALJ finds and concludes that findings of EMG and MRI testing were probably caused by Claimant's work as a property adjuster for Employer. Consequently, Claimant has proven by a preponderance of the evidence that the treatment directed to her right wrist and elbow by Dr. Hart was directly related to her compensable occupational disease.

O. Based upon the evidence presented, the ALJ concludes that Claimant has proven that the right carpal tunnel surgery and elbow injection performed by Dr. Hart was also reasonable and necessary. The totality of the evidence presented outlines persistent pain and functional decline as evidenced by Dr. Castrejon's decision to impose physical restrictions limiting Claimant's use of the wrist and elbow. The evidence presented convinces the ALJ that conservative treatment failed prompting Dr. Hart to recommend and perform surgery. As Claimant has established the necessary nexus between her industrial injury and her need for surgery and the surgery is otherwise reasonable and necessary, Respondents are obligated to provide and pay for it.

Claimant's Entitlement to Temporary Total Disability Benefits

P. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). In this case, Claimant credibly testified and the medical records support that she was suffering from a painful wrist and elbow prompting the imposition of physical restrictions precluding her ability to perform her usual job on December 10, 2015. Moreover, the persuasive evidence establishes that Respondents did not offer Claimant modified duty. Claimant was unable to work from December 10, 2015 through June 6, 2016 due to the effects of her compensable occupational disease. Consequently, she is "disabled" within the meaning of section 8-42-105 and has established a wage loss. Thus she is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Because the period of disability lasted longer than two weeks from the day Claimant left work as a consequence of her injury, Claimant is entitled to recover disability benefits from the day she left work in this case. Section 8-42-103(1)(b), C.R.S. Consequently, the ALJ concludes that Claimant is entitled to TTD benefits from December 10, 2015 through June 6, 2016, having returned to work on June 7, 2016.

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that she suffered a compensable injury to her right wrist and elbow as a consequence of performing prolonged keyboarding and mousing as an insurance adjuster for Employer.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her right wrist/elbow injury, including but not limited to the surgery and injection performed by Dr. Hart on February 9, 2016.

3. Respondents shall pay temporary disability benefits in accordance with section 8-42-103(1)(b), C.R.S. at a rate of sixty-six and two-thirds percent of Claimant's AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. As Claimant's disability lasted longer than two weeks from the day that he left work as a result of her injury, TTD benefits shall be paid from December 9, 2015 through June 6, 2016, in accordance with Section 8-42-103(1)(b), C.R.S.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 15, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

The issues determined in this Order are whether the claims the Claimant has brought are compensable under Colorado law and whether the specific medical procedure the claimant underwent on September 22, 2014 associated with her lower back was reasonable, necessary, and related to a compensable claim.

FINDINGS OF FACT

1. Claimant is a 56 year old female hired as a Terminal Operator for Employer on February 4, 1992. Claimant worked for Employer for 28 years and 8 months in the almost "identical job" since 1992. Claimant's job as a Terminal Operator was not unique to Claimant. All 60 Terminal Operators who worked for Employer performed essentially the same job. Claimant worked in this capacity since 2001, and at all times pertinent, at Silo 35.

2. On June 18, 2015, Claimant gave notice that she would be voluntarily retiring effective November 1, 2015. Claimant's last day of actual work for Employer was August 11, 2015, at which time she applied for short-term disability ("STD"), indicating that the reason was severe osteoporosis. The STD form specifically asked if Claimant's condition was work-related and Claimant responded "No." Claimant's personal care physician, Gary Mohr, M.D., also signed this form. (Ex. X pgs. 440-442).

3. Claimant did not pursue a claim for Workers Compensation (WC) until *after* she retired. Claimant filed two WC claims on consecutive days. The first, dated 10-19-15, was for an alleged traumatic injury from "carrying heavy containers of sand and cement up and down stairs over a long period of time and fractured her back", occurring on September 16, 2014 for which she underwent back surgery on September 22, 2014. This procedure was paid for by her personal health insurance and she received STD through her employer-sponsored STD policy. The second claim, filed 10-20-15, alleged an occupational disease with a date of onset of back pain of August 11, 2015 due to "intense physical labor." This claim was filed the very last day Claimant worked for Employer.

4. Katie Montoya conducted an on-site job analysis on April 26, 2016. Montoya has been accepted as an expert in Colorado WC claims more than 100 times and has been conducting job analyses in Colorado since May, 1991. This Court likewise accepts Montoya as an expert in jobs analysis.

5. As a Terminal Operator, Claimant spent on average 4.5 to 7 hours per day in the terminal operating a computer. Claimant's job was to keep an eye on the trucks coming in and out of the bay area to assure safety. Claimant's main responsibility was

to operate a light system which is utilized to spot the vehicles. Claimant would use a computer system for the processing and loading of the material into the vehicle. This component of the position was not physical demanding. The number of trucks coming into the bay area would vary each day. Up to 78 trucks could be processed in an eight hour period of time. Processing a truck could take from 5 to 14 minutes per truck. Claimant also spent time standing in the observation terminal waiting for the next truck to arrive. Up to 7 hours of the work day is spent by the Terminal Operators, including Claimant, in this room.

6. Claimant's additional job duties could take up to 2 hours per day and including making coffee, and bringing five-gallon water jugs weighing approximately 40 pounds to the break room 1 to 2 times per week. There were also times that the cement filling system would become blocked by pieces of concrete. When this occurred, the pieces would have to be cleaned out by hand, and the concrete pieces placed into five-gallon buckets. During the jobs analysis, these buckets ranged from 37 to 63 pounds. The heaviest bucket weighed 63 pounds because it was overfilled with rock material. Claimant, however, testified that she would not lift buckets weighing 63 pounds, as this would be too heavy for her.

7. According to Claimant's application for Social Security Disability, Claimant would occasionally have to carry a bucket filled with concrete *down* 18 stairs. This would occur approximately 1 to 3 times per week, prior to the installation (occurring in October or November of 2014) of a chute system by Employer to save this labor-intensive step. There was no reason for Claimant to ever have to carry a bucket filled with concrete *upstairs*. Upon installation of the chute system, Claimant no longer had to carry a bucket filled with concrete *downstairs.* On the occasion where a load was spilled it would have to be cleared from the bay area by shoveling. The clean-up would take from one to three hours per occurrence depending upon the amount of product that had been spilled. This occurred 1 to 2 times per week. There was no repetitive, sustained shoveling or sweeping involved in the clean-up. Indeed, Claimant had no job duties that involved repetitive, sustained activity of any kind. Claimant's job would be classified as light work, except for the occasional need to carry the buckets of concrete pieces down the stairs.

Claimant's non-work related spine issues

8. Claimant has a significant history of back problems. She was injured from a non-work-related incident lifting boxes in November 2012. A November 16, 2012, lumbar MRI revealed an L3-4 disc herniation, without stenosis, bone dehydration and a mild compression fracture at L-4. Claimant went on STD after fracturing her lumbar spine in 2012 and she also underwent physical therapy and saw a spine surgeon.

9. On October 27, 2013, Claimant struck a deer while driving her motorcycle at 50 to 60 miles per hour. Claimant testified that she did not hurt back or undergo any medical treatment for the deer accident. The medical records do not support this. Dr. Mohr diagnosed Claimant with a "displaced lumbar intervert disc and back pain" and orthopedic surgeon James P. Duffy, M.D., reported that Claimant had increased left

buttock and thigh pain ever since the deer accident that was related to Claimant's lumbar spine. By December 13, 2013, Dr. Mohr reported that Claimant "has a known herniated lumbar disc" and he wished to refer Claimant to a neurosurgeon.

10. Claimant testified that she did not recall having back pain at all in January 2014. This is contradicted by the medical records. On January 23, 2014, Claimant was seen by Dr. Mohr for hip and back pain from a herniated disc. No X-ray was done of her left hip or leg. Dr. Mohr's diagnosis was "back sprain/strain" and "displaced lumbar intervert disc."

11. On March 28, 2014, Patrick Timmons, M.D., tested Claimant's bone density which revealed osteoporosis in the lumbar spine. All available medical evidence shows that Claimant suffers from severe osteoporosis of the lumbar spine.

12. On April 24, 2014, orthopedic surgeon Michel Huang, M.D., reported that when Claimant hit the deer in October of 2013, the deer "fell on her left leg producing severe groin, back and lower extremity pain." She was initially evaluated and sent to physical therapy for her back injury. Dr. Huang noted that Claimant had a left hip labral tear and recommended 12 weeks with no significant lifting following hip surgery. Claimant testified that Dr. Huang's medical records were wrong, because she did not have any back pain after this deer accident.

13. On June 19, 2014, Dr. Mohr stated in his report that: Claimant's "back pain is controlled with muscle relaxers and ibuprofen. She is riding her motorcycle in the Wedding . . . She is scheduled for hip surgery in January but she is determined to ride [the motorcycle] to Oregon." Claimant testified that she does not know if this medical record by Dr. Mohr was wrong, because she did not have back pain, but was taking the prescribed medications for "full body pain,' not back pain."

Claimant's Alleged Work Injury No. 1

14. Claimant's hearing testimony regarding the first alleged work injury was very specific and detailed, but contradicted by the medical records, Employer testimony and Claimant's own testimony. According to Claimant, she arrived at work on September 16, 2014 feeling good. Then she operated the computer for several hours. Claimant next carried buckets of cement downstairs for approximately 45 minutes and her back still "felt okay." Claimant testified on direct that after finishing with the cement buckets and carrying them down the stairs and cleaning the chunks of cement, "I didn't have any problems, anything that would say that it was – there was a problem with it – I didn't have any". At approximately 11:00 a.m., Claimant was done cleaning the chute and taking all the slag away and carrying the buckets of cement and her back still felt okay and she was not having any back problem.

15. Claimant testified that at about 11:00 a.m., she moved sample bags and one was so heavy that she had to "take a big breath before I could get it up them steps. It hurt. It hurt. But not enough to slow me down. I had things to do that day." Claimant testified that she next took a cart with wheels and filled the cart with six, 5-gallon jugs of

water, each weighing 45 pounds. Claimant then pushed the cart to the truck driver shack and unloaded 2 of the 5 gallon water jugs. She went to grab a water jug and throw it on top of her shoulder to take it up the steps but she could not. According to Claimant, that's when she felt the pain. Claimant returned to the control room and finished her shift and went home. Claimant testified that she woke up on September 17, 2014 in pain, but she went to work. She did not report a work injury. According to Claimant, she left work early to see her Primary Care Physician, Dr. Mohr, and told him that she hurt her back. Claimant did not testify that she told Dr. Mohr she hurt her back "at work." Claimant's testimony is unclear whether she told Dr Mohr that her pain was due to lifting the water jugs, carrying buckets of concrete downstairs, or carrying sample bags across the facility.

Injury No. 1 Contradicted by Employer Testimony

16. Claimant's supervisor, Sonny Daniels, testified that back on September 16, 2014, Claimant told him that she wanted to take "flex" time to attend a scheduled physician appointment. Claimant worked her regular shift on September 16th and said nothing about any work injury of any kind. Claimant returned to work on September 17, 2016, and contacted Daniels from the terminal operator room and told him that she had back problems, specifically, a fracture and disc damage to the lumbar spine. Daniels advised Claimant to go the Human Resources to complete the short-term disability paperwork. Daniels asked Claimant "how and when it happened" and Claimant responded that she was "not sure." Claimant said nothing about a work injury, did not even mention work or job duties or being in pain at work or anything related to work. According to Daniels, had Claimant said anything about a work injury, he would have completed WC paperwork. Claimant also worked September 18th, and once again, did not report a work injury.

17. Claimant applied for STD on September 19, 2014 and stated that her back pain "intensified" on September 16, 2014. When asked if the disability was due to a work injury, Claimant responded "? need more info from Doctor in Pueblo 9-22-14." Physician Assistant D.B. Parsons (to Dr. Mohr) also signed the form stating Claimant had a lumbar fracture, but no work injury was mentioned.

18. On Monday, September 22, 2014, Claimant contacted Human Resources from the hospital and spoke with Carrie Wakley and Cecil Slattery on speaker phone. Claimant told Wakley and Slattery that a "nurse" told her that her back condition might "possibly" be work-related. Claimant stated nothing about when she was injured at work or what she was doing when injured or even what day or time of day she may have been injured. Claimant simply stated that a nurse told her that her condition was possibly work related. Slattery told Claimant if she was claiming her back was work-related she needed to complete the WC forms and see an Employer designated medical provider. Claimant stated to Slattery that she did not want to do that because she did not want to cancel the surgery she was scheduled to have that very day. Slattery reiterated to Claimant to file a claim and see an Employer physician but Claimant did not do so.

19. Claimant's testimony regarding reporting the alleged injury to Employer during the September 22, 2014 conference call is not supported by other evidence. Claimant first testified that right before having back surgery, she spoke with "Dr. Jain's (the surgeon) nurse" and was told by the nurse that "yes, heavy lifting could have easily compress fractured my back." There are no medical records from Dr. Jain or Dr. Jain's nurse or any other medical provider that opines Claimant's need for back surgery on September 22, 2014, was work-related.

20. Claimant testified that she specifically told both Slattery and Wakley during the September 22nd conference call that she hurt her back carrying cement buckets down the steps and that "there is no reason to be doing 18th century work" and "why can't we put a pulley in." When asked why Claimant would have told Slattery and Wakley she hurt her back lifting cement buckets when she testified that she hurt her back lifting water jugs (and her back was "fine" after she carried cement buckets), Claimant responded: "[be]cause the buckets and the water jugs are the same thing." The ALJ rejects Claimant's testimony regarding the alleged work injury because it is contradicted by the testimony of Employer witnesses Slattery, Daniels and Wakley, the medical records, and Claimant's social security application. A review of Claimant's voluminous medical records with multiple providers fails to document that Claimant ever told anyone that she hurt her back while lifting cement buckets or water jugs or any other work-related mechanism on September 16, 2014.

Injury No. 1 Contradicted by the Medical Records

21. On September 17, 2014, the day after the alleged injury, Claimant was seen by Dr. Mohr who diagnosed acute severe lower back pain, known osteoporosis. No mention was made of any work injury. According to Dr. Mohr, Claimant: "presents for back pain, mid to lower L side of back. ***Started earlier this week***. If she coughs she loses control of her bladder, but if she sneezes, she doesn't. Laying and sitting are very painful. . . ***Does not recall any injury.*** . . This is different from her previous back pain. Almost went to ER last night" and can't hardly ride on her motorcycle due to the pain."

22. No mention is made by Dr. Mohr about an alleged injury of any kind at work. Dr. Mohr does not even reference Claimant's job at all. Indeed, he documents that Claimant does not recall any injury and that her back pain started earlier in the week (not the day prior) and that laying and sitting are painful, not lifting or bending or carrying. Claimant's job duties did not include laying or sitting but it was those activities that caused pain.

23. A September 17, 2014 MRI was done by Mark Moore, D.O, for back pain and it revealed a L3 compression fracture but the "Exact age of the L3 compression fracture is unclear." (Ex. V, pg. 405).

24. On September 22, 2014, Claimant underwent back surgery by Dr. Jain. No mention was made by Dr. Jain of any work injury of any kind and the back surgery was paid for by Claimant's health insurance. At the time of the surgery, Claimant had not filed a WC claim and the back surgery was not requested or authorized by WC. At

the time of surgery, there was no WC claim. (Ex. Q, pgs. 278-285). There is no persuasive evidence that the surgery was emergent.

25. Eric Ridings, M.D., was accepted as an expert physician specializing in physical medicine and rehabilitation and is also Level II accredited by the DOWC. Dr. Ridings is the only physician who engaged in a causality analysis which Level II providers are taught by the DOWC to do. Dr. Ridings is also the only physician who reviewed Claimant's job analysis and all of Claimant's medical records. He also evaluated Claimant for an IME on August 22, 2016. (Ex. Z)

26. Dr. Ridings, Dr. Mohr and Dr. Anjmun Sharma (who also conducted an IME on January 25, 2016) agree that Claimant has severe osteoporosis. Osteoporosis is a lack of an appropriate amount of calcium and Claimant's bone density test shows Claimant's osteoporosis is "quite severe." According to Dr. Ridings, during the IME Claimant told him that at the time of her back surgery on September 22, 2014, she "still didn't know how I would fracture my back." (Ex. Z, pg. 13).

27. Dr. Ridings explained that Claimant had a pre-existing compression fracture at the L4 Level in 2012. A 2016 lumbar MRI revealed a compression fracture of L3 just above L4. Thus, "we know that she able to have a non-work related compression fracture" because she had one at L4. (Ridings HT, pg. 235)

28. Dr. Mohr even testified that compression fractures do not always take a lot of trauma: "I mean, it can happen from a car accident, or if someone is hyperflexed in a car accident, but it can take trivial trauma, too; sneezing, or coughing, or turning the wrong way to make if come on." (Mohr HT, pg. 173)

29. Dr. Ridings agreed with Dr. Mohr's testimony that "essentially anything or nothing, *i.e.,* spontaneous, could cause this kind of compression fracture." Making a pot of coffee, flipping pancakes, raking leaves, coughing, sneezing or doing any number of things far too numerous to list, could easily cause or aggravate a compression fracture in a person like Claimant with severe osteoporosis. So, if the acute event which caused or aggravated the fracture was work-related, Dr. Ridings would expect there to be a medical record that was created close in time when Claimant began having symptoms that document the particular event. No such record exists.

30. It is equally possible that the coughing and the sneezing the week of September 17th, as opposed to lifting at work, caused the compression fracture. On September 17th, Dr. Mohr documented that if Claimant "coughs, she loses control of her bladder, but if she sneezes, she does not." (Ex. L, pg. 152). This documentation means, according to Dr. Ridings, that "somewhere approximately in that particular time frame . . . she had coughed or coughed and sneezed, which Dr. Mohr specifically did say, and I agree, could be sufficient to be the straw that broke the camel's back essentially when you have severe osteoporosis and cause that compression fracture." (Ridings HT, pg. 239)

31. Dr. Ridings concluded that the underlying cause of the compression fracture is Claimant's severe osteoporosis. According to the medical literature, "vertebral compression factures" affect approximately 25% of all postmenstrual women in the United States" and that "vertebral compression fractures are recognized as the hallmark of osteoporosis." (Ex. Z, pg. 14). The trauma causing a compression fracture "may be simple, such as stepping out of a bathtub, vigor sneezing or lifting a trivial object" and that "up to 30 percent of compression fractures occur while the patient is in bed." (*Id*. at 14) Osteoporotic compression fractures are quite common, with 700,000 per year. Notably, "there is a 5-fold increased risk of a second compression fracture if there is a compression fracture above or below that level." (Id.) And, as Dr. Ridings explained, Claimant had a pre-existing L4 compression fracture "just below" the L3 level that was allegedly fractured in September 2014, thereby increasing her risk of another osteoporotic fracture 5-fold. (*Id*.) And, while this condition could have been aggravated by lifting heavy cement buckets it also could have happened from a "billion" other things such as "just simply quietly standing or even being in bed overnight and you can wake up in the morning with a compression fracture." (Ridings HT, pgs. 242-243). While it can be any number of mechanisms, in this case a cough or sneeze, which is documented Claimant had during the week of September 17th, could have been the cause. There is no identified relationship between Claimant's work and the fact that she had a compression fracture at L4 "beyond the fact that for some amount of time she did heavy work." (Ridings HT, pg. 248).

32. Even when Claimant was seen by William Lippert, M.D., for an injection on October 21, 2015, she gave him a different history. Although Dr. Lippert did not opine that Claimant's 2014 fracture was work-related, he did reference the history Claimant provided to him that she "was shoveling heavy material working for a concrete company for many years." (Ex. V, pg. 379). And, on January 25, 2016, Claimant told Dr. Sharma she hurt her back on September 16, 2014 and sustained a fracture when she "was carrying heavy containers of cement and sand up and down stairs over a long period of time" (Ex. J, pg. 46). This contradicts Claimant's own hearing testimony.

33. Although Dr. Mohr tried to advocate in good faith for Claimant, his records and testimony did not assist. Dr. Mohr first testified on direct examination that he believed that Claimant did report to him a specific episode of lifting at work in "September ***2015."*** (Mohr HT, pg. 178) (Emphasis added).

34. Upon further questioning, however, Dr. Mohr admitted that (i) he did not document any report of a work injury by Claimant; (ii) if Claimant complained of a work injury that is something he would have documented; (iii) he did document that Claimant "does not recall any injury" and (iv) he had no independent recollection of Claimant reporting any work injury. (Mohr HT, pgs. 171 – 173 and pgs. 198-201).

35. When asked "how can you possibly testify that work duties on 9/16/14" caused the fracture if you have no independent recollection . . . of the Claimant complaining of job duties causing her back pain on 9/16/14 and it's not documented in your 9/17/14 note," Dr. Mohr responded: because "the job she does gives her all of the elements for the classic vertebral compression fracture" and that is "one of the

mechanisms for getting the fracture is to lean forward and apply a load to the spine and her carrying the buckets." (Mohr HT pg. 173 and 201). Dr. Mohr went on to state that "all the elements for the classic vertebral compression fracture" with an "axial load to the spine" are present when one gets into a motorcycle accident and hits a deer, or rakes leaves, or lifts boxes or sneezes and coughs" or "it can take trivial trauma" such as "turning around." (Mohr HT pg. 200-201).

36. On September 26, 2014, Claimant followed up with Dr. Mohr after undergoing back surgery. Dr. Mohr documented that Claimant's "bone density in April has not improved enough to prevent the fracture." (Ex, L pg. 157).

Alleged Work Injury No. 2

37. On October 20, 2015, an Employer First Report of Injury was filed indicating that Claimant was alleging a second back injury with a date of onset of back pain of August 11, 2015 "due to intense physical labor." (Ex. B, pg. 4). Claimant has provided no other information regarding the specific job activity she claims caused her to suffer from a work-related occupational disease to her back after she returned to work on November 3, 2014 through August 11, 2015, which was Claimant's last day of work for Employer. Claimant performed essentially the same job for 22 years, from 1992 through November 3, 2014, and did not report an occupational disease.

38. On November 3, 2014, Dr. Mohr released Claimant to regular, full duty work following back surgery on September 22, 2014. (Ex. L, pg. 162). Between Claimant's return to regular work on November 3, 2014 and Claimant's January 7, 2015, non-work related hip surgery, Claimant worked approximately 33-days. Claimant worked 15-days in November 2014, 14-days in December 2014 and 3 days in January 2015. (*Id.*) During this time, a chute had already been installed in October 2014 and the terminal operators, including Claimant, no longer carried buckets of cement down 18 stairs. (Montoya HT, pg. 28).

39. On January 7, 2015, Claimant underwent non-work related left hip surgery by Dr. Huang. (Ex. O, pg. 221) Claimant was on short term disability following hip surgery from January 8, 2015 through March 17, 2015. Claimant was released to work by Dr. Mohr on March 16, 2015 (Ex L, pgs. 168-170) and worked approximately 88 days until her last day of work on August 11, 2015. (Ex. X, pg. 611). Specifically, Claimant worked 10 days in March 2015, 20 days in April 2015, 13 days in May 2015, from May 26, 2015 to July 1, 2015, she worked 5 weeks, and from July 7, 2015 to August 10, 2015, she worked 4 weeks. Claimant resumed short term disability on August 11, 2015 for her non-work related osteoporosis and never returned to work. (Ex. X pgs. 440-442).

40. On May 29, 2015, Claimant saw Dr. Mohr for leg spasms and was wondering if they were from her back or from osteoporosis medication. Claimant told Dr. Mohr she had bilateral leg pain which happened after going up and down stairs more than 3 times and that this episode started when she had to go back east to help her move her mother into a nursing home. "Lots of packing and lifting." (Ex. L, pg. 172). Claimant also reported back spasms. (*Id.* at 173) (CL HT, pg. 95).

41. Claimant ultimately admitted that she “did not know” if she ever saw Dr. Mohr for her back after helping her mom move into a nursing home. (CL HT. pg. 147 lns 2-13).

42. On June 6, 2015, Claimant hit another deer “square on” and the “deer wrapped around her.” (Ex. L, pg. 184). By July 21, 2015, Claimant “continue[d] to have considerable back pain”, so much so she was referred to a spine surgeon. Dr. Huang’s PA, Shannon Leigh, noted that Claimant’s “history, symptoms on exam and imaging are consistent with severe osteoporosis of the lumbar spine and osteopenia of the hips.” (Ex. U, pg. 271).

43. On August 6, 2015, Claimant was seen by spine surgeon Paul Stanton, D.O., who assessed low back pain, multi-level degenerative disc disease, sciatica, lower extremity pain and secondary weakness, and post L3 kyphoplasty. He noted that Claimant “has had progression of her symptoms and it is likely she has disc disease or stenosis that are causing her symptoms.” (Ex. O, pg. 235). Dr. Stanton reported that Claimant’s pain is “moderate to severe” and is “sharp, electrical, burning, aching, occasionally increases at night with certain activities such as standing and walking.” Lumbar x-rays revealed “facet spondylosis noted throughout the lower lumbar spine with disc disease form L1 to S1.” (*Id*.)

44. On an August 6, 2015, lumbar spine questionnaire Claimant was asked to “Describe your spine problem” including “date of onset, any related injury/accident,” and Claimant responded “Severe Spinal Osteoporosis.” (Ex. O, pg. 238). No mention was made of a work injury.

45. On August 7, 2015, Claimant was seen by Dr. Mohr for severe leg and arm pain in the elbow joint. (Ex. L, pg. 177). Dr. Mohr also diagnosed osteoporosis. (*Id*.)

46. On August 21, 2015, Claimant was seen by Dr. Mohr for lateral epicondylitis. (Ex. L, pg. 180). He noted that Claimant had gone on short term disability and planned to retire in November. (Also on August 21, 2015, Claimant told PA Leigh that she had constant left lateral elbow pain which “Claimant associates with years of work as a construction worker.”) (Ex. P, pg. 272).

47. On August 21, 2015, Dr. Huang assessed “Severe osteoporosis of the lumbar spine with history of vertebral body compression fractures.” (Ex P, pg. 276).

48. On August 25, 2015, Claimant saw Dr. Stanton who recommended a lumbar spine epidural injection and noted that the MRI revealed lumbar spine (and cervical) disc disease. (Ex. O, pg. 244).

49. During the September 3, 2015 visit, Dr. Mohr indicated that Claimant was wondering if the deer she hit in June of 2015 is what started her arm hurting. Dr. Mohr also stated that Claimant was claiming to have lifted a 55 pound gallon of cement at work before she quit, and “may have injured elbow then.” (Ex. L, pg. 184).

50. On September 4, 2014, Claimant saw Dr. Stanton for lateral epicondylitis and he documented that Claimant "cannot identify any specific injury or activity which led to the onset of her symptoms." (Ex. O, pg. 250)

51. By October 14, 2015, Dr. Mohr erroneously stated that "tomorrow" is Claimant's last day of work. (Ex. L, pg. 188). Claimant's last day actually worked for Employer was two months prior, on August 11, 2015. Claimant was noted to have back pain and weakness in the legs. Dr. Mohr diagnosed osteoporosis, and recommended a repeat bone density test and epidural. (Ex. L, pgs. 188-190).

52. On October 16, 2015, PA Leigh documented that she explained to Claimant that her chronic back pain from her age related osteoporosis and severe lumbar spine osteoporosis, can cause depression and fatigue. (Ex. P, pg. 276).

53. During Claimant's entire medical treatment since her return to work on November 3, 2014, no medical provider documented or even suggested that Claimant's back problems or need for medical care were in any way related to an occupational disease from Claimant's job, except Dr. Mohr and Dr. Lippert, both of whom relied entirely upon Claimant for their understanding of her job duties.

54. Dr. Mohr reported that Claimant's "job in the cement plant is carrying 2 buckets of cement, 5 gallons up a flight of stairs all day – for 22 years." (Ex. L, pg. 127). Dr. Mohr later admitted that he had no idea what Claimant's job duties were or that she was never required to lift a bucket of cement of any weight "up" flights of stairs.

55. Dr. William Lippert, M.D., saw Claimant on October 21, 2015. He did not opine that Claimant's back condition was work-related, but he documented that Claimant reported to him that for years she had to shovel heavy material while at work. (Ex. V, pg. 379). Claimant's job did not involve any repetitive or sustained shoveling. Shoveling was not even a task that Claimant herself originally alleged caused the September, 2014 injury. Indeed, Claimant would only have to shovel in the event of a concrete spill from the delivery system. (Montoya Depo. pgs. 35-37). If a spill occurred, it took 1 to 3 hours to clean up. Spills occurred once to twice per week but even when cleaning up a spill, Claimant did not engage in repetitive, sustained, shoveling because cleaning a spill also involved moving material around and sweeping. (Ex. J, pg. 64 and Montoya HT, pgs. 36-37).

56. Dr Ridings testified that Claimant "presented her job to multiple providers as though she were shoveling and carrying buckets of cement up and down stairs throughout each work day for the prior two decades. It does appear that she did carry heavy buckets down the stairs on some occasions for perhaps one hour on many work days and may have shoveled for between one and three hours once or twice a week. However more importantly, the pattern of [Claimant's] symptoms is not one of chronic and increasing pain over multiple years of performing the same job, but rather of being essentially asymptomatic and having no difficulty with work just before her left hip surgery and then after rehabilitation from her left hip surgery, and then a relatively sudden onset of widespread and severe complaints beginning at the end of May 2015 .

. . [Claimant's] pain complaints were markedly increased then on a follow up visit with Dr. Mohr on 10-14-15, stating that she was retiring the following day." There is "no anatomic correlate for her complaints of weakness and paresthesia has been found and her neurologic examination on my evaluation today was normal, as it was on the evaluation of Dr. Sharma." (Ex. Z, pgs. 15-16).

57. Dr. Ridings agreed with "Dr. Sharma's conclusion that [Claimant] has not sustained an occupational disease related to her employment at the cement plant. Neither do I think that her widespread complaints are related to the specific L3 compression fracture which itself was non work-related. I found no abnormalities on my physical examination beyond pain complaints. Her lumbar flexion was not valid in comparison to her straight leg raising, suggesting poor effort." (*Id* at 16).

58. By October 21, 2015, despite not having worked in more than 2 months, Claimant's back pain worsened to the point where she was utilizing a cane for ambulation, secondary to pain and had to undergo an ESI. It is unlikely that her job duties could not cause Claimant's condition to continue to worsen because she had not worked in two and a half months.

59. On October 29, 2015, Dr. Mohr saw Claimant for back pain and noted the epidural did not help much. This time, in addition to osteoporosis, he diagnosed lumbar spinal and foraminal stenosis." (Ex. L, pg. 192).

60. On November 5, 2015, Claimant told Dr. Stanton that she did get short term relief from the L3-4 ESI and that she was going to take care of a family member.

61. On December 3, 2015, Claimant presented for back pain and "pain all over." Dr. Mohr noted that Claimant "can't walk or stand for long periods, difficult to sit for long periods. If she sits for too long and then gets up she will lose control of bladder and a couple of times she almost lost control of her bowel; this is new in the last few weeks." She had herniated a disc in her lumbar spine in 2013 doing yard work. (CL HT, pg. 61 ln. 22 – pg. 62 ln. 7).

62. Claimant has presented no persuasive evidence to support her claim of an occupational disease. Dr. Mohr testified that he did not know the legal definition of an occupational disease and he believes the medical definition is an "illness that is secondary to employment." (Mohr HT, pg. 209). According to Dr. Mohr, he believes Claimant has an illness secondary to employment because Claimant's job at the cement plant "is carrying 2 buckets of cement 5 gal up a flight of stairs all day for 22 years." (Ex. L, pg. 127 and Mohr HT pg. 210). In addition, Dr. Mohr testified that Claimant was a "master shoveler." When asked what he meant by "master shoveler," Dr. Mohr testified that he knew she was carrying cement and water and shoveling, and that Claimant worked hard but he has "no idea" how many days per week she worked or how many times a day or week or year she shoveled or carried buckets. He was unaware that she did not carry cement buckets upstairs "at all" or that chute was installed in October/November 2014 that carried the buckets down the stairs so Claimant no longer had to do that task. Dr. Mohr did not review the job analysis done by Katie Montoya.

(*Id.*) Ultimately, Dr. Mohr does not know what job duties Claimant's job as a terminal operator entails. Dr. Mohr also did not review or recall reviewing any of Claimant's medical records from any other providers other than the lumbar MRIs.

63. Dr. Ridings also explained that in order to relate an injury to a work-related exposure such as shoveling, it is important to know and to understand how much time they are shoveling per day and whether they are "repetitively" shoveling vs. shoveling and then doing something else, then going back to shoveling. (Ridings HT, pgs. 258-259).

64. Dr. Ridings persuasively explained that when determining causality of whether or not a specific job duty or duties caused an injury, it is "obviously fundamental to at least have a good understanding" of what the job entails." (Ridings, HT pgs. 252-253).

65. Dr. Sharma opined that Claimant's "condition is likely as a result of chronic degenerative disc disease over time that it is independent of the work environment. In no way did any of her work activities contribute to the development, aggravation, exacerbation or acceleration of her back condition. This condition is likely to have occurred independent of Claimant's job. (Ex. I, pg. 60).

66. The ALJ finds that Claimant did not prove a work injury by traumatic event on September 16, 2014.

67. The ALJ further finds that Claimant did not prove a work injury, compensable as an occupational disease, occurring while working for Employer up through August 11, 2015.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Claimant has produced sufficient evidence to support a conclusion that some of her symptoms arose during the period of her employment. Here, though, the question for determination here is whether Claimant's spinal condition arose out of her employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts* *v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a “contested fact is more probable than its nonexistence.” *Page v. Clark, supra.* Whether Claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges that she suffered a compensable aggravation of her lumbar osteoarthritis as a consequence of carrying buckets of concrete “up and down stairs for 22 years”, constant shoveling of concrete spills, lifting 5-gallon water cooler bottles, or some combination of these activities. She is alleging that she sustained an occupational disease as a result prolonged exposure occasioned by her work activities for Employer. She alternatively alleges that her compression fracture of her L4 vertebra was caused by some combination of activities occurring during her work shift on September 16, 2014.

G. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). On the other hand, an accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). The failure to satisfy each element by a preponderance of credible evidence is fatal to an occupational disease claim. *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988). Here, Claimant concedes that she has pre-existing osteoarthritis in her lumbar spine; a condition that can result in vertebral fractures resulting in pain and disability. Nonetheless, Claimant asserts that her lumbar condition was asymptomatic until she was exposed to repeatedly carrying buckets of heavy cement and/or water bottles, and frequent, heavy, repetitive shoveling of concrete spills to complete the essential duties of her job. Consequently, Claimant argues that she aggravated her pre-existing condition making her claim for benefits, including medical treatment compensable because the aggravation is fairly traced to her employment as a proximate cause, and did not come from a hazard to which she was equally exposed outside of the employment. Simply put, Claimant asserts that the conditions under which her work was preformed aggravated, accelerated, and/or combined with her pre-existing conditions to cause her symptoms, her disability and her need for medical treatment, for which benefits are sought. Based upon the totality of the evidence presented, the ALJ is not persuaded.

H. A pre-existing disease or susceptibility to injury does not disqualify a claim if The employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Victory,* 805 P.2d 1167 (Colo. App. 1990). While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rita,* 717 P.2d 965 (Colo. App. 1995); *Cots v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). The totality of the evidence presented persuades the ALJ that Claimant's lumbar symptoms, more probably than not, arose from the natural progression of her pre-existing degenerative osteoarthritis, rather than her work duties as she explained and demonstrated. Claimant has not met her burden of proof as to either claim asserted: 1. that her injuries allegedly occurring on September 16, 2014 resulted in a compensable claim arising out of her employment. 2. That her injuries allegedly arising out of her employment constitute a compensable occupational disease involving her lumbar spine.

I. Consequently, her claim is denied and dismissed, and her claim for medical benefits, which Claimant sought and received through her own medical insurance, is not addressed further.

ORDER

It is therefore ordered that:

1. Claimant's September 16, 2014 claim for work injuries to her lumbar spine is denied and dismissed.

2. Claimant's claim for injuries to her lumbar spine resulting from an occupational disease for the period ending August 11, 2015 is denied and dismissed.

3. Claimant's claim for medical benefits for any medical procedures incurred to treat this injury is denied and dismissed.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 17, 2016

/s/William G Edie

William G Edie
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-956-528-04

ISSUES

Has Claimant overcome the DIME regarding MMI by clear and convincing evidence?

Has Claimant overcome the DIME regarding permanent impairment by clear and convincing evidence?

Has Claimant proven by a preponderance of the evidence that she is entitled to additional medical treatment related to her industrial injury?

FINDINGS OF FACT

Claimant sustained an admitted industrial injury on July 14, 2014, in the course and scope of her employment as an addiction counselor. She bent over to place a box on a shelf and experienced pain in her left buttock.

Claimant has a lengthy prior medical history involving her low back. She underwent three lumbar surgeries, the last of which was an L4-5 decompression and fusion in 1998. She was "on disability" for three years before she was able to return to work. The medical records indicate Claimant continued to have episodic low back pain prior to her July 2014 industrial injury.

The most recent documented pre-injury episode of back pain was in July 2011. On July 27, 2011, Claimant contacted her primary care provider at Kaiser and reported "lower back pain, had a fusion 10-15 years ago, last Thursday sat in a chair that seemed to 'throw it out.' Has never had the new pain like this. Has some numbness and tingling in the right leg, noticed it over the last couple of days." She rated her pain level as 7/10. She was scheduled for a "semi-emergent" appointment in two days.

On July 29, 2011, Claimant was evaluated by Dr. Susan Davis at Kaiser. Dr. Davis documented that Claimant "complains of low back pain for 3 day(s), positional with bending or lifting, with radiation down the legs." She described her prior history of back problems as "recurrent self-limited episodes of low back pain in the past. There is numbness in the legs." She reported that "the whole bottom of her foot[1] is tingling," and "pain radiates down the left leg." Significant physical examination findings included painful and reduced lumbar range of motion, and positive straight leg raise test on the left. As a result of "weakness on the left side," Claimant could not elevate or heel walk on the left foot. She demonstrated 4/5 strength with dorsiflexion and plantar flexion. Dr. Davis diagnosed lumbar radiculopathy and ordered lumbar x-rays and an MRI. Claimant

[1] Although the medical report does not indicate which foot was involved, the ALJ infers it was the left foot, because the physical examination findings reference the left leg and foot.

declined a prescription for muscle relaxers, and stated “[she] has plenty of Vicodin, does not need [a] refill.” Dr. Davis also referred Claimant for physical therapy.

The lumbar x-rays taken on July 29, 2011 showed the orthopedic hardware in the L4-L5 disc space and posterior element degenerative change in the lower lumbar spine. There was no evidence of compression abnormality or subluxation. The Kaiser records indicate the lumbar MRI was canceled for unspecified reasons.

On July 8, 2013, Claimant received a prescription for 60 pills of Vicodin 5/500, with five refills.

After the July 13, 2014 industrial incident, the Employer referred Claimant to Emergicare, where she came under the care of Dr. Reasoner. At her initial visit on July 14, 2014, Claimant described the initial injury as “a twinge across left buttock and down leg, pain progressed throughout day.” Her pain diagram indicated shooting pain in her left buttock, left groin and in the posterolateral aspect of her left thigh. She also indicated pain and paresthesias in the left calf and foot. She had taken Vicodin earlier that day, which she apparently had left over from a prior prescription. On physical examination, she demonstrated tenderness of the left lumbar paraspinal musculature and piriformis muscle. Straight leg raise test was positive on the left. Her gait was antalgic and she could not heel walk on the left. Dr. Reasoner diagnosed left-sided sciatica. He ordered lumbar x-rays and administered Toradol and Decadron injections. He prescribed prednisone and physical therapy for two weeks.

Dr. Reasoner’s July 23, 2014 note indicates Claimant’s condition did not significantly improve, so he ordered a lumbar MRI to rule out nerve compression.

The lumbar MRI was performed on July 28, 2014. The radiologist’s report indicates mild degenerative changes of the L3-4 and L5-S1 disk spaces with comparable posterior osteophyte formation and desiccated disc bulges. There was also mild segmental neural canal stenosis and comparable neural foraminal narrowing. At L4-5 there was evidence of postoperative changes from the prior fusion surgery. There was no evidence of recurrent or residual disc herniation. There was no evidence of nerve root impingement at any level.

On August 6, 2014, Claimant told Dr. Reasoner that her leg pain and left buttock pain was “slowly improving,” and physical therapy was helping. Claimant’s physical examination findings were improved as well, with the only abnormalities being tenderness of the left lumbar paraspinal musculature and decreased flexion. Based on the benign MRI findings and improvement in her condition, Dr. Reasoner recommended Claimant returned to regular duty work and continue with physical therapy.

Claimant’s physical therapy records document steady improvement over the course of 10 sessions. On August 22, Claimant reported that “her pain has improved significantly over the past week.” At the time of her discharge on September 2, 2014, claimant indicated she could complete all activities independently with no pain. The therapist observed no signs of antalgic gait. Claimant rated her pain level as zero.

Claimant stated she was “very grateful” for the benefit she received from therapy and was “pleased” with her progress.

Dr. Reasoner placed Claimant at maximum medical improvement (MMI) on September 3, 2014. The corresponding medical report indicates that therapy was a “tremendous help,” and Claimant rated her pain level at zero.[2] Claimant’s physical examination was entirely normal. Notably, Claimant had none of the radicular symptoms she exhibited on her initial visit, such as positive SLR and weakness. Dr. Reasoner released Claimant with no permanent impairment, work restrictions, or recommended follow-up.

Shortly after being placed at MMI, Claimant’s condition decompensated. On September 6, 2014, Claimant contacted her personal physician, Dr. Hoppe, and requested a refill of her Vicodin prescription. Claimant was not able to return to Dr. Reasoner for further evaluation or treatment due to lack of authorization. Therefore, Claimant pursued treatment with Dr. Hoppe.

Dr. Hoppe’s records from September 2014 through February 2015 document ongoing low back pain and left leg symptoms. In January 2015, Dr. Hoppe referred Claimant to a neurologist, Dr. Marc Treihaft.

Claimant’s initial evaluation with Dr. Treihaft took place on January 21, 2015. Claimant reported low back pain radiating into her buttock, but her primary complaint was “severe tightness, pain, and weakness in the left quadriceps.” There is conflicting information in the report regarding her leg symptoms, but it appears that she had tingling and burning in the left leg “from the anterior thigh to the dorsal foot.”

Dr. Treihaft reviewed Claimant’s prior medical history regarding her low back, including the July 2014 work injury and the prior lumbar surgeries. Claimant told Dr. Treihaft that “she did not respond to physical therapy” for the work injury.[3] On physical examination, her lower extremity strength was normal, except for weakness of the hip flexors and knee extensors. Sensation was normal to pinprick and vibration. Her gait was abnormal, and she “walked with a stiff left leg to protect herself from falling due to the quadriceps weakness.” Dr. Treihaft recommended EMG/NCV testing, and requested medical records from her workers’ compensation claim, including the lumbar MRI report.

Claimant returned to Dr. Treihaft on February 9, 2015 to complete the electrodiagnostic testing. The EMG revealed “[c]hronic left L4-5 radicular changes. There were no acute abnormalities. These findings reflect the prior lumbar spine problems, including surgery at that level.” Dr. Treihaft opined that “aspects of her pain

[2] The Questionnaire completed by Claimant on September 3 contains inconsistent notations. In response to question 11, Claimant rated her pain "today" as zero. But she also marked an icon which corresponds to mild pain. The ALJ finds that the most reasonable interpretation of this questionnaire is that Claimant was having no pain, because she did not make any markings on the anatomical pain diagram. Furthermore, the previous day she had also told the physical therapist that she was having "no pain."

[3] That history is directly contradicted by the physical therapy discharge report which notes Claimant was “very grateful for what PT has done for her condition and is pleased with her progress.”

may reflect a residual of the prior lumbar problem status post three surgeries, reaggravation in the lifting incident in September."

Dr. Michael Rauzzino performed an Independent Medical Examination (IME) at Respondent's request on April 11, 2015. Based on his review of records and examination of Claimant, Dr. Rauzzino opined that Claimant might have experienced a lumbar strain after a lifting injury, but she did not cause any acute structural injury to her spine or cause increased pressure on her nerve roots to produce radiculopathy. Regarding the symptoms she was experiencing at the time of his IME, he opined "I do not believe it is related to any new injury sustained on 07/14/14." Dr. Rauzzino opined that Claimant was at MMI with no permanent impairment.

Dr. Sandell performed a DIME on September 24, 2015, at Claimant's request. Dr. Sandell opined that Claimant suffered a work-related injury in July 2014, consisting of a lumbar strain or sprain. Dr. Sandell opined that Claimant was treated appropriately with conservative measures and had reached MMI on September 3, 2014, as determined by Dr. Reasoner. Dr. Sandell did not attribute Claimant's ongoing low back pain and radicular symptoms to the industrial injury. Dr. Sandell noted that the July 2014 lumbar MRI showed no new or acute pathology and the abnormalities shown by the February 2015 EMG were chronic and predated her industrial injury. Therefore, Dr. Sandell determined that Claimant was at MMI with no ratable permanent impairment. He further opined that she required no maintenance care related to the injury.

In May 2016, Dr. Hoppe ordered a lumbar MRI and referred Claimant to Dr. Michael Madsen for a surgical consultation.

The MRI was done on May 17, 2016. The findings were substantially similar to the interpretation of the July 2014 MRI.

Dr. Madsen initially evaluated Claimant on May 25, 2016. The report from that encounter was not included in the medical records submitted into evidence at the hearing. But Dr. Rauzzino described the report in his deposition testimony. According to Dr. Rauzzino, Claimant reported subjective symptoms to Dr. Madsen, but her neurological examination was "entirely normal." She had normal range of motion of the lumbar spine, 5/5 strength in the lower extremities, no atrophy, no sensory loss, and straight leg raise test was negative.

Dr. Madsen requested a lumbar CT to evaluate the condition of the L4-5 fusion and adjacent vertebral levels. The CT scan showed a pseudoarthrosis at the site of the prior arthrodesis. Additionally, there were "chronic-appearing" pars interarticularis defects at L4.

On June 15, 2016, Dr. Madsen opined that the pseudoarthrosis and pars defects were the likely sources of Claimant's symptoms.

Claimant underwent surgery with Dr. Madsen on June 20, 2016. Dr. Madsen revised the arthrodesis at L4-5 and extended it to the L5-S1 level.

Dr. Sandell testified in a deposition on August 18, 2016. Dr. Sandell reviewed the additional medical records generated after his DIME evaluation, including the records of Dr. Madsen's surgery. Dr. Sandell affirmed his previous determination that Claimant had reached MMI on September 4, 2014, with no permanent impairment. He reiterated and elaborated on his opinion that Claimant's industrial injury was a lumbar sprain or strain, which had resolved by September 4, 2014. He emphasized there was no acute structural damage to Claimant's spine or any permanent injury.

Dr. Madsen testified at the hearing on August 31, 2016. Dr. Madsen explained the medical justification for the surgery he performed in June 2016. Dr. Madsen testified that strain or sprain injuries typically resolved within a few months. Dr. Madsen testified that the symptoms for which he treated Claimant "were most likely referable to the failed fusion at L4, 5, as well as the foraminal stenosis at L4, 5 and the L5 S1." He indicated he could not totally exclude some contribution from a sprain/strain, but "her main pain generators where the structural features I just described."

Dr. Rauzzino testified in a post-hearing deposition on October 4, 2016, and elaborated on the opinions he expressed in his IME report. He also reviewed the additional medical developments that occurred after his IME evaluation, including the June 2016 surgery. Dr. Rauzzino reaffirmed his agreement with the DIME regarding MMI and permanent impairment. Dr. Rauzzino testified "I don't believe she sustained a significant injury to her spine in this injury of 7-14-2014. At the most, anyone who lifts or something like that could sustain a muscle injury or muscle strain, but that would be expected to resolve within a short period of time. The time frame between July and September would be the appropriate period to recover from that." Dr. Rauzzino further opined that "her lifting injury did not change the structural anatomy of her spine, and did not cause any sort of permanent irritation which required surgical treatment by Dr. Madsen in 2016." Ultimately, Dr. Rauzzino opined "there is nothing for her now that has anything to do with the single lifting event that occurred in 2014. So there would be no need for any ongoing treatment or evaluation." Dr. Rauzzino further opined that Claimant has no ratable permanent impairment as a result of the July 2014 injury.

Dr. Sandell's and Dr. Rauzzino's opinions regarding causation, MMI, and permanent impairment are more credible and persuasive than any medical opinions in the record to the contrary.

Claimant has failed to overcome the DIME by clear and convincing evidence regarding MMI.

Claimant has failed to overcome the DIME regarding permanent impairment by clear and convincing evidence.

Claimant has failed to prove by a preponderance of the evidence that any medical treatment after MMI was or is causally related to her July 2014 industrial injury.

CONCLUSIONS OF LAW

Maximum Medical Improvement

To receive compensation or medical benefits, Claimant must prove that an industrial injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* The mere existence of a preexisting condition does not disqualify a claimant from receiving benefits, if the industrial injury aggravates, accelerates, or combines with a preexisting condition to produce a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

The Act defines MMI as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. In determining whether a claimant is at MMI, the DIME must decide whether any further treatment is causally related to the industrial injury. The courts have repeatedly held that the DIME's determination regarding causation is an "inherent" part of the DIME process. *E.g.*, *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

The DIME physician's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The clear and convincing standard applies to the DIME's opinions regarding the cause of a claimant's condition. *Egan, supra*.

"Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the MMI and impairment findings are incorrect. *Qual-Med*, 961 P.2d at 592. A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002).

The ICAO has repeatedly held that "mere differences of medical opinion" do not constitute clear and convincing evidence that the DIME's determination is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (ICAO March 18, 2016); *Javalera v. Monte Vista Head Start, Inc.*, W.C. No. 4-532-166 (ICAO July 19, 2004); *see also Gonzales v. Browning-Ferris Industries of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000).

As found, Claimant has failed to overcome the DIME's determination regarding MMI by clear and convincing evidence. Dr. Sandell found that Claimant's industrial injury was limited to a lumbar strain or sprain, which was appropriately treated with conservative measures and resolved. Although Dr. Sandell acknowledged that Claimant was suffering from low back pain and left lower extremity radicular symptoms at the time of the DIME examination, he did not relate those symptoms to the industrial injury.

Dr. Sandell persuasively defended his findings in his deposition testimony. In addition, Dr. Rauzzino's opinions support Dr. Sandell's determination of MMI. Claimant has not presented clear and convincing evidence to show that Dr. Sandell's determinations regarding MMI and causation are highly probably incorrect.

Claimant's challenge to MMI is primarily based on the revision arthrodesis she underwent on June 20, 2016. The ALJ is not persuaded that the surgery was causally related to the admitted July 2014 industrial injury. The primary indications for surgery were the pseudoarthrosis, the "chronic" pars defects, and chronic left lower extremity radiculopathy. None of those conditions were caused by the July injury.

Nor is the ALJ persuaded that the July 2014 injury aggravated a pre-existing condition to cause the need for treatment. The July 2014 injury was a simple strain or sprain, which by Claimant's own account had resolved by September 3, 2014. Claimant has a documented history of episodic symptoms triggered by innocuous or unknown events. In 2011, she developed severe left lower extremity radicular symptoms without an obvious cause, although she speculated it might have been caused by slipping off a chair. Similarly, the July 2014 episode was triggered by a relatively minor event. Therefore, the mere fact that similar symptoms recurred shortly after she was placed at MMI is not sufficient to establish the requisite causal nexus to the work injury. The ALJ concludes that Claimant's ongoing symptoms after September 3, 2014 represent the natural progression of her pre-existing condition, and were not proximately caused or aggravated by the industrial injury.

Permanent Impairment

As with MMI, the DIME's determination regarding whole person permanent impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

As found, Claimant has failed to overcome the DIME regarding permanent impairment. Dr. Sandell persuasively opined that Claimant does not have any ratable permanent impairment as a result of the July 2014 injury. Dr. Sandell concluded that Claimant's ongoing back pain or radicular symptoms are not causally related to the admitted injury. Dr. Rauzzino persuasively supported that finding in his IME report and testimony. The opinions of Dr. Sandell and Dr. Rauzzino regarding MMI and permanent impairment are consistent with those of Dr. Reasoner. The ALJ notes that every Level II physician who expressed an opinion regarding impairment agreed that Claimant does not qualify for a rating.[4] Claimant did not present any persuasive evidence to prove by clear and convincing evidence that the DIME is incorrect regarding impairment.

Medical benefits after MMI

Respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of MMI if the claimant requires periodic maintenance care to relieve symptoms or prevent further deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

A claimant must prove entitlement to medical benefits after MMI by a preponderance of the evidence. The mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010).

The DIME's opinion regarding medical treatment after MMI is not entitled to any special weight, but is simply another medical opinion for the ALJ to consider when evaluating the preponderance of the evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). The fact that a claimant failed to overcome a DIME regarding MMI does not preclude an award of post-MMI medical benefits under the preponderance standard. *Martinez v. K-Mart Corporation*, W.C. No. 4-164-054 (ICAO Sept. 19, 2005).

In this case, the Claimant has failed to prove by a preponderance of the evidence that any need for medical treatment after September 4, 2014 was causally related to her industrial injury. The ALJ credits the opinions of Dr. Sandell and Dr. Rauzzino to conclude that the July 2014 accident did not cause any structural damage to Claimant's spine or permanently aggravate her pre-existing condition. The industrial injury was a lumbar strain or sprain which resolved by September 4, 2014. Any medical treatment Claimant may have needed or received after MMI was caused by the preexisting condition, not the industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME regarding MMI is denied and dismissed.

[4] Although Dr. Madsen is Level II accredited, he did not offer any opinion regarding impairment.

2. Claimant’s request to overcome the DIME regarding permanent impairment is denied and dismissed.

3. Claimant’s claim for medical benefits after MMI is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 17, 2016

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether respondents have overcome, by clear and convincing evidence, the findings of the Division-sponsored independent medical examination ("DIME") physician regarding maximum medical improvement ("MMI"), causation, and the need for reverse right shoulder arthroplasty.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury while working for employer as a bus driver. Claimant testified that her position as a bus driver was physically demanding. For example, claimant was required to manually open portions of the wheelchair ramp of the bus when necessary. In addition, claimant had to steer the bus with both hands and adjust levers at her side and above her head. The ALJ finds claimant's testimony regarding the physical nature of her job to be credible.

2. On February 16, 2014, claimant was driving a bus when part of the steering suspension failed, which caused the bus to shake forcefully. The claimant had difficulty steering the bus during this shaking and immediately felt pain in her neck, chest, and both shoulders.

3. Claimant has a history of issues with her right shoulder beginning on September 27, 1985 when she was thrown from a horse and fractured the head of her right humerus. On September 28, 1985 Dr. Patrick Sillix performed surgery to claimant's right shoulder. However, claimant developed osteonecrosis at the humeral head and on January 31, 1986, Dr. Sillix performed a total shoulder arthroplasty on claimant's right shoulder.

4. Beginning in January 2009, claimant sought treatment with Dr. Larry Copeland because of pain in her right shoulder. On February 25, 2009, Dr. Larry Copeland performed surgery on claimant's right shoulder including diagnostic and operative arthroplasty. Post-surgery, Dr. Copeland diagnosed a massive torn rotator cuff, with extensive adhesions, calcification of the cynovium, articular cartilage of the glenoid, and absence of biceps tendon.

5. On July 13, 2009, Dr. Copeland released claimant to return to work in her position as a water truck driver, with "no heavy lifting overhead" and "no pulling of heavy hoses". Thereafter, claimant was able to perform the various physical aspects of her truck driving job including chaining tires during the winter.

6. Claimant testified that following the 2009 right shoulder surgery she was doing "great" and passed Department of Transportation ("DOT") physicals for her work

as a commercial driver. She also testified that she had no specific right shoulder issues between the 2009 surgery and the February 16, 2014 bus related incident.

7. The medical records indicate that on March 16, 2011 Dr. Larry Copland noted that claimant "may in the future need a reverse total shoulder" and referred claimant to Dr. Richard Knackendoffel or Dr. Mitch Copeland. This discussion was reviewed with the claimant a second time as indicated in Dr. Larry Copeland's note of March 6, 2012. Claimant did not seek treatment from Dr. Knackendoffel or Dr. Mitch Copeland for a reverse total shoulder surgery.

8. With regard to the February 16, 2014 injuries at issue in this case, Dr. David Lorah became claimant's authorized treating physician ("ATP") on February 17, 2014. Dr. Lorah referred claimant to various modes of treatment including physical therapy and chiropractic treatments. When claimant "plateaued" with physical therapy in May 2014, Dr. Lorah referred claimant to Dr. Peter Millett for a surgical consultation.

9. Claimant first saw Dr. Millett on August 5, 2014. At that time, Dr. Millett recommended a magnetic resonance image ("MRI") of claimant's left shoulder and a computed tomography ("CT") arthrogram of claimant's right shoulder. These procedures were conducted on October 14, 2014. The MRI of claimant's left shoulder showed full thickness tearing of the supraspinatus as well as some high-grade partial-thickness tearing of the subscapularis. The CT arthrogram of claimant's right shoulder showed a full thickness supraspinatus tendon tearing and severe atrophy of the supraspinatus muscle belly.

10. Based upon the results of the MRI and CT arthrogram, Dr. Millett diagnosed rotator cuff tears to claimant's left and right shoulders and recommended surgery for both shoulders. Dr. Millett recommended rotator cuff repair on claimant's left shoulder. Due to the extensive issues with claimant's right shoulder, Dr. Millett recommended a right shoulder reverse arthroplasty.

11. Respondents authorized the left shoulder surgery which was performed by Dr. Millett on November 10, 2014. Respondents have denied the right shoulder reverse arthroplasty.

12. Claimant submitted to an independent medical examination ("IME") with Dr. James Lindberg on May 19, 2015. Dr. Lindberg reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant in connection with the IME. Dr. Lindberg opined in his IME report that the injury to claimant's right shoulder was not related to the February 16, 2014 bus incident. Dr. Lindberg notes that the CT arthrogram performed on October 14, 2014 showed no evidence of any acute injury to that shoulder. Dr. Lindberg also points to the medical records in 2011 and 2012 in which Dr. Larry Copeland references the possible need for "reverse total shoulder". Dr. Lindberg's testimony was consistent with his IME report. Dr. Lindberg specifically testified that he agrees that claimant needs a reverse total shoulder arthroplasty, but disagrees with Dr. McLaughlin's causation analysis.

13. Upon learning that respondents denied the right shoulder surgery, Dr. Lorah placed claimant at maximum medical improvement (“MMI”) as of November 16, 2015. Dr. Lorah also assigned a permanent impairment rating of 8% to claimant’s left upper extremity.

14. On December 31, 2015, respondents filed a final admission of liability (“FAL”) admitting to the MMI date of November 16, 2015 and an impairment rating of 8% to claimant’s left upper extremity. Claimant objected to the FAL and timely applied for a Division-sponsored independent medical examination (“DIME”).

15. Claimant submitted to a DIME with Dr. James McLaughlin on April 7, 2016. Dr. McLaughlin reviewed claimant’s medical records, obtained a medical history, and performed a physical examination of claimant in connection with the DIME. Dr. McLaughlin opined in his DIME report that claimant sustained an acute rotator cuff tear to her right shoulder as a result of the February 16, 2014 work incident. Dr. McLaughlin further opined that claimant is not at MMI for her right shoulder and has a current impairment rating of 21% to her right upper extremity. In addition, he assigned a permanent impairment rating of 5% to claimant’s left upper extremity. In his report, Dr. McLaughlin agrees with Dr. Millett’s recommendation that claimant should undergo a right shoulder reverse arthroplasty.

16. The ALJ credits the medical records and the opinions of Dr. McLaughlin, and Dr. Millett over the conflicting opinion of Dr. Lindberg and finds that respondents have failed to overcome, by clear and convincing evidence, the DIME physician on the issues of MMI, causation, and the need for the right shoulder reverse arthroplasty. The ALJ further finds the opinions expressed by Dr. McLaughlin and Dr. Millett to be credible and persuasive regarding claimant’s right shoulder injury.

17. The ALJ credits claimant’s testimony that she had no specific right shoulder issues between the 2009 surgery and the February 16, 2014 bus incident. The ALJ further notes that this testimony is supported by the medical records entered into evidence at hearing.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2013).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

5. As found, respondents have failed to prove, by clear and convincing evidence, that Dr. McLaughlin's opinions regarding MMI, causation, and the need for the right shoulder reverse arthroplasty were incorrect. As found, Dr. McLaughlin's opinions are shared by Dr. Millett and are supported by the medical records. The difference between the opinions of Dr. McLaughlin and Dr. Lindberg is merely a difference of medical opinion regarding the causative factor that resulted in the surgical recommendation and does not demonstrate error on the part of the DIME physician.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome the DIME physician on the issues of MMI, causation, and the need for the right shoulder reverse arthroplasty.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 17, 2016

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant overcame the findings of the DIME physician by clear and convincing evidence as to maximum medical improvement (MMI).

II. Whether Claimant overcame the findings of the DIME physician by clear and convincing evidence as to permanent impairment.

III. Whether Claimant established by a preponderance of the evidence that he is entitled to maintenance medical benefits.

IV. Whether Claimant established by a preponderance of the evidence that he is entitled to disfigurement benefits.

As raised by the parties, the issue surrounding Claimant's impairment rating revolves around proper application of the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*). Consequently, the ALJ takes judicial notice of the "Guides", particularly Chapter 4.1a and the Division of Workers' Compensation Psychological Impairment Worksheet.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works as an emergency room security officer for Employer and has worked in that capacity since being hired on October 13, 2014. (Resp. Ex. A). Claimant sustained an admitted injury while working for Employer on July 11, 2015. (Resp. Ex. B).

2. Claimant testified that on July 11, 2015, he was attempting to control an agitated patient who had become argumentative and violent. Claimant was able to get the individual to calm down momentarily while he went to get information from another security officer. After Claimant left, the patient concealed himself within the confines of the waiting area. Upon Claimant's return, the patient jumped out of hiding, shoved Claimant, and punched him in the face. Claimant fell backwards through the front crash doors of the facility and struck the back of his head on the concrete floor.

3. Claimant was evaluated in the emergency room at Employer's facility shortly after the incident occurred. (Claimant's Ex. 4 pp. 19-26). The records document the mechanism of injury as "blunt trauma by, punch with closed fist, by male assailant" and

indicated Claimant's nose was "with deformity," swollen, along with moderate nasal bleeding. *Id.* at 25. CT scans of the head and facial bones were obtained. No intercranial abnormalities were detected on CT of the head; however, the CT scan of the face revealed a "mildly comminuted fracture of the left nasal bone and fracture at the base of the right nasal bone. While the CT also revealed a deviation of the nasal septum, this deviation appeared "nonacute or congenital."

4. Claimant followed up with a workers' compensation provider—The Southern Colorado Clinic—two days later on July 13, 2015. (Claimant's Ex. 5, pp. 33-39). Claimant was diagnosed as having a fractured nasal bone, a facial laceration, a closed head injury, a facial contusion, and a neck strain. *Id.* at 33-34. Claimant reported being dazed after the attack. *Id.* at 38. Claimant's evaluation was performed by Terry Schwartz, PA-C. Referral to Dr. Brain Dodds, an ear, nose and throat (ENT) specialist was requested.

5. Claimant was evaluated by Dr. Dodds on July 21, 2015. During the history taken by Dr. Dodds, Claimant admitted that he has suffered a previous nasal fracture and that "his nose looks the same as it did prior to getting hit" in the incident forming the basis of the instant claim. Claimant also reported that he had no air restriction caused by the injury sustained on July 11, 2015. Dr. Dodd reviewed Claimant's x-rays and noted that while there was radiographic evidence of the nasal fracture, it was unknown whether this was "acute or old" as Claimant admitted to nasal fractures in the past. (Respondents' Ex. M, 034). Dr. Dodd did not recommend additional specific intervention.

6. Claimant testified that Dr. Dodds misrepresented his statements in the reports and that in fact his nose looks differently now and that he has occasional difficulty with breathing.

7. Claimant returned to the Southern Colorado Clinic on July 28, 2016 and was seen by Dr. Terrance Lakin who placed him at MMI without impairment. The medical record generated from this date of visit is devoid of any detail. There is no indication that a physical examination was performed and there are no subjective statements included in the report. (Claimant's Ex. 5, p. 40).[1]

8. Claimant testified that he began to feel depressed, confused, and was having difficulty articulating his thoughts. Claimant explained that that he has worked all of his life, he was in the military, and he is a type of person that refuses to complain about

[1] Although not indicated in his July 28, 2015 report, Dr. Lakin would later, i.e. on September 21, 2015, document that Claimant reported during his July 28, 2015 appointment that he was "having no pain and no CNS (central nervous system) symptomatology. Moreover, Dr. Lakin would document that Claimant "desired to close [his] case and return to full duty with no restrictions and no impairment" when he was evaluated on July 28, 2015. According to Dr. Lakin, "there was no reason to not do this." The statements attributable to Claimant were documented by Dr. Lakin approximately two (2) months after he allegedly made them, without supporting documentation and following Claimant's hospitalization for a serious neurological condition requiring brain surgery leading Claimant to question the veracity of the statements and assert, in part, that his treatment in this case has been abbreviated.

illness or problems; however, towards the end of August, Claimant felt as if he was on the verge of having a stroke.

9. Claimant testified that on September 8, 2015, he returned to work where he began to experience difficulty with simple activities, such as using the mouse on his computer to draft his reports. Claimant left work, spoke with his wife about his symptoms, and decided to proceed to the St. Mary Hospital that same day.

10. Claimant presented to the emergency room at St. Mary Corwin Hospital at approximately 6:30 pm on September 8, 2015. He reported a three (3) day history of confusion, left sided throbbing headache and parasthesias in the right face and arm. (Claimant's Ex. 7, p. 97). He also reported that he had been assaulted in July and had been diagnosed with a urinary tract infection three days prior for which he was taking Macrobid. Differential diagnosis was considered for TIA, CVA, adverse drug reaction, and complex migraine. A CT scan of the brain was performed that revealed a subacute subdural left-sided hematoma with mass effect midline shift. *Id.* at 100. Claimant was admitted into the intensive care unit (ICU) at that time. *Id.*

11. The treating physician at the hospital indicated that the cause of the subdural hematoma was likely a result of the July 11, 2015 head trauma, which led to a slow accumulating bleed in the brain. (Claimant's Ex. 7, p. 106). Claimant was diagnosed with expressive aphasia—the loss of the ability to produce language—along with the subdural hematoma and traumatic brain injury. *Id.* at 114.

12. Neurosurgical services were consulted and Clamant was evaluated by Dr. Keith Norvill. Dr. Norvill noted Claimant was clinically symptomatic with word-finding problems, memory problems, slurred speech and intermittent confusion. Dr. Norvill advised Claimant that he would need surgical intervention to include drilling a bur hole into the skull along with a possible craniotomy to evacuate the left-sided subdural hematoma. *Id.* at 125. The procedure was performed on September 10, 2015. *Id.* at 140-42. Claimant was discharged from the hospital two days later on September 12, 2015. *Id.* at 170-72). Claimant was advised to follow-up with both the neurosurgeon and his primary care provider in one week. *Id.* at 171.

13. Claimant returned to Dr. Lakin on September 17, 2015, at which time Dr. Lakin removed Claimant from work from that date until at least October 8, 2015. (Claimant's Ex. 5, p. 47). Dr. Lakin referred Claimant to Dr. David Hopkins, a neuropsychologist, for evaluation. *Id.* at 48.

14. Claimant saw Dr. Lakin on October 9, 2015 at which time Dr. Lakin noted that Claimant was scheduled to see Dr. Hopkins of October 14, 2015. Dr. Lakin also noted that Claimant "would likely need neuro that does level II impairment ratings, or would need Dr. Gutterman, psychiatrist in Denver in future for Impairment Rating."

15. Dr. Hopkins evaluated Claimant on October 14, 2015. (Resp. Ex. O). Claimant reported to Dr. Hopkins that he continued to have memory problem, was losing his train

of thought, was experiencing residual numbness, along with headaches and fatigue. *Id.* at 40. Dr. Hopkins administered a neuropsychological battery consisting of the following:

- A mini-mental status exam that revealed claimant to be alert and fully oriented.
- A stand-alone validity test which indicated that the results were an accurate reflection of his neurobehavioral status.
- A Million Behavioral Medicine Diagnostic exam which did not show psychological components to be adversely affecting his neuropsychological testing.
- A premorbid functioning exam which revealed performance solidly within the average range of functioning with the same pattern noted on the WAIS-IV in which his verbal comprehension index, perceptual reasoning index and working memory index were all solidly within the average range.
- A test for language dysfunction which, overall, suggested a mild residual anomic aphasia, which was consistent with his radiological findings.
- A trail making test which scored claimant's processing speed in the mild range of impairment for his age and education.
- A visual sequencing test.
- A complex visual problem-solving task meant to test claimant's executive function which showed claimant to be in the above average range. (Respondents' Exhibit O, 40-43)

16. Upon review of Claimant's testing results, Dr. Hopkins opined that Claimant's overall score of 95 on the Repeatable Battery for the Assessment of Neuropsychological Status (RBANS) fell within the average range and was consistent with Claimant's baseline status. Dr. Hopkins noted that Claimant's neurological symptoms were improved, although they persisted to a mild degree, and that Claimant had significant clearing of his cognitive symptoms since the evacuation of the subdural hematoma. Nonetheless, testing also revealed Claimant's processing speed was in the 18th percentile and there was a decline in his verbal comprehension, suggesting he continued to have at least mild residual anomic aphasia. Dr. Hopkins concluded that Claimant appeared to have made a fairly good recovery but before returning to full duty, he should have a repeat brief cognitive screen. He also suggested that it would be likely that Claimant would continue to show some mild residual language deficits as noted on formal testing.

17. Dr. Hopkins wanted to schedule Claimant for feedback and repeat testing in approximately four weeks.

18. Claimant testified that he asked Dr. Lakin if he could follow-up with Dr. Cohen at Parkview Medical because he trusted Dr. Cohen. An October 30, 2015 report from Dr. Lakin indicates that Claimant was to follow-up with Dr. Cohen on December 7, 2015. Claimant was actually examined Dr. Cohen on November 2, 2015, were he reported that he was "[feeling] much better these days." Claimant reported minimal headache, no speech issues and no further trouble with his right hand. According to Dr. Cohen,

Claimant appeared to be “fully recovered from the hematoma and successful surgery. Dr. Cohen noted that there was no indication that claimant could not return to full duty. (Respondents’ Ex. S, 141).

19. Claimant returned to Dr. Lakin on November 9, 2015, reporting that he had “concerns about and with Dr. Hopkins.” He did not wish to return to see him. He also reported that he was “functioning well with all activities” and did not have “any memory difficulty.” Claimant was accompanied to this appointment by his wife who reported that he did not have any personality changes and that his “behavior and memory [were] back to baseline.” Dr. Lakin commented that Claimant had made a better recovery than expected. Accounting for Claimant’s attitude (personality) that was likely to minimize any subtle problems he was having, Dr. Lakin erred on the side of caution in electing to release Claimant to work 4 hours per day initially. Restrictions included no climbing of ladders or exposure to combative patients.”

20. Claimant testified at hearing that he felt as if Dr. Hopkins was trying to “blackmail” Claimant into being part of a study Dr. Hopkins wanted to conduct on Claimant’s condition. Overall, Claimant felt that Dr. Hopkins “did a whole lot of talking and not a whole lot more” for his condition.

21. A CT scan on December 2, 2015, revealed near complete resolution of the thin left convexity subdural hematoma. No abnormalities were observed. (Respondents’ Ex. U, 168).

22. Claimant was placed at MMI by Dr. Lakin on December 16, 2015 with no recommendations for maintenance care and no permanent impairment rating. (Claimant’s Ex. 5, p. 87).

23. A final admission of liability was filed on December 18, 2015. (Respondents’ Exhibit E, 12-14). Claimant objected to the final admission and began the DIME process. (Respondents’ Exs. F & G).

24. Claimant disagreed with his MMI status and sought review through the Division Independent Medical Exam (DIME) process. Dr. Frank Polanco was selected to perform the Division IME which was subsequently scheduled for March 16, 2016. (Claimant’s Ex. 8).

25. At his DIME, Claimant continued to complain of forgetfulness, slurred speech, difficulty with concentration, facial numbness, and ongoing headaches. (Claimant’s Ex. 8, p. 175). He also reported some difficulties his immediate memory, maintaining attention, and performing repetitive tasks. *Id.* at 176. Dr. Polanco examined Claimant and reviewed pertinent medical records associated with the July 11, 2015 injury. While the DIME report is short on detail, the ALJ is persuaded that Dr. Polanco reviewed, the medical records including the neuropsychological examination conducted by Dr. Hopkins. At the conclusion of his examination and record review, Dr. Polanco agreed that Claimant’s condition had stabilized and that he was at MMI as of December 18,

2015, the date Dr. Lakin determined Claimant to have reached MMI. Based on Claimant's subjective description of his current symptoms combined with the imaging studies, Dr. Polanco diagnosed Claimant with a mild cognitive disorder and completed a psychological/mental impairment worksheet. The results of the DOWC worksheet indicated that claimant had 5% whole person impairment due to difficulties in thinking, concentration and judgment. Claimant denied disruptions with activities of daily living or interpersonal relationships. (Respondents' Exhibit T, 143-150).

26. A final admission of liability was filed on April 12, 2016 admitting to the 5% impairment rating. (Respondents; Exhibit H, 20-22). Claimant again objected to the final admission and filed an application for hearing on April 27, 2016. (Respondents' Exhibit I, 23-25)

27. Claimant underwent an independent medical examination (IME) with Dr. Hall on June 13, 2016. Dr. Hall noted that Claimant presented with significant subjective complaints of symptoms related to his hematoma. On examination, Claimant had significant difficulty recalling three objects over five minutes. In fact, he did not remember Dr. Hall even telling him the three objects. (Claimant's Ex. 10, p. 188). Claimant had considerable difficulty with any tracking and did not come close to appropriate midline. Claimant's convergence was off and any quick movement of his head caused dizziness and balance disturbance. *Id.* Claimant reported to Dr. Hall that he was really struggling, he was not performing his job up to his own standards, and that he also turned over some responsibilities at home to his wife, such as bill paying, because he was writing the wrong checks for the wrong amounts. *Id.* Dr. Hall diagnosed Claimant with a mild traumatic brain injury, ongoing cognitive symptomatology from traumatic brain injury and/or the hematoma, post trauma vision syndrome, post-concussive headaches versus occipital neuralgia, and ongoing right upper extremity symptoms. (Claimant's Ex. 10, p. 188).

28. In response to Dr. Polanco's IME, Dr. Hall opined that it was "cursory, incomplete, and [the] impairment rating [was] hard to understand." (Claimant's Ex. 10, p. 189). Dr. Hall believed Dr. Polanco's rating method was wrong, not understanding why Claimant's condition would be rated as a mental/behavioral impairment when it was Claimant's brain that was injured in the assault. *Id.* He explained that the appropriate way to rate a brain injury is to do so using the "disturbances of complex integrated cerebral functions" under the 4.1a, "The Brain." *Id.* Dr. Hall opined that Claimant would have a 20% whole person rating under this table due to his failing at work and having to turn over daily household chores to his wife for handling. *Id.*

29. Dr. Hall disagreed with Dr. Polanco that Claimant was at MMI. (Claimant's Ex. 10, p. 189). Dr. Hall expressed concern with Dr. Polanco's failure to appreciate that Claimant's medical records document that he was doing okay at the time of MMI, but that his condition had seriously deteriorated by the time of the Division IME. Either Claimant was okay at that time and his condition worsened, or Claimant was presenting better than he actually was. Regardless, Claimant required further evaluation. *Id.* Dr. Hall recommended Claimant undergo further evaluation with a neuropsychologist,

additional therapies for his cognitive impairments, a neuro-optometry evaluation for post traumatic vision syndrome, more complete management of the severe headaches, potentially involving medications, among other things. (Claimant's Ex. 10, p. 189).

30. Dr. Hall reached the above referenced opinions despite his admission that he did not have the notes from Dr. Hopkins. Based upon this admission, the ALJ finds that Dr. Hall, more probably than not, did not review the results of Claimant's neuropsych testing administered by Dr. Hopkins. Nonetheless, Dr. Hall assigned 20% permanent impairment.

31. Claimant testified that he sought treatment on his own after being placed at MMI due to his ongoing problems. Clamant reported that he was referred to a "real" neurologist, and she observed me and felt that I needed treatment." (Tr. 35:9-22). Claimant testified that he was only able to see this neurologist—Dr. Ashakiran Sunku—once because he was unable to afford the tests she wanted to perform. (Tr. 36:4-10). Dr. Sunku evaluated Claimant due to his ongoing complaints of paresthesias, memory difficulties, and headaches. (Claimant's Ex. 11, p. 190). Dr. Sunku had concerns that Claimant may have had a left parietal infarct in addition to the subdural hematoma and recommended an MRI of his brain. *Id.* at 193. Dr. Sunku was not sure what was causing Claimant's recall memory, which was impaired upon exam, so she recommended that be checked on the MRI as well as an EEG, checking vitamin B12, folate, and TSH. *Id.* In regards to the ongoing headaches, Dr. Sunku wanted to perform a comprehensive panel to check ESR, CRP, and ANA. She started him on vitamin B2 200mg twice a day with magnesium 250 mg per day as a prophylaxis and noted that hypertension could be playing a role in his headaches. *Id.* The EEG performed on this date of visit showed no potentially epileptogenic activity or paroxysmal discharges. (Respondent's Ex. W, 236).

32. Claimant attended an IME with Dr. Machanic on July 12, 2016. Dr. Machanic noted that Claimant continues to experience near daily headaches, has difficulties focusing his eyes and tracking objects, has dizzy spells, and will become temporarily confused. Claimant described the feeling of "not being there" and not paying attention, despite having people speaking to him. *Id.* at 197. Dr. Machanic explained, based on his observation and evaluation of Claimant, that Claimant has problems with anything beyond a one or two-stage question, does not understand the significance of abstractions, and will have periods of blank stares with difficulty focusing and concentrating. *Id.* at 200.

33. Dr. Machanic opined that Claimant continues to exhibit symptoms of a mild traumatic brain injury along with troublesome episodes of altered consciousness that could be consistent with posttraumatic complex partial seizures. (Claimant's Ex. 12, p. 201). Dr. Machanic emphatically offered his opinion that Claimant has "in no way" reached MMI. *Id.* Dr. Machanic is of the opinion that Claimant has multiple domains of intellectual dysfunction that have been downplayed and trivialized by some of his previous physicians. *Id.* "These are significant, real, and disabling conditions and need to be taken seriously…." *Id.* However*, s*imilar to Dr. Hall, Dr. Mechanic issued his report and recommendations without having reviewed the complete neuropsychological

examination that had been conducted. Instead, Dr. Mechanic assumed the testing had not been completed and made recommendations based on what he thought the test might show upon claimant's subjective description of his condition. Dr. Mechanic's first recommendation was that Claimant receive neuropsychological testing and that Claimant undergo cognitive behavioral therapy based on these results. This had already been done and/or refused as the medical records submitted at hearing establish. Likewise, without having the normal EEG results from Dr. Sunku, Dr. Mechanic made a recommendation for a 3-day EEG.

34. Dr. Machanic opined that Dr. Polanco's Division IME was superficial, inappropriate, and needed to be disregarded. *Id.* at 202. He felt that Claimant was not at MMI, but if an impairment rating were to be given at that time, it would be a 20% whole person rating from table 1, page 109 of the AMA guides for complex integrated cerebral function disturbances. *Id.* at 201.

35. In addition to the aforementioned testing, Dr. Machanic recommended that Claimant should also use a memory enhancing agent, such as Namenda or galantamine and possible ongoing speech therapy. *Id.* Dr. Machanic indicated it is clear that Claimant is suffering from posttraumatic encephalopathy and may also have posttraumatic epilepsy. *Id.* It was for these reasons that Dr. Machanic felt Dr. Polanco's DIME report was cursory and superficial. *Id.* at 199.

36. Claimant attended an IME with Dr. McCranie on August 17, 2016. Unlike Dr. Hall and Dr. Mechanic, Dr. McCranie had Claimant's entire medical file which included the full neuropsych examination done by Dr. Hopkins. Dr. McCranie opined that Claimant was at MMI due to the extensive work-up that had been done, which included: a full neuropsychological examination, an evaluation for cognitive behavioral therapy, 5 CT scans, speech therapy, an evaluation by physical therapy, a hearing test, a visuospatial examination, examination by a neurologist and an EEG.

37. Dr. McCranie testified that Claimant never appeared to be in an altered state of consciousness during her 1 to 1 ½ hour IME and that, contrary to Claimant's assertion that he was now disorganized, he came well prepared with a medical file that he himself had organized. According to Dr. McCranie, Clamant drove himself from Pueblo to Denver to attend the IME, he was on time and that he had no difficulty finding her office. She also testified that Claimant had a typed written outline in the file he brought to the IME, which he had prepared himself.

38. Dr. McCranie testified that based upon her examination and review of records that Claimant was functioning well supporting the opinion that he was at MMI. Dr. McCranie testified that there were several ways to determine impairment for Claimant's condition. While she personally would have used the neurologic tables for impairment based on her examination, she reported that there was nothing incorrect about Dr. Polanco's decision to use the psychological impairment tables.[2] Dr. McCranie also

[2] Dr. Lakin had raised the idea of having Dr. Gary Gutterman, a physiatrist, issue an impairment rating in this case on October 9, 2015. While not certain, the ALJ finds it reasonable to infer that a psychiatrist

assigned Claimant a 5% whole person impairment rating and indicated that Claimant's subjective presentation upon examination would have a lot to do with which category Claimant's impairment fell into.

39. The ALJ finds the 20% impairment for Disturbances of Complex, Integrated Cerebral Functions, as expressed by Dr. Hall and Dr. Machanic to fall into the Class 2 category of impairment for persons who have suffered an injury to the brain. Class 2 refers to someone who "needs some supervision and/or direction" with daily activities. Claimant reported early on that he was functioning well regarding his daily activities. On more than one occasion, he requested to be released to work. His wife verified Claimant's statements and reported that his condition and established and he was back to his premorbid mental and behavioral baseline. His function then inexplicably worsened. Dr. Hall and Dr. Machanic attribute this to Claimant's injury. The ALJ is not convinced. Rather, the ALJ finds the timing related to Claimant's sudden deterioration in function to coincide with his placement at MMI with 5% whole person impairment by Dr. Polanco. Here, Claimant had been returned to work in November, albeit for 4 hours per day. He later returned to full duty and worked in that capacity for several weeks without apparent problem before being placed at MMI with 5% impairment. Such demonstrated functional ability is inconsistent with a person who falls into the Class 2 category of impairment. In an effort to bolster his claim of needing supervision, Claimant would, approximately 3 months after being placed at MMI with 5% impairment, report to Dr. Hall that he had to turn over "responsibilities at home, such as bill paying" to his wife because he would "mess things up." Claimant presented scant evidence to corroborate his assertion that he needed some supervision because he messes up his finances at hearing.

40. Dr. McCranie also testified that Claimant did not require additional treatment for his nose based on her examination and review of the ENT records provided. However, she testified on cross-examination that Claimant should have a follow-up examination with a neuropsychologist for additional evaluation and treatment. She also recommended that Claimant should be provided medications to help manage his ongoing headaches that are the result of the work injury. Dr. McCranie agreed that Claimant had an injury to his brain and that he did not receive any treatment for depression, anxiety, or any other mental health condition.

41. The ALJ credits the medical records and the opinions of Dr. McCranie to find that Claimant is in need of maintenance medical treatment, including but not limited to repeat neuropsychiatric testing and medications to cure and relieve him of the ongoing effects of his post traumatic headaches. Claimant has proven, by a preponderance of the evidence, that he is entailed to maintenance medical benefits.

42. Claimant testified that the symptoms he has been complaining to his physicians about continue. He testified that he had been a police officer for 40 years prior to the incident and was uniquely capable of handling stressful situations; however, since the

who has been asked to address impairment would do so according to the psychological impairment tables utilized by Dr. Polanco in this case.

incident, he gets flushed, his face and hands become numb, and his hands shake. He continues to get horrible pains in his head that cause his eyes to hurt and water. The pain in his head varies in both severity and frequency, but he typically has some degree of pain daily. In addition to the above, Claimant testified to having a "really bad" short-term memory, irritability, and anger issues. According to Claimant, his symptoms affect his ability to perform his usual daily tasks; however, he does not complain about it because, as he testified: "I'm not a whiner, and I bear with it because that is the proper way."

43. Claimant's direct supervisor, Charles Reyes, testified credibly at hearing that he has not noticed any significant change in Claimant's performance or attitude since his return to full-duty. Mr. Reyes testified that he has interacted with Claimant hundreds of times since his return and has only noticed a personality conflict between Claimant and another supervisor. Mr. Reyes testified that he did not notice any of the symptoms that Claimant was complaining about to his providers other than an occasional headache. According to Mr. Reyes, Claimant has not been more irritable towards him since returning to full duty. When asked whether Claimant's job performance has changed since July of 2015, Mr. Reyes testified, "He hasn't been performing up to the standards he was earlier. Basically, it has gone down somewhat." In this regard, Mr. Reyes testified that Claimant has been verbally warned twice recently in regards to his performance at work. He explained that Claimant is supposed to remain in the work area he is assigned to, but Claimant has been found sitting reading the newspaper or doing something else in an unassigned area of Employers facility.

44. Evidence admitted at hearing establishes that Claimant actively submits editorial articles to the newspaper for publication. The admitted articles indicate that Claimant tendered editorials concerning a variety of community and social issues to the paper published November 28, 2015, January 26, 2016, April 2, 2016, June 20, 2016 and July 9, 2016--all after his July 11, 2015 accident. The ALJ has reviewed the articles tendered and finds them to express cogent opinions. Dr. McCranie also reviewed the articles, testifying that they were very well written, structured and thought provoking. Based upon the evidence presented, the ALJ finds that Claimant probably retreats to the area outside his assigned work zone to find a quite place to read the newspaper, not because he is experiencing any cognitive dysfunction affecting the proficiency of his job, but because he enjoys reading the newspaper. The ALJ also finds that Claimant's decision to steal away to read the newspaper has likely created a conflict between himself and his weekend supervisor rather than any claimed cognitive dysfunction.

45. Claimant was able to follow the proceeding and appropriately answer the questions posed to him during his testimony. He did not appear to be confused at hearing and was able to provide sufficient detail surrounding the events of his injury, his treatment, his ongoing symptoms and his work history. Based upon Claimant's presentation during his testimony and the medical records submitted, the ALJ is not persuaded that he experiences the effects of cognitive dissonance suggestive of Class 2 impairment.

46. Based upon the evidence presented, Claimant has failed to demonstrate, by clear and convincing evidence, that Dr. Polanco's opinions concerning MMI and permanent impairment are highly probably incorrect. Accordingly, Claimant has failed to overcome Dr. Polanco's MMI and impairment determinations.

47. Claimant has a moderate right sided deviation of the bridge of the nose. Review of the emergency room record establishes that Claimant presented with a laceration under the "left orbit" and the bridge of the nose. The ALJ finds these objective injuries consistent with being struck on the left side of the face which would likely deviate the bridge of the nose to the right assuming Claimant's nasal fracture, as revealed on x-ray, was acute. While Claimant's nose was deviated to the right, he reported a prior fracture raising questions about whether his right sided deviation was due to the prior injury or the July 11, 2015 incident. Claimant did not present any pictorial evidence of what his nose looked like prior to the incident. Rather, he testified that the deviation is more pronounced following the July 11, 2015 incident. Respondents contend that Claimant's testimony is not to be believed. Instead, Respondents urge the court to rely on the statements he made by the ENT specialist indicating that Claimant told him it looked the same as it did before the injury and that he had no issues with his breathing as Claimant had no bias at that point. Consequently, Respondents argue that there is simply no evidence that the injury Claimant suffered July 11, 2016 caused permanent disfigurement beyond what was already there. The ALJ is not persuaded. The medical records support that the nose was swollen and there was a moderate amount of blood coming from both nostrils suggesting direct trauma to the nose itself. Indeed, the ER records indicate that there was "visible trauma to the nose and left eye." The ALJ finds that Claimant's statements to the ENT, more probably than not, downplayed the extent of deviation as is consistent with Claimant's propensity not to complain and otherwise "bear" with things. Claimant has proven that he sustained a bodily disfigurement entitlement to additional benefits pursuant to the Workers' Compensation Act.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and

demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, the medical record evidence coupled with Claimant's stated and demonstrated functional ability supports the MMI and impairment rating determinations of Dr. Polanco. Conversely, the opinions expressed by Dr. Machanic and Dr. Hall are not convincing as they are based on incomplete record review and the unreliable subjective presentations of Claimant. Both Dr. Machanic and Dr. Hall assert that Claimant's treatment was incomplete, an assertion the ALJ finds and concludes unfounded when the record evidence is viewed as a whole. For these reasons, the ALJ concludes that the opinions of Drs. Polanco and McCranie are more persuasive than those of Drs. Machanic, Hall and Sunku.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME Opinion of Dr. Polanco Regarding MMI & Impairment

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). The instant case involves complex medico-legal questions regarding Claimant's MMI status in light of a very serious injury resulting in the delayed onset of a life threatening subdual hematoma. As found here, the persuasive evidence supports Dr. Polanco's MMI determination as expressed in his Division IME report. Specifically, the record, contrary to Claimant's suggestion that his injury and subsequent treatment was down-played and trivialized, demonstrates that he received five CT scans, an extensive neuropsychological examination, speech evaluations, hearing evaluations, cognitive evaluations, an EEG, and an ENT evaluation during the course of his treatment. Likewise, despite Claimant indicating to Dr. Lakin that he was fine and wished to return to full duty, in an abundance of caution, Dr. Lakin only allowed claimant to return to light duty and ordered a follow-up CT scan before placing Claimant at MMI. That CT scan demonstrated near complete resolution of Claimant's hematoma. Consequently, the ALJ is persuaded that the residual mental impairment caused by Claimant's July 11, 2015 injury stabilized and no further treatment was reasonably expected to improve the condition by December 16, 2015 when he was placed at MMI.

G. To the extent that Claimant's and/or Dr. Machanic's and Dr. Hall's opinions concerning MMI vary from those expressed by Drs. Lakin, McCranie and Polanco, the ALJ concludes that those divergences constitute a professional difference of opinion. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000).

Consequently, Claimant has failed to prove that Dr. Polanco's opinion regarding MMI was highly probably incorrect.

H. In this case, Claimant contends that the evidence presented supports a conclusion that the opinions of Dr. Polanco concerning permanent impairment have been overcome by clear and convincing evidence. The ALJ is not persuaded. As found, Dr. McCranie credibly testified that there was nothing incorrect about the method by which Dr. Polanco calculated Claimant's permanent impairment in this case. According to Dr. McCranie there are several ways to determine impairment for alleged cognitive dysfunction. Even Dr. Lakin suggested that Claimant may need to see a psychiatrist (Dr. Gutterman) for completion of an impairment rating. Moreover, the impairment associated with Class 2 disturbances of cerebral function is not supported by the record. Class 2 refers to someone who "needs some supervision" with daily activities. Claimant worked after being placed at MMI in December without apparent problems for weeks and months and the medical record fails to establish that during this time Claimant complained of an inability to adequately perform his activities of daily living. Such evidence clearly establishes that Claimant does not fall into the category of "needs some supervision." Moreover, the testimony of Claimant is largely contradicted by the medical records and his actions post injury are inconsistent with someone who requires "some supervision/direction" to carry out daily activities. Considering all the evidence, the ALJ concludes Claimant has failed to establish that Dr. Polanco's impairment rating determination is highly probably incorrect. Accordingly, Claimant has failed to carry his burden to set aside Dr. Polanco's 5% whole-person rating.

Maintenance Medical Benefits

I. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment. If the claimant reaches this threshold, the court stated that the ALJ should enter "a general order, similar to that described in *Grover*."

J. Nevertheless, *Grover* provided that, "[b]efore an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." While Claimant does not have to prove the need for a specific medical benefit at this time, and Respondents remain free to contest the reasonable necessity of any future treatment, Claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). Claimant has made such a showing in this case. Here, the persuasive evidence establishes that Claimant suffers from ongoing headaches and mild cognitive impairment for which Dr. McCranie testified requires medication management and repeat neuropsych testing. Consequently, Respondents shall furnish that medical care reasonably necessary to cure and relieve the effects of the injury and otherwise prevent Claimant's condition from deterioration.

Disfigurement

K. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found in this case, Claimant has an enhanced deviation of the bridge of the nose which alters the natural appearance of his face. Consequently, the ALJ concludes that Claimant has suffered a visible disfigurement entitling him to additional benefits as provided for by Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the DIME opinion of Dr. Polanco regarding maximum medical improvement is denied and dismissed.

2. Claimant's request to set aside the DIME opinion of Dr. Polanco regarding permanent impairment is denied and dismissed. The appropriate permanent impairment rating for Claimant's injury is the 5% whole person rating assigned by Dr. Polanco.

3. Claimant is entitled to ongoing medical treatment reasonably necessary and related to his July 11, 2015 industrial injury to maintain MMI.

4. Respondent-Employer retains the right to dispute any treatment recommended on the basis that the need for treatment is not causally related to Claimant's March 8, 2013 work injury and/or whether any recommended treatment is reasonable and necessary.

5. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Respondent-Employer shall pay Claimant $1,000.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 18, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

The issues to be determined by this decision are the following:

1. Whether Claimant proved by a preponderance of the evidence that she suffered a work-related injury on February 23, 2016, which arose out of and in the course and scope of employment; and

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to an order awarding reasonably necessary, authorized, and related medical benefits.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant worked for Employer as a deposit processing specialist. Claimant commenced her employment with Employer in June 2015. She had been employed by Employer for approximately eight months when, on February 23, 2016, Claimant alleges she suffered a work injury.

2. On February 23, 2016, as Claimant was eating lunch at the Employer, the left-side of Claimant's chair back broke, causing Claimant to lean forward. The back of the chair dislodged but did not break off at the time of the incident. The right side of the chair did not fall off until the chair was later being moved. Claimant alleges injuries from the February 23, 2016, work incident to her low back and left hip.

3. Prior to the alleged work related injury, Claimant has a significant history of low back pain, hip pain, and chronic pain. Claimant testified that she has been diagnosed with fibromyalgia, chronic fatigue syndrome, and had a long-standing history of low back problems. Prior to the work incident, medical records reflect diagnoses of fibromyalgia, degenerative disc disease, lumbar spondylosis, and bilateral SI joint dysfunction.

4. Claimant treated with Dr. Jonathan Ritvo, a board certified psychiatrist, on a twice-monthly basis for psychotherapy beginning October 14, 2003, through 2010, to deal with coping mechanisms for Claimant's difficulties including chronic pain in her upper and lower back, knees, and legs, diffuse severe fibromyalgia pain, depression and severe insomnia.

5. Claimant was determined to be disabled by the Social Security Administration (SSA) and received Social Security Disability Benefits for 28 years, from 1983 to 2011, due to chronic pain, low back issues and a sleep disorder. Claimant's Social Security Disability Benefits ended because disability benefits converted to retirement benefits in 2011 due to Claimant reaching retirement age.

6. In a treatment note from October 2003, Dr. Ritvo noted that Claimant was tearful when talking about losing her mobility from back pain.

7. Dr. Ritvo regularly wrote letters to the SSA regarding Claimant's ongoing treatment and issues. In a letter written by Dr. Ritvo on April 27, 2004, he stated that there had been a continued deterioration of Claimant's back conditioning and worsening of pain. Claimant saw a neurologist and received trigger point injections due to back pain. Claimant reported some relief but still could not bend over, move side to side, or sit for long periods of time. Dr. Ritvo expressed concern that Claimant may not be able to continue working, even on a part time basis.

8. Dr. Ritvo's July 19, 2005, report mentions that Claimant continued to see Dr. Kleen every 2 to 3 months for trigger point injections directed to her back, with little improvement. On May 15, 2007, Dr. Ritvo stated in a letter that Claimant continued to see Dr. Kleen for musculoskeletal pain in her back and hip and was prescribed Lidoderm patches.

9. On December 26, 2007, Dr. Ritvo reported that Claimant continued to report chronic pain in her upper and lower back, knees, legs, and right foot, and diffuse severe fibromyalgia pain.

10. In a report issued by Dr. Ritvo on May 26, 2008, it is reported that Claimant had limited relief of back and hip pain with Lidoderm patches, Flexor, and trigger point injections and continued to experience substantial physical limitations.

11. Dr. Ritvo's September 14, 2010, report stated that Claimant continued to see Dr. Kleen for musculoskeletal pain and obtained some relief of back and hip pain from Lidoderm patches, Flexor, and trigger point injections. Dr. Kleen performed an EMG on October 2, 2009, that showed mild peripheral neuropathy. An MRI dated October 9, 2009, showed disk bulges at L3 through S1 with annular tears at L4-5 and L5-S1.

12. Claimant treated with Dr. Claudia Panzer, an endocrinologist in August and September 2010. Dr. Panzer noted that Claimant was positive for back pain, bone pain, and muscle aches. Claimant's past medical history included bilateral SI joint dysfunction, chronic low back pain, fibromyalgia, chronic fatigue syndrome, and right cervical radiculopathy. Claimant noted that she was very frustrated about her ongoing low back pain.

13. In 2011, Claimant began working additional hours when her Social Security benefits converted to retirement benefits. .

14. Claimant treated at Rocky Mountain Internal Medicine on December 15, 2012, for low back pain. On this date, Claimant reported that she was not able to cope with her current job. On July 5, 2013, Claimant was again seen at Rocky Mountain Internal Medicine. Claimant reported pain in her hip, low back, and upper back. She stated she had problems with her current job because of the amount of ambulation and she would go home in excruciating pain. Lidoderm patches had been prescribed to treat her back pain and were described as the only pain medication that Claimant could tolerate.

15. Claimant treated at Rocky Mountain Internal Medicine on August 31, 2013, for multiple issues including lumbar spondylosis, degenerative disc disease, bilateral SI joint dysfunction, fibromyalgia, and chronic fatigue, among other issues. Claimant was upset that Medicare would not authorize Lidoderm patches for low back pain. Claimant treated at Rocky Mountain Internal Medicine on January 9, 2014. She reported low back and upper back pain and knee pain, 3-4 out of 10 and constant.

16. Claimant treated at Rocky Mountain Internal Medicine on May 16, 2014, for fibromyalgia and low back pain. Claimant reported most of her pain was located in her low back and neck. Claimant had a history of lumbar spondylosis, degenerative disc disease, bilateral SI joint dysfunction, fibromyalgia, and chronic fatigue, among other issues.

17. Claimant treated at Rocky Mountain Internal Medicine on December 12, 2014, for multiple issues. Claimant reported significant low back pain and neck pain. Claimant had a history of lumbar spondylosis, degenerative disc disease, bilateral SI joint dysfunction, fibromyalgia, and chronic fatigue, among other issues.

18. Claimant continued treating at Rocky Mountain Internal Medicine through June 2015 for issues including lumbar spondylosis, degenerative disc disease, bilateral SI joint dysfunction, fibromyalgia, and chronic fatigue. Claimant's prescriptions included Flexor patches for chronic pain.

19. Prior to her work at Employer, Claimant worked at Fitzsimmons Credit Union for approximately three months. Claimant quit her position at Fitzsimmons Credit Union because she was physically unable to work more than four hours due to pain in her low back, upper back, and knees. Claimant went home in excruciating pain while working for Fitzsimmons Credit Union and she had difficulty coping with her job due to back pain. Claimant's inability to perform her work is corroborated by medical reports by her physician, Dr. Mauricio Waintrub, at Rocky Mountain Internal Medicine.

20. Prior to Fitzsimmons Credit Union, Claimant worked for Vectra Bank for approximately fourteen months. Claimant testified that she had problems with low back pain while working at Vectra Bank.

21. Dr. Ritvo wrote a note dated March 23, 2015, documenting that Claimant quit her jobs at Vectra Bank and Fitzsimmons Credit Union because she was unable to physically perform the jobs. Claimant reported to Dr. Ritvo that she had been unable to work full time since 1979 due to back pain.

22. Dr. Roth performed an independent medical examination of Claimant and testified via deposition on September 8, 2016. Dr. Roth credibly testified that it was unlikely that the accident described would cause an injury and not medically probable that there was any significant disruption of Claimant's anatomy due to the February 23, 2016, chair incident.

23. Dr. Roth also credibly testified that in his medical opinion, based on his review of Claimant's records and physical exam, Claimant did not suffer a work-related injury on February 23, 2016, nor did the accident aggravate or accelerating Claimant's pre-existing conditions.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936). The ALJ must assess the credibility of the witnesses and the probative value of the evidence. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998).

4. Claimant must prove by a preponderance of the evidence that she suffered an injury arising out of and in the course of her employment. Section 8-42-301(1), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *H &H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). To recover workers' compensation benefits on a compensable claim, there must be a causal relationship between the industrial accident and the injury for which benefits are sought. *Snyder v. Industrial Claims Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

5. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers an unexpected, unusual, or undersigned occurrence. Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable injury. *City of boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967); *Wherry v. City and County of Denver,* W.C. No. 4-475-818 (ICAO March 7, 2002).

6. Based on a totality of the evidence, claimant experienced an "accident" on February 23, 2016, when her seat back dislodged and detached on one side, startling Claimant and causing her to pull forward. However, Claimant failed to prove that she suffered an actual compensable "injury."

7. The evidence presented at hearing shows that Claimant has a well-established history of pre-existing chronic pain including fibromyalgia, back pain, hip pain, degenerative disc disease, and bilateral SI joint dysfunction which has caused disruption to her daily life and ability to work for more than a decade.

8. Dr. Henry Roth credibly testified via deposition that it is not medically probable that the February 23, 2016, accident caused any significant disruption of Claimant's anatomy. Dr. Roth credibly explained that claimant did not suffer a compensable "injury" at work.

9. This ALJ finds that Claimant failed to prove by a preponderance of evidence that she suffered a compensable injury attributable to the February 23, 2016, chair accident.

ORDER

It is therefore ordered that:

1. Claimant’s claim for benefits under the Act arising from an alleged February 23, 2016, incident is hereby denied and dismissed with prejudice.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: ___November 16, 2016_

/s/ Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-965-722-01

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that L3, L4, L5 medial branch blocks requested by Dr. Lesnak are reasonable, necessary, and causally related to Claimant's August 12, 2014 work injury.

FINDINGS OF FACT

1. Claimant has worked for Employer for approximately 20 years as a delivery driver.

2. On December 7, 2010 Claimant sustained a previous work injury to his lumbar spine. Claimant underwent medial branch blocks in April and May of 2011 and also underwent radiofrequency ablation in June of 2011 for this injury.

3. In September of 2011 Claimant reached maximum medical improvement (MMI) for this prior injury. At MMI, Claimant had pain levels reported by him to be at 3/10. A final admission of liability (FAL) for this prior injury was filed on October 5, 2011.

4. Claimant continued working for Employer. On August 12, 2014 while delivering a keg of beer down a flight of stairs, Claimant felt a pop in his lower back. Claimant was referred to Lawrence Lesnak, M.D. for medical treatment and Respondents filed a general admission of liability that admitted to medical benefits only.

5. Claimant underwent treatment with Dr. Lesnak. On October 6, 2014 Dr. Lesnak performed bilateral L3, L4, and L5 medial facet joint nerve branch blocks that provided Claimant with two days of relief. On October 31, 2014 Dr. Lesnak performed L3, L4, and L5 medial facet joint nerve branch percutaneous radiofrequency ablation that provided Claimant with approximately 6 months of relief.

6. On February 9, 2015 Claimant was released to full duty work. Claimant also was placed at MMI on March 3, 2015 and was provided with a 1% whole person impairment rating. Claimant's symptoms continued after MMI and he was referred back to Dr. Lesnak for further treatment. Dr. Lesnak recommended a repeat MRI and electrodiagnostic testing of Claimant's left lower extremity.

7. On July 13, 2015 Claimant underwent a repeat lumbar MRI. The MRI, compared to his prior study, showed that the L5-S1 disc disease was more desiccated, the annular tear was more scarred, the L4-5 left lateral protrusion was unchanged, and there was progression of an endplate fracture or schmorl node of T11 that had doubled in size. *See* Exhibit 11.

8. On July 23, 2015 Claimant was evaluated by Dr. Lesnak. Claimant reported that his low back symptoms and left greater than right leg and buttock symptoms were worsening. Claimant reported that he needed to be helped out of his truck at work on Friday and that when he went home he just laid around and was miserable all weekend. Dr. Lesnak recommended proceeding with an electrodiagnostic evaluation of the bilateral lower extremities and the lumbar spine regions. Dr. Lesnak performed an EMG and found mild to moderate left L5 sub acute radiculopathy and opined that the symptoms were stemming from an irritation of the left L5 nerve root. Dr. Lesnak recommended a left L5 transforaminal epidural injection. *See* Exhibit 8.

9. On July 27, 2015 Claimant underwent a division independent medical examination performed by Joseph Morreale, M.D. Dr. Morreale opined that Claimant was not at MMI and required further treatment. Dr. Morreale recommended an epidural steroid injection to the L4-L5 level and an evaluation by an orthopedic surgeon for potential foraminotomy or decompression. *See* Exhibit 4.

10. On July 31, 2015 Dr. Lesnak performed a left sided L5 transforaminal epidural steroid injection. Claimant reported prior to injection a pain rating of 5/10 and afterwards a rating of .5/10 with only some very minimal post injection site soreness. *See* Exhibit 8.

11. On August 11, 2015 Respondents filed a general admission of liability reopening the claim. *See* Exhibit B.

12. On September 14, 2015 Claimant underwent an orthopedic evaluation by Bryan Castro, M.D. Claimant reported having medial branch blocks and a radiofrequency rhizotomy which was somewhat helpful. Claimant reported working full time but that he had pain in the bilateral buttocks, posterior thigh, and calf. Dr. Castro opined that Claimant would not benefit from surgical intervention and recommended ongoing conservative management. *See* Exhibits 6, F.

13. On October 13, 2015 Claimant underwent a second orthopedic evaluation by Douglas Wong, M.D. Dr. Wong also did not feel that any surgery would help with Claimant's injury. *See* Exhibits 5, G.

14. On October 19, 2015 Claimant was evaluated by Craig Anderson, M.D. Claimant reported that he continued to experience significant pain first thing in the morning such that he had to roll himself out of bed and that his back remained more painful than his legs. Dr. Anderson noted the recommendations against surgery. *See* Exhibit 7.

15. On December 21, 2015 Claimant was evaluated by Dr. Lesnak. Claimant reported being quite miserable and that his low back pain was much worse than his intermittent/frequent left leg symptoms. Claimant reported working full time and that he could do his job but that when he got home after work his symptoms got worse. Dr.

Lesnak opined that Claimant may be a candidate for consideration of a repeat radiofrequency neurotomy procedure directed at the mid to lower lumbar spine. Dr. Lesnak recommended first that Claimant undergo a repeat electrodiagnostic study of the left lower extremity and lumbar spine to evaluate for any significant changes and that if the study showed no significant changes then a medical facet joint nerve branch block trial would need to be performed to see if Claimant was a candidate for a repeat neurotomy procedure. *See* Exhibit 8.

16. On January 19, 2016 Claimant was evaluated by Dr. Anderson. Dr. Anderson again noted that Claimant had significant pain in the morning in the lower lumbosacral area that improved with movement and that Claimant continued to have left lower extremity radicular pain and numbness in the left foot. *See* Exhibit 7.

17. On March 7, 2016 Claimant was evaluated by Dr. Lesnak. Dr. Lesnak performed EMG studies of Claimant's left lower extremity and opined that the study was essentially unchanged from the previous evaluation performed in July of 2015. Dr. Lesnak noted that the previous sub acute left L5 radiculopathy seemed to have converted to a chronic feature and that there were no new findings. Dr. Lesnak noted that the primary complaint at this time was the persistent low back pain and that Clamant may be a candidate for repeat neurotomy directed at the lower lumbar spine. *See* Exhibit 8.

18. On April 4, 2016 Claimant was evaluated by Dr. Lesnak. Dr. Lesnak noted that an electrodiagnostic evaluation performed one month prior showed evidence of a mild chronic left L5 radiculopathy without any acute or sub acute features. Claimant reported persistent left sided low back pain and constant left posterior leg numbness and cramping sensations in the left posterior calf region. Dr. Lesnak opined that it appeared the majority of Claimant's recurrent/residual moderately severe left sided low back/buttock and leg symptoms were stemming from the left lower lumbar facet joints. Dr. Lesnak noted that although the recent EMG showed evidence of mild chronic left L5 radiculopathy, Claimant reported the left sided low back pain was more symptomatic than any left leg symptoms. Dr. Lesnak recommended that Claimant undergo a onetime diagnostic L3, L4, and L5 medial facet joint nerve branch block trial to see if Claimant was a candidate for a repeat radiofrequency neurotomy procedure directed at the left lower spine. *See* Exhibits 8, H.

19. On April 12, 2016, Frank Polanco, M.D. performed a Rule 16 review of Dr. Lesnak's request for left L3, L4, and L5 medical branch blocks. Dr. Polanco opined that the medial branch blocks were not medically necessary. Dr. Polanco opined that Claimant had multiple pain generators and that there was no clear indication of facet related disease or functional limitations. *See* Exhibit I.

20. On April 26, 2016 Claimant was evaluated by Dr. Anderson. Claimant reported that the low back pain at the lumbar midline and just left of the midline was not made worse by a non related fall and pelvic fracture two months prior. Dr. Anderson noted Claimant's lower back pain was more than the numbness and discomfort of the

left leg. Dr. Anderson noted that Dr. Lesnak recommended a diagnostic left L3, L4, and L5 medial facet joint nerve branch block trial to see if Claimant was a candidate for repeat rhizotomy and that in the past Claimant had significant improvement from rhizotomy. Dr. Anderson noted Dr. Lesnak strongly suspected the pain generator was a recurrence of facetogenic pain. Dr. Anderson opined that Claimant deserved a trial of medial branch nerve blocks. *See* Exhibit 7.

21. On May 25, 2016 Claimant was evaluated by Dr. Anderson. Claimant reported that he continued to have significant pain in the lumbar spine to a degree that made it difficult to get out of bed in the morning. Claimant reported that once he got going the pain improved but continued to be at a moderate level and then got progressively more severe by the end of his shift. Dr. Anderson noted that Claimant's most limiting problem interfering with work activity was the lower back pain and that the left lower extremity radiating discomfort was intermittent and occasional. Dr. Anderson noted Claimant's prior positive diagnostic response and clinical improvements following radiofrequency neurotomies in 2014 and 2011. Dr. Anderson opined that Dr. Polanco was incorrect in stating that Claimant had no clear indication of facet-related disease. Dr. Anderson opined that at present, there was clinical indication that Claimant's primary pain generator was likely recurrence of facet synovitis. Dr. Anderson respectfully submitted that the insurance carrier should reconsider the recommendation for medial branch nerve blocks at L3, L4, and L5. Dr. Anderson noted that Claimant remained at full duty with extreme difficulty but that he needed to work for financial reasons. *See* Exhibit 7.

22. On July 21, 2016 Claimant underwent an independent medical examination performed by Dr. Polanco. Dr. Polanco again opined that the request by Dr. Lesnak for medial branch blocks was not medically necessary. Dr. Polanco noted that the medical records showed that for Claimant's prior 2011 work injury he was placed at MMI and that the MRI at the time reflected degenerative disc disease at L4-L5, L5-S1 with disc bulging and disc dessication, mild lateral recess, left sided foraminal stenosis at L4-5 without nerve root impingement, and small posterior annular tear at L5-S1. Dr. Polanco also noted that Claimant had mild facet arthrosis at L4-5 and L5-S1 and that on discharge Claimant had 3/10 low back pain and thus a clear history of pre-existing condition with degenerative changes. *See* Exhibit I.

23. Dr. Polanco opined that the medial branch blocks requested did not meet the criteria of the medical treatment guidelines. Dr. Polanco noted that Claimant had a chronic degenerative condition that had stabilized to the point that Claimant had returned to full duty work. Dr. Polanco noted that another facet rhizotomy procedure would be recommended for individuals with functional limitations limiting their return to full duty work and who have failed conservative therapy. Dr. Polanco noted that Claimant had improved following treatment and did not have functional limitations that impeded his work due to the facet condition. Dr. Polanco noted that Claimant had multi-level degenerative disease of the lumbar spine and that the normal course of the disease is to flare up periodically with increased discomfort while doing repetitive bending and lifting or prolonged sitting. Dr. Polanco opined that this should primarily be

managed through an independent and active exercise program, over the counter anti-inflammatories, and appropriate ergonomic measures. Dr. Polanco opined that essentially it was an arthritic condition and that repeated rhizotomy was not recommended as a means of long term management. He further noted that the injections and then potential radiofrequency ablation procedures were only temporary measures and were meant to be utilized in connection with an active therapy program to improve function. *See* Exhibit I.

24. Dr. Polanco testified at hearing consistent with his IME report. Dr. Polanco explained that the medial branch blocks were used to determine if there was any pain relief or functional improvement to justify a radiofrequency ablation procedure. Dr. Polanco testified that based on examination, Claimant did not require any work restrictions and that Claimant was functional and had no significant limitations. Dr. Polanco also noted that Claimant had multiple pain generators including arthritic changes in the facet joints, degenerative changes in the discs, and an annular tear. Dr. Polanco opined that the radiofrequency ablation would only treat the facet condition.

25. Dr. Polanco noted that the medical treatment guidelines did not recommend radiofrequency ablation for patients who had multiple pain generators like Claimant has. Dr. Polanco opined that radiofrequency ablation would not take care of Claimant's injury and that Claimant would continue to have pain regardless of undergoing a repeat radiofrequency ablation. Dr. Polanco noted the purpose of the medial branch block was to see if the rhizotomy was appropriate and that the purpose of the rhizotomy was to improve a person's function by burning nerves and helping the pain subside. Dr. Polanco opined that the medical treatment guidelines recommended a clear active rehabilitation program for someone with Claimant's degenerative changes.

26. Claimant testified at hearing. Claimant reported that he had spasms and pops while working and that he was in pain at the end of the day. Claimant has difficulty getting out of bed and getting loose in the morning. Claimant reported that in the morning he stretched to get loose before work. Claimant testified that he wanted the blocks because following his last rhizotomy he was pain free for 6 months.

27. The opinions of Dr. Anderson and Dr. Lesnak are found more persuasive than the opinions of Dr. Polanco.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has established by a preponderance of the evidence that the L3, L4, and L5 medial branch blocks requested by Dr. Lesnak are reasonable, necessary, and causally related to his August 12, 2014 work injury. The opinions of Claimant’s treating providers, Dr. Lesnak and Dr. Anderson, who both recommend this procedure are found persuasive. The treating providers necessarily weighed risks and benefits before recommending the treatment. Further, the overall medical evidence and credible subjective reports from Claimant support the conclusion that, more likely than not, Claimant’s continued severe pain is due to the facet condition. Although Claimant has other pain generators, Dr. Lesnak credibly opined in his medical reports the basis for the belief that the primary pain generator is the facet condition. Dr. Anderson reached a similar opinion that the facet condition was the main pain generator. Additionally, although Claimant does not have current work restrictions, Claimant does have functional limitations that have been documented throughout the medical reports. Claimant is credible explaining his pain and limitations. Claimant's pain, which both Dr. Anderson and Dr. Lesnak believe is likely coming from the facet condition, is limiting Claimant's ability to perform his job. Although Claimant has no work restrictions and continues to work full duty, he does so with extreme difficulty as noted by Dr. Anderson. Claimant is credible in explaining his limitations and has been consistent in explaining his pain and limitations throughout the medical reports.

The opinions of Dr. Polanco are not found credible or persuasive. Claimant has established more likely than not that he has functional limitations, that his pain generator is from the facet, and that a medial branch block is reasonable and necessary both as diagnostic and therapeutic treatment to cure and relieve him from the effects of his work injury. The medial branch blocks are a reasonable and necessary measure to determine whether a repeat rhizotomy will be performed. As found above, Claimant experienced significant relief from prior rhizotomy procedures. Here, the request to perform medial branch blocks to assist in determining whether a repeat rhizotomy is appropriate has been shown to be both reasonable and necessary. Claimant has established an entitlement to this procedure.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that L3, L4, L5 medial branch blocks requested by Dr. Lesnak are reasonable, necessary, and causally related to Claimant's August 12, 2014 work injury. Respondents shall authorize and pay, pursuant to the fee schedule, for this procedure.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 16, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-944-490-02

ISSUES

Did Claimant prove by a preponderance of the evidence that the surgery proposed by Walter Gersoff, M.D. is reasonable and necessary to cure and relieve the effects of her industrial injury?

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on November 26, 2013 while working for Employer. In particular, Claimant injured her left knee when she slipped and fell while at work.

2. Respondents provided medical benefits to Claimant through Concentra. Gary Zuehlsdorff, M.D. was an ATP.

3. Claimant was evaluated by Dmitri Zaronius, M.D. at Kaiser on January 23, 2014. In that note, Claimant was noted to have prior issues with the left knee, but by the summer of 2013, her knee was better. On examination, Dr. Zaronius noted mild swelling and tenderness anterolaterally. No instability was noted and the MRI showed a degenerative tear with posible superior surfacing of some signal with some possible unstable edges. Dr. Zaronius' assessment was left knee anterior horn lateral meniscus tear. Dr. Zaronius opined that the tissue was degenerated a bit and got irritated with this event. He offered Claimant an injection as a possible treatment.

4. Claimant testified she underwent surgery which was performed by Dr. Mann on February 12, 2014. She testified she subsequently aggravated her left knee when she fell on August 28, 2014.

5. A report from Jeffrey Hawke, M.D., M.P.H. dated September 9, 2014 was admitted into evidence. Claimant saw Dr. Hawke for a follow-up and, at the time of the evaluation, Claimant noted no locking or giving out of the knee. Dr. Hawke's assessment was: left knee medial meniscus tear, status post repeat arthroscopy on July 16, 2014; contusion left knee, from recent re-injury. Claimant was to follow-up with Dr. Mann.

6. On December 3, 2014, Claimant returned to Kaiser and was evaluated by Michael Gallagher, M.D. Dr. Gallagher noted Claimant had surgery in February 2014 and what appeared to be a chondroplasty of the patella and medial femoral condyle, along with a partial lateral menisectomy. She also had a corticosteroid injection in May 2014, with a second surgery in July 2014. Claimant was complaining of instability in the left knee. Mild discomfort with hyperextension, 2+ patella femoral crepitus was noted. Dr. Gallagher opined Claimant's pain was likely stemming from a combination of

persistent tear in the anterior horn of the lateral meniscus along with degenerative changes in the form of chondromalacia of the medial femoral condyle and patella. Dr. Gallagher discussed the possibility of a third surgery on the knee, which he felt came with" significant risk". He recommended glucosamine, as well as avoidance of aggravating activity, bicycling and swimming as tolerated.

7. On March 12, 2015, Claimant underwent a medial meniscetomy and debridement as well as chondroplasty of the medical femoral condyle, which was performed by Wayne Gersoff, M.D.[1] Grade 3 and 4 changes were present in the medical femoral condyle and there were grade 3+ changes in the patellofemoral joint.

8. Claimant was evaluated by Dr. Gersoff on July 8, 2015. At that time, her symptoms were described as chronic, non-traumatic. Dr. Gersoff's assessment was joint pain-left leg. He reviewed the MRI findings and films with Claimant and noted there was no new meniscal pathology, but some mild progression of the chrondromalacia of the patella and medial femoral condyle. He recommended a course of viscosupplementation.

9. Claimant underwent an MRI of the left knee on December 30, 2015. Joseph Morgan, M.D. read the films and his impression was: horizontal tear in the posterior horn of the medial meniscus, more pronounced than on previous studies; chronic, unchanged advanced focal chondromalacia in the patellar articular surface; new focal area of chondromalacia with subchondral marrow edema in the lateral space of the knee, as described; stable chronic chondromalacia on the weight-bearing surface of the medial femoral condyle. The ALJ infers that the findings of chondromalacia at various locations in the knee described a degenerative and/or arthritic process.

10. Claimant reached MMI on September 22, 2015. A Final Admission of Liability was filed on behalf of Respondents.[2]

11. On March 30, 2016, Claimant returned to Dr. Gersoff complaining of left knee pain. Claimant described her symptoms as intermittent, but worse. On examination, Dr. Gersoff noted decreased passive range of motion and mild effusion in the left knee. Dr. Gersoff's impression was that there was no other option but to proceed with arthroscopy and partial meniscectomy and debridement.

12. A request for authorization of left knee scope (CPT code 29881) was made on April 1, 2016.

13. Claimant testified that she continues to experience pain in her left knee. She wishes to have the treatment as recommended by Dr. Gersoff. Claimant was a credible witness and the ALJ credited her testimony regarding her pain complaints.

[1] This procedure was summarized by Dr. O'Brien in his medical records review. [Exhibit C, pp. 14-15].

[2] The FAL was not admitted into evidence.

14. Timothy O'Brien, M.D. performed a record review and issued a report dated April 11, 2016. Dr. O'Brien did not examine Claimant. Dr. O'Brien opined Claimant initially had a minor injury, which did not result in a lateral meniscus tear. Dr. O'Brien noted an acute lateral meniscus tear was incredibly painful. Dr. O'Brien documented when Claimant was evaluated by Dr. Hoch on December 3, 2013, no effusion was noted. Dr. O'Brien opined it was highly unlikely and medically improbable that Claimant sustained any type of meniscus tear or interarticular injury on November 26, 2013. The ALJ was not persuaded by this opinion proffered by Dr. O'Brien regarding whether the injury was compensable.

15. In his report, Dr. O'Brien stated Claimant was not a surgical candidate. Dr. O'Brien stated that the proposed surgical procedure would not necessarily relieve Claimant's symptoms. Dr. O'Brien opined that surgery was not warranted given the degenerative changes in Claimant's knee and was, in fact, contraindicated. Dr. O'Brien opined that the proposed arthroscopy would increase Claimant's pain due to the osteoarthritis. The ALJ was persuaded by this opinion.

16. On April 13, 2016, the request for authorization of the left knee surgery was denied on behalf of Respondents, based upon Dr. O'Brien's report.

17. An amended FAL was filed on April 22, 2016[3] pursuant to a joint Stipulation of the parties and an Order approving the Stipulation. That amended FAL admitted for reasonable, necessary, and related medical treatment from an ATP and Drs. Gersoff and Zuehlsdorff were designated ATPs pursuant to the Stipulation.

18. Dr. Gersoff's reports did not establish why a third surgical procedure would relieve Claimant's symptoms.

19. Claimant failed to prove the proposed surgery is reasonable and necessary.

20. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be

[3] Exhibit E.

interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Medical Benefits

Claimant argued the proposed surgery was reasonable and necessary, relying upon Dr. Gersoff's surgical recommendation. Claimant pointed to the evidence of a horizontal tear in the posterior horn in the medial meniscus, which was more pronounced in the 12/30/15 MRI than in the previous study

Respondents averred Claimant's symptoms were a result of the natural progression of the underlying degenerative condition in her knee. As such, they argued Claimant failed to prove the surgery was reasonable and necessary.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved a particular treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002) [upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures]; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). Claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. § 8-43-301(8), C.R.S.

The ALJ concluded Claimant failed to prove the proposed surgery would cure and relieve the effects of her industrial injury for two reasons. First, the medical evidence before the Court did not persuade the ALJ that this procedure was reasonable. More particularly, Dr. Gersoff's reports did not provide an explication as to why he felt the procedure would either reduce Claimant's symptoms or address objective pathology. The ALJ did not have sufficient evidence to conclude that the proposed procedure was necessary and reasonable under these circumstances.

Second, the ALJ reviewed the Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 6-Lower Extremity [effective January 1, 2006] ("Treatment Guidelines") as guidance in determining whether the proposed surgery for Claimant's knee was reasonable and necessary. The Treatment Guidelines were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. 2008. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003), the Court noted that the Treatment Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See § 8-42-101(3)(b), C.R.S. 2008.

The Treatment Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Treatment Guidelines in deciding whether a certain medical treatment is reasonable and necessary for Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria).

> "viii. Surgical Indications/Considerations:
>
> A) Arthroscopic Debridement and/or Lavage. There is good evidence from a randomized controlled trial that arthroscopic debridement alone provides no benefit over recommended therapy for patients with uncomplicated Grade 2 or higher arthritis. The comparison recommended treatment in the study followed the American College of Rheumatology guidelines, including: patient education, supervised therapy with a home program, instruction on ADLs, and stepwise use of analgesics and hyaluronic acid injections if desired. Complicated arthritic patients excluded from the study included patients who required other forms of intervention due to the following conditions: large meniscal bucket handle tears, inflammatory or infectious arthritis, more than 5 degrees of varus or valgus deformity, previous major knee trauma, or Grade 4 arthritis in 2 or more compartments. Therefore, arthroscopic debridement and/or lavage **are not recommended** for patients with arthritic findings, continual pain and functional deficits unless there is meniscal or cruciate pathology or a large loose body causing locking. Refer to the specific conditions in this Section E, for specific diagnostic recommendations". [Emphasis in original]. W.C.R.P. Rule 17, Exhibit 6, p. 74.

In the case at bench, the 12/30/15 MRI documented the presence of degenerative changes in the knee. (Finding of Fact 9). Dr. Gersoff described these as Grade 3 and 4 changes. (Finding of Fact 7). Dr. Gersoff also noted there was no new meniscal pathology, which would be a surgical indication under the Treatment Guidelines. Further, Claimant underwent three[4] prior surgical procedures, two of which involved debridement and her symptoms returned. The ALJ was not persuaded that the surgery proposed by Dr. Gersoff was reasonable and necessary given the guidance provided by the Treatment Guidelines.

Claimant did not establish the proposed surgery was reasonable under these circumstances. Dr. O'Brien's opinion regarding the efficacy of such a procedure was persuasive to the ALJ. Accordingly, this request for benefits is denied.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the surgery recommended by Dr. Gersoff is DENIED.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a

[4] The ALJ notes that the operative records for each procedure were not admitted into evidence, rather Dr. O'Brien referred to three prior surgeries (2/12/14, 7/16/14 and 3/12/15).

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 18, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant produced clear and convincing evidence to overcome the maximum medical improvement (MMI) determination of the Division IME (DIME) opinion of Anjmun Sharma, M.D.

II. Whether Claimant has established by a preponderance of the evidence that the 23% scheduled impairment rating issued by Dr. Sharma should be converted to a whole-person rating.

III. Whether Claimant has established by a preponderance of the evidence that she is entitled to additional medical benefits.

IV. Whether Claimant has established by a preponderance of the evidence that she is entitled to TTD benefits from July 21, 2015 through May 24, 2016, and to TPD benefits from May 25, 2016, and ongoing.

V. Whether Claimant has established by a preponderance of the evidence that she is entitled to disfigurement benefits in excess of those previously awarded.

STIPULATION

At the commencement of hearing, the parties reached the following stipulation approved by the ALJ: Claimant's AWW is $647.52.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant began working for Respondent-Employer beginning May, 2008. She was hired as "delivery load puller" and worked her way up to "delivery manager." In the latter position, her duties included pulling loads for trucks, helping with deliveries, scheduling deliveries, and providing customer service. Claimant injured her right knee while stepping up into a truck during a delivery on August 30, 2011.

2. Claimant treated with Dr. Daniel Peterson at Concentra. On September 28, 2011, Dr. Peterson referred her to orthopedic surgeon Dr. Wiley Jinkins. (Claimant's Exbs. pg. 148). Dr. Jinkins ultimately performed patella re-alignment surgery on November 17, 2011. (Claimant's Exbs. pgs. 184-186). Claimant developed arthrofibrosis in the knee which delayed her rehab. Consequently, Dr. Jinkins performed a manipulation under anesthesia (MUA) on January 19, 2012. (Claimant's

Exbs. pg. 180, 181). On February 16, 2012, Dr. Jinkins performed additional surgery to remove hardware from Claimant's right knee, as well as to effect "limited debridement and bone grafting." (Claimant's Exbs. pg. 177, 178).

3. Concentra physician Dr. Albert Hattem placed Claimant at MMI on August 16, 2012. Dr. Hattem noted "…Jennifer complains of persistent knee pain that she rates at 3/10...When asked to flex her knee, Jennifer could only perform this very slowly and cautiously…" Dr. Hattem issued a 16% lower extremity impairment rating. Based on the results of a functional capacity evaluation, he released her to sedentary work and noted, "…she should not crawl, kneel, or squat." Dr. Hattem recommended maintenance care for twelve months. (Claimant's Exbs. pgs. 91-93).

4. Dr. William Griffis performed a Division IME on December 20, 2012. (Respondents' Exb. C). Dr. Griffis reported; "…Today the patient continues to complain of a constant dull aching pain over the anterior aspect of the right knee. She has occasional sharp shooting pains under the patella. Her knee pain is worse with prolonged walking. She has difficulty ambulating on stairs. She is no longer able to participate in previous recreational activities…" (Id. at 81). Dr. Griffis agreed Claimant reached MMI on August 16, 2012; however, he issued a 25% lower extremity impairment rating. (Id. at 82).

5. Claimant underwent an IME with Dr. Timothy Hall on March 6, 2013. Dr. Hall reported, "…Exam of the right knee reveals thickening of the distal patellar tendon, down to its insertion. I did not do an aggressive exam of the right side due to the fact that she has so much pain and there is nothing to be gained…" (Claimant's Exbs. pg. 5). Dr. Hall's diagnoses included, "right knee injury, status post failed surgical intervention with increased pain and range of motion loss. Gait disturbance leading to postural obliquity through the pelvis..." (Id.)

6. A hearing on Claimant's attempt to overcome Dr. Griffis' Division IME findings was held on May 15, 2013. In an Order dated June 13, 2013, ALJ Walsh found that, "…The Claimant has established that the DIME physician's true opinion is that the claimant is not at MMI…" (Claimant's Exbs. pg. 222).

7. Claimant resumed treatment with Dr. Peterson on July 12, 2013. He noted, "…She does, in fact, has [sic] a limp to her gait because she is unable to fully extend the right knee nor to fully flex it, and it does affect her gait and makes it awkward…She definitely alters the way she goes up and down the stairs, leading with different foot whether she is up or down which causes her greatest pain. If she is going down, she has to lead with the right foot because she cannot typically leave that right knee behind her as she steps down with the left…" (Claimant's' Exbs. pg. 104). Dr. Peterson's diagnoses included; "Right knee chronic pain secondary to Fulkerson osteotomy. It is not improved at all. She is still functionally very limited, and her quality of life is limited…" (Id. at 105). Dr. Peterson discussed with Claimant a referral to orthopedic surgeon Dr. Michael Schuck for consideration of total knee arthroplasty. (Id.) On September 11, 2013, Dr. Peterson formally referred Claimant to Dr. Schuck. (Id. at 100)

8. Dr. Schuck examined Claimant on September 26, 2013. He noted, "…She continues to have severe symptoms. She has difficulty with day to day activity as well as work. She currently takes Ibuprofen 800 mg twice daily which provides only minimal improvement in her symptoms. She is very frustrated by the ongoing nature of her symptoms. She has been unable to work for over a year…" (Claimant's Exbs. pg. 50). Dr. Schuck recommended a new MRI of the right knee.

9. On October 23, 2013, Dr. Schuck reported, "…The newest information from the MRI reveals no evidence of meniscus or ligament injury. I have explained to her that the patellar tendonitis does not necessarily show up on the MRI. I have recommended that we try a repeat intraarticular corticosteroid injection and she agreed to proceed…" (Claimant's Exbs. pg. 48).

10. On November 12, 2013 Dr. Schuck noted the injection provided benefit for less than 24 hours. He reported that; "…Her symptoms are consistent with soft tissue irritation in the anterior medial aspect of the knee. She does have symptoms of patellar tendinitis but her primary problem appears to be the discomfort along the medial margin of the patella. I think her symptoms are consistent with her symptomatic patellofemoral plica. This may be related to synovial scarring from her previous realignment procedure. Since she continues to have severe discomfort in the knee, causing severe debilitation, I think it is reasonable to proceed with arthroscopic surgical treatment of the plica…" (Claimant's Exbs. pgs. 46, 47).

11. Dr. Schuck performed "arthroscopic plica resection/synovectomy" on December 11, 2013. (Claimant's Exbs. pgs. 42, 43). On December 20, 2013, he noted that primary finding in surgery was "…thick synovial scar tissue formation around the patella and behind the patellar tendon. This tissue was resected arthroscopically…" (Id. at 41).

12. On January 16, 2014, Dr. Hattem reported; "…I advised her that following completion of therapy, there will be nothing further to offer. She is most definitely not a candidate for additional surgery…" (Claimant's Exbs. pgs. 81, 82).

13. On January 21, 2014, Dr. Schuck noted Ms. Beeman reported her right knee was
no better after the arthroscopy; "…She continues to have anterior knee discomfort, especially around the patellar tendon. She is unable to go downstairs in a normal fashion because of this pain. She is also unable to fully actively extend the knee because of discomfort…" He administered a corticosteroid injection. (Claimant's Exbs. pgs. 39, 40).

14. On March 18, 2014, Dr. Schuck noted Ms. Beeman was not improving; "…As recently as yesterday, she experienced a painful pop in the right knee as well as locking symptoms that prevented her from fully extending the knee. She continues to work diligently with physical therapy…" He recommended a repeat MRI. (Claimant's Exbs. pgs. 36, 37). It was performed on March 27, 2014. (Id. at 201). He reviewed it with her

on April 1, 2014 and noted, "…The only abnormality noted by the radiologist when comparing this MRI to an MRI from October of 2013 is increased edema in the retropatellar fat-pad. There is no evidence of stress fracture or nonunion at the previous Fulkerson osteotomy site." Dr. Schuck administered an injection directly into fat-pad tissues. (Id. at 34, 35).

15. Dr. Schuck saw Claimant on April 29, 2014 and noted the previous injection did not help. (Id. at 33). He discussed the possibility of platelet rich plasma ("PRP") treatment. In a letter dated June 10, 2014, Dr. Schuck reported; "…Her current diagnosis is intractable patellar tendonitis. She has tried extensive physical therapy, corticosteroid injections, activity modification, and anti-inflammatory medication without relief of her symptoms. She continues to have debilitating pain. An MRI indicates that her patellar tendon is intact. Her symptoms are consistent with tendonitis or tendinosis. For this reason, I have recommended an injection of PRP…" (Id. at 31). Dr. Schuck performed a PRP injection on July 24, 2014. (Id. at 30).

16. On August 22, 2014, Dr. Schuck reported that the PRP injection caused no change in symptoms. He recommended; "…that we reevaluate the knee arthroscopically to address any chondromalacia issues in the patellofemoral compartment. I would also like to perform a limited open procedure to excise any scarring of the synovial fat pad behind the patellar tendon since this seems to be a source of much of her discomfort…"

17. On November 21, 2014, Dr. Schuck discussed the right knee arthroscopy and open scar tissue debridement surgery he performed on November 12, 2014. He reported; "…At the time of surgery, she was not found to have any significant degenerative changes in the patellofemoral compartment. There were no intra-articular abnormalities. During the open portion of the procedure, a significant volume of thick and flexible scar tissue was noted behind the patellar tendon in the area of the retropatellar fat pad. Additionally, a prominent bony spike on the tibial tuberosity was resected. Because of the partial elevation of the patellar tendon, I also anchored the patella with nonabsorbable sutures in the area where the bone resection took place. I have kept her full extension with a knee immobilizer…" (Claimant's Exbs. pg. 22).

18. On February 17, 2015, Dr. Schuck reported Ms. Beeman's symptoms "…are certainly better than they were before November. She does, however, continue to have an uncomfortable catching sensation at about 30 degrees of knee flexion. She feels that her kneecap is catching. She also has episodes of locking in the knee once or twice daily and this is quite uncomfortable. Overall, these symptoms fluctuate with good days and bad days…" He recommended she continue strengthening exercises on her own. (Claimant's Exbs. pg. 18).

19. On March 24, 2015, Dr. Schuck reported that; "…as her knee symptoms have improved, she has been more bothered by longstanding discomfort in her low lumbar region. She states that the right lumbar pain has been present for the past two years. She attributes this pain to the chronic gait abnormality that she has had since originally

injuring her right knee…" Dr. Schuck agreed that Ms. Beeman's back symptoms "…are directly related to her longstanding right knee issues." He recommended physical therapy and chiropractic treatment. (Claimant's Exbs. pgs. 16, 17).

20. On April 28, 2015, Dr. Schuck noted, "…With regard to her knee, she has experienced an increase in interior knee pain. She is somewhat discouraged since her knee seemed to be doing better at the last visit…" He discussed a pain management consultation regarding a selective nerve block to address pain over the anterior aspect of the knee, "…since her symptoms do not appear to have an intraarticular source…" (Claimant's Exbs. pgs. 14, 15). On May 20, 2015, he referred Ms. Beeman to Dr. Joseph Brooks. (Id. at 12).

21. Dr. Hattem placed Ms. Beeman at MMI on July 21, 2015 and issued a 16% extremity impairment rating for her right knee injury. He indicated she would require maintenance care with a Dr. Blau for 6-9 months. (Claimant's Exbs. pgs. 63-68).

22. Dr. Lippert, instead of Dr. Brooks, met with Ms. Beeman on August 17, 2015. He reported; "…This is a 38 year old with complaint of right knee pain that she has been struggling with for some time now. I do think this patient might benefit from central steroids lumbar with a discogenic diagnosis. I also think we should probably inject the genicular nerves at the right knee to see if we can palliate any of this discomfort. If we can, a rhizotomy would be appropriate…" (Claimant's Exbs. pgs. 56, 57).

23. On August 18, 2015, Dr. Schuck responded to written questions from Claimant's counsel. He indicated Claimant had not reached MMI, and he recommended she proceed with injections from Dr. Lippert. (Claimant's Exbs. pgs. 10, 11). Respondent asserts that Dr. Schuck has been inconsistent in his opinions regarding Claimant's need for additional treatment and as such urge the ALJ to disregard his current opinion as incredible.

24. On September 19, 2015, Dr. Lippert reported Claimant suffered from severe pain in the right knee, and some low back pain. He stated; "…We have seen this patient in consultation, and we believe the reason she may have not responded strongly to her appropriate therapies is that she may have some discogenic discomfort. We can easily prove or disprove this thinking with one central steroid injection under image guidance. If she responds positively then a great deal of cost and suffering would be diminished. If there is a negative response to central steroids, injection of the genicular nerves would be appropriate to localize the pain source to the knee proper. The above-mentioned injections would be very appropriate care for the severe back, knee, and thigh discomfort." (Claimant's Exbs. pg. 55).

25. On December 30, 2015, Dr. Lippert reported; "…The patient has been seen in consultation and our diagnostic process is to begin with central axis steroids directed at the protrusion at 4-5. If this is back driven, I believe this will make a significant change for Jennifer's knee pain. If it does not, I think that is ruled out and then we are looking at an intrinsic knee problem that is as yet undiagnosed. If that were to be the case, I

would propose proceeding with genicular nerve blocks to see if we can palliate this pain with ablation of those nerves. This certainly would reduce Jennifer's need for medications and further medical therapies as well as improve her quality of life…" (Claimant's Exbs. pg. 53). Dr. Lippert performed a lumbar epidural steroid injection. (Id.) Claimant credibly testified this injection was of no benefit. As the ALJ interprets the medical records in this case, Claimant's negative response to her low back injection likely renders her pain as emanating from her knee.

26. Dr. Anjmun Sharma performed a Division IME on December 22, 2015. He performed a physical examination, reviewed medical records and authored a very lengthy report. He opined that Ms. Beeman reached MMI on July 21, 2015, per Dr. Hattem. He reported that after multiple surgeries with seemingly no pathology on the MRI or other diagnostic tests, he was not sure whether surgery was actually beneficial for her because "the patient reports she is still having a significant amount of pain." He also noted that "there is nothing else to really offer this patient." He did not believe further surgery was necessary or for her to be on chronic pain medication. He noted in looking at the knee, there is no swelling, there is no ecchymosis. Dr. Sharma believed that no maintenance medical care was required. He did not specifically address the recommendation for a genicular nerve block. Dr. Sharma issued a 23% lower extremity impairment rating, and opined no maintenance care is necessary. (Respondents' Exb. A).

27. Respondents filed a FAL consistent with Dr. Sharma's findings on February 4, 2016. (Claimant's Exb. 9).

28. Dr. Schuck saw Claimant on February 12, 2016 and reported; "…Over the past three months, she has experienced an increase in pain over the anterior aspect of the right knee. There was a period of time after her bone spur excision that she felt that her symptoms were improving. She complains of a catching and grinding sensation in the anterior knee with activity. She has pain with and without activity. She denies any new injury. She did see Dr. Lippert and had a lumbar epidural corticosteroid injection, which did not help her knee pain significantly. I had hoped that she would be able to get a block around the knee itself but this has not been approved by Workers' Comp…While I do not believe that Ms. Beeman requires any further surgical intervention, I do not believe that she has reached maximum medical improvement. She states that her symptoms have actually worsened over the past few months. I had originally referred her to pain management for consideration of a genicular block to address her intractable anterior knee pain. It sounds like this was discussed with Dr. Lippert, but we are now awaiting for approval from Workers' Comp. I think this type of block would be beneficial for the patient. I think it is appropriate to resubmit the request for the knee block." (Claimant's Exbs. pgs. 8, 9).

29. Dr. Hattem saw Claimant on April 12, 2016 and reported "persistent right knee pain that she rates at 4/10 and low back pain that she rates at 6-7/10. Nothing has changed since July 2015. Physical examination revealed a patient in "no distress" who was able to ambulate "unassisted" and whom demonstrated "no focal neurological

deficits to the lower extremities." Her strength in the legs was noted to be normal and she had a negative straight leg raise test. Dr. Hattem opined that Claimant's claimed compensatory low back symptoms were unrelated to her work injury as she was always observed to ambulate with a normal gait. He also informed Claimant that if she would "like additional treatment directed at her right knee, then this should be provided outside of worker's compensation…" (Claimant's Exbs. pg. 59). Dr. Hattem concluded by finding Claimant at MMI and without a need for maintenance care. He closed her claim and recommended that Claimant discuss her disagreement regarding his opinions with her attorney.

30. Dr. Hall conducted a second IME of Claimant, on May 16, 2016. He addressed the opinions Dr. Hattem expressed on April 12, 2016 and concluded, "…I think Dr. Hattem has taken a position that is extremely difficult to defend. He is flatly wrong…" Dr. Hall discussed the genicular nerve block recommended by Dr. Lippert, and stated; "…It is unfortunate for everyone involved in that right at the time when the last reasonable intervention for her knee (that being this Genicular nerve block) was about to happen, is now denied and we are back in court. This nerve block is the last thing available for her short of knee replacement, which is really not a viable option presently due to her age. This of course may be an option in the future. The Genicular nerve block is a reasonable, appropriate, and potentially helpful intervention from a pain management perspective and should be done. Dr. Lippert was headed in that direction after ruling out low back involvement, but was not allowed to follow through. It is therefore my opinion within a reasonable degree of medical probability that the patient is not at maximum medical improvement at this time. She will be at maximum medical improvement once this Genicular nerve block (and subsequent rhizotomy, if successful) has been completed…" (Claimant's Exbs. pgs. 2, 3).

31. Dr. Hall testified by deposition on June 16, 2016. He testified that Claimant is not currently at MMI. He explained the reason for his opinion is that there "seemed to be a reasonable plan going forward to give [Claimant] better control of this knee situation that has been haunting her for some time." The "plan" to which he refers is Dr. Lippert's recommendation to proceed with a genicular nerve block. Outside of the aforementioned block, Dr. Hall testified that there is no other treatment which could be employed to move Claimant to MMI.

32. Dr. Hall testified regarding the procedure and the purpose behind the block. He explained that there are two components to the procedure, one being diagnostic and the second therapeutic. Simply put, the first part of the procedure involves injecting a "chemical agent" into the knee to block the nerves temporarily to see if that is effective in reducing pain. If the injection is successful in reducing perceived pain, the second part of the procedure involves ablating (burning) those nerves identified from the injection as causing the pain.

33. Based upon the testimony of Dr. Hall the ALJ finds the genicular block to be both diagnostic and potentially curative.

34. Dr. Hattem testified by deposition on July 29, 2016. Dr. Hattem testified that all remedies to treat Claimant's condition have been exhausted and that proceeding with additional "operative or other invasive procedures" may be counterproductive.

35. Dr. Hattem testified that he was not "familiar" with the genicular block as he had only known it to have been performed "maybe once or twice" in his 40 years of practice and the interventionalists he referred to did not "use" the procedure. Nonetheless, Dr. Hattem went on to describe what was involved with the procedure stating that he did not believe it was reasonable to move forward with the nerve block. He did not "believe" the block to be provided for by the Medical Treatment Guidelines.

36. Dr. Hattem testified that Claimant is at MMI explaining that "maximum medical improvement is when the patient's condition has stabilized and that additional treatment isn't likely to provide any functional benefits. And this is where we are in this case. We been at that point in this case for a very long time." Dr. Hattem added: I think that, at some point, a person has to get on with their life and disengage themselves from the healthcare system."

37. Regarding the condition of Claimant's low back, Dr. Hattem testified: ". . . I didn't see what I would consider a significant enough antalgic gait to cause a back condition . . ." Dr. Hattem noted that "you have to walk pretty crooked to hurt your back or other knee. And that wasn't the case here. Consequently, Dr. Hattem opined that there was no "causal relationship between her complaints of low back or left knee pain. Rather, he "investigated" the complaints of compensatory back and contra-lateral knee pain to "make absolutely clear that there wasn't any significant objective findings" to those body parts. According to Dr. Hattem, diagnostic work-up for these complaints were "fairly normal."

38. Based upon the evidence presented including their treatment of Claimant and their respective areas of medical specialty, the ALJ finds the opinions of Dr. Lippert and Dr. Schuck regarding Claimant's need for genicular nerve blocks to be credible, persuasive, and entitled to considerable weight.

39. While both Dr. Hall and Dr. Hattem have limited experience with the requested procedure, the ALJ finds Dr. Hall's testimony, regarding the recommended genicular nerve block, to be supported by the medical record and the persuasive opinions of Dr. Lippert and Schuck. Conversely, the opinions of Dr. Hattem rest solely on his belief that "all" remedies (treatment) in this case has been "exhausted" and nothing has helped. While it is true that Claimant remains symptomatic, the ALJ credits the opinions of Dr. Lippert and Schuck and the testimony of Dr. Hall to find that treatment modalities, specifically a genicular nerve block remains a viable treatment option to cure and relieve Claimant from her ongoing symptoms caused by her right knee condition.

40. The ALJ finds Dr. Sharma erred in opining that, "…there is nothing else to really offer this patient…" Dr. Lippert, Dr. Schuck, and Dr. Hall have provided credible and persuasive opinions that the recommended genicular nerve block

treatment is reasonable, necessary, and related to the effects of the industrial injury. The ALJ finds Dr. Sharma was mistaken in opining that Claimant's knee pain is not related to the work injury concluding that this opinion was also highly probably incorrect based upon the evidence presented. The ALJ finds there is consistent, credible and persuasive evidence to the contrary.

41. As Claimant has produced clear and convincing evidence that Dr. Sharma erred when he opined that Claimant was at MMI, the ALJ finds that the DIME has been overcome.

42. As part of a hearing convened before ALJ Walsh on May 15, 2013, disfigurement associated with Claimants August 30, 2011 injury was viewed. ALJ Walsh determined that Claimant had a three inch long by ½ inch wide surgical scar located on the outside portion of the right knee. He also determined that Claimant had two arthroscopic scars on either side of the knee and that Claimant knee cap was significantly more pronounced and her right knee swollen when compared to the left. ALJ Walsh ordered Respondents to pay $2,000.00 for Claimant's visible disfigurement. As part of her hearing in the instant case, Claimant requested a disfigurement viewing to assess additional disfigurement above that viewed by ALJ Walsh as a consequence of her additional surgery. The undersigned ALJ finds the only notable difference in the disfigurement to involve the scar located on the outside of the right leg just below the knee. Whereas the scar in this area was noted by ALJ Walsh to be 3 inches in length by ½ inch wide, the scar is now approximately 7 ½ inches in length. It remains about ½ inch wide.

43. Claimant was observed to ambulate approximately 40 feet as part of her disfigurement viewing conducted by the undersigned ALJ. During this demonstration, Claimant was noted to walk with a significant limp due to her inability to fully extend the right knee. Nonetheless, as Claimant is not at MMI, additional treatment may further ameliorate this limp. Consequently, assessment of a limp as part of Claimant's disfigurement is premature at this time.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As found here, the opinions of Drs. Lippert, Schuck and Hall are more persuasive than the contrary opinions of Drs. Hattem and Sharma.

Overcoming the DIME Regarding MMI & Claimant's entitlement to Additional Medical Treatment

E. Section 8-42-107(8)(b)(III), C.R.S., provides that the determination of the DIME with regard to MMI shall only be overcome by clear and convincing evidence. A fact or proposition has been proved by "clear and convincing evidence" if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). All of the reports and testimony of the DIME are to be considered in deciding what the determination of the DIME is. Then, the party who seeks to overcome that opinion faces a clear and convincing burden of proof. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005); *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998).

F. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

G. Reasonable and necessary treatment and diagnostic procedures are a prerequisite to MMI. MMI is largely a medical determination heavily dependent on the opinions of medical experts. *Villela v. Excel Corporation*, W.C. Nos. 4-400-281, 4-410-547, 4-410-548, & 4-410-551 (Industrial Claim Appeals Office, February 1, 2001). In this case, Claimant has proven by clear and convincing evidence that Dr. Sharma was incorrect in opining she requires no additional treatment and is at MMI. The ALJ concludes the opinions of treating physicians, Dr. Lippert and Dr. Schuck, and of IME physician Dr. Hall, are credible and persuasive. These physician's opinions constitute clear and convincing evidence that Claimant is in fact not at MMI because she requires additional diagnostic testing (part one of the genicular block) and possibly curative treatment in the form of a rhizotomy (part two of the procedure) as credibly testified to by Dr. Hall. Accordingly, Claimant has overcome Dr. Sharma's opinion concerning MMI.

H. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The ALJ concludes, based upon the evidence presented, that Claimant has proven by a preponderance of the evidence that the genicular nerve blocks recommended by Dr. Lippert, Dr. Schuck, and Dr. Hall are reasonable and necessary to cure or relieve the effects of claimant's admitted August 30, 2011 work injury. Moreover, the evidence presented persuaded the ALJ that the need for the block as recommended, is directly related to Claimant's August 30, 2011 industrial right knee injury.

Claimant's Entitlement to Temporary Disability Benefits

I. To prove entitlement to temporary total disability (TTD) benefits, Claimant must establish that the industrial injury caused a disability lasting more than three work shifts; that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). In this case, Respondents paid Claimant TTD through July 20, 2015. Further TTD was terminated due to Dr. Sharma’s opinion that Claimant had reached MMI on July 21, 2015. As found above, clear and convincing evidence was produced establishing that Claimant has not reached MMI and she was otherwise unable to perform her usual job. Consequently Claimant is disabled within the meaning of section 8-42-105 and entitled to TTD benefits commencing July 21, 2015, and continuing through May 24, 2016, as Claimant returned to work May 25, 2016. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Claimant testified that she returned to work as an IT assistant earning $10.00/hour, twenty (20) hours per week. As Claimant, is earning less in her current position than the stipulated average weekly wage, the ALJ concludes that she is entitled to temporary partial disability. Accordingly, Respondents shall pay TPD benefits to Claimant beginning May 25, 2016 and continuing until such benefits can be terminated pursuant to law.

Disfigurement

J. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term “disfigurement” as used in the statute, contemplates that there be an “observable impairment of the natural person.” As found in this case, Claimant has sustained additional scarring above that which she had when her disfigurement was first observed by ALJ Walsh in 2013. Claimant has approximately 4 ½ inches of additional scarring located on the outside on the right leg just below the knee. This additional scarring alters the natural appearance of her leg and entitles her to additional benefits as provided for by Section 8-42-108 (1), C.R.S. As Claimant is not at MMI and the contemplated block and cure and relieve her of the ongoing effects of her industrial injury, the ALJ concludes that the observed limp may likely improve. Consequently, a question remains as to whether Claimant’s current limp is permanent. Given the posture of the claim, the ALJ determines that it is premature to consider whether Claimant’s current limp constitutes a disfigurement entitling her to additional benefits.

K. In light of the above findings and conclusions concerning MMI, it is unnecessary to determine whether Claimant established by a preponderance of the evidence that the 23% (extremity) impairment rating issued by Dr. Sharma should be converted to a whole-person rating.

ORDER

It is therefore ordered that:

1. Claimant has established by clear and convincing evidence that Dr. Sharma's MMI determination is erroneous. The DIME has been overcome and it is concluded that Claimant is not at MMI.

2. Respondents shall authorize and pay for the recommended genicular nerve block treatments.

3. Respondents shall pay TTD benefits to Claimant beginning July 21, 2015, through and including May 24, 2016.

4. Respondents shall pay TPD benefits to Claimant beginning May 25, 2016 and continuing until such benefits can be terminated pursuant to law.

5. Respondents shall pay Claimant $2,800.00 for her visible disfigurement. Respondents shall be given credit for the previous $2,000.00 disfigurement award. Consequently, Respondents shall pay an additional $800.00 in disfigurement benefits. Any disfigurement award for an asserted limp is premature and held in abeyance until such time that Claimant is placed at MMI, whereafter Claimant may apply for a hearing regarding additional disfigurement to assess any vestiges of an asserted limp.

6. Claimant's AWW is $647.52.

7. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein are reserved for future determination.

DATED: November 21, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80920

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-945-896-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 26, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 10/26/16, Courtroom 4, beginning at 8:30 AM, and ending at 12:30 PM).

Claimant's Exhibits 1 through 19 were admitted into evidence, without objection. Respondents' Exhibits A through E were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on November 1, 2016. The Respondent was given 2 working days within which to file objections. No timely objections as to form were filed. After a consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant has overcome the opinion of Jade Dillon, M.D., the Division Independent Medical

Examiner’s (DIME) concerning maximum medical improvement (MMI) and degree of permanent medical impairment. The Claimant bears the burden of proof by clear and convincing evidence on this issue. If the DIME is overcome, the additional issue concerns the Claimant’s entitlement to temporary total disability (TTD) benefits. The Claimant’s burden on this issue is “preponderance of the evidence.”

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant’s date of birth is November 29, 1970. She sustained an admitted compensable back injury on the job, while working in the course and scope of her Employer on March 13, 2014.

2. The Claimant was lifting a hard plastic box containing a bicycle onto a bag belt at the end of her shift and as she stood up she felt a sharp pain in her lower back with pain going down the right side.

3. The Claimant works in Customer Service for the Employer, a job that she has had for approximately 17 years as of the date of the hearing.

4. Claimant never had any physical problems with her back or her sacroiliac joints before March 13, 2014, and she had never previously received any treatment for low back complaints.

5. The Claimant reported the injury to her Employer and she was initially seen by the health care providers at OccMed on March 14, 2014, primarily under the care and treatment of Greg Smith, D.O. Her initial complaint when seen on March 14 was pain located in the right lumbar area with pain to her right buttock proximal posterior right thigh. The diagnosis was a lumbosacral strain with attendant muscle spasm.

6. Ultimately, the Respondent filed a Final Admission of Liability (FAL), dated June 10, 2016, admitting for an average weekly wage (AWW) of $962.35; TTD benefits of $641.57 per week through September 15, 2015; an MMI date of September 14, 2015, pursuant to the opinion of DIME Dr. Dillon; permanent partial disability (PPD) of 5% whole person, pursuant to Dr. Dillon’s opinion; and, denying post-MMI medical maintenance benefits. The Claimant filed a timely objection to the FAL.

Greg Smith, D.O.

7. The Claimant continued under the care and treatment of the health care providers at OccMed with referrals for physical therapy and osteopathic manipulations with trigger point injections. She continued to have physical therapy (PT) in the right sacral area and lumbar movement in forward flexion or extension caused pain.

8. By September 4, 2014, the Claimant was continuing to have pain with bending or sitting for prolonged periods of time in her low back and sacral area. Dr. Smith noted that the Claimant was having only minimal improvement in symptomatology with the conservative care and treatment that was being provided. A lumbar MRI (magnetic resonance imaging) was ordered.

9. The lumbar MRI was performed on September 12, 2014. It showed severe left subarticular stenosis at L5-S1, impinging on the exiting left S1 nerve root. There was moderate left foraminal narrowing at L5-S1 encroaching on the left L5 nerve without definite impingement and a right foraminal disc protrusion at L4-L5 resulting in a mild right foraminal narrowing without definite impingement.

10. On September 19, 2014, Dr. Smith thought that additional aggressive treatment should be undertaken because the Claimant was having low back pain and muscle spasm, right sacroiliac pain and intermittent leg pain radiating to the mid lower leg. Dr. Smith made a referral to Samuel Chan, M.D., for possible epidural steroid injections and Dr. Smith recommended massage therapy.

Samuel Chan, M.D.

11. Massage therapy was commenced on November 10, 2014 with Standley Lake Massage Therapy. The Claimant first saw Dr. Chan on December 1, 2014. Dr. Chan noted that axial loading and rotation exacerbated the pain complaints and that there was diffuse tenderness to palpation over the lower spinal musculature. He thought there might be the presence of symptom magnification (essentially a psychological diagnosis). The Claimant continued to see Dr. Chan and acupuncture was initiated. Dr. Chan noted that the Claimant greatest pain was in the left lumbar region with a positive leg raising on that side. With no substantial improvement, Dr. Chan performed left sacroiliac injections on February 18 and April 15, 2015. The Claimant had a right sacroiliac injection on June 10, 2015.

12. The Claimant continued to see Jordana Quinn, D.O., for osteopathic manipulation and the massage therapists at Standley Lake Massage to receive massage. Despite the injections, the Claimant still complained of pain. Dry needling offered her some benefit.

13. The Claimant returned to OccMed on September 4, 2015 and was seen by a Physician's Assistant (PA), Mr. Page. His note indicates that the Claimant wanted a trial at regular duty. She still had pain in her low back and SI joint and was continuing with the massage therapy and osteopathic manipulations.

14. The Claimant was examined by Dr. Smith at OccMed on September 16, 2015. She was taking Ambien to help her sleep and Valium for muscle spasms. Dr. Smith noted that her main pain had been in her low back region. She was placed at MMI at that time with a note by Dr. Smith that she had no permanent impairment. Medical maintenance treatment was suggested.

Jonathan Bloch, D.O.

15. The Claimant was seen by Jonathan Bloch, D.O., at OccMed on 3 occasions: November 24, 2015, December 16, 2015 and January 7, 2016. The ALJ reviewed his reports regarding those 3 visits. On November 24, 2015, Dr. Bloch noted that the Claimant had ongoing low back pain with radiculopathy, muscle spasms and right SI pain. He noted that pursuant to Division of Workers Compensation Chronic Pain Guidelines, the Claimant was a candidate for rhizotomy, a diagnostic medial branch block and neurosurgical consultation. On December 16, 2015, Dr. Bloch, in disagreement with Dr. Smith, determined that the Claimant was entitled to an impairment rating and stated that a referral for neurosurgical consultation had been denied. Dr. Bloch's assessment at that time was low back strain with symptomatology of radiculopathy, MRI with stenosis at L4-L5, with questions concerning the presence of impingement. Dr. Bloch suggested bilateral EMGs to determine whether the Claimant had true impingement. Dr. Bloch saw the Claimant again on January 7, 2016 for what he deemed her "first post MMI" visit. Evidently an impairment rating was performed on December 16, 2015 which is mentioned in Dr. Cebrian's (Carlos Cebrian, M.D.) report, Dr. Yamamoto's report and Dr. Dillon's report in which Dr. Bloch assigned a 23% physical impairment rating with a 16% loss of range of motion (ROM). In his report of January 7, 2016, Dr. Bloch spoke of perhaps changing the MMI date, based upon the bilateral EMG and neurosurgical consultation. He suggested that he would see the Claimant back in three months unless the FCE (functional capacities evaluation) or the post MMI workup showed anything that was more concerning. Dr. Bloch's computations regarding his impairment rating do not appear in the hearing file.

Independent Medical Examinations (IMEs) and DIME

16. Thereafter the Claimant had two Independent Medical Examinations (IMEs), with Carlos Cebrian, M.D., and David Yamamoto, M.D .as well as the DIME with Dr. Dillon. The ALJ has reviewed the reports of Dr. Cebrian and Dr. Yamamoto; and, considered the testimony of Dr. Dillon. Dr. Cebrian filed two reports: one of March 2, 2016 regarding his original examination and the second of September 30, 2016 after he

reviewed Dr. Yamamoto's and Dr. Dillon's reports. Dr. Cebrian noted on his examination that the Claimant complained of a constant dull aching pain in her low back and shooting pains down her legs. Dr. Cebrian was of the opinion that the MRI findings are pre-existing and did not correlate with the clinical examination. He was further of the opinion that the diagnosis and the objective pathology do not correlate. For the reasons stated herein below, the ALJ does not find Dr. Cebrian's opinions persuasive or credible.

17. On the witness stand, DIME Dr. Dillon presented in a less than persuasive manner, deferring to Dr. Smith, IME Dr. Cebrian and Dr. Chan in many instances. Additionally, Dr. Dillon's opinion that the Claimant's present back condition, other than a sacroiliac dysfunction, is not work-related lacks any persuasive, objective foundation in contra-distinction to the opinion of David Yamamoto, M.D.

18. Dr. Dillon's report and her testimony mirror the opinion of Dr. Cebrian. Dr. Dillon determined that the Claimant was at MMI based upon the September 16 date as set forth by Dr. Smith and that the Claimant was entitled to a Table 53 impairment rating. Dr. Dillon did not believe that the Claimant injured her low back at the time of the injury of March 13, 2014 and should only be entitled to an impairment rating based upon sacroiliac dysfunction and that if the Claimant needed additional rhizotomies or surgical consultation it was not due to the injury of March 13, 2014. Dr. Dillon testified that she had incorrectly filled out the ROM testing sheets, but the ROM testing was of no significance because Dr. Dillon had predetermined that the Claimant's complaints were non-physiologic based upon the thoughts of Dr. Chan that the Claimant exhibited signs of symptom magnification. The ALJ notes a dearth of original medical thinking on the part of DIME Dr. Dillon. In fact, she essentially adopts the opinions of Dr. Smith, Dr. Chan and Dr. Cebrian, all of which are neither persuasive nor credible.

19. The opinions of Dr. Cebrian, Dr. Chan, Dr. Smith and DIME Dr. Dillon, insofar as they maintain that the Claimant's present low back problems are **not** work-related, lack an inadequate foundation and are, essentially, based on speculation.

IME OF David Yamamoto, M.D.

20. Dr. Yamamoto was of the opinion that the Claimant was not at MMI and that she needed to be examined by Barry Ogin, M.D., and Andrew Castro, M.D., so that an additional assessment of the Claimant's ongoing complaints can be undertaken. Upon Dr. Yamamoto's examination, the Claimant was experiencing pain in the lower back and bilateral sacroiliac joints and pain in both legs with bilateral gluteal paresthesia. Dr. Yamamoto was of the opinion that the objective evidence of pathology as set forth on the MRI and the clinical evaluation were consistent and that the Claimant had an ongoing lower back problem related to her admitted compensable injury on the job; and, it correlated with the medical reports and history. Dr. Yamamoto stated the opinion that the Claimant was not malingering or engaged in symptom magnification

and that the pain issues that the Claimant was having were objectively confirmed. The ALJ finds Dr. Yamamoto's opinion in this regard more persuasive and credible than the opinions of Dr. Cebrian, Chan and DIME Dr. Dillon.

The Claimant

21. The Claimant credibly testified regarding her ongoing pain symptoms in her low back, sacroiliac and the numbness and tingling in her lower extremities. She further testified that she gave her maximum effort on all of the testing performed by the doctors for the IMEs and DIME examination. None of the testing doctors persuasively refuted the Claimant's testimony in this regard. According to the Claimant, she was released to full duty by Dr. Smith on September 16, 2015, but that her Employer did not put her back to work until November 8, 2015.

22. The ALJ finds that the totality of the medical records concerning treatment of the Claimant reflect that she has evidenced low back complaints on a consistent basis since the admitted compensable injury on the job. The Claimant has no history of back complaints that predate the admitted injury herein. While Dr. Cebrian and Dr. Dillon are of the opinion that any low back problems are due to preexisting conditions, the ALJ finds no persuasive evidence of any prior back problems and the medical reports are replete with ongoing evidence of low back symptomology after the compensable on the job injury. The Claimant's complaints are substantiated by the MRI which Dr. Dillon stated in her opinion was non-diagnostic of the Claimant's condition. The ALJ notes that diagnostic evidence and clinical presentation must correlate, as it relates to MMI in this particular matter. The ALJ finds that sufficient testing and treatment has not been undertaken that would indicate that the Claimant is at a point where no additional medical treatment will substantially improve her condition. The ALJ finds that the evaluations that Dr. Bloch, ordered in November and December of 2015, were for the purpose of reasonably necessary medical treatment that is reasonably designed to improve the Claimant's condition and to specifically identify the pain generator of the Claimant's ongoing physical issues causally related to her compensable on the job injury.

Temporary Disability Benefits

23. The Claimant has failed to prove any temporary wage loss beyond admitted periods of TTD from September 17, 2015 through the date of hearing. Therefore, she failed to prove entitlement to temporary disability benefits through October 25, 2016.

Ultimate Findings

24. As found herein above, the opinions of IME Dr. Yamamoto are far more cogent, persuasive, grounded and credible than all opinions to the contrary, including the opinion of DIME Dr. Dillon, which lacks an adequate foundation.

25. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Yamamoto and Dr. Bloch, in relevant part, and to reject all opinions to the contrary.

26. Based on the totality of the evidence, including the Claimant's testimony, the Claimant has proven that it is highly likely, unmistakable, and free from serious and substantial doubt that Dr. Dillon's DIME opinion concerning MMI is in error. Consequently, Dr. Dillon's impairment rating is premature and null and void until the Claimant reaches MMI.

27. The ALJ finds that the Claimant has not reached MMI for the admitted job injury, thus, she sustained her burden of proving that she is not at MMI by clear and convincing evidence.

28. The need for additional diagnostic tests to properly prescribe a course of treatment is sufficient to forestall MMI.

29. The Claimant failed to prove, by preponderant evidence, entitlement to temporary disability benefits through October 26, 2016, the date of hearing.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of IME Dr. Yamamoto are far more cogent, persuasive, grounded and credible than all opinions to the contrary, including the opinion of DIME Dr. Dillon, which lacks an adequate foundation.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Yamamoto and Dr. Bloch, in relevant part, and to reject all opinions to the contrary.

Overcoming the DIME of Dr. Dillon

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office***,** 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, based on the totality of the evidence, including the Claimant's testimony, the Claimant proved that it is highly likely, unmistakable, and free from serious and substantial doubt that Dr. Dillon's DIME opinion concerning MMI was in error. Consequently, Dr. Dillon's impairment rating was premature and null and void until the Claimant reaches MMI.

MMI and Need for Further Diagnostic Testing

d. MMI is defined as the point in time when any medically determinable physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 [Indus. Claim Appeals Office (ICAO), October 27, 2011]. .As found, the Claimant overcame, by clear and convincing evidence, the DIME physician's opinions regarding MMI and the causal relatedness of Claimant's.

Burden of Proof on Temporary Disability

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain her burden with respect to additional temporary disability benefits through October 26, 2016.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant is not at maximum medical improvement.

B. The Self-Insured Respondent shall pay all of the Claimant's medical benefits for treatment and tests to correctly diagnose the Claimant's pain generators,, related to the admitted injury of March 10, 2014, subject to the Division of Workers' Compensation Medical Fee Schedule.

C. Any and all claims for temporary disability benefits through October 26, 2016, are hereby denied and dismissed.

D. Any and all matters not determined herein are reserved for future decision.

DATED this______day of November 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

The issues presented were Claimant's entitlement to TTD and whether or not the Claimant was responsible for his termination, barring TTD benefits, pursuant to C.R.S. §8-42-105(4).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. The Claimant suffered an admitted hand injury on August 7, 2015.

2. The Claimant has had two surgeries and is currently receiving TPD benefits at the rate of $347.54 per week. [Exhibit "K"]

3. The Claimant worked in the field for the Respondent/Employer concrete company until he sustained his hand injury on August 7, 2015.

4. Following the Claimant's hand injury, the Claimant received medical treatment from various providers. He was released for one week of light duty in September of 2015. He then received TTD benefits until he received a modified light duty position, approved by treating physician Dr. Frank Polanco on October 12, 2015. Dr. Polanco issued a report detailing what activities the Claimant could perform in that report. [Exhibit "I"] It is undisputed that the Respondent/Employer accommodated these restrictions.

5. The Respondent/Employer put the Claimant back to work performing one-handed duties within his physical restrictions after October 12, 2015. The Claimant's supervisor, while on modified duty, was Joe Wuertz. The Claimant testified that he was accommodated by his employer and was working up to 40 hours per week, at a reduced rate of pay. The Claimant testified at hearing that he received TPD from the Respondent/Insurer while on reduced wages, performing modified duties.

6. Mr. Wuertz testified that he had worked with the Claimant previously and considered him to be a good worker. He confirmed the fact that the Respondent/Employer was able to accommodate the Claimant's restrictions and did so.

7. Mr. Wuertz testified that when he needed to communicate with the Claimant, he utilized the services of Jeannette Wince, the company secretary, who would translate from English to Spanish and Spanish to English. The Claimant acknowledged that he did communicate through Jeannette Wince.

8. Respondents' witnesses, Joe Wuertz and Cynthia Valdez, testified at hearing that Jeannette Wince's secretarial hours were from 7:00 a.m. to 4:00 p.m. every day and that she was generally available for Claimant to speak with or for translation purposes. If not, there were other employees who spoke Spanish. Mr. Wuertz testified

that the Claimant could communicate in basic, limited English terms when necessary, to express himself on the job. If there was more than basic communication needed, they would then utilize Jeannette Wince as an interpreter.

9. The Claimant testified that he occasionally had doctors' appointments during the work day and could not locate anyone to notify in the office.

10. Joe Wuertz testified that the Claimant had many verbal disciplinary reprimands after returning to work at the light duty positions approved by Dr. Polanco. The Claimant would have periods of time when he was absent from the worksite without explanation and was subsequently told, on numerous occasions, that he needed to report any occasion when he left the work premises. Mr. Wuertz testified that he also had to remind the Claimant that he was not to use his injured right hand while performing any modified duties. According to Mr. Wuertz' testimony, the Claimant was also reprimanded for moving company vehicles with standard transmissions that required a Commercial Driver's License. The Claimant was told not to operate these vehicles because he was not qualified to do so and it also required the use of two hands.

11. Mr. Wuertz testified that the Claimant also turned in time cards wherein he claimed that he did not take a lunch and was subsequently informed that he must take a 30 minute break every day for lunch. Mr. Wuertz testified that he also communicated this requirement to the Claimant, through the translator, several times.

12. Cynthia Valdez testified that she was the Human Resources Coordinator at the time of the Claimant's injury and when he returned to work in the modified light duty position. She testified that the Claimant was assigned to light duty supervision under Joe Wuertz. Ms. Valdez testified that they had many disciplinary issues with the Claimant because he would disappear without notifying anyone of where he was going and was moving company vehicles that he was not authorized to move. He was also instructed to follow the doctor's instructions regarding using only his uninjured hand and not to perform anything that was in excess of his restrictions.

13. After these multiple warnings, an incident occurred on December 3, 2015. Mr. Wuertz encountered a co-employee named "Theo" Garcia at 2:35 p.m. He asked the whereabouts of the Claimant at that time and this co-worker informed Mr. Wuertz that the Claimant had left the Respondent/Employer's premises. Thereafter, Mr. Wuertz looked at the Claimant's time card which represented that he worked through 3:00 o'clock p.m., when he had actually left a half of hour earlier. [Exhibit "G," page 28]

14. The Claimant's explanation about this incident was that he had an appointment and left earlier that day. He provided no credible explanation for the fact that his time card showed that he worked until 3:00 p.m.

15. The Claimant's supervisor, Joe Wuertz, testified that most of the crews used a mobile phone application telephone system called "About Time" to document when a job started and stopped in the field. Since the Claimant was not part of a crew in the field, Mr. Wuertz gave him paper timesheets to fill out. An example of that timesheet was the November 30, 2015, through December 4, 2015 timesheet identified as an exhibit at hearing. [Exhibit "G," page 28]. This is the timesheet that showed the

Claimant working until 3:00 p.m. on December 3, 2015, when he had departed at 2:30 p.m.

16. The following day, December 4, 2015, the Claimant was called into a meeting with Adrian Valeriano (Spanish/English Translator), Cynthia Valdez, Erik Rusin, one of the owners of the company. [Exhibit "J"]

17. At the meeting on the morning of December 4, 2015, Cynthia Valdez testified that a decision had been made to terminate the Claimant for falsifying his time card, as verified by his supervisor, Joe Wuertz, and co-employee, Theo Garcia. The reason for his termination was explained to the Claimant in Spanish. He was asked to sign the termination letter. [Exhibit "J"]

18. The Claimant testified that he did not understand the termination letter and did not sign it. Cynthia Valdez testified that the Claimant refused to sign anything without first showing it to his attorney.

19. Following the Claimant's termination, he continued to receive TPD but not TTD benefits. [Exhibit "K"]

20. The Claimant eventually underwent surgery with Dr. Patrick Devanny Although the Claimant testified that he thought that the surgery took place in January, the medical record of Dr. Devanny indicates that the Claimant underwent surgery on February 15, 2016. [Exhibit "D"]

21. The medical record of treating physician Dr. Miguel Castrejon reflects that the Claimant was again released to return to one-handed work on March 3, 2016. [Exhibit "C"]

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. When determining credibility, the ALJ considers, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

B. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

C. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106 (Colo. App. 1971)*. Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985)*. An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952); *Indus. Comm'n v. Havens,* 136 Colo. 111, 134 P.2d 698 (1957).

D. It is the Claimant's burden of proof to show that he is entitled to TTD benefits by a preponderance of the evidence. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina*, 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A*., 104 P. 3d 273 (Colo. App. 2004); *Hosier v. Weld County Bi-Products, Inc.*, W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

E. It is the Respondents' burden of proof to show that the Claimant was responsible for his own termination pursuant to C.R.S. §8-42-105(4). The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina*, 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A*., 104 P. 3d 273 (Colo. App. 2004); *Hosier v. Weld County Bi-Products, Inc.*, W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

F. Because Claimant's injury in this case was after July 1, 1999, §§ 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply to assertions that Claimant is responsible for his wage loss. Those identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Simply put, if Claimant is responsible for his termination from employment, the wage loss which is the consequence of Claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004) As noted above, Respondents shoulder the burden of proving, by a preponderance of the evidence, that Claimant was responsible for his termination. *Colorado Compensation Insurance Authority v. Industrial Claims Appeals Office, 20 P.3d 1209 (Colo. App. 2000).*

G. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Thus, the fault determination depends upon whether Claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). In this case, Respondents assert that Claimant was terminated for cause on December 3, 2015 for leaving Employer's premises for extended period of time without explanation, unauthorized use of company equipment, and falsifying his time card. Claimant contends that he was improperly discharged, claiming that there was a language barrier between he and his supervisor. The ALJ is not persuaded. Rather, the ALJ concludes, based on conflicting evidence, that the Claimant was responsible for his own termination. The credible testimony of Joe Wuertz and Cynthia Valdez establishes that Claimant was informed of inappropriate behavior, including leaving work premises for an extended period without an explanation, failing to take lunch breaks as instructed on numerous occasions, and operating a truck on the Employer's premises for which he was not authorized and would have necessarily required him to use both hands. The evidence presented also establishes that the final instance of misconduct that resulted in his termination was the falsification of his time card on December 3, 2015. The Claimant represented on his time card that he worked until 3:00 p.m., but he actually left the Employer's premises at 2:30 p.m. that day. The ALJ concludes that the Respondents have met their burden of proof that the Claimant was responsible for his own termination after progressive discipline. The ALJ specifically concludes that Claimant volitionally elected to falsify his time card which decision did not involve a language barrier. Falsification of a time record is sufficient cause for termination of the Claimant.

H. The ALJ concludes that the medical records indicate that the Claimant did undergo surgery on February 15, 2016 and was released to return-to-work by Dr. Castrejon again on March 3, 2016. Claimant would be entitled to TTD benefits for this period of time; however, Claimant asserts entitlement to TTD benefits beginning January 20, 2016 as Dr. Castrejon took Claimant out of work on this date. The January 20, 2016 report of Dr. Castrejon indicates that Claimant's medical condition was "unchanged subjectively and subjectively." He indicated further, that Claimant had been recommended to proceed to surgery with Dr. Devanny and was "considered temporary (sic) totally disabled until he has surgery." Based upon Dr. Castrejon's determination that it would be "not be considered medically reasonable" to leave Claimant's digit with an anatomically mal-positioned digit, the ALJ infers that working in any capacity was contraindicated. Consequently, the ALJ agrees with Claimant that his TTD benefits should begin January 20, 2016 and run through March 3, 2016. The ALJ concludes that after March 3, 2016, the Claimant could have returned to one-handed modified duty and that work would have been available to the Claimant, except for the fact that he had been terminated.

ORDER

It is therefore ordered that:

1. The Claimant is entitled to TTD disability benefits beginning January 20, 2016 and continuing through March 3, 2016. Respondents may take credit for TPD benefits paid during that time period.

2. Claimant, being responsible for his own termination, is not entitled to TTD benefits after March 3, 2016.

3. Claimant is entitled to ongoing TPD benefits until those benefits terminate as a matter of law.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 22, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80920

ISSUES

1. Whether the claimant has proven, by a preponderance of the evidence, that she is entitled to reopen her claim pursuant to the provisions of section 8-43-303, C.R.S.

2. Whether the claimant has proven, by a preponderance of the evidence, that she is entitled to an award of medical benefits relating to treatment of her alleged left shoulder injuries, post-MMI.

3. Whether the claimant has proven, by a preponderance of the evidence, that she is entitled to an award of temporary total benefits for the period August 9, 2015 through November 17, 2015.

4. Whether the claimant has proven, by a preponderance of the evidence that she is entitled to an award of permanent partial disability benefits arising out of the September 15, 2014, industrial injury at the Respondent Employer.

5. Whether the claimant has proven, by a preponderance of the evidence, that she was not at MMI on June 15, 2015, contrary to the determination of the authorized treating physician.

6. Whether the claimant has proven, by a preponderance of the evidence, that she is entitled to be reimbursed for medical expenses associated with her left shoulder surgery incurred post-MMI.

7. Whether the Respondents have proven, by a preponderance of the evidence that the claimant is jurisdictionally barred from raising the issues of compensability of the alleged left shoulder injury, Petition to Reopen, medical benefits, TTD, PPD, MMI and "medical reimbursement" per the provisions of sections 8-42-107.2 and 8-43-203(2)(b)(II)(A) and (d), C.R.S.

FINDINGS OF FACT

1. The claimant is a right-hand dominant 45-year-old woman with an August 29, 1971, date of birth. **Exhibit G, Bates 50.**

2. The claimant has been employed by the Respondent Employer as a "document controller" since 2006. **Exhibit G, Bates 50.** The claimant

presented to Concentra Medical Centers on September 15, 2014, complaining of pain in the left wrist and shoulder. The claimant reported the injury occurred from turning pages and data entry. **Exhibit B, Bates 7.** The claimant gave a history of an insidious onset of left wrist pain "two months ago". According to the claimant, the pain started in the volar aspect of the left wrist and slowly radiated up to the lateral elbow and into the anterior left shoulder. **Exhibit B, Bates 8.** The treating physician, Dr. Daniel Peterson, assessed "wrist sprain, lateral epicondylitis of the left elbow, biceps tendinopathy and impingement syndrome of the shoulder". Dr. Peterson referred the claimant to Genex for a job site analysis to evaluate the claimant's workplace for risk factors for cumulative trauma conditions. He opined, "I have my doubts but does do supination/pronation with left hand turning documents and does rest her elbows on her arm rests…. Certainly has posture issues and body habitus issues…. Ultimately, causality to be determined." Physical therapy and medications were prescribed and the claimant was released to return to regular duty work. **Exhibit B, Bates 9, 10.**

3. On December 3, 2014, Colleen Waterous, M.A., CEAS, QRC, performed a job site analysis of the claimant's work stations, as recommended by Dr. Peterson. The job site analysis included a Physical Demands Analysis and Risk Factor Assessment to determine any risk factors present in the workplace as they related to the claimant's diagnosis, consistent with Colorado's Medical Treatment Guidelines, Rule 17, W.C.R.P., Exhibit 5, Cumulative Trauma Conditions. Based on her evaluation, Ms. Waterous opined that of the fourteen primary and secondary risk factors for cumulative trauma, **none** were present relative to the claimant's job as a document controller. **Exhibit C, Bates 53.**

4. Following the job site analysis, the claimant returned to Concentra Medical Centers on December 15, 2014. Jocelyn Cavender, PAC, evaluated the claimant. On physical examination, the claimant's left shoulder had a normal appearance, with no deformity, no tenderness, full range of motion, normal strength and no signs of impingement. PA Cavender noted the job site analysis showed no risk factors. **Exhibit B, Bates 16.** Physical therapy and medications were continued. The claimant was released to return to regular employment.

5. The claimant continued treating at Concentra for her left wrist, elbow and shoulder pain. The claimant was referred to Dr. Jeffrey Jenks for EMG testing of the left upper extremity. Worley Lynch, PA-C, evaluated the claimant on January 2, 2015. He opined, "Causality still needs to be established under Rule 17, depending on if really does have [cubital] tunnel syndrome or not." **Exhibit B, Bates 20.**

6. Due to the claimant's plateau in physical therapy, PA Cavender referred the claimant for a left shoulder MRI. **Exhibit B, Bates 20.**

7. The left shoulder MRI was performed on January 26, 2015. It was read as showing significant increased signal intensity in the posterior distal muscle fibers of the supraspinatus, which showed a partial thickness tear at the myotendinous junction of a large intrasubstance cyst, together with soft tissue impingement under the acromion, tendinosis in the infraspinatus, and severe tendinosis in the intraarticular portion of the biceps tendon, with thickening. The MRI also showed an anterosupralateral labral tear. **Exhibit B, Bates 35.**

8. Orthopedic surgeon, Dr. Michael Simpson, evaluated the claimant on April 20, 2015. He recommended a left shoulder surgery. **Exhibit B, Bates 45.**

9. On June 5, 2015, the carrier filed a Notice of Contest, disputing compensability of the claimant's alleged shoulder injury. **Exhibit A.**

10. The providers at Concentra continued treating the claimant, who reported gradual, but complete, improvement in her wrist and elbow symptoms. On June 15, 2015, authorized treating physician, Dr. Walter Larimore, placed the claimant at MMI, with no impairment, no work restrictions and no need for medical treatment to maintain MMI. Regarding the claimant's alleged left shoulder complaints, Dr. Larimore opined:

    "After extensive review of her job site evaluation, EMG, MRI and all of the past notes, my opinion is that there is a >50% likelihood that the left shoulder complaints are *not* work-related**."** **Exhibit B, Bates 45.**

11. The carrier filed a June 29, 2015, Final Admission admitting liability consistent with Dr. Larimore's opinions on causation, MMI, impairment and the claimant's need for medical treatment to maintain MMI.

12. **It is undisputed that the claimant did not object to the June 29, 2015, Final Admission, did not file a Notice and Proposal to Select a DIME and did not file an Application for Hearing on any issues then ripe, including medical benefits.**

13. On July 6, 2015, the claimant sought treatment with her personal provider, Dr. John Pak, at Front Range Orthopedics, outside the worker's compensation system, for her reported left shoulder complaints. Dr. Pak diagnosed a full thickness rotator cuff tear. **Exhibit F, Bates 87.**

14. On August 9, 2016, Dr. Pak performed an arthroscopic subacromial decompression, acromioplasty rotator cuff repair and arthroscopic debridement for shoulder arthritis. **Exhibit F, Bates 94. 95.** The claimant testified she recovered well from the surgery and her condition at the time of hearing is better than it was on June 15, 2015, the date of MMI. The claimant

further testified that her Petition to Reopen is based on her belief that she was inappropriately placed at MMI and compensability of, and treatment for, her left shoulder was inappropriately denied.

15. On September 16, 2016, the claimant filed an Application for Hearing endorsing the issues of compensability, medical benefits, Petition to Reopen, TTD, PPD, MMI and "medical reimbursement."

16. The claimant presented no credible evidence, and failed to meet her burden of proving, the treatment provided by Dr. Pak was authorized or related to the admitted work injury of left cubital tunnel syndrome and left lateral epicondylitis. The claimant's request for medical benefits provided outside the Workers' Compensation system to treat her left shoulder complaints is not supported by the applicable law.

17. The claimant provided no credible evidence, and failed to meet her burden of proving entitlement to TTD for the period August 9, 2015 through November 17, 2015. The claimant's request for an award of TTD is not supported by the applicable law.

18. The claimant presented no credible evidence, and failed to meet her burden of proving, that she is entitled to an award of permanent physical impairment as a result of the admitted work injury. The claimant's request for an award of PPD is not supported by the applicable law.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law.

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits, including medical benefits, by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

C The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

D. The claimant has the burden of proving entitlement to benefits, including medical benefits, by a preponderance of the evidence. Section 8-43-201, C.R.S; *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

E. Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury or disease and the condition for which benefits or compensation is sought. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo.App. 1997). Whether the claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo.App. 1997).

F. Here, as found, Claimant failed to meet her burden of proving that the medical treatment she received for her left shoulder injury was authorized, or related to the admitted work injury.

G. To obtain indemnity benefits, a claimant must prove, by a preponderance of the evidence, that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 639 (Colo. App. 1997). Here, as found, the claimant failed to meet her burden of proving entitlement to indemnity benefits in the form of TTD or PPD.

H. Section 8-42-107.2(2)(b), C.R.S. provides, in relevant part:

(b) If any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request, on a form prescribed by the division by rule . . . . Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability or the date of mailing or delivery of the disputed finding or determination, as applicable pursuant to paragraph (a) of this subsection (2), the authorized treating physician's findings and determinations shall be binding on all parties and on the division.

I. Sections 8-43-203(2)(b)(II)(A) and 8-43-203(2)(d) provide, in pertinent part:

(II) An admission of liability for final payment of compensation shall include a statement that this is the final admission by the workers' compensation insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation, ... and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not ... contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing....

(d) Once a case is closed pursuant to this subsection (2), the issues closed may only be reopened pursuant to section 8-43-303….

J. The provisions concerning the final admission of liability are part of a statutory scheme to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo.App.1990).

K. The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). In the instant claim, it is undisputed that the ATP, Dr. Walter Larimore, determined that the claimant reached MMI from her industrial injuries on June 15, 2015. Dr. Larimore determined that the injuries caused by the January 23, 2007 accident included only the diagnosed left cubital tunnel and left lateral epicondylitis, and not the left shoulder rotator cuff tear and other findings.

L. It is undisputed that the Respondent Insurer filed a Final Admission of Liability consistent with Dr. Larimore’s opinions on MMI, permanent physical impairment and medical treatment post-MMI. The claimant testified that she was experiencing shoulder symptoms from the date of injury and ongoing. The records reflect the claimant received some treatment for her shoulder complaints within the Workers’ Compensation System. The claimant testified that on June 15, 2015, she did not believe she was at MMI and believed she needed treatment for her shoulder injuries. However, it is undisputed that the claimant did not object to the June 29, 2015, Final Admission of Liability and request a Division IME, disputing Dr. Larimore’s causation determinations. Therefore, Dr. Larimore’s determination regarding the extent of the claimant’s work-related injuries is binding on the parties and the ALJ because claimant did not timely act to contest it. Accordingly, jurisdiction to hear such a contest now has been lost.

M. The claimant attempts to frame the issues as those of “compensability” and medical benefits. However, what the claimant is actually attempting to do is circumvent sections 8-42-107.2 and 8-43-2013(2)(b)(2)(A), C.R.S. and reopen open the claim for on grounds not provided for by statute. Contrary to the claimant’s arguments, the existence of a compensable injury is not in question. Indeed, Respondents admitted, in the Final Admission of Liability, that claimant sustained a compensable injury on September 15, 2014, from which she reached MMI on June 15, 2015, with no impairment, no restrictions and no need for medical treatment to maintain MMI.

N. Section 8-42-107(8)(c), C.R.S. specifies that, once a claimant reaches MMI, the treating physician “shall determine a medical impairment rating” in accordance with the *AMA Guides*. Thus, the treating physician makes the initial determination of MMI and the degree of impairment. *Colorado AFL-CIO v. Donlon,* 914 P.2d 396 (Colo.App.1995). If the rating is disputed, either party may request a Division IME, and the IME physician's rating is binding unless overcome by clear and convincing evidence.

O. When a Division IME has been requested, a hearing may not take place until the finding of the IME physician is filed with the Division. *See Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo.App.1998). This statutory IME process was instituted to reduce litigation over MMI and the degree of impairment. *Colorado AFL-CIO v. Donlon, supra*.

P. Whether a particular component of the claimant's overall medical impairment was caused by the industrial injury is an inherent part of the rating process under the AMA Guides. *See Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333 (Colo.1996) (a rating of overall medical impairment necessarily includes consideration of apportionment of the impairment to other causes). Indeed, the AMA Guides specifically require the treating physician to determine the cause or causes of the claimant's overall impairment. *See AMA Guides* Ch. 2.2.

Q. The ALJ lacks authority and jurisdiction to determine causation of the claimant’s alleged shoulder injuries absent a Division IME. Because the *AMA Guides* required the authorized treating physician to determine the cause or causes of the claimant's medical impairment, the issue of causation of the claimant’s shoulder injuries was necessarily considered. Moreover, §8-42-107(8)(c), C.R.S., gives presumptive effect to the treating physician's determination and prohibits the ALJ from considering claimant’s current “dispute” concerning causation of her shoulder complaints, as a Division IME was not performed. *See Qual-Med, Inc. v. Industrial Claim Appeals Office, supra*.; *Egan v. Indus. Claim Appeals Office of State*, 971 P.2d 664, 665-66 (Colo. Ct. App. 1998).

R. The original finding of causation of the claimant's shoulder injuries has already been conclusively determined and therefore cannot be challenged in reopening or post-reopening proceedings. *See* 8 *Larson's Workers' Compensation Law* § 131.03(2)(a) (2001) (reopening based on a change in condition does not permit relitigation of every potential issue because the question is restricted to the "extent of improvement or worsening of the injury ***on which the original award was based***"; "neither party can raise original issues such as ***work-connection***, employee or employer status, occurrence of a compensable accident, and **degree of disability at the time of the first award**"). [Emphasis supplied.]

S. Similarly, the issues of TTD, PPD, medical benefits and "medical reimbursement" must be measured from claimant's condition when the claim was closed, as established in the original proceeding, and to her current condition. The ATP addressed the original causation issues by his diagnosis at MMI. That resolution is no longer open to question. *See e.g., City & County of Denver v. Indus. Claim Appeals Office of State*, 58 P.3d 1162, 1164 (Colo. Ct. App. 2002).

T. The claimant's request to reopen her claim to address compensability of the alleged shoulder condition, for medical benefits, TTD, PPD and "medical reimbursement" as related to her shoulder disease is denied and dismissed. To do otherwise would, in essence, negate the entire statutory scheme which exists for the prompt, predictable, orderly, and final resolution of disputes involving injured workers.

ORDER

It is therefore ordered that:

1. The claimant's request for an Order determining she suffered a left shoulder injury in the course and scope of her employment with the Respondent Employer is denied and dismissed;

2. The claimant's request that her claim be reopened is denied and dismissed.

3. The claimant's request that she be awarded TTD from August 9, 2015 through November 17, 2015, is denied and dismissed.

4. The claimant's request for an unspecified award of PPD is denied and dismissed.

5. The claimant's request for a new determination that she was not at MMI on June 15, 2015, is denied and dismissed.

6. The claimant's request for an award of medical benefits and "medical reimbursement" in an unspecified amount is denied and dismissed.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 23, 2016

William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

The following issue was raised for consideration at hearing.

1. The issue presented for consideration is whether Claimant proved by a preponderance of the evidence that permanent implantation of a spinal cord stimulator (SCS) is a reasonably necessary maintenance medical benefits.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a 33 year old man, birth date June 12, 1983. Claimant's initial injury occurred on October 19, 2007. Claimant twisted his left ankle. Damage to the sural nerve required surgery and has resulted in chronic neuropathic pain. Claimant was placed at maximum medical improvement by authorized treating physician (ATP), Jeffrey Wunder, on April 13, 2011. He was provided an impairment rating of 22% of the lower extremity and 10% for a diagnosis of CRPS. A final admission of liability was filed by Respondents on July 7, 2011. This admission noted, "We admit for reasonable and necessary and related medical treatment and for medications after MMI." Claimant did not seek a DIME or hearing following the final admission.

2. At the time of his injury, Claimant was a truck driver. Following his injury, Claimant went back to school and now works for full time Cabela's in their IT department. Claimant testified that his restrictions and comfort needs are accommodated at work.

3. Claimant began treatment with Dr. Wunder in January 2010, and continued with post-MMI treatment until that provider's retirement. Claimant was provided medication to manage his symptoms and lumbar sympathetic blocks. The last evaluation with Dr. Wunder was October 29, 2014. At that time, Dr. Wunder noted that Claimant was "holding steady" and there was no need for a repeat injection. The last injection was done in December 2013.

4. Dr. Neil Pitzer preformed a records review and provided recommendations for treatment on December 18, 2014. Dr. Pitzer noted that the symptoms and testing done in this matter did not support a diagnosis of CRPS. As of that time, Claimant's medications for his work condition included Kadian, 20 mg. twice a day; Lyrica 300 mg. twice a day; Cymbalta 60 mg daily; Nifeipine 60 mg. daily. Dr. Pitzer recommended a change in medication.

5. Following Dr. Wunder's retirement, Claimant was seen by Dr. Rosalinda Piniero. She saw claimant initially on January 28, 2015. Dr. Pitzer's recommendations were discussed with Claimant, and Claimant refused to make the recommended changes. Dr. Pineiro noted, "patient is taking the medications as prescribed and is improving." She stated that he was doing well functionally, "personally pt is working and has no major problems with activities of daily living." Dr. Pineiro continued to refill prescriptions for the following year. There is no indication in her notes of declining function or difficulty with work.

6. Dr. Pineiro referred Claimant to Dr. Pouliot, who first saw Claimant on December 9, 2015. Claimant testified that Dr. Pouliot began to discuss the use of a spinal stimulator at the beginning of his appointment. At the time of the appointment, Claimant reported a pain level of 2/10. He reported working full time. He reported taking codeine, 20 mg, b.i.d., Lyrica, 300 mg. twice a day, Cymbalta 90 mg. a day and nifedipine 60 mg. Pain was reported to occur with walking greater than four hours and flaring up randomly. After discussion with Claimant and evaluation, Dr. Pouliot told Claimant that he felt he was a candidate for a spinal cord stimulator. Claimant testified that risks and benefits were discussed with him at that time. From that point, the focus of Dr. Pouliot has been placement of a permanent spine stimulator.

7. The question of the reasonableness and necessity of placement of a trial spinal stimulator was staffed with Dr. Joseph Fillmore. Dr. Fillmore evaluated Claimant on March 29, 2016. Dr. Fillmore reviewed the records and agreed with Dr. Pitzer that Claimant did not have CRPS. His report discussed the diagnostic components of CRPS and explained why Claimant's condition was not consistent with that diagnosis. He noted that Claimant may have had pre-existing sympathetic pain condition, as indicated by a pre-injury triple phase bone scan on October 1, 2002, which suggested sympathetic dystrophy. Dr. Fillmore opined that a spinal cord stimulator trial should be approved. He stated,

> *However, the benefits of this trial should be evaluated by an independent physical therapist. I recommend this therapist evaluate [Claimant] prior to the SCS trial and document physical function and pain levels. The patient should be evaluated again by the therapist toward the end of the SCS trial (usually 5-7 days), when the programming has been optimized. If the patient demonstrates significant improvement in function (see comments on the work restrictions below) and a pain reduction of greater than 50%, then a permanent trial can be considered. If there is no improvement in function, then I do not recommend a permanent implant. Functional improvement to be measured include increased in ROM, ability to stand greater than the patient reported 5 minutes, improvement in walking on heels and toes, ability to squat, kneel, climb, craw, etc. The efficacy of the SCS trial should not be based solely upon subjective reports of pain reduction. Ex. B, Bates 26.*

8. Claimant's trial placement occurred on May 31, 2016. Claimant testified that Dr. Pouliot asked him to complete a pain log. Claimant provided a handwritten log that was the combination of his observances and those of his wife. There were no

objective measurements made before, during or after the trial period. Claimant did record subjective improvement with the stimulator. Claimant testified that he is hopeful that a spine stimulator would help him. Claimant acknowledged that he did not change his medication use during his trial.

9. Dr. Pouliot recommended placement of a permanent spinal cord stimulator.

10. Dr. Fillmore reviewed the material provided following the trial stimulator period. On June 29, 2016, he wrote a report stating that objective documentation was needed in order to determine the success of the trial, and asking that this be provided. Placement of a permanent spinal cord stimulator was therefore denied by Respondents.

11. Dr. Fillmore testified at hearing. He was admitted as an expert. Dr. Fillmore performs stimulator trials for patients that he treats. Dr. Fillmore credibly testified that he would not recommend placement of a permanent stimulator for Claimant in the absence of objective data documenting the success of the trial stimulator. Dr. Fillmore testified that his recommendations were the same whether a stimulator were being provided before or after MMI. He said Claimant's MMI status has no bearing on his recommendations regarding the spinal cord stimulator in this case. Dr. Fillmore testified that is recommendations would be the same regardless of the application of the Division Treatment Guidelines.

12. Dr. Fillmore testified that he did not consider Claimant and Claimant's wife's observations to be objective. He testified that he did believe that Claimant was well intentioned and honest. However, he required objective measures of improvement in his practice because of the placebo effect. He said that he has seen many patients who really want treatment to work have no long term benefit from treatments. He testified that his caution is intended for Claimant's benefit, noting he did not want Claimant to go through something that is not helpful. He testified that he would want to see data, for example, that showed that Claimant could stand longer, walk longer, or lift more.

13. Respondents wrote Dr. Pouliot asking for objective data from the trial stimulator. Dr. Pouliot did not respond. His physician's assistant, Debra Dennis, instead wrote an addendum on June 21, 2016. This did not reflect any of the required objective data. It instead reflected what was purported to be Claimant's subjective report.

14. Based upon the record and Claimant's testimony, the ALJ finds that there is no objective data measuring the impact of the trial stimulator placed on May 31, 2016. Therefore, there is no medical evidence based justification for permanent implantation of the spinal cord stimulator.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. The need for medical treatment may extend beyond the point of MMI where the claimant presents a preponderance of the evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

4. In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI, they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the Claimant's request for specific medical treatment the Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309- 217 (ICAO February 12, 2009).

5. WCRP Rule 17's introduction states that "The medical treatment guidelines set forth reasonable medical care for high cost or high frequency categories of occupational injury or disease." *Rule 17-4.* Both the Chronic Pain Disorder Medical Treatment Guidelines (*CPDMTG*) and the Complex Regional Pain Syndrome/Reflex Sympathetic Dystrophy Medical Treatment Guidelines (CRPSMTG) address the

evidenced-based medicine recommendations for those conditions and use of spinal cord stimulators.

6. Dr. Fillmore testified that he would treat Claimant's condition under the Chronic Pain Disorder Guidelines. The introduction of both Guidelines indicate that surgery should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief. *CPDMTG General Principles, 8.* In the discussion of operative surgical procedures, the Guidelines again emphasize that surgery aims for maximum functional benefits, and that this should be objectively measured, using work status, fewer restrictions, decease in medication dosage and "measurable functional gains" such as increased range of motion or "a documented" increase in strength. *CPDMTG, G, page 102.* The "Positive Patient Response" section of the general principles notes "Positive results are defined primarily as functional gains that can be objectively measured." *CPDMTG General Principles, 6.*

7. The Division expressly states that the provisions are, indeed, "guidelines." Nevertheless, the Division adopted the provisions as an enforceable rule, not simply an unofficial policy position of the Division. The Guidelines expressly acknowledge that one can deviate from the Guidelines in particular cases, but the deviation should be explained. The primary purpose is to advise and educate medical professionals and others about the current state of the medical literature. In so doing, the Guidelines provide a paradigm for decisions about medical treatment.

8. "The chronic pain experience clearly represents both psychologic and complex physiological mechanisms, many of which are just beginning to be understood." *CPDMTG, page 5.* In regard to spinal cord stimulation, "It is particularly important that patients meet all of the indications before a permanent neuorstimular is placed because several studies have shown that workers' compensation patients are less likely to gain significant relieve than other patients." *CPDMTG, G.1.a.* The Guidelines only indicate that the benefits of spinal cord stimulators can be expected to persist for three years. *Id. CPDMTG, G.1.c.* There are many documented complications for permanent spinal cord stimulators. The Guidelines note a complication rate of 45% at 24 months. *CPDMTG, G.1.b.* It is in light of these limits and potential complications that the Guidelines require that a patient must meet criteria in order to be considered for neurostimulation. Among the criteria is a "successful" nuerostimulation screening test. A test is considered successful if a patient meets *both* of the following: (a) a 50% decrees in pain, confirmed by visual analogue scale or numerical rating scale [not done in this case] and (b) demonstrates objective functional gains or decreased utilization of pain medications. "Objectives, measurable, functional gains should be evaluated by an occupational therapist and/or physical therapist and the primary treating physical prior to and before discontinuation of the trial." *CPDMTG G.1.c.v.* An "unsuccessful" spinal cord stimulator test is when there is an "inability to obtain objective, documented, functional improvement or reduction in pain."

9. It is found and concluded based on the totality of the record that permanent implantation of a SCS is not a reasonably necessary maintenance medical benefit. Of significance was Dr. Joseph Fillmore's opinion. He credibly opined that permanent implantation of a spinal cord stimulator was not a reasonably necessary maintenance medical benefit. Dr. Fillmore credibly opined that there was no objective evidence of functional improvement during Claimant's SCS trial. Without objective evidence of functional improvement during the trial, Dr. Fillmore credibly maintained no permanent implantation should be authorized.

ORDER

It is therefore ordered that:

Placement of a permanent spinal cord stimulator is not reasonable or necessary and Claimant's request for this medical benefit is denied.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 21, 2016

/s/ Margot W. Jones

Administrative Law Judge Margot Jones
Office of Administrative Court
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for determination at hearing:

a. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable on-the-job injury while working for the Respondent-Employer; and

b. Whether Claimant proved by a preponderance of the evidence that he is entitled to reasonably necessary and related medical benefits.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following findings of fact are entered.

1. Claimant began working for Employer in July 2015. Claimant worked as a solar installer. Part of his job was installing solar panel structures on the roofs of homes.

2. On October 12, 2016, Claimant was working in Johnstown and was carrying solar panels up a ladder. While he was doing this the wind caught a panel and twisted him. Claimant testified that he felt a sharp pain in his lower back. He continued to work that day and for the rest the week until Friday which he took off because he was sore. Claimant testified that he reported the incident to his coworker, Bailey Peeso, but did not seek medical attention. He also testified that he reported it to the master electrician, Ray Williams. Claimant returned to work the following Monday.

3. Eleven days later, on October 23, 2016, Claimant was working on a roof installing the framework for the solar panels. He did this by bending over and using an impact wrench to put in lag bolts. An impact wrench is a wrench that also hammers while it turns the bolt. Claimant was squatting over the bolt while he was securing it into the roof. When the Claimant attempted to get up he felt a sharp pain in his back and had a difficult time getting up from the squatting position. He immediately reported the injury to Mr. Peeso, who told him to go down and rest. When he tried to get down the ladder, he could not extend his feet to the rungs due to his injury and so he used his arms to lower himself down to the ground.

4. After he got off the roof, he tried to rest by sitting in the van but he could not sit for more than a few seconds. He then lay down on the ground next to the van. He was unable to go back to his work duties because of his back pain

5. At the end of the day, Mr. Peeso drove Claimant back to the shop. Claimant immediately reported the injury to the operations manager, Solei Sadler. She drove him to Concentra Urgent Care where he was seen by Dr. Brian Counts. Dr. Counts prescribed pain medication and physical therapy. He referred Claimant to Dr. Andrew Castro, who is an orthopedic surgeon.

6. Claimant testified that he had pain in both of his legs after the injury. The pain diagram which he filled out after the accident only showed left leg pain. A pain diagram filled on November 3, 2015, shows most of the left leg and the upper part of the right leg circled. A pain diagram filled out by Claimant on November 12, 2015, shows pain in both legs.

7. Dr. Castro noted in his November 16, 2015, report that the MRI showed an "extremely large disk herniation L5–S1 causing severe spinal canal compression and stenosis." Dr. Castro stated that he did not think injections would be helpful because it was such a large herniation. He recommended surgery right away. Dr. Castro also stated that Claimant has bilateral lumbar radiculopathy and that Claimant's symptoms were consistent with the MRI findings of the extremely large disk herniation.

8. Dr. Count's prescribed a wheelchair for the Claimant on January 8, 2016. He also stated in his January 29, 2016, report that Claimant needs surgery but that the hearing was not for 3 months which was much too long. Also on that date, Claimant reported that his symptoms were continuing to get worse with muscle weakness, groin pain and numbness in both legs.

9. Because the case was on a denial from the Insurer, the surgery was not authorized. Claimant does not have his own medical insurance and has been unable to go forward with the surgery.

10. At hearing, Claimant ambulated with crutches but testified that he sometimes uses the wheelchair.

11. Prior to this injury, Claimant had no trouble doing his job. He worked the previous four days without any problems. However, Claimant has been unable to work since the date of the injury.

12. Claimant had a prior back injury 20 years ago when he was 17 years old. He underwent surgery for this and recovered fully. He also had surgery on his hip and left hand several years before the date of this injury. Neither surgery prevented him from working as a solar installer or in his previous job as a mason.

13. Claimant did have back soreness from time to time because of the stress of his job and had mentioned it to Mr. Peeso. However the soreness did not prevent him from working.

14. Dr. Christopher Ryan testified at hearing and stated that he performed an independent medical examination at the Claimant's request. He examined Claimant and received the history that he was carrying a solar panel up a ladder before the date of the injury and suffered a twisting injury. Then, while fastening bolts to a roof he had a severe onset of low back pain which caused pain in the left leg and eventually to the right leg. He stated that Claimant had a baseline of some back and leg pain prior to the October 23, 2016, incident. He testified that the MRI scan showed scar tissue from the injury Claimant suffered when he was 17, but that it was not compressing on a nerve root. However, the new disk herniation was severe and was compressing the nerve root. His examination of Claimant showed that Claimant had lost his right-sided reflex which is generally caused by a nerve compression.

15. Dr. Ryan opined that someone with this type of injury would not be able to work installing solar panels. He stated that the prior injury may have made the disk more vulnerable, but that the bending over and using the vibrating wrench was a watershed event that caused the distinct herniation. The prior incident while going up a ladder with the solar panel probably weakened the disk, but the work he was doing just before he became completely disabled was probably the cause of the severe disk herniation. He also stated that he saw nothing in the medical records indicating Claimant was unable to work due to back problems prior to the October 23, 2016, incident.

16. On cross-examination Dr. Ryan was asked about a sneezing incident which occurred just prior to the first written record of the Claimant having right-sided leg problems. Dr. Ryan stated that he doubted that sneezing would cause a normal disk to herniate but that it could possibly have happened with the disk being in its weakened state due to the on-the-job injury.

17. Mr. Baily Peeso testified that Claimant complained of back pain once or twice per week. He also stated that the Claimant did not report the incident to him where he twisted while climbing a ladder with a solar panel.

18. Mr. Peeso testified that on October 23, 2016, Claimant complained of pain in his back while putting in the lag bolts and Mr. Peeso instructed him to get off the roof. He stated that the Claimant did go into the van and sit down, and that he walked around and also leaned on the van. While driving back to the shop, Claimant complained of his back pain.

19. Shawn Ransom testified in behalf of the respondents. He stated that he was the general manager for the employer. He said that injuries would be reported to him and also to the master electrician, Ray Williams. He also stated that Claimant never reported back pain to him prior to the October 23, 2015, incident.

20. Mr. Ransom said that Claimant was dissatisfied with his last performance review because, while he was a hard worker, he received a raise of 16 cents per hour. He also stated that Claimant told him he was going to do masonry work; however, there was no other evidence of Claimant actually did this type of work while working for the respondent-employer. Claimant specifically denied that he worked as a mason while he was employed for Employer.

21. Dr. Lawrence Lesnak performed an independent medical examination at the Respondents' request and testified at hearing. He stated that it was possible that Claimant's back pain had been ongoing and that it was possible that Claimant could have aggravated preexisting soft tissue that had been ongoing for years. He stated that he did not believe the disk herniation occurred while the Claimant was climbing the ladder because he would have been unable to work with such a large herniation. He also stated that the right-sided complaints were first in the medical records 8 days after the October 23, 2016 incident. Dr. Lesnak did not believe the disk injury was causing the left-sided symptoms but that it was a preexisting condition aggravated while carrying the solar panel up the ladder.

22. Dr. Lesnak pointed out in his report and his testimony that the right sided symptoms were reported the day after the Claimant had an MRI. (R. Ex. G at BS 380). However, at hearing, on cross examination, Dr. Lesnak admitted that he had no way of knowing if the Claimant knew of the MRI results the day after the MRI was taken or if the Claimant knew of the significance of the right-sided herniation. Dr. Lesnak also admitted at hearing that the first mention of the right-sided symptoms occurred the day before the MRI.

23. Dr. Lesnak stated that Claimant had positive Waddell's signs but admitted that Claimant would not have been able to work with his current disk injury. He also conceded that the Claimant may have aggravated his prior back condition when he twisted while carrying the solar panels up the ladder. He also agreed that surgery was indicated in the Claimant's case but he did not think that the need for surgery was caused by an on-the-job injury

24. In rebuttal testimony by deposition, Dr. Ryan stated that the Claimant was engaged in two activities that are known to put a disk at risk. He was squatting down and bending forward and also receiving vibrations from the wrench. Dr. Ryan stated that both those factors will break down the outer fibers of a disk even if someone is young and otherwise healthy. He also pointed out that Claimant's back had already been compromised by the prior back surgery and the incident while climbing the ladder with the solar panel.

25. Dr. Ryan also testified in Claimant's rebuttal that the progression of the symptoms from left to right was not necessarily an indication that the disk injury was initially only to the left side of the disk. He also states that the symptoms of right-leg pain were a natural progression of the October 16, 2015, injury.

26. Dr. Ryan, Claimant's IME, and Dr. Lesnak, Respondent's IME, believe Claimant was injured while working for Employer. Dr. Ryan offers the most credible opinion that the twisting injury on the ladder injured Claimant's already compromised disk and that it progressed from there to the October 23, 2015, incident which rendered Claimant unable to continue working and in need of immediate surgery.

27. It is found and concluded that Claimant suffered an injury in the course and scope of his employment on October 23, 2015, when Claimant was using an impact wrench to install lag bolts on a roof. It is further found credible and persuasive that eleven days earlier, on October 12, 2015, Claimant also injured himself in the course and scope of his employment while carrying a solar panel up a ladder when he suffered a twisting injury when the solar panel was hit by a gust of wind.

28. The evidence established that Claimant had left leg radiculopathy right after the October 23, 2015, incident. Dr. Castro credibly opined that this is caused by the Claimant's ruptured disk. The left leg symptoms have not gone away since the injury. The disk is now causing problems bilaterally. The evidence established that surgery is reasonably necessary, related to the work injury and needed to relieve Claimant of those symptoms.

CONCLUSIONS OF LAW

Having entered the foregoing findings of fact, the following conclusions of law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See, Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See, Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Both Dr. Ryan and Dr. Lesnak believe Claimant was injured while working for Employer. Dr. Lesnak does not believe the disk injury was caused by work. Rather, he believes Claimant suffered a soft-tissue aggravation of a preexisting back condition even though Claimant has had unrelenting pain and numbness in his left leg since the date of the injury. Dr. Ryan credibly opined that the twisting injury on the ladder injured the already compromised disk and that it progressed from there to the October 23, 2015 incident which rendered Claimant unable to continue working and in need of immediate surgery. Dr. Lesnak stated that Claimant could not have worked with the disk injury he has suffered. This follows with Claimant's narrative that he was unable to work from October 23, 2015, forward. Claimant's position that he suffered his injury on the day he left work due to severe back pain and to which he has not been able to return is the most credible explanation. Claimant had left leg radiculopathy right after the October 23 incident. Dr. Castro credibly opines that this is caused by the ruptured disk. The left leg symptoms have not gone away since the injury. The fact that the Claimant's pain and numbness progressed to the right side over time does not diminish the compensable nature of Claimant's initial injury and left-leg symptoms. The evidence established that the disk is now causing problems on both sides and surgery is needed.

5. The Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). It is found that the surgery recommended by Dr. Castro is reasonable and necessary.

ORDER

It is therefore ordered that

1. Respondents shall provide medical benefits including the surgery recommended by Dr. Castro to cure and relieve Claimant of the effects of the work injury.

2. Respondents shall pay interest at the rate of 8% on all benefits not paid when due.

3. Any and all issues not determined herein are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 21, 2016

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones,
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury on February 7, 2016.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to a general award of reasonable and necessary medical benefits.

3. Whether Claimant has established by a preponderance of the evidence that the medical treatment she has received to date for the work injury was authorized treatment.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to a change in authorized treating physician to Dr. Madlock.

STIPULATIONS

1. The issues of temporary partial disability benefits and temporary total disability benefits are held in abeyance.

2. Claimant's average weekly wage is $96.91.

FINDINGS OF FACT

1. Claimant is 17 years old and is employed by Employer as a part-time lifeguard. She began employment with Employer on January 19, 2016, approximately two and one half weeks prior to the incident on February 7, 2016.

2. Claimant had previously worked as a lifeguard during the summer months of 2015 for Rolling Hills Country Club where she had similar duties. The pool at Rolling Hills was outdoors, often reached higher temperatures than the indoor pool at Employer's facility, and had a different lifeguard schedule where Claimant was on duty for longer periods of time without a break as compared to Employer's schedule.

3. Employer's lifeguard schedule includes three lifeguard rotations. The first rotation is at the adult pool where the lifeguards sit on a guard stand for approximately 20 minutes. The second rotation is at the kid's pool area that includes a water slide and lily pad. At this location, the lifeguard stands and/or walks. This rotation is also approximately 20 minutes. The third rotation is at the lifeguard shack where lifeguards are not directly monitoring swimmers and can take a break or clean/organize as needed. Typically lifeguards spend 20 minutes sitting on the stand at the adult pool,

then rotate to the kid's pool and spend 20 minutes standing/walking, then rotate to the lifeguard shack/room where they would also spend approximately 20 minutes before rotating back to the adult pool. Occasionally, depending on staff levels, lifeguards would stay in the lifeguard shack for 40 minutes or for two rotations.

4. On February 7, 2016 Claimant reported to work at 8:49 a.m. and was scheduled to perform her usual lifeguarding duties. Claimant first was at the adult pool where she sat in the lifeguard stand and observed patrons swimming and playing in the pool. After approximately 20 minutes, Claimant rotated to the kid's pool where she stood, walked, and observed patrons at that pool area.

5. The rotation at the kid's pool that day lasted longer than the usual 20 minutes. Another lifeguard was unavailable and unable to rotate in at the usual 20 minute mark due to an unrelated issue in the pool's pump room.

6. At some point between 20 and 30 minutes into the rotation and while overseeing the kid's pool, Claimant began to feel hot and dizzy. Claimant attempted to walk toward the lifeguard stand at the adult pool to tell her co-worker and fellow lifeguard Amanda Cheatum that she was not feeling well.

7. Before making it to Ms. Cheatum, Claimant lost consciousness and fell face first onto the concrete pool deck. There was no excessive water on the pool deck nor were there any obstacles over which Claimant tripped or fell. The pool deck was in its ordinary condition.

8. Ms. Cheatum heard Claimant fall and responded immediately. Ms. Cheatum remained with Claimant until the EMTs arrived and also accompanied Claimant in an ambulance to St. Anthony hospital.

9. Paramedics were called at 11:30 a.m. and arrived at 11:34 a.m. The paramedic reports indicate that they responded to a report of seizure. Claimant was supine poolside on the floor. Paramedics noted that while life-guarding Claimant experienced the gradual onset of dizziness and left her guard station to tell a co-worker she needed to sit when she experienced a syncopal episode and fell face first striking her chin on the concrete. The report also noted witness accounts that Claimant experienced back to back seizures without regaining consciousness with both lasting "about two minutes." Claimant was transported to St. Anthony Hospital. *See* Exhibit 1.

10. At the emergency department of St. Anthony, Claimant was evaluated by Matthew Tigchelaar, M.D. He noted a history of present illness as follows: "Claimant was working as a lifeguard at the Golden recreation center, was standing up and began to feel dizzy and lightheaded and states that her vision was getting blurry. She also felt nauseated. She then fainted and fell forward striking her chin. Witnesses stated that she had what looked like seizure activity afterwards, briefly opened her eyes then her eyes rolled back and she had more shaking. When she came to shortly thereafter she was confused as to where she was." *See* Exhibit C.

11. At St. Anthony Claimant reported a headache and laceration to the chin. Claimant denied any focal neurologic complaints. Claimant reported thinking she may have fainted one time in the past. Dr. Tigchelaar noted no history of exertional syncope or previous seizure activity. CT scans of the head and cervical spine were obtained and were read as normal with no evidence of intracranial process or fractures. An EKG was obtained and was normal. Dr. Tigchelaar opined that Claimant presented with what sounded like vasovagal syncope. He noted that she had all the warning symptoms and had an unremarkable EKG without previous exertional syncope. Dr. Tigchelaar opined that it was unlikely that Claimant had some sort of cardiac conduction abnormality as the cause of syncope. Dr. Tigchelaar also opined that her shaking episodes were likely secondary to brain hypoperfusion and syncope as opposed to true seizure activity. *See* Exhibit C.

12. Dr. Tigchellar noted that Claimant sustained facial trauma with chin lacerations and a bilateral mandibular fracture. He noted that he discussed the case with facial plastics and trauma and that the trauma team decided to keep Claimant overnight for observation. *See* Exhibit C.

13. Claimant was also evaluated by Christopher Mawn, M.D. Dr. Mawn reviewed the CT of the facial bones that showed a mildly displaced subcondylar fracture on the right and a nondisplaced left condylar fracture. Dr. Mawn noted that you could see fractured teeth on the CT scan. Dr. Mawn discussed the case with Claimant and her parents. He recommended surgery to put arch bars on, put her in IMF for 1-2 weeks, and at the time of surgery try to remove the fractured teeth. Dr. Mawn explained to Claimant and her parents that there was a risk of some roots being difficult to remove due to Claimant's age and the health of the bone and indicated that if he had any problems he would put Claimant in elastics and have her see an oral surgeon for teeth removal. *See* Exhibit 2.

14. Claimant was also evaluated at the emergency department by Robert Madayag, M.D. Dr. Madayag noted that Claimant was lifeguarding all morning, stood up and felt dizzy, nauseous, and lightheaded and fell forward striking her head on the pavement. He noted that Claimant had a brief loss of consciousness and then awoke complaining of jaw pain. He noted that Claimant said she had been under increased stress lately as she had recently taken the ACTs and had been working more than usual. Dr. Madayag assessed mandibular fracture, facial laceration, and syncope. Dr. Madayag noted with the syncope that Claimant's EKG was normal and that they would do routine labs to rule out any significant source of syncope. *See* Exhibit C.

15. The next day, February 8, 2016, Claimant underwent surgery performed by Dr. Mawn. Dr. Mawn noted bilateral subcondyler fractures, and dental fractures. In surgery, Dr. Mawn noted that the tooth fractures were diagonal with the roots solidly in place and that it became increasingly evidence to him that he would need an oral surgeon to do the extractions. Dr. Mawn then elected not to place Claimant in wires but to use rubber bands to complete the IMF in order that the bands could be removed for

oral surgery. He noted that the operation performed included closed reduction of mandible fracture with IMF. Dr. Mawn referred Claimant to oral surgeon Paul Madlock, M.D. for the traumatic fracture of tooth, fracture of mandible, and syncope and collapse. *See* Exhibits 2, C.

16. On February 9, 2016 Employer representative Joe Mallory emailed a designated provider list to Claimant. Claimant signed the designated provider list on February 13, 2016. Claimant also received a copy of the list when she began employment with Employer.

17. On February 10, 2016 Claimant was evaluated by Dr. Madlock. Claimant reported that she was a lifeguard and while walking at work she felt light headed and blacked out and did not remember anything about falling. Dr. Madlock noted that Claimant was taken to St. Anthony where an arch bar with rubber bands were put in and that St. Anthony had referred Claimant for oral surgery after noting several cracked teeth and being unable to remove them successfully in surgery. Claimant reported severe pain with her fractured teeth and a severely sore neck. Dr. Madlock ordered an iCAT. Dr. Madlock noted vertical fractures of teeth #'s 3, 19, and 29 as well as possible vertical fractures through teeth #'s 4, 5, 12, and 13. Dr. Madlock recommended extraction of all teeth that were fractured beneath the alveolar crest as soon as possible to relieve pain and to limit the amount of bone destruction caused by the fractured teeth. Dr. Madlock recommended that at the time of extraction, Claimant have human bone graft as well as guided tissue regeneration (GTR) in order to maintain the ridge height and width post extraction. *See* Exhibit 4.

18. Dr. Madlock noted that when Claimant reached age 19, definitive reconstruction would be performed with dental implants versus crown and bridge. Dr. Madlock noted that the next appointment would be for removal of rubber bands for examination of the oral cavity and extraction of teeth #'s 3, 19, and 29 and possible extraction of teeth #'s 4, 5, 12, and 13 with bone graft and GTR under IV general anesthesia with local. Dr. Madlock noted that Claimant needed to be seen by a spine doctor, neuro or orthopedic surgeon for cervical spine clearance prior to sedation. Dr. Madlock noted that Claimant should be scheduled for removal of teeth as soon as possible to allow for her to have pain relief and to prevent infection with bone destruction. He noted that Claimant was using Vicodin for pain relief and that extractions would be scheduled urgently to relieve pain and prevent possible infection as well as bone loss. Dr. Madlock also noted that Claimant would be covered with amoxicillin due to bacterial leakage and the cracked teeth. *See* Exhibit 4.

19. On February 11, 2016 Dr. Madlock noted that Claimant's father called to report that Claimant's primary care provided had evaluated the neck and everything checked out okay and that Claimant was clear for the procedure from a spine and medical perspective. Dr. Madlock noted that the chart note would be faxed over and that his assistant would call to schedule Claimant's procedure.

20. On February 17, 2016 Claimant underwent surgery performed by Dr. Madlock. Dr. Madlock had very detailed surgical notes surrounding each tooth that was examined and extracted. Dr. Madlock noted that he completed surgical extraction of 7 teeth, all of which were non-restorable on examination. Dr. Madlock extracted teeth #'s 3, 4, 5, 12, 13, 19, and 29. Dr. Madlock also performed bone grafting and GTR. Dr. Madlock noted that the vertical fractures were severe and comminuted on the teeth. Dr. Madlock performed a postoperative iCAT noting no perforations in the sinus, no bleeding in the sinus, condylar fractures were non displaced, bone grafts appeared appropriate, and there were no retained root tips. *See* Exhibit 4.

21. On February 24, 2016 Claimant was evaluated by Dr. Madlock. Dr. Madlock noted that Claimant was one week status post extraction of multiple teeth with bone graft and GTR and that Claimant reported no complaints and that she was off all pain medications. Dr. Madlock noted that Claimant was healing well and within normal limits. *See* Exhibit 4.

22. On February 29, 2016 Claimant was evaluated by Dr. Madlock. Claimant continued to report no complaints and being pleased with treatment. Dr. Madlock removed the fixation elastic and placed new light guiding elastics and instructed Claimant to limit her range of motion to opening 30 mm or less. *See* Exhibit 4.

23. On March 15, 2016 Claimant was evaluated by Dr. Madlock. He noted she was one month status post extraction of multiple teeth with bone graft and GTR. Claimant continued to be doing well and was advised to continue the no chew soft diet for three weeks and that in three weeks the arch bar would be removed under sedation. *See* Exhibit 4.

24. On April 6, 2016 Claimant was evaluated by Dr. Madlock. On exam, the rubber bands were removed with no problem. Dr. Madlock noted that an iCAT was taken that day and showed the fracture had healed well and within normal limits for the severity of the injury. Dr. Madlock noted that Claimant would return the next day for arch bar removal and would not require post operative prescriptions besides oral rinse. Claimant was cleared to return to playing volleyball and other sports as long as there was not a chance for the jaw to be forcibly struck. Dr. Madlock cleared Claimant to return to her general dentist and explained that due to Claimant's age and possible continued growth that implant placement should be considered between the ages of 19-20. *See* Exhibit 4.

25. On April 7, 2016 Dr. Madlock removed the deep hardware, the MMF fixation, and rotated the MMF screws out of Claimant's mouth. Dr. Madlock noted that 13 screws and 2 arch bars were accounted for physically and radiographically. *See* Exhibit 4.

26. On April 11, 2016 Dr. Madlock issued a letter indicating that Claimant had been seen by his office for care after a traumatic jaw fracture. The letter cleared Claimant to return to all activities including work and sports at her tolerance. The letter

indicated that Claimant had been advised to avoid any traumatic facial contact. *See* Exhibit 4.

27. On April 25, 2016 Dr. Madlock issued a letter clearing Claimant to return to all activities including work and sports at her tolerance again noting Claimant had been advised to avoid traumatic facial contact. The letter indicated that if traumatic facial contact cannot be guaranteed to be avoided, the activity is at Claimant's own risk. Dr. Madlock noted that the bone should be at full strength in 1.5 to 2 months and that a follow up would be scheduled at that point for clearance for full contact activities. Dr. Madlock noted that by the job description, traumatic facial contact cannot be avoided, therefore, he would expect clearance for full facial contact in 1.5 to 2 months and that there was no test to be absolutely certain the bone had remodeled to at or above its original strength. *See* Exhibit 4.

28. Employer completed a safety committee incident report regarding this incident. Claimant filled out a portion indicating that she was supposed to change guards 10 minutes prior and that her vision started to get blurry and she was very hot. Claimant reported she started to walk to the other guard to sit down and fainted. The supervisor filling out the report indicated that the incident appeared to be accidental in nature and not affected by the pool environment. He suggested a line item in the training manual to train guards about how to signal for help when they are not feeling well. *See* Exhibit H.

29. Claimant testified credibly at hearing. On February 6, 2016 Claimant took the ACT, worked for Employer for 4.5 hours, and went to a friend's house to spend the night. Claimant watched movies with her friend and went to sleep around 10:30 p.m. Claimant ate a bagel with cream cheese the morning of the incident and went to the pool from her friend's house. On February 7, 2016 when she arrived at work Claimant felt normal. Claimant was not stressed, was not thirsty, was not tired, and was not hungry.

30. Claimant testified that she previously passed out when she was 6 years old and had a bloody nose but had no history of passing out or of seizures. Claimant reported that for two weeks following the February 7, 2016 incident her pain was really bad. Claimant testified that it was her first time taking the ACT so she was planning on using the score as a base for the next score and as a base for improvement with a tutor so she was not really stressed over taking the ACT. Claimant did not recall any conversation about whether or not she ate breakfast with either of her co-lifeguards after the fall. Claimant also did not recall any conversation at the hospital about what could have caused her fainting episode.

31. Claimant testified that the pool was not abnormally hot the day of the incident. Claimant testified that the summer prior at her lifeguarding job she had worked in three 20 minute lifeguard shifts and that the summer job was at an outdoor pool where the temperature at the pool could be higher than at the indoor pool for Employer.

32. Claimant’s mother, Katie Carlson testified credibly at hearing. Mrs. Carlson was present when Claimant talked with the emergency room doctors and testified that they were all trying to figure out what could have caused Claimant to faint and that they discussed the ACT and that maybe Claimant could have been stressed out as a possible theory. Mrs. Carlson testified that Claimant did not appear to be under any stress prior to the incident, Claimant had not been practicing for the ACT, and that Claimant had been eating and drinking normally.

33. Mrs. Carlson testified that they saw the designated provider list given to them by Employer shortly after the incident, but that they had already been referred by the emergency department to an oral surgeon and that no one on the list was an oral surgeon so they didn’t see the point in going to any of the providers listed. Mrs. Carlson indicated her belief that an occupational doctor couldn’t deal with Claimant’s symptoms and what was going on with Claimant and that it was scary and painful until the fractured teeth were out.

34. Ms. Cheatum testified at hearing. She reported that she was on the lifeguard stand at the adult pool when she heard a thud and saw Claimant fall. She reported arriving to Claimant being face down and shaking and that she rolled Claimant over and held Claimant’s neck. She saw Claimant uncontrollably shaking with her eyes rolled back and reported that a patron at the pool, who she believed was a doctor, said Claimant was seizing. Ms. Cheatum testified that Claimant was confused when she came to, that Claimant lost consciousness again, and came to again. Ms. Cheatum reported that Claimant told her at the pool that Claimant had not eaten breakfast, but that later at the hospital Claimant indicated she had eaten a bagel. Ms. Cheatum indicated that the pool condition was not unusual that day but that they were on the rotation 5-10 minutes longer than normal because there was water spraying everywhere in the pump room. Ms. Cheatum rode with Claimant in the ambulance to the hospital and was there for some of the conversations with Claimant’s mother and the doctors.

35. Brandon Clark also testified at hearing. On the date of the incident, he was the head lifeguard and managed the pool area for Employer. Mr. Clark indicated that on the day of the incident there was nothing unusual with the pool environment other than a pump problem causing the hot tub to drain. He indicated that another lifeguard rotated late so that the rotation was a little late but that it was unrelated to the pump problem. Mr. Clark indicated that he did not speak to Claimant in the morning before the incident and that after the incident Claimant was not coherent. Mr. Clark did not hear any conversation about whether or not Claimant had breakfast. Mr. Clark indicated that the area where Claimant fell had nothing unusual about it and that there was possibly some splashed water, but that a majority of the pool deck in that area was dry.

36. Claimant is credible and persuasive in her testimony. Her fall was not the cause of stress, improper eating/drinking habits, a hot pool room temperature, or any unusual circumstance of her employment. Significant testing at the emergency department showed no specific cause for her fall. The credible testimony of Claimant’s

mother supports this conclusion as well and it is credible and persuasive that the conversation at the emergency department was simply trying to pinpoint a cause for the fall and that they were mentioning the ACT test and stress as a possible idea. Further, Claimant's testimony at hearing and her statement at the emergency department that she had a bagel for breakfast is credible and persuasive and is more credible than a statement she allegedly made about not having eaten breakfast shortly after she was unconscious and while still out of it or incoherent according to witness reports.

38. Claimant's syncope and fall was due to an unknown cause and despite extensive testing at the emergency department, no cause was found or known.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant must prove by a preponderance of the evidence that her injury was proximately caused by an injury arising out of and in the course of her employment with the employer. Section 8-41-301(1)(b) & (c), C.R.S*.; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.* The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968).

Here, Claimant’s injury occurred while on the clock and working as a lifeguard for Employer and occurred while standing and overseeing the kid’s pool area and thus occurred in the course of employment. However, the parties dispute whether or not the injury arose out of Claimant’s employment.

As found in *City of Brighton v. Rodriguez*, 318 P.3d 496, (Colo. 2014), all risks that cause injury to employees can be placed within three well-established overarching categories: (1) employment risks, which are directly tied to the work itself; (2) personal risks, which are inherently personal or private to the employee him or herself; and (3) neutral risks, which are neither employment related nor personal. Here, Claimant’s injury does not fit into the first risk category. There were no specific employment risks that caused Claimant’s fall. The temperature at the pool was not warmer than usual, the condition of the pool area was not different than on other days, and there was no unusual amount of water on the pool deck nor did Claimant slip and fall due to a wet or slippery condition. Although the Claimant remained at one guard station overseeing the kid’s pool for approximately 10 minutes longer than a normal rotation, this amount of time is not significant and is not found to be a significant factor. As found above, Claimant’s prior lifeguarding duties at Rolling Hills often put her on duty for longer periods of time and at higher temperatures. A small delay in rotation on this day is not a significant factor contributing to or causing her fall. Additionally, the Claimant’s fall does not fall into the second category of risks. Claimant does not have any personal or preexisting idiopathic illness or medical condition that caused her fall. Claimant credibly testified that she fainted once prior at 6 years old after a bloody nose. Claimant however had no other history of seizure, blacking out, fainting, heart disease, epilepsy, and the significant medical testing performed at the emergency department following her fall showed no medical condition or personal or private risk that Claimant had which would have caused her fall. Dr. Madayag noted with the syncope that Claimant’s EKG was normal and that they would do routine labs to rule out any significant source of syncope. The doctors were unable to find any significant source of Claimant's syncope despite significant testing while Claimant was kept overnight.

The third category includes injuries caused by so-called "neutral risks" and are considered neutral because they are not associated with either the employment itself nor with the employee him or herself. *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). An unexplained fall necessarily constitutes a neutral risk and because it is neither occupational nor personal and the fall is fundamentally similar to other neutral risks. *City of Brighton v. Rodriguez*, supra. Injuries stemming from neutral risks arise out of employment because they would not have occurred but for employment. *Id*. The employment causally contributed to the injury because it obligated the employee to engage in employment related functions, errands, or duties at the time of injury. *Horodyskyj v. Karanian*, supra. Here, the cause of Claimant's syncope and fall is unknown. It was not due to an employment related risk or a personal idiopathic risk. Rather, the cause was unknown and despite significant medical testing at the emergency department it remained unknown why Claimant suddenly felt hot, dizzy, nauseous, and fainted. The ALJ concludes that Claimant's fall would not have occurred but for the conditions and obligations of her employment, namely that she patrol and observe patrons at the kid's pool. The conditions and obligations of Claimant's employment placed her on the concrete pool deck where she fell. Consequently, the ALJ finds that the record evidence supports a conclusion that Claimant's injury meets the arising out of analysis and finds that Claimant has established a causal connection between her injuries and her work duties.

Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Claimant has established that she sustained a compensable work injury and that she is entitled to reasonable and necessary medical treatment for her injury. The issue of whether any specific treatment is reasonable or necessary was not before the ALJ. Therefore, the ALJ provides a general award of medical benefits and Respondents retain the right to contest any specific treatment recommendations going forward.

Authorized Treating Physician

Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Section 8-43-404(5)(a), C.R.S. gives the respondents the right in the first instance to select the authorized treating physician. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch* *v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). The claimant may obtain "authorized treatment" without giving notice and obtaining a referral from the employer if the treatment is necessitated by a bona fide emergency. Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

Here, Claimant has established that the treatment she received by paramedics and by St. Anthony hospital was necessary as the result of a bona fide emergency. Claimant sustained a severe, traumatic impact fracturing her jaw and multiple teeth. Claimant was unconscious initially after her fall and was kept overnight at the emergency department of the hospital. The day following her injury, surgery performed by Dr. Mawn also was emergent to assist in wiring her jaw appropriately to allow for healing of her acute jaw fractures and to attempt to extract her fractured teeth. Unfortunately, Dr. Mawn was not successful in the tooth extraction and realized quickly in surgery that Claimant would require an oral surgeon. Two days after being discharged from the hospital, Claimant saw an oral surgeon (Dr. Madlock) who noted her severe pain and recommended removal of teeth as soon as possible to allow for pain relief, to prevent infection, and to prevent bone destruction. Dr. Madlock recommended that Claimant be scheduled urgently for extractions. Dr. Madlock also required clearance regarding Claimant's neck pain prior to putting her under general anesthesia for the surgery. After obtaining clearance, surgery was performed quickly and ten days following Claimant's work injury on February 17, 2016.

As found above, Claimant was in severe pain until the tooth extraction surgery. In the surgery, Claimant had seven teeth extracted, bone grafting, and guided tissue regeneration. Dr. Madlock noted that her teeth had vertical fractures that were severe and comminuted. From the testimony of Claimant, Claimant's mother, and from the medical records it is clear that until this procedure was performed Claimant was in severe pain. Following this procedure, and at a checkup with Dr. Madlock one week later on February 24, 2016 Claimant was doing much better and was off pain medications. However, until February 17, 2016 Claimant was still in a state of severe emergent pain. The surgery performed by Dr. Madlock on February 17, 2016 was a surgery that was necessary and was intended to provide relief from significant pain. Claimant was referred to Dr. Madlock by St. Anthony Hospital when the hospital trauma surgeon realized that an oral surgeon was necessary to remove the significantly damaged and fractured teeth. Although Claimant had received an authorized provider list from Employer during this time, the ALJ concludes that the all of the treatment Claimant received from February 7, 2016 through February 17, 2016 was emergent and was as a direct result of her traumatic work injury on February 7, 2016. Claimant has established by preponderant evidence that the treatment received during this time period was authorized as emergent treatment and that Claimant did not first have to give notice and obtain a referral from Employer.

After the oral surgery on February 17, 2016 where her severely fractured and comminuted teeth were removed, Claimant was no longer in need of emergent treatment. Her severe pain levels were decreased and the acute fractures of her jaw and teeth had been repaired to a point where she was stable. Although it is clear that Claimant required continued treatment and follow up, the continued care necessary was no longer emergent. It is established that once the emergency is over, the employer retains the right to designate the first non-emergency physician. *Sims v. Industrial Claim Appeals Office,* supra. Employer had provided Claimant a designated provider list which Claimant acknowledged receiving. Once the need for treatment was no longer emergent and after February 17, 2016 Claimant was required to consult with one of Employer's designated providers for continued treatment and/or referral to an oral surgeon for continued treatment. Claimant unilaterally decided to continue treating with Dr. Madlock and chose not to consult one of Employer's designated providers under her belief that none of them were qualified to deal with Claimant's injury. Claimant's decision did not allow employer to designate the treating physician or to provide a referral to an oral surgeon. Due to this decision, Claimant has failed to establish that the treatment she received after February 17, 2016 was authorized and has failed to establish that Respondents are liable for payment of that treatment.

Change of Physician

Claimant requests a change of physician to Dr. Madlock pursuant to § 8-43-404(5)(a)(VI)(A) C.R.S, which provides that in addition to the one-time change of physician allowed in § 8-43-404(5)(a)(III), C.R.S, upon the proper showing to the division, the employee may procure the division's permission at any time to have a physician of the employee's selection treat the employee. Claimant's request and argument in support is not found persuasive.

Generally, the purpose of statutory construction is to effect the legislative intent. To that end words and phrases in a statute should be given their plain and ordinary meanings because the General Assembly is presumed to have meant what it clearly said. *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176 (Colo. App. 2002). Further, statutes should be construed a manner that gives consistent, harmonious and sensible effect to all of their parts. *Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261 (Colo. App. 2004).

Here, 8-43-404(5)(a)(VI) and its subparts (A),(B),(C),and (D) when read together refer to a change in authorized treating physician. They reference what is required if Claimant is permitted to change physicians and if Claimant has a new authorized treating provider. The statutes, when read to give a consistent and harmonious and sensible effect, refer to the Claimant's ability to make a proper showing so that she may change from an authorized treating physician to a physician of her choice so that her physician of choice becomes the authorized treating physician. Here, Claimant's argument misses a crucial step in that there is no authorized treating physician yet in this case. Claimant has failed to select an authorized treating physician from Employer's designated provider list. Once she does so, she retains the ability under § 8-43-404(5)(a)(III), C.R.S. to procure written permission from Insurer to have Dr. Madlock continue treatment and retains the ability to make a proper showing to the division to get permission for Dr. Madlock to become the new authorized treating physician. At this time, however, Claimant has failed to show that a change of physician is appropriate as she has not yet taken the necessary steps to have any authorized treating physician.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she sustained a compensable injury on February 7, 2016.

2. Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical treatment to cure and relieve her February 7, 2016 work injury.

3. Claimant has established by a preponderance of the evidence that the treatment she received for the work injury from February 7, 2016 through February 17, 2016 was authorized. Respondents are liable for this treatment.

4. Claimant has failed to establish by a preponderance of the evidence that treatment received after February 17, 2016 was authorized. Respondents are not liable for the unauthorized treatment Claimant received after this date.

5. Claimant has failed to establish by a preponderance of the evidence an entitlement to a change of physician. Claimant shall choose an authorized treating provider from Employer’s designated provider list. The authorized treating provider shall provide any/all referrals as reasonably necessary to cure and relieve Claimant from the effects of her injury.

6. Insurer shall pay interest to Claimant at a rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 22, 2016,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-976-885-04

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Caroline M. Gellrick, M.D. that Claimant reached Maximum Medical Improvement (MMI) on October 23, 2015 and suffered an 11% whole person impairment as a result of his December 25, 2014 admitted industrial injuries.

1. Whether Claimant has established by a preponderance of the evidence that his scheduled 11% right upper extremity impairment rating should be converted to a 7% whole person rating.

FINDINGS OF FACT

1. Claimant worked for Employer as a Maintenance Technician. On December 25, 2014 he suffered admitted industrial injuries during the course and scope of his employment. Claimant was removing snow from the parking lot of Sunflower Condominiums in Steamboat Springs, Colorado. He slipped on ice, twisted his right ankle and struck his right upper extremity when he fell to the ground.

2. After completing his work shift on December 25, 2014 Claimant visited the Emergency Room at the Yampa Valley Medical Center for an evaluation. Claimant reported injuries to his right shoulder and right ankle. X-rays of the right shoulder reflected mild AC arthropathy but no fracture. X-rays of the right ankle were normal. Claimant received treatment that included an Ace wrap splint for his ankle and a sling for his shoulder.

3. After additional conservative treatment Claimant underwent an MRI of his right shoulder. Based on the MRI findings, physicians recommended a right shoulder rotator cuff repair, a subacromial decompression, a biceps tenodesis and a right carpal tunnel release.

4. On May 11, 2015 Claimant underwent right shoulder surgery with Andreas Sauerbrey, M.D. at the Yampa Valley Medical Center. Dr. Sauerbrey performed a right shoulder rotator cuff repair, a subacromial decompression, a biceps tenodesis and debridement of labral tissues.

5. Because Claimant continued to experience right ankle symptoms he underwent a course of physical therapy. Claimant also suffered persistent right shoulder popping and weakness.

6. On September 15, 2015 Claimant visited Dr. Sauerbrey for an examination. A right ankle MRI did not reveal any acute abnormalities but only reflected

chronic changes around the syndesmosis. Dr. Sauerbrey thus did not recommend right ankle surgery. He also noted that Claimant had completed right shoulder treatment. Dr. Sauerbrey referred Claimant to Spine West for any additional treatment recommendations. Absent additional recommendations, Dr. Sauerbrey remarked that Claimant could be placed at Maximum Medical Improvement (MMI).

7. On October 15, 2015 Claimant visited Cliff Gronseth, M.D. at Spine West for an examination. Dr. Gronseth reviewed Claimant's treatment history and conducted a physical examination of his right shoulder. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Gronseth assigned Claimant a 5% right upper extremity impairment rating that converted to a 3% whole person rating. He noted that mild popping was present with shoulder extension. Dr. Gronseth concluded that Claimant had reached MMI on September 15, 2015.

8. On October 23, 2015 Claimant visited David W. Niedermeier, M.D. for an evaluation. Dr. Niedermeier recounted that Claimant had suffered right shoulder and right ankle injuries as a result of the December 25, 2014 industrial incident. He remarked that Claimant had reached MMI on October 23, 2015 and released him to full duty employment. Dr. Niedermeier noted that Claimant could return for medical maintenance treatment for one year if he suffered any right shoulder or ankle problems.

9. On November 18, 2015 Respondents filed a Final Admission of Liability (FAL). The FAL acknowledged that Claimant had reached MMI on September 15, 2015 and suffered a 5% right upper extremity impairment rating.

10. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME). On February 16, 2016 Claimant underwent a DIME with Caroline M. Gellrick, M.D. Claimant reported continuing right shoulder and right ankle pain. He noted that the right shoulder pain radiated into his neck and arm. After reviewing Claimant's medical records and conducting a physical examination, Dr. Gellrick diagnosed Claimant with a right shoulder strain and a right ankle strain as a result of his December 25, 2014 slip and fall at work. She noted that Claimant had undergone right rotator cuff repair surgery but continued to experience persistent popping and weakness in the right shoulder area. She specifically remarked that Claimant was still experiencing right shoulder crepitus and recommended lifting restrictions. Dr. Gellrick also commented that Claimant's high right ankle sprain did not require surgical intervention but had still been tender when Dr. Niedermeier examined him on October 23, 2015. She summarized that Claimant "plateaued with treatment modalities, but still has pain and tenderness with the shoulder and the ankle."

11. Dr. Gellrick agreed with Dr. Niedermeier and concluded that Claimant had reached MMI on October 23, 2016. Relying on the *AMA Guides*, Dr. Gellrick assigned impairment ratings for Claimant's right shoulder, right ankle and cervical spine. Regarding the right shoulder, she assigned a 5% upper extremity impairment rating for range of motion deficits and a 6% rating for crepitus. Claimant also exhibited tenderness in the right trapezius area. Furthermore, Claimant experienced pain in the

neck area and range of motion loss as a consequence of his right shoulder injury. Combining the range of motion and crepitus ratings yields a total 11% right upper extremity or 7% whole person impairment for Claimant's right shoulder. Dr. Gellrick also assigned Claimant a 5% right lower extremity or 2% whole person impairment rating for ankle range of motion deficits. Finally, relying on the Colorado Division of Workers' Compensation *Impairment Rating Tips* (*Impairment Rating Tips*), Dr. Gellrick noted that cervical spine range of motion deficits can be considered in assigning an impairment rating after shoulder surgery. She remarked that Claimant exhibited range of motion deficits with left rotation and left lateral flexion because of tightness in the right trapezius and supraspinatus regions. Dr. Gellrick thus assigned a 2% whole person rating for Claimant's cervical spine. Combining the right shoulder, right ankle and cervical spine impairment ratings yields a total 11% whole person impairment rating.

12. On August 10, 2016 Claimant underwent an independent medical examination with Christopher B. Ryan, M.D. Dr. Ryan remarked that Claimant continued to report the same symptoms he had mentioned to Dr. Gellrick. Claimant specifically noted that he had difficulty maintaining a static right hand position and performing motions of the cervical spine. Although Dr. Ryan did not measure Claimant's range of motion, he did not observe any movements that were inconsistent with Dr. Gellrick's measurements. Dr. Ryan agreed with Dr. Gellrick's analysis. He explained that Claimant had right-sided shoulder dysfunction and range of motion deficits. He also commented that Claimant exhibited loss of strength, loss of cervical range of motion and limitations in functional ability because of his cervical spine injury. Dr. Ryan concluded that Dr. Gellrick did not make any errors in assigning Claimant's impairment ratings pursuant to the *AMA Guides*.

13. Dr. Ryan also explained that Dr. Gellrick correctly assigned Claimant a whole person impairment rating for his right shoulder injury. He noted that the *AMA Guides* and Level II accreditation teachings provide that impairments should be combined with ratings from other parts of the body. Claimant suffered functional impairment not only to the right shoulder but also to the cervical spine. Dr. Gellrick thus properly converted Claimant's 11% right upper extremity rating to a 7% whole person impairment.

14. On September 27, 2016 Claimant underwent an independent medical examination with Michael R. Striplin, M.D. Dr. Striplin reviewed Claimant's medical records and performed a physical examination. He commented that Claimant suffered a right rotator cuff tear and a right ankle injury as a result of his December 25, 2014 slip and fall while working for Employer. Dr. Striplin determined that Claimant had reached MMI on September 15, 2015. He assigned a 1% upper extremity impairment for Claimant's right shoulder and a 4% lower extremity rating for Claimant's right ankle.

15. In addressing Dr. Gellrick's determination that Claimant warranted a 2% whole person rating for his cervical spine, Dr. Striplin relied on the *Impairment Rating Tips* to conclude that a cervical spine rating was not warranted. He noted that the *Impairment Rating Tips* provide:

> In shoulder cases with accompanying neck pain, the clinician must determine whether an additional objective work-related Table 53 cervical pathology qualifies for a rating or the symptoms the patient has are those expected from the shoulder pathology and do not qualify for an additional rating. . . . In unusual cases with established severe shoulder pathology accompanied by treatment of the cervical musculature, an isolated cervical range of motion impairment may be allowed if well-justified by the clinician. Otherwise, there are no exceptions to the requirement for a corresponding Table 53 rating.

Dr. Striplin explained that Dr. Gellrick erroneously assigned Claimant a 2% whole person rating for his cervical spine because his rotator cuff pathology was not "unusual or severe" and the pain was localized to the right superior trapezius.. Instead, he attributed Claimant's cervical spine range of motion loss to age.

16. Dr. Striplin also disagreed with Dr. Gellrick's assignment of a 6% extremity rating for right shoulder crepitus. He noted that the section of the *AMA Guides* titled "Joint Crepitation with Motion" states:

> The evaluator must use judgment and avoid duplication of impairment when other findings, such as synovial hypertrophy, carpal collapse with arthritic changes, or limited motion are present. The latter findings may indicate a greater severity of the same underlying pathological process and take precedence over joint crepitation, which should not be rated in these instances.

Dr. Striplin explained that the simultaneous assignment of an impairment rating for right shoulder range of motion loss and right shoulder crepitation is not in compliance with the *AMA Guides*.

17. Dr. Striplin also considered the conversion of Claimant's right shoulder extremity rating to a whole person impairment. He noted the *AMA Guides* specify that the "upper extremity" consists of the following four parts: the (1) hand; (2) wrist; (3) elbow and (4) shoulder. Moreover, the "shoulder" includes the scapula and clavicle. Dr. Striplin reasoned that any injury to the arm would constitute a scheduled impairment pursuant to the *AMA Guides*. Because Claimant suffered a shoulder injury, he is only entitled to an extremity rating.

18. Dr. Striplin testified at the hearing in this matter. He maintained that Dr. Gellrick erroneously concluded that Claimant reached MMI on October 23, 2015 with an 11% whole person impairment. Instead, Claimant reached MMI on September 15, 2015 and warranted a 1% upper extremity impairment for his right shoulder and a 4% lower extremity rating for his right ankle. Initially, the Dr. Gronseth had determined that Claimant reached MMI on September 15, 2015. Dr. Striplin noted that Dr. Gellrick's reliance on Dr. Niedermeier's October 23, 2015 MMI determination was erroneous, Dr. Sauerbrey had determined that Claimant reached MMI on September 15, 2015 absent additional treatment recommendations. Because there were no additional treatment

recommendations from doctors Gronseth and Niedermeier, Dr. Striplin reasoned that September 15, 2015 was the appropriate MMI date.

19. Dr. Striplin also maintained that Dr. Gellrick erroneously assigned Claimant a 2% whole person rating for his cervical spine. Instead, he assigned Claimant a 1% upper extremity impairment for his right shoulder. Dr. Striplin explained that Dr. Gellrick erroneously assigned Claimant a 2% whole person rating for his cervical spine because his rotator cuff pathology was not "unusual or severe" and the pain was localized to the right superior trapezius. Moreover, Dr. Gellrick erroneously assigned Claimant impairment ratings for right shoulder range of motion loss and right shoulder crepitation because assignments for both conditions are not in compliance with the *AMA Guides*. Finally, Dr. Gellrick erroneously converted Claimant's right shoulder impairment to a whole person rating because Claimant's shoulder injury was limited to his trapezius area.

20. Dr. Ryan also testified at the hearing in this matter. He maintained that Dr. Gellrick correctly determined that Claimant reached MMI on October 23, 2015 and suffered an 11% whole person impairment as a result of his December 25, 2014 admitted industrial injuries. Dr. Ryan specifically remarked that Dr. Gellrick properly exercised her discretion in assigning Claimant a 5% right upper extremity impairment rating for range of motion deficits.and a 6% right upper extremity rating for crepitus pursuant to §3.1(j) of the *AMA Guides*. He also commented that Claimant exhibited loss of strength, loss of cervical range of motion and limitations in functional ability because of his cervical spine injury. Dr. Ryan summarized that Dr. Gellrick did not make any errors in assigning Claimant's impairment ratings pursuant to the *AMA Guides*.

21. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Gellrick that Claimant reached MMI on October 23, 2015. Initially, Dr. Gellrick agreed with Dr. Niedermeier about Claimant's date of MMI. Dr. Niedermeier explained that Claimant had suffered right shoulder and right ankle injuries, but determined that he reached MMI and released him to full duty employment on October 23, 2015. Furthermore, Dr. Ryan also maintained that Dr. Gellrick correctly determined that Claimant reached MMI on October 23, 2015.

22. In contrast, Dr. Striplin determined that Claimant had reached MMI on September 15, 2015. Dr. Striplin noted that Dr. Gellrick's reliance on Dr. Niedermeier's October 23, 2015 MMI determination was erroneous, Dr. Sauerbrey had determined that Claimant reached MMI on September 15, 2015 absent additional treatment recommendations. Because there were no additional treatment recommendations from doctors Gronseth and Niedermeier, Dr. Striplin reasoned that September 15, 2015 was the appropriate MMI date. However, Dr. Gellrick properly exercised her clinical judgment in ascertaining Claimant's MMI date. Moreover, her determination was consistent with other physicians. Dr. Striplin's disagreement with Dr. Gellrick's MMI determination does not constitute unmistakable evidence free from serious or substantial doubt that she was incorrect.

23. Respondents have failed to produce clear and convincing evidence to overcome Dr. Gellrick's determination that Claimant suffered an 11% whole person impairment as a result of his December 25, 2014 admitted industrial injuries. Relying on the *AMA Guides*, Dr. Gellrick assigned impairment ratings for Claimant's right shoulder, right ankle and cervical spine. Dr. Gellrick assigned Claimant a 5% upper extremity impairment rating for right shoulder range of motion deficits. She also assigned Claimant a 6% right upper extremity impairment rating for crepitus based on §3.1(j) of the *AMA Guides*. The section grants a physician discretion to assign an additional rating "only when other factors have not rated the extent of impairment." Dr. Gellrick thus exercised her discretion pursuant to §3.1(j) to assign the 6% extremity rating for right shoulder crepitus. Combining the range of motion and crepitus ratings yields a total 11% right upper extremity or 7% whole person impairment for Claimant's right shoulder. Dr. Gellrick also assigned Claimant a 5% right lower extremity or 2% whole person impairment rating for ankle range of motion deficits. Finally, relying on the *Impairment Rating Tips*, Dr. Gellrick noted that cervical spine range of motion deficits can be considered in assigning an impairment rating after shoulder surgery. She remarked that Claimant exhibited range of motion deficits with left rotation and left lateral flexion because of tightness in the right trapezius and supraspinatus regions. Dr. Gellrick thus assigned a 2% whole person rating for Claimant's cervical spine. Combining the right shoulder, right ankle and cervical spine impairments yields a total 11% whole person rating.

24. In contrast, Dr. Striplin assigned a 1% upper extremity impairment for Claimant's right shoulder and a 4% lower extremity rating for Claimant's right ankle. In addressing Dr. Gellrick's determination that Claimant warranted a 2% whole person rating for his cervical spine, Dr. Striplin relied on the *Impairment Rating Tips* to conclude that a cervical spine rating was not warranted. He explained that Dr. Gellrick erroneously assigned Claimant a 2% whole person rating for his cervical spine because his rotator cuff pathology was not "unusual or severe" and the pain was localized to the right superior trapezius. Instead, he attributed Claimant's cervical spine range of motion loss to age. Dr. Striplin also disagreed with Dr. Gellrick's assignment of a 6% extremity rating for right shoulder crepitus. He explained that the simultaneous assignment of an impairment rating for right shoulder range of motion loss and right shoulder crepitation is not in compliance with the *AMA Guides*.

25. Although Dr. Striplin disagreed with Dr. Gellrick's impairment determinations, the persuasive testimony of Dr. Ryan supports Dr. Gellrick's conclusion. Dr. Ryan explained that Claimant suffered an 11% whole person impairment as a result of his December 25, 2014 admitted industrial injuries. Dr. Ryan specifically remarked that Dr. Gellrick properly exercised her discretion in assigning Claimant a 5% right upper extremity impairment rating for range of motion deficits and a 6% right upper extremity rating for crepitus pursuant to §3.1(j) of the *AMA Guides*. He also commented that Claimant exhibited loss of strength, loss of cervical range of motion and limitations in functional ability because of his cervical spine injury. Dr. Ryan summarized that Dr. Gellrick did not make any errors in assigning Claimant's impairment ratings pursuant to the *AMA Guides*. Based on Dr. Gellrick's proper exercise of discretion and the persuasive evidence of Dr. Ryan, the record reveals that Dr. Striplin simply disagreed

with Dr. Gellrick's impairment determinations. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Gellrick's 11% whole person impairment determination was incorrect.

26. Claimant has demonstrated that it is more probably true than not that his scheduled 11% right upper extremity impairment rating should be converted to a 7% whole person rating. Dr. Gellrick noted that Claimant exhibited tenderness in the right trapezius area. Claimant also suffered pain in the neck area and range of motion loss as a consequence of his right shoulder injury. Furthermore, Dr. Ryan explained that Dr. Gellrick correctly assigned Claimant a whole person impairment rating for his right shoulder injury. He noted that the *AMA Guides* and Level II accreditation teachings provide that impairments should be combined with ratings from other parts of the body. Dr. Ryan reasoned that Claimant suffered functional impairment not only to the right shoulder but also to the cervical spine. Dr. Gellrick thus properly converted Claimant's 11% right upper extremity rating to a 7% whole person impairment.

27. In contrast, Dr. Striplin remarked that the *AMA Guides* specify that the "upper extremity" consists of the following four parts: the (1) hand; (2) wrist; (3) elbow and (4) shoulder. Moreover, the "shoulder" includes the scapula and clavicle. Dr. Striplin reasoned that any injury to the arm would constitute a scheduled impairment pursuant to the *AMA Guides*. Because Claimant suffered a shoulder injury, he is only entitled to an extremity rating. However, the persuasive reports of Drs. Gellrick and Ryan demonstrate that the situs of Claimant's functional impairment is proximal to, or above, the right arm at the shoulder. Accordingly, Claimant suffered a 7% whole person impairment for his right shoulder injury as a result of his December 25, 2014 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., W.C. No. 4-600-47 (ICAP, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by clear and convincing evidence. *Id.* When the ALJ determines that the DIME

physician’s rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAP, Mar. 19, 2004); *McNulty v. Eastman Kodak Co*., W.C. No. 4-432-104 (ICAP, Sept. 16, 2002);

8. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Gellrick that Claimant reached MMI on October 23, 2015. Initially, Dr. Gellrick agreed with Dr. Niedermeier about Claimant’s date of MMI. Dr. Niedermeier explained that Claimant had suffered right shoulder and right ankle injuries, but determined that he reached MMI and released him to full duty employment on October 23, 2015. Furthermore, Dr. Ryan also maintained that Dr. Gellrick correctly determined that Claimant reached MMI on October 23, 2015.

9. As found, in contrast, Dr. Striplin determined that Claimant had reached MMI on September 15, 2015. Dr. Striplin noted that Dr. Gellrick’s reliance on Dr. Niedermeier’s October 23, 2015 MMI determination was erroneous, Dr. Sauerbrey had determined that Claimant reached MMI on September 15, 2015 absent additional treatment recommendations. Because there were no additional treatment recommendations from doctors Gronseth and Niedermeier, Dr. Striplin reasoned that September 15, 2015 was the appropriate MMI date. However, Dr. Gellrick properly exercised her clinical judgment in ascertaining Claimant’s MMI date. Moreover, her determination was consistent with other physicians. Dr. Striplin’s disagreement with Dr. Gellrick’s MMI determination does not constitute unmistakable evidence free from serious or substantial doubt that she was incorrect.

10. As found, Respondents have failed to produce clear and convincing evidence to overcome Dr. Gellrick’s determination that Claimant suffered an 11% whole person impairment as a result of his December 25, 2014 admitted industrial injuries. Relying on the *AMA Guides*, Dr. Gellrick assigned impairment ratings for Claimant’s right shoulder, right ankle and cervical spine. Dr. Gellrick assigned Claimant a 5% upper extremity impairment rating for right shoulder range of motion deficits. She also assigned Claimant a 6% right upper extremity impairment rating for crepitus based on §3.1(j) of the *AMA Guides*. The section grants a physician discretion to assign an additional rating “only when other factors have not rated the extent of impairment.” Dr. Gellrick thus exercised her discretion pursuant to §3.1(j) to assign the 6% extremity rating for right shoulder crepitus. Combining the range of motion and crepitus ratings yields a total 11% right upper extremity or 7% whole person impairment for Claimant’s right shoulder. Dr. Gellrick also assigned Claimant a 5% right lower extremity or 2% whole person impairment rating for ankle range of motion deficits. Finally, relying on the *Impairment Rating Tips*, Dr. Gellrick noted that cervical spine range of motion deficits can be considered in assigning an impairment rating after shoulder surgery. She remarked that Claimant exhibited range of motion deficits with left rotation and left lateral flexion because of tightness in the right trapezius and supraspinatus regions. Dr. Gellrick thus assigned a 2% whole person rating for Claimant’s cervical spine. Combining the right shoulder, right ankle and cervical spine impairments yields a total 11% whole person rating.

11. As found, in contrast, Dr. Striplin assigned a 1% upper extremity impairment for Claimant's right shoulder and a 4% lower extremity rating for Claimant's right ankle. In addressing Dr. Gellrick's determination that Claimant warranted a 2% whole person rating for his cervical spine, Dr. Striplin relied on the *Impairment Rating Tips* to conclude that a cervical spine rating was not warranted. He explained that Dr. Gellrick erroneously assigned Claimant a 2% whole person rating for his cervical spine because his rotator cuff pathology was not "unusual or severe" and the pain was localized to the right superior trapezius. Instead, he attributed Claimant's cervical spine range of motion loss to age. Dr. Striplin also disagreed with Dr. Gellrick's assignment of a 6% extremity rating for right shoulder crepitus. He explained that the simultaneous assignment of an impairment rating for right shoulder range of motion loss and right shoulder crepitation is not in compliance with the *AMA Guides*.

12. As found, although Dr. Striplin disagreed with Dr. Gellrick's impairment determinations, the persuasive testimony of Dr. Ryan supports Dr. Gellrick's conclusion. Dr. Ryan explained that Claimant suffered an 11% whole person impairment as a result of his December 25, 2014 admitted industrial injuries. Dr. Ryan specifically remarked that Dr. Gellrick properly exercised her discretion in assigning Claimant a 5% right upper extremity impairment rating for range of motion deficits and a 6% right upper extremity rating for crepitus pursuant to §3.1(j) of the *AMA Guides*. He also commented that Claimant exhibited loss of strength, loss of cervical range of motion and limitations in functional ability because of his cervical spine injury. Dr. Ryan summarized that Dr. Gellrick did not make any errors in assigning Claimant's impairment ratings pursuant to the *AMA Guides*. Based on Dr. Gellrick's proper exercise of discretion and the persuasive evidence of Dr. Ryan, the record reveals that Dr. Striplin simply disagreed with Dr. Gellrick's impairment determinations. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Gellrick's 11% whole person impairment determination was incorrect.

Whole Person Conversion

13. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." *See* §8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Maree v. Jefferson County Sheriff's Department*, W.C. No. 4-260-536 (ICAP, Aug. 6, 1998); *Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAP, June 11, 1998).

14. When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

15. Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole person

medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

16. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAP Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *Id.* Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *Eidy v. Pioneer Freightways*, W.C. No. 4-291-940 (ICAP, Aug. 4, 1998).

17. As found, Claimant has demonstrated by a preponderance of the evidence that his scheduled 11% right upper extremity impairment rating should be converted to a 7% whole person rating. Dr. Gellrick noted that Claimant exhibited tenderness in the right trapezius area. Claimant also suffered pain in the neck area and range of motion loss as a consequence of his right shoulder injury. Furthermore, Dr. Ryan explained that Dr. Gellrick correctly assigned Claimant a whole person impairment rating for his right shoulder injury. He noted that the *AMA Guides* and Level II accreditation teachings provide that impairments should be combined with ratings from other parts of the body. Dr. Ryan reasoned that Claimant suffered functional impairment not only to the right shoulder but also to the cervical spine. Dr. Gellrick thus properly converted Claimant's 11% right upper extremity rating to a 7% whole person impairment.

18. As found, in contrast, Dr. Striplin remarked that the *AMA Guides* specify that the "upper extremity" consists of the following four parts: the (1) hand; (2) wrist; (3) elbow and (4) shoulder. Moreover, the "shoulder" includes the scapula and clavicle. Dr. Striplin reasoned that any injury to the arm would constitute a scheduled impairment pursuant to the *AMA Guides*. Because Claimant suffered a shoulder injury, he is only entitled to an extremity rating. However, the persuasive reports of Drs. Gellrick and Ryan demonstrate that the situs of Claimant's functional impairment is proximal to, or above, the right arm at the shoulder. Accordingly, Claimant suffered a 7% whole person impairment for his right shoulder injury as a result of his December 25, 2014 industrial injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant reached MMI on October 23, 2015 and suffered an 11% whole person impairment as a result of his December 25, 2014 admitted industrial injuries.

2. Claimant suffered a 7% whole person impairment for his right shoulder injury as a result of his December 25, 2014 industrial injury.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 23, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Have Respondents proven by a preponderance of the evidence that Claimant "failed to begin" modified duty?

2. Have Respondents proven by a preponderance of the evidence that Claimant was responsible for the termination of his employment?

3. Is Claimant entitled to TTD benefits after February 18, 2016?

4. Is Claimant entitled to TPD benefits after February 18, 2016?

5. Are Respondents entitled to reduce Claimant's temporary disability benefits based on his concurrent receipt of unemployment benefits?

6. Has Claimant received an overpayment of temporary disability benefits?

STIPULATIONS

1. Claimant's average weekly wage is $975.96.

2. Dr. Terrance Lakin is Claimant's ATP.

3. Claimant has received unemployment insurance (UI) benefits in the amount of $308 per week since the second week of June 2016.

4. Claimant has received $6,438.95 in TPD benefits between February 19, 2016, and October 6, 2016.

FINDINGS OF FACT

1. Claimant worked as a truck driver for Employer. On January 21, 2016, Claimant sustained an admitted industrial injury as a result of a rollover truck accident.

2. Claimant injured numerous parts of his body as a result of the accident, including his left shoulder and arm, and his cervical, thoracic, and lumbar spines.

3. Claimant returned to work on January 25, 2016, and worked full-time until January 29, 2016.

4. Employer referred Claimant to Southern Colorado Clinic, where he came under the care of Dr. Terrence Lakin, and PA-C Terry Schwartz. His initial visit took place on February 1, 2016. Claimant was released to modified work with restrictions including no driving trucks or heavy equipment, no lifting greater than 10 pounds from the waist to the shoulder and no use of his arms above shoulder level.

5. The work restrictions prevented Claimant from performing his regular preinjury job. Employer did not immediately offer modified-duty work, so Insurer commenced payment of TTD benefits, effective February 2, 2016.

6. Employer sent Claimant a modified job offer on February 9, 2016, for a job to begin on February 19, 2016. Attached to the job offer was a list of tasks that Dr. Lakin had approved Claimant to perform. Claimant received the modified job offer.

7. Theron "Red" Byram, Employer's risk manager, created the task list. Mr. Byram testified that many tasks involved very little physical effort. Specifically, Mr. Byram described the demands of administrative tasks, such as answering incoming telephone calls, as well as tasks such as picking up trash and working as a runner/ride along and driver companion.

8. Mr. Byram tesitified that administrive tasks such as answering the phone or filing can generally be accomplished using only one hand. Picking up trash also requires the use of only one hand. Mr. Byram testified that an employee could perform this job by attaching a plastic bag to his or her belt and cleaning up trash around Employer's property without bending over using a "grabber." The runner/ride along and driver companion positions involve sitting next to a driver, giving the driver directions, handling the paperwork for the inventory the driver receives, and occasionally directing the driver to reverse the truck safely. Mr. Byram testified that the runner/ride along and driver companion positions require an employee to "speak, get in a truck, and sit."

9. Claimant conceded he believed he could have performed some tasks that were approved by Dr. Lakin on February 19, including training, performing administrative tasks, and working as a runner/ride along.

10. Claimant arrived at Employer's office on February 19 in conformity with the modified job offer. Before beginning any of the tasks on his approved list, Claimant spoke with Reese Kirkland, the Employer's maintenance facility manager. Claimant told Mr. Kirkland he could not work. Mr. Kirkland responded that he had a letter from Claimant's physician that said he could work. Claimant explained that he was unhappy with Dr. Lakin, and had requested a change of physician. Mr. Kirkland then called Mr. Byram on the telephone.

11. Claimant explained that he was suffering from severe neck pain, headaches, and numbness in his arm. Mr. Kirkland stated that "from the looks of him, Red, he's pretty f***ed up." Claimant indicated he was dissatisfied with Dr. Lakin and had requested a change of physician. Claimant stated he had spoken with his claims adjuster about his work status, and "she said it's a state law, I have to show up." Mr.

Byram told Claimant “you have fulfilled your obligation and you’ve shown up. And you’ll probably have to show up on Monday.”

12. After discussing the situation with Claimant and Mr. Kirkland, and learning that Claimant did not appear able to work, Mr. Byram allowed Claimant to leave work for the day. But Mr. Byram told Claimant he would discuss the situation with Insurer and call him back to confirm whether he should report to work on Monday, February 22. Mr. Byram concluded the telephone conversation by telling Claimant, “stay in contact with me and again I’ll be calling you. Please answer your phone and we’ll try to get this all worked out.”

13. After the conversation ended, Claimant went home. Mr. Byram called Claimant later that afternoon. Mr. Byram informed Claimant that until a physician changed his work restrictions, he needed to come to work. Mr. Byram had previously explained Employer’s no call/no show policy to Claimant and told him that if he did not return to work, did not call in, or did not have a note from a doctor, Employer would consider him to have voluntarily abandoned his job. Mr. Byram reiterated that Claimant needed to report to work on Monday, February 22. Mr. Byram told Claimant that if he did not report to work, he would be considered a no call/no show. Mr. Byram testified that during his conversation with Claimant on February 19, he “wanted to make sure he [Claimant] understood that it would be considered a no call/no show and he would be violating his agreement with the Company if he did not come in” to work on February 22.

14. Mr. Byram had the impression Claimant would likely not report to work on February 22 because he did not want to perform tasks such as sweeping floors or cleaning bathrooms. But he hoped that Claimant would return, and told Mr. Kirkland to ensure that administrative or ride along positions were available to Claimant on February 22.

15. Mr. Byram’s statements regarding Employer’s policies is consistent with documents Claimant signed when he was hired. Specifically, Claimant acknowledged in writing that “I understand that if I am given work restrictions resulting from an on-the-job injury, every effort will be made to find me a work position within these restrictions. If I do not accept this position, my benefits may be terminated and it may be grounds for termination.”

16. Despite Employer’s clear admonitions, Claimant did not return to work for Employer after February 19. Mr. Byram left voicemail messages for Claimant on February 22, 23, and 24, but Claimant did not respond. After Claimant failed to report to work or contact Employer for three consecutive days, Employer determined Claimant had voluntarily abandoned his position. Claimant’s employment terminated effective February 24, 2016.

17. Mr. Byram and Mr. Kirkland’s testimony is credible and persuasive.

18. Claimant failed to begin modified employment on February 22, 2016.

19. Claimant was responsible for the termination of his employment effective February 24, 2016.

20. Claimant would have suffered an ongoing partial wage loss even if he had accepted the modified job offer. Claimant's admitted AWW is $975.96, but under the terms of the modified job offer, Claimant would have earned $700 per week ($17.50 per hour x 40 hours). Therefore, Claimant's ongoing wage loss after February 22, 2016 would have been $275.96 per week, regardless of his failure to begin modified employment or the termination of his employment.

21. Claimant has received $308 per week in unemployment compensation benefits since the second week of June 2016. This amount exceeds the TPD benefits to which Claimant was entitled during that same period.

22. Although the parties did not provide the ALJ with evidence to prove the exact date Claimant began receiving UI benefits, the parties stipulated that Claimant has been receiving UI benefits since "the second week of June." The ALJ finds that Claimant's UI benefits commenced June 8, 2016.

23. Respondents are entitled to reduce Claimant's TPD benefits to $0 commencing June 8, 2016, due to the UI offset.

24. The TPD payments Claimant has received since June 8, 2016 constitute an overpayment.

25. Claimant received $3,495.43 in TPD payments between June 8, 2016 and October 6, 2016. Therefore, Claimant has been overpaid by at least $3,495.43.

26. Claimant had approximately $3,300 remaining in his UI benefit account as of the date of the hearing.

CONCLUSIONS OF LAW

A. Did Claimant "fail to begin" modified employment?

Insurer voluntarily commenced payment of TTD benefits on February 2, 2016 under a General Admission of Liability (GAL). Once the respondents admit liability for temporary total disability benefits, payments must continue until terminated in accordance with § 8-42-105(3). *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000). Section 8-42-105(3)(d)(I) provides that TTD benefits terminate when "the attending physician gives the claimant a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment."

The phrase “fails to begin” refers to claimant’s failure to start modified employment in the first instance. *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872 (Colo. App. 2001).

Section 8-42-105(3)(d)(I) does not authorize the termination of temporary disability benefits when an employer offers work the claimant cannot, as a practical matter, accept. *Simington v. Assured Transportation & Delivery*, W.C. No. 4-318-208 (ICAO, Mar. 19, 1998). The legal test is whether the proffered employment is reasonably available to the claimant under an objective standard. The claimant’s self-evaluation of his ability to perform the work is irrelevant to his obligation to “begin” modified work. *Blas Villa v. Harvest Select*, W.C No. 4-694-064 (ICAO, Oct. 3, 2008). Whether the claimant’s refusal to accept an offer of modified employment was reasonable is a factual question for the ALJ.

Here, the first two elements of § 8-42-105(3)(d)(I) are clearly satisfied. Dr. Lakin approved the vast majority of duties on Employer’s Job Tasks list. Employer sent Claimant a formal written offer of modified work via certified mail on February 9, which complies with the requirements of WCRP 6-1(A)(4).

The more challenging question involves whether Claimant “failed to begin” the modified job, and if so, when did such failure occur?

Claimant did not “fail to begin” modified employment on February 19 within the meaning of § 8-42-105(3)(d)(I). Claimant reported to the job site on February 19 as instructed. He told Mr. Kirkland he did not believe he could work on that day due to severe pain related to his industrial injury. Mr. Kirkland and Mr. Byram gave Claimant the benefit of the doubt regarding his inability to work on that day, despite the fact that Dr. Lakin had approved most tasks on the list. Mr. Byram told Claimant “you have fulfilled your obligation and you’ve shown up,” and allowed Claimant to go home. Under these circumstances, Claimant justifiably assumed he did not have to work on February 19. Consequently, Claimant did not “fail to begin” modified employment on February 19.

But Mr. Byram told Claimant he would need to report to work on Monday, February 22, 2016. Mr. Byram advised Claimant that, unless and until his physician changed his work restrictions, Claimant was required to report to work and at least attempt to perform modified duties. The ALJ concludes that Employer changed the start date of the modified job offer from February 19 to February 22, 2016.

Claimant presented no reasonable justification for failing to report to work on February 22, 2016, and at least attempting to perform some modified duties. There is no persuasive evidence that the work offered was unreasonable or otherwise unavailable to Claimant under and objective standard. The ALJ concludes that Claimant “failed to begin” modified employment on February 22, 2016, and Respondents were entitled to terminate his TTD benefits as of that date.

B. Was Claimant “responsible for termination” of his employment?

The termination statutes, § 8-42-103(g) and § 8-42-105(4)(a) C.R.S., provide:

> In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

The employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised “some degree of control over the circumstances which led to the termination.” *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). Failure to take action that a reasonably prudent person would take under the circumstances also satisfies the requirement that the claimant have exercised a degree of control over the circumstances resulting in the termination. *Sparks v. Mattas Marine*, W.C. No. 4-98 to-976-01 (ICAO, Sept. 26, 2016).

Claimant’s employment was terminated on February 24, 2016 after three consecutive “no call/no shows,” in conformity with Employer’s policies. Claimant did not provide any persuasive explanation for why he did not stay in contact with Employer or report to work after February 19, 2016. Claimant clearly sustained a significant injury which impaired his ability to work. But it is equally clear that Claimant could perform some work tasks, and Employer was willing to accommodate his limitations and find some work he could do. Claimant’s failure to respond to Mr. Byram’s voice mail messages or otherwise contact Employer after February 19 justified his termination. The ALJ concludes that Claimant’s inaction was volitional and directly led to his termination. Therefore, Claimant was “responsible for termination of employment.”

C. Is Claimant entitled to TPD benefits commencing February 22, 2016?

The findings that Claimant failed to begin modified employment and was responsible for his termination are not dispositive of eligibility for TPD benefits commencing February 22, 2016. As found, Claimant would have continued to suffer a wage loss even if he had accepted the modified job offer. The modified job would have paid Claimant a maximum of $700 per week, which is less than the admitted AWW of $975.96. Claimant would have lost wages in the amount of $275.96 per week, irrespective of his termination or refusal to commence modified employment.

Claimant’s case is essentially identical to the circumstances presented in *Tarman v. US Transport*, W.C. No. 4-981-955-01 (ICAO, Jun. 2, 2016). In *Tarman*, the claimant had failed to report for a modified job assignment approved by his treating physician. The employer subsequently terminated the claimant after he failed to report to work for four consecutive days. The ALJ determined the claimant had failed to begin modified employment and was responsible for his termination. The ALJ determined that the claimant was barred from receiving TTD or TPD.

The ICAO affirmed the ALJ's decision regarding TTD benefits, but reversed the denial of TPD benefits. The ICAO held that the termination statutes do not preclude an award of TPD benefits when a claimant is terminated from work that would have paid less than the preinjury wage. Under those circumstances, the ICAO held that "this wage loss cannot be construed as the 'resulting wage loss' caused by the claimant's termination from the modified duty job."

The ICAO also held that "failure to begin" a modified duty job does not bar an award of TPD benefits when the modified job would have paid less than the AWW. The ICAO held:

> [T]he employer offered the claimant a modified duty job which promised to pay him $464 per week. Because the claimant declined to accept this job, § 8-42-106(2)(b) operates to reduce the AWW figure used to compute his weekly temporary benefits by this same $464. The claimant then, is eligible for TPD benefits, but they are reduced as if he was being paid for the modified job he turned down. In this case that would be 66 2/3 % of his remaining [] wage loss . . . . This section does not represent a penalty for the claimant's failure to begin an offered modified job. It is simply a mechanism to give the employer credit for the wages the employer offered to pay the claimant when the claimant unjustifiably turns down the offer.

The ALJ can discern no significant difference between Claimant's situation and the facts in *Tarman*. Consequently, the ALJ concludes that Claimant was entitled to TPD benefits in the amount of $183.97[1] per week commencing February 22, 2016 ongoing.

D. Unemployment offset

Section 8-42-103(1)(f) provides:

> In cases where it is determined that unemployment compensation benefits are payable to an employee, compensation for temporary disability shall be reduced, but not below zero, by the amount of unemployment insurance benefits received, unless the unemployment insurance amount has already been reduced by the temporary disability benefit amount.

As found, Claimant has received $308 per week in UI benefits since June 8, 2016. Claimant's weekly UI benefits are greater than his weekly TPD benefits.

[1] $975.96 – $700 = $275.96 x 2/3 = $183.97. This corresponds to Insurer's calculation of TPD reflected on February 22, 2016 GAL.

Accordingly, the statutory UI offset reduces the Claimant's TPD benefit to $0 for all overlapping weeks. Claimant will not be entitled to TPD benefits until his UI benefits terminate or are reduced below the weekly TPD amount.

E. Overpayment

An "overpayment" is defined as "money received by a claimant . . . which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." Section 8-40-201(15.5). Respondents must prove their entitlement to an overpayment by a preponderance of the evidence. *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002).

As found, Claimant's weekly entitlement to TPD benefits was $0 commencing June 8, 2016, due to the UI offset. Claimant has received weekly TPD payments in the amount of $183.97 since June 8. Consequently, Respondents have proven the existence of an overpayment.

Claimant received $3,495.43 in TPD payments from June 8, 2016 through October 6, 2016. Therefore, Claimant has been overpaid by at least $3,495.43. Claimant testified he had approximately $3,300 remaining in his UI account as of the date of the hearing. The ALJ infers that Claimant's UI benefits have not terminated before the date of this Order. Therefore, Claimant was overpaid any TPD payments made since October 6, 2016.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant TTD benefits from February 19, 2016 through February 21, 2016.

2. Claimant's claim for TTD benefits commencing February 22, 2016 is denied and dismissed.

3. Insurer shall pay Claimant TPD benefits in the amount of $183.97 per week, commencing February 22, 2016 through June 7, 2016. Insurer may take credit for any TPD benefits previously paid for that same period.

4. Insurer may reduce Claimant's TPD benefits to $0, effective June 8, 2016, and continuing until Insurer receives documentation that Claimant's UI benefits are exhausted or otherwise reduced below $183.97 per week.

5. After Insurer receives documentation that his UI benefits have been terminated or otherwise reduced below $183.97 per week, Insurer shall reinstate TPD payments, continuing until terminated by law.

6. Insurer may claim an overpayment of $3,495.43 for TPD benefits paid between June 8 and October 6, 2016.

7. Insurer may claim an additional overpayment of any TPD benefits paid after June 6, 2016 for which the UI offset reduces the weekly benefit to $0.

8. Insurer may credit its overpayment against additional indemnity benefits owed to Claimant in this matter.

9. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

10. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 25, 2016

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he suffered a compensable injury arising out of an in the course and scope of his employment with employer.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received from Valley View Hospital and Glenwood Medical Associates was reasonable and necessary to cure and relieve claimant from the effects of the work injury.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received from Valley View Hospital and Glenwood Medical Associates was authorized medical treatment.

FINDINGS OF FACT

1. Claimant has worked for employer for 18 years as a painter. On March 5, 2016 claimant was at a job site working on scaffolding. Claimant had one foot on the ground and one foot on the scaffolding when a coworker moved the scaffolding. As a result, claimant's legs were stretched apart and he felt a tearing in his groin area before falling to the floor.

2. Claimant testified that he did not seek medical treatment at that time and continued working. Claimant reported the March 5, 2016 incident to employer on March 14, 2016 by notifying Enrique Pena, a manager with employer. Claimant testified that employer did not provide him with a list of medical providers at that time. Claimant testified that he continued working from March 5, 2016 through March 22, 2016.

3. On March 22, 2016, claimant sought medical treatment at Valley View Hospital emergency room because he was unable to urinate. As indicated by the medical records, claimant was diagnosed with sepsis stemming from a urinary tract infection caused by E. coli bacteria. Claimant was hospitalized at that time because of the severity of the sepsis. Claimant testified that he believes the groin pull he experienced while at work on March 5, 2016 caused the urinary tract infection and sepsis that required hospitalization on March 22, 2016.

4. As indicated by the medical records, on March 23, 2016 claimant reported to infectious disease specialist Dr. Melanie Gerriora that he had a urethral stricture as a child. At hearing, claimant denied having a prior urethral stricture or any urinary tract issues as a child. The ALJ finds the medical records to be more credible and persuasive than claimant's testimony at hearing regarding this prior medical condition.

5. Claimant met with Cindy Williams, Bookkeeper with employer on March 29, 2016 regarding the March 5, 2016 incident. Employer completed a first report of injury on March 29, 2016 and described claimant's injury as "scaffold moved – stretched groin". Claimant began treating with Dr. Bruce Lippman, Sr., with Glenwood Medical Associates on April 1, 2016.

6. On April 6, 2016, Dr. Albert Hattem reviewed claimant's medical records at the request of respondents. In his report, Dr. Hattem opined that "it is not likely that a stretching injury would cause urinary difficulty and it is not likely that a stretching injury would cause a urinary tract infection."

7. On April 22, 2016, Dr. Kathryn Bird reviewed claimant's medical records at the request of respondents. In her report, Dr. Bird considered claimant's past history of a urethral stricture and opined that it is less likely that claimant's March 5, 2016 injury caused his urinary tract infection.

8. Claimant testified that he developed a urinary tract infection while visiting Mexico in December 2015. Claimant sought medical treatment for the infection in Mexico and was prescribed antibiotics.

9. The ALJ credits the medical records and the opinions of Dr. Hattem and Dr. Bird over the claimant's testimony and finds that claimant's March 5, 2016 groin pull did not cause the urinary tract infection and related sepsis he had as of March 22, 2016.

10. The ALJ credits the medical records and the opinions of Dr. Hattem and Dr. Bird over the claimant's testimony and finds that claimant's March 5, 2016 groin pull did not aggravate, accelerate, or combine with claimant's prior urinary tract issues, (including the infection in Mexico and the urinary stricture) to require medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider,

among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has failed to prove by a preponderance of the evidence that the groin pull he experienced on March 5, 2016 required medical treatment. As found, the opinions of Dr. Hattem and Dr. Bird are credible and persuasive.

5. As found, claimant has failed to prove by a preponderance of the evidence that the groin pull he experienced on March 5, 2016 aggravated, accelerated, or combined with claimant's prior urinary tract issues, (including the infection in Mexico and the urinary stricture) to require medical treatment.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits related to a March 5, 2016 work injury is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 23, 2016

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

➢ Whether claimant has proven by a preponderance of the evidence that she suffered a compensable injury arising out of an in the course and scope of her employment with employer.

➢ If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received from Mountain Family Health Centers and Valley View Hospital was reasonable and necessary to cure and relieve claimant from the effects of the work injury.

➢ If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received from Mountain Family Health Centers and Valley View Hospital was authorized medical treatment.

FINDINGS OF FACT

1. Employer operates a spa in Glenwood Springs, Colorado. Claimant was employed with employer as a massage therapist beginning in September 2015. It is undisputed that on March 30, 2016 claimant was in Las Vegas, Nevada on a non-work related trip. Claimant testified that when she arrived in Las Vegas and was exiting her car, she turned in such a way that she felt a pain from her right gluteus muscle down to her right knee. Claimant described it as "sciatic type" pain. Claimant continued to feel this pain and self treated with ice, heat, stretches, and time in the pool. Despite these efforts, claimant testified that the pain continued and she sought treatment from the hotel's first aide staff.

2. On April 1, 2016 claimant sought treatment at Desert Springs Hospital[1] emergency room ("ER"), a hospital in the Las Vegas area. Claimant testified that she was treated at the ER for sciatic pain and received an injection. Claimant also testified that she was told to continue to self treat with ice, heat, and ibuprofen.

3. Claimant further testified that while she was receiving treatment at the ER, on April 1, 2016 she contacted the employer and spoke with Emily Poindexter (now Emily Kite), the manager of the Yampah Spa. Claimant testified that she notified Ms. Poindexter of her back pain. Claimant testified that Ms. Poindexter informed her that she had a full schedule of massages on April 2, 2016 and was expected to be at work.

4. Claimant began her drive from Las Vegas to Glenwood Springs on April 1, 2016. Claimant testified that it was a nine hour drive and she stopped multiple times

[1] Medical records from Desert Springs Hospital were not offered as evidence in this proceeding.

because of her back pain. Claimant testified that she received a voicemail from Patsy Steele, owner of Yampah Hot Springs and Spa, on April 2, 2016 that instructed claimant to report for her scheduled shift at 2:00 p.m. It is undisputed that claimant reported on time for her scheduled shift on April 2, 2016 and worked approximately five hours.

5. Claimant testified that during her shift on April 2, 2016 her back pain increased while she performed massages. Claimant also testified that while changing sheets on her massage table she bent over and felt a "stab" in her back, experienced a muscle spasm in her right calf and numbness in her right foot. Claimant testified that Ms. Poindexter and Ms. Steele knew that she was in pain, but expected her to keep working. Employer did not provide claimant with a list of medical providers to see for her back pain.

6. Emily Kite (formerly Emily Poindexter) testified at hearing that she first heard from claimant on April 2, 2016, when claimant contacted her to ask if she was scheduled to work on that date. Ms. Kite testified that she informed claimant that she was scheduled to work. Ms. Kite also testified that during that April 2, 2016 phone call claimant told her that she hurt her back in Las Vegas and was driving back to Colorado. Claimant did not inform Ms. Kite that she was not able to work on April 2, 2016.

7. Ms. Kite testified that claimant arrived at work on April 2, 2016 and it was during that shift that claimant informed Ms. Kite that she "twisted" her back while painting at her home. Claimant did not inform Ms. Kite that she believed she was injured at work. Ms. Kite testified that she understood that after April 2, 2016, claimant took four days off from work. When claimant returned to work after that time off and continued to work.

8. Patsy Steele, owner of Yampah Hot Springs and Spa, testified at hearing that she first learned of claimant's back related issues on April 2, 2016 when that information was relayed to her by Ms. Kite. Claimant did not request to take April 2, 2016 off from work. Ms. Steele also testified that claimant did not notify her that she believed she injured her back at work on April 2, 2016, but that she hurt her back in Las Vegas.

9. Ms. Steele also testified that claimant presented a note from her doctor excusing her from work for the four day period of April 4, 2016 through April 7, 2016. Ms. Steele testified that claimant returned to work after April 7, 2016 and continued to work if "she felt she was able to work". At one point in late April 2016, claimant reported to work with a cane. At that time, Ms. Steele informed claimant that she would need a doctor's release to return to work. Ms. Steele testified that claimant's final day of work was April 26, 2016.

10. As indicated by the medical records, claimant sought treatment for her back pain on April 4, 2016 at Valley View Hospital and was treated by Dr. Michael Stahl. As indicated by the medical records, claimant informed Dr. Stahl that she was experiencing back pain. Dr. Stahl's report indicates, in part, that claimant described her injury as: "she went for a trip to Las Vegas last week. She was in a car for a lengthy

period of time. Upon exiting the car she began to notice pain in her right buttock area radiating into her right leg." Claimant also reported to Dr. Stahl the treatment she received while at the ER in Las Vegas. Dr. Stahl also noted that claimant had prior "mild back problems." Dr. Stahl's report makes no mention of an incident at work on April 2, 2016. On the contrary, Dr. Stahl note on April 4, 2016 that claimant "does not recall a specific injury".

11. Dr. Stahl diagnosed right-sided sciatica and administered a Toradol injection and ordered a magnetic resonance image ("MRI") of claimant's lumbar spine. However, Dr. Stahl deferred to claimant's primary care physician Mountain Family Health Centers to confirm pursuing the MRI.

12. On April 13, 13, 2016, claimant sought treatment for her continued back pain from Dr. Sandra Deveny at Mountain Family Health Centers. Dr. Deveny administered a Toradol injection. Claimant did not report to Dr. Deveny that she was injured at work.

13. The claimant underwent the MRI ordered by Dr. Stahl on April 13, 2016 which showed degenerative changes as well as a "broad-based bulge with a right paracental annular tear and an extruded disc" at L5-S1. Based upon the MRI results Dr. Deveny referred claimant to Dr. Wade Ceola for a surgical consultation.

14. Claimant was seen by Dr. Ceola on April 19, 2016 and he recommended surgical intervention, specifically a laminotomy (hemilaminectomy), decompression of nerve roots, partial facectotomy, foramiotomy and/or disc removal.

15. Claimant continued to treat with Mountain Family Health Centers and described to Dr. Annaliese Heckert that the injury to her low back occurred in Las Vegas. On April 20, 2016, claimant reported to Dr. Heckert that she "has been working some still when her pain in manageable . . ." The claimant did not report to Dr. Heckert that she had injured her back at work.

16. Claimant's final day of work for employer was April 26, 2016. Claimant testified that was when she learned the results of the April 13, 2016 MRI that showed a bulging disc.

17. On May 7, 2016, claimant completed a request for short-term disability benefits through AFLAC. On that application, claimant noted that the disability did not occur while performing her job duties. Claimant also notified AFLAC that the disability began when she injured herself in Las Vegas. Claimant's request was denied by AFLAC.

18. On May 16, 2016, claimant submitted a request for a correction to Dr. Stahl's April 4, 2016 ER report. In that request to Dr. Stahl, claimant stated "This is what happened. Drove to Las Vegas, twisted to get out of my car; pop in low back, [i]immediate shooting pain." Claimant testified that she requested this addendum at the direction of a representative from AFLAC. In claimant's request for an addendum, she does not mention any injury or event occurring at work.

19. On May 24, 2016, claimant filed a claim for workers' compensation benefits in which she asserts that continuing to work on April 2, 2016 aggravated the injury she sustained in Las Vegas on March 30, 2016.

20. On May 26, 2016, Dr. Stahl made an addendum to the claimant's chart regarding the cause of her injury and noted "there was a clear instigating event" and that "clearly this emergency room visit was for sciatica which appeared clearly related to the patient's actions upon leaving her car". Dr. Stahl's addendum does not make reference to any injury or event at claimant's workplace.

21. On May 26, 2016, claimant underwent surgery which was performed by Dr. Ceola. The surgery was a right-sided L5-S1 hemilaminectomy and discectomy.

22. Claimant attended an independent medical examination ("IME") on September 13, 2016 with Dr. Lawrence Lesnak. Dr. Lesnak reviewed claimant's medical records, obtained a medical history, performed a physical examination, and a psychological examination of claimant in connection with the IME. Following the IME, Dr. Lesnak issued an IME report and opined that claimant injured her low back while in Las Vegas in late March 2016. Dr. Lesnak also opined that claimant did not suffer a specific injury while at work after the Las Vegas injury, nor did the claimant experience any aggravations as a result of her work activities.

23. The ALJ credits claimant initial description of the injury sustained in Las Vegas. The ALJ also notes claimant's attempt to have Dr. Stahl change his notation dated April 4, 2016 to state that the incident in Las Vegas caused the need for medical treatment. It was only after AFLAC refused to pay claimant short-term disability benefits that claimant began to assert the alleged injury at work. The ALJ finds that claimant's report of an injury occurring at work on April 2, 2016 is inconsistent with the medical records entered into evidence.

24. The ALJ credits the testimony of Ms. Steele and Ms. Kite and finds that claimant did not inform them that she had sustained a work related injury or that she was unable to work on April 2, 2016.

25. The ALJ finds claimant's testimony regarding her communications with employer to be inconsistent and unpersuasive. The ALJ is also not persuaded by claimant's testimony that she felt a pull while changing sheets on April 2, 2016 while at work. Therefore, the ALJ finds claimant did not experience an acute injury or incident requiring medical treatment while at work on April 2, 2016.

26. The ALJ credits the medical records and the opinion of Dr. Lesnak and finds that claimant's injury occurred in Las Vegas and that no aggravation to claimant's low back occurred as the result of her work activities.

27. The ALJ finds that claimant has failed to demonstrate that it is more likely than not that she sustained an injury that arose from her employment with employer. The ALJ finds that the claimant has failed to demonstrated that it is more likely than not

that her work activities aggravated, accelerated, or combined with the March 30, 2016 Las Vegas injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has failed to demonstrate by a preponderance of the evidence that she sustained a work related injury on April 2, 2016. As found, claimant has failed to demonstrate that her work activities aggravated, accelerated, or combined with the March 30, 2016 injury she sustained in Las Vegas. As found, claimant's initial descriptions of the March 30, 2016 injury in Las Vegas are more credible and persuasive that her later description of the injury to include an additional event on April 2, 2016.

ORDER

It is therefore ordered that:

1. Claimant’s claim for benefits related to an April 2, 2016 work injury and industrial aggravation is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 23, 2016

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-002-923-01

ISSUES

- Whether Claimant proved, by a preponderance of the evidence, she sustained an injury in the course and scope of her employment on December 29, 2015.

- Whether Claimant proved, by a preponderance of the evidence, she is entitled to ongoing temporary indemnity benefits since the alleged date of injury.

- Whether medical treatments provided at St. Anthony's Emergency Room are reasonable, necessary, and related to a compensable injury.

STIPULATIONS

1. The parties stipulate Claimant's average weekly wage is $627.19.

2. The parties stipulate if the claim is found compensable, Claimant would be entitled to temporary partial disability benefits from December 29, 2015, ongoing.

3. The parties stipulate if the claim is found compensable, Respondents will pay for all medical care rendered to date by the physicians at HealthOne Occupational Medicine and Rehabilitation, including their referral for an MRI on January 13, 2016 at Health Images North Denver, was reasonable, necessary, related, and authorized.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is 54 years old, and has worked as a deli clerk for Employer for 2 ½ years.

2. Prior to the injury at issue, there are no medical records, testimony from Claimant or any other records which reflect Claimant having any medical symptoms related to headaches, cervical spine and lumbar spine symptoms or complaints.

3. On December 29, 2015 Claimant reported to work as a deli clerk starting her shift at approximately 9:00 a.m.

4. At approximately 11:30 a.m. as Claimant was walking quickly to do some preparation work behind the "prep table," she felt something under her foot, slipped and hit the ground. After Claimant struck the floor she was disoriented and a co-employee called an ambulance which took her to St. Anthony's Hospital North Emergency Department.

5. The ambulance service was provided by the City of Westminster Fire Department. Claimant was billed $511.70 for the service and Respondents have not paid that bill.

6. Medical records of the emergency room visit document that Claimant hit her head without loss of consciousness. This is consistent with the detailed notes taken by the first responder. A CT scan of Claimant's head and cervical spine and x-rays of Claimant's thoracic and lumbar spine all showed no acute findings. Upon discharge, Claimant's doctor advised her that she would "most likely be fairly sore for the next few days." Claimant was prescribed narcotic pain medication. Claimant was diagnosed with a cervical and lumbar sprain or strain, as well as a contusion to the head.

7. After Claimant was taken to the emergency department, Employer had Claimant's co-employees Marsha Kidd and A. Estrada fill out "Witness Statements." Both reported hearing Claimant scream and seeing her on the deli floor. Neither actually saw Claimant slip and fall.

8. On December 30, 2016, the day after her injury, Employer requested Claimant provide a statement of what occurred. Claimant provided a handwritten note which read in pertinent part:

> After about an hour and a half into my shift I walked around the side of the prep table and slipped on a used pair of disposable gloves that were on the floor. I screamed as I fell and landed on my back and bumped my head on the floor. I was dazed and surprised when I open my eyes everybody asked me if I was ok as they stood around me. I told them that I bumped my head and I felt something pop in my back. I was in a lot of pain and they called ambulance.

9. Employer directed Claimant to its designated provider, HealthOne Occupational Medicine and Rehabilitation ("HealthOne"). Pradeep Rai, M.D., evaluated Claimant, noting that Claimant reported slipping on a pair of gloves that was on the floor and falling backwards and hitting her head. Dr. Rai diagnosed Claimant with a lumbar sprain or strain, cervical sprain or strain, and head contusion. His initial physician's report of worker's compensation form indicated that he had not made any referrals.

10. Dr. Rai concluded that Claimant's "objective findings" were consistent with a history of a work-related mechanism of injury. Dr. Rai took Claimant off work from December 30, 2015 to January 4, 2016, and prescribed additional narcotic pain medication.

11. On January 4, 2016, George Kohake, M.D. at HealthOne took over Claimant's care. Dr. Kohake examined Claimant noting pain behaviors, poor effort, non-physiologic responses, and subjective symptoms outweighing objective findings. Dr. Kohake's treatment plan provided for: an MRI of low back to rule out any left-sided HNP; a physiatry referral because of the patient's marked symptom complex; and a PT

referral; and the discontinuation of narcotics. Dr. Kohake continued Claimant's work restriction from January 4, 2016 until January 11, 2016.

12. On January 5, 2016, Respondents filed a "Notice of Contest."

13. On January 11, 2016 Dr. Kohake noted that Claimant had not yet been authorized to see the physiatry referral with "Dr. Chan." Dr. Kohake released Claimant to the administrative/sedentary position that Employer offered Claimant. He continued to refer to Claimant's symptoms as work related.

14. On January 13, 2016 Claimant underwent a lumbar MRI at Health Images North Denver which reflected no acute findings.

15. On January 25, 2016 Claimant returned to Dr. Kohake who noted that Claimant had "no authorization yet on PT from Sedgwick. Although Claimant was working modified, seated duty, she reported her back hurt after 5 to 6 hours. Claimant was walking with a cane, although none had been prescribed, and was "moderately antalgic."

16. In the January 25, 2016 medical record Dr. Kohake noted that he gave Claimant Dr. Chan's phone number with instructions to call him as soon as possible and to pursue therapy.

17. On February 22, 2016 medical record Dr. Kohake noted that Respondent had denied the referrals to physical therapy and physiatry because the claim was contested. Dr. Kohake's note states his agreement with Claimant that she needs physical therapy.

18. On March 7, 2016, Dr. Robert Watson at HealthOne evaluated Claimant. He continued Claimant's assessment of cervical, thoracic, and lumbar strains secondary to her slip and fall at work. And although Dr. Watson assessed Claimant had only experienced strains, he indicated that he anticipated Claimant would have permanent impairment. Dr. Watson's records show he continued his assessment and expectation of permanent impairment through June 6, 2016 – the date of Claimant's last treatment. He noted unchanged symptoms of headaches and neck and back pain despite Claimant having continued medications for months and having begun home exercises that he had prescribed.

19. Claimant credibly testified at hearing she has not had any physical therapy nor has she had a physiatry appointment. Claimant credibly testified she would like those medical modalities.

20. Claimant testified at hearing that she continues to have pain in her lower extremities, which was not present prior to her December 29, 2016 injury.

21. Respondents retained two experts to evaluate Claimant's injury.

- On June 2, 2016, Allison M. Fall, M.D. evaluated Claimant who reported that her symptoms were unchanged since her injury. Claimant also reported experiencing memory loss and concentration problems since the slip and fall. Upon examining Claimant, Dr. Fall noted significant pain behaviors and that there were no objective findings to corroborate Claimant's subjective complaints. In addition, Dr. Fall viewed a surveillance video of Claimant taken on May 26, 2016, in which Claimant is seen, "ambulating quickly, with a normal gait, with no sign of discomfort or hesitation. She is also seen rotating her head freely and using her arms normally." Dr. Fall did not dispute that Claimant had slipped and fallen at work.

- Respondents also retained the services of Kathleen D'Angelo, M.D., who evaluated Claimant on June 13, 2016. In addition, Dr. D'Angelo viewed the surveillance video of Claimant taken on May 26, 2016, which shows Claimant "walking comfortably, occasionally bending and twisting at the trunk without distress as well as ambulating without her cane. She twists her neck from side to side without apparent discomfort. She enters the passenger side of a car with ease and, in total, her motion is fluid and without associated pain behaviors." Dr. D'Angelo opined that Claimant suffered only self-limiting myofascial irritation of her cervical and lumbar regions but that Claimant had reached maximum medical improvement.

22. Dr. Fall testified at hearing consistently with her report. She opined that the medical treatments rendered by HealthOne through approximately February of 2016, stemming from Claimant's December 29, 2015 injury were reasonable, necessary and related based on the symptoms Claimant presented to her medical providers following her fall at work. Dr. Fall opined, however, that Claimant had simply suffered a contusion and with the passage of time Claimant should have completely recovered.

23. The ALJ reviewed the surveillance videotape introduced as Exhibit E and observed Claimant engaging in the actions noted by Drs. Fall and D'Angelo. Claimant's reports to her medical providers and her trial testimony about her current symptoms are inconsistent with her presentation on video and the ALJ's observations of Claimant during the hearing.

24. The ALJ finds it more likely than not that Claimant slipped and fell at work December 29, 2015, requiring medical care. The ALJ is not persuaded by Respondents' witnesses' testimony to the contrary. Thus, the ALJ finds Claimant's claim is compensable.

25. The remaining issues are subject to the parties' stipulations.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address every piece of evidence that might lead to a conflicting conclusion. The ALJ may reject evidence contrary to the findings above as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

In order to recover benefits a claimant must prove that he sustained a compensable injury. A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work-related functions. *Finn v. Indus. Comm'n,* 165 Colo. 106, 437 P.2d 542 (1968). It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

Based on the totality of the evidence, the ALJ concludes that Claimant has sustained her burden of proving by a preponderance of the evidence that she sustained a low back injury, cervical injury, and head contusion on December 29, 2015, and, therefore, Claimant is entitled to benefits under the Workers' Compensation Act..

Once compensability is established, Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. *See Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ, and an ALJ's resolution should not be disturbed if supported by substantial evidence in the record.

Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Respondents designated HealthOne as the authorized provider.

Respondents' own expert concurred that the medical treatment Claimant received from HealthOne was reasonable, necessary and related to Claimant's industrial injury. The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The ALJ concludes the medical care rendered by HealthOne was reasonable, necessary, and related to Claimant's December 29, 2016 injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has established by a preponderance of the evidence that she suffered a compensable injury on December 29, 2015.
2. Per stipulation by the parties, Claimant's average weekly wage is $627.19.
3. Per stipulation by the parties, Claimant would be entitled to temporary partial disability benefits from December 29, 2015, ongoing.
4. Per stipulation by the parties, Respondents shall pay for all medical care rendered to date by the physicians at HealthOne Occupational Medicine and Rehabilitation, including their referral for an MRI on January 13, 2016 at Health Images North Denver, as reasonable, necessary, related, and authorized.
5. Respondents shall pay $511.70 for ambulance services provided on December 29, 2015.
6. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.
7. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 30, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law JUdge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-998-909-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 2, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 11/2/16, Courtroom 1, beginning at 2:00 PM, and ending at 5:00 PM).

Claimant's Exhibits 1 through 13 were admitted into evidence, without objection. Respondents' Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed on November 8, 2016. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Respondents are entitled to withdraw their General Admission of Liability (GAL), dated December 31, 2015 (for medical benefits only) on the allegation that it was improvidently filed, pursuant to § 8-43-201 (1), C.R.S. If Respondents are not allowed to withdraw the GAL, the issue of whether the injections recommended by authorized treating physician

(ATP), Usama Ghazi, M.D., are causally related to the closed-head injury of October 11, 2015 and whether they are reasonably necessary to cure and relieve the effects of the injury.

The Respondents bear the burden of proof, by a preponderance of the evidence on the issue of “withdrawal of admission.” The Claimant bears the burden by preponderant evidence on the issue of medical benefits.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Finding and Stipulations

1. At the commencement of hearing, the parties stipulated that the Claimant’s average weekly wage (AWW) is $600.00; and, that the doctors at Midtown Medical, as well as William D. Boyd, Ph.D., Clinical Psychologist; Dr. Ghazi and Lawrence Lesnak, D.O., and their referrals, were authorized under the Workers’ Compensation Act (Act). The ALJ adopts these stipulations and so finds.

Course and Scope of Employment

2. The Claimant suffered an injury to her forehead, nose, head, and neck which involved bruising, while in the course and scope of employment on October 11, 2015, for which the Respondents filed a GAL on December 31, 2015 (Claimant’s Exhibit 11, bates stamp 30).

3. The injury occurred when the Claimant, while on the clock and in the course and scope of employment, accompanied maintenance supervisor Paul Mikeska (hereinafter “Mikeska”) to the attic of the Trocedero Theater on the Employer’s premises. Both the Claimant and Mikeska initially issued statements that the Claimant was injured when she slipped and fell while on an Employer’s service road. Both the Claimant’s and Mikeska’s made these statements on October 11, 2015 (Claimant’s Exhibit 2, bates stamp 3 and 4).

4. Subsequently, both Mikeska and the Claimant repudiated their statements and admitted that the Claimant’s injury occurred when in the attic at the Trocedero Theater location. The Claimant’s repudiated statement of events was completed by her on October 24, 2015 (Claimant’s Exhibit 2, bates stamp 2).

5. A follow up investigation was performed by the Employer's Director of Operations, Lori Kaupp (hereinafter “Kaupp”), who confirmed these revised circumstances on November 23, 2015. The adjuster’s notes state:

> I just got off the phone with Lori Kaupp at [Employer]. She called me about the notice of rep I just sent over and she caught me up on the story about the beam in the attic of the theater. It seems that was the true accident – Paul (Mikeska) came forward and admitted he fabricated the story about the accident on the access road as [the Claimant] said otherwise her injuries would not be covered. She said she reported it happened on the access road so Paul would not get in trouble. Lori said either way it would be compensable and she is not questioning the accident or the medical aspect now that the story is straightened out. So now I am caught up

(Claimant's Exhibit 2, bates stamp 9).

6. After the completion of its investigation, the Respondents issued the GAL, dated December 31, 2015.

7. After the Employer and the insurance adjuster completed their investigation and made a decision to issue a GAL, the case went to Respondents' counsel and the Respondents thereupon sought to withdraw the GAL and argue that the Claimant was not in the course and scope of employment at the time of her injury because she had deviated from her regular job when she accompanied Mikeska, at his request, to the attic of the Trocedero Theater. Indeed, the ALJ infers and finds that the decision to file a GAL was not based on an improvident grasp of the facts, but it was based on the legal theory of counsel for the Respondents, *i.e.,* "frolic and detour," which was materialized after-the-fact.

8. The Claimant regularly walks the campus of the Employer with work colleague Mikeska, when she is on the clock. Although Mikeska is a maintenance supervisor, he is not the Claimant's supervisor. According to the Claimant, Maintenance Supervisor Mikeska requested that she accompany him to the attic of the Trocedero Theater because Mikeska wanted to show her "something". This later turned out to be the view of the Employer's campus from the Trocedero Theater attic.

9. The Claimant accompanied Mikeska into the Trocedero Theater and proceeded to the top floor. She then followed Mikeska, who ascended a ladder into the attic. Upon entering the attic the Claimant struck her head on a steel beam. This forced her to her knees. Apparently, the Claimant did not actually take in the view before she descended the ladder and left the Trocedero Theater to receive medical care at the Centura Emergency Room to stem her bleeding (Claimant's Exhibit 5).

10. As a regular incident of employment, the Employer's employees enter the Trocedero Theater; and, during her regular work shift the Claimant regularly walks about the Employer's premises premises with Mikeska. Mikeska as a maintenance manager of the Employer and enjoys a superior administrative position to the Claimant.

11. According to the Claimant, the only area she was prohibited from entering on the Employer's campus was under the rides, which were surrounded by fencing, unless she was in the presence of a maintenance manager.

12. There is no persuasive evidence that the Claimant, by agreeing to accompany Mikeska to the Trocedero Theater attic, was engaged in an isolated, or personal interest function, which constituted a substantial deviation from the work which was considered part of her service to the Employer. Also, there was no persuasive evidence that the Claimant was not available to be on call to render emergency response activities in her role as a seasonal paramedic when she accompanied Mikeska.

13. The job description for a seasonal paramedic does not prohibit the Claimant from entering into the attic at the Trocedero Theater. In fact, it is broad enough so that she can perform "other duties as assigned", as well as doing inspections, cleaning the grounds, facilities, work areas and vehicles on the Employer's premises (Claimant's Exhibit 3, bates stamp 12). Further, the physical requirements of this job recognize that the Claimant would be called upon to climb, walk, stand, kneel, crawl, or crouch, all of which she performed when accompanying colleague Mikeska to the Trocerdo Theater. *Id*.

Reasonable Necessity of Injections Recommended by ATP Dr. Ghazi

14. The medical records, admitted into evidence, indicate that the Claimant has been under treatment for the injuries she sustained in the October 11, 2015 incident, since the date of the injury, and ongoing, with authorized medical providers.

15. The medical records establish that the Claimant was referred to ATP Dr. Ghazi by Dr. Reiter, who is an ATP, for consultation regarding cervical pain and headaches arising from cranial trauma (Claimant's Exhibit 11, bates stamp 98).

16. ATP Dr. Ghazi has recommended a series of injections which he believes will be both diagnostic and therapeutic (Claimant's Exhibit 11, bates stamp 102).

17. The Claimant underwent an MRI (magnetic resonance imaging) on September 29, 2016, which established the presence of a disease process at multiple levels of her cervical spine (Claimant's Exhibit 13, bates stamp 116 and 117).

Respondents' Independent Medical Examination (IME) by Eric Ridings, M.D.

18. The Respondents retained Dr. Ridings to perform an IME concerning whether the medical treatment recommended by ATP Dr. Ghazi was reasonably necessary and causally related. Dr. Ridings was of the opinion that ATP Dr. Ghazi's recommended injection treatment was not reasonable, although he did not dispute that

ATP Dr. Ghazi's course of treatment, including injections, did not constitute a breach of the standard of care.

19. Dr. Riding's opinion relied, in part, on the Division's Cervical Spine Medical Treatment Guidelines ("*Guidelines*"), Rule 17. Exhibit 8, p. 48, Section F. d. iii. These *Guidelines* suggest that injections should not be performed at more than two levels. The injections requested by ATP Dr. Ghazi are to be performed at two levels, on two separate occasions (Claimant's Exhibit 11, bates stamp 97). The *Guidelines* also suggest that the injections be preceeded by an MRI. An MRI has been performed.

20. ATP Dr. Ghazi is of the opinion that his recommended injections "should be curative for the majority, if not all of the patient's pain" *Id*., bates stamp 102. He also notes that the injections should have the beneficial effect for not only cervical but thoracic pain. The MRI documents a thoracic component to the Claimant's problems (Claimant's Exhibit 13, bates stamp 117) and the *Guidelines* allow for injections where a patient has "facet findings with a thoracic component." *Guidelines*", Rule 17, Section F, d. iii.

Ultimate Findings

21. The ALJ finds that the opinion of ATP Dr. Ghazi on the reasonableness of his recommended facet injections is credible and supported by both his opinion and, generally, the medical records, including the MRI of September 29, 2016. The ALJ rejects the opinion of Respondents' IME Dr. Ridings on this issue. Dr. Ghazi has had substantially more experience, as an ATP, in dealing with the Claimant's medical case. In so finding, the ALJ recognizes that reasonable medical professionals might disagree on the proper course of treatment. Dr. Ghazi is an ATP and his opinion concerning needed medical care support his recommended treatment, which Dr. Ridings acknowledges is within the standard of care for physicians. Therefore, the ALJ finds Dr. Ghazi's opinion more grounded in the medical record and more credible than IME Dr. Ridings' opinion.

22. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Ghazi and to reject the opinions of IME Dr. Ridings.

23. The Respondents have failed to prove, by preponderant evidence that the GAL, dated December 31, 2015, was improvidently filed. Indeed, the ALJ infers and finds that the filing of the GAL was based on a considered decision by the insurance carrier. Subsequently, counsel for the Respondents advanced a new legal theory of 'frolic and detour," requesting to withdraw the GAL.

24. The Claimant has proven, by a preponderance of the evidence that the treatment recommended by Dr. Ghazi is causally related to the admitted injury of October 11, 2015; and, it is reasonable necessary to cure and relieve the effects of the admitted injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinion of ATP Dr. Ghazi on the reasonableness of his recommended facet injections is more credible than the opinion of IME Dr. Ridings, and it is supported by both his opinion and, generally, the medical records, including the MRI of September 29, 2016. The ALJ rejects the opinion of Respondents' IME Dr. Ridings on this issue. Dr. Ghazi has had substantially more experience, as an ATP, in dealing with the Claimant's medical case. In so finding, the ALJ recognizes that reasonable medical professionals might disagree on the proper course of treatment. Dr. Ghazi is an ATP and his opinion concerning needed medical care support his recommended treatment, which Dr. Ridings acknowledges is within the standard of care for physicians.

Therefore, the ALJ finds Dr. Ghazi's opinion more grounded in the medical record and more credible than IME Dr. Ridings' opinion.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Ghazi and to reject the opinions of IME Dr. Ridings.

Withdrawal of General Admission of Liability

c. Rules 5-9(A) and (b), Workers Compensation Rules of Procedure (WCRP), 7 CCR 1101-3, permits an improvidently filed admission of liability to be prospectively withdrawn in certain limited cases (admission for an erroneous amount of benefits). *See Riley Family Trust v. Hood,* 874 P.2d 503 (Colo. App. 1994). *Also see Leewaye v.Harrison School District #2,* W.C. No. 4-649-073 [Indus. Claim Appeals Office (ICAO), October 13, 2006]. Essentially, the Rule allows prospective withdrawal of an admission based on calculation errors. There is no persuasive authority allowing withdrawal of an admission based on an after-the-fact legal theory which differs from the original legal theory, or lack thereof. As found, Respondents failed to prove that the GAL, dated December 31, 2015, was improvidently filed. Indeed, the ALJ inferred and found that the filing of the GAL was based on a considered decision by the insurance carrier; and subsequently, counsel for the Respondents advanced a new legal theory of 'frolic and detour," requesting to withdraw the GAL.

Medical Treatment

d. An employer must provide an injured employee with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." § 8-42-101(1) (a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. Ct. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). As found, the need for the injections recommended by Dr. Ghazi is causally related to the admitted injury of October 11, 2015; and, reasonably necessary to cure and relieve the effects of that injury.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits beyond those admitted by the insurance carrier. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to the treatment recommended by ATP Dr. Ghazi.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents request to withdraw the General Admission of Liability, dated December 31, 2015, is hereby denied and dismissed. The general Admission of Liability remains in full force and effect.

B. The Respondents shall pay all of the costs of the injections and other treatments for the Claimant's compensable injury of October 11, 2015, recommended by her authorized treating physician, Usama Ghazi, .M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

C. Any and all issues not determined herein are reserved for future decision.

DATED this______day of November 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

I. Whether Respondent has established by clear and convincing evidence that the DIME physician erred in determining that the Claimant is entitled to an impairment rating for his low back as a result of his January 21, 2015 work-related accident.

II. Whether Claimant has proven, by a preponderance of the evidence, that his scheduled impairment for his left shoulder should be converted to a whole person impairment rating.

III. Whether Claimant suffered disfigurement to a part of the body normally exposed to public view entitling him to additional benefits pursuant to C.R.S. §8-42-108(1).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works for Respondent-Employer as a police officer. He sustained an admitted work-related injury to his left shoulder on January 21, 2015. After responding to a traffic accident and while he was returning to his patrol car, Claimant slipped on the icy road and fell backwards, landing on the left side of his back, buttocks and left forearm. Claimant was wearing a duty belt which held a taser, radio, and two ammunition magazines on the left side. Claimant landed directly on these objects and his left forearm when he fell.

2. Claimant testified that he experienced immediate pain in his shoulder and biceps. The pain was so severe that Claimant testified that he became nauseous and had to call for backup to process the accident scene. After another officer arrived, Claimant sat in his cruiser for a while to try and regain his composure. Approximately 20 minutes later, he realized he could not move his left arm so he returned to the police station and subsequently proceeded to Respondents' occupational health clinic approximately an hour and a half after he fell.

3. Claimant came under the care of Dr. Miguel Castrejon and Paulette Miksch, NP, at the City of Colorado Springs Occupational Health Clinic. During his initial evaluation Claimant complained of left arm/shoulder pain. He made no complaints of low back pain. Dr. Castrejon reported that Claimant had mild swelling to the left shoulder and that he had exquisite tenderness with palpation over the left deltoid muscle and anterior shoulder. Claimant was unable to actively move his left arm more

than 20 degrees forward. He was unable to abduct, put his arm behind his back, or perform any other range of motion of the shoulder due to pain. Dr. Castrejon diagnosed Claimant with a left shoulder contusion; rule out tear. Claimant was referred for a shoulder MRI and on January 27, 2015, to Dr. David Weinstein, an orthopedist for evaluation and treatment of his left shoulder.

4. Claimant presented to Dr. Weinstein for orthopedic evaluation on January 28, 2015. Claimant stated he was suffering pain on the anterolateral aspect of his left shoulder, which radiated up into his upper arm. He described it as a constant ache with sharp pain with certain movements. Claimant also reported associated symptoms of left lateral neck pain, elbow achiness and intermittent paresthesias. Dr. Weinstein examined the Claimant and reviewed the January 23, 2015 MRI scan of Claimant's left shoulder. That scan revealed a full thickness supraspinatus tear with subchondral cyst formation of the humeral head. The MRI scan also showed a full thickness subscapularis tear with associated biceps dislocation versus tear. Dr. Weinstein diagnosed Claimant with the following: 1) Left rotator cuff tendinitis with large rotator cuff tear involving the supra and subscapularis tendons; and 2) Left biceps tendinitis with medial dislocation. Dr. Weinstein recommended left arthroscopic subacromial decompression, left arthroscopic rotator cuff repair, and left arthroscopic biceps tenodesis, all of which Claimant underwent on February 19, 2015.

5. Claimant testified that approximately two to three days after his work-related fall, he started having lower and middle back pain and neck pain. He stated that he felt this pain was "just part of taking a fall." Claimant testified that initially he was concentrating on his left shoulder because he could not move his left arm (bicep). His shoulder injury was "extremely painful" and during the time frame addressed above, Claimant was not focused on any other part of his body or any other injury he sustained in his work-related fall. He explained that he was stiff and sore, but felt it (his back injury) was not worth reporting. Claimant testified he felt it was something that he would just get over. He further testified he believed that after his left shoulder surgery, and after he started physical therapy and got out of the sling, his neck and back symptoms would gradually disappear.

6. Following his surgical procedures, Claimant was referred by Dr. Weinstein to Falcon Physical Therapy. Claimant underwent his initial examination with Falcon PT on February 25, 2015. Claimant reported that he was very pleased with his surgery and that his pain was much improved. Claimant commenced a bi-weekly treatment program, and later attended three times a week. At his March 26, 2015 appointment, Claimant reported that his shoulder pain was improving steadily and that he was now able to sleep in his bed rather than his recliner. Claimant remained unable to work.

7. Claimant returned to the City of Colorado Springs Occupational Health Clinic on March 19, 2015, at which time he was examined by Nurse Practitioner Miksch. Claimant reported that he was suffering from continued pain in his shoulder. He also reported pain in his neck and low back pain. When asked at hearing why he waited until March 19, 2015 to report his back injury, Claimant testified that there were two

reasons: 1) March 19th was his scheduled appointment so he waited to report his low back symptoms at this appointment; and, 2) He was going through physical therapy and as his shoulder pain and function improved he noticed that his lower back, middle back and neck pain was not improving. In fact, Claimant testified that this pain was getting worse.

8. Claimant further testified that while he was receiving physical therapy for his shoulder, they started working on his neck and back. He stated that while the neck pain went away, the back pain did not. Ultimately, PA Homberger wrote Claimant a formal prescription for physical therapy to his back, but prior to that, Claimant reported that he complained about pain in his back and the therapist was giving him deep tissue massage and encouraging him to perform exercises for his back.

9. By May 18, 2015, Claimant reported, during a PT appointment, that he was experiencing increased pain in his low back when trying to sleep. He also reported that he felt the back pain was more limiting than his residual shoulder pain. Claimant thereafter attended a follow-up examination with PA Homberger on May 22, 2015. Objective findings on examination revealed mild tenderness to palpation in the mid thoracic spine near the left scapular border as well as the lower lumbar area on the left lateral side. PA Homberger diagnosed Claimant with mild thoracic and lumbar strain and recommended that back stretches be added to his physical therapy treatment plan.

10. At Claimant's May 28, 2015 physical therapy visit, he reportedly told his therapist that the "work comp doctor [was] concerned about back injury sustained during same fall." In a therapy note dated June 9, 2015, it is noted that "[Claimant] will be pursuing a new referral from work comp to include low back which was also injured in the fall." On June 11, 2015, Claimant returned to physical therapy where it was noted,

> "Patient has updated script to include lumbar and thoracic pain after injury sustained in same fall as shoulder injury. Shoulder is progressing well and patient very compliant with home program to date. Patient has returned to light duty but reports increased shoulder pain and discomfort s/p prolonged activity. Back pain appears to be soft tissue in nature, patient denies and (sic) radicular symptoms as pain is focally proximal to left SI joint. Plan going forward is to focus on both shoulder and back." (Claimant's Exhibit 94)

11. The June 9, 2015 prescription from the Occupational Health Clinic is located at page 53 of Claimant's Exhibits. It requests that the physical therapist add treatment for Claimant's thoracic and lumbar spine; soft tissue and modalities. A June 16, 2015 physical therapy note indicates that Claimant received manual therapy, including stretching of the glutes, SKC, and piriformis, as well as soft tissue mobilization to the lower back. At his June 18, 2015 visit, Therapist Schultz reported that Claimant seemed to benefit from soft tissue mobilization to the back. The treatment plan on that

date included managing Claimant's back pain in order for Claimant to return to his prior hobby of weightlifting and cardio exercise without limitation.

12. Claimant underwent follow-up examination with PA Homberger on June 25, 2015. Claimant reported that he continued to feel like he was slowly improving. He was attending physical therapy two times a week and they had added some massage and stretching for Claimant's back. Physical examination of the thoracic/lumbar spine revealed mild tenderness to palpation in the mid thoracic spine near the left scapular border with an area of tightness, as well as the lower lumbar area on the left lateral side with no tightness. PA Homberger's assessment was thoracic and lumbar strain, mild, improved. Physical examination of Claimant by PA Homberger on July 9, 2015 showed that Claimant's thoracic and lumbar spine remained painful, with slight improvement. Claimant's thoracic and lumbar strain was again reported as improved by PA. Homberger on July 23, 2015, although Claimant was feeling some achiness in his back. Claimant stated that he had continued independent exercise and stretching for his back and that his back felt about the same.

13. Claimant was placed at maximum medical improvement on August 12, 2015. He was thereafter seen by Dr. Miguel Castrejon on August 31, 2015 for an assessment of permanent impairment. In a 3-page patient questionnaire form completed by Claimant prior to his examination, the body parts listed as injured included the left shoulder and lower left back. In his pain drawing, Claimant marked sharp pain in his left shoulder and dull pain in his left lower back. Claimant also stated that he had not suffered any previous injuries to his left shoulder or left lower back. In his report of August 31, 2015, Dr. Castrejon assessed an 11% upper extremity rating for Claimant's injured left shoulder. No permanent impairment was assigned for Claimant's left lower back injury and Claimant was released to return to regular duty. Claimant was seen by PA Homberger in follow-up on October 5, 2015 and again on October 30, 2015. PA. Homberger testified that Claimant was still complaining of back pain at the time of these two visits, more than six months following his slip and fall on January 21, 2015.

14. Claimant testified that although he has returned to full duty work, there are some work activities that aggravate his lower back condition, such as getting in and out of the car, carrying the duty belt and wearing his ballistic vest. He testified further that his pain is located on the left side, around the hip area and just below the beltline. Claimant stated that his pain waxes. He works four ten-hour days and by the end of shift on day four, he experiences sharp pain. Once he gets out of his uniform and does his exercises, his pain is reduced to more of a "low ache".

15. Claimant has a prior history of "intermittent" low back pain with associated sciatica which he has successfully treated with the use of Ibuprofen. Claimant was seen by his primary care provider, Dr. Kurt Lesh on February 21, 2014 at which time he reported that he was getting "little episodes" of back pain/sciatica a "couple of times per week." The ALJ finds from this report that as of February 21, 2014, Claimant's low back was probably minimally symptomatic. Claimant returned to see Dr. Lesh on April 8, 2015. At that time, Dr. Lesh noted that Claimant's low back revealed good mobility that

day. Dr. Lesh also noted that Claimant had no tenderness on palpitation, documenting that Claimant was not having any back pain that day. In fact, Dr. Lesh noted that overall; Claimant's back pain has been much less of a problem over the last year or more.

16. On February 8, 2016, Claimant underwent a division-sponsored independent medical examination (DIME) with Dr. John H. Bissell. Work-related injury diagnoses reported by Dr. Bissell included: 1) Left shoulder pain status post arthroscopic subacromial decompression, supraspinatus and subscapularis repairs, biceps tenodesis February 19, 2015; and, 2) Left low back chronic sprain/strain. At the outset of his report, Dr. Bissell noted that the Claimant was in the usual course and scope of his employment as a police officer when he suffered a work-related slip and fall on January 21, 2015, injuring his left shoulder and low back. Dr. Bissell further noted that Claimant's authorized treating provider, Dr. Castrejon, and/or his assign (Physician Assistant), determined that the Claimant's low back condition was claim-related. Dr. Bissell opined that the Claimant's accident justified his injury and his injury justified his current complaints. Dr. Bissell acknowledged that Claimant had a history of right-sided low back pain (not work-related) several years ago, which resolved with treatment. He opined that there were no issues of apportionment because, based upon his evaluation and record review, Dr. Bissell found no prior impairment to Claimant's currently involved body region (left-sided back pain). Claimant was not suffering from low back pain at the time of his work-related accident.

17. Dr. Bissell agreed that Claimant attained maximum medical improvement on August 12, 2015 and he rated the Claimant for his left shoulder and low back conditions. Regarding his left shoulder condition, Dr. Bissell determined Claimant had a 13% upper extremity rating, which he converted to 8% impairment of the whole person. Concerning Claimant's lumbar spine condition, Dr. Bissell assessed 13% whole person impairment. Dr. Bissell thereafter combined Claimant's 13% whole person lumbar spine impairment with the 8% converted whole person left shoulder impairment, to arrive at 20% impairment of the whole person.

18. At the request of counsel for the Claimant, Dr. Jack Rook conducted an independent medical examination of Claimant on April 20, 2016. Dr. Rook noted a history consistent with Claimant's sworn hearing testimony, he summarized Claimant's medical records, and he performed a physical examination. Dr. Rook's physical examination revealed a pleasant, well-developed, well nourished middle-aged man in no apparent distress. Claimant ambulated normally into the examination room and he did not demonstrate any chronic pain behaviors. With the Claimant sitting, straight leg raising test caused low back pain on the left side. With the Claimant supine, straight leg raising test caused low back pain on the left side. It was negative on the right side. There was no hip pain elicited with internal or external rotation of the left hip. Claimant did have limitations of range of motion in all lumbar planes with increased low back pain with forward flexion. Dr. Rook provided the following diagnoses: 1) Chronic left shoulder pain; 2) Chronic left sided low back pain (probable facet mediated pain, rule out component of disc mediated pain); 3) Negative lower extremity neurological examination; and, 4) Sleep disturbance.

19. Dr. Rook further reported that he agreed with Dr. Bissell that Claimant warrants a low back impairment rating as a result of his January 21, 2015 work-related injury. Dr. Rook explained that when Claimant slipped and fell, he landed on the left side of his body. His left low back and hip region landed directly on his duty belt taser and radio. Dr. Rook further explained that initially, Claimant's most severe pain involved his left shoulder as he sustained acute tears to his rotator cuff and biceps tendon when he fell. Within a few days of his occupational injury, Claimant was experiencing left-sided neck pain and mid and low back pain. According to Dr. Rook, "[t]his was consistent with the mechanism of the slip and fall injury." Dr. Rook noted the multiple medical records describing ongoing problems with spinal pain involving the Claimant's mid and lower back. Dr. Rook further noted that it has been more than one year since Claimant's occupational injury and he does qualify for an impairment rating for his lumbar spine. Dr. Rook agreed with the methodology utilized by the DIME examiner, Dr. Bissell, noting that he provided the Claimant with a specific diagnosis lumbar impairment as well as a rating for lumbar range of motion loss, as is mandated by the 3rd Edition of the AMA guidelines and the level II accreditation criteria. Lastly, Dr. Rook stated that although Claimant's left shoulder condition is isolated to the joint, significant functional limitations have resulted from Claimant's left shoulder injury. Dr. Rook noted that Claimant's left shoulder condition has caused functional incapacity which threatens his employability with the police force and he concluded that Claimant has functional impairment associated with his left shoulder, warranting consideration of Claimant's left shoulder injury as part of a whole person impairment rating.

20. At the request of counsel for the Respondent, Claimant underwent an independent medical examination on April 21, 2016 by Dr. Nicholas Olsen. Dr. Olsen testified that it was his opinion that Claimant did not suffer a low back injury during his January 21, 2015 accident. Dr. Olsen explained that he held this opinion based on a combination of two factors: One -- "is the temporal relationship you would expect to have complaints has been disrupted significantly." In other words, it is Dr. Olsen's opinion that if Claimant had hurt his back, "you'd anticipate that [he] would experience symptoms within two or three days." Secondly, Dr. Olsen testified that one of the notes from Claimant's personal care physicians (who treated Claimant for unrelated right-sided back pain) indicated that Claimant was having his best year in a long time which he believed correlated with the time frame when Claimant was not reporting his lower back pain.

21. Paula Homberger testified at the September 14, 2016 hearing in this matter. PA Homberger works for City of Colorado Springs Occupational Health and began treatment of Claimant on May 22, 2015. In her note of that date, PA Homberger indicated that Claimant was experiencing mild tenderness to palpation in the mid-thoracic spine near the left scapular border, as well as the lower lumbar area on the left lateral side. PA Homberger testified that, based on the mechanism of injury that Claimant described to her, she felt that it was probable that Claimant could have injured his lower back during the work-related fall. In fact, PA Homberger referred Claimant to physical therapy based on her belief at that time that Claimant's low back symptoms

were related to his occupational accident. PA Homberger testified that when she saw Claimant, he did not complain of any pain going down his legs, nor did he complain of any pain to the right side of his back. All of his complaints were to the left side.

22. In a letter dated August 8, 2016, PA Homberger wrote that it was her opinion that "…a left mid-low back muscular injury did result from Mr. Konz' 01/21/2015 slip & fall injury. The mechanism of injury & sling use is consistent with his symptoms that I noted on physical examination of muscular tightness & tenderness." PA Homberger further wrote that the records she reviewed from Dr. Lesh indicated that Claimant had a history of right-sided low back pain and sciatica which was under fairly good control. Additionally, Claimant provided PA Homberger with a history of unrelated right low back pain when she first evaluated him in May 2015.

23. It was PA Homberger's testimony that Claimant complained of muscular pain at the time of his October 5, 2015 visit and, although she failed to indicate in her written report whether the pain was on the left or right, Claimant's pain drawing did show left lower back pain. Under additional questioning by counsel for Claimant, Ms. Homberger reiterated her opinion that Claimant did suffer a muscular injury to his left lower back related to his January 21, 2015 fall.

24. The testimony of Dr. Bissell, the DIME physician, was taken by way of deposition on July 26, 2016. Dr. Bissell acknowledged that he was told by the Claimant that he injured his left shoulder and low back during his work-related fall. Dr. Bissell testified that when he spoke with him, Claimant only complained of pain to the left side of his body and he did not complain of any pain on the right side of his body. Dr. Bissell testified that the mechanism of Claimant's fall could have caused not only a shoulder injury, but also a neck and a back injury. It was the testimony of Dr. Bissell that the major focus from the beginning of this claim was Claimant's shoulder. He agreed that the records from Claimant's personal physician did not specify which side of his back was painful previously. Dr. Bissell explained that sciatica generally indicates referred pain into a lower limb with its origin being in the low back. Dr. Bissell also testified that Claimant did not complain of sciatica and that his pain was primarily localized in the left lower back.

25. Although he was presented with inconsistencies in the reports Claimant made to medical personnel regarding his back pain and additional medical records outlining Claimant's prior back symptoms, Dr. Bissell elected, after initially retracting his opinion on causality, to stand by his original opinion that Claimant's low back complaints were causally related to his January 21, 2015 fall. In support of this opinion, Dr. Bissell testified that it is common for patients, who suffer injury to more than one area, to concentrate on the most painful area, in this case the left shoulder. Dr. Bissell then concluded as follows in response to whether the condition of Claimant's low back was related to his fall: "I'm reviewing more of this, and it is within a reasonable degree of medical probability, this low back condition that he's complaining of, is related to the fall. Dr. Bissell explained that '"[i]t's difficult for me to look at the records from Dr. Castrejon, from physical therapy, and what they've documented and then say, yeah, it wasn't

related to the fall." In conclusion, Dr. Bissell testified "…*it's my impression, still at this time, that the back injury is claim related, and that's why I gave him an impairment rating for it.*" (emphasis added)

26. Based upon the evidence presented the ALJ finds the opinions of Dr. Bissell, Dr. Rook and PA Homberger to be more credible and persuasive than the contrary opinions of Dr. Olsen. While the record supports a finding that Claimant suffered periodically from low back pain with associated sciatica, the ALJ is not persuaded that Claimant's current symptoms are related to the natural progression of a pre-existing low back condition. Moreover, despite Dr. Olsen's suggestion, the ALJ is also not convinced that there is an insufficient temporal relationship between the onset of Claimant's low back symptoms and the January 21, 2015 work accident. To the contrary, the ALJ finds, albeit on conflicting evidence, that Claimant's stated reasons for the delay in reporting his symptoms are reasonable and convincing. As Dr. Bissell testified it is common for patients who injure more than one body part to focus their complaints on the most symptomatic area. In this case, Claimant suffered a traumatic injury to the left shoulder sufficient to cause a number of structural components of the joint to fail and tear completely. Palpatory symptoms associated with this injury were described by Dr. Castrejon as "exquisite." Consequently, the ALJ finds it probable that Claimant would focus his attention on his shoulder symptoms to the exclusion of less severe low back pain. More probably than not, Claimant developed low back pain contemporaneously with fall and simply did not report it as securing treatment to relieve the pain in his shoulder was of paramount importance to him.

27. At his DIME with Dr. Bissell, Claimant reported continued achiness and stabbing in the left shoulder and proximal arm. Dr. Rook, after evaluating Claimant, stated that Claimant's left shoulder condition was isolated to the joint. Dr. Olsen testified that, based on the descriptions reported by Dr. Bissell and Dr. Rook, Claimant was not reporting any kind of symptoms that would be considered proximal to the glenohumeral joint. Rather, Claimant's symptoms were limited to the shoulder joint itself, and areas distal to the shoulder joint. As Dr. Olsen testified, the medical records, including the pain diagrams, consistently demonstrate that Claimant has only been reporting symptoms that would extend to the level of glenohumeral joint but not beyond. As a result, Dr. Olsen was of the opinion that, to the extent that Claimant has any functional impairment as a result of this injury to his left shoulder, that functional impairment would not be considered proximal to the glenohumeral joint. Moreover, the ALJ finds from the medical records and Claimant's testimony that the pain in his neck resolved. Consequently, while the record reflect that Claimant has alleged functional limitations in his activities, the ALJ finds Dr. Olsen's opinion that those limitations are fully explained by problems and symptoms distal to the glenohumeral joint to be credible and supported by the record evidence.

28. During hearing, Claimant reviewed various job descriptions found under Respondent's Tab I. He acknowledged that those job descriptions are substantially accurate in terms of the job duties that he is now performing on a full time basis. These job duties include the following:

- Pursue fleeing suspects on foot or in vehicle
- Climb, crawl, jump or run to pursue suspects and protect life
- Push, pull, lift, and/or carry persons or suspects who may be injured or unconscious
- Make forceful arrests

29. Claimant testified that he believes that he is fully capable of performing the essential functions of the job in a safe manner, not only to himself, but to his fellow officers, as well as the public at large.

30. The ALJ accepts, as fact, that Claimant's left shoulder may be achy and painful, especially at the end of a heavy work day. Nonetheless, the totality of the evidence presented, including Claimant's own testimony, persuades the ALJ that his left shoulder condition is not functionally impairing beyond the glenohumeral joint. Accordingly, Claimant has failed to establish that he has a "functional impairment" beyond the schedule which would entitle him to "conversion" of his scheduled impairment to impairment of the whole person.

31. The ALJ finds that as a result of his January 21, 2015 work injury, Claimant has a visible disfigurement to the body consisting of a total of four (4), thin arthroscopic scars located about the left shoulder. These scars are lightly pigmented and vary in length from ½ to ¾ of an inch. Claimant has proven by a preponderance of the evidence that he is entitled to a disfigurement award.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). As found, the ALJ concludes that Claimant's testimony regarding the delay in reporting his back injury is reasonable and persuasive.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As found here, the opinions of Dr. Bissell, Dr. Rook and PA Homberger are more persuasive than the contrary opinions of Dr. Olsen.

Overcoming the DIME Opinion of Dr. Bissell Regarding MMI & Impairment

E. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

G. In this case, Respondent has taken the position that Claimant did not injure his low back during the January 21, 2015 work-related slip and fall because, 1) The delay between Claimant's accident and his formal reporting of the injury to his back disrupted the temporal relationship; 2) Claimant suffered a pre-existing low back condition which was reported to be stable at the time of his accident, and thereafter, by Claimant's personal physician; and 3) Claimant did not suffer six (6) months of medically documented pain and therefore, permanent impairment cannot be assessed under Table 53. In light of these contentions, Respondent argues that Dr. Bissell erred in assigning a permanent impairment for Claimant's low back injury. The ALJ is not persuaded, concluding as follows:

> For purpose of clarity, the time frame that Respondent suggests directs a determination that the back is not related to the January 2015 slip and fall is summarized below.
>
> Claimant slipped and fell on the ice on January 21, 2015 sustaining significant and serious injury to his left shoulder, including a torn biceps tendon and a full thickness tear of the rotator cuff, along with the left side of his neck and back. The pain Claimant was suffering in connection with the tears in his biceps tendon and rotator cuff was so severe, it caused dizziness and nausea. Within an hour-and-a-half, Claimant presented to the City's occupational health clinic where he was referred for an orthopedic evaluation. Claimant was under the care of Dr. David Weinstein by January 28, 2015. Dr. Weinstein is an orthopedic surgeon who was charged with the duty of surgically treating Claimant's shoulder injuries. Claimant underwent surgical intervention on February 19, 2015 and on February 25, 2015, Claimant had his initial physical therapy evaluation. It was during a physical therapy session that Claimant noticed his back pain was not getting any better and had in fact increased. After his February 25, 2015 physical therapy evaluation, Claimant's next scheduled appointment with his primary treating physician was March 19, 2015, at which time he reported that his back pain had increased. Claimant testified that he started having back symptomatology two to three days after the slip and fall, but he thought his symptoms would subside on their own. The onset of Claimant's back symptoms and the type of injury he sustained to his back are consistent with the mechanism of his slip and fall injury according to expert witnesses. Moreover, Claimant's complaint on March 19, 2015 that he noticed increased left-sided back pain is common practice with many patients who injure multiple body parts according to Dr. Bissell. As found above, Claimant's delay in reporting his low back injury/pain is persuasively

explained by the severity of his left shoulder and the course of his recovery/rehab. Here, the ALJ is convinced that Claimant first concentrated on the surgical repair of his left shoulder and once that was stabilized, later reported the injuries he sustained to his low back when symptoms associated with that injury did not dissipate. Consequently, the ALJ is not convinced that the delay in reporting supports a conclusion that there is no temporal relationship between Claimant's low back pain and his January 21, 2015 fall as suggested by Dr. Olsen.

H. It is also noted that contrary to the opinion of Respondent's expert, Dr. Olsen, the evidence does not support a strong inference that Claimant suffered from a symptomatic pre-existing left-sided low back condition prior to his January 21, 2015 work-related slip and fall. In this case, the records demonstrate that Claimant likely experienced prior right sided low back pain and sciatica which has waxed and waned over the years. Claimant treated periodically with Dr. Lesh for his right sided back pain and sciatica but the same did not appear to be symptomatic six months prior to the January 21, 2015 slip and fall nor at his follow-up appointment on April 8, 2016. Concerning the suggestion that Claimant's left sided low back pain emanates from a pre-existing condition, the ALJ agrees with Claimant that Dr. Olsen failed to distinguish between Claimant's prior unrelated right-sided low back pain, with sciatica, and his left-sided, localized low back pain. Rather, Dr. Olsen rendered opinions based on low back pain as a whole. In failing to recognize that there are two separate and distinct conditions at play in this case, the ALJ concludes that Dr. Olsen necessarily reached the wrong conclusions and his testimony regarding the cause of Claimant's low back pain is incomplete and unpursuasive.

I. Finally, the ALJ also concludes that Respondent has failed to overcome Dr. Bissell's assessment of impairment for a specific disorder under Table 53. Specifically, Respondent argues that Claimant did not suffer six months of medically documented pain after his injury and prior to MMI. However, the ALJ finds substantial evidence to support the conclusion that Claimant's low back pain continued well after MMI as documented by Paula Homberger, PA-C, in her notes of October 5, 2015 and October 30, 2015 and Dr. Bissell in his February 8, 2016 DWC IME report. As announced in *McLane Western, Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999), the AMA Guides do not require that the documented pain occur prior to MMI to qualify for a Table 53 impairment rating. Consequently, the ALJ is not persuaded that Dr. Bissell's independent decision to rate Claimant's low back condition pursuant to Table 53 of the AMA Guides, Third Edition (Revised), was highly probably incorrect.

J. To the extent that Dr. Olsen's opinions concerning causality and impairment vary from those expressed by Drs. Bissell and Rook, the ALJ concludes that those divergences constitute a professional difference of opinion. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Consequently, Claimant has failed to prove that Dr. Bissell's opinions regarding the cause of

Claimant's left sided low back pain and entitlement to impairment were highly probably incorrect and the request to set aside his opinions must be denied and dismissed.

Conversion

K. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S*. However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether a claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the shoulder.

L. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. On the other hand, disability or "functional impairment", pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.* Functional impairment need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7,2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Albertson's LLC, W.C. No. 4-692-947 (June 30, 2008*). Accordingly, "referred pain from the primary situs of the industrial injury to another part of the body may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005).* Nonetheless, *s*ymptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Consequently, the ALJ concludes that an injury to the structures which make up the shoulder may or may not result in functional impairment beyond the arm. See generally, *Walker v. Jim Fucco Motor Co, supra; Strauch v. PSL Swedish Healthcare System, supra; Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996)

M. Based upon the evidence presented, the ALJ finds that Claimant has failed to meet his burden to establish that he has sustained functional impairment beyond the arm at the shoulder warranting conversion of his scheduled impairment to impairment of the whole person. At hearing, Claimant testified that following his shoulder injury he experienced neck/upper back pain. However, he testified at hearing that his neck is now pain free. While he testified that he cannot do pushups and continues to have pain in the back of the shoulder and down the biceps, the record evidence establishes that Dr. Castrejon released Claimant to return to full duty work as a police officer with no restrictions. No other physician has placed any restrictions of any kind for Claimant's left shoulder injury. Claimant has in fact returned to his job as a police officer without restrictions and as outlined above, Claimant's job as a police officer requires him to perform certain activities that would require a significant amount of lifting and stress to his left shoulder. Finally, Claimant testified that he is fully capable of performing this job as a police officer in a safe manner, not only to him, but to his fellow officers, as well as the public at large. Consequently, while Claimant may have continued pain to areas of the body beyond the shoulder, i.e. the mid and low back, these symptoms have not caused "functional impairment" or disability. Indeed, Claimant's functional capacity, as demonstrated, substantially erodes his claims that the injury has resulted in a decreased capacity to meet his personal, social or occupational demands. Based upon a totality of the evidence presented, the ALJ concludes that the situs of Claimant's functional impairment does not extend beyond the arm at the shoulder. Consequently, the ALJ concludes that Claimant does not have functional loss that would support an award of permanent disability benefits as a whole person.

Disfigurement

N. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found in this case, Claimant has surgical scarring located on the front, back and side of the left shoulder which alters the natural appearance of skin in these areas. Consequently, the ALJ concludes that Claimant has suffered a visible disfigurement entitling him to additional benefits as provided for by Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the DIME opinion of Dr. Bissell regarding the cause of Claimant's low back pain and permanent impairment is denied and dismissed.

2. Claimant's request for conversion of her scheduled upper extremity impairment to impairment of the whole person is denied and dismissed.

3. Claimant is entitled to disfigurement benefits in the amount of $800.00.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 30, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 3-830-846-10

ISSUES

Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her September 17, 1986 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. Claimant worked for Employer as a Registered Nurse. On September 17, 1986 Claimant suffered admitted industrial injuries during the course and scope of her employment. She was transferring a patient from a cart to a bed and experienced pain down her right leg and into her foot.

2. Claimant subsequently received conservative treatment including physical therapy and medications. However, because of continued symptoms, Claimant underwent several surgical procedures.

3. On May 6, 1994 Claimant underwent an examination with Authorized Treating Physician (ATP) Lynn Parry, M.D. Dr. Parry diagnosed Claimant with an SI joint injury and sciatic nerve contusion. Dr. Parry remarked that Claimant had undergone a right SI joint fusion and a sciatic nerve decompression. She noted that Claimant also underwent a left foot plantar fascial release as a result of her SI joint injury.

4. Dr. Parry recommended continued medical treatment in the form of hydrotherapy, medications and physical therapy. She noted that Claimant was unable to "return to any type of competitive work." Dr. Parry concluded that Claimant reached Maximum Medical Improvement (MMI) on May 6, 1994 with a 64% whole person impairment rating as a result of the September 17, 1986 industrial incident.

5. Claimant received the following medical maintenance medications: (1) Oxycontin 40 mg three times each day; (2) Carisprodal (Soma) at night; (3) Cyclobenzaprine (Flexeril) 10 mg three times each day; (4) Zolpidem (Ambien) 10 mg daily at bedtime; and (5) Baclofen 10 mg three times each day. During the course of her maintenance treatment Claimant has remained on the same medications except she began taking the muscle relaxant Cyclobenzaprine and reduced her dosage of Carisoprodol from four pills to one pill each day.

6. On August 11, 1994 Insurer filed a Final Admission of Liability (FAL) in this matter. The FAL acknowledged Claimant's 64% whole person impairment rating as

determined by Dr. Parry. The FAL also recognized Claimant's Permanent Total Disability (PTD) as determined by vocational expert Anthony F. Manuele, Ed.D. The document noted that Insurer was recovering an overpayment of Temporary Total Disability (TTD) benefits of $5,793.12 at the rate of $50.00 per week because of a Social Security Disability (SSD) offset. The FAL did not specify that Claimant was entitled to receive post-MMI medical maintenance benefits.

7. Claimant subsequently continued to receive medical maintenance treatment from Dr. Parry that included medication management. However, Claimant testified that in the late 1990's she left Colorado and moved to New Hampshire. In November 2002 Dr. Parry noted that she would continue to maintain contact with Claimant via telephone and refill prescriptions as necessary.

8. There is a gap in the medical records from November 2002 until August 2012. In August 2012 Dr. Parry issued a summary of a teleconference with Claimant. She noted that Claimant had suffered a permanent sciatic nerve injury with restrictions in the gluteal muscle region and range of motion limitations of her hip, knee and ankle. Claimant had been receiving medications that had not changed over time including: Baclofen, Ambien, muscle relaxers, Soma and OxyContin. Dr. Parry commented that Claimant was doing "extremely well" with her medication regime and independent exercise program. However, when there was a problem obtaining medications Claimant suffered increased pain and decreased functional ability.

9. After a December 2012 teleconference, Dr. Parry remarked that Claimant had been receiving appropriate medication management through teleconferencing and did not require a secondary Workers' Compensation physician. She commented that Claimant had also been undergoing blood work with her primary care physician Mary-Claire Paicopolis, M.D. Dr. Parry increased Claimant's OxyContin supplies from 90 to 110 per month and provided additional Baclofen.

10. On January 15, 2013 ALJ Felter issued an "Order Approving On-The-Record Stipulation." The Stipulation provided, in relevant part, that Dr. Parry remained Claimant's ATP, the medical treatment provided by Dr. Parry had been reasonable and necessary, teleconferencing with Dr. Parry for medical appointments was reasonable and necessary, a local New Hampshire physician would monitor Claimant's maintenance treatment and Claimant would undergo blood work in New Hampshire for review by Dr. Parry.

11. On August 14, 2014 Barry A. Ogin, M.D. performed a records review of Claimant's case. He addressed Claimant's diagnoses and treatment plan. Dr. Ogin commented that there were significant gaps in the medical records from the late 1990's until 2012. Nevertheless, he concluded that, based on the available medical records, he could draw several conclusions. Initially, Claimant sustained an SI joint injury with SI joint laxity on September 17, 1986. Subsequent records revealed that Claimant suffers from an inherited connective tissue disorder that causes a collagen defect known as "Ehlers-Danlos Syndrome." Notably, Dr. Ogin stated that "it does not appear that [Claimant] had been diagnosed with Ehlers-Danlos Syndrome when she was receiving

treatment from Dr. Parry." Dr. Ogin specifically remarked that the hypermobility Claimant suffered along the SI joint, as well as other musculosketal and neurologic issues, was caused by Ehlers-Danlos Syndrome. He noted that Claimant's poor clinical course following her right SI joint fusion was also likely attributable to her Ehlers-Danlos Syndrome.

12. Dr. Ogin concluded that Claimant's diagnoses include chronic back pain, Ehlers-Danlos Syndrome with multiple joint dislocations, a history of polio, bilateral femur fractures, cervical disc disorder with radiculopathy, peripheral nerve entrapment of the brachial plexus, degenerative joint disease and a lumbar compression fracture. He determined that none of the preceding diagnoses were causally related to Claimant's September 17, 1986 industrial incident. Dr. Ogin explained that conditions "possibly" related to the September 17, 1986 industrial injury included an SI joint strain with laxity that required surgical stabilization, myofascial pain syndrome and sciatic nerve entrapment along the periformis muscle.

13. Dr. Ogin summarized that Claimant's current complaints are not related to her September 17, 1986 industrial incident. He noted that, although the 1986 injury involved the SI joint, Claimant failed to improve and her long-term disability is attributable to Ehlers-Danlos Syndrome. Dr. Ogin determined that Claimant does not require any maintenance medications because the September 17, 1986 industrial incident did not cause her current symptoms.

14. On January 20, 2016 Dr. Parry performed a records review of Claimant's case. She explained that Claimant's initial work injury on September 17, 1986 resulted in SI joint instability and right sciatic nerve irritability. Although Claimant underwent an SI joint fusion and a sciatic nerve exploration, the procedures did not relieve her ongoing severe neurogenic pain. Claimant had persistent right leg pain that culminated in chronic pain syndrome. Dr. Parry detailed that Claimant's persistent sensory right leg pain has centralized and can be triggered by attempts to straighten her right lower extremity. Furthermore, Claimant's right leg positioning has contributed to her postural instability, use of crutches, inability to use a wheelchair and placed excessive burdens on her upper extremities. Because of Claimant's postural difficulties she has suffered numerous falls and a femur fracture.

15. Dr. Parry also addressed Claimant's childhood conditions. She noted that Claimant had suffered polio as a child. Although she required leg bracing, she completely recovered from the condition. Dr. Parry characterized polio as a motor neuron disease that can cause failure at the neuromuscular junction. Moreover, Claimant had been diagnosed with Ehlers-Danlos Syndrome as a child. Dr. Parry explained that Ehlers-Danlos Syndrome is a connective tissue disorder that can cause problems with joint integrity and result in multiple dislocations.

16. Dr. Parry concluded that Claimant's industrial injury was "completely independent" of polio or Ehlers-Danlos Syndrome. She explained that Claimant's "persistent problems do not involve motor pathways or musculoskeletal conditions." Dr. Parry commented that Claimant suffers from "centralized sensory dysethesia" that likely

occurred prior to her surgery and “is mediated through different sensory pathways.” She noted that treatment with anticonvulsants had been unsuccessful. Therefore, Claimant has been taking Baclofen for modulation of central pathway dysfunction. She has also been taking muscle relaxants and pain medications in order to maximize her level of function. Dr. Parry summarized that Claimant’s medication regime is stable.

17. Dr. Parry also testified at the hearing in this matter. She maintained that Claimant requires continued maintenance medications. Addressing the Division of Workers’ Compensation *Medical Treatment Guidelines* (*Guidelines*), Dr. Parry noted that Claimant’s medications have decreased her pain and maximized her level of function. Furthermore, the parties agreed that Claimant has never abused any of her medications. Dr. Parry explained that Claimant’s Ehlers-Danlos Syndrome involves joint hypermobility and is not connected to her industrial cervical spine injury. In contrast, Claimant’s cervical spine injury involves neurogenic pain. Accordingly, Dr. Parry disagreed with Dr. Ogin’s records review and concluded that Claimant requires medical maintenance benefits designed to cure or relieve the effects of her September 17, 1986 industrial injury or prevent further deterioration of her condition.

18. Claimant has established that it is more probably true than not that she is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her September 17, 1986 industrial injury or prevent further deterioration of her condition. Initially, Claimant suffered a permanent sciatic nerve injury with restrictions in the gluteal muscle region and range of motion limitations of her hip, knee and ankle. She has been receiving medications that have changed little over time including: Baclofen, Ambien, muscle relaxers, Soma and OxyContin. By 2012 Dr. Parry commented that Claimant was doing “extremely well” with her medication regime and independent exercise program. However, when there was a problem obtaining medications Claimant suffered increased pain and decreased functional ability.

19. In contrast, Dr. Ogin concluded that Claimant’s diagnoses include chronic back pain, Ehlers-Danlos Syndrome with multiple joint dislocations, a history of polio, bilateral femur fractures, cervical disc disorder with radiculopathy, peripheral nerve entrapment of the brachial plexus, degenerative joint disease and a lumbar compression fracture. He determined that none of the preceding diagnoses were causally related to Claimant’s September 17, 1986 industrial incident. Dr. Ogin explained that conditions “possibly” related to the September 17, 1986 industrial injury included an SI joint strain with laxity that required surgical stabilization, myofascial pain syndrome and sciatic nerve entrapment along the periformis muscle. He summarized that Claimant’s current complaints are not related to her September 17, 1986 industrial incident. Dr. Ogin noted that, although the 1986 injury involved the SI joint, Claimant failed to improve and her long-term disability is attributable to Ehlers-Danlos Syndrome. He summarized that Claimant does not require any maintenance medications because the September 17, 1986 industrial incident did not cause her current symptoms.

20. However, Dr. Parry persuasively explained that Claimant’s industrial injury was “completely independent” of polio or Ehlers-Danlos Syndrome. She specified that

Claimant’s Ehlers-Danlos Syndrome involves joint hypermobility and is not connected to her industrial cervical spine injury. Dr. Parry noted that Claimant’s “persistent problems do not involve motor pathways or musculoskeletal conditions.” Instead, Claimant suffers from “centralized sensory dysethesia” that likely occurred prior to her surgery and “is mediated through different sensory pathways.” Dr. Parry commented that treatment with anticonvulsants had been unsuccessful. Therefore, Claimant has been taking Baclofen for modulation of central pathway dysfunction. She has also been taking muscle relaxants and pain medications in order to improve her function. Dr. Parry summarized that Claimant’s medications have decreased her pain and maximized her level of function.

21. Despite Dr. Ogin’s opinion and Claimant’s long-standing treatment with a number of medications, the record reveals that Claimant is entitled to receive medical maintenance benefits designed to relieve the effects of her September 17, 1986 industrial injury or prevent further deterioration of her condition. As Dr. Parry persuasively noted, Claimant’s industrial injury was “completely independent” of polio or Ehlers-Danlos Syndrome. She explained that Claimant’s “persistent problems do not involve motor pathways or musculoskeletal conditions.” Furthermore, Claimant’s medications have decreased her pain and maximized her level of function pursuant to the *Guidelines*. Accordingly, Claimant shall receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her September 17, 1986 industrial injury or prevent further deterioration of her condition.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. The *Guidelines* provide, in relevant part, that "medications should be clearly linked to improvement of function, not just pain control." WCRP 17, Exhibit 9 (H)(6)(a). Furthermore, the *Guidelines*, specify that, "examples of routine functions include the ability to perform work tasks, drive safely, pay bills or perform math operations, remain alert and upright for 10 hours per day, or participate in normal family and social activities." WCRP 17, Exhibit 9(H)(6)(a).

6. As found, Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her September 17, 1986 industrial injury or prevent further deterioration of her condition. Initially, Claimant suffered a permanent sciatic nerve injury with restrictions in the gluteal muscle region and range of motion limitations of her hip, knee and ankle. She has been receiving medications that have changed little over time including: Baclofen, Ambien, muscle relaxers, Soma and OxyContin. By 2012 Dr. Parry commented that Claimant was doing "extremely well" with her medication regime and independent exercise program. However, when there was a problem obtaining medications Claimant suffered increased pain and decreased functional ability.

7. As found, in contrast, Dr. Ogin concluded that Claimant's diagnoses include chronic back pain, Ehlers-Danlos Syndrome with multiple joint dislocations, a history of polio, bilateral femur fractures, cervical disc disorder with radiculopathy, peripheral nerve entrapment of the brachial plexus, degenerative joint disease and a lumbar compression fracture. He determined that none of the preceding diagnoses were causally related to Claimant's September 17, 1986 industrial incident. Dr. Ogin explained that conditions "possibly" related to the September 17, 1986 industrial injury included an SI joint strain with laxity that required surgical stabilization, myofascial pain syndrome and sciatic nerve entrapment along the periformis muscle. He summarized that Claimant's current complaints are not related to her September 17, 1986 industrial incident. Dr. Ogin noted that, although the 1986 injury involved the SI joint, Claimant

failed to improve and her long-term disability is attributable to Ehlers-Danlos Syndrome. He summarized that Claimant does not require any maintenance medications because the September 17, 1986 industrial incident did not cause her current symptoms.

8. As found, however, Dr. Parry persuasively explained that Claimant's industrial injury was "completely independent" of polio or Ehlers-Danlos Syndrome. She specified that Claimant's Ehlers-Danlos Syndrome involves joint hypermobility and is not connected to her industrial cervical spine injury. Dr. Parry noted that Claimant's "persistent problems do not involve motor pathways or musculoskeletal conditions." Instead, Claimant suffers from "centralized sensory dysethesia" that likely occurred prior to her surgery and "is mediated through different sensory pathways." Dr. Parry commented that treatment with anticonvulsants had been unsuccessful. Therefore, Claimant has been taking Baclofen for modulation of central pathway dysfunction. She has also been taking muscle relaxants and pain medications in order to improve her function. Dr. Parry summarized that Claimant's medications have decreased her pain and maximized her level of function.

9. As found, despite Dr. Ogin's opinion and Claimant's long-standing treatment with a number of medications, the record reveals that Claimant is entitled to receive medical maintenance benefits designed to relieve the effects of her September 17, 1986 industrial injury or prevent further deterioration of her condition. As Dr. Parry persuasively noted, Claimant's industrial injury was "completely independent" of polio or Ehlers-Danlos Syndrome. She explained that Claimant's "persistent problems do not involve motor pathways or musculoskeletal conditions." Furthermore, Claimant's medications have decreased her pain and maximized her level of function pursuant to the *Guidelines*. Accordingly, Claimant shall receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her September 17, 1986 industrial injury or prevent further deterioration of her condition.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant shall receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her September 17, 1986 industrial injury or prevent further deterioration of her condition.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge;

and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 28, 2016.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-985-074-03

ISSUES

1. Whether claimant established by a preponderance of the evidence that he suffered a compensable injury on June 2, 2015.

2. Whether claimant established by a preponderance of the evidence an entitlement to reasonable and necessary medical treatment for a June 2, 2015 injury.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from June 3, 2015 and until terminated by statute, rule, or order.

4. Whether Claimant is responsible for his wage loss.

5. Determination of Claimant's average weekly wage

STIPULATIONS

Treatment that is reasonable and necessary from Peak to Peak Family Medicine, including referrals, is authorized treatment.

FINDINGS OF FACT

1. Employer is a masonry company that works as a subcontractor on commercial building projects. Claimant worked for Employer as a hod carrier in a brick laying team and was so employed for approximately five years.

2. Claimant's duties included cutting cement blocks and bricks with a large commercial wet saw, delivering the bricks to others laying the bricks, and cleaning up the site at the end of his shift.

3. Claimant's regular schedule while working for employer was from 7:00 a.m. to 3:30 p.m. and he worked approximately 40 hours per week depending on job assignments. Claimant's total work hours could vary depending on projects. Wage records show that from January 4, 2015 through June 6, 2015 Claimant earned gross wages of $11,822.62. These earnings were earned during a period of 17 work weeks and amount to an average weekly wage of $695.45. *See* Exhibit E.

4. On June 2, 2015 Claimant was working at a parking garage that was being constructed in Boulder. Employer was a subcontractor at this location for general contractor JE Dunn.

5. On June 2, 2015 Claimant alleges that he suffered an injury at approximately 2:45 p.m. while stepping off a pallet after cutting a block. Claimant alleges that he walked backwards off the pallet, stepped on a different cut block that was lying on the ground, twisted his ankle and heard a pop, then caught himself from falling by leaning on/grabbing onto another pallet standing on its side nearby. Claimant alleges that he also heard a pop in his neck/upper back at that time. Claimant alleges that his ankle felt hot immediately but his testimony and reports on when he first felt pain in his ankle is unclear. Claimant reports not feeling pain in his neck or upper back until the next day.

6. Claimant did not report the alleged injury to Employer. After the alleged injury occurred, Claimant delivered the last cut block to his supervisor Jorge Reyes, cleaned up the jobsite, and secured the equipment for the night. Claimant then left the jobsite, which was in the lower level of an underground commercial garage, by climbing up a ladder to reach the ground level. Claimant walked to his car and drove home. During this time following the alleged injury Claimant did not mention to his supervisor or to any other coworkers or employees who were also cleaning up and leaving the site that he had been injured.

7. Claimant then drove approximately one hour home. Claimant alleges that when he got home at approximately 4:00 p.m. he removed his work boot and noticed that his foot was swollen and purple in color.

8. Employer had a policy that required employees to report injuries as soon as they occurred. The general contractor at the site also had a policy requiring immediate reporting of injuries. Claimant attended mandatory safety training and received a sticker for his hardhat upon completion of the training. Claimant could not be at the jobsite without the sticker on his hardhat verifying that he had attended safety training. The general contractor had an office trailer onsite to handle all reports of injury.

9. Despite having been trained on immediate reporting of any injury and despite knowing there was a trailer onsite to make reports, Claimant did not report the injury before leaving the jobsite to head home.

10. Claimant's reports on how the injury occurred throughout the medical records, first report of injury, and during his testimony are slightly inconsistent.

11. Claimant also is slightly inconsistent in describing when he first felt pain.

12. On the day of the alleged injury, Claimant contacted his supervisor by telephone at approximately 5:30 p.m. to report the injury. Claimant reported that he had hurt his ankle but did not report any injury to his neck or upper back. His supervisor reported the conversation to Kent Jorgensen, Employer/owner, who then called

Claimant. Mr. Jorgensen asked Claimant why he did not report the injury at the jobsite and Claimant did not have a response. Mr. Jorgensen advised Claimant that he could not return to the jobsite until his ankle was okay and advised Claimant to go see a doctor.

13. Mr. Jorgensen did not hear from Claimant again after June 2, 2015. Claimant did not provide or ask Mr. Jorgensen to consider any work restrictions nor did Claimant communicate with Employer after that phone conversation.

14. Approximately two months after the alleged injury and on August 5, 2015 Claimant was evaluated by David Yamamoto, M.D. Dr. Yamamoto noted under history of the injury that Claimant was standing on a step stool, backed up and twisted his foot trying to hang on to something and "something popped" in the neck and upper back. Dr. Yamamoto noted that Claimant did not fall. Claimant reported pain in his neck with numbness into the hands when lying down, numbness in both hands with arms elevated, headaches since the injury, and sleep difficulties. Dr. Yamamoto assessed acute cervical strain, thoracic outlet syndrome, strain of thoracic region, sprain of ankle, and headache. Dr. Yamamoto referred Claimant for an x-ray of the ankle. *See* Exhibit B.

15. On August 7, 2015 Claimant had x-rays taken of his left ankle interpreted by Charles Bowles, M.D. Dr. Bowles noted a history of persistent pain over the lateral malleolus. Dr. Bowles found a tiny avulsion fragment of unknown age lying between the medial malleolus and the medial side of the talus, of dubious clinical significance. Dr. Bowles had no other abnormal findings. *See* Exhibit C.

16. On September 14, 2015 Claimant was evaluated by Dr. Yamamoto. Dr. Yamamoto noted under the history of injury that Claimant was standing on a pallet board, stepped back and tripped on a concrete block, backed, twisted his foot, tried to hang on to something and that "something popped" in his neck and upper back and noted that Claimant did not fall. Dr. Yamamoto continued the assessments from the initial examination and added insomnia. *See* Exhibit B.

17. On November 4, 2015 Claimant underwent an independent medical examination (IME) performed by F. Mark Paz, M.D. Claimant reported that he was cutting cement blocks when he walked backwards off a pallet a few steps and stepped onto a cut piece of block and twisted his left ankle. Claimant reported that he preventing himself from falling to the ground by supporting himself with his left upper extremity on a pallet that was residing on its side upright and that as this happened, his neck popped. Claimant reported that he did not have any immediate symptoms but began to feel symptoms two hours later after he went home. Claimant reported at home he had inflammation in the left ankle localized to the lateral malleolus and that he contacted his employer by phone. Claimant reported that the next day when he woke up he was unable to move the left foot and had pain in his neck, shoulders, and upper back. *See* Exhibit A.

18. Dr. Paz performed a physical examination and medical records review. Dr. Paz also performed a causation analysis. Dr. Paz opined that it was not medically probable that Claimant's left ankle symptoms were causally related to the June 2, 2015 reported date of injury. Dr. Paz opined that the diagnoses documented by Dr. Yamamoto were not supported by objective findings on physical examination and that they were inconsistent with the mechanism of injury. Dr. Paz noted that the onset of left ankle symptoms was not contemporaneous with the exposure and that the history provided by Claimant was incongruent with an acute ankle sprain. Dr. Paz also noted that there was no trauma to Claimant's neck, upper back, head, or upper extremities and that there were no objective findings on physical examination and nor correlating mechanism of injury for those diagnoses. Dr. Paz also opined that it was not medically probable that the symptoms of headache, neck pain, upper back pain, and paresthesias of the upper extremities was causally related to the June 2, 2015 reported date of injury. *See* Ex. A.

19. On November 10, 2015 Claimant was evaluated by Dr. Yamamoto. Dr. Yamamoto noted that Claimant's neck pain remained at a 6-7/10 pain level and that physical therapy had been denied. Dr. Yamamoto continued his assessments and noted that he reviewed the RIME by Dr. Paz. Dr. Yamamoto noted that although Claimant described twisting his ankle when he fell back, Dr. Paz did not think this was consistent with a mechanism that could cause an ankle sprain. Dr. Yamamoto noted that Dr. Paz seemed to think it was important that the initial note said Claimant was standing on a step stool while another says he was standing on a pallet. Dr. Yamamoto noted that had to do with the translator and that when he went over the mechanism again with Claimant he changed it to say pallet instead of step stool. Dr. Yamamoto opined that was trivial and that much of the RIME report from Dr. Paz was trivial reporting. Dr. Yamamoto opined that Claimant tripped and injured himself. *See* Exhibit 5.

20. On November 17, 2015 Claimant was evaluated by Dr. Yamamoto. Dr. Yamamoto continued his assessments and noted that he had reviewed the RIME by Dr. Paz. Dr. Yamamoto disagreed with Dr. Paz regarding whether Claimant was injured at work. Dr. Yamamoto opined that the EAST test was an objective physical test consistent with thoracic outlet syndrome and that Claimant was injured when he caught himself to keep from hitting the ground when he leaned on another pallet board. Dr. Yamamoto disagreed that there were inconsistencies in the history and noted that the interpreter confused a "stool" with a "pallet board." *See* Exhibit 5.

21. On December 1, 2015 Claimant was evaluated by Dr. Yamamoto. Dr. Yamamoto noted no change in neck pain levels, no change in thoracic outlet syndrome symptoms, and that headaches were a little better. Dr. Yamamoto noted that Claimant continued to have pain over the anterolateral aspect of the left ankle. *See* Exhibit 5.

22. On December 14, 2015 and on December 28, 2015 Claimant was evaluated by Dr. Yamamoto. Dr. Yamamoto continued his assessments, noted no improvement in Claimant's symptoms, and continued to disagree with Dr. Paz and

continued to recommend further conservative care including physical therapy. *See* Exhibit 5.

23. On January 15, 2016 Claimant was evaluated by Dr. Yamamoto. Dr. Yamamoto noted that Dr. Paz had stated that he did not properly address causation and that he was unsure what Dr. Paz meant. Dr. Yamamoto opined that Claimant had a clear incident that caused his injuries and that Claimant reported something popped in his neck and that he had mid back pain when he fell and caught himself. Dr. Yamamoto noted Claimant's continued neck pain, thoracic outlet symptoms, and left ankle pain. *See* Exhibit 5.

24. On February 15, 2016 Claimant was evaluated by Dr. Yamamoto. Dr. Yamamoto noted the neck strain pain was about the same, the thoracic outlet syndrome symptoms continued, the headaches were still present, and that Claimant continued to have pain over the anterolateral aspect of the left ankle. Dr. Yamamoto noted that referrals to physical therapy, Dr. Hammerberg, Dr. Graves (chiro), and Dr. Davis (DPM) had all been denied. *See* Exhibit 5.

25. On April 11, 2016 Claimant was evaluated by Dr. Yamamoto. Claimant reported pain levels about the same. Dr. Yamamoto continued his assessments and noted that treatment by Dr. Graves had been authorized. *See* Exhibit 5.

26. On May 11, 2016 Claimant was evaluated by Dr. Yamamoto. Claimant reported having had 8 visits with Dr. Graves and that he had a small amount of improvement. Dr. Yamamoto noted that Claimant had an appointment with Dr. Hammerberg coming up. Dr. Yamamoto continued the assessments. *See* Exhibit 5.

27. On May 18, 2016 Claimant was evaluated by Eric Hammerberg, M.D. Dr. Hammerberg noted that Claimant was referred for neurological evaluation of symptoms that occurred when injured on June 2, 2015 and standing on a pallet board and stepped backwards tripping over a cement block and twisting his left ankle. Dr. Hammerberg noted that the history included that while falling, Claimant grabbed an adjacent pallet and felt something pop in his neck and had continuing pain in his neck and both shoulders, recurring right sided headaches, and both upper extremities becoming numb with prolonged overhead activity. Dr. Hammerberg noted Claimant also had symptoms of a left ankle sprain and that previous examinations demonstrated a positive elevated arm stress test (EAST) and that myogenic bilateral thoracic outlet syndrome was suspected. Dr. Hammerberg provided an impression of cervical strain and bilateral shoulder strain, rule out thoracic outlet syndrome. Dr. Hammerberg agreed that the EAST maneuver was a classic finding in patients with thoracic outlet syndrome and that the differential diagnosis included cervical radiculopathy and carpal tunnel syndrome. Dr. Hammerberg noted that a cervical MRI and EMG studies of both upper extremities would be requested. *See* Exhibit 7.

28. On June 1, 2016 Claimant was evaluated by Dr. Yamamoto. Claimant reported the pain level on his neck was about the same but that he felt like he was moving better after chiropractic treatment. Claimant reported continued thoracic outlet

syndrome symptoms. Claimant reported his left ankle still hurt but was better with chiropractic treatment, stretching, and home exercises. *See* Exhibit 5.

29. On June 17, 2016 Claimant underwent electrodiagnostic studies of both upper extremities performed by Dr. Hammerberg. Dr. Hammerberg opined that the tests were for possible bilateral thoracic outlet syndrome or bilateral carpal tunnel syndrome. After performing testing, Dr. Hammerberg opined that the study was normal. He noted, however, that the normal study did not exclude a clinical diagnosis of bilateral thoracic outlet syndrome. *See* Exhibit 7.

30. On July 12, 2016 Claimant was evaluated by Dr. Yamamoto. Claimant reported his neck pain level was about the same. Dr. Yamamoto noted Claimant had not seen Dr. Graves since June 15th and that Claimant had completed an NCS/EMG with Dr. Hammerberg but that he needed the report. Dr. Yamamoto noted that Claimant felt his left ankle sprain had gotten worse since stopping treatment with Dr. Graves. *See* Exhibit 5.

31. On August 15, 2016 Claimant was evaluated by Dr. Yamamoto. Claimant reported his neck strain pain was the same, that his headaches were better, and that his left ankle sprain had gotten worse since stopping treatment. Dr. Yamamoto noted that he would refer Claimant to Dr. Nick Olsen for evaluation and treatment. Dr. Yamamoto noted that Claimant's NCS/EMG testing was normal. *See* Exhibit 5.

32. On August 23, 2016 Claimant was evaluated by Nicholas Olsen, D.O. Dr. Olsen noted that Claimant had been referred for a physiatric consultation after injuring his neck and upper core while employed with Employer on June 2, 2015. Claimant reported temporary relief while undergoing chiropractic care. Dr. Olsen noted that Claimant had a normal cervical MRI and normal EMG/nerve conduction study. Claimant reported his pain was at 7/10 with symptoms in the neck, right greater than left and pain in the shoulders, right greater than left with some parasthesias in the right upper extremity. Dr. Olsen noted on examination that the neural foraminal compression test was equivocal on the right and left and that Claimant had no focal sites of pain to suggest a true facetogenic pain generator. Dr. Olsen opined that the test was negative for true radicular features. Dr. Olsen assessed cervical sprain/strain, right greater than left shoulder sprain/strain, and consider possible right subacromial bursitis/bicipital tendinitis. Dr. Olsen reassured Claimant that the MRI findings were normal and that there was no indication for interventional procedures or surgery. Dr. Olsen opined that Claimant had some components of possible subacromial bursitis and offered a diagnostic injection that Claimant consented to. The injection was performed on the right shoulder and Claimant noticed no change in pain after 10 minutes and no relief. Dr. Olsen asked Claimant to complete a pain diary for the next 8 hours and to return in one week. *See* Exhibit 8.

33. On August 31, 2016 Claimant was re-evaluated by Dr. Olsen. Dr. Olsen noted that Claimant reported after the injection no immediate relief but reported that the next day his right shoulder felt better and that his pain was 20% improved at this visit. Dr. Olsen explained to Claimant that his response to injection did not make sense as

the duration of lidocaine injected at the prior appointment typically lasts 4-6 hours and that it was unclear why Claimant would report relief on the second day. Dr. Olsen opined that it was doubtful Claimant had significant shoulder impingement given the response to the injection. Dr. Olsen assessed cervical sprain/strain, myofacial pain symptoms status post nondiagnostic right subacromial anesthetic injection. Dr. Olsen reassured Claimant that his right shoulder did not appear to be the primary source of his complaints and that he had a normal cervical spine MRI. Dr. Olsen noted there was evidence of myofascial pain and discussed trigger point injections which Claimant consented to. Dr. Olsen injected Claimant at each trigger point in the mid cervical spine, base of the right levator scapula, and right upper trapezius. Dr. Olsen noted Claimant would monitor his symptoms and return. *See* Exhibit 8.

34. Dr. Paz testified by deposition consistent with his IME report. Dr. Paz noted that Claimant was asked why he was walking backwards off the pallet and that Claimant did not provide any clarification or logical response to the question. Dr. Paz testified that Claimant reported hearing a pop from both his neck and left ankle but no discomfort until two hours later. Dr. Paz opined that the mechanism of injury described by Claimant at the IME would not physiologically cause Claimant's neck to pop and that the mechanism Claimant described did not involve an abrupt stop or violent fall. Dr. Paz opined that based on the mechanism of injury described by Claimant there was nothing to support an acute cervical strain, thoracic outlet syndrome, strain of thoracic region, headaches, or sprain of ankle. Dr. Paz opined that a pop in the ankle would suggest an acute traumatic injury and that acute traumatic injuries do not require two hours to develop symptoms. Dr. Paz opined that if there was a structural lesion associated with the pop the natural history would be to have symptoms contemporaneous with the event. Dr. Paz also opined that neurogenic thoracic outlet syndrome is associated with acute traumatic events such as whiplash and that the mechanism of injury described by Claimant was not consistent with a whiplash type event and that there was no traumatic event to Claimant's neck.

35. Dr. Paz testified that Claimant was either unclear or evasive when collecting history and that Claimant would simply respond after multiple asking of questions that he didn't know how to respond. Dr. Paz disagreed with Dr. Yamamoto's assessment and testified that the lack of symptoms for two hours is inconsistent with the natural history of an acute traumatic sprain to the ankle. Dr. Paz testified that he had no findings on his physical examination regarding the ankle and that the findings of Dr. Yamamoto were lateral and on the anterior fibula ligament and anterior tibia fibula ligament whereas the x-ray performed showed a bulging fragment toward the inner aspect closer to the midline. Dr. Paz testified that the x-rays were inconsistent with an ankle sprain/strain. Dr. Paz testified that Dr. Yamamoto was incorrect that a EAST test was an objective physical test as the EAST test is based on an individual's report of symptoms and is based on an individual's response. Dr. Paz testified that diagnoses have to be supported by objective findings, and have to be consistent with the natural history of the condition. Dr. Paz testified that even if Claimant, based on the mechanism of injury, had an ankle strain, neck strain, or thoracic strain, the strains should have improved even in the absence of treatment. However, Dr. Paz noted that despite the time that had passed, Claimant did not report improvement and that

Claimant had a 10 month old neck sprain without improvement despite not having any structural instability.

36. Dr. Paz's testimony and opinions are found credible and persuasive. The symptoms and lack of objective findings found by medical providers is inconsistent with the mechanisms of injury described by claimant. Physiologically, the mechanism of injury would not have produced the symptoms described by Claimant. There was no violent fall or abrupt stop. There was no physiological reason for neck, upper back or shoulder complaints based on the mechanism of injury described by Claimant and no medical explanation of why there would be a delayed onset of symptoms in the ankle when an acute sprain associated with a pop occurred. Further, Claimant's history and testimony is often unclear and not helpful. Claimant's subjective reports of pain are not found credible or persuasive, are inconsistent with the natural history of a strain/sprain, and his response to injections performed by Dr. Olsen do not make sense.

37. Claimant's testimony is not found credible or persuasive. It is inconsistent that Claimant would have sustained an acute ankle strain and an acute cervical injury where he heard pops and that Claimant would have simply continued to work. Not only did he continue to work but Claimant allegedly cleaned up his jobsite, delivered the last cut to his supervisor, climbed out of the garage by ladder, and walked to his car. He alleges during this time he had no pain. Claimant had the opportunity during this time to report the injury to his supervisor who he directly handed a cut block to and at the trailer where he had been trained to immediately report any injury. It is not logically consistent that with an acute ankle strain or cervical strain Claimant would act in the manner he did immediately following the alleged acute incident by failing to report the injury and by continuing on with his normal duties. Further, as noted by Dr. Olsen, Claimant's response to an injection did not make sense and was also inconsistent.

38. Employer owner Kent Jorgensen testified credibly at hearing. Mr. Jorgensen testified there was no reason to walk backwards off of the pallet after cutting a brick. Further, he testified there was no reason for a scrap brick to be on the ground behind the pallet. Claimant's work station included a bin for scrap brick. Once the cut to the brick is made, the scrap brick is thrown into the bin and the cut brick for laying is walked over to the bricklayer. As a subcontractor on these large commercial projects, Mr. Jorgensen testified that a clean worksite was required and that safety training was mandatory prior to his crew being allowed on site. Employer testified credibly that safety training included how and where to immediately report injuries and that all his employees including Claimant had stickers on their hardhats to verify they attended the training before they were allowed on site.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of

litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish, by a preponderance of the evidence, that he sustained a compensable work injury on June 2, 2015. Claimant's subjective reports of pain or limitations are not found credible, persuasive, or consistent with objective medical testing. Dr. Paz's opinions are found credible and persuasive and his conclusion that it was not medically probable that Claimant sustained a work related injury on June 2, 2015 as described is persuasive. The mechanism of injury combined with the reported onset of pain and the objective testing does not add up or make sense and does not support an acute injury. Based on the inconsistencies in Claimant's reports, the credible testimony of the employer, and the persuasive medical opinions of Dr. Paz, Claimant has failed to demonstrate that his work activities for Employer on June 2, 2015 caused an acute injury or produced the need for medical treatment.

As Claimant failed to establish a compensable injury, the other issues for determination are moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish, by a preponderance of the evidence, that he suffered a compensable injury on June 2, 2015. His claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 11/30/16 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues to be determined by this decision are:

- Whether the Claimant's average weekly wage should be increased to $1101.96 in WC 4-977-328;

- Whether the Respondents properly terminated Claimants temporary total disability benefits in WC 4-977-328 due to her failure to accept a modified duty job;

- Whether Respondents' petition to reopen WC 4-910-076, due to an alleged overpayment of benefits should be granted; and if the claim is reopened, whether the Respondents may recover the overpayment by reducing benefits payable in WC 4-977-328.

- The Claimant asserted that the Final Admission of Liability (FAL) filed in WC 4-910-076 is invalid thus reopening would be unnecessary.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as fact:

1. The Employer operates a hotel and spa located in Avon, Colorado. The Claimant worked at the spa as a massage therapist.

2. On January 28, 2013, the Claimant suffered an admitted work injury to her right wrist (WC 4-910-076). Claimant primarily underwent medical treatment at Vail Valley Medical Center with Lucia London, a certified nurse practitioner. Claimant also had surgery on her right wrist performed by Dr. Viola.

3. On March 24, 2014, Ms. London evaluated the Claimant. She completed a report documenting that Claimant had reached maximum medical improvement with no impairment or restrictions.

4. On April 10, 2014, the Respondents filed a FAL. The FAL states that the date of MMI is March 24, 2014, and in the section entitled "Remarks and basis for permanent disability award" states that, "There are no impairment benefits based on "London's" report of 3-24-14." The report attached to the FAL is the March 24, 2014 report referenced in paragraph 2 above. Ms. London, who is not a physician, signed the

report. There is no indication that an authorized treating physician reviewed Ms. London's recommendations or that the Respondents referred Claimant to a level II accredited physician for an evaluation regarding permanent impairment.

5. On March 9, 2015, the Claimant suffered a work injury to her left shoulder (WC 4-977-328). The Respondents admitted liability, and the Claimant has undergone medical treatment again primarily at Vail Valley Medical Center with Ms. London.

6. Claimant was eventually referred to Dr. William Sterett, an orthopedic surgeon. On July 14, 2015, Dr. Sterett performed surgery on Claimant's left shoulder.

7. On July 31, 2015, Dr. Sterret imposed work restrictions to include no lifting, carrying, pushing, pulling more than 10 pounds; and no overhead lifting. He also indicated Claimant should wear her sling for one more week then wean off of it.

8. On August 20, 2015, the Employer sent a letter to Dr. Sterret asking him to approve a modified duty job as a Spa Front Desk Attendant. The modified duty job was based on the restrictions Dr. Sterret imposed on July 31, 2015, stated in paragraph 7 above. Dr. Sterret signed the letter and dated it August 20, 2015. The Employer indicated that the modified duty job began on August 27, 2015.

9. Dr. Sterret signed the August 20, 2015 letter and faxed it back to the Employer in the morning around 9:48 a.m. according to the date and time fax stamp at the top of the letter.

10. Also on August 20, 2015, the Claimant called Dr. Sterret to report that she had a set back and her pain had increased. She also expressed concern that her work restrictions were not appropriate for her. Dr. Sterret electronically signed the note at 11:41 a.m.

11. The ALJ acknowledges that the timing of the new 2-pound restrictions is suspicious but there was no credible or persuasive evidence, such as testimony from Dr. Sterret or Ms. London, that Claimant deliberately urged either of them to modify her restrictions after receiving the August 20, 2015 modified duty job offer.

12. According to Dr. Sterret's August 28, 2015 record, Claimant recovered from her surgery rather slowly. Dr. Sterret imposed work restrictions to include no lifting of more than 2 pounds more than two times per hour and no overhead lifting or overhead work, and no typing.

13. The Claimant also saw Ms. London on August 28, 2015. Ms. London's report indicates that Claimant was residing in Denver so her family could help her out. Ms. London noted that Claimant's restrictions included lifting, carrying, pushing and pulling 0-2 pounds with her left arm; no reaching away from the body; no overhead work; and no typing.

14. On September 3, 2015, the Insurer had Claimant personally served at her physical therapist's office in Denver with the August 20, 2015 modified duty job offer, which offered her a job at the spa in Avon, Colorado. The letter indicated that Claimant must start the modified duty job three business days from the receipt of the letter which fell on September 8, 2015. The Insurer relied upon the restrictions Dr. Sterret imposed on July 31, 2015.

15. The Claimant testified that she had no notice of the August 20, 2015 modified duty job offer until it was personally served upon her on September 3, 2015, although the original letter states that it was sent by regular mail and e-mail.

16. The Claimant did not report to work to begin the modified duty job on or before September 8, 2015. The Claimant testified that the restrictions included in the September 3, 2015 modified duty job offer were no longer valid. Claimant's attorney sent a letter to Respondents' attorney stating that Claimant had re-located to Denver and that due to the change in work restrictions, the job offer was no longer valid.

17. On September 16, 2015, Dr. Sterret again changed Claimant's restrictions to no lifting more than 15 pounds more than two times per hour, no overhead lifting or work, and no typing. Dr. Sterret also indicated that Claimant should not need to use a sling at work. Dr. Sterret did not examine or talk to the Claimant on September 16, 2015 prior to modifying her work restrictions.

18. The Respondents filed a General Admission of Liability terminating Claimants temporary total disability effective September 8, 2015. Respondents relied upon the modified duty job offer dated August 20, 2015, and personally served upon Claimant on September 3, 2015.

19. On September 28, 2015, Dr. Sterret approved a modified duty job of Spa Desk Agent with no lifting greater than 10 pounds; no overhead lifting; and no typing with her left arm. Dr. Sterret's signature indicated that he agreed the modified duty job was within the restrictions he had imposed on September 16, 2015.

20. On October 2, 2015, the Insurer had Claimant personally served with the modified duty job offer dated September 30, 2015 enclosing Dr. Sterret's approval of the modified duty job dated September 28, 2015. The offer letter informed the Claimant that she must begin the modified duty job three business days after receiving the letter. Three business days after October 2 was October 7, 2015. Claimant did not report for work on October 7, 2015.

21. Paige Bowers, the Employer's spa manager, testified that the Employer closed completely every October for an undetermined amount of time until ski season. The wage records supplied by the Respondents show Claimant earned no wages October 2014.

22. Claimant had moved to Denver just before she had surgery in July 2015 because she needed assistance recovering from the surgery. Claimant owned a home in Eagle County. Claimant testified that she felt she could no longer afford to live there due to her injury.

23. Claimant was undergoing physical therapy in the Denver area but still traveling to Vail for her monthly visits with the physicians. She indicated that she scheduled appointments with both Dr. Sterret and Vail Valley Medical on the same day to avoid multiple trips from Denver to Vail.

24. The Employer has a property in the Denver area that is owned by the same management company. Claimant testified that she would have been able to accept an offer of modified duty employment in the Denver area had it been offered.

25. Dr. Sterett has not yet placed Claimant at maximum medical improvement, and Claimant still has work restrictions.

26. Based on the foregoing, the Respondents have failed to prove that termination of TTD effective September 8, 2015 was appropriate under the circumstances. The ALJ finds that the job offer made on October 2, 2015 was a valid job offer but that Claimant, as a practical matter, could not accept it. As such, Claimant remains entitled to TTD.

27. Respondents admitted for an AWW of $810.04, which the Respondents assert is inflated and Claimant asserts is too low.

28. In WC 4-910-076, the Respondents admitted for an AWW of $1,165.69. Claimant urges the ALJ to adopt a method of calculating her AWW that would result in a wage closer to $1,165.69. Claimant supplied wage information for an eight-week period reflecting that she earned $8,815.71 immediately before her injury. Claimant's wage calculation fails to recognize that the Employer closes for several weeks each year. In 2014, the Employer closed for eight weeks during which Claimant earned no wages. Claimant testified that she had side work during those weeks, but provided absolutely no testimony or evidence as to how much she earned thus that loss of earning capacity cannot be considered.

29. Claimant also alleged that in all of 2014 and 2015 through March 9, 2015, she earned less than normal because she was still recovering from her January 2013 injury. Claimant provided no documentary evidence to support her assertion. The fact that Respondents admitted for a higher wage in WC 4-910-076, does not prove that Claimant's AWW should be higher in her subsequent claim.

30. The Respondents urge the ALJ to calculate Claimant's AWW based on 52 weeks of income Claimant earned from March 8, 2014 through March 6, 2015. Claimant earned a total of $30,781.45 over that period which results in an AWW of $591.95. The ALJ finds that $591.95 more accurately reflects Claimant's average wage.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

WC 4-910-076 –Petition to Reopen and Overpayment

4. Section 8-42-107(8)(b)(I), C.R.S., states that an authorized treating physician shall determine when the injured worker reaches MMI. Because the best indicator of legislative intent is the language of the statute, words and phrases in a statute should be given their plain and ordinary meanings. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The plain language of the statute requires that a *physician* determine when a Claimant as reached MMI. There is no dispute that Lucia London is not a physician. As such, Ms. London had no authority to determine Claimant had reached MMI on March 24, 2014, and she certainly had no authority to determine permanent medical impairment as she is not a physician, and cannot have obtained the appropriate accreditation by the DOWC. Because no authorized treating physician has placed the Claimant at MMI, the FAL is void and the claim remains open. Further, the overpayment issue is rendered moot because without an MMI determination, the ALJ cannot ascertain whether the Respondents overpaid any benefits to the Claimant.

WC 4-977-328 – Termination of TTD

5. Section 8-43-105(3)(d)(I), C.R.S., requires termination of TTD once the attending physician releases a claimant to modified duty work, the employer offers, in writing, the modified duty work and the claimant fails to begin such employment. Section 8-42-105(3), C.R.S., provides that upon the occurrence of one of four enumerated conditions TTD benefits shall cease. The termination of TTD benefits under any one of the four enumerated conditions is mandatory. *Burns v. Robinson Dairy, Inc., 911 P.2d 661* (Colo. App. 1995).

6. WCRP Rule 6 provides that respondent may unilaterally terminate claimant's TTD without a hearing by filing an admission of liability together with a certified letter to the claimant containing both an offer of modified employment, setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions.

7. While it is true that the September 3, 2015 letter was valid and in compliance with DOWC Rule 6 when prepared by the Respondents, it became invalid when Dr. Sterret reduced Claimant's lifting capacity to 2 pounds on August 28, 2015. Dr. Sterret did not review the Spa Desk Agent job with a 2-pound restriction in mind prior to the Employer offering Claimant the modified duty job on September 3, 2015. Thus, the unilateral termination of TTD effective September 8, 2015 was improper.

8. The Respondents made a second modified duty job offer on October 2, 2015, when the Insurer had Claimant personally served with the offer dated September 30, 2015 enclosing Dr. Sterret's approval of the modified duty job dated September 28, 2015. The offer letter informed the Claimant that she must begin the modified duty job three business days after receiving the letter. Three business days after October 2 was October 7. The Claimant failed to report to work on October 7, 2015. The ALJ concludes that the October 2, 2015 modified duty job offer complied with Rule 6 of the DOWC Rules of Procedure.

9. Once it has been established that the offer of modified duty was valid and in compliance with Rule 6 and § 8-42-105(3)(d)(I), C.R.S., the appropriate inquiry is whether the offered employment is reasonably available to the claimant under an objective standard. *See Ragan v. Temp Force*, W.C. No. 4-216-579 (ICAO June 7, 2006).

10. Section 8-42-105(3)(d)(I), C.R.S., creates no explicit prescriptions or restrictions on the type of modified employment Respondents may offer other than that the attending physician must approve the employment. *Ragan, supra.* In *Belanger v. Keystone Resorts*, Inc., W.C. No. 4-250-114 (ICAO October 9, 1997) ICAP acknowledged that the location of a claimant's residence is a relevant factor in determining whether the refusal to accept the employment is reasonable. However, ICAP held that the residence factor must be viewed against the totality of the

circumstances, including the claimant's decision to relocate. *See also Loya v. Colorado Roofing Contractors, Inc*., W.C. No. 4-530-597 (ICAO July 22, 2004).

11. As found above, the modified duty job was not reasonably available to the Claimant. The Claimant moved from Vail to Denver due, in part, to her work injury. She needed assistance recovering from the work-related shoulder surgery and she did not have the financial means to continue residing in Vail. In addition, the imminent closure of the Employer's spa following the modified duty job offer would not provide any impetus to the Claimant to move back to Vail. She would have been unemployed within a week or two of commencing the modified duty job, and unable to perform massages for private clients during the shutdown. Under the circumstances presented, the ALJ concludes that Claimant reasonably refused to accept the modified duty job in Vail. Respondents remain liable for TTD commencing on September 9, 2015 and ongoing until terminated by operation of law.

Average Weekly Wage

12. Section 8-42-102(2), C.R.S., requires a claimant's average weekly wage to be calculated upon the monthly, weekly, hourly, daily or other remuneration the claimant was receiving at the time of the injury. Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

13. The Claimant has presented no persuasive evidence that her AWW should be increased whereas Respondents proved by a preponderance of the evidence that they erroneously admitted for an inflated wage. Over a 52-week period from March 8, 2014 through March 6, 2015, Claimant earned a total of $30,781.45. This period of time includes the weeks when the Employer shuts down and Claimant earns no wages. It also reflects the fairest approximation of Claimant's wage loss given that she did not prove that she earned any additional wages during the Employer's shutdown nor did she prove she was earning less than usual due to her 2013 work injury. Thus, Claimant's AWW is $591.95.

ORDER

It is therefore ordered that:

1. Claim number WC 4-910-076 remains open; and the issue of overpayment in that claim is moot.

2. Respondents' unilateral termination of TTD in WC 4-977-328 is reversed. Claimant remains entitled to TTD commencing on September 9, 2015 and ongoing until terminated by operation of law.

3. Claimant's AWW in WC 4-977-328 is $591.95.

4. The Insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 30, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-944-056-01

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

No further hearings have been held in the above-captioned matter. On March 29, 2016, thwe Claimant filed a “Motion for Clarification of Order Dated 03/21/2016,” which the ALJ will construe as a timely motion for a corrected order. The Claimant was appropriately confused by paragraph B of the Order portion of the decision, which is, in fact, inconsistent with the overall decision. Consequently, the Full Findings of Fact, Conclusions of Law are adopted in full with the exception of the herein below modification of the Order portion. Adoption of the Final Admission **is not appropriate** under the circumstances.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 23, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 2/23/16, Courtroom 1, beginning at 1:30 PM, and ending at 4:15 PM).

This matter involves the Respondents’ request to overcome the Division Independent Medical Examination (DIME) opinion of David Yamamoto, M.D. , an occupational medical physician to the effect that the Claimant had not reached maximum medical improvement (MMI) because the Claimant needed more psychiatric/psychological evaluations and/or treatment. The Respondents assert that the medical report provided by Gary S.Gutterman, M.D., a board certified psychiatrist indicates that the Claimant had achieved MMI on January 25, 2016; and, Dr. Gutterman’s psychiatric opinion establishes by clear and convincing evidence that the DIME opinion of Dr. Yamamoto, with respect to psychiatric MMI has been overcome.

Respondent's Exhibits A through M were admitted into evidence, without objection. Claimant's Exhibits 1 through 15 were admitted into evidence, without objection.

ISSUE

The issue to be determined by this decision concerns whether the psychiatric conclusion made by Dr Gutterman that the Claimant reached MMI on January 25, 2016 establishes clear and convincing evidence to overcome the determination made by DIME Dr. Yamamoto, issued on September 23, 2015, that the Claimant had not achieved MMI regarding psychiatric health associated with the initial injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant was injured on February 22, 2014 when he fell from a ladder during a firefighting training exercise for the Employer fire department. The Claimant fell approximately 14 feet and fractured his right ankle and foot.

2. Ultimately, the Respondents filed a Final Admission of Liability (FAL), dated July 10, 2015, based on the opinion of authorized treating physician (ATP) Dean Plok, M.D., admitting for medical benefits; an average weekly wage (AWW) of $1,500; temporary total disability (TTD) benefits of $437.71 per week (reduced 50%, based on an alleged safety violation) from February 23, 2014 through March 17, 2014; and, scheduled permanent partial disability (PPD) of 21% of the right lower extremity (RLE). There was a timely objection and request for a DIME. Dr. Yamamoto was appointed as the DIME Examiner.

3. On February 24, 2014, Dr. Prok examined the Claimant and concluded that the Claimant had a pain rating of 8/10 in the foot and ankle and Dr. Prok referred the Claimant to Gregg A. Koldenhoven, M.D., of the Front Range Orthopedics and Spine Clinic.

4. Dr. Koldenhoven examined the Claimant on February 24, 2014 and confirmed that the Claimant had foot fractures. Dr. Koldenhoven performed surgery on the Claimant's right foot on March 4, 2014.

5. The Claimant underwent physical therapy and had his pain monitored by Drs. Koldenhoven, Olsen, Aspergren, and Prok between March 2014 and May 2015.

6. Dr. Prok placed the Claimant at MMI on July 1, 2015.

Division Independent Medical Examination (DIME) of David Yamamoto, M.D.

7. Dr. Yamamoto is fully Level 2 Accredited by the Division of Workers' Compensation (DOWC). On September 23, 2015, Dr. Yamamoto performed the DIME and subsequently issued a report. He recommended consideration of a trial of injection therapy for lumbar discomfort. He further found that the Claimant was not at MMI because he was experiencing anxiety, panic attacks, depression, and symptoms of Post Traumatic Stress Disorder (PTDS), all psychiatric/psychological conditions. Dr. Yamamoto recommended that the Claimant undergo a psychological evaluation, counseling, and a referral to a psychiatrist for treatment of anxiety, PTSD, and depression. The Claimant was referred to Dr. Gutterman. The ALJ infers and finds that DIME Dr. Yamamoto considered the Claimant at MMI for all purposes other than psychiatric MMI.

8. On December 17, 2015, Dr. Koldenhoven conducted a physical examination and stated, "Consider MMI at present with potential for further intervention later in life."

9. Dr. Prok issued a report on January 4, 2016, indicating that the Claimant wanted to undergo medial branch block for the bilateral L4-5 and L5-S1 facets to provide short term relief.

10. On January 25, 2016, the Claimant underwent the psychiatric evaluation conducted by Dr. Gutterman, as recommended by DIME Dr. Yamamoto. Dr. Gutterman concluded after 45 minutes of psychiatric consultation that the Claimant had reached MMI from a psychiatric perspective. The ALJ finds that Dr. Gutterman's opinion concerning psychiatric MMI makes it highly probable, unmistakable, and free from serious and substantial doubt that DIME Dr. Yamamoto's opinion that the Claimant is **not** at MMI is in error.

Ultimate Findings

11. Dr. Gutterman's (a board certified psychiatrist) opinion that the Claimant reached MMI on January 25, 2016 is highly persuasive and more credible than DIME Dr. Yamamoto's (an occupational medicine physician) opinion that the Claimant was not at psychiatric MMI. Indeed, Dr. Gutterman's opinion renders it highly probable, unmistakable and free from serious and substantial doubt that Dr. Yamamoto's opinion regarding psychiatric MMI is in error. Dr. Gutterman has more specific psychiatric expertise than Dr. Yamamoto and, Dr. Yamamoto, in fact, referred the Claimant to Dr. Gutterman for a psychiatric opinion, which creates an inference that Dr. Yamamoto would defer to Dr. Gutterman on psychiatric matters..

12. Based on substantial evidence, the ALJ makes a rational choice, between conflicting medical opinions, to accept Dr. Gutterman's opinion and to reject Dr. Yamamoto's opinion with respect to psychiatric MMI.

13. The Respondents have proven, by clear and convincing evidence that Dr. Yamamoto's opinion that the Claimant has not reached psychiatric MMI is in error. Therefore, the Respondents have overcome DIME Dr. Yamamoto's opinion in this regard by clear and convincing evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Gutterman's (a board certified psychiatrist) opinion that the Claimant reached MMI on January 25, 2016 is highly persuasive and more credible than DIME Dr. Yamamoto's, (an occupational medicine physician) opinion that the Claimant was not at psychiatric MMI. Indeed, Dr. Gutterman's opinion renders it highly probable, unmistakable and free from serious and substantial doubt that Dr. Yamamoto's opinion regarding psychiatric MMI is in error. Dr. Gutterman has more specific psychiatric expertise than Dr. Yamamoto and Dr. Yamamoto, in fact, referred the Claimant to Dr. Gutterman for a psychiatric opinion.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between two conflicting medical opinions, the ALJ made a rational choice to accept the opinion of Dr. Gutterman on MMI and to reject the DIME opinion of Dr. Yamamoto in this regard..

Burden of Proof

c. Under Colorado law, a party disputing a DIME physician's opinion must meet the burden of proof by a showing of clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 38 (Colo. App. 2000). "The finding regarding MMI and permanent medical impairment of an DIME examiner in a dispute arising under subparagraph (II) of paragraph (b) may be overcome only by clear and convincing evidence. § 8-42-107(8)(III), C.R.S..

d. Clear and convincing evidence is defined as, "[T]hat evidence which is stronger than a 'preponderance of the evidence,' and which is unmistakable and free from serious or substantial doubt." *People v. Lane*, 581 P.2d 719, 722 (Colo. 1978); *Metro Moving and Storage Co. v. Gussert, supra*; *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). a DIME physician's finding may not be overcome unless the evidence establisheS that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995). As found, it has been established that it is highly probable, unmistakable and rfree from serious and substantial doubt that DIME Dr. Yamamoto's opinion that the Claimant has not reached psychiatric MMI is in error.

e. There is no dispute that the Claimant reached MMI on all non-mental health injuries, however, there is but one MMI date for all injuries resulting from a specific compensable event, and psychiatric MMI is a component thereof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant reached maximum medical improvement on January 26, 2016 on all issues as a result of the opinion of Division Independent Medical Examination David Yamamoto, M.D. having been overcome by clear and convincing evidence, by virtue of the opinion of psychiatrist, Gary S. Gutterman, M.D.

B. Any and all issues, including the issues of permanent impairment and safety violation, are reserved for a future hearing.

DATED this _____ day of March 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Corrected Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

Wc.cord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-499-370-07

SUPPLEMENTAL ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

No further hearings have been held in the above-captioned matter. On December 5, 2015, Full Findings of fact, Conclusions of Law and Order was mailed to the parties. On December 8, 2015, the Respondents mailed their Petition to Review and Request for Transcript. On January 12, 2016, a written, verbatim transcript of the November 17, 2015 hearing was lodged with the Office of Administrative Courts. On February 3, 2016, the Respondents filed their Brief in Support of Petition to Review. On February 23, 2016, the Claimant filed her Brief in Opposition to Petition to Review, at which time the matter was ready for the issuance of a Supplemental Order. Administrative Law Judge (ALJ) Edwin L. Felter, Jr. hereby issues the following Supplemental Order.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 17, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 11/17/15, Courtroom 4, beginning at 1:34 PM, and ending at 3:50 PM).

Claimant's Exhibits 1 through 12 were admitted into evidence, without objection. Respondents' Exhibits A through N were admitted into evidence, without objection. A transcript of the evidentiary deposition of Guadalupe Ledezma, Ph.D., clinical psychologist, was received in lieu of Dr. Ledezma's testimony at hearing. A transcript of the November 17, 2015 hearing was lodged with the Office of Administrative Courts on January 12, 2016.

At the commencement of the hearing, the Claimant withdrew the issue of medical maintenance benefits and penalties against the Respondents. Also, the parties agreed to strike the Final Admission of Liability (FAL), dated November 4, 2011. The parties further stipulated to reasonably necessary and causally related medical maintenance care by ATPs, with the exception of ongoing care by Dr. Ledezma, and the ongoing prescription of Zoloft, an anti-depressant. Citing and arguing the holding in *Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002), the gravamen of the Respondents argument that the ALJ compensated a medical benefit for "compensation neurosis," which as herein below determined is misplaced because the facts in *Jarosinski* are clearly distinguishable from the facts in the present case.

ISSUE ON APPEAL

The sole issue to be determined by this decision concerns whether the Claimant's ongoing psychological care and medication recommended by her authorized treating physician (ATP), Lon Noel, M.D., and her authorized treating psychologist, Dr. Ledezma, is reasonably necessary to cure and relieve the effects of the Claimant's admitted injury of August 31, 2000; specifically, does the treatment result from an unbroken chain of causation from the original injury of August 31, 2000, which ultimately resulted in the Claimant being declared permanently and totally (PTD) disabled; or, as the Respondents argue, is the ongoing treatment by Dr. Ledezma and the Zoloft prescription the result of "litigation neurosis,".dealt with in *rosinski.*

The Claimant bears the burden of proof, by a preponderance of the evidence.

SUPPLEMENTAL FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Supplemental Findings of Fact:

Preliminary Findings

1. On August 31, 2000, the Claimant sustained admitted injuries to her right wrist and hand during the course and scope of her employment. As a result of her right

upper extremity (RUE) injury, in 2001, the Claimant developed an injury in her left upper extremity (LUE) (Claimant's Exhibit 1).

2. On April 24, 2001, Authorized treating Physician (ATP) Dr. Noel noted that the Claimant was quite frustrated and was having mental problems secondary to the injury. He referred her to Cynthia Johnsrud, Psy.D., a clinical psychologist, for an evaluation of her functional state and depression related to the Claimant's bilateral wrist injuries (Claimant's Exhibit 2).

3. On May 15, 2001, Dr. Johnsrud diagnosed the Claimant as having an adjustment disorder with somatic reactivity and characteristics of a dependent personality (Claimant's Exhibit 3). As found in the original Findings, the ALJ rejects Dr. Johnsrud's ultimate opinions because they are contrary to the weight of the evidence.

4. On January 11, 2002, the Claimant met with her personal physician, Alicia Vasquez, M.D. Dr. Vasquez reported that the Claimant was feeling depressed and experiencing crying spells. Dr. Vasquez diagnosed the Claimant with depression and started her on 50 mg of Zoloft (Claimant's Exhibit 4).

5. On January 18, 2002, the Claimant returned to see Dr. Johnsrud. Dr. Johnsrud diagnosed the Claimant with a mild depression and stated the opinion that psychotherapy (4-6 sessions) would be beneficial for her" (Claimant's Exhibit 3).

6. In March 2003, Dr. Vasquez reported that the Claimant "wants to try being off Zoloft as per the medical examiner's recommendation (evaluation done as part of her workman's comp exam)." After approximately six weeks, in April 2003, Dr. Vasquez reported that the Claimant's depression had worsened since being taken off Zoloft. Additionally, the Claimant now had anxiety, as well. Dr. Vasquez started the Claimant on 20 mg of Prozac (Claimant's Exhibit 4)

7. On May 2, 2003, Dr. Noel confirmed that the Claimant had begun having anxiety attacks after weaning her off antidepressant medication. Dr. Noel referred the Claimant to Dr. Ledezma for a psychological evaluation (Claimant's Exhibit 2). During her testimony, the Claimant could not recall being weaned off Zoloft because, as she stated, she "has taken Zoloft for such a long time." Nonetheless, the Claimant recalled that at one time she had been prescribed Prozac. She stated that her body "could not take it [Prozac]" and that "it agitated her real bad."

8. On May 9, 2003, Dr. Ledezma recommended that the Claimant's medication be switched back to Zoloft since the Claimant felt increased nervousness, irritability, and continued depression while on Prozac. Dr. Ledezma also noted that when the Claimant's pain was high, she often became depressed and irritable, despite the use of Prozac (Claimant's Exhibit 6).

9. On May 20, 2003, J. Stephen Gray, M.D., a Division Independent Medical Examiner (DIME), reported that the Claimant was seeing Dr. Ledezma for her depression and anxiety. Dr. Gray stated that it was appropriate to allow further treatment under the maintenance care rubric. **According to Dr. Gray, "it is this examiner's opinion that [Claimant's] depression is related to her work-related problems. She had no history of prior depression"** (Claimant's Exhibit 7).

10. After Dr. Gray's report, Dr. Noel restarted the Claimant's prescription of Zoloft on May 30, 2003 (Claimant's Exhibit 2).

11. After the Claimant began taking Zoloft, Dr. Ledezma reported that the Claimant was doing well overall and was responding well to Zoloft (Claimant's Exhibit 6).

12. On September 29, 2003, Dr. Ledezma reported that the Claimant was making considerable progress in her psychological state and anticipated the following session to focus on preparing the Claimant for discharge from treatment (Claimant's Exhibit 6).

13. On January 29, 2004, Dr. Noel referred the Claimant for "psych follow-up, 4-6 additional visits with Dr. Ledezma" (Claimant's Exhibit 2).

14. On October 13, 2004, the undersigned ALJ issued Specific Findings of Fact, Conclusions of Law and Order declaring the Claimant to be permanently and totally disabled (PTD), [which the Respondents re-affirmed by Final Admission of Liability (FAL) dated November 4, 2011], stating, "Respondents shall pay the costs of continuing maintenance medical benefits, under the *Grover* case, to maintain medical stability as recommended by Dr. Gray and prescribed by Dr. Noel including maintenance psychological treatment under Dr. Ledezma" (Claimant's Exhibit 8).

The Present Situation

15. The Claimant testified, however, that she had not sought further treatment from Dr. Ledezma after the October 2004 hearing because she did not know that she had the option of seeing Dr. Ledezma after what she considered the conclusion of her case.

16. On November 11, 2014, Dr. Noel noted that an interaction that Claimant had with the insurance carrier, wherein the adjuster enquired whether the Claimant had a re-injury, created a lot of stress, which caused an increase in symptoms (Claimant's Exhibit 2). The increase in the Claimant's rent and her health issues did not cause a need for psychological treatment. The ALJ draws a plausible inference and finds that the Claimant's fear and anxiety about losing her source of income (PTD benefits) triggered the renewed visits to Dr. Ledezma in 2015. The ALJ further finds that there is

a direct and unbroken causal link from the original admitted work-related injury and the Claimant's interaction with the Respondents' adjuster that created her fear and stress over losing her PTD benefits and this interaction did **not ,** under any stretch, amount to the type of "litigation stress" discussed in *Jarosinski*.

17. During her testimony, the Claimant confirmed this interaction and her resultant increase in stress because she believed she may have been at risk of losing her PTD benefits.

18. According to the Claimant, after her interaction with the Insurance carrier, she discovered that she was still represented by counsel and contacted her attorney. The Claimant verbalized to her attorney that she was having difficulty coping with her pain. Her attorney informed her that she could return to see Dr. Ledezma pursuant to a court order.

19. On May 12, 2015, Dr. Noel reported that Claimant had some depressive affect (Claimant's Exhibit 2).

20. On May 14, 2015, Dr. Ledezma noted that the Claimant returned for psychotherapy after several years. Dr. Ledezma noted that a court ruling provided the Claimant with long-term psychotherapy treatment when she requires additional psychological assistance. Dr. Ledezma noted that the Claimant had been having more anxiety and emotional upset in the past months. Dr. Ledezma recommended that the Claimant's dose of Zoloft be increased since she was having increased psychological distress. On May 26, 2015, Dr. Ledezma continued to recommend that the Claimant's dose of Zoloft be increased (Claimant's Exhibit 6).

21. On June 2, 2015, Dr. Noel noted that the Claimant returned to see her authorized treating psychotherapist, Dr. Ledezma, for a post-maximum medical improvement (MMI) psychological reevaluation and follow-up visit. Dr. Noel issued a referral, stating, "My current referral was to cover the 05/14/2015 visit and to approve the 4 to 6 total maintenance followups [*sic*] **pertaining to her work-related injury"** (Claimant's Exhibit 2)

22. On June 16, 2015, Dr. Noel noted that the Claimant had another appointment scheduled with Dr. Ledezma, and that her appointments with Dr. Ledezma had been "okayed" per an adjudication judge. Dr. Noel reported that the Claimant was demonstrating some depressive affect. He noted that there were a few tears shed as she talked about her case, and she appeared to be upset and worried about the future. Dr. Noel increased the Claimant's Zoloft to 75 mg daily (Claimant's Exhibit 2).

Independent Medical Examination by Stephen Moe, M.D.

23. The Respondents contested the referral to and treatment from Dr. Ledezma. The Respondents requested an Independent Medical Examination (IME), which was performed by Stephen Moe, M.D., a psychiatrist. Dr. Moe is of the opinion that the Claimant's current psychological status is not causally related to her work injuries of 2000 and 2001. As found herein below, the ALJ rejects Dr. Moe's ultimate opinion on causality because it is contrary to the weight of the evidence, and the ALJ makes a rational choice to accept ATP Dr. Noel's and Dr. Ledezma's opinions instead of Dr. Moe's opinions.

24. Dr. Moe did not offer a persuasive opinion concerning whether ongoing psychological/psychiatric care for the Claimant, if not causally related, is reasonably necessary to cure the Claimant's chronic pain and depression nor did he offer a persuasive opinion concerning the Zoloft prescription.

25. The Claimant testified, however, that she needs care from Dr. Ledezma to cope with the pain and decreased functionality caused by her injuries. She stated, "Every day is hard for me dealing with my injuries, doing tasks with my hands. It's hard coping with the pain part, not being able to function the way a person functions that has the mobility in her hands." The Claimant complained that even simple household tasks require much effort on her part.

Dr. Ledezma's Evidentiary Deposition

26. On October 22, 2015, the evidentiary deposition of Dr. Ledezma was taken. Dr. Ledezma testified that anybody living with chronic pain and physical limitations will likely have times when their psychological state deteriorates, and therefore may require ongoing psychological treatment for the rest of the person's life if there continues to be problems that occur that will cause that regression in the person's functioning (Ledezma Depo. pp. 25-26, lines 21-25 & 1-2).

27. Dr. Ledezma testified that the treatment she provided in May and June of 2015 was strictly limited to issues related to the Claimant's work-related injuries and chronic pain (Ledezma Depo. p. 8, lines 9-13; p. 10, lines 17-22; p. 11, lines 19-22; p. 51, lines 23-25; p. 66, lines 13-4).

28. According to Dr. Ledezma, the Claimant's situation is chronic by nature. She stated that the depression and anxiety that the Claimant is having is primarily related to issues around being physically limited and having to depend on other people for assistance with a lot of activities of daily living, and feeling basically that there is no sense of improvement forthcoming. Dr. Ledezma stated that this has been really

emotionally devastating for the Claimant (Ledezma Depo. pp. 8-9, lines 25 & 1-9; pp. 56-57, lines 19-25 & 1; p. 57, lines 7-8).

29. According to Dr. Ledezma, it's not necessarily one specific thing that will cause the Claimant to have more depression or problems sleeping. It is a cumulative effect of basically realizing that as time goes on, she's noticing more and more problems here and there that are impacting her self-esteem, her quality of life, etc. (Ledezma Depo. p. 51, lines 13-18). By necessary implication, the ALJ finds these problems directly related to the admitted compensable injury in an unbroken chain of causation.

30. Dr. Ledezma stated that when she saw the Claimant in September of 2003, the Claimant was functioning fairly well, and she would consider the way she was functioning then to be her general baseline (Ledezma Depo. p. 58, lines 2-5).

31. Dr. Ledezma stated that when the Claimant came back into treatment in 2015, she was no longer at psychological baseline. There was a regression and deterioration in her psychological functioning. Dr. Ledezma stated that part of maintenance care is to maintain that baseline level, which at the time she saw the Claimant, she was not at baseline level in her opinion (Ledezma Depo. p. 13, lines 11-18; pp. 17-18, lines 25 & 1-4; pp. 22-23, lines 24-25 & 1-3; p. 43, lines 9-10).

32. Dr. Ledezma recommended ongoing maintenance care, which included the treatment she received in May and June 2015. Her recommendation, which is based upon her last visit in June 2015, would have been six to eight visits over the course of a year, more or less. Dr. Ledezma stated that that recommendation was consistent with her reading of the "medical treatment guidelines" [Division of Workers' Compensation Medical Treatment Guidelines]. Dr. Ledezma also stated that the possible treatment requirements for the future are something that she may need to assess on an as-needed basis, depending on what is going on with the Claimant. (Ledezma Depo. p. 13, lines 2-10; p. 14, lines 2-15; p. 54, lines 21-23; p. 57, lines 9-13; p. 66, lines 10-11).

33. According to Dr. Ledezma, if the Claimant's current functioning is the way she presented at her last session in June 2015, she would need ongoing treatment of some kind (Ledezma Depo. p. 18, lines 11-13).

34. In fact, Dr. Ledezma observed the Claimant's demeanor during the deposition and stated that it was more likely than not that the Claimant was still having symptoms of depression that had not been resolved or treated. Dr. Ledezma recommended possibly more psychological treatment, definitely ongoing medication, with a possible increase of medication, and a psychiatric referral (Ledezma Depo. p. 62, lines 15-20; p. 63, lines 14-20).

The Claimant's Testimony at Hearing

35. The Claimant testified that she has continuously been taking Zoloft from 2002 to the present and that Dr. Noel has continued to renew her prescription of Zoloft.

36. The Claimant also testified that on one occasion she discovered by accident that she cannot take the generic form of Zoloft. According to her testimony, Dr. Noel forgot to indicate on the prescription that the Claimant could not substitute the generic brand of Zoloft for the name brand. Consequently, she was dispensed Zoloft in generic form. The Claimant testified that she took it for approximately three months and the generic Zoloft did not work for her. The Claimant felt it did not stabilize her mood the same way that the name brand Zoloft did.

37. The Claimant's testimony reveals that the receipt of a letter caused her to contact her attorney. Once the Claimant spoke with her attorney, she found out, pursuant to the undersigned ALJ's Order of years before, that she had the right to return to her psychologist when she had an inability to cope with her pain and disability. [Hearing Transcript, pp. 14-17 and my decision of October 13, 2004 (Exhibit 8 and *See* Finding of Fact No. 19)].

Independent Medical Examination (IME) by Stephen Moe, M.D.

38. Dr. Moe testified that there is no consensus in the medical literature regarding the efficacy of generic versus name brand drugs. Dr. Moe also testified that it is a commonly reported phenomenon that some patients do not tolerate or do not do well on generic brands.

39. Dr. Moe was of the opinion that the Claimant has suffered from chronic disorder involving a blend of depression and anxiety since the mid-1990s, where she presented with symptoms associated with stress. It was recommended at that time that the Claimant get treatment and she declined. The ALJ finds that Dr. Moe's opinions in this regard are not adequately supported and he does not take cognizance of an "aggravation and acceleration" of a preexisting condition

40. According to Dr. Moe it is **possible** (emphasis supplied) that the Claimant could have been benefited from Zoloft even without the work injury. Dr. Moe, however, could not testify that this opinion was within a reasonable degree of psychological probability because the Claimant had not taken nor was prescribed any antidepressant medication prior to her work injury. The ALJ infers and finds that this is sheer speculation on Dr. Moe's part.

41. During his testimony, Dr. Moe agreed that the death of the Claimant's brother and the disabling condition of her mother could cause a **situational** depression

and that it is not unusual for patients who suffer from chronic pain to experience depression and anxiety.

Authorized Treating Psychologist Guadalupe Ledezma, Ph.D.

42. Based on her review of the records, however, Dr. Ledezma stated the opinion that the disorder has been persistent since the early aftermath of the Claimant's work injury. Dr. Ledezma stated, "Her depression has been present since the time that she was injured and was unable to return to her previous level of functioning, which makes it a chronic depression" (Ledezma Depo. p. 16, lines 19-24; p. 17, lines 1-4).

43. Dr. Ledezma further stated that there was no indication of any ongoing prior psychological issues or problems that were treated or identified prior to her 2000 injury, other than a medical report from 1995 that noted that the Claimant was taking care of her diabetic and blind mother and the death of Claimant's brother (Ledezma Depo. p. 16, lines 16-18; p. 17, lines 11-13). The ALJ finds treating psychologist Dr. Ledezma's opinions, in this regard, far more credible and persuasive than Dr. Moe's opinions.

44. According to Dr. Ledezma, the situation [in 1995] would have been a stressor that might have created a limited situational depression; however, she would expect there to be a lot of medical records if the depression had significantly continued, and the lack of records indicated to her that once the situational stressor was resolved, the Claimant's symptoms would also resolve (Ledezma Depo. p. 59, lines 6-20). Comparing Dr. Moe's assessment of the situation in the 90s with Dr. Ledezma's and ATP Dr. Noel's assessment, the ALJ infers and finds that Dr. Moe gave inadequate consideration of the situation in the 90s, and Dr. Ledezma rendered a thorough analysis of the situation. Consequently, Dr. Ledezma's assessment of the situation pre-existing the admitted injury of 2000 is substantially more credible than Dr. Moe's assessment thereof. For this reason, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible.

45. According to Dr. Ledezma, she did not see any indication that there would be any reason for the Claimant's depression other than her deep-rooted depression and anxiety from this injury (Ledezma Depo. p. 17, lines 17-21).

46. Dr. Ledezma is of the opinion that the Claimant's psychological state would worsen if the psychological care and the antidepressant medication were taken away from her (Ledezma Depo. p. 26, lines 20-24).

47. Dr. Ledezma stated that her goal is to bring the Claimant to a level of stable functioning where she's at a baseline level that she feels she can cope on a day-to-day basis with all the issues that she's facing (Ledezma Depo. p. 23, lines 19-22).

48. Dr. Ledezma stated that all of her opinions were within a reasonable degree of psychological probability (Ledezma Depo. pp. 26-27, lines 25 & 1-2).

The Claimant's Testimony

49. The Claimant's testimony reveals that the receipt of the letter caused her to contact her attorney. Once Claimant spoke with her attorney, she found out, pursuant to the Order, that she had the right to return to her psychologist when she had an inability to cope with her pain and disability. (Hearing Transcript pp. 14-17 and Judge Felter's Order of October 13, 2004, Exhibit 8 and Finding of Fact ¶

Ultimate Findings

50. Comparing Dr. Moe's assessment of the situation in the 90s with Dr. Ledezma's and Dr. Noel's assessment, the ALJ infers and finds that Dr. Moe gave inadequate consideration of the situation in the 90s, and Dr. Ledezma rendered a thorough analysis of the situation. Consequently, Dr. Ledezma's assessment of the situation pre-existing the admitted injury of 2000 is substantially more credible than Dr. Moe's assessment thereof. For this reason, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible. On the other hand, Dr. Ledezma's analysis of the 90s situation is credible and persuasive. Indeed, Dr. Moe agreed that the 90s situation was **situational.** For this reason, the continuing need for Zoloft and psychological treatment is directly causally related to the admitted injury of August 31, 2000 and its sequelae, in an unbroken chain of causation.

51. Between conflicting medical/psychiatric/psychological opinions, the ALJ makes a rational choice to accept the ultimate opinions of ATP Dr. Noel and Dr. Ledezma, and to reject the ultimate opinions of Dr. Moe.

52. The Claimant has proven, by a preponderance of the evidence that her continuing need for psychological treatment and the Zoloft prescription is causally related to the admitted injury which rendered her permanently and totally disabled in an unbroken causal chain; and, it is reasonably necessary to maintain her at MMI and to prevent a deterioration of her work-related psychological condition. The Claimant did not seek psychotherapy and did not begin taking antidepressant medication until after her 2000 injury. The admitted compensable injury was an acceleration and aggravation of any of the Claimant's underlying and mostly dormant conditions, including psychological stress conditions.

53. The renewed psychological treatment is directly caused, in an unbroken chain, by the continuing problems associated with Claimant's original physical and psychological injuries from the combined 2000 and 2001 events.

DISCUSSION

Respondents' Argument on Appeal

The ALJ notes at the outset that Respondents have raised the inapplicable issue of ”litigation stress” for the first time on appeal. Citing *Jaronsinski v. Indus. Claim Appeals Office, supra,* in their Brief in Support of Petition to Review, the Respondents argue that the Claimant's interaction with the adjuster which caused her to fear losing her PTD benefits broke the causal link from the original admitted injury and the present need for psychological treatment by Dr. Ledezma and the Claimant's continued need for Zoloft, and was analogous to ”litigation neurosis,” as discussed in *Jarosinski.* The ALJ finds *Jarosinski* inapposite to the present case. The facts in *Jarosinski* could not be more sharply contrasted to the facts in the present case.

In *Jarosinski,* for starters, the ALJ denied a re-opening and was ultimately affirmed. The Claimant suffered stress after the ALJ issued the written order. The Court of Appeals noted that "litigation stress" involves stress caused by adverse rulings and the claimant having to watch surveillance film of "her apparently inconsistent and possibly fabricated complaints. In affirming ICAO, the Court noted that psychological problems caused by an insurance carrier exercising its statutory rights to defend a claim occurs outside the course and scope of employment. The Court held that.problems resulting from litigation "stress" and the entry of an adverse order were not sufficiently similar to quasi course of employment injuries to justify compensation.”The Court also noted that proof of causation is an evidentiary issue of fact and the ALJ's findings must be upheld if supported by substantial evidence, thus, the reviewing authorities did not disturb the ALJ's denial of compensability for the "litigation stress." In a nutshell, the claimant was depressed because she lost the case. The facts in the present case are more than distinguishable from the facts in *Jarosinski.*

Interestingly, the Court noted that adjustment practices may give rise to tort liability for bad faith claims. With the Respondents' disingenuous argument, they would skate on the workers' compensation claim and escape bad faith liability. *See* § 8-44-206, C.R.S. The Guaranty Fund is a special statutory creature that exists to promptly pay **indemnity and medical** benefits. It may not be sued for bad faith claims practices. The Respondents' argument would make the Claimant like Philip Nolan, the lady without a remedy.

The Claimant's Argument in Opposition to the Petition to Review

The cause of Claimant's psychological injury is a question of fact for determination by the ALJ. *Owens v. Indus. Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). Consequently, a reviewing tribunal must uphold the ALJ's determination if supported by substantial evidence in the record. §8-43-301(8), C.R.S. This standard of review requires the reviewing tribunal to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002).

Additionally, the industrial injury does not have to be the sole cause of a claimant's disability before the claimant can recover benefits. *Lidner Chevrolet v. Indus. Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), rev'd on other grounds*; Askew v. Indus. Claim Appeals Office,* 927 P.2d 1333 (Colo. 1996); *Horton v. Indus. Claim Appeals Office,* 942 P.2d 1209 (Colo. App. 1996). Accordingly, the ALJ's finding that the Claimant also experienced "stress" and ongoing uncertainty about the possible loss of her PTD benefits does not preclude an ALJ from ordering a respondent to pay the costs of ongoing psychological care. *See also Briles v. Montrose Memorial Hospital,* W.C. No. 4-522-095 [Indus. Claim Appeals Office (ICAO), April 30, 2004].

As found herein above, the fear and anxiety about the Claimant losing her source of income (PTD benefits) triggered the renewed visits to Dr. Ledezma in 2015, when she received a letter in 2015 that caused her to contact her attorney. Once the Claimant spoke with her attorney, she found out, pursuant to the Order of 2004, she had the right to return to her psychologist when she had an inability to cope with her pain and disability. (Hearing Transcript pp. 14-17; and, the Order of October 13, 2004, Exhibit 8 and Finding of Fact ¶ 18). The ALJ, more specifically found that the credible testimony of Claimant and Dr. Ledezma (in the 2004 Order) reflected that the Claimant, who is permanently and totally disabled, needs care from Dr. Ledezma to cope with the pain and decreased functionality caused by her injuries. (Finding of Fact ¶¶ 18 and 25-28) Therefore, the renewed psychological treatment is caused by the continuing problems associated with Claimant's original physical and psychological injuries from the combined 2000 and 2001 events. The issue of causation was previously determined by the Division Independent Medical Evaluating (DIME) physician's conclusion that the mental problems were components of Claimant's overall impairment which simply constituted part of the diagnostic assessment that comprises the DIME process. *Qual-Med Inc, v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). Since the DIME physician's opinion concerning causation is an inherent part of the "rating," and must be accepted absent "clear and convincing evidence" to overcome the opinion, if both her physical and mental problems caused the Claimant's disability, then the Respondents are liable for those consequences because they did not challenge the finding within the time permitted. (Exhibit 8, Finding of Fact ¶ 19, and Conclusion of Law ¶ **m**, Order of October 13, 2004).

By failing to challenge this finding, the Respondents voluntarily relinquished a known right and waived their right to challenge causation. *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984); *Ewing v. Colorado Farm Mutual Casualty*, 133 Colo. 447, 296 P.2d 1040 (1956). A waiver may be implied by conduct which manifests an intent to relinquish the right to challenge the finding of causation. *Obodov v. Foster*, 105 Colo. 254, 97 P.2d 426 (1939). Therefore, the Respondents are estopped from raising this issue. *See Donahue*, *supra*.

SUPPLEMENTAL CONCLUSIONS OF LAW

Based upon the foregoing Supplemental Findings of Fact, the ALJ makes the following Supplemental Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible. On the other hand, Dr. Ledezma's analysis of the 90s situation is credible and persuasive. Indeed, Dr. Moe agreed that the 90s situation was situational. For this reason, the continuing need for Zoloft and psychological treatment is causally related to the admitted injury of August 31, 2000 and its sequelae.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting psychiatric/psychological opinions, the ALJ made a rational choice to accept the ultimate opinions of ATP Dr. Noel and Dr. Ledezma, and to reject the ultimate opinions of Dr. Moe.

Pre-Existing Condition

c. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App. 1990). Despite the Respondents' argument that the Claimant could easily have benefited from psychotherapy treatment and medication, and been on Zoloft for the past 20 years, she did not seek psychotherapy and did not begin taking antidepressant medication until after her 2000 injury. The admitted compensable injury was an acceleration and aggravation of the Claimant's underlying and mostly dormant conditions, including psychological stress conditions.

Maintenance Medical Care (*Grover Medicals;* Zoloft Prescription

d. A claimant has suffered a compensable injury if the industrial accident is the proximate cause of the claimant's need for medical treatment or disability. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law*, § 13.00 (1997). As found, the increase in the Claimant's rent and her health issues did not cause a need for psychological treatment. The call from the adjuster in 2014 and ongoing uncertainly about the possible loss of her benefits increased the Claimant's anxiety. As found, The ALJ drew a plausible inference and found that fear and anxiety about the Claimant losing her source of income triggered the renewed visits to Dr. Ledezma in 2015. There is no persuasive evidence that the Claimant's need for psychological treatment is based on a subsequent intervening event. The totality of the evidence, including the Claimant's testimony, demonstrated that the need for psychotherapy treatment and medication recommended by Dr. Ledezma and ATP Dr. Noel are reasonably necessary and causally related to the admitted injury of 2000 and the sequelae thereof.

Alleged "Litigation Stress"

e. The Respondents have raised the inapplicable issue of "litigation stress" for the first time on appeal. Citing *Jaronsinski v. Indus. Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002) in their Brief in Support of Petition to Review, the Respondents argue that the Claimant's interaction with the adjuster which caused her to fear losing her PTD benefits broke the causal link from the original admitted injury and the present need for psychological treatment by Dr. Ledezma and the Claimant's continued need for Zoloft, and was analogous to "litigation stress," as discussed in *Jarosinski.* As found, the holding and the facts in *Jarosinski are* inapposite to the present case. The facts in *Jarosinski* could not be more sharply distinguished from the facts in the present case.

f. As found, the fear and anxiety about the Claimant losing her source of income (PTD benefits) triggered the renewed visits to Dr. Ledezma in 2015, when she received a letter in 2015 that caused her to contact her attorney. Once the Claimant spoke with her attorney, she found out, pursuant to the Order of 2004, she had the right to return to her psychologist when she had an inability to cope with her pain and disability. (Hearing Transcript pp. 14-17; and, the Order of October 13, 2004, Exhibit 8 and Finding of Fact ¶ 18).

g. The cause of Claimant's psychological injury is a question of fact for determination by the ALJ. *Owens v. Indus. Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). Consequently, a reviewing tribunal must uphold the ALJ's determination if supported by substantial evidence in the record. §8-43-301(8), C.R.S.. This standard of review requires the reviewing tribunal to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). As found, the ALJ made a finding of evidentiary (basic) fact that the cause of the Claimant's renewed need for psychological treatment from authorized psychologist Dr. Ledezma was from an unbroken chain of causation from the original admitted injury of 2000, which resulted in the Claimant being declared permanently and totally disabled..

h. Indeed, an industrial injury does not have to be the sole cause of a claimant's disability before the claimant can recover benefits. *Lindner Chevrolet v. Indus. Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), rev'd on other grounds*; Askew v. Indus. Claim Appeals Office,* 927 P.2d 1333 (Colo. 1996); *Horton v. Indus. Claim Appeals Office,* 942 P.2d 1209 (Colo. App. 1996). Accordingly, the finding that the Claimant also experienced "stress" and ongoing uncertainty about the possible loss of her PTD benefits does not preclude ordering the Respondents to pay the costs of ongoing psychological care. *See also Briles v. Montrose Memorial Hospital,* W.C. No. 4-522-095 [Indus. Claim Appeals Office (ICAO), April 30, 2004].

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing continuing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on the ongoing need for psychological treatment at the hands of Dr. Ledezma and the Zoloft prescription.

SUPPLEMENTAL ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of ongoing psychological care at the hands of Guadalupe Ledezma, Ph.D., Licensed Clinical Psychologist, and Lon Noel, M.D., including the continuing costs of the Claimant's Zoloft prescription, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision.

DATED this______day of March 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2016, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

____
Court Clerk

Wc.suppord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-761-359-03

ISSUES

- Was Claimant's right to seek additional medical benefits and temporary disability benefits foreclosed by the failure to appeal ALJ Harr's finding that the Division-independent medical examination physician placed Claimant at maximum medical improvement on February 28, 2013?
- Is the Claimant entitled to an award of medical benefits to treat her right knee symptoms?
- Is Claimant entitled to an award of temporary total disability benefits commencing February 28, 2013 and continuing?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 though 13 were received in evidence. Respondents' Exhibits A through AA were received in evidence.

2. On November 1, 2007 Claimant sustained an admitted injury to her left knee. She slipped on a wet or greasy floor and twisted her left knee.

3. On December 1, 2008 Claimant underwent left knee surgery described as a plica resection of the medial compartment and a lateral retinacular release. On December 11, 2009 Claimant underwent a second left knee surgery described as a microfracture of the left medial femoral condyle chondral lesion.

4. On June 16, 2010 authorized treating physician John Hughes, M.D., placed the Claimant at maximum medical improvement (MMI). Dr. Hughes assessed left knee sprain, left knee arthrosis post microfracture and persistent postsurgical patellofemoral arthritis.

5. Claimant requested a Division-sponsored independent medical examination (DIME) to review Dr. Hughes's findings.

6. William Watson, M.D., performed the DIME on November 23, 2010. During the course of the DIME Dr. Watson noted that claimant walked with an "antalgic gait, quick on the left." In addition to examining Claimant's left knee Dr. Watson examined Claimant's *right* knee. With regard to the right knee Dr. Watson noted pain on patellar compression, grinding and crepitation with flexion/extension and tenderness over the lateral patella. Dr. Watson assessed the following: (1) Status post lateral

release and plica resection of the left knee; (2) Status post chondroplasty and microfracture of the medial femoral condyle; chondral lesion; (3) Chondromalacia patella of the right knee, rule out internal derangement. Dr. Watson opined Claimant was not at MMI. With regard to the left knee Dr. Watson recommended Claimant undergo a repeat MRI to assess the medial condylar cartilage defect. With regard to the right knee Dr. Watson noted Claimant had first complained of right knee pain to Dr. Robinson on February 10, 2010, to Dr. Hughes on May 5, 2010 and to Dr. Parry on August 10, 2010. Dr. Watson opined Claimant's right knee symptoms were attributable to her altered gait and excessive weight bearing that were caused by the November 1, 2007 accident. Dr. Watson opined Claimant should undergo x-rays and an MRI of the right knee and follow-up with her orthopedic surgeon.

7. Dr. Watson's November 2010 finding that Claimant had not reached MMI was not contested by either Claimant or Respondents.

8. On January 4, 2011 Claimant was seen by Dr. Hughes. Dr. Hughes wrote that Claimant's "emerging right knee symptoms" were consistent with degenerative chondromalacia patella and not attributable to the November 1, 2007 industrial injury.

9. On January 7, 2011 Claimant returned to her surgeon, Walter Robinson, M.D. Dr. Robinson recommended Claimant undergo bilateral MRI's of her knees to assess chondral defects.

10. In September 2012 Charles Gottlob performed a third surgery on Claimant's left knee. Dr. Gottlob had intended to perform a unicompartmental resurfacing arthroplasty but decided against the procedure upon detecting significant chondromalacia on the central weight bearing portion of the lateral femoral condyle.

11. On February 28, 2013 Dr. Gottlob noted Claimant had undergone an Orthovisc injection with minimal relief. Dr. Gottlob placed Claimant at MMI.

12. On May 28, 2013 Claimant returned to Dr. Watson for a follow-up DIME. Dr. Watson issued a written report in which he listed his impressions as: (1) Status post arthroscopy of the left knee times 3 with the most recent arthroscopy showing grade 4 chondromalacia of the lateral compartment and chondral defect in the medial compartment; (2) Chondromalacia of the patella of the right knee. Dr. Watson wrote that he agreed with Dr. Gottlob's finding that Claimant reached MMI on February 28, 2013. He further stated that his opinion was "unchanged on the right knee from my previous report." Dr. Watson assessed a 21% lower extremity rating for Claimant's left knee. On February 28, 2013 Dr. Watson also completed a Division IME Examiner's Summary Sheet on which he indicated Claimant reached MMI on February 28, 2013 with 21% lower extremity impairment.

13. On June 13, 2013 the Insurer filed a Final Admission of Liability (FAL). The FAL admitted for temporary total disability (TTD) benefits from December 1, 2008 through February 27, 2013. The FAL admitted Claimant reached MMI on February 28,

2013 and admitted for permanent partial disability (PPD) benefits, based on Dr. Watson's 21% lower extremity impairment rating, commencing February 28, 2013. The FAL also admitted for ongoing medical benefits "as related to the injury post MMI."

14. On June 18, 2013 Claimant filed an Application for Hearing listing the issues as medical benefits, TTD benefits commencing March 1, 2013, PPD benefits, and permanent total disability benefits. Claimant also endorsed "other issues" including whether she was at MMI, whether her right knee problems were related to the November 2007 injury and whether additional medical treatment was reasonable and necessary.

15. On October 23, 2013 ALJ Harr conducted a hearing concerning Claimant's application for hearing. ALJ Harr issued Findings of Fact, Conclusions of Law, And Order (FFCL) dated January 2, 2014. In the FFCL ALJ Harr listed the issues as follows: (1) Whether Dr. Watson determined that Claimant's right knee condition was a component of her admitted left knee injury; (2) Whether Claimant proved by clear and convincing evidence that her "altered gait or excessive weight bearing during treatment of the left knee injury aggravated the chondromalacia patella of the right knee; (3) Whether claimant proved by a preponderance of the evidence that she was entitled to an award of medical benefits, temporary disability benefits and PPD benefits related to the right knee condition.

16. In the January 2, 2014 FFCL ALJ Harr determined as fact that it is more probably true than not that Dr. Watson, the DIME physician, found Claimant's symptoms of right knee chondromalacia patella are not related to the left knee injury. In support of this determination ALJ Harr initially found that Dr. Watsons' reports "were equivocal regarding causation of [the] chondromalacia patella disease process in claimant's right knee." Specifically, ALJ Harr noted that in the November 23, 2010 DIME report Dr. Watson recommended diagnostic tests and an evaluation to rule out symptoms of (right knee) internal derangement. However, in the May 28, 2013 follow-up DIME report Dr. Watson no longer recommended evaluation of the right knee, placed the Claimant at MMI, rated the injury based only on left knee impairment and "did not condition MMI upon treatment of the right knee." ALJ Harr inferred from this evidence that Dr. Watson determined that the "chondromalacia patella disease affecting claimant's right knee is not a component of her left knee injury."

17. ALJ Harr next found that Claimant failed to prove it is highly probable that Dr. Watson "was incorrect in his determination that claimant reached MMI, with no permanent impairment of the right knee." In support of this determination ALJ Harr credited the opinion of Dr. Hughes that Claimant's "right knee symptoms are the result of a concurrent and unrelated degenerative condition that was not in any way accelerated or aggravated by the work related left knee injury." Having determined Claimant failed to overcome by clear and convincing evidence Dr. Watson's DIME finding that Claimant was at MMI, ALJ Harr denied the claim for medical benefits, temporary disability benefits and PPD "related to [Claimant's] right knee condition."

18. Claimant appealed ALJ Harr's FFCL to the ICAO. Claimant argued in her brief that, among other things, ALJ Harr misinterpreted the follow-up DIME report and that Dr. Watson's "ultimate opinion" was that the right knee symptoms were caused by the admitted left knee injury. In support of this assertion Claimant explicitly cited that portion of the follow-up DIME report in which Dr. Watson stated that his opinion concerning the right knee was unchanged from the November 29, 2010 DIME report. As a corollary to this argument Claimant reasoned that ALJ Harr mistakenly found she was at MMI because she never received any treatment for the injury-related right knee symptoms. In a Final Order dated June18, 2014 the ICAO affirmed ALJ Harr's FFCL and concluded that ALJ plausibly interpreted the evidence to mean that Dr. Watson found Claimant to be at MMI and her right knee symptoms were not related to the left knee injury.

19. Claimant appealed the ICAO's June 18, 2014 Final Order to the Court of Appeals.

20. On December 11, 2014 the Court of Appeals issued its opinion in *Samuels v. Industrial Claim Appeals Office,* Colo. App. No. 14 CA1281 (not selected for publication). On appeal Claimant argued that ALJ Harr "erred as a matter of law in determining that the follow-up DIME report was ambiguous and that the DIME physician had changed his opinion and no longer considered claimant's right knee problems to be related to the admitted lift knee injury." The court rejected this argument finding that "when viewed in the context of the surrounding circumstances" the follow-up DIME report (May 28, 2013 report) was "ambiguous." Specifically the court concluded that the follow-up DIME could be interpreted as "determining an impairment rating solely as to claimant's left knee, while reiterating that claimant's right knee was still to be evaluated and treated." Alternatively, the court stated that the report could be interpreted as "suggesting that the DIME physician had decided to exclude claimant's right knee symptoms as a component" of the left knee injury. Thus, the court concluded that resolution of the ambiguity presented in the follow-up DIME presented a question of fact for the ALJ.

21. The Court of Appeals next considered whether the record supported ALJ Harr's finding that "the DIME physician had ultimately excluded the right knee symptoms as a component of the left knee injury." In so doing the court noted that a DIME physician's "opinions concerning MMI and permanent impairment inherently require him or her to assess as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the work injury." The court found "no evidence in the record to support [ALJ Harr's] finding that the DIME physician had ultimately excluded the right knee symptoms as a component of the left knee injury." The court explained that ALJ Harr's finding that in the follow-up DIME report Dr. Watson "changed" his opinion concerning the cause of the right knee symptoms was "directly at odds with [Dr. Watsons's] statement that his opinion was *un*changed from his previous report." (Emphasis in original). The court also concluded the record did not support ALJ Harr's "choice to adopt one possible interpretation of the follow-up DIME report over other possible interpretations." The court explained that the mere fact the follow-up DIME report was susceptible to more than one interpretation did not alone support

ALJ Harr's finding that "one possible interpretation versus any other reflected the DIME physician's true opinion."

22. In light of these conclusions the court set aside the ICAO's Final Order affirming ALJ Harr's January 2, 2014 FFCL. The court remanded the case with directions to "reconsider and make record-supported findings regarding the meaning of the follow-up DIME report" and "conduct such additional proceedings as may thereafter be necessary and appropriate." The court specifically authorized the taking of "such additional evidence as is necessary to carry out the requirements" of its order.

23. Subsequently the ICAO entered an Order of Remand setting aside ALJ Harr's January 2, 2014 order and remanding the matter for "further proceedings consistent with the opinion of the Court of Appeals."

24. By the time the matter was remanded to the OAC ALJ Harr had retired. Consequently the matter was reassigned to ALJ Cannici to carry out the instructions of the Court of Appeals.

25. On March 30, 2015 ALJ Cannici entered Findings of Fact, Conclusions of Law, and Order on Remand (Order on Remand). ALJ Cannici did not conduct any additional evidentiary proceedings prior to issuing the Order on Remand. ALJ Cannici described the issue to be determined as whether Dr. Watsons' May 28, 2013 follow-up DIME report "reflects that Claimant's right knee injury was a component of her admitted left knee injury."

26. In the Order of Remand ALJ Cannici found that Dr. Watson's May 28, 2013 follow-up DIME report was "ambiguous." In support ALJ Cannici found the May 28 follow-up DIME report placed Claimant at MMI on February 28, 2013, awarded only a "left knee impairment rating" and did not contain any language conditioning MMI on provision of further treatment for the right knee. PALJ Cannici also found that in the May 28 follow-up DIME report Dr. Watson wrote that his opinion concerning Claimant's right knee "was unchanged from his November 23, 2010 report." ALJ Cannici then resolved the "ambiguity" in the follow-up DIME report. He found that because Dr. Watson stated in the follow-up DIME report that his opinion concerning Claimant's right knee was "unchanged" from the November 2010 report Dr. Watson "maintained that Claimant's right knee symptoms were related to the altered gait and excessive weight-bearing that was caused by the November 1, 2007 left knee injury." Thus, ALJ Cannici concluded that Dr. Watson's "ultimate DIME opinion was that Claimant's right knee injury was component of her admitted left knee injury." However, ALJ Cannici's Order on Remand did not purport to award or deny any specific benefits.

27. On April 17, 2015 Claimant filed a Request for Corrected Order or Petition to Review Order on Remand. This pleading requested ALJ Cannici to issue a "corrected, revised or amended" order to reflect that "any issue not addressed by the [Order on Remand] is reserved for determination at a later date." Apparently ALJ Cannici declined to issue a corrected order and the matter was transmitted to the ICAO for consideration of Claimant's petition to review.

28. On May 29, 2015 Dr. Gottlob referred Claimant to Sheba Shah, M.D., for further treatment. Dr. Shah is located in Arizona and the ALJ infers that Dr. Gottlob made the referral because Claimant had moved to Arizona.

29. On September 29, 2015 the ICAO entered an Order concerning the Claimant's petition to review the Order on Remand. Citing § 8-43-301(2), C.R.S., the ICAO ruled that it lacked jurisdiction to review the Order on Remand because it "did not award or deny specific benefits." However, the ICAO went on to state that the parties were disputing "the effect of the [Order on Remand] on future litigation." The ICAO stated that this dispute was "hypothetical and speculative" and any order that it might issue would be "merely advisory." Finally, the ICAO concluded that ALJ Harr's January 2, 2014 FFCL and ALJ Cannici's Order on Remand did not constitute "awards" of benefits that would serve to close the claim in the absence of a "reservation clause." The ICAO reasoned that ALJ Harr's order had been set aside and therefore was not an "award." The ICAO also explained that the Order on Remand was not an "award" because it did not grant or deny any benefits.

30. On June 23, 2015, while the petition to review the Order on Remand was still pending, Claimant filed an application for hearing listing the issues as medical benefits, TTD benefits commencing February 28, 2013 and "entitlement to benefits in light of" ALJ Cannici's finding that the right knee symptoms are causally related to the left knee injury. On July 23, 2015 Respondents filed a response to the application for hearing listing additional issues that included the following: (1) The claim was closed; (2) Issue preclusion; (3) Claim preclusion; (4) The ALJ did not reserve any issues for future determination in the prior findings of fact conclusions of law and order which closed the claim; (5) Claimant was at MMI pursuant to DIME.

31. Dr. Shah examined Claimant on August 11, 2015. Dr. Shah opined that Claimant "developed compensatory pain in the right knee as a consequence of the left knee issues." Dr. Shah noted Claimant had relocated to Arizona to care for her parents and had not had "active care" since leaving Colorado. Dr. Shah recommended Claimant undergo an x-ray and MRI of the right knee. She also referred Claimant for an orthopedic evaluation for "further recommendations on surgical versus non-surgical care."

32. At the hearing held on November 5, 2015 Claimant's counsel stated that Respondents had authorized an MRI of the right knee and this study had been carried out. However, according to Claimant's counsel Claimant has not had an orthopedic evaluation since the MRI study was done.

33. At the hearing held on November 5, 2015 Claimant's counsel stated that the issues include Claimant's entitlement to TTD benefits and medical benefits for treatment of the right knee. Claimant's counsel explained that from Claimant's perspective PALJ Cannici had determined the Claimant's right knee symptoms are causally related to the left knee injury but did not address the issue of what benefits were owed as a result of the right knee condition. Respondents' counsel stated that from Respondents' perspective Claimant's request for additional benefits cannot be

granted because the claim is “closed.” Respondents’ counsel argued that in the follow-up DIME Dr. Watson found Claimant had reached MMI. Respondents’ counsel interpreted ALJ Cannici’s Order on Remand as finding that although the right knee symptoms are related to the left knee injury the Dr. Watson found that no additional treatment is necessary. Therefore, Respondents’ counsel reasoned that is at MMI.

34. It is Dr. Watson’s opinion as the DIME physician that Claimant has not reached MMI for all conditions causally related to the industrial injury of November 1, 2007 industrial injury. PALJ Cannici has determined that Dr. Watson’s true opinion, as evidenced by the follow-up DIME report, is that Claimant’s right knee symptoms are causally related to the underlying industrial injury.

35. It is Dr. Watson’s opinion as the DIME physician that Claimant needs additional medical treatment for the right knee injury. In the November 23, 2010 report Dr. Watson opined Claimant needed treatment of the right knee to include x-rays, an MRI and follow-up with an orthopedic surgeon. In the follow-up DIME report Dr. Watson indicated his opinions concerning the right knee were unchanged from the November 2010 DIME report. The ALJ infers from the follow-up DIME report that Dr. Watson is still of the opinion that Claimant needs treatment for his right knee.

36. The ALJ understands from comments of Claimant’s counsel that some of the right knee diagnostic studies recommended by Dr. Watson have been performed. However, the evidence establishes that Claimant has not undergone an orthopedic evaluation of the right knee. As late as August 2015 Dr. Shah credibly opined that Claimant still needs orthopedic evaluation of the right knee.

37. Taken together, Dr. Watson’s opinions that Claimant’s right knee symptoms are causally related to the November 2007 left injury and that Claimant needs additional treatment for the right knee constitute a DIME finding that Claimant *has not* reached MMI for the industrial injury. Specifically, Dr. Watson has found Claimant needs additional evaluation of the injury-related right knee condition. Respondents did not argue at the hearing nor do they argue in their position statement that the undersigned ALJ should alter ALJ Cannici’s finding that Dr. Watson’s true opinion is that Claimant’s right knee condition is causally related to the industrial injury. Neither do Respondents assert that they have presented clear and convincing evidence to overcome Dr. Watson’s opinion that the right knee symptoms are causally related to the industrial left knee injury. Respondents do not argue they have presented clear and convincing evidence to overcome Dr. Watson’s DIME opinion that Claimant needs further treatment for the right knee. Consequently, the Respondents have not sought to overcome Dr. Watson’s true opinion that Claimant is not at MMI.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers’ Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as specifically noted below, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

MMI AND RESPONDENTS' "CLOSURE" ARGUMENTS

Claimant contends that she is entitled to an award of TTD benefits commencing February 28, 2013 and an award of medical benefits for treatment of her right knee. Claimant reasons that the Court of Appeals decision effectively determined that the May 28, 2013 DIME report was "ambiguous" regarding the question of whether the right knee is a component of the 2007 left knee injury. Claimant construes the court's order to mean ALJ Harr's finding that Claimant reached MMI because the DIME found the right knee symptoms were not causally-related to the left knee injury has been set aside and is of no force and effect. Claimant reasons that neither ALJ Harr's FFCL nor the opinion of the Court of Appeals has "closed" the issues of MMI and Claimant's right to additional benefits. Moreover Claimant construes ALJ Cannici's Order on Remand as favorably resolving the question of the cause of the right knee symptoms. However, Claimant contends that the Order on Remand failed to resolve the underlying questions of MMI and her consequent right to additional benefits.

In contrast, Respondents contend that Claimant is not entitled to any additional medical or TTD benefits because these issues have been "closed" and Dr. Watson's DIME finding that Claimant reached MMI is binding on the ALJ and the parties. Respondents argue that ALJ Harr found Claimant is at MMI and Claimant "did not appeal that determination." Consequently Respondents assert that the opinion of the Court of Appeals "in no way impacted the MMI determination from the DIME physician or Judge Harr's order pertaining to MMI." According to Respondents the only real effect of the court's order and ALJ Cannici's Order on Remand was to render Respondents liable for post-MMI medical treatment of the right knee. (Respondents' Position Statement at p. 13).

As a corollary Respondents contend that Claimant mistakenly argues the "finding of causation regarding Claimant's right knee is a determination that Claimant's work-related injuries are not at MMI." Respondents reason that there is a distinction between determining that a condition is related to a compensable injury and a determination the condition is at MMI. Respondents assert that ALJ Cannici's Order on Remand merely determined the causation issue with regard to the right knee but did not alter ALJ Harr's finding that Claimant reached MMI.

Considering the facts and procedural posture of this case the ALJ agrees with Claimant's arguments and rejects Respondents' arguments. The ALJ concludes that ALJ Harr's determination that Dr. Watson found the right knee symptoms are not causally related to the left knee injury was integral to ALJ Harr's finding that Dr. Watson placed Claimant at MMI on February 28, 2013. Further, because the Court of Appeals set aside ALJ Harr's finding that the right knee is unrelated to the left knee injury the court necessarily set aside ALJ Harr's finding that Claimant reached MMI.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Hence, A DIME physician's finding concerning MMI is entitled to presumptive weight when the opinion is challenged by either party.

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005). A finding that a claimant needs additional medical treatment to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining a claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician’s finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician’s finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician’s finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician’s “true opinion” concerning MMI. *MGM Supply Co. v. Industrial Claim Appeals Office, supra*; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. An ALJ may consider all statements made by a DIME physician for the purpose of determining the DIME physician’s true opinion concerning MMI. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005); *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

Respondents’ assertions notwithstanding, Claimant has consistently appealed ALJ Harr’s finding that the Dr. Watson placed her at MMI. As determined in Findings of Fact 15 through 17, the matter originally went to hearing before ALJ Harr concerning Claimant’s request for additional medical and temporary disability benefits. ALJ Harr necessarily recognized that the question of MMI turned on a determination of Dr. Watson’s true opinion concerning the cause of the right knee symptoms. Indeed, ALJ Harr wrote that the first issue for his determination was whether Dr. Watson found Claimant’s right knee symptoms are a component of the admitted left knee injury. As determined in Finding of Fact 16 ALJ Harr found Dr. Watson’s follow-up DIME report was “equivocal” concerning the cause of Claimant’s right knee symptoms. ALJ Harr interpreted the follow-up DIME report to mean that Dr. Watson concluded Claimant’s right knee symptoms are not related to the left knee injury, but instead to degenerative chondromalacia. That ALJ Harr based his order on the relationship between the cause of the right knee symptoms and MMI is evidenced by the fact that he placed the burden on Claimant to prove by clear and convincing evidence that her “altered gait or excessive weight bearing during treatment for her left knee aggravated the chondromalacia patella condition of her right knee.”

As determined in Findings of Fact 20 through 22, the Court of Appeals ultimately agreed with ALJ Harr that the Dr. Watson’s follow-up DIME report was “ambiguous” concerning whether or not Claimant’s right knee symptoms are causally related to the industrial injury. However, the Court found that ALJ Harr’s “choice to adopt one possible interpretation of the follow-up DIME report over other possible interpretations” was not supported by the record. Consequently the court set aside the ICAO’s order affirming ALJ Harr’s FFCL and remanded the matter to “reconsider and make record-supported findings regarding the meaning of the follow-up DIME report” and to conduct "such additional proceedings as may thereafter be necessary" including the taking of additional evidence.

It is clear from the Court's opinion that it considers the cause of Claimant's right knee symptoms to be a matter for initial determination by the DIME physician as part of the statutorily mandated process for determining MMI. Indeed, the court explicitly noted that MMI determinations require the DIME physician to determine whether various components of the claimant's medical condition are causally related to the work injury and that the DIME physician's causation findings can be overcome only by clear and convincing evidence. Moreover the court emphasized that resolution of the MMI issue in this case depends on "record-supported findings" resolving the ambiguity in the May 28, 2013 follow-up DIME report. As the court explained the "ambiguity" in the follow-up DIME arises because the follow-up DIME can be read in two ways concerning whether or not the right knee symptoms are related to the left knee injury. Because the court recognized that the causation issue is at the very core of the DIME physician's ultimate opinion concerning MMI it necessarily set aside ALJ Harr's finding that the DIME physician placed the Claimant at MMI.

It follows that the Respondents' incorrectly argue that the issues of additional TTD and medical benefits have been been "closed" by Claimant's alleged failure to appeal ALJ Harr's determination that she reached MMI. To the contrary, Claimant contended all the way through the Court of Appeals that ALJ Harr incorrectly found the DIME physician placed her at MMI for all injury-related conditions. The basis of Claimant's argument was that the DIME physician's true opinion was that she was not at MMI because the right knee symptoms are causally related to the left knee injury and she needs additional treatment for the right knee. The court agreed with Claimant to the extent it concluded ALJ Harr's determination that Dr. Watson placed Claimant at MMI for all injury-related conditions is not supported by ALJ Harr's findings of fact

To the extent that Respondents argue that ALJ Harr's order is of any current legal significance on the issue of MMI, the ALJ disagrees. The Court of Appeals explicitly set aside the ICAO's order affirming ALJ Harr's order and remanded for new findings of fact on the issue of MMI and for additional proceedings, including the taking of additional evidence. The court's order constitutes a "general remand" that authorizes entirely new findings and conclusions with respect to MMI so long as they do not conflict with the court's order. *See Musgrave v. Industrial Claim Appeals Office*, 762 P.2d 686 (Colo. App. 1988).

EFFECT OF ALJ CANNICI'S ORDER ON REMAND

Respondents also contend that in the Order of Remand ALJ Cannici found Claimant reached MMI. Therefore, Respondents reason Claimant is not entitled to an award of additional benefits. As support for this argument Respondents cite that portion of the Order on Remand in which ALJ Cannici found that the follow-up DIME report contained no recommendation for treatment for the right knee, did not condition MMI on further treatment for the right knee, placed Claimant at MMI and provided a rating for the left knee only. The ALJ disagrees with this argument.

Respondents' argument misconstrues ALJ Cannici's findings. Consistent with the opinion of the Court of Appeals, ALJ Cannici found the follow-up DIME report was "ambiguous" with regard to the cause of the right knee symptoms. In support of this finding ALJ Cannici noted that the follow-up DIME report did not expressly recommend any treatment for the right knee, did not condition MMI on treatment of the right knee and appeared to place Claimant at MMI for the left knee. Conversely ALJ Cannici also found that in the follow-up DIME report Dr. Watson wrote that his opinions concerning the right knee were unchanged from the opinions expressed in the November 23, 2010 DIME report. Of course, in the November 2010 DIME report Dr. Watson had opined the right knee symptoms were causally-related to the left knee injury and that Claimant needed treatment for the right knee. Thus, ALJ Cannici recognized, as did the Court of Appeals, that the follow-up DIME report was ambiguous because it is subject to conflicting inferences concerning whether or not the DIME physician found the Claimant's right knee symptoms are related to the left knee injury. ALJ Cannici resolved this conflict and found as a matter of fact that "Dr. Watson's ultimate DIME opinion was that Claimant's right knee injury was a component of her admitted left knee injury."

Further, ALJ Cannici's Order on Remand does not contain any *explicit* finding purporting to determine whether or not Claimant has reached MMI. Rather ALJ Cannici limited the Order on Remand to resolving the "ambiguity" in the follow-up DIME report.

MMI DETERMINATION AND CLAIM FOR MEDICAL BENEFITS TO TREAT RIGHT KNEE

Claimant contends she is entitled to an award of additional medical benefits to treat the right knee condition. Claimant contends that her entitlement to additional medical treatment (other than maintenance treatment) is dependent on a finding that she is not at MMI. The Claimant contends that authority to determine she has not reached MMI is inherent in the remand order issued by the Court of Appeals. The ALJ agrees with Claimant's arguments.

As set forth above, Claimant has always maintained that she has not reached MMI because the right knee symptoms are causally related to the industrial injury and because she needs additional treatment for the right knee to cure and relieve the effects of the 2007 industrial injury. ALJ Harr denied the request for medical treatment of the right knee because he found that the DIME physician opined the right knee symptoms were not causally related to the injury and Claimant failed to overcome that determination by clear and convincing evidence. Claimant ultimately appealed to the Court of Appeals ALJ Harr's conclusion that the DIME physician "changed" his November 2010 opinion concerning the cause of the right knee symptoms. The court remanded the case for new "record-supported findings" to resolve the ambiguity in the follow-up DIME report and for such additional proceedings as might prove necessary and appropriate.

As determined above, a DIME physician's finding concerning whether or not a claimant has reached MMI is binding unless overcome by clear and convincing evidence. A DIME physician's finding concerning MMI necessarily includes determinations of whether the claimant's medical conditions were caused by the industrial injury and whether additional treatment is likely to improve the claimant's condition.

Here, ALJ Cannici has already determined, pursuant to the instructions of the Court of Appeals, that it is Dr. Watson's DIME opinion that Claimant's right knee symptoms are causally related to the industrial injury. As determined in Finding of Fact 37, Respondents do not argue that the undersigned ALJ should interfere with ALJ Cannici's determination. Neither do Respondents argue that they have overcome Dr. Watson's causation finding by clear and convincing evidence. Similarly Respondents do not argue they presented clear and convincing evidence to overcome Dr. Watson's opinion that Claimant needs additional treatment for the right knee including an orthopedic evaluation.

As determined in Finding of Fact 37, Dr. Watson's findings that the right knee symptoms are causally related to the November 2007 industrial injury and that Claimant requires additional treatment are tantamount to a finding Claimant has not reached MMI. Because Respondents do not contend that they have presented clear and convincing evidence to overcome Dr. Watson's finding that Claimant has not reached MMI that finding is binding on the parties and the ALJ. *Cordova v. Industrial Claim Appeals Office, supra.*

In these circumstances Claimant is entitled to an award of additional medical benefits to treat the right knee symptoms including referral to and treatment by an orthopedic specialist.

CLAIM FOR ADDITOINAL TTD BENEFITS

Claimant contends she is entitled to an award of TTD benefits commencing February 28, 2013 until she is determined to have reached MMI. The ALJ agrees with this argument.

Where respondents file an admission of liability admitting for TTD benefits they are bound by that admission and must pay accordingly. Section 8-43-203(2)(d), C.R.S. The filing of an admission for TTD benefits amounts to an admission that Claimant has sustained the initial burden of proof to establish a right to TTD benefits. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000). Once admitted TTD benefits must ordinarily continue until the occurrence of one of the events listed in § 8-42-105(3), C.R.S., including the occurrence of MMI. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997).

Here, Respondents filed an FAL admitting Claimant was entitled to TTD benefits commencing December 1, 2008. The FAL terminated the TTD benefits on February 28, 2013, the date Claimant reached MMI according to Respondents' interpretation of Dr. Watson's follow-up DIME report. However, as determined above, Dr. Watson's true opinion was that Claimant did not reach MMI on February 28, 2013, and Respondents have not overcome that opinion by clear and convincing evidence. Consequently, Respondents have not shown any legal basis for terminating Claimant’s TTD benefits on February 28, 2013. Consequently, Claimant is entitled to an award of TTD benefits commencing February 28, 2013 and continuing until terminated in accordance with law or order. TTD benefits shall be paid at the statutory rate based on the admitted average weekly wage.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. Insurer shall provide reasonable and necessary medical benefits for treatment of Claimant’s right knee condition including the provision of an orthopedic evaluation.

3. Insurer shall pay temporary total disability benefit at the statutory rate and based on the admitted average weekly wage commencing February 28, 2013 and continuing until terminated in accordance with law or order.

4. Issues not determined by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 14, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she is permanently and totally disabled as a result of her October 28, 2010 industrial injury.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to the following specific medical maintenance treatment recommended by Dr. Bloch: neuropsychological testing; right hip MRI; right leg EMG testing; and massage therapy.

STIPULATIONS

Claimant is currently receiving Social Security Disability Benefits. Any benefits awarded to Claimant would be subject to an offset for receipt of those benefits. Any entitlement to future medical maintenance benefits not specifically included in Exhibit 9 is reserved for future determination.

FINDINGS OF FACT

1. Claimant is 34 years old and resides in the Denver metropolitan area, specifically in Aurora, Colorado. Claimant drives a motor vehicle and has a valid Colorado driver's license.

2. In 2010 Claimant was employed by Employer as a lead ramp service agent when she sustained a compensable industrial injury on October 28, 2010. A baggage cart pinned Claimant against a belt loader and she suffered injuries to her right hip and lower extremity.

3. Claimant has undergone three surgeries for her right hip since the date of injury, with the most recent surgery being a revision right hip arthroscopy in January of 2013.

4. Claimant has been treated by doctors at OccMed Colorado throughout the claim including Dr. Raschbacher, Dr. Smith, and Dr. Bloch. Currently Dr. Bloch is her primary authorized treating provider. Claimant's right hip surgeries were performed by Dr. White and Dr. Kelly.

5. On November 4, 2014 Claimant was evaluated by Cynthia Kelly, M.D. Claimant reported continued hip pain. Dr. Kelly noted full range of motion of Claimant's hip with mild complaints of pain at the end of internal rotation and adduction. Dr. Kelly

noted that Claimant's muscle tone in the right thigh compared to the left was symmetric and thigh circumference was symmetric. Dr. Kelly opined that Claimant had an excellent radiographic response to the surgery, and opined that Claimant was using her right lower extremity more than Claimant admitted to based on the muscle tone and circumference of the musculature of Claimant's thigh. Dr. Kelly opined that she was unsure whether Claimant would benefit from a total hip arthroplasty based on Claimant's x-rays and not really knowing what Claimant's pain generator was. *See* Exhibit B.

6. On May 4, 2015 Claimant underwent an independent medical evaluation performed by Douglas Scott, M.D. Claimant reported that her right hip popped and was painful. Claimant reported with any activity she had pain after 30 minutes. On physical examination, Dr. Scott noted that the range of motion in Claimant's right hip flexion was limited by pain to 100 degrees with left hip flexion to 145 degrees. He also noted that right hip abduction was decreased compared to the left with Claimant reporting acute sharp pain similar to a muscle spasm. Dr. Scott noted that right hip extension was decreased compared to the left and that right external rotation was less than the left with Claimant reporting it "hurt." Dr. Scott noted that as a result of her work injury from October 28, 2010 Claimant was diagnosed with a right hip labral tear, underwent a right hip arthroscopy on May 18, 2011, developed osteonecrosis of the right femoral head and had a subsequent surgery to address this, then had a revision right hip arthroscopy surgery to revise the first labral tear repair. Dr. Scott noted that Claimant did not fully respond to the surgical treatment and continued to complain of pain with limits in her right hip range of motion. He noted that in many respects Claimant had failed surgical treatment of her right hip condition. Dr. Scott opined that Claimant's condition was probably stable at this time and that it was appropriate to consider whether maximum medical improvement could be declared. He also noted there was a question as to whether or not a total hip arthroplasty was appropriate and should be performed. Dr. Scott recommended Claimant be referred for a 24-month Division IME to address maximum medical improvement (MMI), ratable permanent impairment, maintenance treatment, ongoing opiate pain medication prescriptions and/or weaning, reasonable and necessary massage treatment, and whether or not a total hip arthroplasty is reasonable, appropriate, and necessary. *See* Exhibit A.

7. On May 23, 2015 Dr. Scott issued a supplemental report. Dr. Scott opined that Claimant had reached MMI and that her hip condition was stable. *See* Exhibit A.

8. On June 18, 2015 Claimant was evaluated by Dr. Bloch. Dr. Bloch noted that Claimant's gait was without antalgia, Claimant sat comfortably in a chair, Claimant was able to rise from the chair without problems, and that Claimant walked about the exam room and clinic without any significant difficulty. Dr. Bloch placed Claimant at MMI and provided an impairment rating of 17% scheduled lower extremity. Dr. Bloch provided permanent work restrictions of no lifting more than 10 pounds, no standing or walking more than 2-4 hours per day, and no crawling, kneeling, squatting, or climbing. Dr. Bloch recommended maintenance treatment that included follow up with Claimant's hip surgeon and referral to a pain management specialist for medication management

and weaning. Dr. Bloch opined that no further medical maintenance should be considered necessary. *See* Exhibit C.

9. On July 7, 2015 Respondents filed a final admission of liability consistent with the 17% scheduled impairment rating of the lower extremity that also provided for maintenance medical treatment that was reasonable and necessary as outlined by Dr. Bloch's June 18, 2015 report. *See* Exhibit F.

10. Claimant timely objected to the final admission of liability.

11. On October 5, 2015 Claimant was evaluated by Kevin Page, PA-C. PA Page noted that Claimant was at MMI and was under maintenance currently. PA Page noted that Claimant should be under maintenance for pain management and should be transferred to long-term pain management outside their clinic.

12. On October 27, 2015 Claimant was evaluated by Dr. Bloch. Claimant reported ongoing pain. Dr. Bloch opined that her case required more workup including an EMG of the right lower extremity, a repeat hip MRI for stability, a three-phase bone scan to make sure there is no CRPS, and a neuropsychological evaluation. Dr. Bloch noted he would be hard pressed to say that Claimant needed a hip replacement without any current imaging. Dr. Bloch opined that otherwise, Claimant was still at MMI and would have ongoing tests while at MMI but should the tests show anything positive it could change the MMI status. Dr. Bloch requested referrals for Claimant to have neuropsychological testing, an MRI of her right hip, an EMG of her right leg, and massage therapy.

13. On November 10, 2015 Claimant was evaluated by Dr. Bloch. Claimant reported not doing well and having increased pain. Dr. Bloch opined that Claimant was still at MMI, that he would refer Claimant for pain management, and noted that they had asked for an EMG, a repeat MRI, and a neuropsychiatric evaluation as testing post MMI to make sure that none of the findings would challenge Claimant's MMI status. *See* Exhibit 11.

14. On November 11, 2015 John Macurak authored a vocational evaluation report. Mr. Macurak noted that he reviewed medical records, conducted a transferable skills review, and performed labor market research in the Denver area. Mr. Macurak noted he conducted his vocational research using work restrictions for Claimant that included: no lifting over 10 pounds; no bending greater than 10 times per hour; no pushing/pulling over 10 pounds of force; walking up to 1 hour per day; standing up to 1 hour per day; sitting 2-4 hours per day. Mr. Macurak opined that Claimant had attempted a return to regular employment activities but that to date had not had any job offers or interviews. Mr. Macurak noted that Claimant was not able to qualify for work assignments advertised in the local newspaper or help wanted ads. Mr. Macurak opined that due to Claimant's physical limitations and work restrictions, in addition to her pain impairment and limited educational background, Claimant was unlikely to secure any modified sedentary employment opportunities in the Denver or Colorado job

markets. Mr. Macurak opined that Claimant was not employable within her current physical abilities and level of skills. He relied on Claimant's physical limitations, inability to transfer her skills into entry level clerical assignments, lack of updated training and knowledge, and work restrictions in forming his opinion. *See* Exhibit 8.

15. Mr. Macurak's opinions are not credible or persuasive. Notably, Mr. Macurak relied on work restrictions that do not match the Claimant's current work restrictions. Mr. Macurak also relied on Claimant's reports that she had been actively seeking work and applying for jobs, which is not accurate. Claimant did not begin any search for employment until November of 2015. Further, Mr. Macurak discounted Claimant's prior ability to use computers, complete and pass training required annually by her employer, ability to multi-task while the lead ramp agent, and her prior vocational certificate as a nail technician that showed her ability to complete and pass training.

16. On November 16, 2015 surveillance video of Claimant was obtained by investigator Cory Shorts. Mr. Shorts also testified at hearing. On November 16, 2015 Claimant was observed for approximately 2.5 hours when she drove from her home to pick up a friend, drove to Costco, pumped gas, shopped at Costco, drove to a restaurant and waited in the car while her friend went in, and drove back to her home. At Costco, Claimant was observed walking around pushing a shopping cart with no apparent difficulty. Claimant was observed lifting a 50 pound bag of ice melt into the cart without assistance. *See* Exhibit E.

17. On November 17, 2015 surveillance video of Claimant was again obtained by Mr. Shorts. Claimant was observed outside her home shoveling, pounding, and breaking apart snow with a shovel. There was no apparent difficulty observed with Claimant walking on the snowy/icy surface. *See* Exhibit E.

18. On November 19, 2015 Katie Montoya authored a vocational assessment report. Ms. Montoya noted that she interviewed Claimant on November 6, 2015, completed research, and reviewed records. Claimant reported to Ms. Montoya that she was in constant pain, could not do anything, and was on pain pills. Claimant reported if she tried to do anything, she could not recover and that she limps and hurts all the time. Claimant reported not being able to maintain more than 20 minutes of activity. Claimant reported her prior work history included: working for United Airlines in cabin services, cleaning and dumping lavatories; working at the front desk of a Marriott hotel; working in a watch shop changing batteries; and working for Employer as lead ramp agent. Claimant reported with her work for Employer she ran a crew of two to four others and handled two to three airline gates and was responsible for bringing in planes, hooking up and connecting planes, and multi-tasking a variety of duties. Claimant reported to Ms. Montoya that one week prior, she had gone to Work Force to attempt to apply for jobs and reported that she planned to do testing with the Division of Vocational Rehabilitation. Claimant reported she could only lift a bottle of water or a notebook. *See* Exhibit D.

19. Ms. Montoya noted Claimant's permanent work restrictions provided by Dr. Bloch on June 18, 2015 when Claimant was placed at MMI included lifting up to 10 pounds with standing and walking 2-4 hours per day and no kneeling, squatting, or crawling. Ms. Montoya noted that although Claimant reported limitations in academic functioning and ADHD, Claimant was able to multitask and function in her work for Employer. Ms. Montoya identified a production position where an individual deals with products that are 6 pounds or less and where an individual could sit or stand as needed that would meet Claimant's restrictions. Ms. Montoya also identified a security attendant position, a cashier position, and a front desk position that would be within Claimant's limitations and available to Claimant. *See* Exhibit D.

20. On November 20, 2015 Ms. Montoya issued an addendum to her report after she had the opportunity to review surveillance video of Claimant. Ms. Montoya opined that Claimant was much more active than reported at the interview. Ms. Montoya noted that Claimant reported significant limitations and inability to do much of anything when the video showed fluid movements and showed Claimant lifting a bag that seemed likely to weigh quite a bit more than 10 pounds or more than a notebook. *See* Exhibit D.

21. Ms. Montoya testified at hearing consistent with her written reports. Ms. Montoya opined that Claimant has the capacity to return to work. Ms. Montoya noted that Claimant's nail technician certificate was relevant because it showed that Claimant was able to complete training to obtain the certificate. Ms. Montoya noted in addition to her nail technician certificate, Claimant had skills that she obtained from prior employment that were transferrable including multitasking, timeliness, and safety and awareness. Ms. Montoya noted that if Claimant's restrictions were lessened to what was recommended by Dr. Scott after Dr. Scott reviewed the surveillance video, this would open up even more vocational options. Ms. Montoya opined that Claimant is able to do the full range of sedentary work and that Claimant would be a semi-skilled worker classification. Ms. Montoya noted her difference of opinion with Mr. Macurak and believed that Mr. Macurak used incorrect restrictions that were given to Claimant before Claimant reached MMI and noted that Claimant had no restriction on sitting.

22. Ms. Montoya's opinions are found credible and persuasive. Ms. Montoya used the applicable work restrictions in place, accounted for the discrepancies in Claimant's reported ability and her demonstrated ability based on past work experience, and was able to find several jobs in the Denver market that Claimant is able to perform. Ms. Montoya is more credible and persuasive than Mr. Macurak.

23. Dr. Scott also testified at hearing consistent with his reports. Dr. Scott opined that Claimant was at MMI as of May 23, 2015. Dr. Scott reviewed additional records including the surveillance video prior to the hearing. Dr. Scott opined that Claimant's restrictions should be lessened to allow for lifting up to 25 pounds from waist to chest. Dr. Scott noted that Dr. Kelly opined that Claimant's surgery was good and that Claimant was using her hip more than Claimant admitted. Dr. Scott recommended for maintenance care that Claimant get off opioids and be referred to a pain

management specialist, that Claimant have a psych evaluation, and that Claimant be referred to her hip surgeon for follow up treatment and/or MRI if the surgeon felt it was appropriate. Dr. Scott opined that massage therapy should not be included in maintenance treatment as it was passive treatment and Claimant was in need of active treatment for her chronic pain. Dr. Scott opined that the EMG study was not reasonable and necessary as there were no indications that Claimant had CRPS or sympathetically mediated pain. Dr. Scott also opined that a neuropsychological evaluation was not appropriate since that type of evaluation was done to assess cognitive function which was not at issue in Claimant's case and he opined instead that a referral for psychological evaluation was appropriate for Claimant's case. He also opined that an MRI was not necessary unless Claimant's treating surgeon felt it was necessary and opined that Claimant should be referred back to her surgeon for that determination.

24. Claimant's testimony, overall, is not found credible or persuasive. Claimant reported to Ms. Montoya not being able to lift more than a bottle of water or notebook when interviewed on November 6, 2015 yet Claimant is shown in surveillance video lifting a 50 pound bag of ice melt into a shopping cart a few weeks after her interview with Ms. Montoya. Additionally, Claimant's range of motion in her right hip was noted to be inconsistent between providers based on Claimant's report of pain and limitations. Claimant testified she has only one to two good days per month, yet back to back days of surveillance show her performing much more activity than she states she is capable of. Claimant also reported to Mr. Macurak that she had been seeking employment, yet Claimant did not make any efforts to obtain employment until the week prior to her evaluation with Ms. Montoya in November of 2015. Despite Claimant's reports that she is not good with computers, Claimant regularly uses social media which involves typing, uploading, and posting photographs. Claimant also completed and passed required training with Employer that was performed via computer. Claimant also reported that after doing much of anything in the way of activity that it takes her two days to recover. Despite this, Claimant was very active on November 16, 2015 while out and about running errands and shopping for 2.5 hours and the next day Claimant was not recovering, but was observed outside shoveling snow. Claimant reported not driving much and having to push on her right leg while driving to help put pressure on the gas and brake pedals. Despite this, Claimant admitted to driving to California for a recent trip. Claimant's testimony and reports are inconsistent and not credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Permanent Total Disability

To prove her claim that she is permanently and totally disabled, Claimant shoulders the burden of proving by a preponderance of the evidence that she is unable to earn any wages in the same or other employment. *See §* 8-40-201(16.5)(a) and 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The ALJ may also consider the claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. The question of whether the claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

Claimant has failed to meet her burden to establish that she is permanently and totally disabled. Claimant has failed to show that she is unable to earn any wages in the same or other employment. The vocational assessment and opinions offered by Ms. Montoya are credible and persuasive and show that there are a variety of employment opportunities available to Claimant in the Denver metropolitan area. Claimant's mental ability, physical ability including her current work restrictions, and her education history show that she is capable of gainful employment. Here, the opinions of Ms. Montoya are persuasive that employment is reasonably available to Claimant given her work restrictions and her abilities. The opinions of Mr. Macurak have been considered and rejected. Mr. Macurak relied on incorrect work restrictions and failed to account for the variety of past work history that show skills Claimant is capable of. Further, Claimant's own testimony regarding her ability to work and her physical limitations is not found credible or persuasive.

Medical Treatment

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Here, Claimant has requested specific treatment that includes: right hip MRI; neuropsychological evaluation; right leg EMG; and massage therapy. Claimant has failed to establish by a preponderance of the evidence that these treatments are reasonable and necessary to maintain her condition or relieve her ongoing symptoms. The opinions of Dr. Scott are found credible and persuasive in this regard. Although Claimant may have established that a referral to her hip surgeon might be appropriate to determine whether or not she needs a repeat right hip MRI, she has not yet established that a right hip MRI is reasonable or necessary. Similarly, although psychological testing may have been shown to be appropriate, Claimant failed to show that a neuropsychological evaluation is reasonable and necessary. The opinion of Dr. Scott that a neuropsychological evaluation is done to assess cognitive function which is not at issue in Claimant's case and that psychological testing would be more appropriate is found persuasive. Claimant also failed to establish that an EMG study would be reasonable and necessary and the opinion of Dr. Scott is credible and persuasive that the EMG study would not be reasonable and necessary as there were no indications of sympathetically mediated pain or CRPS. Dr. Scott is also persuasive that massage therapy is not reasonable and necessary as Claimant is in need of active and not passive treatment.

The requests for these treatments from Dr. Bloch do not establish or show why he believes these treatments to be both reasonable and necessary or why he believes these treatments would relieve the effects of the injury or prevent further deterioration of Claimant's condition. Claimant was unable to meet her burden to show that these specific treatments, at this time, are reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden to show that she is permanently and totally disabled. Her claim for permanent total disability benefits is denied and dismissed.

2. Claimant has failed to meet her burden to show an entitlement to the following specific medical maintenance treatment: neuropsychological evaluation; right hip MRI; right leg EMG testing; and massage therapy.

3. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 24, 2016 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that he suffered a worsening of condition related to the admitted work injury?

- Did Claimant prove the cervical surgery recommended by Jeffrey Donner, M.D. is reasonable, necessary, or related treatment for this claim?

PROCEDURAL STATUS

The ALJ issued Findings of Fact, Conclusions of Law and Order on February 12, 2016 (mailed on February 17, 2106). Respondents filed a Motion for Corrected Order on or about March 1, 2016. Claimant filed an Objection to the Motion for Corrected Order on March 8, 2016, opposing the Motion. The undersigned ALJ issued a Procedural Order, which granted the Motion for Corrected Order (in part) and denied the motion (in part).

Respondents have conceded they are obligated to provide maintenance medical benefits. As found, *infra,* Claimant has adduced sufficient evidence to demonstrate his condition has worsened and he requires treatment. However, there is insufficient evidence in the record to establish the nature and extent of this treatment. Accordingly, the ALJ has found Respondents are required to return Claimant to his ATP for this determination.

FINDINGS OF FACT

1. Claimant was employed by Employer as a construction site supervisor. On December 21, 2010, Claimant suffered a compensable industrial injury when he was involved in a motor vehicle accident ("(MVA") while travelling to a job site. He testified his vehicle was struck by a car travelling approximately 50 m.p.h.

2. Claimant's medical history was significant in that he had a history of degenerative changes in his low back for which he received treatment, including a low back laminectomy. Claimant took Vicodin for arthritis for a number of years[1]. There was no evidence Claimant sustained an injury or required treatment to his cervical spine prior to 12/21/10.

3. Claimant was initially seen at the Windsor Family Clinic by D. McGuire, PA-C on December 23, 2010, two days after the collision. At that time, Claimant

[1] See Dr. Mason's office note, dated 7/25/11.

complained of neck pain and stiffness, as well as describing numbness in the 3rd, 4th and 5th fingers in his left hand. The finger numbness had resolved. Claimant was diagnosed with a cervical strain, provided with pain medication and told to use alternating ice and heat on his neck.

4. On December 28, 2010, Claimant returned to the Windsor Family Clinic and was seen by R.A. Mason, M.D. Claimant reported pain on the left side of his neck, with a lot of popping and stiffness. Dr. Mason noted tenderness over the trapezius muscle, some muscle spasm but good range of motion ("ROM") in the neck. Dr. Mason diagnosed a cervical strain, recommended rest, stretching exercises and moist heat. Naprosyn and physical therapy ("PT") were also prescribed.

5. Claimant received PT from Silvia Sorensen, LPT at Ft. Collins Physical Therapy and Sports Center beginning on April 11 through April 28, 2011. He received multiple modalities of treatment including ultrasound, traction and manual treatments.

6. Claimant was examined by Jeffrey Donner, M.D. on May 5, 2011. He complained of left-sided neck pain along with occasional radicular arm pain and numbness in his fingers. Claimant's history of low back surgery was referenced. Cervical spine x-rays showed disc space narrowing. Claimant completed a Neck Oswestry index (which was a questionnaire that documented the effect of neck pain on everyday activities) at that time and was assessed a score of 18%. Dr. Donner's assessment was cervical disc degeneration and neck pain. Dr. Donner opined Claimant's neck pain was most likely related to an inflamed facet joint at C5-6. He recommended a course of chiropractic care and if that was not effective, an MRI and facet injection.

7. Claimant returned to Dr. Mason on July 25, 2011, complaining of persistent pain on the left side of the neck. He had received PT and underwent an orthopedic evaluation in which it was noted there were some facet joint problems. Dr. Mason found good strength and ROM in the neck. Claimant was to continue rest, stretching exercises, anti-inflammatory medications and moist heat. Dr. Mason prescribed Vicodin.

8. Claimant testified that he did not have health insurance and did not treat in the intervening nine (9) months. There were no records admitted at hearing which showed Claimant received any treatment during this period.

9. Insurer filed a General Admission of Liability ("GAL") for medical benefits on April 9, 2012.

10. On April 20, 2012, Claimant was examined by William Basow, M.D. to whom he was referred by his attorney. Claimant's course of treatment was reviewed, including nine (9) PT sessions which he reported did not relieve his symptoms. Claimant was having intermittent symptoms in the forearm and fingers, as well as pain

in the left neck and trapezius. Claimant had normal strength and sensation upon examination, with no neurological abnormalities noted. Dr. Basow's assessment was chronic neck pain without radicular symptoms. Claimant was to begin PT and chiropractic treatments. Claimant had no work restrictions.

11. Claimant returned to Dr. Basow on May 7, 2012, at which time he was note to have mild limitations in cervical flexion, extension and left rotation. Dr. Basow's assessment was chronic neck strain with a good initial response to PT and traction. A home traction unit was prescribed, along with chiropractic treatment. Dr. Basow noted Claimant had no work restrictions.

12. Dr. Basow saw Claimant on June 1, 2012 and made essentially the same clinical findings as the 5/7/12 exam. Claimant was to resume chiropractic treatments and physical therapy. Claimant remained at full duty.

13. Kevin O'Connell, M.D. assumed Claimant's treatment as of July 3, 2012 when the latter had complaints of intermittent left arm pain and paresthesias. Claimant was noted to have a 110-120 mile per day commute and was taking Vicodin at bedtime. Dr. O'Connell's assessment was cervical sprain, cervical arthropathy and left paracervical muscle spasms. Dr. O'Connell prescribed Flexeril, PT and recommended a cervical MRI. Claimant had no work restrictions.

14. An MRI was done on Claimant's cervical spine on July 12, 2012, which was read by Mark Reese, M.D. Dr. Reese found mild facet and uncovertebral degenerative changes at C4-5; a posterior broad based disc protrusion with an osteophyte formation contributing to severe right-sided neural foraminal narrowing at C5-6; and posterior broad-based disc protrusion with facet hypertrophic changes and severe bilateral neural foraminal narrowing with stenosis of the left aspect of the canal at C6-7. Dr. Reese characterized these as spondylitic changes, significant at C5-6 and C6-7. The ALJ drew the inference that these were degenerative changes in Claimant's cervical spine.

15. Dr. O'Connell evaluated Claimant on July 30, 2012, at which time the MRI results were reviewed. Claimant had tenderness in the left paracervical musculature at the midpoint and restrictions in his ROM. His DTR, motor and sensory nerves were intact. Dr. O'Connell's assessment was left cervical strain, cervical spondlylosis at C5-6 and C6-7. Flexeril was discontinued and Skelaxin prescribed. Claimant was to continue use of home TENS unit and receive massage therapy.

16. On September 10, 2012, Dr. O'Connell examined Claimant and he reported improvement. Claimant was having intermittent radicular symptoms into the left finger. Dr. O'Connell's assessment was cervical strain, cervical degenerative disc disease and left C7 radiculitis. Claimant was to continue with medical massage and home cervical traction. He could return to work full duty.

17. Claimant was next seen by Dr. O'Connell on October 8, 2012. He had tenderness and trigger point discomfort on palpation in the paracervical musculature. His ROM on extension was 50% of normal and his neurological exam was normal. Dr. O'Connell's assessment was cervical strain, underlying cervical spondylosis-exacerbation.

18. Claimant returned to Dr. O'Connell three times over the next three months. At the November 12, 2012 evaluation, Claimant was improved. Dr. O'Connell's assessment was left paracervical strain, cervical degenerative disc disease with foraminal stenosis triggering left cervical radiculitis. Claimant also saw Dr. O'Connell on January 14, 2013 at which time he denied radicular symptoms, but had referred pain into the scapula. Claimant was to continue conservative treatment. On February, 19, 2013, Dr. O'Connell re-examined Claimant and found no arm weakness, with minimal and sporadic left arm radicular symptoms. Dr. O'Connell assessment was the same as the 2/19/13 appointment. In each of these follow-up appointments, Claimant had no work restrictions

19. Dr. O'Connell evaluated Claimant on March 19, 2013 and his pain level on this day was 4/10. Dr. O'Connell determined Claimant was at MMI and assigned a 21% whole person impairment pursuant to the AMA Guides. Dr. O'Connell noted treatment with home cervical traction and medical massage provided Claimant relief and he required massage visits (7) as his only maintenance. Dr. O'Connell further noted Claimant's left arm symptoms "receded over time with conservative treatment, so neurosurgical consultation was never pursued." The ALJ notes throughout Claimant's treatment with Dr. O'Connell he had no work restrictions.

20. Respondents requested a Division Independent Medical Examination, which was performed by Richard Stieg, M.D. on July 30, 2013. Dr. Stieg's impression was severe cervical degenerative disease with persistent myofacial pain and pain disorder (chronic). Dr. Stieg agreed with Dr. O'Connell's MMI date and determined Claimant sustained a 27% whole person impairment under the AMA Guides. Dr. Stieg noted Claimant had no pre-existing history of neck or upper extremity problems prior to the motor vehicle collision on 12/21/10. Dr. Stieg recommended maintenance treatment in the form of continued physiatric visits on a p.r.n. basis and projected Claimant would likely have continued mild to moderate pain which would require maintenance treatment. The ALJ credited Dr. Stieg's DIME findings.

21. A Final Admission of Liability ("FAL") was filed on or about December 5, 2013, admitting for the impairment rating of Dr. Stieg. The FAL was filed pursuant to an agreement between the parties, which resolved issues set for determination at hearing. As part of the agreement, Claimant did not object to the FAL and received a payment of permanent partial disability benefits based upon Dr. Stieg's rating. In its FAL, Insurer stated: "We admit for reasonable and necessary and related medical treatment and/or medications after MMI."

22. Claimant testified at hearing his pain has gradually worsened and he was having more frequent radicular complaints. He was less functional both at work and in his activities of daily living. Claimant was a credible witness, as he did not appear to overly exaggerate his symptoms.

23. Claimant returned to Dr. Donner on April 4, 2014. At that time, he was complaining of continued neck pain on a scale from 3 to 5/10 and described an aching, burning, and stabbing sensation in the left side of his neck and into his left scapular area. He described radiating pain into his left arm, with numbness in his third and fourth fingers. Claimant said the driving he was doing for work "markedly aggravated" his neck and left arm symptoms. Claimant was not in severe pain and had mild tenderness on the left side of the neck. However, Claimant completed a neck Oswestry index at this evaluation and had a score of 42%, which leads to the inference that Claimant believed his level of functioning had decreased. Claimant said he was not smoking cigarettes, but had in the past. Dr. Donner recommended a cervical MRI, but also stated Claimant was a reasonable surgical candidate for a two-level anterior cervical fusion or disc replacement.

24. Dr. Donner authored a letter, dated on April 4, 2014, in which he opined Claimant's neck related complaints were directly related to the motor vehicle collision of 12/21/10, despite preexisting degenerative changes. Dr. Donner believed a majority of the MRI findings from the initial MRI performed in 2012 were directly related to the motor vehicle collision. Dr. Donner noted Claimant continued to have symptoms of intractable neck pain and radiculopathy related to herniated discs and stenosis at C5-6 and C6-7 and he recommended obtaining an updated MRI scan of the cervical spine. Dr. Donner said Claimant was not at MMI.

25. Claimant testified he is currently employed by St. Aubyn Homes as a supervisor for residential home building and was working at this job when he was evaluated by Dr. Donner in April 2014. In that capacity, he had to drive up to seventy (70) miles per day. Claimant admitted that driving long distances sometimes caused his neck to hurt.

26. On May 21, 2014, Claimant underwent a second MRI which was read by Willis Chung, M.D. Dr. Chung said the MRI showed degeneration in the discs at C5-6 and C6-7 of Claimant's cervical spine with a 5mm right lateral disc herniation at C5-6, as well as a 3mm right lateral disc herniation at C6-7 and prominent bilateral C6-7 neural foraminal narrowing from lateral disc bulging at that level. Claimant had no central spinal stenosis. The ALJ notes that it is difficult to compare the findings of this MRI with the one of 7/12/12, as the former did not provide measurements of the disc bulges.

27. Claimant returned to Dr. Donner on May 21, 2014, who reviewed the results of his MRI. Dr. Donner noted he had very limited neck movement. Claimant was noted to be smoking cigarettes. Dr. Donner's assessment was progressive severe neck pain with radiculopathy at C5-6 and C6-7, where there were degenerative

changes, stenosis and herniated discs. Dr. Donner recommended and noted Claimant wanted to proceed with a two-level anterior cervical discetomy, nerve root decompression and placement of artificial discs.

28. Andrew Castro, M.D. (orthopedic spine surgeon) performed a physician advisor review of the request for surgery. In his note dated June 11, 2014, Dr. Castro said two level disc replacement was not cleared by the FDA and by extension the Colorado Worker's Compensation Medical Treatment Guidelines. He opined that cervical surgical intervention for primarily neck pain was questionable, as it had unpredictable outcomes. He also noted Claimant's gap in treatment from prior to the surgical recommendation raised the issue of a possible new injury or intervening event which should be investigated. Dr. Castro recommended authorization for the surgery be denied.

29. Alicia Feldman, M.D. performed an IME[2] of Claimant on June 27, 2014. Dr. Feldman noted Claimant complained of pain in his cervical spine which radiated into his left shoulder, rarely into the left upper extremity, but experienced some paresthesias down his left arm into his third and fourth fingers. Claimant was working a new job as a site supervisor which required he do a lot of driving and repetitive movement of his neck at times, which caused fatigue. Claimant had limited and painful cervical spine extension and rotation to the left. Dr. Feldman's assessment was left-sided neck pain, cervical spondylosis, left upper extremity parasthesias and foraminal stenosis of the cervical spine.

30. Dr. Feldman stated Claimant's imaging studies showed chronic degenerative changes without acute pathology and neurological compromise. Dr. Feldman stated there were no findings of acute or subacute injury in the 7/12 MRI. She believed he had a cervical sprain/strain injury which should have resolved over several months. The cervical degeneration was longstanding. Dr. Feldman believed any residual pain was likely secondary to the underlying cervical spondylosis and degenerative conditions. Claimant had reduced his chronic pain medication, which was indicative that his pain was less than it was pre-accident. Dr. Feldman found Claimant could continue to work full duty. The ALJ notes Dr. Feldman did not make any recommendations concerning Claimant's treatment.

31. Dr. Feldman produced an addendum report, dated August 4, 2014. Dr. Feldman reviewed deposition transcript for Claimant in which he said his neck got fatigued after work when he did inspections. Claimant described using his eyes when he was driving to compensate because he couldn't turn his head. He said he was very fatigued a lot of times at night in his cervical area and shoulder. Dr. Feldman made no significant changes to her previous opinion.

[2] This IME was not requested by either party to the worker's compensation case, but rather was requested in the third party case arising out of the 12/21/10 MVA.

32. Claimant filed a Petition to Reopen alleging a worsening of condition on November 8, 2014. Dr. Donner's 4/4/14 report was attached.

33. Claimant returned to Dr. Donner on February 3, 2015, but no change was reported in Claimant's condition. Claimant reported continued neck pain with radiation to his left arm and hand.[3] Claimant was noted to be smoking. Dr. Donner reiterated his surgical recommendation and described it as Claimant's best option.

34. On March 18, 2015, Dr. Donner reevaluated Claimant. He noted Claimant had primarily neck pain radiating into his trapezial and suprascapular muscles and shoulder. Claimant was smoking cigarettes at this time. He had normal use and function of his upper extremities without any sensory or motor deficits. He once again recommended that Claimant undergo surgery.

35. Scott Primack, D.O. performed an IME on behalf of Respondents on March 30, 2015. Dr. Primack noted Claimant complained of "far more neck pain than arm pain"; that Claimant initially had facetogenic pain, but his current pain appeared to be more discogenic. Dr. Primack opined the two MRIs from 2012 and 2014 indicated that Claimant was suffering from ongoing degenerative changes, as opposed to a worsening of the injuries from the auto accident. He also noted Claimant's cervical spondylosis could be aggravated by his ongoing driving duties. Dr. Primack believed Claimant was at MMI and he had a high level of functioning given the condition of his cervical spine. He noted Claimant's condition would result in some level of ongoing discomfort, but the majority of his discomfort would be secondary to his underlying cervical spondylosis and not his work injury.

36. Dr. Primack issued an addendum report (after reviewing Dr. Feldman's IME report), dated April 20, 2015, which noted Claimant had longstanding cervical degeneration. Dr. Primack cited Dr. Feldman's conclusion the MVA caused a temporary aggravation of Claimant's underlying spondylosis and any residual pain was like secondary to the underlying degenerative condition. Dr. Primack believed Dr. Feldman's opinions supported his opinion.

37. On August 12, 2015, Brian Reiss, M.D. performed an IME on behalf of Respondents. Dr. Reiss noted Claimant had neck pain at a 4/10 level at the time he reached MMI and his only maintenance treatment was finishing his massage treatments. Dr. Reiss stated he would have recommended an isometric strengthening and conditioning program to continue on a long term basis to maintain Claimant's condition. Dr. Reiss felt Claimant's current symptoms were very similar to his symptoms at MMI, when Claimant stated his pain level was 5/10. The ALJ infers that Dr. Reiss' opinion regarding additional treatment was for Claimant to maintain MMI.

38. On examination, Dr. Reiss noted Claimant was not in any apparent distress. He had 0 degrees of neck extension, with full flexion, right rotation 70% of

[3] Claimant's Neck Oswestry Index was 36% at this appointment, indicating a slight lessening of symptoms. Claimant was smoking cigarettes at the time of this appointment.

normal and left rotation 50% of normal. Dr. Reiss noted Claimant's symptoms were primarily axial neck pain and opined that Claimant's symptoms were a continuation from his original injury. Dr. Reiss did not recommend a 2 level disc replacement procedure for Claimant's pain complaints. The ALJ credited the opinions of Dr. Reiss, particularly with regard to his conclusion that this procedure was not likely to help Claimant's symptoms.

39. Dr. Primack testified at hearing. He was qualified as an expert in physical medicine and rehabilitation, a specialty in which he was board certified. He was Level II accredited pursuant to the W.C.R.P. He restated his belief that Claimant's current pain was discogenic in nature, as opposed to facetogenic. He described the anatomical basis of facetogenic pain, noting the disc area was a three joint process including ligaments in the front of the vertebral bodies, the disc, ligaments and facet joints on the posterior side of the bodies. He described facetogenic pain as emanating from the facet joints, which is very common with whiplash disorders after vehicle accidents and opined this was the type of pain suffered in the immediate aftermath of the 12/21/10 MVA.

40. Dr. Primack stated Claimant's reports of pain have remained largely consistent, but there was a shift from facet-based neck pain to cervical spondylosis symptoms, which included more radicular findings. Dr. Primack further testified the MRI-s showed multiple changes over time not associated with the original work injury. Specifically, he noted with the 2014 MRI, facet changes had resolved and were listed as normal at C4-7. He felt there was a new disc herniation at C3-4 and there was also a new herniation at C4-5. The disc herniation at C5-6 previously identified was more lateral than previously identified as central and the disc heights had decreased which compressed the holes where the nerve roots exited, thereby increasing Claimant's stenosis and discogenic pain.

41. Finally, Dr. Primack reviewed the findings on the 2014 MRI, which showed edema at C6-7. This was either associated with an acute injury, endplate and compression fractures, or degenerative conditions. Dr. Primack testified that if the edema was a result of the underlying work injury, it would have developed within 4-5 months after the accident and have been visible in the 2012 MRI. He further testified the edema was more apparently related to an endplate fracture from ongoing degenerative conditions, as the progression of the underlying degenerative disease could further be seen from the new disc protrusions. The reasonable inference from Dr. Primack's testimony was that any treatment Claimant required was related to the degenerative process in his spine as opposed to the MVA.

42. Dr. Donner testified by way of evidentiary deposition. He was qualified as an expert in orthopedic surgery, a specialty in which he is board-certified. He also has a board certification in spine surgery, which has been the focus of his practice for twenty-five (25) years. He was involved in clinical trials related to artificial discs. Dr. Donner estimated he had been involved in close to one hundred cervical surgeries involving artificial discs. The ALJ credited Dr. Donner's extensive experience in performing surgeries of this type.

43. Dr. Donner stated when he first saw Claimant in May, 2011, he felt there was an inflamed facet joint at C5-6. Dr. Donner noted Claimant did not have any of the injections and when he returned in April, 2014, he was having symptoms of neural irritation and nerve root irritation. Dr. Donner opined 100% of Claimant's neck complaints were related to the 12/21/10 MVA. He believed the cause of Claimant's pain was discogenic and related to the facets, as well as nerve compression. Dr. Donner opined Claimant had chronic pain, which was unresponsive to conservative treatment and he was good candidate for cervical disc replacement. Dr. Donner noted with disc replacement there was a quicker recovery and less adjacent segment deterioration. In the absence of the artificial disc replacement surgery, the alternative was a two-level fusion procedure. Dr. Donner did not feel pain management was as good a treatment option as surgery.

44. Dr. Donner was asked about conservative treatment to maintain MMI, but returned to his opinion that surgery was more "realistic and cost effective" for Claimant. Dr. Donner did not believe Claimant should have to continue to exhaust conservative treatment or try every possible modality. Dr. Donner did not have Dr. O'Connell's treatment records or the DIME report when Claimant returned in 2014, although he subsequently reviewed Dr. Stieg's report. Dr. Donner reviewed the Treatment Guidelines and acknowledged these endorse one level disc replacement. Dr. Donner did not address the question of whether the surgical criteria were met under the Treatment Guidelines. He testified the FDA cleared two-level disc replacement, which was also validated by the North American Spine Society's treatment guidelines. (The ALJ overrules any objection and denies the Motion to Strike Dr. Donner's testimony at page 42:12-25.) The ALJ notes Dr. Donner did not consider several conservative treatment options, which could potentially ameliorate Claimant's symptoms.

45. Claimant testified he believed his symptoms have worsened over time. However, his report of pain has stayed in the 3, 4, 5/10 range. The ALJ found Claimant's pain complaints, as reported to his physicians were not appreciably worse than when he was evaluated by Dr. O'Connell and Dr. Stieg. The ALJ concludes that Claimant has not exhausted conservative treatment options, which may relieve these symptoms and/or maintain MMI.

46. The ALJ finds Claimant's need for treatment is result of his industrial injury as opposed to degenerative processes in his cervical spine.

47. The ALJ notes that although Claimant has been evaluated on several occasions since he reached MMI, he has not received active treatment since that time. The ALJ finds Claimant should be reevaluated regarding his need for additional treatment. Claimant is entitled to medical benefits, at a minimum, to maintain MMI.

48. The ALJ finds Dr. Donner made his surgical recommendation after Claimant was determined to be at MMI by the ATP, Dr. O'Connell and the DIME examiner, Dr. Stieg.

49. The ALJ concludes the proposed surgical procedure is not reasonable and necessary at this time.

50. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Worker's Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Reopening

Claimant sought to reopen his claim and alleged his condition worsened. Claimant pointed to his worsening symptoms (including radiculopathy) and Dr. Donner's records to support his Petition to Reopen. Claimant testified at his hearing that his symptoms had worsened. Respondents argued that any increase in Claimant's symptoms were related to degenerative changes in his cervical spine which have progressed, as opposed to his industrial injury. Based on the evidence before the ALJ, Claimant met his burden to reopen the claim.

Section 8-43-303(1), C.R.S., authorizes an ALJ to reopen any award on the grounds of, *inter alia*, change in condition. *Heinicke v. Indust. Claims Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008). The reopening authority under the provisions of Section 8-43-303, C.R.S. is permissive and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996).

Claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the Claimant's physical or mental condition that can be causally related to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

As found, Claimant's degenerative condition in his cervical spine was asymptomatic before 12/21/10 and then developed symptoms as a direct result of the MVA. Claimant adduced evidence that his level of functioning was worse and he had increased pain, as shown by the Oswestry cervical spine index survey he completed in 2014. The ALJ drew the reasonable inference that Claimant's increased pain in his cervical spine required additional treatment. Accordingly, the ALJ was persuaded that Claimant's condition has worsened and his claim should be reopened.

In the initial Findings of Fact, Conclusions of Law and Order, the ALJ noted there was no evidence presented as to when the last medical benefit was "due and payable", under 8-43-303(2)(b), C.R.S. That is still the case. In addition, Respondents 12/5/13 FAL admitted for *Grover* medical benefits, but Claimant has not been in active treatment since approximately March, 2013. Thus, it was unclear whether a Petition to Reopen was required in the case at bench[4]. These Corrected Findings of Fact, Conclusions of Law and Order have been issued to confirm Claimant's entitlement to medical benefits.

At this time, Respondents are obligated by the FAL to provide *Grover* medical benefits to maintain MMI. Respondents are also obligated to provide these benefits by this Order. As found, Claimant requires medical treatment, at a minimum, to maintain MMI. At least one physician (Dr. Reiss) made specific treatment recommendations and characterized this treatment as maintenance treatment. In addition, since Claimant has not been in active treatment since March, 2013 and has not completed several modalities of conservative treatment, there needs to be further evaluations by his authorized treating physicians and to what type of treatment he requires. There was no

[4] The initial Findings of Fact Conclusions of Law and Order noted at p. 13: "Assuming, *arguendo* that it has been longer than two (2) years since Respondents provided the last medical benefit, Claimant has made the requisite showing of a worsening of condition."

evidence before the ALJ on this subject and the ALJ declines to make any findings as to particular treatment Claimant may require. Therefore, the ALJ is limited his ruling to the finding that Claimant is entitled to continuing medical benefits to maintain MMI. Under this ruling, Claimant is not precluded from claiming he is not at MMI and seeking additional medical benefits to cure and relieve the effects of his industrial injury. However, those issues were not before the Court.

Based upon the totality of the evidence, the ALJ has determined Claimant requires additional treatment to maintain MMI. Respondents are required to provide those medical benefits.

Medical Benefits

Claimant seeks authorization of a two-level anterior cervical discetomy, nerve root decompression and placement of artificial discs. In the instant case, Claimant has the burden of proof to establish that the surgery proposed by Dr. Donner is reasonable and necessary, as well as related to his industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant asserted the MVA of 12/21/10 caused his previously asymptomatic cervical spine to develop symptoms and require treatment. Claimant argued the degenerative condition of his cervical spine has worsened over time and his need for surgery is a direct consequence of the 12/21/10 MVA. Claimant proffered the opinions of Dr. Donner to support his contentions. The ALJ concluded that Claimant did not meet his burden of proof in this instance.

There were three bases for the ALJ's conclusion that the proposed surgery is not reasonable and potentially not related to the 12/21/10 MVA; first, the ALJ was not persuaded that less invasive treatment options had been exhausted. Some examples of these available treatment options were identified by expert witnesses. These included:

5/5/11: Dr. Donner recommended a facet joint injection.

3/19/13: Dr. O'Connell recommended completion of therapeutic massage. (Claimant did not complete the treatments.)

7/30/13: Dr. Stieg recommended maintenance treatment in the form of continued physiatric visits on a p.r.n. basis.

8/12/15: Dr. Reiss recommended an isometric strengthening and conditioning program to continue on a long term basis to maintain Claimant's condition.

Given the amount of time that has transpired since Claimant's last treatment (over 2 ½ years) and the fact that non-surgical modalities are available, the ALJ determined that surgery is not reasonable at the time.

Second, the ALJ was persuaded by Respondents' argument the criteria under the Medical Treatment Guidelines were not met and did not support the proposed surgery. Respondents also cited Drs. Reiss' and Primack's opinions, both of whom noted the proposed surgery was not warranted and might not relieve Claimant's symptoms.

The ALJ considered whether the Medical Treatment Guidelines-Cervical Spine Injury, Rule 17, Exhibit 8 ("Treatment Guidelines") applied to the requested cervical surgery. The Guidelines are contained in W.C.R.P. 17, 7 Code Colo. Regs. 1101-3, and provide that health care providers shall use the Guidelines adopted by the Division of Workers' Compensation ("Division").

The Division's Guidelines were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. 2008. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. 2008.

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria).

However, an ALJ is not required to award or deny medical benefits based on the Guidelines.[5] In fact, there is generally a lack of authority as to whether the Treatment Guidelines require an ALJ to award of deny benefits in certain situations. The decision to award or deny medical benefits is addressed to the sound discretion of the ALJ. *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014).

In this case, the ALJ considered Rule 17, Exhibit 8 Section 3, which governs Total Artificial Cervical Disc Replacement (TDR). It provides in pertinent part:

> "Involves the insertion of a prosthetic device into the cervical intervertebral space with the goal of maintaining physiologic motion at the treated cervical segment. The use of artificial discs in motion-preserving technology is based on the surgeons preference and training" …[citing two reviews]…"There is strong evidence that in patients with single level radiculopathy or myelopathy cervical

[5] See W.C.R.P. 17-5(C), which states: "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate.

artificial disc produces 2 year success rates at least equal to those of anterior discetomy and fusion (ACDF) with allograft interbody fusion and an anterior plate…"

"**a. Description**

…

General selection criteria for cervical disc replacement includes symptomatic one level degenerative disc disease with radiculopathy."

"**c. Surgical Indications:** Patient meets one of the 2 sets of indications:

1) Symptomatic one-level degenerative disc disease (on MRI) with established radiculopathy and not improved after 6 weeks of therapy; **and**

Radiculopathy or myelopathy documented by EMG or MRI with correlated objective findings or positive at one level; **or**

2) **All of the following:**

- Symptoms unrelieved after six months of active non-surgical treatment and **one** painful disc established with discogram; **and**
- All pain generators are adequately defined and treated; and
- All physical medicine and manual interventions **are** completed; and
- Spine pathology limited to one level; **and**
- Psychosocial evaluation with confounding issues addressed.

The proposed surgical procedure involves disc replacement on two levels, which is beyond what is recommended in the Treatment Guidelines. In addition, there were significant gaps in Claimant's treatment and Claimant did not complete 6 weeks of therapy. (There was an indication in the record that because of his work schedule, Claimant was not able to complete the treatment which was previously recommended by his doctors.) Claimant should complete a full course of conservative treatment, including physical therapy and possibly the treatment recommended by Dr. Reiss before surgery is performed. Also, there were no findings of myelopathy, so the surgical indications under section 1) have not been met.

Furthermore, not all of the indications in Section 2) were met, including 6 months of active treatment, completion of all physical medicine and manual interventions and spine pathology limited to one level. Accordingly, Claimant did not establish disc replacement surgery was indicated under the Treatment Guidelines.

In addition, this procedure has contraindications, as noted *infra.*

"**d. Contraindications**:

…

- Symptomatic facet joint arthrosis-If imaging findings and physical finds of pain on extension and lateral bending are present, exploration of facetogenic pain should be completed prior to disc replacement for axial pain.

…

- Multiple-level degenerative disc disease.

- Spondylolisthesis greater than 3mm."

In this case, at least one physician (Dr. Primack) was of the opinion that Claimant's symptoms were originally facetogenic in nature. Dr. Donner opined that Claimant's pain was discogenic, related to the facets and nerve compression. As found, the source of Claimant's pain should be clarified.

Also, Claimant had pain on extension and lateral bending. There is also a question whether Claimant has neurological compromise and symptoms that warrant surgery, as noted by Dr. Feldman. Further exploration of these issues is warranted before an invasive surgical procedure is performed. Moreover, Claimant has degenerative changes in his cervical spine, including spinal stenosis on multiple levels in the cervical spine, as shown on MRI. In addition, the 2014 MRI revealed at least one disc herniation which was greater than 3mm. Surgery is contraindicated under these circumstances.

The ALJ also notes that the alternate procedure (ACDF) is contraindicated at this time, since Claimant was smoking as of the last evaluations with Dr. Donner. In addition, since a fusion would be at two levels the risk of adjacent segment deterioration is a significant risk.

Thus, some of the contraindications indentified by the Treatment Guidelines militate against the disc replacement surgery, as well as the ACDF procedure. In short, the ALJ considered the Treatment Guidelines, which raise a question whether proposed surgery is reasonable and necessary.

Third and finally, the ALJ found that there was a question whether the proposed medical treatment would address the symptoms from the spondylitic changes in Claimant's cervical spine and reduce his symptoms. Dr. Castor questioned whether the proposed surgery would ameliorate Claimant's symptoms. Dr. Reiss' opinion was also persuasive on this subject. Dr. Donner's testimony did not refute this or establish that the benefits were outweighed by some of the contraindications of surgery. The ALJ was not persuaded that is reasonable and necessary at this time. For these reasons, Claimant failed to prove that the surgery proposed by Dr. Donner was reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen is GRANTED.

2. Pursuant to Respondents' 12/5/13 FAL and this Order, Respondents shall provide medical benefits to Claimant, who may return to Dr. O'Connell or other ATP for treatment.

3. Claimant's request for authorization of a two-level cervical discectomy, nerve root decompression and disc replacement is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 18, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether the Claimant is entitled to recover the aggregate amount of death benefits under both Mississippi's and Colorado's workers' compensation laws.

2. Whether Respondents correctly calculated the Social Security offset pursuant to the statutory formula.

3. Whether Respondents correctly calculated the interest payment to Dependent Claimants.

4. Whether Respondents correctly paid Dependent Claimants.

UNDISPUTED FINDINGS OF FACT

The ALJ finds the following facts are undisputed:

1. Decedent perished in a work accident in Pueblo, Colorado on October 27, 2010. At that time, the deceased employee, his wife and their son were residents of Mississippi.

2. A claim for workers' compensation benefits was initially brought in the State of Mississippi and the Respondents admitted the claim under the Mississippi workers' compensation act and began paying benefits commencing on October 28, 2010. The Respondents' admitted for a compensation rate in that claim of $337.58.

3. The Dependent Claimants later made a claim for death benefits under the Colorado workers' compensation system. On April 3, 2013, ALJ Friend held that Colorado had jurisdiction over the claim but he did not determine the Decedent's average weekly wage under Colorado law, the equitable division of death benefits between Dependent Claimants, or offsets for the receipt of Social Security benefits or for workers' compensation benefits paid under the Mississippi claim.

4. On September 3, 2013, the Respondents filed a Fatal Case – General Admission in Colorado, admitting for the maximum temporary total disability rate of $1,216.00 for a TTD rate of $810.67.

5. On September 20, 2013, Respondents filed a Fatal Case – Amended General Admission, admitting for death benefits under the Colorado Workers' Compensation Act totaling $66,822.00 from October 28, 2010 to August 28, 2013 and death benefits from August 29, 2013 ongoing at weekly rate of $620.29.

6. The Amended General Admission asserted the Respondents were entitled to take a Social Security offset in the amount of $190.38 per week since the date of the incident forward based on each Dependent Claimant receiving Social Security benefits totaling $825.00 per person per month.

7. The Amended General Admission also takes into account a 50% offset for the receipt of Mississippi workers' compensation benefits in the amount of $168.79 per week.

8. Per the Amended General Admission, at the Respondents' admitted rate, the Dependent Claimants were entitled to receive $451.50 per week in Colorado death benefits. Multiplying the $451.50 weekly rate by the 148 week period from October 28, 2010 through August 28, 2013 yields $66,822.00.

9. Between the day after the decedent's death and the Respondents' filing of the General Admission of Liability in Colorado, the Respondents paid the Dependent Claimants $49,961.84 under the Mississippi workers' compensation system. Under the Colorado workers' compensation system, the Dependent Claimants would have received $66,822.00 for that same time period.

10. The difference between what the Dependent Claimants would have received and what they were actually paid is $16,860.16.

11. The Respondents' paid the Dependent Claimants 8% interest only on the $16,860.16 difference between what the Dependent Claimants were entitled under the Colorado workers' compensation system and the $49,961.84 that the Dependent Claimants received under the Mississippi workers' compensation system.

CONCLUSIONS OF LAW

1. Neither Mississippi law nor Colorado law allow a Claimant to collect duplicate workers' compensation benefits.

2. Mississippi law allows for a 100% offset of benefits paid to a Claimant when that Claimant receives workers' compensation benefits under another state's laws. *See, Southland Supply Co., Inc. v. Patrick,* 397 So.2d 77 (Miss. 1981)(Claimant, who received workers' compensation benefits under Mississippi law, was not precluded from seeking workers' compensation benefits under Louisiana law, and the trial court correctly awarded such benefits to full credit for any amounts previously paid under Mississippi's Workers' Compensation Act).

3. Pursuant to §8-42-114, C.R.S., death benefits paid to dependents of a deceased worker under the Colorado Workers' Compensation Act, are subject to the following:

> In case of death, the dependents of the deceased entitled thereto shall receive as compensation or death benefits sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a

> maximum of ninety-one percent of the state average weekly wage per week for accidents occurring on or after July 1, 2989, and not less than a minimum of twenty-five percent of the applicable maximum per week. In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits.

4. The calculation related to the offset for the Social Security benefits received by the Dependent Claimants shall use a 52 weeks per year and not 52.14 weeks as urged by the Dependent Claimants. Pursuant to §8-42-102(2)(a), C.R.S., when computing wages, the computation shall use 52 weeks and so 52 weeks is appropriate for computing offsets as well. The Division of Workers' Compensation likewise uses a 52 week period for calculating offsets in its published Adjuster's guide.

5. Accordingly, the Respondents correctly calculated the Social Security benefit offset in the amount of $190.38 per week.

6. The Respondents' admitted weekly compensation rate in the Mississipi claim was $337.58. A 50% offset for the receipt of Mississippi workers' compensation benefits amounts to $168.79 per week.

7. In accordance with §8-42-114, C.R.S., the Claimant's weekly temporary total disability (TTD) rate of $810.67 is reduced by 50% of the Claimant's Social Security survivors' benefit, or $190.38, and 50% of the weekly Mississippi workers' compensation payments, or $168.79.

($810.67 - $190.38 - $168.79 = $451.50)

Then, the $451.50 weekly past due death benefit figure is multiplied by 148 weeks, which is the length of time that the weekly workers' compensation death benefits were paid in Mississippi, resulting in a Colorado past due death benefit of $66,822.00.

($451.50 x 148 = $66,822.00)

8. Pursuant to §8-43-410(2), C.R.S, interest on an award of workers' compensation benefits shall be calculated as provided:

> Every employer or insurance carrier of an employer shall pay interest at the rate of eight percent per annum upon all sums not paid upon the date fixed by the award of the director or administrative law judge for the payment thereof or the date the employer or insurance carrier became aware of an injury, whichever date is later. Upon application and satisfactory showing to the director or administrative law judge of the valid reasons therefore, said director or administrative law judge, upon such

> terms or conditions as the director or administrative law judge may determine, may relieve such employer or insurer from the payment of interest after the date of the order therefore; and proof that payment of the amount fixed has been offered or tendered to the person designated by the award shall be such sufficient valid reason.

9. On remand, and pursuant to instruction from the Colorado Court of Appeals, the Claimant's are entitled to receive interest of eight percent (8%) on the past due benefit amount of $66,822.00.

ORDER

It is therefore ordered that, as a matter of law, based upon the undisputed facts:

1. The Dependent Claimants are not entitled to recover $116,783.84, the full aggregate death benefits under both Mississippi's and Colorado's workers' compensation laws.

2. The Respondents correctly calculated the Social Security offset in the amount of $190.38. The Respondents also correctly calculated the offset for paid Mississippi workers' compensation benefits of $168.79.

3. The Respondents did not correctly calculate the amount of interest due to the Dependant Claimants as it was calculated on a past due benefit Colorado death benefit amount of $16,860.16.

4. The Respondents are to pay 8% interest pursuant to §8-43-410(2), C.R.S, on the Colorado past due benefit amount of $66,822.00.

5. The Respondents are entitled to a credit for amounts already paid for interest in this case, if any.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 8, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. This matter is before the ALJ upon remand from a panel of the Industrial Claim Appeals Office, dated January 21, 2016, wherein the panel determined that the claim is compensable. The only issue to be determined upon remand is whether the claimant has established by a preponderance of the evidence that her medical treatment was reasonable, necessary and related to her work injury.

FINDINGS OF FACT

1. The claimant works as a warehouse worker for the respondent-employer and did so at all relevant times.

2. This claim has been found to be compensable by a panel of the Industrial Claim Appeals Office.

3. The claimant reported a work related injury to her right shoulder, right wrist, elbow and shin that occurred on December 11, 2012 when she slipped and fell in the parking lot adjacent to the building in which she worked at approximately 4:05 p.m. on December 11, 2012.

4. The following day the claimant reported the incident to her supervisor.

5. After filling out the appropriate workers' compensation forms the claimant was sent to Emergicare, the respondent's designated provider for workers' compensation injuries, where she first saw Dr. Patty Beecroft.

6. The claimant complained of back pain, neck pain, wrist pain, and shoulder pain. The claimant underwent x-rays of her shoulder and wrist; and was given work related diagnoses of right brachial plexus strain; right wrist contusion; and right sacroiliac strain.

7. The claimant was prescribed Ibuprofen 800 mg; methocarbomal 750 mg; and biofreeze cream.

8. The claimant had a follow-up appointment on December 22, 2012 at Emergicare with Dr. Douglas Bradley.

9. After initially providing medical care benefits to the claimant, on March 5, 2013, the respondent filed a Notice of Contest.

10. The claimant had been treating with Dr. Bradley from December 22, 2012 up to the date the Notice of Contest was filed.

11. Dr. Bradley last saw the claimant on February 22, 2013.

12. The claimant saw Dr. Simpson at Emergicare on March 5, 2013 at which time the claimant had been diagnosed with a partial thickness tear of the rotator cuff and biceps tendonitis and Dr. Simpson was recommending arthroscopic surgery.

13. The ALJ finds that the claimant has established that it is more likely than not that all of the treatment the claimant received at Emergicare and any referrals therefrom, was reasonable, necessary, and related to her industrial injury diagnoses.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P .2d 792 (1979); *People v. M.A.,* 104 P .3d 273, 275 (Colo. App. 2004). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers’ compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P .3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* The burden is on the claimant to prove a causal relationship between his employment and his injury or condition. *See, Industrial Comm'n v. London & Lancashire Indem. Co.,* 135 Colo. 372, 311 P.2d 705 (1957). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a casual relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

5. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106 (Colo. App. 1971)*. Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985)*. An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952); *Indus. Comm'n v. Havens,* 136 Colo. 111, 134 P.2d 698 (1957).

6. The ALJ concludes that the medical records substantially document that the treatment received by the claimant at Emergicare and the referrals, was reasonable, necessary, and related to the claimant's compensable industrial injury.

7. The ALJ concludes that the claimant has established by a preponderance of the evidence that all of the treatment the claimant received at Emergicare and any referrals therefrom, was reasonable, necessary, and related to her industrial injury diagnoses.

ORDER

It is therefore ordered that:

The respondent shall pay for all of the reasonable, necessary, and related medical treatment received by the claimant as found above, as well as any additional treatment that is reasonable, necessary, and related designed to cure or relieve the claimant from the effects of her industrial injury.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: March 25, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained a change of condition that is causally-related to his industrial injury so as to warrant reopening his claim for additional medical benefits?

- Did Claimant prove by a preponderance of the evidence that a total knee arthroplasty constitutes reasonable and necessary medical treatment to cure and relieve the effects of his industrial injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 though 5 were admitted into evidence. Respondents' Exhibits A through N were admitted into evidence.

CLAIMANT'S TESTIMONY

2. Claimant testified that he has worked for the Employer for 35 years. He works as a "bus technician" and oversees the maintenance and repair of shuttles. The job is physically demanding and requires that he work on his knees and his back.

3. Claimant testified that on November 27, 2012 he injured his right knee when he stepped off a shuttle into a pothole. His knee "popped" and he felt immediate, excruciating pain. Claimant stated that Respondents admitted liability for the injury and he underwent a right medial meniscectomy surgery performed by Phillip Stull, M.D. He was then placed at maximum medical improvement (MMI) on May 29, 2013 and returned to work at full duty. Claimant testified that when he was placed at MMI his knee was still sore and he had to ice it every night.

4. Claimant testified that after he was placed at MMI on May 29, 2013 his knee "progressively started getting worse." He explained that between the date of MMI and October 21, 2013, when he went to see one of his treating physicians, Greg Smith, D.O., his right knee symptoms got worse "with the hurting, the giving out, popping, grinding."

5. Claimant testified that Dr. Smith referred him to Dr. Stull. Claimant recalled that he saw Dr. Stull on November 20, 2013 and that Dr. Stull performed a cortisone injection into his right knee. According to Claimant the injection temporarily relieved his symptoms. However, on January 8, 2014 Claimant returned to Dr. Stull for a second injection. After the January 8 injection Claimant recalled that his symptoms

were relieved for about a month and a half. He then returned to Dr. Stull who performed a third injection April 10, 2014. Claimant testified the third injection relieved his symptoms for about two weeks. He then returned to Dr. Stull on October 23, 2014 because his "pain and that was back again." Claimant testified that on October 23 Dr. Stull performed a fourth injection and discussed performing a total knee arthroplasty (TKA).

6. Claimant admitted that in 1996 he sustained a prior work-related right knee injury and underwent surgery for this injury. However, Claimant explained that after completing treatment for the 1996 injury he was released to return to work at full duty and did not receive any medical treatment for the knee until the November 27, 2012 injury. Claimant also testified that prior to November 27, 2012 he had not been diagnosed with arthritis in his knee, had not experienced any popping or grinding in his knee, had not received any cortisone injections and had not received a recommendation for a TKA.

7. At the hearing Claimant testified that he now experiences constant knee pain. He also testified that the knee locks up, gives out and is unstable when he goes up stairs. Claimant stated that he wishes to undergo the TKA recommended by Dr. Stull so that he can start enjoying his life again.

MEDICAL EVIDENCE

8. On November 27, 2012 Claimant was examined at Concentra by PA Glenn D. Peterson. Claimant complained of medial right knee pain and the inability to squat. Claimant related that he was a "bus mechanic and stepped in [a] hole in pavement walking between busses and strained" his right knee medially. Claimant also reported a history of "2 knee surgeries age 15, and 46." PA Petersen diagnosed a right knee strain. He imposed restrictions of no kneeling and/or squatting and required Claimant to wear a knee brace.

9. On November 30, 2012 PA Petersen assessed a sprain/strain of knee/leg at unspecified site and a right knee MCL sprain. PA Petersen referred Claimant for physical therapy (PT) and prescribed Vicodin.

10. On December 14, 2012 Steven Young, M.D., examined Claimant at Concentra. Claimant reported his symptoms were no better despite undergoing PT. Claimant mentioned a history of a "right MCL/meniscal surgical repair 15 years ago." Dr. Young assessed a sprain of the medial collateral ligament of the knee and prescribed an MRI. Dr. Young imposed restrictions of no climbing ladders or stairs, prohibited Claimant from squatting or kneeling, continued use of a brace and continued PT.

11. On December 21, 2012 Jonathan Bloch, D.O., examined Claimant at Concentra. Claimant reported he was having good and bad days with a slight improvement in his condition. Dr. Bloch noted Claimant was working "regular duty."

12. On December 28, 2012 Claimant underwent an MR arthrogram of the right knee. The radiologist's impressions included the following; (1) Complex tear of the posterior horn and posterior body of the medial meniscus without displaced meniscal fragment; (2) Moderate chondral thinning in the patellofemoral articulation and mild chondral thinning in the medial femorotibial articulation; (3) No cruciate or collateral ligament injury.

13. On January 4, 2013 Dr. Bloch again examined Claimant. Dr. Bloch reviewed the MRI results and assessed a knee strain, knee enthesopathy and a prior meniscal injury with "10% LE and 4% WP IR." Dr. Bloch imposed restrictions of no significant kneeling, crawling, squatting or climbing. Dr. Bloch referred Claimant to orthopedics for further "input."

14. On January 10, 2013 orthopedic surgeon Mark Failinger, M.D., examined Claimant on referral from Dr. Bloch. Dr. Failinger took a history, performed a physical examination (PE) and reviewed the recent MRI. Claimant reported that he twisted his right knee on November 27, 2012 and that he had undergone a prior knee surgery in 1997. Dr. Failinger noted that the MRI showed "medial compartment high-grade chondromalacia with evidence of previous meniscectomy without an obvious new tear but some degenerative changes." He also noted there was "some patellar chondromalacia." Dr. Failinger assessed the following: (1) Right knee status post previous medial meniscectomy with medial compartment degenerative joint disease with recent flare; (2) Right knee minimally symptomatic patellar chondromalacia. Dr. Failinger opined that "this is arthritis and not a new meniscus tear." He explained that the arthritis was "down to the bone" in the medial tibial plateau and the medial femoral condyle was "getting quite thin." Dr. Failinger opined that Claimant should wear a medial unloader brace and undergo a cortisone injection. Dr. Failinger stated that viscosupplementation might help and that a "scope is a possibility to help him but it is not even 50% in my opinion."

15. On February 13, 2012 Claimant was examined at Occ Med, Colorado (Occ Med). It is not clear whether Claimant was examined by PA-C Jim Keller, Dr. Smith or both. The office note was signed by PA Keller and Dr. Smith. The February 13 office note states Claimant was a "transfer patient from Concentra sent for a second opinion." Claimant reported that he had experienced swelling and pain medially since twisting his right knee when stepping off of a bus on November 27, 2012. Claimant mentioned that he had a "medial meniscal repair of the same knee in 1997 that was asymptomatic" until the November 2012 injury. The note states that Dr. Failinger opined the MRI was "misread and that [Claimant] did not have a tear and just had postsurgical meniscal changes with some degenerative joint disease." Occ Med assessed Claimant with a sprain/strain of the right knee and a torn right medial meniscus. Occ Med referred Claimant to Dr. Stull for a second opinion and instructed Claimant to wear his knee brace and continue the work restrictions.

16. Dr. Stull, an orthopedic surgeon, examined Claimant on March 14, 2013. Claimant reported symptoms of "persistent locking catching pain and swelling" since he twisted his knee in November 2012. Dr. Stull reviewed "operative pictures" of a

previous knee arthroscopy performed by Dr. Lindberg in “1996.” Dr. Stull commented that the pictures show that Dr. Lindberg treated Claimant with “microfracture for a small chondral defect on the medial femoral condyle” and that the medial meniscus appeared to be in intact. Dr. Stull was “somewhat surprised” that Dr. Failinger “recommended against knee arthroscopy despite the fact that an MRI of December 2012” showed a “meniscus tear and some mild arthritic changes.” Dr. Stull reviewed the MRI images and agreed with the radiologist’s interpretation. Dr. Stull’s impressions included a torn medial meniscus and mild arthritis of the right knee. Dr. Stull recommended “right knee arthroscopy, partial meniscectomy, debridement and related procedures.”

17. On April 11, 2013 Dr. Stull performed surgery described as the following: (1) Right knee arthroscopy with partial medial and partial lateral meniscectomy; (2) Extensive arthroscopic debridement and chondroplasty of the knee. Dr. Stull’s operative notes contained the following observations made during the course of surgery; (1) Patellofemoral joint showed significant arthritic changes; (2) Large bucket handle irreparable tear of the posterior horn of the medial meniscus; (3) Notable arthritic changes of the medial compartment with grade III and IV medially on the tibial plateau and diffusely grade II and III on the femoral condyle; (4) Small degenerative tear of the posterior horn of the lateral meniscus. Dr. Stull wrote that a “thorough and extensive chondroplasty and debridement was performed throughout the knee with particular attention being paid to the arthritic changes in the medial femoral condyle, the medial tibial plateau, the patellofemoral joint including the retropatellar surface and the trochlear groove.”

18. On April 18, 2013 Dr. Stull noted that Claimant reported he was “doing well and having minimal pain.” Dr. Stull noted that Claimant exhibited full range of motion (ROM) on PE. Dr. Stull’s impression was that Claimant was “doing well.” Dr. Stull referred Claimant to begin PT.

19. On May16, 2013 Dr. Stull noted that Claimant reported he was “doing well” and was “back at work.” On PE of the right knee Dr. Stull noted full ROM. Dr. Stull’s impression was that Claimant was “doing well.” Dr. Stull released Claimant from formal care and permitted Claimant to perform activities as tolerated.

20. On May 21, 2013 PA-C Keller examined Claimant at Occ Med. Claimant reported that he was “pain free” and the only “precaution” was “a little bit of concern going up and down stairs and kneeling.” Claimant reported he was using knee pads at work and “tolerating it well.” Claimant was not taking any medications and believed he could be released without restrictions.

21. On May 29, 2013 Dr. Smith, who is board certified in family medicine and level II accredited, examined Claimant at Occ Med. Dr. Smith opined Claimant reached MMI on May 29 with a 22% lower extremity rating for the right leg. The impairment rating was based on 7% impairment for reduced ROM and 16% impairment for the “bilateral meniscal tears and chondromalacia.” Dr. Smith recommended post-MMI maintenance treatment in the form one year of surgical management by Dr. Stull and one year of “medical management” by Dr. Smith.

22. On October 21, 2013 Claimant returned to Occ Med where he was examined by PA-C Keller. Claimant reported that he had not had any new injuries but had experienced increasing right knee pain "for the last two months." Claimant further reported he had some difficulty traversing stairs but the knee had "not locked up or given way" and he did not feel "unstable." Claimant was "quite concerned" because he had "not had any real knee pain" since the impairment rating on May 29, 2013. On PE Claimant demonstrated full ROM with "subjective discomfort medially" on full flexion. There was no crepitus or instability. PA-C Keller referred Claimant to Dr. Stull for another examination.

23. On November 30, 2013 Dr. Stull again examined Claimant. Dr. Stull noted Claimant was "6 months status post right knee arthroscopy" and that "upper findings" revealed "fairly notable arthritic changes in the medial compartment of his knee." Claimant reported "some persistent medial sided symptoms with activity, pain and intermittent swelling." Dr. Stull's impression was right knee symptoms related to known osteoarthritis of the medial compartment. Dr. Stull performed a cortisone injection and recommended that Claimant elevate and ice the knee, take anti-inflammatory medicines and modify his activities.

24. Claimant returned to Dr. Stull on January 8, 2014. Claimant reported that his knee pain had worsened and requested another injection. Dr. Stull assessed degenerative arthritis of the right knee. Dr. Stull performed another injection.

25. Claimant returned to Dr. Stull on April 10, 2014. Dr. Stull noted Claimant received a "good response" to the previous cortisone injection. However, Claimant's symptoms had reportedly returned with medial and retropatella grinding popping pain and swelling. Dr. Stull's impression was moderate arthritic changes in the right knee. Dr. Stull performed another cortisone injection.

26. Claimant returned to Dr. Stull on October 23, 2014. Claimant's chief complaints were activity related pain, swelling and poor function of the right knee. Claimant advised Dr. Stull that he did not respond as well to the April 2014 injection as he had responded to previous injections. On PE Dr. Stull found the medial and patellofemoral compartments were "tender and crepitant." Dr. Stull noted Claimant "had 2 documented work injuries to his knee" and opined that Claimant's "arthritis appears to be related to his work and his work injuries." Claimant and Dr. Stull discussed "solutions" for treating the arthritis and Claimant "decided he would like to have his knee replaced." At Claimant's request Dr. Stull also performed another injection.

27. On November 6, 2014 Dr. Stull examined Claimant for a "new problem" involving his left knee. Claimant reported "6 or 7 months of knee pain came on gradually without injury." Claimant's symptoms were predominantly on the medial side of the left knee and included pain with activities, swelling, catching and clicking. Dr. Stull took x-rays which showed "mild medial joint space narrowing" but were otherwise unremarkable. Dr. Stull's impressions included mild arthritis of the left knee with a possible medial meniscus tear. Dr. Stull recommended Claimant undergo an MRI of the left knee. Additionally Dr. Stull noted that Claimant's right knee had worsened and

wrote that “this is our appeal to reopen the case on his right knee” for further treatment including a potential TKA.

28. On November 14, 2014 Claimant underwent an MRI of the left knee. The radiologist’s impressions were: (1) Complex tear of the body and posterior horn of the medial meniscus; (2) Degenerative cartilage changes in the medial compartment and at the superior medial quadrant of the patella.

29. On December 11, 2014 Dr. Stull recommended that Claimant undergo arthroscopic surgery on the left knee. On January 15, 2015 Dr. Stull performed surgery described as follows: (1) Left knee arthroscopy with partial medial meniscectomy; (2) Extensive arthroscopic debridement of the knee, chondroplasty including multiple compartments. In the operative report Dr. Stull wrote that the patellofemoral joint showed notable arthritic changes and that the medial compartment showed “grade IV change on the more medial aspect of the medial tibial plateau with some exposed bone and diffuse grade II and III arthritis of the weightbearing aspect of the medial femoral condyle.”

30. On April 30, 2015 Dr. Stull examined Claimant’s left knee. Dr. Stull noted that Claimant was “13 weeks postop.” The Claimant reported that his “progress” was slow and that his left knee was “still fairly sore at the end of his work day.” Claimant requested pain medication and Dr. Stull prescribed Tramadol. Dr. Stull also recommended a Synvisc injection. On May 7, 2015 Dr. Stull performed a Synvisc injection to Claimant’s left knee.

31. On May 26, 2015 Dr. Stull wrote a letter responding to an inquiry from Claimant’s attorney. Dr. Stull wrote he has recommended a right knee TKA and opined to a reasonable degree of medical probability that the need for the TKA is “directly related to [Claimant’s] Workmen’s Compensation injury of November 2012.” Dr. Stull opined that Claimant has been through extensive conservative treatment but “is quite disabled by his knee pain at this time.” With regard to causation Dr. Stull noted Claimant was without significant right knee symptoms prior to the November 2012 injury. However, Dr. Stull wrote that after the 2012 injury Claimant “underwent a surgical meniscectomy; unfortunately his R knee pain had gradually worsened and his arthritis has progressed.” Dr. Stull also noted Claimant underwent a previous right knee arthroscopy that resulted from a work related injury. For all of these reasons Dr. Stull opined that Claimant’s “current need for the right knee replacement is related to work related injuries.”

32. WCRP 17, Exhibit 6, the Lower Extremity Injury Medical Treatment Guidelines (MTG) address criteria for proving a causal relationship between “aggravated osteoarthritis” and a Claimant’s employment. Exhibit 6 (2)(a)(ii) states that a “provider” must establish the “occupational relationship” between osteoarthritis and employment “by establishing a change in the patient’s baseline condition and a relationship to work activities.” Exhibit 6 (2)(a)(ii), concerning “other causative factors to consider,” states as follows:

> Previous meniscus or ACL damage may predispose a joint to degenerative changes. In order to entertain previous trauma as a cause, the patient should have medical documentation of the following: meniscectomy; hemarthrosis at the time of the original injury; or evidence of MRI arthroscopic meniscus or ACL damage. The prior injury should have been at least 2 years from the presentation for the new complaints and there should be a significant increase of pathology on the affected side in comparison to the original imaging or operative reports and/or the opposite un-injured side or extremity.

33. On August 6, 2015 John T. McBride Jr., M.D., performed an independent medical examination of Claimant at the request of Respondents. Dr. McBride is board certified in orthopedic surgery and is level II accredited. Dr. McBride authored a written report and testified at the hearing. The following findings of fact represent an amalgamation of Dr. McBride's written report and his testimony.

34. Dr. McBride opined to a reasonable degree of medical probability that Claimant's need for a right TKA is not causally related to the November 2012 industrial injury. Dr. McBride testified that a TKA is performed to treat "end-stage" osteoarthritis. Dr. McBride explained that Claimant's right knee osteoarthritis was documented to be present within a few months after the November 2012 injury as shown by the following: (1) the December 2012 MRI report documenting "moderate" osteoarthritis less than two months after the date of injury; (2) Dr. Failinger's January 2013 report noting that Claimant underwent a right knee meniscectomy in 1997 and documenting the presence of chondromalacia in the medial compartment of the right knee; (3) Dr. Stull's April 2013 operative report documenting the presence of grade III to IV chondromalacia. Dr. McBride stated that there is significant evidence in the medical literature that people who have a meniscus removed develop osteoarthritis "18 to 20 years later." Dr. McBride testified that Dr. Stull's April 2013 operative findings represent "what one would expect from a person who has had his meniscus removed 20 years prior." Dr. McBride opined that because Claimant's chondromalacia was present "less than one year" after the November 2012 injury "the arthritis was not significantly aggravated by the injury." Dr. McBride further testified that "stepping in a hole" caused Claimant to suffer a torn meniscus, but did not cause or aggravate the arthritis.

35. Dr. McBride testified that his conclusions are supported by application of the Lower Extremity Injury MTG. He explained that the MTG indicate that in order for an alleged industrial aggravation of osteoarthritis to be considered the cause of the need for a TKA there must be a "change in the radiographs (objective studies) from the time of injury to the time of the recommended total joint replacement." Dr. McBride explained that Claimant does not meet this requirement because the Claimant had bone-on-bone arthritis in January 2013, only one month after the injury. Dr. McBride further opined that the MTG require that in order to prove aggravation of osteoarthritis a Claimant must show the "new complaints" occurred at least 2 years from the date of the

aggravation. Dr. McBride opined that the records of Claimant's injury do not meet this criterion.

FINDINGS OF FACT CONCERNING CAUSATION

36. Claimant failed to prove it is more probably true than not that the alleged worsening of his right knee symptoms since MMI, and the consequent need for a right TKA, was proximately caused by the industrial injury of November 27, 2012. Consequently, Claimant failed to prove that the alleged need for a TKA was proximately caused by a change in his condition that is causally related to the injury of November 27, 2012. Rather, the persuasive and credible evidence establishes that any worsening of condition that occurred after Claimant was placed at MMI was probably caused by the natural progression of his pre-existing osteoarthritis.

37. Dr. McBride credibly and persuasively opined that the progression of Claimant's right knee symptoms since MMI and the consequent need for a TKA are not causally related to the industrial injury of November 27, 2012. Dr. McBride credibly explained that Claimant already had osteoarthritis of the right knee when he was injured in November 2012 as shown by the December 2012 MRI, Dr. Failinger's January 2013 report and Dr. Stull's operative report documenting findings of grade III and IV chondromalacia in the medial compartment. Dr. McBride persuasively opined that Dr. Stull's findings of chondromalacia are consistent with "what one would expect from a person who has had his meniscus removed 20 years prior." Dr. McBride persuasively opined that since Claimant's chondromalacia was documented to exist less than one year after the November 2012 injury it is not probable that the 2012 injury caused or aggravated Claimant's osteoarthritis.

38. Dr. McBride's opinion that the need for the TKA, if any, was caused by the natural progression of Claimant's pre-existing arthritis independent of the November 27, 2012 injury is consistent with and supported by the medical records. Specifically, the medical records establish that when Claimant was placed at MMI on May 29, 2013 he was essentially pain free. On May 16, 2013 Dr. Stull noted Claimant was "doing well, had full ROM and had returned to work. When PA Keller examined Claimant on May 21, 2013 Claimant reported he was "pain free" and had well-tolerated his return to work. When PA Keller examined Claimant on October 21, 2013 Claimant reported he had experienced increasing right knee pain "for the last two months." The ALJ infers from this evidence that after undergoing surgery in April 2013 and being placed at MMI in May 2013 Claimant's symptoms significantly abated and there was no noticeable worsening until at least late August 2013.

39. Moreover, the medical records refute Claimant's testimony that when he was placed at MMI his knee was still sore and he had to ice it every night. PA Keller's October 21, 2013 note documents that Claimant was "quite concerned" about increasing knee pain over the last two months because he "had not had any real knee pain" since he reached MMI on May 29, 2013. Further, Claimant's testimony that between May 29, 2013 and October 21, 2013 he developed "giving out," popping and grinding is refuted by PA Keller's medical October 21, 2013 note. PA Keller's October

21 note contains no mention of “popping and grinding” and also states that Claimant’s knee had not “locked up or given way.”

40. Dr. McBride also credibly and persuasively opined that Claimant failed to satisfy the criteria for proving aggravation of pre-existing osteoarthritis established by the lower extremity MTG. Dr. McBride explained that the Claimant’s “new complaints” of pain, locking and functional problems presented less than 2 years after the November 2012 industrial injury. Moreover, Dr. McBride explained that Claimant failed to demonstrate an objective basis for finding an increase in right knee pathology when compared to the MRI findings of December 2012, Dr. Failinger’s findings and Dr. Stull’s surgical findings in April 2013. The ALJ finds that Dr. McBride’s application of the MTG should be given substantial weight because the MTG specifically address the circumstances under which “aggravation” of osteoarthritis may be attributed to a previous traumatic injury.

41. The credible and persuasive evidence establishes that Dr. Stull believes Claimant’s current right knee symptoms, which include retropatella grinding and popping, pain, swelling and “poor function” are attributable to “degenerative arthritis of the right knee.” (Findings of Fact 23 through 26) Dr. Stull has also opined that the causes of the right knee arthritis include the 1996 injury to Claimant’s right knee and the November 2012 right knee injury.

42. Dr. Stull’s opinion that Claimant’s November 2012 injury contributed to a worsening of Claimant’s symptoms is not persuasive. Dr. Stull’s opinion is based largely on the fact that Claimant was not experiencing right knee symptoms prior to November 2012. However, Dr. Stull’s opinion does not persuasively address the lower extremity MTG criteria for finding that an injury aggravated pre-existing osteoarthritis. Dr. Stull did not explain whether or not there was any objective change in the Claimant’s pathology between the November 2012 injury and the October 2014 recommendation for a TKA. Rather, Dr. Stull’s analysis appears to rely largely on Claimant’s subjective reports that his symptoms were increasing without identifying any objective change in the underlying pathology. Neither did Dr. Stull explain why the ALJ should disregard the lower extremity MTG’s requirement that “new complaints” appear 2 or more years after the trauma that allegedly aggravated the osteoarthritis. Here, the Claimant’s “new complaints” appeared in October 2013 when he went to see PA Keller. However, these new complaints (increasing pain of 2 months’ duration) appeared less than 1 year after the November 2012 injury.

43. Evidence and inferences inconsistent with these findings of fact are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

PETITION TO REOPEN

Claimant contends that his claim should be reopened and he should receive additional medical treatment in the form of a TKA. Claimant reasons that after he was placed at MMI in May 2013 his injury-related osteoarthritis worsened so as to warrant reopening and an award of additional medical treatment. Respondents argue, among other things, that the Claimant failed to prove that any post-MMI change in condition was causally related to the November 27, 2012 industrial injury. Rather, Respondents argue that any change in Claimant's condition was caused by the natural progression of his pre-existing arthritis uninfluenced by the effects of the November 2012 injury. The ALJ agrees with Respondents.

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985).

Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere fact that a body part affected by the industrial injury later needs additional treatment does not require the ALJ to conclude that the need for the treatment was caused by the industrial injury. Rather, the need for additional treatment may result from the natural progression of a pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Holguin v. Jim's Critter Cutter, LLC*, WC 4-737-191 (ICAO April 6, 2012); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert medical testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990).

Section 8-43-201(3), C.R.S., provides that the ALJ "may consider the medical treatment guidelines" when determining whether "certain medical treatment is reasonable, necessary, and related to an industrial injury." However, the ALJ is not required to use the MTG as "the sole basis for such determinations." Thus, the MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled considering the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As determined in Findings of Fact 36 though 42 Claimant failed to prove that any change in his condition that occurred after he was placed at MMI on May 29, 2013 was causally-related to the November 27, 2012 injury. Rather, the ALJ is persuaded by the opinions of Dr. McBride that any worsening of Claimant's condition after MMI was probably caused by the natural progression of his pre-existing osteoarthritis uninfluenced by the effects of the November 2012 injury. Specifically the ALJ is persuaded that if the November 2012 injury had aggravated the pre-existing arthritis there would have been an objective change in the Claimant's objectively identifiable pathology between the date of injury and the date the TKA was recommended. The ALJ is further persuaded by Dr. McBride's testimony that under the lower extremity MTG the osteoarthritis was probably not aggravated by the November 2012 injury because Claimant's new complaints appeared less than 2 years after the date of injury. Dr. Stull's opinions are not persuasive for the reasons stated in Finding of Fact 42.

Claimant's petition to reopen WC 4-913-621 must be denied. The ALJ need not reach the question of whether the proposed TKA would constitute reasonable and necessary treatment for Claimant's condition.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Claimant's petition to reopen WC 4-913-621 is denied.

2. Claimant's request for additional medical benefits is denied.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 29, 2016

DIGITAL SIGNATURE:
David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that he suffered a work injury on April 1, 2013, in the course and scope of his employment for Employer; and

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to an order for reasonably necessary and related medical benefits.

FINDINGS OF FACT

1. Claimant is a 71 year old man who began working for Employer on April 2, 2012. Employer operates a Laundromat. Ms. Carole King is the owner and operator of the Laundromat. Claimant is a former friend of Ms. King's father and Claimant worked for Ms. King as the night janitor at the Laundromat. Claimant duties included mixing cleaning solutions, sweeping and general cleaning. He worked on average 4-5 hours a night, five days a week, starting at 11:30 p.m. and working until 4:30-5:00 a.m.

2. On or about April 1, 2013, at between 1:30 and 2:30 a.m., Claimant testified that the following incident occurred: Claimant injured his left knee after bending down to pick up a piece of trash. Claimant had to crawl under a table to get at this debris. He could not reach the debris with a broom, so he got down on his hands and knees and as he got back up, he felt a sharp pain in his left knee. Claimant contends that the pain was so bad, he wanted to "take the knee out." On a scale of 1-10, he rated his pain as a 10/10.

3. Claimant further testified that he called Ms. King and told her what happened. Ms. King told Claimant to go home and rest. After a few days, Claimant testified that he could no longer take the pain, so he went to Kaiser. At Kaiser, Claimant alleges that his knee was swollen and bruised.

4. Claimant testified that he previously injured the same knee in the early 1990's when working for the Denver Newspaper Agency. After some care and treatment, Claimant testified that the knee was fine, up until the alleged incident in 2013.

5. Ms. King testified she hired Claimant as a night janitor around April 3, 2012. Ms. King agreed with Claimant's description of his duties.

6. Ms. King testified that Claimant called her around 4:30 a.m. the morning of March 31, 2013, reporting that he did not feel good and that he never felt like that before. Claimant did not mention a knee injury. Ms. King explained that it was Easter holiday and Claimant's early morning phone call was memorable for that reason. Ms. King testified that their conversation covered how much work he had completed and Claimant's promise to push the tables back against the wall before leaving. Ms King explained she would not have talked about work if she knew Claimant had just injured his knee. Ms. King told Claimant to go home and she would come in and finish his work. She told him to take the next few days off and then see how he felt.

7. On the following Wednesday and Thursday, when Ms. King did not hear from Claimant, she called him three times, with no response. She then called the police and asked them to perform a welfare check on Claimant. Ms. King feared Claimant had a heart attack.

8. On April 6, 2013, Claimant called Ms. King to report that he hurt his knee. At that time, Claimant did not indicate the injury was work related.

9. On May 23, 2013, Claimant called Ms. King to inquire why he was not getting paid. She told him it was because he had not been working. Then, he asked for help getting his knee care paid for and about Workers' Compensation. Ms. King told Claimant she would contact her workers' compensation carrier.

10. Thereafter on the advice of the insurance carrier, Ms. King advised Claimant, via certified letter, to seek medical treatment from Concentra or Lutheran. On May 24, 2013, an Employer's First Report of Injury was filed noting Claimant first reported the alleged injury to the Employer on May 23, 2013.

11. On April 8, 2013, Claimant was seen at Saint Joseph Hospital. Claimant testified that he called for an ambulance as he could not go downstairs to use the restroom and he was stuck in his apartment for several days without food. The ambulance crew put him in a chair, took him downstairs to the ambulance and then to the hospital. Records from Saint Joseph note that Claimant's history of present illness was "acute on chronic l(eft) knee pain. Unable to ambulate." Respondents Exhibit D, page 2. The mechanism of injury was reported to be unknown. Claimant reported a gradual onset of symptoms with no change in Claimant's symptoms over time. Claimant reported that he had pain in his left knee since kneeling on it about two weeks prior.

12. On April 8, 2013, Claimant's knee was drained and his condition improved. Medical records reflect that upon examination of the fluid drained from Claimant's knee, Claimant was diagnosed with pseudo gout. The diagnosis/ assessment reflected that Claimant had a pseudogout flare. There was no mention of a traumatic injury occurring at work in the history of illness that was provided by Claimant.

13. On June 8, 2013, Claimant reported to the emergency room at St. Anthony Hospital with long standing problems with his left knee with an exacerbation sustained in March.

14. In 2005, Claimant reported injuring his knee in a similar manner as alleged herein. Then he injured his left knee as his job required kneeling and stooping to change rolls of paper. He had pain in his knee after trying to get up.

CONCLUSIONS OF LAW

Having reached the foregoing Findings of Fact, the following Conclusions of Law are reached.

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. *Section 8-43-201, C.R.S.*

B. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

C. The ALJ concludes, based upon the totality of the evidence presented, that Ms. King's testimony was the more credible and persuasive than Claimant's testimony. If Claimant had reported hurting his knee at work on March 31 or April 1, 2013, it is unlikely Ms. King would have asked him to push the tables back in before he left. It is also unlikely Ms. King would call the police to perform a welfare check on Claimant. Instead, such actions are more consistent with Ms. King's testimony that Claimant did not report injuring his knee at work when they spoke early Easter morning in 2013. Ms. King's testimony is also consistent with the records from St. Joseph Hospital on April 8, 2013, which did not contain a report of Claimant injuring his knee at work.

ORDER

It is therefore ordered that:

Claimant's claim is denied and dismissed.

The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: Marcg 11, 2016_____

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law
Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-929-961-02

ISSUES

Whether the claimant has proven by a preponderance of the evidence that the recommendation for medical treatment for his current low back pain is causally related to the admitted industrial injury.

FINDINGS OF FACT

1. On September 17, 2013, the claimant sustained injuries to multiple body parts when he was confronted by a coyote while working for the respondent-employer.

2. At that time the claimant had been working for the respondent-employer for approximately eight and one-half years as a substation technician.

3. The claimant was called out on a call of an alarm going off at a substation the evening of September 17, 2013 at a location behind Peterson Air Force Base. The claimant had to park his truck some distance away from the substation and walk to the substation as it was muddy. When walking back to his truck, he came upon a coyote and as he backed away from the coyote that was coming toward him, he stepped in what he thought was a prairie dog hole with his left leg, "fell backwards, did the splits, landed straight on the back of my spine." The claimant called his supervisor who came and carried him out of the location. The claimant indicated that he thought it was approximately a mile and a half back to his truck.

4. The claimant did not realize how much pain he was in and what was hurt initially, but when he got to the emergency room that evening, the claimant had excruciating, sharp pain that seemed to be generating from his low-buttocks, mid buttocks that was like a sharp nerve, like someone stabbing him that traveled all the way down the side of his leg into his ankle. The claimant also injured his left shoulder where he experienced a similar sharp pain.

5. The claimant has continued to have problems with his left leg, buttocks, piriformis and pelvis, some problems of which originate in his low back. His problems have been essentially unchanged in the buttocks, left leg, piriformis and back since the injury. For the first four or five months, his shoulder pain was the pain that was the most

overpowering. He had surgery performed on his left shoulder by Dr. Weinstein in December of 2014. He still has pain in his shoulder, neck and trapezius and has headaches. He has developed post-traumatic stress disorder (PTSD) and is being treated for that condition by Dr. Gary Gutterman upon the referral from Dr. Lakin. He had an IME evaluation with Dr. Robert Kleinman, who agrees with Dr. Gutterman of the diagnosis of PTSD arising out of the September 17, 2013 injury. The depositions of both Dr. Gutterman and Dr. Kleinman confirm the diagnoses of PTSD. Dr. Kleinman is of the opinion that the claimant is a poor historian and is not credible. Dr. Gutterman testified that he believes the claimant is candid and credible and that it would be difficult to diagnose PTSD in an individual who is not credible as such diagnosis in large part relies upon the subjective history taken from the patient.

6. The claimant had previous back treatment with Dr. Walker at the Southern Colorado Clinic on July 3, 2013 for mid-back muscle spasms due to the ongoing traveling and driving in his vehicle, which was an F-350 loaded with tools and equipment. Dr. Walker took an x-ray, gave the claimant a shot of toradol and suggested to the claimant that he obtain a cushion for his truck and to perform stretching exercises. Within a few days of seeing Dr. Walker on July 3, 2013, the claimant's back pain resolved. The claimant was having no low back problems of an ongoing nature prior to the injury of September 17, 2013.

7. The claimant does not know what was causing his left leg, buttocks and hip pain and how it was related to his low back issues as the low back issues seemed to come and go, but that the left leg, buttocks and hip pain has been fairly constant and present since the occurrence of the injury. The claimant testified that the low back pain that he has now and the left leg, buttocks and hip pain is completely different than the muscle spasms that he had leading up to the July 3, 2013 visit with Dr. Walker. The complaints from the July 3, 2013 episode were more in the mid-back area.

8. The claimant had undergone a complete CDL physical sometime between July 3, 2013 and September 17, 2013. He described that physical in detail and that it was a physical in which everything was checked physically by the CDL examining physician. He had no physical issues including any issues with his low back or mid-back at that time.

9. Upon the occurrence of the on the job injury on September 17, 2013, the claimant was referred to the care and treatment of Dr. Terrence Lakin of the Southern Colorado Clinic. Dr. Lakin has been the claimant's ATP since the first visit on September 23, 2013 and continues to treat the claimant.

10. As it relates to the claimant's low back condition, Dr. Lakin testified about his opinion in his deposition taken on September 4, 2015. Dr. Lakin is the occupational physician at the Southern Colorado Clinic, which is a clinic for the care and treatment of injured workers referred to it by employers. Dr. Lakin is level 2 certified with the Colorado Division of Workers' Compensation. Dr. Lakin testified that in his opinion the claimant's case is an unusual one in that, while the medical treatment guidelines of the Division do a good job of identifying the run of the mill injuries, and the treatment therefore, the claimant's condition is an "outlier." Dr. Lakin believes that the claimant sustained a very complex, multi-level, musculoskeletal dysfunction at the time of his injury. Dr. Lakin stated that the MRI and the EMG performed on the claimant demonstrate an L5-S1 bulge and herniation with an annular tear and evidence of radiculopathy into his lower leg.

11. Dr. Lakin has watched the claimant in physical therapy and has seen the decompensation that occurs with the attendant muscle spasms, which he described as alternating compensatory mechanisms with the low back and pelvis trying to compensate. Dr. Lakin is of the opinion that the claimant, over the many appointments that he has had with him since September 23, 2013, has been consistent in his history regarding the problems with his low back. Dr. Lakin testified:

> Yes, over—over time, it's been—it has been consistent. I think there's been some waxing and waning, and, perhaps, focusing on one area more than the other. I think it was—my mind set was, initially, to treat him for a few injuries, and he developed into a more complex case, with some abnormal compensatory mechanisms that, the body was trying to adapt to his injuries.

12. Dr. Lakin is of the opinion that the claimant injured his lumbar spine on September 17, 2013 and the additional spasms occurring as a result of the claimant's compensatory mechanisms have compounded the issue. Dr. Lakin was questioned regarding the initial complaints of low back pain on the September 23, 2013 visit and the lack of low back complaints by the claimant being documented on visits between September 23, 2013 and the visit upon referral to Dr. Davis, an orthopedist at the Southern Colorado Clinic on December 5, 2013 and his continuing complaints of low back pain on December 10, 2013. Dr. Lakin stated that in his opinion such a presentation was

> pretty consistent with some compensatory mechanisms, and continued myofascial tightness in multiple areas. It's not what we usually see, but I don't think it's unusual, or unheard of, to develop, you know, waxing and waning, and more symptomatic pain, over time with something like this.

13. Dr. Lakin further indicated that between September 23, 2013 and December 10, 2013, most of the care and treatment that the claimant was receiving was directed towards the claimant's left knee, left elbow and left shoulder, as well as the issues related to the claimant's PTSD.

14. Dr. Davis examined the claimant on December 5, 2013 primarily on referral for examination of the claimant's left shoulder and left knee. Dr. Davis' report further shows examination of the claimant's low back. Dr. Davis' plan was to do some rehab exercise for the claimant's lumbosacral spine and observe his neurogenic symptoms, left thigh and it was hoped that those issues would resolve with time. If not, Dr. Davis suggested EMG and nerve conduction study for further workup as to the neurogenic etiology.

15. The claimant was referred by Dr. Lakin to Dr. Polvi. Dr. Polvi first saw the claimant on April 17, 2014. Dr. Polvi performed a complete and thorough physical examination on that date. Dr. Polvi's initial diagnosis was chronic left sacroiliac joint dysfunction with associated myofascial pain disorder affecting the left gluteal, paralumbar musculature with somatic referred left lower extremity paresthesias. Dr. Polvi continued to treat the claimant's low back and joint dysfunction in conjunction with Dr. Lakin and Dr. John Tyler between April 2014 and April 2015. Treatment consisted of joint mobilization therapy, trigger point dry needling, trigger point injections, manual therapy, and neuromuscular reeducation and kinetic activities.

16. The claimant was referred additionally by Dr. Lakin for care and treatment to Dr. John Tyler with the Colorado Institute for Pain Management. Dr. Tyler first saw the claimant on September 23, 2014. Dr. Tyler performed an initial physical examination of the claimant at that time and was of the opinion that the claimant had severe myofascial pain syndrome in the left parascapular and superomedial paracervical region with accompanying cerviogenic headaches and nearly resolved pain related to what sounded to Dr. Tyler to be pelvic obliquity and myofascial strain patterns to the surrounding hip and gluteal musculature and paralumbar musculature on the left side. Dr. Tyler continued to treat the claimant through May 5, 2015 pending the authorization for the first epidural steroid injection with Dr. Ross. The claimant was continuing to have ongoing low back pain, and Dr. Tyler was hopeful that the injection would resolve the obliquity that was causing some of the claimant's pain.

17. Dr. Lakin wrote a letter to counsel for both parties on June 6, 2015 and an additional letter of January 7, 2016 to counsel for the respondents explaining fully his position regarding the claimant's condition and his rationale as to why he believes the claimant's present low back condition is related to his admittedly compensable on the

job injury of September 17, 2013. Dr. Lakin stated that he did not concur "with Dr. Bisgard's opinion and believe that more likely than not, [the claimant's] lumbar pain and left SI pain is a result of his injuries obtained during his work duties on September 17, 2013." Dr. Lakin further noted:

> [The claimant] indicated stabbing and aching pain in left SI and buttocks area on his initial examination. His multiple injuries have had very significant waxing and waning for multiple body parts regarding the quality and level of pain. But, the areas of pain have been rather consistent. I do not view him as trying to add or embellish complaints. He has a complex of injuries that have been difficult to isolate and treat separately, and this has taken time to recognize. As further treatment and modalities progressed, I believe he has developed a body compensatory pattern from his injuries that has been adding to dysfunction and pain at different levels. This is why his case has been unusual and has not followed usual presentations and outcome.

18. When asked for further clarification of his position as to what treatment he believed was presently required for the claimant's low back/S1 joint dysfunction, Dr. Lakin noted:

> As I thought I related in my deposition several months ago, I believe [the claimant's] injuries have resulted in a compensatory spinal alignment that most likely requires a stepwise approach of trigger point injections and myofascial release, starting at the left paralumbar and working up to his left upper thoracic and shoulder girdle. Again, much like a house with a foundation that is not level, one must address the foundation before one can have a lasting remedy for aligning window frames in the attic that break the window glass.

19. Dr. Elizabeth Bisgard authored pertinent reports of March 24, 2014 and May 23, 2015 and testified at the hearing on January 27, 2016. Dr. Bisgard notes in her report of March 24, 2014 that the claimant "is not having any back pain per se. The symptoms are in his left buttocks radiating into his lateral thigh over his iliotibial band associated with some numbness over the distal portion of his lateral thigh to his knee…We discussed the fact that several of the reports indicate that he has low back pain, but he clarified that the pain is not in his back but in his buttocks." Additionally, Dr. Bisgard testified that while she did not know about the results of the EMG before the time of the hearing, she was of the opinion that the claimant's complaints were consistent with problems in the piriformis not in the spine. Dr. Bisgard testified that she was not sure what the claimant's present condition is, as she has not examined him since March 24, 2014, but as far as treatment for his low back, she did not believe that

any treatment for the claimant's low back condition today would be related to the industrial injury of September 17, 2013.

20. The respondent's position that the claimant had no ongoing low back complaints between September 17, 2013 and December 5, 2013 is not supported by the record. The back complaints were sufficient enough for Dr. Lakin to refer the claimant to Dr. Davis and sufficient enough for Dr. Davis on December 5, 2013 to recommend therapy for the low back and if no improvement to suggest EMG investigation.

21. Whether the claimant has an independent low back condition which is causing the buttocks pain, piriformis complaints and the left lateral thigh numbness which was caused by the injury of September 17, 2013 or has a low back problem presently due to the injury and what Dr. Lakin describes as the compensatory mechanism, the ALJ finds that the claimant has had intermittent, waxing and waning low back component to his compensable on the job injury since the occurrence on September 17, 2013.

22. A review of the medial records of Dr. Tyler, Dr. Polvi, and Dr. Lakin shows that the treatment now being recommended by Dr. Lakin is the same type of treatment that Dr. Polvi and Dr. Tyler were providing to the claimant commencing in April of 2014. Those doctors recommended that, despite some improvement, it would be worthwhile to have the claimant undergo a trial of a SI injection with Dr. Scott Ross. It was at that point that the respondents questioned the causal relationship of the low back condition to the compensable on the job injury.

23. The complexity of the claimant's physical condition is further affected by the development of the claimant's PTSD as a result of the compensable injury. Dr. Gutterman first started treating the claimant on April 8, 2014. He has continued to treat him on a consistent basis since that initial visit for that condition. Dr. Gutterman has provided the claimant with various medications for his depression, nightmares, anxiety and sleep deprivation. The claimant complained of back pain when Dr. Gutterman first met with him. Dr. Gutterman has found the claimant to be forthcoming and credible. He further does not believe that the claimant embellishes or distorts his issues. The diagnosis of PTSD is based primarily on a patient's reliability and history. Dr. Gutterman, finding the claimant credible, thinks it is inconsistent for Dr. Kleinman to agree that he claimant has job related PTSD but to also state that the claimant is not credible.

24. Based upon the testimony and evidence presented, the ALJ finds the analyses and opinions of Dr. Lakin to be more credible and persuasive than analyses and opinions to the contrary.

25. Dr. Lakin has opined that the claimant's is a complex case and that, in addition to the specific injuries sustained on September 17, 2013, the claimant has developed compensatory mechanisms resulting in spasms that have caused further injury to the claimant's low back, buttocks, left thigh and piriformis areas. The notes of Dr. Tyler and Dr. Polvi indicate that the claimant was improving with the trigger point injections to the claimant's low back and piriformis areas when the claimant was getting the treatments with them. There is no indication in any of Dr. Lakin's reports that he is recommending any surgical intervention for the claimant's condition but that it is his opinion that the treatment should continue to be in the nature of trigger point injections and conservative treatment to improve the claimant's low back and piriformis condition.

26. The ALJ finds the claimant credible and that he has been consistent in terms of his pain complaints and the waxing and waning of those complaints.

27. The ALJ finds that the care and treatment to the claimant's low back as requested by Dr. Lakin is a continuation of the treatment commenced in April of 2014 by Dr. Polvi and is for the concomitant problems with the claimant's buttock pain, the piriformis syndrome and the left thigh numbness.

28. The ALJ notes that the Low Back Medical Treatment Guidelines advise that defining the pain generator of low back conditions is, at times, somewhat difficult. The ALJ finds that the claimant has been consistent in describing his ongoing pain complaints to Dr. Lakin and to Dr. Lakin's referrals.

29. The ALJ finds that the claimant has established that it is more likely than not that his low back condition is causally related to the admittedly compensable industrial injury of September 17, 2013.

CONCLUSIONS OF LAW

1. Facts in a workers' compensation case must be interpreted neutrally neither in favor of the rights of the claimant nor in favor of the rights of the respondents. See §8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. §8-43-201(1).

3. The purpose of the Workers' Compensation Act of Colorado in §8-40-101, *et seq*. C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. See §8-40-102(1).

4. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved: The ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. The ALJ's decision need not address every item contained in the record. See *Magnetic Engineering, Inc., v. ICAO,* 5 P. 3d 385 (Colo. App. 2000).

5. The claimant has the burden of proof to establish the right to specific medical benefits by a preponderance of the evidence. §8-43-210, C.R.S. See, *Valley Tree Service V. Jimenez,* 787 P.2d 658 (Colo. App. 1990). A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true than not. See *Page v. Clark,* 593 P.2d 792 (Colo. 1979).

6. When determining credibility, the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness; and whether the testimony has been contradicted and the bias or prejudice of the witness. See *Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936).

7. Whether the moving party has met its burden of proof is a question of fact for resolution by the ALJ whose determinations are to be based upon substantial evidence in the record. See *Suetrack USA v. Industrial Claims Appeals Office,* 902 P.2d 864 (Colo. App. 1995).

8. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Snyder v. Industrial claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis,* 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder,* supra. Proof of causation is a threshold

requirement that an injured employee must establish by a preponderance of the evidence before the request benefits are awarded. §8-41-301(1)(c) C.R.S. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). Whether the claimant has sustained his burden is a question of fact of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

9. The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission,* 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210. 236 P.2d 293 (1951). All results flowing proximately and naturally from an industrial injury are compensable. See, *Standard Metals Corp. V. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

10. In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

11. The ALJ concludes that the claimant is credible.

12. The ALJ concludes that the analyses and opinions of Dr. Lakin are more credible and persuasive than analyses and opinions to the contrary.

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that his low back condition is causally related to the admittedly compensable industrial injury of September 17, 2013 and that the respondent is responsible for medical care to cure or relieve the claimant from the effects of his injury.

ORDER

It is therefore ordered that:

1. The respondent shall pay for treatment to the claimant's back condition as recommended by Dr. Lakin.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: March 15, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-930-062-01

ISSUES

- Did Respondent sustain its burden to overcome the DIME physician's opinion on maximum medical improvement (MMI)?

- What is the DIME physician's ultimate opinion regarding the date of MMI?

- Did Claimant prove by a preponderance of the evidence he was entitled to medical benefits after MMI.

- If Claimant is awarded medical benefits, is Respondent entitled to a change of physician changing from Dr. Greg Smith as the primary treating physician.

STIPULATIONS

The parties entered into a joint stipulation in which they agreed that the cervical spine surgery performed by Dr. Kleiner on December 2, 2013 was not related to left shoulder injury of August 5, 2013. This was approved by Order dated May 14, 2014.

Respondent confirmed that it accepted the determination by Dr. Fry that Claimant sustained a 0% permanent medical impairment[1]. Claimant did not dispute this finding, which was confirmed by his attorney of record at the beginning of the hearing.

FINDINGS OF FACT

1. Claimant has been employed by Respondent-Employer for thirty-seven (37) years as a ramp service agent.

2. Claimant's prior medical history was significant in that he previously treated for cervical spine and left upper extremity symptoms[2]. In particular, he was evaluated on October 10, 2008, by Jeffrey Kleiner, M.D., at which time his chief complaints were weakness and dysesthesias affecting his left upper extremity. Dr. Kleiner found limitations (70% of normal) in Claimant's range of motion ("ROM") in his cervical spine and diagnosed C7 radiculopathy. He ordered an EMG.

3. Craig Davis, M.D. examined Claimant on March 27, 2009. Claimant's symptoms were weakness and tingling in the left arm, including tingling and numbness in his three radial digits. Dr. Davis noted the electrodiagnostic testing revealed moderate left carpal tunnel syndrome ("CTS") bilaterally and evidence of left-sided

[1] This was noted in the Application for Hearing and confirmed by Respondent's counsel at the beginning of the hearing.

[2] Dr. Kleiner noted Claimant had chest pain and underwent a cardiac work-up in April 2008.

radiculopathy. Dr. Davis stated that, although Claimant had CTS, his symptoms were vague and not particularly bothersome. Dr. Davis opined Claimant's weakness in the triceps was related to C7 radiculopathy. Dr. Davis recommended a steroid injection.

4. On August 1, 2013[3], Claimant was evaluated by Howard Corren, M.D. at Potomac Primary Care. In his note, Dr. Corren documented Claimant had been seen in May 2013 for weakness and tingling in his left upper extremity. He was also seen on July 2, 2013 with more weakness and continued pain in the left upper extremity. Degenerative changes were seen on x-ray at C4, C5 and C6. An MRI showed foraminal narrowing at C3-4, C4-5 and C5-6. On examination, Claimant was unable to extend his arm against gravity. He had minimally decreased sensation of the left thumb pad and no reflex at the left bicep. Dr. Corren's impression was progressive weakness in the left upper extremity, most likely due to foraminal narrowing and nerve root impingement. Claimant was to see Dr. Kleiner for an orthopedic evaluation.

5. Prior to August 5, 2013, Claimant had symptoms in his left upper extremity, including weakness and tingling. He was diagnosed with degenerative changes, including foraminal narrowing in his spine at the C4, C5 and C6 levels.
Despite these symptoms, there was no evidence in the record Claimant lost time from work as a result.

6. On August 5, 2013, Claimant suffered an admitted industrial injury to his left shoulder which occurred while he was loading bags. Claimant's testimony established this was a discrete event, which caused an increase in his shoulder symptoms.

7. An Employer's First Report of Injury was completed by Adrianne Holbron on August 6, 2013. The E-1 stated Claimant injured his left shoulder while lifting bags into a cart.

8. Dr. Kleiner examined Claimant on August 8, 2013 and discerned profound weakness in his left upper extremity and left shoulder abductor. Dr. Kleiner thought this was related to the C5 nerve compression, as Claimant had severe foraminal stenosis at C4-5. He also noted supraspinatus atrophy and weakness on abduction, which could be related to a labral tear and cyst. Dr. Kleiner recommended an EMG and MRI of the left shoulder.

9. Claimant also went to OccMed Colorado (the ATP for Employer) on August 8, 2015 and was seen by "Jim", which refers to Jimmie Keller, PA-C, as noted infra. At that time, Claimant reported pain in the left shoulder. He reported no numbness or tingling and denied any previous history. Claimant was diagnosed with a shoulder strain.

10. On August 19, 2013, Claimant was evaluated by Gary Zuehlsdorff, D.O/Jimmie Keller, PA-C, at OccMed and reported he had seen Dr. Kleiner, a spine surgeon, for left arm symptoms which were not in the initial report or on the pain

[3] Claimant was also seen for other non-occupational health issues at this appointment.

diagram. Dr. Zuehlsdorff's assessment was sprain/strain of left shoulder and new complaint of left-sided cervical pain. The MRI/arthrogram (8/12/13) showed rotator cuff tendinopathy without full thickness tear and impingement syndrome. Claimant was referred to Rajeesh Bazaz, M.D. for his shoulder.

11. Dr. Kleiner reviewed Claimant's MRI on August 20, 2013 and noted left rotator cuff tendiopthy, without a tear. Foraminal stenosis was noted at C3-4 and C4-5. Dr. Kleiner recommended a subacromial bursa injection and opined if this did not help, the bulk of his problem was related to the foraminal stenosis.

12. Claimant saw Dr. Bazaz on August 30, 2013. In the first office note, Dr. Bazaz said he did not think there was any evidence of significant partial thickness or full thickness rotator cuff pathology. There was some tendinopathy which was age appropriate. No shoulder surgery was indicated. Dr. Bazaz recommended treating the problem as an impingement issue with physical therapy.

13. On September 27, 2013, Claimant returned to Dr. Bazaz, who noted Claimant's main issue was weakness in the left upper extremity. On examination, Claimant had reduced ROM on forward flexion and abduction, as well as "global" rotator cuff weakness. He could not explain the patient's lack of active range of motion or weakness from a rotator cuff standpoint based on the MRI. Dr. Bazaz did not think this was truly a problem inside the shoulder joint, but thought this was more a neurologic irregularity. He noted Claimant was being evaluated by Dr. Kleiner to see what the next step would be from a cervical standpoint. Dr. Bazaz recommended focusing away from the shoulder and evaluating the neurologic irregularity.

14. On October 1, 2013, Respondent filed a General Admission of Liability (medical benefits only).

15. Claimant returned to Dr. Kleiner on November 14, 2013, who noted there was no benefit from the subacromial bursa injection. Dr. Kleiner recommended an endoscopic foraminotomy and Claimant wished to proceed with the surgery.

16. Claimant returned to Dr. Corren on November 1, 2013. Claimant had marked wasting in the biceps, triceps and shoulder girdle. Dr. Corren noted treatment for the shoulder had been transferred to the worker's compensation system. Dr. Corren's impression was left upper extremity weakness and muscle wasting, secondary to radiculopathy from cervical disk disease and foraminal stenoisis. He stated the shoulder had been cleared as a cause of these complaints.

17. A medical record review was done by Lawrence Lesnak, D.O. In his report dated November 20, 2013 on the issue of whether the left-sided C4-5 and C5-6 micro-foraminotomy was reasonable, necessary and related to the 8/5/13 injury. Dr. Lesnak noted Claimant had a significant history of left upper extremity weakness and there was evidence of chronic radiculopathies in the left C5 and C6 distribution. Dr. Lesnak concluded there was no medical evidence to suggest that any of the current left upper extremity symptoms were in any way related to the incident of August 5, 2013.

Although the proposed surgery might be reasonable and clinically indicated, Dr. Lesnak stated none of the cervical treatment was related to the occupational injury.

18. On December 2, 2013, Claimant underwent cervical spine surgery by Dr. Kleiner for C5-C6 denervation and foraminal stenosis. Dr. Kleiner noted Claimant had profound shoulder abductor weakness, with clear evidence of deltoid weakness. Analysis of his rotator cuff was carried out, but it demonstrated no substantial abnormalities. The CT scan and EMG studies confirmed the denervation and foraminal stenosis in Claimant's cervical spine for which surgery was done.

19. In an undated letter bearing a date stamp of January 31, 2014, Dr. Corren noted Claimant had left upper extremity complaints and weakness. Claimant was found to have multilevel spondylitic changes to his cervical spine, which were the most likely cause of the symptoms.

20. On February 4, 2014, Claimant underwent an IME with Timothy O'Brien, M.D. On examination, Dr. O'Brien found marked atrophy of the infra and suprspinatus musculature on the left. Limitations in his ROM were also noted. Dr. O'Brien concluded Claimant had chronic, preexisting degeneration and desiccation of multiple levels of the cervical spine that resulted in nerve root compression causing weakness, dysesthesias, and profound upper extremity atrophy, particularly regarding the left upper extremity shoulder soft tissue envelope. According to Dr. O'Brien, the left upper extremity complaints were caused by cervical spine pathology, not by the incident of August 5, 2013.

21. Dr. Lesnak issued a supplemental report dated February 28, 2014 in which he concluded that any treatment for the cervical spine and left upper extremity complaints were completely unrelated to the incident of August 5, 2013.

22. On April 16, 2014, Dr. O' Brien testified as a medical expert and the transcript of his deposition was admitted. Dr. O'Brien is a board-certified orthopedic surgeon and was Level II accredited pursuant to the W.C.R.P. Dr. O' Brien opined there was no acute injury or pathology shown by the MRI. Claimant had "dessication" changes, which Dr. O'Brien thought were related to his age. Dr. O'Brien noted the EMG revealed a C7 radiculopathy, which showed the problem was from the cervical spine, not the shoulder. Dr. O'Brien described this as a secondary impingement which was neurogenic, as opposed to mechanical. This was causing Claimant's left shoulder symptoms. The rotator cuff had no full thickness tear and was healthy, as seen on the MRI. Dr. O' Brien testified it was reasonable to provide treatment to Claimant for his left shoulder, as well as diagnostic testing. However, Dr. O'Brien did not believe the August 5, 2013 injury caused, aggravated or accelerated Claimant's cervical spine symptoms. Dr. O' Brien thought Claimant probably reached MMI as of September 27, 2013 and sustained no permanent medical impairment.

23. Claimant was examined by Mark Failinger, M.D. on June 9, 2014 to whom he was referred by Dr. Smith for a second opinion. Claimant had significant atrophy around the left shoulder, with external rotation strength 3+/5. Dr. Failinger opined this

was a neurologic problem in origin, not a shoulder problem. Dr. Failinger recommended an evaluation for the nerves and did not believe Claimant could build muscle.

24. Dr. Corren examined Claimant on September 4, 2014. Dr. Corren noted Claimant had experienced weakness in his left upper extremity since mid-2013, secondary to cervical disk disease. He continued to have weakness and muscle wasting, particularly in the biceps of his left arm. Dr. Corren confirmed the weakness and wasting in the biceps muscle on examination. Dr. Corren cleared Claimant for a C4-5 anterior cervical diskectomy and fusion.

25. On September 8, 2014, Claimant underwent a second cervical spine surgery, which was performed by Dr. Kleiner.

26. Greg Smith, D.O examined Claimant on November 13, 2014 and determined Claimant was at MMI. Dr. Smith noted Claimant was previously diagnosed with global atrophy of the shoulder, weakness and had undergone neck surgery. He also noted Dr. Failinger opined this was more of a neurological problem than a shoulder problem. Dr. Smith's assessment was sprain/strain of shoulder; new complaint of left-sided cervical pain consistent with aggravation from his shoulder; left shoulder girdle and arm weakness with global atrophy; cervical disc disease with myelopathy of the left upper extremity; left sided C3-4 and C4-5 foraminotomy at C4-54 and C5-6 with only minimal relief; status post surgical repair of his left shoulder[4].

27. Dr. Smith said he was asked to opine on shoulder range of motion for an impairment rating. Pursuant to the *AMA Guides*, Dr. Smith assigned a 7% upper extremity impairment, which converted to a 3% whole person impairment. In providing this rating, the ALJ infers Dr. Smith believed Claimant sustained a permanent medical impairment as a result of the August 5, 2013 injury. Dr. Smith found Claimant had permanent restrictions (after a functional capacity evaluation) which included: maximum lifting and repetitive carrying-15lbs. and pushing/pulling 20lbs. For maintenance treatment, Claimant could return to Dr. Kleiner three times per year for two years and to Dr. Smith three or four times per year over the next year.

28. Respondent requested a DIME and Thomas Fry, M.D. was selected to perform the examination.

29. On January 14, 2015, Claimant was evaluated by Dr. Kleiner, who noted an increase in the strength of his biceps deltoid and triceps, as well as improvement in Claimant's pain. Dr. Kleiner recommended a referral for a physical medicine consult to assist with rehabilitation and building up the strength of Claimant's biceps, triceps and deltoid. This was done in connection with follow up after the second cervical spine surgery.

30. J. Scott Bainbridge, M.D. examined Claimant on March 4, 2015 upon a referral from Dr. Kleiner. Claimant reported his strength was improving, but he still felt weak. On examination, full ROM was found with arm abduction and on extension; with

[4] This was a typographical error, as there was no evidence of a shoulder surgery in the record.

some limitation on external rotation and flexion. Dr. Bainbridge noted all C5 innervated muscles had 4/5 strength, which was an improvement. Dr. Bainbridge's assessments were: brachial neuritis or radiculitis; degeneration of cervical invertebral disc. Dr. Bainbridge spoke to Dr. Smith, who was going to do the impairment rating.

31. Dr. Fry performed the DIME on April 28, 2015. Dr. Fry signed the Division IME Examiner's Summary Sheet on June 22, 2015. On that document, he confirmed Claimant had reached MMI and listed the date of MMI as 7/1/15. In his report, Dr. Fry, recorded Claimant's complaints as tightness and discomfort in the left shoulder, which increased with ROM testing. Dr. Fry found full ROM of the left shoulder on examination, including flexion, extension, abduction, adduction; internal and external rotation. No crepitus or instability was found. Dr. Fry's assessment was: cervical spondylosis post surgical release (foraminotomies); chronic C6 radiculopathy; left upper extremity atrophy and weakness secondary to #2; left shoulder discomfort without signs of intrinsic pathology, probably neurologic in origin; progressive improvement post surgery. Dr. Fry stated Claimant sustained a 0% medical impairment rating, as he opined Claimant's weakness in his upper extremity was related to the neurologic condition and not an intrinsic shoulder problem. Dr. Fry stated Claimant should be given a six month health club membership at a facility where he could work out and continue his work strengthening exercises.

32. Dr. Smith examined Claimant on May 22, 2015. He noted the chief complaint was left shoulder pain, with muscle wasting and radiculitis in the left upper extremity after the cervical fusion performed by Jeffrey Kleiner, M.D. on December 2, 2013[5]. Dr. Smith diagnoses were: left shoulder sprain/strain; new complaint of left-sided cervical pain consistent with aggravation from his shoulder; left shoulder girdle and arm weakness with atrophy; cervical disc disease with myelopathy of the left upper extremity; left-sided C3-4 and C4-5 foraminotomy by Dr. Kleiner; status post-foraminotomy surgery; status post surgical repair of left shoulder.

33. Dr. Smith observed this was a somewhat complex case involving a two-part impairment. He did not list a date for MMI (other than the 5/22/15 date of the evaluation). On the range of motion worksheet, he noted a loss of shoulder range of motion due to C4-C6 disc. Dr. Smith opined Claimant sustained a 3% impairment, which converted to a 2% whole person impairment. Dr. Smith recommended a health club membership, which he described as the Claimant's only maintenance. The ALJ credited Dr. Smith's opinion that Claimant was at MMI as of 5/22/15 and inferred Dr. Smith was of the opinion that Claimant's shoulder impairment was derived from his cervical spine.

34. Claimant testified he returned to work in August 2015 and was working full-time. He has continuing limitations in his left shoulder, which he described as weakness.

[5] This appears to be a typographical error, since that date refers to the first cervical surgery and the fusion surgery was done on 9/8/14.

35. Claimant testified he wished to continue treating with Dr. Smith, saying he was satisfied with his treatment.

36. Claimant testified he wanted to obtain the gym membership to increase his strength.

37. Based upon the parties' stipulation, Claimant's medical treatment for his cervical spine, including the surgeries, was not related to the August 5, 2013 industrial injury. The ALJ concluded the medical evidence supported the finding that Claimant's cervical spine caused his left upper extremity symptoms, including weakness and tingling. Objective findings were made by Claimant's treating physicians to support, including muscle wasting and radiculopathy.

38. Dr. Fry's evidentiary deposition was taken on September 28, 2015. Dr. Fry was asked about his conclusions regarding MMI. When asked why he selected an MMI date of July 1, 2015, which was after the evaluation. Dr. Fry testified: "I picked that date because he stated he had a follow-up appointment – I believe it was with Dr. Smith on the 22nd – it may have been May – and I didn't know what was going to become of that appointment. So I picked a date after that." [Fry deposition, p. 9:17-21]. Dr. Fry confirmed the medical records, including the MRI and EMG studies ruled out the shoulder as the source of Claimant's symptoms. However, Claimant still underwent a number of evaluations and accordingly Dr. Fry did not feel it was appropriate to put Claimant at MMI until after these evaluations. [Fry deposition, pp. 13:11-14:2]

39. In his deposition, Dr. Fry agreed the shoulder pathology was from cervical radiculopathy and Claimant's treatment (including physical therapy) was to address issues from the cervical spine. Dr. Fry allowed that it was reasonable to state Claimant was at MMI as of September 27, 2013, after Dr. Bazaz evaluated him. Dr. Fry also declined to characterize his testimony as a change of opinion regarding the date of MMI in his deposition, stating: "No, because whether I agree retrospectively with what the doctors were doing and what the origin of his problem was, the patient was, indeed, being treated for his shoulder." [Fry deposition, pp. 16:25-17:8]. Dr. Fry stated whether the treatment was appropriate was a different issue. The ALJ infers Dr. Fry was stating the treatment being provided to Claimant during the aforementioned time period was appropriate. Dr. Fry also testified he was making a determination regarding Claimant's "overall" date for MMI. Dr. Fry testified he believed Claimant was at maximum medical improvement for the shoulder, since he did not find any particular impairment in the shoulder itself. The ALJ was not persuaded by Dr. Fry's testimony regarding various potential dates for MMI.

40. The ALJ found Dr. Fry's conclusion that Claimant was at MMI on July 1, 2015, a date in the future, was an error. Respondents sustained their burden of proof and overcame Dr. Fry's MMI finding by clear and convincing evidence.

41. The ALJ credited Dr. Fry's opinion regarding Claimant's upper extremity impairment. In particular, Dr. Fry opined that the weakness in the upper extremity was related to the neurologic condition and not an intrinsic shoulder problem. This finding

was also made by several of Claimant's treating physicians, including Drs. Bazaz, Corren, Kleiner and Failinger. Therefore, Claimant was not entitled to a work-related rating for his shoulder.

42. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of various health care providers on the question of MMI and Claimant's need for continuing treatment were the preeminent issues.

Overcoming the DIME On the Issue of MMI

Respondent contends Dr. Fry erred in his determination that Claimant would not reach MMI until 7/1/15. In this regard, Respondent argued Dr. Fry findings regarding the date of MMI were conflicting and/or ambiguous. Respondent averred the date of MMI was earlier and pointed to Dr. Fry's deposition testimony, as well as the medical records to support it's contentions.

Claimant asserted Dr. Fry's conclusion regarding MMI was correct and argued Respondent failed to meet its burden of proof to overcome Dr. Fry's opinion by clear and convincing evidence.

The ALJ's analysis of this issue was two-fold, beginning with an evaluation whether Dr. Fry's projection of an MMI date in the future comported with the statute and rules governing MMI. Subsumed within this consideration is the evaluation of the evidence presented by Respondent in support of their claim that Dr. Fry erred. As noted below, the ALJ found Respondent met its burden of proof and determined Dr. Fry's opinion on the date of MMI was erroneous.

A DIME physician's finding that a party has or has not reached MMI is binding on the parties, unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance'; it is evidence that his highly probable and free from serious and substantial doubt." *Metro Moving & Storage Co v. Gussert, supra*, 914 P.2d at 414 (citing CJI-Civ. 3d 3:2 (1988); *DiLeo v. Kotlnow*, 200 Colo. 119, 613 P.2d 318 (1980). A party meets this burden only by demonstrating that the evidence contradicting the DIME's MMI is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002)(citing *DiLeo v. Koltnow, supra*).The enhanced burden of proof imposed by § 8-42-108(b)(III), C.R.S., reflects an underlying assumption that the DIME, having been selected by an independent and unbiased tribunal, will provide a reliable medical opinion. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998).

A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the Claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the Claimant needs additional medical treatment to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990). In this case, the DIME physician's opinion did not so much concern the need for additional treatment, but projected a future date for MMI after an evaluation by the ATP.

In this case, the controversy centered on Dr. Fry's determination Claimant would be at MMI on July 1, 2015, approximately two months after he examined Claimant. The ALJ found Dr. Fry's conclusion after the DIME did not really confirm Claimant's condition had become "stable and when no further treatment is reasonably expected to improve the condition" [Section 8-40-201(11.5), C.R.S.], in that he referenced a further evaluation by Dr. Smith.

The Act defines MMI as:

> " a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement."
> Section 8-40-201(11.5), C.R.S.

By its very language, the statutory definition of MMI excludes a finding like what was made here by Dr. Fry, namely projection to a date in the future. The MMI definition presumes a finding by the physician that when Claimant was evaluated, he or she was medically stable and no further treatment was required. This does not preclude the DIME physician from confirming an MMI date in the past (made by the ATP), however, a projection to some date in the future would not be countenanced under this statutory definition. In the case at bench, Dr. Fry concluded Claimant was at MMI, but on a date in the future. Implicit in this finding was the conclusion that Claimant was not at MMI when Dr. Fry evaluated him on April 28, 2015.

The ALJ found the DIME physician's estimate of the MMI date was erroneous. To the extent Claimant was not at MMI when he was evaluated, Dr. Fry could have concluded this. Indeed, the DIME Examiner's worksheet specifically provides for this possibility. Moreover, both the Act and the W.C.R.P. provide for a follow-up examination by the DIME physician, at which time Dr. Fry could have given a definite MMI date.

In addition, Dr. Fry explained he also made this determination because Claimant had a return appointment with the ATP (Dr. Smith) on May 22, 2015. (Finding of Fact No. 38). Therefore, Dr. Fry's MMI determination was based, at least in part, on an event which had not yet occurred. As found, making this determination dependent upon an event which had not occurred did comport with the statute and was in error.

Under these circumstances, the ALJ found the DIME examiner's opinion on MMI equivocal and somewhat ambiguous. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*, 5 P.3d at 388. When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). An ALJ may consider the DIME physician's deposition testimony as part of his opinion for purposes of determining the DIME physician's opinion. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

The inquiry then turned to what was Dr. Fry's ultimate opinion regarding the date of MMI. In effect, Respondent argued that the DIME report and Dr. Fry's deposition testimony (which was admitted as part of the record) provided clarity as to the date of MMI. The ALJ did not find such clarity in the record, as Dr. Fry's testimony did not dispel the confusion regarding the date of MMI.

When testifying, Dr. Fry offered several explanations as to his thought process when determining the date of MMI. In particular, Dr. Fry disagreed with the suggestion while being questioned that Claimant was at MMI, at least as of November 1, 2013 when Dr. Corren saw him. (Finding of Fact No. 38). Dr. Fry then agreed that June 9, 2014 was a reasonable date for MMI, when he confirmed the orthopedic surgeons had ruled out the left shoulder as the source of his continuing pain. However, Dr. Fry declined to characterize his conclusion as a change of opinion, noting he agreed retrospectively with what the doctors were doing and what the origin of Claimant's pain was. (Finding of Fact No. 39). As found, Dr. Fry's multiple opinions were not clear and led to the ALJ's conclusion his MMI opinion was overcome.

Because Dr. Fry offered different opinion on the date of MMI, the ALJ reached a conclusion based upon the evidence submitted at hearing. Based upon the totality of the medical evidence before the Court, the ALJ concluded Claimant reached MMI when he returned to Dr. Smith on May 22, 2015. (Finding of Fact No. 33).

Change of Physician

Respondent seeks a change of physician from Dr. Smith. Respondent argued Dr. Smith continued to treat Claimant, even after the parties stipulated that the treatment for the neck was not related and the medical evidence showed Claimant's symptoms were from his cervical spine. At the outset, the ALJ notes there is a question whether Respondent is entitled to seek a change of physician under 8-43-404(5)(a)(III), C.R.S. and 8-43-404(5)(a)(VI), C.R.S; which refer to the "employee" and "injured employee", respectively. Even assuming *arguendo,* such a request for change of physician is allowed, Respondent has the burden of proving that it is entitled to a change of physician at this juncture.

Respondent did not adduce sufficient evidence which would support a change of physician. Respondent argued Dr. Smith continued to treat the Claimant, however, the record had only two instances of evaluations by Dr. Smith after May 14, 2014 when the stipulation was approved by ALJ Order.

In addition, Respondent did not offer statutory or other authority which provided a basis for a change of physician. The ALJ has insufficient evidence and no statutory basis to grant Respondent's request for a change of physician at this time. As such, the request for change of physician is denied.

Medical Benefits

As found, Dr. Smith recommended a six month health club membership to help with strengthening. This was the only maintenance treatment recommended by Dr.

Smith. Incidentally, Dr. Fry also concurred in this recommendation. The ALJ credited these opinions. There was no contrary evidence introduced at hearing and the ALJ found Claimant sustained his burden of proof for maintenance medical benefits. Therefore, Respondent shall provide a six month health club membership to Claimant as *Grover* medical benefits.

ORDER

It is therefore ordered that:

1. Claimant was at MMI as of May 22, 2015.

2. Respondent's request for change of physician is DENIED.

3. Respondent shall provide maintenance medical benefits in the form of a six-month health club membership.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 23, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether the Claimant proved by a preponderance of the evidence that she sustained a worsening of her condition that would entitle her to a reopening of W.C. Case No. 4-903-504 under Section 8-43-303(1), C.R.S.

2. If the Claimant proved that her condition worsened, whether the Claimant proved, by a preponderance of the evidence, that the left knee surgery is reasonably necessary and causally related to the Claimant's November 10, 2013 admitted work injury.

FINDINGS OF FACT

1. The Claimant's date of birth is September 21, 1943 and she is currently 72 years old.

2. The Claimant was employed by Employer as a janitor and she was employed by Employer in this capacity for approximately 3-4 months prior to an incident on November 10, 2013. Prior to that, the Claimant had worked for a different grocery store employer for about 8 ½ years.

3. The Claimant has a long history of rheumatoid arthritis and Dr. Ndudi Oparaeche treated her for rheumatoid arthritis, osteoarthritis, fibromyalgia and low back and joint pain for a number of years. Medical records starting in January of 2010 document the Claimant's treatment (Respondent's Exhibit E). As of July 1, 2013, the Claimant was started on the medication Xeljanz for her inflammatory arthritis and Dr. Oparaeche noted that the Claimant's right knee swelling and other joint swelling was improved as was her pain (Respondent's Exhibit E, pp. E33-E34). On September 4, 2013, Dr. Oparaeche noted the Claimant's rheumatoid arthritis was improved on the Xeljanz although there had been some supply issues (Respondent's Exhibit E, pp. E35-E36).

4. The Claimant sustained an admitted injury on November 10, 2013. The Claimant testified that she was told to go up to the men's bathroom for a water problem. She testified that she brought a mop to pick up liquid on the floor, but realized the mop was not going to do the job sufficiently. The Claimant testified that she then exited the door, coming out adjacent to the stairs and became tangled up in the mop. She tumbled down all 18 steps. During the tumble, the Claimant testified that she first caught her wrist and broke it, then she kept tumbling until reaching the bottom landing on her back and she also hit her knee on concrete.

5. The Employer's First Report of Injury states that the Claimant was injured at 3:45PM on November 10, 2013 when she fell down the stairs attempting to retrieve a mop to clean restrooms. It provides that "the EE broke her wrist. It is unknown what other injuries she sustained. The EE's husband came and picked her up…" (Respondent's Exhibit A, p. A1).

6. At the emergency room at the Medical Center of Aurora, the Claimant was seen on November 10, 2013 due to injuries from a fall that occurred at work. The chief concerns were that the Claimant sustained a blow to the head, without any loss of consciousness and injuries to right wrist. The Claimant was diagnosed with a head injury and a right distal radius fracture and a right distal ulnar fracture. There do not appear to be any references to any knee pain or injury in the medical note documenting this visit (Claimant's Exhibit 3).

7. The Claimant next saw Dr. Matthew Lugliani for an initial evaluation on November 13, 2013. The Claimant's chief complaint was right wrist pain. The Claimant advised Dr. Lugliani that she was experiencing pain in her right wrist, left knee pain and left-sided rib pain. The left knee pain, in particular, was described as "dull and achy in nature, worse with weight bearing or prolonged standing or walking" but with no locking, popping, or giving way (Claimant's Exhibit 5, p. 48; Respondent's Exhibit C, p. C22). At Dr. Lugliani's request, left knee radiographs were performed. The radiologist, Dr. Ellen R. Blatt, noting findings of "an oblique fracture of the lateral aspect of the proximal tibial metaphysic with extends to the articular surface. This is associated with large joint effusion." The impression was, "medial tibial plateau fracture. Follow up CT scan or MRI is recommended" (Respondent's Exhibit D, p. D5). The Claimant also reported the immediate onset of left knee pain to Dr. Kovachevich at Hand Surgery Associates on November 14, 2013 (Claimant's Exhibit 4, p. 27).

8. Dr. Lugliani later diagnosed the Claimant with left knee medial tibial plateau fracture and sprain and noted her history of severe arthritis (Respondent's Exhibit C, p. C20).

9. The Claimant's rheumatoid arthritis treatment provider, Dr. Oparaeche, noted on January 9, 2014 that the Claimant had been in a work injury where she fell down 17 steps at work and had surgery on her wrist (Respondent's Exhibit E, pp. E37-E38).

10. On January 10, 2014, the Claimant underwent a CT scan of the left knee and a hairline, nondisplaced, intra-articular fracture of the medial tibial plateau was found along with a large left knee joint effusion and mild osteopenia (Claimant's Exhibit 6, p. 51).

11. The Claimant saw Dr. Stewart Weinerman on January 20, 2014 for increased knee swelling and pain with activity. Dr. Weinerman assessed the Claimant with a tibial plateau fracture that was new. He recommended an injection and the Claimant's knee was first aspirated and 45 cc's of fluid was obtained and then the

Claimant's knee was injected with Xylocaine and Depmedrol (Claimant's Exhibit 7, pp. 69-72; Respondent's Exhibit G, p. G-1).

12. The Claimant saw Dr. Lugliani on March 20, 2014 and he noted that the Claimant reported "continued left knee pain that she rates at 3/10 in severity, worse with weight bearing or prolonged walking. She denies any locking, popping or giving way." Dr. Lugliani referred the Claimant back to Dr. Weinerman for a possible repeat injection. The Claimant's work status was listed as "working full duty" and she continued to work full duty, tolerating it without any complications per Dr. Lugliani. He noted that the Claimant informed him that she did not want to undergo any surgery (Claimant's Exhibit 5, pp. 44-45; Respondent's Exhibit C, pp. C5-C6).).

13. The Claimant saw Dr. Weinerman again on March 25, 2014 and he noted that the injection performed on January 20, 2014 only lasted a few weeks and the pain and swelling were present after that for two months. Dr. Weinerman characterized the Claimant's knee condition as "deteriorated" and performed a second injection. First the knee was aspirated and this time 65 cc's of fluid was obtained and then she was injected again with Xylocaine and Depomedrol (Claimant's Exhibit 7, pp. 65-68).

14. On April 3, 2014, the Claimant saw Dr. Lugliani again after the repeat injection from Dr. Weinerman. The Claimant reported that she continued to have pain that she rated from 3-5/10 in severity. Dr. Lugliani determined the Claimant was at MMI with no permanent impairment and discharged her from his care but recommended maintenance follow up with Dr. Weinerman, as needed, for mediation adjustments, joint aspiration and joint injections. He returned her to work at full duty with no restrictions (Claimant's Exhibit 5, pp. 42-43; Respondent's Exhibit C2-C3).

15. Also on April 3, 2014, on referral from her PCP Dr. Kevin Scott, the Claimant treated with her rheumatoid arthritis doctor, Dr. Oparaeche. He indicated that the Claimant reported that her left knee swells up and was fractured but healed up on its own. Dr. Oparaeche surmised that the wrist and knee swelling may be from active rheumatoid arthritis and the doctor wanted to have the Claimant consistently treat with Xeljanz to see if there was any improvement. Dr. Oparaeche noted that due to the Claimant's complicated history and by new events and the stopping and starting of medication, it is difficult to determine the cause of the Claimant's various ailments. Dr. Oparaeche did note that the Claimant "never complained of knee effusions in the past," so the doctor wanted to confirm the Claimant's report of a knee fracture that "healed spontaneously and is causing large volume effusions." Dr. Oparaeche noted that as this was through Worker's Compensation, it may be difficult to obtain records on this. (Respondent's Exhibit E, pp. E39-E40).

16. The Respondent filed a Final Admission of Liability on April 24, 2014 in accordance with Dr. Lugliani's April 3, 2014 medical report admitting for no impairment but admitting for post MMI medical treatment that is reasonable and necessary (Respondent's Exhibit A, p. A7). At the hearing, the Claimant testified that she had no attorney and did not object to the Final Admission of Liability.

17. The Claimant saw Dr. Oparaeche again on July 30, 2014. Dr. Oparaeche noted that the Claimant "is hurting everywhere. The neck, fingers, legs, ankles and more. She ran out of her medication as she had to take more." Dr. Oparaeche also noted that the Claimant's "left knee has hurt and swollen more since her fall, she has gotten steroid injections from workers comp with some benefit but is limited to 3 a year." Dr. Oparaeche also noted that the Claimant cannot be started on a biologic therapy or Xeljanz until multiple myeloma is ruled out. An I.M. steroid injection bridge was performed as the Claimant was flaring. Dr. Oparaeche expressed some frustration about what to do about the Claimant's conditions due to poor compliance with medication (Respondent's Exhibit E, pp. E41-E42).

18. The Claimant returned to see Dr. Weinerman on August 22, 2014 for her left knee pain. She reported that there was "increased pain with activities, popping, and grinding." Dr. Weinerman noted that the prior injection gave the Claimant some relief, but her other symptoms have gotten worse. On examination, Dr. Weinerman noted swelling and effusion. Dr. Weinerman aspirated the Claimant's knee, obtaining 30 cc's of fluid. The Claimant was then injected again with Xylocaine and Depomedrol (Claimant's Exhibit 7, pp. 61-64; Respondent's Exhibit G, pp. G4-G7).

19. On September 24, 2014, the Claimant saw Dr. Oparaeche again. Dr. Oparaeche noted the Claimant had her left knee drained again which limited how much she could walk. The Claimant reported that the workers compensation physician offered a surgical procedure but she stated that she didn't want to hear about it. Dr. Oparaeche encouraged the Claimant to inquire about the offered surgical procedure at the next visit. Dr. Oparaeche noted that the Claimant reported the steroid bridge administered at the last visit did not help, but stated that there was obvious improvement in synovitis. Per Dr. Oparaeche, the Claimant remained functional but was restricted at work from the hematologist to no more than four hours per day. Regarding the Claimant's various conditions, Dr. Oparaeche commented as follows:

> Rheumatoid arthritis: the Claimant has the active disease, but there are restrictions to getting more effective biologic treatment due to prior medication non-compliance and a dormant myeloma which required avoiding immune suppression. Cost of medications is also a factor.
>
> Fibromyalgia, unspecified: the Claimant was maintained on hydrocodone due to a claim of morphine intolerance. Dr. Oparaeche recommended switching from short-acting hydrocodone at 6 per day to long-acting generic hydromorpone and also recommended referral to a pain clinic.
>
> Osteoarthritis, unspecified whether generalized: the hand osteoarthritis overlaps the rheumatoid attractors and confuses the diagnosis of the disease. However, since the joint swelling is much improved from the last visit, this confirms rheumatoid activity.

> Unspecified arthopathy involving lower leg: The knee still has residual swelling, arthrocentesis without steroid injection will only last so long. Dr. Oparaeche notes concerns with repeated joint procedures as the Claimant had previous ankle septic arthritis. Dr. Oparaeche encouraged the Claimant to consider the arthroscopic procedure if it is offered.
>
> (Respondent's Exhibit E, pp. E45-E46)

20. When the Claimant saw Dr. Weinerman again on November 4, 2014 he noted that the Claimant reported the last injection given on August 22, 2014 provided only about 3 days of relief and her knee symptoms are the same, including that her knee gives out on her and feels weak. The knee was aspirated again and 65 cc's of bloody fluid was obtained, and then Xylocaine and Depomedrol was injected (Claimant's Exhibit 7, pp. 57-60).

21. The Claimant was seen on January 9, 2015 by Dr. George Schakaraschwili and Nurse Practioner Don Fresqus, on referral from the Claimant's PCP, Dr. Scott for a comprehensive consultation for her chronic pain issues. Dr. Schakaraschwili notes that the Claimant has arthritis all over her body which causes her significant pain. She has a past history of stomach ulcers and bowel obstruction. She had a past injury in 1991 when she fell off a ladder breaking both her tibia-fibula bones. She has a recent history of falling down 18 steps at work on November 10, 2013. She also has a history of 3 back surgeries, a fusion in 1971 with revisions in 1983 and 1984 and cervical fusion. She has a dormant myloma. Dr. Schakaraschwili notes the Claimant has been treated with Norco and is in need of chronic pain management. He noted the Claimant is also on anticoagulation therapy due to her atrial fibrillation and history of deep vein thrombosis (DVT) and pulmonary emboli. Dr. Schakaraschwili assessed the Claimant with "chronic pain due to multiple comorbidities to include rheumatoid arthritis, osteoarthritis, scoliosis, history of cervical and lumbar fusions, history of atrial fibrillation, history of a pulmonary embolus and deep vein thrombosis on anticoagulation therapy." Dr. Schakaraschwili continued the Claimant on Norco and placed her on a Fentanyl patch for better long-term control of her pain (Respondents' Exhibit H, pp. H1-H3). The Claimant saw Dr. Schakaraschwili again on January 23, 2015 and she was tolerating the Fentanyl patch, so Dr. Schakaraschwili increased the dosing and increased the Norco fro breakthrough pain as well (Respondent's Exhibit H, pp. H4-H5).

22. The Claimant saw Dr. Weinerman again on February 3, 2015 and she reported her last injection on November 4, 2014 gave her little to no relief. She reported that her knee had given out on her several times and it pops. Dr. Weinerman noted a knee effusion and assessed the Claimant's condition as deteriorated. He noted grinding and crepitus and medial joint line tenderness along with the swelling and effusion. Dr. Weinerman did not perform an aspiration and injection at this visit, but rather recommended surgery (Claimant's Exhibit 7, pp. 53-56; Respondent's Exhibit G, pp. G8-G11).

23. On February 17, 2015, legal counsel for the Respondent sent correspondence to Dr. Weinerman advising him that Respondent decline to authorize the recommended left total knee arthroplasty (Claimant's Exhibit 8, p. 74).

24. On March 18, 2015, the Claimant saw Dr. Barry Ogin and NP Don Fresques for her chronic pain management. He noted the Claimant was doing well on a Fentanyl patch and was utilizing Norco for breakthrough pain and was compliant with her medicine regimen. The Claimant reported that she continued to work part-time and was doing extremely well. The Fentanyl and Norco was continued and the Claimant was placed on Neurontin at nighttime for sleep disturbance and restless leg syndrome (Respondent's Exhibit H, pp. H6-H7).

25. The Claimant saw Dr. Tim O'Brien for an independent medical examination (IME) and he prepared a written report dated April 3, 2015. Dr. O'Brien took a detailed history of the present illness and it is generally consistent with the medical records contemporaneous with and subsequent to the date of injury. Of note, the Claimant reported to Dr. O'Brien that she reported pain in her left knee immediately, in addition to the significant pain and deformity in her right wrist. She advised Dr. O'Brien that not much attention was directed to the left knee and x-rays were not even taken at the initial medical evaluation, likely due to concerns related to the severe right wrist pain (Respondent's Exhibit B, p. B2). The Claimant reported that she has pain throughout her body and it wears her out and makes her tired, but can also make it difficult to sleep. Her general activities of daily living increase her pain. Her pain and stiffness is worse when she sits and that is why she likes to work and returned to work for Employer (Respondent's Exhibit B, pp. B2-B3). On physical examination, with respect to the left knee, Dr. O'Brien noted that "there was lateral joint line tenderness of the left knee and no medial joint line tenderness. Patellofemoral pain was noted with manipulation" This was noted bilaterally with crepitus bilaterally. Dr. O'Brien noted that "there was mild lateral pseudolaxity with varus stressing of the left knee" which was not noted on the right (Respondent's Exhibit B, p. B5). Dr. O'Brien's review of the medical records only included records from November 10, 2013 through February 3, 2015 that were from the worker's compensation physician and referrals. Other medical records do not appear to have been provided for this IME (Respondent's Exhibit B, pp. B6-B9). Taking into account the above, Dr. O'Brien opined that the November 10, 2013 work incident resulted in (1) a comminuted closed displaced intraarticular distal radius and ulna fracture of the right wrist; and (2) a nondisplaced fracture of the medial tibial plateau of the left knee (Respondent's Exhibit B, pp. B9-B10). Dr. O'Brien opined that treatment up to the date of his report has been reasonable. With respect to the left knee in particular, he noted that this was what he characterized as "a very minor fracture." He questioned how significant the Claimant's left knee osteoarthritis was prior to her work incident. He felt that if the Claimant's prior degeneration were significant enough to qualify her as a candidate for total knee arthroplasty prior to her injury, then a minimally displaced fracture probably had no significant accelerating effect on the Claimant's need for a total knee arthroplasty (Respondent's Exhibit B, p. B10). He indicated that it would be critical to review the medical notes from the Claimant's rheumatologist and any pre-existing radiographic studies of her left knee (Respondent's Exhibit B, pp. B10-B11).

Nevertheless, Dr. O’Brien opined hypothetically that if the Claimant requires a total knee arthroplasty, then “it is medically probable an intraarticular fracture in a knee that had pre-existing arthritic changes, accelerated those pre-existing arthritic changes and thus accelerated the need for a total knee arthroplasty” (Respondent’s Exhibit B, p. B11). Although, Dr. O’Brien did indicate that he is not able to ascertain whether the Claimant is a candidate for total knee arthroplasty as he is not in receipt of critical medical records and imaging studies (Respondent’s Exhibit B, p. B12).

26. On April 15, 2015, the Claimant saw Dr. Ogin and NP Fresques reporting that her pain level was stable at around a 7 level and her medicine regimen was about 60% effective. She remained functional and continued to work part-time. The medication regimen of Fentanyl and Norco was continued (Respondent’s Exhibit H, pp. H8-H9).

27. On September 1, 2015, Dr. O’Brien issued a Supplemental Report upon receipt of additional medical records of the Claimant, including radiology and imaging studies (Respondent’s Exhibit B, pp. B13-B19). In light of his review of the additional medical record documentation, Dr. O’Brien stated that his opinions rendered in his April 3, 2015 report have changed. His opinion that the Claimant sustained a nondisplaced fracture of the medial tibial plateau of the left knee remains unchanged. However, Dr. O’Brien now opines that the records demonstrated that the Claimant had significant osteoarthritis of the left knee prior to the work incident and that the long-standing pre-existing condition was intermittently symptomatic prior to the work incident (Respondent’s Exhibit B, p. B19). Having reviewed the Claimant’s imaging studies, Dr. O’Brien notes that the significant aspect of the Claimant’s osteoarthritic process is that it was isolated to the lateral compartment of the Claimant’s knee, and, on a lateral view, there is bone on bone contact. The Claimant also has a significant history of rheumatoid arthritis, prior nicotine abuse, and age-related, genetically induced osteopenia. Dr. O’Brien opines that with all of these pre-existing factors, the Claimant had significant softening of the bone, which meant that it took very little trauma to fracture her medial tibial plateau. While Dr. O’Brien acknowledged that the Claimant fell down many stairs and overall experienced a significant trauma, with respect to the fracture of the medial tibial plateau, he opined this was a very low energy injury resulting in a slight fracture that was so insignificant it was not visualized on plain radiographs, only a CT scan. The difficulty in even identifying the fracture at first is the main focus of Dr. O’Brien’s change of opinion that the work injury may have aggravated or accelerated her osteoarthritic condition beyond its normal rate of progression. Dr. O’Brien opined that, in light of the new evidence available to him, he now finds that the work injury did not aggravate or accelerate the Claimant’s need for a knee replacement. Instead, he opines that the Claimant was a candidate for total knee replacement prior to her accident and the medial tibial plateau fracture did not, in any way, alter that or impact her pre-existing osteoarthritis (Respondent’s Exhibit B, pp. 20-21). In addition to the imaging evidence, Dr. O’Brien also found the medical reports of Dr. Oparaeche support his change of opinion. In particular he points to a January 9, 2014 report where there is no mention of left knee pain, an April 3, 2014 report in which the Claimant reported that the left knee injury “healed on its own” and Dr. Oparaeche’s comments that swelling in the Claimant’s

knee and wrist may be from active rheumatoid arthritis (Respondent's Exhibit B, p. 21). Dr. O'Brien also points out that the Claimant's reports of an increase in symptoms, including locking and popping well after the fracture was felt to have healed. Dr. O'Brien opines that, to the extent the Claimant is experiencing increased knee symptoms, they are unrelated to the knee fracture which healed uneventfully, and are instead causally related to her pre-existing condition and also the result of nonorganic factors and secondary gain issues (Respondent's Exhibit B, p. B22). Dr. O'Brien finally points to the location of the fracture which did not extend into the joint line, but rather into the inter condylar notch. Dr. O'Brien finds that this substantiates his opinion (Respondent's Exhibit B, B23).

28. At the hearing, the Claimant testified that her knee condition has worsened since April of 2014. She testified that it is now to the point that she can't take one step after the other. Rather, she has to go one step at a time. The Claimant testified that when the doctor drained her knee and gave her an injection, it helped somewhat. She testified that she saw blood fill up the whole needle when he drained her knee. She testified that she can't walk "like a normal person" and that she has started to "crack and grind." She testified that her limp is now much more pronounced and her knee goes out on her causing her to fall. This didn't happen before her fall on the stairs. In the last 2 months her knee went out quite a bit, 5 – 6 times more. On cross-examination, the Claimant agreed that although she only works 20 hours per week now, as opposed to the 30-38 hours she used to work, this is due to restrictions from Dr. Faragher, the doctor the Claimant sees for her cancer diagnosis.

29. Subsequent to the hearing, Dr. Timothy O'Brien testified by deposition on November 10, 2015 as an expert witness in the field of orthopedic surgery (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, p. 3). Dr. O'Brien testified regarding his understanding of the Claimant's mechanism of injury of falling down approximately 17 stairs. He noted that the left knee tibial plateau fracture was a low-energy injury that did not result in displacement, did not extend into the weight bearing portion of the knee joint and did not fracture or disrupt any of the cartilage of the knee joint and was not a fracture that is considered significant (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 5-6). In reconciling what would seem to be a high-energy severe mechanism of injury with what Dr. O'Brien characterizes as a low-energy fracture to her tibial plateau, Dr. O'Brien testified that, "there's not always a direct correlation by what seems to be a severe mechanism and the injury it produces" (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, p. 8). In the case of the Claimant, Dr. O'Brien opines that while the Claimant's fall was traumatic, the vast majority of the trauma from the fall was absorbed by her right wrist and that is where the energy from the impact occurred. In comparison to the violent impact of the wrist injury, in comparison the way that the impact occurred for the knee was low energy and the crack in the bone did not displace. Even in spite of the weakened nature of her bone and the loss of calcium, all that occurred was "a tiny, little crack"(Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 8-10). In fact, Dr. O'Brien later elaborates stating that given the condition of the Claimant's bone, a high-energy impact would have shattered it and it would have literally disintegrated, but it did not, which points to an insignificant amount of energy

required to create the tiny crack in her diseased bone (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 27-28). Then the crack healed, as would be expected (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, p. 10). Dr. O'Brien does agree that the Claimant is a candidate for knee replacement surgery. However, after an opportunity to review reports from the Claimant's rheumatologist and the Claimant's imaging reports, he opines that the Claimant had advanced arthritis in her left knee (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 12-17). In addition, upon viewing the January 2014 CAT scan, Dr. O'Brien testified that he was able to determine that the Claimant's fracture didn't involve a weight-bearing surface and it didn't involve a part of the joint that had cartilage on it. Rather, the fracture went from outside the joint to that interchondral notch where ligaments lie, but not any part of the joint that has to do with weight bearing. He testified that the significance of this is that an extra-articular fracture, such as Claimant's, can't accelerate pre-existing arthritis (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 17-19). Although Dr. O'Brien acknowledges that the Claimant has testified that symptomatically she is worse, he opined that her joint was already bone on bone and she can't lose any more cartilage when there is none left to lose. From that standpoint, Dr. O'Brien testified that she was end-state before her injury and she couldn't become any more end-stage. Her symptoms were progressing for years due to her underlying conditions, but the further progression is not due to her injury, but merely because the Claimant has an incurable, relentlessly progressive condition (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 31-32). On cross-examination, the November 13, 2013 radiographs of the Claimant's left knee were referenced, and in particular, the reference to the fracture in the Claimant's left knee identified in the report. Dr. O'Brien agreed that the report of the November 13, 2013 radiograph does reference a fracture although his supplemental written report stated that no fracture was visible on plain radiographs, only on the CT scan (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 33-35; also, see Respondent's Exhibit B, pp. 20-21). Dr. O'Brien also agreed that the fracture was clearly seen on the axial image 35 and 33 of series 2 of the CT scan (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, p. 35). Dr. O'Brien also testified that the surgery recommended by Dr. Weinerman is reasonable although he denied that it was related. With respect to whether or not the surgery is necessary, he testified that this is more of a subjective matter (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 35-36).

ULTIMATE FINDINGS OF FACT

30. There was considerable evidence presented of the Claimant's multitude of preexisting conditions. While Dr. O'Brien ultimately concluded that the Claimant's left knee condition did not worsen as a result of her November 13, 2013 work injury, but rather, it worsened as part of the natural progression of her preexisting conditions, notably her osteoarthritis, rheumatoid arthritis and osteopenia, there is also evidence to the contrary in the medical records.

31. First, Dr O'Brien testified that that he erred in his report when he stated that the Claimant's fracture was so insignificant that it was not detected by the initial

radiographs, as the radiology report dated November 13, 2013 clearly references the tibial plateau fracture, which was then also referenced in a follow up CT scan.

32. Additionally, while the Claimant has numerous preexisting conditions, until her work injury of November 10, 2013, the medical reports from Dr. Ndudi Oparaeche, her rheumatoid arthritis specialist, generally noted the Claimant hurt everywhere and was tired, it was not localized to her left knee. In fact, to the extent there was any reference to the Claimant's knees prior to the work injury, there was a reference in a July 1, 2013 medical note to swelling and pain in her right knee which was improved with a trial of the drug Xeljanz. Also, even with her preexisting conditions, the Claimant was able to perform her normal job duties. The Claimant saw Dr. Oparaeche on April 3, 2014, the same day that she was placed at MMI by Dr. Lugliani. At the visit with Dr. Oparaeche comments that the knee swelling may be from active rheumatoid arthritis, which is difficult to determine due to the Claimant's complicated history. However, Dr. Oparaeche also noted that the Claimant had never complained of knee effusions in the past, but since the work injury, something was causing large volume effusions in the left knee. On July 20, 2014, almost 4 months after the Claimant was placed at MMI, Dr. Oparaeche again noted that the Claimant's left knee has hurt more and swollen more since her fall, with some benefit from the steroid injections she received under the worker's compensation physician's care. On September 24, 2014, Dr. Oparaeche noted the Claimant still had residual swelling in the left knee and registered concerns with repeated joint procedures. Overall, in review of Dr. Oparaeche's records, the records from before the work injury and before MMI evidence pain and discomfort everywhere due to the Claimant's multiple conditions. It is only after the injury, that the left knee pain and swelling become more pronounced and documented. If, as Dr. O'Brien has opined, the injury had no impact whatsoever on aggravating or accelerating the condition of the left knee, and that the Claimant's current need for a left total knee replacement is due to the natural progression of her preexisting condition, it would be more likely than not that the need for a TKR would be bilateral and that the Claimant would complain of right knee pain and swelling as much, or more, than the left knee pain and swelling, especially as the right knee was more bothersome before the injury, per the records. However, after the November 10, 2013 work injury, there are multiple references to only left knee swelling and effusions in the medical records of the Claimant's rheumatoid arthritis specialist.

33. As for the left knee effusions, a review of the records provides support that the large volume left knee effusions may have a connection to a traumatic process accelerating the Claimant's preexisting arthritic process, and they are also indicative of a worsening of the Claimant's condition after MMI. Dr. Lugliani referred the Claimant to Dr. Weinerman for treatment directed at the left knee after reviewing a January 10, 2014 CT scan which showed a nondisplaced, intra-articular fracture of the medial tibial plateau along with a large left knee joint effusion. On January 20, 2014, Dr. Weinerman aspirated the left knee and obtained 45 cc's of fluid which evidences a rather large volume effusion. The Claimant then received a steroid injection which provided some initial relief, but it wore off after about 2 weeks. The Claimant saw Dr. Weinerman next on March 25, 2014 and this time, 65 cc's of fluid was obtained upon aspirating the knee

and she received another steroid injection. When the Claimant saw Dr. Lugliani on April 3, 2014, a little over a week after receiving a second steroid injection, Dr. Lugliani placed her at MMI with no permanent impairment and returned her to work full duty with no restrictions. At that April 3, 2014 visit, the Claimant denied any locking, popping or giving way in her knee and her pain was rated between 3-5/10, post procedure from her March 25, 2014 aspiration/injection. Dr. Lugliani did recommend medical maintenance to include follow up with Dr. Weinerman for continued aspiration/injection procedures. Post-MMI, the Claimant next saw Dr. Weinerman on August 22, 2014. The Claimant now reported that she was experiencing increased pain with activities along with popping and grinding. Dr. Weinerman noted swelling and effusion and obtained 30 cc's of fluid upon aspiration of her knee and provided another steroid injection. When the Claimant saw Dr. Weinerman again on November 4, 2014, the Claimant reported that the last injection on August 22, 2014 only provided her with about 3 days relief and she had similar knee symptoms as described in the last visit and now her knee gave out and felt weak. This time when Dr. Weinerman aspirated her knee, he obtained 65 cc's of fluid, more than double from the prior aspiration. In addition, Dr. Weinerman's note indicated that the fluid was bloody, which is also consistent with the Claimant's testimony at hearing that she saw the whole needle fill up with blood when he drained her knee. That the fluid aspirated from her knee was bloody, as opposed to being clear or cloudy, is possibly indicative of a traumatic process as opposed to an arthritic process. Further, the volume of fluid has significantly increased again, which is more likely than not, indicative of a worsening of the Claimant's left knee condition. When Dr. Weinerman saw the Claimant again on February 3, 2015, the Claimant reported that the last injection on November 4, 2014 had given her little to no relief and, although Dr. Weinerman noted a knee effusion, he did not perform an aspiration and injection this time. He also noted grinding and crepitus and medial joint line tenderness along with the swelling and effusion. He assessed the Claimant's condition as deteriorated. At this visit, Dr. Weinerman recommended the Claimant undergo surgery.

34. In looking at Dr. Weinerman's medical notes, in conjunction with the Claimant's reports to her other physicians that her left knee symptoms were increasing, and the Claimant's consistent testimony to that effect, the ALJ finds as fact that the evidence supports that the Claimant's condition has worsened since MMI.

35. Moreover, in viewing the record as a whole, and taking the Claimant's substantial preexisting conditions into account, the ALJ nevertheless finds as fact that the November 10, 2013 work injury played a significant causative role in the Claimant's worsened condition of her left knee and accelerated her need for left total knee arthroplasty. Thus, in weighing all of the evidence presented, the ALJ finds that the recommended surgery is found to be reasonably necessary to cure and relieve the Claimant from the effects of her November 10, 2013 work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Petition to Reopen

The Claimant filed here Petition to Reopen W.C. 4-934-299 on the ground that her medical condition has worsened. The Claimant initially sustained work injuries on November 10, 2013 when she suffered injuries including injury to her left knee. The

Claimant now seeks medical benefits in the nature of a left knee total arthroscopy and other care for a worsening left knee condition that the Claimant alleges is causally related to her original admitted work injury.

Section 8-43-303(1), C.R.S., provides that an award may be reopened at any time within six years after the date on the ground of a change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. Reopening is not warranted if once reopened, no additional benefits may be awarded. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

As a threshold matter, the Claimant bears the burden of establishing that change in the Claimant's condition is causally related to the original injury. Section 8-41-301(1)(c), C.R.S.; *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Moreover, medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

In order to prove a causal relationship, it is not necessary to establish that the industrial injury was the *sole* cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

Colorado recognizes the “chain of causation” analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment, such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *City of Durango v. Dunagan*, *supra*. However, to the extent that the worsening of a condition occurs as the result of an independent intervening cause, then reopening would not be warranted as this is unrelated to the original compensable injury. Whether a particular condition is the result of an independent intervening cause is a question of fact for the ALJ. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002).

The Claimant has established, through her testimony and with the medical evidence, that, subsequent to MMI, the relief from left knee aspirations and injections was wearing off and that the periods of relief following the aspirations/injections were diminishing with the each successive aspiration/injection. Because that treatment was failing, and the Claimant’s symptoms were increasing, Dr. Weinerman felt it reasonable and necessary to proceed with a surgical resolution.

Since the Claimant was placed at MMI on April 3, 2014, the Claimant has proved that her left knee condition has deteriorated. The medical records from the Claimant’s treating physicians, including those who treat the Claimant for conditions outside of her work related injury, support the Claimant’s contention that her condition has worsened and that this worsened condition is causally related to the original injury. The medical records from Dr. Weinerman who provided authorized post-MMI treatment are particularly telling. Prior to being placed at MMI, the Claimant continually denied popping, locking or giving way of the left knee joint in the medical records of Dr. Lugliani, Dr. Weinerman or Dr. Oparaeche. However, after being placed at MMI, the Claimant now reports to Dr. Weinerman that her left knee pops, locks and gives way and Dr. Weinerman has noted grinding and crepitus. In addition, the Claimant continues to have large volume effusions which she had not experienced prior to her work injury, Post-MMI, on November 4, 2014, Dr. Weinerman withdrew 65 cc’s of bloody fluid from her left knee, which was more than double the amount extracted at her previous August 22, 2014 visit. In addition, the treatment of providing and aspiration and injection were having a diminished effect and providing less and less relief. These medical records support the Claimant’s testimony that the symptoms she was experiencing in her left knee were getting worse and she was now experiencing symptoms that she had not previously experienced. These symptoms were significantly impacting her ability to walk, resulting in a more pronounced limp that favored the left leg and diminished her ability to handle stairs. The Claimant also testified that the knee was weaker and would give out, causing her to fall.

Because the Claimant has proven by a preponderance of the evidence that her condition has changed and she is entitled to benefits, WC Claim No. 4-934-299 is reopened.

Medical Benefits – Reasonably Necessary

Once a claimant establishes the worsened condition is causally related, the claimant must prove the proposed medical treatment is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

Here, Claimant established by a preponderance of the evidence that the specific medical treatment consisting of total knee arthroplasty is reasonably necessary to cure and relieve the effects of the November 10, 2013 industrial injury and the worsened condition from which the Claimant is now suffering. Although Dr. O'Brien disputes that the need for this surgery is related to the work injury, he agreed that the surgery would be reasonable. Having found that the Claimant's condition has worsened since she was placed at MMI on April 3, 2014, and that the more conservative treatment she was receiving is now failing, it is further determined that the Claimant has proven that the surgery recommended by Dr. Weinerman is reasonably necessary to cure and relieve her from the effects of her work injury. The increased symptoms experienced by the Claimant are found to be a foreseeable consequence in this case following the failure of conservative treatment, including aspirations and injections.

The Medical Treatment Guidelines address the work relatedness of aggravated osteoarthritis. The section for aggravated osteoarthritis under "Occupational Relationship" provides:

> The provider must establish the occupational relationship by establishing a change in the patient's baseline condition and a relationship to work activities including but not limited to physical activities such as repetitive kneeling or crawling, squatting and climbing, or heavy lifting.
>
> W.C.R.P. Rule 17 Exhibit 6, p. 47.

The ALJ finds that the Claimant established this through her testimony, the records establishing her traumatic fall down many stairs, and through the medical records of Dr. Weinerman and other providers. Substantial evidence also established that prior to her injury of November 10, 2013, the Claimant had no work limitations with her left knee activities at baseline, and that post-injury and MMI she had significant limitations in all functions.

Section E of the Medical Treatment Guidelines addresses knee arthroplasty where the following surgical indications exist for osteoarthritis:

> [A]ll reasonable conservative measures have been exhausted and other reasonable surgical options have been considered or implemented. Significant changes such as advanced joint line narrowing are expected.
>
> Rule 17, Exhibit 6, p. 127.

As set forth in greater detail in the Findings of Fact, the medical records establish that conservative treatment measures have failed and have been exhausted in this case and Dr. Weinerman now recommends surgery.

While the Claimant has numerous preexisting conditions, until her work injury of November 10, 2013, the medical reports from Dr. Ndudi Oparaeche, her rheumatoid arthritis specialist, generally noted the Claimant hurt everywhere and was tired, it was not localized to her left knee. Dr. Oparaeche also noted that the Claimant had never complained of knee effusions in the past, but since the work injury, something was causing large volume effusions in the left knee. On July 20, 2014, almost 4 months after the Claimant was placed at MMI, Dr. Oparaeche again noted that the Claimant's left knee has hurt more and swollen more since her fall, with some benefit from the steroid injections she received under the worker's compensation physician's care. On September 24, 2014, Dr. Oparaeche noted the Claimant still had residual swelling in the left knee and registered concerns with repeated joint procedures. Overall, in review of Dr. Oparaeche's records, the records from before the work injury and before MMI evidence pain and discomfort everywhere due to the Claimant's multiple conditions. It is only after the injury, that the left knee pain and swelling become more pronounced and documented. If, as Dr. O'Brien has opined, the injury had no impact whatsoever on aggravating or accelerating the condition of the left knee, and that the Claimant's current need for a left total knee replacement is due to the natural progression of her preexisting condition, it would be more likely than not that the need for a TKR would be bilateral and that the Claimant would complain of right knee pain and swelling as much, or more, than the left knee pain and swelling, especially as the right knee was more bothersome before the injury, per the records. However, after the November 10, 2013 work injury, there are multiple references to only left knee swelling and effusions in the medical records of the Claimant's rheumatoid arthritis specialist.

In addition, the Claimant's testimony that she saw the needles fill up with blood when Dr. Weinerman aspirated the fluid from her knee is consistent with Dr. Weinerman's medical reports, especially the November 4, 2014 report noting that he obtained 65 cc's of bloody fluid, more than double from the prior aspiration. This is further support for the finding that Claimant's worsened left knee condition was related to the work injury and that the work injury and its consequences were an accelerant for the Claimant's need for knee surgery. This is especially telling in Dr. Weinerman's February 3, 2015 medical note when the Claimant reported that the last injection on November 4, 2014 had given her little to no relief and, although Dr. Weinerman noted a knee effusion, he did not perform an aspiration and injection this time. He also noted grinding and crepitus and medial joint line tenderness along with the swelling and effusion. He assessed the Claimant's condition as deteriorated. In viewing the record as a whole, and taking the Claimant's substantial preexisting conditions into account, the ALJ nevertheless found as fact that the November 10, 2013 work injury played a significant causative role in the Claimant's worsened condition of her left knee and accelerated her need for left total knee arthroplasty. Thus, in weighing all of the evidence presented, the ALJ finds that the recommended surgery is found to be reasonably necessary to cure and relieve the Claimant from the effects of her November 10, 2013 work injury.

ORDER

It is therefore ordered that:

1. Workers' Compensation Case No. 4-934-299 is reopened.

2. Insurer is liable for the medical care the Claimant receives that is reasonably necessary to cure and relieve her from the effects of the

compensable injury that occurred on November 10, 2013, as determined by her authorized treating physician and any authorized referrals, including, but not limited to, left knee arthroscopy recommended by Dr. Weinerman, and any reasonably necessary follow up care, per the Act.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 10, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Is the Claimant's request for additional temporary total disability benefits barred because the authorized treating physician released Claimant to return to work at regular employment and because Claimant did so?
- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing May 8, 2014?
- If Claimant proved entitlement to temporary total disability benefits did Respondents prove by a preponderance of the evidence that such benefits should be terminated because Claimant was responsible for his termination from employment?
- If Claimant proved entitlement to temporary total disability benefits did Respondents prove by a preponderance of the evidence that they are entitled to an offset based on Claimant's receipt of unemployment insurance benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 2 through 6 were received into evidence. At hearing, Respondents' Exhibits A through J were admitted into evidence. After the hearing Respondents submitted what has been marked as Respondents' Exhibit K (report of Dr. Walker). Pursuant to the ALJ's Case Status Order dated November 19, 2015 Claimant was given until November 30, 2015 to register any objection to consideration of Respondents' Exhibit K. No objection was filed and Respondents' Exhibit K is admitted into evidence. The post-hearing depositions of Maureen Kelly and Todd Rand are admitted into evidence.

2. The Employer operates a landscaping and lawn service business. Beginning in 2012 Claimant was intermittently employed as an equipment operator in the Employer's business. This job involved driving a truck and operating machinery such as lawn mowers, tractors and "Bobcats." Claimant was paid $13 per hour and given the use of a company truck.

3. Claimant suffered an admitted injury to his low back on September 10, 2013. Claimant slipped while getting off of a large mower and fell striking his lower back on a steel "wing." Claimant reported the injury to the employer on the same day that it happened but continued to work.

4. On September 30, 2013 Claimant sought treatment for low back pain at the Lutheran Medical Center emergency room (ER). The ER noted a 10-year smoking history. The physical examination (PE) was reportedly normal. Claimant was discharged with a prescription for Percocet and advised to follow-up with a workers' compensation doctor.

5. Claimant's low back problems persisted and the Employer referred him to Midtown Occupational Medicine Services (Midtown) for treatment.

6. On December 4, 2013 Craig Anderson, M.D., examined Claimant at Midtown. Claimant gave a history that on September 10, 2013 he fell off of a mower and struck his right lower back and posterior hip. Claimant advised that after the incident he experienced persistent right lower back and right buttock pain. Claimant reported his symptoms suddenly worsened while he was at work on November 15, 2013. Claimant explained that he began to experience radiating pain down the right leg. On PE Dr. Anderson noted tenderness over the sciatic notch, right buttock and piriformis and right SI joint. Claimant had a positive straight leg test on the right. Dr. Anderson ordered a lumbar MRI, prescribed gabapentin and oxycodone and placed Claimant on "modified duty restrictions." (Medical records review of Dr. Walker, Respondents' Exhibit K p. 5).

7. Claimant credibly testified that on December 4, 2013 Dr. Anderson imposed restrictions of no lifting greater than 5 pounds, no bending over, no excessive walking and no climbing stairs.

8. On December 14, 2013 Claimant underwent an MRI of the lumbar spine. The radiologist reported that at L3-4 there was a small central disc protrusion, at L4-5 there was severe right-sided foraminal stenosis and moderate left-sided foraminal stenosis and at L5-S1 there was severe left-sided foraminal stenosis and mild right-sided foraminal stenosis. (Medical records review of Dr. Walker, Respondents' Exhibit K p. 5).

9. On December 18, 2013 Claimant reported to Dr. Anderson that he was continuing to experience severe pain in the right lower extremity as well as numbness and tingling in the right foot. Claimant exhibited a positive straight leg test on the right. Dr. Anderson referred Claimant to a physiatrist, Dr. Lawrence Lesnak, for the purpose of "ruling out" L5-S1 radiculopathy. Dr. Anderson also prescribed physical therapy (PT). (Medical records review of Dr. Walker, Respondents' Exhibit K pp. 5-6).

10. Dr. Anderson examined Claimant on January 17, 2014. Dr. Anderson noted Claimant was progressively improving but still had "moderate, severe aching discomfort of the right lower lumbosacral area and superior buttock." Claimant exhibited negative straight leg testing bilaterally. Dr. Anderson noted Claimant missed an appointment scheduled with Dr. Lesnak on January 16, 2014. Claimant preferred conservative treatment and did not want "invasive treatment such as an epidural injection." (Medical records review of Dr. Walker, Respondents' Exhibit K p. 6).

11. On January 31, 2014 Dr. Anderson again examined Claimant. Dr. Anderson noted Claimant was working full time with restrictions. Claimant advised that he wanted to postpone any consultation with Dr. Lesnak "with regard to the possibility of injections" because he was "doing well in physical therapy." Dr. Anderson noted Claimant's range of motion (ROM) was "mildly restricted with achy pain" but without radiation. The straight leg raising test was normal and Claimant ambulated without pain behaviors or antalgic gait. (Medical records review of Dr. Walker, Respondents' Exhibit K p. 6-7).

12. On February 28, 2014 the physical therapist noted Claimant was "doing well" and that lumbar spine active ROM was within normal limits and pain free. (Medical records review of Dr. Walker, Respondents' Exhibit K p. 7).

13. Dr. Anderson examined Claimant on March 7, 2014. Claimant advised that "just about all of his lower back pain" had resolved although he reported some intermittent nighttime "discomfort in the right lower back right gluteal area." Dr. Anderson noted the physical therapist reported that Claimant performed "aggressive therapeutic exercise without any exacerbation of pain." On PE Dr. Anderson noted normal active ROM and that palpation was negative. Claimant's lower extremity strength was intact and the straight leg raise maneuver was negative. Dr. Anderson diagnosed the following: (1) Lumbosacral strain, work related, resolving; (2) MRI evidence of degenerative disk disease, severe at L5-S1, facet arhtropathy noted, severe left and mild right foraminal stenosis, and somewhat less severe abnormalities noted at L4-L5 and L3-L4. Probably not work related; (3) Lumbosacral myofascial pain and possible piriformis syndrome, resolving. Dr. Anderson opined that the "more severe MRI findings do not correlate with clinical symptoms and signs of right leg pain" and that the right leg pain was "probably not due to a true radiculopathy." Dr. Anderson placed Claimant at maximum medical improvement (MMI) with no permanent impairment and "no work restrictions required." Dr. Anderson encouraged Claimant to continue with independent exercise and opined that no maintenance care was necessary.

14. Claimant testified at hearing that the pain in his back and the pain radiating into his right lower extremity has never abated. Claimant further testified that after Dr. Anderson released him on March 7, 2014 he returned to work at full duty. Claimant explained that when he first returned to work at full duty he helped a mechanic by getting parts. Later, Claimant was assigned to operate a Bobcat in Boulder. Claimant explained that the Bobcat is a very "rough riding" piece of machinery and there was no seat cushion. Claimant testified he was able to operate the Bobcat for only two weeks because his "pain came back worse than before." Claimant opined that operating the Bobcat caused his pain to get worse.

15. It is difficult to determine the precise course and nature of Claimant's medical treatment immediately after Dr. Anderson's March 7, 2014 examination. Apparently, Claimant went to St. Joseph Hospital on March 12, 2014 where he was examined by Robert Springs, M.D. Dr. Springs saw Claimant as a "new patient" for treatment of a workers' compensation injury and ordered x-rays and laboratory work.

(Medical records review of Dr. Ramos, Claimant's Exhibit 3 p. 27; Medical Records review of Dr. Henke, Claimant's Exhibit 3 p. 35).

16. On March 25, 2014 Respondents filed a Final Admission of Liability (FAL). Respondents admitted for temporary total disability (TTD) benefits from December 4, 2013 through December 19, 2013 and for temporary partial disability (TPD) benefits from December 20, 2013 through March 7, 2014. Based on Dr. Anderson's March 7, 2014 report Respondents admitted Claimant reached MMI on March 7, 2014. Respondents did not admit liability for any permanent disability benefits.

17. Records of St. Joseph Hospital dated April 27, 2014 "refer" to an "epidural steroid injection." (Medical records review of Dr. Walker, Respondents' Exhibit K, p. 7).

18. Claimant apparently returned to Dr. Springs on May 5, 2014. Dr. Springs noted Claimant was having back pain with radiation down the right leg. Dr. Springs recorded Claimant had been seen at two emergency rooms since "mid April" and was treated with Medrol Dosepak without benefit. Dr. Springs recorded Claimant was tender over the lower spine and right SI "joint area" and that straight leg testing was positive on the right. Dr. Spring prescribed Percocet and ordered x-rays of the lumbosacral spine. (Medical records review of Dr. Ramos, Claimant's Exhibit 3 p. 27; Medical Records review of Dr. Henke, Claimant's Exhibit 3 p. 35).

19. On May 6, 2014 lumbar spine x-rays were read by a radiologist to indicate multilevel degenerative disc disease greatest at L5-S1. (Medical records review of Dr. Walker, Respondents' Exhibit K p.7).

20. Claimant's Exhibit 6 is a "Medically Advised Absence" (MAA) form issued by the office of Dr. Springs. This document was not signed by Dr. Springs but was signed "for" him by someone whose signature is illegible. The document is dated May 8, 2014 and states Claimant has been "under our care." The document further states Claimant's absence for the period of May 8, 2014 through May 22, 2014 was "considered important" for his health. The document released Claimant to return to work on May 22, 2014.

21. Claimant testified that on May 8, 2014 he went to see his "own physician" Dr. Springs. Claimant recalled that on May 8 he left Dr. Springs's office with the MAA. Claimant stated he never returned to Dr. Anderson for treatment because Dr. Anderson incorrectly predicted that Claimant could "work out" his residual pain and the pain would eventually "go away."

22. Claimant testified as follows concerning the events of May 8, 2014. He drove from the doctor's office to his apartment that was located immediately adjacent to the Employer's premises. As Claimant was getting out of his truck he was approached by his supervisor, Mr. Todd Rand (Rand). Rand asked Claimant how things went at the doctor and Claimant handed the MAA form to Rand. Rand read the MAA and asked what it meant. Claimant told Rand that Dr. Springs said Claimant shouldn't drive the equipment and should do something else. Rand then asked Claimant to return the keys

to the Employer's premises and the keys to the truck that the Employer allowed Claimant to use. Claimant handed these keys to Rand and went to his apartment. Claimant testified that about 15 minutes later Mr. Steve Butler (Butler), the owner of the Employer, knocked at Claimant's apartment door. Claimant testified that Butler was angry, was yelling and pointed his finger at Claimant. Claimant testified that Butler accused Claimant of being a "leech trying to suck money" and threatened to ruin Claimant's life.

23. Claimant testified that he understood from the events of May 8, 2014 that he had been fired by the Employer. Claimant testified that he then applied for unemployment insurance (UI) benefits.

24. Claimant testified that after the conversation with Butler he received a call from Ms. Maureen Kelly (Kelly), the Employer's "secretary." According to Claimant Kelly directed him to pick up his last check at the Employer's office. In Claimant's mind this call affirmed that he had been discharged from employment. Claimant testified that because he could not climb stairs he sent his brother to the Employer's office to pick up the check.

25. Kelly testified at the hearing on behalf of the Employer. Kelly testified that she is the Employer's office manager and is responsible for accounts payable and receivable and "human resources" issues. Kelly recalled that between March 7, 2014 and "about" May 6, 2014 Claimant never told her that he was unable to perform the duties assigned by the Employer and did not ask to return to Midtown for additional medical treatment. However, Kelly testified that Claimant did request additional hours during this timeframe.

26. Kelly testified that sometime between May 6, 2014 and May 8, 2014 Claimant presented her with a "work release" form. Kelly recalled that the work release contained a "doctor's signature" and was not from Midtown. Kelly testified the "work release" was "vague" and did not give a reason why Claimant was being released from work. Kelly testified that she asked Claimant why he was taken off of work and Claimant stated he was having "kidney problems." Kelly testified that she told Claimant she needed a reason for the release on the "next form" or on a "revised form." Kelly stated that she expected Claimant to bring her a more specific work release sometime prior to May 22, 2014.

27. Kelly testified that she expected Claimant to return to work and come to her office sometime on May 28, 2014, the day after Memorial Day. However, Claimant did not come to her office. Kelly explained that Claimant's personnel file lists him as a "voluntary quit." Kelly explained that it was her impression Claimant quit after he "didn't show up for work after Memorial Day." Kelly testified that Rand never disclosed Claimant's employment "status" to her and that Butler never stated Claimant had been terminated.

28. Kelly "assumed" that in early June 2014 Employer was notified that Claimant had applied for UI benefits. Kelly testified that the UI "paperwork" indicated

Claimant applied for benefits on May 11, 2014. Kelly stated that she thought this was "odd" and it "ticked [her] off."

29. Rand testified at the hearing on behalf of the Employer. Rand is the Employer's "landscape manager" and manages the majority of the Employer's business.

30. Rand testified that he had a conversation with Claimant sometime after Memorial Day. Rand testified that during this conversation Claimant stated he was having back pain and was in too much pain to continue working. Rand explained that in the past Claimant mentioned he had many other health issues including shoulder problems, back problems and kidney problems. Rand testified that he did not terminate Claimant from employment and did not ask Claimant to hand over the Employer's keys. Rand testified that as Claimant was explaining he could no longer work he grabbed the keys out of his pocket and handed them to Rand. Claimant also turned over the Employer's fuel card. Rand stated that he then wished Claimant the best and told Claimant "that he always had a home with us."

31. Rand testified that approximately one hour after he had the conversation with Claimant Kelly came into the office. Rand stated that he turned the keys and fuel card over to Kelly. Rand recalled that Kelly asked if Claimant quit and he replied "yes."

32. On July 9, 2014 Clarence Henke, M.D., performed a Division-sponsored independent medical examination (DIME). Dr. Henke issued a DIME report on July 18, 2014. Dr. Henke noted Claimant's chief complaints were burning and aching in the lower lumbar spine with radiation into the right SI joint, a "pins-and-needles sensation" in the right groin area extending down the right leg to the foot and toe numbness. Dr. Henke noted that by history Claimant had fallen off a mower on to his low back and right hip striking a piece of steel. Dr. Henke recorded that since this incident Claimant "has had persistent right lower back pain extending into the right buttock, with shooting pains down the thigh and leg, which became more pronounced on November 15, 2013 when [Claimant] was working." Dr. Henke's DIME report does not mention any history that Claimant's symptoms became worse after he was released by Dr. Anderson and returned to work on a rough-riding Bobcat. On PE Dr. Henke noted instability of the right leg and "tenderness and moderate paravertebral muscle spasm in the mid-lower lumbar spine, with radiation to the right buttock." Dr. Henke recorded reduced pinwheel "sensation in the right lateral thigh, calf, and foot areas." He also noted positive straight leg raising tests on the right and left sides. Based on the lumbar MRI findings Dr. Henke diagnosed the following: (1) L4-5 severe right foraminal stenosis and moderate left foraminal stenosis; (2) L5-S1 severe left and mild right foraminal stenosis; (3) Mild posterior disc bulging at L3-4 with small central disc protrusion. Dr. Henke also diagnosed clinical examination findings "consistent with right leg radiculopathy from compression of the L4 and L5 nerve roots."

33. Dr. Henke opined Claimant was not at MMI. He recommended that Claimant undergo a bilateral lower extremity EMG examination and be referred for a neurological consultation. Dr. Henke imposed work restrictions of no lifting in excess of

10 pounds and avoidance of bending, lifting, or ladder climbing. Dr. Henke also recommended that Claimant continue his medications.

34. On August 27, 2014 Claimant underwent an independent medical examination (IME) performed by Franklin Shih, M.D. Dr. Shih took a history, reviewed medical records including Dr. Henke's DIME report and performed a PE. The history recorded by Dr. Shih mentions that Claimant reported an increase in low back and right buttock symptoms after he was released by Dr. Anderson, and that the Employer denied Claimant's alleged request to be "reevaluated." The history does not mention any increase in symptoms attributed to operation of a Bobcat. Dr. Shih assessed the following: (1) Status post work related injury 09/11/2013 [sic] with secondary back and lower extremity radicular symptoms; (2) On going back and right lower extremity symptomatology "unclear relationship to #1 above." Dr. Shih opined that "unfortunately" the history given by Claimant differed significantly from the history documented in the medical records. Specifically, Dr. Shih noted that Claimant reported he had "significant limiting pain complaints" when he was discharged by Dr. Anderson on March 7, 2014. However, Dr. Shih observed that Dr. Anderson's reports and the PT reports show that in the weeks preceding March 7 Claimant was able to operate machinery, Claimant's back pain had mostly resolved and Claimant had active ROM within normal limits and without pain. Dr. Shih also noted that Claimant gave a history that Dr. Anderson told him he did not need to see Dr. Lesnak, but Dr. Anderson's report indicated that Claimant wanted to postpone the visit to Dr. Lesnak. Dr. Shih opined that in these circumstances he could not within "medical probability" attribute Claimant's ongoing complaints to the September 2013 industrial injury. Dr. Shih also stated that he disagreed with Dr. Henke's opinion that Claimant was not at MMI since Dr. Shih could not state Claimant's symptoms were related to the industrial injury.

35. On September 22, 2014 Claimant underwent an IME performed by Joseph Ramos, M.D. This IME was conducted at the request of Claimant's former counsel. Dr. Ramos is level II accredited.

36. In connection with the IME Dr. Ramos took a history, reviewed medical records and performed a PE. In the history portion of the report Dr. Ramos noted Claimant sustained an injury on September 10, 2013 when he fell from a mower and struck his right lower back and posterior hip against metal. Dr. Ramos recorded that since the injury Claimant "has had persistent pain in his right lower back with radiation into the right buttock with shooting pain down the thigh and leg." Dr. Dr. Ramos also stated that Claimant's condition has "progressively become more pronounced" and he has not been able to work since November 15, 2013. Ramos also stated that after Dr. Anderson released Claimant to return to work he "had such a pain flare that he could hardly walk." Dr. Ramos's report does not contain any history that Claimant experienced an increase in symptoms attributed to operating a Bobcat. On PE Dr. Ramos noted that ROM was "reduced in all planes, but more with forward flexion" and that forward flexion produce "significant radiculopathic symptoms." There was tenderness to palpation of the right SI joint.

37. Dr. Ramos expressed concern that Claimant was "persistently symptomatic" and wrote that the PE suggested Claimant was "suffering significant spinal pathology, specifically, symptomatic lumbar disc injury." Dr. Ramos agreed with Dr. Henke that Claimant had not reached MMI and concurred with Dr. Henke's recommendations that Claimant should undergo an EMG, a neurosurgical evaluation and continue the pain medications. Dr. Ramos further opined that Claimant "should be "restricted to sedentary duties" until further evaluation and treatment is obtained."

38. On September 16, 2015 Sharon Walker, M.D. performed an IME at Respondents' request. Dr. Walker is board certified in emergency medicine and is Level II accredited. Dr. Walker took a history from Claimant, reviewed medical records and performed a PE. Dr. Walker also reviewed surveillance video of Claimant taken on August 27, 2014.

39. Dr. Walker wrote that Claimant gave a history that in September 2013 he fell from a mower and struck his right buttocks on a steel bar. Claimant reported that he was treated by Dr. Anderson who referred him to PT. However, Claimant stated that the PT "did not help." Claimant also told Dr. Walker that Dr. Anderson "refused to send him to any specialists." Claimant also gave a history that approximately 2 weeks after Dr. Anderson released him to regular employment he was running a Bobcat and "developed the same pain in his right lower back, and states that it was worse." Claimant told Dr. Walker that he smoked cigarettes but "but did not smoke until after this injury."

40. Dr. Walker stated that the video surveillance taken on August 27, 2014 started with Claimant walking towards a car with an "antalgic gait." Claimant then got into the car in a "slow and guarded manner" while holding the door frame for assistance. Claimant then moved each leg into the car "one at a time in a very slow motion." Claimant is then shown to park the car and "appeared to have difficulty getting out of the car" and once again held onto the door frame to "assist in standing up." However, Dr. Walker noted that "about an hour and a half later" the video showed Claimant walking into a building with a normal gait. Claimant was next seen to open his car door and then bend and lean into the car to get cigarettes. Dr. Walker opined that Claimant demonstrated "absolutely no pain behaviors" when he leaned into the car. Dr. Walker also wrote that the video depicts Claimant getting into his car in a "normal fashion without any problems."

41. Dr. Walker assessed Claimant with the following conditions: (1) Lumbosacral strain with radicular symptoms; (2) Lumbar facet pain; (3) Bilateral foraminal stenosis L4-5 and L5-S1; Posterior disc bulging L3-4 with small central disc protrusion; (5) Paresthesias. Dr. Walker opined that the September 2013 industrial injury caused a buttock contusion, a lumbosacral strain and aggravation of the foraminal stenosis. Dr. Walker opined the L3-4 posterior disc bulge was either caused or aggravated by the injury.

42. However, Dr. Walker opined to a reasonable degree of medical probability that on March 7, 2014 Claimant reached MMI for the September 2013 industrial injury

and did not suffer any permanent impairment. Dr. Walker opined that Claimant did not "require any specific work, activity or functional limitations or restrictions" as a result of the September 2013 injury.

43. In support of these conclusions Dr. Walker stated that there are "major discrepancies" between the Claimant's reported history and the medical records. Dr. Walker noted that Claimant reported PT did not help him, but the PT "notes specifically state that he responded well to treatment." Dr. Walker also noted that the PT notes and Dr. Anderson's notes show that prior to being placed at MMI on March 7, 2014 Claimant was "essentially pain-free and had full range of motion of his lumbar spine without any pain." Dr. Walker noted Claimant reported that Dr. Anderson refused to make any referrals to a specialist. However, Dr. Walker noted the medical records show Dr. Anderson referred Claimant to Dr. Lesnak, but Claimant missed the appointment with Dr. Lesnak. Dr. Walker further noted that Dr. Anderson's records reflect that Claimant told Dr. Anderson he did not want to see Dr. Lesnak because he was pleased with his progress and did not expect to need "invasive treatment." Dr. Walker also noted there was a discrepancy between Claimant's statement that he had smoked only since the September 2013 injury and medical records showing "at least a 10 year history of smoking." Dr. Walker wrote that she agreed with Dr. Shih that "the medical record documentation is probably a more accurate depiction of what took place between September 30, 2013 and March 7, 2014.

44. Dr. Walker further opined that the surveillance video caused her concern that Claimant was exhibiting "symptom magnification." Dr. Walker explained that it was her "opinion within a reasonable degree of medical probability that a person with a significant back injury would not display such extremes in pain behavior and function within this short window of time."

45. Claimant failed to prove it is more probably true than not that the industrial injury of September 10, 2013 caused him to suffer any disability commencing May 8, 2014 or thereafter. Rather, the credible and persuasive evidence establishes that Claimant's condition did not worsen after Dr. Anderson released Claimant to regular employment on March 7, 2014. Therefore, Claimant failed to prove that the alleged worsening of his allegedly injury-related condition caused any disability that would warrant an award of TTD benefits.

46. Dr. Walker credibly and persuasively opined that Claimant does not have any functional or work activity limitations that are causally related to the September 10, 2013 industrial injury. Dr. Walker credibly and persuasively explained that Dr. Anderson's medical records and the PT records establish that by the time Dr. Anderson released Claimant to return to regular employment on March 7, 2014 he was "essentially pain-free and had full range of motion" in the lumbar spine. Dr. Walker's opinion that Claimant does not have any limitations causally-related to the September 13, 2013 industrial injury is corroborated by the credible and persuasive opinions expressed by Dr. Shih. Dr. Shih credibly and persuasively that he could not state that Claimant's "ongoing back and right lower extremity symptomatology" is related to the September 2013 industrial injury. Like Dr. Walker, Dr. Shih noted that in the days and

weeks prior to March 7, 2014 the medical records show Claimant was able to operate machinery, that Claimant's back pain had mostly resolved and that Claimant demonstrated normal active ROM without pain.

47. The Claimant's testimony that his injury-related low back and right radicular-type symptoms did not "abate" injury is not credible. Similarly, insofar as Claimant gave a history to doctors Henke and Ramos that his symptoms persisted until he was released on March 7, 2014, that history is found to be inaccurate and misleading. Dr. Walker and Dr. Shih credibly and persuasively opined that the medical and PT records through March 7, 2014 demonstrate Claimant's symptoms significantly improved and almost disappeared. The opinions of Dr. Walker and Dr. Shih are supported the records of Dr. Anderson and the PT records. Specifically, Dr. Anderson's records from January 17, 2014 and January 31, 2014 demonstrate that Claimant declined or postponed a referral to Dr. Lesnak because Claimant reported his symptoms were improving with PT and he did not want "invasive treatment." (Findings of Fact 10 & 11). PE findings improved beginning in January 2014 when Claimant began to exhibit negative rather than positive straight leg raising tests. (Findings of Fact 6, 9-11, 13). The PT records demonstrate that by February 28, 2014 Claimant had full, pain-free ROM in the lumbar spine. (Finding of Fact 12). Dr. Anderson's March 7, 2014 report establishes that Claimant himself stated his pain was almost gone and all that bothered him was some "intermittent" nighttime discomfort. Moreover, Dr. Anderson documented that by March 7 Claimant had undergone "aggressive therapeutic exercise without any exacerbation of pain." (Finding of Fact 13).

48. Claimant's testimony that he experienced a worsening of his allegedly ongoing symptoms after he was released to regular duties and operated the "rough-riding" Bobcat is not credible and persuasive. None of the medical records or reports prior to Dr. Walker's IME report of September 2015 contains any history that Claimant's symptoms worsened after he drove a Bobcat. The ALJ infers that if Claimant's symptoms had actually worsened, and if Claimant attributed the worsening to driving the Bobcat (as he testified), Claimant would have reported this history to one or more of the physicians who treated or examined him between March 7, 2014 and Dr. Walker's examination in September 2015. The ALJ further infers that if Claimant had reported an increase in symptoms after operating the Bobcat the examining or treating physician would have documented this history. Claimant's credibility is also diminished by Dr. Walker's description of the Claimant's activities in the video. If Claimant were truly suffering all of the symptoms and consequent disability that he alleges, he would not have exhibited the rapid variation in functional ability depicted in the video.

49. Insofar as Dr. Henke can be understood to opine that after March 7, 2014 the Claimant's injury-related condition(s) worsened so as to necessitate the re-imposition of restrictions, his opinion is not persuasive. Dr. Henke's opinion appears to be largely based on the belief that after the September 13, 2013 injury Claimant suffered from "persistent" low back pain, buttock pain and shooting pain down the right leg. However, Dr. Henke does not persuasively explain or refute the medical records demonstrating that in the days and weeks prior to March 7 Claimant's symptoms actually improved to the point that he had very little pain and exhibited full ROM.

Further, Dr. Henke's opinion appears to be predicated on Claimant's reported history. However, the ALJ has found the history Claimant provided to Dr. Henke was inaccurate and misleading.

50. Similarly, the opinions and restrictions imposed by Dr. Ramos are not credible and persuasive. The opinions of Dr. Ramos largely depend on the inaccurate history that Claimant had persistent symptoms after the September 2013 injury. Like Dr. Henke, Dr. Ramos does not refute or explain the medical records showing that the in the days and weeks prior to March 7, 2014 Claimant's symptoms actually improved to the point that he had very little pain and exhibited full ROM.

51. Evidence and inferences inconsistent with these findings of fact are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Generally, a claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

CLAIM FOR TTD BENEFITS COMMENCING MAY 8, 2014

Claimant contends that he is entitled to an award of TTD benefits commencing May 8, 2014 when Dr. Springs's office issued the MAA releasing Claimant from work. Respondents contend that by May 8 ATP Anderson had already released Claimant to regular duty and Claimant had returned to regular duty. Consequently, Respondents argue that by May 8 Claimant's right to receive TTD benefits had already been terminated pursuant to § 8-42-105(3)(b), C.R.S. (employee returns to regular employment), and § 8-42-105(3)(c), C.R.S. (attending physician gives employee written release to return to regular employment). Respondents further contend that even if Claimant is legally entitled to reinstatement of TTD benefits based on proof of a post-release change of condition Claimant failed to prove a change in condition. The ALJ concludes that Claimant failed to prove any post-relief change of condition that warrants reinstatement of TTD benefits commencing May 8, 2014.

To prove an initial entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he or she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997).

The term "disability" connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until the occurrence of one of the events listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of "disability" presents a question of fact for the ALJ. To prove disability there is no requirement that a claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). When a claimant does present medical evidence of restrictions it is for the ALJ to assess the weight and credibility to be assigned such evidence. *King v. The Inn at Silver Creek,* WC 4-844-514 (ICAO February 6, 2012).

Section § 8-42-105(3)(b) provides that TTD benefits are terminated when the "employee returns to regular or modified employment." Section 8-42-105(3)(c) provides that TTD benefits are terminated when the "the attending physician gives the employee a written release to return to regular employment." The Respondents correctly point out that our courts have held that an unequivocal release to regular employment by an attending physician is conclusive and may not be altered by an ALJ absent conflicting opinions from attending physicians. *Imperial Headware, Inc. v. Industrial Claim Appeals Office*, 15 P.3d 295 (Colo. App. 2000); *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995).

However the ICAO has held in a number of cases that termination of TTD benefits pursuant to § 8-42-105(3)(c) does not establish a *permanent* bar to receipt of TTD benefits. Rather the ICAO has held that where an attending physician has released the claimant to return to regular employment, but the claimant proves a post-release "worsening of condition" causing "additional disability restrictions" the Claimant is again entitled to TTD benefits. *Aragon v. Western LCM, Inc.,* WC 4-874-169 (ICAO December 13, 2012); *Vigil v. Pioneer Healthcare,* WC 4-779-599 (ICAO March 24, 2010); *Rivera v. Ames Construction,* WC 4-421-438 (ICAO August 25, 2000), *aff'd., St. Paul Fire & Marine Insurance v. Industrial Claim Appeals Office,* (Colo. App. No. 00CA1664, January 18, 2001) (not selected for publication). The ICAO has reasoned that after a release to regular employment a request for TTD benefits based on a subsequent worsened condition does not constitute an impermissible "attack on the attending physician's opinion that the claimant was previously able to perform regular employment." *Vigil v. Pioneer Healthcare, supra.* Similarly, the fact that Claimant has actually returned to regular employment after an injury does not prohibit an award of subsequent TTD benefits where the evidence establishes that the Claimant's condition worsened so as to produce additional disability. *See Hrelja v. Band-It-Index, Inc.,* WC 4-787-143-02 (ICAO February 3, 2014).

Here, Claimant does not dispute that his TTD benefits were properly terminated as of March 7, 2014 when Dr. Anderson released him to regular employment and he returned to regular employment. Rather Claimant contends that his injury-related condition(s) worsened after March 7, 2014 and that the worsening caused him to become temporarily disabled on May 8, 2014. The Respondents' argument notwithstanding, the termination of Claimant's right to TTD benefits pursuant to § 8-42-105(3)(b) and/or § 8-42-105(3)(c) did not permanently foreclose Claimant from proving a right to additional TTD benefits based on a worsened condition subsequent to March 7, 2014.

Having concluded that Claimant's release to regular employment and his return to regular employment do not automatically bar reinstatement of TTD benefits commencing May 8, 2014, the ALJ must determine whether Claimant proved entitlement to these benefits by a preponderance of the evidence. The ALJ concludes Claimant did not.

As determined in Findings of Fact 45 through 50, Claimant failed to prove it is more probably true than not the industrial injury of September 10, 2013 caused any "disability" that would warrant an award of TTD benefits commencing May 8, 2014. Specifically, Claimant failed to prove that he sustained any worsening of his condition after he was released to regular employment on March 7, 2014. Therefore, Claimant necessarily failed to prove that the 2013 industrial injury caused any new or additional restrictions that impaired his temporary wage earning capacity commencing May 8, 2014.

As determined in Findings of Fact 46 through 50, the preponderance of the credible and persuasive evidence supports the conclusion that Claimant's injury-related condition(s) did not "worsen" after March 7, 2014, and did not cause any disability beyond that which was previously admitted. As found, the credible and persuasive opinions of Dr. Walker and Dr. Shih establish that Claimant's condition significantly improved up to March 7, 2014. Dr. Anderson released Claimant to regular employment on March 7, 2014. Dr. Walker and Dr. Shih credibly and persuasively opined that after March 7 Claimant's reported symptoms cannot be attributed to the September 2013 injury. To the extent Dr. Henke and Dr. Ramos opined that Claimant's injury-related symptoms persisted through March 7 and necessitated the re-imposition of restrictions thereafter, the ALJ has rejected their opinions for the reasons stated in Findings of Fact 49 and 50. Claimant's testimony that his injury-related symptoms were "unabated" through March 7, 2014, then worsened so as to disable him on May 8, 2014, is not credible and persuasive for the reasons stated in Findings of Fact 48 and 49. The claim for additional TTD benefits commencing May 8, 2014 must be denied.

In light of these conclusions that ALJ need not address whether or not Claimant was responsible for his termination from employment. Neither does the ALJ need to address whether Respondents would be entitled to an offset for UI benefits Claimant received after May 8, 2014.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Claimant's request for an award of temporary total disability benefits commencing May 8, 2014 and continuing is denied.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 24, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he is entitled to a general award of reasonable and necessary medical benefits.

FINDINGS OF FACT

1. Claimant is a 33 year old male who has worked for Employer since June of 2011 as an electrical lineman.

2. On September 20, 2013 Claimant suffered an admitted injury to his low back when he was laying out utility pipe and attempted to prevent a pipe from rolling into a trench.

3. Prior to the September 20, 2013 work injury, Claimant had no problems with his lower back and no pain in his lower back.

4. Following conservative care for his lower back with Kyle Akers, M.D., Claimant was referred to Paul Stanton, D.O. for lumbar spine surgery and Claimant eventually underwent two lumbar spine surgeries performed by Dr. Stanton.

5. On March 24, 2014 Claimant underwent an L4-S1 decompression. During the surgery, Dr. Stanton also found and repaired a dural leak. Claimant did well post operatively until he suffered a fall down the stairs, which Dr. Stanton believed damaged Claimant's dural leak repair. *See* Exhibit 1.

6. On April 17, 2014 Claimant underwent a second surgery performed by Dr. Stanton to repair the dural leak. *See* Exhibit 1.

7. Overall Claimant has had a good result and outcome from his surgeries. His leg symptoms have largely resolved and his back pain is substantially improved. Although substantially improved, Claimant still experiences back pain that waxes and wanes.

8. On June 19, 2014 Claimant was evaluated by Dr. Stanton. Dr. Stanton noted that Claimant was doing well and that it would be okay for Claimant to go back to work with no restrictions but at a reduced number of hours per day. Dr. Stanton noted Claimant's back was getting stronger and Claimant was able to perform more activities without discomfort. Dr. Stanton noted Claimant was taking Mobic 7.5 MG tablet once per day. *See* Exhibit 1.

9. On July 3, 2014 Claimant was evaluated by Dr. Akers. Dr. Akers noted that Claimant had started working four hours per day for the last two weeks with no medical restrictions and that Claimant could advance to six hours per day at work. Dr. Akers noted that Claimant was using Mobic, doing home exercises, and that Claimant had low back pain that comes and goes. Dr. Akers recommended that Claimant continue home exercises and continue Mobic. *See* Exhibit F.

10. On July 21, 2014 Claimant was evaluated by Dr. Akers. Dr. Akers noted that Claimant was doing well and working without restrictions at six hours per day. Dr. Akers noted that Claimant's low back still got a bit sore/stiff and noted that Claimant was using Mobic. Dr. Akers released Claimant to full duty work with no restrictions and noted that Claimant would transition to over the counter medications. *See* Exhibit F.

11. On August 13, 2014 Claimant was placed at maximum medical improvement (MMI) by Dr. Akers. Dr. Akers provided an 11% whole person impairment rating, noted that Claimant was working full duty with no restrictions, and noted no medical maintenance care. Dr. Akers noted that Claimant still got a bit sore/stiff in his lower back at the end of the day, but that Claimant was able to perform activities of daily living and his required job duties okay. *See* Exhibit F.

12. Claimant continues to work full time with no work restrictions. Claimant continues to experience waxing and waning low back pain with occasional flare-ups. Claimant manages his symptoms by using a prescription anti-inflammatory medication (Mobic) prescribed by Dr. Stanton. Claimant also occasionally uses a prescription muscle relaxer (Flexeril) when he experiences back pain flares that was also prescribed by Dr. Stanton.

13. Claimant has been taking Mobic as needed since his surgeries. Claimant testified credibly that Mobic takes the edge off his pain and doesn't bother his stomach like over the counter medications have. Although in late July 2014 Dr. Akers recommended that Claimant transition to over the counter medications, Claimant has continued to use Mobic as it is more effective than and not as harsh on his stomach as over the counter medications. Claimant currently takes Mobic approximately 6-12 times per month. Claimant also uses Flexeril when his pain is the highest and takes it only at night as it makes him groggy. Claimant currently takes Flexeril approximately 2-6 times per month.

14. On February 19, 2015 Claimant underwent a division independent medical examination (DIME) performed by Lee McFadden, M.D. Dr. McFadden noted that Claimant's chief complaint was low back pain. Claimant reported that all activities tend to worsen his low back pain. Claimant reported pain provocation with prolonged standing and walking, when he coughs and sneezes, and when he has a bad flare. Claimant reported pain at a 2-3/10 with normal activities of daily living. Claimant reported medicating on a daily basis with Mobic and also reported having muscle relaxants on hand that he uses rarely when he has a significant flare. Claimant reported feeling better functionally and from a pain perspective following his surgeries but that he

continued to have lifestyle limiting back pain. Dr. McFadden noted Claimant's current medications included Mobic. Dr. McFadden opined that Claimant sustained an acute low back strain related to the September 20, 2013 work injury. Dr. McFadden opined that Claimant had pre-existing and unrelated degenerative disc disease with foraminal stenosis that was rendered symptomatic by the work injury and opined that the work injury permanently aggravated the degenerative disc disease with foraminal stenosis. Dr. McFadden opined that Claimant was fixed and stable and had reached maximum medical improvement (MMI). Dr. McFadden provided a 13% whole person impairment. Dr. McFadden did not address the need for medical maintenance care or the need for continued prescription medications. *See* Exhibit 2.

15. On April 6, 2015 Dr. McFadden prepared a DIME addendum. In the addendum Dr. McFadden opined that Claimant reached MMI on August 4, 2014 with a 19% whole person impairment. Dr. McFadden again did not address medical maintenance benefits. *See* Exhibit 2.

16. On April 30, 2015 Respondents filed a final admission of liability consistent with Dr. McFadden's opinion on MMI and permanent impairment. Respondents denied liability for medical maintenance care.

17. On June 16, 2015 Claimant was evaluated by Dr. Stanton. Dr. Stanton noted that Claimant was doing well and assessed low back pain, lumbar spondylosis, status post discectomy/decompression, status post lumbar decompression L4 through S1, and status post repair of CSF leak. Dr. Stanton recommended for treatment of his low back pain that Claimant continue the Mobic Tablet, 7.5 MG, 1 tablet daily and that Claimant start Flexeril tablet, 10 MG, 1 tablet as needed for spasms. Dr. Stanton also referred Claimant to physical therapy for the low back pain, lumbar spondylosis, and status post surgery for strengthening and recommended that Claimant go to physical therapy two times per week for six weeks. Dr. Stanton opined that Claimant's back would respond well to a dedicated course of lumbar strengthening. *See* Exhibit 1.

18. On July 2, 2015 Claimant underwent an independent medical evaluation performed by Anjmun Sharma, M.D. Dr. Sharma. Dr. Sharma noted that Claimant's current medications included Mobic. Dr. Sharma reviewed Claimant's reported mechanism of injury, his medical history, and the medical records. Dr. Sharma opined that Claimant had reached MMI on February 19, 2015. Dr. Sharma opined that Claimant had a 15% whole person impairment. Dr. Sharma opined that Claimant did not require any further care, that Claimant had an excellent outcome, and offered no maintenance care. *See* Exhibit R.

19. Respondent's claim representative Stephen Fox testified at hearing that medical maintenance benefits were denied because neither Dr. Akers nor Dr. McFadden had recommended medical maintenance benefits and because Respondent saw no recommendation, they denied maintenance.

20. Claimant did not present evidence of any specific maintenance medical benefit being denied by Respondents, but rather he requests a general award for maintenance.

21. Claimant's testimony at hearing is found credible and persuasive. Claimant requires medication for his low back pain that includes Mobic and Flexeril and Claimant still suffers low back pain and gets flares from time to time. Claimant had no low back pain prior to his work injury and his pre-existing degenerative disc disease was rendered symptomatic by his work injury. Claimant has been prescribed Mobic by his back surgeon Dr. Stanton since June of 2014. Claimant has established, more likely than not, that his need for ongoing prescription medications to manage his residual back pain is related to his work injury. The continued prescription medications are reasonable and necessary treatment for his residual back pain and have been prescribed by Claimant's surgeon.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Maintenance Care

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." *See §* 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

In cases where the respondents file an FAL admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Id.* When the respondents challenge the claimant's request for specific post-MMI medical treatment the claimant bears the burden of proof to establish entitlement to the medical benefit. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO February 12, 2009).

Claimant has established by a preponderance of the evidence an entitlement to a general award of medical maintenance benefits. Claimant has presented substantial evidence supporting his need for future medical treatment that is both reasonable and necessary to relieve the effects of his injury. Claimant had no low back pain or symptoms prior to his work injury. Claimant has established that following his work injury, and the two surgeries he underwent, he continues to have low back pain that waxes and wanes. Claimant continues to take medications for his low back pain as needed and he has established that the medications are a reasonable and necessary way to relieve the effects of the residual back pain caused by his work injury. Additionally, although it is argued that Claimant had pre-existing and unrelated degenerative disc disease with foraminal stenosis, the ALJ concludes that the pre-existing condition was asymptomatic at the time of the injury and the pre-existing condition was opined by the DIME physician to have been rendered symptomatic by the work injury and permanently aggravated by the work injury. Claimant has established that his continued back pain is causally related to his work injury and the substantial evidence shows that future medical treatment would be reasonable and necessary to relieve the continued effects of his work injury. Therefore, Claimant has met his burden and shown an entitlement to a general award of medical maintenance benefits.

ORDER

1. Claimant has established by a preponderance of the evidence that he is entitled to a general award of medical maintenance benefits.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 29, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-938-585-01

ISSUES

- Whether Respondents have proven by a preponderance of the evidence that Claimant engaged in an injurious practice warranting the suspension or reduction of compensation as of February 28, 2014 and thereafter pursuant to § 8-43-404(3), C.R.S. ?

- Respondents withdrew the issue of offsets and credits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant suffered an admitted work injury on December 26, 2013 while employed as a cemetery worker for the Employer. He initially sought treatment from Arbor Occupational Medicine (Arbor). Claimant was diagnosed with a lumbar strain. Claimant failed to report any recent treatment for any portion of his back at this initial evaluation.

2. Dr. Lori Long and Dr. Sander Orent of Arbor became the authorized treating physicians. Claimant reported to Dr. Long that he had suffered episodes of sciatica 15 years prior, and suffered a cervicothoracic strain "about 18 months ago" that had "completely resolved." Claimant did not report any recent medical treatment for any portion of the back. Nor did Claimant discuss any of his hobbies or activities with Dr. Long.

3. Claimant had been receiving ongoing treatment for his back with chiropractor Marc Cahn as recently as the month prior to the December 26, 2013 work injury. On July 26, 2013, Dr. Cahn noted Claimant was experiencing an onset of lumbosacral pain with joint dysfunction and myofascitis. Claimant sought treatment for his lower back on October 31, 2013 from Cahn. Dr. Cahn indicated that Claimant was reporting "ongoing lumbosacral pain with joint dysfunction" as late as November 7, 2013.

4. During the course of litigation, Respondents served Claimant with interrogatories and specifically questioned him about injuries and medical treatment prior to the December 26, 2013 injury. Claimant failed to disclose to Respondents that he had been receiving chiropractic treatment for his back from Dr. Cahn. At deposition, Claimant confirmed through his testimony that he failed to provide Respondents with this information.

5. On February 28, 2014, Dr. Long imposed work restrictions limiting Claimant to lifting, carrying, pushing/pulling of no more than 5 pounds. He was

restricted from using heavy equipment, ladders, and from bending and twisting at the waist. Claimant agreed these were his work restrictions as of February 28, 2014.

6. As part of his treatment, Claimant was referred to physical therapy at Alpha Rehabilitation, LLC. Claimant was asked to participate in various therapeutic exercises as part of his therapy and rehabilitation program. Claimant testified, among other things, that his therapist, Rob Rapier, had him lift and pull items that he thought weighed up to 40-50 pounds. He was asked to pick up a 25 pound kettle ball and curl an 18 pound bar while doing a squat during the course of therapy. Claimant admitted he never discussed his work restrictions with Mr. Rapier.

7. On cross examination, Claimant testified in his deposition that the physical therapy and rehabilitation was conducted in a clinic setting. While he was performing the therapeutic exercises, he was supervised by the staff at Alpha Rehabilitation.

8. Claimant played a bass guitar player and sang in a musical group named the Drifter Band after February 28, 2014 when Dr. Long imposed work restrictions. Claimant would play "gigs" at church services about once per month. The band also played other events including at Larry's Guitars, Bitter Sweet, the Laughing Goat Coffee House, and Hampden Hall. Claimant played in the band throughout 2014 and 2015.

9. Claimant exceeded the work restrictions imposed by Dr. Long while participating as a performer with the Drifter Band. On March 15, 2014, surveillance video shows Claimant carrying a music stand in one hand and a mandolin in the other. Claimant was carrying the items to put in the back of his automobile to attend a church event for the band. Claimant admitted that the mandolin weighed more than 5 pounds.

10. By October 3, 2014, Dr. Long decreased Claimant's work restrictions to allow for lifting, carrying, pushing, and pulling up to 10 pounds. Sitting was limited to 15 minutes and walking and standing limited to 45 minutes per hour.

11. Claimant admitted that he exceeded his October 3, 2014 work restrictions. Claimant weighed multiple items used for the band and testified that many of the items he lifted and carried as part of his band duties exceeded his work restrictions. Claimant listed these items in an email to his attorney and the email was admitted as exhibit Y. The items included a Gibson acoustic guitar in a hard case (17 lbs), Fender bass instrument in a hard case (24 lbs), Fender electric guitar in hard case (22 lbs), accordion in a case (20 lbs), Genz Benz amplifier (35 lbs), Ampeg speaker cabinet (29 lbs), church PA speaker cabinet (33 lbs), and fully loaded suitcase with microphones (18 lbs).

12. Surveillance video shows Claimant violating his October 3, 2014 work restrictions. On October 10, 2014, Claimant was shown setting up a pop-up tent or canopy to be used for a band event at Larry's Guitars. The video shows Claimant

lifting, pushing, and pulling the tent in order to open it and set it up. Claimant testified the tent weighed more than 10 pounds.

13. Surveillance video showed Claimant performing at Hampden Hall on December 12, 2014. The video shows Claimant carrying an acoustic guitar in a Fender bass case, an Ampeg cabinet, and a suitcase. The video showed Claimant moving rhythmically, twisting, and bending throughout the night while singing and playing guitar. The event lasted approximately four hours.

14. Dr. A.C. Lotman, an expert in orthopedic surgery, performed an independent medical evaluation (IME) of Claimant at Respondents' request of on April 3, 2014. Claimant told Dr. Lotman at that time he was no longer able to walk his dog, ski, or perform work in his garden. Dr. Lotman concluded that Claimant was not a maximum medical improvement (MMI) at that time.

15. Dr. Lotman subsequently reviewed the surveillance video. Dr. Lotman concluded that Claimant "clearly has not followed those restrictions." Dr. Lotman subsequently concluded that Claimant reached MMI as of June 26, 2014.

16. Dr. Lotman testified at hearing on May 5, 2015 that Claimant violated the work restrictions imposed by Dr. Long multiple times. Dr. Lotman testified that the purpose of work restrictions is to affect a cure by allowing the body to heal and by limiting incidental activity from causing additional harm. Dr. Lotman persuasively testified that by performing activities outside of Dr. Long's work restrictions, Claimant delayed achieving maximum medical improvement, delayed his recovery, and delayed the healing process. The end result was not as satisfactory as if the work restrictions had been followed.

17. Dr. Orent also reviewed the surveillance videos admitted into as evidence Respondents' exhibits T and U. At the time hearing commenced on May 5, 2015, Dr. Orent had not yet placed Claimant at MMI. According to a report subsequently received by the parties, Dr. Orent reviewed the surveillance videos. In a letter dated May 6, 2015, Dr. Orent indicated that Claimant's activities depicted on the videos were not consistent with his reported subjective complaints. Dr. Orent noted he never became aware that Claimant was receiving treatment for his back prior to the December 26, 2013 date of injury. Dr. Orent concluded that he agreed with Dr. Lotman and that Claimant reached MMI as of June 26, 2014. Dr. Orent added, "I must admit to being frankly disturbed by this disconnect between what I see on the video and the history he has given us." Dr. Orent did not believe an impairment rating was warranted because "we do not know the status of his previous spine issues and I also agree that there is clear evidence of symptom magnification…"

18. On May 20, 2015, Dr. Orent issued a report indicating he had discussed the surveillance video with Claimant. Dr. Orent related a conversation with the Claimant wherein Claimant admitted he performed the activities shown in the video. Significantly, Dr. Orent noted "[t]his does not change of course the fact that he was operating outside his work restrictions and he admitted that this was absolutely true."

19. Because Claimant was determined to be at MMI, Respondents filed a Final Admission of Liability on May 26, 2015. Claimant objected and pursued the Division IME (DIME) process. Dr. Clarence Henke was selected as the DIME examiner. Dr. Henke concluded that Claimant was not at MMI because he needed a neuro-surgical consultation. In his report, he did not discuss any surveillance video or the findings in Dr. Lotman's report.

20. On November 19, 2015, Respondents deposed Dr. Henke, an expert in occupational medicine among other things. Dr. Henke insisted that the only way to determine Claimant's true functional abilities was to perform a functional capacity evaluation. He did not find the surveillance video persuasive. Dr. Henke testified that the purpose of imposing work restrictions is to limit continued damage, to avoid any type of fall or other type of injury because of lack of mobility, and would prevent any injuries to other people who would be working with him. Dr. Henke agreed that a patient has a responsibility to follow restriction provided by the physician. Dr. Henke thought that Claimant was following his work restrictions based on the reports of Claimant's treating physicians. Claimant testified at his deposition that he never discussed his daily activities with Dr. Henke during the DIME.

21. On this issue of whether Claimant violated his work restrictions, the ALJ finds the opinions of Drs. Lotman and Orent to be more credible and persuasive than the opinion of Dr. Henke.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. However, "an injured work[er] has the obligation to act reasonably in minimizing the consequences of his injury and liability of his employer." *State Compensation Insurance Fund v. Luna*, 397 P.2d 231, 234 (Colo. 1964).

If any employee persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment or vocational evaluation as is reasonably essential to promote recovery, the director shall have the discretion to reduce or suspend the compensation of any such injured employee. § 8-43-404(3), C.R.S.

Before sanctions under § 8-43-404(3) can be invoked to reduce or suspend benefits, Respondents must show that the treatment at issue is calculated to effect a cure, *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001, 1006 (Colo. App. 2002), or that "such medical or surgical treatment … is reasonably essential to promote recovery." §8-43-404(3), C.R.S.

Respondents have shown by a preponderance of the evidence that compensation, in this case temporary benefits, should be suspended or reduced as of March 15, 2014 after Dr. Long released Claimant to work and imposed work restrictions following the industrial injury. The imposition of work restrictions is a common and important component of almost every workers' compensation claim, they often determine when disability benefits will be paid to a claimant, and they are taken very seriously not only by treating physicians, but by the courts when determining whether a claimant should be entitled to benefits. In this case, Claimant occasionally disregarded the restrictions that were imposed on him by his treating physicians throughout the course of his claim, and in doing so, engaged in an "injurious practice" that imperiled and retarded his recovery.

The evidence shows that Claimant played in a band occasionally during the course of his recovery following the December 26, 2013 admitted work injury to his lumbar spine. Some of his band related activities violated the work restrictions imposed by his treating physicians at Arbor. For example, surveillance video shows Claimant carrying a mandolin on March 15, 2014. Claimant admitted the mandolin weighed more than 5 pounds.

Claimant continued occasionally to violate work restrictions when the restrictions were reduced. By October 3, 2014, Dr. Long decreased Claimant's work restrictions to allow for lifting, carrying, pushing, and pulling up to 10 pounds. Sitting was limited to 15 minutes and walking and standing limited to 45 minutes per hour. Claimant violated those work restrictions during some of his band related activities.

Claimant weighed multiple items used for the band and testified that many of the items he lifted and carried exceeded his lifting restrictions. Such items included a Gibson acoustic guitar in a hard case (17 lbs), Fender bass instrument in a hard case (24 lbs), Fender electric guitar in hard case (22 lbs), accordion in a case (20 lbs), Genz Benz amplifier (35 lbs), Ampeg speaker cabinet (29 lbs), church PA speaker cabinet (33 lbs), and full loaded suitcase with microphones (18 lbs). Claimant admitted at his deposition and eventually to his treating physician, Dr. Orent, that he violated his work restrictions.

The surveillance videos admitted into evidence as exhibits T and U show Claimant engaging in various activities from March 15, 2014 through December 12, 2014. The videos show Claimant engaging in some band activities: carrying items to his car, setting up a tent, and playing a "gig" over a four hour span of time on December 12, 2014. Claimant admitted he disregarded the specific work restrictions imposed on him by his treating physicians and engaged in activities that imperiled and retarded the recovery process.

Claimant engaged in activities that imperiled and retarded his recovery. His own treating physician (Dr. Orent), Respondents' IME physician (Dr. Lotman), and even the DIME physician (Dr. Henke) all essentially opined that the purpose of imposing work restrictions in a workers' compensation claim is to treat pain, to allow tissue damage to heal, and to limit any further damage. Dr. Orent was particularly disturbed that Claimant exceeded his work restrictions without disclosing that information to him during the course of treatment. Dr. Lotman testified that in his expert opinion, Claimant's activities not only violated the work restrictions that were essential to promoting recovery, but did in fact imperil and retard recovery.

Claimant contends that he reasonably exceeded his work restrictions, because he was routinely asked to exceed those restrictions during the course of his physical therapy treatment. The ALJ is not persuaded.

First, there is no bad faith or intent requirement that must be proven under § 8-43-404(3) before benefits may be suspended or reduced. That Claimant engaged in activity that imperiled and retarded his recovery is sufficient to trigger the sanctions in the statute. Even if there were an intent requirement, the evidence shows that Claimant was aware of his work restrictions and proceeded to engage in band activities that violated his work restrictions.

Second, the physical therapy exercises Claimant was asked to perform by the therapists at Alpha Rehabilitation, LLC were all done under staff supervision (as Claimant concedes) with the specific intent of helping Claimant to heal and recover. Participating in therapy exercises designed and supervised by trained therapy personnel is not equivalent to playing in a band even if Claimant is exceeding his work restrictions in both instances. There is no evidence that any therapist encouraged or told Claimant to exceed his work restrictions imposed by Dr. Long, nor any evidence that engaging in his band activities promoted recovery.

Further, the ALJ finds and concludes that Claimant is not a reliable historian. For example,

- Claimant failed to provide Dr. Orent with essential information that was needed in order for treatment.

- Claimant failed to disclose to Dr. Orent or Dr. Long that he was receiving treatment for his lumbar spine from Dr. Cahn up until a month prior to the work injury.

- He also failed to disclose this relevant information to Respondents in sworn discovery responses.

- Claimant posted on Facebook that he was employed by Insurer.

- Claimant failed to disclose to Dr. Long or Dr. Orent that he played in a band.

- He told Dr. Lotman that he was no longer able to walk his dog, ski, or perform work in his garden—giving the wrong impression as to his daily activities.

This lack of candor disturbed Dr. Orent to the point that he released Claimant to MMI immediately upon learning this information and assigned no impairment.

In conclusion, Claimant had an obligation to abide by his work restrictions that were imposed for the purpose of “affecting a cure” and essential for promoting recovery. Claimant conceded he violated these restrictions on multiple occasions and surveillance video demonstrates same. The evidence shows it to be more likely than not that Claimant engaged in these activities occasionally during the course of treatment, and therefore, engaged in an injurious practice that imperiled and retarded his recovery as of March 15, 2014.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have proven by a preponderance of the evidence that Claimant occasionally engaged in an injurious practice that impeded and retarded recovery pursuant to § 8-43-404(3) as of March 15, 2014.

2. The Court finds in its discretion that the appropriate remedy is this case is the reduction by 5% of Claimant's temporary benefits effective March 15, 2014 and continuing until temporary benefits would otherwise be terminated by statute.

3. Any amount of temporary benefits previously paid by Respondents to Claimant during such period of reduced compensation shall be deemed an overpayment, and recoverable as permitted by law.

4. Any issue not resolved herein is reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 29, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence he was in the quasi-course and scope of his employment when he was involved in an automobile accident on June 9, 2014.

- Did Respondents prove Claimant's motor vehicle accident constituted an intervening event, severing Respondents' liability for TTD benefits?

- Was the Petition to Modify, Terminate, or Suspend Compensation improvidently granted?

- Is Claimant entitled to Temporary Total Disability benefits from October 1, 2014 and continuing?

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on December 19, 2013 while working for Employer. Claimant was living in Fairplay, Colorado at the time.

2. Claimant worked on the floor crew and was injured while stripping wax off a floor. Claimant testified that his feet went out from under him, which caused him to hit his head and shoulder. He suffered a severe concussion, which affected his cognitive abilities.

3. Claimant testified Thomas White, M.D. was his primary authorized treating physician.

4. On or about May 22, 2014, Dr. White referred Claimant to Marc Wasserman, M.D.[1] Dr. Wasserman's office was located at 499 E. Hampden Ave, Englewood, CO. This was a neurosurgery referral for Claimant's C6 radiculopathy. Dr. White's narrative report stated Claimant had decreased flexion and extension, as well as reduced range of notion. C6 radiculopathy was confirmed by EMG. Dr. White noted Claimant was unable to work for six (6) weeks.

5. Respondents did not dispute that Dr. Wasserman was an ATP by virtue of the referral from Dr. White. Claimant's appointment with Dr. Wasserman was scheduled for June 9, 2014.

6. Claimant's medical history was significant in that he previously suffered seizures related to alcohol withdrawal. At the hearing, Claimant admitted he was an

[1] Exhibit A.

alcoholic and had received medical treatment for alcohol-related issues. Medical records from St. Anthony Summit Medical Center, dated August 10, 2012, were admitted at hearing. On that day, Claimant was admitted for seizures related to alcohol withdrawal. By history, Claimant had two (2) previous seizures. In the discharge note, Claimant was advised to quit drinking and he may require professional help. A Dr. Gervais also noted Claimant was at risk for seizures or other complications if he quit abruptly.

7. Claimant testified when he had seizures in the past after he stopped drinking, he would experience flu-like symptoms, including nausea and vomiting. He couldn't hold anything down (including water). Claimant testified he would get sick and the seizures would usually come the day after he quit drinking.

8. Claimant testified he decided to stop drinking the Friday[2] before his appointment with Dr. Wasserman. This was after an argument with his wife. Claimant testified that he had no alcohol after that Friday night. The ALJ found Claimant to be a credible witness, both in regard to his history of alcoholism, but also concerning what prompted the decision to stop drinking.

9. On June 9, 2014 (Monday), Claimant drove from his home in Fairplay, Colorado to Englewood, where Dr. Wasserman's office was located. The appointment with Dr. Wasserman was scheduled for 3:00 p.m. Claimant testified he had never travelled to Dr. Wasserman's office before. Claimant said left early (between approximately 10:00 a.m. and 10:30 a.m.) because he didn't know if there would be obstacles such as accidents or road construction which could delay him. He described Highway 285, as "not an easy road or highway to travel" and said it was hard to predict how long the trip would take. Claimant testified he did not know exactly where Dr. Wasserman's office was located. He had never been there before.

10. Claimant did not have any of the symptoms of a seizure on the morning of 6/9/14, including nausea. He had no forewarning he was going to have a seizure that day. The ALJ concluded that Claimant did not have any prior knowledge or indication he was going to suffer a seizure on 6/9/14.

11. Claimant testified he did not drink alcohol that morning, nor did he go to a liquor store. He denied any knowledge of the fireball bottle in his vehicle. Claimant said his drink of choice was beer or vodka, not whiskey.

12. Claimant testified he took Highway 285 from Fairplay to Englewood and turned on a street (north) that he thought was near the doctor's office. Claimant did not recall the name of that street and he stated he was not familiar with the area. The ALJ found Claimant credible, since he had not been to Dr. Wasserman's office before and had never driven in the area.

13. Claimant testified that his plan was to find the doctor's office, as he had the address and then get a bite to eat.

[2] The ALJ takes administrative notice that June 6, 2014 was a Friday.

14. Claimant testified he saw the hospital and thought he had gone too far. He couldn't turn right as this was where the hospital was, so he turned left. Claimant did not know the name of the street. He was going to make a loop around in order to get to where he thought the doctor's office was[3]. The last thing he could remember was the left turn. Claimant thought the accident occurred about 1 block from where he believed the doctor's office was located, but was not sure. The next thing he remembered was waking up in the hospital. The ALJ found Claimant's testimony credible concerning what happened immediately before the motor vehicle accident.

15. An accident report was prepared by the City of Englewood Police Department. In that report, it was noted that Claimant was driving a 1991 Ford Tempo westbound in the 300 block of east Floyd Av. when he went off the right side of the road and struck a utility pole. The witness indicated Claimant was seizing immediately before he hit the utility pole. In Section R–Most Apparent Human Contributing Factor- "illness/medical" was listed. There was no reference to alcohol in this accident report. Claimant was not cited for DUI/DWAI, nor for an open container of alcohol.

16. The EMS report noted Claimant was awake, but actively seizing when they arrived. The witness to the accident said Claimant was shaking before hitting the pole. Medication could not initially be administered because Claimant was shaking so violently. In the report, Claimant's symptoms included "altered mentation, unconsciousness, neurological deficit". The report also noted alcohol was found in the vehicle and Claimant had "smell of alcohol on breath" [sic]. Claimant was transported to Swedish Hospital.

17. The Emergency Department note for 6/9/14 at 16:51 did not record any finding regarding intoxication. There was also no notation in the ED records concerning the smell of alcohol. Claimant's lab tests at Swedish hospital were negative for alcohol. The ALJ infers there would have been reference to the odor of alcohol or intoxication if such an observation was made by health care personnel in the ED. The ALJ was unable to conclude whether the time which elapsed from the accident to when the blood test was performed was long enough for alcohol to be out of Claimant's system or whether would have been a trace amount present. No evidence was presented on that subject.

18. Claimant testified that he had no recollection of the first three (3) days in the hospital. He did not recall anyone questioning him as to what occurred in the accident. Claimant denied he was travelling to a liquor store at the time of the accident. The ALJ credited Claimant's testimony that he did not drink that day and had not gone to the liquor store. The ALJ notes that this conclusion was also supported by the inference drawn from the evidence that Claimant probably would not have had a seizure related to alcohol withdrawal, if he had been drinking that morning.

[3] Respondents' Position Statement incorrectly states Claimant had already found the doctor's office, which was located at the hospital. There was nothing in the record which supported such a finding.

19. There was a June 11, 2014 Swedish Medical Center note which referenced a discussion concerning Claimant during rounds. The note said: “Pt has a PMH of ETOH, Seizure, HTN. Per report pt had a seizure whole (sic) driving and hit a telephone pole. Pt was restrained. Per Trauma pt was trying to stop drinking was going into withdraw (sic) and drove to the liquor store and had an accident”. The ALJ finds this note was based upon an unidentified report and unidentified statement or report from “Trauma”. Thus, because of the error regarding Claimant’s destination and the lack of clarity regarding the source of the information, the ALJ was not persuaded this note accurately reflected Claimant’s activities before the MVA.

20. On June 26, 2014, the adjuster for Insurer sent a letter to Dr. White posing questions related to the motor vehicle accident. Dr. White responded with aletter (undated), which was faxed on 8/25/14. Dr. White noted Claimant had sustained a number of injuries, but was still being treated for radiculopathy when he was involved in the motor vehicle accident (“MVA”).

21. A Trauma Progress Note dated July 7, 2014, from Denetta Sue Slone, M.D., noted under Chief Complaint that Claimant had a seizure driving home from a liquor store and hit a tree. Under the diagnosis of seizure, a comment was made of “alcohol withdrawal most likely.” Under the Assessment/Plan for alcohol abuse/withdrawal/seizure, Dr. Slone noted, “Patient was apparently trying to stop alcohol use, was driving and had an alcohol withdrawal related seizure.” The ALJ finds Dr. Slone incorrectly stated Claimant was travelling home and did not indicate the source of her information. The ALJ concluded Dr. Slone’s description of Claimant’s destination was inaccurate.

22. Respondents filed a Petition to Modify, Terminate or Suspend Compensation on September 30, 2014. The Petition to Modify, Terminate or Suspend Compensation did not have page 2 of 2 of the Division of Worker’s Compensation (“DOWC”) prescribed form, which is the Objection to Petition to Modify, Terminate or Suspend Compensation. A copy of Dr. White’s response letter was attached to the Petition to Modify, Terminate or Suspend Compensation.

23. The fact the Objection form was not attached to the Petition to Modify, Terminate or Suspend Compensation was confirmed by Claimant’s testimony and the certified copy of the DOWC file, which was admitted as Exhibit 21. The failure to attach the Objection form to the Petition to Modify, Terminate or Suspend Compensation made the Petition deficient under the W.C.R.P.

24. Dr. White noted as of the 6/9/14 MVA, Claimant was experiencing a “significant amount of pain and weakness and discomfort” from C6 radiculopathy. Dr. White opined Claimant was unable to return to his maintenance position as of 6/914. Dr. White said the MVA was not related to the worker’s compensation injury or the cervical radiculopathy. Dr. White also stated that, as of his last visit with Claimant on May 22, 2014, his pain was improving and Dr. White thought Claimant would probably be able to resume work in some capacity within a month or less. The ALJ notes the

record was bereft of any evidence that an offer of modified duty was tendered to Claimant before the subject accident.

25. Claimant testified when he received the Petition to Modify, Terminate or Suspend Compensation, he did not know what to do. No Objection to the Petition to Modify, Terminate or Suspend Compensation was filed.

26. The DOWC issued a letter, dated October 24, 2014, which noted the Petition to Modify, Terminate or Suspend Compensation was filed and any response was reviewed. The Petition to Modify, Terminate or Suspend Compensation was approved. The DOWC letter stated Respondents were allowed to suspend compensation as of the date of the Petition.

27. On or about November 6, 2014, Respondents filed an Amended General Admission of Liability ("GAL"), which referenced the Petition to Modify, Terminate or Suspend Compensation, as well as the letter from Dr. White. Claimant's TTD benefits were terminated as of September 30, 2014. No Objection was filed to the Amended GAL. Claimant has not received TTD benefits since that time.

28. The ALJ concludes the MVA occurred while Claimant was trying to find Dr. Wasserman's office.

29. The ALJ concludes Claimant did not deviate on his trip from Fairplay to Englewood for the appointment with Dr. Wasserman. Claimant was still in the process of trying to find Dr. Wasserman's office and the ALJ credited Claimant's testimony that he turned near the hospital. Claimant was still en route to the medical appointment when the MVA occurred, as he had not confirmed where the doctor's office was located.

30. The ALJ concludes the MVA accident occurred while Claimant was in the quasi-course of his employment and therefore his injuries were compensable.

31. No ATP has determined Claimant reached MMI.

32. Claimant has not returned to work since 6/9/14. There was no offer of modified employment tendered to Claimant in the record.

33. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). Claimant's credibility was one of the primary issues in this case, as his testimony had to be considered on its face, as well as when compared with the medical records admitted at hearing.

Quasi-Course of Employment

Claimant argued the injuries he sustained in the 6/9/14 accident were compensable, as he was in the quasi-course of employment when the MVA occurred. Claimant disputed he deviated on his trip to Dr. Wasserman's office and pointed to the location of the accident in support. Claimant also denied he imbibed alcohol prior to the MVA.

Respondents put forward two arguments on this issue; first, even if Claimant was in the quasi-course of employment, he deviated on his trip to the doctor's office. As part of this assertion, Respondents averred the MVA was an intervening event, which served to terminate their liability. Second, Respondents contended compensability under the quasi-course doctrine was defeated by employee misconduct such as a deliberate act in violation of express medical orders or an implied prohibition. The test of implied prohibition required a showing the employer would have forbidden the act, if it had had an opportunity to express itself on the subject and the employee knew or should have known of this fact. Respondents cited *Larson's Workers' Compensation Law*, § 10.05 to support this latter argument.

As a starting point, the ALJ considered whether Claimant was in the quasi-course of employment when the MVA occurred. Claimant had the burden of proof on this issue. As found, Claimant met his burden and established he was in the quasi-course of employment when the MVA occurred.

In Colorado, the quasi-course of employment doctrine has been applied to certain activities of Claimant following a compensable injury. *Employers Fire Insurance Co. v. Lumbermens Mutual Casualty Co.*, 964 P. 2d 591 (Colo. App. 1998). This doctrine has been the basis for expanding what is considered compensable, beyond what would ordinarily be the time and space limits of employment, when it occurs after an industrial injury. The rationale articulated by Colorado courts is that but for the compensable injury, Clamant would not have undertaken those activities. The trip to the physician's office became part of the employment contract. *Excel Corp. v. Indus. Claim Appeals Office,* 860 P.2d 1393, 1394 (Colo. App. 1993). Since the employer is required to provide medical treatment after an industrial injury, liability for injuries sustained while travelling to an appointment to treat for the injuries is compensable because these activities would not have been undertaken but for the compensable injury. *Price Mine Service, Inc. v. Industrial Claim Appeals Office*, 64 P.3d 936, 938 (Colo. App. 2003).

Accordingly, the quasi-course of employment doctrine has been extended to injuries sustained by Claimants while traveling to and from treatment provided by an authorized provider under various factual scenarios. *Excel Corp. v. Indus. Claim Appeals Office, supra,* 860 P.2d at 1394-1395. [Claimant's slip and fall while leaving physical therapy was deemed compensable as part of the quasi-course of employment doctrine. The activity of going to the medical appointment was considered "an implied part of the employment contract", since Claimant would not have been going to the doctor but for the compensable injury.]*; Price Mine Service, Inc. v. Industrial Claim Appeals Office*, *supra* 64 P.3d at 938. [The injuries sustained by Claimant in an MVA after authorized medical treatment was compensable as part of the original injury and the insurer on the risk was liable under quasi-course of employment doctrine. The Court specifically held under this doctrine "the second injury was not an intervening event which would relieve the employer of liability".]; *Turner v. Industrial Claims Appeals Office*, 111 P.3d 534 (Colo. App. 2004) [Claimant's injuries from MVA after a vocational evaluation appointment were found compensable, despite the fact Claimant had stopped for lunch after the appointment].

Therefore, as a general proposition, Claimant's injuries in the 6/9/14 MVA would be compensable under the quasi-course of employment doctrine, if it was shown he was going to a medical appointment when he was injured. As found, Claimant satisfied his burden of proof that he was traveling to an authorized medical appointment when the accident occurred. (Findings of Fact Nos. 9, 12, 28 and 30)

The next issue presented in this case was whether there was a deviation which took Claimant out of the quasi-course of employment. Respondents had the burden of proving Claimant made a substantial deviation, which took him out of the quasi-course of employment. Alternatively, Respondents had the burden of proving that the accident occurred under such circumstances that it would constitute an intervening event.

In this regard, the Colorado Court of Appeals decisions in *Turner v. Industrial Claims Appeals Office*, *supra*, and *Kelly v. Industrial Claim Appeals Office*, 214 P.3d

516, 518 (Colo. App. 2009) were considered by the ALJ. In *Turner,* the ALJ found that neither Claimant's stop at the restaurant after the vocational evaluation, nor the wrong turn constituted a deviation. *Turner v. Industrial Claims Appeals Office*, *supra*, 111 P.3d at 535. However, the ALJ concluded because the Employer did not have a contractual obligation to provide vocational rehabilitation, Claimant was not in the quasi-course of employment. *Id.* The ALJ's decision was affirmed on appeal by the Industrial Claim Appeals Office.

The Court of Appeals found Claimant's travel for the vocational evaluation was directly related to and proximately caused by a compensable prior injury, despite the fact Employer was not required to provide vocational rehabilitation benefits. *Turner v. Industrial Claims Appeals Office*, *supra*, 111 P.3d at 538. The Court reasoned this fit squarely within the quasi-course of employment doctrine. *Id.* The Court of Appeals reversed and remanded the case.

In *Kelly*, Claimant suffered a compensable injury for which he required knee surgery. Authorization for the surgery was initially denied and the surgeon's office sought to re-schedule the surgery due to a cancellation. The surgeon's office contacted Claimant to set a pre-operative appointment. At the time, Claimant was on vacation travelling from Colorado to California and had arrived in Reno, Nevada. Claimant started the return trip to Colorado and was injured in a MVA, approximately 300 miles from Reno. Claimant testified he intended to travel directly from Reno to Denver for the medical appointment because he did not have time to return home. However, Claimant also testified the route he was taking was longer, which took him past his home in Gypsum.

The ALJ concluded Claimant failed to prove he was within the quasi-course of his employment because he did not prove he was en route to a medical appointment at the time of the MVA. The ALJ found the accident occurred after Claimant's vacation in Nevada. The ALJ reasoned the length and duration of Claimant's trip exceeded the reasonable range of consequences contemplated by the employment contract. The ALJ also found Claimant failed to prove the pre-surgical appointment was authorized.

The ICAO affirmed the ALJ's decision on appeal, as did the Colorado Court of Appeals; neither court reaching the authorization issue. When considering the question of whether Claimant deviated from the route of travel so as to take him/her out of the quasi-course of employment, the Court of Appeals noted this issue was highly fact specific. *Kelly v. Industrial Claim Appeals Office*, *supra*, 214 P.3d at 518. The Court held the test was whether the deviation was substantial and adopted the test used in cases where the employee goes on a personal errand during a business trip. *Kelly v. Industrial Claim Appeals Office*, *supra*, 214 P.3d at 519. When a personal deviation was asserted, the issue was whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *Id.*

The Court adopted the aforementioned test for deviations from route of travel and applied it to the quasi-course of employment doctrine when Claimant was seeking medical treatment. In *Kelly,* implicit in the ALJ's finding was that Claimant was travelling home and not to the medical appointment. Therefore, the Court of Appeals affirmed the ALJ's finding that Claimant had substantially deviated from the route of travel. *Id.*

The ALJ notes there are significant factual distinctions between *Kelly* and the case at bar. In *Kelly*, Claimant was injured while traveling back to Colorado after being on vacation. The ALJ determined Claimant was returning to his home, as opposed to being en route to a medical appointment. Under those facts, the ALJ found the travel from Reno to Denver attenuated the causal connection with the injury. In addition, the authorization for the surgery did not occur until after the accident and thus, Claimant was not travelling to an appointment with an authorized physician.

Those facts were not present in this case where Claimant travelled directly from home to Dr. Wasserman's office in Englewood. But for the appointment with Dr. Wasserman (an ATP), Claimant would not have travelled from Fairplay to Englewood. At the time the accident occurred, Claimant was engaged in the act of trying to locate Dr. Wasserman's office. (Findings of Fact Nos. 12 and 14). In fact, by all accounts, the accident occurred a short time after Claimant arrived in Englewood and very close to where the doctor's office was located. Under these facts, this was not sufficiently attenuated from the trip to the medical appointment and was not a substantial deviation. (Finding of Fact No. 29).

In this regard, the fact that Claimant was significantly early for the appointment was not dispositive and did not take the MVA out of the quasi-course of employment. As found, the ALJ credited Claimant's explanation that he was concerned about how long it would take him, possible detours and was unfamiliar with the area where the doctor's office was located. Furthermore, it was significant to the ALJ that the evidence showed Claimant had not yet found the doctor's office and planned to go around the block. As such, Claimant was still en route to the appointment.

In addition, the ALJ did not credit the evidence which Respondents alleged showed Claimant had stopped at a liquor store or was travelling to liquor store. Said evidence was unsubstantiated and based on unknown sources, which raised questions about its accuracy. The ALJ had no way of determining the validity of these reports based upon the evidence in the record. (Findings of Fact Nos. 19 and 21). The ALJ also had no way of determining the credibility of the authors of these notes.

Likewise, the evidence concerning the presence of alcohol was disputed, with evidence both in support of and directly contrary to Respondents' assertions. Respondents had the burden of proving the accident was an intervening event and failed to adduce a sufficient quantum of evidence to carry this burden. As such, the ALJ determined the MVA was not an intervening event and Claimant's injuries were compensable as part of the original claim.

The ALJ also considered the argument that Claimant was engaged in misconduct when the accident occurred (i.e. going to the liquor store or drinking alcohol) which took him out of the quasi-course of employment. As found, the evidence was equivocal (at best) as to whether Claimant was going to the liquor store or had drunk any alcohol. While the paramedic report noted a container of alcohol, the police report did not and Claimant was not cited for DUI/DWAI or for an open container. (Findings of Fact Nos. 15 and 16). While there were hospital notes Claimant was going home from the liquor store, no evidence established this fact. Also, Claimant's blood test had no evidence of alcohol and the ED report contained no reference to alcohol. (Finding of Fact No. 17).

In this regard, there was no evidence in the record regarding Employer's policies on this subject. Although the ALJ could intuitively conclude that the Employer would prohibit drinking alcohol while on the job, even assuming Claimant was traveling to or from a liquor store, there was insufficient evidence to conclude that conduct would have been prohibited. Therefore, the evidence in the record was insufficient to establish the first prong of this defense, that Claimant was engaged in a deliberate prohibited act.

Finally, Respondents argued Claimant's act of driving for 2 ½ hours after he had stopped drinking, when he had a known history of seizures and was previously advised by his physicians not to stop drinking without medical advice, broke the chain of causation. However, the ALJ found Claimant did not know he was going to have a seizure that day. He had no indication before the accident occurred, including any of the symptoms he previously experienced. (Finding of Fact No. 10). Based upon the evidence presented at hearing, there were insufficient facts to establish Claimant's conduct was deliberate or that he engaged in conduct that he knew or should have known was in direct contravention of the prior medical advice concerning seizures.

Considering the totality of the evidence admitted at hearing, the ALJ found Claimant was in the quasi-course of employment when he was injured in the MVA on 6/9/14. He was trying to locate the doctor's office and had not substantially deviated from his route of travel. The MVA was not an intervening event under the facts of this case.

Petition to Modify, Terminate or Suspend Compensation

Claimant also contended the Petition to Modify, Terminate or Suspend Compensation was insufficient and did not provide the basis to terminate his TTD benefits. Respondents argued the termination of Claimant's TTD was proper, as it was approved by the DOWC and there was no Objection filed.

As found**,** Respondents filed a Petition to Modify, Terminate or Suspend Compensation on September 30, 2014. In this filing, Respondents stated Claimant had a MVA on 6/9/14 and was still in rehab. Respondents alleged Claimant would have returned to modified duty, if not for the intervening event and relied upon Dr. White's letter. Claimant did not respond to the Petition to Modify, Terminate or Suspend Compensation and the DOWC issued a letter which approved the termination of benefits.

The issue of whether Claimant's TTD benefits were properly suspended is subsumed in the question of whether proper notice was given by the Petition to Modify, Terminate or Suspend Compensation. W.C.R.P Rule 6-4 (B) governs the Petition and provides in pertinent part:

> "A copy of a response form prescribed by the Division **shall** be mailed with a copy of the petition to the claimant and claimant's attorney and the Division. Certification of this mailing shall be filed with the petition." [Emphasis added].

The ALJ found the attachment of the Objection form to the Petition to Modify, Terminate or Suspend Compensation was required. The Objection form was not attached to the Petition to Modify, Terminate or Suspend Compensation. The use of the word "shall" in the aforementioned rule leads to this conclusion: the failure to attach this document made the filing deficient. This would be a sufficient basis to find that the Petition to Modify, Terminate or Suspend Compensation was improvidently granted.

However, Respondents correctly pointed out this issue is before the Court and could be determined by an ALJ, after a hearing in which the circumstances related to the termination of TTD was considered and evidence presented. W.C.R.P. 6-8(A) specifically provides:

> "Temporary disability benefits may not be suspended, modified or terminated except pursuant to the provisions of this rule or pursuant to an order from the Director under 6-4(C), or an order of the Office of Administrative Courts following a hearing."

Therefore, the more important consideration to be adjudicated at hearing was whether, under these circumstances, Respondents were entitled to terminate Claimants' TTD benefits. In this regard, Respondents filed their Petition to Modify, Terminate or Suspend Compensation, based on the MVA (which they characterized as an intervening event) as grounds for the termination of benefits.

As found, Claimant was in the quasi-course of employment when the accident occurred. Furthermore, the ALJ determined Respondents failed to meet their burden of proof that the MVA was an intervening event. Thus, there was no legal basis to modify, terminate or suspend Claimant's TTD benefits. Since none of the statutory grounds under 8-42-105(3), C.R.S. for termination of indemnity benefits existed, Claimant is entitled to receive TTD from October 1, 2014 (the date his benefits were terminated) until terminated by law. Respondents are required to pay those benefits.

ORDER

It is therefore ordered that:

1. Claimant's injuries sustained in the September 6, 2014 MVA are compensable as these occurred in the quasi-course of his employment.

2. The September 6, 2014 MVA did not constitute an intervening event, which severed Respondents' liability for payment of benefits under the Colorado Workers' Compensation Act.

3. Claimant is entitled to TTD from October 1, 2014 and continuing until terminated by law.

4. Respondents shall pay Claimant temporary total disability benefits from September 30, 2014 and continuing until terminated by law.

5. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 11, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The issues before the ALJ for determination were:

1. Conversion of the permanent partial disability scheduled impairment to a whole person rating; and,

2. Disfigurement.

FINDINGS OF FACT

1. The claimant began working for the respondent-employer in May 2001.

2. The claimant's position requires him to travel to colleges and promote employment opportunities with the respondent-employer.

3. While attending a campus event in Arlington, Texas on October 15, 2013 the claimant was involved in a work related motor vehicle accident (MVA), wherein his Mazda CX-7 was struck in the rear by a Jeep Cherokee. This MVA occurred approximately 7:15 pm under dark and rainy conditions.

4. The claimant was treated for injuries he sustained at an emergency room and released.

5. The claimant sustained serious injuries to his left shoulder and was assigned to an authorized treating physician, Dr. Karen Davis.

6. Ultimately, the claimant required surgery on his left shoulder.

7. The claimant underwent surgery on January 9, 2014 that was conducted by Dr. Phillip Stull.

8. The claimant's surgical procedures included left shoulder arthroscopy with debridement; mini-open acromioplasty and release of CA ligament; and, a distal clavicle excision.

9. Subsequent to the surgery the claimant underwent a course of physical therapy from January 16, 2014 through May 22, 2014 and he was provided an exercise regimen to continue post-PT.

10. The claimant was found to be at maximum medical improvement by Dr. David Zieg as of September 2, 2014. Due to the claimant's travel obligations he did not receive an impairment rating until February 10, 2015.

11. The claimant was given a left upper extremity scheduled rating of 13%, which converts to an 8% whole person impairment. There were no permanent restrictions and no maintenance medical care recommended.

12. The respondent-insurer filed a final admission of liability (FAL) on March 6, 2015 admitting for the scheduled impairment rating of 13%.

13. The claimant objected to the ATP's findings as admitted to in the FAL and subsequently underwent a division independent medical examination (DIME) conducted by Dr. Frank Polanco on July 1, 2015.

14. Dr. Polanco found the claimant to be at MMI as of September 2, 2014 with a scheduled impairment rating of 11% for the left upper extremity that converts to a 7% whole person impairment.

15. The claimant then objected to the FAL filed on August 17, 2015, which admitted for the 11% scheduled impairment as found by Dr. Polanco, and filed an Application for Hearing and Notice to Set on September 16, 2015, requesting a hearing in pertinent part on disfigurement and conversion of the scheduled rating to a whole person rating.

16. As a result of the surgery the claimant continues to have a loss of sleep. Additionally, he hears a recurrent popping sound in the shoulder joint. The residual effects of the surgery have impacted the claimant's lifestyle.

17. The claimant previously engaged in martial arts, weight lifting, golf, and basketball.

18. The claimant has had to minimize or eliminate some of his previous activities. He has had to stop his jiu jitsu activities for fear of landing on his shoulder. Additionally, he has stopped playing basketball due to the physical contact nature of the sport.

19. When undertaking driving activities the claimant can feel strain through his clavicle.

20. Although the claimant agrees he is at MMI, he believes this is so because his job is not a physical job and he can function in his job without a problem.

21. The claimant has, however, lost strength and power. He used to be able to lift heavy weights and now lifting weights greater than 50 pounds will cause considerable pain to the collarbone.

22. The claimant agrees that no doctor has limited his activities; however, during PT he had to reduce activities at times due to clavicular pain.

23. The greatest impact is to the claimant's personal life. He has had to undergo a change in lifestyle and reduce certain activities.

24. The ALJ finds the claimant to be credible.

25. The ALJ finds that the claimant has established that it is more likely than not that he sustained a functional loss that extends beyond the shoulder based upon limitations in activities resulting from pain that is generated beyond the shoulder, specifically in the clavicle area.

26. The ALJ finds that the claimant has established that it is more likely than not that he sustained a 7% whole person impairment.

DISFIGUREMENT

27. The ALJ finds that as a result of his October 15, 2013 work injury, the claimant has a visible disfigurement to the body consisting of two arthroscopic surgery scars on the left shoulder with each being approximately three-quarters of an inch in length and one-eighth of an inch in width. Additionally, there is a main surgical scar on the left shoulder that is approximately three inches in length and three-quarters of an inch wide at its widest. All of the scars are discolored when compared to the surrounding tissue.

28. The ALJ finds the claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to additional compensation in the amount of $1,200.00. Section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. A claimant in a workers’ compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

3. The facts in a workers’ compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A workers’ compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

5. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

6. The question of whether the claimant sustained a loss of an arm at the shoulder within the meaning of Section 8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under Section 8-42-107(8)(c), C.R.S. is one of fact for determination by the ALJ. In resolving this question the ALJ must determine the situs of the claimant's functional impairment, and the situs of the functional impairment is not necessarily the situs of the injury itself. *See Langton v. Rocky Mountain Health Care Corp.* 937 P.2d 883 (Colo.App. 1996); *Staunch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo.App. 1996).

7. The "loss of an arm at the shoulder" is on the schedule of injuries listed under Section 8-42-107 (2)(a), C.R.S. Depending on the particular facts of the claim, damage to the structures of the arm at the shoulder may or may not reflect a functional impairment which is enumerated on the schedule of injuries under Section 8-42-107 (2), C.R.S.

8. An impairment rating issued under the AMA Guides is relevant, but not dispositive of whether the claimant sustained a functional impairment beyond the schedule. *Staunch v. PSL Swedish Healthcare System, supra.* Further, pain and discomfort, which limits the claimant's ability to use a portion of the body, may be considered functional impairment for purposes of determining whether an injury is on or off the schedule. *See Vargas v. Excel Corp., W. C. NO. 4-551-161 (April 21, 2005).* Functional impairment of structures beyond the "arm at the shoulder" is probative evidence of whole person impairment.

9. As found above, the ALJ concludes that the claimant's testimony was credible and is supported by the medical record.

10. The ALJ concludes as found above, that as a result of his work-related injury the claimant has functional impairment of the arm at the shoulder, and the claimant has functional impairment in areas beyond the arm at the shoulder, to include his clavicle area. As a result of his work-related injury, the claimant has functional impairment that is located beyond the arm at the shoulder; it is located in the clavicle area and in the entire body as it relates to the claimant's ability engage in personal pursuits. As a result of his work-related injuries the claimant's functional impairment is not limited to the arm at the shoulder.

11. The ALJ concludes that the claimant has established by a preponderance of the evidence that his upper extremity impairment rating should be converted to a whole person impairment rating.

12. The ALJ concludes that the claimant has established by a preponderance of the evidence that the claimant suffered 7% permanent impairment of the whole person.

13. The ALJ concludes, as found above, that the claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to additional compensation in the amount of $1,200.00. Section 8-42-108 (1), C.R.S.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay the claimant permanent partial disability benefits based upon a 7% whole person impairment rating.

2. The respondent-insurer shall pay the claimant $1,200.00 for disfigurement. The respondent-insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: March 25, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-944-056-01

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

No further hearings have been held in the above-captioned matter. On March 29, 2016, thwe Claimant filed a “Motion for Clarification of Order Dated 03/21/2016,” which the ALJ will construe as a timely motion for a corrected order. The Claimant was appropriately confused by paragraph B of the Order portion of the decision, which is, in fact, inconsistent with the overall decision. Consequently, the Full Findings of Fact, Conclusions of Law are adopted in full with the exception of the herein below modification of the Order portion. Adoption of the Final Admission **is not appropriate** under the circumstances.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 23, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 2/23/16, Courtroom 1, beginning at 1:30 PM, and ending at 4:15 PM).

This matter involves the Respondents’ request to overcome the Division Independent Medical Examination (DIME) opinion of David Yamamoto, M.D. , an occupational medical physician to the effect that the Claimant had not reached maximum medical improvement (MMI) because the Claimant needed more psychiatric/psychological evaluations and/or treatment. The Respondents assert that the medical report provided by Gary S.Gutterman, M.D., a board certified psychiatrist indicates that the Claimant had achieved MMI on January 25, 2016; and, Dr. Gutterman’s psychiatric opinion establishes by clear and convincing evidence that the DIME opinion of Dr. Yamamoto, with respect to psychiatric MMI has been overcome.

Respondent's Exhibits A through M were admitted into evidence, without objection. Claimant's Exhibits 1 through 15 were admitted into evidence, without objection.

ISSUE

The issue to be determined by this decision concerns whether the psychiatric conclusion made by Dr Gutterman that the Claimant reached MMI on January 25, 2016 establishes clear and convincing evidence to overcome the determination made by DIME Dr. Yamamoto, issued on September 23, 2015, that the Claimant had not achieved MMI regarding psychiatric health associated with the initial injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant was injured on February 22, 2014 when he fell from a ladder during a firefighting training exercise for the Employer fire department. The Claimant fell approximately 14 feet and fractured his right ankle and foot.

2. Ultimately, the Respondents filed a Final Admission of Liability (FAL), dated July 10, 2015, based on the opinion of authorized treating physician (ATP) Dean Plok, M.D., admitting for medical benefits; an average weekly wage (AWW) of $1,500; temporary total disability (TTD) benefits of $437.71 per week (reduced 50%, based on an alleged safety violation) from February 23, 2014 through March 17, 2014; and, scheduled permanent partial disability (PPD) of 21% of the right lower extremity (RLE). There was a timely objection and request for a DIME. Dr. Yamamoto was appointed as the DIME Examiner.

3. On February 24, 2014, Dr. Prok examined the Claimant and concluded that the Claimant had a pain rating of 8/10 in the foot and ankle and Dr. Prok referred the Claimant to Gregg A. Koldenhoven, M.D., of the Front Range Orthopedics and Spine Clinic.

4. Dr. Koldenhoven examined the Claimant on February 24, 2014 and confirmed that the Claimant had foot fractures. Dr. Koldenhoven performed surgery on the Claimant's right foot on March 4, 2014.

5. The Claimant underwent physical therapy and had his pain monitored by Drs. Koldenhoven, Olsen, Aspergren, and Prok between March 2014 and May 2015.

6. Dr. Prok placed the Claimant at MMI on July 1, 2015.

Division Independent Medical Examination (DIME) of David Yamamoto, M.D.

7. Dr. Yamamoto is fully Level 2 Accredited by the Division of Workers' Compensation (DOWC). On September 23, 2015, Dr. Yamamoto performed the DIME and subsequently issued a report. He recommended consideration of a trial of injection therapy for lumbar discomfort. He further found that the Claimant was not at MMI because he was experiencing anxiety, panic attacks, depression, and symptoms of Post Traumatic Stress Disorder (PTDS), all psychiatric/psychological conditions. Dr. Yamamoto recommended that the Claimant undergo a psychological evaluation, counseling, and a referral to a psychiatrist for treatment of anxiety, PTSD, and depression. The Claimant was referred to Dr. Gutterman. The ALJ infers and finds that DIME Dr. Yamamoto considered the Claimant at MMI for all purposes other than psychiatric MMI.

8. On December 17, 2015, Dr. Koldenhoven conducted a physical examination and stated, "Consider MMI at present with potential for further intervention later in life."

9. Dr. Prok issued a report on January 4, 2016, indicating that the Claimant wanted to undergo medial branch block for the bilateral L4-5 and L5-S1 facets to provide short term relief.

10. On January 25, 2016, the Claimant underwent the psychiatric evaluation conducted by Dr. Gutterman, as recommended by DIME Dr. Yamamoto. Dr. Gutterman concluded after 45 minutes of psychiatric consultation that the Claimant had reached MMI from a psychiatric perspective. The ALJ finds that Dr. Gutterman's opinion concerning psychiatric MMI makes it highly probable, unmistakable, and free from serious and substantial doubt that DIME Dr. Yamamoto's opinion that the Claimant is **not** at MMI is in error.

Ultimate Findings

11. Dr. Gutterman's (a board certified psychiatrist) opinion that the Claimant reached MMI on January 25, 2016 is highly persuasive and more credible than DIME Dr. Yamamoto's (an occupational medicine physician) opinion that the Claimant was not at psychiatric MMI. Indeed, Dr. Gutterman's opinion renders it highly probable, unmistakable and free from serious and substantial doubt that Dr. Yamamoto's opinion regarding psychiatric MMI is in error. Dr. Gutterman has more specific psychiatric expertise than Dr. Yamamoto and, Dr. Yamamoto, in fact, referred the Claimant to Dr. Gutterman for a psychiatric opinion, which creates an inference that Dr. Yamamoto would defer to Dr. Gutterman on psychiatric matters..

12. Based on substantial evidence, the ALJ makes a rational choice, between conflicting medical opinions, to accept Dr. Gutterman's opinion and to reject Dr. Yamamoto's opinion with respect to psychiatric MMI.

13. The Respondents have proven, by clear and convincing evidence that Dr. Yamamoto's opinion that the Claimant has not reached psychiatric MMI is in error. Therefore, the Respondents have overcome DIME Dr. Yamamoto's opinion in this regard by clear and convincing evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Gutterman's (a board certified psychiatrist) opinion that the Claimant reached MMI on January 25, 2016 is highly persuasive and more credible than DIME Dr. Yamamoto's, (an occupational medicine physician) opinion that the Claimant was not at psychiatric MMI. Indeed, Dr. Gutterman's opinion renders it highly probable, unmistakable and free from serious and substantial doubt that Dr. Yamamoto's opinion regarding psychiatric MMI is in error. Dr. Gutterman has more specific psychiatric expertise than Dr. Yamamoto and Dr. Yamamoto, in fact, referred the Claimant to Dr. Gutterman for a psychiatric opinion.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between two conflicting medical opinions, the ALJ made a rational choice to accept the opinion of Dr. Gutterman on MMI and to reject the DIME opinion of Dr. Yamamoto in this regard..

Burden of Proof

c. Under Colorado law, a party disputing a DIME physician's opinion must meet the burden of proof by a showing of clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 38 (Colo. App. 2000). "The finding regarding MMI and permanent medical impairment of an DIME examiner in a dispute arising under subparagraph (II) of paragraph (b) may be overcome only by clear and convincing evidence. § 8-42-107(8)(III), C.R.S..

d. Clear and convincing evidence is defined as, "[T]hat evidence which is stronger than a 'preponderance of the evidence,' and which is unmistakable and free from serious or substantial doubt." *People v. Lane*, 581 P.2d 719, 722 (Colo. 1978); *Metro Moving and Storage Co. v. Gussert, supra*; *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). a DIME physician's finding may not be overcome unless the evidence establisheS that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995). As found, it has been established that it is highly probable, unmistakable and rfree from serious and substantial doubt that DIME Dr. Yamamoto's opinion that the Claimant has not reached psychiatric MMI is in error.

e. There is no dispute that the Claimant reached MMI on all non-mental health injuries, however, there is but one MMI date for all injuries resulting from a specific compensable event, and psychiatric MMI is a component thereof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant reached maximum medical improvement on January 26, 2016 on all issues as a result of the opinion of Division Independent Medical Examination David Yamamoto, M.D. having been overcome by clear and convincing evidence, by virtue of the opinion of psychiatrist, Gary S. Gutterman, M.D.

B. Any and all issues, including the issues of permanent impairment and safety violation, are reserved for a future hearing.

DATED this _____ day of March 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Corrected Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Division of Workers' Compensation
DIME Unit
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Wc.cord

ISSUES

The issue for determination involves Claimant's entitlement to additional medical treatment. The question to be answered is:

I. Whether Claimant established, by a preponderance of the evidence, that the cervical decompression and lumbar kyphoplasty procedures recommended and performed by Dr. Rauzzino on July 23, 2015, were reasonable, necessary, and related to her admitted February 28, 2014 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant sustained an injury while working as a customer service representative for Employer on February 28, 2014. She was walking in the company's cafeteria when she slipped on water and twisted her ankle. She then fell to the floor landing on her knees and outstretched hands, injuring her neck in the process.

2. Claimant reported an inability to complete her work shift. Consequently, she was sent to Concentra Medical Centers where she was evaluated by Physician Assistant Kristina Sanfilippo. At that time, PA Sanfilippo documented the following history of injury from Claimant: ". . . she states she slipped and fell on some liquid in the cafeteria at work. She states she did not hit her head and states no LOC (loss of consciousness). . . . She states mild HA (head ache) and believes this is due to the jolt she experienced when trying to catch herself as the muscles on the right side of her neck are starting to become tight. Although she was not formally diagnosed with a neck sprain, PA Sanfilippo noted that Claimant head ache was "most likely" related to a neck strain. Claimant was instructed to follow up (F/U) if her condition "[worsened] or [did] not improve."

3. Liability for Claimant's injuries has been admitted.[1]

4. Claimant's neck pain and headaches persisted and she was seen by Dr. Daniel Peterson at Concentra Medical Centers on May 15, 2014. During this encounter, Claimant reported ongoing and increasingly worsening headaches since her neck

[1] A General Admission of Liability (GAL) is contained in Respondents' Exhibit Packet at Tab A. It reflects that copies of the GAL were mailed to Employer, the Division of Workers Compensation and Claimant on February 21, 2014. The content of the GAL persuades the ALJ that the reference to the GAL being mailed on February 21, 2014 is, more probably than not, a typographical error as it predates the injury by seven (7) days.

strain. At the time of her evaluation, Claimant was sitting in a dark exam room secondary to a reported "migraine head ache." Dr. Peterson noted "restricted and painful" rotation of the cervical spine directionally to the right and left. He also noted a positive Spurling's maneuver. Hoffman's testing was not completed. Dr. Peterson ordered x-rays of the neck, which demonstrated "marked DJD C spine" (marked degenerative joint disease of the cervical spine).

5. Claimant was referred for an MRI of the cervical spine, additional physical therapy (PT) and further evaluation by a physical medicine and rehabilitation expert (PM&R), specifically Dr. John Bissell.

6. Claimant underwent MRI of the cervical spine on May 22, 2014, which demonstrated circumferential disc protrusions at C3-4, C4-5, C5-6, C6-7 and C7-T1. The changes at the C5-6 level were noted to be causing mild spinal cord compression.

7. Claimant was evaluated by Dr. Bissell on May 28, 2014. Dr. Bissell documented the following history of injury: "While walking by the salad bar, she slipped and fell on ice and water- she recalls that her right ankle bent underneath her (years ago she tore 5 ligaments in her right ankle and it has been weak ever since). She fell onto her left knee and then onto her right shoulder. . . . In addition she sprained her neck." Dr. Bissell documented 5/5 motor strength in the upper and lower extremities, no atrophy and/or fasciculations were present and Spurling's testing revealed negative results bilaterally. Additionally, Dr. Bissell specifically noted that Hoffman's testing of the bilateral upper limbs was noted to be negative. Dr. Bissell made no comment regarding Claimant's gait pattern; however, expressly noted that there was "no evidence of cervical myelopathy or radiculopathy.

8. Palpation of the cervical spine during Claimant's May 28, 2014 appointment yielded what Dr. Bissell documented as "Tenderness noted over right cervical and thoracic paraspinal muscle regions with trigger points noted." Cervical spine flexion/extension was documented to be 80% of normal and cervical rotation was 50% of normal according to Dr. Bissell. Dr. Bissell prescribed tizanidine (Flexeril) for "spasm" and reassured Claimant that she should "improve with her current treatment."

9. Claimant returned to Dr. Peterson's attention on June 20, 2014 with complaints of neck pain, headache and with specific report that the tizanidine she was prescribed was causing her "vertigo." While Dr. Peterson noted that cervical axial loading and Spurling's testing was negative, he made no comments about Claimant's station and gait or the results of any Hoffman's testing.

10. On July 31, 2014, Dr. Peterson referred Claimant to Dr. Albert Hattem for delayed recovery. The physical examination from this date of service is similar in characteristic to Dr. Peterson's June 20, 2014 exam in that axial loading and Spurling's testing revealed negative findings. Again the record from this encounter date is devoid of reference to Claimant's station and gait and/or the results from Hoffman's testing.

11. Based upon the content of the June 20, 2014 and July 31, 2014 notes, the ALJ

finds it probable that Dr. Peterson did not perform any Hoffman's testing protocol and did not assess Claimant's gait pattern. Nonetheless, he provided a diagnosis for "cervical spondylosis without myelopathy" for what he described was a "whiplash type injury."

12. On September 4, 2014, Claimant was evaluated by physician assistant Jocelyn Cavender. The note concerning this date of service is devoid of any special testing regarding the cervical spine or Claimant's neurological status, including Hoffman's testing; although she noted Claimant's gait to be "normal."

13. Claimant returned to Dr. Bissell on September 8, 2014 with continued complaints of neck pain. She reported having stopped taking her tizanidine secondary to vertigo type symptoms. Nonetheless, Claimant reported persistent vertigo while denying "progressive neurologic deficit, motor paralysis, and bowel and bladder incontinence." Dr. Bissell noted that Claimant station and gait were "Normal, nonanatalgic." He also noted that while Claimant had "mild cord compression at the C5-6 level" per MRI, she had "normal spinal cord signal." He did not feel that there was medical evidence to support a conclusion that Claimant had "myelopathy or radiculopathy." Dr. Bissell administered trigger point injections to the cervical spine.

14. On September 30, 2014, Claimant was evaluated by Dr. Albert Hattem. Dr. Hattem documented that Claimant reported a history of twisting her right ankle, falling onto her left knee and as she fell she "smacked" her neck. Physical examination revealed 0 to 1+ symmetrical deep tendon reflexes bilaterally at the triceps, biceps, knee and ankle, normal muscle strength in the arm and legs bilaterally, no clonus and a negative Hoffman's sign.

15. On November 20, 2014, Dr. Hattem referred Claimant to Dr. Brain Polvi's office for chiropractic care for her persistent cervical spine complaints.

16. Claimant was evaluated by Dr. Woodrow Hill, a chiropractor in Dr. Polvi's office on December 11, 2014. At this appointment, Dr. Hill documented the following history of injury provided by Claimant: "She stated she stepped into a puddle of water by the salad bar with (sic) caused her to slip and fall. She stated 'she twisted her right ankle and fell forward onto her left knee which also caused her neck to jerk forward then snap back." Dr. Hill assessed cervical spine facet syndrome, specifically at the C5-6 joints on the right as well as cervical myofascial pain syndrome involving the right suboccipital, cervical paravertebral and upper trapezius musculature.

17. Despite PT, acupuncture and chiropractic treatment, Claimant cervical spine pain persisted and worsened over time. On February 12, 2015, Claimant reported 6-7/10 pain to Dr. Hattem during a follow-up visit. Consequently, Dr. Hattem referred Claimant to Dr. Michael Rauzzino for neurosurgical evaluation. Dr. Hattem's physical examination demonstrated a "normal" gait and "no focal neurological deficits in the upper or lower extremities.

18. Claimant was evaluated in the offices of Front Range Spine and Neurosurgery, Dr. Rauzzino's clinic, on March 17, 2015. She was evaluated at that time by Physician Assistant Derrick Winckler. PA Winckler noted that Claimant reported getting "dizzy when standing too quickly or when getting into bed or changing activities", which by Claimant's report would then "slowly resolve." According to PA Winckler, Claimant also reported "twitching" in her left eye and migraine headaches. A complete neurological exam was preformed which resulted in negative for Hoffman's sign bilaterally, although Claimant was unable to tandem walk. PA Winckler ordered updated imaging studies, including repeat MRI and flexion/extension views of the cervical spine. Claimant was scheduled to a follow-up visit with Dr. Rauzzino.

19. Repeat cervical spine MRI was performed on March 18, 2015. The images from this study were compared to the previous film taken August 22, 2014. After comparison it was felt by the interpreting radiologist that the findings on the March 18, 2015 MRI had not appreciably changed beyond what had been noted on the August 22, 2014 study.

20. Claimant was evaluated by Dr. Rauzzino on March 31, 2015. During this appointment, Claimant reported continued pain with range of motion of the neck. Dr. Rauzzino noted that the imaging studies (MRIs) had been compared and were "essentially" unchanged. Physical examination revealed a positive Spurling's maneuver and a "trace" Hoffman's sign on the left, but negative on the right. Dr. Rauzzino noted that Claimant had significant difficulty with tandem gait and that she referred to her balance difficulty as "vertigo." Dr. Rauzzino noted that Claimant's imbalance was "likely myelopathy related to the spinal cord" and not positional vertigo. Noting that Claimant had severe stenosis at C4-5 and C5-6, Dr. Rauzzino opined that Claimant's future treatment could involve a surgical decompression due to the "myelopathy related to her gait." He also felt that Claimant's ongoing cervical spine pain could be addressed further with epidural steroid and/or facet injections. He referred Claimant to Dr. Shimon Blau

21. On April 9, 2015, Claimant returned to Dr. Hattem for follow-up. During this encounter, Claimant reported persistent 2-5/10 neck pain and "balance issues that seemed to be worsening during the past year." Directed physical examination revealed a "normal" gait overall, but a mildly abnormal tandem gait pattern. Nonetheless, Claimant's deep tendon reflexes at the biceps, triceps, knee and ankle were 1+ and symmetrical bilaterally. There were no focal neurological deficits of the arm/legs and no clonus elicited on examination and a negative Hoffman's sign. Dr. Hattem noted Dr. Rauzzino's treatment suggestions and rescheduled Claimant for a recheck following her appointment with Dr. Blau.

22. Claimant was evaluated by Dr. Blau on April 20, 2015. She reported continued cervical pain, headaches and restricted cervical range of motion. Following a physical examination which revealed normal and symmetric reflexes bilaterally and a normal gait pattern, Dr. Blau opined that Claimant's ongoing pain may be "stemming from facet joint pathology versus radiculopathy, or . . . both." However, given Claimant's findings on physical examination, Dr. Blau felt that Claimant's facets joints were the most likely

source of her pain. Consequently, Dr. Blau recommended and after consent performed fluoroscopic guided, bilateral facet injections at C4-5, C5-6 and C6-7.

23. Claimant returned to Dr. Rauzzino's offices on May 12, 2015 reporting "increased difficulty with her balance and . . . a recent fall secondary to this." She also reported "residual dizziness after having injections" and "non-positional headaches" occurring every couple of days and which were worse when "leaning forward." According to the office note from this encounter, Claimant's March 17, 2015 MRI demonstrated "significant spinal stenosis at C5-C6 secondary to a broad-based disc osteophyte complex that produces moderate to severe stenosis." Claimant demonstrated a trace positive Hoffman's sign on the right and continued to demonstrate difficulty with tandem gait. She was assessed with "cervical stenosis and myelopathy at C4-C5 and C5-C6." Given Claimant's returning pain, increased difficulty with ambulation coupled with recent falling episodes, Dr. Rauzzino recommended surgical decompression.

24. Claimant lost her balance and fell backwards onto some steps on or about May 16, 2015, injuring her low back. She was taken to the hospital immediately after this fall.[2]

25. On May 21, 2015, Claimant returned to Dr. Rauzzino's offices for follow-up. During this encounter, Claimant reported that she had fallen a couple of times, relating the most recent fall wherein she landed on her back resulting in severe pain. Physical examination was directed to both the cervical and lumbar spines and demonstrated continued trace positive Hoffman's sign on the right and pain with range of motion of the lumbar spine. Additionally, Claimant demonstrated dysdiadochokinesia of the right hand and difficulty with tandem gait. Her gait was also significantly antalgic. MRI of the lumbar spine was recommended to assess whether the L1 compression fracture visualized on CT scan was acute.

26. Based upon the content of the May 21, 2015 report and the testimony presented at hearing, the ALJ finds that Claimant demonstrated both signs of ataxia, i.e. in coordination of the upper/lower extremities consistent with myelopathy as well as findings consistent with a painful gait (antalgic gait), likely as a consequence of her lumbar spine injury after her May 16, 2015 fall.

27. MRI of the lumbar spine was performed on June 23, 2015. The imaging study revealed an "[a]cute compression fracture of the superior endplate of L1 and about 10% reduction of height and mild posterior superior endplate retropulsion and mild stenosis T12-L1."

28. During a follow-up visit at Dr. Rauzzino's office on July 7, 2015, Claimant's gait remained antalgic and she was unable to perform tandem gait testing. Dr. Rauzzino continued to recommend decompressive surgery for the cervical spine and also noted

[2] A report from Dr. Rauzzino's office Dated May 21, 2015 references that a CT scan of the lumbar spine was performed on May 16, 2015 which demonstrated a mild compression fracture at L1 with no retropulsion.

that a kyphoplasty could be preformed for her acute compression fracture at L1. Claimant consented and insisted that both procedures be performed at the same time to avoid additional surgery at a later date. Consequently, Dr. Rauzzino preformed an anterior cervical discectomy and fusion (ACDF) at C4-5 and C5-6 along with a L1 kyphoplasty on July 23, 2015. The procedures generated two separate reports, both of which reference that surgery was necessitated by injuries sustained in a "motor vehicle accident" (MVA). The ALJ finds the reference to the need for surgery being related to a MVA a mistake in documentation of the part of Dr. Rauzzino as the balance of his records documents the details of Claimant's work related injuries culminating in the need to proceed to surgery.

29. During the ACDF procedure, Dr. Rauzzino found and removed "some disc material posterior to the PLL", which he noted suggested a "more acute herniation . . ."

30. On October 21, 2015 Respondents filed an Application for Hearing requesting determination of the reasonableness, necessity and relatedness of Claimant's ACDF and kyphoplasty procedures to her admitted February 28, 2014 industrial injury.

31. On November 16, Dr. John Douthit evaluated Claimant at Respondents' request. As part of his independent medical examination (IME), Dr. Douthit obtained a history concerning Claimant's injuries. According to Dr. Douthit's IME report, Claimant reported that she had just "finished breakfast and was on her way to the cashier. When passing by the salad bar, Claimant believes there was melted ice on the floor causing her ankle to twist and fall. She fell forward onto her knees, twisting her right ankle sustaining injury. She states she went down first left and then right and felt her neck snap."

32. Dr. Douthit also obtained a history of progressive gait instability and subsequent falls. Claimant reported her balance problem as "vertigo" which waxed and waned for which she required the security/stability of a cane to walk. Dr. Douthit's physical examination failed to reveal ataxia. According to Dr. Douthit, Claimant had a "narrow based coordinated gait with the cane and was able to use her hands very well. Tandem gait testing revealed an unsteady pattern, but Claimant did not lose her balance per Dr. Douthit's IME report. Hoffman sign was normal. Dr. Douthit found "no objective physical signs of myelopathy"; however, noted that he was missing records which he wished to review. Nonetheless, Dr. Douthit opined that Claimant did not develop a myelopathy secondary to her fall in the cafeteria. Rather he opined that the results of Claimant's physical examination (failure of long track signs such as clonus, lack of hyperreflexia, no parenchymal signal, normal Hoffman's and lack of ataxic gait) coupled with her persistent post surgery "imbalance" did not support a conclusion that Claimant had myelopathy. To the contrary, Dr. Douthit opined that Claimant's imbalance was consistent with vertigo which he opined should have been "investigated" through consultation by internal medicine before Dr. Rauzzino took her to surgery. Because Dr. Douthit felt that Claimant did not develop a myelopathy as a consequence of her February 28, 2014 slip and fall, he opined that her ACDF procedure was unrelated to that fall. Moreover, because Claimant did not have a myelopathy, her subsequent fall on May 16, 2015 was unrelated to her February 28, 2014 slip and fall. Consequently,

Claimant's kyphoplasty was also unrelated to the February 28, 2014 slip and fall.

33. Additional medical records were sent to Dr. Douthit per his request. Dr. Douthit reviewed those records and prepared a supplemental IME report dated January 5, 2016. In this report, Dr. Douthit draws particular attention to the August 31, 2015 PT report of Jonathan Brown. According to this note, Claimant reported to PT Brown that she had vertigo, which he felt sounds "consistent with crystal . . . lying down nearly always causes vertigo and she covers her eyes while she waits for it to subside. Dr. Douthit reiterated his previous opinions concerning the myelopathy, noting that "[i]t is evident from Mister Brown's report . . . as well as my exam and review of her records that this is unrelated to her fall at work." Based upon the content of the report, the ALJ finds that reference to the phrase "this is unrelated to her fall", likely means Claimant's balance problems.

34. Dr. Rauzzino testified by deposition on January 26, 2016.

35. Dr. Rauzzino testified that he is a board certified neurosurgeon. After graduating from medical school he did an 8 year residency in neurosurgery. He has been board certified in neurosurgery for about 11 years and has taught surgical techniques to other neurosurgeons. He is an actively practicing neurosurgery and the chief of Neurosurgery at Sky Ridge Hospital in addition to acting Chief of the Neurology Department.

36. Dr. Rauzzino testified that Claimants second fall in May, 2015 was caused by myelopathy or spinal cord dysfunction, which manifested itself with gait instability when she walked. Dr. Douthit felt the second fall in May, 2015, was caused by vertigo and unsteadiness of uncertain origin possibly related to hypertension medication, vestibular or vascular problems.

37. Regarding Dr. Douthit's opinion, Dr. Rauzzino distinguished between vertigo and imbalance caused by myelopathy. According to Dr. Rauzzino, position vertigo is separate from myelopathy and occurs when, for example, when you are sitting in a chair and the room starts spinning around you; where as myelopathy manifests in a balance disturbance because of spinal cord dysfunction. (Id.) According to Dr. Rauzzino, a person can have positional vertigo and myelopathy concurrently.[3] Dr. Douthit agreed that it is possible to have both vertigo and myelopathy at the same time.

38. In response to Dr. Douthit's opinion that Claimant did not have myelopathy because she had no evidence of injury to her spinal cord, i.e. no "parenchymal spasm, Dr. Rauzzino testified that "parenchymal spasm" is an irreversible event that evidences injury to the spinal cord and that patients can have a myelopathy without a parenchymal

[3] Dr. Rauzzino also addressed the differences between position vertigo and imbalance caused by myelopathy when addressing PT Brown's August 31, 2015 note, testifying that vertigo is "something that happens kind of at rest, when you change position, when you go from a seated to a laying position, or vice versa, or something like that. Walking is something entirely different. So, she could have vertigo from something else, but the - - the trouble with her balance and - - falling - - is related to the myelopathy."

spasm. He disagreed with Dr. Douthit on this point testifying that the point of treating people with myelopathy is to help them before a parenchymal spasm occurs, causing irreversible spinal cord damage.

39. Dr. Rauzzino opined that Claimant developed a cervical myelopathy when she fell on February 28, 2014, and that when she fell hurting her lower back in May, 2015 that was a result of the myelopathy caused by the original fall.

40. As noted above, Dr. Douthit opined that he saw no signs of myelopathy. Dr. Rauzzino testified that there were likely no signs of myelopathy apparent to Dr. Douthit because Claimant had a good result to surgery. The record evidence indicates that the surgery performed by Dr. Rauzzino was done 4 months before Dr. Douthit's report of November 16, 2015.

41. Regarding the relatedness of Claimant's need for ACDF procedure, Dr. Rauzzino testified that as a Level II accredited physician, he did a causation analysis which lead him to conclude that the need for the procedure was related to Claimant's February 28, 2014 slip and fall of the following reasons:

- Claimant did not have a history of neck symptoms prior to the February 28, 2014 slip and fall. (Dr. Douthit agreed there were no references to Claimant having an unsteady gait prior to Claimant's slip and fall on February 28, 2014);

- Claimant had an acute injury with immediate complaint of symptoms;

- Claimant had signs and symptoms of an acute problem with the spinal cord; she had surgery for this; at the time of surgery, an acute disc herniation was found, in addition to the superimposed chronic changes (noted on MRI); and,

- Claimant got better after the surgery.

42. During cross examination, Dr. Rauzzino testified that a chiropractic examination is not likely to be as detailed and adept in discerning the subtle findings regarding the presence or non-presence of a cervical spine condition as would be that of a neurosurgeon like him. Further the fact that a chiropractic examination found Claimant's neck pain free did not mean that Claimant didn't have a myelopathy since the spinal cord does not sense pain.

43. As to the discrepancy between the results of two Hoffman's tests, one on March 17, 2015 with a negative Hoffman test and one on March 31, 2015 with a positive result, Dr. Rauzzino states the first exam was done by his P.A. and the second by himself. Dr. Rauzzino states his exam may be slightly different and elicit different findings because he is the neurosurgeon. Dr. Rauzzino states the positive Hoffman test was subtle but was there and the PA with less training, likely didn't appreciate it.

44. Dr. Rauzzino testified the lumbar strain is related to the work injury because Claimant fell due to myelopathy from the cervical stenosis.

45. Dr. Douthit testified at hearing. Dr. Douthit testified to that “the story that the injured person gives to the first examiner is the candid one, the truth. Thereafter, things get vague and things change.” Dr. Douthit testified he believes the story Claimant gave on her date of injury was truly what happened. Dr. Douthit testified Claimant changed her story as time went by to fit her circumstances. Based upon the evidence presented, the ALJ finds subtle differences in the histories given to the various providers who have treated/evaluated Claimant during the pendency of the case. While there are minor inconsistencies in the histories as documented, the ALJ finds those inconsistencies immaterial and likely errors due to poor/incomplete documentation by the provider. The ALJ finds that Claimant has been consistent regarding the material aspect of the mechanism of injury (MOI) from the first her first treatment appointment with PA Sanfilippo, namely that she slipped, fell and jolted/snapped her neck. Indeed, Dr. Peterson concluded that Claimant sustained a whiplash type injury based upon the history provided.

46. Dr. Douthit testified that he performed tests for myelopathy. Dr. Douthit testified consistently with his report opining that a patient must have long tract signs for a diagnosis of myelopathy, and that Claimant had no long tract signs. Dr. Douthit relied on medical research finding patients with myelopathy had four long tract signs, and almost all (90%) of them had an ataxic gait. According to Dr. Douthit, Claimant had no long tract signs and no ataxic gait during his examination.

47. Dr. Douthit disagreed with Dr. Rauzzino’s diagnosis of myelopathy and while it was possible to have both vertigo and myelopathy causing imbalance, Dr. Douthit testified exactly opposite of Dr. Rauzzino, specifically that Claimant’s imbalance was caused by vertigo, not myelopathy.

48. Dr. Douthit testified that if Claimant had a myelopathy the results from Hoffman’s testing would have been consistently positive on all testing with every provider who tested her. Dr. Douthit testified that Claimant’s Hoffman’s test results were at worst a trace positive, and negative most of the time, which is “lame evidence of a long tract sign for myelopathy.” Nonetheless, Dr. Douthit testified that whether findings on Hoffman’s testing are documented as positive or negative is dependent on the observations of the examiner. Simply put, the test is subjective. Consequently, Dr. Douthit testified that Hoffman’s testing is known to produce false positive results. Since Claimant only had a few positive tests, Dr. Douthit testified Claimant’s testing results were a very unreliable sign of myelopathy.

49. While the ALJ finds Hoffman’s testing subjective and dependent on the observations of the testing provider, the ALJ notes that the provider who documented the presence of findings consistent with myelopathy is a highly trained, board certified neurosurgeon with years of experience in evaluating patients with cervical spine pathology. Consequently, the ALJ finds that Dr. Rauzzino possesses the expertise to discern subtle physical signs consistent with spinal cord compression, i.e. myelopathy. Based upon the evidence presented, the ALJ credits the testimony of Dr. Rauzzino to

find that Claimant likely developed a myelopathy following her February 28, 2014 slip and fall and this progressing myelopathy caused a subsequent fall on May 16, 2015 resulting in injury to Claimant's lumbar spine.

50. While Dr. Douthit likely possesses the ability to discern the difference between vertigo and myelopathy based upon his experience and training, the ALJ finds the testimony of Dr. Rauzzino more persuasive concerning the question of whether Claimant had a myelopathy for the following reasons:

- Claimant had a positive Hoffman's sign on a number of occasions;

- the imaging of Claimant's neck revealed moderate spinal stenosis causing spinal cord compression;

- Claimant's balance problems worsened with the passage of time suggesting progressing neurological deficits secondary to persistent spinal cord compression;

- Claimant's gait became increasingly ataxic as evidenced by her inability to perform tandem gait testing prior to surgery;

- Claimant's neurologic findings on examination included the presence of ataxia (dysdiadochokinesia) in her right hand by May 21, 2015; and

- Surgery revealed the presence of disc material not appreciated on MRI which likely contributed to further spinal stenosis and spinal cord compression

51. Dr. Douthit disagreed with Dr. Rauzzino's explanation of vertigo occurring primarily when sitting or standing, as compared to imbalance from myelopathy occurring mainly when walking, testifying that a person can also have difficulties walking with vertigo.

52. Claimant continues to experience dizziness and imbalance after her surgery. Claimant still walks with a cane and used the cane on the date of Hearing. Based upon the evidence presented, including the August 31, 2015 report of PT Brown, the ALJ finds that in addition to having a myelopathy that was addressed by Dr. Rauzzino's July 23, 2015 surgery, Claimant likely suffers from positional vertigo which causes symptoms when changing positions, including the position of her head affecting her gait.

53. Dr. Douthit a projected image of Claimant's March 18, 2015 x-ray film, testifying that the segmental level fused by Dr. Rauzzino had no motion prior to that surgery. Specifically, Dr. Douthit testified Dr. Rauzzino "fused these already stable vertebrae. There's no evidence of instability. There's nothing going on here." The ALJ infers from this testimony that Dr. Douthit believes the ACDF procedure was neither reasonable nor necessary.

54. Dr. Douthit also explained how measurements are taken for diagnosing cervical spine stenosis. He testified that a measurement of at least 8mm was discernible on Claimant's MRI image of the cervical spine. A measurement of 6mm or less is consistent with severe stenosis whereas 8mm represents moderate stenosis. According to Dr. Douthit, he measured the most affected spinal segment at 8.7mm. Dr. Douthit testified that based on his measurements and his reading of the MRI, Claimant had moderate spinal stenosis. Dr. Douthit called the radiologist who wrote the March 18, 2015 MRI report to confirm his findings, and there was concurrence between the radiologist's findings and Dr. Douthit's findings of moderate spinal stenosis.

55. Dr. Douthit testified a cervical decompression and fusion would not be appropriate treatment for a patient with only moderate cervical stenosis. Dr. Douthit testified there were not significant indications for a cervical decompression and fusion surgery, reiterating his opinion that the ACDF procedure was not necessary.

56. In addressing Dr. Rauzzino's discovery of disc material in the spinal canal during surgery, which Dr. Rauzzino felt constituted evidence of acute injury and which he testified also "compromised the space for the spinal cord, causing myelopathy, Dr. Douthit testified the discovery did not mean an acute injury happened on February 28, 2014. Rather, Dr. Douthit testified that the disc herniation "could have happened at any time in her lifetime." Dr. Douthit found it "absurd" to try to associate the disc matter found during the surgery to an event occurring 17 months prior. Regardless, the ALJ finds Dr. Douthit's opinion regarding the timing of when the herniation may have occurred unresponsive to the question of whether the herniated disc material was contributing to signs/symptoms consistent with myelopathy.

57. Based upon the totality of evidence presented, the ALJ finds a temporal relationship between the February 28, 2014 event and the development of signs/symptoms consistent with a myelopathy. The evidence presented persuades the ALJ that Claimant's slip and fall, more probably than not, aggravated her previously asymptomatic degenerative disc disease and caused a traumatic disc herniation, which was undetectable on MRI and which caused additional spinal stenosis leading to the development of a myelopathy over time. The ALJ further finds that Claimant's myelopathy precipitated Claimant's uncoordinated gait causing her to fall on or about May 16, 2015 resulting in a compression fracture at L1. Dr. Douthit's contrary opinions are not convincing based upon the totality of the record evidence presented.

58. By the time Dr. Rauzzino preformed surgery, Claimant had been complaining of neck pain for approximately 17 months. She had also been complaining of increasing difficulty with her balance over the preceding year and specifically leading to falls for approximately 2 months prior to surgery. Conservative treatment failed to ameliorate these symptoms leading to the recommendation for surgery. Based upon the evidence presented, the ALJ credits the testimony of Dr. Rauzzino to find that the ACDF procedure was reasonable and necessary to alleviate Claimant's persistent symptoms associated with the myelopathy caused by her February 28, 2014 slip and fall.

59. Dr. Douthit testified he would not recommend performing a kyphoplasty procedure for a compression fracture; that it is a discredited procedure and that there were no objective physical findings indicating the presence of a compression fracture in Claimant's lumbar spine. As noted above, the June 23, 2015 MRI of Claimant's lumbar spine revealed the presence of an "acute" compression fracture at L1.

60. Based upon the evidence presented, the ALJ finds Dr. Douthit's opinions regarding the reasonableness and necessity of the kyphoplasty procedure unconvincing. Imaging revealed the presence of a compression fracture contrary to Dr. Douthit's testimony. The evidence presented persuades the ALJ that it was necessary to address Claimant's severe low back pain caused by this fracture and that kyphoplasty was a reasonable medical procedure to cure and otherwise alleviate that pain.

61. Taken as a whole, the ALJ finds that the record evidence supports a finding that Claimant's need for the ACDF and kyphoplasty procedures performed by Dr. Rauzzino on July 23, 2015 arose as a direct consequence of her February 28, 2014 work related injury. Moreover, the evidence presented persuades the ALJ that these procedures were reasonably necessary to cure and relieve Claimant from the ongoing effects of her myelopathy and compression fracture directly traceable to that work related injury. Claimant has carried her burden of proof to establish that the surgery performed by Dr. Rauzzino on July 23, 2015 were reasonable, necessary and causally related to her February 28, 2014 slip and fall. Consequently, Respondents are obligated to pay for this care.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony regarding her ongoing symptoms and the need for treatment has been consistent and is generally supported by the content of the medical records submitted at hearing. Consequently, the ALJ finds Claimant to be a credible and persuasive witness.

C. Where a party presents expert opinion on the issue of causation, the weight and credibility of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). As found, the opinions of Dr. Rauzzino are credible and more persuasive that the contrary opinions of Dr. Douthit.

D. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

E. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

F. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of*

Aurora, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

G. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). The medical reports submitted in this case along with Claimant's testimony and the testimony of Dr. Rauzzino outline persistent pain and functional decline as a consequence of a probable myelopathy caused by Claimant's slip and fall on February 28, 2014. Here, conservative care failed to yield long-term results leading Dr. Rauzzino to recommend surgical intervention to decompress the cervical spine. Before that surgery could be performed Claimant fell and injured her low back as a direct consequence of her myelopathy. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that the need for the surgical procedures performed by Dr. Rauzzino was related to Claimant's February 28, 2014 slip and fall. Moreover, the evidence presented persuades the ALJ that the procedures were reasonable and necessary given Claimant's continued pain and functional decline in the face of failed conservative care. Consequently, Respondents are liable for the costs of the care associated with Dr. Rauzzino's ACDF and kyphoplasty procedures.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her neck and low back injuries, but not limited to the ACDF and kyphoplasty procedures performed by Dr. Rauzzino on July 23, 2015.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For

statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 23, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant established by a preponderance of the evidence, that his 8% scheduled left shoulder impairment rating should be converted to 5% whole person impairment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On March 14, 2014, Claimant was working in his usual capacity as a lead foreman for Employer when he injured his right knee and left shoulder. Claimant's work crew was setting gables on a pole barn and he was using a 2 x 4 to pry a section of the building over to straighten the frame and set a gable when the 2 x 4 suddenly and unexpectedly snapped. Claimant pitched forward and fell onto his left arm/shoulder injuring it.

2. Claimant reported his injury, liability was admitted and he was referred to Emergicare where he was evaluated/treated by Douglas Bradley, M.D. Conservative care, including physical therapy failed to result in lasting symptom improvement. Consequently, Claimant was referred to Pueblo Imaging Center where an MRI of the left shoulder was performed on June 14, 2014. MRI revealed a "[l]arge full thickness retracted rotator cuff tear with subacromial and subdeltoid bursitis and glenohumeral joint effusion."

3. Claimant underwent left rotator cuff repair surgery on July 17, 2014, performed by Dr. Michael Simpson. Claimant returned to post surgical physical therapy (PT) at Arkansas Valley Regional Medical Centers (AVRMC) where he participated in therapeutic exercise. With additional PT, Claimant demonstrated sufficient improvement to warrant a return to modified work duty.

4. Physical therapy records from AVRMC from January 8, 13 and 15, 2015 indicate that Claimant complained of difficulty reaching behind his back and with overhead activities, including overhead use of tools. His pectoralis, teres, rhomboids and latissimus dorsi muscles were tight and tender.

5. As part of his treatment, Claimant participated in a Functional Capacity Evaluation (FCE) on January 14, 2015. During the FCE, Claimant demonstrated the ability to perform lifting from floor to knuckle and knuckle to shoulder in the medium duty

category.[1] Claimant also demonstrated the ability to carry 50 pounds with the left arm, placing him in the medium duty category. Pushing and pulling was graded at very heavy (over 100 pounds) and medium (50 pounds) respectively. High lift, meaning from shoulder and above was graded at light as Claimant demonstrated a maximum tolerable limit of 20 pounds.

6. Claimant was placed at maximum medical improvement (MMI) with permanent impairment by Dr. Bradley on February 1, 2015.

7. Respondents filed a Final Admission of Liability (FAL) consistent with the opinions expressed by Dr. Bradley concerning MMI and permanent impairment on February 17, 2015.

8. Claimant objected to the FAL and requested a Division Independent Medical Examination (DIME). Dr. William Watson performed the requested DIME on July 14, 2015. In a report dated August 31, 2015, Dr. Watson opined that Claimant had reached MMI on February 1, 2015 with 8% scheduled left upper extremity impairment.

9. On September 18, 2015, Respondents filed a FAL consistent with Dr. Watson's opinion regarding MMI and permanent impairment.

10. Claimant objected to the FAL and filed an Application for Hearing seeking additional Permanent Partial Disability (PPD) on the grounds that his 8% scheduled permanent impairment should be converted to 5% whole person as his injury has resulted in functional impairment of the left upper extremity extending beyond the arm at the shoulder.

11. Regarding the current condition of his left shoulder, Claimant testified it is "no where it was" prior to his March 14, 2014, injury. According to Claimant, he continues to have impaired strength and limited range of motion in the left shoulder. He testified that cannot push (lift) objects overhead like he used to and cannot reach his left hand behind his back in order to scratch it.

12. Claimant testified that after a heavy day of work he experiences tightness and aching pain in his chest, upper back and shoulder which his wife "rubs out." Nonetheless, Claimant has not sought additional formal treatment for his left shoulder since being placed at MMI and released from care. He does utilize chiropractic on his own, but agreed during cross examination that this care was not associated with his workers' compensation injury.

13. As noted above, Claimant was returned to light duty work following his injury. He made the transition to full duty work approximately January 20, 2015 and worked full duty for Employer until June 2015, when he quit to accept a position as a laborer for K.R. Swerdfeger. Based upon the evidence presented, the ALJ finds that Claimant

[1] Maximum tolerable lifting from floor to knuckle was 50# whereas maximum tolerable lifting from knuckle to shoulder was 40#.

worked in a full duty capacity for Employer for approximately 5 months before he quit to start work for K.R. Swerdfeger.

14. As noted, Claimant was working in his capacity as a lead foreman for Employer at the time of his injury. As a lead foreman, Claimant participated in the assembly of pole barns constructed from dimensional lumbar and 2 x 6 posts (columns) set in the ground. His duties required him to dig/shovel dirt, handle/manipulate building materials and climb ladders and/or girts, hand over hand, with a 20# tool belt to access the buildings trusses to nail purlins into place.

15. Claimant's immediate supervisor at the time of his injury confirmed the accuracy of Claimant's testimony concerning his work duties, noting further that the buildings Employer's crews constructed ranged from small 24 x 24 (foot) garages to large "ag" buildings with dimensions of 60 x 120 feet or larger.

16. Based upon the evidence presented, the ALJ finds Claimant's work for Employer was physically demanding and required substantial use of the upper extremities, including the shoulders.

17. During the approximate 5 months he worked full duty for Employer before quitting to start work for K.F. Swerdfeger, Claimant performed the full range of his job duties without assistance. He did not ask for assistance and never complained that he was unable to meet the physical demands of his job.

18. Nick Herron testified that the nature of the job Claimant performed probably made him sore at the end of the day; however, he noted that everyone was sore and that to his knowledge Claimant experienced "nothing out of the ordinary."

19. Claimant presently works as a laborer for K.F. Swerdfeger installing underground utility infrastructure, including gas and sewer lines. Claimant participated on a job in Estes Park installing heavy sewer pipe 6-8 inches in diameter and up to 20 feet long. Most recently, Claimant has been working to install gas lines in Pueblo West.

20. Claimant's work duties include digging, shoveling, and operating equipment. He uses various hand tools, i.e. nail guns, demo saws, ram guns, sledge hammers and spud bars to complete his job duties and he must be able to lift, push and pull up to 100 pounds. Claimant testified that while he is the oldest member of his work crew and cannot swing a sledge hammer and work a spud bar like the younger members of the crew, he has had no problems completing any of his assigned job tasks and is working full duty without assistance. Claimant also testified that his operators are very good, which precludes heavy shoveling and digging, but if necessary Claimant testified he could engage in such digging/shoveling, including digging the 2 x 2 x2 foot holes necessary for the current projects field work. Based upon the evidence presented, the ALJ finds Claimant's work with K. F. Swerdfeger physically demanding.

21. Claimant did not report that he had physical limitations to his current employer at

the time he was hired. Claimant has also never reported any pain/limitations regarding his shoulder or neck while working for K.F. Swerdfeger. According to Claimant, his current employer has no knowledge of his left shoulder condition.

22. Based upon the evidence presented, the ALJ finds Claimant's current left shoulder range of motion and strength deficits similar to those he reported in January 2015 during PT sessions at AVRMC. Despite his claimed limitations, the ALJ finds that Claimant has been able to work two physically demanding jobs one involving the construction of pole barns and the other installing gas and sewer lines, each requiring heavy use of the upper extremities. By his admission, Claimant preformed these jobs without limitation and/or complaint. Indeed, Claimant is currently working as a laborer digging/shoveling and using hand tools to install gas lines for K.F. Swerdfeger.

23. Claimant did not allege he preformed his work duties using his right arm only. Rather, he claimed entitlement to whole person impairment secondary to referred pain and tightness into body parts beyond the shoulder, i.e. the torso, neck and upper back. Consequently, the ALJ finds that in the past several months, Claimant, more probably than not, has used his left arm/shoulder to assist with or carry out activities such as lifting, digging, shoveling, climbing ladders/girts, and using hand tools.

24. The ALJ accepts as fact that Claimant's left shoulder, chest and upper back/neck may be tight and sore, especially at the end of a heavy work day. Nonetheless, the totality of the evidence presented, including Claimant's own testimony, persuades the ALJ that these conditions are not functionally impairing. Accordingly, Claimant has failed to establish that he has a "functional impairment" beyond the schedule which would entitle him to "conversion" of his scheduled impairment to impairment of the whole person.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. *Section 8-43-201, C.R.S.*

B. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The ALJ has considered these factors and concludes, based upon the totality of the evidence presented, that while Claimant sustained a serious injury to his left shoulder, his testimony fails to establish that that he has suffered any decreased capacity to meet his personal, social or occupational demands. Consequently, his assertion that he is entitled to conversion of his scheduled upper extremity impairment to whole person impairment is unpersuasive.

C. In accordance with Section 8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5. P3.d 385 (Colo. App. 2000).

Conversion

D. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S*. However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether a claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the shoulder.

E. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. On the other hand, disability or functional impairment, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.* Functional impairment need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7,2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Albertson's LLC, W.C. No. 4-692-947 (June 30, 2008*). Accordingly, "referred pain from the primary situs of the industrial injury to another part of the body may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005).* Nonetheless, *s*ymptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Consequently, the ALJ concludes that an injury to the structures which make up the shoulder may or may not result in functional impairment beyond the arm. See generally, *Walker v. Jim Fucco Motor Co, supra; Strauch v. PSL Swedish Healthcare System, supra; Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996)

F. Based upon the evidence presented, the ALJ finds that Claimant has failed to meet his burden to establish that he has sustained functional impairment beyond the arm at the shoulder warranting conversion of his scheduled impairment to impairment of the whole person. At hearing, Claimant testified that since his admitted shoulder injury he has experienced neck/upper back pain, pectoralis tightness/pain, difficulty reaching behind his back and using his left shoulder to lift objects overhead. Accordingly, Claimant asserts that he has functional limitations beyond the arm at the shoulder entitling him to an award of whole person impairment. The ALJ is not persuaded for the following reason: While Claimant may have pain and tightness beyond the shoulder into the neck, upper back and chest, these symptoms have not caused "functional impairment" or disability. Indeed, Claimant has worked two physically demanding jobs in the recent months which require substantial use of the upper extremities. While Claimant testified that his crew "looks out" for him when it comes to performing some duties, the ALJ concludes that any suggestion that he was incapable of carrying out some works tasks, based upon this testimony is substantially overstated given Claimant's testimony that he was and is working full duty without limitation and can perform all digging/shoveling tasks as necessary. As found, Claimant did not allege he preformed his work duties using his right arm only. Rather, he claimed entitlement to whole person impairment secondary to referred pain and tightness into body parts beyond the shoulder, i.e. the torso, neck and upper back. Consequently, the ALJ finds that in the past several months, Claimant, more probably than not, has used his left arm/shoulder to assist with or carry out activities such as lifting, digging, shoveling, climbing ladders/girts, and using hand tools.

G. Claimant's functional capacity, as demonstrated, substantially erodes his claims that he has functional impairment beyond the arm at the shoulder. While Claimant's left shoulder injury may cause referred pain to other body parts, such as his neck, upper back and chest while and after he engages in work activities, the injury has not resulted in any decreased capacity to meet his personal, social or occupational demands. Based upon a totality of the evidence presented, the ALJ concludes that the situs of Claimant's functional impairment does not extend beyond the arm at the shoulder. Consequently, the ALJ concludes that Claimant does not have functional loss that would support an award of permanent disability benefits as a whole person.

ORDER

It is therefore ordered that:

1. Claimant's request for conversion of her scheduled upper extremity impairment to impairment of the whole person is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 16, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant has established by clear and convincing evidence that she is not at maximum medical improvement (MMI) for her April 11, 2014 compensable injury;

2. If the claimant is at MMI, whether the claimant has overcome the impairment rating by the Division IME, Dr. Higginbotham, by clear and convincing evidence; and,

3. Whether the claimant has established by a preponderance of the evidence that she is entitled to additional reasonable, necessary, and related medical treatment.

FINDINGS OF FACT

1. On April 11, 2014, the claimant suffered a compensable industrial injury while working for the respondent-employer school district.

2. On that day, the claimant was standing outside, functioning as a monitor in a playground. A basketball struck the claimant in the right temple and apex of the skull. The claimant was knocked backwards and was caught by a nearby teacher. It was unknown whether or not the claimant suffered a loss of consciousness.

3. Approximately forty-five minutes after the injury occurred, the claimant reported to Premier Urgent Care. She was examined by Dr. Anjmun Sharma. The claimant reported symptoms of dizziness and right head symptoms-aching and burning. The claimant was diagnosed with a concussion and was referred for a CT scan. Dr. Sharma temporarily took the claimant off work until April 14, 2014.

4. The claimant returned to Premier Urgent Care on April 14, 2014. She reported nausea, vomiting, lightheadedness, difficulty sleeping, and headaches. Dr. Sharma referred the claimant for physical therapy and continued the claimant's release from work restrictions.

5. On April 16, 2014, the claimant returned to Dr. Sharma at Premier Urgent Care. The claimant reported symptoms of aching pain in her head, lightheadedness,

headache, front of face ache, nausea, difficulty focusing, trouble with balance, and trouble remembering things.

6. On April 21, 2014, the claimant returned to Dr. Sharma again reporting symptoms of difficulty focusing, nausea, headache, light headedness, dizziness, and pressure in her head. Dr. Sharma referred the claimant to vestibular rehabilitation at Balance Point. The claimant remained off work.

7. The claimant returned to Dr. Sharma on April 23, 2014, reporting similar symptoms as her previous visit of difficulty focusing, nausea, vomiting, headache, difficulty with balance, dizziness, and pain behind her eyes. Dr. Sharma noted that the claimant was improving despite her continuation of symptoms.

8. On May 1, 2014, Dr. Sharma noted that the claimant continued to have sensitivity to light, nausea, headache, and trouble with balance. The claimant reported that she vomited after dinner the night before. The claimant also noted that she was still experiencing headaches, dizziness, nausea, confusion, and when she tried to focus it triggers a headache, and ongoing trouble with balance. Dr. Sharma noted: "Anticipate a targeted return to work date on Monday May 12, 2014. Patient continues to make improvements. Speech improved less complaints of headache and dizziness. Must continue with vestibular rehab." Dr. Sharma noted the claimant was improving despite the claimant's continuation of symptoms.

9. On May 7, 2014, the claimant returned to Dr. Sharma reporting she was having a bad headache, dizziness, pressure in her head, having a hard time focusing, and feeling off balance. Dr. Sharma continued the claimant's "off work" work restrictions.

10. On May 9, 2014, the claimant returned to Dr. Sharma reporting headaches, dizziness, difficulty with balance, and difficult time focusing. Dr. Sharma released the claimant to return to work without restrictions.

11. The claimant returned on May 12, 2014 to Dr. Sharma. The claimant was taken off work again through May 21, 2014. Dr. Sharma noted "attempted return to work today 05/12//2014 but she was unable to tolerate extrasensory noise level."

12. On May 21, 2014, the claimant returned to Dr. Sharma. The claimant reported symptoms of headaches, dizziness, difficulty with balancing, difficult time focusing, nausea, pain in her eyes, sensitivity to light, and feeling of light headedness. Dr. Sharma continued the claimant's "off work" restrictions and referred the claimant to "Gleneagle Vision Center PC for Prism lenses to stabilize vestibular system."

13. On May 28, 2014, the claimant reported symptoms of ichiness from medications, trouble sleeping, headaches, light headedness, restlessness, and pressure in her head.

14. On May 29, 2014, Dr. Sharma noted that the claimant was "[u]nable to return to work as balance is still an issue. Making good improvements."

15. On June 13, 2014, the claimant returned to Dr. Sharma. The claimant reported on the pain diagram that she was experiencing headache's hasn't broken yet 2-5, pressure in head, light headedness, dizziness, balance motion, confusion, clumsiness, eyes hurt. The claimant also reported "Problems with memory, remembering past/present important information that I should know. Loss of time/loss of days. Seems or feels like first week of April. Several different times, I've woken up and not recognized my bedroom or where I was." Dr. Sharma noted that the claimant was "improving with time" despite the claimant's report of ongoing symptoms and reports of lost time.

16. On June 13, 2014, Dr. Sharma referred the claimant to neurology associates.

17. On June 20, 2014 the claimant again saw Dr. Sharma and reported headaches, lightheadedness, temporary darkness, dizziness, balance issues, sensory issues, and memory issues.

18. On June 21, 2014 the claimant reported she continued to experience a steady headache, nausea 3-4 times daily, lightheadedness with feelings of passing out daily, weakness, fatigue, dizziness, confusion, and spasms behind the eyes. Dr. Sharma then referred the claimant to Dr. David Reinhard at Colorado Rehabilitation and Occupational Medicine.

19. On June 30, 2014 the claimant met with Dr. Reinhard who recommended the claimant continue with physical therapy and referred her to Dr. Alan Lipkin of ENT for evaluation and treatment of dizziness "secondary to probable inner ear trauma."

20. On July 3, 2014 the claimant met with Dr. Lipkin for initial ENT evaluation.

21. On July 10, 2014 the claimant again visited with Dr. Sharma. She described symptoms of escalating headaches, lightheadedness, a feeling of off balance, dizziness, spinning, stumbling, confusion, issues remembering, and problems sleeping. Dr. Sharma continued the claimants "off work" restrictions until August 5, 2014.

22. A VGN examination with Dr. Lara Strotheide, audiologist, occurred on July 15, 2014 and indicated that the claimant had a vestibular stability pattern.

23. On July 18, 2014 the claimant had a follow-up with Dr. Lipkin regarding the testing with Dr. Strotheide.

24. On July 29, 2014 the claimant had a follow-up appointment with Dr. Reinhard.

25. The claimant attempted to work for about two weeks, however, her symptoms worsened and she could not return to work.

26. On August 29, 2014 the claimant again saw Dr. Sharma and reported symptoms of headaches, dizziness, eye spasms, "stabbing dull ache in head," nausea, lightheadedness, spinning, fatigue, lack of focus, confusion, and pressure in head. Dr. Sharma placed "off work" restrictions until September 8, 2014 after visit.

27. On September 2, 2014 the claimant had a follow-up visit with Dr. Reinhard.

28. On September 8, 2014 the claimant reported to Dr. Sharma symptoms of headaches, nausea, vomiting, lightheadedness, off balance resulting in a fall, light and noise sensitivity, and lack of focus. Dr. Sharma put the claimant on temporary restrictions until September 15, 2014.

29. On September 15, 2014 the claimant continued to report similar symptoms to Dr. Sharma. The claimant was still on temporary restrictions with Dr. Sharma stating she could return to work 3 hours per day for two days each week.

30. On September 25, 2014 the claimant had a follow-up appointment with Dr. Reinhard. Dr. Reinhard noted in his report that if the claimant's symptoms continued that they "may want to do a formal neuropsychological testing."

31. On October 8, 2014 the claimant again met with Dr. Sharma. She reported a steady ongoing headache since August 18th, which easily escalates, lightheadedness, and pain behind the eyes. Dr. Sharma continued work restrictions increasing to 5 hours of work two days per week.

32. On October 16, 2014 the claimant met again with Dr. Reinhard.

33. On October 31, 2014 the claimant continued to report similar symptoms to Dr. Sharma. Work restrictions remain unchanged with modified duty extended until November 7, 2014.

34. On November 5, 2014 the claimant had her initial consultation with neurologist Dr. Adams. Dr. Adams diagnosed the claimant with post concussive syndrome and occipital neuralgia. He recommended occipital nerve injections on the right, medications to include possible stimulants, vestibular therapy, cognitive behavioral therapy/psychotherapy/neuropsychology evaluation.

35. The next day, on November 6, 2014, the claimant reported to Dr. Sharma the following symptoms: steady headaches, eye spasms behind eyes, shooting pain in head (including stabbing, piercing, and dull all over, but especially the right side), nausea and vomiting, memory issues, slow responses, lightheadedness, dizziness, spinning, sensitivity to light/noise/darkness, fatigue, sleeping problems, and balance issues. Dr. Sharma then referred the claimant to an ENT and optometrist, as well as for an MRI Brain and cervical spine evaluation.

36. On November 15, 2014 MRIs of the claimant were conducted by PenRad Imaging.

37. On November 26, 2014 the claimant met with Dr. Reinhard for a follow-up, where the claimant reported ongoing cognitive challenges. Dr. Reinhard again mentioned in his report that the claimant "may need to undergo formal neuropsyological testing."

38. On December 10, 2014 the claimant continued to report similar symptoms as before to Dr. Sharma, including falling down twice since last visit. She also reported ringing in ears, that "brain is going blank," having trouble making choices and problem solving. She reported that her perception of surroundings, people, and time was off. Two days after that visit, Dr. Sharma concluded in his December 12, 2014 report that the claimant had reached MMI with no permanent impairment even though she had met with Dr. Reinhard merely weeks before and had appointment to see Dr. Saxerud for an eye examination.

39. On December 16, 2014 the claimant went for an appointment at Evenstar Internal Medicine. The progress note stated she had mild traumatic brain injury and "needs to get further testing including neurooptem."

40. The claimant underwent an eye examination on December 29, 2014 with Dr. Saxerud who reported the claimant's persistent convergence insufficiency. He found

“corpus labyrinthine movement with induce dizziness, undershoot on saccadic eye movements, and a moderately reduced near-point of convergence.” He provided prismatic lenses to the claimant.

41. On February 27, 2015 Dr. Trudy Wong submitted a Leave Request Form on behalf of the claimant and provided a detailed list of the claimants ongoing symptoms, including: memory problems, balance problems, steady headaches, difficulty understanding, confusion, slow response. Dr. Wong noted that the claimant had “decreased detailed work, decreased concentration.”

42. On March 3rd, 17th, and 24th, 2015 the claimant underwent a neuropsychological evaluation with Dr. Victor Neufeld. He provided a description of “multiple persistent postconcussive symptoms which have not resolved.” The claimant scored in the 8th percentile which may show a “decline from premorbid ability levels. These declines have most likely occurred in the areas of attention and processing speed.” Dr. Neufeld also opined that the claimant’s deficits would “make it difficult for her to work in a competitive employment situation due to significant reduction in her efficiency in processing information.”

43. The claimant underwent a division independent medical examination (DIME) on April 8, 2015 with Dr. Thomas Higginbotham. Dr. Higginbotham noted in his evaluation that the claimant was “unsure with her gait and stance,” had “difficulty with interpreting right-to-left,” and had “difficulties with balance.” Dr. Higginbotham could not make a determination of MMI at his time due to need for further medical records.

44. On June 5, 2015 Dr. Laurence J. Adams with CSNA neurosurgery & neurology opined that the claimant “demonstrates fairly marked amounts of inattention, mild anxiety without abnormalities on [scales] of malingering” This suggested that the claimant had a “concussion, traumatic brain injury, and post concussive syndrome with marked amounts on inattention.” He had previously recommended that the claimant have psychiatry consult with Dr. House, a psychology evaluation with Dr. Neufeld, cognitive rehabilitations, and continue work with Dr. Saxerud.

45. On July 7, 2015, the claimant saw PA-C Elizabeth Harmon at Colorado Springs Neurology Associates. PA-C Harmon noted that “[the claimant] continues to function quite slow from a cognitive perspective, which makes social interactions difficult. She has slurring and disfluency of speech. She has had several episodes of suddenly not knowing where she was or what she was doing although these have resolved fairly quickly. At this point she is unable to work.” PA-C Harmon felt that the

claimant would benefit significantly from cognitive rehabilitation because the claimant was most bothered by cognitive and speech problems.

46. On July 28, 2015 Dr. Higginbotham continued his DIME evaluation, assigning an MMI of the initial DIME evaluation date, April 8, 2015, after having requested additional medical records and noting that Dr. Sharma may be unaware of the claimant's "recent specialty evaluations that appear to support mild traumatic brain injury sequela." Dr. Higginbotham then provided "no mental/behavioral impairment" and gave an impairment rating of 10% of the whole person for complex integrative cerebral function disturbance.

47. The claimant underwent additional eye exams on June 10, 2015, July 9, 2015, and August 27, 2015.

48. On August 20, 2015 Dr. Wong again recommended that the claimant have a temporary leave of absence from work as there was no significant improvement regarding her mild traumatic brain injury.

49. On September 21, 2015, the claimant underwent a Brain SPECT and Assessment at CereScan. The claimant presented with the following reported symptoms:

> Balance problems, blurred vision, cognitive decline or changes, cognitive function problems, confusion, decreased judgement, difficulty following instructions, difficulty integrating information, difficulty learning new things, difficulty performing familiar tasks, difficulty with concentration, disorganization, disorientation to time and/or place, distractability, fatigue, frequent dizziness, frequent headaches, grief, involuntary tics and tremors, irritability, long-term memory problems, losing things, loss of appetite, loss of interest in things, loss of motivation, nausea, performance anxiety, personality changes, problems paying attention, problems with abstract thinking, problems with language/word finding, ringing in ears, sensitivity to light, sensitivity to sound, short-term memory problems.

50. The Brain SPECT scan was interpreted by Dr. Gregory Hipskind, MD, PhD. Dr. Hipskind's impressions were that this was an abnormal SPECT study which demonstrated focal areas of abnormal cortical hypoperfusion in the frontal, temporal, occipital and cerebellar lobes. Dr. Hipskind noted that the frontal/occipital findings are suggestive of a coup/counter coup mechanism of injury. Dr. Hipskind noted that there was also focal areas of abnormal subcortical hypoperfusion in the anterior brainstem

and basal ganglia areas. There was also paradoxical cortical deactivation when performing concentration task.

51. Dr. Hipskind opined that:

> the nature, location, and pattern of these abnormalities is primarily consistent with the scientific literature pertaining to traumatic brain injury (TBI) and the patient's clinical history, as obtained, which was received after the blind review. Alternative considerations for these findings, such as neurodegenerative, neurovascular and tocis/hypoxic process were considered, but were considered to be less likely given the patient's age and clinical history, which was obtained after the blind review. Close correlation with the patient's entire medical history is advised.

52. The claimant began rehabilitative services with Memorial Hospital on September 30, 2015. The speech and language pathologist, Jacy Doumas, reported in the progress notes that the claimant's "speed of processing is delayed and pt is unable to repeat a phrase accurately."

53. The claimant had an IME performed by Dr. Bennett Machanic on December 23, 2015. Dr. Machanic notes in his report that the claimant had "a lot of problems answering questions…There are great delays in her responses, and when she responds, it appears apparent that she really does not understand what was asked or what is expected." Dr. Machanic also noted that the claimant's tandem gait is unsteady. Dr. Machanic assessed that the claimant has "mild posttraumatic encephalopathy residua" and at this time "may indeed be incapable of working due to her posttraumatic issues." Dr. Machanic stated that he was "not convinced that [the claimant was] truly at maximum medical improvement" and if she was then she would be eligible for a permanent partial impairment rating of 24% for the whole person. Dr. Machanic recommended that the claimant be given a trial of a "memory enhancing agent" and continue with ongoing speech therapy to "enhance coping skills."

54. Dr. Machanic testified at hearing that the SPECT scan confirms what he saw during the claimant's examination. He testified that the SPECT scan is used as a correlative device. "The correlation is very sound, in terms of that both [the SPECT scan and the clinical exam] show the evolution of eventual stabilization of a – a previous traumatic brain injury." Dr. Machanic testified that the results of the SPECT scan are absolutely consistent with the claimant's reported symptoms.

55. On cross examination Dr. Machanic conceded that the claimant is most likely at MMI and that his treatment recommendations would be maintenance treatment.

56. At hearing, the claimant testified that she requires help with her activities of daily living. She testified that she requires help with cooking because she has burned herself in the past. She testified that she is not able to drive. She testified that she has difficulty gripping and grasping and that she often drops objects. She testified that she has trouble writing and typing. She testified that she has trouble navigating the grocery store and often runs into the shelves. She testified that she requires assistance with running errands. The claimant testified that she needs help styling her hair. The claimant also testified that she has trouble with memory and understanding things. She testified that she has trouble with her speech.

57. At hearing, the claimant's husband, Jack, testified about the trouble that the claimant has performing her activities of daily living. He testified that the claimant is unable to drive per the doctor's orders. He testified that the claimant has trouble riding in the car for long trips. The claimant often lays down in the back seat when riding in the car. He testified that the claimant has trouble with cooking and has burned herself in the past. He testified that a big problem is that the claimant has difficulty with sleeping. He testified that the claimant has trouble walking and will often touch the wall while walking down the hallways.

58. At hearing, Dr. Mechanic was accepted as an expert in the field of neurology. Dr. Machanic testified that he has been practicing in the field of neurology since 1976. Dr. Machanic also testified that he is Level II Accredited.

59. Dr. Machanic testified that the SPECT scan confirms the symptoms that the claimant is experiencing. Dr. Machanic testified that the claimant would benefit from cognitive behavioral therapy, speech therapy, and treatment with medications. He testified that these treatments might improve her function and activities of daily living. He testified that these treatments are not going to cure the claimant.

60. Dr. Machanic testified that the claimant's permanent impairment is a 24% whole person. Dr. Machanic testified that he arrived at this impairment rating by looking at page 109 of the AMA Guides. He testified that based off his examination and review of the medical records he categorized several subcategories. He assessed a 5% impairment for language. He categorized a 10% for emotional dysfunction. A 10% impairment for headaches. A 10% impairment for sleep disturbances. Dr. Machanic testified that the most significant category was the complex integrated cerebral function. Dr. Machanic testified that a 10% impairment (which is what Dr. Higginbotham assessed) would be for a person who does not require any supervision. Dr. Machanic testified that even requiring minimal supervision would equate to a 20% impairment. Dr. Machanic testified that the claimant has a 20% impairment that category.

61. Dr. Machanic went on to testify that the claimant also has vestibular dysfunction, which is poor coordination and balance dysfunction. He referred to Table 1 on page 178. Dr. Machanic testified that the claimant had a class 2 on this table. Dr. Machanic testified that these impairments combined equate to a 24% whole person impairment.

62. Dr. Machanic testified that vestibular dysfunction means problems with balance. The claimant consistently reported problems with balance to every physician that has examined and treatment her.

63. Dr. Machanic testified that he disagrees with Dr. Higginbotham's impairment rating because "the claimant's integrated cerebral function negates the fact that she historically --- and, by the way, this is also documented – needs some degree of supervision. That changes the category right there. It goes directly from ten percent directly to 20 percent. And because that concept is in the guides, that is indicative of a more severe chronic problem. So, that – that's the rationale for going from ten to twenty." Dr. Machanic went on to testify that Dr. Higginbotham is also missing the impairment rating for balance, coordination, vestibular dysfunction. He testified that these problems are very real and were given a lot of attention throughout the entire course of her treatment. He noted that the claimant was evaluated by an ear, nose, throat doctor and underwent neurological and audiological testing.

64. Under the AMA Guides Appendix A, activities of daily living include self care (urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, eating); communication (writing, typing, seeing, hearing, speaking); normal living postures (sitting, lying down, standing); ambulation (walking, climbing stairs); travel (driving, riding, flying); nonspecialized hand activities (grasping, lifting, tactile discrimination); sexual function (having normal sexual function and participating in usual sexual activity); sleep (restful nocturnal sleep pattern); social and recreational activities (ability to participate in group activities).

65. Under the AMA Guides, a permanent impairment rating ranging between 20%-45% should be assessed if a person possesses complex regional cerebral function disturbances and needs supervision with activities of daily living.

66. The ALJ finds the claimant to be credible.

67. The ALJ finds Dr. Machanic's analyses and opinions to be credible and more persuasive than medical analyses and opinions to the contrary. Dr. Machanic's

impairment rating arises to a greater degree than a difference of opinion between he and Dr. Higginbotham and reveals that Dr. Higginbotham's rating is clearly erroneous.

68. The ALJ finds that the claimant has failed to establish that Dr. Higginbotham was clearly wrong in determining that the claimant reached MMI on April 8, 2015.

69. The ALJ finds that the claimant has established that Dr. Higginbotham was clearly wrong in assigning only a 10% whole person impairment rating.

70. The ALJ finds that the claimant has established that the correct impairment rating for the claimant is that found by Dr. Machanic; that is, 24% whole person.

71. The ALJ finds that the claimant has established that it is more likely than not that the claimant is in need of post-MMI medical maintenance treatment as recommended by Dr. Machanic.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in § 8-40-101, et. seq. C.R.S. (2015), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. § 8-40-102(1), C.R.S. Facts in a workers' compensation case must be interpreted neutrally neither in favor of the rights of a claimant nor in favor of the rights of the respondents. § 8-43-201, C.R.S. The Judges' factual findings concern only evidence that is dispositive of the issues involved: the Judge cannot address every piece of evidence that might lead to a conflicting result. *See Magnetic Engineering, Inc. v. ICAO*, 5. P.3d 285 (Colo. App. 2000).

2. When determining credibility the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness: and whether the testimony would have been contradicted and bias, prejudiced, or in any. *See Impure Prudential Insurance Co. v. Coin*, 57 P.2d 1205 (1936)

3. The findings of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. § 8-42-107(8)(c), C.R.S. "Clear and convincing" evidence is stronger than a preponderance, is unmistakable, and is free

from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.*, W.C. 4-595-741 (ICAO October 8, 2008). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools*, W.C. 4-782-625 (ICAO May 24, 2010).

4. The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). "[A] mere difference of medical opinion does not constitute clear and convincing evidence that the DIME physician's opinion is incorrect or in error." *Patterson v. Comfort Dental East Aurora*, W.C. No. 4-874-745-01 (ICAO February 14, 2014).

5. The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. The need for medical treatment may extend beyond the point of MMI where the claimant presents a preponderance of the evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

6. In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI, they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the Claimant's request for specific medical treatment the Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309- 217 (ICAO February 12, 2009).

7. Dr. Sharma credibly testified claimant was at MMI as of December 2014 due to her exhaustive and detailed treatment. Dr. Higginbotham thereafter found claimant to be at MMI after even more "extensive diagnostic and consultative evaluations post-MMI decisioning of Dr. Sharma of 12/12/2014." Although Dr. Machanic originally testified he did not believe claimant was at MMI, on cross-examination he admitted she was at MMI, and he could not say Dr. Higginbotham erred.

8. As found, the ALJ concludes that the claimant has failed to establish by clear and convincing evidence that the DIME physician, Dr. Higginbotham, was clearly wrong when he assessed the claimant to be at MMI as of April 8, 2015.

9. The ALJ concludes as found above that Dr. Higginbotham was clearly

wrong when he assessed that the claimant suffered a 10% combined impairment rating for her industrial injury of April 11, 2014.

10. Dr. Machanic's finding that the claimant required supervision to conduct her activities is credible and persuasive. Dr. Machanic's analyses and application of the AMA Guides is credible and persuasive.

11. As found, the ALJ concludes that the claimant has established by clear and convincing evidence that Dr. Higginbotham clearly erred in assessing the impairment rating of the claimant.

12. As found, the ALJ concludes that the claimant has established by a preponderance of the evidence that Dr. Machanic's impairment rating of a combined 24% is the correct rating.

13. The claimant requested authorization of medical treatment recommended by Dr. Machanic; specifically cognitive/behavioral therapy administered by a speech therapist, as well as being prescribed a memory enhancing drug or alerting agent. Dr. Machanic's ultimate testimony that the claimant was at MMI, and the ALJ's finding regarding same, renders such a request for post-MMI medical treatment.

14. The claimant must establish by a preponderance of the evidence that post-MMI medical treatment is reasonable and necessary to relieve the effects of the injury or prevent further deterioration. Dr. Machanic's analyses and opinions establish that the recommended treatments would assist the claimant in maintaining her level of function.

15. The ALJ concludes that the claimant has established by a preponderance of the evidence that the treatment recommended by Dr. Machanic is reasonable, necessary, and related post-MMI medical care.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request to overcome the DIME opinion as to MMI is denied and dismissed.

2. The respondents shall pay the claimant permanent partial disability payments based upon her impairment rating of 24% whole person.

3. The respondents shall pay for the claimant's post-MMI medical care as recommended by Dr. Machanic.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: March 17, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-948-326-01

ISSUES

1. Whether the claimant proved by a preponderance of the evidence that the right hip arthroscopy recommended by Michael R. Schuck, M.D. and Miguel Castrejon, M.D. is causally related and reasonably necessary to cure and relieve the claimant from the effects of her February 21, 2014 injury.

2. Originally, the claimant asserted the issue of whether the respondents were liable for penalties for unreasonably delaying and denying medical care pursuant to C.R.S. § 8-43-203. Subsequent to the hearing the claimant withdrew this issue.

FINDINGS OF FACT

1. The claimant was involved in a work-related motor vehicle collision on February 21, 2014 in El Paso County. The car in which the claimant was riding was T-boned on the driver's side.

2. The claimant immediately complained of right hip pain after the collision to paramedics and to emergency room physicians at Penrose St. Francis Hospital. In the motor vehicle collision, the claimant also injured her neck, back, and head.

3. Prior to the motor vehicle collision, the claimant had no significant hip issues. The claimant credibly testified at the hearing that prior to the motor vehicle crash, she has not sought any sort of medical treatment for right hip pain.

4. This is an admitted claim and the claimant received conservative treatment for her claimed injuries, including physical therapy and chiropractic care.

5. The claimant credibly testified that she has consistently complained of pain in her right hip that radiates into her right buttock and right groin area. The claimant's medical records confirm that the claimant has made consistent pain complaints about her right hip.

6. On July 30, 2015, the claimant was placed at MMI by her then ATP, Edwin Baca, M.D. with a 0% impairment rating.

7. On October 27, 2014, the claimant underwent a Division independent medical examination (DIME) with Timothy Hall, M.D. Dr. Hall assigned the claimant with a 17% whole person impairment rating and determined that the claimant was not at MMI. Dr. Hall found that a lot of the claimant's pain symptoms were focused with the hip and recommended that the claimant consult with an orthopedic surgeon for a possible labral tear.

8. When the claimant returned to Dr. Baca for more treatment on December 15, 2014, Dr. Baca opined that he had exhausted all interventional and conservative measures and could not help the claimant any further. Dr. Baca recommended that the claimant's care be transferred to another ATP and specialist.

9. Pursuant to Dr. Baca, request, the claimant transferred her care to Dr. Castrejon. Also, the claimant began to treat with Dr. Schuck, an orthopedic surgeon. On February 19, 2015, the claimant received a corticosteroid injection in her right hip. The injection provided mild improvement and some relief, but did not result in any lasting relief.

10. To rule out the claimant's back as a pain generator, the claimant underwent a lumbar corticosteroid injection.

11. Due to the results of the lumbar injection and a review of the claimant's hip MRI, Dr. Schuck determined that the claimant's pain symptoms were coming from the joint in her hip. Dr. Schuck suspected that the claimant had a more significant labral tear in her right hip than her MRI indicated. Consequently, Dr. Schuck recommended that the claimant undergo a right hip arthroscopy.

12. The claimant underwent hip surgery on May 20, 2015. As originally suspected, Dr. Schuck confirmed during the surgery that the claimant had a labral tear.

13. After the surgery, the claimant continued to complain of significant pain in her right hip. Consequently, Dr. Schuck recommended a second MRI of the claimant's right hip.

14. The MRI revealed objectively that the claimant had a recurrent tearing of her labrum. Dr. Schuck determined that the recurrent tear was consistent with the claimant's pain complaints and recommended a repeat arthroscopic procedure on the right hip.

15. Dr. Schuck made the request for the repeat arthroscopic procedure on October 6, 2015. The respondent-insurer denied the surgery and filed an application for hearing on the issue of whether or not the surgery was reasonable and necessary.

16. Dr. Castrejon, the claimant's ATP, believes there is sufficient documentation of medical necessity to support the treatment plan that is being recommended by both Dr. Schuck and Dr. Castrejon and should be covered under workers' compensation.

17. Dr. Failinger conducted an independent medical examination of the claimant on November 2, 2015. The claimant reported to Dr. Failinger, as she testified at the hearing, that the injections to her hip never provided relief, the surgery did not help with her hip pain, and her pain was diffused throughout her hip with no specific focal discomfort.

18. Dr. Failinger found that the repeat hip arthroscopy is not appropriate. He noted that: (1) the claimant symptoms have never been well defined to the hip and that her pain has always been diffused and nonspecific; (2) no injections to her hip, including diagnostic portion, have provided even temporary relief of her hip pain; and (3) while there apparently is some labral pathology, the surgery on May 20, 2015 did not provide any relief and she is worse off after the surgery. Based upon his findings, Dr. Failinger believed that the repeat surgery has a very low medical probability of helping the claimant's symptomatology.

19. The ALJ finds the analyses and opinions of both Dr. Schuck and Dr. Castrejon to be credible and more persuasive than medical analyses and opinions to the contrary.

20. The ALJ finds the claimant has established that it is more likely than not that the treatment recommended by Dr. Schuck is reasonable, necessary, and related to the claimant's industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-

40-102(1), C.R.S.

2. Pursuant to C.R.S. Section 8-42-101(1)(a), the Respondents are liable for medical treatment which is reasonable and necessary to cure or relieve the effects of an industrial injury. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d, 1337 (Colo. App. 1997). The question of whether a proposed treatment is reasonable and necessary is generally one of fact for determination by ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d, 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d, 251 (Colo. App. 1999).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions, the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Here, the claimant's surgeon, Dr. Schuck, and the claimant's ATP, Dr. Castrejon, have determined that the right hip surgery is reasonable and necessary to relieve the effects of the claimant's industrial injury.

5. The ALJ concludes that the analyses and opinions of both Dr. Schuck and Dr. Castrejon are credible and more persuasive than medical analyses and opinions to the contrary.

6. The ALJ concludes that the claimant has established by a preponderance of the evidence that the treatment recommended by Dr. Schuck is reasonable, necessary, and related to the claimant's industrial injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall authorize and pay for the surgery as recommended by Dr. Schuck.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: March 3, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that the 6-8 acupuncture treatments recommended by Authorized Treating Physician (ATP) Kristen D. Mason, M.D. are reasonable, necessary and causally related to her May 1, 2014 industrial injuries.

2. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recover penalties pursuant to §8-43-304(1), C.R.S because Claimant violated §8-43-503(3), C.R.S. by directing Mark H. Zacharewicz, Ph.D. to engage in a specific course of medical treatment.

FINDINGS OF FACT

1. Claimant worked for Employer in food delivery. On May 1, 2014 Claimant was making a delivery on her bicycle when she collided with another bicyclist on a bike path. She visited Concentra Medical Centers and was diagnosed with a concussion, a mild, traumatic brain injury and abrasions to her knee and hip.

2. On June 24, 2014 Claimant underwent neuropsychological treatment with Kevin J. Reilly, Psy.D. Dr. Reilly obtained a medical history from Claimant and administered psychological testing. He determined that Claimant possessed average to above average neuropsychological capabilities. However, Dr. Reilly concluded that the tests revealed significant non-organic factors for Claimant's symptoms.

3. On July 18, 2014 Claimant returned to Dr. Reilly for an examination. She apprised Dr. Reilly that she did not have a good relationship with counselor Joel L. Cohen, Ph.D. Claimant requested treatment through a prior female counselor. She also informed Dr. Reilly that she did not agree with her neuropsychological testing results. Dr. Reilly thus discharged Claimant from care through his practice.

4. After receiving treatment from additional providers, Kristin D. Mason, M.D. became Claimant's Authorized Treating Physician (ATP) in February 2015. She referred Claimant to various providers for additional treatment.

5. On May 29, 2015 Claimant underwent an independent neuropsychological examination with David W. Zierk, Psy.D. Dr. Zierk determined that Claimant suffered a mild traumatic brain injury as a result of her May 1, 2014 bicycle accident. He would have expected Claimant to have completely recovered within 90 days, but after one year she was still experiencing considerable and variable cognitive difficulties. Dr. Zierk attributed Claimant's continued psychological difficulties to factors that were not related

to her May 1, 2014 accident that included lack of robust psychological functioning, inadequate coping skills, passive orientation and a high intolerance for distress.

6. On July 31, 2015 Dr. Zierk drafted an addendum to his May 29, 2015 report. After reviewing surveillance video and additional documentation, Dr. Zierk determined that Claimant was capable of functioning at a higher level than she had portrayed to medical providers.

7. On September 2, 2015 Dr. Mason prescribed 6-8 acupuncture visits for Claimant.

8. On September 21, 2015 J. Trevor McNutt, M.D. performed a records review of Claimant's condition. He determined that she had suffered a very mild traumatic brain injury, abrasions to her knee and hip and posttraumatic headaches. Dr. McNutt concluded that Claimant no longer required chiropractic treatment and her current symptoms were not related to the May 1, 2014 bicycle accident. Because her current symptoms were caused by pre-existing psychological issues, Dr. McNutt reasoned that additional medical treatment was not necessary.

9. On October 12, 2015 Insurer received a letter from Patient Coordinator Gracie Patrick requesting prior authorization for a follow-up appointment with Mark Zacharewicz, Ph.D. Ms. Patrick specifically noted that Claimant was requesting a two-hour appointment with Dr. Zacharewicz in order to review Dr. Zierk's report and discuss the contents. The cost for the appointment would be $620.00. Insurer denied the prior authorization request.

10. On October 28, 2015 Claimant's counsel drafted a letter to Dr. Mason inquiring about medical treatment and physician referrals. Dr. Mason affirmed that Claimant required acupuncture to relieve her symptoms. She specified that acupuncture constituted reasonable and necessary medical treatment for Claimant's May 1, 2014 industrial injuries. Finally, Dr. Mason acknowledged that she had referred Claimant to Dr. Zacharewicz for reasonable, necessary and related treatment.

11. On December 16, 2015 Claimant underwent an independent medical examination with Dr. McNutt. After reviewing Claimant's medical records and conducting a physical examination, Dr. McNutt determined that Claimant had suffered a mild traumatic brain injury, abrasions to her knee and hip and posttraumatic headaches as a result of her May 1, 2014 bicycle accident. He noted that Claimant's symptoms had resolved and she did not require any additional medical treatment for her industrial injuries. Dr. McNutt concluded that Claimant likely reached Maximum Medical Improvement (MMI) around November 1, 2014 and does not have any functional limitations.

12. On January 7, 2016 Dr. Mason noted that she had ordered acupuncture treatment for Claimant but it had not yet been authorized.

13. Claimant testified at the hearing in this matter. She explained that she had previously undergone acupuncture treatment for her May 1, 2014 industrial injuries.

The treatment decreased her work-related symptoms and improved her functional abilities. Claimant thus seeks to undergo the additional 6-8 acupuncture treatments recommended by Dr. Mason.

14. Dr. McNutt testified at the hearing in this matter. He explained that Claimant's symptoms from the May 1, 2014 mild traumatic brain injury should have improved over time but have not. Relying on Dr. Zierk's reports, he noted that Claimant has had an atypical recovery. Dr. McNutt determined that Claimant's chiropractic treatment was not necessary or appropriate. Moreover, additional acupuncture treatment is not reasonable, necessary or related to Claimant's May 1, 2014 bicycle accident. Dr. McNutt explained that Dr. Mason did not consider Dr. Zierk's findings regarding Claimant's symptom magnification in determining Claimant's treatment. He summarized that Dr. Mason's continuing recommendations for Claimant's treatment are not reasonably, necessary or related to her May 1, 2014 industrial injuries.

15. Claimant has demonstrated that it is more probably true than not that the 6-8 acupuncture treatments recommended by ATP Dr. Mason are reasonable, necessary and causally related to her May 1, 2014 industrial injuries. On September 2, 2015 Dr. Mason prescribed 6-8 acupuncture visits for Claimant. Dr. Mason affirmed that Claimant required acupuncture to relieve her symptoms. She specified that acupuncture constituted reasonable and necessary medical treatment for Claimant's May 1, 2014 industrial injuries. Moreover, Claimant explained that previous acupuncture treatment decreased her work-related symptoms and improved her functional abilities. She thus seeks to undergo the additional 6-8 acupuncture treatments recommended by Dr. Mason.

16. In contrast, Dr. McNutt explained that Claimant's symptoms had resolved and she did not require any additional medical treatment for her industrial injuries. Dr. McNutt concluded that Claimant likely reached MMI around November 1, 2014 and does not have any functional limitations. He remarked that Dr. Mason failed to consider Dr. Zierk's findings regarding Claimant's symptom magnification in determining appropriate treatment. Dr. Zierk had attributed Claimant's continued cognitive difficulties to factors that were not related to her May 1, 2014 accident. Dr. McNutt summarized that Dr. Mason's continuing recommendation for Claimant's acupuncture treatment is not reasonably, necessary or related to her May 1, 2014 industrial injuries. However, Dr. Mason treated Claimant over a significant period of time and thoroughly evaluated her condition. Acupuncture treatment had alleviated some of Claimant's prior work-related symptoms and improved her functional abilities. Although Claimant may have exhibited psychological concerns unrelated to her industrial accident as detailed by Dr. Zierk, additional acupuncture treatment constitutes reasonable and necessary medical care related to Claimant's October 1, 2014 bicycle accident.

17. Respondents have failed to prove that it is more probably true than not that they are entitled to recover penalties pursuant to §8-43-304(1), C.R.S because Claimant violated §8-43-503(3), C.R.S. by directing Dr. Zacharewicz to engage in a specific course of medical treatment. On October 12, 2015 Insurer received a letter from Patient Coordinator Gracie Patrick requesting prior authorization for a follow-up

appointment with Dr. Zacharewicz. Ms. Patrick specifically noted that Claimant was requesting a two-hour appointment with Dr. Zacharewicz in order to review Dr. Zierk's report and discuss the contents. The cost for the appointment would be $620.00. An October 28, 2014 letter reflects that Dr. Mason acknowledged she had referred Claimant to Dr. Zacharewicz for reasonable, necessary and related treatment. The record simply reveals that Claimant sought a two-hour consultation with Dr. Zacharewicz to review and discuss Dr. Zierk's report. The request does not reflect that Claimant directed the type or duration of treatment or her degree of physical impairment. Accordingly, Respondents' request for penalties is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual

determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has demonstrated by a preponderance of the evidence that the 6-8 acupuncture treatments recommended by ATP Dr. Mason are reasonable, necessary and causally related to her May 1, 2014 industrial injuries. On September 2, 2015 Dr. Mason prescribed 6-8 acupuncture visits for Claimant. Dr. Mason affirmed that Claimant required acupuncture to relieve her symptoms. She specified that acupuncture constituted reasonable and necessary medical treatment for Claimant's May 1, 2014 industrial injuries. Moreover, Claimant explained that previous acupuncture treatment decreased her work-related symptoms and improved her functional abilities. She thus seeks to undergo the additional 6-8 acupuncture treatments recommended by Dr. Mason.

6. As found, in contrast, Dr. McNutt explained that Claimant's symptoms had resolved and she did not require any additional medical treatment for her industrial injuries. Dr. McNutt concluded that Claimant likely reached MMI around November 1, 2014 and does not have any functional limitations. He remarked that Dr. Mason failed to consider Dr. Zierk's findings regarding Claimant's symptom magnification in determining appropriate treatment. Dr. Zierk had attributed Claimant's continued cognitive difficulties to factors that were not related to her May 1, 2014 accident. Dr. McNutt summarized that Dr. Mason's continuing recommendation for Claimant's acupuncture treatment is not reasonably, necessary or related to her May 1, 2014 industrial injuries. However, Dr. Mason treated Claimant over a significant period of time and thoroughly evaluated her condition. Acupuncture treatment had alleviated some of Claimant's prior work-related symptoms and improved her functional abilities. Although Claimant may have exhibited psychological concerns unrelated to her industrial accident as detailed by Dr. Zierk, additional acupuncture treatment constitutes reasonable and necessary medical care related to Claimant's October 1, 2014 bicycle accident.

Penalties

7. Section 8-43-304(1), C.R.S. is a general penalty provision under the Act that authorizes the imposition of penalties up to $1000 per day where a party violates a statute, rule, or lawful order of an ALJ. *See Holliday v. Bestop, Inc.,* 23 P.3d 700, 705 (Colo. 2001). The term "order" as used in §8-43-304 includes a rule or regulation promulgated by the Director of the Division of Worker's Compensation. §8-40-201(15), C.R.S.; *see Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176, 177 (Colo. App. 2002). Section 8-43-304(1), C.R.S. also requires that the fine imposed is to be apportioned, in whole or in part, by the ALJ between the aggrieved party and the workers' compensation cash fund created in C.R.S §8-44-112(7)(a), C.R.S. except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed.

8. The imposition of penalties under §8-43-304(1), C.R.S. requires a two-step analysis. *See In re Hailemichael,* W.C. No. 4-382-985 (ICAP, Nov. 17, 2004). The

ALJ must first determine whether the disputed conduct violated a provision of the Act or rule. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623, 624 (Colo. App. 1995). If a violation has occurred, penalties may only be imposed if the ALJ concludes that the violation was objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 907 P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of an insurer's actions depends upon whether the action was predicated on a "rational argument based in law or fact." *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998). Factors considered in assessing the amount of the penalties are willful and wanton conduct, repeated failure to pay indemnity and medical bills, a systemic failure to provide written explanation for the non-payment, hardship on Claimant and punishment to deter future misconduct. See *Associated Business Products v. ICAO*, 126 P.3d 323 (Colo.App. 2005).

9. Respondents specifically request penalties pursuant to §8-43-503(3), C.R.S. because Claimant dictated medical care by directing Dr. Zacharewicz to engage in a specific course of medical treatment. Section 8-43-503(3), C.R.S. provides in pertinent part, that [e]mployers insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment."

10. As found, Respondents have failed to prove by a preponderance of the evidence that they are entitled to recover penalties pursuant to §8-43-304(1), C.R.S because Claimant violated §8-43-503(3), C.R.S. by directing Dr. Zacharewicz to engage in a specific course of medical treatment. On October 12, 2015 Insurer received a letter from Patient Coordinator Gracie Patrick requesting prior authorization for a follow-up appointment with Dr. Zacharewicz. Ms. Patrick specifically noted that Claimant was requesting a two-hour appointment with Dr. Zacharewicz in order to review Dr. Zierk's report and discuss the contents. The cost for the appointment would be $620.00. An October 28, 2014 letter reflects that Dr. Mason acknowledged she had referred Claimant to Dr. Zacharewicz for reasonable, necessary and related treatment. The record simply reveals that Claimant sought a two-hour consultation with Dr. Zacharewicz to review and discuss Dr. Zierk's report. The request does not reflect that Claimant directed the type or duration of treatment or her degree of physical impairment. Accordingly, Respondents' request for penalties is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for 6-8 acupuncture treatments as recommended by ATP Dr. Mason is granted.

2. Respondents' request for penalties because Claimant dictated medical care in violation of 8-43-503(3), C.R.S. is denied and dismissed.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 9, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. WC 4-954-413-03 & 4-985-426

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable right shoulder injury on March 15, 2014 during the course and scope of her employment with Labor Finders.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

3. . Whether Claimant has proven by a preponderance of the evidence that the right shoulder surgery recommended by Nirav Shah, M.D. is reasonable, necessary and related to her March 15, 2014 right shoulder injury.

4. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Labor Finders is a temporary employment agency that contracted with Huron Produce to provide temporary employees. Claimant worked for Labor Finders at the Huron Produce facility as a Cleaner. Her job duties involved cleaning bathrooms, offices and the dining area. Claimant's specific duties included keeping the floor clean of debris in the tomato-packing area, sweeping, mopping and ensuring boxes were properly stacked. Claimant also removed produce from plastic boxes.

2. Claimant stated that she earned $9.75 per hour while working for Labor Finders. She also received time and a half pay for working overtime in excess of 40 hours each week. Claimant noted that she earned a $50.00 annual bonus. Claimant's wage records reflect that she earned $6,638.88 for the 10 weeks preceding March 15, 2014. Including her annual bonus, Claimant earned an Average Weekly Wage (AWW) of $664.84. An AWW of $664.84 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

3. Claimant testified that in early March 2014 she was lifting two boxes of tomatoes weighing approximately 30 pounds when she experienced a "pop" in her right shoulder. She did not seek any medical treatment or miss any time from work as a result of the incident.

4. Claimant explained that on Saturday, March 15, 2014 she was cleaning a microwave oven in the kitchen with co-worker Maricela Morales near the end of her shift. While they were lifting the microwave oven, Claimant experienced pain and a "pop" in her right shoulder.

5. Claimant reported the microwave incident to Huron Produce Supervisor Francisco Carbajal aka "Kiko." She did not directly report her injury to Labor Finders. However, Huron Produce Manager Nathan Sheets relayed the incident to Labor Finders. Labor Finders then scheduled an appointment at the UCHealth Longmont Clinic for Monday, March 17, 2014.

6. On March 17, 2014 Claimant visited Andrew Klein, PA at the UCHealth Longmont Clinic for an evaluation. Claimant reported that she experienced pain in her right shoulder while mopping at work. She noted worsening right shoulder pain with overhead movement and lifting. A physical examination revealed pain with forward flexion and abduction greater than 90 degrees. PA Klein assigned Claimant five pound lifting and carrying restrictions. He also referred her to physical therapy.

7. On March 24, 2014 Claimant underwent physical therapy at Physiotherapy Associates. Claimant reported that approximately two Saturdays earlier she was lifting about 30 pounds and suffered a "pop" in her right shoulder. She continued to work, but approximately one week later she was moving a microwave oven and experienced another "pop of pain" in her right shoulder.

8. On May 5, 2014 Claimant returned to PA Klein for an examination. She reported improved range of motion and strength after one month of physical therapy. PA Klein assigned 10 pound lifting restrictions.

9. On May 13, 2014 Claimant returned to PA Klein and reported a 50% improvement in right shoulder symptoms. She reported continued shoulder popping and difficulties with overhead movements. PA Klein referred Claimant to Mindy Gehrs, M.D. for an examination and reassigned five pound lifting restrictions.

10. On June 4, 2014 Claimant visited Dr. Gehrs at the UCHealth Longmont Clinic for an examination. She reported some improvement with physical therapy but constant pain in the deltoid region of her right shoulder with episodes of popping and significant pain aggravated by backward reaching. Dr. Gehrs diagnosed Claimant with right shoulder impingement. Claimant underwent a subacromial injection with some immediate relief.

11. On June 19, 2014 Claimant underwent a right shoulder MRI. The MRI revealed a full thickness tear in the anterior aspect of the supraspinatous tendon near its insertion site.

12. Claimant subsequently visited Dr. Gehrs for an evaluation. Dr. Gehrs diagnosed Claimant with a right shoulder full-thickness rotator cuff tear of the supraspinatus. She referred Claimant for an orthopedic evaluation.

13. On July 3, 2014 Claimant visited Nirav Shah, M.D. for an orthopedic evaluation. Claimant reported that she had experienced a "pop" in her right shoulder while lifting a 30 pound box at work and then suffered increased pain during a lifting incident approximately one week later. After reviewing Claimant's right shoulder MRI,

Dr. Shah diagnosed Claimant with a full thickness tear of the rotator cuff at the supraspinatus. Based on the failure of conservative measures and symptoms consistent with a rotator cuff tear, Dr. Shah recommended right shoulder surgery. He specifically recommended a right shoulder arthroscopy, decompression, rotator cuff repair, distal clavicle excision and extensive debridement under her Workers' Compensation claim. Dr. Shah assigned work restrictions of no lifting, carrying, pushing or pulling in excess of five pounds.

14. Nolan Smith testified that he has been the Operations Director at Huron Produce for three years. In April 2014 Labor Finders' contract with Huron Produce ended. Claimant continued to work at Huron Produce but was employed by temporary employment agency Labor Max. She worked within her restrictions and avoided lifting heavy items. Claimant specifically denied lifting any 30 pound boxes after her March 15, 2014 right shoulder injury.

15. Mr. Smith explained that Claimant worked with restrictions for approximately one to two months after her March 15, 2014 injury. Claimant's restrictions were then lifted and she returned to full duty work. Claimant did not have any work restrictions from July 2014 until the end of the year.

16. Claimant testified that her right shoulder pain never ceased after the March 15, 2014 lifting incident. However, in approximately March or April 2015 Claimant requested a lighter duty position because of her continued right shoulder symptoms. Claimant denied that her right shoulder condition worsened while working for Labor Max. She acknowledged that she has experienced the waxing and waning of right shoulder symptoms since her March 15, 2014 injury.

17. On January 15, 2015 Claimant underwent an independent medical examination with John Hughes, M.D. Claimant reported that she initially injured her right shoulder when she was lifting a 30 pound box of product at work. She then was moving a microwave oven with a co-worker and suffered an increase in right shoulder pain. Dr. Hughes noted that Claimant's account was consistent with the medical records. He remarked that there were some discrepancies in Claimant's history of her injury because she initially stated that she developed right shoulder pain from mopping. However, Claimant subsequently gave a more detailed history that was consistent with her account at the independent medical examination. After reviewing medical records and conducting a physical examination, Dr. Hughes determined that Claimant suffered a "right shoulder sprain/strain with development of a rotator cuff tear involving the suprespinatus tendon" on March 15, 2014. He also determined that Claimant's medical treatment was reasonable, necessary and related to the March 15, 2014 right shoulder incident. Dr. Hughes remarked that Claimant had not reached Maximum Medical Improvement (MMI). Finally, he agreed with Dr. Shah's recommendation for right shoulder rotator cuff repair surgery.

18. On July 29, 2015 Claimant underwent an independent medical examination with John J. Raschbacher, M.D. Claimant reported that she injured her

right shoulder while moving a microwave oven to perform her cleaning duties at work on March 15, 2014. She denied any shoulder symptoms as a result of a mopping incident but noted that she had injured her right shoulder while carrying 30 pound boxes of produce a few weeks prior to the March 15, 2014 accident. After conducting a physical examination and reviewing medical records, Dr. Raschbacher diagnosed Claimant with a possible right rotator cuff tear. He determined that, because Claimant had presented "grossly different" histories to medical provides, he did not recommend "accepting her current complaints of right shoulder pain and the possible diagnosis of rotator cuff tear as clearly work-related in causation." However, Dr. Raschbacher summarized that he would reserve judgment "with respect to work-relatedness of the current complaints and also further delineating those current complaints by obtaining an MRI arthrogram of the shoulder at this time."

19. On August 30, 2015 Claimant underwent an independent medical examination with Lloyd J. Thurston, D.O. Claimant reported that on March 15, 2014 she injured her right shoulder while lifting a microwave oven with a co-worker in order to perform her cleaning duties. Approximately one week earlier Claimant had experienced a "pop" or pull in her right shoulder while lifting boxes of tomatoes. However, her symptoms resolved prior to the March 15, 2014 microwave incident. After reviewing Claimant's medical records and conducting a physical examination, Dr Thurston concluded that Claimant suffered an acute right rotator cuff injury during the course and scope of her employment with Labor Finders on March 15, 2014. He noted that Claimant has not responded to conservative treatment and has continued to experience significant right shoulder pain, popping, burning and weakness. Dr. Thurston commented that surgery was recommended but had not been performed. He summarized that, although Claimant "continues to complain of right shoulder pain since changing employers, the injury occurred [on March 15, 2014] and has not been exacerbated or aggravated by her current employer/employment."

20. Dr. Raschbacher testified at the hearing in this matter. He explained that Claimant has a full thickness tear of the supraspinatus tendon in her right shoulder. He explained that Claimant's March 15, 2014 injury gradually improved and her condition stabilized in the summer of 2014. Dr. Raschbacher remarked that Claimant reached MMI when her condition stabilized for nine months However, when she continued to work for Labor Max subsequent to July 2014 she had a flare-up of symptoms. Claimant's job duties for Labor Max from July 2014 through April 2015 aggravated her original industrial injury and caused her current symptoms. Accordingly, any future medical treatment would be related to the aggravation of her condition caused by her full duty work for Labor Max. He thus concluded that Claimant's need for right shoulder surgery was related to the aggravation of her condition while working for Labor Max. Nevertheless, Dr. Raschbacher acknowledged that Claimant's medical treatment prior to July 2014 was reasonable, necessary and related to her March 15, 2014 industrial injury while working for Labor Finders.

21. Claimant has established that it is more probably true than not that she suffered a compensable right shoulder injury on March 15, 2014 during the course and

scope of his employment with Labor Finders. On March 15, 2014 Claimant was cleaning and moving a microwave oven in the kitchen with a co-worker when she experienced pain and a "pop" in her right shoulder. In early March 2014 Claimant had been lifting two boxes of tomatoes weighing approximately 30 pounds when she experienced a "pop" in her right shoulder. Despite some minor inconsistencies in the medical records, the bulk of the evidence reveals that Claimant initially suffered a right shoulder incident at work and a recurrent injury on March 15, 2014 that precipitated medical treatment. After undergoing conservative treatment and physical therapy, an MRI revealed that Claimant had suffered a right shoulder full-thickness rotator cuff tear at the supraspinatus.

22. During an independent medical examination with Dr. Hughes, Claimant reported that she initially injured her right shoulder when she was lifting a 30 pound box of product at work. She then was moving a microwave oven with a co-worker and suffered an increase in right shoulder pain. After reviewing medical records and conducting a physical examination, Dr. Hughes persuasively determined that Claimant suffered a "right shoulder sprain/strain with development of a rotator cuff tear involving the suprespinatus tendon." He noted that there were some discrepancies in Claimant's history of her injury because she initially stated that she had developed right shoulder pain from mopping. However, Claimant subsequently gave a more detailed history that was consistent with her account at the independent medical examination. Dr. Hughes concluded that Claimant suffered an acute rotator cuff tear on March 15, 2014. Dr. Thurston also persuasively concluded that Claimant suffered an acute right rotator cuff injury during the course and scope of her employment with Labor Finders on March 15, 2014. He summarized that, although Claimant "continues to complain of right shoulder pain since changing employers, the injury occurred [on March 15, 2014] and has not been exacerbated or aggravated by her current employer/employment."

23. Dr. Raschbacher agreed that on March 15, 2014 Claimant suffered an acute right shoulder full thickness tear at the supraspinatus tendon in her right shoulder. However, he explained that Claimant's March 15, 2014 injury gradually improved and her condition stabilized in the summer of 2014. Dr. Raschbacher remarked that Claimant reached MMI when her condition stabilized for nine months However, when she continued to work for Labor Max subsequent to July 2014 she had a flare-up of symptoms. Claimant's job duties for Labor Max from July 2014 through April 2015 thus aggravated her original industrial injury and caused her current symptoms. However, Claimant credibly testified that her right shoulder pain never ceased after the March 15, 2014 lifting incident. In approximately March or April 2015 Claimant requested a lighter duty position because of her continued right shoulder symptoms. Claimant denied that her right shoulder condition worsened while working for Labor Max. She acknowledged that she has experienced the waxing and waning of right shoulder symptoms since her March 15, 2014 injury. Claimant's credible testimony, in conjunction with the persuasive opinion of Dr. Thurston, reflects that Claimant did not suffer a worsening of her right shoulder condition while working for Labor Max. She suffered an acute injury while working for Labor Finders and no additional incident occurred while Claimant was working for Labor Max that constituted an efficient intervening cause. Claimant was in a

weakened condition as a result of her March 15, 2014 right rotator cuff tear while working for Labor Finders. Her request for additional restrictions while working for Labor Max simply did not sever the causal chain originating from her right rotator cuff tear that occurred while she was working for Labor Finders on March 15, 2014.

24. Claimant has demonstrated that it is more probably true than not that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. Claimant received conservative medical treatment including physical therapy and diagnostic testing for her March 15, 2014 right rotator cuff tear. Dr. Hughes determined that Claimant's medical treatment was reasonable, necessary and related to her March 15, 2014 right shoulder injury. He remarked that Claimant has not reached MMI. Dr. Raschbacher acknowledged that Claimant's medical treatment prior to July 2014 was reasonable, necessary and related to her March 15, 2014 industrial injury while working for Labor Finders. Accordingly, the record reveals that Claimant has received reasonable, necessary and related conservative medical treatment for her March 15, 2014 right shoulder rotator cuff tear.

25. Claimant has proven that it is more probably true than not that the right shoulder surgery recommended by Dr. Shah is reasonable, necessary and related to her March 15, 2014 right shoulder injury. After reviewing Claimant's right shoulder MRI, Dr. Shah diagnosed Claimant with a full thickness tear of the rotator cuff at the supraspinatus. Based on the failure of conservative measures and symptoms consistent with a rotator cuff tear, Dr. Shah persuasively recommended right shoulder surgery. He specifically recommended a right shoulder arthroscopy, decompression, rotator cuff repair, distal clavicle excision and extensive debridement under her Workers' Compensation claim. Dr. Hughes agreed with Dr. Shah's recommendation for right shoulder rotator cuff repair surgery. In contrast, Dr. Raschbacher explained that any future medical treatment would be related to the aggravation of Claimant's condition caused by her full duty work for Labor Max. He thus concluded that Claimant's need for right shoulder surgery was related to the aggravation of her condition while working for Labor Max. However, the record reveals that Claimant suffered an acute right rotator cuff tear while working for Labor Finders on March 15, 2014. Based on the persuasive medical records of Drs. Shah and Hughes, Claimant's need for right rotator cuff repair surgery is reasonable, necessary and related to the March 15, 2014 incident.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For an injury to be compensable under the Act, it must “arise out of” and “occur within the course and scope” of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002); *In Re Lang,* W.C. No. 4-450-747 (ICAP, May 16, 2005). If the need for medical treatment occurs as the result of an independent intervening cause, then the subsequent treatment is not compensable. *Owens,* 49 P.3d at 1188. The new injury is not compensable “merely because the later accident might or would not have happened if the employee had retained all his former powers.” *In Re Chavez,* W.C. No. 4-499-370 (ICAP, Jan. 23, 2004). The determination of whether an injury resulted from an efficient intervening cause is a question of fact for the ALJ. *Id.*

7. As found, Claimant has established by a preponderance of the evidence that she suffered a compensable right shoulder injury on March 15, 2014 during the course and scope of his employment with Labor Finders. On March 15, 2014 Claimant was cleaning and moving a microwave oven in the kitchen with a co-worker when she experienced pain and a “pop” in her right shoulder. In early March 2014 Claimant had been lifting two boxes of tomatoes weighing approximately 30 pounds when she experienced a “pop” in her right shoulder. Despite some minor inconsistencies in the medical records, the bulk of the evidence reveals that Claimant initially suffered a right shoulder incident at work and a recurrent injury on March 15, 2014 that precipitated medical treatment. After undergoing conservative treatment and physical therapy, an MRI revealed that Claimant had suffered a right shoulder full-thickness rotator cuff tear at the supraspinatus.

8. As found, during an independent medical examination with Dr. Hughes, Claimant reported that she initially injured her right shoulder when she was lifting a 30 pound box of product at work. She then was moving a microwave oven with a co-worker and suffered an increase in right shoulder pain. After reviewing medical records and conducting a physical examination, Dr. Hughes persuasively determined that Claimant suffered a “right shoulder sprain/strain with development of a rotator cuff tear involving the suprespinatus tendon.” He noted that there were some discrepancies in Claimant’s history of her injury because she initially stated that she had developed right shoulder pain from mopping. However, Claimant subsequently gave a more detailed history that was consistent with her account at the independent medical examination. Dr. Hughes concluded that Claimant suffered an acute rotator cuff tear on March 15, 2014. Dr. Thurston also persuasively concluded that Claimant suffered an acute right rotator cuff injury during the course and scope of her employment with Labor Finders on March 15, 2014. He summarized that, although Claimant “continues to complain of right shoulder pain since changing employers, the injury occurred [on March 15, 2014] and has not been exacerbated or aggravated by her current employer/employment.”

9. As found, Dr. Raschbacher agreed that on March 15, 2014 Claimant suffered an acute right shoulder full thickness tear at the supraspinatus tendon in her right shoulder. However, he explained that Claimant’s March 15, 2014 injury gradually improved and her condition stabilized in the summer of 2014. Dr. Raschbacher remarked that Claimant reached MMI when her condition stabilized for nine months However, when she continued to work for Labor Max subsequent to July 2014 she had a flare-up of symptoms. Claimant’s job duties for Labor Max from July 2014 through April 2015 thus aggravated her original industrial injury and caused her current symptoms. However, Claimant credibly testified that her right shoulder pain never ceased after the March 15, 2014 lifting incident. In approximately March or April 2015 Claimant requested a lighter duty position because of her continued right shoulder symptoms. Claimant denied that her right shoulder condition worsened while working for Labor Max. She acknowledged that she has experienced the waxing and waning of right shoulder symptoms since her March 15, 2014 injury. Claimant’s credible testimony, in conjunction with the persuasive opinion of Dr. Thurston, reflects that Claimant did not suffer a worsening of her right shoulder condition while working for Labor Max. She suffered an acute injury while working for Labor Finders and no

additional incident occurred while Claimant was working for Labor Max that constituted an efficient intervening cause. Claimant was in a weakened condition as a result of her March 15, 2014 right rotator cuff tear while working for Labor Finders. Her request for additional restrictions while working for Labor Max simply did not sever the causal chain originating from her right rotator cuff tear that occurred while she was working for Labor Finders on March 15, 2014.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

11. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. Claimant received conservative medical treatment including physical therapy and diagnostic testing for her March 15, 2014 right rotator cuff tear. Dr. Hughes determined that Claimant's medical treatment was reasonable, necessary and related to her March 15, 2014 right shoulder injury. He remarked that Claimant has not reached MMI. Dr. Raschbacher acknowledged that Claimant's medical treatment prior to July 2014 was reasonable, necessary and related to her March 15, 2014 industrial injury while working for Labor Finders. Accordingly, the record reveals that Claimant has received reasonable, necessary and related conservative medical treatment for her March 15, 2014 right shoulder rotator cuff tear.

12. As found, Claimant has proven by a preponderance of the evidence that the right shoulder surgery recommended by Dr. Shah is reasonable, necessary and related to her March 15, 2014 right shoulder injury. After reviewing Claimant's right shoulder MRI, Dr. Shah diagnosed Claimant with a full thickness tear of the rotator cuff at the supraspinatus. Based on the failure of conservative measures and symptoms consistent with a rotator cuff tear, Dr. Shah persuasively recommended right shoulder surgery. He specifically recommended a right shoulder arthroscopy, decompression, rotator cuff repair, distal clavicle excision and extensive debridement under her Workers' Compensation claim. Dr. Hughes agreed with Dr. Shah's recommendation for right shoulder rotator cuff repair surgery. In contrast, Dr. Raschbacher explained that any future medical treatment would be related to the aggravation of Claimant's condition caused by her full duty work for Labor Max. He thus concluded that Claimant's need for right shoulder surgery was related to the aggravation of her condition while working for Labor Max. However, the record reveals that Claimant suffered an acute right rotator cuff tear while working for Labor Finders on March 15, 2014. Based on the persuasive medical records of Drs. Shah and Hughes, Claimant's need for right rotator cuff repair surgery is reasonable, necessary and related to the March 15, 2014 incident.

AWW

13. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

14. As found, Claimant stated that she earned $9.75 per hour while working for Labor Finders. She also received time and a half pay for working overtime in excess of 40 hours each week. Claimant noted that she also earned a $50.00 annual bonus. Claimant's wage records reflect that she earned $6,638.88 for the 10 weeks preceding March 15, 2014. Including her annual bonus, Claimant earned an AWW of $664.84. An AWW of $664.84 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable right shoulder injury during the course and scope of her employment with Employer on March 15, 2014.

2. Labor Finders is financially responsible for Claimant's reasonable, necessary and related medical treatment.

3. The right shoulder surgery recommended by Dr. Shah is reasonable, necessary and related to Claimant's March 15, 2014 right shoulder injury.

4. Claimant earned an AWW of $664.84..

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty

(20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 4, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-957-282-01

ISSUES

- Whether Claimant overcome the DIME by clear and convincing evidence?

- If not, whether Respondents are permitted to recoup the overpayment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was employed by employer as a warehouse man. He stocked orders for Employer. Claimant had been employed for three years by Employer when on June 11, 2014, he felt sore during the middle of his shift. He finished working that day and later reported his alleged injury. No specific incident that gave rise to his pain complaints.

2. Claimant was evaluated at Concentra Medical Centers and was diagnosed with a lumbar strain. Provider Nancy Strain prescribed physical therapy and medications and gave Claimant work restrictions.

3. On July 25, 2014, Claimant underwent an MRI. The radiologist concluded that there were mild degenerative disc changes at L4-L5, but no indication of an acute injury.

4. On August 27, 2014, Claimant saw Dr. Bryan Castro on an orthopedic referral. Dr. Castro examined Claimant and determined he was not a surgical candidate and that he should undergo a trial of injections. Dr. Castro did not find any neurological deficits on exam. He noted that Claimant had good range of motion. Dr. Castro made no specific treatment recommendations. Claimant continued to treat and remain off work.

5. On October 3, 2014, Dr. Allison Fall examined Claimant and found him to be neurologically intact. She performed injections but Claimant did not respond well and the injections were determined to be non-diagnostic and non-therapeutic.

6. On February 23, 2015, Claimant underwent an FCE. Claimant's effort was demonstrated to be valid and Claimant was placed in the medium to heavy work category.

7. On February 27, 2015, Dr. Fall placed Claimant at MMI. She assigned a 7% whole person rating comprised of a 5% Table 53II B rating plus 2% for loss of range of motion. Dr. Fall assigned maintenance care over the next six months including medication refills.

8. On March 17, 2015, Respondents filed an FAL admitting for this rating and awarded Claimant PPD in the amount of $21,327.30. These benefits were paid out by June 16, 2015.

9. Claimant elected to proceed to a DIME. On June 10, 2015, Dr. Lloyd Thurston performed the DIME. Dr. Thurston conducted a records review, physical examination, and took Claimant's history. Dr. Thurston recorded the onset of injury and Claimant's then-current symptoms. Dr. Thurston considered his range of motion measurements invalid. However, they were valid, but Dr. Thurston made a mathematical error in his calculations. The error was irrelevant, though, because Dr. Thurston opined that Claimant did not have a ratable impairment under Table 53 IIB of the *Guides*. And a ratable impairment must be found before any impairment rating can be given for reduced range of motion.

10. Dr. Thurston explained in his report that he disagreed with Dr. Fall's application of Table 53 IIB of the *Guides.* He opined that Claimant experienced a non-specific disorder of the spine. Dr. Thurston cited several low back pain medical treatises explaining his conclusions. He noted in his summary that the MRI did not show a specific acute injury and that the changes were age related minimal degenerative changes. Because he did not find a ratable injury, Dr. Thurston did not have Claimant return for range of motion testing. Dr. Thurston assigned a 0% impairment rating.

11. Claimant applied for Hearing to overcome the DIME.

12. On September 10, 2015, Dr. Fall submitted a follow-up report responding to Dr. Thurston's findings and opinions. Dr. Fall opined that Dr. Thurston's opinion that Claimant did not suffer a work related injury was "inconsistent with the medical records provided." She concluded, "in summary, I would say that I respectfully disagree with the opinion of Dr. Thurston. It has generally been agreed upon by the treating providers and myself that he did have a work-related injury. I believe that the impairment rating I assigned was reasonable and appropriate as related to the work-related injury." Dr. Fall did not opine that Dr. Thurston had erred, only that they disagreed.

13. On September 22, 2015, Claimant underwent an IME with Dr. Marc Steinmetz at Respondent's request. Dr. Steinmetz performed a record review, noted Claimant's initial care and low back strain diagnosis, and read Claimant's MRI showing mild degenerative changes. He noted the difference between Dr. Castro's recording of good range of motion and Dr. Fall's finding of lack of extension. Dr. Steinmetz reviewed both ATP Dr. Fall and DIME Dr. Thurston's ratings.

14. Dr. Steinmetz took Claimant's history, performed a physical exam, and measured Claimant's flexion and extension. In his medical opinion the MRI did not show an acute injury and he noted that Claimant had been observed lifting nearly seventy pounds. Dr. Steinmetz agreed with Dr. Thurston that Claimant's injury should

have resolved in a shorter period of time, and noted that the injections were non-diagnostic and non-therapeutic. As to the impairment rating, Dr. Steinmetz noted that Claimant displayed normal to inconsistent extension and flexion findings. Dr. Dr. Steinmetz did not detect any errors or misapplications of the rating tips or the *AMA Guides* in the DIME*.* He agreed that there was no specific disorder and thus the range of motion was moot.

15. On October 1, 2015, Claimant underwent an IME with Douglas Hemler, M.D. upon Claimant's request. Dr. Hemler assessed Claimant with an 8% whole person impairment rating and maintenance medical care in the form of ongoing medication, additional physical therapy, and 4-6 follow-up visits over an 18 month period. Dr. Hemler was critical of Dr. Thurston for not providing an explanation for Claimant's pain. In evaluating whether Table 53 II A. or B. applied, Dr. Hemler concluded

    - "There is a well documented date of injury/mechanism of injury."

    - Claimant had well defined localized tenderness.

    - Claimant's pain "could be from the left L5-S1 facet although injections in this regard have been equivocal."

    The ALJ finds each of these conclusions to be contrary to the preponderance of the evidence.

16. On December 9, 2015, Respondents took the post-hearing deposition of Dr. Thurston. Dr. Thurston explained that Claimant suffered myofacial pain complaints and that pain is not a ratable condition. Dr. Thurston persuasively opined that if Claimant had an injury, it was minor and in his opinion not ratable.

17. The ALJ finds the opinions of Dr. Fall and Dr. Hemler reflect a difference of medical opinion with the DIME but do not constitute clear and convincing evidence to overcome the opinion of the DIME physician. The ALJ finds the opinions of Dr. Fall and Dr. Hemler less credible and persuasive than the opinions of Dr. Thurston and Dr. Steinmetz.

18. Considering the totality of the evidence, the ALJ finds that Claimant has not met the burden of overcoming the Dime by a preponderance of the evidence.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

IMPAIRMENT and RATING

In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). Clear and convincing evidence means evidence which is stronger than a mere preponderance; it is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, supra. To further the public policy of speedy and just resolution of workers' compensation cases, the clear and convincing evidence standard should be systematically applied.

In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004). A mere difference of opinion between physicians fails to constitute error. *Garner v. Home Depot USA, Inc.*, W.C. No. 4-644-099 (July 23, 2008); *Villalobos-Chaparro v. Benny's Concrete*, W. C. No. 4-356-868 (Jan. 4, 2001).

A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

The dispute in this claim is whether or not there was ratable impairment. Both Drs. Steinmetz and Thurston agreed that while claimant had an injury, there was no ratable impairment and that Table 53 II B did not apply. Dr. Thurston credibly testified as to his reasoning in coming to his conclusions in the DIME. Dr. Steinmetz noted that there was no error or deviation from the *AMA Guides* or DOWC rating tips. Dr. Steinmetz noted that Dr. Hemler's critique of the DIME was flawed and gave his reasoning as to why the DIME should not be disturbed.

Dr. Thurston persuasively explained in his report and testimony why he concluded that Claimant did not have a specific disorder of the spine. Given the findings on MRI, mechanism of injury, and the non-diagnostic response to injections and other treatments, Dr. Thurston concluded that there was no indication of a specific injury for this claim.

Dr. Steinmetz noted that Dr. Hemler was incorrect in his criticism of Dr. Thurston for relying upon journals and treatises in his report. As Dr. Steinmetz explained, it is the duty of the DIME physician to substantiate any differences in a rating. In this case, Dr. Thurston properly substantiated why and how he concluded that there was no ratable impairment for claimant. The *AMA Guides* mandate that when the DIME physician has a substantially different rating from the ATP, the physician must explain how they came to a different conclusion. In this case, Dr. Thurston properly explained how he concluded claimant did not sustain a specific disorder to his spine. He not only relied upon the treatises that he listed, but the degenerative changes on the MRI and the inconsistent range of motion measurements.

This case appears to involve a difference of opinion as to whether or not Claimant sustained a ratable impairment. Dr. Steinmetz agreed that Dr. Thurston used the correct methodology in classifying this case under Table 53 IIA versus IIB. Dr. Steinmetz opined, and Dr. Thurston concurred, that the examining physician has discretion in a case such as this as to which table to apply. Dr. Steinmetz testified that this was not abuse of discretion, in that there was no sign, as Dr. Thurston explained, of an acute injury, i.e. there was no specific disorder of the spine. This is substantiated by the medical record and Claimant's FCE.

Dr. Steinmetz agreed with Dr. Thurston that Claimant's was a minor injury which should have resolved in six to eight weeks. He also agreed that there was no acute change on MRI. Dr. Steinmetz noted in his testimony that the inconsistent range of motion as well as the non-diagnostic results of the injections supported Dr. Thurston's conclusions. Dr. Steinmetz credibly testified that the use of 53 II A or B was a difference of opinion and Dr. Hemler was incorrect to assert that II B was the "only" table that should have been applied. Dr. Thurston credibility explained his conclusions, and as Dr. Steinmetz' noted, Dr. Hemler's critique is flawed on multiple counts. The DIME report has not been overcome by clear and convincing evidence and will not be disturbed.

ENTITLEMENT to OVERPAYMENT

Pursuant to § 8-40-201(15.5), C.R.S., "three categories of possible overpayment are included in the statutory definition: one category is for overpayments created when a claimant receives money 'that exceeds the amount that should have been paid'; the second category is for money received that a 'claimant was not entitled to receive,' and the final category is for money received that 'results in duplicate benefits because of offsets that reduce disability or death benefits' payable under articles 40 to 47 of title 8. § 8-40-201(15.5)." *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354, 359 (Colo. App. 2009), *rev'd in part on other grounds, Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010). An overpayment does not have to exist at the time the monies are received. *Grandstaff v. United Airlines,* W.C. No. 4-717-644 December 12, 2013.

This case is analogues to *In re Marquez,* 080714 COWC, 4-896-504-04, August 7, 2014. In *Marquez*, as here, the claimant received an admitted PPD rating from the ATP which the insurer admitted to, followed by the claimant electing to challenge the impairment rating via a DIME. That case also resulted in the claimant receiving a lower impairment rating at the DIME. There is an inherent risk in going to a DIME in that it is within the DIME physicians' prerogative to assign a lower impairment rating. At that point it becomes the statutory duty of the Insurer to either admit or challenge the DIME. By asserting the right to admit to the DIME with a lower impairment rating, the PPD previously paid becomes an overpayment and thus creates Respondents right to recovery. Thus, Respondents are entitled to recoup the overpayment of $21,327.20.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has not sustained his burden and the DIME shall not be disturbed.

2. Respondents are entitled to recoup the overpayment of $21,327.20.

3. Issues not expressly decided herein are reserved to the parties for future determination.

4. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 7, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination are as follows:

1. Did Respondents prove by a preponderance of the evidence there was sufficient evidence to prospectively withdraw their General Admission of Liability ("GAL").

2. Whether the chondrocyte implantation surgery recommended by Dr. Papilion is reasonable, necessary and related to the Claimant's injury.

FINDINGS OF FACT

1. Claimant's medical history was significant in that she had a prior injury to her left knee in 2004, which required surgery. This was a work-related injury sustained while working for Disney on Ice and she was treated by John Reister, M.D. She underwent an arthroscopy and developed a staph infection for which she required treatment. In particular, she required three arthroscopic procedures to eliminate the staph infection from the knee. Claimant testified she recovered fully from the 2004 injury, including the surgeries and complications. She was able to perform her duties for Employer without difficulty.

2. On March 22, 2004, an MRI was done on Claimant's left knee, which was read by Steven Hughes, M.D. Dr. Hughes' impression was small nonspecific joint effusion; edema seen in the soft tissues, anterior to the patella, anterior to the patellar tendon and the distal patella could relate to repetitive microtrauma and overuse or could relate to focal acute trauma; minimal mucoid degenerative signal change in the body and posterior horn of the medical meniscus, but no evidence of meniscal tear. The ALJ notes Dr. Hughes felt the effusion and edema could be related to repetitive injuries or focal acute trauma.

3. On April 13, 2004, Claimant underwent another MRI in Texas. Dr. Andrew Bauer read the films and his impression was no evidence of internal derangement; no other evidence of significant pathology on this MRI. There was no evidence of bone contusion or joint effusion.

4. The ALJ notes there was no reference to a defect or lesion present in the lateral femoral condyle in the 2004 MRI-s.

5. An MRI was also done on March 22, 2006, after Claimant underwent surgery performed by Dr. Reister for the staph infection and sepsis. The films were read by William Dunfee, M.D., whose impression was minimal myositis involving the vastus lateralis and medialis muscles; no drainable abscess or fluid collection; probable

reactive marrow changes to the weight bearing surface of the lateral femoral condyle; and more patchy edema extending to the articular surface at the level of the tibial spines. Dr. Dunfee felt this edema represented infection extending along the distal attachment of the ACL. The ALJ notes that Dr. Dunfee did not describe a large lesion or defect in the lateral femoral condyle.

6. Claimant also experienced of knee pain in May 2007 while running after a small dog. She was examined by Dr. Reister on May 31, 2007. No effusion was noted, but Claimant had a loss of flexion and extension. Claimant was treated with anti-inflammatory medications. There was no evidence before the ALJ that she required treatment for her left knee from June 2007 to August, 2014 after this appointment with Dr. Reister.

7. Claimant worked for Employer as a stagehand, loading and unloading concert equipment. Claimant testified that she was involved in a work-related incident on August 18, 2014. Claimant was "loading out" equipment after a Bruno Mars concert at the Fiddler's Green Amphitheatre. Claimant testified she was injured in the early morning hours of August 18, 2014. Specifically, she and a co-employee took three (3) confetti cannons (weighing approximately 300 lbs[1]) down a ramp to a loading dock. She was on one side and felt something happen to her left knee in between moving the second and third cannons. Her knee then gave out. Claimant stated she did very little in the way of moving heavy equipment for the rest of the evening, as her knee hurt.

8. Claimant told a co-worker about the incident that evening. She called her supervisor the next day, as her knee was swollen.

9. After she spoke to her supervisor, Claimant was sent to Littleton Adventist Hospital on 8/18/14. The nurse's note described the injury as follows: "PT PRESENTS TO ED WITH C/O OF LT KNEE PAIN. PT STATES UNK OBVIOUS TRAUMA BUT WAS CARRYING HEAVY BOXES AT WORK WHEN KNEE GAVE OUT." Further down in the record, it was noted: "Patient reports that yesterday while she was at work she felt her knee 'give out'." Claimant was examined by Sarah Foss PA-C and Ashley-Alpana Rawloo Pekoo, M.D. was identified as the attending physician. There was no significant swelling, but a small effusion was present. X-rays of the knee were negative for fracture or dislocation. She was given a knee immobilizer and referred to an orthopedic surgeon.

10. Claimant completed an Employee Accident Report on August 19, 2014. When describing how the accident occurred: she said "Take confetti cannon down ramp to loading dock 3 times. The knee gave out standing."

11. On August 20, 2014, Claimant was evaluated by Nancy Strain, D.O. at Concentra, the ATP for Employer. The description of the injury was:"This is the result of twisting and Her knee gave way after a lot of walking on an incline at Fiddler's Green".

[1] Claimant testified she originally estimated the weight of a confetti cannon to be approximately 200 lbs, but looked it up and found that a confetti cannon weighed almost 300 lbs.

Dr. Strain's assessment was left knee strain and left knee effusion. Claimant was given work restrictions. The ALJ infers Dr. Strain believed the injury was work related.

12. An MRI was done on Claimant's left knee on September 3, 2014, which was read by Robert Leibold, M.D. Dr. Leibold's impression was focal cartilage loss within the central weight-bearing portion of the medial femoral condyle measuring 8X5mm in diameter, which may be a "chronic defect"; and probable small non-displaced horizontal cleavage tear of the anterior horn of the lateral meniscus. On September 5, 2014, Claimant was seen by Nancy Okamatsu, who diagnosed a left knee effusion and sprain. FNP Okamatsu referred Claimant for an orthopedic consult.

13. On September 18, 2014, Claimant was evaluated by Mark Failinger, M.D. She reported pain on the inner side of her knee and deep in the front. On examination, Dr. Failinger found no effusion in the left knee, full extension and flexion to 130 degrees. Claimant had medial joint line pain and mild retropatellar crepitation. Dr. Failinger noted the MRI showed chondromalacia with focal cartilaginous loss in the medial femoral condyle and smaller change of symptomatic later meniscus tear. Dr. Failinger did not believe a scope was the best option, but if there was no improvement, he recommended viscosupplementation.

14. Claimant was seen by Evan Schwartz, M.D. at Concentra on September 25, 2014, complaining of "moderate" aching pain in her left knee. Mild anterior, posterior, medial and lateral tenderness was noted with flexion and palpation. No laxity was found. Dr. Schwartz' assessment was knee effusion and left knee sprain. He referred Claimant to an orthopedic surgeon for a second opinion because she continued to experience pain and swelling.

15. On October 2, 2014, John Papilion, M.D. examined Claimant and documented her history including the prior surgery and subsequent infection. Dr. Papilion reviewed her MRI from 2005 and did not visualize any chondral defect nor meniscal pathology. He noted she walked with an antalgic gait. Claimant reported her symptoms were worsening and she wore the brace full-time. Dr. Papilion found no effusion, but noted moderate subpatellar crepitus and positive grind test. Dr. Papilion's assessment was post-traumatic high-grade partial-thickness chondral defect on weightbearing surface of medial femoral condyle, left knee. He recommended consideration of arthroscopy with chondroplasty and possible microfracture arthroplasty.

16. Insurer filed a GAL on October 14, 2014 admitting for medical benefits only.

17. Dr. Papilion saw Claimant in follow-up on November 13, 2014, at which time her symptoms were noted to be about the same. Dr. Papilion reviewed the records related to Claimant's arthroscopies in 2006-07 and noted there was no evidence of a chondral defect in those records. He recommended surgery.

18. Dr. Papilion performed arthroscopy partial medial menisectomy and chondroplasty on the Claimant's left knee on January 5, 2015. Dr. Papilion performed a

biopsy of the trochlea in anticipation of future chondrocyte implantation, as the chondral lesion was too large for a microfracture procedure. He requested authorization from the carrier for this surgery. In his operative report, Dr. Papilion stated the injury was work-related, although he incorrectly noted it occurred in June, 2014 rather than August. He found a full thickness chondral defect on the weight-bearing surface of the medial compartment. This was not seen on the prior MRI from 2004. Dr. Papilion noted the medial meniscus had a complex degenerative-type tear in the posterior horn, which was smoothed. The ALJ finds the arthroscopy performed by Dr. Papilion was reasonable and necessary given Claimant's pain complaints and the presurgical concern for a meniscal tear.

19. Dr. Papilion authored a letter to Dr. Schwartz (dated January 15, 2015) in which he summarized the surgery performed on Claimant's left knee and noted authorization was requested from the carrier for the autologous chondrocyte implantation. Claimant's work restrictions were sedentary. Dr. Papilion described this as a "reasonable" course of treatment[2]. The ALJ infers that Dr. Papilion recommended this procedure to increase Claimant's function and reduce her symptoms. Dr. Papilion did not offer an opinion whether Claimant would have developed the chondral lesion as result of her prior injury, staph infections and multiple arthroscopies.

20. Claimant testified the arthroscopic procedure did not relieve her symptoms. She wishes to undergo the surgery Dr. Papilion recommended. Claimant was scheduled to return to Dr. Papilion on 1/29/15, but that record was not introduced.

21. Timothy O'Brien, M.D. conducted a review of the Claimant's medical records at the request of the Respondents and authored a report, dated February 16, 2015. He did not interview or examine Claimant. Dr. O'Brien opined there was no work-related injury, rather the pain was a result of her personal health. In support of this, he cited Dr. Fallinger, who noted Claimant did not fall or twist but that the knee just gave out. Dr. O'Brien also stated that Dr. Papilion's records referred to "pain that resulted from walking up and down an incline at Fiddler's Green" that made the Claimant's knee feel like it was giving way. Dr. O'Brien said there was no sign of a trauma but rather a degenerative condition was causing Claimant's knee pain[3]. Dr. O'Brien stated there was no reference to any effusion[4] or hemarthrosis was an indication there was no acute injury. The ALJ notes Dr. O'Brien did not consider the specific question of whether moving an object the size of a confetti cannon could aggravate or accelerate the degenerative changes in Claimant's knee. Also, Dr. O'Brien did not have the 2006 medical records when he authored this report.

[2] The autologous chondrocyte implantation procedure was described as the best treatment option and potentially the only long-term option by Dr. Papilion's surgical case manager in the letter requesting authorization of the procedure. A review by a board-certified orthopedic surgeon was requested for the medical necessity and appropriateness of the proposed procedure. (See Exhibit pp. 12-13.)

[3] Dr. O'Brien apparently did not have the Littleton Adventist Hospital records or the initial Concentra records, which provided more detail regarding Claimant's injury.

[4] The ALJ notes there were references to a knee effusion in the aforementioned records.

22. On the issue of whether the autologous chondrocyte implantation procedure was needed, Dr. O'Brien opined it was reasonable to recommend the surgery, but felt the results could be unpredictable. Dr. O'Brien said there was no scientific evidence which indicated the surgery would be successful because Claimant was 41 years old and had a history of nicotine abuse and multiple prior arthroscopies. The ALJ notes Dr. O'Brien believed the proposed procedure was reasonable, but disagreed the 8/18/14 industrial injury aggravated or accelerated Claimant's condition in such a way that she required surgery. As referenced *infra,* Dr. O'Brien's testimony provided additional information as to why he felt degenerative changes led to Claimant's need for surgery.

23. On September 21, 2015, Christopher Ryan, M.D. performed an IME at the request of Claimant's counsel. Dr. Ryan noted Claimant denied having any problems with her knee from the time her earlier condition resolved and the injury in August, 2014. Dr. Ryan reviewed photos of where Claimant was working at Fiddler's Green which showed a long downhill ramp and a steep uphill ramp to the loading dock. Dr. Ryan opined that the act of moving the 300 lb. cannons down the ramp and up onto the loading dock was what caused Claimant's injury. Dr. Ryan opined Claimant would not have been able to do the relatively heavy work that she performed for Employer if she had this injury prior to August, 2014. The ALJ credited Dr. Ryan's opinion that moving the confetti cannons could have caused an injury to Claimant's knee.

24. Dr. Ryan also commented on Dr. O'Brien's opinion that Claimant's work activities could not have caused the injury. After looking at the pictures of the ramps and hearing the description of moving the 300 pound loads by Claimant, Dr. Ryan felt some of the medical records did not accurately describe what occurred on the day of the injury. He said that it was not merely a matter "a lot of walking" that caused the Claimant's knee to give way. He also took issue with Dr. O'Brien's conclusion that it was probable that the chondral defect of the medial femoral condyle was present in 2006. Dr. Ryan pointed out the MRI from that time did not show such a defect.

25. Dr. O'Brien issued a supplemental record review dated October 5, 2015, in which he reviewed additional medical records from both prior to and after the injury. Dr. O'Brien believed the records which were more contemporaneous with Claimant's injury established she was not pushing confetti cannons at the time, but rather was only walking when her knee gave out[5]. He opined the report of injury given Dr. Ryan by Claimant constituted "revised historical input". Dr. O'Brien stated the additional medical records he reviewed supported his position that this was a pre-existing condition. Dr. O'Brien's credibility was diminished on this point since Claimant reported how she was injured within 24 hours, as well as by the fact he did not examine Claimant and take a history directly from her.

[5] Claimant reported her movement of the confetti cannons as the cause of her injury in 8/19/14 Employee Accident Report [Exhibit 11], which was prepared immediately after this incident. Dr. O'Brien did not address this document, which would appear to meet the contemporaneous requirement.

26. Dr. O'Brien testified as an expert in orthopedic surgery, the specialty in which he was board-certified. Dr. O'Brien was Level II accredited pursuant to the W.C.R.P. Dr. O'Brien estimated he has performed five thousand (5000) knee surgeries over the course of his career and three thousand (3000) of those were knee replacements. Dr. O'Brien opined Claimant did not have an acute osteochondral or chondral injury. If that had been the case, Claimant would have experienced an immediate onset of pain, swelling and dysfunction. In support of this opinion, Dr. O'Brien noted the 9/3/14 MRI showed edema which was peripherally distributed around the chondral lesion. If it ws na acute injury, the edema would be present directly beneath the osteochondral lesion. Dr. O'Brien believed Claimant probably had episodic pain as a result of an osteochondral defect in the bone and the thinning of the cartilage; both of which were forms of arthritis.

27. Dr. O'Brien did not believe there was anything at Claimant's work which aggravated, accelerated or combined with the pre-existing condition to require treatment. Dr. O'Brien testified Claimant's need for surgery was a result of the degenerative process in the left knee. More particularly, Dr. O'Brien opined that evidence of the degenerative changes was found in the thinning of the joint space as documented in the 2014 MRI. Dr. O'Brien concluded Claimant's staph infection and the arthroscopies were traumatic to the knee joint, which weakened and damaged the medial femoral condyle. Dr. O'Brien also testified a staph infection of this type could invade the bone.

28. Prior to his deposition, Dr. O'Brien reviewed several articles related to chondrocyte implantation, which he testified about and were admitted into evidence. The conclusion in one study was that in an acute injury where hemarthrosis was present an osteochondral lesoin was associated with inflammation. There were also studies was that absent a significant trauma, the implantation surgery was being performed to replace cartilage and for chondral defects in patients who had osteoarthritis. Dr. O'Brien testified that these studies supported his opinion regarding that the need for surgery was a result of the degenerative process in Claimant's knee. The ALJ was persuaded by Dr. O'Brien's testimony that it was more probable the arthritis in Claimant's left knee was why she required surgery.

29. Dr. Ryan testified as an expert in physical medicine and rehabilitation, the specialty in which he was board-certified. Dr. Ryan was Level II accredited pursuant to the W.C.R.P. Dr. Ryan testified Claimant probably had some degenerative arthritis in her left knee prior to August, 2014. However, it was asymptomatic. Dr. Ryan reiterated his conclusion Claimant's work duties aggravated her knee condition. Dr, Ryan did not offer an opinion as to what caused the chondral lesion or defect to develop. He also did not offer an opinion whether Claimant's prior surgeries was a causative factor in the degenerative changes in Claimant's left knee.

30. The ALJ concluded Claimant's knee injury arose out of her employment with Employer. The ALJ credited Claimant's testimony and was persuaded that Claimant's act of moving a confetti cannon down a ramp could cause the injury to Claimant's knee as she described. The confetti cannons were of sufficient size and

weight to cause an injury as alleged. Respondents failed to meet their burden of proof on this issue.

31. The ALJ was not persuaded Claimant's need for surgery was related to her industrial injury. While the incident on 8/18/14 aggravated her underlying degenerative knee condition, the evidence demonstrates her need for surgery was a result of arthritic changes. Claimant failed to meet her burden of proof on this issue.

CONCLUSIONS OF LAW

Generally

The purpose of the Worker's Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). As noted *infra,* Claimant's credibility concerning how her knee was injured was at issue in the case at bench.

Withdrawal of GAL

Respondents seek to withdraw the GAL filed on 10/14/14. In this regard, Respondents argued Claimant did not suffer a compensable injury, contending she gave several versions of the alleged accident as reflected in the medical records. In addition to Claimant's credibility, Respondents averred Claimant's need for surgery was a natural consequence of the degenerative condition in her left knee. Respondents' request to withdraw the GAL is governed by Section 8-43-201(1), C.R.S. and the recent holding by the Colorado Supreme Court in *City of Brighton v. Rodriquez*, 318 P.3d 496, 508 (Colo. 2014). Respondents have the burden of proving by a preponderance of the evidence that the modification to the GAL is warranted in this instance. *Id.*

In *City of Brighton,* the Court considered the withdrawal of an admission by Respondent where Claimant suffered an unexplained fall. More particularly, the issue was whether a truly unexplained fall was compensable under the Colorado Worker's Compensation Act was before the Court. The Supreme Court noted there must be a causal connection between Claimant's employment and the injury. See also *Madden v. Mountain West Fabricators,* 977 P.2d 861, 863 (Colo. 1999). The Court then analyzed when a fall would arise out of Claimant's employment and reviewed the three categories of risk that caused injuries to employees. The first category encompassed risks inherent to the work environment itself (direct); the second category contained risks which are entirely personal or private (which includes idiopathic injuries); and the third category included injuries caused by neutral risks (risks generally not associated with work or the Claimant). *City of Brighton v. Rodriquez*, 318 P.3d at 503-504.

The Court concluded Claimant's unexplained fall fell within the third category which contained neutral risks. Reversing the Court of Appeals, the Supreme Court held Claimant suffered a compensable injury because Claimant would not have been injured, "but for" her employment. The Court also held that Respondent City of Brighton had the burden to prove by a preponderance of the evidence that Claimant's injuries were not compensable in order to withdraw the GAL. Since Claimant's injury was compensable, Respondents failed to meet their burden of proof.

Pursuant to *City of Brighton v. Rodriquez*, subsumed within the issue of whether Respondents should be allowed to withdraw their admission of liability in this case is whether Claimant suffered a compensable injury while working for Employer. The ALJ determined Claimant suffered a compensable injury on 8/18/14 for two reasons. First, Claimant was a credible witness and her description of how her injury occurred was plausible. Although there were variations in the description of how the accident occurred in the medical records, the ALJ notes that Claimant's description of the injury was consistent, starting with the report of injury completed in 8/19/14.

There was no dispute that Claimant was performing the job of breaking down equipment for Employer after a concert on 8/18/14. Claimant was moving very heavy confetti cannons, down a ramp. There was sufficient evidence that this activity could cause her left knee (which had previous issues) to become symptomatic. Accordingly, this injury fits within the first category of risks as identified by the Court in *City of Brighton v. Rodriquez, supra.* Claimant was engaged in an activity (i.e. moving confetti cannons) which caused her previous asymptomatic knee condition to become symptomatic.

In this regard, the ALJ credited the testimony of Claimant and the opinions of Dr. Ryan that this activity could cause Claimant to develop symptoms in the knee. The ALJ notes that Dr. O'Brien did not offer an opinion regarding what impact moving a confetti cannon weighing 300 lbs down a ramp would have on the anatomical structures in Claimant's left knee. Dr. O'Brien believed Claimant's description to Dr. Ryan was "revised historical input" given to Dr. Ryan more than a year after the injury when, in fact, Claimant reported how she was injured to Employer. There was no evidence Claimant required treatment from 2007-2014. Notwithstanding Dr. O'Brien's opinions, Claimant did not require treatment until her work injury. This was sufficient evidence to establish Claimant's physical work on 8/18/14 aggravated and/or accelerated her pre-existing degenerative knee condition.

Under these circumstances there was evidence to show Claimant's work duties on 8/18/14 were the proximate cause of her injury and need for treatment. Stated another way, the ALJ finds "but for" moving the confetti cannons, Claimant would not have aggravated her pre-existing knee condition and required treatment. (Finding of Fact No. 29).

Second, there was objective medical evidence which supported the conclusion that Claimant was injured as alleged. An effusion was noted in Claimant's left knee at Littleton Hospital, as well as by Dr. Strain at Concentra on 8/20/14. On 9/25/14, Dr. Schwartz also found a left knee effusion and referred Claimant for an orthopedic consult. FNP Okamatsu observed a left knee effusion and diagnosed a sprain on 9/5/14. Further, there were descriptions of increased pain and swelling with activity in the medical records. The ALJ found Claimant's treating physicians believed she required treatment, including those doctors who evaluated her at Littleton Hospital and Concentra. For the reasons set for in Finding of Fact Nos. 21 and 25, the contrary opinions of Dr. O'Brien on compensability were not persuasive.

Based upon the totality of the evidence, the ALJ concluded Claimant suffered a compensable injury on 8/19/14 while working for Employer. *Triad Painting Co. v. Blair,* 812 P.2d 638, 641 (Colo. 1991). Since Respondents failed to meet their burden of proof that Claimant's injury was not compensable, their request for withdrawal of the GAL is denied.

Medical Benefits

In the instant case, Claimant has the burden of proof to establish that the surgery proposed by Dr. Papilion is reasonable and necessary, as well as related to her industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant asserted the injury of 8/18/14 caused her previously asymptomatic left knee to develop symptoms and require treatment. Claimant argued the degenerative condition of her knee worsened as a result and her need for surgery is a direct consequence of her work activities on 8/18/14. Claimant proffered the opinions of Dr. Ryan and Dr. Papilion to support her contentions. The ALJ concluded that Claimant did not meet her burden of proof that the proposed surgery was related to the work injury in this instance. While the ALJ determined Claimant suffered a compensable injury, he was not convinced that the chondral defect was a result of the 8/18/14 injury. In addition, Claimant failed to meet the criteria set forth in the Medical Treatment Guidelines-Lower Extremity Injury, Rule 17, Exhibit 6 ("Treatment Guidelines") for the proposed surgery.

As a starting point, the chondral defect was not present when the MRI-s were done in 2004 (Findings of Fact Nos. 2 and 3). The 2006 MRI did not identify a chondral defect, however, there was evidence of reactive marrow changes to the weightbearing surface of the lateral femoral condyle.

The ALJ then considered the evidence admitted at hearing to determine whether the chondral defect or lesion was caused directly by or developed over time as a result of the 8/18/14 injury. In this regard, Dr. O'Brien's testimony was persuasive that this was a degenerative process. Dr. O'Brien testified that the methicillin resistant staph infection would have weakened Claimant's knee and set the stage for the condition to develop.

On the other hand, the evidence proffered by Claimant did not convince the ALJ that her industrial injury required her to undergo surgery. Dr. Papilion did not offer an opinion regarding what caused the osteochondral injury to develop, nor was there anything within his records that provided an explanation. Dr. Papilion also did not address whether Claimant's need for surgery would have developed because of progressive arthritic changes regardless of the 8/18/14 injury. Also, Dr. Ryan did not offer any opinions on this subject and deferred to the orthopedic opinions. In short, the expert testimony offered by Claimant did not rebut Dr. O'Brien's conclusions

Furthermore, the ALJ considered the Treatment Guidelines-Lower Extremity Injury, Rule 17, Exhibit 6 as these applied to the requested knee surgery. The Guidelines are contained in W.C.R.P. 17, 7 Code Colo. Regs. 1101-3, and provide that health care providers shall use the Guidelines adopted by the Division of Workers' Compensation ("Division").

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria).

Section 2(d)(vi), provides in pertinent part :

> **Surgical Indications/Considerations**: Surgery for isolated chondral defects may be indicated when functional deficits interfere with activities of daily living and/or job duties after 6-12 weeks of active patient participation in non-operative therapy."
>
> [Treatment Guidelines Exhibit 6 page 56]

More particularly, Section 2(d)(vi)C) specifies:

> "Autologous chondrocyte implantation (ACI): These procedures are technically difficult and require specific physician expertise…This procedure is controversial but may be appropriate in a small subset of patients with physically rigorous employment or recreational activities. It requires prior authorization.
>
> Indications : The area of lesion should be between 2 square cm and 10 square c m. The patient should have failed 4 or more months of active participation in therapy and a microfracture, abrasion, arthroplasty or drilling with sufficient healing time which may be from 4 months to over one year…"
>
> [Treatment Guidelines Exhibit 6 page 57]

The record demonstrates Claimant did not participate in 4 or more months of active participation in therapy. In fact, as of 2/27/15, Claimant had only 4 PT treatments[6]. Accordingly, Claimant did not meet this surgical indication under the Treatment Guidelines and conservative therapies should be completed before surgery is performed.

In this regard, there was also no evidence that Claimant had some of the non-operative treatment procedures identified in the Treatment Guidelines. [See Exhibit 6, Section 2(a)(v).] Claimant did not receive injections (steroidal and/or viscosupplementation). The ALJ is persuaded these conservative treatment measures should be exhausted before surgery is performed.

Finally, one of the contraindications for this procedure was smoking, as soft tissue healing is affected. Dr. Papilion's records indicated Claimant had quit smoking, but the record was unclear whether that was still the case as the last appointment with Dr. Papilion was more than a year ago. This should be confirmed before surgery is performed.

For the foregoing reasons, ALJ finds Claimant failed to meet her burden of proof and her request for authorization of the surgery proposed by Dr. Papilion is denied.

ORDER

It is therefore ordered that:

1. Respondents request to withdraw the General Admission of Liability is DENIED.

2. Claimant's request for authorization of the chondrocyte implantation surgery recommended by Dr. Papillion is DENIED.

[6] Exhibit 8, p. 39.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 1, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

PROCEDURAL HISTORY

The Claimant proceeded to hearing against AMS before ALJ Michelle Jones on March 19 and May 4, 2015. ALJ Jones entered her Findings of Fact, Conclusions of Law, and Order on June 23, 2015. ALJ Jones found that Claimant did not prove that a contract of employment existed between him and AMS. She concluded that AMS, as an agent of the Respondent, facilitated a contract of hire between the Claimant and the Respondent. The Claimant appealed ALJ Jones' decision and ICAP declined to review it stating that her decision was not final for the purposes of review. In the meantime, the Claimant filed a claim against the Respondent as a potential employer, and applied for hearing with the Office of Administrative Courts.

At the commencement of hearing before the undersigned ALJ, the Respondent moved for a directed verdict arguing that "claim preclusion" would apply to these proceedings based upon the prior hearings and decision entered by ALJ Jones. Respondent asserted that Claimant should have pursued his claim against both AMS and the Respondent prior to the first hearings held in this claim. The Claimant objected asserting that Respondent had failed to plead "claim preclusion" as an affirmative defense in its response to application for hearing. After reviewing the pleadings, and applicable case law, the ALJ found that the Respondent had not identified claim preclusion as an affirmative defense on its response to application for hearing. As such, the Respondent's motion for directed verdict was denied and the hearing commenced.

ISSUES

The issues presented for determination in this proceeding are whether the Claimant is an "independent contractor" pursuant to §8-40-202(2), C.R.S.; and if the Claimant is not an independent contractor, whether Claimant sustained an injury while in the course and scope of his employment with the Respondent; whether Claimant is entitled to medical benefits; whether Claimant is entitled to temporary total disability benefits; and whether penalties should be imposed against the Respondent for failure to carry workers' compensation insurance and for failing to admit or deny the claim.

FINDINGS OF FACT

1. The Respondent ("PPCOA") is a condominium association for the Pagosa Pines Condominium ("PPC") properties located in Pagosa Springs, Colorado.

2. AMS is a property management company owned and operated by Jace Johnson.

3. On December 1, 2008, PPCOA and Jace Johnson, doing business as AMS entered into a management agreement (hereinafter the "agreement").

4. As relevant to these proceedings, the agreement provided as follows:

- PPCOA appointed AMS as the agent and exclusive manager for PPCOA.
- AMS would provide for the day-to-day management of PPCOA.
- Everything done by AMS for the PPCOA under the provisions of the agreement shall be done as the agent for PPCOA
- AMS will provide and supervise persons to perform various duties assigned under the agreement.
- AMS shall arrange for the maintenance and repair of all common elements and negotiate and execute contracts for necessary services.
- AMS shall manage the PPCOA financial accounts and collect assessments from condominium owners, deposit the monies collected, and provide an accounting to the board on at least a quarterly basis.
- AMS shall disburse funds necessary for the operation and maintenance of the PPCOA property in accordance with the budget adopted by the PPCOA board of directors. AMS shall prepare a statement of income and expenses and present it at monthly PPCOA board meetings.
- Each year in the fourth quarter, AMS and the board shall prepare an operating budget setting forth anticipated income and expense for the upcoming year, which if approved, became the major fiscal document under with AMS would operate during the next year.
- AMS shall arrange for the maintenance of the property within the budget approved by PPCOA.

5. As agent for PPCOA, AMS placed advertisements in the local paper requesting bids for specific contract work. AMS collected the bids, presented them to the PPCOA board for review, and arranged for the hire of the contractor that the PPCOA board selected. AMS ensured the work was performed properly by the contractors, issued payment to the contractors from PPCOA accounts, and also ensured the contractors carried proper insurance before beginning service.

6. As agent for PPCOA, AMS had signatory authority on PPCOA accounts and signed the checks that PPCOA issued to contractors.

7. According to Johnson, AMS ran a newspaper advertisement seeking bids for a six-month contract to perform flowerbed maintenance for PPCOA. The advertisement stated that PPCOA was seeking a subcontractor to do light landscaping work.

8. The Claimant did not recall responding to a newspaper advertisement because he already was acquainted with Johnson at that time. Regardless, the Claimant submitted a resume to AMS which listed "Above and Beyond, LLC" on the top and he described himself as the owner of Above and Beyond from June 2004 through January 2008.

9. Claimant's resume stated that his objective was to "care for flower beds in the Pines Condos using my experience obtained through my years of owning and running my own landscaping maintenance business….beautifying the flower beds in the Pines Condos for owners and tenants would be my pleasure."

10. AMS, as agent for PPCOA, negotiated a monthly contract for the flowerbed work with Claimant. Claimant was aware that AMS was the property manager for PPCOA. Claimant began performing flowerbed maintenance at the PPC property during the spring of 2011 at the agreed upon rate.

11. Claimant and AMS had no written agreement outlining the employment relationship. Claimant and AMS had only verbal discussions about the rate of pay and what work Johnson expected Claimant to perform for the PPCOA.

12. No formal written contractual arrangement between PPCOA and Claimant ever existed. No formal written contractual arrangement between AMS and Claimant ever existed.

13. AMS required the Claimant to submit proof of liability insurance in order to perform the flowerbed work.

14. After the completion of the flowerbed contract, Claimant continued to perform work at the PPC property under a verbal agreement with AMS. AMS, as agent for PPCOA, would typically ask Claimant if he could perform whatever work, usually general maintenance, the PPCOA needed. AMS and Claimant would agree upon an hourly rate. The Claimant performed the work and submitted invoices to AMS.

15. The relationship between AMS and Claimant continued with verbal agreements as to the type of work and hourly wage. Claimant did not bid on any job or for any work that he continued to perform for PPCOA. On almost a weekly basis, the Claimant performed work varying from snow and ice removal to window installation and general cleanup. Claimant worked all over the PPC property from 2011 through January 2014.

16. For most other work performed at PPC, AMS would obtain bids from various vendors, present those bids to the PPCOA board who would then vote on which bid to accept. PPCOA or AMS would then enter into a contract to perform the work at the bid

price. Those other vendors were required to supply proof of liability insurance and proof of workers' compensation insurance if the vendor had employees.

17. According to Johnson, the vendors largely remained the same over the years, and PPCOA rarely sought bids concerning the routine work such as snow removal and landscaping. Most of the routine contracts were for six months. As an example, Johnson explained that the snow removal vendor entered into a six-month contract to perform snow removal services during the winter season and flowerbed maintenance vendors would enter into a six-month contract during the nicer weather.

18. Neither PPCOA nor AMS required the Claimant to submit proof of liability insurance to continue performing work for PPCOA after the initial flowerbed contract.

19. During this period of time, AMS was required to update the PPCOA board as to the monthly expenses and assist with developing annual budgets.

20. In 2012, PPCOA decided to begin replacing the siding on the entire condominium complex and approved the budget for this project.

21. Johnson approached Claimant to ask if Claimant wanted to perform the work. The Claimant agreed and he and Johnson negotiated an hourly rate. The Claimant did not bid for the job or compete with any other vendor or contractor to obtain the siding work.

22. Johnson testified that PPCOA had a budget for the siding work and that due to that budget and any unanticipated issues with replacing old siding, he believed obtaining bids would be difficult. Johnson further explained that once the budgeted funds ran out, then the siding work would end.

23. Thereafter, Claimant began to work on re-siding the entire condominium complex, building by building, subject to the funds available and the budget of PPCOA. Claimant performed siding work for PPCOA for approximately two years.

24. PPCOA supplied all of the materials Claimant needed to perform the re-siding work. The Claimant was not required to purchase the siding, batten, nails, glue or any other material associated with the siding work.

25. Johnson showed Claimant how he wanted the siding project to look, and explained how he wanted Claimant to hang the siding, but he did not specifically show the Claimant how to install siding. Claimant had never hung siding before. Claimant testified that he figured out for himself how to hang the siding because "it's not rocket science." Claimant had significant experience with hand tools and maintenance work, thus he did not need specific instruction or oversight in order to perform the work.

26. Claimant used a nail gun he borrowed from Johnson. He also had borrowed a nail gun from a friend. Claimant also used his own sander and other tools for the siding

work. The ladder belonged to Claimant although he testified at the prior hearing that he had borrowed ladders and other tools from AMS or Johnson at times.

27. At the prior hearing, Claimant testified that AMS had authorized him to charge tools to the AMS account and two hardware stores in town. In actuality, the PPCOA held the hardware store accounts, and Claimant did charge "odds and ends" to the PPCOA accounts.

28. Johnson periodically checked on Claimant's progress. Johnson did not constantly oversee Claimant's work. Johnson did not need to constantly oversee Claimant's work because he and Claimant were friends, and he knew Claimant could do the work based on Claimant's prior experience on the PPCOA property. It was apparent from the testimony that Johnson trusted Claimant immensely.

29. When Claimant nearly completed a job, Johnson would identify a new area for Claimant to being siding replacement. Claimant also testified that, "there was [sic] always other things in between that needed to be done" which is evidenced by the invoices reflecting various work being performed in addition to the siding.

30. Johnson did not give Claimant a specific completion deadline for the siding work but provided a general deadline.

31. Claimant had no set work hours. Claimant was not required to clock in or clock out, but he was expected to complete his work within reasonable hours and within a reasonable timeframe. Claimant's hours varied each week.

32. Claimant testified he felt like the "on call" guy for the PPCOA. Johnson disagreed with Claimant's characterization. The ALJ finds Claimant's testimony more credible and persuasive than that of Johnson.

33. Claimant provided invoices for completed work to PPCOA on a weekly basis or when a portion of the project was complete. The invoices stated "Above and Beyond" at the top and the invoices indicated that checks should be made payable to Claimant, personally. Claimant submitted his invoices to the PPCOA and addressed his invoices either "To: Pines" or "To: Pines Association" with c/o AMS next to or below the address to Pines.

34. Claimant explained that he used a computer application to generate the invoices and never changed it to remove Above and Beyond from the top of the invoice.

35. A review of the invoices for the calendar year 2013 through the date of injury reflects that Claimant worked part-time at the PPCOA property. He worked almost every week for PPCOA and his hours varied from six hours to 40 hours per week. No invoices for the calendar year 2013 reflect that Claimant worked anywhere else other than PPCOA and for his own skunk removal business.

36. AMS, as agent for PPCOA, issued checks to Claimant personally. No taxes were withheld.

37. In 2012 and 2013 for all the work performed at the PPC property, PPCOA issued Claimant a 1099-Misc tax document.

38. In 2012 and 2013, Claimant filed his income taxes with the IRS and identified his income as "self-employment income."

39. Claimant's wife had formed Above and Beyond, LLC, as a prerequisite to obtaining government contracts.

40. The Claimant did not obtain business cards for Above and Beyond, LLC, and there was no evidence that he advertised or solicited work on behalf of himself or Above and Beyond, LLC.

41. Claimant and his wife failed to file annual reports with the Colorado Secretary of State concerning Above and Beyond, LLC, essentially allowing the registration of the LLC to lapse as of April 1, 2012. Individuals unrelated to the Claimant have now registered Above and Beyond, LLC with the Colorado Secretary of State.

42. The Claimant had a bank account in the name of Above and Beyond, LLC, as well as a personal bank account.

43. PPCOA did not offer Claimant vacation or sick time nor did it offer him other benefits such as medical or dental insurance.

44. PPCOA did not require Claimant to work exclusively for it. Claimant had a skunk removal business and performed skunk removal for PPCOA and at other locations.

45. Claimant also performed landscaping work at the San Juan Motel, which is owned by Doug Dragoo. Claimant performed work for the Dragoo family, including watching their home during the winter months. Claimant also checked on the home of Clyde Grimm during the winter months. Claimant obtained all this work through Johnson.

46. Johnson testified that the Claimant set his own work schedule and if he had work to perform for someone else, it was within Claimant's discretion to do so.

47. An individual named Chris Tressler also performed siding work at the PPCOA property in March 2013. According to the PPCOA payment ledgers, Tressler primarily performed painting work, and had done no siding work since March 2013. PPCOA and AMS also treated Tressler like an independent contractor. Two other individuals also did some siding work for PPCOA in March 2013 according to the payment ledgers.

48. On January 30, 2014, the Claimant fell off a ladder while performing siding work at the PPC property. Claimant injured his right leg. Specifically, he suffered a shattered tibia and fractured fibula, and later developed complications from this injury.

49. The Claimant continues to require medical treatment for his injuries. He is presently residing in California and receiving medical treatment under the California Medicaid plan.

50. Neither PPCOA nor AMS, as agent for PPCOA, referred the Claimant to a doctor.

51. Claimant has not worked since the date of his injury and has not been released to return to work.

52. Claimant initially filed a Worker's Claim for Compensation naming AMS as his employer in this claim.

53. After the first hearing held on March 19, 2015 regarding this claim Claimant filed a second Workers' Claim for Compensation naming PPCOA as his employer on March 30, 2015. It is apparent from the transcript of the March 19, 2015 Claimant was unsure who employed him on January 30, 2014. He believed he worked for AMS until realizing that his paychecks were issued from the PPCOA bank accounts.

54. PPCOA filed a Notice of Contest on April 15, 2015 asserting that Claimant is not an employee of PPCOA.

55. The PPCOA timely issued its Notice of Contest thus no penalties for failure to timely admit or deny shall be imposed. The Claimant did not even believe PPCOA was a potential employer until March 19, 2015 so any notice to the PPCOA via its agent, AMS, is inadequate to show that Claimant intended to file a claim for workers' compensation benefits against PPCOA.

56. The PPCOA does not maintain workers' compensation insurance thereby entitling the Claimant to a 50 percent increase in his indemnity benefits.

57. Based on the foregoing findings, the Respondent has failed to prove that Claimant was an independent contractor at the time he sustained an injury to his right leg on January 30, 2014.

58. In order to arrive at a fair approximation of Claimant's wages, the ALJ considered Claimant's earnings beginning with the invoice dated October 7, 2013 through the invoice dated January 31, 2014. Claimant's earnings over that period of 16 weeks totaled $4,415.75 making his average weekly wage $275.99 with a corresponding TTD rate of $183.99 increased to $275.99. The average weekly wage proposed by Claimant inappropriately inflates Claimant's average weekly wage and is rejected.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Judge enters the following conclusions of law:

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a worker’s compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a worker’s compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A worker’s compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Principal-Agency Relationship

4. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1(1) (1957). The one for whom the action is to be taken is the principal, and the one who is to act is the agent. Id. § 1(2) and 1(3). Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal’s manifestations of consent to him. Id. § 7. Agency is thus a legal relation having its source in the mutual consent of the parties. The existence of an agency relationship is ordinarily a question of fact. *Marron v. Helmecke*, 100 Colo. 364, 67 P.2d 1034 (1937); *Eckhardt v. Greeley Nat'l Bank*, 79 Colo. 337, 245 P. 710 (1926); *Schoelkopf v. Leonard*, 8 Colo. 159, 6 P. 209 (1884). A general agent is "an agent authorized to conduct a series of transactions involving a continuity of service," Restatement (Second) of Agency § 3(1), such as one "who is an integral part of a business organization and does not require fresh authorization for each transaction." Id. § 3 comment a. An "agent" is generally

one who acts for, or in place of, another, or is entrusted with the business of another. *Victorio Realty Group, Inc.* v. *Ironwood IX*, 713 P.2d 424, (Colo. App. 1985).

5. ALJ Jones concluded, and this ALJ agrees that AMS was acting as the general agent of PPCOA when entering into a verbal contract of hire with the Claimant to perform work at the PPC property in exchange for payment. As agent for PPCOA, AMS was authorized to act on behalf of PPCOA and to bind PPCOA to this contractual relationship.

Employment Status

6. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation … under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

7. Under §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the service, both under the contract for performance of service and in fact ***and*** such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." [Emphasis added]

8. The Respondent has the burden of proving that Claimant was an independent contractor rather than an employee. To prove that Claimant was free from control and direction, the Respondent must prove the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and whether the person is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), C.R.S., creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Nelson v. Industrial Claim Appeals Office, supra.*

9. In addition to proving that the Claimant is free from control and direction, the Respondent must also establish the Claimant is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Section 8-40-202(2)(a), C.R.S. In *Industrial Claim Appeals Office v. Softrock Geological Services, Inc.*, 325 P.3d 560 (Colo. 2014), the Colorado Supreme Court held that whether an individual is customarily engaged in an independent trade, occupation, profession, or

business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer. The court further stated that there is no dispositive single factor or series of factors that would resolve the nature of the relationship between the employee and putative employer.

10. Based on the foregoing findings of fact, the ALJ concludes that PPCOA has failed to meet its burden of proof that Claimant was an independent contractor at the time he sustained an injury on January 30, 2014. While it is true that Claimant initially worked as a landscaping/flowerbed vendor, that relationship changed significantly over the ensuing years. Claimant and Johnson offered conflicting testimony about the nature of the relationship between Claimant and PPCOA, which the ALJ resolves in favor of the Claimant. Claimant essentially became an on-call handyman for the PPCOA property.

Further, the Claimant was not customarily engaged in the independent trade of hanging siding or performing handyman services at the time he was injured. The invoices presented by both parties reflect that Claimant was working exclusively (although he was not required to) for the PPCOA as a handyman at the time of his injury. The fact that Claimant had a skunk removal business does not sever the employment relationship between PPCOA and Claimant. Rather, the skunk removal business merely represents concurrent employment. In addition, PPCOA paid Claimant personally at an hourly rate, instead of through a trade or business name. PPCOA established a quality standard and provided some oversight of Claimant's work. The ALJ recognizes that PPCOA did not provide more than minimal training, but Claimant had significant experience and did not need training. The ALJ also recognizes that PPCOA did not provide tools or benefits to Claimant, although at times Claimant was permitted to borrow tools from AMS or purchase tools at the expense of PPCOA. Finally, the ALJ acknowledges that PPCOA did not dictate time of performance other than providing general deadlines. However, balancing all of the factors enumerated in §8-40-202(2)(a), C.R.S., and considering the totality of the circumstances and nature of the relationship between Claimant and the PPCOA, the ALJ concludes that the PPCOA has failed to overcome the presumption, by a preponderance of the evidence, that Claimant was an employee under the Workers' Compensation Act.

Compensability

11. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). As found, Claimant was in the course and scope of his employment on January 30, 2014 when he fell from a ladder and suffered a broken right leg.

Penalties

12. In any case where the employer fails to comply with the insurance provisions of the Act, the amount of compensation or benefits an employee may claim shall be increased by fifty-percent. Section 8-43-408(1), C.R.S. Here, PPCOA failed to carry the requisite workers' compensation insurance. As such, Claimant is entitled to a fifty-percent increase in his compensation or benefits.

13. Under §8-43-203(1), C.R.S., Respondent is required to notify the Division whether Respondent is admitting or contesting the claim within 20 days after a report is filed, or should have been filed. The ALJ concludes that under the circumstances of this case, there was no indication that Claimant intended to pursue a claim against PPCOA until March 30, 2015. It is apparent from the transcript of the March 19, 2015 Claimant was unsure who employed him on January 30, 2014. He believed he worked for AMS until realizing that his paychecks were issued from the PPCOA bank accounts. Thus, the ALJ declines to impose penalties under §8-43-203(1), C.R.S.

Temporary Disability Benefits and Average Weekly Wage

14. Pursuant to §8-42-103, C.R.S., when a disability lasts longer than two weeks from the date of injury, disability indemnity is recoverable from the day injured employee leaves work. In this case, Claimant never returned to work for the PPCOA following his January 30, 2014 work injury. Claimant has not returned to work in any capacity has he remains on work restrictions and has not been released to full duty. Based on Claimant's average weekly wage of $275.99 the Claimant's TTD rate is $183.99. As of the date this decision, the Claimant has been out of work for 109 weeks and 1 day resulting in a total wage loss of $20,081.19. However, due to the 50 percent penalty, Claimant's total wages loss is increased to $30,122.34. Interest on $30,122.34 at 8 percent per annum totals $2,614.37 with a corresponding daily interest rate of $7.18.

Medical Benefits

15. Pursuant to §8-42-101(1)(a), C.R.S., every employer shall furnish all medical treatment necessary at the time of injury or thereafter to cure and relieve employees of the effects of their injury. Claimant received medical treatment from various providers to cure and relieve him of the effects of her injury. There is no evidence that the treatment Claimant has received thus far has not been reasonable, necessary or related to the Claimant's injury. Further, all treatment received has been authorized given that PPCOA did not refer the Claimant to a physician. Claimant is further entitled to future reasonable and necessary medical treatment. PPCOA is liable for past medical treatment (subject to the Division of Workers' Compensation fee schedule) and for future medical treatment.

ORDER

It is therefore ordered that:

1. On January 30, 2014, Claimant sustained an injury while in the course and scope of his employment with PPCOA.

2. PPCOA failed to comply with the insurance provisions of the Workers' Compensation Act. Claimant is entitled to a 50 percent increase in his benefits.

3. The Claimant is entitled to medical benefits, including all treatment which he has already received. Because PPCOA is liable for payment of Claimant's medical costs associated with his work injury, no medical provider shall seek to recover such costs from the employee. Section 8-42-101(4), C.R.S.

4. All treatment Claimant has received is authorized.

5. Claimant is entitled to reasonable and necessary medical treatment in the future.

6. Claimant's AWW is $275.99.

7. Claimant is entitled to TTD benefits commencing on January 31, 2014 for a period of 109 weeks and 1 day for a total award of $30,122.34 (this amount accounts for the 50 percent increase due to the penalty).

8. The Claimant is entitled to interest in the total amount of $2,614.37 with daily interest continuing to accrue at the rate of $7.18.

9. The PPCOA shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

10. Claimant's claim for penalties for failure to admit or deny liability is denied and dismissed.

11. All matters not determined herein are reserved for future determination.

12. In lieu of payment of the above compensation and benefits to the Claimant, the Employer shall:

    a. Within ten (10) days of the date of service of this order, deposit the sum of $35,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; OR

    b. Within ten (10) days of the date of service of this order, file a bond in the sum of $35,000.00 with the Division of Workers' Compensation:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado. The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 4, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

PROCEDURAL HISTORY

The Claimant proceeded to hearing against AMS before ALJ Michelle Jones on March 19 and May 4, 2015. ALJ Jones entered her Findings of Fact, Conclusions of Law, and Order on June 23, 2015. ALJ Jones found that Claimant did not prove that a contract of employment existed between him and AMS. She concluded that AMS, as an agent of the Respondent, facilitated a contract of hire between the Claimant and the Respondent. The Claimant appealed ALJ Jones' decision and ICAP declined to review it stating that her decision was not final for the purposes of review. In the meantime, the Claimant filed a claim against the Respondent as a potential employer, and applied for hearing with the Office of Administrative Courts.

At the commencement of hearing before the undersigned ALJ, the Respondent moved for a directed verdict arguing that "claim preclusion" would apply to these proceedings based upon the prior hearings and decision entered by ALJ Jones. Respondent asserted that Claimant should have pursued his claim against both AMS and the Respondent prior to the first hearings held in this claim. The Claimant objected asserting that Respondent had failed to plead "claim preclusion" as an affirmative defense in its response to application for hearing. After reviewing the pleadings, and applicable case law, the ALJ found that the Respondent had not identified claim preclusion as an affirmative defense on its response to application for hearing. As such, the Respondent's motion for directed verdict was denied and the hearing commenced.

ISSUES

The issues presented for determination in this proceeding are whether the Claimant is an "independent contractor" pursuant to §8-40-202(2), C.R.S.; and if the Claimant is not an independent contractor, whether Claimant sustained an injury while in the course and scope of his employment with the Respondent; whether Claimant is entitled to medical benefits; whether Claimant is entitled to temporary total disability benefits; and whether penalties should be imposed against the Respondent for failure to carry workers' compensation insurance and for failing to admit or deny the claim.

FINDINGS OF FACT

1. The Respondent ("PPCOA") is a condominium association for the Pagosa Pines Condominium ("PPC") properties located in Pagosa Springs, Colorado.

2. AMS is a property management company owned and operated by Jace Johnson.

3. On December 1, 2008, PPCOA and Jace Johnson, doing business as AMS entered into a management agreement (hereinafter the "agreement").

4. As relevant to these proceedings, the agreement provided as follows:

- PPCOA appointed AMS as the agent and exclusive manager for PPCOA.
- AMS would provide for the day-to-day management of PPCOA.
- Everything done by AMS for the PPCOA under the provisions of the agreement shall be done as the agent for PPCOA
- AMS will provide and supervise persons to perform various duties assigned under the agreement.
- AMS shall arrange for the maintenance and repair of all common elements and negotiate and execute contracts for necessary services.
- AMS shall manage the PPCOA financial accounts and collect assessments from condominium owners, deposit the monies collected, and provide an accounting to the board on at least a quarterly basis.
- AMS shall disburse funds necessary for the operation and maintenance of the PPCOA property in accordance with the budget adopted by the PPCOA board of directors. AMS shall prepare a statement of income and expenses and present it at monthly PPCOA board meetings.
- Each year in the fourth quarter, AMS and the board shall prepare an operating budget setting forth anticipated income and expense for the upcoming year, which if approved, became the major fiscal document under with AMS would operate during the next year.
- AMS shall arrange for the maintenance of the property within the budget approved by PPCOA.

5. As agent for PPCOA, AMS placed advertisements in the local paper requesting bids for specific contract work. AMS collected the bids, presented them to the PPCOA board for review, and arranged for the hire of the contractor that the PPCOA board selected. AMS ensured the work was performed properly by the contractors, issued payment to the contractors from PPCOA accounts, and also ensured the contractors carried proper insurance before beginning service.

6. As agent for PPCOA, AMS had signatory authority on PPCOA accounts and signed the checks that PPCOA issued to contractors.

7. According to Johnson, AMS ran a newspaper advertisement seeking bids for a six-month contract to perform flowerbed maintenance for PPCOA. The advertisement stated that PPCOA was seeking a subcontractor to do light landscaping work.

8. The Claimant did not recall responding to a newspaper advertisement because he already was acquainted with Johnson at that time. Regardless, the Claimant submitted a resume to AMS which listed "Above and Beyond, LLC" on the top and he described himself as the owner of Above and Beyond from June 2004 through January 2008.

9. Claimant's resume stated that his objective was to "care for flower beds in the Pines Condos using my experience obtained through my years of owning and running my own landscaping maintenance business….beautifying the flower beds in the Pines Condos for owners and tenants would be my pleasure."

10. AMS, as agent for PPCOA, negotiated a monthly contract for the flowerbed work with Claimant. Claimant was aware that AMS was the property manager for PPCOA. Claimant began performing flowerbed maintenance at the PPC property during the spring of 2011 at the agreed upon rate.

11. Claimant and AMS had no written agreement outlining the employment relationship. Claimant and AMS had only verbal discussions about the rate of pay and what work Johnson expected Claimant to perform for the PPCOA.

12. No formal written contractual arrangement between PPCOA and Claimant ever existed. No formal written contractual arrangement between AMS and Claimant ever existed.

13. AMS required the Claimant to submit proof of liability insurance in order to perform the flowerbed work.

14. After the completion of the flowerbed contract, Claimant continued to perform work at the PPC property under a verbal agreement with AMS. AMS, as agent for PPCOA, would typically ask Claimant if he could perform whatever work, usually general maintenance, the PPCOA needed. AMS and Claimant would agree upon an hourly rate. The Claimant performed the work and submitted invoices to AMS.

15. The relationship between AMS and Claimant continued with verbal agreements as to the type of work and hourly wage. Claimant did not bid on any job or for any work that he continued to perform for PPCOA. On almost a weekly basis, the Claimant performed work varying from snow and ice removal to window installation and general cleanup. Claimant worked all over the PPC property from 2011 through January 2014.

16. For most other work performed at PPC, AMS would obtain bids from various vendors, present those bids to the PPCOA board who would then vote on which bid to accept. PPCOA or AMS would then enter into a contract to perform the work at the bid

price. Those other vendors were required to supply proof of liability insurance and proof of workers' compensation insurance if the vendor had employees.

17. According to Johnson, the vendors largely remained the same over the years, and PPCOA rarely sought bids concerning the routine work such as snow removal and landscaping. Most of the routine contracts were for six months. As an example, Johnson explained that the snow removal vendor entered into a six-month contract to perform snow removal services during the winter season and flowerbed maintenance vendors would enter into a six-month contract during the nicer weather.

18. Neither PPCOA nor AMS required the Claimant to submit proof of liability insurance to continue performing work for PPCOA after the initial flowerbed contract.

19. During this period of time, AMS was required to update the PPCOA board as to the monthly expenses and assist with developing annual budgets.

20. In 2012, PPCOA decided to begin replacing the siding on the entire condominium complex and approved the budget for this project.

21. Johnson approached Claimant to ask if Claimant wanted to perform the work. The Claimant agreed and he and Johnson negotiated an hourly rate. The Claimant did not bid for the job or compete with any other vendor or contractor to obtain the siding work.

22. Johnson testified that PPCOA had a budget for the siding work and that due to that budget and any unanticipated issues with replacing old siding, he believed obtaining bids would be difficult. Johnson further explained that once the budgeted funds ran out, then the siding work would end.

23. Thereafter, Claimant began to work on re-siding the entire condominium complex, building by building, subject to the funds available and the budget of PPCOA. Claimant performed siding work for PPCOA for approximately two years.

24. PPCOA supplied all of the materials Claimant needed to perform the re-siding work. The Claimant was not required to purchase the siding, batten, nails, glue or any other material associated with the siding work.

25. Johnson showed Claimant how he wanted the siding project to look, and explained how he wanted Claimant to hang the siding, but he did not specifically show the Claimant how to install siding. Claimant had never hung siding before. Claimant testified that he figured out for himself how to hang the siding because "it's not rocket science." Claimant had significant experience with hand tools and maintenance work, thus he did not need specific instruction or oversight in order to perform the work.

26. Claimant used a nail gun he borrowed from Johnson. He also had borrowed a nail gun from a friend. Claimant also used his own sander and other tools for the siding

work. The ladder belonged to Claimant although he testified at the prior hearing that he had borrowed ladders and other tools from AMS or Johnson at times.

27. At the prior hearing, Claimant testified that AMS had authorized him to charge tools to the AMS account and two hardware stores in town. In actuality, the PPCOA held the hardware store accounts, and Claimant did charge “odds and ends” to the PPCOA accounts.

28. Johnson periodically checked on Claimant’s progress. Johnson did not constantly oversee Claimant’s work. Johnson did not need to constantly oversee Claimant’s work because he and Claimant were friends, and he knew Claimant could do the work based on Claimant’s prior experience on the PPCOA property. It was apparent from the testimony that Johnson trusted Claimant immensely.

29. When Claimant nearly completed a job, Johnson would identify a new area for Claimant to being siding replacement. Claimant also testified that, “there was [sic] always other things in between that needed to be done” which is evidenced by the invoices reflecting various work being performed in addition to the siding.

30. Johnson did not give Claimant a specific completion deadline for the siding work but provided a general deadline.

31. Claimant had no set work hours. Claimant was not required to clock in or clock out, but he was expected to complete his work within reasonable hours and within a reasonable timeframe. Claimant’s hours varied each week.

32. Claimant testified he felt like the “on call” guy for the PPCOA. Johnson disagreed with Claimant’s characterization. The ALJ finds Claimant’s testimony more credible and persuasive than that of Johnson.

33. Claimant provided invoices for completed work to PPCOA on a weekly basis or when a portion of the project was complete. The invoices stated “Above and Beyond” at the top and the invoices indicated that checks should be made payable to Claimant, personally. Claimant submitted his invoices to the PPCOA and addressed his invoices either “To: Pines” or “To: Pines Association” with c/o AMS next to or below the address to Pines.

34. Claimant explained that he used a computer application to generate the invoices and never changed it to remove Above and Beyond from the top of the invoice.

35. A review of the invoices for the calendar year 2013 through the date of injury reflects that Claimant worked part-time at the PPCOA property. He worked almost every week for PPCOA and his hours varied from six hours to 40 hours per week. No invoices for the calendar year 2013 reflect that Claimant worked anywhere else other than PPCOA and for his own skunk removal business.

36. AMS, as agent for PPCOA, issued checks to Claimant personally. No taxes were withheld.

37. In 2012 and 2013 for all the work performed at the PPC property, PPCOA issued Claimant a 1099-Misc tax document.

38. In 2012 and 2013, Claimant filed his income taxes with the IRS and identified his income as "self-employment income."

39. Claimant's wife had formed Above and Beyond, LLC, as a prerequisite to obtaining government contracts.

40. The Claimant did not obtain business cards for Above and Beyond, LLC, and there was no evidence that he advertised or solicited work on behalf of himself or Above and Beyond, LLC.

41. Claimant and his wife failed to file annual reports with the Colorado Secretary of State concerning Above and Beyond, LLC, essentially allowing the registration of the LLC to lapse as of April 1, 2012. Individuals unrelated to the Claimant have now registered Above and Beyond, LLC with the Colorado Secretary of State.

42. The Claimant had a bank account in the name of Above and Beyond, LLC, as well as a personal bank account.

43. PPCOA did not offer Claimant vacation or sick time nor did it offer him other benefits such as medical or dental insurance.

44. PPCOA did not require Claimant to work exclusively for it. Claimant had a skunk removal business and performed skunk removal for PPCOA and at other locations.

45. Claimant also performed landscaping work at the San Juan Motel, which is owned by Doug Dragoo. Claimant performed work for the Dragoo family, including watching their home during the winter months. Claimant also checked on the home of Clyde Grimm during the winter months. Claimant obtained all this work through Johnson.

46. Johnson testified that the Claimant set his own work schedule and if he had work to perform for someone else, it was within Claimant's discretion to do so.

47. An individual named Chris Tressler also performed siding work at the PPCOA property in March 2013. According to the PPCOA payment ledgers, Tressler primarily performed painting work, and had done no siding work since March 2013. PPCOA and AMS also treated Tressler like an independent contractor. Two other individuals also did some siding work for PPCOA in March 2013 according to the payment ledgers.

48. On January 30, 2014, the Claimant fell off a ladder while performing siding work at the PPC property. Claimant injured his right leg. Specifically, he suffered a shattered tibia and fractured fibula, and later developed complications from this injury.

49. The Claimant continues to require medical treatment for his injuries. He is presently residing in California and receiving medical treatment under the California Medicaid plan.

50. Neither PPCOA nor AMS, as agent for PPCOA, referred the Claimant to a doctor.

51. Claimant has not worked since the date of his injury and has not been released to return to work.

52. Claimant initially filed a Worker's Claim for Compensation naming AMS as his employer in this claim.

53. After the first hearing held on March 19, 2015 regarding this claim Claimant filed a second Workers' Claim for Compensation naming PPCOA as his employer on March 30, 2015. It is apparent from the transcript of the March 19, 2015 Claimant was unsure who employed him on January 30, 2014. He believed he worked for AMS until realizing that his paychecks were issued from the PPCOA bank accounts.

54. PPCOA filed a Notice of Contest on April 15, 2015 asserting that Claimant is not an employee of PPCOA.

55. The PPCOA timely issued its Notice of Contest thus no penalties for failure to timely admit or deny shall be imposed. The Claimant did not even believe PPCOA was a potential employer until March 19, 2015 so any notice to the PPCOA via its agent, AMS, is inadequate to show that Claimant intended to file a claim for workers' compensation benefits against PPCOA.

56. The PPCOA does not maintain workers' compensation insurance thereby entitling the Claimant to a 50 percent increase in his indemnity benefits.

57. Based on the foregoing findings, the Respondent has failed to prove that Claimant was an independent contractor at the time he sustained an injury to his right leg on January 30, 2014.

58. In order to arrive at a fair approximation of Claimant's wages, the ALJ considered Claimant's earnings beginning with the invoice dated October 7, 2013 through the invoice dated January 31, 2014. Claimant's earnings over that period of 16 weeks totaled $4,415.75 making his average weekly wage $275.99 with a corresponding TTD rate of $183.99 increased to $275.99. The average weekly wage proposed by Claimant inappropriately inflates Claimant's average weekly wage and is rejected.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Judge enters the following conclusions of law:

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a worker’s compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a worker’s compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A worker’s compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Principal-Agency Relationship

4. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1(1) (1957). The one for whom the action is to be taken is the principal, and the one who is to act is the agent. Id. § 1(2) and 1(3). Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal’s manifestations of consent to him. Id. § 7. Agency is thus a legal relation having its source in the mutual consent of the parties. The existence of an agency relationship is ordinarily a question of fact. *Marron v. Helmecke*, 100 Colo. 364, 67 P.2d 1034 (1937); *Eckhardt v. Greeley Nat'l Bank*, 79 Colo. 337, 245 P. 710 (1926); *Schoelkopf v. Leonard*, 8 Colo. 159, 6 P. 209 (1884). A general agent is "an agent authorized to conduct a series of transactions involving a continuity of service," Restatement (Second) of Agency § 3(1), such as one "who is an integral part of a business organization and does not require fresh authorization for each transaction." Id. § 3 comment a. An "agent" is generally

one who acts for, or in place of, another, or is entrusted with the business of another. *Victorio Realty Group, Inc*. v. *Ironwood IX*, 713 P.2d 424, (Colo. App. 1985).

5. ALJ Jones concluded, and this ALJ agrees that AMS was acting as the general agent of PPCOA when entering into a verbal contract of hire with the Claimant to perform work at the PPC property in exchange for payment. As agent for PPCOA, AMS was authorized to act on behalf of PPCOA and to bind PPCOA to this contractual relationship.

Employment Status

6. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation … under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

7. Under §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the service, both under the contract for performance of service and in fact ***and*** such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." [Emphasis added]

8. The Respondent has the burden of proving that Claimant was an independent contractor rather than an employee. To prove that Claimant was free from control and direction, the Respondent must prove the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and whether the person is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), C.R.S., creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Nelson v. Industrial Claim Appeals Office, supra.*

9. In addition to proving that the Claimant is free from control and direction, the Respondent must also establish the Claimant is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Section 8-40-202(2)(a), C.R.S. In *Industrial Claim Appeals Office v. Softrock Geological Services, Inc.*, 325 P.3d 560 (Colo. 2014), the Colorado Supreme Court held that whether an individual is customarily engaged in an independent trade, occupation, profession, or

business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer. The court further stated that there is no dispositive single factor or series of factors that would resolve the nature of the relationship between the employee and putative employer.

10. Based on the foregoing findings of fact, the ALJ concludes that PPCOA has failed to meet its burden of proof that Claimant was an independent contractor at the time he sustained an injury on January 30, 2014. While it is true that Claimant initially worked as a landscaping/flowerbed vendor, that relationship changed significantly over the ensuing years. Claimant and Johnson offered conflicting testimony about the nature of the relationship between Claimant and PPCOA, which the ALJ resolves in favor of the Claimant. Claimant essentially became an on-call handyman for the PPCOA property.

Further, the Claimant was not customarily engaged in the independent trade of hanging siding or performing handyman services at the time he was injured. The invoices presented by both parties reflect that Claimant was working exclusively (although he was not required to) for the PPCOA as a handyman at the time of his injury. The fact that Claimant had a skunk removal business does not sever the employment relationship between PPCOA and Claimant. Rather, the skunk removal business merely represents concurrent employment. In addition, PPCOA paid Claimant personally at an hourly rate, instead of through a trade or business name. PPCOA established a quality standard and provided some oversight of Claimant's work. The ALJ recognizes that PPCOA did not provide more than minimal training, but Claimant had significant experience and did not need training. The ALJ also recognizes that PPCOA did not provide tools or benefits to Claimant, although at times Claimant was permitted to borrow tools from AMS or purchase tools at the expense of PPCOA. Finally, the ALJ acknowledges that PPCOA did not dictate time of performance other than providing general deadlines. However, balancing all of the factors enumerated in §8-40-202(2)(a), C.R.S., and considering the totality of the circumstances and nature of the relationship between Claimant and the PPCOA, the ALJ concludes that the PPCOA has failed to overcome the presumption, by a preponderance of the evidence, that Claimant was an employee under the Workers' Compensation Act.

Compensability

11. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). As found, Claimant was in the course and scope of his employment on January 30, 2014 when he fell from a ladder and suffered a broken right leg.

Penalties

12. In any case where the employer fails to comply with the insurance provisions of the Act, the amount of compensation or benefits an employee may claim shall be increased by fifty-percent. Section 8-43-408(1), C.R.S. Here, PPCOA failed to carry the requisite workers' compensation insurance. As such, Claimant is entitled to a fifty-percent increase in his compensation or benefits.

13. Under §8-43-203(1), C.R.S., Respondent is required to notify the Division whether Respondent is admitting or contesting the claim within 20 days after a report is filed, or should have been filed. The ALJ concludes that under the circumstances of this case, there was no indication that Claimant intended to pursue a claim against PPCOA until March 30, 2015. It is apparent from the transcript of the March 19, 2015 Claimant was unsure who employed him on January 30, 2014. He believed he worked for AMS until realizing that his paychecks were issued from the PPCOA bank accounts. Thus, the ALJ declines to impose penalties under §8-43-203(1), C.R.S.

Temporary Disability Benefits and Average Weekly Wage

14. Pursuant to §8-42-103, C.R.S., when a disability lasts longer than two weeks from the date of injury, disability indemnity is recoverable from the day injured employee leaves work. In this case, Claimant never returned to work for the PPCOA following his January 30, 2014 work injury. Claimant has not returned to work in any capacity has he remains on work restrictions and has not been released to full duty. Based on Claimant's average weekly wage of $275.99 the Claimant's TTD rate is $183.99. As of the date this decision, the Claimant has been out of work for 109 weeks and 1 day resulting in a total wage loss of $20,081.19. However, due to the 50 percent penalty, Claimant's total wages loss is increased to $30,122.34. Interest on $30,122.34 at 8 percent per annum totals $2,614.37 with a corresponding daily interest rate of $7.18. **In addition to the TTD owed to Claimant from January 30, 2014 through March 4, 2016, the Claimant is entitled to ongoing TTD until terminated by operation of law.**

Medical Benefits

15. Pursuant to §8-42-101(1)(a), C.R.S., every employer shall furnish all medical treatment necessary at the time of injury or thereafter to cure and relieve employees of the effects of their injury. Claimant received medical treatment from various providers to cure and relieve him of the effects of her injury. There is no evidence that the treatment Claimant has received thus far has not been reasonable, necessary or related to the Claimant's injury. Further, all treatment received has been authorized given that PPCOA did not refer the Claimant to a physician. Claimant is further entitled to future reasonable and necessary medical treatment. PPCOA is liable for past medical treatment (subject to the Division of Workers' Compensation fee schedule) and for future medical treatment.

ORDER

It is therefore ordered that:

1. On January 30, 2014, Claimant sustained an injury while in the course and scope of his employment with PPCOA.

2. PPCOA failed to comply with the insurance provisions of the Workers' Compensation Act. Claimant is entitled to a 50 percent increase in his benefits.

3. The Claimant is entitled to medical benefits, including all treatment which he has already received. Because PPCOA is liable for payment of Claimant's medical costs associated with his work injury, no medical provider shall seek to recover such costs from the employee. Section 8-42-101(4), C.R.S.

4. All treatment Claimant has received is authorized.

5. Claimant is entitled to reasonable and necessary medical treatment in the future.

6. Claimant's AWW is $275.99.

7. Claimant is entitled to TTD benefits commencing on January 31, 2014 for a period of 109 weeks and 1 day for a total award of $30,122.34 (this amount accounts for the 50 percent increase due to the penalty). **Claimant is also entitled to ongoing TTD until terminated by operation of law.**

8. The Claimant is entitled to interest in the total amount of $2,614.37 with daily interest continuing to accrue at the rate of $7.18.

9. The PPCOA shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

10. Claimant's claim for penalties for failure to admit or deny liability is denied and dismissed.

11. All matters not determined herein are reserved for future determination.

12. In lieu of payment of the above compensation and benefits to the Claimant, the Employer shall:

    a. Within ten (10) days of the date of service of this order, deposit the sum of $35,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; OR

    b. Within ten (10) days of the date of service of this order, file a bond in the sum of $35,000.00 with the Division of Workers' Compensation:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado. The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 25, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she sustained a compensable work related injury to her left knee arising out of and in the course and scope of her employment on September 8, 2014.

II. If a compensable injury was sustained, whether Claimant established by a preponderance of the evidence that the left knee arthroscopy performed on November 7, 2014 by Dr. Romero was reasonably necessary and causally related to the September 8, 2014 incident.

III. If a compensable injury occurred, whether Claimant established by a preponderance of the evidence that a left total knee replacement surgery is reasonably necessary and causally related to the September 8, 2014 incident.

FINDINGS OF FACT

Based upon the evidence presented, including the post hearing deposition testimony of Dr. O'Brien, the ALJ enters the following findings of fact:

1. Claimant is employed as a forensic case manager at the Colorado Mental Health Institute in Pueblo (CMHIP). Her duties include managing the care and compliance of mental health offenders who have been released into the community. Claimant works out of an office located in Building 126 when at the CMHIP.

2. On September 8, 2014, between approximately 12:15 pm and 12:30 pm Claimant and Bernadine Villanueva left Building 126 and walked to the parking lot on the north side of the building to go to lunch. Claimant parks in this lot 80% of the time as she prefers to park in the lot closest to her office. The lot is open to all who wish to park there; there are no permits required.

3. Ms. Villanueva went to her own car to retrieve her cigarettes. Claimant went to her own car as it was her intention to drive the two to lunch off campus. When she got to her car she put her right foot into the car and twisted her whole body to get in and sit down when she felt extreme pain in her left knee causing her to holler out in pain. Both Claimant and Ms. Villanueva testified that the parking lot was older and poorly maintained with holes, pits, and uneven areas. Claimant did not testify that any particular flaw in the parking lot caused her injury. Rather, the ALJ finds from the evidence presented, that Claimant principally alleges a discrete injury, i.e. a tear of the medial meniscus and ACL occurred as she pivoted on her foot in an attempt to get her body into the car and sit down. The ALJ also finds that Claimant asserts that she

suffered an aggravation of her preexisting osteoarthritis as a consequence of her twisting action.

4. Ms. Villanueva testified that she did not see Claimant get into her car and did not hear her cry out. She only knew what happened in that lot based upon what Claimant told her.

5. Claimant testified that she sat down and tried to regain her composure. After two to three minutes, the intense pain in her knee subsided and she was able to move her leg around. Consequently, Claimant thought she would be OK so she decided to proceed to lunch. When they got to the restaurant a short distance away Claimant attempted to exit her car by placing her left foot on the ground. As she attempted to stand up, Claimant experienced pain in the left leg and it gave way, causing her to fall to the ground. Claimant testified that she needed assistance to get up off of the ground. After she was helped back into her car, Claimant drove herself and Ms. Villanueva to the Parkview Emergency Room (ER) downtown. As the ER was crowded, Claimant elected to drive herself and Ms. Villanueva to the Parkview ER in Pueblo West. Ms. Villanueva confirmed that Claimant drove them to the Parkview ER in Pueblo West. She did not testify regarding the Parkview downtown location.

6. Claimant provided a consistent story of having twisted while getting into her car and feeling left knee pain and then falling when she tried to get out of the car to the physicians at Parkview Medical Center. (Exhibit C) Claimant did not report to the physicians at Parkview Medical Center that any particular flaw in the parking lot caused her injury. Claimant reported no pain at the emergency room only a sense of instability and an inability to put weight on her left leg. (Exhibit C, bate stamp 6) Claimant's range of motion was normal; she had minimal effusion, pop with no pain medially and laterally with McMurry's test, negative anterior and posterior drawer, and no joint line or popliteal ttp (tenderness to palpation). (Exhibit C, bate stamp 7) X-rays showed diffuse changes of degenerative arthritis with no evidence of acute fracture or displacement. (Exhibit C, bate stamp 12) Claimant was supplied with a knee immobilizer, crutches and a prescription for a walker secondary to difficulty using crutches and her weight.

7. Once she returned home, Claimant spoke with her supervisor at which time she was informed to report to work the next morning to complete claim paperwork. Claimant completed the necessary paperwork on September 9, 2015. Claimant elected to be seen at Centura Centers for Occupational Medicine (CCOM) for evaluation.

8. Claimant was first seen by Dr. Nanes at CCOM on September 10, 2014. During his encounter, Claimant reported that she "twisted left knee on uneven pavement while getting into car:" She also completed a pain diagram indicating stabbing pain when her left knee pops and pain only 10% of the time. (Exhibit D, bate stamp 23) Dr. Nanes made no notation that Claimant attributed any particular flaw in the parking lot to her injury. Dr. Nanes noted that Claimant's left knee was not swollen but that she has popping when she goes to stand up. (Exhibit D, bate stamp 21) Dr. Nanes

recommended an MRI[1] to determine the exact cause of Claimant's left knee condition. (Exhibit D, bate stamp 21) Claimant was also referred to Dr. Nakamura at SMC Physician Partners Orthopedics for evaluation.

9. Claimant testified and the medical records submitted into evidence support that, while Claimant had treatment for left leg swelling associated with cellulitis, she has not had prior treatment for left knee problems. Claimant testified that she had previously been treating with Dr. Nakamura at SMC Physician Partners Orthopedics for severe degenerative arthritis in her right knee and had been scheduled for a right total knee arthroplasty prior the September 8, 2014 incident. (*See also* Exhibit E, bate stamp 67-69) On October 22, 2014, Antonio Ramos, a nurse practitioner in Dr. Nakamura's office, noted that Claimant was scheduled for a right total knee arthroplasty but that she had "a fall" specifically injuring her left knee. (Exhibit E, bate stamp 64) On October 29, 2014, Claimant was seen by Dr. Romero, Dr. Nakamura's partner, along with Dr. Romero nurse practitioner, who documented a history of having tripped while stepping off of a curb causing her to fall 6-8 weeks ago. (Exhibit E, bate stamp 60-61) This history is not consistent with Claimant's testimony or the history reported at Parkview Medical Center. Consistent with the testimony of Dr. O'Brien, the ALJ finds the history provided contemporaneously with the injury event is likely the more accurate history of the injury mechanism. The ALJ attributes the inconsistencies between the history documented on September 8 and October 29, 2014 to Dr. Romero's office rather than Claimant as she has been consistent regarding the history otherwise.

10. Dr. Romero interpreted the MRI as showing an anterior cruciate ligament tear and bucket handle medial meniscus tear. (Exhibit E, bate stamp 62). Surgery was recommended. Claimant's claim was denied. Nonetheless, Claimant proceeded with treatment on her own with Dr. Romero because she was unable to ambulate without the assistance of crutches. Prior to the injury on September 8, 2014, Ms. Villanueva testified she had never seen Claimant use a device such as a cane or crutches to walk around the office. She testified that she had not seen Claimant fall from a knee problem prior to September 8, 2014. She testified that since the injury, she has seen Claimant use various walking aids.

11. On November 7, 2014, Claimant underwent a left knee arthroscopy with partial medial meniscectomy with Dr. Romero. The surgical report from this date continuously notes grade 3 chondromalacia throughout Claimant's left knee. (Exhibit F) The surgical report also indicates that Claimant's left medial meniscus was "remarkable for a large vertical tear peripherally, that was extended into the meniscus root." Finally, the report documents that Claimant had a completely torn ACL at its origin. Surgical treatment was directed to the meniscus tear only.

12. Claimant has torn her right ACL on two occasions. She testified that the

[1] Although neither party submitted the MRI report to the ALJ for consideration, the balance of the evidence, including Dr. O'Brien's independent medical examination report, persuades the ALJ that the MRI was probably preformed October 14, 2014.

symptoms she experienced in her left knee on September 8, 2014 were similar to the symptoms she had when she torn the right ACL previously.

13. Claimant continues to treat with Dr. Nakamura for her right knee. (Exhibit E, bate stamp 35-51) Both Drs. Romero and O'Brien have opined that any treatment associated with Claimant's right knee is unrelated to the September 8, 2014 incident.

14. On April 27, 2015, Claimant was seen by Dr. Nakamura for her right knee and for left leg swelling. (Exhibit E, bate stamp 35) Claimant was seen again on June 25, 2015 for severe bicompartmental degenerative joint disease in her left knee and chronic left lower extremity edema. The physician assistant (PA) noted that Claimant has chronic anterior cruciate ligament deficiency of her left knee and that they did not reconstruct the anterior cruciate ligament during the November 7, 2014 surgery given her advanced arthritis. The PA further noted that Claimant's chief complaint was recurrence of left lower extremity swelling. (Exhibit E, bate stamp 30-34) Claimant testified that following her right knee total arthroplasty she developed increased swelling and pain in the left knee. A total left knee arthroplasty has been recommended.

15. Claimant underwent an IME with Dr. O'Brien on May 15, 2015. (Exhibit G) Claimant reported to Dr. O'Brien that she put her right foot into the wheel well of her car and then was twisting to rotate around so she could sit when she noted the immediate onset of pain and a popping sensation in her left knee. Dr. O'Brien did not note that any particular flaw in the parking lot caused Claimant's injury. Dr. O'Brien noted Claimant's prior right knee problems and that the MRIs for both her right knee and left knee demonstrated fairly identical findings. (Exhibit G, bate stamp 96) Dr. O'Brien opined that it was "medically improbable" that the September 8, 2014 incident caused an injury. Furthermore, Dr. O'Brien opined that the tears to the ACL and medial meniscus, visualized on MRI, were pre-existing and that these conditions were in "no way substantially aggravated or accelerated by a non-existent work injury." (Exhibit G, bate stamp 105) According to Dr. O'Brien, twisting while getting into a car is a "daily activity" and because Claimant's demonstrated mechanism of injury was not "atypical" from the movement he uses to get into his car, he opined that no injury resulted. Dr. O'Brien noted that "[i]f this daily activity is not associated with pain, then there is no injury." (Exhibit G, bate stamp 104) Dr. O'Brien explained that Claimant demonstrated a classic manifestation of pain on September 8, 2014 associated with her pre-existing long-standing medial meniscus tear and anterior cruciate ligament tear. Dr. O'Brien further explained that there was not enough energy associated with getting into or out of her car on September 8, 2014 to result in an injury. Dr. O'Brien also explained that the MRI demonstrated chronic degenerative changes without a massive hemarthrosis. Dr. O'Brien opined that the November 7, 2014 surgery "was in no way causally related" to the September 8, 2014 incident nor was it reasonably necessary but rather, contraindicated.

16. Dr. Romero testified, via deposition, as an expert in orthopedic medicine. Dr. Romero testified that Claimant's explanation of how she injured her left knee on September 8, 2014 while getting into her car was "unusual" to tear the ACL, that

generally those tears are seen as a result of trauma. (Romero Depo., p.10, ll.1-8) Nonetheless, Dr. Romero noted that Claimant had torn her right ACL in the absence of significant trauma previously. Specifically, in that instance Claimant "twisted and her foot stuck on the carpet" resulting in an ACL tear. (Id.) The ALJ finds the mechanism of injury (MOI) resulting in a torn right ACL similar to the MOI challenged by respondents as sufficient to cause injury in the instant case.

17. Dr. Romero described the typical symptoms of a torn ACL as being a popping and early onset of swelling. Pain would be present at the onset of the tear, but could decrease thereafter. He described instability of the knee as the biggest complaint of someone who had torn his or her ACL. He found Claimant's reports of injury at the Parkview Medical Center ER to be consistent with ACL tear symptoms.

18. Dr. Romero testified that based upon his review of the MRI images, Claimant's ACL tear appeared acute. According to Dr. Romero, the fibers of the ACL were visible on MRI appearing as very swollen "white inflamed . . . fibers where the ALC should be, which is what we see in an acute tear." (Romero Depo., p. 23, ll. 2-14) Nevertheless, Dr. Romero agreed that MRI does not pinpoint a date of injury. Consequently, Dr. Romero could only opine that it was possible that Claimant tore her ACL and medial meniscus during the September 8, 2014 incident. (Romero Depo., p. 23, ll. 15-21, p. 10, ll.14-18)

19. Regarding Dr. O'Brien's opinion that the tears were chronic (old) because the MRI did not demonstrate a large hemarthrosis; Dr. Romero testified that the MRI demonstrated a large effusion but no hemarthrosis in the joint space. According to Dr. Romero, the likelihood of Claimant "still having blood in the knee seven weeks after the injury [was] unlikely", although it was possible for there to be continued swelling (effusion).

20. Dr. Romero agreed that Claimant had arthritis in her left knee that predated the September 8, 2014 incident and that the arthritis was not "mild." (Romero Depo., p. 13, ll. 20-22, p. 15, ll. 8-17) While Dr. Romero agreed that Claimant had preexisting arthritis in the left knee, he testified that her "twisting action" likely aggravated it. (Romero Depo., p. 14, ll. 5-11)

21. Dr. Romero also testified that the need for a total knee replacement was due to her pre-existing arthritic condition but that the injury to her ACL and particularly her meniscus accelerated her need for a knee replacement. (Romero Depo., p. 20, ll. 11-18, p. 25, ll. 16-25) Based upon the testimony presented, the ALJ infers that the acceleration issue raised by Dr. Romero is due to the partial meniscectomy, occasioned by Claimant's acute tear, resulting in the loss of the cushion between the articulating surfaces of the knee joint.

22. Dr. O'Brien testified, via deposition, as an expert in orthopedic surgery with substantial surgical experience. Dr. O'Brien described the history provided to him by Claimant and noted that she did not tell him she slipped or fell into a chuckhole in the

asphalt or otherwise forcefully twist her knee. (O'Brien Depo., pp. 13-14) Dr. O'Brien explained that to create tissue breakage, you have to generate enough energy such that that dissipation through tissue literally disrupts the tissue and that neither getting into nor getting out of a car, given the absence of a slip or a chuckhole or oil, generates enough energy to rupture tissue. (O'Brien Depo., p. 17, ll. 3-10) Dr. O'Brien further testified that the ACL is one of the strongest ligaments in the human body and that it takes impact and rotation, derotation, acceleration, and/or deceleration like on a football field, basketball court, or soccer field to generate enough energy to tear the ACL. (O'Brien Depo. p. 30 ll. 5-16) Dr. O'Brien reviewed Claimant's MRI film and thoroughly explained how the MRI findings were, in his opinion, chronic in nature and why the absence of a hemarthrosis was significant in that determination. (*See* O'Brien Depo., pp. 22-25 and pp. 25-29) Dr. O'Brien went on to testify that it is so improbable that Claimant's tears were caused by twisting while getting into her car that it bordered on the impossible. (O'Brien Depo., pp. 30-31) Dr. O'Brien opined that Claimant had a badly arthritic knee and that the surgery performed on November 7, 2014 was not reasonably necessary or causally related to the September 8, 2014 incident. (O'Brien Depo. pp. 33-36) Dr. O'Brien also credibly testified that a total knee replacement would not be causally related to the September 8, 2014 incident and that nothing that happened on September 8, 2014 aggravated or accelerated the need for a total knee replacement or the arthroscopy. (O'Brien Depo., pp. 40-41)

23. Although Dr. O'Brien opined that the medial meniscus and ACL tears were present prior to September 8, 2014, there are no previous imaging studies to compare with the October 14, 2014 MRI. Consequently, the ALJ finds there is no way to determine the nature and extent of ACL and medial meniscus tearing prior to October 14, 2014. Further, careful review of the medical reports admitted into evidence fails to document a treatment history for left knee problems, due to instability or functional deficits, prior to September 8, 2014. Thus, while the ALJ is persuaded that Claimant had pre-existing osteoarthritis in her left knee, he is not persuaded by Dr. O'Brien's testimony that the medial meniscus and ACL tears were chronic in nature. Rather, the ALJ credits the testimony of Dr. Romero to find that Claimant's clinical findings and complaints of instability upon presentation to the ER on September 8, 2014 coupled with Dr. Romero's description of the MRI findings supports a conclusion that Claimant, more probably than not, tore her medial meniscus and ACL while pivoting to get into her car on September 8, 2014. While, twisting the knee represents a low energy action, Claimant has a history of tearing her right ACL in a similar fashion as noted above. Consequently, for her unique anatomy, the ALJ finds the energy involved sufficient to cause injury. The evidence presented also persuades the ALJ that Claimant's left ACL and medial meniscus tears aggravated Claimant's pre-existing arthritis by accelerating her need for a left TKA.

24. The ALJ has carefully considered Dr. O'Brien's opinions and has weighed them against the balance of the competing evidence. Based upon the totality of the evidence presented, the ALJ finds Dr. O'Brien's opinions less persuasive than those of Dr. Romero.

25. Based upon the evidence presented, the ALJ persuaded that Claimant suffered acute tears of the medial meniscus and ACL of the left knee as a direct consequence of pivoting to get into her car on September 8, 2014. Claimant has proven by a preponderance of the evidence that her left knee injury is compensable.

26. Based upon the evidence presented, including Claimant's testimony concerning her functional abilities, the ALJ finds that the left knee arthroscopy performed on November 7, 2014 by Dr. Romero was reasonably necessary and causally related to the September 8, 2014 incident. The evidence presented also persuades the ALJ that Claimant's left knee injury, chiefly the medial meniscus tear accelerated her need for a left TKA as her knee was substantially diseased previously and the partial meniscectomy performed November 7, 2014 resulted in further loss of the "cushion" between the articulating surfaces of the knee joint. Consequently, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that there is an occupational relationship between her September 8, 2014 injury and her need for a total knee arthroplasty. Accordingly, Claimant's need for a left total knee arthroplasty is related to her July 14, 2013 work injury. Claimant's failure to improve following her November 7, 2014 arthroscopy convinces the ALJ that the recommendation to proceed with a left TKA is reasonable and necessary to relieve Claimant from the effects of her industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential*

Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant produced sufficient evidence to support a conclusion that her alleged injuries occurred in the scope of employment. Indeed Respondent's advance no assertions that Claimant was not in the scope of her employment.

E. Even if Respondents had argued that Claimant was not in the scope of her employment because she was on her way to lunch when the injury occurred, the argument would have been unconvincing. Actions such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water and keeping warm have been held to be incidental to employment under the "personal comfort" doctrine. As an example, injuries sustained on the employer's premises while eating lunch are generally compensable under that doctrine because the employee is at a place he might reasonably be, within the time limits of the employment, and engaged in an activity reasonably incidental to the work. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 22-23 (Colo. 1988)(rape of an employee as she was walking on her employer's premises to the company cafeteria compensable); *Industrial Commission v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952); (Colo. 1988) *Ventura v.*

Albertsons, Inc., 856 P.2d 35 (Colo. App. 1992) Underlying this doctrine is the principle that actions taken to satisfy the employee's "personal comfort" are necessary to maintain the employee's health, and are indirectly conducive to the employer's purposes. *See Ocean Accident & Guaranty Corp. v. Pallaro*, 66 Colo. 190, 180 P. 95 (1919). Here, the persuasive evidence demonstrates that Claimant was on her employers premises preparing to engage in an activity reasonably incidental to her work. Having determined that Claimant was in the course and scope of her employment, the question remains whether or not Claimant's alleged injuries "arose out of" her employment.

F. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

G. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). As found in this case, Claimant has established the requisite causal connection between her work duties and her left knee injury. In concluding that Claimant has proven, by a preponderance of the evidence, that she suffered a compensable work injury, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Sharon Bastian v. Canon Lodge Care Center*, W.C. No. 4-546-889 (August 27, 2003) instructive. In *Bastian*, the claimant, a CNA was on an authorized lunch break when she injured her left knee. Claimant was returning to her employer's building with the intention of resuming her duties when she "stepped up the step at the door to the facility", heard a pop in her left knee and felt severe pain. Claimant did not "slip, fall, or trip." Claimant was diagnosed with a meniscus tear and "incidental arthritis." The claim was found compensable. On appeal the respondents contended that the ALJ erred in part on the grounds that the claimant was compelled to prove that her knee injury resulted from a "special hazard" of employment. Relying on their decision in *Fisher v. Mountain States Ford Truck Sales*, W.C. No. 4-304-126 (July 29, 1997), the Panel concluded that there was no need for claimant to establish the step constituted a "special hazard" as claimant "did not allege, and the ALJ did not find, that the knee injury was "precipitated" by the claimants preexisting arthritis." The same is true of the instant case. As in *Bastian*, Claimant in the instant case asserts that she suffered a discrete injury to her knee while pivoting on her left leg to get into her car. Dr. Romero credibly opined the Claimant's post injury presentation and symptom complaints in the ER were consistent an ACL tear, that the tears appeared acute on MRI and that Claimant had previously torn her right ACL in a twisting incident involving her carpet outside of work. Thus, the ALJ concludes that Claimant was not required to prove that her injury resulted from a "special hazard" of employment as argued by Respondents.

H. The instant case is analogous to *Bastian* and *Fisher* in that the activities involved in each case are activities that, per Dr. O'Brien are the type which should not lead to a finding of compensability as they are performed daily and in a similar fashion by others. Merely because Claimant was engaged in activity, specifically pivoting to get into a car and/or rising from a seated position to get out, which is performed daily outside of work and similarly by others does not compel a finding that Claimant's injury is not work-related as suggested by Dr. O'Brien. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). As found, Claimant has established the requisite causal connection between her pivoting while getting into her car to go to lunch and her left knee injury. Consequently, the injury is compensable.

Medical Benefits

I. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

J. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, the evidence demonstrates that Claimant's medical care as provided at CCOM and their referrals, including the orthopedic evaluation and subsequent surgery performed by Dr. Romero was reasonable, necessary and related to her acute left ACL and medial meniscus tears sustained September 8, 2014. The aforementioned care was necessary to assess and treat, i.e. relieve Claimant from the acute effects of her injury. The specialist referrals were reasonable and necessary to determine the extent of injury in light of Claimant's ongoing difficulty with ambulation without an assistive device. Moreover, the evidence presented persuades the ALJ that the recommendation to proceed with a left TKA is reasonable and necessary given Claimant's continued pain and functional decline. Consequently, Respondents are liable for the aforementioned medical treatment and Claimant's TKA as proposed by Dr. Romero.

ORDER

It is therefore ordered that:

1. Claimant has established by preponderance of the evidence that she suffered a compensable injury to her left knee on September 8, 2014.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her left knee condition, including, but not limited to the treatment afforded Claimant at CCOM, the left knee arthroscopic procedure performed by Dr. Romero on November 7, 2014, and the left sided TKA as proposed by Dr. Romero.

3. All matters not determined herein are reserved for future determination.

DATED: March 2, 2016

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether the claimant is entitled to temporary partial disability benefits (TPD); and,

2. Whether the claimant is entitled to a disfigurement award.

FINDINGS OF FACT

1. The claimant was injured on September 15, 2014. He suffered an injury to his left foot.

2. The claimant did not miss any time from work, however, he was returned to work by his treating physician with significant work restrictions including having his foot elevated above his heart.

3. The claimant underwent a course of care and treatment and was returned to full duty work on January 6, 2015.

4. The claimant was placed at maximum medical improvement on February 20, 2015.

5. The claimant's admitted average weekly wage is $1016. 54.

6. From the date of the injury until January 6, 2015, the claimant was on modified duty.

7. The claimant was paid on a bi-weekly basis.

8. During his modified duty the claimant's wages decreased markedly after he suffered the injury on September 15, 2014.

9. The first pay period after the claimant's injury ended on September 28, 2014. During that pay period, based upon his average weekly wage, the claimant should have been paid $2033.08 had he not been injured. However, since the claimant was on modified duty he only received $1,481.60. The difference between the amount

the claimant received and the amount the claimant would have received had he not been on light duty is $551.48. Two thirds of this amount is $367.65.

10. The second pay period ending on October 12, 2014 is identical to the first pay period. Two thirds of this amount is $367.65.

11. The third pay period ending October 26, 2014 the claimant was paid 1,333.44. During that pay period the claimant should have received $2033.08 had he not been injured. The difference between the amount the clamant received on modified duty and the amount he would have received is $699.64. Two thirds of this amount is $466.43.

12. The fourth pay period ending November 9, 2014 the claimant was paid $1,341.77. During that pay period the claimant should have received $2033.08 had he not been injured. The difference between the amount the clamant received on modified duty and the amount he would have received is $460.87. Two thirds of this amount is $271.25.

13. The fifth pay period ending November 23, 2014 the claimant was paid $1,426.97. During that pay period the claimant should have received $2033.08 had he not been injured. The difference between the amount the clamant received on modified duty and the amount he would have received is $606.11. Two thirds of this amount is $404.07.

14. The sixth pay period ending December 7, 2014 the claimant was paid $1,487.71. During that pay period the claimant should have received $2033.08 had he not been injured. The difference between the amount the clamant received on modified duty and the amount he would have received is $545.37. Two thirds of this amount is $363.58.

15. The seventh pay period ending December 21, 2014 the claimant was paid 1,563.56. . During that pay period the claimant should have received $2033.08 had he not been injured. The difference between the amount the clamant received on modified duty and the amount he would have received is $469.52. Two thirds of this amount is $313.01.

16. The eight pay period ending January 4, 2015 the claimant was paid $1,545.49. During that pay period the claimant should have received $2033.08 had he not been injured. The difference between the amount the clamant received on modified duty and the amount he would have received is $487.59. Two thirds of this amount is $325.06.

17. The claimant was on light duty on January 5 and January 6, 2015. The amount he would have received had he not been injured for those two days is $406.62. The claimant was paid $256.90. The difference between the amount the claimant received on modified duty and the amount he would have received is $149.72. Two thirds of this amount is $99.81.

18. The claimant did not receive any temporary disability benefits of any kind during the pendency of his workers' compensation case.

19. The claimant's pay during these pay periods is depicted as follows:

Start Pay	End Pay	Actual 2-week Pay	AWW x 2	Difference	2/3 of Difference
9/15/2014	9/28/2014	$ 1,481.60	$ 2,033.08	$ 551.48	$ 367.65
9/29/2014	10/12/2014	$ 1,481.60	$ 2,033.08	$ 551.48	$ 367.65
10/13/2014	10/26/2014	$ 1,333.44	$ 2,033.08	$ 699.64	$ 466.43
10/27/2014	11/9/2014	$ 1,341.77	$ 2,033.08	$ 691.31	$ 460.87
11/10/2014	11/23/2014	$ 1,426.97	$ 2,033.08	$ 606.11	$ 404.07
11/24/2014	12/7/2014	$ 1,487.71	$ 2,033.08	$ 545.37	$ 363.58
12/8/2014	12/21/2014	$ 1,563.56	$ 2,033.08	$ 469.52	$ 313.01
12/22/2014	1/4/2015	$ 1,545.49	$ 2,033.08	$ 487.59	$ 325.06
1/5/2015	1/6/2015	$ 256.90	$ 406.62	$ 149.72	$ 99.81
					$ 3,168.15

20. The ALJ finds that the respondent-insurer is liable to the claimant for $3,168.15 in temporary partial disability benefits.

21. The ALJ finds that as a result of his September 15, 2014 work injury, the claimant has a visible disfigurement to the body consisting of the following: the claimant's second toe in from the small toe of the left foot has a permanent downward bend. The great toe of the left foot has a slight deformity to the nail bed. The claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to additional compensation. Section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

1. The claimant bears the burden of proving entitlement to TPD benefits by a preponderance of the evidence.

2. A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true than not. See *Page v. Clark*, 593 P. 2d 792 (Colo. 1979).

3. The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of an injured worker or the rights of the employer. *See* §8-43-201, C.R.S. (2010).

4. Temporary partial disability benefits pay for loss of wages while the claimant is able to return to limited duty and is not yet at maximum medical improvement. *Eastman Kodak Co. v. Industrial Commission*, 725 P.2d 107 (Colo. App. 1986); *State Compensation Insurance Fund v. Lyttle*, 151 Colo. 590, 380 P.2d 62 (1963). The rate of compensation is two-thirds of the difference between the average weekly wage at the time of injury and weekly earnings during the continuance of the partial disability. These benefits are limited to the same weekly maximum applying to temporary total disability benefits and must be paid every two weeks. C.R.S.A. section 8-42-106.

5. The only evidence cited by the respondents to deny TPD benefits is the claimant's wages for the period of time leading up to the date of injury, where the claimant was receiving his full wage amount. The respondents do not address the claimant's earnings subsequent to the date of injury.

6. After considering all of the evidence, the ALJ concludes that the claimant has met his burden of proof, as detailed in the findings of fact above.

7. It is clear that the claimant is entitled to two thirds the difference in his AWW at the time of the injury and the amount that he was actually paid.

8. The ALJ concludes that the claimant has established by a preponderance of the evidence that he is entitled to $3,168.15 in temporary partial disability benefits.

9. The ALJ concludes that as a result of his September 15, 2014 work injury, the claimant has a visible disfigurement to the body, which entitles the claimant to additional compensation. Section 8-42-108 (1), C.R.S.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay the claimant $3,168.15 in temporary partial disability benefits.

2. The respondent-insurer shall pay the claimant $800.00 for disfigurement. The respondent-insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: March 30, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-965-879-02

ISSUES

- Whether Claimant has proven by a preponderance of evidence that she is entitled to temporary total disability benefits as of May 6, 2015, through January 19, 2016.

- Whether Respondents have proven by a preponderance of the evidence that Claimant is responsible for her separation of employment from the Employer.

STIPULATIONS

The parties stipulate that the time period at issue for temporary total disability benefits is May 6, 2015, through January 19, 2016. On January 20, 2016, Claimant underwent right elbow surgery, and Respondents are admitting for temporary disability benefits as of January 20, 2016.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On October 28, 2014, Claimant, a former inventory specialist for the Employer, sustained an injury to her right upper extremity. On November 21, 2014, Respondents filed a General Admission of Liability (GAL), admitting liability for medical and temporary disability benefits.

2. On April 13, 2015, Claimant treated at Concentra with Theodore Villavicencio, M.D., the authorized treating physician, and reported that she tried to work full duty without her brace and as a result was experiencing increased pain in her wrist. Dr. Villavicencio gave Claimant work restrictions, including limited use of right hand and occasional keyboarding with her right hand.

3. On April 22, 2015, Claimant treated at Concentra with Casey McKinney, PA-C, and reported increased right hand and wrist pain after returning to keying for three hours per day. Ms. McKinney recommended additional physical therapy and medications and gave Claimant work restrictions including no use of her right upper extremity.

4. On April 29, 2015, Claimant treated with Ms. McKinney, who maintained Claimant's treatment plan and work restrictions, including no use of her right upper extremity.

5. On May 6, 2015, Claimant treated with Ms. McKinney, who placed Claimant at maximum medical improvement (MMI) with no permanent medical

impairment. Ms. McKinney released Claimant to modified work/activity with permanent work restrictions of no keying with her right hand and no repetitive motion with her right hand. On May 9, 2015, Dr. Villavicencio signed the WC164 form, addressing Ms. McKinney's findings regarding MMI, permanent medical impairment, maintenance medical benefits, and permanent work restrictions. Ms. McKinney recommended Claimant follow-up in the next twelve months to address permanent work restrictions.

6. On May 7 or 8, 2015, Claimant met with Employer's district manager, Victoria Benton, to discuss whether Employer could accommodate Claimant's permanent work restrictions.

7. On May 13, 2015, Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Villavicencio's report.

8. Also on May 18, 2015, Claimant treated with Ms. McKinney, who assigned Claimant additional permanent working restrictions, including no 10-keying with her right hand, no repetitive lifting or sorting with her right hand, and no lifting greater than ten pounds.

9. On July 15, 2015, Claimant treated with Ms. McKinney, who maintained Claimant's work restrictions.

10. On August 19, 2015, Claimant underwent a Division Independent Medical Examination (Division IME) with Stephen Lindenbaum, M.D. Dr. Lindenbaum determined Claimant was not at MMI and recommended Claimant be evaluated for radial tunnel syndrome. On September 15, 2015, Respondents filed a GAL reopening the claim consistent with Dr. Lindenbaum's findings. Respondents admitted for medical benefits only.

11. On October 2, 2015, Claimant treated with Ms. McKinney and reported ongoing pain, numbness, and tingling in her right arm. Ms. Mckinney addressed the Division IME's findings and referred Claimant to a hand surgeon, Dr. In Sok Yi, for an examination regarding radial tunnel syndrome. Ms. McKinney maintained Claimant's work restrictions.

12. On October 8, 2015, Claimant applied for a hearing on the issue of temporary total disability benefits from May 6, 2015, to the present. On November 5, 2015, Respondents filed a Response to Claimant's Application for Hearing and endorsed "Voluntary resignation, Claimant ended [employment] after being offered work within her restrictions, Respondents not responsible for ongoing temporary disability benefits under C.R.S. 8-42-103(1)(g) and 8-42-105(4)."

13. At Hearing, Claimant testified that she worked for the Employer as an inventory auditor and a team leader from October 2013 to May 2015. Claimant testified that prior to her October 2014 injury, she worked multiple different jobs for the employer, including healthcare supervisor and different inventory jobs. Claimant testified that after her October 28, 2014 industrial injury, she was assigned work restrictions which specifically limited use of her right upper extremity, and that she worked different light

duty jobs, including some counting or scanning jobs, as well as some office work. Claimant testified that the light duty jobs she worked required use of both upper extremities. Claimant testified that she had her work restriction of limited use of her right upper extremity continued until April 2015, when she attempted a trial of full duty at the direction of her authorized treating physician. Claimant testified that after doing the trial of full duty, she was “back at square one;” with increased right elbow pain and swelling.

14. Claimant testified that on April 29, 2015, her doctor assigned the work restriction of no use of her right upper extremity. Claimant testified that from April 29, 2015, through May 6, 2015, the date she was placed at MMI by her ATP, she did not work for the Employer. Claimant testified that she met with Victoria Benton on or about April 29, 2015, to discuss whether the Employer could accommodate her restriction of no use of her right upper extremity. Claimant testified that she reviewed the schedule with Ms. Benton and that no jobs were available within her work restrictions.

15. Claimant testified that on May 6, 2015, she was placed at MMI and given permanent work restrictions, including no lifting of greater than ten pounds, no keying, and no repetitive motion with her right upper extremity.

16. Medical documentation supports the finding that Claimant was released to modified work/activity with permanent work restrictions of no keying with her right hand and no repetitive motion with her right hand.

17. Claimant testified that after being placed at MMI, she met with Victoria Benton on May 7 or 8, 2015, to discuss her permanent work restrictions and whether the Employer could accommodate them. Claimant testified that both she and Ms. Benton had copies of her permanent work restrictions at the meeting. Claimant testified that she and Ms. Benton reviewed specific jobs, including supervising the 7-Eleven gas station team, a healthcare supervisor position, auto-quantity (AQ) counting positions, the DePuy medical device account, and a national vendor position.

18. 7-Eleven supervisor position: Claimant testified that this job requires keying merchandise into her work scanner and manipulating the merchandise in gas stations on a repetitive basis, which requires use of both upper extremities.

19. Healthcare supervisor position: Claimant testified the position primarily involves counting medications, specifically pills and blister packs containing pills, and other medical supplies, including syringes, IV bags, and compounds, at pharmacies. The pharmacy based position is an manual quantity (MQ) position. Alternatively, the Healthcare supervisor position could involve counting medical devices, and would be warehouse based and involve auto-quantity (AQ) counting. Claimant testified, based on her experience working the healthcare supervisor position, that the MQ position required physically opening pill bottles and specifically manipulating and counting the number of pills in each bottle. Claimant testified that she cannot open a pill bottle with one hand and the healthcare supervisor position requires repetitive use of both upper extremities. Claimant testified that when counting blister packs of pills, the blister packs

are stacked in rows on shelves and that she has to manipulate the blister packs with one hand and then use the other hand to count. Claimant testified that following her injury and while restricted to limited use of her right upper extremity, she attempted to work a healthcare supervisor job and attempted to work the job just using her left upper extremity. Claimant testified that she was unable to complete the jobs and was sent home early by her supervisor for failing to meet productivity standards.

20. DePuy project position: The DePuy project involves counting medical devices, specifically prosthetics, and is an AQ counting position. Claimant testified this involves going to hospitals or warehouses and physically manipulating the medical devices to count them. Claimant testified the devices are typically stored on shelves or pallets and wrapped in some material. Claimant testified that she is required to unwrap the devices and physically manipulate or sort through the devices with both hands in order to count them. Claimant testified that she scans a bar code on each device to count it, but if the bar code does not work, she is required to key in the identification number using the alpha-numeric system on her keying machine. Claimant testified that based on her prior experience working DePuy project jobs, she has had to manually key in identification numbers on a regular basis.

21. National Vendor positions: Claimant testified that national vendor jobs require her to work with insurance companies following natural disasters or fires and to go into homes or businesses and inventory the damaged items. Claimant testified this requires her to sort through and manipulate items and then to take pictures of the items with a digital camera. Claimant testified that based on her experience this job requires repetitive motion with and use of both upper extremities.

22. AQ positions: Claimant testified that AQ jobs require the use of a finger scanner to scan bar codes, tags, or other identification markers on medications and other items in pharmacies or merchandise, including clothes, jackets, and other items in department stores. Claimant testified that this job requires her to manipulate the merchandise with both hands in order to find the tag and then scan it using the finger scanner. While on light duty under restriction of limited use of her right upper extremity, Claimant attempted to work AQ jobs but was not able to complete the jobs. Claimant testified that AQ jobs require use of both upper extremities and also require her to lift a printer that weighs more than 10 pounds.

23. Claimant testified that when she met with Ms. Benton in May 2015, Claimant did not unilaterally state that she was resigning her job with the Employer. Claimant testified that she reviewed and discussed her restrictions and the available jobs with Ms. Benton, that she had concerns that the jobs offered to her violated her work restrictions, and that she and Ms. Benton mutually agreed that none of the available jobs was within Claimant’s work restrictions. Claimant testified that she loved her work with Employer and that if it were up to her, she would still be working for Employer. The ALJ finds Claimant’s testimony credible and persuasive.

24. At hearing, Victoria Benton testified that her job duties include overseeing multiple offices and over one hundred employees and that she assists with contracting,

scheduling, and staffing. Ms. Benton testified that following Claimant's industrial injury, she helped assigned Claimant different light duty positions. Ms. Benton testified that she never knowingly assigned Claimant work outside her work restrictions. Ms. Benton testified that while generic job descriptions exist for different jobs, including the healthcare supervisor position and AQ jobs, the jobs have a lot of variability and that each job has specific job duties, meaning that some jobs have lighter lifting requirements than 25 pounds.

25. Ms. Benton testified that on approximately May 7 or 8, 2015, she met with Claimant to discuss whether any jobs were available within Claimant's work restrictions. Although she acknowledged having a copy of the permanent work restrictions at the meeting, she understood Claimant's work restrictions were no lifting with her right arm and no keying with her right hand. Ms. Benton testified that at the May 2015 meeting, she verbally offered Claimant different jobs including the healthcare supervisor position and a few AQ jobs. Ms. Benton testified that differences exist between AQ jobs and MQ jobs. Ms. Benton testified that MQ jobs involve specific counting, manipulation, and manual keying. For example, MQ jobs require actual manipulation of pill bottles to open and count the contents. The AQ and other healthcare supervisor positions require meeting with drug representatives and scanning each sample of drug. Ms Benton testified that AQ pharmacy jobs do not require opening pill bottles; Ms. Benton testified that MQ jobs involve opening pill bottles. Ms. Benton testified that MQ jobs, which involve more repetitive motion than AQ jobs, are not within Claimant's permanent work restrictions. Ms. Benton testified that AQ jobs involve keying when there is an issue with the drug identification number on the label.

26. Ms. Benton testified that healthcare supervisor positions, and all other supervisor positions, require the supervisor to transport all of the equipment to and from the job sites for all of the employees. Ms. Benton testified that this includes carrying a printer, which she believes weights approximately 20 pounds, a laptop computer, scanning and laser devices, and often stepstools or ladders. Ms. Benton testified that a person "can't possibly lift the printer with one hand." Ms. Benton also acknowledged that no employees in her district performed with one hand the jobs she discussed with Claimant.

27. Ms. Benton testified that she also verbally offered Claimant different retail jobs, including a retail supervisor position. Ms. Benton testified that all retail jobs, including the supervisor job, require counting clothes and other merchandise and require the employee to scan each item. Ms. Benton testified that the retail supervisor job also requires transporting all the equipment, including the 20 pound printer, to and from the different jobsites. Ms. Benton testified that Claimant thought it would be best if she worked as a non-counting supervisor, but there were no available non-counting supervisor positions available in May 2015.

28. Respondents introduced job descriptions for their inventory associate and team leader positions. The physical requirements of both jobs include frequent repetitive motions of both wrists, and hands, and fingers.

29. Ms. Benton testified that the May 2015 meeting with Claimant was "emotional" and that Claimant did not appear to want to leave her job with Employer. Ms. Benton testified that it would be extremely difficult to perform with one arm the jobs she and Claimant discussed. Ms. Benton testified that she and Claimant mutually agreed that there were no jobs available within Claimant's work restrictions. While Ms. Benton testified that that she had the ability to make accommodations to the job duties Claimant would be required to perform, no persuasive evidence was offered to support a finding that such information was communicated to Claimant.

30. It appears from Claimant's testimony and from Ms. Benton's testimony, that both women misapprehended the actual permanent work restrictions which the ALJ finds were no keying with her right hand and no repetitive motion with her right hand.

31. Respondents presented no persuasive evidence that Employer provided Claimant any written offer of modified employment.

32. Claimant's personnel file contains a letter dated May 18, 2015, from Ms. Benton to Claimant which stated, "We accept your resignation effective 5/18/2015." However, no documentary evidence was offered to support a finding that Claimant resigned.

33. At hearing, Ms. Deborah Redd testified that she currently works for Employer in different AQ jobs, including healthcare and retail jobs. Ms. Redd testified that pharmacy AQ jobs require opening pill bottles and that all pharmacy AQ jobs require use of and repetitive work with both arms. Ms. Redd testified that it would be impossible to work a pharmacy AQ job with only one arm. Ms. Redd testified that all retail AQ jobs require use of both arms and repetitive motion with both arms. The ALJ finds Ms. Redd's testimony credible and persuasive. [check this against notes]

34. The parties stipulate that the time period at issue for temporary total disability benefits is from May 6, 2015, through January 19, 2016. On January 20, 2016, Claimant underwent right elbow surgery. Respondents are admitting for temporary total disability benefits as of January 20, 2016. The ALJ accepts the stipulation.

35. On May 6, 2015, Claimant was initially placed at MMI with permanent work restrictions. Dr. Lindenbaum, the Division IME physician, later determined Claimant was not at MMI on May 6, 2015, and Respondents admitted liability per Dr. Lindenbaum's findings. As of May 6, 2015, Claimant has had work restrictions directly related to her work injury. Claimant established a disability directly related to her industrial injury. The ALJ finds that Claimant has proven by a preponderance of the evidence that she is entitled to temporary disability benefits between May 6, 2015 and January 19, 2016.

36. The ALJ finds that Respondents have not proven by a preponderance of the evidence that Claimant voluntarily resigned her employment with Employer. Claimant testified that at the May 2015 meeting with Ms. Benton, both she and Ms.

Benton agreed that Employer did not have any available jobs within Claimant's permanent work restrictions. Ms. Benton testified that she and Claimant mutually agreed that no available jobs were within Claimant's work restrictions and that Employer was unable to accommodate Claimant's work restrictions. Furthermore, Employer did not offer Claimant a written offer of modified employment. Claimant is entitled to TTD benefits from May 6, 2015, through January 19, 2016.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Generally

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Apps. Office,* 5 P.3d 385, 389 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Temporary Total Disability Benefits

Claimant seeks an award of temporary total disability (TTD) benefits from May 6, 2015, through January 19, 2016. Claimant has the burden of proving she is entitled to TTD benefits by a preponderance of the evidence. § 8-42-103(1)(a), C.R.S. C.R.S. section 8-42-103(1) requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Indus. Claim Apps. Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate an entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she is off work due to the disability, and the disability resulted in the actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term disability connotes two elements: 1) medical incapacity evidenced by loss or restriction of bodily function; and 2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions that impair the claimant''s ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). The existence of disability presents a question of fact for the ALJ. No requirement exists that the claimant produce evidence of medical restrictions imposed by an authorized treating physician or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

As found, on May 6, 2015, Claimant was initially placed at MMI with permanent work restrictions. Dr. Lindenbaum then determined Claimant was not at MMI on May 6, 2015, and on September 15, 2015, Respondents filed a GAL reopening the claim consistent with Dr. Lindenbaum's findings. As of May 6, 2015, Claimant has had work restrictions directly related to her work injury. Claimant established a disability directly related to her industrial injury.

The inquiry then turns to whether Respondents have established by a preponderance of the evidence that Claimant is responsible for her separation of employment. Respondents assert that Claimant is precluded from receiving TTD benefits because she is responsible for her separation of employment from the Employer pursuant to C.R.S. sections 8-42-105(4) and 8-42-103(1)(g). Specifically, Respondents contend Claimant voluntarily resigned her position with Employer effective May 18, 2015. This affirmative defense is governed by the termination statutes and *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004).

Section 8-42-105 (3)(d)(1) provides, "Temporary disability benefits shall continue until the first occurrence of any one of the following: (d)(1) The attending physician gives the employee a written release to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." Because Employer never offered Claimant modified employment in writing, her temporary total disability benefits continue.

"In cases where it is determined that a temporarily disabled employee is responsible for her termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury". §§ 8-42-203(1)(g) and 8-42-105(4)(a), C.R.S.. Under these termination statutes, a claimant who is responsible for her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and the wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his or her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act “volitionally” or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that a claimant is responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that a claimant committed a volitional act, or exercised some control over her termination, under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus “responsible” if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of her employment. *Patchek v. Dep’t of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001). When an employee is responsible for her separation of employment, TTD benefits may be denied. *Anderson,* 102 P.3d at 326; *see also Apex Trans., Inc. v. Indus. Claim Apps. Office*, 321 P.3d 630, 631 (Colo. App. 2014). In *Anderson*, the Colorado Supreme Court construed section 8-42-105(4), C.R.S., holding that termination for cause may bar temporary disability benefits. More particularly, the Court noted the statute bars “TTD wage loss claims when voluntary or for-cause termination of modified employment causes wage loss.” *Anderson*, 102 P.3d at 325-326.

As found, Respondents have failed to prove by a preponderance of the evidence that Claimant is responsible for her separation of employment from the Employer. Claimant testified that after meeting with Ms. Benton to discuss her permanent work restrictions, Claimant and Ms. Benton agreed that there were no available jobs within her work restrictions. Similarly, Ms. Benton testified that she and Claimant mutually agreed that there were no available jobs within Claimant’s work restrictions, and, thus, the Employer was unable to accommodate Claimant’s permanent work restrictions. Accordingly, Claimant did not voluntarily resign her employment with Employer, and Claimant is not responsible for her separation of employment.

As found, Claimant is entitled temporary total disability benefits from May 6, 2015, through January 19, 2016.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is entitled to temporary total disability benefits from May 6, 2015, through January 19, 2016.

2. Respondents shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

3. All matters not determined herein are reserved for future determination.

4. If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at **http://www.colorado.gov/dpa/oac/forms-WC.htm.**

DATED: March 23, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-967-090-02

ISSUES

I. Whether Claimant's left shoulder injury is a compensable consequence of her November 4, 2014 admitted workers' compensation claim.

II. If Claimant's left shoulder injury is not a compensable consequence of her November 4, 2014 claim, whether Claimant established, by a preponderance of the evidence, that she sustained a compensable left shoulder injury on November 12, 2014 as a result of an alleged slip and fall in Employer's parking lot.

III. Whether Respondents have produced clear and convincing evidence to overcome Dr. Tyler's Division IME opinion that Claimant has not reached Maximum Medical Improvement ("MMI") for her injuries sustained on either November 4, 2014 or November 12, 2014.

IV. If Claimant's left shoulder condition is compensable, either as a compensable consequence of her November 4, 2014 admitted claim or as an separate independent injury, whether Respondents are liable for treatment related expenses for the left shoulder treatment, including but not limited to out-of-pocket expenses associated with Claimant's left shoulder surgery performed by Christopher Jones, M.D.

V. Whether Respondents have proven, by a preponderance of the evidence, that Claimant was responsible for the termination of her employment precluding her entitlement to temporary total disability (TTD) benefits.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Jessica Lopez, Shannon Lemons, Rebecca Manuszak, and Aaron Griffen, Ph.D., the ALJ enters the following findings of fact:

Claimant's November 4, 2014 Work Related Incident and Her Prior Medical History

1. Claimant worked for Employer from August of 2013 to June 26 of 2015 as an assistant principal.

2. Claimant testified and the persuasive documentary evidence supports that on November 4, 2014, she responded to an altercation involving some students and a security guard on the Employer's educational campus. While attempting to separate the combatants, Claimant was hit from behind and knocked to the floor along with one of the students who fell on Claimant's ankle. According to the security guard on scene,

Claimant struck her head on the floor and lost consciousness for approximately thirty seconds.

3. Emergency medical technicians (EMT) were summoned to the scene and contacted Claimant who was, by the time EMT's arrived, sitting in a wheelchair. Claimant reported right ankle pain and a worsening headache. She specifically denied "dizziness, blurred vision, diplopia, chest pain, back pain, abdominal pain, pain in her right leg, left lower extremity, and bilateral upper extremities. Claimant was noted to have a Glasgow Coma Scale score of 15 and was alert and oriented to person, place, time and event.

4. Claimant was transported to Penrose-St. Francis Hospital where she was evaluated in the Emergency Room by Dr. Christopher Johnson. Claimant's loss of consciousness was noted and it was documented further that she was "amnesic to the event." Claimant reported pain in the right eye, the head, right hip, right ankle and right foot. She again specifically denied any vomiting, diarrhea, altered mentation, numbness, tingling or weakness. Claimant was provided with an aircast for a "potential sprained ankle." It was specifically noted that it was "okay" for Claimant to bear weight.

5. Claimant followed-up at Integrity Urgent Care (Integrity), Employers designated provider, on November 5, 2014. She was evaluated Edwin Baca, M.D. During this visit, Claimant reported a "moderate" headache and "intermittent" vision changes. She also reported "mild" nausea and one episode of vomiting prior to her appointment; however, she denied "current dizziness, nausea, vision changes memory loss or confusion." She had moderate ankle pain and difficulty weight bearing and walking. Claimant was given a prescription for medications and provided with a "lace up" ankle brace and crutches which, according to a November 5, 2014 "Physicians Report of Workers' Compensation Injury", she was to use 100% of the time as she was instructed to engage in no weight bearing with the right leg.

6. On November 13, 2014, Claimant returned to Integrity on a "walk-in" basis. She was evaluated by Dr. Autumn Dean for complaints of intermittent dizziness and forgetfulness and well as shoulder pain which Claimant associated with crutch use. Claimant testified that she told Dr. Dean that she injured both shoulders during the November 4, 2014 incident. Claimant completed a pain diagram on this date depicting burning and aching pain in the left shoulder. According to Dr. Dean's report from this date of encounter, Claimant reported that she thought her "concussion symptoms were improving, but a day or so after her last visit, she started noticing intermittent dizziness and forgetfulness again." Claimant also specifically reported that the "crutches she is using hurt her shoulder, which was injured in a previous accident."[1] Claimant was provided with a walker to use for ambulation.

[1] Based upon Claimant's specific pain complaints and prior history of left shoulder injury/surgery, the ALJ finds Claimant's reference to "previous accident", more probably than not, meant her remote car accident occurring around 1980 wherein she injured her left shoulder and not the November 4, 2014 incident.

7. Claimant has a pre-existing history of anxiety and prior injury to the left shoulder resulting in a rotator cuff surgery. According to records from Claimant's primary care physician (PCP),Dr. Michael Yoesel, Claimant was evaluated for anxiety, likely associated with her high stress job, on April 10, 2014. During this visit, Claimant complained of "fatigue, lightheadedness, difficulty with concentration, headaches and visual disturbances. Dr. Yoesel also noted a prior 1979 left rotator cuff surgery.

8. Careful inspection of subsequent records submitted into evidence from Dr. Yoesel's office indicates that Claimant received treatment, primarily in the form of medications for her anxiety between April 10, 2014 and September 8, 2014. Claimant's anxiety symptoms improved with the use of medication and by September 8, 2014, she was denying any anxiety and/or depression. Dr. Yoesel noted that Claimant appeared "alert and cooperative" with "normal mood and affect" and with "normal attention span and concentration."

9. Claimant testified that since the November 4, 2014 incident, she has had difficulty with balance, dizziness, and her short-term memory.

Claimant's Alleged November 12, 2014 Slip and Fall and Continued Treatment at Integrity Urgent Care for the November 4, 2014 Work-Related Incident

10. Claimant testified that she fell in the parking lot of the school on November 12, 2014 as a result of her balance and dizziness issues This fall injured her left shoulder. She testified that she told Dr. Dean that she injured both shoulders during the November 4, 2014 incident and further that she fell on November 12, 2014 during her appointment on November 13, 2014. As noted above, Claimant was seen by Dr. Dean on November 13, 2014 in follow-up for injuries sustained during the November 4, 2014 incident. During this visit, Dr. Dean documented that Claimant reported left shoulder pain as a consequence of using crutches secondary to her right ankle injury. The report of Dr. Dean is devoid of any discussion/reference to a left shoulder injury occurring during the November 4, 2014 incident or a fall in Employer's parking lot occurring on November 12, 2014.

11. Claimant testified she hit her shoulder against a vehicle in the parking lot on November 12, 2014 and then landed on the parking lot surface with her outstretched arm. Claimant could not remember whether she had scrapes or bruises on her left shoulder, arm, elbow, wrist or hand when she fell against her car and then landed on the pavement with her outstretched left hand, but she testified the entire left arm hurt. Following physical examination, Dr. Dean reported the entire left upper extremity had normal appearance. Examination and testing of the entire left upper extremity revealed normal function.

12. In addition to seeing Dr. Dean on November 13, 2014, Claimant was seen for her initial physical therapy evaluation on the 13th. Similar to Dr. Dean's report, the initial physical therapy note fails to mention a fall occurring on November 12, 2014 in the parking lot which resulted in injury to Claimant's left shoulder. There is no evidence of

any fall onto a parking lot surface in the physical therapist's examination (i.e., no evidence of any scrapes, bruising or other skin changes one would expect to see of a person fell and landed on her outstretched arm as testified to by Claimant. Claimant did complain the crutches caused her discomfort and that she had a prior history of a rotator cuff tear. Nonetheless, there is no mention of falling; there is no report of a new injury the day before; and there are no examination findings consistent with Claimant's allegation of a fall injuring her left shoulder on November 12, 2014.

13. On November 21, 2014, Claimant returned to Integrity for follow-up for what she reported was "severe pain from injury received at work when I fell on crutches." Dr. Baca noted that Claimant was "using a cane now b/c she is having a great deal of pain in her left shoulder and it was worse when using the walker." According to Dr. Baca's note, Claimant was "reporting pain in her shoulder secondary to her fall. She fell onto her left shoulder she believes and had immediate pain the day of the injury." Mention is made of Claimant's prior left shoulder surgery from 1980 with indication that Claimant reported no "problems with the shoulder" following that surgery until she fell again. The report is devoid of any reference to the date of Claimant's alleged fall while using crutches.

14. Claimant completed a pain diagram dated November 20, 2014 depicting pain in the left shoulder caused by what is reported on the diagram as an "injury [occurring] at school when [Claimant] fell on crutches last week. The ALJ finds the date referenced on the pain diagram likely a documentation error as Claimant did not have a medical appointment on November 20, 2014. Rather, Claimant was evaluated on November 21, 2014.

15. On December 3, 2014, Claimant was seen in the offices of her PCP for a productive cough of one month duration. She was diagnosed with bronchitis and exacerbation of her asthma. However, she also complained of left shoulder pain during this appointment, although discussion regarding a specific cause for her left shoulder pain is not included in the record. It was noted that Claimant was using a cane in the right hand. The ALJ finds that Claimant likely held the cane in her right hand secondary to left shoulder pain.

16. On December 4, 2014, Claimant was re-evaluated by Dr. Baca who ordered an MRI of the left shoulder for "possible RCT" (rotator cuff tear). Dr. Baca noted that Claimant was to continue use of the cane and "may engage in sedentary activities only. No reaching with L (left) shoulder or arm. Regarding causation, Dr. Baca noted: " >50% probability for causation."

17. MRI of the left shoulder was preformed December 8, 2014. The MRI demonstrated what Dr. Baca described as "moderate to severe degenerative changes and rotator cuff tendonopathy, with associated labral fraying and tears.

18. On December 11, 2014, Dr. Baca reviewed the findings of the December 8,

2014, MRI with Claimant. After reviewing the MRI findings, Dr. Baca opined that there was a less than 50% chance of Claimant's shoulder injury being caused by her accident. Dr. Baca referred Claimant to Dr. Christopher Jones for orthopedic consult.

19. As Claimant's treatment with Dr. Baca progressed he clarified his opinion concerning the cause of Claimant's left shoulder condition. On January 1, 2015, Dr. Baca noted that Claimant sustained a "secondary injury" as a consequence of falling while using crutches. Consequently he noted the following regarding causation for Claimant's left shoulder condition: ">50% probability for causation; however, L (left) shoulder injury is <50% probability for causation for initial injury; however, PT (patient) fell using crutches and landed directly onto L (left) shoulder exacerbating chronic deg (degenerative) changes and causing labral tear." The ALJ infers from this causality statement that Dr. Baca does not ascribe any left shoulder injury to the November 4, 2014 incident, i.e. "initial injury." Rather, Dr. Baca's concluded that Claimant's left shoulder condition (injury) was caused by a secondary fall she experienced while using crutches which fall aggravated chronic degenerative changes in the shoulder and which caused a labral tear.

20. As noted above, Claimant previously injured her left shoulder in a car accident resulting in rotator cuff surgery. Claimant testified that her prior left shoulder injury occurred as a consequence of a car accident in 1981. She testified that she had no trouble with her left shoulder after this surgery and the shoulder had time to heal. According to Claimant, her last treatment was likely in 1981. Respondents noted at the first hearing that Claimant's shoulder surgeon noted "degeneration" and "gout" in her shoulder. Nonetheless, Claimant testified that her shoulder "didn't really hurt" much before her work accident, but it was a "12 out of ten" after. Moreover, the ALJ is unable to find record support demonstrating that Claimant obtained treatment or even complained of left shoulder pain/symptoms between 1981 and November 13, 2014.

Dr. Jones' Treatment

21. As noted above, Claimant was referred to Dr. Christopher Jones for orthopedic consult. Dr. Jones first evaluated Claimant on December 29, 2014. During this visit, Dr. Jones documented what he understood to be the events surrounding Claimant's injuries sustained on November 4, 2014. Regarding those events, Dr. Jones noted that Claimant had been "pushed into a door and struck her shoulder." He does not indicate which shoulder was struck however. Assuming Dr. Jones is referencing the left shoulder, the ALJ finds no record support, outside of Claimant's contention, for such conclusion. Nonetheless, Dr. Jones also documents that following the November 4, 2014 incident, Claimant was using crutches when she fell at "work on 11/10/14, and that is when she really feels like she re-hurt her shoulder." The reference to a date of injury occurring November 10, 2014 is inconsistent with the balance of the record evidence suggesting that Claimant fell and injured her left shoulder on November 12, 2014.

22. Dr. Jones also commented on the findings of Claimant's December 8, 2014 MRI,

noting that the MRI demonstrated “a lot of intra-articular debris consistent with possible lose chondral debris and some synovitis associated with that” along with “some tendinopathy of [the] rotator cuff and possibly a partial tear, but I do not see a full-thickness defect.”

23. Regarding the cause of Claimant’s left shoulder symptoms’, Dr. Jones noted: “Given the mechanism of injury, this could certainly be a traumatic injury with impaction of the humeral head onto the glenoid. However, it could also be all chronic with some exacerbation of her previously existing injury.” Dr. Jones elected to proceed conservatively by injecting the shoulder with a 2:2:1 solution of Marcaine, Lidocaine and Depo-Medrol.

24. By January 19, 2015, it was evident Claimant had failed conservative treatments such as physical therapy and injections. Dr. Jones requested surgical authorization from Respondents on January 30, 2015. Respondents denied the request on February 11, 2015.

25. Claimant testified to having two surgeries on her left shoulder following her November fall while using crutches. The first surgery took place on February 11, 2015, and the second occurred in March of that year. The second surgery was necessary to correct a “popeye” deformity in Claimant’s left biceps caused by the first surgery. During Claimant’s February 11, 2015 procedure it was discovered that she had pseudo gout. Claimant’s surgery was covered by her private health insurance although she had out-of-pocket costs for the surgery and subsequent physical therapy.

Maximum Medical Improvement, Dr. Lindberg’s Evaluation, Dr. Hall’s Evaluation and Dr. Tyler’s Division Independent Medical Examination (DIME)

26. Dr. Baca placed Claimant at maximum medical improvement (MMI) without permanent impairment on March 3, 2015. At the time he placed Claimant at MMI, Dr. Baca noted she was not working secondary to her left shoulder condition. Claimant testified she missed work from February 11, 2015 until March 20, 2015, as a result of her left shoulder surgery. Dr. Baca’s opinion concerning causality of the left shoulder condition/injury was unchanged from his January 1, 2015 opinion.

27. Respondents sought an opinion from Dr. James Lindberg regarding the cause of Claimant’s left shoulder condition. Dr. Lindberg examined Claimant on May 5, 2015 after which he opined that he did not believe Claimant had an injury to her left shoulder as a result of the November 4, 2014 incident. He also concluded that there were multiple inconsistencies surrounding Claimant’s alleged second injury stemming from a fall on or about November 12, 2014.

28. Claimant sought an opinion from Dr. Timothy Hall. Dr. Hall evaluated Claimant on June 19, 2015. Dr. Hall concluded that while Claimant had pre-existing degenerative changes in the left shoulder, the two events in November, i.e. the original incident of November 4, 2014 and particularly the November 12, 2014 fall caused those changes to

become symptomatic. But for the November 12, 2014 fall, Dr. Hall opined that Claimant "would not have gone to surgery." Consequently, he opined that Claimant's left shoulder condition/injury was a direct result of the work-related event of November 12, 2014. Dr. Hall also felt that Claimant needed additional work-up for ongoing symptoms related to her concussion. According to Dr. Hall's independent medical examination (IME) report, Claimant needed referral to a neuro ophthalmologist and testing/treatment for ongoing cognitive complaints. The ALJ credits the opinions of Dr. Hall to find that Claimant's use of crutches for her right ankle injury sustained during the November 4, 2014 incident, more probably than not, aggravated the pre-existing degenerative changes in her left shoulder resulting in her symptoms and subsequent need for treatment, including the surgeries preformed by Dr. Jones.

29. Claimant requested a Division Independent Medical Examination (DIME) with Dr. John Tyler. Dr. Tyler completed the requested DIME on July 24, 2015. Dr. Tyler concluded: "[t]his patient is not and has never been at a point of maximum medical improvement. I find it insulting, to be honest with all parties, that this patient was ever thought not to have an injury to her left shoulder." Claimant was only on crutches because of her work injury. While she may have had an underlying shoulder condition, this fall exacerbated that condition and created a need for surgery. "Whether or not this patient had previous trauma to the shoulder, that trauma went back nearly 34 years ago and was asymptomatic until this event."

30. Dr. Tyler also opined that Claimant was not at MMI for her head injury, indicating Claimant should be seen by a neuro optometrist. Dr. Tyler believes Claimant may have a mid-line shift brought on by the trauma of November 4, 2014.

31. Dr. Tyler further opined that Claimant should be evaluated by a psychologist for emotional counseling stemming from the fact that she had become a victim of a violent altercation between a student and a security guard that she unfortunately became entangled in.

The Testimony of Claimant's Co-Workers

32. Aaron Griffen, Ph.D. testified Claimant did not report a left shoulder injury as a consequence of a fall in the parking lot to him on November 12, 2014, the date Claimant asserts it occurred. This contradicts Claimant's report that she immediately told Dr. Griffen of the injury. Had Claimant reported an injury, Dr. Griffen testified he would have followed standard protocol, i.e. provide the employee with medical aide, contact Risk Management, and complete an accident report. Dr. Griffen testified that he did not learn about the alleged November 12, 2014 injury until February of 2015 when Claimant finally reported the injury.

33. Claimant's report of an injury on February 10, 2015 for the alleged November 12, 2014 fall came after Dr. Griffen counseled her in December of 2014 and January of 2015 on her need to improve her work performance. Claimant was working under restricted duty when Dr. Griffen spoke with her regarding her work. Claimant was

missing crucial deadlines necessary and important to the employer and those it served. She was also missing meetings necessary to conduct the business of the school district.

Dr. Griffen documented the problems in a running memorandum of his discussions with Claimant regarding her work performance. Dr. Griffen removed some of Claimant's duties in January of 2015 because Claimant's failure to meet mandatory deadlines resulted in compliance issues for critical testing. Claimant was also counseled on her failure to respond appropriately to a subordinate challenging her authority. Finally, Claimant was warned to cease gossiping; she was a leader of the employer's organization and it was important to not undermine the authority structure given the nature of the work (education). On January 15, 2015, Claimant was told she would be put on a corrective action plan to bring her into compliance with the ten standards set by the state for administrators like her.

34. Dr. Griffen met with Claimant to finalize her corrective action plan on February 6, 2015 (four days before Claimant reported the November 12, 2014 alleged fall at work). The corrective action plan was signed on February 9, 2015, one day before Claimant filed her report of a November 12, 2014 work injury. In the corrective action plan, Claimant is put on notice that "Failure to meet the corrective actions mentioned above will result in further disciplinary actions that may lead to termination of your contract."

35. Claimant testified that she told Dr. Griffen she could not meet her duties because of her worker's compensation claim. Claimant returned to work following her surgery on March 20, 2015. She testified that she moved slowly as a result of her injuries. It "took [her] a lot longer to do things because [her] memory isn't that good anymore. So it took [her] twice as—probably three times as long to get something done. And [she] was so slow, it was hard." She also testified that she had difficulty remembering things, but later testified that she was never told the meetings she missed were mandatory. Finally she testified that she did not "[fail] to show up for the ACT exam," but instead had informed the principal she had a doctor appointment she "had to go to."

36. Dr. Griffen credibly testified to the repeated failure of Claimant to meet identified goals in the corrective action plan. Furthermore, Claimant violated Employer policies/procedures regarding student discipline by extending a delayed suspension consequence to a student. Claimant suggested that she inadvertently reverted back to how things were done at her previous employer as an explanation for her action concerning the extension of a delayed consequence.

37. Claimant's employment was terminated at the end of the school year in May of 2015.

38. Based upon the evidence presented, the ALJ finds Claimant's suggestion that she was not a fault for her contract not being renewed unpursuasive. The evidence presented, demonstrates that Claimant's employer went to great lengths to work with her in an effort to ensure her continued success at work. The ALJ is persuaded that Dr. Griffen asked what specific duties Claimant could not meet, since claimant had been

working in a modified job approved by her physician, Dr. Baca. Thereafter some of Claimant's work responsibilities were taken from her. Furthermore, the record evidence supports that Claimant was provided with a support person to help her meet her remaining responsibilities. Dr. Griffen reviewed the specific duties Claimant was expected to perform at which point Claimant stated she did not agree to the corrective action plan and would go to her attorney. Claimant left school after the corrective action plan without permission and indicated she was going to see her attorney. The February 6, 2015 meeting is memorialized in Dr. Griffen's memorandum.

39. Based upon the testimony presented, the ALJ finds that Claimant ascribes the problems with her job performance to the effects of a closed head injury. Claimant's testimony that she did not know that the meetings were mandatory is unconvincing. Her suggestion that the effects of a closed head injury explain her failure to attend meetings, complete deadlines in a timely fashion, adequately prepare and attend critical testing and violating district discipline policies is equally unpursuasive given Claimant's position, the inconsistencies in her testimony and length of her employment with the school district..

40. Based upon the evidence presented, the ALJ is persuaded that Claimant exercised a degree of control over her work performance and otherwise committed multiple volitional acts that directly lead to the termination of her employment.

41. As noted above, after the corrective action plan was put into place, Claimant reported her November 12, 2014 fall. Claimant indicated that the fall was witnessed by Jessica Lopez. She also indicated that she notified Dr. Griffen of the injury on November 12, 2014, the date it allegedly occurred. As noted above, Dr. Griffen contradicts Claimant's assertion. At hearing Claimant's amended her statement that Jessica Lopez witnessed the fall testifying that she told her about it. She also testified that she could not remember whether her statement about reporting a November 12, 2014 injury to Griffen was correct.

42. Jessica Lopez testified that she did not witness the fall. Rather, Ms. Lopez testified that Claimant told her about the second fall on the day it happened of the next day. According to MS. Lopez, Claimant reported to her that she fell and everything was alright. In response to Ms. Lopez' inquiry as to whether she needed to report an injury, Claimant replied "no", that she was fine a little bumped and bruised, but nothing more than that. As noted above, no physical indications of injury, such as bruises, contusions or scrapes are documented in either the physical therapy or Dr. Dean's notes from November 13, 2014, the day after the alleged fall.

43. Shannon Lemons testified that when Claimant returned to work after the November 4, 2014 incident, a student came into her office early in the morning (between 8:00 a.m. and 8:30 a.m.) asking for a wheelchair. Ms. Lemons asked the student why he needed the chair and he replied he needed it for Claimant. Ms. Lemons responded with the student to Claimant's location. Ms. Lemons found Claimant in a

doorway hunched over her crutches. Ms. Lemons knew Claimant had trouble with her lungs and Claimant was breathing heavily as she leaned over her crutches[2].

44. Ms. Lemons testified that she had Claimant sit in the wheelchair and that she wheeled Claimant to her (Claimant's) office. Claimant indicates she needed the wheelchair after lunch on the 12th. Ms. Lemons indicated she responded with the wheelchair first thing in the morning as Claimant arrived at work. It was before lunch, according to Ms. Lemons. Ms. Lemons offered to help her the rest of the day. Ms. Lemons testified that Claimant used the wheelchair prior to lunch because Claimant called her and asked to be wheeled out to her vehicle for lunch. When claimant returned from lunch, Claimant then used her cell phone to call Ms. Lemons to meet her at her car so she could be wheeled from the parking lot back into school. Ms. Lemons testified there was no fall in the parking lot at lunch time, as she wheeled Claimant to her car, helped her get into the vehicle and helped her get her seatbelt on. When claimant returned from lunch (the time which Claimant reports she fell in the parking lot), Ms. Lemons met her at her car. According to Ms. Lemons, Claimant was still in her vehicle when she arrived with the wheelchair and rolled her into the building. Ms. Lemons witnessed her arrival after lunch and testified there was no fall in the parking lot after lunch as Claimant asserts.

45. Ms. Lemons was asked whether Claimant reported a fall in the parking lot when she arrived at school, after Ms. Lemons brought her a wheelchair. Ms. Lemons testified Claimant never reported any fall in the parking lot to her. Ms. Lemons, a health worker, testified Claimant was having trouble breathing, that Claimant is an asthmatic and that she helped Claimant with her nebulizer. Ms. Lemons believed Claimant's need for assistance upon arrival to school on or around November 12, 2014 were due to trouble breathing, as there no report or signs of an injury consistent with a fall. At the end of the school day, Ms. Lemons testified she wheeled Claimant out to her car around 3:15

46. After Claimant reported the November 12, 2014 injury to Employer on February 10, 2015, Claimant approached Ms. Lemons and complained about the Insurer's denial of her left shoulder claim. Ms. Lemons responded she was unaware of Claimant hurting her shoulder. Later, Claimant went to Ms. Lemons again about her denied claim. Claimant told Ms. Lemons she had reported a second injury to her. Claimant stated to Lemons, "I hope you don't get in trouble for this." Ms. Lemons was concerned about Claimant's statement, so she reported it to her supervisor, Rebecca Manuszak. Ms. Manuszak was the District Nurse for Employer at the time. Both Ms. Lemons and Ms. Manuszak no longer work for Employer and were not employed by the school district when they testified. Like Ms. Lemons, Ms. Manuszak was present when Claimant was injured on November 4, 2014. She stayed with Claimant until paramedics arrived.

47. Ms. Manuszak was also aware of Claimant returning to work after the November 4, 2014 admitted work injury. Ms. Manuszak was aware that Ms. Lemons provided wheelchair assistance to Claimant when she returned to work. According to Ms.

[2] The medical records from the office of Claimant's PCP support a conclusion that Claimant was struggling with respiratory conditions and an unspecified exacerbation of her pre-existing asthma.

Manusazak, Ms. Lemons told her that Claimant had a difficult time ambulating on her crutches due to her asthma. Ms. Lemons reported to Manuszak that a student saw Claimant in distress and that Ms. Lemons brought a wheelchair to Claimant and wheeled Claimant around because of Claimant's asthma. Ms. Manuszak saw Claimant later that day. Claimant reported to Ms. Manuszak it was too difficult to use the crutches because of her asthma. Ms. Manuszak believes Ms. Lemons was notified of Claimant's distress by the student as Claimant arrived to work, not after lunch as testified to by Claimant.

48. Ms. Manuszak testified that Ms. Lemons told her about Claimant coming to her office and asking her to support Claimant's allegation that she (Claimant) reported a second injury to Ms. Lemons in November of 2014. Ms. Manuszak characterized Claimant's actions as a threat to Ms. Lemons to "change her story" or "her job would be in jeopardy." Ms. Manuszak testified Ms. Lemons was very upset about Claimant's statements. Ms. Manuszak noted neither she nor Ms. Lemons were aware of any second fall in November of 2014. According to Ms. Manuszak, Claimant did not report any second fall to her and did not report a second fall to Ms. Lemons. Ms. Manuszak testified Ms. Lemons was upset because Claimant suggested that she (Ms. Lemons) would be in trouble because she failed to report Claimant's second injury at the time it allegedly occurred. Ms. Manuszak reported Claimant's statements to Claimant's supervisor's assistant and to the Risk Manager for Employer. She also went to Claimant's supervisor directly and indicated she would not tolerate an employee threatening Ms. Lemons. Ms. Manuszak testified she did not believe there was a second fall; she remembers Claimant coming into the clinic and reporting her shoulder began hurting when she was dressing at home one day. Claimant reported a "dislocation" of the left shoulder while "getting dressed for school" on January 21, 2015 according to records from Integrity. According to Dr. Baca's report from this date, Claimant's report of dislocation was the second time her shoulder had dislocated. Claimant testified she reduced the dislocation herself based on what she had seen on television.

49. Claimant testified that she believed Ms. Lemons knew about her injury in the parking lot when she mentioned to Ms. Lemons that she (Ms. Lemons) may get in trouble for not handling things right away. Based upon the evidence presented, the ALJ finds Claimant's explanation of the exchange between her and Ms. Lemons unconvincing. The totality of the evidence presented concerning this issue persuades the ALJ that Claimant's decision to repeatedly approach Ms. Lemons about the denial of the November 12, 2014 claim coupled with the statement suggesting that Ms. Lemons may be in trouble for failing to report the claim constituted a veiled threat to get Ms. Lemons to report that Claimant had actually fallen in an attempt to bolster the claim.

50. Based upon the evidence presented, the ALJ finds Claimant's allegations surrounding her alleged fall on November 12, 2014 inconsistent. When Claimant finally does report a November 12, 2014 injury on February 10, 2015, she provides details that are inconsistent with the testimony of her co-workers and her own later testimony. At hearing, Claimant reported she fell after getting dizzy while trying to use her crutches to

get from the parking lot to the school. Claimant told Dr. Lindberg she slipped on ice. Clamant told the Division IME, she became dizzy and fell. In her initial report of injury on February 10, 2015, Claimant asserts an employee (Ms. Lopez) witnessed the fall and that she reported the fall to her supervisor (Dr. Griffen) on the date of alleged injury, November 12, 2014. However, these reports are contradicted by both Ms. Lopez and Dr. Griffen.

51. Based upon the totality of the evidence presented, the ALJ finds the reports and testimony of Claimant concerning an alleged fall occurring on November 12, 2014, inconsistent, unreliable and unpursuasive. The evidence presented persuades the ALJ that Claimant has failed to establish by a preponderance of the evidence that she actually fell in Employer's parking lot injuring her left shoulder on or about November 12, 2014.

Dr. Lindberg's Testimony

52. Dr. Lindberg testified that there was no initial injury to the left shoulder from the November 4 fall. He testified further that there was no medical evidence to support a fall on November 12, 2014.

53. Dr. Lindberg testified that Claimant has gout or other crystalline disorder that is unrelated to work. Dr. Lindberg testified that "gout can be caused by the — exacerbated by trauma" He also testified that a gout flare-up can be caused by trauma. He testified that he had no knowledge of any of left shoulder symptoms between Claimant's car accident in the 80s, and her injury in November 2014. Dr. Lindberg's hypothesis as to why Claimant had not previously been prescribed medication for gout (if she in fact did have it) was that "[i]It hadn't reached a crescendo point in any joint."

54. According to Dr. Lindberg, the dislocations, which Claimant reports are more likely the cause of her flare ups of left shoulder pain rather than the November 4, 2014 or alleged November 12, 2014 work injuries. Dr. Lindberg agreed with Dr. Baca, that Claimant's left shoulder condition is unrelated to work and should be cared for under her health insurance. Further, Dr. Lindberg does not believe any of Claimant's continuing complaints/symptoms resulted from any work related condition with the employer.

Dr. Baca's Testimony

55. Dr. Baca testified that his own medical report from the initial visit documents three different mechanisms of injuries for Claimant's injury on November 4, 2014. Dr. Baca's November 5, 2015 report begins by stating that Claimant "hit her head on a door knob and had loc for 10+ seconds." A few lines down, the report indicates that Claimant fell and hit the left side of her head on the door, not the door knob. The final page of Dr. Baca's report states that the Claimant hit the *right* side of her head on the door, fell to the floor, and then hit the left side of her head and right side of body on the floor.

56. Dr. Baca testified that he did not notice any concussive or post-concussive

symptoms when he first examined Claimant. However, he also testified that assessment of her post-concussive or concussive symptoms was difficult due to her "emotional lability, anxiety, and stress." He also testified that if Dr. Tyler was correct, Claimant would require additional evaluation and treatment.

57. As noted, the initial emergency room report notes Claimant was unconscious for around approximately 30 seconds, and she was "amnesic" to the event. While Claimant had no symptoms of concussion on re-evaluation in the ER, the provider noted a concussion as "always possible" for which he recommended monitoring of symptoms and close follow-up with her PCP. Dr. Baca also reported a concussion as a work related medical diagnosis when he examined Claimant on November 5, 2014. As found above, that examination revealed moderate headache and intermittent vision changes as well as an episode of vomiting. The ALJ finds these symptoms consist with concussion.

58. Claimant was still complaining of "intermittent lightheadedness and intermittent headaches" three days after her initial injury on November 4, 2014. She complained of "intermittent dizziness and forgetfulness" on November 13, 2014. Despite these facts, Dr. Baca testified he did not notice any post-concussive symptoms. Dr. Baca's testimony in this regard is not persuasive.

59. Based upon the evidence presented, the ALJ finds that Claimant likely suffered a concussion as a consequence of the November 4, 2014 incident. While the records reveal inconsistencies regarding whether Claimant injured her left shoulder in the incident occurring November 4, 2014, those records repeatedly document that Claimant hit her head, lost consciousness and injured her right ankle requiring use of crutches.

60. Dr. Baca felt that Claimant's left shoulder complaints were not "consistent at all with a gouty arthritis flare."

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim*

Appeals Office, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony regarding her alleged November 12, 2014 fall and the basis for termination of employment are inconsistent, unreliable and substantially contradicted by the more persuasive testimony of Ms. Lemons, Ms. Manuszak and Dr. Griffen. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability of the Left Shoulder Condition

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989). The question for determination here is whether Claimant's left shoulder symptoms and need for treatment arise out of her employment and are sufficiently connected thereto to result in a finding that her alleged injuries/condition is compensable.

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Whether Claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges, in part, that she sustained an injury to her left shoulder as a consequence of a fall in Employer's parking lot on or about November 12, 2014. As found above, the ALJ is not convinced that Claimant actually fell as she claims. As the ALJ concludes that Claimant likely did not fall, there is no nexus between Claimant's left shoulder condition and that fall. While the evidence presented does not support a conclusion that Claimant sustained a left shoulder injury as a consequence of a fall on November 12, 2014, the ALJ is persuaded that Claimant's left shoulder condition is nonetheless a compensable consequence of her admitted injuries stemming from November 4, 2014 as her use of crutches likely aggravated pre-existing degenerative changes in the shoulder to produce symptoms.

G. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, where the industrial injury "aggravates, accelerates, or combines with" a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial*

Commission, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). In this case, the totality of the persuasive evidence supports a conclusion that Claimant suffered from asymptomatic pre-existing degenerative changes in the left shoulder prior to November 4, 2014. Following injury to her right ankle when a combative student fell on top of it on November 4, 2014, Claimant was non-weight bearing regarding the right leg and was directed to use crutches 100% of the time according to the provider's notes from Integrity. Within eight days of that directive, Claimant returned to Dr. Dean on a walk-in basis complaining that use of the crutches was hurting her left shoulder that had been injured previously. Consequently, Claimant's left shoulder became symptomatic as a consequence of the November 4, 2014 industrial injury. Simply put, Claimant's use of crutches for her November 4, 2014 work injury aggravated her asymptomatic left shoulder condition resulting in pain and the need for treatment, including the surgeries performed by Dr. Jones. Such injuries are compensable. *Subsequent Injury Fund v. Devore*, 780 P.2d 39 (Colo. App. 1989); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo.App. 1986).

Overcoming Dr. Tyler's DIME Opinion Concerning MMI

H. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

I. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.

> The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

J. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). The instant case involves complex medico-legal questions concerning the cause of Claimant's left shoulder condition and her need additional treatment associated with her left shoulder and persistent post concussive symptoms. Here the DIME report of Dr. Tyler reflects that he reviewed medical records from the various providers who evaluated and/or treated Claimant. The DIME considered the opinion of Dr. Lindberg and did not change his opinion regarding MMI. To the contrary, Dr. Tyler rather aggressively, outlined his disagreement with the conclusion reached by both Dr. Baca and Dr. Lindberg that Claimant did not suffer a compensable injury to her left shoulder. While Dr. Tyler engages in unnecessary rhetoric, the ALJ finds and concludes that his opinions are supported by the record evidence presented. Claimant did fall and lose consciousness on November 4, 2014 which has seemingly affected her vision. While the ALJ is not convinced that her claimed cognitive symptoms adequately explain her poor work performance, Claimant has emotional lability which may emanate from a closed head injury and which needs to be treated with counseling per Dr. Tyler. She also clearly was directed to use crutches, which as noted above, likely aggravated an underlying preexisting arthritic condition resulting in the need for treatment, including surgery. To the extent that Dr. Tyler opinions concerning MMI diverge from those expressed by Dr. Baca and Dr. Lindberg, the ALJ concludes that those divergences constitute a professional difference of opinion. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Consequently, Respondents have failed to prove that Dr. Tyler's opinion regarding MMI was highly probably incorrect as stated in the July 24, 2015 DIME report.

K. To the extent that Dr. Tyler causally relates Claimant's left shoulder condition and need for treatment, including surgery to a alleged fall occurring on or about November 12, 2014, the ALJ concludes that Respondent's have overcome that opinion by clear and convincing evidence for the reasons outlined above.

Medical Benefits

L. Claimant bears the burden of establishing entitlement to medical treatment

See Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

M. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). As found, Claimant's need for left shoulder surgery is causally related to her November 4, 2014 admitted claim.

N. "Authorization" refers to the physician's legal status to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Under § 8-43-404(5)(a), C.R.S., the employer or insurer is afforded the right in the first instance to provide a list of at least two physicians from which list the injured employee may select the physician who attends her. In this case, Claimant was referred to Dr. Christopher Jones for evaluation for her left shoulder by Dr. Baca, Claimant's ATP. Dr. Jones is therefore within the chain of referrals. Dr. Baca requested preauthorization for surgery from Respondents and was promptly denied. It was at this time that Claimant proceeded with left shoulder surgery out of necessity. Claimant underwent two separate surgeries on her left shoulder that were covered by herself and her private insurance. Claimant paid $1,000 out of pocket already and there is still an outstanding $800 bill pending with Orthopedic Rehabilitation Associates. As Claimant's left shoulder injury is found to be compensable, Respondents are liable to reimburse Claimant's out-of-pocket expenses of $1,000 and to pay all reasonable and necessary outstanding medical expenses related to treatment of the left shoulder.

Responsibility for Termination

O. Because Claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42 103(1)(g), C.R.S. apply. Those identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58

P.3d 1061 (Colo.App. 2002). Simply put, if claimant is responsible for his/her termination of employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota, Inc.,* W.C. No. 4-465-839 (ICAO February 13, 2002). Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 20 P. 3d 1209 (Colo. App. 2000).

P. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). “Fault” does not require “willful intent” on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996)(unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO April 9, 2008). “Fault” can include poor job performance, but Claimant is not at fault if the termination is due to claimant’s physical or mental inability to perform assigned duties, *Johnston v. Deluxe/Current Corporation*, W.C. No. 4-376-417 (Industrial Claim Appeals Office, June 7, 1999). In this case, Respondents assert that Claimant was terminated for cause at the end of the academic school year in May 2015 for failure to meet her goals set out in her corrective action plan. Claimant counters that she is not responsible for her termination because she was mentally unable to perform her due to the effects of a closed head injury caused by the November 4, 2014 incident occurring at work. As found above, the ALJ is not persuaded by Claimant’s assertion. Here, the evidence supports a conclusion that Claimant knew what was required of her to maintain her employment. She was warned, put on a corrective action plan and given all the tools necessary to do her job. Nonetheless, she continued to miss meetings without a reasonable excuse, she failed to perform important functions of her job, again without reasonable explanation and she directly disregarded the policies of the disciplinary policies of the employer by extending to delayed consequence to a student under suspension. In short, Claimant took voluntary acts that caused the termination of her employment. Accordingly, Claimant’s claim for TTD benefits must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant’s claim from benefits arising out of a fall allegedly occurring on or about November 12, 2014 (W.C. No. 4-974-447-02), is denied and dismissed.

2. Claimant’s left shoulder condition and subsequent need for treatment is a

compensable consequence of her November 4, 2014 admitted injury. (W.C. No. 4-967-090-02)

3. Respondents shall pay for all reasonable, necessary and related medical expenses to cure and relieve the Claimant from the effects of her left shoulder condition, including the treatment/surgery provided by Dr. Jones. Respondents shall also reimburse Claimant for out of pocket expenses associated with Dr. Jones' surgeries.

4. Respondents request to set aside the DIME opinion of Dr. Tyler regarding MMI is denied and dismissed.

5. Claimant's request for TTD benefits is denied and dismissed.

6. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 30, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-970-284-02

ISSUES

The issues presented for determination were as follows:

- Whether the Respondents have proven no industrial injury occurred thereby allowing them to withdraw their General Admission of Liability;
- If the Claimant sustained an industrial injury, whether Claimant's current symptoms are causally related to the injury; and
- Whether Claimant is entitled to travel expense reimbursement for travel to medical appointments.
- The Claimant withdrew the issue pertaining to the surgical recommendation and reserved it for future determination.

FINDINGS OF FACT

1. Claimant worked for the Employer for approximately five years as an "auto catcher" which involved handling shingles. On November 5, 2014, Claimant worked the night shift. At around 2:20 a.m., the Claimant bent down on one knee to look at chains and bundles of shingles coming down a conveyor in an effort to troubleshoot some jamming that had been occurring on his shift. As he arose from the kneeling position, he struck the right side of his head on a machine. He testified that he heard a pop and experienced immediate pain.

2. He reported the incident to his supervisor, Alejandro Jimenez, and initially declined treatment, but eventually sought medical treatment at the emergency room later that morning.

3. Jimenez recalled that Claimant appeared to be in pain after the incident. He acknowledged that a forklift driver told him about the Claimant's incident.

4. The emergency room (ER) record from North Suburban documented that Claimant hit his head on a machine at work around 2:30 a.m. The ER physician examined the Claimant and apparently detected no sign of the patient hitting his head, but Claimant did complain of neck pain. The ER physician noted there was tenderness in the left lateral neck but no actual sign of the patient hitting his head. The claimant was given Morphine and Vicodin. An x-ray of his neck was reported as normal. The ER physician diagnosed Claimant with a cervical strain and recommended that he follow up

with the occupational health physician. Claimant was released with prescriptions for Norco and Valium.

5. Claimant testified he was wearing a bump cap when he hit his head which could have alleviated or prevented immediate outward signs of a contusion on his head.

6. Claimant then began receiving treatment primarily at HealthOne Occupational Medicine with Dr. Frederick Scherr beginning on November 6, 2014. Claimant completed a HealthOne questionnaire on November 6, 2014. The questionnaire does not ask a patient about his history of symptoms related to a specific body part other than in generic terms such as “sprains or strains” and Claimant did check the box marked “bone, joint or spine problems” in response to a question about his past medical history.

7. During his initial evaluation of the Claimant on November 6, 2014, Dr. Sherr observed a small contusion on the right side of Claimant’s head, which supports Claimant’s reported injury. Dr. Scherr diagnosed a post head injury and contusion with cervical strain. Dr. Scherr continued treating Claimant for his injury of November 5, 2014 and referred claimant to Dr. Samuel Chan for treatment.

8. Claimant had a cervical spine MRI on January 13, 2015. The MRI showed no evidence of trauma and no acute abnormalities. Specifically, the radiologist noted as follows: “No evidence of trauma. No acute abnormality.” The MRI showed multilevel degenerative changes with a diffuse disc bulge and mild to moderate neural foraminal narrowing on the right and minimal foraminal narrowing on the left.

9. On February 16, 2015, Dr. Chan opined that Claimant’s MRI results showed a disc bulge at the right side of C6-7 which is contralateral to the Claimant’s clinical presentation of left sided symptoms.

10. On April 20, 2015, Dr. Chan indicated that Claimant has not received relief from any of the treatment (physical therapy, chiropractic, and facet injections) he has received. Dr. Chan opined that due to the lack of response to treatment Claimant’s symptoms “were most consistent with myofascial type complaints.” Dr. Chan recommended follow up with an active exercise program.

11. On June 27, 2015, Dr. Chan performed an EMG test on Claimant which returned a normal result.

12. On June 30, 2015, Claimant followed up with Dr. Bryan Pereira for a neurosurgical consultation. Dr. Pereira noted that Claimant’s MRI showed significant neuroforaminal narrowing at C6-7 which he felt was consistent with Claimant’s reported symptoms. Dr. Pereira recommended a C6-7 anterior discectomy and fusion surgery.

13. On July 13, 2015, Dr. Chan opined that Claimant’s pain was out of proportion from what one would expect from a relatively mild injury. At that time, Claimant had subjective pain complaints without a significant amount of objective findings. Dr. Chan felt that Claimant’s MRI did not reveal any significant findings. Dr.

Chan recommended a psychological evaluation before Claimant undergoes any further invasive procedures such as surgery.

14. The Claimant has had neck symptoms that pre-date the November 5, 2014 work incident. On October 31, 2014, Claimant treated with Dr. William Oligmueller and complained of neck pain on the left side of his head and numbness into his left arm. The record states that Claimant was on short term disability, and unable to work due to the pain (which was apparently inaccurate because Claimant was working full duty and full time). Claimant had completed a recent course of steroids in September 2014. Claimant reported that recent physical therapy visits had increased his neck pain. Dr. Oligmueller reviewed a cervical spine radiology report that was pertinent for foraminal stenosis at the base of Claimant's neck. Dr. Oligmueller recommended a consultation with a neurosurgeon and he prescribed Neurontin for pain.

15. On October 21, 2014 Claimant reported to his physical therapist that he had accidentally hit his head on a hard piece of equipment at work several months earlier. He reported that he felt immediate pain radiating into his neck radiating into his left arm/wrist and shoulder blade.

16. During the hearing, the Claimant testified that following the November 5, 2014 work incident, his pain has intensified and feels different than it did before. He also testified that previously his symptoms would wax and wane whereas now they are more constant. The ALJ finds Claimant's testimony generally credible although the medical records do document some subjective complaints out of proportion with objective findings and Claimant has been a poor historian at times.

17. Claimant has had various treatment including medications, an epidural steroid injection and acupuncture. He has improved somewhat but Dr. Scherr indicated Claimant was not at maximum medical improvement because Claimant's pre-injury state was "pain free." The ALJ acknowledges that Dr. Scherr's characterization of Claimant's pre-injury state is inaccurate, but the ALJ cannot find that Claimant deliberately misled Dr. Scherr into adopting that belief.

18. Dr. Kathy D'Angelo performed an independent medical examination of the Claimant and reviewed his medical records at the request of Respondents. She issued a report wherein she opined that Claimant's ongoing symptoms are long standing, pre-existing, and unrelated to his "alleged 11/5/2014 injury."

19. Dr. D'Angelo testified that Claimant's symptoms were chronic because he had reported neck pain to medical providers in the past. She opined that Claimant's symptoms are a natural progression of his longstanding chronic medical condition, and that he needed no medical treatment as a result of any incident that allegedly occurred at work on November 5, 2014. She also stated that if the Claimant hit his head he could have maybe suffered an exacerbation of his symptoms but that his increased symptoms would have resolved within 6-8 weeks maximum.

20. Claimant obtained an independent medical examination with Dr. Barton Goldman who on October 16, 2015, examined the Claimant in addition to reviewing the medical records. Dr. Goldman opined that when Claimant struck his head at work, Claimant suffered an aggravation of his pre-existing condition, primarily soft tissue and facet problems. Dr. Goldman opined that Claimant suffered a strain and a myofascial pain condition and secondary facet dysfunction. Dr. Goldman explained that the mechanism of injury was minor but that psychosocial factors have now entered the picture causing delayed recovery. Dr. Goldman believes physical therapy, including pool therapy, and a consult with Dr. Carbaugh would be the appropriate next steps. He is against the surgery recommended by Dr. Periera.

21. Dr. Goldman testified that the most current findings upon examination are still consistent with the mechanism of the injury that occurred November 5, 2014. His examination of claimant in October, 2015 led him to conclude that claimant's injury of November 5, 2014 caused the symptoms that he saw upon his examination.

22. Dr. Goldman, however, agreed that Claimant's MRI findings were typical degenerative findings that are seen in more than 50% of human beings over the age of 30 and the findings do not reveal any objective information about the source of Claimant's pain.

23. In January 2015, the Claimant experienced an increase in his neck pain when he cleared snow from the front wheels of his car. The Claimant's pain subsided and returned to its usual level shortly after this incident.

24. Dr. Goldman opined, and the ALJ agrees, that the snow removal incident in January 2015 caused a temporary exacerbation of Claimant's symptoms. This event does not represent a subsequent intervening event sufficient to sever the causal connection between Claimant's injury and his symptoms.

25. The Respondents filed a General Admission of Liability on January 14, 2015, and again on April 22, 2015, both of which include admissions of liability for the treatment Claimant received to his neck.

26. The Respondents have failed to prove that Claimant did not sustain an industrial injury, including an aggravation of his pre-existing neck condition, when he struck his head while in the course and scope his employment. The ALJ finds the opinions of Dr. Goldman more persuasive than those of Dr. D'Angelo.

27. Up until April 2015, Claimant received a ride directly from work to his medical appointments. Claimant lived in Gill, Colorado at that time and his appointments were Thornton, Colorado. Claimant's wife drove from their home in Gill to Thornton to pick Claimant up from his appointments and drive him to their home.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Under § 8-43-201, C.R.S., the Respondents bear the burden of proving that Claimant did not sustain a work-related injury on November 5, 2014. Respondents have failed to meet their burden. The credible evidence shows that on November 5, 2014 Claimant hit his head on a motor as he described. The ALJ finds Dr. Goldman's opinions persuasive that Claimant suffered an aggravation of a pre-existing condition and required medical treatment to cure and relieve him of the effects of the injury. Respondents are, therefore, not permitted to withdraw the GAL. The ALJ rejects Dr. D'Angelo's conclusions as they rely heavily on her opinion that Claimant lied concerning his pre-existing neck problems and the injury itself. The ALJ disagrees with Dr. D'Angelo's assessment of Claimant's credibility and with her overall opinions concerning whether Claimant sustained a compensable injury. As found above, Claimant is a poor historian and has had difficulty explaining his symptoms, but his lack of sophistication does not disprove that he hit his head at work on November 5, 2014 and that medical treatment was necessary.

5. As an alternative to withdrawing their General Admission of Liability, the Respondents seek an order finding that Claimant's current condition is not causally related to his work injury. Although not presented as a medical benefits issue, the practical effect of such a finding would be a *de facto* determination of maximum medical improvement (MMI). *See In re Claim of Bruno*, 4-947-316-01 (ICAO July 31, 2015). Respondents' admissions of liability include treatment for Claimant's neck and

temporary disability payments due to work restrictions related to Claimant's neck. In addition, no authorized treating physician has placed the Claimant at MMI. The ALJ cannot now determine that Claimant's ongoing neck complaints are no longer causally related to his injury without implicitly finding that he reached MMI.

6. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Id.* The only specific treatment that Respondents have denied is the surgery recommended by Dr. Pereira which Claimant decided not to pursue and not to litigate before this ALJ. As such, the Rule 16 denial stands.

7. Pursuant to WCRP, Rule18-6(E), Claimant is entitled to reasonable and necessary expenses for travel to and from medical appointments at 53 cents per mile. If Claimant has not already complied with Rule 18-6(E) by submitting a request to the Insurer showing the dates on which his wife picked him up from his medical appointments, he shall do so and the Insurer shall reimburse Claimant the travel expense at 53 cents per mile roundtrip from his home in Gill, Colorado to the medical appointments.

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ORDER

It is therefore ordered that:

1. Respondents are not permitted to withdraw their General Admission of Liability. As such, Claimant suffered a work injury on November 5, 2014 when he struck his head and experienced neck pain.

2. Claimant's current condition remains causally related to the injury of November 5, 2014.

3. Respondents are liable for travel expenses as concluded in paragraph 7 above.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 23, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination are whether the Claimant sustained an injury in the course and scope of his employment on April 14, 2014, and on May 26, 2014.

STIPULATIONS

The parties stipulated that if the claim is compensable, the Claimant's average weekly wage is $1,623.09. Respondents agreed that if claim number WC 4-952-012 is found compensable, Claimant is entitled to temporary total disability benefits from May 29, 2014 to March 17, 2015. The issue of temporary partial disability from March 18, 2015 forward was reserved for the parties to determine after wage records from the subsequent employer are reviewed.

FINDINGS OF FACT

1. Claimant began working for the Employer in 2010. He left his employment for a short time but later returned. The Employer operates an oil well services business which requires working in remote locations. Claimant has held several positions while employed by the Employer.

2. Claimant initially worked as a sandmaster, which involved running a machine that mixed the sand with the fracking liquid. He would be required to run the machine, and also to hook up the hoses or pipe. Those hoses were typically 4" diameter hoses weighing 40-60 pounds, and the pipe was 2" to 4" pipe weighing 100-150 pounds. He stated that he would carry multiple sections of hose, and in all kinds of weather and ground conditions. If it was snowy or muddy, dragging the hoses was very difficult.

3. Claimant then worked on the hydration machine, essentially doing the same type of work on a different machine. He testified he finished his first period of employment with Employer running the chemical trailer. During all of these jobs he also had to help out where needed to pull hoses and hook up pipe. He stated that the operation would have various periods of shutdown when the crew would have to change the pipe or hoses that might be broken or not operating properly. This happened on a weekly basis so part of his time would was spent operating machines and part of the time was spent changing pipes and hoses which was more physically demanding than operating machines.

4. When Claimant returned to the Employer, he worked on the blender, then the data van. Claimant operated each machine, which involved pushing buttons, but

also had to hook up the pipes and hoses, and help out when needed when the machines were not running.

5. On a typical work day before May 2014, Claimant would drive to the job site which was approximately 1-2 hours away from his hotel. Once he arrived at the job site, he set up if necessary otherwise he would prepare equipment such as making sure pressure was good or ensuring no leaks in hoses. Then, the Claimant would run the equipment.

6. In April 2014, Claimant began experiencing some physical problems primarily while driving from Douglas, Wyoming to Platteville, Colorado. His left hand would "fall asleep" as he drove. The Claimant testified that he did not think much of it at that time but once he finished his shift and returned home, his whole shoulder, arm and hand felt numb and he had shooting pain radiating from his neck down to his fingers.

7. Claimant testified that he made the trip from Douglas to Platteville every day for a week. Once he arrived in Platteville, he dropped of empty totes, the bad iron and reloaded full totes and good iron back onto the truck then drive back to Douglas. Claimant stated he had to physically throw the iron up onto the flat bed and it weighed anywhere from 30 to 300 pounds.

8. Claimant did not identify any specific work activity that precipitated the onset of symptoms other than noticing his left hand falling asleep while he drove for the Employer.

9. On April 22, 2014, the Claimant went to the Central Utah Clinic where Dr. Todd Parry[1] evaluated him. The medical record indicates that Claimant has had left shoulder pain for years not associated with any trauma or event which increased over the past month. He reported pain down the arm, with his hand going to sleep, and numbness in the arm as well as aching neck pain. The record indicates Claimant's symptoms increase with sitting and driving. Dr. Parry suggested some treatment options, including an MRI. Claimant decided to obtain an MRI.

10. Claimant disagreed with Dr. Parry's notation concerning the duration of his neck pain. Claimant testified that he did not have neck pain for years nor did he recall reporting that to Dr. Parry.

11. Claimant had the MRI on May 1, 2014. The radiologist's impressions included:

> Cervical spondylotic degenerative change which is most conspicuous at the C6-7 interspace level with a left paracentral and foraminal focal disc protrusion or extrusion which effaces the left foramina at the expected

[1] During his testimony, Claimant repeatedly referred to a Dr. Pierce. The ALJ could find no records in evidence from a Dr. Pierce thus the ALJ infers that Claimant was referring to Dr. Parry when he stated "Dr. Pierce."

> course of the left C7 nerve root. Correlate for left C7 radicular complaints. Finding also results in moderate spinal canal narrowing at this level. No abnormal cord signal.

12. Claimant returned to see Dr. Parry on May 6, 2014. The record states that Claimant works in the oil field and that his pain has progressed to the point where it was affecting his work and his activities of daily living. There is nothing in this record suggesting that Claimant specifically relates his symptoms to his work activities. Dr. Parry explained the MRI results to the Claimant and recommended that Claimant see Dr. Kris West for further work-up and to discuss treatment options such as injections or surgery.

13. Claimant understood he had a “pretty bad” herniated disc at C7 based on his conversations with Dr. Parry following the MRI.

14. On May 8, 2014, Claimant went to Southwest Spine and Pain Center where he was evaluated by Dr. Rick Obray. Dr. Obray documented a gradual onset of intermittent neck pain over a six-week period following no specific accident or event. Claimant reported that his pain intensity averaged a 3 out of 10. Claimant also reported weakness, numbness and tingling in his left arm. Dr. Obray recommended an epidural steroid injection (ESI) at C7-T1.

15. Claimant underwent the ESI on May 19, 2014.

16. Claimant testified that he reported his symptoms to the Employer and that he was advised he should pursue treatment under his private health insurance because he had not reported that the injury occurred at work. On cross examination, Claimant admitted that he did not report to the Employer that he believed his symptoms were work related until after the May 1, 2014 MRI.

17. After April 22, 2014, the Claimant did not work for several weeks. He had his usual six days off plus he took two weeks of vacation. After not working for three weeks, Claimant testified that he was feeling better with no aches or pains.

18. The Employer required the Claimant to undergo a fitness for duty evaluation at WorkPartners in Grand Junction before he was permitted to return to work.

19. WorkPartners Physicians’ Assistant (PA), Lacie Esser, evaluated the Claimant on May 20, 2014. Claimant reported to PA Esser that he felt 96-97% better after having the ESI the day prior, and that he had actually felt 97% better before the injection but went through with it anyway. Claimant stated he felt completely capable of performing full duty work. PA Esser released the Claimant to return to work without restrictions. PA Esser recommended that Claimant take it easy and ask for help if any activity seems to bother him.

20. The Claimant returned to work full duty until May 26, 2014 when he slipped on some hoses. He testified that he “came down on his left side, and that’s when I started getting that pain back again.”

21. Claimant reported the incident to his supervisor who was on the jobsite that morning. He then returned to his motel room and called John Downie from human resources at his supervisor’s request. Claimant and Downie primarily discussed how Claimant might return home. Claimant was advised to stay in his motel room for the next couple of days and take it easy until he could get a ride home. He was not offered the chance to see a physician at that time.

22. Claimant returned to WorkPartners once he returned to Grand Junction on May 28, 2014. PA Esser examined him again. The medical record states that Claimant tripped and fell over a hose at work on May 26, he reached his left arm out to grab something to prevent his fall, but he missed it and fell landing with the right arm catching him. Claimant reported stabbing pain in the left trapezius, and he considered it intense and constant. His pain was mostly near the left shoulder blade and he did not report much neck pain. Claimant was experiencing electric pain shooting down his left arm and numbness in his left hand. PA Esser noted that Claimant had been feeling good and tolerating work just fine until the tripping incident caused a flare up. PA Esser concluded that Claimant likely exacerbated an underlying pre-existing bulged disc in his neck. PA Esser referred the Claimant back to Dr. Obray, and issued work restrictions of 5 pounds. Esser noted that Claimant was “adamant” he was not able to work in his present condition.

23. Claimant also asked for a work-related driving restriction but PA Esser explained to him that if she restricted his work-related driving, she would need to restrict his personal driving as well. Claimant did not want his personal driving restricted. Claimant also asked to have his medical care transferred to Mesquite, Nevada where he was living.

24. On June 3, 2014, Claimant returned to Southwest Spine and Pain Center where he saw PA Jeffrey Wright. The Claimant reported that his pain level at best is 4 out of 10, at worst is 8 out of 10 and averages 6 out of 10. He stated that the pain impairs his ability to drive, work, bend, twist and lift. The report is silent concerning any work-related tripping incident or the work restrictions imposed by PA Esser. Further, Claimant reported no relief from the May 19, 2014 ESI.

25. Claimant’s report to PA Wright that he obtained no relief from the May 19, 2014 ESI is in direct conflict with the May 20, 2014 fitness for duty evaluation report which states that Claimant was feeling 96-97% better after the ESI.

26. Claimant has since had at least one more ESI plus a radiofrequency ablation procedure. He had not been released from medical treatment as of the date of the hearing in this matter.

27. Claimant collected unemployment in September 2014 at $415 per week through February 26, 2015. Claimant returned to work on March 18, 2015 earning $13.50 per hour, and a wage increase to $15.00 per hour at some point. Claimant testified that he was working as a driver within his work restrictions, and earning 38 cents per mile which earns him a total of $850 to $1,000 per week.

28. Dr. D'Angelo performed a review of Claimant's medical records and issued a report dated October 20, 2014. Dr. D' Angelo did not examine the Claimant or talk to him. Dr. D'Angelo concluded that Claimant did not suffer a work-related injury or aggravation of a pre-existing condition. She opined that Claimant's work activities in April 2014 did not causally relate to Claimant's symptomatic spondylosis or osteoarthritis nor did the hose tripping incident on May 26, 2014 aggravate Claimant's pre-existing condition. She stated, and the ALJ agrees, that whether or not Claimant fell on May 26, 2014, Claimant's symptoms and need for treatment would be the same.

29. Based on the foregoing, the Claimant has failed to meet his burden of proof as to both claims. The Claimant's contention that he suffered an injury in April 2014, and again on May 26, 2014 is not supported by the credible and persuasive evidence.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

5. A preexisting condition does not disqualify a Claimant from receiving worker's compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). The mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the preexisting condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

6. Claimant has failed to meet his burden of proof to establish that he sustained either a specific injury or an occupational disease in April 2014 while working for the Employer. There is no credible or persuasive evidence that Claimant's job duties (driving or throwing iron) caused a work injury or exacerbated or aggravated a pre-existing condition. The contemporaneous medical records make no mention of loading or unloading iron as a cause of his symptoms. Claimant simply stated to his medical providers that driving seemed to increase his symptoms. Claimant also testified that his job duties were physically demanding, and while that may be true, Claimant failed to prove that it was the physical demands of his job that caused the MRI findings or produced the need for medical treatment. The ALJ concludes that Claimant merely experienced symptoms while at work, but the evidence does not support Claimant's contention that he suffered a work-related injury or occupational disease in April 2014 while either driving or loading or unloading his truck.

7. Claimant has also failed to meet his burden of proof to establish that he suffered an injury on May 26, 2014 when he tripped on some hoses at work. The ALJ believes that Claimant tripped on the hoses, but there is no credible or persuasive evidence that Claimant sustained any new injuries or an aggravation of a pre-existing condition as a result. The medical records contain many discrepancies and conflicts which the ALJ resolves in favor of the Respondents. The most glaring discrepancy exists in the fitness for duty evaluation report dated May 20, 2014 which states that Claimant had been feeling significantly better even prior to the May 19, 2014 ESI and that he did not believe he needed the ESI but went through with it anyway; and the June 3, 2014 medical record which states that the May 19 ESI provided no relief. Either Claimant misled PA Esser when he reported feeling almost 100% better and ready to return to full duty, or he was not truthful on June 3, 2014 when he reported to PA Wright that he obtained no relief from the ESI. This discrepancy calls into question whether Claimant truly was symptom free prior to tripping on May 26, 2014. The ALJ concludes

that the persuasive medical evidence demonstrates that the tripping incident did not produce any new symptoms or the need for additional medical treatment beyond what Claimant was already undergoing at that time.

8. Because Claimant did not sustain a work-related injury, he is not entitled to medical benefits or temporary disability benefits.

ORDER

It is therefore ordered that Claimant's claims for workers' compensation benefits are denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 9, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents may withdraw the March 19, 2015 General Admission of Liability in this claim.

2. Whether Claimant sustained a compensable injury in the course and scope of his employment with Employer.

3. Whether the right shoulder surgery recommended by Dr. Hatzidakis is reasonable, necessary, and related to a work injury.

FINDINGS OF FACT

1. Claimant has been working for Employer as a subcontractor installing carpet and flooring for approximately 15 years.

2. When working for or at the direction and benefit of Employer, Claimant is covered under Employer's worker's compensation policy. Deductions for worker's compensation insurance are taken out of payments that Employer makes to Claimant for completed jobs.

3. Carpet and flooring subcontractors report to Employer's warehouse between 6 a.m. and 10 a.m. to get work assignments. Employer's warehouse manager and installation supervisor, Silvino Ramirez gets orders and works on the schedule the day prior. Mr. Ramirez is familiar with the subcontractors and knows who is the best worker for the job depending on the type of flooring that needed to be installed. Mr. Ramirez prints out the work orders with the subcontractor's name on them and hands the orders to the subcontractor assigned in the morning when they report.

4. If a subcontractor declines a work order, Mr. Ramirez gets the work order back from the subcontractor and calls a different subcontractor to see if they can do the work. Mr. Ramirez is supposed to then change the name of the subcontractor on the work order.

5. In early October, 2014 Mr. Ramirez called Claimant. Mr. Ramirez advised Claimant that he had a work orders for a project in Keystone that was assigned to Pedro Lopez, but that Pedro Lopez was too busy/behind on other work. Mr. Ramirez asked Claimant if he could perform the job. Claimant went into the office where he was handed the work orders and assignment for the project from Mr. Ramirez.

6. The work orders that were given to Claimant by Mr. Ramirez had Pedro Lopez's name on them. Mr. Ramirez advised Claimant that the orders would be changed in the computer to Claimant's name.

7. The work orders given to Claimant by Mr. Ramirez in early October of 2014 were for various apartment units in Keystone, Colorado and included work for approximately 31 separate units with an installation date of October 6, 2014 listed. *See* Exhibit Y.

8. Between October 1, 2014 and October 6, 2014 Claimant also received work orders from Mr. Ramirez for 6 total units in the Denver metro area. Claimant completed those 6 units and was paid for the work on those units.

9. Between October 6, 2014 and October 23, 2014 Claimant did not receive any other work orders from Employer.

10. Claimant began work on the 31 units in Keystone, Colorado. Claimant did not work for Pedro Lopez, did not receive direction from Pedro Lopez, and did not have any association with Pedro Lopez in performing the work on the 31 units in Keystone. Claimant was not given the job by Pedro Lopez and was given the job by Employer's warehouse manager and installation supervisor, Mr. Ramirez.

11. On October 8, 2014 Claimant purchased supplies for the 31 unit Keystone job from Southland Flooring Supplies. *See* Exhibit 12.

12. Claimant continued to work the 31 unit Keystone job, unit by unit.

13. On October 17, 2014 Claimant was almost finished with the 31 unit job and he returned to the warehouse for payment based on the completed job. Claimant met Mr. Ramirez who gave him a check for the completed work. The check had Pedro Lopez's name on it because Mr. Ramirez never changed the work order to reflect that the 31 unit job was actually given to Claimant and not to Mr. Lopez. The check issued on October 17, 2014 was for work orders for 31 units located in Keystone, Colorado and was for the amount of $3,520.82. The check, although handed to Claimant, had Mr. Lopez's name on it.

14. On October 17, 2014 Claimant went with Mr. Lopez to a bank where Mr. Lopez cashed the check and gave Claimant the full amount of the check. Claimant's testimony was that he believed the amount of payment from the check was around $3,000.00.

15. Mr. Lopez received work orders for 17 units with an installation date of September 29, 2014 for apartments in Keystone and he also received work orders for 20 units with an installation date of October 1, 2014 for apartments in Keystone.

16. Check number 26705 issued to Mr. Lopez on October 10, 2014 paid him for the 17 jobs that had the installation date of September 29, 2014 listed on the work order. It also paid him for the 20 units on the work orders that had an installation date listed of October 1, 2014. The October 10, 2014 check issued to Mr. Lopez had a net pay of $6,836.91.

17. The check issued in Mr. Lopez's name on October 17, 2014 was for the 31 work orders that had an installation date of October 6, 2014 listed on the work order.

18. On October 18, 2014 Claimant returned to Keystone and was loading up carpet/garbage/scraps from the job to finish the project. The weather was cold and sleeting. Claimant was up on the top of the bed of the truck when he slipped and landed on his outstretched right arm while falling to the ground, injuring his right shoulder.

19. Claimant reported the injury to Mr. Ramirez, but refused medical treatment as he did not want to miss out on any future or present job assignment and wanted to see if he could continue to work.

20. On October 23, 2014 Claimant reported to Employer's warehouse and again received a work order from Mr. Ramirez for a job. This work order had Claimant's name on it. While completing this new work order and on October 23, 2014 Claimant was carrying a roll of carpet when he felt severe pain in his right shoulder that prevented him from continuing the job.

21. Claimant decided that he needed to seek medical treatment and went into Employer's office and reported the injury to Mr. Ramirez and Jeff Tostensen. Claimant was sent to Concentra for treatment.

22. On October 24, 2014 Claimant was evaluated at Concentra by Candice Sobanski, M.D. Claimant reported carrying carpet over his right shoulder and that he now had right shoulder pain and forearm/wrist pain. *See* Exhibit 11.

23. On November 11, 2014 Claimant was evaluated by Matthew Miller, M.D. It was recommended that Claimant undergo a right shoulder MRI arthrogram. *See* Exhibit 11.

24. On January 27, 2014 Claimant was evaluated by Craig Davis, M.D. Dr. Davis noted that Claimant was going up a step on October 23, 2014 when he slipped and fell onto his right side and right shoulder but kept working. Claimant reported approximately three days later he was carrying a heavy roll of carpet up some stairs when he again had sudden pain in his back and fell onto his right side injuring his shoulder. Claimant reported soreness diffusely around the right shoulder that radiated down into his hand causing his hand to get numb at times. Dr. Davis performed a subacromial injection and noted that if Claimant continued to be symptomatic it might be worth considering an MRI of the shoulder.

25. On March 10, 2015 Claimant was evaluated by Dr. Davis. Dr. Davis noted Claimant's shoulder got better for about one week after the subacromial injection but that Claimant was now back to baseline with significant pain over the lateral shoulder limiting the use of his arm. Dr. Davis agreed that an MRI should be performed. *See* Exhibit 11.

26. On March 19, 2015 Respondents filed a general admission of liability in this claim. *See* Exhibit S

27. On April 20, 2015 Claimant underwent an MRI of his right shoulder interpreted by Charles Wennogle, M.D. Dr. Wennogle's impression was: glenoid dysplasia; anteroinferior nondisplaced labral tear with small 3 mm paralabral cyst; possible SLAP type I superior labral tear; minimal distal supraspinatus tendinosis; and AC joint osteoarthritis. *See* Exhibit 7

28. On May 18, 2015 Claimant was evaluated by Michael Hewitt, M.D. Dr. Hewitt noted that Claimant was injured on October 23, 2014 when he fell approximately four feet from the side of a truck onto his right shoulder and hip and that Claimant had pain for the next several days and an exacerbation while carrying a large roll of carpet upstairs. Dr. Hewitt noted no prior history of shoulder injury. Dr. Hewitt assessed history of right shoulder injury with clinical examination consistent with impingement and Dr. Hewitt discussed treatment options including continued observation, continued medications, continued therapy, repeat injection, and shoulder arthroscopy. Dr. Hewitt opined that Claimant was a reasonable surgical candidate. *See* Exhibit 11.

29. On May 28, 2015 Claimant was evaluated by Armodios Hatzidakis, M.D. Claimant reported the onset of shoulder problems was on October 23, 2014 when he fell on an outstretched hand on ice and landed directly onto his shoulder. Claimant reported working for two days and two days later while carrying a roll of carpet, he had another fall resulting in increased shoulder pain. Dr. Hatzidakis assessed right shoulder pain and dysfunction with traumatic injury, with glenoid dysplasia. Dr. Hatzidakis noted Claimant would be set up for EMG, and that claimant underwent an injection in his right shoulder. *See* Exhibit 9.

30. On July 6, 2015 Claimant was evaluated by Duane Fenton, PA-C. PA Fenton noted that Claimant received 60% relief for one week from the cortisone injection performed on May 28, 2015. PA Fenton assessed traumatic right shoulder pain and dysfunction with glenoid dysplasia, possible partial-thickness rotator cuff tear, and numbness and tingling into the right upper extremity. PA Fenton noted Claimant had not yet undergone the EMG testing and noted follow up would be after testing. *See* Exhibit 9.

31. On August 27, 2015 Claimant was evaluated by PA Fenton. PA Fenton noted that Claimant received 80% relief for one week from the cortisone injection performed on May 28, 2015. PA Fenton noted the EMG was reviewed and was within

normal limits. PA Fenton assessed: traumatic right shoulder pain following a work related injury with glenoid dysplasia; healed distal clavicle fracture; possible labral tear; and biceps tendinitis. PA Fenton noted that Claimant would be set up with the surgery coordinator to evaluate a time for an arthroscopic debridement, possible labral repair, possible biceps tenodesis; and possible rotator cuff tear. *See* Exhibit 9.

32. On September 1, 2015 Dr. Hatzidakis submitted a request for authorization for right shoulder arthroscopic debridement with possible rotator cuff repair, longhead biceps tenodesis, and labral repair. *See* Exhibit 9.

33. On October 9, 2015 Claimant underwent an independent medical evaluation performed by Barry Ogin, M.D. Claimant reported finishing a job in Keystone when he was loading rolls of carpet into a pickup truck and was standing on the outer rim of the truck on a piece of plastic. Claimant reported it was cold and slippery and that as he was leaning forward he slipped off the truck landing on his right side with his right arm abducted against his side and that the brunt of the fall was against his right lateral shoulder as well as his hip. Claimant reported after having a few days off over the weekend he was on a smaller job and was carrying a large roll of carpet up a small flight of stairs and as he was walking with his arm hyperabducted holding on to the carpet roll behind his head while carrying the carpet upstairs, he felt a sudden increase in pain in his right shoulder. Dr. Ogin reviewed Claimant's medical history and performed an examination.

34. Dr. Ogin gave the impression of: right shoulder strain/contusion following a work injury when Claimant fell off a truck; increased pain when carrying carpet with a hyperabducted shoulder supporting the carpet roll; shoulder MRI confirming rotator cuff tendinopathy with possible labral tear and underlying glenohumeral dysplasia (preexisting); transient relief with shoulder injection x2; and failure to improve with time, medications, and physical therapy. Dr. Ogin noted that Claimant had seen three different orthopedic specialists who all discussed moving on to a right shoulder arthroscopy with a decompression of the rotator cuff and possible labral repair. Dr. Ogin opined that the surgery was reasonable. Dr. Ogin opined that the mechanism of injury falling off the pickup truck in Keystone was a mechanism where Claimant could have developed a rotator cuff strain or partial tear or possibly a labral tear and that a glenoid fracture was also possible. Dr. Ogin noted that Claimant reported the initial injury falling off the truck was either the 18th or 19th and that he thought he reported it the 23rd which was a Monday. However, Dr. Ogin noted that in October the 18th and 19th fell on the weekend and the 23rd fell on a Thursday. Dr. Ogin noted a discrepancy in dates. Dr. Ogin opined that in any case, the first injury was causative of the rotator cuff pathology. Dr. Ogin opined that with an injury during the fall it was reasonable that Claimant would have pain and that the later activity of holding the carpet on his back with shoulders flexed and abducted would have increased Claimant's discomfort. Dr. Ogin opined that the treatment to date was reasonable and medically necessary and directly related to his injuries. *See* Exhibit A.

35. On October 27, 2015 Dr. Yamamoto issued a letter agreeing with Dr. Ogin's report. Dr. Yamamoto agreed that Claimant had exhausted conservative care and opined that the temporary but positive response to the shoulder injection is a good sign that surgery has a reasonable chance of being beneficial. Dr. Yamamoto agreed that the mechanism of injury could cause a rotator cuff strain, partial tear, or possible labral tear and agreed that Claimant injured his shoulder when slipping off the pickup truck. Dr. Yamamoto agreed that this happened around October 18 or 19 and noted there may have been problems with translation when the date of injury was obtained and that the discrepancy in dates he did not find to be a problem. *See* Exhibit 10.

36. On October 30, 2015 Dr. Hatzidakis responded to a letter agreeing with Claimant's history of injury reported by Dr. Ogin, opining that Dr. Ogin obtained a more precise history without error that a language barrier most likely caused, that the mechanism of injury could cause rotator cuff strain, partial tear, or possible labral tear, that Claimant was injured when slipping off a pickup truck and landing on his abducted shoulder, and that carrying a roll of carpet days later exacerbated the prior injury and was not the overt cause. *See* Exhibit 9.

37. Claimant's testimony, overall, is found credible and persuasive. Claimant was working on a 31 unit job in Keystone, Colorado on October 18, 2014 at the direction of Employer when he suffered an injury. Claimant was not working for or at the direction of Mr. Lopez. Although Claimant presented with some confusion surrounding specific dates, his testimony is logically consistent with the evidence in this matter.

38. Mr. Ramirez testified that it was possible that he gave a work order with Mr. Lopez's name on it to Claimant. Mr. Ramirez also testified that it was possible that he gave a check with Mr. Lopez's name on it to Claimant.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder

should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability and Withdrawal of General Admission of Liability

Generally, a claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See* § 8-41-301(1)(b), C.R.S.*; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). As found above in this case Respondents filed a general admission of liability on March 19, 2015. Respondents are now seeking to withdraw the general admission of liability and wish to have a determination that no compensable injury was suffered. A party seeking to modify an issued determined by a general admission shall bear the burden of proof for any such modification. *See* § 8-43-201(1), C.R.S.

Respondents have failed to meet their burden of proof to modify the general admission of liability on the issue of compensability of the claim. Respondents may modify the general admission of liability to reflect the correct date of injury to be October 18, 2014. Here, the evidence and testimony establishes that the injury arose out of and occurred in the course and scope of Claimant's employment with employer. An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

The evidence establishes that Claimant suffered a compensable injury when he slipped off of a pickup truck on October 18, 2014 while working in Keystone, Colorado at the direction of Employer. In early October, 2014 Claimant was provided work orders from Mr. Ramirez for the Keystone project. Mr. Ramirez gave the work orders to Claimant instead of Mr. Lopez (whose name was on the work orders) as Mr. Lopez was already busy and behind on other projects. This is consistent with the evidence showing Mr. Lopez had recently been assigned a 17 unit project on September 29, 2014 and a 20 unit project on October 1, 2014. Claimant wished to do the job with the October 6, 2014 installation date and accepted the work orders for that job which included a total of 31 units. Mr. Ramirez advised Claimant the name on the work orders would be changed from Mr. Lopez's name to Claimant's name to reflect that Claimant would be doing the work. Although Mr. Ramirez never followed through and never changed the name on the work orders, Claimant performed the work pursuant to Mr. Ramirez's direction. Claimant is credible and persuasive that he did not work for Mr. Lopez at any time. Claimant's testimony is overall consistent with the evidence. Claimant testified he worked on a big job of 32 units in Keystone which is consistent with the 31 units listed in the job with an installation date of October 6, 2014. Claimant testified that he was paid around $3,000.00 for the job which is consistent with the October 17, 2014 paycheck for the 31 unit job which was in the amount of $3,520.82. His testimony is also consistent with the lack of any work orders received by him from Employer between October 6, 2014 and October 23, 2014. During this period of time, Claimant did not receive any new work orders because he was working the 31 unit job in Keystone which had been assigned to him by Mr. Ramirez. On October 18, 2014 Claimant was working this job at Employer's direction when he slipped off his pickup truck and landed on his right side injuring his right shoulder. Claimant was both in the course and scope of employment when he fell off the truck.

Throughout the claim, Claimant has been somewhat inconsistent with reporting specific dates. The ALJ notes these inconsistencies, but overall Claimant has been credible in explaining the mechanism of injury, the later aggravation of injury when working a job on October 23, 2014, and he has been credible in explaining what occurred with the work orders he received, the name listed on the work orders, how he was paid by Mr. Lopez for the work, the number of units he worked on, the date he received the payment for the completed work, and the general amount he was paid for the work. Claimant's testimony, although somewhat inconsistent in reporting dates, is overall credible when compared to the evidence offered. Claimant received the October 6, 2014 work orders instead of Mr. Lopez. Employer gave these work orders to Claimant and directed Claimant to complete the jobs. Claimant did so and was injured while completing the work. Claimant did not work for or at the direction of Mr. Lopez at any time.

Medical Benefits- reasonable and necessary

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found above, Respondents have failed to meet their burden to withdraw the general admission of liability on the issue of compensability. The evidence establishes, more likely than not, that Claimant suffered a compensable injury while in the course and scope of employment with Employer. Respondents are thus liable for reasonable and necessary medical treatment. Claimant has established that the right shoulder arthroscopy surgery is reasonable and necessary and Respondents are liable for this treatment. As found above, three orthopedic specialists have opined that the surgery is the next step given Claimants' failure to improve with more conservative treatment. Dr. Ogin and Dr. Yamamoto agree with these assessments. The surgery is found both reasonable and necessary to cure and relieve the effects of Claimant's fall from the truck on October 18, 2014.

ORDER

It is therefore ordered that:

1. Respondents may not withdraw the March 19, 2015 General Admission of Liability in this claim other than to modify the date of injury to reflect October 18, 2014.

2. Claimant sustained a compensable injury in the course and scope of his employment with Employer on October 18, 2014.

3. Respondents are liable for right shoulder surgery recommended by Dr. Hatzidakis. The surgery is reasonable, necessary, and related to Claimant's October 18, 2014 work injury.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 7, 2016 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-975-033-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer /Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 2, 2016 and February 26, 2016 in Denver, Colorado. The hearing was digitally recorded (reference: 2/02/16, Courtroom 4, beginning at 8:30 AM, and ending at 11:13 AM; and, 2/26/16, Courtroom 1, beginning at 8:30 AM, and ending at 10:31 AM).

Claimant's Exhibits 1,2,4-7 were admitted into evidence without objection. The Respondents objected to Claimant's Exhibit 3 and the ALJ reserved ruling on Exhibit 3. Respondent's objections to Exhibits 8 and 9 were overruled and the Exhibits were admitted into evidence. Respondents' Exhibits A through M were admitted into evidence, without objection. After the conclusion of the hearing, the ALJ admitted Claimant's Exhibit 3, despite the Respondents' objection thereto.

At the conclusion of the continuation hearing, the ALJ established a briefing schedule: Respondents' opening brief was filed on February 26, 2016. The Claimant's answer brief was also filed on February 26, 2016. The Respondents' did not file a timely reply brief and the matter was deemed submitted for decision on February 29, 2016, at which time the ALJ deemed the matter submitted for decision..

ISSUES

Since Respondents have already paid temporary total disability (TTD) benefits from February 11, 2016 and continuing; the only issue is the Respondent's affirmative defense of "responsibility for termination." The Respondents filed a Petition to Suspend benefits on June 30, 2015, requesting a suspension of benefits from February 27, 2015, the date that the Claimant was terminated from employment. The Petition to Suspend has been superseded by the Respondents' Application for hearing, designating the issue of "responsibility for termination." By virtue of the fact that the Respondents continued paying the Claimant TTD benefits, pursuant to the general Admission of Liability (GAL), the respondents have made a judicial admission conceding that the Claimant has been temporarily and totally disabled since February 12, 2015, the day after the admitted back injury of February 11, 2015.

The Respondents bear the burden of proof by a preponderance of the evidence of establishing that the Claimant performed a volitional act that he knew would cause his termination from employment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. On February 24,2015, the Respondents filed a General Admission of Liability(GAL), regarding the Claimant's work-related back injury, admitting for medical benefits; an average weekly wage (AWW) of $857.27 and TTD benefits of $571.51 per week from February 12, 2015 to "undet" (Claimant Exhibit. 2, p.. 2)..

2. The Claimant is still receiving medical and TTD benefits.

The Incident Leading to the Claimant's termination from Employment

3. On February 26, 2015, the Claimant was pulled over and arrested for suspicion of driving under the influence (DUI) and he was issued a court summons. (Respondents' Exhibit D, p. 24). The ALJ infers and finds that the Claimant was driving his personal vehicle at the time.

4. On June 20, 2015, the Respondents filed a Petition to Modify, Terminate, or Suspend Compensation of Claimant's TTD benefits. The stated reason for the motion was "Claimant lost his license after being charged with driving under the influence. Since Claimant is not able to perform his job duties for [Employer] without a valid

driver's license, Claimant's employment was terminated February 26, 2015." The stated reasons were **not** true.

5. The Claimant's driver's license was not revoked or suspended, at any time, on or after February 26, 2015.

6. On July 20, 2015, the Claimant objected to Respondents' Petition to Modify, Terminate or Suspend Compensation, and a hearing was set for October 14, 2015.

7. On August 6, 2015, the Claimant pled guilty to driving while ability impaired (DWAI). As part of the plea agreement, the Claimant did **not** have his license revoked or suspended (Respondents' Exhibit E, pp. 27-30).

8. The Claimant continues to maintain a driver's license in good standing with the State of Colorado.

9. On October 8, 2015, the Respondents filed an Unopposed Motion to Withdraw the Application for Hearing without Prejudice and Vacate the hearing. The motion was granted that day.

Affirmative Defense of Responsibility for Termination

10. The GAL presently in effect establishes TTD from February 12, 2015 and continuing, the prerequisite for the "responsibility for termination" defense.

11. On October 12, 2015, the Respondents filed an Application for Hearing raising the issue that the Claimant was responsible for his own termination, and sought a refund of overpayments, or offsets and credits resulting from Respondents' payment of TTD benefits after the date of the Claimant's termination from employment (Respondents' Exhibit A, p. 1).

12. At the hearing, Franny Sanchez, the Employer's office manager, testified that the Claimant was terminated because it was the Employer's policy to automatically terminate any employee accused of DUI because the Employer's liability insurance would no longer insure the employee. Sanchez said that she spoke with an unnamed individual with the insurance company, who led Sanchez to believe that the Claimant was un-insurable because of his DUI arrest. Sanchez's testimony in this regard was based on unmitigated hearsay, offered to prove the truth of the matter asserted. Indeed, her testimony is contradicted by the assertions in the petition to Modify, Suspend and Terminate Benefits. The ALJ infers that Sanchez changed her version of events, after it was known that the Claimant had retained his drivers' license, to justify the termination. For this reason, the ALJ does **not** find Sanchez's testimony credible.

13. A June 19, 2015 letter generated by Franny Sanchez "To Whom it may Concern" recites that the Claimant was terminated from employment because he "lost his drivers' license and was not (*sic)* longer able to perform the driving duties of his current job…." (Claimant's Exhibit 9 to which the respondents' objected, the objection was overruled and Claimant's exhibit 9 was admitted into evidence). Exhibit 9 contradicts Sanchez's hearing testimony. The ALJ, therefore, finds Sanchez's testimony lacking in credibility.

The Employer's Policy Manual

14. The Employee Policy Manual does not include the company policy to which Franny Sanchez testified --that if an employee is arrested and accused of DUI it will result in automatic termination (Respondents' Exhibit. C, pp. 6-22).

15. In regard to employee driving records, the Employee Policy Manual states that "an employee who may operate a motor vehicle in connection with his/her duties must have and maintain a satisfactory driving record." There is no further clarification as to what is a "satisfactory driving record" (Respondents' Exhibit C, p. 11).

16. The Employee Policy Manual also states that "Should an employee incur multiple moving violations, the [Employer's] liability insurance carrier may refuse to cover the employee." There is no further clarification as to what "multiple moving violations" substantively means. (Respondents Ex. C, p. 11).

17. The Employee Policy Manual further states that "If [an employee] is excluded from liability coverage, he/she must be terminated or reassigned to a different position." (Respondents' Exhibit C, p.11).

18. The Employee Policy Manual given to Claimant states a termination policy that is more ambiguous than the one to which Franny Sanchez testified. Franny Sanchez testified the reason Employer has an automatic termination policy for an employee accused with DUI is because the Employer's liability insurance will no longer insure the accused employee. However, the policy stated in the Manual given to Claimant provides that an employee removed from Employer's liability coverage can continue his/her employment. The Manual states "Should an employee incur multiple moving violations, the [Employer's] liability insurance carrier may refuse to cover the employee. If [an] employee is excluded from liability coverage, he/she must be terminated or reassigned to a different position." (Respondents Exhibit C, p. 11). Thus, the only policy in the Manual given to the Claimant that somewhat reflects the "DUI equals automatic termination policy" to which Franny Sanchez testified, provides that an employee can be insurable after receiving multiple moving violations, and can maintain his/her employment even if found to be uninsurable. However, and more importantly, the Manual contains no language that equates or links being accused of DUI to being uninsurable. Therefore, the Claimant would not reasonably expect that being accused of

DUI would result in the employee being uninsurable. Regarding employee driving records, the Manual states “An employee who may operate a motor vehicle in connection with his/her duties must have and maintain a satisfactory driving record.” (Respondents’ Exhibit. C, p. 11). There is no further clarification as to what is a “satisfactory driving record.” However, the Claimant has, at all times since his work injury, maintained a valid driver’s license with the State of Colorado.

19. The Claimant never knew that being accused of DUI would result in his termination. Therefore, he did not engage in a volitional act that he knew would cause his termination. He testified that prior to being accused of DUI he had knowledge of Fred Espinoza (the owner) being charged with DUI and maintaining his employment. Thus. given the totality of the circumstances, the preponderance of the evidence establishes that the Claimant would not reasonably expect that being accused of DUI would result in his termination from employment. Therefore, the evidence establishes that the Claimant was not responsible or at fault for his termination, in that he did not perform a volitional act or otherwise exercise a degree of control over the circumstances resulting in his termination.

Fred Espinosa, Owner of the Employer

20. Without foundation and based upon hearsay upon hearsay, *i.e.,* what the unknown insurance company individual told Franny Sanchez, Espinosa testified that he felt that a DUI arrest constituted an “unsatisfactory driving” record, despite the fact that the Claimant maintained a valid drivers’ license at all times. Without foundation, Espinosa would have us believe that he gets to define an “unsatisfactory driving record, after the fact. This approach is reminiscent of the Roman Emperor Caligula, who placed the laws on walls so high that no one could read the laws and only the Emperor knew what the laws commanded and prohibited. Espinosa testified that he did **not** check with his insurance company to find out whether the Claimant was still insurable after his DUI arrest.

21. Fred Espinosa conceded that he had been arrested for DUI, but he explained that it was in his personal vehicle.

22. As found herein above in Finding No. 13, the June 19, 2015 letter generated by Franny Sanchez “To Whom it may Concern” recites that the Claimant was terminated from employment because he “lost his drivers’ license and was not (*sic)* longer able to perform the driving duties of his current job….” (Claimant’s Exhibit 9 to which the respondents’ objected, the objection was overruled and Claimant’s exhibit 9 was admitted into evidence). Espinosa attempted to disclaim that Sanchez had any authority to issue such a letter, which further undermines his credibility

23. The Employee Policy Manual does not include a list of driving violations that will result in an Employee's exclusion from the Employer's liability coverage (Respondents' Exhibit. C, pp. 6-22).

The Claimant and his Father

24. According to the Claimant, he was unaware of any Employer policy that being accused of DUI resulted in termination from employment. The Claimant's testimony in this regard is corroborated by the absence of any articulated policy in the Employer's Policy Manual to this effect. The ALJ finds the Claimant's testimony is credible in this regard

25. Dale Iten, the Claimant's father, testified that as the Employer's General Manager, he was unaware of any Employer policy that being accused of DUI resulted in automatic termination from Employer. The ALJ finds that his testimony is corroborated by the absence of any written policies to this effect, and it further fortifies the ALJ's plausible inference and finding that Espinosa's termination of the Claimant was arbitrary and in the unfettered discretion of Fred Espinosa for reasons that the Claimant could not have reasonably known that getting arrested for DUI would lead to his termination.

Ultimate Findings

26. Primarily because of the inconsistent reasons given for the Claimant's termination from employment, first that he had been convicted of DUI and lost his drivers' license, and lastly by the time of the hearing, that the Claimant's arrest rendered him uninsurable (based on unmitigated hearsay), regardless of whether the Claimant maintained a valid drivers' license, compels the ALJ to find that the testimony of Franny Sanchez and Fred Espinosa is lacking in credibility. On the other hand, the ALJ finds the testimony of the Claimant (who presented straight-forwardly) and his father persuasive and credible in supporting the fact that as reasonable persons they did not know that the arrest for DUI would lead to the Claimant's' termination from employment.

27. Based on substantial evidence, the ALJ makes a rational choice between conflicting versions to accept the testimony of the Claimant and his father and to reject the testimony of Franny Sanchez and Fred Espinosa.

28. The Claimant was **not** responsible for his termination by virtue of a volitional act that he reasonably should have known would lead to his termination from employment.

29. The Respondents have failed to prove, by a preponderance of the evidence that the Claimant reasonably should have known that his arrest for DUI, without being convicted thereof, would lead to his termination from employment.

Therefore, the Respondents have failed to prove their affirmative defense of "responsibility for termination."

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See §* 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, primarily because of the inconsistent reasons given for the Claimant's termination from employment, first that he had been convicted of DUI and lost his drivers' license, and lastly by the time of the hearing that the Claimant's arrest rendered him uninsurable (based on unmitigated hearsay), regardless of whether the Claimant maintained a valid drivers' license, compelled the ALJ to find that the testimony of Franny Sanchez and Fred Espinosa was lacking in credibility. On the other hand, the ALJ found the testimony of the Claimant (who presented straight-forwardly) and his father persuasive and credible in supporting the fact that as reasonable persons they did not know that the arrest for DUI would lead to the Claimant's' termination from employment.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). So long as the findings of fact are supported by **substantial evidence,** they will be upheld –even if an appellate tribunal would have reached a different conclusion if it had entered findings of fact. *See May D & F v. Indus. Claim Appeals Office,* 752 P.2d 589 (Colo. App. 1988). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, based on substantial evidence, the ALJ made a rational choice between conflicting versions to accept the testimony of the Claimant and his father and to reject the testimony of Franny Sanchez and Fred Espinosa.

Responsibility for Termination

c. A discharge in accordance to policy does not compel a finding of fault. The mere fact that an employer discharges a claimant in accordance with the employer's policy does not establish that the claimant acted volitionally or exercised control over the circumstances of the termination. *See Gonzales v. Indus. Comm'n,* 740 P.2d 999 (Colo. 1987); *Pace v. Commercial Design Engineering,* W.C. No. 4-451-277 [Indus. Claim Appeals Office (ICAO), May 15, 2001]. § 8-42-105 (4), C.R.S., provides that an employee responsible for his own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002).

d. A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus.*

Claim Appeals Office, 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** In determining whether a claimant is responsible for his termination, the ALJ may be required to evaluate competing factual theories concerning the actual reason or reasons for the termination. *See Rodriguez v. BMC West*, W.C. No. 4-538-788, (ICAO, June 25, 2003). Sections 8-42-103(1)(g), C.R.S. and 8-42-105(4), C.R.S., (collectively the termination statutes), provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job- injury." The term "responsible" introduces into the statute the concept of "fault." *See Colorado Springs Disposal v. Indus. Claim Appeals Office, supra.* The question of whether a claimant is "at fault" for his or her termination from employment is one of fact for resolution by the ALJ. *See Gilmore v. Indus. Claim Appeals Office, supra.* A finding of fault requires the ALJ to consider the totality of the circumstances and determine whether the claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), opinion after remand, 908 P.2d 1185 (Colo. App. 1995).

e. An employee is responsible (*i.e.* at fault) if the preponderance of the evidence establishes that the employee precipitated the employment termination by a volitional act which an employee would reasonably expect to result in the loss of employment. *See Patcheck v. Colorado Department of Public Safety,* W.C. no. 4-432-301 (ICAO, September 27, 2001). *See Also Reyes v. Swift Beef Co.,* W.C. No. 4-586-550 at *2 (ICAO, February 23, 2007). As found, the Claimant was not "responsible" or "at fault" for his termination because, given the totality of the circumstances, he did not precipitate his termination by committing a volitional action which he would reasonably expect to result in the loss of his employment. Thus, the preponderance of the evidence established that he did not perform some volitional act or otherwise exercise a degree of control over the circumstances resulting in his termination. As found, the Claimant would not reasonably expect to be terminated for being accused of DUI because he was never informed of such policy by his Employer. As further found, the Employee Policy Manual given to Claimant states a termination policy that is more ambiguous than the one to which. Franny Sanchez testified. Franny Sanchiez, as found, testified the reason Employer has an automatic termination policy for an employee accused with DUI is because Employer's liability insurance will no longer insure the accused employee. However, the policy stated in the Manual given to Claimant provides that an employee removed from Employer's liability coverage can continue his/her employment. The Manual states "Should an employee incur multiple moving violations, the [Employer's] liability insurance carrier may refuse to cover the employee. If [an] employee is excluded from liability coverage, he/she must be terminated or reassigned to a different position." (Respondents Exhibit C, p. 11). Thus, the only policy in the Manual given to Claimant that somewhat reflects the "DUI equals automatic termination policy" that Franny Sanchez testified about, provides that an Employee can be insurable after receiving **multiple** moving violations, and can maintain their employment even if found to be uninsurable. However, and more importantly, the Manual contains no language that equates or links being accused with DUI to being uninsurable. Therefore, as found, the Claimant would not reasonably expect being accused of DUI results in the employee being uninsurable and states an employee that becomes uninsurable may maintain his or her employment with Employer.

Burden of Proof

f. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found. As found, the Respondents failed to satisfy their burden of proof on the affirmative defense that the Claimant was responsible for his termination through a volitional act on his part and/or that the Claimant exercised ad degree of control over the circumstances leading to termination.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant was not responsible for his termination from employment and the Respondents' affirmative defense of "responsibility for termination" is hereby denied and dismissed.

B. The General Admission of Liability, dated February 24, 2015 shall remain in full force and effect, and temporary total disability and medical benefits shall be paid in accordance therewith.

C. Any and all issues not determined herein are reserved for future decision.

DATED this______day of March 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2016, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

____
Court Clerk

Wc.ord

ISSUE

Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Kathy McCranie, M.D. that she sustained an 8% whole person impairment rating as a result of her June 4, 2013 cervical spine injury.

FINDINGS OF FACT

1. On June 4, 2013 Claimant suffered an industrial injury to her cervical spine during the course and scope of her employment with Employer. She injured her cervical spine during a work-related motor vehicle accident.

2. Claimant subsequently received authorized medical treatment through Arbor Occupational Medicine. On June 6, 2013 Claimant was evaluated by Richard Shouse, PA-C. He noted that Claimant had suffered mild whiplash and a headache as a result of her June 4, 2013 motor vehicle accident. Both of the injuries had resolved. Upon examination, PA-C Shouse remarked that Claimant had "full range of motion of the neck and shoulders." He assessed Claimant with a trapezius strain and released her to regular duty.

3. On July 1, 2013 Claimant returned to Arbor Occupational Medicine and was examined by PA-C Springer. He observed "good" range of motion of Claimant's neck.

4. By August 2, 2013 PA-C Shouse commented that Claimant exhibited full range of motion. He noted that Claimant continued to work full duty and was approaching Maximum Medical Improvement (MMI).

5. On August 14, 2013 Claimant returned to Arbor Occupational Medicine and was evaluated by David Kistler, M.D. He remarked that Claimant exhibited full range of motion in her cervical spine. Dr. Kistler placed Claimant at MMI without any restrictions or impairment.

6. Because of continued symptoms, Claimant visited Lloyd Thurston, D.O. at Arbor Occupational Medicine on April 14, 2014. Dr. Thurston reviewed diagnostic imaging that revealed degenerative disc changes. He explained that the degenerative disc changes likely existed prior to Claimant's June 4, 2013 motor vehicle accident. He observed normal cervical range of motion.

7. On December 9, 2014 Claimant visited Alisa M. Koval, M.D. at Arbor Occupational Medicine. After examining Claimant she noted "very good range of motion of the neck."

8. Between October 7, 2014 and January 9, 2015 Claimant visited Mountain Range Chiropractic, LLC a total of 14 times. At each visit Claimant's cervical range of motion was "abnormal" in the planes of "cervical rotation and lateral flexion, left greater than right."

9. On February 17, 2015 Authorized Treating Physician (ATP) David Orgel, M.D. determined that Claimant had reached MMI. He assigned Claimant an 18% whole person impairment rating for her cervical spine injury. Specifically, Dr. Orgel assigned Claimant a 6% whole person impairment for "Table 53 2C" and 13% for range of motion deficits in the cervical spine.

10. Respondents challenged Dr. Orgel's determinations and sought a Division Independent Medical Examination (DIME). On July 1, 2015 Claimant underwent a DIME with Kathy McCranie, M.D. Dr. McCranie agreed with Dr. Orgel's determination that Claimant reached MMI on February 17, 2015. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)* she also agreed with Dr. Orgel that Claimant warranted a 6% whole person impairment based on her cervical spine condition pursuant to Table 53 C.II.

11. Dr. McCranie agreed with all of Dr. Orgel's opinions with the exception of range of motion measurements. Dr. Orgel had assigned Claimant a 13% impairment for range of motion deficits, but Dr. McCranie assigned Claimant a 2% rating for range of motion deficits in the cervical spine. Combining a 6% impairment pursuant to Table 53 C.II. with a 2% rating for range of motion loss, Dr. McCranie concluded that Claimant warranted an 8% whole person impairment rating.

12. Section 1.2 of the *AMA Guides* outlines the structure and use of the publication. The section specifies, in pertinent part:

> This information gathering and analysis serves as the foundation upon which the evaluation of permanent impairment is carried out. It is most important that the evaluator obtain enough clinical information to characterize the medical condition fully in accordance with the Guides. Once this task is accomplished, the evaluator's findings may be compared with the clinical information already available about the individual. If the current findings are consistent with the results of previous clinical evaluations, they may be compared with the appropriate tables of the Guides to determine the percentage of impairment. If the findings of the impairment evaluation are not consistent with those in the record, the step of determining the percentage of impairment is meaningless and should not be carried out until communication between the involved physicians or further clinical investigation resolves the disparity.

13. Section 1.2 of the *AMA Guides* thus provides that impairment ratings should only be prepared when the "current findings are consistent with the results of previous clinical evaluations." The section also states that an impairment rating "should not be carried out until communication between the involved physicians or further

clinical investigation resolves the disparity." Claimant asserts Dr. McCranie failed to address her range of motion disparity with the measurements of Dr. Orgel. She thus contends that she has overcome Dr. McCranie's July 1, 2015 DIME by clear and convincing evidence.

14. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. McCranie that she sustained an 8% whole person impairment rating as a result of her June 4, 2013 cervical spine injury. After considering voluminous medical records, diagnostic results, the opinions of multiple physicians and performing a physical examination, Dr. McCranie concluded that Claimant reached MMI on February 17, 2015 with an 8% whole person impairment. Initially, Claimant's chiropractic visits between October 7, 2014 and January 9, 2015 revealed that her cervical range of motion was "abnormal" in the planes of cervical rotation and lateral flexion. However, the records reveal that five treating providers, including Dr. Thurston, Dr. Koval, Dr. Kistler, PA-C Shouse, and PA-C Springer documented that Claimant had full, normal or good cervical range of motion. Because Dr. McCranie's opinion was consistent with numerous treatment providers, she had little reason to question her range of motion findings or contact Dr. Orgel to address the disparity. Dr. Orgel's determination simply constitutes a difference of opinion with Dr. McCranie's range of motion measurements. Finally, even if Dr. McCranie deviated from Section 1.2 of the *AMA Guides*, a technical deviation does not render her opinion clearly erroneous. She properly applied the *AMA Guides,* conducted valid range of motion testing and determined that Claimant warranted a 2% whole person impairment rating for range of motion deficits. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. McCranie's impairment determination was incorrect.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. McCranie that she sustained an 8% whole person impairment rating as a result of her June 4, 2013 cervical spine injury. After considering voluminous medical records, diagnostic results, the opinions of multiple physicians and performing a physical examination, Dr. McCranie concluded that Claimant reached MMI on February 17, 2015 with an 8% whole person impairment. Initially, Claimant's chiropractic visits between October 7, 2014 and January 9, 2015 revealed that her cervical range of motion was "abnormal" in the planes of cervical rotation and lateral flexion. However, the records reveal that five treating providers, including Dr. Thurston,

Dr. Koval, Dr. Kistler, PA-C Shouse, and PA-C Springer documented that Claimant had full, normal or good cervical range of motion. Because Dr. McCranie's opinion was consistent with numerous treatment providers, she had little reason to question her range of motion findings or contact Dr. Orgel to address the disparity. Dr. Orgel's determination simply constitutes a difference of opinion with Dr. McCranie's range of motion measurements. Finally, even if Dr. McCranie deviated from Section 1.2 of the *AMA Guides*, a technical deviation does not render her opinion clearly erroneous. She properly applied the *AMA Guides,* conducted valid range of motion testing and determined that Claimant warranted a 2% whole person impairment rating for range of motion deficits. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. McCranie's impairment determination was incorrect. *Compare In Re Lafont*, W.C. No. 4-914-378 (ICAP, June 25, 2015) (concluding that the claimant had overcome the DIME determination because the DIME physician had failed to perform an adequate examination and comply with *AMA Guides* based on an expert physician's opinion).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to overcome the DIME opinion of Dr. McCranie. She reached MMI on February 17, 2015 with an 8% whole person impairment rating.

2. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 2, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues presented involve compensability and Claimant's entitlement to medical benefits. The questions to be answered are:

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his right knee; and if so,

II. Whether he established, by a preponderance of the evidence, that he is entitled to an award of reasonable, necessary and related medical treatment, including treatment recommended by Dr. Duffy.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Drs. Davis and Duffy, the ALJ enters the following findings of fact:

1. Claimant works as a correctional officer for Employer. As part of his employment, Claimant must participate in and pass annual training involving simulated altercation situations between officers and offenders wherein the officers practice restraint techniques to assure personal safety. Claimant referred to this as "PPC" training.

2. Claimant testified that on February 25, 2015, he was participating in PPC training demonstrating an "iron wrist" takedown maneuver on a fellow officer when he injured his right knee. According to Claimant, he was in the process of taking his practice partner to the ground when he felt his right knee "pop" after which Claimant testified he experienced "excruciating" pain.

3. Claimant has a long and complicated medical history concerning his right knee. He has been diagnosed with and treated for end stage osteoarthritis and gout. Claimant testified at hearing that he has suffered from gout for at least the past eight years.

4. Medical records admitted into evidence reveal the following:

- Claimant treated with his personal care physician (PCP) at Kaiser for right knee pain associated with gout on October 30, 2013. As of this date, Claimant was having 2-3 flares in his right knee per week and his uric acid level was high as demonstrated by laboratory work-up on this date. *R.Ex.A, pp.3-6.*

- The Claimant sought a refill for his gout medication on March 21, 2014. *R.Ex.A, p.7.*

- On May 21, 2014, the Claimant was "just walking" at work when his left foot "just cracked" and he twisted his right knee. *R.Ex.B, pp.69-71*; *R.Ex.B,p.83*.

- A four-view x-ray of the right knee on May 22, 2014 indicated "advanced tricompartmental degenerative change" and other "chronic" findings. *R.Ex.B, p.74.*

- Medication adjustments were made to address Claimant's ongoing gout diagnosis on May 27, 2014 as Claimant was seeking treatment that would be "preventative" in nature. *R.Ex.A, p.15.*

- On May 27, 2014, Claimant's blood was drawn for uric acid testing. A reported value of 8.1mg/dl was revealed on May 28, 20914. The goal of treatment for gout patients is a uric acid level below 6.0 mg/dl. Claimant was diagnosed with right knee joint pain. *R.Ex.A, p.18*.

- On June 2, 2014, Daniel Olson, M.D. evaluated Claimant in connection with his left foot and right knee conditions stemming from the May 21, 2014 incident where he was walking at work. Dr. Olson documented that Claimant's right knee appeared "somewhat arthritic." He diagnosis Claimant with a "closed fracture of metatarsal bone(s)" and opined that the "cause of this problem does not appear related to work activities." *R.Ex.B, p.76.*

- On June 3, 2014, the Claimant was diagnosed with end stage osteoarthritis in his right knee by orthopedist Matthew Simonich, M.D. Also on this date, a total knee replacement was discussed in response to the Claimant's arthritic pain. *R.Ex.B, pp.78-82.*

- On August 27, 2014, the Claimant saw orthopedic expert Dr. Hendrick Arnold for an independent medical examination (IME) for his right knee in connection with a worker's compensation claim Claimant filed stemming from the May 21, 2014 incident occurring at work. Dr. Arnold took a history from Claimant, conducted a physical examination and reviewed available records. He then prepared a written report outlining his findings and opinions.

- In his report, Dr. Arnold noted that Claimant had trouble climbing stairs and ladders because of his right knee. He told Dr. Arnold that his right knee gave him problems even while walking on level surfaces ("flat land"), as his right knee felt like it was going to "give out." He told Dr. Arnold that his right knee hurt when he is just sitting still and that the pain increases when he bends it. The Claimant told Dr. Arnold on this date that his right knee pain is global. *R.Ex.C, p.92*. Dr. Arnold indicated that x-ray studies taken shortly after the May 21, 2014 incident demonstrated degenerative changes in the right knee that had occurred over considerable time. *R.Ex.C, p.99*. Dr. Arnold determined that Claimant's history of obesity and gout were the cause of his numerous joint symptoms of pain and inflammation throughout the years, and these same factors accelerated and increased his chances of degenerative joint disease. *R.Ex.C, p.99*.

5. The parties took Dr. Arnold's deposition on October 9, 2014, at which time Dr. Arnold testified that Claimant was not initially forthcoming in relating exactly where his preexisting gout flared. He eventually admitted to Dr. Arnold that his gout flares normally extended to his knees. *R.Ex.D, pp.128-129*.

6. Prior to beginning his deposition testimony, Dr. Arnold had the opportunity to review records from Claimant's PCP at Kaiser for the first time. Dr. Arnold determined that these records demonstrated that the Claimant's preexisting gout was more severe a problem in the time leading up to May 21, 2014 than the Claimant reported during the IME. *R.Ex.D, pp.120-121*.

7. Dr. Arnold explained that gout causes rapidly accelerated degeneration of cartilage and bone. *R.Ex.D, pp.142-143*.

8. Dr. Arnold opined that the degenerative changes evident in the Claimant's right knee are likely related to uric acid deposits. *R.Ex.D, p.24*.

9. In sum, Dr. Arnold noted that gout has a considerable effect on bones and joints, and the most commonly affected areas are the feet and knees. *R.Ex.D, p.144*.

10. Claimant testified that following the May 21, 2014 incident occurring at work, he was returned to full duty work on October 6, 2014. Claimant was assigned to the tool crib upon his return. Claimant testified that his right knee "hurt" when he returned to work in October. Sometime prior to February 25, 2015, Claimant assisted in replacing flooring around the facility. This job required substantial squatting and kneeling and lasted approximately 6 weeks according to Claimant.

11. Claimant testified that his knee continued to hurt following this flooring job. Per Claimant, his right knee "hurts all the time." Regardless, Claimant testified that he could perform the essential functions of his work prior to February 25, 2015. Following the February 25, 2015 "popping" during PPC training, Claimant testified that he could not work secondary to increased pain and swelling in the right knee. According to Claimant, he could not kneel following this incident and had to have his CPR training modified. Claimant testified that he continues to work in the tool crib but with difficulty. He takes Ibuprofen for pain "just so he can walk around."

12. Concerning his gout and treatment for the same, Claimant's testified at his gout is under control, having last had a flare up 1 ½ years ago. Claimant testified that his gout affects his right big toe and causes "aching" pain. Claimant's medical records establish that he was taking 200 mg of gout medication "daily" and actively treating for

"frequent" (weekly) gout attacks extending into his right knee as of Nov. 13, 2014. *R.Ex.A, p.51-54*. Claimant testified that he had suffered only one past gout attack on his right knee. He did not remember treating for his gout in November 2014. Claimant's medical records also establish that he pursued an injection into the right knee on Dec. 19, 2014, *R.Ex.A, p.55,* and he requested a gout medication refill on Feb. 2, 2015. His PCP raised Claimant's gout medication dosage to 300 mg. on this date. *R.Ex.A, p.56-57*. The ALJ finds Claimant's testimony partially inconsistent with the content of his medical records.

13. As noted above, Claimant testified at hearing that he suffered a new injury to his right knee on February 25, 2015, when he felt a "pop" during training. However, an e-mail message generated by Claimant on February 27, 2015, demonstrates that Claimant reported to his employer that he had actually suffered an injury to his *left* knee during the training. *R.Ex.G, p.205*. Claimant also completed paperwork upon his first visit to a physician for his alleged knee injury during which time Claimant reported that his injury occurred on February 26, 2015. *R.Ex.H, p.211*. Further, a report from Dr. Nanes dated August 5, 2015 reflects in the history of present illness section of the report, that Claimant's "right knee gave out on him at work about 2 weeks ago and he did fill out a report, however he advised his staff that he has an appointment with me in 2 weeks." The ALJ finds inconsistencies in Claimant's testimony and the records documenting the body part he alleged to have injured and the date the injury occurred.

14. Claimant testified that he suffered "excruciating" right knee pain following the incident on Feb. 25, 2015. Nonetheless, Claimant testified at hearing that he did not seek medical treatment for his right knee until March 4, 2015, and did so only then because he was already going to see the doctor for an admitted workers' compensation claim involving his shoulder. Claimant saw Dr. Richard Nanes at Centura Centers for Occupational Medicine (CCOM) on March 4, 2015, for right knee pain at which time Dr. Nanes ordered x-rays and an MRI of the right knee. Outside of indicating that he had suffered an injury during "PPCT training", Claimant did not provide a mechanism of injury in the Patient Health and Injury History completed at CCOM on March 4, 2015. *R.Ex.G, p. 211.*

15. There were no acute findings visualized on the three-view right knee x-rays taken March 4, 2015, as ordered by Dr. Nanes. *R.Ex.A., p.59*.

16. Claimant saw orthopedist James Duffey, M.D. on April 7, 2015, complaining of osteoarthritis in the right knee. Claimant told Dr. Duffey on this date that he had never had any right knee problems prior to May 21, 2014 and that his right knee was "completely asymptomatic" prior to May 21, 2014. *R.Ex.I, p.236*.

17. After examining Claimant and reviewing diagnostic studies of the right knee, Dr. Duffey diagnosed Claimant with advanced end-stage osteoarthritis of the right knee. *R.Ex.I, p.236.* Based upon the history provided, Dr. Duffey opined that Claimant had suffered a "significant exacerbation" of his preexisting right knee osteoarthritis on Feb. 25, 2015. *R.Ex.I, p.236.*

18. Dr. Duffey recommended an injection to the right knee and possibly a total knee replacement. *R.Ex.I, p.237*.

19. On September 14, 2015, the Claimant saw orthopedist I. Stephen Davis for an independent medical examination at the Respondent's request. *R.Ex.J, p.238.*

20. Dr. Davis reviewed the actual films from the Claimant's March 27, 2015 MRI scan of the right knee. *R.Ex.J, p.238.*

21. Claimant described the mechanism of his alleged Feb. 25, 2015 injury as a twisting of the right knee resulting in a "blow out" with the onset of severe pain. *R.Ex.J, p.238.*

22. After a full review of relevant medical history, including review of actual MRI films, Dr. Davis opined that there is no objective evidence of additional injury to the right knee on either May 21, 2014 or Feb. 25, 2015. *R.Ex.J, p.242.* Dr. Davis diagnosed Claimant with severe end-stage osteoarthritis of the right knee. *R.Ex.J, p.242.*

23. Dr. Davis agreed that the Claimant was a candidate for a total right knee replacement but that the need was not work-related. *R.Ex.J, p.242.*

24. Dr. Davis testified by deposition on October 27, 2015. Dr. Davis was qualified as a Level II accredited expert in orthopedic medicine who has been treating knee problems since the 1960's. *Davis Deposition, pp.3-5*.

25. During his deposition, Dr. Davis reiterated his opinion that there was no objective medical record evidence of Claimant having suffered an acute injury on February 25, 2015. *Davis Deposition, p.7*.

26. Dr. Davis testified that the Claimant's complaints of right knee pain, difficulty straightening and bending the right knee, and catching and locking of the right knee are all consistent with the Claimant's advanced arthritis. *Davis Deposition, pp.7-8*.

27. Dr. Davis testified that there is no evidence that the Claimant's advanced right knee arthritis was worse the day after the alleged injury of February 25, 2015 than it was the day before. *Davis Deposition, p.12*.

28. Dr. Davis testified that the symptoms reported by Claimant following the incident from Feb. 25, 2015 could have equally manifested after walking down the street or getting up from the dinner table. According to Dr. Davis, any number of activities of daily living could have led to the same complaints. Consequently, Dr. Davis testified: "There's no anatomic change, it's just an expected occurrence when you have arthritis." *Davis Deposition, pp.14-15*.

29. Dr. Davis explained that arthritis causes knee bones to grind, grate, stick and

"give out." These results of arthritis cause swelling and pain without any acute, anatomic change in the knee. *Davis Deposition, p.15*.

30. Dr. Davis testified that much like osteoarthritis, gout can cause anatomic destruction in the knee. *Davis Deposition, p.19*.

31. Dr. Davis testified that gout alone can cause pain in the knee along with erosions and lesions in the knee. *Davis Deposition, p.20*.

32. Dr. Davis testified that gout can have the same effect as osteoarthritis in the knee, namely destruction of articular cartilage causing pain, swelling, deformity, limited motion, giving out and instability. *Davis Deposition, p.20*.

33. Dr. Davis explicitly disagreed with the Claimant's counsel that the Claimant could have asymptomatic days regarding his right knee considering the severity of the osteoarthritis present on imaging study. *Davis Deposition, pp.25-26*. Based upon Claimant's medical records outlining the severity of his gout coupled with the reported findings of the MRI and Claimant's testimony that his knee hurts all the time, the ALJ finds it improbable that Claimant's right knee was asymptomatic leading up to the February 25, 2015 incident.

34. Dr. Davis testified that a total right knee replacement would in no way be aimed at treating the effects of the February 25, 2015 incident. *Davis Deposition, pp.33-34*.

35. The ALJ infers from Dr. Davis' testimony that Claimant's right knee symptoms, i.e. pain, popping, swelling and reduced/painful range of motion are the consequence of the natural and probable progression of his pre-existing degenerative joint disease in the knee.

36. The parties took the deposition of Dr. Duffey on January 26, 2016.

37. Dr. Duffey testified that he is not Level II accredited and has not had any formal training with regard to causation issues. *Duffey Deposition, p.21.*

38. Dr. Duffey testified that he had not reviewed any medical records from 2014 for the Claimant prior to his deposition. *Duffey Deposition, p.22.*

39. Dr. Duffey testified that prior to his deposition he was not aware that the Claimant had been evaluated by any other orthopedist for his right knee. *Duffey Deposition, pp.31-32.*

40. Dr. Duffey testified that prior to his deposition he had no knowledge that the Claimant suffered from gout. *Duffey Deposition, p.8.*

41. Dr. Duffey testified that he has personally viewed gout crystals deposited in

knees, and that gout could “definitely be confounding factor in [the Claimant’s] symptoms.” *Duffey Deposition, p.8.*

42. Dr. Duffey testified that the Claimant wouldn’t be able to distinguish between pain in the right knee caused by gout, osteoarthritis or an acute injury as suggested by Claimant during his testimony. *Duffey Deposition, pp.9,46.*

43. Per Dr. Duffey’s testimony, he understood the mechanism of injury (MOI) to be an abrupt transfer of weight onto the right leg through the knee which caused pain. Regarding this MOI, Dr. Duffey testified that sudden loading of Claimant’s abnormal joint may have led to pain caused by bone bruising which could be seen on MRI. During cross examination, Dr. Duffey admitted that the March 27, 2015 MRI study showed no evidence of bone bruising. *Duffey Deposition, p.18.* Dr. Duffey’s understanding of the MOI in this case is substantially inconsistent with Claimant’s reported MOI to Dr. Davis. As noted above, Claimant’s MOI as reported to Dr. Davis was severe pain associated with a twisting and “blow out” of the knee.

44. Dr. Duffey testified that Claimant had a “relatively functional arthritic knee that was not terribly symptomatic over a period of time, had not been to see people for symptoms; than he has these two episodes, and his symptoms are worse and now continue to be worse. So I think that his injuries have sped up the process to where we are today; you know, maybe not caused, but have exacerbated a problem, and sped up the process.” *Duffey Deposition, p.14.* The ALJ infers from Dr. Duffey’s testimony that Dr. Duffey believes that February 25, 2015 incident resulted in an acceleration of the degenerative process pre-existing in Claimant’s right knee.

45. Dr. Duffey testified that evidence of Claimant seeking a knee injection in December 2014 would change his initial opinion on relatedness that was based in an asymptomatic knee leading up to Feb. 25, 2015. *Duffey Deposition, p.22.*

46. Dr. Duffey testified that evidence the Claimant was treating for right knee pain in October 2013 would change his initial opinion on relatedness much in the same way as would knowledge of the Claimant seeking an injection in December 2014. *Duffey Deposition, p.23.*

47. Dr. Duffey testified that evidence of prior gout treatment would make him think that gout was playing a greater role in the Claimant’s right knee problems than he originally thought. *Duffey Deposition, p.23.*

48. Dr. Duffey testified that it is not uncommon for gout to spread to the knee, and that gout can deteriorate a joint. *Duffey Deposition, pp.24-25.*

49. Dr. Duffey testified that after viewing the PCP notes from Kaiser from December 2014 regarding a knee injection changed his initial opinion that the incident on Feb. 25, 2015 altered the degenerative process in the right knee. *Duffey Deposition, p.27.* In this regard, Dr. Duffey testified as follows:

> Q: Does that change your testimony with regard to the February, 2015, incident speeding up any process in the knee?
>
> A: It does. It, again, makes it apparent that he was having an issue. And this note suggests that there's some urgency, because they were trying to work him in to a cancellation, to get this done relatively sooner. So I would say that, yes, it tells me that he was not doing fine from October until February that, in fact, he was having some issues and some fairly acute symptoms in December of 2014."

50. When asked if there was evidence of an acute exacerbation (acceleration) of the right knee condition in February 2015, Dr. Duffey admitted: "The only evidence I have is the patient's complaint that something happened, and that he experienced increased pain." *Duffey Deposition, p.27.*

51. Dr. Duffey testified at two separate times during his deposition that an atraumatic osteoarthritic flare could present very similarly to the Claimant's complaints on Feb. 25, 2015. *Duffey Deposition, pp.28, 31.*

52. Dr. Duffey testified there is no objective measure that the Claimant's complaints after the incident on February 25, 2015 were related to the alleged work incident as opposed to his osteoarthritis. *Duffey Deposition, p.31.*

53. Dr. Duffey testified that medial pain, swelling, difficulty straightening and bending the knee, grating of the knee, catching of the knee, locking of the knee and restricted range of motion are all expected symptoms of osteoarthritis independent of any trauma. *Duffey Deposition, pp.18,34-35.*

54. Dr. Duffey testified that the treatment he recommends for the Claimant is the same treatment he would recommend for a patient with osteoarthritis and no trauma. *Duffey Deposition, p.45.*

55. Based upon the totality of the evidence presented, the ALJ finds the opinions expressed by Dr. Davis credible and more persuasive than the contrary opinions of Dr. Duffey.

56. Claimant has failed to establish, by a preponderance of the evidence, that he sustained a compensable injury or exacerbation (acceleration) of his pre-existing osteoarthritis as a consequence of the February 25, 2015 incident occurring during PPC training. Rather, the totality of the evidence presented persuades the ALJ that, more probably than not, Claimant's worsening right knee symptoms are a direct consequence of the natural progression of Claimant's underlying pre-existing degenerative right knee arthritis. Based upon the evidence presented, the ALJ is convinced that Claimant's degenerative osteoarthritis progressed naturally, with likely contribution from his non work-related gout but specifically without contribution from his participation in PPC training on February 25, 2015.

57. Consequently, Claimant has failed to prove that his need for right knee treatment, including additional injection therapy and/or surgical intervention in the form of a total knee arthroplasty (TKA) are proximately related to the February 25, 2015 incident occurring during PPC training. Accordingly, Respondent's are not obligated to provide this treatment

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). As noted in this case, the expert medical opinions of Dr. Davis are more persuasive than the opinions of Dr. Duffey. Based upon the evidence presented, the ALJ is convinced that Dr. Duffey did not have a full understanding of the extent of Claimant's pre-existing right knee condition, including the extend of treatment for his gout. It is also evident that Dr. Duffey was working from a different understanding of the MOI which contradicted Claimant's reported MOI to Dr. Davis. Accordingly, the ALJ finds the opinions of Dr. Davis more persuasive than those of Dr. Duffey.

C. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant's right knee symptoms and need for treatment arise out of his employment and are therefore sufficiently connected thereto to result in a finding that his alleged injuries/condition is compensable.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges, based primarily on the testimony of Dr Duffey, that he suffered a compensable exacerbation, i.e. acceleration of his right knee osteoarthritis as a consequence of taking his training partner to the mat while engaging in PPC training.

G. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

H. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). In this case, the totality of the evidence presented persuades the ALJ that Claimant's worsening right knee symptoms, more probably than not, arose from the natural progression of his pre-existing degenerative osteoarthritis with likely contribution from his gout, rather than the incident occurring during PPC training as he testified. Based upon the evidence presented, the ALJ concurs with Respondents assertion that when he arrived at work on February 25, 2015, Claimant's right knee was besieged by end-stage osteoarthritis and gout and that his current symptoms are the continued manifestation of the natural progression of these conditions. In support of this conclusion, the ALJ relies upon the following record evidence:

- Claimant’s own testimony that his knee hurt upon his return to work on in October 2014 and that it hurt all the time.

- The record evidence that in the weeks prior to the alleged work related MOI Claimant was seeking a knee injection on an ostensibly emergent basis on December 19, 2014 and a refill of his gout medications. Claimant’s testimony of ongoing symptoms coupled with the timeline of active treatment in the weeks prior to the alleged work related exacerbation belies Claimant’s assertion that his right knee was feeling good prior to the date of alleged injury.

- The record evidence establishing that Claimant’s complaints from February 25, 2015 are identical to those associated with his preexisting end-stage osteoarthritis and his preexisting gout.

- The record evidence indicating that there was no objective medical evidence to establish that Claimant sustained an acute injury.

- The inconsistencies in Claimant’s reported MOI, the knee involved in the alleged injury and the date the alleged injury occurred. Here, Claimant initially withheld the extent of his right knee history from essentially every medical provider involved in this case. He testified at hearing that he had one prior gout attack in his right knee while the medical record overtly contradicts this assertion. He reported a left knee injury as opposed to a right knee injury and completed paperwork alleging a date of injury different than he testified to at hearing.

ORDER

It is therefore ordered that:

1. Claimant’s February 25, 2015 claim for work related injuries to his right knee is denied and dismissed.

2. Claimant’s claim for medieval benefits associated with alleged injuries occurring February 25, 2015, including injection therapy and surgical intervention is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 28, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUE

1. Whether Claimant has established by a preponderance of the evidence that treatment of his lumbar spine is related to his admitted February 27, 2015 work injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a garbage truck driver for over 15 years.

2. On February 27, 2015 Claimant suffered an admitted work injury when he slipped on ice while climbing out of his truck, causing him to land on his outstretched left arm and left side of his body.

3. On March 1, 2015 Claimant was evaluated at Concentra by Kathy Okamatsu, NP. Claimant reported left side arm, shoulder, neck, and back pain from a fall. Claimant reported that while picking up trash at an apartment he slipped on black ice at ground level and fell backwards and onto his left side possibly landing on his back, left palm, left elbow, and left shoulder. Claimant reported that he worked the remainder of his shift without problem but that the pain became worse the next day. NP Okamatsu assessed left shoulder pain, left elbow pain, left wrist pain, strain of left trapezius muscle, left shoulder strain, left elbow fracture, and left wrist sprain. NP Okamatsu provided Claimant with a sling, and referred Claimant to a hand specialist. *See* Exhibit M.

4. On March 6, 2015 Claimant was evaluated by Nancy Strain, D.O. Dr. Strain noted that Claimant was in for a recheck of his left elbow, wrist, and shoulder and that he also complained of neck and back pain. Claimant reported the pain was radiating into his left leg and that his left knee was sore. Dr. Strain noted that Claimant was in a cast for a distal radius fracture and a sling for a radial head fracture. Claimant reported his back pain was in his lower back bilaterally. Dr. Strain assessed cervical strain, lumbar strain, left knee pain, left elbow fracture, and left wrist fracture. *See* Exhibit 6.

5. On March 16, 2015 Claimant was evaluated by Chelsea Rasis, PA-C. It was noted that Claimant presented for several problems after suffering a fall at work onto his left arm. PA Rasis noted a left shoulder sprain with continued dull ache in the anterior shoulder, left elbow x-rays suggesting minimally displaced radial head/neck fracture, left wrist x-rays suggesting non-displaced radius fracture, and lumbar sprain with reports that the pain radiates from the left lower back into the left knee. *See* Exhibit 7.

6. On March 31, 2015 Claimant was evaluated by Stephen Danahey, M.D. Dr. Danahey assessed cervical strain, knee pain left, left elbow fracture, left shoulder strain, left wrist sprain, and lumbar strain. Dr. Danahey noted a slip and fall injury onto Claimant's left side. Dr. Danahey noted Claimant would be undergoing an MRI of the lower back and ordered an MRI of the left shoulder and left knee. *See* Exhibit 7.

7. On April 1, 2015 Claimant underwent an MRI of his lumbar spine interpreted by Charles Wennogle, M.D. Dr. Wennogle provided an impression of: L3-L4 disc degeneration with broad-based disc bulge and mild bilateral facet arthropathy; L4-L5 disc degeneration and left foraminal annular tear, mild to moderate bilateral facet arthropathy, mild bilateral lateral recess stenosis without nerve root deformity; L5-S1 disc degeneration and mild bilateral facet arthropathy, mild right lateral recess and foraminal stenosis without nerve root deformity, and type 2 fatty modic discogenic endplate changes. *See* Exhibit 2.

8. On April 15, 2015 Claimant was evaluated by Dr. Danahey. Dr. Danahey noted Claimant's continued pain complaints and referred Claimant for orthopedic evaluation for his left shoulder and left knee and noted that Claimant was scheduled to see Dr. Zimmerman for his cervical and low back area. Dr. Danahey also noted that Claimant would be referred for a delayed recovery evaluation and treatment as well as psychological treatment and help with pain management. *See* Exhibit 7.

9. On May 15, 2015 Claimant was evaluated by Melanie Heto, Psy.D. Dr. Heto noted that Claimant felt betrayed and severely devalued by his supervisor's lack of a more deliberate attempt to help him after the accident, especially given his long history of employment and as such Claimant psychologically globalized this devaluation resulting in social isolation and disengagement from his usual enjoyments, and that Claimant turned his negative feelings inward on himself and saw himself as worthless and impotent. Dr. Heto opined that Claimant's feelings of worthlessness, frustration with his employer and medical team, and generalized hopelessness and worry may contribute to a worsening of his experience of pain, his perceived progress in recovery, and was likely to continue to undermine Claimant's recovery. Dr. Heto opined that Claimant was very likely to exhibit a delayed physical recovery from his injuries. She noted that Claimant's current level of passivity and resignation appeared to be quite uncharacteristic of him. *See* Exhibit 4.

10. On June 11, 2015 Claimant was evaluated by Rafer Leach, M.D. Claimant reported slipping on black ice when stepping out of a garbage truck he drove for work. Claimant reported falling on his left side with primary impact on his left shoulder, upper back, and neck. On examination Dr. Leach noted loss of lumbar lordosis in the lumbar spine, lumbar midline tenderness at L2-L3 and again at L4-S1. Dr. Leach noted positive lumbar facet guarding with extension, left lateral bending, and rotation in the lower lumbar segments with radiating pain into the left gluteal region. Dr. Leach referred Claimant to physical therapy and also referred Claimant for ultrasound-guided left patellafemoral and femorotibial steroid injection. *See* Exhibit K.

11. On July 30, 2015 Claimant was evaluated by James Benoist, M.D. Dr. Benoist noted that Claimant had an ultrasound-guided drainage of the prepatellar bursa effusion with steroid injection on June 24, 2015 and that the swelling had resolved and pain was markedly improved in Claimant's knee. Dr. Benoist also noted that on July 8, 2015 Claimant had left sacroiliac sulcus/ligament and left piriformis muscle injection for both diagnostic and therapeutic purposes with no anesthetic phase benefit and no therapeutic phase benefit. Dr. Benoist referred Claimant for bilateral L5-S1 transforaminal epidural steroid injections. *See* Exhibit 8.

12. On August 26, 2015 Claimant was evaluated by Dr. Benoist. Dr. Benoist included in the diagnosis traumatic spondylopathy, lumbago, thoracic or lumbosacral neuritis or radiculitis, lesion of sciatic nerve, and sacroilitis. Dr. Benoist noted that Claimant had clinical findings which could be suggestive of S1 radiculitis but could also be consistent with sacroilitis and piriformis syndrome. Dr. Benoist noted that given Claimant's MRI findings and lack of benefits with injection, the persistent low back pain and left lower extremity discomfort was most likely related to the L5-S1 disc and radiculitis. He also opined that it was possible that the descending S1 nerve root was being irritated at the L4-5 level where there was a left paracentral disc protrusion. Dr. Benoist listed the work related medical diagnoses to include lumbago and traumatic arthropathy. *See* Exhibit 8.

13. On September 17, 2015 Claimant underwent an independent medical examination performed by Allison Fall, M.D. Claimant reported to Dr. Fall that on February 27, 2015 while working he fell on the ice, his feet went up in the air, and as he landed he put his right hand on the back of his head and injured his left shoulder, elbow, wrist, and that his low back and left knee also hurt. Claimant reported that his wrist has improved a little but that nothing else had gotten better. Claimant reported no prior shoulder, back, or knee injuries. Dr. Fall opined that the work related injuries were to the left shoulder, elbow, wrist, and left knee. She opined that the lumbar spine epidurals were not medically reasonable, necessary, or appropriate and were not work related. She noted that Claimant had delayed recovery and psychological overlay. *See* Exhibit J.

14. On October 21, 2015 Claimant was evaluated by Mitchel Robinson, M.D. Dr. Robinson noted that Claimant was involved in a work related accident 10 months prior and that Claimant had two shoulder MRIs that showed partial thickness tearing of the rotator cuff and a small portion of a full thickness tear in the shoulder. Dr. Robinson noted that although there was concern on the MRI, Claimant had severely diminished range of motion in his shoulder, elbow and wrist and was not a candidate for any type of surgery of the shoulder until Claimant regained range of motion. Dr. Robinson noted he was unable to fully assess Claimant's shoulder due to Claimant's limitations. *See* Exhibit L.

15. On November 11, 2015 Claimant was evaluated by Rafer Leach, M.D. Dr. Leach noted that Claimant's complaints were the same since his last visit. On

examination, Dr. Leach noted that Claimant had paraspinal tenderness in the left cervical and left lumbar region. *See* Exhibit 8.

16. On December 9, 2015 Claimant was evaluated by Dr. Leach. Dr. Leach noted that Claimant was involved in a work related injury when he fell stepping out of the garbage truck he was driving and slipped on black ice, and fell to the left side. Claimant reported mild back pain, frequent left knee pain, lower back pain, and left arm pain interfering with his daily activities. Claimant denied having significant previous medical history. Dr. Leach noted no apparent preexisting spinal injury for which Claimant required any treatment prior to the date of injury. Dr. Leach noted that the MRI of the lumbar spine showed at L2-L3 mild left facet arthropathy; at L3-L4 disc degeneration with broad-based disc bulge and mild bilateral facet arthropathy with small bilateral facet articulation effusions; and at L4-L5 broad-based disc bulge and left foraminal annular tear, mild to moderate bilateral facet arthropathy and ligamentum flavium hypertrophy with small bilateral facet articulation effusions, and mild bilateral lateral recess stenosis without nerve root deformity; and at L5-S1 disc degeneration with broad-based disc bulge and predominantly right foraminal broad-based bulge, mild bilateral facet arthropathy, and mild right lateral recess and foraminal stenosis. On examination Dr. Leach noted lumbosacral lordosis decreased with midline tenderness in the L4-S1 region with a positive bilateral lumbar facet exam, bilateral muscle spasms in the lumbar region left greater than right, and bilateral SI joint tenderness. *See* Exhibit 8.

17. Dr. Leach noted on spinal examination that Claimant had decreased cervical lordosis with midline tenderness in the C4-7 region. Dr. Leach also noted a positive cervical facet exam on the left. Dr. Leach noted bilateral muscle spasms, left greater than right. Dr. Leach noted lumbosacral lordosis was decreased with midline tenderness in the L4-S1 region. Dr. Leach noted a positive bilateral lumber facet exam with bilateral muscle spasms in the lumbar region, left greater than right. *See* Exhibit 8.

18. Dr. Fall testified at hearing. She opined that Claimant did not suffer a lumbar spine injury in the fall at work. She opined that he did not suffer a great fall from a height, but rather that the fall was from standing position to the ground, and she opined that the MRI and x-rays combined with the mechanism of injury did not support an acute injury to the lumbar spine. She also opined that Claimant has somataform disorder that can affect the reliability of Claimant's reports of his symptoms. She opined that the lumbar MRI was benign and showed nothing to indicate a traumatic injury to the spine.

19. Dr. Leach also testified at hearing. He opined that Claimant had guarding and limited range of motion in the spine with lumbar tenderness, pain with facet testing, and loss of lumbar lordosis. Dr. Leach opined that Claimant had positive facet guarding. Dr. Leach noted that both he and Dr. Zimmerman were concerned with a facet condition based on examination. He disagreed with Dr. Fall and noted that the MRI of Claimant's lumbar spine showed a tear at L4 and facet injury and that both of those conditions could be the result of a traumatic injury and could be acute. He noted that Claimant had low back complaints and increased muscle activation in the lumbar

spine immediately after the fall. He opined that the lumbar spine condition is related to the fall Claimant suffered based on the lack of pre-existing lower back pain, the first evaluation and lumbar diagnosis, the lumbar MRI findings, and the physical examination that was consistent with a lumbar spine diagnosis. Dr. Leach opined that Claimant suffered a traumatic injury to the lumbar spine.

20. The testimony of Dr. Leach is found credible and persuasive and supported by the great weight of the medical evidence. Claimant had no pre-existing lumbar spine problems, the conditions noted by MRI are found to be consistent with an acute traumatic injury, and Claimant had immediate lumbar spine complaints following the injury.

21. The testimony of Dr. Fall is not credited. Although Claimant fell from ground level, Claimant's fall was significant enough to cause two fractures. Although Dr. Fall opined that the MRI showed nothing that could be due to an acute injury, the opinion of Dr. Leach that the MRI showed problems that could have been from an acute fall is found more persuasive. The MRI combined with the mechanism of injury and lack of prior pain complaints or treatment to the lumbar spine supports the overall opinion of Dr. Leach that Claimant suffered an acute injury to the lumbar spine.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Relatedness of lumbar spine

The claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition, by a preponderance of the evidence. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993).

Claimant has met his burden to establish that treatment for his lumbar spine is causally related to his February 27, 2015 work injury. The records establish that Claimant suffered an acute traumatic fall that caused injury to several body parts. At his first appointment following the fall, Claimant reported back pain. Claimant continued to report lumbar back pain at subsequent appointments. Claimant had no prior back complaints or limitations related to his lumbar spine and prior to the injury Claimant was able to work full duty as a garbage truck driver without limitations. The MRI of Claimant's lumbar spine showed changes that could be due to either degeneration or to acute injury. The testimony of Dr. Leach is found credible and persuasive that the MRI combined with the mechanism of injury, Claimant's immediate report of back pain following the injury, and the lack of prior back pain complaints/treatment all support an acute injury in this case.

Dr. Fall's opinions have been considered and rejected. Dr. Fall noted that Claimant's initial injury was confined to the upper left extremity and that the initial weeks of treatment were directed to Claimant's upper extremity. Although the initial treatment was directed at the left upper extremity due to acute fractures that Claimant suffered, the initial injury reported by Claimant included from the beginning a complaint of lower back pain. The injury was significant and included both a left elbow and wrist fracture and it is understandable that the initial treatment focused on both fractures. However, Claimant's pain complaints in his lower back began immediately and continued during the course of the claim. Claimant did not have similar pain complaints prior to the injury. Claimant's pain complaints in the back did not come on over time as argued by Respondents, but were present immediately and were reported at his initial evaluation. Also, Claimant's pain complaints are supported by an MRI that has acute indications and are also supported by Claimant's physical examinations. The opinions of Dr. Leach that the findings on MRI combined with Claimant's complaints and the mechanism of injury show consistency and support the conclusion that the fall at work on ice caused a lumbar spine injury is found credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that treatment of his lumbar spine is related to his admitted February 27, 2015 work injury. Respondents are liable for treatment of the lumbar spine provided to date and for ongoing treatment reasonable and necessary to treat Claimant's lumbar spine.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 29, 2016 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge

Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by U.S. Mail, or by e-mail addressed as follows:

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Division of Workers' Compensation
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Date: __**3/3/2016**__ _**Gabriela Chavez**
Court Clerk

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-977-954-01

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant prove by a preponderance of the evidence that he suffered an injury in the course and scope of his employment for Employer; and
2. Whether Claimant was disabled from his usual employment by the work related injury and therefore entitled to an order awarding temporary total disability benefits (TTD).

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is 58 years old and began work for Employer on February 1, 2010, as local delivery route driver. Employer is in the business of supplying businesses with janitorial supplies. Prior to working for Employer, Claimant was employed by Longmont Packing doing similar work except he delivered meat products.

2. When Claimant arrived at work each morning his truck was loaded with pre-

packaged pallets for his route to be delivered. Claimant's truck was generally loaded with 12 pallets which had products that needed to be delivered to 20 or 25 stops depending on the route.

3. The pallets were generally loaded with products that were 6 to 7 feet high and the individual items generally weighed between 25 to 50 pounds apiece, with some paper products weighing less and some products weighing up to 100 lbs or more, for instance, drums of detergent.

4. Claimant's delivery route included two types of delivery stops, dock deliveries and non-dock deliveries. The non-dock deliveries require Claimant to deliver directly to office buildings, businesses or hotels.

5. Claimant credibly testified that 70 percent of his normal route required hand unloading and 30 percent were dock deliveries. Claimant was provided with a hand truck or dolly to unload and deliver the products. Each truck also had a hand-held pallet jack for dock deliveries.

6. Claimant testified that for dock deliveries he would put the pallet jack underneath the pallet, hand pump the pallet jack to lift the pallet up and wheel the pallet onto the dock area to wherever they wanted the items placed. Claimant testified that these were not always at the dock area and could sometimes be half a block away from the dock. He described having to roll the pallet around corners.

7. Claimant testified that most of his dock stops required him to bring the whole pallet to the door or inside the store or business if there was a receiving area. Claimant testified that when he was making a dock delivery he usually had to assemble or re-assemble the items on the pallet to make the delivery because the pallets would generally be loaded with the products for more than one stop. Claimant would have to separate the products for each stop.

8. Claimant testified that it was his obligation as the delivery driver to assure that the items that he was delivering were meant for that delivery location. He would have the business sign the manifest that they received the right products. This would require him to separate and confirm the proper orders. He would have to separate the orders from the prepackaged pallets which required Claimant to reach up and take items off one pallet and either put it on another pallet or on the floor of the truck. Claimant testified that he spent the whole day reaching up, bending over, stooping and picking it up, putting it on the floor or wherever there was space. He also pushed and pulled the loads that were dock deliveries.

9. Claimant testified he worked 8 hours a day, 5 days a week and earned $14.00 an hour, and generally had 20 stops per day. If he was lucky he would have one dock stop that would be loaded right that he would not have to re-do the pallet. Claimant testified that the truck was equipped with a lift gate, so after he separated the order to be delivered he would use the lift gate and load the delivery items on a two-wheeler, go

back down the lift gate, and deliver it usually to a janitorial closet, storage room or the laundry room in motels. He would unload them where the customer wanted them placed. He would do this several times until the ordered product had been delivered. Claimant's truck when fully loaded carried up to 15,000 pounds of product. He testified that he delivered 7,000 to 15,000 pounds of product each day. Claimant was considered to be one of the Employer's most productive drivers.

10. Claimant began noticing problems with his low back and leg that were minor in his mind about 2 1-2 to 3 years after he started working for Employer. Claimant first noticed problems which he thought were in his hip, because his hip was hurting really bad, and then his leg started hurting. He went to his family doctor who told him that it was probably arthritis in the hip. The doctor gave Claimant some pills that didn't help with the problem. Claimant also testified that there were a number of times that he slipped and fell on the job when delivering product in the winter. He indicated that slip and falls were a hazard of the job. He also testified that he did tell his supervisor when he had significant enough falls that he thought he should report the injury. At those times, his supervisor offered to send him to the doctor but he usually felt like he could work through the problems.

11. Claimant credibly testified, and it is found, that Claimant suffered a slip and fall at the jail; the jail was one of Claimant's delivery locations. He described that at the jail his delivery truck sits somewhat higher than the dock plate and there is a dock plate at a 45-degree angle going up to the back of the truck. On this day it was the first stop of the morning. It was a little rainy and wet. He tried to pull the pallet over the dock plate and the pallet stuck. Claimant pushed the pallet so he could get a better run at it. When he pulled up, he slipped and fell on his back. The pallet came over the dock plate and started rolling towards the Claimant who put his feet up in order to stop it from running over him. The pallet carried him across the dock and stopped when he hit the wall with his low back.

12. Claimant testified he reported the accident to his supervisor Danny Hemans and Tim Clanton, who offered to send him to the doctor. He testified he told them he thought he could work through it, and did not go to the company doctor.

13. Claimant testified that from that point forward, his back continued to deteriorate and get worse. Claimant asked his supervisor about changing routes to an easier route, because it was hard for him to make it through the day because of the pain in his leg and back.

14. On January 21, 2015, Claimant requested FMLA from his employer. Claimant testified that when he asked for FMLA he told Holly Nugent in HR that he was in a lot of pain and that he did not know if he could do the job right now because of his back. He asked Holly if there was any kind of workers' compensation, temporary workers' compensation or anything that he could apply for until he got better. Claimant said that Holly told him the only thing that the company offered was FMLA.

15. On January 21, 2015, Claimant was evaluated by Dr. Gale, his family doctor. He complained of right lower extremity pain difficult to localize when it radiates up into his lumbar back and down into calf and mid foot associated with numbness, pain, and dysfunction. Claimant has right hip pain that really involves the whole leg, worse in the right thigh in front pocket distribution. Claimant indicated it was hard to work, hard to walk, hurts with all exercise. Activity makes it worse. Claimant has moderate to severe pain and sometimes cannot stand.

16. Claimant's physical examination on that date showed antalgic gait, mildly decreased sensation to the right foot. Dr. Gale diagnosed Claimant with radicular syndrome right leg, right leg pain. Severe right side pain starts in lumbar and radiates down the leg, some claudication type symptoms were present, but not typical. An MRI was ordered. Claimant was disabled from his usual employment commencing on January 21, 2015.

17. Dr. Gale completed the FMLA forms on February 3, 2015. Dr. Gale indicated that Claimant was unable to perform job duties of lifting, getting into and out of vehicles frequently. Condition was exacerbated over the past 4 months. Dr. Gale described symptoms as severe debilitating pain that limits Claimant's ability to walk > ½ block, pain shooting down the right lower extremity and gets worse with activity, better with rest. Dr. Gale reported that work up is in progress.

18. Claimant testified that when he took FMLA, it was his intent to get better and to return to work. But his back condition did not get better.

19. Claimant testified that currently he always has back pain. He has trouble walking more than 20 feet. Claimant has pain in his right hip and tingling in the back of his leg. The pain goes to the bottom of his foot.

20. Claimant is currently taking medication prescribed by his family doctor, Dr. Gale. He is currently taking gabapentin for the burning, and Percocet for the pain. Dr. Gale ordered an MRI and referred Claimant for a surgical consult at the Colorado Spine Institute. Surgery has been recommended.

21. Claimant was evaluated by Dr. Kevin Schmidt at Colorado Comprehensive Spine Institute on July 27, 2015, for evaluation and treatment of chronic low back and right lower extremity pain. Claimant described 1.5 years of low back and right lower extremity pain along with aching, stabbing, with numbness and pins and needles right posterior and lateral thigh, calf, and lateral foot. Claimant's pain is worse with walking. Walking tolerance poor but improves with a walking stick and pushing a cart. Claimant advised that he benefits from gabapentin, Percocet, and rest. Has not done formal physical therapy but Claimant says swimming improves his symptoms. Pain worse with sitting, standing, rising, walking, bending, twisting, reaching, lying down, sneezing, coughing, lifting, or driving.

22. On examination, Claimant had painful lumbar range of motion. Sensory testing is focally abnormal in right S1 distribution. Ankle jerks absent bilaterally. Tandem gait mildly impaired. MRI findings are consistent with symptoms. Claimant was diagnosed with lumbar stenosis, degenerative disc disease, spondylosis, moderate- severe foraminal narrowing L5-S1, neurogenic claudication. Claimant was urged to stop smoking. Claimant reported that he wanted to continue rehabilitative efforts, but has a fear of injections.

23. Claimant was evaluated by Dr. Hugh Macaulay on June 4, 2015. Claimant told Dr. Macaulay that he believes his right leg and low back pain are caused by his work at the Employer. He advised that he has fallen a few times. He told Dr. Macaulay that 12 months earlier he fell pulling a 2000 pound pallet off the truck, the pallet got stuck on dock plate. This fall was reported to the supervisor.

24. The history provided to Dr. Macaulay was that Claimant's problem began about 2 years earlier with pain in the right lower extremity which was initially diagnosed by Claimant's primary care physician as plantar fasciitis, and later arthritis in the hip. Claimant provided a history of a fall in April 2014 when unloading a full pallet and fell onto the dock. The event was reported but no incident report was filed. The back discomfort stopped but over the subsequent several weeks numbness in the foot was noticed and initially there was pain in the bottom of the right foot. This progressed to involve entire right lower extremity.

25. Dr. Macaulay opined, within a reasonable degree of medical probability, that the nature of Claimant's work, when compared with the criteria set out in the Low Back Pain Medical Treatment Guidelines, were compatible with an industrial illness. Dr. Macaulay also opined that a significant event occurred in April of 2014 causing an intensification of low back and right leg pain, and caused progression of low back and right leg dysfunction, aggravation of the neural compression secondary to the moderate to severe bilateral foraminal stenosis at L5-S1 and medically probable acceleration of the neural compromise to atrophy of the right thigh. According to Dr. Macaulay, the bilateral L5-S1 foraminal stenosis, central congenital stenosis at L4-S1, low back pain, L5-S1 neuritis, and the fall were all work related.

26. Dr. Macaulay diagnosed Claimant with work related low back pain with sciatica – cumulative trauma, severe lumbar spinal foraminal stenosis at L5-S1, S1 radiculopathy secondary to above, right SI joint hypomobility. He opined Claimant was not at MMI. Claimant needed alternative to narcotic medication, a neurosurgical consultation; possible surgical intervention, and electrodiagnostic studies. Dr. Macaulay advised that Claimant would be unable to return to his previous work and was restricted to sedentary/sub sedentary activities with need to change positions for comfort and no torqueing of the lumbar spine. He would need to continue to use the cane.

27. Dr. Macaulay testified at hearing that the medical treatment guidelines contain evidence based medicine regarding the cumulative effect of work risk factors in the development of low back pain, and based on the medical treatment guidelines and the

parameters that they have defined as being reasonably probable, associated with causation of low back pain, Claimant met those criteria.

28. Dr. Macaulay testified that the development of pain and the acceleration of symptom manifestation of structural changes can occur if you are performing heavy manual labor. He indicated that the most recent medical treatment guidelines (MTG) have put a cumulative trauma component into the guidelines. Not only do the MTG address the cumulative component, they have incorporated some very specific information as to what are the reasonable parameters that one would use for defining cumulative trauma as a cause for low back pain and an inability to perform the usual functions associated with your job.

29. Dr. Macaulay disagreed with Dr. Burris's opinion that Claimant's back pain was not related to the two slip and fall incidents at work because of the significant delay in treatment and Claimant's failure to timely report the accident.

30. Dr. Macaulay explained that he disagreed with this opinion by Dr. Burris because Dr. Macaulay opined that Claimant is not an "entitled individual", and doesn't run to the doctor, and just "sucks it up" as he goes along, until he finally gets to a point where there is a problem. He explained that some people think and say everything is work related when it is not, Dr. Macaulay was of the opinion that Claimant was not that type of person.

31. Dr. Macaulay opined that Claimant's delay in reporting the injury only meant that Claimant was stoic. He indicated that his opinion is supported by Claimant's personal medical records. He noted that Claimant did not have numerous doctors' visits and only had his blood checked every two years, even though he is diabetic.

32. Dr. Macaulay also testified that his opinion regarding causation was based on Claimant's cumulative trauma issue in his back. He indicated the falls were certainly aggravating and although they may have contributed they were not defining.

33. Dr. Macaulay testified that the job description provided by Employer was not helpful. There was nothing in the job description that defined the functional, mechanistic portion of the job duties.

34. Danny Hemans, Claimant's supervisor for the last 6 months prior to his hearing, testified confirming Claimant's description of his job duties. Mr. Hemans did not recall being told about a slip and fall incident at the jail involving Claimant.

35. Mr. Hemans agreed that Claimant told him that his leg was hurting. Mr. Hemans said he offered to send Claimant to a doctor but Claimant did not want to go. He left work soon after he reported having leg problems.

36. Mr. Hemans testified that Claimant took FMLA and when the supervisor called Claimant, Claimant reported he might have a bulged disc in his back pinching a nerve

and numbness in his leg caused by all the years Claimant drove a truck. Mr. Hemans did not refer Claimant for medical care or provide information regarding a claim for workers' compensation. Mr. Hemans acknowledged that he was aware low back injuries were common complaints among truck drivers.

37. Dr. Burris testified that Claimant's job duties did not fall within the MTG parameters. Dr. Burris opined therefore that Claimant did not have a cumulative trauma injury. Dr. Burris opined that Claimant's condition was not related to acute injuries from slip and falls because there was no contemporaneous medical record documenting the injury. Dr. Burris agreed with Dr. Macaulay's diagnosis, and agreed that if the Claimant's back condition is work related Claimant is not at maximum medical improvement, needs further workup, and is not able to perform his job duties with Employer.

38. Dr. Burris also agreed that as part of the Level 2 accreditation program that the physicians are taught that just because there is the presence of degenerative findings, that alone does not justify an argument that the low back pain was inevitable and not due to work-related exposures.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are reached.

1.The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

2.In this case, Drs. Macaulay and Burris's opinions are in conflict. Dr. Macaulay believes that Claimant's condition is worked related and Dr. Burris does not believe that it is work related. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

COMPENSABILITY OF CUMULATIVE TRAUMA INJURY AND SLIP AND FALL INJURY

3.More weight should be given the opinions of Dr. Macaulay than Respondent's IME Dr. Burris. Physicians in workers compensation cases that are Level II accredited are trained to assess and determine causation. In order to provide these opinions, the physician is to discuss the relationship between the patient's diagnosis and the work-related exposure. Dr. Burris never provided a diagnosis of Claimant's condition, but did agree with Dr. Macaulay's diagnosis. The doctor is to assess the risk of developing the suspected diagnosis as a result of the actual exposure of the individual patient and provide an opinion whether the patient's diagnosis and physical findings are related to the work-related exposure. Dr. Macaulay performed this analysis and concluded that Claimant's job duties caused his work injury.

4.Dr. Macaulay credibly testified that the cumulative risk factors associated with Claimant's work caused the current need for medical care although the slip and falls aggravated it. The MTG supports the conclusion that heavier lifting, 25 kilograms or 50-

55 pounds and higher, may be considered a risk factor for cumulative low back pain, when combined with flexion and performed 10-15 times per day over cumulative years of exposure. The totality of the credible and persuasive evidence established that Claimant's job duties required that he perform heavy lifting with flexion performed more than 10 to 15 times per day. Claimant and Mr. Hemans credibly testified regarding Claimant's routine work activities loading and unloading pallets of janitorial supplies from a truck at loading docks and transporting the supplies to customer storage areas.

TTD

5. As found, commencing January 21, 2015, Claimant was unable to return to his usual job due to the effects of the work injury. Consequently, Claimant is "disabled" within the meaning of Section 8-42-105, C.R.S. and is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Claimant is entitled to TTD benefits if the injury caused a disability, the disability caused claimant to leave work, and claimant missed more than three regular working days. TTD benefits continue until the occurrence of one of the four terminating events specified in section 8-42-105(3), C.R.S. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

ORDER

It is therefore ordered that:

1. Respondents shall be liable to Claimant for TTD benefits from January 21, 2015, and continuing until terminated by law.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 1, 2016__

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-977-980-01

ISSUES

The issues for determination are:

1. Whether the Claimant proved, by a preponderance of the evidence, that she suffered a compensable injury in the course and scope of her employment on November 18, 2014.

2. If the Claimant proves he suffered a compensable injury, whether the Claimant proved, by a preponderance of the evidence, that she is entitled to medical benefits reasonably necessary to cure and relieve the Claimant of the effects of her November 18, 2014 injury.

3. If the Claimant proves she suffered a compensable injury, whether the Claimant proved, by a preponderance of the evidence, that she is entitled to temporary total disability indemnity benefits.

4. If the Claimant proves she suffered a compensable injury, whether the Respondents proved, by a preponderance of the evidence, that the Claimant is responsible for her termination of employment and resulting wage loss.

FINDINGS OF FACT

1. The Claimant worked for the Employer for approximately 2 ½ years at the time of an incident on November 18, 2014. The Claimant was a customer care representative / project manager for the Employer.

2. Prior to November 18, 2014, the Claimant had previous sustained previous injuries. The Claimant testified that she was in three motor vehicle accidents, one in 2012, one in March of 2014 and one in September of 2014. The Claimant testified that after each accident, she went in to see doctors at the ER just to get checked to make sure there were no serious injuries. However, she testified that after this initial visit, she did not follow up with any doctor visits.

3. On April 7, 2012, the Claimant was seen in the emergency department by Dr. Sally A. Coates and RN Brett Davis following a motor vehicle collision in which the car she was driving was rear-ended. The Claimant complained of a headache and a little bit of rib pain on the right. There was slight lateral tenderness on the left side of the neck with good range of motion and no thoracic or lumbar spine or paraspinal tenderness. The primary diagnosis was "minor chest contusion." The Claimant was released to self care and advised she might have some increasing muscle discomfort

and headache. She was told to see her physician if she was not back to normal in 3 days (Respondents' Exhibit G).

4. On April 17, 2013, the Claimant was seen by NP Melody Zwakenberg at the Denver Health Medical Center for a cervical strain. The Claimant reported that she was coughing and she pulled something. She reported that she had been having neck pain “for a while” and had seen her PCP the previous Monday. The note indicates, “there is no evidence of a fracture” and “no injury to the spinal cord or nerve roots was detected.” The Claimant was advised that her pain would likely gradually resolve and for her condition complete healing typically takes about 2-3 weeks. The Claimant was provided with an anti-inflammatory medication and she was discharged (Respondents’ Exhibit H).

5. On February 26, 2014, the Claimant was seen at the Denver Health Medical Center Emergency Department after her car was side swiped earlier that day. The Claimant reported that she went to work but started to have neck pain and back pain through the day. The Claimant was assessed with neck strain and back strain. The Claimant was later discharged with a muscle strain. Radiology reports of cervical and lumbar spine imaging showed no acute fracture or subluxation or subluxation (Respondents’ Exhibit H).

6. On September 16, 2014, the Claimant was seen at St. Anthony Hospital Emergency Department for an MVA that occurred when her car was rear ended at a stop. She complained of neck and back pain and a headache (Respondents’ Exhibit I). The Claimant underwent a CT of the cervical spine that was “unremarkable” and showed “no fracture, no prevertebral soft tissue swelling. Normal alignment and mineralization. No gross soft tissue abnormality.” An imaging report of three views of the Claimant’s lumbar spine also taken on September 16, 2014 also showed “no evidence of fracture or listhesis. The intervertebral disc spaces are maintained” (Respondents’ Exhibit E, pp. 290-291). The Emergency Department assessment was that “the patient has no signs of serious injury but has some probable neck and back strain and will be treated symptomatically (Respondents’ Exhibit I). The Claimant returned to the ED on September 18, 2014 stating she was still uncomfortable, but had no new complaints. The Claimant returned to request pain medication that was prescribed at the prior visit, but she forgot to take with her (which was confirmed with nursing staff). The Claimant was provided with Oxycodone/Acetaminophen (Respondents’ Exhibit I).

7. With respect to the current claim, the Claimant testified that on November 18, 2014, she was taking the stairs back down from the upstairs restroom. As she was coming down the last flight of stairs, she slipped on some ice melt and came down on her bottom over six steps until she was all the way down. The Claimant testified that, at the same time, she had been holding on to the rail with her right arm and, as she fell, it twisted her arm back. The fall was not observed by any other witness. The Claimant testified that as she walked out of the stairwell towards her desk, a manager named Derek Peterson saw the Claimant and asked her what was wrong. The Claimant testified that she was still a little shaken up and she told him that she had just fallen

down the stairs. The Claimant testified that Mr. Peterson directed the Claimant to go to HR immediately, which the Claimant did. The Claimant's testimony regarding her mechanism of injury on November 18, 2014 is consistent with the Employer's First Report of Injury completed on November 20, 2014 and with the initial medical and physical therapy evaluations notes dated November 19, 2014 and is found as fact.

8. On November 19, 2014, the Claimant was seen by Dr. Theodore Villavicencio at Concentra. The Claimant reported that she "slipped on the stairs at work and injured lower back, neck and right and left side of the body." The Claimant reported that she took a pill to help with the pain but does not know what she took. On examination, Dr. Villavicencio noted, "joint pain, muscle pain, back pain, neck pain, joint swelling and muscle weakness." He also specifically noted a left hip contusion and cervical area strain. Dr. Villavicencio indicated that the Claimant reported a past history of cervical strain around March of 2014 that had resolved. He noted that the Claimant's prior medical history was "non-contributory based on review with patient and/or comprehensive questionnaire except as detailed in the clinical documentation." He opined that the Claimant's current injury was "the result of slip and fall on ice melt. Occurred while at work." Dr. Villavicencio diagnosed the Claimant with lumbar strain, cervical strain and left elbow contusion. He referred the Claimant to physical therapy and prescribed medications. The Claimant was not provided with any work restrictions and permitted to return to work full time/full duty (Claimant's Exhibit 3).

9. The Claimant also underwent an X-ray of the lumbar spine on November 19, 2014 and the impression was reported as "nothing acute. Mild degenerative change" (Respondents' Exhibit E, p. 289).

10. Also on November 19, 2014, the Claimant saw the physical therapist at Concentra for an initial evaluation. PT Jessica Hejde noted the Claimant reported her mechanism of injury as follows, "Pt reports that she was going down the stairs at work and slipped and fell on her butt down several steps with her arms out to catch her. Has some numbness and tingling down her bilateral legs along the anterior and posterior surfaces all the way to her foot." PT Hejde noted the Claimant's chief complaint was low back pain, with radiation and tingling (Respondents' Exhibit D, pp. 283-286).

11. On November 20, 2014, Donna Gunter, HR specialist for the Employer, completed Employer's First Report of Injury noting that the Claimant was injured at approximately 2:15 PM on November 18, 2014 and notified the Employer that same day. The report indicated the Claimant injured multiple body parts when "she was walking down the stairs in the stairwell and slipped on ice melt. She twisted her body and sustained a lower back, left arm and right rib cage injury." Ms. Gunter noted that Derek Peterson was notified on behalf of the Employer and that the Claimant treated with Concentra (Claimant's Exhibit 4; also Respondents' Exhibit 1 (4), p. 26).).

12. On November 25, 2014, the Claimant continued to report right SI pain at a 6/10 level and CTJ pain at an 8/10 level to PT Chris Traut (Respondents' Exhibit D, pp. 280-282).

13. On November 26, 2014, the Claimant was seen by PA-C Casey McKinney at Concentra for evaluation. The Claimant continued to complain of back pain but was working regular duty. PA-C McKinney noted the Claimant's cervical spine was tender to palpation and that the bilateral paraspinals and sciatic notches were tender in the lumbosacral spine. There was no tenderness noted at the Claimant's left elbow (Respondents' Exhibit D, pp. 277-278).

14. The Claimant continued to attend physical therapy sessions at Concentra. In addition to the above-referenced sessions, she had physical therapy sessions on 11/26/2014, 12/02/2014, 12/04/2014, 12/11/2014, 12/12/2014, 12/16/2014, 12/19/2014. 12/22/2014, 12/24/2014 and 12/29/2014. As of the end of December 2014, the Claimant was reporting little to no change in her condition with continued pain in her low back and SI region (Respondents' Exhibit D, pp. 246-286). Nevertheless, the Claimant continued to attend regular physical therapy sessions. The Claimant attended additional physical therapy sessions on 01/05/2015, 01/07/2015, 01/13/2015, 01/15/2015, and 01/20/2015 (Respondents' Exhibit D, pp. 230-245).

15. On January 5, 2015, there was work correspondence that the Claimant was recertified for 480 hours of FML leave related to her medical condition of 11/19.2014. The FML leave was for 2 three hour appointments each week and flare-ups (allowing for a day off up to 2 times per month) per the Claimant's doctor. The Claimant was notified that she must follow company policy regarding calling in or scheduling ahead for any FML leave she intended to take (Respondents' Exhibit 1, p. 4). Also on January 5, 2015 the Claimant's supervisor Jamie Schott e-mailed the Claimant requesting that she communicate her FML appointment absences by e-mail with the time she would be leaving and the time she returned to work (Respondents' Exhibit 1, p. 3).

16. On January 15, 2015, the Claimant's supervisor Jamie Schott sent the Claimant an e-mail indicating that it was not acceptable for the Claimant to provide only verbal notification regarding when she was leaving the office. Rather, e-mail notification was require to communicate when the Claimant would be leaving the office for medical appointments or flare-ups in her condition and when the Claimant would be returning and if she wanted to use paid sick, personal or vacation time to cover the leave (Respondents' Exhibit 1, p. 2). The Claimant responded by e-mail that she verbally communicated that she was leaving on January 15, 2015 and she intended to e-mail the communication later when she could clear up a scheduling issue with her appointments. The Claimant also stated that she assumed that Donna was e-mailing Ms. Schott with the appointment later when she turned in the documentation (Respondents' Exhibit 1, pp. 1-2). The Claimant's manager Jamie Schott responded to this e-mail that, "going forward, I do need you to communicate with my [sic] via e-mail for these situations as we have discussed before" (Respondents' Exhibit 1, p. 1).

17. On January 20, 2015, there was correspondence between the Claimant's supervisor Jamie Schott and Donna Gunter in HR regarding an issue related to the

timing of her physical therapy appointment that day. The paperwork received by Donna Gunter indicated that the Claimant's appointment was at 3:00 pm that day. The Claimant sent her supervisor an e-mail stating that her physical therapy was at 2:00 pm and that she would be clocking out at 1:45 pm (Respondents' Exhibit 1, pp. 30-32).

18. On January 21, 2015, there is paperwork indicating that the Claimant's employment was terminated for "gross misconduct" (Respondents' Exhibit 1, p. 27). The Employer's company handbook does identify "excessive offline times; ACW, Personal, Lunches and Breaks," "Recurring discrepancies when clocking into PC Time clock," and "Not communicating with management or command center regarding calling out, leaving early, or other issues that may affect your scheduled shifts" as Rules Violations. The handbook does provide that, "actions deemed as violations of company and/or role expectations will result in point penalties and/or appropriate actions including termination for gross misconduct violations" (Respondents' Exhibit 1, p. 59). The specific gross misconduct attributed to the Claimant is identified in an undated memo noting that the Claimant had discrepancies on her timecard which caused her to be paid for 11 hours of time she did not work. This was identified through an audit and the Claimant was unable to provide a satisfactory explanation of what she was doing during the times listed to her supervisors (Respondents' Exhibit 1, p. 40 and pp. 55-57). The Claimant's supervisors have previously communicated the importance of the Employer's attendance, timekeeping and communication policies on multiple occasions. The Claimant has also specifically been placed on Performance Enhancement Plans in the past for attendance issues on September 17, 2013 and December 10, 2014 (Respondents' Exhibit 1, pp. 98-123).

19. The Claimant testified that her last date of employment with the Employer was January 22, 2015. The Claimant admitted that her employment was terminated due to violation of policy (Respondents' Exhibit K, response to interrogatory 4). She testified that she is currently employed as a restaurant server with a different employer.

20. The Claimant continued to attend physical therapy sessions at Concentra following her termination of employment with Employer. She attended physical therapy sessions on 01/23/2015, 01/27/2015 and 01/29/2015. As of the January 23, 2015 appointment, the Claimant reported that "her low back and mid back are the same. She does not feel like therapy is helping. She feels good at the end of treatment but wakes up in just as much pain the next day" (Respondents' Exhibit D, pp. 227). By January 29, 2015, the Claimant reported that she had stopped working the prior Thursday and "has felt better since not sitting at a desk for prolonged periods" (Respondents' Exhibit D, p. 221).

21. The Claimant underwent an MRI of the lumbar spine, without contrast on January 26, 2015. The report signed by Dr. Craig Stewart noted, "mild degenerative changes at L4-L5 and L5-S1" with "no significant focal disc herniation, central canal stenosis or significant nerve impingement within the lumbar spine" (Claimant's Exhibit 2; Respondents' Exhibit E, p. 288).

22. The Claimant continued to attend physical therapy sessions at Concentra through February of 2015 with appointments on 02/03/2015, 02/05/2015, 02/09/2015 and 02/23/2015 (Respondents' Exhibit D, pp. 209-220).

23. On February 10, 2015, the Claimant was evaluated by physiatrist, Dr. Samuel Chan. On examination, Dr. Chan noted that the Claimant's cervical range of motion was within functional limits. He found no tenderness or signs of impingement at the bilateral shoulders. He also noted no tenderness to palpation at the lumbar spine. Dr. Chan noted that the Claimant's complaints were consistent with myofascial complaints to the cervical spine area and there were physical findings of sacroiliac joint dysfunction of the lumbar area. Dr. Chan noted a normal MRI and an essentially normal neurologic examination. He recommended the Claimant continue with a proper exercise program and, if she continued to be symptomatic, that a sacroiliac joint injection be considered (Respondents' Exhibit J, pp. 367-368).

24. On March 11, 2015, Dr. Chan performed bilateral sacroiliac joint steroid injections (Respondent's Exhibit J, pp. 364-365). At the hearing, during rebuttal testimony, the Claimant testified that her symptoms improved after the injection and things were getting better.

25. On March 24, 2015, the Claimant underwent x-rays of the lumbar spine which showed no fracture or subluxation. Disc spaces and heights of the vertebral bodies were preserved and the normal lordotic curvature was maintained. Facet joints and pedicles appeared normal. The overall impression was that this was an "unremarkable exam of the lumbar spine" (Respondents' Exhibit E, p. 287).

26. The Claimant did not attend physical therapy sessions in March of 2015, but resumed again in April of 2015, with physical therapy sessions on 04/09/2015, 04/13/2015, 04/17/201504/22/2015, 04/23/2015, 04/27/2015 and 04/29/2015 (Respondents' Exhibit D, pp. 182-208).

27. The Claimant saw PA-C Christine O'Neal at Concentra on April 27, 2015 for a recheck. The Claimant reported her symptoms are about the same as her last visit. The Claimant reported the pain is under control with medications but is frustrated that the pain does not continue to improve. The Claimant continues to see Dr. Chan and Dr. Mobus. On examination, the Claimant was tender at the thoracic spine and tender with pain bilateral with right-sided muscle spasms on palpation at the paraspinals and sciatic notch (Respondents' Exhibit D, pp. 186-188).

28. On April 28, 2015, the Claimant saw Dr. Chan for reevaluation of her cervical spine pain, interscapular pain and low back pain. Dr. Chan noted a positive diagnostic and therapeutic response to the bilateral sacroiliac joint injections. Dr. Chan opined that due to the positive response, it would be reasonable for the Claimant to have a follow up of the injections (Claimant's Exhibit 1).

29. On June 4, 2015, the Claimant saw Dr. Villavicencio for follow up for her lumbar and cervical strain conditions with persistent pain in her mid-lumbar and bilateral paraspinous muscles. Dr. Villavicencio noted the Claimant had benefit from bilateral SI injections administered by Dr. Chan, but that repeat injections were not approved. The Claimant reported negative side effects from some of her medications. Dr. Villavicencio noted tenderness without spasms at the bilateral paraspinals at the cervical, thoracic and lumbosacral regions but no tenderness at the spine (Respondents' Exhibit D, pp. 179-181).

30. The Claimant saw Dr. Chan for follow up on July 21, 2015. She reported that the SI injection recommended on April 28, 2015 was denied by the Insurer, as was a muscle stimulator. She continued to see Dr. Mobus for chiropractic care. Due to residual pain reported, Dr. Chan again recommended a repeat SI joint injection and opined that "the use of a muscle stimulator will also be beneficial for pain management…" (Respondents' Exhibit J, p. 362-363).

31. On August 10, 2015, the Claimant presented for a re-check with Dr. Villavicencio as a walk-in due to a self-reported re-injury on August 7, 2015. Dr. Villavicencio noted that this is not related to her November 18, 2014 work injury and would be considered a new injury and a claim would need to be opened through the usual process. The Claimant reported that she slipped on a wet floor at work with her current employer, but did not fall as she caught herself. She reported that the process aggravated her back injury. Dr. Villavicencio noted tenderness at the bilateral lumbosacral paraspinals and left-sided muscle spasms. Flexion, extension and side bending was painful (Respondent's Exhibit D, pp. 174-177).

32. The Claimant underwent an independent medical examination with Dr. F. Mark Paz, who prepared a written report dated August 31, 2015 (Respondents' Exhibit C). The Claimant described her mechanism of injury to Dr. Paz consistent with her testimony at the hearing in this case and to her treating physicians (Respondents' Exhibit C, p. 156). Dr. Paz noted that the Claimant denied a prior history of low back injury or symptoms or hip injury, but that she did have a remote history of upper back pain (Respondents' Exhibit C, p. 156). The Claimant reported to Dr. Paz that she currently works for a different employer as a waitress. She reported that she can only work 4-hour shifts and not a "double" 8-hour shift recently due to the increase in her symptom intensity (Respondents' Exhibit C, p. 157). The Claimant reported three motor vehicle accidents that pre-dated her November 18, 2014 work injury. The Claimant denied experiencing any back symptoms, but did experience some neck symptoms for which she was treated in the ER for the September 2014 MVA (Respondents' Exhibit C, p. 157). On physical examination, Dr. Paz noted full range of cervical motion with no tenderness or paraspinous muscle spasm (Respondents' Exhibit C, p. 158). Dr. Paz also noted no tenderness at the thoracic spine and good range of motion. He noted diffuse tenderness from midline to the right flank and to the left flank at the lumbar spine and no localizing tenderness over the sacroiliac joints bilaterally. He found the Claimant's range of motion effort to be "poor" and range of motion measurements invalid (Respondents' Exhibit C, p. 159). As part of his IME, Dr. Paz also provided a

medical record summary of the ER records from the Claimant's February and September 2014 MVAs and summary of select records from after the November 18, 2014 fall on the stairs (Respondents' Exhibit C, pp. 160-161). Dr. Paz opined that the Claimant did not provide an accurate history of low back symptoms associated with her prior motor vehicle accidents (Respondents' Exhibit C, p. 161). Based on the physical examination, history and review of the medical records, Dr. Paz opined that the Claimant "reached maximum medical improvement for the buttock contusion on or about March 11, 2015, following the response to the bilateral sacroiliac joint injection completed by Dr. Chan. Subsequent to that treatment, the back symptoms remained stable despite additional treatment." Dr. Paz found that the Claimant has no impairment rating for her lumbar spine and requires no medical maintenance treatment (Respondents' Exhibit C, p. 162).

33. Dr. Paz testified at the hearing as an expert witness in the area internal medicine and as to Level II accreditation matters. Dr. Paz testified that the Claimant's radiology imaging reports do not reflect an acute injury, but only degenerative changes. Dr. Paz further opined that the Claimant's diagnosis related to her work injury is "buttock contusion." He testified that because the Claimant did not improve as a result of the injections provided by Dr. Chan on March 11, 2015, her diagnosis is not sacroiliac joint dysfunction, but rather, simply buttock contusion. He testified that this condition should have resolved without treatment after 3-4 weeks. Thus, he finds that an MMI date of March 11, 2015 would be generous given the original date of injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

There is sufficient evidence in the record that the Claimant suffered an injury to her lower back, neck, buttocks, hip and elbow on November 18, 2014 and the Claimant's testimony regarding her mechanism of injury was credible and no persuasive evidence was presented to contradict her testimony. In fact, the Claimant's testimony was consistent with the Employer's First Report of Injury completed by an HR representative for Employer on November 20, 2014 and with the initial medical and physical therapy evaluation notes. There were no independent witnesses to the Claimant's slip and fall down the stairs, but the incident was reported immediately and the clinical presentation of the Claimant's medical condition after the incident was consistent with the injury reported. Although Respondents have argued that the condition was somehow related to the Claimant's prior motor vehicle accidents, the medical reports in evidence do not support this theory. Dr. Villavicencio, the Claimant's authorized treating provider found that the Claimant's prior medical history was noncontributory and this is more persuasive than the opinion of the Respondents' IME doctor, Dr. Paz, on this issue.

There is also evidence to establish that the Claimant continues to have symptoms resulting from the fall at work that occurred on November 18, 2014. The Claimant has not been placed at MMI by her treating physicians and this is more persuasive than the opinion of Dr. Paz that the Claimant likely reached MMI as of March 11, 2015. Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that her work activities on November 18, 2014 caused or permanently aggravated, accelerated or combined with a preexisting condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits – Authorized, Reasonable and Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. The employer's duty to provide designated medical providers is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

Here the Claimant began treating with Dr. Villavicencio and Dr. Chan and was also referred to Dr. Mobus for chiropractic care. Although Respondents have denied authorization for certain treatment and the Claimant did not receive a recommended follow-up injection or a muscle stimulator medication, her treating physicians continued to recommend these treatments. The Claimant was not placed at MMI by any treating physician. Rather, her treating physicians continued to offer treatment recommendations.

As set forth above, there is evidence to establish that the Claimant continues to have symptoms resulting from injury she suffered on November 18, 2014. Although, it is unclear whether or not there are new or increased symptoms related to a slip and fall that occurred on August 7, 2015 while working for a new employer, it is clear that, as of that date, the Claimant was still actively treating for the November 18, 2014 work injury. Thus, the conditions related to the initial injury are still present and may require treatment.

Therefore, the Respondents shall be liable for the continued medical treatment recommended by Drs. Villavicenio and Chan and their authorized referrals that is reasonably necessary to cure and relieve the Claimant from the effects of her November 18, 2014 work injury.

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of*

Colorado Springs v. Industrial Claim Appeals Office, 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

In this case, the Claimant established that she suffered a compensable work injury on November 18, 2014, but she failed to prove that she suffered a wage loss as a result of that injury prior to the termination of her employment. The Claimant was working full duty with no restrictions until January 21, 2015. It is only as of December 22, 2015 that the Claimant suffered any wage loss.

Therefore, it is necessary to address Respondents' contention that the Claimant is precluded from receiving temporary indemnity benefits because the Claimant is responsible for her termination on January 21, 2015.

Responsible for Termination

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly.

Gilmore v. Industrial Claim Appeals Office, supra. However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

The evidence in the record shows that On January 5, 2015 and January 15, 2015, the Claimant's supervisors communicated with her the requirement that she communicate her medical appointment absences by e-mail with the time she would be leaving and the time she returned to work. Then, on January 20, 2015, there was correspondence between the Claimant's supervisor Jamie Schott and Donna Gunter in HR regarding an issue related to the timing of her physical therapy appointment that day. The paperwork received by Donna Gunter indicated that the Claimant's appointment was at 3:00 pm that day. The Claimant sent her supervisor an e-mail stating that her physical therapy was at 2:00 pm and that she would be clocking out at 1:45 pm. On January 21, 2015, there is paperwork indicating that the Claimant's employment was terminated for "gross misconduct."

The Employer's company handbook does identify "excessive offline times; ACW, Personal, Lunches and Breaks," "Recurring discrepancies when clocking into PC Time clock," and "Not communicating with management or command center regarding calling out, leaving early, or other issues that may affect your scheduled shifts" as Rules Violations. The handbook does provide that, "actions deemed as violations of company and/or role expectations will result in point penalties and/or appropriate actions including termination for gross misconduct violations."

The specific gross misconduct attributed to the Claimant is identified in an undated memo noting that the Claimant had discrepancies on her timecard which caused her to be paid for 11 hours of time she did not work. This was identified through an audit and the Claimant was unable to provide to her supervisors a satisfactory explanation of what she was doing during the times listed. Moreover, the Claimant's supervisors had previously communicated the importance of the Employer's attendance, timekeeping and communication policies on multiple occasions. The Claimant was specifically placed on Performance Enhancement Plans in the past for attendance issues on September 17, 2013 and December 10, 2014.

Thus, the Claimant was placed on notice, both before and after her work injury of November 18, 2014, that she was required to strictly comply with Employer's attendance policies. The Claimant was further placed on notice that she was required to provide written e-mail notice to supervisors regarding when she would be leaving the workplace and when (if) she would be returning. The ALJ finds that the Claimant was aware of what her Employer required from her in terms of attendance and attendance documentation. She was also aware that failure to comply with the requirements could result in termination. The Claimant testified that her last date of employment with the Employer was January 22, 2015 and the Claimant admitted that her employment was terminated due to violation of policy.

While the Claimant's counsel argued that the Claimant's attendance issues were related to her injury-producing activity, the weight of the evidence establishes that with respect to the Claimant's termination from employment with Employer, the Claimant violated known and well-communicated attendance and communication policies. The Claimant's employment was terminated as a result of these violations and she is not entitled to temporary disability benefits.

ORDER

It is therefore ordered that:

1. The Claimant suffered a compensable industrial injury during the scope and course of his employment with Employer on November 18, 2014.

2. The Respondents are liable for medical treatment recommended by Dr. Villavicencio or another physician at the Concentra facility, by Dr. Chan, or by their referrals, that is reasonably necessary to cure and relieve the Claimant from the effects of her November 18, 2014 work injury.

3. The Claimant is responsible for termination and the Claimant's claim for total temporary disability benefits is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 2, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-987-724, 4-986-776

ISSUES

- Whether Claimant demonstrated by a preponderance of the evidence that she suffered a compensable inguinal hernia while in the course and scope of her employment for Employer on May 29, 2015.

- If compensable, Claimant requests temporary disability benefits from September 12, 2015 and ongoing. She requests an average weekly wage (AWW) of $904.21. If compensable, Respondents contend Claimant's AWW is $569.12, and request penalties for Claimant's failure to report the May 29, 2015 injury until June 26, 2015.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On April 9, 2015, Employer hired Claimant to work as a furniture salesperson at its Thornton store. As part of her job duties, at the end of her shift Claimant dusted, vacuumed, and organized a portion of the showroom.

2. Claimant testified that on May 29, 2015, at approximately 9:45 p.m., she was vacuuming her work area. She stated that when she picked up the vacuum to get it over a shag rug, she had immediate pain in her right groin which went down her lower back. She stated that the pain was very severe but that after a short time, her pain lessened.

3. Claimant worked the rest of her shift and did not report any injury. She sought no medical care and she lost no time from work.

4. Claimant testified that on June 22, 2015, at about 9:15 p.m., she was walking at work while carrying a spray bottle and cloth when she experienced severe pain. She did not tell her manager that she had a work injury. She told her manager that she did not know what the problem was.

5. At hearing, Claimant testified that her pain on June 22, 2015 was the "same pain" that she previously had on May 29, 2015. Claimant testified that she was not injured on June 22, 2015, but instead experienced pain that day, which she stated was caused by the event on May 29, 2015 when she lifted the vacuum.

6. On June 23, 2015, Claimant went to the Emergency Room at St. Anthony's North. Those records state that Claimant started to have pain in her right lower back on the previous day, with no specific trauma or injury. Claimant was

diagnosed with right leg pain and probable sciatica. The record states that Claimant "had a similar incident one month ago that resolved on its own without any difficulty."

7. At hearing, Claimant testified that this medical record was incorrect because she did not tell the E.R. staff that her pain from the previous month (i.e., on or about May 29, 2015) had resolved.

8. The June 23, 2015 Emergency Room records contain no reference to Claimant's condition being work-related. At hearing, Claimant testified that she told the E.R. staff that her injury was work-related, and that the failure to reflect that fact was an error in the medical records.

9. On June 25, 2015, Claimant saw her personal physician, Dr. Karen Ratner, whose records reflect that Claimant had right back and right leg pain, which had a sudden onset three days ago "pushing heavy furniture at work" (quotation marks in original).

10. At hearing, Claimant testified that this medical record was incorrect, and that she did not tell Dr. Ratner that her pain was due to pushing heavy furniture at work.

11. On June 26, 2015, Claimant met with her store manager, Steve Williams. She testified that this was the first time that she reported an injury to her Employer. Claimant and Mr. Williams filled out an "Incident Report" together; he asked her questions, she answered, and he wrote down the answers. The Incident Report consists of two pages, both of which Claimant signed. It lists Claimant's injury as "sciatic nerve" and the body part as "lower back." It states that Claimant was injured while "reaching into an overhead cabinet to get some cleaning rags." It further notes that Claimant thinks "she may have injured herself vacuuming about a month prior at the Thornton store."

12. Steve Williams testified that he is Employer's store manager and Claimant's supervisor. Claimant called him on June 25, 2015, and asked to meet with him. He met with Claimant on June 26, 2015 to fill out an Incident Report and workers' compensation paperwork. He testified that prior to June 26, 2015, he had no knowledge that Claimant had any work-related injury, or that she had pain between late May and June 26, 2015.

13. Mr. Williams asked the Claimant various questions about her claimed work injury and he wrote down what she told him. On the Incident Report, he wrote "she tweaked her lower back while reaching into an overhead cabinet. This is what [Claimant] explained happened." He also wrote that Claimant "thinks she may have injured herself vacuuming about a month prior at the Thornton store." He stated that Claimant did not tell him that she lifted a vacuum.

14. Mr. Williams testified that Claimant continued to work for Employer through September 4, 2015, and then she stopped coming to work. He stated that

Employer was aware of Claimant's work restrictions and had accommodated them, and that no one at the store told Claimant that she should not come back to work. He stated that if she had continued to show up for work, she would still be working there, and that he did not know why she stopped showing up for work.

15. After meeting with Mr. Williams, Claimant went to see Dr. Michael Striplin. His records dated June 26, 2015 state that Claimant was pushing a vacuum on carpet a month ago and that she said she had some mild symptoms that persisted until June 22, 2015, when she noted the sudden onset of right hip and groin pain with no known injury. He noted she was diagnosed with sciatica at St. Anthony's North Emergency Room. He determined Claimant's pain complaints were not work-related and recommended that she follow-up with her personal care physician.

16. Contained in Dr. Striplin's records is Claimant's handwritten statement which reads, "I was vacuuming one day, I felt the pain while pushing the vacuum but I walked it off, a month later I was walking at work and the pain started again, but this time I could not walk, I went to the E.R."

17. Claimant testified that although her handwritten statement makes no reference to her pain being associated with lifting the vacuum, that she did lift it. She also stated that although she wrote that she had "walked off" the pain associated with vacuuming; her written statement was incorrect, and wrongly phrased.

18. Claimant stopped working for Employer on September 4, 2015. She said this was because she could not walk due to pain. She testified that no one told her she could not come back to work. She provided no documentation, including any medical record, to corroborate her statement that she was not able to continue working.

19. Employer's records show Claimant's last day at work was September 4, 2015, and that Claimant called in sick on September 5, 2015, and did not return.

20. On September 5, 2015, Claimant went to Kaiser and saw Dr. Jennifer Kuhl. Those records state that Claimant's "pain increased two weeks ago while playing with children and her son pulled her arm." At hearing, Claimant testified that her pain had increased the day before she saw Dr. Kuhl, not two weeks before.

21. On July 7, 2015, Claimant went to the North Suburban Medical Center Emergency Room for abdominal pain. This record reflects that Claimant reported "a tearing sensation in her right groin several weeks ago, progressively worse since that time occurred while lifting heavy objects at work at [Employer]." An ultrasound showed that Claimant had a "small defect" within the fascia, which measured 6.1 mm. The defect was referenced as a "small, fat-containing right-sided inguinal hernia."

22. On July 10, 2015, Claimant was seen by Edward Medina, M.D., who noted that he could not palpate Claimant's hernia. His note states that Claimant "lifted up a

vacuum when she felt pain in her right groin." This is the first reference in the medical records which associates Claimant's pain with having lifted a vacuum at work.

23. Medical records from Dr. Karen Ratner show that Claimant was diagnosed with chronic low back pain and arthropathy of multiple sites on three occasions prior to her May 2015 alleged injury. However, in her recorded statement, taken on July 8, 2015, Claimant denied having prior medical treatment to her low back.

24. A Kaiser record dated August 18, 2015 reflects that Claimant asked for a letter "to take to her work" and that her Kaiser physician, Dr. James Hutchings, responded that he had no documentation that Claimant truly had a hernia, and that he could not state that it was work-related. He stated that he could document only that Claimant reported that she had a work-related injury.

25. A Kaiser record from Dr. Karen Black dated November 20, 2015 reflects that Claimant called Dr. Black that day in order to obtain documentation regarding the causes of hernia. These records contain an email from Claimant to Dr. Black dated November 23, 2015 stating "I have never experienced this groin pain until I lifted a vacuum over a shag rug, can you please explain on your note if you think that vacuum could cause or aggravate a hernia." In response, Dr. Black wrote Claimant a letter dated November 25, 2015. This letter contains data on various factors that are associated with hernias. Dr. Black wrote, inter alia, that "the relationship between inguinal hernias and intermittent straining or heavy lifting is not clear; some studies suggest that the incidence of hernia is no higher in professions performing heavy manual labor than in sedentary professions, while others have come to the opposite conclusion." Dr. Black did not state that Claimant's having lifted a vacuum probably caused or aggravated her hernia.

26. At hearing, Claimant testified that no one had told her that there was a relationship between the pain which she felt on or about May 29, 2015 and the pain which she felt on June 22, 2015. Claimant submitted no medical record or report which: a) concluded there was any relationship between her pain on the two dates; b) found that her pain on May 29, 2015 was likely caused by lifting a vacuum at work; or c) found that lifting the vacuum probably caused her hernia.

27. Dr. Lesnak performed an IME for Respondents and testified at hearing. He testified that Claimant's complaints were primarily groin pain, and that while a hernia can cause groin pain, there are other causes, including hip pathology, muscle or nerve pathology, and unknown causes. He stated that an increase in abdominal pressure can cause a hernia and/or hernia pain. He noted that Claimant stated that she had pain while walking, including at work on June 22, 2015. He stated that walking does not cause an increase in intra-abdominal pressure, and that it is not probable that Claimant's pain complaints on June 22, 2015 were related to a hernia.

28. Dr. Lesnak testified that although an ultrasound detected a hernia, it was so small that he could not feel it. He characterized her hernia as a small, fat-filled

defect, which was not likely a pain generator. While Claimant had stated that walking, twisting, sitting, or having her child pull on her arm caused her symptoms, Dr. Lesnak testified that these activities do not cause an increase in abdominal pressure, and would not cause a hernia to become painful. He stated that any pain related to these activities would probably be related to Claimant's preexisting chronic multi-site arthralgia, i.e., joint pain, and was not work-related.

29. Dr. Lesnak stated that it was not medically probable that lifting a vacuum on or about May 29, 2015 caused Claimant's hernia, because lifting in the way Claimant described would not cause an increase in abdominal pressure. Dr. Lesnak testified that it is more probable than not that Claimant's pain on or about May 29, 2015 was due to her preexisting chronic back and joint pain.

30. Dr. Lesnak noted that the record shows multiple histories of how Claimant's purported injury occurred, and that it was not until July 10, 2015 that the records reflect that Claimant said she injured herself by lifting a vacuum at work. He commented that although Claimant testified she did not tell the E.R. personnel on June 23, 2015 that her prior pain from May 2015 had "resolved on its own without difficulty", that the E.R. note is more reliable. He stated that E.R. personnel would be unlikely to concoct such a note.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101*, et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102 (1) C.R.S. The Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark,* 197 Colo*.* 306, 592 P. 2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of the injured worker or the rights of employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P. 3d 385 (Colo. App. 2000).

Claimant carries the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment. *See City of Boulder v.*

Streeb, 706 P.2d 786 (Colo. 1985). The facts in a workers' compensation case may not be interpreted liberally in favor of either Claimant or Respondents. Section 8-43-201. C.R.S. A preponderance of evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P 2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Claimant alleges that she sustained a work-related hernia on May 29, 2015 while pushing and then lifting a vacuum cleaner over a shag rug at work. She did not report this incident, sought no medical treatment, and lost no time from work. She alleges that her pain from this incident recurred on June 22, 2015 while she was walking at work. She does not contend that she was injured on June 22, 2015. Rather, she states that she felt pain on that day, which she believes was due to a hernia from lifting a vacuum on May 29, 2015. Claimant alleges she was misdiagnosed with sciatica.

When Claimant first sought treatment on June 23, 2015, those records state that while Claimant had pain from a similar incident a month earlier, her pain "resolved on its own and without difficulty." Although Claimant states she did not make this statement, it is improbable that the E.R. staff entered this note into the record without Claimant having made the statement. Claimant's testimony that several of her medical records contain errors or misstatements is not credible.

Prior to her claimed injury of May 29, 2015, Claimant had been diagnosed with chronic back and joint pain. While she may have had a flare of back pain on May 29, 2015 associated with vacuuming, there is no evidence that she sustained a compensable injury that day. She sought no treatment and lost no time from work. Instead, she stated that her pain lessened after a few minutes. The medical records show that this pain resolved on its own. While Claimant had another flare of pain while walking at work on June 22, 2015, she admitted that she was not injured at work on that day.

The evidence shows that Claimant's inguinal hernia is probably not the cause of her pain complaints. It is more probable that her pain complaints are due to her preexisting condition.

The record contains no documentation from any physician indicating that Claimant's pain, whether on May 29 or June 22, 2015, was probably related to her hernia. Claimant has failed to prove the existence of a compensable injury by a preponderance of the evidence.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for compensation is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 9, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury on February 22, 2015.

2. Whether Claimant has established by a preponderance of the evidence that medical treatment he received from Dr. Smith, the surgery he underwent performed by Dr. Pazik, and the physical therapy he underwent were reasonable, necessary, and related medical treatments for his February 22, 2015 injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits from March 29, 2015 through January 5, 2016.

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary partial disability benefits from February 23, 2015 through March 28, 2015.

STIPULATIONS

1. Claimant's average weekly wage is $1,136.45

2. The exact amounts of any temporary partial disability benefits due to Claimant for the period of February 23, 2015 through March 28, 2015 are reserved for future determination.

FINDINGS OF FACT

1. Claimant has been employed by Employer since November, 2013 as a driver, working hand, and stabber. Claimant worked on drilling rigs and his job duties included handling the drilling pipe and regularly involved bending, stooping, kneeling, squatting, and pulling slips that weighed up to 150 pounds.

2. On February 22, 2015 Claimant was so employed. Claimant was walking around the back of the rig when he slipped on ice and fell with his right leg bent backward. Claimant heard a pop in his right knee. Claimant's knee turned red and began swelling so he went to the truck to elevate his leg and he called dispatch to report the injury.

3. On February 22, 2015 a third party incident report was filled out. The report indicates that Claimant was coming from out house to his truck staged on off driller side of rig and as he walked on flat ground and on about 2-3 inches of wet snow,

he fell onto his right leg. The report indicated Claimant reported pain and discomfort in his right knee and that Claimant was able to walk without help with a slight limp. *See* Exhibit 22.

4. On February 22, 2015 email communications indicated that Claimant had reported the slip and fall, was icing his knee, and would let Employer know if it got worse. The emails note that Claimant wanted to continue working. The emails note that Claimant's knee had "swelled up." *See* Exhibit 23.

5. On February 23, 2015 an email from Employer's HSE Director indicated that Claimant's knee was observed to be swollen and causing him discomfort and that Claimant was able to walk with only a slight limp. *See* Exhibit 23.

6. Claimant stayed home from work on February 23, 2015 but returned to work on February 24, 2015. On the 24th, Claimant attempted to work in the shop but had trouble with bending and lifting. Claimant requested medical treatment and went home from work.

7. On February 25, 2015 Claimant was evaluated by Cathy Smith, M.D. Claimant reported walking around the drilling rig when he slipped on ice and snow and fell backwards onto a partially bent right knee with his right leg under him. Claimant reported feeling a popping sensation in his right knee and that he had immediate swelling. Claimant reported he was able to get up and limp to his truck and then went home to ice and elevate his knee. Claimant reported trying to return to work the day prior, but that he had increased swelling and discomfort in his knee. Claimant reported a prior history of a right knee injury from 2011 when playing football with his children and that he had surgery with Dr. Pazik. Claimant reported he had a brace that he used after his prior surgery and that he had been wearing the brace for added comfort since his February 22, 2015 incident. Dr. Smith noted that Claimant had no swelling at the right knee at the evaluation but that Claimant had slight discomfort with palpation over the medial retinaculum and the medial collateral ligament as well as with manipulation of the medial meniscus. Dr. Smith provided the impression of work related fall resulting in sprain to the right knee. Dr. Smith discussed with Claimant that his injury was soft tissue in nature and could involve partial displacement of the patella during the fall, as well as straining to the medical collateral ligament, the medial retinaculum, and a possible contusion to the medial meniscus. Dr. Smith advised Claimant he could continue using his soft brace as needed, that he should continue to ice and elevate the knee, and she indicated that Claimant could return to full duty work status but discussed how to work safely to protect his knee. *See* Exhibit H.

8. On February 26, 2015 an email from Employer's HR & Payroll Manager indicated that Employer was not questioning the claim as Claimant was working and walking fine prior to the incident. *See* Exhibit 23.

9. On March 5, 2015 Claimant was evaluated by Ken Frisbie, PA-C. Claimant reported continued pain in his right knee, improved swelling, but a lot of painful

popping in the medial aspect. Claimant reported a lot of pain going up and down stairs as well as when applying pressure on the gas pedal while driving. PA Frisbie noted Claimant's gait was antalgic with a perceivable limp on the right side. Claimant reported sit stand transfers were painful. PA Frisbie diagnosed right knee strain and opined that the objective findings were consistent with the history of a work related etiology. PA Frisbie noted Claimant could continue on regular duty work status with activities as tolerated working ergonomically. PA Frisbie referred Claimant for physical therapy evaluation and treatment. *See* Exhibit H.

10. On March 16, 2015 Claimant was evaluated by Dr. Smith. Claimant reported the pain overall was somewhat better and that the swelling had decreased but that he continued to have sharp pain in the medial knee with twisting and pivoting. Claimant reported he had two physical therapy visits. Claimant reported he had not been working regular hours. Dr. Smith noted that Claimant ambulated with a minimal limp. Dr. Smith noted pain complaints with palpation in the MCL and medial retinaculum. Dr. Smith continued to diagnose right knee strain. Dr. Smith placed claimant on restricted duty work status with no crawling, kneeling, squatting, climbing, running, or jumping. Dr. Smith recommended an MRI of the right knee, and noted that Claimant may need an orthopedic evaluation depending on the MRI results and recommended that Claimant continue physical therapy. *See* Exhibit H.

11. On March 20, 2015 Claimant underwent an MRI of his right knee interpreted by Richard Desruisseau, M.D. Dr. Desruisseau provided the impression of: grossly stable signal abnormality with the posterior horn of the medial meniscus which may reflect chronic tear; likely area of scarring/fibrosis within Hoffas fat that could be related to recent surgical intervention and if anterior knee pain a component of impingement could be considered; patellofemoral joint degenerative changes and associated chondromalacia most prominent about the lateral patellar facet; and small joint effusion. Claimant was referred to Dr. Pazik for evaluation. *See* Exhibit F.

12. From the date of injury until March 29, 2015 Claimant continued to work for Employer. Claimant worked within the restrictions given to him on March 16, 2015 and during this period of time, although working, Claimant did not work the same number of hours as he worked prior to the injury. During the period of time between February 22, 2015 and March 29, 2015 Claimant worked approximately 15-20 hours per week. On March 29, 2015 Claimant left work to go on short term disability and Claimant has not worked for Employer since March 29, 2015.

13. On March 31, 2015 Claimant was evaluated by Thomas Pazik, M.D. Dr. Pazik noted a fall at work on February 22, 2015 and that Claimant had right knee pain. Dr. Pazik noted that the MRI showed PHMM signal abnormality likely reflecting prior surgery; small effusion and PF degenerative changes/CMP with marrow edema LPF. Dr. Pazik performed an injection in Claimant's right knee. Dr. Pazik assessed chondromalacia patellae of the right knee and noted that Claimant had been improving with non-op measures and noted that a scope could be considered if there was no improvement. *See* Exhibit G.

14. On April 9, 2015 Claimant was evaluated by Dr. Smith. Dr. Smith noted that Claimant underwent the MRI which showed a chronic tear of the posterior medial meniscus, scarring, fibrosis, Hoffa's pad, patellar chondromalacia. Claimant reported 100 percent relief for several hours following an injection performed on April 2, 2015. Dr. Smith provided an impression of work related fall resulting in sprain to the right knee. She recommended continuing the restricted duty work status, continuing physical therapy, and following up with Dr. Pazik. *See* Exhibit H.

15. On April 21, 2015 Claimant was evaluated by Dr. Pazik. Dr. Pazik noted that Claimant had persistent medial joint line and anterior pain and that Claimant wanted to proceed with a scope as he was not improving with non-op measures. Dr. Pazik recommended a right knee arthroscopy with partial medial meniscectomy and debridement. *See* Exhibit G.

16. On April 28, 2015 James Lindberg, M.D. provided a document recommending denying surgery under workers' compensation. Dr. Lindberg noted he had reviewed Claimant's records and that Claimant was requesting a right knee partial medial meniscectomy and debridement. Dr. Lindberg noted that the MRI performed on March 20, 2015 showed a grossly stable single abnormality within the posterior horn of the medial meniscus, which may reflect a chronic tear and that the MRI was unchanged from the prior study. Dr. Lindberg noted that Claimant had a previous medial meniscectomy and the MRI stated that it was unchanged from the prior study and therefore there was no acute chondromalacia. Dr. Lindberg opined that the mechanism of injury was not consistent with causing either a meniscal tear or a chondromalacia aggravation of his knee. *See* Exhibit E.

17. On April 29, 2015 Respondent filed a notice of contest contesting/denying the claim for further investigation into the injury/illness not being work related. *See* Exhibit B.

18. On April 29, 2015 Claimant was evaluated by Dr. Smith. Dr. Smith continued the diagnosis of right knee strain and continued the restricted duty work status. Dr. Smith advised Claimant that he would be discharged as the claim was denied by the insurance company. *See* Exhibit H.

19. On June 2, 2015 Claimant was evaluated by Dr. Pazik. Dr. Pazik noted that Claimant's knee was unchanged from the prior evaluation on April 21, 2015. Dr. Pazik noted that the recommended knee arthroscopy was denied by workers' compensation. Dr. Pazik continued to recommend a scope for diagnostic/therapeutic benefit. *See* Exhibit G.

20. On July 15, 2015 Claimant underwent right knee arthroscopy performed by Dr. Pazik. The operative report notes that the operative procedure was: arthroscopy of the right knee with partial medial meniscectomy; partial lateral meniscectomy;

extensive anterior scar debridement; and debridement grade 3 chondromalacia patella and grade 2 condromalacia, proximal central femoral trochlea. *See* Exhibit 6.

21. On July 28, 2015 Claimant was evaluated by Dr. Pazik. Dr. Pazik noted that Claimant was status post surgery, had been attending physical therapy, and had a primary complaint of knee stiffness and weakness. Dr. Pazik recommended continued supervised physical therapy, limiting activities per physical therapy instructions, using a neoprene knee sleeve with patellar cutout to help control swelling, avoiding slippery or uneven surfaces or crowded conditions, and ice and elevate as helpful. *See* Exhibit G.

22. On December 10, 2015 Dr. Smith responded to an inquiry from Claimant. Dr. Smith noted that she agreed with Dr. Pazik that the reported mechanism of injury in the fall with the knee twisted under Claimant would correlate with the medial meniscal tear found at the time of surgery. However, Dr. Smith also noted that the PCL and chondromalacia were pre-existing and not caused or aggravated by the work incident. Dr. Smith opined that in all medical probability the medial meniscus was degenerative from Claimant's previous surgery but the mechanism of injury would correlated with a medial meniscal injury and would/could cause further injury to the meniscus. *See* Exhibit H.

23. On January 5, 2016 Claimant was evaluated by Dr. Smith. Dr. Smith provided the impression of work related fall resulting in sprain to the right knee. Dr. Smith noted that due to findings at surgery in addition to the fact that this was a repeat injury to the right knee she recommended permanent activity restrictions of no kneeling, crawling, squatting, or climbing. May partially squat but not to full squat, may climb steps but not ladders, and recommended avoiding high impact activities such as running or jumping. Dr. Smith discharged Claimant at maximum medical improvement with impairment. Dr. Smith noted that in discussing the case with Dr. Pazik and in reviewing the mechanism of injury, the only specific disorder related to the work injury of February 22, 2015 was the medial meniscus tear. She opined that the lateral meniscus tear, the chondromalacia patella, and the PCL insufficiency would be adjusted out of Claimant's overall impairment. Dr. Smith opined that for the work injury, Claimant had a 9% lower extremity impairment that could be converted to a 4% whole person impairment. *See* Exhibit H.

24. On January 10, 2016 Dr. Lindberg performed a record review. Dr. Lindberg noted Claimant's initial injury was in November of 2011 while playing with his children and that Claimant's first surgery followed in February of 2012. Dr. Lindberg noted that Claimant then had a re-injury on May 20, 2012 when he slipped on water in light rain and was seen in the emergency room in Greeley. Dr. Lindberg noted that another MRI was done on May 25, 2012 that showed scarring of the ACL and PCL, scarring of the medial collateral ligament, and an unchanged small under surface tear of the medial meniscus maybe partially healed and fraying of the posterior lateral meniscus. Dr. Lindberg noted that Claimant was then re-evaluated by Dr. Pazik on May 29, 2012 and recommendations provided to wear the playmaker brace, avoid significant pivoting, climbing, or similar activities. Dr. Lindberg noted that with the alleged work

injury Claimant had another MRI in March of 2015 that was compared to the MRI done in May of 2012. Dr. Lindberg noted that the medial meniscus appeared unchanged between MRIs. Dr. Lindberg provided an impression that Claimant had chronic instability in his knee secondary to his first injury playing with his kids and his second injury due to a slip and fall. Dr. Lindberg opined that the second injury and the MRI that was performed in 2012 show the same changes that we now see on the MRI done in 2015 following the alleged work injury. Dr. Lindberg opined that the operative note from July of 2015 basically substantiates chronic instability and a chronic medial meniscal tear. Dr. Lindberg opined that the MRIs between 2012 and 2015 were not significantly different and that the findings at arthroscopy in July of 2015 do not substantiate any acute injury. Dr. Lindberg opined that Claimant's fall was most likely caused by his instability and was a manifestation of chronic instability not a particular significant hazard at work. Dr. Lindberg opined that there was no new injury caused by the slip and fall on February 22, 2015. Dr. Lindberg opined that Claimant had chronic instability in his knee which would cause the knee to give way and slip and fall with minimal or no cause. Dr. Lindberg recommended denying any further treatment under workers' compensation. *See* Exhibit E.

Prior injuries/treatment to right knee

25. Prior to the alleged work injury, Claimant had two separate injuries to his right knee, surgery on his right knee, and two MRIs on his right knee that occurred in late 2011 and 2012.

26. On November 13, 2011 Claimant was evaluated at the emergency department of North Colorado Medical Center. Claimant reported right knee pain in the medial aspect of the knee after playing with his son.

27. On November 15, 2011 Claimant was evaluated by Dr. Pazik. Dr. Pazik diagnosed right knee internal derangement of the knee, moderate MCL sprain, possible MMT, and possible torn ACL. *See* Exhibit G.

28. On November 21, 2011 Claimant underwent an MRI of his right knee that was interpreted by Eric Handley, M.D. Dr. Handley provided the impression of extensive edema and distortion throughout the PCL with a possible component of chronic degeneration and high grade distal tearing suggested, full thickness grade 3 proximal medial collateral ligament tear, subtle inferior surfacing oblique tear of the medial meniscal posterior horn, and small to moderate knee effusion with synovitis.

29. On November 22, 2011 Claimant was evaluated by Dr. Pazik. Dr. Pazik diagnosed right knee torn PCL, grade 3 proximal MCL tear, and medial meniscus tear. Dr. Pazik recommended surgery for PCL reconstruction, medial meniscus repair, and partial medial meniscectomy. Dr. Pazik recommended in the mean time that Claimant continue with the playmaker brace and recommended using crutches. *See* Exhibit G.

30. On January 16, 2012 Claimant was evaluated by Dr. Pazik. Claimant reported that while chasing his son he twisted his knee in an external rotation mechanism and felt the knee slide out of place and had immediate discomfort and swelling. Claimant reported being evaluated in the ER and being discharged with a knee immobilizer. Dr. Pazik noted the MRI findings from November 21, 2011 showed torn PCL distally, full thickness grade 3 proximal MCL tear, medial meniscus tear, and moderate effusion with synovitis. Dr. Pazik discussed surgical and non surgical options. Dr. Pazik recommended surgery for PCL reconstruction, medial meniscus repair, and partial medial meniscectomy. Dr. Pazik noted that Claimant seemed to understand that his knee would never be completely normal. *See* Exhibit J.

31. On February 6, 2012 Claimant underwent surgery performed by Dr. Pazik. Dr. Pazik performed right knee arthroscopy with medial meniscus repair, and arthroscopic patellar chondral debridement. *See* Exhibit J.

32. On April 17, 2012 Claimant was evaluated by Dr. Pazik. Dr. Pazik released Claimant to full duty work and noted that Claimant was doing well. Dr. Pazik recommended that Claimant avoid squatting and kneeling activities until June. Dr. Pazik cautioned Claimant against squatting and kneeling generally and demonstrated to Claimant with a model how such activities place the meniscus under significant stress. Dr. Pazik noted that Claimant seemed to understand, but Dr. Pazik really did not think that Claimant was going to modify his activities. *See* Exhibit G.

33. On May 20, 2012 Claimant suffered a slip and fall outside of a casino in Black Hawk. Claimant went back to Dr. Pazik for an evaluation and underwent an additional MRI.

34. On May 25, 2012 Claimant underwent an MRI of his right knee interpreted by Kelly Lindauer, M.D. Dr. Lindauer gave the impression of: new moderate scarring along the deep margin of Hoffa's fat pad which is along the spectrum of artrofibrosis and could be a source of impingement. Moderate knee joint effusion with synovitis; unchanged chronic undersurface tear of the medial meniscus at the junction between the body and posterior horn segments intermediate in signal and that may be healed with granulation tissue; unchanged mild chondromalacia involving the patellofemoral compartment; interval development of mucinous degeneration and/or scarring of the posterior cruciate ligament with healing of the previously seen tear. Mucinous degeneration of the ACL as well; interval development of scarring in the medial collateral ligament with healing of the previously seen sprain. *See* Exhibit F.

35. On May 29, 2014 Claimant was evaluated by Brittany Downing, DC. Claimant reported hurting his knee pulling some pipes at work. Dr. Downing noted that Claimant's right knee was tender to touch but noted no swelling. *See* Exhibit I.

Testimony at hearing

36. Dr. Lindberg testified at hearing consistent with his reports. Dr. Lindberg opined that the mechanism of injury described in the slip and fall on February 22, 2015 was not a mechanism that would cause a meniscus injury. Dr. Lindberg opined that Claimant did not sustain any injury to his knee in the February 22, 2015 incident based on both the MRI results and the surgical results. Dr. Lindberg noted that after Claimant's first injury in late 2011, Claimant tore the medial meniscus. Claimant then had surgery where Dr. Pazik attempted a medial meniscal tear repair and stapled part of the meniscus together. Dr. Lindberg opined that the medial meniscus never completely healed after the attempt to repair it in the 2012 surgery. Dr. Lindberg noted that after Claimant had a slip and fall at a casino in 2012, Claimant had a new MRI that showed fraying of the lateral meniscus and only partial healing of the medial meniscus repair. He opined that although surgically repaired, the second MRI in May of 2012 shows that the medial meniscus never exhibited complete healing after Claimant's first surgery.

37. Dr. Lindberg opined that when Dr. Pazik performed the second surgery in July of 2015, Dr. Pazik removed what had not worked the first time, the medial meniscus tear repair and that the rest of the surgery was to clean up the progressive degenerative fraying of cartilage and ligament secondary to PCL and ACL instability from the initial injury in late 2011. Dr. Lindberg opined that naturally a PCL injury becomes progressively more unstable and noted that PCL repair is very difficult and most surgeons do not repair unless there is significant rotational instability. Dr. Lindberg opined that the naturally progressive PCL instability can cause meniscal tears over time from the rotational instability. Dr. Lindberg also noted that nothing in Dr. Pazik's report indicated that he believed Claimant had sustained any new or acute injury as a direct result of the February 22, 2015 incident. Dr. Lindberg also opined that the medial meniscus looked slightly better on the 2015 MRI than it looked on the May 2012 MRI and that nothing reflected any additional injury or aggravation to the prior medial meniscus tear.

38. The opinions of Dr. Lindberg are found credible and persuasive. They correlate with the MRIs performed in this matter which do not show any worsening or acute aggravation of a pre-existing medial meniscus tear.

39. Neither Dr. Smith nor Dr. Pazik have provided a persuasive opinion that the February 22, 2015 incident caused the medial meniscus tear or caused an aggravation or further injury to the medial meniscus. The medial meniscus tear was pre-existing. It also was not shown to be worse or aggravated by the February 22, 2015 fall and the MRIs, when compared, show no new injury or aggravation to the meniscus. Although Dr. Smith noted that in all probability the medial meniscus was degenerative from the previous surgery, she noted that the mechanism of injury in the fall could have caused further injury to the meniscus. Although the fall could have caused further injury to the medial meniscus, Claimant has failed to establish that the fall in fact caused any further injury to the meniscus or any aggravation to the meniscus.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167

(Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury on February 22, 2015. Although Claimant slipped and fell on snow/ice on that date, the fall did not result in any physical injury or trauma. Claimant has no findings of an acute injury to his medial meniscus and Claimant's knee condition and pathology shown on the March 2015 MRI was unchanged from the prior MRI Claimant underwent in May of 2012. There was no new physical injury shown by the MRI comparisons. Rather, they show that Claimant continued in 2015 to have the same injuries to his right knee as he had in 2012. Although Dr. Smith opined that the mechanism of injury could have caused further injury to Claimant's meniscus, the overall medical evidence and MRIs do not support that further injury to the meniscus actually occurred. Although Claimant suffered an accident on February 22, 2015 when he slipped and fell, Claimant has not established that he suffered a new injury or that he aggravated a pre-existing injury.

The prior medical treatment shows that Claimant had instability and pain in his right knee following his 2011 injury and 2012 surgery. This included a similar slip and fall in May of 2012 as well as a report of hurting his right knee and being tender in the right knee in May of 2014. Following his 2012 surgery, Dr. Pazik warned Claimant about the stress on the meniscus by certain activities and explained that Claimant's knee would never be normal. Claimant has failed to establish that the incident on February 22, 2015 caused any addition injury or any aggravation to a pre-existing condition. Rather, his knee is in a same or similar condition as it was in May of 2012. The opinion of Dr. Lindberg in this regard is credible and persuasive. Further, the mere occurrence of symptoms of instability in his knee do not require a conclusion that the duties of employment caused Claimant's symptoms or that his employment aggravated or accelerated his pre-existing condition. Here, although Claimant may have had symptoms of instability at work that caused him to fall, this is just as likely representative of the natural progression of the pre-existing conditions in Claimant's right knee that are unrelated to his employment. Claimant has failed to meet his burden to establish a causal connection between his right knee condition and his employment.

Medical Benefits

Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S. (2014);

Snyder v. Industrial Claim Appeals Office, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S.

Claimant has failed to establish a causal relationship between his current symptoms and diagnoses and any work related injury. As he has failed to establish that he suffered from a work related injury, the Respondents are not liable for medical treatment or medical benefits sought by Claimant.

Temporary disability benefits

To obtain temporary disability benefits, a claimant must establish a causal connection between a work-related injury and a subsequent wage loss. *See* § 8-42-103(1)(a), C.R.S. As found above, Claimant has failed to establish that he suffered a work related injury. Therefore, any wage loss is not causally related to a work injury and Claimant has failed to establish an entitlement to any temporary disability benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden of proof to establish that he suffered a compensable injury on February 22, 2015.

2. Claimant is not entitled to medical treatment and is not entitled to any temporary disability benefits.

3. The claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 22, 2016 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-981-534-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/ Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 25, 2015 and February 29, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 11/25/15, Courtroom 3, beginning at 1:30 PM, and ending at 3:50 PM; and, 2/29/16, Courtroom 3, beginning at 8:40 AM, and ending at 9:00 AM).

Claimant's Exhibits 1 through 13 were admitted into evidence, without objection. Respondents' Exhibits A through J were admitted into evidence, without objection. Respondents' Exhibit K was admitted into evidence over the Claimant's objection. The evidentiary deposition of Michael Rauzzino, M.D., was admitted into evidence without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: Claimant's opening brief to be filed within 5 calendar days of the last session of the hearing. Instead, the Claimant filed proposed findings of fact on March 7, 2016, which the ALJ hereby considers as an opening brief. Respondents' answer brief was filed on March 11, 2016; and, the Claimant's rebuttal brief was filed on March 14, 2016. The matter was deemed submitted for decision on March 15, 2016.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable industrial injury, or compensable aggravation of a preexisting condition on April 27, 2015; whether the cervical surgery proposed by Michael Rauzzino, M.D., is causally related to the incident of April 27, 2015 and reasonably necessary to cure and/or relieve the effects of the April 27, 2015 alleged industrial injury; the Claimant's average weekly wage (AWW); and temporary total disability (TTD) benefits from April 28, 2015 through September 18, 2015, and from November 13, 2015 and continuing.

The Claimant has the burden of proof, by a preponderance of the evidence, on all issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Procedural Findings

1. At the commencement of the first session of the hearing, the parties stipulated that, if the claim was found compensable, the Claimant's AWW is $827.58, and the ALJ so finds.

2. The parties also stipulated that if temporary indemnity benefits were awarded, the periods of entitlement would be April 28, 2015 through September 18, 2015 and November 13, 2015 ongoing, and the ALJH so finds.

3. The parties further stipulated that, if compensable, the Claimant's authorized treating physicians (ATPs) included HealthOne and Dr. Rauzzino.

Preliminary Findings (Pre-Incident)

4. On September 16, 2014, the Claimant went to his personal chiropractor, noting a new injury to his right shoulder while working out at the gym. The Claimant's complaints on that date included sharp and aching pain rated at a 5/10 and getting worse (Respondents' Exhibit. E, BS.40).

5. On September 29, 2014, the Claimant returned to his chiropractor noting that his pain was getting worse and that "the pain first started in his neck, and now has radiated down his right arm. He also is feeling some numbness in two of his fingers."

The Claimant reported that the pain was rated at 6/10 and getting worse (Respondents' Exhibit. E, BS 38).

6. Dr. Rauzzino, a surgeon, testified in his evidentiary deposition on January 12, 2016, that these reported symptoms from September 2014 are consistent with a cervical radiculopathy similar to those symptoms the Claimant presented with in his July visit with Dr. Rauzzino (Rauzzino Depo., p. 6, ln. 7-17).

7. John Burris, M.D., who performed a medical records review, concurred with Dr. Rauzzino, noting that the Claimant's symptoms of cervical radiculopathy are documented at least as far back as September 2014(Respondents' Exhibit. K).

8. In his rebuttal brief, the Claimant notes that he had not missed any time from work prior to the alleged compensable event of April 27, 2015

9. On April 16, 2015, the Claimant was evaluated by Jonathan Scott, M.D., of Blue Sky Neurosciences. Dr. Scott is a neurologist. This evaluation was eleven days prior to the alleged work injury of April 27, 2015 (Respondents' Exhibit D, BS 26-29).

10. In the" New Patient History" form filled out by the Claimant on April 16, 2015, the Claimant indicated that he had sought out an evaluation by a neurologist due to right arm weakness, neck pain, back pain, numbness in his fingertips, tingling/burning sensation, and involuntary movements. The Claimant testified that he had sought out treatment with Dr. Scott because he was experiencing numbness and tingling that was unlike any of his prior symptoms and that his condition was different than anything else he had experienced. Because of this the Claimant stated that he did not want to see his regular personal chiropractor, but rather seek treatment with a neurologist (Respondents' Exhibit D, BS 28; 11/25/15 Hearing Tr., p. 45, ln. 15-25).

11. Dr. Scott recorded that the Claimant reported injuring his right trapezius in November of 2014 and then, after going for a run and performing some push-ups, he had "sharp neck pain and couldn't move his neck." In his physical examination, Dr. Scott recorded that the Claimant had the following complaints:

- Weakness in the chest muscle;
- Weakness in the right triceps and pectoralis muscle, which did not allow him to lift as heavy weights as he was previously able to do; and
- Numbness in the pinky and ring finger with pain into his right elbow.

Dr. Scott recorded that the Claimant had sought treatment out with his chiropractor previously for this condition and received dry needling and electrical stimulation as a result (Respondents' Exhibit. D, BS 26).

12. Dr. Scott's physical examination on April 16, 2015 established that the Claimant had reduced bulk of the right triceps compared to the left (Respondents' Exhibit D, BS 26)

13. On April 16, 2015, eleven days before the alleged compensable injury, Dr. Scott diagnosed the Claimant with "Radiculitis, Cervical Disc Herniated" and noted that he suspected a right C7 or C8 radiculopathy with neck pain, numbness in the right pinky and ring finger, and weakness in the right triceps muscle. Dr. Scott recommended that the Claimant undergo a cervical MRI (magnetic resonance imaging) and an EMG of the right upper extremity (RUE) to confirm his diagnosis (Respondents' Exhibit D, BS 27).

14. The Claimant testified that he believed that the condition evaluated by Dr. Scott on April 16, 2015 was not related to work but rather "everyday-type – you know – wear and tear." He also testified that he sought treatment with Dr. Scott at the suggestion of his girlfriend and that the pain he was experiencing prior to his appointment with Dr. Scott was different that anything he had experienced before. (11/25/15 Hearing. Tr. p. 28, ln. 7-10; p. 48, ln. 5-21).

15. According to the Claimant, he kept the EMG and MRI appointments requested by Dr. Scott despite the alleged intervening work injury and he underwent these appointments under his own health insurance (11/25/15 Hearing Tr. p. 27, ln. 6-14).

After the Alleged Compensable Event of April 27, 2015

16. The cervical MRI was performed on April 30, 2015. The study established a disc bulge a both the C6-C7 level and C5-C6 level. R. Matthew Lugliani, M.D., one of the Claimant's ATPs, who evaluated the Claimant after the alleged work injury, was of the opinion that the disc bulge seen on the MRI is "likely long-standing" (Respondents' Exhibit H, BS 77-78).

17. The RUE EMG was performed on May 1, 2015 by Adam Graham, M.D. The study established that the Claimant had moderately severe right C7 radiculopathy as predicted by Dr. Scott on April 16, 2015 (Respondents' Exhibit D, BS 23, 27).

The Alleged Compensable Aggravation of the Claimant's Preexisting Condition

18. The Claimant alleges that on April 27, 2015, he sustained an injury to his neck while performing work for the Employer. He first sought treatment for this alleged work-related injury on April 28, 2015 at HealthOne, where he was evaluated by Dr. Lugliani.

19. The Claimant complained of the following symptoms at the April 28, 2015 appointment:

- Neck pain described as “dull and achy” with radiating symptoms into his bilateral trapezial area;

- Right arm weakness;

- Numbness and tingling involving elbow and third, fourth, and fifth digits of his right hand; and

- Muscle wasting involving right triceps with an inability to perform as many push-ups as previously able to do.

(Respondents’ Exhibit. B, BS 9).

20. Dr. Lugliani’s physical examination on April 28, 2015 established that “inspection of the right shoulder/arm reveals muscle wasting involving his right triceps.” This is a similar physical finding as that found by Dr. Scott two weeks prior (Respondents’ Exhibits. B, BS10; and. D, BS 26).

21. Dr. Lugliani stated that he had a high suspicion for C5, C6, or C7 nerve injury consistent with RUE radiculopathy. Like Dr. Scott, Dr. Lugliani made this diagnosis without the benefit of either a MRI or EMG (Respondents’ Exhibit B, BS 10-11).

22. After having reviewed the MRI on May 7, 2015, Dr. Lugliani was of the opinion that the disc bulge was chronic and he questioned whether the Claimant’s current presentation was related to an April 27, 2015 incident or was long-standing (Respondents’ Exhibit B, BS 8).

Independent Medical Records Review by John Burris, M.D.

23. Dr. Burris is of the opinion that the Claimant’s reported symptoms of significant neck pain, right arm weakness, and decreased muscle bulk of the triceps had been present for at least five months prior to the alleged April 27, 2015 injury. The ALJ finds this opinion highly persuasive and credible against a backdrop of the Claimant’s medical history pre-dating April 27, 2015. Dr. Burris also is of the opinion that the documented symptoms and physical examination at the April 28, 2015 appointment with Dr. Lugliani were “essentially the same” as those documented by Dr. Scott on April 16,

2015 (Respondents' Exhibit K). Dr. Burris' opinions do **not** preclude a work-related aggravation and acceleration of the Claimant's underlying condition, regardless of how slight the aggravation may be.

24. Dr. Burris, in his February 9, 2016 report, was of the opinion that the clinical findings, specifically the decreased muscle bulk of the triceps and right arm weakness, had been present five months before the April 27, 2015 alleged injury and thus could not have been caused or aggravated by any event on April 27, 2015 (Respondents' Exhibit. K).

Michael J. Rauzzino, M.D.

25. Dr. Rauzzino is of the opinion that the Claimant's symptom complex prior to the alleged injury was the same documented after the alleged injury and that the symptoms of a C7 radiculopathy were documented in the medical records as early as September 2014 (Rauzzino Depo. Tr., p. 17, ln. 20-24; p. 23-24). Nonetheless, the ALJ finds that Dr. Rauzzino's ultimate opinion is that the Claimant sustained a work-related aggravation and acceleration of his underlying condition at work on April 27, 2015.

26. Dr. Lugliani's physical examination revealed muscle wasting of the Claimant's right triceps two weeks before the alleged injury (Respondents' Exhibit B, BS10).

27. Dr. Rauzzino testified that muscle wasting "is loss of bulk of muscle" that is either caused by a problem within the muscle itself, or with the nerve root that supplies the muscle. Dr. Rauzzino testified that "a C7 radiculopathy due to a herniated disc at C6-C7 could lead to injury of the C7 nerve root, which could lead to muscle wasting of the triceps, which is the muscle that the C7 nerve root supplies" (Rauzzino Depo. Tr., p. 15, ln. 17-23; p. 16, ln. 3-9).

28. Dr. Rauzzino further testified that the muscle wasting seen in the April 28, 2015 report from Dr. Lugliani could not have developed in the 24 hours after the alleged injury of April 27, 2015 (Rauzzino Depo. Tr., p. 16, ln. 10-15).

29. Dr. Rauzzino further testified that he could not testify with medical **certainty** (although the wrong standard, the ALJ finds that Dr. Rauzzino subsequently rendered an opinion supporting compensability, to a reasonable degree of medical **probability**) that the Claimant herniated the cervical disc on April 27, 2015 (Rauzzino Depo. Tr., p. 18, ln. 1-6).

Inconsistent Histories Given by the Claimant

30. On April 16, 2015, the Claimant was evaluated by Dr. Scott for right arm weakness. He informed Dr. Scott that this pain began in November 2014 while working

and then made significantly worse thereafter while working out (Respondents' Exhibit D, BS 26).

31. Two weeks later, on April 28, 2015, the Claimant reported to ATP Dr. Lugliani that he had experienced a shoulder injury about a year ago and a neck injury while working two months prior to April 28, 2015, which would have been February 2015. The Claimant reported a foot injury at the April 27, 2015 appointment, occurring in February 2015, but no neck injury was reported (Respondents' Exhibit. B, BS 9; Exhibit I, BS 81).

32. In his signed intake sheet, filled out on April 28, 2015, the Claimant denied that he had sought treatment for his neck previously and he specifically denied any musculoskeletal problems occurring in the last month (Respondents'. Exhibit B, BS 13, 14; 11/25/15 Hearing Tr., p. 39, ln. 1-12).

33. On May 12, 2015, the Claimant informed his physical therapist that he had "the same injury a couple months ago in which he reported but didn't see a MD" (Respondents' Exhibit C, BS 16).

34. On July 6, 2015, the Claimant informed Dr. Rauzzino about the April 27, 2015 alleged injury but noted that he had "no history of prior neck injury or work-related spinal injury." Dr. Rauzzino confirmed that the Claimant did not report to him any related cervical history of pain or injury (Respondents' Exhibit A, BS 2; Rauzzino Depo. Tr., p. 11, ln. 4-13).

35. According to the Claimant, these were "miscommunications." The Claimant testified that did not have a neck or related injury in November 2014 or February 2015 (11/25/15 Hearing. Tr., p. 15; p. 40, ln. 14-22; p. 55, ln. 3-20). The ALJ finds the Claimant's characterization of "miscommunications" lacking in credibility, based on the weight of previous medical histories the Claimant gave to medical providers.

36. The Claimant reported that the September 26, 2014 was an injury only to his shoulder, not to his cervical spine. The Claimant also clarified that he sought treatment after the September alleged incident with his personal chiropractor until he ran out of time to attend appointments (11/25/15 Hearing. Tr., p. 62-63).

37. The Claimant specifically stated that he did not contend that he injured his neck in September of 2014 and that the September 2014 injury was the source of his current problem (11/25/15 Hearing. Tr., p. 33, ln. 4-13).

38. In verified answers to interrogatories sent by the Respondents, the Claimant was specifically asked to describe the circumstances that caused the injury subject to this claim. The Claimant alleged that his current cervical symptoms began on

September 26, 2014 during a lifting injury at work and that he later re-injured his neck on April 27, 2015. He alleged that he sought no treatment for the September 26, 2014 injury. He also made no reference to a shoulder injury occurring on that date (Respondents'. Exhibit J, admitted into evidence at hearing).

39. Despite the medical records that the September 2014 injury was caused by a gym incident and the Claimant's testimony that the September 2014 incident was only a shoulder injury, the Claimant argues that the Claimant had a pre-existing neck condition "albeit probably caused by work done in September 2014.

40. The Claimant testified that he sustained a right shoulder injury while working on September 26, 2014. He did not seek any treatment for this alleged injury. (11/25/15 Hearing, Tr., p. 14, ln. 1-25).

41. The medical records establish that the Claimant strained his right shoulder on September 15, 2014, ten days before reporting the "work" injury to the same body part, while working out at the gym. The medical records specifically state that on the day prior to the September 16, 2014 date of service, the Claimant began experiencing sharp pain rated at a 5/10 in his shoulder. This treatment was sought through the Claimant's personal chiropractor (Respondents' Exhibit E, BS 40).

42. Ten days before the Claimant reported an alleged September 26, 2014 work injury, on September 16, 2014, he was evaluated at Advanced Orthopedics, where it was noted that he had more pain after trying to exercise yesterday (September 15, 2014) [Respondents' Exhibit F, BS 53].

43. The medical records also establish that the Claimant's gym shoulder injury included neck pain and radiation into two of his fingers of his right hand (numbness). The Claimant reported on September 29, 2014 that symptoms were getting worse without any reference to any new event or injury. Specifically, the records establish that the Claimant's "condition has been aggravated for an unknown reason" (Respondents' Exhibit E, BS 38). This was three days after the Claimant's alleged work injury of September 26, 2014 and "no new work injury" was noted as having occurred in the interim, but rather the condition had been aggravated for "unknown reasons." Moreover, this note was recorded by the Claimant's personal chiropractor who the Claimant had had a relationship with for several months.

The Claimant's Testimony

44. The Claimant continued treating for his September 15, 2014 gym injury for over a month until at least October 27, 2014. No mention about a work injury was ever made to his personal chiropractor. When discharged, the Claimant had continuing numbness, radiating pain, shooting, tightness and tingling in his shoulder that he rated at a 5/10, suggesting no improvement (Respondents' Exhibit E, BS 30-40).

45. When specifically asked at hearing if he ever got hurt working out, the Claimant initially denied it, but later clarified that maybe he got hurt while working out overseas in 2012 but he did not recall any other injury. He denied recalling that he informed his chiropractor that the 2014 right shoulder injury was an exercise injury. (11/25/15, Hearing Tr., p. 15-23).

46. According to the Claimant, as a result of the failure to get relief from his personal chiropractor with his shoulder his girlfriend suggested that he make an appointment with a neurologist. This appointment was on April 16, 2015 with Dr. Scott. (11/25/15, Hearing, Tr., p. 46, ln. 7-21).

47. According to the Claimant, the September 2014 injury only included sharp pain to his right shoulder and did not include his neck. The Claimant had previously testified that, in September, what – he was just dealing with the right shoulder." (11/25/15 Hearing, Tr., p. 33, ln. 4-8; 56, ln. 9-10).

48. In verified responses to interrogatories (admitted into evidence), however, the Claimant indicated that it was his allegation that the September 2014 alleged injury included an injury to his neck:

> The first injury occurred on 9/26/14. I lifted a heavy bag, trying to clear the belt, and I felt a pull and a sharp, burning pain in my neck.

The Claimant's response to the interrogatory makes no reference to any shoulder injury occurring on September 26, 2014 (Respondents' Exhibit J).

49. Despite the many inconsistencies in the Claimant's histories to medical providers, and in his testimony, the actual fact that the Claimant was taken off work after the April 27, 2015 incident, plus the fact that Dr. Rauzzino based his causal opinion on this fact as opposed to the Claimant's histories, the ALJ hereby determines that the Claimant's lack of credibility is not an important factor in determining a work-related aggravation and acceleration of the Claimant's underlying condition on April 27, 2015. Dr. Rauzzino's ultimate causal opinion, which is credible and highly persuasive, is based primarily on the fact that the Claimant could not work after the April 27, 2015 incident, whereas the Claimant always worked prior thereto.

Causal Relatedness

50. Dr. Rauzzino stated in his deposition that his opinions as to causation were based on the "overall veracity of [the Claimant] in terms of his subjective complaints to him" (Rauzzino Depo. Tr. p. 24, ln. 20-25).

51. Dr. Rauzzino stated that his causality opinion regarding compensability and/or the need for surgery could be changed if there was a question as to whether or not the subjective reports of the Claimant were accurate (Rauzzino Depo. Tr. p. 25, ln. 1-6).

52. Dr. Rauzzino, ultimately, was of the opinion that it was likely that something occurred on April 27, 2015 because the Claimant's functional status changed dramatically, going from being able to work to no longer being able to function at work. Dr. Rauzzino stated that the events of April 27, 2015 caused the prior condition to worsen or aggravated it to the point where the Claimant was no longer able to work (Rauzzino Depo., p. 10, ln :1 – 12.) On cross-examination, Dr. Rauzzino stated that not everyone that has C7 radiculopathies needs surgery, but in the Claimant's case, the need for surgery is based upon the Claimant's inability to live his life and do his job (Rauzzino Depo., p. 18, ln 17 – 20.) When asked if his opinions were based upon subjective reporting, Dr. Rauzzino testified that it was not totally subjective and that it had to be factored in that the Claimant worked up until a certain day and then he stopped working (Rauzzino Depo., p. 19, ln 1 – 15).

Average Weekly Wage (AWW) and Temporary Total Disability (TTD)

53. At the commencement of the first session of the hearing, the parties stipulated and the ALJ finds, that if the claim is compensable, the Claimant's AWW is $827.58 (which yields a TTD rate of $551.74 per week, or $78.22 per day); and, the Claimant was temporarily and totally disabled from April 28, 2015 through September 18, 2015 (both dates inclusive, a total of 144 days, and November 13, 2015 and continuing. The period from November 13, 2015 through the date of the last session of the hearing, February 29, 2016, both dates inclusive, is 109 days).

Compensability/Aggravation of Pre-existing Condition

54. It is clear from the medical records, as well as the testimony of the Claimant, that he had preexisting conditions in his neck which included some radicular symptoms. These were reported in his medical records. He and other ramp agents went to Dr. Ishan Erhuy, D.C., on a regular basis and the Claimant reported low back and shoulder pain in July of 2014 (Claimant's Exhibit 8, BS 76 – 88.) Dr. Erhuy, however, notes radicular symptoms on September 29, 2014 (Claimant's Exhibit 8, BS 89.) This was two days after the reported an on-the-job incident documented in the Employer's Injury Report of September 26, 2014 (Claimant's Exhibit 13, BS 125.) Nonetheless, the Claimant continued to work without problems until April 27, 2015 when he felt a pop in his neck while lifting a heavy bag. Even then, while he reported it to his supervisor, he did not seek medical treatment. The next day, the Claimant had difficulty even getting out of bed but he still went to work and tried to work using only his left arm. It was only after other coworkers noticed his difficulty and encouraged him to go to

management, that the Claimant stopped working, reported an alleged work-related injury to management and went to HealthOne.

55. While the Claimant had a preexisting neck condition, it was not disabling until it was aggravated while lifting a bag at work on April 27, 2015. Consistent with Dr. Rauzzino' s testimony, the work-related aggravation rendered the Claimant unable to perform his work and necessitated the recommended cervical spine surgery.

Ultimate Findings

56. Based on his greater familiarity with the Claimant's medical case, plus his candid testimony in his deposition, the ALJ finds that the ultimate causation opinion of Dr. Rauzzino is more credible and persuasive than other opinions to the contrary. As found, herein above, the inconsistencies in the Claimant's medical histories and his hearing testimony, are overshadowed by Dr. Rauzzino's ultimate causation opinion, thus, the Claimant's lack of credibility is not an important factor in determining the overall credibility of work-related causality of the April 27, 2015 incident.

57. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the ultimate opinion of Dr. Rauzzino on aggravation and acceleration of the Claimant's underlying condition, by virtue of the April 27, 2015 incident and the causal relatedness of the need for the surgery recommended by Dr. Rauzzino, and to reject all opinions to the contrary.

58. The Claimant has proven, by a preponderance of the evidence that he sustained a work-related aggravation of his underlying neck condition on April 27, 2015, and this compensable injury arose out of the course and scope of his employment with the Employer herein.

59. After reporting an alleged work-related injury to the Employer, the Employer referred the Claimant to HealthOne, and all referrals emanating from HealthOne were within the authorized chain of referrals.

60. All medical care and treatment for the compensable injury of April 27, 2015 was and is causally related to the compensable injury of April 27, 2015, and it was and is reasonably necessary to cure and relieve the effects thereof, including the cervical arthroplasty at C6-7, recommended by Dr. Rauzzino.

61. The Claimant's AWW is $827.58 (which yields a TTD rate of $551.74 per week, or $78.22 per day); and, the Claimant was temporarily and totally disabled from April 28, 2015 through September 18, 2015 (both dates inclusive, a total of 144 days, and November 13, 2015 and continuing. The period from November 13, 2015 through the date of the last session of the hearing, February 29, 2016, both dates inclusive, is 109 days). Aggregate days of TTD equal 253 days. Consequently, aggregate TTD benefits as of February 29, 2016, the last session of the hearing, equal $19,789.66.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, based on his greater familiarity with the Claimant's medical case, plus his candid testimony in his deposition, the ultimate causation opinion of Dr. Rauzzino is more credible and persuasive than other opinions to the contrary. The inconsistencies in the Claimant's medical histories and his hearing testimony, are overshadowed by Dr. Rauzzino's ultimate causation opinion, thus, the Claimant's lack of credibility is not an important factor in determining the overall credibility of work-related causality of the April 27, 2015 incident.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the ultimate opinion of Dr. Rauzzino on aggravation and acceleration of the Claimant's underlying condition, by virtue of the April 27, 2015 incident, and the causal relatedness of the need for the surgery recommended by Dr. Rauzzino, and to reject all opinions to the contrary.

Compensability

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant sustained a work-related aggravation of his underlying neck condition on April 27, 2015, and this compensable injury arose out of the course and scope of his employment with the Employer herein.

Medical

d. Because this matter is compensable, the Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Aan employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, upon the Claimant's reporting of the April 27, 2015 alleged work-related injury, the Employer referred the Claimant to HealthOne and all subsequent medical referrals emanated from HealthOne and were, thus, authorized.

e. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the aggravation of his underlying neck condition of April 27, 2015. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment as reflected in the evidence was and is reasonably necessary to cure and relieve the effects of that injury, including the C6-7 arthroplasty recommended by Dr. Rauzzino.

Average Weekly Wage and temporary Total Disability

f. The parties stipulated, and the ALJ found that the Claimant's AWW is $827.58 (which yields a TTD rate of $551.74 per week, or $78.22 per day); and, the Claimant was temporarily and totally disabled from April 28, 2015 through September 18, 2015 (both dates inclusive, a total of 144 days, and November 13, 2015 and continuing. The period from November 13, 2015 through the date of the last session of the hearing, February 29, 2016, both dates inclusive, is 109 days). Aggregate days of TTD equal 253 days. Consequently, aggregate TTD benefits as of February 29, 2016, the last session of the hearing, equal $19,789.66.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on all issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay for the costs of medical care rendered by the Employer's designated provider, HealthOne and any other medical providers within the chain of referral, including the costs of the surgery recommended by Michael J. Rauzzino, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Respondents shall pay the Claimant temporary total disability benefits at the rate of $551.68, or $78.22 per day, from April 28, 2015 through September 18, 2015, both dates inclusive, a subtotal of 144 days; and, from November 13, 2015 through the date of the last session of the hearing, February 29, 2016, both dates inclusive, a subtotal of 109 days, for a grand total of 253 days, in the aggregate amount of $19,789.66, which is payable retroactively and forthwith.

C. From March 1, 2015 and continuing until termination or modification of temporary disability benefits is warranted by law, the Respondents shall pay the Claimant $551.68 in temporary total disability benefits.

D. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this______day of March 2015.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

____
Court Clerk

Wc.ord

ISSUES

The issues presented for hearing are:

1. Whether the claimant established by a preponderance of the evidence that she sustained an injury to her right knee with a date of injury of either February 25, 2015, and/or March 9, 2015, and/or May 6, 2015, arising out of and in the course of her employment with the respondent-employer; and,

2. If so, has the claimant established by a preponderance of the evidence that she is in need of reasonable and necessary medical care to cure or relieve her from the effects of the injury.

Based upon the findings and conclusion below that the claim is not compensable the ALJ does not reach a determination on the remaining issue.

PROCEDURAL MATTER

The claimant called Melissa Denoo as a witness in her case-in-chief. The respondents objected based upon the fact that the witness was not endorsed by either party, or added by agreement, or an order of the ALJ. Based upon this objection the ALJ sustained the objection and did not allow the witness to testify.

Subsequent to the hearing the parties submitted post-hearing position statements. The claimant provided additional documentation along with her position statement. Since this additional documentation was not provided and admitted at the hearing, the ALJ cannot consider this documentation in the resolution of the issues.

FINDINGS OF FACT

1. The claimant testified on her own behalf substantially as follows:

   a. The claimant has been working for the respondent-employer since August of 2003.

   b. The claimant agrees that she does have arthritis in her knees.

   c. She has treated with medical providers and has been seen by orthopedic clinics.

d. She has maintained her knees and knows what she needs to do to prolong her knees. She states she is too young for a total knee replacement; therefore, she maintains her weight, diet, and exercise and aerobics.

e. While admitting she has arthritis she questions what gives someone the right to kick her, repeatedly.

f. She has done everything to maintain herself so that she doesn't have to have surgery.

g. The claimant declares it is documented repeatedly, "don't touch me, do not hit me, don't kick me."

h. She feels she should be compensated for her pain.

i. She did not act to be put in this position to be injured.

j. She states that in exhibit 9, the report clearly states that she was kicked repeatedly.

k. She reported it to the administration.

l. She states that the form says she was going to get training on this but she never did and she never was removed from the two students.

m. The claimant did not try to take advantage of the respondent-employer by calling in sick and saying she can't work because of her knee.

n. She never said she did not want to work with special education kids as that has been her passion for 17 and ½ years.

2. Prior to the first reported incident the claimant was examined, diagnosed and treated for both left and right knee problems. The claimant had medical documentation of early degenerative arthritic changes to her bilateral knees and has had two surgeries to her right knee.

3. The claimant was seen on March 12, 2015 where she had bilateral knee x-rays. "Indication: chronic bilateral pain." Review of the report establishes "there is tricompartmental osteoarthritis involving both knees manifested by joint space narrowing and marginal osteophytes. …the findings demonstrate mild progression at the medial and patella foraminal compartments since the prior exam (5/15/2002)."

4. A March 16, 2015 chart note under history of present illness does not document any corroboration of the February 25 or March 9, 2015 incidents. Under review of systems “musculoskeletal: no musculoskeletal symptoms and no non-specific pain, swelling, and stiffness.” Under physical examination “musculoskeletal system: general/bilateral normal movement of all extremities. Other: general/bilateral no musculoskeletal swelling was seen.” Under neurological: “gait and stance: no ataxic gait was observed.” Complete review of the March 16, 2015 chart note does not support the February 25 or March 9, 2015 incidents as generators of the need to seek healthcare treatment.

5. Review of the June 29, 2015 chart note does not support the May 6, 2015 incident occurring in general and/or requiring healthcare treatment to claimant’s right knee in specific. Review of the physical exam musculoskeletal system: “general/bilateral: musculoskeletal system: normal neck, back, shoulders, elbows, wrists, hips-5 strength and normal ROM. Normal gait and stance.” “Knee: general/bilateral: knee showed no abnormalities normal flexion and extension strength and normal ROM bilaterally.”

6. Review of the letters submitted by claimant from October 28, 2015 to January 11, 2016 does not support a compensable industrial injury of February 25, March 9 and/or May 6, 2015. While the claimant has a torn meniscus and requires medical care, the credible evidence does not support that the pathology was as a direct and proximate result of any of the incidents as averred by the claimant.

7. The respondent had the claimant evaluated by Eric Ridings, M.D. on October 5, 2015. Upon receipt of the claimant’s medical records from Evans Army Hospital Dr. Ridings prepared an addendum on October 29, 2015. Dr. Ridings noted that “in my Independent Medical Examination of [the claimant] on October 5, 2015, I had asked her about any prior history of any problems with her knees, particularly the right knee which is the subject of this claim. The patient reported prior history of severe arthritis over her opposite, left knee with prior recommendation for a total knee replacement on that side, which the patient has not pursued, instead having left knee arthroscopic surgery in February 2015. She reported that she did not have injuries or problems with the right knee prior to the 5 separate workers’ compensation injuries involving trauma to her right knee in 2015.” On my intake form asking “have you had any previous injuries or problems in the area that we are evaluating” she circled “no” and it was stated in the provided space below “at times I could feel a little discomfort when the weather is extremely cold outside.”

8. When Dr. Ridings reviewed the medical records he commented “the provided medical records from the military indicate that the patient was not forthcoming regarding previous serious problems with her right knee before 2015, with previous recommendation for right total knee replacement.”

9. Based upon a complete review of all of the medical records Dr. Ridings noted “assuming the incident occurred acute care for being kicked in the knee would be appropriate under workers’ compensation “for any verifiable episodes of trauma at work that treatment for claimant’s underlying chronic preexisting degenerative changes should not be handled by workers’ compensation.” Based upon his physical examination of October 5, 2015 the claimant did not require any healthcare treatment because of the incidents.

10. Post-hearing, Dr. Ridings was provided with the claimant’s exhibits 1 through 6 for review. Upon review Dr. Ridings specifically stated, “the more recent notes mention a right knee meniscal tear. When I examined the patient on October 5, 2015, she did not have any signs of a meniscal tear on examination. Additionally, the recent note from her orthopedic surgeon states that the care was “acute” and therefore would not be expected to have occurred on or about May 6, 2015, but more likely sometime after my examination in October, and would therefore not be related to this claim. Additionally, meniscal tears typically occur with a twisting motion of the knee which was not reported in any of the incidents in which she was kicked at work.”

11. The ALJ finds Dr. Ridings’ analyses and opinions to be credible and persuasive.

12. The ALJ finds that the incidents of February 25, 2015, March 9, 2015, and May 6, 2015 while sufficient to cause pain, were not sufficient to cause a need for compensable treatment as it did not cause, aggravate, or accelerate the claimant’s need for treatment for her underlying arthritic condition.

13. The ALJ finds that the claimant has failed to establish that it is more likely than not that she suffers from an injury, occurring on either February 25, 2015, and/or March 9, 2015, and/or May 6, 2015, that arose out of and occurred in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The Workers' Compensation Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undersigned occurrence." See §8-40-201(1) C.R.S. In contrast, an injury contemplates the physical or emotional trauma caused by an accident. An accident is the cause and an injury is the result. No benefits flow to the victim of an industrial accident unless the accident causes compensable injury. A compensable injury is one that causes disability or the need for medical treatment. See *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967). See also *Soto-Carrion v. C&T Plumbing, Inc., W.C. 4-650-711 (ICAO Probate 15 2007).* Compensable injuries involve an "injury" which requires medical treatment or causes disability. See *H&H Warehouse v. Victory,* 805 P.3d 1167 (Colo. App. 1990). Whether compensable injury has been sustained is a question of fact to be determined by the ALJ. See *Lou v.* ICAO, 224 P.3d 397 (Colo. App. 2009).

2. The mere fact that claimant experienced pain at work does not necessarily require a finding of a compensable injury. In Miranda vs. Best Western Rio Grande Inn, W.C. No. 4-663-169 (ICAO April 11, 2007) the Panel stated, "pain is a typical symptom caused by the aggravation of a pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury." The occurrence of symptoms at work may represent the result of a natural progression or a preexisting condition that is unrelated to the employment. See *F.R. Orr Construction v. Renta,* 717 P.2d. 965 (Colo.App.1995).

3. A preexisting disease or susceptibility to an injury does not disqualify a claim if the employment aggravates, accelerates, or combines with a pre-existing disease or condition to produce a disability or need for medical treatment. See *Duncan v. ICAO,* 107 P.3d.999 (Colo. App. 2004).

4. Claimant shoulders the burden of proof of proving by a preponderance of the evidence that she sustained an injury arising out of and within the course of her employment and that she is entitled to benefits under the Act. See §8-43-201(1), §8-41-301(1). See also *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the triar–of–fact, after considering all of the evidence, to find that a fact is more probably true than not. See *Page v. Clark* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. See §8-43-201.

5. It is the claimant's burden to prove that the alleged injury is a "significant" cause of the need for treatment in a sense that there is a direct relationship between the alleged precipitating event and the need for treatment. The claimant must prove a causal relationship between the injury alleged and the medical treatment claimant is seeking. See *Snyder v. ICAO,* 942 P.2d 1337 (Colo. App. 1997.) Treatment for a condition not caused by employment is not compensable. See *Owens v. ICAO*, 49 P.3d 1187 (Colo. App. 2002.) Where an industrial injury does not accelerate the need for treatment for the underlying disease, treatment for the preexisting condition is not compensable. See *Robinson v. Youth Track* 4-649-298 (ICAO May 15, 2007).

6. In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a casual nexus between the need for treatment and the work related injury. See *Singleton v. Kenya Corp.* 961 P.2d. 571 (Colo. App. 1998). It is up to the ALJ, as the fact finder, to determine whether a need for medical treatment is caused by the industrial injury or some other intervening injury. See *F.R. Orr, supra.*

7. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered to resolve conflicts in the evidence, make credibility and determinations, determine the weight to be accorded to expert testimony, and draw reasonable inferences from the evidence. See *Bodensieck v. ICAO,* 183 P.3d 684 (Colo. App. 2008). In determining credibility the fact finder should consider, among other things, the consistency or inconsistency of the witnesses testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936).

8. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she suffers from an injury, occurring on either February 25, 2015, and/or March 9, 2015, and/or May 6, 2015, that arose out of and occurred in the course of her employment with the respondent-employer.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: March 7, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUE

The following issue was raised for consideration at hearing:

> Whether Claimant proved by a preponderance of the evidence that she is entitled to an award of penalties under Section 8-43-304(1), C.R.S. for Respondent's alleged failure to timely pay TTD.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the ALJ enters the following Findings of Fact.

1. Claimant is a 20 year-old female who was injured in a motor vehicle collision on April 28, 2015, while in the course and scope of her employment at the Respondent in her capacity as a home delivery employee. Claimant was seated in the passenger seat of the home delivery van at a stop light when she and her co-worker were rear-ended by another vehicle.

2. Since Claimant's pain did not resolve following her shift, she sought medical treatment at Concentra on April 29, 2015, where she was ordered to take the rest of the shift off and return to work with restrictions effective April 30, 2015.

3. Claimant worked with restrictions from April 30, 2015, to May 25, 2015, per Claimant's authorizing treating provider's written release to return to modified employment.

4. On May 26, 2015, Claimant's authorized treating physician (ATP), Robert Nystrom, D.O., issued a no-work order for two (2) weeks until her follow-up appointment with him on June 9, 2015. Per Dr. Nystrom's no-work order, Claimant was unable to earn any wages from May 26, 2015, to June 8, 2015.

5. On June 9, 2015, Claimant's ATP gave Claimant a written release to return to modified employment effective June 9, 2015. Claimant earned partial wages from June 9, 2015, to July 2, 2015.

6. On July 3, 2015, Rosalinda Pineiro, M.D., issued the second no-work order. From July 3, 2015, to September 10, 2015, Claimant's authorized treating providers issued five (5) no-work orders on the following dates: July 3, 2015; July 7, 2015; July 21, 2015; August 13, 2015; and September 10, 2015. Thus, Claimant was rendered unable to earn any wages from July 3, 2015, to October 21, 2015. Claimant was released to full duty by Dr. Nystrom on October 22, 2015.

7. Claimant's testimony regarding her inability to earn any wages from July 3, 2015, to October 21, 2015, per her doctors' multiple no-work orders is credible and supported by the medical records.

8. On June 17, 2015, Respondent filed a General Admission of Liability admitting to medical benefits and temporary partial disability benefits (TPD) from April 29, 2015, and continuing.

9. On June 18, 2015, Respondent issued a TPD check to Claimant in the amount of $537.20 for the TPD period of April 29, 2015, to June 13, 2015. On July 2, 2015, Respondent issued a TPD check to Claimant in the amount of $175.26 for the TPD period June 14, 2015, to June 27, 2015. Then, on July 30, 2015, Respondent issued a TPD check to Claimant in the amount of $336.14 for the TPD period June 28, 2015, to July 2, 2015.

10. Pursuant to statute, following the TPD payment on July 2, 2015, Claimant's next payment of TPD was due by July 16, 2015. On July 30, 2015, Respondent issued the next TPD check to Claimant in the amount of $336.14 for the TPD period of June 28, 2015, through July 2, 2015.

11. From July 2, 2015, through September 1, 2015, Respondent issued no indemnity payments to Claimant, neither TPD nor TTD payments were made to Claimant by Respondent.

12. Then, on September 2, 2015, Respondent issued nine (9) TTD checks to Claimant for the periods of July 3, 2015, to August 4, 2015, and August 13, 2015, through September 2, 2015.

13. On September 4, 2015, Respondent issued three (3) TTD checks to Claimant for the periods of August 5, 2015, to August 12, 2015, and September 3, 2015, to September 6, 2015.

14. On September 11, 2015, Respondent issued a TTD check to Claimant for the period of September 7, 2015, to September 9, 2015.

15. Claimant credibly testified that she suffered economic hardships as a result of Respondent's payment of indemnity benefits. Claimant credibly testified that during the period of non-payment of indemnity benefits, July to September 2015, she was in her second trimester of pregnancy and due to her inability to earn any wages, her cell phone service was shut off, she was unable to afford the necessary and medically recommended nutrient-rich foods for prenatal health, and she was unable to afford the necessary repairs to her vehicle to make it operational.

16. Claimant credibly testified that she contacted her attorney's office numerous times to find out why she was not receiving the temporary disability benefits to which she was entitled.

17. On July 16, 2015, Claimant filed an Application for Hearing claiming penalties for Respondent's failure to pay TTD benefits. Claimant contends that Respondent did not cure their violation for failure to pay TTD benefits. Respondent issued its first installment of TTD benefits on September 2, 2015.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered:

The parties' arguments

1.Claimant argues that she proved by a preponderance of the evidence that she is entitled to an order awarding penalties against Respondent pursuant to Section 8-43-304 for failure to timely pay TTD. Claimant contends that Respondent was under a duty to pay TTD benefits to Claimant after she was taken off work by her authorized providers. Claimant further contends that Respondent received notice of the claim for penalties and did not attempt to cure the alleged violation. Respondent contends that it had no duty to pay TTD benefits. Respondent's further contend that it did not violate a provision of the Act, a rule or order of the Director or panel and therefore a penalty is not justified in this case.

Summary of Judge's determination

2. The Judge finds that Claimant failed to establish by a preponderance of the evidence that Respondent violated the Act, a rule or an order of the Director or panel. The Judge could not find authority for Claimant's argument that Respondent had a duty to pay TTD to Claimant after the July 3, 2015, no work orders from her authorized providers. The Judge further finds that a penalty for Respondent's failure to pay TPD conistent with the General Admission of Liability filed on June 17, 2015, was not raised by Claimant in the application for hearing. It is concluded that Claimant failed to pled with specificity a claim for penalty for failure to timely pay TPD benefits.

General legal principles

3. A claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the

employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, *supra*.

4. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

The claim for penalties for failure to timely pay TTD

5. Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The statute then creates a procedure for the alleged violator to cure the alleged violation within twenty days after the mailing of the application. If the violation is cured, the proponent of the penalty bears an increased burden of proof to establish by clear and convincing evidence that the violator knew, or reasonably should have known, that "such person was in violation."

6. The ICAO has held that the purposes of the specificity requirement contained in Section 8-43-304, C.R.S are to provide notice of the basis of the alleged violation so as to afford the putative violator an opportunity to cure the violation, and to provide notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense. *Davis v. K Mart,* W.C. No. 4-493-641 (ICAO April 28, 2004); *Gonzales v. Denver Public School District Number 1,* W.C. No. 4-437-328 (ICAO December 27, 2001). In essence, the notice aspect of the specificity requirement is designed to protect the fundamental due process rights of the alleged violator to be "apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of" its position. *Matthys v. City of Colorado Springs,* W.C. No. 4-662-890 (ICAO April 2, 2007). The statute does not prescribe a precise form for pleading penalties, and an ALJ may consider the circumstances of the individual case to determine whether the application for hearing was sufficiently precise to satisfy the statute. *See Davis v. K Mart*, W.C. No. 4-493-641 (ICAO April 28, 2004) (factual allegations contained in pleading were sufficiently specific to notify the respondent of the rule of procedure that was allegedly violated, and to extent respondent was unsure of precise nature of allegations discovery was available to assist in clarifying the issues.)

7. Section 8-43-304(1) provides for the imposition of penalties of up to $1,000.00 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" The assessment of penalties under this statute requires a two-step analysis. The ALJ must first determine whether the insurer's conduct constituted a

violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was "objectively unreasonable." *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Skelly v. Wal-Mart Stores, Inc.*, WC 4-632-887 (ICAO July 31, 2008).

8. In this case, Claimant failed to establish by a preponderance of the evidence that Respondent violated any specific rule, statute or order. There is no credible or persuasive evidence of record that Respondent should be penalized for late payment of TTD. The Judge can find no basis in a rule, statute or order that required Respondent to pay TTD beginning July 3, 2015, when Claimant was taken off work. Since it was not proven that Respondent violated any specific rule, statute or order, it cannot be found that an award of penalties under Section 8-43-304(1) is warranted.

The claim for penalties for failure to timely pay TPD

9. Claimant's primary argument appears to be that Respondent had a duty to pay TTD and failed to do so. However, it is also argued that notice to Respondent that Claimant was seeking penalties for late payment of TTD constitutes notice to Respondent that a penalty is sought for late payment of TPD. In support of this position, Claimant argues that the Act references the payment of "temporary disability benefits," without specification whether it is TTD or TPD. Claimant contends that, since there is no differentiation between TPD and TTD, notice of a claim for penalties for failure to timely pay TTD provides sufficient notice of a claim for penalties for failure to timely pay TPD.

10. As previously stated above in paragraph 5 of these Conclusions of Law, the requirement that a claimant plead with specificity the basis of a claim for penalties has two purposes. The specificity requirement provides notice of the basis of the alleged violation so as to afford the putative violator an opportunity to cure the violation, and provides notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense.

11. The statute, Section 8-42-106, C.R.S., governing the payment of TPD required Respondent to continue the payment of those benefits until Claimant reached MMI or Respondent offered modified employment and Claimant failed to respond to the offer of modified employment. Claimant was not placed at MMI nor was he given an offered of modified employment to which he failed to respond. Thus, TPD was the only indemnity payment that was required by law to continue. Yet, Claimant failed to plead a penalty for late payment of TPD

12. In this case, the ALJ concludes that Respondent had a duty under Section 8-42-106, C.R.S. to pay TPD to Claimant once every 14 days after the first payment of TPD was made to Claimant pursuant to the June 17, 2015, General Admission of Liability. Yet, it is also concluded that Claimant's pleading regarding a penalty claim for late payment of TPD was deficient to the extent that it did not identify TPD to be the benefit for which a late payment penalty was sought.

ORDER

It is therefore ordered that:

1. Claimant's claim for penalties under Section 8-43-304(1), C.R.S. is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 29, 2016

DIGITAL SIGNATURE:
Margot W. Jones

Margot Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-987-724, 4-986-776

ISSUES

- Whether Claimant demonstrated by a preponderance of the evidence that she suffered a compensable inguinal hernia while in the course and scope of her employment for Employer on May 29, 2015.

- If compensable, Claimant requests temporary disability benefits from September 12, 2015 and ongoing. She requests an average weekly wage (AWW) of $904.21. If compensable, Respondents contend Claimant's AWW is $569.12, and request penalties for Claimant's failure to report the May 29, 2015 injury until June 26, 2015.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On April 9, 2015, Employer hired Claimant to work as a furniture salesperson at its Thornton store. As part of her job duties, at the end of her shift Claimant dusted, vacuumed, and organized a portion of the showroom.

2. Claimant testified that on May 29, 2015, at approximately 9:45 p.m., she was vacuuming her work area. She stated that when she picked up the vacuum to get it over a shag rug, she had immediate pain in her right groin which went down her lower back. She stated that the pain was very severe but that after a short time, her pain lessened.

3. Claimant worked the rest of her shift and did not report any injury. She sought no medical care and she lost no time from work.

4. Claimant testified that on June 22, 2015, at about 9:15 p.m., she was walking at work while carrying a spray bottle and cloth when she experienced severe pain. She did not tell her manager that she had a work injury. She told her manager that she did not know what the problem was.

5. At hearing, Claimant testified that her pain on June 22, 2015 was the "same pain" that she previously had on May 29, 2015. Claimant testified that she was not injured on June 22, 2015, but instead experienced pain that day, which she stated was caused by the event on May 29, 2015 when she lifted the vacuum.

6. On June 23, 2015, Claimant went to the Emergency Room at St. Anthony's North. Those records state that Claimant started to have pain in her right lower back on the previous day, with no specific trauma or injury. Claimant was

diagnosed with right leg pain and probable sciatica. The record states that Claimant "had a similar incident one month ago that resolved on its own without any difficulty."

7. At hearing, Claimant testified that this medical record was incorrect because she did not tell the E.R. staff that her pain from the previous month (i.e., on or about May 29, 2015) had resolved.

8. The June 23, 2015 Emergency Room records contain no reference to Claimant's condition being work-related. At hearing, Claimant testified that she told the E.R. staff that her injury was work-related, and that the failure to reflect that fact was an error in the medical records.

9. On June 25, 2015, Claimant saw her personal physician, Dr. Karen Ratner, whose records reflect that Claimant had right back and right leg pain, which had a sudden onset three days ago "pushing heavy furniture at work" (quotation marks in original).

10. At hearing, Claimant testified that this medical record was incorrect, and that she did not tell Dr. Ratner that her pain was due to pushing heavy furniture at work.

11. On June 26, 2015, Claimant met with her store manager, Steve Williams. She testified that this was the first time that she reported an injury to her Employer. Claimant and Mr. Williams filled out an "Incident Report" together; he asked her questions, she answered, and he wrote down the answers. The Incident Report consists of two pages, both of which Claimant signed. It lists Claimant's injury as "sciatic nerve" and the body part as "lower back." It states that Claimant was injured while "reaching into an overhead cabinet to get some cleaning rags." It further notes that Claimant thinks "she may have injured herself vacuuming about a month prior at the Thornton store."

12. Steve Williams testified that he is Employer's store manager and Claimant's supervisor. Claimant called him on June 25, 2015, and asked to meet with him. He met with Claimant on June 26, 2015 to fill out an Incident Report and workers' compensation paperwork. He testified that prior to June 26, 2015, he had no knowledge that Claimant had any work-related injury, or that she had pain between late May and June 26, 2015.

13. Mr. Williams asked the Claimant various questions about her claimed work injury and he wrote down what she told him. On the Incident Report, he wrote "she tweaked her lower back while reaching into an overhead cabinet. This is what [Claimant] explained happened." He also wrote that Claimant "thinks she may have injured herself vacuuming about a month prior at the Thornton store." He stated that Claimant did not tell him that she lifted a vacuum.

14. Mr. Williams testified that Claimant continued to work for Employer through September 4, 2015, and then she stopped coming to work. He stated that

Employer was aware of Claimant's work restrictions and had accommodated them, and that no one at the store told Claimant that she should not come back to work. He stated that if she had continued to show up for work, she would still be working there, and that he did not know why she stopped showing up for work.

15. After meeting with Mr. Williams, Claimant went to see Dr. Michael Striplin. His records dated June 26, 2015 state that Claimant was pushing a vacuum on carpet a month ago and that she said she had some mild symptoms that persisted until June 22, 2015, when she noted the sudden onset of right hip and groin pain with no known injury. He noted she was diagnosed with sciatica at St. Anthony's North Emergency Room. He determined Claimant's pain complaints were not work-related and recommended that she follow-up with her personal care physician.

16. Contained in Dr. Striplin's records is Claimant's handwritten statement which reads, "I was vacuuming one day, I felt the pain while pushing the vacuum but I walked it off, a month later I was walking at work and the pain started again, but this time I could not walk, I went to the E.R."

17. Claimant testified that although her handwritten statement makes no reference to her pain being associated with lifting the vacuum, that she did lift it. She also stated that although she wrote that she had "walked off" the pain associated with vacuuming; her written statement was incorrect, and wrongly phrased.

18. Claimant stopped working for Employer on September 4, 2015. She said this was because she could not walk due to pain. She testified that no one told her she could not come back to work. She provided no documentation, including any medical record, to corroborate her statement that she was not able to continue working.

19. Employer's records show Claimant's last day at work was September 4, 2015, and that Claimant called in sick on September 5, 2015, and did not return.

20. On September 5, 2015, Claimant went to Kaiser and saw Dr. Jennifer Kuhl. Those records state that Claimant's "pain increased two weeks ago while playing with children and her son pulled her arm." At hearing, Claimant testified that her pain had increased the day before she saw Dr. Kuhl, not two weeks before.

21. On July 7, 2015, Claimant went to the North Suburban Medical Center Emergency Room for abdominal pain. This record reflects that Claimant reported "a tearing sensation in her right groin several weeks ago, progressively worse since that time occurred while lifting heavy objects at work at [Employer]." An ultrasound showed that Claimant had a "small defect" within the fascia, which measured 6.1 mm. The defect was referenced as a "small, fat-containing right-sided inguinal hernia."

22. On July 10, 2015, Claimant was seen by Edward Medina, M.D., who noted that he could not palpate Claimant's hernia. His note states that Claimant "lifted up a

vacuum when she felt pain in her right groin." This is the first reference in the medical records which associates Claimant's pain with having lifted a vacuum at work.

23. Medical records from Dr. Karen Ratner show that Claimant was diagnosed with chronic low back pain and arthropathy of multiple sites on three occasions prior to her May 2015 alleged injury. However, in her recorded statement, taken on July 8, 2015, Claimant denied having prior medical treatment to her low back.

24. A Kaiser record dated August 18, 2015 reflects that Claimant asked for a letter "to take to her work" and that her Kaiser physician, Dr. James Hutchings, responded that he had no documentation that Claimant truly had a hernia, and that he could not state that it was work-related. He stated that he could document only that Claimant reported that she had a work-related injury.

25. A Kaiser record from Dr. Karen Black dated November 20, 2015 reflects that Claimant called Dr. Black that day in order to obtain documentation regarding the causes of hernia. These records contain an email from Claimant to Dr. Black dated November 23, 2015 stating "I have never experienced this groin pain until I lifted a vacuum over a shag rug, can you please explain on your note if you think that vacuum could cause or aggravate a hernia." In response, Dr. Black wrote Claimant a letter dated November 25, 2015. This letter contains data on various factors that are associated with hernias. Dr. Black wrote, inter alia, that "the relationship between inguinal hernias and intermittent straining or heavy lifting is not clear; some studies suggest that the incidence of hernia is no higher in professions performing heavy manual labor than in sedentary professions, while others have come to the opposite conclusion." Dr. Black did not state that Claimant's having lifted a vacuum probably caused or aggravated her hernia.

26. At hearing, Claimant testified that no one had told her that there was a relationship between the pain which she felt on or about May 29, 2015 and the pain which she felt on June 22, 2015. Claimant submitted no medical record or report which: a) concluded there was any relationship between her pain on the two dates; b) found that her pain on May 29, 2015 was likely caused by lifting a vacuum at work; or c) found that lifting the vacuum probably caused her hernia.

27. Dr. Lesnak performed an IME for Respondents and testified at hearing. He testified that Claimant's complaints were primarily groin pain, and that while a hernia can cause groin pain, there are other causes, including hip pathology, muscle or nerve pathology, and unknown causes. He stated that an increase in abdominal pressure can cause a hernia and/or hernia pain. He noted that Claimant stated that she had pain while walking, including at work on June 22, 2015. He stated that walking does not cause an increase in intra-abdominal pressure, and that it is not probable that Claimant's pain complaints on June 22, 2015 were related to a hernia.

28. Dr. Lesnak testified that although an ultrasound detected a hernia, it was so small that he could not feel it. He characterized her hernia as a small, fat-filled

defect, which was not likely a pain generator. While Claimant had stated that walking, twisting, sitting, or having her child pull on her arm caused her symptoms, Dr. Lesnak testified that these activities do not cause an increase in abdominal pressure, and would not cause a hernia to become painful. He stated that any pain related to these activities would probably be related to Claimant's preexisting chronic multi-site arthralgia, i.e., joint pain, and was not work-related.

29. Dr. Lesnak stated that it was not medically probable that lifting a vacuum on or about May 29, 2015 caused Claimant's hernia, because lifting in the way Claimant described would not cause an increase in abdominal pressure. Dr. Lesnak testified that it is more probable than not that Claimant's pain on or about May 29, 2015 was due to her preexisting chronic back and joint pain.

30. Dr. Lesnak noted that the record shows multiple histories of how Claimant's purported injury occurred, and that it was not until July 10, 2015 that the records reflect that Claimant said she injured herself by lifting a vacuum at work. He commented that although Claimant testified she did not tell the E.R. personnel on June 23, 2015 that her prior pain from May 2015 had "resolved on its own without difficulty", that the E.R. note is more reliable. He stated that E.R. personnel would be unlikely to concoct such a note.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101*, et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102 (1) C.R.S. The Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark,* 197 Colo*.* 306, 592 P. 2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of the injured worker or the rights of employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P. 3d 385 (Colo. App. 2000).

Claimant carries the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment. *See City of Boulder v.*

Streeb, 706 P.2d 786 (Colo. 1985). The facts in a workers' compensation case may not be interpreted liberally in favor of either Claimant or Respondents. Section 8-43-201. C.R.S. A preponderance of evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P 2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Claimant alleges that she sustained a work-related hernia on May 29, 2015 while pushing and then lifting a vacuum cleaner over a shag rug at work. She did not report this incident, sought no medical treatment, and lost no time from work. She alleges that her pain from this incident recurred on June 22, 2015 while she was walking at work. She does not contend that she was injured on June 22, 2015. Rather, she states that she felt pain on that day, which she believes was due to a hernia from lifting a vacuum on May 29, 2015. Claimant alleges she was misdiagnosed with sciatica.

When Claimant first sought treatment on June 23, 2015, those records state that while Claimant had pain from a similar incident a month earlier, her pain "resolved on its own and without difficulty." Although Claimant states she did not make this statement, it is improbable that the E.R. staff entered this note into the record without Claimant having made the statement. Claimant's testimony that several of her medical records contain errors or misstatements is not credible.

Prior to her claimed injury of May 29, 2015, Claimant had been diagnosed with chronic back and joint pain. While she may have had a flare of back pain on May 29, 2015 associated with vacuuming, there is no evidence that she sustained a compensable injury that day. She sought no treatment and lost no time from work. Instead, she stated that her pain lessened after a few minutes. The medical records show that this pain resolved on its own. While Claimant had another flare of pain while walking at work on June 22, 2015, she admitted that she was not injured at work on that day.

The evidence shows that Claimant's inguinal hernia is probably not the cause of her pain complaints. It is more probable that her pain complaints are due to her preexisting condition.

The record contains no documentation from any physician indicating that Claimant's pain, whether on May 29 or June 22, 2015, was probably related to her hernia. Claimant has failed to prove the existence of a compensable injury by a preponderance of the evidence.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for compensation is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 9, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained an injury proximately caused by the performance of service arising out of and in the course of his employment?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing July 15, 2015 and ongoing?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable and necessary medical benefits to treat the alleged injury?

- What is Claimant's average weekly wage?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 though 8 were received into evidence. Respondents' Exhibits A through E were received into evidence.

2. Employer operates a large storage facility. Claimant was employed as a janitorial type worker. His duties included operating a forklift, opening railcar doors and lifting shingles.

3. Claimant testified as follows. On May 6, 2015 he was performing his duties at work. A broken pallet caused bundles of shingles to fall on the floor. Claimant was responsible for picking up the bundles and placing them on a different pallet. Each bundle of shingles weighed approximately 60 pounds. Claimant picked up one of the bundles and twisted to place it on a pallet. He experienced immediate pain in the area beneath his left breast. Claimant also experienced shortness of breath and began vomiting. Claimant remembered that lead manager Larry Clark, a "supervisor" and four other persons were present at the time of this event. Larry Clark remarked that Claimant didn't look good and instructed Claimant to sit down. Claimant sat down and rested for about 20 minutes but completed his shift. Claimant went home about 3 p.m. but was still experiencing severe pain in his chest. That night Claimant went to North Suburban Medical Center (NSMC) for treatment.

4. In answers to interrogatories Claimant stated that his supervisor "Bruce Smith" was also present at the time he lifted the bundle. Claimant stated that Bruce Smith asked if Claimant was "alright."

5. Claimant admitted that he did not immediately report the injury to his employer. Claimant testified did not report the injury to the Employer until July 15, 2015.

6. Mr. Brad Abell (Abell) testified on behalf of the Employer. Abell is the Employer's facilities manager and was Claimant's manager. Abell testified that the Employer has regular meetings and posts signs instructing employees on to how to report injuries. Abell testified he has no difficulties in speaking with Claimant and that in May 2015 Claimant did not report that he sustained an injury while lifting shingles. However, Abell recalled that on July 1, 2015 Claimant came to his office and reported that 3 months previously he felt burning pain while opening a railcar door. Abell stated that he reminded Claimant he should have reported the incident within 72 hours. Claimant replied that he did not mention the episode because he had experienced previous episodes of heartburn and thought this was just another one of them.

7. Mr. Bruce Smith (Smith) testified on behalf of the Respondents. Smith testified that he worked in the same area as Claimant but was not Claimant's supervisor. Smith did not recall observing any incident on May 6, 2015 where Claimant lifted shingles and then began to lose his breath and vomit. Smith denied that he went up to Claimant and asked if Claimant was "alright."

8. Claimant reported to the NSMC emergency department (ED) late in the evening of May 6, 2015. He was seen by a physician early on May 7, 2015. The Claimant gave a history that the previous day he saw a dentist for a molar infection. After visiting the dentist Claimant reportedly took "new medications" including vicodin, amoxicillin and ibuprofen. Claimant reported that he lay down after taking the medications and began to experience shortness of breath (SOB), diaphoresis, tingling, light headedness and nausea. Claimant denied vomiting and abdominal pain. Claimant was discharged at 4:25 a.m. on May 7 with a "primary impression" of "near syncope" and "secondary impressions" of history of dental abscess and "medication reaction." Claimant agreed to stop taking vicodin. The May 6, 2015 NSMC ED record does not indicate that Claimant reported a lifting injury at work or that he associated his symptoms with a lifting injury.

9. Claimant reported to the NSMC ED on May 20, 2015 at 6:18 p.m. Claimant reported he was experiencing "upper abdominal burning with some shortness of breath." Claimant gave a history that these symptoms began earlier in the day shortly after he "had spicy food/burrito." Claimant also reported he "had prior symptoms in the past when he took an acid reflux medication that improved his symptoms." Claimant's pain improved "in the ED with GI cocktail." Claimant was diagnosed with gastritis (irritation of stomach lining) and discharged home. The May 20, 2015 NSMC ED record does not indicate that Claimant reported a lifting injury at work or that he associated his symptoms with a lifting injury.

10. Claimant returned to the NSMC ED on May 21, 2015 at 7:00 a.m. Claimant gave a history that he was driving to work when he experienced burning pain in the throat, vomiting and dyspnea. The symptoms were reportedly similar to those

claimant experienced the previous day. The ED physician assessed gastroesophageal reflux disease (GERD) and discharged Claimant. The May 21, 2015 NSMC ED record does not indicate that Claimant reported a lifting injury at work or that he associated his symptoms with a lifting injury.

11. On May 22, 2015 Claimant went to Clinica Family Health (Clinica) where he was examined by NP Kelley Creamer. Claimant reported that he had been to the emergency room 4 times over the previous month and was diagnosed with gastritis. His symptoms included problems swallowing and breathing. Claimant stated the hospital told him "everything was normal" but he wanted his tonsils checked because his "heartburn" was ongoing. NP Creamer assessed GERD, environmental allergies, snoring, atypical chest pain, obesity and "encounter to establish care." NP Creamer recommended Claimant continue famotidine and carafate for GERD and prescribed an albuterol inhaler. The May 22, 2015 Clinica record does not indicate that Claimant reported he sustained a lifting injury at work or that he associated his symptoms with a lifting injury.

12. On May 28, 2015 Claimant returned to Clinica for blood work, a PE and follow-up from the May 22 examination. NP Creamer noted Claimant stated that his GERD was "a lot better, except when he lifts heavy objects." On PE NP Creamer noted Claimant's abdomen was normal with no tenderness, no hepatic enlargement, no splenic enlargement and no hernia. Claimant's respiration was also normal.

13. On June 29, 2015 NP Creamer again examined Claimant for reported "abdominal pain." The pain reportedly began 2 months previously, had not changed and was located in the "epigastric" area. Claimant did not report dyspnea or heartburn or nausea. Rather, Claimant reported "chest pressure" that sometimes "goes away fast" and was "worse with work or with stress." NP Creamer prescribed albuterol, omeprazole and released Claimant from work until July 2, 2015. NP Creamer further recommended that Claimant undergo a cardiac "stress test."

14. On July 3, 2015 Claimant was seen at the NSMC ED for chest pain "over the last 2 months." Claimant reported the pain had worsened over the last two days. The ED physician's "primary impression" was GERD and Claimant was discharged home.

15. On July 10, 2015 Claimant returned to Clinica and was examined by NP Devon Gershaneck. Claimant complained of a "possible chest hernia." He explained that he had experienced 2 months of chest pain and SOB that had been treated as heartburn. Claimant stated his pain began "after lifting a heavy bundle of shingles at work." NP Gershaneck assessed "chest tightness" and obesity. NP Gershaneck opined the chest tightness was "likely multi-factorial" and that Claimant's "story seems c/w musculoskeletal strain."

16. On July 14, 2015 Claimant underwent a resting EKG. The test was negative for ischemia.

17. On July 14, 2015 Claimant was again examined by NP Creamer. Claimant advised Creamer he believed his SOB and chest pain were caused by an injury at work on May 6, 2015 when he was "lifting something heavy." NP Creamer assessed active chest pain of "uncertain etiology." Based on PE NP Creamer was highly suspicious of a hiatal hernia or possibly an "MSK injury." Claimant was encouraged to wear a "lifting belt while at work" and educated "regarding worsening of hernia if lifting belt is not worn while lifting."

18. Claimant testified that on July 15, 2015 he informed the Employer of the May 6, 2013 injury. Claimant recalled speaking to an Employer representative, Mr. Joe Esteban (Esteban), on July 15. According to Claimant Esteban called saying that he had spoken to the hospital and wanted to know what happened to Claimant. Claimant testified that he told Esteban that he had been treated for gastritis, but since he wasn't getting any better he told Esteban about the May 6 injury.

19. On July 15, 2015 Claimant selected Michael Ladwig, M.D., as the authorized treating physician (ATP) for the alleged injury.

20. Dr. Ladwig examined Claimant on July 15, 2015. Claimant gave a history that on March 5, 2015 [sic] he was lifting multiple packs of shingles when he felt pain on the left side of his abdomen. Claimant advised he had been treated by his primary care physician (PCP) for three months and the PCP believed he had a hernia related to the lifting incident. On PE of the abdomen Dr. Ladwig noted no swelling, no deformity, no redness, no ecchymosis and no edema. Claimant was tender to palpation of the left upper quadrant and splenic area. Dr. Ladwig assessed abdomen strain versus hernia versus a medical issue. Dr. Ladwig wrote that it was undetermined if Claimant's condition was "work-related or not." Dr. Ladwig indicated he would request records from NSMC and Claimant's PCP and review the medical records to determine "work relatedness" of Claimant's condition. Dr. Ladwig restricted Claimant to no lifting, carrying, pushing or pulling in excess of 10 pounds and no repetitive lifting.

21. Claimant testified that the restrictions imposed by Dr. Ladwig would have prevented him from performing some of his regular job duties including opening railcar doors and lifting shingles.

22. Dr. Ladwig saw the Claimant on July 21 and July 22, 2015. On July 22 Dr. Ladwig issued a report stating he rechecked Claimant for complaints of chest and abdominal pain. Dr. Ladwig stated that he reviewed a note from Claimant's "PCP" diagnosing Claimant with GERD with no relationship to work. Dr. Ladwig assessed abdominal pain and GERD unrelated to Claimant's employment. Dr. Ladwig opined Claimant had reached maximum medical improvement without impairment and released Claimant to return to work without restrictions.

23. On July 23, 2015 Claimant was examined by Mark Flannigan, M.D. Dr. Flannigan recorded a history that Claimant was "lifting" and "felt something tear in epigastric" area. Claimant also reported SOB and that he had been treated for gastritis 7 times in 2 months. On July 24, 2015 Dr. Flannigan authored a note opining that

Claimant has a “history compatible with traumatic hiatal hernia” and recommending that he be seen by a workers’ compensation gastroenterologist for continued hiatal hernia symptoms.

24. On August 19, 2015 Claimant underwent an upper gastrointestinal endoscopy. This procedure was performed by Daniel Siegel, M.D. Dr. Siegel’s impressions included a “small hiatus hernia” and “LA Grade B reflux esophagitis.” Dr. Siegel recommended Claimant use omeprazole and adhere to an anti-reflux regimen.

25. On November 25, 2015 Albert Hattem, M.D., performed an independent medical examination (IME) of Claimant. This examination was performed at Respondents’ request. Dr. Hattem is a board certified in occupational medicine, practices occupational medicine and is level II accredited. In connection with the IME Dr. Hattem took a history from Claimant, reviewed some of Claimant’s medical records and performed a PE.

26. Dr. Hattem issued a written report on November 25, 2015. Respondents’ counsel requested that Dr. Hattem address noted the question of whether Claimant’s gastrointestinal complaints were related to his work activities. Claimant gave a history that on May 6, 2015 he lifted 70 pounds of shingles, twisted and developed left upper abdominal pain. On review of systems Claimant reported symptoms of chest pain, SOB, nausea and vomiting. Claimant informed Dr. Hattem that he recently had a “scope” and was diagnosed with “two hernias – one upper and one lower on his esophagus.” On PE Dr. Hattem noted that Claimant weighed 259 pounds with a BMI of 35.1. The abdomen was examined and there was no tenderness to palpation, no masses and no umbilical or ventral hernias.

27. Dr. Hattem assessed Claimant as suffering from GERD and a likely hiatal hernia. Dr. Hattem explained that a hiatal hernia occurs when the upper portion of the stomach protrudes through the diaphragm into the lower esophagus causing the lower esophageal sphincter to remain open. This condition can allow stomach contents to enter the esophagus resulting in “heartburn” related to GERD.

28. Dr. Hattem opined Claimant’s GERD and hiatal hernia are not causally related to the alleged industrial injury of May 6, 2015. In support of this conclusion Dr. Hattem noted that umbilical and ventral hernias are commonly caused by lifting, but Claimant does not have either of these conditions. Dr. Hattem explained that GERD and hiatal hernias are very common conditions among the population. Dr. Hattem further explained that hiatal hernias are even more common among obese persons such as Claimant. Dr. Hattem wrote that a hiatal hernia is a congenital condition in which the “junction of the esophagus and stomach lose elasticity.” Dr. Hattem noted that The American Medical Association Guides to the Evaluation of Disease (AMAGED) and Injury state that “no clear occupation is associated with increased risk for development of GERD.” Therefore, the AMAGED state that GERD and hiatal hernias “are not considered work related.” Dr. Hattem noted that the only medical literature “implicating trauma as a cause of hiatal hernia involves only very violent motor vehicle accidents in which, for instance, a steering wheel is pushed up into the driver’s chest

wall." Dr. Hattem opined that lifting shingles does not constitute the type of trauma necessary to cause a hiatal hernia. Dr. Hattem also opined that the temporal relationship between lifting tiles and the development of gastrointestinal symptoms "does not imply that one causes the other." Dr. Hattem agreed with Dr. Ladwig that Claimant's GERD and hiatal hernia were not caused by work activities.

29. Dr. Hattem testified at the hearing. Dr. Hatter's testimony was consistent with his written report. Dr. Hattem stated that his opinions were expressed to a reasonable degree of medical probability. Dr. Hattem opined that lifting does not aggravate or accelerate GERD or a hiatal hernia. He testified that in his 25 years of experience he has not seen a case of work-related GERD or hiatal hernia.

30. Claimant failed to prove it is more probably true than not that lifting tiles at worked caused him to suffer GERD and a hiatal hernia, or that lifting tiles aggravated or accelerated either of these conditions.

31. The credible and persuasive evidence establishes that Claimant suffers from a hiatal hernia and GERD. The upper gastrointestinal endoscopy establishes that Claimant has a hiatal hernia and GERD. Dr. Hattem persuasively opined that Claimant suffers from a hiatal hernia and GERD. Dr. Hattem credibly explained how a hiatal hernia causes GERD by permitting stomach contents to enter the esophagus and cause inflammation. Dr. Flannigan agrees with Dr. Hattem that Claimant has a hiatal hernia and related symptoms.

32. Dr. Hattem credibly and persuasively opined that Claimant's hiatal hernia and related GERD symptoms were not caused, aggravated or accelerated by Claimant's work-related activity of lifting tiles. Dr. Hattem credibly and persuasively explained that hiatal hernias and GERD are common conditions among the population, and that hiatal hernias are particularly prevalent among obese persons such as the Claimant. Dr. Hattem also credibly and persuasively opined that hiatal hernias are typically congenital rather than work-related conditions, and that this opinion is supported by the medical literature. Dr. Hattem also credibly explained that Claimant's history does not demonstrate that lifting the tiles generated the type of force necessary to cause a "traumatic" hiatal hernia.

33. Dr. Hatter's opinions are substantially corroborated by the opinions expressed by Dr. Ladwig.

34. Dr. Flannigan's opinion that Claimant's history is consistent with a "traumatic" hiatal hernia is not as persuasive as Dr. Hattem's contrary opinion. Dr. Flannigan's notes do not reflect that he reviewed any of Claimant's medical records prior to examining Claimant on July 23, 2015. Therefore, Dr. Flannigan could not have known that Claimant failed to even hint that his gastrointestinal symptoms were related to lifting at work until at least three weeks after the alleged incident. (See Finding of Fact 12). Dr. Flannigan could not have known that when Claimant went to the NSMC ED on May 7, 2016, within hours of the alleged lifting incident, Claimant associated his symptoms with taking new medications rather than lifting tiles. Neither could Dr.

Flannigan have known that on May 20, 2015 Claimant would advise the ED his symptoms were associated with eating spicy food. Because Dr. Flannigan's opinion concerning causation is not grounded in a meaningful review of Claimant's medical records, the opinion is not persuasive. Moreover, Dr. Flannigan did not persuasively refute Dr. Hattem's arguments that hiatal hernias are typically congenital and that the lifting incident did not generate sufficient force to cause a "traumatic" hiatal hernia.

35. Insofar as Claimant's testimony could permit the inference that he sustained a hiatal hernia and consequent GERD from lifting tiles on May 6, 2015, that testimony is not credible. Claimant's testimony that on May 6 he experienced sudden chest pain, trouble breathing and vomiting after lifting tiles is contradicted by the medical records and other evidence. Claimant indicated in answers to interrogatories that the tile incident was witnessed by several other workers including Smith. However, Smith credibly testified he did not witness any such event. Abell's testimony persuasively establishes that Claimant was informed of the obligation to report work injuries, but Claimant did not report any injury to the Employer until at least July 1, 2015. When Claimant initially reported an injury to Abell on July 1 Claimant stated that he incurred the injury while opening a railcar door, not while lifting tiles. It was not until July 10, 2015 that the medical records document any report by Claimant that his injury was caused by lifting tiles. (See Finding of Fact 15).

36. Evidence and inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY OF GERD AND HIATAL HERNIA

Claimant contends he proved it is more probably true than not than on May 6, 2015 he sustained injury proximately caused by the performance of service arising out of and in the course of his employment. Specifically, Claimant alleges that lifting tiles caused him to suffer a hiatal hernia and consequent GERD. Respondents contend that the credible and persuasive evidence establishes that Claimant's gastrointestinal symptoms were not proximately caused by the alleged injury of May 6. The ALJ agrees with Respondents.

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks disability benefits and medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 30 through 35, Claimant failed to prove it is more probably true than not that he sustained an injury arising out of and in the course of his employment that proximately caused, aggravated or accelerated his hiatal hernia and GERD. As found, the ALJ credits the opinion of Dr. Hattem that Claimant's hiatal hernia and GERD are most probably the result of a congenital condition uninfluenced by the performance of his work including lifting tiles on May 6, 2015. The ALJ further credits Dr. Hattem's opinion that lifting tiles would not cause sufficient force to cause, aggravate or accelerate a hiatal hernia and GERD. Dr. Flannigan's opinion is not credible and persuasive for the reasons stated in Finding of Fact 34. Insofar as Claimant's testimony would permit an inference that lifting tiles caused, aggravated or accelerated his hiatal hernia and GERD his testimony is not credible for the reasons stated in Finding of Fact 35.

Because Claimant failed to prove that he sustained a compensable injury the ALJ need not consider the other issues raised by the parties.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in WC 4-988-804 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 29, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-988-881-01

ISSUES

- Whether Claimant's EMG on August 18, 2015 is compensable under workers' compensation.

- Whether Claimant's injection for carpal tunnel syndrome on September 15, 2015 is compensable under workers' compensation.

- Whether Claimant's previously recommended medical care is reasonable, necessary, and related to the work injury and compensable under workers' compensation.

- Whether Claimant is entitled to TPD benefits from April 7, 2015 to November 1, 2015, and ongoing.

➢ STIPULATIONS

At the onset of hearing, Respondents advised that they no longer disputed compensability and would be filing a General Admission of Liability. The parties stipulate that this claim is compensable. The parties stipulate that Claimant's average weekly wage (AWW) is $356.26. Additionally, the parties stipulate that time period at issue for temporary partial disability benefits is April 7, 2015, through November 1, 2015. Claimant reserves for future determination her right to temporary disability benefits as of November 2, 2015, and continuing, until terminated by law.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On April 6, 2015, Claimant, a food preparer and server for Employer, injured her right upper extremity when a box fell and struck her in her right shoulder. Claimant dropped the two bags of trash she was carrying and fell forward, striking her right hand on a metal shelf. Claimant's supervisor, Laura Serrano, witnessed the injury and directed Claimant to the authorized treating physician.

2. On April 7, 2015, Claimant treated with Brian Beatty, D.O, the authorized treating physician, and reported the circumstances of her injury. Claimant reported right shoulder and right hand pain. Dr. Beatty noted tenderness and mild swelling on the dorsum of Claimant's right hand. Dr. Beatty prescribed Claimant medications and assessed work restrictions, including no lifting, carrying, pushing, pulling, or pinching/gripping greater than one pound, as well as no reaching over head or away from her body with her right arm.

3. On April 14, 2015, Claimant treated with Dr. Beatty and reported continued right shoulder pain and right hand pain, including right middle finger pain and stiffness. Dr. Beatty noted tenderness and pain over the dorsum of Claimant's right hand. Dr. Beatty diagnosed Claimant with: a) right shoulder contusion; b) right shoulder acromioclavicular (AC) joint strain; c) right hand contusion; and d) right middle finger tendinitis. Dr. Beatty recommended physical therapy and decreased Claimant's right upper extremity restrictions to no more than two pounds lifting, carrying, pushing/pulling, and pinching and no reaching over head or away from her body.

4. On April 28, 2015, Claimant treated with Dr. Beatty and reported continued right shoulder and right hand pain and right middle finger pain and stiffness. Dr. Beatty noted AC joint tenderness and right hand tenderness and pain over the palmer aspect of the hand along the middle finger. Dr. Beatty maintained Claimant's treatment plan and work restrictions.

5. On May 5, 2015, Claimant treated with Dr. Beatty and reported right shoulder pain and right hand pain with numbness and tingling but without weakness. She also reported pain and stiffness in her right middle finger. Dr. Beatty noted AC joint tenderness, right hand tenderness, and decreased sensation. Dr. Beatty recommended a right shoulder MRI and referred Claimant to Dr. Kawasaki for an EMG/nerve conduction study due to the numbness in her right arm. He referred Claimant to Dr. Fell for chiropractic treatment. Dr. Beatty decreased Claimant's right upper extremity restrictions to no activity more than five pounds.

6. On May 14, 2015, Claimant treated with Dr. Beatty and reported ongoing right shoulder pain, right hand pain with numbness and tingling, and right middle finger stiffness. Claimant added reports of weakness in her right shoulder. Claimant reported having trouble squirting ketchup bottles. Dr. Beatty maintained Claimant's treatment plan and work restrictions.

7. On May 21, 2015, Claimant underwent a right shoulder MRI, which revealed supraspinatus and infraspinatus tendinosis with focal thickening at the anterior aspect of the infraspinatus and possible shallow articular surface tear, and moderate AC joint osteoarthritis.

8. On May 28, 2015, Claimant treated with Dr. Beatty and reported continued right shoulder pain and weakness, right hand pain with numbness, tingling, pain and stiffness in her right middle finger, and right-sided neck pain. Dr. Beatty reviewed Claimant's right shoulder MRI and maintained Claimant's treatment plan and work restrictions.

9. On June 11, 2015, Claimant treated with Dr. Beatty and reported the same complaints regarding her right shoulder, right hand, and right middle finger. Dr. Beatty noted tenderness over the AC joint and other areas of the right shoulder and tenderness over the palmar aspect of Claimant's right hand with decreased sensation in a glove-like pattern. Dr. Beatty maintained Claimant's treatment plan and work restrictions.

10. On June 16, 2015, Claimant underwent her first physical therapy session and reported right shoulder and hand pain with electrical shocks. Claimant reported pain primarily on the palmar/dorsal surface of her right hand. Claimant reported that she would like to be able to work full duty without increased pain. *Claimant's Exhibit 9, pages 88-90*. From June 16, 2015, through September 21, 2015, Claimant underwent seven physical therapy sessions. *Claimant's Exhibit 9, pages 88-108*.

11. On June 25, 2015, Claimant treated with Dr. Beatty and reported ongoing issues with her right shoulder, right hand, and right middle finger, including right shoulder weakness and right hand numbness and tingling. Dr. Beatty made the same objective findings as in prior visits. Dr. Beatty referred Claimant to Dr. Davis for examination regarding her right upper extremity and maintained Claimant's work restrictions.

12. Claimant's June 25, 2015 appointment with Dr. Beatty was the first appointment at which an interpreter was present. Claimant did not have an interpreter present for her first seven visits with Dr. Beatty.

13. In each of Dr. Beatty's reports, he relates Claimant's symptoms to her April 6 work injury.

14. On June 26, 2015, Claimant treated with Craig Davis, M.D., an orthopedic surgeon. She reported the circumstances of her injury and her ongoing pain complaints, including right shoulder and right hand/middle finger pain. Dr. Davis reviewed the right shoulder MRI and noted significant edema around the AC joint with significant degenerative findings, as well as rotator cuff tendinitis. Dr. Davis gave Claimant an injection in her right AC joint and noted that Claimant may have subacromial bursitis. Dr. Davis also prescribed Claimant new medications. Dr. Davis diagnosed Claimant with trigger finger, AC joint separation, and rotator cuff tendinitis and recommended Claimant follow-up for another injection.

15. On June 30, 2015, Claimant treated with Robert Kawasaki, M.D. and reported the circumstances of her injury, including how after the box struck her shoulder, she fell forward "jamm[ing] her hand on a metal shelf." Claimant reported swelling along the ulnar aspect of her hand and her knuckles, as well as some problems with her middle finger. Additionally, Claimant reported numbness and tingling down her right upper extremity and into her hand, mostly in the middle and small digits. On examination of Claimant's right wrist and hand, Dr. Kawasaki noted right hand and right middle finger swelling, positive median nerve compression, and positive Tinel's over the ulnar groove. Dr. Kawasaki commented that Claimant's treatment had been appropriate so far, except that Claimant's physical therapy should not have been terminated. Dr. Kawasaki recommended ongoing therapy. Because he found Claimant's pattern of right upper extremity numbness to be unusual, Dr. Kawasaki recommended an EMG/nerve conduction study to rule out right cervical radiculopathy, brachial plexopathy, and compression neuropathy.

16. On July 9, 2015, Claimant treated with Dr. Beatty with an interpreter present. She reported that she underwent a right shoulder injection with Dr. Beatty and was off work for five days. Claimant reported the injection temporarily resolved her right shoulder and right hand symptoms but that her symptoms worsened since she returned to work. She reported her right hand was about the same as it was prior to the injection. Claimant continued to report right hand pain, numbness, and tingling. Dr. Beatty maintained Claimant's work restrictions.

17. On July 16, 2015, Claimant treated with Dr. Davis and reported excellent improvement for one week following the right shoulder injection but that it had worn off. Claimant reported ongoing right shoulder and right hand/middle finger pain. Dr. Davis noted that Claimant may have subacromial bursitis and injected Claimant's right shoulder. Regarding Claimant's right hand/middle finger, Dr. Davis recommended surgery, including trigger finger release and flexor tenosynovectomy with cyst removal.

18. On July 23, 2015, Claimant treated with Dr. Beatty with an interpreter present. She reported the most recent right shoulder injection temporarily relieved her symptoms, but only for a couple days. Claimant reported that she had right hand surgery scheduled for August 14, 2015. Dr. Beatty maintained his treatment plan and Claimant's work restrictions.

19. On August 14, 2015, Claimant treated with Dr. Davis and reported that her right hand/middle finger surgery had been denied, and that she had not had any treatment since her last visit. Claimant reported that pain was spreading into her neck. Claimant reported ongoing right shoulder and right hand/middle finger pain. Dr. Davis noted Claimant's ongoing pain and other issues in her right shoulder and right hand/middle finger. He emphasized that Claimant's lack of treatment was delaying her recovery.

20. On August 18, 2015, Claimant underwent an EMG/nerve conduction study with Dr. Kawasaki, who diagnosed Claimant with moderate right median nerve compression neuropathy, compatible with moderate right carpal tunnel syndrome.

21. On August 20, 2015, Claimant treated with Dr. Beatty and reported continued pain in her right shoulder and hand without numbness, tingling, or weakness. Dr. Beatty noted that Dr. Davis' requests for right hand surgery and physical therapy were denied. Dr. Beatty noted that he wanted to proceed with Dr. Davis' recommendations, and he otherwise maintained his treatment plan and Claimant's work restrictions.

22. On August 25, 2015, Respondents filed a Notice of Contest, alleging Claimant's injury did not occur within the course and scope of her employment with the Employer.

23. On September 3, 2015, Claimant treated with Dr. Beatty with an interpreter present. Claimant reported continued right shoulder and right hand pain. Dr. Beatty recommended physical therapy for her right shoulder and hand. Dr. Beatty

maintained Claimant’s work restrictions, including no lifting, carrying, pushing, or pulling greater than ten pounds, no repetitive lifting greater than five pounds, and restricted pinching and gripping.

24. On September 15, 2015, Claimant treated with Dr. Davis and reported ongoing right shoulder pain and right hand/middle finger pain. Claimant reported continued numbness and tingling in her wrist and hand. With respect to carpel tunnel syndrome, Dr. Davis noted, “At her right hand, she still complains of numbness and tingling involving the radial digits which is worse at night and with activity. She says this has been present since the injury in April and she denies any tingling in her fingers prior to that.” Dr. Davis noted positive Tinel’s and median nerve compression testing at the right wrist, and crepitation over the flexor sheath with a palpable lump in the right middle finger. Based on these findings and his review of the EMG/nerve conduction test results, Dr. Davis diagnosed Claimant with right carpal tunnel syndrome. Dr. Davis injected Claimant’s right carpal tunnel, and the injection provided temporary relief. Dr. Davis also requested authorization for right middle finger flexor tenosynovectomy.

25. On October 20, 2015, Claimant applied for a hearing on: a) compensability; b) reasonable and necessary medical benefits; c) average weekly wage; and d) temporary disability benefits from April 6, 2015, to ongoing.

26. On November 13, 2015, Respondents filed a Response to Claimant’s Application for Hearing and endorsed the same issues as Claimant, as well as general affirmative defenses, including course and scope of employment and “Respondents deny and contest the right middle finger flexor tenosynovectomy of Dr. Davis as being non-work related; Claimant is not entitled to TTD benefits; Claimant continues to work for employer and TPD benefits, if owed must be determined.”

27. On January 11, 2016, Claimant underwent an independent medical examination with Respondents’ retained expert witness John D. Sanidas, M.D. Dr. Sanidas met with Claimant to discuss her injury, examine her, and review her medical records. Dr. Sanidas opined that on April 6, 2015, Claimant sustained an industrial injury to her right upper extremity. Dr. Sanidas diagnosed Claimant with: 1) right shoulder contusion, minimal AC joint separation; 2) right middle finger flexor sheath contusion; and 3) carpal tunnel syndrome. Dr. Sanidas opined Claimant’s trigger finger was secondary to her industrial injury. If Claimant’s trigger finger continued to be symptomatic, Dr. Sanidas agreed with Dr. Davis’ surgical recommendation. Dr. Sanidas noted that Claimant needs medical benefits for her right shoulder and right hand. Dr. Sanidas determined that Claimant’s carpal tunnel syndrome was an incidental finding and not related to Claimant’s industrial injury.

28. At Hearing, Dr. Sanidas testified as an expert in the field of occupational medicine. He testified that Claimant speaks Spanish and that he communicated with Claimant through an interpreter. Dr. Sanidas testified that on April 7, 2015, the day after her injury, Claimant treated with Dr. Beatty and reported right hand pain, among other issues. Dr. Sanidas agreed that Claimant did not have an interpreter present for her first seven visits with Dr. Beatty and agreed that it would be difficult for Claimant to

communicate without the benefit of an interpreter. Dr. Sanidas testified that, to his knowledge, Claimant did not have any right upper extremity symptoms, including numbness, tingling, and weakness, prior to April 6, 2015. Dr. Sanidas testified that Claimant was working full duty with no limitations and no restrictions prior to her April 6, 2015 industrial injury. Dr. Sanidas testified that on April 6, 2015, Claimant sustained an industrial injury to her right upper extremity.

29. Dr. Sanidas testified that the EMG/nerve conduction study recommended by Claimant's authorized treating physicians, including Dr. Davis, was reasonable, necessary, and related to Claimant's industrial injury. Dr. Sanidas testified that the EMG revealed that there is nothing in Claimant's neck that is affecting the nerves in her hand. He testified that the EMG revealed Claimant has carpal tunnel syndrome and he opined the diagnosis was an incidental finding and not related to Claimant's industrial injury. Dr. Sanidas noted Claimant repeatedly reported decreased sensation in her right hand in a glove-like pattern. While Claimant's treating physicians did not remark on these reports, Dr. Sanidas testified that they were non physiologic.

30. Dr. Sanidas testified that he did not think Claimant hit her hand hard enough on the metal shelf to cause the carpal tunnel syndrome. Nevertheless, He testified Claimant's carpal tunnel syndrome was asymptomatic prior to date of injury. Dr. Sanidas acknowledged that Claimant reported right hand symptoms, including pain, numbness, and tingling, at each appointment following her injury. He testified that the right carpal tunnel injection was both diagnostic and therapeutic and that there was nothing wrong with it from a clinical standpoint.

31. Before her April 6, 2015 industrial injury, Claimant had no right upper extremity injuries and no right upper extremity symptoms, including no pain, numbness, tingling, or weakness in her right shoulder, arm, or hand. After her injury, she consistently reported symptoms consistent with carpel tunnel syndrome.

32. Dr. Sanidas testified that Claimant's mechanism of injury, as described to him by Claimant would be insufficient to aggravate or accelerate Claimant's right carpal tunnel syndrome. However, no persuasive evidence was offered regarding whether Dr. Sanidas discussed with Claimant the amount of force with which her hand struck the metal shelving or whether Dr. Sanidas knew what amount of force would be required to aggravate or accelerate previously existing but asymptomatic carpel tunnel syndrome. Thus, the ALJ finds Dr. Sanidas' testimony on this issue not persuasive.

33. Regarding Dr. Davis' recommendation for right middle finger flexor tenosynovectomy, Dr. Sanidas testified that when he examined Claimant, she had full range of motion in her finger. Dr. Sanidas testified that he does not recommend the surgery because while Claimant has pain, her finger is fully functional. Dr. Sanidas testified that it had been over five months since Claimant underwent treatment and that she was improving. Additionally, Dr. Sanidas testified that he did not find any evidence of trigger finger during his examination.

34. Dr. Sanidas testified that on September 3, 2015, Dr. Beatty assigned Claimant work restrictions, and no doctor has released Claimant to full duty. Dr. Sanidas testified that Claimant told him she was working six hour shifts due to Employer's scheduling needs.

35. Per the parties' stipulation, on April 6, 2015, Claimant sustained a work-related injury to her right upper extremity. Per the parties' stipulation, Claimant's AWW is $356.26, with a corresponding temporary disability rate of $237.51.

36. However, the ALJ finds that no persuasive evidence was offered to support a finding that Claimant's injury resulted in her working reduced hours, sustaining a wage loss, or a causal connection between the industrial injury and a subsequent wage loss were such a wage loss to have been found. Based on the totality of the evidence the ALJ finds that Claimant has not met her burden of establishing by a preponderance of the evidence an entitlement to temporary partial disability benefits.

37. Based on the totality of the evidence, the ALJ finds that Claimant has established by a preponderance of the evidence that the EMG/nerve conduction study is reasonable, necessary, and related to the industrial injury.

38. Based on the totality of the evidence, the ALJ finds that Claimant has established by a preponderance of the evidence that the right carpal tunnel injection is reasonable, necessary, and related to the industrial injury.

39. Based on the totality of the evidence, the ALJ finds that while Claimant has proven by a preponderance of the evidence that the right middle finger flexor tenosynovectomy recommended by Dr. Davis is related to her industrial injury, the recommended surgery is not reasonable or necessary given her current lack of symptoms and the potential risk of harm from the procedure.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

GENERALLY

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S.

The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Apps. Office,* 5 P.3d 385, 389 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’ testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

TEMPORARY DISABILITY BENEFITS

Claimant seeks an award of TPD benefits from April 7, 2015, through November 1, 2015. Claimant has the burden of proving she is entitled to TPD benefits by a preponderance of the evidence. § 8-42-103(1)(a), C.R.S. C.R.S. section 8-42-103(1) requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Indus. Claim Apps. Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate an entitlement to TPD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she is off work due to the disability, and the disability resulted in the actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term disability connotes two elements: 1) medical incapacity evidenced by loss or restriction of bodily function; and 2) impairment of wage earning capacity as demonstrated by claimant’s inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions that impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co*., 964 P.2d 595 (Colo. App. 1998). The existence of disability presents a question of fact for the ALJ. No requirement exists that the claimant produce evidence of medical restrictions imposed by an authorized treating physician or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

Dr. Beatty assigned Claimant work restrictions directly related to her industrial injury and no physician ever took Claimant off work restrictions. However, no persuasive evidence supports a conclusion that Claimant actually worked pursuant to those restrictions. Rather, persuasive evidence indicates that Claimant continued to work full duty after the work restrictions were assigned. Claimant offered no persuasive evidence to support a finding that her injury resulted in her working reduced hours or sustaining a wage loss. Rather, the ALJ credits Dr. Sanidas' testimony that Claimant reported working six hour shifts due to Employer's scheduling needs.

Claimant's entitlement to temporary partial or temporary total disability benefits as of November 2, 2015, and continuing is reserved for future determination.

MEDICAL BENEFITS

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000).

The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence; expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

As found, Claimant has proven by a preponderance of the evidence that the EMG/nerve conduction study was reasonable, necessary, and related to her April 6, 2015 industrial injury. This is supported by Dr. Kawasaki noting Claimant's pattern of right upper extremity numbness to be unusual, and his recommendation that an EMG/nerve conduction study be performed to rule out right cervical radiculopathy, brachial plexopathy, and compression neuropathy. Additionally, Dr. Sanidas testified that that the EMG/nerve conduction study recommended by Claimant's authorized treating physician was reasonable, necessary, and related to Claimant's industrial injury.

As found, Claimant has proven by a preponderance of the evidence that the carpel tunnel injection was reasonable, necessary, and related to her April 6, 2015 industrial injury. Based on consistent symptoms Claimant reported throughout the course of her treatment and the results of her EMG/nerve conduction study, Dr. Davis diagnosed Claimant with carpel tunnel syndrome. The syndrome became symptomatic when Claimant hit her hand on metal shelving incidental to her workplace accident. The ALJ finds unpersuasive Dr. Sanidas' testimony that the force of Claimant's hand on the metal shelving was insufficient to cause her carpel tunnel syndrome to become symptomatic.

Claimant has proven by a preponderance of the evidence that the right middle finger flexor tenosynovectomy recommended by Dr. Davis is related to her industrial injury. However, the persuasive medical evidence establishes that Claimant most recently has full function in her finger, and that surgery could potentially be harmful to Claimant without providing any functional improvement.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. On April 6, 2015, Claimant sustained a work-related injury during the course and scope of her employment with Employer.

2. Claimant's average weekly wage is $356.26, with a corresponding temporary disability rate of $237.51.

3. Claimant is not entitled to temporary partial disability benefits from April 7, 2015, through November 1, 2015. Claimant's entitlement to temporary partial or temporary total disability benefits as of November 2, 2015, and continuing is reserved for future determination.

4. The EMG/nerve conduction study and the right carpal tunnel injection performed by Dr. Davis on September 15, 2015 are reasonable, necessary, and related to Claimant's industrial injury.

5. The right middle finger flexor tenosynovectomy recommended by Dr. Davis although related, is not reasonable or necessary because she is currently asymptomatic.

6. All matters not determined herein are reserved for future determination.

DATED: March 29, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the total knee replacement surgery performed by Dr. Duffey was causally related to the claimant's May 18, 2015 industrial injury.

STIPULATIONS

The parties stipulated that the claimant sustained a work related injury to his left knee on May 18, 2015, that Dr. Nanes and Dr. Duffey are authorized treating physicians, that the claimant's average weekly wage is $1,109.81, and that if the surgery performed by Dr. Duffey is found to be causally related to the claimant's industrial injury, that the claimant is entitled to temporary total disability (TTD) benefits from August 21, 2015 to October 13, 2015.

FINDINGS OF FACT

1. The claimant is a 54-year-old male who has been employed with the respondent-employer, since 1997. On May 18, 2015, the claimant was in charge of a bus that transported prisoners. The claimant was in the course and scope of his employment when he attempted to close a cargo bay door on the side of the bus. The cargo bay door had previously been damaged and was difficult to close. The claimant had to put all of his weight into closing the door. When he did, the door kicked out, striking him in the left knee while he was weight bearing. The claimant immediately felt and heard a pop in the left knee and experienced a sudden onset of pain. Soon after the incident, the left knee began to swell up. The claimant reported the injury to the proper personnel with the respondent-employer who then referred him for medical treatment.

2. The claimant was referred by the respondent-employer to Dr. Richard Nanes of the Centura Centers for Occupational Medicine, who became the claimant's authorized treating physician (ATP). Dr. Nanes treated the claimant from May 18, 2015 to November 19, 2015. From the first encounter with Dr. Nanes, the claimant was open and honest about his left knee injury and surgical history.

3. In 1996, the claimant experienced a torn ACL in the left knee from a motorcycle accident that was not work-related. The claimant underwent an ACL reconstruction at that time and he made a full recovery. The claimant was symptom free relative to his left knee when he was hired by the respondent-employer in 1997. From the time he was hired in 1997, until April of 2007, the claimant worked unrestricted full duty as a corrections officer. During this time the claimant had no pain in his left knee and he did not have any physical limitations relative to his left knee.

4. On April 20, 2007, the claimant experienced a left knee injury in the course and scope of his employment with the respondent-employer. The claimant was stepping down out of a van when he hyper-extended his left knee. The claimant had an immediate onset of pain and was referred for treatment with the respondent-employer's designated health care provider. Dr. Daniel Olson of CCOM served as the primary ATP for this case.

5. On May 8, 2007, the claimant underwent a left knee MRI which showed that the ACL repair was intact but revealed complex tears of the posterior horns of both the medial and lateral meniscus. On May 31, 2007, the claimant underwent medial and lateral partial meniscectomies as well as chondroplasty. The claimant recovered from the surgery but was still symptomatic as of the time he was placed at maximum medical improvement (MMI) on August 14, 2007. The impairment rating report authored by Dr. Olson indicates that the claimant was still experiencing 3 out of 10 pain present 30% of the time. The claimant received a 17% left lower extremity rating (8% table 40; 10% ROM) and was returned to work without permanent physical restrictions. Dr. Olson also opined that the claimant would not need future medical care for this injury. The claim was closed at that point.

6. Following the 2007 left knee surgery, the claimant returned to unrestricted full duty as a corrections officer. The claimant, however, continued to experience symptoms of pain and functional limitations in his left knee after the 2007 work-related left knee injury.

7. In 2012, the claimant sought a second opinion with an orthopedic surgeon of his choosing. The claimant chose Dr. Rowell. The claimant sought his own second opinion instead of going back to the workers' compensation doctors and resuming treatment with them the workers' compensation doctors had told him there was nothing else that could be done and they had closed the case. The claimant believed his workers' compensation claim had been closed and that he was on his own for treatment.

8. The claimant had sustained no new left knee injury in 2012, he had tired of living with the ongoing left knee pain from the 2007 work-related injury and surgery and he wondered if something could be done to fix it.

9. In 2012, Dr. Rowell obtained a MRI which showed a loose fragment in the left knee. Shortly thereafter, Dr. Rowell performed a left knee arthroscopy with microfracture. After this 2012 left knee surgery the claimant again became symptom free relative to his left knee. The claimant was able to return to playing golf, running, and other physical activity.

10. The claimant then suffered the work-related left knee injury which forms the basis of this claim on May 18, 2015.

11. Dr. Nanes, upon initial referral, requested an MRI, X-rays, and physical therapy. The May 26, 2015 MRI revealed a subtle peripheral tear involving the posterior horn of the lateral meniscus, an undersurface tear involving the posterior horn of the medical meniscus, and a 9mm cartilaginous defect in the central aspect of the lateral femoral condyle. He then referred the claimant to James Duffey, MD of Premier Orthopedics. Dr. Duffey took an accurate history of the claimant's treatment of the left knee. He assessed "advanced end-stage osteoarthritis" that was previously asymptomatic, but once again symptomatic following the work related injury. He recommended a total knee replacement and submitted a preauthorization request to the respondent.

12. The respondent obtained a peer review with Dr. Richard Lutz. Dr. Lutz did not take issue with causation. However, he wanted to see more conservative therapy before the total knee replacement was authorized. The respondent denied the request.

13. On August 24, 2015, in an attempt to return to work prior to losing his job, the claimant underwent a total knee replacement with Dr. Duffey through his private health insurance. After the surgery, the claimant continued to treat with Dr. Nanes who continues to support the compensability of the May 18, 2015 left knee injury. Dr. Nanes opines that the incident aggravated the claimant's pre-existing arthritis causing the need for the total knee replacement.

14. On September 2, 2015, the respondent issued a Notice of Contest denying liability for the claim.

15. On November 19, 2015 Dr. Nanes placed the claimant at MMI with 14% impairment for ROM and 20% impairment per table 40. The claimant returned to unrestricted full duty on October 14, 2015.

16. In anticipation of litigation, the claimant obtained a written opinion from Dr. Nanes regarding whether the May 18, 2015 work-injury caused the need for the total knee replacement. Dr. Nanes opined, within a reasonable degree of medical probability, the May 18, 2015 work-related injury caused an aggravation of the pre-existing injury to the left knee. Consistent therewith, Dr. Nanes opined that the cause of the need for the total knee replacement was the May 18, 2015 work injury.

17. Dr. James Duffey provided an assessment of "[a]dvanced end stage osteoarthritis of the left knee. This was previously asymptomatic, but has become symptomatic once again following the work-related injury. Consistent therewith, Dr. Duffey opined that the claimant was a candidate for a total knee replacement.

18. Also, in anticipation of litigation, the respondent obtained an IME opinion from Dr. Timothy O'Brien. Dr. O'Brien ultimately opined that the claimant suffered a compensable left knee injury in the course and scope of employment on May 18, 2015. However, Dr. O'Brien testified that he did not feel the total knee replacement was related to the work-injury.

19. Dr. O'Brien states "the 2008 (although he must be referring to the 2007 work-related injury as there was no 2008 left knee injury or surgery) work-related injury was a contributor to [the claimant's] current end state osteoarthritis that existed prior to May 18, 2015. Dr. O'Brien goes on to opine that if the 2012 surgery performed by Dr. Rowell was work-related, this 2012 surgery would also be work-related trauma that contributed to the overall end stage arthritis present in 2015. However, Dr. O'Brien opined that because the 2012 left knee surgery was performed outside of the workers' compensation system, it is not work-related surgical trauma. However, the ALJ finds that the 2012 surgery performed by Dr. Rowell was directly caused by the 2007 work-related injury and surgery. The only reason the claimant had this surgery on his own outside of the workers' compensation system is because the workers' compensation doctors had told the claimant there was nothing further to offer. Believing that his claim had properly been closed, the claimant sought medical care for his work-related symptoms on his own.

20. Reading Dr. O'Brien's report, it is clear that Dr. O'Brien had trouble saying whether or not the total knee replacement in this case was due to the work-related injury. In fact, Dr. O'Brien went so far as to offer alternative opinions on the subject. Dr. O'Brien states:

> In summary, the May 18, 2015, work injury did not result in the need for a total knee replacement. The May 18, 2015, injury was a minor injury and in my

> opinion it is medically probable this injury would have healed within a matter of weeks and at the very outside three months. This is keeping with the natural history of minor injuries such as that which [the claimant] sustained.
>
> On the other hand, [the claimant] has been employed by the [respondent-employer] since 1997, and he has sustained numerous work-related left knee injuries including surgeries, and these prior surgical interventions have been materially contributory causative factors that have in part contributed to [the claimant's] current need for a total knee replacement.

21. The ALJ finds the claimant to be credible.

22. The ALJ finds that the analyses and opinions of Dr. Nanes, supported by the opinion of Dr. Duffey, are credible and more persuasive than medical analyses and opinions to the contrary.

23. The ALJ finds that the cumulative trauma of the claimant's work-related injuries with the respondent-employer, culminated in a work-related injury on May 18, 2015 that exacerbated his asymptomatic, dormant knee condition causing the need for the total knee replacement to be accelerated.

24. The ALJ finds that the claimant has established that it is more likely than not that the total knee replacement surgery performed by Dr. Duffey on August 24, 2015 is reasonable, necessary, and related to his industrial injury of May 18, 2015.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P .2d 792 (1979); *People v. M.A.,* 104 P .3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P .3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Treatment for a condition that is not caused by employment is not compensable. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). Where an industrial injury merely causes the discovery of the underlying condition but does not accelerate the need for the surgery for the underlying condition, treatment for the underlying condition is not compensable. *Robinson v. Youth Track*, W.C. No. 4-649-298 (May 15, 2007).

5. The burden is on the claimant to prove a causal relationship between his employment and his injury or condition. *See, Industrial Comm'n v. London & Lancashire Indem. Co.,* 135 Colo. 372, 311 P.2d 705 (1957). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

6. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with

reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106 (Colo. App. 1971)*. Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985)*. An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952); *Indus. Comm'n v. Havens,* 136 Colo. 111, 134 P.2d 698 (1957).

7. The ALJ concludes, as found above, that the analyses and opinions of Dr. Nanes, supported by the opinion of Dr. Duffey, are credible and more persuasive than medical analyses and opinions to the contrary.

8. The ALJ concludes, as found, that the claimant has established by a preponderance of the evidence that the need for the left total knee replacement surgery performed by Dr. Duffey is causally related to his May 18, 2015 industrial injury.

9. The claimant generally has the burden of proving a causal relationship between a work related condition or injury and the wage loss for which compensation is sought by a preponderance of the evidence. *Romayor v. Nash Finch Co.*, W.C. No. 4-609-915 (March 17, 2006); *Turner v. Waste Management of Colorado*, W.C. No. 4-463-547 (July 27, 2001).

10. As was stipulated at the outset of the hearing, the claimant is entitled to TTD benefits for the period from August 21, 2015 to October 13, 2015.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent is responsible for the claimant's medical care to cure or relieve him from the effects of his injury, specifically the surgery performed by Dr. Duffey on August 24, 2015.

2. The respondent shall abide by the stipulations as stated at the outset of the hearing.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: March 22, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUE

The issue for determination involves Claimant's entitlement to additional medical treatment. The question to be answered is:

I. Whether Claimant established, by a preponderance of the evidence, that a right shoulder rotator cuff tear he suffered at home, while performing exercises he was taught in physical therapy for an admitted June 19, 2015 injury to his left wrist, right shoulder and neck, is sufficiently causally connected to that admitted injury so as to be deemed a compensable part of the claim making Respondent liable for all right shoulder care, including the surgery performed by Dr. David Weinstein on November 5, 2015.

STIPULATIONS

At hearing, the parties advised the Court of the following stipulations, which were accepted and approved by the Court:

- Claimant's average weekly wage (AWW) for purposes of this claim is $1,254.38; and,

- In the event the right shoulder rotator cuff tear is deemed a compensable component of the claim, the time periods for which temporary disability benefits would be owed extend from July 29, 2015 through September 11, 2015, and November 5, 2015 and continuing until terminated by operation of law.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Ms. Bogenschuetz-Bonn, the ALJ enters the following findings of fact:

1. Claimant is employed with the Pueblo County Sheriff's Office (PCSO). He has worked for the PCSO as a patrol officer for the past twenty seven years. (Resp's Exh. A; Hrg. Tr. p. 11, ll. 1-5).

2. On June 19, 2015, Claimant was assigned to the CSU-Pueblo Campus with duties that included calls for service, handling issues on the campus itself, and typical patrol work. (Hrg. Tr. p. 11, ll. 6-10) Claimant started his shift that day at approximately 5:45 a.m. (Hrg. Tr. pp. 11-12, ll. 23-2) As part of his duties, Claimant was tasked with opening up the technology building. In the process of opening the building, Claimant tripped over a rock used to prop the outside door to the building open. Claimant caught his foot under a rug lying on the floor in the vestibule of the building and was pitched forward. Claimant's momentum carried toward the inside door where he tried

unsuccessfully to break his fall by reaching for the inside door with his right arm/hand. Claimant fell to the floor on his outstretched left hand; landing on his left side and injuring his left wrist, right shoulder and neck. (Hrg. Tr. pp. 12-13, ll. 11-12, 1-10) Claimant reported the injury to his supervisor and was referred to CCOM for medical treatment. (Hrg. Tr. pp. 14-15, ll. 15-18, 1-6) Liability for the claim has been admitted.

3. Claimant was evaluated at CCOM on June 19, 2015 by Steven Byrne, PA. (Resp's Exh. G, pp. 48-51) Claimant reported pain and discomfort in his left wrist, neck and right shoulder. X-rays of the wrist were negative for acute bony injury. In his narrative report, PA Byrne diagnosed contusion/strain left wrist and strain right sternocleidomastoid muscle. However, in his M164 report, PA Byrne noted the diagnoses as strain of the left neck and strain of the left wrist. Based upon the evidence presented, the ALJ finds that PA Byrne's reference to strain of the right neck was likely a reporting error and that Claimant, more probably than not strained the left side of his neck along the area of the sternocleidomastoid muscle. The record is also devoid of any reference to a specific diagnosis regarding the right shoulder. Although PA Byrne did not provide a specific diagnosis concerning the right shoulder, the ALJ finds that the evidence presented, including the history Claimant provided to the medical providers involved in this case supports a finding that he injured his right shoulder while reaching for the inside door with his right arm/hand. PA Byrne directed Claimant to use ice, take ibuprofen, use a neoprene thumb spica support during working hours and a spica wrist support at home and at bedtime. PA Byrne released Claimant to return to regular work.

4. Claimant saw PA Byrne in follow up on June 25, 2015. (Resp's Exh. G, pp. 42-46) During this encounter, Claimant reported pain in the neck, left wrist and left ear, although he stated that his wrist was feeling considerably better. Cervical spine films were negative for acute injury. PA Byrne referred Claimant to Centura Center for Rehabilitation for physical therapy (PT) twice a week for three weeks. A Notification of Workers' Compensation Referral to Centura Center for Rehabilitation dated June 25, 2015 indicates the diagnosis as contusion of wrist. There is no documentation of right shoulder pain in the records from this visit.

5. Claimant's initial PT evaluation was conducted on June 26, 2015 by Mary Bogenschuetz-Bonn. Following physical examination, Ms. Bogenschuetz-Bonn assessed Claimant as having hypomobility in the cervical spine along with "significant scapular dysfunction." Ms. Bogenschuetz-Bonn recommended that therapy be initiated two times a week to include dry needling and an "[i]ndependent home exercise program."

6. On June 29, 2015, Claimant was seen in PT at which time he was "instructed in [a] customized program of skiled (sic) physical therapy to include mobility, strength and stability for cervical spine and B shoulders." The ALJ finds that the reference to "B shoulders", more probably than not, means "bilateral" shoulders.

7. Claimant testified that he received instruction regarding the home exercises he was to perform on his own. According to Claimant, the exercises were preformed with resistance bands and varied by movement. He was provided with a written description of

the exercises to perform, which material contained pictorial diagrams demonstrating the proper technique for the movement.

8. On July 10, 2015, Claimant returned to PT at which time it was noted that Claimant was working on "upper extremity strengthening and postural ex per flow sheet." The ALJ finds the reference to "EX" in this note, more probably than not, refers to "exercise."

9. Claimant next presented to CCOM on July 14, 2015, at which time he was evaluated by Paul Merchant, M.D. (Resp's Exh. G, pp. 38-41) Other than the "Patient Description of Accident" which is dated June 19, 2015 and appears to be cut and pasted from Claimant's initial evaluation of that date, there is no mention in this report of any right shoulder discomfort. Rather, Dr. Merchant noted that Claimant returned for follow up of his cervical strain and left wrist sprain. Claimant reported that he has been participating in physical therapy with good results, and that he "typically has benefitted from the dry needling of his neck and trapezius." Dr. Merchant's diagnoses were contusion of wrist and strain, cervical spine. Dr. Merchant continued Claimant in physical therapy and continued Claimant's release to full duty work.

10. On July, 17, 2015, Ms. Bogenschuetz-Bonn added crossover band exercises to Claimant's exercise protocol. Claimant had noted weakness of the right shoulder while performing crossover band exercise according to the July 17, 2015 PT report authored by Ms. Bogenschuetz-Bonn. Claimant testified that he could not do more than 2 reps of the cross over reverse fly exercise with a heavier resistance band, so he proceeded to try the exercise with lighter resistance and was only able to complete two reps. Consequently, Claimant testified that Ms. Bogenschuetz-Bonn instructed him to concentrate on this particular exercise. Claimant submitted a copy of the pictorial diagram he was provided describing the crossover exercises he was to complete as part of his exercise regimen.

11. On July 28, 2015, while performing the crossover reverse fly exercise at home, Claimant felt a tearing sensation in his right shoulder. According to Claimant, he was on his third repetition and his arms were extended away from his body at 90 degrees (a right angle) when he felt the muscle in his right arm tear. Claimant testified the muscle then rolled and pulled up into his chest area and he experienced substantial pain.

12. Claimant called Dr. Merchant and was scheduled for an appointment for the same day. A report generated from this appointment reflects that Claimant reported that he was "at his residence and performing prescribed home physical therapy using a 'thera-band' when he felt a pop in his right shoulder followed by immediate pain. Claimant complained of an inability to raise his arm to the level of his shoulder and 9/10 pain 100% of the time. Dr. Merchant noted that Claimant's objective findings were consistent with the "history of work-related etiology." Dr. Merchant ordered a right shoulder MRI and took Claimant off work until he was seen the following day.

13. The MRI of Claimant's right shoulder was obtained on July 28, 2015 at St.

Mary Corwin Medical Center. The radiologist's impression on MRI was full-thickness tear of the supraspinatus tendon anteriorly with retraction to the mid humeral line. (Resp's Exh. I, pp. 62-63) Claimant followed up with Dr. Merchant on July 29, 2015 to review the MRI results. (Resp's Exh. G, pp. 30-34) Dr. Merchant continued to diagnose contusion of wrist and added rotator cuff tear, shoulder, right. Dr. Merchant assigned temporary work restrictions, placed physical therapy on hold pending orthopedic evaluation, and referred Claimant to Dr. David Weinstein for evaluation.

14. Claimant has a prior history of right rotator cuff injury and prior rotator cuff repair on two occasions.

15. Claimant saw Dr. Weinstein pursuant to Dr. Merchant's referral on August 19, 2015. (Resp's Exh. J, pp. 67-70) Dr. Weinstein noted a history of two rotator cuff repairs, noting further that Claimant "returned to a normal shoulder until his recent injury on June 19, 2015." Dr. Weinstein went on to describe Claimant's more recent history of feeling severe pain and a pop in the anterior aspect of his right shoulder after doing "band exercises" on July 28, 2015. Dr. Weinstein reviewed Claimant's imaging studies, including Claimant's MRI scan and diagnosed right rotator cuff tendinitis with full thickness rotator cuff tear and right biceps tendinitis with partial tear. Dr. Weinstein wrote that he discussed nonoperative management versus surgery with Claimant and that Claimant wished to proceed with surgery. The specific surgical procedure identified by Dr. Weinstein was an arthroscopic subacromial decompression with rotator cuff repair and possible biceps tenodesis.

16. Respondent-Employer denied liability for right shoulder treatment, including the surgery recommended by Dr. Weinstein following Claimant's August 19, 2015 evaluation.

17. Prior reports from Dr. Weinstein dated February 16, 2011, March 23, 2011, and April 7, 2011 reflect that Claimant underwent a rotator cuff repair in 1998 and had evidence of a re-tear in 2006 but elected to defer from additional surgery at that time. (Resp's Exh. J, pp. 71-74) By February of 2011, Claimant's right shoulder symptoms had worsened, particularly with any weighted activities including working out in the weight room. Claimant had tried a home exercise program from his therapist in the past and noted that he would like to consider having a second rotator cuff repair in the summertime, if warranted. The March 23, 2011 report reflects that a repeat MRI confirmed that Claimant had re-torn his rotator cuff and that there had been significant progression in the last five years since his last exam. Dr. Weinstein noted that Claimant's tear was approaching the level of being irreparable. According to an operative report dated April 7, 2011, Dr. Weinstein performed a right arthroscopic subacromial decompression, rotator cuff repair and biceps tenodesis on Claimant's right shoulder. Nonetheless, following his examination of Claimant and review of his July 28, 2015 MRI, Dr. Weinstein noted the following in his August 19, 2015 report:

> . . . this appears to be an acute injury. As there is only minimal atrophy and no permanent changes, this indicates that his previous rotator cuff tears

> have healed appropriately and it is doubtful an injury, based on his MRI scan, would have occurred in the last several months, consistently with his history.

18. Claimant acknowledged at hearing that he had undergone two rotator cuff surgeries on his right shoulder and one rotator cuff repair surgery on his left shoulder prior to the date of injury in this claim. (Hrg. Tr. p. 24, ll. 1-6) Claimant also testified that both of the prior right shoulder surgeries were performed by Dr. Weinstein, and were essentially the same procedure that Dr. Weinstein again performed on the right shoulder on November 5, 2015. (Hrg. Tr. pp. 26-27, ll. 23-9)

19. Claimant testified that he underwent the right shoulder rotator cuff repair surgery recommended at his August 19, 2015 appointment with Dr. Weinstein on November 5, 2015 under his own insurance. (Hrg. Tr. p. 21, ll. 17-25) According to Claimant he has incurred out of pocket expenses associated with his November 5, 2015 surgery.

20. On December 3, 2015, Dr. Allison Fall completed an independent medical examination (IME) of Claimant at the request of Respondent-Employer. Dr. Fall opined that Claimant's right shoulder weakness was "likely related to his scapular dysfunction" caused by his prior rotator cuff surgeries and that performing crossover band exercise above shoulder level with increased resistance would be contraindicated in a patient who had a history of two prior rotator cuff repairs. According to Dr. Fall, the exercise Claimant preformed on July 28, 2015 directly led to the "need for specific treatment of the right shoulder which in this case was the rotator cuff repair by Dr. Weinstein" on November 5, 2015.

21. Based upon the evidence presented, including the opinions form Dr. Fall, the ALJ finds that Claimant, more probably than not, sustained an acute rotator cuff tear while performing crossover band exercise on July 28, 2015.

22. Ms. Bogenschuetz-Bonn, PT, provided testimony at a post-hearing deposition. Ms. Bogenschuetz-Bonn confirmed that Claimant was referred to her for physical therapy by PA Byrne with a diagnosis of neck strain. (Bogenschuetz-Bonn Depo, pp. 4-5, ll. 18-21, 16-20) PT Bogenschuetz-Bonn further testified that, while the diagnosis of neck strain was consistent with the complaints that Claimant reported to her and Claimant had limited mobility of the neck to the left and right, both Claimant's subjective complaints and her objective findings were primarily left sided. (Bogenschuetz-Bonn Depo, p. 5, ll. 21-24; p. 7, ll. 11-2, 18-20)

23. Ms. Bogenschuetz-Bonn confirmed that Claimant was shown crossover band exercises; including the reverse fly and victory exercise and that they were added to his exercise protocol. (Bogenschuetz-Bonn Depo, p. 10, ll. 5-12) According to Ms. Bogenschuetz-Bonn, the reverse fly exercise works the scapular muscles which help support posture and keeping the head in an upright position and are done with both hands to strengthen both side of the body. Bogenschuetz-Bonn Depo, p. 13, ll. 6-25; p. 14, ll. 1-18)

24. Ms. Bogenschuetz-Bonn's testimony regarding whether Claimant was instructed to perform the crossover band exercises at home as part of his home exercise program is unclear. Ms. Bogenschuetz-Bonn testified that Claimant advised her that he had bands at home and asked if he could do the crossover band exercises at home to which Ms. Bogenschuetz-Bonn responded "that would be great." (Bogenschuetz-Bonn Depo, p. 15, ll. 5-9) Based upon the testimony of Ms. Bogenschuetz-Bonn, the ALJ finds that Claimant reasonably believed that the crossover band exercises were effectively added to his home exercise regimen. In this case, Ms. Bogenschuetz-Bonn acquiesced to Claimant's suggestion that he incorporate the crossover band exercises as part of his home program by affirmatively telling him that "that would be great." Consequently, the ALJ rejects Respondent's contention that the crossover exercises, including the reverse fly, were not part of Claimant's home exercise program and that he was not to perform them as part of his home exercise routine.

25. Based upon the evidence presented, the ALJ is not persuaded that Claimant's actions in completing the reverse fly exercise were in direct contradiction to the instructions that he had been by PT Bogenschuetz-Bonn. While it is true that Claimant was, probably told not to go beyond the point of pain, Respondents did not provide convincing evidence that he did so. Expending maximum effort and noting that performance of exercise was painful, does not support a conclusion that Claimant had exceeded the point of pain causing a tear in his rotator cuff. Furthermore, as Claimant credibly testified, the goal with exercise was "stretch out farther" with each rep. Consequently, the ALJ rejects, as speculative and unconvincing, Respondent's suggestion that Claimant's right shoulder rotator cuff tear is the direct consequence of a "deviation or efficient intervening" event because Claimant failed to comply with the physical therapist's instructions regarding the performance of his exercises.

26. Based upon the evidence presented, the ALJ finds that Claimant has established a sufficient causal connection between his July 28, 2015 right shoulder rotator cuff tear and his June 19, 2015 left wrist, left neck strain and right shoulder injury so as to result in the right rotator cuff tear to be compensable part of the June 19, 2015 claim under the quasi course of employment doctrine.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2014), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. Assessing the weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

Compensability of Claimant's Right Rotator Cuff Tear

D. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001); *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question*

Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* Nevertheless, the employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). It is sufficient "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment." *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this case, Claimant asserts that the right shoulder rotator cuff tear that he sustained on or about July 28, 2015, while performing exercises at home, should be deemed compensable as part of this claim under the quasi course of employment doctrine. Respondent asserts that the rotator cuff tear is not compensable under the quasi-course of employment doctrine because Claimant's performance of the exercises at the time he sustained the rotator cuff tear was not due to an implied employment contract arising out of the June 19, 2015 left wrist, right shoulder and neck strain. Respondent further asserts that, even if Claimant's performance of these exercises at his home were deemed to be within the quasi-course of his employment with the Employer, the right shoulder rotator cuff tear is still not compensable because such injury was the result of Claimant performing the exercises in such a way that failed to comply with the physical therapist's instructions. Thus, Respondent argues, even if the quasi-course of employment doctrine were deemed to apply to this case, Claimant's rotator cuff tear was nevertheless the result of a subsequent deviation or efficient intervening event that renders such injury beyond the scope of the compensable consequences of this claim. Based upon the evidence presented as a whole, the ALJ is not persuaded by Respondent's position.

G. With regard to the quasi-course of employment doctrine, the Colorado Supreme Court has held as follows:

> [A] subsequent injury is compensable under the quasi-course of employment doctrine only if it is the "direct and natural" consequence of an original injury which itself was compensable. See 1 A. Larson, supra § 13.11 at 3-348.91; *Wood v. State Accident Insurance Fund*, 30 Or. App. 1103, 569 P.2d 648 (1977)(accidental injury suffered during rehabilitation program compensable because direct and natural consequence of original injury); *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1265 (Colo. 1985); *see also Turner v. Industrial Claim Appeals Office*, 111 P.3d 534, 535-536 (Colo. App. 2004); *see also Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993)(where claimant was injured in a slip-and-fall accident while leaving a physical therapy session, second injury was compensable because it was a natural and proximate result of the original compensable injury).

H. Under the doctrine, compensation is awarded when a claimant is injured during treatment of an industrial injury. *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993) *Hembry v. Farmers Implement Company, Inc.*, W.C. No. 4-106-004 (October 5, 1993).. The rationale for the doctrine is that, although such injuries occur outside the time and space limits of normal employment and would not be considered employment activities for usual purposes, an employer has a quasi-contractual obligation to provide treatment for the compensable injury and the claimant has an obligation to submit to such treatment or risk the suspension/termination of benefits. *Employers Fire Insurance Co. v. Lumbermen's Mutual Casualty Co.,* 964 P.2d 591 (Colo. App. 1998)*; Shreiber v. Brown & Root, Inc.,* 888 P.2d 274 (Colo. App. 1993). Simply put, because the medical treatment is an implied part of the employment contract, the subsequent injury is related to the employment and therefore both prongs of the compensability test as set out above are met. See, *Colorado Workers Compensation Practice and Procedure*, West's Colorado Practice Series, Vol. 17, § 4.19.

I. In this case, the evidence presented persuades the ALJ that Claimant's right rotator cuff tear, which occurred while he was performing home exercise to remediate the effects of his June 19, 2015 injury, is compensable because it occurred as a "direct and natural" consequence of an original injury which itself was compensable and during an activity, i.e. physical therapy which implicates the implied contractual obligations between the parties inherent in the workers' compensation system. Here, Claimant's rotator cuff tear is a consequence of obtaining medical treatment for the admitted June 19, 2015 accident. His participation in home exercise was a reasonable and necessary activity that would not have been undertaken but for the compensable injury occurring on June 19, 2015. As found, Claimant reasonably assumed that the crossover reverse fly and victory exercises were added to his physical therapy home program and that it "would be great" if he did them at home in an effort to further remediate the effects of his June 19, 2015 admitted claim. Consequently, Claimant's rotator cuff tear is compensable under the quasi-course of employment doctrine because of the employer's obligation to provide such physical therapy treatment and the Claimant's duty of cooperation. *See Turner v. Industrial Claim Appeals Office,* 111 P.3d 534 (Colo. App. 2004); *Excel Corp. v. Indus. Claim Appeals Office, supra.* As found above, Respondent's contrary assertions that Claimant's rotator cuff tear represents a "deviation or an efficient intervening cause that severs any causal connection with the June 19, 2015 work injury" because it was "directly and naturally caused by his failure to comply with the physical therapist's instructions regarding the performance of his exercises" are unconvincing and explicitly rejected as being speculative in nature.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that his right rotator cuff tear is compensable as part of the June 19, 2015 claim under the quasi-course of employment doctrine.

2. Respondent shall provide all reasonably necessary and related medical treatment to cure and relieve Claimant from the effects of his compensable right rotator cuff tear, including but not limited to the November 5, 2015 surgery performed by Dr. Weinstein.

3. Pursuant to the parties stipulation Claimant's AWW for purposes of this claim is $1,254.38. Temporary total disability benefits shall be paid at a rate of sixty-six and two-thirds percent of this AWW so long as Claimant's disability is total, not to exceed a maximum of ninety-one percent of the state AWW per week. Section 8-42-105(1), C.R.S.

4. Respondents shall pay temporary disability benefits consistent with the parties' stipulation from July 29, 2015 through September 11, 2015, and November 5, 2015 and continuing until terminated by operation of law.

5. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

DATED: March 8, 2016

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

STIPULATIONS

The parties stipulated to the following and the ALJ approves and accepts the following stipulations:

1. The parties stipulate to an average weekly wage from July 1, 2015 to September 11, 2015 of $381.48 and an average weekly wage of $390.81 from September 12, 2015 ongoing.

2. If the claim is found compensable, Banner Occupational Health, Dr. Vlahovich and Dr. Bussey are deemed authorized treating physicians.

ISSUES

1. Whether the Claimant has established by a preponderance of the evidence that she suffered a compensable occupational disease.

2. If the Claimant's claim is compensable, whether the Claimant proved that medical treatment the Claimant has received is reasonably necessary to cure and relieve the effects of her occupational disease.

3. If the Claimant's claim is compensable, whether the Claimant proved that she is entitled to temporary partial disability benefits from August 5, 2015 ongoing.

FINDINGS OF FACT

1. The Claimant has worked for Employer since September, 2013 as a customer care assistant. Until approximately August 5, 2015, the Claimant worked 8 hour shifts and her full workday included a 30 minute break for lunch and two 10 minute breaks, which are in addition to the 8 hour shift.

2. The Claimant's duties as a customer care assistant were to handle incoming calls. She answered incoming calls using a headset. She would use a computer keyboard and mouse during her entire eight hour work shift while taking the calls on the headset. The Claimant testified that her work space was extremely cramped and she did not have proper wrist rests to use while typing and using the computer mouse.

3. Thus, over the course of a day, the Claimant is typing with her wrists bent and/or placed in an awkward position for approximately 4 hours per day and she is using her mouse for 4 hours per day on average. If she is engaging in less of one

activity, presumably she would be doing more of the other since her work day is comprised of either keyboarding or mouse use while answering a telephone using a headset. So, if the Claimant were to keyboard for only 3 hours, then she would be using her mouse for 5 hours and conversely, if she were using a mouse for 3 hours, she would be typing for 5 hours (and doing so in an awkward bent wrist position).

4. The Claimant testified she began having pain in the webbing of her right hand and her right wrist shortly after starting her employment with Respondent Employer. She testified that over time the pain in her hands became worse and she began to experience swelling in her hands.

5. The Claimant testified the pain and swelling in her hands continued to worsen and, on July 1, 2015, she reported her symptoms to her supervisor at her Employer. The Claimant was referred to Banner Occupational Health by her Employer. She saw Dr. Vlahovich at Banner Occupational Health twice and was also referred to Dr. Bussey, a hand specialist.

6. The Claimant was initially evaluated by Kevin Vlahovich, M.D. at Banner Occupational Health on July 8, 2015. The Claimant reported that her job duties entailed answering phones with a headset, typing and mousing. Claimant reported her symptoms primarily occur at work and improve on breaks and at home. She reported that she used a mouse with her right hand but recently switched to her left hand because her right hand was hurting. She also reported that she did not use a wrist pad at her keyboard and frequently rested her wrists on the edge of her desk. The Claimant denied non-work causes of her injury (Claimant's Exhibit 1, p. 1). Upon examination, Dr. Vlahovich noted the left wrist examination was abnormal with pain to palpation present on the palmar side of the wrist. Swelling was also present on the palmar side of the forearm and range of motion and strength were decreased. Examination of the right wrist was abnormal with pain to palpation present on the palmar side of the right wrist and decreased range of motion and strength. Swelling was present on the palmar side of the right wrist. Dr. Vlahovich stated the medical causation as unknown but requested a worksite evaluation and reported it was possibly from poor ergonomics at her workstation and resting wrists on the edge of the table. He prescribed bilateral wrist supports and recommended the Claimant stretch and/or rest her hands at least 5 minutes every hour (Claimant's Exhibit 1, pp. 2-4). In response to the question, "Are your objective findings consistent with history and/or work related mechanism of injury /illness?" Dr. Vlahovich checked the box "unknown" (Claimant's Exhibit 1, p. 5).

7. The Claimant returned to Dr. Vlahovich on July 29, 2015 with complaints of pain and swelling in both wrists. The Claimant reported that since her initial visit she had gotten worse. She was frustrated with lack of progress and the worksite evaluation with ergonomic changes not being done. Dr. Vlahovich noted that the worksite evaluation was for determining causation and to make ergonomic changes. Since it was not done yet, Dr. Vlahovich recommended the Claimant take breaks to stretch and rest her hands when possible and use a padded wrist support when typing. Dr. Vlahovich prescribed Meloxicam and Prednisolone to reduce inflammation and help with her pain. He referred her for an orthopedic evaluation (Claimant's Exhibit 1, pp. 8-11).

8. Randy Bussey, M.D. performed an orthopedic examination on August 5, 2015. The Claimant reported a history of bilateral hand difficulties since February of 2014 with an official date of injury of 07/01/2015. The Claimant reported her symptoms occur at work primarily. Outside of work, she may have numbness and tingling, but mainly this occurs at work. The Claimant had pain in the right hand on the volar surface and it was associated with puffiness. The Claimant reported pain over the left wrist first extensor compartment. The Claimant reported her pain has not been diminished by the use of splints or prescription medications. Examination demonstrated a right wrist volar Tinel that was extremely irritable and was actually a painful Tinel causing the dysethesias and paresthesias. On the left, Dr. Bussey noted a positive Finkelstein test and palpation of the first extensor compartment recreated the historical pain. Dr. Bussey injected the carpal canal on the right. Dr. Bussey recommended discontinuing use of the splints and recommended only a Futoro splint on the right and only at night. He recommended decreased hours because there was no way to limit both hands sufficiently to keep her active at work. He recommended the Claimant's work be limited to 4 hours a day until her symptoms were controlled (Claimant's Exhibit 2).

9. The Claimant saw Dr. Jeffrey Wunder for an independent medical examination (IME) on December 17, 2015. The Claimant reported her chief complaint was right wrist pain, but further reported that she began to compensate with her left hand and now that is hurting too. The Claimant reported her job duties were to answer phones with a headset, typing and mousing. The Claimant reported working an 8-hour day with an additional 30-minute break and two 10-minute breaks. The Claimant estimated that she spends about 4 hours each day mousing and 4 hours each day typing, She reported her desk is smaller and she has to put her wrist in ulnar deviation to type. The Claimant reported that she has not had symptoms in the past even though she has worked other telephone service jobs. The Claimant reported that her right hand symptoms started in late 2013 and she first developed pain and tingling in the first dorsal web space of her right hand. Later, approximately six months after being hired by Respondent Employer she reported that her pain in this area increased and she continued to have pins and needles in the first dorsal web space. Her symptoms subsequently moved from there to the wrist where she began to experience numbness and tingling in her wrist. The Claimant reported that on or about July 1, 2015 she reported her right wrist symptoms increased in severity and she began to develop numbness and tingling in the first three digits. Dr. Wunder noted the Claimant continued to work, although now she was working only 20 hours per week. The Claimant's current symptoms are volar wrist pain that is constant and throbbing with occasional pins and needles. Her symptoms increase with typing or cooking and improve with rest. On examination, Dr. Wunder noted the Claimant reported diffuse tenderness all across the volar aspect of the wrist with a slightly positive Finkelstein but no tenderness in the first dorsal compartment. Dr. Wunder noted positive Tinel at the right carpal canal with radiation of pain reported from the long finger all the way up to the shoulder. It was negative on the left. Dr. Wunder's impression was of probable right carpal tunnel syndrome. However, he opined that the Claimant was lacking as far as CTD risk factors were concerned according to CTD guidelines of the DOWC. He did not find exposure to vibration or cold or the requisite combination of force, repetition or vibration. He further stated that greater than four hours of mouse use is listed as a primary risk factor; but he

found that the Claimant did not use the mouse more than four hours per day. He recommended electrodiagnostic studies of both wrists so as to compare the left to the right wrist and, if positive, she should return to Dr. Bussey. Nevertheless, he did not believe the Claimant had a work related condition.

10. As set forth in the Cumulative Trauma Disorder (CTD) guidelines of the Division of Workers' Compensation Rules, wrist bending or awkward posture for 4 hours is a risk factor and mouse use of more than 4 hours is a risk factor. While, computer work up to 7 hours per day at an ergonomically correct workstation is not a risk factor, the Claimant testified that her work area was very cramped and she did not have wrist support and had to rest her wrists on her desk and therefore her work was not performed at an ergonomically correct workstation.

11. The Claimant had not experienced pain or swelling in her hands before working for Employer and had not received any treatment for her hands until July of 2015 after reporting her injury. The Claimant did not perform any activities outside of her employment with Employer that required her to repetitively use her hands. The Claimant did not have work restrictions before August 5, 2015. She has not been returned to full time, full duty work by any treating physician since August 5, 2015 nor have her symptoms been controlled. The ALJ credits the testimony of the Claimant along with the medical records and determines that the Claimant has demonstrated that it is more probable than not that the Claimant has suffered a work related occupational disease.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the

testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability - Occupational Disease

Section 8-40-201(14) C.R.S. (2010) defines “occupational disease” as:

> “A disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been generally exposed outside of the employment.”

An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill,* 940 P.2d 1125 (Colo. App. 1997). Occupational diseases are subject to a more rigorous test than accidents or injuries before they can be found compensable. All elements of the four-part test mandated by the statute must be met to ensure the disease arises out of and in the course of employment. The statute imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

The hazardous conditions of employment need not be the sole cause of the disease. The existence of a preexisting condition does not defeat a claim for an occupational disease unless it can be shown that a non-industrial cause was an equally exposing stimulus. A claimant is entitled to recovery if he or she demonstrates that the hazards of employment cause, intensify or aggravate to some reasonable degree, the disability. Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

The purpose of this rule "is to ensure that the disease results from the claimant's occupational exposure to hazards of the disease and not hazards to which the claimant is equally exposed outside of employment." *Saenz-Rico v. Yellow Freight System, Inc.,* W.C. No. 4-320-928 (January 20, 1998); see also *Stewart v. Dillon Co.,* W.C. No. 4-257-450 (November 20, 1996). Once the claimant makes such a showing, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.*, W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office*, N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines*, W.C. 4-785-790 (ICAO September 9, 2011).

Of particular note in the Claimant's case, as this is a right upper extremity claim based primarily on the diagnosis of carpal tunnel syndrome, is analysis of whether or not she has suffered a work-related cumulative trauma injury which is addressed in Rule 17, Exhibit 5 of the Guidelines.

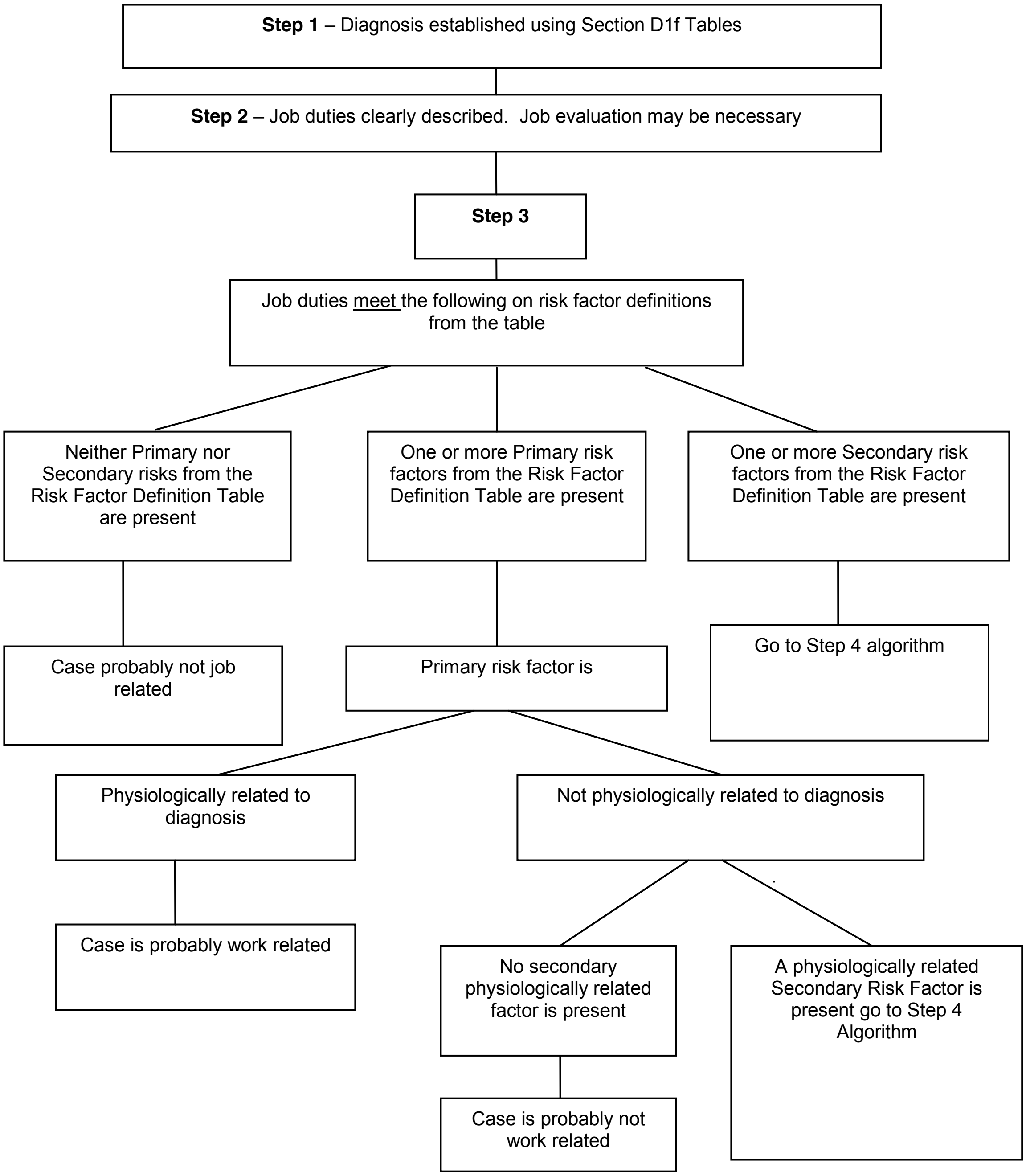
Rule 17, Exhibit 5 (D)(3) provides that,

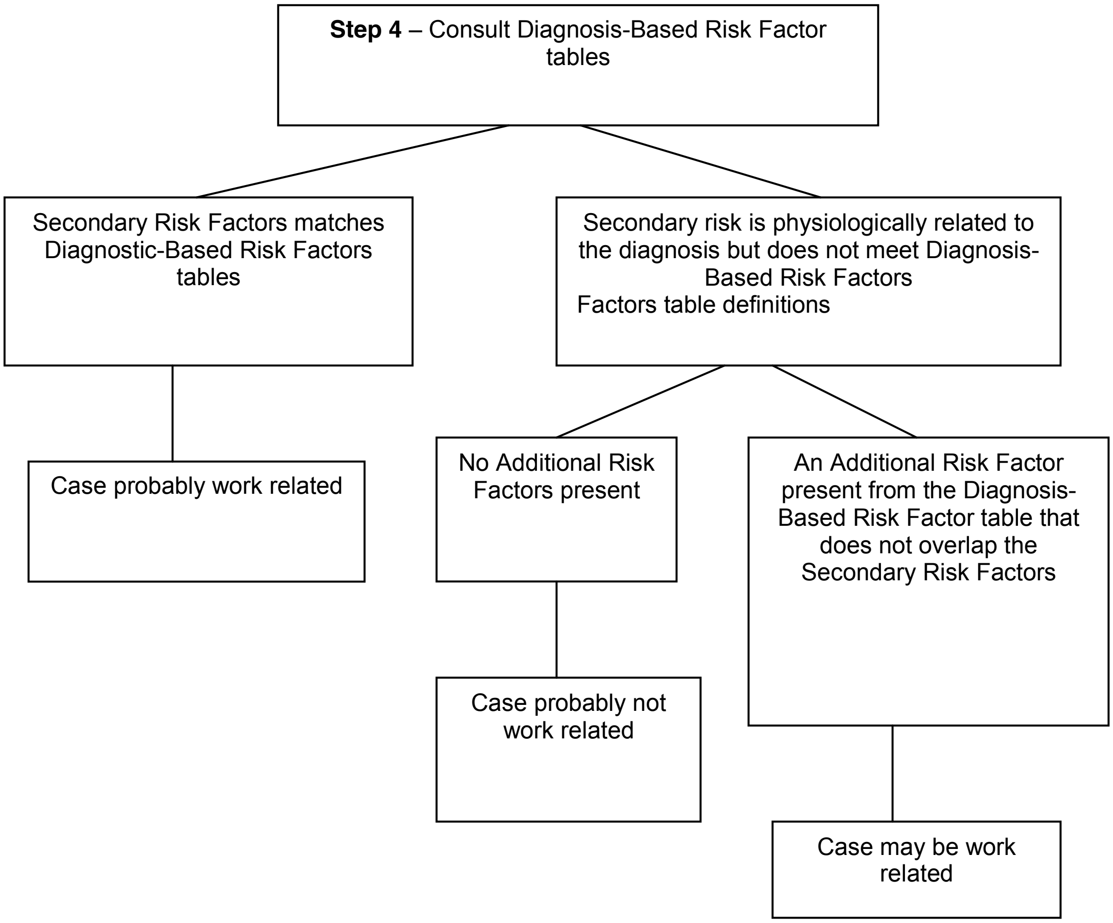
> The clinician must determine if it is medically probable (greater than 50% likely or more likely than not) that the need for treatment in a case is due to a work-related exposure or injury. Treatment for a work-related condition is covered when: 1) the work exposure causes a new condition; or 2) the work exposure causes the activation of a previously asymptomatic or latent medical condition; or 3) the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic condition. In legal terms, the question that should be answered is: "Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place?" If

the answer is “yes,” then the condition is not work-related. If the answer is “no,” then the condition is most likely work-related.

The Cumulative Trauma Guidelines then set out the steps the clinician should follow to make a proper causation evaluation. There is a 6-step general causation analysis and a 5-step causation analysis when using risk factors to determine causation. The Guidelines provide a chart (see next 2 pages) to illustrate the causation analysis as follows:

Algorithmic Steps for Causation Assessment


Step 1 – Diagnosis established using Section D1f Tables
Step 2 – Job duties clearly described. Job evaluation may be necessary
Step 3
Job duties meet the following on risk factor definitions from the table
Neither Primary nor Secondary risks from the Risk Factor Definition Table are present
One or more Primary risk factors from the Risk Factor Definition Table are present
One or more Secondary risk factors from the Risk Factor Definition Table are present
Case probably not job related
Primary risk factor is
Go to Step 4 algorithm
Physiologically related to diagnosis
Not physiologically related to diagnosis
Case is probably work related
No secondary physiologically related factor is present
A physiologically related Secondary Risk Factor is present go to Step 4 Algorithm
Case is probably not work related


Step 4 – Consult Diagnosis-Based Risk Factor tables
Secondary Risk Factors matches Diagnostic-Based Risk Factors tables
Secondary risk is physiologically related to the diagnosis but does not meet Diagnosis-Based Risk Factors
Factors table definitions
Case probably work related
No Additional Risk Factors present
An Additional Risk Factor present from the Diagnosis-Based Risk Factor table that does not overlap the Secondary Risk Factors
Case probably not work related
Case may be work related

Here, the Claimant's job duties are described sufficiently by the Claimant to make a determination as to the risk factors and the relationship of the Claimant's carpal tunnel syndrome symptoms to the demands of her job. There was no evidence presented that a job analysis was performed and no job description was provided in evidence in this case. There was no contrary evidence presented from a coworker or supervisor regarding the nature and duration of the Claimant's job duties. Thus, the only evidence presented regarding the Claimant's job duties came from the Claimant herself. The Claimant has consistently reported her job duties to medical providers and in her testimony, which was credible and uncontroverted.

Here, there is some dispute over the amount of time that the Claimant would have spent over the course of her work day keyboarding, using her mouse and holding her wrists in an awkward position.

The Claimant testified that she types or uses her mouse for the full 8 hour shift that she worked until her hours were reduced by 50% by Dr. Bussey. The 8-hour shift does not include her 30 minute lunch break and two 10 minute breaks, which are additional. She testified that her workspace is small and cramped. The Claimant reported to Dr. Vlahovich that she does not have a wrist pad at work and frequently rests wrists on the edge of her desk, which could provide the requisite time period for awkward posture as a risk factor. The Claimant reported to Dr. Wunder that of her 8 hour shift, she estimated typing occurred over 4 hours and mouse use occurred over 4 hours. Thus, over the course of a day, she is typing with her wrists bent and/or placed in an awkward position for approximately 4 hours per day and she is using her mouse for 4 hours per day on average. If she is engaging in less of one activity, presumably she would be doing more of the other since her work day is comprised of either keyboarding or mouse use while answering a telephone using a headset. So, if the Claimant were to keyboard for only 3 hours, then she would be using her mouse for 5 hours and conversely, if she were using a mouse for 3 hours, she would be typing for 5 hours (and doing so in an awkward bent wrist position).

Thus, in referring to the pertinent sections (see below) of the risk factor definitions chart (at WRCP Rule 17, Exhibit 5, pp. 21-22) and the diagnosis-based risk factors (at WRCP Rule 17, Exhibit 5, pp. 23-30), analysis shows that there are diagnosis-based risk factors or occupational risk factors linking the Claimant's mouse use of greater than 4 hours or the awkward posture activities to her diagnosis of right carpal tunnel syndrome. Even if the Claimant did work an 8 hour work day with the activities divided completely equally (which is not as likely), she still has 4 hours of exposure of awkward position. If on a particular day, she uses her mouse more than she types, then she has more than 4 hours of exposure to that activity. Further, on any day, she compounds one risk factor with the other and while the time may be right at the 4 hour cut-off, there are two activities occurring back to back at that cut-off. While Respondents have argued that the Claimant does not keyboard for more than 7 hours and there is evidence to support that this is not a risk factor for carpal tunnel syndrome, this argument ignores the fact that the 7-hour duration is for keyboarding in a good ergonomic position. There is persuasive evidence in this case to support that the Claimant is not keyboarding in a good ergonomic position and is likely typing with her wrists bent or in a awkward position for 4 or more hours.

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RISK FACTOR DEFINITIONS (excerpt)

CAUSATION MAY BE ESTABLISHED BY THE PRESENCE OF 1) A DIAGNOSIS-RELATED SOLE PRIMARY RISK FACTOR WHICH IS PHYSIOLOGICALLY RELATED TO THE DIAGNOSIS OR; 2) AT LEAST ONE SECONDARY RISK FACTOR THAT MEETS THE REQUIREMENTS FROM THE DIAGNOSIS-BASED RISK FACTOR TABLE

NOTE: Hours are calculated by totaling the cumulative exposure time to the risk over an 8 hour day. Breaks or periods of inactivity or performing other types of work tasks are not included.

Category	**As a Primary Risk Factor**	**Secondary Risk Factor**
Force and Repetition/Duration	6 hrs. of: > 50% of individual maximum force with task cycles 30 seconds or less or force is used for at least 50% of a task cycle-maximum force for most individuals is 3-5 kg of force.	4 hrs. of: > 50% of individual maximum force with task cycles 30 seconds or less or force is used for at least 50% of a task cycle-maximum force for most individuals is 3-5 kg of force.
	6 hrs. of: lifting 10 lbs > 60x per hour.	4 hrs. of: lifting 10 lbs > 60x per hour. *
	6 hrs. of: use of hand held tools weighing 2 lbs or greater.	4 hrs. of: use of hand held tools weighing 2 lbs or greater.
Awkward Posture and Repetition/Duration	4 hrs. of: Wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees.	
	6 hrs. of: Elbow - flexion > 90 degrees.	4 hrs. of: Elbow - flexion > 90 degrees.
	6 hrs. of: Supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle.	4 hrs. of: Supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle.
Computer Work	**Note:** up to 7 hours per day at an ergonomically correct work station is not a risk factor > 4 hrs. of: Mouse use.	
Use of handheld vibratory power tools and Duration	6 hrs. for more common types of vibration exposure	2 hrs. when accompanied by other risks
Cold Working Environment		Ambient temperature of 45F or less for 4 Hrs. or more, such as handling frozen foods that are 10 degrees

DIAGNOSIS - BASED RISK FACTORS

Hours are calculated by totaling the cumulative exposure time to the risk over an 8 hour day. Breaks or periods of inactivity or performing other types of work tasks are not included. Unless the hours are specifically stated below, "combination" of factors described below uses the Secondary Risk Factor Definitions from the Risk Factor Definition Table

Diagnosis	**Evidence FOR Specific Risk Factors**			**Evidence AGAINST Specific Risk Factors**	**Non-Evidence-Based Additional Risk Factors to Consider. These factors must be present for at least 4 hours of the work day, and may not overlap evidence risk factors.** [1]
	Strong Multiple high quality studies	**Good One high quality study or multiple adequate studies**	**Some One adequate study**		
Carpal Tunnel Syndrome		Combination of force, repetition, and vibration.	Wrist bending or awkward posture for 4 hrs.	Good evidence - Keyboarding less than or equal to 7 hrs. in good ergonomic position is NOT RELATED.	High repetition defined as task cycle times of less than 30 seconds or performing the same task for more than 50% of the total cycle time.
		Combination of repetition and force for 6 hours.			
		Combination repetition and forceful tool use with awkward posture for 6 hours – Deboning study.	Mouse use more than 4 hours.	Good evidence- Repetition alone less than or equal to 6 hrs. is NOT RELATED.	Tasks using a hand grip.
		Combination force, repetition, and awkward posture.	Combination cold and forceful repetition for 6 hours - Frozen food handling.		Extreme wrist radial/ulnar positions or elbows in awkward postures.

*Excerpt of relevant diagnosis from complete table

In this case, the Claimant proved that she suffered from an "occupational disease" as defined by C.R.S. § 8-40-201(14) with respect to her carpal tunnel syndrome. The Respondents' IME physician, Dr. Wunder, did not dispute that the Claimant had carpal tunnel syndrome, only that it was work related. Although Dr.

Wunder concluded that the Claimant's work duties did not establish that the requisite risk factors were present, analysis of the Claimant's work duties shows that the Claimant had, more likely than not, established that the risk factors were met. Therefore, the ALJ finds that the Claimant established that she suffered from an occupational disease traced to her employment duties as a cause, aggravation or acceleration of her condition.

Medical Benefits

The right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990). Under C.R.S. §8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Authorized providers include those medical providers to whom a claimant is directly referred by the employer, as well as providers to whom an authorized treading physician ("ATP") refers a claimant in the normal progression of authorized treatment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

As set forth above, the Claimant's carpal tunnel syndrome condition is found to be causally related to the Claimant's work activities and is compensable. The treatment of the Claimant's condition provided by Dr. Vlahovich and Dr. Bussey was reasonably necessary to treat the occupational disease. Respondents shall be liable for the conservative treatment the Claimant has received to date and for further medical treatment recommended by the Claimant’s authorized treating physicians that is consistent with the Act.

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain temporary disability benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

In the case of temporary partial disability (TPD) benefits, the disability benefit is calculated on the “difference between the employer’s average weekly wage at the time of the injury and the employee’s average weekly wage during the continuance of the temporary partial disability….” Per § 8-42-106(2)(a)-(b), TPD benefits shall continue until the first occurrence of either one of the following:

- the employee reaches maximum medical improvement; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment

In this case, the Claimant established that she suffered a compensable occupational disease and that she has missed work and suffered a wage loss. The Claimant sustained an occupational disease with a gradual onset of symptoms but a date of July 1, 2015 when the symptoms became intolerable enough that the Claimant reported the condition to her employer and sought medical attention. The Claimant’s initial treatment was conservative. During her initial conservative treatment, the Claimant continued to work full time. Then, after performing an orthopedic examination on August 5, 2015, Dr. Bussey recommended decreased hours for the Claimant because there was no way to limit both hands sufficiently to keep her active at work. He recommended the Claimant’s work be limited to 4 hours a day until her symptoms were controlled. No treating physician has placed the Claimant at MMI nor has any released the Claimant to work full duty, full time and the Claimant’s symptoms are not under control. Since August 5, 2015, the Claimant has worked 50% of her normal hours and has suffered a wage loss through the present. The parties stipulated that the Claimant’s average weekly wage for the purposes of calculating a wage loss and any temporary disability benefits was $381.48 from July 1, 2015 to September 11, 2015 and then $390.81 from September 12, 2015 ongoing. The Claimant is entitled to temporary partial disability benefits from August 5, 2015 ongoing until terminated by statute calculated using the stipulated average weekly wage amounts.

ORDER

It is, therefore, ordered that:

1. The Claimant has established by a preponderance of the evidence that she suffered a compensable occupational disease of carpal tunnel syndrome related to her work duties for Employer.

2. The conservative treatment for the Claimant's carpal tunnel syndrome provided thus far was reasonable, necessary and related to cure and relieve the effects of the compensable occupational disease and the Claimant is entitled to further medical treatment reasonably necessary to cure and relieve the effects of her work related occupational disease.

3. Respondents shall pay the Claimant temporary partial disability ("TPD") benefits for the time period commencing August 5, 2015 and ongoing.

4. Pursuant to the stipulation of the parties, the average weekly wage is $381.48 from July 1, 2015 to September 11, 2015 and then $390.81 from September 12, 2015 ongoing. The stipulation was approved and shall be used to calculate the Claimant's disability benefits.

5. Insurer shall pay eight percent (8%) per annum on all compensation not paid when due.

6. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 21, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has met his burden of proof that he sustained a compensable injury when he fell off a table at work on May 18, 2015 striking his right elbow?

2. Whether the claimant has met his burden of proof that the medical care he received at Parkview Hospital, and from Dr.Cheryl Wills, Dr. Sumant Rawat, Dr. William Watson and Dr. Kenneth Danylchuk were authorized and reasonable and necessary?

3. Whether the average weekly wage is appropriately set at $1,040.66?

4. Whether the claimant has met his burden of proof that he is entitled to temporary total disability commencing July 27, 2015, his last day of work, and ongoing?

5. Whether the respondents should be penalized pursuant to §8-43-203(2) C.R.S. for failure to timely admit or deny the claim?

6. Whether the respondent-employer should be penalized for late reporting pursuant to §8-43-101(1) C.R.S.?

7. Whether the claimant should be penalized for late reporting?

FINDINGS OF FACT

1. On May 18, 2015 the claimant was performing his usual duties as a machinist. He was standing on the table that housed his machine while changing gears. As he attempted to step off of the table he slipped and fell striking his right elbow on the table. At first he was not sure that he would need medical attention but he was experiencing a sharp pain in his elbow shooting down his arm. He reported the injury immediately to his supervisor, Jack Johnson. He did not at first request medical attention. Mr. Johnson completed a document entitled "Accident Investigation Supervisor's Report" and signed it on the date of the injury. It provides that the injury was reported by the employee on May 18, 2015 and describes the injury consistently with the claimant's testimony.

2. The claimant's condition did not resolve and he asked for the respondent-employer to refer him for medical care. The claimant asked Mr. Johnson and asked the plant manager, Craig Fetty. Mr. Fetty informed the claimant that he would not be provided medical care because this was not considered by the respondent-employer to be a work related injury. The claimant then sought medical care on his own and initially went to Parkview Medical Center on July 27, 2015. The emergency room report notes that the claimant was complaining of medial right elbow pain after having fallen about a month before. The final diagnosis was medial epicondylitis and he was referred to his family doctor, Dr. Cheryl Wills. The claimant was given discharge instructions from Parkview which he took to the respondent-employer. The claimant was released to light duty until August 3, 2015, with the diagnosis and referral to his family doctor as set forth above. The claimant delivered these documents to the respondent-employer on July 27, 2015. Neither light duty nor a referral for medical care was offered.

3. The claimant was seen the following day by his family doctor, Dr. Wills. Dr. Wills' medical records provide that the claimant hurt his elbow at work approximately 1 ½ months ago after he fell and hit it on a counter at work. The initial medical record states that the claimant is unable to use his right upper extremity at work, that light duty was not available, and therefore he was unable to work. Dr. Wills referred the claimant to Dr. Danylchuk at Maple Leaf Orthopedics and to Parkview for an MRI. She also indicated subsequently that until his condition improved her restrictions of no use of his right upper extremity would be reasonable.

4. The claimant was seen by Dr. Danylchuk's partner, Dr. William Watson on September 1, 2015. The claimant advised Dr. Watson that he fell on his right elbow on May 18, 2015. Dr. Watson notes the MRI, done on August 4, 2015, indicates a ". . . combination of arthritis, a small volume of joint effusion, a partial tear, and extensor tendon origin non specific mildly increased signal intensity in the medial collateral ligamentous structures which may be a partial tear or degeneration of the menisci." According to Dr. Watson, the claimant stated that he felt pain and numbness. The numbness was in the ulnar nerve distribution. The diagnosis was advanced arthritis of the right elbow aggravated from work related injury, strain of the medial collateral ligament structure with involvement of the ulnar nerve and probable intermittent subluxation ulnar nerve cubital tunnel with secondary cubital tunnel syndrome. Dr. Watson referred the claimant for an EMG to evaluate the ulnar nerve.

5. Dr. Watson referred the claimant to Dr. Rawat for the EMG and provided sedentary only work restrictions.

6. The claimant returned to see Dr. Watson on October 27, 2015. After reviewing the EMG results which indicated a moderately severe right ulnar neuropathy with entrapment at the elbow mild bilateral carpal tunnel syndrome, his impression was a severe right ulnar neuropathy with entrapment of ulnar nerve at the elbow with subluxation. Surgery was discussed. The claimant was subsequently scheduled for an ulnar nerve release of his right elbow which occurred on December 8, 2015 and which was performed by Dr. Watson's partner, Dr. Kenneth Danylchuk. The claimant testified credibly that the surgery has improved but not yet alleviated the shooting pain and numbness. The claimant testified credibly that prior to May 18, 2015 he had never had symptoms in his right elbow or upper extremity pain and numbness.

7. After initially seeing Dr. Wills on July 28, 2015 the claimant brought to the respondent-employer a release from work for that day. Taken all together the employment records, the medical records, and the claimant's testimony supports the determination that the claimant sustained a compensable injury.

8. On August 19, 2015 Dr. Wills completed a form on behalf of the claimant's effort to get short term disability through the respondent-employer. Dr. Wills checked a box that the claimant's condition did not arise out of his employment. This document, as it turns out, was the last of three versions prepared by Dr. Wills and submitted to the respondent-employer. Ms. Lucero, as the HR coordinator received the first two versions which indicated in that same box that the condition was work related. She refused to accept those two versions. She contacted Dr. Wills, indicting she would not accept statements by Dr. Wills that the condition was work related.

9. The second version signed by Dr. Wills August 13, 2015 states that the condition of ulnar neuropathy and elbow pain arose out of his employment and also provides that there is a partial tear secondary to his work related injury.

10. There is insufficient evidence that any effort was made by the respondent-employer to provide authorized medical care. This is true even after the claimant brought in medical records from Parkview Hospital and from Dr. Wills on July 27 and July 28. The claimant's ongoing requests for authorized medical care were specifically denied. The ALJ finds that the claimant's selection of Parkview and the subsequent referrals from Parkview to Dr. Wills and from Dr. Wills to Dr. Danylchuk and his partner are all authorized. The referral to Dr. Rawat by Dr. Watson is further authorized.

11. The medical care received by the claimant was reasonable and necessary as set forth in the medical records from the treating doctors and facilities. Diagnostic studies ordered by Dr.'s Watson and Wills confirm the ulnar neuropathy. The claimant

underwent the surgery to relieve him of the ulnar neuropathy. There have been no Rule 16 denials.

12. The claimant testified that he normally worked a 40 hour work week and was paid, as of December 2014 at the hourly rate of $17.33 per hour. Employment records support his position. Payroll records from pay date January 8, 2015 through April 17, 2015 establish the total hours the claimant was working was between 73 and 88 hours per two week period. The ALJ finds the average weekly wage is fairly based upon a 40 hour work week which equates to $693.20 or a temporary total disability rate of $462.13.

13. As of September 30, 2015 the loss of fringe benefits increases the average weekly wage. The ALJ finds the claimant lost his fringe benefits for himself and his family. According to his testimony and the COBRA letter found the cost to replace the medical coverage for his family is $1,429.16 per month. The cost for dental was $74.74 per month, and the cost for vision was $1.76 per month. These premium costs total $1,505.66 per month which equates to an average weekly increase of $347.46 as of the termination event of September 30, 2015. Combined with the base of $693.20 the average weekly wage can fairly be placed at $1,040.66. An average weekly wage of $1,040.66 provides for a temporary total disability rate of $693.77.

14. The claimant testified that his last day of work was July 27, 2015. On that date he went to Parkview Hospital. He returned to the respondent-employer and gave the respondent-employer a release to return to work light duty only. The employer offered no employment. The following day the claimant saw Dr. Wills who provided a specific restriction of no use of upper right extremity. This written restriction was also provided to the respondent-employer. No work was offered to the claimant then or later. No work has ever been offered to the claimant. While under restrictions the claimant's employment was terminated as part of a "layoff". The claimant has neither reached maximum medical improvement, nor has there been a determination that the claimant may return to work full duty. Dr. Wills confirmed restrictions are continuing in her note of December 17, 2015. The claimant has not worked since going to the hospital on July 27, 2015. All of these facts are unrefuted. The claimant is entitled to temporary total disability benefits commencing July 27, 2015 and continuing as allowed by law.

15. Section 8-43-203(1)(a) C.R.S. provides that the insurance carrier shall notify in writing the Division and the injured employee within twenty (20) days after a report is or should have been filed with the Division pursuant to §8-43-101, whether liability is admitted or contested. The claimant filed his Workers' Claim for Compensation with the Division with copies to the respondents. The claim was dated

August 4, 2015. In response, the Division of Workers' Compensation issued its letter of August 12, 2015 to the insurance carrier notifying them that they had 20 days from August 12, 2015 to state a position. The respondent-insurer did not file their position; namely, the Notice of Contest until received by the claimant on September 17, 2015. The filing of the Notice of Contest was 16 days late. The claimant may be awarded up to one day of compensation for each day late pursuant to §8-43-203(2)(a) C.R.S. The ALJ finds that the claimant is entitled to 16 days of compensation for the respondent-insurer's failure to timely file a position.

16. Section 8-43-101(1) C.R.S. requires that every employer shall notify the Division within ten (10) days after notice or knowledge that an employee has sustained a loss-time injury. The HR coordinator, Nadine Lucero, who agreed that this was part of her job admitted that she never notified the Division because she never wanted to treat this as work related. This was not done in the face of the claimant reporting the injury, the supervisor reporting the injury and medical records being delivered that indicated a work related injury. Pursuant to §8-43-304(1) a party may be penalized for any violation of any provision of the Workers' Compensation Act or fails or refuses to perform any duty mandated by the statute within time prescribed for up to $1,000.00 per day. The Division indicates that an Employer's First Report was received on September 9, 2015. The claimant requests penalties from August 7, 2015 through September 9, 2015 be assessed. The respondent-insurer knew that the claimant was missing time from work due to this industrial injury no later than July 27, 2015. They had ten (10) days to report the lost time claim. As of August 7, 2015 they were in violation of the statute. The ALJ finds that the respondents are liable for penalties for the period August 7, 2015 through September 9, 2015, a period of 33 days. The ALJ finds that a penalty of $100.00 per day is sufficient to address this violation.

17. There is no question that the claimant reported the industrial injury to his supervisor on the date it occurred. It is established that the claimant sought medical attention once he determined that his symptoms were not going away. It is established that he provided medical records for treatment at both Parkview and Dr. Wills on July 27, 2015 and July 28, 2015. The claimant filed a Workers' Claim for Compensation when he was not provided medical care dated August 4, 2015. The claimant provided written notice by the Workers' Claim for Compensation within ten (10) days of his lost time with the employer.

18. The statute provides that a written report can be made by the employee, a foreman, superintendent, manager or any other supervisor or by any person who has notice of the injury. §8-43-102(1)(a) C.R.S. The claimant's supervisor was provided notice and signed his incident report on the date of injury. The decision to assign a

penalty is discretionary. The time question would be July 27th through August 4th, the filing of the Workers' Claim for Compensation. The ALJ finds that the claimant provided sufficient notice, on multiple occasions and in multiple ways of the industrial injury. The respondents knew that the claimant was asserting a work related claim. The respondents simply chose not to treat this as work related.

19. The ALJ finds that the claimant should not be penalized under the totality of the evidence.

CONCLUSIONS OF LAW

1. Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; see, *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001). If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

2. Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1977), cert. denied September 15, 1997.

3. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

4. The employer and its insurance company must provide all medical benefits which are reasonably needed at the time of injury and thereafter during the disability to cure and relieve the injury. §8-42-101 C.R.S. The employer and the insurer have the first right to select the attending physician at the time of injury. §8-43-404(5)(a) C.R.S. The employer's initial right to select the treating physician is triggered once the employer has some knowledge of the facts connecting the injury or occupational disease with the employment and indicating "to a reasonably conscientious manager" that a potential workers' compensation claim may be involved.

Bunch v. Industrial Claim Appeals Office, 148 P.3d 381 (Colo. App. 2006). If the employer does not provide medical care the employee is permitted to select the treating physician. §8-43-404(5)(a)(I)(A) C.R.S. The attending physician is selected by the employee from a list provided by the employer at the time of injury. There is insufficient evidence that a list was provided to the claimant. There is insufficient evidence that any effort was made by the respondent-employer to provide authorized medical care. The claimant's ongoing requests for authorized medical care was specifically denied. The ALJ concludes that the claimant's selection of Parkview and the subsequent referrals from Parkview to Dr. Wills and from Dr. Wills to Dr. Danylchuk and his partner are all authorized. The referral to Dr. Rawat by Dr. Watson is further authorized. Referrals from an authorized provider made in the course of treatment of the Claimant are authorized. *Rogers v. Industrial Commission,* 746 P.2d 565 (Colo. App. 1987); *Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985).

5. The fact that the claimant did not initially seek medical care does not relieve the respondent-employer of the absolute duty to provide medical care once requested by the claimant. The fact that the claimant was providing notes of his visits alerted the respondent-employer that he was, indeed, requesting medical care. A "reasonably conscientious manager" would have made a referral. If an employee does not report the injury for several days, it is impossible for the employer to tender medical care at the time of injury. However, at the time of notification, the employer must immediately exercise its right of selection. If the employer does not select the physician, the employee's right to pick the treating doctor becomes vested. *Sims v. Industrial Claims Appeal Office,* 797 P.2d 777 (Colo. App. 1990).

6. The ALJ concludes that the medical care received by the claimant was reasonable and necessary as set forth in the medical records from the treating doctors and facilities. Diagnostic studies ordered by Dr.'s Watson and Wills confirm the ulnar neuropathy. The claimant underwent the surgery to relieve him of the ulnar neuropathy. There have been no Rule 16 denials. The ALJ concludes that the treatment is the responsibility of the respondent-insurer, subject to a fee schedule.

7. The ALJ concludes that the claimant's average weekly wage, as found above, is $1,040.66. This based upon the premium costs totaling $1,505.66 per month which equates to an average weekly increase of $347.46 as of the termination event of September 30, 2015. This combined with the base of $693.20 results in the average weekly wage being $1,040.66. An average weekly wage of $1,040.66 provides for a temporary total disability rate of $693.77.

8. Pursuant to §§8-42-103 and 8-42-105, C.R.S., a claimant is entitled to an award of TTD benefits if: (1) The injury or occupational disease causes disability; (2) The injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three (3) regular working days. *See, Lymburn v. Symbios Logic,* 952 P.2d 831(Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. §8-42-103 C.R.S; *Liberty Heights at Northgate v. Industrial Claim Appeals Office,* 30 P.3d 872 (Colo. App 2001). The ALJ concludes that the claimant has met his burden of proof that he is entitled to temporary disability benefits. The claimant testified that his last day of work was July 27, 2015, and as found above has not returned to work due to his industrial injury. The claimant has neither reached maximum medical improvement, nor has there been a determination that the claimant may return to work full duty. Dr. Wills confirmed restrictions are continuing in her note of December 17, 2015. The ALJ concludes that the claimant is entitled to temporary total disability benefits commencing July 27, 2015 and continuing as allowed by law.

9. Section 8-43-203(1)(a) C.R.S. provides that the insurance carrier shall notify in writing the Division and the injured employee within twenty (20) days after a report is or should have been filed with the Division pursuant to §8-43-101, whether liability is admitted or contested. The claimant filed his Workers' Claim for Compensation with the Division with copies to the respondents. The claim was dated August 4, 2015. In response, the Division of Workers' Compensation issued its letter of August 12, 2015 to the insurance carrier notifying them that they had 20 days from August 12, 2015 to state a position. The respondents did not file their position; namely, the Notice of Contest until received by the claimant on September 17, 2015. The filing of the Notice of Contest was 16 days late. The claimant may be awarded up to one day of compensation for each day late pursuant to §8-43-203(2)(a) C.R.S.

10. The ALJ concludes that the claimant is entitled to 16 days of compensation for the respondent-insurer's late filing.

11. Section 8-43-101(1) C.R.S. requires that every employer shall within ten (10) days after notice or knowledge that an employee has sustained a loss-time injury, notified the Division. The HR coordinator, Nadine Lucero, who stated in her deposition testimony that this was part of her job admitted that she never notified the Division because she never wanted to treat this as work related. This was not done in the face of the claimant reporting the injury, the supervisor reporting the injury and medical records being delivered that indicated a work related injury. Pursuant to §8-43-304(1) a party may be penalized for any violation of any provision of the Workers' Compensation Act or fails or refuses to perform any duty mandated by the statute within time

prescribed for up to $1,000.00 per day. The Employer's First Report was received on September 9, 2015. The ALJ concludes that penalties are assessed from August 7, 2015 through September 9, 2015. The respondents knew that the claimant was missing time from work due to this industrial injury no later than July 27, 2015. They had ten (10) days to report the lost time claim. As of August 7, 2015 they were in violation of the statute.

12. The ALJ concludes that a penalty of $100.00 a day is sufficient to address this penalty.

13. The statute provides that a written report can be made by the employee, a foreman, superintendent, manager or any other supervisor or by any person who has notice of the injury. §8-43-102(1)(a) C.R.S. The Claimant's supervisor was provided notice and signed his incident report on the date of injury. The decision to assign a penalty is discretionary. The time question would be July 27, 2015 through August 4, 2015, the date of filing of the Workers' Claim for Compensation. The ALJ concludes that under these circumstances the claimant should not be penalized. The ALJ concludes that the claimant provided sufficient notice, on multiple occasions and in multiple ways of the industrial injury. The respondents knew that the claimant was asserting a work related claim. The respondents simply chose not to treat this as work related.

14. The ALJ concludes that the claimant has established by a preponderance of the evidence that he sustained an injury on May 18, 2015, arising out of and in the course of his employment with the respondent-employer.

15. The ALJ concludes that the claimant has established by a preponderance of the evidence that the claimant is entitled to medical care to cure or relieve him from the effects of his injury, including that medical care found above to be reasonable and necessary.

16. The ALJ concludes that the claimant has established by a preponderance of the evidence that his average weekly wage is $1,040.66.

17. The ALJ concludes that the claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits commencing July 27, 2015 and continuing until terminated by operation of law.

18. The ALJ concludes that the claimant has established by a preponderance of the evidence that he is entitled to 16 days of compensation for the respondent-insurer's failure to admit or deny, for a period of 16 days.

19. The ALJ concludes that the claimant has established by a preponderance of the evidence that the respondents should be penalized for failure to notify the Division of a lost time injury for a period of 33 days.

20. The ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that the claimant should be penalized for late reporting.

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The respondent-insurer shall pay for all reasonable, necessary, and related medical care to cure or relieve the claimant from the effects of the injury, including the care received as found above.

3. The respondent insurer shall pay benefits based upon an average weekly wage of $693.20 from July 27, 2015 through September 30, 2015.

4. The respondent-insurer shall pay benefits based upon an average weekly wage of $1,040.66 beginning October 1, 2015.

5. The respondent-insurer shall pay the claimant temporary total disability benefits beginning July 27, 2015 and ongoing until terminated by operation of law, at the average weekly wage amounts ordered herein.

6. The respondent-insurer shall pay the claimant 16 days of compensation for failure to timely admit or deny.

7. The respondent-insurer shall pay a penalty of $3,300.00 to be apportioned 80% to the claimant and 20% to the workers' compensation cash fund created in section 8-44-112(7)(a); thus the claimant is awarded $2,640.00 with the cash fund being awarded $660.00.

8. The respondents request to penalize the claimant for late reporting is denied and dismissed.

9. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

10. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: March 3, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-990-258-01

ISSUES

- Whether Claimant suffered a compensable injury on June 22, 2015.

- Whether Claimant is entitled to further treatment to her back as a result of the June 22, 2015 injury.

STIPULATIONS

- Should this claim be found compensable, the parties stipulate that Claimant's average weekly wage is $590.87.

- Should this claim be found compensable, the parties stipulate that treatment Claimant received between June 25, 2015 and August 2, 2015 was not rendered by authorized providers, and therefore is not payable under the Worker's Compensation Act.

- Should this claim be found compensable, the parties stipulate that treatment Claimant received from August 3, 2015 forward was reasonable, necessary, and authorized. Respondent agrees to pay the cost of that treatment rendered.

- Should this claim be found compensable, the parties stipulate that Claimant's lost time from work, if there was any, can be determined by the wage records previously exchanged between the parties.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant works as a laundry attendant at Vail Resorts where she is responsible for linens used at two Vail Resorts properties. Claimant's job duties include collecting, washing, drying, folding, and restocking between 500 and 600 pounds of linens per eight hour shift.

2. On Sunday June 21, 2015, Claimant's shift began at approximately 10:00 p.m. and ended on Monday June 22, 2015 at approximately 7:00 a.m. At approximately 11:00 p.m. on June 21, 2015, a water line to or from the industrial washing machines broke resulting in flooding in the laundry room. Engineers working that night repaired the water line and used fans and vacuums to remove water. "Chase," the night supervisor, mopped up water. Claimant used towels to remove water from the floor by placing them on the floor, allowing them to become saturated with water, then picking them up three at a time, and placing them into a 55-gallon garbage container. Claimant spent approximately twenty to

thirty minutes on this task which involved "lots of bending" and "some twisting." Claimant experienced soreness in her lower back, and within approximately sixty minutes, her back locked-up or seized and she experienced a dramatic increase in pain and decrease in mobility. Claimant testified that at approximately 2:00 a.m. she told Chase that she injured her back and needed to go home to rest. She returned for approximately the last two hours of her shift. Claimant did not ask to file a workers' compensation claim, nor did Chase offer to do so.

3. Claimant was not scheduled to work on Monday night. She returned to work on Tuesday night, June 23, 2015, and told her manager, Andy Stoll, that she needed help doing her job. Mr. Stoll provided her with an assistant. Claimant also worked the Tuesday night/Wednesday morning shift with assistance moving heavy items and bending to the floor. Claimant had been released from restrictions for an unrelated injury on June 4, 2015. No persuasive evidence was offered to support a finding that Claimant distinguished for Mr. Stoll that she needed assistance due to the June 21, 2015 incident.

4. On Wednesday, June 24, 2015, Claimant, using her personal insurance, sought chiropractic treatment from Dr. Pitcher for her then-moderate back pain. On Dr. Pitcher's intake form Claimant responded "no" to the question "Is today's visit due to a work related injury?" But when asked what caused her pain, she wrote, "Not sure – I was at work and my back went out/seized up completely – had to go home." Dr. Pitcher noted Claimant's history of onset as "the patient is a 45-year-old female that presents to the office with a chief complaint of right-sided low back pain after bending and lifting laundry on Sunday. She had immediate pain which increased with time." Dr. Pitcher noted the following on physical exam:

    - Claimant's lumbar straight leg raise (SLR) was negative, prone SLR was positive,
    - Local pain and dysfunction in the right sacroiliac (SI) joint,
    - Sustained lumbar hyperextension was unremarkable,
    - Hypertonicity in lumbar para spinal musculature, especially at the lumbo-sacral junction.

    Claimant continued to treat with Dr. Pitcher through the end of June and part of July 2015. Dr. Pitcher's notes reflect that work in the laundry aggravated Claimant's problem. Claimant was able to continue working in her position as a laundry attendant through July because she was very careful about picking up items and limited her bending. Claimant also purchased a tool to pick up items that fell on the floor so she would not have to bend.

5. Other than an unrelated event twenty years earlier, Claimant has not had prior back pain, symptoms, treatment, or evaluations.

6. In approximately mid July, Claimant's improvement stalled. She attributed the stall to an increase in her workload due to the holidays, and to one of the properties sending their laundry in large heavy bags as opposed to wheeled carts which increased her required lifting. By early August the property began sending its laundry in wheeled carts.

7. On July 13, 2015, Claimant, on her own referral, presented for physical therapy at Howard Head Sports Medicine. She filled out a "Patient Health History" noting that her date of injury was June 21, 2015, and that she injured her right spine and her SI joint. Claimant's response to the question "What do you think caused your injury?" was "Work – bending and twisting." While Claimant reported minimal pain and very limited effect on her abilities, when asked to rate her back as a percentage of normal, with 100% being normal; Claimant rated her back at just 20%. In the history of injury section of her Initial Evaluation, it states, "Patient's low back pain began on the evening of June 21, 2015 during a work shift. She reports her back became so painful it locked up on her at work and she had to leave early." While Claimant rated her then-current pain at 1/10, she verbally reported that she was constantly aware of her pain. Claimant winced and withdrew with pain on palpation of her right SI joint line.

8. Claimant attended twenty physical therapy appointments ending on October 6, 2015. She cancelled her October 7, 2015 appointment noting a personal conflict.

9. Claimant's personal insurance covered ten chiropractic visits. Claimant exhausted that benefit by July 15, 2015. Because Claimant's symptoms had not resolved, Dr. Pitcher referred Claimant to Rachel Segerdahl, a P.A. who is supervised by John Hughes, D.O.

10. Claimant first saw Ms. Segerdahl on July 22, 2015. Under history of present illness, Ms. Segerdahl noted, "patient cannot recall any specific incident that occurred before the onset of pain." Ms. Segerdahl's findings on physical exam included the following:

    - Patient is able to heel-toe walk without difficulty,

    - Forward flexion is without pain,

    - Extension is 0 degrees with pain in lower back,

    - Tender to palpation over midline spine L3-S1, bilateral lumbar paravertebral muscle, and over right SI,

    - SLR (straight leg raise) is negative bilaterally.

11. On July 23, 2015, Claimant underwent a lumbar spine MRI without contrast. Claimant used her personal insurance to cover the costs of the procedure. Michele Lajaunie, M.D., the neuro radiologist who interpreted the MRI, found:

- Mild to marked bilateral facet joint arthropathy from L2 through S1,
- Mild to moderate disc bulges at L2 through S1,
- The right L4 and L5 nerve roots could be irritated,
- Mild to moderate bilateral foraminal stenosis at L4 through S1,
- Claimant was also noted to have a congenitally narrow spinal canal.

12. Although Claimant asserts that Ms. Segerdahl referred Claimant for physical therapy as well as for a spinal injection, the ALJ finds no persuasive evidence to support such a referral.

13. On August 3, 2015, Claimant reported her injury to her supervisor, Andrew Stoll. He then filled out an Employer's First Report of Injury. Claimant testified that she told Mr. Stoll that her injury was worse than she thought and that she needed to pursue a workers' compensation claim. Claimant testified that she had not pursued a workers' compensation claim earlier because she was unaware of the procedure to do so, and she did not realize how badly she was injured until she was advised of the MRI findings.

14. Claimant testified that Mr. Stoll filled out the report. The report specifies that the injury occurred at 1:00 a.m. on June 22, 2015. It further provides, "Had a gradual progression of soreness in right hip, lower back, and right glut [sic] area. Jo's back eventually 'locked up' causing her to be una [no further text]." Claimant testified that she was not given a copy of the report, and that she had no input into the preparation of the first report of injury. Claimant testified she disagrees with Mr. Stoll's statement that her back pain had a gradual onset. Mr. Stoll did not give Claimant a list of providers, but Insurer's adjuster called her later and provided that information.

15. Claimant selected Dr. Steve Yarberry from the list of designated providers and first saw him on August 7, 2015. His notes reflect that Claimant's injury occurred on June 22, 2015 and started with Claimant bending over a lot at work. Claimant complained that her back had locked up five times since the original injury, that she had done a lot of bending the day before and thought her back could lock up again. On examination of Claimant's lumbar spine, he noted:

- Tender in the lower lumbar area, midline, and right para midline,
- Some SI joint tenderness,
- Pain with forward flexion and back extension, worse on extension,
- And positive SLR.

Dr. Yarberry did not have the MRI or report and speculated that it sounded like a possible annular tear or recurrent sprain. He referred Claimant to Scott Raub, D.O., who prescribed physical therapy twice a week for four weeks, and Naprosyn.

16. On August 11, 2015, Dr. Yarberry completed a Physician's Report of Worker's Compensation Injury. His work related diagnoses were low back pain, spinal stenosis, and facet arthritis. The report included his referral to physical therapy twice a week and Naprosyn prescription, and temporary work restrictions. Dr. Yarberry indicated that his objective findings were consistent with Claimant's history and work related mechanism of injury.

17. Claimant filled out a Spine History form on August 19, 2015 indicating that her injury was "work related but was denied work comp." Marginal notes on the form not in Claimant's handwriting read, "0 prior probs W/C Denied caused from picking up wet towels Multiple evals 'Lock up' x 6 can last up to 3 days."

18. On December 18, 2015, Claimant was evaluated by Scott E. Raub, D.O. At that visit, Claimant attributed her back problems to repetitive lifting of wet towels on June 22, 2015, and she denied any prior low back issues. On physical exam, Dr. Raub noted that Claimant was very guarded and difficult to palpate due to her obesity. This interfered with his ability to evaluate her hip range of motion, her straight leg raise, sacroiliac provocation, and lumbar range of motion. Dr. Raub noted:

> I'm concerned that her obesity may limit her recovery or make treatment much less predictable and difficult to provide from a technical standpoint. We talked about the fact that intraspinal injections as well as surgery have a higher degree of difficulty technically given her size, the response [to] such treatments are also less predictable and there are more potential adverse occurrences.

Dr. Raub recommended Facet injections and, injections if the facet injections were not diagnostic, right sacroiliac injections. With respect to whether Claimant's injury was work related, Dr. Raub opined:

- The underlying facet arthritis and disc degeneration clearly predated her work event.

- It was possible that her work activities exacerbated an underlying condition.

- Claimant's obesity and deconditioning predisposed her to developing low back pain.

19. Claimant's personal health insurance policy which is self-insured by Employer notified Claimant via correspondence that it denied treatment because it deemed

Claimant's need for treatment to be related to a work injury. Employer also filed the Notice of Contest on August 25, 2015 denying treatment under workers' compensation. Because of these denials, Claimant did not pursue the injections recommended by Dr. Raub.

20. On September 14, 2015, Claimant saw David Karli, M.D. In describing how her problems began, Claimant recounted:

> I work in Laundry so always bending over. Washers broke one night. After picking up lots of wet towels to dry the floor, back started to feel sore & w/in 30-60 min. completely locked up. Had to go home. No previous back pain but now it flares at work almost every night depending on how much bending or work I do.

Claimant also specified that she was at work when her symptoms began and that a specific accident or injury while at work caused her symptoms.

21. Dr. Karli's notes of Claimant's physical examination indicate that "lumbar range of motion was nonprovocative in flexion/extension." However, in the next section of his report he states, "Extension based provocation confirmed today on exam would also indicate possible posterior element involvement." He was unable to identify whether Claimant's pain was discogenic or facetogenic, and agreed with Dr. Raub's assessment that a course of injections be pursued.

22. On October 8, 2015, Claimant underwent a right L5-S1 transforaminal epidural steroid injection, performed by Dr. Karli. Claimant testified that her father paid for the procedure. Claimant reported some pain relief for a couple of weeks, with her pain levels then returning to baseline.

23. On November 23, 2015, Elizabeth Bisgard, M.D., performed a Respondents sponsored independent medical examination on Claimant. Dr. Bisgard's report is dated December 29, 2015. On physical exam, Dr. Bisgard found Claimant to have a non-physiologic exam with palpation. "I was barely able to touch her jeans without her complaining of increased pain." Dr. Bisgard also found Claimant's response to the straight leg raise to be non-physiologic, in that she was unable to lift her leg in the supine position, but could straighten her knees without pain in a seated position.

24. Dr. Bisgard relied on dates included in a few medical records to conclude that Claimant's injury preceded the broken water pipe incident. Dr. Bisgard also concluded that Claimant only reported to her that the injury was work related. The ALJ finds these conclusions to be contrary to the greater weight of evidence and not persuasive.

25. Dr. Bisgard evaluated Claimant's condition as a cumulative trauma and concluded that Claimant's job description did not meet the causality criteria for a work related back injury. The ALJ finds that Claimant's complaints are more

consistent with an acute injury than with cumulative trauma, and that Dr. Bisgard's cumulative trauma analysis is not persuasive.

26. Dr. Bisgard's opinion that Claimant "does not have a diagnosis" is not persuasive.

- Ms. Segerdahl diagnosed Claimant with lumbago on July 22, 2015.
- The MRI referenced diffuse disc bulges at the L4-5 and L5-S1 levels.
- Dr. Yarberry diagnosed Claimant with Low Back Pain on August 7, 2015.
- Dr. Karli diagnosed Claimant during the epidural steroid injection procedure with lumbar degenerative disc disease and lumbar radiculitis on October 8, 2015.

27. Dr. Bisgard opined that Claimant's act of bending and lifting wet towels and placing them in a trashcan could be a mechanism of low back injury.

28. At hearing Dr. Bisgard opined that Claimant's symptoms as reported were inconsistent. However, the medical records all reflect right-sided low back pain which worsened depending on the amount of bending she had to do. The severity of Claimant's symptoms fluctuated depending on her work activities, and whether he back was locked up: this is consistently reflected in the medical records.

29. While some of the care providers reported Claimant's history differently than others, overall Claimant's presentation is consistent. The ALJ finds Claimant is credible.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Claimant contends the evidence establishes it is more probably true than not that when she picked up the wet towels she caused injury to her back or aggravated pre-existing pathology so as to necessitate medical treatment including additional treatment recommended by Dr. Karli. Claimant argues that this chain of events constitutes a compensable injury that arose out of and in the course of employment. The ALJ agrees.

The Claimant in a workers' compensation case is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course her employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the Claimant met the burden of proof to establish these elements is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

An injury occurs "in the course of" employment where the Claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires the Claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Triad Painting Co. v. Blair*, *supra.*

In *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2013) the supreme court stated that risks causing injury to employees may be placed "within three well-established, overarching categories:

> (1) *employment risks,* which are directly tied to the work itself; (2) *personal risks*, which are inherently personal or private to the employee him- or herself; and (3) *neutral risks* which are neither employment related nor personal.

The *City of Brighton* court stated that the first category of risks encompasses "risks inherent to the work environment itself" and the causal relationship of such risks to the employment is "intuitive and obvious." Hence, injuries resulting from such risks are "universally considered to 'arise out of' employment under the Act." 318 P.3d at 502. In contrast, the court stated that the second category of risks are "entirely personal or private" to the employee and include preexisting idiopathic illnesses or medical conditions that are completely unrelated to the employment. Such idiopathic conditions and injuries are generally not compensable unless an exception, such as the "special hazard doctrine," applies. 318 P.3d at 503. The third category of risks are "neutral risks" and are "not associated with either the employment itself nor with the employee him- or herself." Injuries caused by neutral risks, such as lightning, murderous lunatics and stray bullets "arise out of" because they would not have occurred *but for* employment. Such neutral risk or "positional risk" injuries are causally related to the employment because the employment "obligated the employee to engage in employment-related functions, errands, or duties at the time of injury." 318 P.3d at 503-504.

A pre-existing disease or susceptibility to injury does not disqualify a claim if the injury aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce the need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004). The ICAO has noted that pain is a typical symptom from the aggravation of a pre-existing condition and a Claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the industrial injury and is not attributable to an underlying pre-existing condition. *Sanderson v. The Servicemaster Co.*, WC 4-854-168-02 (ICAO May 14, 2013); *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

In cases where there is a compensable aggravation of a pre-existing condition the Claimant need not show that the industrial injury was the "sole cause" or "principal cause" of a need for medical treatment. Rather, it is sufficient to show the injury was a "significant" cause of the need for treatment in the sense that there is a direct causal relationship between the industrial aggravation and the need for treatment. *Coleman v. General Parts International,* WC 4-912-645-01 (ICAO February 26, 2014); *Nicholl v. Cannino Sausage Co.,* WC 4-473-725 (ICAO March 10, 2003).

The ALJ concludes Claimant proved by a preponderance of the evidence that on or about June 21, 2015 she sustained an injury to her back "in the course of" her employment. As determined, Claimant experienced the onset of low back pain when she picked up heavy wet towels while performing her duties as a laundry attendant. This incident occurred during the time and place limits of Claimant's employment while she was performing her duties.

The ALJ concludes Claimant proved by a preponderance of the evidence that on or about June 21, 2015 she sustained and injury "arising out of" her employment. Specifically, the ALJ concludes that the act of picking up wet towels precipitated an aggravation of Claimant's pre-existing lumbar conditions.

As determined, the ALJ credits the opinion of Dr. Raub that, although Claimant had pre-existing lumbar pathology, the lifting incident of June 21, 2015 "aggravated" the lumbar pathology so as to render it symptomatic and cause a need for treatment. Dr. Raub's opinion is corroborated by Claimant's credible testimony that she did not have any lumbar symptoms or treatment prior to the reaching incident of June 21, 2015, with the exception of a remote event taking place 20 years earlier. Although Dr. Bisgard expressed opinions that conflict with those of Dr. Raub, the ALJ finds Dr. Bisgard's opinions are not persuasive for the reasons stated.

In reaching this result the ALJ necessarily rejects Respondents' argument that Claimant's injury is not compensable because it was "precipitated" by a pre-existing "personal" or "idiopathic condition" condition. In this case the ALJ finds the duties of Claimant's employment precipitated an aggravation of pre-existing pathology. As such the ALJ concludes that the injury in this case resulted from a risk that was inherent in the duties of Claimant's employment and therefore arose out of her employment. *City of Brighton v. Rodriguez, supra.*

As determined, the lifting incident of June 21, 2015 rendered Claimant's lumbar condition symptomatic and caused her need for medical treatment including treatment recommended by Dr. Raub and Dr. Yarberry. Thus, the industrial injury of June 21, 2015 proximately caused a need for medical treatment. The fact that the injury combined with a pre-existing condition to cause the need for treatment does not sever the causal relationship between the injury and need for treatment. *Coleman v. General Parts International*.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Because the ALJ finds the claim is compensable the Respondents shall provide reasonable and necessary medical treatment.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. On or about June 21, 2015, Claimant sustained a compensable injury to her back arising out of and in the course of her employment.

2. As a result of the compensable injury, Insurer shall provide reasonable and necessary medical treatment.

3. Medical treatment received by Claimant prior to August 3, 2015 was not obtained from an authorized provider and therefore Respondent is not liable for that treatment under the Workers Compensation Act.

4. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 21, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-990-361-01

ISSUES

- Whether Claimant has established by a preponderance of the evidence that the recommended artificial disc replacement surgery is reasonable, necessary, and related medical care?
- Whether Claimant has established by a preponderance of the evidence that the admitted average weekly wage should be increased?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On September 7, 2014, Claimant, a manager for the City and County of Denver in the Criminal and Municipal court, was traveling to a conference for his employment on I-70 West, exit 176 towards Vail, when he lost control of his motorcycle and ran into a curb. Claimant fell off the motorcycle and hit the road sustaining admitted injuries.

2. On September 10, 2014, Claimant saw Dr. Szczukowski. In her initial report, Dr. Szczukowski found that Claimant had, among other things, a contusion to his head with headaches, neck, and upper back strain. She noted in her report that Claimant's "headache seems more compatible with a tension headache and the source of the headache may be more than the neck and upper back tension." Dr. Szczukowski referred Claimant for medical massage treatments to decrease his muscle tension.

3. On September 26, 2014, Claimant saw Dr. Blair. Claimant complained of increasing headaches and asked for chiropractic treatment because it helped in the past with similar symptoms. Dr. Blair initially prescribed eight chiropractic visits with Dr. Testa. Dr. Blair's impression was that Claimant was experiencing a cervical sprain with muscle contraction headaches.

4. During a November 12, 2014, visit with Dr. Ann Dickson, M.D., Claimant reported that "he has been treated by a primary care chiropractor for a 'rotator cuff problem' in the right arm that pre existed the motor vehicle accident."

5. On November 17, 2014, Dr. Blair noted that Claimant's neck was the only remaining symptomatic body part remaining from the September injury.

6. Claimant eventually completed twenty visits with Dr. Testa and was reporting good progress. Dr. Blair prescribed six more chiropractic visits. Dr. Blair noted that Claimant was having “no upper extremity radicular symptoms.”

7. Medical records dated September 11, 18, 26, 2014; October 23, 2014; November 12, 17, 2014; December 1, 2014; January 6, 2015; February 3, 2015; March 17, 2015; all document Claimant experiencing tense or tight musculature in his neck and upper back which responded to chiropractic and massage therapy until March 17, 2015. On March 17, 2015, Dr. Blair reported that Claimant continued to have waxing and waning posterior neck muscle pain and tightness in spite of multiple chiropractic and myofascial release sessions. Complaints of upper back and neck muscle tightness reappear in medical records dated July 14, 2015; September 3, 2015; and November 16, 2015.

8. On April 27, 2015, Claimant saw Dr. Kawasaki on referral from Dr. Blair. Dr. Kawasaki’s notes of Claimant’s past surgical history show that Claimant underwent a laminectomy at L5-S1 in 1994 for a ruptured disc. Dr. Kawasaki noted on Claimant’s April 27, 2015 physical exam that Claimant had “increased pain with cervical extension and facet loading with pain radiating into the shoulder girdle.” Dr. Kawasaki’s notes indicate these findings “implicate potential right C5-C6 and C6-C7 facetogenic pain generation.”

9. Dr. Kawasaki’s physical exam on May 11, 2015 also increased pain with cervical facet load and Spurling’s test combined causes increased pain to the posterior aspect of the neck into the shoulder girdle on the right side. Again, these findings indicate facetogenic pain generation.

10. Dr. Kawasaki ordered an MRI of the cervical spine which was completed May 5, 2015. The MRI revealed a right-sided disc herniation at C3-4. The disc protruded and caused some flattening of the ventral aspect of the right side of the spinal cord. There were also vertebral osteophytes causing right foraminal narrowing at C3-4. The C4-5 level showed a disc osteophyte complex, right versus left, with some minimal contact to the right side of the cord. The C5-6 level showed disc protrusion without cord compression. The C6-7 level showed disc protrusion with contact to the ventral aspect of the cord which is being mildly flattened. The MRI Impression was “Multilevel degenerative changes.”

11. The MRI findings appear to have shifted Dr. Kawasaki’s focus from facetogenic pain generation as revealed on physical exam to cervicogenic pain generation as indicated by MRI. On May 29, 2015, Dr. Kawasaki performed transforaminal epidural steroid injections at both C3-C4 and C4-C5 which provided Claimant with total pain relief for approximately three days. The injections did not distinguish whether the pain was generated at C3-C4 or C4-C5 or both, or whether pain was or was not facetogenic as well.

12. Claimant continued working full duty for Employer during the course of his treatments with the exceptions of May 29, 2015 when the epidural steroid injections

were performed, and then in September and October 2015 for debilitating headaches. These later headaches also responded to chiropractic and massage therapy.

13. Claimant followed up with Dr. Kawasaki June 12, 2015, at which time Dr. Kawasaki opined that Claimant had a "diagnostic response implicating [both] the right C3-4 disc herniation and C4-5 neural foraminal stenosis as the culprits for his continued pain complaints." Dr. Kawasaki referred Claimant for a surgical consultation.

14. On Claimant July 27, 2015, Dr. Rauzzino performed a surgical consultation. Dr. Rauzzino read Claimant's MRI as showing an acute disc herniation at C3-C4 with some cord compression and mild degenerative changes with some foraminal narrowing at C4-C5, and a mild disc bulge at C6-C7. Dr. Rauzzino opined that Claimant should consider motion preservation technology to decompress the spinal cord and replace the disc at C3-C4 with an artificial disc. He opined that the disc herniation was producing significant pain and that the recommended surgery "has a high likelihood of improving his pain symptoms." Dr. Rauzzino acknowledged that there was a myofascial component to Claimant's pain that would "He may still have some myofascial symptoms that will need to be treated" even with surgery.

15. Insurer denied the surgical request on August 17, 2015 and again on October 30, 2015 after it was resubmitted.

16. On September 1, 2015, Ron Carbaugh, Psy.D., performed a presurgical psychological screening on Dr. Blair's referral. Dr. Carbaugh concluded that Claimant has no psychological contraindications to surgery.

17. On September 3, 2015, Claimant was again examined by Dr. Szczukowski who again noted that extension caused more pain than flexion, indicative of facetogenic pain.

18. On September 11, 2015, Dr. Sabin completed an Independent Medical Examination (IME) at Respondents' request. Dr. Sabin found that Claimant had decreased range of motion on flexion to about 45 degrees and very limited extension to about 20 degrees with marked pain. Dr. Sabin noted "no radicular findings." His medical record review also pointed out that Claimant had no radiculopathy at one week and at three plus weeks post accident. In his report, Dr. Sabin opined that the issues of C3-4 disc herniation and C4-5 neural foraminal stenosis were preexisting conditions and degenerative in nature. In addition, Dr. Sabin stated that Claimant does not meet the Colorado Department of Workers' Compensation Cervical Spine Injury Medical Treatment Guidelines for Total Artificial Cervical Disc Replacement Section G-3-c (page 93). He explained that the Treatment Guidelines state that the patient must not have multilevel disc disease and the Claimant does. The Treatment Guidelines also state that the patient must not have facet degeneration or pain, and he believes Claimant has this because his pain is greater on extension. Finally, Dr. Sabin concluded that Dr. Kawasaki's initial treatment plan was reasonable, and that he believed Dr. Kawasaki was sidetracked with the MRI findings which depicted pre-existing degenerative foraminal issues. Dr. Sabin believed it was absolutely necessary to rule out facet

mediated pain in Claimant before performing surgery because a disc replacement would not address facet mediated pain, and Claimant would likely have continued symptoms even if he went forward with the disc replacement.

19. Dr. Blair's notes of an October 27, 2015, visit with Claimant indicate that he agreed with Dr. Sabin's opinion that facet pain needed to be ruled out by injections or medial branch blocks prior to proceeding with any kind of surgery. Dr. Blair opined, "This makes good sense considering the type of pain that [Claimant] has been having and Dr. Kawasaki's assessment." On November 16, 2015, Dr. Blair added "facet arthropathy to his impression.

20. At hearing, Dr. Sabin was qualified as an expert in orthopedic surgery, the Colorado Department of Workers' Compensation Cervical Spine Injury Medical Treatment Guidelines for Total Artificial Cervical Disc Replacement Section G-3, and spinal disorders. He testified in his expert capacity that facet mediated pain had not yet been ruled out. Dr. Sabin added that when there is a degenerative disc in the front, there are almost always going to be degenerative facets in the back. He continued that this is one of the contraindications to doing the disc replacement.

21. Dr. Sabin testified that the relief Claimant experienced from the C3-4 and C4-5 injections was not particularly strong evidence in support of a disc replacement because it did not narrow the pain generator down to C3-4 but to both levels. Two levels were injected, and the Claimant's pain generator was "not adequately localized to give us the best guarantee that surgery is going to help him."

22. On November 23, 2015, Dr. Kawasaki performed right and left medial branch blocks at C2-3 and C3-4 and bilateral third occipital nerve blocks. Dr. Kawasaki then saw Claimant on December 14, 2015 for a follow up. Dr. Kawasaki noted that the medial branch blocks were non-diagnostic, meaning that they did not rule out facetogenic pain.

23. Dr. Rauzzino did not testify at the hearing. However, on December 21, 2015, Dr. Rauzzino wrote a letter responding to Dr. Sabin's September11, 2015 IME. Dr. Rauzzino disagreed that the C3-C4 disc herniation was degenerative. "The fact that it is a disc herniation and not a chronic bony problem would indicate that it is not necessarily degenerative in nature but represents an acute injury." Dr. Rauzzino opined that C3-C4 had been adequately identified as the pain generator because the problems at C4-C5 were degenerative and had not caused pain prior to the date of injury. Dr. Rauzzino opined that Claimant only had one symptomatic level of disease which had been identified at C3-C4. Dr. Rauzzino also noted that while Dr. Sabin had commented on Claimant's pain as being facet related, the MRI made no comment about facet disease or fluid within the facet joints.

24. The ALJ is not persuaded by Dr. Rauzzino's opinion that the disc herniation at C3-C4 is an acute finding as no persuasive evidence was offered suggesting that disk herniations are de facto acute. Further, the ALJ finds that a

degenerative condition at C4-C5 could also have become symptomatic at the time of his motorcycle accident.

25. Claimant has a long history of tension headaches predating the industrial injury. Chiropractic records indicate that Claimant received care for tension headaches through 2008. And February 7, 2013 hospital records for an unrelated issue show that Claimant listed tension headaches as an active problem.

26. At hearing, Dr. Sabin testified that it was possible that Claimant could still be having tension headaches, and that testing was insufficient to rule them out. Dr. Sabin explained that the more defined you can get with the injections, the more you can rule out tension headaches.

27. On January 6, 2016, Respondent filed a General Admission of Liability. At present, Respondent is only contesting reasonableness, necessity, and relatedness of the artificial disc replacement surgery.

28. Claimant submitted a paystub from the pay period of 12/27/15-1/09/16 to determine his average weekly wage (AWW). Claimant used the annual pay rate on this paystub, $78,206.55 divided by 52 to calculate an AWW of $1,503.98.

29. Respondent submitted a Personnel Action Form from January 21, 2014 which documented Claimant's rate of pay on the date of his work related injury to determine Claimant's AWW. Respondent used the monthly rate stated of $6,383.17 multiplied by 12 and then divided by 52 to get an AWW of $1,473.04. Respondent admitted to this amount in its January 6, 2016 Final Admission of Liability.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Reasonable, related, and necessary medical benefits

C.R.S. 8-42-101(1)(a) provides that the employer must furnish such medical treatment as may reasonably be needed to cure and relieve an injured employee from the effects of the industrial injury. *Hillen v. Tool King*, 851 P.2d 289 (Colo.App.1993). The record must distinctly reflect the medical necessity of any such treatment and any ancillary service, care, or treatment as designed to cure or relieve the effects of such industrial injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo.App.1992*); Pub. Serv. Co. of Colorado v. Indus. Claim Appeals Office of State of Colo.*, 979 P.2d 584, 585 (Colo.App. 1999). Claimant is seeking disc replacement surgery. This treatment is not designed to cure or relieve the effects of his condition.

Admission on a claim does not entitle an injured worker to any medical treatment he wants. An employer who has admitted liability for medical benefits can dispute a claimant's need for continued medical benefits. *Williams v. Industrial Commission*, 723 P.2d 749 (Colo.App.1986); *Snyder v. Indus. Claim Appeals Office of the State of Colo.*, 942 P.2d 1337, 1339 (Colo.App. 1997). Claimant is only entitled to such medical treatment as may reasonably be needed to cure and relieve an injured employee from the effects of the industrial injury. *Hillen v. Tool King*, 851 P.2d 289 (Colo.App.1993).

The disc replacement surgery is not reasonable or necessary medical treatment for Claimant. Rule 17 Medical Treatment Guidelines Exhibit 8 – Cervical Spine Injury Medical Treatment Guidelines outlines the conditions when Total Artificial Cervical Disc Replacement (TDR) is appropriate. According to the Medical Treatment Guidelines, a patient must either exhibit:

> 1) symptomatic one-level degenerative disc disease (on MRI) with established radiculopathy or myelopathy and not improved after 6 weeks of therapy; **and** radiculopathy or myelopathy documented by EMG or MRI with correlated objective findings or positive at one level; **or**
>
> 2) **All of the following:**
>
> - Symptoms unrelieved after six months of active non-surgical treatment and **one** painful disc established with discogram; **and**
> - All pain generators are adequately defined and treated; and
> - All physical medicine and manual therapy interventions **are** completed; **and**
> - Spine pathology limited to one level; **and**
> - Psychosocial evaluation with confounding issues are addressed

Rule 17, Exhibit 8, pg 94 (emphasis in original).

First, Claimant does not have one level degenerative disc disease. Instead, his MRI shows multi-level degenerative changes. Claimant's C3-4 showed broad-based disc herniation and C4-5 broad-based posterior disc osteophyte complex. The C5-6 level showed disc protrusion without cord compression. The C6-7 level showed disc protrusion with contact to the ventral aspect of the cord which is being mildly flattened. The MRI Impression was "Multilevel degenerative changes." Therefore, Claimant does not meet the first requirement under the Medical Treatment Guidelines for Artificial Disc Replacement Surgery.

Second, Dr. Sabin credibly testified that the pain generator has not been adequately defined. He rationally explained that there has not been sufficient workup to show that the facets are not the problem and the medial branch blocks were non-diagnostic. In addition, Dr. Sabin credibly testified that the relief Claimant experienced from the C3-4 and C4-5 injections was not particularly strong because it did not narrow the pain generator down to just the C3-4 level. Two levels were injected, and

Claimant's pain generator was "not adequately localized to give us the best guarantee that surgery is going to help him."

Dr. Sabin testified in his expert capacity that even absent the Medical Treatment Guidelines, this type of surgical intervention is not appropriate given the facts. Claimant's symptoms do not fit the need for the type of surgery being recommended. Dr. Sabin credibly testified that Claimant likely has problems with his facets because the pain is worse with neck extension, a common symptom with facet mediated pain. Finally, Dr. Sabin testified that, as a spine surgeon, he would need more information before he did any type of neck surgery, including disc replacement.

Dr. Kawasaki initially planned to treat Claimant with facet injections. In his IME, Dr. Sabin opined that this treatment plan was very reasonable. However, Dr. Sabin reasonably deduced that Dr. Kawasaki got sidetracked with the MRI findings depicting pre-existing degenerative foraminal issues. Dr. Sabin concluded that it is "absolutely necessary to rule out facet mediated pain in this patient as a disc replacement would not address this and the patient would likely have continued symptoms."

Average Weekly Wage

C.R.S. § 8-42-102 provides that "Average weekly wages for the purpose of computing benefits provided in articles 40 to 47 of this title, except as provided in this section, shall be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of the injury." C.R.S. § 8-42-102(2).

On the date of injury, September 7, 2014, Claimant was earning an annual salary of $76,598.04which translates to an AWW of $1,473.04. Respondent has admitted to an AWW of $1,473.04.

Claimant's position is that his AWW is $1,503.98. He reached this figure by using his annual rate from the 12/27/15-1/9/16 post accident pay period from more than a year after his date of injury.

An ALJ has broad, statutorily granted discretion to calculate AWW "in such other manner and by such other method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's [AWW]." § 8–42–102(3), C.R.S.2011; *see also Pizza Hut v. Indus. Claim Appeals Office*, 18 P.3d 867, 869 (Colo.App.2001) ("[Section] 8–42–102(3) . . . grants the ALJ discretionary authority to calculate the [AWW] in some other manner if the prescribed methods will not fairly calculate the wage in view of the particular circumstances."); *Zerba v. Dillon Companies, Inc.*, 2012 COA 78, ¶ 28.

No persuasive evidence was presented at hearing to suggest that the default AWW calculation would not fairly reflect Claimant's AWW in this claim.

Moreover, the point is moot because the maximum AWW for Claimant’s 2014 date of injury is $1,322.48, and both Respondent and Claimant present figures which exceed this maximum.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondent must only pay for reasonable and necessary medical care. The surgery Claimant requested is not reasonable and necessary. Accordingly, Claimant's request should be denied.

2. Claimant's AWW is appropriate as admitted, at $1473.04 per week.

3. Issues not expressly decided herein are reserved to the parties for future determination.

4. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 14, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-991-495-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 10, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 2/10/16, beginning at 8:30 AM and ending at 11:00 AM).

Claimant's Exhibits 1 through 10 were admitted into evidence, without objection. Respondents' Exhibits A through U were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and took the written decision under advisement. The ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; average weekly wage (AWW); temporary total (TTD) and/or temporary partial (TPD) disability benefits from November 11, 2015 and continuing; and, whether the right carpal tunnel release recommended by Kavi Sachar, M.D., the Claimant's authorized treating physician (ATP), is causally related to the injury of June 17, 2015 and reasonably necessary to cure and relieve the effects of that injury.

The Claimant bears the burden of proof, by a preponderance of the evidence, on all designated issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant, a 53 year old female, suffered an injury to her right upper extremity (RUE) on June 17, 2015 when she was involved in a takedown of an adolescent patient.

2. The ALJ finds that the injury to the Claimant's RUE was in the course and scope of her employment, while she was performing assigned duties.

3. At the commencement of the hearing the parties stipulated, and the ALJ finds that the Claimant's AWW is $761.50. The parties further stipulated, and the ALJ finds that all of the Claimant's medical care at Denver Health and its referrals, including Dr. Sachar, was authorized, causally related to the June 17, 2015 compensable injury, and reasonably necessary to cure and relieve the effects of that injury.

4. The Claimant has had pain in her right hand and wrist since the date of injury.

5. The Claimant was given modified work as a "greeter" until November 10, 2015. She has not worked since that date nor has she earned wages, been released to return to work without restrictions, nor has she been declared to be at maximum medical improvement (MMI).

6. Dr. Sachar, an ATP and Board Certified Hand Surgeon, has recommended a right carpal tunnel release and the Claimant wishes to proceed with the right carpal tunnel release.

Reasonable Necessity of the Recommended Surgery

7. Henry J. Roth, M.D., an internist, performed an independent medical exam (IME) of the Claimant on November 18, 2015. In his report, Dr. Roth was of the opinion that there was a lack of causal relatedness between the Claimant's right and left carpal tunnel syndrome and the injury of June 17, 2015. Due to this alleged lack of causation, Dr. Roth's medico-legal opinion was that further medical evaluation, diagnosis, and treatment for the carpal tunnel syndrome was not appropriate for workers compensation.

8. Dr. Roth testified at hearing, on behalf of the Respondent, consistently with his report, that the Claimant's carpal tunnel syndrome is not related to work

activities. The ALJ finds that Dr. Roth's opinion on lack of causality is contrary to the weight of all the evidence. Further, the ALJ finds that Dr. Roth's causality opinion is less credible than the opinion of ATP and Hand Surgeon Dr. Sachar because Dr. Sachar has more specific expertise concerning the Claimant's hand, has dealt with the Claimant more than Dr. Roth, and was in a more neutral position than Dr. Roth because he has a treater.

9. Dr. Roth's opinion rests, in significant part, on the proposition that the Claimant also has left carpal tunnel syndrome. Dr. Roth concedes, however, that the left carpal tu8nnel syndrome is less severe than the right carpal tunnel syndrome. In part, Dr. Roth's opinion in this regard is contradicted by Dr. Sachar by virtue of the fact that Dr. Sachar is only recommending surgery for the right carpal tunnel syndrome. Essentially, Dr. Roth stated that left and right carpal tunnel syndromes go "hand in hand." The ALJ finds that Dr. Roth offered little if no support for this opinion.

10 On August 17, 2015, Dr. Sachar, a hand surgeon, examined the Claimant. Dr. Sachar noted that Claimant's EMG showed severe right carpal tunnel syndrome and moderate left carpal tunnel syndrome. As a result of the EMG findings, Dr. Sachar recommended the right carpal tunnel release.

Ultimate Findings

11. The ALJ finds the opinions of ATP Dr. Sachar, a hand surgeon, more credible and persuasive than the opinions of IME Dr. Roth, an internist.

12. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept Dr. Sachar's opinion regarding the right carpal tunnel release and to reject Dr. Roth's opinion.

13. The ALJ finds that the recommended right carpal tunnel release is causally related to the compensable June 17, 2015 injury and reasonably necessary to cure and relieve the effects thereof. Further, Dr. Sachar is within the authorized chain of referrals and, therefore, authorized.

14. The Claimant has proven all designated issues by a preponderance of the evidence, including the issue concerning the recommended right carpal tunnel release is causally related and reasonably necessary.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* C.R.S. § 8-43-210; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Sachar, a hand surgeon, were more credible and persuasive than the opinions expressed by Dr. Roth, an internist.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept Dr. Sachar's opinion regarding the causal relatedness and reasonable necessity of the right carpal tunnel release and to reject Dr. Roth's opinion in this regard.

Reasonable Necessity of Right Carpal Tunnel Release

c. Section 8-42-101(1)(a), C.R.S., provides that every employer shall furnish such medical care and treatment as may reasonably be needed to cure and relieve the effects of a compensable injury. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, the Claimant's medical treatment for her right carpal tunnel syndrome, and the surgery recommended by Dr. Sachar is causally related to the compensable injury of June 17, 2015. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment, and the recommended right carpal tunnel release is reasonably necessary to cure and relieve the effects of the Claimant's compensable injury of June 17, 2015..

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing compensability and entitlement to benefits. §§ 8-43-201 and 8-43-210. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *See also Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688

P.2d 1116 (Colo. 1984). As found, the Claimant has proven, by a preponderance of the evidence that she sustained a compensable injury to her RUE on June 17, 2015 and that the right carpal tunnel release, recommended by Dr. Sachar, is causally related to her injury of June 17, 2015 and is reasonably necessary to cure and relieve the effects of that injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The request for authorization of the requested right carpal tunnel release, recommended by Kavi Sachar, M.D., is hereby granted.

B. The Respondent shall pay the costs of all authorized medical care and treatment, including the costs of the right carpal tunnel release, recommended by Kavi Sachar, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

C. Any and all issues not determined herein are reserved for future decision.

DATED this______day of March 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2016, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-991-876-01

ISSUES

- Did Claimant suffer a compensable injury to his left shoulder on August 24, 2015 arising out of and in the course and scope of his employment?
- If compensable, is Claimant entitled to medical benefits to cure and relieve the effects of his industrial injury?
- What was Claimant's average weekly wage at the time of his injury?

STIPULATION

Claimant and Respondents stipulated that Claimant's average weekly wage at the time of the injury was $1,789.27; giving a TTD rate of $1,192.85. Therefore, Claimant was entitled to the statutory maximum for TTD benefits of $914.27.

The parties further agreed should the claim be found compensable, included within the medical benefits issue was a request for payment of bills from Claimant's personal physicians[1].

FINDINGS OF FACT

1. Claimant, who was fifty-three (53) years old at the time of the hearing, was originally from Ghana. He began working for Respondent-Employer on October 7, 2007, starting first as a temporary employee. After ninety days, he became a permanent employee.

2. Claimant worked for Employer for two (2) years on what was called the dry side and then approximately six (6) years ago became a cook. His job duties in this position included setting up the line for making various batches of food products for customers such as Torani-California and Jack in the Box. The batches made for Torani included white and dark chocolate; for Jack in the Box the batches were for strawberry and chocolate syrup. Claimant estimated they would prepare ten (10) batches per day, sometimes twelve (12).

3. Claimant testified that cooking the product involved a three stage process. In stage two of the process, he was required to carry five 55 pound buckets of invert sugar from a pallet ten to fifteen feet to a kettle, where he would then lift the buckets and pour the sugar into the kettle. A picture of the buckets containing sugar, dry milk

[1] Exhibits 7 and 8.

bags and two cooking kettles was admitted at the hearing[2]. Claimant testified that during the third stage of the process for each batch he would lift, carry and pour a 55-pound bag and 32-pound bag of dry milk into the kettle. Using Exhibit 12, Claimant demonstrated the action of lifting these ingredients, which required lifting above his chest, almost to shoulder level. He would use his body to lift the bag of ingredients into the kettle. The ALJ finds the action of lifting ingredients for the batches required repetitive use of the arms, including the shoulders.

4. Claimant stated he worked 6-7 days per week for Employer over the last four years. Claimant testified he worked 80 regular hours and 70 overtime hours in the 2 weeks before the hearing. The time records admitted at hearing corroborated Claimant's testimony in which he said that he worked 10-12 hours per day, 6-7 days per week. In particular, the time records from Employer revealed Claimant was paid for 3,852.51 regular and OT hours from 8/29/14 through 8/28/15. It also included some holiday and vacation hours. No contrary evidence was before the ALJ.

5. In his limited free time, Claimant testified he would go to church, go home and sleep. There was no evidence in the record that Claimant's non-occupational activities caused an injury to his left shoulder.

6. Claimant's medical history was significant in that he treated for right shoulder pain in February 2012. In particular, Claimant was evaluated on February 24, 2012 by Melissa Helms, M.D. at New West Physicians[3]. His complaints were right-sided neck and shoulder pain, which had been ongoing for 1 year. On examination, Dr. Helms noted inward rotation with difficulty and tenderness on extension with resistance. He was able to abduct his shoulder without difficulty and his muscle strength was intact. Dr. Helms noted Claimant's job required him to lift a lot. Dr. Helms' assessment was muscle spasm, neck strain and shoulder tendinitis. Claimant was given home stretches, was told to apply ice and take ibuprofen and Cyclobenzaprine.

7. There was no evidence before the ALJ which showed Claimant suffered an injury or required treatment for his left shoulder before 2012.

8. Claimant returned to Dr. Helms on March 19, 2012 noting his shoulder pain was improved. Claimant's right shoulder had full range of motion ("ROM") on examination; no weakness or pain was noted with rotator cuff testing and no impingement was found.

9. On August 2, 2012, x-rays of Claimant's cervical spine and right shoulder were taken and read by Robert Lile, M.D. Dr. Lile's impression was C5-6 degenerative disc disease; moderate-mild cervical kyphosis; and asymmetric foraminal narrowing, secondary to uncovertebral osteophytes and facet degeneration. After reviewing the right shoulder radiographs, Dr. Lile's impression was abnormal AC joint, suspect for

[2] Exhibit 12.

[3] These were Claimant's family physicians.

degenerative or inflammatory arthropathy. The remainder of Claimant's shoulder was described as normal.

10. Claimant suffered a work-related injury to his back/neck on or about November 14, 2012. Medical records (M-164 forms) from HealthONE (Drs. Hawke and Kuper), dated November 12 and 21, 2012 were admitted at hearing, which documented treatment for burns to Claimant's back, shoulder and forearm (described as superficial), as well as a neck strain. Claimant thought he treated until approximately January, 2013. There was no record Claimant sustained a permanent medical impairment as a result of the 11/14/12 injury.

11. On March 25, 2015, Claimant was evaluated by Diann Barton, N.P. for left neck and shoulder symptoms[4]. Upon examination, no visible abnormalities were noted in Claimant's left shoulder, which had subacromial bursa tenderness but no AC joint tenderness and full ROM. Claimant reported he had experienced left neck and shoulder pain intermittently since 2012. Claimant testified he spoke to Mr. Slaughter about reopening the 2012 claim, but was told the claim was closed. Claimant stated this was before his injury on 8/24/15.

12. Dr. Helms examined Claimant on April 2, 2015, when he was complaining of left shoulder pain. At that time, Claimant had left shoulder weakness and limited mobility. On examination, Claimant had decreased ROM in the shoulder and was unable to abduct greater than 90 degrees. He had no pain in the infraspinatus or teres minor. Weakness was noted with supraspinatus testing. Dr. Helms believed it could be a rotator cuff tear or rotator cuff tendonitis with associated frozen shoulder. She opined this was a work-related condition, noting "this is clearly a work related overuse injury - heavy lifting and working long hours". Dr. Helms recommended an MRI and discussed options, including going outside the workers' compensation system. Dr. Helms also recommended an orthopedic evaluation and possible arthrogram. There was nothing in the record which indicated Claimant had an MRI before August 2015.

13. On April 15, 2015, Claimant was evaluated by NP Barton for a general physical exam. His shoulder joint pain was referenced, but no physical findings were made with regard to that condition. He declined physical therapy ("PT") and his Cyclobenzaprine prescription was refilled. Claimant testified the reason he did not go for PT was because of his work schedule. Claimant testified he told Marcus (Slaughter) and the GM about the pain he was experiencing at this time. He did not say he suffered another injury. He testified he did not file a claim, as he could still work.

14. Marcus Slaughter testified on behalf Employer at hearing. He has worked for Employer for 19 years, 7 of which he has been the safety coordinator. He was familiar with Claimant's cook job, as had previously held that position. He hired Claimant when he was the production supervisor. Mr. Slaughter stated the goal was to

[4] Claimant was also seen for other general health issues at this appointment.

cook 8-10 batches per shift. He confirmed the kettle was at chest (sternum) level and Claimant was required to lift the invert sugar into the kettle while making a batch.

15. As safety coordinator, Mr. Slaughter was involved in the process of filing worker's compensation claims. He was aware of Claimant's 2012 worker's compensation claim. He conducted an investigation and completed the paperwork. Claimant received treatment for that injury, which was completed in early 2013.

16. Mr. Slaughter said Claimant would complain to him about aches and pains. Mr. Slaughter stated these complaints did not occur very often, every few months. Mr. Slaughter said he offered to send Claimant back to the doctor. However, Claimant declined, saying he had to cook. The ALJ found Mr. Slaughter credible on this point and his testimony was consistent with Claimant's.

17. Claimant came to him complaining of neck pain approximately a week prior to 8/24/15. Claimant asked Mr. Slaughter if he could reopen his neck claim from 2012. Mr. Slaughter testified he contacted Deb Jonas, whom he described as the corporate work comp person, who said Claimant had reached MMI. Mr. Slaughter said he then had a discussion with Claimant.

18. Specifically, Mr. Slaughter testified he spoke with Claimant on August 24, 2015, who said he needed to go back to the doctor for his neck. He said this conversation occurred between 1:30 p.m. and 1:40 p.m. He advised Claimant his claim was not going to be reopened. He said Claimant was mad and then said he would make a new claim. Mr. Slaughter said Claimant should tell his supervisor. He denied telling Claimant not to file a claim. Mr. Slaughter also testified he would not deny an employee medical treatment and would be subject to discipline (termination) if he did so. While Mr. Slaughter may not have directly denied the claim or medical treatment for the Claimant, the ALJ infers he provided the information to Insurer which led to the filing of the Notice of Contest. Significantly, Mr. Slaughter was not working when Claimant was injured in the afternoon of August 24, 2015 as Mr. Slaughter's shift ended at 2:30 p.m.

19. Claimant testified on August 24, 2015 (Monday), at approximately 3:00 p.m., he was lifting a 55 lb. bucket of invert sugar to put it in a kettle when he felt something pop in his left shoulder. He could not lift the bucket all the way up to the top of the kettle, causing some of the liquid sugar to spill on him. He testified that after injuring his shoulder and spilling the liquid sugar, he was required to go change his work clothes. He stated he had been scheduled for nine batches and was cooking the seventh batch when he was hurt. Claimant testified this was the last batch of product he cooked for the day and advised the packaging area.

20. Claimant testified he told his supervisor ("Craig") about his injury the next day. Claimant thought this conversation occurred in the afternoon of August 25, 2015. An Incident Investigation Report (undated) was prepared which documented Claimant's

injury[5]. This document was signed by Craig Liebler, Claimant's supervisor, who noted Claimant took a pail 10-15 feet to the kettle. The report stated Claimant experienced pain while lifting the ingredient to the kettle. Claimant "felt a lot of pain and could no longer lift arm up all the way". Claimant testified that Mr. Liebler came to his work area and saw how far he would carry the various ingredients.

21. An Employee's Statement of Injury/Illness was completed and signed by Claimant on 8/25/15[6]. This statement said Claimant was injured between kettles 11 & 12 and while he was "lifting 55# invert sugar".

22. Mr. Slaughter testified he had a conversation with Claimant in the morning on August 25, 2015 (Tuesday), the day after the alleged injury. Mr. Slaughter asked how Claimant was doing. Mr. Slaughter stated Claimant said nothing about suffering an injury the day before and appeared to be working normally, including using his arms. Mr. Slaughter also testified he became aware that Claimant had reported a new injury in the afternoon "ops" meeting.

23. Claimant's version of the 8/25/15 meeting was that he advised Mr. Slaughter he was injured while lifting the 55 lb. bag of sugar. Claimant testified he described his injury to Mr. Slaughter and was told to use his own insurance. The ALJ infers Claimant was distinguishing between neck/shoulder pain, which he experienced intermittently and his shoulder injury.

24. On August 25, 2015, Claimant was referred to HealthONE and signed an acknowledgment form. Claimant testified he was sent to Dr. Kohake, who told him the injury was work-related.

25. On August 26, 2015, Claimant was examined by George Kohake, M.D. at HealthONE, the ATP for Employer. Claimant indicated that on August 24, 2015 he was lifting a 55 pound barrel of ingredients when he felt pain in his left shoulder. Claimant complained of left arm and shoulder pain at a level of 8 out of 10. Claimant's left shoulder range of motion was significantly limited and Claimant had a positive supraspinatus testing. This was contrasted with the right shoulder which had full range of motion, good strength and was asymptomatic. Claimant reported his prior work-related neck injury, but did not think this injury involved his neck. Claimant denied prior shoulder problems. The ALJ infers Claimant was distinguishing between prior symptoms and the discrete injury suffered on 8/24/15.

26. Dr. Kohake's assessment was left shoulder injury and probable rotator cuff tear. Dr. Kohake ordered an MRI, issued work restrictions and referred Claimant for physical therapy. The ALJ notes Dr. Kohake's Physician's Report of Worker's Injury (M-164) specified Claimant left shoulder condition was work-related.

[5] Exhibit K, pp. 59-61.

[6] Exhibit 6, pp.18-19.

27. An Employer's First Report of Injury (E-1) was filed on August 26, 2015, which listed the date of injury as August 24, 2015 at 3:00 p.m. The document was completed by Mr. Slaughter (Safety Coordinator), who noted a 55 lb pail of invert sugar injured Claimant. Mr. Slaughter also noted Claimant carried 10-15 pails of ingredients over to the kettle. Mr. Slaughter stated the injury was reported on 8/25/15.

28. Mr. Slaughter prepared written memoranda, one undated[7] and one dated September 2, 2015[8], documenting conversations he had with Claimant. He testified he thought the first document was created on Wednesday, August 26, 2015. In this memorandum (which was not signed and undated), Mr. Slaughter noted he found out about the new injury "the next day", which was August 26, 2015. This was directly contradicted by Mr. Slaughter's hearing testimony. The memo said Mr. Slaughter spoke to Peggy Allen, and then when testifying at hearing, he said he spoke to Deb Jonas.

29. In the 9/2/15 document, Mr. Slaughter recounted that Claimant told him he talked with Patty Richardson (identified as the adjuster on the Notice of Contest), who said someone in the Denver office said he wasn't hurt. Mr. Slaughter said he reminded Claimant of their prior conversation regarding reopening his claim. Claimant said he was not lying and "Jesus would judge us". Mr. Slaughter said they discussed the reference to Jesus because he was an "Ordain [sic] Elder and I don't take people throwing around false scriptures lightly". Although this statement was not completely clear, the ALJ infers Mr. Slaughter was upset by Claimant's statements. Mr. Slaughter testified Claimant was talking about his neck. Significantly, the 9/2/15 memo said the conversation with Claimant concerning reopening the claim occurred "Tuesday" (which would have been 8/25/15). This contradicted Mr. Slaughter's testimony at hearing when he said the conversation occurred on August 24th, which was Monday. Mr. Slaughter was less credible than Claimant regarding the chronology of events, including what was reported on 8/25/15.

30. On September 4, 2015, Insurer filed a Notice of Contest alleging the injury/illness was not work-related.

31. Claimant testified no one from Employer gave him an explanation for the denial. He said he tried to return to Health One for physical therapy, but was told his treatment was canceled because his claim was denied. Thereafter, Claimant received an invoice billed to him for the initial care provided by Health One, where his employer had sent him, as his employer and insurance carrier refused to pay for the care.

32. Claimant returned to New West on September 4, 2015 and was seen by Theresa Shieh, PA-C. PA-C Shieh stated she suspected the injury was work-related. She noted Claimant had several months of atraumatic left shoulder pain, which did not

[7] Exhibit K, p. 64.

[8] Exhibit K, p. 65.

keep him from doing his job as a chef. He then suffered an acute injury while lifting a heavy object on 8/24/15. Since then he had been unable to lift heavy objects. PA-C Shieh ordered x-rays of the shoulder and instructed Claimant to get a second opinion for the workers' compensation injury. The ALJ credited the opinions of PA-C Shieh and finds Claimant experienced symptoms in his left shoulder prior to 8/24/15. However, this does not obviate the fact that Claimant suffered a traumatic injury on 8/24/15 in which he tore his rotator cuff.

33. Dr. Helms evaluated Claimant on September 11, 2015. Claimant had left shoulder pain and weakness as result of an incident at work. Dr. Helms noted Claimant had underlying shoulder pain for which she had she had treated him in April, but was concerned about a rotator cuff/labral tear because there was a noise associated with the August 24th injury. The ALJ infers Dr. Helms was of the belief that the injury on 8/24 was a discrete event.

34. Dr. Helms found decreased ROM in the shoulder, including less than 45 degrees abduction and extension only to 60 degrees in the anterior direction. The ALJ notes the reduced ROM documented at this appointment was significantly worse than in Dr. Helms' prior evaluation. Pain and weakness were noted in the supraspinatus, infraspinatus, teres and subscapularis. Dr. Helms ordered an MRI, referred Claimant for an orthopedic evaluation and noted Claimant should continue tramadol at bedtime. Dr. Helms issued work restrictions which included a 5 lb. lifting restriction for Claimant and no reaching overhead or pushing away from the body.

35. On September 16, 2015, Michael Ellman, M.D. (orthopedic surgeon) examined Claimant. Dr. Ellman recorded Claimant was lifting 55 lb. of liquid sugar, pumping it into a kettle when he had the acute onset of pain and his shoulder gave way. Dr. Ellman found limitations in left shoulder range of motion, including active abduction and forward elevation compared to his contralateral side. Dr. Ellman noted the left shoulder radiographs were unremarkable and ordered an MRI.

36. Claimant returned to Dr. Ellman on September 23, 2015 for a review of his MRI. Dr. Ellman found Claimant had a full-thickness rotator cuff tear of the supraspinatus, high grade near-complete tear of the subscapularis, and tenosynovitis of the biceps with medial dislocation of the biceps from the biceps groove. Dr. Ellman opined: "Given that his rotator cuff musculature looks well preserved on the sagittal images, I do feel this is most likely an acute tear that occurred at the time of his injury four weeks ago. Given the full-thickness and acute nature of this tear, I have recommended surgical intervention." The ALJ was persuaded by Dr. Ellman's opinion that the rotator cuff tear was acute.

37. On October 2, 2015, Dr. Ellman sent a notification to Dr. Helms regarding his surgery recommendation. Claimant returned to Dr. Helms for a pre-operative appointment on October 19, 2015. Dr. Helms noted the surgery was rotator cuff repair and the only concern was hypertension. Dr. Helms referred Claimant for MR arthrogram and PT.

38. Claimant underwent surgery on October 26, 2015, which was performed by Dr. Ellman. Dr. Ellman's postoperative diagnoses were: left shoulder 2-tendon rotator cuff tear involving the supraspinatus and subscpularis; left shoulder subacromial bursitis and impingement; left shoulder SLAP type 2 tear; and left shoulder synovitis. Dr. Ellman drafted a letter dated December 2, 2015 which identified these work restrictions: no lifting over 5 lbs and no aggressive range of motion in his shoulder.

39. On December 15, 2015, Claimant was evaluated by Allison Fall, M.D. at the request of Respondents. Claimant told Dr. Fall that he injured his left shoulder on August 24, 2015 while lifting a 55 pound pail of ingredients. Claimant stated that he had pain in his left shoulder prior to August 24, 2015. After examining Claimant and reviewing his medical history, Dr. Fall opined Claimant had chronic neck and bilateral shoulder complaints predating 8/24/15. Dr. Fall opined the most probable scenario was that Claimant had progressive rotator cuff degeneration which was the most typical mechanism for a rotator cuff tear in Claimant's age group, given his chronic history of bilateral shoulder complaints. Dr. Fall concluded Claimant's need for surgery and subsequent treatment was not related to the alleged incident on 8/24/15.

40. Dr. Fall testified as an expert on behalf Respondents at hearing. She was board-certified in physical medicine and rehabilitation. She was Level II accredited pursuant to the W.C.R.P. Dr. Fall testified that lifting a pail to one's chest and pushing it out forward was not a mechanism of injury which would typically cause a rotator cuff tear. Dr. Fall further testified rotator cuff tears were most commonly caused by overhead lifting or traumatic injuries from falling on the shoulder. Dr. Fall's testimony did not specifically consider Claimant's action of lifting 55 lbs. above chest level, then lifting it to pour it in the kettle. Dr. Fall also did not discuss Dr. Ellman's characterization of the injury as "acute". Dr. Fall testified that Claimant's job duties were not repetitive to the point that it could cause a degenerative condition in this claim.

41. Dr. Fall was credible in many respects, including the general etiology of rotator cuff tears. However, Dr. Fall was less persuasive than Claimant's treating physicians, particularly Dr. Helms and Dr. Ellman on the question of whether this was an acute tear. Based upon the medical evidence, including opinions of the treating physicians and the MRI, the ALJ concluded the rotator cuff tear and biceps tear was an acute injury which occurred on August 24, 2015.

42. The ALJ finds Claimant suffered a compensable traumatic injury on August 24, 2015, crediting Claimant's testimony and based upon the medical evidence.

43. The ALJ concludes the medical treatment provided by Dr. Helms was reasonable and necessary to cure the effects of the 8/24/15 industrial injury.

44. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Clamant alleged he suffered an injury on 8/24/15, while lifting invert sugar into a kettle for a batch he was cooking. Claimant argued he suffered an acute injury that day, tearing his rotator cuff.

Respondents denied Claimant suffered a compensable injury and averred there was insufficient evidence to support a finding Claimant suffered a traumatic injury. Respondents focused on what they alleged to be Claimant's lack of credibility to dispute that Claimant was injured. Respondents also relied upon Dr. Fall's opinion to support the argument that Claimant's rotator cuff tear was the result of a degenerative process. Respondents also argued the medical evidence did not support a compensable occupational disease based upon overuse.

The ALJ considered these arguments and the totality of the evidence admitted at hearing. As found, Claimant sustained a traumatic injury on 8/24/15[9]. The ALJ's reasoning was two-fold. First, there was direct evidence of the injury provided by

[9] In light of this finding, the ALJ did not address whether Claimant suffered from an occupational disease.

Claimant and in Employer's records. Claimant testified he was lifting the invert sugar and pouring it into the kettle. This version of the injury was related to Claimant's health care providers immediately after the injury and Claimant was consistent in how he described the injury. There was also no dispute Claimant was making a batch of white chocolate on 8/24/15 at the time alleged.

When evaluating the evidence on whether an injury occurred, the ALJ considered one of Respondents' primary contentions that Claimant was not credible (as compared to Mr. Slaughter) in that he reported an injury after being told the 2012 injury would not be reopened. In fact, when his written memoranda were compared with his hearing testimony, Mr. Slaughter's credibility suffered. As found, Mr. Slaughter's hearing testimony conflicted with his written memoranda. (Finding of Fact Nos. 28 and 29). The ALJ found Claimant was a more credible witness when discussing what occurred on August 24-25, 2015. Therefore, even though Claimant and Mr. Slaughter had divergent recollections about the events of August 24 and 25, 2015, the ALJ credited Claimant's testimony, which supported the finding he suffered a compensable injury.

Moreover, the Employer records admitted at hearing supported the conclusion that Claimant suffered a traumatic injury that day. Even though Mr. Slaughter testified Claimant said nothing about an injury on August 25, 2015 when they spoke in the morning, Mr. Slaughter also recorded in the E-1 that Claimant reported an injury that day. Claimant's injury was also documented in the Injury Incident Report prepared by Mr. Liebler.

Second, there was direct medical evidence of a traumatic injury, specifically a rotator cuff tear and bicep damage, which was described as acute. This supported the ALJ's finding of a compensable injury. These records included:

8/26/15: Dr. Kohake's (ATP) concluded Claimant suffered a left shoulder injury and probable rotator cuff tear. Dr. Kohake noted the symptoms and mechanism of injury were work related.

9/4/15: PAC Shieh noted the previous shoulder pain described as "atraumatic", then an acute injury while lifting a heavy object on 8/24/15.

9/11/15: Dr. Helms (who had knowledge of Claimant's previous left shoulder treatment) offered her opinion that Claimant was injured on 8/254/15 and made an orthopedic referral.

9/23/15: Dr. Ellman stated "this is most likely an acute tear that occurred at the time of his injury four weeks ago. Given the full-thickness and acute nature of this tear, I have recommended surgical intervention".

The foregoing objective medical evidence led the ALJ to conclude that an injury occurred on 8/24/15. (Finding of Fact No. 42). Dr. Ellman's opinion was particularly convincing, as he reviewed the MRI films, saw Claimant on two occasions before the surgery and performed the arthroscopy. Furthermore, the ALJ found Claimant had a history of symptoms in his left shoulder before August 2015. However, this did not preclude the occurrence of a traumatic injury on 8/24/15. (Finding of Fact No. 32). Indeed, the MRI findings, Dr. Ellman's opinions and the substantially reduced ROM in the left shoulder support this conclusion.

In this regard, The ALJ considered Dr. Fall's opinions, particularly those concerning the mechanism of injury. As found, Dr. Fall expressed a somewhat circumscribed view of how Claimant was lifting the sugar at the time of the injury. (Finding of Fact No. 40). In fact, Claimant lifted the sugar above his chest (above the sternum or higher) and the act of pouring it in the kettle put torque on the shoulder, specifically the rotator cuff. Considered as a whole, the medical evidence persuaded the ALJ that a traumatic injury occurred as alleged by Claimant.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved a particular treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002) [upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures]. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). Claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

As found, Claimant required treatment to cure and relieve the effects of the 8/24/15 injury. This included the evaluations Claimant received at HealthONE and New West Physicians. The treatment provided by Dr. Helms, including the evaluations, diagnostic testing and referral to Dr. Ellman was reasonable and necessary. Respondents are liable for said treatment, including payment of those medical bills admitted at hearing. In addition, Claimant is entitled to continuing medical benefits to cure and relieve the effects of his industrial injury.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable industrial injury on 8/24/15.

2. Respondents shall pay reasonable and necessary medical benefits for treatment of Claimant's left shoulder, including treatment received at Health One.

3. Pursuant to the parties' stipulation, Respondents shall pay for the treatment rendered by Dr. Helms and referrals made by Dr. Helms (including Dr. Ellman), pursuant to the Worker's Compensation Fee Schedule.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 9, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

STIPULATIONS

At the outset of the hearing, the parties stipulated to hold the determination of Claimant's average weekly wage (AWW) in abeyance until fringe benefit information could be obtained. It was further stipulated that the parties would destroy all medical records obtained in the case once the claim/issues had been determined and appeals exhausted. Respondents also elected to withdraw their claim for penalties for alleged late reporting pursuant to section 8-43-102(1)(a), C.R.S. The parties' stipulations are approved.

REMAINING ISSUES

The remaining issues addressed in this decision concern compensability, Claimant's entitlement to medical and temporary disability benefits, and Respondents' entitlement to offsets. The specific questions addressed are:

I. Whether Claimant established by a preponderance of the evidence that he sustained an occupational disease affecting his hips and pelvis, arising out of and in the course and scope of his employment.

II. Whether Claimant established by a preponderance of the evidence that the medical treatment he received from Colorado Springs Health Partners and its referrals was reasonable, necessary and causally related to his alleged occupational disease.

III. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) from May 29, 2015 to January 27, 2016.

IV. Whether Respondents are entitled, pursuant to C.R.S. § 8-42-103(1)(f), to offset any TTD benefits for unemployment insurance benefits received by Claimant, as well as for severance pay he received.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a long time former employee of Employer having worked for Employer since his hire date on October 9, 1995. Claimant stopped working for Employer on March 5, 2015. Over the course of his employment, Claimant worked primarily as a laborer in the cooler, or "vault," which is refrigerated to a constant 35 degrees Fahrenheit. While working as a laborer, Claimant duties included handling, sorting, moving and processing various dairy products. Specifically, Claimant would lift,

carry, push, stack and un-stack crates of milk weighing 32 pounds each. Often the crates were stacked 5-6 high, meaning that the stack was as tall as or taller than Claimant. The concrete floors of the vault were purposely sprayed with water so that a thin layer of ice would form permitting crates of product to slide across the floor with greater ease. Claimant also loaded trucks which were iced to create a slick floor in order to slide the carts of product into the truck.

2. Based upon the evidence presented, the ALJ finds that Claimant's job as a laborer was physically demanding involving a considerable amount of bending, stooping, squatting, reaching, carrying, pushing and pulling. Claimant did not perform heavy, physical work or engage in such activities outside of the work place.

3. Claimant began experiencing pain in his left hip in late August, 2013. He presented to Colorado Springs Health Partners ("CSHP") on September 3, 2013 and was seen by Carmen Aguirre, PA-C. PA Aguirre reported; "…Patient is here for evaluation of left hip pain which started about 2 weeks ago.He does not recall any specific injury but thinks he might have slipped sideways causing a hip strain. He has been taking Ibuprofen 200mg every 3 hours, improves the pain. He states it is difficult to walk due to the pain. Pain is aggravated by lifting of the leg, flexing, climbing stairs and just putting weight on the leg hurts. The pain sometimes shoots down the leg from the groin and hip area…" Claimant was diagnosed with "sprain of the left hip." Ms. Aguirre administered injections of Toradol and Kenalog. She prescribed Ibuprofen and Flexeril. She provided hip exercises for Claimant to perform at home, and she took Claimant off work for four days. (Claimant's Exbs. pg. 97).

4. About the time Claimant developed hip pain, he had just experienced a change in job positions. He was working as an operator filler, in the cheese room, which consisted of lifting boxes which weighed 20 to 25 pounds. He had to take the boxes off a cart to the table and open the boxes, lifting a sleeve of ½ pint containers onto a table. He loaded the ½ pint containers onto a machine, pushing buttons to fill the containers with product. This required reaching to take the top boxes off the cart and squatting to take the last box off the cart. Claimant bid for and secured this position as he wanted "something different." Although, the position was easier than his position in the vault, it was, still physically demanding requiring frequently bending, squatting and lifting according to Claimant.

5. None of the positions held by Claimant involve job duties requiring high impact activities such as running and jumping.

6. On September 30, 2013, Claimant was seen at CSHP where he was again evaluated by PA Aguirre for left hip strain/sprain as well as right costochondritis persistent for 2 weeks. Claimant reported that he was having difficulty performing his work duties because he could not lift, twist, squat, bend or climb ladders secondary to hip pain. He brought FMLA paperwork to the appointment for completion as he felt he needed to "rest for a few weeks" to get his symptoms to improve. The record generated from this date of visit is devoid of any suggestion that Claimant's work duties were causing his symptoms; however, the record indicates that after a 12-13 hour work day

involving “repetitive lifting, twisting squatting, ect. His symptoms worsen.” Claimant was diagnosed with a hip sprain, x-rays were ordered and Claimant was taken out of work from September 30, 2013 through October 31, 2013 during which time he was to participate in physical therapy per referral. Follow-up was set for one month. (Claimant’s Exbs. pg. 89).

7. On October 3, 2013, x-rays were taken of the left hip and the right hip. At that time it was noted that Claimant had no abnormality of the left hip but increased sclerosis of the right humeral head. This is also partially noted in the lumbar spine series of November 4, 2010 and in the CT IVP of April 20, 2012, it appeared this may be deemed related to prior trauma.

8. Claimant was seen at CSHP on October 28, 2013, and Ms. Aguirre reviewed x-ray results with him. She noted, “…Left hip mild sclerosis of femur head discussed with patient. Advised [follow-up] if pain worsens or recurs. I don’t believe his pain is due to this finding of sclerosis because his symptoms seem more consistent with ligament/muscle sprain.” (Claimant’s Exbs. pg. 81). Ms. Aguirre noted Claimant reported feeling better, and wanted to return to full duty work. (Id. at 82). Pa Aguirre also noted that Claimant suffered from moderately severe hyperlipidemia for which he was taking “Atorvastatin” 80 mg daily.

9. On January 6, 2015, Claimant was seen for complaints of a right rib cage pain, he denied trauma or injury. An x-ray performed on January 23, 2015 showed no acute rib fractures on the right, but a left rib fracture with sclerosis and periosteal reaction, likely chronic.

10. Claimant returned to CSHP on January 20, 2014 at which time PA Aguirre reported, “…The patient states recently his head (sic) pains have worsened. He is having left hop anterior muscle pain with abduction, squatting and bending activities. Patient states that because of this, his right hip is also hurting him now. Patient recently also noticed right mid back pain. He believes maybe at work he sprained his back while lifting or twisting. He cannot recall any exact injury of his back or hips at this time. Patient denies any fall or any blunt trauma….” (Claimant’s Exbs. pg. 77). Ms. Aguirre referred Claimant to physical therapy, noting, “…47 y.o. male with bilateral hip pains, left worse than right ongoing for about 2.5 months, recurrent problem. Pt. has hx of left hip sprain and now also with right hip [pain] due to compensation…” (Id.)

11. On April 22, 2014, Linda Silveira, M.D., at CSHP reported, “…The patient is in for follow up from PT for left hip s/p x-ray. The patient’s left hip x-ray was within normal limits as were the right hip are known to have a mild early DJD of the right hip. To [sic] the right hip is not bothering him but the left hip and some stable [sic] in the aftermath of physical therapy…” Dr. Silveira’s diagnosis included “sprain of left hip.” (Claimant’s Exbs. pg. 73). The Atorvastatin Claimant taking for his hyperlipidemia was causing mild side effects so consideration was given to changing that medication at Claimant’s next office visit. (Id.)

12. Dr. Silveira saw Claimant on July 30, 2014 documenting her continued belief that

Claimant's hip pain was emanating from a tendon problem. She noted, "…He's sore in the past couple of months. He's had a left hip tendon problem in the past 2 months and P.T. helped. He has been working in a milk processing plant, Borden's. He has been taking 600 mg of Ibuprofen taken 2-3 times daily with some help. Leg cramps in the aftermath of working intermittently on the left upper thigh near the sore tendon at the hip." (Claimant's Exbs. pg. 69). No change was made regarding Claimant's Atorvastatin, which he continued to take for hyperlipidemia.

13. Claimant was seen by Brian McIntyre, D.O., at CCOM on September 9, 2014. Dr. McIntyre reported, "…Michael Hanscom is a 47 year old male, employee of Sinton Dairy – COS, Laborer at Sinton dairy, where he has to lift 50 lbs, stand up to 8 hours, push and pull up to 300 pounds, reach overhead, kneel, squat." Dr. McIntyre noted Claimant's chief complaint was bilateral hip pain, accompanied by aching and that Claimant complained of; "…bad hip pain constant, without known incident other than repetitive lifting/squatting and carrying causing injury. He describes worsening gradually, for about 3+ weeks bad, but began prior to this, exact date unknown…He has noticed that it is made worse by standing, walking, bending, squatting…" (Claimant's Exbs. pg. 103.) Dr. McIntyre concluded that the objective findings associated with Claimant's examination were "not consistent with the history of a work related etiology." Consequently, Dr. McIntyre was unable to causally connect Claimant's complaints of hip pain to his work duties. To the contrary, Dr. McIntyre opined that Claimant's condition was related to "degenerative joint disease of both hips." Dr. McIntyre "[recommended] that [Claimant] follow with his PCP for further evaluation and treatment of this condition, which is likely being aggravated some recently…" (Id. at 104)

14. On January 6, 2015 claimant was seen for complaints of a right rib cage pain, he denied trauma or injury. An x-ray performed on January 23, 2015 showed no acute rib fractures on the right, but a left rib fracture with sclerosis and periosteal reaction, likely chronic.

15. Claimant was seen on February 17, 2015 complaining of chronic hip pain and costochondritis after he sneezed and pulled a muscle in his back. Concerning the ongoing pain in Claimant's hip, PA Aguirre noted: "…Patient continues to have left hip pain symptoms causing difficulty with walking activities and work activities. He works a very physical job walking and standing most of the time. Patient is recommended to discuss option to modify his job activities to prevent worsening injury and pain…Since his symptoms are recurring on the same hip, I feel it is important to check an MRI to further evaluate for soft tissue injury of the hip…" Claimant's Exbs. pg. 60).

16. Claimant testified he determined his work activities were causing his hip problems in approximately January, 2015. He testified he told a supervisor named Gerald Flowers that his hips were bothering him because of his work activities. In February, 2015, Claimant decided he should file a claim for workers' compensation benefits. Claimant testified that due to a change of ownership of the dairy, Employer's representatives advised Claimant he could not file a claim for workers' compensation benefits until his health insurance ran out. The ALJ finds it likely that Claimant reported that his hip condition/symptoms were caused by his work duties in February, 2015.

17. On March 2, 2015, an MRI of the hips were performed. The MRIs showed early changes consistent with avascular necrosis (AVN)[1] in the femoral heads bilaterally, bilateral incomplete subcapital stress fractures of the femurs, a fracture of the right superior acetabulum margin and a fracture of the inferior right sacral area extending to the SI joint. It was noted that all these fractures were somewhat sclerotic in appearance with minimum to no T2 signal. The underlying bone marrow was low on T1 and weighted imaging suggesting red marrow conversion. Other marrow pathology could not be excluded.

18. On March 5, 2015, Claimant was seen by Dr. Waskow. By history, it was noted that Claimant had recently returned from vacation with increasing left groin pain which was "slowly getting worse on the left side." It was noted Claimant stated he was unsure how he got his pain and he did not have an injury to his hip. His pain was 7/10 located in the groin and posterior side of the hip. Dr. Waskow noted that the stress fractures did not appear to be acute based upon the minimum of edema present on imaging study. His diagnosis included; "stress fracture of hip; AVN (avascular necrosis of bone); stress fracture femoral neck and bilateral appears to be not acute; stress fracture superior acetabulum right; inferior pubic rami stress fracture; small area avascular process superior femoral head bilateral." Dr. Waskow stated, "…He must quit his vigorous job right now..." (Claimant's Exbs. pg. 48).

19. PA Aguirre saw Claimant on March 10, 2015 and reported, "…Patient suffers with chronic hip pain symptoms ongoing since September 2013…was first evaluated in this office for left hip pain symptoms. Patient has been having intermittent left hip pain recently the pain worsened and an MRI of the hips was ordered, unfortunately it showed bilateral stress fractures and some [sign of] avascular necrosis. The results were communicated to the patient by phone last week Wed afternoon and he was instructed to avoid walking and lifting activities. He stopped working last week Thursday and the orthopedic specialist Dr. Waskow estimates his condition may take 2-3 months to heal. FMLA paperwork is being requested by this employer with his work restrictions and disability. At this time [patient] is totally disabled until his condition heals…Discussed with patient the fact that we cannot for sure tell if this condition was caused by his work activities, however, he is encouraged to discuss the issue with the specialist, Dr. Waskow…At this time no wheelchair rx will be provided since Dr. Waskow approved for patient to do some light walking, to prevent hip muscle atrophy and worse weakness…" (Claimant's Exbs. pg. 39). Based on the content of this report, the ALJ finds that PA Aguirre did not causally relate Claimant's bilateral hip condition to his work duties.

20. Dr. Waskow examined Claimant on March 26, 2015, and reported, "…Pt rates his aching pain level as a three after prolonged walking. Pt had x-rays taken today. 75% improvement, due to not working." (Claimant's Exbs. pgs. 35, 36). Dr. Waskow stated, "…Stress fracture can be caused/worsened by being a vault worker – warehouse…strongly encouraged him not to be returning back to physical work…" (Id. at 34). X-rays on March 26, 2015 revealed; "…stable healing stress changes within the left greater than right medial femoral head neck junctions." (Id. at 33).

[1] Also referred to as osteonecrosis.

21. On April 28, 2015, Dr. Waskow reported, "…Pt is f/uing up on his bilat hip stress fxs. Pt has no pain, no sharp shooting pains, stiffness or soreness. He just wants to make sure they are healing correctly. Pain scale 1/10…" (Claimant's Exbs. pg. 26) Dr. Waskow recommended; "…no physical work for another 3 months. Return to clinic in 2 ½ to 3 months for follow up with new x-rays. Pt to schedule bone density..." (Id. at 30).

22. Claimant was laid off from his employment on May 29, 2015. Claimant has looked for work, but has not returned to work due to the effects of his hip condition. Claimant received short term disability benefits prior to his lay off. (Respondents' Exbs. pgs. 139, 140).) After he was laid off, Claimant received severance pay of $1,458.40 for pay period ending June 13, 2015, and the same amount for pay period ending June 27, 2015. (Respondents' Exbs. pg. 139). Claimant received unemployment insurance benefits in the amount of $404.00 per week beginning August 14, 2015 and continuing through the date of hearing. (Respondents' Exbs. pg. 139).

23. The requested bone density study was completed on June 30, 2015. The diagnostic results of that study were consistent with osteoporosis[2] as Claimant had a low T score of -2.7. On July 9, 2015, Virginia Quiroz, NP, reported, "…I personally reviewed and interpreted BD [bone density] = osteoporosis." (Claimant's Exbs. pg. 12). She added osteoporosis to Claimant's diagnoses. (Id. at 10).

24. Repeat MRI and x-rays taken of the hips on July 13, 2015 showed a band of sclerosis in the medial femoral necks bilaterally compatible with the area stress fractures noted on the previous MRI, no lucent line identified and mild bilateral hip osteoarthritis.

25. Dr. Waskow has not seen the claimant since April 2015 and claimant has not been seen at CSHP since July 9, 2015. Claimant did not return to CSHP after July, 2015 because his health insurance expired after he was laid off, and he was unable to afford treatment. After Claimant's health insurance expired, he filed a claim for workers' compensation benefits on August 27, 2015. (Claimant's Exb. 6). In that form, Claimant indicated he notified the Employer of his work-related condition in February, 2015. As noted above, the ALJ finds that to be so.

26. Dr. Waskow responded to written questions from Claimant's counsel on September 22, 2015. Dr. Waskow reported his diagnosis was "stress fractures of hip & pelvis." He stated this condition was due to the repetitive duties of Claimant's job, as opposed to the aging process. He stated he was unsure of the definition of an occupational disease, "…but this medical problem was/is caused by his job." Dr. Waskow confirmed that Claimant's job duties accelerated, exacerbated, worsened, or aggravated his underlying degenerative condition. He added Claimant's prognosis was good, "…but probably not doing heavy work." (Claimant's Exbs. pgs. 6, 7).

[2] According to Dr. Piko, Claimant is at a high risk for suffering fracture.

27. On November 8, 2015, Dr. Piko, a board certified and fellowship trained musculoskeletal radiologist, reviewed Claimant's imaging films. He noted findings on the MRI from March 2, 2015 involving Claimant's hips to reveal bilateral femoral head avascular osteonecrosis (AVN). This involves cellular bone death, due to interruption or decrease in blood supply. AVN is associated with numerous medical risks. Some disease states and types of medication can increase the risk of developing AVN to include, excessive alcohol use, chemotherapy, HIV/AIDS, Cassion's disease, lupus, vasculitis, cancer, and marrow disorders including sickle cell anemia. In Claimant's case, Dr. Piko opined that Claimant had multiple fractures involving bilateral proximal femurs, acetabulum and sacrum. Minimum if any bone marrow edema was associated with the described fractures on MRI and this was an indication of fairly long-standing pathology, meaning months to years. These types and locations of fractures also have the characteristic appearance of insufficiency fractures according to Dr. Piko. Insufficiency fractures occur where normal stress is applied to abnormal bone. Typically, insufficiency fractures occur in older patients with osteoporosis. Claimant has been diagnosed with osteoporosis. It was Dr. Piko's opinion there were abnormal marrow signal changes on MRI of the pelvis, sacrum and lower lumbar spine, which is indicative of yellow marrow conversion and possible myeloproliferative disease. Chronic illnesses, such as anemia, HIV-positive patients and cancer therapies can produce hyperplasia of bone marrow also. It was his opinion that claimant's finding of the AVN and multiple insufficiency fractures could not be caused by an acute injury. Per Dr. Piko, the most likely cause of Claimant's AVN and insufficiency fractures were "due to normal stresses on abnormal bone, caused by an underlying disease state and associated osteoporosis and which were chronic, taking months to years to develop.

28. Claimant is HIV positive and has been since 1997. Claimant has been taking antiviral drugs for this condition since 1997. Claimant also has a history of alcohol abuse noted in 1999 for fifteen years, stopping alcohol use in approximately 2005. Further, in addition to his hyperlipidemia and osteoporosis, Claimant has a history of renal insufficiency, gout, and Vitamin D deficiency.

29. On December 17, 2015, Dr. Cynthia Kelly, a board certified orthopedic surgeon, with expertise in AVN, bone healing and infection completed an independent medical examination (IME) at the request of Respondents. As noted, Dr. Kelly testified at hearing. Dr. Kelly opined that Claimant has avascular necrosis as well as osteoporosis. Dr. Kelly opined Claimant's hip problems are the result of osteonecrosis and osteoporosis; pre-existing conditions that affect Claimant's bones. AVN or osteonecrosis results from loss of blood supply to bone, causing bone death. She testified the factors contributing to Claimant's osteonecrosis include high cholesterol (hyperlipidemia), a remote history of alcohol abuse, and taking of anti-viral drugs to treat HIV. The disease may cause degeneration of the cartilage on the surface of the femoral head which subsequently causes pain. However, it is a disease that is affected only by time. She noted the sclerosis observed in the 2012 films, already demonstrated that avascular necrosis of the femoral head was present on the right side. In Dr. Kelly's opinion Claimant has likely had evolving osteonecrosis since 2010. Dr. Kelly indicated that pain with activities may occur but does not change the underlying pathology of the

AVN. She did not believe the activities Claimant described at work would cause the AVN or accelerate the degenerative process.

30. Dr. Kelly testified that Claimant has osteoporosis based on his bone scan and low T scores. Dr. Kelly explained that osteoporosis results from low bone density and has nothing to do with osteonecrosis. She explained that it is a metabolic problem, and that HIV accelerates it by causing a decrease in the cells that maintain bone density. Dr. Kelly testified Claimant's bone density study yielded a score of -2.7, which she explained is unusually low for a 49 year old male. She opined that Claimant was at risk for the development of osteoporosis not only due to being HIV positive, but also due to his vitamin D deficiency and his chronic renal insufficiency. Although Dr. Kelly opined that it was impossible to pinpoint an exact age of the fractures in Claimant's hips and pelvis, it was her opinion that the MRIs noted no T2 signal which was indicative of older fractures that were sclerotic and likely up to 2 years old. Dr. Kelly opined that treatment for osteoporosis is weight bearing. Consequently, because Claimant's fractures healed despite his lifting, squatting, standing, walking and bending, those work activities would not have accelerated or aggravated Claimant's osteoporosis according to Dr. Kelly. Per Dr. Kelly, Claimant's progressing AVN and not the stress fractures were the cause of his pain and disability at the end of August and beginning of September 2013.

31. Neither diagnosis was impacted by Claimant's work activities according to Dr. Kelly. Rather, Dr. Kelly opined that only high impact activities, such as running and jumping would aggravate and accelerate Claimant's underlying degenerative condition, neither of which Claimant did to complete his work-related obligations.

32. Dr. Waskow opined that Claimant's diagnosis was stress fractures. He indicated that Claimant's repetitive duties caused this condition and aggravated the underlying degenerative condition, although it is unclear what condition he is specifically referring to.

33. After careful review of the conflicting causation opinions of Dr. Waskow, Dr. Piko and Dr. Kelly, the ALJ finds Dr. Waskow's opinions less persuasive than those of Dr. Piko and/or Dr. Kelly. The ALJ finds Claimant's work activities did not cause his underlying osteonecrosis or osteoarthritis. Furthermore, the ALJ finds that Claimant's work activities did not aggravate, exacerbate or accelerate those underlying conditions, leading to stress fractures, pain, disability, and the need for medical treatment. To the contrary, the ALJ credits the opinions of Drs. Piko and Kelly to find: 1. Claimant's pain and disability beginning at the end of August and beginning of September 2013 was, more probably than not, caused by the natural progression of his AVN and not the stress fractures observed on imaging study as those fractures were old. 2. Claimant's work duties did not accelerate or exacerbate Claimant's osteoporosis to cause his stress fractures, pain, disability and need for treatment.

34. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable occupational disease in the form stress fractures in his hips/pelvis as a consequence of his work duties.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-01, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). As found, the opinions of Drs. Piko and Kelly are credible and more persuasive than the contrary opinions of Dr. Waskow.

C. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant's injuries arise out of his employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of*

Durango v. Dunagan, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges that he suffered an occupational disease to his hips as a result of repeated lifting, bending, squatting and standing/walking of slippery concrete floors. According to Claimant, these repeated activities lead to stress fractures, pain, disability, and the need for medical treatment.

G. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). On the other hand, an accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). Under the statutory definition, the hazardous conditions of employment need not be the sole cause of the disease. To the contrary, a claimant is entitled to recovery if he demonstrates that the hazards of employment cause, intensify, or aggravate, to some reasonable degree, the disability. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Here, Claimant concedes that he has osteonecrosis and osteoporosis; pre-existing conditions that cause pain, disability and increase the likelihood of fractures. Nonetheless, Claimant asserts that his injuries (hip fractures) are compensable because they are fairly traced to the employment as a proximate cause, and they do not come from a hazard to which Claimant was equally exposed outside of the employment. Simply, Claimant asserts that the conditions under which his work was preformed aggravated, accelerated, and/or combined with his pre-existing conditions to cause fractures, his need for medical treatment and produce the disability for which benefits are sought. Based upon the totality of the evidence presented, the ALJ is not persuaded.

H. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work or the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). As found here, the totality of the evidence, including the medical records and the testimony of Dr. Kelly establishes that Claimant has been treated for hip problems since 2013. The evidence shows that Claimant has pre-existing non-work related medical conditions which likely placed him at risk for and lead to his diagnosis of avascular necrosis; a disease unrelated to his work duties and neither aggravated nor accelerated by those duties. The avascular necrosis appears to have started in the right hip as early as 2012, possibly even 2010. ANV affects the cartilage covering the head (ball) of the femur and in Claimant's case is progressing according to the persuasive testimony of Dr. Kelly. Weight bearing or non-weight bearing activities do not affect the disease process. Consequently, the ALJ is persuaded that Claimant's work duties did not cause or aggravate Claimant's underlying AVN. Because AVN primarily results in degeneration of the cartilage over the femoral head and is not affected by the duties Claimant alleges ceased his hip fractures, the ALJ is not persuaded that Claimant's AVN caused or changed the underlying pathology of the stress fractures as they were healing while Claimant was working.

I. Claimant also has underlying osteoporosis and some abnormal bone marrow proliferation, which makes his bone insufficient. Both Dr. Piko and Dr. Kelly believe Claimant had insufficient bone structures which represents the likely cause of his stress fractures. However, Dr. Kelly testified that the stress fractures were old ranging from months to years because the T2 signal was not present indicating that they were not acute fractures. Dr. Piko also noted this in his report as well. In the two years preceding Claimant's alleged date of injury he was working, performing the same duties that he claims caused his injuries. Nonetheless, his fractures demonstrated evidence of healing per the x-rays and MRI scans in 2015. Further, Claimant appears to have fractures of his left rib of unknown duration, with sclerosing and a chronic appearance. Finally, weight bearing activities are encouraged for someone who suffers from osteoporosis. Here, the ALJ is convinced that Claimant has insufficient bones which failed under normal stressors as a consequence of his non-work related osteoporosis. His hip fractures likely represent the natural progression of his underlying disease process and predate his claim date of injury by months or years as evidenced by the healing fractures in his femur, pelvis and ribs. Consequently, the ALJ concludes that it is improbable that Claimant's stress fractures were caused, aggravated or exacerbated by Claimant's work activities as suggested.

J. As Claimant failed to prove by a preponderance of the evidence that he sustained a compensable occupational disease in the form stress fractures in his hips/pelvis as a consequence of his work duties, his remaining claims need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 4, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable occupational disease involving her left knee.

II. If Claimant sustained a compensable left knee injury, whether she established, by a preponderance of the evidence, that she entitled to a general award of any and all reasonable and necessary medical treatment related to that injury.

III. If Claimant sustained a compensable left knee injury, whether the right of selection to designate a provider to attend to that injury passed to Claimant.

IV. If Claimant sustained a compensable left knee injury, whether Claimant is entitled to TTD benefits beginning August 28, 2015 and continuing until terminated by operation of law.

Because the ALJ concludes that Claimant failed to prove by a preponderance of the evidence that she sustained a compensable occupational disease as a consequence of her work duties, the remaining claims concerning entitlement to medical and indemnity benefits are not addressed in this order.

STIPULATION

At the commencement of hearing, the parties advised the Court of the following stipulation, which was accepted and approved by the ALJ: Claimant's average weekly wage (AWW) for purposes of this claim is $675.33.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Lakin, the ALJ enters the following findings of fact:

1. Claimant began working for Employer in 2009 as a Tortilla packager.

2. As a tortilla packager, Claimant would grab and bag tortillas as they would approach her on a variety of assembly lines. She worked four different production lines within her department. She stood on her feet at three of the lines; however, the work at the fourth line involves sealing bags of tortillas and affords the packager an opportunity to get off his/her feet as the sealing is performed from a seated position.

3. All of the lines are different in layout and the physical movements necessary to

complete the work at each line is also different. On some machines, Claimant demonstrated that she would bend and rotate slightly to the left and on others to the right, the direction dependent upon the layout of the line and which side the tortillas were coming from. On one line, tortillas came directly at Claimant from the front. As noted, Claimant worked all production lines, rotating between each line every hour.

4. Claimant testified that the summer months of the year are particularly busy at the factory and that during the summer of 2015, she worked 12 hours per day, 6 days per week. Claimant testified that her routine shift was eight hours but that all workers must be able to work up to 12 hours if necessary.[1] Claimant was paid a base wage of $12.21 per hour.

5. Claimant testified that she was able to sit down during three 15 minute and one 30 minute break per shift. The balance of the time, i.e. 10 hours 45 minutes were spent on her feet standing or walking according to Claimant.

6. Prior to June 2015, Employer imposed no requirement regarding the footwear to be worn by packagers such as Claimant. Claimant testified that she wore tennis shoes while performing her job duties prior to June 2015. Around the last week of June 2015, Employer mandated that packagers wear a steel toed shoe. Claimant testified that she immediately experienced fatigue in her legs/feet with having to use a steel toed shoe. Claimant complained about her leg/foot symptoms and asked if she could forego using the required steel toe. Her request was denied.

7. According to Claimant, she then developed a "pinching" sensation on the inside of her left knee around August 3, 2015. This symptom progressed to the outside of the knee and to the area below her knee as well. Claimant testified that her work activities and the need to wear steel toed shoes made her symptoms worse. Per Claimant's testimony her knee would be visibly swollen by the end of her shift.

8. On August 21, 2015 Claimant experienced increased pain and swelling in her left knee Claimant asserted that she reported her symptoms to her supervisor, "Megan", but Megan did not refer her to a physician. Consequently, Claimant testified that she elected to pursue treatment through her primary care physician (PCP) at Southern Colorado Family Medicine. Based on the evidence presented, the ALJ finds that Claimant saw her family practitioner, Dr. Aaron Shupp on August 28, 2015 before reporting to work.

9. According to Claimant, her PCP recommended reducing her work hours. This testimony is corroborated by Dr. Shupp's September 10, 2015 report. Claimant informed Employer of the need to reduce her work hours which prompted the completion of a "First Report of Injury" on August 28, 2015. The "First Report" contains an indication that Claimant had notified Employer of her alleged work-related knee condition on August 21, 2015.

[1] A fact confirmed by the testimony of Hubert Marias during his testimony.

10. Claimant was referred to the Southern Colorado Clinic where she was evaluated by Terry Schwartz, PAC on August 28, 2015. Ali Medina, Employers HR Representative, accompanied Claimant to this appointment. Ms. Medina is Spanish speaking and was present to act as an interpreter. PA Schwartz documented a history of symptoms beginning August 2, 2015. According to PA Schwartz, Claimant did not recall sustaining a specific injury, noting specifically: "Pt states no specific injury, doesn't operate foot peddles (sic), no pushing/shoving with foot/leg or knee. 'Stands at assembly line', rotating to new position on the line every hour."

11. PA Schwartz ordered x-rays, including weight bearing views of the knees bilaterally. The left knee x-rays revealed a small calcified cyst behind the knee along with "very minimal degenerative change." No acute fractures, dislocations, and no significant knee joint effusion were appreciable. There was narrowing of the medial aspects of both knees and the right knee x-ray demonstrated evidence of patellar chondromalasia (sic) according to PA Schwartz' report from August 28, 2015.

12. As noted in paragraph 8 and 9 above, the ALJ finds that Claimant saw her PCP on August 28, 2015 prior to reporting to work and prior to being seen by PA Schwartz with Ms. Medina being present. In a record dated September 10, 2015, Aaron Shupp, M.D., a family medicine physician, noted that Claimant had first visited him regarding osteoarthritis knee pain on August 28, 2015. PA Schwartz' record from his August 28, 2015 appointment notes that Claimant's "private physician sent her to SMC for xrays of her knee due to pain in the knee." These x-rays were available to PA Schwartz according to his report and demonstrated "[m]oderate tricompartmental osteoarthritis is present on the right with mild tricompartmental osteoarthritis present on Lt. No effusions. No acute boney or joint abnormalities." The ALJ finds the reference to "Lt." likely means "left."

13. Regarding the cause of Claimant's left knee pain, PA Schwartz note from August 28, 2015 indicates:

> No clear cause as to relate pain to work situation: no injury, no activity other than standing that may affect the knee. Pt notes that the pain started after she had to start wearing steel toed shoes. Notes that there is not a height difference between her tennis shoes and work boots."

14. In a Physician's Report of Worker's Compensation Injury, PA Schwartz concluded that Claimant's condition was not work related, that there was "no clear cause and effect for work comp injury", and that there was a "clear diagnosis of osteoarthritis per radiologist of both knees".

15. Claimant was released to return to full duty effective August 28, 2015.

16. Terrance Lakin, D.O. works closely with and supervises PA Schwartz. As part of

his supervision, Dr. Lakin reviews all of PA Schwartz' notes and signs them, provided that they are accurate. Dr. Lakin signed PA Schwartz' August 28, 2015 report on August 30, 2015.

17. Claimant testifed that she met with a "man", which the ALJ finds from the evidence presented was likely PA Schwartz, at the Southern Colorado Clinic on August 28, 2015. Per Claimant's testimony, PA Schwartz spent little more than 30 minutes with her. Claimant testified that PA Schwartz asked no questions about her work or the duties of her job. Claimant asserts that Mr. Schwartz did not analyze whether the work exposure could have aggravated the pre-existing asymptomatic arthritis. Given the content of PA Schwartz' August 28, 2015 report, the ALJ is not persuaded by Claimant's assertion.

18. PA Schwartz assessed Claimant with "left knee pain" at her August 28, 2015 appointment. Based upon the evidence presented, the ALJ finds that Claimant's left knee pain is, more probably than not, emanating from osteoarthritis as demonstrated on x-ray studies. Osteoarthritis is a wearing and tearing of the articular surfaces of the knee which is usually age related, but could also be caused by mild trauma. A patient's weight could also be a factor in the development of osteoarthritis.

19. On November 24, 2015 Claimant was evaluated by Michael Dallenbach, M.D. at her request. According to Claimant, Dr. Dallenbach spent more than an hour with her during completion of his independent medical examination (IME). Claimant presented to Dr. Dallenbach's office with her daughter who acted as an interpreter. Dr. Dallenbach reviewed the available medical records and performed an examination of Claimant's left knee.

20. Regarding the left knee, Dr. Dallenbach obtained a history from Claimant that she worked 6-7 days per week, 12 hours per day; that her shift involved standing for 10 hours and walking two hours and that she began to experience pain on August 3, 2015, but did not report the injury until August 24th. Dr. Dallenbach diagnosed Claimant with mild degenerative joint disease of the left knee.

21. In addressing causation, Dr. Dallenbach stated that the medical treatment guidelines for "accumulative (sic) trauma conditions" at "page 19" require the clinician to determine whether it was medically probably (sic) that the need for treatment was due to work related exposure and that treatment was "covered" when the work exposure caused a new condition, activated a previously asymptomatic condition, or if the work exposure "combines with, accelerates or aggravates the preexisting symptomatic condition".

22. In opining that Claimant's left wrist and left knee conditions were causally related to her work duties, Dr. Dallenbach stated:

> Maria Alcala's current clinical condition as it pertains to a left wrist ganglion cyst and her left knee pain, within a reasonable degree of medical probability

> it is work related and secondary to her 6 years of employment at Gruma as a tortilla packer in that the force, frequency, intensity and duration of the activities that she had to performs to fulfill her job requirements suggest causality as referenced above, i.e. constant gripping and grasping, pinching activities involving her left wrist; constant twisting or torque mechanism of injury in her left knee.

23. Dr. Dallenbach did not specifically attribute Claimant's left knee condition to prolonged standing or the use of steel-toed shoes.

24. Hubert Murias testified at hearing. Mr. Murias has been the human resources manager for Employer's Pueblo facility since July 2015. He is familiar with Claimant and has observed the movements/tasks occurring at the various lines which Claimant works.

25. Mr. Murias testified that Employer has black anti-fatigue mats around each machine.[2]

26. According to Mr. Murias, Claimant worked the in the "flour" department which consists of four production lines where packagers stand on one or both sides of the line and grab tortillas as they travel on a belt and place them into plastic bags. According to Mr. Murias, the tortillas are brought directly to the side or in front of the standing employees by the conveyor belt. At the end of the forth line, a person in a seated position would take the bagged tortillas and heat seal the bags before they were taken away for further processing. Employees rotated between the standing positions along the flour packaging lines and the seated sealer position on an hourly basis. As Claimant only worked the flour lines, she had the opportunity to sit for a quarter of her work shift.

27. Mr. Murias testified and demonstrated the manner in which the packager position is performed. According to Mr. Murias' testimony and demonstration, the lines are "belt" high and product is brought right up to the side or in front of the packagers so as to limit the amount of movement necessary to package the tortillas for efficiency sake. The ALJ finds from Mr. Murias' testimony that Claimant's description/demonstration of the movements involved in completion of her job duties was exaggerated. According to Mr. Murias the movements required to work as a packager on the flour lines placed little to no stress on the knees since twisting (pivoting), reaching and bending to grab the tortillas as they proceed down the line to the packagers is not required.

28. On rebuttal, Claimant adamantly testified that Mr. Murias' testimony regarding the movements necessary to perform as a packager were incorrect. According to Claimant's testimony, it was absolutely necessary to shift the weight to one leg and reach while pivoting back and forth on the feet because the tortillas did not end up directly in front of the packager except on one machine. The ALJ finds the

[2] This testimony was corroborated by the testimony of Dr. Lakin who has visited Employer's Pueblo production plant previously.

testimony/demonstration of Mr. Murias credible and convincing and credits it over the testimony/demonstration of Claimant.

29. Mr. Murias testified that the hours at the plant varied and the usual work schedule was 5-6 days per week. According to Mr. Murias Employer is a national company and there was no particularly busy time of the year. Rather, production was based upon supply and demand. Mr. Murias explained that the steel toed shoe requirement was instituted for operators and warehouse personnel before his arrival and was extended to all employees in late June or early July 2015. Per Mr. Murias there was no requirement for employees to wear steel toed boots. To the contrary, he testified that employees could wear steel caps over their tennis shoes and that the caps were available at the plant.

30. Dr. Lakin was deposed on February 2nd. He is a medical doctor and has been licensed to practice medicine in Colorado since 1993. He is board certified in occupational medicine. He is also level II accredited with the Division of Workers' Compensation.

31. Dr. Lakin has twice visited Employer's Pueblo facility. He has observed operation of the lines Claimant works. He would not classify the job as involving "a lot of knee bending". Dr. Lakin is "impressed" with the Employer's rotation of people and its program to "try and reduce a lot of the mechanisms that cause injuries". By rotation, he meant that people are shifted after a certain amount of time to "give them a break from repetitive type injuries." He agreed with PA Schwartz in that the x-ray findings of degenerative changes led to the conclusion that Claimant's condition was not work-related. He also opined that Claimant's weight likely played a causative role in the development of her arthritis. Claimant had weighed as much as 300 pounds during 2011, but weighed 189 pounds at the time of her August 28, 2015 appointment. Nonetheless, Dr. Lakin opined that she had a body mass index (BMI) of 32, placing her in the category of obese. He opined that with a person of Claimant's weight and body mass, weight would "very much" be a factor in the development of arthritis.

32. Dr. Lakin ruled out Claimant's use of steel-toed shoes as a cause or aggravating factor in Claimant's case. In part, his opinion was based on the fact that Claimant's osteoarthritis had developed over a lengthy period of time for perhaps 20 years or so before her reported complaints whereas the footwear requirement was only in place for a few weeks. Dr. Lakin also relied on the diagnosed presence of calcified cyst behind her left knee, an indication, according to Dr. Lakin that Claimant had "stuff" going on in the knee many years prior to August 2015.

33. Dr. Lakin reviewed Dr. Dallenbach's report. He found that the occupational history obtained or noted by Dr. Dallenbach in terms of walking and standing was inconsistent with his own observation of Employer's rotation policy. He observed that Dr. Dallenbach did not consider Claimant's weight, attempt to correlate Claimant's work activities with risk factors for arthritis, or determine a temporal association between workplace risk factors and the onset of symptoms. While Dr. Lakin agreed that a

potential hazard for leg disorders could be standing for prolonged periods on concrete floors, he noted that use of mitigation measures such as anti-fatigue mats and rotation between sitting and standing positions would make Claimant's standing less of a factor in the development of a leg disorder. According to Dr. Lakin, the lack of improvement in Claimant's condition following removal from work activities also made it less likely that work activities caused or aggravated Claimant's osteoarthritis.

34. During his deposition Dr. Lakin was asked if he was familiar with the "Medical Causation Assessment for Cumulative Trauma Conditions." Dr. Lakin stated that he was familiar with the guides but offered that he thought those guides were for cumulative trauma conditions of the upper extremity. Respondents' attorney questioned Dr. Lakin about whether Dr. Dallenbach had compared the risk factors discussed in the "Medical Causation Assessment for Cumulative Trauma Conditions" (for upper extremities) with the work performed by the Claimant which was alleged to have caused her left knee condition. Dr. Lakin opined that Dr. Dallenbach had not. While Claimant argues that such questions were absurd given that Claimant is asserting a left knee condition and not an upper extremity injury, the ALJ notes that Dr. Dallenbach raised the issue of a left hand/wrist injury in his IME report. Moreover, Claimant was seen at CCOM Pueblo for left hand complaints on September 15, 2015 for an "abscess due to repetitive work." Consequently, the ALJ is not convinced that Respondents were attempting to argue that the cumulative trauma guides, WCRP, Rule 17, Exhibit 5 (which only have risk factors and medical conditions dealing with the upper extremities), should apply to the claimant's left knee injury as suggested by Claimant.

35. To the extent that Claimant asserts that she sustained a cumulative trauma injury of the left hand on or about August 2, 2015, the ALJ finds that she has failed to establish the same by a preponderance of the evidence. The causation analysis which Dr. Dallenbach stated was at "page 19" of an exhibit which he did not identify is actually found at Exhibit 5, page 13 in a section marked "general principles of causation assessment". That analysis requires a specific diagnosis, a determination of whether the disorder was known to be or plausibly associated with work, an interview of the patient to determine whether the risk factors were present in sufficient degree and duration to cause or aggravate the condition, a matching of risk factors with the established diagnosis, determine the existence of a temporal connection, and identify non-occupational diagnoses such as obesity which can affect the work related causation decision. W.C.R.P. 17, Exhibit 5, p. 14.

36. On cross examination, Dr. Lakin was asked about whether he was familiar with the treatment guidelines for assessment/treatment of lower extremity injuries, particularly the section dealing with "aggravated osteoarthritis of the knee." Dr. Lakin noted that he was not familiar with these guides.

37. Per Claimant's request at hearing, the ALJ takes administrative notice of WCRP 17, Exhibits 5 and 6. Exhibit 5 addresses cumulative trauma generally and with respect to upper extremities and Exhibit 6 addresses lower extremity injuries, including

aggravated osteoarthritis of the knee. Page 47 of WCRP 17, Exhibit 6 specifically discusses osteoarthritis of the knee, stating:

> Description/Definition: Swelling and/or pain in a joint due to an aggravating activity in a patient with pre-existing degenerative change in a joint. Age greater than 50 and morning stiffness lasting less than 30 minutes are frequently associated. The lifetime risk for symptomatic knee arthritis is probably around 45% and is higher among obese persons.

38. Per WCRP 17, Exhibit 6(E)(2)(a)(ii), the question of whether a claimed aggravation of osteoarthritis of the knee is causally related to work duties requires the provider to "establish the occupational relationship by establishing a change in the patient's baseline condition and a relationship to the work activities including but not limited to physical activities such as repetitive kneeling or crawling, squatting and climbing, or heavy lifting.

39. Based upon the evidence presented, the ALJ finds Claimant's testimony that she worked 12 hours per day, six days per week unreliable. Claimant's payroll records with Employer were introduced into evidence. Those records reflect that Claimant worked 1,995.42 hours (of which 475.80 were overtime hours during 2014); an average of 38.37 hours per week. She worked 1,576.84 regular hours (of which 328.02 were overtime hours) through the end of August 2015 for an average of 45.80 hours per week. In the six weeks prior to her report of symptoms, she worked 342.55 hours or an average of 57.09 hours per week. In the three full weeks after she reported the development of symptoms, she worked 182.43 hours; an average of 60.81 hours. The payroll record evidence, fails to support Claimant's assertion that she worked 12 hours per day six days per week. To the contrary, the ALJ finds from her payroll records that at her peak, Claimant worked on average 10 hours per day, over a six day work week. Consequently Claimant's assertion that she was on her feet 10.75 hours per day during her work shifts is also suspect.

40. As part of his causation analysis, Dr. Dallenbach outlined the specific work exposures that Claimant asserts aggravated her pre-existing osteoarthritis. He also noted that he "assumed" the information provided by Claimant was correct. Based primarily on the history provided by Claimant, he made a causal connection between the work exposure and her current condition. As found above, Claimant's testimony regard the amount of time spent on her feet and the movements necessary to complete her work tasks is unconvincing. As the persuasive record evidence does not support the history Claimant provided to Dr. Dallenbach during his IME, the ALJ finds Dr. Dallenbach's opinion regarding causality unpursuasive. Furthermore, the ALJ is not persuaded that Dr. Dallenbach's opinions are entitled to "more weight than those of Dr. Lakin" simply because Dr. Lakin has not met or examined Claimant.

41. Claimant has failed to establish that she suffered a compensable left knee injury in the course and scope of her employment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of “and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that her symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant’s left knee condition arises out of her employment.

E. The term "arises out of” refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a “contested fact is more probable than its nonexistence.” *Page v. Clark, supra.* Whether Claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges that she suffered a compensable aggravation of her left knee osteoarthritis as a consequence of prolonged standing, the required use of steel toed shoes, repeated knee twisting or flexion, or some combination of these activities. She did not allege the occurrence of a discrete injury. Rather, she is alleging that she sustained an occupational disease as a result prolonged exposure occasioned by her work activities for Employer.

G. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). On the other hand, an accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). The failure to satisfy each element by a preponderance of credible evidence is fatal to an occupational disease claim. *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988). Here, Claimant concedes that she has pre-existing osteoarthritis in the left knee; a condition that causes wear and tear to the articular surfaces of the knee resulting in pain and disability. Nonetheless, Claimant asserts that her left knee condition was asymptomatic until she was exposed to prolonged standing with the use of steel toed shoes while having to bend and twist her knee to complete the essential duties of her job. Consequently, Claimant argues that she aggravated her pre-existing condition making her claim for benefits, including medical treatment compensable because the aggravation is fairly traced to her employment as a proximate cause, and did not come from a hazard to which she was equally exposed outside of the employment. Simply put, Claimant asserts that the conditions under which her work was preformed aggravated, accelerated, and/or combined with her pre-existing conditions to cause her symptoms, her disability and her need for medical treatment, for which benefits are sought. Based upon the totality of the evidence presented, the ALJ is not persuaded.

H. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial*

Claim Appeals Office, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). The totality of the evidence presented persuades the ALJ that Claimant's left knee symptoms, more probably than not, arose from the natural progression of her pre-existing degenerative left knee osteoarthritis rather than her work duties as she explained and demonstrated.

I. To the extent that Claimant asserts that prolonged standing caused her symptoms, her claim that she worked 12 hours per day, six days per week is not credible as noted above. Review of Claimant's payroll records reflects that she never worked that many hours (paid or otherwise). Moreover, Claimant's assertion that she stood for 10.75 hours per day, never sitting despite having symptoms for several weeks strains credulity. Mr. Murias testified that there was a rotation of employees from station to station and machine to machine on an hourly basis (a fact to which Claimant testified). Mr. Murias testified that the rotation included a shift from a standing bagging position to the seated sealer position. His testimony was supported by the deposition testimony of Dr. Lakin who observed both the periodic rotation and the rotation between sitting and standing. Given that Claimant became symptomatic around August 2 and did not report her symptoms until August 21 convinces the ALJ that Claimant's report that she did not sit during any part of her shift is incredible. Based upon the evidence presented, the ALJ finds that if Claimant's symptoms were as severe as she claims, she likely would have taken the opportunity to sit in an effort to rest her swollen knee and avoid what she now claims was an aggravating/symptom producing activity, i.e. standing. While standing for prolonged periods on concrete might contribute to lower extremity symptoms, the ALJ is not convinced that Claimant stood for the time periods she claims. Furthermore, the evidence presented persuades the ALJ that the risk of aggravation of her pre-existing condition was mitigated further by the use of anti-fatigue mats, which the ALJ finds were present around each machine on which Claimant worked. Even Dr. Dallenbach did not opine that the standing portion of Claimant's job caused, contributed or aggravated Claimant's osteoarthritis. Rather, he attributed Claimant's left knee symptoms to "constant" twisting or torquing of the left knee. Consequently, Claimant has not shown, by a preponderance of credible evidence, that standing constituted a hazard of her employment which would render her arthritis a compensable occupational disease. Compare, *Samake v. Transdev*, W.C. 4-956-998-03 (ICAO, July 31, 2015); *Bennai v. Shearton Denver Downtown Hotel*, W.C. 4-866-503-02 (ICAO, April 8, 2013); *Adams v. Loan-N-Jug*, W.C. 4-797-652 (IACO, July 16, 2010); and *Robinson v. J.C. Penney*, W.C. 4-151-232 (ICAO, June 30, 1995).

J. As to repetitive twisting of the knee, Claimant offered her own testimony and

Dr. Dallenbach's opinion. Neither is convincing. Claimant demonstrated the manner in which she allegedly performed her job duties. Claimant's demonstration included reaching way and to the side of the body, requiring her to shift her weight and twist slightly at the knee and waist. As found, Mr. Murias has observed the movements necessary to complete the tasks on the lines Claimant worked. Like Claimant, Mr. Murias demonstrated the movements necessary to grab and package the tortillas coming down the line to the packagers. In this case, the ALJ is convinced by Mr. Murias' testimony and demonstration as it involved very little wasted motion, a factor the ALJ finds important to a business with a high production quota. Moreover, as noted above, Claimant was not credible on other verifiable details, calling her testimony regarding the specific movements required to complete tasks on the line into doubt and rendering Dr. Dallenbach's opinion that twisting and torquing injured Claimant's knee equally unpursuasive.

K. Likewise, Claimant failed to meet her burden of proving, by a preponderance of credible evidence, that there is a causal connection between her osteoarthritis and the use of steel toed shoes. Dr. Lakin ruled out the shoes as a causative factor because there was no difference in elevation and that the policy regarding the need to wear steel toe protection had not been in place long enough to account for Claimant's osteoarthritis. Dr. Dallenbach also took a history of steel toed shoe use with reported discomfort, but did not include the shoes as a risk factor in the development or aggravation of Claimant's left knee osteoarthritis. No medical provider has commented on a causal connection and none is discussed in either treatment guideline exhibit for which administrative notice was taken.

L. The Medical Treatment Guidelines are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight. Moreover, the MTGs have been accepted in the assessment of the cause for aggravated osteoarthritis. While the MTGs provide for specific steps in analyzing whether there is sufficient proof to causally connect an aggravation of pre-existing osteoarthritis to a Claimant's need for additional treatment, the Court is not bound by the MTGs in deciding individual cases on the MTGs or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

M. Dr. Dallenbach purported to use the risk analysis contained in WCRP 17, Exhibit 5 and 6 when he concluded that Claimant's upper extremity and left knee conditions were causally related to her work duties. While he may have completed a causality assessment according to the MTGs, his assessment did not persuasively account for non-occupational factors such as age and obesity in the development of osteoarthritis and Claimant's current symptoms. More importantly, neither the history Claimant gave Dr. Dallenbach regarding the amount of time spent on her feet nor the testimony she provided at hearing regarding the movements required to complete her job duties while standing are credible as found above. Consequently, Dr. Dallenbach's causation opinions are neither credible nor persuasive. Accordingly, the ALJ concludes it proper to consider the entire record, including the deposition opinions of Dr. Lakin, despite the fact that Dr. Lakin did not conduct a causality assessment according to the MTGs, in determining whether Claimant sustained a compensable injury to her left hand and/or left knee arising out of her employment. In considering the record evidence presented as a whole, the ALJ concludes that Claimant has failed to prove the requisite casual connection between her work duties and the condition of her left knee. Consequently, her claim is denied and dismissed and the claims for medical and temporary disability benefits not addressed further.

ORDER

It is therefore ordered that:

1. Claimant's August 2, 2015 claim for work related injuries to her left knee is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

DATED: March 15, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-993-247-01

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury on July 20, 2015.

2. Determination of Claimant's average weekly wage (AWW).

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary disability benefits from July 20, 2015 and ongoing.

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to an increase in compensation or benefits of 50% pursuant to § 8-43-408(1), C.R.S

5. Whether Claimant has established by a preponderance of the evidence an entitlement to penalties for Respondent's failure to timely admit or deny the claim pursuant to § 8-43-203(2), C.R.S.

PROCEDURAL HISTORY

This matter was set for hearing initially on January 7, 2016. At hearing, Claimant was present and represented by Mr. Cohen. Respondent was not present at the start of hearing and a record was made that Respondent had proper notice of the hearing and of all the case filings in the matter and that Respondent had not filed any documents or responses throughout the course of the claim. The hearing commenced and Claimant presented his case in chief. At the close of Claimant's case, Respondent appeared in court and made a statement that he believed he had counsel and thought his attorney would appear to request a continuance. Respondent was advised that no attorney had made an entry of appearance in the case and the ALJ treated Respondent's statement as a request for continuance which was granted, in part.

On January 7, 2016 the ALJ entered a procedural order allowing Respondent a continued hearing date to present Respondent's case. The ALJ allowed Respondent one week to contact the court to reschedule the matter and the ALJ required that the matter be reset within 60 days.

The matter was reset for a continued hearing to be held on March 7, 2016. Notice of the March 7, 2016 hearing was sent to all parties on January 22, 2016 and notice was properly mailed and emailed to Respondent. The matter proceeded to the continued hearing on March 7, 2016 and Respondent failed to appear. The Respondent has not filed any pleadings or correspondence with the court in this matter. At the continued hearing, Claimant was allowed to make a closing argument, evidence was closed, and the matter became ripe for decision.

FINDINGS OF FACT

1. Claimant was hired by Employer on April 22, 2015 as a full time mover. Claimant began working for Employer on approximately May 10, 2015 and received his first paycheck for 43.48 hours of work on May 22, 2015. *See* Exhibit 3.

2. On July 20, 2015 Claimant was loading a pallet that weighed approximately 250 pounds onto a moving truck with a co-worker. They lost control of the pallet and Claimant injured his lower back and groin region when the pallet fell. The injury occurred at Employer's warehouse and Claimant reported the injury to the warehouse supervisor. *See* Exhibit 1.

3. Prior to Claimant's injury, and on May 15, 2015, the workers' compensation insurance policy for Employer was cancelled by Pinnacol Assurance. Employer was not insured for workers' compensation on July 20, 2015. *See* Exhibit 2.

4. Claimant was paid by Employer for a two week period of work and was issued paychecks six days after the close of the pay period. The check issued to Claimant on May 22, 2015 was for work performed between May 10, 2015 and May 16, 2015. The check issued to Claimant on July 17, 2015 was for work performed between June 28, 2015 and July 11, 2015. The final check issued to Claimant on July 31, 2015 was for work performed between July 12, 2015 and Claimant's date of injury. *See* Exhibit 4.

5. For the 10 weeks that Claimant performed work for Employer prior to his injury and for work performed between May 10, 2015 and July 18, 2015, Claimant earned gross wages of $8,219.62. This was for a period of 10 weeks of work and comes out to an average weekly wage of $821.96. *See* Exhibits 3, 4.

6. On July 23, 2015 Michael Ladwig, M.D. received verbal authorization to treat Claimant for an on the job injury from Brian Light, and Light Speed Delivery. *See* Exhibit 5.

7. On July 24, 2015 Claimant was evaluated by Dr. Ladwig. Claimant reported that he was lifting a pallet to load into a truck that was top heavy when his partner started tipping and he fought it and threw his back. Claimant reported throbbing pain radiating into his right gluteus. Dr. Ladwig diagnosed lumbar strain and radiculopathy. Dr. Ladwig opined that there was a greater than 51% probability that the injury was work-related. Dr. Ladwig noted that Claimant was unable to work and scheduled a follow up appointment for x-rays and to consider an MRI on July 27, 2015. *See* Exhibit 7.

8. On July 27, 2015 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig noted the continued diagnosis of lumbar strain and radiculopathy and opined that Claimant could not work until an ultrasound and MRI were obtained. *See* Exhibit 7.

9. On August 3, 2015 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig noted that Claimant had a return appointment on August 5, 2015 and could not work until return appointment. Dr. Ladwig noted that Claimant would need a valid company credit card in order to pay for the diagnostic work up and medical services going forward. *See* Exhibit 7.

10. On August 10, 2015 Claimant was evaluated by Dr. Ladwig. Claimant was referred to Ergo Med and Dr. Ladwig noted Claimant was unable to work until a return appointment on August 24, 2015. Dr. Ladwig diagnosed lumbar strain with radiculopathy and groin strain. *See* Exhibit 7.

11. On August 11, 2015 Gigi Henry, Controller for Employer, sent an email to Alan Anderson at Ergo Med that approved Claimant for recommended physical therapy and attached a direct pay billing agreement. *See* Exhibit 6.

12. On August 12, 2015 Ms. Henry emailed Claimant's attorney's office and indicated that Employer had been in constant contact with Claimant's doctor at Aviation & Occupational Medicine and indicated that Employer had provided payment for any and all charges for treatment at Aviation & Occupational Medicine. *See* Exhibit 6.

13. On August 24, 2015 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig continued the diagnoses of lumbar strain with radiculopathy and groin strain. Dr. Ladwig noted that Claimant was able to return to modified duty on August 24, 2015 with a restriction of lifting maximum of 5-10 pounds. *See* Exhibit 7.

14. On August 27, 2015 Claimant was evaluated by Hector Brignoni, M.D. Dr. Brignoni diagnosed lumbar strain with radiculopathy and groin strain. Dr. Brignoni noted than an L-S MRI was done on August 6, 2015. Dr. Brignoni continued work restrictions of lifting maximum weight of 5-10 pounds and added restrictions of walking 2 hours per day, standing 2 hours per day, and sitting 3 hours per day. Dr. Brignoni referred Claimant for a physiatrist consultation. *See* Exhibit 7.

15. On September 14, 2015 Claimant was evaluated by Dr. Ladwig. The diagnoses continued. Dr. Ladwig listed the work restrictions of maximum lifting weight of 5 pounds. *See* Exhibit 7.

16. On September 29, 2015 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig continued the diagnoses and work restrictions of 5 pounds lifting. Dr. Ladwig noted that chiropractic and acupuncture had not been helpful and that Claimant was probably looking at injections with Dr. Olsen. *See* Exhibit 7.

17. On October 27, 2015 Claimant was evaluated by Dr. Ladwig. The diagnoses and work restrictions were continued. Claimant reported to Dr. Ladwig that his pain was constant and that he had an appointment that day for injections but that Employer denied. Dr. Ladwig noted that Claimant would discuss the denial issue with

his attorney and then proceed forward. It was checked at that appointment that Claimant was “not working.” *See* Exhibit 7.

18. On November 3, 2015 Ms. Henry sent an email to Tony Baker at Aviation & Occupational Medicine. Ms. Henry asked for a statement regarding Claimant’s account and noted that Employer was no longer approving any future visits for Claimant. *See* Exhibit 9.

19. Claimant did not testify at hearing. Respondents did not present any testimony or evidence at hearing.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See* § 8-41-301(1)(b), C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

An accident "arises out of" employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

Claimant has established by a preponderance of the evidence that he sustained a compensable injury on July 20, 2015 that arose out of and occurred in the course of his employment. The evidence establishes consistent reports of lifting a pallet at Employer's warehouse when Claimant was injured. Dr. Ladwig opined that the injury was more likely than not work related. Dr. Ladwig consistently provided work related diagnoses at each medical appointment noting injury to Claimant's lumbar spine and groin.

Average weekly wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

The wage records in evidence establish that for the 10 weeks that Claimant performed work for Employer prior to his injury and for work performed between May 10, 2015 and July 18, 2015, Claimant earned gross wages of $8,219.62. This was for a period of 10 weeks of work and comes out to an average weekly wage of $821.96. Claimant has established this as his average weekly wage. Claimant's argument that his average weekly wage is $907.29 is rejected after reviewing the evidence. Claimant failed to account for the full number of weeks Claimant worked for Employer in calculating the average weekly wage.

Temporary disability benefits

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Claimant has established an entitlement to TTD benefits in this matter. The evidence and medical records show that as of his first appointment Claimant was placed on work restrictions that did not allow him to work for the first month following his injury. In approximately late August of 2015 Claimant was placed on work restrictions that allowed him to work with a maximum lifting restriction of 5-10 pounds. These restrictions continued throughout his treatment and through his last medical appointment on October 27, 2015. The medical records repeatedly note that Claimant was "not working" during his three months of treatment. Claimant has established an initial entitlement to TTD benefits and there has been no showing that TTD should be stopped. The evidence does not show Claimant is at maximum medical improvement, does not show that he has returned to regular or modified employment, does not show that he has been given a written release by his attending physician to return to regular employment, and does not show that he was given a written release to return to modified employment such employment was offered to him in writing and he failed to begin such employment. Further, the restrictions imposed on Claimant of maximum lifting of 5-10 pounds make it highly unlikely that Claimant would be able to return to his job and effectively and properly perform his regular employment duties as a full time mover. Claimant has established that his temporary total disability lasted more than three regular working days' duration and that he is entitled to sixty-six and two-thirds percent of his average weekly wages from July 21, 2015 through the hearing date of March 7, 2016 and ongoing until terminated by statute. Claimant has established that through the date of hearing, he is entitled to TTD benefits of $18,083.01 for the 33 week period between July 21, 2015 and March 7, 2016.

50% increase in benefits

Section 8-43-408(1), C.R.S. provides that in any case where the employer is subject to the provisions of the workers' compensation act and at the time of an injury has not complied with the insurance provisions of said articles, or has allowed the required insurance to terminate, or has not effected a renewal thereof, the employee, if injured…may claim the compensation and benefits provided in said articles, and in any such case the amounts of compensation or benefits provided in said articles shall be increased by fifty percent.

Here, Claimant has established that he suffered a compensable injury while working for Employer. Employer is subject to the provisions of the workers' compensation act. Claimant has also established that at the time of his injury, Employer did not have workers' compensation insurance as required by statute. Therefore, Claimant has established that the amount of compensation and benefits due to him shall be increased by fifty percent. The TTD owed to Claimant through the date of hearing in the amount of $18,083.01 thus shall be increased to $27,124.52.

Penalties

§ 8-43-101(1), C.R.S. requires that within ten days after notice of a lost-time injury to an employee, the employer shall, upon forms prescribed by the division for that purpose, report said lost-time injury. After a report is or should have been filed with the division, the employer is then required to notify in writing the division and the injured employee within twenty days as to whether liability is admitted or contested. *See* § 8-43-203(1)(a), C.R.S. If employer does not file such notice, then the employer may become liable to the claimant if the claimant is successful on the claim for compensation for up to one day's compensation for each day's failure to so notify. *See* § 8-43-203(2)(a), C.R.S.

Claimant has established that notice was provided to Employer in this case that Claimant had suffered a lost-time injury. Claimant reported his July 20, 2015 injury immediately to his supervisor and was taken off work at his first medical appointment a few days later. Employer failed to report the lost-time injury within ten days of receiving notice of the injury and did not report the injury by July 30, 2016. Further, Employer was required within twenty days of July 30, 2016 to either admit or contest liability. Employer also failed to do so.

On January 7, 2016 Respondent appeared at the hearing where Claimant was seeking an award of benefits and compensation. By appearing at hearing and requesting a continuance and indicating he had sought out legal counsel, the ALJ makes a reasonable inference that Respondent was contesting liability. Although not filed formally in writing with the division, the ALJ treats the January 7, 2016 date as the date that Respondent contested liability for the purpose of determining an appropriate penalty. As of that date, the violation period would have been 136 days (8/24/15-1/7/16). Under statute, the ALJ may assess a penalty of up to one day's compensation for each day's failure to notify the division of whether the claim is admitted or contested. In this matter, the ALJ finds a penalty of $25.00 per day to be appropriate. Therefore, the accrued penalty during this time period is found to be $3,400.00. As required by statute, fifty percent of the penalty shall be paid to the subsequent injury fund and fifty percent to the Claimant. *See* § 8-43-203(2)(a), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant has met his burden to show he suffered a compensable injury on July 20, 2015 while an employee of Respondent.

2. Claimant's average weekly wage at the time of his injury was $821.96.

3. Respondent is ordered to pay benefits and compensation to Claimant for temporary total disability in the amount of $27,124.52. (accounting for $18,083.01 plus a 50 % increase due to failure to be insured).

4. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. Respondent shall also pay a penalty to Claimant in the amount of $1,700.00.

6. Respondent shall pay a penalty of $1,700.00 to the workers' compensation cash fund. Respondent shall pay the Director of the Division of Workers' Compensation on behalf of the Workers' Compensation Cash Fund as follows: Respondent shall issue any check payable to "Cash Fund" and shall mail the check to: Brenda Carrillo, SIF Penalty Coordinator, Revenue Assessment Officer, DOWC Special Funds Unit, P.O. Box 300009, Denver, Colorado 80203-0009.

7. All matters not determined herein are reserved for future determination.

8. In lieu of payment of the above compensation and benefits to the Claimant, Respondent shall either:

a. Within ten (10) days of the date of service of this order, deposit the sum of $28,824.52 (amount due to Claimant for TTD benefits and compensation plus the amount due to Claimant for penalty) with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; **OR**

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $28,824.52 with the Division of Workers' Compensation:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
(2) Issued by a surety company authorized to do business in Colorado.
The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Employer shall notify the Division of Workers' Compensation of payments made pursuant to this order AND that the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 17, 2016 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-994-827-01

ISSUE

Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant is employed by Employer as cab driver and has been so employed for approximately 2.5 years. Her duties include driving passengers to/from different locations. She primarily drives Medicare and Medicaid patients to appointments for which she receives voucher payments, but she also drives regular fare clients who pay by either cash or credit card.

2. On September 19, 2015 Claimant sustained an admitted injury when she fell off the loading ramp on the handicap van she was driving.

3. In the General Admission of Liability (GAL) filed on October 14, 2015 Respondents admitted to an AWW of $340.15. Respondents used Claimant's 2014 Schedule C net income listed in her 2014 tax returns to generate the AWW amount. *See* Exhibit B.

4. On October 28, 2015 Claimant filed an application for hearing on the issues of AWW and temporary total disability benefits from September 19, 2015 and onward. A hearing was set for February 12, 2016 in Greeley, Colorado.

5. At the outset of hearing, the parties identified the only issue for determination to be AWW.

6. The majority of Claimant's work is done with Medicare and Medicaid patients. When Claimant drives a patient to and from a medical appointment, she receives a completed voucher. Claimant submits the completed vouchers to Employer, and Employer places the amounts owed to Claimant from the vouchers (after debiting expenses) onto a driver card payable to Claimant. Employer debits expenses that include the cost of leasing Employer's vehicle, and the cost of workers' compensation insurance. The amount placed on the driver card is the net revenue Claimant generates minus the expenses that were debited.

7. Employer does not debit fuel expenses from the payment provided to Claimant on the driver card. Claimant pays for fuel separately and from her own checking account.

8. In addition to the voucher payments that Employer pays to Claimant through the driver card, Claimant also accepts credit card payments that are processed

through Employer, cash payments, and payments through Apple Square which is a smart phone application that processes credit card transactions. Claimant pays a processing fee when she uses Apple Square and the amount she is paid for a fare minus the processing fee charged by Apple Square is directly deposited into her checking account and does not go through Employer. Claimant also accepts and runs credit card payments through Employer, and Employer also charges a processing fee and deposits the remaining amount on the driver card.

9. Employer issues cashier receipts to its drivers that reflect the total revenue generated by the driver minus the expenses debited by Employer. The cashier receipts show the amount deposited weekly onto Claimant's driver card.

10. On her 2014 U.S. Individual Income Tax Return (1040), Claimant reported a total of $17,688.00 in business income. Claimant reported $47,200 in gross receipts or sales minus $29,512 in total expenses to arrive at this figure. Respondents divided $17,688.00 by 52 weeks to arrive at the admitted AWW of $340.15. *See* Exhibit B.

11. From January 1, 2014 through December 31, 2014 Employer computed Claimants gross receipts or sales to be $60,911.98 which included voucher payments to her in the amount of $59,858.36, and credit card sales that were run through Employer in the amount of $1,053.62. See Exhibit F.

12. The $60,911.98 in gross receipts or sales for 2014 that was computed by Employer did not include any cash payments Claimant received in 2014 and did not include any credit card payments that Claimant processed through Apple Square in 2014 as Employer would not be aware of those transactions or the amounts of those transactions.

13. From January 1, 2015 through September 18, 2015 (the day prior to Claimant's injury), Claimant's gross receipts or sales computed by Employer were $65,182.13 for an average weekly gross amount of $1,755.04. This amount included all vouchers and credit card payments processed through Employer. This amount did not include any cash payments or credit card payments run through Apple Square. Employer did not calculate or run the expenses deducted during this period nor did they calculate or run the net amount paid to Claimant during this time period.

14. For the 12 weeks prior to Claimant's injury and from cashier receipts for work performed between June 22, 2015 and September 14, 2015 Claimant's gross receipts or sales from Employer were $20,875.96 for an average weekly gross amount of $1,739.66. The net amount paid to Claimant during this time period after Employer deducted expenses including the vehicle lease fee, voucher and credit card processing fees, and workers' compensation insurance was $15,222.18 for an average weekly net amount of $1,268.52. The total expenses deducted by Employer during this 12 week period were $5,653.78 for an average weekly deduction of $471.15. *See* Exhibit 1.

15. Claimant's Exhibit 4 has an error in the date listed on the first line of the chart prepared by Claimant summarizing Exhibit 1. The date listed for the gross

payment of 1,903.72 is June 4, 2015 when Exhibit 1 shows that the date of the gross payment of $1,903.72 was in fact June 29, 2015. This payment was for work performed from June 22, 2015 through June 29, 2015.

16. Claimant's earnings in the 12 weeks prior to her injury are consistent with her earnings for the entire year of 2015. From the amounts processed through Employer, Claimant had earned more in the first three quarters of 2015 than she earned in the entire year 2014. Using her 2014 earnings, whether the amount arguably underreported by her on her 2014 tax return or the amount calculated by Employer would not determine a fair approximation of her AWW at the time of her injury as she earned more in 2015 than in 2014.

17. For the 12 weeks prior to Claimant's injury and from June 22, 2015 through September 14, 2015 Claimant spent $1,231.78 in fuel costs related to her employment, for an average weekly fuel cost of $102.65.

18. From January 1, 2015 through September 30, 2015 Claimant had gross sales through Apple Square of $6,996.13. Claimant's net sales through Apple Square after processing fees were deducted for this time period were $6,803.15. The net sales over the course of the 38.86 weeks in which Claimant earned the income, amounts to average weekly net sales of $175.07.

19. The average net amount paid to Claimant through Employer for the 12 weeks prior to her injury was $1,268.52 per week. The average weekly net amount paid to Claimant through Apple Square for the 2015 year was $175.07. Thus, Claimant's total average weekly net pay was $1,443.59. Claimant's average weekly fuel cost during the 12 weeks prior to her injury was $102.65. After subtracting out the average weekly fuel cost, Claimant had an average weekly net wage of $1,340.94.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. *See* § 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Where the claimant’s earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant’s earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.*, *supra*.

After reviewing the evidence in this case, the ALJ determines that Claimant’s AWW at the time of her injury was $1,340.94.

Claimant’s net earnings calculated by Employer for the entire year of 2015 leading up to her injury were consistent with her earnings in the 12 weeks prior to her injury. Claimant had earned more in 2015 at the time of her injury than she had earned in the entire year 2014. Although Respondents established a discrepancy between Claimant’s 2014 earnings processed through them and the earnings she reported on her 2014 tax return, any earnings in 2014 are not determinative to a fair calculation of her average weekly wage at the time of her injury as she earned significantly more in 2015 and in the 9 months prior to her injury than she had in 2014.

Respondents argument that Claimant’s award of AWW should be reduced by a percentage equal to what they believe is the percentage Claimant under-reported on her 2014 tax return is not persuasive. The ALJ is required to fairly determine a Claimant’s AWW at the time of her injury. Here, the evidence and records establish the wages Claimant was earning at the time of her injury. Whether or not Claimant under-reported her actual wages on her 2014 tax return is not an issue for determination and the ALJ is not inclined to determine Claimant’s AWW was less at the time of her injury because Claimant may have under-reported income in her prior year’s tax returns.

Additionally, Respondent's argument bases their calculation of AWW on a summary chart (Exhibit 4) prepared by Claimant that includes an error in date on the first line of the income chart. The first line lists June 4, 2015 when the amounts reported and date matching the 12 weeks prior to injury show that the date listed should have been June 29, 2015. By using the June 4, 2015 date instead of the correct June 29, 2015 date, Respondents calculated the AWW based on a period of time that is 25 days longer than the actual period of wages established by evidence in Exhibit 1. The calculation of AWW offered by Respondents is thus not a fair calculation of Claimant's wages at the time of her injury.

Similarly, Claimant's argument that the ALJ should award Claimant a maximum AWW amount because her income is close to the maximum amount and because alternative calculations might place her AWW at or above a maximum compensation rate is also not persuasive. The determination on AWW is based on evidence and actual wages earned by Claimant at the time of her injury. Just as the ALJ will not reduce the AWW due to under-reporting of income in a past tax return, the ALJ also will not round up or increase the AWW because Claimant is "close" to a maximum award or because an alternative calculation would place her at a higher AWW.

Claimant's net AWW, as shown by her earnings through Employer, through Apple Square, and after deducting expenses is $1,340.94.

ORDER

It is therefore ordered that:

1. Claimant's Average Weekly Wages is $1,340.94.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 14, 2016 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-938-585-01

ISSUES

- Whether Respondents have proven by a preponderance of the evidence that Claimant engaged in an injurious practice warranting the suspension or reduction of compensation as of February 28, 2014 and thereafter pursuant to § 8-43-404(3), C.R.S. ?

- Respondents withdrew the issue of offsets and credits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant suffered an admitted work injury on December 26, 2013 while employed as a cemetery worker for the Employer. He initially sought treatment from Arbor Occupational Medicine (Arbor). Claimant was diagnosed with a lumbar strain. Claimant failed to report any recent treatment for any portion of his back at this initial evaluation.

2. Dr. Lori Long and Dr. Sander Orent of Arbor became the authorized treating physicians. Claimant reported to Dr. Long that he had suffered episodes of sciatica 15 years prior, and suffered a cervicothoracic strain "about 18 months ago" that had "completely resolved." Claimant did not report any recent medical treatment for any portion of the back. Nor did Claimant discuss any of his hobbies or activities with Dr. Long.

3. Claimant had been receiving ongoing treatment for his back with chiropractor Marc Cahn as recently as the month prior to the December 26, 2013 work injury. On July 26, 2013, Dr. Cahn noted Claimant was experiencing an onset of lumbosacral pain with joint dysfunction and myofascitis. Claimant sought treatment for his lower back on October 31, 2013 from Cahn. Dr. Cahn indicated that Claimant was reporting "ongoing lumbosacral pain with joint dysfunction" as late as November 7, 2013.

4. During the course of litigation, Respondents served Claimant with interrogatories and specifically questioned him about injuries and medical treatment prior to the December 26, 2013 injury. Claimant failed to disclose to Respondents that he had been receiving chiropractic treatment for his back from Dr. Cahn. At deposition, Claimant confirmed through his testimony that he failed to provide Respondents with this information.

5. On February 28, 2014, Dr. Long imposed work restrictions limiting Claimant to lifting, carrying, pushing/pulling of no more than 5 pounds. He was restricted from using heavy equipment, ladders, and from bending and twisting at the waist. Claimant agreed these were his work restrictions as of February 28, 2014.

6. As part of his treatment, Claimant was referred to physical therapy at Alpha Rehabilitation, LLC. Claimant was asked to participate in various therapeutic exercises as part of his therapy and rehabilitation program. Claimant testified, among other things, that his therapist, Rob Rapier, had him lift and pull items that he thought weighed up to 40-50 pounds. He was asked to pick up a 25 pound kettle ball and curl an 18 pound bar while doing a squat during the course of therapy. Claimant admitted he never discussed his work restrictions with Mr. Rapier.

7. On cross examination, Claimant testified in his deposition that the physical therapy and rehabilitation was conducted in a clinic setting. While he was performing the therapeutic exercises, he was supervised by the staff at Alpha Rehabilitation.

8. Claimant played a bass guitar player and sang in a musical group named the Drifter Band after February 28, 2014 when Dr. Long imposed work restrictions. Claimant would play "gigs" at church services about once per month. The band also played other events including at Larry's Guitars, Bitter Sweet, the Laughing Goat Coffee House, and Hampden Hall. Claimant played in the band throughout 2014 and 2015.

9. Claimant exceeded the work restrictions imposed by Dr. Long while participating as a performer with the Drifter Band. On March 15, 2014, surveillance video shows Claimant carrying a music stand in one hand and a mandolin in the other. Claimant was carrying the items to put in the back of his automobile to attend a church event for the band. Claimant admitted that the mandolin weighed more than 5 pounds.

10. By October 3, 2014, Dr. Long decreased Claimant's work restrictions to allow for lifting, carrying, pushing, and pulling up to 10 pounds. Sitting was limited to 15 minutes and walking and standing limited to 45 minutes per hour.

11. Claimant admitted that he exceeded his October 3, 2014 work restrictions. Claimant weighed multiple items used for the band and testified that many of the items he lifted and carried as part of his band duties exceeded his work restrictions. Claimant listed these items in an email to his attorney and the email was admitted as exhibit Y. The items included a Gibson acoustic guitar in a hard case (17 lbs), Fender bass instrument in a hard case (24 lbs), Fender electric guitar in hard case (22 lbs), accordion in a case (20 lbs), Genz Benz amplifier (35 lbs), Ampeg speaker cabinet (29 lbs), church PA speaker cabinet (33 lbs), and fully loaded suitcase with microphones (18 lbs).

12. Surveillance video shows Claimant violating his October 3, 2014 work restrictions. On October 10, 2014, Claimant was shown setting up a pop-up tent or canopy to be used for a band event at Larry's Guitars. The video shows Claimant lifting, pushing, and pulling the tent in order to open it and set it up. Claimant testified the tent weighed more than 10 pounds.

13. Surveillance video showed Claimant performing at Hampden Hall on December 12, 2014. The video shows Claimant carrying an acoustic guitar in a Fender bass case, an Ampeg cabinet, and a suitcase. The video showed Claimant moving rhythmically, twisting, and bending throughout the night while singing and playing guitar. The event lasted approximately four hours.

14. Dr. A.C. Lotman, an expert in orthopedic surgery, performed an independent medical evaluation (IME) of Claimant at Respondents' request of on April 3, 2014. Claimant told Dr. Lotman at that time he was no longer able to walk his dog, ski, or perform work in his garden. Dr. Lotman concluded that Claimant was not a maximum medical improvement (MMI) at that time.

15. Dr. Lotman subsequently reviewed the surveillance video. Dr. Lotman concluded that Claimant "clearly has not followed those restrictions." Dr. Lotman subsequently concluded that Claimant reached MMI as of June 26, 2014.

16. Dr. Lotman testified at hearing on May 5, 2015 that Claimant violated the work restrictions imposed by Dr. Long multiple times. Dr. Lotman testified that the purpose of work restrictions is to affect a cure by allowing the body to heal and by limiting incidental activity from causing additional harm. Dr. Lotman persuasively testified that by performing activities outside of Dr. Long's work restrictions, Claimant delayed achieving maximum medical improvement, delayed his recovery, and delayed the healing process. The end result was not as satisfactory as if the work restrictions had been followed.

17. Dr. Orent also reviewed the surveillance videos admitted into as evidence Respondents' exhibits T and U. At the time hearing commenced on May 5, 2015, Dr. Orent had not yet placed Claimant at MMI. According to a report subsequently received by the parties, Dr. Orent reviewed the surveillance videos. In a letter dated May 6, 2015, Dr. Orent indicated that Claimant's activities depicted on the videos were not consistent with his reported subjective complaints. Dr. Orent noted he never became aware that Claimant was receiving treatment for his back prior to the December 26, 2013 date of injury. Dr. Orent concluded that he agreed with Dr. Lotman and that Claimant reached MMI as of June 26, 2014. Dr. Orent added, "I must admit to being frankly disturbed by this disconnect between what I see on the video and the history he has given us." Dr. Orent did not believe an impairment rating was warranted because "we do not know the status of his previous spine issues and I also agree that there is clear evidence of symptom magnification…"

18. On May 20, 2015, Dr. Orent issued a report indicating he had discussed the surveillance video with Claimant. Dr. Orent related a conversation with the

Claimant wherein Claimant admitted he performed the activities shown in the video. Significantly, Dr. Orent noted "[t]his does not change of course the fact that he was operating outside his work restrictions and he admitted that this was absolutely true."

19. Because Claimant was determined to be at MMI, Respondents filed a Final Admission of Liability on May 26, 2015. Claimant objected and pursued the Division IME (DIME) process. Dr. Clarence Henke was selected as the DIME examiner. Dr. Henke concluded that Claimant was not at MMI because he needed a neuro-surgical consultation. In his report, he did not discuss any surveillance video or the findings in Dr. Lotman's report.

20. On November 19, 2015, Respondents deposed Dr. Henke, an expert in occupational medicine among other things. Dr. Henke insisted that the only way to determine Claimant's true functional abilities was to perform a functional capacity evaluation. He did not find the surveillance video persuasive. Dr. Henke testified that the purpose of imposing work restrictions is to limit continued damage, to avoid any type of fall or other type of injury because of lack of mobility, and would prevent any injuries to other people who would be working with him. Dr. Henke agreed that a patient has a responsibility to follow restriction provided by the physician. Dr. Henke thought that Claimant was following his work restrictions based on the reports of Claimant's treating physicians. Claimant testified at his deposition that he never discussed his daily activities with Dr. Henke during the DIME.

21. On this issue of whether Claimant violated his work restrictions, the ALJ finds the opinions of Drs. Lotman and Orent to be more credible and persuasive than the opinion of Dr. Henke.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. However, "an injured work[er] has the obligation to act reasonably in minimizing the consequences of his injury and liability of his employer." *State Compensation Insurance Fund v. Luna*, 397 P.2d 231, 234 (Colo. 1964).

If any employee persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment or vocational evaluation as is reasonably essential to promote recovery, the director shall have the discretion to reduce or suspend the compensation of any such injured employee. § 8-43-404(3), C.R.S.

Before sanctions under § 8-43-404(3) can be invoked to reduce or suspend benefits, Respondents must show that the treatment at issue is calculated to effect a cure, *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001, 1006 (Colo.

App. 2002), or that "such medical or surgical treatment … is reasonably essential to promote recovery." §8-43-404(3), C.R.S.

Respondents have shown by a preponderance of the evidence that compensation, in this case temporary benefits, should be suspended or reduced as of March 15, 2014 after Dr. Long released Claimant to work and imposed work restrictions following the industrial injury. The imposition of work restrictions is a common and important component of almost every workers' compensation claim, they often determine when disability benefits will be paid to a claimant, and they are taken very seriously not only by treating physicians, but by the courts when determining whether a claimant should be entitled to benefits. In this case, Claimant occasionally disregarded the restrictions that were imposed on him by his treating physicians throughout the course of his claim, and in doing so, engaged in an "injurious practice" that imperiled and retarded his recovery.

The evidence shows that Claimant played in a band occasionally during the course of his recovery following the December 26, 2013 admitted work injury to his lumbar spine. Some of his band related activities violated the work restrictions imposed by his treating physicians at Arbor. For example, surveillance video shows Claimant carrying a mandolin on March 15, 2014. Claimant admitted the mandolin weighed more than 5 pounds.

Claimant continued occasionally to violate work restrictions when the restrictions were reduced. By October 3, 2014, Dr. Long decreased Claimant's work restrictions to allow for lifting, carrying, pushing, and pulling up to 10 pounds. Sitting was limited to 15 minutes and walking and standing limited to 45 minutes per hour. Claimant violated those work restrictions during some of his band related activities.

Claimant weighed multiple items used for the band and testified that many of the items he lifted and carried exceeded his lifting restrictions. Such items included a Gibson acoustic guitar in a hard case (17 lbs), Fender bass instrument in a hard case (24 lbs), Fender electric guitar in hard case (22 lbs), accordion in a case (20 lbs), Genz Benz amplifier (35 lbs), Ampeg speaker cabinet (29 lbs), church PA speaker cabinet (33 lbs), and full loaded suitcase with microphones (18 lbs). Claimant admitted at his deposition and eventually to his treating physician, Dr. Orent, that he violated his work restrictions.

The surveillance videos admitted into evidence as exhibits T and U show Claimant engaging in various activities from March 15, 2014 through December 12, 2014. The videos show Claimant engaging in some band activities: carrying items to his car, setting up a tent, and playing a "gig" over a four hour span of time on December 12, 2014. Claimant admitted he disregarded the specific work restrictions imposed on him by his treating physicians and engaged in activities that imperiled and retarded the recovery process.

Claimant engaged in activities that imperiled and retarded his recovery. His own treating physician (Dr. Orent), Respondents' IME physician (Dr. Lotman), and even the

DIME physician (Dr. Henke) all essentially opined that the purpose of imposing work restrictions in a workers' compensation claim is to treat pain, to allow tissue damage to heal, and to limit any further damage. Dr. Orent was particularly disturbed that Claimant exceeded his work restrictions without disclosing that information to him during the course of treatment. Dr. Lotman testified that in his expert opinion, Claimant's activities not only violated the work restrictions that were essential to promoting recovery, but did in fact imperil and retard recovery.

Claimant contends that he reasonably exceeded his work restrictions, because he was routinely asked to exceed those restrictions during the course of his physical therapy treatment. The ALJ is not persuaded.

First, there is no bad faith or intent requirement that must be proven under § 8-43-404(3) before benefits may be suspended or reduced. That Claimant engaged in activity that imperiled and retarded his recovery is sufficient to trigger the sanctions in the statute. Even if there were an intent requirement, the evidence shows that Claimant was aware of his work restrictions and proceeded to engage in band activities that violated his work restrictions.

Second, the physical therapy exercises Claimant was asked to perform by the therapists at Alpha Rehabilitation, LLC were all done under staff supervision (as Claimant concedes) with the specific intent of helping Claimant to heal and recover. Participating in therapy exercises designed and supervised by trained therapy personnel is not equivalent to playing in a band even if Claimant is exceeding his work restrictions in both instances. There is no evidence that any therapist encouraged or told Claimant to exceed his work restrictions imposed by Dr. Long, nor any evidence that engaging in his band activities promoted recovery.

Further, the ALJ finds and concludes that Claimant is not a reliable historian. For example,

- Claimant failed to provide Dr. Orent with essential information that was needed in order for treatment.

- Claimant failed to disclose to Dr. Orent or Dr. Long that he was receiving treatment for his lumbar spine from Dr. Cahn up until a month prior to the work injury.

- He also failed to disclose this relevant information to Respondents in sworn discovery responses.

- Claimant posted on Facebook that he was employed by Insurer.

- Claimant failed to disclose to Dr. Long or Dr. Orent that he played in a band.

- He told Dr. Lotman that he was no longer able to walk his dog, ski, or perform work in his garden—giving the wrong impression as to his daily activities.

This lack of candor disturbed Dr. Orent to the point that he released Claimant to MMI immediately upon learning this information and assigned no impairment.

In conclusion, Claimant had an obligation to abide by his work restrictions that were imposed for the purpose of "affecting a cure" and essential for promoting recovery. Claimant conceded he violated these restrictions on multiple occasions and surveillance video demonstrates same. The evidence shows it to be more likely than not that Claimant engaged in these activities occasionally during the course of treatment, and therefore, engaged in an injurious practice that imperiled and retarded his recovery as of March 15, 2014.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have proven by a preponderance of the evidence that Claimant occasionally engaged in an injurious practice that impeded and retarded recovery pursuant to § 8-43-404(3) as of March 15, 2014.

2. The Court finds in its discretion that the appropriate remedy is this case is the reduction by 5% of Claimant's temporary benefits effective March 15, 2014 and continuing until temporary benefits would otherwise be terminated by statute.

3. Any amount of temporary benefits previously paid by Respondents to Claimant during such period of reduced compensation shall be deemed an overpayment, and recoverable as permitted by law.

4. Any issue not resolved herein is reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 29, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

➢ Whether claimant has proven by a preponderance of the evidence that the proposed medical treatment recommended by Dr. Bender, including the referral for a neurosurgical evaluation and low back injections, is reasonable medical treatment necessary to maintain claimant at maximum medical improvement ("MMI").

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of his employment with respondent employer on May 10, 2007 when he injured his back while lifting two and a half inch tubing while working in the oil fields in the course and scope of his employment with employer.

2. Claimant was referred for medical treatment and eventually underwent with Dr. Mack consisting of an L4-L5 lateral microsurgical discectomy for a foraminal disc herniation causing an L4 radiculopathy.

3. Claimant was eventually placed at MMI by Dr. Mack and was referred to Dr. Watson for a permanent impairment rating on January 6, 2010. Dr. Watson provided claimant with a permanent impairment rating of 10% whole person pursuant to Table 53.

4. Respondents filed a final admission of liability ("FAL") based upon the impairment rating provided by Dr. Watson on March 10, 2010. Respondents also admitted for ongoing maintenance medical benefits in the FAL.

5. Claimant was re-evaluated by Dr. Bender on July 16, 2010 who noted claimant was much improved since his last visit on January 7, 2010. Dr. Bender noted claimant had chronic low back pain. Dr. Bender noted claimant complained of pain radiating to the buttocks, hips and thighs occasionally when he overdoes it. Dr. Bender cautioned claimant about lifting significant amounts of weight, especially with a twisting location.

6. Claimant returned to Dr. Bender on April 8, 2011. Dr. Bender noted claimant was seeking to get updated work restrictions so he could understand what job he would qualify or apply for. Claimant noted that his back pain was moderate (at worst), after activity and work such as gathering firewood. Dr. Bender provided claimant with work restrictions and discussed the necessity to continue safe and consistently paced physical activities, as well as continuing to follow the body mechanics and lifting mechanics taught in past physical therapy courses. Dr. Bender noted claimant was invited to follow-up as soon as possible if any occurrence of symptoms.

7. Claimant next returned to Dr. Bender almost four years later, on January 8, 2015. Dr. Bender noted that on the weekend of November 30, 2014, claimant had an acute onset (while fixing his truck) of severe lumbar back pain (8/10 severity, sharp, aching, constant) associated with pain (burning, stabbing, constant) and numbness that radiates to the left buttock, lateral groin, posterior and lateral thigh, as well as posterior lateral lower leg to the ankle. Dr. Bender noted claimant's acute exacerbation of pain occurred 6-7 weeks ago and had gradually worsened. Dr. Bender recommended a repeat magnetic resonance image ("MRI") scan of his low back and provided claimant with prescription medications for Lyrica.

8. Claimant testified at hearing that he attempted to return to Dr. Bender before January 8, 2015 but was told by insurer that his claim was closed. The record, however, is devoid of any credible evidence that would support claimant's testimony at hearing, such as a follow up letter from claimant to insurer seeking a follow up appointment. In fact, the records from Dr. Bender dated January 8, 2015 indicate claimant did not follow up after his last visit as the chronic residual pain and associated symptoms were intermittent and tolerable.

9. Based on the records entered into evidence at hearing, the ALJ finds claimant's testimony that he attempted to schedule follow up appointments with Dr. Bender only to be turned down the insurer to be not credible.

10. Claimant testified at hearing that the incident in which he was working on his truck on November 30, 2014 involved simply replacing a valve stem on his truck and did not involve significant lifting.

11. Claimant underwent the repeat MRI scan on February 8, 2015. The MRI showed a recurrent or residual moderate to large size inferiorly projecting disc extrusion of the left paracentral and foraminal location, which severely effaces the left lateral recess and abuts and displaces the transiting L5 nerve root at the lateral recess. The MRI scan also showed a moderately sized central disc protrusion at the L5-S1 level that was noted to be similar in size and appearance as the prior study.

12. Claimant returned to Dr. Bender on February 10, 2015. Dr. Bender noted the results of claimant's MRI scan and recommended claimant return to Dr. Mack for neurosurgical consultation.

13. The neurosurgical consultation recommendation was denied by respondents.

14. Dr. Bender subsequently recommended claimant be referred to Dr. Heyman for a left L5-S1 and L4-5 transforaminal epidural steroid injection to reduce any reversible swelling and inflammation and therefore decrease pain. The transforaminal epidural steroid injection was likewise denied by respondents.

15. Respondents had Dr. Hattem review the claimant's medical records. Dr. Hattem indicated in his report that he did not believe that any of claimant's current

recommendations for medical treatment were related to his work injury. Dr. Hattem noted claimant had gone several years without medical treatment and sought medical treatment only after he experienced back pain on November 30, 2014 while working on his truck.

16. The ALJ credits the opinions expressed by Dr. Hattem and finds that claimant has failed to establish that it is more probable than not that the current need for medical treatment is causally related to his May 10, 2007 work injury. The ALJ credits the medical records from Dr. Bender that document an acute onset of symptoms after working on his truck on November 30, 2014 as the cause of his current symptoms. Therefore, claimant's request for medical treatment recommended by Dr. Bender consisting of the neurosurgical consultation and transforaminal injections is hereby denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2008).

3. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus

authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

4. As found, claimant has failed to prove by a preponderance of the evidence that the recommended medical treatment is related to his May 10, 2007 work injury. Due to the fact that claimant has failed to establish his burden of proof, his request for an Order requiring respondents to pay for the medical treatment is hereby denied.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits is denied.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 5, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

The issues addressed by this decision involve Claimant's entitlement to medical benefits. The questions to be answered include:

I. Whether Claimant's claim should be reopened based on an alleged worsening of condition related to Claimant's original 2009 industrial injury; and if so,

II. Whether Claimant's need for right MP and CMC joint surgery as performed by Dr. Philip Marin was reasonable, necessary and related to Claimant's 2009 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is employed as a working supervisor for Respondent-Employer. She works in the custodial department of the University and has been employed with Respondent- Employer for approximately 10 years and 4 months.

2. On or about June 5, 2009, Claimant injured her right thumb while donning a back-pack vacuum cleaner. Claimant experienced immediate pain in her right thumb, hand and wrist. She reported her injury and was seen by Respondent-Employer's designated workers' compensation provider who referred her to Dr. Philip Marin.

3. Dr. Marin obtained x-rays of the right carpometacarpal (CMC) joint which revealed joint subluxation and bone on bone osteoarthritis of the CMC joint which Dr. Marin opined had been aggravated by Claimant's 2009 injury.

4. Liability for the injury was admitted and conservative care undertaken. Despite conservative care, including steroid injections, Claimant's condition failed to improve. Consequently, Dr. Marin recommended and Claimant underwent a right CMC arthroplasty with ligament reconstruction and tendon interposition using the flexor carpi radialis (FCR) tendon on August 4, 2009.

5. Claimant recovered slowly following surgery. She was placed at maximum medical improvement (MMI) on January 18, 2010 by Dr. Marin. She subsequently followed up with her authorized treating physician (ATP) under the claim, Dr. Richard Nanes approximately one week later. Dr. Nanes released Claimant from care without

impairment. He also returned Claimant to full unrestricted work and recommended maintenance care in the form of use of a thumb splint to wear as needed.

6. Claimant worked between her release date and 2014 wearing her thumb splint. Careful review of the medical records between her date of MMI and 2014 fails to reveal that she sought specific treatment for her right wrist/thumb during this time frame. Rather the records submitted reflect the following:

- January 25, 2010 (MMI Date of original acute injury): Per Dr. Marin, "[e]verything has healed up very nicely. She is using her hand a work and has minimal discomfort." (Ex. 4 pg. 93)[1]

- Although Claimant reported moderate pain at the base of her right thumb 50% of the time, "she has full range of motion of the right thumb and of the right wrist and these movements are without pain." (Dr. Nanes, Ex 1 pg. 44)

- July 28, 2010: Claimant was seen by Dr. Nanes for a non-thumb related issue, and reported no right thumb pain in the diagram or in the report at all. (Ex. D pg. 23-26)

- July 2, 2012: Claimant sees her primary care physician at Kaiser, Rebecca Nickell, M.D., for systemic joint pain and swelling, and the report includes discussion of other issues such as toenails – yet other than generalized "tenderness" in both hands, there is no report regarding her right thumb being tired or otherwise affected. (Ex. B pg. 1-3)

- January 24, 2013: Claimant went back to Dr. Nickell for her general joint pain / arthritis, which now included complaints of her hands "tingling" and being "tight" in the mornings. (*Id*. pg. 6) However, the note did not mention the right thumb whatsoever. (*Id.*) Claimant testified that her joint pain "definitely" included her hands in 2013. (Transcript 23:19-25)

7. On February 1, 2014 Claimant testified that she spent all day on her computer preparing tax returns. According to Claimant's hearing testimony, she prepared her return, her son's return and her boyfriend's return on this date. She started around noon after she woke up, and kept going till the evening. Per Claimant, as she hit the print function on her computer with her right thumb to print the returns, she heard and felt a sudden "pop" followed by immediate and debilitating pain. According to Claimant her pain was so severe it precluded use of the right thumb. She could not put any pressure on the thumb or move it. According to Claimant's testimony, her right hand was "tired" because of her work duties as a custodian.

[1] Notably, Claimant's original thumb injury was viewed as an acute injury. (Ex. C pg. 21.)

8. Rather than follow up with her workers' compensation physician, Claimant sought treatment with her personal care physician (PCP) and later with Dr. Marin for her right hand/thumb symptoms.

9. On February 6, 2014, Claimant was evaluated by Dr. Nickell, and, for the first time since 2010, the medical record from this date of visit reflects that Claimant was complaining of right thumb problems. (Ex. B pg. 8)[2]

10. On February 8, 2014, Dr. Alfred D. Airline at Kaiser reported that Claimant told him that "the *only provocative issue"* which would explain her symptoms was *"approximately a week ago"* while she was typing to "*fill out her taxes.*" (*Id.* at pg. 10)(emphasis added). Although Dr. Airline noted that Claimant was a custodian, absent from his report is any comment/report from Claimant stating that her work duties were making her hands tired – instead, his report states: "[h]as no recent trauma" when discussing her employment. (*Id.*) Dr. Airline's report also notes that X-rays obtained on this date of visit were "consistent with arthritic changes." (*Id.*)

11. On February 24, 2014, Claimant reported to Dr. Marin that she "is *now getting* some pain and subluxation in the joint." (Ex 4, pg. 89)(emphasis added) She also stated her pain "*started* approximately two to three weeks ago… she was otherwise *doing quite well prior to this*." (*Id.*)(emphasis added)

12. Claimant also told John Gard, OTR, on this date, that "around 02/01/2014, she *began* to get significant symptoms in the area again… she was doing a lot of computer work and data entry while *doing her taxes* over the weekend." (Ex 4 pg. 91)(emphasis added).

13. On March 20, 2014, Claimant was evaluated by Dr. Nickell. During this encounter, Claimant reported that her hands and feet were painful and stiff in the morning. Dr. Nickell documented the presence of more nodules on Claimant's hands.

14. On March 31, 2014, Dr. Marin recommended revision right CMC surgery for what he described later was a failed prior surgery secondary to Claimant's "lack of flexion stabilization of the MP joint. Consequently, on April 11, 2014, Dr. Marin performed what is described in his surgical report as a fusion of the right thumb MP joint with Acutrak mini screw, 28 mm, right thumb CMC arthroplasty.

15. On June 16, 2014, Claimant presented to Dr. Marin's office in follow-up for her right CMC and MP fusion. According to Dr. Marin's note from this date of visit, Claimant was "using her hand as tolerated" and she was "very pleased." Claimant was taken out of her thumb splint and instructed to begin "gentle use as tolerated." The ALJ infers from this note that although Claimant was using her right hand to complete activities, her right thumb had been splinted and she was unable to use it. Claimant's medications were reviewed and she was to return in one month for additional follow-up.

[2] Note that Claimant testified that she told the truth to her doctors generally and specifically regarding Dr. Nickell. (Transcript 21:21-22:2.)

Nonetheless, there are no recorded visits by Claimant to Dr. Marin between June 16, 2014 and January 21, 2015.[3]

16. On September 23, 2014, Claimant returned to Dr. Nickell with continued complaints of "arthritis pain." She reported that her joints felt like they were "on fire." This included her "low back, hands, knees etc." According to this note, Claimant also complained that her "[r]ight hand [was] still numb despite carpal tunnel surgery." Careful review of the records reveals that Claimant has a history of right sided carpal tunnel syndrome dating back to 2007. Claimant underwent a right carpal tunnel release procedure, performed by Dr. Marin on June 25, 2007.

17. On Claimant returned to Dr. Marin's office on January 21, 2015. During this encounter, Claimant complained of pain in both the MP and CMC joint regions of the right thumb. Dr. Marin noted that Claimant's MP fusion appeared to be solid and that the CMC joint was in "excellent alignment." Claimant was provided with additional cortisone injections, was given topical anti-inflammatory gel and instructed to follow-up in five to six weeks for re-evaluation.

18. Claimant was seen by Dr. Jan Dunn on January 22, 2015. During this visit, Claimant reported that the medication regime that Dr. Nickell had prescribed for her arthritis was not working. Dr. Dunn noted that Claimant's arthritis had been "progressively worsening since [Claimant's] 50s and is interfering with her function. Dr. Dunn documented "slight enlargement of MCPs with generalized redness of [the] skin of all fingers and knuckle (sic)." Dr. Dunn suspected that Claimant had premature, generalized OA (osteoarthritis), but because of a "fairly strong" family history of rheumatoid arthritis, felt that a repeat rheumatologic lab panel and referral to rheumatology was appropriate.

19. On March 2, 2015, Claimant returned to Dr. Marin's office with complaints of numbness in both the "palmer and dorsal side of the middle, ring, and small finger involving the entire digits that has been going on for approximately 3 months causing night awakening, numbness, and dropping objects." Claimant was assessed by Dr. Marin as having "generalized neuritis."

20. On March 18, 2015, Claimant was evaluated by Dr. Nanes who noted that Claimant was "undergoing a rheumatology workup which is not work-related and this will not happen until late next month."

21. Claimant underwent an EMG study on March 24, 2015 which study revealed findings consistent with severe right carpal tunnel syndrome as well as right superficial radial sensory neuropathy at the wrist.

22. On April 7, 2015, Claimant returned to Dr. Marin's office for follow-up regarding

[3] Although there are no records indicating that Claimant was seen between June 16, 2014 and January 21, 2015 in the exhibits submitted to the ALJ, the report generated by Dr. Marin following Claimant's January 21, 2015 visit reflects that Claimant had right thumb injections performed on November 19, 2014.

her EMG results. Based upon the EMG findings, Dr. Marin recommended an open carpal tunnel release, noting that Claimant had undergone a prior endoscopic release in 2007.

23. On April 28, 2015, Claimant was evaluated by Dr. Patrick Timms for the rheumatologic evaluation recommended by Dr. Dunn and referenced by Dr. Nanes on March 18, 2015. Laboratory work-up was completed during this visit which according to a June 2, 2015 report from Dr. Timms was "unremarkable . . . for inflammatory disease. Consequently, Dr. Timms recommended an enhanced NMRI of the left (sic) hand.

24. On May 5, 2015, Dr. Marin performed a "right open carpal tunnel release, with synovectomy of all 9 flexor tendons of the forearm and wrist."

25. On July 17, 2015, a diagnosis/symptom specific MRI of the right wrist extending through the proximal interphalangeal joints of the right hand, as recommended by Dr. Timms was performed which revealed "active inflammatory synovitis with associated erosions of metacarpophalangeal joint (second, third, and fifth)" and "synovitis and small erosions of first carpometacarpal joint and scaphotrapeziotrapezoid joint, with superimposed degenerative osteoarthritis."

26. Claimant returned to Dr. Timms on July 23, 2015 for follow-up regarding the results of her enhanced MRI. Based upon Claimant's MRI findings, Dr. Timms definitively diagnosed her with "[e]rosive rheumatoid arthritis- seronegative." Claimant was started on methotrexate and folic acid.

27. On September 14, 2015, Dr. Sollender conducted an independent medical examination (IME) of Claimant at Respondent's request. Dr. Sollender was asked to evaluate Claimant and comment upon whether she had any worsening or aggravation of a work related medical condition and whether Claimant's right carpal tunnel syndrome (CTS) was causally related to her 2009 industrial injury.

28. Dr. Sollender couched the controversy surrounding Claimant's suggestion that her 2009 claim should be re-opened on the basis of a worsening of condition, secondary to an aggravation of her degenerative osteoarthritis and CTS as follows:

> Claimant told me that her gripe with this relates to Dr. Marin's apparent concern that she had been released to work back in 2009 by Dr. Nanes too early for Dr. Marin's liking. She feels that workers compensation should be responsible for her condition worsening in 2014, even though I confronted her that no clinic notes between 2009 and 2014 demonstrated any ongoing complaints of worsening right hand problems. . . . When I read her release note from Dr. Marin in early 2010 documenting that she could return to work without restrictions and follow-up as needed, she said that Dr. Marin had some notes (not supplied) saying that he had wanted her to be protected for another month or so to allow her thumb to heal. I saw no notes reflecting this concern of Dr. Marin or other providers.

29. Following his physical examination and records review, Dr. Sollender opined that Claimant had not suffered a worsening or aggravation of her underlying degenerative arthritis. Rather, Dr. Sollender opined that Claimant had sustained a new non-work related injury on February 1, 2014 while she was preparing tax returns for herself, her son and her boyfriend. According to Dr. Sollender, Claimant's report of hearing and feeling a pop was consistent with rupture of a tendon which is not unheard of in the face of osteoarthritis. Citing the Colorado Workers' Compensation Medical Treatment Guidelines (MTGs), specifically Rule 17, Exhibit 5, Dr. Sollender noted that in order to properly address whether a medical condition is work related or not requires treating providers to carefully analyze the alleged offending activity before making a determination as to likelihood that the activity caused the medical condition in question. Per Dr. Sollender, the activity alleged to have caused the medical condition needs to be analyzed for "significant force, repetition, awkward posture, computer work, mousing, vibration and cold exposure. Dr. Sollender opined, based upon the history Claimant provided concerning her work activities and his records review, that "nothing in what [Claimant] reports . . . from 2010 onward seems to fit within these guidelines such that she would meet the exposure times for such potential risks factors." Moreover, Dr. Sollender opined that the "ongoing challenges [Claimant] has had from 2014 onward is not from work exposures, but from the ongoing degenerative process of osteoarthritis, for which her work has no contributory effect."

30. Citing the same MTG, Dr. Sollender also opined that the only way Claimant's CTS would be considered an occupationally related condition is if her job exposed her to occupational risk factors defined in the MTGs. Consequently, Dr. Sollender opined that a job site analysis would be useful in determining if Claimant's position as a working custodial supervisor exposed her to risk factors for the development of CTS. Nonetheless, Dr. Sollender noted that "with the lack of any described worsening of her carpal tunnel syndrome from 2010 to 2014, that [Claimant's] work did not expose her to any of the necessary risk factors for this condition to be occupationally related."

31. At Hearing, Dr. Sollender testified that on February 1, 2014, Claimant suffered an acute injury to the thumb as a consequence of her underlying osteoarthritis (OA) and rheumatoid arthritis (RA). According to Dr. Sollender, Claimant's injury was likely the consequence of the wearing down of the structures of the CMC joint secondary to the progressive nature of her arthritis.

32. Based upon the evidence presented, including Dr. Timms diagnosis of erosive rheumatoid arthritis and the degree of both OA and RA found on MRI of the right hand and wrist, the ALJ finds Dr. Sollender's opinions credible, persuasive and supported by the medical records submitted into evidence.

33. Dr. Sollender testified that because Claimant suffered a discrete injury at home while preparing tax returns, it was unnecessary to consider a workplace analysis to consider whether her work related duties as a working custodial supervisor were contributory to an aggravation of her underlying degenerative OA. In this regard, Dr.

Sollender testified that if the case presented as a question of whether Claimant had an occupational disease, then such job site analysis would be appropriate. Based upon the evidence as presented, the ALJ credits the testimony of Dr. Sollender to find that Claimant suffered an acute non-work related injury to her right thumb while preparing tax returns at home.

34. Originally, Dr. Nanes professed that he did not know the cause of Claimant's new symptoms when he evaluated Claimant on December 31, 2014, almost a year after Claimant's new injury in February of 2014. (*Id.* pg. 19.) Dr. Sollender testified that Dr. Nanes' one sentence statement on causality did not appear until March of 2015 (well after he started seeing Claimant again) and that it was without any basis for such a statement as there was no analysis and no details to understand what logic he used to change his opinion. (Transcript pg. 34:13-21.) As a result, there is no evidence showing whether Dr. Nanes was basing his opinion on an acute injury or upon an occupational disease.

35. As noted above, Dr. Marin issued one report which could be interpreted as his opinion regarding the cause of Claimant's right thumb injury, which was that her previous surgery had "failed due to her lack of flexion stabilization of the MP joint." Dr. Sollender testified there is nothing within a reasonable degree of medical probability relating that explanation to Claimant's work. (Transcript, pg. 31:15-17.) Further, he noted that there was "nothing supporting that the thumb was getting worse from the work that she was doing." (*Id.* at 30:14-16.) Therefore, Dr. Marin's records provide no support for a finding of an occupational disease. Consequently, the ALJ finds Dr. Sollender's opinions more persuasive than the contrary opinions expressed by Dr. Marin and/or Dr. Nanes.

36. The ALJ finds from the evidence presented, that Claimant's February 1, 2014 right thumb injury was, more probably than not, caused by the natural and probable progression of her underlying OA which Claimant failed to establish was aggravated by her Claimant's work duties between 2010 and 2014.

37. Regarding the question of whether the Claimant's original 2010 surgery was one that would naturally fail over time, Dr. Sollender stated that: "The ongoing pain that she developed starting on February 1st, 2014 was ongoing degenerative changes that essentially was the straw that broke the camel's back rather than an occupational condition." (Transcript pg. 44:18-45:1; *see also* at 39:9-16 ("In somebody with known osteoarthritis and now with known rheumatoid arthritis I would not expect that surgery to last a lifetime."

38. Based upon the evidence presented, the ALJ finds that Claimant's need for revision surgery of the MP and CMC joints of the right thumb was, more probably than not, caused by the natural progression of Claimant's underlying pre-existing degenerative arthritis. Based upon the evidence presented, the ALJ is convinced that Claimant's degenerative osteoarthritis advanced naturally without contribution from her work duties between 2010 and 2014 when, secondary to that natural degenerative

progression, Claimant suffered a new acute, non-work related injury while completing several tax returns from home. Consequently, the ALJ rejects, as unpursuasive, Claimant's suggestion that her 2014 injury and subsequent need for revision CMC and MP surgery is causally related to her original 2009 injury simply because the original surgery failed and but for the original surgery her condition would not have worsened.

39. Claimant has failed to prove, by a preponderance of the evidence, that the worsening of her arthritis is causally related to her original 2009 work injury. Moreover, Claimant failed to prove, by a preponderance of the evidence, that the condition of her thumb and wrist would not have worsened but for her original 2010 surgery. Consequently, Claimant failed to prove that her 2014 injury and her need for revision MP and CMC joint surgery are proximately related to her June 5, 2009 work injury. Accordingly, Respondent's are not obligated to provide this treatment.

40. While addressed in Dr. Sollender's IME, Claimant made it clear at the outset of hearing that she was not seeking a determination concerning the relatedness of her need for right CTS surgery to her 2009 industrial injury. Consequently, this order does not address this issue other than to fully set out the timeline of Claimant's treatment with Dr. Marin as provided in the findings of fact noted above.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Reopening

D. Pursuant to § 8-43-303 (1) C.R.S., a claim may be reopened based on a change of condition which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The burden to prove that a claim should be reopened rests with the Claimant to demonstrate that reopening is warranted by a preponderance of evidence. Pursuant to §8-43-303(1), C.R.S., a "change of condition" refers to a "change in the condition of the original compensable injury or a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). Reopening may be appropriate where the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000); *Brickell v. Business Machines, Inc.*, 817 P.2d 536 (Colo. App. 1990) (reopening is appropriate if additional benefits are warranted).

E. The question of whether the Claimant has proven a change in condition of the original compensable injury or a change in physical or mental condition which can be causally connected to the original compensable injury is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12, P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Based upon the evidence presented, Claimant has failed to prove that the worsening of her arthritis is causally related to her original 2009 work injury. Moreover, Claimant failed to prove, by a preponderance of the evidence, that the condition of her thumb and wrist would not have worsened but for her original 2010 surgery. Consequently, Claimant failed to prove that her 2014 injury and her need for revision MP and CMC joint surgery are proximately related to her June 5, 2009 work injury. Accordingly, Respondent's are not obligated to provide this treatment. The key facts, based upon the evidence presented, supporting this conclusion include the following:

- After four years without treatment, there was an intervening event between the original injury in 2009 and Claimant's need for treatment to her right thumb in 2014: Claimant had an acute non-work related injury while doing her taxes and typing all day at home.

- The underlying causes of Claimant's right thumb injury were her arthritic conditions. Claimant's underlying arthritic conditions were not affected by Claimant's work or any life activities, but were progressing with time and age. They were not aggravated or in any way affected by her work and therefore her work did not contribute to the cause of Claimant's February 1, 2014 right thumb injury at home;

- There is insufficient evidence to establish that Claimant has a cumulative trauma diagnosis;

- Even if there was cumulative trauma diagnosis, there is not enough information in the record to make a finding that any of WCRP 17 Ex. 5s risk-factors for the development of any such condition existed at Claimant's job. Instead any risk factor activities were intermittent and did not, according to Dr. Sollender's persuasive opinion, satisfy the MTGs time requirements for the development of such a condition;

F. As found above, the ALJ concludes that Claimant failed to meet her burden to prove that her osteoarthritis was aggravated or accelerated by her work duties after being placed at MMI in 2010, that her condition would not have worsened but for her original CMC surgery or that her February 1, 2014 injury was caused by or related to a worsening of her June 5, 2009. Consequently, her request for reopening based upon a change of condition is denied and dismissed. Because Claimant failed to causally relate her need for MP and CMC surgery to her June 5, 2009 work injury, her request for additional medical benefits, including the MP and CMC revision surgery and all costs attendant thereto must similarly be denied and dismissed.

ORDER

It is therefore ordered that:

1. The claimant's request for re-opening of her June 5, 2009 claim is denied and dismissed.

2. Claimant's request for medical benefits, including the costs associated with Dr. Marin's revision MP and CMC joint surgery is denied and dismissed as Claimant failed to prove a causal connection between her need for that surgery and her June 5, 2009 work injury. Consequently, Respondent's are not liable for the costs associated with Claimant's revision MP and CMC joint surgery performed by Dr. Marin on April 11, 2014.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 9, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the recommendation for left ulnar nerve revision (cubital tunnel) surgery is reasonable and necessary.

II. Whether Claimant established by a preponderance of the evidence that his bilateral carpal tunnel syndrome symptoms and consequently his need for a left carpal tunnel release procedure relate to his April 30, 2010 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Drs. Sachar, Larsen and Castrejon, the ALJ enters the following findings of fact:

1. Claimant was employed as an Automotive and Diesel Vehicle Technician for Employer for approximately 24 years. His job duties included working on and maintaining over-the-road delivery trucks and local delivery trucks. Claimant sustained admitted injuries to his bilateral upper extremities on April 30, 2010 while performing maintenance work on a vehicle called a "Sprinter."

2. Claimant's injuries lead to a protracted course of treatment involving both conservative measures and surgical intervention. Throughout the course of this claim, Claimant has undergone the following surgical procedures:

- 12/9/10: right shoulder subacromial decompression/distal clavicle resection
- 7/7/11: left shoulder subacromial decompression/distal clavicle resection
- 7/7/11: left elbow ulnar neurolysis/elbow debridement
- 3/6/12: right elbow ulnar neurolysis
- 3/6/12: right carpal tunnel release
- 2/7/14: right elbow epicondylar debridement/ulnar nerve revision

3. Initially Claimant presented to presented to Concentra on April 30, 2010, complaining of shoulder symptoms. Claimant described pain in both shoulders attributable to his job duties which included repetitive lifting, use of upper extremities, and overhead work. Along with pain in the shoulders, Claimant described pain in his bilateral elbows. He described the pain level as 6/10. Dr. Suzanne Malis assessed Claimant with shoulder impingement and bilateral epicondylitis. Claimant suggested during his testimony that he complained of wrist symptoms during his treatment at Concentra, but Dr. Malis elected to take a "top down" approach to his care focusing her

attention on Claimant's shoulder symptoms. Nevertheless, no documented complaints of wrist symptoms appear in Dr. Malis' initial report. (Resp. Ex., pp. 27-28.)

4. On May 11, 2010, Claimant returned to Concentra and presented to Dr. Wiley Jinkins. Claimant described increased bilateral shoulder symptoms associated with overhead work activity. Dr. Jinkins recommended a steroid injection in the right shoulder. Claimant did not complaint of wrist symptoms. (Resp. Ex., pp. 34-35.)

5. On May 19, 2010, Claimant returned to Dr. Malis. He described greater pain in the right shoulder than the left shoulder. On a pain diagram for that date, Claimant did not note any pain to either the left or right wrist. (Resp. Ex., pp. 37-42.) According to Claimant, his pain diagrams were not sufficiently detailed, given the providers focus of treatment on his shoulders, until his care was transferred to Dr. Michael Dallenbach.

6. Claimant stopped working in any capacity for Employer on July 15, 2010 and has not returned to any type of work since.

7. Over the next few months, Claimant continued to treat with Dr. David Weinstein (orthopedic surgeon) and Dr. Dallenbach, who assumed care from Dr. Malis. Claimant testified that he informed Dr. Dallenbach of wrist symptoms in 2010. Although the medical records from Dr. Dallenbach's office for 2010 reflect that Claimant reported symptoms associated with bilateral lateral epicondylitis, which in the case of the left elbow was made worse with repetitive motion of the left wrist, the records do not reflect specific documentation concerning wrist symptoms. On December 9, 2010, Claimant underwent shoulder surgery performed by Dr. David Weinstein. Specifically, Claimant underwent a right arthroscopic subacromial decompression, right arthroscopic distal clavicle resection, left shoulder subacromial injection with cortisone and left elbow lateral epicondylar cortisone injection. (Resp. Ex., p. 88.)

8. On March 28, 2011, Claimant underwent an independent medical examination (IME) with Dr. Jutta Worwag. Dr. Worwag concluded that Claimant's work activities met the criteria for the development of cumulative trauma with regards to the bilateral shoulder and bilateral epicondyle conditions. Dr. Worwag concluded that Claimant reached maximum medical improvement with respect to the right shoulder and bilateral elbows. She opined "there is no reasonable expectation that any surgical intervention with respect to the elbows would lead to any meaningful lasting functional gains." Additionally, Dr. Worwag advised that to the extent Claimant was considering a left shoulder subacromial decompression, Dr. Weinstein should fully discuss with Claimant potential outcomes which could and could not be achieved with surgical intervention. (Resp. Ex. O.)

9. On April 19, 2011, Claimant underwent bilateral EMG and nerve conduction studies of the upper extremities. The studies showed evidence of bilateral moderately severe cubital tunnel syndromes, evidence of a mild right carpal tunnel syndrome, but no evidence of left carpal tunnel syndrome or right/left cervical radiculopathy. The reviewing physician, Dr. William Griffis, recommended cubital tunnel injections. If the

symptoms persisted, he recommended that Claimant consider a cubital tunnel release. (Resp. Ex. Q.)

10. On May 23, 2011, Claimant presented to Dr. Karl Larsen. Dr. Larsen noted that Claimant has experienced possibly two to three years worth of bilateral elbow pain. Dr. Larsen assessed Claimant with bilateral cubital tunnel syndrome and bilateral tennis elbow (epicondylitis) syndrome. Dr. Larsen advised that Claimant undergo a left lateral tennis elbow debridement and left ulnar release at the elbow. Dr. Larsen counseled Claimant that while surgery would be an option for the lateral epicondylitis, it is "not a guaranteed success, and the recovery from this [could] be lengthy and incomplete." Concerning the right elbow, Dr. Larsen noted that Claimant should proceed with the cubital tunnel decompression so that it did not progress to something more chronic. Additionally, Dr. Larsen recommended that Claimant undergo a right carpal tunnel release at that same time, given the electrodiagnostic evidence of mild right carpal tunnel syndrome. (Resp. Ex. S.)

11. Claimant testified that he told Dr. Larsen about his wrist symptoms in 2011. Based on the content of the May 23, 2011 note, the ALJ finds that Claimant, more probably than not, informed Dr. Larsen that he was having symptoms associated right sided CTS. Consequently, the ALJ finds record support for Claimant's testimony that he discussed right sided wrist symptoms with Dr. Larsen in 2011 as he testified. However, there is no documentation in the record that Claimant ever raised left sided wrist symptoms and the April 19, 2011 EMG study does not reveal evidence consistent with left sided CTS.

12. Based upon the evidence presented, the ALJ finds that May 23, 2011 is probably the earliest date that Claimant discussed, with Dr. Larsen, symptoms associated with a wrist condition and then the discussion was likely limited to his right wrist only. There is no record support for any date prior to this; nor is there any indication in any medical record that Claimant expressed concern about his left wrist. Indeed since the April 19, 2011 EMG was devoid of any finding suggestive of left CTS, the ALJ finds it unlikely that Claimant would have had any complaints about symptoms in the left wrist consistent with CTS. The ALJ finds that any discussion regarding right sided CTS symptoms on May 23, 2011 was likely driven by the positive EMG findings from April 19, 2011 documenting evidence of mild right CTS.

13. On July 7, 2011, Claimant underwent left shoulder arthroscopic subacromial decompression and left arthroscopic distal clavicle resection performed by Dr. Weinstein. During the same surgery, Dr. Larsen performed a left elbow cubital tunnel release and left elbow lateral epicondyle debridement. (Resp. Ex. U.)

14. On December 19, 2011, Claimant returned to Dr. Larsen. Claimant described complete relief as a result of the left ulnar surgery. However, Claimant continued to complain of occasional pain over the left lateral elbow with gripping and grasping activities. Dr. Larsen described the left lateral epicondyle repair as "imperfect." Regarding his right sided CTS, the note from this encounter reflects that Claimant "still

needs to consider cubital and carpal tunnel releases on the right side but is not quite ready to do so from a recovery perspective on the left side." Physical examination of the right upper extremity revealed "abnormal tenderness over the ulnar nerve with a positive Tinel's sign. Dr. Larsen also documented that Claimant had a positive Tinel's sign over the carpal tunnel, although it was characterized as "very mild." Dr. Larsen recommended that Claimant return in six weeks for purposes of addressing the right carpal and cubital tunnel releases on the right side. (Resp. Ex. p. 142).

15. Six weeks later on January 30, 2012, Claimant returned to Dr. Larsen. Dr. Larsen noted that Claimant was recovering "relatively well" on the left side. This is in stark contrast of Dr. Larsen's previous note. Nonetheless, Dr. Larsen noted that Claimant had "known carpal tunnel and cubital tunnel syndrome on the right side" and that he (Dr. Larsen) felt Claimant was "ready to proceed with carpal tunnel release and ulnar neurolysis at the elbow." (Resp. Ex. p. 143).

16. Claimant underwent right carpal tunnel and right in-situ ulnar neurolysis at the elbow procedures performed by Dr. Larsen on March 6, 2012.

17. On May 10, 2012, Dr. Worwag performed a second IME. On that day's visit, Claimant rated his pain as 7/10. His described medical problems included: "both shoulders pain, both elbows post-op pain, right hand post-op pain." Dr. Worwag continued to conclude that Claimant's bilateral shoulder and bilateral elbow symptoms are related to the work activity at Federal Express. She concluded the carpal tunnel symptoms were not work related because Claimant had "no symptoms in either hand or on his pain diagram well over one year ago when he first saw me." As Claimant was not working at the time of his first IME, Dr. Worwag opined that the "subsequent development of carpal tunnel syndrome symptoms cannot reasonably be causally related to the work injury as the patient reports last working in July 2010." Dr. Worwag noted that despite numerous surgical interventions, Claimant had not experienced any significant change in his functional status. (Resp. Ex. DD).

18. On June 25, 2012, Dr. Dallenbach placed Claimant at MMI. Claimant described his condition as stable. There is no notation from Dr. Dallenbach that Claimant disagreed with being placed at MMI. (Resp. Ex. EE).

19. On December 5, 2012, after approximately an eight month hiatus, Claimant returned to Dr. Larsen. Claimant described persistent right lateral tennis elbow pain, similar to those pains on the left side for which he had surgery. Claimant described difficulty with gripping and grasping activities. Dr. Larsen noted that Claimant had not done well with nonsurgical treatment, including two cortisone steroid injections. As Claimant's persistent symptoms were unacceptable to him, Dr. Larsen noted that he could proceed with additional surgery for his right elbow pain and he would be scheduled for the same upon authorization. Dr. Larsen's report does not address how Claimant's functional limitations would otherwise improve from surgery. For example, Dr. Larsen noted that Claimant had a "successful" result on the left side, but his report does not provide a definition of what he deemed to be "successful." As noted above,

Claimant has not worked since July 2010. Of note, Dr. Larsen also reported that, "…[Claimant] does feel like he may be developing some numbness and tingling in the radial digits of the left hand, but we are not evaluating that today…" (Resp. Ex. GG.) The ALJ finds that Claimant's complaints of left hand numbness and tingling from this date comprise the first indication that Claimant may be experiencing symptoms consistent with left sided CTS since the inception of the claim. Moreover, the ALJ finds that more than two years past from the date Claimant first presented to Dr. Malis on April 2010 and the first suggestion that he was having symptoms consistent with CTS in the left wrist. Again, it is noted that Claimant stopped working in any capacity in excess of two years before the onset of any left wrist symptoms.

20. On December 20, 2012, Dr. Worwag completed a record review with regards to Dr. Larsen's request for right lateral epicondyle surgery. Dr. Worwag cited the Colorado Treatment Guidelines, and explained that when evaluating surgical candidacy for right lateral tennis debridement/repair, the surgeon and the patient should clearly define expected functional gains from the procedure. Dr. Worwag noted that Dr. Larsen failed to delineate such functional gains. Dr. Worwag noted that notwithstanding numerous surgical procedures, Claimant had not returned to employment. As documented above, the medical records fail to show improved function as a result of the left lateral tennis elbow repair. Additionally, Dr. Worwag noted that Claimant advised that his left elbow had not improved significantly. Dr. Worwag concluded, "Given his continued and unimproved complaints despite numerous prior surgeries – including the same type surgery now proposed for the right elbow previously done on the left elbow – positive patient response cannot be expected." Dr. Worwag pointed out that Claimant had not reported improved activities of daily living with the prior left lateral tennis elbow surgery. She believed there is little reason to expect any improvement with regards to the right tennis elbow surgery. (Resp. Ex. FF.)

21. On January 14, 2013, Dr. Thomas Higginbotham issued the DIME report, concluding that Claimant had not reached MMI. The DIME physician noted that Claimant should undergo the surgery recommended by Dr. Larsen. (Claimant's. Ex. 4.)

22. Notably, in discussing Claimant's history and the mechanism of injury, Dr. Higginbotham observed that; "…He relates of progressive pain and weakness of his upper extremities and neck beginning around 2008. He transferred to this facility from a Federal Express facility in California. He states that he had been losing his grip strength and experiencing sharp shooting pains about the forearms into both hands. He relates zapping, electrical-like feelings into his hands. He would have difficulty working overhead and relates of dropping items. He relates once of dropping a transmission valve body. He states that on this particular day, he experienced a sharp pain from him shoulders into his hands while trying to remove an oil filter from a vehicle. It required a wide grip with forceful twisting. He couldn't do it with the right hand and tried it with the left hand and incurred a similar sharp shooting pain there as well…" (Claimant's Exs. pg. 211).

23. On June 19, 2013, Claimant underwent an IME with Dr. Kavi Sachar, an

orthopedic surgeon at Hand Surgery Associates. Dr. Sachar opined that Dr. Larsen's recommendation for surgery was not reasonable or necessary. Based upon his review of the records and examination of the Claimant, Dr. Sachar concluded "I do not believe the patient would benefit from right lateral epicondyle release." The Claimant advised Dr. Sachar that his right arm had not improved as a result of the medial epicondyle release and right cubital tunnel release. He described his medial epicondyle pain as 7-10/10. With regards to his right lateral epicondyle, the pain was only 5-7/10. Additionally, the Claimant described the left upper extremity where he had undergone the previous lateral epicondyle surgery as still painful, 3-4/10. Accordingly, Dr. Sachar concluded that the potential for Claimant regaining significant function and significant pain relief from the recommended surgery is "extremely guarded." He declined to recommend further surgery with regards to Claimant's right elbow. (Resp. Ex. II.)

24. The matter proceeded to hearing on Respondent's request to overcome the DIME physician's opinion. The ALJ determined that Respondent did not overcome the DIME physician's opinion and that the right elbow surgery proposed by Dr. Larsen was reasonable, necessary, and related to the industrial injury. (Claimant's Ex. 9)

25. On February 11, 2014, Claimant underwent a right revision of the ulnar nerve at the elbow, a right sub muscular ulnar nerve transposition, and a right lateral tennis elbow debridement, performed by Dr. Larsen. (Resp. Ex., p. 189)

26. On March 21, 2014, Claimant returned to Dr. Larsen complaining "of some left volar radial wrist discomfort." Dr. Larsen documented that Claimant "had no clunking about the wrist and no new injuries." Physical examination revealed no tenderness over the first or second dorsal compartments of the wrist. X-rays revealed early developing arthritis in the left wrist. (Resp. Ex., p. 193)

27. On May 5, 2014, Claimant returned to Dr. Larsen. The record from this date of visit does not reflect that Claimant had complaints of left elbow or carpal tunnel symptoms. (Resp. Ex., p. 194)

28. On September 15, 2014, Claimant returned to Dr. Larsen. Dr. Larsen noted, "Unfortunately he has developed recurrent lateral epicondylar pain on the left side. He feels like he has developed a recurrent numbness in the ring and small finger with small discomfort at the medial elbow." Dr. Larsen recommended that Claimant undergo a repeat electrodiagnostic testing to determine if Claimant developed a recurrent cubital tunnel syndrome.

29. On November 11, 2014, underwent the recommended electrodiagnostic testing conducted by Dr. Griffis. The testing revealed mild left cubital tunnel syndrome, moderate right cubital tunnel syndrome, bilateral mild carpal tunnel syndrome and no electrodiagnostic evidence of right or left cervical radiculopathy. (Resp. Ex. MM.)

30. On December 1, 2014, Claimant returned to Dr. Larsen. Dr. Larsen concluded

that the electrodiagnostic testing returned “generally better” than the earlier studies. He went onto write, “[w]ith regards to his lateral epicondyle, he is aware there is really not much for me to do. I think just continue maintenance with occasional corticosteroid injections in time are all that is needed. Similarly, with respect to his neuropathy symptoms, his areas where he had surgery have findings I consider fairly typical for post-surgery, and I do not know really represent new comprehensive lesions. I certainly would not advocate for a revision of the left side unless he got far worse. With regard to his left carpal tunnel syndrome, he has had symptoms here for some time. They have always been mild and I think conservative measures are appropriate here also.” After discussing Claimant’s treatment options, Dr. Larsen injected Claimant’s right lateral epicondyle and his left carpal tunnel. Dr. Larsen added that; “…It is possible he would come to carpal tunnel release in the future, but I do not see that happening in the near term unless things worsen. He is in agreement with that plan…” (Resp. Ex., p. 200.) Based upon the evidence presented, the ALJ finds that this date of visit represents the first indication from a physician that Claimant had left sided CTS.

31. On January 5, 2015, Dr. Miguel Castrejon completed an IME at Respondent’s request. Claimant described pain located at both posterior elbows and a separate area of pain to both wrists. Claimant graded his level of bilateral elbow pain as ranging between 6 and 7/10. He noted his wrist pain as approximately 4/10. Dr. Castrejon performed an extensive medical record review. Dr. Castrejon noted that Claimant admitted treatment to the right wrist 3-4 years prior to the date of injury. Dr. Castrejon observed that the medical records contained no mention of wrist symptoms by any examiner or therapist until July 14, 2011. He concluded, “Based upon a review of the medical file it is clear the diagnosis of right carpal tunnel syndrome (and more recently left carpal tunnel syndrome) were never specifically addressed. There is no documentation in the medical file as to when these symptoms specifically arose. It is clear that no formal documentation was made of the diagnosis until April 19, 2011 when Dr. Griffis performed electrodiagnostic testing primarily to evaluate for ulnar entrapment at the elbow. The finding of a right carpal tunnel syndrome appeared to have been an unexpected electrical finding with no documentation of symptoms or clinical findings on the part of the patient, and his treating physicians, up to and even after the electrodiagnostic study of April 19, 2011.” Dr. Castrejon concluded that Claimant’s carpal tunnel symptoms do not relate to the industrial injury. (Resp. Ex. A.)

32. On January 26, 2015, Claimant returned to Dr. Larsen. Dr. Larsen did not address Claimant’s left elbow complaints during this visit. However, regarding Claimant’s left wrist, Dr. Larsen reported, “…His left side carpal tunnel syndrome is very mild and I don’t think warrants any surgery at this point. That could become an issue in the future if it worsens. He does have symptoms of thenar fatigue…As a symptom alone; I don’t think there is anything specific to do for it. He can follow up with me if it worsens, otherwise I don’t have a lot left to offer and he can follow up with me if he has any other issues…” (Resp. Ex., p. 202.)

33. On March 19, 2015, Dr. Larsen opined that Claimant had reached maximum

medical improvement. Respondent had provided Dr. Larsen with Dr. Castrejon's report, and he agreed with Dr. Castrejon with regards to MMI. Dr. Larsen did not disagree with Dr. Castrejon's opinion that the carpal tunnel syndrome did not relate to the industrial injury. (Resp. Ex. pp.204-05.)

34. On April 20, 2015, Claimant returned to Dr. Larsen complaining of worsening left upper extremity symptoms. Specifically, Claimant described tenderness along the course of his ulnar nerve, in addition to pain and numbness in the ring and small fingers when he rested on the area, i.e. the left forearm. Regarding the carpal tunnel, Dr. Larsen noted: "[h]e also feels like he is getting worse numbness and tingling in the radial digits of the left hand. He has known carpal tunnel syndrome on that side that has been electrodiagnostically graded as mild, and I had initially recommended just conservative measures. However, he feels like his symptoms have worsened to the point that he would like to pursue more treatment." (Claimant's Exbts. pg. 4). On examination, Dr. Larsen noted; "…He has a painfully positive Tinel's sign at the left wrist with a positive carpal tunnel compression test." Dr. Larsen concluded that; "…Bryan has persistent symptoms in his left arm. Most of this seems to be consistent with ulnar nerve irritation or ulnar neuritis at the left elbow and some median neuritis associated with his carpal tunnel syndrome. I had a frank discussion with him that I do not have a lot of non-surgical measures left for his elbow and his options are to live with it or consider a revision. He has been through the revision surgery on his right arm and feels like his symptoms are bad enough that he wants to pursue left side treatment. He says if his right elbow was a 10 by the time we came to surgery, his left elbow [is] already a 7 or an 8. Similarly, he feels like he is having significant discomfort at the wrist and he has considered this and would like me to go ahead and proceed with a carpal tunnel release. Further, Dr. Larsen noted, "I discussed with him that I had recommended he be placed at MMI in March, as I do not reasonably have the expectation that people go on to require revision ulnar nerve surgery, let alone require it bilaterally." (Resp. Ex. pp. 206-207.)

35. On April 24, 2015, Dr. Larsen submitted a request for authorization of left carpal tunnel surgery and left elbow revision surgery. (Claimant's Exbts. pg. 3). Respondents denied the request and filed an Application for Hearing challenging the reasonableness and necessity, of the surgical procedures, in addition to the relatedness of Claimant's bilateral carpal tunnel syndrome to his April 30, 2010 work injury.

36. Dr. Larsen addressed the denial on May 3, 2015 as follows "…I would like to point out that Mr. Holcombe has presented with worsening neuropathic symptoms and complaints in his left arm. I have provided care for him in the past under his workers' compensation claim; specifically his left elbow surgery was performed under his workers' compensation claim. As his condition appears to be worsening and requiring revision as a result of his original surgery, it would appear that his left elbow would certainly be related to his workers comp claim as part of ongoing treatment for that problem. Similarly, he has had carpal tunnel syndrome recognized for a long period of time that we have tried not to perform surgery to treat; however, it is worsening. He has had similar nerve compression on the contralateral side that has been treated under his

workers' compensation claim, and it only makes sense that this is part of the ongoing problem…" (Claimant's Exbts. pg. 2).

37. On July 6, 2015, Claimant underwent an IME with Dr. Kavi Sachar. Claimant advised Dr. Sachar that his left hand numbness and tingling worsened over the past one year to 18 months. Claimant advised Dr. Sachar this happened after the surgery on the right side when he had to do increased activities with the left side because he was recovering with regards to the right. Physical examination revealed no evidence of subluxation of the ulnar nerve on the left. Rather, Dr. Sachar noted that the nerve was in an anterior transposed position. Following a physical examination, Dr. Sachar noted that Claimant had a negative median nerve compression, Tinel's and Phalen's signs although he did complain of tenderness with palpation of the carpal tunnel. Claimant also reported "subjective numbness in the ring and small finger." In concluding that the surgery recommended by Dr. Larsen was not reasonable, necessary, or related to the industrial injury, Dr. Sachar noted:

> The patient had a left cubital tunnel release done previously. There is very little mention of his symptoms and there is no reason to believe that his left cubital tunnel became acutely worse because he had surgery on the right arm. The patient has not been employed for 5 years. There are no significant activities of daily living that would take a previously transposed ulnar nerve and make it symptomatic to the point that it would need recurrent surgery. His EMG only shows mild left cubital tunnel. Interestingly, the EMG on the right side, which has had previous revision surgery, actually had worse findings than on the one currently involved left side. His left carpal tunnel is mild on the EMG. The patient at no point today indicated signs or symptoms of carpal tunnel. At no point did he indicate numbness and tingling in the thumb, index, and middle finger with range of motion and activities.

38. Dr. Sachar went on to note that while Claimant reported weakness and fatigue in his hand, these are not symptoms consistent with carpal tunnel. Overall, the physical examination was inconsistent with carpal tunnel syndrome according to Dr. Sachar. Dr. Sachar concluded that Claimant's carpal tunnel syndrome did not relate to Claimant's April 30, 2010 industrial injury. He explained that while Claimant had an EMG finding of electrical abnormality in the median nerve distribution, he did not demonstrate the clinical findings consistent with a diagnosis of left carpal tunnel syndrome. (Resp. Ex. B.)

39. Dr. Larsen testified as an expert in the fields of orthopedic surgery and surgery of the upper extremity on October 7, 2015. He explained that the proposed left elbow ulnar nerve revision surgery is "identical" to that which he previously performed on the right elbow. (Dr. Larsen depo. tr. pg. 25, l. 25 – pg. 26, l. 8). Dr. Larsen noted Claimant had a positive outcome from the previous revision surgery on the right side. (Id. at pg. 26, ll. 9-12). He testified about it as well, noting: "…At this point, because he did improve so significantly with the right side revision surgery, in some respects it sort of

drives pursuing the left side surgery because he has done so well with it on the right side." (Dr. Larsen depo. tr. pg. 62, ll. 11-15).

40. Dr. Larsen testified regarding the worsening of Claimant's carpal tunnel and elbow symptoms as follows:

> Q: What do you believe accounts for the worsening of symptoms?
>
> A: It's hard to know. There is (sic) two aspects to this. One is the carpal tunnel syndrome. This is a virgin carpal tunnel on the left side, so he has worsening carpal tunnel on that side. That's sort of the typical course for people that get carpal tunnel syndrome and go on to surgery. He failed a period of nonsurgical matters. Clinically the syndrome is worsening.
>
> With regards to the ulnar nerve, he has had a previous surgery There. Reasons I would entertain for him to have a recurrence or worsening symptoms would either be progressive instability of the nerve, where it shifts around because it's no longer restrained where I released it and becomes irritated and symptomatic from that. Scar formation around the nerve, the scar is contractile sometimes over time and it can produce a new site of compression or adherence where it sticks the nerve down. Sometimes those are obvious if the nerve is unstable and it's popping back and forth over the epicondyle. It's something you can see across the room. Other times it's more subtle and we are left guessing a little bit as to why it's so bothersome.

(Dr. Larsen depo. tr. pg. 27, l. 1 – pg. 28, l. 3).

41. Dr. Larsen also testified regarding the objective evidence of Claimant's carpal tunnel syndrome based upon his physical examination. According to Dr. Larsen's testimony, Claimant had complaints of numbness in the affected digits, the radial digits. He had a positive Tinel's sign and a positive carpal tunnel compression test at that point I examined him. (Dr. Larsen depo. tr. pg. 33, ll. 15-23).

42. Regarding Dr. Sachar's opinion that Claimant's CTS was not causally related to Claimant's work injury because Claimant had not worked for a lengthy period of time, Dr. Larsen noted: "I agree he hasn't worked for a long time. He's had carpal tunnel symptoms that were - - or nerve compression symptoms that have been present since his initial work complaint. So this has been more of an ongoing treatment since the time of initial contact." (Dr. Larsen depo. tr. pg. 33, l. 24 – pg. 34, l. 9). Consequently, Dr. Larsen testified:

> Q*:* Do you believe the carpal tunnel symptoms are a result of Mr. Holcombe's work injury?

A: I do, because all of his nerve symptoms that he has had up to this point seem to stem from his original work complaint. I have treated every other nerve he has in his arms that I would treat surgically under that. It makes sense as part of the continuum of developing nerve compression.

Q: What about the left elbow?

A: His left elbow was a surgery performed directly under his work comp claim, and that surgery is now failing. I view that as a failure of his previous surgery, which was a work comp claim. Redoing that to try to make it better seems related to that.

(Dr. Larsen depo. tr. pg. 34, l. 19 – pg. 35, l. 9). Based upon the record evidence as presented, the ALJ is unable to find support for Dr. Larsen's suggestion that Claimant's CTS symptoms have been "present since his initial work complaint." Rather, the ALJ finds that the record evidence supports a finding that Claimant's CTS symptoms on the right side did not manifest until May 23, 2011 following an April 19, 2011 EMG study. Furthermore, as noted above, the record evidence supports a finding that Claimant's left CTS symptoms did not manifest, at the earliest, until December 5, 2012.

43. Dr. Larsen also offered an opinion that Claimant's left carpal tunnel symptoms may have resulted from his left shoulder surgery. However, Dr. Larsen was unable to detail any medical literature supporting this suggestion.

44. Dr. Sachar testified by deposition on October 13, 2015. Dr. Sachar testified that Claimant's physical examination was inconsistent with carpal tunnel syndrome. (Depo. of Dr. Sachar, p. 5-6.) Dr. Sachar explained that the median nerve compression test, the Tinel's sign and Phalen's test all returned negative. (Depo. of Dr. Sachar, p. 6.) Dr. Sachar further explained that Claimant did not describe typical symptoms or conditions which he would expect to see with regards to carpal tunnel syndrome. (Depo. of Dr. Sachar, p. 9.) Dr. Sachar addressed Dr. Larsen's assertion in his evidentiary deposition that Claimant's carpal tunnel syndrome may have resulted from the left shoulder surgery. Dr. Sachar noted that Claimant's left shoulder surgery took place in July 2011, but Claimant's symptoms did not commence until April 2012. He explained that this timeframe was too long for Claimant's CTS to be related to his left shoulder surgery. Ultimately, Dr. Sachar testified, "I can't relate those two." (Depo. of Dr. Sachar, pp. 10-11.) Dr. Sachar noted that if massive swelling occurred after an operative procedure, it is possible carpal tunnel could develop, but it would develop almost immediately, not months later. (Depo. of Dr. Sachar, p. 11.) Based upon the evidence presented, particularly the testimony of Dr. Castrejon and Dr. Sachar, the ALJ finds the suggestion that Claimant's CTS developed as a consequence of his shoulder surgery improbable and unconvincing.

45. Regarding the left elbow surgery, Dr. Sachar concluded as follows: "In this

patient, I think there is a far greater chance that he will not improve, but get worse, and, in fact, lose function in the nerve, because the dissection of the nerve compromises its blood flow. His EMG did not show significant findings. If he had very severe findings on the EMG, I would consider it, but with mild EMG findings in someone who previously had a - - what appears to be a well transposition (sic) nerve, I don't see any indication for redoing it. I don't think he would get better." (Depo. of Dr. Sachar, p. 15.) Dr. Sachar concluded that if Claimant did undergo the recommended procedure, Claimant would likely not reach MMI for approximately 11 months. (Depo. of Dr. Sachar, p. 35.)

46. Dr. Castrejon testified by deposition on December 10, 2015. Dr. Castrejon testified that following his IME with the Claimant, he received additional medical records, including the depositions of Dr. Larsen and Dr. Sachar. When providing his opinion with regards to the reasonableness and necessity of the left ulnar revision, Dr. Castrejon answered by recounting Claimant's medical history. Dr. Castrejon explained that the recommended cubital tunnel ulnar nerve revision surgery is a "big procedure"[1] which, based on the literature, was unlikely to provide significant relief in the form of functional gains. (Depo. of Dr. Castrejon, pp. 22-23.) Dr. Castrejon further observed that Claimant still continues to experience difficulty performing relatively simple tasks even after the prior surgeries. (Depo. of Dr. Castrejon, p. 24.) He explained that the mere fact Claimant's right upper extremity revision resulted in decreased pain is not sufficient. Ultimately, Dr. Castrejon testified that the cubital tunnel revision is not reasonable and necessary.

47. Claimant testified regarding the functional improvement he has experienced since his right sided ulnar nerve revision surgery. According to Claimant he can now shift the manual transmission of his car and open jars with his right hand. In addition, he can vacuum and stir a wok/soup with his right arm in addition to using it to assist in making a bed. Claimant explained that he has not tested his right arm/hand in a work like way and could not fully quantify the increased functional abilities in the right arm/hand because his left arm/hand remains very problematic. Nonetheless, the evidence presented persuades the ALJ that in the approximately 22 months since his right ulnar nerve revision surgery, Claimant's functional use of the right arm remains limited to rudimentary activities of daily living. Consequently, Claimant's testimony regarding his current functional abilities cannot be reconciled with Dr. Larsen's testimony that Claimant "improved significantly" following his right sided ulnar nerve revision surgery.

48. Based on the evidence presented, the expert opinions of Dr. Castrejon and Dr. Sachar regarding the reasonableness and necessity of revision cubital tunnel surgery are credible and persuasive. As predicted by Dr. Sachar following his initial independent medical examination in 2013, the right ulnar nerve revision surgery did not result in noteworthy functional gains. As found above, the medical records and

[1] A fact which Dr. Larsen apparently agrees with based upon the content of his August 7, 2013 medical report wherein the subject of revision of the right ulnar nerve was being contemplated. According to this report, Dr. Larsen advised the Claimant that "revision ulnar nerve surgery is a very big surgery compared to what [Claimant had] undergone before."

Claimant’s own testimony support a finding that the previous right sided ulnar nerve revision surgery failed to result in functional gain. Expecting a different surgical outcome regarding the left ulnar nerve in the face of overwhelming evidence that the right ulnar nerve revision surgery failed to produce consequential functional improvement is folly.

49. The ALJ finds that the course of Claimant’s recovery following his right ulnar nerve revision surgery supports Dr. Sachar’s opinion that the chances Claimant will not improve following any left sided ulnar nerve revision surgery are far greater than the chances that he will improve functionally with said surgery. Combining the convincing prospect that Claimant will not improve, and possibly worsen with additional surgery with the fact that the November 11, 2014, EMG revealed only mild left sided cubital tunnel syndrome, persuades the ALJ that the recommended left ulnar nerve revision surgery is not reasonable or necessary. While the EMG itself is not definitive, Dr. Sachar noted that Claimant’s physical examination did not reveal a basis to pursue proposed surgery.

50. With regards to the carpal tunnel symptoms, Dr. Castrejon, during his deposition, reaffirmed his report conclusions that neither Claimant’s right or left carpal tunnel syndromes were related to his April 30, 2010 industrial injury. Based upon the medical records and the evidence presented as a whole, the ALJ rejects Claimant’s assertion that his left carpal tunnel syndrome is related to his April 30, 2010 industrial injury. As detailed by Drs. Worwag and Castrejon, Claimant treated for approximately a year without any complaint of carpal tunnel symptoms until he had an EMG on April 19, 2011 which revealed evidence of mild right CTS. As found above, this finding likely lead to Claimant discussing right wrist symptoms with Dr. Larsen on May 23, 2011. Nonetheless, there was no evidence of left CTS until Claimant complained of some numbness and tingling in the radial digits of the left hand on December 5, 2012, greater than two (2) years from the date of his original injury and more than a year after he stopped performing work activity for Employer. Consequently, the ALJ is persuaded that the etiology of Claimant’s carpal tunnel symptoms do not reasonably relate to his April 30, 2010 injury or any work activities performed thereafter.

51. Based on the foregoing, it is hereby found that Claimant has failed to prove by a preponderance of the evidence that the left cubital tunnel surgery recommended by Dr. Larsen reasonable and necessary. Further, it is found that the bilateral carpal tunnel symptoms do not relate to the industrial injury. Consequently, Respondents are not obligated to pay for the additional treatment Claimant seeks.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Dr. Worwag, Dr. Sachar and Dr. Castrejon's opinions are credible and supported by the totality of the record evidence submitted for consideration. Conversely, the testimony of Dr. Larsen, especially his testimony that Claimant "improved significantly" following his right sided ulnar nerve revision surgery, is contradicted by Claimant's ongoing complaints of pain and reports of limited effectiveness of his prior surgeries.[2] Consequently, the ALJ concludes that the opinions expressed by Drs. Worwag, Sachar and Castrejon are more persuasive than the opinions of Dr. Larsen.

C. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

[2] See Dr. Castrejon's deposition transcript wherein Claimant disclosed to Dr. Malstrom that "all of [the previous surgeries] have had limited effectiveness." (Depo of Dr. Castrejon, Ex 3, p.5.)

Medical Benefits

D. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

E. The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant retains the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

F. As found here, the left cubital tunnel revision recommended by Dr. Larsen is not reasonable and necessary. Drs. Sachar and Castrejon persuasively opined that pursuing this surgery would not result in additional functional gains and Claimant's recovery from his right ulnar nerve revision surgery supports this opinion. Both physicians relied upon the previous medical records which have detailed that while Claimant has not worked since 2010 and has undergone numerous surgeries, none of the procedures have resulted in meaningful functional gain. Additionally, as the ALJ previously found that Claimant failed to establish at hearing that the need for surgery would impact or otherwise improve his functional capabilities. Accordingly, Claimant failed to demonstrate, by a preponderance of the evidence, that the proposed left ulnar nerve revision surgery is reasonable and necessary.

G. Additionally, Claimant has failed to demonstrate, by a preponderance of the evidence, that his need for a left carpal tunnel release as proposed by Dr. Larsen is related to this April 30, 2010 industrial injury. To sustain his burden of proof, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial*

Claim Appeals Office, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); §8-41-301(I)(c), C.R.S.

H. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

I. As found in this case, Claimant treated for approximately a year without any complaint of carpal tunnel symptoms until he had an EMG on April 19, 2011 which revealed evidence of mild right CTS. While this finding likely lead to Claimant discussing right wrist symptoms with Dr. Larsen on May 23, 2011, it does not support a conclusion that Claimant's right CTS is causally related to the April 30, 2010 work injury. Furthermore, there was no evidence of left CTS until Claimant complained of some numbness and tingling in the radial digits of the left hand on December 5, 2012, greater than two (2) years from the date of his original injury and more than a year after he stopped performing work activity for Employer. Accordingly, Dr. Larsen's opinion that Claimant had carpal tunnel symptoms that were - - or nerve compression symptoms that have been present since his initial work complaint is not supported by the record evidence and as such, is not convincing. Furthermore, the evidence presented persuades the ALJ that Claimant's bilateral CTS was is not a consequence of shoulder surgery as suggested by Dr. Larsen. Here, Dr. Sachar adequately explained that such a circumstance is rare and would only occur within a day or two following surgery, not months later as Claimant now asserts. Based upon the evidence presented, the ALJ credits the testimony of Dr. Sachar and Dr. Castrejon to conclude that the etiology of Claimant's carpal tunnel symptoms do not reasonably relate to his April 30, 2010 injury or any work activities performed thereafter. Consequently, Claimant has failed to establish that his CTS "arose out of" and "in the course of" occurred in the course and scope of his employment. Because Claimant failed establish a sufficient "nexus" or causal relationship between his employment, his need for CTS surgery and his April 30, 2010 injury his claim for medical benefits must be dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request for a left ulnar nerve (cubital tunnel) revision procedure is denied and dismissed as the need for this surgery is not reasonable or necessary.

2. Claimant's request for a left carpal tunnel release procedure is denied and dismissed as the need for this surgery is not causally related to claimant's April 30, 2010 industrial injury.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 3, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-830-409-07

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 26, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 1/26/16, Courtroom 4, beginning at 1:30 PM, and ending at 2:40 PM).

Respondent's Exhibits A through G were admitted into evidence, without objection, with the exception of Claimant's Exhibit G, wherein Claimants' objections were sustained and the Exhibit was rejected as inadmissible hearsay.

At the conclusion of the hearing, the ALJ ruled from the bench and took the matter under advisement for the preparation of a written decision, which is hereby issued.

PROCEDURAL BACKGROUND

This matter involves a claim for the payment of medical expenses associated with a Stipulation Regarding Benefits (Respondent's Exhibit D), concerning post-maximum medical improvement (MMI) medical expenses, entered into as a result of an admitted low back injury of June 17, 2010. The specific issue to be determined by this decision concerns whether the Respondent is liable for the payment of other medical expenses associated with the prescription of Cymbalta, or its generic equivalent. The Stipulation provided, in paragraph 4.e. thereof that the Claimant waived post-MMI medical benefits "except for Cymbalta (or its generic equivalent) for neuropathic pain so long as this medication is **reasonable necessary, and related to the relief of neuropathic pain caused by this work injury.”** The Claimant moved to Arizona and came under the care of Arizona Dr. Maxwell.

ISSUE

The sole issue to be determined by this decision concerns authorization of doctor visits to Dr. Maxwell in Arizona, as well as oversight of his Cymbalta prescription. The Respondent’s position is that the terms of the Stipulation Regarding Benefits do not provide for Claimant’s post-maximum medical improvement (MMI) doctor visits in Arizona.

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant is a retired detective with the Denver Police Department, who suffered a work-related low-back injury on June 17, 2010.

2. The Respondent admitted liability and provided medical benefits and salary continuation benefits.

3. The Claimant and the Respondent entered into a Stipulation Regarding Benefits on November 12, 2012. In accordance with the Stipulation, the Claimant underwent surgery for L4-5 artificial disc replacement and L5-S1 and anterior interbody fusion on December 14, 2012.

4. In the Stipulation, the Claimant agreed to waive post-MMI medical benefits connected with the work injury and back surgery except for a Cymbalta prescription, its generic equivalent, or other medication to replace Cymbalta. The ALJ takes administrative notice and finds that Cymbalta, or its equivalent, may not be obtained over-the-counter but must be prescribed by an authorized physician.

5. The parties agreed in the Stipulation Regarding Benefits that the Claimant waived post-MMI medical benefits connected with the work injury and back surgery except for Cymbalta, its generic equivalent, or another medication to replace Cymbalta for neuropathic pain as long as the medication was reasonable, necessary, and related to the relief of neuropathic pain caused by the work injury.

6. The Claimant moved to Arizona and wants the Respondent to pay for visits to his personal physician, Dr. Maxwell, who is in charge of his Cymbalta prescription.

6. The Respondent argues that the Claimant is not entitled to payments for visits to a personal physician claiming that recurring payments for that purpose constitute post-MMI medical benefits that were not included in the Stipulation.

DISCUSSION

A Cymbalta prescription in Arizona or Colorado needs to be monitored by a licensed physician. As concluded herein below, Arizona law provides that the definition of "unprofessional conduct" includes, "Prescribing, dispensing, or furnishing a prescription medication or a prescription-only device to a person if the licensee has not conducted a physical or mental health status examination of that person or has not previously established a physician-patient relationship. The physical or mental health status examination may be conducted during a real-time telemedicine encounter with audio and video capability if the telemedicine audio and video capability meets the elements required by the Centers for Medicare and Medicaid services. . ." Ariz. Rev. Stat. (A.R.S.) § 32-1854(48). Cymbalta is only available with a doctor's prescription. Respondent argues that the Stipulation Regarding Benefits should be interpreted as providing that Dr. Maxwell should not monitor the Claimant's Cymbalta prescription. However, this interpretation would amount to a violation of Arizona law as unprofessional conduct. Indeed, a physician needs to monitor a patient taking a prescription drug such as Cymbalta to determine, among other things, if there would be adverse reactions to other substances. If the Stipulation is interpreted to prohibit Dr. Maxwell from complying with Arizona law regarding the monitoring of the Claimant's Cymbalta prescription, then the Stipulation provision regarding Cymbalta is meaningless and incapable of performance.

If the Cymbalta provision is legally incapable of performance, then, the consideration for the Stipulation is lacking. As concluded herein below, however, such an interpretation would be **void**. Of course, the Respondent could choose to have an authorized workers' compensation doctor in Colorado monitor the Claimant's Cymbalta prescription, according to the Colorado Medical Practice Act. *See* § 12-36-117 (1) (g), C.R.S., AND § 18-18-102 *et seq.* In such case, the Repondent would be liable for the Claimant's reasonable transportation costs, plus a per diem allowance, to and from Denver for such monitoring.

However, the determination that the Stipulation Regarding Benefits must allow for the monitoring of the Cymbalta prescription to be valid does not mean the Claimant is entitled to any post-MMI medical care by Dr. Maxwell. Principles of statutory construction offer guidance in the interpretation of contractual provisions, *i.e.,* if the wording is plain and clear, the provision must be applied as written. *See Catholic Health Initiatives Colorado v. City of Pueblo,* 207 P.3d 812 (Colo. 2009). The Stipulation plainly and clearly relinquishes the Respondent's responsibility for compensation of post-MMI medical benefits unrelated to the prescribing, monitoring, or refilling of Cymbalta.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Stipulation Regarding Benefits (Respondent's Exhibit D)

a. As found, the parties agreed in the Stipulation Regarding Benefits that the Claimant waived post-MMI medical benefits connected with the work injury and back surgery except for Cymbalta, its generic equivalent, or another medication to replace Cymbalta for neuropathic pain as long as the medication was reasonable, necessary, and related to the relief of neuropathic pain caused by the work injury.

b. A Stipulation is interpreted as a contract. *Cherokee Metro. Dist. v. Upper Black Squirrel Creek Designated Ground Water Mgmt. Dist.*, 247 P.3d 567, 573 (Colo. 2011). The ALJ, therefore, concludes that contract law applies to the issue herein.

c. In the Stipulation, the Claimant unambiguously waives his entitlement to post-MMI medical benefits except for Cymbalta in exchange for the Respondent providing compensation for back surgery, post-surgical care, and temporary disability benefits. Principles of statutory construction offer guidance in the interpretation of contractual provisions, *i.e.,* if the wording is plain and clear, the provision must be applied as written. *See Catholic Health Initiatives Colorado v. City of Pueblo,* 207 P.3d 812 (Colo. 2009).

Payment for Medical Consultation

d. Arizona law provides that the definition of "unprofessional conduct" includes, "Prescribing, dispensing, or furnishing a prescription medication or a prescription-only device to a person if the licensee has not conducted a physical or mental health status examination of that person or has not previously established a physician-patient relationship. The physical or mental health status examination may be conducted during a real-time telemedicine encounter with audio and video capability if the telemedicine audio and video capability meets the elements required by the Centers for Medicare and Medicaid services. . ." Ariz. Rev. Stat. (A.R.S.) § 32-1854(48). The ALJ concludes that it is necessary for Arizona Dr. Maxwell to establish a physician-patient relationship with the Claimant and monitor, as determined by his best medical judgment, the Cymbalta prescription (or generic equivalent) to avoid unprofessional conduct in violation of Arizona law and to periodically determine the causal relatedness and reasonable necessity of the Cymbalta prescription.

g. Under Arizona law, "telemedicine" means, "(a) [T]he interactive use of audio, video, or other electronic media for the purpose of diagnosis, consultation or treatment. (b) [Telemedicine] does not include the sole use of an audio-only telephone, a video-only system, a facsimile machine, instant messages, or electronic mail." A.R.S. § 20-1406.05(E) (3).

h. The U.S. Food and Drug Administration (FDA) identifies the marketing status of drug products. The "marketing status" indicates how a drug product is sold. The FDA has identified four types of marketing status: (1) prescription, (2) over the counter, (3) discontinued, and (4) none. *Drugs@FDA Glossary of Terms*, U.S. Food and Drug Administration (Feb. 2, 2012) http://www.fda.gov/Drugs/InformationOnDrugs/ucm079436.htm#prescription_drug.

i. "Prescription drug" means, "A prescription drug product requires a doctor's authorization to purchase." *Drugs@FDA Glossary of Terms*. The FDA has classified Cymbalta's marketing status as "prescription." *Drugs@FDA Cymbalta Overview*, U.S. Food and Drug Administration, http://www.accessdata.fda.gov/scripts/cder/drugsatfda/index.cfm?fuseaction=Search.Overview&#totable.

h. Dr. Maxwell, or any other licensed medical professional in the State of Arizona, should be given medical control over the Claimant's prescribing, monitoring, and refilling of Cymbalta, or its generic equivalent, in order to avoid the unprofessional conduct under A.R.S. § 32-1854(48).

i. Dr. Maxwell, or any other licensed medical professional in the State of Arizona, should be given the authority under A.R.S. § 32-1854(48) to determine whether he or she conducts the physical or mental health examination of Claimant in-person or via telemedicine.

j. In order to avoid the unprofessional practice of medicine under A.R.S. § 32-1854(48), Dr. Maxwell, or any other licensed medical professional in the State of Arizona, should have medical control to determine the frequency of physical or mental health examinations conducted either in-person or via telemedicine for the prescribing, monitoring, and refilling of Cymbalta, or its generic equivalent.

k. An interpretation of contractual provisions that are contrary to law or public policy, are void *ab initio. Russell v. Courier Printing and Publishing Co.*, 43 Colo. 321, 95 P. 936 (1908)**.** As found and concluded, Cymbalta is a prescription medication and a physician who does not monitor such a prescription, in person or through the modality of telemedicine as defined by Arizona law, would be committing unprofessional conduct. Also, the physician would have to monitor the prescription in person, or by telemedicine, to determine the continued causal relatedness and reasonable necessity of the medication.

l. The Respondent should be liable for all payments associated with physical or mental health examinations conducted either in-person or via telemedicine for the prescribing, monitoring, and refilling of Cymbalta, or its generic equivalent, to the Claimant.

m. The Respondent should not be liable for any other costs associated with medical visits to Dr. Maxwell or any other medical professional licensed in the State of Arizona for reasons other than the prescribing, monitoring, and refilling of Cymbalta, or its generic equivalent, because those costs constitute post-MMI medical benefits to which the Claimant waived his right under the Stipulation Regarding Benefits..

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay all the costs of ancillary medical expenses of Arizona Dr. Maxwell, associated with the prescribing, monitoring, and refilling of Cymbalta, or its generic equivalent, according to Dr. Maxwell's independent medical judgment, in order to satisfy the agreement outlined in the Stipulation Regarding Benefits. Claimant's counsel shall send Dr. Maxwell information that the Respondent should be billed for medical services associated solely with the prescribing, monitoring, and refilling of Cymbalta.

B. In the alternative, the Respondent shall pay the costs of a Colorado authorized treating physician in the Claimant's workers' compensation case, associated with monitoring the Cymbalta prescription in compliance with the Colorado Medical Practice Act, including reasonable transportation and lodging costs of the Claimant between Arizona and Denver, Colorado, plus a reasonable per diem allowance.

C. Any and all issues not determined herein are reserved for future decision.

DATED this______day of February 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of February 2016, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

____
Court Clerk

Wc.ord#2

ISSUES

- Did Claimant prove by a preponderance of the evidence that he suffered a worsening of condition related to the admitted work injury?

- Did Claimant prove the cervical surgery recommended by Jeffrey Donner, M.D. is reasonable, necessary, or related treatment for this claim?

FINDINGS OF FACT

1. Claimant was employed by Employer as a construction site supervisor. On December 21, 2010, Claimant suffered a compensable industrial injury when he was involved in a motor vehicle accident ("(MVA") while travelling to a job site. He testified his vehicle was struck by a car travelling approximately 50 m.p.h.

2. Claimant's medical history was significant in that he had a history of degenerative changes in his low back for which he received treatment, including a low back laminectomy. Claimant took Vicodin for arthritis for a number of years[1]. There was no evidence Claimant sustained an injury or required treatment to his cervical spine prior to 12/21/10.

3. Claimant was initially seen at the Windsor Family Clinic by D. McGuire, PA-C on December 23, 2010, two days after the collision. At that time, Claimant complained of neck pain and stiffness, as well as describing numbness in the 3rd, 4th and 5th fingers in his left hand. The finger numbness had resolved. Claimant was diagnosed with a cervical strain, provided with pain medication and told to use alternating ice and heat on his neck.

4. On December 28, 2010, Claimant returned to the Windsor Family Clinic and was seen by R.A. Mason, M.D. Claimant reported pain on the left side of his neck, with a lot of popping and stiffness. Dr. Mason noted tenderness over the trapezius muscle, some muscle spasm but good range of motion ("ROM") in the neck. Dr. Mason diagnosed a cervical strain, recommended rest, stretching exercises and moist heat. Naprosyn and physical therapy ("PT") were also prescribed.

5. Claimant received PT from Silvia Sorensen, LPT at Ft. Collins Physical Therapy and Sports Center beginning on April 11 through April 28, 2011. He received multiple modalities of treatment including ultrasound, traction and manual treatments.

[1] See Dr. Mason's office note, dated 7/25/11.

6. Claimant was examined by Jeffrey Donner, M.D. on May 5, 2011. He complained of left-sided neck pain along with occasional radicular arm pain and numbness in his fingers. Claimant's history of low back surgery was referenced. Cervical spine x-rays showed disc space narrowing. Claimant completed a Neck Oswestry index (which was a questionnaire that documented the effect of neck pain on everyday activities) at that time and was assessed a score of 18%. Dr. Donner's assessment was cervical disc degeneration and neck pain. Dr. Donner opined Claimant's neck pain was most likely related to an inflamed facet joint at C5-6. He recommended a course of chiropractic care and if that was not effective, an MRI and facet injection.

7. Claimant returned to Dr. Mason on July 25, 2011, complaining of persistent pain on the left side of the neck. He had received PT and underwent an orthopedic evaluation in which it was noted there were some facet joint problems. Dr. Mason found good strength and ROM in the neck. Claimant was to continue rest, stretching exercises, anti-inflammatory medications and moist heat. Dr. Mason prescribed Vicodin.

8. Claimant testified that he did not have health insurance and did not treat in the intervening nine (9) months. There were no records admitted at hearing which showed Claimant received any treatment during this period.

9. Insurer filed a General Admission of Liability ("GAL") for medical benefits on April 9, 2012.

10. On April 20, 2012, Claimant was examined by William Basow, M.D. to whom he was referred by his attorney. Claimant's course of treatment was reviewed, including nine (9) PT sessions which he reported did not relieve his symptoms. Claimant was having intermittent symptoms in the forearm and fingers, as well as pain in the left neck and trapezius. Claimant had normal strength and sensation upon examination, with no neurological abnormalities noted. Dr. Basow's assessment was chronic neck pain without radicular symptoms. Claimant was to begin PT and chiropractic treatments. Claimant had no work restrictions.

11. Claimant returned to Dr. Basow on May 7, 2012, at which time he was note to have mild limitations in cervical flexion, extension and left rotation. Dr. Basow's assessment was chronic neck strain with a good initial response to PT and traction. A home traction unit was prescribed, along with chiropractic treatment. Dr. Basow noted Claimant had no work restrictions.

12. Dr. Basow saw Claimant on June 1, 2012 and made essentially the same clinical findings as the 5/7/12 exam. Claimant was to resume chiropractic treatments and physical therapy. Claimant remained at full duty.

13. Kevin O'Connell, M.D. assumed Claimant's treatment as of July 3, 2012 when the latter had complaints of intermittent left arm pain and paresthesias. Claimant was noted to have a 110-120 mile per day commute and was taking Vicodin at bedtime. Dr. O'Connell's assessment was cervical sprain, cervical arthropathy and left paracervical muscle spasms. Dr. O'Connell prescribed Flexeril, PT and recommended a cervical MRI. Claimant had no work restrictions.

14. An MRI was done on Claimant's cervical spine on July 12, 2012, which was read by Mark Reese, M.D. Dr. Reese found mild facet and uncovertebral degenerative changes at C4-5; a posterior broad based disc protrusion with an osteophyte formation contributing to severe right-sided neural foraminal narrowing at C5-6; and posterior broad-based disc protrusion with facet hypertrophic changes and severe bilateral neural foraminal narrowing with stenosis of the left aspect of the canal at C6-7. Dr. Reese characterized these as spondylitic changes, significant at C5-6 and C6-7. The ALJ drew the inference that these were degenerative changes in Claimant's cervical spine.

15. Dr. O'Connell evaluated Claimant on July 30, 2012, at which time the MRI results were reviewed. Claimant had tenderness in the left paracervical musculature at the midpoint and restrictions in his ROM. His DTR, motor and sensory nerves were intact. Dr. O'Connell's assessment was left cervical strain, cervical spondlylosis at C5-6 and C6-7. Flexeril was discontinued and Skelaxin prescribed. Claimant was to continue use of home TENS unit and receive massage therapy.

16. On September 10, 2012, Dr. O'Connell examined Claimant and he reported improvement. Claimant was having intermittent radicular symptoms into the left finger. Dr. O'Connell's assessment was cervical strain, cervical degenerative disc disease and left C7 radiculitis. Claimant was to continue with medical massage and home cervical traction. He could return to work full duty.

17. Claimant was next seen by Dr. O'Connell on October 8, 2012. He had tenderness and trigger point discomfort on palpation in the paracervical musculature. His ROM on extension was 50% of normal and his neurological exam was normal. Dr. O'Connell's assessment was cervical strain, underlying cervical spondylosis-exacerbation.

18. Claimant returned to Dr. O'Connell three times over the next three months. At the November 12, 2012 evaluation, Claimant was improved. Dr. O'Connell's assessment was left paracervical strain, cervical degenerative disc disease with foraminal stenosis triggering left cervical radiculitis. Claimant also saw Dr. O'Connell on January 14, 2013 at which time he denied radicular symptoms, but had referred pain into the scapula. Claimant was to continue conservative treatment. On February, 19, 2013, Dr. O'Connell re-examined Claimant and found no arm weakness, with minimal and sporadic left arm radicular symptoms. Dr. O'Connell assessment was the same as the 2/19/13 appointment. In each of these follow-up appointments, Claimant had no work restrictions

19. Dr. O’Connell evaluated Claimant on March 19, 2013 and his pain level on this day was 4/10. Dr. O’Connell determined Claimant was at MMI and assigned a 21% whole person impairment pursuant to the AMA Guides. Dr. O’Connell noted treatment with home cervical traction and medical massage provided Claimant relief and he required massage visits (7) as his only maintenance. Dr. O’Connell further noted Claimant’s left arm symptoms “receded over time with conservative treatment, so neurosurgical consultation was never pursued.” The ALJ notes throughout Claimant’s treatment with Dr. O’Connell he had no work restrictions.

20. Respondents requested a Division Independent Medical Examination, which was performed by Richard Stieg, M.D. on July 30, 2013. Dr. Stieg’s impression was severe cervical degenerative disease with persistent myofacial pain and pain disorder (chronic). Dr. Stieg agreed with Dr. O’Connell’s MMI date and determined Claimant sustained a 27% whole person impairment under the AMA Guides. Dr. Stieg noted Claimant had no pre-existing history of neck or upper extremity problems prior to the motor vehicle collision on 12/21/10. Dr. Stieg recommended maintenance treatment in the form of continued physiatric visits on a p.r.n. basis and projected Claimant would likely have continued mild to moderate pain which would require maintenance treatment. The ALJ credited Dr. Stieg’s DIME findings.

21. A Final Admission of Liability (“FAL”) was filed on or about December 5, 2013, admitting for the impairment rating of Dr. Stieg. The FAL was filed pursuant to an agreement between the parties, which resolved issues set for determination at hearing. As part of the agreement, Claimant did not object to the FAL and received a payment of permanent partial disability benefits based upon Dr. Stieg’s rating. In its FAL, Insurer stated: “We admit for reasonable and necessary and related medical treatment and/or medications after MMI.”

22. Claimant testified at hearing his pain has gradually worsened and he was having more frequent radicular complaints. He was less functional both at work and in his activities of daily living. Claimant was a credible witness, as he did not appear to overly exaggerate his symptoms.

23. Claimant returned to Dr. Donner on April 4, 2014. At that time, he was complaining of continued neck pain on a scale from 3 to 5/10 and described an aching, burning, and stabbing sensation in the left side of his neck and into his left scapular area. He described radiating pain into his left arm, with numbness in his third and fourth fingers. Claimant said the driving he was doing for work “markedly aggravated” his neck and left arm symptoms. Claimant was not in severe pain and had mild tenderness on the left side of the neck. However, Claimant completed a neck Oswestry index at this evaluation and had a score of 42%, which leads to the inference that Claimant believed his level of functioning had decreased. Claimant said he was not smoking cigarettes, but had in the past. Dr. Donner recommended a cervical MRI, but also stated Claimant was a reasonable surgical candidate for a two-level anterior cervical fusion or disc replacement.

24. Dr. Donner authored a letter, dated on April 4, 2014, in which he opined Claimant's neck related complaints were directly related to the motor vehicle collision of 12/21/10, despite preexisting degenerative changes. Dr. Donner believed a majority of the MRI findings from the initial MRI performed in 2012 were directly related to the motor vehicle collision. Dr. Donner noted Claimant continued to have symptoms of intractable neck pain and radiculopathy related to herniated discs and stenosis at C5-6 and C6-7 and he recommended obtaining an updated MRI scan of the cervical spine. Dr. Donner said Claimant was not at MMI.

25. Claimant testified he is currently employed by St. Aubyn Homes as a supervisor for residential home building and was working at this job when he was evaluated by Dr. Donner in April 2014. In that capacity, he had to drive up to seventy (70) miles per day. Claimant admitted that driving long distances sometimes caused his neck to hurt.

26. On May 21, 2014, Claimant underwent a second MRI which was read by Willis Chung, M.D. Dr. Chung said the MRI showed degeneration in the discs at C5-6 and C6-7 of Claimant's cervical spine with a 5mm right lateral disc herniation at C5-6, as well as a 3mm right lateral disc herniation at C6-7 and prominent bilateral C6-7 neural foraminal narrowing from lateral disc bulging at that level. Claimant had no central spinal stenosis. The ALJ notes that it is difficult to compare the findings of this MRI with the one of 7/12/12, as the former did not provide measurements of the disc bulges.

27. Claimant returned to Dr. Donner on May 21, 2014, who reviewed the results of his MRI. Dr. Donner noted he had very limited neck movement. Claimant was noted to be smoking cigarettes. Dr. Donner's assessment was progressive severe neck pain with radiculopathy at C5-6 and C6-7, where there were degenerative changes, stenosis and herniated discs. Dr. Donner recommended and noted Claimant wanted to proceed with a two-level anterior cervical discetomy, nerve root decompression and placement of artificial discs.

28. Andrew Castro, M.D. (orthopedic spine surgeon) performed a physician advisor review of the request for surgery. In his note dated June 11, 2014, Dr. Castro said two level disc replacement was not cleared by the FDA and by extension the Colorado Worker's Compensation Medical Treatment Guidelines. He opined that cervical surgical intervention for primarily neck pain was questionable, as it had unpredictable outcomes. He also noted Claimant's gap in treatment from prior to the surgical recommendation raised the issue of a possible new injury or intervening event which should be investigated. Dr. Castro recommended authorization for the surgery be denied.

29. Alicia Feldman, M.D. performed an IME[2] of Claimant on June 27, 2014. Dr. Feldman noted Claimant complained of pain in his cervical spine which radiated into his left shoulder, rarely into the left upper extremity, but experienced some paresthesias down his left arm into his third and fourth fingers. Claimant was working a new job as a site supervisor which required he do a lot of driving and repetitive movement of his neck at times, which caused fatigue. Claimant had limited and painful cervical spine extension and rotation to the left. Dr. Feldman's assessment was left-sided neck pain, cervical spondylosis, left upper extremity parasthesias and foraminal stenosis of the cervical spine.

30. Dr. Feldman stated Claimant's imaging studies showed chronic degenerative changes without acute pathology and neurological compromise. Dr. Feldman stated there were no findings of acute or subacute injury in the 7/12 MRI. She believed he had a cervical sprain/strain injury which should have resolved over several months. The cervical degeneration was longstanding. Dr. Feldman believed any residual pain was likely secondary to the underlying cervical spondylosis and degenerative conditions. Claimant had reduced his chronic pain medication, which was indicative that his pain was less than it was pre-accident. Dr. Feldman found Claimant could continue to work full duty. The ALJ notes Dr. Feldman did not make any recommendations concerning Claimant's treatment.

31. Dr. Feldman produced an addendum report, dated August 4, 2014. Dr. Feldman reviewed deposition transcript for Claimant in which he said his neck got fatigued after work when he did inspections. Claimant described using his eyes when he was driving to compensate because he couldn't turn his head. He said he was very fatigued a lot of times at night in his cervical area and shoulder. Dr. Feldman made no significant changes to her previous opinion.

32. Claimant filed a Petition to Reopen alleging a worsening of condition on November 8, 2014. Dr. Donner's 4/4/14 report was attached.

33. Claimant returned to Dr. Donner on February 3, 2015, but no change was reported in Claimant's condition. Claimant reported continued neck pain with radiation to his left arm and hand.[3] Claimant was noted to be smoking. Dr. Donner reiterated his surgical recommendation and described it as Claimant's best option.

34. On March 18, 2015, Dr. Donner reevaluated Claimant. He noted Claimant had primarily neck pain radiating into his trapezial and suprascapular muscles and shoulder. Claimant was smoking cigarettes at this time. He had normal use and function of his upper extremities without any sensory or motor deficits. He once again recommended that Claimant undergo surgery.

[2] This IME was not requested by either party to the worker's compensation case, but rather was requested in the third party case arising out of the 12/21/10 MVA.

[3] Claimant's Neck Oswestry Index was 36% at this appointment, indicating a slight lessening of symptoms. Claimant was smoking cigarettes at the time of this appointment.

35. Scott Primack, D.O. performed an IME on behalf of Respondents on March 30, 2015. Dr. Primack noted Claimant complained of “far more neck pain than arm pain”; that Claimant initially had facetogenic pain, but his current pain appeared to be more discogenic. Dr. Primack opined the two MRIs from 2012 and 2014 indicated that Claimant was suffering from ongoing degenerative changes, as opposed to a worsening of the injuries from the auto accident. He also noted Claimant’s cervical spondylosis could be aggravated by his ongoing driving duties. Dr. Primack believed Claimant was at MMI and he had a high level of functioning given the condition of his cervical spine. He noted Claimant’s condition would result in some level of ongoing discomfort, but the majority of his discomfort would be secondary to his underlying cervical spondylosis and not his work injury.

36. Dr. Primack issued an addendum report (after reviewing Dr. Feldman’s IME report), dated April 20, 2015, which noted Claimant had longstanding cervical degeneration. Dr. Primack cited Dr. Feldman’s conclusion the MVA caused a temporary aggravation of Claimant’s underlying spondylosis and any residual pain was like secondary to the underlying degenerative condition. Dr. Primack believed Dr. Feldman’s opinions supported his opinion.

37. On August 12, 2015, Brian Reiss, M.D. performed an IME on behalf of Respondents. Dr. Reiss noted Claimant had neck pain at a 4/10 level at the time he reached MMI and his only maintenance treatment was finishing his massage treatments. Dr. Reiss stated he would have recommended an isometric strengthening and conditioning program to continue on a long term basis to maintain Claimant’s condition. Dr. Reiss felt Claimant’s current symptoms were very similar to his symptoms at MMI, when Claimant stated his pain level was 5/10.

38. On examination, Dr. Reiss noted Claimant was not in any apparent distress. He had 0 degrees of neck extension, with full flexion, right rotation 70% of normal and left rotation 50% of normal. Dr. Reiss noted Claimant’s symptoms were primarily axial neck pain and opined that Claimant’s symptoms were a continuation from his original injury. Dr. Reiss did not recommend a 2 level disc replacement procedure for Claimant’s pain complaints. The ALJ credited the opinions of Dr. Reiss, particularly with regard to his conclusion that this procedure was not likely to help Claimant’s symptoms.

39. Dr. Primack testified at hearing. He was qualified as an expert in physical medicine and rehabilitation, a specialty in which he was board certified. He was Level II accredited pursuant to the W.C.R.P. He restated his belief that Claimant’s current pain was discogenic in nature, as opposed to facetogenic. He described the anatomical basis of facetogenic pain, noting the disc area was a three joint process including ligaments in the front of the vertebral bodies, the disc, ligaments and facet joints on the posterior side of the bodies. He described facetogenic pain as emanating from the facet joints, which is very common with whiplash disorders after vehicle accidents and opined this was the type of pain suffered in the immediate aftermath of the 12/21/10 MVA.

40. Dr. Primack stated Claimant's reports of pain have remained largely consistent, but there was a shift from facet-based neck pain to cervical spondylosis symptoms, which included more radicular findings. Dr. Primack further testified the MRI-s showed multiple changes over time not associated with the original work injury. Specifically, he noted with the 2014 MRI, facet changes had resolved and were listed as normal at C4-7. He felt there was a new disc herniation at C3-4 and there was also a new herniation at C4-5. The disc herniation at C5-6 previously identified was more lateral than previously identified as central and the disc heights had decreased which compressed the holes where the nerve roots exited, thereby increasing Claimant's stenosis and discogenic pain.

41. Finally, Dr. Primack reviewed the findings on the 2014 MRI, which showed edema at C6-7. This was either associated with an acute injury, endplate and compression fractures, or degenerative conditions. Dr. Primack testified that if the edema was a result of the underlying work injury, it would have developed within 4-5 months after the accident and have been visible in the 2012 MRI. He further testified the edema was more apparently related to an endplate fracture from ongoing degenerative conditions, as the progression of the underlying degenerative disease could further be seen from the new disc protrusions. The reasonable inference from Dr. Primack's testimony was that any treatment Claimant required was related to the degenerative process in his spine as opposed to the MVA.

42. Dr. Donner testified by way of evidentiary deposition. He was qualified as an expert in orthopedic surgery, a specialty in which he is board-certified. He also has a board certification in spine surgery, which has been the focus of his practice for twenty-five (25) years. He was involved in clinical trials related to artificial discs. Dr. Donner estimated he had been involved in close to one hundred cervical surgeries involving artificial discs. The ALJ credited Dr. Donner's extensive experience in performing surgeries of this type.

43. Dr. Donner stated when he first saw Claimant in May, 2011, he felt there was an inflamed facet joint at C5-6. Dr. Donner noted Claimant did not have any of the injections and when he returned in April, 2014, he was having symptoms of neural irritation and nerve root irritation. Dr. Donner opined 100% of Claimant's neck complaints were related to the 12/21/10 MVA. He believed the cause of Claimant's pain was discogenic and related to the facets, as well as nerve compression. Dr. Donner opined Claimant had chronic pain, which was unresponsive to conservative treatment and he was good candidate for cervical disc replacement. Dr. Donner noted with disc replacement there was a quicker recovery and less adjacent segment deterioration. In the absence of the artificial disc replacement surgery, the alternative was a two-level fusion procedure. Dr. Donner did not feel pain management was as good a treatment option as surgery.

44. Dr. Donner was asked about conservative treatment to maintain MMI, but returned to his opinion that surgery was more "realistic and cost effective" for Claimant.

Dr. Donner did not believe Claimant should have to continue to exhaust conservative treatment or try every possible modality. Dr. Donner did not have Dr. O'Connell's treatment records or the DIME report when Claimant returned in 2014, although he subsequently reviewed Dr. Stieg's report. Dr. Donner reviewed the Treatment Guidelines and acknowledged these endorse one level disc replacement. Dr. Donner did not address the question of whether the surgical criteria were met under the Treatment Guidelines. He testified the FDA cleared two-level disc replacement, which was also validated by the North American Spine Society's treatment guidelines. (The ALJ overrules any objection and denies the Motion to Strike Dr. Donner's testimony at page 42:12-25.) The ALJ notes Dr. Donner did not consider several conservative treatment options, which could potentially ameliorate Claimant's symptoms.

45. Claimant testified he believed his symptoms have worsened over time. However, his report of pain has stayed in the 3, 4, 5/10 range. The ALJ found Claimant's pain complaints, as reported to his physicians were not appreciably worse than when he was evaluated by Dr. O'Connell and Dr. Stieg. The ALJ concludes that Claimant has not exhausted conservative treatment options, which may relieve these symptoms.

46. The ALJ notes that although Claimant has been evaluated on several occasions since he reached MMI, he has not received active treatment since that time. The ALJ finds Claimant should be reevaluated regarding his need for additional treatment.

47. The ALJ concludes the proposed surgical procedure is not reasonable and necessary at this time.

48. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Worker's Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Reopening

Claimant sought to reopen his claim and alleged his condition worsened. Claimant pointed to his worsening symptoms (including radiculopathy) and Dr. Donner's records to support his Petition to Reopen. Respondents argued that any increase in Claimant's symptoms were related to degenerative changes in his cervical spine which have progressed, as opposed to his industrial injury. Based on the evidence before the ALJ, Claimant met his burden to reopen the claim.

Section 8-43-303(1), C.R.S., authorizes an ALJ to reopen any award on the grounds of, *inter alia*, change in condition. *Heinicke v. Indust. Claims Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008). The reopening authority under the provisions of Section 8-43-303, C.R.S. is permissive and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996).

Claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the Claimant's physical or mental condition that can be causally related to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

As a starting point, the record was unclear whether a Petition to Reopen was required in the case at bench. Respondents provided medical benefits pursuant to the GAL filed on 4/9/12. Respondents FAL specifically admitted for *Grover* medical benefits to maintain MMI. It was not clear and there was no evidence before the ALJ when the last medical benefit was due and payable under 8-43-303(2)(b), C.R.S.

Assuming, *arguendo* that it has been longer than two (2) years since Respondents provided the last medical benefit, Claimant has made the requisite showing of a worsening of condition. As found, Claimant's degenerative condition in his cervical spine was asymptomatic before 12/21/10 and then developed symptoms as a direct result of the MVA. Claimant adduced evidence that his level of functioning was worse and he had increased pain, as shown by the Oswestry cervical spine index survey he completed in 2014. The ALJ drew the reasonable inference that Claimant's increased pain in his cervical spine required additional treatment. Accordingly, the ALJ was persuaded that Claimant's condition has worsened and his claim should be reopened.

In addition, Claimant has not been in active treatment since March, 2013 and has not completed several modalities of conservative treatment. Such treatment could improve his symptoms. Based upon the totality of the evidence, the ALJ has determined Claimant requires additional treatment to maintain MMI. However, the additional treatment referenced above, can be provided as *Grover* medical benefits pursuant to the FAL.

Medical Benefits

Claimant seeks authorization of a two-level anterior cervical discetomy, nerve root decompression and placement of artificial discs. In the instant case, Claimant has the burden of proof to establish that the surgery proposed by Dr. Donner is reasonable and necessary, as well as related to his industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved the proposed treatment was reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant asserted the MVA of 12/21/10 caused his previously asymptomatic cervical spine to develop symptoms and require treatment. Claimant argued the degenerative condition of his cervical spine has worsened over time and his need for surgery is a direct consequence of the 12/21/10 MVA. Claimant proffered the opinions of Dr. Donner to support his contentions. The ALJ concluded that Claimant did not meet his burden of proof in this instance.

There were three bases for the ALJ's conclusion that the proposed surgery is not reasonable and potentially not related to the 12/21/10 MVA; first, the ALJ was not persuaded that less invasive treatment options had been exhausted. Some examples of these available treatment options were identified by expert witnesses. These included:

5/5/11: Dr. Donner recommended a facet joint injection.

3/19/13: Dr. O'Connell recommended completion of therapeutic massage. (Claimant did not complete the treatments.)

7/30/13: Dr. Stieg recommended maintenance treatment in the form of continued physiatric visits on a p.r.n. basis.

8/12/15: Dr. Reiss recommended an isometric strengthening and conditioning program to continue on a long term basis to maintain Claimant's condition.

Given the amount of time that has transpired since Claimant's last treatment (over 2 ½ years) and the fact that non-surgical modalities are available, the ALJ determined that surgery is not reasonable at the time.

Second, the ALJ was persuaded by Respondents' argument the criteria under the Medical Treatment Guidelines were not met and did not support the proposed surgery. Respondents also cited Drs. Reiss' and Primack's opinions, both of whom noted the proposed surgery was not warranted and might not relieve Claimant's symptoms.

The ALJ considered whether the Medical Treatment Guidelines-Cervical Spine Injury, Rule 17, Exhibit 8 ("Treatment Guidelines") applied to the requested cervical surgery. The Guidelines are contained in W.C.R.P. 17, 7 Code Colo. Regs. 1101-3, and provide that health care providers shall use the Guidelines adopted by the Division of Workers' Compensation ("Division").

The Division's Guidelines were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. 2008. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. 2008.

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria).

However, an ALJ is not required to award or deny medical benefits based on the Guidelines.[4] In fact, there is generally a lack of authority as to whether the Treatment Guidelines require an ALJ to award of deny benefits in certain situations. The decision to award or deny medical benefits is addressed to the sound discretion of the ALJ. *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014).

In this case, the ALJ considered Rule 17, Exhibit 8 Section 3, which governs Total Artificial Cervical Disc Replacement (TDR). It provides in pertinent part:

[4] See W.C.R.P. 17-5(C), which states: "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate.

> "Involves the insertion of a prosthetic device into the cervical intervertebral space with the goal of maintaining physiologic motion at the treated cervical segment. The use of artificial discs in motion-preserving technology is based on the surgeons preference and training" …[citing two reviews]…"There is strong evidence that in patients with single level radiculopathy or myelopathy cervical artificial disc produces 2 year success rates at least equal to those of anterior discetomy and fusion (ACDF) with allograft interbody fusion and an anterior plate…"

"**a. Description**

…

General selection criteria for cervical disc replacement includes symptomatic one level degenerative disc disease with radiculopathy."

"**c. Surgical Indications:** Patient meets one of the 2 sets of indications:

1) Symptomatic one-level degenerative disc disease (on MRI) with established radiculopathy and not improved after 6 weeks of therapy; **and**

Radiculopathy or myelopathy documented by EMG or MRI with correlated objective findings or positive at one level; **or**

2) **All of the following:**

- Symptoms unrelieved after six months of active non-surgical treatment and **one** painful disc established with discogram; **and**
- All pain generators are adequately defined and treated; and
- All physical medicine and manual interventions **are** completed; and
- Spine pathology limited to one level; **and**
- Psychosocial evaluation with confounding issues addressed.

The proposed surgical procedure involves disc replacement on two levels, which is beyond what is recommended in the Treatment Guidelines. In addition, there were significant gaps in Claimant's treatment and Claimant did not complete 6 weeks of therapy. (There was an indication in the record that because of his work schedule, Claimant was not able to complete the treatment which was previously recommended by his doctors.) Claimant should complete a full course of conservative treatment, include physical therapy and possibly the treatment recommended by Dr. Reiss before surgery is performed. Also, there were no findings of myelopathy, so the surgical indications under section 1) have not been met.

Furthermore, not all of the indications in Section 2) were met, including 6 months of active treatment, completion of all physical medicine and manual interventions and spine pathology limited to one level. Accordingly, Claimant did not establish disc replacement surgery was indicated under the Treatment Guidelines.

In addition, this procedure has contraindications, as noted *infra.*

"**d. Contraindications**:

…

- Symptomatic facet joint arthrosis-If imaging findings and physical finds of pain on extension and lateral bending are present, exploration of facetogenic pain should be completed prior to disc replacement for axial pain.

…

- Multiple-level degenerative disc disease.
- Spondylolisthesis greater than 3mm."

In this case, at least one physician (Dr. Primack) was of the opinion that Claimant's symptoms were originally facetogenic in nature. Dr. Donner opined that Claimant's pain was discogenic, related to the facts and nerve compression. As found, the source of Claimant's pain should be clarified. Also, Claimant had pain on extension and lateral bending. There is also a question whether Claimant has neurological compromise and symptoms that warrant surgery, as noted by Dr. Feldman. Further exploration of these issues is warranted before an invasive surgical procedure is performed. Moreover, Claimant has degenerative changes in his cervical spine, including spinal stenosis on multiple levels in the cervical spine, as shown on MRI. In addition, the 2014 MRI revealed at least one disc herniation which was greater than 3mm. Surgery is contraindicated under these circumstances.

The ALJ also notes that the alternate procedure (ACDF) is contraindicated at this time, since Claimant was smoking as of the last evaluations with Dr. Donner. In addition, since a fusion would be at two levels the risk of adjacent segment deterioration is a significant risk.

Thus, some of the contraindications indentified by the Treatment Guidelines militate against the disc replacement surgery, as well as the ACDF procedure. In short, the ALJ considered the Treatment Guidelines, which raise a question whether proposed surgery is reasonable and necessary.

Third and finally, the ALJ found that there was a question whether the proposed medical treatment would address the symptoms from the spondylitic changes in Claimant's cervical spine and reduce his symptoms. Dr. Castor questioned whether the proposed surgery would ameliorate Claimant's symptoms. Dr. Reiss' opinion was also persuasive on this subject. Dr. Donner's testimony did not refute this or establish that the benefits were outweighed by some of the contraindications of surgery. The ALJ was not persuaded that is reasonable and necessary at this time. For these reasons, Claimant failed to prove that the surgery proposed by Dr. Donner was reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant’s Petition to Reopen is GRANTED. Respondents shall provide *Grover* medical benefits to Claimant.

2. Claimant’s request for authorization of a two-level cervical discectomy, nerve root decompression and disc replacement is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 12, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Respondents have produced clear and convincing evidence to overcome Dr. Tyler's Division IME opinion that Claimant reached MMI on April 20, 2015.

FINDINGS OF FACT

Based upon the evidence presented, including Dr. Tyler's deposition testimony, the ALJ enters the following findings of fact:

1. Claimant sustained an admitted work injury to his bilateral upper extremities on February 29, 2012. (Exhibit (Ex.) A at 1.)

2. On August 11, 2014, claimant was placed at maximum medical improvement by Dr. Miguel Castrejon with a scheduled 10% impairment to the left upper extremity and 7% schedule impairment to the right upper extremity. (Ex. A at 1; Ex. G at 13, 15-16.)

3. On October 21, 2014, Respondents filed a Final Admission of Liability (FAL). The FAL admitted claimant reached MMI on August 11, 2014. The FAL further admitted for permanent partial disability (PPD) benefits based on 10% scheduled left upper extremity and 7% scheduled right upper extremity. (Ex. A at 1.)

4. On November 12, 2014, claimant objected to the FAL and filed an Application for a Division Independent Medical Examination (DIME). (Ex. B and C.)

5. A DIME was held with John Tyler, M.D. on January 13, 2015. Dr. Tyler opined that claimant had not yet reached MMI. Dr. Tyler wrote that claimant should be evaluated by an orthopedic hands surgeon to determine whether there are any surgical procedures that could improve claimant's bilateral upper extremity functioning. (Ex. H at 26-27.) After this evaluation, and if no surgical treatment is warranted, Dr. Tyler's report provides, "*then on that date and at that time, I feel the patient will have reached a point of maximum medical improvement*." (Emphasis added.) (Ex. H at 27.)

6. On April 20, 2015, claimant was evaluated by Dr. Timothy Hart of Premier Orthopedics. Dr. Hart wrote, "I do not feel that I have any type of surgery that can improve Mr. Roper's current situation…. I do not feel that I have a surgery that can further benefit Mr. Roper." (Ex. I at 28.) Careful review of Dr. Hart's report suggests that he had seen Claimant previously, i.e. before the referral by Dr. Tyler and that his opinion regarding surgery had not changed and further, that Dr. Hart had "exhausted [his] surgical skills" as of the April 20, 2015 visit. Consequently, Dr. Hart elected to

discharge Claimant from his care "again".

7. On August 7, 2015, Dr. Tyler completed a follow-up DIME report. Dr. Tyler reviewed Dr. Hart's April 20, 2015 report, and determined that claimant reached maximum medical improvement on April 20, 2015. (Ex. J at 30.)

8. On October 21, 2015, an Order was issued by Prehearing Administrative Law Judge (PALJ) Thomas DeMarino, permitting the parties to schedule and conduct a deposition of Dr. Tyler. (Ex. F at 11.)

9. Dr. Tyler testified by deposition on December 3, 2015. During direct examination, Dr. Tyler agreed with Respondents' definition of MMI, chiefly that MMI occurs at "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further medical treatment is reasonably expected to improve the condition." *Id.* at 36, depo. page 7, lines 18-23.

10. Respondents' counsel asked Dr. Tyler to elaborate as to why he felt Claimant was not at MMI on January 13, 2015, the date of the original DIME. Dr. Tyler stated, "I felt that he required further assessment by a surgeon to see if there was an explanation if this was a pathology that could be assisted by further surgery. And that's why I said he wasn't at MMI at that date." *Id* at 38, depo. page 16, lines 12-16.

11. Dr. Tyler testified that his second DIME report had an incorrect date of MMI. Dr. Tyler testified that his second DIME incorrectly stated that Claimant reached MMI on April 20, 2015. Dr. Tyler further testified that Claimant reached MMI on August 11, 2014, the date that Dr. Castrejon placed claimant at MMI. (Ex. K at 39, Tyler Dep.18:2 - 18:10.) When asked to explain the comments in his original report that he would place Claimant at MMI on the date and time that a hand surgeon stated Claimant's work injury could not be repaired surgically, i.e., April 20, 2015, Dr. Tyler testified:

> ". . . that is poor writing on my part and I would like to state at this time that it should have stated instead of 'on that date and at that time,' I should have stated that the date of MMI would return to the previous date of MMI for the same reasons that we just previously talked about, that the patient had reached a point of MMI at the time that Dr. Castrejon stated he had reached MMI, because there was no change in his treatment based upon further review of his status by someone with greater expertise in the area . . . and that was Dr. Hart".

12. Dr. Tyler explained that he did not accept that portion of Dr. Hart's report that a third surgical opinion with Dr. Zinis was necessary before placing Claimant at MMI because, in trusted Dr. Hart's opinion as a physician known to him, that a third opinion was not what he (Dr. Tyler) had requested and that despite a "curbside" evaluation, there was no report to backup Claimant's suggestion that Dr. Zinis had opined that Claimant was an appropriate surgical candidate.

13. Based upon the evidence presented, the ALJ finds that a conflict exists between the content of Dr. Tyler's DIME reports and his testimony concerning MMI. While his report indicates that he would place Claimant at MMI on the date and time that a hand surgeon stated Claimant's work injury could not be repaired surgically, his testimony clearly explains that, based upon Claimant's course of treatment and progress, MMI would be considered to be August 11, 2014 given the definition of MMI as provided and accepted at his deposition. After carefully considering Dr. Tyler's DIME report in its totality, the ALJ credits his testimony to find that Dr. Tyler erred in preparing his second Division IME report on August 7, 2015, when he wrote that claimant reached MMI on April 20, 2015. The ALJ finds that further, that Dr. Tyler credibly acknowledged his error and testified persuasively as to his reasoning behind his decision to change Claimant's MMI date to August 11, 2014.

14. Respondents have demonstrated, by clear and convincing evidence, that Dr. Tyler's notation that Claimant reached MMI on April 20, 2015 was highly probably incorrect. Accordingly, Respondents have overcome Dr. Tyler's April 20, 2015 MMI determination. Based upon the evidence presented, the ALJ finds that Claimant likely reached MMI on August 11, 2014.

CONCLUSIONS OF LAW

Based upon the forgoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Dr. Tyler clearly admits that he erred in opining that Claimant

Overcoming the DIME

Generally

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by “clear and convincing evidence.” Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant’s medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be “unmistakable and free from serious or substantial doubt.” *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

Overcoming the DIME Regarding MMI

D. “Maximum medical improvement” is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

E. In this case, the opinions of Dr. Tyler concerning MMI, as expressed in his DIME report and subsequently through his testimony are inconsistent. Consequently, a threshold determination of what constituted the actual opinion of Dr. Tyler regarding MMI must be resolved before the question of whether Respondents overcame his opinions can be addressed. If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5* P.3d 385 (Colo. App. 2000); *Stephens* v. *North and Air Package Express Services,* W. C, No. 4-492-570 (February 16, 2005), *aff'd, Stephens* v. *Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006) (not selected for publication). In this case, a conflict exists between Dr. Tyler's DIME report and his oral testimony. Nonetheless, the ALJ concludes after careful review of the DIME reports that Dr. Tyler determined, as a matter of fact, that Claimant was at MMI as of April 20, 2015 following Dr. Hart's surgical evaluation. Accordingly, Respondents, who contested that opinion, carried the burden to overcome Dr. Tyler's original MMI determination by clear and convincing evidence.

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). In concluding that Respondents have carried their burden to establish that Dr. Tyler's opinion regarding MMI, as expressed in his August 7, 2015 DIME report was highly probably incorrect, the ALJ finds the opinion expressed in *Andrade* v. *Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005) instructive. In *Andrade* the Colorado Court of Appeals held that a DIME physician's finding of MMI and permanent impairment consists not only of the initial report, but also any subsequent opinion given by the physician. Thus the court held that an ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video. Similarly, in *Jarosinski* v. *Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002) it was proper for the ALJ to consider a DIME physician's retraction of her original permanent impairment rating after viewing videotapes showing the claimant performing activities inconsistent with the symptoms and disabilities she had reported. *See also*, *Williams v. Canon City & Royal Gorge Railroad*, W.C. 4-775-399 (ICAO May 12, 2010).

G. Claimant argues that the above referenced cases are distinguishable from the instant case because Dr. Tyler's change in opinion was not prompted by new evidence. The ALJ is not persuaded. Following the logic of the above cited case law, the ALJ finds that the record clearly establishes that Dr. Tyler did not believe Claimant to be at MMI at the time of the original DIME examination because additional opinions regarding his surgical candidacy were necessary. To that extent that the referral to Dr. Hart generated an updated report regarding the stability of Claimant's condition, the ALJ finds the report constituted "new" medical evidence which Dr. Tyler was free to consider when he reached his ultimate opinion concerning MMI. Once this "new" medical opinion was received by Dr. Tyler it became clear to him that Claimant's condition was stable and no further treatment was reasonably expected to improve the condition as of the date Dr. Castrejon placed Claimant at MMI. Consequently, Dr. Tyler changed his opinion regarding MMI from April 20, 2015 to August 11, 2014. As found, Dr. Tyler recognized and credibly acknowledged his error in placing Claimant at MMI on April 20, 2015. His testimony regarding the basis for his change of opinion is persuasive and supported by the totality of the record evidence. Accordingly, the ALJ is persuaded that

Dr. Tyler's original opinion that Claimant reached MMI on April 20, 2015 was highly probably incorrect and has been overcome.

ORDER

It is therefore ordered that:

1. Respondents' request to set aside Dr. Tyler's opinion that Claimant reached MMI on April 20, 2015, as expressed in his August 7, 2015 DIME report is GRANTED. Claimant reached MMI on August 11, 2014.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 22, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the 24-month Division Independent Medical Examination (DIME) performed by Brian Beatty, D.O. on October 20, 2014 should be stricken based on a failure to follow the procedure outlined in §8-42-107(8)(b)(II)(B), C.R.S.

2. Whether Respondents have established by a preponderance of the evidence that they are entitled to recover an overpayment in the amount of $97,641.12.

FINDINGS OF FACT

1. On May 9, 2012 Claimant suffered admitted industrial injuries during the course and scope of her employment with Employer.

2. On August 14, 2012 Respondents filed a General Admission of Liability (GAL). The GAL specified that Claimant was entitled to receive Temporary Total Disability (TTD) benefits beginning on July 16, 2012 in the amount of $732.57 per week.

3. On July 24, 2014 Respondents filed a Notice and Proposal to Select a Division Independent Medical Examiner. However, on July 28, 2014 Respondents filed a Notice of Failed IME Negotiation.

4. On July 28, 2014 Respondents filed an Application for a 24-Month Division Independent Medical Examinaion (DIME). The Application specified Claimant's left shoulder as the body part to be addressed. Respondents listed Maximum Medical Improvement (MMI) and impairment rating as issues for the DIME.

5. On October 20, 2014 Claimant underwent a 24-month DIME with Brian Beatty, D.O. Dr. Beatty determined that Claimant had reached MMI on June 15, 2012 for her left shoulder and cervical spine injuries. He assigned a 16% whole person impairment rating.

6. Dr. Beatty subsequently reviewed extensive video surveillance and medical records. On January 27, 2015 he issued a supplemental report concluding that Claimant reached MMI on June 15, 2012 with a 0% whole person impairment rating.

7. On February 13, 2015 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Beatty's MMI date of June 15, 2012 and 0% whole person impairment rating. Because the date of MMI preceded the first TTD payment, Respondents asserted an overpayment of all TTD benefits paid from July 16, 2012 and continuing for a total of $97,641.12.

8. On March 11, 2015 Claimant filed an Application for Hearing and Notice to Set. Claimant specifically noted in her Application that she was seeking to strike the DIME because of "failure to follow procedures set forth in C.R.S. §8-42-107(8)(b)(II)(A-D)."

9. The 24-month DIME performed by Dr. Beatty on October 20, 2014 is stricken based on a failure to follow the procedure outlined in §8-42-107(8)(b)(II)(B), C.R.S. Claimant acknowledges that Respondents' overpayment calculation is correct, but asserts that the 24-month DIME was invalid. She specifically contends that Respondents violated §8-42-107(8)(b)(II)(B), C.R.S. by failing to request that an Authorized Treating Physician (ATP) address MMI in writing prior to the 24-month DIME. Claimant maintains that, if the 24-month DIME is invalid, there has been no MMI determination and she is not responsible for the $97,641.12 overpayment.

10. A 24-Month DIME is statutorily authorized in §8-42-107(8)(b)(II)(A)-(D), C.R.S. The plain language of §8-42-107(8)(b)(2)(B), C.R.S. requires the moving party to inquire in writing from an ATP whether a claimant has reached MMI. Inquiring of an ATP in writing is a condition precedent to obtaining a 24-Month DIME. However, the record is devoid of evidence that an ATP addressed in writing whether Claimant had reached MMI prior to the 24-month DIME. The 24-month DIME by Dr. Beatty conducted on October 20, 2014 was thus invalid. Moreover, Dr. Beatty lacked authority pursuant to statute to address Claimant's impairment rating. Finally, Dr. Beatty's determination was not final because an ATP was required to assign a permanent impairment rating.

11. Claimant did not waive her right to challenge the propriety of the 24-month DIME process because she filed an Application for Hearing and Notice to Set on March 11, 2015. Claimant specifically noted in her Application that she was seeking to strike the DIME because of "failure to follow procedures set forth in C.R.S. §8-42-107(8)(b)(II)(A-D)." She thus properly challenged the validity of the 24-month DIME performed by Dr. Beatty.

12. Because the 24-month DIME was invalid, there have been no MMI or impairment determinations for Claimant's May 9, 2012 industrial injuries. Respondents February 13, 2015 FAL was improperly filed. It is thus premature for Respondents to recover an overpayment. Accordingly, Respondents' request to recover an overpayment in the amount of $97,641.12 is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician’s opinion, the ALJ should consider all of the DIME physician’s written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician’s determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by “clear and convincing evidence.” §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

6. In contrast, §8-42-107(8)(b)(II), C.R.S. outlines the procedure for selecting an independent medical examiner if an ATP has not determined whether an employee has reached MMI. The statute provides that at least 24 months must have passed since the date of injury before a party may seek an independent medical examination. §8-42-107(8)(b)(II)(A), C.R.S. The statute also requires a party “to request in writing that an ATP determine whether the employee has reached MMI. §8-42-107(8)(b)(II)(B), C.R.S.

7. The statute authorizing the 24-month DIME does not refer to permanent impairment but only contemplates MMI. §8-42-107(8)(b)(II), C.R.S. The 24-month DIME physician is thus not statutorily authorized to address impairment. *Meza v. Industrial Claims Appeals Office,* 303 P.3d 158, 162 (Colo. App. 2013). The opinion of a 24-month DIME physician carries presumptive, binding weight only concerning MMI. *Meza,* 303 P.3d at 162. Because a 24-month DIME physician's opinion carries no presumptive weight concerning permanent impairment, his impairment opinion is "advisory only, and neither party [is] required to object to or seek a hearing on causation issues related to impairment within the time limits specified" in §§8-42-107.2, C.R.S. & 8-43-203(2)(b)(II)(A), C.R.S.; *Meza,* 303 P.3d at 163.

8. As found, the 24-month DIME performed by Dr. Beatty on October 20, 2014 is stricken based on a failure to follow the procedure outlined in §8-42-107(8)(b)(II)(B), C.R.S. Claimant acknowledges that Respondents' overpayment calculation is correct, but asserts that the 24-month DIME was invalid. She specifically contends that Respondents violated §8-42-107(8)(b)(II)(B), C.R.S. by failing to request that an Authorized Treating Physician (ATP) address MMI in writing prior to the 24-month DIME. Claimant maintains that, if the 24-month DIME is invalid, there has been no MMI determination and she is not responsible for the $97,641.12 overpayment.

9. As found, a 24-Month DIME is statutorily authorized in §8-42-107(8)(b)(II)(A)-(D), C.R.S. The plain language of §8-42-107(8)(b)(2)(B), C.R.S. requires the moving party to inquire in writing from an ATP whether a claimant has reached MMI. Inquiring of an ATP in writing is a condition precedent to obtaining a 24-Month DIME. However, the record is devoid of evidence that an ATP addressed in writing whether Claimant had reached MMI prior to the 24-month DIME. The 24-month DIME by Dr. Beatty conducted on October 20, 2014 was thus invalid. Moreover, Dr. Beatty lacked authority pursuant to statute to address Claimant's impairment rating. Finally, Dr. Beatty's determination was not final because an ATP was required to assign a permanent impairment rating.

10. As found, Claimant did not waive her right to challenge the propriety of the 24-month DIME process because she filed an Application for Hearing and Notice to Set on March 11, 2015. Claimant specifically noted in her Application that she was seeking to strike the DIME because of "failure to follow procedures set forth in C.R.S. §8-42-107(8)(b)(II)(A-D)." She thus properly challenged the validity of the 24-month DIME performed by Dr. Beatty.

11. As found, because the 24-month DIME was invalid, there have been no MMI or impairment determinations for Claimant's May 9, 2012 industrial injuries. Respondents February 13, 2015 FAL was improperly filed. It is thus premature for Respondents to recover an overpayment. Accordingly, Respondents' request to recover an overpayment in the amount of $97,641.12 is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. The 24-month DIME performed by Dr. Beatty on October 20, 2014 is stricken based on a failure to follow the procedure outlined in §8-42-107(8)(b)(II)(B), C.R.S.

2. Respondents' request to recover an overpayment in the amount of $97,641.12 is denied and dismissed.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: February 11, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant is entitled to penalties for late temporary total disability payments between September 1, 2015 and November 6, 2015.

STIPULATION

At the commencement of hearing, the parties stipulated that allegedly delayed TTD payments were a total of 25 days late. Specifically, the parties agreed that the September 25, 2015 check was 10 days late and the November 6, 2015 check was 15 days late. The ALJ accepts and approves the parties' stipulation.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant suffered an admitted injury on December 1, 2011. Claimant subsequently developed chronic regional pain syndrome (CRPS) as a consequence of surgery she had in connection with her industrial injury. Following her diagnosis of CRPS, Respondents re-opened the claim by filing a General Admission of Liability (GAL) on May 21, 2015, which re-instated temporary total disability (TTD) benefits in the amount of $419.74 per week or $59.96 per day retroactively to February 13, 2015. Temporary total disability checks were issued every two weeks in the amount of $839.48.

2. Although Claimant did not always receive her checks in the mail every fourteen days,[1] Respondents issued temporary total disability checks consistent with the May 21, 2015 GAL in a timely fashion through September 1, 2015.

3. Claimant testified that beginning in September 2015, her TTD check did not arrive on time. Specifically, Claimant testified that she recalled the check being a week late.

4. The indemnity payment history submitted into evidence establishes the following payment issue dates for Claimant's biweekly TTD checks: September 1, 2015; September 25, 2015; October 8, 2015; and November 6, 2015.

[1] Claimant testified that at times her checks were 1-2 days late and that on these occasions she would let the matter "slide."

5. On September 22, 2015, counsel for Claimant notified counsel for Respondents that Claimant had not yet received her disability check. (Claimant's Ex.9). Based upon the payment schedule, this check should have been issued on September 15, 2015. On September 25, 2015, Counsel for Claimant followed-up with Respondents' counsel on regarding the status of Claimant's September TTD check. In an e-mail message to Respondents' counsel, Claimant's counsel wrote: "No response on her late TTD check—what have you found out please?"

6. According to Respondents' payment records Claimant's first September TTD check was issued September 25, 2015. (Respondents' Exhibit A, p. 4). This check was therefore 10 days late.

7. Respondents issued Claimant's next payment on October 8, 2015. Although this check was mailed fourteen days after the September 25, 2015 payment, the ALJ finds this check was also not timely, as it carried on the late payment scheduled created by Respondents late payment of Claimant's first September TTD check, which was delayed 10 days as found above. On October 2, 2015, Claimant's counsel wrote to Respondents counsel regarding payment of Claimant's TTD check which was due October 1, 2015 had Respondents actually paid the September TTD check timely. In her e-mail, Claimant's counsel wrote: "Michelle, Marla has not received her last TTD check, period ending 10/1, nor her last mileage check. This is happening too often--please get after the adjuster."

8. On October 6, 2015 counsel for Respondents responded as follows: "I have checked with the adjuster. She has a reserve issue with respect to the TTD checks and is working to get this matter resolved as quickly as possible." Based upon this exchange, the ALJ finds that Respondents were aware that Claimant's TTD checks were not being issued in a timely manner.

9. Despite having knowledge that Claimant's TTD checks were not being issued timely and Claimant's repeated requests to address the problem with the adjuster, Claimant's next TTD payment was not issued until November 6, 2015 or 25 days after the October 8, 2015 check. However, the November 6, 2015 check paid Claimant for several weeks and caught up on all back TTD payments.

10. Claimant testified that as a result of the late receipt of her TTD payments, she had to "pull" money from her savings account in order to avoid falling behind on household bills. Claimant testified that Respondents failure to timely issue her TTD checks created additional stress above and beyond that caused by the nature of her medical condition because she relies on her TTD checks to meet monthly expenses. According to Claimant, she is part of a two check household raising a dependent daughter. Based upon the evidence presented, the ALJ credits Claimant's testimony to find that Respondents failure to timely issue Claimant's TTD checks eventually created an actual financial hardship for Claimant, which she tried, without success, to prevent by having her representative e-mail the adjuster with requests to rectify the situation.

11. Sara Oberle, testified at the hearing in lieu of the adjuster, Beverly Copsey. The

ALJ summarizes the pertinent testimony of Ms. Oberle as follows:

- that Ms. Copsey had been on "severe" lost time claims adjusting since being promoted in April of 2015, although she had been an adjuster for Zurich American for eight years, where she adjusted both medical and lost time claims;

- that the adjusters receive training in the laws of the states for which they adjust claims, which in Ms. Copsey's case was two, including Colorado;

- that the claimant's checks fell off of the carrier's "repetitive pay" (rep pay) system;

- that the reserves had run out and had to be increased;

- that they had been set by the prior adjuster;

- that this file required a consultation with the insured before the insurance company could increase reserves, which sometimes took a couple of weeks to accomplish, when it was required;

- that Ms. Copsey did not update the "rep pay" correctly. In explaining Ms. Copsey's actions in this regard, Ms. Oberle explained that Ms. Copsey had recently been promoted to her current position handling claims involving long term "rep pay" and that she had provided Ms. Copsey with additional training in setting up and updating "rep pay" on her files after the errors that occurred in this claim.

- that she did not know of any inquiries about the late checks, despite the inquiries from Claimant's counsel concerning the same;

- that the TTD checks in question could be written manually in such a situation, even before the consult with the insured was completed, but that this was not done;

- that the late check(s) could have been sent by overnight delivery with a manager's approval, but was not;

- that she did not know why interest was not paid;

- that she does not know if emails sent to the prior adjuster about reserves running out were forwarded to Ms. Copsey;

- that Ms. Copsey erred in not getting the checks out on time;

- that Ms. Copsey is familiar with Colorado law requiring payment of temporary total disability every fourteen days;

- that she understood that claimants frequently rely on their indemnity checks for food and other necessities of life; and,

- that it is the adjuster's responsibility to check the status of the reserves and the rep pay.

12. Based upon the evidence presented, the ALJ finds Respondents actions in failing to issue Claimant's TTD checks in conformity with C.R.S. §8-42-105(2)(a) and WCRP 5-6(B) unreasonable. In considering the totality of the evidence presented as to why Claimant's TTD checks were not issued timely, the lack of a reasonable explanation for the insurer's conduct is overwhelming. The sum total of the evidence presented, persuades the ALJ that Ms. Oberle's testimony provided nothing but post violation excuses for the carrier's failure to issue Claimant's TTD checks timely, namely the Insurer's internal procedural issues, i.e. problems with Claimant falling off of the "rep pay" system, improper reserving practice, including the requirement to complete a consultation with the insured and the adjusters alleged lack of knowledge in adjusting the type of claim represented in this matter. The ALJ finds the actions of the Insurer, after receiving notice of the second late check, unreasonable and particularly egregious in light of Ms. Oberle's testimony that multiple checks could have been issued manually, despite Claimant falling off of "rep pay" and Claimant's repeated efforts to have the situation concerning the timely issuance of her TTD checks rectified. Despite assurances by Respondents on October 6, 2015 that the adjuster was working to resolve the problem "as quickly as possible", Claimant's check for the period extending from October 2 to October 29 was not issued until November 6, 2015. The ALJ also finds, as an aggravating factor, the fact that Insurer did nothing, at any time after the concern was brought the adjuster's attention to ameliorate the situation, such a mailing the checks overnight and/or including interest on the amount of benefits not paid when due.

13. Based upon the evidence presented, the ALJ finds that Claimant, as the moving party, has proven that despite the clear mandate of §8-42-105(2)(a), C.R.S. and WCRP 5-6(B), that Insurer failed, without reasonable explanation, to issue her TTD checks in a timely fashion on two occasions. Moreover, the Insurer failed to take an action that a reasonable Insurer would have taken after knowledge of the violation in an effort to mitigate its impact on Claimant. Accordingly, Claimant has proven that Respondent-Insurer is liable for a penalty, pursuant to §8-43-304(1), C.R.S. and §8-43-305, C.R.S. for failing to issue TTD checks on a timely basis as mandated by §8-42-105(2)(a), C.R.S. and WCRP 5-6(B).

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. *C.R.S. § 8-40-102(1)*; *see Specialty Rests. Corp. v. Nelson,* 231 P.3d 393, 398 (Colo.2010).

B. When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. *Section 8-43-210, C.R.S.* As found, Claimant is a credible witness and her testimony is both persuasive and consistent with the evidentiary record submitted in this case.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See Davison v. Industrial Claim Appeals Office, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385(Colo. App. 2000).

Penalties

D. In this case, Claimant seeks a penalty pursuant to section 8-43-304(1), C.R.S. due to respondents' alleged violations of section 8-42-105(2)(a), C.R.S. and WCRP 5-6(B). Section 8-43-304(1), C.R.S. provides in pertinent part for penalties of up to $1,000.00 per day if respondent "violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel . . ."

E. Moreover, § 8-43-305 provides that "[e]very day during which any . . . insurer . . . fails to perform any duty imposed by articles 40-47 of this title shall constitute a separate and distinct violation thereof." The purpose of section 8-43-305 is to address "ongoing conduct." *Spracklin v. Indus. Claim Appeals Office,* 66 P.3d 176, 178 (Colo.App.2002). When conduct is ongoing, imposition of a daily penalty is required. *Pueblo Sch. Dist. No. 70 v. Toth,* 924 P.2d 1094, 1097, 1100 (Colo.App.1996) (delay in paying bill for 645 days resulted in "645 separate offenses," and pursuant to predecessor statute to section 8-43-305, imposition of the penalty at a "daily rate" is "mandated").

F. The imposition of penalties under §8-43-304(1) requires a two-step analysis. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). First, it must be determined whether a party has violated the Act in some manner, or failed to carry out a lawfully enjoined action, or violated an order. Both §8-42-105(a), C.R.S. and WCRP 5-

6 require that indemnity benefits be paid at least once every fourteen (14) days. Respondents' own indemnity payment records demonstrate that at least two TTD checks issued between September 1, 2015 and November 6, 2015 were issued more than 14 days apart. Consequently, the ALJ concludes that Insurer violated §8-42-105(2)(a), C.R.S. and WCRP 5-6(B) in this case. Accordingly, analysis of the penalty allegations under §8-43-304(1) and §8-43-305 is appropriate in this case.

G. Nonetheless, penalties may be imposed, under the second prong of the two step test, only if respondent's actions were not reasonable under an objective standard. *Pueblo Sch. Dist. No. 70 v. Toth*, *supra*. Contrary to Respondents assertion, the Claimant need not demonstrate that the reasonableness of the violator's actions were predicated on a rational argument based on law or fact. *See Pioneers Hospital of Rio Blanco County v. ICAO,* 114 P.3d 97 (Colo. App. 2005)(ALJ not required to determine whether the hospital's conduct was "based on a rational argument anchored in law or fact.", but rather, to decide only whether the conduct was merely unreasonable). Furthermore, the standard does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676, (Colo. App. 1995).

H. In concluding that Respondent-Insurer is liable for penalties, the ALJ finds the case of *Higuera v. Industrial Claim Appeals Office*, W.C. 4-683-101(September 22, 2009) instructive. In Higuera, the ALJ imposed a penalty of $1,125 for violation of § 8-42-105(2)(a) C.R.S. 2009 and Workers' Compensation Rule of Procedure Rule 5-6(B), 7 Code. Colo. Reg. 1101-3 (2009). On appeal, respondents argued that the TTD checks were, in part late, due to internal procedural issues, including a "computer error" which resulted in indemnity checks being sent to a wrong address. In affirming the imposition of penalties, the Industrial Claims Appeals Panel (ICAP) concluded that the evidentiary record supported that the "TTD payment was issued late because it fell off the insurer repetitive pay system for some reason"; that the "claims adjuster testified that although she had tried to figure out how that happened she had not been able to do so"; that the "claims adjuster also testified that a second TTD check was late because the prior payment had fallen off"; and that the claims adjuster "agreed that the insurer had the responsibility to pay TTD benefits every two weeks."

I. The similarities between the facts presented in *Higuera* and the instant case are inescapable. Here, Respondent-Insurer asserts that the checks were not issued timely because a mistake had occurred regarding claim reserves, which subsequently ran out, resulting in the checks falling off of the "rep-pay" system. A "mistake" (computer or otherwise) is not a reasonable action by the insurer. *Halbritter v. Colorado Professional Counseling Services, P.C.*, W.C. No. 4-160-869 (Industrial Claim Appeals Office, August 3, 1995). While a "mistake" may have occurred in this case, the evidentiary record supports a conclusion that, despite knowledge of the reserve and computer problem, the Insurer did not issue checks prusuant to statute and rule on two separate occasions, although they knew that TTD was mandated to be paid every 14 days and had the ability to override the system and pay the benefits timely. The ALJ is also not persuaded by the Insurer's suggestion that their decision not to pay the due and owing TTD was reasonable because a consultation with the insured was necessary before a check could be issued. The ALJ concludes the assertion unpursuasive as it is severely undermined by the fact that Insured was aware of the need to consult with the insured during the entire pendency of the case and was aware of the problem concerning reserves as early as October 6, 2015; yet they did not issue a check until November 6, 2015. Consequently, Claimant has proven that Insurer failed, without reasonable explanation, to issue her TTD checks in a timely fashion on two occasions making the imposition of penalties appropriate in this case.

J. Although the amount of penalties is within the sound discretion of the Administrative Law Judge, once an unreasonable violation is proven, a penalty of at least one cent is mandatory. *Marple v. Saint Joseph Hospital*, W.C. No. 3-966-344 (Industrial Claim Appeals Office, September 15, 1995)(decided under predecessor section 8-53-116). Furthermore, any penalty to be imposed should consider the degree of culpability on the part of the adjuster and the relationship between the penalty to any harm suffered by Claimant. *McOmber v. Associated Business Products*, W.C. No. 4-257-682 (October 25, 2004). As found, Insured's unreasonable delay in issuing Claimant's TTD checks resulted in an actual financial hardship for her. Respondents' suggestion that the late payments constituted "more of a financial inconvenience" because the late payments did not result in Claimant actually missing any bill payments is unconvincing. In this case, Claimant's testimony that and she and her husband combine their resources to meet their financial obligations is credible and persuasive. Here, the evidence presented supports a conclusion that but for the existence of a savings account, Respondent-Insurer's failure to timely pay Claimant TTD, more probably than not, would have resulted in Claimant missing a bill payment or payments. The ALJ concludes the fact that Claimant had to access her savings account under the circumstances she was facing constitutes a financial hardship in and of itself. Due to the Insured's unreasonable delay, they virtually guaranteed that Claimant would have to access her saving account to avoid further financial complications. The ALJ infers and concludes, from the evidence presented, that having to access her savings account caused the additional stress Claimant alluded to during her testimony. The fact that Claimant had a savings account to access does not act as a mitigating factor for Respondent-Insurer or shield it from exposure to penalties.

K. Nevertheless, the violations that occurred in this case resulted from a specific set of circumstances and the ALJ is convinced that corrective actions have already been taken by the Insurer to prevent a repeat of the same violations which occurred in this case. Consequently, the ALJ is not convinced that a penalty of $100.00/day is necessary to "deter" future conduct as suggested by Claimant. However, careful deliberation regarding the nature of the penalty, the Insured's actions/conduct and the relationship between the penalty to the harm suffered by Claimant also convinces the ALJ that imposition of a nominal penalty is insufficient in this case. Based on the record evidence presented, the ALJ concludes that the carrier's conduct and their explanations and delays in addressing the problem regarding timely payment of Claimant's fail to pass scrutiny, were in fact unreasonable and should be penalized in an amount of $50.00/day for the 25 day time period stipulated to by the parties. The ALJ concludes that this penalty appropriately accounts for the nature of the violations, the adjuster's actions/conduct and the relationship of the penalty to the harm suffered by the Claimant.

ORDER

It is therefore ordered that:

1. Respondents shall pay a penalty of $50.00/day for 25 days ($1,250.00); said penalty to be apportioned between Claimant, as the aggrieved party and the workers' compensation cash fund created in section 8-44-112(7)(a) as follows:

    a. 75% to Claimant;

    b. 25% to the workers' compensation cash fund.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 24, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant has proven by a preponderance of the evidence that Dr. Bhatti's proposed cervical fusion is reasonable and necessary to cure and relieve the Claimant from the effects of the admitted industrial injury;

2. Whether Dr. Olson's prescription for Cialis for the claimant's sexual dysfunction is reasonable, necessary and related to the claimant's industrial injury; and,

3. Whether the claimant is entitled to temporary total disability benefits from September 25, 2012 and ongoing until terminated by operation of law.

FINDINGS OF FACT

1. The claimant suffered a compensable, admitted industrial injury on or about September 25, 2012 while employed with the respondent-employer. The claimant reported that he was pushing a cart when he suffered an injury to his abdomen, lower back, cervical spine, and left shoulder.

2. The claimant received treatment for his shoulder injury and hernia condition. He underwent a lipoma excision and a shoulder surgery.

3. The claimant continues to have pain in his cervical and lumbar spine. He has had pain on the right side of his neck and in his lower back. He also reported numbness in his extremities that is essentially constant. He emphasized that the numbness in his hands was particularly debilitating. He reported little to no improvement with previous interventional therapies, including injections, rhizotomies, and pain medications. The claimant continues to use opiate medication for his pain relief, along with "5-6" other medications depending on the day.

4. The claimant underwent an MRI with Open MRI of Pueblo on January 16, 2013 for his lumbar spine and cervical spine. Dr. Jayson Lord, M.D. interpreted the imaging. Dr. Lord determined that the claimant had an L5-S1 disc bulge with facet hypertrophy without stenosis, slight scoliotic curvature of the spine, and an L4-5 disc bulge without canal or foraminal stenosis. Regarding the cervical spine, the only disc

herniation not determinate for age was at the C5-C6 level, which showed a disc bulge with mild to moderate canal stenosis.

5. Dr. Olson, the claimant's authorized treating physician, referred the claimant to Dr. Michael Sparr, M.D. The claimant saw Dr. Sparr on March 21, 2013. Dr. Sparr completed an EMG of the claimant's bilateral lower extremities, which was normal. Dr. Sparr ordered an EMG study of the claimant's cervical spine.

6. The claimant saw Dr. Sparr again on April 26, 2013 for the bilateral upper extremity EMG. The EMG was normal. Dr. Sparr found no objective evidence of the claimant's subjectively reported radicular symptoms or bilateral parathesias.

7. The claimant followed up with Dr. Sparr on August 12, 2013. Dr. Sparr noted "vague and diffuse" subjective pain complaints in the claimant's lower back, cervical spine, and bilateral lower and upper extremities. He could not explain these symptoms with the imaging studies available, which again were all normal. He also noted positive Waddell's testing, which demonstrated symptom magnification and a possible psychological overlay. That, combined with the claimant's subjective reporting of "0%" improvement, caused Dr. Sparr to recommend no further intervention with the claimant.

8. The claimant saw Dr. James Sceats, M.D. regarding possible surgical interventions on January 28, 2014. Dr. Sceats reviewed the cervical spine MRI and Dr. Sparr's EMG study. Dr. Sceats concluded that the claimant's cervical MRI was "not particularly remarkable" and did not show either a large herniated disc or canal or foraminal stenosis. Dr. Sparr's EMG study was also essentially normal. Dr. Sceats concluded that the claimant's pain complaints were the result of myofascial pain and that he would not recommend surgery.

9. The respondent-insurer obtained an Independent Medical Evaluation from Dr. William Watson, M.D. Dr. Watson evaluated the claimant in person on May 6, 2014. Dr. Watson noted that the claimant had marked pain behavior throughout the examination, including diffuse tenderness and pain throughout the cervical spine. However, distracted palpitation was negative for pain. The Spurling's test revealed pain but no evidence of radicular symptoms. Regarding the lumbar spine, Dr. Watson noted on his physical evaluation that the claimant had "intense" pain on both light touch and deep palpitation. Dr. Watson noted that the claimant gave way on all muscle testing and that the claimant's symptoms seemed to change throughout the examination.

10. Dr. Watson opined that the claimant showed positive Waddell's testing throughout the examination for both the cervical and lumbar spine. After reviewing the imaging studies, Dr. Watson found no objective basis for the claimant's extreme pain complaints and subjectively reported symptoms. Thus, he felt that all active care should be terminated, that the claimant should be encouraged to do his home exercise program, and that no further surgical intervention was appropriate.

11. The claimant saw Dr. Sceats again on July 10, 2015 for another surgical evaluation. Dr. Sceats noted that the claimant had received cervical epidural steroid injections and lumbar epidural steroid injections without benefit. The claimant had also had cervical spine rhizotomies but did not get significant relief from the procedures. Absent objective evidence of spinal pathology, Dr. Sceats concluded that the claimant's pain was primarily myofascial in origin, and once again did not recommend any further surgical intervention. However, because the claimant "really wishes something done", Dr. Sceats referred the claimant to his partner, Dr. Sanna Bhatti, M.D. for another surgical opinion.

12. The claimant underwent a surgical evaluation with Dr. Sana U. Bhatti, M.D. on July 27, 2015. Dr. Bhatti evaluated the claimant, and ordered repeat cervical MRI and bilateral upper extremity EMG studies of the claimant.

13. The claimant underwent a follow up bilateral upper extremity EMG with Dr. Dwight Caughfield on June 9, 2015. Dr. Caughfield noted that the claimant's study showed evidence of left cervical radiculopathy, but did not find evidence of right sided radiculopathy.

14. The claimant then underwent a repeat cervical spine MRI at St. Mary Corwin medical center on August 4, 2015. Once again, the MRI showed "mild degenerative disc disease" with minimal levels of spinal stenosis at the C5-C6 level. There was no note of a disc herniation at the C5-C6 level.

15. The claimant deposed Dr. William Griffis regarding his 24 month DIME opinion. Dr. Griffis opined that he did not feel that the claimant was at MMI and that he would defer to the treatment proposed by Dr. Olson. However, on cross examination Dr. Griffis agreed with Dr. Sceats that the claimant's pain symptoms were myofascial in origin. Dr. Griffis further opined that surgery was not reasonable or necessary to treat a myofascial pain disorder. Dr. Griffis did not agree with sending the claimant to see a second surgical opinion because there was no clear pain generator identified in any MRI. He specifically stated, "unless we have really objective findings on the MRI that

indicate that there's a pain generator, such as -- such as a disc herniation pressing on nerves."

16. Dr. Griffis did not recommend further intervention in the cervical spine stating, "I think it's a mistake to pursue additional diagnostic tests and then possibly put him through a cervical surgery."

17. The claimant took the post-hearing evidentiary deposition of Dr. Sanna Bhatti, M.D. Dr. Bhatti opined that the claimant's MRI showed a right sided disc herniation at the C5-C6 level of the cervical spine, along with foraminal stenosis at various levels in both MRI studies, which "may or may not" be significant depending on the physical examination He also stated that he personally reviewed the MRI. Regarding the EMG studies, he noted that the latest EMG study showed a mild left C6 radiculopathy. Dr. Bhatti felt that because the claimant's disc herniation was on the right side, but the radiculopathy was only present on the left, that the "left C6 radiculopathy may not be meaningful."

18. Dr. Bhatti examined the claimant one time, on July 27, 2015. In that exam, the claimant subjectively complained of severe pain in his cervical spine and right arm. The claimant also complained of numbness and paresthesias. However, Dr. Bhatti further explained that the disc herniation would not explain the left sided numbness, and that he did not have an explanation for the left sided numbness.

19. Despite a lack of an objective basis for the claimant's subjective complains of paresthesias and numbness, Dr. Bhatti recommended proceeding with a C5-C6 anterior discectomy. The objective was to help with the claimant's severe subjective pain complaints in his neck and right arm. However, Dr. Bhatti stressed that the discectomy would not help the claimant's parasthesias because there was no objective physical basis for that pain. However, he wanted to proceed with the surgery because there was "nothing short of surgery has helped [the claimant]." However, Dr. Bhatti also stated that, "What I'm saying in this case what I'm saying is that the surgery at C5-6 may be able to help him, but I'm not totally sure. If I was totally sure, I would have reported that I expect surgery at C5-6 to relieve his symptoms."

20. The ALJ finds that the opinions of Dr. Griffis, Dr. Sparr, Dr. Watson, and Dr. Sceats are more credible and more persuasive than the opinion of Dr. Bhatti regarding the proposed C5-C6 surgery.

21. The claimant recently reported symptoms of numbness during sexual intercourse to Dr. Olson. Dr. Olson prescribed Cialis as a potential remedy for the

claimant's newly reported sexual dysfunction. At hearing, the claimant testified that he had always experienced numbness in his penis, but did not report the problem due to embarrassment. Dr. Olson ordered a lower back MRI in order to determine the potential cause of the claimant's subjective numbness complaints.

22. The claimant underwent the MRI on September 25, 2015. The radiologist, Dr. Eric Lyders, reviewed the imaging, and concluded in his narrative report that, "Essentially normal MRI of the lumbar spine. No focal disc protrusion or significant stenosis."

23. Dr. Olson then saw the claimant on October 9, 2015. The claimant reported a subjective pain level of 7-8 in his lower back. Dr. Olson reviewed the MRI and commented that "[The claimant] continues to complain of lower back pain but the most recent MRI scan was basically negative. It certainly did not explain the numbness he has during sexual intercourse."

24. Dr. Olson's narrative report and the September 25, 2015 MRI show that there is no physiological basis for the claimant's penile numbness. The claimant's medical record packet does not contain any further explanation of Dr. Olson's Cialis recommendation. The claimant has not provided objective evidence to support his subjective complaint of penile numbness.

25. The respondent-insurer filed for a 24-month Division IME based on Dr. Watson's IME report. However, neither the respondents nor the claimant's counsel listed the claimant's spine in the Application for DIME. Dr. Griffis, the selected 24 month DIME physician, authored a report finding that the claimant was at MMI for his shoulder and hernia condition. However, Dr. Griffis later testified that he did not rate or examine the claimant's spine because it was not listed on the application. Therefore, Dr. Griffis' recommendation that the claimant was at MMI was in error.

26. The ALJ finds that it is more likely than not that the DIME is a nullity and is void since the DIME did not address an admitted portion of the claimant's injury, and the DIME subsequently agreed that the claimant was not at MMI as to one of those conditions.

27. Regarding temporary total disability benefits, the claimant persuasively testified that he has not returned to work. No treating physician has returned the claimant to full duty.

28. The ALJ finds that it is more likely than not that the claimant is not at MMI until his ATP determines an MMI date, and the attendant procedural provisions have run their course.

29. The ALJ finds that it is more likely than not that the claimant is entitled to TTD from September 25, 2012 and ongoing until terminated by operation of law.

30. The ALJ finds that the claimant has failed to establish that it is more likely than not that the proposed surgery by Dr. Bhatti is reasonable or necessary to cure or relieve him from the effects of his injury.

31. The ALJ finds that the claimant has failed to establish that it is more likely than not that the prescription for Cialis is reasonable, necessary, or related to his industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), et seq., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. § 8-43-201.5.

2. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ has not addressed every piece of evidence or every inference that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. The respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, the claimant has failed to meet his burden of proof to show that the C5-6 discectomy procedure proposed by Dr. Bhatti is reasonable and necessary. Dr. Bhatti identified a mild disc herniation at the C5-6 level from an MRI in 2013, but admitted that his proposed surgery was based upon the claimant's subjective complaints.

6. Balanced against Dr. Bhatti's recommendation are opinions from four different physicians of various specialties. All four physicians, Dr. Griffis, Dr. Sceats, Dr. Sparr, and Dr. Watson, recommended against surgical intervention. All four physicians noted that the objective medical evidence did not suggest pathology that would require surgical intervention. Dr. Sceats, Dr. Bhatti's own partner at his practice, diagnosed myofascial pain disorder as the likely cause of the claimant's subjective pain complaints. No physician was able to diagnose or even identify the cause of the claimant's parasthesias. While weight of numbers alone is not sufficient to overcome Dr. Bhatti's opinion, the uniformity of examinations and opinions between the four doctors suggests that Dr. Bhatti's recommendation is not reasonable or necessary. Therefore, the claimant has failed to prove by a preponderance of the evidence that the C5-6 discectomy procedure is reasonable and necessary.

7. The claimant has failed to present sufficient credible evidence suggesting that Dr. Olson's erectile dysfunction medication is reasonable and necessary. Specifically, Dr. Olson states that the claimant's recent lumbar MRI does not support the numbness that the claimant subjectively reports in his penis. Thus, the claimant has failed to meet his burden of proof that the erectile dysfunction medication is reasonable, necessary, or related to his work injury.

8. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio*, W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005).

9. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

10. As found, Dr. Griffis testified that he had made a mistake based on an erroneous Application for DIME, and that he did not think that the claimant was at MMI. No treating physician has stated that the claimant was at MMI. Therefore, the respondents' Final Admission of Liability of March 16, 2015 is invalid.

11. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, supra. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

12. As found, the claimant has been off work since his date of injury, September 25, 2012. He is still off work. As the respondents' Final Admission is invalid, the claimant is entitled to temporary total disability benefits ongoing.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The DIME procedure conducted by Dr. Griffis is null and void.

2. The FAL filed pursuant to the DIME is null and void.

3. The claimant's request for surgery as recommended by Dr. Bhatti is denied and dismissed.

4. The claimant's request for the prescription of Cialis is denied and dismissed.

5. The respondent-insurer shall pay the claimant temporary total disability benefits commencing on September 25, 2012 and continuing until terminated by operation of law.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: February 10, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that her claim should be reopened based on a worsened condition.

2. If Claimant proved her claim should be reopened for a worsened condition, whether Claimant proved by a preponderance of the evidence that low back surgery is reasonably necessary and related to her work injury.

3. If Claimant proved her claim should be reopened for a worsened condition, whether Claimant proved by a preponderance of the evidence her entitlement to temporary total disability benefits (TTD) benefits from May 27, 2014, and ongoing.

4. Whether Claimant proved the low back surgery is a reasonably necessary and related post-maximum medical improvement (MMI) maintenance medical benefit.

5. Whether Claimant proved by a preponderance of the evidence that she is entitled to a change of authorized physician to Dr. George Frey, M.D.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant sustained an admitted work injury on October 5, 2012. On that date, Claimant bent over cleaning and dusting. As she twisted to come back up, Claimant felt the acute onset of low back pain with radiation into the right leg. Claimant initially treated with Concentra. Claimant's complaints were pain in the low back and down her right leg. An MRI was ordered for the lumbar spine. The MRI revealed a central-right disc protrusion at L5-SI and a right paracentral disc protrusion at L4-5. Concentra referred Claimant to John T. Sacha, M.D. on October 15, 2012. Claimant has continued to treat with Dr. Sacha and his referral to the present day.

2. Dr. Sacha initially examined Claimant on October 24, 2012, 19 days after the injury. Claimant noted she had bilateral low back pain with radiation to the right leg. Dr. Sacha performed an examination of Claimant and took a history from her of the mechanism that caused her symptoms. Dr. Sacha reviewed the MRI taken of Claimant's low back. Dr. Sacha scheduled Claimant for a

transforaminal epidural/spinal nerve block for therapeutic and diagnostic purposes. He prescribed medication, including Lyrica and tramadol for her pain and radicular symptoms.

3. Dr. Sacha indicated he would reassess Claimant's condition and need for treatment after the injection. On November 8, 2012, Dr. Sacha performed the epidural injections/spinal nerve blocks on the right side of the spine at the L5 nerve root and the SI nerve roots. Claimant initially reported 100% relief following the injections/blocks.

4. Dr. Sacha's care for Claimant was comprehensive. Claimant reported a history of urinary tract infections to Dr. Sacha, which the doctor treated. Claimant also reported a skin rash and lesions to Dr. Sacha. Dr. Sacha's approach showed professionalism as Claimant's treating physician. Claimant testified Dr. Sacha did not listen to her and was uncaring about her symptoms but contemporaneous medical records generated by Dr. Sacha reflecting 30 visits do not correlate with Claimant's account.

5. Dr. Sacha has treated Claimant for more than three years. Medical records reflect that in that period of time he explored the potential causes of Claimant's complaints over those years. Claimant underwent multiple MRI's. Claimant had several sets of diagnostic and therapeutic injections. Claimant was referred to a spinal surgeon and underwent surgery on her lumbar spine. Dr. Sacha secured EMG's to identify with particularity the source of Claimant's pain complaints. When Claimant had psychological manifestations during her course of treatment with Dr. Sacha, he referred Claimant to a Spanish-speaking psychologist for care. Claimant was provided with pain medications, medications to treat nerve symptoms, anti-spasm medications, and anti-inflammatory medications to treat her condition. He explored the recommendations of other physicians in an attempt to help Claimant.

6. Claimant requests a change of physician to Dr. George Frey, an orthopedic surgeon, who Claimant contends "inspired trust," was "very thorough" and who took a "good look" at her and her condition. Claimant's opinion is contrary to the evidence.

7. Dr. Frey admitted in testimony that during the two visits he had with Claimant he did not learn how Claimant injured her back. Dr. Frey only reviewed records of a pre-operative MRI during the course of his contact with Claimant. Dr. Frey testified that he did not need to review Claimant's medical records in order to make treatment recommendations. Dr. Frey stated a "good outcome," as defined by the patient, is what he tries to achieve.

8. Dr. Frey was unaware of Claimant's psychological condition and the treatment of it. Dr. Frey had little knowledge of the medical treatment Claimant received from Dr. Sacha, Dr. Esparza, Dr. Castro and the other providers who provided Claimant with treatment and support. Dr. Frey was unaware that Claimant had

been evaluated for additional surgery before Dr. Frey's involvement. Dr. Castro, the physician who performed her surgery, found there was no further reasonable surgical treatment for her low back pain.

9. Prior to Dr. Castro's surgery, Dr. Sacha provided Claimant with injections to which Claimant had a diagnostic response but experienced only modest relief. Claimant underwent an EMG test on December 28, 2012, which was normal. Dr. Sacha had Claimant evaluated by Dr. Castro, for a surgical opinion. Dr. Castro took a history from Claimant. Based on the imaging studies and Claimant's good response to injections by Dr. Sacha, Dr. Castro recommended surgery.

10. Dr. Sacha saw Claimant the day before her surgery in February of 2013, providing her with pain medicine for after the surgery. On February 7, 2013, Dr. Castro performed surgery, a partial laminectomy at L5-SI on the right side, an undercutting facetectomy and foraminotomy at the same level, and a microdiskectomy on the right at L5-SI.

11. Dr. Frey admitted he did not know what procedures Dr. Castro performed. Yet, it was his opinion that the "wrong surgery was done for the wrong problem" by Dr. Castro. Dr. Frey shared opinions with Claimant which inspired Claimant's confidence when Dr. Frey had little knowledge of her condition.

12. Dr. Castro's surgical report from February 7, 2013, reflects that Claimant had a "full decompression" of the spinal cord and nerve roots. Yet, Dr. Frey without reviewing the operative report, testified that he would perform a "more complete decompression" at the old surgical site.

13. After Dr. Castro's surgery, Dr. Castro opined that, overall, Claimant had improved. Yet, Dr. Frey took a history from Claimant of "no improvement" after surgery. Medical records, unseen by Dr. Frey, showed Claimant experienced relief from symptoms following Dr. Castro's surgery. On March 11, 2013, Dr. Sacha documented one month out from the surgery, that Claimant had back pain and noted that Claimant exhibited "mild pain behaviors" but had little in the way of leg pain, numbness or tingling.

14. On April 22, 2013, Claimant reported to Dr. Sacha she was having significant leg symptoms. Dr. Sacha ordered a repeat EMG and a repeat MRI to determine if there was an objective explanation for her complaints. The second EMG was normal. Dr. Castro found no further surgical treatment was warranted. There was "no recurrent disc protrusion" on MRI.

15. In his May 13, 2013, report, Dr. Sacha documented positive Waddell's signs in two of the five areas of testing and moderate pain behavior. Claimant was placed at MMI on June 17, 2013, exhibiting positive Waddell testing positive in three out of the five areas of testing, and Claimant exhibited pain behaviors. Dr. Sacha noted Claimant has a "progressively nonphysiologic presentation."

Dr. Sacha delayed the impairment rating because Claimant's range of motion testing was invalid on June 17 and he saw Claimant again on July 3, 2013, for completion of the impairment rating.

16. At MMI, Claimant had a 12% whole person impairment for the low back as a result of the injury. She was given permanent work restrictions of no lifting over 10 pounds and only occasional bending and twisting at the waist. Dr. Sacha provided Claimant with maintenance medical benefits, including medications, a gym and pool pass, and follow ups with her treaters.

17. On July 18, 2013, Respondents filed a Final Admission consistent with Dr. Sacha's MMI and impairment determination. Respondents admitted for post-MMI medical benefits. Claimant did not file an objection to the Final Admission and did not request a Division independent medical examination (IME). On August 17, 2013, Claimant's claim closed.

18. Dr. Sacha, and other authorized providers, continued to treat Claimant after MMI. On August 12, 2013, after examination, Dr. Castro reiterated that Claimant was not a candidate for further surgery and noted Claimant was "dramatically improved" from her pre-operative state. On August 14, 2013, Dr. Sacha noted Claimant was doing fairly well and he continued her medications. In September of 2013, Claimant ran out of Lyrica and had an increase in leg symptoms. Dr. Sacha attributed these symptoms to the permanent impairment she had at MMI and Claimant's failure to take her medications.

19. Claimant had flare-ups and treated with Dr. Sacha for them. On October 22, 2013, Claimant had a flare up that subsequently calmed down. Dr. Sacha provided Claimant with medications and recommended follow-up. On October 29, 2013, Dr. Sacha noted there was a seroma on the MRI prior to MMI. He performed an ultrasound and ordered another MRI of the lumbar spine. The MRI was performed on November 6, 2013. Dr. Sacha provided Claimant with injections as maintenance care. On November 26, 2013, Claimant reported the injection provided 100% relief of her pain. But Dr. Sacha noted the finding was somewhat unusual, since the injection showed "excellent foraminal flow" that is indicative of no significant narrowing that would cause complaints. Dr. Sacha suspected the impingement prior to the surgery probably left Claimant with some residual damage that was causing pain. At the December 31, 2013 appointment, Dr. Sacha noted Claimant does have pain behaviors. Dr. Sacha opined there was nothing else to do from an active standpoint.

20. On March 17, 2014, Claimant had another flare of pain, this time reporting left leg pain, which was a "new complaint" according to Dr. Sacha. On April 28, 2014, Claimant did not receive Lyrica medication and had increased pain. Dr. Sacha attributed the medication problem to a mail order pharmacy, so the doctor stopped Claimant's use of the mail order prescriptions in the future.

21. Claimant alleges her worsening occurred on May 27, 2014. She alleges she was no longer at MMI on that date. Claimant alleges she is entitled to temporary disability benefits from that date forward. And, she wants surgery by Dr. Frey for her low back as a result of the worsening she alleges. However, Dr. Frey opined in his deposition that he is not recommending surgery at this time. There are no surgical requests from any of Claimant's treaters.

22. On May 13, 2014, two weeks before the alleged worsening, Dr. Sacha examined Claimant and reported that she was doing "quite well." Claimant was exercising and her symptoms were better. On May 13, 2014, Claimant turned down Dr. Sacha's offer of injections because of her improvement.

23. On May 27, 2014, the date of the alleged worsening, Claimant returned to Dr. Sacha and reported another flare up of pain. Claimant requested the injection that had been offered to her prior to this alleged worsening. Dr. Sacha found the request reasonable and performed the injections. Claimant again, as she had in March of 2014, noted complaints down both legs. Dr. Sacha injected her spine and noted there was no evidence of impingement or narrowing with the injections.

24. Dr. Sacha's May 27, 2014, report warns that Claimant has a history of a non-physiologic presentation and a somatic presentation. Claimant's restrictions were not changed. Claimant was not taken off of MMI. Dr. Sacha assessed that there is no objective evidence of worsening, just the waxing and waning of symptoms.

25. On June 19, 2014, Dr. Sacha performed the fourth set of injections. Claimant's pain was consistent with a left L5 distribution, as it had been in the past. Dr. Sacha could not assess Claimant's short-term relief because Claimant had some post-procedure needle track pain.

26. On July 1, 2014, the next time Dr. Sacha evaluated Claimant, she was better. Dr. Sacha characterized the injections he performed as "maintenance," did not remove the MMI designation, and did not increase Claimant's work restrictions. Claimant leg symptoms were intermittent and unchanged. Dr. Sacha recommended additional physical therapy. Claimant had better range of motion in her low back and, overall, she was improved.

27. On July 15, 2014, Claimant's symptoms increased again. Claimant had increased low back pain and right leg pain. Claimant reported she was depressed. Dr. Sacha referred her for psychological counseling. Again, MMI was not removed nor were work restrictions increased.

28. By July 24, 2014, Claimant was improved after a course of oral steroids prescribed by Dr. Sacha. Claimant refused injections at that time and indicated she wanted no surgical intervention. Claimant was in a good mood as noted by Dr. Sacha. Claimant's pain behaviors were minimal. Dr. Sacha did not

recommend further care other than medication management and home exercise. Claimant continued with her psychological visits and did well. By September 17, 2014, the psychological visits were improving Claimant's ability to avoid her pain focus and improving her functionality. Dr. Sacha noted Claimant was stable and coping better.

29. Shortly before being seen by Dr. Frey, Claimant visited with Dr. Esparza, her psychologist. In his September 10, 2014, Dr. Esparza noted Claimant's pain was decreasing, she was coping better and more active in her life.

30. On October 20, 2014, Claimant saw Dr. Frey who was unaware of the progress Claimant had made. After seeing Dr. Frey, Claimant's mood shifted according to Dr. Esparza. Dr. Frey gave Claimant hope that surgery would cure her. But he did so without knowledge of her treatment with Dr. Sacha, Dr. Esparza and Dr. Castro.

31. Dr. Sacha opined, after years of treating her, that Claimant should not be put on a more aggressive treatment plan. Nonetheless, he considered Dr. Frey's treatment recommendations that Claimant should be considered for surgery. Dr. Sacha performed the diagnostic blockade as suggested by Dr. Frey. Claimant was somatic in her presentation with the injections.

32. On November 13, 2014, Dr. Sacha disagreed that there was a need for further surgical intervention. Dr. Frey did not see Claimant for a year after his initial October 20, 2014, report. Dr. Sacha worked with Claimant regularly during that time and recorded her symptoms. Dr. Esparza noted her preoccupation with surgery.

33. Claimant had two IME's regarding ongoing treatment. On December 11, 2014, Dr. Sharma reviewed the records and provided his opinion regarding ongoing treatment. Dr. Sharma agreed Claimant attained MMI on July 17, 2013, and remained at MMI. Dr. Sharma opined that Claimant's maintenance care is complete. Dr. Sharma noted Claimant was functioning well prior to Dr. Frey's involvement.

34. Dr. Sacha concluded in his January 22, 2015, special report that surgical intervention was not reasonable or necessary. He opined surgery is unwarranted and would cause a disservice to Claimant. Claimant's condition waxed and waned.

35. Anant Kumar, MD, evaluated Claimant at the request of Respondents for an IME on June 5, 2015. Dr. Kumar concluded further surgery was not reasonable or necessary. Dr. Kumar found no new or recurrent herniation. He recommended no further maintenance care, no surgery and no injections.

36. Following Drs. Kumar and Sharma's opinions of no additional treatment, Dr. Sacha continued to treat Claimant. On September 8, 2015, Dr. Sacha ordered a repeat MRI as a reasonable maintenance medical benefit. The MRI was

unchanged from her last MRI and Claimant's condition did not warrant further care or attention.

37. Dr. Frey saw Claimant on October 25, 2015, for the second time. He still had not reviewed her medical records. He did take a history from Claimant, but he did not compare that history to the medical records. He has not reviewed the reports of Drs. Kumar and Sharma.

38. It is found that there is no credible or persuasive evidence of any worsening that removed Claimant from MMI. The credible and persuasive evidence demonstrates surgery is not a reasonable and necessary curative treatment or maintenance medical benefit that should be ordered.

39. It is further found that Dr. Sacha has performed competently and professionally as Claimant's treating physician. There are insufficient grounds for a change of physician to Dr. Frey.

40. Claimant is not entitled to TTD. She remains at MMI. She has not had a worsening of her condition that would warrant a reopening. Her petition to reopen must be denied and dismissed, as the credible and persuasive evidence does not support a reopening for worsening.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201(1),C.R.S.

REOPENING BASED ON WORSENED CONDITION

2. Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that

can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985).

3. The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

4. A change in condition, for purposes of the reopening statute, refers to a worsening of the Claimant's work-related condition after MMI. *El Paso County Dept. of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The pertinent and necessary inquiry is whether the claimant has suffered any deterioration in her work related condition that justifies additional benefits. *Cordova v. Indus. Claim Appeals Office, supra.* The reopening authority under the provisions of Section 8-43-303, C.R.S. is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996).

5. In this case, Claimant has failed to meet her burden to reopen his claim and has not shown that she suffers from a worsened condition. The credible and persuasive evidence presented at hearing established that Claimant continued to have radiculopathy and ongoing symptoms following her surgery and at the time she was placed at MMI. At the time of MMI on July 3, 2013, Dr. Sacha found Claimant had a whole person impairment rating of 12% for impairment based on Claimant's surgery and continued symptomatology. It is clear from Dr. Sacha's impairment assessment, and Claimant's medical records before and after MMI, that Claimant was expected to have symptomatology. Dr. Sacha performed multiple diagnostic tests, including MRI, EMG and injections, after MMI. None demonstrated a credible or persuasive presence of a worsened condition in Claimant's low back. Medical treatment subsequent to MMI was for the same symptomatology that was present at MMI. The evidence established that Claimant's symptoms waxed and waned, but Claimant failed to establish by a preponderance of the evidence that there was a worsening of condition that required more curative treatment or that caused increased disability. Claimant was not placed on any additional work restrictions during this period of alleged worsening. Dr. Sacha did not retract his opinion of Claimant's MMI date. Dr. Sacha's opinions are supported by the IME's of Drs. Sharma and Kumar.

6. In deposition testimony, Dr. Frey recanted any suggestion of a current need for surgery. Dr. Frey admitted he never reviewed the medical records to determine what the discrepancies were and how they might be resolved. His opinions are not credible or persuasive.

7. Claimant's testimony regarding the history of her injury is not found credible or persuasive. The evidence established there are significant discrepancies between Claimant's reports to Dr. Frey, her IME, and the medical records of treaters. The MRI's show no new or recurrent herniation. The credible evidence established that Claimant remains with symptoms at the level where surgery was performed. Dr. Sacha credibly opined that those symptoms are relatively permanent and have not changed since MMI.

MEDICAL BENEFITS

8. The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents a preponderance of the evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

9. In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI, they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the Claimant's request for specific medical treatment the Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309- 217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

10. In this case, Claimant has failed to prove surgery is a reasonably necessary and related medical benefit that should be provided as part of this claim. Whether curative or as maintenance, the overwhelming preponderance of evidence demonstrates surgery is not reasonable or necessary. Claimant failed to prove by a preponderance that the surgery is reasonable and necessary to maintain Claimant's work related condition or to relieve her ongoing symptoms. Diagnostics, including MRI, EMG and injections, show little or no evidence to support a recommendation for surgical care.

11. In their final admission of liability in this matter filed on July 18, 2013, Respondents admitted for ongoing post-MMI medical benefits as outlined by Dr. Sacha's MMI report. They have continued to provide those benefits. The medical treatment admitted to in the final admission of liability is not being challenged by Respondents and is ongoing pursuant to the final admission of liability. Claimant failed to meet her burden of proof to show the surgery suggested by Dr. Frey is reasonably necessary to relieve the effects of her work-related injury or to prevent deterioration of her work-related condition.

TTD

12. Since Claimant failed to establish that she suffered a worsening of her condition, there is no basis to award Claimant TTD. Rather, the persuasive evidence demonstrates the medical restrictions that existed at the time of MMI are the same as those provided by Dr. Sacha at MMI. There is no credible and persuasive evidence suggesting that the Claimant's earning capacity has diminished since MMI as a result of increased physical limitations.

CHANGE OF PHYSICIAN

13. Claimant failed to make a proper showing that a change of physician to Dr. Frey is warranted. If a claimant wants to change physicians, there is a statutory obligation to follow the prescribed procedures in Section 8-43-404(5)(a), C.R.S. *Yeck v. Indus. Claim Appeals Office,* 996 P.2d 228, 229 (Colo. App. 1999). The Act does not permit an injured worker to change physicians or employ additional physicians without notice and consent. *Pickett v. Colorado State Hospital,* 513 P.2d 228 (Colo. App. 1973). However, a claimant may seek a change of physician upon a "proper showing" to the division.Section8-43-404(5)(a)(VI),C.R.S.

14. The credible and persuasive evidence demonstrates Dr. Sacha has provided proactive and professional medical care for Claimant. Claimant proposes Dr. Frey as a new provider of medical treatment. Dr. Frey's testimony demonstrates he is largely unfamiliar with the care provided to Claimant by Dr. Sacha and other treaters and his opinions and recommendations are without merit. Claimant failed to carry her burden of proof for a change of physician.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's petition to reopen is denied and dismissed.

2. Claimant's claim for medical benefits denied and dismissed.

3. Claimant's claim for TTD from May 27, 2014, and continuing is denied and dismissed.

4. Claimant's request for a change of physician to Dr. Frey is denied and dismissed.

5. Any and all issues not determined herein are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 17, 2016

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-906-476-01

ISSUES

- Whether Claimant has established by a preponderance of the evidence that he has suffered a worsening of condition to his low back and/or right ankle related to the December 24, 2012 work injury to allow a reopening of WC Claim 4-906-476.

- Whether Claimant is entitled to additional medical benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

Claimant is a 22 year old former employee of Employer. On December 24, 2012, Claimant was assisting with the placement of prefabricated walls when a wall fell and struck him in the head, back, and right ankle.

2. Paramedics were dispatched to the site. The paramedics noted Claimant felt the wall "scrape" the back of his helmet and "brush" his lower back before landing on his ankle. Claimant denied loss of consciousness, neck pain, or back pain. On exam, Claimant denied back pain on palpation, and it was noted he had abrasions on his lower back which he described as feeling "like a carpet burn or Charlie horse." He had minor swelling of his ankle with "minor discomfort."

3. X-rays were taken of Claimant's right ankle and low back at Presbyterian / St. Luke's. The back x-rays were normal, and the ankle x-ray showed only a small ankle joint effusion. *Id.* Claimant denied loss of consciousness. Claimant relayed that he had "jumped out of the way" of the falling wall, causing the wall to scrape down his back, and he was noted to have a "superficial abrasion" to his left low back. Claimant had full back range of motion with mild soft tissue tenderness in the left lower lumbar paraspinous region.

4. On December 26, 2012, Claimant was evaluated by Steve Bratman, M.D. at HealthOne. Claimant again denied a loss of consciousness. He complained of pain in his left lower back and in his right ankle. Dr. Bratman assessed an ankle sprain, back contusion, and minimal head contusion.

5. On January 2, 2013, Dr. Bratman noted Claimant's ankle was "markedly improved." Claimant had no swelling, and he had 2/10 ankle discomfort. Regarding his back, he also reported it was "much improved," with some stiffness in the morning which improved as the day progressed. He had full range of motion without discomfort. Dr. Bratman did not elicit tenderness to his back on palpation. *Id.*

6. On January 9, 2013, Dr. Bratman noted Claimant wanted to close his case. He denied any significant discomfort to his right ankle, and on exam he had full range of motion in all planes without tenderness to palpation. Regarding his low back, he stated he was minimally stiff in the morning but the feeling "rapidly recovers." He also had full range of motion in his back. Dr. Bratman noted Claimant's injuries had resolved, he placed Claimant at MMI without impairment.

7. On January 11, 2013, Insurer filed a Final Admission of Liability. The next medical record in time is from August 19, 2014 from HealthOne, where Claimant was administered a post-offer physical exam for beginning employment with Western States Fire Protection. Claimant was noted to have range of motion within functional limits ("WFL") in all aspects for his lumbar spine. He also was noted to pass lifting tests, including lifting 75 lbs. from the floor to waist level, turning 90 degrees and placing on a 30" surface 4 times on each side, push/pull 80 lbs. for 25', and safely lifting 50 lbs. from floor to waist and carry for 10 feet.

8. On August 20, 2014, the day following his physical exam at HealthOne, Claimant was evaluated by Paul Geersen, D.C. On the intake form of that date, it was noted Claimant's low back symptoms appeared "2 months ago." Handwritten notes in the records from that date discuss "2 yr [rest unintelligible] . . . bruises LB, FX AK . . . went away . . . 2-3 mo ago [rest unintelligible]."

9. On February 19, 2015, Claimant was evaluated by Pamela Knight, M.D. at Denver-Vail Orthopedics. She recorded that Claimant was originally hit in the back, "this was not x-rayed at that time he did lose consciousness." She also noted he stated he had a "lower extremity fracture." He stated his back symptoms had been present for one year. Dr. Knight took lumbar x-rays and noted he had a congenital fusion unilaterally on the left at the lowest level with some degeneration/disc space narrowing at that level. She referred Claimant for a lumbar MRI. The MRI occurred on February 24, 2015 and showed a L4-5 disc bulge with at least abutment of the left L5 nerve. *Resps.*

10. On March 2, 2015, Dr. Knight noted that Claimant had a prior workers' compensation case which was closed, and "they did not look into his lumbar cervical spine." She felt the injury was responsible for his complaints.

11. John Hughes, M.D. was retained by Claimant to perform an independent medical evaluation ("IME") of Claimant on August 20, 2015. Dr. Hughes documented that Claimant advised he lost consciousness during the work injury. Claimant informed Dr. Hughes that he "began developing symptoms that included right ankle pain and lumbar spine pain." However, Dr. Hughes nowhere documents when the symptoms began after MMI or if they were a continuation. Claimant alleged he "began developing a sense of "overworking myself or something." Claimant alleged symptoms of left low back pain of 3/10, but he denied any right ankle symptoms at that time. Dr. Hughes noted right ankle crepitation and a positive right anterior drawer test on exam, and he also noted reduced lumbar range of motion. Dr. Hughes stated that he felt Claimant suffered a worsening of his lumbar and right ankle injuries. He recommended a MRI

and orthopedic consultation for Claimant's ankle. Regarding Claimant's back, he stated "I feel he has sustained left lower lumbar spine facet joint arthropathy," and he recommended facet joint injections. *Id.* He stated he did not believe Dr. Bratman appreciated residual symptoms at the time of discharge.

12. Allison Fall, M.D. was retained by Respondents to perform an IME of Claimant on December 4, 2015. She recorded that Claimant told her three walls fell on him, and he "blacked out." He stated his ankle swelled up "like a baseball" and "He did not tell them about his low back." Regarding his work history, he stated he stopped working for the Employer in February 2014, worked for his uncle moving boxes and furniture, and then got back into construction again. Dr. Fall recorded he told her "it was not until he started doing that [construction] again that he developed a lot of pain." Dr. Fall noted asking him about the timeframe of his symptoms, and that he responded from the time he was working for his uncle until his pain returned he "does not remember his back; therefore, it was not bad."

13. Dr. Fall noted in her report that Claimant's post-accident records show excellent prognosis and quick healing for both body parts, and at the time of MMI he had no objective findings. She also noted the interim records indicated that his pain actually went away and then came back one year prior to seeing Dr. Knight which would separate the pain from the initial injury. Dr. Fall stated that she felt the most likely etiology for his current back findings was the congenital fusion noted by Dr. Knight, which was leading to degeneration at the level of his disc bulge.

14. Dr. Fall noted Dr. Hughes did not indicate when Claimant's symptoms allegedly arose. She did not agree Claimant suffered a worsening of his injuries over time, as she felt it was inconsistent with the medical records which indicated his symptoms had resolved, and there was not return for additional treatment until August 2014. She also disagreed with Dr. Hughes' conclusion that a facet joint arthropathy would be related to his original injury, as the mechanism of injury involved a scraping motion not causative of an arthropathy. On exam, Claimant had tenderness in his low back and some limitations on range of motion. Dr. Fall noted his right ankle exam was normal without swelling, crepitus, instability, or other abnormalities. She diagnosed myofascial back complaints and had no diagnosis for his right ankle, which was symptom free. Dr. Fall stated Claimant did not suffer a worsening of condition, but if he had, it would have been related to the construction work he began in the spring or summer of 2014, as he specifically told her it was when he returned to working construction that his pain got worse.

15. Claimant testified at hearing that one or more walls hit him in the back of his head and collapsed him underneath. He testified he was knocked out. He testified he downplayed his injuries, and he did not tell his physicians he lost consciousness, because he was afraid of making the injury a large issue with his employer.

16. Claimant testified when he returned to construction work, he worked for BAM Construction as a wood framer and carpenter standing walls, laying decking and subflooring, and other construction activities. Claimant testified that he started to feel

pain in his low back every morning and when he returned from work after starting working for BAM Construction. Claimant testified he then changed jobs to work for Heggem Lundquist, where he was hanging drywall and doing framing work. He testified during his time working for Heggem Lundquist his back pain was getting much worse. He testified at that point he sought treatment for his back with a chiropractor, Dr. Geersen. He testified he was taking time off work to obtain treatment. He testified he has never felt 100% since the injury. Claimant testified he had continuous back pain from when he was released from care.

17. On cross-examination, Claimant testified he only remembered pieces of his treatment with Dr. Bratman at HealthOne, he did not remember his treatment at Presbyterian/St. Lukes, and he did not remember what he told the paramedics that day. The ALJ notes Claimant's testimony is inconsistent that he recalled consciously lying about the extent of his injuries on the day of the injury but also testifying he did not remember his treatment at all at Presbyterian St. Luke's on that day.

18. Claimant was asked about the notations in Dr. Geersen's and Dr. Knight's records that stated Claimant had suffered an ankle fracture with the original injury. Claimant testified he had a past left ankle fracture not related to this claim she may have recorded. Respondents' counsel then read Dr. Knight's record to him referencing that she recorded he suffered a "lower extremity fracture when a very heavy wall fell on him. . ." Claimant then admitted he did not suffer an ankle fracture during the work injury. Claimant was also asked about Dr. Knight's February 19, 2015 reference that his back had not been x-rayed. He testified only that he told Dr. Knight he did not remember a lot about his original injury.

19. Claimant was asked whether he told Dr. Bratman that he had back pain, because Dr. Knight's records reference that they did "not look into" his lumbar spine. Claimant testified "it wasn't focused" on my back. Claimant was then asked about Dr. Fall's report which recorded that Claimant told her that he "did not tell them [his treating physicians] about his low back." Claimant was asked about that not being correct and that he had informed Dr. Bratman of his back pain. Claimant responded he only remembered his treatment being directed to his ankle. When referenced that medical records with Dr. Bratman discuss his levels of back pain and examinations of his back, Claimant testified he had no memory of that treatment. Claimant was asked how he could remember that he downplayed the injuries if he has no memory of any back exams or treatment. Claimant responded generally that he remembered being afraid of reporting the injury.

20. Claimant was asked about Dr. Geersen's records which reference his pain had appeared two months prior to August 2014. Claimant testified that referenced when his pain became worse. He was then asked about Dr. Geersen's notes which reference "went away" – "2-3 mo. ago." Claimant responded that what is referenced is correct, but when he told Dr. Geersen it "came back" referenced when it worsened to a level he could not handle.

21. Claimant confirmed his pain levels were stable from being released at MMI through the time period he was working for his uncle. Claimant was asked about the course of his pain with respect to his various employments. He confirmed on cross-examination his pain initially increased once he began working for BAM Construction in July 2013. He specifically testified and agreed that the work he was doing for BAM Construction was causing the increase in his pain. Claimant testified around August 2014 he was hurting "pretty bad."

22. The ALJ notes that Claimant did not testify at all regarding the condition of his right ankle at the time of MMI or thereafter with respect to any allegations of worsening.

23. Dr. Fall testified at hearing as an expert in the field of physical medicine and rehabilitation. She testified Claimant suffered a worsening of condition which would be related to the workers' compensation claim. She testified that Claimant provided her a history which was inconsistent with the medical records. Specifically, she noted the discrepancy in the references to him losing consciousness, and the medical records reference minor symptoms and findings not consistent with his description of the degree of injury, including the documentation of superficial abrasions to his back. She testified Claimant's report that his low back was not initially addressed was not correct.

24. Dr. Fall testified the initial diagnosis for the back appeared to be a lumbar abrasion without much bruising, consistent with the reference to superficial abrasions in the Presbyterian/St. Luke's records which indicated a mechanism of injury of the wall scraping down along the edge of his back. She also noted the paramedics' notes reference to a "carpet burn" was consistent with a scraping injury. She testified the course of recovery would not be consistent with any other type of injury other than a minor abrasion and/or bruise to his back.

25. Dr. Fall discussed Dr. Knight's reference to a unilateral congenital fusion identified during x-rays taken at Dr. Knight's office. Dr. Fall explained a unilateral congenital fusion of this type is a development abnormality, from birth, where there is a partial fusion of the sacrum and L5. She noted that in conjunction with degenerative conditions at those same levels, those conditions predispose an individual for low back pain at that level because it mechanically predisposes someone for advanced degeneration due to the lack of normal movement at that level. Dr. Fall testified this condition, a unilateral condition where one side of the spine is fixed but the other side attempts to move, is called Bertolotti's Syndrome. She further clarified it predisposed Claimant to left sided back pain since the fusion was on the left side. She also testified that someone with that condition who was working in a heavy duty field would be more prone to be symptomatic earlier than someone with a sedentary life. She testified people with this condition usually do not become symptomatic until their late 20's or early 30's, because they have not had such wear and tear.

26. Dr. Fall commented that she disagreed with Dr. Hughes' diagnosis of a lumbar facet joint arthropathy. She testified a scraping / abrasion mechanism of injury does not create arthritis of the underlying joint unless there is movement of the joint or

tearing of the cartilage, which would have been a much more painful injury and which would have required long term care. She testified a contusion does not lead to the underlying development of arthropathy, which is degeneration of the facet joint.

27. Dr. Fall further testified that at the time Claimant was released from care by Dr. Bratman, there were no documented objective findings, as he had full range of motion and it was noted his contusion had resolved. Regarding Claimant's testimony he downplayed his condition at the time of MMI, Dr. Fall testified that if Claimant had remaining back pain of significance, that condition should be apparent upon exam with range of motion exercises or by elicitation of spasm or trigger point upon palpation.

28. Dr. Fall testified that Claimant told her specifically that his increase in pain was associated with his return to construction work for subsequent employers. She testified that if Claimant had experienced a worsening of back pain, she would attribute that worsening to his heavy work in construction, in conjunction with his congenital fusion abnormality, which he was performing after he was released from care. She testified any such worsening would not be causally related back to his original injury.

29. Dr. Fall testified the results shown in the August 19, 2014 HealthOne post-offer screening record, that his range of motion was "within functional limits," was not consistent with Claimant's testimony regarding his condition at that time. Dr. Fall testified Claimant's ankle recovery was consistent with a mild sprain. She noted that if it was a worse ankle sprain, it would be hard to fake improvement where it can be difficult to bear weight and there is associated swelling and bruising. She noted there were no objective findings of a continuing ankle injury at the time of MMI. She testified Claimant was properly placed at MMI.

30. The ALJ finds that Claimant did not prove by a preponderance of the evidence that he suffered a worsening of his condition to his low back or right ankle which is related to the original work injury. The ALJ credits Dr. Fall's testimony that any worsening of condition which may have occurred in Claimant's low back would be causally related to his work in construction for other employers and/or his pre-existing and unrelated unilateral congenital fusion. The ALJ notes that Dr. Hughes and Dr. Knight do not appear to have been provided an accurate medical history, and Dr. Hughes does not address in his analysis any role the subsequent employment activities with separate employers may play in a causation analysis of to what any worsening would be attributed. The ALJ also notes that no evidence was presented of an actual worsened condition in Claimant's right ankle.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. ICAO*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008).

Reopening and Change of Condition

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S.; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). A change in condition, for purposes of the reopening statute, refers to a worsening of the claimant's work-related condition after MMI. *El Paso County Dept. of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The pertinent and necessary inquiry is whether claimant has suffered any deterioration in his work related condition that justifies additional benefits. *Cordova v. Indus. Claim Appeals Office, supra.*

Claimant has failed to establish by a preponderance of the evidence that he suffered a worsening of condition to his left low back or right ankle. Moreover, even if Claimant suffered an overall worsened condition to either body part, he has not proven any such worsening is causally related to the work injury.

Relevant to a consideration of whether Claimant suffered a work-related worsening of condition is an examination of Claimant's argument that he downplayed his level of symptoms at the time of his release at MMI. Claimant's description of the severity of his original injury is not supported by the medical records. Rather, the medical records document minimal injuries which evolved into benign physical exams at MMI. The medical records document the falling wall scraped his back, as opposed to a more serious direct impact injury. Claimant was documented at Presbyterian/St. Lukes to have "superficial abrasion" from jumping "out of the way" of the wall. That finding is consistent with Claimant's own report to the paramedics that he had a "carpet burn." The objective findings on exam therefore matched his story at the time, not his contrary testimony at hearing. As noted by Dr. Fall, Claimant's minimal complaints at the time were consistent with such a scraping mechanism of injury.

As of January 2, 2013, Dr. Bratman recorded Claimant had full range of motion in his back and ankle without discomfort, and he specifically noted that there were no findings upon palpation. Dr. Fall noted that if there was any remaining injury of significance to his back, Claimant would either have presented with some limitation on range or motion or Dr. Bratman would have elicited spasms or trigger points upon palpation. Dr. Fall also testified credibly that it is difficult to "fake" improvement of an ankle sprain, because a more severe ankle sprain would have had remaining swelling, and discomfort upon weight bearing would be apparent and difficult to hide. Dr. Bratman placed Claimant at MMI on January 9, 2013, at which point he documented Claimant had benign physical exams to his low back and right ankle. Dr. Bratman's documentation of full ranges of motion without pain or other signs of injury are not consistent with Claimant's testimony. The weight of the evidence establishes that Claimant suffered a minor injury which resolved consistent with its severity.

Moreover, Claimant's testimony and recollection of events appeared to be selective at hearing. This selective emphasis on certain, at times incorrect, facts also appears to have been communicated by Claimant to his physicians. For example, Dr. Knight recorded that Claimant told her that his back was not treated during the course of the claim, which is obviously not correct upon review of the records. Dr. Fall also noted that Claimant told her he did not inform his treating physicians about his back pain at all. This is clearly contradicted by the medical records which show Claimant's back was consistently examined, and both his complaints and objective findings from those exams were documented. Dr. Knight's stated opinion that Claimant's complaints were related to his original injury cannot be endorsed by this ALJ because she was clearly misinformed in the course of forming that opinion regarding the nature and severity of Claimant's original injury, as well as the medical treatment he received for same.

Similarly, Dr. Hughes noted that Claimant's history provided to him, which was consistent with Claimant's testimony at hearing, was consistent with the medical records, but this is not the case for the various reasons discussed herein. Dr. Hughes' report lacks any discussion of Claimant's pain levels after MMI, and whether they dissipated completely or remained. His report also lacks discussion or consideration of the role Claimant's subsequent employment may play in determining whether any complaints of worsening are causally related to the original injury. For these reasons, the ALJ endorses Dr. Fall's testimony over the written opinions of Dr. Hughes.

When presented with contrary evidence to his assertions at hearing, Claimant testified that he only remembered the portions of his examinations pertaining to his ankle. Claimant was examined by responding paramedics, the ER physician, and Dr. Bratman on three occasions after his injury. Records from those five examinations document examinations of both his back and ankle, as well as discussions with Claimant about his level of symptoms in both body parts. The ALJ does not find it credible that Claimant remembered his ankle exams during each of those visits while lacking any recollection of examinations or discussions pertaining to his back. Also, Dr. Knight's and Dr. Fall's records do not document that Claimant told them he did not remember portions of his treatment, but that specifically he either did not tell his physicians about his back or that they did not examine his back.

Claimant has also alleged that his symptoms never dissipated and were constantly present after MMI, only to worsen at some point. However, all post-MMI medical records indicate a complete resolution of his pain. Both Dr. Knight and Dr. Geersen documented an onset of pain, not a worsening of pain, in the first half of 2014. Dr. Geersen specifically documented Claimant's condition "went away" and "came back." Dr. Fall noted that Claimant informed her he could not remember any back pain while working for his uncle after being released from care, and Dr. Hughes' report contained no analysis of whether the pain ever resolved. Claimant's testimony at hearing that his pain never went away, and references such as "came back" refer to when his pain worsened, are not credible in light of the weight of the totality of the evidence. The weight of the evidence establishes Claimant suffered a minor injury, which resolved completely. Therefore, it is less likely any worsening or reappearance of the pain could be causally traced back to the original injury.

The ALJ also notes that Claimant testified that by August 2014, his continuous back pain since MMI had become bad and was causing him to miss work to seek treatment. However, the August 19, 2014 HealthOne post-offer physical documents that Claimant had functional limits of lumbar range of motion, there is no discussion of any limitations or pain complaints, and Claimant was able to lift various heavy work category weights without documented limitation. Claimant then sought chiropractic care the very next day from Dr. Geersen, at which time he informed Dr. Geersen his pain had previously gone away but had recently come back. The circumstances of these records and complaints are contrary to Claimant's assertions at hearing regarding continuous symptoms and the level of symptoms from which he was suffering at that time.

The ALJ must rely upon Claimant's testimony in order to find that he has suffered a worsened condition at all to his back or right ankle. However, as documented herein, Claimant's subject reports are too unreliable, contradictory, or lack plausible inferences to find that Claimant has suffered a worsened condition over time.

Perhaps most important in the analysis of Claimant's reopening request is whether any worsening would be causally related to the original work injury. It is axiomatic in the workers' compensation system that an employer takes an employee as they find them and is responsible for aggravations of pre-existing conditions, even if those pre-existing conditions were caused while employed for a prior employer. Conversely, an employer responsible for a prior workers' compensation injury will not be held liable in perpetuity for aggravations or a worsening of a pre-existing condition if such worsening arises from a workers' duties performed for a subsequent employer.

Here, Claimant directly testified at hearing that he began feeling increased pain in his low back when he began working for another construction company, BAM Construction, and that he felt his work at that company led to the increase in his symptoms. He further testified the pain increased even more over the course of working for Heggem Lunquist, doing the same type of construction labor work, to the extent he began missing work and sought treatment from Dr. Geersen. His testimony was consistent with his report to Dr. Hughes that he began to feel as if he was overworking himself when his pain returned or got worse. Dr. Fall also noted in her report and testified at hearing that Claimant specifically informed her that his pain started when he started working in construction again.

The evidence, including Claimant's own testimony, establishes that Claimant had reached a stable level with respect to his back and ankle symptoms at and after MMI, regardless of whether his symptoms had completely resolved at MMI or were minimal. His symptoms thereafter subjectively worsened as a direct result of his employment with a subsequent employer. Therefore, if there was any true worsening of condition, such worsening would not be causally related to the original injury, but rather would be causally related to Claimant's work for subsequent employers. Any new claim for benefits for an aggravation of a preexisting condition should be directed to those employers accordingly.

The ALJ also credits the testimony of Dr. Fall that Claimant's congenital left sided fusion, in conjunction with heavy category physical labor, would predispose Claimant to left sided low back pain at a young age independent of the original work injury. Dr. Fall's testimony that Claimant had Bertolotti's syndrome involving a lack of normal movement on the left side of Claimant's low back was persuasive on this point. Also persuasive was her testimony that it was not unusual for Claimant to feel these symptoms at his age, as people with this condition who are not subject to such wear and tear will become symptomatic themselves in their late 20's or early 30's. While Claimant may still be theoretically subject to a worsening of condition in his back relatable to the original work injury, Claimant has not proven as much where the evidence shows a resolution or near complete resolution of symptoms, onset of symptoms again while working for a subsequent employer, in conjunction with a congenital defect that has no relation to the original work injury.

The ALJ also notes that, specifically with respect to Claimant's right ankle, Claimant did not offer any testimony at hearing in support of an argument that his right ankle had worsened. Although he testified generally his symptoms at MMI were worse than he informed his treating providers, his testimony concerning an alleged worsening thereafter only pertained to his back. Even Claimant's own IME physician, Dr. Hughes documented that Claimant denied any ankle pain during his examination. While Dr. Hughes recommended Claimant receive additional care for his ankle, he expressly stated the basis for his recommendation was his belief that Dr. Bratman did not appreciate residual symptoms in the ankle upon physical exam, such as crepitation. His opinion as not based upon complaints of worsened pain. Even so, Dr. Hughes' opinion is countered by Dr. Fall, who documented a benign ankle exam without pain, crepitation, or other signs of an injury at all, let alone a worsened condition.

Claimant must prove a worsened condition to reopen his claim, and it is not sufficient to argue the claim should be reopened to examine symptoms which were present at MMI but not treated, which was recommended by Dr. Hughes. The Act and D.O.W.C.R.P. have promulgated rules and procedures relating to a Division IME review and ability to challenge a MMI determination in such circumstances. Claimant chose not to pursue those avenues, his claim was closed, and he has not established by a preponderance of the evidence that he suffered a worsened condition of his right ankle.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claims for reopening regarding both his low back and right ankle are denied and dismissed. Claimant's claim for additional medical benefits is denied.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 26, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the shoulder surgery recommended by Dr. Copeland is reasonable and necessary to cure and relieve claimant from the effects of his industrial injury?

FINDINGS OF FACT

1. Claimant was employed with employer as a warehouseman. Claimant testified he was injured on January 13, 2013 when he a rail car (referred to as a "rail king") he was standing in collided with 3 parked rail cars after the rail king malfunctioned. Claimant testified he was thrown into the window and the control box during the collision. Claimant testified the rail king was traveling approximately 30-35 miles per hour.

2. Claimant sought treatment for the injury with Work Partners, the physician designated by employer to treat the injury, on January 14, 2013. Claimant reported to Mr. Esser, the physician's assistant for Dr. Gustafson, that at the point of impact, he hit the right side of his hip/buttocks area on a metal box and then slammed his right shoulder and head into the window. Claimant reported involuntary jerking of his left leg since the previous evening. Mr. Esser noted that he believed the right shoulder had just been contused and potentially irritated the bursa resulting in some bursitis. Claimant was referred for soft tissue manipulation with Dr. Angello and advised to take over the counter anti-inflammatories.

3. Claimant testified at hearing that he downplayed his right shoulder pain in his follow up appointments because he wanted to continue to work for employer performing his normal job. Claimant's follow up treatment generally appears to have focused on his leg spasms as opposed to his shoulder condition.

4. Claimant was examined by Dr. Dean on February 4, 2013. Dr. Dean noted claimant's problems included localized epilepsy and epileptic syndromes with simple partial seizures along with cervical spondylosis with myelopathy and a concussion. The records also note that after the accident, claimant reported pain in the right hip and gluteal region, pain in the shoulder and some headache. Dr. Dean recommended an EEG to evaluate for possible myoclonic epilepsy and noted that amazingly, claimant continued to work despite his ongoing problems.

5. Claimant returned to Mr. Esser on February 11, 2013. With regard to clamiant's right shoulder, Mr. Esser noted claimant was mildly tener to palpation over the acromioclavicular ("AC") joint and noted claimant was complaining that his shoulder was bothering him near the AC joint. Mr. Esser noted claimant could have a potential

first degree acromioclavicular joint separation. Mr. Esser referred claimant for an x-ray of his right shoulder to confirm there was no fracture.

6. Claimant continued to follow up for treatment of his left sided leg jerks which included an EEG, and multiple computed tomography ("CT") tests.

7. On March 12, 2013 claimant was evaluated by Dr. Gustafson who noted that claimant's right shoulder was still painful. Dr. Gustafson advised claimant that this would take some time to heal and noted that the x-ray did not show any significant damage. Claimant returned to Dr. Gustafson on April 4, 2013 and was noted to have mild tenderness on exam of the right AC joint with tightness of the trapezius muscle. Dr. Gustafson noted on April 23, 2013 that claimant's right shoulder AC separation was "resolved".

8. On June 25, 2013, Dr. Gustafson places claimant at MMI and noted that claimant had tremendous improvement since his last visit. Claimant testified at hearing, however, that he was not improved, but was affected by the death of his mother-in-law and reported to Dr. Gustafson that he was improved in an attempt to move on past his workers' compensation injury.

9. Claimant continued to treat after being placed at MMI for his ongoing left sided leg myoclonus jerking, including psychiatric treatment with Dr. Kareus.

10. Claimant eventually returned to Dr. Holmes and was evaluated by nurse practitioner Haraway on January 2, 2015. Claimant reported to Mr. Haraway that he continued to experience pain in his right shoulder. Mr. Haraway provided claimant with range of motion exercises and referred claimant to orthopedics for evaluation and treatment.

11. Claimant was seen by Dr. Stagg on April 28, 2015. Dr. Stagg took over claimant's care after claimant was discharged from care at Work Partners. Dr. Stagg noted claimant's symptoms included pain in the right shoulder. Dr. Stagg referred claimant for a magnetic resonance image ("MRI") of the right shoulder. Dr. Stagg noted claimant reported persistent pain in his right shoulder following the work injury.

12. Claimant underwent the MRI of the right shoulder on May 11, 2015. The MRI showed partial thickness tearing of the supraspinatus and findings suggestive of labral tearing.

13. Claimant was examined by Dr. Copeland on May 20, 2015. Dr. Copeland noted claimant reported symptoms in his right shoulder following the work injury. Dr. Copeland performed a physical examination and reviewed the results of the MRI and diagnosed a partial tear of the right rotator cuff. Dr. Copeland noted that claimant had symptoms that were likely due to his labral tear, but noted no frank instability and recommended formal physical therapy.

14. Claimant returned to Dr. Copeland on June 23, 2015. Dr. Copeland at this point recommended claimant undergo right shoulder arthroscopy with repair of the

superior labrum; biceps tenotomy; debridement of the rotator cuff versus repair and a subacromial decompression. Respondents denied the request for authorization from Dr. Copeland and referred claimant to Dr. O'Brien for an independent medical examination ("IME").

15. Claimant underwent the IME with Dr. O'Brien on September 22, 2015. Dr. O'Brien reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. O'Brien noted that claimant reported to his medical providers that his right shoulder contusion had resolved as early as January 18, 2013 when Mr. Esser noted that claimant's right hip and shoulder were both just find and no longer causing pain. Dr. O'Brien opined that claimant's MRI exam was normal for age relative to claimant's shoulder. Dr. O'Brien opined that the findings that were suggestive of a labral tear were not indicative of a labral tear, especially considering claimant's history of smoking. Dr. O'Brien opined that claimant sustained an injury to his right shoulder on January 13, 2013, but that it had healed on or before January 18, 2013.

16. Dr. O'Brien testified by deposition in this case consistent with his IME report. Dr. O'Brien opined that claimant's ongoing complaints of pain in his right shoulder after January 18, 2013 were a manifestation of claimant's personal health and were not related to the work injury of January 13, 2013.

17. Dr. Copeland likewise testified by deposition in this matter. Dr. Copeland opined that claimant reported pain in his shoulder after his work injury on January 13, 2013 and opined that claimant's work injury either caused or exacerbated a pre-existing degenerative condition involving claimant's shoulder pathology.

18. Claimant testified at hearing that despite what he reported to his physicians, his right shoulder symptoms never fully resolved after the injury. Claimant testified he reported to Dr. Gustafson that his condition had significantly improved because of issues with his personal life and his concern with regard to supporting his family. Claimant's testimony in this regard is found to be credible.

19. The ALJ notes that claimant's testimony in this regard makes sense as Dr. Gustafson had likewise noted the claimant's condition had unexpectedly and dramatically improved in June 2013. The ALJ finds claimant's explanation for this dramatic improvement to be credible and determines that claimant has established that it is more probable than not that he continued to experience symptoms in his right shoulder as he testified to at hearing.

20. The ALJ further credits the opinions expressed by Dr. Copeland as being more credible and persuasive than the contrary opinions expressed by Dr. O'Brien. The ALJ notes that Dr. O'Brien's opinion relies on the medical records documenting claimant reporting a recovery of his symptoms by January 18, 2013. The ALJ credits claimant's testimony at hearing that his condition involving his right shoulder did not fully resolve following the injury and credits Dr. Copeland's opinions involving causation over the contrary opinions of Dr. O'Brien.

21. The ALJ concludes that claimant has established based on the evidence that it is more probable than not that the treatment for his right shoulder recommended by Dr. Copeland, including the proposed surgery, is reasonable and necessary medical treatment causally related to claimant's January 13, 2013 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has proven by a preponderance of the evidence that the medical treatment recommended by Dr. Copeland is reasonable and necessary to

cure and relieve claimant from the effects of his work injury. As found, the opinions of Dr. Copeland in this regard are determined to be more credible and persuasive than the contrary opinions expressed by Dr. O'Brien.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical treatment recommended by Dr. Copeland, including the recommended right shoulder surgery, pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 8, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Respondents have produced clear and convincing evidence to overcome Dr. Bloch's Division IME opinion that Claimant is not at maximum medical improvement.

II. If the answer to issue I is yes, what is the appropriate permanent impairment rating for Claimant's injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was injured on April 6, 2013, when he fell at work and struck his head on a railing.

2. Claimant was first treated for his injury in the Platte County Memorial Hospital emergency department (ED). A CT of the head without contrast was done. The radiologist's conclusion was "negative noncontrast head CT." (Exhibit 4, Bates p. 19) The ED record from this date is difficult to read, but it indicates that Claimant had a Glasgow Coma Scale score of 15 and that while Claimant had some memory loss for "details" after his injury, he was able to recall the injury itself and coming to the hospital for treatment. Claimant testified inconsistently with this report indicating that he had no memory for anything and that his first recollection after his fall was waking up in the hospital. The ED record provides a clinical impression of "concussion w/o LOC", i.e. concussion without loss of consciousness.

3. Claimant was seen at Centura Centers for Occupational Medicine (CCOM) on April 15, 2013, by Bernice Barnes, NP-C. Ms. Barnes documented Claimant's complaints of headaches, sleepiness, stuttering, and episodes of gasping for air at night. She specifically noted that his short-term memory and recall were intact and he had no obvious neural deficits with examination. (Exhibit 5, Bates p. 28)

4. Claimant had a second noncontrast CT of the brain on April 16, 2013. The radiologist's impression was "unimpressive CT brain with no acute intracranial process currently suggested." (Exhibit 6, Bates p. 78)

5. On April 22, 2013, Claimant was seen by Kenneth Ginsburg, PA-C, at CCOM. Mr. Ginsburg noted that Claimant said some of his friends had stated he was stuttering, but he had not noticed this. His girlfriend had noticed him occasionally

gasping for breath at night, but he had not felt any more than his usual shortness of breath. Claimant stated that other than the mild headaches, he had no other symptoms that would keep him from returning to work and he would like to return to full duty work without restrictions. On examination, Mr. Ginsburg noted no speech or language deficits or difficulties with memory. He noted "higher mental functions grossly intact." Claimant was released to full-duty work without restrictions and told that if he had difficulties performing normal work duties he should call the clinic for follow-up. (Exhibit 5, Bates pp. 35–36)

6. Dr. Olsen initially placed Claimant at maximum medical improvement (MMI) on May 9, 2013 without permanent impairment. (Exhibit 5, 39) In his narrative report of that date, Dr. Olson noted that Claimant still got occasional headaches but had not really complained of any dizziness, blurred vision or double vision. Dr. Olson specifically noted that Claimant really had not had any noticeable memory loss except for one incident. (Exhibit 5, Bates p. 40).

7. Claimant returned to Dr. Olson on August 2, 2013, almost 3 months later, complaining of continuing headaches and some memory problems. Dr. Olson's assessment was history of concussion with continued post-concussive symptoms. He referred Mr. Claimant to Dr. Rawat for neurologic consult. (Exhibit 5, Bates pp. 41–42)

8. Claimant was seen by Sumant Rawat, M.D., on September 12, 2013. He complained of headaches; an inability to use familiar tools at work; left-sided numbness involving his face, arm, and leg; and sensitivity to light and sound. Dr. Rawat's impressions were posttraumatic/postconcussion headaches without significant improvement with his current regimen of nortriptyline; mild cognitive impairment question attention deficit disorder that is not uncommon with concussion; and sleep disorder. (Exhibit 7, Bates p. 83)

9. Claimant was seen by Bradley W. Patterson, PhD, for neuropsychological evaluation on January 23, 2014. In his summary of the test results, Dr. Patterson stated, "In summary, the current test findings reveal a mild isolated deficit in some aspects of new learning and memory, word finding, and executive cognitive functions. There were no pronounced focal or lateralizing CNS signs or any unequivocal pathognomonic indications, and the rest of his neural behavioral test performances were grossly within normal limits." Dr. Patterson's diagnostic impressions were listed as cognitive disorder NOS (mild but clinically significant deficits in verbal new learning and memory, word finding, and executive cognitive functions associated with the history of concussion on 04/06/2013, prior concussions, a long-standing history of polysubstance abuse, low O2 saturations, normal hypoxemia, use of sedating medications, white matter lesions on the MRI, and mild, agitated depression. Dr. Patterson also diagnosed adjustment disorder with mixed anxiety and depressed mood, primarily secondary to the cognitive disorder diagnosis; a history of polysubstance abuse, reportedly in remission for the last seven years; personality disorder NOS with antisocial features, provisional; a history of auditory acuity deficit with multiple concussions, reported back injury, nocturnal

hypoxemia; and vocational problem associated with all of the above. (Exhibit 9, Bates pages 97–99)

10. Claimant was seen by Dr. Rawat through October 27, 2014. On that date, Dr. Rawat's impressions were chronic posttraumatic headaches with definite improvement with increased dose of Inderal and posttraumatic syndrome with questionable cognitive impairment and sleep disorder, though for the most part the patient seems to be doing better in this regard. (Exhibit 10, Bates p. 104)

11. Claimant was seen for an IME by Eric O. Ridings, M.D., on October 28, 2014. Dr. Ridings noted that the natural history of traumatic brain injury is for the patient to have maximum symptoms just after the injury, with ongoing improvement in symptoms over the next 18 to 24 months. He opined that it was quite medically improbable that with Claimant's history a patient would begin having cognitive difficulties of any sort subsequently, giving his benign course to the point of MMI. (Exhibit B, Bates p. 18) Dr. Ridings stated that the new symptoms described in Dr. Rawat's September 12, 2013 note were entirely unexpected based upon Claimant's course to that point. Numbness throughout the left side of one's body would be expected to be due to a significant abnormality of the brain such as a stroke, partial complex seizures, or a migraine variant. None of the symptoms would be expected as a result of a mild traumatic brain injury that was asymptomatic except for headaches for weeks in the absence of a structural finding on cross-sectional imaging. Stuttering is not associated with traumatic brain injury. Inability to use familiar tools would not be expected even shortly after a traumatic brain injury unless the injury were severe, which based on the medical records Claimant's injury clearly was not. (Exhibit B, Bates p. 19) Dr. Ridings concluded that the only symptoms he could attribute to Claimant's April 6, 2013 injury were his ongoing headaches. He opined, within a reasonable degree of medical probability, that Claimant's cognitive complaints, which were first documented on the follow-up evaluation with Dr. Olson on August 2, 2013, were not related to this work injury. Dr. Ridings stated that Claimant's reports regarding his current cognitive loss of function were not consistent with his neuropsychological test results. He discussed the alternate explanations for the mild deficits seen on Claimant's neuropsychological testing. Dr. Ridings opined that Claimant remained at MMI since he was originally placed there on May 9, 2013, and did not require any work restrictions. Dr. Ridings agreed with Dr. Olson's original rating of 0% impairment. (Exhibit B, Bates pp. 25–26)

12. On November 25, 2014, Dr. Olson opined that Claimant was probably stable and at maximum medical improvement for his headaches, and that therefore he would probably assign an impairment rating for the headaches. (Exhibit A, Bates pp. 6–8) On December 10, 2014, Dr. Olson issued his Maximum Medical Improvement and Impairment Report. He stated the date of MMI was November 25, 2014. He outlined Claimant's treatment for his injury and noted that the results of the neuropsych testing were inconclusive as to the actual cause of the problem as Claimant had prior head injuries and substance abuse. Dr. Olson noted that although he had previously placed Claimant at MMI with 0% impairment, he now felt that since Claimant was still requiring medications for his headaches he would qualify for impairment for his headaches. In

arriving at the impairment rating, he referred to the AMA Guides, third edition revised, Chapter 4, Table 1 and assigned 5% for episodic neurologic disorders which represent his headaches. Dr. Olson felt that the cognitive findings were multifactorial and not necessarily related to the injury and therefore the headaches were what he felt required an impairment rating. (Exhibit A, Bates pp. 1–5)

13. Claimant was seen for a second IME with Dr. Ridings on June 3, 2015. He agreed with Dr. Olson that Claimant was at MMI on November 25, 2014. He also agreed with Dr. Olson's assigned impairment rating of 5% from Table 1 of Chapter 4 for episodic neurological disorders regarding his headaches. He noted that while Claimant did have some cognitive deficits, it was not clear from the medical records that these were worsened by his most recent head injury on April 6, 2013. He noted Claimant had been able to return to the workforce, working full time when he was able to find such employment without restrictions. (Exhibit B, Bates p. 14)

14. Claimant was seen for a Division IME by Jonathan Bloch, D.O., on April 3, 2015. Claimant reported to Dr. Bloch that he was still having significant memory and concentration problems that included forgetting how to use tools, forgetting job duties, leaving the water running at home, etc. Claimant also complained of emotional outbursts as well as the ongoing headaches. Dr. Bloch diagnosed Claimant with post concussive symptoms of headache, decreased mentation, and anxiety. *Id.* at 128. In his Division IME Examiner's Summary Sheet, Dr. Bloch checked "No, the Claimant is not at MMI" and added "TBD via testing recommended." In his narrative report, Dr. Bloch listed diagnoses of postconcussive symptoms of headache, decreased mentation and anxiety; mild or greater OSA, not work-related; possible restless leg syndrome, not work-related; and tobacco abuse, not work-related. Regarding MMI, Dr. Block noted: "Stable currently, and I appreciate no significant decline over the majority of this claim, and MMI status is rather comparable to today's encounter." (Claimant's Ex. 13, p. 128). Despite indicating that Claimant's condition was stable, Dr. Bloch suggested that Claimant undergo a pulmonary function test (PFT) and oxygen desaturation testing to determine whether Claimant's ongoing symptoms are a result of smoking as opposed to the head injury from April 6, 2013. *Id.* If either of these tests indicated lung disease, Dr. Bloch opined it was more probable Claimant's cognitive symptoms were from smoking and not the head injury of April 2013 and he was at MMI from the original MMI date without impairment. If neither test showed decreased lung capacity attributable to smoking, Dr. Bloch's opined that it was reasonable to set the MMI date with impairment rating to December 10, 2014.

15. Dr. Bloch also opined that an impairment rating for Class 2 disturbances of cerebral function was appropriate based upon Claimant's cognitive complaints. Class 2 disturbances of cerebral function gave Claimant a 20% whole person impairment rating. (Exhibit C, Bates p. 27–34)

16. Dr. Ridings issued a report of his analysis of Dr. Bloch's DIME report on June 15, 2015. Although he agreed with Dr. Bloch's opinion that Claimant had other possible explanations for his current cognitive deficits, he disagreed with Dr. Bloch's

suggestion that the decision on whether these complaints were pre-existing or related to the current injury would depend on the amount of Claimant's cigarette smoking rather than the history of drug abuse or the quite severe pre-existing closed head injury. Dr. Ridings pointed out the error in Dr. Bloch's report in which he stated Claimant was not at MMI pending the recommended pulmonary testing, but then indicated that in the event Claimant had findings of pulmonary disease he was at MMI on May 9, 2013, but if no pulmonary disease was found he was at MMI on November 25, 2014. Dr. Ridings opined that Dr. Bloch's request for pulmonary workup for issues unrelated to the work injury simply to determine which of two dates of MMI were most appropriate was not supported by the workers' compensation statute or medical treatment guidelines. Dr. Ridings also disagreed with Dr. Bloch's provisional 20% whole person impairment rating as not supported by the AMA guides. (Exhibit B, Bates pp. 10–11; see also hearing transcript page 13, line 7 to page 15, line 12)

17. Claimant was seen for an IME by Timothy O. Hall, M.D., on July 9, 2015. Dr. Hall disagreed with Dr. Ridings' conclusion regarding the timing of Claimant's cognitive symptoms, opining that it was not unusual from a cognitive perspective for symptoms to show up some months after an initial injury. Nonetheless, Dr. Hall also questioned Dr. Bloch's request for pulmonary function tests to determine a date of MMI. Dr. Hall argued that Claimant has permanent sequelae from his April 3, 2013 injury and "deserves" the impairment rating assigned by Dr. Bloch of 20% whole person without apportionment. (Exhibit 14, Bates p. 135)

18. Based upon the evidence presented, the ALJ finds that a conflict exists between the explanations given in Dr. Bloch's DIME report versus what his DIME summary sheet indicates concerning MMI. While Dr. Bloch explains in his report that Claimant would be at MMI on either December 10, 2014 or on April 7, 2013, his summary sheet clearly indicates that MMI is to be determined after additional testing is completed. After carefully considering Dr. Bloch's DIME report in its totality, the ALJ finds that Dr. Bloch's determination concerning MMI was contingent upon Claimant receiving additional medical testing to determine if smoking was the cause of Claimant's current cognitive deficits. Consequently, the ALJ finds that Dr. Bloch determined that Claimant was not at MMI until such testing was done; whether he ultimately decided to set MMI as of December 10, 2014 or April 7, 2013 date or some other date entirely. Claimant's suggestion that Dr. Bloch had determined that he was at MMI because all of his statements and recommendations indicate that Claimant's condition was stable and not likely to change and that the requests for further treatment were to help clarify the impairment rating are unpursuasive when the DIME report is considered in its entirety.

19. Dr. Ridings testified to his opinion that Claimant was at maximum medical improvement for his April 7 (sic), 2013 injury the time he was first placed at MMI by Dr. Olson on May 9, 2013. When Claimant was seen at CCOM nine days after his injury, at the next visit, and at the third visit by Dr. Olson on May 9, 2013, there was no documentation of any problems with cognition. CCOM did a good job of documenting cognition at each visit. (Hearing transcript page 16, line 1 to page 17, line 23) Dr. Ridings testified that there are two major explanations that are more medically probable

for Claimant's reduced cognitive findings documented by Dr. Patterson then the incident at work. One is the pre-existing head injury in which he reported to multiple examiners that he had fallen 25 feet, landing on his head with a loss of consciousness for 45 minutes at the time. According to the medical record, it took approximately three years to recover from this injury. Claimant also reported to multiple evaluators that he had abused alcohol and hard drugs for 30 years, although not for the sometime prior to his April 6, 2013 fall and injury. Dr. Ridings also noted Claimant's previous history of altercations and fights. (Hearing transcript page 19, line 22 page 21, line 16) Based upon the evidence presented, the ALJ finds that Dr. Ridings agrees with Dr. Olson and Dr. Patterson that Claimant's cognitive dysfunction is, more probably than not, multifactorial in nature. The ALJ also finds that Dr. Ridings agrees with Dr. Olson that Claimant was properly rated under a different category for brain under Chapter 4.1a of the AMA Guides, namely episodic neurological disorders as the impairing nature of Claimant's injury was his residual headaches and not cognitive deficits.

20. Dr. Ridings explained that if cognitive issues are going to arise from a head injury unless there is a subdural or epidural hematoma, which Claimant did not have, the most severe cognitive deficits are expected immediately afterwards. Problems with things like memory, orientation, multitasking, and sequencing are most severe initially after the injury to the head and gradually improve over time for up to two years. So it's not expected or in conformance with the medical literature for someone to repeatedly say they have no problems with cognition and then 2 1/2 months after their last physician visit to say I'm beginning to have cognitive symptoms and have those related to the previous injury. Dr. Ridings explained it is also not reasonable, medically, for those cognitive symptoms to progressively worsen after that point. (Hearing transcript page 19, line 24 to page 23, line 1) Dr. Ridings also testified that it is a very rare occurrence for someone to have difficulty with basic cognitive function, which Claimant is currently alleging, and have them not report that to the physician with whom they are treating with when they are specifically asked if they have cognitive symptoms.

21. According to Dr. Ridings, the degree of severity of Claimant's reported symptoms in later treatment records, such as not being able to use tools that he's used in carpentry throughout his career, suggests a severe cognitive deficit that would not have been unapparent early on, because the most severe cognitive symptoms manifest earlier and gradually improve over time, not the opposite. Dr. Ridings testified that Dr. Hall's statement to the contrary is medically unfounded. (Hearing transcript page 21, line 22 to page 24, line 21)

22. As noted above, Dr. Ridings explained that he agreed with Dr. Olson's 5% impairment rating for episodic neurologic disorders attributable to Claimant's post-concussive headaches. He explained the medical records supported the fact that Claimant is having ongoing headache problems, which had been getting better with appropriate treatment but still cause him some difficulties. (Hearing transcript page 28 lines 14 to page 29, line 1) Dr. Ridings disagreed with Dr. Bloch's 20% impairment rating using the charts on page 105 of the AMA Guides for disturbances of cerebral function. Dr. Ridings explained that Dr. Bloch was entirely in error in assigning a class 2,

disturbance of cerebral function, impairment because class 2 refers to someone who "needs some supervision" with daily activities. He explained that "needs some supervision" means the person can't go about their daily activities without someone being there to make sure they don't do something dangerous to themselves or others. According to Dr. Ridings', Claimant's ability to work several jobs after his first date of MMI without apparent problems for weeks and months is inconsistent with the suggestion that Claimant requires "some supervision" attributable to cognitive dysfunction. There is, according to Dr. Ridings, no corroborative evidence in the medical record that would support a finding that Claimant needs some supervision qualifying him for a Class 2 impairment rating as found by Dr. Bloch. As explained by Dr. Ridings the medical record evidence fails to support a finding that Claimant sustained an injury in the April 2013 fall that would justify a rating for disturbance of cerebral function. (Hearing transcript page 24, line 22 to page 28, line 13)

23. Claimant testified that in addition to his headaches, he has significant memory loss, including word finding difficulty while talking, wandering off when he's supposed to be working, and forgetting how to put tools back together at work. Nonetheless, Claimant was able to follow the proceeding and appropriately answer the questions posed to him during his testimony. He did not appear to be confused at hearing and was able to provide sufficient detail surrounding the events of his injury, his treatment, his ongoing symptoms and his work history. Based upon Claimant's presentation during his testimony, the ALJ is not persuaded that he was experiencing the effects of cognitive impairment at hearing.

24. During cross examination, Claimant admitted that he applied for and got unemployment beginning April 2013. He applied for and got work June 2013 and worked through June 2014. He applied for and received unemployment beginning July 2014. He got work in September 2014 and worked to January 2015. In January 2015, he applied again for and got unemployment benefits. (Hearing transcript page 49, lines 1–25) During these times, Claimant worked in a variety of positions including loading trains where he also guided a forklift driver and in carpentry where Claimant built stage sets for performance art productions. He was able to get along with co-workers and had no fights on the job. He also admitted that he has a current driver's license and drove to his IME in Colorado Springs with Dr. Hall by himself. While Claimant described an incident following his IME with Dr. Hall, where he was found wondering around a parking lot because he didn't know why he was there, Claimant presented no corroboration concerning this event. Based upon the evidence presented, the ALJ finds Claimant's testimony attributing his current cognitive symptoms to his April 6, 2013 injury cannot be reconciled with the documentary evidence which supports a finding that he did not report any memory, attention, word finding and/or problems with work processes to his treating providers from the date of injury until August 2, 2013, nearly 5 months after his injury and 3 months after he was first placed at MMI on May 9, 2013. Consequently, the ALJ finds Claimant's testimony concerning his current cognitive dysfunction and his need for supervision grossly overstated and unconvincing.

25. Patricia Quintrell testified that she is Claimant's live in girlfriend. She and Claimant have lived together for the past nine (9) years. According to Ms. Quintrell she never observed Claimant to suffer from headaches prior to his April 6, 2013 head injury. Now Claimant, per Ms. Quintrell, suffers from daily headaches. The ALJ finds this portion of Ms. Quintrell's testimony supported by the record evidence, including Claimant's persistent complaints of headaches early on and throughout the course of his recovery.

26. Ms. Quintrell explained that since Claimant's April 6, 2013 injury she has taken to following him around the house to make sure he has turned things off. According to Ms. Quintrell, Claimant will often leave the oven or stove burners on and/or the water running in the sink. (Tr. 60:18-25). She further explained that she has taken over the payment of all bills in their home since April of 2013 because Claimant had forgotten to pay bills in the past to the point of having their electricity shut off. (Tr. 63:23-64:9)

27. The ALJ credits Dr. Ridings' testimony to find that Dr. Bloch's request for pulmonary workup for issues unrelated to the work injury is not supported by the Colorado Workers' Compensation Act or the Medical Treatment Guidelines simply to determine which of two dates of MMI were most appropriate. The ALJ further credits the opinions of Dr. Olson and Dr. Ridings to find that Dr. Bloch erred in concluding that Claimant was not at MMI as stated on his DIME summary sheet. Respondents have demonstrated, by clear and convincing evidence, that Dr. Bloch's opinion that Claimant has not reached MMI highly probably incorrect. Accordingly, Respondents have overcome Dr. Bloch's finding that Claimant has not reached maximum medical improvement. Based upon the evidence presented, the ALJ finds that Claimant likely reached MMI on November 25, 2014.

28. The ALJ finds Dr. Bloch's Class 2 impairment for disturbance of cerebral function unsupported by the record. Class 2 refers to someone who "needs some supervision" with daily activities. Claimant worked at several jobs after his first date of MMI, apparently without problems for weeks and months, which clearly does not fall into the category of "needs some supervision." Little persuasive evidence to corroborate Claimant's assertions that he "needs some supervision" because he forgets to turn the water and stove off and/or pay his bills was presented at hearing. Rather in an effort to bolster Claimant's claims of needing supervision, he presented the testimony of his live in girlfriend, Ms. Quintrell. This case involves a question regarding the degree of impairment which impacts the money benefit Claimant is entitled to under the Workers Compensation Act. Consequently, questions regarding Ms. Quintrell's bias and interest in the outcome of the case are inescapable. Because the unbiased medical records fail to support a finding that Claimant sustained an injury in the April 2013 fall that would justify a rating for disturbance of cerebral function and Claimant delayed the reporting of cognitive deficits and otherwise acted inconsistently with someone who needed "some supervision" for weeks and months after this injury, the ALJ finds Ms. Quintrell's testimony no more persuasive than Claimant's. Indeed, Ms Quintrell simply parrots the same "forgetfulness" as Claimant did for his claim that he "needs some supervision." As

found above, the weight of the remaining evidence dispels the ALJ of the idea. Consequently, Respondents have also demonstrated, by clear and convincing evidence, that Dr. Bloch erred in providing a rating based upon a degree of impairment of complex integrated cerebral functions such that Claimant required “some supervision and/or direction” to complete daily activities. Consequently, Respondents have demonstrated that Dr. Bloch’s 20% impairment rating is highly probably incorrect. Accordingly, Respondents have overcome Dr. Bloch’s 20% impairment rating. The ALJ credits the opinions of Dr. Olson and Dr. Ridings to find that Claimant has 5% whole-person impairment as a direct consequence of his April 6, 2013 industrial injury.

CONCLUSIONS OF LAW

Based upon the forgoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

B. In determining credibility, the ALJ should consider the witness’ manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Dr. Olson’s and Dr. Ridings’ opinions are credible and supported by the totality of the record evidence submitted for consideration. Conversely, the opinions expressed by Dr. Bloch in his DIME report are not supported by the Colorado Workers’ Compensation Act, the AMA Guidelines and the record as a whole. Accordingly, the ALJ concludes that the opinions of Drs. Olson and Ridings are more persuasive than those of Drs. Bloch and Hall. As found, the testimony of Claimant and Ms. Quintrell is largely contradicted the medical record and is otherwise unreliable secondary to bias and interest in the outcome of the case. Accordingly, Claimant’s testimony along with that of Ms. Quintrell is rejected as unconvincing.

Overcoming the DIME

Generally

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by “clear and convincing evidence.” Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant’s medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be “unmistakable and free from serious or substantial doubt.” *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

Overcoming the DIME Regarding MMI

D. In this case, Claimant asserts that the opinions of Dr. Bloch concerning MMI are ambiguous and that a threshold determination of what constituted the actual opinion of Dr. Bloch regarding MMI and impairment must be resolved before the question of whether Respondents overcame his opinions can be addressed. Based upon the evidence presented, the ALJ agrees with Claimant. If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5* P.3d 385 (Colo. App. 2000); *Stephens* v. *North and Air Package Express Services,* W. C, No. 4-492-570 (February 16, 2005), *aff'd, Stephens* v. *Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006) (not selected for publication). In this case, a conflict exists between the explanations given in Dr. Bloch’s DIME report versus what his DIME summary sheet indicates concerning MMI. However, as found, the ALJ concludes that Dr. Bloch’s determination concerning MMI was contingent upon Claimant receiving additional medical testing to determine if smoking was the cause of Claimant’s current cognitive deficits. Consequently, the ALJ concludes after careful review of the DIME report that Dr. Bloch determined, as a matter of fact, that Claimant was not at MMI until such testing was done; whether he ultimately decided to set MMI as of December 10, 2014 or April 7, 2013 date or some other date entirely. Claimant’s contrary suggestion that Dr. Bloch actually determined that Claimant was at MMI is unconvincing when the DIME report is viewed in its entirety. Thus, while Claimant agrees that he is at MMI, albeit, because Dr. Bloch actually concluded that MMI would be assigned on a particular date after the requested testing was done, the ALJ concludes that Respondents actually had the burden to overcome Dr. Bloch's opinion that Claimant was not at MMI, by clear and convincing evidence.

E. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). In this case, the issue of whether Claimant is at MMI involves a complex medico-legal question regarding Claimant's ongoing cognitive symptoms, specifically whether they are a result of smoking as opposed to the head injury from April 6, 2013. After considering the totality of the evidence presented, the ALJ concludes that Respondents have produced unmistakable evidence establishing that the DIME physician's determination regarding MMI is highly probably incorrect. As found, the ALJ is persuaded that the record evidence supports a conclusion that Dr. Bloch's request for pulmonary workup for issues unrelated to the work injury is not supported by the Colorado Workers' Compensation Act or the AMA Guidelines simply to determine which of two dates of MMI were most appropriate. Thus the ALJ concludes that Respondents have proven that it is highly probable that Dr. Bloch was incorrect when he found Claimant had not reached MMI. Accordingly, the ALJ concludes that Dr. Bloch's DIME opinions regarding MMI have been overcome by clear and convincing evidence.

Overcoming the DIME Regarding Permanent Impairment

F. In this case, Respondents argue that if Dr. Bloch's opinion as to MMI is overcome it is Claimant's burden, by a preponderance of the evidence, to prove the correct impairment rating. In support of their position, Respondents cite *Paredes v. ABM Industries*, W.C. No. 4-862-312 (ICAO Nov. 13, 2014), for the proposition that it would be error for the ALJ to require Respondents to also overcome the DIME physician's impairment rating by clear and convincing evidence if the ALJ determined that the DIME opinion regarding MMI had been overcome. In *Paredes*, the Industrial Claim Appeals Office held that once the ALJ determined the DIME physician's calculation of impairment was in error, the ALJ erred in requiring the respondents to overcome the DIME physician's opinion on causation by clear and convincing evidence. Following the decision handed down in *Paredes*, Respondents contend that it would be error for the ALJ to require them to also overcome the DIME physician's impairment rating by clear and convincing evidence if there is a conclusion that the "not at MMI" component of the DIME physician's opinion had been overcome. Simply put, Respondents contend that once any part of the DIME physician's opinion has been overcome, the burden is then on Claimant to establish the correct rating. The ALJ is not persuaded that the burden shifts and/or changes regarding overcoming a DIME physician's impairment rating if the physician's MMI determination has been overcome. *See Lee v. J. Garlin Commercial Furnishings,* W.C. No. 4-421-442 (December 17, 2001); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001); *McNulty* *v. Eastman Kodak Co.,* W.C. No. 4-432-104 (September 16, 2002); *DeLeon v. Whole Foods Market Inc.,* W.C. No. 4-600-477 (November 16, 2006); *Ortiz v. Service Experts Inc.,* W.C. No. 4-657-974 (January 22, 2009); *Sawyer v. Life Quality Options of Colorado, Inc.,* W.C. No. 4-764-408 (May 10, 2010).

G. Review of the above cited case law persuades the ALJ that the burden of proof changes after a portion of the impairment rating has been overcome. As stated: "Following *Garlets* we have ruled that once an ALJ determines that the DIME physician's **rating** has been overcome, an ALJ is not required to reject every other component of a DIME physician's rating." *DeLeon* at *3 (emphasis added). Thus, where an ALJ determines that the DIME physician's **rating** has been overcome, the ALJ may independently determine the correct rating. *McNulty* at *2 *citing Garlin (*emphasis added). The decision in *DeLeon* provides an explanation for the court's reasoning that once part of an impairment rating has been overcome, the challenging party does not have to prove the rest of the impairment rating to be incorrect. As stated:

> As we read the ALJ's order, after he found the DIME physician's rating had been overcome on the range of motion component of the claimant's impairment he concluded that he was then compelled to independently assess each remaining component of the claimant's impairment to determine whether it had been overcome by clear and convincing evidence. Hence, the ALJ determined whether the rating based upon the range of motion deficits was overcome by clear and convincing evidence and then separately determined whether the rating based upon Table 53 of the *AMA Guides* was similarly overcome by the same burden of proof. In our view it was error for the ALJ to apply the clear and convincing burden to his evaluation of the rating based on Table 53, since at that point he had determined that the DIME's impairment rating had been overcome by clear and convincing evidence. In this regard, we note that § 8-42-107(8)(c), C.R.S. 2006 sets forth the procedures for obtaining a DIME to challenge the authorized treating physician's impairment rating. The statute states that the "finding of such independent medical examiner shall be overcome only by clear and convincing evidence." § 8-42-107(8)(c), C.R.S. 2006. In our view the DIME's "finding" is generally the impairment rating and it is that rating that must be overcome.

DeLeon at *2. The ALJ concludes the reasoning in this paragraph to hold that it does not make sense for a party challenging a DIME opinion on impairment to have to overcome each part of that impairment rating, by clear and convincing evidence, once a portion of the rating has been overcome. It becomes highly probable once a portion of the rating has been overcome that the rest of the rating is flawed. Thus, as stated: "[O]nce the ALJ determines that the DIME's **rating** has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon a preponderance of the evidence. *DeLeon* at *3 *citing Garlets* (emphasis added).

H. Respondents' contention that overcoming a DIME as to MMI triggers the impairment rating to then be proven by the Claimant is inconsistent with the above cited case law and the undersigned ALJ finds no support for Respondents proposition. Rather a review of the case law supports Claimant's argument that this switching of the burden *only* applies to the question regarding the burden of proof necessary to overcome the rest of an impairment rating when a portion of the rating has been overcome. The cases, including those cited by Respondents, do not stand for the proposition that the burden of challenging an impairment rating shifts to Claimant or changes in character, i.e. to a preponderance standard changes once an MMI determination has been overcome. For these reasons, the ALJ concludes that the burden remains on Respondents to overcome Dr. Bloch's impairment rating opinion by clear and convincing evidence, regardless of the determination concerning MMI.

I. As found, Dr. Bloch's rating Claimant's impairment as a Class 2 disturbances of cerebral function is not supported by the record. Class 2 refers to someone who "needs some supervision" with daily activities. Claimant worked at several jobs after his first date of MMI, apparently without problems for weeks and months, and was able to apply for and obtain unemployment benefits, which clearly does not fall into the category of "needs some supervision." There is no corroborative evidence in the medical records that would support a finding that Claimant sustained an injury the April 2013 fall that would justify a rating for disturbance of cerebral function. Moreover, the testimony of Claimant is largely contradicted by the medical records and his actions post injury are inconsistent with someone who rewires "some supervision/ direction" to carry out daily activities. Considering all the evidence, the ALJ concludes that the appropriate impairment rating is Dr. Olson's 5% whole-person rating.

ORDER

It is therefore ordered that:

1. Respondents' request to set aside the DIME opinion of Dr. Bloch regarding maximum medical improvement is GRANTED. The correct date of MMI is November 25, 2014.

2. Respondents' request to set aside the DIME opinion of Dr. Bloch that Claimant has a whole person impairment of 20% whole person impairment is GRANTED. The appropriate permanent impairment rating for Claimant's injury is the 5% whole person rating assigned by the ATP, Dr. Olson.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 19, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864. S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the respondents have overcome the Division IME by clear and convincing evidence as to whether the claimant is at Maximum Medical Improvement (MMI);

2. If the respondents have proven that the claimant is at MMI, whether they have proven by clear and convincing evidence that the DIME erred in his impairment rating determination; and,

3. If the respondents have proven that the claimant is at MMI, whether the claimant has proven by a preponderance of evidence that he is entitled to post-MMI medical treatment that is reasonable, necessary and causally related?

Based upon the findings and conclusions below that the respondents have failed to overcome the DIME opinion concerning MMI, the ALJ does not reach a decision on the remaining matters.

FINDINGS OF FACT

1. The claimant is a 42 year old male. He was 39 years old on April 10, 2013 when he was involved in a motor vehicle accident in the course and arising out of his employment with the respondent-employer. The claimant was the passenger in a pick-up truck that went into a ditch and rolled over. The claimant was initially diagnosed with a myriad of injuries including a cervical strain.

2. The claimant's cervical condition continued to worsen. As of June 17, 2013, the claimant reported to Dr. Randall Jones that he was now having episodes of left arm paresthesia into the left hand.

3. An MRI was performed on July 23, 2013 due to the claimant's ongoing neck pain and radiculopathy. The MRI showed a significant increase in size of a left posterolateral disc extrusion at the C6-7 as compared to a previous cervical MRI from March 2, 2011. The disc now "indents the left anterolateral aspects of the cervical spinal cord and results in severe left foraminal entrance zone stenosis."

4. The claimant was sent for further evaluation with Dr. Michael Rauzzino, a neurosurgeon, on October 29, 2013. Dr. Rauzzino documented that the claimant continued to have left arm paresthesias with numbness into the index and middle fingers in the C7 distribution. Dr. Rauzzino explained, “This is a man with a large C6-C7 herniated disc” that was likely pressing on the nerve root.

5. The claimant’s symptoms had not improved by December 23, 2013 and Dr. Rauzzino recommended a C6-C7 disc arthroplasty due to the claimant’s failure to improve with conservative therapies. The claimant underwent the disc replacement surgery on February 28, 2014.

6. The claimant’s left upper extremity symptoms had markedly improved initially after the surgery, though he was still complaining of some numbness and tingling in the fingers. By May 27, 2014, the residual numbness persisted in the claimant’s fingers. Dr. Rauzzino explained that it could just take up to a year to fully recover from the February 28, 2014 surgery. Anticipating the claimant’s condition to improve, Dr. Rauzzino released the claimant back to Dr. Albert Hattem for an MMI determination.

7. Dr. Hattem performed his impairment rating evaluation of the claimant at the time of MMI, September 16, 2014. At this time, the claimant continued to experience left arm symptoms as well as neck pain rating at up to a 5 out of 10 pain. Dr. Hattem determined that the claimant had a 10% impairment for abnormal cervical range of motion and a 9% impairment based on Table 53 section II-E of the AMA Guides, Third Edition Revised. These combined to yield an 18% whole person rating.

8. The respondents filed a Notice and Proposal to select an independent medical examiner. Prior to the DIME taking place, the claimant underwent an IME at the request of the respondent-insurer with Dr. Frank Polanco on February 11, 2015. At the time of the IME, the claimant continued to complain of left neck pain and left second and third finger numbness along with twitching of the left upper arm. Dr. Polanco agreed with Dr. Hattem’s placement of the claimant at MMI on September 16, 2014.

9. Dr. Polanco found the claimant to have an 11% impairment due to cervical range of motion loss and a 9% impairment based on Table 53 II-E. However, he apportioned the rating by 6% for a pre-existing unoperated disc lesion and therefore assigned a final rating of 13% whole person.

10. Dr. Yusuke Wakeshima performed the Division IME on July 20, 2015. At the time of this exam, the claimant complained of neck pain, numbness in the second

and third digits of the left hand along with weakness of the left hand. The neck pain was at a level 7 out of 10 on this date.

11. Due to the claimant's ongoing, persistent, C6-7 symptoms, he opined that the claimant was not at MMI. He noted that the claimant was now approaching 17 months post-surgery, 5 months past the one year time frame that Dr. Rauzzino had contemplated when he released the claimant. It was his opinion that the claimant's increased neck pain could be directly related to facet arthrosis at the disc replacement level. Dr. Wakeshima thought it reasonable for the claimant to undergo further evaluation with Dr. Rauzzino due to the persistent symptoms 17 months post surgery.

12. Dr. Wakeshima provided a provisional impairment rating of 20% whole person. 12% for cervical range of motion loss and 9% based on Table 53 II-E. Dr. Wakeshima provided a detailed and articulate discussion regarding his disagreement with Dr. Polanco's apportionment that he proposed in his IME report. Dr. Wakeshima explained that Rule 12-3(B) states, for injuries occurring after July 1, 2008, apportionment is improper unless the following three conditions are met: 1.) There is sufficient medical information available which establishes an identified and treated prior injury to the same body part; 2.) The prior injury meets the criteria for permanent impairment; and 3.) Prior impairment was independently disabling at the time of the injury.

13. Dr. Wakeshima explained that the rule states a "disability" is expected to adversely affect the claimant's ability to perform his job. Dr. Wakeshima stated that the claimant had no permanent restrictions from any previous injury, nor did any previous injury affect his ability to perform his job, and therefore determined apportionment to be inappropriate based on the rules.

14. Dr. Timothy Hall performed an IME of the claimant on November 17, 2015. Again, the claimant reported neck pain and upper extremity radicular symptoms. The claimant explained that the neck surgery did help, but he remains significantly symptomatic. "Considering these ongoing symptoms and the fact that there has not been improvement (as the surgeon opined with time), it would be appropriate for [the claimant] to have a re-evaluation and consideration for further intervention for ongoing neck and upper extremity symptoms." Dr. Hall agreed with Dr. Wakeshima's determination on MMI and impairment rating.

15. Dr. Polanco's evidentiary deposition was taken on December 21, 2015. He testified that he believed the claimant was at MMI as of September 16, 2014 based on his opinion that the claimant's condition had stabilized and required no further treatment

or evaluation. Dr. Polanco also felt that Dr. Wakeshima's recommendations for further treatment were inconsistent with the medical treatment guidelines.

16. The claimant testified at hearing that he has not seen either Dr. Rauzzino or Dr. Hattem since being released at MMI back in 2014. There are no medical records in evidence from Dr. Rauzzino or Dr. Hattem subsequent to September 16, 2014.

17. The claimant testified that his cervical spine symptoms and the radicular symptoms down his left arm continue to worsen, and have worsened since being examined by Dr. Polanco in February of 2015. He continues to experience significant numbness and tingling in the fingers of his left hand. The grip strength in his left hand is significantly weakened as compared to his right. It has affected his ability to perform certain tasks and has prevented him from exercising like he is used to. The claimant testified regarding his previous neck injury from 2011 and explained that after his third injection for the previous neck injury, he was essentially cured. The claimant had no residual symptoms from the C6-7 leading up to the April 10, 2013 rollover accident.

18. The claimant did sustain a soft tissue injury to his left upper back on January 7, 2013, four months prior to the April 10, 2013 accident. This was diagnosed as a cervical and upper thoracic strain, but there was no arm symptoms, parasthesias, or weakness. The claimant explained at hearing that this injury was completely different than the 2011 and April 2013 cervical injuries to the C6-7 levels because it was nothing more than a soft tissue injury. The medical records document that the claimant's "neck was doing much better" prior to the April 10, 2013 MVA.

19. The ALJ finds the claimant to be credible.

20. The ALJ finds Dr. Wakeshima's medical analyses and opinions to be credible and more persuasive than medical analyses and opinions to the contrary.

21. The ALJ finds that Dr. Polanco's analyses and opinions do not establish any clear error on the part of Dr. Wakeshima but amounts only to a difference of opinion.

22. The ALJ finds that the respondents have failed to establish that Dr. Wakeshima clearly erred in determining that the claimant was not at MMI.

CONCLUSIONS OF LAW

1. The findings of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. § 8-42-107(8)(c), C.R.S. "Clear and convincing" evidence is stronger than a preponderance, is unmistakable, and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.* (W.C. 4-595-741, ICAO October 8, 2008), *citing Dilco v. Koltnow,* 613 P.2d 318 (1980). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* (W.C. 4-782-625, ICAO May 24, 2010). The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995).

2. The ALJ concludes that the claimant is not at MMI based upon the respondents' failure to establish by clear and convincing evidence that the DIME physician, Dr. Wakeshima, was clearly wrong in his finding that the claimant was not at MMI.

3. The ALJ concludes that Dr. Wakeshima's July 20, 2015 report reveals a thorough and detailed examination with resulting persuasive opinions. Dr. Wakeshima noted in his report that the claimant's surgeon, Dr. Rauzzino, anticipated the claimant's condition improving and resolving, but that it would take up to a year from the February 28, 2014 surgery for that to occur. Dr. Wakeshima specifically noted in his report that the claimant's symptoms have not improved, that they have only worsened since being placed at MMI, despite the fact that 17 months time had passed since the surgery.

4. The ALJ concludes that Dr. Wakeshima's analyses and opinions are credible and more persuasive than medical analyses and opinions to the contrary.

5. The ALJ concludes that the respondents have failed to establish by clear and convincing evidence that Dr. Wakeshima erred in determining that the claimant is not at MMI.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents' request to have the DIME overturned as to the finding that the claimant is not at MMI is denied and dismissed.

2. The insurer shall pay interest to the claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: February 1, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-917-763-02

ISSUES

- Did Claimant prove by clear and convincing evidence that the DIME physician erred in finding that Claimant reached maximum medical improvement on February 25, 2014?

- Did Claimant prove by a preponderance of the evidence that the industrial knee injury rendered him permanently and totally disabled?

- Did Claimant prove by a preponderance of the evidence that he suffered functional impairment beyond the leg at the hip so as to warrant conversion of his scheduled impairment rating to a whole person rating?

- If conversion to a whole person impairment rating is not warranted what is the Claimant's scheduled impairment rating?

- Did Claimant prove by a preponderance of the evidence that he sustained disfigurement to parts of his body normally exposed to public view so as to justify an award of disfigurement benefits?

- Did Respondents prove by a preponderance of the evidence that they are entitled to recover alleged overpayments of temporary total and permanent partial disability benefits?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of ongoing medical benefits after maximum medical improvement?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 through 4 were admitted in evidence. At hearing Respondents' Exhibits A through S were admitted into evidence. Exhibit R was subsequently admitted because Claimant did not register an objection to the exhibit within 7 days of the hearing. Respondents' Exhibit T (transcript of hearing held on April 16, 2014) was admitted with the agreement of the parties that the ALJ's consideration of the transcript would be limited to the testimony of Dr. Larson and Dr. Yamamoto.

CLAIMANT'S TESTIMONY CONCERNING INJURY

2. Claimant testified as follows. On April 10, 2013 he was employed as an "assistant to the manager" of the Employer's food delivery service. He had been in this

position for about 6 months. The assistant to the manager job required Claimant to work in the Employer's warehouse facility answering calls from delivery drivers having problems such as incorrect orders or finding locations. Claimant also put driver logs into files and was required to perform delivery jobs when needed. Before becoming an assistant to the manager Claimant worked for the Employer as a delivery driver, meat grinder and warehouse worker.

3. Claimant testified that on April 10, 2013 he was assisting a co-worker to make deliveries in downtown Denver. Claimant loaded four boxes of potatoes on a dolly and wheeled them down the truck ramp. At the bottom of the ramp snow covered up ice on the ground. Claimant slipped and "extended" his left knee and then fell and struck the left knee on the ground.

4. Claimant testified that prior to April 10, 2013 he had no problems with his left knee.

5. Claimant has not returned to work of any kind since April 10, 2013.

MEDICAL AND RELATED EVIDENCE

6. Employer referred claimant to Concentra Medical Centers (Concentra). On April 10, 2013 Physician's Assistant Katherine E. Peterson examined Claimant at Concentra. Claimant gave a history that he twisted his knee when he was walking down a ramp and slipped on ice. On physical examination (PE) PA Peterson found no evidence of swelling, deformity, or discoloration of the left knee. Claimant was tender over the lateral and medial joint lines. PA Peterson diagnosed a left knee strain with possible internal derangement. PA Peterson placed claimant in a hinged knee brace, prescribed ibuprofen and referred him for physical therapy (PT). PA Peterson released claimant to modified duty work with restrictions of no prolonged standing or walking, no squatting or kneeling and no climbing stairs or ladders.

7. On April 15, 2013 PA Peterson referred Claimant for an MRI of the left knee.

8. On April 22, 2013 Claimant underwent an MRI of the left knee. The radiologist assessed the following: (1) Thin horizontal tear of the body of the medial meniscus; (2) Fraying of the anterior root of the lateral meniscus plus possible accompanying horizontal tear through its anterior junctional zone; (3) Mild ACL sprain but no partial/full thickness ACL tear. There was also "focal chondromalacia of the central weightbearing surface of the femoral condyles" with a "small knee joint effusion."

9. On April 25, 2013 Concentra physician Felix Meza, M.D., referred Claimant to Cornerstone Orthopedics (Cornerstone) for an orthopedic evaluation.

10. On April 29, 2013 Claimant was evaluated at Cornerstone by Joseph Hsin, M.D. Dr. Hsin reviewed the MRI and noted a torn medial meniscus and possibly a torn lateral meniscus. Dr. Hsin recommended surgery described as arthroscopy and meniscectomy.

11. On May 16, 2013 Dr. Hsin performed surgery described as a left knee arthroscopy with partial medial and lateral meniscectomies. Dr. Hsin also performed a left knee arthroscopic chondroplasty of the medial femoral condyle. Dr. Hsin's surgical report reflects that on examination of the medial compartment of the knee he observed grade 3 chondromalacia of the medial femoral condyle. Dr. Hsin also observed a complex posterior horn tear of the medial meniscus and a small lateral meniscus tear.

12. On June 7, 2013 Concentra physician Kirk Nelson, D.O., examined Claimant. Claimant reported knee pain of 9 on a scale of 10 (9/10) and that he could not bend his knee since he kneeled to get into bed. Claimant was still on crutches and taking Percocet for pain. Dr. Nelson documented that claimant exhibited "marked pain behaviors" upon examination of the knee. Dr. Nelson also noted Claimant initially appeared to be unable to flex the knee. However, upon "distraction" Claimant demonstrated flexion of 90 degrees.

13. Dr. Hsin examined Claimant on July 10, 2013. At that time Claimant reported his post-operative status was worsening. Dr. Hsin noted that Claimant had poor ROM and "extreme pain in the knee." Dr. Hsin opined Claimant was making "very poor progress" and had "pain out of proportion to exam." Dr. Hsin also wrote that Claimant had "non-organic findings on clinical exam." Dr. Hsin injected the knee with lidocaine but "this did not help."

14. On July 16, 2013 Dr. Nelson again examined Claimant. Claimant reported 9/10 pain and advised that he received no relief from Dr. Hsin's injection or from Lidoderm patches. Dr. Nelson recorded the claimant was moaning, cursing, and mumbling while sitting in a chair in the examination room. On PE Dr. Nelson noted there was no edema or effusion of the left knee. Dr. Nelson stated that examination was difficult because claimant was guarding. He opined that Claimant's pain was "out of proportion to physical findings." Dr. Nelson noted that he discussed Claimant's case with Dr. Hsin and Dr. Hsin did not want to perform an exploratory arthroscopy. Dr. Hsin and Dr. Nelson agreed Claimant should be referred for a pain psychology evaluation and to a physiatrist.

15. Claimant returned to Dr. Nelson for examination on July 30, 2013. Claimant reported 7/10 pain. On PE Dr. Nelson observed no edema or effusion and no ligament laxity. Dr. Nelson wrote that Claimant displayed increased pain behaviors and complained of pain out of proportion to physical findings. Dr. Nelson also noted that Claimant appeared "to actively resist flexion and extension" and continued to use crutches despite instructions to stop using them. Dr. Nelson opined that Claimant's inactivity was "not playing well with his recovery."

16. On August 13, 2013, Physical Therapist Martin Swiderski noted that Claimant ambulated with a markedly antalgic gait while "using an odd set cane." PT Swiderski also reported that on examination of the left knee Claimant was guarding and resisting passive ROM and was self-limited by effort and "pain behavior" with active ROM. PT Swiderski noted that Claimant complained of pain on meniscal testing despite the lack of objective findings. PT Swiderski also noted that when distracted with

conversation Claimant was able to achieve full left knee extension and flexion passively without exhibiting pain behaviors.

17. On August 14, 2013 John Sacha, M.D., examined Claimant. Dr. Sacha noted that Claimant exhibited “marked pain behaviors,” walked with an antalgic gait and was using a cane. Dr. Sacha opined that Claimant had made very poor progress since surgery and it was “unclear why.” Dr. Sacha recommended a repeat MRI of the left knee.

18. On August 20, 2013 Ron Carbaugh, Psy.D., performed a pain psychology evaluation of Claimant. The evaluation included a review of records, a clinical interview and the administration of 2 psychological tests. Dr. Carbaugh noted that Claimant reported no benefit from the surgery or conservative medical care. Dr. Carbaugh observed that when discussing his injury claimant displayed moderately high pain behavior. Dr. Carbaugh administered the Millon Behavioral Medicine Diagnostic (MBMD) test which is designed to appraise the role of psychiatric and psychosomatic factors in a patient’s disease and treatment. The results of the MBMD indicate that Claimant has limited psychological awareness, may be vague and inaccurate when describing symptoms and is at increased risk for having an exaggerated negative reaction to stressful or invasive medical procedures. Dr. Carbaugh also administered the Pain Patient Profile (P-3) designed to identify patients experiencing emotional distress that may be affecting their symptoms and response to treatment. Claimant exhibited a high score on the “validity index” of the P-3 suggesting “response magnification.” Dr. Carbaugh assessed “psychological factors affecting medical condition.” Dr. Carbaugh also noted that claimant clearly believed there was a structural problem with his knee and noted that an MRI was pending. Dr. Carbaugh opined that Claimant’s particular personality and coping style likely impact his symptom perception and response to treatment. Dr. Carbaugh cautioned claimant’s physicians about performing additional surgery and recommended counseling if surgery was performed. In the event additional surgery was not performed Dr. Carbaugh recommended the immediate implementation of 6 sessions of “pain and adjustment counseling” to provide pain management strategies.

19. On August 15, 2013 PT Swiderski discharged Claimant from PT because of lack of progress. PT Swiderski reported that claimant had plateaued in therapy in part due to his self-limited effort.

20. On August 24, 2013 Claimant underwent a repeat MRI of the left knee. The radiologist compared this study to the prior MRI of April 22, 2013. The radiologist’s impressions included the following: (1) Horizontal tear through the medial meniscal body; (2) Horizontal tear through the anterior horn of the lateral meniscus; (3) Moderate-severe articular cartilage thinning in the medial femoral condyle includes a small full-thickness articular cartilage defect with mild underlying subchondral marrow edema; (4) Thinning and partial tears of the medial patellar retinaculum; (5) Mild-moderate chondromalacia patella. The horizontal meniscal tears were reportedly “more pronounced” than seen on the April 22, 2013 MRI.

21. On August 28, 2013, Claimant followed-up with Dr. Hsin to review the results of the recent MRI. Dr. Hsin felt that MRI report of medial and lateral meniscus tears likely represented postoperative changes rather than new injuries. Dr. Hsin noted Claimant demonstrated non-organic findings and displayed pain out of proportion to the examination. Dr. Hsin recommended against further surgical intervention and opined that visco supplementation was Claimant's only option.

22. Claimant returned to Dr. Sacha on September 9, 2013. Dr. Sacha compared the April 2013 MRI to the August 2013 MRI and opined that the "only new finding" was some increase in size of the lateral meniscal tear. According to Dr. Sacha everything else was the same including fairly severe chondral damage to the medial femoral condyle and significant multi-compartment degenerative changes. Dr. Sacha noted mild to moderate pain behavior and a slightly antalgic gait. Dr. Sacha's impression was a "chondral injury with ongoing symptoms and significant osteoarthritis." Dr. Sacha recommended a Synvisc injection and opined Claimant would be at MMI after the injection was completed.

23. Dr. Sacha again examined Claimant on October 7, 2013. Dr. Sacha noted that Claimant had not undergone the Synvisc injection but was instead requesting a total knee arthroplasty (TKA) under the auspices of the "work comp claim." Dr. Sacha advised Claimant that he thought there was a "significant causality issue" because there were not any changes in the "MRI from prior to this injury to post-injury." Further, Claimant had a history of performing activities that would call causality into question. Dr. Sacha noted Claimant exhibited moderate pain behaviors and a significant antalgic gait.

24. Claimant returned to Dr. Hsin for follow-up on October 23, 2013. Claimant wanted to discuss a TKA. Dr. Hsin advised claimant against knee replacement surgery but referred him to his colleague Thomas Eickmann, M.D., to "discuss the procedure."

25. Dr. Eickmann evaluated claimant on November 7, 2013. Dr. Eickmann reviewed x-rays that reportedly showed "severe osteoarthritis" of the left knee. Claimant reported it was difficult for him to ascend/descend stairs, to complete cooking activities, to don/doff shoes and socks, to drive, to get in and out of the bathtub, to get in and out of a vehicle, to sleep on the affected side, to stand from a seated position, and to walk. Dr. Eickmann reported that claimant wanted to proceed with a left TKA and would seek insurance authorization.

26. David W. Yamamoto, M.D., examined Claimant on December 9, 2013. Dr. Yamamoto noted that he was to see Claimant for left knee pain under a "Rule 8 transfer." Claimant gave a history that on April 10, 2013 he slipped on ice while moving a dolly down a ramp and experienced hyperextension of the knee. Claimant advised that after the slip he had "acute swelling." Claimant told Dr. Yamamoto that prior to the injury he was very active and had no problems working, lifting, bending, riding bikes and hiking. However, at the time of the examination Claimant could not work more than 10 minutes "on the level." Dr. Yamamoto was aware Dr. Eickmann had recommended a

TKA. Dr. Yamamoto assessed osteoarthrosis not designated as generalized or localized and a current tear of the medial cartilage or meniscus of the knee. Dr. Yamamoto opined within a "reasonable degree of medical probably [sic], this injury is work related." He opined Claimant will "likely need a total knee replacement."

27. Insurer requested that Gwendolyn C. Henke, M.D., perform a records review for the purpose of determining whether the TKA was reasonable, necessary and causally related to the April 10, 2013 injury. Dr. Henke is board certified in orthopedic surgery and level II accredited. Dr. Henke reviewed Claimant's medical records from April 10, 2013 through December 2, 2013, including the 2 MRI's taken in 2013.

28. Dr. Henke issued a written report dated December 16, 2013. Dr. Henke opined to "a reasonable degree of medical certainty" that there was a "causal relationship" between Claimant's April 10, 2013 injury and his "current complaints." Dr. Henke explained that the April 10 injury "resulted in [Claimant's] underlying knee osteoarthritis becoming symptomatic due to an exacerbation of a preexisting condition." However, Dr. Henke also opined that a TKA would not be related to the April 10 injury because there was "no significant knee trauma identified" because of the fall, "just an exacerbation of [Claimant's] preexisting left knee osteoarthritis." Dr. Henke further opined that a TKA would not be reasonable and necessary treatment because Claimant's "reported pain behavior and psychological profile" made him a poor candidate "for any elective procedure at this time."

29. On December 27, 2013 Dr. Yamamoto authored a note stating that he was of the opinion that Claimant needed a TKA. Because Claimant was "asymptomatic prior the" April 10, 2013 industrial injury Dr. Yamamoto was "strongly of the opinion that the total knee replacement should be done under workers' compensation." Dr. Yamamoto also wrote that Claimant's osteoarthrosis was "aggravated" by the April 10, 2013 injury.

30. On January 8, 2014 Dr. Yamamoto authored a letter to Claimant's attorney. Dr. Yamamoto wrote that he reviewed Dr. Henke's report and disagreed with her opinion. Dr. Yamamoto noted that Dr. Hsin reported Claimant's pain complaints were out of proportion to the examination findings. However, Dr. Yamamoto opined the Claimant had severe degenerative disease in the left knee and this diagnosis was confirmed by Dr. Eickmann. Dr. Yamamoto reported he took measurements of both thighs and there was atrophy of the left thigh. Dr. Yamamoto disputed Dr. Henke's implicit finding that the April 10, 2013 injury caused a mere "exacerbation" of preexisting arthritis and the Claimant subsequently returned to baseline. Dr. Yamamoto opined that Claimant suffered an "aggravation" of the preexisting arthritis and needed further treatment in the form of a TKA.

31. On February 25, 2014 Wallace K. Larson, M.D., performed an independent medical examination (IME). Dr. Larson is board certified in orthopedic surgery and is level II accredited. In connection with the IME Dr. Larson took a history from Claimant, performed a PE and reviewed medical records.

32. Dr. Larson noted Claimant gave a history that on April 10, 2013 he slipped on snow covered ice and the knee hit the ground in the area of the patella. On PE Dr. Larson observed claimant had greater ROM in his knee on causal observation than on directed examination. Dr. Larson noted no effusion or muscle wasting. He wrote that Claimant appeared to have a "relative varus deformity" of the knee. Dr. Larson observed that Claimant exhibited a "great deal of pain behavior" and was hyper-reactive during the PE. Dr. Larson opined Claimant had "pre-existing osteoarthritis of his left knee" that by history was aggravated by the April 10, 2013 fall. Dr. Larson stated that on arthroscopic examination of the knee Claimant was shown to have "degenerative tears of the medial and lateral meniscus [sic] which were treated arthroscopically." Dr. Larson opined that Claimant's symptoms are not of a type likely to be caused by osteoarthritis and would likely worsen rather than improve if a TKA were performed. Dr. Larson opined Claimant had reached MMI and assessed 10% impairment of the left lower extremity "secondary to the meniscectomy." He added that the 10% rating would ordinarily be combined with impairment based on ROM testing but Claimant was not "cooperative enough" with testing to produce a valid evaluation.

33. Respondents' denied authorization for the proposed TKA surgery and on April 16, 2014 the issue proceeded to hearing before ALJ Michael Harr.

34. Dr. Yamamoto testified at the hearing before ALJ Harr. Dr. Yamamoto is board certified in family medicine, was qualified as an expert in family and occupational medicine and is level II accredited. Dr. Yamamoto opined that Claimant has osteoarthritis of the left knee, a degenerative joint condition that pre-dated the April 2013 injury. However, because Claimant reported that he had no symptoms prior to the injury and was "very symptomatic" afterwards, Dr. Yamamoto opined that the injury caused the tears of the lateral and medial menisci, aggravated the osteoarthritis and caused a defect in the cartilage of the medial femoral condyle.

35. Dr. Yamamoto testified that throughout his treatment of Claimant he did not observe any "significant non-physiologic findings" or "symptom exaggeration." Dr. Yamamoto explained that non-physiologic findings could include global tenderness of the knee and increased ROM in the joint when the patient is distracted. Dr. Yamamoto testified that on PE Claimant's pain was focal to the medial part of the knee and that measurement showed atrophy of the left quadriceps muscle.

36. Dr. Yamamoto opined that a TKA constituted reasonable and necessary treatment for Claimant's osteoarthritis and chondral defect. Dr. Yamamoto admitted that horizontal tears of a meniscus and "complex tears" of a meniscus are ordinarily caused by degenerative changes rather than trauma. Dr. Yamamoto opined that Claimant had not reached MMI at the time of the hearing.

37. Dr. Larson testified at the hearing before ALJ Harr. Dr. Larson opined that in retrospect he does not believe the April 10, 2013 caused any "internal derangement" of Claimant's left knee. Dr. Larson explained that if the April 10 incident had caused injury to the chondral surface of the medial femoral condyle he would expect swelling of the knee. Similarly, Dr. Larson opined that if the Claimant had torn the medial and

lateral menisci he would have expected swelling. Dr. Larson further opined that the MRI findings of complex horizontal tears of the menisci are more consistent with degenerative tears than traumatic tears. Dr. Larson opined that Dr. Hsin's operative report described a "relatively limited area of grade 3 chondromalacia on the medial femoral condyle" but nothing about "traumatic injury or cartilage that was knocked off traumatically." In light of Dr. Hsin's operative report Dr. Larson explained that the August 2013 MRI finding of a full thickness cartilage defect was an "artifact."

38. Dr. Larson testified that on PE of Claimant he noted "non-organic findings." The non-organic findings included very widespread tenderness in the knee that can't be explained by osteoarthritis or any other structural problem. Dr. Larson also noted that Claimant's ROM was greater on casual observation than it was during direct examination of the knee. In light of these non-organic findings Dr. Larson opined that it is hard to know what is causing Claimant's persistent pain complaints. Dr. Larson also opined that Claimant's pain complaints do not correlate with the actual pathology seen on the MRI's and during Dr. Hsin's arthroscopic evaluation.

39. Dr. Larson opined that in these circumstances it was not reasonable and necessary to perform a TKA to treat Claimant's knee.

40. In Findings of Fact, Conclusions of Law, and Order dated July 18, 2014 ALJ Harr denied Claimant's request for an order requiring Respondents to pay for a TKA. ALJ Harr found that Claimant failed to prove that a TKA is reasonable and necessary to cure and relieve the effects of the April 10, 2013 injury. In so doing ALJ Harr credited Dr. Larson's opinion that a TKA is not reasonable and necessary to treat the degree of osteoarthritis evidenced by the MRI's and Dr. Hsin's arthroscopic evaluation of the knee. ALJ Harr also credited Dr. Larson's opinion that Dr. Hsin's arthroscopic examination did not reveal "any acute or traumatic changes to the underlying osteoarthritis pathology in" Claimant's left knee. ALJ also credited Dr. Larson's opinion that Claimant's reports of left knee symptoms were "unreliable." ALJ Harr found that the record was "replete with treating physicians finding claimant complaining of pain unsupported by physical findings." ALJ Harr found Dr. Yamamoto's opinions were unpersuasive because they overly relied on Claimant's subjective history and symptoms.

41. From February 19, 2014 through July 2, 2014 Dr. Yamamoto examined and treated Claimant on 5 occasions. Throughout this period Dr. Yamamoto continued to opine that Claimant needed to undergo a TKA. Dr. Yamamoto also prescribed meloxicam, the topical cream Terocin and Trazodone for sleep.

42. On August 5, 2014 Dr. Yamamoto again examined Claimant. Dr. Yamamoto noted that the TKA had been denied and stated he would place Claimant "at MMI in three weeks." Dr. Yamamoto continued to prescribe meloxicam and Terocin.

43. On September 17, 2014 Dr. Yamamoto examined Claimant. Dr. Yamamoto assessed a left knee injury on April 10, 2013 "status post medial lateral meniscectomies." Dr. Yamamoto also assessed "severe osteoarthritis that was

aggravated" by the April 10 injury. Claimant's medications were listed a Lisinopril, Trazodone, Terocin and meloxicam. Dr. Yamamoto added a prescription for Norco "for pain control." Dr. Yamamoto placed Claimant at MMI. Dr. Yamamoto imposed permanent restrictions of seated work only, no repetitive lifting, no lifting in excess of 5 pounds and occasional lifting of 2 pounds. Dr. Yamamoto also opined Claimant needs a cane to ambulate. Dr. Yamamoto recommended Claimant receive ongoing treatment of "medication maintenance for up to 6 months."

44. On September 17, 2014 Dr. Yamamoto determined an impairment rating. Using the AMA Guides to the Evaluation of Permanent Impairment, *Third Edition (Revised)* (AMA Guides) Dr. Yamamoto assessed 10% lower extremity impairment for the bilateral partial meniscal tears requiring surgery. He assessed 20% lower extremity impairment for "severe left knee osteoarthritis" and 24% impairment for reduced ROM. Combining these impairments Dr. Yamamoto assessed 45% impairment of the left lower extremity. Dr. Yamamoto stated that this rating would, if applicable, convert to 18% whole person impairment.

45. Claimant sought treatment with Dr. Yamamoto on four occasions from November 18, 2014 through April 20, 2015. On November 18, 2014 Dr. Yamamoto prescribed a topical cream and Norco. After November 18 Dr. Yamamoto prescribed only topical creams.

46. At hearing Claimant testified that the topical cream prescribed by Dr. Yamamoto provides "short time" pain relief. Claimant stated he has not been back to Dr. Yamamoto since April 15, 2015.

47. On February 23, 2015 Kevin Nagamani, M.D., performed a Division-sponsored independent medical examination (DIME). Claimant reported that his pain was primarily located in the medial aspect of the left knee. He rated the pain as 6/10 "at its best" and 7-/10 "at its worst." Dr. Nagamani reviewed Claimant's medical records. On PE Dr. Nagamani observed that Claimant walked with a severe limp and noted "significant pain behaviors." Range of motion (ROM) was limited to 90 degrees on the left with full ROM on the right. There was no patholaxity, no effusion and no gross atrophy of the quadriceps. Dr. Nagamani opined that the examination was "very difficult secondary to severe guarding with every examination maneuver."

48. Dr. Nagamani's impressions included "left knee medial and lateral meniscus tears caused by work injury in the setting of preexisting arthritis." Dr. Nagamani agreed with Dr. Larson that Claimant reached maximum medical improvement (MMI) on February 25, 2014. Dr. Nagamani explained that he did not believe any further intervention would "substantially alter" Claimant's condition and opined that any further surgery would have a "poor prognosis" given Claimant's pain behaviors. Dr. Nagamani opined claimant's presentation and symptomatology were not reasonable for pain related to osteoarthritis of the knee.

49. Dr. Nagamani assigned a 33% lower extremity impairment rating. The rating was arrived at by combining 15% lower extremity impairment for a "Table 40

diagnosis for the meniscectomies" with 21% impairment for abnormal range of motion measured at 90 degrees of flexion. Dr. Nagamani explained that Claimant had some preexisting arthritis and there was some "possible worsening" of this condition shown on the "followup MRI scan." However, Dr. Nagamani opined that the progression of the arthritis "cannot be solely attributed to the work-related injury." Dr. Nagamani opined that "no specific maintenance care is necessary as nothing has been effective thus far." He also opined it would be difficult to ascertain work restrictions because an objective examination of Claimant is very difficult.

50. On August 6, 2015 Allison Fall, M.D., performed an IME of Claimant. Dr. Fall is board certified in physical medicine and is level II accredited. In connection with the IME Dr. Fall took a history from Claimant, performed a PE and reviewed medical records.

51. On PE Dr. Fall noted Claimant exhibited "significant pain behaviors" including moaning and groaning. Dr. Fall also opined that Claimant engaged in "significant guarding" while the left knee was examined. Dr. Fall noted that there was no crepitus or muscular wasting. Claimant stood with the left knee "slightly flexed" but was able to achieve full extension while lying supine. Knee flexion appeared self-limited but Claimant eventually attained 120 degrees of flexion.

52. Dr. Fall opined Claimant reached MMI on February 25, 2014 when he saw Dr. Larson. Dr. Fall explained that at that time there was no expectation that "additional medical treatment would lead to any significant improvement based upon the pain behaviors and inconsistencies." Dr. Fall agreed with Dr. Nagamani that Claimant did not need any maintenance medical care because "no treatment to date has led to any reported functional benefit."

53. Dr. Fall opined that the work restrictions imposed by Dr. Yamamoto were "inappropriate." Dr. Fall stated there is no reason Claimant should be restricted to sitting for eight hours per day and walking with a cane. Dr. Fall explained there is no instability of Claimant's knee and Claimant should be encouraged to walk without a cane. Dr. Fall further stated that considering the surgical procedure and the "benign physical examination" the only appropriate work restrictions are no kneeling on the left knee and avoidance of "high-impact activities." Dr. Fall wrote that there is "no reason to limit lifting, sitting, standing, or walking."

54. Dr. Fall assessed 15% impairment of Claimant's left lower extremity. Specifically Dr. Fall assessed 10% impairment for the meniscectomies. She also assessed 5% for reduced ROM. Dr. Fall explained that she measured Claimant's ROM in the *right* lower extremity that accounted for "6% lower extremity impairment at the baseline." She then subtracted 6% from Claimant's 11% left lower extremity impairment to arrive at 5% for reduced ROM. Dr. Fall also commented that the DIME physician's impairment rating "appeared to have been done correctly according to the AMA Guides."

55. Dr. Fall testified at the hearing. Her testimony was generally consistent with her written report although she elaborated on the bases for some of her opinions. Dr. Fall opined that the "amount of pain complaints" expressed by Claimant was not consistent with the type of surgery performed by Dr. Hsin.

56. Dr. Fall testified it is not necessary for Claimant to walk with a cane. She explained that Claimant's injury and surgery did not result in any instability or neurological damage that would create a medical indication for use of a cane.

57. Dr. Fall noted that at hearing the undersigned ALJ observed swelling in Claimant's left lower extremity. Dr. Fall opined that this swelling would not be unusual under the circumstances. She explained that Claimant's relative inactivity would cause "pooling" of fluid in the left lower extremity. She also noted that Claimant had wrapped his knee with an Ace bandage so as to impede venous flow and lymph flow back to the heart.

58. Dr. Fall opined the restrictions imposed on Claimant by Dr. Yamamoto are not medically indicated. Dr. Fall testified that unless there is a very severe knee injury with instability, there is no reason to impose lifting restrictions. She explained that typically a knee arthroscopy would not affect person's use of his arms, back, and body. Therefore, there is no indication for restrictions on lifting, pushing and pulling. Dr. Fall opined that not only is there no basis to limit walking or standing, but Claimant can walk and ambulate and should be encouraged to do so. Dr. Fall opined there is no medical reason that Claimant can't sit, stand, or walk for 8 hours per day and perform work. Dr. Fall opined that Dr. Yamamoto based his restrictions on the Claimant's subjective complaints rather than the medical indications. Dr. Fall opined that in "cases like this" a physician should not impose restrictions based solely on subjective complaints but must consider the nature of the injury, the surgical findings and absence of post-surgical complications and what patients are typically able to do after surgery.

59. Dr. Fall also reiterated the opinion that maintenance care is not medically necessary. She explained Claimant has not reported any benefit from treatment, including surgery, and most people do not need maintenance care after they type of surgery performed on Claimant. Dr. Fall further stated that when a pattern develops where no treatment alleviates ongoing pain complaints it is appropriate to consider that psychological issues may be playing a role. Dr. Fall also testified there were no findings on the August 2013 MRI that would indicate the need for additional surgery. She noted that Dr. Hsin, who performed the surgery in May 2013, considered the August 2013 MRI and found no basis for additional surgery.

60. Dr. Fall testified that when performing her impairment rating she measured Claimant's right knee ROM to use as a "baseline." Dr. Fall stated that the AMA Guides treat 150 degrees of flexion as normal and equal to no impairment. However, Claimant's uninjured right knee exhibited only 135 degrees of flexion, which is equivalent to 6% impairment. Dr. Fall found that Claimant's left-sided flexion was 120 degrees which is equivalent to 11% impairment. Consequently, Dr. Fall deducted 6% from 11% to arrive at 5% impairment for left knee ROM. Dr. Fall also assigned 10%

impairment under Table 40 for the partial meniscectomies. Dr. Fall opined that claimant had a 15% lower extremity impairment rating.

61. On cross-examination Dr. Fall admitted that the Dr. Nagamani tested Claimant's right-sided ROM and reported the results as normal. Dr. Fall also recognized that Dr. Nagamani recorded only 90 degrees of flexion on the left side.

62. On cross-examination Dr. Fall admitted that to her knowledge Claimant had never undergone the six sessions of counseling recommended by Dr. Carbaugh.

63. On cross-examination Dr. Fall testified that she made handwritten notes during her examination of the Claimant. However, her office destroyed the notes after she dictated her report. Dr. Fall credibly testified that this is her standard operating procedure. Claimant's arguments notwithstanding, the ALJ declines to draw any adverse inference concerning Dr. Fall's credibility based on the fact that her handwritten notes were converted to a narrative report and subsequently destroyed as part of her standard procedure.

64. Dr. Fall opined that the back problems Claimant reported in May 2015 are not related to the April 10, 2013 injury. Dr. Fall noted that Claimant reported the back problems occurred when he turned and felt a pop.

VOCATIONAL EVIDENCE

65. On June 4, 2015 Ms. Gail Pickett (Pickett), a vocational expert, issued a written report concerning a vocational evaluation of the Claimant. This evaluation was performed at the request of Claimant's counsel. In connection with the evaluation Pickett interviewed Claimant, reviewed medical records and determined Claimant's transferable skills.

66. Pickett noted Claimant was 56 years of age at the time of the evaluation, had completed 11 years of education and earned a GED in the military. Claimant reported that he had served in the military as a paratrooper from 1970 to 1993 and had a vocational history of performing truck driving jobs since 1993. Claimant advised that when working for Employer as a truck driver his duties included loading and unloading 35 to 100 pound boxes, completing a log book and operating a palette jack. Claimant also reported that "when his supervisor left the business and the new person didn't know the Denver area well enough" Claimant performed "routing" on a computer. Claimant stated that he had help operating the computer Pickett noted that Dr. Yamamoto had imposed work restrictions of lifting a maximum of 8 pounds [sic], lifting 2 pounds occasionally, carrying 0 pounds, pushing or pulling up to 10 pounds, no walking or standing, no kneeling, no crawling, no squatting and no climbing.

67. Pickett opined that considering her research and the medical reports Claimant "will be unable to return to the workforce."

68. Ms. Katie Montoya (Montoya), an expert in vocational evaluation, evaluated the Claimant at Respondents' request, issued a written report and testified as an expert

at the hearing. In connection with the evaluation Ms. Montoya interviewed Claimant, reviewed medical records, evaluated Claimant's transferable skills and performed labor market research.

69. Claimant told Montoya that he attended school through the 11th grade, completed a GED and performed military service from 1970 through 1993. Claimant advised that he principally worked as a driver from 1993 until he commenced work with the Employer in 2000. Claimant worked for the Employer as a delivery driver, a job that required him to drive trucks and operate a "two-wheeler" carrying up to 200 pounds. Claimant advised that approximately 6 months prior to his knee injury the Employer transferred him into the warehouse to learn the job of "assistant to the manager." During this 6 month period Claimant reported that he answered phones, answered, dispatched trucks and tracked the routing system on the computer. Claimant also "put in" pre-trips, did driver's logs and checked service logs. Claimant was seated during this work. Claimant stated that he considered the assistant to the manager job to be a promotion and believed he was doing a good job getting drivers to "where they were supposed to be." Claimant advised Montoya that he felt he could perform the assistant to the manager job except for the requirement that he "back-up" other drivers and make occasional deliveries.

70. Claimant told Montoya that he started looking for work in late May 2015. Claimant reported that when he applies for jobs he indicates he must sit for 8 hours, cannot lift over 5 pounds and must use a cane. Claimant also advised that he began receiving unemployment benefits in June 2015 and is required to make 3 job contacts per week.

71. Montoya recognized there is a significant difference between the medical restrictions imposed by Dr. Yamamoto and Dr. Fall. Ms. Montoya opined that based on her market research Claimant can obtain employment even if Dr. Yamamoto's restrictions are considered valid. Montoya identified positions as an entry gate attendant, "hot stamp machine operator" and "vehicle transporter." Montoya wrote that the "limitations provided by Dr. Yamamoto do not allow for many alternatives."

72. Montoya wrote that if Dr. Fall's restrictions are considered valid there "would be quite an increase" in Claimant's employment alternatives. Montoya identified a cutlery assembly position, a cleaning position, a "feeder/folder" position and "additional driving alternatives." Montoya added that if Dr. Fall's restrictions are adopted the Claimant "would not be eliminated from most of his past relevant work."

73. Montoya testified that if Claimant is released to "light" duty then jobs would be available to him. Montoya explained that "light" duty as defined by the Department of Labor includes the ability to lift up to 20 pounds and stand and walk for the majority of the shift. According to Montoya most dispatch jobs fall in the light duty category.

74. Montoya testified that if Claimant were released to "sedentary" duty then jobs would be available to him. Montoya explained that "sedentary" duty is defined as no lifting over 10 pounds and "predominantly seated activities." According to Montoya

jobs in the sedentary category would include some dispatch jobs, some driving jobs, some security jobs and some production jobs.

75. Pickett testified at the hearing. Pickett opined that the reason the Claimant has not been returned to work by the Employer is that "they don't think he is capable of it." Pickett further opined that it would be easier for Claimant to return to work with an Employer who was familiar with him than to obtain a job with another employer.

76. Pickett opined Claimant would not be able to perform the gatekeeper job identified by Montoya because gate attendants are required to "walk to the gate in all weather conditions" and there is some standing, walking, pushing and pulling. Pickett opined Claimant is unable to perform driving jobs. She explained that Claimant keeps his leg elevated on a pillow when driving and is unable to operate a clutch. Pickett also testified that she never found a "driving job where you just sit." Rather, in her experience a driver generally has to drive somewhere to pick up something or drop something off. In the case of auto auctions a driver must be able to walk and stand. Pickett opined that Claimant is not able to do production jobs because some require standing throughout the day, some require lifting beyond his capacity and some require computer skills beyond his ability.

77. Pickett testified that in formulating her opinion she relied on the restrictions imposed by Dr. Yamamoto as well as Claimant's education, work history and skill set. Pickett stated that many driving jobs fall within the "light" classification established by the Department of Labor. She stated that security jobs are generally in the light to medium category. Pickett opined Claimant could "possibly" return to work if his limitations place him in the "light" duty category.

78. Claimant testified that his date of birth is April 26, 1959. He completed the 11th grade and earned a GED while serving in the military. Claimant was on active duty as a paratrooper for 9 years and served 10 years in the reserves.

79. Claimant testified that he has not returned to work for the Employer and does not know why the Employer has not returned him to work since the injury. Claimant spoke to "Liz" in human resources but was not given any reason why he has not been returned to work. Claimant received a COBRA notice dated September 15, 2015. Claimant does not know if he is still employed by the Employer but has not received any termination notice.

80. Claimant testified that he began looking for alternative employment after April 28, 2015. Claimant explained that when he applies for a job he tells the potential Employer that he has the restrictions imposed by Dr. Yamamoto.

81. Claimant testified that he is unable to watch an entire movie because his knee begins to throb and he must stand up and walk "a little bit." Claimant stated that he cannot watch an entire television program or sit through a religious service because he keeps his knee elevated and it becomes "numb." Consequently Claimant must stand

and stretch. Claimant explained that he has difficulty lifting and carrying any weight because he uses a cane and because he experiences pain in his knee.

FINDINGS OF FACT CONCERNING MMI

82. Claimant failed to prove it is highly probable and free from serious doubt that the DIME physician, Dr. Nagamani, incorrectly found Claimant to have reached MMI on February 25, 2014.

83. Dr. Nagamani specifically and credibly opined that as of February 25, 2014 no further medical intervention would "substantially alter" Claimant's medical condition. Dr. Nagamani correctly noted that by the time of his examination in February 2015 no treatment had effectively altered Claimant's continuing symptoms. Indeed, Dr. Nagamani noted that in February 2015 Claimant was still reporting 7/10 pain and was exhibiting significant "pain behaviors" and "severe guarding with every examination maneuver."

84. Dr. Nagamani's opinion that no further treatment was likely to alter Claimant's medical condition is corroborated by the persuasive opinions of Dr. Larson and Dr. Fall. In February 2014 Dr. Larson noted that Claimant was exhibiting a great deal of pain behavior and that a TKA would likely worsen these symptoms. Under the circumstances Dr. Larson found Claimant had reached MMI. In August 2015 Dr. Fall opined that Claimant reached MMI on February 25, 2014. Dr. Fall credibly opined that after February 25 there was no expectation that additional treatment would improve Claimant's condition considering his documented pain behaviors.

85. The opinions of doctors Nagamani, Larson and Fall are further corroborated by examination of the effects of Claimant's medical treatment prior to February 25, 2014. By February 25, 2014 Claimant had undergone various conservative treatments including the use of medications and PT. He had also undergone arthroscopic repair of the meniscal tears and chondroplasty. Despite conservative and invasive treatment Claimant continued to report high pain levels after surgery. As found above, numerous physicians and providers that examined Claimant after surgery reported that he exhibited pain behaviors out of proportion to examination findings, excessive guarding and/or "non-organic findings."

86. Dr. Yamamoto's opinion that Claimant did not reach MMI until September 17, 2014 is not sufficiently persuasive to overcome the DIME physician's opinion that Claimant reached MMI on February 25, 2014. Dr. Yamamoto's opinion that Claimant needed additional treatment (after February 25, 2014) to cure and relieve the effects of the injury appears to be largely based on Dr. Yamamoto's belief that Claimant needed a TKA to treat the industrial knee injury. As Dr. Yamamoto himself admitted, his belief that Claimant needed the TKA was predicated on the history that Claimant had no knee symptoms before April 10, 2013 but experienced severe symptoms thereafter. (See Finding of Fact 34 through 46). Indeed, Dr. Yamamoto testified that he did not record "non-physiologic findings" or observe "symptom exaggeration" when he examined Claimant.

87. However, the great weight of the credible and persuasive medical evidence establishes that after Claimant underwent arthroscopic surgery numerous medical providers, including Dr. Nelson, Dr. Hsin, Dr. Sacha, PA Swiderski, Dr. Larson, Dr. Nagamani and Dr. Fall observed pain behaviors, non-organic findings and pain in excess of what could be expected based on examination. The ALJ is persuaded that Claimant's reported symptoms are not reliable indicators of his true condition and such reports do not justify Dr. Yamamoto's conclusion that Claimant did not reach MMI until September 17, 2014.

88. Dr. Yamamoto's opinion that Claimant did not reach MMI until September 17, 2014 is also unpersuasive because it is largely unexplained. From February 2014 until August 5, 2014 Dr. Yamamoto took the position that Claimant needed a TKA and continued treating Claimant's symptoms with medication. On August 5, 2014 Dr. Yamamoto learned the request for a TKA was denied by ALJ Harr. Nevertheless, Dr. Yamamoto continued treating Claimant with medications. On August 5 Dr. Yamamoto stated that he expected Claimant to be at MMI in "three weeks." Dr. Yamamoto offered no credible or persuasive explanation for his implicit conclusion that medication alone could reasonably be expected to improve Claimant's condition between February 2014 and September 17, 2014.

FINDINGS OF FACT CONCERNING PERMANENT TOTAL DISABILITY

89. Claimant failed to prove it is more probably true than not the industrial injury has rendered him unable to earn any wages.

90. Dr. Fall credibly opined that the permanent work restrictions imposed by Dr. Yamamoto were "inappropriate" and that the Claimant's only permanent restrictions are no kneeling on the left knee and avoidance of "high-impact activities." Dr. Fall persuasively opined that Dr. Yamamoto improperly based his restrictions on the Claimant's subjective pain reports rather than the nature of the injury, the surgical findings and absence of complications after surgery and what patients are typically able to do after surgery.

91. Dr. Fall credibly explained that there is no medical reason for Claimant to be restricted from standing and walking. Dr. Fall credibly opined that Claimant's knee is stable and does not evidence neurological damage that might impair balance and warrant restrictions on walking, standing and lifting. Dr. Fall credibly opined that there is no reason Claimant can't sit, stand or walk for 8 hours per day and perform work.

92. As determined in Findings of Fact 86 and 87, Claimant's subjective pain reports after the May 2013 surgery are not reliable because numerous medical providers, with the exception of Dr. Yamamoto, have observed that Claimant exhibits "pain behaviors," symptoms in excess of findings on PE and "non-organic" findings. Despite the observations and findings of these other physicians, Dr. Yamamoto largely formulated his opinions based on Claimant's untrustworthy reports of symptoms.

93. Dr. Yamamoto testified that his PE of Claimant revealed atrophy of the left quadriceps. However, in February 2014 Dr. Larson reported that he did not observe any “muscle wasting.” When Dr. Nagamani examined Claimant in February 2015 he observed there was no “gross atrophy of the quadriceps.” When Dr. Fall examined Claimant in August 2015 she reported there was no “muscular wasting.” The ALJ finds that the preponderance of the credible evidence establishes that Claimant does not exhibit any significant wasting of the left quadriceps muscle.

94. Vocational expert Montoya credibly and persuasively opined, based on her vocational evaluation of Claimant and labor market research, that Claimant is employable in numerous occupations if Dr. Fall’s restrictions are found to be accurate. Similarly, Montoya credibly testified that if Claimant’s restrictions place him in the light duty category (lifting up to 20 pounds and able to walk and stand for majority of shift) he would qualify for most dispatch jobs. Dr. Fall did not restrict Claimant from performing work in the “light duty” category. Therefore Claimant is eligible for most dispatch jobs. Montoya also credibly opined that if Dr. Fall’s restrictions are considered valid then Claimant is not prohibited from performing most of his past work. (The ALJ recognizes that Claimant is prohibited from returning to his job of paratrooper because this is a “high-impact” occupation.)

95. Vocational expert Pickett’s opinion that Claimant cannot return to work is not credible and persuasive. Pickett admittedly relied on Dr. Yamamoto’s restrictions as one of the primary bases for her opinion. As found, the restrictions imposed by Dr. Yamamoto are not credible and persuasive. Moreover, Pickett opined Claimant could “possibly” find employment if Dr. Fall’s restrictions are found credible.

FINDINGS OF FACT CONCERNING CONVERSION OF SCHEDULED IMPAIMRMENT RATING TO WHOLE PERSON IMPAIRMENT RATING

96. Claimant failed to prove it is more probably true than not that he sustained “functional impairment” beyond the leg at the hip so as to warrant conversion of his lower extremity impairment rating to a whole person impairment rating.

97. Claimant failed to prove it is more probably true than not that the injury to his knee has functionally impaired any part of his body beyond the leg at the hip. Claimant has not produced any credible or persuasive evidence that the admitted left knee injury has caused damage to any tissues located beyond the leg at the hip. Not even Dr. Yamamoto has opined that the injury to Claimant’s knee caused injury to tissues beyond the leg at the hip. Rather, Dr. Yamamoto opined the injury resulted in tears of the lateral and medial menisci of the left knee, aggravated preexisting osteoarthritis of the left knee and caused a defect in the cartilage of the left medial femoral condyle.

98. There is no credible or persuasive evidence that the knee injury has caused pain, and hence dysfunction, in any part of the body beyond the leg at the hip. Although Claimant sought emergency treatment for back pain on May 6, 2015, he did not attribute the back pain to his knee injury. Rather, Claimant reported that he

experienced the onset of back pain 2 days previously when he "twisted while walking." Dr. Fall persuasively opined that the back problems Claimant reported in May 2015 are not related to the April 10, 2013 knee injury.

99. No physician has credibly or persuasively opined that the April 10, 2013 knee injury caused functional impairment beyond the leg at the hip. Not even Dr. Yamamoto has opined that his scheduled rating should be converted to a whole person because Claimant sustained functional impairment beyond the leg at the hip. Rather, Dr. Yamamoto reported that Claimant's pain was "focal" and located on the medial aspect of the knee.

FINDINGS OF FACT CONCERNING SCHEDULED IMPAIRMENT RATING

100. A preponderance of the credible and persuasive evidence proves that Claimant sustained impairment of 33% of the left lower extremity.

101. Dr. Nagamani credibly and persuasively opined that that Claimant sustained scheduled impairment of 33% of the lower extremity. Dr. Nagamani assessed impairment based on a rating for reduced ROM and a "Table 40 diagnosis for the meniscectomies." Dr. Nagamani's rating was partially corroborated by Dr. Fall who opined that it "appeared to have been done correctly according to the AMA Guides."

102. Dr. Nagamani's impairment rating of 21% for reduced ROM is more persuasive than the ROM rating issued by Dr. Fall. Dr. Fall's ROM impairment rating was based on her determination that measurement of the contralateral and uninjured right leg afforded an accurate "baseline" for measuring the reduced ROM in the injured left knee. While Dr. Fall's methodology for calculating the ROM impairment may be permissible under the Division of Workers' Compensation (DOWC) "Impairment Rating Tips", Dr. Fall's testimony and report did not offer any detailed and persuasive explanation of why she exercised her discretion to calculate ROM in this manner. Dr. Fall also admitted that Dr. Nagamani measured Claimant's right leg ROM and the results were "normal." Neither Dr. Nagamani nor Dr. Yamamoto elected to use measurements of the contralateral leg when calculating ROM impairment. Indeed, their ratings for reduced ROM were very similar.

103. The ALJ is not persuaded by Dr. Yamamoto's opinion that Claimant suffered a ratable impairment for "aggravation" of preexisting osteoarthritis. As determined in Finding of Fact 34, Dr. Yamamoto's opinion that Claimant's diagnoses of "aggravated osteoarthritis" and damage to the cartilage of the femoral condyle are admittedly based, at least in part, on Claimant's report that he was asymptomatic prior to the April 10, 2013 injury and "very symptomatic" afterwards. However, for the reasons stated in Finding of Fact 87 Claimant's reporting of symptoms is not reliable and does not serve as a persuasive basis for Dr. Yamamoto's opinion.

104. Dr. Yamamoto's opinion that Claimant has ratable osteoarthritis is contradicted by the credible opinions of Dr. Fall and Dr. Nagamani. Neither Dr. Fall nor Dr. Nagamani found there is any permanent ratable impairment based on aggravation

of preexisting osteoarthritis. Dr. Larson credibly opined that Claimant's ongoing and diffuse pain complaints are not of a type likely to be caused osteoarthritis. Dr. Larson's opinion concerning the nature of Claimant's reported symptoms was corroborated by Dr. Nagamani. Dr. Larson credibly opined that Dr. Hsin's operative report detailed a limited area of chondromalacia on the medial femoral condyle but but nothing about traumatic injury to cartilage. Dr. Hsin, the original surgeon, credibly opined that the differences between the April 2013 MRI and the August 2013 MRI likely represent "postoperative changes" rather than "new injuries." Dr. Larson credibly opined that Dr. Hsin's operative report demonstrates that the "full thickness cartilage defect" reported on the August 2013 MRI is probably "artifact."

105. The ALJ takes administrative Notice of Table 40 of the AMA Guides. Table 40 provides for impairment ratings based on various lower extremity disorders including a torn meniscus, a meniscectomy and a partial meniscectomy. Table 40 indicates that a physician has the discretion to rate from 0 to 10% for one torn meniscus and from 0 to 25% for "both menisci." Here, the evidence establishes Claimant has 2 torn menisci (lateral and medial). Therefore, the ALJ is persuaded by Dr. Nagamani's 15% based on two partial meniscectomies (medial and lateral) performed on May 16, 2013.

FINDINGS CONCERNING DISFIGUREMENT

106. Claimant demonstrated that he has two one-half inch scars. One scar is located on the outside of the knee and one is located on the inside of the left knee. These scars are the result of the arthroscopic surgery performed in May 2013.

107. At hearing Claimant appeared to walk with a noticeable limp. However, the ALJ finds that the limp exhibited by Claimant is not a credible and reliable indicator of his actual disfigurement, if any. A limp can be demonstrated as a matter of choice. As found above, numerous physicians and medical providers have observed that Claimant exhibits non-organic symptoms and pain behaviors inconsistent with PE. The non-organic findings include observations that Claimant has demonstrated greater knee ROM when distracted than when he is directly examined. In these circumstances the limp observed by the ALJ is not found to represent a valid indicator of Claimant's actual appearance and disfigurement. The ALJ also credits Dr. Fall's testimony that there is no medical indication for Claimant's use of a cane because his knee is stable and neurologically intact. The ALJ further credits Dr. Fall's testimony that the swelling which the ALJ observed in Claimant's left lower extremity is probably the result of inactivity and wrapping of the knee with an Ace bandage.

FINDINGS OF FACT CONCERNING OVERPAYMENT

108. Respondents failed to prove it is more probably true than not that Claimant received an overpayment of permanent partial disability (PPD) benefits. Respondents' argument is predicated on the assertion that they admitted liability for PPD benefits based on Dr. Nagamani's 33% lower extremity impairment rating, but Claimant is actually entitled to PPD benefits on Dr. Fall's lesser rating. However, the ALJ has found that Claimant is entitled to PPD benefits based on Dr. Nagamani's 33% lower extremity

impairment rating. The ALJ has also found Dr. Fall's rating to be less persuasive than Dr. Nagamani's rating. In these circumstances Respondents' May 11, 2015 FAL correctly admitted liability for PPD benefits in the amount of $18,325.51.

109. Respondents proved it is more probably true than not that Claimant received an overpayment of temporary total disability (TTD) benefits in the amount of $12,919.12.

110. As determined in Findings of Fact 82 through 88, Claimant reached MMI on February 25, 2014. Respondents' May 11, 2015 FAL establishes that they admitted liability for payment of $20,876.14 in TTD benefits between the date of injury and the date of MMI. The Respondents' "payment log" (Respondents' Exhibit R) reflects that Insurer continued to pay TTD benefits after the date of MMI. The payment log demonstrates Respondents paid a total of $52,120.77 in TTD benefits.

111. The Claimant was overpaid TTD benefits in the amount of $31,244.63 ($52,120.77 - $20,876.14). However, the FAL reflects Respondents reduced the amount of the overpayment by crediting Claimant with the $18,325.51 in admitted PPD benefits. Thus, Respondents correctly argue that the outstanding overpayment was reduced to $12,919.12 ($31,244.63 - $18,325.51).

112. Further, the $500 in disfigurement benefits that Claimant is entitled to receive as a result of this order must also be credited against the TTD overpayment. Thus the Claimant has been overpaid TTD benefits in the final amount of $12,419.12 ($12,919.12 - $500).

FINDINGS CONCERNING MAINTENANCE MEDICAL TREATMENT

113. Claimant failed to prove it is more probably true than not that he is entitled to an award of post-MMI medical treatment to relieve the effects of his injury or prevent deterioration of his condition.

114. Dr. Nagamani and Dr. Fall credibly opined that Claimant does not need "maintenance care." Both of these physicians credibly and persuasively noted that no treatment provided to Claimant, surgical or otherwise, has significantly diminished his pain complaints. The medical records demonstrate Claimant has undergone extensive treatment for his knee including surgery, PT, injection and drug therapy. Nevertheless Claimant's pain complaints have not been alleviated and he continues to exhibit pain behaviors out of proportion to physical findings.

115. The ALJ is not persuaded by Claimant's testimony that he receives any "short-time" benefit from the pain medications and creams prescribed by Dr. Yamamoto. In August 2015 Claimant told Dr. Fall that he has not received benefit from any treatment. Claimant made similar statements to Dr. Carbaugh in August 2013. Considering Claimant's persistent pain behaviors and non-organic findings the ALJ is not persuaded that any medications or treatments actually relieve Claimant's condition.

116. Moreover, Dr. Fall credibly opined that in view of Claimant's persistent symptoms and failure to respond to treatment one must consider that Claimant's symptoms have a psychological origin. Dr. Fall's opinion in this regard is corroborated by Dr. Carbaugh who opined that Claimant has "psychological factors" affecting his medical condition and that Claimant's "personality and coping style" likely impact his perception of symptoms. The ALJ finds that no treatment, except possibly psychological counseling, is likely to alleviate Claimant's symptoms or prevent deterioration of his condition. As for psychological counseling suggested by Dr. Carbaugh the ALJ is persuaded that the need for this treatment, if any, is not causally related to the industrial injury. Rather, the need for such treatment, if any, originates in Claimant's unique psychological make-up and personality style and is not related to the industrial injury. In this regard the ALJ notes that Dr. Nagamani, Dr. Larson and Dr. Fall have all opined that Claimant does not need any maintenance care despite the fact the no psychological counseling has been provided. Not even Dr. Yamamoto has opined that Claimant needs or is likely to need psychological counseling as a form maintenance treatment.

117. Dr. Yamamoto's opinion that Claimant needs continuing management of his medications is not persuasive. As previously found, Dr. Yamamoto has placed undue reliance on Claimant's reports of pain. Moreover, despite the observations and opinions of numerous medical providers, Dr. Yamamoto does not acknowledge that Claimant exhibits pain behaviors and reports symptoms that are out of proportion to the objective evidence and are "non-physiologic" in character.

STIPULATION

118. Claimant's admitted average weekly wage is $730.66. At hearing the parties stipulated that as of September 30, 2015 Claimant's average weekly wage should be increased to $824.12.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as noted below, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

MAXIMUM MEDICAL IMPROVEMENT

Claimant argues that the evidence establishes that he did not reach MMI until September 17, 2014 as found by Dr. Yamamoto. Respondents contend Claimant failed to overcome Dr. Nagamani's finding of MMI by clear and convincing evidence. The ALJ agrees with Respondents.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician’s finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician’s finding concerning MMI is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician’s finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As determined in Findings of Fact 82 through 88, Claimant failed to prove it is highly probable and free from serious doubt that the DIME physician erred in finding Claimant reached MMI on February 25, 2014. The DIME physician persuasively opined that Claimant reached MMI on February 25, 2014 because no further treatment is likely to improve Claimant’s condition and all prior treatments failed to effect significant improvement. The DIME physician’s opinion was corroborated by the opinions expressed by Dr. Larson and Dr. Fall. For the reasons stated in Findings of Fact 86 though 88, Dr. Yamamoto’s opinion that Claimant did not reach MMI until September 17, 2014 is not sufficiently persuasive to constitute clear and convincing evidence to overcome the DIME physician’s finding concerning MMI.

PERMANENT TOTAL DISABILITY

Claimant alleges that the evidence establishes that it is more probably true than not that the effects of the industrial knee injury have rendered him unable to earn wages in the same or other employment. Therefore, Claimant seeks an award of permanent total disability (PTD) benefits. The ALJ disagrees with Claimant’s contention.

To prove a claim that he is permanently and totally disabled, a claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995).

In weighing whether Claimant is able to earn any wages, the ALJ may consider various “human factors” including Claimant's physical condition, mental ability, age, employment history, education, and availability of work that he can perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The ALJ may also consider Claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to Claimant under his particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. The question of whether Claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

As determined in Findings of Fact 89 through 95, Claimant failed to prove it is more probably true than not that the industrial injury has rendered him unable to earn wages in any employment. Rather, the ALJ has discredited the restrictions imposed by Dr. Yamamoto and credited the restrictions imposed by Dr. Fall. The ALJ has credited the testimony of vocational expert Montoya that Dr. Fall's restrictions render Claimant capable of finding employment in many jobs, including most of those that he performed prior to the April 2013 injury. The claim for PTD benefits must be denied.

CONVERSION OF SCHEDULED IMPAIRMENT TO WHOLE PERSON IMPAIRMENT

Claimant argues that if he is denied PTD benefits Dr. Nagamani's (DIME physician's) 33% lower extremity impairment rating should be "converted" to a 13% whole person impairment rating and PPD benefits awarded on that basis. Specifically, Claimant argues that the "restriction limiting his ability to lift more than five pounds along with limiting him to seated work only are functional impairments beyond the schedule" that warrant conversion to a whole person rating. The ALJ is not persuaded by this argument.

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)." If the claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides the claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Pain and discomfort that limit the claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the leg at the hip. *Cf. Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002).

Section 8-42-107(2)(w), C.R.S., provides for scheduled compensation based on "loss of a leg at the hip or so near thereto as to preclude the use of an artificial limb." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the leg at the hip and the consequent right to PPD benefits awarded under § 8-42-107(8)(c). Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Maestas v. American Furniture Warehouse,* WC No. 4-662-369 (June 5, 2007).

As determined in Findings of Fact 96 through 99, Claimant failed to prove it is more probably true than not that he sustained an injury causing "functional impairment" beyond the leg at the hip. Claimant has not shown that the injury to his knee caused any damage to tissues located beyond the leg at the hip, or that the knee injury has caused him to experience pain in tissues located beyond the leg at the hip. Neither does the record contain any credible or persuasive medical opinion tending to prove that knee injury cause functional impairment beyond the leg at the hip. Even Dr. Yamamoto opined that Claimant's injury involved injury to the left menisci, aggravation of preexisting left knee osteoarthritis and a cartilage injury to the left femoral condyle.

The ALJ is not persuaded by Claimant's argument that he has proven functional impairment beyond the leg at the hip because Dr. Yamamoto restricted him to seated work and lifting no more than 5 pounds. First, the factual predicate for Claimant's argument is invalid. As found above, the ALJ credits Dr. Fall's opinion that the knee injury has not caused any restrictions that limit Claimant to lifting 5 pounds and performing only seated work. Rather, the ALJ has credited Dr. Fall's opinion that Claimant's only restrictions are no kneeling on the left knee and avoidance of high-impact activities. (*See* Findings of Fact 90 and 91.)

However, even if Dr. Yamamoto's restrictions were considered valid, the ALJ concludes they would not prove the existence of functional impairment beyond the leg at the hip. It is clear from Dr. Yamamoto's reports and testimony that he imposed the lifting and seated work restrictions based on Claimant's complaints of pain and dysfunction in the left knee. The Claimant did not, and does not now contend that the restrictions were necessitated by injury to or dysfunction involving any part of the body other than his left knee. Therefore, it is the left knee that suffered the "ultimate loss" and was functionally impaired. Restrictions that Dr. Yamamoto imposed because of injury to the Claimant's left knee do not prove that Claimant sustained functional impairment to any part of the body beyond the leg at the hip.

Claimant's request that he be awarded PPD benefits based on conversion of a lower extremity impairment rating to a whole person rating must be denied.

SCHEDULED IMPAIRMENT RATING

Claimant contends that if his PPD benefits are awarded under the schedule they should be based on Dr. Yamamoto's 45% lower extremity rating. The Claimant argues that this is so because Dr. Yamamoto's rating includes impairment based on the aggravation of preexisting osteoarthritis. Conversely Respondents argue that Claimant's scheduled PPD benefits should be based on Dr. Fall's 15% lower extremity rating rather than Dr. Nagamani's 33% lower extremity impairment rating. Respondents assert that Dr. Fall's rating is the most credible rating. The ALJ concludes that Dr. Nagamani's rating is the most credible and persuasive impairment rating.

As determined above, Claimant's impairment is correctly rated under the schedule of disabilities. Consequently, the Claimant bears the burden of proof to establish the degree of his impairment by a preponderance of the evidence. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000); *Maestas v. American Furniture Warehouse,* WC 4-662-369 (ICAO June 5, 2007).

Based on Findings of Fact 100 through 105, the ALJ finds the credible and persuasive evidence proves it is more probably true than not that Claimant is entitled to PPD benefits based on Dr. Nagamani's 33% lower extremity impairment rating.

DISFIGUREMENT

Claimant seeks an award of disfigurement benefits based on his scars, limp, "use of a cane," use of a Neoprene Sleeve, and swelling of the lower leg caused by wearing the sleeve.

Section 8-42-108(1), C.R.S., provides for an award of disfigurement benefits if an "employee is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view."

As determined in Findings of Fact 106 Claimant has sustained permanent disfigurement to a parts of the body normally exposed to public view. These disfigurements consist of two half-inch scars located on the outside and inside of the knee.

As determined in Finding of Fact 107 the Claimant failed to prove it is more probably true than not that the knee injury has caused a permanently disfiguring limp.

As determined in Finding of Fact 107 Claimant's use of a cane does not evidence a permanent disfigurement. Rather, the ALJ credits Dr. Fall's opinion that there is no medical indication for Claimant's use of a cane.

The ALJ concludes Claimant's use of a cane and neoprene sleeve do not constitute "disfigurements" to "parts of the body" normally exposed to public view. A disfigurement is an "observable impairment of the natural appearance of a person." A disfigurement, such as the loss of a tooth or an eye, exists even if the disfigurement can be concealed by use of a prosthetic device. *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961). Moreover, to be compensable the disfigurement must be to a "part of the body" that is normally exposed to public view. *See Twilight Jones Lounge v. Showers*, 732 P.2d 1230, 1232 (Colo. App. 1986) (abdominal scar is to part of body normally exposed to public view since "males commonly appear at swimming pools or other public places without upper body garments" during warm months). Assistive and prosthetic devices, such as canes, wheel chairs and braces are not "parts of the body." Rather, they are external medical devices that may be prescribed to assist with or preserve bodily function.

The ALJ further concludes that the swelling in Claimant's lower extremity does not constitute a "permanent" disfigurement. Rather, the ALJ credits Dr. Fall's testimony that the swelling is the result of Claimant's personal decisions to wrap up the knee and to remain inactive so as to reduce return blood flow to the heart. (Findings of Fact 57 and 91). The ALJ finds that Claimant's decisions to wrap the knee and remain inactive are not medically necessary because, as Dr. Fall testified, the knee is not unstable and Claimant is fully capable of standing and walking for most of the day. It follows that swelling of the lower extremity is not "permanent" because it the product of Claimant's own decisions, not any medical necessity caused by the injury. *Cf. Irvin v. Medical Center of Aurora,* WC 4-320-720 (ICAO January 6, 2006).

Based on the scars on the ALJ concludes Claimant is entitled to an award of disfigurement benefits in the amount of $500.

OVERPAYMENT

Respondents contend that because Claimant reached MMI on February 25, 2014, but the Insurer continued to pay TTD benefits Claimant has been "overpaid" $12,919.12 in TTD benefits. Respondents further contend that that they are entitled to recover an overpayment of PPD benefits in the amount of $8,329.78 based on Dr. Fall's opinion that Claimant sustained 15% impairment of the lower extremity. Thus, Respondents seek an order requiring Claimant to repay a total of $21, 248.90. The ALJ concludes that after credits Claimant has been overpaid TTD benefits in the amount of $12,419.12 and Claimant should be ordered to repay this amount to the Insurer.

The Respondents bear the burden of proof to establish that Claimant received an overpayment of benefits. See *City and County of Denver v. Industrial Claim Appeals Office,* 58 P.3d 1162 (Colo. App. 2002). An overpayment is defined to include "money received" by the claimant that exceeded the amount that should have been paid or that the claimant "was not entitled to receive." For an overpayment to occur it is "not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles." Section 8-40-201(15.5), C.R.S. Section 8-43-303(1), C.R.S. provides that a claim may be reopened to recover overpayments and "repayment shall be ordered." *See Simpson v. Industrial Claim Appeals Office,* 219

P.3d 354 (Colo. App. 2009); *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010).

As determined in Finding of Fact 108, Respondents failed to prove that the Claimant received an overpayment of PPD benefits. As found Claimant is entitled to PPD benefits based on Dr. Nagamani's 33% lower extremity rating. Respondents' FAL admitted liability for PPD benefits in the amount of $18,325.51 based on Dr. Nagamani's 33% rating. Because the ALJ rejects Respondents' argument that Claimant's PPD benefits should be based on Dr. Fall's 15% lower extremity impairment rating there has been no overpayment of PPD benefits.

As determined in Findings of Fact 109 through 111 Respondents proved it is more probably true than not that Claimant was overpaid TTD benefits in the amount of $12,919.12. Because Claimant reached MMI on February 25, 2014 his right to receive TTD benefits ended on that date. Section 8-42-105(3)(a), C.R.S. However, on February 25, 2014 Respondents were not legally entitled to terminate payment of Claimant's TTD benefits because no ATP had yet placed the Claimant at MMI and the DIME process had not yet been triggered let alone completed. See sections 8-42-107(8)(b)(I) and (b)(II), C.R.S.; § 8-43-203(2)(b)(II)(A), C.R.S.; § 8-42-107.2(4)(c), C.R.S. As a result, Respondents continued to pay and Claimant continued to receive TTD benefits after February 24, 2015.

The TTD benefits paid to Claimant after February 24, 2014 constituted an "overpayment" within the meaning of the Act because they represented money in excess of the amount Claimant should have been paid. Section 8-40-201(15.5). The mere fact that Claimant was entitled to receive the TTD payments at the time they were being made does not vitiate their ultimate status as an "overpayment." Section 8-40-201(15.5). *Simpson v. Industrial Claim Appeals Office, supra*; *Marquez v. Americold Logistics,* WC 4-896-504-04 (ICAO August 7, 2014; *Mattorano v. United Airlines,* WC 4-861-379-01 (ICAO July 25, 2013*); Haney v. Shaw, Stone and Webster,* WC 4-796-763 (ICAO July 28, 2011).

As found, Claimant has been overpaid TTD benefits in the amount of $12,419.12 after being given credit for PPD benefits paid to Claimant and disfigurement benefits owed to Claimant. Claimant is ordered to repay Insurer $12,419.12. Claimant shall repay this amount at the rate of $50 per week.

MAINTENANCE MEDICAL TREATMENT

Claimant requests an award of ongoing medical treatment subsequent to MMI including payment for the treatments provided by Dr. Yamamoto since the date of MMI. The ALJ concludes Claimant is not entitled to an award of post-MMI medical benefits.

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As determined in Findings of Fact 113 through 117 Claimant failed to prove it is more probably true than not that he is entitled to ongoing medical benefits to alleviate his symptoms or prevent deterioration in his condition. As found, the persuasive opinions of Dr. Fall and Dr. Nagamani establish that no treatment provided to Claimant has resulted in any improvement in his condition and it is unlikely any treatment ever will. Despite an extensive course of invasive and non-invasive treatment Claimant's reported symptoms have never substantially improved. Indeed, Claimant told Dr. Fall in August 2015 that no treatment had provided benefit.

The ALJ is persuaded that no ongoing medical treatment is likely to relieve Claimant's symptoms because the origin of Claimant's ongoing symptoms lies in his psychological make-up and personality style, not the effects of the industrial injury. To the extent that psychological counseling could alter Claimant's condition the need for such treatment is not necessitated by the injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Claimant reached maximum medical improvement on February 25, 2014.

2. The Claimant's request for an award of permanent total disability benefits is denied.

3. Claimant is entitled to permanent partial disability benefits based on a scheduled impairment rating of 33% of the leg at the hip. Respondents have admitted the value of this rating is $18,325.51.

4. Respondents are liable to pay disfigurement benefits in the amount of $500.

5. Insurer's claim for recovery of an alleged overpayment of permanent partial disability benefits is denied.

6. Insurer is entitled to recover an overpayment of temporary total disability benefits. As determined the amount of the overpayment, after crediting payments for permanent partial disability benefits and disfigurement

benefits, is $12,419.12. Claimant shall repay this overpayment at the rate of $50 per week.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 18, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-921-854-01

ISSUES

Did the claimant establish by a preponderance of the evidence that she should be compensated for a 10% whole person permanent impairment rather than the extremity ratings?

FINDINGS OF FACT

1. The claimant was an employee of the respondent-employer on May 18, 2012 working as a laboratory technician and a phlebotomist. In this capacity she was on her feet for eight to nine hours a day. The floor surface was mad of concrete, and she was working 40+ hours per week.

2. The claimant's duties required her to draw blood from the facilities patients and to conduct lab tests.

3. The claimant suffered from an admitted work related condition which manifested itself in May 2012 as a severe heel pain with burning and sharp pain causing the claimant to be almost unable to walk.

4. Dr. Lakin was the claimant's original authorized treating physician and he had referred the claimant to Dr. Simpson.

5. The claimant underwent surgery on her right foot on February 6, 2014, after which she was in a walking boot for four to six weeks.

6. The claimant had surgery on her left foot on April 17, 2014, after which she was again in a walking boot.

7. The claimant had repeat surgery on her left foot on October 2, 2014; once again the claimant was in a walking boot post-surgery.

8. The use of a walking boot affected the way the claimant walks. Her walking was unstable causing her hips and S-I joint to hurt.

9. The claimant states that she thinks she still does not walk normally, as she did before the surgeries.

10. The claimant states that she still has an abnormal gait. As of the hearing date the claimant foot is still bothersome. Her left foot is worse than her right and she favors the left foot. There is burning and shooting pain down the side of the foot.

11. The claimant states that she began to experience pain in her low back and hip in 2013. The claimant indicates that she discussed this low back and hip pain with Dr. Lakin and that Dr. Lakin did a mild adjustment but had indicated to her that he didn't think insurance would cover the low back and hip issue.

12. Although the claimant would fill out pain diagrams she states that she stopped indicating low back pain on the diagrams subsequent to Dr. Lakin telling her that it would not be covered.

13. Additionally, subsequent to being told that it would not be covered she initiated treatment on her own.

14. The claimant states that every day she has low back, hip, and S-I joint pain. To alleviate the pain she does a lot of stretching. She states she is limited in doing daily activities such as yard work; where she needs to stop, stretch, and shift.

15. The claimant was placed at maximum medical improvement in June 2015. The claimant indicates that at the time of MMI she was suffering from low back and hip pain.

16. Just prior to being given her impairment rating the claimant underwent a Functional Capacity Evaluation. During that evaluation the claimant experienced pain more pain in her back than in her feet, and her ability to lift was limited due to the back pain.

17. As of the date of hearing the claimant still has pain in her feet and this pain limits the way she walks and limits how she can lift.

18. Upon releasing the claimant at MMI Dr. Lakin provided permanent restrictions, based upon the FCE, of: Limit standing tolerance to tolerance of pain, 10-15 minutes at one time and 30-40 minutes in any one hour time period.

19. He additionally provided for post-MMI maintenance care with the anticipation that the claimant would continue having pain and possibly need surgery within the next five years.

20. The claimant was seen by Dr. Allison Fall for an independent medical examination on December 8, 2015.

21. Dr. Fall opined that the claimant's functional loss is at her bilateral feet and left ankle area. She indicates that she believes there is no functional deficit proximal to the lower leg and foot that is work related. Dr. Fall cites the fact that the claimant is no longer wearing a boot or a cast and therefore there would be no reason for her to have compensatory back pain.

22. The ALJ finds that the claimant is credible.

23. The ALJ finds that, while Dr. Fall's opinion is based in pertinent part on the fact that the claimant is no longer in a boot or cast, the claimant's credible testimony is that she has an altered walking patter due to the pain that remains in her.

24. Additionally, the claimant's FCE results support a finding of a functional deficit beyond the lower extremities.

25. The ALJ finds that the claimant has established that it is more likely than not that the functional deficit she suffers extends beyond the lower extremity and into the back and hip.

26. The ALJ finds that the claimant has established that it is more likely than not that she should be compensated for the whole person rating of 10%.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

3. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a

conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

5. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

6. The question of whether the claimant sustained a loss of a loss of a foot below the ankle within the meaning of Section 8-42-107(2)(y), C.R.S. or a whole person medical impairment compensable under Section 8-42-107(8)(c), C.R.S. is one of fact for determination by the ALJ. In resolving this question the ALJ must determine the situs of the claimant's functional impairment, and the situs of the functional impairment is not necessarily the situs of the injury itself. *See Langton v. Rocky Mountain Health Care Corp.* 937 P.2d 883 (Colo.App. 1996); *Staunch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo.App. 1996).

7. The "loss of a foot below the ankle" is on the schedule of injuries listed under Section 8-42-107 (2)(y), C.R.S. Depending on the particular facts of the claim, damage to the structures above the foot may or may not reflect a functional impairment which is enumerated on the schedule of injuries under Section 8-42-107(2), C.R.S.

8. An impairment rating issued under the AMA Guides is relevant, but not dispositive of whether the claimant sustained a functional impairment beyond the schedule. *Staunch v. PSL Swedish Healthcare System, supra.* Further, pain and discomfort, which limits the claimant's ability to use a portion of the body, may be considered functional impairment for purposes of determining whether an injury is on or off the schedule. *See Vargas v. Excel Corp., W. C. NO. 4-551-161 (April 21, 2005).* Functional impairment beyond the "loss of a foot below the ankle" is probative evidence of whole person impairment.

9. As found above, the ALJ concludes that the claimant's testimony was credible and supported by the medical record.

10. The ALJ concludes as found above, that as a result of her work-related injury the claimant has functional impairment of the foot below the ankle, and the claimant has functional impairment in areas beyond the foot extending into the low back and hip area. As a result of her work-related injuries the claimant's functional impairment is not limited to the foot below the ankle.

11. The ALJ concludes that the claimant has established by a preponderance of the evidence that her lower extremity impairment rating should be converted to a whole person impairment rating.

12. The ALJ concludes that the claimant suffered 10% permanent impairment of the whole person.

ORDER

It is therefore ordered that:

1. The respondent-insurer shall compensate the claimant for permanent impairment of 10% whole person.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: February 22, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-924-869-01

STIPULATIONS

1. The Respondents are currently processing the Claimant's request for the medical benefit of a pool pass and admit for this benefit.

2. The Claimant's commutable labor market is Kingman, AZ / Mojave County, AZ.

3. In position statements submitted post-hearing, the Claimant and Respondents both confirm that the total current overpayment to the Claimant as a result of receiving Social Security Disability benefits of $1,910/ per month is a current overpayment amount of $8,299.20. Respondents further elaborated in their brief that Respondents were entitled to reduce receipt of the Claimant's workers' compensation TTD benefits by $220.38/week ($1910.00 x 12 divided by 52 x 0.5). Because Claimant received TTD benefits for 11 months after the award of SSD benefits and failed to timely notify Respondents, Respondents overpaid TTD in the amount of $10,505.00 ($1910.00 x 11 x 0.5). Upon learning of the duplicative benefits, Respondents ceased payments of PPD, after $13,248.82 of the $15,449.62 PPD benefits had been paid. As such, the overpayment amount was offset, or reduced, by $2,200.80. Respondents thus claim a current overpayment of $8,299.20 (which is the amount that both parties confirm for overpayment).

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he is permanently totally disabled?

2. Whether the Claimant is entitled to compensation for disfigurement pursuant to C.R.S. § 8-42-108 and, if so, the amount of compensation.

3. Whether the Respondents established the Claimant received an overpayment of indemnity benefits by virtue of his receipt of social security benefits and whether such overpayment is subject to repayment, and, if so, the manner in which the Claimant should be ordered to repay such amounts.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant's date of birth is November 5, 1951 and he is currently 64 years old. He currently lives in Golden Valley, Arizona which is in the commutable labor market for the Kingman, Arizona area. His last employment was with the Respondent Employer.

2. On July 15, 2013, the Claimant was pulling a side-dump trailer and the electric tarp was not functioning properly so the Claimant had to get up onto the material in the trailer and manually tarp it. The Claimant testified that at a certain point he realized he got too far over, had lost his balance and he was about to fall so he jumped to the ground to avoid more serious injuries. He landed on both feet and suffered fractures to both feet. This testimony is consistent with his reporting of the mechanism of injury in the medical records and is credible and found as fact.

3. The Claimant saw Erica Herrera, PA-C, at Work Partners Occupational Health Clinic on July 15, 2013 reporting severe right and left ankle pain. The Claimant reported a pain level range from 4-9/10 with weight bearing increasing his pain. On examination there was significant swelling present over the entire right and left ankle joints. After x-rays confirmed the Claimant had fractured both the ankles, the Claimant was sent for CT scans which showed that the left calcaneus was comminuted. The Claimant was placed in splints, provided a wheelchair and placed on restricted duty limited to non-weight bearing, sedentary work (Claimant's Exhibit 4, pp. 124-127; Respondents' Exhibit A).

4. On July 23, 2013, the Claimant's case was assigned to nurse-case manager Jill Francini, RN (Claimant's Exhibit 3, p. 73). RN Francini noted that in her first contacts with the Claimant and his wife on July 23, 2013 and July 24, 2013, the Claimant expressed a good deal of frustration over delay in authorization for the Claimant to see an orthopedic foot specialist and the Claimant's wife felt they should get an attorney due to the delay. RN Francini noted that due to the swelling, it was not likely the Claimant could have proceeded to surgery any earlier (Claimant's Exhibit 3, p. 74). On July 24, 2013, the Claimant reported a pain level of 4/10 at the visit, but stated that his pain level ranged from 4-9/10 depending on activity (Claimant's Exhibit 4, p. 131).

5. The Claimant was evaluated by Dr. Christopher Copeland on July 29, 2013. Dr. Copeland diagnosed the Claimant with a distal fibula fracture of the right lower extremity. He diagnosed a left foot calcaneus fracture. Dr. Copeland recommended treating the right lower extremity with a cast and immobilization, followed by a cam boot and keeping the Claimant non-weight bearing for 8-10 weeks. As for the left lower extremity, Dr. Copeland recommended surgical and non-surgical options and the Claimant opted to proceed with the surgical repair (Claimant's Exhibit 2, pp. 4-10;

Respondents' Exhibit B). RN Francini attended this medical appointment with the Claimant and noted that the Claimant's knuckles were very calloused from transferring with his knuckles. She noted that Dr. Copeland stressed the need to stop smoking and drinking as surgery was indicated in this case. RN Francini also noted that the swelling was still preventing surgery and the Claimant was advised to keep the leg elevated to get the swelling down for a possible surgery date on August 5, 2013 (Claimant's Exhibit 3, p. 75).

6. The Claimant underwent surgery for his left lower extremity on August 5, 2013. Dr. Copland performed a left calcaneus open reduction internal fixation, left subtalar joint arthrodesis and iliac crest bone marrow aspiration (Claimant's Exhibit 2, pp. 11-14; Respondents' Exhibit C).

7. RN Francini attended a follow up appointment with the Claimant, his wife and Dr. Copeland on August 13, 2013. She noted that the Claimant did well with his surgery. The Claimant was taking Percocet and Oxycodone for pain at the 6-7/10 level RN Francini noted the Claimant was applying for SSDI on this date (Claimant's Exhibit 3, p. 78).

8. The Claimant saw Erica Herrera, PA-C, on August 27, 2013 and on October 1, 2013 while he was recovering from his work injury and subsequent surgery. The Claimant reported pain in the left and right ankle. The Claimant reported that he was improving and continued to use a wheelchair to get around. By the October visit, the Claimant still reported the bilateral ankle pain to be sharp but felt it was improving and variable depending on activity level. The Claimant was in therapy and still non-weight bearing, but was to begin slowly transitioning back to weight bearing status. At this point, the Claimant remained off work (Claimant's Exhibit 4, pp. 143-150).

9. By October 1, 2013, Dr. Copeland noted the Claimant was healing well from the surgery. The left lower extremity cast was removed and significant improvement was noted for the right ankle. No complications were noted and the plan was for the Claimant to slowly transition to weight bearing (Claimant's Exhibit 2, pp. 18-19).

10. As of October 21, 2013, the Claimant's pain levels continued to improve and the Claimant continued with his physical therapy. Although he was slowly transitioning to weight bearing status, the Claimant reported that he was still reliant on his wheelchair and was having a difficult time using crutches (Claimant's Exhibit 4, pp. 151-153). RN Francini attended this appointment and noted that the Claimant was wearing CAM boots on both legs and had rashes, right worse than left, on both legs due to the CAM boots. The toes and ankle on the left side was still swollen. The Claimant reported that he uses crutches at home and at PT but otherwise mostly uses the wheelchair as he fatigues easily (Claimant's Exhibit 3, p. 84).

11. RN Francini accompanied the Claimant and his wife to a November 12, 2013 appointment with Dr. Copeland. She noted that the Claimant's wife reported that she didn't feel that physical therapy was doing much for the Claimant and that he could do what they were offering on his own. The Claimant advised that he and his wife would like to return home (to Arizona) as their home needed care and it was difficult staying with relatives. RN Francini advised that she would see about transferring care for physical therapy to Arizona. RN Francini noted that they experienced a very long, over 2 hour, wait for Dr. Copeland. She also noted that Dr. Copeland examined the Claimant's left knee and found prepatellar bursitis and advised the Claimant to keep off the knee as much as possible and he added PT for the left knee (Claimant's Exhibit 3, p. 85).

12. In the November 12, 2013 medical note of Erica Herrera, PA-C, the Claimant was non-weight bearing and in a wheelchair. Swelling to his bilateral ankles was noted, but the pain symptoms were reportedly improving with a pain level of 2/10. For the first time in the medical records, Ms. Herrera notes that she examined the Claimant's left knee and notes swelling in the pre-patellar bursa with tenderness (Claimant's Exhibit 4, p. 156). RN Francini also attended this appointment with the Claimant and his wife and noted that after the exam, Ms. Herrera had PT come in to help the Claimant with gait instruction with his crutches and provided a cortisone patch for the knee and recommended icing and staying off the knee as much as possible (Claimant's Exhibit 3, pp. 85-86).

13. On January 2, 2014, the Claimant saw Dr. Copeland and reported that he was using crutches and a CAM boot and was weight bearing with the assistance of his crutches (Claimant's Exhibit 2, pp. 25-27). That same day, the Claimant also saw Erica Herrera, PA-C at Dr. Gustafson's office and the Claimant reported his pain level, numbness and swelling was improving significantly. He rated his pain level at 0/10. Ms. Herrera noted that the Claimant was starting to bear weight without his crutches. Ms. Herrera examined the Claimant's left knee again on this visit, in addition to his ankles. She noted that the examination showed continued swelling in the pre-patellar bursa with tenderness. Ms. Herrera also noted the Claimant was going back to Arizona the next weekend. The plan was for the Claimant to continue to transition into complete weight bearing without crutches. Ms. Herrera also advised the Claimant to avoid any kneeling as he was exacerbating his left knee bursitis. She also provided the Claimant with a prescription for the bursitis. The Claimant's work status was changed from no work to restricted duty with restrictions limiting his standing and walking each to 1 hour per day and his sitting to 6 hours per day (Claimant's Exhibit 4, pp. 159-163; Respondents' Exhibit D). RN Francini also attended this appointment with the Claimant and noted that the Claimant was walking with a CAM boot on the left and in a regular shoe with a brace on the right and using crutches. The Claimant reported that he was very pleased with the physical therapy in Arizona. RN Francini also noted that as for the knee swelling, the Claimant was advised to keep off the knee and not to bump it. If there was no change by the next visit, Dr. Copeland indicated he would consider an injection (Claimant's Exhibit 3, pp. 91-92).

14. RN Francini accompanied the Claimant to a visit with PA-C Herrera on January 2, 2014 as well. She noted that due to the continued bursitis, PT for the knee was recommended. PA-C also recommended the Claimant use a knee pad due to the need for him to transfer into his truck on his knee when he goes to PT (Claimant's Exhibit 3, p. 92).

15. On February 10, 2014, the Claimant received notification that he was entitled to monthly Social Security Disability benefits of $1,910.00 per month. The notification indicated that the Claimant was entitled to benefits beginning January 2014 and he would receive the benefit check for January 2014 on or around February 16, 2014 and thereafter would receive the benefit check in the amount of $1,910.00 on or about the second Wednesday of the month (Respondents' Exhibit X pp. 115-118).

16. On February 11, 2014, the Claimant presented himself for an Arizona Department of Transportation Commercial Driver Fitness Determination. The Medical Examination Report was issued on February 11, 2014. The medical examiner Stephen Shuffler noted that after the Claimant's 7/15/13 injury, he has "limited gait and activity" and he is not yet released by his orthopedic surgeon, otherwise he would be qualified for re-certification (Claimant's Exhibit 8, p. 297-299). On February 14, 2014, the Arizona Department of Transportation sent the Claimant notice of his CDL revocation (Claimant's Exhibit 8, p. 300).

17. The Claimant saw Dr. Copeland again on March 4, 2014 and the Claimant reported that over the past 3 weeks he had regressed without physical therapy. The Claimant also reported an inability to stand for long periods of time. Dr. Copeland recommended continued physical therapy (Claimant's Exhibit 2, pp. 29-31). The Claimant saw Ms. Herrera at Dr. Gustafson's office 2 days later on March 6, 2014 reporting that his left ankle remained his primary problem and that his right ankle was feeling great and "his left knee bursitis is almost completely resolved." Ms. Herrera noted that secondary to pain in the left ankle the Claimant was still having difficulty getting to full weight-bearing and she prescribed a walking cane (Claimant's Exhibit 4, pp. 164-166). RN Francini attended the medical appointment on March 6th with the Claimant and his wife and noted that the knee was better but there was still some swelling. The Claimant was walking with 2 crutches and RN Francini noted that the Claimant can walk without the crutches but any standing for more than several minutes causes pain and selling with the pain reaching 5/10 (Claimant's Exhibit 3, p. 101).

18. On May 8, 2014, the Claimant saw Dr. Copeland who noted that the Claimant was able to walk without crutches or a wheelchair, but the Claimant's wife did report that the Claimant could not walk very long without having to utilize his cane. Dr. Copeland suspected that the Claimant was having peroneal tendon irritation secondary to the hardware placed during surgery. He discussed a second surgery to remove the hardware and conduct an exploration of the peroneal tendon (Claimant's Exhibit 2, pp. 37-39). RN Francini attended the medical appointment with Dr. Copeland on this date and noted that the Claimant was walking without cane or crutches. He was wearing

ankle braces on both ankles and he reported that he can't go too long or too far without the cane. The Claimant also reported he has difficulty with stairs, especially descending them. The Claimant expressed concerns about his ability to return to truck driving. A heel wedge and Ritchy brace were ordered for the Claimant (Claimant's Exhibit 3, p. 108).

19. On May 12, 2014, Dr. Copeland requested authorization for left foot hardware removal, peroneal tendon exploration and lateral wall decompression (Claimant's Exhibit 2, p. 42; Respondents' Exhibit E).

20. On June 18, 2014, the Dr. Copeland performed the second surgical procedure on the Claimant's left lower extremity to remove the hardware and repair the peroneal tendon (Claimant's Exhibit 2, pp. 52-54; Respondents' Exhibit F). In the initial months after the second surgery, the Claimant was in a cast and was provided with a scooter so he was not weight bearing on the left ankle and foot (Claimant's Exhibits 2 and 4, pp. 56, 58, 177 an 185).

21. On October 3, 2014, Dr. Copeland noted the Claimant's left side was doing well but he was having increased pain in the right ankle. Dr. Copeland switched the Claimant's right ankle brace and gave him a diagnostic and therapeutic injection (Claimant's Exhibit 2, pp. 61-63; Claimant's Exhibit O). RN Nacole Williams attended this medical appointment with the Claimant and also noted the increased pain in the Claimant's right ankle and that this could be attributed to the Ritchie brace or from arthritis worsening in his joint. The RN also accompanied the Claimant to an office visit with PA-C Herrera on that same date and she noted the Claimant's work restrictions were standing and walking limited to 1 hour each per 8 hour shift, sitting limited to 6 hours and sedentary work only with no CDL driving (Claimant's Exhibit 3, p. 114).

22. On November 7, 2014, Dr. Copeland responded to questioning regarding the Claimant's prognosis and need future medical care. Dr. Copeland opined the Claimant was under postoperative care for the left ankle and appeared to be doing well. Dr. Copeland did not foresee future treatment for the left side other than potentially orthotics. As for the right ankle, Dr. Copeland opined that further imaging evaluation with CTs and/or MRIs might be warranted along with potential surgical intervention. Dr. Copeland noted that the Claimant was currently working with orthotic and bracing on the right side. In terms of the Claimant's ability to return to work, Dr. Copeland recommended an FCE because it was unclear if the Claimant's limitations with climbing, loading and chaining up would prevent him from returning to his regular truck driving duties (Claimant's Exhibit 2, p. 67; Respondents' Exhibit P).

23. On November 25, 2014, Dr. Copeland reported that the Claimant did very well with the right ankle injection provided on October 3, 2014 and that he felt it was still working. The Claimant also reported the left ankle was doing good at this point. Dr. Copeland felt that the Claimant was at MMI from his standpoint, but noted that the Claimant may require future medical treatment. However, at this point the Claimant

wished to continue with conservative care (Claimant's Exhibit 2, pp. 69-70; Respondents' Exhibit Q).

24. The following day, on November 26, 2014, the Claimant saw Dr. Gustafson who noted that Dr. Copeland felt the Claimant was at MMI and scheduled no further follow up. The Claimant was not wearing any braces, but was wearing a wedge with his right foot that the Claimant stated was helpful. The Claimant described his right ankle pain as aching and considered it to be minimal, intermittent and improved with time. The Claimant rated the pain at 0/10. The Claimant described his left ankle pain as aching and minimal as well and also felt it was intermittent and minimal with a pain level of 0/10. Dr. Gustafson left the Claimant's work restrictions limited to 1 hour per day of walking, 1 hour per day of standing and 6 hours per day of sitting. He was permitted to return to sedentary work restrictions but no CDL driving. The Claimant was scheduled for a Functional Capacity Evaluation (FCE) in the next couple of days and then scheduled to return to Dr. Gustafson for an impairment rating (Claimant's Exhibit 4, pp. 193-195, Respondents' Exhibit R).

25. The Claimant underwent an FCE on December 1, 2014. The listed work restrictions of 1 hour per day of walking, 1 hour per day of standing and 6 hours per day of sitting appear to be part of a summary of medical records in this case about the Claimant's condition and taken from the last visit with Dr. Gustafson. The Claimant was able to push and pull a sled with a weight of 50 lbs. for a distance of 40 feet. He was able to carry 30 lbs. of weight for a distance of 40 feet. The Claimant was able to lift 60 lbs. of weight from the floor to his waist. The Claimant only completed one repetition of a squat to 80 degrees and did not want to continue due to pain. The Claimant completed 40 steps up and 30 steps down and then did not want to continue due to discomfort. On the ladder, the Claimant completed 10 steps up and 10 steps down before he wished to discontinue due to discomfort. The Claimant did not want to perform the balance/SLS test due to fear of pain and swelling (Claimant's Exhibit 4, pp. 198-201; Respondents' Exhibit S).

26. The Claimant saw Dr. Gustafson the following day on December 2, 2014 to review the FCE results and for an impairment rating. Dr. Gustafson noted that the Claimant's pain level for the right and left ankles was now 1/10 and there was some swelling as a result of the FCE the day before. Dr. Gustafson performed range of motion measurements and provided the Claimant with a 10% whole person impairment rating for both lower extremities based on range of motion deficits for his bilateral ankles. The scheduled impairment ratings for each extremity (if not converted to a whole person impairment) were 16% for the left lower extremity and 11% for the right lower extremity. Dr. Gustafson opined the Claimant's need for maintenance care may include follow up visits with Dr. Copeland and Work Partners, possible repeat surgeries, possible injections, a one year gym pass and further physical therapy up to 4 visits per year. Having reviewed the FCE report and conducting a physical examination, the only recommended activity restrictions imposed by Dr. Gustafson was "NO jumping off of anything higher than 12 inches." This was the only restriction listed in the both the

narrative medical report as well as the closing Physician's Report of Worker's Compensation Injury sent to the injured worker and to the Insurer. There were no limitations placed on standing, walking or climbing stairs. There was no restriction requiring the Claimant to elevate his lower extremities. Dr. Gustafson also checked the box on the form that the Claimant was able to return to modified duty as of 12/2/2014 (Claimant's Exhibit 4, pp. 202-207; Respondents' Exhibit T).

27. On January 20, 2015, the Respondents submitted a Final Admission of Liability admitting for medical expenses to date, temporary total disability payments of $38,390.40 and permanent partial disability based on a 16% scheduled impairment of the left lower extremity and an 11% scheduled impairment of the right lower extremity per the medical report of Dr. Gustafson dated December 2, 2014. Respondents calculated the PPD payment as $15,449.61(Respondents' Exhibit Z).

28. On February 24, 2015, the Claimant filed an Amended Application for Hearing on the issues of Average Weekly Wage, Disfigurement, Temporary Total Disability benefits and Permanent Total Disability benefits. On that same day, the Respondents filed an Amended Response to the Claimant's original January 21, 2015 Application for Hearing endorsing the additional issue of offsets (Respondents' Exhibits AA and BB).

29. On March 25, 2015, the Claimant was seen by Dr. Tashof Bernton for an independent medical evaluation. Dr. Bernton took a history from the Claimant and the mechanism of injury reported was consistent with prior reporting in the medical records (Respondents' Exhibit U, p. 55). Dr. Bernton also reviewed the medical records, including diagnostic imaging, physician records, surgical records, physical therapy records and partial records from the functional capacity evaluation (Respondents' Exhibit U, pp. 55-57). The Claimant described his current condition to Dr. Bernton as aching in the left ankle and aching with pain in the right ankle. The Claimant reports this is worse with standing or walking and better with elevation. The Claimant advised that he has not returned to work since his injury, but currently he will go out to his garage and sit, making furniture out of wood and welding horseshoes. The Claimant advised Dr. Bernton that he does not currently have a CDL but that he does drive. The Claimant reported concerns when he has to use his right foot for quick braking. The Claimant reported he was not taking any medications as of the date of the examination with Dr. Bernton (Respondents' Exhibit U, p. 57). The Claimant also reported balance problems due to the injury and memory problems, to the extent that when his pain is increased, it affects his memory and thinking (Respondents' Exhibit U, p. 58). On physical examination, Dr. Bernton noted that the Claimant had an irregular gait when barefoot that is improved when he wears shoes. Dr. Bernton also noted that the Claimant had mild patellofemoral crepitus on examination of his knees, left greater than right with a minimal prepatellar bursal effusion bilaterally (Respondents' Exhibit U, p. 58). Dr. Bernton noted that, as of the date of the IME, the Claimant had some persistent, mild swelling and expected limitation of motion on the left following his subtalar arthrodesis. Dr. Bernton noted that radiographic studies document appropriate healing, physical

therapy notes indicate good progress, and physician notes indicate “minimal” pain. Dr. Bernton noted that the Claimant currently takes no medication and no tenderness was present on examination. Dr. Bernton found the recommended limitations from the FCE of 1 hour per day walking, 1 hour per day standing and up to 6 hours per day of sitting, to be excessive and inconsistent with physical therapy notes. Rather, Dr. Bernton opined that the Claimant “has no other significant restrictions beyond those associated with his ankles.” Dr. Bernton opined that

> reasonable restrictions based on the nature of the patient’s injury, review of medical records, physical examination, and history from the patient include at least up to four hours per day of standing or walking. Although, the patient should have a five-minute break per hour, and, in addition, walking on uneven surfaces should be limited to no more than five minutes per hour, and the patient should not be doing ladder climbing or shoveling. Lifting in a seated position is limited to 50 pounds occasionally and 25 pounds frequently. The patient should not be carrying over 20 pounds occasionally. The patient should not be shoveling or ladder climbing or working in areas where balance difficulties may create safety risks. The patient should be limited to one flight of stairs per hour. In addition, he should not be required to run on the job (Respondent’s Exhibit U, pp. 59-60).

Dr. Bernton agreed that it was not feasible for the Claimant to return to commercial over-the-road driving due to the necessary job duties this work entails. However, Dr. Bernton found the Claimant should be able to drive a regular vehicle with power brakes (Respondents’ Exhibit U, p. 60).

30. The Claimant was evaluated by Robert Van Iderstine, CRC, for an evaluation of the Claimant’s ability to earn wages in the labor market where he resides. Mr. Van Iderstine prepared a written vocational evaluation report dated March 20, 2015. Mr. Van Iderstine interviewed the Claimant by telephone and he reviewed medical records from Dr. Gustafson, Dr. Copeland and Erica Herrera, PA. He also reviewed the Claimant’s Social Security Administration application in vocational rehabilitation industry literature (Claimant’s Exhibit 10, p. 308; Respondents’ Exhibit V, p. 61). Mr. Van Iderstine reported that the Claimant currently has a valid AZ drivers’ license and reliable transportation although he no longer has his CDL. Mr. Van Iderstine noted that the Claimant advised him that he used to hunt, fish, camp and hike prior to his work injury and that he cut logs and built furniture which he sold and provided to friends. However, currently, the Claimant advised he is only able to be active for 30-45 minutes at a time before he needs to sit and break for 15-20 minutes. He and his wife have a home computer, but the Claimant advised he only plays Solitaire or occasionally reads Facebook information about family and friends. The Claimant has a high school degree and obtained additional training on-the-job with his work experience (Claimant’s Exhibit 10, p. 309; Respondents’ Exhibit V, p. 62). Mr. Van Iderstine noted that the Claimant’s prior vocational history that included truck driving and working as an oil and gas driller.

He worked for a number of different companies. The Claimant also worked as an owner-operator of a trucking company operating commercial vehicles on several occasions (Claimant's Exhibit 10, pp. 310-311; Respondents' Exhibit V, pp. 63-64). In discussing the Claimant's medical records, Mr. Van Iderstine did not address the permanent restrictions of no jumping over 12 inches, and did not reference such restrictions in his report. Instead, he based his analysis on the temporary restrictions of one hour standing/walking (Claimant's Exhibit 10, pp. 312-313; Respondents' Exhibit V, p. 65-66). He noted that the Claimant lost his CDL and had recently been awarded SSD benefits due to his inability to return to his past employment (Claimant's Exhibit 10, p. 311 and 314; Respondents' Exhibit V, p. 64 and 67), but did not comment on the fact that these decisions were made at a time when the Claimant was in a wheelchair or otherwise not weightbearing, and was much more disabled than he was at the time of his vocational evaluation, over one year later. In his written report, Mr. Van Iderstine opined that the Claimant's prior employment did not provide transferrable skills to sedentary employment and that, to obtain employment, the Claimant would have to find an entry level, unskilled/semi-skilled sedentary job opening (Claimant's Exhibit 10, p. 315; Respondents' Exhibit V, p. 68). Mr. Van Iderstine mentioned some general positions in his "labor market research" section, but provided only minimal detail as to the job requirements for these positions, before finding that such positions were not consistent with the restrictions the Claimant was under as Mr. Van Iderstine understood them (Claimant's Exhibit 10, pp. 316-317; Respondents' Exhibit V, pp. 69-70). Mr. Van Iderstine reiterated that the physical limitations upon which he based his report were the one hour walking and one hour of standing and six hours a day of sitting restrictions, which placed the Claimant in the sedentary work category. Mr. Van Iderstine was unable to find any positions in the commutable labor market of Kingman, Arizona (Claimant's Exhibit 10, p. 318; Respondents' Exhibit V, p. 71). Nowhere in this initial March 20, 2015 written vocational evaluation does Mr. Van Iderstine address any personality traits or characteristics that would be an impediment to the Claimant obtaining and maintaining employment. Rather, the opinions reached in the written report appear based solely upon the Claimant's physical limitations and lack of transferable skills to a sedentary occupation (Claimant's Exhibit 10; Respondents' Exhibit V).

31. The Claimant was evaluated by Patricia Anctil, CRC, CDMS, CCM, for an evaluation of the Claimant's ability to earn wages in the labor market where he resides. Ms. Anctil prepared a report dated April 14, 2015 with her findings (Respondents' Exhibit W). Ms. Anctil met with the Claimant, his wife and his attorney at his attorney's office in Grand Junction, CO for an interview and to gather data for the assessment. Prior to that meeting, Ms. Anctil reviewed medical records from Dr. Gustafson, Dr. Copeland, Erica Herrera, PA, Nacole Williams, RN, physical therapy records, imaging/diagnostic records, surgical records, the Claimant's Response to Interrogatories, the FCE, the Claimant's application for SSDI benefits, and the March 20, 2015 report of Mr. Van Iderstine. Subsequent to the meeting, Ms. Anctil reviewed Dr. Bernton's March 25, 2015 IME report (Respondents' Exhibit W, p. 76). In summarizing the extensive medical records, Ms. Anctil noted that the Claimant

sustained injuries to both of his ankles and underwent surgical procedures on the left ankle, but has not undergone any surgery on his left ankle (Respondents' Exhibit W, p. 77). She noted that, as of the impairment rating with Dr. Gustafson on December 2, 2014, the Claimant reported pain in his bilateral ankles at a level of 1/10 and that the whole person impairment rating was 10%. She noted the Claimant may need follow up care including visits with Dr. Copeland, possible repeat surgeries and possible injections along with a gym pass and limited physical therapy (Respondents' Exhibit W, p. 78). Ms. Anctil also summarized Dr. Bernton's report, noting that the Claimant had some persistent, mild swelling and expected limitation on the left side following surgery with radiographic studies documenting appropriate healing and physical therapy notes indicating minimal pain (Respondents' Exhibit W, p. 79). Per the Claimant's interview with Ms. Anctil, she noted that the Claimant felt that physical therapy helped somewhat but he is no longer doing a home exercise program since about one month after he stopped physical therapy since he didn't think it seemed to help. While the Claimant acknowledged that he was more independent now that following the initial injury when he was in a wheelchair, including the ability to walk a little bit, he reported that there was little improvement and he cannot walk very good. The Claimant also reported aching in his ankles, greater on the left than the right (Respondents' Exhibit W, p. 79). The Claimant also reported right wrist and left knee pain due to the time period that he was crawling on his hands and knees while living at his daughter's home which is not handicap-accessible. The Claimant acknowledged that the wrist and knee pain is improving and he is no longer using a cane, which resulted in improved right wrist symptoms (Respondents' Exhibit W, p. 80). In terms of physical capacity, Ms. Anctil noted that Dr. Gustafson opined on December 2, 2014 that the Claimant's work status was restricted duty and his restrictions were, "NO jumping off anything higher than 12 inches." She also noted that Dr. Gustafson signed off on the December 1, 2014 FCE (Respondents' Exhibit W, p. 82). Ms. Anctil also noted that Dr. Bernton commented on the recommended limitations set forth in the FCE of "one hour per day of walking, one hour per day of standing, and up to six hours per day of sitting." Ms. Anctil noted that Dr. Bernton stated that, "the basis for this is not available for review, and these restrictions seem both excessive with respect to the nature of the patient's injuries and complaints and healing and inconsistent with the physical therapy notes." Ms. Anctil further notes that Dr. Bernton found that reasonable restrictions include, "at least up to four hours per day of standing or walking" with 5 minute breaks each hour, limits on walking on uneven surfaces and no ladder climbing or shoveling with lifting and carrying restrictions and limits on climbing stairs (Respondents' Exhibit W, p. 83). As part of her report, Ms. Anctil also noted and considered various additional factors, such as the Claimant's activities of daily living, socioeconomic factors, the Claimant's vocational and employment history, his vocational interests and his avocational interests (Respondents' Exhibit W, pp. 85-92). Using the physical capacity information from Drs. Gustafson and Bernton, along with Ms. Anctil's transferable skill analysis, Ms. Anctil identified some occupations at the sedentary work level for the Claimant, including: order clerk, surveillance-system monitor, machine operator, bench hand, and assembler (Respondents' Exhibit W, p. 92). Per her labor market research in the Claimant's commutable labor market, Ms. Anctil identified specific positions including receptionist, general clerk and attendance clerk with the Kingman Unified School District 20. She also identified a security guard position at a microelectronics manufacturing company, front desk clerk positions at 2 different hotels, and telework-customer service/surveyor positions (although these positions required fairly substantial fees for services needed in order to obtain the telephone/customer service/surveyor positions) (Respondents' Exhibit W, pp. 93-97). Ms. Anctil described the Claimant's skills as including "supervising and instructing employees, basic computer skills and hunt and peck typist." She noted that the Claimant, "was pleasant, had a sense of humor and was personable during our meeting." She felt that if he were to increase his computer skills, he would increase his employability. However, even without this, she opined that, taking the opinions of Dr. Gustafson and Dr. Bernton into account regarding the Claimant's physical capacities, there were occupations and positions available that represented some, but not all, of the potential employment for the Claimant within his residual functional capacities, education and skill level in his commutable labor market that would provide him with a wage (Respondents' Exhibit W, p. 100).

32. At the hearing the Claimant testified that his work injuries included fractures in his bilateral lower extremities. He underwent surgeries on the lefts side but not on the right. During recovery from surgery, the Claimant testified that he had to crawl around on his hands and knees to get around and get to the bathroom because he couldn't use a wheelchair in the house. He crawled until he was able to use crutches. As a result of this crawling, the Claimant testified that he has bursitis in his knee and his right wrist is "all goofed up" and he can't move it well or grip anything. He testified that his current lower extremity symptoms include left foot numbness that goes half-way up his shin and left foot swelling and irritation. As for his right foot, the Claimant testified that every once in a while he gets a sharp pain, like someone is stabbing him with a knife. He also testified that due to balance problems, he has a hard time getting around. The Claimant testified that he can only walk or stand at 15-20 minute intervals, sometimes less, or his foot becomes irritated and numb. He feels that the longest he can stay up on his feet is 30 minutes. When asked why the Claimant needed to take his shoe off during the hearing, the Claimant testified that "it feels like it's on fire." The Claimant testified that he has concerns with driving a vehicle because he doesn't know if he can take his right foot off the throttle and brake fast enough if he had to react quickly. The Claimant disagreed with Dr. Bernton's assessment of his ability to drive because he does not know if he could stop suddenly or continue to apply pressure to a brake if the sharp pain in his right foot is happening. He testified that he generally has his wife drive him everywhere he needs to go. The Claimant testified that the reason he does not use a cane to assist with walking is that it causes him too much wrist pain. The Claimant testified that his pain levels are generally lower in the morning, but increase over the course of the day, depending on his activity level. At the end of the day, his pain level is about 3-4/10. During the day, the Claimant elevates his feet because it relieves some of the pain. At night, he generally sits and watches TV while keeping his feet up. The Claimant testified that he does not take any pain medications because he does not want to become addicted to it and he takes baby aspirin very infrequently. The Claimant disagrees with Dr. Bernton's assessment of his physical capabilities,

specifically the Claimant does not agree he can be on his feet for up to four hours per day, that he could climb 1 flight of stairs per hour or that he could push or pull a sled weighing 40 pounds. The Claimant also testified that he disagrees with Dr. Bernton's opinion that his feet were not tender, stating that he screamed out when Dr. Bernton touched his feet. The Claimant testified that he does no household chores and does not pay bills as his wife takes care of all of that. He testified that he just "barely graduated" from high school and he cannot really operate a computer. He does not turn the computer on and get the system booted up, his wife does that for him. He only uses the computer to play spider solitaire, but he can't play for very long since it hurts his wrist. He does not turn the computer off after he is done playing solitaire. He can't do internet searches and has not typed letters on the computer or accessed any other software programs or filled out forms on the computer or sent an e-mail. The Claimant testified that he could not presently get certified to obtain a CDL due to physical limitations.

33. In reviewing the potential employment positions identified by Ms. Patricia Anctil in her report, the Claimant testified that he could not perform any of the jobs she identified because he has never used office equipment, is not familiar with any office software, has poor communication skills and gets irritated on the phone and also cannot hear very well, cannot fill out purchase orders and is not good at filing papers. The Claimant testified that when he had to complete paperwork or log books in prior employment positions, he would have other people help him. The Claimant also testified that he would have to change positions and elevate his feet to relieve pain while at work and he is limited in the amount of walking he is able to tolerate. He did not believe he could watch TV monitors in a booth because he would lose concentration thinking about his foot. As for increasing his computer skills, the Claimant testified that his wife and children tried to teach him how to use a computer but he would get frustrated and walk off. He testified that he has looked in his local newspaper for jobs but does not see anything listed that he can do. He also testified that if he was in pain, he cannot deal with people and he might fly off the handle.

34. On cross-examination, the Claimant testified that he is not having any issues with his back and that when he stood up several times during testimony it was to get circulation to his foot. The Claimant also testified that he understands his activity restrictions to be limited to 1 hour walking, 1 hour standing, 6 hours sitting, and no jumping greater than 12 inches. Also on cross-examination, the Claimant testified that he has previously performed vehicle repair work in connection with prior employment and he conducted pre-trip inspections of vehicles, completed checklists for pre-trip inspections and filled out log books. He testified that he was never fired from any employment position that he held. The Claimant also testified that he worked in the drilling industry operating a drilling rig, taking care of the rig, instructing roughnecks, keeping the rig cleaned up and paperwork. The Claimant agreed that he can read and write, perform basic arithmetic and count change, although he feels he has issues with the arithmetic and counting change. The Claimant also agreed that he can use a telephone and testified that he has not been diagnosed with any learning disability. The Claimant testified that he believes he has less than average intelligence in the areas of

communication and electronics. He testified that he could not learn to operate electronics because he has a “hot temper.” The Claimant testified that when he is not at home, he goes to a casino to play bingo about 1 time per month for 3-4 hours max, he goes out with his wife to supper, he plays horseshoes, and makes furniture/woodworking. The Claimant testified that the last time he drove before the hearing date was in February. He testified that he does not do much yard work anymore, and that is generally limited to weeding. The Claimant testified that he listens to music and attends concerts but has not been to the movies and has not gone camping, hunting or fishing in a long time and he no longer does volunteer work. The Claimant testified that when he was reporting pain levels of 1-2/10 to medical providers prior to reaching MMI, it was because he was reporting these levels in the morning. However, by mid-morning or the afternoon of these days, his pain levels would have been up to 3-4/10. In referencing Respondents’ Exhibits G,I and T, the Claimant agrees that the medical appointments occurred at either 10:30 AM or 11:00 AM which would be mid-morning and he was reporting 0-1/10 pain levels. The Claimant acknowledged that at the time he obtained a favorable SSDI decision, he was in a wheelchair with one foot bundled up. He testified that he is a little better now, but, per his opinion, not that much.

35. On redirect, the Claimant reiterated that he can no longer perform many of the tasks that would be required by prior employment positions that he has held. As for his telephone abilities, the Claimant testified that he can’t hear very well so he gets angry and just hands the phone to his wife or if she’s not there, he just hangs up. As for past attempts to learn how to use the computer, the Claimant reiterated that he didn’t get too far due to his frustration level. With respect to future surgery, the Claimant testified that he would like to avoid surgery on the right ankle because he has been advised it will be more extensive that the left ankle surgery he already had and he doesn’t want to do it unless he can’t stand it anymore.

36. Over the course of the hearing the Claimant exhibited some difficulty with walking and issues with his left foot and his wrist, although the times when the Claimant physically displayed activities indicating pain and/or discomfort were sporadic. The Claimant very actively engaged in behaviors indicating pain and/or discomfort for the first half-hour of his testimony. Then, he did not display such behaviors for over an hour in the middle of his testimony, then he engaged in the behaviors again for about 10 minutes, and then from about 11:45 AM until the hearing was concluded at 12:20 AM, the Claimant did not display as many behaviors indicating pain and/or discomfort. The ALJ specifically observed that at the commencement of his testimony, the Claimant removed his shoe and he had a slow and irregular gait as he walked up to the table in the Grand Junction courtroom to testify (approx. 9:25 AM). At approximately 9:35 AM, the Claimant requested to use another chair so he could elevate his left foot. He appeared to have difficulty walking as he got the chair. At approximately 9:45 AM, the Claimant stood up for about 1 minute or less and lifted his feet up and down. At approximately 9:50 AM, the Claimant was fidgeting in his chair and, on and off, he began massaging his wrist or supporting his wrist with his other hand. At 11:36, the Claimant stood up for about 1 minute, lifting his foot up and down while standing. At

approximately 11:42, while sitting, the Claimant moved his foot around and adjusted his knee.

37. The Claimant's wife, Julia Morgan, testified by telephone deposition on May 19, 2015 (Depo. Tr., Julia Morgan, May 19, 2015, p. 4). She has been married to the Claimant for 33 years and they currently reside in Golden Valley, Arizona (Depo. Tr., Julia Morgan, May 19, 2015, p. 5). Ms. Morgan testified that she was aware that the Respondents were asserting a $10,505.00 overpayment based on the Claimant's receipt of SSDI payments. She testified that no one asked if the Claimant had received SSDI and, if they had, she and her husband would have advised the Workers' Compensation insurer about the SSDI award (Depo. Tr., Julia Morgan, May 19, 2015, p. 6). Ms. Morgan testified that the only source of income for their household is the $1,945.00 per month SSDI benefits and they have no savings account. She testified that the mortgage is $1,025.00 per month, utilities and insurance total about $462.00 per month and their food bill averages about $500.00 per month. The Claimant and his wife also have a credit card with a $400.00 balance for which they make payments each month of about $25.00. Ms. Morgan testified that if the Claimant were required to enter into a repayment with the Workers' Compensation carrier, they could not pay the $10,505.00 in a lump sum and does not know what monthly payment they could afford (Depo. Tr., Julia Morgan, May 19, 2015, pp. 6-10).

38. With respect to the Claimant's recovery process after the first surgery after his accident, Ms. Morgan recalled the Claimant had a rough time and had to crawl on his hands and knees between August 5, 2013 until October or November of 2013 because he was non-weight bearing on both feet (Depo. Tr., Julia Morgan, May 19, 2015, p. 11). Ms. Morgan attended all of the Claimant's medical appointments with him and has had ample opportunity to observe the Claimant

39. Ms. Morgan testified that she has seen the Claimant stand for maybe 15-20 minutes at any given time, but that after that he has to sit down and take a break. She sees him put his feet up every day. He will put his feet up off and on all throughout the day for about 15-20 minutes – long enough to ease the pain in his foot and then he will get up (Depo. Tr., Julia Morgan, May 19, 2015, p. 15). Ms. Morgan testified that she has concerns that the Claimant has underreported his pain levels to his doctors because he does not complain about his pain and "he wouldn't tell them if he was dying." On cross-examination, Ms. Morgan reiterated that her husband doesn't tell his doctors when he is in pain and sometimes won't even tell her (Depo. Tr., Julia Morgan, May 19, 2015, p. 16 and pp. 58-59). She later testified that even though she thought the Claimant was downplaying his pain to his doctors that she didn't correct this or say anything to the doctors because she let the Claimant handle that (Depo. Tr., Julia Morgan, May 19, 2015, pp. 61-63). Ms. Morgan further testified that the Claimant has issues with balance. Claimant will just be walking and all of a sudden he will lose his balance, and reach out for whatever is near him (Depo. Tr., Julia Morgan, May 19, 2015, p. 16). Ms. Morgan also testified that she has observed the Claimant having difficulty walking steps. He takes the steps one at a time, stepping up with one foot and

then the other on the same step all while holding onto the wall (Depo. Tr., Julia Morgan, May 19, 2015, p. 17-18).

40. Ms. Morgan was present for the Claimant's FCE. She observed that the Claimant had a really hard time completing the FCE and he pushed himself way too much. Mrs. Morgan explained that there was too much weight to start with and that Claimant forced himself to complete the tasks given during the FCE and even took ibuprofen that day, which is not typical. She testified how each of the exercises during the FCE were difficult for the Claimant and noted that it was a real struggle for the Claimant to complete each of the tasks. In the days following the FCE, Claimant had his feet up as much as he could and laid on their daughter's couch (Depo. Tr., Julia Morgan, May 19, 2015, pp. 18-21). Ms. Morgan disagrees with Dr. Bernton's opinion that the restrictions for the Claimant from the FCE are too restrictive. She testified that she lives with the Claimant and she knows what his limits are. There is no way that the Claimant could stand up to 4 hours in an 8 hour day. The most she has seen the Claimant stand in 8 hours is 30 minutes. When the Claimant pushes himself and stands too much, the next day the Claimant's foot will swell and cause him constant pain. For example, if the Claimant goes to the store with her, he will leave her in the checkout line to head to the truck because he cannot stand in line that long. And then, most of the time, she still beats him to the truck because he is so slow moving. Based on what she has observed, Mrs. Morgan does not believe the Claimant could climb down two flights of stairs in an hour. Coming down stairs is really hard for the Claimant (Depo. Tr., Julia Morgan, May 19, 2015, pp. 21-23). Ms. Morgan testified that she attended the appointment with the Claimant and Dr. Bernton. Ms. Morgan recalled Dr. Bernton feeling the Claimant's foot during the exam and Dr. Bernton pushing on the Claimant's foot and he yelled out when Dr. Bernton pushed on his foot and that the doctor then apologized (Depo. Tr., Julia Morgan, May 19, 2015, p. 22).

41. Ms. Morgan testified that she and the Claimant previously owned a water hauling business. Her role was to do all of the paperwork and bookwork and the Claimant drove a truck and did the mechanics on the truck. Ms. Morgan did observe the Claimant's customer service skills in the course of owning their own business and she describes them as "nonexistent." She usually dealt with the customers because the Claimant did not have the patience or tolerance to deal with people. The Claimant does not have any phone skills and is hard of hearing. Ms. Morgan testified that the Claimant shouts into the phone, he is impolite and uncourteous and comes across as very rude (Depo. Tr., Julia Morgan, May 19, 2015, pp. 23-25).

42. In regard to computer use, Ms. Morgan testified that the Claimant does not get on the computer very often and when he does it is to play one game on the computer and then gets off because it hurts his wrist. She describes the Claimant's computer skills as nonexistent, as the Claimant does not know how to navigate a computer or use different programs on a computer. She has tried teaching Claimant how to use a computer for 20 years and he does not retain any of it. Per Ms. Morgan's testimony, the Claimant can click on an icon, but cannot navigate or close it from there.

Ms. Morgan states that to look something up on the internet, she has to get to the location on the internet. The Claimant does not know how to send an email and Ms. Morgan has never seen him type a letter or try to use a letter typing program. When she has tried to teach the Claimant how to use a computer, Ms. Morgan testified the Claimant "gets mad, he curses at it and yells at it, and he's done. He just stomps off and he's done with it. Ms. Morgan takes care of any forms that have to be filled out on the computer. Ms. Morgan strongly disagrees with the opinion of Ms. Anctil that the Claimant has basic computer skills. Ms. Morgan testified that the Claimant is also unable to handle customer service phone calls because he is hard of hearing and he doesn't understand what the person on the line is saying to him, both of which frustrate him and he hands the phone off to her. Ms. Morgan also testified that the Claimant cannot successfully send a text message. Mrs. Morgan has tried to teach him that as well and Claimant just pushes the wrong buttons and cannot seem to ever get it to work (Depo. Tr., Julia Morgan, May 19, 2015, pp. 26-30).

43. Ms. Morgan reviewed the report of Ms. Anctil and disagrees that her husband can perform jobs identified by Ms. Anctil such as an attendance clerk and hotel clerk. She testified that she believes the Claimant is not the type of person to deal with the public on a daily basis. He does not have the tolerance or patience for rude or disrespectful people and she believed the Claimant would probably smack the first kid that was disrespectful to him (Depo. Tr., Julia Morgan, May 19, 2015, p. 30). In addition, she has seen the Claimant try to use standard office equipment and she testified that it doesn't usually go well because he does not comprehend office equipment - he has tried and he has never been able to do it (Depo. Tr., Julia Morgan, May 19, 2015, pp. 31-32 and 48). While Ms. Anctil described the Claimant as pleasant, with a sense of humor and personable in her report, Ms. Morgan stated that is not how he usually comes across with the public. Specifically, Ms. Morgan testified that, "most people, I think their first impression is probably that he's a real jerk" and that he has a quick temper. Ms. Morgan testified that she has seen her husband throw his cell phone across the room and storm out because he can't figure out how to get into it with a password. She testified that she has also seen him break a glass coffee table by slamming a television remote onto it when it did not work the way he thought it should. She also testified that she has seen the Claimant throw a hammer through the wall of the garage (Depo. Tr., Julia Morgan, May 19, 2015, pp. 32-34). On cross-examination, Ms. Morgan agreed that the Claimant coming across like a "jerk" is a longstanding trait that was pre-existing to the Claimant's work injury. Nevertheless, Ms. Morgan also agreed that the Claimant has remained gainfully employed the entire time that she has been with him (Depo. Tr., Julia Morgan, May 19, 2015, pp. 40-41) and he has never been fired from any jobs (Depo. Tr., Julia Morgan, May 19, 2015, p. 42). On re-direct examination, Ms. Morgan testified that the Claimant was able to sustain employment in spite of his personality and demeanor because he was a good, dependable, hard worker (Depo. Tr., Julia Morgan, May 19, 2015, p. 66).

44. As for the hotel clerk position, Ms. Morgan testified that her husband could not perform this job because, "the first person that would walk in there that did not

speak English, [the Claimant] would have an issue with it" because "if [the Claimant] can't understand anybody, he gets really frustrated" and "if there's a lot of people talking at the same time, no, he does not do well" (Depo. Tr., Julia Morgan, May 19, 2015, pp.34-35). Other issues with the hotel clerk position would be that he could not work the computer system and answering the telephone would be a huge issue because of his hearing problem (Depo. Tr., Julia Morgan, May 19, 2015, pp. 35-36). Also, the Claimant is unable to work in a space if it is too small because he needs room to get his composure. The Claimant does not do well moving side to side or step backwards. When Claimant has to get up and down, he is very slow. And once he stands, he needs a few seconds to make sure his feet are going to hold him up before he takes a step.
Before the Claimant starts going, after being in a seated position, he has to make sure that he is stable on his feet (Depo. Tr., Julia Morgan, May 19, 2015, p. 36). Ms. Morgan also testified that she does not believe her husband could perform the parking lot monitor job identified by Ms. Anctil either. She testified this is because the Claimant cannot walk without needing to sit down and rest. Further, the Claimant would have to hold onto the cars to balance himself (Depo. Tr., Julia Morgan, May 19, 2015, p. 37). Ms. Morgan testified that she has looked in the newspaper for jobs that the Claimant could perform and saw nothing in the paper he could do. (Depo. Tr., Julia Morgan, May 19, 2015, p. 38). Prior to the Claimant's injury, Ms. Morgan testified that the Claimant was very handy around the house and took care of everything. Ms. Morgan states that now the Claimant cannot do most of it because of his feet (Depo. Tr., Julia Morgan, May 19, 2015, pp. 46-47). In spite of the fact that Ms. Morgan concedes that her husband used to be handy and mechanical, she testified that she still does not believe that the Claimant could learn to operate general office equipment (Depo. Tr., Julia Morgan, May 19, 2015, p. 48).

45. The Claimant's daughter Chelsea O'Conor also testified by deposition on May 19, 2015 (Depo. Tr., Chelsea O'Conor, May 19, 2015, p. 4). Ms. O'Conor testified that the Claimant stayed at her home after his injury and through two surgical procedures. While he stayed with Ms. O'Conor, she testified that to get around the house the Claimant would either crawl on his hands and knees or he was in a wheelchair (Depo. Tr., Chelsea O'Conor, May 19, 2015, p. 5). Ms. O'Conor has had opportunities to see the Claimant since he moved back to Kingman, AZ and he has stayed again at her house. When he was at her house in the six months prior to her deposition, Ms. O'Conor testified that the Claimant is not very active, mostly sitting on the couch watching TV or sitting out on the deck. She has only seen him on his feet for 15-20 minute timeframes, and usually not that long. He also moves slowly getting up from a seated position and has issues with balance (Depo. Tr., Chelsea O'Conor, May 19, 2015, pp. 6-7). Ms. O'Conor testified that in the six months prior to her deposition, she has not observed the Claimant do anything that he used to do before the injury such as working on his vehicles or his house or doing yard work (Depo. Tr., Chelsea O'Conor, May 19, 2015, p. 9). Ms. O'Conor also testified that the Claimant does not deal well with talking to sales people or customer service representatives and he gets upset very fast, especially if someone is rude (Depo. Tr., Chelsea O'Conor, May 19, 2015, p. 11). Ms. O'Conor testified that she has tried to teach her father how to use a

computer for the better part of her life and "he just does not get it." He has difficulty with the steps required and he gets lost, upset and frustrated and then "he's just done" (Depo. Tr., Chelsea O'Conor, May 19, 2015, pp. 11-12). Regarding the Claimant's communication skills, Ms. O'Conor testified that except for friends and family, he does not try to communicate with people (Depo. Tr., Chelsea O'Conor, May 19, 2015, p. 15).

46. The Claimant's son Chad Morgan also testified by deposition on May 19, 2015 (Depo. Tr., Chad Morgan, May 19, 2015, p. 4). In the six months prior to his deposition, Mr. Chad Morgan has had opportunities to observe the Claimant and he testified that after about 4-5 minutes of activity, the Claimant is looking for a place to sit down (Depo. Tr., Chad Morgan, May 19, 2015, p. 5). Mr. Chad Morgan is a diesel mechanic and is also familiar with his father's ability to work on vehicles. He testified that the Claimant's abilities are at the "maintenance level" and not up to a "technician level." Moreover, Mr. Chad Morgan testified that since the Claimant's injury, he would not even be able to stand and balance and lift 50 pounds on a regular basis, so the Claimant would not be able to work on a daily basis even at the maintenance level (Depo. Tr., Chad Morgan, May 19, 2015, pp. 6-7). In addition, Mr. Chad Morgan testified that the new technology and electrical for trucks now is very different from the 1997 Kenworth that his father used for his prior business (Depo. Tr., Chad Morgan, May 19, 2015, pp. 7-8). Mr. Chad Morgan is familiar with the job position of truck service advisor and testified that it is a job that requires being on your feet almost 100 percent of the time, assisting less experienced technicians and requiring that they physically assist with repairs. He also testified that the job requires customer service skills, including the ability to deal with irate customers. Based on the level of technical ability required, the physical requirements and the need to have customer service skills, Mr. Chad Morgan testified that this is not a job position that the Claimant could perform currently (Depo. Tr., Chad Morgan, May 19, 2015, pp. 8-12).

47. The Claimant's son Brock Morgan also testified by deposition on May 19, 2015 (Depo. Tr., Brock Morgan, May 19, 2015, p. 4). Mr. Brock Morgan testified that he saw his father approximately two weeks after his work injury and the Claimant was not able to get around or do much of anything. Mr. Brock Morgan testified that although the Claimant had a wheelchair it was hard to get around in it and he watched his father crawl around on his hands and knees (Depo. Tr., Brock Morgan, May 19, 2015, pp. 6-7). In the six months prior to Mr. Brock Morgan's deposition, Mr. Brock Morgan testified that he has not seen the Claimant stand or walk for more than 5 minutes at a time and he would have to sit down and put his feet up. He also testified that it's hard for his father to get up from a seated position and he does not do this quickly (Depo. Tr., Brock Morgan, May 19, 2015, p. 7). Mr. Brock Morgan has observed various physical limitations for the Claimant in the six months prior to the deposition such as a lack of balance and need to hold on to things, difficulty getting in and out of a vehicle, and a difficulty walking up stairs (Depo. Tr., Brock Morgan, May 19, 2015, p. 8). Mr. Brock Morgan testified that he has a CDL and has had one for about 10 years. He testified that the Claimant would not currently be able to obtain a CDL at this point because he would not meet the physical requirements and wouldn't have the ability or reaction time

to operate the brakes on a commercial vehicle (Depo. Tr., Brock Morgan, May 19, 2015, pp. 9-11). As for the Claimant's communication skills, Mr. Brock Morgan characterized them as "zero. He doesn't have any." In observing the Claimant deal with customer service situations, "it usually ends up with him cussing." Mr. Brock Morgan testified that the Claimant has a temper and a really short fuse (Depo. Tr., Brock Morgan, May 19, 2015, p. 12). Mr. Brock Morgan further testified that the Claimant is not very proficient on the computer because he types one finger at a time and he is not able to use a computer mouse correctly (Depo. Tr., Brock Morgan, May 19, 2015, p. 13). In the six months prior to the deposition, Mr. Brock Morgan has not seen his father stand up on his feet for four hours out of a day and he has less endurance (Depo. Tr., Brock Morgan, May 19, 2015, p. 13). On cross-examination, Mr. Brock Morgan testified that he does not consider the Claimant to be of below-average intelligence but he is not good with electronics. Mr. Brock Morgan testified that the Claimant can perform more complex tasks such as mechanical work on trucks, but that he just can't perform simple computer skills although his family has tried to teach him for 15 years (Depo. Tr., Brock Morgan, May 19, 2015, pp. 14-16).

48. On June 19, 2015, vocational rehabilitation counselor Robert Van Iderstine testified by deposition on behalf of Claimant. He testified that his process for performing a vocational assessment in Worker's Compensation cases includes an interview of the injured individual to get background information (education, training, work experience, skills, etc.) and the current family and community situation and to determine the appropriate labor market. He also uses the interview to help determine the injured worker's physical capabilities and he reviews medical records and independent evaluations (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 7-9). Mr. Van Iderstine testified that,

> Taking all of those things into account, I tried to develop a profile, a vocational profile, of the individual, and then utilizing that profile take a look at the labor market where the individual resides and say is there anything realistically that this person can qualify for and accomplish given all of the aspects of their profile, their age, their education, their training, all of the factors that would go into that, including the physical – their physical capabilities and limitations, and then determine, you know, what impact the injury and the resulting medical condition has on their employability.
> (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 9).

49. In reviewing the Claimant's FCE, Mr. Van Iderstine testified that it placed Claimant in a sedentary work category, with an inability to stand and walk for more than two hours in a day, as opposed to a light duty category (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 13). Mr. Van Iderstine testified that he assumed the work restrictions set forth in the FCE were the Claimant's permanent restrictions, and they were consistent with what the Claimant identified, and that is why he used them in his report (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 77-78). He stated that Claimant's

subjective reports that he could only stand for 30 minutes a day and then has to take a break for 15-20 minutes was a “big factor” that would preclude him from many jobs evaluations (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 15). He felt that Claimant’s need to elevate his foot during the day would be a “deal breaker” for some of the sedentary jobs evaluations (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 25). Mr. Van Iderstine’s ultimate conclusion is that the Claimant is not capable of finding and maintaining employment due to his age, prior work experience in the medium-heavy work categories and lack of customer service and computer skills evaluations (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 14-15). Mr. Van Iderstine testified that the Claimant’s only basic transferable skill was operation of a vehicle and he cannot drive, other than for very short periods of time (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 17). Mr. Van Iderstine testified that in his opinion, the Claimant does not have the technical and mechanical skills for a truck service writer position and he also could not stand for the required time, nor would he have the necessary customer service and computer skills for this position evaluations (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 18-19).

50. As part of his evaluation, Mr. Van Iderstine performed a labor market survey using the Mohave County, Arizona geographic area. He contacted the workforce center there and spoke with an employment counselor and looked at available jobs on the website for Arizona Work Connection. He noted positions including courtesy clerks, guest services, retail sales and cashiers but because these jobs required standing and walking, Mr. Van Iderstine opined that he didn’t believe the Claimant could perform these job positions (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 20-22). Mr. Van Iderstine also provided his opinion as the Claimant’s ability to perform various job positions that were identified by Ms. Pat Anctil in her written report. Addressing job positions Ms. Anctil had identified within the Kingman School District of receptionist and attendance clerk, Mr. Van Iderstine also opined that he did not agree that the Claimant could perform these jobs because they are clerical jobs revolving around interpersonal communication with people, customer service and computer skills which Mr. Van Iderstine does not see matching up with the Claimant’s overall profile and skill set (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 23-24). Due to a lack of customer service skills, lack of computer skills and limitations related to physical requirements of the job, Mr. Van Iderstine also disagrees with Ms. Anctil that the Claimant could perform the job position of hotel/motel clerk (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 27-28). Of the jobs identified by Ms. Anctil, Mr. Van Iderstine opined that the position of security guard or parking lot attendant “would probably be the closest jobs that he might have a capacity to accomplish,” but Mr. Van Iderstine still questioned the Claimant’s ability to function in these jobs. Mr. Van Iderstine questioned the ability of the Claimant to elevate his feet and noted that the Claimant’s compromised upper extremities would present a difficulty with the parking lot attendant position. Overall, Mr. Van Iderstine did not see that the Claimant could physically perform these jobs and maintain the degree of attention during the course of the day that would be required (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 28-29). On redirect examination, Mr. Van Iderstine again stated that the need to elevate his feet would preclude the Claimant from all

employment (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 76). Mr. Van Iderstine also disagreed with Ms. Anctil that the Claimant could perform assembly type job positions. He noted that these production assembly positions can be done from both standing and seated positions, but questioned the Claimant's ability to elevate his legs. Mr. Van Iderstine also opined that these positions require constant use of the upper extremities and if the Claimant' upper extremities are compromised then he would not be able to sustain this type of employment (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 29-30).

51. Mr. Van Iderstine reviewed Dr. Bernton's work restrictions that the Claimant was capable of performing work of standing and walking 4 hours out of an 8 hour work day, taking a 5 minute break each hour and climbing one flight of stairs per hour. Mr. Van Iderstine opined that these restrictions don't strictly place him into any one work category in terms of light, sedentary and medium, but rather a hybrid of all three. Nevertheless, Mr. Van Iderstine opined that the physical restrictions are only one part of the Claimant's profile and the lack of training, preparation and background must still be taken into account when locating and maintaining employment (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 32-34).

52. Mr. Van Iderstine opined that, in addition to physical restrictions, there are too many inconsistencies in the Claimant's profile that lead him to the conclusion that the Claimant cannot perform any of the semiskilled, light duty positions identified by Ms. Anctil (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 35). Specifically, Mr. Van Iderstine discussed that the production pace required by jobs like assembly or clerical work would be problematic as they would not allow the Claimant to do the work at his own pace with breaks as needed and this is another factor that would prevent the Claimant from sustaining employment on an ongoing basis (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 41-43). Mr. Van Iderstine does not believe that the Claimant is simply unmotivated to return to work because, in looking at the Claimant's work history up until his accident, he had a good work record. The accident took away the Claimant's ability to do the type of work he has done all his life and also took him away from recreational activities that he can no longer do. Mr. Van Iderstine characterizes this as a significant life change rather than a motivational issue (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 44-45).

53. Mr. Van Iderstine opined that the Claimant would have difficult performing jobs that involved computer use or work with office machinery based solely on the prior testimony from his family members that he lacked patience and would become frustrated when his family members would try to teach him computer skills. In fact, Mr. Van Iderstine noted that, other than the prior testimony, there is nothing in the records that would indicate that the Claimant could not learn basic computer skills if he were motivated to do so (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 52-55). Mr. Van Iderstine also concurred that there was nothing in the Claimant's prior work history or the testing that would indicate from an intellectual standpoint that the Claimant could not

learn to use basic office machinery Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 55-56).

54. On cross-examination, Mr. Van Iderstine agreed that he is not aware of any restrictions in the medical records that require the Claimant to elevate his foot (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 57). He also agreed that the medical records generally indicate that the Claimant was reporting pain levels of 0-1/10 and that he was doing well (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 63). He further testified that the specific work restrictions used for his labor market survey were limiting standing and walking to 1-2 hours per day and the need for positional changes (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 63-64). Mr. Van Iderstine testified that he found it appropriate to take the restrictions provided by physicians and the information provided by the injured worker and then attempt to identify jobs that are the closest match to restrictions identified consistently by both the injured individual and the doctor (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 64-65). Mr. Van Iderstine testified that he did not amend the restrictions provided by the treating or evaluating physicians, but rather he was just looking for consistencies (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 65 and pp. 79-80). Mr. Van Iderstine agreed that it is not appropriate to place a person in a permanent position based on temporary restrictions (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 66). Mr. Van Iderstine testified that he assumed the restrictions noted in the FCE summary sections were Claimant's permanent restrictions (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 77). Mr. Van Iderstine testified that he did not know how to correlate the apparent discrepancy between Dr. Gustafson signing the FCE with the more limiting restrictions one day and then the next day listing "no jumping over 12 inches" as the only explicit restriction. He indicated that he would like to have some clarification on that (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 86). When asked if his opinion as to vocational options would be changed if the only restriction was no jumping over 12 inches, he admitted that he "would change my opinion, yes." He went on to state that he would find that Claimant was not permanently and totally disabled based on such restrictions, even after including his intellect, age and all of the other factors and personal characteristics of Claimant to which he had previously testified (Depo. Tr., Robert Van Iderstine, June 19, 2015, p. 71). He testified that the Claimant could perform a cashier position identified by Ms. Anctil consistent with Dr. Bernton's restrictions and that that he "could probably do the job physically," although did remark of his lack of customer service skills. Likewise, Mr. Van Iderstine testified that the parking lot attendant could also be another position that he might find appropriate under Dr. Bernton's restrictions, discounting only the Claimant's age and lack of experience. He also stated that he was "sure there might be other positions [the Claimant] could perform" (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 72-75). On redirect examination, Mr. Van Iderstine clarified that if Dr. Bernton's restrictions were found to be applicable, the Claimant could physically perform positions identified by Ms. Anctil such as attendant or cashier, but his personality, lack of customer service skills and lack of computer skills would still be inconsistent with those job positions (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 87-90). Later, Mr. Van Iderstine did recall the 5-minute break per hour that Dr.

Bernton imposed and he testified that this also would be an impediment to obtaining and maintaining employment (Depo. Tr., Robert Van Iderstine, June 19, 2015, pp. 91-92).

55. On July 2, 2015, vocational rehabilitation counselor Patricia Anctil testified by deposition on behalf of Respondents (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 4). As part of her evaluation, Ms. Anctil performed a vocational assessment and labor market survey. Prior to meeting with the Claimant, she reviewed the Claimant's medical records, performed a transferable skills analysis based on his work history and did labor market research in the Claimant's commutable market to assess the availability of jobs in his skill level and residual capacity (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 5-6). Ms. Anctil also interviewed the Claimant for approximately two hours regarding his current medical treatment, medications and current symptoms and pain levels (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 7). Ms. Anctil testified that the Claimant's subjective report of his condition was limitations for standing, walking, stairs and some balance issues, but he is able to bend and lift 35-40 pounds (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 8). Ms. Anctil testified that the Claimant reported to her that he is ambidextrous and alternates hands when engaged in hobbies such as woodworking and welding (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 9). She summarized his past education and aptitude levels, as well as vocational and volunteer work history, and noted his history included supervising up to five crew members, to whom he would delegate work and would "have to communicate with his employees to get the job done" (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 10-12). For the labor market survey, Ms. Anctil testified that she looked at the FCE report, Dr. Bernton's report, the Claimant's subjective report and Dr. Gustafson's records, and pulling all of that information together, she used restrictions of mostly sedentary duty, with more sitting than standing (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 13). So, overall she used restrictions that were more limiting than those provided by Dr. Gustafson and more in alignment with those of Dr. Bernton per his IME report (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 13-14). She considered the Kingman, Arizona area to be the Claimant's commutable labor market (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 14). In speaking with employers in this labor market, Ms. Anctil testified that she found 3 appropriate job openings with the school district in the area in addition to possibilities for other positions in that job market using Dr. Bernton's more restrictive limitations (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 15-18). Had she strictly used Dr. Gustafson's restrictions, Ms. Anctil testified that there would be more available positions for the Claimant in his commutable labor market (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 23). With respect to activity restrictions gleaned from the Claimant's FCE, Ms. Anctil testified that the FCE did not provide any permanent restrictions, and she agreed with Dr. Bernton that it was "not a complete FCE" (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 29).

56. On the issue of the Claimant's personality, Ms. Anctil testified that when she met the Claimant, "he was pleasant, he had a sense of humor, he was personable," and that she did not see anything in the records regarding his personality that would make him unable to find or keep employment (Depo. Tr., Patricia A. Anctil, July 2, 2015,

p. 29). She had no information that he had been terminated from jobs due to his personality, and also saw indication in the medical records that there were any emotional or personality concerns that would make it difficult for him to find or keep employment (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 29-30). In regard to the Claimant's statements that he had difficulty hearing and the suggestions that this would make customer service positions more difficult to perform, she responded that the Claimant stated to her that he previously used hearing aids, so she found that his hearing loss is correctable and commented that he did previously pass the CDL exam, which involved a hearing test. Ms. Anctil also testified that "people who are deaf find employment" (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 30-31).

57. Ms. Anctil also testified that the Claimant's testimony that he is unable to use or learn to use basic office equipment was not consistent with his vocational history, and also noted that the Claimant did not have a learning disability or head injury, and that his aptitude levels established that he should be able to use such equipment (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 31-32). Moreover, she testified the positions she identified for the Claimant did not require significant computer use and provided on-the-job training (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 32-33). When asked if the Claimant's relative inexperience with computers and office equipment would be an impediment to finding employment, she disagreed, and stated that "through the many years I've been doing this, employers will say to me, if a person is motivated and wants to work, that's the most important criteria to them" (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 34).

58. Ultimately, Ms. Anctil testified that it is her opinion that the Claimant is capable of finding and holding gainful employment in his commutable labor market (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 39). In this regard, she disagrees with Mr. Van Iderstine and, in reviewing his deposition transcript, opines that Mr. Van Iderstine may not have had all of the information she did regarding the Claimant's history and level of participation with volunteer groups such as the Shriners (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 38). As to the Claimant's claim that he needs to elevate his leg, Ms. Anctil testified that she did not see anything in the records indicating that that was an actual restriction, but that she was aware of security and desk jobs that potentially would allow this and she noted that the Claimant was able to elevate his leg while meeting with her (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 39). Ms. Anctil disagreed with Mr. Van Iderstine's opinion that the Claimant's age of 63 years was a "concerning factor;" she had spoken to numerous employers who hire people in their sixties and seventies, and many employers are seeking older workers to fill in employment gaps due to their "maturity, experience and ability to mentor younger workers," and that such issue "comes down to motivation" and "does the person want to work" (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 42-43).

59. On cross-examination, Ms. Anctil testified that she had no reason to believe that the Claimant was not being honest with her when they met for the interview that Claimant's counsel also attended (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 48).

Ms. Anctil conceded that the Claimant did advise her that he had not driven in the two months prior to her meeting with him (Depo. Tr., Patricia A. Anctil, July 2, 2015, p. 50). After considerable questioning, Ms. Anctil conceded that the Claimant would need to work on his computer skills to be considered for a customer service representative position (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 63-65). However, Ms. Anctil testified that positions such as receptionist, general clerk or attendance clerk are not classified as data entry positions and would require only occasional computer use (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 72-73). When questioned if the Claimant's vocational profile includes an individual who cannot stand or walk more than an hour out of an eight-hour work day, with a need to alternate positions and elevate feet, at the age of 63 with no computer experience, Ms. Anctil testified that the Claimant is not necessarily less likely to get a job position than someone who is younger with no physical limitations and computer and office experience. Ms. Anctil testified that there are many factors that go into a hiring decision and persons who are not skilled but are motivated to work are considered for sedentary, entry level positions (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 85-86). In speaking with a potential employer at the school district and discussing the Claimant's physical limitations, Ms. Anctil used the November 26, 2014 temporary restrictions used in the FCE of standing and walking for an hour each day, and also factoring in the Claimant's subjective report of not being able to stand and walk for more than 15-20 minutes and these restrictions would not prevent the Claimant from working in the receptionist or clerical positions at the school district as they are willing and able to accommodate people with disabilities (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 87-92). Ms. Anctil also testified that when she researched the position of parking lot attendant/security, the amount of walking and standing is an hour per less the whole day and there is no reason to believe the Claimant would not be able to elevate his feet during the day (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 98-101) although she noted there was not an open position at the time that she called.

60. On redirect examination, Ms. Anctil testified that she had not seen anything in the Claimant's records that restricted him or limited him from driving or that the Claimant had to put his feet up 15-20 minutes every hour (Depo. Tr., Patricia A. Anctil, July 2, 2015, pp. 112-113 and p. 117). Ms. Anctil also testified that, based on the Claimant's prior work history and his aptitude levels, he has the capacity to learn basic computer skills and count change, and she finds that allegations that the Claimant would be unable to do so are inconsistent with his intelligence level (Depo. Tr., Patricia A. Anctil, July 2, 2015, p.115).

61. Dr. John Tashof Bernton testified by deposition on July 14, 2015 as an expert witness in the field of occupational medicine (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 4-5). Dr. Bernton testified that he performed an IME of the Claimant on March 25, 3015 (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 5). Dr. Bernton noted that the type of lower extremity injuries suffered by the Claimant have a fairly wide spectrum of outcome, but that the Claimant experienced a very good recovery from the injury and subsequent first surgery (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 7-8). After this, the Claimant underwent a second surgery for removal of the hardware

and reconstruction of the peroneal tendon which had torn. Dr. Bernton testified hardware removal was not a setback, but the tendon split tear was a setback, although Dr. Bernton would not characterize it as a "major" setback (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 9-10). Commenting on medical records about a month after the second surgery in which the Claimant described his pain as dull and mild with a pain level of 1/10, Dr. Bernton opined that this was a very good recovery (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 11). As for the right foot that was treated conservatively and allowed to heal without surgery, Dr. Bernton testified that, based on physical therapy and medical records, the Claimant experienced a good to excellent recovery (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 12-13). Dr. Bernton noted that per the Claimant's last PT session report dated October 1, 2014, the report indicated that the Claimant's left ankle strength was 5/5 with no pain and this meant that the Claimant had good strength and was able to move the foot appropriately, and did not have pain when he exerted full effort (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 15). The medical reports for the final visit with Dr. Copeland on November 25, 2014 and the November 26, 2014 medical note of Dr. Gustafson also indicated the Claimant achieved maximum medical improvement and the Claimant was providing a pain level report of 0/10 which equates with no pain (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 15-16).

62. After discussing the value of FCEs and how an FCE should be performed, including validity testing, Dr. Bernton opined that the FCE the Claimant underwent on December 1, 2014 was not a true FCE with no validity testing and there was a lack of objectivity in that the Claimant simply chose not to perform or discontinued certain tasks due to fear of pain and swelling (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 20-21). Dr. Bernton also opined that the "restrictions" listed in the FCE were not restrictions which were determined based upon the FCE. He testified that this is clear because they are in the "history" section and they don't relate at all to the data obtained during the FCE which demonstrated the Claimant could do tasks that were very inconsistent with the restriction (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 22-23). Dr. Bernton also noted that when Dr. Gustafson put the Claimant at MMI on December 2, 2014, the day following the FCE, the Claimant was reporting a pain level of 1/10 which is a very low level of pain for the day after performing all of the activities at the FCE, which emphasizes that the Claimant retains the capacity to perform the minimum functions detailed in the FCE report (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 23-24). Dr. Bernton also notes that Dr. Gustafson provided only one permanent work restriction when he placed the Claimant at MMI, and that was that the Claimant was not to jump off anything higher than 12 inches (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 26).

63. Dr. Bernton commented that a patient's subjective reports are important data, but "if it's not in line with all the other data you have, physical examination, nature of the injury, medical records, progress over the course of time," then such reports should be given less weight (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 28). In this case, Dr. Bernton points out that since filing for PTD, the Claimant is engaging in "fairly dramatic symptom exaggeration," which was not consistent with the nature of the

injuries, his examination, or the medical records. The Claimant's statements that he was in extreme pain, highly disabled, needed to elevate his feet for 20 to 30 minutes every hour and was unable to perform numerous tasks, was "not even remotely" consistent with the prior records, and he also did not see anything on his examination that would be consistent with such level of dysfunction, which was "grossly inconsistent with the nature of the injuries given the progress that's been demonstrated" following the surgeries (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 29-30). Overall, Dr. Bernton testified that his physical examination of the Claimant was consistent with the medical records leading up to MMI and not consistent with the later subjective reports of the Claimant regarding significant pain and disability (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 34). At the time of his examination, Dr. Bernton noted no bursitis of the knee, shoulder injury or wrist injury that would require permanent work restrictions (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 35-39).

64. In considering the sole restriction that Dr. Gustafson imposed of no jumping off anything higher than 12 inches, Dr. Bernton opined that Dr. Gustafson's restrictions were not onerous enough, and noted that his own restrictions were "very conservative" by comparison (although he believed the Claimant could "probably do more than that"). However, Dr. Bernton took into account the fact that the Claimant had significant degenerative arthritis in his ankle before his injury and surgeries and although he opined that the Claimant had a good recovery, he "would not be as ambitious as Dr. Gustafson's restrictions" noting "they're really not limiting enough" (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 45). Dr. Bernton reiterated his more limiting restrictions, which included up to four hours per day walking or standing with a 5 minute break per hour, no walking on uneven surfaces for more than 5 minutes per hour and no ladder climbing or shoveling" (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 45). He repeated that the Claimant actually demonstrated the ability to go up and down a ladder 10 steps so, by definition, "these are fairly conservative restrictions," and noted that the FCE demonstrated that he went up more stairs than his restrictions, so he was "absolutely confident" that Claimant could perform within the restrictions Dr. Bernton assigned, and probably "more than that" (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 45-46). He clarified his statement that the Claimant required a five minute break per hour was intended to mean that Claimant "simply needs to be able to change positions," and not that the Claimant had to stop work; any other interpretation was "not a valid use of these restrictions" per Dr. Bernton (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 46-47). Dr. Bernton opined that there was "absolutely not" any reference that the Claimant had to elevate his feet for 20-30 minutes per hour and, if that were the case, the Claimant was "not getting the treatment he needs to" and he also did not see any indication on examination that that level of elevation would be required, and that there was "just nothing in this type of injury, with this type of recovery which would indicate that that's the case and if it was, then such can be treated" (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 47-48). Further, if the Claimant were now experiencing talar dome issues, he would expect to see significant gait abnormalities, which were not present, and would not expect the Claimant to be able to do something like walk up a ladder, as was demonstrated in the FCE, so these assertions are simply

inconsistent with all of the other information in this case (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 48).

65. Dr. Bernton testified that in order to determine if a particular person with work restrictions can perform a job, it is important to understand the specific tasks associated with that job in order to match up the worker's physical abilities. In that light, Dr. Bernton characterized Mr. Van Iderstine's vocational evaluation as "a pretty worthless piece of work" as the job positions discussed in the evaluation did not provide the specific job tasks associated with the job positions in question (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 63-64).

66. With reference to Ms. Anctil's vocational evaluation report, Dr. Bernton took issue with the Claimant's subjective reports of his capabilities stating, "it's grossly inconsistent with what you would expect and what he demonstrated in his functional capacity evaluation" (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 65). Dr. Bernton opined that most or all of the positions located by Ms. Anctil were consistent with his abilities per the "very conservative" restrictions he assigned (and not the less onerous restrictions of the ATP) (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 67-68). He thought that some of the positions located by Ms. Anctil would be consistent with the fictional work restrictions of one hour standing, one hour walking and six hours sitting (temporary restrictions), but that "no physician has ever determined those to be permanent restrictions for this patient" (Depo. Tr., John Tashof Bernton, July 14, 2015, p. 68). Dr. Bernton also saw nothing in the records suggesting the Claimant's personality or intelligence would preclude him from performing those positions (Depo. Tr., John Tashof Bernton, July 14, 2015, pp. 68-69).

67. Dr. Bernton's deposition was completed on August 20, 2015 (Depo. Tr., John Tashof Bernton, August 20, 2015, pp. 76). On cross-examination, Dr. Bernton testified that the Claimant's surgery was a complex orthopedic procedure due to complex fracture patterns that may be challenging to reconstruct (Depo. Tr., John Tashof Bernton, August 20, 2015, p. 94). Dr. Bernton testified that, "I don't disagree that given the nature of the injury, it's certainly possible that further care could be required" (Depo. Tr., John Tashof Bernton, August 20, 2015, p. 137). However, he stated that the Claimant's pathology would not be expected to increase only several months later, and remarked that "once you're recovered, absent new pathology, the patient's pain is not going to dramatically increase, the function is not going to dramatically decrease" and "it isn't consistent with his clinical status" (Depo. Tr., John Tashof Bernton, August 20, 2015, p. 154). With respect to the Claimant's wrist complaints, Dr. Bernton reiterated that the Claimant's statement that he stopped using the cane because of pain in the right wrist was inconsistent with the medical records, and also his examination, and noted that the PT records indicated the Claimant was not using a cane because he did not need to use it, and also added that if a person needed a cane, such could be accommodated through various ways (Depo. Tr., John Tashof Bernton, August 20, 2015, pp. 155). As to the Claimant's balance issues, Dr. Bernton noted that he could use a cane or other structured balance assistance and aids, but that he did not believe

the Claimant needed any of those devices and would not expect that to be a major problem, and also remarked that, if the pathology here caused balance issues, such would be noted consistently, and would be worse earlier, when he was going through the healing process, and that PT would have specifically notated such issues, but there was nothing documented in those records (Depo. Tr., John Tashof Bernton, August 20, 2015, pp. 157-158).

68. During the second day of Dr. Bernton's deposition, Claimant's counsel moved for the admission of the audio CD of Dr. Bernton's IME examination of the Claimant. The ALJ admits the CD (Exhibit Bernton 4) over the objection of the Respondents. In reviewing the CD, the ALJ addresses some allegations made during the hearing and deposition testimony and in the post-hearing briefs. Namely, there are allegations that Dr. Bernton's deposition testimony and his written report do not accurately reflect what occurred during the examination of the Claimant. Also, there was an allegation that the Claimant "yelled out" when Dr. Bernton palpated his left ankle. In listening to the portion of the examination of the left foot (from approximately 28:30 to 28:50), Dr. Bernton was palpating the Claimant's foot and the Claimant did make a noise and, when asked, told Dr. Bernton that it hurt when he touched the ankle near the surgical scar. However, the Claimant did not yell, as has been represented. Further, the Claimant was able to complete the remainder of the examination, including some provocative maneuvers and was able to comply with some, but not all, of Dr. Bernton's requests related to movement of the foot. The Claimant spoke with Dr. Bernton and responded to questions in a normal tone of voice for the remainder of the IME. While Dr. Bernton's written report and his deposition testimony do not include the totality of the conversation on the IME recording, neither the written report nor the deposition testimony misrepresented what occurred at the IME, neither does Dr. Bernton appear to be downplaying the levels of pain the Claimant described to him, even if Dr. Bernton ultimately concluded that there was no physiological basis for the levels of pain and the extent of the disability that the Claimant now reports.

69. A rebuttal deposition of Mr. Van Iderstine was taken on September 22, 2015 (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 4). Mr. Van Iderstine testified that since his prior deposition, he had reviewed the deposition transcripts of Ms. Anctil and Dr. Bernton (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 4-5). Mr. Van Iderstine testified that he disagreed with Ms. Anctil's statement that he was applying Social Security Disability standards for disability to the Claimant's case rather than Workers' Compensation standards. Mr. Van Iderstine testified that he does many cases for both types of disability determinations and he understands the difference in the standards and definitions of disability in each type of case. In referencing the Claimant's age, he was not applying the Social Security standards, but merely pointing out that the Claimant's age is a factor in terms of difficulty learning new skills (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 6). Mr. Van Iderstine also questioned Ms. Anctil's transferable skills analysis. Specifically, he noted that while the Claimant completed paperwork in the past related to his work as a truck driver, Mr. Van Iderstine opined that this type of paperwork is a skill indigenous to truck driving and does not

readily transfer to the type of skill needed for an office job or as a receptionist (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 8-9). Similarly, Mr. Van Iderstine opined that a supervisor position in a volunteer organization such as the Shriners or as a drill rig supervisor does not necessarily transfer as a skill in another field and Mr. Van Iderstine does not believe this is an applicable skill to any significant degree to his overall vocational profile (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 9-10). Mr. Van Iderstine also disputes that it is necessary to contact specific employers in the context of labor market research, this is only relevant if you are looking to place someone in a specific position (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 11-12). In response to the criticism from Dr. Bernton that his report was useless because Mr. Van Iderstine did not contact employers, Mr. Van Iderstine countered that he has done so many job analyses over the course of his career that he is familiar with the jobs and what work is entailed and he does not feel it is necessary to contact specific employers if he is not looking to place someone (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 12-13). Mr. Van Iderstine further testified that even with Dr. Bernton's clarification of his restrictions that 5 minute break every hour was actually the need to alternate positions, his opinion did not change regarding the positions of hotel clerk, sales clerk or attendance clerk as job positions the Claimant would not be able to perform (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 13-15).

70. In terms of Mr. Van Iderstine's definition of "basic computer skills," he testified that this can be a variable term, but it is more than just a fundamental ability to turn the computer on; rather a person has to at least know certain applications and have a certain degree of familiarity. Based on his interviews with the Claimant and his wife and the review of testimony by other family members, Mr. Van Iderstine finds that the Claimant does not have the necessary patience to learn the skill and he has been unsuccessful in learning computer skills and is frustrated with his lack of accomplishment (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 16-18). In his experience, Mr. Van Iderstine has found that job positions such as front desk clerks or attendance clerks do require fundamental computer skills. It is not necessarily an extensive part of the job, but basic fundamental skills are required to check people in and out and to register people or look up reservations (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 19). Mr. Van Iderstine agreed that motivation was a factor to consider, but also pointed out that the ability to perform the job is also a factor. Motivation can overcome some difficulties but the ability to perform the essential functions of a job is critical to an individual being able to find and maintain the job (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 21). He agreed "partially" with Ms. Anctil that older workers were being sought out and preferred over younger workers when they have a good work history, but he still opined that "the difference becomes when they don't have the ability to perform the essential functions of the job (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 23-24). Mr. Van Iderstine distinguished between having an "aptitude" versus having an "ability." He stated that the definition of a skill is the ability to perform a specific job whereas as aptitude is the capacity to learn the skill, but you don't actually have the skill, which is learned through

education, past training, and experience (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 24-25). He disagreed with Ms. Anctil that the Claimant had the skill levels and residual functional capacity to be a fast food clerk, machine operator or bench hand. Mr. Van Iderstine testified that he does not have the skill, so it becomes a question of whether he has the ability to learn to do the job. Because of his age and because he has not performed this type of work before, in combination with the factor that his family members have testified that the Claimant would not have the ability to interact with people, Mr. Van Iderstine does not believe that the Claimant has the capacity to perform these positions (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 26). Mr. Van Iderstine further finds that the Claimant's need to elevate his feet on and off throughout the day means that it is less likely that the Claimant would be hired as opposed to a younger worker with experience (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 26-27).

71. Mr. Van Iderstine disagreed with Ms. Anctil that his analysis was based on restrictions that are not applicable to the Claimant. He testified that his vocational evaluation was based on restrictions (noted in the history/summary section) of the FCE of one hour standing/walking (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 29-30). He reiterated that the Claimant would have trouble finding a job where he had to elevate his feet on an "ongoing basis," but admitted that neither the FCE nor any of the medical records documented that the Claimant needed to elevate his foot (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 30-31). In terms of the testimony of the Claimant's family members that the Claimant cannot turn on a computer or click a mouse button, Mr. Van Iderstine stated that the testimony as to an inability to turn on a computer or click a mouse was "perhaps an overstatement of his lack of computer skills" and was "not credible" (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 33-34). Overall, however, Mr. Van Iderstine does not believe that it would be more effective for the Claimant to take a computer class than it has been for family members to attempt to teach him computer skills (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 34). Mr. Van Iderstine opined that the Claimant does not have the skills to perform jobs he has never performed before in customer service type settings; he does would not be able to perform the core tasks or the aptitude necessary to perform these types of jobs (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 36-37). Of the potential job positions identified by Ms. Anctil, Mr. Van Iderstine opined that the surveillance position, which involved sitting in a booth and watching monitors with limited walking and standing, was the position the Claimant was most likely to be able to perform. Mr. Van Iderstine still expressed some questions as to whether the Claimant could maintain the level of attention for the period of time required by the job, but opined, "that would be the job out of everything that we've talked about that I would feel would be the one possibility" if it were available (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 37-38). If the Claimant were in a lot of pain, Mr. Van Iderstine opined that this could impact his ability to perform this job and maintain his attention (Depo. Tr., Robert Van Iderstine, September 22, 2015, p. 39). Finally, Mr. Van Iderstine clarified that when he was considering the Claimant's work restrictions, in addition to the

FCE, he also considered the limitations outlined by Dr. Bernton (Depo. Tr., Robert Van Iderstine, September 22, 2015, pp. 40-41).

72. At the hearing, the Claimant testified that Exhibit 12, p. 238 is a photograph of the outside of his left foot with the measuring tape running across the length of the horizontal scar. He testified that Exhibit 12, p. 329 is a photograph of the outside of his left foot with the measuring tape running up the height of the length of the vertical portion of his scar. He testified that Exhibit 12, p. 330 is the same left foot and scarring, just from another view. The Claimant testified that his last surgery was performed on June 18, 2014 and that the appearance of the scarring has stabilized since the surgery. Through photographs, the Claimant exhibited an L shaped scar on his left ankle that was approximately 4 inches long and less than 1/16 of an inch in width along the horizontal portion of the scar and approximately 2.5 inches in length and less than 1/16 of an inch in width along the vertical portion of the scar. The center of the scar differed in color and texture from the surrounding skin.

Ultimate Findings of Fact

73. There was considerable discrepancy between the physical activity restrictions for the Claimant that were used by the two vocational rehabilitation expert witnesses in this case. The conclusions reached by the experts were, in great part, driven by consideration of the limitations placed on the Claimant's physical activities. The permanent restrictions decisions were reached by each expert considering the medical records, opinions of Dr. Gustafson and Dr. Bernton, and testimony and input from the Claimant, his wife, and the Claimant's children regarding his abilities and tolerance for physical activities. In considering these various sources, the vocational rehabilitation experts came to significantly distinct conclusions as to the Claimant's ability to perform various job positions. Thus, the ALJ considers the appropriate permanent activity restrictions for the Claimant.

74. The ALJ finds that after having the opportunity to review the Claimant's FCE results and after performing a physical examination in order to provide the Claimant's impairment rating, Dr. Gustafson provided very minimal permanent restrictions for the Claimant's physical activity. The only recommended activity restriction imposed by Dr. Gustafson was "NO jumping off of anything higher than 12 inches." This was the only restriction listed in the both the narrative medical report as well as the closing Physician's Report of Worker's Compensation Injury sent to the injured worker and to the Insurer. There were no limitations placed on standing, walking or climbing stairs. There was no restriction requiring the Claimant to elevate his lower extremities. Dr. Gustafson also checked the box on the form that the Claimant was able to return to modified duty as of 12/2/2014. Thus, Dr. Gustafson clearly anticipated that the Claimant had the ability to return to work.

75. Dr. Bernton, on the other hand, opined that Dr. Gustafson's restriction was not sufficient and imposed much more conservative restrictions. Specifically, he would

limit the Claimant to four hours per day of standing or walking, with an ability to change positions during five minutes of every hour. In addition, walking on uneven surfaces should be limited to no more than five minutes per hour, and the Claimant should not be doing ladder climbing or shoveling. Lifting in a seated position is limited to 50 pounds occasionally and 25 pounds frequently and the Claimant should not be carrying over 20 pounds occasionally. Nor should the Claimant be shoveling or ladder climbing or working in areas where balance difficulties may create safety risks, and the Claimant should be limited to one flight of stairs per hour. In addition, he should not be required to run on the job. While Dr. Bernton considered the Claimant's subjective reports regarding his activity limitations, he determined that the Claimant is engaging in "fairly dramatic symptom exaggeration," which was not consistent with the nature of the injuries, his examination, or the medical records. The Claimant's statements that he was in extreme pain, highly disabled, needed to elevate his feet for 20 to 30 minutes every hour and was unable to perform numerous tasks, was "not even remotely" consistent with the prior records, and he also did not see anything on his examination that would be consistent with such level of dysfunction, which was "grossly inconsistent with the nature of the injuries given the progress that's been demonstrated" following the surgeries. Overall, Dr. Bernton testified that his physical examination of the Claimant was consistent with the medical records leading up to MMI and not consistent with the later subjective reports of the Claimant regarding significant pain and disability. At the time of his examination, Dr. Bernton noted no bursitis of the knee, shoulder injury or wrist injury that would require permanent work restrictions. Dr. Bernton specifically opined that there was "absolutely not" any reference that the Claimant had to elevate his feet for 20-30 minutes per hour and he also did not see any indication on examination that that level of elevation would be required.

76. Overall, in consideration of all of the testimony and evidence, the ALJ finds the permanent restrictions provided by Dr. Bernton to be the most reasonable for the Claimant. While Dr. Gustafson was the Claimant's authorized treating physician and had the opportunity to see the Claimant improve over time after the injury and subsequent surgeries, his restrictions are not sufficient, in light of the testimony of Dr. Bernton and the fact witnesses in this case. Dr. Bernton's restrictions take into account the mechanism of injury, the progress of the Claimant's recovery and involved a thorough physical examination. His restrictions are in line with the data contained over the course of the Claimant's recovery from the date of injury, through MMI, and subsequent to MMI through the hearing. However, the ALJ further finds that reliance on activity restrictions that are in addition to those provided by Dr. Bernton, such as the need of the Claimant to elevate his foot, is misplaced in this case as these additional restrictions are not supported by the record taken as a whole.

77. With respect to his disfigurement claim, and with reference back to paragraph 72 of these findings of fact, the ALJ finds that the Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation per § 8-42-108 (1), C.R.S. The ALJ finds that the Claimant is entitled to compensation of $1,625.00 for that disfigurement.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. §8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Permanent Total Disability

Permanent total disability, as defined in § 8-40-201(16.5), C.R.S., means an "employee is unable to earn any wage in the same or other employment." When the statute was amended in 1991, it established a strict definition of permanent total disability. The intention of the amendments was to create a real and non-illusory bright line rule for the determination whether a claimant has been rendered permanently and totally disabled. *Lobb v. Indus. Claim Appeals Off.*, 948 P.2d 115 (Colo. App. 1997). A claimant must also establish that the industrial injury was a significant causative factor by showing a direct causal relationship between the industrial injury and the permanent total disability. *Joslins Dry Goods Co. v. Indus. Claim App. Off.*, 21 P.3d 866 (Colo. App. 2001)*; Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App.1986).

It is the claimant's burden of proof to establish that he is permanently totally disabled by a preponderance of the evidence. The question of whether claimant has the ability to earn any wages is one of fact for resolution by the administrative law judge. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995). For purposes of permanent total disability, "any wages" means more than zero. *McKinney v. Indus. Claim Appeals Off.*, 894 P.2d 42 (Colo. App. 1995). In *McKinney* the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving permanent total disability benefits. It is not necessary that the claimant be able to return to previous employment. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for the purpose of the statute. *See also Christie v. Coors Transportation*, 933 P.2d 1330 (Colo. 1997). Although, if the evidence establishes that a claimant is not physically able to sustain post-injury employment, or that such employment is unlikely to become available to a claimant in the future in light of particular circumstances, an ALJ is not required to find a claimant is capable of earning wages. *Joslins,* supra; *Holly Nursing Care Center v. Industrial Claim Appeals Office, 992 P.2d 701, (Colo. App. 1999).*

The determination of whether a claimant is permanently and totally disabled is made on a case by case basis and varies according to the particular abilities and circumstances of the claimant. In determining whether a claimant is permanently totally disabled, the ALJ may consider various "human factors" such as mental capabilities, physical ability, education, vocational training, overall physical condition, former employment, and availability of work a claimant can perform within a commutable labor market. The overall objective is to determine whether employment exists that is reasonably available to a claimant under her particular circumstances. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Holly Nursing v. ICAO*, 992 P.2d 701, 703 (Colo. App. 1999).

In resolving the question of whether the Claimant is permanently totally disabled, the ALJ addresses the Claimant's physical ability and overall physical condition, his education and vocational training, his former employment, his mental capabilities and the availability of work within the Claimant's abilities within the Claimant's commutable labor market.

In this case, there was a great deal of conflicting information presented regarding the Claimant's pain levels, physical condition and reasonable restrictions or limitations on the Claimant's physical activities. Inherent in these factors are the issues of pain, functionality, and reasonable work restrictions.

There has been a great deal of inconsistency in the Claimant's reporting of pain levels and ability to function. At the hearing, and since filing for PTD, the Claimant has complained of 7-9/10 pain and advised Respondents' IME physician Dr. Bernton of this same pain level. This is higher that the level of pain he experienced early after his injury. He now reports significant balance issues, suggesting that he cannot walk without holding onto something, and reports that it is necessary to regularly elevate his legs, varying from in the evening (as told to Ms. Anctil) to "sometimes (as stated at hearing) to “ongoing” (as assumed by Mr. Van Iderstine in his testimony). At the hearing and in reports to the medical and vocational expert witnesses in this case, the Claimant also reports problems with his wrist and knee that increase his pain and decrease his ability to function.

The Claimant’s testimony in this regard and his more recent reports to the expert witnesses in this case are inconsistent with the Claimant’s medical records detailing the Claimant’s recovery from two left lower extremity surgeries following his injury and the conservative treatment for his right lower extremity and his knee and wrist. The medical records admitted in this case establish that initially, and in the early aftermath of his injury, the Claimant reported high levels of pain. At this point, the Claimant was reporting pain range levels of 4-9/10, depending on activity. The Claimant resolved well following both his initial surgery and hardware removal. Dr. Bernton testified credibly that the records indicate a very good recovery. After the hardware removal on June 18, 2014, the Claimant routinely reported 0-1/10 pain that was only intermittent, and noted few issues other than some occasional swelling (there was reference to 5/10 pain in the right ankle in October 2014, the day Claimant received an injection, but this is the exception). The Claimant often reported that he had no pain. Although the Claimant’s wife testified he is one to underrepresent his pain level, at the outset of his medical treatment, the Claimant was reporting much more substantial pain levels. This calls into question why the Claimant would minimize his pain in March through December 2014, but not earlier and, then again, not since filing for hearing.

Per the medical records, physical therapy records, and even in the Claimant’s reports to Dr. Bernton and the vocational rehabilitation experts, in the later part of 2014 and through 2015, the Claimant continued to perform yard work, welding and engage in other activities. He ceased taking medications very shortly after his second surgery and for months leading up to his MMI placement denied the need for any medication. In interviews with Dr. Bernton and the vocational rehabilitation experts, the Claimant again denied that he took any pain or other medications, which is inconsistent with the level of pain and lack of function he now claims. The Claimant declined any additional treatment, other than the pool pass, despite the topic being raised by his ATP prior to MMI, inconsistent with the level of pain and lack of function he now claims. He did not challenge the doctors’ opinions that he did not require further pre-MMI treatment or challenge his placement at MMI – nothing is referenced in records indicating that he disagreed with it, and he did not file for a Division IME. He was discharged from medical care in early December 2014.

There is no objective evidence that activity increases the Claimant’s pain, only his subjective reports and these reports have not been consistent over the relevant time period. The Claimant had stated back in September 2014 that he performed yard work without any increased problems. That same month, he went to a weekend concert and then specifically reported that Tuesday that he had “no pain” and then stated a few days later that did not know why he needed his cane and would not use it. The pain level he reported to Dr. Gustafson the day after the FCE was 1/10.

The Claimant now claims significant balance issues. But none of the records reference any such problems with balance. He states that his ankles are very weak, but the medical records do not corroborate this assertion and, in fact, document 5/5 strength by September 2014. The Claimant told his therapist on September 4 that he did not understand why he needed crutches, and refused to use a cane by September 15. The FCE did not document balance issues. Records, pathology and testing are not consistent with balance deficiencies, in this case. This evidence is at odds with the testimony of the Claimant and his family members that the Claimant had to hold onto walls and other objects in order to maintain his balance while he walks.

The Claimant claims now that he can only walk 15-20 minutes, but as Dr. Bernton noted, the Claimant's condition would not be expected to worsen as time went by, absent new injury or intervening event, and the records provide no explanation as to why the Claimant would have such minimal pain and good function throughout 2014, especially towards the end, but then suddenly be unable to stand or walk more than an one to two hours/day and must brace to keep from falling, once litigation began. But Claimant's position is not even necessarily that he has worsened in more recent weeks and months. Rather, Claimant testified that his condition had remained essentially the same since at least the time when he lost his CDL (in February 2014 – when he was still transitioning from the wheelchair), and was at the time of the May 2015 hearing still "fairly close" to his condition when he applied for SSDI (in August 2013 – while in a wheelchair following his initial injury just one month earlier). He claims similar and constant issues throughout, and not some new aggravation or increased disability.

The significant improvement, limited pain and good function documented in the medical records, especially since the hardware removal, is what would be anticipated recovery from the type of injury sustained here, the pathology and the records, and not the significant pain and limited function the Claimant claims only now in more recent months. Dr. Bernton has stated that the Claimant's presentation is wholly inconsistent with the progress of the case prior to his filing for PTD, as evidenced by the treatment records, PT findings and the FCE, as well as the nature of pathology and type of injury and the Claimant's documented recovery. Because the Claimant's reports of pain and function since litigation began are not consistent with the record, they do not carry as much weight as the statements that the Claimant made to his physicians leading up to and at the time the Claimant was placed at MMI.

In resolving conflicting information as to the Claimant's permanent work restrictions, the ALJ found the permanent restrictions provided by Dr. Bernton to be the most reasonable for the Claimant. While Dr. Gustafson was the Claimant's authorized treating physician and had the opportunity to see the Claimant improve over time after the injury and subsequent surgeries, his restrictions are not sufficient, in light of the testimony of Dr. Bernton and the fact witnesses in this case. Dr. Bernton's restrictions take into account the mechanism of injury, the progress of the Claimant's recovery and involved a thorough physical examination. His restrictions are in line with the data contained over the course of the Claimant's recovery from the date of injury, through MMI, and subsequent to MMI through the hearing. However, the ALJ further found that reliance on activity restrictions that are in addition to those provided by Dr. Bernton, such as the need of the Claimant to elevate his foot, is misplaced in this case as these additional restrictions are not supported by the record taken as a whole.

Despite this, the Claimant and his vocational evaluator support the claim for permanent total disability around one hour walking and standing restrictions, which are not permanent restrictions applicable to this case, per any medical provider or otherwise, and also assumed balance issues and a need to elevate feet that is not only unmentioned in the permanent restrictions, but not documented in any of the medical reports. Thus, the baseline restrictions upon which the Claimant bases his claim for PTD, and which his expert based his survey, are not appropriate.

In seeking PTD benefits, the Claimant also asserts general incompetency and what appears to be a personality issue which results in the Claimant engaging in inappropriate, rude and possibly insulting behavior when required to communicate with the public or utilize office equipment, phone and computers at an entry level capacity. The Claimant and his family portray him as a person who would easily lose his temper, be unable to talk on the phone or possibly learn how to perform the most rudimentary tasks on a computer or office equipment. The testimony of the Claimant was at odds with how the Claimant presented during the IME examination (as evidenced by the audio CD of the examination), at the hearing, and in an interview with the Respondents' vocational rehabilitation expert, Ms. Anctil. While the Claimant and his family testified that the Claimant is unable to successfully perform in most any position that requires any technology or interaction with another human, his interactions over the course of this claim do not support those contentions. In particular, Ms. Anctil credibly found that Claimant was quite personable when she met him, and both she and Dr. Bernton noted that the records do not demonstrate anything as far as a personality disorder or indicate any likely impediment to employment. In any event, the Claimant's wife admitted that these personality traits long pre-existed Claimant's injury, and despite these personality traits, Claimant had always been gainfully employed, and never had any issues with maintaining employment.

In fact, the Claimant's vocational history includes performing substantial tasks of a mechanical nature and complex character, including performing some more routine mechanical tasks for his truck, completing log books and past supervision of multiple subordinates. The Claimant's SSDI application (in Exhibit X) documents both the nature of complex and varied tasks performed by the Claimant over the years. Outside of work, the Claimant also routinely performed mechanical work around the house and on his personal vehicle. All family members agree that the Claimant is of at least of average intelligence. Overall, the Claimant's vocational and non-vocational history are contradictory to a claim that the Claimant is incompetent and would be unable to perform entry level positions.

In asserting this pronounced incompetence as a bar to vocational attainment, the Claimant's presentation is more indicative of a lack of motivation as opposed to a lack of ability or at least an ability to learn. Also, Ms. Anctil testified credibly that the Claimant's age should not be an obstacle, as many employers are seeking older individuals due to maturity; Mr. Van Iderstine did not entirely disagree with this assertion, but then fell back on the Claimant's alleged lack of ability and physical limitations.

Also persuasive is that, even if the restrictions and personal characteristics the Claimant asserts are accurate, the Claimant still does meet his burden of establishing that he likely incapable of finding and holding employment. The Respondents' vocational expert has found him employable even taking into account more of the subjective reports of the Claimant and his family. In her vocational evaluation for the Claimant, Ms. Anctil used restrictions of mostly sedentary duty, with more sitting than standing, which were "very much" more significant than those assigned by ATP Dr. Gustafson and even more significant than those assigned by Dr. Bernton. Even considering the Claimant's subjective reports and assumptions of the Claimant's very limited computer abilities and inexperience with office equipment, Ms. Anctil still located employment opportunities for the Claimant in his commutable labor market.

Specifically, she located three jobs with the local school district that Claimant not only could perform consistent with these subjective restrictions and his limited personal characteristics, but which positions were open and available. These positions were consistent with his subjective need to alternate positions standing/walking limitations, required only a GED or high school diploma, very little computer use and were otherwise fully consistent with the Claimant's skill level and history. Ms. Anctil also identified security positions, which require very limited walking/standing and no lifting, and presumably little customer contact, as well. An actual guard currently employed in the field confirmed job duties that would even be compliant with even the most onerous restrictions claimed by the Claimant, and which, required no computer use or substantial interface with technology or the public, or any advanced degree.

In addition to the actual positions that Claimant not only could perform which were open and available, Ms. Anctil also credibly and persuasively opined that there would be numerous other positions if Dr. Bernton's restrictions were found to be the applicable standard. Even Mr. Van Iderstine agreed that the Claimant would not be permanently totally disabled if the permanent restrictions assigned by the ATP, after review of all the medical evidence and objective data, including the FCE, were determined to be the appropriate restrictions upon which a vocational evaluation should be based. Mr. Van Iderstine also admitted that the Claimant was more likely capable of working if the restrictions per Dr. Bernton were controlling, referencing the jobs of front desk clerk, courtesy clerk, retail sales and cashier, at least physically and excluding the "personal" issues, and that such restrictions were "more conducive to light duty jobs" than the restrictions upon which he based his evaluation. He went on to note that the Claimant could physically perform a cashier and parking lot attendant job within these restrictions, and that the only considerations potentially precluding such was "his age and lack of experience." He also stated that those two positions were merely the ones that came to mind but that he was "sure there might be other ones."

Therefore, the ALJ finds that Mr. Van Iderstine's opinion as to the issue of the Claimant being permanently totally disabled is less persuasive than that of Ms. Anctil in this case. This is in part because Mr. Van Iderstine's is relying on inappropriate permanent restrictions. Next, it is important to note that Mr. Van Iderstine found it significant that the Claimant was found eligible for SSDI and lost his CDL, but then neglects to mention that the former application occurred just one month post-injury when the Claimant was in a wheelchair and the latter occurred in February 2014 when the symptoms were still significantly pronounced. This highlights Mr. Van Iderstine's reliance on temporary rather than permanent restrictions and physical conditions. In addition, Mr. Van Iderstine repeatedly referred to restrictions beyond those even identified in the temporary restrictions related to balance issues and the need for the Claimant to elevate his legs for substantial parts of the day, which Mr. Van Iderstine testified was – for many of the jobs under consideration - the "deal-breaker." As noted by Dr. Bernton, balance problems and a need to elevate the feet are not part of any temporary or permanent restrictions and are also inconsistent with the pathology and other information in the record. Mr. Van Iderstine also assumed that Dr. Bernton's reference to five minute breaks means he has to be off-task for that period. However, even after Dr. Bernton clarified that it does not mean that, Mr. Van Iderstine continue to consider this in evaluating the Claimant's ability to obtain and maintain employment.

Finally, Mr. Van Iderstine posits that the Claimant is unable to learn new tasks based on his age and the testimony of the Claimant and his family members, even though this would appear to be inconsistent with his vocational and non-vocational history, in which the Claimant performed varied mechanical activities requiring intellect. Mr. Van Iderstine testified that to the extent the Claimant had skills from previous employment, these are not "transferable skills," but were "indigenous" to his prior positions. In rebuttal testimony, Mr. Van Iderstine admits that portions of the testimony from the Claimant and his family may have represented "an overstatement of his lack of computer skills" and was "not credible," but then disregards this to base his opinion, in part, on the Claimant's inability to perform entry level tasks required of various sedentary job positions. Leaving aside the question as to why the Claimant could not perform such tasks, or learn to do so if properly motivated, such testimony is not credible, especially in light of Mr. Van Iderstine's own admission that the Claimant is of average intelligent, has no learning disability and that there is no evidence in the records to suggest an inability to learn such activities.

Since commencing litigation claiming PTD, the Claimant has raised some other issues to support his assertion that he is PTD, such as knee complaints, wrist issues and hearing deficiencies. These are all unsupported, temporary, correctable and/or irrelevant issues. With respect to the Claimant's wrist issues, such issues appear to have resolved or were not particularly significant. Dr. Bernton agreed that the Claimant's wrist condition, at the time of his examination, was likely related to a cyst, which would not be work-related and is easily and fully correctable. The Claimant did not challenge his placement at MMI without any rating for the wrist, through a Division IME or otherwise. While Claimant now claims that it was wrist issues that led him to abandon use of the cane by September 2014, this is contradicted by the records, which make no reference to wrist problems during that period, work-related or otherwise, and document that Claimant refused to use a cane because he "didn't need it." Most relevant, the Claimant was not provided work restrictions for wrist issues, and there is no information to support any disability for the wrist. Similarly, the Claimant complains of knee issues due to having to "crawl around" when he was less ambulatory while recovering from surgery. The Claimant's knee issues were really noted only in early records, including those records from November 12, 2013, January 23, 2014 and for the last time on March 6, 2014, when the issues were noted to be "almost completely resolved." A Cortisone injection was considered, but then never occurred, presumably because the issue resolved once Claimant no longer had to crawl around. The issue did not arise at the time of the Claimant's impairment rating when he was placed at MMI. At the time of his IME, Dr. Bernton found no evidence of bursitis when he examined him. Whatever the case, and whether such might be work-related, these issues appear to have been temporary and would have been considered by the treaters, who did not assign any specific restrictions related to that condition. There is no documentation of ongoing knee issues in the last 19 months, and nothing indicating that this condition is a relevant consideration for PTD.

The Claimant and his family members also testified that the Claimant could not obtain or maintain employment in customer service positions in part due to hearing issues, with his wife testifying that he would become easily frustrated if he could not understand someone, and could also not engage in telephonic activities as a result thereof. The Claimant and his wife failed to mention during their testimony that Claimant previously had hearing aids and that any such hearing issues are correctable. There is also a lack of persuasive evidence that hearing issues precluded the Claimant from finding and holding employment previously. Both Dr. Bernton and Ms. Anctil stated that they experienced no trouble in communicating with the Claimant and he did not seem to experience any difficulty in hearing or responding to questioning while he testified at hearing (which was conducted via videoconference with the Claimant and his counsel in Grand Junction and the ALJ and counsel for the Respondents in Denver. As such, any potential hearing deficiencies is questionable, and would otherwise be pre-existing, correctable and non-permanent, and also non-disabling, and will not be considered in the context of this PTD claim.

In sum, it is found that the Claimant continues to experience pain due to his significant injury in July 2013, and the ALJ acknowledges that there is functional diminishment and recurring swelling and other issues. These issues were evident at the hearing and documented in the findings of fact. However, for the purposes of claiming permanent total disability, the Claimant and his family have magnified his condition, symptoms and disability, and have made statements that are contradicted by other, more persuasive, evidence in the record. The Claimant's vocational rehabilitation expert, Mr. Van Iderstine, relied upon these statements in spite of the inconsistencies and based his opinion using this information and, in addition, he used inapplicable physical activity restrictions.

On the other hand, the Respondents' expert witness, Ms. Anctil used the more reliable and appropriate physical activity restrictions. In addition, she even found job positions in the Claimant's commutable labor market that the Claimant could perform based on restrictions per Claimant's subjective reports and his relative inexperience in using a computer or performing work in an office setting. Even based on the more substantial restrictions, that are not actually applicable, there are available positions the Claimant could perform. However, these are not the appropriate restrictions under consideration. Under the restrictions set forth by Dr. Bernton, there are, more likely than not, even more available job positions the Claimant could obtain and maintain. As established by the evidence, the Claimant is capable of finding and maintaining gainful employment in his commutable labor market. As such, his claim for permanent total disability is denied and dismissed.

Disfigurement Award

Pursuant to C.R.S. § 8-42-108, if the Claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view, in addition to all other compensation benefits…the director may allow compensation not to exceed four thousand dollars to the employee who suffers such disfigurement." The area normally exposed to public view has been interpreted to include all areas of the body that would be apparent in swimming attire. *Twilight Jones Lounge v. Showers,* 732 P.2d 1230 (Colo. App. 1986). The ability to conceal a disfigurement, by means of clothing or a prosthetic or artificial device does not defeat an entitlement to benefits for the disfigurement. *Arkin v. Industrial Commission,* (145 Colo. 463, 358 P.2d 879 (1961).

At the hearing, the Claimant testified that Exhibit 12, p. 238 is a photograph of the outside of his left foot with the measuring tape running across the length of the horizontal scar. He testified that Exhibit 12, p. 329 is a photograph of the outside of his left foot with the measuring tape running up the height of the length of the vertical portion of his scar. He testified that Exhibit 12, p. 330 is the same left foot and scarring, just from another view. The Claimant testified that his last surgery was performed on June 18, 2014 and that the appearance of the scarring has stabilized since the surgery. Through photographs, the Claimant exhibited an L shaped scar on his left ankle that was approximately 4 inches long and less than 1/16 of an inch in width along the horizontal portion of the scar and approximately 2.5 inches in length and less than 1/16 of an inch in width along the vertical portion of the scar. The center of the scar differed in color and texture from the surrounding skin. The Claimant has sustained a serious permanent disfigurement to areas of his body normally exposed to public view, which entitles the Claimant to additional compensation. Accordingly, in the discretion of the ALJ, it is determined that the Claimant is entitled to $1,625.00 for that disfigurement.

Overpayment

C.R.S. § 8-42-103(1)(c), provides that where periodic disability benefits are payable under social security, the aggregate benefits payable by the employer for TTD, TPD and PTD under § 8-42-103 shall be reduced by an amount equal to one half of the amount of the benefit. As such, Respondents can offset their wage loss liability by 50% of the SSDI receipts paid during the relevant period.

The term "overpayment" is defined in C.R.S. § 8-40-201, as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." Thus, any amounts Respondent paid in excess of their liability through MMI while Claimant received SSDI benefits constitute an overpayment.

C.R.S. § 8-42-113.5, requires that a claimant provide written notice to the employer or insurer within 20 days of any payment of disability payments. If the claimant or legal representative fail to give such notice, any overpayment that resulted from the failure to make the appropriate reduction in the original calculation of such disability benefits shall be recovered by the employer or insurer in installments at the same rate as, or a lower rate than, the rate at which the overpayments were made. If the claimant fails to give the notice, the employer or insurer is authorized to cease all disability payments immediately until the overpayments have been recovered in full.

Pursuant to subsection (c), "[i]f for any reason recovery of the overpayment as contemplated … is not practicable, the employer or insurer is authorized to seek an order for repayment."

In this case, the parties concur that the current overpayment amount is $8,299.20. The Claimant received social security benefits at a rate of $1,910.00/month since January 2014. The Claimant received TTD benefits through December 1, 2014. Respondents were entitled to reduce receipt of such benefits by 50%, or $220.38/week ($1910.00 x 12 divided by 52 x 0.5). The Claimant received TTD benefits for 11 months after the award of SSD benefits. Because the Respondents were unaware of Claimant's receipt of the SSD benefits, as the Claimant did not timely notify the Respondents, the Respondents did not reduce the TTD benefits by the amount they were entitled. Thus, Respondents overpaid TTD in the amount of $10,505.00 ($1910.00 x 11 x 0.5). Upon learning of the duplicative benefits, Respondents ceased payments of PPD, after $13,248.82 of the $15,449.62 PPD benefits had been paid. As such, the overpayment amount was offset, or reduced, by $2,200.80.

Under such circumstances, repayment must be ordered. Respondents are entitled to recover $8,299.20. The Respondents may offset or recover $1,625.00 of the current overpayment amount by application of the $1,625.00 to which the Claimant is entitled for permanent disfigurement. This leaves a balance owed of $6,674.20.

Through testimony, it was established that it would be a serious hardship to repay the entire amount of the overpayment in a lump sum. The Claimant's wife, who handles the finances for the Claimant and herself testified that the only source of income for their household is the $1,945.00 per month SSDI benefits and they have no savings account. She testified that the mortgage is $1,025.00 per month, utilities and insurance total about $462.00 per month and their food bill averages about $500.00 per month. The Claimant and his wife also have a credit card with a $400.00 balance for which they make payments each month of about $25.00. Ms. Morgan testified that she does not know what monthly payment they could afford. Based on financial status, in the Claimant's post hearing brief, the Claimant requested a payment of $25.00 per month.

In Respondents' post hearing brief, the Respondents requested payments of $220.38 per week, which is the same rate as the Respondents initially overpaid the Claimant.

The ALJ finds that based on the financial information presented by the Claimant, the Claimant is not required to pay the entire $8,299.20 in a lump sum. Rather, the total overpayment amount will first be offset by the $1,625.00 disfigurement award, leaving a balance of $6,674.20. Thereafter, the Claimant shall pay 133 payments of $50.00 each month with a final payment of $24.20. The first payment shall be due on the 20th day of the month following the month in which this order is served on the parties.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. The Claimant's claim for permanent total disability benefits is denied and dismissed with prejudice.

2. The Claimant is entitled to $1,625.00 for permanent disfigurement in accordance with C.R.S. § 8-42-108, C.R.S.

3. The Respondents are entitled to recover an overpayment of $8,299.20, by first offsetting the amount by the $1,625.00 due to the Claimant for his disfigurement award, leaving a balance of $6,674.20. Thereafter, the Claimant shall pay 133 payments of $50.00 each month with a final payment of $24.20. The first payment shall be due on the 20th day of the month following the month in which this order is served on the parties.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Date: February 19, 2016

Kimberly Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-926-368-05

ISSUES

1. Whether Claimant suffered compensable industrial injuries during the course and scope of his employment with Employer on April 26, 2013.

2. Whether Employer has proven by a preponderance of the evidence that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S. or worked for Wade Pate.

3. Whether Insurer has demonstrated by a preponderance of the evidence that it properly cancelled Employer's Workers' Compensation insurance policy effective April 16, 2013.

STIPULATIONS

The parties agreed to the following:

1. If Claimant's claim is compensable, he is entitled to a general award of medical benefits.

2. If Claimant's claim is compensable, he is entitled to Temporary Total Disability (TTD) benefits for the period April 27, 2013 until terminated by statute.

3. Claimant's TTD benefits are subject to a Social Security Disability Insurance (SSDI) offset in the amount of $755.00 per month since October 1, 2014.

4. Claimant earned an Average Weekly Wage (AWW) of $1,153.84.

FINDINGS OF FACT

1. Employer is a sole proprietorship owned by Aaron McKeehan. Employer provides logistical, planning and coordinating services for companies seeking construction, maintenance and landscaping work.

2. Altisource Solutions, Inc. is a corporate entity located in Chicago, Illinois On September 21, 2012 Employer and Altisource executed a field vendor agreement for the purposes of property preservation and inspection.

3. Mr. McKeehan and Wade Pate have been friends for approximately 15 years. In early April 2013 Mr. McKeehan offered property preservation and inspection work to Mr. Pate in Granby, Colorado.

4. On April 21, 2013 Mr. Pate and Claimant completed the job in Granby, Colorado. They cleaned up firewood and other materials. Mr. McKeehan reviewed a picture of the job site, noted his satisfaction with the work and asked Mr. Pate to travel to Chicago to complete additional work supplied by Altisource. Employer noted that Mr. Pate would earn at least $10,000 each month working on projects in the Chicago area.

5. Mr. McKeehan did not directly offer any work in Chicago to Claimant. Instead, Mr. Pate asked Claimant to help him complete the job duties. Mr. Pate explained that he would split 50% of his expected monthly earnings or $5,000 with Claimant. Claimant agreed to accompany Mr. Pate to Chicago and Employer acquiesced to the arrangement.

6. On April 26, 2013 Claimant and Mr. Pate were involved in a motor vehicle accident in Buffalo County, Nebraska while traveling to Chicago on I-80. Claimant and Mr. Pate suffered catastrophic injuries during the crash that included traumatic brain injuries. The parties do not dispute that Claimant was injured during the accident. However, they argue about whether Claimant worked for Employer and whether Employer possessed Workers' Compensation insurance coverage through Insurer on April 26, 2013.

7. Andy Lease testified that he works as an Underwriter for Insurer. He previously worked for Insurer as a New Business Representative and Customer Service Representative. Mr. Lease explained that Employer obtained a Workers' Compensation insurance policy with Insurer in January 2013. The policy was issued in Mr. McKeehan's name and Mr. Lease was the assigned underwriter.

8. On March 27, 2013 Insurer sent a letter dated March 26, 2013 via certified mail to Mr. McKeehan notifying him that his insurance premium was overdue. The letter apprised him that his policy would be canceled on April 16, 2013 unless Insurer received the amount due by April 15, 2013 ("Notice of Cancellation"). The Notice of Cancellation was mailed to Mr. McKeehan at 4137 Warbler Drive, Ft. Collins, CO, 80526. Insurer contemporaneously sent a copy of the Notice of Cancellation to Mr. McKeehan's insurance agent.

9. Rhonda Isham testified that she works for Insurer as a Corporate Services Assistant. Ms. Isham aids the manager who oversees Insurer's outgoing mail team and previously was a member of the outgoing mail team. She remarked that Insurer has business customs of sending all notices of cancellation via certified mail and entering the assigned certified mail numbers into Pitney Bowes' electronic equipment. The Pitney Bowes equipment meters and tracks Insurer's mail. Insurer also uses envelopes that allow the contact information of the addressees listed in outgoing letters to be seen through transparent "windows" to ensure they are sent to the correct recipients. Ms. Isham explained that "certified mail" and "return receipt certified mail" are different. Insurer's standard practice is to send notices of cancellation via certified mail rather than return receipt certified mail.

10. Ms. Isham commented that the Pitney Bowes equipment generated a report reflecting that Insurer's March 26, 2013 Notice of Cancellation was mailed to Mr. McKeehan's zip code of 80526 on March 27, 2013 and received on March 28, 2013. The equipment generated a document bearing certified mail number 9171082133393950727893. Although the report did not reflect that an individual had signed for the Notice of Cancellation, Ms. Isham explained that she has never seen a similar report that revealed an individual had signed for the document. Finally, a "Delivery Status" confirmation from the United States Postal Service (USPS) also states that tracking number 9171082133393950727893 was delivered.

11. Mr. Lease explained that Insurer sent the Notice of Cancellation to Mr. McKeehan at his address of record via certified mail because he failed to timely pay his insurance premiums. Mr. Lease commented that Insurer has a business custom of sending notices of cancellation via certified mail when policyholders fail to timely pay their premiums. He noted that he has never seen Insurer send a notice of cancellation through any method other than certified mail. He detailed that Insurer has a business custom of generating an electronic "notepad entry" when a notice of cancellation is issued and Insurer's underwriting file contains an entry stating that the Notice of Cancellation was sent via certified mail.

12. Mr. Lease also testified that Insurer has sent other correspondence to Mr. McKeehan using the same name and address since the inception of his Workers' Compensation insurance policy in January 2013. Mr. McKeehan has never reported any trouble receiving mail. Although Mr. Lease acknowledged that Insurer does not possess a return receipt for the Notice of Cancellation, he explained that USPS only retains return receipts for two years and he had no reason to believe one might be relevant within the timeframe. Mr. Lease further commented that Insurer has a business custom of sending copies of notices of cancellation to the insurance agents of its policyholders and the Notice of Cancellation was mailed to McKeehan's insurance agent.

13. Mr. Lease noted that Insurer did not receive any premium payments from Mr. McKeehan after mailing the Notice of Cancellation. In fact, Mr. McKeehan agreed that he did not pay any Workers' Compensation insurance premiums during March and April 2013. Insurer thus cancelled Employer's insurance policy effective April 16, 2013 based on the non-payment of premiums. Insurer sent a letter to Mr. McKeehan informing him of the termination.

14. Mr. McKeehan testified that he learned of the April 26, 2013 motor vehicle accident shortly after it occurred. He believed that Employer did not have Workers' Compensation insurance coverage on the date of the accident because "we were getting these cancellations, you know, letters." Mr. McKeehan acknowledged that he received the Notice of Cancellation but could not recall when he received the document or whether he signed for it.

15. Mr. McKeehan commented that he was aware Claimant and Mr. Pate were traveling to Illinois, but did not believe that he needed Workers' Compensation

insurance coverage for them because they were independent contractors. In fact, he had sent Mr. Pate and Claimant "Independent Contractor Agreements" but they never completed the documents. Mr. McKeehan explained that his role in projects for Altisource was limited to reviewing pictures to ensure that work was satisfactorily completed. He noted that he loaned a credit card to Mr. Pate so that Mr. Pate could incur expenses while traveling to Illinois. In fact, at the scene of the April 26, 2013 motor vehicle accident tools and supplies that Mr. Pate had purchased with Mr. McKeehan's credit card were strewn about the area. Nevertheless, Mr. McKeehan expected reimbursement for the expenditures. He added that the credit card belonged to a different company that he owns by the name of Western Waste, LLC.

16. On November 14, 2014 Altisource filed a Motion for Summary Judgment requesting dismissal based on a lack of jurisdiction. On December 30, 2014 ALJ Felter issued an Order granting the Motion and dismissing Altisource from the claim.

17. ALJ Felter conducted hearings in this matter on January 21, 2015 and April 6, 2015. He issued a Full Findings of Fact, Conclusions of Law, and Order on April 15, 2015, in which he ruled that all of the previous proceedings were "a nullity and held for naught because [Insurer] did not receive notice thereof," and the matter would begin again if Insurer was joined as a party.

18. On April 10, 2015 Claimant filed an Application for Hearing in which it joined Insurer as a party.

19. On September 9, 2015 the Industrial Claim Appeals Office (ICAP) determined that it lacked jurisdiction to consider Claimant's Petition to Review ALJ Felter's December 30, 2014 and April 15, 2015 Orders. The ICAP reasoned that ALJ Felter's Orders were interlocutory.

20. Employer has failed to prove by a preponderance of the evidence that Claimant was an independent contractor pursuant to statute or was an employee of Mr. Pate. Initially, on April 21, 2013 Mr. Pate and Claimant completed the job in Granby, Colorado. They cleaned up firewood and other materials. Mr. McKeehan reviewed a picture of the job site, noted his satisfaction with the work and asked Mr. Pate to travel to Chicago to complete additional work supplied by Altisource. Although Mr. McKeehan did not offer any work in Chicago to Claimant, he acquiesced to Claimant's participation in the Illinois projects. Mr. Pate did not operate a trade or business but simply performed work for Mr. McKeehan and was paid personally. Claimant was simply a co-worker with Mr. Pate who was traveling to Illinois to complete additional assignments.

21. Employer has established some, but not all, of the elements enumerated in §8-40-202(b)(II), C.R.S. For example, Employer demonstrated that it did not provide more than minimal training for Claimant. However, the overwhelming evidence reflects that Claimant was an employee of Employer on April 26, 2013. Claimant did not operate a trade or business and did not complete an independent contractor agreement or any other written document reflecting that he was not an employee. The record reveals that there was no fixed or contract rate of pay based on the completion of a

specific project. There was some evidence that Mr. Pate would earn $10,000 for his work in Illinois and that Claimant would receive 50% of the total, but there was no mention that the pay was contingent on the completion of a specific project. Furthermore, Mr. McKeehan acknowledged that Claimant and Mr. Pate had completed work in Granby, CO on April 21, 2013. Moreover, Mr. McKeehan established a quality standard for the completion of projects because he reviewed pictures to ensure that work was satisfactorily completed. He also noted that he loaned a credit card to Mr. Pate so that Mr. Pate could purchase tools and supplies for the projects while traveling to Illinois . Finally, by sending Claimant and Mr. Pate to Illinois to work on Altisource projects for an extended period of time, Claimant was effectively required to work exclusively for Employer.

22. Claimant was not “customarily engaged in an independent trade, occupation, profession or business related to the service performed” during the time he worked for Employer. In fact, while working for Employer, Claimant was not engaged in any independent business. Based on the expectation that he would earn $5,000 while in Illinois for an unspecified time period, Claimant’s income was wholly dependent on his earnings from Employer. Accordingly, Claimant was an employee of Employer on April 26, 2013.

23. The record reflects that Insurer substantially complied with §8-44-110, C.R.S. in cancelling Employer’s Workers’ Compensation insurance policy. Initially, on March 27, 2013 Insurer sent a letter dated March 26, 2013 via certified mail to Mr. McKeehan notifying him that his insurance premium was overdue. The letter apprised him that his policy would be canceled on April 16, 2013 unless Insurer received the amount due by April 15, 2013. The Notice of Cancellation was mailed to Mr. McKeehan at 4137 Warbler Drive, Ft. Collins, CO, 80526. Insurer contemporaneously sent a copy of the Notice of Cancellation to Mr. McKeehan’s insurance agent.

24. Ms. Isham credibly remarked that Insurer has business customs of sending all notices of cancellation via certified mail and entering the assigned certified mail numbers into Pitney Bowes’ electronic equipment. The Pitney Bowes equipment meters and tracks Insurer’s mail. Ms. Isham commented that the Pitney Bowes equipment generated a report reflecting that Insurer’s March 26, 2013 Notice of Cancellation was mailed to Mr. McKeehan’s zip code of 80526 on March 27, 2013 and received on March 28, 2013. The equipment generated a document bearing certified mail number 9171082133393950727893. Finally, a “Delivery Status” confirmation from the United States Postal Service (USPS) also states that tracking number 9171082133393950727893 was delivered. Moreover, Mr. Lease credibly explained that Insurer has a business custom of sending notices of cancellation via certified mail when policyholders fail to timely pay their premiums. He noted that he has never seen Insurer send a notice of cancellation through any method other than certified mail. He detailed that Insurer has a business custom of generating an electronic “notepad entry” when a notice of cancellation is issued and Insurer’s underwriting file contains an entry stating that the Notice of Cancellation was sent via certified mail. Mr. Lease further commented that Insurer has a business custom of sending copies of notices of cancellation to the insurance agents of its policyholders and the Notice of Cancellation was mailed to

McKeehan's insurance agent. Based on the preceding credible testimony, Insurer has established by a preponderance of the evidence the existence of several business customs that warrant presumptions that the Notice of Cancellation was sent to Mr. McKeehan via certified mail and his insurance agent via regular mail.

25. Mr. Lease noted that Insurer did not receive any premium payments from Mr. McKeehan after mailing the Notice of Cancellation. In fact, Mr. McKeehan agreed that he did not pay any Workers' Compensation insurance premiums during March and April 2013. Furthermore, Mr. McKeehan acknowledged that he knew the policy was cancelled when he first learned of the accident "shortly" after it occurred because he had already received the Notice of Cancellation. Because Employer had an adequate opportunity to avoid non-insured status and any mailing deficiency did not adverse affect his interests, Insurer substantially complied with §8-44-110, C.R.S. in cancelling Employer's Workers' Compensation insurance policy. Insurer thus cancelled Employer's insurance policy effective April 16, 2013 based on the non-payment of premiums. Employer thus did not possess Workers' Compensation insurance coverage for Claimant on April 26, 2013.

26. Employer was not insured on April 26, 2013. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act. Claimant is entitled to receive TTD benefits for the period April 27, 2013 until terminated by statute. As of the date of this Order, the period covers 1035 days. Claimant's weekly TTD rate of $769.15 shall be increased by 50%, for a lack of insurance, to a TTD rate of $1,153.84 each week. Multiplying $1,153.84 for a total period of 1035 days or 147.86 weeks yields a total TTD amount of $170,603.49.

27. Claimant's TTD benefits are subject to a SSDI offset in the amount of $755.00 per month since October 1, 2014. For the 17 month period from October 1, 2014 through the date of this Order, the total TTD offset is $12,835.00. Subtracting $12,835 from $170,603.49 equals total TTD benefits of $157,768.49.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might

lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Independent Contractor

4. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." The second prong of §8-40-202(2)(a), C.R.S. as to whether an claimant should be deemed an employee is whether the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011). Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document. The "employer" may also establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

5. A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAP, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is

protected from the “vagaries of involuntary unemployment.” *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011).

6. As found, Employer has failed to prove that it is more probably true than not that Claimant was an independent contractor pursuant to statute or was an employee of Mr. Pate. Initially, on April 21, 2013 Mr. Pate and Claimant completed the job in Granby, Colorado. They cleaned up firewood and other materials. Mr. McKeehan reviewed a picture of the job site, noted his satisfaction with the work and asked Mr. Pate to travel to Chicago to complete additional work supplied by Altisource. Although Mr. McKeehan did not offer any work in Chicago to Claimant, he acquiesced to Claimant’s participation in the Illinois projects. Mr. Pate did not operate a trade or business but simply performed work for Mr. McKeehan and was paid personally. Claimant was simply a co-worker with Mr. Pate who was traveling to Illinois to complete additional assignments.

7. As found, Employer has established some, but not all, of the elements enumerated in §8-40-202(b)(II), C.R.S. For example, Employer demonstrated that it did not provide more than minimal training for Claimant. However, the overwhelming evidence reflects that Claimant was an employee of Employer on April 26, 2013. Claimant did not operate a trade or business and did not complete an independent contractor agreement or any other written document reflecting that he was not an employee. The record reveals that there was no fixed or contract rate of pay based on the completion of a specific project. There was some evidence that Mr. Pate would earn $10,000 for his work in Illinois and that Claimant would receive 50% of the total, but there was no mention that the pay was contingent on the completion of a specific project. Furthermore, Mr. McKeehan acknowledged that Claimant and Mr. Pate had completed work in Granby, CO on April 21, 2013. Moreover, Mr. McKeehan established a quality standard for the completion of projects because he reviewed pictures to ensure that work was satisfactorily completed. He also noted that he loaned a credit card to Mr. Pate so that Mr. Pate could purchase tools and supplies for the projects while traveling to Illinois . Finally, by sending Claimant and Mr. Pate to Illinois to work on Altisource projects for an extended period of time, Claimant was effectively required to work exclusively for Employer.

8. As found, Claimant was not “customarily engaged in an independent trade, occupation, profession or business related to the service performed” during the time he worked for Employer. In fact, while working for Employer, Claimant was not engaged in any independent business. Based on the expectation that he would earn $5,000 while in Illinois for an unspecified time period, Claimant’s income was wholly dependent on his earnings from Employer. Accordingly, Claimant was an employee of Employer on April 26, 2013.

Insurance Coverage

9. Once the existence of a valid insurance contract has been established, the burden is on the insurer to establish that the policy has lapsed. *Butkovich v. ICAO*, 690

P.2d 257, 259 (Colo. App. 1984). It is undisputed that Employer had a Workers' Compensation insurance policy with Insurer prior to April 16, 2013.

10. Employer asserts that Insurer's March 26, 2013 Notice of Cancellation failed to comply with §8-44-110, C.R.S. because it was not sent by certified mail. The procedure for cancelling a workers' compensation policy is established by §8-44-110, C.R.S. The statute provides:

> Every insurance carrier authorized to transact business in this state, including Pinnacol Assurance, which insures employers against liability for compensation under the provisions of articles 40 to 47 of this title, shall notify any employer insured by the carrier or Pinnacol Assurance, and any agent or representative of such employer, if applicable, by certified mail of any cancellation of such employer's insurance coverage. Such notice shall be sent at least thirty days prior to the effective date of the cancellation of the insurance. However, if the cancellation is based on one or more of the following reasons, then such notice may be sent less than thirty days prior to the effective date of the cancellation of the insurance: Fraud, material misrepresentation, nonpayment of premium, or any other reason approved by the commissioner of insurance.

The statute is designed to "afford the insured advance notice of an impending cancellation of insurance so that the insured has an opportunity to avoid non-insured status." *Perez v. Lags Exploration, d/b/a Waterboyz Int'l, LLC*, W.C. Nos. 4-734-913 & 4-734-795 (ICAP, Mar. 23, 2009). Because the policy cancellation was based on Mr. McKeehan's non-payment of premiums, Insurer was permitted to terminate the policy fewer than 30 days prior to the effective date of the cancellation.

11. In *EZ Building Components v. Industrial Claim Appeals Office,* 74 P.3d 516 (Colo. App. 2003), the Colorado Court of Appeals analyzed the specific language of §8-44-110, C.R.S. At the time §8-44-110, C.R.S. required notice of cancellation by certified mail to the Division, employer and insurer. *EZ Building Components,* 74 P.3d at 518. The Court reasoned that substantial compliance with the notice provisions of the statute is sufficient to cancel a Workers' Compensation insurance policy. *Id.* The Court affirmed the final order of the Industrial Claim Appeals Office and concluded that the insurer substantially complied with the notice provision of §8-44-110, C.R.S. when the employer was notified of the policy cancellation by certified mail but there was no evidence that the employer's insurance agent or the Division was also notified by certified mail. *Id.* at 518-19. The Court noted that the existence of a business custom is sufficient to warrant a presumption that notice was sent. *Id.* at 519 The Court explained that there was no evidence that the failure to notify the agent and the Division by certified mail adversely affected the employer's interests. *Id.* at 518.

12. In *Acosta v. Plumbing Co. of Colorado*, W.C. No. 4-732-044 (ICAP, Mar. 9, 2010) ICAP concluded that the record was "sufficient to establish a presumption that the notice of cancellation was mailed to and received by the employer based on the

business custom" of the insurer. Substantial compliance with the notice requirements of the statute was thus sufficient to effect cancellation of the policy. *Id.* Whether Insurer substantially complied with §8-44-110, C.R.S. in cancelling Employer's policy, and whether Mr. McKeehan actually received the Notice of Cancellation, are questions of fact for the ALJ to resolve. *See EZ Building Components,* 74 P.3d at 519.

13. As found, the record reflects that Insurer substantially complied with §8-44-110, C.R.S. in cancelling Employer's Workers' Compensation insurance policy. Initially, on March 27, 2013 Insurer sent a letter dated March 26, 2013 via certified mail to Mr. McKeehan notifying him that his insurance premium was overdue. The letter apprised him that his policy would be canceled on April 16, 2013 unless Insurer received the amount due by April 15, 2013. The Notice of Cancellation was mailed to Mr. McKeehan at 4137 Warbler Drive, Ft. Collins, CO, 80526. Insurer contemporaneously sent a copy of the Notice of Cancellation to Mr. McKeehan's insurance agent.

14. As found, Ms. Isham credibly remarked that Insurer has business customs of sending all notices of cancellation via certified mail and entering the assigned certified mail numbers into Pitney Bowes' electronic equipment. The Pitney Bowes equipment meters and tracks Insurer's mail. Ms. Isham commented that the Pitney Bowes equipment generated a report reflecting that Insurer's March 26, 2013 Notice of Cancellation was mailed to Mr. McKeehan's zip code of 80526 on March 27, 2013 and received on March 28, 2013. The equipment generated a document bearing certified mail number 9171082133393950727893. Finally, a "Delivery Status" confirmation from the United States Postal Service (USPS) also states that tracking number 9171082133393950727893 was delivered. Moreover, Mr. Lease credibly explained that Insurer has a business custom of sending notices of cancellation via certified mail when policyholders fail to timely pay their premiums. He noted that he has never seen Insurer send a notice of cancellation through any method other than certified mail. He detailed that Insurer has a business custom of generating an electronic "notepad entry" when a notice of cancellation is issued and Insurer's underwriting file contains an entry stating that the Notice of Cancellation was sent via certified mail. Mr. Lease further commented that Insurer has a business custom of sending copies of notices of cancellation to the insurance agents of its policyholders and the Notice of Cancellation was mailed to McKeehan's insurance agent. Based on the preceding credible testimony, Insurer has established by a preponderance of the evidence the existence of several business customs that warrant presumptions that the Notice of Cancellation was sent to Mr. McKeehan via certified mail and his insurance agent via regular mail.

15. As found, Mr. Lease noted that Insurer did not receive any premium payments from Mr. McKeehan after mailing the Notice of Cancellation. In fact, Mr. McKeehan agreed that he did not pay any Workers' Compensation insurance premiums during March and April 2013. Furthermore, Mr. McKeehan acknowledged that he knew the policy was cancelled when he first learned of the accident "shortly" after it occurred because he had already received the Notice of Cancellation. Because Employer had an adequate opportunity to avoid non-insured status and any mailing deficiency did not

adverse affect his interests, Insurer substantially complied with §8-44-110, C.R.S. in canceling Employer's Workers' Compensation insurance policy. Insurer thus cancelled Employer's insurance policy effective April 16, 2013 based on the non-payment of premiums. Employer thus did not possess Workers' Compensation insurance coverage for Claimant on April 26, 2013.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

16. Every employer subject to the provisions of the Workers' Compensation Act shall carry workers' compensation insurance. §8-44-101, C.R.S. Section 8-43-408(1), C.R.S. provides that an injured employee's benefits shall be increased by 50% for an employer's failure to comply with the insurance provisions of the Act. If compensation is awarded the Judge shall compute and require the employer to pay a trustee an amount equal to the present value of all unpaid compensation or require the employer to file a bond within 10 days of the order. §8-43-408(2), C.R.S. The term "compensation" refers to disability benefits. *In Re of Shier,* W.C. No. 4-573-910 (ICAP, Dec. 15, 2005). The penalty in §8-43-408(1), C.R.S. is mandatory not discretionary. *See Eachus v. Cooper*, 738 P.2d 383, 386 (Colo. App. 1986) (noting that "courts have no discretion in imposing the penalty").

17. As found, Employer was not insured on April 26, 2013. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act. Claimant is entitled to receive TTD benefits for the period April 27, 2013 until terminated by statute. As of the date of this Order, the period covers 1035 days. Claimant's weekly TTD rate of $769.15 shall be increased by 50%, for a lack of insurance, to a TTD rate of $1,153.84 each week. Multiplying $1,153.84 for a total period of 1035 days or 147.86 weeks yields a total TTD amount of $170,603.49.

18. As found, Claimant's TTD benefits are subject to a SSDI offset in the amount of $755.00 per month since October 1, 2014. For the 17 month period from October 1, 2014 through the date of this Order, the total TTD offset is $12,835.00. Subtracting $12,835 from $170,603.49 equals total TTD benefits of $157,768.49.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable industrial injuries during the course and scope of his employment with Employer on April 26, 2013.

2. Claimant worked for Employer as an employee not an independent contractor.

3. Insurer substantially complied with §8-44-110, C.R.S. in cancelling its Workers' Compensation insurance policy with Employer effective April 16, 2013.

4. Employer is financially liable for Claimant's reasonable and necessary medical treatment that is designed to cure or relieve the effects of his April 26, 2013 industrial injuries. Claimant suffered extensive brain injuries during the motor vehicle accident, he required the appointment of a conservator and guardian and he has received home healthcare. A conservative estimate of his medical expenses is $1,000,000.

5. Claimant earned an AWW of $1,153.84.

6. Employer shall pay Claimant total TTD benefits in the amount of $157,768.49..

In lieu of payment of the above compensation and benefits to Claimant, Employer shall:

a. Deposit the sum of $1,157,768.49 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, Attn: Sue Sobolik, Special Funds Unit, 633 17th St, Suite 900, Denver, CO, 80202, or

b. File a bond in the sum of $1,157,768.49 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Employer shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

7. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: February 25, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

- Whether claimant has proven by a preponderance of the evidence that his claim should be reopened pursuant to Section 8-43-303, C.R.S.?

- If claimant has proven by a preponderance of the evidence that his claim should be reopened, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury?

- If claimant has proven by a preponderance of the evidence that his claim should be reopened, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits for the period of March 29, 2015 through August 12, 2015?

FINDINGS OF FACT

1. Claimant is employed by employer as an over the road truck driver. Claimant testified he sustained a work injury on July 30, 2013 when he was run off the road in Barstow, California. Claimant testified he injured his left shoulder and left foot in the injury.

2. Claimant was initially seen at the emergency room ("ER") in Barstow on July 31, 2013. Claimant underwent x-rays of his left shoulder but did not seek treatment for his left foot. Claimant testified at hearing that three days after the injury, his toes on his left foot began popping, cracking with associated pain.

3. Claimant began treating with Dr. Klein after returning home. Dr. Klein examined claimant on August 5, 2013 and noted that in addition to his shoulder injury, claimant had mild tenderness of his left tibia with bruising. Claimant reported he was able to fully bear weight on the left leg. Claimant returned to Dr. Klein on August 14, 2013 and reported he got his foot jammed into the floorboards in the accident. Claimant was reporting pain in his left foot, including cracking and popping. Dr. Klein noted that the pain appeared to be coming from claimant's existing hammertoes and opined that he did not see enough evidence of injury on exam to warrant this problem related to his workers' compensation claim.

4. Dr. Klein saw claimant on August 20, 2013 and noted that while claimant reported his shoulder was still hurting, he was much improved. Dr. Klein also noted claimant complaining of left foot pain, but reported that this had resolved. Claimant continued to treat with Dr. Klein for his shoulder injury, but was not actively getting treatment to his left foot.

5. Claimant eventually underwent shoulder surgery under the auspices of Dr. Luker on January 30, 2014.

6. Records indicate claimant was complaining of losing both of his great toenails on May 21, 2014 after changing shoes. Claimant also had a sore on the medial aspect of his first metatarsal joint which was noted to be a diabetic foot ulcer.

7. Claimant eventually got placed at maximum medical improvement ("MMI") by Dr. Klein on June 23, 2014 with a permanent impairment rating of 17% of the upper extremity. A final admission of liability ("FAL") admitting for the impairment rating on July 10, 2014. No objection to the FAL was filed and claimant's case was closed as a matter of law.

8. Claimant returned to Dr. Klein on October 13, 2014 with continued complaints involving the left shoulder. Dr. Klein provided claimant with a Kenalog injection into his left shoulder. Claimant did not complain to Dr. Klein of issues with his toes according to the medical report.

9. Claimant returned to Dr. Klein on February 24, 2015 with complaints of an ulcer on his left 4th toe. Claimant noted he had a "corn" on the top of the toe that rubbed off and was sore and within a few days, he noted some purulent drainage. Dr. Klein referred claimant to Dr. Griffiths.

10. Claimant was examined by Dr. Griffiths on February 26, 2015. Claimant reported to Dr. Griffiths that he had issues with his left foot since a rollover truck accident on June 30, 2013 when his left foot was pinned under the brake pedal. Claimant noted he had some black and blue changes to the foot and some swelling. Dr. Griffiths obtained x-rays of the foot and noted that the third, fourth and fifth metatarsals have been fractured consistent with claimant's subjective history of injury. Dr. Griffiths further noted that the toes appear to be well healed. Dr. Griffiths recommended continued conservative care, but noted claimant may at some point require surgical reduction of the dislocated metatarsophalangeal joints ("MTPJ's) and the rigid hammertoes.

11. Claimant returned to Dr. Griffiths on March 5, 2015 and noted that his foot was significantly improved. However, when claimant returned on March 30, 2015, it was noted that claimant had developed an infection in his left foot. Dr. Griffiths performed debridement of the heperkeratotic lesion and ulceration plantar right (sic) foot.

12. Claimant returned to Dr. Griffiths on April 1, 2015 and was diagnosed with a diabetic foot infection with localized infection/abscess of the left forefoot. Dr. Griffiths recommended a simple aspiration incision and drainage. Claimant agreed with the surgical recommendation and the incision and drainage was performed. Claimant continued to follow up with Dr. Griffiths following the incision and drainage. Dr. Griffiths also referred claimant to Dr. Lockwood.

13. Claimant was examined by Dr. Lockwood on April 22, 2015. Dr. Lockwood noted claimant has a long history of diabetes and hyperlipidemia. Dr. Lockwood indicated claimant had a problem that developed in early February 2015 when he removed a corn from his foot and ultimately developed ulcers on his feet. Dr. Lockwood diagnosed claimant with osteomyeltis and noted claimant's diabetes was under poor control. Dr. Lockwood noted cultures are showing strep dysgalactae and opined that oral antibiotics were not going to be sufficient in claimant's case. Dr. Lockwood therefore recommended intravaneous antibiotics.

14. Claimant returned to Dr. Griffiths on May 19, 2015. Dr. Griffiths noted that there were some questions regarding the cause of his dislocated MTPJ's. Dr. Griffiths noted claimant sustained an accident previously with obvious trauma at the metatarsal shafts that were confirmed on the MRI evaluation. Dr. Griffiths noted that it was probable that the accident led to the malalignment of the metatarsals and subsequent dislocation of the metatarsophalangeal joints and hammertoe deformities. Dr. Griffiths noted that claimant did not have clinical dislocation of the MTPJ's on the contralateral (right) foot.

15. Claimant underwent pan metatarsal head resection and hammertoe corrective surgery on or about May 27, 2015. Claimant followed up with Dr. Griffiths on June 1, 2015 and reported he was doing quite well.

16. Claimant was referred for an independent medical examination ("IME") with Dr. Hughes on June 29, 2015. Dr. Hughes reviewed claimant's medical records, obtained a medical history and performed a physical examination of claimant in connection with his IME. Dr. Hughes noted that x-rays were interpreted by Dr. Griffiths as showing dislocated 2nd, 3rd, and 4th metatarsophalangeal joints along with well-healed-appearing fractures involving the 3rd, 4th and 5th metatarsals "consistent with his subjective history of injury." Dr. Hughes opined that claimant's infectious cascade of events leading to his surgery of May 27, 2015 was initiated by the motor vehicle accident of July 30, 2013. Dr. Hughes opined that claimant was not at MMI and recommended addition treatment including rehabilitation and reconditioning.

17. Claimant underwent an IME with Dr. Lindberg at the request of respondents on September 1, 2015. Dr. Lindberg reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with the IME. Dr. Lindberg noted claimant reported to him that he had pain in his foot the entire time since the accident. Claimant reported to Dr. Lindberg that he had had hammertoes prior to his accident but that the cracking and popping seemed to occur after the accident.

18. Dr. Lindberg diagnosed claimant with hammertoe deformities and diabetic neuropathy and a current active diabetic ulcer on the dorsal aspect of his right 4th toe. Dr. Lindberg opined that the hammertoe deformities and/or dislocations of the MTP joints were a natural progression of severe hammertoes and not related to his motor vehicle accident. Dr. Lindberg noted that the same pathology can been seen happening on claimant's right foot, albeit at a different stage.

19. Dr. Lindberg testified by deposition in this matter. Dr. Lindberg testified consistent with his IME report. Dr. Lindberg testified that following claimant's accident he was evaluated by various providers and there was no comment about any ecchymosis or selling that extended down into the foot. Dr. Lindberg also noted that claimant, on examination, had significant hammertoe development on his right foot, which would have been unaffected by the injury. Dr. Lindberg testified that if hammertoes are left unchecked, many times they end up dislocating.

20. Dr. Klein issued a report on September 24, 2015 to clarify his opinion in this case. Dr. Klein noted that claimant's hammertoes could make toe dislocations difficult to detect without an x-ray and claimant did not get an x-ray following his work injury of his left foot. Dr. Klein opined in this report that it was his opining that it was more likely than not that the accident on July 30, 2013 caused the claimant's dislocations or at a minimum disrupted/aggravated a pre-existing pathology.

21. Dr. Klein testified at hearing in this matter. Dr. Klein testified that prior to claimant's motor vehicle accident he had uncontrolled diabetes and hammertoes. Dr. Klein acknowledged that claimant denied left foot pain when he was seen in the emergency room on July 30, 2013. Dr. Klein testified that to go from a hammertoe without dislocation to a hammertoe with a dislocation, it would take only a small amount of trauma.

22. Dr. Klein testified that on August 5, 2013 when he examined claimant, claimant did not have problems weight bearing. Dr. Klein testified that on August 14, 2013 he examined claimant's left foot and believed at that time that claimant's left foot problems were not related to the motor vehicle accident. Dr. Klein testified that by August 20, 2013, claimant's foot seemed to have gotten better. Dr. Klein testified that there was no indication that claimant had dislocated his toes prior to being placed at MMI.

23. Dr. Klein testified that although Dr. Griffiths had indicated that there was "obvious trauma" to his foot after the motor vehicle accident, Dr. Klein noted that there was no obvious trauma to claimant's foot.

24. Dr. Klein testified that it was his opinion that claimant's injury in this case predisposed claimant to have a problem with his foot. Dr. Klein testified that his opinion expressed in the September 24, 2015 letter had not changed during the hearing.

25. The ALJ credits the opinions expressed by Dr. Lindberg in his report and testimony over the contrary opinions expressed by Dr. Klein, Dr. Hughes and Dr. Griffiths and finds that claimant has failed to prove that it is more likely than not that his medical treatment for his left foot are related to the work injury of July 30, 2013. The ALJ notes that claimant did not present with obvious trauma to the foot following the motor vehicle accident and did not immediately complain of any problems with his left foot. The ALJ further credits Dr. Lindberg's testimony that if claimant had dislocated his toes associated with the motor vehicle accident, he would have presented with some symptoms related to that dislocation immediately following the incident.

26. In this case, claimant didn't complain of pain in his left foot at the ER following the accident. Additionally, when claimant was examined by Dr. Klein on August 5, 2013, claimant was noted to have ecchymosis on his left anterior tibia and left anterior thigh, but no bruising was noted in claimant's left foot. Claimant displayed no pain with weight bearing on this examination.

27. The ALJ notes that Dr. Griffiths' statement that claimant's dislocations and well-healed fractures that were associated with claimant's subjective history relies, at least in part, on the incorrect history that claimant "had some black and blue changes to the foot and some swelling." This history is simply not reflected in the medical records and was disputed by Dr. Klein in his testimony at hearing. Moreover, this history is likewise recited by Dr. Hughes in his IME report and was likely relied upon, to some degree, in formulating Dr. Hughes' opinion in this case.

28. When claimant returned to Dr. Klein on August 14, 2013, he did complain of some problems with his left foot, but those issues were noted by Dr. Klein to have resolved by claimant's next visit on August 20, 2013.

29. Based on the evidence presented that ALJ can not indicate that claimant has demonstrated that it is more likely than not that the medical treatment provided by Dr. Griffiths and Dr. Lockwood in February 2015 is related to the July 30, 2013 work injury. As such, claimant's request to have his claim reopened must be denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of error, mistake or a change in condition. Section 8-43-303(1), C.R.S. When considering whether the claim should be reopened based on a mistake, the ALJ must determine whether a mistake was made, and if so, whether it is the type of mistake which justifies reopening the case. *See Travelers Insurance Co. v. Industrial Commission*, 646 P.2d 399 (Colo. App. 1981). A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4).

4. As found, claimant has failed to prove by a preponderance of the evidence that his claim should be reopened based on either a mistake or a worsening of his condition. Due to the fact that claimant has failed to meet this burden of proof, claimant's request to have his case reopened is denied.

ORDER

It is therefore ordered that:

1. Claimant's request to have his claim reopened is hereby DENIED.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 2, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

The issues presented were:

1. Has the claimant established by a preponderance of the evidence that he maintained concurrent employment at the time of the industrial injury;

2. If so, has the claimant established by a preponderance of the evidence what his average weekly wage is as a result of such concurrent employment; and,

3. If so, has the claimant established by a preponderance of the evidence that his temporary total disability benefits and his permanent partial disability benefits require adjustment related to the concurrent employment and wages.

FINDINGS OF FACT

1. The claimant was injured on the job on September 9, 2013 while working for the respondent-employer. The respondent-insurer has admitted this injury as evidenced by the Final Admission of Liability dated August 14, 2015.

2. The claimant, acting as a home health CNA, was wheeling a patient out the patient's front door. The wheelchair tipped over, the claimant fell over it and the patient landed on top of the claimant severely injuring the claimant's right shoulder.

3. The claimant's injury required him to undergo surgery on his right shoulder.

4. Due to his shoulder injury, the claimant was unable to work for the respondent-employer from September 10, 2013 through June 15, 2014, the date of maximum medical improvement, and the respondent-insurer admitted to temporary total disability benefits for that period.

5. At the time of the work related injury the claimant was working concurrent employment as a home health care CNA for Primary Home Health Care, doing the same job duties with similar physical requirements.

6. Following the job related injury at the respondent-employer, the claimant was unable to perform his job duties with Primary Home Health Care as a result of those injuries and did not work from September 10, 2013 through June 15, 2014.

7. The claimant's wages for Primary Home Health Care for the period of May 19, 2013 to August 24, 2013, a 12 week period of time prior to the injury, was $3,328.71. The ALJ finds that this amounts to an average weekly wage from the concurrent employer of $277.39.

8. The ALJ finds the claimant's testimony of concurrent employment and wages to be credible.

9. At hearing the respondents stipulated that the average weekly wage with the respondent-employer was $145.86 with a temporary total disability rate of $97.24.

10. As the result of the injury of September 9, 2013, the claimant suffered a wage loss from the respondent-employer and Primary Home Health Care.

11. The admission by the respondent-insurer for the wages lost solely at the respondent-employer does not fairly compute the average weekly wage of the claimant.

12. The fair determination of the claimant's average weekly wage includes his average wage earned in his concurrent employment with Primary Home Health Care. The average weekly wage with the respondent-employer of $145.86 plus the average weekly wage with Primary Home Health Care of $277.39 yields a total average weekly wage of $423.25. The revised temporary total disability rate is $282.17.

13. The ALJ finds that the claimant has established that it is more likely than not that he suffered a wage loss as a result of his industrial injury that includes the wages lost from his concurrent employer Primary Home Health Care.

14. The ALJ finds that the claimant has established that it is more likely than not that his total AWW is $423.25 per week.

15. The ALJ finds that the claimant has established that it is more likely than not that his TTD and his PPD benefits require adjustment based upon his correct AWW.

CONCLUSIONS OF LAW

1. The ALJ has great discretion in calculating AWW. Further, discretionary authority is granted to the division of labor to utilize an alternative method of computing an AWW if concurrent employments exist. *Coleman v. National Produce Service,* W. C. No. 4-601-676 (July 12, 2005). There is nothing specific in the Act which mandates wages from concurrent employment be included in the AWW. *Miranda v. ISS Prudential Services, Inc. and/or Denver Public Schools,* W.C. 3-833-976, 3-908-234 and 4-105-113 (February 28, 1994). There is no *ipso facto* rule requiring the ALJ to include wages from concurrent employments. *Sanchez v. Pueblo Medical Investors,* W.C. No. 3-942-960 (December 14, 1998).

2. Where the claimant holds two concurrent employments at the time of the injury, the ALJ has discretion to calculate the AWW so as to include the total income from the multiple employments. The basic objective when calculating the AWW is to arrive at a "fair approximation of the claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993).

3. Colorado Revised Statutes, Section 8-42-102(3) grants the Administrative Law Judge discretion in fairly determining an employee's average weekly wage. Where an injury impairs a claimant's ability to earn from concurrent employment, a "fair" computation of the average weekly wage may warrant inclusion of all such wages. *Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988); *Broadmoor Insurance Co. v. Industrial Claim Appeals Office*, 939 P.2d 460 (Colo. App. 1966).

4. The ALJ exercises this discretion and determines that the concurrent wages of the claimant at the time of the injury should be combined to determine a fair average weekly wage.

5. The ALJ concludes that the claimant has established by a preponderance of the evidence that he suffered a wage loss as a result of his industrial injury that includes the wages lost from his concurrent employer_Primary Home Health Care.

6. The ALJ concludes that the claimant has established by a preponderance of the evidence that the average weekly wage with the respondent-employer of $145.86 plus the average weekly wage with Primary Home Health Care of $277.39 yields a total average weekly wage of $423.25, with a revised temporary total disability rate is $282.17.

7. The ALJ concludes that the claimant has established by a preponderance of the evidence that the claimant's TTD and PPD benefits require adjustment based upon his correct AWW.

ORDER

It is therefore ordered that:

1. The claimant's concurrent employment requires adjustment of his average weekly wage.

2. The claimant's average weekly wage is $423.25.

3. The respondent-insurer shall adjust the claimant's permanent partial disability payments to reflect this higher AWW.

4. The respondent-insurer shall adjust the claimant's temporary total disability payments to reflect this higher AWW.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: February 4, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

➢ Whether claimant has proven by a preponderance of the evidence that the right knee replace surgery recommended by Dr. Heil is reasonable and necessary medical treatment related to claimant's September 6, 2013 industrial injury?

➢ Whether claimant has proven by a preponderance of the evidence that the right hip arthrogram recommended by Dr. Heil is reasonable and necessary medical treatment related to claimant's September 6, 2013 industrial injury?

FINDINGS OF FACT

The first two findings of fact are taken from the April 27, 2015 findings of fact issued by the court and are recited here pursuant to a stipulation entered into at the hearing regarding the facts surrounding claimant's September 6, 2013 workers' compensation injury.

1. Claimant was employed as a heavy equipment operator for employer. Claimant is a 53 year old female who sustained an admitted injury on September 6, 2013 in the course and scope of her employment with employer. Claimant testified at hearing she was driving heavy equipment on an off-road pipeline project in western Colorado. Claimant testified that at the time of the injury she had been driving heavy equipment for approximately 13 years for various employers.

2. Claimant testified that on the date of the injury she was operating a water pole truck. Claimant testified that while working on the pipeline project there was a waterway that needed to be crossed and that because of the steepness of the grade near the bridge over the waterway, the water pole truck could not drive over it independently. Claimant testified that she and her co-workers had a "tailgate meeting" where it was discussed how the water pole could be towed across the bridge. It was decided that a side boom, a tractor-like piece of equipment used to lower large sections of pipe into trenches, would tow claimant's water pole slowly down the slope and then up and over the bridge. Claimant testified that once the side boom started towing her water pole down the slope, the side boom was traveling faster than was agreed upon. Claimant testified she attempted to slow her water pole, but that the front of her water pole collided with the rear of the side boom when the two vehicles reached the bottom of the slope. Claimant testified that she was restrained in a seatbelt, but that when the two vehicles collided, she was tossed about in the cab of the water pole. Claimant testified that several parts of her body, including her knees, hit the metal front dash and the metal box around the vehicle's steering column. Claimant testified that the force of the impact knocked off a weight that was attached to the side boom.

3. Following the injury, claimant was evaluated at St. Mary's Hospital Emergency Room ("ER"). Claimant noted she had a lap belt restraint on and hit the steering wheel with her knees, abdomen and chest. Claimant complained of pain to her left knee with bruising to the prepatellar area and the medial aspect with some swelling. Claimant also complained of a knot to her right prepatellar knee, but only minimal discomfort. Claimant was diagnosed with multiple contusions with an acute cervical strain and provided with medications.

4. Claimant sought care following her work injury with Work Partners. Claimant was evaluated by PA-C Herrera on September 30, 2013 and complained of low back pain, neck pain, left knee pain and right knee pain. PA Herrera noted claimant's knees had no ecchymosis or bony deformity and no effusion. Claimant was diagnosed with a cervical spine strain, a lumbar spine sprain, and bilateral knee contusions.

5. Claimant continued to follow up with Ms. Herrera for complaints involving her right knee and low back. On October 14, 2013, Ms. Herrera recommended claimant undergo a magnetic resonance image ("MRI") of the right knee. Claimant eventually underwent the right knee MRI on November 11, 2013. The MRI showed articular disease in the central patella, deep patellar groove, and in the medial and lateral joint compartment. The MRI also noted there was mild fragmentation and probably a small radial tear at the central tip in the middle third of the medial meniscus.

6. Claimant came under the care of Dr. Stagg on December 23, 2013. Dr. Stagg noted claimant presented with complaints of neck pain, low back pain and bilateral knee pain. Dr. Stagg reviewed claimant's MRI results and referred claimant to Dr. Reeder and Dr. Clifford at Rocky Mountain Orthopaedic Associates for further evaluation.

7. Claimant underwent an MRI of her left knee on January 3, 2014. The left knee MRI showed severe tricompartmental degenerative changes, especially medially.

8. Claimant was evaluated by Dr. Reeder on January 6, 2014. Dr. Reeder noted claimant's accident history that involved being in a heavy equipment collision causing claimant to hit the metal column in front of her with both knees. Dr. Reeder noted that although claimant's left knee was more symptomatic, her right knee had anterior and lateral diffuse pain symptoms and was worse with kneeling, bending, and squatting. Dr. Reeder noted that with regard to claimant's left knee, her pain was mostly medially to some anterior pain and was very painful with any pressure. Dr. Reeder recommended claimant undergo an injection to her right knee. Dr. Reeder noted that with regard to claimant's left knee, he felt she had an exacerbation of her underlying arthritis. Claimant indicated she would like to undergo an injection for her left knee as well.

9. Claimant underwent a cortisone injection into her right knee on February 19, 2014. Claimant ultimately reported that she had pain relief following the injection for

only 48 hours. Claimant returned to Dr. Reeder on March 27, 2014 and noted that she had burning pain in her right knee, mostly in the distal patellar area with some medial discomfort. Dr. Reeder referred claimant to Dr. Heil for surgical consultation.

10. Claimant was initially evaluated by Dr. Heil on April 16, 2014. Dr. Heil noted that claimant reported that her left knee was worse than her right knee. Dr. Heil also noted claimant's ongoing complaints of right hip pain. Dr. Heil noted that claimant had x-rays in January 2014 that showed right knee tricompartmental arthritis and left knee more medial and patellofemoral compartment arthritis. Dr. Heil noted that the injections had not really helped with claimant's symptoms. Dr. Heil noted that about the only option claimant had left was a total knee arthroplasty on her left knee. Dr. Heil recommended claimant obtain an MRI of her right hip to make sure there was not an injury to her abductor muscles.

11. Claimant eventually underwent the left total knee replacement surgery on June 9, 2015.

12. Following the surgery, claimant continued to follow up with her treating physicians, including Dr. Heil, Dr. Price and Dr. Stagg. Claimant's treatment included not only her knees but also her neck and back issues as well.

13. Claimant returned to Dr. Heil on July 16, 2015. Dr. Heil noted claimant was doing okay following her surgery and the focus at this point was to wean her off her main medications. Claimant was again evaluated by Dr. Heil in follow up after her surgery on August 6, 2015. Dr. Heil noted that while claimant's left knee range of motion was improving, she was still having significant right knee pain. Dr. Heil noted that her x-rays had shown near bone on bone changes in the medial compartment of her right knee along with patellofemoral arthritis. Dr. Heil noted that heading in the direction of getting the right knee replaced would make sense based on her overall symptoms.

14. Claimant was examined by Dr. Price on September 1, 2015. Dr. Price noted claimant was doing a little better from her left knee surgery and was happy with the results. Dr. Price noted claimant was mostly having low back pain. Dr. Price diagnosed claimant with a pain disorder.

15. Claimant returned to Dr. Clifford on September 2, 2015 with complaints of low back pain and left greater than right leg pain. Dr. Clifford noted claimant's treatment had included injections, epidural steroid injections, perifacet injection and an electromyelogram ("EMG") that did not show obvious evidence of a nerve injury.

16. Claimant was evaluated by Dr. Heil on September 17, 2015. Dr. Heil noted claimant was doing well after her total left knee replacement. Dr. Heil noted claimant was using a cane, but this was for her right knee condition. Dr. Heil noted claimant also had pain in her right hip and recommended an MR Arthrogram of the right

hip to determine if there was something that they could do for her right hip. Dr. Heil noted that the prior MRI of the right hip was normal.

17. Dr. Heil referred claimant for additional weight bearing x-rays of the right knee on November 2, 2015. Dr. Heil noted that the x-rays showed narrowing of the medial compartment of the right knee. Dr. Heil noted claimant had osteoarthritis and post-traumatic arthritis of the right knee and opined that claimant's knees were related to her work-related injury. Dr. Heil noted that claimant's symptoms and treatment were well documented in Dr. Reeder's notes from the initial visit. Dr. Reeder further opined that obtaining an MRI arthrogram of claimant's right hip would be appropriate given her complaints of right hip pain.

18. Dr. Price testified at hearing in this matter. Dr. Price testified that while she felt the left knee replacement surgery was related to her September 6, 2013 work injury, Dr. Price did not believe claimant's right knee replacement surgery was related to the work injury. Dr. Price testified that she believed the left knee surgery was related to her work injury because claimant had objective evidence of an injury to her left knee in that she had a bruise to her left knee after the work injury. However, the records document claimant having objective evidence of an injury to her right knee after the injury as well, in that claimant was noted to have a knot on her right prepatellar knee in the ER record.

19. Dr. Price testified that she was concerned that the proposed right knee replacement surgery could make claimant worse. Dr. Price testified that claimant should undergo more conservative care, including physical therapy and exercise as opposed to the recommended knee replacement surgery.

20. Claimant testified at hearing that prior to her accident on September 6, 2013, she did not have right hip pain and never received medical treatment for her right hip. Claimant testified that following her injury, she has experienced pain in her right hip and would like to undergo a right hip arthrogram to determine if there is any medical treatment that could alleviate her ongoing pain involving her right hip.

21. Claimant testified that following the injury she now has constant right knee pain and that on occasion, her right knee will give out on her. Claimant testified that she would like to undergo the right total knee replacement recommended by Dr. Heil as it was her understanding that the surgery could provide her with pain relief and more stability and mobility involving her right knee.

22. The ALJ credits the testimony of claimant at hearing along with the medical records and reports from Dr. Heil and finds that claimant has demonstrated that it is more probable than not that the recommended right knee arthroplasty proposed by Dr. Heil is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

23. The ALJ notes that claimant has consistently complained of right knee pain following her September 6, 2013 work injury for which she has been under active medical care. The ALJ credits the opinions expressed by Dr. Heil after reviewing claimant's x-rays that the total knee replacement surgery is reasonable and necessary to cure and relieve claimant from the effects of the work injury. The ALJ determines that claimant's testimony and the medical opinions of Dr. Heil establish that it is more likely than not that the work related injury on September 6, 2014 aggravated, accelerated or combined with claimant's pre-existing condition to produce the need for treatment recommended by Dr. Heil.

24. The ALJ credits the testimony of claimant at hearing along with the medical records and reports from Dr. Heil and finds that claimant has demonstrated that it is more probable than not that the recommended right hip MR Arthrogran proposed by Dr. Heil is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. The ALJ finds claimant's testimony regarding the onset of symptoms in her right hip to be credible and supported by the medical records entered into evidence. The ALJ finds the reports of Dr. Heil credible that the proposed MR Arthrogram is necessary to determine if there is underlying damage related to the work injury that can be treated and relieve the ongoing symptoms claimant continues to experience in her right hip.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2013. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has proven by a preponderance of the evidence that the proposed medical treatment recommended by Dr. Heil including the right total knee arthroplasty and the right hip MR Arthrogram are reasonable and necessary medical treatment related to the industrial injury. As found, claimant's testimony and the medical opinions of Dr. Heil establish by a preponderance of the evidence that claimant's right knee condition necessitating the right knee total arthroplasty are a result of the work related injury that aggravated, accelerated or combined with claimant's pre-existing condition to produce the need for treatment.

ORDER

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the September 6, 2013 work injury including the total right knee arthroplasy recommended by Dr. Heil and the right hip MR Arthrogram recommended by Dr. Heil pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 19, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-941-297-02

STIPULATION

The parties stipulated to hold the issue of Permanent Total Disability benefits in abeyance pending resolution of the issue of Maximum Medical Improvement.

ISSUES

- Whether Respondent has overcome the Division IME physician's opinions on Maximum Medical Improvement by clear and convincing evidence.
- Whether Respondent has overcome the Division IME physician's opinion on permanent impairment by clear and convincing evidence.
- Whether Respondent has proven Claimant's Average Weekly Wage by a preponderance of the evidence.
- Whether Claimant has proven entitlement to temporary disability benefits by a preponderance of the evidence.
- Whether Claimant has proven entitlement to disfigurement benefits, and if so, in what amount.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On January 26, 2014, Claimant was removing a loaded pallet from a semi-truck when the top of the pallet load shifted, broke loose and slid towards Claimant, striking Claimant in the left side of the head.

2. Claimant was taken by ambulance to the Medical Center of Aurora (MCA). Records from the ambulance service provide that Claimant sustained a brief loss of consciousness and that "Neuros checked and were normal."

3. MCA's triage notes state, "Bystanders state loss of consciousness 30-60 seconds." Medical staff performed CT scans of Claimant's thoracic spine, brain, and cervical spine, and x-rays of his lumbar spine. All were read as negative and the brain CT revealed no intra cranial hemorrhage or acute process. At discharge, MCA provided Claimant with information regarding head injuries which provided in part, "You suffered an injury to the head. At this time it does not appear to have caused a concussion." Claimant was specifically advised to return to the emergency department if he had, among other things, severe headaches, confusion, or trouble remembering things. Claimant did not return to the emergency department.

4. On January 27, 2014, Claimant presented to Hiep Ritzer, M.D., for an initial evaluation. Dr. Ritzer documented that Claimant's "Chief Complaint" was "head, neck and back pain and right hand pain." Claimant also completed a pain diagram documenting complaints of pain in the area of his left eye, the front and back of his neck, bilateral shoulders and entire back area. Dr. Ritzer's assessment was head contusion, thoracic and back contusion and right hand contusion. Dr. Ritzer is Claimant's ATP and oversees Claimant's treatment and referrals.

5. After numerous diagnostic tests and treatments including two surgeries, Dr. Ritzer placed Claimant at maximum medical improvement (MMI) on January 29, 2015. Dr. Ritzer rated Claimant for the following impairments: 5% upper extremity for loss of range of motion in the left shoulder, and 14% upper extremity for loss of range of motion in the right shoulder. Combined and converted, this equalled an 11% whole person impairment. Dr. Ritzer placed Claimant on permanent work restrictions and provided for limited maintenance care. Respondents filed a final admission of liability (FAL) based on Dr. Ritzer's report.

6. Claimant objected to the FAL and pursued a Division sponsored independent medical examination (DIME). Dr. Lynn Parry performed the DIME on May 28, 2015. Dr. Parry found Claimant not to be at MMI. She rated Claimant's bilateral shoulder impairment at 16% whole person. In addition, she gave Claimant a 17% whole person psychological impairment rating, and also gave him a cervical spine impairment rating of 13% whole person. Dr. Parry's final combined rating was 39% whole person.

Neck Pain

7. Dr. Ritzer saw Claimant eight times between January 30, 2014 and April 30, 2014, each time documenting a "Chief Complaint" of neck pain. However, Claimant's pain diagrams on each of those visits documented only bilateral shoulder pain without any notation by Claimant of neck pain. In addition, Dr. Ritzer's notes of February 7, 2014 specify, "His neck is nonpainful." As a result of Claimant no longer complaining of neck pain, Dr. Ritzer stopped documenting neck pain in Claimant's "Chief Complaint" after April 30, 2014. Dr. Ritzer dies not document neck pain again until November 6, 2014. Dr. Ritzer determined that Claimant's November neck pain is not work related, but rather is attributable to Claimant's sleep position. Although Dr Ritzer ordered a cervical spine MRI on July 21, 2014, it was to assess whether Claimant's continued right shoulder pain was referred pain from the cervical spine, and not because Claimant complained of neck pain. Further, although cervical spine MRI showed some pathology, the findings were deemed not work related by Dr. Ritzer and were not producing any symptoms.

8. Dr. Ritzer referred Claimant to Rudy Kovachevich for bilateral shoulder pain. Because Claimant did not improve with more conservative care, on March 21, 2014, Dr. Kovachevich performed a right shoulder rotator cuff repair. Claimant continued to complain of pain in his right shoulder following surgery and a repeat MRI on July 21, 2014, documented recurrent rotator cuff tear. On August 15, 2014, Dr. Kovachevich performed repeat rotator cuff repair surgery. Claimant attended twenty-

five appointments with Dr. Kovachevich between February 24, 2014, and March 17, 2015, and Dr. Kovachevich did not document any complaints of neck pain in any of those office visits.

9. From May 14, 2014, through October 30, 2014, Dr. Ritzer saw Claimant an additional seventeen times. At no time during any of those visits did Claimant mark that he was experiencing neck pain on his pain diagrams and at no time during any of those visits did Dr. Ritzer document neck pain in Claimant's subjective complaints, "Chief Complaint," or assessment.

10. Claimant's pain diagram for the visit with Dr. Ritzer on June 16, 2016, circled his entire head. During that visit Dr. Ritzer documented that Claimant was "quite 'snappy and angry' at work … tearful. Loses his patience at work … losing his appetite 'sick to his stomach.'" During that appointment Dr. Ritzer had Claimant call Dr. Dworetsky's office to discuss Claimant's depressive symptoms. Nowhere in Claimant's complaints to Dr. Ritzer or in his pain diagram did Claimant indicate neck pain, and the visit clearly focused on Claimant's psychological status. Pain diagrams on July 31, 2014, and August 7, 2014, again show that Claimant circled his entire head. Dr. Ritzer's report of August 7, 2014, states that "[o]n the pain diagram, he is circling his head. States he is making 'wrong' decisions. Recently fired his lawyer, and states he is making wrong decisions while driving." Thus, on questioning from Dr. Ritzer about the meaning of circling his entire head on the pain diagram, Claimant responded by complaining of psychological issues, not neck pain. Context makes clear that by circling his entire head on the pain diagram, Claimant was complaining of psychological issues and not neck pain.

11. Dr. Ritzer referred Claimant to Yusuke Wakeshima, M.D., a pain medicine physician, specifically to address Claimant's pain complaints. Dr. Wakeshima's Initial Comprehensive Medical Consultation dated June 24, 2014, specifically documented that Claimant reported right shoulder region pain but "denies any neck pain." Dr. Wakeshima documented a physical examination of the cervical spine which had "no tenderness to palpation about the cervical paraspinal musculature, upper trapezius, and levator scapula. There was no tenderness to palpation about the periscapular muscle region." In addition, Dr. Wakeshima documented that he performed a Spurling's maneuver. During this maneuver Dr. Wakeshima rotated Claimant's head to one side, hyperextended and flexed his neck, and then applied pressure to the forehead. Dr. Allison Fall, who performed a Respondent sponsored independent medical examination (IME) of Claimant, testified that if Claimant had neck pain this maneuver would have elicited complaints of pain. However, Dr. Wakeshima's report documents no complaints of neck pain despite the pressure applied to Claimant's neck during the maneuver. Given that Claimant

- specifically denied neck pain when asked by Dr. Wakeshima,
- Dr. Wakeshima performed a detailed examination of the neck and cervical spine without documenting any complaints of pain, and

- Claimant did not complain of neck pain during the Spurling's maneuver,

it is highly probable and free from serious or substantial doubt that Claimant was not experiencing neck pain when examined by Dr. Wakeshima.

12. William Beaver, MA, LPC, performed seven sessions of psychophysiology/biofeedback therapy from July 7, 2014, through August 25, 2014. A purpose of the biofeedback therapy was to increase Claimant's ability to recognize and decrease muscle tension levels and to assist Claimant with improving his pain management and stress management skills. Therefore, it would have been important for Mr. Beaver to document the areas where Claimant was having pain in order to focus treatment on those areas and to measure progress. On each visit Claimant reported his areas of pain to Mr. Beaver, and there is no mention of any complaints of neck pain. On each visit Mr. Beaver marked the ICD-9 codes for headache, shoulder pain, and arm pain, but did not mark the ICD-9 code for neck pain. Claimant did not complain of neck pain to Mr. Beaver in July or August 2015.

13. Allison Fall, M.D., testified that shoulder pain can be caused by certain cervical conditions, and that when a patient complains of shoulder pain it frequently is appropriate to order a cervical MRI to determine whether the shoulder pain actually is caused by a cervical condition. On July 10, 2014, Dr. Ritzer recommended a cervical spine MRI "to assess whether this pain to the right shoulder is also referred pain from the cervical spine." If Claimant had been complaining of cervical spine pain when Dr. Ritzer ordered the cervical MRI, Dr. Ritzer would have stated she was obtaining the cervical MRI because of complaints of neck pain, not to determine if the shoulder pain was coming from the cervical spine. Thus, it is highly probable that the referral for a cervical MRI was not made because of any complaints of neck pain, but rather to determine whether Claimant's shoulder pain was coming from his cervical spine.

14. Claimant underwent MRIs of the right shoulder, cervical spine, and brain on July 21, 2014. Dr. Ritzer documents that she reviewed the findings of all three MRIs with Claimant on July 31, 2014, including the findings of the cervical MRI. Dr. Ritzer specifically documented that the cervical MRI showed a focal disk protrusion at C4-5 indenting the cord. However, Dr. Ritzer did not recommend any treatment to the cervical spine based on the MRI findings. Dr. Fall testified that it was appropriate for Dr. Ritzer not to make any referral for treatment to the cervical spine after reviewing the MRI report because Claimant was not experiencing neck pain at that time. This testimony is consistent with the Division of Workers' Compensation Impairment Rating Tips, which indicate that greater than 50% of patients 50 years and older have disc degeneration or loss of signal intensity on MRI without experiencing any pain, and that the existence of anatomic findings including cervical disc bulging cannot be considered pathological unless there are clear physiologic ties and correlation with clinical findings in an individual patient. Since the medical records from multiple physicians document that Claimant's neck pain had resolved before April 30, 2014, the degenerative findings on MRI in July 2014 were not symptomatic and Claimant did not need treatment for his neck.

15. Dr. Fall performed an IME on September 25, 2014. Dr. Fall stated that Claimant's "symptoms include bilateral shoulder pain." As part of the IME, Claimant completed a questionnaire in which Claimant stated that his pain complaints were limited to "shoulders and mental." Claimant also completed a pain diagram in which Claimant marked pain in his shoulders and the very top of his head, but did not mark any pain in his neck. Dr. Fall documented that Claimant's cervical spine range of motion was "within functional limits without tenderness or radicular symptomatology."

16. Dr. Ritzer's November 3, 2014 report documents that Claimant presented as a walk-in patient because at the end of his workday on November 2, 2014, Claimant "went home and fell asleep in his clothes, slept funny, and awoke with right-sided neck pain, which he has not had for quite some time. Pain is 8/10 in severity, right sided neck area, and right posterior parascapular area." Dr. Ritzer's statement that Claimant had not experienced neck pain for quite some time is consistent with her medical records and those of Dr. Wakeshima, Mr. Beaver, Dr. Fall, and Claimant's pain diagrams over the prior ten months. Dr. Ritzer advised Claimant that "awaking with the kink in his neck on the right side due to positional changes in his sleep … would be deemed not work related."

17. The medical records document that Claimant's original complaint of neck pain at his initial evaluation with Dr. Ritzer had resolved by April 30, 2014, and recurred only due to positional changes during his sleep. It is highly probable and free from serious or substantial doubt that the recurrence of Claimant's neck pain in November 2014, is not related to his industrial injury.

18. On May 28, 2015, Claimant underwent a Division IME by Lynn Parry, M.D. Dr. Parry opined that Claimant is not at Maximum Medical Improvement (MMI) for his cervical spine because the "cervical MRI done in July 2014 showed cord impingement and abnormal signal within the cord. This is not only abnormal but it is also concerning. He has ongoing sensory symptoms into the right arm." However, the ALJ finds the following flaws in Dr. Parry's opinion regarding Claimant's cervical spine:

- Dr. Parry's report does not include any analysis of whether the injury caused or aggravated the findings on MRI or if his neck pain at the time of the DIME was causally related to the industrial injury.

- Dr. Parry does not explain how Claimant had no complaints of neck pain from April 30, 2014 until the event on November 3, 2014, when he "slept funny" and "awakened with a kink in his neck."

- While Claimant clearly complained of neck pain on his first visit with Dr. Ritzer, it is highly probable and free from serious or substantial doubt that those complaints of neck pain resolved by April 30, 2014 and despite the findings on MRI, Claimant did not experience any neck pain again until November 3, 2014, when he slept on his neck wrong.

19. On June 24, 2015, Dr. Fall performed a repeat IME. When asked to list his current symptoms in order of most to least severe, Claimant listed “neck muscles” as the least severe symptom. Claimant indicated that he did not know to what he attributes his neck muscle pain, and that “it did not hurt after the accident but, now it does.” Thus, Claimant acknowledges that the neck pain he experienced originally resolved and he did not attribute his then-current neck pain complaints to the injury. If Claimant’s neck had hurt since the injury, Claimant would not have admitted that his neck did not hurt after the accident and that he did not know what caused the neck problems. Dr. Parry failed to recognize that Claimant’s neck complaints resolved for over seven months. Because she was unaware of this fact, she did not determine whether Claimant’s neck pain at the time of the DIME was causally related to the industrial injury.

20. Dr. Fall, Dr. Ritzer, and Dr. Wakeshima all have opined that Claimant’s neck pain is not causally related to the industrial injury. Their opinions are based on a detailed review of the medical records and a thorough analysis of whether the neck pain Claimant experienced subsequent to November 3, 2014, was caused by the injury. Dr. Parry performed no such causation analysis, and did not mention that Claimant’s neck complaints clearly resolved for more than seven months until the incident on November 3, 2014. Rather, Dr. Parry’s report simply assumes that Claimant’s neck complaints at the time of the DIME were causally related to the injury. Respondents have proven by clear and convincing evidence that Claimant’s neck condition resolved by April 30, 2014, and that his neck complaints beginning on November 3, 2014, were not work related and thereafter were not caused by the industrial injury.

Traumatic Brain Injury (TBI)

21. The paramedic report on January 26, 2014, indicated that Claimant experienced a brief loss of consciousness but that his neurological system was checked and was normal. The MCA Emergency Department report indicates that bystanders reported that Claimant lost consciousness for only thirty to sixty seconds. Claimant’s exam revealed “no altered mental status or neurological deficits”. A CT scan of Claimant’s brain taken in the emergency department also was negative.

22. Dr. Ritzer’s initial evaluation report of January 27, 2014, documented that Claimant denied memory loss or confusion. Dr. Ritzer completed a neurological exam which was unremarkable. Dr. Ritzer examined Claimant ten times from January 27, 2014, through May 22, 2014, some of the visits lasting as long as forty minutes. At no time did Dr. Ritzer document any signs or symptoms of cognitive deficits.

23. On June 2, 2014, more than five months after his injury, Claimant presented to Dr. Ritzer as a walk-in patient complaining that he was “mentally unstable” and “emotionally a wreck,” depressed and suffering from daily panic attacks. Dr. Ritzer assessed Claimant with acute stress reaction/anxiety/depression and referred Claimant to Kevin J. Reilly, Psy.D., for counseling and to Steven Dworestsky, M.D., for medication management.

24. Dr. Reilly specializes in clinical neuropsychology, including neuropsychological assessments, neurobehavioral consultations, and cognitive therapy. Hal Wortzel, M.D., testified that Dr. Reilly is experienced in treating patients with TBI. Dr. Reilly treated Claimant on five occasions from June 10, 2014 through August 12, 2014, and documented his assessment of Claimant's cognition. Given his stated specialties, his experience with patients with TBI, and being aware that Claimant sustained a loss of consciousness at the time of the injury, the ALJ reasonably infers that Dr. Reilly would have been alert to whether Claimant was exhibiting any signs or symptoms of a TBI or cognitive deficits. Dr. Reilly's reports do not document any signs or symptoms of a TBI. Instead, Dr. Reilly diagnosed Claimant with Adjustment Disorder with Mixed Anxious and Depressed Mood, and Somatic Symptom Disorder with Predominant Pain. Dr. Reilly referred Claimant to William Beaver, M.A., for biofeedback therapy.

25. Mr. Beaver's medical records from July 7, 2014, through August 25, 2014, document that he used a cognitive-behavioral therapy technique to improve Claimant's self-management of psychophysiological symptoms. None of Mr. Beaver's reports document signs or symptoms consistent with a TBI or support the proposition that Claimant presented with cognitive deficits during his treatment.

26. Dr. Dworetsky conducted ten psychiatry sessions with Claimant from June 11, 2014 through October 21, 2014. He did not document any signs or symptoms of TBI or cognitive deficits, and did not diagnose Claimant with a TBI. Further, on November 16, 2014, Dr. Dworetsky authored a three-page report summarizing his medical treatment and responding to a psychiatric IME opinion by Dr. Weingarten regarding Claimant's psychiatric diagnosis and the cause of Claimant's psychiatric/mental complaints. Despite specifically addressing various concerns regarding Claimant's mental and emotional presentation, Dr. Dworetsky still did not diagnose Claimant with a TBI or document any of the cognitive deficits associated with a TBI during his treatment.

27. Hal Wortzel, M.D., is a fellowship-trained psychiatrist, board certified in general psychiatry, forensic psychiatry, and certified by the United Counsel of Neurological Subspecialties in neuropsychiatry and behavioral neurology. A substantial portion of Dr. Wortzel's practice involves research, writing, and scholarship regarding and treatment of patients with TBIs. Dr. Wortzel performed a Respondent sponsored IME of Claimant on September 18, 2015, which included a detailed analysis of Claimant's medical records. Dr. Wortzel testified that the nature and severity of cognitive deficits Claimant reported experiencing would have been "readily apparent" to a treating psychiatrist even with little understanding or experience with traumatic brain injury, and that a treating psychiatrist would have had ample opportunity to notice "prominent cognitive complaints that featured subjectively or objectively" in treatment.

28. Judith Weingarten, M.D., who performed a Respondent sponsored psychiatric IME, testified that Dr. Dworetsky specializes in treatment of patients suffering from TBI and head trauma. Since Dr. Dworetsky specialized in the treatment of TBI and did not document cognitive deficits that would have been readily apparent to

even a psychiatrist with little experience with TBI, it is highly improbable that Claimant presented to Dr. Dworetsky with the nature and severity of the cognitive deficits with which Claimant presented at the time of his DIME and thereafter.

29. At Dr. Wortzel's IME, Claimant presented with complaints of "rather prominent functional deficits relating to cognitive impairment that [Claimant] attributed to a traumatic brain injury" including "slowed thought processes, difficulty sustaining or maintaining conversations, even suggesting that his combined cognitive deficits and musculoskeletal injuries had rendered him incapable from even rudimentary activities like cooking for himself." Dr. Wortzel testified that Claimant's presentation was grossly inconsistent with the medical records, which showed an initial presentation consistent with a concussive injury "after which there is no mention of traumatic brain injury or neuropsychiatric or neurocognitive deficits relating to such up until May 2015 and his evaluation with Dr. Parry."

30. Dr. Wortzel testified that because medical records most contemporaneous with the time of injury document a brief loss of consciousness of less than 30 minutes and his post-traumatic amnesia did not exceed 24 hours, Claimant's injury meets the criteria for a mild TBI. Furthermore, since the CT scan of the brain on the date of injury was negative and Claimant had not reported prior concussions, Claimant's injury is characterized as single and uncomplicated (i.e. no evidence of brain injury on MRI or CT scan). Dr. Wortzel testified that the vast majority of patients sustaining a single, uncomplicated mild TBI will experience a full and relatively fast recovery and that Claimant's medical records prior to Dr. Parry's Division IME on May 28, 2015, are consistent with a full and fast recovery for his single, uncomplicated mild TBI.

31. Dr. Wortzel testified that although Claimant did sustain a single, uncomplicated mild TBI in January 2014, the nature, severity, persistence, and trajectory of his presentation of illness subsequent to being placed at MMI all are inconsistent with the natural history of mild TBI. The vast majority of people sustaining a single, uncomplicated mild TBI will reach full recovery within three months, and a patient taking even one year to recover would be considered an outlier. Claimant presents with complaints that are quite severe and getting worse, which is profoundly inconsistent with the natural course of single, uncomplicated mild TBI, especially in light of the medical records immediately after the injury which are very benign from a neuropsychiatric standpoint and are devoid of any prominent cognitive complaints which cannot be more accurately explained by the anxiety and depression Claimant was experiencing. As Dr. Wortzel testified, there appears to be "an eruption" of neuropsychiatric complaints beginning in May 2015 at the time of Dr. Parry's Division IME.

32. Dr. Wortzel performed a number cognitive screening evaluations in which Claimant performed so poorly that, if taken at face value, suggested "rather severe executive dysfunction" which would put him below the first percentile for patients with Claimant's age and education level. On another test, Claimant endorsed severe problems that more than 75% of time interfere with audition, verbal communication, nonverbal communication, attention/concentration, memory, fund of information, novel

problem-solving, anxiety, sensitivity to mild symptoms and appropriate social interactions. It is highly improbable that Claimant's condition could have been affected to this degree while undergoing treatment prior to the Division IME, as Claimant would have been unable to communicate and interact with his physicians to the extent shown in the medical records and those same medical providers would have documented these highly readily apparent deficits.

33. Dr. Wortzel testified that patients with a single, uncomplicated mild TBI almost universally experience their worst symptoms immediately after the injury and gradually improve over time, and do not "fall of the neurocognitive cliff" eighteen months after the injury. However, given the essentially complete lack of documentation of cognitive deficits from multiple medical providers during the course of Claimant's treatment, there is no way to interpret Claimant's presentation but to conclude that he either worsened over time or there are other explanations for Claimant's current presentation.

34. Dr. Parry failed to explain the discrepancy between Claimant's treatment records which essentially lack any documentation of cognitive deficits by multiple medical providers who specifically evaluated Claimant's cognition (including two mental health professionals who specialize in treatment of patients with TBI) and Claimant's presentation at the time of her Division IME. In addition, Dr. Parry did not review Dr. Ritzer's notes from Claimant's January 27, 2014 exam showing that Claimant had no memory loss or confusion at that time. As Dr. Wortzel testified, Dr. Parry's opinions are a "wild outlier in terms of the rest of the medical records." Not one of Claimant's treating physicians opined that Claimant sustained a TBI.

35. It is highly probable and free from serious or substantial doubt that Dr. Parry erred when she opined that Claimant is not at MMI for the psychological aspects of his injury. The nature, severity, persistence, and trajectory of Claimant's presentation of illness all are inconsistent with the natural history of a single, uncomplicated mild TBI. Claimant's presentation to Dr. Parry for the May 2015 DIME is (1) highly inconsistent with his presentation to Dr. Wortzel for his September 2015 IME and (2) unsupported by any documentation of cognitive deficits in the extensive medical records from January 2014 through April 2015.

36. Respondent has overcome by clear and convincing evidence Dr. Parry's finding that Claimant is not at MMI for the psychological aspects of his injury.

Bilateral Shoulder Condition

37. Dr. Parry opined that Claimant is not at MMI for his shoulder condition because he needs "another orthopedic opinion" from an orthopedist who specializes in disorders of the shoulder. However, Dr. Parry failed to appreciate that Claimant received a second opinion from Craig A. Davis, M.D., a shoulder surgeon, on January 5, 2015. Dr. Davis opined that further surgical treatment was not likely to benefit Claimant. Thus, Claimant already has had the second opinion which Dr. Parry recommended.

38. Further, Dr. Parry's opinion that Claimant was not at MMI for his shoulder was based on Claimant's continued complaints of shoulder pain which Dr. Parry opined "were not likely to resolve on their own and ongoing repeated cortisone injections would not be appropriate." However, Claimant returned to Dr. Kovachevich on September 15, 2015, for a repeat cortisone injection consistent with his prior expectation regarding maintenance care. Claimant's own expert, John Hughes, M.D., opined that a third surgical opinion was not reasonable and that Claimant had reached MMI for his shoulder injuries. Dr. Parry failed to appreciate:

- that Claimant already had a second opinion surgical consult,
- that Dr. Kovachevich had recommended continuing cortisone injections as maintenance therapy, and
- that Dr. Fall, Dr. Kovachevich, Dr. Davis, and Claimant's own expert Dr. Hughes all have opined that Claimant is at MMI for his shoulder conditions.

39. It is highly probable and free from serious or substantial doubt that Dr. Parry's opinion that Claimant is not at MMI for his shoulder condition is incorrect. The ALJ finds that Respondent has proven by clear and convincing evidence that Claimant is at MMI for his shoulder conditions.

Average Weekly Wage

40. Respondent filed a General Admission of Liability on February 11, 2014, which admitted to an Average Weekly Wage (AWW) of $801.15, based on Claimant's earnings for the thirteen weeks prior to the industrial injury.

41. John Casados testified that he is the store manager for King Soopers Store 16, the store to which Claimant transferred on December 8, 2013, and where Claimant worked at the time of his injury on January 26, 2014. Mr. Casados credibly and persuasively testified that the grocery business is seasonal and that the busiest time of the year runs from mid-November just before the Thanksgiving holiday until mid-January just after the New Year holiday. During that time period, all employees work substantial overtime. During ten of the thirteen pay periods used to determine Claimant's AWW, Claimant was required to work substantial overtime in excess of his usual schedule. In addition, Claimant earned eight hours of holiday pay on Thanksgiving and another eight hours of holiday pay on Christmas.

42. Mr. Casados testified that Claimant's position for Store No. 16 would not have required him to continue to work the amount of hours Claimant worked around the holiday season, and that Claimant's wages for the thirteen weeks prior to the injury were greater than he would have continued to earn for the remainder of 2014 because:

- Claimant worked excess overtime during the holiday season;

- Claimant earned sixteen hours of holiday pay on Thanksgiving and Christmas day;
- Claimant was a new hire replacing a position which had been vacant, requiring him to work excess hours after the holiday season in order to get the department caught up; and
- Claimant was forecast to work a forty hour week.

Claimant presented no persuasive evidence to contradict Mr. Casados' testimony.

43. Respondent has proven by a preponderance of the evidence that the AWW of $801.15 for which Respondent admitted liability is not an accurate reflection of the wages that Claimant would have earned over the course of Claimant's disability because Claimant earned more in the thirteen weeks used to calculate Claimant's AWW than Claimant would have normally earned. Thus, Claimant is experiencing a windfall by calculating his AWW using only the thirteen weeks prior to his injury. Respondent has sustained its burden of proving that the most fair and accurate method of calculating Claimant's AWW would be to average Claimant's total earnings in the 52 weeks prior to his industrial injury, increasing the total earnings to reflect Claimant's wage increases in the weeks ending September 21, 2013 and December 21, 2013, which calculates to an average of $558.92.

Temporary Disability Benefits

44. Dr. Ritzer placed Claimant at MMI on January 29, 2015. As found above, the ALJ has determined that the DIME was overcome on this issue. Thus, Claimant's entitlement to temporary disability benefits terminated on January 29, 2015 by operation of statute.

Disfigurement

45. The ALJ finds and concludes that as a result of his January 26, 2014 work injury, Claimant has a visible disfigurement to the body consisting of a one inch long well healed scar in the crease of his right underarm, a three-quarter inch well healed scar with minor dimpling and a one-quarter inch very well healed scar both on the back of his right shoulder. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

Maximum Medical Improvement

The Division IME physician's opinion on Maximum Medical Improvement is binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). Clear and convincing evidence is evidence that demonstrates that is it "highly probable" that the Division IME physician's opinion is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

Dr. Parry's opinion that Claimant was not at Maximum Medical Improvement for his shoulder condition was based on Claimant's continued complaints of shoulder pain which "were not likely to resolve on their own and ongoing repeated cortisone injections would not be appropriate." However, Claimant returned to Dr. Kovachevich on September 15, 2015, for a repeat cortisone injection consistent with his prior expectation regarding maintenance care. Claimant's own expert, John Hughes, M.D., opined that a third surgical opinion was not reasonable and that Claimant had reached MMI for his shoulder injuries. Given that Dr. Parry failed to appreciate that Claimant already had a second opinion surgical consult and that Dr. Kovachevich had recommended continuing cortisone injections as maintenance therapy, and that Dr. Fall, Dr. Kovachevich, Dr. Davis and Claimant's own expert Dr. Hughes all have opined that

Claimant is at MMI for his shoulder conditions, it is highly probable and free from serious or substantial doubt that Dr. Parry's opinion that Claimant is not at MMI for his shoulder condition is incorrect. The ALJ concludes that Respondent has proven by clear and convincing evidence that Claimant is at MMI for his shoulder conditions.

Cause of Claimant's Neck Complaints

Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions must be overcome by the same clear and convincing evidence standard. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995).

It is highly probable and free from serious or substantial doubt that Claimant's neck pain had resolved by April 30, 2014, at the latest. Dr. Parry failed to recognize that Claimant's neck complaints had resolved for over seven months and recurred only after sleeping awkwardly on his neck. Because she was unaware of this fact, she made no attempt to determine whether Claimant's neck pain at the time of the DIME was causally related to the industrial injury, and instead based her opinion only on the MRI findings, which cannot be correlated to Claimant's lack of neck pain complaints from April 30, 2014 until November 3, 2014. Thus, it is highly probable and free from serious or substantial doubt that the recurrence of Claimant's neck pain in November 2014, is not related to his industrial injury.

Cause of Claimant's Complaints of Cognitive Deficits

It is highly probable and free from serious or substantial doubt that Dr. Parry erred when she opined that Claimant is not at MMI for the psychological aspects of his injury. The nature, severity, persistence, and trajectory of Claimant's presentation of illness all are inconsistent with the natural history of a single, uncomplicated mild TBI. Claimant's presentation to Dr. Parry for her DIME in May 2015 and to Dr. Wortzel for his IME in September 2015 are so inconsistent with the lack of any documentation of cognitive deficits in the extensive medical records from January 2014 through April 2015 as to be incredible. The ALJ concludes that Respondent has overcome by clear and convincing evidence Dr. Parry's finding that Claimant is not at MMI for the psychological aspects of his injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondent has sustained its burden of proving by clear and convincing evidence that Claimant is at MMI for his shoulder condition.

2. Respondent has sustained its burden of proving that Claimant's current neck complaints and current complaints of cognitive deficits are not causally related to the industrial injury.

3. Respondent has failed to overcome Dr. Parry's impairment rating of 11% right upper extremity and 17% left upper extremity.

4. Claimant's Average Weekly Wage is $558.92.

5. Claimant's request for temporary total disability benefits is denied and dismissed.

6. Insurer shall pay Claimant $300 for his disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

7. Respondents shall pay Claimant interest at 8% on all benefits not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 26, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

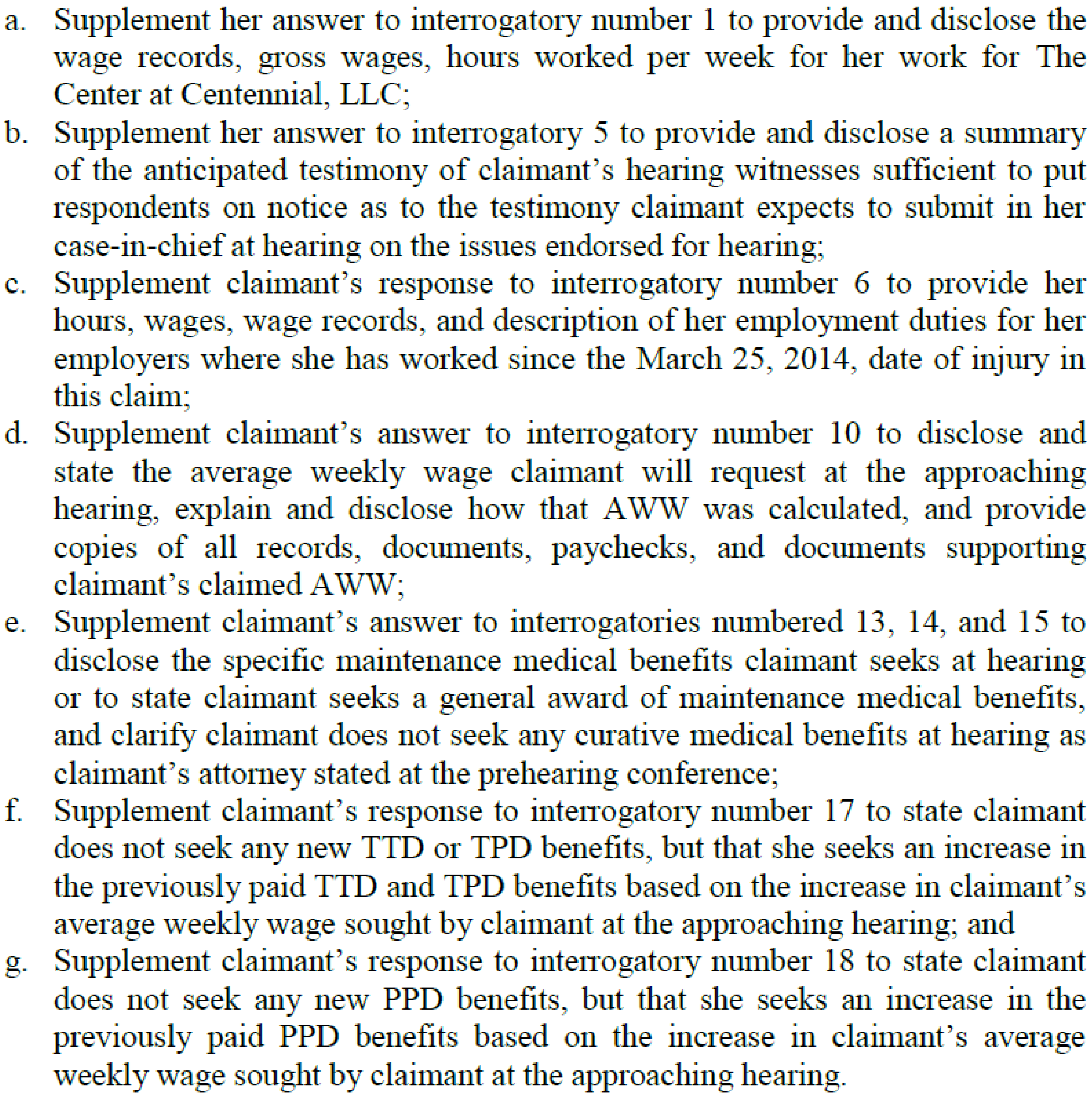
I. Whether Claimant has proven, by a preponderance of the evidence, that the prehearing conference order (PHCO) issued by Prehearing Administrative Law Judge (PALJ) Thomas DeMarino on June 16, 2015, dismissing Claimant's application for hearing on all endorsed issues with prejudice, as well as, PALJ DeMarino's subsequent PHCO denying Claimant's Motion for Reconsideration issued July 23, 2015, should be reversed because the judgments of PALJ DeMarino exceeded the bounds of reason constituting an abuse of discretion.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant sustained a compensable injury on March 25, 2014 (Ex. A). Respondents issued a Final Admission of Liability on February 5, 2015, admitting to medical benefits, temporary total disability benefits, and MMI with permanent partial disability benefits pursuant to the Division IME Examiner's 19% impairment rating. The FAL denied liability for maintenance medical benefits (Ex. B, pgs. 2-14). Claimant, on February 25, 2015, timely filed an Objection to that FAL (Ex. C), and, on March 3, 2015, filed an Application for Hearing endorsing the issues of medical benefits, AWW, TTD, TPD, PPD benefits, and "Maintenance Medical Care." (Ex. D, pg. 16) Claimant's AFH listed 34 hearing witnesses (Id., pgs. 17-18).

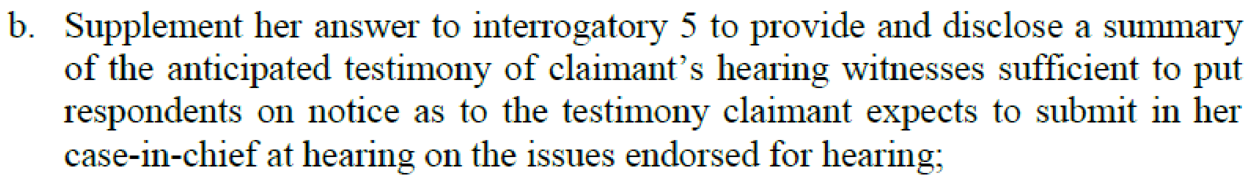
2. Respondents sent interrogatories to claimant's attorney on April 1, 2015 (Ex. F). Claimant's attorney has never claimed that the interrogatories were not received or that they were deficient in any way. Claimant's attorney answered respondent's interrogatories on April 17, 2015 (Ex. G). Respondents, finding claimant's answers non-responsive, and that claimant's objections to respondents' interrogatories were misplaced and incorrect, sent a letter to claimant's attorney on April 20, 2015, outlining the deficiencies in claimant's interrogatory answers, and requesting supplemental answers (Ex. H). Claimant's attorney did not reply to that letter, and did not supplement claimant's interrogatories. Respondents therefore scheduled a PHC to compel responsive and sufficient answers to interrogatories from claimant. That PHC, held on May 21, 2015, before PALJ Barbara Henk, produced a PHCO granting each facet of respondents' motion to compel claimant to supplement claimant's answers to respondents' interrogatories numbered 1, 5, 6, 10, 13, 14, 15, 17, and 18 (Ex. I, pg. 45). Judge Henk gave claimant's attorney specific directions on how to supplement claimant's answers, and what information to provide in the supplemental answers to interrogatories:



> a. Supplement her answer to interrogatory number 1 to provide and disclose the wage records, gross wages, hours worked per week for her work for The Center at Centennial, LLC;
> b. Supplement her answer to interrogatory 5 to provide and disclose a summary of the anticipated testimony of claimant's hearing witnesses sufficient to put respondents on notice as to the testimony claimant expects to submit in her case-in-chief at hearing on the issues endorsed for hearing;
> c. Supplement claimant's response to interrogatory number 6 to provide her hours, wages, wage records, and description of her employment duties for her employers where she has worked since the March 25, 2014, date of injury in this claim;
> d. Supplement claimant's answer to interrogatory number 10 to disclose and state the average weekly wage claimant will request at the approaching hearing, explain and disclose how that AWW was calculated, and provide copies of all records, documents, paychecks, and documents supporting claimant's claimed AWW;
> e. Supplement claimant's answer to interrogatories numbered 13, 14, and 15 to disclose the specific maintenance medical benefits claimant seeks at hearing or to state claimant seeks a general award of maintenance medical benefits, and clarify claimant does not seek any curative medical benefits at hearing as claimant's attorney stated at the prehearing conference;
> f. Supplement claimant's response to interrogatory number 17 to state claimant does not seek any new TTD or TPD benefits, but that she seeks an increase in the previously paid TTD and TPD benefits based on the increase in claimant's average weekly wage sought by claimant at the approaching hearing; and
> g. Supplement claimant's response to interrogatory number 18 to state claimant does not seek any new PPD benefits, but that she seeks an increase in the previously paid PPD benefits based on the increase in claimant's average weekly wage sought by claimant at the approaching hearing.

(Id., pg. 46). Claimant did not challenge PALJ Henk's PHCO, and does not do so now. Claimant admits her April 17, 2015, answers to respondents' interrogatories were deficient and non-responsive, and that the PHCO compelling these supplemental answers was correct and binding.

3. On May 28, 2015, claimant's attorney submitted Claimant's Supplemental Answers to Interrogatories (Ex. J). Judge Henk's PHCO gave clear instruction in subparagraph 1 (b) for the information to be disclosed in the supplemental response to interrogatory 5:



b. Supplement her answer to interrogatory 5 to provide and disclose a summary of the anticipated testimony of claimant's hearing witnesses sufficient to put respondents on notice as to the testimony claimant expects to submit in her case-in-chief at hearing on the issues endorsed for hearing;

However, claimant's supplemental response to this interrogatory republished the previously voiced objections to the interrogatory, and stated only, "[T]he claimant will properly testify to all of the endorsed issues. Claimant will testify as to all aspects concerning her injury, her ongoing pain, her employment history, why she is entitled to an increase in her AWW, why her MMI date is not correct, her treatment and what she would like in regards to future care." (Ex. J, pg. 50-51) Respondents' attorney sent a letter to claimant's attorney on June 1, 2015, telling claimant's attorney:

> Despite the specific instructions given to you by Judge Henk during the prehearing conference on May 21, 2015, and Judge Henk's Prehearing Conference Order compelling your supplemental answers, your supplemental answer did not disclose the summary of the facts claimant is expected to testify about and the testimony she is expected to provide at the approaching hearing on June 23, 2015. Simply giving respondents a list of the issues claimant will address or discuss during her testimony is not responsive. This failure to properly supplement claimant's answers places claimant in violation of Judge Henk's Prehearing Conference Order.

(Ex. K). Claimant's attorney did not reply to that letter, or supply the requested supplemental information to respondents' attorney. Therefore, respondents set a second PHC for June 11, 2015, to compel claimant to comply with PALJ Henk's May 27, 2015, PHCO, and seeking the striking of claimant's March 3, 2015, Application for Hearing with prejudice because of claimant's willful failure to comply with the discovery order of Judge Henk.

4. PALJ Thomas DeMarino presided at the June 11, 2015, PHC. Judge DeMarino found, after listening to the parties' arguments and reviewing the interrogatories, claimant's answers to respondents' interrogatories of April 17, 2015, PALJ Henk's PHCO, and claimant's supplemental answers to respondents' interrogatories sent May 28, 2015, that claimant had not complied with PALJ Henk's PHCO. PALJ DeMarino's PHCO quotes claimant's supplemental response to interrogatory five verbatim (Ex. J, pg. 61), showing he was not mistaken about claimant's supplemental answer. Judge DeMarino stated in his order that he noted, "[C]ounsel for claimant believes that he properly complied with the Order of ALJ Henk." (Ex. J, pgs. 61-62) He wrote, "This PALJ concludes the claimant entirely missed the mark in supplementing her response to respondents' interrogatory No. 5." PALJ DeMarino found claimant's attorney had again issued objections to the interrogatory in the supplemental answer to interrogatory five that had been overruled by PALJ Henk, and that claimant's supplemental answer to inadequate and not responsive. Judge DeMarino stated, "Claimant has failed to comply with the May 27, 2015, Order of ALJ Henk, which then invokes the following sequence of authorities to sanction claimant."

Citing WCRP Rules 9-1 (G) and (E), CRS § 8-43-207 (1) (p) (I), and CRCP Rule 37 (b), PALJ DeMarino concluded, “[T]he sanction that this PALJ imposes in this case regarding this issue is that claimant’s Application for Hearing filed on 03/03/15 is hereby stricken on all issues, with prejudice.” (Ex. L, pgs. 62-63)

5. On July 8, 2015, claimant’s attorney filed a Motion for Reconsideration of PALJ DeMarino’s PHCO (Ex. M). Claimant’s attorney, in that motion, incorrectly asserts that Judge DeMarino mistakenly based his PHCO on claimant’s original answers to respondents’ interrogatories, and ignored her supplemental answer to interrogatory five (Id, pgs. 66-67). This is clearly incorrect, for, as stated above, and as clearly seen on page 61 of Judge DeMarino’s PHCO, he quotes and incorporated claimant’s supplemental response to interrogatory five in its entirety. Claimant’s also asserted that there was no pattern of failure to comply with discovery requirements or orders, and that the sanction given by PALJ DeMarino was unduly harsh (Id. pgs. 67-68).

6. Respondents, on June 18, 2015, filed on Objection to Claimant’s Motion for Reconsideration (Ex. N). Respondents stand by the facts asserted, application law referenced, and arguments made in that objection for purposes of this position statement. There was a pattern of conduct by claimant of non-compliance with discovery requests, rules, discovery orders, and the PHCO issued by PALJ Henk (Id. pg. 74). Claimant’s assertion that PALJ DeMarino was not aware of claimant’s supplemental response to interrogatory five was not true (Id.). The sanction for claimant’s prolonged, sustained, and repeated discovery violations and violations of the May 27, 2015, PHCO provided by PALJ DeMarino was permissible and well-supported by applicable rules and long-standing case law on this issue (Id. pgs. 75-76). On July 23, 2015, PALJ DeMarino issued an Order stating it is, “ORDERED that claimant’s motion for reconsideration shall be and hereby is DENIED, based up the reasons stated in “Respondents’ Objection to Claimant’s Motion for Reconsideration” dated 7/18/15.” (Ex. O; emphasis in original)

7. On September 9, 2015, claimant filed the pending Application for Hearing and Notice to Set, endorsing as the only issue, “Review of Division’s Order 06-16-15.” (Ex. P)

8. At no time after June 16, 2015, did claimant further supplement her response to interrogatory five, and indeed had not done so as of the December 15, 2015, hearing. Claimant remains in violation of PALJ Henk’s May 27, 2015, PHCO, and has taken no steps to address the inadequate supplemental answer to interrogatory five PALJ DeMarino’s June 16, 2015, PHCO delineates. This is further evidence of a willful, sustained, prolonged pattern of conduct by claimant of not complying with discovery requests, Orders, or rules. Claimant presented no evidence, testimony, or facts in mitigation or explanation at hearing.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Section 8-43-207.5, C.R.S., authorizes a PALJ to conduct prehearing conferences to address certain limited issues of ripeness, discovery matters, and evidentiary disputes. The PALJ is authorized to conduct prehearing conferences and settlement conferences, approve settlements, and issue "interlocutory orders," among other things. Subsection (3) provides in pertinent part, "An order entered by a prehearing administrative law judge shall be an order of the director and binding on the parties. Such an order shall be interlocutory." The statute remains silent on any appeals from PALJ orders.

ALJ Review of PALJ DeMarino's Prehearing Conference Order

D. Section 8-43-207, C.R.S., enumerates powers of a hearing ALJ. Hearings shall be held to "determine any controversy concerning any issue arising under" the Workers' Compensation Act. In conducting such hearings, the hearing ALJ is empowered to issue subpoenas, administer oaths, make evidentiary rulings, limit evidence, permit discovery, rule on discovery matters, impose sanctions for willful failure to comply with discovery requests, conduct prehearing conferences upon written motion and good cause, dispose of procedural requests, control the course of the hearing, grant extensions of time, adjourn a hearing to take additional evidence, issue orders, appoint some guardians *ad litem* for dependents, determine the competency of witnesses, dismiss issues for failure to prosecute, set aside fees for medical services, and require repayment of overpayments. The statute does not enumerate any specific power to review the decision of a PALJ, nor does it appear to restrict the ALJ's powers due to the fact that a PALJ has issued a prehearing conference order.

E. Few reported cases have dealt with the powers of a PALJ. In *Industrial Claim Appeals Office v. Orth*, *965 P.2d 1246* (Colo. 1998), the Supreme Court held that a PALJ may approve a settlement agreement and the order approving the settlement is a final order subject to appeal rather than an interlocutory order. The Court also noted, "a PALJ's order relating to a prehearing conference is interlocutory (i.e., not immediately appealable) because a prehearing conference, by definition, is followed by a full hearing before the director or an ALJ. . . . Thus, the propriety of a PALJ's prehearing order may be addressed at the subsequent hearing." The Court distinguished the interlocutory nature of the prehearing order from the order approving a settlement, which was at issue in *Orth*. After *Orth*, parties began seeking ALJ review of PALJ prehearing orders. This ALJ has noticed increasing numbers of such appeals without any clear consistent procedure or standards. Some parties to cases which present with similar issues to that presented in the instant case file motions indicating they want a hearing ALJ to review the PALJ order. Still other parties file applications for hearing on the appeal issues. As found here, Claimant filed an Application for Hearing endorsing "Review of Division's Order 06/16/15." Under such circumstances and consistent with settled case law, the undersigned ALJ concludes that he is vested with jurisdiction to address the content and correctness of Judge DeMarino's PHCO dated June 16, 2015.

Standard of Review

F. The conduct of discovery is a matter committed to the discretion of the ALJ, for § 8-43-207 (1) (e), C.R.S. provides that an ALJ may rule on discovery matters and impose the sanctions provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery. *See also,* Workers' Compensation Rule of Procedure 9-1 ("If any party fails to comply with the provisions of this rule [providing for discovery] and any action governed by it, an administrative law judge may impose sanctions upon such party pursuant to statute and rule"). As noted above, Section 8-43-207.5 (1), C.R.S. provides that discovery matters are issues among those which the PALJ is empowered to address, and subsection (2) states the PALJ has the power to strike a party's application for hearing, "[F]or failure to comply with any provision of this section." Consequently, the ALJ determines that PALJ DeMarino was not acting outside of his enumerated powers when he struck Claimant's application for hearing.

Nonetheless, the question of whether, based upon the unique facts of this case, PALJ DeMarino applied an appropriate sanction in this case must be addressed.

G. An ALJ's exercise of discretion in determining the appropriate discovery sanction is broad, and is binding in the absence of an abuse of discretion. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 at 869 (Colo. App. 2001) Whether to impose sanctions and the nature of the sanctions to be imposed are matters within the ALJ's discretion. *Shafer Commercial Seating, Inc. v. Industrial Claim Appeals Office,* 85 P.3d 619 (Colo. App. 2003). The ALJ has flexibility in choosing the appropriate sanction and should exercise informed discretion in imposing a sanction that is commensurate with the seriousness of the disobedient party's conduct. *Shafer Commercial Seating, Inc. v. Industrial Claim Appeals Office, supra.* The imposition of discovery sanctions generally serves the dual purposes of protecting the integrity of the truth-finding process and deterring discovery-related misconduct. *People v. Cobb,* 962 P.2d 944, 944, 949 (Colo. 1998); *People v. District Court,* 808 P.2d at 836. Discovery rules should be interpreted liberally, which "[A]ssures that all parties are afforded their day in court and guarantees that all relevant evidence is available for presentation at trial." *J.P. v. District Court*, 873 P.2d 745, 750 (1994).

H. WCRP Rule 9-1 (G) holds, "Once an order to compel has been issued and properly served upon the parties, failure to comply with the order to compel shall be presumed willful." WCRP Rule 9-1 (E) gives the judge power to impose sanctions for failure to comply with that rule and discovery that rule governs. Section 8-43-207 (1)(p)(I), C.R.S. states that a judge may, "Impose the sanctions provided in the Colorado rules of civil procedure… for willful failure to comply with any order of an administrative law judge issued pursuant to articles 40-47 of this title." C.R.C.P. 37 (b)(2)(C) clearly states a judge may issue an Order striking out pleadings or parts thereof, . . . or dismissing the action or proceeding or any part thereof . . . ," for a party's failure to obey a discovery order. A party's disobedience of a discovery order warrants sanctions under § 8-43-207(1) (e), C.R.S. if the noncompliance is intentional, deliberate, a flagrant disregard of discovery obligations, or a substantial deviation from reasonable care in complying with such obligations. *Reed v. Industrial Claim Appeals Office,* 13 P.3d 810,813 (Colo. App. 2000). Claimant's failure to comply with a previous discovery order without explanation means the judge may infer a deliberate, or "willful," intent not to comply with discovery under the statute. See *Shafer Commercial Seating, Inc. Industrial Claim Appeals Office,* 85 P.3d 619, 621 (Colo. App. 2003). "Willful" under the Act means deliberate intent and party's failure to comply with order to compel is sufficient to support sanctions. *Shafer Commercial Seating, Inc. Industrial Claim Appeals Office,* supra; *Burchard v. Preferred Machining*, W.C. No. 4-652-824 (ICAO July 23, 2008).

I. Because the PALJ has, under C.R.S. § 8-43-207.5 (1), authority to address discovery matters and as Colorado's courts have previously reviewed rulings by judges in challenges to those rulings under an abuse of discretion standard, the undersigned ALJ agrees with Respondents that PALJ DeMarino's PHCO, striking all issues endorsed in Claimant's application for Hearing, should be subject to review under an abuse of discretion standard. An abuse of that discretion is only shown where the order "exceeds the bounds of reason," such as where it is not in accordance with applicable law, or not supported by substantial evidence in the record. *Coates, Reid and Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993); *Rosenberg v. Board of Education of School District #1,* 710 P.2d 1095 (Colo. 1985); *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001). Where a matter is discretionary, the judge is empowered to make a decision within a range of permissible decisions. The fact finder only abuses that discretion where the decision rests upon an error of law, the underlying findings of fact are not supported by substantial evidence, or the decision "cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.,* 252 F.3d 163, 168 (2d Cir. 2001). *See also Wheat v. United States,* 486 U.S. 153, 164, 108 S. Ct. 1692 (1988) (discretion implies a range of choice).

J. The undersigned ALJ concludes that the application of the abuse of discretion standard to review of PALJ discovery orders promotes and otherwise effectuates the principal purpose of the Workers' Compensation Act, namely as noted above, to provide "[T]he quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S." As stated in *Dee Enterprises v ICAO*, 89 P.3d 430, 437 (Colo. App. 2003):

> [R]eview . . . for errors of law and abuse of discretion is sufficient to protect the proper exercise of judicial function. This scheme is consistent with the purpose of the Act, which is to avoid congestion of the courts with piecemeal litigation and to provide a method whereby claims arising out of work-related injuries can be resolved in a just and speedy manner. *See Indus. Comm'n v. Globe Indem. Co.,* 145 Colo. 453, 358 P.2d 885 (1961); *cf. Huizar v. Allstate Ins. Co.,* 952 P.2d 342 (Colo.1998) (de novo review of workers' compensation claims not required).

K. Based upon the entirety of the record evidence presented, the undersigned ALJ concludes that PALJ DeMarino's order striking all issue endorsed in Claimant's application for hearing did not exceed the bounds of reason so as to constitute an abuse of discretion. Rather, the order was appropriate in light of claimant's sustained, prolonged and repeated refusal to appropriately answer interrogatory five, comply with PALJ Henk's PHCO, respect the purpose of discovery, respond to respondents' attorney's letters sent giving notice of the deficient answers, appropriately supplement the interrogatory answer despite PALJ Henk's clear instructions and long-established case law on what is expected for discovery responses, and failure to even attempt to supplement the answer after Judge DeMarino's PHCO issued June 16, 2015. Taken together, the undersigned ALJ finds and concludes that there is no basis to disturb PALJ DeMarino's decision, affirmed in his Order denying claimant's motion for reconsideration. Accordingly, the ALJ affirms the June 16th and July 23rd, 2015 PHCOs of PALJ DeMarino.

ORDER

It is therefore ordered that:

1. The June 16th and July 23rd, 2015 PHCO's of PALJ DeMarino are affirmed.
2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 11, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the left shoulder arthroscopic surgery proposed by Dr. Pak is reasonable and necessary and related to her admitted April 6, 2014 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant sustained an admitted left shoulder work related injury on April 6, 2014 while employed as a registered nurse for Employer. Claimant experienced immediate pain in her left shoulder after lifting a bag of wet linens while cleaning an operating room. Claimant has had no prior injuries to her left shoulder.

2. Claimant was referred by her employer to Centura Center for Occupational Medicine (CCOM) under the direction of Dr. Johnson. The Claimant continues treating with Dr. Johnson to the present date.

3. Claimant received conservative care under the direction of Dr. Johnson, including medications, injections and physical therapy.

4. Claimant's first evaluation was with Dr. Johnson on April 10, 2014 at which time Dr. Johnson diagnosed a left shoulder sprain. (See Cl. Ex. 2, Bates No. 108).

5. Dr. Johnson initially opined that Claimant would not require shoulder surgery although this opinion was rendered prior to any diagnostic evaluations. Claimant was eventually referred for a left shoulder MRI of her left shoulder which occurred on May 4, 2014. The MRI demonstrated minimal distal supraspinatus tendinopathy, but no evidence for rotator cuff tendon tear and trace fluid in sub-acromial subdeltoid bursa, possibly bursitis. (Cl. Ex. 6(b), Bates No. 142).

6. Subsequent to reviewing the MRI, Dr. Johnson prescribed additional physical therapy and considered a repeat steroid injection in the shoulder. (CL. Ex. 2, Bates No. 92).

7. Due to worsening shoulder pain, The Claimant was referred to Dr. Weinstein, orthopedic surgeon. Dr. Weinstein's initial evaluation of the Claimant occurred on June 30, 2014. (Cl. Ex. 5, Bates No. 138-140).

8. In his initial evaluation, Dr. Weinstein noted that the Claimant's treatment to date consisted of physical therapy, cortisone injections, rest, heat, activity modification, medications with no significant improvement. (Cl. Ex. 5, Bates No. 138). Dr. Weinstein's diagnostic impression included right rotator cuff/bicep tendinitis and right mild paracervical/shoulder girdle myofascial inflammation. Dr. Weinstein recommended a second cortisone injection and resumption of physical therapy. (Cl. Ex. 5, Bates No. 140).

9. Claimant returned to Dr. Weinstein on August 11, 2014 with continuing symptoms and increased pain in the area of the anterior shoulder. Dr. Weinstein noted that a significant portion of the Claimant's left shoulder symptoms were coming from the rotator cuff and biceps. Dr. Weinstein's medical report of this date indicates that he discussed non-operative versus operative options and the Claimant expressed a desire to avoid surgery. Dr. Weinstein provided another cortisone injection with directions to continue physical therapy. (Cl. Ex. 5, Bates No. 136-137).

10. By September 22, 2014, Dr. Weinstein noted that Claimant continued with marked tenderness with pain in the area of her biceps and lateral shoulder. The Claimant was having difficulty sleeping and had undergone three cortisone injections without improvement. Dr. Weinstein noted further that Claimant has remained symptomatic since the beginning of April, 2014. (Cl. Ex. 5, Bates No. 134-135).

11. Dr. Weinstein, in his medical report of January 14, 2015 again noted that Claimant's limitations with shoulder level and overhead activity continued and that she had remained symptomatic over an extended period of time without improvement. As a result, Claimant elected to proceed with surgery. (Cl. Ex. 5, Bates No. 132-133).

12. Claimant underwent left shoulder surgery on February 20, 2015. The surgical procedures involved left arthroscopic subacromial decompression and biceps tenodesis. Dr. Weinstein's operative notes states that Claimant had significant inflammation of the biceps tendon with fraying along with outer surface rotator cuff fraying. (Cl. Ex. 5, Bates No. 130-131).

13. Post-surgery, Claimant noted gradual improvement with her left shoulder pain. She continued prescribed medications and was referred for physical therapy. (Cl. Ex. 5, Bates No. 129, Cl. Ex. 2, Bates No. 55-57).

14. Claimant testified, and the medical records establish that she experienced increased shoulder pain as a consequence of engaging in too much therapy. According to an April 18, 2015 report authored by Physician Assistant (PA) Miyoko Ivis Claimant reported that she had a “loud pop” in her shoulder while performing her post-surgical rehabilitation exercises at home following a formal session of physical therapy the day before. Claimant had an increase in her pain following this event and was concerned that she re-tore the rotator cuff. Consequently, the Claimant was referred for a repeat MRI of the left shoulder. (Cl. Ex. 2, Bates No. 47-48). See also (CL. Ex. 5, Bates No. 124-126). Dr. Johnson opined that the Claimant may have reinjured her shoulder. (Cl. Ex. 2, Bates No. 45).

15. Claimant had a second left shoulder MRI on May 19, 2015. Among other findings, the MRI demonstrated a slightly thickened and edematous axillary recess synovium in addition to edema in the rotator interval, and an indistinct coracohumeral ligament. While the findings were noted to be "non-specific", they raised the possibility of "adhesive capsulitis." (Cl. Ex. 6(a), Bates No. 141).

16. Claimant was evaluated by Dr. Johnson on May 22, 2015. Dr. Johnson reviewed the May 19, 2015 MRI and noted… "there are concerning findings in the MRI." (Cl. Ex. 2, Bates No. 39-41). The Claimant continued attending physical therapy per the direction of Dr. Weinstein and Dr. Johnson throughout May, June and July of 2015. (Cl. Ex. 2, Bates No. 26-28; 31-33; 35-37).

17. On June 22, 2015, Claimant returned to Dr. Weinstein following her May 19, 2015 MRI. During this visit, Claimant reported mild pain in the front of her shoulder along with pain in the area of her triceps which was radiating down the outside of the arm and which was exacerbated by overhead lifting or repetitive activity. Dr. Weinstein explained that the findings noted on Claimant's May 19, 2015 MRI were "primarily postoperative in nature." He also felt that the majority of Claimant's symptoms appeared to be myofascial in nature. Dr. Weinstein performed a cortisone injection and indicated that Claimant should continue with physical therapy with a wellness program. (Cl. Ex. 5, Bates No. 122-123).

18. On August 18, 2015, Dr. Johnson's medical report of August 18, 2015 states that the Claimant would be transitioned from physical therapy to work hardening. Further, Dr. Johnson referred the Claimant to Dr. Pak, orthopedic surgeon, for second opinion in regards to the Claimant's symptomatic left shoulder. (Cl. Ex. 2, Bates No. 20-22).

19. On September 1, 2015, Claimant presented to Dr. Pak's offices for a second opinion evaluation. A medical report generated from this date of visit reflects that Claimant was evaluated by Nurse Practitioner (NP-C), Trisha Finnegan. NP Finnegan took a history from Claimant, reviewed imaging studies and preformed a detailed physical examination which revealed limited left shoulder range of motion, posterior shoulder pain with external and internal range of motion and positive physical exams tests for shoulder impingement. Although the report from this date was authored by NP Finnegan, the record reflects that Claimant was "seen and evaluated with Dr. Pak." Claimant testified that both Dr. Pak and his nurse practitioner evaluated her. Claimant's examination was consistent with left shoulder adhesive capsulitis and she was formally assessed as having the same per the medical record generated in conjunction with her September 1, 1015 visit. Dr. Pak recommended arthroscopic debridement and capsular shift (release) to address Claimant's adhesive capsulitis. (Cl. Ex. 3, Bates No. 112-113).

20. Subsequent to Dr. Pak's evaluation and surgical recommendation, Dr. Johnson's medical notes indicate that Dr. Pak was recommending surgery and the surgery was pending approval. Dr. Johnson, in his medical appointment notes does not indicate that he is opposed to or in disagreement with the plan for surgery as submitted by Dr. Pak. (Cl. Ex. 2, Bates No. 11-13; 15-17).

21. Respondents denied the recommended surgery and Claimant returned to Dr. Johnson on October 6, 2015. Dr. Johnson's medical report from this encounter documents that Claimant had been diagnosed with adhesive capsulitis and that Dr. Pak had recommended surgery. However, the note also indicates that Respondents had asked Dr. Weinstein to "evaluate Dr. Pok's (sic) recommendation." Dr. Johnson addressed Claimant's return to work, noting that he felt she could return to "full duty work without difficulty." According to Dr. Johnson's October 6, 2015 report, Claimant became "upset" with the suggestion, reporting that "she knew she could not work because of her pain." As of the date of this visit, Claimant was noted to be in excess of 7 months post op and still having what she reported as constant, moderate left shoulder pain. Dr. Johnson noted that he would get a functional capacity assessment (FCE) to determine Claimant's work capacity.

22. On October 21, 2015, Claimant presented to Dr. Johnson in follow-up of her shoulder condition. Careful review of the medical report authored by Dr. Johnson reveals no substantial change in Claimant's condition. She continued to complain of constant, moderate left shoulder and neck pain. Dr. Johnson opined that Claimant was "nearing" maximum medical improvement (MMI) and he again discussed Claimant's return to work. Claimant again expressed strong reservations about her ability to return to full work. Dr. Johnson noted that Claimant had scheduled the FCE discussed at her October 6, 2015 appointment for November 12, 2015.

23. On October 26, 2015, in response to a letter from Respondents, Dr. Johnson indicated that Claimant's report of neck/upper back pain following her surgery was not an uncommon occurrence. He further noted that Claimant had "nearly normal" left shoulder range of motion. Consequently, he questioned whether Dr. Pak's recommended surgery would result in significant improvement from her current shoulder condition. (Cl. Ex. 2, Bates No. 2). This is the first notation made by Dr. Johnson indicating any concerns regarding the proposed surgical procedure. Finally, Dr. Johnson commented upon videotape from 9/17 which he was asked to review. In this regard, Dr. Johnson noted: "Her 9/17 videotape showed her functioning better with her left arm than she was on 8/28. This would be expected."

24. On December 14, 2015, in response to an inquiry from Respondents, Dr. Weinstein conducted a chart review which included Dr. Pak and Dr. Abercrombie's notes. Based upon that review, Dr. Weinstein noted that Claimant had good range of motion in the left shoulder with minimal restrictions. He noted further that Dr. Abercrombie diagnosed Claimant with myofascial pain and that her examination (as documented in the aforementioned records) was not "significantly changed from when [he] previously saw her. He reiterated his opinion that the restrictions in Claimant's shoulder were "secondary to her muscle inflammation and pain", i.e. her myofascial symptoms. Dr. Weinstein also reviewed surveillance video tape, commenting that the images from September 12, 2015 demonstrated Claimant to be "lifting her left arm up well which generally does not occur with adhesive capsulitis." Dr. Weinstein expressed an opinion that further surgery would not be of any benefit. He went on note that he did not believe that Claimant's myofascial

pain was "correctable" with surgery and that additional surgery may only result in additional inflammation and was "unlikely to affect her outcome." (Cl. Ex. 5, Bates No. 120-121). The ALJ infers from the content of Dr. Weinstein's December 14, 2015 note that he disagrees with Dr. Pak's diagnosis of adhesive capsulitis.

25. Claimant testified that she was not referred back to Dr. Weinstein for an additional evaluation or follow-up subsequent to Dr. Pak's surgical evaluation.

26. Claimant also testified she continues to have pain and impaired function of the left shoulder, particularly for activities which require her to reach across and away from the body, such as buckling her seatbelt and reaching out to close a car door. Claimant testified and demonstrated that she can reach, i.e. flex her left arm above shoulder level. Simply put, Claimant can reach overhead with her arm straight-out in front of her. While she can reach overhead, Claimant testified that she cannot perform any weighted shoulder flexion. Based upon the Claimant's testimony, the ALJ finds that she has difficulty for movements which require abduction, adduction and external rotation of the left shoulder.

27. Regarding the surveillance videotape viewed by Dr. Johnson and Dr. Weinstein, Claimant testified that her vehicle is equipped with an automatic tailgate and requires no force to open. Rather, the tailgate is opened and closed by simply pushing a button. The ALJ reviewed surveillance videotape from August 28, 2015, August 29, 2015 and September 12, 2015. Careful review of the videotape reveals no activity captured on August 28, 2015. On August 29, 2015, Claimant is observed from a distance. While most of the video is marginal in quality and partially obscured by cars and other people, Claimant appears in no obvious distress. Nonetheless, Claimant does not use her left arm/shoulder for any functional activity beyond using it to assist in stabilizing a camera held below shoulder level. Indeed, the surveillance from August 29, 2015 shows Claimant to use her right arm to unlatch the tailgate of her vehicle, to reach out and grab the door handle of her car to close the car door and fasten her seatbelt and her right shoulder to bear the weight of moderate sized bad and her camera. While Claimant flexes her left elbow to reach her hand toward her face occasionally, she is never observed to reach her left arm up or away from her body to any significant degree. Moreover, while sitting in a chair on the sidelines of a playing field, during what the ALJ finds is probably a soccer tournament, Claimant is observed to reach her right arm across her body to rub her left shoulder. The August 29, 2015 surveillance videotape confirms Claimant's testimony that the tailgate of her car is automatic. In the September 12, 2015 videotape, Claimant is observed to support a moderate bag on her right shoulder. While Claimant uses the left arm to unlatch the tailgate of her car with her left hand and raise the left arm up as the tailgate ascends, she does not raise the elbow above shoulder height. Rather, Claimant flexes her elbow to approximately 90 degrees while flexing the arm to 90 degrees. Consequently, Claimant's left forearm is the only left upper extremity structure above the level of the shoulder. Moreover, Claimant does not push or pull the tailgate up or down.

28. Claimant is a registered nurse and is aware of the details involved in the surgical procedure proposed by Dr. Pak. Claimant testified that her condition is sometimes referred to as a frozen shoulder and the surgery is intended to loosen scar tissue and

allow for greater movement. Claimant stated that the surgery recommended by Dr. Pak gives her the best opportunity for improved functioning so that she can return to gainful employment so she can return to gainful employment.

29. The ALJ finds record support, for Dr. Pak's opinion that Claimant likely has adhesive capsulitis. The May 19, 2015, MRI raises this as a concern and her physical examination findings on September 1, 2015 are consistent with the diagnosis.

30. The ALJ finds Claimant's testimony regarding the functionality of her left arm/shoulder credible and persuasive. Despite Respondents' contrary suggestions, the video surveillance tape supports Claimant's testimony that the functionality of her left shoulder remains restricted despite substantial post operative care, including extensive physical therapy and additional injections. Indeed, the ALJ finds that the content of the surveillance video tape supports a finding that Claimant does not use her left arm/shoulder to any significant degree, likely secondary to pain and restricted motion. Based upon the totality of the evidence presented, the ALJ finds that Claimant's limited ability to abduct, externally rotate and adduct her left shoulder is a consequence of her adhesive capsulitis diagnosis, which developed after Claimant experienced a set back while performing home exercises following her February 20, 2015 surgery. Consequently, the ALJ finds that claimant's current condition is related to her April 6, 2014 industrial injury.

31. Based upon the evidence presented, the ALJ credits Dr. Pak's opinions to find that the proposed arthroscopic debridement and capsular shift procedure will, more probably than not, cure and relieve Claimant from the ongoing effects of her largely posterior left shoulder symptoms and afford her improved shoulder abduction, adduction and internal and external rotation. Consequently, the ALJ finds the proposed surgery reasonable and necessary.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony is generally consistent with the content of the medical records and the surveillance videotape submitted at hearing. Consequently, the ALJ finds Claimant to be a credible and persuasive witness.

C. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

D. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

E. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury.

Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013. Based upon the evidence presented, the ALJ concludes that Claimant has proven that the left shoulder arthroscopic debridement and capsular shift recommended by Dr. Pak reasonable and necessary. The medical reports submitted at hearing along with the video surveillance tape outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Pak to recommend surgical capsular. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that the recommended procedure is reasonable and necessary to cure and relieve Claimant from the ongoing effects of her compensable injury. Respondents' primary basis for denying the surgery in this case rests on the opinion of Drs. Johnson and Weinstein. In this case, Dr. Weinstein provided an opinion letter opining against surgery. However, Dr. Weinstein had not personally evaluated the Claimant in six months. There is no indication that he contacted Dr. Pak to discuss the recommended surgery or any other related issues. Consequently, the ALJ concludes that Dr. Weinstein's opinions regarding the appropriateness of surgery are not as persuasive at those of Dr. Pak. Further, Dr. Weinstein selectively extrapolated one portion of video surveillance that is clearly not representative of the Claimant's limited left shoulder functioning when the surveillance video tape is considered in its totality. Finally, the ALJ rejects Dr. Johnson's surgical opinion as unconvincing. Dr. Johnson is not a surgeon and for several months after Claimant sustained her April 6, 2014 injury, Dr. Johnson opined that surgery would not likely be necessary. Moreover, the ALJ finds that Dr. Johnson did not persuasively explain why the proposed surgery was unlikely to result in significant improvement from Claimant's current condition. While it can be inferred from the content of Dr. Johnson's October 26, 2015 letter that he believes Claimant's left shoulder range of motion is adequate, his opinion does not address whether the proposed procedure is likely to reduce Claimant's ongoing pain and thereby substantially improve her function.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all medical expenses to cure and relieve Claimant from the effects of her ongoing left shoulder pain and dysfunction including, but not limited to, the left shoulder arthroscopic debridement and capsular shift as recommended by Dr. Pak.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 10, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-948-119-02

PROCEDURAL BACKGROUND

A prior hearing in the above captioned matter was held before Margot Jones, Administrative Law Judge (ALJ) on April 17, 2015 in Greeley, Colorado. Claimant appeared via telephone and was represented by Michael D. Mullison, Esq. Insurer was represented by Lynda S. Newbold, Esq. Employer Waste Chasers was represented by James Peters, Esq. Employer Bender did not appear at the hearing in this matter.

A Summary Order was issued by ALJ Jones concluding that Employer Bender had not been afforded notice of the hearing by the Office of Administrative Courts consistent with the provisions of Section 8-43-211, C.R.S. The parties were therefore instructed to re-set the matter for hearing on all issues. In a subsequent prehearing conference order, ALJ Jones clarified that the parties would be required to re-file all evidence which they wished to have considered as part of the record for determination of the issues.

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that he suffered a work related injury in the course and scope of his employment on April 18, 2014;

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to an order awarding authorized reasonable, necessary and related medical benefits;

3. Whether Employer Waste Chasers proved by a preponderance of the evidence that it timely paid its workers' compensation insurance premium;

4. Whether Bender Industrial Group is the statutory employer; and

5. Whether Claimant proved by a preponderance of the evidence that Claimant is entitled to an award of penalties against Employer Waste Chasers for failure to maintain workers' compensation insurance under Section 8-43-409, C.R.S.

STIPULATIONS

1. The parties filed an unopposed motion to file into evidence the official transcript from the April 17, 2015, hearing in Greeley, CO as to the issue of insurance coverage. The transcript was received into the record on November 13, 2015.

2. Counsel for Employer Waste Chasers stipulated on the record that this employer received proper, timely and sufficient actual notice of cancellation of the employer's policy pursuant to Section 8-44-110, C.R.S.

3. The issues of temporary total disability benefits and penalties against Employer Waste Chasers for failure to properly insure for workers' compensation were preserved for later determination.

FINDINGS OF FACT

Having considered the evidence presented at hearing on April 17, and November 13, 2015, the following Findings of Fact are made.

1. Claimant injured his right hand in the course and scope of his employment on April 18, 2014, when he was electrocuted while taking apart an electrical box. Claimant was employed at the time of the injury by Employer Waste Chaser as a pump truck driver and general laborer. Claimant had worked for Employer Waste Chaser for seven or eight months.

2. Employer Waste Chaser was engaged in the business of demolition. John Garber is the owner of Employer Waste Chaser and Claimant's uncle. On the day of the accident, Claimant was assigned by John Garber to take apart electrical boxes at a demolition site. Claimant was expected to separate valuable metals from invaluable metals for recycling purposes. It was in this process that Claimant suffered an injury to his right hand through electrocution.

3. Immediately following Claimant's injury on April 18, 2014, John Garber took him to the emergency room at Poudre Valley Hospital for treatment of his right hand. At the emergency room, an EKG was administered to check Claimant's heart and morphine was prescribed for pain. Claimant was transferred to North Colorado Medical Center Burn Unit. John Garber took Claimant to North Colorado Medical Center where Claimant remained in the hospital for four days receiving medical treatment.

4. At North Colorado Medical Center, Claimant received medical treatment for the right hand electrical wound to assure that it healed properly. Claimant also received occupational therapy, vestibular therapy and physical therapy. Following Claimant's discharge from the hospital, he returned two weeks later for a follow up appointment with a Dr. Cook.

5. As a result of the work related injury, Claimant has outstanding medical bills at Poudre Valley Hospital, North Colorado Medical Center, Emergency Physicians of the Rockies, Colorado Health Medical Group and Advanced Medical Imaging. Claimant incurred bills to these providers for reasonably necessary, authorized and related medical treatment of the April 18, 2014, work injury.

6. Josef Bender appeared on behalf of Employer Bender as the president of Bender Industrial Group. Employer Bender is an Oregon Corporation that was conducting business in Fort Collins, CO as a general contractor on a construction job taking place at 3138 West Drake Rd., Fort Collins, CO.

7. Employer Bender normally conducted business as a general contractor on projects. On April 18, 2014, Employer Bender was the general contractor on the job site at which Claimant was injured.

8. Mr. Bender testified that the overall nature of the project at 3138 West Drake Rd. was construction of a medical office building. In order to complete Employer Bender's obligations for that medical office building, partial demolition of the existing property was necessary, including removal of all wiring and electrical boxes.

9. Employer Bender hired Employer Waste Chasers as a subcontractor to perform demolition duties at the job site which included removing all metal, piping, ducting, wiring and fixtures from the existing building. The project work order and agreement found at Exhibit 7 of Claimant's hearing exhibits was an accurate representation of the work order and agreement entered into between Employers Bender and Waste Chasers. This contract was in place on April 18, 2014.

10. Mr. Bender was of the opinion that the work performed by Employer Waste Chasers as a subcontractor was essential to the completion of the project, and that Employer Bender would have had to hire their own employees if the services were not provided by a subcontractor.

11. Claimant was performing duties included in the contract between Employers Waste Chasers and Bender at the time he was injured. Mr. Bender was made of aware of Claimant's April 18, 2014, injury by John Garber after the injury took place.

12. Employer Bender did not have a workers' compensation insurance policy in place on the project at the time Claimant was injured. Employer Bender did not maintain workers' compensation insurance coverage in Colorado because the company does not have employees in Colorado.

13. Employer Bender is a general contractor who typically contracts out necessary labor activities to subcontractors in order to complete construction

projects. Subcontractor's work was essential to completion of the overall project for Employer Bender.

14. Employer Bender is a statutory employer pursuant to Section 8-41-401, C.R.S. Pursuant to that statute, Employer Bender is a corporation operating and engaged in a business in Colorado where they contracted out work to complete the overall project. Under the circumstances, Employer Bender is liable to pay compensation for injuries sustained by the Claimant in the event Employer Waste Chasers is determined to be a noninsured employer.

15. John Garber received a notice by certified mail of the pending cancellation of the workers' compensation insurance policy for Employer Waste Chasers which was in place with the Insurer. In response to this notice, he wrote a check for the past due premium on April 10, 2014. He placed the check in the envelope provided by Insurer, along with the payment coupon, and placed it in the outgoing mail "cubby hole." Mailing a check was Employer Waste Chasers usual method of paying the premiums on the insurance policy with the Insurer. Mr. Garber had no way of knowing if the post office promptly delivered the check once it was mailed.

16. Elizabeth Garber is John Garber's wife and also works in the office of Employer Waste Chasers. Ms. Garber was also aware that Employer Waste Chasers received the notice of cancellation from Insurer. Ms. Garber typically dealt with the Insurer on insurance premium issues. Ms. Garber could not specifically testify whether the premium check was mailed on April 10 or April 11, 2014, but Ms. Garber represented that she was sure the check was mailed on one of those days. It was her practice to remove envelopes from the "cubby hole" and drive the mail to the post office.

17. Ms. Garber credibly testified that the bank statement for Employer Waste Chasers reflects that the check cleared their bank after May 2, 2014. Ms. Garber credibly testified that she did not remember the specific date the bank statement reflected that the check cleared. She also acknowledged that in the past, premium payments from the company had occasionally been processed electronically, through their agent.

18. Jeff Bunn is an underwriter with Insurer who has been at Insurer for 22 years and an underwriter since 2004. Mr. Bunn credibly testified explaining that the computer system generates the notice of cancellation letters to the policyholder when the premiums have not been received by the due date. If the premiums are not received by the date identified on the notice, the policy is automatically canceled at 12:01 on the day after the premium due date. In this case, the policy was canceled at 12:01 a.m. on April 17, 2014. Mr. Bunn verified that the notices are sent to the policyholders by certified mail and identified the receipt signature from Mr. Garber. He also verified that to his knowledge, Insurer has never accepted premiums as paid upon the date of

mailing, only as of the date of receipt as is stated on the cancellation notice.

19. Mr. Bunn clarified that the Insurer's system automatically cancels the policy if the premium has not been received by the due date in the cancellation notice. In this case, he was contacted after this cancellation to begin the procedure for issuance of a new policy. The canceled policy was not eligible for reinstatement because Claimant's injury occurred the day after the cancellation. Therefore, the only option was to complete a final audit of the canceled policy and begin the process to issue a new policy of insurance.

20. Elizabeth Schmieder is an employee of the Insurer who has worked in the Accounts Receivable Department for 16 years. Her job duties include overseeing the posting of premium payments to the various insurance policies issued by Insurer. During Ms. Schmieder's employment for Insurer, premium payments have never been accepted as of the date of mailing. Rather, actual receipt of the premium has always been required for valid payment.

21. Ms. Schmieder credibly testified and explained that payment coupons are mailed to the policyholder with the premium invoice. The purpose of the coupon is to insure proper credit of a premium check when the payment is deposited and credited to the policyholder's account. The address which appears on this coupon is a post office box in the control of U.S. Bank used exclusively by Insurer for receipt of premium checks. No other mail is addressed to this address. This address has been used by Insurer since June 2012. Checks received at this post office box are handled directly by U.S. Bank.

22. Each day at approximately 2:00 p.m., Ms. Schmieder receives information from U.S. Bank concerning that day's deposits. The information is transmitted electronically and consists of a data file and an image file. The image file contains copies of each deposit's documents including the front and back of the policyholder's check as well as the payment coupon, if returned by the customer. These images are stored in the customer's policy file. If U.S. Bank should make an error on a deposit, Ms. Schmeider is notified of the error and any corrective action taken.

23. Also received is a data file which transmits electronic information concerning each deposit including the policyholder's identifying information, the amount of the deposit, the date of the deposit, and the invoice number. Ms. Schmieder identified the canceled premium check in this case which reveals it was deposited on May 2, 2014. Insurer considers the receipt date of the premium to be the date on which U.S. Bank receives, processes and deposits the check. In this case, therefore, the premium payment was received by Insurer on May 2, 2015.

24. Further evidence of when this payment was received by Insurer is the batch

screen print. This printout shows the policy number, the policyholder's name, the invoice number, the payment amount and check number for all payments deposited on a particular day. This document reflects that the premium payment was received on May 2, 2014.

25. When the electronic data file is received by Insurer, the internal system automatically uploads the information and posts the payments to each policyholder's account. This happens on the same day, and therefore the date of posting, of deposit and of receipt are the same. Each individual policyholder's information is posted to their policy management screen.

26. The payment information also appears on their Policy Financial Transactions Report which provides a running history of payments (or credits) made to a policyholder's account. The employer's Policy Financial Transactions Report reflects that the payment in question was received on May 2, 2014. Because of the automated nature of the processing of premium checks, once deposited, payments are posted to the account of the identified policy number regardless of whether the policy has been previously canceled. If payments are made to a canceled policy, they are either refunded later to the policyholder or, as in this case, transferred to the policyholder's newly issued policy. The Policy Financial Transactions Report reflects that this occurred on May 7, 2014.

27. Michael Mosher is the Lock Box Operations site manager for U.S. Bank in Denver, Colorado. He has been at this position with U.S. Bank for 17 years. The Lock Box Facility is a facility dedicated to processing premium or other payments for corporate customers. Insurer has a dedicated post office box with the bank which is number 561434. This post office box is used for receipt of coupons and premium checks for Insurer's customers only. Insurer has used this post office box for approximately three years. U.S. Bank owns the zip code used with this post office box address which protects the policyholders' payments from being misrouted. Further protection is provided by the fact that the return envelopes provided by Insurer also contain as the pre-printed return address the post office box for Insurer's lock box. Even if there is a problem with postage at mailing, the envelope will be returned to the lock box facility. However, U.S. Bank has no control over the United States Postal Service, and if the mail delivery is delayed in getting to the post office box, this is out of the bank's control.

28. The workers at this facility begin work at 2:00 a.m. Mail is collected from the post office box at 2:00, 4:00, 6:00 and 8:00 a.m. The mail is opened, sorted and prepared for processing. The contents of each envelope are extracted and organized for scanning through an automated system. Depending on the number of payments received, the entire process can take from a half hour to several hours. All payments received in the mail are processed the same day. There are no exceptions.

29. During the automated process, an electronic image of the check and payment coupon is created and the lines on the bottom of the payment coupon are read to identify the policyholder for the electronic data file. Mr. Mosher credibly testified that the endorsement on the Waste Chasers check reflects it was deposited, and therefore received by Insurer on May 2, 2014.

30. Once the processing is complete, the data files and image files are transmitted to Insurer no later than 2:00 p.m. Physical copes of the checks and coupons are retained for 60 days before being destroyed. Envelopes are not kept but are shredded after the contents are removed. Based on Mr. Mosher's credible testimony it is concluded that the envelope in which Employer Waste Chasers' payment was mailed would not provide relevant information to determination of the cancellation issue. The only information on the envelope which is unknown at this time would be the USPS postmark. Since the date of mailing is not the relevant inquiry herein, this information would not have any effect on the determination of when the payment was received by Insurer.

31. Mr. Mosher explained that since U.S. Bank has no way of knowing whether a policy has been canceled, all checks are deposited according to the coupon information provided with the policyholder's payments. Depending on the size of the bank and whether it has a particular relationship with U.S. Bank, this can take up to several days. However, the payment is considered received by Insurer on the deposit date, May 2, 2014, in this case, and not the later date of clearance on the policyholder's account.

32. When asked whether a check could be misplaced during the handling process, Mr. Mosher credibly testified this is highly unlikely. The lock box facility has a clean desk policy to help guard against any such issues. This means that all items are processed the same day they come in, there are no items on top of the employees' desks, and no work can be kept in a drawer or anywhere other than the top of the desk at which the employee is working. Mr. Mosher is not familiar with any incident in which a payment for Insurer has been lost or delayed by the bank's handling process.

CONCLUSIONS OF LAW

Having made the foregoing Findings of Fact, the following Conclusions of Law are reached.

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592, P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO, 5 P.3d 385,389 (Colo. App. 2000).*

2. The ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008); *Kroupa* v. ICAO, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

COMPENSABILITY

3. The ALJ concludes that Claimant's testimony is credible and persuasive as to the injuries he sustained in the course and scope of his employment on April 18, 2014. Claimant established by a preponderance of the evidence that the injuries he sustained are compensable.

MEDICAL BENEFITS

4. Section 8-42-101(1)(a), C.R.S. provides that Respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007. Respondents are liable for medical treatment by authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

5. In this case, Claimant has established by a preponderance of the evidence entitlement to reasonable and necessary medical benefits to cure and relieve the effects of the injuries. Claimant's persuasive and credible testimony establishes that the treatment he received from Poudre Valley Hospital, North Colorado Medical Center, Emergency Physicians of the Rockies, Colorado Health Medical

Group and Advanced Medical Imaging was authorized, reasonable, necessary and related to the injuries he sustained on April 18, 2014.

WASTE CHASERS' INSURANCE COVERAGE

6. Section 8-44-110, C.R.S. requires an insurer to notify an employer when it cancels coverage:

   > Every insurance carrier authorized to transact business in this state, including Pinnacol Assurance, which insures employers against liability for compensation under the provisions of articles 40 to 47 of this title, shall notify any employer insured by the carrier or Pinnacol Assurance, and any agent or representative of such employer, if applicable, by certified mail of any cancellation of such employer's insurance coverage. Such notice shall be sent at least thirty days prior to the effective date of the cancellation of the insurance. However, if the cancellation is based on one or more of the following reasons, then such notice may be sent less than thirty days prior to the effective date of the cancellation of the insurance: Fraud, material misrepresentation, nonpayment of premium, or any other reason approved by the commissioner of insurance.

7. In *Perez v. Lags Exploration, d/b/a Waterboyz Int'l, LLC*, W.C. 4-734-913 & 4-734-795 (ICAO March 23, 2009), the Industrial Claim Appeals Office stated: "We have construed this provision (Section 8-44-110, C.R.S. 2008) to afford the insured advanced notice of an impending cancellation of insurance so that the insured has an opportunity to avoid non-insured status. *Davidovich v. Team Builders, Inc.*, W.C. 4-468-801 (October 5, 2001).

8. In the present case, the ALJ concludes that Insurer did provide proper notice of cancellation by certified mail to the employer. Proof of receipt of the notice of cancellation by certified mail is evidenced by the signature card signed by John Garber on behalf of Employer Waste Chasers. In addition, counsel for Employer Waste Chasers stipulated that notice was received by his client. The ALJ concludes that Employer Waste Chasers raised no other issue at hearing in this matter regarding the sufficiency of notice under Section 8-44-110, C.R.S. The ALJ therefore concludes that Insurer proved by a preponderance of the evidence that Insurer complied with the notice requirement of Section 8-44-110, C.R.S.

9. Once the existence of a valid insurance contract has been established, the burden rests with the insurer to establish that policy lapsed or was validly canceled. *Butkovich v. Industrial Claim Appeals Office,* 690 P.2d 257 (Colo. App. 1984.) In the insurance context, "[a]bsent an express agreement or a course of dealing to the contrary, the mailing of a premium or a statement alone is not *per*

se sufficient to constitute delivery thereof." *Butkovich, supra.* Further, the risk of postal loss is on the insured where no facts indicate that the insurer intended the mere mailing of a premium to be sufficient as payment. *Thomason v. Schnorr,* 587 P. 2d 1205 (Colo. App. 1978.) There is no credible evidence in the record to establish such a course of dealing between Employer Waste Chasers and Insurer that would warrant a finding that mere mailing of the premium payment constituted receipt thereof.

10. Rather, the evidence established that the Notice of Cancellation expressly states that the premium payment must be "received" by April 16, 2014 or the policy would be canceled. Under these circumstances, mailing the check was not in itself sufficient to avoid cancellation. *Butkovich, supra; Thomason, supra.* There were no credible or persuasive facts presented to establish that Insurer intended to accept payment as of the date of mailing. In fact, the credible, persuasive and uncontroverted testimony of Insurer's employees establishes that the opposite is true. The documentary evidence also clearly establishes that it is the receipt of the payment that determines the timeliness of the payment.

11. Therefore, the ALJ concludes that the Employer Waste Chasers' policy was properly canceled for nonpayment of premium. The preponderance of the evidence establishes that Employer Waste Chasers' premium payment was not received by Insurer until it was processed and deposited by U.S. bank on May 2, 2014. It is further concluded that Employer Waste Chasers was uninsured on the date of Claimant's April 18, 2014, injury.

STATUTORY EMPLOYER

12. The primary purpose of the Act is to provide injured workers a remedy for job-related injuries without regard to fault. *See Travelers Insurance Co. v. Savio*, 706 P.2d 1258 (Colo. 1985). The statutory scheme of the Act provides an injured worker compensation from the employer without regard to negligence; in return, the responsible employer is granted immunity from common-law negligence liability. *Buzard v. Super Walls, Inc.*, 681 P.2d 522 (Colo. 1984). The Act contemplates that "statutory employers" are also afforded such immunity. *Travelers Insurance Co. v. Savio*, *supra*. While a company may not be an injured worker's employer under common law, it may nevertheless be a statutory employer for purposes of workers' compensation coverage and immunity purposes. *O'Quinn v. Walt Disney Productions,* 177 Colo. 190, 493 P.2d 344 (1972).

13. Section 8-41-401(1)(a), C.R.S., provides:

> Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sub lessee, contractor, or subcontractor ... shall be construed to be an

> employer ... and shall be liable ... to pay compensation for injury ... resulting there from to said lessees, sub lessees, contractors, and subcontractors and their employees ....

14. This provision of the Act makes general contractors ultimately responsible for injuries to employees of subcontractors. *Edwards v. Price*, 191 Colo. 46, 550 P.2d 856 (1976). Its purpose is to prevent employers from avoiding responsibility for injuries under the Act by contracting out their regular work to uninsured independent contractors. *Heflely v. Morales,*197 Colo. 523, 595 P.2d 233 (1979).

15. The test for determining whether an alleged employer is a "statutory employer" under Section 8-41-401(1)(a), C.R.S. is whether the work contracted out is part of the employer's "regular business" as defined by its total business operation when considering elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer. *Finlay v. Storage Technology,* 764 P.2d 62 (Colo. 1988). This test requires inquiry into the importance of the disputed service to the alleged employer's total business operation, which may be demonstrated by showing that, in the absence of a subcontractor's services, the contractor would find it necessary to accomplish the work by use of the contractor's own employees rather than to forego the performance of the work. *Id.*

16. The ALJ is persuaded through the documentary evidence and the testimony of John Garber and Josef Bender that Employer Waste Chasers worked as a subcontractor on the accident site. The credible and persuasive evidence presented at hearing through these witnesses established that Employer Waste Chasers was hired by the general contractor Bender Industrial Group, Inc. to perform work under contract that was a regular part of Bender Industrial Group's business and for which Bender would have had to hire employee to perform if Employer Waste Chasers had not performed it. Therefore, it is found and concluded that Bender Industrial Group, Inc. is the statutory employer of Claimant and is liable for Claimant's April 18, 2014, work injury.

ORDER

It is therefore ordered that:

1. Employer Bender is the statutory employer of Claimant;

2. Employer Bender shall be liable for authorized, reasonably necessary and related medical benefits for the April 18, 2014, work injury. Specifically, Employer Bender shall be liable for medical expense incurred for medical treatment of the April 18, 2014, work injury pursuant to the Workers' Compensation Fee Schedule as established at hearing for services rendered to Claimant by Poudre Valley Hospital, North Colorado Medical Center, Emergency Physicians of the Rockies, Colorado Health Medical Group and Advanced Medical Imaging.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 8, 2016

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues addressed in this decision concern Claimant's entitlement to medical benefits, specifically left knee surgery. The question is whether a recommended left total knee replacement procedure is reasonable, necessary, and related to Claimant's admitted February 24, 2014 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Rook and McBride, the ALJ enters the following findings of fact:

1. Claimant works as a carpenter-rigger for Employer. His duties involve setting forms for completion of vertical and horizontal concrete projects. As part of his duties Claimant must lift and install concrete forms, sometimes at significant heights off the ground.

2. On February 24, 2014, while Claimant was working to secure equipment due to excessive wind on the upper deck of a multistory structure, a gust caught a piece of plywood he was carrying. As the ground was icy and slick, Claimant slide across the deck where he struck his left knee cap on a steel concrete form beam.

3. Claimant sustained a 3.5 cm laceration to his left knee and was taken to the Penrose-St. Francis emergency room for treatment. X-rays showed no fractures. Claimant received six sutures and was released. (See Respondents' Exhibit F).

4. Claimant testified that he was "knocked out," at the time of his work injury. (H. Tr. p. 14 ll 17-18). Claimant's testimony is contradicted by medical records from Penrose-St. Francis Hospital which show that Claimant denied any loss of consciousness just two hours after the incident occurred. (Respondents' Exhibit F, p. 148).

5. On February 25, 2014 Claimant followed-up with Premier Urgent Care, the authorized treating provider in this matter. Claimant denied twisting his knee. He was diagnosed with left knee sprain and laceration. He was prescribed oxycodone and a knee immobilizer with recommendations to elevate and ice his knee. (Respondents' Exhibit C, p. 61-70).

6. On February 27, 2014 Claimant returned to Premier Urgent Care and reported his knee was getting better. (See Respondents' Exhibit C, p. 57). Claimant

completed a pain diagram on this date depicting aching pain in his right knee. Based upon the evidence presented, the ALJ finds that Claimant was probably confused by the body diagram and intended to indicate that he had aching pain in his left knee. Consequently, the ALJ also finds that the triage nursing note from this date indicating that Claimant was in for follow up for his "right" knee is also in error.

7. On March 5, 2014, Dr. Anjmum Sharma, of Premier Urgent Care, evaluated Claimant. Dr. Sharma's notes indicate that Claimant had no complaints of pain; however, a pain diagram completed by Claimant on this date depicts aching pain in the knees bilaterally. (Respondents' Exhibit C, p. 52 & 53). Claimant's sutures were removed and he was placed at maximum medical improvement (MMI) without impairment and released to full duty work. (*Id.* at p. 49).

8. Approximately three weeks later, Claimant returned to Dr. Sharma on March 28, 2014 with complaints of pain in his left knee. (Respondents' Exhibit C, p. 44-48). Radiographs from March 28, 2014 showed mild degenerative changes of the medial patellofemoral compartments. (Respondents' Exhibit G, p. 213). Claimant completed a pain diagram depicting what the ALJ interprets, from the diagram, was burning pain in the left knee. While Dr. Sharma's report is difficult to read, he documents that Claimant had developed cellulitis. Claimant was diagnosed with a left knee contusion with cellulitis. (Respondents' Exhibit C, p. 44). Based upon the evidence presented, the ALJ finds that, more probably than not, Claimant's laceration became infected after his sutures were removed causing cellulites and resultant burning pain in the left knee.

9. On April 11, 2014, Claimant returned to Dr. Sharma for follow-up. Although Dr. Sharma's report documents complaints of left knee pain, Claimant's pain diagram from this date indicates that he was having aching in the right knee. As found at paragraph 6 above, Claimant's reference to having aching in the right knee was, more probably than not, an inadvertent mistake based upon the evidence presented.

10. On April 17, 2014 an MRI of Claimant's left knee was performed. It demonstrated findings consistent with "prepatellar bursitis with marked edema in the surrounding soft tissues, cartilage loss over the medial, median, and lateral patellar facets with subchondral marrow edema, extending up to full-thickness at the medial facet consistent with chondromalacia patella, and small joint effusion." No loose bodies were appreciated. (Respondents' Exhibit G, p. 209-210).

11. On April 21, 2014 Dr. Sharma referred Claimant to Dr. David Walden at Premier Orthopedics for an orthopedic evaluation. Claimant's pain diagram from this encounter depicts stabbing pain in the front of the right knee and the back of the left knee. The ALJ finds from the pain diagram that Claimant likely intended to depict that he had stabbing pain on the front and back of the same knee; however, was probably confused by the reverse images of the body resulting in his marking both the right and left leg. Given that Claimant has always verbally reported left knee pain, the ALJ finds it probable that he intended to depict that he had stabbing pain in the front and back of

the left knee. Again, the ALJ finds that Claimant was likely confused by the body diagram as noted at paragraphs 6 and 9 above.

12. Dr. Walden saw Claimant on April 22, 2014. After reviewing the April 17, 2014 MRI and examining Claimant, Dr. Walden's impression was that of "left knee acute on chronic irritation/exacerbation of patellar chondral damage and left knee septic prepatellar bursitis with no evidence of current infection." Dr. Walden provided an injection for Claimant's knee. (Respondents' Exhibit D, p. 92-93).

13. Claimant returned to Dr. Walden on May 20, 2014. Dr. Walden noted that Claimant's cellulitis had resolved with antibiotics. He discussed with Claimant that the April 17, 2014 MRI primarily showed osteoarthritis. He recommended visco-supplementation injections followed by maximum medical improvement. He stated that surgery was not indicated. (*Id*. at p. 89-91).

14. Dr. Sharma found Claimant to be at MMI on May 21, 2014 without permanent impairment. Dr. Sharma provided a diagnosis of left knee chondromalacia. Claimant's pain diagram from this date of appointment is devoid of any indication that Claimant was having any aching, burning or stabbing sensations as he had noted on previous diagrams. While the pain diagram is blank, the triage nursing note from this date of encounter reflects that Claimant was in for follow up of his work related left knee injury and he was "not better." Moreover, Dr. Sharma's notes in the HPI section of his report from this date that Claimant had positive complaints of left knee pain. Dr. Sharma released Claimant to full duty without permanent work restrictions. Dr. Sharma recommended the three visco-supplementation injections be performed under maintenance care. (Respondents' Exhibit C, p. 51).

15. Respondent's filed a Final Admission of Liability consistent with Dr. Sharma's opinions on June 5, 2014.

16. Claimant received additional Orthovisc injections on June 9 and June 16, 2014. The additional injections failed to provide Claimant relief from his ongoing pain.

17. Claimant filed a timely objection to the Final Admission of Liability requesting a Division Independent Medical Examination ("Division IME").

18. Claimant attended a Division IME with Dr. Stephen Scheper on September 10, 2014. Dr. Scheper opined that Claimant was not at MMI and recommended Claimant return to Dr. Walden for continued treatment. (Claimant's Exhibit 9). In so opining Dr. Scheper noted: that "[i]n consideration of his long professional career without difficulty, the inciting event on 2/24/2014 resulted in a dramatic change to his functional capacity for gainful employment and deserves further management." (Claimant's Exhibit 9, p. 109).

19. Dr. Scheper recommended that Claimant "be referred back to orthopedic surgery for continued treatment with Dr. Walden, or an additional provider at the

claimant's discretion. The specific treatment options should be left to the expertise of his orthopedist at this point." (Claimant's Exhibit 9, p. 109).

20. At the request of Respondents, Dr. Wallace Larson performed an Independent Medical Examination (IME) of Claimant on December 10, 2014. As part of his evaluation, Dr. Larson reviewed Claimant's medical records, Dr. Scheper's Division IME report, and performed a physical examination of Claimant. Dr. Larson noted that on April 5, 2008 Claimant had an MRI of his right knee which demonstrated evidence of posttraumatic osteoarthritis and mild chondromalacia of the patella. He also noted that the March 5, 2014 medical records of Premiere Urgent Care indicated Claimant reported "no pain". Dr. Larson noted that Claimant's pain diagram from this date "does not demonstrate any pain." As noted at Finding of Fact (FOF) ¶ 7 above, Claimant completed a pain diagram on March 5, 2014, which the ALJ finds depicts aching in the knees bilaterally. Consequently, the ALJ finds Dr. Larson's suggestion that Claimant was not having any pain erroneous and unconvincing. Dr. Larson further noted that the March 28, 2014 radiographs of Claimant's left knee demonstrated no fracture but showed mild degenerative changes of the medial and patellofemoral compartments, and that the April 17, 2014 MRI of Claimant's left knee demonstrated prepatellar bursitis with marked edema in the surrounding tissue, cartilage loss over the medial, median, and lateral patellar facets with subchondral marrow edema extending up to full-thickness at the medial facet consistent with chondromalacia patella, and small joint effusion. He opined that Claimant sustained a work-related left knee contusion and laceration and was at MMI, without indication for surgical intervention. (Respondents' Exhibit B).

21. Claimant returned to Dr. Walden for further evaluation on January 13, 2015. Dr. Walden noted that the MRI scan showed complete loss of cartilage of the medial facet of the patella. Dr. Walden stated it was "difficult to tell whether or not this was acute or chronic phenomenon." In recommending consideration for a total knee arthroplasty, Dr. Walden noted as follows: "The patient does not seem to (sic) getting better and, according to him, he is "unemployable." I am not certain that all of the patient's arthritic changes in the knee are related to trauma, however, certainly this incidence seem (sic) to worsen the symptoms and may have worsened the underlying condition as well." (emphasis added) The ALJ finds, based upon the opinions expressed in this report, that Claimant had pre-existing left knee arthritis and that Dr. Walden is uncertain whether that arthritis was aggravated or accelerated by Claimant striking his knee on a steel concrete form beam on February 24, 2014.

22. Claimant returned to Dr. Walden on April 21, 2015. It was noted that on physical exam both of Claimant's knees had crepitus through range of motion. Dr. Walden referred Claimant to Dr. Schuck for "evaluation and possible total knee arthroplasty." (*Id.* at p. 76-77).

23. On May 5, 2015, Dr. Schuck's office requested authorization for a left total knee replacement (TKR).

24. On June 1, 2015, Dr. John McBride, a board certified, level II accredited orthopedic surgeon conducted an IME of Claimant at Respondents' request. Dr. McBride took a history from Claimant, reviewed the medical records, and performed a physical examination. Dr. McBride noted that Claimant's pain appeared to be "significantly out of proportion" to his injury. He applied the Medical Treatment Guidelines, Rule 17, Exhibit 6 (hereinafter "MTGs") to determine whether Claimant's February 24, 2014 work injury was sufficient to meet the criteria to establish proof of an aggravation of his pre-existing osteoarthritis resulting in Claimant's need for a total knee arthroplasty (TKA).

25. The ALJ takes judicial notice of the MTGs, Rule 17, Exhibit 6.

26. Dr. McBride noted the MTGs state that the provider must establish an occupational relationship establishing a change in the patient's baseline condition in relationship to the work activities. Dr. McBride further noted that Claimant met this criterion because he had pain and he did have an injury to his knee which was evidenced by the acute effusion in films.

27. Nonetheless, Dr. McBride explained that the MTGs provide that in order to entertain previous trauma (injury) to the knee as a causative factor for an asserted aggravation of pre-existing osteoarthritis, the patient should have medical documentation of meniscectomy or hemarthrosis at the time of the original injury (trauma), evidence of meniscus or ACL damage, and the prior injury (trauma) should have been at least two years from the presentation of the new complaints. He explained that according to the treatment guidelines to have aggravation of osteoarthritis as a need for a total knee replacement, Claimant's osteoarthritis should have been "significantly changed" on the radiographs and there should be at least two years for the increasing pathology. Dr. McBride noted that Claimant's MRI from April 2014 showed full thickness chondromalacia with cystic changes indicating chronic osteoarthritis which predated the February 24, 2014 injury. Accordingly, Dr. McBride explained that Claimant did "not meet the guidelines under the lower extremity, section 2, section A, aggravated arthritis with regards to the injury on exhibit page 47." Dr. McBride noted further that Claimant also has medial joint line osteoarthritis which would not be affected by a direct blow to the anterior aspect of his knee as described by Claimant. He opined that while a total joint replacement may be appropriate, Claimant does not meet the guidelines to have a TKA as part of his workers' compensation claim. (Respondents' Exhibit A).

28. On September 23, 2015 Claimant attended an IME with Dr. Jack Rook at Claimant's request. Dr. Rook diagnosed Claimant with left knee chondromalacia, left knee osteoarthritis, and a sleep disturbance. Dr. Rook opined that Claimant's left knee condition and his need for a TKA is directly related to the February 24, 2014 occupational injury. He noted Claimant did not have any problems with his left knee prior to the work injury. He stated that Claimant sustained direct trauma to his left knee on February 24, 2014 and the knee pain has persisted since. Dr. Rook noted that Claimant had "not improved despite conservative treatment and his primary

occupational orthopedic physician, Dr. Walden, has recommended a resurfacing procedure." According to Dr. Rook, "that procedure would not have been necessary at this point in time if not for the patient's injury of February 24, 2014."

29. Dr. Rook disagreed with Dr. McBride's interpretation of the guidelines, opining that the "principal" criteria which must be met is that of establishing a relationship to work activities such as repetitive kneeling, crawling, squatting, and climbing or heavy lifting. Regarding Dr. McBride's decision to "consider" other causative factors as provided for in the MTGs, Dr. Rook noted: "There is a clear occupational relationship to the patient's left knee condition and his current need for more aggressive treatment. Dr. McBride erroneously relied upon the "other causative factors to consider" with regards to the patient's aggravated osteoarthritis. This patient does not have any other causative factors to consider because he was asymptomatic in February 24, 2014. Dr. McBride is misinterpreting this section of the guidelines with regards to the medical reasoning that he applied in the discussion section of his report."

30. Dr. Rook stated that a physician only needs to consider "other causative factors" in the case of an occupational disease. (Claimant's Exhibit 12).

31. Dr. Rook's deposition was taken on October 9, 2015. Dr. Rook is a board certified physiatrist with expertise in physical medicine and rehabilitation (PM&R) and level II accredited. Dr. Rook testified consistently with his report opining that Claimant sustained a traumatic injury to his left knee on February 24, 2014. (Deposition of Dr. Rook, October 9, 2015, hereinafter "Rook Depo.", p. 8 ll 24-25, p. 9 ll 1-2). He opined that Claimant's April 17, 2014 MRI showed swelling of the bone indicative of bony trauma and fluid in the joint. He stated it was his opinion that this was indicative of an acute injury because of the findings of edema and fluid within the joint. (*Id*. at p. 10 ll 6-24). Dr. Rook also testified that he disagreed with Dr. McBride's opinion that the recommended TKA was not related to Claimant's work injury. He opined that Dr. McBride misinterpreted the guidelines by utilizing "other causative factors" as he believed these factors should only be taken into consideration if the patient has a pre-existing condition or when dealing with an occupational disease. (*Id*. at p. 14 ll 5-12, p. 16 ll 9-25, p. 17 ll 1-15).

32. Dr. Rook explained that it was not his opinion that Claimant's osteoarthritis was caused by trauma due to his February 24, 2014 injury, but that his osteoarthritis was permanently aggravated as a result of his injury. (*Id*. at p. 24 ll 9-16, p. 27 ll 6-15). He conceded that if Claimant's pathology was caused by the injury he would expect Claimant to have continuous symptoms from the date of injury. (*Id*. at p. 25 ll 7-12). Dr. Rook testified that he did not know if the specifics of Claimant's history included a period of time where Claimant reported being better and then his knee became symptomatic again, however, if this was the case one would need to figure out if there was a new injury or if Claimant did something to re-aggravate his condition. (See *Id.* at p. 25 ll 13-25, p. 26 ll 1-11). Additionally, Dr. Rook conceded that the Rule 17, Exhibit 6, page 47 does not actually list or refer to primary and secondary factors; it was merely his opinion that they were implied. (Rook Depo. at p. 26 ll 19-25, p. 27 ll 1-5).

33. Dr. McBride also testified by deposition taken on November 5, 2015. Dr. McBride has been a board certified orthopedic surgeon for 30 years. He testified that in his opinion the recommended TKA was not related to Claimant's February 24, 2014 work injury. (Deposition of Dr. McBride, November 5, 2015, hereinafter "McBride Depo.", p. 11 ll 7-11). He testified that Claimant's MRI from April 17, 2014 showed end-stage arthritis, which is the medical basis for replacement of the joint. (*Id*. at p. 11 ll 11-25). He testified that the April 17, 2014, MRI showed full thickness cartilage loss over the medial patellar facet, subchondral cystic changes and edema. He explained that the edema was secondary to Claimant's arthritis and his subchondral cystic changes. Dr. McBride testified that subchondral cystic changes develop from wear and tear arthritis and not from a direct blow to the knee as described by Claimant. Moreover, according to Dr. McBride it takes years to develop subchondral cystic changes. (*Id*. at p. 12 ll 1-12).

34. Based upon the evidence presented, the ALJ finds that Claimant likely had severe pre-existing, yet asymptomatic, osteoarthritis in the left knee at the time of his February 24, 2014 work injury and that this arthritis was not caused by striking his knee on a steel concrete form beam. See also, Finding of Fact (FOF) ¶ 19.

35. Regarding the question of whether Claimant's need for a TKA was related to an occupationally induced aggravation or acceleration of Claimant's pre-existing osteoarthritis, Dr. McBride testified that, while the MRI showed a small joint effusion, the MTGs require a hemarthrosis and a large effusion for occupational relatedness, which Claimant did not have. (*Id*. at p. 12 ll 17-25, p. 13 ll 1). He also explained that there were no loose bodies appreciated in the MRI which indicated there had been no acute chondral injury to Claimant's knee. (*Id*. at p. 13 ll 1-4). Dr. McBride further explained there was no evidence of significant intra-articular damage (inside the knee joint), which are the articular surfaces that are replaced with a total knee arthroplasty. (*Id*. at p. 13 ll 12-21). He testified the damage to Claimant's knee was all to the superficial surface, i.e. the outside of the knee joint as documented by both Dr. Walden and Dr. Larson. (*Id*. at p. 15 ll 5-8).

36. Dr. McBride reviewed both Dr. Rook's IME report and the transcript of his deposition testimony. Following that review, Dr. McBride testified that Dr. Rook was not accurate in his description of "primary" and "secondary" factors under the guidelines for aggravation of osteoarthritis. He explained that in determining whether wear and tear arthritis is secondary to an occupational injury you need to consider causative factors. He explained, according to the guidelines, the prior injury must be at least two years from presentation of the new complaints. He testified that the guidelines specifically state under the section of aggravated osteoarthritis "in order to entertain previous trauma as a cause" there has to have been a significant deterioration of the condition as documented in objective studies, i.e., normal studies then two years later abnormal studies. (*Id*. at p. 29 ll 1-11; p. 15 ll 11-19). He testified that Claimant's studies from a month and a half after his work injury are significantly abnormal; therefore, they would

have been abnormal at the time of the injury as this was not enough time for Claimant to develop subchondral cystic changes and edema.

37. Dr. McBride explained that, contrary to the opinion of Dr. Rook's that the edema present on imaging study was indicative of acute injury, the edema was actually more suggestive of chronic osteoarthritis and the subchondral cystic changes as edema is the first stage before cysts develop and Claimant's cystic changes indicated his arthritis was more than five years old. (*Id.* at p. 15 ll 20-25, p. 16, p. 17 ll 1-7). He testified that Claimant's 2008 MRI of his right knee also showed evidence of edema associated and consistent with osteoarthritis. (*Id.* at p. 17 ll 14-25, p. 18). Therefore, the edema noted in Claimant's left knee MRI was more indicative of a natural progression of osteoarthritis and not an acute injury. (*Id.* at p. 19 ll 1-5).

38. Dr. McBride opined Dr. Sharma's note from March 5, 2014 which indicated Claimant had no pain complaints was significant in that it meant Claimant had returned to baseline from his February 24, 2014 work injury. He stated the fact that Claimant returned several weeks later with pain complaints is consistent with the natural progression of his pre-existing degenerative osteoarthritis and not from acute trauma caused by Claimant's February 24, 2014 work injury. (*Id.* at p. 21 ll 21-25, p. 22, p. 23 ll 1-11). The ALJ finds this testimony ignores Claimant's March 5, 2014 pain diagram which constitutes some evidence that Claimant was not pain free on March 5, 2014 as suggested by Respondents. Moreover, the opinions expressed by Dr. McBride do not account for the fact that Claimant's pain had changed in nature from aching on March 5, 2014 to burning on March 28, 2014, which the ALJ finds was probably due to Claimant's acute cellulitis rather than an interval progression of Claimant's osteoarthritis over a three week time frame. Based upon the evidence presented as a whole, the ALJ finds the suggestion that Claimant returned to "baseline" following his February 24, 2014 work injury dubious.

39. Based upon the evidence presented, the ALJ finds that Claimant has not returned to his previous baseline level of function despite significant conservative care.

40. During his hearing testimony, Claimant adamantly denied having any problems with either of his knees prior to his February 24, 2014 work injury. (Hrg. Tr., p. 25 ll 17-19; p. 27 ll 6-11). Medical records contradict Claimant's assertion, as they show Claimant previously complained of pain and swelling in his right knee which appears to have been so significant as to result in an MRI being performed on April 5, 2008. (Respondents' Exhibit G, p. 215-216). Nonetheless, after careful review of the medical record evidence, the ALJ finds no evidence to suggest that Claimant's left knee was symptomatic, that he was actively engaged in ongoing treatment for his left knee or that his left knee was functionally limiting prior to February 24, 2014. Consequently, while there are inconsistencies between Claimant's testimony and the medical records submitted concerning loss of consciousness following his February 24, 2014 work injury and prior pain in the right knee, the evidence presented persuades the ALJ that Claimant's pre-existing left knee osteoarthritis was asymptomatic and non-limiting until it was aggravated and made symptomatic when he struck his left knee on a steel beam

on February 24, 2014. Based upon the evidence presented, the ALJ finds, more likely than not, that Claimant aggravated his previously asymptomatic osteoarthritis and that conservative treatment measures have failed to return him to his baseline level of function.

41. Consistent with the opinions expressed by Dr. Walden, Dr. Rook and Dr. McBride, Claimant's need for a TKA is reasonable and necessary. Regardless, the question of whether the need for the procedure is related to Claimant's February 24, 2014 work injury must be resolved. To that extent, Dr. McBride testified that the question is whether Claimant's knee is worn out because of the direct blow to it, an infectious process related to the work injury, or damage to the ligament or hemarthrosis as outlined in Rule 17, to which he stated the answer, is "clearly no." (*Id.* at p. 26 ll n23-25, p. 27 ll 1-10). Based upon his report and testimony, the ALJ finds that Dr. McBride's opinion is that Claimant's need for surgery is the result of the natural progression of a pre-existing condition, specifically degenerative osteoarthritis of the knee. The ALJ is not persuaded.

42. The ALJ has carefully considered the MTGs and the opinions of Dr. McBride. Based upon the record evidence presented as a whole, the ALJ finds the opinions of Dr. Rook regarding the causal relationship between Claimant's industrial injury and his need for a TKA more persuasive than the contrary opinions of Dr. McBride. The ALJ has weighed the evidence and concludes that the opinions of Dr. McBride ignored critical evidence concerning Claimant's left knee pain leading to an erroneous conclusion that Claimant had returned to "baseline." Moreover, having carefully reviewed the MTGs, the ALJ is persuaded that Dr. McBride misapplied the guidelines to the injury in this case. The section of the MTGs entitled "Other causative factors to consider" addresses prior trauma/injury to the knee joint as a likely cause for a claimant's aggravated arthritis. Here, the ALJ is convinced that there are no causative factors at play which would explain Claimant's aggravated osteoarthritis other than his February 24, 2014 work injury. Claimant did not have previous meniscus or ACL damage that would predispose him to degenerative change in the knee as provided for by the MTGs.

43. Taken as a whole, the ALJ finds that the record evidence supports a finding that Claimant's current need for a left total knee arthroplasty flows proximately and naturally from his February 24, 2014 work related injury. Accordingly, the ALJ finds that Claimant has proven by a preponderance of the evidence that his need for a left total knee replacement is related to his February 24, 2014 work injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony is generally consistent with the content of the medical records. Consequently, the ALJ finds Claimant to be a credible and persuasive witness.

C. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Claimant's Entitlement to a Left Total Knee Arthroplasty and the Colorado Workers' Compensation Medical Treatment Guidelines

D. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

E. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

F. The Medical Treatment Guidelines are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight. Moreover, the MTGs have been accepted in the assessment of the cause for aggravated osteoarthritis. While the MTGs provide for specific steps in analyzing whether there is sufficient proof to causally connect an aggravation of pre-existing osteoarthritis to a Claimant's need for additional treatment, the Court is not bound by the MTGs in deciding individual cases on the MTGs or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

G. In this case, the totality of the evidence supports a conclusion that Claimant suffered from a latent pre-existing osteoarthritis in the left knee which manifested after Claimant struck this knee on a steel concrete form beam while performing his work duties. Since that injury, Claimant has experienced increasing functional decline despite extensive conservative treatment. Specific surgical treatment for the knee has been recommended as a consequence. Such injuries are compensable. *Subsequent Injury Fund v. Devore*, 780 P.2d 39 (Colo. App. 1989); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986); see also, *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990)(industrial injuries which aggravate, accelerate, or combine with preexisting conditions so as to produce disability and a need for treatment are compensable). As found, Claimant has proven by a preponderance of the evidence that he suffered a compensable aggravation of a pre-existing condition when he struck his left knee on a steel concrete beam, that this aggravation has resulted in disability and that Claimant's current need for a total knee arthroplasty flows proximately and naturally from the February 24, 2014 aggravation/injury. Contrary to Dr. McBride's testimony, the persuasive evidence does not support a conclusion that conservative care restored Claimant to "baseline."

H. Further, as noted above, the ALJ has considered the MTGs and the opinions of Dr. Rook and McBride regarding their application to the injury in this case. In this case, the finds and concludes that the evidence supports Dr. Rooks opinions that Claimant's need for a TKA is directly related to the compensable aggravation of Claimant's underlying osteoarthritis. Dr. McBride's contrary opinions are not persuasive. When the evidentiary record is considered in its entirety, the ALJ concludes that substantial evidence exists to support a conclusion that Claimant's February 24, 2014 work injury aggravated his underlying osteoarthritis hastening his need for a TKA. Consequently, Claimant has proven by a preponderance of the evidence that the recommended procedure is reasonably necessary and related to his compensable February 24, 2014 work related injury. Accordingly, Respondents are obligated to pay for it.

ORDER

It is therefore ordered that:

1. Respondent shall pay for all medical expenses to cure and relieve Claimant from the effects of the compensable aggravation of his left knee osteoarthritis including, but not limited to, the left TKA as recommended by Dr. Walden and Dr. Schuck.
2. All issues not expressly decided herein are reserved for future determination.

DATED: February 1, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-956-741-02

ISSUES

- Whether Respondents have overcome the opinion of Lynn Parry, M.D., the Division Independent Medical Exam ("DIME") examiner through a showing of clear and convincing evidence.
- What Claimant's permanent impairment rating should be, and what her entitlement to permanent partial disability benefits should be.
- Whether Claimant is entitled to maintenance medical benefits.
- Whether Claimant has met her burden to support conversion of her upper extremity rating to a whole person rating.
- Whether Claimant is entitled to a disfigurement award, and if so, in what amount.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On March 4, 2013, Claimant sustained a compensable occupational injury when she slipped and fell in her work parking lot, falling backwards and landing on her back and striking her head. As a result of the slip and fall, Claimant sustained injuries to her head, back, and right shoulder.

2. On March 5, 2013, Claimant sought initial emergency treatment for her injuries at Swedish Medical Center and then established care with her primary authorized treating physician, David A. Zieg, M.D. Dr. Zieg diagnosed Claimant with occipital neuralgia, right rotator cuff syndrome, lumbosacral strain, and tinnitus.

3. Dr. Zieg referred Claimant to Philip A. Stull, M.D., of Colorado Orthopedic Consultants for treatment of the right shoulder injury. Medical records from Colorado Orthopedic Consultants indicate that Claimant's complaints included neck pain. After undergoing extensive conservative care, including rest, medications, injections, and physical therapy, Dr. Stull recommended surgical intervention. On August 7, 2014, Claimant underwent a right shoulder arthroscopy, subacromial decompression, and distal clavicle excision. Following surgery, Claimant reported doing well and noted that her right shoulder symptoms were greatly improved. From August 18, 2014 to November 20, 2014, Claimant sought post-surgical physical therapy at Functional Performance Center which continued to successfully decrease pain and soreness in her right shoulder.

4. Dr. Zieg also referred Claimant to Alan Lipkin, M.D. at Associates of Otolaryngology for treatment of a ringing sensation in her ears. Dr. Lipkin diagnosed Claimant with tinnitus and bilateral sensorineural hearing loss. Dr. Lipkin noted that Claimant's tinnitus symptoms began soon after the March 4, 2013 slip and fall accident, and that Claimant had never experienced symptoms of tinnitus prior to the accident. The medical providers at Associates of Otolaryngology ultimately provided Claimant with binaural behind-the-ear hearing aids with tinnitus masking.

5. Usama H. Ghazi, D.O., of Colorado Rehabilitation and Occupational Medicine evaluated Claimant for treatment of her low back pain. On June 19, 2014, Dr. Ghazi performed a left L5-S1 facet injection and left sacroiliac joint injection. Claimant reported a 100% reduction of back pain for three days following the June 19, 2014 injection. On July 21, 2014, Dr. Ghazi performed a cluneal nerve block and indicated that while he was very pleased with the improvement in Claimant's back symptoms, she may eventually need rhizotomies or another set of steroid injections. Following Claimant's facet injection and nerve block, her lower back symptoms were largely resolved, but the pain then increased once again in December 2014.

6. Dr. Zieg opined that Claimant had reached maximum medical improvement (MMI) on January 6, 2015. He assigned permanent impairment ratings of 11% upper extremity or 7% whole person for Claimant's right shoulder range of motion deficits; and 11% whole person for her lumbar spine condition and range of motion deficits.

7. Claimant timely objected to Respondents' Final Admission of Liability and requested a Division Independent Medical Exam (DIME). Lynn Parry, M.D. was selected as the DIME examiner. Dr. Parry evaluated Claimant on July 17, 2015, approximately six months after Claimant was placed at MMI.

8. Respondents hired John Burris, M.D. to perform an independent medical examination (IME) of Claimant which took place on October 19, 2015.

9. Dr. Parry and Dr. Burris both agreed with Dr. Zieg that Claimant reached MMI on January 6, 2015, and that date is not contested.

10. Dr. Zieg, Dr. Parry, and Dr. Burris all also agreed that Claimant was entitled to an impairment rating for loss of range of motion in the right shoulder. Dr. Zieg and Dr. Burris both assigned an 11% scheduled rating for loss of range of motion in the shoulder, and Dr. Parry assigned 19%. Dr. Parry testified that in her opinion, the difference between the range of motion calculations taken by Dr. Zieg in January 2015 and her range of motion calculations taken in July 2015 was explained by six months having passed during which time Claimant had not received substantial treatment, and that during that time period Claimant had developed adhesive capsulitis from underuse of her shoulder. Dr. Burris agreed that the passage of six months could have led to a change in Claimant's medical condition.

11. In addition to the impairment rating given to Claimant for loss of range of motion in the right shoulder, Dr. Parry and Dr. Burris also agreed that pursuant to the AMA Guides, Claimant was entitled to an additional 10% impairment rating for undergoing a distal clavicle excision.

12. With regard to Claimant's lumbar spine, Dr. Zieg, Dr. Parry, and Dr. Burris all gave Claimant a 5% impairment for a specific disorder of the spine under Table 53 of the AMA Guides. All three doctors also acknowledged that Claimant had restricted range of motion in the lumbar spine. However, only Dr. Zieg and Dr. Parry awarded an impairment rating for that loss of range of motion. Dr. Burris opined that Claimant's loss of range of motion was "meaningless" considering her body habitus and deconditioning. Dr. Burris did not explain why Claimant's body habitus rendered Claimant's loss of lumbar range of motion "meaningless," or why it affected Claimant's lumbar range of motion measurements but not her shoulder range of motion measurements. The ALJ finds no persuasive evidence to support Dr. Burris' opinion that obese individuals are not entitled to lumbar range of motion impairment ratings. In contrast, Dr. Zieg and Dr. Parry both believed that Claimant's loss of range of motion in the spine was related to her work injury. Dr. Zieg awarded a 6% whole person impairment for loss of range of motion in the spine, and Dr. Parry awarded a 13% whole person impairment for same. Dr. Parry testified that in her opinion, the reason that Claimant's range of motion deteriorated between the time of MMI and the time that she evaluated Claimant was due to Claimant not receiving treatment for six months and continuing to work a significant amount of overtime for Employer which involved prolonged sitting, a documented aggravating factor for Claimant's lumbar spine injury. Dr. Parry's opinion is also supported by Claimant's credible testimony confirming her lack of treatment for the six months prior to th DIME, and her testimony that she was on pain medications at the time she was placed at MMI, but was no longer on pain medications at the time of her DIME examination. The ALJ finds this was sufficient to resolve the disparity between the ratings.

13. In addition to ratings for the lumbar spine and right shoulder, Dr. Parry also assigned a 2% whole person rating for occipital neuralgia. At his deposition, Dr. Burris testified that while he did not assign an impairment rating for occipital neuralgia, it is a ratable condition under the AMA Guides, and that tables 3, 4 and/or 5 on page 113 should be used in the event that a rating is necessary. Dr. Burris testified that he was not sure how Dr. Parry assigned the occipital neuralgia rating, but that if she could explain her rationale, the decision to do so was not necessarily error, but rather a difference of opinion from his own. Dr. Parry attached Page 113 of the AMA Guides to her report, which showed her handwritten notes regarding how she calculated the occipital neuralgia impairment rating. She also verified in her deposition that she used that Page 113 in assigning an impairment rating for occipital neuralgia.

14. Dr. Parry also assigned Claimant a 4% impairment rating for tinnitus. Dr. Burris opined that this was an error because tinnitus can only be rated when accompanied by a hearing loss sufficient to qualify for impairment. However, medical records establish that Claimant was diagnosed with bilateral sensorineural hearing loss sufficient to require treatment with hearing aids. And the ALJ does not find persuasive

support in the AMA Guides for Dr. Burris' opinion that such hearing loss must be sufficient to qualify for impairment. Dr. Burris also opined in his report that tinnitus is not a typical result of a fall. However, Dr. Burris testified that tinnitus can be caused to a trauma to the head, and that reports indicate that Claimant fell and hit her head during the course of the March 4, 2013 slip and fall accident. Further, Dr. Parry testified that Claimant suffered acute vertigo immediately after falling, indicating that she concussed her ear causing tinnitus.

15. When Dr. Zieg placed Claimant at MMI, he recommended a significant amount of maintenance medical care, including follow-up appointments with his office, follow-up appointments with Dr. Ghazi, and additional medications and/or injections. Similarly, at the DIME examination, Dr. Parry recommended maintenance care in the form of follow-up appointments and a gym pass with a pool therapy program. Dr. Burris disagreed with Claimant's need for maintenance medical care. He testified, "[Claimant's] undergone all kinds of treatment, and it's done nothing to get her better. . . . She's been through all of this, and I don't think she's going to get any different results by doing more of it." Dr. Burris' opinion is not supported by the medical records which demonstrate Claimant's condition improved with surgery, injections, steroid creams, pain medications, and physical therapy which provided continued functional gains including decreased pain and increased strength. Dr. Burris' opinion is also controverted by Claimant's credible testimony that her condition improved with physical therapy, steroid creams, pain medications, injections, and surgery. And her credible testimony that physical therapy provided so much relief that she continued receiving physical therapy after being placed at MMI.

16. Both Dr. Parry and Dr. Burris testified regarding the situs of Claimant's limitation of the right shoulder, and whether that limitation extends past the arm and into the core of the body. Dr. Burris testified that all of Claimant's limitation with respect to the shoulder is located in the arm. However, he also admitted that Claimant circled the collarbone on her pain diagram at the time of her IME to indicate that she was experiencing pain in that area and that the collarbone is above the head of the humerus and considered a part of the core of the body. In contrast, Dr. Parry indicated that Claimant complained of tightness in the upper trapeze area where it attaches to the cervical spine, indicating that effected functionality extends to the core of her body. Dr. Parry's opinion is further supported by Claimant's credible testimony that her pain was greatest in the area of her clavicle.

17. As a result of Claimant's March 4, 2013 work injury, Claimant has a visible disfigurement to the body consisting of two scars over her right shoulder resulting from Dr. Stohl's August 7, 2014 surgery. One scar is two inches long; the other is two and one half inches long. Both scars are thin, white, and well-healed. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

18. To the extent that Dr. Burris' opinions differ from those of Dr. Parry, the ALJ finds the opinions of Dr. Parry to be more credible and persuasive than those of Dr.

Burris as they are better supported by the AMA Guides, Claimant's medical records, and Claimant's persuasive testimony.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

The opinion of a DIME examiner is given special weight over the opinions of other physicians in a workers' compensation claim. *Askew v. Sears Roebuck & Co.*, 914 P.2d 416 (Colo. App. 1995). A medical impairment rating assigned by a DIME examiner is binding unless it is overcome by a showing of clear and convincing evidence. § 8-42-107(8)(c); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Clear and convincing evidence is established by showing that the truth of a contention is highly probable and free from serious or substantial doubt. *DiLeo v. Koltnow*, 200 Colo. 119, 613 P. 2d 318 (1980). Put more simply, in order to overcome a DIME examiner's opinion regarding permanent impairment a party must prove that it is highly probable that the DIME physician's opinions are incorrect. *Metro Moving & Storage Co.* at 411. A mere difference of opinion between physicians fails to constitute error.

The question of whether a party meets the "clear and convincing" burden of proof is a question of fact for an administrative law judge. *McLane Western, Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999). In determining whether the DIME examiner's opinion has been overcome, one factor for consideration is whether the DIME physician complied with the AMA Guides. *Kirschenman v. Eastman Kodak*, E.C. No. 4-361-035 (July 31, 2000); *Rivale v. Beta Metals, Inc.*, W.C. No. 4-265-360 (April 16, 1998).

In ascertaining the DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of her initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see also Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

Dr. Burris opined that the DIME examiner made several errors, including using the sixth edition of the AMA guides to assign impairment ratings, giving an impairment rating for tinnitus where there is no documented hearing loss, failing to explain in writing how a rating was assigned for occipital neuralgia, and failing to explain the inconsistencies between her own range of motion measurements and the authorized treating physician's measurements.

However, none of the issues brought forth by Dr. Burris are true errors.

- Dr. Parry clearly testified that she only utilized the 3rd revised edition of the AMA guides in assigning impairment ratings in this case, and the ALJ has credited that testimony as persuasive.

- With regard to the tinnitus rating and whether Claimant has documented hearing loss, both the medical records from Associates of Otolaryngology and Dr. Parry's testimony establish that Claimant suffered from bilateral hearing loss.

- Dr. Parry explained what portion of the AMA Guides she used to assign an occipital neuralgia rating. Dr. Parry attached page 113 of the AMA Guides to the back of her report, and she also provided hand-written notes regarding how, specifically, she arrived at a 2% impairment rating.

- Dr. Parry explained the occipital neuralgia rating at her deposition, and the procedure she used to assign an occipital neuralgia rating was the same procedure that Dr. Burris opined can be used to assign such a rating.

- Finally, that Dr. Parry's range of motion findings were higher than the authorized treating physician's and that Dr. Parry chose to use her own range of motion findings does not constitute error. Dr. Parry persuasively testified that the passage of time and the lack of post-MMI medical care explained Claimant's change in function and range of motion.

Respondents have not met their burden of proof to overcome the DIME examiner's opinions in this case. Dr. Parry properly assigned impairment ratings for Claimant's right shoulder, lower back, tinnitus, and occipital neuralgia.

Permanent Partial Disability Benefits

Medical impairment ratings are the basis for permanent partial disability awards. Ratings must be made pursuant to the AMA Guides. § 8-42-101 (3.7), C.R.S.

The impairment ratings assigned to Claimant by Dr. Parry are all accurate and in compliance with the AMA Guides. The ALJ finds Dr. Burris' testimony regarding perceived errors made by the DIME examiner to be unpersuasive.

Maintenance Medical Benefits

A claimant may receive maintenance medical benefits that are reasonable, necessary and related to relieve the effects of a claimant's industrial injury or prevent further deterioration of the claimant's condition. *See* § 8-42-101(1)(a), C.R.S.; *Grover Industrial Commision*, 759 P.2d 705 (Colo. 1988). The burden of proof to establish entitlement to these benefits rests on the claimant. *Id*. In order to receive maintenance benefits, the claimant must present substantial evidence that future medical treatment is or will be reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition. *See Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo App. 2003). The question whether the claimant met the burden of proof to establish entitlement to maintenance medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999).

Claimant's authorized treating physician and the DIME examiner recommended maintenance medical benefits for Claimant. The ALJ credits their opinions over the opinion of Dr. Burris, who opined that Claimant does not need any additional medical care because the medical care she has received in the past has not been helpful. This opinion is inconsistent with the medical records, which demonstrate a marked improvement from surgery, injections, and physical therapy. Claimant is entitled to the maintenance medical benefits recommended for her by Dr. Zieg and Dr. Parry.

Conversion

Section 8-42-107(1)(a), C.R.S. limits a claimant to a scheduled disability award if the claimant suffers an injury or injuries described in section 8-42-107(2), C.R.S.; *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). The term "injury," as used in § 8-42-107(1)(a), refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself*.* *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997). The term "injury" refers to the manifestation in a part or parts of the body that have been functionally impaired or disabled as a result of the industrial accident. *Warthen v. Indus. Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004). It is not the location of physical injury or the medical explanation for the "ultimate loss" which determines the issue. *Blei v. Tuscorora,* W.C. No. 4-588-628 (June 17, 2005).

Whether a claimant has suffered an impairment that can be fully compensated under the schedule of disabilities is a factual question for the ALJ. *Walker v. Jim Fuoco Motor Co.,* supra. In determining whether an impairment can be fully compensated under the schedule of disabilities, the ALJ is not limited to the medical evidence. A claimant's testimony, if credited, may be utilized to support a finding on the nature and extent of the claimant's functional impairment. *Savio House v. Dennis*, 665 P.2d 141 (Colo.App. 1983).

Evidence of pain which restricts a claimant's ability to use a portion of the body located proximal to the arm at the shoulder is a relevant factor in determining whether a claimant has proven a functional impairment above the level of the arm at the shoulder. *Guilotte v. Pinnacle Glass Company,* W.C. No. 4-443-878 (November 20, 2001).

Claimant testified that she has significant ongoing pain in her shoulder, and that the pain extends up into her collarbone and neck. This ALJ finds Claimant's testimony credible. Furthermore, this ALJ credits the testimony of Dr. Parry over Dr. Burris with regard to the situs of Claimant's functional limitation of the shoulder. Claimant underwent a distal clavicle excision as a part of her shoulder surgery on August 7, 2014. Having a portion of the collarbone removed, and experiencing ongoing pain in the area of the collarbone and neck clearly exhibits the fact that the functional limitation of Claimant's shoulder extends to the core of her body. A scheduled impairment rating for the shoulder in this case does not compensate the claimant appropriately. Claimant has proved to a preponderance of the evidence that she is entitled to conversion of her right shoulder impairment rating.

Disfigurement

In addition to other compensation benefits, an additional sum may be paid for scarring or other disfigurement to a part of the body normally exposed to public view. § 8-42-108, C.R.S.

THE ALJ FINDS AND CONCLUDES that as a result of Claimant's March 4, 2013 work injury, Claimant has a visible disfigurement to the body consisting of two scars over her right shoulder resulting from Dr. Stohl's surgery. One scar is two inches long; the other is two and one half inches long. Both scars are thin, white, and well-healed. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. DIME examiner Lynn Parry, M.D.'s opinions have not been overcome by clear and convincing evidence. Respondents shall pay Claimant permanent partial disability benefits based on the impairment ratings assigned by Dr. Parry.

2. Claimant has established to a preponderance of the evidence that she is entitled to maintenance medical benefits. Respondents are responsible for the maintenance medical treatment recommended for Claimant by Lynn Parry, M.D. and David Zieg, M.D.

3. Claimant's has established to a preponderance of the evidence that her shoulder injury cannot be fully compensated under the schedule of disabilities. The right shoulder impairment rating assigned to Claimant shall be converted to a whole person impairment rating, and permanent partial disability benefits shall be paid based on the converted rate.

4. Claimant has sustained scarring to her shoulder in an area that is normally exposed to the public view. Insurer shall pay Claimant $900 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

5. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

6. Issues not expressly decided herein are reserved to the parties for future determination.

7. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 18, 2016

Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury to his lower back during the course and scope of his employment with Employer on July 24, 2012.

2. Whether Claimant has proven by a preponderance of the evidence that he suffered compensable injuries to his head and neck during the course and scope of his employment with Employer on December 29, 2014.

FINDINGS OF FACT

1. Claimant is a 58 year old male who works for Employer as an On-Car Supervisor. Claimant has received significant training on investigating and reporting Workers' Compensation claims.

2. Claimant explained that on July 24, 2012 he slipped and fell at Employer's facility after tripping on a rug. He asserts that he injured his lower back during the incident.

3. Claimant's coworker Brandon Martin explained that Workers' Compensation claims are reported to Business Manager Larry Antonio. Alternatively, Mr. Martin remarked that on-call supervisors can enter their own injuries into Employer's reporting system.

4. Instead of reporting his injury to Mr. Antonio, Claimant explained that he contacted District Manager Eldridge Sims. However, Mr. Sims denied that Claimant reported a lower back injury to him in July 2012. Claimant remarked that he deviated from Employer's policy of reporting injuries to the Business Manager because he was concerned about Employer's retaliatory action related to authorization of an expense account.

5. Claimant noted that he subsequently reported his lower back injury to Mr. Antonio. However, Mr. Antonio denied that Claimant mentioned any July 24, 2012 work accident. Instead, Mr. Antonio recalled that Claimant reported a non-work related injury in approximately July 2012. Claimant had stated that he injured his lower back when he fell off a ladder at home.

6. On August 7, 2012 Claimant visited his personal primary care physician Grant Taylor, M.D. Claimant reported that he was in "overall good health this past year without any significant injuries or illnesses." Dr. Taylor specifically evaluated Claimant for his musculoskeletal and neurological health. He noted the Claimant was negative

for back pain, joint pain, extremity weakness, headaches and numbness in the extremities. In an On October 10, 2012 visit to Dr. Taylor Claimant again did not mention back or lower extremity pain.

7. On April 1, 2013 Claimant returned to Dr. Taylor for an examination. Dr. Taylor noted that Claimant reported sharp and consistent pain in the left lower back for the past three days. He commented that Claimant had no specific trauma, falls or injuries. Claimant was negative for extremity weakness, gait disturbance, headaches and numbness in the extremities.

8. On July 24, 2013 Dr. Taylor recorded that Claimant was experiencing an exacerbation of chronic, intermittent lower back pain. He noted that there were no other specific injuries. Claimant had pain across both sides of his lower back that radiated into his posterior thigh. Dr. Taylor referred Claimant to pain specialist Brooke Bennis, M.D. for an evaluation.

9. Claimant subsequently received epidural steroid injections for his lower back. However, Claimant continued to experience numbness and tingling in his lower back that radiated down his right leg into his toes. Dr. Taylor referred Claimant for a surgical consultation and an MRI of his lower back.

10. On February 4, 2014 Claimant entered his own report of the July 24, 2012 injury into Employer's reporting system. Mr. Antonio had recently ceased working for Employer and Gary Penaflor had just become Employer's new Business Manager. Mr. Penaflor took no action on Claimant's July 24, 2012 injury claim because Claimant had told him he had discussed the matter with Mr. Sims.

11. Mr. Sims testified that an employee has never directly reported an industrial injury to him. Instead, Employer's policy is that employees should report injuries to the Facility Business Manager. He recalled that Claimant had noted a back injury prior to 2012 on a boat, but never mentioned a work-related injury. Mr. Sims remarked that, if an employee is concerned about a retaliation problem, the employee can contact Employer's Human Resources Department to file a complaint.

12. On February 24, 2014 Claimant visited Authorized Treating Physician (ATP) Tracy L. Stefanon, M.D. for an evaluation. Claimant reported that on July 24, 2012 he was walking from one office to another in Employer's facility when he tripped on a "ripple" in a rug. He landed on his right shoulder and within approximately one hour he experienced pain on the right side of his lower back. Dr. Stefanon diagnosed Claimant with lower back pain. She determined that, based on the information provided, Claimant's lower back injury occurred during the course and scope of his employment with Employer.

13. Claimant asserts that he also suffered an injury during the course and scope of his employment on December 29, 2014. He explained that he was walking through Employer's parking lot when he slipped and fell on ice. Claimant noted that he landed on his back, left shoulder and head. He took photographs of the scene with his

cellular phone and sent them through a text message to Mr. Penaflor. Claimant then left Employer's facility in his personal automobile to transport his wife to a medical appointment. He subsequently dropped his wife off at home and returned to Employer's facility to complete his work shift. Claimant discussed the fall with Mr. Penaflor and showed him the location of the incident.

14. Mr. Penaflor testified that Claimant reported a lower back injury on December 29, 2014. Claimant did not require emergency treatment and did not mention any head or neck injuries.

15. On January 8, 2015 Claimant visited Dr. Stefanon for an examination. Claimant reported that on December 29, 2014 he slipped on a patch of ice in Employer's parking lot, fell backwards and struck his left shoulder blade. He did not strike his head, elbow or wrist. However, Claimant experienced immediate pain on the left side of his neck. Dr. Stefanon diagnosed Claimant with a cervical strain, a thoracic strain and radicular symptoms in the C8 nerve root distribution. She concluded that Claimant suffered an industrial injury during the course and scope of his employment with Employer on December 29, 2014. Dr. Stefanon referred Claimant for a cervical MRI.

16. On January 28, 2015 Dr. Stefanon noted that the MRI revealed multilevel degenerative changes in Claimant's cervical spine but nothing at the C8 level that would correspond to Claimant's symptomatology. Dr. Stefanon continued Claimant's full duty employment, referred him to physical therapy and prescribed an EMG study.

17. On March 25, 2015 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. Dr. Lesnak addressed Claimant's July 24, 2012 lower back injury. Although Claimant had already reported a December 29, 2014 neck injury, he denied neck and cognitive complaints at the evaluation. Dr. Lesnak reviewed Claimant's medical records and conducted a physical examination. He determined that Claimant did not suffer a lower back injury on July 24, 2012 during the course and scope of his employment with Employer. He concluded that there was "absolutely no medical evidence to suggest that [Claimant] had any complaints of low back or leg symptoms that developed as a result of the 07/24/12 occupational incident. In fact he did not have any low back symptoms until approximately over eight months after 07/24/12. The symptoms that developed over eight months after an incident are clearly completely unrelated to the 07/24/12 occupational incident." Dr. Lesnak summarized that, if Claimant sustained a mild injury on July 24, 2012, his symptoms completely resolved by August 7, 2012. None of Claimant's current symptoms are thus related to the July 24, 2012 incident.

18. During the course of Claimant's subsequent treatment with Dr. Stefanon he mentioned cognitive difficulties after his December 29, 2014 fall. On May 13, 2015 Claimant visited Gerald Macintosh, M.D. for an evaluation. Claimant reported that he fell on ice and snow at work and lost consciousness for approximately 10 minutes on December 29, 2014. Dr. Macintosh remarked that the temporal relationship between

the December 29, 2014 accident and Claimant's cognitive symptoms over time remained "spotty."

19. On October 8, 2015 Claimant returned to Dr. Stefanon for an examination. He reported migraine headaches that he attributed to his December 29, 2014 slip and fall. Dr. Stefanon determined that the migraines were remote from his fall and unrelated to the December 29, 2014 incident. Nevertheless, he reported continuing cognitive difficulties.

20. On November 3, 2015 Claimant underwent a neuropsychological evaluation with Suzanne Kennealy, Psy.D. She performed a neuropsychological evaluation involving 12 different clinical procedures for assessing a traumatic brain injury. Dr. Kennealy concluded that "current neuropsychological testing indicated that Claimant has no cognitive sequela associated with the slip and fall injury of December 29, 2014."

21. On January 11, 2016 the parties conducted the post-hearing evidentiary deposition of Dr. Stefanon. Regarding the July 24, 2012 date of injury, Dr. Stefanon noted that she had not reviewed Claimant's complete medical history. She did not consider Claimant's prior medical records or his treatment with Dr. Taylor. Shortly prior to her deposition she reviewed Claimant's medical records from July 2012 through February 2014. Dr. Stefanon changed her opinion and concluded that Claimant did not sustain a work-related lower back injury during the course and scope of his employment with Employer on July 24, 2012.

22. In addressing the December 29, 2014 incident, Dr. Stefanon commented that there were no objective symptoms to correlate with Claimant's subjective complaints of cognitive difficulties. She thus determined that Claimant did not suffer a traumatic brain injury as a result of the December 29, 2014 accident. Moreover, Claimant's brain MRI did not support the diagnosis of a traumatic brain injury. Dr. Stefanon maintained that Claimant's cognitive difficulties were not related to the December 29, 2014 incident or have resolved without permanent disability.

23. Dr. Stefanon maintained that Claimant suffered a cervical strain as a result of the December 29, 2014 slip and fall. She explained that Claimant's cervical MRI revealed multiple levels of chronic degenerative changes. Dr. Stefanon noted that Claimant's fall caused a flare-up of symptoms in the facet joints of his neck. Claimant's facet pain requires additional medical treatment. Dr. Stefanon summarized that her objective findings were consistent with the history of a work-related mechanism of injury if there was a legal determination that the timing and place of Claimant's fall was on Employer's premises.

24. On January 8, 2016 the parties conducted the post-hearing evidentiary deposition of Dr. Lesnak. Dr. Lesnak maintained that Claimant did not suffer a lower back injury during the course and scope of his employment with Employer on July 24, 2012. He commented that Claimant noted he had not developed lower back pain until approximately September 2013 when he was bending over to put on his socks after

showering in the morning. Dr. Lesnak commented that Claimant's October 22, 2013 lumbar spine MRI was normal for someone of his age and did not reveal any acute findings. He explained that the medical records did not reflect any specific, documented, reproducible, objective findings on examination that correlated with Claimant's symptoms. Dr. Lesnak summarized that, although Claimant experienced subjective pain, the medical records did not reveal any objective evidence of an injury to his lumbar spine attributable to the July 24, 2012 incident.

25. Dr. Lesnak agreed with Dr. Stefanon that Claimant did not suffer a traumatic brain injury as a result of the December 29, 2014 slip and fall. He remarked that Claimant's symptoms simply did not comport with the diagnosis of a traumatic brain injury pursuant to the Colorado Medical Treatment Guidelines (*Guidelines*). Dr. Lesnak noted that Claimant did not have any documented loss of consciousness 24 to 72 hours after the slip and fall and did not have any loss of memory concerning events that occurred immediately before and after the injury. He commented that Claimant did not have any alteration in mental status at the time of the injury, did not have any Glasgow Scale Coma disorders and did not suffer posttraumatic amnesia greater than 24 hours or loss of consciousness for 30 minutes or less. Finally, Claimant's abilities to investigate his slip and fall, operate a motor vehicle and return to work after the incident were inconsistent with a traumatic brain injury on December 29, 2014.

26. Dr. Lesnak disagreed with Dr. Stefanon regarding Claimant's cervical spine injury as a result of the December 29, 2014 slip and fall. He concluded that Claimant did not suffer a cervical spine injury during the course and scope of his employment with Employer on December 29, 2014. Dr. Lesnak remarked that subjective pain complaints must be verified through objective testing to constitute a compensable injury. He reiterated that Claimant's cervical MRI reflected degenerative changes consistent with age. Dr. Lesnak testified that Rule 17, Exhibit 8 of the *Guidelines* specifies that pain alone is generally not compensable. Upon reviewing the medical records, Dr. Lesnak determined that Claimant may have had a sprain or strain of the soft tissue in his neck. However, he would have expected those symptoms to resolve a couple of weeks to a couple months after the December 29, 2014 incident. Dr. Lesnak stated that he saw no evidence that Claimant sustained any trauma to his cervical spine, nervous system, spinal cords, discs, joints or any other pathology in the neck. He concluded that Claimant's presentation did not make sense because one would likely not sustain a structural injury to the cervical spine after a fall that was not a compression-type injury.

27. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable injury to his lower back during the course and scope of his employment with Employer on July 24, 2012. Initially, Claimant did not report that he tripped and injured his lower back while working for Employer until approximately 18 months after the incident or February 4, 2014. Although Dr. Stefanon originally determined that Claimant suffered a lower back injury while working on July 24, 2012, she noted at her deposition that she had not reviewed Claimant's complete medical history. She had not considered Claimant's prior medical records or his treatment with

Dr. Taylor. Shortly prior to her deposition she reviewed Claimant's medical records from July 2012 through February 2014. Dr. Stefanon changed her opinion and concluded that Claimant did not sustain a work-related lower back injury during the course and scope of his employment with Employer on July 24, 2012. Finally, Dr. Lesnak persuasively maintained that Claimant did not suffer a lower back injury during the course and scope of his employment with Employer on July 24, 2012. He commented that Claimant's October 22, 2013 lumbar spine MRI was normal for someone of his age and did not reveal any acute findings. Dr. Lesnak explained that the medical records did not reflect any specific, documented, reproducible, objective findings on examination that correlated with Claimant's subjective symptoms. He summarized that, although Claimant experienced subjective pain, the medical records did not reveal any objective evidence of an injury to Claimant's lumbar spine attributable to the July 24, 2012 incident. Accordingly, Claimant has failed to establish that the July 24, 2012 incident aggravated, accelerated or combined with his pre-existing lower back condition to produce a need for medical treatment.

28. Claimant has failed to prove that it is more probably true than not that he suffered compensable injuries to his head and neck during the course and scope of his employment with Employer on December 29, 2014. Initially, Claimant has failed to demonstrate that he suffered a traumatic brain injury as a result of the December 29, 2014 slip and fall. Dr. Kennealy concluded that "current neuropsychological testing indicated that Claimant has no cognitive sequela associated with the slip and fall injury of December 29, 2014." Dr. Stefanon commented that there were no objective symptoms to correlate with Claimant's subjective complaints of cognitive difficulties. She thus determined that Claimant did not suffer a traumatic brain injury as a result of the December 29, 2014 accident. Dr. Stefanon summarized that Claimant's cognitive difficulties were not related to the December 29, 2014 incident or have resolved without permanent disability. Finally, Dr. Lesnak agreed with Dr. Stefanon that Claimant did not suffer a traumatic brain injury as a result of the December 29, 2014 slip and fall. He remarked that Claimant's symptoms simply did not comport with the diagnosis of a traumatic brain injury pursuant to the *Guidelines*. Dr. Lesnak noted that Claimant did not have any documented loss of consciousness 24 to 72 hours after the slip and fall and did not have any loss of memory concerning events that occurred immediately before and after the injury. He commented that Claimant did not have any alteration in his mental status at the time of the injury, did not have any Glasgow Scale Coma disorders and did not exhibit posttraumatic amnesia greater than 24 hours or loss of consciousness for 30 minutes or less. Claimant's abilities to investigate his slip and fall, operate a motor vehicle and return to work after the incident were inconsistent with a traumatic brain injury on December 29, 2014.

29. Claimant has also failed to establish that he suffered a cervical spine injury as a result of the December 29, 2014 slip and fall. Dr. Stefanon maintained that Claimant suffered a cervical strain as a result of the December 29, 2014 slip and fall. She explained that Claimant's cervical MRI revealed multiple levels of chronic degenerative changes. Dr. Stefanon noted that Claimant's fall caused a flare-up of symptoms in the facet joints of his neck. Claimant's facet pain requires additional

medical treatment. Dr. Stefanon summarized that her objective findings were consistent with the history of a work-related mechanism of injury if there was a legal determination that the timing and place of Claimant's fall was on Employer's premises.

30. However, Claimant initially reported that he had suffered a recurrent lower back injury on December 29, 2014. He did not mention a neck injury to Mr. Penaflor. Dr. Lesnak persuasively disagreed with Dr. Stefanon regarding Claimant's cervical spine injury as a result of the December 29, 2014 slip and fall. He concluded that Claimant did not suffer a cervical spine injury during the course and scope of his employment with Employer on December 29, 2014. Dr. Lesnak remarked that subjective pain complaints must be verified through objective testing to constitute a compensable injury. He testified that Rule 17, Exhibit 8 of the *Guidelines* specifies that pain alone in the neck and cervical spine is generally not compensable. Upon reviewing the medical records, Dr. Lesnak determined that Claimant may have had a sprain or strain of the soft tissue in his neck. However, he would have expected those symptoms to resolve a couple of weeks to a couple months after the December 29, 2014 incident. Dr. Lesnak stated that he saw no evidence that Claimant sustained any trauma to his cervical spine, nervous system, spinal cords, discs, joints or any other pathology in the neck. Finally, the medical records reveal that Claimant's subjective pain symptoms do not correlate with clinical, objective, medical evidence. Accordingly, Claimant has failed to establish that the December 28, 2014 incident aggravated, accelerated or combined with his cervical spine condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable injury to his lower back during the course and scope of his employment with Employer on July 24, 2012. Initially, Claimant did not report that he tripped and injured his lower back while working for Employer until approximately 18 months after the incident or February 4, 2014. Although Dr. Stefanon originally determined that Claimant suffered a lower back injury while working on July 24, 2012, she noted at her deposition that she had not reviewed Claimant's complete medical history. She had not considered Claimant's prior medical records or his treatment with Dr. Taylor. Shortly prior to her deposition she reviewed Claimant's medical records from July 2012 through February 2014. Dr. Stefanon changed her opinion and concluded that Claimant did not sustain a work-related lower back injury during the course and scope of his employment with Employer on July 24, 2012.

Finally, Dr. Lesnak persuasively maintained that Claimant did not suffer a lower back injury during the course and scope of his employment with Employer on July 24, 2012. He commented that Claimant's October 22, 2013 lumbar spine MRI was normal for someone of his age and did not reveal any acute findings. Dr. Lesnak explained that the medical records did not reflect any specific, documented, reproducible, objective findings on examination that correlated with Claimant's subjective symptoms. He summarized that, although Claimant experienced subjective pain, the medical records did not reveal any objective evidence of an injury to Claimant's lumbar spine attributable to the July 24, 2012 incident. Accordingly, Claimant has failed to establish that the July 24, 2012 incident aggravated, accelerated or combined with his pre-existing lower back condition to produce a need for medical treatment.

8. As found, Claimant has failed to prove by a preponderance of the evidence that he suffered compensable injuries to his head and neck during the course and scope of his employment with Employer on December 29, 2014. Initially, Claimant has failed to demonstrate that he suffered a traumatic brain injury as a result of the December 29, 2014 slip and fall. Dr. Kennealy concluded that "current neuropsychological testing indicated that Claimant has no cognitive sequela associated with the slip and fall injury of December 29, 2014." Dr. Stefanon commented that there were no objective symptoms to correlate with Claimant's subjective complaints of cognitive difficulties. She thus determined that Claimant did not suffer a traumatic brain injury as a result of the December 29, 2014 accident. Dr. Stefanon summarized that Claimant's cognitive difficulties were not related to the December 29, 2014 incident or have resolved without permanent disability. Finally, Dr. Lesnak agreed with Dr. Stefanon that Claimant did not suffer a traumatic brain injury as a result of the December 29, 2014 slip and fall. He remarked that Claimant's symptoms simply did not comport with the diagnosis of a traumatic brain injury pursuant to the *Guidelines*. Dr. Lesnak noted that Claimant did not have any documented loss of consciousness 24 to 72 hours after the slip and fall and did not have any loss of memory concerning events that occurred immediately before and after the injury. He commented that Claimant did not have any alteration in his mental status at the time of the injury, did not have any Glasgow Scale Coma disorders and did not exhibit posttraumatic amnesia greater than 24 hours or loss of consciousness for 30 minutes or less. Claimant's abilities to investigate his slip and fall, operate a motor vehicle and return to work after the incident were inconsistent with a traumatic brain injury on December 29, 2014.

9. As found, Claimant has also failed to establish that he suffered a cervical spine injury as a result of the December 29, 2014 slip and fall. Dr. Stefanon maintained that Claimant suffered a cervical strain as a result of the December 29, 2014 slip and fall. She explained that Claimant's cervical MRI revealed multiple levels of chronic degenerative changes. Dr. Stefanon noted that Claimant's fall caused a flare-up of symptoms in the facet joints of his neck. Claimant's facet pain requires additional medical treatment. Dr. Stefanon summarized that her objective findings were consistent with the history of a work-related mechanism of injury if there was a legal determination that the timing and place of Claimant's fall was on Employer's premises.

10. As found, however, Claimant initially reported that he had suffered a recurrent lower back injury on December 29, 2014. He did not mention a neck injury to Mr. Penaflor. Dr. Lesnak persuasively disagreed with Dr. Stefanon regarding Claimant's cervical spine injury as a result of the December 29, 2014 slip and fall. He concluded that Claimant did not suffer a cervical spine injury during the course and scope of his employment with Employer on December 29, 2014. Dr. Lesnak remarked that subjective pain complaints must be verified through objective testing to constitute a compensable injury. He testified that Rule 17, Exhibit 8 of the *Guidelines* specifies that pain alone in the neck and cervical spine is generally not compensable. Upon reviewing the medical records, Dr. Lesnak determined that Claimant may have had a sprain or strain of the soft tissue in his neck. However, he would have expected those symptoms to resolve a couple of weeks to a couple months after the December 29, 2014 incident. Dr. Lesnak stated that he saw no evidence that Claimant sustained any trauma to his cervical spine, nervous system, spinal cords, discs, joints or any other pathology in the neck. Finally, the medical records reveal that Claimant's subjective pain symptoms do not correlate with clinical, objective, medical evidence. Accordingly, Claimant has failed to establish that the December 28, 2014 incident aggravated, accelerated or combined with his cervical spine condition to produce a need for medical treatment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim based on a July 24, 2012 lower back injury is denied and dismissed.

2. Claimant's claim based on December 29, 2014 injuries to his head and neck is denied and dismissed.

. 3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: February 19, 2016.
#L4COFRFF0D1MMVv 2

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. What is Claimant's Average Weekly Wage (AWW);

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary partial disability benefits (TPD);

3. Whether Claimant proved by a preponderance of the evidence that the right to select the authorized treating physician for maintenance medical benefits passed to Claimant; and

4. Whether Claimant proved by a preponderance of the evidence that Claimant sustained functional impairment not limited to the schedule of injuries.

STIPULATIONS OF FACT

The following stipulations were accepted by the court:

1. Claimant was placed at maximum medical improvement (MMI) on November 14, 2014.

2. Respondents admit to a general medical maintenance award of reasonable, necessary and related medical benefits prescribed by an ATP.

3. Claimant was not provided with a copy of a designated provider list by Respondents.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are made.

1. Claimant sustained an admitted industrial injury to his left shoulder on June 21, 2014, while carrying a heavy metal support with a co-worker. Claimant's co-worker lost his hold on the heavy metal support when the co-worker fell placing the weight of the metal support on Claimant's shoulder.

2. Claimant’s job duties at the time of injury required that he perform heavy labor while working in a ditch. Claimant duties in the ditch involved uncovering gas and drainage lines. Claimant’s duties required him to use a shovel and to dig a lot. Claimant used his left shoulder extensively in the performance of his job duties.

3. At the time of his injury, Claimant testified that he was paid $20.75 per hour up to 40 hours per week, and time and a half for work over 40 hours. Claimant received a per diem of $270 per week expense reimbursement. Claimant’s per diem was not reimbursement and he did not have to incur any expense to receive his per diem. Claimant did not establish by a preponderance that the per diem was considered wages for federal income tax purposes.

4. Respondents admitted for an AWW of $1,543.59 but did not admit for indemnity benefits. Claimant’s AWW is calculated, as follows: Employer hired Claimant on April 14, 2014, and Claimant’s date of injury was June 21, 2014. The employment period used for AWW calculation purposes shall be the ten-week period of April 14, 2014, through June 22, 2014. Based on wage records, Claimant earned a total of $15,174.93 during this ten-week period. The total of $15,174.93 divided by 10 results in an AWW of $1,517.49.

5. Claimant provided notice of his injury to Employer’s safety manager and was taken for medical treatment at a clinic physically on the job site. When Claimant continued to experience pain and difficulty sleeping, a different safety manager for Employer took him to Concentra.

6. Claimant was first seen at Concentra on July 10, 2014, by Dr. Terrell Webb. Claimant provided a history of having received prior treatment in 2008, receiving PT and injection therapy that resolved his problem. Claimant was diagnosed with pain in the left shoulder and shoulder impingement. Claimant underwent x-rays, was prescribed Cyclobenzaprine HCL and Dr. Webb assigned work-restrictions of no repetitive lifting over 10 pounds, no pushing/pulling over 15 pounds of force, no reaching above shoulders, no climbing and limited use of left upper extremity.

7. Claimant was placed on temporary work-restrictions from July 10, 2014, to MMI on November 14, 2014. Claimant’s regular job duties required him to lift in excess of his temporary work-restrictions and he was limited in the hours he was able to work due to pain, medical restrictions and sleep deprivation caused by his work-related shoulder injury. Despite the limitations placed on Claimant’s activities due to work restrictions and pain, wage records reflect that Claimant continued to work full time for Employer. Although Claimant worked full time for Employer, he worked

fewer hours than before the work injury because of the disability caused by the work injury. Claimant is entitled to temporary partial disability benefits for the period from July 10, 2014, to the date of MMI on November 14, 2014.

8. Claimant had a MRI on September 2, 2014, which revealed tearing of the posterior superior glenoid labrum extending to the biceps labral anchor with rotator cuff tendinopathy with shallow partial interstitial tearing of the supraspinatus tendon.

9. Claimant was initially evaluated by orthopedic surgeon, Dr. Cary Motz, on August 26, 2014. On this date, Dr. Motz provided Claimant with an injection into the subacromial space which reduced Claimant's symptoms.

10. On October 21, 2014, Claimant followed up with Dr. Motz. On this date, Claimant showed mildly positive impingement and Hawkins test. Dr. Motz provided Claimant with the option of living with his symptoms or proceeding to surgery for arthroscopy with subacromial decompression. Claimant did not want to pursue surgery at the time and Dr. Motz indicated Claimant could reopen his case if he wished to pursue surgery in the future.

11. Claimant was placed at MMI on November 14, 2014, by Dr. Kirk Nelson at Concentra. Claimant's musculoskeletal exam was positive for muscle pain, muscle weakness and night pain. Dr. Nelson diagnosed Claimant with glenoid labrum tear, partial tear of the rotator cuff and shoulder impingement. Dr. Nelson released Claimant to full activity and assessed a 6% left upper extremity impairment rating, which converts to a 4% whole person impairment. The doctor prescribed maintenance medical treatment to include the ability to follow up in the next 12 months with Dr. Motz for treatment options to include injections or surgery, if indicated.

12. Claimant underwent a Division Independent Medical Exam (DIME) performed by Dr. Thomas Fry on May 5, 2015. Dr. Fry performed a physical examination of Claimant which showed tenderness with stress of supraspinatous and minimal discomfort of the infraspinatus. Claimant had mildly positive impingement signs and Hawkins maneuver. Claimant had slight guarding against anterior inferior motion of the glenohumeral joint. Assessment was left shoulder pain, probable small supraspinatous tendon tear with mild degenerative changes. Dr. Fry assessed Claimant to have a 9% left upper extremity impairment rating, which converts to a 5% whole person rating.

13. Claimant continued to experience pain and limitation with certain movements, as well as difficulty with sleep. Claimant credibly testified that when he performed range of motion, he experienced pain in the front of

his shoulder and physically pointed to a location which was on his body/chest side of his shoulder. Claimant attempted to return to Concentra, but was told his case was closed and additional treatment was not authorized. Claimant testified that he obtained a second injection from his private doctor which provided temporary relief, but his pain returned. Claimant testified that he understood his previous injury was to his right shoulder and he confirmed this with his previous treating physician but there was some initial confusion. The testimony of Claimant is found credible and persuasive.

14. Dr. Fry testified that Claimant had impingement at the shoulder. Dr. Fry testified that impingement occurs when the tendon goes under the clavicle and acromion. Dr. Fry testified that the impingement occurs cephalad, or to the head side of the glenohumeral joint. Dr. Fry testified that the subacromial space and bursa, supraspinatous tendon, infraspinatus tendon, acromion and clavicle were all located adjacent and cephalad to the glenohumeral joint. The opinions of Dr. Fry are found credible and persuasive on the issue of conversion.

15. Dr. Allison Fall testified as an expert witness in physical medicine and rehabilitation. Dr. Fall testified at hearing that Claimant's pain diagram, testimony at hearing and the locations of his pain were all located at the glenohumeral joint, and not proximal in location. Dr. Fall testified that Claimant's injury was to his rotator cuff and these tendons were responsible for moving the arm. Dr. Fall acknowledged that pain could reduce function. Dr. Fall testified that Claimant's functional limitations were limited to his arm and that his impairment should be limited to the schedule of injuries. Dr. Fall testified that some extraordinary rotator cuff injuries could be converted to a whole person if they impact function of the neck. However, if there was no functional impairment involving the neck, Dr. Fall testified that all rotator cuff injuries should be limited to impairment on the schedule of injuries. The testimony in this case of Dr. Fall is found less credible or persuasive on the issue of conversion than the testimony of Claimant and Dr. Fry.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after

considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592, P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO, 5 P.3d 385,389 (Colo. App. 2000).*

2. The ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008); *Kroupa* v. ICAO, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

3. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). The ALJ has broad discretion to determine the admissibility and weight of evidence based on an expert's knowledge, skill, experience, training and education. See Section 8-43-210, C.R.S; *One Hour Cleaners v. ICAO*, 914 P.2d 501 (Colo. App. 1995).

AWW

4. “Wages” is defined as the “money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied.” Section 8-40-201 (19(a), C.R.S. The term wages also includes…reasonable value of board, rent, housing, and lodging received by the employee, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case. Section 8-40-201 (19(b), C.R.S. No per diem payment shall be considered wages unless it is considered wages for federal income tax purposes. Section 8-40-201 (19(c), C.R.S. The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. Section 8-42-102(3), C.R.S.; *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo.App. 1993);

see *Williams Brother, Incorporated v. Grimm,* 88 Colo. 416, 197 P.1003 (1931); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo. App. 1992).

5. Claimant asserts an AWW of $1,544.28 prior to per diem. Respondents admitted for an AWW of $1,543.59. Based on the wage records, during the 10 week period preceding the work injury from April 14, 2014, through June 22, 2014, Claimant's AWW was $1517.49.

6. The issue is whether Claimant's AWW should include the $270 weekly per diem. Per diem payments are excluded from Average Weekly Wage unless the per diem payment is also considered wages for federal income tax purposes. Section 8-40-201(19)(C), C.R.S.

7. Claimant did not introduce evidence to establish that the $270 per diem payment is considered wages for federal income tax purposes. Thus, based on C.R.S. section 8-40-201(19)(C), the Court holds that the per diem payment shall not be included in AWW.

TPD

8. To establish entitlement to temporary disability benefits, an employee must prove that the industrial injury, or occupational disease, has caused a "disability," and that he/she suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S.; *PDM Molding, Inc. v. Stanburg*, 898 P.2d 542, 546 (Colo. 1995). The term "disability," as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or reduction of bodily function. "Disability" connotes both medical incapacity and restrictions to bodily function.

9. The second element of temporary disability is loss of wage earning capacity. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of "disability" may be evidenced by a complete or partial inability to work, or physical restrictions that preclude a claimant from securing employment. See *Culver v. Ace Electric*, supra; *Hendricks v. Keebler Company*, W.C. No. 4-373-392 Industrial Claim Appeals Office (ICAO), June 11, 1999.

10. Claimant proved by a preponderance of the evidence that he suffered a medical incapacity from July 10, 2014, until he was placed at MMI and released to full duty on November 14, 2014, via evidence of continuous work-restrictions by the ATP's at Concentra. Claimant credible testified that he missed hours from work following his injury due to pain, work-restrictions of 40 hours and sleep deprivation caused by his work injury.

11. Claimant shall receive sixty-six and two-thirds percent of the difference between Claimant's AWW at the time of the injury and Claimant's AWW during the continuance of the temporary partial disability. Section 8-42-106(1) C.R.S.

MEDICAL BENEFITS

12. Section 8-43-404(5), C.R.S. provides that an Employer shall provide a list of designated health care providers to the injured worker from which the employee may select the physician who attends the injured worker. If the services of a physician are not tendered at the time of injury, the claimant shall have the right to select a physician. Section 8-43-404 (5)(a)(I)(A), C.R.S.

13. The parties stipulated that Respondents did not tender to Claimant a designated provider list at any time following his injury. Claimant credibly testified that he was taken to multiple health care providers directly by Employer, but was not aware that he had a choice of health care provider that he could select for medical treatment. It is concluded that Claimant's request for change of physician is not a constructive challenged to MMI, since the MMI date was agreed to by the parties. As a result, the right to select the designated provider for Claimant passed to Claimant.

PPD/CONVERSION

14. The question of whether Claimant sustained a scheduled injury within the meaning of Section 8-42-107(2), C.R.S. or a whole person medical impairment under Section 8-42-107(8), is one of fact for determination by the ALJ. *Joseph Velasquez v. UPS and Liberty Mutual,* W.C. No. 4-573-459, (April 13, 2006). In resolving this question, the ALJ must determine the situs of the Claimant's functional impairment and the site of the functional impairment is not necessarily the site of the injury itself. *Id.* Discomfort which interferes with Claimant's ability to use a portion of the body may be considered an "impairment." *See Id. Citing Mader v. Popejoy Construction Co., Inc.,* W.C. No. 4-198-489 (August 9, 1996). Referred pain from the primary situs of the injury may establish proof of functional impairment to the whole person*. Id*. Thus, pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for purposes of determining whether an injury is on or off the schedule. *Id.*

15. Claimant established by a preponderance of the evidence that he sustained functional loss not limited to the schedule of injuries. The medical records and Claimant's credible testimony document Claimant's subjective complaints of pain in front of his shoulder and on the body/chest side of his shoulder. Claimant also established limitation involving impingement and pain/tenderness involving the supraspinatus and infraspinatus tendons, including guarding with range of motion movement. Claimant also credibly testified to ongoing difficulty with sleep due to shoulder pain.

16. A claimant's experience of pain in the shoulder or supraspinatus region that restrict range of motion functionally impairs beyond the schedule. *See Franklin Rutherford v. Gale/ Sutton Insulation,* W.C. No. 4-464-456 (August 29, 2001); *Mader v. Popejoy Construction Co., Inc.,* W.C. No.4-198-489 (August 9, 1996). Therefore, as documented in the present case, the pain and discomfort Claimant feels in his shoulder and chest limits his ability to reach forward, out to the side and back which functionally impairs Claimant beyond the shoulder.

17. Dr. Fry credibly opined that Claimant's physical examination and treatment provided evidence of functional loss based on impingement and pain involving the supraspinatous, infraspinatus and subacromial space all located cephalad, or to the head from the glenohumeral joint. It is concluded that the evidence supports functional impairment not limited to the schedule of injuries. Also, consistent with the present case, as documented by MRI and Dr. Nelson, abnormalities involving labral tears support conversion. *Velasquez v. UPS,* W.C. No. 4-573-459 (April 13, 2006); *Ortiz v. Service Experts, Inc.*, W.C. No. 4-657-974, (January 22, 2009).

ORDER

IT IS, THEREFORE ORDERED THAT:

1. Claimant's AWW is $1,517.49.

2. Claimant is entitled to TPD from July 10, 2014 to November 13, 2014.

3. The right to select the authorized treating physician passed to Claimant.

4. Claimant is entitled the 5% whole person impairment rating provided by Dr. Fry.

5. Respondents shall pay 8% statutory interest for all amounts that are not paid when due.

6. All matters not determined by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 3, 2016

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones,
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable head injury on September 10, 2014.

II. Whether Claimant established that he is entitled to medical benefits associated with his September 10, 2014 head injury.

III. Whether Claimant established that he is entitled to temporary total disability benefits, and, if so, the duration of those benefits.

Because the undersigned ALJ determines that Claimant failed to prove that he sustained a compensable injury, this order does not address issues II and III outlined above.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On the date of the alleged injury, September 10, 2014, Claimant was working as a civil engineer for Spectrum Wireless Solutions. Ex. A, bates 3. Claimant's job duties included construction of cell phone towers. Hr'g Tr. 17:20-24.

2. At the time of his alleged injury, Claimant was working at the airport, labeling and stacking boxes containing cell phone tower equipment. Hr'g Tr. 18:11-12. While the boxes weighed as much as 80 pounds, Claimant did not consider the work which he was performing "heavy." Hr'g Tr. 16:23-25. Claimant was working at ground level, standing on flat surface. Hr'g Tr. 30:9; 22:23; Ex. A, bates 3, and was working at a "nice, good pace and nothing out of the ordinary." Hr'g Tr. 16:25-17:1. As he was working, he began to develop a headache over his left eye, but worked through the pain. Hr'g Tr. 30:15; Ex. A, bates 2. The last thing he remembered was that he began to feel light-headed. Hr'g Tr. 22:1; 30:10. Claimant then suffered a seizure, falling to the ground and hitting his head, suffering a small epidural hematoma. The next thing Claimant remembers is waking up in the ER. Hr'g Tr. 22:5; Ex. A, bates 1. Claimant would later testify at hearing that he had no idea what caused his injury. Hr'g Tr. 13:18-19.

3. Claimant received treatment at the University of Colorado Hospital (Hospital) intensive care unit. There he underwent serial CT scans of his head as well as blood work. Hr'g Tr. 32:6. The medical records from the Hospital indicate that Claimant had a

history of seizures, although had not had a seizure for 20-25 years. Ex. B, bates 6. Claimant's physicians at University of Colorado Hospital placed him on anti-seizure medication, noting that he had "not been on anti-epileptic drugs (AEDs) in over 20 years. *Id.* and Hr'g Tr. 32:9. His final diagnoses were a "small epidural hematoma" and "seizures." Ex. B, bates 6. Regarding the diagnosis of "seizures", the medical records submitted at hearing reflect that Claimant was moving around on the day of his fall, when he became lightheaded, experienced "ringing" in his ears and fell suffering trauma to the back of his head. According to reports from Claimant's co-workers, Claimant had "tonic-clonic activity" at the time. Claimant was eventually released for outpatient treatment with Dr. Diane Hesselbrock in Colorado Springs, Colorado. Hr'g Tr. 19:23-24.

4. Claimant later filed for workers' compensation benefits. Respondents denied the claim on the basis that Claimant's seizure was not work-related, but was an idiopathic disease personal to Claimant. Claimant was released back to work on October 8, 2014. Hr'g Tr. 21:1-2.

5. Respondents requested and Claimant underwent an independent medical examination (IME) with Dr. Allison Fall on January 22, 2015. Hr'g Tr. 21:22; 28:22; Ex. A, bates 1-4. Dr. Fall is board certified in physical medicine and rehabilitation (PM&R) and she is Level II accredited with the Colorado Division of Workers' Compensation. Hr'g Tr. 26:3-10. Dr. Fall completed her residency at Craig Hospital, a nationally recognized traumatic brain injury treatment center and a large part of her medical practice encompasses diagnosis and treatment of brain injuries. Hr'g Tr. 27:24-28:6.

6. Dr. Fall reviewed Claimant's medical records and Claimant's reported medical history. Hr'g Tr. 28:25-29:10; Ex. A, bates 2. She also performed a physical examination of Claimant. Hr'g Tr. 29:12; Ex. A, bates 3.

7. At the time of his IME, Claimant reported to Dr. Fall that he was standing on a flat surface at the time of his injury. Hr'g Tr. 30:9; Ex. A, bates 3. He had been experiencing a headache over his left eye, but worked through the pain. Hr'g Tr. 30:15-16; Ex. A, bates 2. He recounted to Dr. Fall that the last thing he remembered was feeling light-headed. Hr'g Tr. 22:1; 30:10. The next thing Claimant remembered was waking up in the ER. Hr'g Tr. 22:5; Ex. A, bates 1.

8. When Dr. Fall asked Claimant about his prior seizure history, Claimant reported that he had experienced seizures twice before in his life. Following both occasions, Claimant reported that he was placed on anti-seizure medications. Hr'g Tr. 24:18-19.

9. Medical record evidence indicates that Claimant first had seizures as an infant. Apparently, Claimant suffered bilateral hematomas with delivery which were evacuated. He was placed in three antiepileptics and eventually had a shunt placed after which his AED's were discontinued. Ex C, bates 9; Hr'g Tr. 23:12-13. According to the medical records submitted at hearing, Claimant then had a seizure at age 12 following a bicycle accident. No therapy was provided following this seizure. Ex. C, bates 9. Finally, the

record submitted establishes that at age 26, Claimant suffered seizures following a car accident. Per the record, Claimant had four seizures three days post accident which were “grand mal” in nature. Two of these seizures came on without warning and two were preceded by complaints of lightheadedness and seeing spots. Claimant was on AEDs for a year then stopped taking them. Hr’g Tr. 31:17-18; Ex. A, bates 1; Ex C, bates 9. Claimant testified that he was in a motor vehicle accident in which he was thrown out of the passenger side of the vehicle at 90 miles per hour. Hr’g Tr. 9:18-19; 23:18; Ex. A, bates 1. Claimant told Dr. Fall that, just prior to one of those seizures, he felt light-headed, just as he had prior to the alleged work injury. Hr’g Tr. 31:15-16; Ex. A, bates 3. .

10. Dr. Fall considered two principal diagnoses for Claimant’s loss of consciousness (LOC), resulting in his fall: 1. hypoglycemia and 2. seizure. Hr’g Tr. 32:20-25; Ex. A, bates 3. Dr. Fall felt that the medical records did not support a finding that hypoglycemia caused Claimant’s LOC and subsequent fall. Hr’g Tr. 33:2-4; Ex. A, bates 3. In opining as such, Dr. Fall noted that Claimant described that the three days before the September 10, 2014 incident; Claimant had gotten good sleep and was eating well. Ex. A, bates 1. He had a good dinner the night before, and stated that the work was not heavy. Ex. A, bates 1. Dr. Fall felt that the medical records and Claimant’s prior medical history supported that Claimant suffered a seizure and not an episode of fainting from hypoglycemia. Hr’g Tr. 33:2-4; Ex. A, bates 3. Dr. Fall also opined that, even if the cause of Claimant’s fall were hypoglycemia, the fall would have been unrelated to his work. Hr’g Tr. 36:8; Ex. A, bates 3.

11. In Dr. Fall’s opinion, the headache and pain over Claimant’s right eye was indicative that Claimant suffered a seizure. Hr’g Tr. 30:15-17; 33:13-14. She noted that the ER records indicated that the emergency room personnel felt that Claimant suffered a seizure. Hr’g Tr. 33:1. Dr. Fall also testified at hearing that Claimant’s history of seizures made it more likely that what he suffered was in fact a seizure. She expressed that, within a reasonable degree of medical probability, a seizure is the only reasonable explanation for Claimant’s injury, given Claimant’s history of seizures. Hr’g Tr. 34:18-20; Ex. A, bates 3.Hr’g Tr. 32:24-25. Given all the evidence supporting a seizure, and given the absence of evidence of any other cause for Claimant’s injury, Dr. Fall opined that a seizure was in fact the cause of Claimant’s injury. Hr’g Tr. 33:3-4.

12. The ALJ credits the testimony of Dr. Fall to find, consistent with Claimant’s prior history, that his lightheadedness, eye pain and headache, more probably than not, represented an aura signaling an impending seizure.

13. Dr. Fall also opined to a reasonable degree of medical probability that none of Claimant’s job duties caused his seizure. Hr’g Tr. 33:9; Ex. A, bates 3. She reasoned that Claimant was simply working on a flat surface when he began to experience the aura and the eventual seizure. Hr’g Tr. 33:11-15; Ex. A, bates 3.

14. At Hearing, Claimant cross-examined Dr. Fall. Claimant asked Dr. Fall whether it is possible for a person to faint as a result of locking his or her knees. Dr. Fall

confirmed that it is possible, but that fainting from locked knees would require locking the knees for a long period of time. Hr'g Tr. 35:5-6. She clarified that Claimant's account of events indicated that he was working and that his knees were not locked. Hr'g Tr. 35:6-9. Notably, Claimant's testimony, even on rebuttal, did not contain any reference to locked knees and the medical record as noted above indicates that Claimant was "moving around." There are no other references in the record to locked knees.

15. Claimant later testified at hearing that "for it not being work related, I just don't have a clue what would have caused it." Hr'g Tr. 37:12-14.

16. Based upon the evidence presented as a whole, including references to Claimant's prior medical history and the credible testimony of Dr. Fall, the ALJ is persuaded that Claimant's fall and subsequent head injury was caused by a dormant seizure condition which had no underpinnings in Claimant's work-related duties on September 10, 2014.

17. Claimant has failed to carry his burden to establish, by a preponderance of the evidence, that he suffered a compensable head injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado ("Act") is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. *§ 8-43-201, C.R.S.* A Workers' Compensation case is decided on its merits*. § 8-43-201, C.R.S.*

B. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ need not address every piece of evidence that might lead to a conflicting conclusion and need not reject every piece or item of evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this case there is ample record support to establish that Claimant's alleged injury occurred in the scope of his employment. Nonetheless, the question of whether Claimant's head injury "arose out of" his employment must be addressed before the injury can found to be compensable.

F. In C*ity of Brighton and Cirsa v. Rodriguez,* 318 P.2d 496, 502 (Colo. 2014), the Colorado Supreme Court clarified the three categories of risks attendant with all work place injuries in determining whether a fall down a flight of stairs was compensable. The Court in *City of Brighton v. Rodriguez* set forth the following risk categories: (1) employment risks which are directly tied to the work itself; (2) risks which are inherently personal or private to the employee, (which includes idiopathic conditions or illnesses that are unrelated to the employment, such as epilepsy and fainting spells) and (3) neutral risks that are neither employment-related, nor personal. *Id.* at 503.

G. Under the first category, a fall at work is "typically…only attributable to an employment-related risk if it results from tripping on a defect or falling on an uneven or slippery surface on an employer's premises." *Id.* at 501, quoting from *In re Margeson*, 162 N.H. 273, 27 A.3d 663, 667 (2011); *See also, Miles v. Denver*, W.C. No. 4-961-742-01 (December 15, 2015) Based upon the evidence presented, the ALJ finds insufficient record support to conclude that an employment-related risk caused Claimant's fall. To the contrary the evidence demonstrates that the floor was clean, dry and otherwise free from defects or other hazardous conditions at the time of Claimant's fall. Indeed, Claimant presented no evidence to suggest that he tripped over a defect on the floor and by testifying that he had no idea what caused his injury, Claimant necessarily did not attribute his injury to any risks specific to his employment.

H. The second category includes risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to her employment. Idiopathic conditions have been defined to mean "self-originated." C*ity of Brighton and Cirsa v. Rodriguez, supra* at 503. Purely idiopathic personal injuries generally are not compensable unless an exception applies. *Id.* at 503. One exception is when an idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. *Gates Rubber Co. v. Industrial Comm'n.*, 705 P.2d 6, 7 (Colo. App. 1985); *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

I. The third category includes injuries caused by "neutral risks." *City of Brighton*, *supra* at 503. Such risks are associated neither with the employment itself nor with the employee. *Id.* at 504. "An injury is compensable under the Act if triggered by a neutral source that is not specifically targeted at a particular employee and would have occurred to any person who happened to be in the position of the injured employee at the time and place in question". *Id.* citing *Horodyskyj*, 32 P.3d at 477. Concerning unexplained falls the Court noted that injuries resulting from neutral risks arise out of employment only if the employee would not have been injured but for the fact that the conditions and obligations of the employment placed the employee in the position where he was injured. *Id.* at 504. In this case, there is a paucity of evidence to support a contention that Claimant's fall was "unexplained' and the result of a neutral risk. To the contrary, the overwhelming evidence presented supports a finding that Claimant's fall resulted from a seizure. Moreover, while Claimant expresses uncertainty as to the cause of his injury, the remainder of the evidence is unequivocal in support of a finding that Claimant's injury resulted from a seizure. Dr. Fall expressed the possibility that such an injury could theoretically result from fainting, whether from hypoglycemia or from locked knees, but she specifically ruled both out, as Claimant's own account of events did not support the necessary conditions for either cause. Given Claimant's history of seizures and treatment for the same, an emergency room diagnosis of seizure in this case and Dr. Fall's diagnosis of a seizure, in combination with the dearth of evidence supporting an alternate cause for Claimant's LOC, there is a clear explanation for Claimant's head injury, specifically that he suffered a seizure, lost consciousness and hit his head on the ground as a result.

J. The ALJ is persuaded by the following evidence in concluding that Claimant's injury arose entirely out of a personal condition, i.e. an idiopathic seizure condition (category 2 risk factors):

- Claimant has a history of seizures, both as an infant, a child and an adult.

- On two of the occasions when Claimant suffered from seizures, he was prescribed anti-seizure medications.

- Following the injury at issue in this claim, Claimant was diagnosed with a seizure, resulting in a fall and a subsequent epidural hematoma and prescribed anti-seizure medication.

- Claimant experienced auras before the offset of seizure activity similar to that which he experienced in the instant case right before he lost consciousness, fell and hit his head.

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- Dr. Fall, after reviewing Claimant's medical history, concluded that Claimant most likely suffered a seizure, just as he had several times in the past.

- Other causes for Claimant's LOC and subsequent head injury have been persuasively excluded.

Because Claimant's seizure condition was idiopathic and entirely personal, he carried the burden to prove that an exception applied to the general rule that injuries caused by such personal conditions are not compensable. In concluding that Claimant failed to prove that he suffered a compensable work injury, the ALJ has considered the "special hazard" rule announced by the Court of Appeals in *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989), as noted in paragraph H above. Under the "special hazard" rule," a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by "the concurrence of a pre-existing weakness and a hazard of employment." *Id*. The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the employment and the injury. *See National Health Laboratories v. Industrial Claim Appeals Office, supra; Ramsdell v. Horn, supra.*

K. To be considered an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. *Gates Rubber Co. V. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985) (hard level concrete floor not special hazard because it is a condition found in many non-employment locations); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999) (injury when pre-existing condition caused the claimant to stumble on concrete stairs not compensable because stairs were ubiquitous condition). Here Claimant failed to establish that a special hazard of employment combined with his pre-existing idiopathic condition to cause his injury. Accordingly, his claim for benefits must be denied and dismissed and his remaining claims need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers compensation benefits emanating from an alleged September 10, 2014 work related head injury is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 29, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant has proven by a preponderance of the evidence that he sustained a worsening of his condition that would entitle him to a reopening of his workers' compensation claim under § 8-43-303(1), C.R.S.;

2. If so, whether the claimant has established by a preponderance of the evidence, his entitlement to medical benefits that are reasonably necessary and causally related to the claimant's May 8, 2014 admitted work injury; and,

3. If so, whether the claimant is entitled to recover used sick time through the payment of temporary total disability benefits if this claim is reopened.

Based upon the findings and conclusions below that the case should not be reopened, the ALJ does not reach a decision on the remaining issues.

FINDINGS OF FACT

1. The claimant sustained an admitted work injury while working for the respondent-employer on May 8, 2014. He slipped on the kitchen floor at the correctional facility where he performed his duties.

2. Later that day the claimant went to the St. Thomas More emergency department. Dr. Numsen instructed the claimant, "You have strained the muscles in the low back; I would expect you to feel better over the next one to 2 days."

3. The claimant first saw his authorized treating provider, Steve Quackenbush, PA-C, on May 12, 2014. His work related medical diagnosis was "low back muscular strain." Mr. Quackenbush imposed zero work restrictions.

4. The claimant received an MRI on May 23, 2014. The MRI showed a small central disk protrusion, a peripheral annular fiber tear, and no significant spinal canal or neural foraminal stenosis at L3-L4.

5. The claimant underwent conservative treatment. He received trigger point injections, which provided relief.

6. The claimant saw Dr. McIntyre on August 14, September 9 and September 18, 2014. On each visit, Dr. McIntyre noted, “He feels the pain will radiate down the legs intermittently to the feet - bilateral.”

7. The claimant underwent physical therapy with Meghann Vanslager, PT. His initial visit was August 6, 2014. The PT notes, “He presents to physical therapy today with complaints of left low back and leg pain with radiculopathy all the way down to the left foot, right thigh numbness, and bilateral foot pain.” Ms. Vanslager noted the claimant’s radiculopathy again on August 26 and September 5, 2014.

8. Steve Quackenbush placed the claimant at maximum medical improvement (MMI) on March 16, 2015. He imposed zero permanent work restrictions. He assigned zero permanent impairment. He opined, "No further follow up care regarding this care is required.”

9. The claimant testified that he “initiated” his MMI. He stated at that time, his pain was at a level of one or two, and he was still able to do all of his extracurricular activities.

10. After the claimant was placed at MMI on March 16, 2015, the respondents filed a Final Admission of Liability (FAL) on March 19, 2015. The claimant did not object to the FAL, and the claim closed.

11. On July 4, 2015 the claimant awoke in excruciating pain. He stated that “I didn’t feel like I had any mobility in my legs at all—like I couldn’t use them…I just felt like I was burning…I almost felt like my ears were ringing, it was so intense. So I screamed ‘We’ve got to call 911.’”

12. The claimant was taken to the St. Thomas More Hospital. He was admitted to the emergency department at 5:43 a.m. on July 4, 2015.

13. Dr. Geiger’s emergency room record notes that the claimant was given a CT scan. It was discussed with the claimant that the finding “does not appear significantly changed from previous MRI.”

14. Dr. Geiger also noted that “patient does not appear to be in any pain when he is not moving; I do not feel that further pain medication at this time is indicated.”

15. The claimant’s CT scan of July 4, 2015 showed that his lumbar spine was stable in curvature and alignment. There was no new fracture or significant subluxation.

The surrounding soft tissues were unremarkable. The claimant's lumbar x-ray of July 4, 2015 showed "no acute findings."

16. On August 4, 2015, the claimant went to Urgent Care, where he was treated by his original authorized treating provider, Steve Quackenbush, PA-C. Mr. Quackenbush did not impose any work restrictions. He did not note that any other provider had imposed work restrictions. He did state that the claimant was no longer at maximum medical improvement.

17. The claimant had a new MRI taken on September 17, 2015. At L3-L4, he had, "Mild disk bulge. No significant spinal canal or neural formanial stenosis." The report does not include the annular tear that the claimant had in March, 2014.

18. The claimant also sought private treatment with Parkview Neurological Services. Micah Johnson, PA, noted that the claimant reported he had had "lower back pain and radiating pain into the legs for about 1 year." Mr. Johnson noted that the claimant had a back injury "that never got better."

19. Mr. Johnson ordered a spine-lumbar x-ray with bending. It demonstrated no abnormal motion, and unremarkable soft tissues.

20. The claimant testified that since his worsening, he does "nothing" around the house, as far as chores. When asked if he helps out with the house at all, he stated, "I can't." He reiterated that his wife does all chores. "Everything, sir. I do nothing."

21. The claimant testified that he has been paid by the respondent-employer his full wages since his alleged worsening.

22. The respondent retained Dr. Primack for an independent medical evaluation (IME). Dr. Primack was admitted as an expert in physical rehabilitation and occupational medicine. He is triple board certified and is Level II accredited. He stated that 40-45% of his practice deals with industrial injuries.

23. Dr. Primack explained that the claimant's work related diagnosis was a lumbosacral sprain/strain, or a muscle strain. This is based on the records, clinical examination, and the claimant's response to treatment, in particular the trigger point injections. The prognosis for that muscle strain is excellent.

24. Dr. Primack stated that he would expect to find objective findings of a worsening if the claimant experienced his self-described symptoms from July 4, 2015.

25. Dr. Primack explained that the only difference between the claimant's MRI's before and after his alleged worsening is that the latter MRI does not show the annular tear. Annular tears can be a component of pain, but they get better because of blood flow, time, and muscle control. Dr. Primack stated that the claimant's MRI after the alleged worsening actually showed improvement.

26. Dr. Primack stated it was significant to him that the claimant's former ATP, Mr. Quackenbush, declined to impose work restrictions after the alleged worsening.

27. Dr. Primack conducted a clinical examination of the claimant. The claimant reported sensory loss in multiple levels that did not correlate with the objective findings on his MRI.

28. Dr. Primack conducted the Hoover's test on the claimant's legs, which tests for submaximal effort. He found the claimant's response to be non-physiological, and that he was giving sub-maximal effort.

29. Dr. Primack explained that the claimant displayed multiple nonphysiologic findings, which are "findings that we see on clinical examination or a non-clinical examination which don't correlate with what we know of how the neuro-muscular-skeletal system works."

30. The claimant's nonphysiologic findings included, "The gait which, again, didn't make any sense. I haven't seen a gait like that in a while. The significant pain with minimal palpation on the skin. Palpating the skin isn't going to get into any deep levels of the spine. The Hoover test." He explained that he simultaneously pushed and pulled on the claimant's foot, creating no load. The claimant reported pain going up the spine. "Doesn't make sense. There's nothing I know of that would cause that type of effect."

31. Dr. Primack stated that with the claimant's post-MMI self-reported symptoms that approach paralysis, he would expect severe pathology. Yet, the MRI showed his pathology was better than in June 2014. Additionally, his high level of symptoms did not correlate with the clinical examination.

32. Dr. Primack stated he disagrees with Dr. Hall's opinion that the claimant is no longer at MMI, because he is more symptomatic today. "That's not what MMI means, within the medical treatment guidelines. MMI means when you've reached a stable and stationary level of function. It's not symptom-based. That's why impairment ratings are not symptom-based. It's pathology based…You can't reopen a case purely based upon symptoms."

33. Dr. Primack explained: “What’s the pathology that begets the alteration in function? I mean, someone can say they have an alteration in function and they’re in pain...You don’t have a diagnosis to correlate with the symptoms to correlate with the loss of function.”

34. Dr. Primack disagreed with Dr. Hall’s assessment that the claimant should have referrals to specialists and injections. “I don’t know what you would inject.”

35. Dr. Primack gave his medical opinion regarding the claimant’s assertion of a worsening. “I do not believe he has suffered a worsening of his work injury—that injury being—and here’s the diagnosis—a lumbosacral strain—or muscle strain—and perhaps, an annular tear, which has clearly healed…”

36. Dr. Primack opined that the claimant is not restricted from work in any way.

37. Dr. Primack stated that it is not appropriate to reopen the claimant’s claim based on his complaints alone. He stated he agreed with obtaining imaging after the claimant complained of his symptoms, but “you have to respect the imaging study that you get.”

38. Dr. Primack stated that the claimant’s reported new symptom of left leg radiculopathy was based solely on his subjective complaints. There are no clinical findings that support him having left leg pain or numbness.

39. The claimant retained Dr. Hall for an IME. The claimant stated that his condition was very different that day compared to when he saw Dr. Primack. He stated he did not have a gait that day.

40. Dr. Hall agreed that in the claimant’s exam, there were no abnormalities that were completely objective and not subject to the claimant’s physical control.

41. Dr. Hall stated that “there didn’t seem to be any significant changes between the two studies” taken before the claimant’s MMI date and after his alleged worsening.

42. Dr. Hall stated, “I don’t think there’s been any dramatic change in whatever his particular pathology is.”

43. Dr. Hall’s opinion regarding the claimant’s MMI status is, “he is very much more symptomatic today than he was then. He is, therefore by definition, not at maximum medical improvement.”

44. The ALJ finds the analyses and opinions of Dr. Primack to credible and more persuasive than medical evidence to the contrary.

45. The ALJ finds that the claimant has failed to establish that it is more likely than not that his claim should be reopened.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P .2d 792 (1979); *People v. M.A.,* 104 P .3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P .3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989

P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.* The burden is on the claimant to prove a causal relationship between his employment and his injury or condition. *See, Industrial Comm'n v. London & Lancashire Indem. Co.,* 135 Colo. 372, 311 P.2d 705 (1957). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a casual relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

5. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106 (Colo. App. 1971)*. Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985)*. An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952); *Indus. Comm'n v. Havens,* 136 Colo. 111, 134 P.2d 698 (1957).

6. Pursuant to section 8-43-303(1), C.R.S., at any time within six years after the date of injury, an administrative law judge may reopen any award on the ground of change in condition. Change of condition refers to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that can be causally connected to the original compensable injury. *Chavez v. ICAO,* 714 P.2d 1328, 1330 (Colo. App. 1985). A claimant has the burden of proof in seeking to reopen a claim for a worsened condition. *Richards v. ICAO,* 996 P.2d 756, 758 (Colo. App. 2000). The worsened condition must warrant further benefits. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Richards v. ICAO*, 996 P.2d 756 (Colo. App. 2000).

7. The ALJ concludes that Dr. Primack's analyses and opinions concerning the claimant's medical conditions are credible and more persuasive than medical evidence to the contrary.

8. The ALJ concludes there is a lack of substantial objective evidence to support a reopening.

9. The ALJ concludes that the claimant has failed to establish a worsening of his condition subsequent to MMI.

10. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that his claim should be reopened for a worsening of condition.

ORDER

It is therefore ordered that:

1. The claimant's request to reopen his workers' compensation claim is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: February 17, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-963-474-02

ISSUES

- Whether Vikki Farrow, as the surviving spouse ("spouse"), is "wholly dependent" for purposes of section 8-41-501(1)(a), C.R.S.?

- Whether Vikki Farrow is entitled to a percentage of her dependency?

- How shall death benefits be allocated as between the surviving spouse and C.F., a minor child of the decedent?

STIPULATIONS

- Decedent died on October 9, 2014, while in the course and scope of his employment from injuries he suffered that same day.

- Spouse and decedent were married at the time of decedent's death.

- C.F., a minor whose date of birth is August 10, 2016, was wholly dependent upon decedent at the time of his death per section 8-41-501(1)(b) because he was a minor child of the deceased under the age of eighteen.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. At the time of decedent's death, he and spouse were living separately.

2. The two began living separately on February 1, 2013, when spouse asked decedent to leave the marital residence because of his excessive alcohol consumption and her concern for their son in that environment. Decedent began drinking excessively when spouse was diagnosed with cancer in 2009. His alcohol consumption increased when his brother died and he lost his job in 2011. His alcohol consumption increased even further in January of 2012 when spouse's cancer diagnosis became terminal.

3. Upon separating, decedent moved into a condominium owned by the couple. The condominium went into foreclosure because the couple was unable to make payments, and at some point during the foreclosure proceedings, decedent became unable to live there.

4. The record contains references to a bankruptcy proceeding involving decedent.

5. On June 19, 2013, spouse filed a petition for divorce. Decedent filed as a co-petitioner. However, neither spouse nor decedent wanted to terminate their marriage.

6. Spouse credibly testified that she filed for dissolution not because she wanted a divorce, but rather to obtain an enforceable obligation to compel decedent's financial support because she "couldn't get a penny out of him otherwise."

7. On October 28, 2013, spouse and decedent entered into a Memorandum of Understanding in the dissolution matter. Per that agreement, decedent was obligated to pay spouse $1,100 per month in "family support." Spouse's testimony and a pleading decedent filed in the dissolution matter clarify that of that amount, $775 was for spousal maintenance, and $325 was for child support.

8. This division was in part determined by spouse's income as of October 28, 2013. However, spouse indicated at hearing that her current income was lower than at that time.

9. No persuasive evidence supports a finding that the parties took further actions to finalize their divorce proceedings.

10. Spouse testified that decedent "knew that the court was watching his payments." From this testimony the ALJ reasonably infers that decedent made some actual payment(s) to spouse.

11. Spouse testified further that neither she nor decedent wanted to finalize the divorce and that was why they had not done so. She wanted decedent "to get clean and come home."

12. Spouse had not invited decedent to return to the marital home because he had not been sober for longer than a period of approximately two weeks. However, decedent had stayed at the marital home for periods of approximately one week, the last time being during the winter prior to his death.

13. While spouse testified that it was "voluntary" on her part that she and decedent live separately, it was clear from the context that her use of the term was not as a legal term of art defined by statutory and case law, and thus does not establish voluntariness as fact.

14. Decedent began dating another woman two months after the February 1, 2013 separation and continued to see her through the time of his death. Decedent began living with the other woman two months prior to his death.

15. No persuasive evidence was offered from which the ALJ can discern what motivated decedent's conduct in doing so.

16. Decedent took no steps towards finalizing his divorce.

17. Based on the totality of the evidence, the ALJ finds it more likely than not that spouse and decedent were not voluntarily living separately at the time of decedent's death.

18. No other dependants were identified.

19. Neither spouse nor the minor child has received any benefits as beneficiaries of life insurance policies.

20. Neither spouse nor the minor child has received any benefits from the Social Security Administration.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Respondents bear the burden of overcoming the presumption that spouse is wholly dependant. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201.

Section 8-41-501(1)(a), C.R.S 2014, provides:

> For the purposes of articles 40 to 47 of this title, the following described persons shall be presumed to be wholly dependent (however, such presumption may be rebutted by competent evidence):
>
> (a) Widow or widower, unless it is shown that she or he was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependant in whole or in part on the deceased for support.

Thus, to overcome the presumption that the spouse is wholly dependent, Respondents must present competent evidence that either: (1) the spouse was voluntarily separated and living apart from the spouse at the time of the injury or death; or alternatively (2) the spouse was not dependant in whole or in part on the deceased for support. Competent evidence satisfying either one of the clauses defeats the presumption of a spouse being wholly dependent.

Voluntarily Living Separately

Whether a wife is voluntarily separated and living apart from her husband is a question of fact. *Gold Mines Consol., Inc. v. Simmons*, 112 P.2d 555 (Colo. 1941). The evidence is uncontroverted: decedent and spouse were living separately at the time of decedent's death. However, Respondents must establish that decedent and spouse were doing so voluntarily. On this point, case law is instructive.

In *Michalski v. I.C.A.O.*, 781 P.2d 183 (Colo. App. 1989), a division of the court of appeals held that a decedent and spouse who lived separately during the week because they worked in different cities were not voluntarily separated. The division looked at factors including whether there was a pending divorce proceeding; whether the spouse and decedent were estranged; whether they intended to maintain their marital relation. The division instructed that the focus of inquiry in determining whether living separately was voluntary turned, "upon the nature and character of the absence and the intention of the parties respecting it." *Michalski v. I.C.A.O.*, citing *Latting v. Broadmoor Hotel, Inc.*, 105 Colo. 386, 98 P.2d 857 (1940).

Thus, *Michalski* provides certain factors to consider in determining voluntariness, and further instructs that we look to the nature and character of the absence and the intentions of *both* the decedent and spouse regarding living separately.

In *Latting v. Broadmoor Hotel, Inc.*, *supra*, over the course of the decedent and spouse's thirty-seven year marriage, the decedent lived separately from the spouse over the course of several years because his life insurance sales job required extensive travel. In addition, the decedent worked seasonally in Colorado Springs and Phoenix, Arizona at hotels in those states. At the time of his death, decedent's Colorado Springs employer required that he live near the hotel. The decedent "consorted with another woman during the last period of his service in Phoenix, and upon his return to the Broadmoor the same woman came also and shared with him the small quarters which he occupied near the hotel." The spouse only learned that decedent was living with another woman after his death. The division focused on other aspects of the couple's relationship, including their devotion to one another, and that "not a note of domestic discord, at any time, so far as appears, marred their lives." The division found determinative that no divorce or legal separation or estrangement existed, and regardless of decedent's "moral lapses," there was no showing that either party wished to sever the marriage.

As found, spouse and decedent began living separately due to decedent's alcoholism and her concern for their minor child. She filed the petition for dissolution in order to establish decedent's enforceable financial support obligations. Although the petition for dissolution contains spouse and decedent's affirmation that the marriage was irretrievably broken, she did not believe that to be the case. And, in fact, neither party took steps towards finalizing a divorce. Rather, spouse was waiting for decedent to stop drinking at which time she would invite him to return to the marital home. This was her stated intention even though she was aware decedent was dating another woman and began living with her two months before his death.

The fact that parties have filed a petition for the dissolution of their marriage can support a finding that they were voluntarily living separately. *See City of Aurora v. Claimant in Matter of Death of Corr*, 689 P. 2d 659 (Colo. App. 1984) (finding hearing officer's conclusion that parties were voluntarily living separately was supported by finding that spouse had filed a petition for the dissolution of marriage).

However, the filing of a petition is not necessarily determinative. For example, in *Gold Mines Consol., Inc. v. Simmons*, 112 P.2d 555 (Colo. 1941), the spouse and the decedent were married and lived together for eight years when the spouse left the decedent "because of his habit of frequent intoxication." The couple did not live together again and a year after separating the spouse filed for divorce without contest. Three months later an interlocutory decree of divorce was granted. The following month, the decedent was killed in a work related accident. The supreme court ultimately affirmed the underlying order finding there was support in the record to uphold the commission's finding that the spouse was voluntarily separated and living apart from the decedent at the time of his death. However, the opinion provides, "[F]rom our consideration of the record, we are of the opinion that the commission could have found either way on this issue." Thus, even after an interlocutory decree of divorce had been granted, the court advised that the finder of fact could have found the spouse and decedent were not voluntarily living separately.

Spouse testified that decedent did not want to file the petition for dissolution. She also testified that there were times decedent stayed with her for a week at a time until six to nine months before his death.

The ALJ's ability to determine decedent's intent is somewhat hindered as his testimony, obviously, was not available. Additionally, the intent of his conduct is ambiguous. For example, decedent's living with another woman two months before his death and his failure to financially support his wife and child in the absence of a court order could have been motivated by financial necessity. This interpretation is supported by (1) spouse's testimony that decedent lost jobs because of his alcoholism, (2) the condominium that decedent moved into after the couple separated was foreclosed on because the couple was unable to make payments, and (3) references in the record to a bankruptcy proceeding involving decedent. Based on the totality of the evidence, the ALJ is unable to find or conclude that decedent's intention was to voluntarily live separately from spouse.

Accordingly, where no order of dissolution was issued, and spouse intended for decedent to return, the ALJ reasonably infers that spouse and decedent were not voluntarily living separately at the time of decedent's death.

Spouse Dependant in Whole or in Part on Deceased for Support

Respondents may overcome the presumption that a spouse is wholly dependent by establishing that spouse "was not dependant in whole or in part on the deceased for support." Decedent here had a legally enforceable obligation to support spouse. Earlier cases have found that an obligation, issued by the marital court, to provide support was sufficient to establish that the spouse was dependant on decedent in whole or in part for support. For example, in *Broadmoor*, the court held, "Dependency rests upon an obligation of support, and not upon the question as to whether that obligation is being discharged." Similarly, in *Empire Zine Co. v. Industrial Comm'n*, 71 Colo. 251, 206 P. 158 (Colo. 1922), the court found the spouse was dependant on the decedent for support despite uncontroverted evidence that decedent had not provided any support to spouse for the last six years of the marriage. This position was again stated by a division of the court of appeals as recently as 1974 in *Tilley v. Bill's Sinclair*, 524 P.2d 314 (Colo. App. 1974). In *Tilley*, the respondents argued that where there is no evidence of actual support, the Commission must find that a wife is not dependent. The division disagreed, holding that if, "a wife demonstrates a need for support, then, under C.R.S.1963, 81--11--1(2), the decedent's legal obligation to support his wife, whether or not that duty is being discharged, is sufficient to establish dependency."

However, more recent decisions issued by divisions of the court of appeals have shifted to requiring a showing of actual support. These cases interpret the current version of section 8-41-501 which is stated disjunctively and requires overcoming a presumption. Prior to the 1975 amendment, the statute required proof that the married couple be voluntarily separated, *and* living apart, *and* that the wife was not dependant in whole or in part on her husband for support. In addition, the presumption that the wife was wholly dependent under the prior version of the statute was "conclusive."

This issue appears to have been most recently addressed by a division of the court of appeals in 1989 in *Michalski*. There, the division held that a spouse need only prove that decedent contributed to her support. "Although the [spouse] may have other substantial sources of support, any contribution of the decedent is sufficient to meet the dependency requirements." *Michalski.* The presumption afforded by the statute "is overcome only by a finding that the widow receives no support from the deceased." *Diamond Industries v. Claimants in the Matter of the Death of Crouse*, 589 P.2d 1383, 41 Colo. App. (1978).

Spouse's testimony that the domestic court was watching his payments of spousal maintenance and child support established that spouse received some support from decedent. The ALJ concludes that Respondents have not offered persuasive, competent evidence that spouse received no support from the deceased. Thus, Respondents have not rebutted the statutory presumption that spouse is wholly dependent.

Beneficiaries

Section 8-41-501(1)(b), C.R.S., provides that “minor children of the deceased under the age of eighteen years” are “presumed to be wholly dependent.” The ALJ concludes that C.F. is wholly dependent because C.F. was a minor child of the decedent on the date of his death.

Section 8-41-501(1)(a), C.R.S. provides a presumption that a spouse is wholly dependent unless “it is shown that she or he was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support.” The ALJ concludes spouse is wholly dependent.

There is no credible evidence of any other potentially dependent person.

Apportionment

Section 8-42-121, C.R.S., provides for apportionment of death benefits between multiple dependents “in such manner as the director may deem just and equitable.” Upon review of the evidence the ALJ concludes that a distribution of benefits should be made between spouse and C.F. C.F. is relatively young and will require substantial expenditures for food, shelter, education and other necessities throughout the remainder of his minority. No persuasive evidence was offered that C.F. has any special needs or health concerns. There is persuasive evidence that spouse has special health factors which favors an unequal distribution of death benefits. No credible or persuasive evidence was presented that either C.F. or spouse has access to other sources of income or wealth that might favor a different apportionment of benefits.

Based on the totality of the evidence, the ALJ apportions the death benefits provided for by section 8-42-114 at 70% to spouse and 30% to C.F.

Payment of Benefits

Payment of benefits allocated to spouse shall be made to an account she designates for such purpose.

Section 8-42-122, C.R.S. provides that for the “purpose of protecting the rights and interests of any dependents whom the director deems incapable of fully protecting their own interests,” death benefits may deposited in federally insured state or national banks or savings and loan associations, or credit unions insured by the national credit union share insurance fund.” Further the director may “otherwise provide for the manner and method of safeguarding the payments due such dependents in such manner as the director sees fit.”

The ALJ concludes that for the purpose of protecting the death benefits allocated and owed C.F., spouse should be directed to open a trust account within fourteen days of the date of this order into which the apportioned death benefits shall be paid. The trust account should be opened at one of the types of financial institutions described in section 8-42-122.

The ALJ concludes that spouse should be appointed trustee with authority to withdraw funds from the account and to spend the funds in a manner that protects the health and welfare of C.F. and provides for the education of him. The ALJ concludes that spouse, as parent, is the appropriate trustee for the account.

The ALJ retains jurisdiction to modify this arrangement should it prove inadequate to protect the interests of the dependents. The ALJ further retains jurisdiction over all related and ancillary matters concerning the payment of death benefits.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Insurer shall pay spouse 70% of the death benefit into an account designated or opened by spouse within fourteen days of the date of this order for such purpose.

2. Insurer shall pay C.F. 30% of the death benefit into a trust account opened by spouse within fourteen days of the date of this order at one of the types of financial institutions described in section 8-42-122 for such purpose.

3. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

4. Issues not expressly decided herein are reserved to the parties for future determination.

5. The ALJ retains jurisdiction to modify this arrangement should it prove inadequate to protect the interests of the dependents. The ALJ further retains jurisdiction over all related and ancillary matters concerning the payment of death benefits.

6. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 10, 2016

Kimberly B. Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Pursuant to § 8-42-103(1)(f), C.R.S., are Respondents entitled to offset their liability for temporary total disability benefits by Claimant's receipt of unemployment insurance benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 through 5 were admitted into evidence. Respondents' Exhibits A through G were admitted into evidence.

2. Claimant sustained an admitted industrial injury on September 5, 2014. However, the Claimant continued working for the Employer at light duty.

3. On December 12, 2014 the Employer terminated Claimant from his modified employment. A dispute then arose as to whether Claimant was entitled to temporary total disability benefits of the period December 13, 2012 through March 29, 2015. The Respondents took position that Claimant was "responsible" for the termination from employment and was not entitled to TTD benefits for the disputed period of time.

4. On April 29, 2015 ALJ Cannici conducted a hearing to determine Claimant's entitlement to TTD benefits. The precise issue for hearing was whether Respondents established by a preponderance of the evidence that Claimant was precluded from receiving TTD benefits because he was responsible for his termination from employment. At the April 29 hearing the parties stipulated that if Claimant was not responsible for the termination he was entitled to TTD benefits for the period December 13, 2014 through March 29, 2015.

5. On May 26, 2015 Respondents filed a General Admission of Liability admitting liability for medical benefits and TTD benefits commencing March 30, 2015.

6. In Findings of Fact, Conclusions of Law, and Order dated June 8, 2015, ALJ Cannici determined that Respondents failed to prove by a preponderance of the evidence that Claimant was legally responsible for his termination from employment. Consequently, ALJ Cannici ordered Respondents to pay Claimant TTD benefits from December 13, 2014, through March 29, 2015 "subject to any statutory offset for the receipt of unemployment compensation benefits." The undersigned ALJ infers from ALJ Cannici's FFCL that the issue of Respondents' right to take an offset for Claimant's

receipt of unemployment insurance (UI) benefits was not actually litigated or determined.

7. On September 4, 2015, Claimant filed an Application for Hearing on various issues including TTD benefits, UI benefits and "repayment" of UI benefits.

8. By letter dated December 1, 2015, the Colorado Department of Labor and Employment Division of Unemployment Insurance (Division) notified Claimant he had been "overpaid" UI benefits in the amount of $3,454.00 and was required to repay this amount to the Division. The letter warns Claimant that if "we do not hear from you, you may be subject to a 25 percent collection fee and further legal action. If necessary, we may **intercept your State and/or Federal tax refund** to pay back your overpayment." (Emphasis in original.)

9. At Hearing on December 16, 2015 Claimant's counsel represented that the only issue remaining for determination was Respondents' right to take an offset for the UI benefits. Claimant's counsel requested entry of an order determining that Respondents justifiably took the offset for the UI benefits and are not required to "repay" Claimant any of the $3,454.00.

10. At the hearing on December 16, 2015 the parties stipulated that for the period of December 13, 2014 through March 29, 2015 Claimant is entitled to $13,315.14 in TTD benefits. The parties further stipulated that during the same period of time Claimant received $3,454 in UI benefits. Thus, when factoring in the UI offset the total amount due Claimant from Respondents was $9,861.14.

CONCLUSIONS OF LAW

In pertinent part § 8-43-103(1)(f), C.R.S., provides as follows:

> In cases where it is determined that unemployment insurance benefits are payable to an employee, compensation for temporary disability shall be reduced, but not below zero, by the amount of unemployment insurance benefits received, unless the unemployment insurance amount has already been reduced by the temporary disability benefit amount and except that the temporary total disability shall not be reduced by unemployment insurance benefits received pursuant to section 8-73-112.

In *Pace Membership Warehouse v. Axelson*, 938 P.2d 504 (Colo. 1997), involving facts very similar to those present here, the court noted that the purpose of § 8-43-103(1)(f) is to prevent double recovery of wage loss benefits. In the face of an equal protection challenge the court upheld the right of respondents to offset UI benefits against TTD benefits despite the fact that the offset reduced the claimant's overall entitlement to UI benefits payable under § 8-73-112, C.R.S. The court reasoned that "section 8-42-103(1)(f) is rationally related to the legitimate state interest of preventing double recover and therefore does not violate the equal protection guarantees of the United States and Colorado Constitutions."

Based on the plain language of § 8-43-103(1)(f) as well as the holding in *Pace Membership Warehouse v. Axelson*, *supra*, the ALJ concludes that Respondents are legally entitled offset their liability for TTD benefits during the period December 13, 2014 through March 29, 2015 ($13,315.14) by the amount of UI benefits paid to Claimant ($3,454) during this same period of time.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. For the period December 13, 2014 through March 29, 2015 Respondents are entitled to offset their liability for temporary total disability benefits by the amount of UI benefits paid to Claimant..

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 4, 2016

DIGITAL SIGNATURE:
David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-964-182-02 & 4-970-092

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 2, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 2/2/16, Courtroom 4, beginning at 1:30 PM, and ending at 5:30 PM).

W.C. No. 4-964-182-02 involves a fully contested claim for an alleged head injury by virtue of a slip and fall incident on October 3, 2014. W.C. No. 4-970-092 involves a fully contested claim for an alleged head injury of November 26, 2014 by virtue of a bucket falling on and hitting the Claimant's head.

Claimant's Exhibits 1 through 13 were admitted into evidence, without objection, with the exception of Claimant's Exhibits 8, 9, 10 and 11, wherein Respondents' objections were sustained and the Exhibits were rejected as hearsay lacking in foundation. Therefore, these Exhibits were rejected. Respondents' Exhibits A through F were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and took the matter under advisement for the preparation of a written decision, which is hereby issued.

ISSUES

The issues to be determined by this decision concern compensability of both claims (W.C. No. 4-964-182-02 and W.C. No. 4-970-092) and, if compensable; medical benefits, average weekly wage (AWW), and entitlement to temporary total disability (TTD) benefits.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant (dob 5-2-67), began working for the Employer in August 2014, based on a work week of 35 hours per week at minimum wage ($8.00 an hour), with no fringe benefits. Respondents' Exhibit F-36 an Employer "Wage Verification" of August 5, 2015, lists aggregate wages of $3,127.73 from August 9, 2014 through February 21, 2015. Because of sporadic and erratic listed earnings during several two-week pay periods, the ALJ hereby finds that Exhibit F-36 does not fairly reflect a reliable indicator of the Claimant's AWW or loss of temporary earning capacity. The ALJ finds that the fairest and most equitable way to calculate the Claimant's AWW should be according to statute and the contract of hire, which is as follows: $8.00 X 35 hours = $280.00, which the ALJ hereby finds is the Claimant's AWW. This AWW yields a TTD benefit rate of $186.66 per week, or $26.67 per day.

W.C. No. 4-964-182-02 --- October 3, 2014 Incident

2. On October 3, 2014, while working for the Employer, the Claimant slipped and fell, hitting his back but not his head. His undisputed testimony at hearing is that he did not hit his head. This is corroborated by histories that he gave to medical providers.

3. After reporting the incident of October 3, 2014 to his Employer, the Employer gave the Claimant a list of two unrelated medical providers (Respondents' Exhibit F-29) and the Claimant selected Advanced Urgent Care, where he was first seen by Adam Bonner, PA-C (Physician's Assistant). At Advanced Urgent Care, the Claimant came under the care and treatment of Anthony G. Easer, D.O. On October 6, 2014, and Dr. Easer became the Claimant's authorized treating physician (ATP) as of that date. From the beginning, Dr. Euser indicated a tentative diagnosis of a work-related "post-concussive syndrome." or work-related traumatic brain injury, which the ALJ takes administrative notice and infers and finds that these diagnoses are of an organic brain injury, a physical condition which differs from the strict **mental impairment** contemplated by § 8-41-301 (2) (a), C.R.S.

4. At his first visit to Advanced Urgent Care, the Claimant reported that he thought “he has a concussion, feels not present, has mild headaches.” The Claimant stated that “he wants to be taken off work (Respondents’ Exhibit C-21). Heather Roth, PA-C, indicated “this is not necessary—he has no focal neurological deficits, no difficulty with ataxia or speech impairment, and no trouble with memory.” Forms completed by Dr. Euser on October 6 and October 20 indicate that the Claimant “was working.” The Claimant failed to show up for an appointment on November 3, 1014. On November 19, 2014, the form indicates that the Claimant was **not** working, however, Dr. Euser indicated that the Claimant was “**able to return to full duty.”**

5. At the October 6, 2014, visit, the Claimant was complaining of headaches. It is undisputed that the Claimant did not hit his head in slip-and-fall of October 3. On October 20, 2014, Dr. Euser noted that he wanted a “neurocognitive consult.” On November 19, 2014, Dr. Euser reiterated his work-related medical diagnosis as “post-concussive syndrome,” and he released the Claimant to return to full duty as of November 19, 2014.

6. As found herein above, the Claimant’s medical care and treatment at Advanced Urgent Care was an authorized selection. All referrals emanating from Advanced Urgent Care were within the chain of authorized referrals and, therefore, authorized Dr. Euser was a physician with Advanced Urgent Care. The medical care and treatment through November 26, 2014 was causally related to the slip and fall incident of October 3, 2014 and reasonably necessary to diagnose and treat the symptoms thereof.

7. On December 5, 2014, the Claimant told Dr. Euser that he was “going to fix his problems with a gun,” which triggered a referral by Dr. Euser to Platte Valley Medical Center for a psychiatric evaluation. This referral was within the authorized chain of referrals. The Claimant was seen at the emergency room (ER) of Platte Valley Medical Center, but there is no indication that the Claimant had a psychiatric evaluation there. At hearing, the Claimant expressed regret for making this impulsive statement about a gun, which he did not mean.

8. The Claimant has failed to prove, by preponderant evidence that he sustained any temporary disability from October 3, 2014 through November 25, 2014.

The Incident of November 26, 2014 –W.C. No. 4-970-092

9. In approximately seventeen subsequent form reports completed by Dr. Euser [forms furnished by the Division of Workers’ Compensation (DOWC)], from December 2014 through November 16, 2015, Dr. Euser consistently checked off Box No. 3, that his objective findings were consistent with a history of a **work-related mechanism of injury**. On November 16, 2015, Dr. Euser ultimately diagnosed a

"traumatic brain injury," and on that date, Dr. Euser placed the Claimant at maximum medical improvement (MMI), without rating the Claimant's permanent medical impairment. Regardless of the noted "date of injury" in the upper left hand corner of Dr. Euser's November 16, 2015 MMI Report (Claimant's Exhibit 1-49), and all of his other reports, the ALJ infers and finds that Dr. Euser erroneously perpetuated and listed the October 3, 2014 date to encompass the November 26, 2014 bucket incident. Indeed, when all the reports after November 26, 2014 are read *in pari materia,* the ALJ finds that the reports subsequent to November 26, 2014 were intended to refer to the November 26, 2014 bucket incident.

10. Upon referral from Dr. Euser, the Claimant was seen by Suzanne Kenneally, Psy.D., for a neuropsychological evaluation. Dr. Kenneally saw the Claimant on June 23, 2015 and July 8, 2015, and after testing and observing the Claimant, she arrived at diagnostic impressions of: (1) schizotypal personality disorder; and, (2) status 8 months post workplace injury. Dr. Kenneally's opinions were that the Claimant had no residual cognitive impairments as a result of the October 3 and November 26, 2014 incidents. After reviewing Dr. Kenneally's report, dated July 15, 2015, the Claimant's ATP, Dr. Euser, nonetheless continued to diagnose "traumatic brain injury." The ALJ takes administrative notice and finds and infers that Dr. Kenneally had no opinion concerning "traumatic brain injury" and even if she did, she would lack the requisite expertise to render a medical opinion concerning a physical injury, *i.e.,* "traumatic brain injury."

11. In light of the fact that the Claimant did **not** hit his head in the slip-and-fall incident of October 3, 2014 and the fact that Dr. Euser did not restrict the Claimant from work, the ALJ infers and finds that Dr. Euser based his initial diagnosis of work-related post-concussive syndrome as a result of the October 3, 2014 incident [W.C. No. 4-964-182-02], on the history given by the Claimant whereby the Claimant had said that he thought he had a concussion as a result of the October 3 fall. Dr. Euser, however, appropriately diagnosed "traumatic brain injury" as a result of the bucket-hitting-the-head incident of November 26, 2014, and the ALJ accepts his opinion as it relates to the November 26, 2014 incident.

Independent Medical Examination (IME) by Eric K. Hammerberg, M.D.

12. On June 25, 2015, Dr. Hammerberg performed an IME at the behest of the Respondents (Respondents' Exhibit A). Dr. Hammerberg's report is dated July 30, 2015. He had the benefit of Dr. Kenneally's opinion at the time of issuance of his report. His impression was essentially the same as Dr. Kenneally's impression: "schizotypal personality disorder." He added "with somatization and anxiety." Dr. Hammerberg is not a psychiatrist. He is a neurologist and electromyographist. Therefore, his opinions by virtue of credentials have no added weight beyond the opinions of another medical doctor or doctor of osteopathic medicine. The ALJ finds that the opinions of the ATP, Dr. Euser, who was seeing the Claimant for a long period of time for the purpose of

treatment, are entitled to more weight and credence than the one-time opinion of IME Dr. Hammerberg, who was not treating the Claimant and had no physician-patient relationship with the Claimant.

Average Weekly Wage

13. Respondents' Exhibit F-36, the Employer's Wage verification for the Claimant shows sporadic and erratic pay for different two-week pay periods, between August 9, 2014 and February 21, 2015. For this reason, the ALJ determines that the document is not a fair and/or reliable indicator of the Claimant's AWW, or of any subsequent wage loss after the November 26, 2014 bucket incident. On the other hand, no one contradicted the Claimant's testimony that he worked 35 hours per week at $8.00 an hour, thus, yielding an AWW of $280.00, which the ALJ hereby finds is the Claimant's AWW. Indeed, the ALJ infers and finds that the Claimant's testimony reasonably reflects the contract of hire, which is the best measure of loss of temporary earning capacity under the circumstances herein.

Temporary Disability

14. The Claimant failed to prove entitlement to TTD benefits as a result of the October 3, 2014 slip and fall incident (W.C. No. 4-964-182-02)..

15. It was the Claimant's undisputed testimony that he last worked on December 8, 2014 and since that time has earned **no** wages. As of December 8, 2014, the Claimant's ATP, Dr. Euser, released the Claimant to return to **restricted** work, from December 8, 2014 through December 29, 2014. There is no evidence that the Employer offered modified work to the Claimant during this period of time. On January 6, 2015, Dr. Euser took the Claimant off work altogether through January 26, 2015, pending a neurology referral. On January 26, February 27, and March 27, 2015, Dr. Euser kept the Claimant off work. From March 27, 2015 through November 15, 2015 (Claimant's Exhibits 1-49 through 1-60), Dr. Euser kept the Claimant off work. ATP Dr. Euser continuously kept the Claimant off work from January 6, 2015 through November 15, 2015, the day before Dr. Euser declared the Claimant to be at MMI.

16. The ALJ finds that on account of the November 26, 2014 bucket-on-the-head injury, the Claimant was temporarily and totally disabled from December 8, 2014 through December 29, 2014, both dates inclusive, a subtotal of 29 days; and, from January 6, 2015 through November 15, 2015, both dates inclusive, a subtotal of 314 days, for a grand total of 343 days. The Claimant failed to prove entitlement to temporary disability benefits from December 30, 2014 through January 5, 2015.

17. The Claimant's ATP. Dr. Euser, determined that the Claimant reached MMI on November 16, 2015, without giving the Claimant a permanent medical impairment rating.

Ultimate Findings

18. The ALJ finds the opinions of the Claimant's ATP, Dr. Euser, more credible and persuasive than the opinions of IME Dr. Hammerberg and Psychologist Dr. Kenneally insofar as she implies that there is nothing wrong with the Claimant.

19. The ALJ makes a rational choice, based on substantial evidence, to accept the opinions of ATP Dr. Euser, and to reject the opinions of IME Dr. Hammerberg, Psychologist Dr. Kenneally and any other opinions contrary to the opinions of ATP Dr. Euser.

20. The Claimant has proven, by a preponderance of the evidence that he suffered a compensable injury on October 3, 2014 when he slipped and fell at work (W.C. No, 4-964-182-02).

21. The Claimant has proven, by preponderant evidence that he suffered a compensable head injury at work when a bucket hit him on the head (W.C. No 4-970-092).

22. The Claimant has proven, by preponderant evidence that all of his medical care and treatment for the October 3, 2014 and the November 26, 2014 injuries was authorized, within the chain of authorized referrals, causally related to the work-related injuries, and reasonably necessary to cure and relieve the effects of those injuries.

23. The Employer's "wage Verification" (Respondents' Exhibit F-36) does not accurately or fairly reflect the Claimant's temporary wage loss. Therefore, the orthodox statutory provision dealing with hourly wages is the fairest method of determining the Claimant's AWW. The Claimant's AWW is, therefore, $280.00, which yields a TTD benefit rate of $186.66 per week, or $26.67 per day.

24. The Claimant failed to prove entitlement to TTD benefits from October 3, 2014 through December 7, 2014, for either claim; and, from December 30, 2014 through January 5, 2015.

25. The Claimant was temporarily and totally disabled from December 8, 2014 through December 29, 2014, both dates inclusive, a subtotal of 29 days; and, from January 6, 2015 through November 15, 2015, both dates inclusive, a subtotal of 314 days, for a grand total of 343 days.

26. The Claimant's ATP, Dr. Euser, declared the Claimant to be at MMI as of November 16, 2015. Therefore the Claimant is **not** entitled to additional temporary disability benefits after that date.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of the Claimant's ATP, Dr. Euser, are more credible and persuasive than the opinions of IME Dr. Hammerberg and Psychologist Dr. Kenneally insofar as she implies that there is nothing wrong with the Claimant.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005).

Also see Martinez v. Indus. Claim Appeals Office, 176 P.3d 826 (Colo. App. 2007). Substantial evidence is “that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence.” *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ’s resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of ATP Dr. Euser, and to reject the opinions of IME Dr. Hammerberg, Psychologist Dr. Kenneally and any other opinions contrary to the opinions of ATP Dr. Euser.

Compensability of Both Claims

c. In order for an injury to be compensable under the Workers’ Compensation Act, it must “arise out of” and “occur within the course and scope” of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury “arises out of’ employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured.” *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7,** which essentially implies that there is a presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant has proven, by a preponderance of the evidence that he suffered a compensable injury on October 3, 2014 when he slipped and fell at work (W.C. No, 4-964-182-02); and, that he suffered another compensable injury at work, specifically a head injury, when a bucket hit him on the head (W.C. No 4-970-092).

Medical

d. Because these matters are compensable, Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of the industrial injuries. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942

P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, on reporting the work-related nature of the October 3, 2014 injury, the Employer furnished the Claimant a list of at least two separate and unrelated medical providers, Advanced Urgent Care in Brighton and Exempla Healthcare in Thornton (Respondents' Exhibit F-29).

e. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all referrals from Advanced Urgent Care/ATP Dr. Euser were within the chain of authorized referrals and, therefore, authorized.

f. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the temporary injury of October 3, 2014 and the head injury of November 26, 2014. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of his injuries.

Average Weekly Wage (AWW)

g. As found, the Employer's "wage Verification" (Respondents' Exhibit F-36) does not accurately or fairly reflect the Claimant's temporary wage loss. Therefore, the orthodox statutory provision dealing with hourly wages is the fairest method of determining the Claimant's AWW. § 8-42-102 (2) (d), C.R.S., indicates that AWW for hourly employees should be calculated by multiplying the hourly rate times the number of hours worked per week. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. An ALJ has the discretion to determine a claimant's AWW, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, the

Claimant’s AWW IS $280.00, which yields a TTD benefit rate of $186.66 per week, or $26.67 per day.

Temporary Total Disability

h. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a “disability,” and that he has suffered a wage loss that, “to some degree,” is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee’s restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). There is no persuasive evidence, nor was “responsibility for termination” designated as an issue, that the Claimant’s separation from employment in this case was in any way his fault. Indeed, his ATP, Dr. Euser, had restricted the Claimant from employment.. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant’s testimony alone is sufficient to establish a temporary “disability.” *Id*. As found, the Claimant failed to prove entitlement to TTD benefits from October 3, 2014 through December 7, 2014, for either claim; and, from December 30, 2014 through January 5, 2015.

i. As further found, the Claimant was temporarily and totally disabled from December 8, 2014 through December 29, 2014, both dates inclusive, a subtotal of 29 days; and, from January 6, 2015 through November 15, 2015, both dates inclusive, a subtotal of 314 days, for a grand total of 343 days (W.C. No. 4-970-092). As found, the Claimant’s ATP, Dr. Euser, declared the Claimant to be at MMI as of November 16, 2015. Therefore the Claimant is **not** entitled to additional temporary disability benefits after that date.

j. Once the prerequisites for TTD are met (*e.g.,* there has beenno release to return to full duty, MMI has not been reached, modified employment has not been made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant had not been released to return to work without restrictions; he did not work or earn wages; and, he had not been declared to be at MMI until November 16, 2015. During the 343 days of TTD, the Claimant was sustaining a 100% temporary wage loss. Based on his AWW IS $280.00, a TTD benefit rate of $186.66 per week, or $26.67 per day, is yielded. Aggregate TTD benefits for all periods between December 8, 2014 and November 15, 2015 (the period from December 30, 2014 through January 5, 2015 is excluded) equal $9,147.81.

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Burden of Proof

k. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on all issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay all the costs of causally related and reasonably necessary medical care and treatment for the compensable injuries of October 3, 2014 and November 26, 2014, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all claims for temporary disability benefits through November 25, 2014 (W.C. No. 4-964-182-02) are hereby denied and dismissed.

C. The Respondents shall pay the Claimant temporary total disability benefits of $186.66 per week, or $26.67 per day, from December 8, 2014 through November 15, 2015 (December 30, 2014 through January 5, 2015 excluded), a total of 343 days, in the aggregate amount of $9,147.81, which shall be paid retroactively and forthwith.

D. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this______day of February 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of February 2016, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

____
Court Clerk

Wc.ord

ISSUES

The issues addressed in this decision concern Claimant's entitlement to medical benefits, specifically reimbursement to Claimant for out of pocket expenses associated with prescription medication used to control his migraine headaches and a trial of Botox injections. The questions to be answered are whether a recommended trial of Botox injections and Claimant's continued use of Propranolol are reasonable, necessary, and related to Claimant's admitted October 10, 2014 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, including the parties hearing exhibits, the ALJ enters the following findings of fact:

1. Claimant was employed by Employer as a construction worker at the Dillon Reservoir Dam.

2. Claimant had an admitted work related accident on October 10, 2014, while he was running an air line into an elevator shaft. Claimant was approximately 245 feet underground when he got ill, complaining of headache, nausea and vomiting. The initial diagnosis was exposure to chemical inhalation.

3. Claimant had blood tests (Chem 7, LFT, lead, mercury, zinc, manganese, Protoporphyrin and Cholinesterase), all levels were normal.

4. Claimant continued to experience headaches following his exposure. He was tried on a number of medications, including Ketorolac, Ultram, Imitrex, Vicodan, and Flexeril. He was also treated with occipital nerve blocks. The aforementioned medications were either ineffective or caused untoward side effects.

5. Given Claimant's persistent symptoms an MRI of the brain and a neurology consultation was requested.

6. Claimant's MRI was interpreted as normal; however, he was determined to have left maxillary sinusitis. On December 22, 2014, Claimant was evaluated by Dr. Rawat a neurologist, who provided a probable diagnosis of "atypical migraine." Dr. Rawat recommended checking Claimant's oxygen levels at night and a trial of Depakote.

7. Continued symptoms lead to a referral to Dr. Hoyte, a toxicologist at the University of Colorado Hospital. Dr. Hoyte evaluated Claimant on January 13 and January 16, 2015. Following his evaluation, Dr. Hoyte noted that Claimant was possibly

exposed to carbon monoxide on the date of injury. As noted above, laboratory tests were performed shortly after Claimant's exposure; however, there is no indication that the blood work performed included a carboxyhemoglobin level to test for exposure to carbon monoxide.

8. Claimant returned to Dr. McCurry, the authorized treating physician (ATP) designated in this case, on March 20, 2015 where, based upon the evaluation of Dr. Hoyte, it was presumed that Claimant had been exposed to carbon monoxide. Due to ongoing headaches and cognitive decline, Dr. McCurry referred Claimant for neuropsych testing. Dr. McCurry also added Nortriptyline and Fioricet to the medications used to treat Claimant's ongoing headaches.

9. On March 23, 2015 Claimant saw Dr. Wodushek for the requested neuropsych testing. Repeat MRI of the brain completed April 3, 2015, showed normal brain but left maxillary sinus disease. Records from Dr. Wodushek indicate that Claimant was likely exposed to several chemicals including Phenol and Propylene Glycol. Claimant's neuropsychological testing results demonstrated a normal neurocognitive profile.

10. On April 21, 2015, Claimant reported to Dr. McCurry that the Fioricet prescribed was not effective in abating his headaches and that the Nortriptyline was only partially effective in increasing his sleep. Consequently, Dr. McCurry increased Claimant's Nortriptyline dosage and added Zanaflex and Propranolol to Claimant's medication regimen.

11. Claimant persuasively testified that Propranolol helps keep his headaches "at bay". The ALJ credits Claimant's testimony to find that the use of Propranolol helps cure and relieve him of the ongoing effects of his migraine headaches. Currently, Claimant uses Propranolol two times a day.

12. Claimant's headaches persisted. Consequently, he was referred to a headache specialist at University of Colorado Hospital. On June 22, 2015 Dr. Birlea, a neurologist, recommended repeat occipital nerve block and Botox injection. Additionally, Dr. Birlea recommended the addition of Indocin.

13. On August 5, w2015 Dr. McCurry placed Claimant on Indocin.

14. Respondents denied authorization of continued Propranolol and denied the request for a trial of Botox injections. Claimant testified and the records submitted at hearing support that he is paying out of pocket for continued Propranolol prescribed by Dr. McCurry. According to Claimant's testimony, he has paid $190.00 out of pocket for the necessary Propranolol.

15. Respondents retained Hua Judy Chen, M.D. (neurologist) to complete a medical records review of Claimant's treatment, and to give medical opinions regarding whether ongoing prescription medications, i.e. Propranolol were reasonable, medically

necessary and related to Claimant's October 10, 2014 injury, and whether the request for Botox injections are causally related to the October 10, 2014 injury.

16. Dr. Chen opined that she did not believe that the request for migraine treatment, including Botox injections, is related to the October 10, 2014 injury. Further, Dr. Chen found that: "*after 10 months of treatment for headache and normal tests, I do not think the treatment is reasonable or medically necessary for the accident occurred on 10/2014 anymore*".

17. Dr. McCurry testified by deposition on December 17, 2015. Dr. McCurry testified that Claimant failed "every medicine that we routinely use for migraine headaches, as well as just headache prevention". According to Dr. McCurry they were "not working, or we would have a secondary complication or side effect". Later under cross examination Dr. McCurry would testify that Claimant failed four classes of medication used to treat migraine headaches, including: tricyclic antidepressants, narcotics, beta blockers, and calcium channel blockers. He had also failed to respond effectively to anti-emetics (phenothiazine derivatives).

18. Dr. McCurry also addressed lifestyle changes that Claimant appeared committed to in order to effectively treat his migraine headaches.

19. The ALJ infers from Dr. McCurry's deposition opinions that he believes that Claimant was probably exposed to carbon monoxide and that his current migraine headaches are directly related to the long term effects of such exposure. Consequently, because Claimant continues to experience symptoms, Dr. McCurry believes that the treatment including ongoing medications and a trial of Botox injections are reasonable, necessary and related to Claimant's October 10, 2014 carbon monoxide exposure.

20. Regarding the use of Botox to treat headaches, the Medical Treatment Guidelines (MTGs) (Rule 17, Exhibit 10, Traumatic Brian Injury Medical Treatment Guidelines Section G (7)(b)), state: "*No longer generally recommended for cervicogenic or other headaches based on good evidence of lack of effect. There is good evidence that botox is not more effective than placebo for reducing the frequency of episodic migraines….*". Nonetheless, the MTGs go on to state that Botox injections "*may be considered in a very small subset of patients with chronic migraines 12-15 days/month who have failed all other conservative treatment, including trials of at least three drug classes, and who have committed to any life style changes related to headache triggers".* Based on the evidence presented, including the opinions expressed by Dr. McCurry during his deposition, the ALJ finds that Claimant falls into this subset of patient for whom the use of Botox injections to treat headache complexes is indicated.

21. Dr. McCurry's reasoning and recommendations are supported by the totality of the medical record as a whole. Accordingly, the ALJ credits Dr. McCurry's testimony to find that Claimant's migraine headaches are industrially based, i.e. related to his probable exposure to carbon monoxide on October 10, 2014. The opinions of Dr. McCurry are credible and more persuasive than the contrary opinions of Dr. Chen.

22. Claimant has proven by a preponderance of the evidence presented, that the continued use of Propranolol and a trial of Botox injections is reasonable, necessary and causally related to his October 10, 2014 industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony regarding his ongoing symptoms and current need for treatment is consistent with the content of the medical records submitted at hearing. Furthermore, Claimant's testimony is generally supported by testimony of Dr. McCurry. Consequently, the ALJ finds Claimant to be a credible and persuasive witness.

C. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals*

Office, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

D. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

E. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

F. The Medical Treatment Guidelines are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight. The MTGs addresses the criteria necessary for accepted use of Botox to treat cervicogenic or other headaches in workers compensation cases. As found, the ALJ is persuaded that Claimant fits into the subset of patients for whom the use of Botox injections is indicated. Even if, Claimant did not meet the identified criteria for use of Botox exactly, the Court is not bound by the guidelines when deciding individual cases on the MTGs or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable,

> necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

G. In this case, the totality of the evidence supports a conclusion that Claimant suffers from work related migraine headaches as a long term consequence of likely exposure to carbon monoxide. The record evidence establishes that Claimant's headaches have been recalcitrant to management efforts and he has failed multiple classes of medications used to treat the condition. Moreover, Claimant has made lifestyle changes and remains committed to treating his condition, as demonstrated by his out of pocket payment for Propranolol, the medication that Claimant persuasively testified helps cure and relieve him from the symptoms of his ongoing migraines.

H. As noted above, the ALJ has considered the MTGs and the opinions of Dr. Chen and McCurry regarding their application to the injury in this case. In this case, the ALJ finds and concludes that the evidence supports Dr. McCurry's opinions that Claimant's need and suitability for continued medications and a trial of Botox injections are reasonable, necessary and directly related to Claimant's compensable work injury. Dr. Chen's contrary opinions are not persuasive. Consequently, Claimant has proven by a preponderance of the evidence that the recommended treatment, including continued prescription medication is reasonably necessary and related to his compensable October 10, 2014 work related injury. Accordingly, Respondents are obligated to pay for it.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all medical expenses to cure and relieve Claimant from the effects of his industrially based migraine headaches including, but not limited to, ongoing prescriptions for Propranolol and a trail of Botox injections as recommended/requested.

2. Respondents shall reimburse Claimant for his out-of –pocket expenses for his continued payment for Propranolol.

3. All issues not expressly decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For

statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 11, 2016

/s/ Richard M. Lamphere________________
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-968-811-01

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he is entitled to reopen his case based upon a worsening of his condition pursuant to Section 8-43-303?

- If claimant has proven that his claim should be reopened, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury?

- If claimant has proven that his claim should be reopened, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") commencing March 16, 2015 and continuing?

- If claimant has proven that his claim should be reopened, whether claimant has proven by a preponderance of the evidence that his average weekly wage ("AWW") should be increased to $715.56 after December 22, 2014.

FINDINGS OF FACT

1. Claimant was employed as a moderate needs teacher at Orchard Avenue Elementary School. Claimant began his employment with employer in August 2012. Claimant's job duties included working with groups of students on math or literacy. Generally, claimant's students are two or more years behind in their grade level contemporaries or have behavioral issues.

2. Claimant testified that on December 1, 2014, he was called into a classroom as part of a crisis team to deal with a disruptive student who was throwing chairs and upending tables. Claimant testified he was holding down the chair and the student tried to bit claimant. Claimant testified he attempted to restrain the child using a one-person restraint and the child proceeded to lash out at claimant and kicked him in the head. Claimant testified he did not lose consciousness when he was kicked. Claimant testified he got a headache after getting kicked.

3. Claimant testified he went back to the classroom and started vomiting after the incident.

4. Claimant sought treatment with the Community Hospital Urgent Care on December 4, 2014. Claimant noted he had been kicked in the head by a student's foot and later that day developed a headache, nausea, and vomiting. Claimant reported he had taken over the counter migraine medications and a Percocet that belonged to his

wife. Claimant was diagnosed with nausea and vomiting and a possible mild concussion.

5. Claimant's medical records document that claimant has reported to his medical providers that he has periodically taken his mother's Xanax prior to his work injury. The records further provide that claimant was seeking medical treatment on November 7, 2014 from Community Hospital for complaints of anxiety.

6. Claimant returned to Community Hospital Urgent Care on December 8, 2014 with continued complaints of headache that had not improved. Claimant reported that lights and computers bother him and noted he was unable to concentrate on tasks. Dr. Lykke noted that his levels of symptoms had not improved since the time of the injury and recommended claimant go to the emergency room ("ER") for urgent head imaging.

7. Claimant was seen in the Community Hospital ER on December 8, 2014. The ER reports a history of claimant being involved in martial arts and being kicked in the head one week ago. Claimant was diagnosed with post-concussive syndrome and taken off or work for 3 days. Claimant underwent a computed tomography ("CT") scan of his head that was noted to be unremarkable. Claimant was instructed to avoid television and reading and to follow up with his primary care physician.

8. Claimant was evaluated by Dr. Sofish with Grand Valley Occupational Medicine on December 11, 2014. Claimant reported that he was kicked by a student on December 1, 2014 after which he experienced a headache, blurred vision, sensitivity to lights and a halo effect while watching television. Dr. Sofish noted claimant had undergone a CT scan that was negative. Dr. Sofish diagnosed claimant with postconcussive syndrome and recommended claimant remain off of work through at least December 15, 2014.

9. Claimant returned to Dr. Sofish on December 15, 2014. Dr. Sofish noted claimant was not working and continued to complain of a frontal headache that would pass to the parietal area, with nausea, no vomiting and sensitivity to lights. Dr. Sofish continued claimant's medications and instructed claimant to return on December 22, 2016.

10. Respondents filed a general admission of liability admitting for medical benefits and wage continuation benefits on December 16, 2014. Claimant testified at hearing that he remained off of work through the Winter Break.

11. Claimant was seen in the ER on December 18, 2014 with complaints of vomiting, diarrhea and epigastic abdominal pain that began at 4:00 that morning. Claimant was diagnosed with a concussion and anxiety. Claimant was noted to have normal mood/affect with no motor/sensory deficits. Claimant treatment focused on a possible viral etiology for these complaints.

12. Claimant was re-evaluated by Dr. Sofish on December 22, 2014. Claimant was noted to have flu symptoms on December 18, 2014 for which he sought treatment. Dr. Sofish noted that claimant was in no acute distress, was neurologically intact and was able to toe and heel and squat with no difficulties whatsoever. Dr. Sofish provided a diagnosis of postconcussive syndrome and closed claimant's case returning claimant to work without restrictions.

13. Respondent filed a final admission of liability ("FAL") on December 26, 2014 admitting for a 0% whole person impairment rating based on Dr. Sofish's December 22, 2014 medical reports. Claimant did not object to the FAL and his claim was closed as a matter of law.

14. Claimant testified he returned to work for employer after the Winter Break in early January 2015. Claimant testified he experienced headaches when looking at computer screens when he returned to work and over the course of time in January 2015, his headaches returned along with increased anxiety, nausea and vomiting at work. Claimant testified he would also experience crying at work, along with retching or shaking while working with students.

15. Claimant sought additional treatment with Community Hospital on February 18, 2015 where he was examined by Physician's Assistant Blunk. Mr. Blunk noted claimant was complaining of recent worsening of anxiety/panic with migraine headaches worsening as his anxiety worsens. Claimant reported that his anxiety has been gradual and has been occurring in an intermittent pattern for years with symptoms including breathlessness, chest pain, dry mouth, headache, migraine, palpations, and sweating. Claimant reported a history of migraine headaches that began six years earlier (at age 31) and occurring yearly and then in December 2014 he had a closed head injury with a concussion and following his recovery, his headaches have become more frequent. Mr. Blunk recommended medications, including Omeprazole and Paxil and noted claimant could consider counseling if his symptoms continued. Mr. Blunk instructed claimant to follow up in one year.

16. Claimant returned to Mr. Blunk on March 11, 2015 with continued complaints associated with anxiety that had been increasing in frequency and severity. Mr. Blunk noted that claimant was interested in psychiatry.

17. Claimant returned to Mr. Blunk on March 23, 2015 and noted his anxiety was still a real problem. Claimant noted he had physical "shakes" and some retching from time to time. Mr. Blunk noted that claimant was unable to carry on at work and a substitute had been signed on to do his teaching for him late last week and this week.

18. Claimant testified at hearing that he last worked for employer on March 16, 2015 and had not returned to work.

19. Claimant was seen for psychological examination by Mr. Flinn with Behavioral Health and Wellness on referral from Mr. Blunk on April 2, 2015. Claimant testified this is a program that provides free counseling sessions through the employee

assistance program ("EAP") provided by employer. Claimant reported a history of prior concussions when he was 18, 19 and 20 years old. Claimant reported he had another concussion in December from a behavioral student kicking him the forehead. Claimant reported he was treated with his primary care physician following his last concussion and was diagnosed with post concussion syndrome. Claimant reported he had violent headaches, vomiting and sensitivity to light and other issues for three weeks after the December concussion followed by a week where he felt amazing. Claimant reported that since that week, his anxiety levels have consistently risen to maladaptive ends. Claimant admitted to using medicinal marijuana to help him sleep occasionally on the weekends.

20. Claimant was seen on April 6, 2015 by Mindsprings due to suicidal ideations. Claimant's wife reported claimant's work injury as an inciting event for his current psychological issues. Claimant reported he had been retching, vomiting and shaking and crying. Claimant reported a history of a prior suicide attempt remote in time to when he was 17 years old. Claimant reported a history of significant problems with his family (sister, brother-in-law, mother and father) and was noted by his wife to be the rock of the family, the one everyone else relied on. Claimant reported his use of marijuana had increased since being kicked. Claimant was diagnosed with post-traumatic stress disorder and anxiety disorder.

21. Claimant was evaluated on April 7, 2015 by Dr. Sammons at Mesa Behavioral Medicine Clinic. Dr. Sammons noted claimant reported his anxiety as being "over the top". Claimant reported he had a concussion in December with headaches and blurred vision and after going back to work after the headaches got better, the computer gave him headaches that increased his anxiety. Dr. Sammons noted claimant's history of 3 concussions between the ages of 18-20 and provided claimant with a current medical diagnosis of multiple concussions. Dr. Sammons prescribed Alprazolam.

22. Claimant returned to Dr. Sofish on April 9, 2015. Dr. Sofish noted claimant's recent medical treatment and his complaints of severe anxiety, intrusive thoughts, retching and vomiting, and some suggestion of possible audio and visual hallucinations. Dr. Sofish noted claimant presented with postconcussive syndrome and seemed to be symptom-free when he was discharged, but has had continuing symptoms of severe anxiety. Dr. Sofish recommended claimant return to Mindspring to consider being admitted. Dr. Sofish noted in his WC164 form that claimant remained at MMI.

23. Claimant returned to Mr. Flinn on April 20, 2015 and noted he had six straight days of headache with anxiety levels that make him contract or retch, hot flashes and panic tremors. Mr. Flinn focused his session with claimant on indentifying and addressing the areas on ongoing difficulty including increasing his coping skills and improving his stress management.

24. Claimant returned to Mr. Blunk on April 21, 2015. Mr. Blunk noted claimant continued to treat for anxiety and reported having trouble sleeping with

troublesome nightmares. Claimant was continued on medications and instructed to follow up.

25. Claimant was evaluated by Dr. Young with the EAP program on April 21, 2015. Claimant reported he sustained a concussion while trying to restrain a student in December 2014. Dr. Young noted claimant had a prior history of 3 concussions when he was 18-20 years old. Claimant reported he was currently on medical leave and noted that some of his symptoms had improved. Dr. Young noted claimant reported a long history of anxiety and social phobia, which was both exacerbating and exacerbated by his concussion. Dr. Young instructed claimant on activity pacing and instructed claimant to follow up in one month. Dr. Young performed "impact testing" in connection with his examination and provided a diagnosis of having post concussion syndrome.

26. Claimant returned to Mr. Flinn on April 29, 2015 and reported another hard week, but did have some progress. Mr. Flinn focused on increasing claimant's coping skills and stress management.

27. Dr. Young referred claimant to Dr. Mistry on June 1, 2015 for further examination. Dr. Mistry examined claimant initially on June 10, 2015 and noted claimant's complaints of blurred vision, tinnitus, and bilateral cervical radicular pain. Dr. Mistry recommended a brain MRI to evaluate for occult structural pathology and to rule out Chiari malformation. Dr. Mistry also recommended claimant undergo speech therapy for cognitive retraining, a cervical spine MRI, and a referral to an ear, nose and throat ("ENT") specialist for evaluation of claimant's tinnitus along with a referral to an ophthalmologist for evaluation of claimant's blurred vision.

28. Claimant returned to Dr. Sofish on June 11, 2015. Dr. Sofish noted in his June 11, 2015 report that claimant's post concussive syndrome was a direct result of the trauma from December 1, 2014.

29. Claimant returned to Dr. Mistry on July 22, 2015 Dr. Mistry noted claimant's MRI of his brain was normal and recommended claimant continue with his ongoing therapies, including his speech therapy with Ms. Beach.

30. Claimant returned to Dr. Mistry on August 21, 2015 and reported he believed the speech therapy had helped reduce the intensity of his symptoms. Dr. Mistry recommended claimant continue with his therapies and discussed potential additional treatment including neurological consultation, in-patient rehabilitation, and possible soft tissue massage.

31. Claimant underwent an independent medical examination ("IME") with Dr. Kleinman on October 28, 2015. Dr. Kleinman performed a psychiatric evaluation and reviewed claimant's medical records in connection with his IME. Dr. Kleinman issued an IME report dated November 6, 2015 in which he discussed his findings. Dr. Kleinman noted that claimant had sought treatment for anxiety shortly before his work injury and opined that the claimant likely had a generalized anxiety disorder that pre-

dated claimant’s work injury for which Dr. Lykke had recommended counseling and medications, which claimant had not accepted.

32. Dr. Kleinman further opined in his report that while he was kicked in the head, there was no loss of consciousness, no amnesia and claimant was not dazed. Dr. Kleinman noted that the symptoms of blurry vision and headaches resolved, according to Dr. Sofish by December 22, 2014. Dr. Kleinman opined that there would be little basis to consider persisting post concussive syndrome since claimant’s injury was not of the severity that he would be expected to have symptoms almost a year later. Dr. Kleinman opined that claimant’s diagnosis would be anxiety, unrelated to the occupational injury.

33. Dr. Kleinman testified at hearing consistent with his report. Dr. Kleinman testified that claimant is receiving treatment for a neurocognitive disorder, but opined that claimant did not present with evidence of a neurocognitive disorder, as claimant would need a loss of consciousness and post-traumatic amnesia according to the DSM V. Dr. Kleinman testified that while claimant had undergone “impact testing” with Dr. Young, this data is not necessarily reliable.

34. Dr. Kleinman testified that claimant’s concussion was not severe enough to cause a post concussive neurological disorder and opined that claimant’s condition was related to his pre-existing anxiety and not his work injury.

35. The ALJ credits claimant’s testimony at hearing along with the opinions expressed by Dr. Mistry and Dr. Sofish in their medical reports over the contrary opinions expressed by Dr. Kleinman in his report and testimony and finds that claimant has established that it is more likely true than not that he has suffered a worsening of his condition related to the December 1, 2014 work injury. The ALJ credits claimant’s testimony at hearing along with the medical records entered into evidence at hearing and finds claimant has proven that it is more likely true than not that his claim should be reopened based on a worsening of his condition.

36. The ALJ credits the medical records entered into evidence at hearing along with claimant’s testimony and finds that claimant has established that the medical treatment he received, including claimant’s treatment after December 22, 2014, including claimant’s treatment from Dr. Sofish and Dr. Mistry was reasonable and necessary to cure and relieve claimant from the effects of his work injury.

37. Claimant testified at hearing that he was paid his wages by employer through the end of his contract year in August 2015. The ALJ credits claimant’s testimony at hearing along with the medical records entered into evidence and finds that claimant has established that it is more probable than not that he is entitled to an award of TTD benefits beginning March 16, 2015 and continuing.

38. The issue of offsets and credits was reserved by the parties at hearing, but respondents may be entitled to an offset against the award of TTD benefits for continuation of wages pursuant to Section 8-42-124, C.R.S. as noted in the FAL.

39. The wage records entered into evidence establish claimant was paid a monthly salary of $3,100.77. Taking claimant's monthly salary multiplied by 12 and divided by 52 equates to an AWW of $715.56.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2014. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4).

4. As found, the ALJ credits the testimony of claimant at hearing along with the medical opinions expressed by Dr. Sofish and Dr. Mistry in their medical reports and determines that claimant has established by a preponderance of the evidence that he has sustained a worsening of his condition related to his work injury that entitles claimant to reopen his claim pursuant to Section 8-43-303, C.R.S.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury.

Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, claimant's medical treatment after December 22, 2014, including his treatment from Dr. Mistry and Dr. Sofish is found to be reasonable and necessary to cure and relieve claimant from the effects of his work injury.

7. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

8. As found, based on claimant's credible testimony at hearing, claimant stopped working for employer on March 16, 2015 due to his ongoing problems related to his December 1, 2014 work injury. As found, claimant is entitled to TTD benefits beginning March 16, 2015 and continuing until terminated by law.

9. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

10. As found, based on the wage records entered into evidence at hearing, claimant was paid a monthly salary of $3,100.77 by employer. As found, claimant's appropriate AWW is determined to be $715.56.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury.

2. Respondent shall pay claimant TTD benefits commencing March 16, 2015 and continuing based on an AWW of $715.56. Respondent may be entitled to an offset pursuant to Section 8-42-124, C.R.S.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 9, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-971-336-01

ISSUES

- Pursuant to the Order of Remand, the court is instructed to review the evidence and enter an Order in which the ALJ shall issue further findings and a new order on the difference between the claimant's pre-injury average weekly wage ("AWW") and the wages claimant earned in his modified employment.

- The parties stipulated at the prior hearing that claimant's AWW with employer was $1,601.47.

FINDINGS OF FACT

1. As found at the prior hearing, and as set forth in the prior Findings of Fact, Conclusions of Law and Order, claimant was employed with employer as a Systems Operator I on December 27, 2014. Claimant testified his job duties included operating a fork lift and a front end loader. Claimant testified that through his work with employer, he would work shifts from 5:30 p.m. to 6:00 a.m.

2. Claimant testified that he was working on a drilling site in Wyoming on December 27, 2014 when at approximately 9:00 p.m., he slipped and fell on an icy ramp and landed on his right shoulder. Claimant testified he called his supervisor, Mr. Hansen and informed him that he fell. Claimant testified Mr. Hansen told him he would tell Mr. Chambers, the direct supervisor for the area, of claimant's fall. Claimant testified he continued working and took it easy and was going to see how he felt in the morning.

3. Claimant testified that following his fall, he continued to work, but would use his left arm to lift. Claimant testified he finished his shift with employer and his shoulder was numb and throbbing.

4. Claimant testified that following his shift, he was scheduled to return to work on December 28, 2014 at 5:30 p.m., but was woken up at approximately 2:00 p.m. by Mr. Hansen and was told to pack up because he was going to another job site where he would catch a ride back to his home in Colorado. Claimant testified Mr. Hansen helped him load his belongings, including his tools and a cooler.

5. Claimant testified that while he was in the car with Mr. Hansen, he again mentioned that he hurt his shoulder. Claimant testified Mr. Hansen told him to sleep on it and that he had reported the injury to Mr. Chambers and someone would be getting back to him. Claimant testified he went to the new job site and operated a loader with his left hand. Claimant testified he was at the new job site for approximately 12-13 hours, before leaving the job site on December 29, 2014 at approximately 6:00 a.m.

6. Claimant testified he got a ride back to Colorado with Mr. Rotta and arrived at his home late in the afternoon on December 29, 2014. Claimant testified he did not receive a referral from employer to a physician between December 29, 2014 and January 2, 2015. Claimant testified that during this time, his pain began getting worse.

7. Claimant testified he was advised that he was terminated by employer on January 2, 2015. Claimant testified he then made a medical appointment with his personal physician, Dr. Smith with Roaring Fork Family Physicians.

8. Claimant was examined by Dr. Smith on January 2, 2015. Dr. Smith noted claimant reported he fell and landed on his right shoulder on December 27, 2014. Dr. Smith noted claimant had pain since his fall and documented "a little bruising down into the proximal upper arm". Claimant reported pain with overhead activity. Dr. Smith diagnosed claimant with a likely injury to the rotator cuff and provided claimant with restrictions of no lifting over 10 pounds. Claimant testified at hearing that he had not had an injury to his right shoulder before December 27, 2014.

9. Claimant testified that after his appointment with Dr. Smith, he called Axiom, a medical service provided by employer that allows the employees to call with medical questions involving work related injuries and speak to a nurse. Claimant testified he knew to call Axiom from a co-worker. Claimant testified he spoke with "Jan" at Axiom and asked her if a report had been filed. Claimant testified he was not referred to a physician by Axiom or employer after reporting the injury.

10. Claimant returned to Dr. Smith on January 14, 2015. Claimant noted continued pain in his right shoulder and Dr. Smith recommended claimant obtain a magnetic resonance image ("MRI") of his right shoulder. Claimant was referred by Dr. Smith to Dr. Adams.

11. Dr. Adams evaluated claimant on January 21, 2015 and noted claimant's accident history of slipping at work, landing on the right shoulder. Dr. Adams referred claimant for an MRI of the right shoulder.

12. Claimant returned to Dr. Smith on February 11, 2015. Dr. Smith noted that it was evident that claimant had a torn rotator cuff, but that insurer had denied the request for the MRI. By March 30, 2015, Dr. Smith was noting that claimant had a known rotator cuff tear and would likely need surgery.

13. Mr. Norwood, claimant's co-worker, testified at hearing that he was working with claimant on December 27, 2014 and witnessed claimant fall when he slipped on iron. Mr. Norwood testified claimant was talking on the phone and walking away from him when he stepped on iron, slipped and fell, landing on his right side. Mr. Norwood testified he walked over to claimant and asked him if he was OK, to which claimant replied that he was OK. Mr. Norwood testified he asked claimant several times through the day if he was OK, to which claimant responded that he was OK. Mr. Norwood testified he did not notice any difference in how claimant performed his work.

14. Mr. Norwood testified that he did not work with claimant anymore after the shift in which claimant fell (the shift ending December 28, 2014). Mr. Norwood testified he later saw claimant and his supervisor loading claimant's belongings. Mr. Norwood testified he did not hear claimant complain of right arm pain following his fall.

15. Mr. Hansen testified at hearing in this matter that he had spoken with claimant in December 2014 regarding a tire claimant had blown on the loader. Mr. Hansen confirmed that claimant had told him that he had fallen. Mr. Hansen testified he asked claimant if he was OK, and claimant replied that he was OK. Mr. Hansen testified he did not interpret this as claimant reporting a work related injury.

16. Mr. Hansen testified that the next day he removed claimant from the rig he was working on because of complaints employer had received from the rig owner about claimant. Mr. Hansen testified he moved claimant to a different rig and helped claimant move some of his belongings. Mr. Hansen testified that in the drive to the new rig, claimant did not complain of shoulder pain. Mr. Hansen testified he did not tell Mr. Chambers of claimant having fallen at work.

17. The ALJ credited the testimony of claimant and Mr. Norwood and found in the prior order that claimant had established that on December 27, 2014 he slipped and fell on ice at work and landed on his right side. The ALJ credited the medical records from Dr. Smith that document claimant had bruising on his right shoulder on examination on January 2, 2014 and diagnosed claimant with a possible torn rotator cuff and found that claimant had proven that it was more likely than not that claimant sustained an injury at work when he slipped and fell on December 27, 2014.

18. As noted in the prior Order, claimant was placed on restrictions by Dr. Smith on January 2, 2015. The ALJ found in the prior Order that the claimant had demonstrated that it was more likely true than not that the medical restrictions were a result of his December 27, 2014 slip and fall when he landed on his right side and resulted in claimant's subsequent wage loss. The ALJ found that the wage loss continued until February 24, 2015 when claimant returned to work for a new employer. The ALJ therefore awarded TTD benefits for the period of January 2, 2015 through his return to work on February 24, 2015. The ALJ noted that the evidence at hearing established that claimant was off of work beginning December 29, 2014 due to his normal scheduled time off, and therefore, awarded claimant TTD benefits beginning on January 2, 2015.

19. With regard to the issue of temporary partial disability ("TPD") benefits, the ALJ originally found that claimant failed to establish that his wage loss after returning to work for another employer was related to his work injury with employer. Claimant timely appealed this decision and the Industrial Claim Appeals Panel issued an Order remanding the case to the ALJ to review the evidence and make additional findings ordering respondents to pay TPD benefits based on the difference between the claimant's AWW and the actual earnings claimant had from his post-injury employment.

20. Claimant entered into evidence two pay stubs from his subsequent employer that establish claimant was paid year to date amounts of $6,500.30 for the period ending April 30, 2015 and $7,774.39 for the period ending May 15, 2015. Based on claimant's testimony that he started working on February 24, 2015, this represents a period of 11 4/7 weeks.

21. Based on claimant's stipulated AWW of $1,601.47, claimant would have earned $18,531.30 in those 11 4/7 weeks. This equates to a difference of $10,756.91 and TPD benefits of $7,171.27.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Once the claimant establishes the injury has caused "disability" in the sense that the injury impairs the claimant's ability to perform his regular duties, the right to temporary disability benefits is measured by the claimant's wage loss. This is true because the physical restrictions caused by the injury affect the claimant's prospects for finding alternative employment. *J.D. Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989).

3. In the prior Order, entered on July 31, 2015, the court found claimant established he sustained a compensable injury and awarded claimant TTD benefits for the period of January 2, 2015 through February 23, 2015. Because claimant has not been placed at MMI and is earning less wages in his new employment, claimant is entitled to an award of TPD benefits commencing February 24, 2015.

4. As found, based on the wage records entered into evidence, claimant's TPD benefits amount to $7,171.27. The ALJ further orders that TPD benefits shall continue until terminated by law or statute.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TPD benefits in the amount of $7,171.27 for the period of February 24, 2015 through May 15, 2015.

2. Respondents shall continue TPD benefits until terminated by law or statute.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 16, 2016

Keith E. Mottram

Keith E. Mottram
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222 S. 6th Street, Suite 414
Grand Junction, Colorado

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION No. WC 4-972-492-01

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease to his bilateral knees.

2. If compensable, whether Claimant has established by a preponderance of the evidence that he is entitled to an award of authorized medical benefits that are reasonable and necessary to treat his bilateral knees.

3. If compensable, whether Respondents have established by a preponderance of the evidence that causation should be apportioned.

FINDINGS OF FACT

1. Claimant works for Employer as a trailer mechanic and has been employed in this position by Employer for approximately eighteen years. Claimant was employed by Employer from 1990 until 1997 as a mechanic. In 1997, and for a period of approximately nine months, Claimant worked as a fuel tank and gas pump installer for a separate employer before returning to work for Employer later in 1997.

2. As a trailer mechanic and for the past eighteen years, Claimant's duties include manual labor involving jacking up trailers, installing bumpers and beds, and changing tires and his duties involve repetitive kneeling, crawling, crouching, squatting, carrying, and lifting and carrying heavy items including tire rims and tires. Claimant often works on his knees.

3. Claimant has suffered from bilateral knee pain for several years. Claimant first mentioned occasional complaints of joint pain in his knees during an annual physical examination with Thomas Motz, D.O. in March of 2009. Claimant began treating with Western Orthopedics & Sports Medicine for knee pain in early 2012. Claimant has used bilateral knee braces and has received several injections during the course of his treatment. Claimant has continued to work throughout this period of time.

4. On February 7, 2012 Claimant was evaluated at Western Orthopedics & Sports Medicine by Mitchell Copeland, D.O. Claimant reported right knee pain that started without any known injury two months ago and constant symptoms exacerbated by walking, kneeling, and squatting. Dr. Copeland assessed osteoarthritis of the knee and x-rays were performed in the clinic and reviewed. *See* Exhibit 6.

5. On February 17, 2012 Claimant was evaluated by Dr. Copeland and Dr. Copeland performed a Synvic ONE injection in Claimant's right knee. *See* Exhibit 6.

6. On August 10, 2012 Claimant was evaluated by Dr. Copeland. Claimant reported left knee pain without known injury that began years ago and worsened in the last two weeks. X-rays performed in the office showed complete joint space collapse of the medial compartment and Dr. Copeland assessed end-stage osteoarthritis of the left knee. Dr. Copeland performed a corticosteroid injection of Claimants left knee. *See* Exhibit 6.

7. On September 28, 2012 Claimant was evaluated by Dr. Copeland. Claimant reported no relief from the injection seven weeks prior. Dr. Copeland performed another injection. *See* Exhibit 6.

8. On March 22, 2013 Claimant was evaluated by Dr. Copeland. Dr. Copeland assessed osteoarthritis of the right knee and left knee. Dr. Copeland noted Claimant's continued pain and that the left knee was tolerating use of an unloader brace well. Dr. Copeland recommended Claimant continue with the brace until he is ready to pursue more definitive treatment in terms of joint replacement. Dr. Copeland recommended an injection for the right knee which was performed. *See* Exhibit 6.

9. On September 3, 2013 Claimant was evaluated by Dr. Copeland. Claimant reported pain in the left knee without known injury with onset of symptoms several years ago. Dr. Copeland noted that Claimant had osteoarthritis of the left knee and that Claimant had returned for a repeat injection. Dr. Copeland provided a corticosteroid injection. *See* Exhibit 6.

10. On December 6, 2013 Claimant was evaluated by Dr. Copeland, who noted continued symptoms of intermittent knee pain. Dr. Copeland noted recurrence of left knee pain and provided a corticosteroid injection in Claimant's left knee. *See* Exhibit 6.

11. On March 13, 2014 Claimant was evaluated by Dr. Copeland and reported his right unloader brace was broken at the thumbwheel. A new unloader brace was provided for his right knee osteoarthritis. *See* Exhibit 6.

12. On April 4, 2014 Claimant was evaluated by Dr. Copeland. Claimant requested a new left knee unloader brace for treating his medial compartment osteoarthritis. Dr. Copeland noted that the brace provided to Claimant in 2012 had worn out and that the brace was good conservative treatment and noted they would order Claimant a new brace. *See* Exhibit 6.

13. On October 8, 2014 Claimant was evaluated by Dr. Copeland. Claimant reported pain in the bilateral knees with symptoms that began several years ago and included pain, popping, and decreased range of motion. Dr. Copeland assessed

bilateral osteoarthritis of the knees. Dr. Copeland provided bilateral corticosteroid injections. *See* Exhibit 6.

14. By October of 2014, Claimant's bilateral knee pain while at work was constant and was making it difficult to perform his job duties. Claimant decided to report his bilateral knee pain as a work injury and reported it to his Employer on October 28, 2014.

15. After reporting the bilateral knee pain, Claimant was referred by Employer for treatment.

16. On November 6, 2014 Claimant was evaluated by Korrey Klein, M.D. Claimant reported bilateral knee pain and that he had significant arthritis on the inside of his knees. Claimant was wearing bilateral unloading braces and reported that one month ago he had bilateral cortisone injections that helped the left knee but not the right. Claimant reported 25 years of on the job requirements of bending, lifting, and crawling. Dr. Klein noted that the bilateral knee pain had been an ongoing problem for Claimant who was already seeing orthopedic specialty care. Dr. Klein noted that Claimant had been treating on his own but after discussion with his employer and the job demands over the years was now looking to change it to a workers' compensation injury. Dr. Klein noted that Claimant's job requirements and activities certainly impacted his knees over time. Dr. Klein noted that the injury was not caused by a specific day but that Claimant's symptoms had a very slow progressive course which is expected with osteoarthritis. Dr. Klein opined that while the evidence was not overwhelming that the causation was related to employment, that there was a 51% or greater chance that the bilateral knee pain was causally related to Claimant's job duties over the years. Dr. Klein recommended work restrictions of no kneeling, crawling, or using ladders, a 25 pound weight lifting restriction, and noted that Claimant was to wear unloading braces at all times while at work and he referred Claimant back to Dr. Copeland. *See* Exhibit 5.

17. On December 10, 2014 Claimant was evaluated by Dr. Klein. Dr. Klein noted Claimant's bilateral knee pain and noted that x-rays showed osteoarthritis. Dr. Klein opined that it was unclear if the pain is all arthritis or if there was some other underlying pathology related to his work that was contributing to the pain. Dr. Klein recommended bilateral knee MRIs for further evaluation to help clarify whether Claimant had meniscal or ligamentous injury and opined that may help clarify the work related status of the injuries. *See* Exhibit 5.

18. On December 22, 2014 Claimant underwent MRIs of his right and left knees that were interpreted by Michael Neste, M.D. The impression for the right knee was: severe degenerative changes of the medial compartment of the right knee, similar to the correlative left knee with a chronic degenerative tear of the entire medial meniscus with displacement of the meniscus medially, just deep to the medial collateral ligament and severe cartilaginous denudation of the medial compartment with bone on bone articulation; chronic partial tear of the anterior cruciate ligament; and prepatellar bursitis. The impression for the left knee was: complex chronic degenerative tear of the

medical meniscus with near complete absence of the normal meniscus and a large fragment of abnormal meniscus displaced posteriorly near the posterior cruciate ligament; severe degenerative changes of the medical joint compartment with cartilaginous denudation and near bone on bone articulation of the medial femoral condyle and medial tibial plateau; and intra-articular osteochondral loose bodies posterior to the knee. *See* Exhibit 10.

19. On January 7, 2015 Claimant was evaluated by Dr. Klein. Claimant reported bilateral knee pain and that corticosteroid injections did not help. Dr. Klein reviewed the MRIs with Claimant. Dr. Klein opined that the MRI of the right knee showed a right ACL tear and medial meniscal tear with severe underlying osteoarthritis. Dr. Klein noted that it could have started with an ACL tear/meniscal tear which if left untreated could have caused the arthritis. Given the severity on the right knee MRI, Dr. Klein opined that further injections would not likely be helpful. Dr. Klein also opined that the MRI of the left knee showed a medial meniscal tear with severe underlying osteoarthritis. Dr. Klein noted that it could have started with a meniscal tear which if untreated could have caused the arthritis but also noted that severe arthritis may have eroded and damaged the meniscus. Dr. Klein again opined that further injections would not likely be helpful. *See* Exhibit 5.

20. On January 14, 2015 Claimant was evaluated by Dr. Copeland. Dr. Copeland noted that Claimant had very significant arthritic changes in both knees and that the MRI showed torn menisci, but that the torn menisci were small components of Claimant’s overall situation. Dr. Copeland noted that Claimant felt the knees had worn out due to his work and that nevertheless medically Claimant’s only treatment was palliative treatment and eventually knee replacements. Dr. Copeland noted he had counseled Claimant for years regarding treatment options and that Claimant had decided it was time to proceed with knee replacements. *See* Exhibit 6.

21. On February 6, 2015 Claimant was evaluated by Dr. Klein. Claimant reported continued bilateral knee pain and that he could not walk without his braces due to severe pain. Dr. Klein reviewed Claimant’s MRIs and noted Claimant’s activities of daily living and ability to perform at work was very limiting and painful. Dr. Klein recommended proceeding with knee replacement surgery. *See* Exhibit 5.

22. On June 22, 2015 John Hughes, M.D. issued an Independent Medical Examination report. Claimant reported working in multiple capacities for Employer for 25 years and described work involving pressure on the knees. Claimant reported continued bilateral knee pain alleviated somewhat by rest and use of knee braces and reported that aggravating factors included bending and moving and particularly squatting and kneeling. Dr. Hughes noted on examination bilateral fusiform swelling of the knees without effusion. Dr. Hughes assessed bilateral knee osteoarthritis with bone on bone articulation in the bilateral medial compartments; a-traumatic right anterior cruciate ligament insufficiency and medial meniscus tear; a-traumatic left medial meniscus tear; de-conditioning and obesity; hypertension well controlled; restless leg syndrome; and lumbar spondylosis. Dr. Hughes noted that Claimant’s weight, family

history and idiopathic knee osteoarthritis are independent risk factors for development of end stage osteoarthritis of the knees at 55 years old. As a result of his consideration, Dr. Hughes opined that he could not state with a reasonable degree of medical probability that knee pain is a direct and proximate result of Claimant's work related occupational stresses and strains due to his work as a mechanic for approximately 25 years. However, Dr. Hughes opined that the work tasks substantially contributed to and worsened Claimant's bilateral knee osteoarthritis and other conditions and that Claimant's work was the proximate cause for his need for total knee arthroplasty at this point in time. Dr. Hughes opined that Claimant's work did aggravate, accelerate, exacerbate, and worsen his pre-existing osteoarthritis and made Claimant become symptomatic prior to what would have occurred absent the job induces physical stressors. *See* Exhibit 3.

23. Dr. Hughes opined that Claimant's work caused a substantial and permanent aggravation of his bilateral knee osteoarthritis and that the proximate cause of Claimant's need for total knee arthroplasty at this point in time is Claimant's work. *See* Exhibit 3.

24. On August 31, 2015 Tashoff Bernton, M.D. issued an Independent Medical Examination (IME) report. Dr. Bernton assessed severe bilateral knee osteoarthritis, symptomatically worse on the left than on the right. Dr. Bernton noted that Claimant had fairly diffuse osteoarthritis in many parts of his body and that Claimant was also overweight which were both independent predictors of osteoarthritis in the knee. Dr. Bernton opined that it was clearly evident to and beyond a reasonable degree of medical probability that, given Claimant's independent risk factors, Claimant would have had osteoarthritis of the knees if he were not in his current job, the occupational history of repeated lifting and squatting over the years is sufficient to meet the standard in the Colorado Workers' Compensation Treatment Guidelines for aggravation of the condition on a work related basis. Dr. Bernton opined that bilateral knee replacement was most likely indicated and would be necessary at some point. *See* Exhibit 4.

25. Dr. Bernton opined that the work activities were not a necessary precondition to the development of knee problems and that Claimant would have osteoarthritis in both of his knees whether or not he had his current job duties, although the job duties aggravated his osteoarthritis. *See* Exhibit 4.

26. Claimant testified credibly at hearing. Claimant is 55 years old and admitted arthritis in his hands, neck, and back that he has received past treatment for. Claimant admitted significant bilateral knee pain surfaced approximately 5 years prior. Claimant also admitted that approximately 12.5 years ago he quit smoking and his weight went up and he has been overweight since.

27. Dr. Bernton testified at hearing consistent with his IME report. Dr. Bernton opined that Claimant has a degenerative condition in both of his knees with no specific injuries and worsening symptoms that gradually increased over time. Dr. Bernton opined that the tears shown by the MRI of the left knee were degenerative tears and

that Claimant's level of degenerative change took years or decades to develop. Dr. Bernton opined similarly regarding the right knee. Dr. Bernton noted four basic risk factors for osteoarthritis included genetics, weight/body mass index, age, and activity. Dr. Bernton opined that Claimant was obese, that Claimant had the genetic marker of osteoarthritis in both sides and in multiple body parts, and that Claimant had three of the basic risk factors before even looking at activity. Dr. Bernton noted that Claimant's work activity will aggravate osteoarthritis but that even without the work activity Claimant would still have osteoarthritis. Dr. Bernton opined that work was not a necessary pre-condition to the development of osteoarthritis and that even without work Claimant would have osteoarthritis and would need bilateral knee replacements.

28. Dr. Bernton opined that the percentage of cause due to work activities would be at most 1/3 and the cause due to non work related activities would be 2/3. Dr. Bernton considered weight bearing activities outside of work. Dr. Bernton noted that Dr. Hughes' opinion was similar in that Dr. Hughes couldn't say that the osteoarthritis was a direct result of work activities. Dr. Bernton disagreed that work activities made Claimant symptomatic and opined that Claimant would have become symptomatic even without his current work activities.

29. The opinion of Dr. Bernton is found credible and persuasive and is consistent with medical records as well as the opinion of Dr. Hughes regarding cause of the bilateral osteoarthritis not being a direct and proximate cause of Claimant's work but that the work aggravated Claimant's conditions.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the

testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Occupational disease

An injury or occupational disease "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer in connection with the contract of employment. *Panera Bread, LLC v. Indus. Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). For an injury to arise out of employment, “the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract.” *Madden v. Mountain W. Fabricators*, 977 P.2d 861 (Colo. 1999). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

An occupational disease, as opposed to an occupational injury, arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). C.R.S. § 8-40-201(14) defines “occupational disease” as: “A disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been generally exposed outside of the employment.”

A claimant seeking benefits for an occupational disease must first establish the existence of the disease and that it was directly and proximately caused by claimant’s employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims*, 989 P.2d 251 (Colo. App. 1999); *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). The conditions of employment need not be the only cause of the disease and a claimant is entitled to compensation if the hazards of employment cause, intensify, or aggravate to some reasonable degree the disability for which compensation is sought. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). If the occupational exposure is not a necessary precondition to the development of a disease then the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id*.

Here, claimant contends that his bilateral knee osteoarthritis was caused by an occupational disease which he developed as the result of repetitive activities during his work at employer. Claimant has established that he suffers from a compensable occupational disease to his bilateral knees and has established that the hazards of his employment intensified or aggravated his bilateral osteoarthritis. However, the hazardous conditions of Claimant's employment are not the sole cause for his disease or his need for treatment. Respondents have established that the industrial exposure was not a necessary precondition to the development of Claimant's bilateral knee osteoarthritis and that Claimant would, more likely than not, have developed bilateral knee osteoarthritis regardless of whether or not claimant had a job or any occupational exposure. The opinion of Dr. Bernton is persuasive that the occupational exposure was not a necessary precondition to Claimant developing bilateral knee osteoarthritis given Claimant's genetic predisposition, several body areas with arthritis, Claimant's age and weight, as well as Claimant's activity outside of work. Similarly, the opinion of Dr. Hughes is consistent and persuasive that Claimant's knee pain cannot be said within a reasonable degree of medical probability to be a direct and proximate cause of Claimant's work.

Claimant's bilateral knee osteoarthritis was not caused by his occupational exposure and Claimant would have bilateral knee osteoarthritis whether or not he worked. However, the bilateral knee osteoarthritis was aggravated, intensified, and accelerated by his work with Employer that involved significant use of his knees as found above. Given the aggravation of his underlying disease caused by his employment, Claimant has established that he is entitled to compensation to the extent that the employment and occupational exposure contributed to his disability. Here, Respondents have established significant non-occupational causes of Claimant's bilateral knee osteoarthritis and Respondents have established that they are entitled to apportionment between the work related and non work related causes of Claimant's bilateral knee osteoarthritis.

As found above, both Dr. Bernton and Dr. Hughes agree that Claimant's bilateral knee pain was not directly and proximately caused by Claimant's work, but that the cause is multi-factorial in nature. However, both medical experts opine that Claimant's work aggravated and contributed to his knee pain. Respondents have established that Claimant's age, weight, and genetics have contributed to the development of his severe bilateral knee osteoarthritis. The opinion of Dr. Bernton is credited that 2/3 of the development of Claimant's bilateral knee osteoarthritis was due to Claimant's genetic predisposition combined with Claimant's age and weight. Dr. Bernton's opinion that

Claimant's work for Employer accelerated the development of his bilateral knee osteoarthritis to the extent of 1/3 is also found credible and persuasive. The MRIs of Claimant's bilateral knees support Dr. Bernton's overall opinions and his opinion overall is consistent with the opinion of Dr. Hughes who could not state that the knee pain was directly and proximately caused by employment but that the employment contributed to and aggravated the condition. Dr. Hughes did not provide an apportionment, but like Dr. Bernton, he noted there were multi-factorial causes of Claimant's condition. As found above, Claimant is 55 years old and has been overweight for the past 12.5 years. Claimant also has arthritis not only in his bilateral knees but also in his neck, back, right shoulder, and right hand. Claimant's age, weight, and arthritis throughout his body was noted by Dr. Bernton in providing his opinion.

Dr. Klein's opinions, overall, are not helpful or persuasive in a causation analysis. Dr. Klein initially opined that causation of Claimant's condition was more likely than not related to Claimant's job duties over the years but noted that the evidence was not overwhelming. Dr. Klein also noted that Claimant's x-rays showed osteoarthritis and that it was unclear if the pain was all due to arthritis or if there was some work related underlying pathology contributing to the pain and recommended MRIs to further clarify the work related status. After the MRIs were performed, Dr. Klein did not provide a further opinion as to whether or not the MRIs showed any work related underlying pathology. Additionally, Dr. Copeland has provided no opinon on causation or work relatedness of the bilateral knee osteoarthritis.

The opinion of Dr. Bernton is found credible and persuasive and consistent with the medical records and medical history. Claimant has established that he suffers from a compensable occupational injury, however, Respondents have also established an apportionment of any medical treatment and payment of disability benefits and that Claimant's employment contributed to 33.33 percent of the bilateral knee osteoarthritis and that Respondents are liable for payment of 33.33 percent of any compensation due to Claimant and 33.33 percent of any medical benefits awarded to Claimant.

Compensability

Respondent's argument that Claimant has failed to establish a compensable injury has been considered and rejected. Claimant's injury is disabling, he is currently under work restrictions, and Claimant has established the need for significant medical treatment and time off work following bilateral knee replacement surgeries recommended by his surgeon. Although disability indemnity is not yet payable to Claimant because he has not established any lost time from work, Claimant has established that he suffers from an occupational disease, that his work has aggravated his bilateral knee osteoarthritis, and has caused him significant physical disability at this time that will require significant time off work to undergo recommended knee surgeries.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease to his bilateral knees.

2. Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits to treat his bilateral knees. The treatment received by Claimant on or after October 28, 2014 for his bilateral knees and provided by Dr. Klein and any provider to whom Dr. Klein referred Claimant is authorized.

3. All medical benefits shall be paid in accordance with the Division medical fee schedule.

4. Respondents are liable for 33.33 percent of all medical benefits and any compensation awarded in this claim as a result of Claimant's work activities and contribution of his work activities to his occupational disease.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 4, 2016 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-973-619-01

ISSUES

- Did Claimant establish by a preponderance of the evidence that she is entitled to Temporary Total Disability benefits from January 29, 2105 and continuing until terminated by law?
- If so, did Respondents establish that Claimant was responsible for her termination as an affirmative defense to the claim for TTD benefits?

PROCEDURAL STATUS

The undersigned ALJ issued Findings of Fact, Conclusions of Law and Order on February 5, 2016. Claimant filed a Motion for Corrected Order on or about February 10, 2016 regarding the TTD rate specified in the Order. No opposition was filed to the Motion for Corrected Order.

The ALJ finds good cause exists for the issuance of the Corrected Findings of Fact, Conclusions of Law and Order as the Findings of Fact reflected the correct TTD rate, but an inadvertent typographical error was present in the Order. Section 8-43-302(1)(a), C.R.S.

STIPULATION

1. The parties stipulated that Claimant's average weekly wage (AWW) was $255.42 per week.

FINDINGS OF FACT

1. Claimant began working for Employer on September 30, 2014[1]. She performed various job duties, including cashier, making pizzas, delivery and cleaning the store. Claimant worked at the Boulder store and her normal shift was 10:00 a.m. to 5:00 p.m.

2. The parties stipulated Claimant's average weekly wage (AWW) at the time of her injury was $255.42 per week. The stipulation was accepted by the ALJ. Based upon this stipulation, Claimant's TTD rate was $170.28 per week.

3. Claimant suffered an admitted industrial injury on January 12, 2015, when she slipped and fell on ice in the parking lot of Employer. Claimant testified she heard a pop when she injured her right knee.

[1] This was documented in the timecard records (Exhibit K, page 165), as well as Claimant's testimony.

4. Claimant advised her manager on duty that day (Lowell Hines) she had been injured. She was initially able to work after the injury, but felt pain in her knee. When she came into work the next day, Claimant reiterated to her manager on duty (Scott) she had been injured and Misty Holden (area supervisor) called her later that day.

5. Claimant was evaluated by Felix Meza, M.D. at Concentra Medical Center (Boulder) on January 14, 2015. Dr. Meza was the ATP for Employer. Claimant told Dr. Meza she slipped on the ice, after which she heard a popping noise and experienced immediate pain in her knee. She had pain along the medial aspect of the right knee. On examination, Claimant's right knee had swelling, but no deformity. Dr. Meza's assessment was right knee injury and he prescribed Ibuprofen, gentle exercises and RICE (Rest, ice and elevation).

6. Dr. Meza issued the following restrictions on 1/14/15: must use crutches (100% of the time); no squatting or kneeling; may not walk on uneven terrain; no climbing stairs; sitting duty only; unable to drive company vehicle. Dr. Meza completed an M-164 form documenting those restrictions. The ALJ infers that Dr. Meza's restrictions were provided to Employer, as Claimant was put on light duty.

7. Claimant testified she worked light duty after her injury, which included answering phones and folding pizza boxes. She said she had to move between two (2) work stations, which were approximately 5-6 feet apart.

8. On January 15, 2015, Claimant returned to Dr. Meza and had continued complaints of right knee pain. Swelling was noted, along with limited range of motion in all planes. Diffuse tenderness was appreciated along the anteromedial aspect and medial joint line. No crepitus was found. Dr. Meza's assessment and limitations were the same as the 1/14/15 appointment. Claimant was given a prescription for Vicodin and an MRI was ordered.

9. Claimant was next seen by Dr. Meza on January 20, 2015. She continued to have pain along the medial aspect of the knee. Dr. Meza observed reduced swelling and point tenderness along the medial aspect of the knee joint line and the anteromedial aspect of the knee, along with limitations in full flexion. Claimant had diminished straight leg raise and the McMurray's test caused pain along the medial aspect. Dr. Meza's assessment was right knee injury and he once again recommended an MRI to evaluate for MCL tear or possible meniscal injury. As part of the Physician Work Activity Status Report, Dr. Meza continued Claimant's restrictions, including must use crutches 100% of the time; no squatting, kneeling; no climbing stairs or ladders; sitting duty only (100% of the time); unable to drive company vehicle.

10. Dr. Meza examined Claimant on January 26, 2015, at which time she was complaining of right knee medial pain, as well as symptoms of stiffness and locking. Dr. Meza found limited ROM in all planes, but no crepitus. He prescribed Vicodin for Claimant and she was to begin physical therapy ("PT"). Dr. Meza continued Claimant's

restrictions, which were the same as the 1/20/15 appointment and also included the additional restriction: may not walk on uneven terrain.

11. Claimant testified she brought a copy of the reports from the doctor's office to Employer and gave these to her supervisor. She thought Ms. Vaughn received copies of the reports by fax from Concentra. The ALJ finds the Concentra Physician Work Activity Status Report listed upcoming appointments by date and time. The 1/20/15 and 1/26/15 Physician Work Activity Status Reports listed the appointment for 1/30/15 at 9:30 a.m.[2] The ALJ further finds Employer had notice of the date and time of Claimant's appointments

12. Employer's Reliability and Attendance Policy was admitted into Evidence. This policy provided in pertinent part:

> "There is a 90 day probationary period that commences the day an employee is hired-any call in (unavailability for a scheduled shift) or no call no shows during this period **WILL** result in termination. During this time it is vital that all employees report to work scheduled shifts as it determines the future of their employment.
>
> Ozark Pizza Company, LLC expects all team members to be reliable. Following the 90 day probationary period, it is still important that employees report to work when scheduled. When an employee is late or calls in, it hurts other employees as well as our customers. If you are unable to work your scheduled shift, **YOU** (not the manager) are responsible to find a suitable replacement. HotSchedules has features that facilitate this-speak with you GM or AM for details.
>
> **If you repeatedly fail to work your scheduled shifts (even shifts that were covered), you may be terminated.** [Emphasis in original.]

13. The ALJ finds Employer's Reliability and Attendance Policy applied to Claimant's employment.

14. Kaitlyn Vaughn testified (via telephone) on behalf of Employer. She was the Payroll/HR Director during the time Claimant was employed. She held this position for four (4) years. In that capacity, she oversaw the payroll function for the stores. However, Ms. Vaughn was not involved in the day-to-day operations of the stores. Her main contacts were the managers and supervisors of the stores.

15. Ms. Vaughn's other responsibility concerned work-related accidents. She reported injuries to the insurer. She would also work with managers when an employee was hurt and put the injured employee on light duty after a work injury. She had never met Claimant, but knew Claimant slipped and fell in the parking lot. Ms. Vaughn communicated with the claims representative, who in this case was Tiffany Johnson. Ms. Vaughn was aware Claimant was on light duty after her injury.

[2] Exhibit 4, page 20, 24; Exhibit B, page 63, 67.

16. Claimant testified she had a PT appointment on 1/30/15, which she thought was scheduled at 9:30 a.m.[3] Claimant said Concentra would tell her the dates and times available and she would pick the time for her appointments. She did not believe she could change these appointments. Claimant testified she notified the manager at the Boulder store (Lowell) she had a PT appointment two days before this appointment. She also told the manager at the Lafayette store (Nick). Claimant testified that at this time she was moving from the Boulder store to the Lafayette store.

17. Claimant testified that after her therapy session ended at 10:45, she waited with the physical therapist. It was her understanding that a treatment plan was being developed. She then left Concentra at approximately 12:30 p.m.[4] She went to work at the Lafayette store. Claimant's explanation regarding why she remained after the PT session was not particularly persuasive and hurt her credibility somewhat. However, there was no evidence before the ALJ that Claimant was repeatedly late for her shifts after medical appointments or on other occasions.

18. When she arrived at work, Claimant was told that she was being suspended indefinitely. Claimant testified she discussed the fact that she had an appointment with Ms. Holden and they were developing a treatment plan. Claimant said Ms. Holden said she was not being truthful. She has not returned to work for Employer.

19. Ms. Vaughn testified regarding Claimant's termination. She stated she could compare the hours worked by an employee with the schedule on the Employer's system. However, Ms. Vaughn did not have a specific recollection that she made this comparison concerning Claimant in this case. The ALJ notes no testimony was elicited from Ms. Vaughn concerning the specific provisions of the Reliability and Attendance Policy which concerned non-probationary employees. In particular, no testimonial or documentary evidence was before the ALJ as to whether Claimant "repeatedly" failed to work her scheduled shifts.

20. Ms. Vaughn testified she was generally familiar with the Concentra Physician Work Activity Status Report. She had copies of those reports available to her. Ms. Vaughn stated Claimant was required to tell her manager about her appointment. However, Ms. Vaughn had no information whether Claimant told either manager, Lowell Hines (Boulder) or Nick (Lafayette) about her appointment. There was no evidence that Ms. Vaughn took steps to try to verify this fact when the decision to terminate Claimant was made. Ms. Vaughn was less credible because she failed to articulate a cogent explanation for Claimant's termination and why it comported with Employer's policies.

21. Claimant was terminated on January 30, 2015. At the time of her termination, Claimant was no longer a probationary employee.

[3] The records for this PT session were admitted into evidence. Sarah Coughlin, PT was the therapist for Claimant. Claimant's vital signs were recorded at 9:42 a.m. that day.

[4] Although, Ms. Coughlin's therapy note was dictated at 12:33 p.m., there was no notation which documented when the PT session was finished.

22. A letter was sent to Claimant by Ms. Vaughn which stated Claimant was "no call, no show" for her scheduled 10-2 light duty shift. This was characterized as a terminable offense. Ms. Vaughn's letter stated Claimant's failure to appear for her shift or to call in violated Employer's Reliability and Attendance Policy and her employment was terminated. The letter was sent by certified mail. The ALJ infers Claimant was terminated under the "no call, no show" provision of the policy and this portion of the policy was relied upon by Employer when the decision to terminate Claimant was made. By the express terms of this policy, it was unclear whether one occurrence of a "no call, no show" subjected non-probationary employees like Claimant to immediate termination.

23. At the time of her termination, Claimant's restrictions from Dr. Meza included: must use crutches 100% of the time no squatting, kneeling; no climbing stairs or ladders; sitting duty only (100% of the time); may not walk on uneven terrain, unable to drive company vehicle. The ALJ infers Claimant could not perform her regular job duties, particularly the requirement that she use crutches 100% of the time and was required to sit 100% of the time.

24. On February 4, 2015, Dr. Meza examined Claimant at which time he noted swelling but no deformity in her knee. Diffuse tenderness was found at the anteromedial aspect, medial joint line. There was a positive medial McMurray test. Dr. Meza's assessment was right knee injury. More particularly, he suspected meniscal tear v. MCL injury. Dr. Meza once again recommended an MRI and kept Claimant's work restrictions[5] in place.

25. Claimant returned to Concentra on February 12, 2015 and was seen by Jeffery Winkler, M.D. At that time, she still had pain across the medial line and described a catching/locking feeling in the knee. Dr. Winkler noted that an MRI was ordered and made a referral to an orthopedic surgeon.

26. Insurer filed a General Admission of Liability ("GAL") on or about February 17, 2015. This was a medical only GAL, which stated Claimant was being provided modified duty.

27. Claimant was evaluated by Dr. Meza on February 19, 2015. Diffuse tenderness was noted at the anteromedial aspect and medial joint line. Claimant had limited ROM in all planes. Positive laxity was found on the valgus stress test, along with positive medial and lateral McMurray test. Claimant was going to be seen by an orthopedic surgeon and her work restrictions of no squatting or kneeling, unable to drive company vehicle, sitting 50% of time, limited stairs were continued.

28. On February 23, 2015, Claimant was examined by Joseph Hsin, M.D. to whom she was referred by Dr. Meza. Claimant had dull, throbbing pain in the right knee

[5] This report noted Claimant apparently had a non-work injury of her upper extremity (rotator cuff) and had restrictions from the treating provider after surgery in 2015. Claimant confirmed this in her testimony. However, the ALJ had no further information regarding these restrictions and was unable to determine what impact, if any, these would have on Claimant's wage loss.

and failed conservative management. On examination, Dr. Hsin noted mild swelling, positive medial McMurray test and limitations in range of motion. Dr. Hsin recommended an MRI.

29. Claimant continued to receive physical therapy at Concentra through February 25, 2015. The physical therapy records documented continued symptoms in her right knee.

30. An MRI was done of Claimant's right knee on March 6, 2015. The films were read by Craig Stewart, M.D. Dr. Stewart noted thickening along the tibial collateral ligament, as well as a small joint effusion. Dr. Stewart's impression was Grade II MCL sprain; thickening and low signal within and adjacent to the tibial collateral ligament; intact medial meniscus. He recommended radiographic correlation.

31. Dr. Hsin saw Claimant in follow-up on March 10, 2015 and reviewed the results of the MRI scan. Claimant had a grade 2 MCL sprain, but no meniscus tear. She had mild chondromalacia in the lateral plateau. Dr. Hsin did not recommend a surgical procedure and recommended Claimant return to PT for MCL protocol.

32. On March 16, 2015, Dr. Meza saw Claimant at which time she was complaining of moderate pain, particularly with activity. Dr. Meza observed swelling in the right knee, but no deformity. Tenderness was found at the medial joint line and medial collateral ligament. Positive laxity was noted, but there was a negative Lachman's test and negative patellar grind. Dr. Meza's assessment was knee MCL sprain and right knee injury.

33. The ALJ credits Dr. Meza's opinion regarding Claimant's restrictions, as he had the opportunity to evaluate her on multiple occasions from 1/14/15 through 3/16/15. Dr. Meza recorded objective findings with regard to Claimant's right knee on several occasions (including swelling, positive McMurray test, positive valgus stress tests etc.) at various examinations during this period. Dr. Meza's findings established Claimant was disabled during the time he was treating her.

34. Claimant's care was transferred to Sander Orent, M.D. at Arbor Occupational Medicine, who evaluated her on April 1, 2015. After a review of Claimant's history, Dr. Orent found looseness in the MCP, which was minimal. She had an effusion in the joint, which was tender to palpation. Dr. Orent thought she had an undisclosed meniscal tear creating impingement. He referred Claimant for a second orthopedic opinion. Dr. Orent issued a 10 lb. lifting restriction and limited Claimant to sedentary work.

35. Claimant was examined by Eric McCarty, M.D. at the University of Colorado on April 23, 2015 to whom she was referred by Dr. Orent. Claimant reported feelings of instability along with catching and locking. Dr. McCarty noted pain on the valgus stress test and opined that some of her symptoms were related to the MCL injury, which was Grade II as shown by the MRI. Dr. McCarty also thought she could have intraarticular issues, including a cartilage issue, which was why arthroscopy would

be reasonable. Dr. McCarty discussed that it could take time for her symptoms to resolve, as well as the risks/benefits of the arthroscopy.

36. Claimant returned to Dr. Orent on April 29, 2015 after seeing Dr. McCarty, who was planning to perform surgery. Claimant's MCL was relatively tight and an effusion was once again noted. Dr. Orent sent a letter, dated June 2, 2015, appealing the denial of the surgery.

37. After missing a couple of appointments, Claimant returned to Dr. Orent on August 12, 2015 after a pain management referral was denied. Dr. Orent found a positive patellar grind, along with a possible effusion in the joint. Dr. Orent's impression was patient with significant knee issues with a probable torn meniscus. Dr. Orent prescribed pain medication.

38. Mark Failinger, M.D. performed an IME at the request of Respondents on August 17, 2015. Claimant's history was reviewed, including the fact that she had no history of prior injury, treatment or surgery to the right knee. Claimant advised Dr. Failinger she typically would deliver anywhere from 10-15 pizzas, as well as assisting in making pizzas and clean-up. Claimant reported she had pain, popping and catching in the knee since her fall. Dr. Failinger found no crepitus or effusion upon examination, nor was there instability. Dr. Failinger's impression was right knee strain of the MCL with chondromalacia of the lateral femoral condyle.

39. Dr. Failinger opined arthroscopic surgery was not medically necessary as it had a low probability of helping the patient with multiple risk factors. Claimant was morbidly obese and he did not see any obvious lesions which would be improved by surgery. Dr. Failinger stated the medial collateral ligament would heal on its own and there was no surgery for that. He opined that Claimant's chondromalacia was pre-existing and her pain was dramatically out of proportion to her MRI findings. Dr. Failinger believed reasonable treatment would include a cortisone injection and possibly viscosupplementation.

40. Claimant returned to Dr. Orent on September 2, 2015 after the IME with Dr. Failinger. Dr. Orent was in agreement with the recommendations for injection and viscosupplementation as initial therapy, which he was going to implement. He disagreed Claimant was a poor surgical candidate. Dr. Orent once again noted pain in the medial aspect of the knee and marked patellar grind. Dr. Orent reiterated his opinion that Claimant required pain management, given the fact that she continued to require narcotic pain medications. Claimant's work restrictions included 10 lb. lifting restriction; no crawling, kneeling squatting or climbing; and seated work.

41. Dr. Orent evaluated Claimant on September 23, 2015 and noted she had been approved for intraarticular injections. He also found Claimant was experiencing substantial anxiety and opined she needed to be evaluated by a psychiatrist and counselor, including a Dr. Moe. Dr. Orent continued Claimant's work restrictions.

42. Claimant was examined by Peter Mars, M.D. on October 7, 2015, after receiving a cortisone injection administered by Dr. McCarty. As found by Dr. Mars, Claimant had a normal gait, but limitations in right knee ROM, as well as mild crepitus. The McMurray test was equivocal. Dr. Mars' diagnosis was right knee injury and anxiety. He refilled diazepam and recommended a follow-up for treatment of her anxiety.

43. On October 28, 2015, Claimant was seen by Dr. Orent, who noted Claimant was approved to see Dr. Moe. Dr. Orent found there was an interaction between Cymbalta and the narcotics she was taking. The goals were to stabilize her pain, reduce the narcotics and to address the anxiety issue. Dr. Orent stated Claimant was not working and opined she was not capable of working. This was due to high doses of narcotics which precluded her driving, operating machinery or being around the public. The ALJ credits Dr. Orent's opinion that Claimant's high dose narcotics would have prevented from doing her job at Employer.

44. Claimant had work restrictions related to her right knee through 10/28/15 and there was no evidence before the ALJ that these have been lifted.

45. None of Claimant's treating physicians put her at MMI with regard to her right knee.

46. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S.

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Temporary Total Disability Benefits

Claimant seeks an award of TTD benefits from December 29, 2015 and continuing until terminated by law. The ALJ concluded Claimant was entitled to this award of benefits. In order to come to this conclusion, a two-part analysis was applied by the ALJ; first, did Claimant prove her entitlement to TTD benefits. Second, the question of whether Respondents established their affirmative defense was evaluated.

Claimant argued she was entitled to TTD benefits because she was on light duty and had work restrictions as a direct result of her work injury. She claimed she sustained a wage loss as a direct result of her industrial injury and she has not returned to work. Claimant also disputed Employer's version of events leading to her termination.

Claimant had the burden of proving that she was entitled to TTD benefits by a preponderance of the evidence. Section 8-42-103(1)(a), C.R.S. This provision required Claimant to establish a causal connection between the work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). The existence of disability presents a question of fact for the ALJ. There is no requirement that the Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). In this case, Claimant established a disability directly related to her industrial injury.

As of January 30, 2015, the effects of the industrial injury precluded the Claimant from performing her job duties for Employer. As found, Claimant sustained an injury to her right knee, which resulted in work restrictions. With these restrictions, Claimant could not perform various aspects of her job. Her work restrictions (as of 1/30/15) precluded her from making pizzas, delivery, and cleaning. Dr. Meza documented these restrictions. (Findings of Fact Nos. 6, 8, 9,10). Dr. Orent also issued work restrictions. (Findings of Fact Nos. 34, 40, 41). In addition to the restrictions, Dr. Orent opined the narcotics Claimant was taking prevented her from returning to work. (Finding of Fact No. 43).

Respondents did not dispute that Drs. Meza, Orent and other authorized treating physicians issued work restrictions, nor that these restrictions were related to the work injury. Therefore, Claimant proved her injury caused a disability lasting more than three shifts and her disability caused an actual wage loss.

The inquiry then turned to whether Respondents established the affirmative defense of Claimant's responsibility for her termination. Respondents contended Claimant was responsible for her termination because she failed to contact her manager to advise that she had the PT appointment on January 30th and would be late for her shift. Respondents submitted the testimony of Ms. Vaughn to support the argument that Claimant violated company policy and was subject to termination. Respondents argued Claimant's testimony was inconsistent and pointed to several medical appointments where she did not appear as scheduled as evidence that she failed to call in as required.

This defense is governed by the termination statutes, as well as *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004) and its progeny. "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury". Sections 8-42-203(1)(g) and 8-42-105(4)(a), C.R.S. 2013. Thus, where the employee is responsible for the termination, TTD benefits may be denied. *Id.;* See also *Apex Trans., Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 631 (Colo. App. 2014)

In *Anderson*, the Colorado Supreme Court construed § 8-42-105(4), C.R.S., holding that a termination for cause may bar temporary disability benefits. More particularly, the Court noted the statute bars "TTD wage loss claims when voluntary or for-cause termination of modified employment causes wage loss, but not when the worsening of a prior work-related injury causes wage loss." *Anderson v. Longmont Toyota, supra*, 102 P.3d at 325-326.

Anderson was followed by *Grisbaum v. ICAO,* 109 P.3d 1055 (Colo. App. 2005). In *Grisbaum*, Claimant suffered a compensable back injury in June 2001, but continued to work with no restrictions until he voluntarily resigned in January 2002. In May 2002, the Claimant was completely restricted from working due to his June 2001 injury and because he underwent two surgeries. The ALJ determined that § 8-42-105(4) barred Claimant from receipt of TTD benefits, which was affirmed by the Industrial Claims Appeals Office and that decision was initially affirmed by the Colorado Court of Appeals. However, the opinion was vacated after the issuance of *Anderson v. Longmont Toyota*. The Colorado Court of Appeals held that *Anderson* applied equally to scenarios involving regular or modified employment when there is "a worsening of condition or the development of a disability after the termination." *Grisbaum v. ICAO, supra, 109 P.3d 1056.* Accordingly, the Court remanded the case for an appropriate award of TTD benefits.

Most recently, the Colorado Court of Appeals decided *Apex Trans., Inc. v. Industrial Claim Appeals Office*, *supra*, 321 P.3d at 630. In *Apex*, Claimant worked as a truck driver for Apex for five and a half years before sustaining an injury to his shoulder. Claimant initially did not receive medical treatment for this injury, but self-medicated by obtaining a pain pill from his brother. After Claimant's symptoms persisted, he reported the injury and went to the ATP for the employer. Claimant initially had no restrictions and could return to work. Claimant was then terminated for a violation of the employer's "zero tolerance" drug policy, as he had a positive drug test (from the pain pill he got from his brother). Subsequently, a physician took Claimant off work. Claimant requested a hearing, seeking TTD benefits.

The ALJ found that Claimant's termination from employment was volitional (violation of the drug policy) and Claimant failed to establish that his condition had worsened after he was terminated. On appeal, the Panel reversed the decision, concluding that the ALJ's factual findings would support the conclusion that Claimant's condition had worsened and he would be entitled to TTD. The Panel remanded the case and on remand, the ALJ awarded TTD benefits. The Court of Appeals then reviewed the Final Order and concluded that the Panel exceeded its authority by re-weighing the evidence. The Court concluded that factual determinations were within the purview of the ALJ and substantial evidence supported the ALJ's findings in the case. The Court reversed and ordered that the ALJ's original findings be reinstated. *Apex Trans. Inc. v. Industrial Claim Appeals Office*, *supra*, 321 P.3d at 633.

In order to establish this defense, Respondents must prove the Claimant was responsible for her separation from employment. This requires a finding of fault on the part of Claimant. A finding of fault requires a volitional act or some degree of control by a Claimant of the circumstances that led to her termination. *Gilmore v. Indus. Claims Appeals Office,* 187 P.3d 1129, 1132 (Colo. App 2008) [employee smoked cannabis 4 days before accident which was deemed a volitional act].

In the case at bar, Respondents failed to prove that Claimant's volitional conduct led to her termination or that she was responsible for the circumstances which led to her termination. Although Claimant's explanation as to why she stayed at Concentra on 1/30/15 was not completely clear, the reason Claimant was late for work was directly related to her industrial injury and the concomitant medical treatment. Also, Claimant's testimony that she did not have a lot of flexibility with regard to PT appointments at Concentra was credible. (Finding of Fact No. 16). There was insufficient evidence that Claimant had more than a modicum of control over her modified duty and her PT appointments. Therefore, it cannot be said that Respondents proved that Claimant engaged in volitional conduct that caused her termination or controlled the circumstances that resulted in her termination.

Furthermore, there was no evidence that Claimant violated company policy or a directive from her managers (or Ms. Holden or Ms. Vaughn) related to the PT appointment and her late arrival on 1/30/15. (Finding of Fact No. 22). In fact, Ms. Vaughn's testimony failed to delineate what Claimant's obligations were under the Employer's policies. The evidence concerning a potential violation of the Reliability and Attendance Policy was ambiguous at best and did not prove Claimant's conduct was voluntary.

Also, there was no direct evidence Claimant was required to inform management of upcoming appointments. Thus, while it is true that Ms. Vaughn could not be expected to know each appointment Claimant had, the inquiry does not end there. At the time she was involved in the termination decision, there was no evidence Ms. Vaughn determined what the store managers were told by Claimant or whether the stores got a copy of the Physician Work Activity Status Reports. Ms. Vaughn did not talk to Claimant. Without this evidence, Respondents' quantum of proof fell short of what was required.

In addition, since Claimant was no longer a probationary employee, Respondents were required to show that she engaged in volitional conduct and repeatedly failed to work her shifts (or was tardy for her shifts). There was no evidence before the ALJ that this was the case.

Finally, Ms. Vaughn's testimony did not provide a link between the stated reason for termination ("no call, no show"), Employer's policies and Claimant's conduct. As found, Ms. Vaughn did not talk directly with Claimant, nor did she discuss an attendance issue with either manager. (Finding of Fact No. 20). Ms. Vaughn's testimony did not elucidate whether she had considered that portion of the policy which seemed to require repeated violations after the employee was no longer considered probationary or whether an employee was subject to immediate termination for failing to appear for a shift or call beforehand. As Employer's sole management witness, Ms. Vaughn's testimony needed to establish that Claimant volitionally violated company policy or was subject to immediate termination for being late on January 30th. Without this evidence, Respondents failed to establish a crucial element of the termination defense. Therefore, Respondents failed to meet their burden of proof.

This case is factually distinct from *Apex Trans., Inc. v. Industrial Claim Appeals Office*, *supra* and *Gilmore v. Indus. Claims Appeals Office, supra,* where Respondents were able to adduce clear evidence of volitional conduct and the resulting termination. Respondents were not able to make such a showing in the instant case. Without evidence linking the two, Claimant is entitled to TTD benefits despite the fact she was terminated. Claimant is entitled to TTD from January 30, 2015[6] until terminated by law.

[6] Since 1/30/15 was the date of termination and there was no evidence Claimant was paid for work that day, the ALJ determined this as the date TTD benefits should commence.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD benefits at the rate of $170.28 per week from January 30, 2015 and continuing until terminated by law.

2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 24, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-973-619-01

ISSUES

- Did Claimant establish by a preponderance of the evidence that she is entitled to Temporary Total Disability benefits from January 29, 2105 and continuing until terminated by law?
- If so, did Respondents establish that Claimant was responsible for her termination as an affirmative defense to the claim for TTD benefits?

STIPULATION

1. The parties stipulated that Claimant's average weekly wage (AWW) was $255.42 per week.

FINDINGS OF FACT

1. Claimant began working for Employer on September 30, 2014[1]. She performed various job duties, including cashier, making pizzas, delivery and cleaning the store. Claimant worked at the Boulder store and her normal shift was 10:00 a.m. to 5:00 p.m.

2. The parties stipulated Claimant's average weekly wage (AWW) at the time of her injury was $255.42 per week. The stipulation was accepted by the ALJ. Based upon this stipulation, Claimant's TTD rate was $170.28 per week.

3. Claimant suffered an admitted industrial injury on January 12, 2015, when she slipped and fell on ice in the parking lot of Employer. Claimant testified she heard a pop when she injured her right knee.

4. Claimant advised her manager on duty that day (Lowell Hines) she had been injured. She was initially able to work after the injury, but felt pain in her knee. When she came into work the next day, Claimant reiterated to her manager on duty (Scott) she had been injured and Misty Holden (area supervisor) called her later that day.

5. Claimant was evaluated by Felix Meza, M.D. at Concentra Medical Center (Boulder) on January 14, 2015. Dr. Meza was the ATP for Employer. Claimant told Dr. Meza she slipped on the ice, after which she heard a popping noise and experienced immediate pain in her knee. She had pain along the medial aspect of the right knee. On examination, Claimant's right knee had swelling, but no deformity. Dr. Meza's

[1] This was documented in the timecard records (Exhibit K, page 165), as well as Claimant's testimony.

assessment was right knee injury and he prescribed Ibuprofen, gentle exercises and RICE (Rest, ice and elevation).

6. Dr. Meza issued the following restrictions on 1/14/15: must use crutches (100% of the time); no squatting or kneeling; may not walk on uneven terrain; no climbing stairs; sitting duty only; unable to drive company vehicle. Dr. Meza completed an M-164 form documenting those restrictions. The ALJ infers that Dr. Meza's restrictions were provided to Employer, as Claimant was put on light duty.

7. Claimant testified she worked light duty after her injury, which included answering phones and folding pizza boxes. She said she had to move between two (2) work stations, which were approximately 5-6 feet apart.

8. On January 15, 2015, Claimant returned to Dr. Meza and had continued complaints of right knee pain. Swelling was noted, along with limited range of motion in all planes. Diffuse tenderness was appreciated along the anteromedial aspect and medial joint line. No crepitus was found. Dr. Meza's assessment and limitations were the same as the 1/14/15 appointment. Claimant was given a prescription for Vicodin and an MRI was ordered.

9. Claimant was next seen by Dr. Meza on January 20, 2015. She continued to have pain along the medial aspect of the knee. Dr. Meza observed reduced swelling and point tenderness along the medial aspect of the knee joint line and the anteromedial aspect of the knee, along with limitations in full flexion. Claimant had diminished straight leg raise and the McMurray's test caused pain along the medial aspect. Dr. Meza's assessment was right knee injury and he once again recommended an MRI to evaluate for MCL tear or possible meniscal injury. As part of the Physician Work Activity Status Report, Dr. Meza continued Claimant's restrictions, including must use crutches 100% of the time; no squatting, kneeling; no climbing stairs or ladders; sitting duty only (100% of the time); unable to drive company vehicle.

10. Dr. Meza examined Claimant on January 26, 2015, at which time she was complaining of right knee medial pain, as well as symptoms of stiffness and locking. Dr. Meza found limited ROM in all planes, but no crepitus. He prescribed Vicodin for Claimant and she was to begin physical therapy ("PT"). Dr. Meza continued Claimant's restrictions, which were the same as the 1/20/15 appointment and also included the additional restriction: may not walk on uneven terrain.

11. Claimant testified she brought a copy of the reports from the doctor's office to Employer and gave these to her supervisor. She thought Ms. Vaughn received copies of the reports by fax from Concentra. The ALJ finds the Concentra Physician Work Activity Status Report listed upcoming appointments by date and time. The 1/20/15 and 1/26/15 Physician Work Activity Status Reports listed the appointment for

1/30/15 at 9:30 a.m.[2] The ALJ further finds Employer had notice of the date and time of Claimant's appointments

12. Employer's Reliability and Attendance Policy was admitted into Evidence. This policy provided in pertinent part:

> "There is a 90 day probationary period that commences the day an employee is hired-any call in (unavailability for a scheduled shift) or no call no shows during this period **WILL** result in termination. During this time it is vital that all employees report to work scheduled shifts as it determines the future of their employment.
>
> Ozark Pizza Company, LLC expects all team members to be reliable. Following the 90 day probationary period, it is still important that employees report to work when scheduled. When an employee is late or calls in, it hurts other employees as well as our customers. If you are unable to work your scheduled shift, **YOU** (not the manager) are responsible to find a suitable replacement. HotSchedules has features that facilitate this-speak with you GM or AM for details.
>
> **If you repeatedly fail to work your scheduled shifts (even shifts that were covered), you may be terminated.** [Emphasis in original.]

13. The ALJ finds Employer's Reliability and Attendance Policy applied to Claimant's employment.

14. Kaitlyn Vaughn testified (via telephone) on behalf of Employer. She was the Payroll/HR Director during the time Claimant was employed. She held this position for four (4) years. In that capacity, she oversaw the payroll function for the stores. However, Ms. Vaughn was not involved in the day-to-day operations of the stores. Her main contacts were the managers and supervisors of the stores.

15. Ms. Vaughn's other responsibility concerned work-related accidents. She reported injuries to the insurer. She would also work with managers when an employee was hurt and put the injured employee on light duty after a work injury. She had never met Claimant, but knew Claimant slipped and fell in the parking lot. Ms. Vaughn communicated with the claims representative, who in this case was Tiffany Johnson. Ms. Vaughn was aware Claimant was on light duty after her injury.

16. Claimant testified she had a PT appointment on 1/30/15, which she thought was scheduled at 9:30 a.m.[3] Claimant said Concentra would tell her the dates and times available and she would pick the time for her appointments. She did not believe she could change these appointments. Claimant testified she notified the manager at the Boulder store (Lowell) she had a PT appointment two days before this

[2] Exhibit 4, page 20, 24; Exhibit B, page 63, 67.

[3] The records for this PT session were admitted into evidence. Sarah Coughlin, PT was the therapist for Claimant. Claimant's vital signs were recorded at 9:42 a.m. that day.

appointment. She also told the manager at the Lafayette store (Nick). Claimant testified that at this time she was moving from the Boulder store to the Lafayette store.

17. Claimant testified that after her therapy session ended at 10:45, she waited with the physical therapist. It was her understanding that a treatment plan was being developed. She then left Concentra at approximately 12:30 p.m.[4] She went to work at the Lafayette store. Claimant's explanation regarding why she remained after the PT session was not particularly persuasive and hurt her credibility somewhat. However, there was no evidence before the ALJ that Claimant was repeatedly late for her shifts after medical appointments or on other occasions.

18. When she arrived at work, Claimant was told that she was being suspended indefinitely. Claimant testified she discussed the fact that she had an appointment with Ms. Holden and they were developing a treatment plan. Claimant said Ms. Holden said she was not being truthful. She has not returned to work for Employer.

19. Ms. Vaughn testified regarding Claimant's termination. She stated she could compare the hours worked with the schedule on the Employer's system. However, Ms. Vaughn did not have a specific recollection that she made this comparison. The ALJ notes that no testimony was elicited from Ms. Vaughn concerning the specific provisions of the Reliability and Attendance Policy which concerned non-probationary employees. In particular, no testimonial or documentary evidence was before the ALJ as to whether Claimant "repeatedly" failed to work her scheduled shifts.

20. Ms. Vaughn testified she was generally familiar with the Concentra Physician Work Activity Status Report. She had copies of those reports available to her. Ms. Vaughn stated Claimant was required to tell her manager about her appointment. However, Ms. Vaughn had no information whether Claimant told either managers, Lowell Hines (Boulder) or Nick (Lafayette) about her appointment. There was no evidence that Ms. Vaughn took steps to try to verify this fact when the decision to terminate Claimant was made. Ms. Vaughn was less credible because she failed to articulate a cogent explanation for Claimant's termination and why it comported with Employer's policies.

21. Claimant was terminated on January 30, 2015. At the time of her termination, Claimant was no longer a probationary employee.

22. A letter was sent to Claimant by Ms. Vaughn which stated Claimant was "no call, no show" for her scheduled 10-2 light duty shift. This was characterized as a terminable offense. Ms. Vaughn's letter stated Claimant's failure to appear for her shift or to call in violated Employer's Reliability and Attendance Policy and her employment was terminated. The letter was sent by certified mail. The ALJ infers Claimant was terminated under the "no call, no show" provision of the policy and this portion of the policy was relied upon by Employer when the decision to terminate Claimant was made.

[4] Although, Ms. Coughlin's therapy note was dictated at 12:33 p.m., there was no notation which documented when the PT session was finished.

By the express terms of this policy, it was unclear whether one occurrence of a “no call, no show” subjected non-probationary employees like Claimant to immediate termination.

23. At the time of her termination, Claimant’s restrictions from Dr. Meza included: must use crutches 100% of the time no squatting, kneeling; no climbing stairs or ladders; sitting duty only (100% of the time); may not walk on uneven terrain, unable to drive company vehicle. The ALJ infers Claimant could not perform her regular job duties, particularly with the requirement that she use crutches 100% of the time and was required to sit 100% of the time.

24. On February 4, 2015, Dr. Meza examined Claimant at which time he noted swelling but no deformity in her knee. Diffuse tenderness was found at the anteromedial aspect, medial joint line. There was a positive medial McMurray test. Dr. Meza’s assessment was right knee injury. More particularly, he suspected mescal tear v. MCL injury. Dr. Meza once again recommended an MRI and kept Claimant’s work restrictions[5] in place.

25. Claimant returned to Concentra on February 12, 2015 and was seen by Jeffery Winkler, M.D. At that time, she still had pain across the medial line and described catching/locking feeling in the knee. Dr. Winkler noted that an MRI was ordered and made a referral to an orthopedic surgeon.

26. Insurer filed a General Admission of Liability (“GAL”) on or about February 17, 2015. This was a medical only GAL, which stated Claimant was being provided modified duty.

27. Claimant was evaluated by Dr. Meza on February 19, 2015. Diffuse tenderness was noted at the anteromedial aspect and medial joint line. Claimant had limited ROM in all planes. Positive laxity was found on the valgus stress test, along with positive medial and lateral McMurray test. Claimant was going to be seen by an orthopedic surgeon and her work restrictions of no squatting or kneeling, unable to drive company vehicle, sitting 50% of time, limited stairs were continued.

28. On February 23, 2015, Claimant was examined by Joseph Hsin, M.D. to whom she was referred by Dr. Meza. Claimant had dull, throbbing pain in the right knee and failed conservative management. On examination, Dr. Hsin noted mild swelling, positive medial McMurray test and limitations in range of motion. Dr. Hsin recommended an MRI.

29. Claimant continued to receive physical therapy at Concentra through February 25, 2015. The physical therapy records documented continued symptoms in her right knee.

[5] This report noted Claimant apparently had a non-work injury of her upper extremity (rotator cuff) and had restrictions from the treating provider after surgery in 2015. Claimant confirmed this in her testimony. However, the ALJ had no further information regarding these restrictions and was unable to determine what impact, if any, these would have on Claimant’s wage loss.

30. An MRI was done of Claimant's right knee on March 6, 2015. The films were read by Craig Stewart, M.D. Dr. Stewart noted thickening along the tibial collateral ligament, as well as a small joint effusion. Dr. Stewart's impression was Grade II MCL sprain; thickening and low signal within and adjacent to the tibial collateral ligament; intact medial meniscus. He recommended radiographic correlation.

31. Dr. Hsin saw Claimant in follow-up on March 10, 2015 and reviewed the results of the MRI scan. Claimant had a grade 2 MCL sprain, but no meniscus tear. She had mild chondromalacia in the lateral plateau. Dr. Hsin did not recommend a surgical procedure and recommended Claimant return to PT for MCL protocol.

32. On March 16, 2015, Dr. Meza saw Claimant at which time she was complaining of moderate pain, particularly with activity. Dr. Meza observed swelling in the right knee, but no deformity. Tenderness was found at the medial joint line and medial collateral ligament. Positive laxity was noted, but there was a negative Lachman's test and negative patellar grind. Dr. Meza's assessment was knee MCL sprain and right knee injury.

33. The ALJ credits Dr. Meza's opinion regarding Claimant's restrictions, as he had the opportunity to evaluate her on multiple occasions from 1/14/15 through 3/16/15. Dr. Meza recorded objective findings with regard to Claimant's right knee on several occasions (including swelling, positive McMurray test, positive valgus stress tests etc.) at various examinations during this period. Dr. Meza's findings established Claimant was disabled during the time he was treating her.

34. Claimant's care was transferred to Sander Orent, M.D. at Arbor Occupational Medicine, who evaluated her on April 1, 2015. After a review of Claimant's history, Dr. Orent found looseness in the MCP, which was minimal. She had an effusion in the joint, which was tender to palpation. Dr. Orent thought she had an undisclosed meniscal tear creating impingement. He referred Claimant for a second orthopedic opinion. Dr. Orent issued a 10 lb. lifting restriction and limited Claimant to sedentary work.

35. Claimant was examined by Eric McCarty, M.D. at the University of Colorado on April 23, 2015 to whom she was referred by Dr. Orent. Claimant reported feelings of instability along with catching and locking. Dr. McCarty noted pain on the valgus stress test and opined that some of her symptoms were related to the MCL injury, which was Grade II as shown by the MRI. Dr. McCarty also thought she could have intraarticular issues, including a cartilage issue, which was why arthroscopy would be reasonable. Dr. McCarty discussed that it could take time for her symptoms to resolve, as well as the risks/benefits of the arthroscopy.

36. Claimant returned to Dr. Orent on April 29, 2015 after seeing Dr. McCarty, who was planning to perform surgery. Claimant's MCL was relatively tight and an effusion was once again noted. Dr. Orent sent a letter, dated June 2, 2015, appealing the denial of the surgery.

37. After missing a couple of appointments, Claimant returned to Dr. Orent on August 12, 2015 after a pain management referral was denied. Dr. Orent found a positive patellar grind, along with a possible effusion in the joint. Dr. Orent's impression was patient with significant knee issues with a probable torn meniscus. Dr. Orent prescribed pain medication.

38. Mark Failinger, M.D. performed an IME at the request of Respondents on August 17, 2015. Claimant's history was reviewed, including the fact that she had no history of prior injury, treatment or surgery to the right knee. Claimant advised Dr. Failinger she typically would deliver anywhere from 10-15 pizzas, as well as assisting in making pizzas and clean-up. Claimant reported she had pain, popping and catching in the knee since her fall. Dr. Failinger found no crepitus or effusion upon examination, nor was there instability. Dr. Failinger's impression was right knee strain of the MCL with chondromalacia of the lateral femoral condyle.

39. Dr. Failinger opined arthroscopic surgery was not medically necessary as it had a low probability of helping the patient with multiple risk factors. Claimant was morbidly obese and he did not see any obvious lesions which would be improved by surgery. Dr. Failinger stated the medial collateral ligament would heal on its own and there was no surgery for that. He opined that Claimant's chondromalacia was pre-existing and her pain was dramatically out of proportion to her MRI findings. Dr. Failinger believed reasonable treatment would include a cortisone injection and possibly viscosupplementation.

40. Claimant returned to Dr. Orent on September 2, 2015 after the IME with Dr. Failinger. Dr. Orent was in agreement with the recommendations for injection and viscosupplementation as initial therapy, which he was going to implement. He disagreed Claimant was a poor surgical candidate. Dr. Orent once again noted pain in the medial aspect of the knee and marked patellar grind. Dr. Orent reiterated his opinion that Claimant required pain management, given the fact that she continued to require narcotic pain medications. Claimant's work restrictions included 10 lb. lifting restriction; no crawling, kneeling squatting or climbing; and seated work.

41. Dr. Orent evaluated Claimant on September 23, 2015 and noted she had been approved for intraarticular injections. He also found Claimant was experiencing substantial anxiety and opined she needed to be evaluated by a psychiatrist and counselor, including a Dr. Moe. Dr. Orent continued Claimant's work restrictions.

42. Claimant was examined by Peter Mars, M.D. on October 7, 2015, after receiving a cortisone injection administered by Dr. McCarty. As found by Dr. Mars, Claimant had a normal gait, but limitations in right knee ROM, as well as mild crepitus. The McMurray test was equivocal. Dr. Mars' diagnosis was right knee injury and anxiety. He refilled diazepam and recommended a follow-up for treatment of her anxiety.

43. On October 28, 2015, Claimant was seen by Dr. Orent, who noted Claimant was approved to see Dr. Moe. Dr. Orent found there was an interaction

between Cymbalta and the narcotics she was taking. The goals were to stabilize her pain, reduce the narcotics and to address the anxiety issue. Dr. Orent stated Claimant was not working and opined she was not capable of working. This was due to high doses of narcotics which precluded her driving, operating machinery or being around the public. The ALJ credits Dr. Orent's opinion that Claimant's high dose narcotics would have prevented from doing her job at Employer.

44. Claimant had work restrictions related to her right knee through 10/28/15 and there was no evidence before the ALJ that these have been lifted.

45. None of Claimant's treating physicians put her at MMI with regard to her right knee.

46. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S.

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Temporary Total Disability Benefits

Claimant seeks an award of TTD benefits from December 29, 2015 and continuing until terminated by law. The ALJ concluded Claimant was entitled to this award of benefits. In order to come to this conclusion, a two-part analysis was applied by the ALJ ; first, did Claimant prove her entitlement to TTD benefits. Second, the question of whether Respondents established their affirmative defense was evaluated.

Claimant argued she was entitled to TTD benefits because she was on light duty and had work restrictions as a direct result of her work injury. She claimed she sustained a wage loss as a direct result of her industrial injury and she has not returned to work. Claimant also disputed Employer's version of events leading to her termination.

Claimant had the burden of proving that she was entitled to TTD benefits by a preponderance of the evidence. Section 8-42-103(1)(a), C.R.S. This provision required Claimant to establish a causal connection between the work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). The existence of disability presents a question of fact for the ALJ. There is no requirement that the Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). In this case, Claimant established a disability directly related to her industrial injury.

As of January 30, 2015, the effects of the industrial injury physically precluded the Claimant from performing her job duties for Employer. As found, Claimant sustained an injury to her right knee, which resulted in work restrictions. Her work restrictions (as of 1/30/15) precluded her from making pizzas, delivery, and cleaning. Dr. Meza documented these restrictions. (Findings of Fact Nos. 6, 8, 9,10). Dr. Orent also issued work restrictions. (Findings of Fact Nos. 34, 40, 41). In addition to the restrictions, Dr. Orent opined the narcotics Claimant was taking prevented her from returning to work. (Finding of Fact No. 43).

Respondents did not dispute that Drs. Meza, Orent and other authorized treating physicians issued work restrictions, nor that these restrictions were related to the work injury. Therefore, Claimant proved her injury caused a disability lasting more than three shifts and her disability caused an actual wage loss.

The inquiry then turned to whether Respondents established the affirmative defense of Claimant's responsibility for her termination. Respondents contended Claimant was responsible for her termination because she failed to contact her manager to advise that she had the PT appointment on January 30th and would be late for her shift. Respondents submitted the testimony of Ms. Vaughn to support the argument that

Claimant violated company policy and was subject to termination. Respondents argued Claimant's testimony was inconsistent and pointed to several medical appointments where she did not appear as scheduled as evidence that she failed to call in as required.

This defense is governed by the termination statutes, as well as *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004) and its progeny. "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury". Sections 8-42-203(1)(g) and 8-42-105(4)(a), C.R.S. 2013. Thus, where the employee is responsible for the termination, TTD benefits may be denied. *Id.;* See also *Apex Trans., Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 631 (Colo. App. 2014)

In *Anderson*, the Colorado Supreme Court construed § 8-42-105(4), C.R.S., holding that termination for cause may bar temporary disability benefits. More particularly, the Court noted the statute bars "TTD wage loss claims when voluntary or for-cause termination of modified employment causes wage loss, but not when the worsening of a prior work-related injury causes wage loss." *Anderson v. Longmont Toyota, supra*, 102 P.3d at 325-326.

Anderson was followed by *Grisbaum v. ICAO,* 109 P.3d 1055 (Colo. App. 2005). In *Grisbaum*, Claimant suffered a compensable back injury in June 2001, but continued to work with no restrictions until he voluntarily resigned in January 2002. In May 2002, the Claimant was completely restricted from working due to his June 2001 injury and because he underwent two surgeries. The ALJ determined that § 8-42-105(4) barred Claimant from receipt of TTD benefits, which was affirmed by the Industrial Claims Appeals Office and that decision was initially affirmed by the Colorado Court of Appeals. However, the opinion was vacated after the issuance of *Anderson v. Longmont Toyota*. The Colorado Court of Appeals held that *Anderson* applied equally to scenarios involving regular or modified employment when there is "a worsening of condition or the development of a disability after the termination." *Grisbaum v. ICAO, supra, 109 P.3d 1056.* Accordingly, the Court remanded the case for an appropriate award of TTD benefits.

Most recently, the Colorado Court of Appeals decided *Apex Trans., Inc. v. Industrial Claim Appeals Office*, *supra*, 321 P.3d at 630. In *Apex*, Claimant worked as a truck driver for Apex for five and a half years before sustaining an injury to his shoulder. Claimant initially did not receive medical treatment for this injury, but self-medicated by obtaining a pain pill from his brother. After Claimant's symptoms persisted, he reported the injury and went to the ATP for the employer. Claimant initially had no restrictions and could return to work. Claimant was then terminated for a violation of the employer's "zero tolerance" drug policy, as he had a positive drug test (from the pain pill he got from his brother). Subsequently, a physician took Claimant off work. Claimant requested a hearing, seeking TTD benefits.

The ALJ found that Claimant’s termination from employment was volitional (violation of the drug policy) and Claimant failed to establish that his condition had worsened after he was terminated. On appeal, the Panel reversed the decision, concluding that the ALJ’s factual findings would support the conclusion that Claimant’s condition had worsened and he would be entitled to TTD. The Panel remanded the case and on remand, the ALJ awarded TTD benefits. The Court of Appeals then reviewed the Final Order and concluded that the Panel exceeded its authority by re-weighing the evidence. The Court concluded that factual determinations were within the purview of the ALJ and substantial evidence supported the ALJ’s findings in the case. The Court reversed and ordered that the ALJ’s original findings be reinstated. *Apex Trans. Inc. v. Industrial Claim Appeals Office*, *supra*, 321 P.3d at 633.

In order to establish this defense, Respondents must prove the Claimant was responsible for her separation from employment. This requires a finding of fault on the part of Claimant. A finding of fault requires a volitional act or some degree of control by a Claimant of the circumstances that led to her termination. *Gilmore v. Indus. Claims Appeals Office,* 187 P.3d 1129, 1132 (Colo. App 2008) [employee smoked cannabis 4 days before accident which was deemed a volitional act].

In the case at bar, Respondents failed to prove that Claimant’s volitional conduct led to her termination or that she was responsible for the circumstances which led to her termination. Although Claimant‘s explanation as to why she stayed at Concentra on 1/30/15 was not completely clear, the reason Claimant was late for work was directly related to her industrial injury and the concomitant medical treatment. Also, Claimant’s testimony that she did not have a lot of flexibility with regard to PT appointments at Concentra was credible. (Finding of Fact No. 16). There was insufficient evidence that Claimant had more than a modicum of control over her modified duty and PT appointments. Therefore, it cannot be said that Respondents proved that Claimant engaged in volitional conduct that caused her termination or controlled the circumstances that resulted in her termination.

Furthermore, there was no evidence that Claimant violated company policy or a directive from her managers (or Ms. Holden or Ms. Vaughn) related to the PT appointment and her late arrival on 1/30/15. (Finding of Fact No. 22). In fact, Ms. Vaughn’s testimony failed to delineate what Claimant’s obligations were under the Employer’s policies. The evidence concerning a potential violation of the Reliability and Attendance Policy was ambiguous at best and did not prove Claimant’s conduct was voluntary.

Also, there was no direct evidence Claimant was required to inform management of upcoming appointments. Thus, while it is true that Ms. Vaughn could not be expected to know each appointment Claimant had, the inquiry does not end there. At the time she was involved in the termination decision, there was no evidence Ms. Vaughn determined what the store managers were told by Claimant, whether the stores got a copy of the Physician Work Activity Status Reports and she did not talk to Claimant. Without this evidence, Respondents' quantum of proof fell short of what was required.

In addition, since Claimant was no longer a probationary employee, Respondents were required to show that she engaged in volitional conduct and repeatedly failed to work her shifts (or was tardy for her shifts). There was no evidence before the ALJ that this was the case.

Finally, Ms. Vaughn's testimony did not provide a link between the stated reason for termination ("no call, no show"), Employer's policies and Claimant's conduct. As found, Ms. Vaughn did not talk directly with Claimant , nor did she discuss an attendance issue with either manager. (Finding of Fact No. 20). Ms. Vaughn's testimony did not elucidate whether she had considered that portion of the policy which seemed to require repeated violations after the employee was no longer considered probationary or whether an employee was subject to immediate termination for failing to appear for a shift or call beforehand. As Employer's sole management witness, Ms. Vaughn's testimony needed to establish that Claimant volitionally violated company policy or was subject to immediate termination for being late on January 30th. Without this evidence, Respondents failed to establish a crucial element of the termination defense.

This case is factually distinct from *Apex Trans., Inc. v. Industrial Claim Appeals Office*, *supra* and *Gilmore v. Indus. Claims Appeals Office, supra,* where Respondents were able to adduce clear evidence of volitional conduct and the resulting termination. Respondents were not able to make such a showing in the case at bar. Without evidence linking the two, Claimant is entitled to TTD benefits despite the fact she was terminated. Claimant is entitled to TTD from January 30, 2015[6] until terminated by law.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD benefits at the rate of$10.28 per week from January 30, 2015 and continuing until terminated by law.

2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

[6] Since 1/30/15 was the date of termination and there was no evidence Claimant was paid for work that day, the ALJ determined this as the date TTD benefits should commence.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 3, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-976-688-01

STIPULATIONS

Prior to the commencement of hearing, the parties reached the following stipulations:

1. Claimant withdrew her request for TPD benefits.

2. Respondents also requested that, if the claim was deemed compensable, any medical benefits awarded be paid in accordance with the Colorado Division of Workers' Compensation medical fee schedule. Claimant voiced no objection.

These stipulations were accepted and approved by the ALJ.

REMAINING ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she sustained a traumatic injury to her neck, back and arms arising out of and in the course and scope of her employment on February 16, 2015, and if so;

II. Whether Claimant has proven has proven by a preponderance of the evidence that the medical benefits requested are causally related to her alleged work injury on February 16, 2015, and;

III. Whether Claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits for the following time periods: February 25, 2015 - March 11, 2015; March 24, 2015 - April 1, 2015, and May 11, 2015 and ongoing;

IV. Whether, TTD should be paid beyond June 29, secondary to Respondents' assertion that Claimant refused to accept a physician-approved modified job offered to claimant by employer pursuant to C.R.S. Section 8-42-105 (3) (d) (I).

V. Whether, Claimant's AWW is $476.56.

Because the ALJ finds that Claimant failed to establish that she sustained a compensable injury on February 16, 2015, this order does not address the remaining issued outlined above.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On February 16, 2015, the date of the alleged injury in this case, Claimant was employed by as a commercial driver for Employer.

2. Claimant began working for Employer as a commercial driver on July 27, 2014.

3. On February 16, 2015, Claimant was to drive a transit bus from the area of Vail and Avon, Colorado to Colorado Springs, Colorado after the 2015 World Alpine Skiing Championships had concluded. The weather was snowy, and all busses were to be fitted with either tire chains or snow socks for traction. The transit bus Claimant was to drive was to be fitted with snow socks. Mike Clark, a company mechanic, began installing the snow socks on the transit bus Claimant was assigned to drive. To install a snow sock, Mr. Clark needed to fit his hand and arm between a wheel guard or "mud flap." To assist Mr. Clark's effort to get his hand and arm between the wheel guard or "mud flap" on one of the transit bus's tires, Claimant pulled "mud flap" away from the bus and tire to widen the space between the wheel's tire and the mud flap. Based upon the evidence presented, the ALJ credits the testimony of Mr. Clark to find that Claimant assisted in this fashion on only one tire for a couple of minutes only.

4. The ALJ finds Claimant did not engage in activity, i.e. pulling on the wheel guard or "mud flap," that required prolonged, sustained isometric contraction of the muscles of the hands, wrists, forearms, periscapular area and low back as suggested by Dr. Timothy Hall, Claimant's medical expert. Since Dr. Hall's causation analysis is based upon the assumption that Claimant engaged in activity sufficient to cause muscular hypoxia secondary to prolonged sustained isometric contraction which, as noted above is unconvincing, the ALJ finds that Dr. Hall's causation analysis is also fatally flawed. Consequently, Dr. Hall's testimony that Claimant sustained a compensable sprain/strain of the ligaments, tendons and muscles of the arms, periscapular area and low back because she exceeded the capacity of these tissues to respond to such isometric activity is found unpersuasive.

5. The totality of the credible evidence presented persuades the ALJ that Claimant's symptoms, including the numbness and tingling in her hands in addition to her arm pain is, as Dr. Larson credibly testified, a likely consequence of pre-existing carpal tunnel syndrome, confirmed by EMG/NCV study and probably due to non-occupational factors such as Claimant's weight and her sex. Moreover, the evidence presented, including Dr. Larson's testimony convinces the ALJ that Claimant's cubital tunnel syndrome is not explained by the mechanism of injury in this case. To the contrary the ALJ credits Dr. Larson's testimony to find that the mechanism of injury, even assuming the description provided by Claimant was accurate, is unlikely to cause Claimant's asserted upper extremity complaints and conditions. Considering that Claimant was likely involved in using her hands, arms and back in the pulling on the mud flap for a "couple of minutes", the suggestion that her current complaints are all related to that activity is even more

unbelievable. Finally, the ALJ finds claimant's low back pain is probably due to the natural progression of pre-existing degenerative disc disease at L1-L2 and L5-S1 as demonstrated on x-ray obtained May 22, 2015 or persistent pain as a consequence of a fall Claimant had at work in 2014 as documented in a February 19, 2014 office visit noted from Peak Vista Community Health Centers.

6. Claimant's contention that her conditions/injuries are compensable because she was not actively seeking treatment for her back, neck, or bilateral upper extremities prior to February 16, 2015 and that her symptoms arose after the claimed incident in this case is not persuasive. Here, Claimant's medical records establish that she experienced symptoms in her right hand diagnosed as carpal tunnel syndrome that required her to seek medical care and wear a wrist splint in October 2013. She sought treatment for this condition from Peak Vista Community health Centers on November 4, 2013 (Resp. Ex. G, pg. 71). Moreover, the aforementioned prior fall resulted in low Claimant obtaining low back treatment for at least four months. Although her condition stabilized, her pain occurred "persistently". Claimant was given medication, referred to physical therapy, and excused from work as a consequence of her back pain.

7. The ALJ finds Dr. Wallace Larson's analysis and opinions, that Claimant's work activities during the installation of one snow sock did not cause any injury, to be credible and more persuasive than the opinions of Dr. Hall to the contrary.

8. The ALJ finds that claimant has failed to establish that it is more probable than not that on February 16, 2015, she suffered an injury arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. The purpose of the Workers' Compensation Act of Colorado ("Act") is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. ; *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. § 8-43 201, C.R.S.

B. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might lead to a conflicting conclusion and need not reject every piece or item of evidence contrary to the findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

D. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(l)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of her employment relationship with Employer and during an activity, specifically pulling on a "wheel guard" in order to assist another employee in installing a snow sock on a tire as part of her duties as a bus driver for Employer. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" her employment must be resolved before the injury is deemed compensable.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while, or in this case shortly after performing job duties, does not mean that she sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

G. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable injury" is one which requires medical treatment or causes disability. *Id.*; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S.

H. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from at work without sustaining a compensable "injury." This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where a claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where a claimant involved in motor vehicle accident without resultant injuries suffered no compensable injury). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted, "[C]orrelation is not causation." Thus, merely because a coincidental correlation between Claimant's work and her symptoms exists in this case does not mean there is a causal connection between Claimant's injury and her work duties.

I. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Moreover, the question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

J. As found, the ALJ conclues that the expert opinions of Dr. Larson regarding the cause of Claimant's upper extremity and low back symptoms are credible and more persuasive than contrary opinion of Dr. Hall. As presented, the evidence does not support that Claimant sustained any injury to her hands, wrists, arms, neck or back in this case. Rather, Claimant's complaints of severe total body pain, inability to move, trouble walking, and progression of symptoms over time, when combined with her pre-existing carpal tunnel syndrome and degenerative disc disease supports a conclusion that she did not sustain an injury while pulling on a mud flap and that social factors are at play in this case, as testified to by Dr. Larson. Consequently, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between her employment and the resulting condition for which medical treatment and indemnity benefits are sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because Claimant failed to establish she suffered a compensable "injury" as defined by the aforementioned legal opinions, her claim is denied and dismissed. Accordingly, her claims for medical and temporary disability benefits need not be addressed.

ORDER

It is therefore ordered that:

Claimant's February16, 2015 claim for work related injuries to her low back, neck and upper extremities, including her hands, wrists and arms is denied and dismissed.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 5, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUE

Whether Claimants Rachel Archer-Reid and Ariel Dalton worked for Pace Joint Interests-Denver LLC or Chiropractic Healthcare Solutions LLC at the time of their February 3, 2015 Motor Vehicle Accident (MVA).

STIPULATIONS

The parties agreed to the following:

1. Claimants' cases should be heard at the same time because there is an identity of facts, legal issues and witnesses. It would be in the interest of judicial efficiency to consider the cases simultaneously.

2. Claimants were both injured in a MVA on February 3, 2015. They were traveling in Rachel Archer-Reid's vehicle when it was rear-ended by another vehicle.

3. Rachel Archer-Reid injured her neck, back, left knee and shoulders in the MVA.

4. Ariel Dalton injured her head, neck and back in the MVA.

5. Claimants were in the course and scope of employment when they were injured in the MVA on February 3, 2015.

6. Hanover Insurance Company was the insurance carrier for Pace Joint Interests-Denver LLC at the time of the MVA.

7. Travelers Indemnity Company was the insurance carrier for Chiropractic Healthcare Solutions LLC at the time of the MVA.

8. Both insurance carriers have denied liability for Claimants' injuries and chosen not to designate four providers as required by Workers' Compensation Rule of Procedure 8.

9. Hugh Macaulay, M.D. is designated as the primary Authorized Treating Physician (ATP) for Claimants.

FINDINGS OF FACT

1. The Joint is a franchisor of numerous chiropractic clinics operating in multiple states.

2. Phil and Erin Davis are franchisees of The Joint. They own and operate multiple chiropractic clinics located in Texas, Nevada and Colorado. The Colorado chiropractic clinics function under a separate limited liability company named Pace Joint Interests-Denver, LLC.

3. As of February 3, 2015 Pace Joint Interests-Denver LLC maintained six chiropractic clinics established as separate limited liability companies. The clinics were: Pace Joint Interests-Lakewood LLC, Pace Joint Interests-Highlands Ranch LLC, Pace Joint Interests-Southwest Plaza LLC, Pace Joint Interests–Southglenn LLC, Pace Joint Interests–Tech Center LLC and Pace Joint Interests–Parker LLC.

4. Phil and Erin Davis owned the franchised chiropractic clinics in Texas and Nevada. However, Colorado requires a licensed chiropractor to have an ownership interest in the clinical aspects of the business.

5. Chiropractic Healthcare Solutions LLC is an entity established by licensed Colorado chiropractor Dr. John Lloyd. Dr. Lloyd created the entity to satisfy the Colorado requirement that a chiropractic clinic must be owned by a licensed chiropractor.

6. Fees generated for chiropractic services are deposited into an account under Chiropractic Healthcare Solutions LLC. The fees are then placed in six separate accounts for each clinic under Pace Joint Interests-Denver, LLC. Chiropractic Healthcare Solutions LLC then receives a flat monthly fee of $400.00 per clinic for operating each facility. Each of the six clinics' operating accounts is also used to pay for Chiropractic Healthcare Solutions LLC's monthly fees and clinician salaries. After all clinical operating expenses are paid any remaining funds are placed in Pace Joint Interests-Denver, LLC.'s account.

7. Kaitlin Ko worked for Pace Joint Interests-Denver LLC to manage the six Denver Metropolitan area clinics. Ms. Ko ceased working for Pace Joint Interests-Denver LLC in September 2014. Dr. Lloyd, through Chiropractic Healthcare Solutions LLC, assumed some of her duties in exchange for an increased flat monthly fee.

8. Claimants initially worked for Pace Joint Interests-Denver LLC as Wellness Coordinators. The duties of wellness coordinators involve receptionist and front desk work at a specific clinic under the Pace Joint Interests-Denver LLC umbrella. They are paid out of the general accounts maintained by each clinic. Wellness coordinators are hired and paid by Pace Joint Interests-Denver LLC.

9. Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC. executed a Management Agreement effective October 15, 2012. There are no written Management Agreements between Chiropractic Healthcare Solutions LLC and any of the other five clinics under the Pace Joint Interests-Denver LLC umbrella.

10. Under the Management Agreement, Pace Joint Interests-Lakewood, LLC is identified as the "Company" and Chiropractic Healthcare Solutions LLC, is identified

as the “P.C.” In the Management Agreement the company is obligated to provide furnishings, equipment and management services to the PC for the PC to operate a chiropractic clinic. The company has the responsibility for the day-to-day administration and management of the operations of the PC excluding clinical matters. The company’s management services include virtually all aspects of operating a chiropractic clinic outside of four delineated areas under article 3.2(c). These delineated areas involve clinical matters. Under article 3.3 the company is required to:

> “… employ or engage and make available to the clinic, on a non-exclusive basis, sufficient non-clinical personnel and administrative staff (collectively, Administrative Staff). The hiring, firing, disciplining and determination of compensation and benefits of the administrative staff shall be within the sole discretion of the company….”

The Management Agreement memorializes the operational accounts identified by the witnesses and the payment arrangements between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Denver, LLC.

11. The Agreement between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Denver, LLC establishes a relationship between the two entities that was confirmed by the testimony of Dr. Lloyd, Erin Davis and Dean Davenport. Mr. Davenport was associated with Pace Joint Interests-Denver LLC as the manager of clinical staff. He did not manage the chiropractors. Chiropractic Healthcare Solutions LLC, is identified as the “owner” of the six clinics under Pace Joint Interests-Denver LLC.

12. Article 18.4 of the Management Agreement specifies that the Agreement is complete and may not be changed orally but can only be amended by an agreement in writing executed by the parties. None of the witnesses identified any ambiguity in the Agreement. In fact, Mr. Davenport identified the Agreement as an accurate, clear representation of the rights and responsibilities between the parties.

13. Although the Management Agreement specifies the duties and obligations of the parties, it is a contract only between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC. Mr. Davenport explained that no written management agreements have been executed between Chiropractic Healthcare Solutions LLC and any of the other Denver Metropolitan area chiropractic clinics under Pace Joint Interests-Denver LLC. He simply remarked that the agreements had never been completed. Part-owner of Pace Joint Interests-Denver LLC Ms. Davis agreed that there are no management agreements in place for the other five Denver Metropolitan area chiropractic clinics because there was “simply a paperwork oversight.”

14. Mr. Davenport acknowledged that the Management Agreement specifically states that the obligations of the parties are limited to the four corners of the Agreement. Nevertheless, he maintained that the Management Agreement functions as the exact agreement between Chiropractic Healthcare Solutions LLC and the other five

Denver Metropolitan area chiropractic clinics under the Pace Joint Interests-Denver LLC umbrella.

15. Mr. Davenport testified that, after Ms. Ko ceased employment with Pace Joint Interests-Denver LLC in September 2014, Pace Joint Interests-Denver LLC entered into a verbal agreement with Chiropractic Healthcare Solutions LLC through Dr. Lloyd. Essentially the verbal modification provided that Chiropractic Healthcare Solutions, LLC would assume marketing duties and wellness coordinator training duties as well as handle the clinical components of operating the six Pace Joint Interests-Denver, LLC clinics. Dr. Lloyd agreed that Chiropractic Healthcare Solutions, LLC assumed marketing duties and wellness coordinator training duties after Ms. Ko ceased working. In exchange for assuming the marketing duties, Pace Joint Interests-Denver LLC paid Chiropractic Healthcare Solutions LLC an additional $200.00 per month. Pace Joint Interests-Denver, LLC also increased the fees it paid to Chiropractic Healthcare Solutions LLC from $400.00 to $500.00 each month for assuming the wellness coordinator training duties. Ms. Davis also agreed that there was a verbal agreement between Pace Joint Interests-Denver LLC and Chiropractic Healthcare Solutions LLC. Dr. Lloyd would assume some marketing and management services that had been performed by Pace Joint Interests-Denver LLC before the departure of Ms. Ko. Ms. Davis also acknowledged that Chiropractic Healthcare Solutions LLC received an additional fee for assuming the marketing and management duties.

16. In consultation with part-owner of Pace Joint Interests-Denver LLC Phil Davis, Dr. Lloyd decided to hire Claimants to perform the management duties and wellness coordinator training duties that Chiropractic Healthcare Solutions LLC had assumed pursuant to the verbal agreement. Claimants reduced their hours as Wellness Coordinators for Pace Joint Interests-Denver LLC so that they could assume the additional responsibilities for Chiropractic Healthcare Solutions LLC. Claimants became marketers and managers for all six clinics under the Pace Joint Interests-Denver LLC umbrella. They received a higher hourly wage for their additional duties than they had in their roles of Wellness Coordinators. While working as Wellness Coordinators at individual clinics Claimants were paid by Pace Joint Interests-Denver LLC. However, while performing marketing and management duties Claimants were paid by Chiropractic Healthcare Solutions LLC. Dr. Lloyd specified that he subsequently decided that Ms. Archer-Reid would focus on the management and training of wellness coordinators and Ms. Dalton would concentrate on marketing for the six Denver metropolitan area chiropractic clinics. He noted that Ms. Archer-Reid and Ms. Dalton would sometimes assume both duties as requested.

17. On February 3, 2015 Claimants were involved in a MVA at approximately 1:00 p.m. Claimants were coming from a promotional lunch meeting for employees of Eye Maxx. Claimants provided pizza and supplies for the marketing event. The promotional lunch meeting was designed to develop new patients for the six Pace Joint Interests-Denver LLC clinics and promote “The Joint” brand generally. While conducting the promotional presentation at Eye Maxx, Claimants wore “The Joint” shirts and “The Joint” was printed on the marketing materials. Chiropractic Healthcare Solutions LLC paid for the pizza and supplies.

18. At the time of the MVA Claimants were traveling to the Pace Joint Interests-Southwest Plaza LLC clinic to train another wellness coordinator. Chiropractic Healthcare Solutions LLC paid Claimants for marketing and training the wellness coordinator as part of its management responsibilities.

19. Claimants received reasonable and necessary medical care from providers Mountain View Pain Center and Injury Solutions after the MVA. Rachel Archer-Reid injured her neck, back, left knee and shoulders in the MVA. Ariel Dalton injured her head, neck and back in the MVA. Neither Claimant lost any time from work after the accident. However, Claimants require additional medical treatment as a result of the February 3, 2015 MVA.

20. Claimants worked for Chiropractic Healthcare Solutions LLC at the time of their February 3, 2015 MVA. Initially, a Management Agreement exists between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC. The Agreement provides that Pace Joint Interests-Lakewood, LLC will provide furnishings, equipment and management services to Chiropractic Healthcare Solutions LLC. so that it can operate a chiropractic clinic. Pace Joint Interests-Lakewood LLC. is essentially responsible for the day-to-day administration and management functions of Chiropractic Healthcare Solutions LLC except for clinical matters. Article 18.4 of the Management Agreement specifies that the Agreement is complete and may not be changed orally, but can only be amended by an agreement in writing executed by the parties. None of the witnesses identified any ambiguities in the Agreement. The Management Agreement between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC establishes a relationship between the two entities that was confirmed by the testimony of Dr. Lloyd, Ms. Davis and Mr. Davenport. In fact, Mr. Davenport identified the Agreement as an accurate, clear representation of the rights and responsibilities between the parties. Considering the plain and generally accepted meanings of the words in the Agreement it is unambiguous and thus cannot be altered by extrinsic evidence.

21. However, the Management Agreement is a contract only between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC. Mr. Davenport explained that no written management agreements have been executed between Chiropractic Healthcare Solutions LLC and any of the other Denver Metropolitan area chiropractic clinics under Pace Joint Interests-Denver LLC. He simply remarked that the agreements had never been completed. Part-owner of Pace Joint Interests-Denver LLC Ms. Davis agreed that there are no management agreements in place for the other five Denver Metropolitan area chiropractic clinics because there was "simply a paperwork oversight." Nevertheless, Mr. Davenport maintained that the Management Agreement functions as the exact agreement between Chiropractic Healthcare Solutions LLC and the other five Denver Metropolitan area chiropractic clinics under the Pace Joint Interests-Denver LLC umbrella. Despite Mr. Davenport's representation that the Management Agreement applies between Chiropractic Healthcare Solutions LLC and all six of the Denver Metropolitan area Pace Joint Interests-Denver LLC clinics, the four corners of the Agreement are limited to the Pace Joint Interests-Lakewood, LLC location. The February 3, 2015 MVA did not involve the

Pace Joint Interests-Lakewood, LLC clinic. Claimants were driving from Eye Maxx to the Pace Joint Interests-Southwest Plaza LLC clinic to train another wellness coordinator. Accordingly, in the absence of a written contract, the parol evidence rule is inapplicable and extrinsic evidence is admissible to determine the obligations of the parties in this matter.

22. After Ms. Ko ceased employment with Pace Joint Interests-Denver LLC in September 2014, Pace Joint Interests-Denver LLC entered into a verbal agreement with Chiropractic Healthcare Solutions LLC through Dr. Lloyd. Essentially the verbal modification provided that Chiropractic Healthcare Solutions, LLC would assume marketing responsibilities and wellness coordinator training duties as well as handle the clinical components of operating the six Pace Joint Interests-Denver, LLC clinics. Dr. Lloyd agreed that Chiropractic Healthcare Solutions, LLC assumed marketing duties and wellness coordinator training duties after Ms. Ko ceased working. In exchange for assuming the marketing duties, Pace Joint Interests-Denver LLC paid Chiropractic Healthcare Solutions LLC an additional $200.00 per month. Pace Joint Interests-Denver LLC also increased the fees it paid to Chiropractic Healthcare Solutions LLC from $400.00 to $500.00 each month for assuming the wellness coordinator training duties. Ms. Davis agreed that there was a verbal agreement between Pace Joint Interests-Denver LLC and Chiropractic Healthcare Solutions LLC that Dr. Lloyd would assume some marketing and management services that had been performed by Pace Joint Interests-Denver LLC before the departure of Ms. Ko. Ms. Davis also acknowledged that Chiropractic Healthcare Solutions LLC received an additional fee for assuming the marketing and management duties.

23. In consultation with part-owner of Pace Joint Interests-Denver LLC Phil Davis, Dr. Lloyd hired Claimants to perform the management duties and wellness coordinator training duties that Chiropractic Healthcare Solutions LLC had assumed pursuant to the verbal agreement. Claimants reduced their hours as Wellness Coordinators for Pace Joint Interests-Denver LLC so that they could assume the additional responsibilities for Chiropractic Healthcare Solutions LLC. Claimants became marketers and managers for all six clinics under the Pace Joint Interests-Denver LLC umbrella. They received a higher hourly wage for their additional duties than they had in their roles of Wellness Coordinators. While working as Wellness Coordinators at individual clinics Claimants were paid by Pace Joint Interests-Denver LLC. However, while performing marketing and management duties Claimants were paid by Chiropractic Healthcare Solutions LLC.

24. On February 3, 2015 Claimants were involved in a MVA while performing the marketing and management duties pursuant to the verbal agreements. Chiropractic Healthcare Solutions LLC paid Claimants for marketing and training the wellness coordinator as part of its management responsibilities. The February 3, 2015 MVA occurred while Claimants were performing their marketing and management duties for Chiropractic Healthcare Solutions, LLC and not while they were acting as Wellness Coordinators. Accordingly, Chiropractic Healthcare Solutions LLC was the employer of Claimants at the time of the MVA.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The general rules of contract interpretation provide that when the contract terms are clear and unambiguous the contract must be enforced as written. *Cary v. Chevron U.S.A., Inc.*, 867 P.2d 117, 119 (Colo. App. 1993). "When a contract is unambiguous, the court must give the effect to the contract as written, unless the contract is voidable on grounds such as mistake, fraud, duress, undue influence, or the like, or unless the result would be an absurdity." *Ringquist v. Wall Custom Homes, LLC*, 176 P.3d 846, 849 (Colo. App. 2007). Conversely, contracts "…containing ambiguities or unclear language must be construed in accordance with the intent of the parties, and relevant extraneous evidence may be considered to resolve the factual question of the parties' intent." *Chambliss/Jenkins Assocs. v. Forste*r, 650 P.2d 1315, 1318 (Colo. App. 1982). Parol evidence can only be considered if the contract is so ambiguous that the intent of the parties is unclear. *Janick v. Obsideo*, LLC, 271 P.3d 1133, 1138 (Colo. App. 2011). In determining whether a contract is ambiguous "the instrument's language must be examined and construed in harmony with the plain and generally accepted meaning of the words used, and reference must be made to all the agreement's provisions." *Fibreglas Fabricators, Inc. v. Kylberg,* 799 P.2d 371, 374 (Colo. App. 1990). Evidence that the parties ascribe different meanings to contract terms does not compel the conclusion that the contract is ambiguous. *Dorman v. Petrol Aspen, Inc.* 914 P.2d 909, 912 (Colo. 1996).

5. As found, Claimants worked for Chiropractic Healthcare Solutions LLC at the time of their February 3, 2015 MVA. Initially, a Management Agreement exists between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC. The Agreement provides that Pace Joint Interests-Lakewood, LLC will provide furnishings, equipment and management services to Chiropractic Healthcare Solutions LLC. so that it can operate a chiropractic clinic. Pace Joint Interests-Lakewood LLC. is essentially responsible for the day-to-day administration and management functions of Chiropractic Healthcare Solutions LLC except for clinical matters. Article 18.4 of the Management Agreement specifies that the Agreement is complete and may not be changed orally, but can only be amended by an agreement in writing executed by the parties. None of the witnesses identified any ambiguities in the Agreement. The Management Agreement between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC establishes a relationship between the two entities that was confirmed by the testimony of Dr. Lloyd, Ms. Davis and Mr. Davenport. In fact, Mr. Davenport identified the Agreement as an accurate, clear representation of the rights and responsibilities between the parties. Considering the plain and generally accepted meanings of the words in the Agreement it is unambiguous and thus cannot be altered by extrinsic evidence.

6. As found, however, the Management Agreement is a contract only between Chiropractic Healthcare Solutions LLC and Pace Joint Interests-Lakewood, LLC. Mr. Davenport explained that no written management agreements have been executed between Chiropractic Healthcare Solutions LLC and any of the other Denver Metropolitan area chiropractic clinics under Pace Joint Interests-Denver LLC. He simply remarked that the agreements had never been completed. Part-owner of Pace Joint Interests-Denver LLC Ms. Davis agreed that there are no management agreements in place for the other five Denver Metropolitan area chiropractic clinics because there was "simply a paperwork oversight." Nevertheless, Mr. Davenport maintained that the Management Agreement functions as the exact agreement between Chiropractic Healthcare Solutions LLC and the other five Denver Metropolitan area chiropractic clinics under the Pace Joint Interests-Denver LLC umbrella. Despite Mr. Davenport's representation that the Management Agreement applies between Chiropractic Healthcare Solutions LLC and all six of the Denver Metropolitan area Pace Joint Interests-Denver LLC clinics, the four corners of the Agreement are limited to the Pace Joint Interests-Lakewood, LLC location. The February 3, 2015 MVA did not involve the Pace Joint Interests-Lakewood, LLC clinic. Claimants were driving from Eye Maxx to the Pace Joint Interests-Southwest Plaza LLC clinic to train another wellness coordinator. Accordingly, in the absence of a written contract, the parol evidence rule is inapplicable and extrinsic evidence is admissible to determine the obligations of the parties in this matter.

7. As found, after Ms. Ko ceased employment with Pace Joint Interests-Denver LLC in September 2014, Pace Joint Interests-Denver LLC entered into a verbal agreement with Chiropractic Healthcare Solutions LLC through Dr. Lloyd. Essentially the verbal modification provided that Chiropractic Healthcare Solutions, LLC would assume marketing responsibilities and wellness coordinator training duties as well as handle the clinical components of operating the six Pace Joint Interests-Denver, LLC

clinics. Dr. Lloyd agreed that Chiropractic Healthcare Solutions, LLC assumed marketing duties and wellness coordinator training duties after Ms. Ko ceased working. In exchange for assuming the marketing duties, Pace Joint Interests-Denver LLC paid Chiropractic Healthcare Solutions LLC an additional $200.00 per month. Pace Joint Interests-Denver LLC also increased the fees it paid to Chiropractic Healthcare Solutions LLC from $400.00 to $500.00 each month for assuming the wellness coordinator training duties. Ms. Davis agreed that there was a verbal agreement between Pace Joint Interests-Denver LLC and Chiropractic Healthcare Solutions LLC that Dr. Lloyd would assume some marketing and management services that had been performed by Pace Joint Interests-Denver LLC before the departure of Ms. Ko. Ms. Davis also acknowledged that Chiropractic Healthcare Solutions LLC received an additional fee for assuming the marketing and management duties.

8. As found, in consultation with part-owner of Pace Joint Interests-Denver LLC Phil Davis, Dr. Lloyd hired Claimants to perform the management duties and wellness coordinator training duties that Chiropractic Healthcare Solutions LLC had assumed pursuant to the verbal agreement. Claimants reduced their hours as Wellness Coordinators for Pace Joint Interests-Denver LLC so that they could assume the additional responsibilities for Chiropractic Healthcare Solutions LLC. Claimants became marketers and managers for all six clinics under the Pace Joint Interests-Denver LLC umbrella. They received a higher hourly wage for their additional duties than they had in their roles of Wellness Coordinators. While working as Wellness Coordinators at individual clinics Claimants were paid by Pace Joint Interests-Denver LLC. However, while performing marketing and management duties Claimants were paid by Chiropractic Healthcare Solutions LLC.

9. As found, on February 3, 2015 Claimants were involved in a MVA while performing the marketing and management duties pursuant to the verbal agreements. Chiropractic Healthcare Solutions LLC paid Claimants for marketing and training the wellness coordinator as part of its management responsibilities. The February 3, 2015 MVA occurred while Claimants were performing their marketing and management duties for Chiropractic Healthcare Solutions, LLC and not while they were acting as Wellness Coordinators. Accordingly, Chiropractic Healthcare Solutions LLC was the employer of Claimants at the time of the MVA.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimants suffered compensable injuries during the course and scope of their employment with Chiropractic Healthcare Solutions LLC when they were involved in a MVA on February 3, 2015.

2. Chiropractic Healthcare Solutions LLC and its Insurer Travelers Indemnity Company shall reimburse Claimants for all out-of-pocket expenses for medical

treatment as a result of the February 3, 2015 MVA from providers Mountain View Pain Center and Injury Solutions.

3. Hugh Macaulay, M.D. is designated as the primary Authorized Treating Physician (ATP) for Claimants.

4. Chiropractic Healthcare Solutions LLC and its Insurer Travelers Indemnity Company shall pay for all authorized, reasonable, necessary and related medical treatment provided by Dr. Macaulay.

5. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: February 3, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-977-848-01

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable industrial injuries during the course and scope of his employment with Employer on March 14, 2015.

2. Whether Respondent has proven by a preponderance of the evidence that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on March 14, 2015.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $398.45.

2. If the claim is compensable, Claimant is entitled to receive Temporary Total Disability (TTD) benefits from March 24, 2015 through August 23, 2015.

3. If the claim is compensable, Respondent will be financially responsible for Claimant's reasonable, necessary and related medical expenses.

4. The issue of Claimant's Temporary Partial Disability (TPD) benefits from August 24, 2015 until terminated by statute is reserved for future determination.

FINDINGS OF FACT

1. Employer is a Colorado ski resort. Claimant worked for Employer as a Ski Lift Operator. On March 14, 2015 he was descending the ski hill from his lift tower when he struck a tree and suffered serious injuries. Claimant's injuries included a C1/2 fracture, a rib fracture, a scapular fracture, a spleen laceration, a pelvic fracture and a comminuted fracture of the left scapula.

2. Employer designated routes for employees to follow when leaving the mountain after work. Employer's Senior Specialist of Health and Safety Koby Kenny explained that the policy existed to minimize the risk to employees and ensure they all safely reached the bottom of the mountain after work. He noted that Employer always selected the easiest possible route down the mountain. Generally, the route was a trail designated as either a blue or green run.

3. Lift Operations Supervisor Chris Mills explained that employees who violated the policy for leaving the mountain after work received discipline ranging from a verbal warning to termination. Discipline was predicated on the level of the infraction.

Claimant's immediate supervisor Team Lead Kevin Crittenden commented that he would issue verbal warnings or refer lift operators who did not follow the designated route down the mountain to his supervisor for discipline.

4. Claimant testified that he received and read Employer's Handbook and Lift Operation Manual. Both of the publications outlined Employer's designated route policy. The Handbook stated that: "If the employee deviates from the applicable designated route, he or she will be considered 'free skiing' and not covered by Workers' Compensation. In addition, employees disregarding designated ski and snowboard routes may be subject to disciplinary action up to and including termination." The Manual provided that "[t]he recommended ski/ride routes to and from all ski lift facilities are restricted to more difficult (blue) and easiest (green) runs that are the most direct route to and from said ski lift facility . . . ." The Manual further specified that "[i]n the event that an employee deviates from the recommended ski/ride-down routes, such employee shall be considered to be participating in a recreational activity and at such time is relieved of and is not performing any prescribed duties . . . ."

5. Claimant testified that he read and signed both Employer's Handbook and Lift Operation Manual. He acknowledged that the designated route policy required him to use either blue or green runs to descend the mountain.

6. On March 14, 2015 Claimant was working at the top of lift three. The Manual designated a specific route down the mountain from his position. The lift operator would ski down Hunkey Dory to the bottom of lift three and meet up with the other operators of lift three. They would then ski down Upper Lion's Way until taking Avanti to the bottom of lift two. They would meet more lift operators and descend the mountain along Gitalong Road to Bear Tree. Lift Operators would then ski down Bear Tree to the locker rooms. The accident occurred on Gitalong Road shortly after the lift operators joined the trail at the bottom of lift two.

7. Gitalong Road is a catwalk or a road used by Employer's snow grooming equipment in winter to traverse the mountain. In the summer months Employer's work vehicles also use the road for access to the mountain. Over the series of switchbacks where Claimant's accident occurred, Gitalong Road is relatively flat from side to side and about 32 feet across with a 6 degree grade. The switchbacks' design diminishes the grade and reduces the rate of dissent so vehicles can use the road to access the mountain. Claimant testified that Gitalong Road was a green, slow zone, agreeing it was "as slow as it goes."

8. Between the switchbacks there is an area of steep, ungroomed snow with a 40 degree grade. Both Mr. Crittenden and Mr. Kenny acknowledge that they were familiar with this steep section because they had skied the area while off-duty. Mr. Crittenden testified that the ungroomed section was significantly more challenging than the flat catwalk. He explained that the steep section was not part of Gitalong Road because it contained ungroomed moguls, ice and obstacles lurking beneath the snow. Mr. Crittenden had verbally warned lift operators for skiing or boarding down the steep section instead of following the switchback. Mr. Kenny testified that the steep portion

would have been categorized as a black run because it was ungroomed, there were moguls and the 40 degree grade was consistent with other black runs on the mountain.

9. Claimant testified about the accident. He explained that on March 14, 2015 he was following the designated descent route down the mountain with other lift operators including Mark Smith. Claimant acknowledged that he took a minor deviation from the designated route by cutting the corner of the switchback at Gitalong Road. Nevertheless, Claimant maintained that he remained on a green or blue slope at all times during his descent. When Claimant returned to Gitalong Road he carved back and forth for approximately 20 yards, struck some ice and lost control. Claimant careened off the trail through a rope closure and struck a tree. He sustained severe injuries as a result of the accident.

10. Claimant acknowledged that Employer showed him the specific route down the mountain from his position as a Lift Operator. He noted that he followed the route on a daily basis and had not been disciplined for failing to abide by Employer's regulations or deviating from the route.

11. Claimant explained that it was his understanding that areas that were not roped off constituted parts of the trail. He thus assumed that the area of his deviation was part of Gitalong Road. Claimant maintained that, after his brief deviation, he was skiing along Gitalong Road in a controlled and safe manner before he struck ice and lost control.

12. Mr. Kenny produced an accident report in compliance with OSHA regulations. It contained a summary of the accident, witness statements, a diagram of the accident and a series of photos of Gitalong Road taken the day after the accident. Mr. Kenny testified that the report showed the probable trajectory of Claimant's travel based on where he struck the tree and the force of the impact. As summarized in the report, Claimant left Gitalong Road at the top of one of the switchbacks and cut through the steep section. His momentum carried him across the lower switchback. Claimant then passed through a six rope closure separating Gitalong Road from the wooded terrain below and struck a tree a few feet from the rope closure. Ultimately, Claimant came to rest eight feet from the tree. Claimant was unconscious for approximately two minutes following the accident. The emergency room report reflects that Claimant struck the tree with the left side of his torso and the impact broke his ski helmet.

13. Mr. Smith authored two written statements regarding the March 14, 2015 accident. He initially wrote that Claimant "was coming down cross cut and went down the steeper incline instead of the catwalk. I was behind him and watched him slip on ice, go through the yellow ropes, and into a tree. Found him face down unconscious. Out for a good 2 – 5 minutes." The next day Mr. Smith provided a slightly different account in which he stated Claimant "took the steep part on cross cut, took a hard left on the catwalk and slid out. Went through yellow ropes and wrapped himself around a tree. Unconscious for, 3 – 6 minutes, face down."

14. Claimant objected to the admission of Mr. Smith's statements as hearsay. The ALJ overruled Claimant's objection based on §8-43-210, C.R.S. and CRE 803(6). Section 8-43-210 C.R.S. authorizes the admission of employer records without foundation and C.R.E. 803(6) provides an exception to the hearsay rule for admission of records of regularly conducted business activities. Mr. Kenny testified that it was Employer's regular business practice to produce an accident report under such circumstances and that Mr. Smith was a witness to the incident. Mr. Smith's statements are consistent with Claimant's testimony that Claimant cut through the steep section. Although Claimant contends he left the trail in a different location than suggested in the accident report, neither statement by Mr. Smith specifies where Claimant left Gitalong Road and therefore could not have provided a basis for determining the location. Rather, Claimant's path of travel, as Mr. Kenny testified, was derived from where he hit the tree and the forces involved in the accident.

15. Mr. Kenny testified that Claimant's account of the accident would have been impossible. Although Mr. Kenny was not in the courtroom when Claimant testified, he reviewed Claimant's demonstrative exhibit and received details of Claimant's account of the accident. Mr. Kenny testified that Claimant's account was not consistent with the trajectories shown in the accident report. He explained that, because the terrain where the accident occurred was closed off by ropes, the only tracks were from the emergency extraction of Claimant. There were no tracks suggesting Claimant skied into the enclosure by the path shown in Claimant's Exhibit 8. Mr. Kenny testified that it would have been "difficult if not impossible" to generate enough speed on the path of travel suggested by Claimant "to cross those ropes, hit the tree, and end up eight feet beyond that tree." The switchback would have scrubbed Claimant's rate of decent. The gentle slope of Gitalong Road would not have significantly increased Claimant's speed in the 20 yards he purportedly traveled before hitting ice.

16. Claimant has established that it is more probably true than not that he suffered compensable industrial injuries during the course and scope of his employment with Employer on March 14, 2015. On March 14, 2015 Claimant was following the designated descent route down the mountain with other lift operators at the conclusion of his work shift. Claimant credibly explained that he took a slight deviation from the prescribed route by cutting the corner of the switchback at Gitalong Road. He maintained that he remained on a green or blue slope at all times during his descent. When Claimant returned to Gitalong Road he carved back and forth for approximately 20 yards, struck some ice and lost control. Claimant careened off the trail through a rope closure and struck a tree.

17. Claimant's activity of descending the mountain was part of his job function for Employer. His credible account reflects that he engaged in a minor deviation from the prescribed route that was neither serious nor complete. Claimant's slight deviation from the prescribed route did not remove his activity from the employment relationship. His deviation was simply not significant enough to sever his activities from the course and scope of employment for Employer on March 14, 2015.

18. In contrast, Mr. Kenny produced an accident report that contained a summary of the accident, witness statements, a diagram of the accident and a series of photos of Gitalong Road taken the day after the accident. Mr. Kenny testified that the report showed the probable trajectory of Claimant's travel based on where he struck the tree and the force of the impact. He testified that it would have been "difficult if not impossible" to generate enough speed on the path of travel suggested by Claimant "to cross those ropes, hit the tree, and end up eight feet beyond that tree." Moreover, Mr. Smith's statement reflects that Claimant may have cut off a steeper section of the switchback than Claimant acknowledged.

19. Despite the testimony of Mr. Kenny and Mr. Smith, it is ultimately unclear exactly where Claimant deviated from the prescribed descent route. Claimant's act of descending the prescribed route, deviating and returning to Gitalong Road for some period of time does not constitute a significant deviation from his duties to render his activity unrelated to his job. Claimant's presence on Gitalong Road had a sufficient connection to the circumstances under which he usually performs his job duties to be considered incidental to employment. Employer's prescribed descent routes regulated Claimant's conduct while he was descending the mountain but did not limit the sphere of his employment. Claimant simply did not substantially deviate from his job duties so that he was acting for his sole benefit. Accordingly, Claimant suffered compensable industrial injuries while working for Employer on March 14, 2015.

20. Respondent has failed to prove that it is more probably true than not that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on March 14, 2015. Claimant testified that he read and signed both Employer's Handbook and Lift Operation Manual. He acknowledged that the designated route policy required him to use either blue or green runs to descend the mountain. However, Claimant credibly maintained that it was his understanding that areas that were not roped off constituted parts of the trail. He thus presumed that the area of his deviation was part of Gitalong Road. Claimant maintained that, after his brief deviation, he was skiing along Gitalong Road in a controlled and safe manner before he struck ice and lost control.

21. Claimant did not act with deliberate intent by deviating from the prescribed descent route and crashing into a tree on March 14, 2015. After he cut off the corner of the switchback at Gitalong Road, Claimant slipped on ice, lost control and crashed into a tree. The record reflects that Claimant did not receive any prior warnings about his descent routes, the risk of slipping on ice was not obvious and there was little evidence of any deliberation in deviating from the descent route. In fact, Claimant reasonably believed he had returned to the designated descent route when he struck the ice on Gitalong road. Claimant's action was therefore not willful, but rather resulted from thoughtlessness or negligence. Accordingly, Claimant did not commit a safety rule violation on March 14, 2015 warranting a 50% reduction in benefits.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991).

5. Regardless of the theoretical framework that is applied, the issue is whether the “claimant’s conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit.” *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an

obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

6. When the employer asserts a personal deviation from employment activities "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship." *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986); *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for his sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). However, ministerial actions for an employee's personal comfort do not constitute a substantial deviation from employment unless the personal need being met or the means chosen by the employee to satisfy his personal comfort is unreasonable. *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008); *see Larson's Workers' Compensation Law,* §21.00.

7. In *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715, 718 (Colo.App. 1995), the court announced the following four part test to analyze whether an activity constitutes a deviation or horseplay: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. The question of whether a deviation is significant enough to remove the claimant from the course and scope of employment is a factual determination for the ALJ. *Id.*

8. As found, Claimant has established by a preponderance of the evidence that he suffered compensable industrial injuries during the course and scope of his employment with Employer on March 14, 2015. On March 14, 2015 Claimant was following the designated descent route down the mountain with other lift operators at the conclusion of his work shift. Claimant credibly explained that he took a slight deviation from the prescribed route by cutting the corner of the switchback at Gitalong Road. He maintained that he remained on a green or blue slope at all times during his descent. When Claimant returned to Gitalong Road he carved back and forth for approximately 20 yards, struck some ice and lost control. Claimant careened off the trail through a rope closure and struck a tree.

9. As found, Claimant's activity of descending the mountain was part of his job function for Employer. His credible account reflects that he engaged in a minor deviation from the prescribed route that was neither serious nor complete. Claimant's slight deviation from the prescribed route did not remove his activity from the employment relationship. His deviation was simply not significant enough to sever his activities from the course and scope of employment for Employer on March 14, 2015.

10. As found, in contrast, Mr. Kenny produced an accident report that contained a summary of the accident, witness statements, a diagram of the accident

and a series of photos of Gitalong Road taken the day after the accident. Mr. Kenny testified that the report showed the probable trajectory of Claimant's travel based on where he struck the tree and the force of the impact. He testified that it would have been "difficult if not impossible" to generate enough speed on the path of travel suggested by Claimant "to cross those ropes, hit the tree, and end up eight feet beyond that tree." Moreover, Mr. Smith's statement reflects that Claimant may have cut off a steeper section of the switchback than Claimant acknowledged.

11. As found, despite the testimony of Mr. Kenny and Mr. Smith, it is ultimately unclear exactly where Claimant deviated from the prescribed descent route. Claimant's act of descending the prescribed route, deviating and returning to Gitalong Road for some period of time does not constitute a significant deviation from his duties to render his activity unrelated to his job. Claimant's presence on Gitalong Road had a sufficient connection to the circumstances under which he usually performs his job duties to be considered incidental to employment. Employer's prescribed descent routes regulated Claimant's conduct while he was descending the mountain but did not limit the sphere of his employment. Claimant simply did not substantially deviate from his job duties so that he was acting for his sole benefit. Accordingly, Claimant suffered compensable industrial injuries while working for Employer on March 14, 2015.

Safety Rule Violation

12. Section 8-42-112(1)(b) C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including "evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimant's conduct." *Id.*

13. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAO, Oct. 20, 2003). "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez,* W.C. No. 4-561-352 (ICAP, Apr. 29, 2004). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.*, 907 P.2d at 719.

14. As found, Respondent has failed to prove by a preponderance of the evidence that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b)

C.R.S. on March 14, 2015. Claimant testified that he read and signed both Employer's Handbook and Lift Operation Manual. He acknowledged that the designated route policy required him to use either blue or green runs to descend the mountain. However, Claimant credibly maintained that it was his understanding that areas that were not roped off constituted parts of the trail. He thus presumed that the area of his deviation was part of Gitalong Road. Claimant maintained that, after his brief deviation, he was skiing along Gitalong Road in a controlled and safe manner before he struck ice and lost control.

15. As found, Claimant did not act with deliberate intent by deviating from the prescribed descent route and crashing into a tree on March 14, 2015. After he cut off the corner of the switchback at Gitalong Road, Claimant slipped on ice, lost control and crashed into a tree. The record reflects that Claimant did not receive any prior warnings about his descent routes, the risk of slipping on ice was not obvious and there was little evidence of any deliberation in deviating from the descent route. In fact, Claimant reasonably believed he had returned to the designated descent route when he struck the ice on Gitalong road. Claimant's action was therefore not willful, but rather resulted from thoughtlessness or negligence. Accordingly, Claimant did not commit a safety rule violation on March 14, 2015 warranting a 50% reduction in benefits.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable industrial injuries during the course and scope of his employment with Employer on March 14, 2015.

2. Respondent shall be financially responsible for Claimant's reasonable, necessary and related medical expenses.

3. Claimant earned an AWW of $398.45.

4. Claimant shall receive TTD benefits from March 24, 2015 through August 23, 2015.

5. Claimant did not commit a safety rule violation on March 14, 2015 warranting a 50% reduction in benefits.

6. All issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: February 16, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

____
Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has established by a preponderance of the evidence that he suffered a compensable injury on February 24, 2015, arising out of and in the course of his employment with the respondent-employer; and,

2. If the claimant did suffer a compensable injury, whether he established by a preponderance of the evidence that he is entitled to all reasonable, necessary, and related medical treatment.

Based upon the findings and conclusions below that the claim is not compensable, the ALJ does not address the remaining issue.

FINDINGS OF FACT

1. The respondent-employer provides public school transportation. The claimant has been a mechanic/technician for the respondent-employer since September 23, 2013. His regular job duties included maintaining the school buses.

2. On a normal work day the claimant was required to be available when the school bus drivers began their morning routes at 5:30 a.m. and 9:15 a.m., and when the drivers returned from their afternoon routes at 2:00 p.m. and 5:30 p.m.

3. February 24, 2015, was not a normal work day for the claimant. Corporate representatives were at the Woodland Park facility to investigate reports that they had from drivers about unsafe buses and their complaints about the new general manager. There were driver meetings with the school bus drivers to discuss and address their issues.

4. Krista Koster, Operations Manager, John Kemblowski, Human Resources Regional Manager, and Steve Kim, General Manager, were visiting from out of state. Koster and Kemblowski were based in the Chicago, Ill. area and Kim was based in Washington state.

5. The claimant testified that he was worried that Koster, Kemblowski, and Kim would get elevation sickness. He encouraged them numerous times to stay

hydrated. The claimant testified that there was not enough water in the refrigerator in the drivers' room or in the office and therefore he offered to get water for them numerous times. The claimant admitted that there was a water faucet in the break room.

6. Koster testified that the claimant was present before the driver meeting and periodically during throughout the day. Some of the issues addressed concerns by the drivers' regarding the maintenance of the school buses which the claimant was responsible for, such as bald tires and other maintenance issues.

7. When the claimant offered water to Koster, she told the claimant that they did not need water and kept at her tasks.

8. John Kemblowski testified that the claimant asked him if he wanted water. The claimant told him that he was going to run out and get cigarettes, and asked if anyone else wanted anything. The claimant admitted that he bought cigarettes when he went to the store.

9. The claimant left the premises to go to the convenience store. While there the claimant purchased cigarettes and two cases of bottled water at approximately 2:00 p.m. on February 24, 2015. He purchased the water at 2:15:11 p.m. The claimant was returning to work when he was in a motor vehicle accident. He was making a left turn when his car was struck in the rear, causing him to spin 180 degrees and strike a third vehicle.

10. The ALJ finds that the claimant was never asked or ordered to leave the premises to purchase water for the respondent-employer.

11. The ALJ finds that the claimant's testimony is not credible or persuasive.

12. The ALJ finds Koster's testimony is credible and persuasive.

13. The ALJ finds Kemblowski's testimony is credible and persuasive.

14. The ALJ finds Hatfield's testimony is credible and persuasive.

15. The ALJ finds the testimony of testimony Koster, Kemblowski, and Hatfield to be consistent.

16. The ALJ finds that the claimant was on a personal errand when he was injured on February 24, 2015.

17. The ALJ finds that the claimant has failed to establish that it is more likely than not that he sustained an injury arising out of and in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. A claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. The claimant has must show that he sustained an injury while "performing service arising out of and in the course of employment." § 8-41-301(1)(b), C.R.S. An injury happens in the "course of employment" if it occurs within the time and place limits of the employment, during an activity having some connection with the employee's job functions. The "arising out of" element requires the claimant to prove the injury had its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991).

2. Whether the claimant has sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan* 939 P.2d 496 (Colo. App. 1997).

3. The ALJ is not required to cite or discuss every piece of evidence before crediting evidence to the contrary. *Crandall v. Watson-Wilson Transporation System, Inc.* 171 Colo. 329, 467 P.2d 48 (1970). Rather, evidence not cited is implicitly rejected as unpersuasive. *Magnetic Engineering v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

4. The general rule is that "going to and coming from" work are not compensable. *Berry's Coffee Shop, Inc. v. Palomba,* 423 P.2d 2 (1967); *Perry v. Crawford & Co.,* 677 P.2d 416 (Colo. App. 1983).

5. Injuries sustained during off premises lunchtime travel usually fall within the "going to and coming from rule," and are not compensable. *Perry v. Crawford & Co., supra.* There is an exception to this rule where special circumstances demonstrate a nexus between the lunchtime travel and the circumstances of employment. Special circumstances have been found where the travel was at the behest of the employer, where the employer receives some special benefit from the travel, or where the employer provided the means of travel. *City and County of Denver School District No. 1 v. Industrial Commission,* 581 P.2d 1162 (1978); *Berry's Coffee Shop Inc. v. Palomba, supra; National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992).

6. In the present matter, the claimant's travel to the convenience store was not at the behest of the employer. He was never asked or ordered to leave the premises to purchase water for the employer. Purchasing water was not incidental to the claimant's position as a mechanic/technician and did not provide a benefit to the employer. The claimant was on a personal errand when he was involved in the motor vehicle accident. There is insufficient evidence that the injury had its origin in the claimant's work-related functions.

7. The claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: February 2, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-978-624-01

ISSUES

1. Whether the claimant has established by a preponderance of the evidence that she suffered a compensable injury to her right wrist on March 6, 2015, arising out of and in the course of her employment with the respondent-employer;

2. If so, whether she proved by a preponderance of the evidence that she is entitled to all reasonable, necessary, and related medical treatment;

3. If so, whether the claimant is entitled to temporary partial benefits from March 8, 2015 to March 19, 2015; and,

4. If so, whether the claimant is entitled to ongoing temporary total benefits from March 19, 2015.

PRELIMINARY MATTERS

1. During the hearing the recording equipment failed and there is no transcript of the proceedings.

2. The Hearing began with the parties stipulating that if the claim was compensable that the authorized treating physician would be Dr. Annamarie Meeuwsen of Gunnison Valley Health Family Medicine Clinic and that the claimant's average weekly wage is $243.75.

3. Subsequent to the hearing the ALJ reconstructed the testimony of the witnesses with input from the parties. This reconstructed testimony was provided by separate Order dated December 29, 2015.

FINDINGS OF FACT

1. The claimant is a 28 year old woman with a birth date of September 12, 1987. She was 27 years old on March 6, 2015, when she sustained an injury on that day.

2. On March 6, 2015, the claimant was at work for the respondent-employer. The claimant was working as a housekeeper. As a housekeeper, the claimant would routinely clean rooms, clean bathrooms, and make beds, among other duties.

3. At around 9:00 to 9:30 am that morning, the claimant was cleaning one of the 22 rooms she had assigned to her that day. As the claimant was removing sheets from a bed, she felt a pop in her right wrist. She felt pain from her wrist to her mid-arm at that time.

4. The claimant previously had injuries to her right mid-arm and her right elbow, but never to her right wrist. In March of 2015, the claimant was not having any problems with her arm until this injury.

5. The claimant looked for her immediate supervisor, Deborah Rhoades, but was unable to locate her. She continued to work. Susana Beltran Simental was the claimant's supervisor that day. Ms. Rhoades was not working on March 6, 2015, but was working on March 7, 2015.

6. The claimant had a previously scheduled meeting on the morning of March 6, 2015 at her daughter's school. The claimant left work, with permission, to go to that meeting. The meeting lasted about an hour and the claimant returned to work.

7. Upon returning to work, the claimant told her supervisor about her injury. Ms. Simental then reminded the claimant that the claimant had two warnings, and asked her to finish work. The claimant, despite being in pain, continued work for the rest of the day because she was afraid of losing her job.

8. After finishing her 22 rooms, the claimant started to have pain traveling up towards her elbow. The claimant then asked Ms. Simental if she could go to a doctor. Ms. Simental told the claimant that if the claimant was still having pain in her wrist to come back in the morning and tell Ms. Rhoades.

9. The following day, March 7, 2015, the claimant returned to work. In accordance with what Ms. Simental told her, the claimant told Ms. Rhoades about her wrist pain.

10. The claimant then met with Ms. Rhoades and Tyler Newman, the hotel's general manager. According to the claimant, Mr. Newman implied that the claimant needed to get back to work, despite the claimant telling him she was in pain.

11. The claimant does not usually work with anyone else. On this day, March 7, the claimant worked with another employee, Suzy.

12. The claimant continued to have wrist pain, but she was also having pain in her shoulder.

13. The claimant asked Ms. Rhoades around lunchtime on this date if she could go home, but Ms. Rhoades told her the claimant couldn't leave until all of her rooms were cleaned.

14. Together with Suzy, the claimant completed 30 to 35 rooms.

15. Another employee, Teresa Barrientos, confirmed that the claimant informed her that day, March 7, 2015, that the claimant's wrist was hurting. In fact, when Ms. Barrientos came to work that morning, she heard people "in the boss's office…commenting that [the claimant] wasn't feeling well."

16. The claimant again asked Ms. Rhoades if she could go to a doctor. The claimant was told that Mr. Newman said she could go to a clinic on Monday. The claimant told Ms. Rhoades that she couldn't wait that long, and Ms. Rhoades told her that if she went to the hospital on that date, she would have to pay for it herself.

17. Despite this warning, the claimant went to Gunnison Valley Hospital that evening and was seen by Dr. William Gattis in the emergency room. In his initial evaluation, Dr. Gattis checked "yes" to the question: Are your objective findings consistent with history and/or work related mechanism of injury/illness? The claimant was given a note off work until she saw Dr. Meeuwsen.

18. Dr. Gattis further noted that the claimant "has had swelling, tingling, and weakness. There is diffuse muscular swelling of the extensor muscles in the right arm, and up into the triceps muscles. Pain with rom." Dr. Gattis believed the claimant had "an overuse injury, and then did multiple similar action with work today in changing sheets and has [now] gotten significant swelling in the muscles causing pain."

19. The claimant then saw Jodi Bauer, N.P. on March 9, 2015. Ms. Bauer found objective evidence of "decreased range of motion note in: right fingers, unable to make a fist due to pain and numbness, pt unable to touch first digit to the palm due to pain; pain with range of motion in: right wrist flexion, extension, ulnar deviation, and radial deviation; right hand with pain with movement of fingers and thumb, states they feel numb." The claimant was given a note off work from March 9, 2015 until March 16, 2015.

20. Ms. Bauer checked "yes" to the question: Are your objective findings consistent with history and/or work related mechanism of injury/illness?

21. The claimant had an appointment with Amy Sandusky at Alpine Orthopaedics and Sports Medicine, P.C. on March 17, 2015. Ms. Sandusky writes in her report that the "injury is work related." The claimant was diagnosed with carpal tunnel syndrome. She was given an injection during this visit for her carpal tunnel.

22. The claimant saw Ms. Bauer on March 18, 2015, and continued to have both subjective and objective findings consistent with her work injury.

23. The claimant then treated with John Miller on March 19, 2015 after having a negative reaction to the medication she was prescribed. After speaking with the claimant, Mr. Miller checked "yes" to the question: Are your objective findings consistent with history and/or work related mechanism of injury/illness?

24. The claimant had an appointment with Ms. Bauer on March 24, 2015. During that appointment, Ms. Bauer noted that the claimant's "employer calls her and told her they are going to fire her if she is not returning to work. The caller was Tyler, main manager." The claimant continued to have both objective and subjective symptoms associated with her work injury.

25. The claimant also had multiple physical therapy appointments in March and April.

26. When the claimant saw Dr. Gattis on March 7, 2015, he gave her a note to be off work from that date until after she has seen Dr. Meeuwsen on March 9, 2015. He further wrote in his report that the claimant should not return to work until after she had seen Dr. Meeuwsen's office. The claimant was seen by Dr. Meeuwsen's office on March 9, 2015, when she was given a note to be off work until March 16, 2015. According to her time card, the claimant went to work on March 18 for half an hour, and then again on March 19 for two and a quarter hours. After both unsuccessful days at work, the claimant went and saw a medical provider.

27. The claimant was off work and then returned to work on light duty as her doctor advised. As such, she is entitled to temporary partial disability benefits for the time she was not working due to her injury.

28. After attempting to go to work on March 19 and not having success, the claimant was seen by John Miller on that same day. Mr. Miller wrote in a work note

“[The claimant] was seen here at our clinic on 3/9, 3/18 and 3/19 for her right arm/wrist. She is scheduled for follow up on 3/23. She is to go to physical therapy today (3/22) and has an appointment with the orthopedist on Tuesday 3/31. If pain not controlled over this weekend (Friday 3/20, Saturday 3/21, Sunday 3/22), then please excuse. She is having problems taking pain medication due to reaction.” Further, the claimant was given work restriction of not using her right hand.

29. In a conversation with Ms. Rhoades, Ms. Rhoades told the claimant that she could only go back to work in housekeeping and that she needed the use of both of her hands. Since the claimant did not have those restrictions, she was unable to comply with the respondent-employer’s request. The claimant has not returned to work since, and the respondent-employer has not provided the claimant with a suitable job that was within her work restrictions. As a result, the claimant is entitled to ongoing temporary total disability payments from March 19, 2015.

30. The ALJ finds the claimant to be credible.

31. The ALJ finds the opinions of Dr. Gattis, Jodi Bauer, Amy Sandusky, and John Miller to be more credible than medical evidence to the contrary.

32. The ALJ finds that the claimant has established that it is more likely than not that on March 6, 2015 she sustained an injury to her right upper extremity that arose out of and occurred in the course of her employment with the respondent-employer.

33. The ALJ finds that the claimant has established that it is more likely than not that the claimant is entitled to all reasonable, necessary and related medical treatment to cure or relieve her from the effects of her injury.

34. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to temporary total disability benefits from March 8, 2015 through March 17, 2015 and from March 20, 2015 and ongoing until terminated by operation of law.

35. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to temporary partial disability benefits on March 18, 2015 and March 19, 2015.

CONCLUSIONS OF LAW

1. The claimant must prove that she is a covered employee who suffered an

injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001).

2. The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997*.*

3. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

4. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

5. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

6. The ALJ concludes that the claimant has shown by a preponderance of evidence that her injury was in the course of, and arose out of, her employment.

7. Because this matter is compensable, the respondent-insurer is liable for medical treatment which is reasonably necessary to cure or relieve the claimant from the effects of her industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim*

Appeals Office, 942 P.2d 1337 (Colo. App. 1997). All of the medical treatment the claimant received for her industrial injury, from March 6, 2015 and onward, was reasonable and necessary. The respondent-insurer is liable for payment of that treatment, as well as all additional treatment necessary to cure and relieve the claimant from the effects of the injury.

8. To prove entitlement to temporary partial disability benefits, the claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. Section 8-42-106, C.R.S. *See also, PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Here, as a result of the injury the claimant experienced an unspecified partial wage loss on March 18 and March 19, 2015.

9. To prove entitlement to temporary total disability (TTD) benefits, the claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

10. The ALJ concludes that the claimant was unable to work from March 8, 2015 through March 17, 2015 and from March 20, 2015 and ongoing.

11. The ALJ concludes that the claimant has established by a preponderance of the evidence that on March 6, 2015 she sustained an injury to her right upper extremity that arose out of and occurred in the course of her employment with the respondent-employer.

12. The ALJ concludes that the claimant has established by a preponderance of the evidence that the claimant is entitled to all reasonable, necessary and related medical treatment to cure or relieve her from the effects of her injury.

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits from March 8, 2015 through March 17, 2015 and from March 20, 2015 and ongoing until terminated by operation of law.

14. The ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to temporary partial disability benefits on March 18, 2015 and March 19, 2015.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The respondent-insurer shall pay for all reasonable, necessary, and related medical treatment to cure or relieve the claimant from the effects of her injury.

3. The respondent-insurer shall pay the claimant temporary partial disability benefits for March 18, 2015 and March 19, 2015 to be determined by the parties.

4. The respondent-insurer shall pay the claimant temporary total disability benefits for the period from March 8, 2015 through March 17, 2015.

5. The respondent-insurer shall pay the claimant temporary total disability benefits for the period from March 20, 2015 and ongoing until terminated by operation of law.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: February 8, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by U.S. Mail, or by e-mail addressed as follows:

Gregory B. Cairns Esq.
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Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Date: **2/23/2016** **Gabriela Chavez**
Court Clerk

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-980-714-02

ISSUE

The following issue was raised for consideration at hearing:

1. Whether Claimant's temporary total disability benefits (TTD) should be reduced by 50% because he willfully violated a safety rule or willfully failed to use a safety device within the meaning of Section 8-42-112(1) (a) and (b), C.R.S., respectively.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant was born June 11, 1979, and was 36 years old at time of hearing. Claimant has a high school education. Claimant was hired by Employer on July 11, 2014. Claimant is right hand dominant. He originally served as a dishwasher and busser. In September 2014, Claimant was promoted to the position of line chef. This position required him, among other tasks, to cut vegetables and to slice and grind meat.

2. Claimant suffered an industrial injury to his right hand on April 16, 2015, when in the course and scope of his employment for Employer he stuck his right hand in a meat grinder, amputating five fingers and a portion of the hand. On the date of his injury, Claimant reported to work at his regular time, about 7:45 a.m. Claimant was well rested and fed, and he was not under the influence of any medication or drug.

3. Respondents admitted liability for this industrial accident and have paid TTD from April 17, 2015, ongoing. Respondents took a 50% reduction of TTD benefits due to a "Safety Rule violation."

4. Respondents have provided conservative medical care as directed primarily by Bret C. Peterson, M.D. Claimant was provided care by the authorized treating physician, including surgeries, physical therapy, counseling, and pain management. Claimant receives care for his emotional issues from Dr. Edmonds, his therapist, Dr. Roberta Anderson-Oeser, his pain management specialist, and Dr. Joel Cohen, his psychologist. Since his injury, Claimant has undergone five surgeries to correct his condition.

5. According to Dr. Peterson in a report dated December 8, 2015, Claimant has essentially a transmetacarpal amputation with some additional length over the ulnar side of the hand. The wounds are completely healed and he has a viable soft padded flap on the palm of his hand. Claimant has a devastating, life altering, and debilitating injury that will permanently impair both his functionality and his ability to gain livelihood

6. On the day of Claimant's injury, he was supervised by Brent Jackson and Dryden Goss, both *sous* chefs or assistant chefs. Mr. Jackson trained Claimant in the use and cleaning of the meat grinder. He trained Claimant to use a white plastic plunger to push meat into the grinder feed chute. Mr. Jackson pointed to the prominent sign on the side of the grinder which stated "WARNING! INJURY HAZARD KEEP FINGERS OUT OF FEED CHUTE!" and warned Claimant to heed the sign.

7. Mr. Jackson's verbal warning was the only formal safety training that Claimant received from any management member about use of the meat grinder. Mr. Jackson warned Claimant of the danger of the meat grinder and cautioned him to use the plunger.

8. Mr. Jackson credibly testified that the purpose of the warning was to keep Claimant from injury and that the consequence of not heeding the warning was injury to the hand. There were no written statements published by the Employer pertaining to the use of the meat grinder or the consequences of placing one's fingers into the chute.

9. Mr. Jackson testified that the warning sign on the grinder was probably placed there by the manufacturer or distributor. There was a smaller warning on the grinder in yellow and black which began with the word “Caution!”. Both Claimant and Mr. Jackson were unaware of the exact wording of this smaller warning label.

10. Claimant testified that he often used the plunger, but sometimes the plunger was not present at the machine. If he could not find the plunger, to save time, he would use his hand to push lamb meat into the grinder chute. He did this multiple times without injury. Claimant was never reprimanded or punished for failing to use the plunger at work.

11. On April 16, 2015, at about 9:00 a.m., Claimant began the task of grinding lamb meat. There were between 4 and 6 employees in the kitchen area at any given time, and at times the pace of work was hectic. Claimant could not find the plunger, so he searched for it for a few minutes. He then tried to find the *sous* chef on duty that day, Dryden Goss, to ask him what to do. He failed to find Mr. Goss, so he put the lamb meat on the grinder tray and moved it into the grinder chute with his bare hand. The first grinding did not grind the meat sufficiently to make lamb burgers, so he placed the partially ground meat on the grinder tray, and once again guided the meat into the grinder chute with his right hand. This time, his hand followed the meat deeply into the shaft, causing his injury.

12. Claimant testified about cleaning and storage of the meat grinder and plunger. Claimant’s point being the machinery was cumbersome and was stored out of the way of kitchen staff in a back hall way. This information was determined not to have bearing on the issue for consideration here.

13. Both Mr. Goss and Mr. Jackson testified that Claimant was a good and dependable worker. Claimant was convicted of a felony and was incarcerated at the Canon City, Colorado penitentiary where he worked in the kitchen and canteen services. Claimant has worked as a line cook at other employers. At least one of Claimant’s previous employers had a meat grinder which Claimant used.

14. Claimant has not returned to work since his injury.

15. Dryden Goss, *sous* chef, testified that he never saw Claimant or any other kitchen worker fail to use the plunger. He credibly testified that if he’d seen them fail to use the plunger, he would have reprimanded them.

16. Mr. Jackson also testified that he never saw Claimant or any other kitchen worker fail to use the plunger. And, he also credibly testified that if he had seen them fail to use the plunger, he would have reprimanded them.

17. Both Mr. Goss and Mr. Jackson testified that manufacturer's warning signs constituted the Employer's "safety rule." Employer did not maintain or publish a separate written safety rule related to the use of the meat grinder and plunger.

18. Employer established by a preponderance that Claimant intended to violate the safety rule and intended not to use the Employer's safety device.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are reached.

1. The purpose of the Workers' Compensation Act of Colorado (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *See Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. *See* Section 8-43-201(1), C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. *See* Section 8-43-201, C.R.S. The judge's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the judge has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Industrial Claims Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Safety Rule Violation

3.Considering the facts of this case, the ALJ concludes that Claimant should be penalized 50% of his TTD benefits for violation of a safety rule. Respondents proved that they are entitled to an order reducing Claimant's benefits pursuant to Section 8-42-112(1), C.R.S. That section provides for a reduction of Claimant's TTD benefits where the injury results from the employee's willful failure to obey a reasonable rule adopted by the employer for the safety of the employee or fails to use a safety device provided by the employer. In this case, Respondents sustain their burden of proof to establish by a preponderance of the evidence that Claimant willfully violated a safety rule and willfully failed to use a safety device.

4. Respondents contend that it maintained a safety rule regarding use of the plunger in meat grinding. Respondents argue they adopted the rule which appeared on the meat grinder at the time of sale and then further enunciated their rule when in conversation Claimant's supervisor showed Claimant the meat grinder with cautionary sign prominently affixed to it and told him to use the plunger in grinding the meat.

5. The meaning and content of a safety rule must be specific. *Butland v. Industrial Claim Appeal Office*, 754 P.2d 422 (Colo. App. 1988. It is generally held that oral warnings, prohibitions and directions meet the safety requirement for the protection of both employer and employee if given by someone generally in authority and known to be heard and understood by the employee. *Industrial Commission v. Golden Cycle Corp*., 246 P.2d 902 (Colo. 1952). Respondents in this case had a safety rule requiring workers to utilize the plunger to force meat into the grinder. It was credibly established that this rule was communicated to Claimant by Claimant's supervisor, Brent Jackson.

6. A safety rule violation is only applicable if the violation is willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995). Violation of a rule is not willful unless the claimant intentionally did the forbidden act. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *Stockdale v. Industrial Commission*, 232 P. 669 (Colo. 1925); *Brown v. Great Peaks, Inc.,* W.C. No. 4-368-112 (Industrial Claim Appeals Office, July 29, 1999). A violation which is the product of mere negligence, forgetfulness or inadvertence is not willful. *Johnson v. Denver Tramway Corp*., 171 P.2d 410 (Colo. 1946). The record evidence indicates that Claimant intentionally failed use the meat plunger. The evidence established that Claimant knew of the safety rule and knew of the safety device and that he intentionally proceeded to grind the meat without the plunger. The ALJ considered the evidence that the kitchen was hectic and that the plunger was sometimes hard to locate. Neither consideration changes the judgment that Claimant intended to violate a safety rule about using the plunger with the meat grinder and intended not to use the safety device. Consequently, Respondents are entitled to a 50% reduction in indemnity benefits.

ORDER

It is therefore ordered that:

Respondents shall reduce Claimant's TTD benefits by 50% for violation of Section 8-42-112(1)(a) and (b).

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 23, 2016_

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law
Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STIPULATION

1. The parties stipulated that, should the claim be found compensable and the Claimant proves she is entitled to temporary disability benefits, the Claimant's average weekly wage (AWW) is $591.11 which corresponds to a temporary total disability (TTD) rate of $394.07 per week.

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right shoulder arising out of and in the course of her employment with Employer on December 6, 2014.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits and that treatment she received was authorized, and reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

3. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability ("TTD") benefits in this claim from December 7, 2014 ongoing.

FINDINGS OF FACT

1. The Claimant is a bakery clerk for Respondent, with a date of birth of May 4, 1965. She has been employed by Employer for approximately 16 years, since 2009 as a baker and pastry icer. The Claimant's normal work hours are from 4:00 AM to 11:00 AM on her work days. Her job duties included baking and icing donuts and cakes. The job duties were physical and fast paced. The trays on which the donuts and cakes were placed are approximately 3 feet by 2 feet. The screens for icing the donuts and cakes fit on the tray below the donuts and cakes. The screens were also 3 feet by 2 feet. After icing the donuts and cakes, and stacking them, she had to package them, place them out on the display racks, and do clean-up. Clean-up included placing the icing screens and trays into hot soapy water and letting them soak, then moving them to hot water to rinse, and then to a further sink for sanitation. Then the screens are moved again to dry. The Claimant typically would pick up 3 screens at a time as she moved them, holding them with her arms outstretched.

2. The Claimant was experiencing pain in her right shoulder while performing her work in the months before December 6, 2014. She testified credibly that her right shoulder had begun to bother her in September or October, 2014. She testified that in November, 2014 her Employer had a large holiday event attended by multiple employees and management from other Employer shops so they can see what will be available in stores over the holidays. In preparation for this event, the Claimant had to ice up to 3,000 donuts and 160 cakes per day. The Claimant testified that her shoulder pain increased beginning in November and that she had to work multiple days in a row with only a single break day in between, instead of her usual two-day break.

3. The Claimant testified credibly that, on December 6, 2014 while lifting three icing screens from one sink to the next that she felt and heard a pop in her right shoulder. A co-worker, Carmalita Tsosie, who was a baker and is currently one of Employer's assistant managers, corroborated the Claimant's testimony, testifying at the hearing that she was standing behind the Claimant and also heard the Claimant's shoulder make a "weird popping sound" when the Claimant was lifting some screens from the sink.

4. The Claimant testified that after her shoulder popped, her shoulder felt weaker than before. The Claimant testified that before her shoulder popped she had been able to lift 3 of the icing screens at a time from one sink to the next, but after her shoulder popped that she was only able to lift 1 at a time. Likewise, before her injury the Claimant had been able to lift buckets full of icing by herself, but afterwards she needed the help of her co-worker, Ms. Tsosie. Ms. Tsosie testified that she had to help the Claimant lift the icing buckets that day, and had previously only helped her every now and then with icing buckets, never consistently.

5. The Claimant testified that she continued working until the end of her shift on December 6, 2014 and then went home. She did not report a work injury during her shift before she left work that day. She noticed that her shoulder was swollen and that it felt weaker. She iced it before going to bed. While in bed on the night of December 6, 2014, the Claimant attempted to rollover in bed and the pain in her right shoulder increased (Respondent's Exhibit G). The pain was so intense after this that the Claimant decided to go to the emergency room on December 7, 2014.

6. The Claimant went to the North Suburban Emergency room on December 7, 2014. The medical record on that date indicates that the Claimant reported that "she was reaching forward yesterday and then felt a pop and pain in her right shoulder. Then while sleeping last night she rolled over it and aggravated the right shoulder more." An x-ray was done, which did not identify any "acute significant abnormalities"(Respondent's Exhibit J). The Claimant was diagnosed with a shoulder strain, was given a prescription for Norco, and advised to "follow-up with PCP in two to three days" (Respondent's Exhibits J and L).

7. Also on December 7, 2014, the Claimant engaged in a series of text messages with her immediate supervisor at work. The text messages from this day were,

Claimant: Hey, I’m gonna have to go to the er when Rachel gets off work. Woke up last night in a lot of pain. The bone in my shoulder is sticking way out and I can’t move any of my shoulder without crying. I need an exray [sic] for sure.
12/7/2014, 2:43 PM

Supervisor: Hopefully everything is okay I know the shoulder has been hurting you for a while now just let me know and good luck.
12/7/2014, 4:31 PM

Claimant: Waiting for the exrays [sic] to come back. They just gave me a shot for the pain. It never hurt this bad. All I did was try to roll over in my sleep.
12/7/2014, 7:00 PM

Claimant: Nothin [sic] broken, yet but definitely ligament issues. Can’t use my arm for a few days. It’s really swollen! She gave me a note for work.
12/7/2014, 7:44 PM

Supervisor: Get some rest and try to see a doctor as soon as you can because they’re going to want a doctors release for you to come back to work. Have a good night.
12/7/2014, 9:08 PM

(Claimant’s Exhibit 1)

8. The Claimant testified that she initially did not want to claim the injury as a Workers Compensation injury since she had some sick leave that she could use as well as private medical insurance and the potential for short term disability. She believed, initially, based on the initial medical records that she would be able to return to work in a relatively short period of time.

9. From the Emergency Room, the Claimant was referred to Dr. Eric Keahey. Claimant testified that she elected to go to Dr. Eric Keahey at the Westminster Internal Family Medicine Clinic, because that clinic was convenient and was covered by her private medical insurance. Dr. Keahey’s records reflect that he saw the Claimant for an initial evaluation on December 9, 2014. The medical record reports “…onset of right shoulder pain over the weekend, 3 days previously. She works in a bakery, pouring, stirring and lifting frequently. She denies any acute injury, but pain that began rather abruptly while at work” Claimant’s Exhibit 4, p. 27; Respondent’s Exhibit K, p. 25). Dr. Keahey testified in his deposition that he also asked for an x-ray at this visit “because shoulder separation is often missed on plain films. She reported to me that they were normal and sure enough ours showed the AC separation” (Tr. of Deposition of Dr. Keahey Deposition, p.17). Dr. Keahey gave the Claimant a diagnostic injection which caused a significant improvement in symptoms (Claimant’s Exhibit 4, p. 29; Respondent’s Exhibit K, p. 29). Dr. Keahey testified in his deposition that if a person has “increasing shoulder pain for months before but it abruptly worsens on particular day at work that that

would indicate an acute incident." He further testified that in his records when he says: "That she denies acute injury, I am stating that she did not have a fall or something fall on her or some serious injury of that sort. I'm not – that does not mean there was not an abrupt on-set of pain in my nomenclature" (Tr. of Deposition of Dr. Keahey Deposition, pp. 25- 27).

10. On December 9, 2014 the Claimant engaged in another series of text messages with her supervisor, advising her supervisor that she had injured herself at work on December 6, 2014. Previous text messages between Claimant and her supervisor were suggestive of a work injury but were not as definitive as the December 9, 2014 text message. The text messages from this day were,

> Claimant: Just gotta [sic] back from the doc. I will be out till released. Took more exrays [sic] will go over them Thursday am. He is leaning towards a separated shoulder. Has me in a sling and not allowed to move my arm.
> 12/9/2014, 2:13 PM
>
> Claimant: Yes he said as of now I can't work. Said he wouldn't eve [sic] want me to check. It's definitely messed up! I will know more Thursday morning. He said I could be out awhile.
> 12/9/2014, 2:26 PM
>
> Supervisor: Sorry you're going through this. I hope it's not too bad. I hope work knows they are going to have to hire someone until you're [sic] back or we'll be screwed for Christmas [sad face emoji] don't feel bad though you need to take care of yourself and get better. It's been bothering you for a while now. Please keep me informed. Thanks.
>
> Claimant: Doc called, yep my arm fell off [crying sad face emoji] have an ac separation.
> 12/9/2014, 3:53 PM
>
> Supervisor: Oh no I'm sorry but that's horrible that probably means you need surgery and at least two months off work? Ouch that must really hurt.
> 12/9/2014, 3:54 PM
>
> Supervisor: Just out of curiosity do they know what caused it
> 12/9/2014, 4:09 PM
>
> Claimant: What I do at work. He said there are two ways for it to happen, to have it yanked out or the slow way, (like mine) till it comes apart. I felt a snap when I was reaching in the sink before I left work Sat.
> 12/9/2014, 4:14 PM

(Claimant's Exhibit 1)

11. The Employer did not provide the Claimant with a list of designated providers within seven (7) days of this text message exchange on December 9, 2014 although the Claimant had advised that her supervisor that her shoulder injury was work related.

12. On or about December 10, 2014, the Claimant filed for non-occupational short-term disability. The Claimant had Dr. Keahey fill out the Employer's Sick Pay Request (Respondent's Exhibit I, p. 21). In the December 11, 2014 report submitted in support of that Sick Pay Request, Dr. Keahey stated that the injury was not related to the patient's employment. He had initially checked that the condition was due to the patient's employment, but then he crossed it out and checked that it was not related to the patient's employment (Claimant's Exhibit 2, p. 16; Respondent's Exhibit I, p. 22). The Claimant testified that she asked Dr. Keahey to not list it as a Workers Comp claim since she would handle it on her own insurance. Dr. Keahey testified in his deposition that he had originally marked this injury as "Due to injury" but that he scratched that out and indicated that it was not. Dr. Keahey testified that he had a specific recollection that the Claimant asked him to change it from a work related injury to a non-work related injury (Tr. of Deposition of Dr. Keahey Deposition, pp. 16-17).

13. On December 22, 2014 pursuant to the referral from Dr. Keahey, Claimant was seen by Dr. Michael Bagley at Cornerstone Orthopedic and Sports Medicine. Dr. Bagley noted in his report that the Claimant had a "mild to moderate AC joint separation per x-ray… This is not surgical" (Claimant's Exhibit 5, p. 53; Respondent's Exhibit G). The Claimant testified that she told Dr. Bagley that she did not want to claim this as a work injury and Dr. Bagley commented in his medical note of 12/22/2014 that "We did discuss that this is not a Work Comp situation" (Claimant's Exhibit 5, p. 53; Respondent's Exhibit G). Dr. Bagley also issued a report in support of the Claimant's request for non-occupational sick pay. Dr. Bagley signed off on the request for non-occupational leave and indicated that the Claimant's condition was not work-related (Respondent's Exhibit H).

14. The Claimant next saw Dr. Bagley at Cornerstone a month later on January 22, 2015. At that time Dr. Bagley noted "Rotator cuff tear. Certainly, within the differential diagnosis to the right-sided rotator cuff tear given the fact that [the Claimant] temporarily did well with the cortisone shot and she has rotator cuff weakness." Dr. Bagley referred the Claimant for an MRI of the right shoulder (Claimant's Exhibit 5, p. 57).

15. On January 31, 2015, the Claimant texted her supervisor: "…as you may have guessed my shoulder is still messed up. I get my MRI on the 5th and see the doc on the 12th. He thinks it is the rotator cuff. I think it all came apart in there [pain face emoji]" (Claimant's Exhibit 1, p. 14).

16. On February 12, 2015 Dr. Bagley notes that the Claimant's right shoulder pain "occurs constantly and is worsening….the pain is aggravated by lifting and movement. The pain is relieved by rest and sling." He further noted that the Claimant

"cannot work at all as a baker. This really is a disabling type of injury including both pain and weakness" (Claimant's Exhibit 5, p. 60; Respondent's Exhibit F, p. 11).

17. The Claimant testified that when it became likely that she was going to need surgery and would be disabled for a prolonged period of time that she consulted an attorney in February 2015, to initiate a workers' compensation claim. She filled out a Worker's Claim for Compensation dated February 12, 2015 which had been provided to her by the initial attorney that she consulted. The actual Claim for Compensation was not received by the Division of Workers' Compensation, according to the date stamp on Respondent's Exhibit D until May 13, 2015. The Claimant testified that she had retained an attorney on or about February 12, 2015 and left the Claim for Compensation to be filed by him (Claimant's Exhibit 3, p. 25; Respondent's Exhibit D, p. 8). The Claimant testified that the initial attorney she consulted in February had not done anything for her. Consequently she hired her current attorney in May 2015. The current attorney filed the Worker's Claim for Compensation on May 13, 2015.

18. On that same date, February 12, 2015, the Claimant filled out an additional Employer three day or more sick pay request. In this request, for the first time, she did not designate, one way or the other whether or not her injury was occupational. Likewise, Dr. Bagley signed this particular work release statement and indicated both "yes" and "no" on whether the condition was due to the patient's employment. Dr. Bagley indicated that it was "pending review" Claimant's Exhibit 2, p. 19-20; Respondent's Exhibit E, pp. 9-10).

19. On March 4, 2015 Dr. Bagley performed surgery on the Claimant's right shoulder. His post-operative diagnosis included:

1. Right shoulder partial thickness rotator cuff tear (high grade).

2. Right shoulder sub-acromial impingement syndrome.

(Claimant's Exhibit 5, p. 64; Respondent's Exhibit C, p. 6).

20. Dr. Bagley saw the Claimant again on April 27, 2015. At that time he commented: "Of note, I do want to clarify that [the Claimant's] rotator cuff injury is very consistent with her line of work. The overhead lifting that she does with the heavy baking trays certainly could cause an injury such as [the Claimant's]. She has a very clear cut rotator cuff tear. The biceps tendon is intact, so again, it is reasonable that she did sustain this injury at work." Dr. Bagley restricted the Claimant from all work and completed a disability form. He restricted all lifting up to her shoulder and all overhead lifting. He noted the overhead lifting restriction will be in effect for six months from the time of surgery (Claimant's Exhibit 5, p. 75). On June 19, 2015, Dr. Bagley reiterated his stance about overhead work, stating, "I am not going to release [the Claimant] to do any overhead work for six months following the surgery. This is non-negotiable" (Claimant's Exhibit 5, pp. 88).

21. On July 2, 2015, Dr. Bagley notified the Claimant that he was moving out of state and that her follow up care would be with one of Dr. Bagley's colleagues. Dr. Bagley noted that he tentatively anticipated that the Claimant may be able to return to work in September, but cautioned that, "this is just an estimation" and indicated that the Claimant "may be unable to do over head work for a year following her surgery" (Claimant's Exhibit 5, pp. 96-97 and 100).

22. The Claimant continued treating with Cornerstone until she was discharged from orthopedic care. At that time, the Claimant testified that she needed to obtain another three day work release. She went to Dr. Keahey for a work release. The Claimant testified that Dr. Keahey did not do occupational medicine. Dr. Keahey confirmed in his deposition that "we don't have any occupational specialist here, so she was referred outside of our clinic." Dr. Keahey referred the Claimant to Dr. David Yamamoto on October 13, 2015 (Tr. of Deposition of Dr. Keahey Deposition, p. 22).

23. The Claimant testified that she saw Dr. Yamamoto and he provided continued work restrictions that she turned in to her Employer on October 28, 2015. The Claimant testified as of the date of the hearing, November 4, 2015 that she was still physically unable to perform her pre-injury duties as a baker or an icer.

24. Michael Busby, the Assistant Manager at the Claimant's store, testified that he was alerted in May of 2015, for the first time, that the Claimant was making a claim for workers' compensation. Mr. Busby testified that he and other supervisors and employees were aware that the Claimant had right shoulder problems and had not been able to work. However, it was his understanding that this was a non-occupational condition. Mr. Busby testified that he received a call and was yelled at because a claim was filed with the State and the Employer's store had not submitted a Report of Injury form. When he was alerted that the Claimant was making a workers' compensation claim, Mr. Busby went back through the paperwork and found that the Claimant, Dr. Keahey and Dr. Bagley had signed all forms indicating that the Claimant was suffering from a non-occupational condition. He also commenced and investigation and tried to talk to anyone who might have had knowledge of the Claimant's alleged injury. When he spoke with the Claimant's direct supervisor, she did not advise Mr. Busby about the text messages between the Claimant and her, only that the Claimant had reported her shoulder hurting. Mr. Busby also testified that he spoke with Carmelita Tsosie, but she did not tell him that she had heard anything about the Claimant's injury at that time.

25. Mr. Busby further testified that he and the Store Manager were the individuals to whom employees were to report workers' compensation claims. He noted that the Claimant had had a prior workers' compensation claim when she had been bitten by a bat. He remembered sitting down with the Claimant and explaining to her that she had to report all workers' compensation injuries to him, as the Assistant Store Manager, or to the Store Manager. Mr. Busby explained to the Claimant that an injured worker has to go see a workers' compensation physician and advised the Claimant of the panel of physicians utilized by Respondent, when they were discussing

this bat bite. He testified that he did not understand why he was not contacted before May of 2015, if the Claimant was off work and making a workers' compensation claim for an incident that happened five and a half months before.

26. Mr. Busby prepared an Employee Incident Questionable Claim Form dated May 27, 2015. In this form Mr. Busby provides a summary of the paperwork the Claimant completed to obtain medical leave and he notes that on multiple occasions the Claimant indicated her injury was "non-occupational" until changing the status to occupational on paperwork dated April 27, 2014. Mr. Busby also incorrectly noted that the Claimant had only complained to her supervisor of shoulder pain over time going on for months and that the Claimant never once mentioned that the shoulder condition was a work injury and never reported it as such to the Employer. These statements are contradicted by the series of text messages between the Claimant and her supervisor on December 7, 2014 and December 9, 2014.

27. On May 28, 2015, Respondent filed a Notice of Contest on the grounds that the Claimant's injury was not work related.

28. On cross-examination and on rebuttal, the Claimant testified about her prior worker's compensation claim which involved an incident where a bat attacked her while she was on a lunch break. The bat landed on her and attached itself to her backside. She reported this to her supervisor. A number of days later, other co-workers saw reports on TV about rabid, aggressive bats in Adams County and the Claimant went to Vista Hospital and was started on rabies shots which made her sick. Although reported as a worker's compensation claim, the Claimant didn't see worker's compensation physicians, but rather had appointment with an infectious disease doctor on referral from the ER doctors and obtained additional advice from a nurse practitioner at the Little Clinic. The Claimant testified credibly that based on that prior claim, she was not very familiar with the requirements and process of a worker's compensation claim.

29. In resolving the conflicts in testimony between the Claimant and Mr. Busby regarding the Claimant's report of an injury and when Employer should have been aware that the Claimant sustained a work related injury, the ALJ finds that Mr. Busby did not appear to have all of the pertinent information initially and at the time he prepared his May 27, 2015 report. He did not initially have access to the text messages between the Claimant and her immediate supervisor, nor did he have accurate and complete information regarding the actual knowledge of Ms. Tsosie as to the events of December 6, 2014 and Claimant's shoulder condition after an incident that day. The testimony of the Claimant as to the onset of her shoulder condition, the cause of the shoulder condition, and her reporting of the shoulder condition, is supported by the medical records, the contemporaneous text messages between the Claimant and her supervisor and the credible and persuasive testimony of Ms. Tsosie. Thus, the Claimant's testimony is found as fact on these issues. While there is evidence that the Claimant initially made efforts to keep her shoulder injury from being treated under the

worker's compensation system, this does not change the fact that the Claimant sustained a work injury on December 6, 2014 and that she reported the injury and her evolving condition to her supervisor from December 7, 2014 to December 9, 2014.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury or illness have its origins in an employee's work-related functions. There is no presumption than an injury or illness which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones,* 688 P.2d 1116 (Colo. 1984); *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, supra.

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

With respect to the factual testimony and evidence regarding the Claimant's mechanism of injury, the ALJ found the Claimant's testimony to be credible and further found that the medical records, the text messages between the Claimant and her supervisor, and the testimony of a co-worker Ms. Tsosie support the finding that the Claimant suffered an injury to her right shoulder on December 6, 2014 while lifting and cleaning screens.

Prior to her injury, the Claimant testified credibly that her right shoulder had begun to bother her in September or October, 2014. She testified that in November, 2014 her Employer had a large holiday event attended by multiple employees and management from other Employer shops so they can see what will be available in stores over the holidays. In preparation for this event, the Claimant had to ice up to 3,000 donuts and 160 cakes per day. The Claimant testified that her shoulder pain increased beginning in November and that she had to work multiple days in a row with only a single break day in between, instead of her usual two-day break.

However, it is more likely than not that, after experiencing a worsening of her pre-existing condition over the months leading up to December 6, 2014, the Claimant sustained an acute injury while lifting icing screens from one sink to the next when she felt and heard a pop in her right shoulder. The Claimant was lifting these icing screens as part of her required job duties as a baker and icer. The Claimant reported the popping sensation to the North Suburban emergency room personnel on December 7, 2014, as well as to Dr. Keahey and Dr. Keahey's nurse on December 9, 2014. Additionally, the Claimant's witness, Carmalita Tsosie, actually heard the Claimant's shoulder pop on the date and time of the injury. After experiencing the pop in her shoulder, it felt weaker than before. The Claimant testified that before her shoulder popped she had been able to lift 3 of the icing screens at a time from one sink to the next, but after her shoulder popped that she was only able to lift 1 at a time. Likewise, before her injury the Claimant had been able to lift buckets full of icing by herself, but afterwards she needed the help of her co-worker, Ms. Tsosie.

As a result of her right shoulder injury, the Claimant was restricted from returning to work by her physicians and was restricted from any overhead work for a significant period of time. The Claimant required conservative medical care and then ultimately, underwent surgery for her right shoulder condition. The Claimant testified credibly that, as of the date of the hearing, she still would be unable to return to her full job duties.

Much has been made of the fact that the Claimant initially sought to proceed with medical treatment outside of the worker's compensation system and that in order to obtain 3-day leave approvals and short term disability benefits, she and her physicians checked form boxes indicating that the Claimant's right shoulder condition was not work related. However, the evidence viewed as a whole, and set forth in greater detail above in the Findings of Fact, nevertheless, supports a finding that the condition was work-related and that the Claimant sustained a compensable work injury on December 6, 2014.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that her work activities on December 6, 2014 caused or permanently aggravated, accelerated or combined with her preexisting shoulder condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits-Authorized and Reasonable & Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. The employer's duty to provide designated medical providers is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

However, respondents may by their conduct or acquiescence waive the right to object to a change of physician. A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial*

Commission, 701 P.2d 168, 170 (Colo. App. 1985); *Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990); *Rogers v. Industrial Claims Appeals Office*, 746, 565 (Colo. App. 1987); *Cabela v. ICAO*, 198 P. 3d 1277 (Colo. pp. 2008); *Roybal v. University of Colorado Health Sciences Center*, 768 P .2d 1249 (Colo. App. 1988).

Authorized providers also include those medical providers to whom an authorized treading physician ("ATP") refers a claimant in the normal progression of authorized treatment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

Additionally, in an emergency situation, an employee need not give notice to the employer nor await the employer's choice of a physician before seeking medical attention. A medical emergency allows an injured party the right to obtain treatment without undergoing the delay inherent in notifying the employer and obtaining his referral or approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing medical service and the employer then has the right to select a physician. *Sims v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 777 (Colo. App. 1990).

Awards of emergency medical treatment have been upheld where the claimant's condition was so acute, and the need for treatment so immediate, that the claimant could not reasonably wait for authorization or a hearing to obtain permission for the treatment. See *Lucero v. Jackson Ice Cream*, W.C. No. 4-170-105 (January 6, 1995); *Ashley v. Art Gutterson*, W.C. No. 3-893-674 (January 29, 1992). However, compensable emergency treatment is not restricted to such circumstances. *Lutz v. Western Pacific Airlines, Inc*., W.C. No. 3-333-031 (ICAO, December 27, 1999). There is no precise legal test for determining the existence of a medical emergency. Rather, the question of whether the claimant has proven a bona fide emergency is dependent on the particular facts and circumstances of the claim. The question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case. An ALJ's determination whether there was a bona fide emergency or not will be upheld if supported by substantial evidence. *Hoffman v. Wal-mart Stores, Inc*., W.C. No. 4-774-720 (ICAO, January 12, 2010); *Timko v. Cub Foods*, W. C. No. 3-969-031 (ICAO, June 29, 2005).

As set forth above, the Claimant's work activities of December 6, 2014 aggravated, accelerated or combined with the Claimant's pre-existing right shoulder condition and the Claimant established that a need for medical treatment was proximately caused by an acute injury on that date. The Claimant did not report an injury during that shift, but did begin a series of text messages to her supervisor on December 7, 2014 indicating that she was seeking medical care for her right shoulder at the Emergency Department. The initial series of text messages on December 7, 2014 put the Employer on notice that the Claimant was injured, but not necessarily that the injury was work related. However, in the next series of text messages between the Claimant and her supervisor, it was clear that the injury would require medical treatment and that the injury was likely related to the Claimant's work activities on December 6, 2014. The particular part of the text message exchange that makes this clear is as follows:

> Claimant: Doc called, yep my arm fell off [crying sad face emoji] have an ac separation. 12/9/2014, 3:53 PM
>
> Supervisor: Oh no I'm sorry but that's horrible that probably means you need surgery and at least two months off work? Ouch that must really hurt. 12/9/2014, 3:54 PM
>
> Supervisor: Just out of curiosity do they know what caused it 12/9/2014, 4:09 PM
>
> Claimant: What I do at work. He said there are two ways for it to happen, to have it yanked out or the slow way, (like mine) till it comes apart. I felt a snap when I was reaching in the sink before I left work Sat. 12/9/2014, 4:14 PM

The Respondent did not provide the Claimant with medical treatment provider selections as set forth in the Act. Rather, on December 7, 2014 the Claimant first advised her Employer that she was seeking emergency medical treatment for her right shoulder condition. The Claimant completed her shift on December 6, 2014 in spite of an acute onset of increased weakness in her right shoulder. Then, after further aggravating the shoulder as she rolled over while sleeping the night after the shift when her shoulder popped, the Claimant made the decision to obtain emergency treatment and notified her supervisor that she intended to do so. An x-ray was done, which did not identify "acute significant abnormalities" (which were later revealed with an MRI) but the Claimant was diagnosed with a shoulder strain and given a prescription for her pain and advised to follow-up with her PCP.

The Claimant followed up with Dr. Keahey and later Dr. Bagley and was diagnosed with a rotator cuff tear and AC joint separation after further diagnostics. She ultimately underwent surgery on March 4, 2015 for her right shoulder condition.

With respect to the visit to North Suburban Emergency Department on December 7, 2014, the ALJ finds that the visit did constitute a bona fide emergency. A Claimant should not fear repercussions for obtaining emergency medical care when there is a reasonable and authentic belief that a medical condition is worsening due to an escalation of symptoms. Here, the Claimant credibly testified regarding an increase in the intensity of the pain and a further weakening of her arm and shoulder. It is reasonable that the Claimant experienced anxiety regarding how her medical condition appeared to be progressing and the ALJ finds this presented a situation that she believed to be a true emergency. In looking at the whole picture over the course of the Claimant's treatment, seeking emergency treatment at North Suburban Emergency Department is found to be reasonable and necessary. This was the one and only emergency care visit over the course of the Claimant's treatment for this work injury and the evidence does not support an inference that the Claimant was attempting to circumvent the workers' compensation scheme to obtain inappropriate treatment or additional medications. The treatment the Claimant received at North Suburban is deemed authorized as emergency treatment under the Act.

Then, on and after December 9, 2014, the Claimant advised her Employer that she was seeking treatment from a physician through her private insurance and seeing an orthopedic specialist to whom she was referred from her private physician. The Respondent did not object to this nor did the Respondent direct the Claimant to a different choice of medical providers. By its conduct and acquiescence in this case, the Respondent gave the Claimant the impression that she was authorized to proceed with seeing her personal physicians for her shoulder condition, the onset of which occurred while performing her work duties. While the Employer may have done so under the impression that this was a private matter and not a workers' compensation matter, the Employer had some knowledge and information that the Claimant performed activities at work that contributed to the Claimant's right shoulder condition. The Respondents failed to designate a provider and they waived the right to object to Dr. Keahey and Dr. Bagley, and referrals from these physicians, as authorized treating physicians in this case.

Dr. Keahey's records reflect that he saw the Claimant for an initial evaluation on December 9, 2014. The medical record reports "…onset of right shoulder pain over the weekend, 3 days previously. She works in a bakery, pouring, stirring and lifting frequently. She denies any acute injury, but pain that began rather abruptly while at work." Dr. Keahey testified in his deposition that he also asked for an x-ray at this visit "because shoulder separation is often missed on plain films. Although the Claimant had reported to Dr. Keahey that the x-rays from the ER were normal and the x-rays requested by Dr. Keahey showed the AC separation. Dr. Keahey gave the Claimant a diagnostic injection which caused a significant improvement in symptoms. Dr. Keahey testified in his deposition that if a person has "increasing shoulder pain for months before but it abruptly worsens on particular day at work that that would indicate an acute incident." He further testified that in his records when he says: "That she denies acute injury, I am stating that she did not have a fall or something fall on her or some serious injury of that sort. I'm not – that does not mean there was not an abrupt on-set of pain in my nomenclature."

On December 22, 2014 pursuant to the referral from Dr. Keahey, the Claimant was seen by Dr. Michael Bagley at Cornerstone Orthopedic and Sports Medicine. Dr. Bagley noted in his report that the Claimant had a "mild to moderate AC joint separation per x-ray…this is not surgical." The Claimant next saw Dr. Bagley at Cornerstone a month later on January 22, 2015. At that time Dr. Bagley noted "Rotator cuff tear. Certainly, within the differential diagnosis to the right-sided rotator cuff tear given the fact that [the Claimant] temporarily did well with the cortisone shot and she has rotator cuff weakness." Dr. Bagley referred the Claimant for an MRI of the right shoulder. On February 12, 2015 Dr. Bagley noted that the Claimant's right shoulder pain "occurs constantly and is worsening….the pain is aggravated by lifting and movement. The pain is relieved by rest and sling." He further noted that the Claimant "cannot work at all as a baker. This really is a disabling type of injury including both pain and weakness." On that same date, February 12, 2015, the Claimant filled out an additional Employer three day or more sick pay request. In this request, for the first time, she did not designate, one way or the other whether or not her injury was occupational. Likewise, Dr. Bagley signed this particular work release statement and indicated both "yes" and "no" on whether the condition was due to the patient's employment. Dr. Bagley indicated that it was "pending review."

On March 4, 2015 Dr. Bagley performed surgery on the Claimant's right shoulder. His post-operative diagnosis included: (1) Right shoulder partial thickness rotator cuff tear (high grade) and (2) Right shoulder sub-acromial impingement syndrome.

Dr. Bagley saw the Claimant again on April 27, 2015. At that time he commented: "Of note, I do want to clarify that [the Claimant's] rotator cuff injury is very consistent with her line of work. The overhead lifting that she does with the heavy baking trays certainly could cause an injury such as [the Claimant's]. She has a very clear cut rotator cuff tear. The biceps tendon is intact, so again, it is reasonable that she did sustain this injury at work." Dr. Bagley restricted the Claimant from all work and completed a disability form. He restricted all lifting up to her shoulder and all overhead lifting. He noted the overhead lifting restriction will be in effect for six months from the time of surgery. On June 19, 2015, Dr. Bagley reiterated his stance about overhead work, stating, "I am not going to release [the Claimant] to do any overhead work for six months following the surgery. This is non-negotiable."

On July 2, 2015, Dr. Bagley notified the Claimant that he was moving out of state and that her follow up care would be with one of Dr. Bagley's colleagues. Dr. Bagley noted that he tentatively anticipated that the Claimant may be able to return to work in September, but cautioned that, "this is just an estimation" and indicated that the Claimant "may be unable to do over head work for a year following her surgery." The Claimant continued treating with Cornerstone until she was discharged from orthopedic care.

At the time she was released from orthopedic care, the Claimant testified that she needed to obtain another three day work release. She went to Dr. Keahey for a work release. The Claimant testified that Dr. Keahey did not do occupational medicine. Dr. Keahey confirmed in his deposition that "we don't have any occupational specialist here, so she was referred outside of our clinic." Dr. Keahey referred the Claimant to Dr. David Yamamoto on October 13, 2015. The Claimant testified that she saw Dr. Yamamoto and he provided continued work restrictions that she turned in to her Employer on October 28, 2015. The Claimant testified as of the date of the hearing, November 4, 2015 that she was still physically unable to perform her pre-injury duties as a baker or an icer.

The ALJ finds that Dr. Keahey, Dr. Bagley (and colleagues at Cornerstone) and Dr. Yamamoto are authorized treating physicians. The conservative medical care and the surgical care that the Claimant received to date from Dr. Keahey, Dr. Bagley, and any referrals, was reasonably necessary to treat the Claimant's work-related condition. The medical records do not indicate that the Claimant's authorized treating physicians have placed the Claimant at MMI or released her to return to work without restrictions. The Claimant testified that she felt the onset of pain immediately at the time her shoulder popped on December 6, 2014 and she still does not feel good. In addition, the Claimant testified that her condition currently would prevent her from performing 100% of her job duties as a baker and icer. The Claimant has established that she is entitled to further evaluation of her right shoulder condition to determine if she requires any additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act.

Temporary Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. § 8-42-103(1)(b), C.R.S. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or

- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

The Claimant's testimony and the Employer records show the Claimant was absent starting December 7, 2014 and that she had not been released to return to work by a treating physician as of the date of the hearing. Her absence was directly attributable to a right shoulder condition caused by her work injury on December 6, 2014. The Claimant's work-related disability resulted in her missing more than 3 work shifts and she has missed work shifts for more than two weeks resulting in a wage loss. Therefore the Claimant is entitled to temporary total disability benefits for the entire time she missed work due to his work injury. The Claimant is entitled to TTD benefits from December 7, 2014 ongoing until one of the occurrences listed in § 8-42-105(3), C.R.S. or by order or otherwise by operation of law.

ORDER

It is therefore ordered that:

1. The Claimant proved that she suffered a compensable work injury on December 6, 2014.

2. Emergency Medical treatment provided by North Suburban Medical Center on December 7, 2014 was reasonably necessary to cure and relieve the Claimant from the effects of her December 6, 2014 work injury and is authorized as emergency medical treatment.

3. Medical treatment provided to the Claimant by Dr. Keahey, Dr. Bagley (and medical professionals at Cornerstone Orthopedics and Sports Medicine), and pursuant to referrals from Dr. Keahey and Dr. Bagley, including Dr. Yamamoto, is authorized treatment because the right to select a physician passed to the Claimant due to Respondent's failure to provide a designated list of physicians and due to Respondent's acquiescence to the Claimant proceeding with medical treatment in the manner that occurred in this case. Respondent shall be liable for payment for this medical treatment in accordance with the Medical Fee Schedule and the Act.

4. The Claimant is entitled to further medical benefits to treat her right shoulder condition and associated symptoms which are causally related to the December 6, 2014 work injury, if any, as determined by her authorized treating physicians, and the Respondent is responsible for

payment for such treatment in accordance with the Medical Fee Schedule and the Act.

5. The Claimant's AWW, per stipulation of the parties, which was approved by the ALJ, is $591.11 and her corresponding TTD rate is $394.07 per week.

6. Respondents shall pay Claimant temporary total disability benefits for the period of December 7, 2014 ongoing until one of the occurrences listed in § 8-42-105(3), C.R.S. or by order or otherwise by operation of law.

7. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein are reserved for future

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 8, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-984-303-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 13, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 1/13/16, beginning at 1:30 PM, and ending at 3:30 PM).

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection. Respondents' Exhibits A through Q were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents. It was filed, electronically, on January 19, 2016. Claimant was given 2 working days within which to file objections. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns the reasonable necessity of an arthroscopic decompression of the Claimant's right shoulder, originally recommended by Mark S. Failinger, M.D., the Claimant's authorized treating physician (ATP).

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant, a 55 year old male, suffered an admitted injury on May 13, 2015 when he was struck from behind by a cart stacked with bags of flour.

2. The Respondents filed a General Admission of Liability (GAL) on June 10, 2015. The GAL remains in full force and effect.

3. According to the Claimant, he has had intense pain in his right shoulder since the date of injury.

4. The Claimant stated that he wished to proceed with the arthroscopic decompression that was requested by Dr Failinger,

Reasonable Necessity, or Lack Thereof Regarding Recommended Surgery

5. On August 21, 2015, James P. McElhinney, M.D., performed a physician advisor staffing to review the surgery request. Dr. McElhinney reviewed the Claimant's MRI (magnetic resonance imaging) and noted that the Claimant had no rotator cuff tear and his biceps tendon was normal. Dr. McElhinney concluded that the surgery should be denied until Dr. Failinger was able to explain why the surgery was necessary when there was minimal pathology on the MRI.

6. Pursuant to Dr. McElhinney's opinion, surgery was denied by the insurance carrier as not being reasonable or necessary.

7. Jon M. Erickson, M.D., performed an independent medical exam (IME) of the Claimant on November 5, 2015. In his report, Dr. Erickson noted that surgery was unlikely to relieve the Claimant's pain. Specifically, Dr. Erickson noted that the Claimant's MRI showed no evidence of significant pathology and revealed no surgical lesions. Dr. Erickson stated in his report that if the Claimant had some pathology in his shoulder, the diagnostic injections performed on June 24, 2015 and July 8, 2015, should have provided him with some relief from his pain.. Instead, the Claimant received no pain reduction whatsoever, which seriously called into question the true pain generator

in the Claimant's case, according to Dr. Erickson. Dr. Erickson noted that the Claimant's formal pain presentation was not consistent with his informal pain presentation when he no longer thought that he was being evaluated. Cumulatively, Dr. Erickson stated that there were no findings suggesting that the Claimant's shoulder was the source of his pain.

8. Dr. Erickson testified at hearing, on behalf of Respondents, consistently with his report, that the arthroscopic decompression was not reasonably necessary.

9. Dr. Feininger wrote a second report on December 16, 2015 addressing the reasonableness and necessity of the arthroscopic decompression. In that report, Dr. Feininger stated:

> Surgery certainly does not have a high probability of helping the patient. The notes by Dr. McElhinney and Dr. Erickson are correct in that, if a patient receives little relief form a subacromial injection, the odds of surgery helping are significantly decreased and the patient's pain, from the beginning, has been out of proportion from one would expect given the MRI findings. There are no obvious tears that I could determine. This does not automatically preclude a patient from surgery, though, but, one would like to see some results in the immediate post-injection period following injection with an anesthetic to see if there is any improvement to determine whether or not a decompression would be of help. It is not rare that other findings are present sometimes, but, I would agree that it is NOT WITH MEDICAL PROBABILITY that any biceps pathology, major labral pathology, or rotator cuff pathology would be found.
>
> I do not see any specific lesions that would account for the patient's pain, which I believe require surgical repair. The surgical procedure is for an arthoroscopic decompression to see if that would help the patient, but, I do not expect to find biceps pathology, major labral pathology, or rotator cuff pathology that has to be 'repaired.'
>
> I do agree with Dr. Erickson that the MRI does not show a full-thickness tear as I noted in my notes as well…
>
> The patient certainly has pain out of proportion to the findings on the MRI and, therefore, a chronic pain disorder could be possible. When a patient's pain description and symptomatology far exceed that of what we see on the MRI,

> either the MRI is totally wrong, which is with low medical probability, or, the patient has a different perception of pain and I believe that is likely the case here.

10. The Claimant was not aware of Dr. Failinger's December 16, 2015 report or the opinions contained therein. The Claimant stated that the last time he spoke with Dr. Failinger was on August 5, 2015. Nonetheless, the Claimant still wanted to proceed with the surgery after being presented with Dr. Failinger's opinion from his December 16, 2015 report. Based upon Dr. Failinger's latest report, the reasonable necessity of the recommended surgery has **not** been proven by preponderant evidence.

11. Dr. Erickson stated that Dr. Failinger provided a compelling argument as to why the surgery requested by the Claimant is not reasonable or necessary. Dr. Erickson further reiterated in his testimony at hearing that the Claimant's shoulder MRI did not show any surgical lesions and that the Claimant's non-diagnostic response to shoulder injections further supported the fact that the Claimant's shoulder was not his pain generator. Dr. Erickson testified he was not sure why Dr. Failinger originally recommended surgery, but he agreed with Dr. Failinger's subsequent findings contained in the December 16, 2015 report.

12. This ALJ took administrative notice of the Division of Workers' Compensation Medical Treatment Guidelines (hereinafter "Guidelines") as they related to invasive treatment of the shoulder. Dr. Erickson testified that the Claimant does not meet the requirements of the Guidelines to qualify for an invasive shoulder procedure, and the ALJ so finds.

ULTIMATE FINDINGS

13. The ALJ finds the opinions in Dr. Failinger's December 16, 2015 report more credible and persuasive than opinions expressed in his previous reports. Further, the ALJ finds the opinions of Dr. Erickson and Dr. McElhinney credible, persuasive, and corroborative of the opinions in Dr. Failinger's December 16, 2015 report.

14. Although Dr. Failinger originally recommended the surgery, his most recent reports do not support the contention that the surgery is reasonable or necessary. Rather, the ALJ finds that Dr. Failinger has provided the Claimant with an option to proceed with surgery while taking pains to note that there is no shoulder pathology which is known, or likely to be found in an exploratory surgery --that would benefit the Claimant. Dr. Failinger clearly stated that he does not believe that surgery has a high probability of relieving the Claimant's complaints of pain, which he noted were out of proportion to objective findings. Dr. Erickson also found that the Claimant's condition is not supported by any objective findings such as surgical lesions in the MRI or positive diagnostic injections. Dr. Erickson further detailed how, in the absence of any known pathology or diagnostic response to treatment, the Claimant is not a candidate

for the requested surgery in accordance with the Division of Workers' Compensation Medical Treatment Guidelines. This is consistent with the conclusions of Dr. Failinger, as discussed in his December 16, 2015 letter. Dr. Erickson's conclusions are fully supportive of Dr. Failinger. There is no contrary medical opinion in the record that the requested surgery is medically reasonable or necessary. Indeed, the Claimant cannot have surgery on the insurance carrier's "nickel" just because he wants the surgery. Ordinarily, surgeons perform surgery that is medically warranted, and not based on the personal preferences of the patient, especially when the surgery is unlikely to offer relief.

15. Based on substantial evidence, the ALJ makes a reasonable choice to accept Dr. Failinger's latest opinions and the opinions of all other physicians, which are in evidence, and to reject Dr. Failinger's earlier opinions.

16. The Claimant has failed to prove, by a preponderance of the evidence that the arthroscopic decompression of his right shoulder is reasonably necessary.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions in Dr. Failinger's December 16, 2015 report were more credible and persuasive than opinions expressed in his previous reports. Further, as found, the opinions of Dr. Erickson and Dr. McElhinney were credible, persuasive, and corroborative of the opinions in Dr. Failinger's December 16, 2015 report. Indeed, in the final analysis, all opinions including Dr. Failinger's latest opinion are undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, , the ALJ made a reasonable choice to accept Dr. Failinger's latest opinions and the opinions of all other physicians, which are in evidence, and to reject Dr. Failinger's earlier opinions.

Reasonable Necessity of Arthrosopic Decompression

c. Section 8-42-101 (2) (a) , C.R.S., provides that Respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of a compensable injury. Medical treatment must be reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d

777 (Colo. App. 1990). As found, the recommended arthroscopic decompression is not reasonably necessary to cure and relieve the effects of the Claimant's admitted injury.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain his burden with respect to the reasonable necessity of the arthrosopic decompression of the right shoulder.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The request for authorization of the requested arthroscopic decompression, originally recommended by Mark S. Feininger, M.D., is hereby denied and dismissed.

B. The General Admission of Liability, filed on June 10, 2015, remains in full force and effect.

C. Any and all issues not determined herein are reserved for future decision.

DATED this______day of February 2016.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of February 2016, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-984-439-02

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury on April 29, 2015.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment for the April 29, 2015 injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary disability benefits from April 29, 2015 through October 31, 2015.

STIPULATIONS

1. Claimant's average weekly wage is $135.63

2. The date of the alleged injury was April 29, 2015 and Claimant reported the alleged injury to Employer on May 2, 2015.

3. The parties reserve the issue of temporary disability benefits from November 1, 2015 and ongoing.

FINDINGS OF FACT

1. Claimant worked for Employer beginning March 26, 2015 in the position of part-time mover/helper.

2. Claimant reported to, called in, or was called by Employer to determine whether or not Employer needed any extra mover/helpers for a given day. If so, Claimant would work. If Employer did not need extra mover/helpers or have jobs for the day, Claimant would not work that day.

3. For the month leading up to the alleged work injury, Claimant worked on average less than 15 hours per week.

4. On April 29, 2015 Claimant was working as a mover/helper at a job site near 8th Avenue and York Street in Denver, Colorado. The job required boxes of belongings to be moved from a storage pod located outside the apartment, through an exterior apartment door into the complex, and then into the customer's apartment.

5. Claimant alleges that as he was walking into the apartment complex through the exterior door, and while carrying boxes, the door closed quickly and a metal bar on the door struck him directly in his lower back.

6. Claimant is between 6'0 and 6'1 inches tall. On the date of the alleged injury Claimant was wearing work boots with a slight heel (undetermined height). The spot where Claimant reported the bar on the door hit his lower back is approximately 40" from the ground. The height of the bar on the door that Claimant reported hit him in the back is between 36" to 37" from the ground.

7. Claimant alleges he felt immediate pain when the metal bar on the door struck his back. Claimant did not report the injury immediately to Employer. Claimant also did not report the injury to his co-worker working on site with him. Claimant's co-worker, Steven Litzinger was not aware of any potential injury to Claimant until several days later when Claimant reported it to Employer and Mr. Litzinger was interviewed.

8. Claimant did not work on April 30, 2015 or May 1, 2015 for reasons unrelated to the injury.

9. On May 2, 2015 Claimant alleges that he woke up with excruciating back pain and believed his injury had become serious. Claimant went in to work and reported his injury to Employer. Claimant was referred for treatment and a first report of injury was filled out.

10. On May 2, 2015 Claimant was evaluated at Concentra by Catherine Hunt, PA-C. Claimant reported that he was carrying a box at work when a door swung shut and the bar on the door struck his lower back. Claimant reported he did not feel any pain until 12 hours later. Claimant denied prior back injuries. Claimant reported having lower back pain with occasional pain radiating into his left thigh. A lumbar x-ray performed that day showed no evidence of acute injury or significant degenerative change. PA Hunt assessed lumbar pain and Claimant was provided work restrictions of no lifting, pushing, or pulling more than 20 pounds and was referred for physical therapy. *See* Exhibit 6.

11. On May 5, 2015 Claimant was evaluated at Concentra by Diane Adams, D.O. Claimant reported continued back pain in the left low back and left sacroiliac region with improving symptoms. Dr. Adams noted no bruising or contusions on Claimant's lumbar spine. Dr. Adams assessed lumbar pain and changed Claimant's work restrictions to allow up to up to 50 pounds of lifting and up to 30 pounds of pushing and pulling. *See* Exhibit 6.

12. On May 6, 2015 Claimant had his first physical therapy appointment. Claimant reported a bar from the door hit him in the left lower back and that he had numbness and tingling down the left lower extremity. Claimant reported having

previous right-sided sciatic nerve irritation approximately two years prior. *See* Exhibit 13.

13. On May 20, 2015 Claimant underwent an MRI of his lumbar spine that was interpreted by Charles Wennogle, M.D. Dr. Wennogle provided an impression of L2-L3, L3-L4, L4-L5, and L5-S1 disc degeneration; L3-L4 mild bilateral lateral recess and foraminal stenosis; L4-L5 moderate bilateral lateral recess and mild bilateral foraminal stenosis with contact of bilateral descending L5 nerve roots; L5-S1 broad based disc bulge and right focal paracentral annular tear causing mild right lateral recess stenosis with minimal contact of the descending right L5 nerve root; and a 6 mm cauda equine nodule. Dr. Wennogle noted no acute fracture or marrow edema. *See* Exhibit 7.

14. On May 24, 2015 Claimant worked 4 hours of modified duty within his work restrictions. Claimant also worked 4.25 hours within his restrictions on June 7, 2015. Thereafter, Claimant stopped showing up, calling in, or checking with Employer to see if work was available. Claimant did not offer a clear explanation as to why he stopped reporting to work or stopped calling in to see if work was available. Employer's general manager, Victor Davanzo reported that modified duty work remained available to Claimant and also could not explain why Claimant stopped reporting or calling in to work.

15. On May 26, 2015 Claimant was evaluated at Concentra by Allison Hedien, N.P. Claimant reported pain that was the same, mostly in the lower back with numbness in the anterior thigh. NP Hedien assessed radiculopathy and lumbar strain and referred Claimant to a physiatrist spine specialist to discuss the lumbar MRI and possible procedures. *See* Exhibit 6.

16. On June 10, 2015 Claimant underwent a follow up lumbar MRI interpreted by Dr. Wennogle. Dr. Wennogle noted the MRI was with contrast compared to the May 20, 2015 MRI without contrast to follow-up the cauda equine nodule. His impression was a 7 mm well circumscribed uniformly and avidly enhancing mass involving the right cauda equine at the L1 level, most likely schwannoma versus ependymoma or other less likely etiologies. *See* Exhibit 7.

17. On June 16, 2015 Claimant was evaluated by Scott Primack, D.O. Claimant reported carrying a box when a door swung and shut and hit him squarely on the back. Claimant reported pain with occasional symptoms down his left thigh. Claimant reported no prior problems with his lumbar spine. Dr. Primack noted that Claimant had a non work related mass at the cauda equine, that Claimant had some discogenic pain at L4-L5 and to lesser degree at L5-S1, and that Claimant had discomfort at the left lower extremity worse than on the right lower extremity. Dr. Primack explained to Claimant that he would need to see a neurosurgeon for the non work related mass at the cauda equine. Dr. Primack noted that Claimant did have work related discogenic low back pain. *See* Exhibit 11.

18. On July 16, 2016 Claimant underwent an independent medical examination performed by Anjmun Sharma, M.D. Claimant reported that while carrying a box, a door swung shut on his back, and a metal bar hit his low back. Claimant reported that he did not feel pain until 12 hours later and that he had pain and occasional tingling radiating to his left thigh. Dr. Sharma reviewed Claimant's medical records and MRI reports. Dr. Sharma opined that Claimant's current medical conditions were not a direct result and were not causally related to the work injury that occurred in April 2015. Dr. Sharma noted that Claimant's mass in the lower back needed to be evaluated by a neurosurgeon and may be the reason why Claimant was having symptoms. Dr. Sharma opined that there was no evidence suggesting that the current medical conditions Claimant had were related to a simple contusion or injury where a bar hit the lower back. Dr. Sharma did not recommend any additional treatment and noted that Claimant should follow-up with his primary doctor. Dr. Sharma noted that Claimant should limit a lot of repetitive lifting, carrying, pushing, and pulling that he had been doing over a number of years that invariably has led to Claimant's ongoing chronic medical condition and chronic degenerative disc disease presently in his back. Dr. Sharma found no evidence of causal relation or aggravation of the underlying problem as a result of the work injury. *See* Exhibit 12.

19. On August 7, 2015 Claimant underwent physical therapy at Rose Medical Center with Elizabeth Bunge, DPT. Claimant reported a work injury when he pushed back against a door to open it while carrying three boxes. Claimant reported that his symptoms began 12 hours later as low back pain and progressed to lower extremity pain.

20. On August 28, 2015 Claimant was evaluated at Western Neurological Group by Stephen Johnson, M.D. Claimant reported left low back and left leg pain after an accident at work where a bar on a door struck him in the low back area. Claimant reported that approximately 12 hours later he noted increased symptoms. Dr. Johnson noted that the MRI report from May 20, 2015 discusses some degenerative changes of discs but no clear evidence of significant stenosis or disc herniation. Dr. Johnson also noted that the MRI of June 10, 2015 noted the small tumor with differential diagnoses including schwannoma. Dr. Johnson assessed benign nerve sheath tumor at the L1 level not likely related to Claimant's recent back trauma and probably not related to Claimant's left leg pain symptoms and a history of low back and left leg pain following a work related accident. Dr. Johnson noted he was not certain as to the etiology of persistent back and left leg symptoms but did not feel that they were likely related to the intradural tumor. Dr. Johnson noted that he felt the L1 intradural tumor was likely asymptomatic and probably not related to claimant's low back and left leg pain. Dr. Johnson also noted that at present, he did not see evidence of significant disc herniation or spinal stenosis. *See* Exhibit 10.

21. On September 15, 2015 Dr. Sharma provided an updated report. Dr. Sharma noted that he had reviewed a video of the door and the bar that Claimant alleges caused his injury, interrogatories the Claimant answered, and an audio tape of conversation with Mr. Litzinger who was working with the Claimant on the alleged date

of injury. Dr. Sharma noted that Mr. Litzinger knew nothing about the alleged injury until several days later when Claimant filed a claim. Dr. Sharma noted that the bar is 36 inches from the ground and that Claimant is 6 feet tall. Dr. Sharma noted due to the door and bar height it was hard to say that Claimant would have been injured in the lumbar spine by the bar and opined that it was unlikely that the bar would have hit Claimant in the lumbar spine as Claimant alleges. Dr. Sharma opined that Claimant did not have work related discogenic back pain. Dr. Sharma did not believe that there was a work related injury. Dr. Sharma opined that discogenic pain would not even be remotely founded with result of a bar hitting the Claimant's lower back, even assuming it did hit the lower back and opined that discogenic pain is a chronic degenerative process. *See* Exhibit N.

22. On September 17, 2015 Dr. Primack provided an updated report. Dr. Primack noted that it was interesting that Mr. Litzinger knew nothing about Claimant's alleged work injury. Dr. Primack noted that with Claimant's height and the height of the bar on the door, the bar would never have hit Claimant in the back. Dr. Primack opined that after reviewing surveillance video of the door and Claimant's history, that there was an obvious discrepancy. Dr. Primack opined that the bar did not hit Claimant in the back and would not have caused work-related discogenic pain. Dr. Primack opined that Claimant's diagnoses were non work-related and were not aggravated, accelerated, intensified, or caused by a bar hitting Claimant. Dr. Primack opined that there was no specific work injury. *See* Exhibit O.

23. At hearing, Dr. Sharma testified consistent with his written reports and opinions. Dr. Sharma noted that there were no medical records indicating that Claimant had immediate pain when the bar to the door hit him. He also pointed out that there were no records indicating Claimant was bent over or hunched over when the bar hit him. Dr. Sharma agreed with Dr. Primack's opinion that the diagnoses were not work related and were not aggravated, accelerated, intensified, or caused by the bar hitting Claimant in the back. Dr. Sharma noted that in his initial report he did not believe there were work related injuries and after reviewing further information including the door height, interview of Mr. Litzinger, etc. it only reinforced his original opinion that no work related injury was suffered by Claimant.

24. Dr. Sharma's opinions are found credible and persuasive. His opinions are consistent with those of Dr. Primack and are supported by the great weight of credible evidence presented in this case.

25. Claimant's testimony, overall, is not found credible or persuasive. Claimant has presented with several inconsistencies. Claimant testified at hearing that he had immediate pain in his lower back when the bar struck him, but reported to several medical providers that he did not have pain until 12 hours later. Claimant's co-worker also was unaware of any injury or pain despite working with Claimant on the moving job where Claimant alleges the injury occurred. Claimant reported to physical therapy that he had prior right sided sciatic nerve pain in his lower back two years prior, yet denied to multiple providers that he had any prior lumbar spine issues or injuries.

There also are inconsistencies between the height of the door's bar and the spot where Claimant indicated it struck him.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See* § 8-41-301(1)(b), C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

An accident “arises out of” employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury on April 29, 2015 that arose out of and occurred in the course of his employment. Claimant’s testimony, as found above, is not credible or persuasive. Claimant provided inconsistent information as to when he first began experiencing pain following his alleged injury. He testified his pain was immediate, yet reported to various providers that it began approximately 12 hours later. His co-worker was unaware of any potential injury despite working on the same moving job with Claimant. The height of the bar on the door also would not logically have struck Claimant in the location Claimant alleges. Further, both medical experts examining the case opined credibly that Claimant did not suffer a work-related injury and provided persuasive causation analyses. In weighing all the evidence, the Claimant has failed to meet his burden to show he suffered from a work related injury on April 29, 2015.

Medical Benefits

Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S. (2014); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant’s entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S.

Claimant has failed to establish a causal relationship between his current symptoms and diagnoses and any work related injury. As he has failed to establish that he suffered from a work related injury, the Respondents are not liable for medical treatment or medical benefits sought by Claimant.

Temporary disability benefits

To obtain temporary disability benefits, a claimant must establish a causal connection between a work-related injury and a subsequent wage loss. *See* § 8-42-103(1)(a), C.R.S. As found above, Claimant has failed to establish that he suffered a work related injury. Therefore, any wage loss subsequent to April 29, 2015 is not causally related to a work injury and Claimant has failed to establish an entitlement to any temporary disability benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden of proof to establish that he suffered a compensable injury on April 29, 2016.

2. Claimant is not entitled to medical treatment and is not entitled to any temporary disability benefits.

3. The claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 24, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right upper extremity arising out of and in the course of her employment with Employer on March 23, 2015.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits and that treatment she received was reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

FINDINGS OF FACT

1. The Claimant has worked for Employer for over 15 years as a circulation clerk at one of its branch libraries. Her job duties include general clerical duties, typing, answering phones, creating library cards, faxing, checking in and checking out books, sorting and shelving holds, and working with the after school teen activities.

2. The Claimant testified that she has a prior work related injury to her right upper extremity from repetition work with returning and checking out books. She testified that the prior injury occurred in the spring of 2014, she treated with Dr. Chan, and she was placed at maximum medical improvement in the fall of 2014. She testified that she had no permanent work restrictions after being placed at MMI for the prior injury and was able to perform her regular job duties. In addition, on cross-examination, the Claimant testified that prior to her 2014 injury, she had also treated with Dr. Chan for carpal tunnel syndrome with respect to her right wrist and hand. The Claimant's testimony regarding her prior right upper extremity injury and conditions is consistent with the medical records in evidence in this case (see below), and is found as fact.

3. On April 18, 2014, the Claimant reported a work injury involving her right wrist when she felt a pop and then pain after grabbing a multiple disk audio book (Claimant's Exhibit 6; Respondent's Exhibit D).

4. The Claimant was first evaluated at Concentra for the April 18, 2014 injury on that same date. The Claimant was provided temporary work restrictions and medication was prescribed (Respondent's Exhibit G, pp. 38-39). The Claimant saw Dr. Stephen Danahey for this injury on April 29, 2014 and he noted tenderness and weakness on the right and left wrist but swelling only on the right wrist. He also noted that since her initial injury and evaluation, the Claimant was now reporting right and left wrist and elbow pain. He continued the Claimant's work restrictions and added that she was to avoid repetitive bilateral wrist motion. He also provided the Claimant with medications (Respondent's Exhibit G, pp. 36-37).

5. The Claimant was initially evaluated by Dr. Chan for the prior 2014 work injury on June 4, 2014 and he diagnosed her with tenosynovitis. He noted that he had previously treated the Claimant about six years prior and later placed her at MMI. At this visit, Dr. Chan noted no evidence of carpal tunnel syndrome or ulnar entrapment neuropathy (Respondent's Exhibit J, pp. 58-59). By July 10, 2014, Dr. Chan noted that the Claimant's pain complaints were reduced and she no longer used medications and had returned to work on a full-time, full-duty basis. He recommended only the consideration of 4 additional acupuncture sessions as medical maintenance (Respondent's Exhibit J, pp. 46-47).

6. On September 19, 2014, Dr. Danahey noted that she had treated with Dr. Davis and had received another cortisone injection to the lateral elbow 10 days prior. While the Claimant still had some hand pain with stapler use on a repetitive basis, she reported doing very well otherwise. Dr. Danahey released the Claimant from care for this claim and placed her at MMI. She received no permanent work restrictions and returned to work full duty, full time (Claimant's Exhibit 7; Respondent's Exhibit G, pp. 31-32).

7. The Claimant testified that on March 23, 2015, she and another circulation clerk were in the process of working with a large donation of fabrics that had just come in when the Claimant stopped working on that project to set up the community room where this library branch holds an after school teen program. She testified that she had to set up the tables in the room and pull chairs that were stacked on a cart down. This required grabbing the chairs, lifting them over her head and then pulling them off the rack. The Claimant then set the chairs down by the tables and around the gaming area. About half-way through taking the chairs down on March 23, 2015, the Claimant testified that her arm started really burning and getting hot. Her right elbow hurt the worst, but she also had pain in her upper back and shoulders. The Claimant completed the room set up duties from approximately 2:00pm – 2:30pm and then the kids come in after school from approximately 3:00pm – 5:00 pm. On cross-examination, the Claimant clarified that the activity of taking the chairs down actually takes 10-15 minutes but when you include the set up of the room with the tables that accounts for the additional time in the 2:00 – 2:30 time frame. The Claimant continued to work after setting up the community room for the teen program and then after the work day was over, she went home and took a Motrin and rubbed and massaged the affected areas. The Claimant's testimony regarding her work activities and mechanism of injury on March 23, 2015 is credible, consistent with her reports to medical providers and evaluators, and is found as fact.

8. The Claimant testified that she was still not feeling great, but went in to work the next morning as usual. When the Claimant realized that she was not feeling any better, she reported this to her supervisors Jennifer Frick and Lisa Cole. Ms. Frick had the Claimant call the "Ouch Line" and after providing information, the Claimant was directed to see one of the doctors and the Claimant chose to see Dr. Danahey at Concentra. The Claimant testified that in addition to treating with Dr. Danahey, she was also referred to Dr. Davis, one of the specialty doctors at Concentra, and he

recommended a platelet rich plasma (PRP) injection for her elbow. The Claimant testified that his injection recommendation was never performed and the Claimant's treatment with all physicians stopped sometime in the summer after her work injury, although none of her treating physicians placed her at MMI for this injury.

9. The Claimant saw Dr. Stephen Danahey on March 24, 2015 for evaluation after her March 23, 2015 incident. He noted that The Claimant reported that in December 2014, mild symptoms of right elbow pain had returned with her regular job duties which began to worsen. Then, Dr. Danahey noted that the Claimant reported that on the day of injury, she was pulling down 20-25 chairs from an overhead rack to set up a room for an after school program, this, in addition to sorting and ripping some donated fabric, aggravated her elbow a lot. On examination, Dr. Danahey noted, "R lateral elbow; mod TTP with mild STS and pain with resisted supination. TTP right back trap area with tight trapezius." He assessed the Claimant with lateral epicondylitis and trapezius strain and ordered physical therapy 3 times a week for 2 weeks and indicated he was considering re-evaluation with Dr. Davis who had provided 2 injections to the elbow previously. The Claimant was placed on work restrictions with lifting, pushing and pulling not to exceed 5 lbs. and to avoid repetitive right elbow motion (Claimant's Exhibit 2, pp. 12-14; Respondent's Exhibit G, pp. 28-30). At a recheck visit on April 14, 2015, the Claimant continued to report pain and discomfort in her right lateral elbow which radiates proximally. Dr. Danahey referred the Claimant for an ergonomic review and for an MRI of the right elbow (Claimant's Exhibit 2, pp. 23-26; Respondent's Exhibit G, pp. 22-24).

10. Mr. Scott Washam of Ergonomic Solutions, LLC conducted an Office Ergonomic Worksite Evaluation for the Claimant and prepared a written report dated April 17, 2015. The evaluation set forth the Claimant's job duties as working 3-4 hours at the front circulation desk, 1-2 hours in the work room and 2 hours with the teen program over the course of her work day (Respondent's Exhibit F, p. 13). In considering the Claimant's diagnosis of lateral epicondylitis, and the Medical Treatment Guidelines primary and secondary risk factors, Mr. Washam noted that none of the risk factors for cumulative trauma exist for the Claimant related to her job duties (Respondent's Exhibit F, pp. 14-16). Specifically in relation to the Claimant's job duties for the teen program, Mr. Washam recommended that the Claimant utilize the available folding chairs instead of the stackable chairs for her primary choice of chair and to request assistance for handling the stackable chairs (Respondent's Exhibit F, pp. 17-18).

11. On May 6, 2015, Dr. Danahey noted that the Claimant had an MRI showing "a low grade soft tissue contusion behind the lateral epicondyle." He also noted that the Claimant had an "ergo eval" showing no risk factors, and stated "she was injured lifting chairs at work." He continued to diagnose the Claimant with lateral epicondylitis in spite of the ergonomic evaluation results (Claimant's Exhibit 2, pp. 27-29; Respondent's Exhibit G, pp. 19-21).

12. On May 12, 2015, the Claimant was evaluated by Dr. Craig Davis, who noted that he had previously seen the Claimant about a year prior for right lateral epicondylitis and he performed a couple of injections which provided some partial relief of her symptoms such that she could function well. Dr. Davis noted the mechanism of injury moving chairs on March 23, 2015 and that the Claimant underwent an MRI on April 23, 2014. Dr. Davis noted that the MRI "demonstrated some soft tissue contusion of the posterolateral epicondyle area" and he opined that there was "a little bit of fluid in the extensor origin at the lateral epicondyle, although there is no tear." On examination, Dr. Davis noted the Claimant "is tender directly over the lateral epicondyle today and has pain with resisted wrist and finger extension and is extremely tender with resisted supination. She is minimally tender over the radial tunnel and nontender over the posterior aspect of the lateral epicondyle. She has full range of motion with pain at extremes." Dr. Davis diagnosed the Claimant with lateral epicondylitis and stated, "her symptoms are fairly well localized to the lateral epicondyle." Rather than the same injection he previously provided, Dr. Davis suggested a PRP injection which he opined "might be beneficial in her case." Dr. Davis also recommended additional therapy along with Tramadol and meloxicam to take as needed (Claimant's Exhibit 3, p. 51; Respondent's Exhibit H, p. 40).

13. The Claimant saw Dr. Danahey again on May 27, 2015 and he noted that the Claimant had seen Dr. Davis who recommended a PRP injection which was pending authorization. He further noted that if this was not authorized, she will try the steroid injection which she had in the past. Dr. Danahey noted the Claimant was "in moderate distress" and, on examination, found, "TTP right lateral elbow with very guarded motion, but full extension and flexion." Dr. Danahey continued to assess the Claimant with lateral epicondylitis. The Claimant remained on work restrictions limiting the weight she could lift, push or pull and to avoid repetitive right arm motion (Claimant's Exhibit 2, pp. 31-33). On June 17, 2015, Dr. Danahey noted that the Claimant reported her claim was under investigation but that her ongoing right elbow pain remained at an 8-9/10. Dr. Danahey noted that he would hold off on further treatment pending a decision as to whether Respondent accepted liability for the (Claimant's Exhibit 2, pp. 34-35).

14. On July 20, 2015, at Respondent's request, Dr. Douglas Scott performed an extensive review of the medical records and diagnostics in this case, including medical treatment notes, the First Report of Injury, the MRI, the Claimant's physical therapy notes, and the Office Ergonomic Worksite Evaluation. Dr. Scott opined that "as a result of her claimed 3/23/2015 grabbing, pulling and/or lifting chairs from a stack of chairs [the Claimant] aggravated her pre-existing condition of chronic lateral epicondylitis at the right elbow." He specifically concurred with the diagnosis, opining that the Claimant's "symptoms, exam and diagnostic testing findings are consistent with a diagnosis of lateral epicondylitis at the right elbow." Dr. Scott also opined that the Claimant's injuries are work related and noted, the medical documentation supported a causal link between the Claimant's undisputed work activities and the aggravation to her pre-existing condition. Based on the ergonomic evaluation, he noted that the Claimant does not have a cumulative trauma disorder. Dr. Scott noted that the

Colorado Medical Treatment Guidelines state that there is good evidence that Platelet Rich Plasma (PRP) injections in patients with symptoms lasting six months or more, result in better pain and functional outcomes after one year than steroid injections. He opined that "PRP injections should be authorized if [the Claimant's] symptoms persist past six months (Claimant's Exhibit 1, pp. 1-11).

15. Respondent next requested that Dr. Jonathan L. Sollender conduct a record review of the Claimant's claim. He prepared a written medical record review dated August 9, 2015. He noted that the Claimant's mechanism of injury involved, "no specific traumatic event" but rather repetitive elbow motion from the checking out of media, pulling 20-25 chairs from an overhead rack and sorting donated fabric. He noted that the Claimant was diagnosed with right lateral epicondylitis and trapezius strain and underwent some initial conservative treatment (Respondent's Exhibit E, p. 10). Dr. Sollender noted that he had reviewed Mr. Washam's ergonomic evaluation and that none of the Claimant's work activities that day surpassed established time thresholds to be considered occupational risk factors (Respondent's Exhibit E, p. 11). Dr. Sollender noted that an April 23, 2015 MRI showed low grade soft tissue contusion behind the right lateral epicondyle but no tear of the common extensor origin (Respondent's Exhibit E, p. 11). Dr. Sollender reviewed the treatment notes of Drs. Danahey and Davis, and the evaluation of Dr. Scott, noting there was an authorization request for steroid or PRP injections, but that this was not provided as treatment ceased pending investigation of the claim by the Insurer for causation. Dr. Sollender disputed Dr. Scott's opinion on causation that taking the stackable chairs down strained and aggravated a pre-existing right elbow condition. Dr. Sollender found it determinative that the Claimant's activities did not meet the duration requirement for the risk factors for a cumulated trauma for forceful repetitive activities. Dr. Sollender also disputes that the MRI findings are consistent with her diagnosis (Respondent's Exhibit E, p. 11). In conclusion, Dr. Sollender opined that the Claimant's pathology and activities were inconsistent with a work related injury being a cause of the Claimant's diagnosis of right lateral epicondylitis (Respondent's Exhibit E, p.12).

16. The Claimant saw Dr. Danahey again on September 4, 2015 reporting that a hearing for this claim was scheduled in November but that she did not believe any treatment was authorized at this point. On examination, Dr. Danahey noted "R elbow: TTP lateral aspect, with full motion and no swelling." Dr. Danahey provided work restrictions for the Claimant of lifting no greater than 5 lbs. occasionally, pushing/pulling up to 10 lbs. occasionally and avoiding repetitive grip and grasp with the right arm (Claimant's Exhibit 2, pp. 42-43).

17. At the hearing, the Claimant testified that since March 23, 2015, there has been an impact on her ability to perform her job due to the pain and due to work restrictions of no pushing, pulling or lifting anything over 5 pounds. The Claimant also testified that since her medical treatment stopped, her symptoms have not gone away and they have actually gotten worse. She testified that outside of work, her injury impacts her daily activities with her children, her housework activities and activities of daily living such as sleeping, combing her hair, using the restroom along with attendant

activities, and anything that activates her elbow or wrist on her right arm is painful. The Claimant's testimony regarding her symptoms and their impact on her activities of daily living is credible and is found as fact.

18. On cross-examination, the Claimant testified that she has missed work due to the March 23, 2015 work injury. She testified there were a few days that her arm was in so much pain from not being able to sleep and she needed to take a muscle relaxer the next day, so she could not work. Prior to March of 2015, the Claimant recalled only missing work due to unrelated sick days and on the day after she received a cortisone shot for her 2014 work injury prior to being placed at MMI for the 2014 work injury. She testified that it is possible that she may have missed other work days for the 2014 claim, but she is not certain and does not remember if she missed days after being placed at MMI for the 2014 claim but before the March 23, 2015 claim.

19. Mr. Washam testified at the hearing as an expert in the areas of physiology, ergonomics, work capacity evaluations, sports medicine and the Medical Treatment Guidelines. Mr. Washam testified that for the purpose of his ergonomic evaluation, he determined the Claimant's job duties by interviewing the Claimant and then observing the Claimant perform her job duties. Mr. Washam testified that the Claimant's work activity of lifting the stackable chairs to set up the teen program did not meet the Cumulative Trauma Guidelines for duration, which would be 4-6 hours of lifting 60 times per hour. On cross-examination, Mr. Washam testified that the Claimant showed him the chairs she was lifting when she alleges she injured herself. He questioned why the Claimant would be lifting the stackable chairs instead of setting out the folding chairs that would not require her to lift. Mr. Washam confirmed that he did not weigh the stackable chairs that the Claimant lifted because did not perform a force calculation to determine if a certain activity created a risk factor. His rationale was that since the Claimant's activity did not meet the duration factor for performing the activity, it was not required to perform a force calculation. On redirect examination, Mr. Washam further clarified that the force required to lift the chairs would not matter in this case because lifting 20-25 chairs for 10-15 minutes does not meet the criteria of lifting 60 times per minute for 4-6 hours under the risk factors in the Medical Treatment Guidelines.

20. Dr. Jonathan L. Sollender also testified at the hearing as an expert witness in the areas of hand surgery, upper extremity Level II accreditation matters and regarding the Cumulative Trauma Medical Treatment Guidelines. He explained that "tennis elbow" would be the layman's term for lateral epicondylitis. He further explained that the lateral epicondyle has two components, a bony component and the soft tissue component of extensor muscles that are attached to the bony prominence by way of a tendon. When that tendon is inflamed, there is epicondylitis. Dr. Sollender testified that lateral epicondylitis can be caused by a direct contusion (acute trauma) or a chronic condition where repetitive motions over an extended period of time, under a specific load, cause microscopic tearing of the tendon (cumulative trauma). For cumulative trauma, Dr. Sollender opines that a sufficient time period for repetition of an activity such that it could lead to cumulative trauma would be at least a few weeks of exposure.

Dr. Sollender testified that he had not examined the Claimant and had not met her before the hearing, having only previously conducted a record review. Based on his review of the medical records and Mr. Washam's worksite evaluation, Dr. Sollender testified that he disagrees with the Claimant's diagnosis of lateral epicondylitis. He opined that while the MRI showed some irregularities, including a low-grade soft tissue contusion behind the right lateral epicondyle, there was no evidence of an injury or pathology on the lateral epicondyle and the extensor muscles as they attach. Further, Dr. Sollender testified that although he did not examine the Claimant, he believed that Dr. Davis' medical report provided for tenderness in the area where the contusion was seen but not at the lateral epicondyle itself. Based on the Claimant's testimony and reporting of her mechanism of injury, Dr. Sollender further opines that there was no acute injury in this claim as she was not struck on the outside of the elbow with anything and the contusion is the only pathology of note. Dr. Sollender testified that he found the ergonomic evaluation in this case important since it provided specific details about the Claimant's work duties so that Dr. Sollender could make a determination as to the nature of any repetitive activities and he could assess that data in the context of the risk factors set forth in the Medical Treatment Guidelines. Dr. Sollender testified that if there is a dispute between a patient's report of their job duties and the report of from a jobsite or ergonomic evaluation, he generally sides with the evaluator as he finds this to be more objective information and he finds that a patient is more likely to overestimate job activities. In looking at the treatment of PRP injection recommended by Dr. Davis, Dr. Sollender opines that it is not reasonable because he does not believe there would be a benefit based on his opinion that there is a lack of identified pathology on the Claimant's imaging study. Dr. Sollender ultimately opined that the Claimant did not suffer a chronic or acute injury as a result of her work exposure.

21. On cross-examination, Dr. Sollender was asked to review the medical note of Dr. Davis found at Claimant's Exhibit 3, p. 51. Upon review, Dr. Sollender agreed that his prior testimony was incorrect regarding the location where Doctor Davis noted tenderness and in fact Dr. Davis did note the Claimant was tender directly over the lateral epicondyle, which would be clinically consistent with a diagnosis of lateral epicondylitis. However, Dr. Sollender pointed out that he still found a lack of pathology on the MRI and he disagrees with Dr. Davis' interpretation of the Claimant's MRI. Although, Dr. Sollender testified that he has confidence in Dr. Davis' clinical and operative skills as a board certified orthopedic surgeon with a hand surgery fellowship. Dr. Sollender also agreed that in addition to tenderness to palpation at the lateral epicondyle, a diagnosis requires reproduction of pain through one of three provocative maneuvers. He further agreed that additional studies such as plain radiographs, MRI and sonograms are not routinely ordered to establish the diagnosis of lateral epicondylitis per the Medical Treatment Guidelines, but may be used to rule out other conditions. However, Dr. Sollender opines that there is still a requirement of objective findings to properly establish the diagnosis and, as he does not agree with Dr. Davis' finding of fluid in the extensor origin at the lateral epicondyle, he still opines there are no objective findings to support the diagnosis. After a series of questions on the subject, Dr. Sollender did concede that if a patient had a preexisting, low-grade condition of lateral epicondylitis, the activity of grabbing, pulling, and lifting 20-25 chairs

off a stack where you had to lift the chair up overhead with arms extended could aggravate the preexisting condition as would any activity that irritates the muscles at issue. While Dr. Sollender reiterated that he disagrees with the assumption that the Claimant has lateral epicondylitis, he did agree that the treatment of PRP injections is reasonable for a patient with confirmed lateral epicondylitis with both clinical and objective findings where a causation analysis has been properly performed.

22. On redirect examination, Dr. Sollender was asked to look at an earlier report of Dr. Davis at Respondent's Exhibit H, p. 42 in which Dr. Davis noted diffuse tenderness that "is not really localized to any one area." Dr. Sollender testified that this note confirmed his testimony on direct examination that Dr. Davis did not note pain localized to the lateral epicondyle. Dr. Sollender also testified that it was more likely than not that he reviewed the Claimant's MRI film as opposed to simply the MRI report as this is his common business practice when he has received the film. Based on Dr. Sollender's opinion that there is a lack of objective findings in this case, he again testifies that he disagrees with the diagnosis of lateral epicondylitis for the Claimant. Ultimately, based on his causation analysis, even taking the disagreement regarding whether the Claimant meets the criteria for a lateral epicondylitis diagnosis into account, Dr. Sollender continues to opine that her work exposure is not sufficient for this condition to be work related.

23. In considering the conflicting evidence in this case with respect to both the Claimant's diagnosis of lateral epicondylitis and whether or not this condition is work related, the ALJ finds the opinion of Dr. Davis, as supported by the opinions of Dr. Danahey and Dr. Scott to be more persuasive than that of Dr. Sollender. The weight of the evidence establishes that the Claimant's work activities on March 23, 2015 permanently aggravated her pre-existing right lateral epicondylitis condition such that her condition significantly advanced and now requires medical treatment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University*

Park Care Center v. Industrial Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant’s right to compensation initially hinges upon a determination that “at the time of the injury, the employee is performing service arising out of and in the course of the employee’s employment.” C.R.S. § 8-41-301(1)(b). The “arising out of” test is one of causation which requires that the injury or illness have its origins in an employee’s work-related functions. There is no presumption than an injury or illness which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 124 Colo. 210, 236 P.2d 293 (1951). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, supra.

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

In this case, the facts related to the Claimant's work activities on March 23, 2015 are essentially unchallenged and the ALJ found the Claimant's testimony credible and consistent with reports regarding her mechanism of injury in the medical records. It is also uncontested that the Claimant had a preexisting right upper extremity condition. Thus, the dispute in this case turns on conflicting medical opinions as to (1) the accuracy of the Claimant's diagnosis of right lateral epicondylitis; and (2) whether the Claimant's work activities on March 23, 2015 caused, aggravated, accelerated or combined with the Claimant's preexisting condition to produce the need for medical treatment.

The substantial weight of the evidence in this case establishes that the Claimant was injured on the job on March 23, 2015, while grabbing, pulling and lifting 20-25 chairs off of a rack to set up an afternoon teen program as part of her daily job duties at the Employer's library branch, her place of employment. The task took about 10-15 minutes to complete, but about half-way through she felt a burning pain in her right elbow and upper back. While there was also some discrepancy between the nature of the claim as between the Claimant and Respondent, the ALJ finds that the Claimant is seeking benefits for an acute injury she incurred performing a discrete task, which significantly aggravated a pre-existing lateral epicondylitis condition. The ALJ finds that, contrary Respondent's arguments, she is not claiming to have suffered a cumulative trauma industrial disease.

The evidence established that the Claimant reported her March 23, 2015 injury the day following the activity of grabbing, pulling and lifting the chairs from an overhead rack and she was sent to Dr. Danahey at Concentra. Dr. Danahey had treated the Claimant for right lateral epicondylitis in connection with a prior work injury in 2014. She reached MMI for the prior injury and was released to full duty on 9/19/14. Mild symptoms returned in December 2014, but they did not require treatment. The continued to work and function well without restrictions – until she reinjured her elbow on March 23, 2015. Dr. Danahey opined that the chair lifting incident “aggravated her elbow a lot.” After several weeks of conservative care with no improvement, Dr. Danahey ordered an MRI, which showed a contusion behind the right lateral epicondyle. He referred the Claimant to orthopedic surgeon, Dr. Davis, who had also treated her for the prior elbow injury. Like Dr. Danahey, Dr. Davis noted that Claimant’s moving the chairs on March 23, 2015 caused a significant increase in pain directly over the Claimant’s right lateral epicondyle. He found that the MRI revealed fluid on the extensor origin at the lateral epicondyle in addition to a contusion. He diagnosed lateral epicondylitis and sought approval for a series of PRP injections, which are also recommended by the Medical Guidelines for treatment of lateral epicondylitis.

Respondent retained Dr. Scott to perform a record review and give a causation opinion. Dr. Scott performed an extensive review of the records and he agreed with the treating doctors and opined that the Claimant had suffered an acute aggravation of her pre-existing, but previously manageable, right lateral epicondylitis while performing the discreet tasks of lifting the chairs for the Teen Room on March 23, 2015. He further opined that the Claimant’s aggravated condition was caused by her work activities on March 23, 2015. Finally, Dr. Scott agreed that the PRP injections proposed by Dr. Davis were reasonable and necessary to treat the Claimant’s work injury and that these injections were recommended by the Medical Guidelines for treatment of lateral epicondylitis.

Shortly after receiving Dr. Scott’s report, Respondents’ counsel requested Dr. Sollender to provide a second opinion. Dr. Sollender rejected the diagnosis of lateral epicondylitis. Dr. Sollender found that the Claimant did not suffer an acute injury on March 23, 2015 nor did she suffer a cumulative trauma disorder as a result of her work activities.

In considering the conflicting evidence in this case with respect to both the Claimant’s diagnosis of lateral epicondylitis and whether or not this condition is work related, the ALJ finds the opinion of Dr. Davis, as supported by the opinions of Dr. Danahey and Dr. Scott to be more persuasive than that of Dr. Sollender. The weight of the evidence establishes that the Claimant’s work activities on March 23, 2015 permanently aggravated her pre-existing right lateral epicondylitis condition such that her condition significantly advanced and now requires medical treatment.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that her work activities on March 23, 2015 caused or permanently aggravated, accelerated or combined with her preexisting right elbow condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits - Reasonable & Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers also include those medical providers to whom an authorized treading physician ("ATP") refers a claimant in the normal progression of authorized treatment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

As set forth above, the Claimant's work activities of March 23, 2015 work activities on March 23, 2015 caused or permanently aggravated, accelerated or combined with her preexisting right elbow condition producing the need for medical treatment and the Claimant established that a need for medical treatment was proximately caused by an acute injury on that date.

Prior to March 23, 2015, the Claimant was able to perform her work activities on a full time basis without work restrictions in spite of a pre-existing right elbow condition. However, since March 23, 2015, there has been an impact on the Claimant's ability to perform her job due to the pain and due to work restrictions. The Claimant also testified credibly that since her medical treatment stopped, her symptoms have not gone away and they have actually gotten worse. She testified that outside of work, her injury impacts her daily activities with her children, her housework activities and activities of daily living such as sleeping, combing her hair, using the restroom along with attendant activities, and anything that activates her elbow or wrist on her right arm is painful. The conservative care the Claimant received from Dr. Danahey and Dr. Davis was reasonably necessary to treat the Claimant's work-related condition. The Claimant's authorized treating physicians have never placed the Claimant at MMI nor released her to return to work without restrictions. The Claimant has established that she is entitled to further evaluation of her right upper extremity condition to determine if she requires any additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act. In addition, Drs. Danahey, Davis and Scott all concurred that PRP injections are in accordance with the Colorado Medical Treatment Guidelines for treatment of epicondylitis and have opined that the Claimant would likely benefit from this treatment. While Dr. Sollender disputed the diagnosis of lateral epicondylitis for the Claimant, he testified that PRP injections would be a reasonable medical treatment for epicondylitis.

The Claimant has shown by a preponderance of the evidence that the series of PRP injections and other treatment recommended by Drs. Davis and Danahey are reasonably necessary to cure and relieve the Claimant from the effects of her March 23, 2015 work injury. As such, Respondents must furnish and are liable for the costs of such treatment.

ORDER

It is therefore ordered that:

1. The Claimant proved that she suffered a compensable work injury on March 23, 2015.

2. The Claimant is entitled to further medical benefits to treat her right upper extremity condition and associated symptoms which are causally related to the March 23, 2015 work injury, as determined by her authorized treating physicians, and the Respondent is responsible for payment for such treatment in accordance with the Medical Fee Schedule and the Act. This shall specifically include the PRP injections recommended by Drs. Davis and Danahey.

3. All matters not determined herein are reserved for future

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative

Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 25, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that his bilateral carpal tunnel syndrome is causally related to his employment with Employer.

FINDINGS OF FACT

1. Claimant worked for Employer full time as a senior medical associate beginning in July of 2012.

2. Claimant's job duties included contacting potential clients by telephone, scheduling sales meetings with individuals who make or influence buying decisions for various medical practices to discuss products/services for sale, and documenting the results of call attempts or completions.

3. Claimant's job was sedentary in nature. Claimant sat at a computer daily and worked Monday to Friday for approximately 40 hours of work per week. Claimant used a telephone headset to make calls and used a computer with a keyboard and mouse to initiate (click) to make calls, to note the result of calls, and to perform scheduling on a computerized calendar.

4. On July 6, 2015 Claimant was terminated from his employment. On the same day, Claimant reported to Employer that he believed he had bilateral carpal tunnel syndrome that was work related.

5. On July 8, 2015 Claimant filled out a written report of injury. Claimant reported that both of his arms and hands were affected by carpal tunnel syndrome and that the injury occurred from word processing with the keyboard directly harming him. *See* Exhibit H.

6. On August 11, 2015 Claimant was evaluated by Brian Williams, M.D. Claimant reported bilateral hand numbness that began in September of 2014. Claimant reported working in sales that required lots of keyboarding and mousing and Claimant reported never having this type of problem before. Claimant reported that he did not report the injury to his employer for fear of repercussions at work but was let go in July 2015 for his declining performance that he believed was related to ADHD and what he believed was carpal tunnel syndrome. Claimant reported having numbness and tingling in both hands. Dr. Williams assessed bilateral hand numbness. *See* Exhibit C.

7. Dr. Williams noted that this was a difficult case and that he was concerned with the timing of Claimant's complaint. Dr. Williams opined that by description and

exam, Claimant had carpal tunnel syndrome and noted that he would like to formally evaluate with EMG/NCV testing through neurology. Dr. Williams opined that if positive, he would work with "ortho hand" to determine causality. *See* Exhibit C.

8. On September 2, 2015 Claimant underwent an EMG of his bilateral upper extremities performed by Frederic Zimmerman, D.O. Dr. Zimmerman concluded it was an abnormal study demonstrating bilateral median motor and sensory neuropathy at the wrists. Dr. Zimmerman opined that the findings were consistent with moderate to severe carpal tunnel syndrome. *See* Exhibit D.

9. On September 4, 2015 Claimant was evaluated by Dr. Williams. Dr. Williams noted that the EMG testing was positive for severe carpal tunnel syndrome bilaterally. Dr. Williams encouraged Claimant to follow up with his primary care provider to rule out medical cause. Dr. Williams noted he would consider an "ortho hand" evaluation to aid causality. *See* Exhibit C.

10. On October 20, 2015 Claimant was evaluated by Dr. Williams. Dr. Williams continued to assess bilateral carpal tunnel syndrome and noted that he would like to have Claimant evaluated by "hand surgery" to determine whether Claimant was a surgical candidate. Dr. Williams noted that Claimant had an upcoming hearing to determine the work-relatedness of the claim but that regardless of the outcome, Claimant should be ready for surgery if surgery was indicated. *See* Exhibit C.

11. On December 30, 2015 Sara Nowotny performed a physical demand evaluation for the position of senior medical associate at Employer's place of business. Ms. Nowotny noted that Claimant was no longer employed by Employer and that for the purpose of the job site evaluation she observed and interviewed an employee performing the job of senior medical associate. Ms. Nowotny provided information regarding the job tasks and physical demands of the position.

12. Ms. Nowotny noted that keyboard use was estimated at .8 hours per day and mouse used at 3.2 hours per day based on her observations. Ms. Nowotny noted that on her day of observation, call activity was at a rate of 25 calls per hour when production data suggested actual rates of 6-7 calls per hour and noted that the overall mouse/keyboard time reported y her was thus somewhat inflated. *See* Exhibits B, 1.

13. Ms. Nowotny noted that through direct interview and observation of the job tasks and working environment and after comparing to the medical treatment guidelines, there were no primary or secondary risk factors for bilateral carpal tunnel syndrome met by the job duties. *See* Exhibits B, 1.

14. On January 8, 2016 Thomas Mordick, M.D. performed a record review of Claimant's case and issued a two page report. Dr. Mordick opined that Claimant had a long history of carpal tunnel like complaints but with no prior EMG/NCV. Dr. Mordick opined that under the Colorado upper extremity guidelines for determining whether there was significant aggravation of a prior condition, it would require that Claimant's job

exposed him to awkward posture, force, or repetitive activity as defined in the guidelines. Dr. Mordick noted that none of those thresholds were met and that Claimant's bilateral carpal tunnel syndrome was not work related and should be treated through private insurance. *See* Exhibits A, 3.

15. Claimant had previously sought treatment for symptoms similar to those he is reporting exist now.

16. On March 4, 2013 Claimant was evaluated by Stanley Ginsburg, M.D. Claimant reported developing what he thought were symptoms suggesting carpal tunnel syndrome many years ago and was seen by Dr. Mechanic but did not undergo electro diagnostic studies. Dr. Ginsburg noted that Claimant had a distribution of numbness that conformed to the distribution of the right median nerve including a split ring finger with some symptomatology present on the left but not as severe. Claimant reported the symptoms were waking him up at night but that he acquired a wrist splint and the symptoms became less prominent. Dr. Ginsburg noted that he believed Claimant had carpal tunnel syndrome but that it was affecting Claimant minimally and suggested observing it, undergoing blood testing, undergoing electro diagnostics, or seeing a hand surgeon. Claimant reported he wanted to think about it. *See* Exhibit E.

17. On October 31, 2000 Claimant was evaluated by Bennet Machanic, M.D. Dr. Machanic noted Claimant came to his office for further evaluation of possible carpal tunnel syndrome. Claimant reported that three weeks prior he had planted a large number of bulbs for the spring and within a day or two developed a numb and tingling sensation involving digits one, two, and three of the right hand. Claimant reported difficulty writing and that the pain was awakening him from sleep. Dr. Machanic noted under diagnostic impression that the clinical examination and history strongly suggested right carpal tunnel syndrome. Dr. Machanic also noted that there appeared to be a component of right extensor tendinitis. Dr. Machanic recommended conservative treatment with the use of Celebrex as well as utilizing a wrist splint. Dr. Machanic also recommended vitamin B6. Dr. Machanic noted that if Claimant failed to improve or deteriorated, he would consider EMG nerve conduction studies and that if the EMG showed significant pathology, Claimant might need either local injection or surgical release. *See* Exhibit F.

18. At hearing Ms. Nowotny testified as an expert consistent with her written report. She opined that during her observation of the job that Claimant performed before his termination, she did not observe or identify any primary or secondary risk factors for carpal tunnel syndrome under the medical treatment guidelines. Ms. Nowotny did not observe Claimant as he was no longer employed by Employer, but observed an individual with the same job title. Ms. Nowotny observed the individual for one hour and noted every key stroke and mouse use to extrapolate data for an 8 hour work day which she testified was a common method. She found no primary or secondary risk factors for bilateral carpal tunnel syndrome to be present.

19. Claimant testified at hearing. Claimant reported that his job duties involved constant use of the mouse that was greater than four hours per day, that the chair he used was broken and one arm rest was higher than the other, and that to use the mouse more comfortably he made his own wooden platform that raised the mouse and that therefore the hand he used to mouse was always at greater than a forty-five degree angle. Claimant reported that in the fall of 2014 several people quit rapidly and the number of calls he made per day went up from 51 calls per day to 125 calls per day and that he had to work faster to increase the number of calls he made. Claimant reported that the report prepared by Ms. Nowotny didn't account for several factors.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment duties or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P. 2d 251 (Colo. App. 1999). The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). In deciding whether the Claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Claimant has failed to meet his burden of proof to establish that his bilateral carpal tunnel syndrome was directly and proximately caused by his employment duties or his working conditions. Claimant had a history of prior bilateral carpal tunnel syndrome dating back to 2000 with a noted period of flare in 2013. The symptoms Claimant believes are causally related to his employment with Employer are just as likely the result of the natural progression of a pre-existing condition. Claimant has failed to establish that his work caused, aggravated, or accelerated the condition. As found above, Ms. Nowotny performed a jobsite evaluation and used both the job description provided by Employer as well as direct observation of an employee performing the same job duties as Claimant. She observed how the work of senior medical associate was performed and using data extrapolation was able to determine the amount of time that the job involved keyboard and mousing functions. Claimant's position does not meet the requirements under the medical treatment guidelines for any primary or secondary risk factors. The amount of time spent mousing and keyboarding is not significant enough to cause bilateral carpal tunnel or to cause an aggravation or acceleration of bilateral carpal tunnel. No medical provider has opined that Claimant's condition is work related or that his job duties caused, aggravated, or accelerated his bilateral carpal tunnel syndrome. Although Claimant attempted to explain that the hand he uses to mouse rested against a wooden platform he build and was at a greater than 45 degree angle, the amount of time spent mousing as determined by Ms. Nowotny's evaluation was not significant enough to establish a causal relationship between Claimant's job duties and his diagnosis of bilateral carpal tunnel syndrome. Further, the use of the wooden platform only addresses the hand Claimant uses for mousing and does not address Claimant's other hand which carries the identical diagnosis. It is just as likely that Claimant's bilateral condition is the natural progression of a non-work related condition and Claimant has failed to establish a causal relationship to his employment or employment duties.

Ms. Nowotny's evaluation is found persuasive regarding the amount of time spent in each activity and although Claimant's desk and mouse may have had a different set-up than the employee observed, the amount of time spent on each activity is found credible and persuasive for the position and the duties. Dr. Mordick also is found credible and persuasive that the amount of time in each of the activities as observed by Ms. Nowotny would not bear a causal relationship between Claimant's employment and Claimant's diagnosis. Additionally, it is not credible that Claimant experienced this alleged work related injury or occupational disease yet failed to report it until the date he was terminated. The report on the day of termination is logically inconsistent with a person who believed they suffered a work related injury where you would expect more immediate reporting of the alleged injury. Further, when Claimant was first evaluated by Dr. Williams in August of 2015, Claimant reported never having had this type of problem before when the medical records suggest otherwise and point to similar problems for which Claimant sought treatment in both 2000 and 2013 Claimant's bilateral condition has not been shown, more likely than not, to be causally related to his employment.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden of proof to establish that he suffers from bilateral carpal tunnel syndrome causally related to his employment with Employer.

2. Claimant's claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 22, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on April 7, **2015**.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his April 7, **2015** industrial injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period May 11, **2015** until terminated by statute.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $640.00.

FINDINGS OF FACT

1. Employer builds customized storage containers used for shipping items. Randy Williams is the co-owner of Employer.

2. Claimant worked for Employer as a Builder at Employer's Longmont Colorado facility. His job duties involved constructing large crates using plywood and 2x4's. He worked the night shift from 4:30 p.m. until 2:30 a.m. four times each week. The night crew consisted of Claimant and two co-workers.

3. Claimant testified that on April 7, **2015** he was using a nail gun to build a crate base on a workbench. He noted that plywood had been lifted onto a bench and he was nailing framing 2x4's onto one side of the plywood. Claimant was then required to flip the plywood so the risers for the forklift could be applied to the bottom side.

4. While standing at the workbench, Claimant reached forward with a nail gun to apply the last riser. He estimated that the nail gun weighed approximately 25 pounds. Claimant placed the nail gun on the plywood and pulled the trigger to release the nail. However, he testified that he experienced a "pop" in his right shoulder.

5. Claimant subsequently wrote a note on Employer's crate fabrication instructions. He remarked that he had only worked one-half of the day and would be out of work on Wednesday and Thursday because of a "bad shoulder." Claimant then left work. He did not subsequently miss three days of work but performed modified duty employment.

6. In late March **2015** Mr. Williams had accused Claimant and his coworkers on the night shift of intoxication and using marijuana while on the job. Although Employer did not conduct drug or alcohol testing of the employees, Mr. Williams sent a letter to the night crew expressing concerns that they were "pitheads" based on customer complaints. Mr. Williams explained that none of the employees denied the allegations in the letter He suspended Claimant and the other night crew employees without pay.

7. Prior to returning to work after the suspension, Claimant and his co-workers were required to meet with Mr. Williams to discuss reinstatement. During Claimant's meeting he accused other workers of various infractions. Claimant stated that marijuana use "had been going on since Dust was here." "Dust" was a prior supervisor for Employer. Claimant subsequently worked for the following two weeks without incident until the April 7, **2015** incident.

8. On April 16, **2015** Claimant visited Bruce Cazden, M.D. at Workwell Occupational Medicine for a right shoulder evaluation. Claimant reported that he began experiencing right shoulder pain while performing extensive power drilling at work over a period of one or two days. Claimant noted that he then used a nail gun to perform his job duties. While he was reaching and depressing the trigger on the nail gun he felt a sharp, popping pain in his right shoulder. Dr. Cazden diagnosed Claimant with a sprain or strain of the rotator cuff capsule and assigned work restrictions including no use of the right arm and no lifting. He specifically stated that Claimant had suffered an acute right shoulder tear. Dr. Cazden ordered an MRI/arthrogram. He concluded that Claimant's work activities caused his right shoulder symptoms.

9. On April 27, **2015** Claimant completed a Vacation/Absence Request form stating that he was taking a leave of absence from April 29, **2015** until May 11, **2015**. In a separate note Claimant commented that he needed to visit his father in Arizona because his father had only two weeks to live.

10. On April 28, 2015 Claimant returned to Dr. Cazden for an evaluation. After reviewing the right shoulder MRI, Dr. Cazden diagnosed Claimant with a superior glenoid labrum lesion or SLAP tear but no rotator cuff tear. He assigned work restrictions including no lifting or reaching with the right arm away from the body or overhead and no lifting in excess of 10 pounds to chest height. Dr. Cazden reiterated that Claimant's work activities caused his right shoulder condition.

11. Claimant subsequently visited his father in Arizona. He returned to work for Employer on May 11, 2015 and was terminated. In fact, Mr. Williams terminated the

entire night crew at Employer’s Longmont facility and transferred the functions to Employer’s Commerce City, Colorado operation.

12. Mr. Williams authored the termination letters on Friday, May 8, **2015** and distributed them to the night shift employees on May 11, **2015**. He explained in the letter that he had been considering termination of the night crew since he had learned they were “potheads.” Mr. Williams realized that, because he had knowledge of drug and alcohol use at work, he had made Employer liable for any accidents that might occur. He thus determined that termination of the night crew was warranted. Notably, Employer’s Drug and Alcohol Policy provided, in relevant part, that employees were not permitted to be under the influence of drugs or alcohol while performing work-related activities. Violation of the Policy could lead to disciplinary action that included termination.

13. Claimant disagreed with the basis for his termination and testified that he never told Employer he was using marijuana on the job or admitted the infraction. He acknowledged that he has been receiving unemployment benefits in the amount of $405.00 per week since September 2015. The benefits have continued through the date of the hearing in this matter. Claimant has searched for work since his termination but he is still limited in lifting, working overhead and functioning to the side because of his right shoulder injury.

14. On October 27, 2015 Claimant underwent an independent medical examination with James P. Lindberg, M.D. Claimant reported that, while using a nail gun to construct crates at work, he experienced a sharp twinge at the back of his right shoulder. Dr. Lindberg noted that Claimant’s right shoulder MRI reflected a labral tear. He explained that lifting a nail gun and pulling the trigger would not cause a significant labral or SLAP tear and biceps tendon anchor disruption. Dr. Lindberg remarked that SLAP tears are generally caused by circumduction under force such as throwing a football or baseball. A SLAP tear is a rotational injury and “[i]t is not possible that pulling a trigger on the nail gun would have caused the lesions seen on the MRI.” Dr. Lindberg thus concluded that Claimant’s right shoulder condition was not caused by his work activities for Employer. Accordingly, he determined that any surgical intervention should be performed under Claimant’s private health insurance.

15. Dr. Cazden testified at the hearing in this matter. He maintained that Claimant suffered a work-related injury to his right shoulder on April 7, **2015**. Dr. Cazden explained that Claimant was reaching out to the side and activating his rotator cuff muscles to support the weight of the nail gun. In conjunction with the firing of the nail gun, Claimant experienced rotary force to the hand. Dr. Cazden specified that the head of the humerous abuts the labrum as the arm is extended. The rotary force generated by the impact of the nail gun causes movement of the head of the humerous and possible grinding and pulling of the tendons or labrum.

16. On December 28, 2015 the parties conducted the post-hearing evidentiary deposition of Dr. Lindberg. Dr. Lindberg maintained that Claimant’s work activities for Employer on April 7, **2015** did not cause his right shoulder symptoms. Claimant

described to Dr. Lindberg that he was working on a crate wall that was 40 inches by 60 inches on a bench at waist height. Dr. Lindberg testified that the described mechanism of injury was highly unlikely to have caused a SLAP tear in Claimant's right shoulder. In fact, Dr. Lindberg stated that "[b]ased on what he told me in the physical exam, I don't think that there's any way that this could have happened by the injury that he describes." Claimant was working at waist height, he never raised his arm (or anteriorly flexed) above 45 degrees, pulling the trigger involves only muscles below the elbow and no forces are exerted on the shoulder other than holding an eight pound nail gun. The nail gun is stationary against the plywood when the trigger is pulled and it is pointed downward. Dr. Lindberg commented that it is highly unlikely that Claimant would suffer a SLAP tear simply from reaching forward with the nail gun in his hand. Dr. Lindberg remarked that In his 40 years of experience, he has never seen a trivial injury cause a Type 2 SLAP lesion. SLAP tears are caused by large forces with rotational motions of the arm. Holding the gun with his right arm and depressing the trigger did not exert any rotational force on Claimant's right shoulder. Accordingly, Dr. Lindberg concluded that it is not likely to a reasonable degree of medical probability that Claimant's work activities on April 7, **2015** caused his right shoulder injury.

17. Claimant has demonstrated that it is more probably true than not that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on April 7, **2015**. Claimant testified that on April 7, **2015** he was using a nail gun to build a crate base on a workbench. While standing at the workbench, Claimant reached forward with a nail gun to apply the last riser. Claimant placed the nail gun on the plywood and pulled the trigger to release the nail. However, he testified that he experienced a "pop" in his right shoulder. On April 16, **2015** Claimant visited Dr. Cazden for a right shoulder evaluation. Claimant reported that he began experiencing right shoulder pain while performing extensive power drilling at work over a period of one or two days. Claimant noted that he then used a nail gun to perform his job duties. While he was reaching and depressing the trigger on the nail gun he felt a sharp, popping pain in his right shoulder. Dr. Cazden subsequently diagnosed Claimant with a superior glenoid labrum lesion or SLAP tear. He concluded that Claimant's work activities caused his right shoulder injury.

18. Dr. Cazden persuasively explained that Claimant was reaching out to the side and activating his rotator cuff muscles to support the weight of the nail gun. In conjunction with the firing of the nail gun, Claimant experienced rotary force to the hand. Dr. Cazden specified that the head of the humerous abuts the labrum as the arm is extended. The rotary force generated by the impact of the nail gun causes movement of the head of the humerous and possible grinding and pulling of the tendons or labrum. Accordingly, Dr. Cazden persuasively maintained that Claimant suffered a right shoulder injury that was caused by his industrial activities for Employer on April 7, **2015**.

19. In contrast, Dr. Lindberg commented that it is highly unlikely that Claimant would suffer a SLAP tear simply from reaching forward with the nail gun in his hand. SLAP tears are caused by large forces with rotational motions of the arm. Dr. Lindberg explained that holding the nail gun with his right arm and depressing the trigger did not exert any rotational force on Claimant's right shoulder. Accordingly, he concluded that it

is unlikely that Claimant's work activities on April 7, **2015** caused a right shoulder injury. However, Dr. Lindberg failed to address whether Claimant's right shoulder condition was aggravated by his work activities on April 7, **2015**. Moreover, Claimant's credible testimony, the consistent medical records regarding the mechanism of injury and the persuasive opinion of Dr. Cazden reflect that Claimant's work activities on April 7, **2015** triggered a need for right shoulder treatment. Accordingly, Claimant's work activities on April 7, **2015** aggravated, accelerated or combined with a pre-existing right shoulder condition to produce a need for medical treatment.

20. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. Claimant initially obtained medical treatment from Dr. Cazden at Workwell. He subsequently received additional medical treatment for his right shoulder condition. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his April 7, **2015** right shoulder injury. Respondents are thus liable for the preceding medical treatment as well as all additional treatment reasonably necessary to cure or relieve the effects of Claimant's right shoulder injury.

21. Claimant has established that it is more probably true than not that he is entitled to receive TTD benefits for the period May 11, **2015** until terminated by statute. Claimant was unable to earn any wages subsequent to May 11, **2015** because he was terminated by Employer and experiencing the effects of his right shoulder injury. On April 28, **2015** Dr. Cazden assigned work restrictions including no lifting or reaching with the right arm away from the body or overhead and no lifting in excess of 10 pounds to chest height. Claimant has searched for work since his termination but he is still limited in lifting, working overhead and functioning to the side because of his right shoulder injury. He has thus been unable to return to work due to the effects of his April 7, **2015** industrial injury. He has also not reached Maximum Medical Improvement (MMI) for his right shoulder condition.

22. Respondents have failed to demonstrate that it is more probably true than not that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment pursuant to the termination statutes. Mr. Williams authored termination letters on Friday, May 8, **2015** and distributed them to the night shift employees on May 11, **2015**. He explained in the letter that he had been considering termination of the night crew since he had learned they were "potheads." Mr. Williams realized that, because he had knowledge of drug and alcohol use at work, he had made Employer liable for any accidents that might occur. He thus determined that termination of the night crew was warranted. Notably, Employer's Drug and Alcohol Policy provided, in relevant part, that employees were not permitted to be under the influence of drugs or alcohol while performing work-related activities. However, Claimant disagreed with the basis for his termination and testified that he never told Employer he was using marijuana on the job or admitted the infraction. Moreover, there was no drug testing or observations to confirm the allegations. Mr. Williams's allegations do not establish a volitional act by Claimant or suggest that he exercised some control over his termination under the totality of the circumstances. Claimant was

thus not responsible for his termination because he did not precipitate the employment termination by a volitional act that he would reasonably expect to cause the loss of employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences

symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on April 7, **2015**. Claimant testified that on April 7, **2015** he was using a nail gun to build a crate base on a workbench. While standing at the workbench, Claimant reached forward with a nail gun to apply the last riser. Claimant placed the nail gun on the plywood and pulled the trigger to release the nail. However, he testified that he experienced a "pop" in his right shoulder. On April 16, **2015** Claimant visited Dr. Cazden for a right shoulder evaluation. Claimant reported that he began experiencing right shoulder pain while performing extensive power drilling at work over a period of one or two days. Claimant noted that he then used a nail gun to perform his job duties. While he was reaching and depressing the trigger on the nail gun he felt a sharp, popping pain in his right shoulder. Dr. Cazden subsequently diagnosed Claimant with a superior glenoid labrum lesion or SLAP tear. He concluded that Claimant's work activities caused his right shoulder injury.

8. As found, Dr. Cazden persuasively explained that Claimant was reaching out to the side and activating his rotator cuff muscles to support the weight of the nail gun. In conjunction with the firing of the nail gun, Claimant experienced rotary force to the hand. Dr. Cazden specified that the head of the humerous abuts the labrum as the arm is extended. The rotary force generated by the impact of the nail gun causes movement of the head of the humerous and possible grinding and pulling of the tendons or labrum. Accordingly, Dr. Cazden persuasively maintained that Claimant suffered a right shoulder injury that was caused by his industrial activities for Employer on April 7, **2015**.

9. As found, in contrast, Dr. Lindberg commented that it is highly unlikely that Claimant would suffer a SLAP tear simply from reaching forward with the nail gun in his hand. SLAP tears are caused by large forces with rotational motions of the arm. Dr. Lindberg explained that holding the nail gun with his right arm and depressing the

trigger did not exert any rotational force on Claimant's right shoulder. Accordingly, he concluded that it is unlikely that Claimant's work activities on April 7, **2015** caused a right shoulder injury. However, Dr. Lindberg failed to address whether Claimant's right shoulder condition was aggravated by his work activities on April 7, **2015**. Moreover, Claimant's credible testimony, the consistent medical records regarding the mechanism of injury and the persuasive opinion of Dr. Cazden reflect that Claimant's work activities on April 7, **2015** triggered a need for right shoulder treatment. Accordingly, Claimant's work activities on April 7, **2015** aggravated, accelerated or combined with a pre-existing right shoulder condition to produce a need for medical treatment.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

11. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. Claimant initially obtained medical treatment from Dr. Cazden at Workwell. He subsequently received additional medical treatment for his right shoulder condition. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his April 7, **2015** right shoulder injury. Respondents are thus liable for the preceding medical treatment as well as all additional treatment reasonably necessary to cure or relieve the effects of Claimant's right shoulder injury.

TTD Benefits

12. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

13. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive TTD benefits for the period May 11, **2015** until terminated by statute. Claimant was unable to earn any wages subsequent to May 11, **2015** because he was terminated by Employer and experiencing the effects of his right shoulder injury. On April 28, **2015** Dr. Cazden assigned work restrictions including no lifting or reaching with the right arm away from the body or overhead and no lifting in excess of 10 pounds to chest height. Claimant has searched for work since his termination but he is still limited in lifting, working overhead and functioning to the side because of his right shoulder injury. He has thus been unable to return to work due to the effects of his April 7, **2015** industrial injury. He has also not reached Maximum Medical Improvement (MMI) for his right shoulder condition.

Responsible for Termination

14. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

15. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment pursuant to the termination statutes. Mr. Williams authored termination letters on Friday, May 8, **2015** and distributed them to the night shift employees on May 11, **2015**. He explained in the letter that he had been considering termination of the night crew since he had learned they were "potheads." Mr. Williams realized that, because he had knowledge of drug and alcohol use at work, he had made Employer liable for any accidents that might occur. He thus determined that termination of the night crew was warranted. Notably, Employer's Drug and Alcohol Policy provided, in relevant part, that employees were not permitted to be under the influence of drugs or alcohol while performing work-related activities. However, Claimant disagreed with the basis for his termination and testified that he never told

Employer he was using marijuana on the job or admitted the infraction. Moreover, there was no drug testing or observations to confirm the allegations. Mr. Williams's allegations do not establish a volitional act by Claimant or suggest that he exercised some control over his termination under the totality of the circumstances. Claimant was thus not responsible for his termination because he did not precipitate the employment termination by a volitional act that he would reasonably expect to cause the loss of employment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. On April 7, **2015** Claimant suffered a right shoulder injury during the course and scope of his employment with Employer.

2. Claimant shall receive reasonable and necessary medical treatment to cure or relieve the effects of his right shoulder injury.

3. Claimant earned an AWW of $640.00.

4. Claimant shall receive TTD benefits for the period May 11, **2015** until terminated by statute.

5. Respondents shall receive a credit or offset for unemployment benefits in the weekly amount of $405.00 from September 1, 2015 until terminated by operation of law.

6. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: February 2, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he received medical treatment that was reasonable and necessary to cure and relieve the claimant from the effects of the work injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of June 19, 2015 and continuing?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that employer is subject to penalties for failing to provide and maintain workers' compensation insurance pursuant to Section 8-43-408, C.R.S.?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that employer failed to timely file a notice of the injury to the Division of Workers' Compensation in violation of Section 8-43-103(1), C.R.S. for the period of June 19, 2015 through August 25, 2015 when employer filed a Notice of Contest?

FINDINGS OF FACT

1. Claimant testified at hearing that he was employed with employer in the service department starting on April 2, 2014. Claimant testified his job duties included performing the services of a mechanic. Claimant testified he was hired by Mr. Dana. Claimant testified he was paid $25 per hour for the work he performed for employer.

2. Claimant testified that on June 19, 2015 he was installing a fuel pump in a Ford Explorer with another mechanic. Claimant testified he was carrying a fuel tank when he slipped on fuel that had spilled on the floor and fell. Claimant testified that the fuel tank he was carrying landed on his chest. Claimant testified he had injured his back a few days prior to this incident when he was installing a transmission in a Volkswagon beetle, but did not seek medical treatment after that incident.

3. Claimant testified he reported both injuries to Mr. Dana, his boss. Claimant testified he took a couple of days off the first injury installing the transmission and had just returned to work on the day that he fell while installing the fuel tank. Claimant testified the pain in his back increased after the incident when he fell on June 19, 2015. Claimant testified after the incident, he left work and did not return.

4. Claimant eventually sought treatment for his low back pain at St. Mary's Hospital Emergency Room ("ER") on June 25, 2015. Claimant reported to the ER that he injured his back 9 days ago while lifting a transmission by himself when he twisted and started developing pain in his low back. Claimant further reported to the ER that he had taken a day off and rested and went back to work when 6 days ago he was helping someone lift a full gas tank and they dropped the other end cause claimant to hit into his chest and twist him. Claimant was diagnosed with a low back strain and provided with medications. Claimant was referred to Dr. Price for follow up.

5. Claimant returned to the ER on June 29, 2015 and reported his pain had improved, but he did not feel he was well enough to work. Dr. Weintraub in the ER refilled some of his prescriptions, including his Valium and Percocet and recommended that claimant remain off of work and follow up with a primary care physician.

6. Claimant was evaluated by Dr. McLaughlin at St. Mary's Occupational Medicine on July 6, 2015. Claimant reported to Dr. McLaughlin that he injured his low back when he was working on a gas tank for a Jeep Cherokee and he slipped and twisted his low back. Dr. McLaughlin performed a physical examination and diagnosed claimant with a lumbar strain consistent with his work activity from June 19, 2015. Dr. McLaughlin provided claimant with prescription medications including Percocet, Flexeril and recommended physical therapy. Dr. McLaughlin kept claimant off of work until his follow up appointment.

7. Claimant continued to treat with Dr. McLaughlin on July 9, 2015 who noted claimant was feeling significantly improved, but was not rated for full duty. Dr. McLaughlin recommended claimant continue the physical therapy and then try modified work beginning the next Monday.

8. Claimant returned to St. Mary's Occupational Medicine on July 13, 2015 and was examined by Dr. Stagg. Dr. Stagg noted claimant reported he was doing terrible with a significant amount of pain with radiation into both legs. Dr. Stagg kept claimant off of work for an additional 2 days until he was scheduled to see Dr. McLaughlin.

9. Dr. McLaughlin evaluated claimant on July 16, 2015 and noted claimant's continued problems with his low back pain. Dr. McLaughlin changed claimant's prescriptions to start Ultram, Soma and Lidoderm patches as opposed to the tramadol, Flexeril and Percocet.

10. Claimant again returned to Dr. McLaughlin on July 20, 2015. Dr. McLaughlin noted claimant was going to try to go back to work the next day for four

hours in a sedentary capacity. Dr. McLaughlin continued claimant's medications and instructed claimant to follow up 2-3 days.

11. Claimant returned to Dr. McLaughlin on July 23, 2015 and reported he had more pain with work. Dr. McLaughlin encouraged claimant to continue to increase his activity and recommended claimant undergo a magnetic resonance image ("MRI") of his lumbar spine.

12. Claimant returned to Dr. McLaughlin on July 30, 2015 and claimant reported he was doing better with the Lidoderm patches helping claimant throughout the day. Dr. McLaughlin noted that claimant's MRI was normal. Dr. McLaughlin reported claimant would like to work full hours and Dr. McLaughlin provided him with work restrictions that limited his lifting to 20 pounds. Dr. McLaughlin also recommended claimant follow up with chiropractic treatment, and referred claimant to Dr. Foote for this purpose.

13. Claimant again returned to Dr. McLaughlin on August 11, 2015. Dr. McLaughlin noted that claimant's treatment with the chiropractor, Dr. Foote, had really helped.

14. Claimant returned to Dr. McLaughlin on August 17, 2015. Dr. McLauglin noted that he had reviewed claimant's Colorado Prescription Drug Monitoring Program ("PDMP") that showed claimant had seen Dr. Reusswig for chronic pain for 7 years and was on Methadone. Dr. McLaughlin noted that he recommended no narcotics at this point and referred claimant to Dr. Price, a pain specialist.

15. Claimant was initially examined by Dr. Price on August 26, 2015. Dr. Price noted that claimant reported he was injured on June 19, 2015 while working for employer when he lifted a gas tank that weighed about 300 pounds when he slipped and fell on his back. Claimant reported to Dr. Price he felt immediate back pain following the incident. Dr. Price noted claimant was on a pain contract with Dr. Reusswig and goes to Denver each month for medications. Dr. Price noted claimant presented with three out of five Waddell's sign's and provided claimant with a diagnosis of a long history of lumbar spine pain with previous chronic opioid use. Dr. Price noted claimant had some acute exacerbation of his chronic low back pain and recommended a facet joint injection on the right at L3, L4 and L5.

16. Claimant returned to Dr. McLaughlin on September 1, 2015. Dr. McLaughlin reviewed Dr. Price's report and recommended claimant get back to physical therapy and work on a good active rehab program. Dr. McLaughlin recommended another 6 visits with Dr. Foote and wanted to hold off on the facet injection until they determined how claimant was doing with physical therapy and chiropractic treatment together. Dr. McLaughlin continued claimant's work restrictions that included no lifting over 30 pounds and no crawling, kneeling, squatting or climbing.

17. Claimant was re-evaluated by Dr. McLaughlin on September 30, 2015. Dr. McLaughlin noted that Dr. Foote was not getting paid and was therefore not willing

to schedule more visits. Dr. McLaughlin noted that claimant was also in collections from St. Mary's. Dr. McLaughlin recommended claimant continue his Lidoderm patches, ambulate as much as he can, and continue the exercises and stretches he learned in physical therapy.

18. Claimant returned to Dr. McLaughlin on October 21, 2015. Dr. McLaughlin noted claimant was not working and had ongoing lumbar pain. Dr. McLaughlin showed claimant some additional exercises and provided claimant with ongoing work restrictions that included lifting up to 25 pounds.

19. Claimant testified at hearing that he reported the injury to Mr. Dana, owner for employer. Claimant testified he took the ER records and medical bills to Mr. Dana and provided him with the medical bills and Mr. Dana said, "OK". Claimant testified he spoke to Mr. Dana regarding his missed time from work and Mr. Dana told claimant he was afraid to pay claimant until he came back to work. Claimant testified Mr. Dana eventually told him he did not have workers' compensation insurance.

20. According to the wage records entered into evidence, claimant was issued a check on July 17, 2015 for $1,000.00. Claimant testified at hearing he believed this was for his accrued vacation time and he was provided this check after speaking to Mr. Dana.

21. Claimant was issued a second check on July 29, 2015 in which he was paid $2,678.25. The check came with an accounting that showed claimant should have been paid for 220.68 hours for "missed hours". This was multiplied by 66.67% with the notation of "WC benefit %" to come to 147.13 to come to the "total hours we should pay". This amount was then multiplied by 25 (hourly rate) to come to a total of $3,678.25 and $1,000.00 was subtracted as having been "already paid".

22. Claimant presented the testimony on Ms. Doutis who was a previous employee for employer. Ms. Doutis testified she had heard of claimant's injury from a sales person and testified that at some point claimant brought in paper work from St. Mary's Hospital and gave the paperwork to Ms. Doutis. Ms. Doutis testified she then gave the paperwork to Mr. Dana. Ms. Doutis testified claimant later tried to work part time but could not continue to work. Ms. Doutis testified she recalled posters being up in the office that pertained to various OSHA and labor law rules, but did not stop to read the posters. Ms. Doutis testified that when claimant was hired, she would have had claimant sign a medical provider designation in his new hire paperwork.

23. The ALJ credits the testimony of claimant and Ms. Doutis along with the supporting medical records and determines that claimant has established that it is more probable than not that he sustained a compensable injury arising out of and in the course and scope of his employment with employer. The ALJ notes that claimant's testimony at hearing was consistent with the medical reports and was supported by the testimony of Ms. Doutis regarding his work injury. The ALJ finds that employer was aware of the work injury based on the testimony of claimant and Ms. Doutis and finds that claimant's medical treatment with the ER and Dr. McLaughlin and his referrals was

reasonable and necessary to cure and relieve claimant from the effects of his work injury.

24. The ALJ finds that claimant has established that the medical treatment from Dr. Foote, Dr. Price, and Grand Junction Therapies (physical therapy) are all within the proper chain of referrals from Dr. McLaughlin. The ALJ relies on these medical records and the reports of Dr. McLaughlin and finds that claimant has established that this treatment was reasonable and necessary to cure and relieve claimant from the effects of his work injury.

25. The ALJ further finds that although Ms. Doutis testified claimant would have been provided a list of providers when he was hired, there is no credible evidence to establish that Dr. McLaughlin would not be authorized to treat claimant where the employer does not designate the treating physician in writing up having the work injury reported to employer as required under Section 8-43-404(5)(a)(I)(A), C.R.S.

26. The ALJ credits claimant's testimony at hearing along with the medical records entered into evidence and finds that claimant has established by a preponderance of the evidence that the injury resulted in disability that prevented claimant from performing his regular job for employer. The ALJ determines that claimant has therefore established that he is entitled to an award of temporary total disability ("TTD") benefits commencing June 20, 2015 and continuing. The ALJ notes that claimant was paid by employer in July and finds that employer is entitled to an offset for those benefits paid to claimant. The ALJ finds makes no finding with regard to claimant's sick leave or accrued vacation being paid to claimant as that would have been contained in the initial $1,000.00 check issued to claimant on July 17, 2015. Employer is entitled to an offset for the entire $3,678.25. The ALJ notes that claimant was paid temporary disability benefits during the July time period and these checks were not subject to the withholding claimant's prior checks were subject to. Therefore, the ALJ determines that the checks issued on July 17, 2015 and July 29, 2015 represent temporary disability benefits and not accrued vacation or sick leave or payments for hours actually worked.

27. The ALJ credits the testimony of claimant at hearing that employer was not insured for workers' compensation benefits and finds that claimant has established by a preponderance of the evidence that he is entitled to increase his benefits by 50% pursuant to Section 8-43-408, C.R.S.

28. Claimant filed a Workers' Claim for Compensation with the Division of Workers' Compensation on July 11, 2015. The form was received by the Division of Workers' Compensation on August 3, 2015. The form was filled out and completed by claimant. There was no reason given for the discrepancy between the date the form was filled out and when it was received by the Division of Workers' Compensation presented at hearing.

29. The Division of Workers' Compensation issued a letter to employer on August 5, 2015 advising employer that they had 20 days to either admit or deny liability

for the claim. An amended Workers' Clam for Compensation, completed by claimant's attorney, was filed with the Division of Workers' Compensation on August 17, 2015. Employer filed a Notice of Contest on August 25, 2015.

30. While employer did respond within 20 days of the letter from the Division of Workers' Compensation, Section 8-43-101 requires the employer to report to the Division of Workers' Compensation all injuries that result in lost time from work within 10 days of knowledge of the injury. The ALJ finds that under the facts of this case, claimant has established that employer failed to notify the Division of Workers' Compensation of the injury that resulted in claimant missing more than three shifts from work as required by Section 8-43-101, C.R.S.

31. The ALJ credits the evidence presented at hearing and finds that the evidence establishes that employer was aware of claimant missing time from work and issued two checks to claimant in July to pay claimant for the time he had missed from work related to the industrial injury. The evidence further establishes that employer did not notify the Division of Workers' Compensation of this injury within 10 days as required by the statute. Therefore, employer is subject to penalties pursuant to Section 8-43-203(2)(a), C.R.S.

32. However, the records also demonstrate that when notified by the Division of Workers' Compensation, employer timely filed a notice of contest within 20 days. Employer was notified by the Division of Workers' Compensation when the Division of Workers' Compensation received claimant's Claim for Compensation. As noted above, there is no explanation for the over three week discrepancy between when claimant dated the Claim for Compensation and when the Division of Workers' Compensation received the form filed by claimant. Regardless, the ALJ finds that the delay in reporting the injury to the Division of Workers' Compensation by claimant along with employer paying claimant temporary disability benefits in July serve as mitigating factors when determining the amount of the penalty to issue against employer.

33. The records entered into evidence at hearing establish that claimant was paid $21,926.50 for the period ending June 16, 2015. This represents a period of 23 5/7 weeks from the beginning of the year (January 1, 2015). This equates to an AWW of $924.61.

34. Claimant testified at hearing that the medical bills claimant incurred following his injury have been sent to collections. This testimony is supported by the evidence including notifications from debt collectors sent to claimant and claimant's attorney regarding the status of unpaid medical bills.

35. The ALJ hereby finds that employer is responsible for the unpaid medical bills including the medical bills from St. Mary's Hospital Emergency Room, St. Mary's Occupational Medicine (Dr. McLaughlin and Dr. Stagg), Applied Chiropractic Health Center (Dr. Foote), Dr. Price, and Grand Junction Therapies.

36. Once there has been an admission of liability or the entry of a final order that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee. Section 8-42-101(4), C.R.S. 2014. In this case, this Order finds employer liable for the cost of claimant's medical bills as referenced above.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2008. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2008. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course and scope of his employment with employer. The ALJ credits the claimant's testimony at hearing along with the testimony of Ms. Doutis and the medical records entered into evidence and finds that claimant has proven that the incident in which he slipped while carrying a fuel

tank and injured his low back aggravated, accelerated or combined with claimant's preexisting disease or infirmity to produce his disability and need for treatment.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

7. "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

8. As found, claimant reported his injury to his employer and was not instructed to see a specific physician or medical provider. Therefore, the right to select a physician was passed to claimant. Claimant exercised his right of selection and sought medical treatment with the ER and eventually Dr. McLaughlin. As found, the treatment claimant received at the St. Mary's ER and through Dr. McLauglin and his referrals, including Dr. Price, Dr. Foote, and Grand Junction Therapies, is reasonable and necessary to cure and relieve claimant from the effects of his June 19, 2015 work injury.

9. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and

properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

10. As found, claimant has proven by a preponderance of the evidence that he sustained an injury that led to a medical incapacity in his ability to work as evidenced by the work restrictions set forth by Dr. McLaughlin. As found, claimant is entitled to an award of TTD for the period of June 20, 2015 and continuing until terminated by law or statute.

11. As found, employer is entitled to an offset for the temporary disability benefits voluntarily paid to claimant on July 17, 2015 and July 29, 2015 totaling $3,678.25.

12. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

13. As found, the wage records entered into evidence establish that claimant is entitled to an AWW of $924.61 based on the amount claimant earned in the time period between January 1, 2015 and June 16, 2015.

14. Section 8-43-408(1) C.R.S., provides that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits provided in said articles shall be increased fifty percent.

15. As found, claimant has proven by a preponderance of the evidence that employer was not insured for workers' compensation at the time of his injury. As found, claimant's compensation and benefits shall be increased by fifty percent pursuant to Section 8-43-408(1). As found, the TTD rate will be $924.61 based on the 50% increase allowed by Section 8-43-408(1) based on employer's failure to obtain insurance in violation of the Colorado Workers' Compensation Act.

16. Section 8-43-101(1), C.R.S. provides that the employer shall provide notice to the Division of Workers' Compensation within 10 days of an injury that results in lost time in excess of three days or three calendar shifts. Sections 8-43-203(1)(a) and 8-43-203(2)(a) provides that if an employer fails to notify the Division of Workers' Compensation of an injury resulting in lost time, the insurer may be subject to penalties of up to one day's compensation, with 50% of the penalty being paid to the subsequent injury fund as required by statute.

17. As found, claimant has proven that he sustained an injury for which lost time benefits were due and payable and insurer failed to notify the Division of Workers' Compensation. Claimant was issued a check for lost time benefits from employer on July 17, 2015 and July 29, 2015, but was no admissions of liability admitting for the

indemnity benefits or alternatively, a Notice of Contest, was filed by the employer with the Division of Workers' Compensation until the notice of contest was filed on August 25, 2015.

18. The statute allows for "up to" one day's compensation to be issued as a penalty for employer's failure to notify the Division of Workers' Compensation. As found, the ALJ considers the mitigating circumstances in that employer did pay claimant lost time benefits in July and did issue a Notice of Contest in a timely manner after being advised by the Division of Workers' Compensation of the claim for compensation. The ALJ further finds that while claimant's claim for compensation was dated July 11, 2015, it was not received by the Division of Workers' Compensation until August 3, 2015. The ALJ therefore determines that while employer is subject to penalties of up to $132.09 per day ($924.61 divided by 7), the actual penalty in this case should be $10 per day for a period of 57 days (July 29, 2015, ten days after the injury, until August 24, 2015).

19. This equates to a total penalty of $570.00, 50% payable to claimant, 50% payable to the Subsequent Injury Fund as directed at the end of this Order.

ORDER

It is therefore ordered that:

1. Employer shall pay claimant TTD benefits based on an AWW of $924.61 beginning June 20, 2015. The TTD benefits are increased by 50% pursuant to Section 8-43-408, C.R.S. for employer's failure to maintain workers' compensation insurance. Therefore, the TTD rate for claimant's injury is $924.61.

2. Employer is entitled to a credit against TTD benefits owed for the wages paid to claimant in July 2015 in the amount of $3,678.25.

3. Claimant's AWW is determined to be $924.61.

4. Employer shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury, including claimant's treatment from St. Mary's Hospital ER, St. Mary's Occupational Medicine, Dr. Price, and Grand Junction Therapies.

5. Employer shall pay claimant an additional penalty pursuant to Section 8-43-203(2)(a) of $570.00 with 50% payable to the subsequent injury fund ($285.00) and 50% payable to claimant ($285.00).

6. Employer shall pay the Director of the Division of Workers' Compensation on behalf of the Workers' Compensation Cash Fund as follows: employer shall issue any check payable to "Cash Fund" and shall mail the check to: Brenda Carrillo, SIF Penalty Coordinator, Revenue Assessment Officer, DOWC Special Funds Unit, P.O. Box 300009, Denver, Colorado 80203-0009.

7. The employer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

In lieu of payment of the above compensation and benefits to the claimant, the Respondent-Employer shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $41,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; OR

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $41,000.00 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Respondent-Employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

DATED: February 22, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUE

Whether Claimant has proven by a preponderance of the evidence that he is entitled to recover reimbursement for mileage expenses related to his trips to and from work in addition to his reimbursement for trips to attend medical and physical therapy appointments.

FINDINGS OF FACT

1. Claimant works for Employer as a Journeyman/Lineman. On March 12, 2015 Claimant suffered an admitted industrial injury to his left shoulder during the course and scope of his employment with Employer.

2. Claimant underwent conservative treatment for his left shoulder condition. He incurred mileage expenses to attend medical appointments and physical therapy sessions.

3. Claimant underwent physical therapy at Advanced Orthopedics located at 11960 Lioness Way, Parker, Colorado 80134. He received medical treatment from Authorized Treating Physician (ATP) John Sanidas, M.D. at Arbor Occupational Medicine located at 8200 Belleview, Greenwood Village, Colorado 80111. Claimant's physical therapy and medical treatment ceased when he reached Maximum Medical Improvement (MMI) on October 28, 2015.

4. Claimant submitted mileage reimbursement requests to Insurer for his physical therapy and medical appointments during the period August 10, 2015 through September 2, 2015. He sought reimbursement for 309 miles and requested a corresponding payment of $163.77. Insurer's adjuster disagreed with Claimant's calculations and reimbursed him for 220.12 miles with a corresponding payment of $116.66. Claimant thus seeks the difference of $47.11 in payment.

5. Claimant testified that every time he attended a medical appointment or physical therapy session he set the odometer in his personal vehicle to zero and when he arrived at his destination he recorded the mileage. He noted that the trips to physical therapy were approximately 35 miles. Of the 35 miles, 21-23 were from home to physical therapy while 12-14 were for the second leg of the trip from physical therapy to work.

6. Claimant explained that, if he had driven home from his medical and physical therapy appointments and then to work, he would have incurred additional mileage. Under the preceding scenario, he would have driven approximately 46 miles.

Claimant remarked that he drove directly to work from physical therapy and medical appointments in order to minimize his lost work time.

7. It is undisputed that Claimant is entitled to mileage reimbursement to attend medical appointments to and from work or home. However, Respondents are not liable for the additional mileage incurred by Claimant for simply traveling to and from work on a daily basis. The additional mileage does not constitute "travel to and from medical appointments" and is not the responsibility of Respondents.

8. Claimant suggests that it was more efficient to drive directly from physical therapy to work rather than going home first and incurring additional mileage expenses to drive the complete distance to work. However, Respondents are only liable for mileage expenses that would not have been incurred "but for" the industrial injury. Claimant sought reimbursement for trips from home to physical therapy and received reimbursement. However, Claimant also sought reimbursement for the second leg of his trips from physical therapy to work. The additional mileage reimbursement request would have been incurred regardless of his industrial injury. He would still have to travel the additional miles to go to work.

9. Claimant has failed to prove that it is more probably true than not that he is entitled to recover reimbursement for mileage expenses related to his trips to and from work in addition to his reimbursement for trips to attend medical and physical therapy appointments. Respondents are only liable for mileage expenses that would not have been incurred "but for" the industrial injury. Claimant sought reimbursement for trips from home to physical therapy and received reimbursement. However, Claimant also sought reimbursement for the second leg of his trips from physical therapy to work. The additional mileage reimbursement request would have been incurred regardless of his industrial injury. Claimant would still have to travel the additional miles to go to work. The additional mileage does not constitute "travel to and from medical appointments" and was not Respondents' responsibility. Respondents are not required to reimburse Claimant for the additional mileage incurred because it was not incidental to his industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-101(1)(A), C.R.S. requires respondents to pay for expenses that are incidental to obtaining reasonable and necessary medical treatment. Moreover, Colorado Workers' Compensation Rules of Procedure 18-6 (E) specifies the reimbursement of mileage expenses to injured workers. The Rule provides:

> [t]he payer shall reimburse an injured worker for reasonable and necessary mileage expenses for travel to and from medical appointments and reasonable mileage to obtain prescribed medications. The reimbursement rate shall be 30 cents per mile. The injured worker shall submit a statement to the payer showing the date(s) of travel and the number of miles traveled, with receipts for any other reasonable and necessary travel expenses incurred.

5. Mileage expenses for travel to and from medical appointments are recoverable as incidental medical treatment under the Workers Compensation Act. *Sigman Meat Co. v. Industrial Claim Appeals Office*, 761 P.2d 265 (Colo. App. 1988). "Incidental mileage expenses are those that "would not have been incurred but for the industrial injury." *Daughty v. King Soopers, Inc.,* W.C. No. 3-837-001 (ICAP, Jan. 17, 1996); *see Anderson v. United Airlines,* W.C. No. 4-445-052 (ICAP, Jan. 9, 2004). However, whether particular mileage expenses are reasonable, necessary and incidental to medical treatment is a question of fact for determination by the ALJ. *Krupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Anderson v. United Airlines,* W.C. No. 4-445-052 (ICAP, Jan. 9, 2004).

6. As found, Claimant has failed to prove by a preponderance of the evidence that he is entitled to recover reimbursement for mileage expenses related to his trips to and from work in addition to his reimbursement for trips to attend medical and physical therapy appointments. Respondents are only liable for mileage expenses that would not have been incurred "but for" the industrial injury. Claimant sought reimbursement for trips from home to physical therapy and received reimbursement. However, Claimant also sought reimbursement for the second leg of his trips from physical therapy to work. The additional mileage reimbursement request would have been incurred regardless of his industrial injury. Claimant would still have to travel the additional miles to go to work. The additional mileage does not constitute "travel to and

from medical appointments" and was not Respondents' responsibility. Respondents are not required to reimburse Claimant for the additional mileage incurred because it was not incidental to his industrial injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for additional mileage reimbursement in the amount of $47.11 is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: February 4, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

____
Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his left lower back on August 11, 2015.

STIPULATIONS

1. Claimant's average weekly wage is $1902.36 and if the claim is found compensable, Claimant would be entitled to the maximum compensation benefit rate of $914.27.

2. If the claim is compensable, Claimant is entitled to temporary total disability benefits from August 17, 2015 through October 7, 2015.

3. If the claim is compensable, the medical treatment Claimant received from On the Mend, Dr. Walker, and Dr. Jatana is reasonable, necessary, and related to the claim.

RESERVED ISSUES

1. The issue of temporary partial disability benefits beginning October 8, 2015 was reserved for future determination.

FINDINGS OF FACT

1. Claimant works for Employer as a firefighter and has been so employed for approximately eighteen years. Claimant has held the title of Captain for approximately the last two years.

2. On August 11, 2015 at approximately 5:50 p.m. Claimant was performing physical fitness training at work. Employees are required to perform physical fitness training for one hour of each scheduled 24 hour shift to maintain physical shape.

3. Claimant was performing a box jump exercise when he jumped onto a box with both feet and felt a tear into his left lower back and left gluteus region. Claimant was approximately two feet up on the box and in a squat type position when he felt the tearing sensation.

4. Claimant did not immediately report the injury to Employer.

5. Claimant worked a scheduled shift on August 12, 2015 and worked a trade shift on August 15, 2015. Claimant's pain was increasing during this time, but he was able to work full duty shifts.

6. On August 17, 2015 Claimant's pain had worsened and he reported the injury verbally to a supervisor. Claimant did not fill out an Accident/Injury/Incident report until August 25, 2015.

7. Claimant sought treatment on his own and underwent physical therapy on August 17, 2015, August 19, 2015, August 21, 2015, and August 25, 2015 and thought that he could rehabilitate himself. On August 17, 2015 Claimant reported to the physical therapist that he had left sided hip and leg pain that began last Wednesday maybe after doing a hard work and that it had gotten progressively worse since. *See* Exhibit 4.

8. On August 18, 2015 Claimant was evaluated by a personal care provider, William LeCoq, PA-C. Claimant reported left leg pain shooting down to his toes for the past week with symptoms starting at his left buttocks/hip and radiating to his toes. Claimant reported seeing physical therapy the day prior and that he had improved symptoms with physical therapy and home stretches. PA LeCoq assessed sciatica. *See* Exhibit C.

9. On August 24, 2015 Claimant underwent x-rays of the lumbar spine that were interpreted by Frank Crnkovich, M.D. Dr. Crnkovich noted loss of the normal lumbar lordosis with straightening, mild disc space narrowing at L5-S1, facet changes at L4-L5 and L5-S1, and mild vertebral body endplate lipping at the L3-L4 and L4-L5 levels. Dr. Crnkovich noted that if Claimant failed conservative therapy, an MRI to evaluate disc herniation could be considered. *See* Exhibit C.

10. On August 25, 2015 Claimant filled out an Accident/Injury/Incident report. Claimant reported that on August 11, 2015 while performing physical fitness training, he felt a strain on his left hip/gluteus area and minor discomfort in his lower back. Claimant reported that he had attended four physical therapy sessions and met with his PCP William LeCoq prior to filing the report. *See* Exhibit 1.

11. Claimant was referred to Sharon Walker, M.D. Dr. Walker referred Claimant for MRI testing and later referred Claimant to Sanjay Jatana, M.D.

12. On August 26, 2015 Claimant underwent an MRI of his lumbar spine that was interpreted by Samuel Scutchfield, M.D. Dr. Scutchfield noted at L5-S1 there was a broad based disc bulge with a superimposed complex disc herniation extending into the left lateral recess inferiorly, mild facet arthropathy, and impingement of the left descending S1 nerve roots secondary to complex cyst herniation, and mild bilateral neural foraminal narrowing. *See* Exhibit 8.

13. On August 31, 2015 Claimant was evaluated by Dr. Jatana. Dr. Jatana assessed degeneration of lumbar or lumbosacral intervertebral disc, displacement of

lumbar intervertebral disc without myelopathy, and spinal stenosis of lumbar region. Dr. Jatana opined that the best long-term success rates given the neurologic deficit present in Claimant's case would be with surgery, so Dr. Jatana planned to move forward with authorization for L5-S1 microdiscectomy. *See* Exhibit 10.

14. On September 8, 2015 Respondents denied the request for surgery authorization and filed a Notice of Contest. *See* Exhibit 2.

15. On September 10, 2015 Claimant underwent surgery performed by Dr. Jatana. Dr. Jatana performed a left L5-S1 laminectomy with medial facectomy and craniotomy of S1 nerve root and microscope assisted microdiscectomy with removal of a distal extruded fragment. *See* Exhibit 11.

16. Claimant has suffered prior work related injuries. On October 20, 2009 Claimant suffered an injury while performing physical fitness training. Claimant reported that injury the same day and was given a designated provider list. On December 17, 2013 Claimant suffered a back injury and reported the injury the same day and was given a designated provider list. On August 13, 2014 Claimant again reported an injury shortly afterwards and was given a designated provider list. Finally, on January 26, 2015 Claimant was bit by a combative patient while at work. Claimant reported the injury the day it occurred and was given a designated provider list. *See* Exhibits E, F, G, H.

17. Claimant is found credible and persuasive. Although Claimant did not report this injury immediately like several other injuries he suffered, this injury did not appear to Claimant to be immediately disabling or serious. Claimant is credible that he believed he could rehabilitate himself and might not need to file a claim. Claimant realized within two weeks that he could not fix it himself, and filed a claim approximately two weeks following the injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See § 8-41-301(1)(b), C.R.S.; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

An accident "arises out of" employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

Claimant has established by a preponderance of the evidence that he suffered a left lower back injury that arose out of and occurred in the course and scope of his employment on August 11, 2015. Claimant has established that during the course of required physical fitness training, he was performing a box jump when he had pain/pulling in his lower left gluteal area. Claimant has established that following this injury he experienced left low back pain and radiculopathy that was not present prior to the injury. Although Claimant did not immediately report this injury like he had with past injuries, Claimant is found credible and persuasive in explaining why he did not report this injury immediately and that he believed he could rehabilitate himself and would not need to file a claim. As found above, Claimant was able to work scheduled shifts on August 12, 2015 and August 15, 2015. Although he had pain immediately on August 11, 2015 while performing physical training, his immediate pain was not disabling. Unlike several of his prior work related injuries, where the seriousness of the injury was immediately recognizable, Claimant reasonably believed that this injury might not require a claim. Claimant's symptoms, however, continued to worsen and by August 17, 2015 he wasn't able to work. At this time, he verbally reported the injury to his supervisor and went on his own to physical therapy and to a primary care provider. Claimant ultimately filed a claim approximately two weeks following the injury. Although it was not an immediate same day claim, the claim was very close in time to the injury and Claimant is credible in explaining the two week delay between injury and the filing of the claim. Claimant is also credible in explaining the mechanism of injury and has been consistent in that explanation from the beginning of his treatment with physical therapy and his personal care provider.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his left lower back on August 11, 2015.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 11, 2016 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-890-890-04

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that she is entitled to an order awarding medical benefits, specifically a triple-phase bone; and

2. Whether Claimant proved by a preponderance of the evidence that she is entitled a change of physician to Dr. Feldman.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following Findings of Fact.

1. Claimant was born on December 3, 1961, and is 54 years of age. Claimant suffered a work related injury on June 5, 2012. Claimant's authorized treating physician is Jeffrey Wunder, M.D. Dr. Wunder placed Claimant at maximum medical improvement (MMI) on February 3, 2014. On April 15, 2014, Claimant treated at Colorado Rehabilitation and Occupational Medicine (CROM). She initially treated with Rebekah Martin, M.D. Claimant's treatment with Dr. Martin was unauthorized. On May 5, 2014, Dr. Kristin Mason performed an independent medical evaluation and, among things, found that Claimant was not at MMI and needed further evaluation of possible complex regional pain syndrome (CRPS).

2. On June 2, 2014, Claimant was seen for a Division independent medical examination (DIME) by Karen Ksiazek, M.D. Dr. Ksiazek concluded that Claimant was not at MMI. According to Dr. Ksiazek, Claimant's work-related diagnoses are right hip labral tear status post-repair June 20, 2013, with iliotibial band windowing, femoroplasty due to acquired FAI and iliopsoas release, postoperative lateral femoral cutaneous hypaesthesia and obturator dysaesthesias; right upper extremity contusion with right SLAP lesion and known osteoarthritis with impingement symptoms; adjustment disorder with depressed and frustrated mood secondary to physical and psychosocial issues impacting career; and delayed right upper extremity onset sympathetically maintained pain with the question of possible CRPS. Dr. Ksiazek recommended workup of the right shoulder and CRPS, including clarification of the CRPS diagnosis with a triple-phase bone scan. She also suggested physical therapy to incorporate treatment of the pelvic floor obliquity and muscular recruitment would be indicated.

3. On August 5, 2014, Claimant saw Dr. Wunder. On that date, Dr. Wunder referred Claimant to Colorado Infrared Imaging Center for a stress thermogram and three-phase bone scan of the right upper extremity. Claimant requested to have her tests done at

CROM, but Dr. Wunder, aware that Claimant was seeing Dr. Martin, opined that there was a conflict of interest because Dr. Martin was a member of CROM. Dr. Wunder instructed Claimant to return to him in 3 to 4 weeks to review the additional diagnostic results, but she did not return. Records do not reflect that Claimant underwent the stress thermogram or triple phase bone scan at Colorado Infrared Imaging Center as referred by Dr. Wunder.

4. Two days after seeing Dr. Wunder, on August 7, 2014, Claimant saw Dr. Martin at CROM where the doctor reported that Claimant should undergo the triple phase bone in the northern Colorado area closer to Claimant's home and not in the Denver area as recommended by Dr. Wunder. Dr. Martin reported that her office could provide the triple phase bone scan to Claimant. Dr. Martin did not comment on the conflict of interest noted by Dr. Wunder.

5. Claimant had been seeing Dr. Martin since April 15, 2014, meeting with the doctor every month through October 2014. This treatment was unauthorized.

6. On November 25, 2014, Claimant began treating with Alicia Feldman, M.D. at CROM. Claimant's treatment with Dr. Feldman at CROM was unauthorized. Dr. Feldman left CROM and went to the Colorado Clinic. On July 1, 2015, Claimant followed Dr. Feldman to the Colorado Clinic and began treating with her there. Dr. Feldman diagnosed Claimant with chronic pain syndrome, post-herpetic neuralgia, CRPS, left knee osteoarthritis, and right hip pain. Dr. Feldman prescribed treatment including Trazadone, Norco, and mental healthcare. Claimant's treatment with Dr. Feldman at Colorado Clinic was unauthorized.

7. On October 15, 2015, Claimant was seen by Dr. Allison M. Fall, M.D., for an independent medical examination. Dr. Fall's assessment was S/P fall leading to right hip contusion/aggravation of pre-existing condition, S/P hip arthroscopic, labral reconstruction, and greater trochanteric bursectomy by Dr. White; right elbow contusion, no residual complaints or objective findings; left knee osteoarthritic changes, unrelated; chronic pelvic floor pain, unrelated; pre-existing right shoulder complaints with MRI consistent with age-appropriate changes; and doubtful CRPS, if present not work-related. In her report, Dr. Fall opined that no further treatment was reasonable and necessary to bring Claimant to MMI from any work-related injury.

8. On November 23, 2015, Claimant underwent a stress thermographic diagnostic evaluation at CROM by Tashof Bernton, M.D. Dr. Bernton determined the findings of the stress thermogram were not compatible with CRPS and it was a negative diagnostic assessment for CRPS or neuritic pain.

9. Dr. Fall is an expert in physical medicine and rehabilitation and Level II accredited. Dr. Fall credibly testified that much of the healthcare provided to Claimant by Dr. Feldman was neither reasonable, necessary nor related to the work injury of June 5, 2012. Dr. Fall explained Dr. Feldman's diagnosis of postherpetic neuralgia, CRPS upper extremity, and left knee osteoarthritis are in error as Claimant does not have CRPS and her knee osteoarthritis is not a direct and proximate result of the

industrial injury. The diagnostic tests performed at CROM by Dr. Bernton on November 23, 2015, further supports that Claimant does not have CRPS. In addition, Dr. Feldman's prescriptions of Trazodone, Norco, and pain psychology are not reasonably needed to cure and relieve Claimant from, nor related to, the effects of the industrial injury.

10. The Judge finds that Claimant sustained her burden to prove by a preponderance of the evidence that a triple-phase bone scan is a reasonable and necessary medical treatment. The evidence established that the DIME physician found that Claimant is not at MMI and recommended further work up on several conditions, including the possible CRPS. A triple phase bone scan was recommended by Dr. Ksiazek, the DIME physician. It was thereafter prescribed by Dr. Wunder, the authorized treating physician. The DIME physician indicates that it is not yet clear whether Claimant has CRPS and the triple phase bone scan will clarify this. Dr. Wunder opines that Claimant's CRPS symptoms are not work related and will likely be discovered to be psychogenic in nature. Dr. Wunder further opines that Claimant's right upper extremity problems are not work related. The recommendation and Claimant's referral by the DIME physician and the authorized treating physician for a triple phase bone scan constitutes a preponderance of the evidence to support the reasonableness and necessity of this medical benefit.

11. Claimant testified that the patient-physician relationship between herself and Dr. Wunder has deteriorated. She testified that Dr. Wunder does not appear to listen to her. She testified that Dr. Wunder inexplicably placed her at MMI when Dr. White, her Orthopedic Surgeon for her hip condition, recommended additional physical therapy.

12. Claimant testified that she wants to continue to treat with Dr. Feldman because she established a patient-physician relationship with her and to begin treating with a new physician would be detrimental to her treatment prospects.

13. The evidence of record in this matter reflects that Claimant began treating with physicians outside of the workers' compensation system in April 2014. Claimant underwent a DIME with Dr. Ksiazek in June 2014 whose assessment of Claimant's condition is that she was not at MMI. When Dr. Wunder acted on Dr. Ksiazek's DIME recommendations by referring Claimant for a triple phase bone scan and stress thermogram, Claimant ignored his referrals and began to consistently treat with Dr. Martin, seeing the doctor monthly for a six month period. Dr. Martin's notes reflect ongoing discussions with Claimant about undergoing the stress thermogram and triple phase bone scan at Dr. Martin's CROM office at Claimant's expense.

14. Dr. Feldman, the doctor to whom Claimant wants her care transferred, is a pain management specialist according to her records, who in November 2014 was also working at CROM. After Claimant's November 25, 2014, visit, Claimant saw Dr. Feldman again in February, July and September 2015. Claimant now claims she wants Dr. Feldman designated as her authorized treating physician.

15. Dr. Wunder had long standing concern about whether Claimant's right shoulder complaints were related to the June 2012 work injury. Dr. Wunder also had reservations about whether the CRPS symptoms in Claimant's right upper extremity were work related. Dr. Wunder's August 5, 2014, report expressed his concerns about Claimant's treatment and recovery. He states,

> I think this is a classic case of the patient's symptoms being shaped by her medical treatment providers. Although she reported diagnostic tests with her stellate ganglion block, I do not think her report of pain relief at all can be trusted or considered valid in light of the psychosocial problems reported and, on her physical examination, she had no evidence of CRPS today.

Despite Dr. Wunder's concerns, he followed the recommendations of Dr Ksiazek and referred her for the stress thermogram and triple phase bone scan.

16. Considering all the evidence, the Judge finds that Claimant failed to establish by a preponderance of the evidence that she is entitled to an order for a change of physician. Claimant failed to make a proper showing that her care would be improved by changing physicians or that Dr. Wunder acted in any way to cause her harm. Thus, a change of physician is not warranted.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law.

1. The purpose of the Workers' Compensation Act of Colorado (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *See Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. *See* Section 8-43-201(1), C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. *See* Section 8-43-201, C.R.S. The judge's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the judge has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected

evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Industrial Claims Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

TRIPLE PHASE BONE SCAN

3. Respondents are liable for medical treatment reasonably necessary to cure or relieve the claimant from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when the claimant establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000).

4. The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the Judge. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192, 1197 (Colo. App. 2002). Even where they have admitted liability, respondents are not precluded from later contesting liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Moreover, when respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *Id.*

5. In this case, the DIME physician has determined that Claimant is not at MMI and requires additional curative treatment. The DIME indicates that Claimant requires additional diagnostic testing to clarify the diagnosis of the right upper extremity condition. Respondents did not challenge the DIME determination on MMI or on the relatedness of the right upper extremity condition.

6. Considering all the evidence, the Judge concludes that Claimant sustained her burden of proof by a preponderance of the evidence to establish that a triple-phase bone scan is a reasonable and necessary medical treatment related to her work injury. Drs. Ksiazek, Wunder, Mason and Martin opined on the necessity of further testing to clarify Claimant’s CRPS diagnosis.

7. Dr. Fall’s opinion on this matter was considered and it is concluded her opinion might have been more helpful in the case challenging the DIME opinion on MMI and relatedness. But, Dr. Fall’s opinion is less persuasive in the case before the court at this time regarding the reasonableness and necessity of the triple phase bone scan. It is concluded that Dr. Wunder, Mason, Martin and Ksiazek’s opinions regarding the need for diagnostic work up of the right upper extremity condition in order clarify whether Claimant has CRPS constitutes a preponderance of the evidence supporting this order.

CHANGE OF PHYSICIAN

8. Pursuant to Section 8-43-404(5)(a), C.R.S., the respondent has the right to select the treating physician in the first instance. Once the respondent has exercised its right of first selection, the claimant is not entitled to a change of physician but may request a change under several sections of the Act. *Vigil v. City Cab Co.*, W.C. No. 3-985-493

(ICAO May 23, 1995); *See Sims v. Industrial Claim Appeals Office*, 797 P.2d 777, 780 (Colo.App. 1990).

9. Claimant failed to make a proper showing that a change of physician to Dr. Feldman is warranted. If a claimant wants to change physicians, there is a statutory obligation to follow the prescribed procedures in Section 8-43-404(5)(a), C.R.S. *Yeck v. Indus. Claim Appeals Office,* 996 P.2d 228, 229 (Colo. App. 1999). The Act does not permit an injured worker to change physicians or employ additional physicians without notice and consent. *Pickett v. Colorado State Hospital,* 513 P.2d 228 (Colo. App. 1973). However, a claimant may seek a change of physician upon a "proper showing" to the division. Section8-43-404(5)(a)(VI),C.R.S.

10. The credible and persuasive evidence demonstrates Dr. Wunder has provided competent and professional medical care and that Claimant without explanation has not followed his recommendations. A change of physician is not warranted by the mere fact that a claimant has more faith in a specific doctor or lacks confidence in the employer's doctor. 5 *Larson's Workers' Compensation Law* Section 94.02[3] (1999).

11. Section 8-43-404(5)(a)(VI), C.R.S. does not define what a claimant must prove to make a "proper showing." A claimant does not have any entitlement to be treated by any particular physician. *See Colorado Compensation Insurance Authority v. Noflo,* 886 P.2d 714 (Colo. 1994). The Judge's decision should be made with a view towards insuring the claimant is being provided reasonable and necessary medical treatment as required by Section 8-42-101(1)(a), C.R.S. while protecting the respondents' legitimate interest in being apprised of the course of treatment for which it may ultimately be held liable*. See Landeros v. CF& I Steel,* W.C. No. 4-395-314 (ICAO Oct. 26, 2000). *See also Villalobos v. Spring Air Mattress*, W.C. No. 4-662-825 (ICAO Jun. 22, 2007).

12. In light of Drs. Wunder and Fall's credible opinions regarding Claimant's treatment, and the medical records regarding Claimant's treatment by the physicians at CROM, the Judge finds Claimant failed to make a proper showing that a change of physician to Dr. Feldman is warranted.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Judge orders, as follows.

1. Respondents shall be liable for a triple phase bone scan.

2.Claimant's claim for a change of physician is denied and dismissed.

3. Any issues not determined in this decision are reserved for future

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _February 25, 2016__

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law
Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has established by a preponderance of the evidence that he is entitled to permanent total disability (PTD) benefits;

2. If so, whether the respondents have established by a preponderance of the evidence that any offsets should be deducted from the PTD benefits;

3. Whether the respondents have overcome by clear and convincing evidence Dr. Sandell's finding that the claimant's right hip symptoms and diagnosis of "ectopic bone" were a direct result of claimant's work injury[1]; and,

4. Whether the respondents have established by a preponderance of the evidence that the doctrine of waiver bars claimant's claim.

At the start of hearing, the parties agreed on the record that the claimant had timely and properly objected to prior final admissions of liability and that the foregoing issues were preserved for hearing. The parties previously stipulated that claimant's average weekly wage is $1084.08.

FINDINGS OF FACT

1. The claimant was born and raised in Leadville, Colorado. He is 66 years old. The claimant is married and he and his wife have two children, a son Steven and a daughter Melissa. The claimant did poorly in school. In sixth and seventh grades, the claimant received D's and F's in arithmetic, geography, language, reading, science, and spelling. In high school, he received mostly C's and D's, with an occasional B or F. Despite his poor grades, on May 20, 1962, a teacher commented, "[The claimant] can learn, but is quite slow. He especially needs help in writing. (He always tries)"

2. Following high school, the claimant commenced employment with the Climax Mine near Leadville where he worked for seventeen years from 1969 to 1986. Following a layoff from Climax Mine in 1986, the claimant worked for a goldmine in

[1] On April 25, 2014, insurance adjuster Marjorie H. Kelly issued a letter to Dr. Hess stating that the respondent-insurer was not liable for the claimant's right hip problems.

Nevada for two years as a mechanic. In 1988 the claimant returned to work for the Climax Mine and worked there another four years until 1992 when the mine closed. After his layoff from Climax Mine in 1992, the claimant commenced employment with the respondent-employer where he continued to work until around May 2006. The claimant has not worked since he left employment with the respondent-employer.

3. The claimant worked as a mechanic at the respondent-employer's bus barn. He performed maintenance and repaired damage to the respondent-employer's buses. The claimant's schedule was four days per week. He would leave by 3:15 or 3:30 a.m., and drive to East Vail, where the bus barn was located. His workday commenced around 4:00 o'clock or 4:30 a.m. He worked a ten-hour shift and then returned home. The claimant was the first person at the bus barn on the days that he worked. The claimant rarely, if ever, missed work because of illness.

4. On July 20, 2000, the claimant was on a ladder removing a window from a bus. He fell backwards off the ladder, and the window came down on top of his knee. The claimant suffered a comminuted severe tibia plateau fracture involving the proximal tibia. The claimant underwent emergency repair of this fracture. The repair included an external fixator. Following surgery, he stayed in the hospital for twelve days. The claimant had the external fixator until October 23, 2000 when some of the hardware was surgically removed.

5. On January 9, 2001 the claimant underwent a third surgery to remove scar and meniscus tissue. On June 5, 2001, Dr. Bradley operated on the claimant again. Dr. Bradley again removed some scar tissue. He noted that the claimant's knee was 5° short of full extension. Dr. Bradley also performed further hardware removal.

6. In April 2002, the claimant was referred to surgeon Gary Hess, MD of Denver-Vail Orthopedics, P.C. On July 10, 2002, Dr. Hess performed a right total knee arthroplasty. On September 27, 2002, Dr. Hess noted that the claimant was struggling with his rehabilitation and recovery and recommended that the claimant be provided with a "double upright hinged brace that he can lock in full extension for ambulation to avoid falling episodes." On March 14, 2006 Dr. Hess noted that the claimant had developed pain in his right hip as well as arthritis. On April 13, 2005 the claimant underwent a revision right total knee arthroplasty, correction of flexion contracture in the right knee, and a repair of his infrapatellar tendon in his right knee. The claimant's previous total knee arthroplasty (replacement) had failed and needed to be redone.

7. Dr. Kathy McCranie examined the claimant on November 8, 2005 for a pain management consultation. Her impressions were chronic right knee pain. She

noted that the claimant had undergone multiple right total knee replacements. She prescribed Ibuprofen, Ultram, and Lidoderm patches. Dr. McCranie placed claimant at MMI and gave him a 14 percent whole person impairment rating.

8. On May 26, 2006 the claimant underwent a functional capacity evaluation with Keith McCarroll, P.T. McCarroll noted that there were no inconsistencies with the claimant's effort. McCarroll noted that the claimant was at risk for falls if working on uneven surfaces, or on ice, snow, or stepladders. McCarroll also noted that the claimant had pain in his right knee and hip, and that he should be on his feet no more than two to three hours per day. McCarroll also noted that the claimant was at a "significantly increased risk for back injury because of his poor body mechanics with lifting, which are a direct result of his inability to use his right knee to squat or kneel."

9. On May 30, 2006, Dr. Hess again examined the claimant and again assigned a restriction of no work. Per Dr. Hess, these restrictions were permanent.

10. On August 17, 2006, Dr. Allison Fall examined the claimant on behalf of the respondents. She assigned a lower extremity impairment rating of 44%, converted to 18% whole person. Dr. Fall remarked that her objective examination did not demonstrate pathology consistent with the claimant's ongoing complaints of pain. Nonetheless, she recommended at least one year of Darvocet and Lidoderm patches for pain management. Dr. Fall also issued work restrictions of "40 hours of work with no squatting, kneeling, climbing ladders or work at unprotected heights." She declined to limit the claimant's standing or walking.

11. On September 1, 2006 the respondent-employer formally discharged the claimant, effective August 28, 2006. On November 2, 2006 Dr. Hess answered a questionnaire and reported that, with respect to the claimant's right hip, the claimant had suffered a tear of the muscles with bleeding around his right hip. Dr. Hess noted that the claimant's right hip injury arose when he fell from the ladder at work on July 20, 2000. Dr. Hess stated that he had last treated the claimant's hip on September 2, 2006 and that the claimant was not at MMI for his right hip. Dr. Hess suggested that the claimant would likely need the excision of the ectopic bone in his right hip, as well as a hip replacement at some point in time. Dr. Hess also noted that the claimant was at MMI for his right knee as of September 26, 2006, although he was not at MMI for the right hip.

12. On November 26, 2006, the claimant began receiving long-term disability (LTD) benefits of $2537.73 per month from Sun Life Financial (Sun Life), continuing until June 15, 2015. Sun Life asserted a subrogation interest against the claimant's

workers' compensation recovery for the full amount of the LTD benefits. As of July 15, 2015, the claimant started receiving Social Security retirement benefits in the amount of $1,674.00 per month.

13. On December 14, 2006, Dr. Fall issued an opinion stating that the claimant had no "internal derangement of the right hip joint," although she did confirm that there had been some muscular injury around the right hip. On December 29, 2006 the claimant underwent an Independent Medical Examination with Dr. James Bachman. Dr. Bachman noted that the claimant had undergone six right knee surgical procedures and two right knee replacements. Dr. Bachman stated that the claimant had suffered a right hip injury that occurred on July 20, 2000 and was "solely due to this work related injury." Current diagnosis is "bone chip." Dr. Bachman noted that the claimant suffered a lumbar spine injury due to his abnormal gait, and that the claimant also suffered insomnia "directly and solely due to his pain and stiffness." Dr. Bachman stated that the claimant still had "severe right knee pain" and that the claimant walked "with a distinct and abnormal gait and his severe limitation in his right knee [range of motion]."

14. Dr. Bachman stated that the claimant needed pain management care. Dr. Bachman stated that the claimant should lift no more than 10 pounds and should drive no more than 1 ½ hours per day. Dr. Bachman disagreed with Dr. Hess' "no work" restrictions. Dr. Bachman determined that claimant had a 35% whole person impairment rating. He noted that the claimant would need quarterly pain management and yearly orthopedic evaluations for the rest of his life. Although Dr. Bachman noted that the claimant had insomnia caused by pain, his report contains no discussion as to how that insomnia would affect the claimant on a day-to-day basis if the claimant were working. At the time of Dr. Bachman's examination, the claimant had not worked for a period of some months.

15. On January 16, 2007 Dr. Hess wrote a letter "To Whom It May Concern" that as of September 26, 2006 the claimant was "permanently disabled and I do not expect him to return to work activities."

16. On January 26, 2007 the claimant underwent a Division independent medical examination (DIME) with Dr. Timothy Sandell. Dr. Sandell determined that the claimant's right hip symptoms were a direct result of the claimant's work injury. On April 4, 2007 Dr. Sandell issued an addendum stating that the claimant's final impairment rating was 60% of the lower extremity, or 24% whole person. Dr. Sandell found no reason to apportion the claimant's rating to any cause other than the claimant's July 20, 2000 work injury.

17. Dr. Sandell also determined that the claimant's date of MMI was May 30, 2006. On February 17, 2007 Dr. Hess noted that the claimant required chronic pain management.

18. On July 17, 2007, Dr. Hess completed a questionnaire for Sun Life. He noted that the claimant could "never" squat, climb, twist, push, pool, balance, kneel, or crawl. He also noted that the claimant could "occasionally" drive, walk, stand, bend at the waist, lift up to 25 pounds and carry up to 25 pounds. Dr. Hess commented that the claimant was "permanently disabled & not able to return to work."

19. On May 24, 2007 Dr. J. Randall Burris examined claimant. Dr. Burris noted that the claimant had 25° of extension lag and 90° of flexion in his right knee, and he would need to review 2 1/2 inches of medical records and issue an addendum. There is insufficient evidence that any addendum was ever issued.

20. On August 17, 2007, vocational evaluator Ronald Brennan, M.A., C.D.M.S. evaluated the claimant with regards to the claimant's ability to earn any wages. Mr. Brennan opined that the claimant was "unable to earn any wage from his past employment ... and unable to earn any wage from other jobs existing in his commutable labor market."

21. On June 17, 2008, Dr. Hess noted that the claimant's right knee would flex to 95° and extend to -5°. Dr. Hess noticed some concerns about claimant's right hip. Dr. Hess again noted that the claimant's right hip symptoms were work-related.

22. On August 27, 2008, the claimant underwent a functional capacity evaluation with Gail Gerig, M.Ed., PT, CHT-retired. Ms. Gerig noted that the claimant had "severe loss of right knee extension and flexion," some atrophy of his right calf musculature, approximately 3 cm of right leg shortening, a severe discrepancy between the right and left iliac crest levels with the right much lower than the left, and the claimant "does not stand and bear weight on the right." Ms. Gehrig noted that the claimant's test results were valid. She also noted the claimant's true work level was "less than sedentary."

23. On April 13, 2009 the claimant underwent another employability assessment with Louis C Phillips, B.S., Q.R.C. At that time, the claimant was 59 years old. Mr. Phillips agreed with Mr. Brennan that the claimant was unable to earn any wages within his commutable labor market. Mr. Phillips also noted that the respondents' vocational evaluator Gail Pickett had determined that the claimant was able to work, but that she had based her conclusions entirely on Dr. Allison Fall's opinions of work restrictions. Mr. Phillips noted that Dr. Fall had imposed no restrictions on the claimant's ability to "sit,

stand, walk or lift." Mr. Phillips noted with disapproval the contrast between the restrictions assigned by Dr. Fall and the restrictions assigned by numerous other physicians that had treated claimant.

24. On June 4, 2009, Dr. Fall conducted another independent examination of the claimant. She noted that the claimant had current symptoms of, "Pain is aggravated by standing, walking, or sitting for a prolonged period of time." She noted that the claimant lacked 15° from neutral extension in his right knee when standing and when lying down, and she also noted that the claimant had active flexion of the right knee of 100°. Dr. Fall again affirmed that the claimant could work 40 hours a week with no squatting, kneeling, climbing ladders, or work at unprotected heights, and she again declined to issue any limitations for standing or walking.

25. From July 8, 2009 until February 4, 2014 the claimant continued follow-up with Dr. Hess, who noted that the claimant complained of pain in his hip, his right hip, knee, and low back, while also noting the claimants continued inability to work.

26. On September 15, 2015, the claimant underwent another IME with Dr. Fall. Dr. Fall reaffirmed her previous work restrictions, again declining to issue any limitations upon the claimant with respect to walking or standing. Dr. Fall never addressed in any of her reports the impact of the claimant's inability to sleep because of pain.

27. On October 27, 2015, vocational evaluator Gail Pickett issued a report stating that the claimant could perform work. Ms. Pickett suggested that the claimant could: drive a bus school (assist wheelchair bound students to get on and off the bus; requires CDL license), work at Taco Bell as a cashier (stand entire shift); work as a bakery Café service staff (stand entire shift); or be a part-time driver guard in Leadville (must lift 50 pounds). Ms. Pickett's report also states there was a Gate Keeper job in Summit County.

28. On October 12, 2015 the claimant was examined by O.T. Resources, Inc., for evaluation of functional capacity as well as ability to earn wages. Occupational therapist Marie Andrews, OTR/L, BCG, MSW administered the functional capacity evaluation. Doris Shriver, OT/L. FAOTA, QRC, CLCP, reviewed the results of the functional capacity evaluation and completed the employability assessment portion of the report. On November 2, 2015 Ms. Andrews and Ms. Shriver issued a report finding that the claimant had numerous significant physical limitations. They included no floor to waist lifting, a maximum of one hour of sitting at one time with the ability to alternate between sitting, standing, walking and lying down throughout the day. Limitations also included significant standing restrictions, the avoidance of all climbing of ropes, ladders

or scaffolds, kneeling, crouching or squatting, crawling, and reaching overhead. The report noted marked limitations in the claimant’s ability to maintain attention and concentration for extended periods, as well as moderate difficulty with 2 to 3 step directions. The report also noted moderate difficulty with dressing, feeding, bathing, hygiene, cooking, cleaning, and local travel. It noted extreme difficulty with distance travel. The report advised that the claimant should totally avoid unprotected heights, being around moving equipment, and driving machinery. It noted moderate limitations with respect to exposure to extreme heat, cold and wetness. It noted moderate difficulty with the claimant driving an automobile.

29. Ms. Shriver and Ms. Andrews also noted that the claimant read at grade level 3.7, spelled at grade level 2.1, performed math at grade level 4.5 and had sentence comprehension of grade level 5.5**.** The report also noted that the claimant had clinically observed severe chronic pain as well as sleep disturbance due to pain. He also had impaired tolerance for sitting, standing, walking.

30. The claimant had to stop working for the respondent-employer because of his pain. He has difficulty sleeping because of the pain and he has to prop his knee on a pillow, and he often needs to nap during the day to catch up on his rest. The claimant tries to avoid ice and snow in order not to fall. The claimant returned to work with the respondent-employer numerous times between his surgeries. The claimant now lives in constant pain, and his pain is quickly exacerbated to severe and intolerable levels by too much walking, sitting or activity. The claimant has lost the ability to participate in many enjoyable family activities such as hiking, biking, fishing, helping his daughter with sponsoring and organizing local foot races, helping his daughter open up the recreation center in Leadville, traveling, and doing things with his son, who was approximately 13 years old when the claimant was injured. The claimant testified to restrictions that were essentially in accord with those found by Marie Andrews and Doris Shriver of O.T. Resources, Inc. He also testified as to his poor school performance and his lack of experience running a cash register or a computer. He also stated that he did not have a CDL license. He also stated that it took him approximately 45 minutes under the best of circumstances to get from his home in Leadville to Vail.

31. The claimant testified that had never sent any document or expressed or communicated any intent to waive his workers' compensation claim. He stated that there had been some delay in his claim because, as he understood it, his attorney had been ill.

32. The claimant’s wife and his daughter Melissa affirmed in their testimony the claimant's restrictions and difficulties with activities of daily living. The claimant's

wife related that the claimant was a hard and conscientious worker who would go to work even when he was sick. The claimant's daughter Melissa stated that her family had been a family that loved to play together in the outdoors, and that her father's injury had inflicted a very large loss not only on him but also on all other members of the family.

33. Vocational evaluator Doris Shriver testified that she had 40+ years of experience in vocational evaluation and had occupied a number of board and officer positions in national occupational therapy and vocational associations. Ms. Shriver detailed the methodology and procedure employed by O.T. Resources to ensure safety, validity and lack of bias in testing. Ms. Shriver stated that the battery of tests administered to the claimant were largely based on the McCarron-Dial system introduced to the field of rehabilitation in 1973 and generally regarded as one of the most extensively validated vocational evaluation systems. There was insufficient evidence to directly dispute the reliability of the McCarron-Dial system. She testified the claimant's work level was less than sedentary. Ms. Shriver also testified that the claimant would miss an unacceptable (from an employer’s point of view) number of days from work if he tried to return to work.

34. The respondents’ vocational evaluator Gail Pickett stated that the claimant's commutable labor market was approximately 30 miles from home. The claimant testified that Buena Vista, Frisco, and Vail were beyond the distance of his commutable labor market as determined by Ms. Pickett. Ms. Pickett stated that if the vocational restrictions determined by O.T. Resources, Inc. were valid, that the claimant was unable to earn any wages. Ms. Pickett also admitted that the claimant's work history indicated that he was a reliable and hard-working employee. Ms. Pickett also admitted that chronic lack of sleep causes approximately the same effect on driving ability as driving under the influence.

35. Dr. Fall testified essentially in accordance with her reports. She again stated that she could find no reason for the claimant to have pain in his right knee, despite the many surgeries he had undergone. She stated that even though the claimant could not straighten his knee, it would require no more effort for the claimant to stand on his right leg than if his knee worked be able to extend completely straight.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8- 43-201, *supra.*

2. The judge's factual findings concern only evidence that is dispositive of the issues involves; the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936).

4. Under Section 8-40-201(16.5)(a), C.R.S., permanent total disability (PTD) means, "the employee is unable to earn any wages in the same or other employment." A claimant thus cannot obtain PTD benefits if he is capable of earning wages in any amount. Therefore, to establish a claim for PTD a claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment.

5. A claimant must demonstrate that his industrial injuries constitute a "significant causative factor" in order to establish a claim for PTD. *In re Olinger,* W.C. No. 4-002- 991 (ICAO, March 31, 2005). A "significant causative factor" requires a "direct causal relationship" between the industrial injuries and a PTD claim. *In re Dickerson,* W.C. No. 4-323-980 (ICAO, July 24, 2006); see *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

6. In ascertaining whether a claimant is able to earn any wages, the ALJ may consider various "human factors," including a claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. RE-12 v. Bymer,* 955 P.2d 550 at 556 (Colo. 1998); *Holly Nursing v. ICAO,* 992 P.2d 701 (Colo. App. 1999). As part of the determination, the ALJ may also consider whether the claimant will be able to obtain and maintain employment. *Bymer,* 955 P.2d at 556. The critical test, which must be conducted on a case-by-case basis, is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Bymer,* 905 P.2d at 557. Ultimately, the determination of whether a claimant suffers from a permanent and total disability is an issue of fact for resolution by the ALJ. *In re Selvage,* W.C. No. 4-486-801 (ICAO, Oct. 9, 2007).

7. The ALJ concludes that the claimant's descriptions of his pain and limitations are credible. The ALJ concludes that, given the totality of the circumstances and the evidence considered as a whole, the limitations and restrictions noted and determined in the report of O.T. Resources, Inc. are the most accurate and credible. The evidence in the record indicates that the claimant was hard-working and conscientious and dependable. Even though the claimant had significant difficulties with subjects such as math, reading and spelling, he worked hard to overcome these limitations and made a successful career for himself as a mechanic and a miner. The claimant's orthopedic surgeon Dr. Gary Hess has treated claimant from 2002 through the present time. Dr. Hess has consistently maintained for over nine years that the claimant is permanently disabled from work. Further, the claimant and his wife and his daughter and vocational expert Doris Shriver were credible and consistent in their description of the claimant's condition, restrictions, limitations and work ethic.

8. The ALJ concludes that the functional capacity evaluation performed by O.T. Resources, Inc. employed appropriate processes to minimize bias and/or invalid findings. In contrast, the work restrictions imposed by Dr. Fall are inconsistent and not credible.

9. The respondents' vocational evaluator Gail Pickett admitted that the claimant's commutable labor market was very limited as well as that the claimant would be unable to earn any wages if the O.T. Resources, Inc. restrictions were valid.

10. As found, the claimant has demonstrated by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. The claimant is permanently totally disabled.

11. As to the claimant's hip symptoms, Sections 8-42-107(8)(b)(III) and (c), *supra,* provide that the determination of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office,* 961 P.2d 590 (Colo. App. 1998). As is suggested by the foregoing finding of permanent total disability, the ALJ concludes that the respondents have failed to present clear and convincing evidence that would demonstrate that it is highly probable that Dr. Sandell erred in determining that claimant's hip symptoms arose from his work injury.

12. As to waiver, it is the intentional relinquishment of a known right. A waiver must be made with full knowledge of the relevant facts, and the conduct should be free from ambiguity and clearly manifest the intention not to assert the right. *Johnson v. Industrial Commission,* 761 P.2d 1140 (Colo. 1988); *Department of Health v. Donahue,* 690 P.2d 243 (Colo. 1984). Waiver may be explicit, or it may be implied, as where a party acts inconsistently with the known right and where that action would prejudice the other parties. *Vanderbeek v. Vernon Corp.,* 25 P.3d 1242 (Colo. App. 2000); *Norden v. E.F. Hutton and Co Inc.,* 739 P.2d 914 (Colo. App. 1987); *Klein v. State Farm Mutual Automobile Ins. Co.,* 948 P.2d 43 (Colo. App. 1987); *Red Sky Homeowners Assoc. v. The Heritage Company,* 701 P. 2d 603 (Colo. App. 1984). Determination of whether there has been a waiver is generally a factual issue to be resolved by the ALJ. *Johnson v. Industrial Commission, supra.* "We must uphold the ALJ's findings if supported by substantial evidence in the record." Section 8-43-301(8), C.R.S. 2006. In applying this standard, "we must defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the evidence." *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995).

13. The ALJ concludes that the respondents have failed to prove by a preponderance of the evidence that the claimant waived his workers' compensation claim for permanent total disability benefits. The respondents offered insufficient evidence of any explicit intent on the part of the claimant to waive PTD. Nor have respondents shown any prejudice. The respondents could have availed themselves of the provisions of C.R.S. § 8-43-207(l)(n) to seek closure of the claimant's claim, but they never did.

14. As to offsets, the respondents are entitled to deduct from any permanent total disability benefits owed to the claimant an amount equal to 50% of the claimant's initial Social Security retirement benefits. C.R.S. § 8-42-103(1)(c)(II). As the claimant

began receiving Social Security retirement benefits as of July 2015 in the amount of $1,674.00 per month, the respondents are entitled to claim an offset of $837.00 per month as of July 1, 2015.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay permanent total disability benefits to the claimant commencing May 30, 2006.

2. The respondents' claim to overcome Dr. Sandell's finding that the claimant's hip symptoms are related to and caused by the injury of July 20, 2000 is denied and dismissed.

3. The respondent-insurer may claim an offset of $837.00 per month commencing July 1, 2015.

4. The respondents' claim that the claimant waived his right to permanent total disability benefits is denied and dismissed.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 15, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the respondents have established by clear and convincing evidence that the claimant's need for an amputation is not work related due to the claimant's diagnosis of Munchhausen's Syndrome.

2. Whether the respondents have established by a preponderance of the evidence that the claimant is no longer entitled to Grover medicals for his October 16, 2003 admitted injury.

3. Whether the claimant has established by a preponderance of the evidence that the Stair Glide system and wheelchair ramp recommended by Dr. Robert Meier is reasonable, necessary, and related to the October 16, 2003 industrial injury.

4. Whether the October 14, 2013 emergency treatment and all subsequent treatment stemming from the October 14, 2013 incident was reasonable, necessary, and related to the October 16, 2003 industrial injury.

5. Whether the treatment the claimant received for his contralateral knee was reasonable, necessary, and related to the October 16, 2003 industrial injury.

FINDINGS OF FACT

1. The claimant sustained an admitted left knee injury on October 16, 2003 while working as a plumber when his knee became infected.

2. The respondent-insurer filed a General Admission of Liability (GAL) on October 28, 2003. Multiple amended GALs were filed from 2004-2007.

3. Dr. Scott Primack placed the claimant at maximum medical improvement (MMI) on September 9, 2011. He assigned a 100% scheduled impairment rating for the claimant's left lower extremity.

4. The respondent-insurer filed a Final Admission of Liability (FAL) consistent with Dr. Primack's report on February 22, 2012. The claimant had already exceeded the statutory cap and received no additional indemnity benefits as a result. The respondent-

insurer also asserted an overpayment of $61,402.30 to be offset against any future indemnity payments owed. The respondent-insurer admitted to reasonable, necessary, and related post-MMI benefits.

5. The claimant objected to the FAL on February 22, 2012 and simultaneously requested a Division Independent Medical Examination (DIME).

6. Dr. Jade Dillon was selected to conduct the examination, which occurred on June 7, 2012. Dr. Dillon's June 9, 2015 report found the claimant not to be at MMI.

7. Dr. Dillon, however, issued an addendum to her report on September 21, 2012 following receipt of Dr. Primack's report, which concluded the claimant suffers from Factitious Disorder and also found the claimant reached MMI on September 9, 2011.

8. The claimant's medical history is extensive. It began in October 2003, when the claimant went to Dr. Hansen with a fever and complaints his knee was "throbbing." Dr. Hansen opined the claimant likely suffered from a septic prepatellar bursitis. A six centimeter incision was made and mildly turbid bursal fluid was extracted.

9. On October 27, 2003, the claimant attended a follow-up appointment with Dr. Hansen. The incision was showing good granulation tissue and the claimant was returned to work so long as he refrained from kneeling.

10. The claimant's wound inexplicably failed to heal by February 2004. The claimant underwent multiple procedures in an attempt to facilitate healing.

11. In February 2004, cultures from swabs taken from the claimant's left knee wound indicated the presence of enterococcus. Enterococcus is a bacterium which is found in feces.

12. The claimant was ultimately referred to Dr. Primack. Dr. Primack first examined the claimant on November 30, 2005. The claimant still had a wound on his left knee the size of a fifty-cent piece.

13. On March 7, 2007, the Dr. Schnur opined the claimant was doing well. His wound was healing and showing good tissue granulation. Tissue granulation occurs as new connective tissue is produced by the body during the healing process.

14. Dr. Schnur reported continued improvement on July 2, 2007 and stated the claimant's wound looked "much better."

15. On August 29, 2007, only six weeks later, the claimant's wounds were infected. Dr. Schnur opined he was "unsure of the etiology of [the claimant's] wound problems at this point."

16. On October 31, 2007, despite indications of prior healing earlier in the year, Dr. Schnur found the claimant's wounds "did not look good from a healing standpoint." Dr. Schnur questioned whether a vitamin C deficiency was the cause of the claimant's continued failure to heal. Dr. Schnur discussed the possibility of amputation if the wound did not heal.

17. On January 2, 2008, the claimant was admitted to the hospital due to increased pain, swelling and pain in the left leg. Dr. Schnur reported amputation was becoming a strong consideration.

18. On January 8, 2008, almost five years after the claimant's soft tissue injury, which involved only an inflamed and infected bursa sac, the claimant underwent a left leg amputation at four inches above the knee. The claimant began to recover and slowly began the use of a prosthesis.

19. On March 19, 2008, two weeks after surgery, Dr. Schnur reported the claimant "has overall been getting better."

20. On July 9, 2008, Dr. Schnur reported the claimant's leg wounds were smaller, but the claimant also suffered from multiple ulcerations throughout the stump. Dr. Schnur could attribute some of the ulcerations to the pressure of the prosthesis, but the claimant also suffered from ulcerations where Dr. Schnur would not expect pressure. The cause of those ulcerations was simply unknown.

21. On October 15, 2008, Dr. Schnur reported the claimant was not feeling well and was suffering from low-grade fevers. An MRI revealed fluid collection next to the bone and Dr. Schnur opined the fluid would need aspirated.

22. Dr. Schnur reported on February 18, 2009 the claimant presented with "excoriations along many, many areas" of the left stump. Dr. Schnur was the second doctor to note excoriation. He again stated the claimant is suffering from wounds of "unknown etiology."

23. On March 18, 2009 Dr. Meier examined the claimant. Dr. Meier noted, "I continue to be frustrated by the lack of healing of these lesions and do worry whether he is displaying findings compatible with Munchhausen's."

24. On March 18, 2009, Dr. Meier also noted wounds on the claimant's right leg. Dr. Meier states, "I have always believed that the right leg lesions were factitious in nature."

25. Dr. Meier's April 9, 2009 reported the claimant had two wounds on his left stump. One measured 6 centimeters in diameter and the other measured 8 centimeters. Dr. Meier also noted most of the prior open areas on the right leg appear to have healed.

26. On May 6, 2009, the claimant's left residual stump only had superficial lesions and did not appear infected, but the claimant was again suffering from multiple lesions on the right leg.

27. On May 11, 2009, Dr. Arbuckle reported his frustrations with the claimant's failure to heal in an appropriate period of time. Dr. Arbuckle was the third doctor to note excoriation marks. Dr. Arbuckle wrote, "[i]t is unclear to me at this time why [the claimant] will not heal. Many of the skin lesions that we see on examination are excoriation, but patient denies any history of self-inflicted trauma. I would recommend that we work [the claimant] up for a micro vascular coagulopathy…If this work up is negative I would highly suspect that patient might has {*sic*} some secondary gain for current condition and that there are other factors playing a role in these non-healing wounds." Testing revealed the claimant did not suffer from a microvascular disease or coagulopathy."

28. On November 4, 2009, the claimant reported to Dr. Schnur that his wounds were getting smaller. Dr. Schnur reported good granulation. The wound on the left residual leg which measured 1.5 centimeters. Otherwise, the stump "looked relatively good."

29. Just three months later, on February 24, 2010, the claimant's wound had grown and he reported "pus" coming from his stump. Dr. Schnur ordered an MRI to look from osteomyelitis or a deeper infection. The MRI revealed deeper infection.

30. The claimant underwent his first amputation revision in March 2010.

31. The claimant presented to Dr. Ronald Hugate for an urgent visit on August 9, 2010. Dr. Hugate reviewed an MRI and found no signs of osteomyelitis. He opined surgery was not a good option as each time a portion of the leg is removed, the infection returns. Dr. Hugate opined the claimant suffered from an unusual condition and he was not sure "what caused it." Dr. Hugate theorized the claimant suffered from Munchhausen's.

32. The claimant's second amputation revision was conducted on December 16, 2010.

33. By March 23, 2011, the claimant's left residual stump wound was 8-10 millimeters deep. Dr. Schnur opined "The claimant continues to have wound problems, which are worsening."

34. The claimant was admitted to Presbyterian/St. Luke's Medical Center on April 20, 2011. He complained of chills, fever, and pain in the left residual leg. His wound was deeper and blood tests demonstrated an elevated white blood cell count.

35. On August 19, 2011, Dr. Primack conducted a comprehensive consultation and medical record review. The claimant's wound was not fully closed and some granulation tissue was present.

36. Dr. Primack concluded "The claimant likely suffers from Munchhausen's syndrome." Dr. Primack based this diagnosis on the claimant's extensive medical treatment despite objective findings to explain his failure to heal. Dr. Primack cited medical records which demonstrate "e-coli/feces found within the residual limb," "negative biopsies for osteomyelitis but he still has had extensive surgery," extensive issues with healing and concerns of self-harm. Dr. Primack wanted to approach the claimant following discussions with the claimant's other treating providers.

37. Dr. Primack discussed his concerns regarding Munchhausen's with Drs. Schnur and Meier in mid-August 2011.

38. It was agreed Dr. Primack would inform the patient of the diagnosis. According to Dr. Primack, Dr. Meier told Dr. Primack, "You tell him, I'll be there to support him." Dr. Primack informed the patient due to the probability of the diagnosis having a significant compromising effect on the physician-patient relationship between the claimant and Dr. Meier.

39. On September 9, 2011, Dr. Primack placed the claimant at MMI. Dr. Primack informed the claimant his placement at MMI is because he suffers from Munchhausen's syndrome.

40. On September 14, 2011, Dr. Schnur reported the claimant was distressed due to his recent diagnosis of Munchhausen's by Dr. Primack. On examination, the claimant was showing good granulation with no signs of infection. His wound measured 3 x 5 centimeters at the surface. Dr. Schnur reported the claimant continued to heal on his November 16, 2011 and December 14, 2011 visits.

41. On April 17, 2012, another swab culture yielded results indicative of fecal bacteria in the stump. Swab cultures collected from the claimant's residual left leg wound reflected "heavy growth of e-coli."

42. On June 3, 2012, Dr. Schnur noted the claimant's wound was about 3.8 centimeters deep and also found "[the claimant's] wound is improving; although I'm not seeing much healing."

43. Dr. Schnur noted on September 12, 2012, "[the claimant's] wound is not showing significant signs of healing." Dr. Schnur found a "brownish discharge on the dressing and some foul odor." The depth of the wound was 4-5 centimeters.

44. Swab cultures from the claimant's left stump on September 18, 2012 and October 10, 2012 again showed the presence of enterococcus and e-coli.

45. On March 6, 2013, Dr. Meier reported the claimant was finally showing signs of healing. The claimant agreed the open area on his stump was "really closing." The wound measured 2 centimeters in length and 1.5 centimeters deep. The claimant had been infection free for over a year.

46. By May 13, 2013, Dr. Meier was ready to work towards fitting the claimant for a micro-processor knee. He noted the "open area on [the claimant's] stump has decreased in size. It did not expand or worsen with use of prosthesis."

47. The claimant still had a relatively small wound on July 10, 2013 when he met with Dr. Meier. The claimant's wound measured 1 centimeter wide and 2 centimeters deep. Dr. Meier opined it was "much smaller than before."

48. Five months later the claimant's wound worsened again. An August 7, 2013 record shows the claimant's wound had again began to grow and was "slightly larger." A Q-tip went in approximately ¾ of an inch.

49. By September 11, 2013, the claimant reported to Dr. Schnur his wound was again getting larger. The claimant's wound grew deeper and now measured 4 centimeters deep, which was four times deeper than the wound was 2 months earlier.

50. Despite the apparently worsening condition, the medical records are void of any documentation showing the claimant sought medical treatment between September 11, 2013 and October 14, 2013.

51. The claimant's condition continued to worsen and, on October 14, 2013, he was transported to St. Mary Corwin Hospital via ambulance. He complained of chills,

pains and fever. He was released the same day after treating providers recommended admission, but the claimant and his wife declined.

52. Later that day, the claimant's family again called 9-1-1 and reported the claimant was unconscious. The claimant was transported by Flight for Life to Parkview Hospital due to possible sepsis.

53. On October 21, 2013, swab cultures from the claimant's left stump wounds again revealed the presence of e-coli. This was the fifth swab culture to indicate the presence of fecal bacteria in the wound site.

54. On October 28, 2013, Dr. Schnur opined the claimant again had osteomyelitis in his stump and ordered a third revision, which was performed in November 2013.

55. Dr. John Raschbacher performed a medical records review to determine whether the Stair Glide recommended by Dr. Schnur was reasonable, necessary and related to the claimant's original 2003 knee injury. The Stair Glide was requested due to the claimant's self-reported incidences of falling and an inability to wear a prosthesis. Dr. Raschbacher recommended against authorizing the Stair Glide. It was his opinion the claimant's amputations were not work related. He also opined the claimant's reports of falling were not reliable due to Munchhausen's.

56. On January 23, 2014, Dr. Raschbacher conducted a second medical review regarding a requested prosthetic socket. Dr. Raschbacher opined the claimant's limb treatment was not work related due to the claimant's Munchhausen's diagnosis.

57. Dr. Raschbacher performed a third medical records review on October 9, 2014. The request was for wheelchair repairs. He opined the repairs were not work-related due to the claimant's Munchhausen's syndrome.

58. On October 24, 2014, the claimant reported to treating providers at Heart of the Rockies Regional Medical Center that he hurt his right knee "when he fell while on crutches." This is the only record regarding the claimant's right knee condition. The record is void of medical opinions relating the right knee condition to the admitted left knee injury. No testimony was provided regarding this issue at hearing. When asked about the claimant's right knee issues, Dr. Meier testified, "I don't have any notes to that effect in my records." Dr. Raschbacher had insufficient records to opine on the claimant's right knee condition."

59. Dr. Raschbacher conducted a respondent-insurer's Independent Medical Examination (RIME) on January 5, 2015. Dr. Raschbacher physically examined the claimant and reviewed the opinions of his treating physicians in addition to the claimant's extensive medical records. He ultimately concluded the claimant's left leg amputation and subsequent treatment were a result of the claimant's Munchhausen's syndrome and not a result of his October 2003 knee injury. Dr. Raschbacher, therefore, opined all treatment related to the claimant's amputation is not work-related.

60. The claimant, Dr. Stephen Moe, and Dr. Raschbacher testified at hearing on October 23, 2015. The depositions of Drs. Primack and Meier were entered into evidence in lieu of live testimony.

61. Dr. Meier was ultimately unable to explain how the leg continuously became infected.

62. Dr. Meier continues to treat the claimant and at the time of the hearing had last seen the claimant on April 15, 2015. He reported the claimant's wound is fully healed.

63. Dr. Primack testified the ongoing need for treatment that he's had since February 2010 would look different had he not had Munchhausen's. "I think he'd already be in a prosthesis and hopefully having a better quality of life."

64. Dr. Primack was asked whether the claimant would ever admit to self-injury. Dr. Primack testified "There's no way after knowing [the claimant] that he's going to say I put feces in my wound, I scratched out of it, and I infected. It's not going to happen."

65. Dr. Raschbacher testified consistently with Dr. Primack's conclusions at hearing. He credibly testified: "I think you can see a – I hesitate to call it a narrative, but you can see certain items that appear to be recurring wounds and excoriations, bafflements on the part of the physicians, many different physicians, with respect to why these wounds don't heal, why they break down, why they became infected, why they had certain types of bacteria in the wounds, etc. And if you retroactively go back, with the idea that is there Munchhausen's here? Is this a likely diagnosis? Then it seems to support that diagnosis and fit the pattern if you will."

66. In response to the claimant's testimony he never scratched or picked at his wounds, Dr. Raschbacher testified, "No, I think [the claimant's testimony] is actually controverted by the medical evidence…Again, the devil's in the details, but there are multiple episodes where physicians have raised this." "Dr. Hansen found that he had neurotic excoriations – or likely neurotic excoriations – meaning that – his not indicated

that he had pre-patellar, -- that means front of the knee – skin defects….and he was urged from scratching the areas." "The other thing that is suggestive of that pattern is—are Dr. Schnur's records, which you have already kind of gone through. Improvement, deterioration, improvement, deterioration."

67. Dr. Raschbacher also testified regarding the claimant's notable history of certain types of bacteria in the wound site and testified, "[The claimant] had multiple episodes of cultures, biopsies, etc. There were in some cases the usual bugs – or I should say the usual skin bug. But there was also evidence for what's called the bowel bugs, or gastrointestinal bugs—meaning bugs you find in feces, such as enterococcus. Those don't live on the skin."

68. When asked about whether the claimant's use of a prosthesis is the cause of the claimant's healing/non-healing pattern, Dr. Raschbacher opined, "I don't think it provides an adequate explanation. That's really a gray area. If he does, in fact, scratch this area or inoculate himself with fecal bugs, then certainly the prosthetic would not be necessary to cause skin breakdown and recurrent infection."

69. When asked whether a Vitamin C deficiency could be the cause of the claimant's failure to heal, Dr. Raschbacher responded, "Vitamin C deficiency does cause problems with healing body-wide. It is not a focal thing" "He had other wounds at other locations which – for example, the donor site for the flap. Those appeared to heal. I'm not aware of evidence for vitamin C deficiency."

70. At hearing, Dr. Raschbacher was asked if the claimant's failure to heal could simply be bad luck. "I don't think I would ascribe luck to it. I think you have a situation where – I might be oversimplifying, but is there some rational medical or scientific explanation – coagulopathy, microvascular problems, immune system disorder, metabolic – is there something that's been missed, something that could be causing this? Well those have been pretty much ruled out." "Could he just have bad luck? Well, that – I don't think that's a good explanation. And I think that you have, particularly in retrospect – a diagnosis that would explain it."

71. Dr. Stephen Moe, a psychiatrist also testified the medical evidence supports a psychological diagnosis of Munchhausen's. It is a diagnosis based on elimination.

72. He testified, "Factitious Disorder is deeply rooted in psychopathology that developed long before, and which is wholly unrelated to, an acute physical injury that occurs in adulthood."

73. Dr. Moe explained the methodology of diagnosing an individual with Munchhausen's. "There's a lot of medical conditions at the interface of medical and psychiatry, and you really need a team approach. You need the physical medicine doctors to say this, really, does not fit with any known medical problem. And then the psychiatrist or psychologist comes in and says how do we then understand it, and what are the accessory features that allow us to classify it and – as best we can – treat it." "The pure psychiatric database is by itself too ambiguous to make a diagnosis of Factitious Disorder. You have to start with a medical database and determine if there is good evidence that there's not a medical explanation for the condition."

74. "The diagnosis of Factitious Disorder is a diagnosis of exclusion. So – I mean if someone has got a medical problem that is unusual, challenging, destructive, what have you – they're often going to present kind of odd psychiatrically."

75. Dr. Moe credibly testified a psychologist cannot simply rely upon the psychological profile to make a Munchhausen's diagnosis. Dr. Evans opined the claimant's psychological test results suggest the claimant did not suffer from Munchhausen's. Dr. Moe testified, however, "I think for the question that he and we all are facing, he did not use the type of methodology -- the way to get to the answer – that is called for." There were two fundamental flaws with Dr. Evans' report. Dr. Moe found, "One is he did not really incorporate the physical database, which is – at the end of the day – the fundamental basis on which you diagnose Factitious Disorder. And then secondly, his evaluation was much more narrowed on the patient's – or at that time presentation, and maybe a little bit previously. But did not take into consideration, you know, the comprehensive assessment."

76. Dr. Moe testified about his experience with patients who suffer from psychological issues as a result of protracted treatment. He testified they are quick to seek treatment when their condition worsens: "Day after day I see patients who are injured or ill. And almost all of them greatly despair of their losses. They exhibit a tremendous amount of anxiety about their condition….Whereas, in contrast, [the claimant] – in both his – as emerges from his medical records and as evidenced in his presentation with me, was not that commensurate level of feelings that, you know, to take a downturn after the doctor says he's making great progress – the best I've ever seen him. And then to come back six weeks later and, oh my god, we – he's as bad as he's ever been. What was missing was he's extremely distressed about this, he wants a second opinion, he's – he needs to see a psychiatrist. There was none of that."

77. Dr. Moe testified there are two pieces of medical history that impacted his opinion the most: "The two that jump to mind are the roller coaster of his condition that I

thought was best displayed in Dr. Schnur's records. Dr. Schnur was seeing him very frequently. And each time he met, there'd be like about a, you know, four-, five-, six-line paragraph. And it was just striking how there'd be a notation, he's doing very well, he's improving. And then, what, two weeks later, four weeks later– he's doing very poorly, the wound is much bigger. And then it's not big again. I will have to defer to Dr. Raschbacher, but my experience of infections is much more of a predictable pattern. You're either getting on top of it, or you're losing the game. But not this up and down piece. Secondly is get back to the modal patient that we have. I mean, when a person – they're suffering from, you know, a slow to recover back problem. And then they're getting better, and then they take a turn for the worse – they twist suddenly, you know picking something up at a grocery store. And it's just striking how – I mean, they call the doctor, they're calling me. They move on that change, because damn it, they were – you know, they thought they were almost better, and it's just devastating to suffer with a condition for a long time, and then feel that you suddenly had the, you know, chair pulled out from under you. And I saw [the claimant's] history, where he would go from doing extremely well, and then the next time he's back to his doctor, six weeks have elapsed, and his wound is huge – like from one millimeter to five times- six centimeters. So that's, you know the size of thumbtack. So those two features."

78. Dr. Moe explained the claimant would not admit to self-injury. He testified: "[Factitious Disorder] is abnormal illness behavior – a person wants to be in the illness role. He wants to mislead his doctors. "[A] patient is not going to cop to this unless he's, you know, almost caught red-handed…a person is not going to confess to it."

79. Per the Diagnostic and Statistical Manual (DSM IV), the diagnosis of Factitious Disorder requires that features suggestive of a medical or psychiatric condition are judged to meet the following criteria:

1. The signs or symptoms are not the result of the medical condition.

2. The signs or symptoms are intentionally produced by the patient.

3. The motive for intentionally producing the signs or symptoms is to adopt or maintain the illness role for the gratification that comes from this role.

80. Given the first two criteria of Factitious Disorder require medical expertise, this condition is one of several psychiatric diagnoses that in fact must be primarily diagnosed by physical medicine doctors.

81. The ALJ finds the claimant was primarily diagnosed with factitious disorder by physical medicine doctors who include Drs. Primack, and Raschbacher. Drs. Hugate,

Arbuckle, Schnur, and even Meier also questioned the claimant’s failure to heal and opined Munchhausen’s provided a diagnosis and explanation.

82. The ALJ finds that the DIME physician Dr. Dillon diagnosed the claimant with factitious disorder. Dr. Dillon found the factitious disorder arose after the date of MMI as can be inferred by the fact that she provided an impairment rating for the amputation.

83. Dr. Primack likewise inferred that the factitious disorder arose after the date of MMI by providing an impairment rating for the amputation.

84. The ALJ finds that Dr. Raschbacher’s opinion that the need for the amputation was not work-related is a difference of opinion between him and Dr. Dillon and thus does not overcome Dr. Dillon’s DIME opinion that the cause of the claimant’s amputation was work-related.

85. This ALJ is persuaded by the testimony of Dr. Moe who states a proper determination of whether an individual suffers from Factitious Disorder is made following an analysis of medical records in addition to the use of psychiatric evaluation.

86. This ALJ is unpersuaded by the testimony of Dr. Meier who states the claimant does not suffer from Factitious Disorder. Dr. Meier continues to treat the claimant. Despite considerable evidence to the contrary, which includes the conclusions of multiple physicians, including his own at one time, Dr. Meier opines the claimant does not suffer from Munchhausen’s. The ALJ finds that Dr. Meier has a difference of opinion with Dr. Dillon and this mere difference of opinion is insufficient to overcome Dr. Dillon’s finding of Factitious Disorder or Munchhausen’s.

87. The ALJ is persuaded by Dr. Meier that the claimant’s need for home modifications and a Stair Glide are reasonable, necessary, and related to the claimant’s initial industrial injury.

88. This ALJ finds the claimant’s Munchhausen’s syndrome is the cause of the claimant’s need for ongoing treatment of infections to the left stump since the date of MMI, September 9, 2011.

89. The ALJ finds that the claimant has failed to establish that it is more likely than not that treatment for ongoing infections to the left leg after September 9, 2011 are related to the original industrial injury.

90. The ALJ finds that the claimant has established that it is more likely than not that he continues to be in need of post-MMI medical treatment to treat the effects of his industrial amputation.

91. The ALJ finds that the claimant has established that it is more likely than not that home modifications and a Stair Glide, are reasonable, necessary, and related to the claimant's original industrial injury.

92. This ALJ finds that the claimant has failed to establish that it is more likely than not that the claimant's need for right knee treatment is related to his original October 2003 industrial injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, this ALJ enter the following conclusions of law.

Self- Injury-Munchhausen's Syndrome

1. Self-inflicted injuries are not compensable under the Colorado Workers' Compensation Act. Section 8-41-301(1)(c), C.R.S; *Triad Painting Co. v. Blair, 812 P.2d 638 (Colo. 1991).*

2. Whether a claimant intentionally injured himself is a question of fact to be determined by the ALJ. *See Industrial Commission v. Peterson, 151 Colo. 289, 377 P.2d 542 (1962)*.

3. In this case, there is persuasive evidence that establishes the claimant self-injured by introducing infectious disease into his body. Dr. Dillon, the DIME physician determined that the claimant had a diagnosis of Munchhausen's Syndrome and that this was not work related. However, Dr. Dillon provided for an impairment rating for the claimant's amputation of the left leg; thus, the ALJ concludes that the effects of the claimant's non-work related Munchhausen's Syndrome arose after the date of MMI. The ALJ concludes that the claimant's Munchhausen's Syndrome is limited to the introduction of infectious disease.

4. The ALJ concludes that the respondent-insurer is responsible for all medical care of the claimant's left leg up to MMI; however, the ALJ concludes that all treatment of the left leg arising after the date of MMI and involving infectious disease is not the responsibility of the respondent-insurer as it is not work related.

Medical Benefits

5. Respondents are only liable for medical treatment reasonably necessary to cure or relieve an employee from the effects of a work injury. C.R.S. §8-42-101 (2015).

6. The claimant suffers from a Factitious Disorder, which caused the claimant to self-injure and necessitated the treatments to which the claimant asserts entitlement. The ALJ concludes that the respondents proved, by a preponderance of the evidence, the claimant's ongoing need for medical treatment since September 9, 2011, and involving an infectious process, is a direct result of the claimant's self-injurious practices. The respondents, therefore, are not liable for any of the specifically requested medical treatment involving an infectious process occurring after September 9, 2011, including the third revision surgery of November 2013.

7. The ALJ concludes that the claimant has established by a preponderance of the evidence that the need for home modifications and the provision of a Stair Glide is reasonable, necessary, and related to the original industrial injury.

Right Knee Treatment

8. To recover workers' compensation benefits, the claimant must prove he suffered a compensable injury. A compensable injury is one which arises out of and in the course of employment. C.R.S. §841-301(1)(b).

9. The "arising out of" test is one of causation. It requires the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968).

10. It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. C.R.S. §8-43-201. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

11. The "threshold question" regarding compensability of an injury is one of fact for the ALJ to determine under the preponderance of the evidence standard as set forth in cases such as *Leprino Foods v. Industrial Claim Appeals Office,* P.3d (Colo. App. No.

04CA1379, Dec. 1, 2005). *Moore v. Cobb Mechanical Contractors and American Ins.*, W.C. No. 4-599-920 (April 12, 2006).

12. The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

13. In this case, the record is nearly void of medical documentation or credible testimony which links the claimant’s right knee issues to his original October 2003 work injury. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that there is a causal connection between the original October 2003 injury and the need for the right knee treatment.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents' request to establish that the claimant's amputation was not work related and was caused by his underlying Munchhausen's Syndrome is denied and dismissed.

2. The respondents request to terminate all post-MMI medical benefits is denied and dismissed.

3. The respondent-insurer is not responsible for Post-MMI medical treatment of the claimant's left leg involving an infectious process, including the October 14, 2013 emergency treatment and all subsequent treatment stemming from the October 14, 2013 incident including the third revision surgery in November 2013.

4. The respondent-insurer shall provide the claimant with the home modifications and Stair Glide as recommended.

5. The claimant's request for treatment of his right leg as being work related is denied and dismissed.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 20, 2016

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-765-705-05

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter is presently scheduled for February 9, 2016, in Denver, Colorado. On January 4, 2016, Respondents filed a Motion for Partial Summary Judgment on the issues of costs under § 8-42-101 (5), C.R.S; maintenance care; and, penalties pursuant to §§ 8-43-304 and 8-43-305, C.R.S. On January 11, 206, the Claimant filed an Objection to Respondents' Motion for Partial Summary Judgment, alleging that there were contested issues of fact concerning maintenance care and penalties, and withdrawing his claim for costs. The Motion and the Objection are supported by attached documents.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether there are genuine issues of disputed material fact concerning costs; maintenance medical care; and, penalties versus the Respondents.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant suffered an injury to his right shoulder on June 5, 2008. On January 16, 2012, the parties entered into a full and final settlement of the indemnity portion of the Claimant's claim. Medical benefits were left open. The issue of penalties concerning aspects of the claim other than indemnity benefits was not contemplated by the settlement agreement.

2. The Claimant concedes, and the ALJ finds, that costs under the provisions of § 8-42-101 (5) applies to claims with a date of injury on or after July 1, 2010. The Claimant was injured on June 5, 2008.

3. The Claimant's Objection to the Respondents' Motion for Partial Summary Judgment details specific contested issues of disputed material fact concerning maintenance medical care and penalties, whereby the Claimant indicates that he will call specific witnesses and present specific evidence at an evidentiary hearing to dispute the allegations made in the Respondents' Motion.

Ultimate Findings

4. There is **no** genuine issue of disputed material fact concerning the inapplicability of claims for costs in the Claimant's case.

5. There are genuine issues of disputed material fact concerning maintenance medical benefits and penalties for alleged violation of the settlement agreement and the order approving the same.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Motion for Partial Summary Judgment and the Claimant's Objection thereto are supported by documents.

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the Claimant was injured prior to the effective date of § 8-42-101 (5), C.R.S. Therefore, there is no genuine issue of disputed material fact concerning the inapplicability of the "costs" provision.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, the Claimant's Objection to the respondents' Motion for Partial Summary Judgment sets forth specific facts that reveal there are genuine issues o disputed material fact concerning maintenance care and penalties. Consequently, the Respondents are **not** entitled to summary judgment on these issues.

Burden of Proof

d. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Respondent sustained its burden that there is no genuine issue of disputed material fact on the issue of "costs." The Respondents, however, have failed to sustain their burden that there is **no** genuine issue of disputed material fact regarding maintenance benefits and penalties.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Partial Summary Judgment is granted with respect to costs. Any and all claims for costs are hereby denied and dismissed.

B. The Respondents' Motion for Partial Summary Judgment with respect to maintenance benefits and penalties is hereby denied and dismissed.

C.. The hearing of February 9, 2016 stands and the evidentiary hearing shall proceed on the issues of maintenance benefits and penalties.

DATED this______day of January 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order Granting Partial Summary judgment in Favor of Respondents** on this_____day of January 2016, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

____
Court Clerk

Wc.sjord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-863-323-04

ISSUES

1. A determination of whether Division Independent Medical Examination (DIME) physician Joseph Fillmore, M.D. concluded that Claimant reached Maximum Medical Improvement (MMI) on September 2, 2014.

2. Whether the party challenging Dr. Fillmore's DIME determination has produced clear and convincing evidence to overcome the opinion.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period September 5, 2014 until terminated by statute.

4. Whether Claimant has demonstrated by a preponderance of the evidence that surgical intervention in the form of an ulnar shortening osteotomy is reasonable, necessary and causally related to his August 5, 2011 right wrist injury.

FINDINGS OF FACT

1. Employer is an Italian restaurant and bakery located in Aurora, Colorado. Claimant began working as the Head Chef for Employer on May 23, 2011. He prepared both Italian meals and pastries.

2. On August 5, 2011 Claimant was carrying an industrial-sized pan of lasagna on his left shoulder when he tripped over a kitchen mat. As he tripped, the lasagna fell to the ground and Claimant extended his left hand to prevent him from striking an industrial-sized mixer. His left hand made contact with the mixer, slipped off and his left shoulder then struck the mixer. Claimant's extended right arm ended up in the mixing bowl attached to the mixer. The mixer was operating at the time with dough hooks affixed to the paddles After Claimant felt a dough hook twist his right arm he fell backwards into a table.

3. On August 6, 2011 Claimant visited Michael Schuett, M.D. at the Parker Adventist Hospital Emergency Department. Dr. Schuett documented that Claimant had limited left shoulder range of motion because of swelling. Claimant's right hand was also swollen and tender. He received a right wrist splint.

4. On August 10, 2011 Claimant visited Vernon Maas, M.D. at HealthONE for an evaluation. Claimant reported that on August 5, 2011 he fell forward and his right hand became stuck in a mixer after his left shoulder struck a cabinet. Dr. Maas documented soft tissue swelling and limited right wrist range of motion. He took Claimant off of work. Dr. Maas recommended continued use of a right hand splint and left shoulder sling.

5. On August 30, 2015 Claimant underwent an MRI of his right wrist. The MRI revealed spotty areas of edema in several carpal bones with the most prominent edema in the lunate. The abnormalities were likely the result of bone bruises based on the history of trauma and a tear of the articular disc of the Triangular Fibrocartilage Complex (TFCC). An MRI of the left shoulder reflected a rotator cuff tear and a posterior labral injury.

6. Respondents denied liability for Claimant's August 5, 2011 accident. However, after a hearing, Administrative Law Judge Broniak determined that Claimant sustained compensable injuries to his left shoulder and right wrist.

7. On February 16, 2012 Claimant underwent a left rotator cuff repair.

8. In October of 2012 Claimant visited In Sok Yi, M.D. for an evaluation. After performing an injection, Dr. Yi proposed right wrist surgery. Claimant had undergone several prior injections to his right wrist within the previous year.

9. On March 15, 2013 Claimant underwent an independent medical examination with Lloyd Thurston, M.D. Dr. Thurston reviewed Claimant's medical records, conducted a physical examination and considered video surveillance. He determined that Claimant did not sustain any permanent impairment as a result of the August 5, 2011 accident. Dr. Thurston concluded that Claimant had reached Maximum Medical Improvement (MMI) and did not require additional medical treatment.

10. On March 18, 2013 Dr. Yi performed a right wrist TFCC repair and right CMC boss excision. Elizabeth Bisgard, M.D. subsequently took Claimant completely off of work. On April 19, 2013 Dr. Bisgard released Claimant to return to work with no use of his right hand.

11. On May 13, 2013 Dr. Yi documented that Claimant's range of motion was improving and he only had pain with movement.

12. On June 12, 2013 Claimant visited Dr. Bisgard for an examination. Dr. Bisgard documented that Claimant was still having significant pain in his right wrist. She explained that "I have released him to some work, so as part of his therapy, he is working on squeezing the pastry tube for decorating, but he is very weak in that right hand. He is also trying to roll dough as part of his therapy but having significant pain along the ulnar side of the wrist."

13. On July 16, 2013 Claimant visited Dr. Yi for an evaluation. Dr. Yi documented that Claimant was "having increased pain on the ulnar aspect of the wrist and he has a difficult time being able to squeeze it back to make his pastries." He recommended a repeat right wrist MRI.

14. On August 13, 2013 Claimant underwent a right wrist MRI. The MRI revealed hamate lunate abutment and ulnar carpal abutment. Dr. Yi recommended a lunar shortening osteotomy of Claimant's right wrist. Insurer authorized the proposed surgery on September 20, 2013. However, on September 25, 2013 Dr. Bisgard noted

that Claimant's left shoulder was quite symptomatic and limiting his activities. Claimant thus chose to focus on his left shoulder and the proposed right wrist surgery was postponed.

15. On December 4, 2013 Claimant sustained another injury while working for Employer. He slipped on a wet floor and struck his head and neck. He did not suffer additional injuries to his right wrist.

16. Pursuant to §8-42-107(8)(b)(II), C.R.S. Respondents requested a "24 Month" Division Independent Medical Examination (DIME) on June 5, 2014. On September 2, 2014 Joseph H. Fillmore, M.D. performed the DIME. Dr. Fillmore reviewed Claimant's medical records and conducted a physical examination. He diagnosed Claimant with the following: (1) a pre-existing history of cervical and lumbar spine pain; (2) a report of a mild traumatic brain injury; (3) a left shoulder injury, including rotator cuff and labral tears, that had been surgically repaired; (4) a right wrist injury that included arthroscopy with joint debridement and CMC boss excision; and (5) a reported history of depression. Based on his review of the medical records and considering the input of independent medical examination physicians Henry Roth, M.D. and Lloyd Thurston, D.O., Dr. Fillmore concluded that Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. He determined that Claimant did not require additional medical care. Dr. Fillmore assigned Claimant a 7% right upper extremity impairment rating for his wrist flexion deficits and an additional 5% upper extremity impairment rating for his right wrist extension deficits. The combined ratings yielded a 12% upper extremity or 7% whole person impairment. Dr. Fillmore also assigned Claimant a 13% left upper extremity or 8% whole person rating for his left shoulder injury.

17. On April 23, 2014 Claimant returned to Dr. Bisgard for an examination. Dr. Bisgard modified Claimant's work restrictions to include a 15 pound lifting restriction with his right arm, minimal pinching/gripping with his right wrist minimal overhead work.

18. Over four days during November and December of 2014 Respondents conducted video surveillance of Claimant while he was working for Employer. The video depicts Claimant interacting with customers and using his injured upper extremities. While at times his right hand is out of video, the video reflects that he is using his right hand and wrist to engage in some type of repetitive activity.

19. Investigator Kathy Lam of Global Investigations conducted video surveillance of Claimant on December 20, 2014 and December 23, 2014. Ms. Lam observed Claimant interacting with customers, kneading dough and lifting pots. She specifically detailed that on December 23, 2014 Claimant worked an "eight hour shift performing the duties of a cook and manager." He utilized both upper extremities to "knead dough, carry a large white box above his head, stir a pot using a long stick" and close the restaurant. Claimant was not wearing a brace and did not exhibit pain behaviors.

20. On February 11, 2015 Claimant underwent a neuropsychological evaluation with David Zierk, PhD. Dr. Zierk performed multiple screening tests and examined Claimant. He highlighted the following eight clinical impressions of Claimant: personality disorder; symptom magnification; pursuit of narcotics; history of domestic violence; history of motor vehicle violations; drug seeking behavior; desire for secondary gain and maladaptive avoidance. Dr. Zierk concluded that Claimant's testing results reflected that he was inconsistent and failed to provide a valid effort. Claimant had abnormal recovery patterns and engaged in over-reporting of cognitive difficulties. Dr. Zierk concluded that Claimant had reached MMI for his 2013 head injury.

21. On May 14, 2015 the parties conducted the post-hearing evidentiary deposition of In Sok Yi, M.D. Dr. Yi explained that Claimant's August 13, 2013 right wrist MRI revealed a hamate lunate abutment and ulnar carpal abutment. He commented that the ulnar carpal abutment was a direct result of Claimant's TFCC tear and March 18, 2013 surgery to repair the tear. Dr. Yi detailed the cause of the abutment:

> So, well, the thing is that his first injury, if you look at the spectrum of injury, he had a TFC tear with edema within the lunate with the first injury. And as that progresses, then now you're going to get edema within the ulna, because the ulna is hitting -- the ulna is hitting the TFC which in turn cushions the lunate. But with the TFC torn, then all of a sudden the force is going to be imparted onto the lunate because the TFC is no longer there to act as a bushing or a cushion to pad it. And then we go and debride that, and then also now when you start moving your wrist from side to side and put weight on it, then you have the ulna hitting the lunate directly because the bushing for the TFC is gone.

Dr. Yi remarked that the anatomical variations caused by the first surgery created additional anatomical changes requiring the second surgery. He explained that "is the reason why when people have an ulnar positive variance or an ulnar neutral variance, when you debride the TFC, it does not -- the surgery does not have as high a success rate. So there are some guys in town where -- when they have an ulnar positive variance with a TFC tear, no matter what the MRI shows, they'll just go ahead and shorten the ulna to begin with."

22. On May 22, 2015 the parties conducted the post-hearing evidentiary deposition of Barry A. Ogin, M.D. Dr. Ogin agreed with Dr. Yi that patients who undergo TFCC debridement surgery frequently require a subsequent ulnar shortening surgery. Moreover, he also acknowledged that some surgeons will perform both procedures during the same surgery. Dr. Ogin concluded that the ulnar shortening osteotomy recommended by Dr. Yi was reasonable and necessary to cure or relieve the effects of Claimant's August 5, 2011 right wrist injury.

23. On May 20, 2015 the parties conducted the post-hearing evidentiary deposition of Henry Roth, M.D. Dr. Roth disagreed with Dr. Yi that the proposed ulnar shortening osteotomy was reasonable and necessary to cure or relieve the effects of

Claimant's August 5, 2011 right wrist injury. Instead, he agreed with Dr. Fillmore that Claimant had reached MMI. Dr. Roth explained that it was not reasonable to expect that Claimant would benefit from additional medical treatment. He detailed that the proposed surgery would not improve Claimant's work circumstances, "personal behavioral deficiencies" or drug tendencies. Dr. Roth concluded that Dr. Fillmore had based his opinion on the totality of the available information including medical records and surveillance videos. He summarized that Dr. Fillmore's opinion was consistent with the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*).

24. On July 29, 2015 the parties conducted the post-hearing evidentiary deposition of Lloyd Thurston, D.O. Dr. Thurston agreed with Dr. Fillmore that Claimant had reached MMI. He disagreed with Dr. Yi's recommendation for additional surgery because he did not believe an additional procedure would improve Claimant's symptoms or function.

25. On September 2, 2015 the parties conducted the post-hearing evidentiary deposition of DIME Dr. Fillmore. In Dr. Fillmore's DIME report he determined that Claimant had reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. However, Dr. Fillmore did not address the reasonableness or necessity of the ulnar shortening osteotomy recommended by Dr. Yi. During the deposition Dr. Fillmore initially could not state whether Claimant was at MMI because he did not know whether the proposed surgery would improve Claimant's condition. Dr. Fillmore recommended a second opinion about whether the surgical procedure was reasonable and necessary.

26. Later during the deposition, Dr. Fillmore reviewed surveillance video of Claimant from November 21-22, 2014 December 20, 2014 and December 23, 2014. He reaffirmed that Claimant had reached MMI because he could not discern Claimant's limitations. He agreed with Drs. Roth and Thurston that additional surgery to Claimant's right wrist was not reasonable and necessary. Although he acknowledged that it was possible that Claimant was not performing any activities in the video that caused right wrist pain, he stated that it was not probable.

27. Near the conclusion of the deposition, Dr. Fillmore again suggested that a second opinion from a hand surgeon regarding the proposed ulnar shortening osteotomy was appropriate. However, he subsequently reaffirmed that Claimant remained at MMI based on his hand movements and lack of pain behaviors exhibited in the video surveillance.

28. Despite some equivocation during his deposition testimony, DIME physician Dr. Fillmore ultimately concluded that Claimant reached MMI on September 2, 2014. Based on his review of the medical records and considering the input of independent medical examination physicians Drs. Roth and Thurston, Dr. Fillmore determined that Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. He explained that Claimant did not require additional medical care and assigned a 12% right upper extremity impairment rating. However, during his September 2, 2015 post-hearing evidentiary deposition, Dr. Fillmore initially could not

state whether Claimant was at MMI because he did not know whether the surgery proposed by Dr. Yi would improve Claimant's condition. Dr. Fillmore thus recommended a second opinion about whether the surgical procedure was reasonable and necessary.

29. Later during the deposition, Dr. Fillmore reviewed surveillance video of Claimant from November 21-22, 2014 December 20, 2014 and December 23, 2014. He reaffirmed that Claimant had reached MMI because he could not discern Claimant's limitations. He agreed with Drs. Roth and Thurston that additional surgery to Claimant's right wrist was not reasonable and necessary. Near the conclusion of the deposition, Dr. Fillmore again suggested that a second opinion from a hand surgeon regarding the proposed ulnar shortening osteotomy was appropriate. However, he subsequently reaffirmed that Claimant remained at MMI based on his hand movements and lack of pain behaviors exhibited in the video surveillance. The deposition dialogue suggests that Dr. Fillmore equivocated about whether Claimant had actually reached MMI or required additional treatment. However, in ascertaining Dr. Fillmore's ultimate opinion based on a review of his report and deposition testimony, he determined that Claimant reached MMI on September 2, 2014. The initial ambiguity in his MMI opinion early in the deposition was resolved after he viewed the surveillance video from November 21-22, 2014 December 20, 2014 and December 23, 2014. Accordingly, Claimant bears the burden of overcoming Dr. Fillmore's MMI determination by clear and convincing evidence.

30. Claimant has failed to produce clear and convincing evidence to overcome Dr. Fillmore's DIME determination that Claimant reached MMI on September 2, 2014. Dr. Fillmore reviewed Claimant's medical records, conducted a physical examination and considered surveillance video of Claimant. He also reviewed the opinions of independent medical examination physicians. Dr. Fillmore concluded that Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. Dr. Roth noted that Dr. Fillmore had based his opinion on the totality of the available information including medical records and surveillance videos. He summarized that Dr. Fillmore's opinion was consistent with the *AMA Guides*.

31. In contrast, Dr. Yi explained that Claimant's August 13, 2013 right wrist MRI revealed a hamate lunate abutment and ulnar carpal abutment. He commented that the ulnar carpal abutment was a direct result of Claimant's TFCC tear and March 18, 2013 surgery to repair the tear. Dr. Ogin concluded that the ulnar shortening osteotomy recommended by Dr. Yi was reasonable and necessary to cure or relieve the effects of Claimant's August 5, 2011 right wrist injury. However, although Drs. Yi and Ogin expressed differences of opinion with Dr. Fillmore about whether Claimant requires additional surgery and has reached MMI, their opinions do not constitute clear and convincing evidence to overcome Dr. Fillmore's MMI determination. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fillmore's September 2, 2014 MMI determination was incorrect.

32. Claimant has failed to establish that it is more probably true than not that he is entitled to receive TPD benefits for the period September 5, 2014 until terminated

by statute. Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. Although Claimant asserts that he is entitled to receive TPD benefits subsequent to September 5, 2014 because he was unable to perform his regular job duties as a chef for Employer, he has failed to demonstrate that he has suffered any wage loss as a result of his altered job duties. It is thus speculative to conclude that Claimant suffered a wage loss that was caused by his August 5, 2011 industrial injuries. Moreover, Claimant has not demonstrated that a worsened condition caused additional restrictions resulting in a greater impairment of his temporary work capability than existed at the time of MMI. Finally, Dr. Zierk persuasively commented that Claimant exhibited a desire for secondary gain as part of his clinical assessment. Accordingly, Claimant's request for TPD benefits is denied and dismissed.

33. Claimant has failed to demonstrate that it is more probably true than not that surgical intervention in the form of an ulnar shortening osteotomy is reasonable, necessary and causally related to his August 5, 2011 right wrist injury. Dr. Yi explained that Claimant's August 13, 2013 right wrist MRI revealed a hamate lunate abutment and ulnar carpal abutment. He commented that the ulnar carpal abutment was a direct result of Claimant's TFCC tear and March 18, 2013 surgery to repair the tear. Dr. Yi summarized that the anatomical changes caused by the first surgery created additional anatomical changes requiring the second surgery. Moreover, Dr. Ogin concluded that the ulnar shortening osteotomy recommended by Dr. Yi was reasonable and necessary to cure or relieve the effects of Claimant's August 5, 2011 right wrist injury.

34. In contrast, Dr. Roth explained that it was not reasonable to expect that Claimant would benefit from additional medical treatment. He detailed that the proposed surgery would not improve Claimant's work circumstances, "personal behavioral deficiencies" or drug tendencies. Furthermore, Dr. Thurston agreed with Dr. Fillmore that Claimant had reached MMI. He disagreed with Dr. Yi's recommendation for additional surgery because he did not believe an additional procedure would improve Claimant's symptoms or function. Moreover, Dr. Fillmore concluded that Claimant reached MMI on September 2, 2014 and did not require additional medical care. Dr. Fillmore assigned Claimant a 7% right upper extremity impairment rating for his wrist flexion deficits and an additional 5% upper extremity impairment rating for his wrist extension deficits. Finally, Dr. Zierk performed multiple screening tests and examined Claimant. He highlighted that Claimant exhibited symptom magnification, drug seeking behavior, a desire for secondary gain and maladaptive avoidance. Dr. Zierk concluded that Claimant's testing results reflected that he was inconsistent and failed to provide a valid effort. Claimant had abnormal recovery patterns and engaged in over-reporting of cognitive difficulties. Dr. Zierk's assessment reflects that Claimant is not a suitable candidate for Dr. Yi's proposed surgery. In conjunction with the persuasive medical opinions of Drs. Roth, Thurston and Fillmore, Claimant's request for an ulnar shortening osteotomy is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured

workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. Pursuant to §8-40-201(11.5), C.R.S. MMI "means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition."

5. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

6. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

.   7. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by “clear and convincing evidence.” §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

8. As found, despite some equivocation during his deposition testimony, DIME physician Dr. Fillmore ultimately concluded that Claimant reached MMI on September 2, 2014. Based on his review of the medical records and considering the input of independent medical examination physicians Drs. Roth and Thurston, Dr. Fillmore determined that Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. He explained that Claimant did not require additional medical care and assigned a 12% right upper extremity impairment rating. However, during his September 2, 2015 post-hearing evidentiary deposition, Dr. Fillmore initially could not state whether Claimant was at MMI because he did not know whether the surgery proposed by Dr. Yi would improve Claimant’s condition. Dr. Fillmore thus recommended a second opinion about whether the surgical procedure was reasonable and necessary.

9. As found, later during the deposition, Dr. Fillmore reviewed surveillance video of Claimant from November 21-22, 2014 December 20, 2014 and December 23, 2014. He reaffirmed that Claimant had reached MMI because he could not discern Claimant’s limitations. He agreed with Drs. Roth and Thurston that additional surgery to Claimant’s right wrist was not reasonable and necessary. Near the conclusion of the deposition, Dr. Fillmore again suggested that a second opinion from a hand surgeon regarding the proposed ulnar shortening osteotomy was appropriate. However, he subsequently reaffirmed that Claimant remained at MMI based on his hand movements and lack of pain behaviors exhibited in the video surveillance. The deposition dialogue suggests that Dr. Fillmore equivocated about whether Claimant had actually reached MMI or required additional treatment. However, in ascertaining Dr. Fillmore’s ultimate opinion based on a review of his report and deposition testimony, he determined that Claimant reached MMI on September 2, 2014. The initial ambiguity in his MMI opinion early in the deposition was resolved after he viewed the surveillance video from November 21-22, 2014 December 20, 2014 and December 23, 2014. Accordingly, Claimant bears the burden of overcoming Dr. Fillmore’s MMI determination by clear and convincing evidence.

10. As found, Claimant has failed to produce clear and convincing evidence to overcome Dr. Fillmore’s DIME determination that Claimant reached MMI on September

2, 2014. Dr. Fillmore reviewed Claimant's medical records, conducted a physical examination and considered surveillance video of Claimant. He also reviewed the opinions of independent medical examination physicians. Dr. Fillmore concluded that Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. Dr. Roth noted that Dr. Fillmore had based his opinion on the totality of the available information including medical records and surveillance videos. He summarized that Dr. Fillmore's opinion was consistent with the *AMA Guides*.

11. As found, in contrast, Dr. Yi explained that Claimant's August 13, 2013 right wrist MRI revealed a hamate lunate abutment and ulnar carpal abutment. He commented that the ulnar carpal abutment was a direct result of Claimant's TFCC tear and March 18, 2013 surgery to repair the tear. Dr. Ogin concluded that the ulnar shortening osteotomy recommended by Dr. Yi was reasonable and necessary to cure or relieve the effects of Claimant's August 5, 2011 right wrist injury. However, although Drs. Yi and Ogin expressed differences of opinion with Dr. Fillmore about whether Claimant requires additional surgery and has reached MMI, their opinions do not constitute clear and convincing evidence to overcome Dr. Fillmore's MMI determination. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fillmore's September 2, 2014 MMI determination was incorrect. *Compare In Re Lafont*, W.C. No. 4-914-378 (ICAP, June 25, 2015) (concluding that the claimant had overcome the DIME determination because the DIME physician had failed to perform an adequate examination and comply with *AMA Guides* based on an expert physician's opinion).

TPD Benefits

12. To establish entitlement to temporary disability benefits, the claimant must prove by a preponderance of the evidence that the industrial injury has caused a "disability," and that he has suffered a wage loss which, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S. 2010; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 546 (Colo. 1995). The term "disability," as used in workers' compensation cases, connotes two elements. The first element is "medical incapacity" evidenced by loss or restriction of bodily function. There is no statutory requirement that the claimant present evidence of a medical opinion of an attending physician to establish his physical disability. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the claimant's testimony alone could be sufficient to establish a temporary "disability." *Lymburn v. Symbios Logic, supra.* The second element is loss of wage earning capacity. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of "disability" may be evidenced by a complete inability to work, or physical restrictions which preclude the claimant from securing employment. *See Ortiz v. Charles J. Murphy and Co.*, 964 P.2d 595 (Colo. App. 1998); *Chavez v. Manpower*, W.C. No. 4-420-518 (May 11, 2000); *Davisson v. Rocky Mountain Safety, Inc.*, W.C. No. 4-283-201 (June 21, 1999). For a claimant to receive additional temporary disability benefits after reaching MMI he must show that the worsened condition caused additional restrictions resulting in a greater impairment of his temporary work capability than existed at the time of MMI. *In re Fontecchio,* W.C. No. 4-376-276 (ICAP, July 28, 2003).

13. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to receive TPD benefits for the period September 5, 2014 until terminated by statute. Claimant reached MMI on September 2, 2014 for his August 5, 2011 industrial injuries. Although Claimant asserts that he is entitled to receive TPD benefits subsequent to September 5, 2014 because he was unable to perform his regular job duties as a chef for Employer, he has failed to demonstrate that he has suffered any wage loss as a result of his altered job duties. It is thus speculative to conclude that Claimant suffered a wage loss that was caused by his August 5, 2011 industrial injuries. Moreover, Claimant has not demonstrated that a worsened condition caused additional restrictions resulting in a greater impairment of his temporary work capability than existed at the time of MMI. Finally, Dr. Zierk persuasively commented that Claimant exhibited a desire for secondary gain as part of his clinical assessment. Accordingly, Claimant's request for TPD benefits is denied and dismissed.

Surgical Request

14. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

15. As found, Claimant has failed to demonstrate by a preponderance of the evidence that surgical intervention in the form of an ulnar shortening osteotomy is reasonable, necessary and causally related to his August 5, 2011 right wrist injury. Dr. Yi explained that Claimant's August 13, 2013 right wrist MRI revealed a hamate lunate abutment and ulnar carpal abutment. He commented that the ulnar carpal abutment was a direct result of Claimant's TFCC tear and March 18, 2013 surgery to repair the tear. Dr. Yi summarized that the anatomical changes caused by the first surgery created additional anatomical changes requiring the second surgery. Moreover, Dr. Ogin concluded that the ulnar shortening osteotomy recommended by Dr. Yi was reasonable and necessary to cure or relieve the effects of Claimant's August 5, 2011 right wrist injury.

16. As found, in contrast, Dr. Roth explained that it was not reasonable to expect that Claimant would benefit from additional medical treatment. He detailed that the proposed surgery would not improve Claimant's work circumstances, "personal behavioral deficiencies" or drug tendencies. Furthermore, Dr. Thurston agreed with Dr. Fillmore that Claimant had reached MMI. He disagreed with Dr. Yi's recommendation for additional surgery because he did not believe an additional procedure would improve Claimant's symptoms or function. Moreover, Dr. Fillmore concluded that Claimant reached MMI on September 2, 2014 and did not require additional medical care. Dr.

Fillmore assigned Claimant a 7% right upper extremity impairment rating for his wrist flexion deficits and an additional 5% upper extremity impairment rating for his wrist extension deficits. Finally, Dr. Zierk performed multiple screening tests and examined Claimant. He highlighted that Claimant exhibited symptom magnification, drug seeking behavior, a desire for secondary gain and maladaptive avoidance. Dr. Zierk concluded that Claimant's testing results reflected that he was inconsistent and failed to provide a valid effort. Claimant had abnormal recovery patterns and engaged in over-reporting of cognitive difficulties. Dr. Zierk's assessment reflects that Claimant is not a suitable candidate for Dr. Yi's proposed surgery. In conjunction with the persuasive medical opinions of Drs. Roth, Thurston and Fillmore, Claimant's request for an ulnar shortening osteotomy is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant reached MMI on September 2, 2014.

2. Claimant has failed to produce clear and convincing evidence to overcome Dr. Fillmore's DIME determination that Claimant reached MMI on September 2, 2014.

3. Claimant's request for TPD benefits is denied and dismissed.

4. Claimant's request for an ulnar shortening osteotomy is denied and dismissed.

5. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 27, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-879-066-04

BASIS FOR CORRECTED ORDER

The Respondents moved for a corrected order due to a discrepancy between the amount of the disfigurement award found in paragraph 175 and the amount found in the Order. Based on the Respondents' motion, the ALJ hereby enters the following corrected order. The correction will be identified in bold-faced type.

PROCEDURAL HISTORY

1. The Respondents filed a Final Admission of Liability (FAL) on March 8, 2013. The Claimant timely objected and applied for a Division Independent Medical Examination (DIME).

2. Prior to the filing of the FAL, the Respondents had filed an application for hearing (AFH) on January 11, 2013 on the issues eventually heard by ALJ Margot Jones on April 3, June 7, June 10 and August 26, 2013.

3. While the hearings before ALJ Jones were pending, the Respondents moved to hold the DIME proceedings in abeyance pending resolution of the issues before ALJ Jones. On June 26, 2013, ALJ Jones granted the Respondents' motion.

4. ALJ Jones entered her Findings of Fact, Conclusions of Law, and Order on November 5, 2013. ALJ Jones found that control of medical care did not revert to the Claimant when his authorized treating physician discharged him; that Claimant shall return to Dr. Orent for authorized care and for referrals to specialists; and that Claimant's entitlement to indemnity benefits after January 18, 2013 is barred and shall remain barred until Claimant returns to Dr. Orent or Dr. Kistler.

5. Both the ICAO and the Court of Appeals have affirmed ALJ Jones' November 5, 2013 order.

6. On February 20, 2014, Claimant filed another AFH, but a hearing never commenced. Claimant endorsed several issues which included change of physician, insurance coverage penalties alleging Respondents engaged in improper communication with treatment providers; the FAL was defective; attorney fees and costs; and bad faith.

7. Subsequent to the filing of the February 20, 2014 AFH, five pre-hearing conferences were held concerning discovery disputes and the myriad of issues Claimant endorsed. As pertinent to the issues before the undersigned ALJ, PALJ Patricia Clisham ordered that:

a. Respondents were not required to produce a copy of the insurance policy for this claim;

b. the issue of change of physician was limited to the time period subsequent to ALJ Jones' November 5, 2013 order;

c. TTD and TPD were stricken or voluntarily withdrawn;

d. Insurance coverage was stricken but Claimant may appeal the decision to a merits ALJ at the OAC. Respondents were permitted to add the issue of attorney fees to the response to the AFH to defend the appeal if the issue is found to be unripe by the OAC ALJ.

e. The issues of authorized provider, deauthorization and MMI were stricken.

f. The DIME is no longer held in abeyance.

g. The February 20, 2014 AFH was stricken and Claimant was ordered not to re-apply for hearing until he had complied with discovery orders.

h. Claimant was limited to presenting testimony from himself and Dr. Bennett when the hearing was reset upon the issues endorsed in the February 20, 2014 AFH.

i. Claimant was permitted to re-file his AFH limited to the following issues i) change of physician based on change of circumstances subsequent to ALJ Jones November 5, 2013 order; ii) penalty for improper communication with health care providers; and iii) penalty for improper communication with Claimant's authorized treating providers.

j. Respondents' request for attorney fees may be raised with the OAC ALJ.

8. On December 4, 2014, Respondents filed an AFH to overcome the DIME opinions concerning the date of MMI and the permanent impairment rating.

9. On January 6, 2015, Claimant filed an Amended Response to the AFH. Claimant listed the following issues, which have been summarized by the ALJ:

   a. Medical benefits, which included authorized provider, change of physician, reasonably necessary, related to the injury, and treatment after maximum medical improvement;

   b. Disfigurement;

   c. Temporary total disability benefits;

   d. Temporary partial disability benefits;

   e. Insurance Coverage;

f. Permanent Partial Disability Benefits;

g. Permanent Total Disability Benefits;

h. Production of the Respondents' complete files related to the Claimant including a copy of the insurance policy and all other documents providing or describing coverage for workers' compensation, surveillance documents, Claimant's personnel file, and other employment records;

i. Various defenses (which the ALJ will not recite);

j. Penalties for failure to comply with WCRP Rule 11 regarding medical records submitted to the DIME physician;

k. MMI date if Claimant has reached MMI;

l. Current DIME determinations set aside due to alleged violation regarding DIME records;

m. Insurance coverage (increased liability and penalties for noncoverage); and

n. Interest

10. Three additional pre-hearing conferences occurred before PALJ Clisham concerning the Respondents' December 4, 2014 AFH and Claimant's Amended Response. PALJ Clisham entered the following orders pertinent to the issues presented to the undersigned ALJ:

a. The PALJ has jurisdiction to determine which issues are legally ripe for adjudication and may determine whether issues previously stricken may be stricken again;

b. The issue of insurance coverage was stricken;

c. The issue of production of the Respondents' complete file was stricken;

d. Change of authorized treating provider was limited again to circumstances subsequent to ALJ Jones' November 5, 2013 order;

e. Respondents may add the issue of attorney fees and costs;

11. Nowhere in any of the pre-hearing orders that followed the December 4, 2014 AFH did Claimant move to endorse the issue of appealing the PALJ orders; nor did he specifically endorse it in his response to the AFH.

12. The first time Claimant raised the issue of appealing pre-hearing orders was in his case information sheet. Issues may not be added in a case information sheet, and may only be added by written agreement of the parties or order. OACRP Rule 12.

13. The ALJ ultimately declined to revisit PALJ Clisham's orders, not necessarily because the issue was not properly endorsed, but because the ALJ determined Claimant's arguments concerning the orders were without merit.

ISSUES

Based on the foregoing procedural history, the application for hearing filed December 4, 2014, the amended response filed January 6, 2015, and the statements made by the parties when the hearing commenced, the issues presented for determination are as follows:

1. Claimant alleges that the Division Independent Medical Examination (DIME) opinion is invalid because some of the medical records submitted to the DIME physician contained markings or underlined portions. Claimant alleges that such markings constitute improper communication with the DIME entitling him to a new DIME, and imposition of penalties against the Respondents.

2. Whether Respondents have overcome the DIME opinions concerning the extent of permanent impairment/the permanent partial disability (PPD) award and the date of maximum medical improvement (MMI).

3. Whether Claimant is permanently and totally disabled.

4. Whether Claimant is entitled to maintenance medical treatment.

5. Whether Claimant is entitled to a change of physician.

6. The Claimant also requested a de novo review of several orders issued by Prehearing ALJs. Specifically, Claimant alleges that PALJ Patricia Clisham erred in striking the issue of “insurance coverage” and “production of Respondents’ complete file” from Claimant’s Response to Application for Hearing. As stated above, the ALJ declined to engage in such a review, and after more carefully reviewing the pleadings, Claimant never endorsed the issue of reviewing the PALJ orders.

7. Disfigurement.

8. Whether attorney’s fees should be assessed against Claimant for endorsing unripe issues for hearing, specifically issues that had previously been stricken by a PALJ.

FINDINGS OF FACT

Pre-MMI Medical Treatment and Claim History

1. Claimant is a 65-year old man who worked for the Employer as a Senior Buyer/Planner for approximately 14 ½ years.

2. On December 19, 2011, Claimant sustained injuries when he tripped on a piece of wood on the floor at work. Claimant testified that he fell forward towards his chest, and pushed up against his right hand, forearm and shoulder and then rolled onto his back. He also stated that he struck his right knee.

3. Claimant selected Dr. Sander Orent as his authorized treating physician (ATP) and began receiving treatment on January 19, 2012. Thereafter, Claimant underwent significant medical treatment within the workers' compensation system for his injuries. The medical treatment included the following:

- Physical therapy for his hand, shoulder and knee;
- MRI of his right shoulder;
- Surgery to repair his right rotator cuff and biceps tendon tears;
- MRI of his right knee;
- EMG/NCS on the right upper extremity;
- Injections for his right forearm and wrist problems;
- Viscosupplementation injections into the right knee;
- Surgery for the radial nerve symptoms; and
- Narcotic pain medications.

4. In August 2012, Dr. Orent (and his physician's assistant) had released Claimant to return to work, but limited to four hours per day with restrictions concerning use of his right arm.

5. Dr. Orent made many references in his reports that Claimant expressed he could not tolerate working more than four hours per day. In the September 6, 2012 record, Dr. Orent noted that Claimant was "adamant" he could not work more than four hours per day because he gets exhausted and he is afraid he will asleep on the way home. Dr. Orent stated, "Certainly we do not want to risk this." Claimant reiterated his intolerance to working more than four hours per day to Dr. Orent on October 4, 2012.

6. Claimant wrote a letter dated October 24, 2012 to Dr. Orent complaining of hypersensitivity in his right hand.

7. On November 19, 2012, Dr. Orent referred the Claimant to Dr. Lief Sorenson for pain management given Claimant's lack of improvement. Dr. Orent had expressed concerns over Claimant's ability to undergo pain management treatment given that Dr. Schneider had performed knee surgery on November 8, 2012, and had prescribed narcotic pain medications. Claimant did not report to Dr. Orent that he had already scheduled an appointment with Dr. Bennett (the ALJ infers that Claimant had already scheduled the appointment with Dr. Bennett because the intake paperwork for Dr. Bennett's office was dated November 14, 2012).

8. Claimant had an EMG of his right upper extremity performed by Dr. Hammerberg on December 12, 2012. Dr. Hammerberg concluded that the EMG findings were compatible with the clinical diagnosis of chronic right posterior interosseous neuropathy, a mild right ulnar neuropathy, and a mild entrapment of the right median nerve within the carpal tunnel.

9. On December 18, 2012, Dr. Sorenson evaluated the Claimant. Dr.

Sorenson noted mild decreased sensitivity to touch on the right forearm and hand (Claimant had reported hypersensitivity to Dr. Bennett just five days earlier – see paragraph 27 below). Dr. Sorenson recommended neuropathic cream to assist in the weaning off of pain medication. Upon examination, Dr. Sorenson found no evidence of Complex Regional Pain Syndrome (no swelling, no allodynia or color change found), and thus recommended against a sympathetic block. Thereafter, a discussion took place concerning the necessity for Claimant to sign a narcotic agreement with Dr. Sorenson. Claimant refused to sign the narcotic agreement with Dr. Sorenson, which prevented Dr. Sorenson from being able to treat Claimant.

10. Dr. Orent ultimately found that Claimant reached MMI on December 27, 2012 with no ratable impairment. Claimant was upset with Dr. Orent's determination concerning MMI and informed Dr. Orent that he would seek treatment with Dr. Bennett. Claimant had already had an initial consultation with Dr. Bennett on December 13, 2012.

11. Dr. Orent kept Claimant's work restrictions the same: four hours per day with no use of his right arm except to handle pieces of paper. Dr. Orent had previously recommended that Claimant use voice recognition software at work.

12. On January 24, 2013, Dr. Orent referred the Claimant to Dr. Lawrence Lesnak for an evaluation and impairment rating.

13. Dr. Lesnak evaluated the Claimant on February 20, 2013. Dr. Lesnak took a history from Claimant and reviewed Claimant's medical records. Claimant reported that he has constant right forearm, hand and thumb and finger pain; and intermittent right shoulder pain; constant right knee pain with mild weakness; and mild tingling in the superior buttocks region, bilaterally.

14. Claimant reported that he had regained full range of motion in his right shoulder but continued to have some pain involving his right shoulder and right upper arm.

15. Upon physical examination of Claimant's right upper extremity, Dr. Lesnak found no evidence of peripheral extremity edema and that "there was no evidence of any skin temperature or color changes involving his right distal upper extremity as compared to his left distal upper extremity." Percussion over Claimant's right radial tunnel produced some symptoms. Claimant had no tenderness over his knee or any knee effusion. Claimant had some limited range of motion in his right upper extremity as documented below.

16. Dr. Lesnak also noted that, "the patient exhibited severe pain behaviors during today's evaluation and appeared to be very 'dramatic' throughout my evaluation. He consistently would not shake my hand, but instead shook with his left hand."

17. Dr. Lesnak noted that Claimant was taking Oxycodone 10 mg four times

per day per Dr. Bennett's prescription.

18. Dr. Lesnak's impressions and recommendations include as it relates to the right upper extremity: probable right radial neuritis, no clinical evidence to suggest CRPS, including CRPS type I or II, right shoulder strain, with no clinical evidence of impingement syndrome or symptomatic specific right shoulder joint pathology. Dr. Lesnak stated, "Please note that at this point there is absolutely no medical evidence to suggest that any of the patient's low back/buttock symptoms, previously reported radiating left leg symptoms, his right knee symptoms for which he underwent treatment for his underlying osteoarthritis, as well as any evaluations performed by Dr. Bennett, would be in any way related o his previous occupational injury of 12/19/11."

19. Dr. Lesnak rated Claimant's right upper extremity only. He provided impairment ratings of 6% of the upper extremity for Claimant's right shoulder and 10% of the upper extremity for Claimant's residual right radial neuropathy, for a combined impairment rating of 15% of the right upper extremity. Dr. Lesnak opined that no maintenance medical care was indicated to cure these two work-related conditions.

20. Although Claimant had complained of back pain and left hip pain both of which he attributed to the work injury, neither Drs. Lesnak or Orent related these complaints to the original injury primarily because the symptoms surfaced several months after the work injury.

21. Dr. Orent also opined that the work injury did not cause Claimant's ongoing knee symptoms.

22. On March 8, 2013, Respondent's filed a Final Admission of Liability admitting to the 15% right upper extremity rating provided by Dr. Lesnak, with an MMI date of December 27, 2012, while denying liability for maintenance medical care.

23. Claimant objected to the Final Admission and filled a Notice and Proposal to Select Division Independent Medical Examiner.

24. Claimant eventually underwent the DIME on October 16, 2014, which Dr. Ronald Swarsen performed.

25. While undergoing medical treatment with Dr. Orent and the other providers to whom Dr. Orent had referred Claimant, the Claimant simultaneously pursued medical treatment on his own. Claimant self-referred to Dr. Judi Chen for a second EMG/NCS because he was dissatisfied with the results from the same test performed by Dr. Green. Claimant also initiated medical treatment with Dr. David Schneider for his knee symptoms. Finally, Claimant pursued treatment with Dr. Daniel Bennett for pain management.

26. Dr. Schneider had previously treated Claimant's right knee in 2001 so Claimant returned to him on September 19, 2012 complaining of right knee pain. Dr.

Schneider had already evaluated the Claimant for left hip and low back pain in July 2012. Dr. Schneider eventually recommended surgery on the right knee which he performed on November 18, 2012. Claimant continued to follow up with Dr. Schneider concerning his knee. Drs. Orent, Lesnak and Swarsen have all opined, and the ALJ agrees, that the need for surgery on Claimant's right knee was unrelated to the work injury.

27. According to a November 23, 2012 note from Claimant's primary care physician, Dr. Loree Koza, Claimant had stopped all of his pain medications.

28. Claimant's initial consultation with Dr. Bennett occurred on December 13, 2012. Claimant prepared intake forms prior to his appointment, which were dated November 14, 2012. Claimant stated that his symptoms included hypersensitivity in right hand, thumb and fingers. Claimant also attached a list of his medications. He noted that Dr. Orent was prescribing: OxyContin 10 mg., 1 tablet at night; Oxycodone, 5 mg. every 4 hrs, p.r.n.; and Dr. Schneider had prescribed Oxycodone HCL 5mg.

29. According to Dr. Bennett's report, Claimant reported the following symptoms regarding his right upper extremity: intolerance to light touch; myoclonic activity (sporadic and pre-dates burning pain); temperature sensitivity to both heat and cold; color changes (blue and marbled or red and wet); significant diminished hair growth; and brittle nails with early ridging. Claimant reported burning, stabbing, painful tingling with an underlying ache. Dr. Bennett commented the December 12, 2012 EMG findings were inconsistent with Claimant's reported pain levels.

30. Dr. Bennett diagnosed Claimant as suffering from: 1) Complex Regional Pain Syndrome (CRPS) 2) R/O sympathetic maintained pain (SMP), and 3) status post radial nerve entrapment with release. Dr. Bennett recommended among other things, that Claimant undergo a stellate ganglion block, which Claimant underwent on December 26, 2012. Dr. Bennett did not refer Claimant for any other diagnostic tests that would assist in accurately diagnosing CRPS. As part of his recommendations, Dr. Bennett agreed with, "continuing oxycodone 5-10 mg q4h prn severe pain in the interim."

Post-MMI Medical Treatment and Claim History

31. On January 3, 2013, Dr. Bennett issued work restrictions that reduced Claimant's work hours from four per day to two per day with breaks.

32. Claimant returned to work on Monday, January 7, 2013, after the Employer's holiday break. Claimant advised his supervisor, Geri Siebenaller, that he was addicted to pain medications. Due to concerns for Claimant's health and job safety, Siebenaller informed Marcia Norris, who handles workers compensation claims for the Employer, about Claimant's report. Norris scheduled a meeting with Siebenaller and Claimant which took place on Wednesday, January 9, 2013. During this meeting, Norris advised Claimant that she had spoken with Dr. Orent's office and that Dr. Orent was willing to see the Claimant the next day, January 10, 2013. She gave Claimant her

business card with the appointment date on the back. Claimant advised Norris that he did not want her scheduling appointments for him and that he would have to talk to his attorney about attending the appointment. Thereafter, Claimant advised Norris to cancel the appointment.

33. The Insurer's adjuster then scheduled Claimant for a demand appointment with Dr. Orent to take place on Monday, January 14, 2013, with the alternative option of seeing his partner, Dr. Kistler, on Friday, January 18, 2013.

34. On January 16, 2013, Judge Purdie then ordered the Claimant to attend an appointment with Dr. Kistler who is Dr. Orent's practice partner. The appointment was scheduled for January 18, 2013.

35. The Claimant attended the appointment at Dr. Kistler's office on January 18, 2013. However, Dr. Kistler recorded that, "The patient wanted to record the visit today and I allowed that even though I cannot say as I have ever been recorded by a patient in the past…" The patient wanted to speak to his attorney, so I had him go out of the room to do that…." The patient came back following his phone call with his attorney saying that he really cannot proceed without the form being in place…

36. After Dr. Lesnak's evaluation on February 20, 2013, Claimant underwent medical treatment primarily with unauthorized providers for his various pain complaints. Dr. Bennett essentially assumed management of Claimant's care with Dr. Schneider evaluating his orthopedic complaints including the right knee and right shoulder. Claimant saw other providers for conditions and symptoms unrelated to his work injury.

37. On April 4, 2013, Dr. Bennett documented Claimant's pain medications as: Oxycodone 10 mg BID for breakthrough pain; and OxyContin 10 mg A.M., and 30 mg P.M. for pain. Dr. Bennett increased Claimant's pain medications.

38. By May 13, 2013, Claimant had a spinal cord stimulator implanted to treat CRPS as diagnosed by Dr. Bennett. Thereafter, Claimant suffered from a myriad of ailments to include low back pain, leg pain, and carpal tunnel syndrome, most of which have been treated by Dr. Bennett.

39. The parties proceeded to hearing on April 3, June 7 and June 10, 2013 before AL Margot Jones on whether the right to control medical care reverted to the Claimant and whether Claimant's benefits should be suspended for violation of a pre-hearing order.

40. ALJ Margot Jones issued her order on November 6, 2013 finding in favor of the Respondents. The Claimant appealed to the ICAO which upheld ALJ Jones' order. The Claimant appealed to the Colorado Court of Appeals, which also upheld the decision of the ICAO and ALJ Jones. Claimant has apparently filed a petition for writ of certiorari to the Colorado Supreme Court, but has not received a response.

41. Despite the order of ALJ Jones, and the subsequent affirmances by the ICAO and Court of Appeals, the Claimant has never returned to Drs. Orent or Kistler. Rather, Claimant continued to treat with unauthorized providers, Drs. Bennett and Schneider.

42. On February 3, 2015, Dr. Orent wrote a letter and commented on video surveillance taken of the Claimant in October 2014. Dr. Orent noted that Claimant had no problems using his right arm or right shoulder in the video and thus should have no occupational or functional work restrictions.

43. The most recent medical record offered into evidence was dated March 5, 2015 from Dr. Bennett. As of that date, Claimant had been diagnosed with a number of conditions that include: right arm pain (secondary to CRPS); carpal tunnel syndrome, thoracic outlet syndrome, cervical dystonia, insomnia due to another medical condition, spondylosis with myelopathy in the lumbar region, long term opiate use, and partial rotator cuff tear. Dr. Bennett stated that Claimant is permanently and totally disabled due to his right rotator cuff tear, low back and CRPS in his right arm.

44. According to the March 5, 2015 report, Dr. Bennett was prescribing Claimant the following:

> OxyContin, 40 mg, 1 tablet every morning for pain;
> Oxycodone, 10 mg, 1 daily as needed for break through pain;
> Subsys Liquid, 100 MCG, sublingual up to 4x per day for pain; and
> Zolpidem for sleep

45. Dr. Bennett testified that Subsys is brand name for Fentanyl and that Claimant's dosage is the lowest dosage a patient can take. Dr. Bennett believed that Claimant takes less pain medications at the time of the hearing than in December 2012 when he first started treating Claimant. However, Dr. Bennett initially recommended "continuing oxycodone 5-10 mg q4h prn severe pain in the interim." Assuming Claimant took 4 10mg pills per day, he would have taken only 40 mg of Oxycodone per day. It appears Claimant's medications have indeed increased since December 2012 rather than decreased.

Video Surveillance

46. The video surveillance taken of the Claimant on October 17, 2012 depicted Claimant leaving the Employer's offices while talking on a cell phone. He held the cell phone in his right hand up to his left ear. The Claimant proceeded to walk to his vehicle while talking on the phone. He pulled his car keys out of his pocket with his right hand then used his right hand to open the car door. He used his right hand/arm to pull himself into the vehicle. The Claimant then drove away with his right hand on the steering wheel and his left hand holding the cell phone.

47. The Claimant is then depicted pushing a shopping cart and placing items into the back of his vehicle. He pushed the shopping cart with some force into the cart

corral. The Claimant proceeded to a different store and once again was shown pushing a shopping cart and loading his vehicle with his purchases.

48. Claimant testified that on October 17, 2012, he had just started a scheduled vacation after he left work.

49. The Claimant is later shown carrying a cup from a fast food restaurant in his right hand outside of Panorama Orthopedics where he had an appointment scheduled with Dr. Schneider concerning his right knee symptoms. The Claimant returned home at approximately 6:00 p.m.

50. The Claimant eventually got into a truck that had a trailer hitched to it and drove around to a different part of his property. He then loaded two red tanks then two propane tanks into the trailer then continued to load several other items onto the trailer using both hands or just his right or just his left hand. Claimant then manipulated a large tarp using both hands/arms to grasp the tarp and place it on the trailer. Manipulating the tarp lasts almost four minutes. Claimant removed additional propane tanks using his bilateral hands/arms from the back of the pickup truck and placed them onto the trailer. He used his right hand to twist and maneuver the tanks into place. Claimant added additional items to the trailer using both upper extremities. He carried away an unidentified object under his right arm. The video continues to show Claimant loading items into the trailer until approximately 6:42 p.m.

51. Claimant testified he was in pain while engaging in these activities as he is always in pain.

52. On October 18, 2012, surveillance video resumed with Claimant carrying some items in his right hand. He then opened the hood of his truck with both arms/hands then poured some type of engine fluid into the engine using his left hand. He closed the hood with his left hand. The Claimant continued to load items into his vehicle including a large case (appeared to be a gun case) which he carried with his right hand. He bent down onto his right knee to pick up some small items under the truck. He used his right hand. Claimant is next shown in a parking lot. He carried grocery bags with his left hand. He then unlocked then opened the truck cap door with his right hand, and placed the bags into the truck bed with his left arm. Claimant next climbed up onto the rear bumper. He appeared to use both arms while maneuvering items around the bed of the truck. Claimant then climbed down and used his right hand to shut the door.

53. Claimant is next shown at a gas station. While waiting for the fuel to pump, he walked around talking on his cell phone using his left hand with his right hand in his jeans pocket. He grabbed the gas receipt with his right hand then used his right hand to open the truck door. The Claimant climbed into the truck and drove off. The video concluded.

54. Surveillance was also taken from October 16-19, 2014. On October 16,

2014, the video showed Claimant walking with his items under his left arm while carrying keys in his right hand. Claimant opened his truck door with his right hand, got in and closed the rear truck door with right hand. The Claimant is next observed getting into his truck. He again used his right hand to enter key into locked truck door.

55. On October 18, 2014, the video showed Claimant carrying a large step stool under his right arm and holding it with his right hand. Next, he manipulated a large tarp with both arms and hands. He bent down on his hands and knees to spread the tarp across his RV. Another man assisted him. Claimant then climbed down the RV ladder with some hesitation but he used both hands/arms to hold on to the ladder as he descended. Once on the ground, he used his right arm which he extends above his head to hand a cover to the man helping him who is still on top of the RV.

56. Claimant is next observed standing around for a few minutes then walking around again. Claimant took a glove off his right hand to use a keypad to enter his garage.

57. The Claimant re-appeared carrying a rake with his right hand. He got down onto the ground next to a trash can. As he stood up, he used his right hand and arm to push himself up off of the ground. Claimant stood for a while looking around again then he started talking with a man. Claimant stepped out of view of the camera for a while, but appeared to continue his conversation with the man. He shook the man's right hand with his left, and they continued to talk as Claimant stepped out of view again. They parted ways and the video concluded.

58. On October 19, 2014 beginning at 12:52 p.m., the video showed Claimant outside using a leaf blower. He held the leaf blower in both his right hand and left hand. Claimant used both hands together, as well as his right hand only and his left hand only at times to hold the blower and manipulate it to reach the desired areas of the yard.

59. At around 1:10 p.m., Claimant switched from the blower to a leaf vacuum. Claimant held the leaf vacuum with right hand while holding the debris bag in the left hand. Claimant held the vacuum fairly still while he maneuvered his body to access the debris. At approximately 1:21 p.m., he stopped using the vacuum, and set it down.

60. The video showed Claimant handling the power cord using both hands. Then, Claimant had a trash bag in hands. He opened it up using both hands then emptied the vacuum bag into the trash bag. He used his right hand to shake the leaf vacuum bag then used both hands to shake the leaf vacuum bag to get the debris into the trash bag. Claimant proceeded to vacuum leaves/debris again by holding the vacuum in his right hand and the debris bag in his left hand.

61. Claimant continued to vacuum leaves until about 1:33 p.m. when he had to empty the debris bag again. After emptying the debris bag, he picked up the trash bag and slung it over his left shoulder and walked away.

62. Claimant returned to the yard and began to gather the power cord. He wrapped it up over his left arm using his right hand/arm to wind it around his left arm. Claimant then picked up the leaf vacuum and with his right hand and walked out of view. Claimant then wrapped up another power cord using the same method with his right hand winding it around his left arm. He continued these activities until approximately 1:40 p.m.

63. At approximately 1:53 p.m., Claimant then appeared with a lawn mower. Claimant mowed the lawn until approximately 2:19 p.m. At 2:33 p.m., Claimant returned to the yard riding a tractor/mower, which he rode around the year until about 2:39 p.m. He then reappeared on the tractor at 2:45 p.m. and the video ended at 2:49 p.m. The Claimant shifted the tractor/mower with his right hand.

64. Claimant did not appear to have any difficulty engaging in the tasks depicted in any of the video surveillance. He certainly does not appear to be in significant pain although he testified he was in constant pain.

Validity of the DIME

65. The Respondents submitted a packet of medical records (DIME packet) to Dr. Swarsen as required by WCRP 11, and the Claimant alleges some of the records contain markings that should be construed as inappropriate communication with Dr. Swarsen. At the hearing, Claimant also asserted that the DIME packet contained what he referred to as “advisory opinions” from Claimant’s authorized treating physicians (ATPs), which he also alleged were improper.

66. Although Claimant did not specifically identify which records he alleges contain inappropriate markings, the Respondents identified records in their position based on Claimant’s answers to interrogatories. Those records are as follows:

- Dr. Hak
- Drs. Orent & Kistler
- Dr. Lesnak
- Dr. Sorensen

67. Upon reviewing the DIME packet records of the aforementioned physicians, the ALJ finds that any markings (circling or underlining) found thereon are innocuous and not intended as a “communication” with the DIME physician as contemplated by WCRP Rule 11-6.

68. The “advisory opinions” referenced by Claimant constitute medical records as defined in WCRP Rule 11-3 (J) and (K), and do not constitute an improper communication with the DIME physician as contemplated by WCRP Rule 11-6.

69. The Claimant has made no showing that the innocuous markings or the “advisory opinions” in any way tainted the DIME process or opinions rendered by Dr.

Swarsen. The ALJ finds that the DIME was conducted pursuant to WCRP Rule 11, and that no penalties shall be imposed against the Respondents for any violations thereof. Further, the ALJ finds that the DIME opinion stands as valid.

DIME Opinions

70. Dr. Swarsen issued a 58-page DIME report. He reviewed the extensive medical records and summarized them, while also providing commentary and observations throughout his entire report, labeled as "interim review". In addition, Dr. Swarsen physically examined the Claimant and took a history from him.

71. Claimant provided the following chief complaints to Dr. Swarsen:

- Worst current symptom: carpal tunnel that was mild but is now severe which includes thoracic outlet syndrome. Claimant stated his hands are numb and he wakes up screaming in the middle of the night. The Claimant complained of bilateral pain in his hands and fingers, as well as tingling and swelling.

- Right forearm: Claimant stated it was much better with the stimulator but he can still feel some pre-stimulator symptoms. He does not have acute sensitivity to touch.

- Right shoulder: Claimant has good range of motion but continues to have pain with motion in the joint. He cannot carry things on the shoulder and cannot engage in major carpentry projects any more.

- Low back: Claimant reported nerve pain down his legs and swollen feet but improvement in his right leg symptoms. He stated he uses a recliner for his low back, neck and feet, noting "that's where I live."

- Right knee: Claimant has continued pain on the inside of his right knee and under the patella. He felt his knee has improved and he can walk his dog.

- Upper back/neck: Claimant reported pain along the neck and upper back which as improved with Botox.

- Left hip: He reported continued pain at the left hip region but he pointed more toward the region of his left buttock.

72. Claimant reported his pain level is usually 5 out of 10 where a level 1 is almost unnoticeable and 10 being so severe that suicide would be considered. Claimant reported that at worst, his pain reaches 10 out 10. Claimant reported that he rests or lays down 2-4 hours per day to relieve pain and that he sleeps less than 4 hours per day. He reported he is never pain free.

73. Claimant reported that his medications included: OxyContin 10 qam; OxyContin 40 qhs; Oxycodone 10 mg tid; and Subsys 100 mg qid.

74. Throughout the medical record review Dr. Swarsen commented on the causal relationship to Claimant's growing list of symptoms to the work injury. In that regard, Dr. Swarsen stated, "The case has become extremely convoluted, complex and enmeshed with ostensibly all issues supposedly related to the initial work injury according to [Claimant] however causality has not supported these claims."

75. Dr. Swarsen questioned Dr. Bennett's' diagnosis of CRPS without following the appropriate protocol set forth in the Medical Treatment Guidelines. Dr. Swarsen also questioned implantation of a spinal cord stimulator absent additional testing for CRPS.

76. Dr. Swarsen noted that one of the goals of spinal cord implantation per the Guidelines is to reduce the level of narcotic medication the patient is ingesting and that as of October 2013, this goal had not been met. Dr. Swarsen stated that:

> More invasive procedures continue to be introduced. This case now has a life of its own, many components of which are unrelated to the original mechanism of injury. Prognosis is poor just based on the review of the records. Expanding symptoms, increasing invasive procedures, increasing opioids and no noted improvement in function.

77. Dr. Swarsen commented, "What started as a contusion of a knee and shoulder has ever expanding symptoms now including the low back, neck upper back and thoracic outlet".

78. Dr. Swarsen found no causal relationship between Claimant's newly diagnosed carpal tunnel syndrome and the work injury.

79. Upon physical examination of Claimant's right forearm and hand, Dr. Swarsen did not observe any color changes or loss of hair comparing the right extremity to the left. He further noted similar capillary refill with right compared to left hand and no temperature changes. He did note that both of Claimant's hands appeared pale and both felt slightly cool.

80. Dr. Swarsen listed the conditions he believed to be occupationally related and those not-occupationally related. The diagnoses he found to be work related included the right shoulder, forearm and knee. He disagreed with Dr. Bennett and opined that the conditions involving: thoracic outlet syndrome; carpal tunnel syndrome, back pain, neck pain, hip pain are not related to the August 2011 work injury. Dr. Swarsen also stated that Claimant has a chronic pain syndrome of his right upper extremity, likely sympathetically mediated pain.

81. Regarding the relatedness of Claimant's second shoulder surgery to the work injury, the ALJ finds that on February 6, 2013, the Claimant began complaining to Dr. Schneider of moderate right shoulder pain that occurred constantly. Dr. Schneider noted that Claimant complained of the inability to actively work his arm even though Claimant's active and passive range of motion was essentially full. Dr. Schneider recommended a repeat MRI.

82. Claimant's February 26, 2013 MRI revealed instrasubstance tearing of the supraspinatus with a thin linear split heading towards the myotendinous junction. On June 18, 2013, Dr. Schneider performed surgery on the right shoulder to repair a re-tear and to determine if Claimant had acquired an infection. The operative report showed that only an arthroscopic examination with synovectomy and debridement occurred, and that no repair of a re-tear occurred.

83. On September 18, 2013, Dr. Schneider reported no infection in the right shoulder, but Claimant still reported symptoms including pain and weakness in his right shoulder.

84. Dr. Swarsen related Claimant's second shoulder surgery to the work injury and adjusted the MMI date to September 18, 2013, which was the date of Claimant's last follow-up with Dr. Schneider. Dr. Swarsen rated Claimant's right upper extremity at 33%. As noted previously, based upon his record review alone, work prognosis is poor, but Dr. Swarsen had expressed a desire to review the surveillance tapes described by Drs. Orent and Lesnak.

85. Dr. Swarsen noted that medical maintenance would be appropriate only for chronic pain in the right upper extremity. Dr. Swarsen stated that Claimant is dependent on opioids as well as the neurostimulator due to the clinical course followed by Dr. Bennett both of which have provided limited functional improvements. Dr. Swarsen recommended maintenance of the stimulator and medications as managed by Dr. Bennett.

86. Dr. Swarsen opined that accurately diagnosing Claimant's chronic pain at this point would be difficult if not impossible. Dr. Swarsen disagrees with Dr. Bennett's diagnosis of CRPS due to a lack of workup for CRPS in accordance with the DOWC's Medical Treatment Guidelines. Dr. Swarsen concluded that the more supported diagnosis is sympathetic mediated pain rather than CRPS. Dr. Swarsen concluded that: "Frankly, clinically, this case is quite complex and enmeshed with prior decision regarding treatments selected. Under these circumstances, defining the boundaries of medical maintenance is difficult and becomes a dynamic target." Dr. Swarsen also recommended a complete psychological evaluation, noting that it would not be related to the workers' compensation claim.

Overcoming the DIME Opinions

87. The Respondents seek to overcome Dr. Swarsen's opinions concerning the date of MMI and the permanent impairment rating assigned to Claimant's right shoulder.

88. In support of the opinions that Dr. Swarsen erred when changing the date of MMI from December 27, 2012 to September 18, 2013, Respondents presented the opinions and testimony of Drs. Orent and Lesnak.

89. As found above, Dr. Orent had imposed work restrictions that included sedentary work at four hours per day with minimal use of the right upper extremity and had prescribed voice activated computer software for Claimant to use.

90. In a letter dated May 20, 2013, Dr. Orent opined that he could not relate the Claimant's re-tear of the supraspinatus to any occupational exposure. Dr. Orent commented that Claimant had "marked restrictions" regarding the right shoulder and it would be substantially difficult to determine a mechanism of injury that would make the re-tear causally related to the initial injury.

91. On June 27, 2013, Dr. Orent wrote a letter after he reviewed the videotape surveillance of Claimant's activities on October 17 and 18, 2012. Dr. Orent stated, "the amount of activity he is performing with an absolute absence of pain behaviors strongly suggests, in my opinion, malingering." This is not physiologic…." My opinion now is that [Claimant] is consciously malingering and that he is attempting to put non-occupational problems into the occupational setting." Dr. Orent pointed out that at the time this videotape was secured Claimant had been telling him that we as disabled and incapable of even using a keyboard.

92. On July 30, 2013, Dr. Lesnak also opined that the partial re-tear in Claimant's right shoulder was completely unrelated to his original injury. Dr. Lesnak noted that Claimant was performing activities outside of his work restrictions as shown in the surveillance video taken in October 2012. Dr. Lesnak opined that Claimant need no further surgery on his right shoulder, and if Claimant underwent any additional surgery, it would be completely unrelated to the work injury.

93. Also in the July 30, 2013 report, Dr. Lesnak reiterated that his examination of Claimant in February 2013 did not suggest CRPS; and hence he felt that the implantation of a spinal cord stimulator was neither reasonable nor necessary medical care, nor causally related to the work injury. He further again stated that Claimant's low back symptoms were not work related and that based upon his review of the medical reports, lumbar surgery was not reasonable nor necessary. He further concurred with Dr. Orent's opinion that the re-tear of the supraspinatus detected upon MRI scanning was not causally related to the industrial injury, again based upon the fact that due to the restrictions Claimant was working under after the original surgery, the tear could not have been caused by any work activity. Dr. Lesnak commented on the

surveillance videotape taken on October 17 and 18, 2012. He opined that Claimant demonstrated no functional limitations whatsoever with the right upper extremity or at all.

94. Dr. Orent testified during the hearing held on April 6, 2015. He reiterated his opinion that the re-tear in Claimant's right shoulder was not related to work exposure especially because Claimant was not working at all around that time. Dr. Orent explained that he perceived no basis to change the date of MMI based on a shoulder surgery that did not arise from a work-related injury or condition. Dr. Orent opined that Claimant remained at MMI as of December 27, 2012.

95. Dr. Lesnak also opined that Dr. Swarsen's impairment rating for the right shoulder was also clearly in error, as evidenced by the range of motion Claimant displayed in the videotape footage secured on the exact date of Dr. Swarsen's examination, and the two days thereafter.

96. Both Drs. Orent and Lesnak testified that based upon their review of the videotape surveillance and observations of Claimant's level of function in both October 2012 and October 2014, Claimant's diagnosis must include malingering. Further, both doctors concluded that as a result, no work restrictions are indicated, or at the most per Dr. Lesnak, Claimant should avoid continuous overhead activities with the right upper extremity, as the only restriction. Furthermore, Dr. Orent, who treated Claimant on a bi-weekly basis for over one year, opined that the discrepancies between what Claimant was advising him as to his physical capabilities back in October 2012, were so very disparate from what was depicted on the surveillance videotape that this has caused him to re-think his diagnosis of malingering and also consider the diagnosis of Munchausen's disease or other severe psychiatric explanation for the discrepancy. Dr. Orent admitted that psychiatry or psychology were not his areas of expertise.

97. Dr. Orent further opined that the level of function demonstrated on both surveillance tapes, the 2012 tape secured prior to any SCS implantation, and the 2014 tape after the implantation, causes him to question even the diagnosis of neuropathy in the right extremity, for in his opinion, a patient with a neuropathy, could not tolerate the vibration of the leaf blower or other activities Claimant was participating in during the surveillance videotape. Dr. Lesnak testified consistently with this opinion and his observations of the videotape.

98. Both Drs. Orent and Lesnak disagree with Dr. Bennett's diagnosis of CRPS, and both agree with the DIME physician, in that Dr. Bennett did not follow the Medical Treatment Guidelines in attempting to confirm this diagnosis. Accordingly, both Drs. Orent & Lesnak disagree with Dr. Bennett's decision to refer this Claimant for the implantation of a spinal cord stimulator.

99. Dr. Orent testified that in the 40 years that he has been practicing, he has "only recommended that a patient undergo this procedure two to three times, and I treat some very significant chronic pain in some very significant CRPS patients….This is not one of those times that would have even considered remotely considered a spine

stimulator". Dr. Lesnak agreed and noted that in the 18 years that he has practiced in Colorado, he has only made this recommendation five to six times.

100. Both Drs. Orent & Lesnak opined that unfortunately, Claimant is now on 2-3 times the amount of narcotic medication than he was at the time he stopped seeing Dr. Orent in December 2012, and that this is inconsistent with the goals for the implantation of a spinal cord stimulator. Both doctors agreed that the goal of such implantation involves an increase in function and a decrease in narcotic medication usage.

101. Dr. Bennett testified at the hearing as expert in anesthesiology, pain medicine, interventional spine and pain surgery, and device implantation. Dr. Bennett has authored a peer reviewed article on CRPS and spinal cord stimulation which was published in the Pain Medicine Journal.

102. Dr. Bennett is not Level II accredited, he does not typically treat workers' compensation patients, and while he knows of the Medical Treatment Guidelines, he is not intimately familiar with them. He testified that the Guidelines are outdated and that he does not "treat to treatment guidelines." Rather, he treats the patient with the most reliable data.

103. Dr. Bennett testified that when he initially examined the Claimant, he determined Claimant had a regional pain syndrome in his entire right upper extremity. Dr. Bennett described his exam findings as indicated above in paragraph 29. He testified that he elected to proceed with the stellate ganglion blocks which Claimant did not respond to. Dr. Bennett concluded that Claimant's lack of response suggested he did not suffer from SMP but rather suffered from CRPS.

104. Dr. Bennett opined that the additional testing recommended by the Guidelines and Dr. Swarsen to diagnose CRPS was unnecessary in Claimant's case. He felt the clinical symptoms were sufficient to make the diagnosis.

105. Dr. Bennett agreed that no other physician has agreed Claimant has CRPS, including Drs. Orent, Lesnak and Sorenson, all of whom examined the Claimant in and around December 2012. Drs. Lesnak and Sorenson specifically examined Claimant's right hand looking for symptoms of CRPS and found none.

106. Dr. Bennett believes that Claimant suffers from pain in his right arm and in other parts of his body. Dr. Bennett testified that Claimant's right shoulder is main reason Claimant remains on opioids, in addition to Claimant's other conditions.

107. Dr. Bennett agreed with Dr. Swarsen's conclusions regarding SMP, but he believes Claimant suffers from SMP as well as CRPS. Dr. Bennett also opined that the improvement in Claimant's symptoms after implantation of the spinal cord stimulator suggests that CRPS is the correct diagnosis.

108. Dr. Bennett disagreed that the goal of spinal cord stimulator implantation was to increase function and decrease opioid dependency. Dr. Bennett further testified that according to his computations, Claimant is now being prescribed less or the same amount of narcotic medication as when he first began treating Claimant in December 2012.

109. Dr. Bennett did not believe that Claimant's activities in the surveillance videos contradicted the diagnoses of torn rotator cuff; thoracic outlet syndrome; traumatic neck; radial nerve entrapment; CRPS; carpal tunnel syndrome; or the extent of the pain Claimant has described. Dr. Bennett basically testified that the medical treatment Claimant has received would allow him to engage in the level of activity depicted in the videos. He also stated that he encouraged Claimant to be active.

110. Based on the credible and persuasive evidence, the ALJ finds the Respondents have not overcome the DIME opinions concerning the second shoulder surgery, adjusted MMI date, and impairment rating for the right upper extremity. The Claimant, although his credibility overall is questionable, has consistently complained of right shoulder pain even immediately after the first surgery. Even Dr. Hsin opined that it was reasonable for Claimant to discuss, and potentially undergo, additional surgery with Dr. Schneider. Although Claimant had restrictions regarding use of his right upper extremity, there is no persuasive evidence that the causal connection to Claimant's right shoulder problems was severed at some point between the first surgery and the second surgery. The ALJ is not persuaded by the testimony of Drs. Lesnak and Orent concerning assessment of Claimant's permanent impairment based on the surveillance videos.

Permanent Total Disability

111. At the time of the hearing, the Claimant was 64 years old with a date of birth of August 21, 1950. The Claimant has a college education and significant work experience.

112. Claimant testified that his position with the Employer was "fairly unique." He explained that his position was classified as a senior buyer/planner but that he was involved in a tremendous amount of corporate level teamwork, working with the Employer's software, software vendors and coders. He testified that he "ran teams under the direction of the executive vice president of North America . . . for the purposes of software enhancements."

113. Claimant's position also involved travel, both domestic and international. He made his position seem important and he seemed proud of the work he performed for the Employer.

114. The Claimant testified that he attended vocational rehabilitation in 2014 but quit because had surgeries scheduled in October and December and didn't feel he could give an honest effort given that surgery causes "additional pain" and "issues with

rehabilitation."

115. Claimant testified that he gets drugged sleep due to the Ambien, OxyContin, Oxycodone and Fentanyl he takes at night. He stated that sometimes if he is in too much pain that combination of drugs does not help him sleep much.

116. Claimant testified that he has nerve pain and muscular pain. He testified that the spinal cord stimulator mitigates the nerve pain in his right arm. He then testified that if he turns off the stimulator his pain returns immediately. Claimant testified that he has back pain, both muscular and nerve, and nerve pain in his neck.

117. Claimant testified that all his medical conditions prevent him from sitting for long periods of time and his fine motor skills, which include typing and mousing, are gone.

118. Claimant testified that has difficulty cleaning his house and he had recently begun seeking help from his neighbor's wife.

119. Claimant's testimony was articulate, he was a good historian and his thoughts were organized. He did not demonstrate any memory problems nor did he appear overly drowsy or drugged from medications.

120. Claimant admitted that around October 2012 he asked Dr. Orent to reduce his work hours from four to something less because his pain. Claimant was also concerned about driving after working four hours because he was tired due to lack of sleep from his pain symptoms.

121. As found above, Claimant repeatedly advised Dr. Orent that he could not tolerate working more than four hours per day.

122. Claimant testified that he can function better now but his pain has not improved. Claimant's testimony contradicted Dr. Swarsen's comments that Claimant reported reduced pain but no increase in functionality.

123. Claimant had a somewhat contentious relationship with the Employer. The Employer had wanted Claimant to increase his work hours and Claimant wished to reduce his hours. In addition, psychometric testing Claimant underwent revealed that Claimant had some level of dissatisfaction with the Employer.

124. Dr. Swarsen noted that he observed Claimant "move around the exam room and transition with much greater ease than I would have expected from his history and was able to fill out his forms writing with the right hand (though he appeared to shake it once in a while), he presented himself as disabled." Dr. Swarsen stated that he does not question Claimant's symptoms but does questions what "elements if any the psychological milieu adds to his self-perception."

125. Dr. Bennett testified that his diagnoses of injuries related to the industrial injury include: Torn rotator cuff, thoracic outlet syndrome, cervical dystonia, radial nerve entrapment, CRPS, and carpal tunnel syndrome.

126. Dr. Bennett further testified that despite all of the surgeries to cure and relieve Claimant from the effects of his back pain, he still has hardware in his back causing mechanical back pain, and that since Dr. Schneider did not repair the supraspinatus tear when he did the last surgery, Claimant continues to experience shoulder pain, and despite undergoing carpal tunnel releases, Claimant continues to experience pain as well as radial pain despite the fact that Dr. Conyers performed a radial release; and hence, Claimant must continue on opioids.

127. Dr. Bennett opined that Claimant is unable to earn any wages. Dr. Bennett testified that in his experience treating CRPS, it fluctuates despite the spinal cord stimulation. He testified that, "out of the blue you would five days, three weeks, two months of pain spikes on top of the baseline pain that are hard to control, even with stimulation." Dr. Bennett further testified that Claimant's pain spikes would prevent him from sitting or standing for any prolonged period of time to engage in a job.

128. Both Drs. Lesnak and Orent believe Claimant has no functional limitations based on the video surveillance, and thus should be able to work.

129. Claimant applied for Social Security Disability and was initially denied. After a hearing before a Social Security Administration ALJ, the ALJ entered an order on August 28, 2014, finding that the Claimant was disabled as defined by the Social Security Act. The undersigned ALJ is not bound by this determination.

130. Respondents retained Donna Ferris as an expert in vocational rehabilitation. On February 12, 2015, Ferris met with the Claimant. Bonnie Hacker who is also a vocational evaluator was present at the meeting. Hacker works with Bonnie Ruth who performed a vocational evaluation on behalf of the Claimant. Ferris issued a report on March 17, 2015.

131. When Claimant first met Ferris, he refused to shake Ferris' hand with his right hand, and instead shook her hand with his left hand.

132. When Ferris asked Claimant about his symptoms, he stated he was a "chronic pain patient" and explained he has had nine surgeries. Claimant reported that the spinal cord stimulator alleviates 90% of the pain in his forearm on a normal day and the stimulator also improved the hypersensitivity in his right hand. He reported that he can feel the stimulation throughout his entire body.

133. Claimant reported ongoing constant right shoulder pain even at rest. Claimant told Ferris that his first shoulder surgery he had left him in excruciating pain. Claimant reported ongoing back pain, and that before the surgery Dr. Bennett performed he could not walk. Claimant also reported surface nerve pain his neck and

calves that had been increasing over the four months prior to February 12, 2015.

134. Claimant also reported bilateral carpal tunnel problems and that he had undergone surgeries for those problems. He reported ongoing pain but not as severe as prior to the surgeries, and that he has now developed trigger fingers and increased pain in other fingers. Claimant finally reported thoracic outlet syndrome and described nerve pain in his pectoralis muscles. Claimant reported that these symptoms combined result in sleep deprivation.

135. At that time, Claimant's medications included Oxycodone 10 mg at three doses per day; Oxycontin 10 mg – one in the morning; Oxycontin 40 mg – one at night; Subsys 100 mcg in liquid form – four times per day; and Ambien (unknown dosage) – one at night for sleep. Claimant reported to Ferris that he takes the Oxycontin 40 mg, Oxycodone 10 mg, Subsys and Ambien at night before bed in an effort to sleep. Claimant reported difficulty falling and staying asleep despite these medications.

136. Claimant has a bachelor of science in business administration with an emphasis in international finance and computer information systems. Claimant reported advanced computer skills in both software applications and hardware. Claimant is knowledgeable in Microsoft Office applications.

137. Claimant worked for the Employer as a Senior Buyer/Planner from November 1998 through January 2013. His job duties included planning and purchasing of materials and capital equipment; significant use of the Employer's computer system; international travel to train and give presentations on the Employer's computer system.

138. Claimant explained to Ferris that he has looked at available positions on the Internet, and has spoken to headhunters but has had no interviews. Claimant stated that he is "bluntly honest" about his medical condition and has told potential employers he can work only three to five days per month secondary to his "medical needs." He stated he does not look disabled so he can get the job but he cannot keep the job.

139. Ferris concluded that based upon the lack of permanent restrictions assessed by Drs. Orent and Lesnak, the authorized treating physicians; it is her opinion, that Claimant remains capable of earning wages despite his work related injuries.

140. During the hearing, Ferris testified consistent with her report. She noted that Claimant reported continued symptoms in his right arm, shoulder, low back and nerve pain in his neck, both calves and feet. He advised her that due to these symptoms he had to make choices about what activities he participated in the day, but whatever the choice he made, he paid for it the next day. Claimant further reported that if he vacuums, he uses his left hand. He does some laundry, takes his dog for a walk and drives, but had difficulty driving long distances due to low back pain and also due to the vibration. He felt his ability to drive had improved since his carpal tunnel releases.

141. Ferris discussed her review and observations of Claimant's activities and level function in both surveillance videotapes and her understanding of Claimant's restrictions in 2012, when the first tape depicts his activities. She opined that his activities in the 2012 tape were highly inconsistent with the sedentary work restrictions he was under at the time. Ferris further stated that her review of both tapes to include the 2014 video surveillance, and the inconsistencies of level of function seen therein, raised questions in her mind about Claimant's true functional capabilities.

142. Ferris reiterated her opinion that Claimant is capable of earning wages, and that Claimant is capable of returning to any work for which he has prior training and experience.

143. On cross-examination, Ferris was asked, if she had to use the DIME physician's opinion only, would her opinion change. Ferris indicated that the DIME did not contain sufficient information for her to render a vocational evaluation if it was the only report she had to rely on.

144. Ferris further opined that the she did not comment on the other "human factors" that an ALJ considers when analyzing this Claimant's ability to earn wages, such as Claimant's age and where he lives, for in her opinion, because those factors do not preclude Claimant from being able to earn a wage.

145. Ferris also noted that the mere experience of chronic pain does not preclude someone, including the Claimant, from working. She stated, "people have chronic pain and they function in the workplace every day of their lives in spite of chronic pain. So the existence of chronic pain, in and of itself, does not necessarily limit a person's ability to function in the workplace."

146. Bonnie Ruth, Ph.D., also performed a vocational evaluation of the Claimant by telephone on March 11, 2015. She issued a report dated March 14, 2015. Claimant stated that he is a chronic pain patient and has had nine surgeries. He reported that he has a spinal cord stimulator that controls 90% of his pain on a normal day. Claimant reported he had difficulty using his right arm and hand to do his taxes and trouble pulling checks out of his checkbook. Claimant reported that he has thoracic outlet syndrome and pain from his pectoral muscles down his arms. He reported surface nerve pain in his calves, feet and neck. Claimant stated he had no back problems prior to his work injury and that he told Dr. Orent about it during his first few visits, but Dr. Orent did not put it into the reports.

147. Claimant reported the same medications to Dr. Ruth as he did to Ferris but added a thyroid medication and aspirin to the list. Claimant told Dr. Ruth that all of his doctors have advised him he needs to get off his pain medication but when he tries to reduce his medications, he wakes up screaming at night due to pain.

148. Claimant essentially provided the same reports concerning his activities of daily living to both Dr. Ruth and Ferris.

149. Claimant's work history has primarily involved manufacturing settings where he worked in inventory control or purchasing. He has always worked with computers and has good computer skills.

150. In February or March 2014, Claimant entered a program at the Division of Vocational Rehabilitation in Longmont. After participating in the program for approximately nine months, the Claimant asked himself if he really wanted or could do a job given all of the drugs he takes. He then quit the program. Claimant has searched for jobs on the Internet but he does not feel anyone would hire him given his medications and bad days that would lead to him missing work.

151. Dr. Ruth opined that Claimant is unable to work based on the opinions of Drs. Schneider and Bennett. She stated that the shoulder condition and CRPS are what primarily render him unable to work, and that both conditions were identified by Dr. Swarsen as work-related. She further stated that the non-work related conditions make Claimant even less likely to return to work but that the CRPS and shoulder alone regardless of the other conditions make Claimant unable to return to work.

152. Dr. Ruth testified at hearing consistent with the opinions in her report. She admitted that she had never met Claimant prior to the first hearing, and prior to the preparation of her report. However, she based her opinion that Claimant is permanently and totally disabled on the DIME's opinions and her perception of Claimant's overall pain level.

153. Dr. Ruth testified that Ferris made mistakes in formulating her opinions because she did not consider Dr. Swarsen's conclusions about the conditions that are related to the claim and his opinion that it is unlikely that Claimant could return to work in any capacity. Dr. Ruth also commented on Dr. Orent's notes regarding Claimant's likely inability to return to the job he held with the Employer.

154. Dr. Ruth testified that she reviewed literature related to individuals with CRPS with regard to return to work and that the prognosis for returning to work is poor in older people with CRPS. She stated, "I have articles that say they almost never return to work." She also felt he could not drive for 30 minutes given his medications. She testified that Dr. Bennett stated Claimant should not drive on a regular basis. There is nothing in the record to support Dr. Ruth's contention regarding formal limitations on driving from Dr. Bennett or any other physician.

155. Dr. Ruth opined that there is no work Claimant can perform in the Dacono area where he resides because the jobs available involve manual labor or driving.

156. Dr. Ruth admitted that Dr. Swarsen did not provide any specific physical restrictions, so she is "not relying on any specific restrictions**.** I am relying on the overall pain level. This is what is disabling with CRPS." Dr. Ruth admitted that as a vocational expert, she is not qualified to gauge the level of pain a person is experiencing; and that

it is especially difficult to do this over the telephone, as was the case herein. She further admitted that in her report, she noted that she observed Claimant's physical functioning in the surveillance videotapes and that it was her observation that Claimant did not exhibit any pain behaviors with any of the activities, and that she never observed him refraining from using his right upper extremity differently than his left.

157. Dr. Ruth also testified that independently as a vocational expert, she judged this Claimant incapable of driving thirty minutes to work on a regular basis. However, she admitted that she is not a doctor of medicine, and that no treating physician has restricted Claimant from driving. Dr. Ruth further opined that she based her opinion that this Claimant is permanently and totally disabled on not only the DIME opinions, but "my knowledge regarding CRPS and return to work." Yet, when asked if she agreed that Dr. Swarsen had found that Dr. Bennett had failed to properly confirm the diagnosis of CRPS through the appropriate testing required by the Treatment Guidelines, she responded, "According to the Workers Compensation Guidelines, yes, not necessary according to medical guidelines". Dr. Ruth was unable to explain which "medical guidelines" she was referring to.

158. Upon review of the October 2014 surveillance video, Dr. Orent issued a report dated February 3, 2015, wherein he noted that he reviewed 1 hour and 29 minutes of videotape. He opined that during all of the activity that he observed Claimant doing, he saw no evidence of any type of physical restriction in multiple activities, and that it was quite clear that Claimant had no problems with his right shoulder. Based upon his observations, Dr. Orent opined that he saw no reason for any physical restriction on Claimant's future work endeavors.

159. Claimant testified he was aware of much of the surveillance and was just getting on with his life. He declared that, "he is not a cripple, he is just disabled." Claimant testified that he was in constant pain while conducting all of the activities observed in the videos.

160. Given the very vast disparities between the Claimant's clinical presentations, the video surveillance, his presentation to the vocational experts, and his presentation at hearing, the ALJ cannot discern with any level of accuracy whether Claimant truly suffers from the pain and lack of function he claims. Moreover, Dr. Bennett's opinions concerning the myriad of medical conditions, including CRPS, he attributes to Claimant's injury are unpersuasive. Dr. Bennett failed to follow the Medical Treatment Guidelines to confirm the CRPS diagnosis, and Dr. Swarsen questioned such diagnosis as well. Dr. Bennett essentially testified that he need not follow the Guidelines because he is an expert in CRPS and that his clinical judgment should be sufficient. Dr. Ruth relied very heavily upon a CRPS diagnosis to determine that Claimant is unable to earn any wages. She further relied upon non-existent work restrictions and journal articles which state that older people with CRPS rarely return to work. Her opinions are unpersuasive as are Dr. Bennett's. While the ALJ understands Claimant is not necessarily pain free, he has failed to demonstrate that his work injury has rendered him unable to earn any wages.

Maintenance Medical Treatment

161. As found above, Dr. Swarsen recommended maintenance of the right upper extremity condition in the form of spinal cord stimulator maintenance and medications as managed by Dr. Bennett.

162. At hearing, both Drs. Orent and Lesnak opined that Claimant is not in need of any maintenance medical care to maintain the work related conditions at MMI. They both further opined that since it is their strong opinion that the spinal cord stimulator implantation was neither reasonable nor necessary, and that maintenance of the device should not be the liability of the Insurer.

163. Dr. Bennett testified that Claimant requires opioid chemotherapeutics to maintain a reasonable degree of function.

164. The ALJ finds that implantation of the spinal cord stimulator was unauthorized and not reasonable or necessary. As such, the Respondents are not liable for maintenance of the stimulator.

165. The Claimant has also failed to prove entitlement to maintenance medical care in the form of opioid prescription medication. Although Claimant may suffer from some residual pain in his right upper extremity as a result of his work injury, the Claimant has failed to prove that he requires opioids to cure and relieve him of such pain or to maintain his condition at MMI. The Claimant provided no credible or persuasive evidence that the opioids improve his pain or his function. He testified that his pain has not improved but his function has, but Dr. Swarsen's report stated that his pain had improved but his function had not. As noted above, the inconsistencies in Claimant's testimony, clinical presentation and video surveillance call into question whether Claimant truly suffers from the pain he claims.

Change of Physician

166. Although the ALJ has found that Claimant is not entitled to maintenance medical care, the ALJ will nevertheless address the issue of change of physician. Claimant alleges he should be entitled to a change of physician to Drs. Bennett and Schneider. The evidence presented to the undersigned ALJ was limited to circumstances that have occurred subsequent to the order ALJ Jones entered on November 5, 2013.

167. Claimant presented little evidence on this issue other than his testimony that the surgeries performed by Drs. Bennett and Schneider have helped him tremendously, and that the "spinal cord stimulator made a world of difference in regard to the nerve pain" he has in his hand. Dr. Swarsen concluded, and the ALJ finds, that many of the surgeries Drs. Bennett and Schneider performed on Claimant were unrelated to the work injury.

168. Dr. Bennett also testified that since Dr. Lesnak believes Claimant does not have CRPS, Dr. Lesnak would not be an effective treatment provider for the Claimant.

169. Claimant testified that his treatment goals with Dr. Bennett included reducing his opiate intake, increasing function and returning to work. Claimant testified that he has not been able to return to work, his function has improved but his pain has not. Claimant's subjective pain complaints have essentially remained unchanged based on pain diagrams he has completed over the years.

170. Claimant testified that workers' compensation was "basically taken away from me because I had - - I guess the audacity to try to get myself better my going to a doctor that was not within the workmen's comp structure."

171. In examining the abundance of evidence presented in this case, the ALJ can find no persuasive or credible evidence that since November 5, 2013, any circumstances have changed such that Claimant would be entitled to a change of physician. Claimant raised no new persuasive arguments pertaining to the change of physician issue, and no objective evidence demonstrates that the treatment Claimant has received with Drs. Bennett and Schneider since November 5, 2013 has improved his condition in any meaningful way. Claimant's subjective pain complaints are essentially the same; his function has not improved despite his testimony to the contrary (he testified that he now cannot perform basic housework); and he has not returned to work and alleges he is incapable of working. Claimant's authorized treating physicians remain Drs. Orent, Kistler, Sorenson, Hsin and Conyers.

172. The ALJ recognizes that Claimant's relationship with Dr. Orent has deteriorated; however, he has never made a bona fide attempt to treat with either Drs. Kistler or Sorenson, neither of whom have refused to treat the Claimant in the past.

Disfigurement

173. The Claimant did not actually show the ALJ any scars or other disfigurement. Instead, the Claimant asked the ALJ to consider the DIME physician's descriptions of his scars.

174. Dr. Swarsen described the scars as follows: a "well-healed 1" angular scar toward the medial aspect of the right upper arm consistent with the reported documented open tenodesis of the right biceps." A "well-healed 3 ½" vertical scar at the proximal volar aspect of the forearm consistent with the reported cubital tunnel surgery." A "well-healed 4 1/2" midline scar consistent with the reported placement of the permanent neurostimulator."

175. The ALJ awards **$1,800.00** for the scarring on the medial aspect of the right upper arm; and for the scarring on the forearm. The scar for the implantation of the spinal cord stimulator is not considered because the ALJ has found that its implantation was unauthorized, unreasonable and unnecessary.

Attorney Fees

176. As stated above in the procedural history, following the December 4, 2014 AFH, the Claimant filed an amended response on January 6, 2015, and endorsed two issues (production of Respondents' complete files and insurance coverage) that PALJ Clisham had previously stricken after pre-hearing conferences held pursuant to the February 20, 2014 AFH.

177. The Respondents scheduled pre-hearing conferences on February 4, 2015 to address the two previously stricken issues and to renew their request to strike the issues, and add the issue of attorney fees and costs pursuant to §8-43-211(3), C.R.S.

178. The issue of "production of Respondents' complete files" arises out of a discovery dispute. Claimant requested production of the complete file in a discovery request dated February 21, 2014. PALJ Clisham entered an order on June 13, 2014, granting Respondents' motion to be relieved from any obligation to produce its insurance policy for the claim, and other documents related to ADA, EEOC, ADEA and OSHA. PALJ Clisham did not address ripeness in her order.

179. Claimant did not appeal PALJ Clisham's June 13, 2014 order to an OAC ALJ. Instead, he listed the issue of "production of Respondents' complete files" in his January 6, 2015 amended response to AFH.

180. The ALJ finds that Claimant's endorsement of the issue of "production of Respondents' complete files" is not even a justiciable issue, and therefore, cannot be considered ripe or unripe. It's a discovery problem that PALJ Clisham handled, which was not properly appealed to the OAC. No attorney fees shall be assessed for Claimant's listing of "production of Respondents' complete files" on his amended response to the AFH.

181. Regarding the insurance coverage issue, Claimant's counsel argued at the hearing before the undersigned ALJ that PALJ Clisham did not strike the issue as unripe but instead struck it because she did not believe it had legal viability. However, the June 26, 2014 order entered by PALJ Clisham specifically stated that the issue of insurance coverage was stricken as either unripe or resolved by ALJ Jones' November 5, 2013 order. ALJ Jones' order did not deal in any way with the issue of insurance coverage, thus PALJ Clisham struck it as "unripe."

182. Rather than appeal PALJ Clisham's order to a merits ALJ, Claimant restated the issue in his amended response to the AFH. The ALJ cannot necessarily find the issue unripe as a matter of law despite PALJ Clisham's findings. The Claimant elected to endorse it again on a response to a new AFH, and the prior finding of PALJ Clisham has no preclusive effect on the current AFH or response.

CONCLUSIONS OF LAW

General

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Penalties – Invalid DIME Opinions

4. As found above, the ALJ perceives no violation of any rule or statute as it pertains to the medical records submitted to the DIME physician. The extremely minimal markings, underlining or circling found on only a few pages of the voluminous DIME records are innocuous and do not constitute improper communication with the DIME physician. As such, no penalty shall be imposed against the Respondents and the Claimant is not entitled to a new DIME. The opinions of the DIME are upheld as valid and will be relied upon for the purposes of this ALJ’s decision.

Overcoming the DIME Opinions

5. Sections 8-42-107(8)(b)(III) and (c), *supra*, provide that the finding of a DIME selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by “clear and convincing evidence.” Section 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004).

6. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (Nov. 17, 2000).

7. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id.*

8. However, if the DIME physician offers ambiguous or conflicting opinions concerning MMI, it is for the Administrative Law Judge to resolve the ambiguity and determine the DIME's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385, 388 (Colo. App. 2000). In doing so, the Administrative Law Judge should consider all of the DIME's written and oral testimony. *Lambert & Sons, Inc., v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1988).

9. As found above, the Respondents have failed to overcome the DIME opinions regarding the second shoulder surgery, adjusted MMI date, and impairment rating for the right upper extremity. The Claimant, although his credibility overall is questionable, has consistently complained of right shoulder pain even immediately after the first surgery. Even Dr. Hsin opined that it was reasonable for Claimant to discuss, and potentially undergo, additional surgery with Dr. Schneider. Although Claimant had restrictions regarding use of his right upper extremity, there is no persuasive evidence that the causal connection to Claimant's right shoulder problems was severed at some point between the first surgery and the second surgery. The ALJ is not persuaded by the testimony of Drs. Lesnak and Orent concerning assessment of Claimant's permanent impairment based on the surveillance videos. In addition, the ALJ is not persuaded by the opinions of Drs. Orent and Lesnak concerning the origin of the partial re-tear of the supraspinatus. Their opinions represent a mere difference of opinion concerning causation, and are insufficient to overcome Dr. Swarsen's conclusions. Consequently Claimant reached MMI on September 18, 2013 with a 33% impairment of the right upper extremity.

Permanent Total Disability

10. Section 8-40-201(16.5)(a), C.R.S., defines permanent total disability as the inability to earn "any wages in the same or other employment." *Christie v. Coors Transportation Co.,* 933 P.2d 1330 (Colo. 1997). Under the statute, the Claimant carries the burden of proof to establish permanent total disability by a preponderance of the evidence. The question of whether the Claimant proved permanent total disability is a question of fact for resolution by the Administrative Law Judge. Under this statute, a Claimant is not permanently and totally disabled if she able to earn some wages in modified, sedentary, or part time employment. *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995).

11. In ascertaining whether a Claimant is able to earn any wages, the Judge may consider various "human factors," including a Claimant's physical condition, mental ability, age, employment history, education, and availability of work that the Claimant could perform. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998); *Holly Nursing v. ICAO,* 992 P.2d 701, 703 (Colo. App. 1999). The overall objective of this standard is to determine whether, in view of all of these factors, employment is "reasonably available to the Claimant under his or her particular circumstances." *Bymer, supra*.

12. Given the very vast disparities between the Claimant's clinical presentations, the video surveillance, his presentation to the vocational experts, and his presentation at hearing, the ALJ cannot discern with any level of accuracy whether Claimant truly suffers from the pain and lack of function he claims. Moreover, Dr. Bennett's opinions concerning the myriad of medical conditions, including CRPS, he attributes to Claimant's injury are unpersuasive. Dr. Bennett failed to follow the Medical Treatment Guidelines to confirm the CRPS diagnosis, and Dr. Swarsen questioned such diagnosis as well. Dr. Bennett essentially testified that he need not follow the Guidelines because he is an expert in CRPS and that his clinical judgment should be sufficient. The ALJ disagrees with Dr. Bennett's conclusions based on the credible opinions of Drs. Swarsen, Orent and Lesnak. The diagnosis of CRPS is questionable at best and the ALJ declines to consider the diagnosis as a condition that would impact Claimant's ability to earn wages.

13. Dr. Ruth relied very heavily upon a CRPS diagnosis to determine that Claimant is unable to earn any wages. She further relied upon non-existent work restrictions and journal articles which state that older people with CRPS rarely return to work. Her opinions are unpersuasive as are Dr. Bennett's. While the ALJ understands Claimant is not necessarily pain free, he has failed to demonstrate that he suffers from a level of pain that would prevent him from working.

14. In addition, Claimant has acquired sufficient skills (through both education and experience) throughout his life in order to earn wages. Claimant testified about his breadth of experience working for the Employer, and the skills and expertise he developed both there and with prior employers. The Claimant did not appear drowsy or

drugged during his testimony. He was a good historian, articulate and his thoughts were organized. The Claimant testified he could get the job but not keep the job due to his chronic pain condition. The ALJ is not convinced that Claimant suffers from a chronic pain condition that would affect his ability to obtain and sustain employment. As such, the Claimant has failed to establish that preponderance of the evidence that he is unable to earn any wages in the same or other employment as a result of his work injury.

Maintenance Medical Treatment

15. To prove entitlement to medical maintenance benefits, a Claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of the condition. *Grover v. Industrial Commission,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a Claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a Claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

16. Claimant has failed to prove that he is entitled to maintenance medical treatment. First, implantation of the spinal cord stimulator was unauthorized and not reasonable or necessary. The ALJ credits the opinions of Drs. Orent and Lesnak regarding implantation of the stimulator. Even Dr. Swarsen questioned it. The Claimant has also failed to prove entitlement to maintenance medical care in the form of opioid prescription medication. Although Claimant may suffer from some residual pain in his right upper extremity as a result of his work injury, the Claimant has failed to prove that he requires opioids to cure and relieve him of such pain or to maintain his condition at MMI. The Claimant provided no credible or persuasive evidence that the opioids improve his pain or his function. He testified that his pain has not improved but his function has, but Dr. Swarsen's report stated that his pain had improved but his function had not. As noted above, the inconsistencies in Claimant's testimony, clinical presentation and video surveillance call into question whether Claimant truly suffers from the pain he claims.

Change of Physician

17. Section 8-43-404(5)(a)(VI), C.R.S., allows a change of physician upon written request to the insurer. If the insurer neither grants nor denies the request within twenty days, the insurer shall be deemed to have waived any objection to the employee's request. While this issue may be moot given the conclusions regarding maintenance medical treatment, the ALJ has nevertheless addressed the issue.

18. In examining the abundance of evidence presented in this case, the ALJ can find no persuasive or credible evidence that since November 5, 2013, any circumstances have changed such that Claimant would be entitled to a change of physician. Claimant raised no new persuasive arguments pertaining to the change of physician issue, and no objective evidence demonstrates that the treatment Claimant has received with Drs. Bennett and Schneider since November 5, 2013 has improved his condition in any meaningful way. Claimant's subjective pain complaints are essentially the same; his function has not improved despite his testimony to the contrary (he testified that he now cannot perform basic housework); and he has not returned to work and alleges he is incapable of working. Claimant's authorized treating physicians remain Drs. Orent, Kistler, Sorenson, Hsin and Conyers.

Disfigurement

19. Pursuant to §8-42-108(1), C.R.S., Claimant is entitled to a discretionary award for his serious and permanent bodily disfigurement that is normally exposed to public view. As found, Claimant has sustained a serious permanent disfigurement to areas of his body normally exposed to public view. Accordingly, Claimant is entitled to disfigurement benefits in the amount of $1,800.00.

Attorney Fees

20. Section 8-43-211(3), C.R.S. permits an award of attorney fees for endorsing issues not ripe for adjudication. The Respondent has failed to prove entitlement to an award of attorney fees pursuant to §8-43-211(3). The ALJ cannot necessarily find the issues of production of Respondents' complete files and insurance coverage were not ripe for adjudication. The mere fact that PALJ Clisham had ordered both issues stricken leading up to a hearing set pursuant to a prior application for hearing does not automatically make the issues unripe as a matter of law.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome the DIME opinions concerning MMI and permanent impairment. Claimant reached MMI on September 18, 2013 with 33% permanent impairment of the right upper extremity.

2. Claimant has failed to prove that he is permanently and totally disabled as a result of his workers' compensation claim.

3. Claimant's request for maintenance medical treatment is denied and dismissed.

4. The Claimant has failed to prove entitlement to a change of physician. The authorized treating physicians remain Drs. Orent, Kistler, Sorenson, Hsin and Conyers.

5. The Respondents shall pay Claimant $1,800.00 for disfigurement.

6. No attorney fees shall be imposed against Claimant for endorsing unripe issues for hearing.

7. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 26, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant satisfy the applicable burden of proof to establish that he is entitled to an award of temporary total disability benefits commencing March 29, 2012 and continuing?
- If Claimant is entitled to an award of temporary total disability benefits did Respondents establish any circumstances to terminate the benefits?
- Did Respondents prove by a preponderance of the evidence that Claimant's entitlement to temporary total disability benefits, if any, should be suspended or reduced based on Claimant's participation in alleged injurious practices?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 through 5 were admitted into evidence. At hearing Respondents' Exhibits A through G were admitted into evidence.

2. Claimant was born in China on April 13, 1962 and lived there until he was 39 years of age. He then immigrated to the United States. Claimant speaks Chinese and does not speak, read or write English. Claimant has worked as a chef for his entire life.

3. In November 2009 Employer hired Claimant to work as a chef in the Employer's Asian restaurant. Claimant opened the restaurant, turned on the lights, prepared soups, prepared and cut food ingredients, cleaned the kitchen, checked stock and cooked food.

4. Claimant testified as follows concerning the events of December 20, 2011. It was a busy day and the kitchen filled with smoke while he was cooking. He then experienced pressure in his chest and could not stop coughing. Thereafter, whenever the kitchen filled with smoke he experienced chest pain and pressure. He also experienced symptoms when climbing stairs. Claimant never had these symptoms prior to December 20, 2011.

5. Claimant explained that in December 2011 the ventilation system at the Employer's restaurant had not been cleaned for more than a year and did not operate properly. Although Claimant reported the ventilation problem to the Employer Claimant testified that the vent remained unrepaired for three months.

6. Claimant testified that on March 21, 2012 he first sought medical treatment for his symptoms from a “family doctor” near his home.

7. On March 21, 2012 PA-C Valerie Maes examined and treated Claimant at Rocky Mountain Family Medicine (RMFM). Claimant reported chest pain, shortness of breath and coughing. Claimant stated that he thought he was “breathing in smoke at work.” PA Maes assessed bronchitis, “possibly secondary to smoke exposure.” PA Maes prescribed an antibiotic and other medication and referred Claimant for an electrocardiogram (EKG) and spirometry examination.

8. Claimant returned to work at the Employer on March 29, 2012. However, Claimant testified that his chest began to hurt and he gave the Employer a release he received from his “doctor.” Claimant testified that he advised the Employer he would rest until April 3, 2014.

9. Claimant’s Exhibit 2, p.12, is a “Work/School Release” dated March 29, 2012. The release is illegibly signed by a “provider” at RMFM. The release states Claimant was seen on March 21, 2012 and was “okay to return to work on” April 3, 2012. The ALJ infers this is the release Claimant allegedly gave to the Employer on March 29, 2012.

10. Claimant returned to RMFM on April 4, 2012 where he was seen by PA Maes. Claimant reported he had additional shortness of breath and was weak and dizzy when he attempted to return to work. It was noted Claimant was taking albuterol for his cough and shortness of breath.

11. On April 4, 2012 PA Maes issued another work release to Claimant. This release states that Maes saw Claimant on April 4 and the return to work date was to be determined. PA Maes noted Claimant needed further treatment and evaluation.

12. Claimant testified that he has not worked, nor has he looked for any work since March 29, 2012. He stated that he gave the April 4, 2012 work release to the employer.

13. On April 11, 2012 Claimant returned to RMFM. On that date PA Maes issued a note stating that Claimant was “suffering from chronic bronchitis most likely directly attributed to smoke inhalation at his work establishment.” Nathaniel Moore, M.D., referred Claimant for pulmonary medicine and “GI” consultations.

14. On May 10, 2012 Ahmad Rashid, M.D., and PA-C Kasia Hoover examined Claimant at National Jewish Hospital (NJH) on referral from Dr. Moore. Claimant gave a history of “increasing respiratory difficulty” over the past 6 months that he related to “increased smoke inhalational exposure at work.” Claimant reported his symptoms of cough, chest pain and dyspnea would improve when he went home from work at night and then worsen when he returned to work. The Claimant advised Dr. Rashid and PA Hoover that he had been off of work since March but had “not noted much improvement in the symptoms.” Dr. Rashid and PA Hoover noted that spirometry testing revealed slightly reduced air flow and that Claimant had normal oxygenation at room

temperature. These providers agreed that Claimant's cough may have been "smoke/irritant induced from his occupational exposures," but noted his symptoms had changed little despite being off of work for 2 months. Dr. Rashid and PA Hoover questioned whether there might be "an underlying asthmatic component." Dr. Rashid prescribed Prednisone, Advair, and Albuterol. Dr. Rashid and PA Hoover recommended Claimant stay off work until further evaluation considering "the hypersensitivity of his airways and aggravation by" his exposure to smoke at work.

15. Claimant returned to NJH and Dr. Rashid examined him on May 30, 2012. Dr. Rashid noted Claimant continued to experience coughing that was "triggered" by exposure to smoke, cold air, dust and cooking fumes. Dr. Rashid reviewed pulmonary function tests (PFTs) that showed "evidence of small airway hyperactivity." Dr. Rashid opined Claimant "does seem to have underlying small airway obstructive lung disease – cough variant asthma" and that the "symptoms of cough and wheezing do get worse by workplace exposure to fumes and smoke." Dr. Rashid suggested Claimant use a mask at work but Claimant was "very reluctant to do so." Dr. Rashid described Claimant as "clinically better" but stated Claimant thought he could "not go back to work at this point." Dr. Rashid prescribed Advair and referred Claimant to NJH occupational medicine division "to see if there is anything that we can change in his workplace that might help him keep his job."

16. On July 11, 2012 Annyce Mayer, M.D., examined Claimant at NJH for the purpose of performing an occupational/environmental consultation. Claimant gave a history that he had no respiratory problems until 6 months ago when there was "more smoke in the kitchen because the ventilation system was not working as well as it should." Claimant reported he initially experienced chest discomfort when he left work. By the end of February 2012 or the beginning of March 2012 he began to "cough along with the chest discomfort towards the end of the workday." Claimant reported his cough was better since leaving work at the end of March but the cough was still triggered by smoke, heat and cold. Dr. Mayer opined Claimant's symptoms were suggestive of "airway irritation." Dr. Mayer stated that the "exposure was not consistent with RADS, but bronchitis and irritant-induced asthma" were "in the differential." An element of vocal cord dysfunction (VCD) could not be ruled out. Dr. Mayer recommended a methacholine challenge with laryngoscopy after clarification of Claimant's cardiovascular status.

17. On August 17, 2012 Dr. Mayer referred Claimant for a methacholine challenge with laryngoscopy and an esophagram to rule out gastroesophageal reflux disease (GERD). In the August 17 note Dr. Mayer noted that "schedulers were provided Ms. Chen's contact information as Wei works during the day, to help facilitate the scheduling of his tests."

18. On September 13, 2012 Claimant underwent rhinolaryngoscopy with methacholine challenge. Karin Pacheco, M.D., diagnosed VCD and chronic rhinitis.

19. On September 26, 2012 Dr. Mayer noted Claimant's condition was unchanged except he had a "sense of something in his throat" and had developed

hoarseness that increased with exposure to wind and air conditioning. Claimant was not taking any medications. Dr. Mayer noted claimant had recently undergone a methacholine challenge test that was positive for "mild asthma" and an esophagram showed "mild spontaneous GERD noted only to the mid esophagus." Dr. Mayer assessed cough, chest tightness, throat tightness and shortness of breath that "by history developed in temporal association with failure of the exhaust ventilation system to remove smoke." Dr. Mayer opined Claimant's symptoms are "due to a combination of mild asthma and vocal cord dysfunction, both irritant-induced on a medically probable basis." Dr. Mayer opined the GERD was not work-related but was "probably contributing to the delay in [Claimant's] recovery." Dr. Mayer prescribed "QVAR" one puff twice daily and ProAir HFA 1-2 puffs as needed. Dr. Mayer also prescribed Omeprazole twice daily, Ranitidine and speech therapy "for breathing techniques including with exposure to irritants and exercise." Dr. Mayer noted that she expected Claimant would respond well to this course of treatment.

20. Dr. Mayer added an addendum to her September 26, 2012 note stating that Claimant's case had been discussed in an occupational and environmental medicine case conference with an "industrial hygienist and occupational pulmonologists." Dr. Mayer wrote that it was the "consensus opinion of the group that but for the described smoke exposure, it is medically probable that [Claimant] would not have developed these respiratory symptoms due to asthma and vocal cord dysfunction."

21. On October 10, 2012 Dr. Mayer noted Claimant had not been able to tolerate the OVAR and ProAir treatments. Claimant requested oral medication and Dr. Mayer prescribed "albuterol extended release 4 mg twice daily."

22. On October 19, 2012 Dr. Mayer noted Claimant reported "improvement with albuterol." Claimant also reported that he recently had been cooking at home and about twice a week "will stir fry something such as pepper, which will increase his symptoms." Dr. Mayer opined that if Claimant continued treatment he would continue to improve and be able to return to work as a cook in a kitchen with "appropriate ventilation."

23. On October 23, 2012 Lawrence Repsher, M.D., performed an independent medical examination (IME) of Claimant. Dr. Repsher issued a written report on October 29, 2012. Dr. Repsher took a history, reviewed records of Claimant's treatment at NJH and performed a physical examination (PE). Dr. Repsher noted Claimant had undergone "normal" chest x-rays and PFTs. Claimant's oxygen saturation was also reportedly normal. On PE Dr. Repsher noted that Claimant's breath sounds were initially normal but then Claimant began to have "volitional cough and wheezing." Dr. Repsher commented that the September 2012 methacholine challenge was reported to be strongly positive but Dr. Repsher opined, based on Claimant's "behavior during my physical examination" that Claimant was "clearly malingering." Dr. Repsher's impression was malingering versus Munchausen's syndrome. Dr. Repsher opined that Claimant has no medical condition and therefore there was no "causality." Likewise, Dr. Repsher opined Claimant does not need any additional medical care and does not need any restrictions.

24. On January 16, 2013 Dr. Mayer noted that Claimant's breathing continued to improve although he had some "triggering symptoms" around smoke, stir frying in the home and cold air. Claimant had reportedly stopped using albuterol and his GERD medications because he believed they caused him to experience severe elbow pain. Dr. Mayer noted Claimant had a history of epicondylitis and recommended he get treatment for this condition. Dr. Mayer stated that she would not recommend that Claimant resume taking albuterol because Claimant was convinced the drug triggered his elbow pain. Dr. Mayer stated she would be willing to prescribe albuterol again if Claimant wanted to try it, but opined it would not necessarily be required considering Claimant's "considerable improvement." Dr. Mayer's diagnoses remained unchanged. However, she opined Claimant's condition had stabilized and he had reached maximum medical improvement (MMI) since there was no additional treatment to be considered.

25. By using the methodology recommended by the Division of Workers' Compensation Level II accreditation course Dr. Mayer assessed 14% whole person impairment for occupational asthma. She noted no impairment rating was available for paroxysmal VCD. As permanent restrictions Dr. Mayer recommended Claimant "avoid exposure to irritant dust, smoke and fumes and physical exertion in cold air."

26. At the request of Claimant's former attorney, Dr. Rashid submitted a report dated February 25, 2013. Dr. Rashid wrote that "the clinical findings and spirometry as well as subsequent workup by Dr. Annyce Mayer from the division of environmental and occupational medication, indicate a diagnosis of mild reactive airway disease and bronchospasm, most probably caused by exposure to smoke in the workplace." Dr. Rashid also stated that he reviewed Dr. Mayer's "consult notes" and concurred with her opinion.

27. On March 21, 2013 Clarence Henke, M.D., conducted an IME of Claimant at the Respondents' request. Dr. Henke is board certified in preventative medicine and board certified by the conjoint boards of internal medicine, pathology, radiology and nuclear medicine. He is Level II accredited. Dr. Henke took a history from Claimant, reviewed medical records and performed a PE. Dr. Henke apparently did not review any medical records subsequent to Dr. Repsher's October 29, 2012 report.

28. In a report dated April 4, 2013 Dr. Henke stated Claimant gave a history that he was working as a cook and began having "breathing problems" in the "summer of 2011" because of a poorly functioning ventilation system. On PE of the neck Dr. Henke noted wheezing and stridor over the larynx when Claimant was speaking and breathing. On PE of the chest Dr. Henke noted that breath sounds were normal in quiet breathing but slight rhonchi and wheezing were caused by forced exhalation." Dr. Henke's impressions included "occupational asthma secondary to smoke inhalation" at work, laryngitis secondary to VCD of uncertain etiology and GERD. Dr. Henke opined that Claimant's occupational asthma was improved by medications provided by NJH physicians, but Claimant reported he could not "financially afford these medications." Dr. Henke opined Claimant would continue to improve if he could afford the medications prescribed at NJH. Dr. Henke opined claimant could return to work avoiding smoke,

gasses, fumes and extreme temperature changes. Dr. Henke opined Claimant "will be able to return to work as a cook in kitchens that provide appropriate ventilation."

29. On April 29, 2013 Insurer filed a General Admission of Liability. Respondents admitted Claimant sustained an injury on December 20, 2011. Insurer admitted liability for medical benefits but not temporary total disability (TTD) benefits.

30. Claimant returned to Dr. Mayer on July 31, 2013. Dr. Mayer noted that the claim for workers' compensation had been "accepted" and that Claimant had recently undergone an IME. Claimant reported symptoms of cough and throat tightness particularly when walking outside on windy and cool days. Dr. Mayer recommended that Claimant again try oral albuterol, and Claimant indicated his willingness to do so. Dr. Mayer also prescribed speech therapy to improve "breathing techniques." Dr. Mayer also recommended further evaluation of GERD.

31. On September 9, 2013, Dr. Mayer reported that Claimant felt "about 30% better" since resuming albuterol. Dr. Mayer noted Claimant had recently undergone a "pH probe" and there was no evidence of GERD, which had previously been considered a contributor to Claimant's symptoms. On PE Dr. Mayer noted prominent laryngeal sounds on forced exhalation. Dr. Mayer stated Claimant had not yet returned to speech therapy for review of breathing techniques, but she opined that Claimant's "examination today certainly suggests that a large component of his ongoing symptoms are related to vocal cord dysfunction." Dr. Mayer anticipated MMI in 6 to 8 weeks.

32. On November 12, 2013 Dr. Henke issued an additional report after reviewing Dr. Mayer's notes of January 16, 2013 and July 21, 2013. Dr. Henke wrote that he agreed with Dr. Mayer's January 16, 2013 statements that Claimant was at MMI and no additional treatment was needed. Dr. Henke also stated that based on Dr. Repsher's October 23, 2012 examination Claimant could have returned to work "in some capacity that did not feature environmental conditions that could irritate his respiratory system." Dr. Henke noted claimant had multiple non-industrial health issues. Dr. Henke did not think that claimant was totally incapable of working.

33. On December 5, 2013 Claimant returned to Dr. Mayer. Dr. Mayer noted Claimant had undergone 4 sessions of speech therapy to address his breathing technique. The speech therapist reported that Claimant responded well but the favorable response was "short-lived." Dr. Mayer opined Claimant was at MMI. Dr. Mayer assessed a combined 19% whole person impairment for asthma and VCD, which Dr. Mayer classified as an "air passage defect." Dr. Mayer reiterated that Claimant was restricted from exposure to irritant dust, smoke, fumes and work in cold air. Dr. Mayer opined these restrictions would limit Claimant's employment options including his "former career as a chef in a Chinese restaurant." Dr. Mayer recommended medical maintenance treatment to include two clinic visits per year as needed and ongoing use of oral albuterol.

34. In their position statements both parties indicate that Respondents requested a Division-sponsored independent medical examination (DIME) following Dr. Mayer's December 5, 2013 report.

35. On February 20, 2014 Michael Volz, M.D., performed a DIME. Dr. Volz took a history, performed a PE and reviewed medical records. It is not always clear which medical records Dr. Volz reviewed since he did not summarize them in his report. Claimant's reported symptoms included a cough, chest pain, shortness of breath and chest tightness. Claimant gave a history of onset of the symptoms since December 2012. These symptoms reportedly appeared "after inhaling smoke." Claimant reported he tried inhalers for asthma but they did not work. He was currently taking "asthma pills" twice daily. On PE Dr. Volz noted airflow was normal and there were no "unordinary breath sounds."

36. Dr. Volz "assessed" cough, dyspnea, chest pain and chronic pharyngitis. Dr. Volz opined the cause(s) of Claimant's symptoms remains "unknown" at this time. Dr. Volz further stated that the "accurate/diagnoses is/are not clearly established." Dr. Volz explained that the timing of the onset of Claimant's symptoms does not prove that a "workplace exposure" caused the issues. Instead, Dr. Volz stated that the possibility of RADS was highly unlikely in the absence of a "of a sudden and acute exposure." He did state that if there was an "airflow issue at work" there is no doubt "this factor could at least temporarily" have worsened Claimant's "status non-specifically."

37. Dr. Volz opined that a "positive" methacholine test does not mean that "someone has asthma," especially where the person failed to respond to "controller asthma medications." Dr. Volz noted that Claimant was taking albuterol but still experienced symptoms. However, Dr. Volz also noted that Claimant's reported "improvement on oral tabs of albuterol suggests subjectively asthma might be present." Dr. Volz also noted that Claimant's "objective tests do show some degree of airway reversibility" that "would suggest asthma might be present."

38. Dr. Volz also opined there is "absolutely no evidence" to support the diagnosis of VCD. He noted that a key feature of VCD is paradoxical vocal cord movement on inspiration. However, in this case closure of the vocal cords was only seen on expiration. He further opined that the record contains evidence that Claimant has GERD which could explain his symptoms. In any event, Dr. Volz opined that the medical literature indicates that if VCD is present there is a very high likelihood that it is not work-related.

39. Dr. Volz opined Claimant is not at MMI because he has not tried to relieve his symptoms through the use of alternative inhaled "combination medications." However, Dr. Volz opined that "the question of whether to discuss MMI" is a "moot point" because Claimant's symptoms cannot be causally connected to his work. Dr. Volz stated that if causation was established he would assign a 0% impairment rating because there are "no current objective abnormalities beyond the question of bronchiectasis, the cause and duration of which is unknown."

40. On March 20, 2014 Dr. Volz completed a Division IME Examiner's Summary Sheet on which he marked an "x" next to the statement: "No the claimant is not at MMI."

41. There is no credible and persuasive evidence that Respondents filed a Final Admission of Liability (FAL) following the issuance of Dr. Volz's DIME report. Rather, the Respondents state in their position statement that the case "remained on General Admission."

42. Claimant returned to Dr. Mayer on December 31, 2014. Claimant reported that overall he was doing "relatively well." Claimant reported there had been a "problem with his medication being covered last fall" but he was using the medications on December 31. Dr. Mayer recommended Claimant continue to use albuterol as needed for asthma and return in a year for follow up unless there was a earlier worsening of condition.

43. Dr. Henke testified by deposition on April 8, 2015. Dr. Henke stated that he agreed with Dr. Rashid that Claimant's symptoms (cough, chest tightness and dyspnea) were "smoke/irritant induced from his occupational exposure." Dr. Henke testified that on PE of the Claimant he noted "slight sounds of wheezing" during forced expiration. Dr. Henke stated that this finding gave him the impression that Claimant "had occupational asthma, which is work-related, secondary to smoke inhalation at the workplace." Dr. Henke testified that he agreed with Dr. Volz that the cause of Claimant's symptoms could not be traced to a "cause" associated with a specific date or event. However, Dr. Henke opined the Claimant's respiratory symptoms were "aggravated" by irritants in the workplace including smoke. Dr. Henke explained that asthma is a "general condition" with many causes, but when he used the term "occupational asthma" he was referring "very specifically to smoke inhalation."

44. Dr. Henke testified that he agreed with Dr. Volz's opinion that "there's absolutely no evidence to support a vocal cord dysfunction." Dr. Henke explained that there is "no anatomical reason for that to cause respiratory discomfort."

45. Dr. Henke testified that Dr. Rashid's suggestion that Claimant wear a mask to work was a "reasonable accommodation." Dr. Henke understood Claimant did not want to use a mask. Dr. Henke stated the type of mask he recommended for Claimant would include a "small oxygen supply" and contain a filter that would remove smoke particulates. Dr. Henke opined it would be difficult to wear a mask "on an eight-hour or more time of work as a chef."

46. Dr. Henke opined that Claimant could have returned to work at the end of October 2012. Dr. Henke explained that by that date Claimant's symptoms had improved and the diagnostic tests, primarily spirometry, did not show any evidence of lung abnormalities. Consequently Dr. Henke opined there was no reason for Claimant to remain off of work. However, Dr. Henke opined Claimant should avoid exposure to "smoke and dust." Dr. Henke opined Claimant could return to work as a chef as long as the smoke was properly controlled and the vent system is working on the hood.

47. Dr. Henke testified he agreed with Dr. Mayer's January 13, 2013 report that Claimant's condition, although not fully resolved, was stable and Claimant was at MMI because there was no additional treatment to be considered.

48. Dr. Mayer testified by deposition on June 18, 2015. Dr. Mayer disagreed with Dr. Henke that there is no evidence that Claimant sustained VCD. Dr. Mayer opined that exposure to "irritants" is a "known" cause of VCD. She explained that exposure to irritants can cause "endogenous or exogenous" VCD. She explained that an example of endogenous VCD would occur after a "severe respiratory illness" while exogenous VCD is a type of "learned response" that can develop as a "protective mechanism" that develops when a person is in an irritant environment.

49. Dr. Mayer testified that during her treatment of Claimant she never thought there was a cause of Claimant's symptoms other than exposure to smoke caused by the faulty ventilation system at Claimant's job.

50. Dr. Mayer testified that a positive methacholine challenge is a "test of nonspecific air wave's hyperresponsiveness, which in the proper clinical context does establish the diagnosis of asthma." Dr. Mayer explained that taken together with Claimant's pre-challenge history of cough, wheeze, chest tightness and shortness of breath the methacholine challenge results established "confirmed" asthma. Dr. Mayer stated that "one can't fake a positive methacholine challenge." Dr. Mayer testified that asthma can "trigger coughs."

51. Dr. Mayer opined that returning to work while using a "respirator" was not a "feasible option" for Claimant. Dr. Mayer opined that "wearing a mask" for eight hours per day would have "been extremely difficult" because the mask would have been "hot and uncomfortable," particularly in a cooking environment. Further, Dr. Mayer opined that use of the mask would have impeded "communication." Dr. Mayer disagreed with Dr. Henke that use of a mask with oxygen would be a "reasonable accommodation." Dr. Mayer stated that use of oxygen presents a fire hazard and is typically not recommended "within six feet of stoves."

52. Dr. Mayer was asked when Claimant could have returned to work. Dr. Mayer stated that she was concerned that working in any kind of a kitchen environment would have been "difficult" for Claimant unless the local exhaust system was "optimized" to prevent "too much in the way of irritant exposures." Dr. Mayer explained that merely because an exhaust system is working properly does not mean the conditions are "optimized." Dr. Mayer stated that she did not know anything about the "current status" of Claimant's workplace and therefore did not know if the ventilation conditions were ever "optimized such that he could return to work."

53. Dr. Mayer testified that she was never under the impression that Claimant returned to work during treatment. Dr. Mayer credibly explained that when she wrote that "Wei works during the day" in the August 17, 2012 note she was referring to Claimant's son Jay, not to Claimant himself. Dr. Mayer further explained that she

referred to Ms. Chen because Chen was to act as Claimant's interpreter for scheduling appointments.

54. Claimant proved it is highly probable and free from serious doubt that he developed symptomatic occupational asthma proximately caused by the admitted industrial accident of December 20, 2011.

55. Claimant credibly testified that on December 20, 2011 he was performing his duties as a chef when the kitchen became very smoky because of a malfunctioning exhaust system. Claimant credibly testified that this event caused him to experience pressure in his chest and coughing. Claimant continued to experience these symptoms whenever the kitchen filled with smoke, and his symptoms tended to decline when he went home from work. Claimant credibly testified that the ventilation system was not repaired before he left work on March 29, 2012. Claimant credibly testified he had not had any respiratory symptoms prior to the events of December 20, 2011.

56. Dr. Mayer credibly and persuasively opined that Claimant's exposure to smoke at work caused him to develop irritant-induced asthma. Dr. Mayer credibly explained that the methacholine challenge was positive for asthma when considered in the context of Claimant's history. Dr. Mayer credibly and persuasively opined that there is a significant "temporal relationship" between the malfunctioning of the ventilation system at Claimant's place of employment and the development of Claimant's respiratory symptoms.

57. Dr. Mayer's opinion that work-related exposure to smoke caused Claimant to develop asthma is corroborated by Dr. Henke. In his report of April 4, 2013 Dr. Henke opined that Claimant sustained "occupational asthma" secondary to exposure to smoke. He explained that the diagnosis was supported by sounds of "slight rhonchi and wheezing" on forced exhalation. Even though Dr. Henke changed his opinion concerning whether or not Claimant suffers from VCD, he never changed his opinion that Claimant developed "occupational asthma" caused by exposure to smoke. Dr. Mayer's opinion is further corroborated by Dr. Rashid who reviewed Dr. Mayer's notes and concurred with her opinion that Claimant suffered from "mild reactive airway disease and bronchospasm, most probably caused by exposure to smoke in the workplace."

58. Dr. Repsher's opinion that Claimant has "no medical condition" and that Claimant is "malingering" is not persuasive. Dr. Mayer persuasively testified that it is not possible to "fake" a response to a methacholine challenge. Although Claimant may have exaggerated his symptoms when Dr. Repsher performed his examination, the ALJ is not persuaded that all of Claimant's symptoms were fabricated. Even Dr. Volz, the DIME physician acknowledged the Claimant may have experienced a "temporary," albeit "unspecified," condition when he was exposed to smoke in the workplace.

59. To the extent Dr. Volz, the DIME physician, opined that Claimant does not suffer from asthma caused by his exposure to smoke in the workplace the ALJ finds his opinions are not persuasive. Dr. Volz's opinions are persuasively refuted by the

credible opinions of Dr. Mayer, Dr. Henke and Dr. Rashid. Doctors Mayer, Henke and Rashid agree that exposure to smoke either caused Claimant to develop asthma or aggravated a prior underlying condition that manifested itself as symptomatic asthma. Moreover, even Dr. Volz admitted that Claimant's "subjective" improvement while taking albuterol and "objective" tests demonstrating "some degree of airway reversibility" suggest asthma "might be present."

60. Claimant proved it is more probably true than not that he is entitled to an award of TTD benefits commencing March 29, 2012.

61. As found, Claimant has proven by clear and convincing evidence that exposure to smoke at work caused him to develop occupational asthma. Dr. Mayer opined that that Claimant's symptoms of cough, chest tightness and shortness of breath result from a "combination" of "mild asthma" and VCD. (See Finding of Fact 19). Dr. Mayer has repeatedly and persuasively opined that Claimant should not return to work in an environment where he is exposed to smoke and fumes. (Findings of Fact 25 and 33). When asked when Claimant could have returned to work Dr. Mayer credibly testified that she does not know when Claimant could have returned to his pre-injury employment, if ever, because she has no information that the ventilation system had been "optimized" sufficiently to allow him to return to work.

62. The ALJ infers from Dr. Mayer's testimony and restrictions that she believes occupational asthma is at least one of the causes of the need for a restriction that prevented Claimant from returning to his pre-injury job. Further Dr. Mayer was of the opinion that the restriction should remain in place until the ventilation system was "optimized" to prevent exposure to irritants.

63. Dr. Mayer's opinion that occupational asthma restricted Claimant from returning to his pre-injury employment is corroborated by the opinions of Dr. Henke. Dr. Henke testified that he believes Claimant suffers from "asthma" that was "aggravated" by exposure to smoke in the workplace. Dr. Henke opined Claimant should avoid dust and smoke. Dr. Henke opined Claimant could return to work as a chef as long as the smoke was properly controlled and the ventilation system was working. The ALJ infers from these statements that Dr. Henke agrees with Dr. Mayer that claimant should not be exposed to smoke in the workplace and should not be released to return to his regular employment until the ventilation system is "working."

64. Claimant credibly testified that he left work on March 29, 2012 as a result of the restrictions imposed at RMFM. Claimant credibly testified he has not returned to work since that time.

STIPULATIONS

65. The parties stipulated that the Claimant's TTD rate is $467 per week.

66. The parties stipulated that if Claimant is awarded TTD benefits Respondents are entitled to a Social Security Disability offset of $49.38 per week commencing March 29, 2012 and continuing.

67. The parties stipulated that if Claimant is awarded TTD benefits Respondents are entitled to an unemployment insurance offset of $185.54 per week for the period of November 18, 2012 through May 30, 2013.

68. The parties stipulated that if Claimant is awarded TTD benefits Respondents are entitled to an unemployment insurance offset of $151.38 per week for the period of May 31, 2013 through July 7, 2013.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as specifically noted below, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

LEGAL STANDARD TO PROVE ENTITLEMENT TO TEMPORARY TOTAL DISABLITY BENEFITS

Claimant contends that a preponderance of the evidence demonstrates that he is entitled to an award of TTD benefits commencing March 29, 2012 and continuing to the present. Claimant argues that the admitted industrial injury caused both occupational asthma and VCD. He further asserts that both of these conditions have contributed to his inability to return to his regular employment.

Respondents contend that Claimant failed to prove that he is entitled to TTD benefits. In support of this position Respondents assert that Dr. Mayer restricted Claimant from work, at least in part, because she diagnosed VCD. However, Respondents note that the DIME physician (Dr. Volz) found Claimant does not have VCD and that even if he does it is not work-related. Respondents assert that Claimant failed to “overcome” Dr. Volz’s findings regarding VCD by clear and convincing evidence. Respondents contend that in these circumstances Claimant is not entitled to TTD benefits. Respondents’ argument assumes that even if Claimant proved he has work-related asthma that he would not be entitled to TTD benefits unless he also proved that he has VCD.

The Respondents also argue that Claimant has “waived” the right to contest the DIME physician’s opinions because Claimant failed to apply for a hearing to “overcome the DIME.”

.Relying on Dr. Repsher’s opinions, Respondents also argue that “malingering is present in this case.” Respondents cite Dr. Repsher’s opinion as the basis for their “position that TTD should be awarded from the date of injury to October 23, 2013, when Claimant was able to return to work.

The ALJ concludes Claimant proved by clear and convincing evidence that he sustained occupational asthma as a result of the admitted industrial injury of December 20, 2011. In these circumstances, the ALJ concludes Claimant proved he is entitled to TTD benefits without regard to whether he has work-related VCD.

Usually a claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks TTD benefits were proximately caused by an injury or occupational disease arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must also prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

To prove an initial entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, the claimant left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to prove a causal connection between the work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

The term "disability" connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until the occurrence of one of the events listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of "disability" presents a question of fact for the ALJ. To prove disability there is no requirement that a claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). When a claimant does present medical evidence of restrictions it is for the ALJ to assess the weight and credibility to be assigned such evidence. *King v. The Inn at Silver Creek,* WC 4-844-514 (ICAO February 6, 2012).

As an initial matter the ALJ concludes it is necessary to determine the burden of proof which the Claimant must bear in order to establish that the admitted industrial injury "caused" the alleged temporary disability. This issue arises because Claimant asserts that he must prove by a mere preponderance of the evidence that the occupational diseases of asthma and VCD caused his temporary disability. Conversely, Respondents argue the parties are bound by the Dr. Volz's finding that Claimant does not have work-related VCD.

The ALJ notes that Respondents do not cite any cases, statutes or other authority to support their argument that because Dr. Volz is the DIME physician his "diagnosis determinations" must be "accepted." Consequently, the ALJ is left to state his own understanding of the legal basis for Respondents' argument.

The ALJ infers that Respondents' legal argument is that the findings of the DIME physician (Dr. Volz) concerning Claimant's diagnoses and the causes of those diagnoses are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(II), C.R.S., and § 8-42-107(8)(c), C.R.S., require that the treating physician's determinations with respect to MMI and permanent medical impairment "cannot be disputed in the absence of" a DIME. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186, 190 (Colo. App. 2002). Section 8-42-107(8)(b)(III), C.R. S., provides that a DIME physician's finding concerning MMI "may be overcome only by clear and convincing evidence." Similarly, § 8-42-107(8)(c), C.R.S., provides that a DIME physician's finding concerning permanent medical impairment "may be overcome only by clear and convincing evidence."

Our courts have held that determinations of MMI and medical impairment require a DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). Therefore, a DIME physician's findings concerning the diagnoses of a claimant's medical conditions and the cause of those conditions are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office, supra*.

In contrast, when the issue to be determined concerns the "threshold" determination of whether the Claimant sustained *any injury* proximately caused by the performance of service arising out of and in the course of employment, the DIME physician's opinion is not given any presumptive weight and need not be overcome by clear and convincing evidence. Rather the threshold issue of "compensability" is determined under the preponderance of the evidence standard. *Eller v. Industrial Claim Appeals Office,* 224 P.3d 397 (Colo. App. 2009); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

In this case the "threshold" issue of whether the Claimant sustained an injury arising out of and in the course of employment is not in dispute because the Respondents filed a GAL admitting that Claimant sustained a compensable injury on December 20, 2011. *See Leprino Foods v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005); *Nielsen-Hernandez v. King Soopers*, WC 4-657-036 (ICAO February 2, 2011); *Gianzero v. Final Order Wal-Mart Stores, Inc.,* WC 4-669-749 (ICAO May 5, 2010). The Respondents have not sought to withdraw that admission.

Rather the precise issues presented for determination are whether the Claimant sustained work-related asthma and/or VCD as a result of his exposure to smoke at work, and whether one or both of these conditions caused Claimant to become temporarily disabled. The Claimant does not dispute that Respondents timely sought a DIME to review Dr. Mayer's December 5, 2013 finding that Claimant was at MMI and had a 19% whole person impairment rating attributable to the residual effects of asthma and VCD. The question of whether the admitted injury caused asthma and/or VCD fell within the DIME physician's authority to diagnose the Claimant's medical conditions, determine whether any of Claimant's medical conditions are work-related, determine whether Claimant's conditions are stable and determine whether these conditions caused any ratable permanent impairment. It follows that the question presented here is the "extent" of the Claimant's work-related injury and not the existence of a work-related injury. The "extent" of Claimant's injury was a question properly submitted to the DIME physician and the ALJ and the parties are bound by the DIME physician's findings unless overcome by clear and convincing evidence. *Leprino Foods v. Industrial Claim Appeals Office, supra*; *Nielsen-Hernandez v. King Soopers, supra*; *Gianzero v. Final Order Wal-Mart Stores, Inc., supra*.

It follows that becasue the DIME physician found the Claimant does not have work-related asthma and/or VCD the claimant must overcome those findings by clear and convincing evidence.

DIME PHYSICIAN'S TRUE OPINION REGARDING DIAGNOSES OF OCCUPATIONAL ASTHMA AND VCD

The ALJ notes that the DIME physician's findings concerning the correct diagnosis of Claimant's injury-related medical conditions and the cause of those conditions are somewhat ambiguous. On the one hand Dr. Volz "assessed" the Claimant with cough, dyspnea, chest pain and chronic pharyngitis and stated the cause of these conditions remains "unknown." This would suggest that Dr. Volz found the Claimant does not have diagnosable asthma, or if he does have asthma it is not work-related. (Dr. Volz emphatically found Claimant does not have VCD, and even if he did it would probably not be work-related.)

On the other hand, Dr. Volz indicated Claimant is not at MMI because he should try different medications for treatment of asthma. Dr. Volz also marked the Division IME Examiner's Summary Sheet to indicate Claimant is not at MMI. Section 8-40-201(11.5), C.R.S., defines MMI as a "point in time" when any "medically determinable physical or mental impairment *as a result of injury* has become stable and when no further treatment is reasonably expected to improve the condition." (Emphasis added.) Because Dr. Volz has indicated Claimant is not at MMI his report could be interpreted as finding that Claimant has work-related asthma and needs additional treatment for that condition before reaching MMI.

In cases where a DIME physician offers ambiguous or conflicting inferences concerning MMI or impairment, the ALJ must determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Rainwater v. Sutphin*, WC 4-815-042-04 (ICAO September 9, 2014).

The ALJ determines as a matter of fact that Dr. Volz's true findings are that Claimant probably does not have asthma, but even if he does have asthma it is not causally related to his exposure to smoke in the workplace.

With regard to the "diagnosis" of Claimant's condition, the ALJ finds that Dr. Volz never actually diagnosed Claimant as suffering from "asthma." Rather, Dr. Volz "assessed" Claimant with symptoms of cough, dyspnea, and chest pain and stated that the cause of these conditions or symptoms is "unknown." Dr. Volz further stated that the "accurate/diagnoses is/are not clearly established." Moreover, Dr. Volz discussed why he believes that Claimant's symptoms are not consistent with asthma and why the positive methacholine challenge may not be diagnostic of asthma considering the persistency of Claimant's symptoms despite the use of albuterol.

With regard to the cause of Claimant's symptoms, the ALJ finds that Dr. Volz did not intend to suggest that Claimant is not at MMI because he needs additional medical treatment for work-related asthma. Dr. Volz stated that he considered his discussion of

MMI, and hence the need to try different asthma medications, to be “moot” because “there is no clear established causal work relationship.” The ALJ finds that Dr. Volz’s statement means that even if Claimant has asthma that condition is not related to Claimant’s employment. Therefore, the ALJ determines that Dr. Volz found it would be meaningless to consider whether Claimant needs additional treatment for asthma because that condition would not causally related to his employment.

It follows from this discussion that Claimant is obliged to overcome Dr. Volz’s findings regarding diagnosis and causation by clear and convincing evidence.

OVERCOMING DIME BY CLEAR AND CONCINCING EVIDENCE

The ALJ concludes Claimant proved by clear and convincing evidence that he has work-related occupational asthma proximately caused by the admitted industrial injury of December 20, 2011.

Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging a DIME physician's findings concerning MMI and or impairment must produce evidence demonstrating that it is highly probable the DIME physician’s findings are incorrect. The question of whether the party challenging the DIME physician’s findings has overcome them by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As determined in Findings of Fact 54 through 59, Claimant proved it is highly probable and free from serious doubt that he sustained occupational asthma proximately caused or aggravated by exposure to smoke in the workplace. As found, the ALJ is persuaded by the opinions of Dr. Mayer, Dr. Rashid and Dr. Henke that Claimant has occupational asthma that was either caused by or aggravated by the workplace exposure to smoke. The ALJ is persuaded by Claimant’s testimony that the asthma was caused or aggravated by the exposure to smoke that resulted from the malfunctioning of the ventilation system in the employer’s kitchen. The ALJ finds that the opinions of Dr. Volz are not persuasive for the reasons stated in Finding of Fact 59.

ALLEGED WAIVER OF RIGHT TO CHALLENGE DIME PHYSICIAN’S FINDINGS

Respondents contend that Claimant “waived” his right to challenge the DIME physician’s findings because he did not timely apply for a hearing to overcome the DIME. The ALJ rejects this argument.

As Respondents acknowledge in their position statement, an “implied” waiver based on a party’s conduct must be free from ambiguity and clearly manifest an intent not to assert the right or benefit. *Department of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984).

Section 8-43-203(2)(b)(II)(A), C.R.S., provides that a claimant has 30 days after the respondents file an FAL to contest the admission in writing and request a hearing on ripe issues. However, in the event a party requests a DIME, the claimant is not required to request a hearing "until the division's independent medical examination process is terminated for any reason." Section 8-43-203(2)(b)(II)(A) also provides as follows:

> The respondents have twenty days after the date of mailing of the notice from the division of the receipt of the IME's report to file an admission or to file an application for hearing. The claimant has thirty days after the date respondents file the admission or application for hearing to file an application for hearing, or a response to respondents' application for hearing, as applicable, on any disputed issues that are ripe for hearing.

There is no credible or persuasive evidence to establish Respondents filed an FAL after the DIME report was issued. Neither is there any credible and persuasive evidence that they filed an application for hearing to contest any finding of the DIME physician. It follows that the Claimant's obligation to challenge the DIME physician's findings by objecting to an FAL or by filing a response to the Respondents' application for hearing never actually arose under § 8-43-203(2)(b)(II)(A). In these circumstances the Claimant's failure to "file an application for hearing" to contest one or more of the DIME physician's findings does not constitute an implicit waiver of the right to do so. To the contrary, it appears that nothing can be inferred from Claimant's failure to request a hearing because his duty to contest the DIME physician's findings had not yet been triggered under the statutory scheme.

TEMPORARY TOTAL DISABLITY BENEFITS

Claimant argues he is entitled to an award of TTD benefits commencing March 29, 2012 and continuing because the combination of asthma and VCD rendered him to be unable to perform his regular employment. Claimant relies heavily on the restrictions imposed by Dr. Mayer as the basis for this argument. Respondents assert Claimant failed to prove that he was "disabled" from performing his regular employment and is not entitled to TTD benefits. Specifically Respondents contend that Dr. Mayer considered VCD when "precluding Claimant from working in smoke and with irritant spices." Respondents assert that Claimant has not overcome the DIME physician's finding that Claimant does not have VCD. Respondents also assert that if Claimant is awarded TTD benefits the award should not continue past October 23 when Dr. Repsher opined Claimant could return to work.

As determined in Findings of Fact 60 through 64 Claimant proved it is more probably true than not that he is entitled to an award of TTD benefits commencing March 29, 2012 and continuing until terminated by law or order. As found, the ALJ is persuaded by the testimony opinions of Dr. Mayer and Dr. Henke that as of March 29, 2012, when Claimant left work, occupational asthma contributed to Claimant's inability to perform his regular duties as a Chef. Specifically, Claimant could not return to work at his regular employment because the Employer's ventilation system caused him to be exposed to irritant smoke at levels that would have caused him to experience symptoms of asthma. There is no credible and persuasive evidence that the ventilation system was ever sufficiently repaired to avoid exposure to smoke at levels that would allow Claimant to perform his regular duties.

The ALJ considers the arguments about whether or not Claimant could return to work with a "mask" to be a red herring. Claimant's regular job did not require use of a "mask." Provision of a mask, even if workable, would have constituted an offer of modified employment. There is no showing that any offer of modified employment was ever made.

The Respondents insist that because Dr. Mayer considered the diagnosis of VCD as one of the bases for imposing the restriction against returning to regular employment, Claimant has not proven entitlement to TTD benefits. The respondents argue that Claimant has not overcome the DIME physician's opinion that Claimant does not have VCD. Indeed, the ALJ has not found that Claimant overcame the DIME physician's opinion that Claimant does not have VCD.

However, as found, Dr. Mayer imposed the restriction against returning to regular employment in part because of the established diagnosis of work-related asthma. Dr. Henke imposed a restriction against returning to regular employment based *entirely* on the diagnosis of asthma. Indeed, Dr. Henke is of the opinion Claimant does not have VCD. It follows that Claimant has proven by a preponderance of the evidence that work-related injury is, at a minimum, a partial cause of his inability to resume his regular employment and Claimant is entitled to an award of TTD benefits. *See Horton v. Industrial Claim Appeals Office,* 942 P.2d 1209 (Colo. App. 1996).

The respondents advance a meritless argument that any TTD benefits awarded should end on October 23, 2013, when Dr. Repsher opined that Claimant had no medical condition and did not need restrictions. As noted above, once Claimant establishes a right to TTD benefits the benefits continue until such time as the Respondents establish grounds to terminate them in accordance with one of the circumstances listed in § 8-42-105(3). Because Dr. Repsher is an IME physician and not a treating or attending physician, his opinion is insufficient to provide a basis for terminating Claimant's TTD benefits under any of the statutory conditions. The same is true of Dr. Henke insofar as Dr. Henke agreed with Dr. Repsher.

INJURIOUS PRACTICE

Respondents contend that Claimant engaged in injurious practices by failing to seek medical treatment from April 29, 2013 to July 31, 2013, and from December 2013 to December 2014. Respondents also assert that Claimant's failure to take albuterol constituted an "injurious practice." The Respondents argue Claimant's actions should result in a reduction or suspension of Claimant's compensation pursuant to § 8-43-404(3), C.R.S.

The pertinent passage of § 8-43-404(3) states the following:

> If any employee persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment or vocational evaluation as is reasonably essential to promote recovery, the director shall have the discretion to reduce or suspend the compensation of any such injured employee.

The burden of proof to establish the elements of this defense rests with the Respondents. *Cain v. Industrial Commission,* 136 Colo. 227, 315 P.2d 823 (Colo. 1957). Generally, the question of whether the circumstances would justify the ALJ in exercising discretion to reduce or suspend compensation presents issues of fact. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002).

The ALJ concludes that Respondents failed to prove it is more probably true than not that Claimant engaged in an injurious practice or failed to cooperate with medical treatment from April 29, 2013 (when the GAL was filed) to July 31, 2013 when he returned to Dr. Mayer. As determined in Finding of Fact 24, Claimant was seen by Dr. Mayer, an ATP, on January 16, 2013. At that time Dr. Mayer concluded that Claimant did not need any further treatment and placed Claimant at MMI. Therefore, Claimant's failure to seek medical treatment from April 29, 2013 until July 31, 2013 cannot be classified as persistence in an injurious practice or a "refusal" to submit to treatment needed to promote recovery. Instead, Claimant's behavior during this period of time is best categorized as cooperation with the then existing recommendations of the ATP.

The ALJ concludes that Respondents failed to prove it is more probably true than not that Claimant persisted in an "injurious practice" that imperiled or retarded recovery when he stopped taking albuterol. It is true that Claimant stopped taking albuterol because of his incorrect belief that it was causing elbow pain. However, it cannot be said that refusal to take albuterol was retarding or imperiling Claimant's recovery. When Dr. Mayer examined the Claimant on January 16, 2013 she noted that, although she was willing to prescribe albuterol, the drug was not necessarily required in view of Claimant's "considerable improvement." Thus, at that time the Claimant was not refusing to submit to medical treatment that was reasonably necessary to promote his recovery.

The respondents failed to prove it is more probably true than not that Claimant's failure to seek medical treatment between December 2013 and December 2014 constituted an injurious practice or a refusal to cooperate with medical treatment reasonably essential to promote recovery. Claimant was examined by Dr. Mayer on December 5, 2013. At that time Dr. Mayer placed Claimant at MMI for the second time and recommended "maintenance treatment" to include "two clinic visits per year as needed" and ongoing use of oral albuterol. Thus, in December 2013 it was Dr. Mayer's opinion that Claimant did not need any "clinic visits" unless Claimant, at his own discretion, thought he needed one. In these circumstances Claimant's failure to seek medical treatment from December 2013 to December 2014 was not a violation of his physician's treatment recommendations and can hardly be viewed as persistence in an injurious practice or refusal to submit to treatment reasonably essential to recovery.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. Insurer shall pay Claimant temporary total disability benefits at the stipulated rate commencing March 29, 2012 and continuing until terminated by law or order.

3. Insurer may take an offset against liability for temporary total disability benefits based on the stipulations contained in Findings of Fact 66 through 68.

4. Respondents' request to suspend or reduce Claimant's temporary total disability benefits based on alleged injurious practices is denied.

5. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 5, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-887-035-02

ORDER UPON REMAND

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

No further hearings have been held in the above-captioned matter. On December 4, 2015, the Industrial Claim Appeals Office (ICAO) issued a Remand Order, setting aside the undersigned Administrative Law Judge's (ALJ's) order of June 16, 2015 for further findings concerning the Claimant's "release to return to work," and entitlement to temporary disability benefits from the date of the admitted injury, February 13, 2012, through the date of maximum medical improvement (MMI), May 5, 2014. ICAO transmitted the file upon remand to the undersigned ALJ on January 12, 2016, at which time the matter was deemed submitted for an Order Upon Remand.

After a thorough review of the evidence, Administrative Law Judge (ALJ) Edwin L. Felter, Jr. concludes that an additional evidentiary hearing concerning the issues of average weekly wage (AWW) and temporary disability benefits is required in order to comply with the law of the case, established by ICAO. *See Buckley Powder Co. v. State,* 70 P.3d 547 (Colo. App. 2002); *Giampapa v. American Family Mut. Ins. Co.,* 64 P.3d 230 (Colo. 2003); *Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983).

The hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 21, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 5/21/15, Courtroom 1, beginning at 1:30 PM, and ending at 4:00 PM). The ALJ rendered Full Findings of Fact, Conclusions of Law and Order, dated June 16, 2015, after considering the Respondents' detailed objections to the proposed decision, filed prior to the entry of the decision (hereinafter referred to as "Objections").

Claimant's Exhibits1 through 13 were admitted into evidence, without objection. Respondents' Exhibits A through M were admitted into evidence, without objection.

ISSUES TO BE CONSIDERED AT EVIDENTIARY HEARING UPON REMAND

The issues to be determined after the evidentiary hearing upon remand, by this decision, concern average weekly wage (AWW), temporary partial disability (TPD) and temporary total disability (TTD) benefits from February 13, 2012, the date of the admitted injury, through May 5, 2014, the date of maximum medical improvement (MMI). Collateral issues involve the legal status of a nurse practitioner's (NP) release to return to work, allegedly approved, after-the-fact by physicians who did not actually see the Claimant until much later, but merely "rubber-stamped" the NP's release to return to work. This presents factual issues to be resolved on remand concerning whether a nurse practitioner fits under the definition of "**attending** (emphasis supplied) physician; whether a NP may give a claimant a written release to return to regular employment," [§ 8-42-105 (3), C.R.S.], without a co-signature by a physician; and, whether an **attending physician** can give a blanket delegation to a NP to release injured workers to return to work, without regard to a licensed physician exercising any medical judgment concerning the release to return to work. In any event, ICAO has established the law of the case that an "attending physician" can give a blanket delegation to a NP to release injured workers to return to work.

FINDINGS OF FACT ON REMAND

Based on the evidence presented at the original hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Respondents admitted liability for back injuries sustained by Claimant arising out of a slip and fall accident on February 13, 2012.

2. On July 24, 2014, the Respondents filed a Final Admission of Liability (FAL), admitting for zero temporary disability benefits; a maximum medical improvement

(MMI) date of May 5, 2014; 14% whole person permanent medical impairment (PPD) for a total of $5,852.56 (based on a lower AWW as a component of the formula), however, permanent disability was not designated as an issue nor was it an issue at the hearing, PPD benefits were payable at the rate of $150 per week; $40,438.08 in medical benefits to date were admitted; and, the Respondents admitted for causally related and reasonably necessary post-MMI medical maintenance benefits.

3. The Claimant was working as a school bus driver at the time of her injury. Claimant testified that she was able to continue to work as a bus driver but had difficulty performing some of the lifting and reaching duties required of her employment. There is a factual issue concerning whether the Claimant continued working contrary to the retrospective restrictions imposed by Dr. Reichhard and Dr. Ghazi, to whom the original delegating (to the NP) physicians deferred. The Claimant continued to work for the Employer until she was dismissed from employment on May 22, 2013. The reasons for the Claimant's dismissal are unclear. It is a plausible explanation that the Claimant may have had difficulty performing all of her job duties as a school bus driver, which would be consistent with her testimony.

Medical Status

4. After the admitted injury, the Employer sent the Claimant to Banner Health for treatment, where she was seen by Paulette Carpenter, FNP (Nurse Practitioner). According to the Claimant, Carpenter referred her for an orthopedic evaluation a few months after her injury. Claimant was seen by Robert Benz, M.D., an orthopedic surgeon. According to the Claimant, she was not seen by another physician until she was seen by Adam Mackintosh, M.D., a Sterling physician, in August 2013. The Claimant denied having been seen by Jeff Bacon, M.D., at Banner Health nor was there any persuasive evidence proffered that the Claimant was, in fact, seen by Dr. Bacon. In the Remand Order, ICAO indicates that the Claimant "was initially seen by Family Nurse Practitioner Carpenter," and "Carpenter's reports indicate that the claimant was able to return to regular work almost immediately after the injury." ICAO then found: "the **majority** (emphasis supplied) of Carpenter's reports were co-signed by Dr. Bacon and also Dr. MacKIntosh."

5. **"Attending Physician"** and "**Physician"** are not defined in the Workers' Compensation Act. *See* § 8-40-201, C.R.S. § 8-42-105 (3) (c) and (d) provide that temporary disability ceases when "**the attending physician"** gives an employee a written release to return to work." Webster's New World Dictionary defines "physician" as a "**doctor** of medicine." As the Respondents imply in their argument concerning the status of "nurse practitioners," herein below, nurse practitioners may generically be considered "doctors of medicine." In any event, there are factual issues surrounding the status and abilities of nurse practitioners, which should be resolved after an additional evidentiary hearing.

6. In their Objections to the proposed decision, the Respondents argued the validity of Nurse Practitioner Carpenter's "releases to return to work" at great length. Respondents argued:

> Claimant was working under a full duty work released by Dr. Bacon, Dr. Macintosh, Dr. Fenton and Dr. Nix (ATP's) and a Nurse Practitioner working under them, Paulette Carpenter. Claimant's attorney downplayed the role of nurse practitioners, but they play an essential role in modern American healthcare. Their role will expand under the Affordable Care Act, as it provides greater opportunities for primary health care to Americans formerly uninsured. *See* "Nurse Practitioners and Primary Care, Health Affairs, May 15, 2013, www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=92. As explained by Dr. Macintosh in his evidentiary deposition, Nurse Practitioner Carpenter is a "midlevel" who is able to prescribe medications and propose treatment plans. Deposition of Dr. Macintosh, pp. 31-32. Dr. Macintosh fully trusts Paulette Carpenter as a nurse practitioner; he trusts her judgment and he knows she is "outstanding at what she does." *Id.*

The Respondents generalize by attributing NP Carpenter's opinions to Dr. Bacon, Dr. MacKintosh and Dr. Fenton because NP Carpenter was working under their blanket supervision, as subsequently ratified by them in blanket form. Suffice it to say, a more refined factual issue on remand is presented concerning the exact actions and roles of Dr. Bacon, Dr. MacKintosh and Dr. Fenton in the Claimant's early releases to return to work, under the blanket authorization to NP Carpenter. Additional Findings to comply with ICAO's Remand Order can only be made after hearing additional evidence.

7. The Claimant was subsequently referred to Kenneth Pettine, M.D., Usama Ghazi, D.O., and Gregory Reichhardt, M.D. All of these physicians were within the chain of authorized referrals and, therefore, authorized.

8. The Claimant's medical records from Banner Health reveal that the Claimant was treated by Paulette Carpenter, FPN, throughout the course of her medical treatment. With the exception of the period from October 25, 2012 until November 17, 2012, FPN Carpenter indicated Claimant was able to return to full duty work. The Physician's Reports of Workers' Compensation Injury up until April 16, 2013 were signed by FPN Carpenter, without co-signatures by physicians. The majority of reports beginning on April 16, 2013 were signed or co-signed by Dr. Bacon (who had never

seen the Claimant) or Dr. MacKintosh, who saw the Claimant for the first time in September 2013. With the aforementioned exception, all medical reports after April 16, 2013 indicated that the Claimant was able to return to full duty work. There is presently no persuasive evidence that the Claimant was seen by Dr. Fenton, however, this presents a factual issue which should be resolved through the process of an additional evidentiary hearing with Dr. Fenton's testimony, among other things.

9. Dr. MacKintosh testified by deposition on April 10, 2015. He first saw the Claimant in September 2013. He stated that Paulette Carpenter, FNP, provided primary care to the Claimant prior to this date. Dr. MacKintosh began seeing the Claimant when nurse practitioners (NPs) required a physician to sign off on treatment. The ALJ infers and finds that NPs began having concerns about functioning under a blanket authorization wherein physicians did not specifically exercise medical judgment in specific cases. In September 2013, Dr. MacKintosh stated that he felt the Claimant could perform the regular duties of a bus driver as he understood them to be, and that he was hesitant to place work-restrictions on patients that could impact their employment. Dr. MacKintosh stated that there were physical limitations that the Claimant should have avoided after her injury such as heavier lifting. Dr. MacKintosh did not disagree with the permanent restrictions provided by Dr. Reichhardt because that was "Dr. Reichhardt's area of expertise**."** **Dr. MacKintosh stated that the Claimant had medical incapacity after her date of injury and it would not have been unreasonable for the Claimant to have the permanent restrictions provided by Dr. Reichhardt in place from her date of injury until MMI** (emphasis supplied)**.** Dr. MacKintosh deferred to Dr. Reichhardt on the issue of medical restrictions, and Dr. Reichhardt, as subsequently inferred and found herein, retrospectively restricted the Claimant to limitation of lifting, pushing, pulling and carrying up to 20 pounds occasionally, 10 pounds frequently. Limit bending and twisting at the waist to a rare basis four times per hours. Factual issues concerning the Claimant's abilities to perform as a school bus driver and to perform in her other four employments on a continuing basis are presented and these can only be resolved by further medical opinions, comparing the restrictions to the job duties. Also, there is a factual issue concerning the Claimant's disability status after the Employer herein terminated her employment on May 22, 2013 for unclear reasons.

10. The Claimant was seen once by Dr. Benz on or about May 4, 2012 for a perfunctory orthopedic surgical evaluation. Dr. Benz did not become a regular treating physician. He was merely a one-time surgical consultant. In addition to stating the opinion that the Claimant would not benefit from surgical intervention, Dr. Benz indicated that the Claimant could return to her full duties as a bus driver. There is no persuasive indication that Dr. Benz understood the Claimant's "full duties" as a bus driver. Additional evidence in this regard, which should include questions of Dr. Benz concerning the Claimant's job duties in all of her jobs, is required in order for the ALJ to make additional Findings consistent with ICAO's Remand Order.

11. The Claimant was seen by Kenneth A. Pettine, M.D., on or about March 1, 2013. Dr. Pettine was of the opinion that the Claimant was a candidate for a 2-level fusion procedure. Dr. Pettine also outlined a number of non-operative treatment options. Dr. Pettine stated the opinion that the Claimant should avoid heavy weight lifting, squats and dead lifts as well as extensive lifting, twisting, bending and stooping. Dr. Pettine's opinions contraindicate the generalized releases to return to work by NP Carpenter.

12. Against a backdrop of early "full duty releases to return to work" by NP Carpenter, the Claimant underwent bilateral L4-5, bilateral L5-S1 facet joint intra-articular injections performed by Scott Hompland, D.O., on September 6, 2012 and December 6, 2012. Additional evidence concerning the causal relatedness of these procedures is required.

13. The Claimant was seen by Usama Ghazi, D.O., on or about November 11, 2013. Dr. Ghazi recommended a course of treatment to begin with sacroiliac injections. Dr. Ghazi subsequently performed bilateral sacroiliac injections and a sacrococcygeal joint injection with some improvement. Dr. Ghazi noted that the Claimant was frustrated that her tailbone pain was precluding her from returning to her occupation as a trucker. Dr. Ghazi did not specifically comment on work-restrictions. Therefore, additional evidence is required concerning Dr. Ghazi's opinions concerning work restrictions.

14. The Claimant was placed at MMI by Dr. Reichhardt on May 5, 2014. Dr. Reichhardt issued a 10% whole person permanent impairment rating for Claimant's cervical spine and 11% whole person permanent impairment rating for Claimant's lumbar spine (later apportioned to 4%). Dr. Reichhardt recommended 3 years of maintenance treatment and provided permanent work-related restrictions of limited lifting, pushing, pulling and carrying to 20 pounds occasionally, 10 pounds frequently. Limit bending and twisting at the waist "to a rare basis four times per hours." Dr. Reichhardt deferred any opinion concerning the Claimant's temporary restrictions prior to MMI to the Claimant's authorized treating physicians, which would be NP Carpenter as endorsed by Dr. Bacon, Dr. MacKintosh and Dr. Fenton, who essentially deferred to Dr. Reichhardt, thus, creating a "merry-go-round" effect concerning temporary restrictions. Additional evidence concerning the deference to Dr. Reichhardt is required.

Multiple Employments as of Admitted Date of Injury

15. The Claimant's gross earnings from the Employer herein for 2011 (Claimant's Exhibit 7) amount to $10, 012.05 divided by 52 = $192.35 per week, as opposed to the admitted AWW of $156.76. This higher AWW would affect the formula for determining whole person permanent partial disability, however, permanency was **not** a designated issue. The Respondents argue that there is **no** medical evidence indicating that the admitted injury caused the Claimant to become temporarily disabled

after working at these jobs for a period of time. Additional medical evidence is required in order for the ALJ to make additional Findings, consistent with ICAO's Remand Order.

Average Weekly Wage (AWW)

16. If additional medical evidence supports temporary disability after the Claimant had worked at her multiple employments until she could no longer do so under the prevailing medical restrictions, then, as of the admitted date of injury, the Claimant had three concurrent, multiple employments. Her gross earnings from the Employer herein for 2011 (Claimant's Exhibit 7) amounts to $10, 012.05 divided by 52 = $192.35 per week. Add $110.09 per week from Stops and $157.16 per week from Quizno's, and an overall AWW of $459.60 results, however, this amount is only tentative contingent on medical support for temporary disability from these jobs, or any combination of these jobs. A subsequent evidentiary hearing on these issues is required. If there is no medical support, then, the Claimant's AWW is $192.35.

Unemployment Insurance (UI) Benefit Offset

17. The Claimant received UI benefits of $129.00 every two weeks, or $64.50 per week, from June 1, 2013 until November 24, 2013 (Claimant's Exhibit 6).

Multiple Employments

18. From the date of the admitted injury of February 13, 2012 until the Claimant was terminated from employment by the Employer herein on May 22, 2013, she continued to earn $192.35 per week from the Employer herein. From February 13, 2012 through December 31, 2012, she continued working for Stops, earning an additional $110.09 per week. From February 13, 2012 through April 15, 2012, she also continued working for Quizno's at $157.16 per week.

Ultimate Findings

19. In order to comply with the ICAO Remand, additional evidence, as herein above described, concerning whether the physicians at Banner (Dr. Bacon, Dr. Fenton and Dr. MacKintosh) specifically exercised independent medical judgment in the Claimant's releases to return to work, prior to September 2013.

20. At the additional hearing, specific medical evidence is required to determine whether the Claimant was temporarily disabled when and as her concurrent employments were no longer made available to her (and whether she had been working these jobs contrary to her medical restrictions).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact upon Remand, the ALJ makes the following Conclusions of Law:

Law of the Case

a. It is the law of the case that Nurse Practitioner (NP) Carpenter's releases to return to work under the blanket supervision of Dr. Bacon, Dr. MacKintosh and Dr. Fenton (although they did not co-sign or see the Claimant after the admitted injury) are legally binding releases (Dr. Mackintosh first saw the Claimant in September 2013--over a year-and-a-half after the admitted injury). There is no persuasive evidence that Dr. Bacon or Dr. Fenton ever saw the Claimant. Dr. MacKintosh first saw the Claimant in September 2013, however, more evidence in this regard is required in order for the ALJ to comply with the Remand Order. *See Buckley Powder Co. v. State,* 70 P.3d 547 (Colo. App. 2002); *Giampapa v. American Family Mut. Ins. Co.,* 64 P.3d 230 (Colo. 2003); *Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). Whether NP Carpenter qualifies as an "attending physician," or, in the alternative, released the Claimant to return to work early in the claim under the generalized understanding that she could do so with the blanket approval of Dr. Bacon, Dr. MacKintosh and Dr. Fenton is, in part, a factual issue which must be determined after an additional evidentiary hearing in order for the ALJ to make additional Findings, consistent with ICAO's Remand Order.

Average Weekly Wage and Temporary Disability Benefits

b. In light of ICAO's Remand Order, an additional evidentiary hearing is required in order to determine the correct AWW and whether the Claimant is entitled to temporary disability benefits after the date of her admitted injury.

Unemployment Insurance Benefit Offset

c. Section 8-42-103 (1) (f), C.R.S., provides for a 100% offset for UI benefits. As found, the Claimant received UI benefits of $129.00 every two weeks, or $64.50 per week, from June 1, 2013 until November 24, 2013, and the Respondents are entitled to an offset of $64.50 per week during this period of time.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant shall set the matter for an additional hearing upon remand to the undersigned Administrative Law Judge., on the issues of “release to return to work,” average weekly wage, and temporary disability benefits, according to the rules for setting of hearings. No new Application for Hearing or Response shall be filed, however, Case Information Sheets (CISs) shall be filed, listing the additional medical witnesses necessary to comply with the herein Order Upon Remand..

B. the matter shall be set on a non-trailing docket for one full day.

C. Any and all issues not determined herein are reserved for future decision.

DATED this______day of January 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of January 2016, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

____
Court Clerk

Wc.ord.rm

ISSUES

I. Whether Respondents have overcome the opinion of the DIME physician regarding MMI by clear and convincing evidence.

II. Whether respondents are liable for Botox injections, a 48 Hour EEG, additional occipital nerve blocks, a sleep study, Depakote, and payment of an ambulance bill for treatment of seizure and sleep disorders as reasonable, necessary medical treatment related to Claimant's June 22, 2012 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant suffered an admitted industrial injury on June 22, 2012. At that time, Claimant was repeatedly head-butted by a juvenile inmate and suffered a nasal fracture, neck sprain and concussion as a result.

2. The Claimant was placed at MMI by her ATP, Dr. George E. Schwender, M.D. on May 21, 2013. Dr. Schwender assigned a 23% whole person impairment.

3. Respondents challenged the opinions of Dr. Schwender by requesting a Division Independent Medical Examination (DIME), which was subsequently scheduled with Dr. David Yamamoto, M.D.

4. Claimant saw Dr. Yamamoto on August 12, 2013, for purposes of completing the requested DIME. At that time, Dr. Yamamoto felt the Claimant was not yet at MMI, because she required additional treatment, especially for her post-concussion headaches. Dr. Yamamoto also rendered an advisory impairment rating of 26% whole person.

5. After receiving the DIME report from Dr. Yamamoto, the Respondents did not challenge his opinions.

6. Claimant was eventually seen again by Dr. Yamamoto for a follow-up DIME on November 19, 2014. Once again, Dr. Yamamoto felt the Claimant was not at MMI, because her post-concussion headaches had not been adequately addressed, along with the failure to follow through with his earlier treatment recommendations. Dr. Yamamoto also issued an advisory impairment rating, of 25% whole person.

7. Following the second DIME, the Respondents challenged the opinion of Dr.

Yamamoto that the Claimant was not at MMI. Respondents also believed that if the Claimant was found at MMI, then the correct impairment rating was the one originally given by Dr. Schwender, 23% whole person. Moreover, even if the Claimant was not at MMI, Respondents challenged whether certain medical treatment was related to the industrial injury.

8. This ALJ finds that Respondents have failed to overcome the opinion of Dr. Yamamoto that the Claimant is not at MMI, by clear and convincing evidence.

9. Both Dr. Yamamoto and Claimant's current primary ATP, Dr. Miguel Castrejon, M.D., share the opinion that Claimant should be given a trial of medication, including Elavil or Propranolol, and if that fails to get Claimant's post-concussion headaches under control, then Botox injections should be tried. The Claimant's hypotension may cause the Elavil and Propranolol to fail, in which case, the best course for Claimant's treatment would be Botox injections. Based upon the evidence presented, Respondents failed to establish that the recommended trial of patient monitored Elavil/Propranolol has been provided. Moreover, in the case of Botox injections, the recommendation has been denied. The ALJ has considered the opinions of Dr. Yamamoto and Dr. Castrejon and finds that that their opinions on the treatment of Claimant's post-concussion headaches is persuasive. In making this finding, the ALJ has considered the opinions of Dr. Carlos Cebrian regarding MMI and the reasonableness, necessity and relatedness of Claimant's need for Botox injections and rejects them as unpersuasive.

10. Concerning Claimant's psychological symptoms, Dr. Yamamoto recommended six counseling sessions. Dr. Castrejon considered Dr. Yamamoto's argument for counseling noting that he would "concede" the same. Thus, on May 18, 2016, Dr. Castrejon referred Claimant for a psychological evaluation and subsequent follow-ups. While a psychological examination and a follow-up session have been accomplished, additional appointments have not. In fact, Dr. Hopkins noted on November 4, 2015, that he did not schedule Claimant for another appointment. Respondents have suggested that the results of Claimant's psychological evaluation indicate that she does not require counseling as a consequence of her June 22, 2012, work injury. After careful review of Dr. Hopkins' initial psychological evaluation report and his follow-up treatment note from November 4, 2015, the ALJ concludes that Respondents have misinterpreted the content therein. Based upon the reports as presented, the ALJ concludes that Dr. Hopkins opined that because of Claimant's personality characteristics and her preexisting psychological conditions, treatment for her psychological sequelae alone would be ineffective. Thus, while Dr. Hopkins noted that Claimant's cognitive complaints are not related to "structural damage" of the brain, he did note that Claimant's cognitive complaints are likely related to depression/anger and chronic head pain associated with her June 22, 2012 work injury. Dr. Hopkins recommended biofeedback training to assist with disconnecting Claimant's "head pain from the thought process that perpetuates [her] anger." Consequently, the ALJ concludes that Dr. Hopkins actually supports Claimant's need for additional psychological treatment which Respondents failed to establish has been completed.

11. After finding that the Claimant is not at MMI, and that she is entitled to medical treatment for her post-concussion headaches, as well as related psychological issues, there is still a need to address the relatedness of Claimant's need for treatment for an alleged seizure disorder, including her transportation via ambulance to secure treatment and the subsequent recommendations for Depakote and a 48 hour EEG, in addition to treatment for an alleged sleep disorder and balance (dizziness), to her admitted industrial injury. Based upon the evidence presented, the ALJ finds these medical conditions unrelated to Claimant's admitted June 22, 2012 work injury to the head, face and neck. Here, the conclusions of Dr. Castrejon persuades the ALJ that the aforementioned conditions either pre-existed and were not aggravated by the admitted injury or are related to non-occupationally induced conditions (orthostatic hypotension).

12. Based upon the evidence presented the ALJ finds and concludes that Claimant has failed to establish a causal connection between her admitted June 22, 2012 work injury and her need for treatment for the aforementioned conditions. Consequently, the ALJ concludes that Respondents are not liable to provide payment for treatment for a seizure and a sleep disorder, including transportation via ambulance, a 48 hour EEG study, Depakote, and a sleep study.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Overcoming the DIME

A. A DIME physician's findings of causation and MMI are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

B. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro*

Moving and Storage Co. v Gussert, 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The question whether the DIME properly applied the Guides or other rating protocols is an issue of fact for the ALJ. *See McLane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999). Proof that a DIME deviated from the AMA Guides does not compel the ALJ to find that the rating has been overcome by clear and convincing evidence. Rather, proof of such a deviation constitutes some evidence which the ALJ may consider in determining whether the challenge to the rating should be sustained. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Almanza v. Majestic Industries,* W.C. No. 4-490-054 (Nov. 13, 2003); *Smith v. Public Service Company of Colorado,* W.C. No. 4-313-575 (May 20, 2002). Similarly, while the Medical Treatment Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act, "compliance" with them does not control whether an expert's opinions constitute substantial evidence supporting a fact finder's determinations. Section 8-42-101(3)(b), C.R.S.; *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003); *Jiron v. Douglas County School District RE-1*, W.C. No. 4-636-107 (May 12, 2009).

C. In this case, the issue of whether Claimant is at MMI involves a complex medico-legal question regarding the cause of Claimant’s need for additional treatment for post concussive headaches, a questionable seizure disorder, a sleep disorder and psychological sequelae that Claimant asserts are related to her June 22, 2012 work injury. Respondents argue that the evidence presented establishes that Dr. Yamamoto’s opinion concerning MMI has been overcome by clear and convincing evidence because the treatment that is “reasonable, necessary and related” to the June 22, 2012 injury recommended by Dr. Yamamoto has been provided. Based upon the evidence presented, the ALJ is not persuaded. While the ALJ agrees that Claimant’s asserted dizziness, balance and seizure disorders are unrelated to her June 22, 2012 work injury and that treatment for these conditions should be pursued outside of the workers’ compensation system, the record evidence does not support Respondents assertion that Claimant has received all reasonable treatment for conditions caused by her June 22, 2012 injury necessary to bring her to MMI. To the contrary, the ALJ finds that the record evidence supports a conclusion that Claimant requires additional treatment for her pre-existing migraine headaches and depression which were aggravated by her June 22, 2012 industrial injury. Dr. Castrejon agrees with “Dr. Yamamoto’s recommendation against MMI on the basis that these headaches have not been appropriately treated.” He, like Dr. Yamamoto, recommends a trial of Elavil or Propranolol as a preventative for Claimant’s headaches. However, as these medications can exacerbate Claimant’s known orthostatic hypotension, Dr. Castrejon recommends careful patient response monitoring regarding the use of Elavil/Propranolol. In the event that this course of treatment proves ineffective, Dr. Castrejon, like Dr. Yamamoto, recommends that Claimant proceed with Botox injections.

D. As found, Respondents failed to establish that the recommended trial of patient monitored Elavil/Propranolol has been provided. Moreover, the recommendation for Botox injections has been denied. Finally, as noted, there is record evidence supporting a conclusion that Dr. Hopkins actually supports Claimant's need for additional psychological treatment which has not been completed. The opinions of Dr. Cebrian regarding the reasonableness, necessity and relatedness of these treatment modalities has been carefully considered and are rejected as unpersuasive.

E. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. Here, the weight of the persuasive evidence demonstrates that Claimant's need for additional psychological counseling as well as post concussive headache treatment, including potential Botox injections is directly related to her industrial injury. Because this treatment presents a reasonable prospect for curing and relieving Claimant of the ongoing effects caused by the aggravation of her pre-existing depression and migraine headaches, Claimant is not at MMI. See *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001), *aff'd. Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA0401, February 14, 2002)(*not selected for publication)* (citing PDM *Molding v. Stanberg*, 898 P.2d 542 (Colo. App. 1995) *and Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995)]; *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (August 11, 2000).

F. After considering the totality of the evidence presented, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that the DIME physician's determination regarding MMI is highly probably incorrect. Rather, the ALJ concludes that the evidence presented at hearing establishes a mere difference of opinion between the DIME physician and the medical expert (Dr. Cebrian) hired by Respondents. A professional difference of opinion do not rise to the level of clear and convincing evidence that is required to overcome Dr. Yamamoto's opinion concerning MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents have failed to meet their required legal burden to set Dr. Yamamoto's opinion regarding MMI aside.

Relatedness of Claimant's Need for Treatment for an Alleged Seizure Disorder, Depakote, a 48 Hour EEG, a Sleep Disorder, Including a Sleep Study, and Dizziness/Balance Disorder to her June 22, 2012 Work Injury

G. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

H. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

I. Based on the totality of the evidence presented, the ALJ credits the opinions of Dr. Castrejon and Dr. Bernton to conclude that Claimant's need for treatment for an alleged seizure disorder, including her transportation via ambulance to secure treatment and the subsequent recommendations for Depakote and a 48 hour EEG, in addition to treatment for an alleged sleep disorder and balance (dizziness) are not related to Claimant's admitted June 22, 2012 work injury to the head, face and neck. As found above, the conclusions of Dr. Castrejon persuades the ALJ that the aforementioned conditions either pre-existed and were not aggravated by the admitted injury or are related to non-occupationally induced conditions (orthostatic hypotension). Consequently, the ALJ concludes that Claimant has failed to establish a causal connection between her admitted June 22, 2012 work injury and her need for treatment for the aforementioned conditions. Thus, Respondents are not liable to provide payment for treatment for a seizure and a sleep disorder, including transportation via ambulance, a 48 hour EEG study, Depakote, and a sleep study.

ORDER

It is therefore ordered that:

1. Respondents' request to set aside the Division IME opinion of Dr. Yamamoto that Claimant has not reached MMI for the effects of her admitted industrial injury is denied and dismissed.

2. Claimant is entitled to treatment for post-concussion headaches, including the use of Botox injections if her headaches cannot be controlled through the use of medications, such as Elavil and Propranol.

3. Claimant is also entitled to treatment for psychological conditions of anger and depression related to the industrial injury.

4. Respondents' request to terminate medical care related to an alleged seizure disorder, including her transportation via ambulance to secure treatment and the subsequent recommendations for Depakote and a 48 hour EEG, in addition to treatment for an alleged sleep disorder and balance (dizziness) is granted as these conditions are not related to Claimant's industrial injury.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 14, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether Claimant established by a preponderance of the evidence that post maximum medical improvement medical treatment is reasonably necessary and related to maintain claimant at MMI?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On April 6, 2012, Claimant, a now retired teacher for Employer, sustained a work related injury. Although Claimant reported and her providers addressed other areas, treatment focused primarily on injuries to her bilateral shoulders.

2. Claimant first sought medical attention from Dr. D'Angelo. On April 12, 2012, Claimant reported that she was experiencing neck and back muscle pain. Dr. D'Angelo determined at that point that Claimant's neck muscle pain was related to her work injury.

3. On April 11, 2012, MRIs revealed bilateral rotator cuff tears. Based on the MRI findings, on April 26, 2012 orthopedist Thomas Mann, M.D., evaluated Claimant and recommended surgery. On June 19, 2012, Claimant underwent a second surgical opinion with Dr. Christopher Isaacs, D.O., who concurred with Dr. Mann. Dr. Isaacs performed a right rotator cuff repair, and later performed a left rotator cuff repair.

4. Dr. D'Angelo directed Claimant's postoperative care which included medications, physical therapy, massage therapy, and acupuncture. On December31, 2012, Dr. D'Angelo diagnosed Claimant's cervical pain as "compensatory trapezius muscle spasm" and prescribed massage therapy and Flexeril, a muscle relaxant.

5. In January 2013, Dr. D'Angelo referred Claimant to Dr. Samuel Chan for a physiatry evaluation and possible treatment of the cervical spine based on Claimant's complaints of neck pain. Dr. Chan recommended a MRI of the cervical spine which was conducted on January 31, 2013. The MRI revealed multilevel degenerative changes with disc osteophytes complexes, and central canal stenosis at C5-6. During an examination on February 6, 2013, Claimant's cervical spine range of motion was noted to be within functional limits. Dr. Chan also recommended an EMG of the bilateral upper extremities which was conducted on February 22, 2013. The EMG showed no evidence of cervical radiculopathy.

6. Dr. Chan questioned whether Claimant's complaints were related to facet pathology, but concluded that any cervical spine pain was more myofascial in nature

and that physical examination did not suggest facet dysfunction. His conclusion is supported by Claimant's initial reports of neck muscle pain, Dr. D'Angelo's diagnosis of a muscle spasm, and the degenerative cervical MRI findings. Dr. Chan's treatment included several sessions of acupuncture which Claimant reported were not helpful.

7. On September 26, 2013, Claimant reported her pain as 1-2/10 and Dr. Chan noted her cervical range of motion was within functional limits.

8. On October 17, 2013, Claimant reported continued neck pain to Dr. Hnida who took over Claimant's care from Dr. D'Angelo when she left the practice group. Dr. Hnida conferred with Claimant's physical therapist who indicated Claimant had plateaued from a therapy standpoint.

9. On November 14, 2013, Dr. Isaacs examined Claimant and noted Claimant had good range of motion. He noted that Claimant's "shoulder is still giving her a fair amount of pain," and opined that there was nothing further he could offer Claimant and discharged her from care.

10. On December 18, 2013, Dr. Chan placed Claimant at maximum medical improvement and evaluated her for permanent impairment. Dr. Chan assigned Claimant extremity impairment ratings for range of motion deficits to her bilateral shoulders. In his impairment rating, Dr. Chan specifically opined that Claimant's cervical spine findings were pre-existing and degenerative in nature, and could "very well be an ongoing pain generator." He noted, "it has been counseled with [Claimant] that the cervical spine findings are pre-existing and degenerative in nature and I do not feel that there is a specific impairment from the incident that occurred in April 2012." Therefore he did not assign an impairment rating for the cervical spine. With respect to maintenance medical care, Dr. Chan recommended that Claimant continue an active exercise program on her own and noted that Claimant had already undergone an extensive course of physical therapy.

11. On December 18, 2013, Dr. Hnida also evaluated Claimant and considered her complaints of neck pain.

> [Claimant] has been thoroughly evaluated and worked up for cervical spine complaints by Dr. D'Angelo and Dr. Chan. She has been released from further care for her cervical spine complaints. . . . At this point, it has been determined that [Claimant] has concluded all treatments for her cervical spine and does not warrant impairment.

In particular, Dr. Hnida noted: "Neck pain, with long term assessment by other physicians, felt now to be secondary to preexisting abnormalities." Dr. Hnida agreed with Dr. Chan's upper extremity impairment ratings and agreed with his recommendation that Claimant did not need any maintenance medical treatment. Dr. Hnida found maximum medical improvement on January 22, 2014. He provided permanent restrictions and recommended no maintenance medical treatment.

12. On April 4, 2014, Respondents filed a Final Admission of Liability admitting to Dr. Hinda's January 22, 2014 date of maximum medical improvement and his scheduled impairment rating of Claimant's bilateral upper extremities. Respondents did not admit for maintenance medical care.

13. Claimant objected to the Final Admission and requested a Division IME. On October 4, 2014, Dr. Lindenbaum performed the DIME. In his report, Dr. Lindenbaum assigned Claimant a whole person impairment rating for her cervical spine. In addition, Dr. Lindenbaum assigned Claimant higher scheduled impairments for her shoulders than had Dr. Hnida or Dr. Chan.

14. Dr. Lindenbaum opined that Claimant may require injections for her cervical spine, but noted that this could be done under maintenance medical care. Dr. Lindenbaum recommended that Claimant be referred to a physiatrist for consideration of facet blocks, but was not specific as to the level or side where the blocks should be provided. Dr. Lindenbaum does not appear to have recognized that such a work up had already been performed, and that such treatment had been ruled out by Drs. Chan and Hnida.

15. On May 21, 2015 the parties reached a stipulation resolving all permanency issues. Specifically, Respondents agreed to file a Final Admission of Liability consistent with the impairment rating of Dr. Lindenbaum and, in exchange, Claimant agreed to waive her right to pursue conversion or permanent total disability benefits. Respondents filed a Final Admission of Liability based on the stipulation on June 5, 2015.

16. Paragraph 10 of the stipulation between the parties specifically held open maintenance medical care. Respondents continue to deny maintenance medical care. Claimant asserts entitlement to maintenance medical care, which is the only issue endorsed for hearing.

17. On February 2, 2015, Dr. Carlos Cebrian evaluated Claimant at Respondents' request. On March 19, 2015, Dr. Cebrian issued a report detailing his findings. He also testified via post-hearing deposition on November 16, 2015. During the evaluation, Claimant reported that she was taking no medication as a result of her April 6, 2012 injury, and that she was now "busier" in retirement taking care of her grandchildren, quilting, and gardening, than she was while working full time. With respect to Claimant's reported increased activity, Dr. Cebrian noted this was inconsistent with her reports to Dr. Lindenbaum that her neck pain limited her function. Dr. Cebrian noted on physical exam there were "negative facet maneuvers."

18. Dr. Cebrian opined that:

- Claimant did not suffer a work related injury to her cervical spine.

- While Claimant may have had some myofascial pain, this is relatively common after shoulder surgeries, and that there was no objective diagnosis of injury to the cervical spine.

- Claimant did not require maintenance medical care. In support of this position he noted that Claimant was not taking any medications and that no ongoing treatment was indicated.

19. With respect to Dr. Lindenbaum's opinion that further cervical spine work up was required, Dr. Cebrian testified that the spine had been fully evaluated. Both an MRI and EMG had been performed, radicular symptoms were ruled out, and Claimant had received cervical spine physical therapy as part of her post operative recovery. Dr. Cebrian also testified that Dr. Chan, a physiatrist, had fully evaluated the cervical spine, concluding any pain was more myofascial in nature, and that physical examination findings showed nothing which would suggest facet dysfunction.

20. Claimant does not specify what particular treatment she seeks. Instead she seeks a general order that she is entitled to "medical maintenance care under Grover Medicals."

21. Based on the totality of the evidence and Claimant's position statement, the Judge reasonably infers that Claimant could be seeking (1) additional physical therapy, (2) additional acupuncture, and (3) facet injections. With respect to each, the Judge finds as follows:

- Based on the totality of the evidence, Claimant has not satisfied her burden of establishing that additional physical therapy is reasonable, necessary and related to relieve the effects of Claimant's industrial injury or prevent further deterioration of Claimant's condition.

- Based on the totality of the evidence, Claimant has not satisfied her burden of establishing that additional acupuncture is reasonable, necessary and related to relieve the effects of Claimant's industrial injury or prevent further deterioration of Claimant's condition.

- Based on the totality of the evidence, Claimant has not satisfied her burden of establishing that facet injections are reasonable, necessary and related to relieve the effects of Claimant's industrial injury or prevent further deterioration of the claimant's condition.

In addition, the Judge finds that Claimant has not satisfied her burden of establishing that any maintenance medical benefits are reasonable, necessary and related to relieve the effects of her industrial injury or prevent further deterioration of her condition.

22. Because Claimant has failed to meet her burden of proof, her claim for post maximum medical improvement medical treatment is denied and dismissed.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

A claimant may receive maintenance medical benefits that are reasonable, necessary and related to relieve the effects of a claimant's industrial injury or prevent further deterioration of the claimant's condition. See § 8-42-101(1)(a), C.R.S.; *Grover Industrial Commission,* 759 P.2d 705 (Colo. 1988). However, the burden of proof to establish entitlement to these benefits is on the claimant by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). In order to receive such benefits, the claimant must present substantial evidence that future medical treatment is or will be reasonably necessary to relieve the Claimant from the effects of the injury or to prevent deterioration of the Claimant's condition. See *Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App. 2003); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The question of whether the claimant met the burden of proof to establish entitlement to maintenance medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999).

In this case, Claimant has failed to present substantial evidence that future medical treatment is or will be reasonably necessary to relieve her from the effects of the injury or prevent deterioration of her condition. The opinions of the authorized treating physicians are that Claimant does not require further medical care to maintain her status at maximum medical improvement. Dr. Hnida, Dr. Isaacs, and Dr. Chan have all had multiple opportunities to evaluate Claimant and to determine whether any additional treatment would help bring improvement or stabilize her condition. Each physician provided a clear opinion on maximum medical improvement and, when providing these opinions, each specifically indicated that maintenance medical care is not necessary. This opinion was additionally supported by the independent review and evaluation performed by Dr. Cebrian. The only medical opinion presented by Claimant is Dr. Lindenbaum's suggestion she undergo further workup for facet dysfunction in the cervical spine.

In making his recommendation, Dr. Lindenbaum failed to consider that Claimant has already undergone a complete work-up for any cervical spine pathologies. A MRI found normal degenerative disc disease for someone of Claimant's age without any indication that surgical intervention would be beneficial. An EMG found non-work related carpal tunnel syndrome, but ruled out radiculopathy. And multiple physical evaluations by a physiatrist, as suggested by Dr. Lindenbaum, failed to find any objective condition which could be treated or any evidence of facet dysfunction. At best, Dr. Lindenbaum suggested evaluations which have been performed or treatments which have been ruled out. His suggestion for maintenance medical care does not constitute persuasive evidence of a need for maintenance care as it has already been shown his recommendations would neither improve or stabilize Claimant's condition.

Claimant has failed to establish by a preponderance of the evidence that future medical treatment is reasonably necessary and causally related to relieve her from the effects of the injury or prevent deterioration of her condition. Claimant has presented no medical evidence that she requires further treatment for either shoulder. The only persuasive medical evidence presented by Claimant is the report of the Division evaluator, following his one-time evaluation of Claimant, which suggests an evaluation that has already been performed and a possible treatment which has already been ruled out. Claimant has had a complete course of care for her work injuries, is currently taking no medications and receiving no treatment for her work injuries and does not require further medical treatment to maintain her status at maximum medical improvement.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for post maximum medical improvement medical treatment is denied and dismissed.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 6, 2016

Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-915-306-02

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the medical treatment he received to his cervical spine was reasonable, necessary and related to his admitted April 7, 2013 work injury?

FINDINGS OF FACT

1. Claimant testified at hearing that he was injured on April 7, 2013 when he was checking the transmission under the hood of a customer's car when the driver jerked the car forward, striking claimant in the knees, forcing claimant into the engine area of the car. Claimant testified his knees popped and his head and neck skimmed the hood as the hood fell down on top of claimant. Claimant testified he fell back to the ground, slammed the hood down and instructed the woman driving the car to stay put, but she drove off. Claimant testified co-workers from the shop came to check on him and he tried to walk off the pain. Claimant testified his primary injury following the accident involved his knees.

2. Respondents admitted liability for the claim and filed a general admission of liability ("GAL") on April 24, 2013.

3. Claimant was first examined by Dr. Hughes on April 8, 2013. The medical records from Dr. Hughes document claimant complaining of immediate pain in his knees after the accident. Claimant denied any back pain.

4. Claimant provided insurer with a recorded statement on April 10, 2013. Claimant mentions in the recorded statement injuries to his knees, calf and leg, but does not mention his neck.

5. Initial medical treatment focused on claimant's knee injuries and claimant underwent bilateral knee replacement surgery with Dr. Copeland on April 1, 2014. Following the knee replacement surgery, claimant continued to complain of his legs giving away. Dr. Copeland noted claimant had a prior history of a cervical fusion at C3-C6 and was concerned claimant had a myelopathy. Dr. Copeland referred claimant to Dr. Janssen for evaluation of possible myelopathy and recommended claimant undergo a cervical magnetic resonance image ("MRI")

6. Dr. Janssen first evaluated claimant on October 7, 2014 and noted claimant was complaining of bilateral tremors in his bilateral upper and lower extremities. Dr. Janssen eventually reviewed claimant's MRI studies and noted claimant had a broad based disc vertical collapse, dissection, loss of structural integrity of the discs, C7 nerve root compression and vertical instability. Dr. Janssen diagnosed

claimant with a C7 radiculopathy/radiculitis. Dr. Janssen opined that this diagnosis appeared to be temporally related to claimant's workers' compensation injury when his head was jammed into the car. Dr. Janssen recommended an anterior cervical discectomy, fusion and reconstruction at C6-7.

7. Claimant returned to Dr. Copeland on November 14, 2014 and reported claimant was stating he was hit on the back and lower neck during his work injury. Dr. Copeland indicated that he agreed with Dr. Janssen that claimant's cervical condition and resultant lower extremity weakness was related to his work injury. Dr. Copeland further indicated that he did not believe claimant's lower extremity symptoms would improve until his cervical spine condition was addressed.

8. Claimant underwent an electromyelogram ("EMG") study with Dr. Dean on November 20, 2014. Dr. Dean noted claimant reported neck and shoulder pain in 2005 that resulted in a surgical fusion. Dr. Dean noted claimant was struck on the back of the head or neck in the April 2013 incident and that soon after he began noticing tingling in the right arm and both hands. Dr. Dean reviewed the EMG study and diagnosed cervical radiculopathy and cervical spine stenosis with early myelopathy. Claimant was also diagnosed with carpal tunnel syndrome. Dr. Dean noted that the carpal tunnel syndrome was not related to claimant's work injury of April 2013.

9. Claimant returned to Dr. Copeland on December 16, 2014 and reported two incidents of his legs giving out and claimant falling since his last evaluation. Dr. Copeland noted he had encouraged claimant to seek treatment for his cervical spine with Dr. Janssen and opined it was not safe for claimant to work.

10. Dr. Copeland issued a "To whom it may concern" letter on March 6, 2015 that indicated claimant had told him that the hood of the car he had been working on struck his head when the car hit him. Dr. Copeland responded to an inquiry from insurer on March 17, 2015 and noted that while claimant was at maximum medical improvement ("MMI") for his bilateral knee condition, he still needed to have his cervical spine condition addressed.

11. Claimant underwent cervical surgery under the auspices of Dr. Janssen on April 22, 2015. Claimant testified that the issues involving his lower extremities resolved with the surgery.

12. On October 5, 2015, in response to an inquiry from respondents' counsel, Dr. Copeland issued a statement indicating that claimant's statements in the recorded statements obtained by respondents called into question whether claimant was struck on the head in the April 7, 2013 injury. Dr. Copeland noted that his statement that claimant's condition was related to his work injury was based on claimant's history to Dr. Copeland that he was struck on the head by the car hood during the incident. Dr. Copeland noted that this issue involving whether claimant's cervical condition was related to the work injury was all based on whether the hood hit claimant in the head/neck.

13. Respondents obtained an independent medical exam ("IME") report from Dr. Reiss on September 9, 2015. Dr. Reiss issued a report that opined that claimant's cervical condition was not related to his work injury. Dr. Reiss noted that although claimant reported to Dr. Reiss at the time of his IME that he was struck on the back of his head in the accident, this is different that the initial medical history and audio recordings. Dr. Reiss opined that claimant perhaps developed a C7 radiculopathy many months after the work incident that was likely related to his pre-existing foraminal stenosis at the C6-7 level. Dr. Reiss opined that this was not related to claimant's work injury of April 7, 2013.

14. Dr. Janssen testified by deposition in this matter. Dr. Janssen noted that the recordings of claimant's history to Dr. Lindberg in January 2014 did not indicate claimant was struck on the back of his head during the accident. Dr. Janssen testified his report of October 2014 that indicated claimant's condition was temporally related to his work injury was based on claimant's history as provided to Dr. Janssen. Dr. Janssen effectively maintained the opinion that if the history provided to him by claimant was correct, his October 2014 opinion regarding the relatedness of claimant's cervical condition would remain unchanged. The ALJ finds the testimony of Dr. Janssen to be credible and persuasive.

15. Multiple recordings of claimant's accident history were entered into evidence at hearing, including the recorded statement claimant provided to insurer shortly after the injury, the recording of claimant's IME with Dr. Lindberg, and his statement to Mr. Bernhardt on February 7, 2014. Claimant does not report hitting the back of his head as a result of the accident in these recorded statements.

16. Respondents presented the testimony of Dr. Reiss at hearing. Dr. Reiss testified it was his opinion that claimant did not sustain an injury to his cervical spine on April 7, 2013. Dr. Reiss testified claimant did not have an injury that would involve his cervical spine being compressed and opined that claimant's reported leg weakness was likely related to claimant's knee surgeries. Dr. Reiss ultimately opined that claimant's cervical condition was not related to his work injury because there was no injury to claimant's head or neck.

17. Based on the testimony of Dr. Janssen, the ALJ determines that the issue in this case comes down to whether or not claimant's testimony regarding the circumstances surrounding his work injury on April 7, 2013 is credible. As noted by Dr. Copeland, claimant did not initially report an injury of striking his head during the work injury.

18. The ALJ finds claimant's testimony credible that he struck the back of his head on April 7, 2013 when he was struck by the car. While claimant did not report to the treating physicians that he struck his head, the ALJ notes that claimant's treatment at that time was focused on his bilateral knees. Under these circumstances, claimant's failure to report hitting his head during the incident in question is found to be understandable, and does not serve to overcome claimant's otherwise credible

testimony at hearing. Claimant's explanation of the injury as described in court is found to be reasonable and persuasive.

19. Because the ALJ determines that claimant's testimony regarding how he hit the back of his head on the hood of the car is credible, the ALJ credits the opinions of Dr. Copeland and Dr. Janssen and finds that claimant has established that his cervical condition is related to the April 7, 2013 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance of the evidence that the medical treatment to his cervical spine is reasonable, necessary and related to his April 7, 2013 work injury. As found, claimant's testimony at hearing as to the

circumstances of the injury on April 7, 2013 is found to be credible. As found, the deposition testimony of Dr. Janssen that indicated that if claimant's accident history of striking his head on the hood of the car was correct, then the treatment to claimant's cervical spine was related to the April 7, 2013 work injury is found to be credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant has established that his cervical condition is related to the April 7, 2013 work injury. Respondents shall pay for the reasonable and necessary medical treatment related to claimant's cervical condition including the cervical surgery performed by Dr. Janssen pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 6, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-919-172-01

ISSUES

- Did Claimant prove by a preponderance of the evidence that the knee surgery proposed by Dr. Cunningham is reasonable and necessary, as well as related to his admitted industrial injury?

FINDINGS OF FACT

1. Claimant worked as a lead technician for Respondent-Employer for fourteen (14) years.

2. Claimant suffered an admitted industrial injury on May 20, 2013. At the time, he was working on a waterfall feature located at the top of a swimming pool. Claimant slipped and fell from the top of the waterfall to the bottom of the pool, which was empty. He testified that it was between a 12 and 14 foot fall and he lost consciousness.

3. As a direct result of his fall, Claimant injured his right ankle (comminuted talus fracture), right knee and hip, pelvis and low back. He was initially taken to Vail Valley Medical Center and then transported to Denver Health for further evaluation of his pelvis fractures.

4. Prior to the 5/20/13 industrial injury, Claimant had no history of knee problems. He did not have any prior pain complaints, injuries, treatment (including physical therapy or massage), or diagnostic tests (including x-rays or MRI-s)[1].

5. On May 29, 2013, Claimant was evaluated by Guy Kovacevich, M.D. Dr. Kovacevich's assessment was fracture (closed) foot metatarsal; pelvic fracture (closed), disruption. Claimant was to follow-up with a specialist. The ALJ notes that Claimant saw Dr. Kovacevich at regular intervals from May 2013 through August 2015 while he was receiving treatment for his injuries.

6. Claimant was examined by John Paul Elton, M.D. (orthopedic surgeon) on May 29, 2013 to whom he was referred for management of the talus fracture and pelvis fractures. Moderate edema was noted through the ankle and hindfoot. Pain with active compression was noted in his pelvis, but no instability. Dr. Elton recommended surgery to correct Claimant's lateral process fracture, including ORIF and subtalar arthroscopy. Dr. Elton stated Claimant would remain non-weight bearing for 8-10 weeks.

[1] The ALJ notes Claimant's medical records from St. Vincent's Hospital (Leadville) confirmed this, as there was no reference to prior right knee injury/treatment.

7. Dr. Elton performed the surgery on June 7, 2013 to repair the right talus fracture (ORIF). Dr. Kovacevich then examined Claimant on June 14, 2013 after he had undergone surgery and noted Claimant was restricted from putting weight on his right leg. Dr. Kovacevich also found Claimant was unable to work in his evaluation on July 10, 2013. Dr Elton saw Claimant for a follow-up evaluation on July 27, 2013. At that time, he had mild right ankle and hindfoot edema with minimal tenderness. Dr. Elton's assessment was closed fracture of other specified part of pelvis; fracture of astragalus (closed), satisfactory post-operative course post-ORIF, with subtalar arthroscopy. Dr. Elton recommended Claimant begin a more aggressive range of motion and issued a prescription for physical therapy. Dr. Elton said Claimant could progress to partial weight bearing in 2-3 weeks.

8. Dr. Kovacevich evaluated Claimant on August 5 and September 3, 2013. Claimant was recovering ankle/foot surgery and had stated weight-bearing as of the latter appointment.

9. When Claimant returned to Dr. Kovacevich on October 10, 2013, it was noted that after starting ambulation, Claimant's right knee was painful, with swelling. An MRI was ordered. Claimant testified he felt pain in his right knee once he began using it following the ankle surgery. The ALJ infers that Dr. Kovacevich ordered the MRI because he discerned swelling in Claimant's right knee at the time of this evaluation.

10. Claimant received physical therapy ("PT") at Parker Physical Therapy and Rehab from August 5, 2013 through October 28, 2013. His PT included various modalities, such as hotpacks, massage, ultrasound, stretching and therapeutic exercise.

11. An MRI was done on Claimant's right knee on October 17, 2013 and read by Kelly Lindauer, M.D. Dr. Lindauer's impression was moderate bone edema along the medial femoral condyle (stress-related); medial tibial plateau indicative of a stress-related bone edema, along with a subchondral trabecular fracture likely stress related along the medial tibial plateau; intact menisci and knee ligaments; moderate chondromalacia involving the medial patellar facet and central trochlea.

12. Claimant was evaluated by Dr. Elton on October 23, 2013, at which time he noted that the right knee pain had started over the past several weeks as he became more active. The pain was described as "daily intermittent mild aching discomfort"; discomfort worse with activity and weight–bearing. Dr. Elton reviewed the MRI, noting it showed a stress reaction along the far medial border of the medial tibial plateau with associated stress reaction of the medial femoral condyle. There was no cortical fracture or completed fracture with mild trabecular fracture.

13. Dr. Elton's assessment on 10/23/13 was pain in joint involving the lower leg; closed fracture of other specified part of pelvis; fracture of astragalus-satisfactory post-operative treatment (ORIF); and closed treatment multiple pelvic fractures. He recommended Claimant limit weight-bearing activities and use crutches until he had no pain in the knee. Claimant was given a prescription for PT.

14. Claimant was seen by Dr. Kovacevich on November 11, 2013. Claimant was requesting to return to work. Dr. Kovacevich's assessment was pelvis fracture-closed/pelv. disrup; fracture clsd. foot metatarsal; strain/sprain knee. Claimant's work restrictions were maximum 15 lbs. lifting, carrying, pushing/pulling; no crawling kneeling, squatting or climbing. Claimant was to continue PT.

15. Claimant returned to Dr. Elton on November 21, 2013, which was 5 ½ post ankle surgery. Claimant said he had returned to work and felt like he was getting stronger. His knee pain continued to improve, but had some mild swelling after a long day of standing. On examination, Dr. Elton noted a slight antalgic gait and Claimant had 130 degrees of stable motion at the knee. X-rays were taken which showed no evidence of fracture or periosteal reaction. Dr. Elton's assessment was the same as the 10/23/15 exam and Claimant was to continue with a home exercise program and wean off narcotic pain medications. Dr. Elton also noted he should follow-up in 8 weeks at which time the knee radiographs would be repeated if he still had pain.

16. Dr. Kovacevich examined Claimant on November 26, 2013[2] at which time he noted more discomfort in his knees and hips, as well as being tired at the end of the day. Dr. Kovacevich's assessment was the same as on 11/13 and Claimant's lifting restrictions were continued.

17. In the follow-up appointment with Dr. Kovacevich on December 26, 2013, Claimant was still having pain in his right knee. He was to continue PT and his lifting/carrying restrictions were 25 lbs. No restrictions were given for crawling, kneeling, squatting or climbing. Similarly, in the appointment on January 20, 2014, Claimant had discomfort in his right knee and Dr. Kovacevich's diagnosis was right knee sprain/strain. Claimant was to see Dr. Elton for a follow-up eval.

18. Dr. Elton saw Claimant on January 16, 2014, which was 7.5 months post ORIF right comminuted talus fracture with multiple pelvic fractures and stress fracture to the medical tibial plateau. Claimant reported his right knee was bothering him, especially after a full day with a lot of activity. Dr. Elton found his gait to be nonantalgic, however, there was a small right knee effusion. Claimant had mild tenderness at the medial line without tenderness at the tibial plateau. The x-rays showed no fractures or progression of stress reaction or periosteal reaction. Dr. Elton thought because the knee continued to give him discomfort, an intra-articular injection may need to be considered. He noted Claimant was able to work full duty.

19. Claimant was evaluated by Mary Bryan, PA-C at Dr. Elton's office on January 23, 2014 following the CT scan of his pelvis. He was concurrently complaining of right knee pain and wanted to discuss an injection, which was completed at that time.

20. Claimant returned to Dr. Kovacevich on March 4, 2014 and reported that he continued to have pain at the end of the day. Dr. Kovacevich assessment included knee sprain/strain and stated it was imperative for Claimant to start PT to work on total

[2] Dr. Kovacevich noted Claimant was involved in a MVA on 11/21/13 and sustained a concussion. This was also referenced in the St. Vincent hospital records. No knee complaints were documented.

body conditioning. Claimant's work restrictions included maximum 50 lbs. lifting, carrying, pushing/pulling.

21. Dr. Kovacevich examined Claimant on April 3, 2014, at which time he said his knee and ankle pain were better. His main symptoms related to the hip and an MRI was ordered. Claimant's work restrictions remained the same as 3/4/14. On April 13, 2014, Dr. Kovacevich noted Claimant's right knee strain was resolved.

22. Claimant returned to Dr Elton on April 21, 2014, which was 10 months post-surgery. Claimant reported that he had 6-8 hours of pain relief after the injection, but has the same mild discomfort. Dr. Elton's assessment with regard to the right knee was improving right knee stress reaction to medial tibial plateau. No specific treatment was recommended for the right knee. When Dr. Kovacevich saw him again on April 23, 2014, his right knee was noted to be improved after injection.

23. Claimant was evaluated by Scott Raub, D.O. on May 13, 2014, at which time he noted Claimant had right knee pain on the medial side, along with intermittent crepitus and popping. Dr. Raub's assessment was chronic right knee and hip pain; lumbar MRI-unremarkable; possible hip joint problem; prior right sacral fracture; status post right talus ORIF; no lumbosacral radiulopathy-either from hip or related to separate knee issue. Dr. Raub's treatment recommendations were confined to the hip and he performed a fluoroscopic right hip injection on May 28, 2014.

24. Dr. Raub saw Claimant in follow-up on June 10, 2014. Claimant reported his hip pain had improved with injection, but there was no improvement in his knee pain. Dr. Raub stated that the hip injection did not improve Claimant's knee pain, so he did not think it was referred form the hip. Dr. Raub recommended a repeat hip injection, but no other treatment was specifically provided to the right knee. The repeat injection was performed on June 18, 2014.

25. Claimant was examined by Dr. Raub on June 30, 2104, who noted the second injection did not provide relief for his hip pain. Dr. Raub did not see a clear pain source and recommended a second opinion with regard to the hip.

26. Dr. Kovacevich evaluated Claimant on September 17, 2014. Dr. Kovacevich recorded Claimant had a recent surgery with Dr. White to repair the torn labrum (hip) and found Claimant was unable to work from 9/17 through 10/9/14.

27. Claimant was examined by Shawn Karns, MPA, PA-C of Western Orthopaedics on November 18, 2014. Claimant was 2 ½ months post right hip arthroplasty with labral reconstruction and also for the past year his right knee has been bothering him. He received a cortisone injection, which provided relief for a month, but continued to have pain on the anterior part of the knee. On physical exam, PA-C Karns noted Claimant walked with a slightly guarded gait, but did not have knee swelling. Claimant had tenderness to palpation over the medial border of the patella as well as a positive grind test. PA-C Karns' assessment was patellofemoral issues in the right knee and Claimant received an injection into the anterolateral aspect of the right knee.

28. Claimant returned to Dr. Kovacevich on November 19, 2014, he was kept off work through 12/110/14. Dr. Kovacevich noted Claimant had undergone two injections for the right knee and continued to have symptoms.

29. Claimant was examined by Rick Cunningham, M.D. on December 23, 2014, at which time Claimant had right knee pain while with kneeling squatting and stairs. Dr. Cunningham reviewed the results of the 2nd MRI of the right knee. That MRI revealed “significant thinning of the trochlea cartilage”. Dr. Cunningham believed that finding was more advanced than the results of the 1st MRI of October 17, 2013, which revealed only “moderate chondral thinning of the central trochlea” in the patellofemoral compartment of Claimant’s right knee. On examination, Dr. Cunningham noted mild to moderate patellofemoral crepitus. There was no posterolateral or posteromedial rotary instability.

30. Dr. Cunningham’s assessment was right medial knee pain, mild to moderate patellofemoral osteoarthritis. Dr. Cunningham opined: “MRI imaging demonstrates significant chondral thinning of the true clear groove and evidence of mild to moderate patellofemoral osteoarthritis. While it is possible that this was present prior to his work-related injury, the patient was asymptomatic before his fall. It is likely that his work-related injury aggravated this condition.” Based upon the MRI results, Dr Cunningham recommended a Synvisc injection for the right knee.

31. Claimants aw Dr. Cunningham on January 15, 2015 for the Synvisc injection. Dr. Cunningham’s assessment was mild to moderate patellofemoral compartment osteoarthritis-right knee. Claimant received the Synvisc injection and had no complications.

32. Dr. Cunningham examined Claimant on March 12, 2015. Claimant reported the Synvisc injection provided little or no relief. He had sharp and burning pain, localized to the anterior knee. On examination, Dr. Cunningham noted Claimant walked with a slightly antalgic gait and had mild knee effusion. There was severe patellafemoral crepitus and pain with patellar compression. Dr. Cunningham discussed treatment options, including conservative and surgical intervention. A right knee arthroscopy with chondroplasty of the patellafemoral compartment was described as the best option to address the condition of Claimant’s right knee. The ALJ credits Dr. Cunningham’s opinion that this proposed surgery represents the best treatment option.

33. Claimant was seen by Dr. Kovacevich on March 13, 2015. Dr. Kovacevich’s diagnoses were right talus fracture- s/p ORIF; right hip s/p repair; low back pain; right knee strain. Claimant was awaiting clearance for right knee scope and he was to continue PT for his low back and hip. Claimant’s work restrictions included maximum 10 lbs. lifting, carrying, pushing/pulling; 2 hours walking/standing; no crawling kneeling, squatting or climbing. The ALJ infers the crawling kneeling, squatting or climbing restrictions were related to his right knee symptomatology.

34. Jon M. Erickson M.D. (orthopedic surgeon) issued a letter, dated March 24, 2015 after reviewing some of the medical records in the case[3]. Dr. Erickson reviewed the record[4] of the MRI and noted that the majority of the pathology involved the patellofemoral compartment. Mild to moderate fissuring was noted on the medial patellar facet with concomitant damage in the trochlear groove. Dr. Erickson believed that many these abnormalities were pre-existing. Dr. Erickson noted that Claimant had a BMI of 32.67, which classified him as obese. Dr. Erickson recommended denial of the requested authorization of right knee scope with chondroplasty and synovectomy/plica excision. Dr. Erickson noted the results of the patellar chondroplasty procedure had not been very impressive.

35. Dr. Erickson issued a subsequent report, dated April 3, 2015. He noted additional records had been provided, but these did not change his opinion and recommended the proposed surgery be denied. Dr. Erickson compared the reports of both MRI-s and stated the fall caused a compression fracture to the medial compartment of the right knee. Dr. Erickson described this issue as resolved as of the second MRI and said Claimant did not complain of patellofemoral pain until recently. Dr. Ericson did not analyze whether the fall and its aftermath could have caused Claimant's patellofemoral arthritis to become symptomatic. The ALJ finds Dr. Erickson's opinion to be less persuasive than those of Dr. Cunningham and Dr. Kovacevich, as he did not examine Claimant, nor did he analyze the impact the 5/20/13 fall and subsequent gait alteration had on the patellofemoral osteoarthritis.

36. Dr. Kovacevich evaluated Claimant in April 7, 2015 and noted the request for surgery by Dr. Cunningham was denied. Claimant advised Dr. Kovacevich that he was doing more than his outlined restrictions. Claimant was to continue PT and await the appeal of the denial of surgery. Claimant's restrictions remained the same as the 3/13/15 appointment and Dr. Kovacevich advised Claimant to abide by his restrictions. In the examination of April 28, 2015, Dr. Kovacevich noted Claimant continued to have discomfort in his right knee, which he felt was causing him to alter his gait. Claimant reported soreness in the right knee after therapy. Claimant was to continue PT and stayed on modified duty.

37. A letter dated May 12, 2015 from Kurt Parker, PT was admitted into evidence. Mr. Parker stated Claimant's right knee had been problematic since the original injury. Mr. Parker noted he had been working with Claimant for the past twenty-one (21) months and said Claimant had consistently reported knee pain. Claimant had also expressed frustration that this problem had been put on the back burner.

[3] In his record review Dr. Erickson noted that he did not have Dr. Cunningham's earlier records and did not know whether Claimant had received PT or steroid injections. It does not appear that Dr. Erickson had records from Drs. Kovacevich, Elton or Raub, nor did he apparently have the PT records from Parker Physical Therapy.

[4] It does not appear that Dr. Erickson had the actual MRI films, nor did he refer to the x-rays taken in Dr. Cunningham's office.

38. Dr. Kovacevich's report from the May 20, 2015 examination noted Claimant felt about the same, specifically, activity caused his knee to be painful. On June 19, 2015, Dr. Kovacevich re-evaluated Claimant, who reported his foot and ankle felt fine, but any activity caused discomfort and pain in his knee. Claimant stated that he had an IME in Denver, but the physician did not examine his knee, but told him the MRI showed nothing was wrong. Dr. Kovacevich's assessment was knee sprain/strain, which was described as Claimant's primary issue. Dr. Kovacevich opined that Claimant's arthritis predated the injury but the fracture to the ankle and the injury to the hip "exacerbated and made the arthritic changes symptomatic". Claimant's restrictions were decreased (although he was still to do no kneeling) and Dr. Kovacevich was looking to taper his medications. The ALJ credits Dr. Kovacevich's opinion regarding the cause of Claimant's right knee condition.

39. At the request of Respondents, James Lindberg, M.D. performed an IME on June 16, 2015. Dr. Lindberg reviewed Claimant's course of treatment following the 5/20/13 injury. Dr. Lindberg stated Claimant more than likely suffered a contusion to his right knee, with concomitant stress reaction on the tibial plateau on the medial side and medial femoral condyle. Dr. Lindberg opined that the injury to his patella predated the accident, as this was not the type of injury one sees in an acute patellofemoral injury. Dr. Lindberg stated Claimant did not land on the anterior aspect of his right knee, but landed on the right side on the right hip.[5] Dr. Lindberg did not believe Claimant had a patellofemoral problem which required surgery. He also stated most of Claimant's pain complaints were medial joint line and there was no surgically treatable injury in the medial joint.

40. Dr. Kovacevich examined Claimant on July 31, 2015 and he had continued right knee pain, as well as swelling with activity. Dr. Kovacevich's diagnoses were s/p right talus fracture-ORIF; right knee pain; low back pain; s/p pelvic fr; right hip labral tear.

41. Dr. Lindberg testified as an expert in orthopedic surgery on August 19, 2015. He was board certified in that specialty, as well as Level II accredited pursuant to the W.C.R.P. He stated Claimant had patella femoral arthritis in the right knee and a small defect in the lateral femoral condyle (filled in with bone). Dr. Lindberg testified there was edema in the medial femoral condyle. This was confirmed by the 10/13 MRI. He opined the medial condyle condition was related to the fall at work. Dr. Lindberg testified the patellar femoral problem was identified early, but was asymptomatic and he thought the first mention of pain in this area was November 2104. Dr. Lindberg said there was no indication for surgical intervention in this area.

42. Dr. Lindberg reviewed the 12/14 MRI, which he said showed chondromalacia. There was a small 3X5 mm defect in the lateral tibia plateau (new) with subchondral osteophytes filling the defect. Dr. Lindberg did not address the issue

[5] Claimant correctly points out in his Position Statement that it was unclear how Dr. Lindberg concluded this, since Claimant lost consciousness and there was no other evidence that conclusively showed how Claimant fell or whether there was a direct impact on the knee.

of whether Claimant's altered gait could have accelerated the process of osteophyte formation. Dr. Lindberg testified that he believed a "majority" of Claimant's knee pathology was the patella femoral pathology, which the surgery was to address. Dr. Lindberg believed this condition was pre-existing and not aggravated/accelerated by the work injury. He also opined there was a less than 50/50 result with this surgery. Dr. Lindberg testified that while it was possible that Claimant's altered gait exacerbated the patella femoral osteoarthritis, it was not probable.

43. The ALJ found Dr. Lindberg's testimony generally persuasive, particularly in his review of the MRI-s and his description of Claimant's symptoms as these related the anatomic structures in Claimant's knee. However, Dr. Lindberg did not address the question of whether Claimant continued to pain complaints related to the stress injury to the femoral condyle (in addition to the patellofemoral pain) and whether the proposed surgery (including the chrondroplasty) could address those issues. Dr. Lindberg also did not testify on the issue of whether the chondroplasty could address the chondral thinning of the central trochlea and reduce Claimant's symptoms.

44. Claimant returned to Dr. Raub on August 20, 2015, which was the first time Dr. Raub had seen him since he underwent a right hip labral repair (9/2/14) done by Brian White, M.D. Prior to this surgery, he had very little low back pain, but was experiencing low back pain, as well as bilateral leg pain. It was noted that surgery was recommended for moderate patellofemoral arthritis (right knee). On examination, Dr. Raub noted Claimant had an antalgic gait on the right and he had to stand with his knee flexed.

45. In Dr. Raub's assessment concerning the right knee, he considered whether right knee problems were causing Claimant's current low back symptoms. Dr. Raub stated if he solely had low back pain that would be more possible. Given the leg symptoms "that seem to be neuritic, we need to make sure there is no structural change in the lumbar spine that would more likely correlate with symptoms". If there wasn't significant pathology, Dr. Raub was more inclined to say Claimant was putting mechanical stress on the lumbosacral area leading to some referred leg symptoms. A new MRI was ordered.

46. Dr. Raub evaluated Claimant on September 29, 2015 and he was complaining of low back pain at the lumbosacral area with right knee pain and intermittent bilateral lower extremity symptoms. In Dr. Raub's assessment of the right knee (right knee patellofemoral arthrosis), he noted that surgery had been recommended and he saw nothing on the lumbar MRI which would refer right knee pain in his opinion.

47. The ALJ finds that Claimant requires medical treatment for his right knee to cure and relieve the effects of his industrial injury. Claimant suffered a compression fracture to the medial compartment of the right knee, as well as an aggravation of the osteoarthritis in the patellofemoral compartment as a direct result of the 5/20/13 fall.

48. Claimant has proven the right knee arthroscopy with chondroplasty of the patellafemoral compartment recommended by Dr. Cunningham is reasonable and necessary. Claimant testified he is desirous of the surgery. The ALJ concludes that the surgery recommended by Dr. Cunningham will cure and relieve the effects of Claimant's industrial injury.

49. None of Claimant's authorized treating physicians found that he was at MMI with regard to his right knee.

50. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo.

1994). The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In the instant case, Claimant has the burden of proof to establish that the surgery proposed by Dr. Cunningham is reasonable and necessary, as well as related to his industrial injury. Claimant asserted he suffered a medial femoral condyle injury on 5/20/13. Also, while he may have had osteoarthritis in his right knee prior to his industrial injury, Claimant argued this condition was asymptomatic and never required treatment. It was only after the 5/20/13 injury and that he developed pain in the knee. Claimant also argued that the knee pain was a direct result of his limp while he was transitioning to weight bearing on the right leg. In summary, Claimant argued it was a combination of these factors which led to his need for surgery. The ALJ agrees. As found, Claimant met his burden of proving his entitlement to medical benefits.

In arriving at this decision, the ALJ fully considered Respondents' contentions. More particularly, Respondents argued that Claimant did not report right knee symptoms until well after the accident and his initial treatment. They asserted that Claimant suffered from pre-existing osteoarthritis, which was what caused his symptoms. Respondents also averred that criteria under the Medical Treatment Guidelines were not met and did not support the proposed surgery. Respondents also contended that the proposed surgery will not be efficacious for Claimant's symptoms and relied upon the expert opinions of Dr. Lindberg.

The ALJ considered the broader question of whether the Medical Treatment Guidelines-Lower Extremity Treatment Guidelines, Rule 17, Exhibit 6 ("Guidelines") applied to the requested knee surgery. The Guidelines are contained in W.C. Rule of Procedure 17, 7 Code Colo. Regs. 1101-3, and provide that health care providers shall use the Guidelines adopted by the Division of Workers' Compensation ("Division"). The Division's Guidelines were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. 2008. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. 2008.

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria).

However, an ALJ is not required to award or deny medical benefits based on the Guidelines. In fact, there is generally a lack of authority as to whether the Guidelines require an ALJ to award of deny benefits in certain situations. Thus, the ALJ has discretion to approve medical treatment even if it deviates from the Guidelines. *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014).

W.C.R.P. 17-5(C) provides in relevant part:

> "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate. For cases in which the provider requests care outside the guidelines the provider should follow the procedure for prior authorization in Rule 16-9."

In the case at bench, the Guidelines provided parameters for the ALJ to consider when evaluating the proposed right knee surgery. The ALJ notes that the Guidelines do not directly address the factual scenario presented by this case; namely where Claimant suffered an injury to the medial femoral condyle (variously described as "moderate bone edema", "stress reaction to medial tibial plateau" and "compression fracture to the medial compartment"), as well as trauma to the patellofemoral compartment where osteoarthritis was present.

W.C.R.P. 17-Exhibit 6, 2, a (i) [page 47] addresses osteoarthritis in the knee, but is concerned with "swelling and/or pain in a joint due to an **aggravating activity** in a patient with pre-existing change in a joint". [Emphasis added.]

The Guidelines further provide:

> "…There is good evidence from a randomized controlled trial that arthroscopic debridement alone provides no benefit over recommended therapy for patients with uncomplicated Grade 2 or higher arthritis…"
>
> "Therefore arthroscopic debridement and/or lavage are not recommended for patients with arthritic findings and continual pain and functional deficits unless there is meniscal or cruciate pathology …" [W.C.R.P. 17-Exhibit 6, 2, a (vi) [page 50].

The ALJ noted that both Drs. Erickson and Lindberg opined that the proposed procedure was not recommended pursuant to the Guidelines. However, this case not only arthritic changes in the patellfemoral compartment, but trauma to the medial tibial plateau. Neither of Respondents' experts were more persuasive than Claimant's treating physicians.

The ALJ also considered the Guidelines provisions with regard to Patellofemoral Pain Syndrome. (W.C.R.P. 17-Exhibit 6, 2, I (vi) [page 66]), but finds these do not apply in this instance. Claimant was never diagnosed with this condition, nor did the various orthopedists who examined him (including Dr. Lindberg) find weakening, instability or misalignment of the patellafemoral mechanism.

Because of the unique factual circumstances of this case (medial injury and aggravation of patellofemoral osteoarthritis), the Guidelines did not definitively assist the ALJ in determining whether a right knee arthroscopy with chondroplasty is reasonable and necessary in this case.

The ALJ considered the nature of the fall, Claimant's resulting treatment and the various medical expert opinions in the case. The ALJ was persuaded that not only did Claimant suffer an injury to the medial femoral condyle as a result of the industrial injury, but his pre-existing patellofemoral osteoarthritis was aggravated by the 5/13/13 injury and its aftermath.

As a starting point, the evidence before the Court established an injury and resulting symptoms in Claimant's right knee. Claimant's work-related injury involved a significant fall from a height of between 12-14 feet, which was not disputed. Claimant suffered multiple fractures, including the ankle and pelvis. (Findings of Fact 2 and 5). There was also direct evidence that Claimant suffered a medial femoral condyle injury. (Finding of Fact 11). This was confirmed by Respondents' expert, Dr. Lindberg. (Finding of Fact 41). Accordingly, an injury of this magnitude was the cause of Claimant's right knee symptoms and his need for surgery.

Second, Claimant's right knee symptoms were most probably the result of the acute injury to the medical femoral condyle and the aggravation of the osteoarthritis in the patellofemoral compartment. The symptoms came to the forefront after he became weight-bearing. Claimant subjectively reported pain and swelling in the knee. These symptoms were consistently reported after September, 2013. These symptoms were worse after activity. Claimant did not have these symptoms before his injury.

Objective evidence in the form of findings made by physicians and other providers supported the conclusion that Claimant had symptoms both on the medial side and the patellofemoral compartment. Some examples included:

- 10/10/13: Dr. Kovacevich noted swelling after Claimant became weight-bearing.
- 10/17/13: Dr. Lindauer reviewed MRI films and noted edema to medial tibial plateau.
- 11/21/13: Dr. Elton noted antalgic gait, limited ROM.
- 1/16/14: Dr. Elton observed small knee effusion.
- 5/13/14: Dr. Raub found crepitus and popping.
- 11/18/14: PA Karns found guarded gait and positive grind test.
- 12/23/14: Dr. Cunningham found mild to moderate patellofemoral crepitus.
- 3/12/15: Dr. Cunningham noted antalgic gait and small knee effusion.

- 5/12/15: Physical Therapist Parker noted consistent symptoms of knee pain.

Third, Dr. Kovacevich and Dr. Cunningham supported the recommended surgical procedure. As found, the proposed surgery is reasonable as it can not only address Claimant's symptoms on the medial side, but also in the patellofemoral compartment. In addition, both Dr. Kovacevich and Dr. Cunningham opined that previously asymptomatic arthritic condition to become symptomatic and recommended surgery.

The ALJ was persuaded that Claimant's treating physicians were in the best position to assess whether the proposed surgery was reasonable and offered the possibility of symptom relief. (Findings of Fact 32 and 38). As such, he is entitled to medical benefits, as recommend by these physicians.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the right knee arthroscopy with chondroplasty as recommended by Dr. Cunningham.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 22, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he had a reasonable excuse for filing his Application for Hearing and Notice to Set more than two years but less than three years after the date of his left knee injury pursuant to §8-43-103(2), C.R.S.

2. Whether Claimant has established by a preponderance of the evidence that he suffered a left knee injury during the course and scope of his employment with Employer on May 31, 2013.

FINDINGS OF FACT

1. Employer is a furniture moving company. On May 1, 2001 Claimant began working for Employer as a Mover. Claimant's job duties involved driving to a designated location, removing furniture from the property, packing the furniture into a truck and delivering it to another location.

2. Claimant testified that on May 31, 2013 he was moving furniture in South Dakota with coworker Jeremy Wager. They were specifically removing a large, front-loading washing machine from a home. Claimant remarked that, as they were moving the machine up a staircase, his hand slipped and the washer struck him in the left knee. He immediately experienced left knee pain.

3. Claimant remarked that, because his left knee was not terribly painful as a result of the accident, he decided to drive with Mr. Wager to their next moving assignment in Wyoming. Mr. Wager commented that on the drive to Cheyenne, Wyoming he contacted Employer's General Manager of Colorado Operations Tim Porter. Mr. Wager requested additional materials for the next move and a replacement Mover because Claimant had injured his left knee in South Dakota.

4. Claimant and Mr. Wager met replacement mover Troy Howdin at a Holiday Inn Hotel in Cheyenne on Saturday June 1, 2013. Claimant explained that the parties watched television, drank beer and went to bed. He testified that at about 11:30 p.m. he got out of bed to use the restroom in the hotel room but his left knee buckled and he fell to the floor. Because of Claimant's left knee pain he called 9-1-1 and was transported by ambulance to the Cheyenne Regional Medical Center Emergency Room.

5. The ambulance report specifies that paramedics found Claimant "sitting in an office chair in his room awake and alert with beer sitting on the desk beside him." Claimant stated that "he was wrestling with his buddy" approximately two hours earlier when his left knee went backwards and he felt a "pop." Claimant noted that his left knee

pain had increased but he denied any other knee injuries. He also stated that he had consumed approximately seven beers and had not taken any pain medication.

6. The report from the Cheyenne Regional Medical Center reflects that Claimant's attending physician was Michelle Lynn Anderson, M.D. Claimant reported left knee pain but refused an ice pack stating "it doesn't really help with the pain" and refused pain medications. Instead, he exclaimed "can I just get the hell out of here." Claimant reported that he had been wrestling with a buddy approximately one to two hours earlier when he felt his knee "pop" and experienced immediate pain. X-rays of Claimant's left knee were normal. He was diagnosed with left knee pain after "wrestling with friends," placed in a knee immobilizer and told to follow-up with orthopedics. The report did not mention any left knee injury while Claimant was moving a washing machine in South Dakota.

7. Claimant testified that he received a ride back to Colorado from friends. Mr. Wager and Mr. Howdin left Cheyenne to complete the next moving job in Wyoming. Mr. Porter testified that he learned of Claimant's left knee injury on Sunday June 2, 2013 when he received a telephone call from Mr. Wager. Mr. Porter also acknowledged that he had spoken to Mr. Wager on May 31, 2013. Mr. Wager explained that he and Claimant had been on the road for four weeks and Claimant had banged his knee. Mr. Porter noted that there was no suggestion during the telephone call that Claimant had injured his left knee on May 31, 2013. However, he sent Mr. Howdin to Cheyenne as a replacement mover because Claimant and Mr. Wager had been on the road for an extended period of time.

8. The June 2, 2013 First Report of Injury detailed the circumstances surrounding Claimant's left knee injury. The Report specifically provided that Claimant mentioned to Mr. Wager that he was "sore and fatigued from previous job." Claimant got up to use the restroom at about 1:00 a.m. and his knee buckled. Employer directed Claimant to Exempla Occupational Medicine for treatment. The June 4, 2013 Employee Incident Report also specified that Claimant's knee buckled when he got up to use the restroom but did not mention any specific work-related accident on May 31, 2013.

9. On June 4, 2013 Claimant visited Andrew Plotkin, M.D. at Exempla for an examination. Claimant reported that he was on a moving assignment and stopped at a hotel in Cheyenne for the night. When he stood up to use the restroom at approximately 1:00 a.m. his left knee buckled, he fell to the ground and experienced severe pain. Claimant did not mention any incident while moving a washing machine on May 31, 2013. Dr. Plotkin diagnosed Claimant with a left knee sprain and possible medial meniscal tear. He concluded that the "mechanism of injury did not arise from the course and scope of [Claimant's] work nor was there any demonstrated hazard that resulted in the injury. It is my opinion that this is a non-occupational injury." He recommended work restrictions but left the details to Claimant's private physician because the injury was not work-related.

10. Claimant testified that he did not agree with Dr. Plotkin's assessment and sought a change of physician. On June 7, 2013 Bruce D. McFarland, D.O. drafted a

note stating that Claimant was medically unable to work from June 1-14, 2013 or until "cleared by an orthopedic specialist."

11. On June 17, 2013 Claimant visited James Johnson, M.D. for an evaluation. Dr. Johnson recorded that Claimant "was doing a job in Cheyenne, Wyoming at which time his knee was in a tremendous amount of pain. Later on that night he was in more pain and his knee buckled." Claimant did not mention that he injured his left knee while moving a washing machine in South Dakota. An x-ray of Claimant's left knee did not reveal any fractures or tumors. Based on Claimant's pain sensitivity and the mechanism of injury Dr. Johnson recommended a left knee MRI.

12. On June 19, 2013 Claimant visited Tomm Vanderhorst, M.D. at Exempla for an examination. The report did not address any mechanism of injury. Dr. Vanderhorst diagnosed Claimant with a left MCL sprain, a left minor medial meniscus tear and a left shin abrasion. He released Claimant to modified duty employment.

13. On June 24, 2013 Claimant returned to Dr. Vanderhorst for an evaluation. The left knee MRI revealed a small meniscus tear. Dr. Vanderhorst noted that he was concerned about possible surgery because Claimant was "in far more pain than would be expected with such a small injury."

14. On June 27, 2013 Respondents filed a Notice of Contest challenging Claimant's claim because his left knee injury was not work-related.

15. On August 19, 2013 Dr. McFarland drafted a note permitting Claimant to return to regular employment. The note specifically provided that "[a]fter examining [Claimant] he is medically stable to return to full work duties."

16. On August 25, 2014 Claimant filed an Application for Hearing and Notice to Set. Claimant specified that the following issues would be considered at hearing: (1) compensability; (2) medical benefits; (3) Average Weekly Wage (AWW); (4) disfigurement; (5) Temporary Total Disability (TTD) benefits; (6) Temporary Partial Disability (TPD) benefits; and (7) Permanent Total Disability (PTD) benefits. On September 5, 2014 Respondents filed a Response to Claimant's Application for Hearing and Notice to Set.

17. On December 10, 2014 Respondents filed a Motion to Strike Claimant's Application with Prejudice. The Motion to Strike was predicated upon Claimant's failure to respond to Respondents' discovery requests.

18. On December 26, 2014 the Division of Workers' Compensation issued an Order striking Claimant's Application for Hearing without prejudice. The Order also prohibited Claimant from filing a new Application until he answered Respondents' pending discovery requests.

19. On July 24, 2015 Claimant answered Respondents' discovery requests and provided releases for personal health care information. On August 9, 2015 Claimant filed his second Application for Hearing and Notice to Set.

20. Claimant has demonstrated that it is more probably true than not that he had a reasonable excuse for filing his Application for Hearing and Notice to Set more than two years but less than three years after the date of his left knee injury. Initially, Claimant recognized the compensable character of his left shoulder injury when he reported the injury to Mr. Porter on June 2, 2013. On August 25, 2014 Claimant filed an Application for Hearing and Notice to Set. The Application was filed within two years of Claimant's injury date. The Application thoroughly apprised Respondents of the issues to be considered at hearing. Although the Application was stricken without prejudice because of a failure to produce discovery responses, it nevertheless informed Respondents that Claimant had suffered a compensable industrial injury and was seeking benefits. The second Application filed on August 9, 2015 was outside the two year statute of limitations but within the three year limitation period. A reasonable excuse exists for the late filing of the second application because Respondents had been informed that Claimant was seeking benefits under the original Application and thus were not prejudiced. Respondents had been advised by the August 25, 2014 Application that Claimant was seeking benefits as a result of the May 31, 2013 incident. Respondents were thus permitted to evaluate Claimant's claim to prepare a defense. Accordingly, Claimant's Application is not barred by the statute of limitations period in §8-43-103(2), C.R.S.

21. Claimant has failed to establish that it is more probably true than not that he suffered a left knee injury during the course and scope of his employment with Employer on May 31, 2013. Claimant and Mr. Wagar explained that on May 31, 2013 they were removing a large, front-loading washing machine from a home in South Dakota. Claimant remarked that, as they were moving the machine up a staircase, his hand slipped and the washer struck him in the left knee. He immediately experienced left knee pain. However, despite the testimony of Claimant and Mr. Wagar, the medical records suggest that Claimant injured his left knee in his hotel room in Cheyenne, Wyoming on June 1, 2013 and not while he was performing his job duties on May 31, 2013.

22. The ambulance report specifies that paramedics found Claimant "sitting in an office chair in his room awake and alert with beer sitting on the desk beside him." Claimant stated that "he was wrestling with his buddy" approximately two hours earlier when his left knee went backwards and he felt a "pop." The report from the Cheyenne Regional Medical Center also specifies that Claimant had been wrestling with a buddy approximately one to two hours earlier when he felt his knee "pop" and experienced immediate pain. The reports did not mention any left knee injury while Claimant was moving a washing machine in South Dakota. The June 2, 2013 First Report of Injury specifically provided that Claimant mentioned to Mr. Wager that he was "sore and fatigued from previous job." Claimant got up to use the restroom at about 1:00 a.m. and his knee buckled. On a June 4, 2013 visit to Dr. Plotkin Claimant reported that he was on a moving assignment and stopped at a hotel in Cheyenne for the night. When he stood up to use the restroom at approximately 1:00 a.m. his left knee buckled, he fell to the ground and experienced severe pain. Claimant again did not mention any incident while moving a washing machine on May 31, 2013. Dr. Plotkin persuasively concluded that the "mechanism of injury did not arise from the course and scope of [Claimant's]

work nor was there any demonstrated hazard that resulted in the injury." Even by June 17, 2013 Claimant reported to Dr. Johnson that he "was doing a job in Cheyenne, Wyoming at which time his knee was in a tremendous amount of pain. Later on that night he was in more pain and his knee buckled." Claimant still did not mention that he injured his left knee while moving a washing machine in South Dakota.

23. Claimant's testimony is simply inconsistent with the bulk of the medical records. Absent any mention of the washing machine incident in South Dakota, the medical records reflect that Claimant's left knee injury did not occur while performing his job duties for Employer, but instead occurred while walking or wrestling in a hotel room in Cheyenne, Wyoming. The activity did not constitute an employment duty but was removed from the employment relationship. Accordingly, Claimant's left knee injury did not arise out of the course and scope of his employment duties for Employer on May 31, 2013.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Statute of Limitations

4. Section 8-43-103(2), C.R.S. provides that the right to Workers' Compensation benefits is barred unless a formal claim is filed within two years after the injury. However, the statute of limitations does not begin to run until the claimant, as a

reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). The requirement that the claimant recognize the "seriousness" of the injury contemplates the claimant will recognize the gravity of the medical condition. Finally, a "compensable" injury is one which is disabling and entitles the claimant to compensation in the form of disability benefits. *Romero v. Industrial Commission,* 632 P.2d 1052 (Colo. App. 1981). Therefore, to recognize the "probable compensable character" of an injury, the injury must be of sufficient magnitude that it causes a disability that would lead a reasonable person to recognize that he may be entitled to compensation benefits. *Id.*

5. A claim may be filed within three years after an injury if it is determined that a reasonable excuse exists for the failure to file the claim within two years and the employer's rights have not been prejudiced. §8-43-103(2), C.R.S. The claimant bears the burden of proving that a reasonable excuse exists. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Colorado Fuel & Iron Corp. v. Industrial Commission*, 129 Colo. 257, 269 P.2d 696 (1954). A "reasonable excuse" is one which is "legally justifiable." *Armour & Co. v. Industrial Commission*, 149 Colo. 251, 368 P.2d 798 (Colo. 1962); *Morford v. Fresh Express*, W.C. No. 4-209-032 (ICAP, Sept. 29, 1995).

6. A "reasonable excuse" for neglecting to timely file a claim may exist when an employer misleads a claimant regarding compensability. *City and County of Denver v.* Phillips, 443 P.2d 379 (1968). However, a claimant's lack of knowledge of the law or of his legal rights cannot constitute a reasonable excuse. *Ramos v. Sears Roebuck Company*, W.C. No. 4-156-827 (ICAP, Feb. 10, 1994). The applicable standard is whether the claimant, as a reasonable person, believed that it was unnecessary to file a claim for compensation. *Id.* The existence of a reasonable excuse for purposes of neglecting to file a claim within two years is a matter within the discretion of the ALJ. *Emrich v. Jackson Hewitt Tax Service*, W.C. No. 4-241-443 (ICAP, Oct. 27, 1998). Moreover, an ALJ has "wide discretion" in determining whether reasonable excuse exists. *Butler v. Memorial Gardens Cemetery*, W.C. No. 4-589-950 (ICAP, Nov. 9, 2005).

7. As found, Claimant has demonstrated by a preponderance of the evidence that he had a reasonable excuse for filing his Application for Hearing and Notice to Set more than two years but less than three years after the date of his left knee injury. Initially, Claimant recognized the compensable character of his left shoulder injury when he reported the injury to Mr. Porter on June 2, 2013. On August 25, 2014 Claimant filed an Application for Hearing and Notice to Set. The Application was filed within two years of Claimant's injury date. The Application thoroughly apprised Respondents of the issues to be considered at hearing. Although the Application was stricken without prejudice because of a failure to produce discovery responses, it nevertheless informed Respondents that Claimant had suffered a compensable industrial injury and was seeking benefits. The second Application filed on August 9, 2015 was outside the two year statute of limitations but within the three year limitation period. A reasonable excuse exists for the late filing of the second application because Respondents had been informed that Claimant was seeking benefits under the original Application and

thus were not prejudiced. Respondents had been advised by the August 25, 2014 Application that Claimant was seeking benefits as a result of the May 31, 2013 incident. Respondents were thus permitted to evaluate Claimant's claim to prepare a defense. Accordingly, Claimant's Application is not barred by the statute of limitations period in §8-43-103(2), C.R.S.

Compensability

8. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991).

9. Regardless of the theoretical framework that is applied, the issue is whether the "claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

10. When the employer asserts a personal deviation from employment activities "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship." *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986); *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for his sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). However, ministerial actions for an employee's personal comfort do not constitute a substantial deviation from employment unless the personal need being met or the means chosen by the employee to satisfy his personal comfort is unreasonable. *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008); *see Larson's Workers' Compensation Law,* §21.00. In *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715, 718 (Colo.App. 1995), the court announced the following four part test to analyze whether an activity constitutes a deviation or horseplay: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. The question of whether a deviation is significant

enough to remove the claimant from the course and scope of employment is a factual determination for the ALJ. *Id.*

11. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a left knee injury during the course and scope of his employment with Employer on May 31, 2013. Claimant and Mr. Wagar explained that on May 31, 2013 they were removing a large, front-loading washing machine from a home in South Dakota. Claimant remarked that, as they were moving the machine up a staircase, his hand slipped and the washer struck him in the left knee. He immediately experienced left knee pain. However, despite the testimony of Claimant and Mr. Wagar, the medical records suggest that Claimant injured his left knee in his hotel room in Cheyenne, Wyoming on June 1, 2013 and not while he was performing his job duties on May 31, 2013.

12. As found, the ambulance report specifies that paramedics found Claimant "sitting in an office chair in his room awake and alert with beer sitting on the desk beside him." Claimant stated that "he was wrestling with his buddy" approximately two hours earlier when his left knee went backwards and he felt a "pop." The report from the Cheyenne Regional Medical Center also specifies that Claimant had been wrestling with a buddy approximately one to two hours earlier when he felt his knee "pop" and experienced immediate pain. The reports did not mention any left knee injury while Claimant was moving a washing machine in South Dakota. The June 2, 2013 First Report of Injury specifically provided that Claimant mentioned to Mr. Wager that he was "sore and fatigued from previous job." Claimant got up to use the restroom at about 1:00 a.m. and his knee buckled. On a June 4, 2013 visit to Dr. Plotkin Claimant reported that he was on a moving assignment and stopped at a hotel in Cheyenne for the night. When he stood up to use the restroom at approximately 1:00 a.m. his left knee buckled, he fell to the ground and experienced severe pain. Claimant again did not mention any incident while moving a washing machine on May 31, 2013. Dr. Plotkin persuasively concluded that the "mechanism of injury did not arise from the course and scope of [Claimant's] work nor was there any demonstrated hazard that resulted in the injury." Even by June 17, 2013 Claimant reported to Dr. Johnson that he "was doing a job in Cheyenne, Wyoming at which time his knee was in a tremendous amount of pain. Later on that night he was in more pain and his knee buckled." Claimant still did not mention that he injured his left knee while moving a washing machine in South Dakota.

13. As found, Claimant's testimony is simply inconsistent with the bulk of the medical records. Absent any mention of the washing machine incident in South Dakota, the medical records reflect that Claimant's left knee injury did not occur while performing his job duties for Employer, but instead occurred while walking or wrestling in a hotel room in Cheyenne, Wyoming. The activity did not constitute an employment duty but was removed from the employment relationship. Accordingly, Claimant's left knee injury did not arise out of the course and scope of his employment duties for Employer on May 31, 2013.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 5, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-931-571-02

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the total knee replacement surgery performed by Dr. Adams was reasonable and necessary medical treatment related to her September 10, 2013 workers' compensation injury?

FINDINGS OF FACT

1. Claimant sustained an injury to her right knee on September 10, 2013 when she walked into a room, noticed a resident who was in a wheel chair start to stand up and as she went to help the resident, the resident fell as claimant reached for the resident causing claimant to hyperextend her right knee.

2. Claimant was referred for medical treatment to Dr. Knaus who initially examined claimant on September 11, 2013. Dr. Knaus noted claimant did fairly well after the incident initially, but developed increasing pain and stiffness with instability in her right knee. Dr. Knaus referred claimant to Dr. Pevny for orthopedic consultation.

3. Claimant underwent a magnetic resonance image ("MRI") of her right knee on October 10, 2013. The MRI noted evidence of a prior right anterior crucial ligament ("ACL") reconstruction. The MRI also showed an old posterior horn lateral meniscal tear with later posterior horn meniscal osicle and osteoarthritis most severe in the patellofemoral and lateral compartments.

4. Claimant subsequently underwent surgery consisting of a right knee ACL reconstruction with partial medial and lateral meniscectomies and removal of multiple loose bodies under the auspices of Dr. Pevny on December 31, 2013.

5. Following claimant's surgery, claimant reported to be doing well initially, but subsequently developed persistent swelling and discomfort. Based on claimant's continued complaints, Dr. Pevny recommended a repeat MRI scan on September 2, 2014.

6. The MRI was performed on September 16, 2014 and showed tricompartmental osteoarthritis with increased cartilage fissuring and loss of intra-articular bodies. The MRI also showed fraying along the medial meniscal free edge and a small joint effusion.

7. Claimant underwent a second surgery under the auspices of Dr. Pevny on September 23, 2014. The second knee surgery involved a right knee arthroscopy, partial lateral mensiectomy, removal of loose bodies and debridement of the anterior compartment.

8. Following claimant's second surgery, claimant returned to Dr. Pevny on December 30, 2014. Dr. Pevny noted claimant was doing reasonably well with some residual symptoms that he opined was related to underlying degenerative disease in her knee in all three compartments. Despite claimant's degenerative disease in her knee, she reported she was doing better than she was prior to her surgery, but noted continuing problems including some stiffness, difficulty with terminal extension and occasional popping.

9. By June 30, 2015, Dr. Pevny noted claimant was continuing to complain of significant pain throughout her entire right knee. Dr. Pevny noted claimant had undergone multiple arthroscopic surgeries and clean outs with ACL reconstruction. Dr. Pevny noted that from her surgery he had observed arthritic disease in her knee in multiple compartments. Dr. Pevny noted claimant's young age, and referred her for a second opinion regarding possible total knee arthroplasty.

10. Claimant was eventually evaluated by Dr. Adams on July 17, 2015. Dr. Adams reviewed claimant's radiographic findings, performed a physical examination, obtained a medical history and concluded claimant was a candidate for a total knee arthroplasty. Dr. Adams performed the total knee arthroplasty on September 3, 2015.

11. Claimant testified at hearing that she had some initial improvements following both surgeries, but subsequently developed problems in her right knee. Claimant testified she initially tore her right ACL in 2002 and had surgery with Dr. Pevny to repair the torn ACL.

12. Respondents obtained a records review independent medical examination ("IME") of claimant with Dr. Failinger on November 25, 2015. Dr. Failing reviewed claimant's medical records and noted claimant had high grade arthritis prior to her surgeries related to her work injury. Dr. Failinger noted claimant's significant degenerative findings and opined that these findings were not related to her work injury.

13. Notably, the medical records from Dr. Adams and Dr. Pevny do not indicate that claimant's need for a total knee replacement is causally related to her September 10, 2013 work injury. Additionally, Dr. Pevny's notes indicate that claimant's tricompartmental arthritis was appreciated by him when he performed the surgeries. This indicates that the need for the total knee replacement is related to claimant's pre-existing condition and not related to her compensable work injury of September 10, 2013.

14. The ALJ credits the opinions expressed by Dr. Failing and finds that claimant has failed to establish that it is more probable than not that her right knee total knee arthroplasty is related to the September 10, 2013 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has failed to establish by a preponderance of the evidence that the total knee replacement surgery performed by Dr. Adams is reasonable and necessary medical treatment related to her September 10, 2013 work injury.

6. As found, respondents are not liable for the cost of the total knee arthroplasty surgery pursuant to the Colorado Workers' Compensation Act.

ORDER

It is therefore ordered that:

1. Claimant's request for an Order requiring respondents to pay for the total knee arthroplasty surgery performed by Dr. Adams is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 28, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the request for right shoulder surgery by Theodore F. Schlegel, M.D. and Cary R. Motz, M.D. is reasonable, necessary and causally related to her August 16, 2013 admitted industrial injury.

FINDINGS OF FACT

1. Claimant works as a Teacher for Employer. On August 16, 2013 she suffered an admitted industrial injury to her right shoulder while participating in a team building exercise. After Claimant jumped she was forcefully pulled backwards and landed on her right shoulder. Her arm was fully flexed over her head and she heard a cracking sound in her right shoulder when she landed. Claimant initially received medical treatment at the Centennial Medical Center Emergency Room.

2. On August 19, 2013 Claimant visited Authorized Treating Physician (ATP) Sharon Walker, M.D. at Arbor Occupational Medicine for an examination. Dr. Walker assigned Claimant work restrictions and prescribed physical therapy. She also recommended a right shoulder MRI. After reviewing the MRI, Dr. Walker diagnosed Claimant with a right shoulder strain and an acromioclavicular joint strain.

3. Claimant continued to receive treatment from Dr. Walker throughout the fall of 2013. She underwent conservative right shoulder treatment including physical therapy, injections and pool therapy.

4. On January 23, 2014 Claimant visited ATP John Raschbacher, M.D. at Arbor Occupational Medicine for an evaluation. Claimant reported continuing right shoulder pain. Dr. Raschbacher noted that Claimant exhibited a painful arc with forward flexion and a positive impingement sign in her right shoulder. He administered a right shoulder subacromial space injection.

5. On February 28, 2014 Claimant returned to Dr. Raschbacher for an examination. She reported improvement following the right shoulder injection but continued to experience anterior right shoulder pain. Dr. Raschbacher referred Claimant to Robert Schlegel, M.D. at the Steadman-Hawkins Clinic.

6. On April 30, 2014 Claimant visited Dr. Schlegel for an examination. Claimant reported progressive right shoulder pain, stiffness and range of motion limitations. Dr. Schlegel recommended conservative care including physical therapy. Claimant subsequently underwent 31 physical therapy sessions through the Steadman-Hawkins Clinic during the period June 9, 2014 until March 31, 2015.

7. On August 13, 2014 Claimant underwent a repeat right shoulder MRI. The MRI revealed mild rotator cuff tendinosis, slight subacromial bursal thickening, possible fraying of the superior labrum, mild long biceps tendinosis along the biceps anchor and an increased bone signal adjacent to the humeral head along the medial aspect of the bicipital groove.

8. On August 18, 2014 Claimant returned to Dr. Schlegel for an evaluation. Dr. Schlegel noted that the MRI revealed capsulitis and biceps tendinosis. He commented that the MRI also reflected some signal change in the bicipital groove and proximal humerus. Dr. Schlegel recommended surgery that included an arthroscopic lysis of adhesions, a capsular release and a biceps release.

9. On September 15, 2014 Respondents filed a General Admission of Liability (GAL). The GAL acknowledged medical benefits and temporary disability benefits beginning October 16, 2014.

10. On October 16, 2014 Claimant underwent right shoulder surgery with Dr. Schlegel. In his operative report Dr. Schlegel noted degenerative fraying of the superior labrum, partial detachment of the biceps labral anchor, synovitis around the biceps tendon, chondromalacia involving the posterior glenoid and mild-to-moderate bursal hypertrophy. Dr. Schlegel remarked that there was no evidence of capsulitis.

11. On December 1, 2014 Claimant returned to Dr. Schlegel for an examination. She reported continued right shoulder pain that was localized to the mid-upper arm near the biceps. Claimant remarked that the pain was largely unchanged from before her surgery. Dr. Schlegel commented that the ongoing shoulder pain could be related to adhesive capsulitis. He recommended continued physical therapy, but if Claimant's condition did not improve, then injections might be warranted.

12. On December 17, 2014 Claimant visited James Genuario, M.D. based on a referral from Dr. Schlegel. Dr. Genuario stated that Claimant developed postoperative adhesive capsulitis. He reported that Claimant had 110 degrees of active and passive right shoulder flexion and 20 degrees of external rotation. Dr. Genuario administered a right shoulder intraarticular corticosteroid injection.

13. After obtaining approximately two weeks of excellent relief from the intraarticular corticosteroid injection, Claimant returned to Dr. Genuario on February 4, 2015. Dr. Genaurio again diagnosed Claimant with adhesive capsulitis, administered another right shoulder intraarticular steroid injection and recommended additional physical therapy.

14. On February 26, 2015 Claimant visited Alisa Koval, M.D. at Arbor Occupational Medicine for an examination. Claimant reported some right shoulder relief and increased range of motion following her recent cortisone injection. Dr. Koval noted Claimant's decreased range of motion and recommended a follow-up visit with Dr. Schlegel.

15. On March 13, 2015 Claimant underwent a repeat right shoulder MRI. The MRI revealed a possible irregular tendon remnant at the biceps anchor, an irregular and possibly scarred or degenerated tendon along the bicipital groove, possible adhesions and scarring. The MRI also reflected rotator cuff tendinosis, possible subacromial/subdeltoid bursitis and capsular synovial thickening.

16. On March 27, 2015 Claimant visited Scott Mullen, M.D. in Dr. Schlegel's office for an evaluation. After reviewing Claimant's right shoulder MRI he noted scarring within the interval, rotator cuff tendinosis, bursitis and capsular thickening that was more severe than the August 13, 2014 MRI and consistent with adhesive capsulitis. Dr. Mullen diagnosed Claimant with postoperative adhesive capsulitis.

17. On April 9, 2015 Claimant visited Dr. Koval and noted that Dr. Schlegel wanted to perform a second surgery to address an unattached biceps tendon, adhesive capsulitis and clean up scar tissue. Claimant reported painful range of motion and constant pain in her biceps. Dr. Koval referred Claimant for a second surgical opinion and recommended massage therapy.

18. On April 23, 2015 Claimant underwent an examination with Orthopedic Surgeon Cary Motz, M.D. Claimant reported continuing right shoulder pain with activities of daily living. After reviewing the March 2015 MRI, Dr. Motz diagnosed Claimant with right shoulder impingement, bicipital tenosynovitis, and moderate adhesive capsulitis. Dr. Motz recommended repeat right shoulder surgery.

19. On May 7, 2015 Claimant returned to Dr. Motz for treatment. Dr. Motz administered an ultrasound-guided right shoulder injection. He noted that the ultrasound did not reveal a biceps or rotator cuff tear. Nevertheless, he was surprised to see the biceps in the groove and remarked that the biceps "may have stuck in the groove and could be causing the symptoms."

20. On May 21, 2015 Claimant returned to Dr. Motz and reported a few days of relief from the last injection but progressively worsening pain. Dr. Motz noted positive objective testing, including decreased passive range of motion, and maintained his prior diagnoses. He recommended right shoulder surgery including arthroscopy with biceps tenotomy/tenodesis and debridement.

21. On May 30, 2015 John D. Douthit performed a records review of Claimant's case. Dr. Douthit noted that Claimant "has had neck and shoulder pain for two years since her injury and, if anything, medical care has made her worse." He determined the recommended right shoulder surgery was not reasonable, necessary, or related to Claimant's industrial injury. Dr. Douthit commented that Claimant's condition was identical to her preoperative condition before her first surgery. He summarized that a repeat surgery would not accomplish anything other than aggravate Claimant's pain and produce more scarring. Dr. Douthit strongly advised against repeat invasive surgery because it was "counterintuitive to inhibit adhesions and reduce pain with motorized cutting instruments." He recommended a right shoulder examination under

anesthesia with Dr. Schlegel. Respondents subsequently denied Claimant's right shoulder surgical request.

22. On July 28, 2015 Claimant returned to Dr. Koval and noted that Dr. Schlegel continued to recommended right shoulder surgery. Dr. Koval remarked that

> [i]t would be entirely inappropriate to end this case at this point in time. [Claimant] is an athletic woman, fairly young, age 42, and to be this limited in her range of motion and activity level for the rest of her life is entirely inappropriate and would represent a massive failure on the part of the Workers' Compensation system.

She noted positive objective testing and recommended continued massage therapy and medications.

23. On August 27 2015 Claimant underwent an independent medical examination with Eric O. Ridings, M.D. Dr. Ridings diagnosed Claimant with biceps tendonitis with a partial tear of the biceps anchor and a right shoulder strain. He stated that "there has been significant psychological overlay to the severity of the patient's complaints of pain and decreased function." Dr. Ridings noted that Claimant's complaints were quite similar to those she had experienced prior to her first surgery He acknowledged that the absence of adhesive capsulitis at the first surgery did not preclude the possibility that she subsequently developed the condition. Dr. Ridings noted that Claimant has had progressively worsening right shoulder range of motion deficits since the first surgery. The range of motion limitations could be due to progressive adhesive capsulitis or psychological overlay. Dr. Ridings explained that "[i]f [Claimant] truly has adhesive capsulitis, then the proposed surgery would be reasonable, necessary, and work-related." Similar to Dr. Douthit, Dr. Ridings recommended an evaluation of Claimant's right shoulder under anesthesia. If Claimant's examination under anesthesia reveals right shoulder limited range of motion, he recommended proceeding with the surgery proposed by Dr. Schlegel and Dr. Motz. He mentioned that "I am not suggesting [Claimant] is consciously exaggerating her symptoms, but rather that if there is not found to be an anatomic basis that this would be due to a preexisting psychiatric condition, not malingering."

24. Dr. Koval disagreed with Dr. Ridings' determination and maintained that right shoulder surgical intervention was warranted. She explained that Claimant cannot forward flex or laterally abduct to 90 degrees. Claimant has also exhibited negligible internal and external rotation and positive diagnostic testing. She recommended continued physical and massage therapy and medications. Dr. Koval concluded that Claimant had not reached Maximum Medical Improvement (MMI).

25. Dr. Koval also disagreed with Dr. Ridings' recommendation that Claimant undergo passive right shoulder range of motion testing under anesthesia. Dr. Koval specifically challenged Dr. Ridings' comment that if full, passive range of motion could be achieved under anesthesia, then Claimant does not require surgery. Dr. Koval stated that "simply because someone has full range of motion passively under

anesthesia" does not mean that "they should be able to demonstrate full range of motion actively out of anesthesia." She mentioned that she "can think of several clinical examples where this is not the case, mostly due to soft tissue dysfunction surrounding the shoulder joint." Dr. Koval summarized that Dr. Ridings' recommendation is not a definitive answer to whether Claimant should have surgery.

26. Claimant testified at the hearing in this matter. She stated that prior to her injury she was very active in sports including running, tennis, biking, soccer and basketball. She also coached high school girls' sports. Claimant explained that since her August 2013 injury she has been unable to compete in the sports that she enjoys and has had to stop coaching. She maintained that she has not had any prior right shoulder injuries, conditions, restrictions or limitations. Claimant explained that, following her first right shoulder surgery, she continued to experience right shoulder pain and range of motion limitations. Finally, postoperative treatment including massage, physical therapy and injections has not relieved her right shoulder symptoms.

27. Claimant has demonstrated that it is more probably true than not that the request for right shoulder surgery by Drs. Schlegel and Motz is reasonable, necessary and causally related to her August 16, 2013 admitted industrial injury. In October 2014 Claimant underwent a first right shoulder surgery with Dr. Schlegel. In his operative report, Dr. Schlegel noted that he examined Claimant's shoulder under anesthesia and did not find any evidence of adhesive capsulitis and proceeded with an arthroscopy. Following the first surgery Claimant did not improve and continued to report pain and other right shoulder symptoms. She underwent three right shoulder injections and received only temporary relief. On March 13, 2015 Claimant underwent a repeat right shoulder MRI that revealed increased capsular synovitis that is indicative of adhesive capsulitis. Five different treating surgeons diagnosed Claimant with postoperative adhesive capsulitis. Claimant's surgeons and Dr. Koval noted that Claimant has significantly decreased range of motion and recommend repeat surgery. Dr. Motz reviewed Dr. Schlegel's October 2014 operative report, Claimant's prior medical records and March 2015 MRI. He diagnosed Claimant with right shoulder impingement, bicipital tenosynovitis and moderate adhesive capsulitis. Dr. Motz administered an ultrasound-guided right shoulder injection. Although the ultrasound did not reveal a biceps or rotator cuff tear, Dr. Motz was surprised to see the biceps in the groove and remarked that the biceps "may have stuck in the groove and could be causing the symptoms." Dr. Motz recommended repeat right shoulder surgery to relieve Claimant's worsening symptoms. Finally, Dr. Koval explained that Claimant cannot forward flex or laterally abduct her right shoulder to 90 degrees. Claimant has also exhibited negligible internal and external rotation and positive diagnostic testing. Dr. Koval maintained that right shoulder surgery was warranted because of Claimant's range of motion deficits and limited activity levels.

28. In contrast, Drs. Douthit and Ridings challenge the surgical request and instead recommend right shoulder manipulation under anesthesia to determine whether Claimant actually has adhesive capsulitis. Dr. Ridings acknowledged that, if Claimant has adhesive capsulitis, then the surgery recommended by Drs. Schlegel and Motz is

reasonable, necessary, and related to Claimant's August 16, 2013 admitted industrial injury. Moreover, Dr. Ridings also acknowledged that, although Claimant did not have adhesive capsulitis at the time of the first surgery, she very well may have developed adhesive capsulitis. More importantly, Dr. Koval disagreed with Dr. Ridings' recommendation that Claimant undergo passive right shoulder range of motion testing under anesthesia. She specifically challenged Dr. Ridings' comment that if full, passive range of motion could be achieved under anesthesia, then Claimant does not require surgery. Dr. Koval stated that "simply because someone has full range of motion passively under anesthesia" does not mean that "they should be able to demonstrate full range of motion actively out of anesthesia." Finally, Dr. Ridings' concerns about Claimant's psychological condition are contrary to the large bulk of the medical records and the opinions of Claimant's treating physicians. Accordingly, based on the medical records and persuasive opinions of Drs. Schlegel, Motz, Koval and other treating physicians, Claimant has demonstrated that right shoulder surgery is reasonable, necessary and causally related to her August 16, 2013 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the

employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has demonstrated by a preponderance of the evidence that the request for right shoulder surgery by Drs. Schlegel and Motz is reasonable, necessary and causally related to her August 16, 2013 admitted industrial injury. In October 2014 Claimant underwent a first right shoulder surgery with Dr. Schlegel. In his operative report, Dr. Schlegel noted that he examined Claimant's shoulder under anesthesia and did not find any evidence of adhesive capsulitis and proceeded with an arthroscopy. Following the first surgery Claimant did not improve and continued to report pain and other right shoulder symptoms. She underwent three right shoulder injections and received only temporary relief. On March 13, 2015 Claimant underwent a repeat right shoulder MRI that revealed increased capsular synovitis that is indicative of adhesive capsulitis. Five different treating surgeons diagnosed Claimant with postoperative adhesive capsulitis. Claimant's surgeons and Dr. Koval noted that Claimant has significantly decreased range of motion and recommend repeat surgery. Dr. Motz reviewed Dr. Schlegel's October 2014 operative report, Claimant's prior medical records and March 2015 MRI. He diagnosed Claimant with right shoulder impingement, bicipital tenosynovitis and moderate adhesive capsulitis. Dr. Motz administered an ultrasound-guided right shoulder injection. Although the ultrasound did not reveal a biceps or rotator cuff tear, Dr. Motz was surprised to see the biceps in the groove and remarked that the biceps "may have stuck in the groove and could be causing the symptoms." Dr. Motzrecommended repeat right shoulder surgery to relieve Claimant's worsening symptoms. Finally, Dr. Koval explained that Claimant cannot forward flex or laterally abduct her right shoulder to 90 degrees. Claimant has also exhibited negligible internal and external rotation and positive diagnostic testing. Dr. Koval maintained that right shoulder surgery was warranted because of Claimant's range of motion deficits and limited activity levels.

6. As found, in contrast, Drs. Douthit and Ridings challenge the surgical request and instead recommend right shoulder manipulation under anesthesia to determine whether Claimant actually has adhesive capsulitis. Dr. Ridings acknowledged that, if Claimant has adhesive capsulitis, then the surgery recommended by Drs. Schlegel and Motz is reasonable, necessary, and related to Claimant's August 16, 2013 admitted industrial injury. Moreover, Dr. Ridings also acknowledged that, although Claimant did not have adhesive capsulitis at the time of the first surgery, she very well may have developed adhesive capsulitis. More importantly, Dr. Koval disagreed with Dr. Ridings' recommendation that Claimant undergo passive right shoulder range of motion testing under anesthesia. She specifically challenged Dr. Ridings' comment that if full, passive range of motion could be achieved under anesthesia, then Claimant does not require surgery. Dr. Koval stated that "simply because someone has full range of motion passively under anesthesia" does not mean that "they should be able to demonstrate full range of motion actively out of anesthesia."

Finally, Dr. Ridings' concerns about Claimant's psychological condition are contrary to the large bulk of the medical records and the opinions of Claimant's treating physicians. Accordingly, based on the medical records and persuasive opinions of Drs. Schlegel, Motz, Koval and other treating physicians, Claimant has demonstrated that right shoulder surgery is reasonable, necessary and causally related to her August 16, 2013 industrial injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for right shoulder surgery as recommended by Drs. Schlegel and Motz is granted.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 14, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that her claim should be reopened pursuant to Section 8-43-303, C.R.S.?

- Whether claimant has proven that she is entitled to medical treatment that is reasonable and necessary to cure and relieve claimant from the effects of her industrial injury?

FINDINGS OF FACT

1. Claimant was employed with employer on December 31, 2013 when she was injured within the course and scope of her employment with employer. Claimant testified she injured her right hand in the injury and her finger is now crooked. Claimant was injured when her right hand was caught in a shower door. Claimant was treated at the Aspen Valley Hospital Emergency Room ("ER")following her injury.

2. Claimant was referred for a surgical consultation with Dr. Golden on January 10, 2014. Dr. Golden noted claimant's right fifth finger was held in a swan neck position with an obvious injury to the tip of her finger. Dr. Golden noted claimant's contralateral hand (the left hand) had a mild swan-necking of the fifth finger as well. Dr. Golden noted that through questioning of claimant with a translator, claimant admitted to having a swan-neck deformity to her finger prior to the injury, but it may be accentuated by the injury. Dr. Golden noted claimant could have her sutures taken out and, after claimant heals, she would consider re-examination with correction of the swan-neck deformity.

3. Despite the records from Dr. Golden, claimant denied at hearing having a swan-neck deformity in her pinky prior to her work injury. The ALJ credits the reports from Dr. Golden which document claimant reporting the swan-neck deformity was present before her injury along with documentation of a swan-neck deformity in her contralateral hand as being more credible than claimant's contrary testimony at hearing.

4. Claimant was referred to Dr. Goyette for medical treatment following her injury. Dr. Goyette evaluated claimant on January 10, 2014 and noted claimant had a right pinky laceration and noted the stitches she had received at the ER. Dr. Goyette noted claimant had a fracture and recommended she continue using the splint and letting the bone heal.

5. Claimant returned to Dr. Golden on February 7, 2014. Dr. Golden noted claimant had undergone x-rays that showed a tuft fracture and what appeared to be more of a chronic swan necking of the PIP joint. Dr. Golden noted that it was possible that claimant had a tendon injury or a volar plate injury and, if acute, a magnetic resonance image ("MRI") would show the acute nature of the injury. Therefore, Dr. Golden ordered an MRI and opined that if the MRI did not show evidence of an acute injury, then she would question whether surgical intervention would be better for her than a silver ring spint.

6. The MRI was performed on February 25, 2014 and showed residual deformity of the fifth finger with hypertension of the MCP and flexion of the PIP joint; mild deformity of the tip of the distal phalanx due to the original fracture, and fifth finger flexor tenosynovitis without tendon rupture with mild bowstringing near the PIP joint with possible tear of the A2 pulley.

7. Claimant returned to Dr. Golden on March 4, 2014. Dr. Golden noted that claimant's x-rays show evidence of possible bony changes that would indicate and old PIP joint injury and opined that the MRI showed no acute injuries. Dr. Golden noted that possible bowstringing with possible injury to the A2 pulley, but found that this did not correspond to her area of tenderness and opined that this was merely an incidental finding. Dr. Golden noted that claimant is left with a swan-neck deformity which could be corrected surgically.

8. Dr. Golden issued an addendum regarding the proposed surgery on March 11, 2014. Dr. Golden noted claimant's medical history and her swan-neck deformity with a mallet. Dr. Golden acknowledged that whether the swan-neck deformity was caused by the mallet finder is difficult to say. Dr. Golden did not indicate in her addendum that the swan-neck deformity was related to her work injury.

9. Respondents obtained a records review independent medical examination by Dr. Mordick on March 16, 2014. Dr. Mordick reviewed claimant's medical records and opined that claimant's treatment to date had been appropriate. Dr. Mordick opined that it was his opinion that claimant's need for treatment of the swan neck deformity was not related to her work injury.

10. Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Goyette on March 27, 2014. Claimant was provided with a 0% impairment rating.

11. A final admission of liability ("FAL") was filed by respondents on March 27, 2014 admitting for a period of temporary disability benefits and the 0% impairment rating. Claimant failed to object to the FAL and her case was closed as a matter of law.

12. Claimant testified at hearing that she returned to Dr. Golden one month after she received the FAL for additional treatment. Claimant testified she did not recall

the date she returned to Dr. Golden. According to the medical records entered into evidence at hearing, claimant did not return to Dr. Golden after March 4, 2014.

13. Claimant testified at hearing that her condition has gotten much worse since being placed at MMI. Claimant's testimony in this regard is rejected by the ALJ as not credible.

14. The ALJ credits the reports from Dr. Mordick and Dr. Goyette and finds that claimant has failed to establish that her claim should be reopened. The ALJ also credits the records from Dr. Golden that document claimant's condition being related to an old injury rather than an acute event and finds that claimant has failed to establish that additional medical treatment related to her work injury is appropriate in this case.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting

disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has failed to demonstrate that additional medical treatment related to her work injury is reasonable and necessary.

6. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of error, mistake or a change in condition. Section 8-43-303(1), C.R.S. The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4).

7. As found, claimant has failed to demonstrate that she has sustained a worsening of her condition that would entitle claimant to reopen her claim pursuant to Section 8-43-303.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen her claim is denied and dismissed.

2. Claimant's request for additional medical treatment related to her December 31, 2013 work injury is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 28, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Did Respondents overcome the opinion of the DIME physician (Stanley Ginsburg, M.D.) concerning the Claimant's permanent medical impairment by clear and convincing evidence?

- If Respondents overcame the DIME physician's opinion, what is Claimant's medical impairment rating?

STIPULATED FACTS

The Parties agreed to the following facts:

1. Claimant's date of birth was January 20, 1994.

2. Claimant suffered an admitted industrial injury on July 22, 2013.

FINDINGS OF FACT

1. On 7/22/13, Claimant was working as a hostess for Respondent-Employer. The injury occurred when she cleaning the pie case at the restaurant. Claimant had lifted the glass cover up was bent over and was reaching inside the case. The glass cover came down and struck her in her lower back, just above her hips.

2. Claimant was nineteen (19) years old on the date of injury.

3. Claimant's medical history was significant before her industrial injury in that she had two (2) prior motor vehicle accidents and treated with a chiropractor, Daniel Flemming, D.C. In the patient information sheet she completed on March 2, 2012, Claimant stated that she was having neck and mid-back pain after being rear-ended in a car accident that day and the pain diagrams she completed showed neck and shoulder pain. No narrative report was included within these records, although what appear to be Dr. Flemming's handwritten treatment notes were included.

4. Claimant was involved in a second motor vehicle accident at the end of April, 2012[1]. She was complaining of neck and low back pain. At the time she stopped chiropractic treatments, Claimant continued to have neck inflammation, although some improvement was noted. Claimant treated with Dr. Flemming on the following dates, with the subjective symptoms noted below:

a. July 13, 2012: Claimant reported NP (neck pain), LBP (low back pain)

[1] In the patient information sheet on 4/30/12, Claimant stated the car accident was "last Friday".

and mid back problems along with some ongoing finger numbness.

b. September 11, 2012: Claimant reported NP (neck pain) and LBP (low back pain) over the last two days.

c. September 26, 2012: Claimant reported NP (neck pain), LBP (low back pain) and left wrist problems. Claimant again reported neck and low back pain on October 31, 2012.

d. February 5, 2013: Claimant reported LBP and hand numbness along with pain in her ankles and feet. She also noted neck pain which was getting worse over the last month.

e. February 11, 2013: Claimant again reported neck pain, mid back pain, knee problems and pain to her elbows. It was noted that she has not been sleeping due to her pain.

f. February 15, 2013: Claimant reported that her "entire back hurts" and noted that her legs hurt as well. She specifically reported neck and low back pain as well.

g. February 25, 2013, Claimant complained of pain in her cervical, thoracic, and lumbosacral spine.

5. In summary, Claimant received treatment at Dr. Flemming's office from 3/2/12- 2/25/13. Claimant received treatment at this office and the records reflected subjective reports of pain in the cervical, thoracic and lumbosacral spine throughout, although some slight improvement with treatment was noted in the records. No discharge summary was included. The ALJ notes that Claimant registered similar complaints after the 7/22/13 injury.

6. At the hearing Claimant testified that she was not having symptoms that she related to the MVA-s. Claimant also testified that she had not treated with Dr. Flemming (whom she identified as Dan) since she was fifteen (15) years old.[2] The chiropractic records admitted as Exhibit L highlighted the inaccuracy of this testimony and this hurt Claimant's credibility.

7. After her industrial injury at Village Inn, Claimant testified that she developed pain in her neck, mid and low back, as well as both of her extremities.

8. Claimant was sent to CCOM (Employer's ATP) and was evaluated by Mary Dickson, M.D. on July 22, 2013. Dr. Dickson noted that the glass cover hit her in the lower back and Claimant was complaining of cervical, thoracic and lower back symptoms, along with radicular symptoms down the right arm and leg. Dr. Dickson's

[2] The ALJ notes that in Claimant's Responses to Interrogatories, which were admitted as Exhibit 17, Claimant denied prior injuries to her back before the industrial injury. [Response to Interrogatory 11]. Claimant also did not say she had treated with Dr. Flemming. [Response to Interrogatory 10].

assessment was multiple contusions and strains to include cervical strain with radicular symptoms down right arm; thoracolumbar strain with radicular symptoms down the right leg. Medications (Ibuprofen, Skelaxin and Flexeril) were dispensed and Claimant was taken off work.

9. Claimant returned to Dr. Dickson on July 24, 2013, at which time improvement was noted in her right arm symptoms, although she had continued discomfort in cervical, thoracic spine and low back. Dr. Dickson adjusted Claimant's medication and started her on a physical therapy program. Work restrictions were also given.

10. Claimant was next seen by Dr. Dickson on August 2, 2013. At that time, improvement in her radicular symptoms (both right arm and leg) was noted. Claimant was to continue physical therapy and begin massage therapy over the next 2-3 weeks.

11. Claimant was examined by Dr. Dickson on August 20, 2013 and was complaining of pain between her shoulder blades, neck, mid and lower back. Dr. Dickson recommended that Claimant continue with physical therapy and recommended a TENS unit.

12. Dr. Dickson evaluated Claimant on September 19, 2013, noting there had been improvement in the right arm symptoms, which were present again, as well as left arm symptoms. Dr. Dickson recommended x-rays for the cervical, thoracic and lumbar spine. Claimant was to continue therapy and was returned to regular duty.

13. The spinal x-rays were taken at Penrad Imaging on October 1, 2013. Jon Snider, M.D. noted no acute abnormality in Claimant's lumbosacral spine. Timothy Cloonan, M.D. found her cervical and thoracic spine to be within normal limits.

14. Claimant returned to Dr. Dickson on October 3, 2013 and reported continued symptoms. Dr. Dickson reviewed the therapist notes and noted that Claimant was making all the sessions, but not demonstrating functional change with the treatment. Dr. Dickson's assessment was multiple contusions and strains to include cervical with symptoms into the upper shoulders; thoracolumbar strain with improved radicular symptoms right leg. Dr. Dickson discontinued PT and referred Claimant to Dr. Jenks.

15. Claimant was evaluated by Chad Abercrombie, D.C. (referred by Dr. Dickson) on October 13, 2013 for her ongoing neck and back complaints. She described lower neck and upper, mid and low back pain as constant. Tightness and some restrictions in range of motion were found in the cervical and thoracic spine. Dr. Abercrombie's assessment was lower cervical, thoracic and lumbar myofacial pain/tightness with associated articular component most likely reactionary to blunt trauma to dorsal spine. Dr. Abercrombie began treatment including manual joint mobilization-manipulation, myofacial release techniques and electrical modalities.

16. Claimant was examined by Jeffrey Jenks, M.D. on October 17, 2013, at which time it was noted that Claimant had bilateral cervical, thoracic and lumbosacral pain, as well as pain and parasthesias radiating into all four extremities. Upon examination, Dr. Jenks noted diffuse, nonspecific tenderness in the cervical, thoracic and lumbosacral paraspinals. Claimant's sensation was intact to pinprick in all of her extremities. Dr. Jenks' impression was myofacial cervical, thoracic and lumbosacral pain. Dr. Jenks injected 4 trigger points in the cervical periscapular and trapezial ridge region.

17. Dr. Dickson examined Claimant on October 25, 2013. Claimant related she underwent trigger point injections which were administered by Dr. Jenks that she described as painful. Dr. Dickson noted rounded shoulder posture, but no soft tissue bruising. Dr. Dickson noted Claimant had pain relief with Dr. Abercrombie's treatment and would also follow-up with Dr. Jenks.

18. Claimant returned to Dr. Jenks' office on November 7, 2013 and was seen by Jamie Case, M.S., PA-C. She stated that the injections did not help, but her treatments with Dr. Abercrombie were helpful. Modest increased tone was noted in the interscapular muscles. Full range of motion was seen in the cervical spine and upper extremities. PA-C Case's impression was myofacial pain in the cervical, thoracic and lumbar regions with noted improvement[3]. Claimant was given a prescription for Voltaren gel and was to continue chiropractic treatments with Dr. Abercrombie

19. Dr. Abercrombie issued a report dated November 7, 2013 in which he noted Claimant had completed seven (7) treatments. Tightness was noted in the qudarotus lumborum, rhomboids and longissimus thoracic region. Range of motion was full in all cervical thoracic and lumbar planes. Dr. Abercrombie's assessment was overall improved status with mild objective residual. The ALJ notes that Dr. Abercrombie's findings on range of motion were based upon clinical observations.

20. Dr. Dickson saw Claimant on November 15, 2013 and improvement was noted following Dr. Abercrombie's sessions. Claimant said she experienced soreness after dance classes, but some improvement.

21. The ALJ notes that over the course of her treatment of Claimant, Dr. Dickson consistently recorded in her records that the objective findings on examination were consistent with the mechanism of injury. The ALJ infers that Dr. Dickson found Claimant's pain complaints to be credible.

22. Claimant was taking a dance class in the fall semester at UCCS. Claimant testified that she did not take a dance class the second semester.

23. PA-C Case evaluated Claimant on December 3, 2013. PA-C Case's impression was noted improvement in cervical, thoracic and lumbar myofacial pain with

[3] PA-C case noted he staffed the case with Drs. Jenks and Abercrombie.

some increased tone in the right suprascapular region. Claimant was to complete her treatment with Dr. Abercrombie and then follow-up with Dr. Dickson.

24. Claimant did not lose time from work as a result of her injury. She testified that she continued to work for Employer through mid-January.

25. George Schwender, M.D. (of CCOM) evaluated Claimant on January 17, 2014, which was the first time Dr. Schwender examined Claimant. Claimant noted there was no change or improvement since the last visit and Dr. Schwender observed that she was in no distress and no particular tenderness was found upon examination. Dr. Schwender determined Claimant was at MMI with no impairment and had no work restrictions. For maintenance treatment Dr. Schwender opined that Claimant was to continue using a TENS unit for six months.

26. Although he stated there was full range of motion in Claimant's back, there were no worksheets admitted at hearing to show that Dr. Schwender performed range of motion testing at the time of this examination, including any reference to dual inclinometer measurements. The ALJ concludes that Dr. Schwender did not comply with the AMA Guides to the Evaluation of Permanent Impairment (3rd Ed. Rev.) ["AMA Guides"] when he evaluated Claimant's permanent medical impairment because there was no evidence that he used dual inclinometers.

27. A Final Admission of Liability was filed by Insurer on January 24, 2014, admitting for 0% whole person impairment based upon Dr. Schwender's 1-17-14 report. Respondents denied liability for any maintenance medical treatment.

28. Respondent submitted a DVD documenting Claimant's activities on April 7 and April 18, 2014. (Exhibit J). Claimant was observed doing a number of activities, including entering/exiting a vehicle and walking. More particularly, the DVD documented the following:

April 7, 2014

1:22 p.m.: Claimant exited a car wearing approximately 2" high heels with no observable pain behaviors.

2:26 p.m.: Claimant walked out of building, got in vehicle and was able to turn her head without apparent difficulty.

2:36 p.m.: Claimant got out of car, appeared to have low back pain, walked a short distance and returned to her car.

2:47 p.m.: Claimant walked quickly up a sidewalk talking on cell phone, keys in right hand, cell phone in left hand held to ear. She walked back down sidewalk and got in car.

April 18, 2014

12:25 p.m.: Claimant walked quickly/runs up sidewalk, up a flight of stairs and runs back down.

29. Stanley Ginsburg, M.D. performed and DIME on May 9, 2014. Dr. Ginsburg evaluated Claimant for chronic pain, cervical, thoracic, thoracic outlet syndrome, low back SI joint range of motion, neurological radiating pain. At that time, Claimant told Dr. Ginsburg that she continued to have discomfort in her spine for her cervical to lumbar area. Claimant had diffuse pain, but no marked tenderness in the cervical, thoracic and lumbar areas. Claimant's neurological evaluation was normal. Dr Ginsburg noted the x-rays were normal, but scans had not been accomplished. He described he radicular complaints as atypical for this type of injury. After reviewing the mechanism of injury, Dr. Ginsburg wondered how this patient developed cervical symptoms. Also, there was variability in her response to therapy with initial improvement, then rather constant worsening.

30. Dr. Ginsburg noted that nine (9) months had elapsed since the date of injury. Dr. Ginsburg stated that he considered the entire picture carefully and concluded that Claimant had a 12% whole person permanent medical impairment to her lumbar spine, only. He assigned 5%for a specific disorder pursuant to the AMA Guides to the Evaluation of Permanent Impairment (3rd Ed. Rev.) [4] and assigned 7% for Claimant's loss of range of motion. Dr. Ginsburg did not recommend maintenance treatment, but opined that a lumbar MRI would be appropriate.

31. The ALJ infers that Dr. Ginsburg fully considered whether Claimant sustained a permanent impairment, given the somewhat minimal findings on examination and concluded that she sustained a ratable impairment to the lumbar spine only. The ALJ credits Dr. Ginsburg's opinion that Claimant sustained a permanent medical impairment. However, Dr. Ginsburg did not have information concerning the two prior MVA-s in which Claimant was involved when considering Claimant's medical impairment. Also, Dr. Ginsburg did not include a separate section entitled "diagnosis", but included a section with his "observations".

32. Lawrence Lesnak, D.O. performed an IME on behalf of Respondents on July 29, 2014. He noted that Claimant had some tenderness throughout her paraspinal musculature bilaterally. She displayed no significant pain behaviors or nonphysiologic findings when he examined her. Dr. Lesnak found that Claimant had full cervical and thoracic spine range of motion. In his report, Dr. Lesnak noted that, on examination, there were "no abnormalities whatsoever," and, specifically, "no abnormalities with specific active range of motion measurements of her lumbar spine".

[4] Dr. Ginsburg's rating was based upon Chapter 3.3 of the AMA Guides, which incorporates Table 53 (page 80). Table 53 provides that Claimant is entitled to a 5% specific disorder rating.

33. As part of taking lumbar spine range of motion measurements, Dr. Lesnak performed straight leg raising tests on both the right and left sides, both of which yielded invalid results. Dr. Lesnak testified that his range of motion testing findings were valid. Dr. Lesnak opined that "there is absolutely no medical evidence to suggest that [claimant] has sustained any type of permanent functional impairment" as a result of the July 22, 2013 work incident.

34. Dr. Lesnak testified at hearing as an expert in occupational medicine and physiatry on behalf of Respondents. He was board certified in the specialty of physical medicine and rehabilitation and was Level II accredited pursuant to the W.C.R.P. Dr. Lesnak testified that the presentation of Claimant's symptoms was not consistent with any sort of objective radicular findings. Dr. Lesnak testified that based upon his range of motion testing, Claimant would have been entitled to a 0% impairment for that portion of the impairment rating. Dr. Lesnak did not dispute that Claimant would be entitled to a 5% impairment rating if the criteria for Table 53 were met and correlated to the clinical findings.

35. Dr. Lesnak testified that most of Claimant's symptomatic presentation after July 22, 2013 did not make sense medically. He stated, "It would be very unusual to start immediately having pain that goes from the upper or low back area…, shooting up to the head, shooting down lower, encompassing the arms and legs." Additionally, it was concerning that Claimant's symptoms were diffuse, or all over her body, rather than being localized. While testifying, Dr. Lesnak reiterated his opinion that a medical impairment rating was not warranted in these circumstances. Dr. Lesnak testified that DR. Ginsburg's rating did not follow the AMA Guides. The ALJ found Dr. Lesnak's testimony persuasive on this point.

36. An MRI of Claimant's lumbar spine was done on September 22, 2014, which was read by Eric Handley, M.D. Dr. Handley's impression was minimal L4-5 disc bulge and mild facet arthropathy. No thecal sac or foraminal narrowing was seen.

37. Claimant returned to CCOM on September 25, 2014 and was examined by George Johnson, M.D. At that time, Claimant was complaining of a dull ache in her low back, intermittent numbness in her extremities and occasional neck pain. Upon examination, Claimant had normal range of motion[5] in her lumbar spine and no pain to palpation. This was also true for her cervical spine. Dr. Johnson's diagnosis was sprain, lumbar spine and he confirmed the MMI date of 1/17/14. Dr. Johnson opined that the MRI did not show a condition which would require surgery, but facet joint injections may be beneficial.

38. Ronald Swarsen, M.D testified as an occupational medicine expert on behalf of Claimant. He has been Level II accredited pursuant to the W.C.R.P. since 1996. He did not examine Claimant, but reviewed her treatment records. He did not prepare a written report. Dr. Swarsen testified that Dr. Ginsburg's impairment rating

[5] No worksheets were included with Dr. Johnson's report.

was valid. This included the Table 53 specific disorder impairment and the range of testing which was performed. The ALJ credits Dr. Swarsen's testimony that Claimant would be entitled to a specific disorder impairment.

39. Dr. Swarsen specifically addressed the issue concerning whether the lack of a "diagnosis" section rendered Dr. Ginsburg's rating invalid. Dr. Swarsen noted that Dr. Ginsburg did not have a diagnosis section in this report, but there were consistent diagnoses throughout Claimant's treatment records and he opined this was support for Dr. Ginsburg's findings, including the rating. The ALJ credits Dr. Swarsen's testimony that there were clinical findings and diagnoses concerning Claimant's lumbar spine made by the treating physicians over the course of Claimant's treatment.

40. The ALJ finds that while Dr. Ginsburg's DIME report included a section entitled "comments", it did not include a "diagnosis" section, which is required by the AMA Guides Ch 2.3.[6] That section provides:

> "A clear, accurate, and complete report is essential to support a rating of permanent impairment. The following kinds of information are expected.
>
> **Medical evaluation includes:**
>
> **…**
>
> 4. Diagnoses and clinical impressions."

41. The ALJ finds that the comments section did not provide sufficient detail and did not correlate to the clinical findings made by other physicians. Therefore, Respondents showed it highly probable Dr. Ginsburg erred by not including a section that set forth diagnoses and clinical impressions.

42. The ALJ takes administrative notice of the AMA Guides, which governs Claimant's medical impairment. The ALJ also notes that Chapter 1.2 is an explanatory section which directly relates to chapter 2.3, at issue here. This section provides in pertinent part:

> "…Evaluation of impairment using the *Guides* requires integration of previously gathered medical information with the results of a current clinical evaluation. To characterize the impairment fully, the evaluation should be carried out in accordance with the directions in the Guides. Accomplishing this is based on using three fundamental components.
>
> First, Chapter 2 of the *Guides* lists the kinds of information needed to document the nature of an impairment and its consequences; specifies procedures for acquiring the information; and defines a structured format

[6] Exhibit K.

> for analyzing, recording, and reporting the information. A summary of this material appears at the beginning of each clinical chapter..."[7]

43. Based upon the evidence presented to the ALJ, Claimant met the criteria for a Table 53, II B lumbar spine impairment, as supported by the findings made by Dr. Ginsburg. Respondents failed to overcome this aspect of Claimant's rating. Claimant's entitlement to a specific disorder impairment rating was also supported by the records of Dr. Johnson. Therefore, Claimant is entitled to a 5% whole person impairment.

44. The ALJ finds that the only two physicians who conducted range of motion studies, as required by the AMA Guides were Dr. Ginsburg and Dr. Lesnak. The other findings with regard to range of motion were based upon clinical observations and not actual measurements. Dr. Ginsburg's found range of motion deficits in Claimant's lumbar spine and his measurements met the validity criteria under the AMA Guides. Dr. Lesnak did not obtain valid range of motion measurements for Claimant's lumbar spine.

45. In the Introduction section for chapter 2 of the AMA Guides, it specifies:

> "If two physicians using the *Guides* have obtained similar results and reached similar conclusions, a framework exists within which to resolve the discrepancies. Analysis of records and reports will disclose the differences. In such an instance, the differences will be in the clinical findings, which are matters of fact, not opinion; the latter can be verified by further observation of the claimant in accordance with the procedures and methods of the *Guides*…"[8]

46. The ALJ is unable to resolve the conflict between Dr. Ginsburg and Lesnak based concerning Claimant's range of motion deficits in the lumbar spine (or lack thereof) based upon the evidence adduced at hearing. As such, the ALJ finds Claimant is not entitled to additional impairment based upon loss of range of movement in her lumbar spine.

47. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must

[7] The second and third components refer to medical evaluation protocols and reference tables specifically keyed to the evaluation protocols.

[8] *Id.*

be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S.

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

OVERCOMING THE DIME ON THE ISSUE OF IMPAIRMENT

The Respondents contend that they proved by clear and convincing evidence that Dr. Ginsburg, the DIME physician, erred in assessing an impairment rating of 12% whole person for physical impairment. Relying principally on the opinions of Dr. Lesnak, they aver that Dr. Ginsburg did not properly apply the AMA Guides in arriving at his rating. Respondents’ argument is twofold; first Respondents assert that Dr. Ginsburg’s opinion was erroneous in that he did not identify a spinal disorder and did not provide a diagnosis. As part of this argument, Respondents contend that Dr. Ginsburg failed to base his rating on the AMA Guides and what is taught during the Level II accreditation course when evaluating Claimant’s permanent medical impairment.

Second, Respondents argued that Claimant’s symptoms do not correlate to either the mechanism of injury or the anatomical structure of her spine. Respondents also argued that Claimant failed to disclose her prior motor vehicle accidents to her doctors, as well as her prior chiropractic care.

Claimant contended that the DIME physician’s opinion concerning impairment was correct and Respondents failed to meet their burden to overcome Dr. Ginsburg’s opinion. Claimant asserted that Dr. Ginsburg validly found a specific disorder of the lumbar spine and his range of motion testing was valid.

Claimant argued that Dr. Swarsen’s testimony that Dr. Ginsburg’s rating was valid was persuasive on this point. Claimant further averred that the evidence of other medical professionals is a difference of opinion which does not constitute clear and convincing evidence.

A DIME’s physician’s rating is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S. 2006; *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186-90, 189 (Colo. App. 2002). Clear and convincing evidence means “evidence which is stronger than a mere ‘preponderance’**;** it is evidence that his highly probable and free from serious and substantial doubt." *Metro Moving & Storage Co v. Gussert,* 914 P.2d 411, 414 (citing CJI-Civ. 3d 3:2 (1988); *DiLeo v. Kotlnow*, 200 Colo. 119, 613 P.2d 318 (1980).

Respondents meet this burden only by demonstrating that the evidence contradicting the DIME is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002)(citing *DiLeo v. Koltnow, supra*). Respondents meet this burden only by demonstrating that the evidence contradicting the DIME is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002) (citing *DiLeo v. Koltnow, supra).*

The enhanced burden of proof imposed by § 8-42-108(b)(III), C.R.S., reflects an underlying assumption that the DIME, having been selected by an independent and unbiased tribunal, will provide a reliable medical opinion. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998).

In *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000), the court noted that under the AMA Guides the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002). Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*.

The factual scenario in the case at bench is similar to cases in which a part of the DIME physician's rating was overcome by clear and convincing evidence. See *Deleon v. Whole Foods Market, Inc.,* W.C. No. 4-600-477 (ICAO, November 16, 2006); *Ortiz v. Service Experts,* W.C. No. 4-657-974 (ICAO, January 22, 2009). *Deleon* addressed the proper evidentiary standard for determining a Claimant's impairment rating after an ALJ found that a portion of the DIME physician's impairment rating was overcome by clear and convincing evidence.

In the *Deleon* case the ALJ determined the Respondents overcame by clear and convincing evidence a DIME physician's finding that the Claimant sustained 5 percent impairment for lost range of motion in the lumbar spine. However, the ALJ also found that the Respondents failed to overcome by clear and convincing evidence the DIME physician's finding that the Claimant sustained 5 percent impairment for a specific disorder of the lumbar spine. Consequently the ALJ upheld the specific disorder portion of the rating. The ICAO ruled that once an ALJ determines "the DIME's rating has been overcome in any respect" the ALJ is "free to calculate the Claimant's impairment rating based upon the preponderance of the evidence" standard. See also *Laclay v. Academy Insulation,* W.C. No. 4-693-581 (ICAO June 4, 2009).

As found, Respondents proved that Dr. Ginsburg erred in not including a section that specified a diagnosis and clinical impressions. The ALJ credited Dr. Lesnak's testimony on this issue. While Dr. Ginsburg included a section with comments and observations, the ALJ found more detail was required to connect the clinical findings and his final rating. Here, the Judge found Respondents showed it was highly probable that the "comments " section of Dr. Ginsburg's report did not comply with the AMA Guides. Respondents thus overcame Dr. Ginsburg's permanent medical impairment rating by clear and convincing evidence.

Claimant's Impairment Rating

Having decided that Dr. Ginsburg's opinion was overcome by clear and convincing evidence, the inquiry turns to what, if any, permanent medical impairment Claimant sustained as a result of her industrial injury. *Deleon v. Whole Foods Market, Inc, supra.* Under this scenario, the ALJ makes a determination of fact as to Claimant's correct medical impairment based upon the preponderance of the evidence standard. *Ortiz v. Service Experts,supra.* In the case at bar, the evidence submitted by Claimant showed that she sustained a permanent medical impairment.

First, Claimant showed it more probably true than not that her injury proximately caused a specific disorder of the lumbar region under Table 53 of the AMA Guides. There were objective findings made by her treating physicians, including Drs. Dickson, and Jenks, which support this. As found, these physicians correlated their clinical findings with Claimant's symptoms over the course of her treatment. Since the treatment was based upon finding made upon multiple evaluations, the ALJ concludes that Claimant sustained an injury to her lumbar spine that was ratable.

Second, there was objective evidence of a lumbar injury and therefore a potential impairment in Dr. Johnson's report and the MRI. As found, Dr. Johnson diagnosed lumbar strain in September 2014, more than a year after the injury. Although Dr. Johnson clinically observed full range of motion in the lumbar spine, he did not perform range of motion testing pursuant to the AMA Guides. Dr. Johnson further opined that maintenance treatment in the form of injections was reasonable. This was direct evidence that his clinical findings supported a diagnosis of lumbar strain and Claimant had symptoms for a period of longer than six (6) months. Based upon the evidence before the Court, Claimant had greater than six (6) months of pain and rigidity in her lumbar spine, which entitled her to a 5% specific disorder impairment.

Therefore, Claimant has proven by a preponderance of the evidence that she sustained a permanent medical impairment as a result of her injury. Based upon the clinical findings made by Drs. Dickson, Jenks, Johnson and Ginsburg, along with the testimony of Dr. Swarsen, the ALJ has concluded that Claimant sustained a 5% impairment to her lumbar spine as a result of the industrial injury.

ORDER

It is therefore ordered that:

1. Claimant sustained a 5% whole person impairment as a result of the 7/22/13 industrial injury.

2. Respondents shall pay Claimant PPD benefits based upon a 5% whole person rating.

3. Since Claimant was a minor on the date of injury, PPD benefits shall be paid pursuant to Sections 8-42-102(4) and 8-42-107(8)(d),C.R.S.

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 31, 2015

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right shoulder and right wrist with an onset date of December 5, 2013.

2. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his left shoulder on February 7, 2014.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment benefits for his right shoulder, right wrist, and left shoulder.

4. Whether Claimant has established by a preponderance of the evidence that Dr. Reichhardt is an authorized treating physician.

5. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Prior to November, 2013 Claimant worked for Employer in the position "trim loin tail." Claimant worked an overnight shift, labeled the "B" shift.

2. In approximately August, 2013 Claimant bid on a daytime "A" shift job position of "seam inside round." Claimant won the bid and began working the "A" shift in the position "seam inside round" in the beginning of November, 2013.

3. The new position of seam inside round was more physically demanding than Claimant's prior position of trim loin tail. The pull force for trim loin tail is listed on Employer's job description as 5-8 pounds while the pull force for seam inside round is listed as 35 pounds. A video of the different positions also shows the new position of seam inside round to be more physically demanding.

4. The seam inside round position required Claimant to hold a hook in his left hand, hook the meat, pull it closer to him, cut it with his right hand for 20-25 seconds, and rest for 8-10 seconds between cuttings. Claimant alleges that the repetitive motion from moving his hand and shoulder in the seam inside round position caused injury to his right wrist and shoulder.

5. Approximately one month after starting the seam inside round position, Claimant alleges that he began experiencing pain in his right wrist and right shoulder due to repetitive movements.

6. At this time, Claimant had been having trouble making count in his new position and was failing to meet his job requirements.

7. On December 5, 2015 Claimant was evaluated by Employer's health services unit. Claimant reported pain in his right wrist, that he had just started pulling count, and that this job was quite a bit harder than his previous job. It was noted that Claimant had tenderness and slightly limited range of motion in his right wrist. Claimant was provided a cold pack, NSAID's for pain, and an elastic wrist support. Claimant was restricted from using his right wrist for the rest of the shift. Claimant did not report any right shoulder pain. *See* Exhibit 2.

8. Claimant filled out a pain chart and circled his right hand/wrist as the injured area and rated the severity of pain as a 6/10. *See* Exhibit 2.

9. Claimant was provided a designated provider list. Claimant was told he could chose which provider he wished to select and Claimant initialed that he wished to select Banner Occupational Health Services. Claimant signed and dated this document. *See* Exhibit 2.

10. On December 6, 2013, Claimant was evaluated at Employer's health services. Claimant reported continued pain in his right wrist. It was noted that Claimant had better range of motion but noticeable weakness and tenderness. Claimant was provided a cold pack, NSAID's for pain, and a coban wrap for added support. Claimant was restricted to ¼ of a count. *See* Exhibit 2.

11. On December 9, 2013 Claimant was evaluated at Employer's health services. Claimant reported pain in the right wrist was a little better. It was noted Claimant had better range of motion and that Claimant had a small nodule like bump/growth on the radial head of the right wrist that was firm and moved when Claimant moved his wrist. Claimant was provided heat to his right wrist, ibuprofen, an elastic wrist support, and an ergo hook for his left hand. Claimant's ¼ of a count restriction was continued. *See* Exhibit 2.

12. On December 10, 2013 Claimant was evaluated at Employer's health services. Claimant reported his wrist was about the same. It was noted that tenderness was slightly improved but that Claimant still had a floating type of nodule about the radial head of the wrist. Claimant was provided heat, NSAID's for pain, and an elastic wrist support. Claimant continued to be restricted to ¼ of a count. *See* Exhibit 2.

13. On December 11, 2013 Claimant was evaluated at Employer's health services. Claimant reported continued pain in his right wrist and stated he was now also having pain in his right shoulder. Claimant reported that his supervisor was not

following the ¼ count restriction and that his supervisor had him on ½ of a count. Claimant was provided heat and NSAID's for pain. The ¼ of a count restriction was continued. *See* Exhibit 2.

14. On December 11, 2013 Claimant sought treatment at his personal provider's office and was evaluated by John Volk, M.D. Claimant reported right shoulder and hand pain for the last two weeks with numbness to his right fingers and difficulty making a fist. Claimant reported his belief that he injured his arm at work with repetitive motion cutting meat and that he was moved several weeks ago from the night to the day shift with a new job involving more repetitive motion of his right shoulder. Dr. Volk assessed right arm pain as a new repetitive use injury and advised Claimant to seek further evaluation through proper work channels. *See* Exhibit 3.

15. On December 12, 2013 Claimant was evaluated at Employer's health services. Claimant reported he was about the same. Claimant was again provided with heat, NSAID's for pain, and was continued on a ¼ of a count restriction. *See* Exhibit 2.

16. On December 13, 2013 Claimant was evaluated at Employer's health services. Claimant reported having more pain especially in the right shoulder. Claimant reported that his supervisor was not abiding by his ¼ of a count restriction. It was noted that Claimant continued to show good range of motion. Claimant was provided heat, NSAID's for pain, and his ¼ of a count restriction was continued. *See* Exhibit 2.

17. On December 16, 2013 Claimant was evaluated at Employer's health services. Claimant reported that his right shoulder was a little better after having the weekend off, but that he was still having pain. Claimant reported that his job of seam inside rounds was too hard for him and that he would like to be back on his old job of trim loin tails. Claimant reported that he wanted to stay on A shift. Claimant reported numbness in his 4th and 5th fingers, continued to have a floating nodule along the radial head of his right wrist, and showed full range of motion in his right wrist. Claimant was continued on ¼ of a count restriction. Claimant was referred to "Fab Supt" to discuss possibilities of a job change to betters suit his physical abilities. *See* Exhibit 2.

18. On December 17, 2013 Claimant was evaluated at Employer's health services. Claimant reported his right shoulder was hurting more and that he had little if any change to his right wrist. Claimant's ¼ of a count restriction was continued. *See* Exhibit 2.

19. In late December, 2013 Claimant's restriction was increased to ½ of a count.

20. On January 2, 2014 Claimant was evaluated at Employer's health services. Claimant reported pain/numbness in his right hand/thumb/index finger and pain in his right shoulder. It was noted that Claimant's initial pain was in the hand then several days later while on reduced count restriction Claimant began to report right shoulder pain. It was noted that Claimant had reported the job he was doing was too

hard and that if he could go back to trim loin tail that his complaints would be resolved. It was noted that Claimant was moved back to B shift not to his liking and that Claimant was back to the complaints of hand and now shoulder pain even though on his old job and on a reduced count. It was noted that the basis of Claimant's complaints showed to be unfounded with no mechanism to justify the complaints. Claimant's restrictions noted he would gradually resume back to full and regular duties in trim loin tail over the next two weeks. *See* Exhibit 2.

21. On January 3, 2014 Claimant was evaluated at Employer's health services. Claimant reported right hand and shoulder bothering him. It was noted there was no real mechanism apparent other than Claimant's displeasure with being back on B shift. It was noted that Claimant continued to show full range of motion with no acute distress or objective findings to note. Claimant was to continue with slowly progressing back to his regular duties. *See* Exhibit 2.

22. On January 7, 8, and 9, 2014 Claimant was evaluated at Employer's health services with no complaints specifically noted and continued expectation of working toward regular duties. *See* Exhibit 2.

23. On January 10, 2014 Claimant was evaluated at Employer's health services with no specific complaints noted and progression toward regular duties again continued. It was noted Claimant was playing on his cell phone. *See* Exhibit 2.

24. On January 14, 2014 Claimant was evaluated at Employer's health services. Claimant reported right hand numbness and pain. It was noted that Claimant had full range of motion and no indication or objective findings. It was noted that Claimant was able to play with his cell phone without difficulty during care. Claimant was released from health services with no restrictions. *See* Exhibit 2.

25. Claimant continued to work in trim loin tail on the B shift.

26. Employer generally treats its employees in its own health services unit. An employee is sent to a doctor when emergent treatment is needed, an employee asks to see a doctor, or if an employee is being treated in house and fails to show progression. When an employee asks to see a doctor, they are set up with an appointment as soon as possible. If they do not ask to see a doctor, the decision to send an employee to a doctor is made on a case by case basis.

27. In mid to late January, Claimant saw John Michaud, EMT at Employer's health services. Claimant asked to see a doctor. Mr. Michaud passed the information on in person to both the nurse who was primarily treating Claimant at Employer's health services as well as to the nurse manager of Employer's health services.

28. Around the same time in mid to late January, Employer was contacted by Insurer. Employer found out that Claimant had an attorney and wanted to see a doctor. Prior to mid to late January, Employer was not aware that Claimant wanted to see a

doctor. When an employee requests to see a doctor, the form the employee filled out when the initial injury was reported is pulled to see which doctor the employee chose and Employer sets employee up with an appointment.

29. Here, after finding out that Claimant had requested to see a doctor, Employer pulled the paperwork, saw that Claimant had selected Banner Occupational Health, and Employer set an appointment for Claimant at Banner Occupational Health with Cathy Smith, M.D. for February 27, 2014.

30. Jay Grant, LPN was the nurse that primarily treated Claimant at Employer's health services. Mr. Grant explained to Claimant at the initial visit that if a doctor was needed one would be made available and that Claimant needed to decide which doctor to pick on the form in the case one was needed. Claimant did not need an interpreter while being treated by Mr. Grant. Claimant communicated with Mr. Grant in English and expressed his complaints and needs without problems or hesitation in English. Claimant did not ask Mr. Grant for an interpreter at all during his treatment until after Claimant hired an attorney. Mr. Grant noted that if he believed an interpreter was needed or if Claimant had requested an interpreter, he had a language line available and would have used it. Claimant did not ask Mr. Grant if Claimant could see a doctor at any time during treatment and if Claimant had, Mr. Grant would have honored his request. Mr. Grant opined that if someone wanted to see a doctor he was fine with it and it made his job somewhat easier since he would no longer be primarily treating the person.

31. At hearing, Claimant answered questions asked to him in English several times prior to translation of the question to Spanish being completed.

32. On January 27, 2014 Insurer mailed a letter to Claimant advising him that an appointment had been scheduled for him with Dr. Cathy Smith at Banner Occupational Health for Thursday February 27, 2014. *See* Exhibit B.

33. Claimant alleges he never received the letter despite it being mailed to his correct address.

34. On February 7, 2014 while working in trim loin tail on the B shift Claimant alleges he suffered a new injury to his left shoulder. Claimant alleges he was moving a large bucket full of meat when it got stuck and he pulled with his left arm and felt strong pain in his left shoulder.

35. On March 12, 2014 Insurer mailed a second letter to Claimant noting he failed to attend the medical appointment set with Dr. Smith on February 27, 2014 and that they had rescheduled the appointment to Wednesday, April 9, 2014. Claimant also alleges that he never received this second letter despite it being mailed to his correct address. *See* Exhibit B.

36. Claimant received a phone call from Banner Occupational Health the day of one of his appointments as a reminder call. Claimant alleges he had insufficient time to make it to the appointment. Claimant is unsure if he received the call in February or in April.

37. There are no treatment records or reference to the February 7, 2014 alleged injury until March 6, 2014 and Claimant did not file a workers' compensation claim until May 8, 2014.

38. After his release from treatment at Employer's health services in January, 2014 and through April, 2014 Claimant was provided with in house treatment protocol slips. Most of the slips are illegible and it is unclear as to whether or not Claimant received any treatment on the dates he received treatment protocol slips. If claimant just received ice, Tylenol, or if the slips just repeated a restriction imposed by a doctor Claimant was seeing outside of Employer's health services, then a treatment record or detailed note would not be expected to exist. A treatment record or detailed note is only entered if an employee is taken back to a room for examination or if treatment is provided.

39. On March 6, 2014 Claimant was evaluated by Gregory Reichhardt, M.D. Claimant went to see Dr. Reichhardt at the direction of his attorney. Claimant reported bilateral shoulder and upper extremity pain. Claimant reported working as a meat trimmer where carcasses were suspended from a chain and he would cut the round of the carcass off and it would fall to the belt. Claimant reported starting cutting at shoulder level and moving down below shoulder level with significant force used in his right arm. Claimant reported that on one particular piece he had the onset of right shoulder and arm pain, reported the injury, and was seen at Employer's health services. Claimant reported he changed to night shift which was less physically demanding and that while on the night shift he was moving a tub of meat and again was seen at health services. Claimant reported then being switched to working in the laundry. *See* Exhibit 1.

40. Claimant reported pain over both shoulders, radiating down the arm and into the second and third digits of the right hand and the fourth digit of the left hand with some pain along the upper trapezius towards the neck. Dr. Reichhardt assessed bilateral shoulder and upper extremity pain. Dr. Reichhardt recommended physical therapy for instruction in a periscapular stretching program, a scapular stabilization program, and cervical stretches. Dr. Reichhardt performed trigger point injections over the upper trapezius and levator scapula bilaterally. Dr. Reichhardt noted that if Claimant continued to have radiating upper extremity symptoms, he would recommend a cervical MRI. *See* Exhibit 1.

41. On April 4, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported continued pain over the neck, periscapular area, and both shoulders with pain extending down the arms and numbness extending down into the fourth digits bilaterally. Claimant reported no relief with the trigger point injections. Claimant was

referred for a cervical MRI and was referred for physical therapy. Claimant was provided work restrictions. *See* Exhibit 1.

42. On April 9, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported neck pain and bilateral upper extremity pain. Dr. Reichhardt assessed bilateral shoulder and upper extremity pain and noted positive impingement signs in the shoulders. Dr. Reichhardt recommended an MRI to address cervical radiculopathy. *See* Exhibit 1.

43. On April 14, 2014 Claimant underwent an MRI of his cervical spine that was interpreted by Richard Ruderman, M.D. Dr. Ruderman provided the impression of minimal/mild degenerative disc disease and osteoarthritis with no evidence of focal disc protrusion or spinal stenosis. *See* Exhibit 1.

44. On April 15, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported he continued to have pain focused over the shoulders that radiates up towards the neck and pain and numbness extending down his arms. Dr. Reichhardt reviewed the cervical MRI images that demonstrated C3-4 osteophyte with moderate foraminal narrowing and disc bulges at C4 to C7 as well as mild left neuroforaminal C5-6 and C6-7. Dr. Reichhardt noted on examination positive shoulder impingement signs bilaterally and decreased bilateral shoulder range of motion. Dr. Reichhardt assessed bilateral shoulder and upper extremity pain. Dr. Reichhardt opined that the examination was consistent with subacromial impingement and myofascial pain but that the cause of Claimant's more diffuse upper extremity pain was unclear. Dr. Reichhardt noted that he discussed doing a shoulder MRI but that Claimant noted it would be difficult for him to afford. Dr. Reichhardt also discussed pursuing an EMG/NCV test and that Claimant preferred to wait and do the shoulder MRI first. *See* Exhibit 1.

45. On April 24, 2014 Claimant underwent an Independent Medical Evaluation performed by Kathleen D'Angelo, M.D. Dr. D'Angelo performed a record review and physical examination of Claimant. She opined that Claimant had bilateral shoulder pain and impingement signs and possibly arthritis or another system disease, which were not work related. Dr. D'Angelo noted Claimant's ever changing and migratory pain complaints could not be traced to any specific physiologically or neurologically known pathway. Dr. D'Angelo noted Claimant's diffuse pain complaints in his entire left arm and right arm from his shoulders down to his fingers. Dr. D'Angelo disagreed with Dr. Reichhardt's opinion that Claimant's pain complaints were work related. *See* Exhibit A.

46. Dr. D'Angelo noted the inconsistencies in Claimant's report that his symptoms developed immediately to the right hand and shoulder when the medical records indicate first right wrist complaints and approximately one week later right shoulder complaints. Dr. D'Angelo noted the inconsistent reports of Claimant that the right shoulder/wrist was due to repetitive motion but also his report of one specific meat cut causing acute injury/pain. Dr. D'Angelo noted inconsistencies between reports to different medical providers on when and how Claimant's symptoms developed. Dr. D'Angelo opined that Claimant's pain to all of his fingers and his diffuse right and left

arm pain did not follow any known neurological pathway and was not consistent with symptoms of impingement. Dr. D'Angelo noted that although Claimant might have diagnoses of impingement syndrome and myofascial pain, the injuries that Claimant alleges did not cause either of those conditions. Dr. D'Angelo opined that the described mechanisms of injury would not cause prolonged pain complaints and normal physical examination findings. She noted that while observing Claimant at the IME he displayed normal range of motion with no apparent distress or pain. Dr. D'Angelo opined that with Claimant's right arm complaints, he had only been at the position for one month and only pulling count for one week and that the timeframe was not sufficient enough to develop a cumulative occupational disease. *See* Exhibit A.

47. On May 1, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported bilateral shoulder pain and pain over the dorsal radial aspect of the wrist. Claimant reported pain in his hands, primarily over the MP joints. Dr. Reichhardt assessed bilateral shoulder and upper extremity pain, with an exam consistent with subacromial impingement and myofascial pain. Dr. Reichhardt again opined that the cause of the more diffuse upper extremity pain was unclear. Dr. Reichhardt also assessed right dorsal radial wrist pain, first dorsal compartment tenosynovitis and cyst overlying the abductor tendon, and right hand pain. *See* Exhibit 1.

48. On May 8, 2014 Claimant completed a Worker's Claim for Compensation for the alleged February 7, 2014 injury.

49. On May 12, 2014 Claimant underwent an MRI of his right shoulder. The impression was tendinosis and bursal sided attenuation and fraying of the supraspinatus tendon, but no evidence of a significant partial-thickness or full-thickness rotator cuff tear; small to moderate amount of fluid and edema in the region of the subacromial/subdeltoid bursa; and infraspinatus tendinosis without evidence of a significant infraspinatus tendon tear. *See* Exhibit 6.

50. On June 10, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported doing better and that he had better shoulder range of motion with his work in therapy but continued to have pain over the neck and in both shoulders. Claimant reported pain extending down his arms in digits three and four in both hands. Dr. Reichhardt continued his assessment, and again noted that Claimant's examination was consistent with subacromial impingement and myofascial pain but that the cause of Claimant's more diffuse upper extremity pain was unclear. *See* Exhibit 1.

51. On June 16, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported that he was doing better. Dr. Reichhardt noted on physical examination that Claimant had tenderness over both shoulder with mild range of motion limitations and positive impingement signs on both sides as well as decreased sensation in upper extremity digit four in both hands. Dr. Reichhardt continued to assess bilateral shoulder and upper extremity pain, right dorsal radial wrist pain, and right hand pain. Dr. Reichhardt noted that Claimant was taken off of work because of his restrictions but that Claimant wanted to try going back to full duty work. Dr. Reichhardt agreed it was

reasonable to give full duty work a try. Dr. Reichhardt also suggested an upper extremity EMG to evaluate the arm numbness. Dr. Reichhardt continued to opine that the cause of Claimant's more diffuse upper extremity pain was unclear but that it was medically probable that the subacromial shoulder impingement was related to Claimant's work activities. *See* Exhibit 1.

52. On July 24, 2014 Claimant was evaluated by Dr. Reichhardt. Claimant reported he was doing better, continued to have bilateral shoulder pain, but was doing reasonably well working full duty. Claimant reported morning stiffness that lasts 20-30 minutes and that he had swelling in his hands as well as continued numbness and tingling in the upper extremities. Dr. Reichhardt recommended that Claimant get an arthritis profile and that Claimant proceed with a left shoulder MRI. *See* Exhibit 1.

53. On February 27, 2015 Claimant underwent an MRI of his left shoulder that was interpreted by Benjamin Aronovitz, M.D. The impression was high grade partial thickness bursal sided tear through the supraspinatus tendon; and partial thickness undersurface tear through the distal fibers of the subscapularis tendon, through which there is mild medial subluxation of the long head of the biceps tendon. *See* Exhibit 6.

54. Dr. Reichhardt testified at hearing. Dr. Reichhardt noted he did not focus much on Claimant's right hand or wrist complaints because the shoulders were a bigger complaint. Dr. Reichhardt noted his concern with structural problems associated with the shoulders and potential neurologic issues occurring in the neck which is why he first did a cervical MRI which only showed minor degenerative changes. He noted he then focused more on the shoulders. Dr. Reichhardt opined that it appeared unlikely that Claimant have an arthritic or rheumatoid arthritis component to his current pain complaints because Claimant did not have the classic manifestations of upper rheumatoid arthritis. He opined that it was unlikely that Claimant's hand and/or shoulder complaints represented an inflammatory arthritis. Dr. Reichhardt opined that Claimant's shoulder problems were more likely musculoskeletal problems including a partial thickness rotator cuff tear on the left and tendonosis and subacromial impingement.

55. Dr. Reichhardt acknowledged that in July of 2014 he was concerned with Claimant having a rheumatoid type problem due to his bilateral hand pain and swelling with morning stiffness. Dr. Reichhardt noted that the MRI of the left shoulder showed that Claimant had a downsloping acromion and opined that a downsloping acromion can contribute to or cause tendonosis in the rotator cuff and could cause rotator cuff tears. Dr. Reichhardt also opined that a partial thickness under surface tear of the subscapularis often tends to be degenerative and that he would most times think that it was a degenerative and not acute injury. Dr. Reichhardt, however, opined that although mostly degenerative and not acute, the partial thickness undersurface tear of the subscapularis tendon could have been aggravated by the work injury.

56. Dr. D'Angelo testified at hearing consistent with her report. Dr. D'Angelo opined that it was not medically probable that Claimant, a previously healthy 33 year old, would develop right wrist complaints, right shoulder complaints, then diffuse right

arm complaints, left shoulder complaints, then diffuse left arm complaints, neck complaints, and identical bilateral ring finger numbness in a short period of time due to separate discrete and unrelated injuries.

57. Dr. D'Angelo opined that it was not medically probable that Claimant's present complaints were causally related to his work with Employer either from an acute, chronic, or cumulative injury. Dr. D'Angelo opined that she could not with any medical probability offer one or more diagnoses that would explain Claimant's current complaints.

58. Dr. D'Angelo opined that impingement syndrome is a genetic predisposition to abnormalities in the bone structure at the AC joint. Dr. D'Angelo noted that Claimant was adamant at the IME that his pain began in his right shoulder, then descended down his arm finally culminating into total arm pain including the hand and wrist which was not consistent with Claimant's treatment records which show upon his initial report and pain diagram he noted only right wrist pain. Dr. D'Angelo noted the records were consistent with a ganglionic type cyst on claimant's right wrist which is most times associated with degenerative changes in the wrist.

59. Dr. D'Angelo noted Claimant's symmetric bilateral hand complaints of morning stiffness and swelling makes her concerned about a rheumatological disease given Claimant's young age and symmetrical symptoms. Dr. D'Angelo noted that with either an acute injury or a cumulative injury, the expectation and what is medically anticipated is that people heal, tissue heals. She noted that symptoms are anticipated to resolve particularly when away from the inciting activity but that with Claimant, he had been through five job changes and instead of improving, he had spreading symptoms. Dr. D'Angelo opined that was inconsistent with having suffered an acute injury or a cumulative injury but that with a systemic disease you would see that.

60. Dr. D'Angelo opined that a cumulative trauma type exposure has a general range of six months to fourteen years and that it would be unusual for an cumulative trauma to develop within only three to four weeks and would be very unusual for it to have persisted four months after the initial onset Claimant reported despite him having left the position three months prior. She opined that to have persistent pain that worsened and then spread after such a short period of exposure and a long period out of the job was very unusual and not medically consistent. Dr. D'Angelo opined that she had no medical diagnosis of a type of trauma to the shoulder that would account for swelling into Claimant's bilateral hands seven months after an initial presentation. Dr. D'Angelo opined that shoulder impingement is something Claimant has had since birth and will have and that he will continue to have flare and remissions and that his shoulder impingement is not related to either work incident he described. Dr. D'Angelo also opined that shoulder impingement is very localized and does not cause swelling or numbness and that shoulder impingement in this case only explained a portion of Claimant's complaints.

61. Dr. D'Angelo is found credible and persuasive. Her overall opinion notes Claimant's inconsistent reports of what body parts were initially injured, and how the symptoms first occurred and spread. Her overall opinion also notes Claimant's inconsistent report of when the injury occurred and whether it occurred acutely or whether it occurred from cumulative repetition. Her opinion that Claimant's various complaints and symptoms are unexplained and that she cannot offer a diagnosis fitting the various complaints and symptoms is consistent with Dr. Reichhardt's opinions that Claimants diffuse symptoms (besides bilateral shoulder impingement) could not be explained. Overall, Dr. D'Angelo is found credible and persuasive that Claimant did not suffer a work related injury either to the right shoulder, right wrist, or to the left shoulder.

62. The opinion of Dr. Reichhardt only opines that that the bilateral shoulder impingement symptoms are work related. Dr. Reichhardt does not relate the right wrist or the bilateral right and left arm diffuse symptoms to either work related injury date. Dr. Reichhardt, similar to Dr. D'Angelo, was unable to explain the more diffuse right and left arm symptoms and acknowledged that he did not focus on the right wrist. Overall, his opinion on the work relatedness of the bilateral shoulder impingement is not found as credible or persuasive as the opinion of Dr. D'Angelo.

63. Claimant's testimony is not found credible or persuasive. Claimant provided inconsistent reports of the right shoulder and right wrist injuries. Claimant also exaggerated his lack of English speaking skills as demonstrated by his answering several questions prior to translation and as shown by testimony of Mr. Grant who credibly explained that Claimant was able to receive treatment with no problems conversing in English. Claimant also did not file a claim regarding his alleged acute left shoulder injury for several months after the alleged injury date, which is not logically credible for someone who had suffered an acute injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder

should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet his burden to show that he suffered a compensable work injury to his right shoulder, right wrist, or left shoulder. Overall, Claimant is not found credible or persuasive in his testimony. For the alleged repetitive use injury to his right shoulder and right wrist, Claimant initially reported only right wrist pain. He later reported the right shoulder pain. Claimant at a later time then reported that the pain started in his right shoulder and traveled down his entire arm into his right hand. Despite clear reports to Employer's health services that the initial pain was only to the right wrist, Claimant later provided inconsistent reports of where the initial pain was and how the pain started and traveled throughout his right upper extremity. Additionally, Claimant has in this claim reported two separate alleged mechanisms of injury to his right wrist and right shoulder. Claimant alleges both a repetitive use/cumulative trauma type mechanism but also reported a sharp acute injury to his right shoulder while cutting a piece of meat. For the left shoulder injury, Claimant alleges an acute injury but failed to report the injury immediately or seek immediate medical care. The first mention by medical providers of Claimant's left shoulder injury was not made until several months after the alleged acute injury occurred and Claimant did not file a claim for workers' compensation until several months after the alleged injury. These actions are inconsistent and are not logical for someone who had suffered an acute injury.

Further, the opinion of Dr. D'Angelo is found credible and persuasive that it is not medically probable that Claimant has such severe, widespread, and identical symptoms in both his right and left upper extremities despite very different reported mechanisms of injury. Dr. D'Angelo is credible and persuasive that the Claimant's conditions are not work-related. Claimant has had swelling in his bilateral hands which is consistent with an underlying rheumatological disorder and both Dr. D'Angelo and Dr. Reichhardt have recommended Claimant undergo testing. Claimant has swelling in pain in both hands throughout the claim despite being moved to different less demanding jobs and he continues to have swelling present in the morning upon waking. Dr. D'Angelo is credible that these symptoms are consistent with a systemic inflammatory disease. Further, it is noted that regardless of the work activities, the symptoms remained the same bilaterally and Claimant's arthritic symptoms continued up to the hearing date. Additionally, Dr. D'Angelo is credible that Claimant's downsloping acromion on his left shoulder can cause impingement and a rotator cuff tear and is a genetic predisposition not causally related to employment. Dr. D'Angelo is credible that a cumulative injury would not develop over a short period of time, a couple weeks, as Claimant alleges and also is credible that the symptoms would not persist for several months after the repetitive activity in question was no longer being performed. The evidence suggests that Claimant may have an underlying rheumatological process/disease. Both Dr. D'Angelo and Dr. Reichhardt have this shared concern and have recommended Claimant undergo an arthritis panel.

Dr. Reichhardt could not explain Claimant's diffuse bilateral arm symptoms and did not focus on Claimant's right wrist complaints during treatment, but Dr. Reichhardt opined that Claimant's bilateral shoulder impingement is work related. However, the opinion of Dr. D'Angelo that the bilateral shoulder impingement is not work relates is found more credible and persuasive. Dr. Reichhardt's opinion is based, in part, on Claimant's subjective report on how the injuries occurred. Claimant is not entirely credible and his reports cannot be relied upon to any degree of certainty. Overall, Dr. D'Angelo noted the inconsistent reports of initial pain locations, inconsistent reports of mechanisms of injury, and her overall opinion is credible and persuasive. Claimant has failed to show, more likely than not, that his bilateral shoulder impingement or his right wrist pain complaints are causally related to his employment.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

As Claimant has failed to establish an industrial injury, the medical treatment that Claimant has received to date has not been shown to be reasonable or necessary to cure and relieve any industrial injury. The conditions Claimant currently suffers from for which he seeks medical treatment are not causally related to an on the job injury and he therefore has failed to meet his burden of proof to show an entitlement to medical benefits.

Authorized Provider – Dr. Reichhardt

Section 8-43-404(5)(a), C.R.S. gives the respondents the right in the first instance to select the authorized treating physician(ATP). Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999). If upon notice of the injury the employer fails forthwith to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006).

In this case, Employer did not fail to exercise its right to select a treating physician. After being first notified of the injury at Employer's health services, Employer exercised its right to select a treating physician by providing Claimant with a designated provider form and Claimant was able to initial and choose which of the two providers he wished to designate. Employer thus exercised their right to select a physician. Employer did not advise Claimant that medical treatment would not be provided nor did they refuse Claimant medical treatment. Rather, they treated Claimant in-house until the point where Claimant asked to see a doctor and Employer set up an appointment for Claimant with the provider Claimant had chosen from Employer's designated provider list.

The Claimant has failed to establish that the treatment he sought on his own with Dr. Reichhardt was authorized treatment. Employer had not denied Claimant treatment and had scheduled Claimant for an appointment with Dr. Smith at the time Claimant sought treatment elsewhere. Employer had been treating Claimant and had provided Claimant a designated provider list when Claimant reported the injury. As such, Claimant was aware that designated providers existed and was aware of which provider he was expected to see if he needed treatment from a doctor. Instead of seeking medical care from that provider, Claimant on his own sought out a separate provider and Claimant has not established that the right of selection had passed to him at the time he saw Dr. Reichhardt and has not met his burden to show that Dr. Reichhardt is an authorized provider in this matter.

Average Weekly Wage

As the claim is not compensable, the issue of average weekly wage is moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable injury to his right shoulder and right wrist with an onset date of December 5, 2013.

2. Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable injury to his left shoulder on February 7, 2014.

3. Claimant has failed to establish by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment benefits for his right shoulder, right wrist, and left shoulder.

4. Claimant has failed to establish by a preponderance of the evidence that Dr. Reichhardt is an authorized treating physician.

5. Any issues not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 11, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-942-206-02

ISSUES

1. Whether the respondents have overcome the Division independent medical examination (DIME) determination that the claimant is not at maximum medical improvement (MMI) by clear and convincing evidence.

2. If so, whether the claimant's impairment rating is the 0% provided by Dr. Hattem, the authorized provider (ATP), and Dr. Beatty.

FINDINGS OF FACT

1. The claimant was injured on January 23, 2014 when she fell in the parking lot outside of the respondent-employer's place of business. As the claimant was exiting her car, she slipped on snow and ice and fell with her left leg out in front of her and her right leg behind her. As she was falling, she twisted her body to the right, landing mostly on her right side.

2. She had immediate onset of pain in her low back which radiated down her left leg. She then got up and made her way to the door of her employer where she immediately went downstairs and notified her staff supervisor, Daphne, of the fall.

3. After the claimant made her way inside the store, she noticed that her clothes were wet from the snow upon which she fell. The claimant attempted to work but after one of the mall's security officers noticed that she "did not look good" and suggested that she go to the hospital, an ambulance was called and she was transported to Memorial Hospital. The claimant was treated and released.

4. She then followed up with Concentra Medical Clinic, her employer's authorized treating physician. When her condition failed to improve after undergoing physical therapy, dry needling and chiropractic therapy, the claimant underwent an MRI on her lumbar spine. She was then referred to Dr. John Bissell, for pain management. Dr. Bissell treated the claimant with medications and epidural steroid injections, from which the claimant had no long-lasting improvement.

5. Dr. Bissell referred the claimant to Dr. David Hopkins for a psychological evaluation which the claimant declined because, at the time, she did not feel her

problems were “mental” but, rather, “physical” in nature.

6. The claimant was also seen by Dr. Rauzzino, a neurosurgeon, who determined she was not a surgical candidate. The claimant was then sent back to Concentra where she was released from care by Dr. Hattem with no impairment. Dr. Hattem’s note of January 15, 2015 reflects “today, as requested, I will release [the claimant] to full time, full duty work.” When asked at hearing about whether she “agreed” with Dr. Hattem that she should be released from care at full duty, the claimant explained that it was her understanding that she would lose her job if she was released from care with any permanent physical restrictions.

7. The MRI of claimant’s lumbar spine showed mild degenerative changes as well as a subtle bilateral annular disc bulge with noncompressive left neural foraminal narrowing at L2-3; an annular disc bulge at L3-4 with small left foraminal disc protrusion potentially impinging the exiting L3 nerve root; a posterior bilateral annular disc bulge at L4-5 greatest on the left, potentially impinging the exiting L4 nerve roots; and a circumferential annular disc bulge at L5-S1.

8. The claimant observed that she still has significant pain in her lower back which radiates down her leg. She continues to work for the respondent-employer full time, although now works as a cashier. She has a constant limp because of the radiating pain in her left leg. The claimant has good days and bad days with regards to her low back and leg pain. On the bad days, the pain can be extreme especially if she has to stand too long. On those days, she cannot bend over too far and sometimes she gets nauseated from the pain. She feels that she needs more treatment on her lumbar spine because of her ongoing pain levels and the fact that she “does not walk normal” like she used to.

9. The claimant underwent a Division independent medical examination by Dr. Miguel Castrejon on May 6, 2015. Dr. Castrejon opined that the claimant was not at MMI and felt that she needed additional treatment on her lumbar spine to include a left L4-5 and L5-S1 facet joint injection and perhaps a repeat of the left L5-and S1 transforaminal epidural steroid injection. He opined that if there was objective evidence of benefit following the facet injection(s), consideration should be given to medial branch blocks and rhizotomies. He also felt that if Lyrica has not been attempted, it should be considered in low dose with slow progression to avoid side effects. He also recommended the use of nonnarcotic medications and an additional 6 physical therapy sessions following the facet injections to instruct the claimant with regards to an independent exercise program. At the end of this additional treatment, Dr. Castrejon recommended that a functional capacity examination should be completed. He also

gave the claimant a 17% whole person impairment to her lumbar spine.

10. Dr. Castrejon opined that the claimant's physical complaints of low back pain and radiculitis were consistent with her described mechanism of injury. He opined that the claimant had multi-level preexisting degeneration in her lumbar spine which was aggravated as a result of her slip and fall. He diagnosed the claimant with chronic lumbar musculo-ligamentous strain/sprain with left lower limb radiculitis. He opined that the claimant sustained a permanent aggravation of her preexisting degenerative lumbar spine condition when she fell in the parking lot. The basis for this opinion is the fact that the claimant has not had any medical treatment for her lower back since 2009, had not lost any time from work prior to this industrial injury due to her lower back pain nor had any functional residual impairment to her lower back prior to this industrial injury.

11. Dr. Castrejon explained that the reason he did not feel the claimant was at MMI was because she continued to have a medical condition that had been previously undiagnosed, namely, facet mediated pain (rather than discogenic or SI joint pain) and for which he opined that she would derive additional benefit from more treatment.

12. Dr. Castrejon opined that, in his experience, an SI condition will not typically refer pain distal to the knee. Referral of pain to the distal portion of the knee is not consistent with a regular strain/sprain type injury. Rather, Dr. Castrejon opined that the claimant likely is suffering from facet mediated pain based upon the MRI and the fact that he felt no one had looked at why the claimant was having lower limb symptoms as far down as the foot. He noted that a "facet mediated problem implies that at the level of the spine, there's some impingement. The MRI revealed that there was facet arthropathy at L4-5. There was also fusion at the level of the facet joint which implies a swelling.....So there are three sites of possible impingement of the nerve root–the disc bulge, the facet arthropathy with the fusion and a foraminal stenosis that was significantly more pronounced on the left at L4-5. The importance of the L4-5 level is that at that level, you will get pain referred into the limb distal to the knee to the level of the foot".

13. Dr. Castrejon also noted that the claimant received approximately 40% benefit following the nerve root blocks at L5 and S1 she underwent by Dr. John Bissell. If the claimant's pain is, in fact, originating out of the L4-5 facet joint, Dr. Castrejon explained that an individual could get some partial relief from an SI joint injection (as the claimant did) simply because the areas are anatomically so close to each other.

14. Dr. Michael Rauzzino and Dr. Brian Beatty both focused on Waddell signs in their medical reports to bolster their opinion that the claimant is malingering and has

symptom magnification. Dr. Castrejon rejected their reasoning by pointing out that Waddell signs were not developed to determine if an individual has symptom magnification or is malingering. Rather, Dr. Waddell developed those tests to specifically determine whether an individual requires psychological care to assist with chronic pain management. He noted that Dr. Hattem's report never mentioned Waddell signs nor indicated there was any element of malingering present. Additionally, Dr. Castrejon noted numerous instances in the medical records where the claimant complained of worsening pain, especially when the claimant attempted to increase her work hours from four to six per day. For that reason, as well as the fact that the claimant has continued to complain of consistent pain in her lumbar spine, Dr. Castrejon has recommended that a functional capacity evaluation be completed before the claimant reaches MMI to determine at what exertional level the claimant is truly capable of working.

15. Dr. Castrejon further testified that the facet injections he has recommended are not being recommended as maintenance medical care. His reasoning is based upon the fact that facet mediated pain syndrome is a new diagnosis and not one for which any of the claimant's previous physicians treated her. It involves its own specific form of care and treatment (facet blocks and perhaps a rhizotomy if the facet blocks are successful). Under the Colorado Worker's Compensation Treatment Guidelines, a rhizotomy is considered a surgical procedure that is curative in nature. Therefore Dr. Castrejon opined that it doesn't seem reasonable to continue the claimant on MMI status at the present time.

16. Dr. Castrejon further explained that it is difficult to determine if an individual is self-limiting if a physician only sees that individual one time. If a physician sees an individual numerous times and follows a patient over a longer period of time, it is easier to make that assessment. Dr. Castrejon commented numerous times on the fact that the claimant had a solid work history with the respondent-employer and has continued to work throughout this worker's compensation claim.

17. The claimant underwent an IME with Dr. Brian Beatty at the respondents' request on August 5, 2015. Dr. Beatty opined that he disagreed with Dr. Castrejon's assessment and felt the claimant remained at MMI, as previously determined by Dr. Hattem, on March 3, 2015. In his opinion, the slip and fall incident which is the subject matter of this claim resulted merely in a lumbar sprain. He also opined that the claimant's preexisting degenerative condition in her lumbar spine has been the source of her pain since she reached MMI. He further opined that the claimant would not have any physical restrictions as a result of this work related injury and that he would not recommend any further treatment with the exception of a possible additional epidural

steroid injection. He does not feel the claimant should undergo another injection until the claimant participates in a psychiatric assessment to determine if the claimant has an underlying somatoform disorder or other issues contributing to her current symptoms. Any further epidural injections or facet blocks should be categorized as maintenance care.

18. Dr. Beatty agreed that he simply has a difference of opinion with regards to Dr. Castrejon regarding the issues of MMI, where the claimant's pain is truly coming from (discogenic versus facet mediated pain); whether the claimant has any permanent impairment related to this injury and the claimant's need (or lack thereof) for future medical treatment.

19. The ALJ finds Dr. Castrejon's analyses and opinions to be more credible than medical analyses and opinions to the contrary.

20. The ALJ finds that the respondents have failed to establish that Dr. Castrejon's analyses and opinions concerning MMI are clearly erroneous.

CONCLUSIONS OF LAW

1. A DIME's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." C.R.S. § 8-42-107(8)(b)(III); *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" that the Division IME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). "Clear and convincing evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probably or the converse, and is free from serious or substantial doubt. *Metro Moving,* supra; *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence established that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995).

2. To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097

(ICAO, July 19, 2004); *see also Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

3. A DIME's "deviation from the *AMA Guides* constitutes some evidence that the DIME physician's rating is incorrect." *Jaramillo v. Pillow Kingdom and Gen. Ins. Co. of Amer. d/b/a Safeco Ins.*, W.C. No. 4-457-028 (ICAO, Sep. 10, 2002). Whether or not the DIME correctly applied the *AMA Guides* and whether a party overcomes the DIME is a question of fact for determination by the ALJ. C.R.S. § 8-43-301(8); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO, Aug. 18, 2004).

4. It is in the ALJ's sole prerogative to assess the credibility of the witnesses and the probative value of the evidence to determine whether the proponent has met his burden of proof. *Dover Elevator Co. v. Indus. Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). It is within an ALJ's purview to assess the relative weight and credibility of various opinions. See, *Kraft v. Medlogic Global Corp. et al.*, W.C. No. 4-412-711 (ICAO, Mar. 15, 2001) (citing *Rockwell Internat'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990)). Additionally, if an individual expert's opinion contains contradictions or is subject to multiple interpretations, the ALJ may resolve the conflict by crediting only a portion of the opinion, or discrediting the opinion in its entirety. *See Kraft*, W.C. No. 4-412-711; *Johnson v. Indus. Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997).

5. An ALJ is required to make specific findings only as to the evidence which is deemed persuasive and determinative. An ALJ is not obligated to address every issue raised or evidence which is unpersuasive. *See Riddle v. Ampex Corp.*, 839 P.2d 489 (Colo. App. 1992) (citing *Roe v. Indus. Commission*, 734 P.2d 138 (Colo. App. 1986); *Crandall v. Watson-Wilson Transportation System, Inc.*, 467 P.2d 48 (Colo. 1970)). Furthermore, an ALJ may resolve conflicts in the evidence based upon his credibility determinations. *See*, *Brodbeck v. Too Busy Painting and Pinnacol Assurance*, W.C. No. 4-163-762 (ICAO, Apr. 16, 2002) (citing *Riddle*, 839 P.2d at 489).

6. Here, there is insufficient evidence to support the contention that it is highly probable that Dr. Castrejon's opinion concerning MMI is incorrect. Dr. Castrejon credibly and persuasively opined that the claimant is in need of additional care to cure or relieve the claimant from the effects of her industrial injury.

7. The ALJ concludes, as found above, that the respondents have failed to establish by clear and convincing evidence that the DIME physician, Dr. Castrejon, was incorrect in opining that the claimant is not at MMI.

ORDER

It is therefore ordered that:

1. The claimant is not at maximum medical improvement as determined by Dr. Castrejon.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 4, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The issues for determination at the hearing were:

1. Whether the Respondents have overcome by clear and convincing evidence the DIME opinion of Dr. Jeffrey Jenks regarding the Claimant's status related to maximum medical improvement ("MMI").

2. Whether the Claimant proved, by a preponderance of the evidence, that she is entitled to medical treatment recommended by the DIME examiner that is reasonably necessary to cure and relieve the effects of the Claimant's February 28, 2014 work injury.

FINDINGS OF FACT

1. The Claimant testified at the hearing that she worked for Employer in February of 2014. Her job duties at that time included driving a feed truck and working on the roll floor. The feed truck she drove was slightly larger than the size of a dump truck. The Claimant would sit about 8 feet off the ground when she was behind the wheel of the truck.

2. Currently, the Claimant is employed as a pharmacy technician for a different employer. Her current job duties include receiving prescriptions, typing into the computer, and grabbing bottles of medication from the pharmacist and bagging them.

3. On February 28, 2014, the Claimant testified that she had just picked up a full load which is 37,000 pounds of feed. On right side of the truck cab is a whole set of levers to operate the conveyor belt for the feed and the scale, among other things. She testified that as she was going down the alley, she passed another driver and there was a slight incline and she started to brake and noticed there were no brakes. She ended up driving into the pond. She testified that she had been in a hurry to get back to the feed lot and she driving about 35 miles per hour last time she looked at speedometer. The Claimant testified that she was wearing a seatbelt at the time of the accident. The truck rolled onto passenger side and the Claimant got out of the vehicle on driver side. She rolled down the window and climbed out and over to the back of truck to the loader basket and they got her to the shore.

4. The Claimant testified that she left work early that day but did not go to hospital that day. She was leaving to see doctor at 3pm that day for previously scheduled appt for another unrelated medical issue. The Claimant didn't go to hospital on March 1st or 2nd either. The Claimant testified credibly that she had filled out paperwork prior to that for her work injury, but office manager didn't fill out paperwork until March 3rd, so her supervisors didn't approve for the Claimant to go to the doctor until March 3rd.

5. After the motor vehicle accident with the feed truck, the Claimant testified that her symptoms included neck and lower back pain, numbness in her fingers, and constant pain close to tail bone that radiates into her buttocks and down into her thigh.

6. On March 3, 2014, the Claimant saw Dr. John D. Glick for medical treatment. Dr. Glick notes, "patient is presenting for pain in her low back, sacrum, across her buttocks as well as in her upper back and shoulder, these all started after an incident where she rolled a feed truck onto its side, this is a low speed MVA, this occurred 3 days ago…" Dr. Glick noted the Claimant reported that at the time of the incident she felt fine but developed worsening pain over the next couple of days. The worst pain was in her low back and left posterior ribs. After physical examination, Dr. Glick assessed a "multitude of soft tissue injures as well as a possible cracked rib. Dr. Glick noted that he offered pain medications to the Claimant but the Claimant's supervisor was present and pushed her not to get any prescription medication and the Claimant declined them (Claimant's Exhibit 3).

7. On March 3, 2014, Andrea Prise, the office manager for the Employer wrote an e-mail addressed to other employees along with the Claimant stating,

> [The Claimant] said she was just fine with taking Tylenol and Ibuprofen. Dr. Glick did prescribe her Flexeril, a muscle relaxer, but she said she didn't want it and gave him the prescription back. Marked full duty for work status, but limited to driving/no shoveling for the week. Her back checks out clear, but she does have a crack in her 6th rib. We will still need to get her to fill out an ESI. I dropped her off at her car before I remembered to do that…"

8. Employer's First Report of Injury was prepared by the Employer's office manager Andrea Prise on March 10, 2014. She noted the Claimant was injured on February 28, 2014 while driving a feed truck. The report notes that the Claimant

> drove the feed truck into the settling pod. The truck laid over on its side in the pod. The EE's unk hand slipped when crawling out of the truck and hit on the side of the truck. The EE suffered a cracked 6th rib. The EE did seek medical treatment…

9. The Claimant saw Dr. Glick again on March 19, 2014 for follow up of the MVA at her work. Dr. Glick notes that the Claimant had declined muscle relaxants and pain medications for rib and low back pain at the last visit because the Claimant reported that she was concerned they would fire her because of the accident. Dr. Glick also noted that "the representative who was present at the last visit also told me that they would rather that I did not prescribe any medication and that it would be 'better for them.'" The Claimant was also advised that the accident was not covered by workers' compensation because it was her fault and so chiropractic care would not be covered. Dr. Glick noted that he placed a call to the insurer's claim's management department to report threatening and inappropriate management of this incident by the Employer. At

this visit, the Claimant reported a sensation of numbness running down her arm into her left hand along with tightness in her neck and shoulder. Pain in the ribs and low back was improving but was exacerbated by working in the mill where the Claimant had to work overhead and push large carts up to several 100 pounds. On examination, Dr. Glick noted, "very tight trapezius and strap muscles in her left neck, radiating down across the top of her shoulder, also tender to palpation in lumbar stress spinal muscles, left somewhat more than right, with spasm here as well, also tender to palpation over her area of possible rib fracture…" Dr. Glick prescribed Flexeril and Vicodin and referred the Claimant for physical therapy. He provided work restrictions limiting repetitive lifting to 25 pounds and all lifting to 50 pounds, pushing to 100 pounds and no shoveling work. Dr. Glick also recommended an MRI of the cervical spine (Claimants' Exhibit 3).

10. As of April 16, 2014, Dr. Glick continued to report "significant tension and spasm in [the Claimant's] trapezius muscles and leading up into her paraspinal muscles on the left side of her cervical spine" and bilateral tenderness to palpation in the lower lumbar paraspinal muscles. Dr. Glick notes slow, if any, progress and continued the Claimant with physical therapy. He also noted that if there was no substantial improvement over the next 2-3 weeks, consideration would be given to a referral to orthopedics (Claimant's Exhibit 3).

11. On April 29, 2014, the Claimant saw Dr. Glick again and reported continued moderate to severe pain. Dr. Glick noted the Claimant reported pain in her shoulder, trapezius, her right low back and numbness in her left hand. Dr. Glick noted that the MRI of the Claimant's neck did not seem to show pathology to cause the symptoms she was experiencing and so he suspected compression of the nerves in the muscles of the Claimant's shoulder. Dr. Glick noted that a next step would be an EMG and potential follow up with a cervical spine evaluation and injections (Claimant's Exhibit 3).

12. The Claimant saw Dr. Rick Zimmerman on May 16, 2014 on referral from Dr. Glick for a neck and low back consultation. After taking a history of present illness from the Claimant, reviewing her 4/8/14 MRI of the cervical spine and conducting a physical examination, Dr. Zimmerman assessed the Claimant with,

1. Cervical strain with whiplash mechanism of injury
2. Myofascial pain in the left upper quadrant with tender points noted in the upper trapezius muscle
3. lumbar strain with extension-based pain
4. possible sacroiliac joint strain
5. cervical disc degeneration in the C3-4, C4-5 and C5-6 levels that do not correlate with the patient's symptoms (likely incidental finding)

Based on his assessment, Dr. Zimmerman performed 4 trigger point injections in the left upper trapezius and cervical paraspinals and in the lumbar paraspinals. After five minutes, the Claimant reported 85% relief in the neck and greater than 50% relief in the back, and therefore a diagnostic response for both areas. Dr. Zimmerman recommended a formal physical therapy regimen to include myofascial release, cervical range of motion, posture training, core activation and hip flexor stretches. Dr. Zimmerman noted that at the one-month follow up reevaluation, cervical or lumbar facet injections would be considered as well as right SI joint injections if the SI joint dysfunction continued (Claimant's Exhibit 5; Respondents' Exhibit C, pp. 11-13).

13. On May 20, 2014, the Claimant returned to Dr. Glick for follow up. He noted that the Claimant had seen PM&R for her injury which included "whiplash to her upper back and neck, particularly her left shoulder, as well as low back strain." Dr. Glick noted the Claimant underwent some injections into her neck and shoulder which helped. On examination, Dr. Glick continued to note tenderness to palpation and spasm in the paraspinal muscles on the left side of the Claimant's neck and her left trapezius and bilateral spasm in the paraspinal muscles of her lumbar region. He did note improvement (Claimant's Exhibit 3).

14. On June 17, 2014, Dr. Glick noted the Claimant still had tenderness to palpation and moderate spasm in her trapezius and rhomboids on the left sides and tenderness to palpation in her lumbar region, but no spasm at that location.

15. The Claimant saw Dr. Zimmerman on September 26, 2014 for an impairment rating. He noted that she had been seen on September 12, 2014 for a right SI joint steroid injection that was diagnostic according to Dr. Zimmerman as he reported that it relieved all of her perisacral pain and therapeutic as it relieved 75-80% of her right-sided lumbosacral pain. Dr. Zimmerman quoted the Claimant as stating, "It really helped a lot." Dr. Zimmerman noted the Claimant's formal physical therapy was complete and the Claimant was continuing with home exercises. He noted the Claimant continued to use her TENS unit for myofascial pain primarily in the left lower quadrant. Dr. Zimmerman noted that, "today [the Claimant] states she is functional and uses pain medications on a p.r.n. basis and reports total relief in her neck and shoulder pain and 80% relief in her right-sided perisacral pain." Based on the positive response to injections and physical therapy, Dr. Zimmerman noted that the Claimant's cervical strain, myofascial pain and right SI joint dysfunction had resolved and he found the Claimant to be at MMI as of September 26, 2014. He opined that the Claimant "has been symptom free for several weeks," sacroiliitis does not qualify for an impairment, and the Claimant had full range of motion of her lumbar spine. Therefore, Dr. Zimmerman noted that the Claimant received no impairment for her injuries. He opined there were no permanent work restrictions. For maintenance, Dr. Zimmerman noted the Claimant was to taper off use of Tramadol over the next several weeks and she may need trigger point injections or an SI joint injection for any flare ups over the next 6 months. Dr. Zimmerman also recommended a 6 – 12 month gym membership to follow up with the independent exercise program the Claimant learned in physical therapy. He anticipated case closure with Dr. Glick the following week (Claimant's Exhibit 5; Respondents' Exhibit C, pp. 8-10).

16. On November 20, 2014, the Respondents filed a Final Admission of Liability admitting for medical benefits, but no permanent partial disability, per the

impairment rating medical report of Dr. Zimmerman from September 26, 2014 (Respondents' Exhibit A, p. 1).

17. On March 24, 2015, the Claimant saw Dr. Jeffrey P. Jenks for a Division IME. He noted that the Claimant's symptoms at the time of the DIME were cervical pain and low back pain and that the symptoms began following a work-related motor vehicle accident on February 28, 2014. The Claimant reported to Dr. Jenks that after the truck she was driving lost its brake, she rolled the truck into a ditch and had to crawl out of the vehicle. She reported that over the following one to two days, she developed pain in her cervical and lumbosacral region. Dr. Jenks noted that the Claimant was treated by Dr. Glick and Dr. Zimmerman and underwent physical therapy and trigger point injections for her cervical and lumbosacral regions which helped. The Claimant also reported that a right SI joint injection on September 12, 2014 gave her a 75-80% improvement in her symptoms. Dr. Jenks notes that in spite of being placed at MMI on September 26, 2014, the Claimant "complains of persistent cervical pain, which radiates into her trapezial ridge and into the left periscapular region," intermittent paresthesias in the fingers of her left hand" and "bilateral lumbosacral pain, worse on the right." Dr. Jenks noted that the Claimant denied any prior cervical or lumbosacral pain. On physical examination, Dr. Jenks noted that the Claimant exhibited tenderness in the left cervical paraspinal region and along mid-cervical facets. He noted that cervical range of motion was decreased secondary to pain. Dr. Jenks also noted tenderness over L4-5 and L5-S1 facets bilaterally and tenderness over both SI joints. There was increased pain with lumbar extension. It was Dr. Jenks' impression that the Claimant had ongoing cervical pain that was likely soft tissue, but could be related to cervical facet dysfunction and she had ongoing lumbosacral pain. He opined that the Claimant was not at MMI and recommended a lumbosacral MRI to evaluate for a discogenic source for her ongoing symptoms. For the cervical pain, Dr. Jenks opined that the Claimant should undergo diagnostic cervical medial branch blocks with a possible rhizotomy, depending on the result of the medial branch blocks. Dr. Jenks also opined that further trigger point injections could be an option. Although he felt she was not at MMI, Dr. Jenks also provided an impairment rating for the Claimant's loss of range of motion. He noted a 14% impairment due to cervical range of motion deficits and a 4% Table 53 impairment for a total 17% whole person impairment for the cervical range of motions deficits. For the lumbar spine, Dr. Jenks provided a 5% Table 53 impairment and a 2% range of motion impairment since he did not include the lumbar flexion and extension measurements. Combining all of the impairment ratings, resulted in a 23% whole person impairment rating (Claimant's Exhibit 1).

18. On June 25, 2015, the Claimant saw Dr. Allison Fall for an Independent Medical Examination. The Claimant reported her mechanism of injury to Dr. Fall relatively consistent with what she had reported to previous physicians, although she also mentioned that she believes she may have blacked out. The Claimant reported that the physical therapy and trigger point injections helped her condition and that a right sacroiliac joint injection decreased her pain 40-50% (which is significantly lower that the number Dr. Zimmerman reported on September 26, 2014). The Claimant stated to Dr. Fall that about one week after that SI injection she was placed at MMI, saw Dr. Glick one last time, and then has not had any treatment since. The Claimant described

shooting pains in her low back that go up to her mid back. She described swelling in her shoulder where she has numbness and tingling every once in a while in her shoulder blade area. The Claimant also reported neck pain to Dr. Fall. The Claimant reported that her pain can range from 3/10 to 9/10 in the evenings. She reported her pain was aggravated by prolonged standing. The pain is alleviated by using the TENS unit for 30 minutes to one hour. The Claimant denied that she had prior symptoms before her motor vehicle accident. On physical examination, Dr. Fall found no visible or palpable spasming in the cervical spine region. She also found the Claimant's shoulder examination to be unremarkable with no signs of internal derangement or loss of range of motion. Dr. Fall found that the Claimant's lumbosacral area was generally normal and her range of motion was only restricted due to obesity. Dr. Fall ultimately opined that the Claimant most likely suffered only soft tissue injuries and she is at MMI and has no medical impairment as a result of the work injury. Dr. Fall stated that she was, "in agreement with the impairment assessment noted by Dr. Zimmerman." She found that the Claimant required no additional treatment or permanent work restrictions (Respondents' Exhibit B).

19. The Claimant testified credibly that she never told Dr. Zimmerman that she had "zero pain" or that her neck and back pain had completely resolved. The Claimant testified that the injections she received helped with her neck pain but that it did not go away. She also had physical therapy, but this did not make the pain go away permanently. The numbness in her fingers has never gone away completely either. With specific reference to office visit notes of Dr. Zimmerman on May 16th and September 26th, the Claimant stated that she is not, and was not, able to touch her hands to the ground, regardless of what these medical notes state. While at Dr. Zimmerman's office to determine the Claimant's range of motion, she testified that she stood in front of him and put her arms out and arms pushed and then she bent over as far as she could. She testified that she also looked from side to side. The Claimant testified that Dr. Zimmerman did not measure any motion with any sort of device when she was examined by him.

20. The Claimant further testified that prior to February 28, 2014, she did not ever have pain in her shoulder, back or neck. Prior to February 28, 2014, the Claimant used to engage in activities such as fishing, hiking and golfing. She testified credibly that after February 28, 2014 she has not been able do these things because she has too much low back pain.

21. The Claimant testified that she did believe she had a rib fracture because her side hurt and because she was told she had a rib fracture. This is consistent with an e-mail written by the Employer's office manager who attended appointments with the Claimant that the Claimant had cracked ribs. She was not able to see Dr. Glick after September of 2014 because she did not have insurance. She did try to go back to see him to get an impairment rating but he wasn't allowed to do this as he lacked the certification.

22. The Claimant was sent to see Dr. Jenks for an MMI determination and impairment rating. The Claimant testified that he used medical instruments for her range

of motion measurements. The Claimant testified credibly that he used a round scale and he pushed buttons and it would measure how far I could move. The Claimant told Dr. Jenks she had pain in lower back, neck and shoulder and that the pain had been ongoing since September.

23. The Claimant testified that she did not think her employer was treating her professionally prior to her termination from employment. The Employer's office manager accompanied the Claimant to doctor office visits and directed the Claimant not to take any medications or therapies recommended by Dr. Glick. This is documented in the March 19, 2014 medical note of Dr. Glick and he found the behavior of the Employer's representative to be "very threatening and inappropriate" (see Claimant's Exhibit 3).

24. The Claimant testified that she suffers from depression and she was diagnosed by Dr. Reed who prescribes Prozac for this condition. The Claimant does not recall if Dr. Jenks asked her if she was diagnosed with depression.

25. Dr. Allison Fall testified at the hearing as an expert in the areas of physical medicine and rehabilitation and regarding Level II certification matters. She testified that a patient is at MMI when that patient's condition is stable and there is an expectation that the patient requires no more active treatment. Dr. Fall testified that she is familiar with the Claimant and met with her for an IME and reviewed her medical records before the IME. Then, Dr. Fall reviewed the medical records again after the interview and physical examination of the Claimant. Dr. Fall testified that, per the medical records, the Claimant's injuries were lumbar strain and cervical strain with myofascial pain, which had resolved.

26. Dr. Fall testified that in reviewing Dr. Jenks' DIME report, it was significant to her that the report was 6 months after the last doctor appointment for the injury because the Claimant's condition seemed somewhat benign and then at DIME, it had worsened. Dr. Fall testified that Dr. Jenks recommended a lumbosacral MRI to evaluate for discogenic source of pain, but she opined that an MRI would not show discogenic origin. Rather, a discogram could be used for this. Dr. Fall also testified that it was her opinion that as of March 2015, it was her understanding that the Claimant had resolved myofascial pain, so she didn't understand why Dr. Jenks would attribute the symptoms the Claimant was reporting at the DIME back to the Claimant's work injury. She opined that Dr. Zimmerman's report and impairment rating were fairly complete and denoted that the Claimant's symptoms were essentially resolved.

27. Dr. Fall testified that the Claimant did not tell her anything about the speed of the vehicle. However, from the medical records of Dr. Glick and Dr. Zimmerman, Dr. Fall believed the Claimant's MVA was a lower speed accident. Dr. Fall opined that in a lower speed accident, there is less body movement and you wouldn't expect much in the way of injury.

28. In reviewing Dr. Jenks' DIME, Dr. Fall notes that regarding the Claimant's cervical pain, he recommends diagnostic cervical medial branch blocks with a possible rhizotomy and depending on the results, that she might need trigger point injections. Dr.

Fall does not believe this is indicated because she opines there is still not causal link between cervical symptoms and the Claimant's documented mechanism of injury. Dr. Fall further opined that Dr. Jenks did not perform a causal analysis regarding the Claimant's lumbar or cervical conditions and he didn't comment on Dr. Zimmerman's findings and account for the difference in his opinion and Dr. Zimmerman's. However, Dr. Fall failed to note that Dr. Zimmerman, with whom she agrees, found the Claimant had cervical strain with whiplash mechanism of injury, which would be important in a causal analysis.

29. Ultimately, Dr. Fall opined that Dr. Jenks erred in his opinion that the Claimant was not at MMI due to the causation issue, the Claimant's symptoms and the fact that, per Dr. Fall's opinion, there is no reasonable expectation that additional treatment would lead to positive change. Dr. Fall opined that you have to look at some other underlying reasons for continued reports of pain, for example, treatment at work and depression.

30. On the issue of range of motion measurements, Dr. Fall testified that per her review of Dr. Zimmerman's 9/26/14 medical note, Dr. Zimmerman addressed cervical range of motion, and she pointed to Exhibit C, p. 9, at the 3rd paragraph. Dr. Fall finds the notation regarding cervical ROM from Dr. Zimmerman inconsistent with cervical discogenic pain as she finds that Dr. Zimmerman specifically evaluated for this and noted the Claimant was within functional limits. As for the Claimant's lumbar range of motion, Dr. Fall pointed to Exhibit C, p. 9, at the 2nd paragraph and opined that this notation was inconsistent with ongoing symptomatology of the lumbar spine. Thus, Dr. Fall testified that she agrees with Dr. Zimmerman that there is no ratable impairment for the injuries the Claimant sustained in the MVA. Dr. Fall finds no evidence to support the ratable impairment Dr. Jenks assigned for Claimants cervical condition and testified that there is nothing in the treatment records to show related ongoing cervical condition tied to the injury. Also, Dr. Fall opined that if there is no Table 53 rating, you don't proceed to ROM deficits for cervical. The only exception to this is if there is a severe shoulder condition with related cervical, otherwise you don't get to cervical ROM without a cervical Table 53 rating. As for the lumbar spine rating from Dr. Jenks, Dr. Fall testified that Dr. Zimmerman's report of 9/26 showed full lumbar ROM. Also, Dr. Jenks refers to lumbar "pain" and Dr. Fall opines that it is not appropriate to rate for lumbar pain.

31. Based on her IME and review of the medical records and her examination of the Claimant, Dr. Fall finds the Claimant reached MMI on September 26, 3014 and that she did not sustain any permanent impairment based on her industrial injury. Dr. Fall testified that the Claimant requires no further medical treatment for any condition related to her industrial injury.

32. On cross examination, Dr. Fall testified that she has no basis to doubt that the Claimant is in pain. However, Dr. Fall relates this to psychological factors. Dr. Fall did acknowledge that the Claimant had no prior conditions for her back or neck and there was no documented injury or trauma prior to this injury that could have caused the Claimant's symptoms. On the other hand, she also testified that neither she nor Dr. Zimmerman found objective symptoms when examining the Claimant.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Burden of Proof for Challenging an Opinion on MMI Rendered by a DIME Physician

The DIME physician's findings include his subsequent opinions, as well as his initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning a claimant's medical impairment rating is binding on the parties unless it is overcome only by clear and convincing evidence. C.R.S. §8-42-107(8)(b)(III). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." C.R.S. §8-40-201(11.5), C.R.S. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). Therefore, a DIME physician's finding that a party has or has not reached MMI is binding unless overcome by clear and convincing evidence. Whether a party has overcome the Division IME's opinion as to MMI is a question of fact for the ALJ as the sole arbiter of conflicting medical evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

A finding that the claimant needs additional medical treatment (including surgery) to improve his condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1080 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures which offer a reasonable prospect for defining the claimant's condition or suggesting further treatment are warranted would be consistent with a finding that a Claimant was not at MMI. *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (I.C.A.O. August 11, 2000). However, the requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of MMI per C.R.S. § 8-40-201(11.5), nor does the need for recommended diagnostic testing solely to assist in the maintenance of a claimant's condition. *Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

Here, the Respondents have failed to meet their burden of proof to show that it is highly probable that the opinion of Dr. Jenks on the determination of the Claimant's MMI status was clearly incorrect. Dr. Fall disagrees with Dr. Jenks's opinion that the Claimant is not at MMI. Dr. Fall opines instead that Dr. Zimmerman's opinion that the Claimant was at MMI as of September 26, 2014 is correct. Dr. Jenks found that the Claimant is not at MMI because he opined that there were additional medical treatment options to diagnose and potentially improve the Claimant's low back and cervical conditions, which would not be consistent with a finding of MMI. He opined that the Claimant's pain could be related to cervical fact dysfunction and he found she continued to suffer from lumbosacral pain not present prior to her injury. He specifically recommended the Claimant undergo a lumbosacral MRI to evaluate for a discogenic source for her ongoing symptoms. For the cervical pain, Dr. Jenks opined that the Claimant should undergo diagnostic cervical medial branch blocks with a possible rhizotomy, depending on the result of the medial branch blocks. Dr. Jenks also opined that further trigger point injections could be an option. Dr. Fall does not believe these recommendations are indicated because she opines there is still not causal link between cervical symptoms and the Claimant's documented mechanism of injury. Dr. Fall found no visible or palpable spasming in the cervical spine region. She also found the Claimant's shoulder examination to be unremarkable with no signs of internal derangement or loss of range of motion. Dr. Fall found that the Claimant's lumbosacral area was generally normal and her range of motion was only restricted due to obesity. Yet this does not square with Dr. Jenks' findings which are credible and persuasive.

A finding that additional diagnostic procedures which offer a reasonable prospect for defining the Claimant's condition or suggesting further treatment could be warranted would be consistent with a finding that the Claimant was not at MMI as Dr. Jenks determined. The conclusion of Dr. Fall that the Claimant is not at MMI for her low back and cervical conditions amounts to a difference of opinion with Dr. Jenks, based mainly on her views regarding a causation issue for the cervical condition, which is not sufficient to overcome the DIME physician's opinion. Thus, Dr. Jenk's determination that the Claimant is not at MMI has not been overcome by clear and convincing evidence. Therefore, Respondents' application to overcome the DIME opinion is denied and dismissed.

Medical Benefits–Authorized, Reasonably Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

In this case, the Claimant continues to suffer from cervical and lumbosacral pain due to her work related motor vehicle accident. The DIME physician Dr. Jenks recommended the Claimant undergo a lumbosacral MRI to evaluate for a discogenic source for her ongoing symptoms. For the cervical pain, Dr. Jenks opined that the Claimant should undergo diagnostic cervical medial branch blocks with a possible rhizotomy, depending on the result of the medial branch blocks. Dr. Jenks also opined that further trigger point injections could be an option.

The Claimant's ATP, Dr. Glick, had evaluated the Claimant on May 20, 2014 after her first round of injections into her neck and shoulder performed by Dr. Zimmerman. While he indicated she experienced some relief from the injections, he still noted tenderness to palpation and spasm in the paraspinal muscles on the left side of the Claimant's neck and her left trapezius and bilateral spasm in the paraspinal muscles of her lumbar region. After this, Dr. Glick referred the Claimant to Dr. Zimmerman again for further evaluation and possible injections. After SI injections performed on September 12, 2014, Dr. Zimmerman noted a diagnostic response as he reported that it relieved all of her perisacral pain and a therapeutic response as it relieved 75-80% of her right-sided lumbosacral pain. Dr. Zimmerman noted that the Claimant reported total relief in her neck and shoulder pain and 80% relief in her right-sided perisacral pain. Based on the positive response to injections and physical therapy, Dr. Zimmerman opined that the Claimant's cervical strain, myofascial pain and right SI joint dysfunction had resolved and he found the Claimant to be at MMI as of September 26, 2014. Yet, the Claimant credibly testified that she never told Dr. Zimmerman that she had "zero pain" or that her neck and back pain had completely resolved. The Claimant testified that the injections she received helped with her neck pain but that it did not go away. She also had physical therapy, but this did not make the pain go away permanently. The numbness in her fingers has never gone away completely either. With specific reference to office visit notes of Dr. Zimmerman on May 16th and September 26th, the Claimant stated that she is not, and was not, able to touch her hands to the ground, regardless of what these medical notes state. While at Dr. Zimmerman's office to determine the Claimant’s range of motion, she testified that she stood in front of him and put her arms out and arms pushed and then she bent over as far as she could. She testified that she also looked from side to side. The Claimant testified that Dr. Zimmerman did not measure any motion with any sort of device when she was examined by him. This is in contrast with the Claimant’s credible testimony that during the DIME, Dr. Jenks made use of formal instruments to measure her range of motion. Based on what he saw during his examination, coupled with his review of the medical records, Dr. Jenks recommended additional diagnostic and therapeutic treatment. The treatment recommended by Dr. Jenks is reasonably necessary to cure and relieve the Claimant of the effects of her February 28, 2014 work injury. In this case, the ALJ finds the recommendations and opinions expressed by Dr. Jenks to be more persuasive than those of Dr. Fall and Dr. Zimmerman. Dr. Fall opined that she was in agreement with Dr. Zimmerman and felt that Dr. Jenks failed to establish a causal relationship prior to making diagnostic and treatment recommendations for the Claimant. The ALJ does not find these arguments as persuasive as the opinion of Dr. Jenks.

The Claimant has established the right to the diagnostic and treatment recommendations expressed by Dr. Jenks in his DIME report.

ORDER

It is therefore ordered that:

1. The Respondents have failed to meet the burden of proving, by clear and convincing evidence that the DIME physician is in error as to his determination that the Claimant is not at MMI.

2. The Respondents’ application to overcome the DIME opinion is denied and dismissed.

3. The Respondents shall provide medical treatment to the Claimant consisting of the treatment recommendations by Dr. Jenks, including a lumbosacral MRI, diagnostic cervical medial branch blocks with a possible rhizotomy, and further trigger point injections, to the extent they are indicated and recommended by the Claimant’s ATP based on the results of the diagnostics.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative

Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 4, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she suffered a worsening of condition thereby supporting reopening of her claim; and if so,

II. Whether Dr. Robert Sung's recommendation for a L4-L5 fusion surgery is reasonable, necessary, and related to Claimant's industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works for Employer as a city bus driver. She has been employed in this capacity since 2011.

2. On April 13, 2014, Claimant experienced mechanical problems with the bus she was driving during her shift. Consequently, she returned to the maintenance facility to report the trouble to the company mechanic. While walking across the parking lot, Claimant slipped on water near the bus wash bay. Claimant fell onto her knees and back. A workers compensation claim was filed and liability for injuries to Claimant's knees and back was admitted.

3. Claimant came under the care of Dr. George Johnson at Concentra Medical Centers. She was initially diagnosed with bilateral knee strain and contusion, lumbar pain, and post-laminectomy syndrome. Claimant was treated conservatively, with physical therapy and medication; Tramadol, Motrin, and Percocet. She was given restrictions of 20 lbs. carrying, no kneeling, crawling, squatting or climbing. Her employer could not accommodate the restrictions, so she was off work on temporary total disability from April 28, 2014 until July 30, 2014. She returned to work on July 31, 2014.

4. Claimant developed persistent low back pain following her slip and fall. Dr. Johnson's office notes from June 4, 2014 indicate that her low back pain was constant and 5/10 in severity, compared with 2/10 prior to the April injury. He commented, "She states that her current back pain is significantly worse than her prior back pain."

5. Claimant has a history of pre-existing residual low back pain secondary to injuries sustained in car accidents occurring in 2004 and 2008. Claimant came under the care of Dr. Katherine Leppard following her 2004 car accident. She has received extensive treatment from Dr. Leppard, including treatment for back pain.

6. Following her 2008 car accident, Claimant developed worsening low back and left leg pain. Consequently she was referred for an MRI of the lumbar spine. On July 20, 2009, Claimant underwent a lumbar MRI which revealed an interval progression of severe L5-S1 degenerative disc disease and associated marrow reactive changes and edema, persistent moderate left L5-S1 neural foraminal stenosis with minimal left L5 nerve root compression, a 3mm left intraforaminal disc protrusion with mild contact on the left L4 foraminal nerve root and mild L2-3 and L4-5 disc degeneration.

7. Claimant's low back and left leg pain continued so she was referred to Dr. Roger Sung who evaluated Claimant and recommended surgery. On September 1, 2009, Dr. Sung performed a L5-S1 decompression and instrumented fusion procedure. Claimant testified that following this procedure she did well. She was able to reduce the amount of pain medication she was taking and had no functional limitations. As noted Claimant began working for Employer as a bus driver in 2011. Medical reports from Dr. Leppard dated April 29, 2010, November 1, 2010, and August 26, 2011, supports Claimant's testimony. These records document minimal use of narcotic medication and overall compliance with the continued use of such medication. Moreover, the records establish that Claimant had "excellent results" from her lumbar fusion surgery and that her primary concerns were persistent shoulder pain despite rotator cuff surgery in addition to neck pain for which Claimant ultimately underwent cervical fusion.

8. Nonetheless, medical records submitted at hearing support a conclusion that Claimant has never been pain free regarding her low back since 2009. For example in 2013 Claimant undertook injection therapy for lower back pain. On January 14, 2013 and December 5, 2013, Dr. Stephen Ford provided epidural steroid injections for low back pain. Dr. Ford's reports from these encounters documents Claimant's need for ESI's as necessary for lumbar disc disease noting specifically that Claimant has "chronic bilateral lower back pain (LBP), buttock, leg pain/numbness/tingling to feet has returned." Regardless, a medical report from Dr. Leppard, dated March 17, 2014, approximately 30 days prior to her work related slip and fall indicates that Claimant was managing her chronic back pain with the use of Ultram and the rare Percocet; indicating further that Claimant had "dramatically reduced" the use of pain medication over the preceding years.

9. Based upon the medical records submitted, the ALJ is persuaded that Claimant was not actively engaged in low back treatment in the weeks prior to her April 13, 2014 work related slip and fall. Rather, the ALJ finds that while Claimant had chronic low back pain, she was managing that pain with the appropriate use of medication only.

10. Following Claimant's April 13, 2014 slip and fall and in light of her leg pain Claimant underwent an EMG with Dr. Leppard to determine the cause of pain and numbness in her lower extremities on June 12, 2014. Dr. Leppard opined that there is no electrodiagnostic evidence of a lumbar radiculopathy and concluded that Claimant was experiencing peripheral neuropathy.

11. Dr. Johnson also ordered a repeat lumbar MRI, which was performed on August

4, 2014. It showed degenerative changes at T11-12; T12-L1; L2-3, and L4-5, slightly worse at L4-5. Claimant returned to Dr. Ford for a series of epidural steroid injections, which were done on August 24, 2014; October 6, 2014 and October 20, 2014.

12. Dr. Johnson placed the Claimant at maximum medical improvement on October 22, 2014 without permanent impairment. Dr. Johnson indicated that he believed that Claimant had “returned to her normal status of health prior to her fall.” Claimant did not object to the Final Admission and her case closed.

13. Claimant testified that she disagreed with the decision to place her at MMI. Dr. Johnson’s report of MMI supports Claimant’s testimony. According to Claimant, she was slightly better when she was placed at MMI. Per her testimony, her pain was substantial necessitating copious amounts of pain medications which have persisted since her fall.

14. Claimant's back pain worsened subsequent to her release by Dr. Johnson, culminating in insurance approval for her to return to his facility on July 17, 2015. His report from that date states, "She complains of lower back pain which has been progressing gradually since December of last year. . .She saw Dr. Sung on July 9, 2015. She (sic) recommended surgery. . . Currently the patient complains of moderately severe nearly constant lower back and left leg pain. The left leg pain is described as burning and stabbing."

15. Dr. Johnson also discussed Claimant's prior history of a low back injury and surgery, stating, "She states that her baseline pain prior to the injury [of April 13, 2014] was 1-2/10 in severity." In his treatment plan, Dr. Johnson stated, "I believe the current low back pain is mostly due to her work related injury in 2004 with worsening of the condition from her injury on 4/13/2014. I recommend reopening the case and doing an MRI to evaluate the lumbar spine and see if surgery is needed." Dr. Johnson completed Form WC164 for that visit, stating, "MMI date unknown at this time because need additional evaluation."

16. The MRI was done on July 23, 2015, revealing evidence of postop changes status post posterior decompression and fusion at L5-S1 with posterior left foraminal osteophyte formation causing moderate left-sided neural foraminal narrowing; and degenerative changes of T10-L3 disc spaces; and mild to moderate degenerative changes of the L4-5 disc space. The August 4, 2014 and July 23, 2015 MRI’s were compared by Dr. Kahn. Based upon the evidence presented, including the MRI reports and , the ALJ finds that there was been insignificant interval changes at the L4-L5 and L5-S1 levels.

17. Dr. Johnson saw the Claimant in follow-up on August 7, 2015. At that time, he again recommended reopening the case, stating that Claimant may need additional surgery, and the case was positive for anticipation of permanent medical impairment. He notes that Claimant had increased her pain medication though there is no change in her MRI. He referred Claimant back to Dr. Sung for additional evaluation. Insurer

denied the referral and any further treatment as well as Claimant's request to reopen the claim.

18. Claimant did return to Dr. Sung on July 9, 2015, at her own expense. At that time, Dr. Sung stated that he thought an adjacent segment fusion (at L4-5) would help with her back and leg pain. For comparison, when claimant saw Dr. Sung's physician's assistant, Phil Falender, on August 6, 2014, he recommended that she return to Dr. Ford for an additional injection. The recommendation for surgery was not made until the July 9, 2015 visit to Dr. Sung. Although Dr. Sung noted that imaging, including x-rays and MRIs were reviewed, he did not comment on the findings of those imaging studies.

19. On October 8, 2015, Dr. Kathie McCranie performed an Independent Medical Examination (IME) of Claimant at the request for Respondents. Following review of medical records and examination of Claimant, Dr. McCranie authored a report indicating that given Claimant's subjective report of a change in her low back symptoms following her April 13, 2014 slip and fall, she would need to review Claimant's medical records pre-dating the April 13, 2014 injury. Additional records were provided after which Dr. McCranie authored a second report wherein she opined that Claimant's reports of increased symtomotolgy were without objective changes in examination or diagnostic imaging. Consequently, Dr. McCranie opined that there was no "objective basis for the lumbar surgery to be related to the 04/14/14 (sic) Workers Compensation injury." According to Dr. McCranie, Dr. Sung's proposed surgery would not likely alleviate Claimant's "complaints and symptoms."

20. Regarding the request to reopen the claim, Dr. McCranie opined that Claimant did not meet the criteria for spinal fusion under the Colorado Medical Treatment Guidelines (MTGs) because there was no MRI evidence of spinal stenosis, nerve root compression or instability. Rather, Dr. McCranie noted that the MRIs revealed a widely patent L4-L5 neural canal. Moreover, Dr. McCranie noted that Dr. Sung simply described Claimant's response to ESI as "good" and Claimant actually described a 60% short-term benefit to ESI which according to Dr. McCranie constitutes a "non-diagnostic" response as it relates to the efficacy of ESIs. Consequently, Dr. McCranie opined that the request for surgery is based "purely" on Claimant's subjective complaints of increased pain.

21. Dr. Sung responded to Dr. McCranie's report on November 16, 2015. In an "addendum" to a November 5, 2015 letter he authored to Claimant's counsel. In his addendum Dr. Sung notes: Regarding Dr. Kathy McCranie's IME, I disagree with her report. Patients do not have to have neurologic deficits to have a benefit from surgery. Moreover, Dr. Sung noted that there does not have to be substantial changes on imaging study to support a complaint of increased symptoms and that a positive EMG is not a prerequisite for surgery. Finally, Dr. Sung noted that Claimant's response to ESI supported that her pain was coming from the L4-L5 spinal level. Consequently, Dr. Sung continued to recommend surgery for this segmental level which had been aggravated by her April 13, 2014 slip and fall.

22. Dr. Kathy McCranie testified by deposition on December 1, 2015. Dr. McCranie testified regarding Dr. Sung's recommendation for surgery, the Colorado Workers' Compensation Treatment Guidelines, and Claimant's current complaints and symptoms. As provided in her reports, Dr. McCranie testified that a fusion surgery is a serious surgery where each subsequent surgery is less likely to be successful. Dr. McCranie testified that Claimant's MRIs did not change post MMI and did not show instability or stenosis. She testified that Claimant's injections were not diagnostically significant and Claimant's pain generator was not properly isolated. Finally, Dr. McCranie credibly testified as to the importance of the Treatment Guidelines and how Claimant's symptoms did not correspond to the required findings for a spinal fusion without radiculopathy.

23. Claimant testified to worsening functional decline in the face of her ongoing low back and left leg symptoms. She must limit her shopping to short trips where she is able to buy a few items. She can no longer vacuum her house, participate in chosen recreational pursuits, such as hunting, fishing and 4 wheeling or interact with her grandchildren as she used to. According to Claimant she would like to return to her "normal" life and decrease the use of medications again.

24. Based upon the record evidence as a whole, the ALJ is persuaded that Claimant's low back condition has worsened since being placed at MMI on October 22, 2014.

25. Based on a totality of the evidence presented, the ALJ finds that Claimant had proven that the surgery recommended by Dr. Sung is reasonable, necessary and related to Claimant's April 13, 2014 slip and fall injury involving Claimant's low back.

26. Dr. McCranie's opinions as expressed in her IME reports and subsequent deposition testimony are not persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Reopening

D. Pursuant to § 8-43-303 (1) C.R.S., a claim may be reopened based on a change of condition which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The claimant shoulders the burden of proving her condition has changed and her entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A "change of condition" refers to a "change in the condition of the original compensable injury or a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). Reopening may be appropriate where the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000); *Brickell v. Business Machines, Inc.*, 817 P.2d 536 (Colo. App. 1990) (reopening is appropriate if additional benefits are warranted).

E. The question of whether the Claimant has proven a change in condition of the original compensable injury or a change in physical or mental condition which can be causally connected to the original compensable injury is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12, P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). In this case, the evidence presented persuades the ALJ that Claimant has proven that her low back condition has worsened since being placed at MMI on October 22, 2014. At the time of her discharge on October 22, 2014, Claimant was experiencing the maximum, but temporary, effects of three epidural steroid injections done closely together. When the effects of these injections wore off, Claimant's pain returned and worsened, as documented by the authorized treating physician, Dr. George Johnson.

Dr. Johnson specifically recommended reopening her case in July of 2015, for consideration of additional surgery. Dr. Roger Sung has recommended that additional surgery, a fusion at L4-5. At the time of her discharge in October of 2014, surgery was not being recommended. Claimant's pain levels were temporarily manageable likely due to the effects of her ESIs. When she returned to Dr. Johnson in July of 2015, she reported low back pain progressing gradually since December of last year. She complained of moderately severe nearly constant lower back and left leg pain described as burning and stabbing. She was taking Tramadol three times per day and Percocet two to three times per day. Dr. Johnson stated that her back pain was mostly due to her work related injury in 2004 with worsening of condition from her injury on 4/13/14. He recommended reopening her case to see if surgery was needed. Accordingly, Claimant’s request to reopen her claim is hereby granted.

Medical Benefits
The Proposed L4-L5 Spinal Surgery Recommended by Dr. Sung

F. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

G. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013. Based upon the evidence presented, the ALJ concludes that Claimant has proven that L4-L5 fusion surgery recommended by Dr. Sung is reasonable and necessary. The medical reports outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Sung to recommend surgical intervention.

H. The Medical Treatment Guidelines are regarded as the accepted professional standards for care under the Workers’ Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the

Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight. Moreover, the MTGs have been accepted in the assessment of low back pain. While the MTGs provide for that several pre-operative surgical indications should be considered before surgery is undertaken, including assessment/definition and treatment of all likely pain generators along with x-ray, MRI or CT myelography findings consistent with spinal stenosis with instability or disc pathology, the Court is not bound by the MTGs in deciding individual cases on the MTGs or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

Although Dr. Sung's treatment notes are devoid of substantial detail and although Dr. McCranie testified that Claimant's potential pain generators have not been adequately defined and treated and Claimant's MRI did not demonstrate spinal stenosis with instability, the ALJ concludes that Dr. Sung adequately identified Claimant's pain generator as an L4-L5 disc herniation causing stenosis and pain. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that the recommended procedure is reasonable and necessary to cure and relieve Claimant from the ongoing effects of her compensable injury and restore her function. Based upon the evidence presented and in keeping with the MTGs, the ALJ concludes that Claimant's surgery has been contemplated within the context of expected functional outcome and not merely for the purposes of pain relief.

ORDER

It is therefore ordered that:

1. Claimant's request for re-opening of her claim is GRANTED.

2. Respondent shall pay for all authorized reasonable and necessary treatment medical treatment, resulting from the Claimants April 13, 2014 slip and fall, including but not limited to the L4-L5 spinal surgery recommended by Dr. Sung

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 20, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-956-542-01

ISSUES

- In the case before the ALJ, are the Respondents required to overcome the DIME finding that the claimant is not at MMI by clear and convincing evidence and if so, have the Respondents sustained their burden?

FINDINGS OF FACT

Based upon the evidence presented at Hearing, the ALJ finds as follows:

1. The Claimant works for the Employer as a lead support person and while working in the course and scope of her employment was physically assaulted by one of the clients of the Employer on May 30, 2013. The Claimant is a supervisor of other support staff, working on a computer and performing intake work for the employer's patients. Claimant described her work as primarily sedentary in nature. (Transcript, July 10 hearing, page 38, lines 16-22).

2. The Employer works with mandated clients coming out of prison or probation and a client of the employer's came into an area of the employer's premises that was posted not to enter. As the lead support person, the Claimant tried to get the individual to turn around and go back to the lobby. Claimant was unsuccessful in doing so, but was finally able to get in front of the client and indicated to the client that she needed to turn around and go back out to the lobby.

3. At that point and at that time, the client "body butted" the Claimant, poured the contents of an Arizona tea can over the Claimant's head, started pulling the Claimant's hair and hitting her. The Claimant, with the help of two of her co-workers, was able to subdue the assailant and got the assailant up against a wall. The Claimant testified that the assailant was fighting the Claimant and the co-workers the whole time, clenching her fists and trying to get away. During the approximate fifteen minute period of time that the Claimant and her co-workers were trying to control the assailant and the struggle ensued, the Claimant testified that she sustained injuries to her hand and finger from which she recovered, but that her left knee was caught between the assailant's knee and the male therapist's knee and that their knees were grinding against her left knee until the police arrived and took the assailant into custody. (Transcript, July 10 Hearing, page 16, lines 17-25; page 17, lines 1-5).

4. The Claimant testified that her left knee and hand started to swell immediately and the police took pictures of her swelling. Claimant filed an incident report with her Employer and was sent to Champs for evaluation and treatment. On the

incident report initially filled out by the Claimant she did not note the left knee problem but mentioned her right hand, right arm and shoulder. (Transcript, July 10, 2015, p. 20, line 15).

5. The Claimant testified that prior to the incident of May 30, 2013, she had never had any care and treatment for any injuries to her left knee, had never been evaluated for any type of pain or problems associated with her left knee, had never had any diagnostic tests or restrictions placed upon her activities due to any type of medical condition associated with her left knee, and had never had any swelling or pain in her left knee. (Transcript, July 10 hearing, p. 33, lines 10-25; p.38, lines 1-6).

6. Claimant was first examined at the Champs Clinic by PA Micheal Dietz on June 6, 2013 and advised PA Dietz of the problems that she was having with her left knee since the events that took place on May 30, 2013. PA Dietz examined the claimant's left knee on June 6, 2013 but did not take any X-Rays. Claimant was of the opinion that her knee condition was worsening since the day of the incident and that the pain in her knee had continued since the day of the assault.

7. Claimant was seen again by PA Dietz again on June 20, 2013 and Mr. Dietz's report is before the ALJ. Claimant testified that as of June 20, 2013 she was still limping due to her left knee complaints. Her knee was hurting and she was of the opinion that at that time her pain level was at a 5-6 based upon a 1-10 scale with 10 being the worst pain imaginable. PA Dietz in his report of June 20, 2013 indicated that the Claimant continued to have a "minimal amount of discomfort." Claimant, at the hearing of July 10, 2013 testified that she disagreed with that notation by PA Dietz that she had a minimal amount of discomfort as of June 20, 2013. (Transcript, July 10, 2015, page 24, line 3). Claimant testified that she thought her pain level was still at about a 5-6 on the above pain scale.

8. Claimant was reexamined again by PA Dietz on July 11, 2013. PA Dietz's July 11, 2013 report is before the ALJ. PA Dietz placed the claimant at MMI on that date with a provision if the Claimant continued to have problems that the Claimant could return for evaluation and treatment. PA Dietz put in his report of that date that the Claimant has a history of arthritis in her left knee. The Claimant testified that she did not recall any conversations with PA Dietz about her having arthritis of her left knee and that she had never had any problems of any type prior to the injury of May 30, 2013 with her left knee, nor was she aware that she had arthritis in her knee at that time. PA Dietz did not perform any diagnostic tests whatsoever on her left knee. PA Dietz's report states: "however at four to six weeks now, if she continues to have pain, it would certainly be reasonable to reopen the claim for recheck, but this is not anticipated." Claimant was not seen by a doctor prior to being placed at MMI by PA Dietz and there is no indication that any diagnostic tests were undertaken prior to the Claimant being placed at MMI by PA Dietz.

9. Claimant, between the date of the injury and the time of the hearing of July 10, 2015, had not been taken off work nor had she missed any time from work other than for doctor's visits. The Claimant has continued to work full duty for the Employer.

10. After the Claimant was released by PA Dietz as having reached MMI on July 11, 2013, the Claimant continued to perform her job duties and according to the Claimant's testimony, the pain never went away. Finally Claimant testified she could no longer stand the pain and requested permission from Pinnacol to go back to see the doctor. The Claimant credibly testified that she is not the type of person to complain and run to the doctor and was hopeful that with the passage of time the pain would lessen or diminish completely. (Transcript July 10 Hearing, p.39, lines17-20).

11. The Claimant credibly testified that she did not have any additional injuries to her left knee between the time that she was released at MMI by PA Dietz and the time that she returned to see Dr. Charbonneau on February 20, 2014.

12. Dr. Charbonneau's report of February 20, 2014 of his examination of the Claimant of even date therewith is before the ALJ and has been reviewed. Dr. Charbonneau's report indicates the history of the May 30 event but sets forth that it was the right knee of the Claimant that was caught between the assailant and the coworker which the claimant denies. Dr. Charbonneau advised the Claimant that the issue with her left knee could be multifactorial including the possibility of arthritis, the injury, and her weight. Dr. Charbonneau was of the opinion that the Claimant could continue to do her job but that it would be helpful to have an MRI performed to diagnose the Claimant's condition and to determine the best course of treatment, if any. (Respondents' Ex. E, pp 071-076).

13. An MRI was performed on June 20, 2014. The results of that MRI demonstrated that the Claimant had: degenerative arthritis of the left knee and meniscus tears of the left medial meniscus. (Respondents' Ex. C).

14. On July 7, 2014, the Claimant went back to Dr. Charbonneau to review the results of the MRI with him. Dr. Charbonneau's report of July 7, 2014 has been reviewed. That report states that Dr. Charbonneau was of the belief that the Claimant needed an orthopedic consultation and Dr. Charbonneau referred the Claimant to Dr. Kindsfater with Orthopedic Center of the Rockies for that consultation. (Respondents' Ex. E, pp.078-081).

15. The Claimant was seen by Dr. Kindsfater, an orthopedic surgeon on July 23, 2014 and his report has been reviewed. Dr. Kindsfater is of the opinion that the Claimant is in need of a total knee arthroplasty. Dr. Kindsfater opined concerning causation that the on the job injury of May 30, 2013 exacerbated the Claimant's underlying arthritic condition and caused the necessity for the total knee arthroplasty. (Respondents' Ex. F, p. 093).

16. The insurer thereafter had Dr. Jon Erickson perform a staffing review of the matter and Dr. Erickson's physician advisor report of July 28, 2014 has been reviewed by the ALJ. Dr. Erickson's report states: "Obviously we have a significant situation here because in my opinion it is difficult to believe that advanced arthritis of the patellofemoral and medical compartments were caused by what was felt to be a knee sprain… I therefore believe that Dr. Kindsfater is probably in error in his conclusion, but I think that to afford both Dr. Kindsfater and the patient their day in court, so to speak, an IME should be performed which will hopefully address the issue of causality here. The orthopedic surgeon performing this examination can review the actual studies and x-rays and make a determination as to whether or not this was an aggravation of her pre-existing condition or whether it is not related to the work injury."

17. Dr. Erickson testified at the Hearing. Dr. Erickson is an orthopedic surgeon. Dr. Erickson stated that the Claimant had pre-existing degenerative arthritis of her left knee. He testified that there was lack of clarity in the medical records of the mechanism of injury and how severe it was. Dr. Erickson acknowledged that the Claimant did have an injury to her left knee but the records according to Dr. Erickson "seem to indicate" that she continued to improve over the three visits with PA Dietz. Dr. Erickson thought that since PA Dietz did not request diagnostic tests that PA Dietz did not think of the injury as being severe. Dr. Erickson on direct examination concluded that since the Claimant did not return to seek treatment until January of 2014 that the injury had resolved and that the Claimant sought additional treatment in January of 2014 because of an additional problem that was as a result of the underlying degenerative condition. Dr. Erickson was unable to testify based upon the MRI examination in June of 2014 as to whether the meniscal tears were as a result of the compensable injury of May 30, 2013 or not. Dr. Erickson agreed that the treatment of choice for the Claimant presently is a total knee arthroplasty and further testified that it really made no difference whether the Claimant had pain in the knee before the injury of May 30, 2013, but was of the opinion that in order to have an aggravation there had to be a significant injury. Dr. Erickson opined that he assumed that if PA Dietz thought the injury was significant that he would have done the appropriate studies. (Transcript, July 10 hearing, pages 43-59).

18. Upon cross-examination, Dr. Erickson acknowledged that Dr. Shea, the DIME physician, followed the AMA Guides in performing his evaluation and Dr. Erickson testified that he was not critical of Dr. Shea's opinion as to whether he appropriately followed the AMA Guides in his determination but had a difference of opinion with Dr. Kindsfater and Dr. Shea regarding the causation of Claimant's condition. (Transcript, July 10 Hearing, page 61, lines 11-22; page 67, lines 10-22). Dr. Erickson further indicated that the location of the Claimant's pain was on the medial side of the knee both immediately after the injury and when the Claimant saw Dr. Charbonneau in February of 2014. Dr. Erickson further acknowledged that when an individual is bone on bone with degenerative arthritis it does not mean that a total knee arthroplasty needs to be performed, but it is a question of whether the individual has pain that limits the individual's functionality. (Transcript, July 10 Hearing, p.65, lines 9-12). Dr. Erickson was unsure of which condition was making the Claimant symptomatic, the arthritis or

the meniscal tears or a combination of both. Dr. Erickson was asked at page 77 of the transcript of Hearing of July 10, the following:

> Q. "If the IME doctor who looked at the x-rays and looked at the MRI had come back and issued a report saying, gee, in my opinion, this injury aggravated, accelerated the preexisting, underlying, asymptomatic degenerative arthritic condition and she needs a total knee replacement, would you have agreed with that?
>
> A. "I would have assumed that whoever the individual that did the IME was a credible physician, and I would go along with that opinion."

19. The Claimant had an IME examination with Dr. James Lindberg at the request of the Insurer and his report of August 19, 2014, and his Deposition of June 10, 2015 have been reviewed by the ALJ. Dr. Lindberg took a history and reviewed the medical records in the file. Dr. Lindberg's conclusions in his report were that the Claimant had severe pre-existing osteoarthritis and that the meniscal tear was degenerative in nature and neither were caused by incident at work. Dr. Lindberg opined that "given her obesity and severe osteoarthritis, I find it not credible that she was asymptomatic prior to this alleged injury sustained at work. There was no fall. There was no twist. There was no blow." (Respondents' Exhibit A, 002). Dr. Lindberg's Deposition has been reviewed. Dr. Lindberg testified that he did not believe the Claimant was asymptomatic before the injury. (Deposition, page 10, lines 10-20). He is further of the opinion that Dr. Shea, the DIME doctor, is in error in his causation determination and that the Claimant was lying about her being asymptomatic prior to the injury of May 30, 2013. (Deposition, page 22, line 22).

20. The Claimant had a DIME examination performed by Dr. Brian Shea and Dr. Shea's DIME report of February 23, 2015 has been reviewed. Dr. Shea noted that he reviewed all of the medical reports regarding the care and treatment given to the Claimant and the reports of Dr. Erickson and Dr. Lindberg. Dr. Shea concluded: "Records indicate there are no previous left knee problems in the patient and the proximate cause of the injury is directly tied to the assault from a patient that she had on 5/30/13. If it is determined that she wants to have left knee surgery to repair the meniscal tear or have a full knee replacement by Dr. Kindsfater, then this should be approved under the Worker's Compensation system. Yes, she is overweight. Yes, there were degenerative conditions going on in her left knee prior to the day of the injury but she was symptom-free in the left knee with no complaints. This injury on the day of the assault unfortunately started a cascade of problems and pathology in her left knee which is directly attributed to the injury and to say otherwise is to ignore the facts." (Respondents' Ex. H, p. 098).

21. The Claimant testified that her examination with Dr. Lindberg took approximately 5-10 minutes and that the examination with Dr. Shea, the DIME, was

very thorough regarding the examination of the Claimant's knee and Dr. Shea questioned the Claimant about how the injury occurred. (Transcript, July 10 Hearing, pages 41, lines 24-25 and page 42, lines 1-16).

22. The ALJ finds the Claimant credible in her testimony that she did not have any pre-existing problems with her left knee prior to May 30, 2013. There are no medical records indicating any previous examinations or limitations on the Claimant's activities. Further when the Claimant was put at MMI by PA Dietz the Claimant still had ongoing pain. While the opinions are conflicting between the doctors as to the causation of the need for the total knee arthroplasty, there is consensus that the Claimant needs the surgery.

23. The ALJ finds that the issue of causation of the claimant's condition must be overcome by the Respondents by clear and convincing evidence and the ALJ finds further that the Respondents have not overcome the opinion of the DIME doctor by clear and convincing evidence.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. Section 8-42-107(8)(b)(III), C.R.S., provides that the DIME determination of MMI shall only be overcome by clear and convincing evidence. The DIME's determinations of causation are binding unless overcome by clear and convincing evidence. See ***Qual-Med, Inc. v. Industrial Claim Appeals Office,*** 961 P.2d 590 (Colo. App. 1998); ***Cudo v. Blue Mountain Energy Inc.,*** W.C. N0. 4-375-278 (ICAO, October 29, 1999). Thus a DIME physician's findings that a causal relationship does or does not exist between an injury and the requirement for medical treatment must be overcome by clear and convincing evidence. ***Cordova v. Industrial Claim Appeals Office,*** 55 P.d 186 (Colo. App. 2002).

Respondents argue that under ***Roberts v. Frontier Airlines,*** (ICAO, 2/02/2015, W.C. 4-819-127) it is Claimant's burden "to prove that the knee degeneration is work related because this is a scheduled rating," and that since this injury is a scheduled injury that the DIME doctor's opinion regarding causation is not entitled to greater weight under the statute. The ALJ has reviewed the ***Roberts'*** decision and finds it to be inapposite to the instant claim. In ***Roberts,*** the issues for determination were decidedly different than in the instant situation as the DIME's determination of MMI and impairment rating had become final and the Claimant was additionally alleging permanent total disability. The ICAO determined that when the issue is conversion of the schedule to a whole person that the DIME opinion regarding that conversion is not entitled to the heightened degree of weight as set forth in the statute for the DIME's opinions relating to MMI and PPD. Further the Claimant here is not claiming that the degeneration was caused by the admittedly compensable on the job injury. Claimant contends that the compensable on the job injury caused the pre-existing arthritic condition to become painful and that the pain related to that aggravation necessitates the proposed medical treatment. This therefore entails a causation analysis of the condition for which the Claimant is requesting treatment for which the DIME physician's opinion is entitled to greater weight under the provisions of Section 8-42-107(8)(b)(III), C.R.S.

2. "Clear and convincing evidence" is evidence which proves that it is "highly probable" the DIME physician's opinion is incorrect. ***Id.*** The question of whether the DIME physician's determination of MMI has been overcome by "clear and convincing evidence" is a matter of fact for determination by the ALJ. ***Id.*** Mere differences of opinion between the determination of the DIME doctor regarding MMI and those of other evaluating doctors with contrary views are insufficient to sustain Respondents' burden of overcoming the DIME opinion by clear and convincing evidence. Thus, the party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the DIME physician's MMI finding is incorrect. ***Qual-Med, Inc.,*** supra. Moreover, the Respondents are responsible for the direct and natural consequences which flow from a compensable injury. The Colorado Court of Appeals previously has held that the DIME physician's opinion on the cause of a Claimant's disability is an inherent part of the diagnostic assessment which comprises the DIME process of determining MMI and rating permanent impairment. ***Egan v. Industrial Claim Appeals Office,*** 971 P.2d 664 (Colo. App. 1998). The party disputing the DIME physician's opinions on the issue of causation bears the burden to overcome the DIME physician's opinions by clear and convincing evidence. ***Hodges v. ATR Collision, Inc.,*** W.C. No. 4-751-557 (January 19, 2011).

3. The Respondents do not dispute that the recommended surgery is reasonable and necessary. The Respondents only dispute that it is not causally related to the admitted industrial injury. The Respondents contend based upon the opinions of Dr. Lindberg and Dr. Erickson that the DIME's determination of Dr. Shea which is supported by the opinion of Dr. Kindsfater is incorrect and that the need for the surgery suggested is not causally related to the admittedly compensable on the job injury.

4. The Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(I)(a), C.R..S. ***Snyder v. Industrial Claim Appeals Office,*** 942 P.2d 1337 (Colo. App. 1997); ***Country Squire Kennels v. Tarshis,*** 899 P.2d 362 (Colo. App. 1995). Further , the Respondents are liable for medical treatment if the employment-related activities, aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment Section 8-41-301(i)(c), C.R.S.; ***Snyder v. Industrial Claim Appeals Office,*** supra. Pain is a typical symptom from the aggravation of a pre-existing condition. The Claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. See, ***Merriman v. Industrial Commission,*** 120 Colo. 400, 210 P.2d 448 (1949); ***Abeyta v. Wal-mart Stores,*** W.C. No. 4-669-654 (January 28, 2008).

5. Weighing the medical evidence is the sole prerogative of the ALJ. It is well held that the expert opinion of an expert may not be solely based upon the opinion of another expert. Dr. Erickson, one of the Respondents' experts, testified that he did not have any basis upon which to dispute that the DIME had used the *AMA Guides* appropriately but that he disagreed with the DIME's opinion regarding the causation of the need for the total knee arthroplasty. An expert's opinion must not be predicated, in whole or in part, on opinions of others, expert or lay. See ***People v. Beasley,*** 43 Colo. App. 488, 608 P.2d 835 (1979); ***People v. District Court,*** 647 P.2d 1206 (Colo. 1982). Dr. Erickson conceded that his opinion amounted to a difference of opinion only between he and Dr. Shea, the DIME and that of Dr. Kindsfatter. Dr. Erickson further testified that if the additional IME selected by the Respondent Pinnacol had rendered an opinion that the compensable on the job injury had necessitated the need for the total knee arthroplasty he would have then agreed that the need for the surgical intervention was in fact job related. Under the standard set forth in ***Beasley,*** supra, if such is the case then Dr. Erickson's opinion regarding causation would be based entirely on the opinion of the additional opining doctor. As such Dr. Erickson's opinion regarding causation is given little weight by the ALJ.

6. The ALJ is experienced in the assessment of medical evidence and testimony, and is presumed to have special expertise in evaluating this type of evidence. ***Wierman v. Tunnell,*** 108 Colo. 544, 120 P.2d 638 (1941); ***Seagrave v. Sanders,*** W.C. No. 3-107-326 (June 5. 1995.) The ALJ is fully capable of weighing the doctor's testimony and reports and, in doing so, of considering the bases for their opinions. Insofar as expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. ***Colorado Springs Motors, Ltd. V. Industrial Commission,*** 165 Colo. 504, 441 P.2d 21 (1968).

7. Dr. Lindberg has opined that there is no support for a causal relationship between the claimant's need for surgery and the industrial injury because there was no indication of trauma to the knee joint itself when the claimant sustained her injury on May 30, 2013. Dr. Lindberg indicated in his Deposition that the claimant is being untruthful when she has stated that she had no pre-existing problems with her left knee. The Respondents have presented no evidence of any pre-existing history of care or treatment of the claimant's left knee nor is there any evidence presented that the claimant had any complaints of pain or injury to her left knee that predates the admittedly compensable on the job injury. The claimant testified credibly that she sustained an injury and described the grinding of her knee between that of her co-worker and the assailant while waiting for the police to arrive. Dr. Kindsfatter and the DIME, Dr. Shea, both concluded that this event aggravated the Claimant's underlying arthritic condition and that it was the injury that created the pain and that the recommended surgery was causally related to the compensable industrial injury.

8. When determining credibility of witnesses, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. ***Prudential Insurance Co. v. Cline,*** 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved: The ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. ***Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,*** 5 P. 3d 385 (Colo. App. 2000)

9. "Maximum medical improvement" is defined in Section 8-40-201(11.5) R.R.S. as:

> "A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement."

Reasonable and necessary treatment and diagnostic procedures are a prerequisite to MMI. MMI is largely a medical determination heavily dependent on the opinions of medical experts. ***Villela v. Excel Corporation,*** W.C. Nos. 4-400-281, 4-410-547

10. The ALJ concludes in the matter before her that it is the Respondents' burden to overcome by clear and convincing evidence the opinions relating to causation and MMI rendered by Dr. Brian Shea, the DIME physician. In order to meet their burden the Respondents must show that it is highly probable that the DIME opinion of Dr. Brian Shea regarding the Claimant not having reached MMI as a result of the admittedly compensable injury of May 30, 2013 is in error. The ALJ concludes for the reasons set forth above that the Respondents have failed to sustain that burden.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The Respondents have failed to overcome the finding of the DIME doctor that the Claimant is not at MMI by clear and convincing evidence. The ALJ finds that the need for the total knee arthroplasty of the Claimant's left knee is as a result of the aggravation of the Claimant's pre-existing condition by the admittedly compensable on the job injury of May 30, 2013.

2. If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _________________

/s/ Margot Jones
Margot Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

WC 4-956-542

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that a repeat right leg EMG/NCV test, consultation with neurologist Dr. Burnbaum, and pool therapy are reasonable and necessary maintenance medical benefits to relieve Claimant of the effects of her April, 2014 work injury or to prevent further deterioration of her condition.

FINDINGS OF FACT

1. On April 26, 2014 Claimant suffered an admitted work injury to her lower back when she was on a ladder stocking shelves, turned to talk to a co-worker, and slipped off the ladder stumbling down a few ladder steps. Claimant reported that she twisted her lower back and left knee as she stumbled and that she had constant moderate pain to the back near the hip and mild pain to the knee after the incident. *See* Exhibit A.

2. On April 27, 2014 Claimant was evaluated at Delta County Memorial Hospital by Charles Bibby, M.D. Claimant reported falling approximately three feet off a ladder onto her feet, that she jerked her back and had pain in her low and mid back and anterior chest. A chest x-ray was performed and was found normal with noted minimal degenerative change present in the spine and postsurgical changes of a cholecystectomy. Claimant also underwent a CT scan of her lumbar spine and cervical spine with no definite evidence of fracture, early degenerative disc disease noted in the mid lumbar spine, and disc herniation suspected, most pronounced at the L4-L5 level. *See* Exhibit G.

3. On April 30, 2014 Claimant was evaluated by Kevin Pulsipher, D.O. Claimant reported she could not walk and had sharp spasm type pain rated at 8/10. Claimant's weight was noted to be 177 pounds, and her height was 5'4". Dr. Pulsipher assessed lumbar strain and opined that there seemed to be a huge anxiety/secondary gain element. Dr. Pulsipher opined that Claimant's behavior was utterly out of proportion to exam findings, CT scans, and reports and mechanisms of the injury. He referred Claimant to physical therapy and explained that the symptoms and exam were most consistent with a benign musculoskeletal back injury. *See* Exhibit 6.

4. On May 7, 2014 Claimant was evaluated by Dr. Pulsipher. Claimant reported she was walking much better. Claimant had a hostile and confrontational attitude and noted she wanted to transfer her care to GJ orthopedics. Claimant reported incorrectly that she had an MRI at the hospital. Dr. Pulsipher noted evidence of exaggerated pain behavior. Claimant insisted she wanted to know what was wrong

with her back but refused to hear Dr. Pulsipher's opinion of back strain. Dr. Pulsipher noted that Claimant's function was inconsistent with a catastrophic disc injury and much more consistent with a back strain. Dr. Pulsipher transferred Claimant's care due to her hostile attitude. Dr. Pulsipher released Claimant to light duty work and continued to opine that there was major secondary gain in this case. *See* Exhibit 6.

5. On May 22, 2014 Claimant was evaluated by Todd Ousley, PA and Kirk Clifford, M.D. Claimant reported low back pain for approximately one month after she fell off a ladder, landed on her feet, and had the onset of fairly severe low back pain. Claimant reported debilitating pain. Claimant reported that she initially had numbness and tingling radiating down the posterior aspects of both legs to the knees but that those symptoms subsided a couple of weeks ago. Claimant was assessed with lumbar strain in the setting of mild L4-L5 spondylosis. Claimant was referred to physical therapy for core strengthening, general conditioning, and a home program. Claimant was advised after therapy for one week she could try return to work with a 15 pound work restriction. Dr. Clifford noted that if Claimant was not significantly improved at the next visit in 4-6 weeks, then consideration would be given for a lumbar MRI. Dr. Clifford noted that x-rays of the lumbar spine were obtained in the office and that there was a very slight amount of L4-L5 degenerative disk disease. *See* Exhibit J.

6. On July 3, 2014 Claimant was evaluated by Dr. Clifford. Claimant reported going to physical therapy and felt that a lot of her pain was subsiding but then went back to work for a 9 hour shift and her pain returned back into her legs down to her calves. Claimant reported feeling unable to do a 9 hour shift and some of the work. Dr. Clifford continued to assess lumbar strain, L4-5 lumbar spondylosis and questioned stenosis or disk herniation. Dr. Clifford noted without significant improvement he planned to get an MRI of Claimant's back and he placed her on restrictions of 4 hours of work a week and 50 pounds lifting. *See* Exhibit J.

7. On July 31, 2014 Claimant was evaluated by Dr. Clifford. Dr. Clifford noted that the MRI showed a mild L4-L5 disk bulge with facet widening at the L4-L5 level. Dr. Clifford noted that Claimant went back to work at 4 hours but that her pain was so severe that she was unable to continue working. Claimant reported both back and leg pain. Dr. Clifford noted that Claimant had a little bit of disk degeneration and herniation at the L4-L5 level with facet widening and opined that Claimant was likely developing some micro-instability. He noted it was important for Claimant to work on core strengthening exercises and noted that an epidural steroid injection would be tried. Dr. Clifford opined that he was not expecting any surgical management for her back. *See* Exhibit J.

8. On August 25, 2014 a transforaminal epidural steroid injection was performed by Dr. Clifford. Post injection Claimant reported not a lot of difference. *See* Exhibit J.

9. On September 17, 2014 Claimant was evaluated by Jason Bell, P.A. Claimant reported continued severe back pain and bilateral lower extremity numbness

and tingling down to both feet, right greater than left. PA Bell assessed lumbar stenosis with a mild L4-L5 disk bulge. PA Bell opined that he did not see anything from a surgical standpoint for treatment of her back pain and leg radiculopathy. PA Bell stressed Claimant's daily home exercise program. PA Bell opined there was not much more that he recommended from an interventional standpoint. *See* Exhibit J.

10. On October 16, 2014 Claimant was evaluated by Dr. Clifford. Claimant reported no great benefit from the transforaminal injections and that she had continued back pain and leg pain. Dr. Clifford provided an impression of bilateral leg symptoms and questioned neuropathic pain. Dr. Clifford noted his plan to have Claimant undergo EMG nerve conduction studies to make sure she was not having any nerve dysfunction. Dr. Clifford noted he reviewed the MRI and x-rays which did not show evidence of nerve compression. *See* Exhibit J.

11. On November 5, 2014 Claimant underwent EMG nerve conduction studies performed by Mitchell Burnbaum, M.D. Dr. Burnbaum evaluated Claimant and noted a lot of pain behavior during the procedure. Dr. Burnbaum noted that Claimant was significantly overweight. Dr. Burnbaum noted no evidence of root compression and that her nerve conduction studies and EMG were normal. *See* Exhibit K.

12. On November 20, 2014 Claimant was evaluated by Dr. Clifford. Claimant reported continued back pain and leg pain. Dr. Clifford noted that he reviewed the EMG studies which were normal with no evidence of any root compression or peripheral neuropathy. Dr. Clifford opined that no additional injections, surgeries, or other more aggressive treatment was recommended. Dr. Clifford recommended Claimant continue with physical therapy, icing, anti-inflammatory medication, and Lyrica. Dr. Clifford discussed with Claimant that it may take years for her to fully recover but that she needed slow, gradual work. *See* Exhibit 2.

13. On December 5, 2014 Dr. Clifford referred Claimant to Jeffrey Krebs, D.O. for evaluation for pain management. *See* Exhibit 2.

14. On March 16, 2015 Claimant was evaluated by Dr. Krebs. Dr. Krebs noted that Claimant underwent a right sided L4-5 and L5-S1 transforaminal epidural steroid injection as well as EMG studies. Dr. Krebs noted the EMG was normal, that it was noted that Claimant had a lot of pain behavior during the EMG and that the previous MRI of the lumbar spine had showed mild spondylosis across the L4-5 level, mild central disk bulge, some slight widening of facets, but no evidence of nerve compression which reiterated the unremarkable EMG study. Dr. Krebs assessed lumbar stenosis with mild L4-5 disk bulge, work related. Dr. Krebs noted Claimant had invalid straight leg raising testing. After repeated testing, Dr. Krebs provided a 9 % whole person impairment rating. Dr. Krebs opined that Claimant was at maximum medical improvement (MMI) and that her condition would not improve with surgical intervention or active medical treatment. Dr. Krebs opined that medical maintenance care was warranted. Dr. Krebs explained to Claimant that it was essential to work on weight loss and walking. Claimant reported she had such leg and foot pain that she

could not walk and as an alternative, Dr. Krebs suggested that aquatic therapy might be helpful. Dr. Krebs opined that aquatic therapy and/or weight loss should be included in medical maintenance and should be continued for 48 months. Dr. Krebs noted that in order to maintain MMI, a visit with a geriatric surgeon to consider laparoscopic stomach banding ought to be contemplated if Claimant could not lose weight from a conventional standpoint. Dr. Krebs opined that Claimant could not lift/push/pull any weight and that she should be limited in standing and walking to less than about half an hour a day of both and opined that Claimant might benefit from a cane or 4 point walker. *See* Exhibit L.

15. On July 31, 2015 Claimant was evaluated by Dr. Krebs. He noted that in order to maintain MMI, he discussed weight loss and exercise with Claimant. *See* Exhibit L.

16. On August 4, 2015 Dr. Krebs submitted a request for pre-authorization for repeat right leg EMG/NCV testing and consultation with neurologist Dr. Burnbaum. *See* Exhibit L.

17. On August 11, 2015 Claimant underwent a Division Independent Medical Examination (DIME) performed by Craig Stagg, M.D. Claimant reported stumbling off a ladder, bouncing down, and hitting the ground on her feet without hitting or falling. Claimant reported that immediately her low back and right knee began bothering her. Dr. Stagg noted that since that time, Claimant had received a significant amount of treatment.

18. Dr. Stagg reviewed medical records and noted that he did not see any prior back injuries or treatment of the back although the records were extensive and he may have missed something. He assessed a small disk herniation at L4-L5. He opined that Claimant reached MMI on March 16, 2015. He noted that for range of motion, six measurements were taken and were invalid. He noted Claimant has had measurements on two different occasions that were invalid both times. He provided Claimant with a 10% whole person impairment rating. He opined that there was no impairment or further treatment needed for her legs, feet, or right knee issues and that her injury caused the low back problem and no other injuries. He opined that maintenance care outlined by Dr. Krebs was appropriate. *See* Exhibit M.

19. On August 12, 2015 Respondents filed an Application for Hearing contesting Dr. Krebs' request for repeat EMG/NCV testing and consultation with Dr. Burnbaum. On September 2, 2015 Respondents filed an Application for Hearing contesting Dr. Krebs' request for pool therapy.

20. On October 12, 2015 Respondents filed a Final Admission of Liability (FAL). The FAL admitted to a 10% whole person impairment rating as well as reasonable, necessary, and related post MMI medical benefits. In the FAL Respondents noted that they denied any recommendations of weight loss treatment or surgery. *See* Exhibit F.

21. Anjmun Sharma, M.D. performed an Independent Medical Examination Record Review in this case. Dr. Sharma reviewed approximately 1,500 pages of medical records, dating back to 1995. Dr. Sharma noted that on May 21, 2008 Claimant was evaluated by Lee Bules, D.O. for back pain since bending forward. Dr. Bules noted that Claimant had a history of mild back pain and headaches on and off and that Claimant generally saw a chiropractor. Claimant reported to Dr. Bules that earlier that week she began having a lot more back spasm and then pain into her right hip and down into her right leg. Dr. Bules noted Claimant was uncomfortable just sitting and standing because of the spasm in her back and that there was tenderness in her mid-lower back and a little bit into the right upper buttock. Dr. Bules prescribed Tylenol with Codeine and referred Claimant to follow up with her chiropractors. Dr. Sharma also noted Claimant's extensive history of kidney stones with several visits to medical providers for treatment. *See* Exhibit N.

22. Dr. Sharma also reviewed all the medical records surrounding the April 26, 2014 work injury. Dr. Sharma opined that Claimant reached MMI on March 16, 2015 with a 10% whole person impairment. Dr. Sharma opined that there was no reasonable necessity in this claim for any continued medical treatment and that Claimant could return to work full duty with no permanent work restrictions. Dr. Sharma opined that Claimant had a strain in her back and nothing more and that Claimant's current ongoing pain symptoms were out of proportion to her medical records. Dr. Sharma noted that spondylolisthesis can be caused by chronic degenerative changes over time and that obesity and smoking both contribute to spondylolisthesis. Dr. Sharma noted that Claimant is obese and is a chronic heavy smoker. Dr. Sharma opined that the MRI study indicates that Claimant has had low back pain for quite some time and that there was nothing acute on any of the diagnostic tests that indicated an acute structural change. Dr. Sharma was concerned that Claimant was discharged from Dr. Bules' care just prior to her reported work injury for violation of her pain contract and was concerned that Claimant might have a narcotic-seeking habit. Dr. Sharma suspected some secondary gains in this claim. *See* Exhibit N.

23. Dr. Sharma opined that Dr. Krebs' request for authorization for additional medical treatment including pool therapy, repeat leg and lower extremity EMG and nerve conduction studies, and consultation with neurologist Dr. Burnbaum should all be denied and opined that the requests were not reasonable or medically necessary. Dr. Sharma opined that the requests are not considered to be part of the ongoing pain complaints for an acute injury that occurred in April. *See* Exhibit N.

24. Claimant's testimony, overall, is not found credible or persuasive. Claimant failed to disclose a prior back injection, prior back spasms, and prior back pain that radiated into her lower extremities. Claimant testified that she did not have any of those symptoms when medical records from May 21, 2008 show the contrary. *See* Exhibit H.

25. Multiple physicians opined credibly that Claimant had symptoms out of proportion, and that she displayed pain behaviors. Multiple physicians were concerned about secondary gain issues.

26. Although Dr. Krebs has requested repeat EMG/NCV testing and consultation with Dr. Burnbaum, Dr. Krebs and Dr. Clifford both opined that there was no evidence of nerve compression and that the results of the prior EMG testing was consistent with the MRI performed in this case. Dr. Krebs did not provide a new analysis or reason for requesting the repeat testing when the prior EMG/NCV testing showed no abnormalities and was consistent with prior MRI testing.

27. Claimant was obese prior to the work injury. Claimant remains obese at this time. Dr. Krebs noted Claimant's limitations of standing or walking were limited to less than half an hour per day and that Claimant needed to perform exercise in order to maintain MMI. Dr. Krebs' opinion is found credible and persuasive.

28. Dr. Krebs opined that aquatic therapy should be included in maintenance treatment. Dr. Clifford also opined that it was important to work on core strengthening exercises. As part of this claim, Claimant performed pool therapy which allowed her to perform exercises in the pool reducing the load on her joints and helped improve her function.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals*

Office, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits after MMI

Respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." *See* § 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has established by a preponderance of the evidence that pool therapy recommended by Dr. Krebs is reasonably necessary to relieve the effects of the injury and to prevent further deterioration of her condition. As noted by Dr. Krebs, due to her work injury, Claimant has limitations in walking and standing and should limit her standing and walking to less than half an hour per day. Dr. Krebs credibly opined that Claimant not only needed to lose weight but needed to exercise in order to maintain MMI. Due to her injury and limitations, she cannot effectively exercise. However, pool therapy allows her to be somewhat weightless with less of a load placed on her joints and allows her to exercise in order to strengthen the muscles in her core, surrounding her back, and allows her to maintain her current condition. Claimant has shown by a preponderance of the evidence that she will not be able to maintain MMI or improve function without weight loss and muscle strengthening. Because she is unable to exercise on land due to significant limitations caused by her work injury, Claimant has met her burden to show that the requested pool therapy is reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition.

However, Claimant has failed to establish by a preponderance of the evidence that repeat EMG/NCV testing or consultation with neurologist Dr. Burnbaum is reasonably necessary to relieve the effects of her injury or prevent further deterioration of her condition. Although Dr. Krebs requested authorization for repeat testing and consultation, Dr. Krebs failed to explain why he was doing so and failed to provide information as to why the repeat testing or repeat consultation would be reasonable or necessary. As found above, Claimant has already undergone this testing with Dr. Burnbaum and has already undergone a consultation. Dr. Burnbaum noted the results were all normal and did not show any abnormal nerve issues. It was also previously noted by Dr. Clifford and Dr. Krebs that the results from the EMG were consistent with the MRI study of Claimant's lumbar spine which also showed no evidence of nerve impingement. Claimant has failed to establish why a repeat test or repeat consultation is reasonable and necessary when the identical test previously performed showed no abnormalities and was consistent with MRI testing. Claimant does not have new or different symptoms that would warrant repeat testing nor has she shown any reason that the repeat testing or consultation is reasonable or necessary.

ORDER

It is therefore ordered that:

1. The request for pool therapy is granted.

2. The request for repeat EMG/NCV testing and consultation with neurologist Dr. Burnbaum is denied.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 14, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability ("TTD") benefits for the period of June 19, 2014 through February 18, 2015?

- Whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary partial disability ("TPD") benefits for the period of April 15, 2014 through June 18, 2014?

- Whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to her termination of employment?

- The parties stipulated prior to the hearing to an average weekly wage ("AWW") of $311.20.

- Claimant reserved the issue of TTD benefits after February 19, 2015.

FINDINGS OF FACT

1. Claimant was employed with employer performing industrial/commercial laundry. Claimant testified her job duties required her to arrange shirts and pants on hangers. Claimant sustained an admitted injury on April 15, 2014 when she was pulling very heavy clothes and injured her right arm up to her neck. Claimant testified she was in immediate pain, but did not report her injury right away to employer. Claimant did report her injury the next morning, however.

2. Claimant was referred by employer for medical treatment with Dr. Gustafson on April 17, 2014. Dr. Gustafson noted claimant's accident history, performed a physical examination and diagnosed claimant with a strain of her cervical and thoracic spine. Dr. Gustafson provided claimant with work restrictions of no lifting greater than 10 pounds, provided claimant with lidocaine patches, and referred claimant for massage therapy.

3. Claimant returned to work for employer and was provided with modified duty. Claimant testified at hearing that she may have had to lift more than ten pounds, but was not sure.

4. Claimant continued to treat with Dr. Gustafson and noted a pain level of 9/10 on May 7, 2014. Dr. Gustafson noted normal range of motion and strength of 5/5 in all major muscle groups in the right shoulder. Claimant returned to Dr. Gustafson on May 23, 2014 and reported that work seemed to really aggravate her. Dr. Gustason provided claimant with a prescription for Tramadol.

5. Claimant returned to Dr. Gustafson on May 30, 2014 with continued complaints of pain that were made worse by her work. Claimant also reported, however, that she was working light duty and it seemed to be going “alright”. Dr. Gustafson continued claimant on light duty work with no lifting over 10 pounds and referred claimant for chiropractic adjustments.

6. Claimant again returned to Dr. Gustafson on June 13, 2014 and reported she did not notice any improvement following her therapy. Dr. Gustafson continued claimant’s work restrictions.

7. Claimant testified at hearing that her job duties would require her to lift overhead and away from her body. Claimant testified her body became more debilitated with work. Claimant testified that her work made her arm worse and would request to leave early or call because she could not come in to work. Claimant testified she asked to perform a different light duty job because the job they had her do was making her arm and neck worse. Claimant testified employer gave her a different job but she was told to perform the job faster.

8. Claimant signed an agreement with employer on June 2, 2014 in which she agree to work within the restrictions set forth by Dr. Gustafson that included no lifting more than 10 pounds and no reaching overhead or away from her body. Claimant was again evaluated on June 13, 2014 and was referred to Dr. Langston for pain management.

9. Claimant testified she stopped showing up for work after June 18, 2014 because she felt she couldn’t work for employer anymore. Claimant testified that she asked to be moved to another job around this time and was told “no” by employer. Claimant testified her neck got stiff and hurt a lot at work.

10. Claimant eventually returned to Dr. Gustafson’s office and was evaluated by Ms. Herrera, the physicians’ assistant, on June 26, 2014. Ms. Herrera noted that claimant’s pain level was 8/10 which was consistent with her pain level on the June 13, 2014 evaluation. Ms. Herrera noted that if claimant didn’t improve, she may need to be referred for an electromyelogram (“EMG”) nerve conduction study. Ms. Herrera increased claimant’s work restrictions to 5 pounds lifting on this date.

11. Claimant continued to treat with Ms. Herrera and Dr. Langston. Dr. Langston noted claimant was dealing with a myofascial pain syndrome and provided claimant with trigger point injections. Claimant reported to Ms. Herrera on July 8, 2014 that she had not responded favorably to the trigger point injections. Ms. Herrera referred claimant to Dr. Burnbaum for evaluation.

12. Claimant underwent the EMG studies with Dr. Burnbaum on August 7, 2014. The EMG studies were normal.

13. Claimant returned to Dr. Gustafson on August 13, 2014 with continued complaints of pain. Dr. Gustafson noted claimant’s ongoing medical care and the

recent EMG study. Dr. Gustafson continued claimant's work restrictions of no lifting greater than 5 pounds with no repetitive motion of the right upper extremity.

14. Claimant returned to Ms. Herrera on September 10, 2014 and reported pain levels of 7 out of 10. Claimant reported that the numbness and tingling in her right arm has now resolved and is now just pain. Ms. Herrera noted that claimant was not currently working and "lifted her restrictions" indicating that she didn't believe that medically she needed restrictions in place. Pursuant to the WC164 form, claimant was released to return to work with no restrictions.

15. Claimant returned to Ms. Herrera on September 16, 2014 and again noted her pain level was a 7 out of 10. Ms. Herrera trigged some trigger point work in her right cervical and thoracic regions and noted claimant continued to report no relief in her pain with the medications or therapy. Ms. Herrera again released claimant to return to regular duty.

16. Claimant again returned to Ms. Herrera on October 9, 2014 and reported she felt her pain was getting worse, with a pain level of 9 out of 10. Ms. Herrera recommended claimant increase her medications and provided claimant with new work restrictions that includes no use of the right upper extremity and no lifting.

17. Claimant continued her care with Dr. Gustafson on October 29, 2014, again reporting that she felt she was getting worse. Claimant's pain levels were listed as 8 out of 10. Dr. Gustafson noted that her pain was primarily myofascial in nature and recommended claimant proceed with a magnetic resonance image ("MRI") of her cervical spine. Interestingly, Dr. Gustafson indicated in his dictated report that claimant was released to return to regular duty. The ALJ notes, however, that later in the dictated report, Dr. Gustafson recommends no use of the right upper extremity. The ALJ further notes that in the WC164 form dated October 29, 2014, Dr. Gustafson continued claimant's work restrictions that included no lifting.

18. The ALJ resolves this conflict to find that Dr. Gustafson was continuing claimant's work restrictions as of October 29, 2014 and did not release claimant to return to regular employment. This is supported by the later reports from Dr. Gustafson that continued claimant's work restrictions.

19. In that regard, claimant returned to Dr. Gustafson on December 2, 2014. Dr. Gustafson noted in his dictated report as of this date that claimant was on restricted duty that included no use of the right upper extremity.

20. Dr. Gustafson eventually placed claimant at maximum medical improvement ("MMI") as of February 19, 2015 and provided claimant with a permanent impairment rating.

21. Respondents presented the testimony of Ms. Salchenberger, the Human Resources Coordinator for employer. Ms. Salchenberger testified she had claimant sign the form on June 2, 2014 acknowledging her restrictions to let claimant know that employer was aware of her restrictions and claimant was aware that employer was

providing claimant with work within those restrictions. Ms. Salchenberger testified that upon being hired, claimant was presented with the employer's attendance policy for which she signed. Ms. Salchenberger testified that the employer attendance policy requires an employee to call in one-half hour before a shift and talk directly to a supervisor. Ms. Salchenberger testified claimant last worked for employer on June 18, 2014, before she no showed for work on June 19, June 20 and June 23, 2014. Ms. Salchenberger testified claimant did not call in again for work to her knowledge. Ms. Salchenberger testified she considered claimant to have abandoned her job with employer. The ALJ finds the testimony of Ms. Salchenberger to be credible and persuasive.

22. Respondents presented the testimony of Mr. Huisjen, the plant manager for employer. Mr. Huisjen claimant was provided with the same pay and same hours after her injury as she had before her injury. Mr. Huisjen testified claimant was given work within her restrictions. Mr. Huisjen testified he did not recall claimant asking to be changed to a different job. Mr. Huisjen testified after June 18, 2014, he did not receive any calls from claimant. The ALJ finds the testimony on Mr. Huisjen to be credible and persuasive.

23. The wage records entered into evidence at hearing demonstrate that claimant worked less hours, and earned less money due to the lower hours, than she did prior to the injury. However, the records demonstrate that claimant was paid the same hourly rate after the injury ($8 per hour) as she was prior to the injury.

24. The ALJ credits the testimony of Mr. Huisjen that claimant was provided with the same number of hours after her injury as she was before her injury. Furthermore, claimant testified at hearing that she would leave work because her work was aggravating her injury, which would account for her reduction in hours. Nonetheless, employer provided claimant with work in her restrictions and claimant voluntarily leaving work or calling in to avoid work because of her subjective complaints do not establish a basis for temporary partial disability benefits where, as here, the ALJ finds claimant voluntarily reduced her hours without any medical authorization to do so.

25. Based on this finding, the ALJ determines that claimant has failed to prove that it is more probable than not that her reduction in wages for the period of April 15, 2014 through June 18, 2014 was related to her work injury. Instead, the ALJ determines that claimant's reduction in earnings was based on her own decision to reduce her hours with employer, and not related to her work injury.

26. With regard to the issues of TTD presented before the court, the ALJ determines that respondents have proven that it is more probable than not that claimant committed a volitional act by failing to show up for work after June 18, 2014 and finds claimant was responsible for her termination of employment as of June 18, 2014.

27. Therefore, the ALJ determines that claimant's request for TTD benefits after June 18, 2014 is denied based on claimant being responsible for her termination of employment.

28. However, the medical records document that claimant's work restrictions from Ms. Herrera increased as of June 26, 2014. Pursuant to the Colorado Supreme Court holding in *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004), claimant is entitled to TTD benefits if her condition worsens after she is responsible for her termination of employment, as evidenced by increased work restrictions.

29. The ALJ credits the medical records from Ms. Herrera and Dr. Gustafson that show an increase in claimant's work restrictions and finds that claimant has demonstrated that it is more probable than not that she is entitled to an award of TTD benefits commencing June 26, 2014 when her work restrictions increased from the restrictions that were in place when claimant was terminated from her work with employer.

30. Claimant's TTD benefits then continue until they are terminated by law. The Colorado Workers' Compensation Act allows for the TTD benefits to be terminated when an injured worker is released to return to regular employment by the attending physician. The ALJ finds that Ms. Herrera and Dr. Gustafson are the attending physician in this case. The ALJ notes Ms. Herrera is not a "physician", but her reports, including the September 9, 2014 report, list Dr. Gustafson as the "Supervising MD" and are co-signed by Ms. Herrera and Dr. Gustafson. Therefore, the restrictions set forth by Ms. Herrera are ostensibly the restrictions set forth by Dr. Gustafson, the "attending physician". The ALJ finds claimant was released to return to regular employment by Ms. Herrera on September 9, 2014. Therefore, claimant's right to TTD benefits end on September 9, 2014 when she is released to return to regular employment by the attending physician.

31. Claimant's restrictions then increase again as of October 9, 2014 that include no use of the right upper extremity and no lifting, carrying, or pushing/pulling. The ALJ finds that claimant then re-establishes her right to TTD benefits based on the restrictions set forth by Ms. Herrera and Dr. Gustafson as of October 9, 2014. These restrictions remained in place until claimant was placed at MMI as of February 19, 2015. Therefore, claimant is entitled to TTD benefits for the period of October 9, 2014 through February 19, 2015.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

4. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

5. As found, claimant voluntarily decided to stop showing up for work because she felt work was causing her pain. However, employer had provided claimant with work within her restrictions. As found, claimant's act of refusing to show up for

work represents a volitional act that claimant reasonably knew were result in her termination of employment. Therefore, respondents have established by a preponderance of the evidence that claimant committed a volitional act that resulted in her termination of employment.

6. Claimant is therefore not entitled to TTD benefits after June 18, 2014 when she voluntarily left her employment with employer.

7. However, in *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004) the Colorado Supreme Court held that in cases where it is determined that the claimant is responsible for his or her termination of employment, the statutory provisions of Sections 8-42-103(1)(g) and 8-42-105(4) are not a permanent bar to receipt of temporary disability benefits. In *Anderson*, the claimant suffered a worsened condition causally related to the industrial injury as evidenced by increased work restrictions after claimant's termination of employment that prevented claimant from working. The court held in *Anderson* that because the worsened condition and not the termination of employment caused the wage loss, the claimant was entitled to temporary disability benefits. See *Anderson, supra.*

8. In this case, claimant likewise had increased work restrictions as set forth by Ms. Herrera in Dr. Gustafson's medical office, her authorized treating physician, as of June 26, 2014. Therefore, claimant had then re-established the right to TTD benefits by virtue of a worsened condition as of June 26, 2014.

9. Section 8-42-105(3), C.R.S. provides, in pertinent part, that temporary total disability benefits shall continue until the first occurrence of any one of the following:

(a) The employee reaches maximum medical improvement;

(b) The employee returns to regular or modified employment;

(c) The attending physician gives the claimant a written release to return to regular employment;

10. As found, claimant was released to return to regular employment by Ms. Herrera as of September 10, 2014. Therefore, as found, respondents get to cut off TTD benefits as of September 10, 2014 pursuant to Section 8-42-105(3)(c), C.R.S.

11. However, Ms. Herrera then provided claimant with restrictions that included no lifting, carrying, pushing or pulling as of October 9, 2014. The fact that Ms. Herrera may have indicated that claimant was working at this time is puzzling, but does not negate the fact that increased work restrictions were set forth by Ms. Herrera as of this date.

12. Therefore, as found, claimant is then entitled to an additional award of TTD benefits for the period of October 9, 2014 through February 15, 2015 when claimant was placed at MMI.

13. With regard to the issue of temporary partial disability benefits, in order to prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

14. As found, claimant was under restrictions that were being accommodated by employer for the period of April 15, 2014 through June 18, 2014. The ALJ finds claimant worked less hours during this period of time based on her voluntary decision to work fewer hours, despite the fact that employer was accommodating her restrictions. Therefore, claimant has failed to establish by a preponderance of the evidence that her injury contributed to some degree to a temporary wage loss.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits for the periods of June 26, 2014 through September 10, 2014 and from October 9, 2014 through February 15, 2015 based on the stipulated AWW of $311.20.

2. Claimant's claim for TPD benefits for the period of April 15, 2014 through June 18, 2014 is denied and dismissed.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 5, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. A determination of the true opinion of DIME physician Dr. Miguel Castrejon regarding maximum medical improvement (MMI) and permanent impairment, and once determined,

II. Whether Respondents have proven by clear and convincing evidence that they have overcome the opinion of the Division Independent Medical Examiner.

FINDINGS OF FACT

Based upon the evidence presented at hearing and the deposition testimony of Dr. Castrejon, the ALJ enters the following findings of fact:

1. On September 17, 2014, Claimant reported to Employer that he injured his low back cleaning carpets on September 16, 2014. Claimant was referred to and was seen at Concentra Medical Centers where he reported to Dr. Stephen Danahey that he had severe lower back pain after cleaning carpets all day and moving heavy furniture in order to complete the cleaning. Dr. Danahey documented tenderness of the lumbar spine and decreased range of motion in all planes. He diagnosed Claimant with a lumbar strain and provided Claimant with work restrictions of 10 pounds lifting, no bending, and standing no more than two hours per shift.

2. Claimant was also seen by Dr. Randall Jones in follow-up on October 6, 2014. Claimant explained at this time that his condition had worsened after being on his feet for two hours at work the day prior. Because Claimant's condition had yet to improve with physical therapy, Dr. Jones referred him to Dr. Brian Polvi for chiropractic treatment.

3. Claimant underwent an MRI of the lumbar spine on October 12, 2014. The MRI was interpreted as being normal, i.e. without evidence of degenerative disc disease, herination or stenosis.

4. Dr. Brian Polvi first examined Claimant on October 20, 2014. Dr. Polvi performed a physical examination of Claimant, revealing a positive Yeoman's maneuver indicative of sacroiliitis. Dr. Polvi explained that the maneuver was "positive for producing bilateral, prominent left sacroiliac joint pain…." He further noted that the Hibb's maneuver performed "also revealed bilateral sacroiliac joint dysfunction." Dr. Polvi diagnosed Claimant with left sacroiliac joint dysfunction and a myofascial strain of the lumbosacral and gluteal region.

5. Because of ongoing pain complaints and a lack of improvement with conservative care including chiropractic treatment, Claimant was referred to Dr. Jeffery Jenks for consideration of injections into the lumbar spine. On November 26, 2014 Dr. Jenks found that Claimant presented with symptoms of persistent low back pain and left leg pain along with potential facet syndrome. In making these findings, Dr. Jenks also noted symptom magnification. Dr. Jenks recommended left L4-5 and L5-S1 facet injections and a left SI joint injection, which were authorized. In reevaluating Claimant on December 10, 2014, following these injections, Dr. Jenks noted that Claimant reported the injections made his symptoms worse. Dr. Jenks noted that he had no further treatment recommendations and that Claimant was likely at maximum medical improvement.

6. Following the trial of injection therapy by Dr. Jenks, Claimant returned to and continued his treatment with Concentra seeing both Dr. Danahey and Dr. Ginsburg in December 2014. Both physicians noted that claimant's pain complaints had not resolved. Consequently, they continued prescriptions for pain management treatment.

7. On December 19 and 31, 2014 an investigator from Advantage Investigations attempted video surveillance of Claimant at the request of respondents. Video taken on December 31, 2014 shows claimant (as identified by both Dr. Castrejon and Dr. Hattem) performing various postural maneuvers in an attempt to open his car after locking his keys inside. Review of the video demonstrates Claimant to be able to assume and maintain various postures which depict his lumbar range of motion in this video and establishes further that Claimant is able to work on unlocking his car without any obvious signs of pain or discomfort. Claimant climbs on top of his vehicle, bends and twists through a complete range of motion and places himself in numerous awkward positions in an attempt to get a coat hanger inside of his vehicle through a closed window and door.

8. Claimant followed-up with Dr. Jones with Concentra on January 8, 2015. Dr. Jones referred Claimant for delayed recovery to Dr. Albert Hattem; however, prior to seeing Dr. Hattem, Claimant saw Dr. Jenks again on January 28, 2015. Dr. Jenks performed an exam revealing a positive straight leg test. He explained that he wanted to perform an EMG of Claimant's lower extremity to rule out radiculopathy prior to placing Claimant at MMI.

9. An FCE was conducted on January 29, 2015 at Select Physical Therapy. At the FCE, Claimant presented with substantial limitations and pain complaints. Claimant presented as unable to crouch due pain, unable to crawl, unable to life more than 10 pounds and only able to walk at a slow pace for a few minutes on a treadmill with the support of hand rails.

10. Claimant next saw Dr. Jones on February 5, 2015. At this evaluation, he continued to report ongoing low back pain and was provided 10 pound lifting restrictions. Dr. Jones declined further follow-up appointments instead deferring any further treatment or determinations of MMI to Dr. Hattem and Dr. Jenks.

Claimant saw Dr. Jenks on February 18, 2015 at which time Dr. Jenks noted ongoing pain behaviors. Although he continued Claimants prescriptions, Dr. Jenks did not provide further treatment recommendations pending the outcome of the previously recommended and requested EMG. The EMG was conducted on March 10, 2015 by Dr. Jenks. It was interpreted as a normal study without evidence of lumbosacral radiculopathy or peripheral neuropathy. In his EMG report, Dr. Jenks noted there was no further treatment to offer Claimant.

11. Claimant saw Dr. Hattem on March 12, 2015. Following his evaluation, Dr. Hattem noted that Claimant's condition had not improved despite multiple interventions. Dr. Hattem found that Claimant's subjective pain complaints were "far in excess" of objective findings on physical examination. Nonetheless, Dr. Hattem delayed placing Claimant at MMI following this evaluation, noting he had not yet reviewed Claimant's EMG results.

12. In advance of any further evaluations by Dr. Hattem or Dr. Jenks, Respondents sent both physicians copies of the December 19 and 31, 2015 surveillance videos. On March 16, 2015, Dr. Jenks composed a letter to respondents' counsel regarding his review of the surveillance. Dr. Jenks stated that the actions by Claimant in the surveillance video contradicted his presentation at office visits, contradicted the findings of the FCE and evidenced that Claimant magnified his complaints of pain and disability to a "very large extent." Based on his review of the video, it was Dr. Jenks recommendation that Claimant be placed at MMI with no impairment or permanent restrictions.

13. Claimant returned to Dr. Hattem on April 30, 2015. In his subsequent report, Dr. Hattem discussed his review of the December, 2014 surveillance video stating, "It is my opinion that [claimant's] activity level demonstrated in this video was not consistent with his activity level demonstrated during the functional capacity evaluation completed at Select Physical Therapy on January 29, 2015. It was also not consistent with his reported significant low back pain during clinical examinations. It is therefore my opinion that [claimant] does not qualify for an impairment rating. His subjective complaints are out of proportion to negative objective testing. His current complaints are also not consistent with the activity demonstrated during a surveillance video."

14. Respondents filed a Final Admission of Liability consistent with the March 16, 2015 report of Dr. Jenks. The admission indicated claimant had reached MMI as of March 16, 2015, admitted for no permanent impairment and denied maintenance medical care. Claimant objected to the Final Admission, requesting a DIME. The DIME was conducted by Dr. Miguel Castrejon on July 28, 2015. In his DIME report, Dr. Castrejon found Claimant had reached MMI on April 30, 2015 with 11% whole person impairment. In evaluating Claimant, Dr. Castrejon noted a normal neurologic examination, no evidence of facet mediated pain, focal tenderness over the SI joint but negative SI joint stressing maneuvers and normal EMG and MRI results. Nonetheless, Dr. Castrejon assigned 11% permanent impairment.

15. The Division of Workers' Compensation IME program issued a notice of completed DIME on July 22, 2015. Respondents challenged the opinion of Dr. Castrejon regarding MMI and impairment filing an Application for Hearing on August 6, 2015.

16. Dr. Castrejon was not provided copies of the December 19 and 31, 2014 video surveillance tape.; however, Dr. Castrejon noted in his DIME report the opinions of Dr. Hattem and Dr. Jenks in their discussion of the surveillance video and stated that he retained the right to alter or reconfirm his opinion on review of the video.

17. A second round of surveillance was conducted in August, 2015. On August 20, 2015, video was taken of claimant helping to move a bed mattress. In advance of hearing, Respondents took the deposition of Dr. Castrejon on November 16, 2015 and a copy of the deposition transcript was taken into evidence at hearing. At the deposition, Dr. Castrejon was presented with both the December 31, 2014 surveillance video and the August 20, 2015 surveillance video. In both instances, Dr. Castrejon identified Claimant as the individual featured in the videos. Additionally, Dr. Castrejon provided a detailed description of the activities Claimant engaged in during videotaping. After careful review of the video tape, the ALJ finds Dr. Castrejon's description of the movements/postures/activities Claimant engaged in while trying to open his vehicle precise and accurate.

18. After being provided an opportunity to review the surveillance videos, Dr. Castrejon was asked to reconsider his opinions on MMI and impairment. With respect to the August 20, 2015 video, Dr. Castrejon testified that he did not see evidence of an individual who was experiencing back pain. Dr. Castrejon estimated the subject mattress Claimant helped lift and carry to be a queen size, which based upon experience weighed "probably between 20-30 pounds."

19. Based on the December 31, 2014 video, Dr. Castrejon testified that Claimant had no permanent physical impairment for loss of range of motion. Dr. Castrejon testified that, based on Claimant's abilities as demonstrated in the video, it would have been difficult to provide an impairment rating under Table 53 of the AMA Guides because Claimant likely had no Table 53 diagnosis that extended beyond six months. With respect to impairment for range of motion loss, Dr. Castrejon testified that after reviewing the video there is no impairment for range of motion loss because his range of motion measurements could not be corroborated based upon Claimant's activities as demonstrated in the video surveillance. In short Dr. Castrejon testified that, "I think if I had all this information, I likely would have concluded the Claimant had achieved MMI for a lumbar strain that probably did not go beyond the six-month period, with no ratable impairment." Concerning MMI, Dr. Castrejon testified that Claimant likely would have been at MMI as of the date of the December 31, 2014 video

20. Dr. Hattem testified regarding his evaluations of Claimant and his review of the surveillance video. Dr. Hattem's testimony corroborated the opinions of Dr. Castrejon in his deposition. Dr. Hattem testified that there was no objective evidence of an injury to

the lumbar spine based on the negative MRI and EMG. Based on the lack of objective evidence of injury, Dr. Hattem, like Dr. Castrejon was unable to find any impairment under Table 53 of the AMA Guides. Dr. Hattem also testified that the activities demonstrated by Claimant in the December 31, 2014 surveillance video demonstrated full range of motion and evidenced that Claimant would not have any permanent impairment for loss of range of motion. Lastly, Dr. Hattem testified that, on review of the surveillance video, his initial determination of MMI could be amended to December 31, 2014.

21. The ALJ finds Dr. Castrejon's and Dr. Hattem's testimony regarding MMI and the absence of permanent impairment, based upon the evidence presented, including the video surveillance tape, credible and persuasive.

22. Claimant testified at hearing regarding the two surveillance videos of him taken on December 31, 2014 and in August of 2015. He explained that on December 31, 2014 he had accidentally locked his car keys inside his vehicle. Claimant is a single father with sole custody of his child and he testified that he needed his vehicle to pick up his child from school.

23. Claimant testified that he knows the activities performed on December 31, 2014 were outside the restrictions provided to him by his authorized treating physician. His testified that his concern over the welfare of his child outweighed the restrictions placed on his physical activities. Claimant testified that this particular incident did cause a flare up of his ongoing back pain and that the activities performed were not pain free.

24. Claimant testified that he had previously viewed the surveillance video from August of 2015 showing him lifting a mattress. He explained that the mattress was not very heavy because it was a sponge/foam type of mattress and he had assistance carrying the light mattress.

25. Based on the evidence presented, the ALJ is not persuaded by Claimant's testimony. Claimant's professed concern for his child's welfare as the impetus to ignore his restrictions and engage in physically demanding activity is incredible. If Claimant were as restricted and his low back condition as disabling as he wants the ALJ to believe, the ALJ is convinced that he would have found alternatives to lifting and carrying a queen sized bed mattress and picking his daughter up from school rather than spending considerable time involved in physically demanding activity to break into his vehicle to retrieve his keys. Moreover, while Claimant testified that these activities caused him pain, there is no evidence that Claimant was in any pain while attempting to retrieve his keys or lifting/carrying the mattress in the video submitted. Rather, the video surveillance establishes that Claimant's movements were fluid and that he was able to get into and maintain awkward positions for sustained periods of time. Such objective evidence suggests a lack of pain. This cannot be reconciled with Claimant's subjective testimony to the contrary. Consequently, the ALJ finds Claimant's testimony unreliable and unpersuasive.

26. Respondents have proven by clear and convincing evidence that it is highly probable that Dr. Castrejon's original opinion concerning permanent impairment was incorrect. The ALJ finds that Dr. Castrejon erred in his decision to assign Table 53 and associated range of motion impairment for Claimant's September 16, 2014 lumbar sprain/strain and his opinions in this regard have been overcome.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. *C.R.S. § 8-40-102(1)*; *see Specialty Rests. Corp. v. Nelson,* 231 P.3d 393, 398 (Colo.2010).

B. When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. *Section 8-43-210, C.R.S.* As found, Dr. Castrejon and Dr. Hattem are credible witnesses and their testimony is both persuasive and consistent with the medical records and video surveillance tape submitted in this case. Conversely, Claimant's activity level, as demonstrated in the video surveillance, is not consistent with his activity level demonstrated during the functional capacity evaluation completed at Select Physical Therapy on January 29, 2015, nor is it consistent with his reports of significant low back pain during clinical examinations. Finally, Claimant's current complaints are also inconsistent with the activity demonstrated during a surveillance video. Consequently, Claimant's testimony is incredible and unconvincing.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See Davison v. Industrial Claim Appeals Office, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385(Colo. App. 2000)

Overcoming the DIME

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. In this case, Claimant asserts that the opinions of Dr. Castrejon are ambiguous and that a threshold determination of what constituted the actual opinion of Dr. Castrejon regarding MMI and impairment must be resolved before the question of whether Respondents overcame his opinions can be addressed. If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a: matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5* P.3d 385 (Colo. App. 2000); *Stephens* v. *North and Air Package Express Services,* W. C, No. 4-492-570 (February 16, 2005), *aff'd, Stephens* v. *Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006) (not selected for publication). In this case, Dr. Castrejon's initial DIME report gave a MMI date of April 30, 2015 and provided claimant a whole person impairment rating. He acknowledged that he did not have the video surveillance tape yet chose to assign MMI and impairment without it after discussing the activities contained thereon with Claimant. While Dr. Castrejon specifically stated he reserved the right to alter his opinions following review of any surveillance video, he clearly and unambiguously placed Claimant at MMI with 11% whole person permanent impairment. Consequently, the ALJ finds, as a matter of fact, that at the conclusion of the DIME, Dr. Castrejon concluded that Claimant was at MMI with impairment. Accordingly, Respondents, who contested those opinions, properly filed their application for hearing and the burden to overcome those opinions by clear and convincing evidence rested with them.

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). In concluding that Respondents have carried their burden to establish that Dr. Castrejon's opinion regarding MMI and impairment, as expressed in his July 8, 2015 DIME report, the ALJ finds the opinion expressed in *Andrade* v. *Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005) instructive. In *Andrade* the Colorado Court of Appeals held that a DIME physician's finding of MMI and permanent impairment consists not only of the initial report, but also any subsequent opinion given by the physician. Thus the court held that an ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video. Similarly, in *Jarosinski* v. *Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002) it was proper for the ALJ to consider a DIME physician's retraction of her original permanent impairment rating after viewing videotapes showing the claimant performing activities inconsistent with the symptoms and disabilities she had reported.

G. In this case, once the application for hearing was filed, Respondents provided Dr. Castrejon the opportunity to review the surveillance video of Claimant in its entirety at his November 16, 2015 deposition. On reviewing the surveillance video, Dr. Castrejon testified that the video did further inform his opinion with respect to maximum medical improvement and impairment, and Dr. Castrejon revised/changed his opinions regarding MMI and permanency. Dr. Castrejon's revised opinions are consistent with the March 16, 2015 report of Dr. Jenks, which served as the basis for respondents' Final Admission of Liability, and the testimony of Dr. Hattem at hearing. Additionally, Dr. Casterjon's findings are consistant with the medical history of this claim which consistantly recorded pain behaviors and complaints in excess of the objective findings, and in particular, in excess of the negative MRI and EMG. As noted above, in order to overcome the Division IME, Respondent must show that it is highly probable that Dr. Castrejon erred in his conclusions, as expressed in July 8, 2015 DIME report that Claimant reached MMI with 11% whole person impairment. Based on Dr. Casterjon's deposition testimony, the medical opinions of Dr. Jenks and Dr. Hattem and the surveillance video, the ALJ concludes that Dr. Castrejon's original opinions concerning MMI and impairment were based upon an incomplete understanding of the case. Indeed, Dr. Castrejon admitted that he did not have the video surviellance tape in question. Once he was afforded the opportunity to veiw the video, Dr. Castrejon retracted his opinions, concluding that Claimant's reached MMI earlier than opined in his previously and without impairment. Consequently, the ALJ fiinds and concludes that Dr. Castrejon's original opinions regarding MMI and impoairment were highly probably incorrect. Accordingly, the Respondents request to set aside Dr. Castrejon's opinion that Claimant reached MMI on April 30, 2015 with 11% whole person impairment is GRANTED. The DIME opinions as expressed by Dr. Castrejon on July 8, 2015 have been overcome.

Where the ALJ determines that the DIME physician's opinion has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. Thus, once the ALJ determines that the DIME's opinion has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). In this case, the ALJ adopts the unrefuted testimony of Dr. Castrejon and Hattem to conclude that Claimant reached MMI on December 31, 2014 without impairment.

ORDER

It is therefore ordered that:

1. Respondents' request to set aside Dr. Castrejon's opinions regarding MMI and permanent impairment as expressed July 8, 2015 is GRANTED. Claimant reached MMI on December 31, 2014. The 11% whole person impairment assigned by Dr. Castrejon is set aside and replaced by his amended opinion of 0% impairment..

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 11, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he is entitled to reopen his case pursuant to Section 8-43-303, C.R.S.?

- Whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of May 9, 2015 and ongoing, with the exception of September 8, 2015 through September 28, 2015 when claimant returned to work for Durango Joe's, a subsequent employer.

- Whether claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability ("TPD") for the period of September 18, 2015 through September 28, 2015?

- Whether claimant has proven by a preponderance of the evidence that penalties should be assessed against respondents for their failure to file either a Notice of Contest of an admission of liability prior to March 19, 2015?

- The parties stipulated to an average weekly wage ("AWW") of $782.00 for the period of December 26, 2013 through July 31, 2015 and an AWW of $955.03 as of August 1, 2015.

- The parties stipulated that respondents have agreed to pay for claimant's ongoing reasonable medical benefits necessary to cure and relieve claimant from the of the work injury, including the left SI joint radiofrequency ablation recommended by Dr. Lewis.

- The parties stipulated that claimant sustained a work related injury on December 26, 2013 as a result of being jerked in a harness while on the roof, and another work injury when he slipped and fell in the parking lot the following day and that both of those injuries are treated as one admitted injury with a date of injury of December 26, 2013.

- The parties stipulated that insurer received Dr. Jernigan's October 27, 2014 report placing claimant at maximum medical improvement ("MMI") with a 16% whole person impairment rating on November 5, 2014.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of and in the course of his employment with employer on December 26, 2013. Claimant was employed as a maintenance technician with employer. As indicated above, claimant's injuries arise from being jerked in a harness and falling in a parking lot the following day. These

injuries are to be treated as one admitted injury with a date of injury of December 26, 2013.

2. Following claimant's injury, claimant was referred for medical treatment with Mercy Medical Center. Claimant was initially evaluated by Dr. Graham with Mercy Medical Center on December 27, 2013. Dr. Graham noted claimant's report of injury associated with a slip on ice and diagnosed claimant with a lumbar strain with radiculopathy. Dr. Graham noted claimant's medical history included a prior work related injury and recommended claimant undergo a course of physical therapy and provided medications including skelaxin, and Valium. Dr. Graham also took claimant off of work for the period of December 27 through December 31. Claimant testified that after his injury he was off of work for four (4) days before being provided with work within his restrictions.

3. Claimant returned to Mercy Medical Center on December 31, 2013 and was evaluated by Dr. Jernigan. Dr. Jernigan noted claimant reported he was still feeling pretty sore and stiff. Dr. Jernigan recommended claimant continue his physical therapy and, if his symptoms continued to cause him problems, they would need to refer claimant for a magnetic resonance image ("MRI") of the lumbar spine.

4. Claimant returned to Dr. Jernigan on January 6, 2014. Dr. Jernigan noted claimant's ongoing complaints and indicated that his modified duty should be increased to 10 pounds with only 4 hours of work per day. Claimant returned to Dr. Jernigan on January 14, 2014 and reported some slow improvement with his low back. Dr. Jernigan recommended claimant undergo an MRI of the lumbar spine and continue physical therapy.

5. The MRI was completed on January 23, 2014 and showed minimal posterior disc bulging at the L4-L5 level with a central and right disc protrusion at the L5-S1 level with mild canal stenosis and moderate narrowing of the lateral recess and moderate right and severe left neural foraminal narrowing.

6. Following the MRI, claimant returned to Dr. Jernigan on January 24, 2014. Dr. Jernigan noted claimant was continuing to work, but was limited to only 4-6 hours per day. Dr. Jernigan referred claimant to Spine Colorado for physiatry evaluation. Dr. Jernigan also continued claimant's physical therapy.

7. Claimant underwent a bilateral L5 transforaminal injection on February 10, 2014 under the auspices of Dr. Bohachevsky. Claimant reported after the injection he had increased pain which improved he next day for about 6 hours. Claimant then developed lower extremity numbness and tingling which persisted for several hours.

8. Claimant testified at hearing that he was off of work for four days after his December 26, 2013 work injury. Claimant also testified he was off of work for a couple of days after his February 2014 injection. This testimony is supported by the medical records from Dr. Jernigan that indicate claimant was to be off of work for February 10 and February 11, 2014.

9. Claimant continued to treat with Dr. Jernigan and Dr. Bohachevsky and eventually, on June 4, 2014 underwent a radiofrequency ablation ("RFA") neurotomy treatment under the auspices of Dr. Lewis. In connection with the RFA treatment, Dr. Jernigan took claimant off of work for the period of June 3 through June 8, 2014. Claimant was released to restricted duty effective June 8, 2014 that limited his lifting to 40 pounds.

10. Claimant reported improvement following the RFA procedure. Claimant eventually underwent an L5-S1 interlaminar injection on September 8, 2014. Claimant again reported some improvement following the injection. Dr. Bohachevsky noted that claimant could have additional injections as a part of maintenance care.

11. Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Jernigan on October 27, 2014. Dr. Jernigan noted in the October 27, 2014 report that claimant was at MMI as of October 7, 2014. Dr. Jernigan provided claimant with a permanent impairment rating of 16% whole person. Dr. Jernigan also recommended ongoing maintenance medical care that included "extensive future care." Dr. Jernigan specifically mentioned additional medical treatment that could include a repeat SI RFA, repeat epidurals, physical therapy or other structural therapy such as massage therapy and potential surgical intervention.

12. As indicated above, the parties stipulated that respondents received the October 27, 2014 report on November 5, 2014. However, the evidence establishes that the first admission of liability ("FAL") was filed on March 19, 2015.

13. Claimant filed a workers' claim for compensation on December 5, 2014. The Division of Workers' Compensation issued a letter to employer inquiring about insurance on December 12, 2014. Employer had Ms. Cadrain respond to the inquiry with information regarding the insurer and the response was stamped received by the Division of Workers' Compensation on December 19, 2014.

14. Claimant filed an amended application for hearing on March 3, 2015 endorsing various issues for hearing, including compensability, average weekly wage, temporary total disability ("TTD"), temporary partial disability ("TPD"), average weekly wage ("AWW"), penalties and permanent partial disability.

15. The Director of the Division of Workers' Compensation issued an Order to Show Cause on March 11, 2015 requiring insurer to issue either an admission of liability or a notice of contest within 15 days of the date of the Order. The FAL was then filed on March 19, 2015. The FAL admitted for a period of temporary partial disability benefits for the period of December 27, 2014 through February 15, 2014 and listed a total amount of TPD benefits paid to be $1,290.25. With regard to ongoing medical treatment the FAL admitted for "further claim related treatment through October 26, 2015 per Dr. Jernigan's medical report of October 27, 2014." It is unclear from the record the basis of insurer's claim to be able to cut off maintenance medical treatment as of October 26, 2015 as indicated on the FAL.

16. Claimant filed an objection to the FAL on March 24, 2015 and noted issues that still needed to be resolved included TTD, penalties, maintenance medical care and AWW. The objection to the FAL is stamped as being received by the Division of Workers' Compensation on March 24, 2015.

17. During this time, claimant continued to treat with Dr. Lewis and Dr. Jernigan. Notably, shortly after being placed at MMI, Dr. Jernigan referred claimant back to Dr. Lewis on November 3, 2014 for consideration of a repeat RFA. Dr. Jernigan noted on November 21, 2014 that claimant's request for an SI ablation was denied. Dr. Jernigan followed up with a letter to the insurer on January 7, 2015 requesting reconsideration of the repeat RFA.

18. Claimant returned to Dr. Lewis on January 29, 2015. Dr. Lewis recommended another RFA procedure focusing on the left sacroiliac joint.

19. Claimant returned to Dr. Jernigan on February 12, 2015 and reported he was continuing to worsen. Dr. Jernigan took claimant off of work for the period of February 12, 2015 until February 20, 2015. Dr. Jernigan noted that claimant's case should be reopened due to the worsening of claimant's symptoms and marked the MMI date as unknown on the WC164 form.

20. Claimant returned to Dr. Lewis on February 17, 2015 and reported his prior RFA had resulted in a decrease in pain of 70-80% that lasted 4 ½ months, followed by a return of his symptoms. Dr. Lewis noted he was recommending a repeat RFA and if he received a positive result, claimant could be a candidate for an SI joint fusion.

21. Claimant continued to treat with Dr. Jernigan who consistently reported that claimant's MMI date was unknown. Claimant eventually underwent an epidural steroid injection ("ESI") with Dr. Bohachevsky on March 30, 2015. Claimant reported significant relief following the ESI when he returned to Dr. Jernigan on April 13, 2015. Dr. Jernigan again referred claimant to Dr. Lewis.

22. Claimant returned to Dr. Jernigan on April 27, 2015 and noted he was struggling to work more than 32 hours per week due to increased right SI pain. Dr. Jernigan also noted limited range of motion on examination. Claimant returned to Dr. Jernigan on May 4, 2015 and again provided claimant with work restrictions that included no lifting more than 20 pounds and work hours of up to 6 hours per day.

23. Claimant returned to Dr. Bohachevsky on May 12, 2015 who noted that claimant's second RFA had helped about fifty percent, but also noted that claimant's stabbing pain had returned. Dr. Bohachevsky recommended another left SI joint injection which was accomplished on June 9, 2015.

24. In response to an inquiry from claimant's attorney, Dr. Jernigan issued a report answering specific questions regarding claimant's medical treatment. Notably, Dr. Jernigan indicated that since claimant was placed at MMI, he was definitely worsening and recommended claimant's case be reopened as of February 3, 2015. Dr.

Jernigan further noted that claimant's current course of treatment was intended to improve claimant's condition and was not intended to maintain claimant.

25. Claimant returned to Dr. Jernigan on May 20, 2015. Dr. Jernigan noted that claimant needed to stop working due to his inability to work his full hours. Dr. Jernigan continued claimant on restrictions, including the 20 pounds of lifting and 6 hours per day, and again indicated that his MMI date was unknown.

26. Claimant returned to Dr. Jernigan on July 8, 2015 and reported no significant changes in his physical condition. Dr. Jernigan recommended claimant return to Dr. Lewis for an RFA and Dr. Cotgageorge. Dr. Jernigan continued claimant's restrictions. Claimant continued his treatment with Dr. Jernigan on July 22, 2015. Dr. Jernigan noted claimant continued to struggle and the SI ablation had begun to wear off. Dr. Jernigan continued claimant's restrictions.

27. Claimant returned to Dr. Jernigan on August 4, 2015. Dr. Jernigan noted claimant's continued complaints and recommended additional treatment including acupuncture and consultation with a psychologist. Claimant returned to Dr. Jernigan on August 21, 2015. Dr. Jernigan noted claimant was scheduled for a repeat ESI and reported that claimant was "clearly worse" than he was at the time of MMI.

28. Claimant underwent a repeat ESI injection at the L5-S1 level on August 24, 2015.

29. Claimant continued to treat with Dr. Jernigan throughout the Fall of 2015. Dr. Jernigan continued claimant on work restrictions during this time and limited claimant to working no more than six hours per day. Claimant returned to Dr. Jernigan on October 14, 2015. Dr. Jernigan noted claimant was having issues with getting approval for his medical appointments, including the SI ablation procedure and acupuncture. Dr. Jernigan at this point indicated that claimant was restricted to "no work from October 14, 2015".

30. Claimant was referred by respondents to Dr. Scott of an independent medical examination ("IME") on September 16, 2015. Dr. Scott reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Scott indicated in his report that claimant's diagnosis for his work related injury would be left sacroiliac joint dysfunction with pain and discopathy at L5-S1 with disc pain. Dr. Scott opined that claimant's case would not need to be reopened because the treatment including the left sacroiliac joint radiofrequency ablation could be performed as maintenance medical treatment.

31. Dr. Jernigan testified at hearing in this matter. Dr. Jernigan testified that following claimant's injury, he diagnosed claimant with a lumbar disk injury and sacroilitis. Dr. Jernigan testified that claimant's MRI results supported this diagnosis. Dr. Jernigan testified that when he put claimant at MMI as of October 7, 2014, it was because claimant had significant improvement following the RFA and the ESI and he didn't think there was further invasive procedures that would be recommended.

32. Dr. Jernigan testified that after he placed claimant at MMI, his referral for the second RFA was denied and by January 7, 2015, it was clear to Dr. Jernigan that claimant was getting worse. Dr. Jernigan testified that even after the second RFA was completed, it was his opinion that claimant was no longer at MMI because the repeat RFA was only partially effective.

33. Dr. Jernigan testified that claimant's care since February 3, 2015 was designed to get claimant better as opposed to maintenance treatment. Dr. Jernigan testified that claimant's treatment has partially made claimant better, but has not resolved his problem. Dr. Jernigan testified he was recommending the repeat RFA because it was common for the results of an RFA procedure to wear off. Dr. Jernigan testified he sent the request for the second RFA procedure within one month of having placed claimant at MMI. Dr. Jernigan testified the purpose of the repeat injections and recommended massage therapy was to deal with flare ups. Dr. Jernigan testified he first saw claimant post MMI on January 26, 2015 and between October 27, 2014 and his follow up visit on January 26, 2015, he was actively trying to get the insurance company to authorize the RFA procedure. Dr. Jernigan testified he opined claimant's claim should be reopened on February 3, 2015 because the RFA hadn't been authorized.

34. Dr. Scott testified at hearing consistent with his IME report. Dr. Scott testified that while claimant may need additional medical treatment, he would classify the additional treatment as maintenance medical treatment. Dr. Scott testified there was no evidence that claimant's underlying back problem or SI joint problem had deteriorated since being placed at MMI. Dr. Scott testified that claimant's symptoms that returned after MMI would be expected and the appropriate treatment would be to repeat the ablation procedure. Dr. Scott testified that this treatment, including the repeat of the ablation procedure would be considered maintenance medical treatment.

35. With regard to claimant's work, claimant testified at hearing that he continued to work for employer up until May 8, 2015. Claimant testified his employer attempted to make reasonable accommodations, but claimant could not continue to perform the work of his employer due to his physical limitations. Claimant's testimony is found to be credible and persuasive. Claimant signed a general settlement and release indicating his final day of employment with employer was May 8, 2015.

36. Claimant testified that after he quit working for employer, claimant attempted to return to work within his restrictions by applying for and accepting a job with Durango Joe's working as a barista. Claimant testified he worked for 2 days at Durango Joe's working four hour shifts on both days, but he could not complete the work and had to quit due to his workers' compensation injury. Claimant's testimony regarding his work at Durango Joe's is found to be credible and persuasive.

37. Ms. Spratta, a claims adjuster for insurer testified at hearing in this matter. Mr. Spratta testified she was familiar with claimant's case as she took over as the claims handler for the case in March 2015. Ms. Spratta took over claimant's case for a previous employee who was no longer employed by insurer. Ms. Spratta testified she became the claims adjuster after the FAL was filed by insurer in this case.

38. Ms. Spratta testified that in her review of the file, no admission of liability or a notice of contest was filed until the FAL was filed on March 19, 2015. Ms. Spratta testified she was unaware why no admission or notice of contest was filed until March 19, 2015 and testified that according to the claim notes, there was an entry on January 8, 2015 in which the adjuster acknowledged receiving notice from the state advising insurer that action needed to be taken regarding the filing of the notice of contest or an admission of liability.

39. The ALJ credits the opinions and testimony of Dr. Jernigan and finds that claimant has proven by a preponderance of the evidence that he has sustained a worsening of his condition after being placed at MMI that would allow claimant to reopen his case. The ALJ credits claimant's testimony at hearing regarding his physical condition as being credible and persuasive and notes that the medical records document claimant's condition having worsened to the point that Dr. Jernigan has revoked the prior finding of MMI.

40. The ALJ therefore determines that claimant's case should be reopened pursuant to Section 8-43-303, C.R.S. based on a worsened condition.

41. The ALJ credits the records entered into evidence at hearing along with claimant's testimony at hearing and finds that claimant has proven that it is more likely than not that he is entitled to an award of TTD benefits for the period of May 9, 2015 through September 18, 2015 and from September 29, 2015 through ongoing. The ALJ credits the opinion of Dr. Jernigan that claimant was not at MMI as of February 3, 2015 and finds that claimant was under restrictions at the time he stopped working for Employer. The ALJ credits the testimony of claimant at hearing and finds that claimant was unable to perform the functions of his job due to the work restrictions set forth by Dr. Jernigan and is therefore entitled to an award of TTD benefits commencing May 9, 2015.

42. The ALJ credits the records entered into evidence at hearing along with claimant's testimony at hearing and finds that claimant has proven that it is more likely than not that he is entitled to an award of TPD benefits for the period of September 18, 2015 through September 28, 2015, representing the period of time claimant attempted to return to work for Durango Joe's. The ALJ credits claimant's testimony at hearing that he attempted to return to work for Durango Joe's as an attempt to find work within his restrictions as set forth by Dr. Jernigan. The ALJ credits claimant's testimony that he could not perform the functions of this job due to his work injury and he necessarily had to abandon his attempt to return to work due to his physical restrictions from his work injury.

43. According to the wage records from Durango Joe's, claimant earned $144.27 while employed with Durango Joe's for the pay period of September 16, 2015 through September 30, 2015. The ALJ credits claimant's testimony that the dates he was actually employed were September 18, 2015 (noted on the pay stub to be claimant's hire date) through September 28, 2015.

44. The ALJ credits the records entered into evidence at hearing along with claimant's testimony at hearing and finds that claimant has proven that it is more likely than not that he is entitled to an award of TTD benefits beginning again on September 29, 2015 after his attempt to return to work had failed. The ALJ credits the claimant's testimony at hearing along with the medical records and finds claimant continued to be under work restrictions that prohibited claimant from returning to work after September 29, 2015.

45. In this case, claimant was taken off of work for 3 days immediately after the injury from December 27 through December 31, 2013. Claimant was again taken off of work for several days after his injection in February 2014 (from February 10 through February 11, 2014). The ALJ finds respondents should have filed either an admission of liability or a notice of contest following the three days of lost time pursuant to Section 8-43-101(1). Therefore, respondents are subject to penalties pursuant to Sections 8-43-203(1)(a) and 8-43-203(2)(a).

46. The ALJ finds insurer liable for one days compensation for failing to make the appropriate filings with the Division of Workers' Compensation. The ALJ notes that he has discretion to award "up to" one days compensation and has considered awarding less than one day's compensation. However, when considering the fact that insurer also failed to timely admit liability for the permanent impairment benefits, the ALJ finds that the full award of one day's compensation for 365 days is appropriate in this case.

47. The ALJ notes that claimant was not regularly missing a significant amount of time from work during the period of time in which respondents failed to admit or deny liability in this case, with indemnity benefits totally only $1,290.25 being paid during this time. However, the ALJ finds that sufficient evidence has been presented to allow for the full penalty of one days compensation for 365 days based on the absolute failure of insurer to make any appropriate filings in this case despite paying indemnity benefits and having received an impairment rating for claimant from the authorized treating physician until the FAL was filed on March 19, 2015.

48. In this case, the ALJ notes that claimant was eventually paid his temporary disability benefits on or about March 19, 2014. Nonetheless, no admission of liability was filed admitting for the indemnity benefits. The ALJ finds that the claimant was established that the admission of liability should have been filed within 20 days of claimant missing three days from work, or by January 19, 2014. Section 8-43-203(2)(a) further limits the penalty to 365 days of up to one day's compensation.

49. The ALJ determines that claimant has proven that insurer failed to notify the Division of Workers' Compensation in a timely manner pursuant to Section 8-43-203(1)(a) as to whether claimant's claim was admitted or contested. The ALJ finds that insurer is liable for one days compensation for 365 days, with 50% of the penalty to be paid to the subsequent injury fund pursuant to Section 8-43-203(2)(a).

50. Claimant also argues that respondents are subject to penalties under Section 8-43-304, C.R.S. (the general penalty provision) for failing to admit or deny liability for this work injury until the FAL was filed on March 19, 2015. Respondents argue that claimant's claim for penalties for this alleged violation is precluded by the one year statute of limitations. Because the ALJ determines that claimant is precluded from the general penalty provision set forth under Section 8-43-304(1) based on the more specific penalty provision established under Sections 8-43-203(1) and 8-43-203(2), the ALJ need not consider the statute of limitations defense raised by respondents in their position statement.

51. However, Section 8-43-304(1) applies to "Any employer or insurer, or any officer or agent of either, or any employee or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, *for which no penalty has been specifically provided*, or fails, neglects or refuses to obey any lawful order made by the director or panel…"(emphasis added). In this case, insurer's failure to timely file the admission of liability pursuant to Section 8-43-101(1) has a specific penalty provision established in Section 8-43-203(2)(a).

52. Claimant argued that respondents are subject to penalties for failing to file an FAL or request a Division-sponsored Independent Medical Examination ("DIME") within 30 days of the date of receiving the PPD report from Dr. Jernigan. The parties stipulated respondents received this medical report on November 5, 2014. Respondents argue that claimant must establish that respondents knew or reasonable should have known of the penalty violation because the penalty was cured within 20 days of the filing of the March 3, 2015 application for hearing when they filed the March 19, 2015 FAL.

53. Notably, claimant alleges that respondents waived the right to raise any affirmative defenses at the commencement of the hearing. However, the ALJ notes that the respondents Case Information Sheet listed various affirmative defenses and, based on the fact that these defenses were listed on the Case Information Sheet, will consider the affirmative defenses raised by respondents.

54. The ALJ credits the testimony of Ms. Spratta at hearing along with the claim notes and finds the claimant has established that respondents knew or reasonably should have known of the penalty violation prior to the filing of the application for hearing. According to Ms. Spratta's testimony, the prior adjuster was advised by the Division of Workers' Compensation no later than January 8, 2015 of the need for taking action on the claim. Nonetheless, no filings were made by insurer for another 78 days when the FAL was filed.

55. The ALJ finds insurer is liable for penalties for failing to timely file appropriate paperwork either admitting to the impairment rating provided by Dr. Jernigan or requesting a DIME. The ALJ credits Ms. Spratta's testimony that there was no malice nor any nefarious intent by insurer in failing to properly request a DIME evaluation or file the admission of liability and timely providing claimant with his PPD

benefits. Nonetheless, the ALJ takes this into consideration as to the extent of the penalty that is warranted and not into consideration as to whether a penalty should be assessed in the first instance. The ALJ further finds that the actions of insurer were not reasonable considering the fact that they received the impairment rating from Dr. Jernigan on November 5, 2014 but did not file anything with the Division for almost six months until March 19, 2015.

56. The ALJ concludes that claimant has demonstrated by clear and convincing evidence that respondent knew or reasonably should have known of the facts giving rise to the penalty violation prior to the application for hearing being filed. The ALJ notes that insurer was advised by the Division of Workers' Compensation that they were required to file appropriate documentation through the January 8, 2015 notice from the Division of the issues with the claim. Therefore, the ALJ finds that claimant has demonstrated by clear and convincing evidence that insurer knew or reasonably should have known that they were in violation of the act.

57. The ALJ determines that insurer is subject to penalties for failure to timely file an admission of liability or apply for a Division IME following receipt of the impairment rating from Dr. Jernigan pursuant to W.C.R.P. 5-5(E). The ALJ determines that this penalty began to run 30 days from insurer's receipt of the impairment rating on November 5, 2014. The ALJ determines that the penalty period ends with the filing of the FAL on March 19, 2015, representing a period of 103 days (December 5, 2014 through March 18, 2015).

58. The ALJ takes into consideration the fact that insurer failed to properly make filings on multiple occasions with regard to this claim in determining the extent of the penalty, including the fact that insurer was put on notice by the Division of Workers' Compensation in December 2014 and January 2015 of the need to make filings associated with this claim.

59. The ALJ determines that insurer is liable for penalties to claimant for failing to either file a FAL or request a Division IME at a rate of $50.00 per day with 50% of the penalty being paid to the subsequent injury fund.

CONCLUSIONS OF LAW

1. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2012. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a

conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4).

4. As found, claimant has proven by a preponderance of the evidence that he has sustained a change in his condition that is causally connected to his original compensable injury. As found, the opinions expressed by Dr. Jernigan in his reports and testimony at hearing are found to be credible and persuasive in determining this issue. As found, claimant's claim is reopened based on a worsening of his condition.

5. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

6. As found, claimant has proven by a preponderance of the evidence that he had a medical incapacity evidenced by his restricted body function that resulted in an impairment of his wage earning capacity when he left his employment with employer as of May 9, 2015 through September 18, 2015 and from September 29, 2015 and

ongoing. Claimant is therefore entitled to an award of TTD benefits for these two periods of time.

7. Furthermore, claimant is entitled to an award of TPD benefits for the period of time claimant worked for Durango Joe's from September 18, 2015 through September 28, 2015. Because claimant was under work restrictions, and was earning less money when he worked at Durango Joe's, claimant is entitled to an award of TPD benefits. See *Edgar v. Halliburton Energy Services*, W.C. No 4-971-336 (December 22, 2015).

8. Based on the stipulated AWW of $955.03, and considering the 11 days claimant was employed with Durango Joe's, the ALJ calculated claimant's TPD benefits to equal $901.59 ($955.03 times 52 divided by 365 for a daily wage rate of $136.06, times 11 days (September 18 through September 28) equals $1,496.66 minus $144.27 from Durango Joes equals $1,352.39 (x 2/3) equals $901.59).

9. Section 8-43-101(1), C.R.S. provides that the insurer shall provide notice to the Division of Workers' Compensation within 10 days of an injury that results in lost time in excess of three days or three calendar shifts. Sections 8-43-203(1)(a) and 8-43-203(2)(a) provides that if an insurer fails to notify the Division of Workers' Compensation of an injury resulting in lost time, the insurer may be subject to penalties of up to one day's compensation, with 50% of the penalty being paid to the subsequent injury fund as required by statute.

10. As found, claimant has proven that he sustained an injury for which lost time benefits were due and payable and insurer failed to notify the Division of Workers' Compensation. Claimant was issued a check for the indemnity benefits on or about March 19, 2014, but was no admissions of liability admitting for the indemnity benefits were filed by the insurer with the Division of Workers' Compensation acknowledging the indemnity benefits paid.

11. As found, insurer is liable for one days compensation for the 365 day period between when insurer should have notified the Division of Workers' Compensation (January 20, 2014) and when the first admission of liability was filed (March 19, 2015). While this represents more than 365 days, the penalty from this section of the statute is limited to 365 days.

12. The penalty pursuant to Sections 8-43-203(1) and 8-43-203(2) is based on claimant's AWW at the time of the violation of $782.00. The amount of the penalty is therefore $40,664.00, with 50% of the penalty paid to claimant through his attorney and 50% of the penalty paid to the subsequent injury fund.

13. Section 8-43-304(1), C.R.S. provides that penalties of up to $1,000 per day may be ordered if a party "violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been

specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel.

14. Pursuant to Section 8-43-304(1), a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995).

15. However, this section of the statute only applies to a violation of the statute, "for which no Section In this case, the issue of insurer's failure to file an admission of liability or to contest the claim is barred by the statute of limitations.

16. With regard to the claim for penalties under Section 8-43-304(1) for failing to admit or deny liability of the claim, claimant is limited to the penalty provision established by Sections 8-43-203(1) and 8-43-203(2).

17. With regard to the penalty claimant has brought pursuant to the failure of the insurer to file an FAL or request a Division IME, W.C.R.P. 5-5(E) provides in pertinent part:

> For those injuries required to be filed with the Division with dates of injury on or after July 1, 1991:
>
> (1) Within 30 days after the date of mailing or delivery of a determination of impairment by an authorized Level II accredited physician, or within 30 days after the date of mailing or delivery of a determination by the authorized treating physician providing primary care that there is no impairment, the insurer shall either:
>
> (a) File an admission of liability consistent with the physician's opinion, or
>
> (b) Request a Division Independent Medical Examination (IME) in accordance with Rule 11-3 and §8-42-107.2, C.R.S.,

18. Pursuant to Section 8-43-304(1), a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If respondents committed a violation of the statute, rule or order, penalties can be imposed only if respondents actions were not reasonable under an objective standard. *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The standard is "an objective standard measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado*

Compensation Insurance Authority v. Industrial Claim Appeals Office, 907 P.2d 676 (Colo. App. 1995).

19. The court of appeals has set stands to employ in determining an appropriate penalty in workers' compensation cases, including (1) the degree of reprehensibility of employer/insurer's conduct; (2) the disparity of the harm suffered by claimant and the fine imposed; and (3) the difference between the penalty awarded and the penalties authorized or imposed in comparable cases. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

20. In this case, it is significant that insurer committed multiple violations for failing to make the appropriate filings with the Division of Workers' Compensation regarding the admission of liability and the payment of the permanent partial disability benefits. However, claimant did eventually receive his PPD award, albeit much later than it should have been paid. Considering the circumstances of this penalty, and the potential penalty exposure, along with the reprehensibility of the conduct in this case, the ALJ determines that a fine of $50 per day is appropriate.

21. As found, claimant is entitled to an award of penalties for insurer's failure to file an FAL or request a DIME following receipt of the impairment rating from Dr. Jernigan in violation of W.C.R.P. 5-5(E). As found, the penalty period commenced on December 5, 2014 (30 days after the insurer received notice of the impairment rating from Dr. Jernigan, pursuant to the stipulation) and ended on March 18, 2015 (the day before the FAL was filed) representing a period of 103 days. As found, insurer shall pay claimant penalties in the amount of $50 per day. This equates to a total penalty of $5,150.00. The ALJ hereby order that 50% of this penalty shall be paid to the subsequent injury fund pursuant to Section 8-46-101.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits commencing May 9, 2015 and continuing until September 18, 2015 and from September 29, 2015 and continuing based on the stipulated AWW.

2. Respondents shall pay claimant TPD benefits for the period of September 18, 2015 through September 28, 2015.

3. Insurer shall pay claimant penalties for violation of Section 8-43-203(1) in the amount of one day's compensation for each day based on an AWW of $782.00 that was in effect at the time of the violation, for a period of 365 days. This amounts to a total penalty of $40,664.00. Insurer shall pay 50% of the penalty to the claimant as the aggrieved party and 50% of the penalty to the Subsequent Injury Fund as required pursuant to Section 8-43-203(2)(a), C.R.S.

4. Insurer shall pay a penalty of $5,150.00 for failure to file the failure to file a timely FAL or request a Division IME pursuant to W.C.R.P. 5-5(E) within 30 days of the

receipt of the permanent impairment rating from Dr. Jernigan. Insurer shall pay 50% of the penalty to claimant as the aggrieved party and 50% of the penalty to the Division of Worker's Compensation cash fund as required by Section 8-43-304(1), C.R.S.

5. Insurer shall pay the Director of the Division of Workers' Compensation on behalf of the Workers' Compensation Cash Fund as follows: Insurer shall issue any check payable to "Cash Fund" and shall mail the check to: Brenda Carrillo, SIF Penalty Coordinator, Revenue Assessment Officer, DOWC Special Funds Unit, P.O. Box 300009, Denver, Colorado 80203-0009.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 2, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Did Claimant suffer a compensable injury to his low back and right knee on August 25, 2014 arising out of and in the course and scope of his employment?
- If Claimant sustained a compensable injury, is he entitled to temporary total disability benefits from December 8, 2014 and continuing?
- If compensable, is Claimant entitled to medical benefits to cure and relieve the effects of his industrial injury?
- Is the knee surgery proposed by Dr. Hewitt is reasonable and necessary, as well as related to the industrial injury?

PROCEDURAL ISSUES

Prior to the hearing, Respondents filed a motion to take the post-hearing evidentiary deposition of Lloyd Thurston, M.D., which was granted on August 11, 2015. Claimant filed a motion to take the post-hearing evidentiary deposition of Brian Beatty, M.D., which was granted on August 25, 2015. These depositions were taken on October 7 and 9, 2015, respectively.

The parties stipulated that Claimant's average weekly wage at the time of the injury entitled him to the maximum temporary total disability rate of $881.65 per week. This stipulation was accepted by the ALJ.

FINDINGS OF FACT

1. Claimant began working for Respondent-Employer in April, 2014. He performed general labor, as well as operating machinery. He worked at different job sites. In August, 2014, he was working at a job site at 33rd and Peoria in Aurora, Colorado.

2. On August 25, 2014, Steve Barr was Claimant's supervisor. That day, Claimant unloaded an asphalt cutter from a truck at the job site. This machine weighed approximately 800 pounds and to get it off the truck required the use of a hydraulic ramp. After he got the asphalt cutter down, Claimant aligned the machine, placing the blade on the pavement. He made a cut which was approximately 26 to 30 feet in length.

3. Claimant testified Mr. Barr came to the job site when he was almost finished with that cut and yelled at him because the job was taking so long. He finished the cut after Mr. Barr left.

4. Claimant credibly testified that he was injured when the cutter blade got caught as he was trying to move the machine, which did not turn. He felt pain in his right knee and low back. Claimant said he not feel well after he was injured. Claimant loaded the asphalt cutting machine back onto the truck, but was still in pain. The ALJ finds that the physical activity of working with a machine of this size caused pain in Claimant's right knee and low back.

5. Claimant testified he told Steve Barr that he hurt his low back and knee, once the latter returned to the job site. Mr. Barr said he did not look too bad and Claimant requested a "report", so he could go to the doctor. Mr. Barr kept putting him off.

6. Claimant testified he had never injured his knee and low back prior to 8/25/14.

7. Claimant testified that he continued to work in pain, which increased over time. After a two to three week period of time, Claimant began working in the central yard. Claimant worked with Dave Moser and also told the superintendent for the company (Todd) that he suffered an injury. Todd told him he would report the claim. The ALJ infers that the Employer was aware of Claimant's injury.

8. Claimant was initially examined by Brian Beatty, D.O.[1] on October 16, 2014. His chief complaints were low back and right knee pain. Tenderness was noted upon palpation over the paralumbar musculature. No sensory deficits were documented in the lower extremities. Dr. Beatty's diagnoses were right knee sprain with patellar tendinitis and lumbar strain. On the M-164, Dr. Beatty noted that his objective findings were consistent with the mechanism of injury. For work restrictions Claimant was noted to be at full duty.

9. Dr. Beatty next evaluated Claimant on October 23, 2014, at which time he found tenderness in the paralumbar muscle and along the patellar tendon anteriorly. Dr. Beatty diagnosis was lumbar strain and tendonitis in the right knee. Dr. Beatty also issued work restrictions, including: lifting-10lbs; repetitive lifting-5lbs; carrying & pushing/pulling-10lbs. Claimant was restricted from crawling, kneeling, squatting and climbing. The ALJ infers that Claimant could not perform the laborer/machine operator job at Employer with these restrictions.

10. Claimant returned to Dr. Beatty on October 30, 2014. Claimant reported his symptoms were about the same. Dr. Beatty's diagnosis was right knee sprain with patellar tendinitis and lumbar strain. Claimant's physical restrictions were the same as 10/23/14. Claimant began a course of physical therapy. Claimant received physical therapy at Rocky Mountain Physical Therapy from October 30, 2014 through December 19, 2014.

11. Claimant was next seen by Dr. Beatty on November 13, 2014. Dr. Beatty prescribed Naprosyn, as well as making a referral for an MRI of the lumbar spine and right knee. He also referred Claimant to Dr. Primack.

[1] The ALJ infers Dr. Beatty/Rocky Mountain Medical Group was an ATP for Employer.

12. An Employer's First Report of Injury was completed on or about November 20, 2014 by Laurie Mattics, Corporate Safety Admin for Employer. The E-1 listed the date/time of injury as 8/25/14 at 11:00 a.m. This report specified that the injury occurred while Claimant was using the target saw and the blade got stuck. The employer representative who was notified was Steve Barr.

13. Dr. Beatty referred Claimant for an MRI of the right knee, which he underwent on November 21, 2014 and was read by Eduardo Seda, M.D. Dr. Seda's impression was mild degenerative changes in the patellar cartilage with mild subchondral edema; focal edema in the superior lateral corner of the infrapatellar fat pad, suspected fat pad impingement.

14. An MRI of Claimant's lumbar spine was also done on 11/21/14. Dr. Seda noted a normal disc signal and no disc narrowing at L1-2, L2-3 and L3-4. There were no disc bulges or protrusions and no joint or foraminal changes at these levels. At L4-5, there was mildly dark T2 disc signal and no disc narrowing; a small central disc bulge mildly indenting the dural sac without root sleeve deformity was found. At L5-S1, mildly dark T2 disc signal was noted, with no disc narrowing; a small central disc bulge extending into the epidural fat without dural sac or root sleeve deformity. No joint or foraminal changes were noted at the last two levels. Dr. Seda's impression was degenerative disc and joint changes.

15. Dr. Beatty examined Claimant on December 2, 2014. At that time, he complained of low back and right knee pain without numbness, tingling or weakness. On examination, tenderness was noted over the paralumbar muscles, with pain on right and left side bending. Dr. Beatty's diagnoses were right knee sprain, with patellar tendinitis and lumbar strain. Dr. Beatty's treatment plan included physical therapy, medications and a knee brace. Claimant's restrictions remained the same.

16. Claimant was terminated on December 8, 2014. The employee separation form said the employee was laid off by the company with reason given: "reduction in force". The ALJ finds that Claimant was not responsible for the termination of his employment.

17. Claimant testified that he was told that he was being laid off because he had too many doctors' appointments.

18. A Worker's Claim for Compensation was prepared on or about December 9, 2014. In the description of injury, Claimant specified that he was pulling an asphalt cutter, felt pain and heat in right knee and low back. The right knee and low back were the parts of the body listed as injured.

19. Claimant was examined by Michael Hewitt, M.D. on December 15, 2014. In his examination, Dr. Hewitt noted significant anterior knee pain when attempting to squat at approximately 30 degrees. Mild medial and lateral joint line tenderness, mild tenderness along the patellar tendon, no calf tenderness; all were noted. Dr. Hewitt

diagnosed chondromalacia patella. Dr. Hewitt performed an injection of Depo-Medrol and lidocaine in the right knee. He also prescribed Naprosyn.

20. Claimant returned to Dr. Beatty on 12/16/14. Claimant reported his back still hurt, but felt a little better. His right knee felt a little worse. Dr. Beatty noted tenderness on palpation over the paralumbar muscles. His diagnosis was right knee sprain with patellar tendinitis and lumbar strain. Claimant was to continue with physical therapy, Naprosyn and a knee brace. Claimant's restrictions were the same. Claimant's MMI status was unknown.

21. Claimant was evaluated by Usama Ghazi, D.O. on December 23, 2014 to whom he was referred by Dr. Beatty. At that time, Claimant had complaints of pain at L3-S1, as well as in the bilateral SI joints. He also had pain in the peripatellar and subpatellar region. Dr. Ghazi found tenderness with patellar grind and positive apprehension sign. Tenderness was also noted at the midline at the L3-4, L4-5 and L5-S1 interspinous ligaments, worse with extension. Dr. Ghazi found there was no suggestion of poor effort on examination or inconsistent behaviors.

22. Dr. Ghazi's diagnoses were patellofemoral syndrome with chondral fissuring of the patella and infrapatellar fat pad edema-pain worsened by intra-articular steroid injection; low back pain secondary to sacrolilits as well as interspinous ligament pain; L4-L5 annular tears-possible secondary cause of his midline and buttock pain. Dr. Ghazi administered an interspinous ligament bursa injection under ultrasound guidance. Dr. Ghazi also referred Claimant for 8 visits of medical massage for the knee and low back.

23. Dr. Beatty examined Claimant on December 30, 2014, at which time he reported his knee pain was worse. He had undergone an injection in his low back one week before, with no improvement. On examination, tenderness was noted upon palpation and Claimant had difficulty squatting due to knee pain. Dr. Beatty's diagnosis was the same as 12/16/14 and Claimant was to continue with massage therapy and medication.

24. Claimant reported a worsening of right knee pain on January 20, 2015 when he saw Dr. Beatty, who noted that additional injections were denied. Tenderness was noted in the low back; Dr. Beatty's diagnosis was right knee sprain with patellar tendinitis and lumbar sprain. Claimant's work restrictions were continued.

25. Dr. Hewitt saw Claimant for a follow-up on January 26, 2015. This was approximately one month after the cortisone injection and Claimant noted mild improvement during the lidocaine phase, but no improvement from the cortisone. He continued to complain of interior knee pain with the sensation of catching. Since he had received conservative treatment, Claimant expressed an interest in proceeding with the arthroscopy.

26. There was no evidence before the ALJ that a request for authorization of an arthroscopy (which is required) was sent by Dr. Hewitt's office to Insurer.

27. Claimant was next evaluated by Dr. Beatty on the February 3, 2015, at which time he reported that his knee pain was the same, but his low back pain was worse. Claimant related he was losing his balance and had worsening leg strength. Restrictions in his range of motion were noted, as well as difficulty squatting due to knee pain. Dr. Beatty noted Claimant was awaiting authorization for medication, massage and injections (Dr. Ghazi), as well as a right knee surgery.

28. Lloyd Thurston, D.O. examined Claimant at the request of Respondents on April 22, 2015. He reviewed the mechanism of injury, noting that Claimant stated he injured his right leg and low back on 8/25/14 when he was pulling an asphalt cutting machine backwards when it bound, kicked back and twisted him right to left. Dr. Thurston also related Claimant stated he had injured his right knee and low back approximately one week earlier following the same machine onto a truck. (There was no reference to this earlier injury in any of the medical records.)

29. Upon examination, Dr. Thurston noted Claimant exhibited many pain behaviors, including moaning and groaning when his right knee was touched. There was moderate tenderness and apprehension with patellar compression. Dr. Thurston opined that Claimant's subjective symptoms were excessive. This was based upon the mechanism of injury, the severity of the subjective right knee and low back pain, the complete lack of subjective improvement, the negative imaging studies and the complete lack of response to appropriate conservative care.

30. Dr. Thurston also believed the knee surgery recommended by Dr. Hewitt was not reasonable, necessary, or related to the alleged injury. This was based upon his examination of Claimant, as well as his lack of response to conservative treatments. He also disagreed with the diagnosis of chondromalacia patella, based upon minimal MRI findings.

31. Dr. Thurston opined Claimant's medical evaluation and treatment to date was reasonable. Dr. Thurston stated that Claimant's knee and low back symptoms were consistent with right knee sprain and low back strain, as documented by Dr. Beatty. However, he felt the current severe right knee and low back symptoms were not consistent with the 8/25/14 injury. The ALJ credits Dr. Thurston's conclusion that Claimant suffered a compensable injury.

32. Dr. Thurston testified as an expert in family medicine, the specialty in which he was board-certified. He was Level II accredited pursuant to the W.C.R.P. Dr. Thurston believed Claimant was an accurate historian, but he had exaggerated pain behavior that was out of proportion to what the medical records demonstrated. Claimant had positive Waddell signs and an altered gait that could not be explained. Dr. Thurston had no reason to think that Claimant didn't suffer an injury, however, it was much less severe than Claimant thought. Dr. Thurston stated Claimant was at MMI and did not require any additional treatment. He believed Claimant should have been taken off work for a week.

33. Dr. Thurston agreed that Claimant had objective signs of injury to his knee and low back. He also agreed that Claimant did not demonstrate exaggerated pain behaviors when he was evaluated by Dr. Beatty and Dr. Ghazi. Dr. Thurston testified he trusted Dr. Hewitt would not offer knee surgery if he didn't think it would be beneficial. However, Dr. Thurston read Dr. Hewitt's report to say that if Claimant continued to have symptoms he could justify doing surgery, not that he was recommending surgery.

34. Dr. Beatty re-examined Claimant on August 6, 2015, at which time he reported his symptoms were the same, if not a little worse. On examination, Dr. Beatty found tenderness upon palpation over the paralumbar musculature and noted Claimant had a mild antalgic gait. Claimant had difficulty squatting due to knee pain. Dr. Beatty's diagnosis was right knee sprain with patellar tendinitis and lumbar strain. Dr. Beatty renewed Claimant's medications and gave him a knee brace. Claimant continued to have work restrictions of: lifting- 10 lbs; repetitive lifting-5 lbs; carrying and pushing/pulling-5lbs. Claimant was restricted to one (1) hour per day of walking and standing. He was to do no crawling, kneeling, squatting and climbing.

35. Claimant returned to Dr. Beatty on September 3, 2015. Similar symptoms were noted as at the 8/6/15 appointment and an examination was deferred. Dr. Beatty's diagnosis was right knee sprain with patellar tendinitis and lumbar strain. Claimant was to continue with his independent home exercise program and his medications were re-filled. Claimant work restrictions were continued.

36. Dr. Beatty testified as an expert in occupational medicine, the specialty in which he was board-certified. He was Level II accredited pursuant to the W.C.R.P. Dr. Beatty testified there was objective evidence of trauma to Claimant's knee, including edema underneath the kneecap and inflammation at the prepatellar fat pad. This was documented by the MRI. Dr. Beatty testified that Claimant's work restrictions were supported by the MRI results.

37. Dr. Beatty credibly testified that he would have expected Claimant to improve with treatment. However, Claimant's worsening symptoms could be the result of depression and his anxiousness about his situation. Dr Beatty testified that Claimant did not demonstrate any inconsistent behaviors, nor did he show poor effort when examined. Dr. Beatty opined that Claimant should be re-evaluated before additional treatment was provided. Dr. Beatty's recommendations regarding future treatment were both credible and reasonable.

38. The ALJ found the opinions expressed by Dr. Beatty were more persuasive than those expressed by Dr. Thurston. Dr. Beatty examined Claimant on multiple occasions and correlated his recommendations with objective findings. The ALJ also notes Dr. Thurston testified that he could not rule out that Claimant was injured as alleged. Dr. Thurston also opined that Claimant's treatment had been reasonable up to the date of his evaluation.

39. Claimant continued to treat with Dr. Beatty though October of 2015[2] and nothing in the record indicates that his work restrictions were lifted or that he was released to return to regular work. Dr. Beatty concluded Claimant was not at MMI at the time of his last evaluation on October 8, 2015[3].

40. The ALJ finds that Claimant sustained a compensable industrial injury on August 25, 2014 while employed by Sema Construction.

41. The ALJ finds that Claimant requires medical treatment to cure and relieve the effects of his 8/25/14 industrial injury.

42. The ALJ finds that Claimant is not at MMI.

43. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

[2] Dr. Beatty confirmed this in his deposition, taken on 10/9/15.

[3] *Id.*

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

Claimant contends that he sustained a compensable injury on August 25, 2014. The ALJ agrees.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing a service for Respondent-Employer arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As a starting point, Claimant's testimony supported his claim that his injury was one that arose out of and was in the course and scope of his employment. In this case, Claimant credibly testified that he was using a heavy asphalt cutter on August 25, 2014 while working alone at the project located at 33rd in Peoria. There was no contrary evidence submitted by Respondents which contradicted that Claimant was performing that specific job task, at that location, at the date and time as he alleged.

Claimant also testified that he told the supervisor (Mr. Barr) he was injured. This was corroborated by the Employer's First Report of Injury. The administrative assistant for Employer documented that Claimant had reported the injury (Finding of Fact No. 12). Although there was a dispute as to when Claimant told Mr. Barr, no evidence was submitted to contradict that a report of injury was made. Records from the Employer supported this and Claimant was sent to the ATP for the company for treatment of his injury.

As found, the asphalt cutter which being used by Claimant at the time the injury occurred was of sufficient size and weight to cause such an injury. As described by Claimant, the mechanism of injury is plausible; namely that the cutter got stuck, he was trying to move it and this caused stress to be put on his low back and right knee. In addition, Claimant's MRI provided objective evidence of injury to the right knee, including focal edema in the superior lateral corner of the infrapatellar fat pad, suspected fat pad impingement. The ALJ was persuaded that Claimant injured his right knee as he described.

Likewise, the MRI of Claimant's lumbar spine showed degenerative disc and joint changes. However, these were asymptomatic before 8/25/14. As found, working with a machine of this size could cause the low back pain as described by Claimant. The medical reports prepared by Drs. Beatty and Ghazi also supported this conclusion. No evidence was adduced at hearing which directly contradict ted this. (Dr. Thurston testified that there were objective signs of injury to the low back and he could not rule out such an injury.) Accordingly, the ALJ concluded that the evidence supported the claim of an injury to the lumbar spine.

The ALJ has considered Respondents' argument that Claimant's lack of credibility required the claim to be denied. In particular, Respondents contended that he didn't like operating the asphalt cutter alone and Claimant's supervisor yelled at him immediately before the alleged injury. This presumably upset him and gave him a motive to report an injury. Respondents also pointed to the fact that Claimant also took pictures of the asphalt cutter before the injury and then equivocated as to why he took the pictures.

However, Claimant was credible in his description of how the injury occurred. His descriptions were consistent in what was reported to the Employer (as reflected in the E-1), in what he told Dr. Beatty and the other authorized treating physicians and through his testimony at hearing. As found, while this issue of Claimant's credibility raised questions about the subject injury, sufficient evidence was admitted for the ALJ to conclude that Claimant was injured as alleged. (See Findings of Fact Nos. 2-6). Claimant satisfied his burden of proof. Therefore, it is determined that Claimant was injured while working for Employer on August 25, 2014.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant suffered a compensable work injury. Respondents are therefore liable for medical benefits, including the treatment by Dr. Beatty and his referrals.

As found, Dr. Beatty's testimony was persuasive that Claimant needed to be returned to Dr. Hewitt and Dr. Ghazi to evaluate Claimant's current treatment needs. Claimant requires further evaluation and potentially treatment from these physicians. In his deposition, Dr. Beatty opined that there needed to be a reassessment of Claimant's knee and low back condition, since time had elapsed since the last evaluations by Drs. Ghazi and Hewitt. The ALJ credited this testimony.

At this juncture, there is insufficient evidence for the ALJ to determine whether Claimant requires an arthroscopic procedure to his right knee. The last record by Dr. Hewitt was not clear on whether a request for authorization of surgery was made. That issue is reserved until the evaluations recommended by Dr. Beatty, *supra,* are completed.

Temporary Total Disability Benefits

Claimant seeks an award of TTD benefits commencing on December 8, 2014 and continuing until terminated by law. The ALJ concludes Claimant is entitled to the requested award of benefits.

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

In the case at bench, Claimant established that he was disabled as a result of the 8/25/14 industrial injury. As found, the ATP (Dr. Beatty) issued work restrictions for Claimant on October 23, 2014. (Finding of Fact No. 9). These restrictions were not lifted by Dr. Beatty. As found, Claimant's job duties required him to lift more than 10lbs and he would not have been able to perform his job duties. Claimant has not returned to work since his lay-off and his work restrictions remain in force. Because Claimant had documented evidence of physical injuries to his knee and lumbar spine, work restrictions and an inability to resume his prior work, the ALJ has determined he was disabled.

Finally, the ALJ notes that in their Position Statement[4], Respondents did not argue Claimant's termination as a defense to TTD benefits, although this was raised as an affirmative defense in the Response to Application for Hearing. There was no evidence before the Court that Claimant engaged in volitional conduct which made him

[4] Claimant listed this as an issue to be adjudicated in his Position Statement.

responsible for his termination. This is required for Respondents to establish this defense. 8-42-103(1)(g), C.R.S.; *Anderson v. Longmont Toyota, supra.* The written evidence related to the termination from Employer specified that the termination was due to a reduction in force. Therefore, the ALJ concludes that Claimant was not responsible for his termination. Respondents are required to pay TTD benefits to Claimant at a rate of $881.65 per week from 12/8/14 and continuing until terminated by law.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury while working for Employer and is entitled to wage and medical benefits under the Colorado Worker's Compensation Act.

2. Respondents shall provide reasonable and necessary medical treatment to Claimant to cure and relieve the effects of the 8/25/14 industrial injury.

3. Respondents are liable for the treatment provided by Dr. Beatty and those health care providers to whom he referred Claimant.

4. Claimant's request for authorization of knee surgery is denied (without prejudice).

5. Respondents shall pay TTD benefits to Claimant at a rate of $881.65 per week from 12/8/14 and continuing until terminated by law.

6. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 7, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of disfigurement benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At the hearing Respondent's Exhibits A through C were admitted into evidence. The only exception is that the Final Admission of Liability contained in Exhibit A was withdrawn by Respondent's counsel. Thus, only the medical documentation contained in Exhibit A was admitted into evidence.

2. Claimant sustained a compensable shoulder injury on November 19, 2014. Because of the shoulder injury Claimant was required to take an agility test to determine his fitness to return to duty. As a part of the agility test Claimant was required to climb over a barrier. Claimant fell while climbing over the barrier and injured his left lower extremity. The lower extremity injury occurred on November 23, 2014.

3. Respondent does not dispute that the left lower extremity injury is a compensable consequence of the November 19, 2014 shoulder injury. However, Respondent contends that the Claimant did not sustain any permanent disfigurement as a result of the fall.

4. Claimant testified as follows. After the fall from the barrier he was put on light duty. He received treatment that included physical therapy (PT) and an MRI. He was given an "option" for surgery.

5. Claimant testified that as a result of the left lower extremity injury his knee and foot are still painful. Claimant testified that he currently takes 1000 milligrams of Naproxen per day to treat the pain.

6. Claimant testified that he walks with a limp as a result of the injury to his left lower extremity. At the hearing Claimant demonstrated his gait by physically walking back and forth across the courtroom. The ALJ finds that Claimant appeared to walk with a slight but noticeable limp.

7. On June 17, 2015 Clarence, Ellis, M.D., examined Claimant in follow-up for the left lower extremity injury. Dr. Ellis noted Claimant continued in PT and was "steadily improving." However, Claimant "continued" to complain of pain with walking. Dr. Ellis recorded his observations that Claimant was not in "acute distress" and

appeared to “walk in a fairly normal fashion.” Claimant exhibited “mild discomfort with palpation of the foot.” Dr. Ellis assessed “traumatic plantar fasciitis with some continued improvement with conservative treatment.”

8. Dr. Ellis examined Claimant on July 29, 2015. Claimant continued in PT. Claimant reported that the discomfort in his heel was improved and his pain was “75% better.” Dr. Ellis observed that Claimant was not in “acute distress,” that the left foot and ankle appeared “reasonably normal,” and that Claimant walked “in a reasonably normal manner.” Dr. Ellis noted that Claimant was restricted from running and jumping.

9. On October 15, 2015 Dr. Ellis again examined Claimant. Claimant reported that his “discomfort” increased after the last therapy session but overall he was “significantly better” than he was at the time of the injury. Dr. Ellis observed Claimant was in no “acute distress” and the feet and ankles looked “normal.” The range of motion in the ankles looked “reasonable.” There was still tenderness over the bottom aspect of the left heel. Dr. Ellis placed Claimant at maximum medical improvement (MMI) without impairment. Dr. Ellis imposed permanent restrictions of no running or jumping. Dr. Ellis recommended maintenance treatment to include Naproxen for one year, follow-up with “Dr. Mazzola if needed,” and replacement of “orthotics one time in the next 2 years.”

10. Claimant testified that he never demonstrated his walk for Dr. Ellis. Rather, Claimant stated that he remained seated on the examining table and did not even stand during the physical examinations performed by Dr. Ellis.

11. Claimant proved it is more probably true than not that as a result of the industrial injury to his left lower extremity he has sustained serious, permanent disfigurement to a part of the body normally exposed to public view. Specifically, Claimant proved it is more probably true than not that he walks with a slight but noticeable limp as a result of the injury to his left lower extremity.

12. The ALJ credits Claimant’s testimony that he walks with a demonstrable limp as a result of the industrial injury. Claimant’s testimony that he walks with a limp as a result of the injury is corroborated by Dr. Ellis’s medical records insofar as those records establish a diagnosis of traumatic plantar fasciitis that resulted in permanent restrictions against running and jumping and a prescription for pain medication and orthotics.

13. The ALJ further notes that none of Dr. Ellis’s medical records state that Claimant was able to walk without a limp. Rather, Dr. Ellis always qualified his description of Claimant’s gait. On June 17, 2015 Dr. Ellis stated Claimant’s walk was “fairly normal.” On July 29, 2015 Dr. Ellis stated that Claimant walked in a “reasonably normal” fashion. The ALJ infers from Dr. Ellis’s use of these qualifying phrases that he was unable to describe Claimant’s gait as “normal.” Finally, on October 15, 2015, the date of MMI, Dr. Ellis did not directly comment on Claimant’s gait.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

Section 8-42-108(1), C.R.S., allows compensation for serious, permanent disfigurement "about the head, face, or parts of the body normally exposed to public view." Public view means "accessible or shared by all members of the community." *See Twilight Jones Lounge v. Showers*, 732 P.2d 1230 (Colo. App. 1986).

As determined in Findings of Fact 11 through 13 Claimant proved it is more probably true than not that the industrial injury has caused him to walk with slight but noticeable limp. This limp is generally visible to the community whenever Claimant walks in public. Claimant has sustained, serious, permanent disfigurement within the meaning of the Act.

The ALJ concludes Claimant is entitled to an award of $3500 for his disfigurement.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Respondent shall pay claimant $3,500 as compensation for disfigurement.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 6, 2016

DIGITAL SIGNATURE:
David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that bilateral hearing aids are reasonable, necessary, and causally related to his January 9, 2015 work injury.

FINDINGS OF FACT

1. On January 9, 2015 Claimant slipped and fell on ice while walking into work at Front Range Airport. Claimant hit his head, back, and neck on the ground and loss consciousness.

2. When Claimant came to he was being assisted into an ambulance and was bleeding from both ears. The ambulance report provides that he suffered a laceration to the back of his head and had blood in both ears.

3. At the time he suffered the work injury, Claimant suffered from pre-existing bilateral hearing loss and he was wearing bilateral hearing aids. The hearing aids stopped working due to being soaked with blood and were repaired under warranty.

4. Claimant alleges that following the work injury, his hearing loss increased significantly due to his injury.

5. Following his fall, Claimant was admitted to the hospital and was discharged on January 15, 2015 with noted skull base fracture, temporal bone fracture, mastoid fracture, and hemotympanum. It was noted on discharge that ENT wanted Claimant to see audiology for formal hearing test. *See* Exhibit J.

6. On January 28, 2015 Claimant was evaluated by Greg Reichhardt, M.D. Dr. Reichhardt noted tenderness to palpation over the mastoid regions bilaterally and noted that Claimant appeared to have blood either in the ACs or in the middle ear. Dr. Reichhardt provided the impression of traumatic brain injury, mastoid fractures with hemotympanum, new onset numbness of digits one and two, T12 compression fracture, trauma to the chronically un-fused coccygeal segment, hallucinations, and non-displayed fracture of S3 with a small avulsion fracture of the superior aspect of the coccyx. Dr. Reichhardt did not assess hearing loss. *See* Exhibit 9.

7. On March 11, 2015 Claimant was evaluated by Douglas Peller, D.O. Claimant also underwent bilateral hearing exam performed by Kristine Moore, Au.D. The notes from the visit are difficult to decipher. *See* Exhibit 7.

8. On July 7, 2015 Claimant was evaluated by Dr. Reichhardt. Claimant reported concern with his hearing and that he had additional hearing loss from the accident above what he had prior to the accident. Claimant reported that Dr. Peller felt that Claimant needed a new hearing aid above what he had before and that Dr. Peller felt it would be work related. Dr. Reichhardt did not make any new assessment of hearing loss. *See* Exhibit 9.

9. On July 16, 2015 Dr. Moore authored a letter "to whom it may concern," noting that Claimant had a diagnosis of right ear moderate to profound mixed hearing loss and left ear mild to profound sensorineural hearing loss. She noted that Claimant had been examined by herself and Dr. Peller in March of 2015. Dr. Moore opined that the hearing evaluation completed at their facility in March indicated a decrease in hearing since February of 2015. Dr. Moore noted that Claimant's current in the canal hearing aids were approximately two years old and that at the limits of their range, they did not provide sufficient amplification for Claimant's current hearing loss. Dr. Moore opined that Claimant would benefit from more powerful behind the ear binaural hearing aids. *See* Exhibit 7.

10. On July 21, 2015 Claimant underwent a neuropsychological assessment performed by Suzanne Keneally, Psy. D. Dr. Keneally opined that the testing found Claimant to be functioning in the average to above average range with no indication of any residual cognitive impairment associated with his January 9, 2015 workplace injury. Dr. Keneally noted only one test in the very mildly impaired range, and only 1 point below the low average. Dr. Keneally opined that the one test "Speech Sounds Perception" where Claimant had a very mildly impaired performance was most likely due to Claimant's hearing difficulties and not due to cognitive dysfunction. *See* Exhibit 8.

11. On July 22, 2015 Claimant was evaluated by Dr. Reichhardt. Dr. Reichhardt noted that he was sent hearing tests from February 24, 2014 and February 3, 2015. Dr. Reichhardt opined that Claimant had a decrease in hearing across most frequencies during that time frame except for perhaps the lower frequencies in the left ear. Dr. Reichhardt noted that Claimant's audiologist opined that there had been a decrease in Claimant's hearing since 2015 and Dr. Reichhardt noted that he did not have the expertise to say whether or not the decrease in hearing was suggestive of post-traumatic involvement or just a progression of Claimant's rather severe hearing loss. Claimant reported to Dr. Reichhardt that his hearing was stable from 2000 up until the injury. Dr. Reichhardt noted that it would be helpful to have Dr. Peller review reports and determine whether or not the change in hearing pre- and post-accident is post-traumatic in nature or due to the natural progression of Claimant's hearing loss over time. *See* Exhibit 9.

12. On September 23, 2015 Claimant was evaluated by Dr. Reichhardt. Dr. Reichhardt opined that Claimant had reached maximum medical improvement on August 5, 2015 and Dr. Reichhardt recommended six follow up visits with a physician, four follow up visits with a physical therapist, coverage of medications, and any

necessary laboratory tests to monitor for side effects of medication as maintenance treatment. Dr. Reichhardt provided an impairment rating of 9% whole person for spinal impairment and olfactory sensory loss. Dr. Reichhardt did not provide any impairment for hearing loss related to the work injury nor did he recommend hearing aids as a maintenance medical benefit. *See* Exhibit 9.

13. On August 6, 2015 Alan Lipkin, M.D. issued a report addressing Claimant's hearing loss after performing a medical record review. Dr. Lipkin noted that Claimant had significant bilateral pre-existing sensorineural hearing loss and used hearing aids prior to the work injury. Dr. Lipkin noted that serial audiograms revealed bilateral sloping to a severe sensorineural hearing loss with gradual deterioration in hearing noted in audiograms of 2011, 2012, 2013, and 2014. Dr. Lipkin noted that Claimant had recent audiograms performed on February 3, 2015 and on March 11, 2015 that were consistent with Claimant's gradual deterioration in hearing over time. Dr. Lipkin opined that the post-injury audiograms were not consistent with any acute damage due to Claimant's January 9, 2015 work injury. Dr. Lipkin noted that Claimant had a further audiogram on July 8, 2015 that showed additional deterioration of hearing again more consistent with gradual sensorineural drop than with an injury related drop in hearing. Dr. Lipkin noted he was unable to say that the injury led to deterioration in hearing and opined that it was more likely an ongoing gradual deterioration in hearing related to heredity or presbycusis. Dr. Lipkin opined that the necessity for new hearing aids could not be substantiated on an injury-related basis. *See* Exhibit O.

14. Dr. Lipkin testified at hearing consistent with his report. Dr. Lipkin noted that Claimant had significant nerve loss in both ears in lower speech frequencies in September of 2003 and that Claimant's hearing loss was severe and sloping and got worse at hertz increases. Dr. Lipkin opined that with the results from the 2003 testing, it would be common for the hearing to gradually worsen and that Claimant's audiograms showed gradual worsening over the years.

15. Dr. Lipkin reviewed the audiograms from 2014 prior to the work injury and from 2015 after the work injury and opined that there was a slight worsening over the year between tests. Dr. Lipkin opined that the worsening from 2014 to 2015 was not related to Claimant's work injury and that it was more likely due to the same gradual process of hearing loss that Claimant has shown over the last decade.

16. Dr. Lipkin opined that if Claimant's slightly worsening hearing shown from the 2014 to the 2015 tests was due to a traumatic loss or injury it would show up differently on the testing. Dr. Lipkin noted a traumatic hearing loss would show up immediately after the event and wouldn't continue to get gradually worse later. He also noted that Claimant's hearing loss is almost exclusively nerve type loss and that although Claimant was bleeding from the ears due to the work injury, bleeding from the ears alone does not establish damage was done to the actual ear canal at the time of the fall.

17. Dr. Lipkin is found credible and persuasive. His opinions are consistent with Claimant's medical records and history of audiograms showing sloping bilateral sensorial neural hearing loss beginning in 2003 and gradually worsening. Dr. Moore noted loss between February and March of 2015 but did not note or review the gradual worsening shown by audiograms from 2003 through 2015. Dr. Lipkin's causation assessment is credited over the opinion of Dr. Moore which simply notes hearing loss over a period of one month and does not review the hearing loss shown over the prior 12 years. Further, Dr. Lipkin's opinion that the hearing loss is not causally related to the work injury is consistent with Dr. Reichhardt's treatment records and maintenance medical benefits recommendations which do not note hearing loss aggravated by the work injury.

18. Claimant testified at hearing that prior to his work injury his hearing was stable and manageable. Claimant testified that he had hearing tests between 2000 and 2014 that showed his hearing was stable. Claimant believes his hearing has gotten worse since the accident and is having a harder time hearing conversations with or without ambient noise. Claimant is credible that his hearing has gotten worse following the work injury. As shown by testing, it has gotten gradually worse since January 9, 2015. However, Claimant is not credible that his hearing over the past several years has been stable. Rather, the audiograms show that his hearing did not remain stable but gradually worsened over the years on a sloping basis and continues to do so.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim*

Appeals Office, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

The respondents are liable to provide such medical treatment “as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury.” *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Claimant has failed to meet his burden to establish that bilateral hearing aids are reasonable and necessary to cure and relieve the effects of his work injury or to prevent further deterioration of his condition. Claimant has failed to establish that he suffered any hearing loss due to his work injury on January 9, 2015. Rather, it is found persuasive that Claimant had significant pre-existing bilateral hearing loss that gradually worsened from 2003 through 2015 and after his injury continued to gradually worsen. Claimant has not shown that the injury aggravated, accelerated, or combined with his pre-existing hearing loss to produce the need for new and stronger bilateral hearing aids. Rather, the opinion of Dr. Lipkin is persuasive that the hearing loss measured between 2014 and 2015 and between February of 2015 and March of 2015 was not shown on testing to be due to an acute injury and continued to show gradual sloping hearing loss consistent with Claimant’s history and the progression of Claimant’s bilateral hearing loss.

Additionally, the recommendation for more powerful bilateral hearing aids made by Dr. Moore simply notes mild sloping to profound hearing loss bilaterally with a decrease in hearing since February of 2015 which is consistent with Claimant’s extensive history of gradual decrease in hearing from 2003 to 2015. Dr. Lipkin agrees with Dr. Moore that there has been decrease in hearing since February of 2015. Although Dr. Moore recommends more powerful hearing aids, she does not explicitly opine or outline that the hearing loss from February of 2015 was caused by an acute injury or that it was due to the work injury on January 9, 2015. It also is unclear as to whether Dr. Moore reviewed the audiograms from 2003 through 2014 and prior to the work injury to compare the continued gradual hearing loss Claimant experienced with the hearing loss in 2015 that was noted. Overall, Dr. Lipkin presented credibly and persuasively that the hearing loss continues to be consistent with the progression of hearing loss Claimant has shown over the years and that the hearing loss was not due to the acute work injury on January 9, 2015 and his opinion is more persuasive than Dr. Moore's.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that bilateral hearing aids are reasonable, necessary, and causally related to his January 9, 2015 work injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 20, 2016

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right shoulder arising out of and in the course of his employment on February 7, 2015.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to an award of medical benefits, including right shoulder surgery recommended by Dr. Michael Simpson.

III. Whether Claimant established by a preponderance of the evidence that he is entitled to an award of Temporary Total Disability (TTD) benefits from February 8, 2015 through March 14, 2015.

IV. Whether Respondents have proven by a preponderance of the evidence that Claimant was terminated for cause.

Because the ALJ finds and concludes that Claimant failed to establish the he sustained a compensable injury to his right shoulder on February 7, 2015, this order does not address issues II-IV outlined above.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was hired by Employer as a floor worker at an hourly rate of $8.23. Claimant's job duties as a floor worker included sweeping the floor and making French fries.

2. On February 7, 2015, Claimant was making French fries when he ran out of product. Consequently, he walked to the back of the restaurant to get more fries from the freezer. As he was walking down a narrow hallway Claimant testified he felt a pop and saw a bright flash of light. Claimant testified that he thought his hair was on fire.

3. It was discovered that a live electrical wire was hanging from the ceiling next to a metal freezer. Claimant testified that the wire "hit" him on the shoulder but he was unsure if after making contact with the wire he pushed it against the metal freezer. An in store video camera captured the incident.

4. The incident was witnessed by several co-employees, including Paul Hughley, a

crew trainer for Employer. Claimant made statements to his coworkers following the incident, but he did not remember what they were.

5. Paul Hughley, credibly testified that he witnessed the alleged incident. Mr. Hughley testified that he was walking past Claimant when he brushed up against the metal freezer door causing a wire hanging from the ceiling to flash and pop. Mr. Hughley testified that Claimant turned around and asked him what happened and if his hair was on fire. Mr. Hughley further testified that Claimant did not look to be in any pain and made no complaints about injuring his right shoulder. Rather, according to Mr. Hughley, Claimant simply appeared surprised. Mr. Hughley then testified that Claimant jokingly stated that he should have fallen and flopped around on the floor. Mr. Hughley testified that Claimant later stated that he was going to own the store, which Mr. Hughley interpreted as Claimant's intention to "sue." Additional witness statements corroborate Mr. Hughley's testimony. According to Jessica, last name illegible, both she and Mr. Hughley asked Claimant if he was alright to which Claimant respond: "yea, but I should fall on the floor and flop around." Claimant "seemed fine and unharmed after the incident" according to this co-worker.

6. Following the incident, Claimant reported to Bennett Johnson, the on duty manager. Mr. Johnson asked Claimant if he needed and "ambulance and medics to check him out". Claimant responded affirmatively, so an ambulance was called. According to Mr. Johnson's statement Claimant also joked to him that he "should've 'fell on the floor and flopped like a fish' to make it look more real." He also reportedly stated that he was "gonna own this bitch", meaning the store, cause he was injured and was going to sue the store.

7. Claimant testified that the whole incident was embarrassing and he was emotionally worked up. Only after additional time had passed and he had calmed down did Claimant notice pain and aching in his right shoulder. He denies making any statement about flopping on the floor. Claimant's testimony is contradicted by multiple witnesses who provided statements consistent with one another. The ALJ credits the statements of Jessica, last name unknown, Bennett Johnson and Paul Hughley to find that Claimant made multiple comments following the incident that he should have flopped around on the floor and that he would own the store secondary to his claim of injury to his right shoulder. To the extent that Claimant's testimony contradicts these witnesses, his testimony his incredible.

8. An ambulance crew arrived after which Claimant refused EMT care. According to Claimant, he did not go to the ER in the ambulance out of concern for his girlfriend having to work and being without a car during her shift should she have to pickup him up at the ER later. Claimant's girlfriend picked him up and took him to the Emergency Room at Memorial Hospital. According to the medical reports from Memorial Hospital ER, Claimant was first evaluated by a nurse at 12:38 AM on February 8, 2015, approximately 3 hours after the incident occurred. Based upon the evidence presented, the ALJ finds Claimant's treatment in the ER, three hours after the incident and after

refusing EMT care at the scene over his professed concern that he did not want to leave his girlfriend without a car, non-emergent in nature.

9. In the ER, the following history of the incident was recorded by Registered Nurse, Rebecca Ahis: "About 2130, pt was @ work and went to open a walk-in freezer. Sts he was touched by a wire hanging from it and felt a shock, then **jerked** away. Sts his right shoulder hurts." (emphasis added) A similar history was documented by the ER physician, Dr. Laurence J. Cohen. Dr. Cohen provided the following history: "At about 9:00 tonight, the patient was at work and he was in a commercial freezer. There was a wire hanging down that touched his right shoulder. He felt and saw an arc, and felt like his shoulder dislocated, which it has done in the past." Claimant complained of right shoulder pain and tingling sensation at the fingertips. Claimant denied Morphine for pain. An x-ray of the right shoulder revealed "no evidence of acute fracture or dislocation." Claimant reported that he thought he dislocated his shoulder and that it went back in. RN Ahis' examination of the right shoulder revealed the following: "No redness, burn marks, edema noted." Moreover, RN Ahis documented that Claimant was "able to take off 2 layers of clothing w/o (without) problem." Dr. Cohen noted that Claimant's skin was negative for color change, rash or edema. Moreover, Dr. Cohen documented that Claimant demonstrated normal range of motion in the shoulder. Nonetheless, Dr. Cohen felt that it was possible that Claimant could have dislocated his shoulder if he had experienced a "significant shock" so he gave Claimant a sling and swathe." He also referred Claimant to Dr. Michael Simpson for orthopedic evaluation and recommended additional physician follow-up.

10. Mr. Hughley testified that he examined the wire which had a bit of black around it. According to Mr. Hughley, it looked like the wire shorted out. Mr. Hughley stated that he could see where it touched up against the stainless steel door. Based upon Mr. Hughley's observation, the ALJ finds that while the wire likely touched Claimant's shoulder, he probably pushed the exposed portion of the wire onto the freezer sending electrical current into the metal door which caused the wire to short out, creating the popping sound and flash of light referenced by Claimant and Mr. Hughley. Based upon Mr. Hughley's testimony in combination with the lack of observable changes to the skin surrounding Claimant's right shoulder, i.e. redness, rash, edema or burn marks, the ALJ is not convinced that Claimant was directly subjected to electrical current sufficient to dislocate his right shoulder as suggested.

11. Claimant first reported to his designated provider, EmergiCare, on February 8, 2015, upon his discharge from the ER. Claimant again reported that he was walking by a freezer when a loose hanging wire struck his shoulder, causing it to dislocate. Dr. Rosemary Greenslade referred Claimant for physical therapy, noted that Claimant may need an MRI if his shoulder instability persists, and stated that there was evidence of a labral/rotator cuff injury. She instructed Claimant that he was not to lift more than one pound with the injured extremity. Claimant's past medical history was noted as unremarkable.

12. Claimant has a long pre-existing history of pain complaints to his right shoulder

secondary to shoulder dislocation injuries. Claimant's medical records establish that Claimant had pain in his right shoulder from a dislocation in 2007. On October 10, 2008, Claimant suffered a recurrent dislocation of his right shoulder while playing football. He was treated by Dr. Robert Keaney at Community Hospital of the Monterey Peninsula. Upon admission, Claimant reported 7 prior dislocations of the shoulder since April 2007. X-rays were obtained and a dislocation confirmed. Claimant was medicated with Morphine, Ativan and Reglan for pain. Attempts to reduce the dislocation were unsuccessful. Consequently, conscious sedation was introduced after which traction and counter traction was applied to the shoulder resulting in a "fairly easily obtained reduction." Post reduction x-rays were obtained which confirmed a restored glenohumeral relationship. It also demonstrated a "Hill-Sachs" deformity. Claimant was instructed to follow up with Dr. Gollogly for an orthopedic evaluation. Dr. Greenslade did not have Claimant's past medical records documenting prior dislocations and treatment for the same in her possession when she evaluated Claimant on February 8, 2015.

13. Claimant confirmed that he has dislocated his shoulder multiple times in the past. He also testified that he could not remember if he underwent an orthopedic evaluation in the past. Finally, Claimant testified that he could not remember if he informed his physicians about his specific past shoulder injuries.

14. Claimant returned to Dr. Greenslade on February 11, 2015. He reported to Dr. Greenslade that his right shoulder continued to have constant pain and that he has been getting headaches since the incident on February 7, 2015. Dr. Greenslade's report from this encounter date notes that an MRI completed February 9, 2015 demonstrated an anterior labral tear and a Hill-Sach's lesion confirming dislocation. As noted above, Dr. Greenslade did not have Claimant's prior medical records demonstrating that prior radiographic imaging in 2008 revealed the presence of a Hill-Sach's deformity.

15. Claimant was first evaluated by Dr. Michael Simpson's on February 18, 2015. Claimant explained to Dr. Simpson that he had recently moved to Colorado and had done construction work prior to moving. Claimant reported the same story to Dr. Simpson that he told all of the other providers, specifically that he was walking past a hanging live wire when it came in to contact with his right shoulder. Claimant indicated that it felt to him like the shoulder dislocated and went back in to place, a sensation Claimant was familiar with because it has happened to him previously, yet which in the past required Morphine for pain and conscious sedation for reduction.

16. Claimant reported to Dr. Simpson that he did have a previous shoulder dislocation in California, but he had been asymptomatic since the last time it occurred. Physical examination revealed anterior laxity of his shoulder. Dr. Simpson, after reviewing the MRI, taking a history, and performing a physical exam, diagnosed Claimant with "History of prior right shoulder dislocation with recent subluxation/dislocation in the course of industrial or work-related accident." Regarding causation, Dr. Simpson noted: "By the patient's report, the treatment of disorder appears to be causally related to the injury sustained. He is unsure whether it was

witnessed incident or not. He states he thinks it was on video camera. He denies any prior issues with his shoulder other than **a** prior dislocation which he states it has been completely asymptomatic prior to that (emphasis added). Based upon the evidence presented, the ALJ finds that Claimant did not provide Dr. Simpson with an accurate history concerning the condition of his shoulder and the number of dislocations he had prior to February 7, 2015. Moreover, Dr. Simpson there is no credible evidence to suggest that Dr. Simpson was in possession of Claimant's prior medical records or the video tape capturing the incident on February 7, 2015 before commenting on causation. Finally, the ALJ finds Dr. Simpson's assessment and statement concerning causality to be based upon Claimant's report only. Consequently, the ALJ finds Dr. Simpson's statement attributing Claimant's need for right shoulder treatment to the February 7, 2015 incident unpursuasive.

17. Claimant returned to Dr. Simpson on March 18, 2015. Claimant had been through a course of physical therapy, but continued to have pain and a sensation of his shoulder being loose. Dr. Simpson determined that Claimant was an appropriate candidate for surgical stabilization of his right shoulder as a result of the work incident.

18. Dr. I. Stephen Davis performed a record review on April 1, 2015 to provide his opinion regarding Dr. Simpson's request for surgery. Dr. Davis concluded, "In summary, it is my opinion, to a reasonable degree of medical probability, that [Claimant] has sustained an acute injury to his right shoulder, causally related to the on the job incident as described on February 7, 2015. He elaborated that the need for the surgery was as a result of both the preexisting shoulder condition and the acute injury of February 7, 2015. Based upon the evidence presented the ALJ finds that similar to Dr. Simpson, Dr. Davis did not have Claimant's prior medical records, including his imaging studies or the video surveillance tape when he commented on causality. Rather, his opinions are based upon the history provided by Claimant to other providers which including Claimant's report that he was directly subjected to an electric shock.

19. As noted above, the February 7, 2015 incident forming the basis for Claimant's allegation that he sustained a compensable injury because he was shocked by an exposed wire was captured on the store's video camera. A frame by frame review of the video tape demonstrates that at 21:32:50 on the video tape Claimant and a co-worker attempt to pass by each other in a narrow hallway. Claimant is very close to a metal freezer which appears to his right. As Claimant moves to the right to allow his coworker to pass by, a flash of light can been seen in the lower right corner of the screen. Claimant is then seen moving to his left to the area vacated by his co-employee. Contrary to Claimant's description, the video tape does not demonstrate that he jerked away after the flash of light. The ALJ finds the video to demonstrate that between 21:32:50 and 21:32:52 Claimant moves fluidly to his left while looking over his left shoulder toward the metal freezer. At 21:32:53 Claimant raises his left hand to the top of his head where he touches his hair. Claimant resumes work passing in front to the camera on several occasions where he is seen touching his right shoulder area. At 21:37:15 Claimant extends his right arm/hand to open an appliance door. He retrieves a bag with his left arm and then uses his right arm to close the door at 21:37:20. At

21:37:23 Claimant raises his right hand/arm to the left as if to sneeze or cough into the area of his right elbow. At 21:37:24 Claimant transfers the bag he is carrying from his left hand to the right hand. He is seen reaching his right shoulder with the left hand at this time. At 21:40:07 Claimant is seen holding his left arm in a guarded fashion. He holds his right arm down at his side in this frame. At no time during the video tape, does Claimant display overt pain behavior.

20. Respondents requested an Independent Medical Examination (IME) with Dr. Eric Ridings on July 28, 2015. Dr. Ridings was provided with a copy of the video tape for review. Based upon the content of his report and the opinions he expressed at hearing, the ALJ finds that Dr. Ridings meticulously analyzed the video tape he was provided.

21. Claimant reported to Dr. Ridings that he had dislocated his right shoulder playing basketball two or more years back. Claimant stated that he was making a vigorous side arm pass and that his arm went well behind his back dislocating his shoulder.

22. Dr. Timothy Hall performed an IME of Claimant on October 22, 2015 at Claimant's expense. Claimant told Dr. Hall that he dislocated his shoulder approximately 2-5 years ago, although he was unsure of the timing. Claimant's representation about his preexisting condition to Dr. Ridings and Dr. Hall is inconsistent with the medical history outlined above; however, as Claimant conceded to having suffered 7 prior dislocations, the ALJ finds it probable that Claimant dislocated his right shoulder while playing basketball 2-5 years prior to the February 7, 2015 incident.

23. In his IME report, Dr. Hall explained that electrical shocks can cause anything from burns, to convulsions, to nerve injury, and to cognitive symptomatology. He indicated that it is a "completely reasonable conclusion that it was this intervening event in the cooler that precipitated the symptoms, particularly since we have such a limited understanding of what can or cannot happen with an electrical injury." Dr. Hall explained his opinion very simply: "[Claimant] was fine before walking in the cooler. Something happened in the cooler and within a very short time frame, he was having symptoms. Sometimes, this is as good as it gets. This is one of those times." Based upon the content of his report, it is probable that Dr. Hall did not have Claimant's prior medical records outlining the number of dislocations or the treatment he received for those dislocations for review at the time of his IME. As noted in his report, Dr. Hall did not see the videotape capturing the event as it occurred on February 7, 2015. Rather, he commented based upon Dr. Ridings IME report that Claimant was "clearly" shocked.

24. Dr. Ridings opined that the findings on Claimant's February 9, 2015 MRI are chronic in nature. According to Dr. Ridings, Claimant's Hill-Sachs impaction fracture finding, the lack of bone marrow edema and the presence of labral scarring are consistent with remote injury and are not acute findings. As noted above, an x-ray obtained in 2008 demonstrated the presence of a Hill-Sachs lesion. Moreover, the ALJ finds it improbable that Claimant's labral scarring would be related to an incident occurring just days before the images were obtained. Consequently, the ALJ credits Dr. Ridings' testimony over that of Dr. Hall find that the February 9, 2015 MRI findings are,

more probably than not, old and related to Claimant's prior shoulder dislocations rather than any injury allegedly sustained on February 7, 2015.

25. Dr. Ridings also testified that acute shoulder dislocations are very painful and associated with muscle spasm and swelling. The ALJ finds this opinion credible, persuasive and supported by the record as evidenced by the treatment rendered for Claimant's known dislocation in 2008. During the acute phase of that injury Claimant required Morphine and Ativan for pain and subsequent conscious sedation to achieve reduction and restoration of glenohumeral alignment. Based upon the evidence presented, the ALJ credits Dr. Ridings' testimony to find that there is a paucity of objective findings supporting the conclusion that an acute dislocation occurred in this case.

26. Dr. Ridings explained that an electrical shock could conceivably cause a shoulder dislocation; however, for this to happen he would expect to see evidence of an entry mark such as a burn on the skin and the shock must be long enough and strong enough to cause a tetanic contraction of the muscles. He also explained that a jerking motion away from the shock, especially in somebody who had a previous shoulder dislocation, can be enough to cause a recurrent dislocation. Dr. Ridings' opined that neither of these events were present based upon his review of the video tape. Based upon careful review of the video tape in question, the ALJ agrees with Dr. Ridings. As noted, the video tape does not, contrary to Claimant's suggestion, show him jerking away from any stimulus. Rather, he immediately and fluidly moves to the left to occupy the space vacated by Mr. Hughley after a spark lasting less than a second is observed. The video shows no sudden, violent movements of the body, including the arm nor does Claimant appear to be in any pain during the entire video. While Claimant reaches for his right shoulder from time to time during the length of the video, the ALJ concludes, like Dr. Ridings that this grabbing is probably for effect because Claimant was aware of the camera and he had expressed an intention to pursue legal action indicating that he would "own" the restaurant because of his claimed injury.

27. Based upon a totality of the evidence presented, including review of the video tape, the ALJ finds that Claimant was not exposed to any prolonged electrical stimulus sufficient to cause a shoulder dislocation. While Claimant's sensation of his hair being effected constitutes some evidence that he occupied the same area of an electrical field when the wire shorted out on the freezer door, there is scant evidence he was subjected to any direct electrical current. As noted there was no redness, rash or burns noted on his skin.

28. Given Claimant's history, the ALJ finds that his need for right shoulder treatment, including stabilization surgery is, more probably than not, related to the ongoing laxity in the right shoulder caused by Claimant's prior non-worked related dislocations and the persistent feeling that his shoulder will pop out rather than the incident occurring February 7, 2015.

29. Based upon the evidence presented, the ALJ finds that although an "accident",

i.e. a live wire making contact with a freezer door occurred resulting in a sensation that Claimant's hair might be alight while Claimant was performing his work duties; he failed to prove by a preponderance of the evidence that he suffered a compensable right shoulder dislocation injury resulting in disability or the need for treatment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found here, Claimant's testimony was largely contradicted by the more persuasive statement/testimony of his co-workers. Moreover, because Dr. Greenslade, Dr. Simpson, Dr. Davis and Dr. Hall did not review Claimant's prior medical records and/or the video tape before commenting on causality, the ALJ finds their understanding of the case, including the mechanism of injury incomplete. As such, the ALJ finds and concludes that the testimony of Dr. Ridings is more persuasive than the opinions expressed by these physicians.

Compensability

D. As noted, Claimant bears the burden to prove that he suffered a compensable injury. To sustain that burden, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); §8-41-301(I)(c), C.R.S. The fact that claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

E. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S.

F. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an "accident" at work without sustaining a compensable "injury." This is true even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where the claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where claimant involved in motor vehicle accident without resultant injuries, no compensable injury occurred). As found, while the ALJ is convinced that an "accident" occurred, the ALJ is not persuaded that Claimant's need for right shoulder treatment was caused by his allegation that he was shocked by a live wire and/or he jerked away from that stimulus causing him to suffer a recurrent dislocation of the right shoulder. Consequently, Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable "injury" as defined by the aforementioned legal opinions and his case must be denied and dismissed under the circumstances. In light of this conclusion, Claimant's remaining claims need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's February 7, 2015 claim for a work related right shoulder dislocation injury is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 14, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence that on February 2, 2015 she sustained an injury proximately caused by the performance of service arising out of and in the course of her employment?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability benefits commencing February 4, 2015 and continuing?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable and necessary medical benefits to cure and relieve the effects of the injury?

- Did respondents prove by a preponderance of the evidence that Claimant is not entitled to an award of temporary total disability benefits because she was responsible for her termination from employment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 5 were received into evidence. Respondents' Exhibits A through E were received into evidence.

2. Claimant worked in the Employer's meat processing facility. Her job was to cut skin from meat. Claimant explained that she worked in a standing position. Another employee stood opposite of her. Between Claimant and the other employee was a space to throw bones.

3. Claimant testified that on February 1, 2015 the man standing opposite of her threw a big bone and her in the leg. Claimant reported this incident to her supervisor but she was not seriously injured.

4. Claimant testified as follows concerning the events of February 2, 2015. Claimant was again cutting meat when the employee opposite of her threw a big cow bone that struck her in the chest. Claimant could not describe the length or weight of the bone other than to say it was heavier than her purse. Claimant recalled that the bone was thrown "hard" with an overhand motion and it felt as if a "bullet" had struck her. Claimant recalled that she was almost knocked down by the bone but remained upright because she was holding onto the desk. She almost "threw up" and felt short of breath. Another employee advised Claimant to go to the nurse.

5. At hearing Claimant testified that she still has very severe symptoms attributable to the February 2, 2015 incident. Claimant reported that she has difficulty sleeping on her left side because of pain. She also stated that she has difficulty raising her left arm and is unable to raise it above shoulder level.

6. After being struck in the chest Claimant reported to the Employer's on-site occupational health department (OHD) where she was examined by a nurse.

7. Notes from the Employer's OHD indicate Claimant was seen at the nurse's office on February 2, 2015 at 7:50 p.m. Claimant gave a history that she was doing her job when another employee "threw a bone up to the conveyer belt and it fell" hitting Claimant on the left side of her chest. Claimant reported that she "couldn't breathe air" after she was struck and complained of pain located on the left side of her chest and back. Claimant also reported nausea because she was scared by the bone. No "bruising or swelling" was observed on examination. The nurse noted Claimant was "breathing fine" when she reported to the nurse's office. The Claimant was given 2 "Pepto" tablets to ease her stomach discomfort and ice was applied for fifteen minutes to the Claimant's chest and back. Claimant requested and was given "IBU 400 mg" for pain. Claimant rested for a while and was released from care without restrictions.

8. On February 2, 2015 Claimant completed a form selecting Carlos Cebrian, M.D., as the authorized treating physician for her alleged injury.

9. Claimant returned to the OHD nurse's office at 2:45 p.m. on February 4, 2015 and was seen by Nurse Lori Chapman. According to Nurse Chapman's notes Claimant gave a history that she was "sick and having pain." Claimant also reported that on February 3, 2015 she had a fever and did not work. Nurse Chapman noted the Claimant was angry and raised her voice to the "translator and nurse." Claimant reportedly stated that it was not the nurse's business why she could not work. Nevertheless, Claimant agreed to be examined by Nurse Chapman.

10. At the 2:45 p.m. examination Claimant reported to Nurse Chapman that she was experiencing pain from above the left breast to below the breast and into her left side. Claimant also reported trouble with breathing. On physical examination (PE) Nurse Chapman noted full range of motion in both upper extremities. There was no swelling, bruising or deformity of the left shoulder or chest. Claimant's respiration was even and unlabored. Nurse Chapman noted there were no "physical findings of injury." Claimant was advised to apply ice, stretch daily and use over the counter pain medications. Nurse Chapman wrote that Claimant requested additional treatment or she would not return to work. Claimant also demanded a paper to go and see her personal physician.

11. Nurse Chapman testified at hearing. Nurse Chapman testified that on February 4, 2015 she performed a complete evaluation of Claimant's upper extremities, chest and back. However there were no findings indicative of injury. Nurse Chapman testified that she released Claimant to return to work. (See also Respondents' Exhibit A-4 containing Nurse Chapman's written release to return to regular job).

12. At 5:40 p.m. on February 4, 2015 Claimant returned to the OHD nurse's office. Once again, Claimant was seen by Nurse Chapman. According to Nurse Chapman's notes Claimant reported that she was having a lot of pain and was not going to work. Claimant also requested Chapman to provide additional treatment. Alternatively Claimant requested a "paper" to see her own doctor if Chapman refused to provide additional treatment. According to Chapman's notes Claimant was again advised there were "no finings on exam." Chapman advised Claimant she could go to work or go home.

13. Nurse Chapman testified that when Claimant returned to the nurse's office for the second time she was adamant that she could not work and demanded to see a doctor and not a nurse. According to Chapman the Claimant's behavior "escalated" and she was asked to leave the plant. However, Claimant refused to do so and security was called. Eventually the police were called to escort Claimant off the Employer's premises. Chapman opined that Claimant was insubordinate and refused to follow instructions.

14. Claimant testified that she was mistreated and humiliated by Nurse Chapman. According to Claimant Nurse Chapman gave a "bad face," used "bad words" and called Claimant a liar.

15. Chapman testified that she did not make faces at Claimant, did not use bad language towards Claimant and did not accuse Claimant of being a liar. Nurse Chapman explained that she told Claimant there was nothing objectively wrong. Nurse Chapman opined that Claimant did not want to hear there was nothing wrong with her.

16. On February 5, 2015 the Employer terminated the Claimant's employment. According to the termination document Claimant was discharged for insubordination on February 4, 2015 when she was "given numerous instructions by members of management and she refused."

17. Claimant testified that she did not know why she was terminated and that she had not done anything to justify the termination. Claimant also stated that she believes the Employer knows she has a severe injury and fired her so she could "not go after them."

18. On February 11, 2015 Dr. Cebrian examined Claimant. Claimant gave a history that on February 2, 2015 "she was hit on the left side of her chest by a small bone" that was "thrown over a belt." Claimant stated that she had trouble breathing for a week and that she "developed pain in the left side of her chest that spread into her back on the left side." Claimant stated that she had "minimal pain on the left side of her chest on the anterior aspect but most of her pain" was "over the thoracic spine" and was "going lower on the left side." Dr. Cebrian also noted that in November 2014 Claimant had pain on the left side of her chest, missed two weeks of work and was treated with antibiotics. Claimant also told Dr. Cebrian that she had experienced an "infection in her left arm."

19. On PE Dr. Cebrian noted that when he tried to palpate the Claimant she pushed his hand away. Later, Claimant allowed Dr. Cebrian to examine her but "recoiled" every time Dr. Cebrian touched her "even lightly." Dr. Cebrian recorded that Claimant was "diffusely tender on the left side of the upper chest, the left trapezius, the left upper back, the left lumbar spine and left side." Examination of Claimant's lungs revealed air entry was equal bilaterally without adventitial sounds." Dr. Cebrian noted there was no "swelling, bruising or redness." Dr. Cebrian assessed diffuse subjective complaints "out of proportion to examination findings." Dr. Cebrian opined to a reasonable degree of medical probability that Claimant's presentation was "not related to what may or may not have happened at work." Dr. Cebrian explained that Claimant had diffuse and widespread complaints "that would not be related to a small bone hitting her on the left side of the chest."

20. Medical records from Salud Family Health Centers indicate that in November 2014 Claimant was taken off of work because of a non-work-related medical condition.

21. Claimant proved it is more probably true than not that on February 2, 2015 she sustained a compensable injury arising out of and in the course of her employment.

22. The ALJ credits Claimant's testimony insofar as she stated that on February 2, 2015 she was at her work station when a co-employee threw a bone that struck Claimant in the chest and caused her to experience some pain. The Claimant's testimony that she was hit by the bone and that it caused her to experience pain on the left side of her chest is consistent with the history she provided to the OHD nurse on February 2, 2015, to Nurse Chapman on February 4, 2015, and to Dr. Cebrian on February 11, 2015.

23. The Claimant proved it is more probably true than not that the incident of February 2, 2015 caused a need for medical treatment in the form of a visit to the nurse on February 2, 2015. On February 2, 2015 the OHD nurse examined Claimant and determined it was appropriate to prescribe "Pepto" tablets for Claimant's stomach discomfort, to apply ice to the chest and back and to provide pain relief medication.

24. Claimant failed to prove it is more probably true than not that she is entitled to an award of temporary total disability (TTD) benefits commencing February 4, 2015 and continuing. Specifically, Claimant failed to prove that the industrial injury disabled her from performing the duties of her regular employment.

25. The ALJ is persuaded by the findings and opinions of the nurses and doctor who have examined Claimant that the industrial injury has not resulted in any condition that disabled Claimant from performing her regular employment. The nurse that examined Claimant on February 2, 2015 noted that Claimant was "breathing fine" and that there was no bruising or swelling. The nurse credibly determined Claimant's condition did not warrant the imposition of any restrictions and the nurse released Claimant from further care. On February 4, 2015 Nurse Chapman performed an examination of Claimant's upper extremities, chest and back. Nurse Chapman found no

evidence of injury to Claimant and credibly released Claimant to her return to regular work. Dr. Cebrian examined Claimant on February 11, 2015 and noted diffuse and widespread pain complaints that he considered out of proportion to Claimant's findings on PE. Dr. Cebrian did not impose any restrictions on Claimant's activities and the ALJ infers that he does not believe any restrictions are warranted as a result of the February 2, 2015 incident.

26. The ALJ finds it significant that Claimant did not present any credible or persuasive medical evidence or opinion to the effect that the February 2, 2015 injury caused a condition that restricted her from performing the duties of her regular job. Although the ALJ recognizes that the law permits claimants to prove disability by lay evidence alone, nothing prohibits the ALJ from considering and weighing whatever medical evidence is presented on the question of disability. Here, the great weight of the medical evidence persuasively establishes that the industrial injury did not disable Claimant from performing the duties of her regular employment.

27. Claimant's testimony that she still suffers great pain and immobility of her left upper extremity is not credible and persuasive. The medical providers have unanimously failed to identify any objective evidence that Claimant suffers from a condition that could cause her reported symptoms. Dr. Cebrian credibly noted that Claimant's symptoms were out of proportion to the objective findings.

28. Claimant failed to prove that it is more probable than not that she is entitled to an award of additional medical benefits to cure and relieve the effects of the industrial injury.

29. There is no credible and persuasive medical evidence tending to establish that Claimant needs additional medical treatment to cure or relieve any condition proximately caused by the industrial injury of February 2, 2015. Claimant has not proven that she has any identifiable ongoing medical condition that was proximately caused by the February 2 injury. Dr. Cebrian credibly opined that Claimant's symptoms are out of proportion to any objective findings. Dr. Cebrian did not recommend additional treatment of any type. On February 4, 2015 Nurse Chapman credibly opined Claimant did not need any more medical treatment and declined to provide any. As determined in Finding of Fact 27, Claimant's testimony that she is still suffering severe symptoms from the February 2 injury is not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY

Claimant contends she proved by a preponderance of the evidence that on February 2, 2015 she sustained a “compensable” injury arising out of and in the course of her employment when she was struck by a bone thrown by a co-employee. Respondents argue Claimant did not sustain a compensable “injury” because even if she was hit by a bone the incident did not cause any disability nor did it necessitate medical treatment beyond the minor care she received “on the day of the incident.”

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Act creates a distinction between an “accident” and an “injury.” The term “accident” refers to an “unexpected, unusual, or undesigned occurrence.” Section 8-40-201(1), C.R.S. In contrast, an “injury” contemplates the physical or emotional trauma caused by an “accident.” An “accident” is the cause and an “injury” is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable “injury.” A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

As determined in Findings of Fact 21 through 23, Claimant proved it is more probably true than not that she sustained a compensable injury arising out of and in the course of her employment. The ALJ credits Claimant's testimony to the extent she stated that she was performing her duties when a co-employee threw a bone that struck Claimant's chest. This evidence is sufficient to establish that the injury arose out of and in the course of Claimant's employment.

The ALJ further credits Claimant's testimony insofar as she stated that she experienced pain from this incident and as a result sought treatment at the OHD nurse's office. The ALJ is persuaded by the February 2, 2015 nurse's note that the incident caused the need for medical treatment which included the application of ice to the affected areas and the prescription of a pain medication.

Insofar as Respondents assert the claim is not compensable because the treatment provided on February 2, 2012 was minor and brief, the ALJ is not persuaded. The Respondents cite no authority for the proposition that the finding of a compensable "injury" is dependent on the particular nature or duration of the medical treatment provided, and the ALJ is not aware of any such authority.

TEMPORARY TOTAL DISABILITY BENEFITS

Claimant contends that she proved by a preponderance of the evidence that she is entitled to an award of TTD benefits commencing February 4, 2015 and continuing. The Respondents contend Claimant failed to present credible and persuasive evidence that the industrial injury resulted in any disability that prohibited Claimant from working. The ALJ agrees with Respondents.

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As determined in Findings of Fact 24 through 27, Claimant failed to prove that the industrial injury of February 2, 2015 caused any condition that disabled her from performing the regular duties of her employment. As found, the nurse that examined Claimant on February 2 released Claimant to return to work without restrictions. Nurse Chapman examined Claimant on February 4, 2015 and released her to return to work without restrictions. Dr. Cebrian examined Claimant on February 11, 2015 and did not impose any restrictions. Claimant has not presented any credible or persuasive medical evidence tending to establish that the February 2 injury caused a medical condition warranting the imposition of disabling restrictions. Although medical evidence of restrictions is not required to prove disability, the absence of such evidence is a significant factor leading the ALJ to conclude Claimant failed to prove that she sustained any disability. Moreover, as determined in Finding of Fact 27, Claimant's testimony that she still suffers great pain and inability to move her left upper extremity is not credible and persuasive.

The claim for temporary disability benefits is denied. In light of this determination the ALJ need not consider whether or not Claimant was responsible for her termination from employment.

MEDICAL BENEFITS

Claimant requests an award of additional medical benefits to treat the alleged ongoing effects of the industrial injury. Claimant does not explicitly identify what type of treatment she is seeking.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The claimant is also required to prove by a preponderance of the evidence that the condition for which she seeks medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 28 and 29, Claimant failed to prove that she is currently entitled to any medical treatment to cure and relieve the effects of the February 2, 2015 industrial injury. The ALJ is persuaded by Dr. Cebrian's opinion that Claimant's symptoms are out of proportion to her objective findings and that they are not related to the injury of February 2. The ALJ is further persuaded that Claimant does not need any medical treatment for the February 2 injury because none was recommended by Dr. Cebrian or Nurse Chapman. Significantly, Claimant failed to present any credible or persuasive medical evidence or opinion tending to identify a medical condition causally related to the injury of February 2 injury or suggesting a course of treatment for this hypothetical condition.

The Claimant's request for additional medical treatment is denied. Of course, Claimant remains free to make claims for future medical benefits subject to her ability to prove entitlement to such benefits.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Claimant sustained a compensable injury on February 2, 2015.

2. The claim for temporary total disability benefits commencing February 4, 2015 is denied.

3. The claim for additional medical benefits is denied.

4. Issues not addressed by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 27, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that, in addition to suffering an admitted mid-back injury, he also sustained a lower back injury on March 25, 2015 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his lower back injury.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period March 26, 2015 until August 29, 2015 and Temporary Total Disability (TTD) benefits for the period August 30, 2015 until terminated by statute.

4. Whether Claimant has established by a preponderance of the evidence that the right of medical selection passed to him and he is entitled to recover penalties because Respondents failed to provide him with a list of at least two designated treatment providers after receiving notice of his injury.

5. Whether Claimant has demonstrated by a preponderance of the evidence that Respondents dictated medical care in violation of §8-43-503(3), C.R.S., §8-43-404(5), C.R.S. and WCRP 16-5(A)(4)(a) and he is entitled to recover penalties.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $1,198.68.

FINDINGS OF FACT

1. Claimant worked for Employer in its Leak Detection Department. Employer is a public entity that maintains the water supply for the City and County of Denver, Colorado. The Charter of the City and County of Denver specifically provides for the creation of a board to oversee Employer to "have complete charge and control of a water works system and plant for supplying the City and County of Denver and its inhabitants with water for all use and purposes."

2. On March 25, 2015 Claimant had traveled to a location to identify a leak in a water system. After removing a 50 pound hydraulic unit from the side cabinet of his truck he immediately experienced pain in his back.

3. Co-worker Zach Sponsal transported Claimant to Employer's Occupational Health Clinic. The Clinic provides occupational health services to employees of Employer. The Clinic is staffed by Hugh H. Macaulay, III, M.D., a physicians' assistant, nurses and an office staff.

4. Dr. Macaulay has a contract to provide medical services to Employer. The contract is bid out about every three years and is published on the internet through Bidnet. Employer also sends out Requests for Proposals for medical services. Dr. Macaulay has provided medical services to Employer for approximately 20 years. He is present at the Clinic on Mondays and Wednesdays.

5. When Claimant arrived at the Clinic on March 25, 2015 he visited Jessica Bedwell, R.N. and Authorized Treating Physician (ATP) Dr. Macaulay. Claimant completed an Injury Statement Form providing that he was experiencing pain to his right lower back. He also affirmed that he had injuries to the right side of his upper back in the thoracic area. After conducting a physical examination, Dr. Macaulay diagnosed Claimant with an acute right rib subluxation at T9/T10. He directed Claimant to Michael House at Back to Motion Physical Therapy for treatment.

6. Later on March 25, 2015 Mr. Sponsal transported Claimant to Back to Motion Physical Therapy. Claimant completed an electronic diagram delineating his injuries. The diagram revealed that Claimant was experiencing stabbing and aching pain on the right side of his back in an area that was mid-way between his hip and armpit. Claimant subsequently continued to receive medical treatment from Dr. Macaulay and undergo physical therapy.

7. On April 9, 2015 Insurer filed a General Admission of Liability (GAL). Insurer's Adjuster Teresa Manshardt testified that she handled Claimant's case and completed the GAL. She noted that the GAL did not delineate an injury to a specific body part because it was up to Dr. Macaulay to determine the appropriate compensable body parts. The GAL also noted that the case was a "medical only claim with no lost time."

8. On April 13, 2015 Claimant returned to Dr. Macaulay for an evaluation. Claimant reported that he was improving and in much less pain in the thoracic area. He believed he could return to most of his regular work duties. Dr. Macaulay "loosened" Claimant's work restrictions.

9. In an April 29, 2015 visit with Dr. Macaulay Claimant reported that he was doing well and had essentially returned to normal. Claimant noted that he could return to regular work but had some apprehension. Dr. Macaulay explained that Claimant could return to regular duty work in conjunction with continued physical therapy.

10. On May 13, 2015 Claimant returned to Dr. Macaulay for an evaluation. Claimant reported some continuing discomfort in his mid-back area. Notably, Claimant mentioned a severe headache 10 days earlier, but did not report any lower back concerns. Based on Claimant's subjective complaints, Dr. Macaulay continued physical

therapy for an additional two weeks. Claimant continued to perform regular work duties. Dr. Macaulay noted that he planned to discharge Claimant without impairment at his next visit.

11. On June 3, 2015 Claimant returned to Dr. Macaulay for an examination. He reported that he was experiencing significantly more discomfort in his mid-back area. An MRI of Claimant's thoracic spine revealed benign findings. Dr. Macaulay explained that he could discharge Claimant to full duty without restrictions. Dr. Macaulay remarked that he could assign restrictions and an impairment rating, but Employer might not accommodate the restrictions and Claimant might not have a job. After considerable discussion, Claimant decided he could return to regular work. Dr. Macaulay determined that Claimant had reached Maximum Medical Improvement (MMI).with no impairment or restrictions.

12. On July 13, 2015 Claimant returned to Dr. Macaulay for an examination. Claimant reported lower back discomfort. Dr. Macaulay responded that his records revealed Claimant's work injury was limited to his thoracic spine and related rib subluxation that had quickly improved with treatment. Dr. Macaulay subsequently determined that Claimant's lower back complaints were not work-related.

13. On July 14, 2015 Insurer filed a Final Admission of Liability (FAL). The FAL was consistent with Dr. Macaulay's determination that Claimant reached MMI on June 3, 2015 with no permanent impairment. The FAL noted that Claimant's claim involved medical benefits only with no lost time.

14. Dr. Macaulay referred Claimant to Robert L Kawasaki, M.D. for an evaluation of thoracic pain. On July 21, 2015 Claimant visited Dr. Kawasaki for an examination. Claimant reported that he initially experienced pain in his lower lumbar region into the thoracic area. He remarked that many of the physical therapy exercises seemed to aggravate his pain. Claimant reported that most of his current pain was in the lower lumbar region. After reviewing Claimant's medical records and conducting a physical examination, Dr. Kawasaki determined that Claimant's rib dysfunction had been treated appropriately and there were no objective abnormalities of Claimant's thoracic spine. Dr. Kawasaki noted that Claimant's lower back complaints were most compatible with "facetogenic pain of the lower lumbar segments." He remarked that "there does not appear to be an initial report of low back pain, and most of the treatment has been focused on the thoracic rib dysfunction." Dr. Kawasaki commented that there was no indication in the medical notes of significant facetogenic pain in the lumbar spine region. He summarized that "there does not appear to be specific injury to the lumbar spine from the 03/25/15 injury." Nevertheless, Dr. Kawasaki commented that Claimant required some treatment for his lower back pain.

15. On November 10, 2015 David W. Yamamoto, M.D. authored a letter stating that Claimant's lower back strain on March 25, 2015 constituted a work-related injury. He reported that he had been providing Claimant with medical treatment for his March 25, 2015 back injury through private insurance. Dr. Yamamoto noted that Claimant had initially completed a pain diagram "marking the lower back as part of his

injury." Moreover, an October 17, 2015 lumbar spine MRI revealed multilevel degenerative changes. Dr. Yamamoto commented that, if Claimant did not respond well to physical therapy, an evaluation with a spine surgeon to discuss an L5-S1 fusion would be appropriate.

16. On November 12, 2015 Claimant underwent an independent medical examination with Sander Orent, M.D. After reviewing Claimant's medical records and conducting a physical examination. Dr. Orent concluded that Claimant suffered an injury to his lower back on March 25, 2015. He specified that Claimant "suffered a low back strain and it is incompletely treated." Dr. Orent explained that the medical and physical therapy records are replete with Claimant's references to lower back pain. He was "puzzled" as to why Dr. Macaulay focused on Claimant's thoracic spine and commented that there was "an inaccurate assessment of the problem."

17. On November 18, 2015 Claimant underwent an evaluation with Ryan Kramer, M.D. Dr. Kramer determined that Claimant had suffered a strained lower back at work. He remarked that Claimant's "pain started with a particular task at work." Dr. Kramer also commented that Claimant had persistent back pain with no specific cause.

18. On December 2, 2015 Dr. Yamamoto testified through a pre-hearing evidentiary deposition in this matter. He maintained that Claimant's lower back injury was caused by his work activities for Employer on March 25, 2015.

19. Claimant testified at the hearing in this matter. He explained that on March 25, 2015 he experienced a large area of pain that extended from his lower back up to his mid-back area. Claimant remarked that he received medical treatment from Dr. Yamamoto. Dr. Yamamoto assigned work restrictions including no lifting, carrying or pulling in excess of 10 pounds and no repetitive lifting in excess of five pounds. Claimant noted that he has not worked anywhere since August 29, 2015. He maintained that he would like to receive additional treatment from Dr. Yamamoto because he does not trust Dr. Macaulay. Claimant had asked Employer if he could receive treatment from Dr. Yamamoto, but Nurse Cogan denied the request.

20. Dr. Macaulay testified at the hearing in this matter. He explained that he has a contract with Employer to provide medical services at Employer's Occupational Health Clinic. He works at the Clinic on Mondays and Wednesdays. Dr. Macaulay maintained that Claimant's lower back injury was not work-related based on pain diagrams, physical therapy records and physical examinations. He specifically commented that Claimant's initial pain diagram did not reveal any evidence of a lower back injury and the lumbar MRI only reflected degenerative changes. Dr. Macaulay concluded that Claimant suffered an injury to his mid-back area on March 25, 2015. He determined that Claimant reached MMI on June 3, 2015 with no permanent impairment.

21. Nurse Cogan is the supervisor of Employer's Occupational Health Clinic. She specifically oversees the nurses, physician's assistant and office staff at the Clinic. On December 30, 2015 she testified through a post-hearing evidentiary deposition in this matter. Nurse Cogan explained that her supervisor is Employer's Manager of

Health Care and Benefits Sandra Miller. Nurse Cogan remarked that Claimant completed a Personal Injury Statement on March 25, 2015. The Statement provided that Claimant was suffering pain in his right lower back but that his injuries were to his right upper back or thoracic area. Nurse Cogan commented that the information about lower back pain came from Claimant but the information involving the mid-back injury came from a drop-down menu based on Dr. Macaulay's diagnosis after examining Claimant.

22. Nurse Cogan also addressed a conversation with Claimant regarding a possible transfer of medical care to Dr. Yamamoto. She denied that she told Claimant he could not visit Dr. Yamamoto. Instead, she explained that Dr. Yamamoto had not been an approved referral from Dr. Macaulay. Nurse Cogan did not preclude Claimant from visiting Dr. Yamamoto but told him that he would be financially responsible for any medical care he received from Dr. Yamamoto.

23. Claimant has failed to establish that it is more probably true than not that, in addition to suffering an admitted mid-back injury, he also suffered a lower back injury on March 25, 2015 during the course and scope of his employment with Employer. On March 25, 2015 while Claimant was removing a 50 pound hydraulic unit from the side cabinet of his truck he experienced immediate pain in his back. Claimant completed an Injury Statement form providing that he was experiencing pain to his right lower back. He also affirmed that he had injuries to the right side of his upper back in the thoracic area. After conducting a physical examination, ATP Dr. Macaulay diagnosed Claimant with an acute right rib subluxation at T9/T10. Nurse Cogan explained that the information about lower back pain came from Claimant but the information involving the mid-back injury came from a drop-down menu based on Dr. Macaulay's diagnosis after examining Claimant. At Back to Motion Physical Therapy on March 25, 2015 Claimant completed an electronic diagram delineating his injuries. The diagram revealed that Claimant was experiencing stabbing and aching pain on the right side of his back in an area that was mid-way between his hip and armpit. Claimant continued to regularly visit Dr. Macaulay and undergo physical therapy during April and May 2015. He reported improving symptoms in his mid-back area and repeatedly commented that he could return to his regular job duties. Notably, Claimant did not mention lower back complaints. On June 3, 2015 Dr. Macaulay determined that Claimant had reached MMI with no impairment or restrictions.

24. On July 13, 2015 Claimant returned to Dr. Macaulay for an examination. Claimant reported lower back discomfort. Dr. Macaulay responded that his records revealed Claimant's work injury was to his thoracic spine and related rib subluxation that had quickly improved with treatment. Dr. Macaulay subsequently determined that Claimant's lower back complaints were not work-related. He referred Claimant to Dr. Kawasaki for an examination. On July 21, 2015 Dr. Kawasaki determined that Claimant's rib dysfunction had been treated appropriately and there were no objective abnormalities in Claimant's thoracic spine. Dr. Kawasaki noted that Claimant's lower back complaints were most compatible with "facetogenic pain of the lower lumbar segments." He remarked that "there does not appear to be an initial report of low back pain, and there was no indication in the medical notes of significant facetogenic pain in

the lumbar spine region. He summarized that there was no specific injury to the lumbar spine of March 25, 2015.

25. In contrast, Drs. Yamamoto, Orent and Kramer determined that Claimant injured his lower back on March 25, 2015 and required additional medical treatment. The physicians commented that Claimant's medical records and physical therapy notes repeatedly referenced lower back pain. However, ATP Macaulay examined Claimant on multiple occasions from March 25, 2015 until June 3, 2015. Claimant reported improving symptoms in his mid-back area and repeatedly commented that he could return to his regular job duties. Notably, Claimant did not mention lower back symptoms. Moreover, as Dr. Macaulay noted, Claimant's lumbar MRI only reflected degenerative changes. Accordingly, Claimant's employment did not aggravate, accelerate, or combine with a pre-existing condition to produce a need for medical treatment of his lower back.

26. Claimant has failed to prove that it is more probably true than not that he is entitled to receive TPD benefits for the period March 26, 2015 until August 29, 2015 and TTD benefits for the period August 30, 2015 until terminated by statute. On June 3, 2015 Dr. Macaulay determined that Claimant reached MMI with no impairment or restrictions. On July 14, 2015 Insurer filed a FAL consistent with Dr. Macaulay's MMI and impairment determinations. The FAL noted that Claimant's claim involved medical benefits only with no lost time. The record reveals that Claimant did not suffer a wage loss as a result of his admitted mid-back injury and did not suffer a compensable lower back injury. Accordingly, Claimant has not established a causal connection between his industrial injury and subsequent wage loss. Claimant is therefore not entitled to recover TPD benefits for the period from March 26, 2015 until August 29, 2015. Finally, because Claimant reached MMI on June 3, 2015 he is statutorily precluded from receiving TTD benefits for the period subsequent to the MMI date.

27. Claimant has failed to establish that it is more probably true than not that the right of medical selection passed to him and he is entitled to recover penalties because Respondents did not designate a medical provider after receiving notice of his injury. Generally, respondents must provide injured workers with a list of at least two designated treatment providers when they are apprised of a work-related injury. However, Section 8-43-404(5)(a)(II)(A), C.R.S. and WCRP 8-1(B) provide that, if the employer is a "governmental entity" that currently has its own occupational health care provider system, the employer may designate health care providers from within its own system and is not required to provide an alternate physician from outside its system. Because Employer is a governmental entity that has its own occupational health care system, Claimant's request to select a physician and recover penalties fails.

28. Employer is a public entity that maintains the water supply for the City and County of Denver, Colorado. The Charter of the City and County of Denver specifically provides for the creation of a board to oversee Employer to "have complete charge and control of a water works system and plant for supplying the City and County of Denver and its inhabitants with water for all use and purposes." Employer is thus a governmental entity.

29. Employer maintains an Occupational Health Clinic. The Clinic provides occupational health services to employees of Employer. The Clinic is staffed by Dr. Macaulay, a physicians' assistant, nurses and an office staff. Dr. Macaulay has a contract to provide medical services to Employer. He is present at the Clinic on Mondays and Wednesdays. There is no requirement in §8-43-404(5)(a)(II)(A), C.R.S. or WCRP 8-1(B) that a physician must be present full-time in an occupational health care provider system. Nurse Cogan is the supervisor of Employer's Occupational Health Clinic. She specifically oversees the nurses, the physician's assistant and the office staff at the Clinic. Nurse Cogan explained that her supervisor is Employer's Manager of Health Care and Benefits Ms. Miller. The record reflects that Employer regularly provides health care services to injured employees through its Occupational Health Clinic. The arrangement thus constitutes an "occupational health care provider system" pursuant to §8-43-404(5)(a)(II)(A), C.R.S. and WCRP 8-1(B). Accordingly, Employer properly designated health care providers from within its own system and was not required to provide an alternate physician from outside its system.

30. Claimant has failed to demonstrate that it is more probably true than not that Respondents dictated medical care in violation of §8-43-503(3), C.R.S., §8-43-404(5), C.R.S. and WCRP 16-5(A)(4)(a) and he is entitled to recover penalties. Claimant testified that he asked Employer if he could receive treatment from Dr. Yamamoto, but Nurse Cogan denied the request. Nurse Cogan denied that she told Claimant he could not visit Dr. Yamamoto. Instead, she explained that Dr. Yamamoto was not an approved referral from Dr. Macaulay. Nurse Cogan did not preclude Claimant from visiting Dr. Yamamoto but told him that he would be financially responsible for any medical care he received from Dr. Yamamoto. Nurse Cogan simply apprised Claimant that he required a referral from Dr. Macaulay if he wanted to obtain medical treatment from Dr. Yamamoto within the Workers' Compensation system. Absent a referral, Claimant would be responsible for the medical costs associated with his treatment from Dr. Yamamoto. The record does not contain any probative evidence demonstrating that Respondents ordered or directed a physician to engage in a specific course of conduct. Moreover, the record lacks evidence that a physician was influenced or compelled to engage in a specific course of conduct or treatment because of Respondents' actions. The record thus does not demonstrate that Employer dictated Claimant's medical care. Accordingly, Claimant is not entitled to recover penalties.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to establish by a preponderance of the evidence that, in addition to suffering an admitted mid-back injury, he also suffered a lower back injury on March 25, 2015 during the course and scope of his employment with Employer. On March 25, 2015 while Claimant was removing a 50 pound hydraulic unit from the side cabinet of his truck he experienced immediate pain in his back. Claimant completed an Injury Statement form providing that he was experiencing pain to his right lower back. He also affirmed that he had injuries to the right side of his upper back in the thoracic area. After conducting a physical examination, ATP Dr. Macaulay diagnosed Claimant with an acute right rib subluxation at T9/T10. Nurse Cogan explained that the information about lower back pain came from Claimant but the information involving the mid-back injury came from a drop-down menu based on Dr. Macaulay's diagnosis after examining Claimant. At Back to Motion Physical Therapy on March 25, 2015 Claimant completed an electronic diagram delineating his injuries. The diagram revealed that Claimant was experiencing stabbing and aching pain on the right side of his back in an area that was mid-way between his hip and armpit. Claimant continued to regularly visit Dr. Macaulay and undergo physical therapy during April and May 2015. He reported improving symptoms in his mid-back area and repeatedly commented that he could return to his regular job duties. Notably, Claimant did not mention lower back complaints. On June 3, 2015 Dr. Macaulay determined that Claimant had reached MMI with no impairment or restrictions.

8. As found, on July 13, 2015 Claimant returned to Dr. Macaulay for an examination. Claimant reported lower back discomfort. Dr. Macaulay responded that his records revealed Claimant's work injury was to his thoracic spine and related rib subluxation that had quickly improved with treatment. Dr. Macaulay subsequently determined that Claimant's lower back complaints were not work-related. He referred Claimant to Dr. Kawasaki for an examination. On July 21, 2015 Dr. Kawasaki determined that Claimant's rib dysfunction had been treated appropriately and there were no objective abnormalities in Claimant's thoracic spine. Dr. Kawasaki noted that Claimant's lower back complaints were most compatible with "facetogenic pain of the lower lumbar segments." He remarked that "there does not appear to be an initial report of low back pain, and there was no indication in the medical notes of significant facetogenic pain in the lumbar spine region. He summarized that there was no specific injury to the lumbar spine of March 25, 2015.

9. As found, in contrast, Drs. Yamamoto, Orent and Kramer determined that Claimant injured his lower back on March 25, 2015 and required additional medical treatment. The physicians commented that Claimant's medical records and physical therapy notes repeatedly referenced lower back pain. However, ATP Macaulay examined Claimant on multiple occasions from March 25, 2015 until June 3, 2015. Claimant reported improving symptoms in his mid-back area and repeatedly commented that he could return to his regular job duties. Notably, Claimant did not mention lower back symptoms. Moreover, as Dr. Macaulay noted, Claimant's lumbar MRI only reflected degenerative changes. Accordingly, Claimant's employment did not aggravate, accelerate, or combine with a pre-existing condition to produce a need for medical treatment of his lower back.

TTD and TPD Benefits

10. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

11. As found, Claimant has failed to prove by a preponderance of the evidence that he is entitled to receive TPD benefits for the period March 26, 2015 until August 29, 2015 and TTD benefits for the period August 30, 2015 until terminated by statute. On June 3, 2015 Dr. Macaulay determined that Claimant reached MMI with no impairment or restrictions. On July 14, 2015 Insurer filed a FAL consistent with Dr. Macaulay's MMI and impairment determinations. The FAL noted that Claimant's claim involved medical benefits only with no lost time. The record reveals that Claimant did not suffer a wage loss as a result of his admitted mid-back injury and did not suffer a compensable lower back injury. Accordingly, Claimant has not established a causal connection between his industrial injury and subsequent wage loss. Claimant is therefore not entitled to recover TPD benefits for the period from March 26, 2015 until August 29, 2015. Finally, because Claimant reached MMI on June 3, 2015 he is statutorily precluded from receiving TTD benefits for the period subsequent to the MMI date.

Right of Selection/Penalties

12. Section 8-43-304(1), C.R.S. is a general penalty provision under the Act that authorizes the imposition of penalties up to $1000 per day where a party violates a statute, rule, or lawful order of an ALJ. *See Holliday v. Bestop, Inc.,* 23 P.3d 700, 705 (Colo. 2001). The term "order" as used in §8-43-304 includes a rule or regulation promulgated by the Director of the Division of Worker's Compensation. §8-40-201(15),

C.R.S.; *see Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176, 177 (Colo. App. 2002). Section 8-43-304(1), C.R.S. also requires that the fine imposed is to be apportioned, in whole or in part, by the ALJ between the aggrieved party and the workers' compensation cash fund created in C.R.S §8-44-112(7)(a), C.R.S. except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed.

13. The imposition of penalties under §8-43-304(1), C.R.S. requires a two-step analysis. *See In re Hailemichael,* W.C. No. 4-382-985 (ICAP, Nov. 17, 2004). The ALJ must first determine whether the disputed conduct violated a provision of the Act or rule. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623, 624 (Colo. App. 1995). If a violation has occurred, penalties may only be imposed if the ALJ concludes that the violation was objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 907 P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of an insurer's actions depends upon whether the action was predicated on a "rational argument based in law or fact." *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998).

14. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least two designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least two physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list in compliance with C.R.S. §8-43-404(5)(a)(I)(A)." W.C.R.P. Rule 8-2(D) additionally provides that the remedy for failure to comply with the requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

15. Section 8-43-404(5)(a)(II)(A), C.R.S. specifies, in relevant part, that if the employer is a "governmental entity" that currently has its own occupational health care provider system, the employer may designate health care providers from within its own system and is not required to provide an alternate physician or corporate medical provider from outside its own system. Similarly, WCRP 8-1(B) provides, in relevant part, that employers who are "governmental entities" that have their own occupational health care provider system pursuant to §8-43-404(5)(a)(ii)(A), C.R.S. "may designate health care providers from their own system and are otherwise exempt from the requirement to provide a list of alternate physicians or corporate medical providers."

16. As found, Claimant has failed to establish by a preponderance of the evidence that the right of medical selection passed to him and he is entitled to recover penalties because Respondents did not designate a medical provider after receiving notice of his injury. Generally, respondents must provide injured workers with a list of at least two designated treatment providers when they are apprised of a work-related injury. However, Section 8-43-404(5)(a)(II)(A), C.R.S. and WCRP 8-1(B) provide that, if the employer is a "governmental entity" that currently has its own occupational health care provider system, the employer may designate health care providers from within its own system and is not required to provide an alternate physician from outside its system. Because Employer is a governmental entity that has its own occupational health care system, Claimant's request to select a physician and recover penalties fails.

17. As found, Employer is a public entity that maintains the water supply for the City and County of Denver, Colorado. The Charter of the City and County of Denver specifically provides for the creation of a board to oversee Employer to "have complete charge and control of a water works system and plant for supplying the City and County of Denver and its inhabitants with water for all use and purposes." Employer is thus a governmental entity.

18. As found, Employer maintains an Occupational Health Clinic. The Clinic provides occupational health services to employees of Employer. The Clinic is staffed by Dr. Macaulay, a physicians' assistant, nurses and an office staff. Dr. Macaulay has a contract to provide medical services to Employer. He is present at the Clinic on Mondays and Wednesdays. There is no requirement in §8-43-404(5)(a)(II)(A), C.R.S. or WCRP 8-1(B) that a physician must be present full-time in an occupational health care provider system. Nurse Cogan is the supervisor of Employer's Occupational Health Clinic. She specifically oversees the nurses, the physician's assistant and the office staff at the Clinic. Nurse Cogan explained that her supervisor is Employer's Manager of Health Care and Benefits Ms. Miller. The record reflects that Employer regularly provides health care services to injured employees through its Occupational Health Clinic. The arrangement thus constitutes an "occupational health care provider system" pursuant to §8-43-404(5)(a)(II)(A), C.R.S. and WCRP 8-1(B). Accordingly, Employer properly designated health care providers from within its own system and was not required to provide an alternate physician from outside its system.

Penalties for Dictating Medical Care

19. Section 8-43-503(3), C.R.S. provides, in pertinent part, that employers, insurers, claimants and their representatives shall not dictate to any physician the type or duration of treatment or degree of physician impairment. WCRP 16-5(A)(4)(a) specifies that "[a] payer or employer shall not redirect or alter the scope of an authorized treating provider's referral to another provider for treatment or evaluation of a compensable injury." The critical inquiry is whether the record contains any probative evidence demonstrating that the respondents ordered or directed a physician to engage in a specific course of conduct. *In Re Teegardin,* W.C. No. 4-748-106(2) (ICAP, Jan. 17, 2014). Moreover, the record must include evidence that the physician was

influenced or compelled to engage in a specific course of conduct or treatment because of a respondent's actions. *Id.*

20. As found, Claimant has failed to demonstrate by a preponderance of the evidence that Respondents dictated medical care in violation of §8-43-503(3), C.R.S., §8-43-404(5), C.R.S. and WCRP 16-5(A)(4)(a) and he is entitled to recover penalties. Claimant testified that he asked Employer if he could receive treatment from Dr. Yamamoto, but Nurse Cogan denied the request. Nurse Cogan denied that she told Claimant he could not visit Dr. Yamamoto. Instead, she explained that Dr. Yamamoto was not an approved referral from Dr. Macaulay. Nurse Cogan did not preclude Claimant from visiting Dr. Yamamoto but told him that he would be financially responsible for any medical care he received from Dr. Yamamoto. Nurse Cogan simply apprised Claimant that he required a referral from Dr. Macaulay if he wanted to obtain medical treatment from Dr. Yamamoto within the Workers' Compensation system. Absent a referral, Claimant would be responsible for the medical costs associated with his treatment from Dr. Yamamoto. The record does not contain any probative evidence demonstrating that Respondents ordered or directed a physician to engage in a specific course of conduct. Moreover, the record lacks evidence that a physician was influenced or compelled to engage in a specific course of conduct or treatment because of Respondents' actions. The record thus does not demonstrate that Employer dictated Claimant's medical care. Accordingly, Claimant is not entitled to recover penalties.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim that he suffered a lower back injury while working for Employer on March 25, 2015 is denied and dismissed. Therefore, Claimant is not entitled to receive additional medical benefits.

2. Claimant's request for TPD and TTD benefits is denied and dismissed.

3. Claimant earned an AWW of $1,198.68..

4. The right of medical selection did not pass to Claimant.

5. Claimant's requests for penalties are denied and dismissed.

6. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 21, 2016.

_Peter J Cannici________________
Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

The issues addressed in this decision concern compensability, Claimant's entitlement to medical and temporary disability benefits, a determination of Claimant's average weekly wage and Respondents' entitlement to offsets. The specific questions answered are:

I. Whether Claimant established by a preponderance of the evidence that he sustained a traumatic injury to his neck, arising out of and in the course and scope of his employment on August 19, 2014.

II. Whether Claimant established by a preponderance of the evidence that the initial medical treatment he received following his August 19, 2014 accident was emergent in nature.

III. Whether Claimant established by a preponderance of the evidence that Respondents failed to properly designate a treatment provider to attend to Claimant's alleged injuries.

IV. Whether Claimant established by a preponderance of the evidence that the treatment provided to Claimant was reasonable, necessary and causally related to his alleged August 19, 2014 work injury.

V. Whether Claimant's average weekly wage (AWW) is $1,236.45, $1,362.87 or some other figure.

VI. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) from August 20, 2014 and thereafter for five days, April 1, 2015 through September 29, 2015 and temporary partial disability (TPD) benefits from October 1, 2015 through October 15, 2015 as a result of the neck injury sustained on August 19, 2014.

VII. Whether Respondents are entitled, pursuant to C.R.S. § 8-42-103(1)(d)(I), to offset any TTD/TPD benefits for short-term disability benefits received by Claimant.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is employed as a hail and water loss claims adjuster for Employer.

As part of his duties, Claimant is required to travel to/from various residential and commercial properties, in order to conduct damage inspections concerning the claimed loss. Claimant's travel takes him to locations outside of Colorado Springs. Claimant is provided a company car and a gas stipend by Employer for his travel needs.

2. When he is not in the field completing inspections, Claimant works from a home office in Colorado Springs where, in addition to negotiating settlements, he prepares written damage estimates from his property inspection notes.

3. On August 19, 2014, Claimant was tasked with inspecting multiple properties in Pueblo, Colorado for hail and water damage. As part of his inspections, Claimant routinely enters crawl spaces, looks up at ceilings and climbs ladders to gain access to the property's roof. Inspections also include taking pictures which Claimant later downloads from a digital camera for inclusion in his written damage estimate. Based upon the evidence presented, the ALJ finds the aforementioned inspections detailed and physically challenging.

4. Between 2:30 and 3:00 pm on August 19, 2014, Claimant experienced a bout of dizziness while on the roof of a property he was inspecting. Claimant is a Type 1 diabetic, having been diagnosed with diabetes at age 10. Regulation of his blood sugar levels has been challenging, requiring the use of a diabetic pump during his early years, although Claimant did not feel it controlled his sugar levels well. Consequently, as an adult, Claimant attempts to manage his blood sugar levels with the use of insulin and dietary controls. Because Claimant's work schedule is highly variable, he misses meals and insulin doses. Moreover, because he frequently works at heights, Claimant utilizes food and candy bars as a precautionary means to prevent low blood sugar level events and their attendant physical/mental symptoms.

5. Upon feeling dizzy, Claimant retreated from the roof and once on the ground, drank a can of soda and ate a candy bar. Reportedly, this made him feel better, so he started the drive for home where he intended to begin the preparation of his written damage estimates for the day's inspections.

6. While driving north bound on Interstate 25, Claimant experienced an episode of syncope (short loss of consciousness) secondary to hypoglycemia. He testified that he only has a vague recollection of the events after suffering this event. Specifically, Claimant testified that he felt a "bump" while driving but kept going, exiting the interstate and traveling home. Once home, Claimant testified that he let his dog out and drank some Dr. Pepper as he was shaky, dizzy, had a headache and was generally not feeling well. According to Claimant, he fell asleep on the couch that evening. The following morning, Claimant had chest pain and his right arm was sore. He discovered that the front end of his company provided car was damaged. He testified that the damage was "not bad". He assumed that he had collided with "something" not "someone else."

7. Claimant testified that he was worried about his chest pain so he called a

friend, who took him to the emergency room at Penrose Hospital where he was treated for symptoms consistent with a chest wall contusion. The ALJ finds that although there did not appear to be an immediate threat to Claimant's life, his treatment in the ER constituted a bona fide emergency due to his previous hypoglycemia, syncope, impaired mental status and his chest pain. Claimant has proven by a preponderance of the evidence that his treatment in the ER at Penrose Hospital was emergent in nature.

8. Upon returning home from the hospital, Claimant called his supervisor to report the events that had occurred the previous afternoon, the damage to his company car and his injuries. Claimant was not provided with a list of designated medical providers from which to choose to attend to the injuries he sustained as a consequence of the collision the day before.

9. Claimant also contacted the local police agencies, including the Colorado Springs PD and the El Paso County Sheriff's Office to ascertain whether there had been any reports of any hit and run accidents for August 19, 2015. These agencies had no such reports. Consequently, Claimant contacted the Colorado State Patrol (CSP) and discovered that there had been a report of a motor vehicle accident (MVA) on I-25 involving a car matching his where the driver drove off. Additional investigation and conversation with the State Patrol revealed that Claimant had run into the rear of another vehicle being driven by Ryan Pearson as both cars were traveling north on I-25. Contrary to Claimant's testimony, the accident report notes that both vehicles sustained major damage. According to Mr. Pearson's statement, Claimant's car had visible front end damage and was leaking fluids. Claimant was subsequently contacted by a Trooper from the CSP and provided with a Colorado State Patrol Drivers Statement and Exchange of Information Form for completion. Claimant completed and signed the form on August 20, 2014. The form contains information detailing the accident which is consistent with Claimant's hearing testimony. It also contains an affirmative response to the question of whether Claimant sustained injuries in the accident, noting his report of a "sore chest, head and neck" (emphasis added). Claimant was cited for careless driving, failure to notify authorities of an accident and leaving the scene of an accident.

10. Following the accident, Claimant testified that he was placed on a "mandatory" five day leave of absence. He was subsequently notified of Employer's request for a "Fitness for Duty" evaluation to determine his ability to safely operate a motor vehicle. Claimant used five days of paid time off (PTO) to assure no decrease in his pay during the mandatory five day leave of absence (LOA). Following his LOA, Claimant returned to work conducting claims reviews only as he had not been cleared to perform inspections pending completion of his "Fitness for Duty" examination.

11. Before his "Fitness for Duty" examination, Claimant saw his personal doctor, Keith Bodrero, DO on August 29, 2014. During this appointment, Claimant complained of having a "sore neck" after hitting another driver from "behind."

12. Claimant returned to full duty work after his Fitness for Duty examination.

Although he was working full duty, Claimant continued to treat for the effects of his MVA with Dr. Bodrero who documented, as a primary complaint, Claimant's continued report of chest pain on September 19, 2014. No complaints of neck/arm pain are documented in Dr. Bodrero's treatment note from this date.

13. Claimant testified that he was "living" with right arm and lower neck pain following his MVA. The ALJ infers from Claimant's testimony, the accident report materials and the August 29, 2014 report of Dr. Bodrero that Claimant had persistent neck and arm pain which was more tolerable than his chest pain for which he sought treatment.

14. On November 18, 2014, Claimant was no longer able to tolerate his neck and arm pain. On this date, Claimant returned to Dr. Bodrero who documented that Claimant's "ribs" (chest) were "fine" but that he now had complaints of right neck, shoulder and arm pain. Physical examination (PE) revealed positive ("+") cervical spasms right greater than left. Claimant was provided with osteopathic manipulation treatment, which Dr. Bodrero documented was well tolerated and which improved Claimant's symptoms.

15. Claimant returned to Dr. Bodrero on February 2, 2015 with continued complaints of neck, shoulder and arm pain which was waking him at night and impairing his ability to sleep. Dr. Bodrero documented "severe" spasms and tenderness of the right neck with pain radiating in an area consistent with the "4 and 5 nerve roots." Dr. Bodrero provided additional osteopathic manipulation, which failed to yield perceived benefit. Consequently, Dr. Bodrero prescribed pain medication and recommended an MRI.

16. An MRI of the cervical spine was performed March 10, 2015 which revealed a "right paracentral disc herniation at C6-C7 which could affect the exiting right C7 nerve root." Although there was no definite cord deformity seen at this spinal level, the central canal was narrowed according to the radiologist's read of the MRI images. Additionally the MRI demonstrated spondylosis with mild central canal stenosis at the C5-C6 spinal levels along with left sided foraminal narrowing at C3-C4.

17. Claimant returned to Dr. Bodrero on March 16, 2015 with complaints of constant neck pain. Claimant's pain was noted to be worse with "sitting and laying down." Dr. Bodrero documented that Claimant had a C6-7 disc to the right which was the "probable cause of [his] pain." Dr. Bodrero referred Claimant to Dr. Joseph Illig for neurosurgical evaluation.

18. On March 25, 2015 Employer faxed to Dr. Bodrero's office a request for medical information which included a disability form to be completed and returned to Employer as Claimant was "requesting income replacement" from Employer under Claimant's short term disability coverage. The request contained a "Memo" outlining the essential duties of Claimant's work as: "Climbing roofs, estimating, contacting insured

and EE, walking, standing, sitting, driving, carrying ladders, inspecting houses, occ (occasional) lifting up to 40 pounds.

19. On April 1, 2015 Claimant met with Dr. Bodrero to discuss the requested disability paperwork. During this appointment, Claimant reported that he could not work because he was not sleeping at night and that his hands were going numb while sitting which was preventing him from doing desk work. Claimant testified that he had increased burning pain in his right arm around this time and that he was unable to make appropriate work decisions. He did not feel he could work. Thus, he made the decision to apply for short term disability (STD).

20. Claimant was unaware of whether he paid for STD coverage. He testified to his understanding that STD coverage was an employee benefit. Review of the STD policy reveals that Claimant did not contribute toward the cost of STD coverage.

21. Claimant was also evaluated by Dr. Illig on April 1, 2015. Dr. Illig reiterated the history of injury and completed a physical examination which revealed "absent reflexes in the brachioradialis and triceps" along with impaired upper extremity sensation. Motor testing also revealed weakness of the right triceps with "atrophy of the lateral head of the triceps on the right compared to the left." Dr. Illig reached the following impression:

> Patient has a compressive right C7 radiculopathy which
> According to the patient has worsened over time. He has
> pain and weakness. He has a disc herniation C6, C7 on
> the right compressing the C7 root. Do not feel that
> medications or physical therapy are likely [to] be of benefit.
> Epidural steroid will only aggravate his diabetes and will probably
> not be of lasting benefit therefore recommend surgery.

22. Employer required a second opinion regarding Claimant's STD claim. Consequently, he was evaluated by Dr. David Miller of High Mountain Brain and Spinal Surgery Center in Glenwood Springs on May 12, 2015. During this encounter Claimant reiterated the history of injury noting that he had had no "issues with his neck until a motor vehicle accident that occurred in 08/2014." Claimant repeated this claim during his testimony at hearing. Careful review of the medical records, including a medical record completed approximately three weeks (July 28, 2014) before the August 19, 2014 collision forming the basis for this claim supports Claimant's testimony that he had no issues or treatment for his neck prior to his August 19, 2014 MVA.

23. Claimant's STD claim was approved and he was out of work, due to the effects of his claimed injuries, from April 1, 2015 to September 29, 2015.

24. On July 20, 2015, Claimant underwent a posterior cervical formaninotomy and discectomy performed by Dr. Illig. Claimant was bothered by post-operative pain and muscle spasm which was treated with Dilaudid and Valium; however, he did well

post-operatively and by September 28, 2015 during a follow-up appointment with Dr. Illig he was allowed to return to work four hours a day beginning October 1, 2014. A 25 pound lifting restriction was imposed.

25. Based upon the evidence presented, included the medical records documenting Claimant's worsening pain and functional decline coupled with his pre-existing diabetes, making additional injection (steroid) therapy risky and contraindicated, the ALJ finds Dr. Illig's decision to proceed with surgery reasonable and necessary treatment to cure and relieve Claimant of the effects of his neck injury.

26. Consistent with Dr. Illig's September 28, 2015 report, Claimant testified that he recovered well, had no pain in his arm and returned to work, light duty conducting claims reviews for four hours per day on October 1, 2015.

27. Claimant attended a follow-up appointment with Dr. Illig on October 16, 2015, during which time Dr. Illig noted that he (Claimant) was "ready to return to work full time." The importance of "proper neck mechanics" and avoidance of heavy overhead lifting was stressed and a follow-up appointment was scheduled for four weeks.

28. Consistent with Dr. Illig's October 16, 2015 report, Claimant testified that he returned to full duty work, at full wages on October 16, 2015. On November 16, 2015 Dr. Illig liberalized Claimant's lifting restriction to 40 pounds and set a follow-up appointment for four week at which time he anticipated releasing Claimant from care without restrictions.

29. Dr. John Burris performed an independent medical examination (IME) at the request of Employer and testified at hearing. Dr. Burris testified that the most common cause of disc herniation is degeneration and that an MRI does not provide evidence of chronicity. Simply put, Dr. Burris testified that an MRI won't tell the reader whether disc herniation is acute or chronic. The ALJ infers from the evidence presented, including Dr. Burris' testimony, that there are findings consistent with the presence of pre-existing degenerative change on Claimant's MRI. Dr. Burris opined that Claimant's cervical disc herniation was a consequence of progressive degeneration; not his MVA. However, on cross examination, Dr. Burris admitted that he had limited information regarding the details of the injury and no records to support that Claimant had any prior complaints of pain or treatment directed to Claimant's neck. Furthermore, Dr. Burris admitted that in some patients, symptoms of disc herniation can manifest up to a week after injury and that if Claimant's disc herniation was present before August 19, 2014 he would have expected to see symptoms. Finally, Dr. Burris conceded that it was possible that Claimant's pre-existing degenerative disc disease was aggravated by Claimant's MVA.

30. While Claimant's recall concerning his accident is limited, there is, as noted above, an accident report completed by a Trooper from the Colorado State Patrol which contains statements documenting specific details concerning the accident. Despite Dr. Burris' indication otherwise, there is a victim statement from Mr. Pearson containing

information regarding the collision, including the speeds involved, the extent of damage to the vehicles concerned and the injuries claimed by both parties.[1]

31. Based upon the evidence presented, the ALJ finds that at the time of the accident and for several hours afterward, Claimant's mental state was considerably compromised secondary to his hypoglycemic event and subsequent syncope. Consequently, the ALJ finds Claimant's suggestion that he merely "bumped" into another car an unreliable understanding and a gross misstatement of what actually occurred. Based upon the accident materials submitted, the ALJ finds that the impact with the rear of the Mr. Pearson's car was sufficient to leave both cars with major damage and both parties complaining of neck pain and in the case of Claimant with chest pain for approximately three months, despite the fact that Mr. Pearson was traveling away from Claimant at a rate of 30 MPH when he was hit. The ALJ finds this evidence suggestive that the impact between Claimant's vehicle and the car driven by Dr. Pearson was considerable, not merely a "bump"

32. Based upon the totality of the evidence presented, the ALJ finds that the collision with the back of Mr. Pearson's car, more probably than not, caused a contusion to Claimant's chest wall[2] and aggravated Claimant's pre-existing, albeit asymptomatic, degenerative disc disease in his neck leading to cervical disc herniation which manifest itself originally as neck pain per his accident report statement and his verbal report to Dr. Bodrero on August 29, 2014. Only after Claimant's chest (rib) pain subsided did he focus on his neck and his radicular arm pain. Dr. Burris' opinion that Claimant's disc herniation is solely related to degenerative change rather than the August 19, 2014 MVA is unpersuasive.

33. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his cervical spine in the form of a disc herniation at C6-C7 on August 19, 2014 after colliding with another vehicle while on this return trip to Colorado Springs after conducting property inspections in Pueblo.

34. Claimant has proven by a preponderance of the evidence that Respondents failed to properly designate a provider in the first instance to attend to Claimant's compensable neck injury.

35. Claimant presented evidence which establishes an average weekly wage of $1,429.86. Documentation entered into evidence regarding this issue consists of the wage records demonstrating Claimant's gross wages from August 30, 2013 through August 29, 2014. The injury in this case occurred on August 19, 2014. Wage records submitted into evidence for the first two weeks of August 2014 establish that Claimant

[1] Mr. Pearson's statement notes that he was hit from behind while traveling 30 MPH and that Claimant's car had visible front end damage and was leaking fluids. Moreover, Mr. Pearson reported that he had also sustained neck pain as a consequence of the collision. Finally, the Trooper completed accident report details the extent of damage to the vehicles as major.

[2] Likely from the use of his seatbelt as referenced by Dr. Bodrero and which the ALJ finds constitutes evidence of trauma despite Dr. Burris' suggestion otherwise.

was paid $2,678.97 leading up to the date of injury. When one performs the necessary calculation ($2,678.97 / 2 (weeks) = $1,339.48), Claimant's average weekly wage, at the time of injury was $1,339.48. However, the records also establish that Claimant was paid an Annual Incentive Plan Bonus on March 14, 2014. The Bonus was paid in two installments totaling $4,700.00. Calculating the weekly value of Claimant's bonus into his AWW calculation of his AWW increases his AWW to $1,429.86.

36. Claimant has proven by a preponderance of the evidence that he was placed on a mandatory LOA beginning August 20, 2014 and continuing thereafter for a period of an additional four days. Claimant was also incapable of working due to the effects of his compensable neck injury from April 1, 2015 through September 29, 2015. Consequently, the ALJ finds Claimant entitled to temporary total disability benefits for this time period.

37. Claimant has proven that he was returned to work in a modified duty capacity, four hours per day, as a consequence of his compensable neck injury, beginning October 1, 2015 and continuing through October 15, 2015.

38. Respondents are entitled to offset any TTD benefits paid to Claimant as a consequence of his receipt of STD benefits.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado ("Act") is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. *§ 8-43-201, C.R.S.* A Workers' Compensation case is decided on its merits*. § 8-43-201, C.R.S.*

B. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ need not address every piece of evidence that might lead to a conflicting conclusion and need not reject every piece or item of evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). The ALJ has carefully considered the testimony of Claimant. Outside of his previously reported indication that he “bumped” another car, which the ALJ finds unreliable given Claimant’s mental status at the time of the report, the ALJ finds Claimant to be a credible and consistent historian/witness.

Compensability

D. As found above, Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his cervical spine after colliding with another car while driving to Colorado Springs after completing his property inspections in Pueblo. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an “injury” arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff’d Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(l)(b), C.R.S.*

E. The phrases "arising out of” and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). In this case, there is a question of whether Claimant’s injuries arose out of and occurred in the course of employment, since he was driving back to Colorado Springs after having completed his last inspection of the day and he arguably had pre-existing degenerative disc disease in his cervical spine.

F. Ordinarily, an employee injured while traveling to or from work is not entitled to workers' compensation benefits because, absent “special circumstances”, that employee is not within the course or scope of employment during such travel. *Berry's Coffee Shop, Inc. v. Palomba,* 161 Colo. 369, 423 P.2d 2 (1967); *Mountain West Fabricators v. Madden,* 958 P.2d 482 (Colo. App. 1997), *affd,* 977 P.2d 861. However, the travel status exception applies when the employer requires the claimant to travel. *Tatum-Reese Development Corp. v. Industrial Commission,* (30 Colo. App.) 149, 490 P.2d 94 (1971). The essence of the travel status exception is that when the employer requires the claimant to travel beyond a fixed location established for the performance of his duties, the risks of such travel become risks of the employment. *Staff Adm'rs, Inc. v. Industrial Claim Appeals Office* 958 P.2d 509 (Colo. App. 1997), *citing Martin K. Eby Construction Co. v. Industrial Commission,* 151 Colo. 320, 377 P.2d 745 (1963). Here, Claimant's travel occurred during working hours[3]; was at the implied or express direction of Employer and Claimant was performing a service, i.e. a damage inspection requested by Employer. Moreover, traveling between the Employer's job assignments was required to complete the inspections. Consequently, as a likely inducement to accept such employment, Employer provided a vehicle and paid for the cost of fuel associated with Claimant's travel. Injuries sustained as a consequence of travel under these circumstances has been determined to be compensable. See *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); see also, *Whale Communications v. Claimants in Death of Osborn*, 759 P.2d 848 (Colo. App. 1988); *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). Based upon the evidence presented in this case, the undersigned concludes that "special circumstances" exist which brings Claimant's accident within the course of employment.

G. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a pre-existing infirmity or disease "to produce the disability for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment – related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). As noted above, the ALJ is convinced that Claimants cervical pain was a consequence of his forceful impact with the rear end of Mr. Pearson's car. As found, the ALJ is persuaded that Claimant's cervical pain arose as a direct consequence of the aggravation of his underlying pre-existing cervical degenerative disc disease occasioned by the August 19, 2014 MVA. Simply put, the aggravation of Claimant's pre-existing condition prompted by his MVA caused the need for treatment, including his posterior cervical formaninotomy and discectomy performed by Dr. Illig rather than the natural progression of Claimant's pre-existing conditions. For these reasons, the ALJ concludes that Claimant has established the requisite causal connection between his work related MVA and his cervical spine injury and subsequent need for treatment. Accordingly, the injury is compensable.

Medical Benefits

H. Respondents are liable for medical treatment reasonably necessary to

[3] Based upon the testimony of Claimant that he normally downloads pictures taken of the damages observed during his inspection after he arrives back at his office and that he intended to begin the preparation of his written damage estimates from inspections completed on August 19, 2014, the ALJ finds that Claimant's work day was not complete when the accident occurred.

cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Nonetheless, Respondents are only liable for authorized or emergency medical treatment. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973). In *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990), the court held that in cases of medical emergency the claimant need not seek authorization from the employer or insurer before obtaining medical treatment from an unauthorized provider. The question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case. *Timko v. Cub Foods* W. C. No. 3- 969-031 (June 29, 2005). The emergency exception is not necessarily limited to situations where life is threatened. *Bunch v. Industrial Claim Appeals Office* 148 P.3d 381 (Colo. App. 2006). Although the ALJ concludes from the evidence presented that Claimant's life likely was not in jeopardy, his treatment in the emergency room constituted a bona fide emergency for which treatment could be obtained without prior authorization nonetheless. Here Claimant had little recall of the events surrounding his accident, although it was apparent he had been in one, his mental capacity remained impaired and he was experiencing chest pain arm pain. In light of this these factors, it was prudent for Claimant to seek care in the emergency room without waiting for authorization from Respondents.

I. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Under §8-43-404(5)(a)(I)(A), C.R.S. 2014 the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition. The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. Section 8-43-404(7), C.R.S. 2005; Yeck v. Industrial Claim Appeals Office, 996 P.2d 228 (Colo. App. 1999); Pickett v. Colorado State Hospital, 32 Colo. App. 282, 513 P.2d 228 (1973).

J. In order to assert the statutory right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 545 (Colo. App. 1987). The employer's failure to designate the authorized treating physician results in the right of selection passing to the claimant. *Id*. The employer's duty is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. See *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984). Based upon the evidence presented, the ALJ concludes that Respondents failed to designate a provider to attend to Claimant's compensable neck injury. Consequently, the right of selection passed to Claimant. Here, the unrefuted evidence establishes that Claimant contacted his supervisor upon his return from the ER informing him of the circumstances surrounding his accident, the damage to his car and his treatment in the ER. The ALJ finds and concludes that this constitutes sufficient notice to place a "reasonably conscientious supervisor that the case may involve a claim for compensation. Nonetheless, while Claimant was placed on five days leave, his manager never designated a provider. Accordingly, the right of selection passed to Claimant had he effectively chose to treat with Dr. Bodrero. The ALJ concludes that Dr. Bodrero is the authorized treating provider (ATP) in this case.

K. Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). Here, the evidence presented convinces the ALJ that Dr. Bodrero made a referral to Dr. Illig in the normal progression of Claimant's treatment once the MRI results revealed internal disc disruption for which additional treatment opinions were reasonable and necessary. Consequently, the ALJ finds and concludes that Dr. Illig is also an authorized treating physician.

L. Claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). As found, the ALJ is persuaded that Claimant's cervical pain and subsequent need for treatment, including his posterior cervical formaninotomy and discectomy arose as a direct consequence of the aggravation of his underlying pre-existing cervical degenerative disc disease occasioned by the August 19, 2014 MVA. Moreover, the treatment Claimant received at the hand of Dr. Bodrero and Dr. Illig was reasonable and necessary to cure and relieve him of the effects of his compensable neck injury.

AWW

M. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), give the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. An AWW calculation is designed to compensate for total temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The best evidence of Claimant’s actual wage loss and therefore a fair approximation of his diminished earning capacity comes from the testimony and the wage records submitted into evidence. In this case, the ALJ concludes that Respondents methodology in calculating Claimant’s AWW results in a fundamentally unfair figure that does not represent Claimant’s true wage loss and diminished earning capacity. Instead, the ALJ notes that Claimant was a salaried employee at the time of his MVA. According to the wage records submitted, Claimant earned $2,678.97 for the first two weeks of August 2014 (through August 15, 2014), four days prior to his August 19, 2014 MVA. Dividing this figure in half to account for one week of earnings yields a figure of $1,339.48. Based upon the evidence presented, the ALJ finds this was Claimant’s AWW at the time of his MVA. However, the records also reflect that Claimant was paid an Annual Incentive Plan Bonus on March 14, 2014. The Bonus was paid in two installments totaling $4,700.00. As this was money Claimant earned by meeting incentive plan goals which was paid in 2014, the ALJ concludes that it would be fundamentally unfair to exclude or prorate it from/in a calculation of Claimant’s overall AWW. Accordingly, the ALJ calculates Claimant’s $4,700 bonus to equal 90.38 per week ($4700.00 / 52= 90.38) which the ALJ adds to Claimant’s “regular salary” to calculate an AWW of $1,429.86. The ALJ finds and concludes that this figure most closely approximates Claimant’s wage loss and diminished earning capacity at the time of his August 19, 2014 compensable work related injury.

TTD/TPD

N. To receive temporary disability benefits, the Claimant must prove the injury caused a disability, he leaves work as a consequence of the injury, and the disability is total and lasts more than three regular working days. *C.R.S. § 8-42-103(1); PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Here, Claimant was placed on mandatory leave as a consequence of his compensable injury from August 20, 2014 through August 25, 2014. Moreover, Claimant was unable to work as a direct consequence of his compensable work related injury from April 1, 2014 through September 29, 2014. Consequently, Claimant is “disabled” within the meaning of section 8-42-105, C.R.S. and is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Respondents shall pay TTD in accordance with C.R.S. § 8-42-103(1)(b), for the period beginning August 20, 2014 and for an additional four days thereafter and for the period extending from April 1, 2014 through September 29, 2014 at a rate of sixty-six and two-thirds percent of her AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. C.R.S. § 8-42-105(1). Because Claimant’s period of disability lasted longer than two weeks from the date he left work as a consequence of his injury, TTD is recoverable from the date Claimant left work, i.e. August 20, 2014. See C.R.S. § 8-42-103(1)(b).

Claimant returned to work on October 1, 2015 and worked through October 15, 2015 in a modified capacity. Claimant worked and was paid for 4 hours per day per Dr. Illig's restriction rather than the 8 hours/day he worked prior to his compensable injury. Consequently, Claimant experienced a wage loss secondary to the effects of his industrial injury and thus is entitled to temporary partial disability (TPD) for the time periods extending from October 1, 2015 through October 15, 2015.

Offsets

Short Term Disability Benefits

O. Pursuant to C.R.S. § 8-42-103(1)(d)(I) the aggregate benefits payable to a Claimant for TTD shall be reduced, but not below zero, "by an amount equal as nearly as practical" to the amount of any benefits paid to a Claimant under any disability plan financed in whole or in part by the employer, subject to the following limitations:

> (A) Where the employee has contributed to the . . . disability plan, benefits shall be reduced . . . *in an amount proportional to the employer's percentage of total contributions to the employer . . . disability plan.*
>
> (B) Where the employer . . . disability plan provides by its terms that benefits are precluded there under in whole or in part if benefits are awarded under articles 40 to 47 of this title, the reduction provided in paragraph (d) shall not be applicable to the extent of the amount so precluded.

The "offsets" provided for under C.R.S. § 8-42-103(1)(d)(I) are statutory in nature. Consequently, Respondent's are entitled to apply the provisions of C.R.S. § 8-42-103(1)(d)(I) and offset the TTD benefit to be paid to Claimant if the circumstances raised by C.R.S. § 8-42-103(1)(d)(I) otherwise apply to the case. Here Claimant is entitled to TTD benefits and received periodic disability benefits under an employer sponsored disability plan which the evidence establishes he did not contribute to. In this case, the evidence presented at hearing focused on the amount of Claimant's contribution to the disability plan and the reduction in benefits provided for under the plan in the event that Claimant is found to be eligible for temporary worker's compensation" benefits rather than the amount of STD benefit paid although it is clear from the documentary evidence submitted that Claimant did not contribute to the disability plan. Consequently, the ALJ concludes that insufficient evidence was presented to determine the amount of any "offset" which respondents may assert entitlement to. Thus, the order of this ALJ is limited to an indication that the statutory provisions of C.R.S. § 8-42-103(1)(d)(I) apply to this case.

ORDER

It is therefore ordered that:

1. Claimant’s August 19, 2014 neck injury is deemed compensable.

2. Respondents shall pay for all medical expenses associated with Claimant’s treatment and care received through the ER at Penrose-St. Francis Hospital.

3. Dr. Bodrero is Claimant’s ATP in this case. Respondent shall pay for all reasonable, necessary and related treatment resulting from Claimants August 19, 2014 injury as provided by Dr. Bodrero and any of his referrals, including Dr. Illig.

4. Respondent shall pay for all reasonable, necessary and related medical treatment, provided by Dr. Illig including, but not limited to, the posterior cervical formaninotomy and discectomy performed on July 20, 2015 and the necessary post surgical care.

5. Claimant’s AWW is $1,449.86.

6. Respondents shall pay temporary total disability benefits (TTD) in accordance with C.R.S. § 8-42-103(1)(b), beginning August 20, 2014 for a period of five days and from April 1, 2015 through September 29, 2015 at a rate of sixty-six and two-thirds percent of Claimant’s average weekly wage (AWW), but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. C.R.S. § 8-42-105(1). Respondents are entitled to offset Claimant’s TTD for STD received by Claimant during this time period.

7. Respondents shall pay temporary partial disability benefits (TPD) in accordance with C.R.S. § 8-42-106 at a rate of sixty-six and two-thirds percent of the difference between Claimant’s AWW at the time of the injury and Claimant’s AWW during the continuance of the temporary partial disability, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for the time periods October 1, 2015 through October 15, 2015.

8. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

9. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail,

as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 8, 2016

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained a frostbite injury proximately caused by the performance of service arising out of and in the course of his employment?

- What is Claimant's average weekly wage?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits for the periods April 4, 2015 through April 8, 2015 and April 10, 2015 through June 9, 2015?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary partial disability benefits?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable, necessary and authorized medical benefits as a result of the alleged injury?

- Is Claimant subject to penalties for failure timely to report the injury in writing?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 through 14 were received into evidence. Respondents' Exhibits A though D were received into evidence.

2. Claimant was employed as an order selector at the Employer's food storage facility. This job required Claimant to select cases of food and place them on a cart pulled by a "tugger." When the order was completely selected Claimant drove the tugger to a loading dock where he would detach and leave the cart. Claimant worked a night shift. This shift commenced at approximately 5:00 p.m. and ended 8 to 10 hours later on the following morning. Claimant's shift typically included 2 fifteen-minute breaks and 1 thirty- minute lunch period.

3. Claimant was sometimes required to select cases of food stored in a large freezer. The temperature in the freezer was typically at or below zero degrees. When working in the freezer Claimant was required to wear protective clothing including a freezer jacket and gloves supplied by the Employer.

4. Claimant testified as follows concerning his work shift commencing on the afternoon of March 25, 2015 and ending on the morning of March 26, 2015 (hereinafter the March 25 - 26 shift). Claimant was required to work in the freezer for the entire March 25 - 26 shift. Prior to the March 25 - 26 shift Claimant had not been assigned to work in the freezer for an entire shift, although he had worked in the freezer for 20 to 30 minutes at a time. While working in the freezer Claimant wore 2 pairs of gloves supplied by the Employer. During the March 25 - 26 shift Claimant was also required to wear a "scanner" device. Claimant wore part of the scanner, which he described as similar to a "printer," on his right "hand" where it was secured with a "tightening" mechanism. Claimant wore another part of the scanner on his right index finger. Claimant explained that because his fingers are "small" he wrapped tape around the outside of the gloves covering the right index finger in order to keep the scanner part in place. Claimant wore the tape around his right index finger for the entire March 25 - 26 shift.

5. Claimant did not testify to a specific amount of time that he spent inside the freezer during the March 25 - 26 shift. Rather he testified that the amount of time spent in the freezer depended on how many cases he was selecting. Claimant also testified that when he left the freezer to deliver the order he would "quickly" return to the freezer.

6. Employer "shift summary information" persuasively demonstrates that Claimant clocked in to work at 5:20 p.m. on March 25, 2015 and clocked out at 2:47 a.m. on March 26, 2015. This information also shows that Claimant selected a total of 1520 cases during the March 25 - 26 shift for an average of 179.91 cases per hour worked. The "shift summary information" record shows that on March 25-26 Claimant's "clock code" was "pick frozen" and that his "job name" was "picker/freezer."

7. Claimant testified that when he went home after the March 25 - 26 shift he realized there was something wrong with his right index finger. However, the finger was not "hurting" at that time.

8. Claimant testified that during the time period from the end of March 2015 through April 2015 he did not do anything "at home" to expose his finger to cold temperatures.

9. Claimant continued working his regular duties after the March 25 - 26 shift. He did not seek any medical treatment for his right index finger until April 1, 2015.

10. Claimant testified that prior to commencing his shift on April 1, 2015 he noticed fluid coming out of his right index finger. Consequently, he decided to seek treatment at Medcor. Claimant explained that Medcor has a facility located on the Employer's premises where employees may seek treatment for work-related and non-work-related medical problems. Claimant testified he did not know what was wrong with his finger when decided to seek treatment at Medcor.

11. On April 1, 2015 Claimant was seen at Medcor by a registered nurse. The encounter lasted 5 minutes. Claimant complained of "left [sic] index finger swelling and drainage." Claimant was unable to identify a "work related event that resulted in injury." The Medcor nurse observed "significant swelling to left [sic] index finger" and "weeping clear fluid from a couple of small breaks in skin." The nurse's impression was "left [sic] finger infection." The nurse advised Claimant that if felt his condition was "work related he should report the injury to his supervisor and return to the clinic for likely referral for abx treatment." Conversely if Claimant did not feel the condition was work related he was advised that he "should follow-up with his PCP urgently for evaluation and treatment."

12. The parties stipulated that the there was an error in transcription of the April 1, 2015 Medcor note and Claimant reported *right* index finger problems rather than left index finger problems.

13. Claimant testified that on April 3, 2015 he realized his hand was hurting. Consequently he decided to report to the emergency room (ER) at Medical Center of Aurora (MCA). Claimant further testified that he left a message with the Employer stating he would not be able to work the shift of April 3 - 4, 2015. Claimant stated that in this message he told the Employer that he realized he hurt his hand while working in the freezer and was going to see the doctor.

14. On April 3, 2015 PA Catherine Kushner examined and treated Claimant at the MCA ER. Claimant gave a history of right finger pain with onset 4 days previously. Claimant advised that he entered the refrigerator at the warehouse where he worked but denied "injuring his finger in any way." Claimant stated that after he went home from work he experienced some finger pain and noted swelling the following morning. The pain from his finger was reportedly shooting up the arm. On physical examination (PE) of the right hand PA Kushner noted distal right forefinger swelling, pain with palpation, limited range of motion and a "superficial abrasion" to the dorsal aspect with serosanginous fluid. PA Kushner's "primary impression" was "felon" with secondary impressions of cellulitis and abscess of the digit, finger infection and left [sic] forefinger pain. PA Kushner performed an "I & D" procedure and prescribed clindamycin, percocet, zofran, naprosyn and tetanus bacitracin to the finger. PA Kushner's note was attested to by Jonathan Savage, D.O.

15. On April 3, 2015 PA Kushner issued a work release excusing Claimant from work from April 3 through April 6, 2015.

16. Claimant testified as follows. He did not work between April 4, 2015 and June 10, 2015, except for one day on April 9, 2015. On June 10, 2015 the Employer offered him light duty work and he accepted the offer. He worked light duty from June 10, 2015 until July 1, 2015 when he was released to return to work at full duty.

17. On April 5, 2015 Keith Tucker, Claimant's supervisor, sent an email to various Employer personnel (including Edward Rhodes) stating that Claimant had come to work with a doctor's note indicating that Claimant needed to be off work until April 6,

2015. Tucker noted that Claimant had "called in" and mentioned he hurt his finger in the freezer and that was the reason he did not work on Friday (presumably the April 3 – 4, 2015 shift.). Tucker stated that Claimant wanted to return to work but Tucker told Claimant that he could not work until he received a "full release from the doctor."

18. Edward Rhodes (Rhodes) testified on behalf of the Respondents. Rhodes is the Employer's safety supervisor with responsibility for workers' compensation issues. At the time of Claimant's alleged injury he was the night warehouse supervisor in charge of all order selectors. Rhodes first learned that Claimant was alleging there was something wrong with his finger when he received an email from Medcor on April 1, 2015.

19. Rhodes testified that he has performed the job of order selector in the freezer. Rhodes testified that when a selector leaves the freezer the amount of time the selector is outside the freezer varies but is about 2 to 3 minutes. Rhodes stated that the Employer's records do not establish the amount of time Claimant spent inside and outside of the freezer on the March 25 - 26 shift.

20. Rhodes testified that on April 6, 2015 Claimant came into work to talk. This conversation occurred in English. Rhodes opined the Claimant was "confused" as to whether his finger problem was work-related or not. Rhodes understood Claimant had a "felon" injury that Rhodes believed to be some type of infection. Claimant suggested filing a workers' compensation claim for this condition and Rhodes advised Claimant that such a claim would probably be "investigated" because of the type of injury and Claimant's "late reporting." However, Rhodes told Claimant that he was free to file a workers' compensation claim.

21. On April 8, 2015 Claimant returned to MCA where he was examined and treated by PA Jessica Chonlahan and George Sassu, D.O. The Claimant's "stated complaint" was "wound check" and the MCA patient record describes the chief complaint as "non-urgent general care." The history indicates Claimant presented for a "right index finger injury about + 2 weeks ago from refidgator [sic] injury at work." The right distal second digit was described as necrotic with bloody discharge from tissue and was discolored to the middle phalanx. The differential diagnoses included burn, cellulitis, hematoma and laceration. The "primary impression" was "frostbite." Claimant was referred to Jonathan Sollender, M.D. for a "debridement."

22. On April 8, 2015 Claimant reported to the Employer that he sustained an injury to his finger while working in the freezer "last week." On April 8, 2015 Tucker completed and signed a First Report of Injury (First Report). The First Report states that Claimant reported a "frostbite" injury to his right "pointer finger" that occurred on March 25, 2015. Claimant stated that on March 25, 2015 "he was selecting in the freezer for one full day" but "did not notice anything was wrong with his finger until the following week when he reported it."

23. On April 8, 2015 Employer provided Claimant with a “Choice of Provider Acknowledgement.” Claimant selected Concentra as the medical provider for the reported injury.

24. On April 8, 2015 PA-C Glenn Petersen examined Claimant at Concentra. The office note indicates that the “date of injury” and the “date of service” were both April 8, 2015. However, the history of present illness states that Claimant “worked for first time in cooler with gloves on for 8 hours on April 1st and numbness tip of RIF.” On PE PA Petersen noted the right index finger exhibited “hard early necrotic tissue and poor capillary refill.” There was a “[H]ard eschar distal phalanx with transitional area middle phalanx.” PA Petersen observed Claimant was “talking fast” and was “difficult to understand at times since he [was] taking Oxycodone.” PA Petersen assessed “Frostbite with tissue necrosis of finger (991.1).” PA Petersen referred Claimant to a “hand specialist” and imposed restrictions of no work in the cooler, no lifting with the right hand and no work when taking narcotics.

25. Claimant denied that he told Concentra he worked in the freezer for the first time on April 1, 2015. Claimant testified that he told Concentra that he worked in the freezer on March 25 and March 26.

26. On April 10, 2015 PA Petersen again examined Claimant. PA Petersen noted “doubt about injury and when it happened.” PA Petersen “advised” Claimant to go to MCA because it was “unclear” if the claim would be “accepted or denied due to variable story of when injured and when work notified.”

27. Claimant returned to MCA late in the evening of April 10, 2015. Claimant was given Norco and advised to see Dr. Sollender.

28. On April 13, 2015 Dr. Sollender examined Claimant. Claimant gave a history that on March 26, 2015 he worked in a freezer for about 7 hours while wearing gloves. Claimant reported he had “no specific issues” with his fingers or hand on that day. However, one week later around April 1, 2015 Claimant noticed some “water coming out from his right index finger.” Dr. Sollender noted he could not get Claimant to explain whether he had a blister prior to April 1 because there was “some degree of language barrier.” Dr. Sollender noted Claimant was seen by a “company physician” on April 1, 2015. Dr. Sollender also reviewed the MCA ER reports of April 3 and April 8, 2015. On PE Dr. Sollender observed that Claimant had a “necrotic right index fingertip” with “hypopigmented pink skin from the base of the nail proximal to the distal aspect of the middle phalanx.” There was an area of “black” 1.5 cm in circumference that included part of the distal nail plate and nail bed.

29. In the April 13, 2015 office note Dr. Sollender wrote that Claimant’s history and examination were “all consistent with a frostbite injury sustained from prolonged cold exposure at work.” Dr. Sollender explained that there was “no other obvious cause” for Claimant’s condition. Dr. Sollender further opined that Claimant never had an infected finger despite the ER diagnosis of a felon of the index finger. Dr. Sollender stated that he would oversee Claimant’s work restrictions because Concentra’s

restrictions were “inadequate.” Dr. Sollender restricted Claimant to no use of the right hand, no work in a freezer and no exposure to any temperature below 60 degrees.

30. On April 15, 2015 Concentra physician Kirk Holmboe, M.D., completed a Physician’s Report of Workers’ Compensation Injury (WC 164). Dr. Holmboe marked a box indicating that the “objective findings” were consistent with “history and/or work related mechanism of injury.” Dr. Holmboe stated Claimant needed referral for treatment and evaluation of “Frostbite necrosis.” Dr. Holmboe imposed restrictions of no work when taking narcotics, no work in the cooler, no lifting with the right hand and no use of the right upper extremity.

31. Dr. Sollender again examined Claimant on April 20, 2015. At this examination Claimant reported the injury occurred on April 8, 2015 rather than March 25 - 26, 2015. Dr. Sollender observed that April 8 was the date the claim was filed and made “no sense” as the date of injury because Claimant had noticed drainage from the finger on April 1, 2015. Dr. Sollender commented that he could “not help [Claimant] with his reporting difficulties.” Dr. Sollender remained “confident” there was a “frost bite injury” but he could not establish the exact date of injury based on “information conveyed” by Claimant. Dr. Sollender also noted that Claimant had given him FMLA paperwork to complete. However, Dr. Sollender noted that he told the Employer that he could not “in good conscience fill out FMLA paperwork for an occupational injury.” Dr. Sollender continued restrictions of no use of the right hand, no work in a freezer and no exposure to any temperature below 60 degrees.

32. Claimant admitted that he told Dr. Sollender that the date of injury was April 8, 2015. Claimant explained the April 8 was the day he went to Concentra and he “wanted everything to be in order.”

33. On April 21, 2015 Claimant was again seen at MCA. Claimant reported he had run out of medication and needed “pain control.” Claimant advised MCA that his “workman’s comp” had “not come through” and his surgeon “would not see him without it.” Claimant also reported that the “workman’s comp doctor instructed him to go to the ER for pain medication refill.” Claimant was advised to see Dr. Sollender and that “further pain medications should be” prescribed by the “hand surgeon.”

34. On May 8, 2015 PA-C Catherine Peterson examined Claimant at Concentra. PA Peterson referred Claimant to hand specialist Craig Davis, M.D., for a “second opinion” concerning evaluation and treatment of Claimant’s frostbite injury. PA Peterson prescribed acetaminophen and Tramadol. She restricted Claimant to no work in the freezer, no work at temperatures below 60 degrees and no use of the right upper extremity.

35. Dr. Davis examined Claimant on June 2, 2015. Dr. Davis’s report lists the date of injury as April 8, 2015. However, Dr. Davis notes that Claimant gave a history that on March 26, 2015 he was “working in a freezer which was not a part of his usual job” and “subsequently noticed some discoloration of his right index fingertip.” Dr. Davis assessed “right index finger frostbite.” Dr. Davis was concerned that the “wound may

communicate with the bone" resulting in a possible infection and consequent amputation of the fingertip. However, Dr. Davis thought it appropriate to continue treating the finger with daily soaks, antibiotic ointment and therapy for "desensitization and work conditioning."

36. On July 1, 2015 PA-C Lacie Esser examined Claimant at Concentra. Claimant reported that he did not have any concerns about returning to work at his regular job. There was no open wound or pain. PA-C Esser released Claimant to return to work at regular duty without restrictions.

FINDINGS OF FACT CONCERNING COMPENSABILITY

37. Claimant proved it is more probably true than not that on March 25 and March 26, 2015 he sustained a frostbite injury to his right index finger. Claimant proved it is more probably true than not that the frostbite injury was proximately caused by the performance of service arising out of and in the course of his employment as an order selector.

38. The Employer records establish that on the March 25 - March 26, 2015 shift Claimant was "clocked in" for 9 hours 27 minutes. It is probable that during this time Claimant was on break for 30 minutes and took a 30 minute lunch period.

39. Claimant credibly testified that on March 25 – 26, 2015 he was assigned to work in the freezer for his entire shift, and this was the first time he worked in the freezer for more than thirty minutes during any shift. Claimant credibly testified that whenever he left the freezer to deliver a cart to the loading dock he quickly returned to the freezer to select more orders. Claimant's testimony that he was outside of the freezer for only a short periods of time is corroborated by Rhodes. Rhodes credibly testified that the typical amount of time a selector was outside the freezer was 2 to 3 minutes. Claimant's testimony is also supported by evidence that he selected 1520 cases of food during the March 25 – 26, 2015 shift.

40. Claimant's testimony that he spent substantial amounts of time in the freezer is also consistent with the history he gave to the Employer and to several medical providers. The First report indicates that Claimant told the Employer that on March 25, 2015 he spent "one full shift" in the freezer. On April 8, 2015 Claimant told PA-C Petersen that he worked in the freezer for "8 hours." On April 13, 2015 Claimant told Dr. Sollender that he worked in the freezer for about 7 hours.

41. Although the exact amount of time Claimant spent in the freezer on March 25 – 26, 2015 cannot be established with certainty, the ALJ infers that Claimant spent many hours working in the freezer on March 25 – 26. The credible evidence also establishes that the temperature in the freezer was at or below zero degrees during Claimant's shift.

42. Claimant credibly testified that from the end of March 2015 through the beginning of April 2015 he did not do anything at home to expose his right index finger to cold temperatures.

43. The ALJ finds that Claimant's testimony is not rendered incredible simply because the medical records reflect that he reported several dates of injury to different medical providers. The ALJ is persuaded that during the first week after the March 25 - 26, 2015 shift Claimant was uncertain of what was wrong with his finger and the cause of the problem. It was not until April 8, 2015 that Claimant received a diagnosis of frostbite at the MCA ER. At that time Claimant affirmatively reported to the Employer that he believed his injury occurred when he was required to work in the freezer during the March 25 – 26 shift. When Claimant was seen at Concentra on April 8, 2015 PA-C Petersen recorded that the date of injury was April 8, 2015 even though he took a history that Claimant was exposed to cold on April 1, 2015. Moreover, PA-C Petersen noted that he had trouble communicating with Claimant because Claimant was talking rapidly and was on Oxycodone. Dr. Sollender also noted some difficulty communicating with Claimant. At any rate, Claimant's testimony that he was exposed to substantial periods of very cold temperatures is corroborated by the Employer's records.

44. Dr. Sollender credibly opined that Claimant's exposure to cold temperatures while working in the freezer caused Claimant to develop frostbite of the right index finger. Dr. Sollender was aware of Claimant's history, the fact that MCA initially diagnosed Claimant with an infection and the condition of Claimant's finger on April 13, 2015. On April 13, 2015 Dr. Sollender persuasively opined that all of the information at his disposal was "consistent" with a frostbite injury sustained at work and that there was no other "obvious cause" that would explain the injury. It is true that on April 20, 2015 Claimant told Dr. Sollender that the date of injury was April 8, 2015 rather than March 25 – March 26, as Claimant initially reported. Despite this discrepancy in the Claimant's history Dr. Sollender declined to sign FMLA paperwork for what he continued to believe was a work-related frostbite injury.

45. Claimant credibly testified that on April 20, 2015 he told Dr. Sollender that the date of injury was April 8, 2015 because that was the date of injury being used by Concentra and Claimant wanted everything to be consistent. The credible evidence shows that prior to April 8, 2015 Claimant regularly reported his finger condition was caused by exposure to cold on a day prior to April 8.

46. Dr. Sollender's opinion that Claimant sustained frostbite as a result of exposure to cold at work is corroborated by the "primary impression" noted by PA Chonlahan and Dr. Sassu on April 8, 2015. Dr. Sollender's opinion is also corroborated by the Dr. Holmboe's April 15, 2015 WC 164 and Dr. Davis's June 2, 2015 report.

47. The ALJ is not persuaded by Respondents' assertion that Dr. Sollender's opinion is "illogical" and therefore not credible. Respondents argue that because Claimant was wearing two pairs of gloves on March 25 – 26, 2015 it makes no sense that only his right index finger developed a frostbite injury. However, Dr. Sollender, a qualified physician, did not express any reservation about diagnosing a work-related frostbite injury despite the fact that only the index finger was involved. Respondents did not produce any credible and persuasive medical evidence that explicitly refutes Dr. Sollender's opinion. Neither did Respondents produce any credible and persuasive medical evidence to support the "logic" that if Claimant's frostbite injury was the result of

exposure to cold in the freezer he would have developed frostbite in more than one digit. The weight of the evidence produced, including the medical evidence, does not support Respondents' attack on Dr. Sollender's credibility.

FINDINGS CONCERNING AVERAGE WEEKLY WAGE

48. Employer pay records demonstrate that Claimant earned $59,020.86 for the 52 week period from March 23, 2014 through March 21, 2015. The evidence establishes that Claimant was paid by the hour and worked longer hours on some days than others. Further, Rhodes credibly testified that order selectors receive extra pay if they exceed established productivity levels. In these circumstances the ALJ exercises his discretion and determines that the fairest method of determining Claimant's average weekly wage (AWW) is to divide $59,020.86 (total earnings for one year before date of injury) by the number of weeks in a year (52) to arrive at an AWW of $1,135.02.

49. The ALJ is not persuaded by Respondents' assertion that the $59,020.86 represents 27 bi-weekly pay periods rather than 26 biweekly pay periods. The employer records reflect that during the pay period ending September 6, 2014 Claimant received 2 checks rather than the usual 1 check. This evidence does not establish that the second check resulted from Claimant working an additional pay period. Rather, the persuasive evidence establishes it is more probable that the extra check was the result of Claimant working extra hours or because he was entitled to extra pay for high productivity.

FINDINGS OF FACT CONCERNING TEMPORARY DISABLITY BENEFITS

50. Claimant proved it is more probably true than not that he is entitled to an award of temporary total disability (TTD) benefits for the periods April 4, 2015 through April 8, 2015, and April 10, 2015 through June 9, 2015 (66 days). Claimant concedes he is not entitled to any TTD benefits for April 9, 2015 because he worked that day.

51. Claimant credibly testified that, except for April 9, 2015, he did not work at all from April 4, 2015 through June 9, 2015. The ALJ infers from this testimony that Claimant did not earn any wages for this period of time. The ALJ notes that Claimant's Exhibit 13 pp. 5-6 shows that Employer made some payments to Claimant during this period of time, but Respondents do not contend that these payments were of a type that would offset their liability for TTD benefits, if any.

52. Claimant proved that the frostbite injury disabled him from performing the duties of his regular employment commencing April 4, 2015. On April 3, 2015 PA-C Kushner noted Claimant's symptoms and released him from any work until April 6, 2015. On April 5, 2015 Tucker advised Claimant he could not return to work without a "full release" from the doctor. On April 8, 2015 PA-C Petersen diagnosed a frostbite injury and credibly restricted Claimant from working in the "cooler" and lifting with the right hand. On April 13, 2015, Dr. Sollender diagnosed a frostbite injury and credibly imposed restrictions of no use of the right hand, no work in the freezer and no exposure to temperatures less than 60 degrees. The ALJ infers that these credible restrictions

precluded Claimant from effectively performing all of the duties of his regular employment, which involved some work in the freezer and some exposure to temperatures of significantly less than 60 degrees.

53. Claimant proved he left work on April 4, 2015 as a result of the industrial injury. Claimant credibly testified that he called in sick prior to the April 3 - 4, 2015 shift because his hand was hurting. Claimant's testimony is corroborated by Tucker's April 5, 2015 email stating that Claimant reported that he hurt his hand in the freezer and that was the reason he did not work last Friday, April 3, 2015.

54. Claimant proved it is more probably true than not that he is entitled to an award of temporary partial disability (TPD) benefits for the period June 10, 2015 through June 27, 2015. Claimant credibly testified that on June 10, 2015 the Employer offered light duty work and he commenced light duty work. Claimant credibly testified that he returned to regular duty when he was released on July 1, 2015.

55. Employer pay records for the pay periods ending June 13, 2015 and June 27, 2015 reflect the Claimant worked 97.44 "regular" hours and earned a total of $821.42. The ALJ infers that all of the regular hours worked during the June 13 pay period were worked on or after June 10, 2015, when Claimant commenced light duty work.

56. The ALJ is unable to determine how much Claimant earned for the period of June 28, 2015 through June 30, 2015. The employer pay records reflect that for the pay period ending July 11, 2015 Claimant worked 80.11 regular hours and 13.96 overtime hours. However, the ALJ cannot meaningfully determine how many hours Claimant worked and how much he earned (if anything) on June 28, June 29, and June 30, 2015. The Employer pay records are not sufficiently precise to determine daily earnings. Therefore, Claimant failed to prove that he earned less than the daily equivalent of the average weekly for June 28 through June 30. Therefore Claimant failed to prove entitlement to TPD benefits for the period June 28 through June 30, 2015.

FINDINGS OF FACT CONCERNING MEDICAL BENEFITS

57. Claimant did not notify the Employer that he had a work-related injury until April 5, 2015. As determined in Finding of Fact 17, on April 5 Claimant told Tucker, his supervisor, that he injured his finger in the freezer, that he had missed work because of the injury to the finger and that he was restricted from returning to work. Tucker told Claimant that he could not return to work until he received a "full release" from the doctor. On April 5, 2015 a reasonably conscientious manger would have recognized that there was a potential claim for workers' compensation benefits, including medical benefits.

58. On April 8, 2015 Employer provided Claimant with a list of designated providers. The Claimant selected Concentra as the provider to treat the injury.

59. Claimant proved it is more probably true than not that treatment by the Medcor nurse on April 1, 2015 constituted “authorized medical treatment.” At the time Claimant went to Medcor he had not notified the Employer that he believed he had sustained a work-related injury. Consequently the Employer had not yet had an opportunity to give Claimant a list of physicians and/or corporate providers from which the Claimant could select the authorized provider.

60. The treatment Claimant received at Medcor was the result of a bona fide emergency. The Medcor note indicates that Claimant was experiencing drainage from the right index finger. The Medcor nurse believed the Claimant had an infection and advised Claimant to either report a work-related injury to the Employer so that he could be referred for treatment or seek “urgent” treatment from his personal physician. The ALJ infers from this state of the evidence that on April 1, 2015 Claimant had acute symptoms in the finger that required medical treatment on an urgent basis.

61. The service provided at Medcor was reasonable and necessary to treat Claimant’s work-related frostbite injury. Although the nurse did not diagnose frostbite, he recognized that Claimant’s symptoms and condition warranted additional treatment by qualified medical providers. For this reason the nurse instructed Claimant to obtain additional care either by reporting a work-related injury to the Employer and obtaining a referral for abscess care or by seeking treatment from a private physician if the condition was not work-related. As shown by the subsequent diagnosis of frostbite and consequent course of treatment the Medcor nurse’s recommendations were an appropriate first step in the treatment of the industrial injury.

62. The Claimant proved it is more probably true than not that the treatment he received at MCA on April 3, 2015 was “authorized” medical treatment. Specifically Claimant proved this treatment was necessitated by a bona fide emergency. The ALJ finds that when Claimant went to the MCA ER on April 3 he had some suspicion but was not certain that the condition of his finger was related to his work in the freezer. PA-C Kushner’s April 3 ER note states that Claimant mentioned he “entered the refrigerator at the warehouse” but “denied injuring his finger in any way.” Rhodes credibly testified that when he spoke to the Claimant on April 6, 2015 Claimant still seemed “confused” about whether or not his injury was work-related. On April 1 Claimant had been told by the Medcor nurse that he needed “urgent” treatment by his personal physician if he could not identify a work-related cause for his finger problem. Claimant credibly testified that on April 3 his was experiencing pain in his finger and determined that he needed medical attention. While at the MCA ER Claimant was prescribed antibiotic and pain relieving medications, underwent an “I & D” procedure and was restricted from work. The ALJ infers from this sequence of events that Claimant’s April 3 visit to the ER was the result of a bona fide emergency. The Claimant sought and was provided treatment for serious finger pain. Claimant was not certain that the pain was related to his employment. The April 3 MCA records confirm that Claimant was not sure his finger pain was work-related. The records further establish that Claimant had a serious medical condition that warranted immediate attention.

63. The April 3, 2015 MCA records demonstrate that the treatment provided was reasonable and necessary to cure and relieve the effects of Claimant's frostbite.

64. The Claimant failed to prove that the treatment he received at MCA on April 8, 2015 was authorized. By April 8, 2015 Claimant believed his finger condition was related to his work in the freezer and had reported this conclusion to his supervisor, Tucker, on April 5, 2015. Thus, as of April 5, 2015 the Employer received sufficient notice of the injury to lead a reasonably prudent supervisor to conclude Claimant's finger condition might result in a claim for benefits. This notice triggered the Employer's statutory right to participate in the selection of the authorized treating physician (ATP) by providing Claimant a list of medical providers from which the Claimant could select the ATP.

65. The treatment Claimant received at MCA on April 8 was not the result of a bona fide emergency. The Claimant's sought treatment for a "wound check" and the MCA classified the visit as involving non-urgent general care. Moreover, on April 8 Claimant was able to complete paperwork involving his claim for workers' compensation and to go to Concentra for the visit with PA-C Petersen.

66. Visits to MCA after April 8, 2015 constituted authorized medical treatment. The credible evidence establishes that Concentra became the authorized provider on April 8, 2015. On April 10, 2010 PA-C Petersen referred Claimant back to MCA, apparently because Petersen was concerned the claim would be denied and necessary treatment for Claimant's finger would no longer be available through Concentra. This referral to MCA occurred in the normal progression of authorized treatment.

67. Medical records from Claimant's visits to MCA on April 10, 2015 and April 21, 2015 show that he was provided reasonable and necessary treatment for his finger. This included a referral to Dr. Sollender on April 10, 2015.

68. On April 8, 2010 Claimant designated Concentra as the authorized medical provider. Consequently all treatment provided by Concentra is authorized. The Concentra medical records demonstrate the treatment provided by Concentra was reasonable and necessary to treat Claimant's frostbite injury.

69. On April 10, 2015 Dr. Sollender became an authorized treating physician by virtue of MCA's referral in the natural progression of authorized treatment.

70. Dr. Sollender's records establish that the treatment he provided for Claimant's frostbite has been reasonable and necessary.

71. Treatment provided by Dr. Davis was authorized by virtue of the referral from Concentra on May 8, 2015. Dr. Davis's records establish that his examination and recommendations constituted reasonable and necessary medical treatment for Claimant's frostbite injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY

Claimant contends he proved by a preponderance of the evidence that he sustained a frostbite injury to his right index finger that was proximately caused by the performance service arising out of and in the course of his employment as an order selector. The ALJ agrees with Claimant's argument.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

Claimant was required to prove by a preponderance of the evidence that the condition for which he seeks medical treatment and disability benefits was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990).

As determined in Findings of Fact 37 through 47 Claimant proved it is more probably true than not that he sustained a frostbite injury to his right index finger that was proximately caused by the performance of service arising out of and in the course of his employment as an order selector. The ALJ is persuaded by Claimant's testimony that during the March 25 – March 26, 2015 shift he was exposed to extremely cold temperatures while working the majority of his shift in the Employer's freezer. The Claimant also credibly testified that he was not exposed to cold temperatures at home during the relevant time period. Dr. Sollender credibly and persuasively opined that Claimant sustained a frostbite injury as a result of the exposure to the cold at work and that there was no other "obvious explanation" for the injury. Dr. Sollender's diagnosis of a work-related frostbite injury is corroborated by other medical opinions as set forth in Finding of Fact 46. The evidence does not contain any credible and persuasive medical evidence that directly refutes Dr. Sollender's opinion or supports Respondents' theory that if Claimant was exposed to cold at work then he would necessarily have suffered frostbite to digits in addition to the right index finger.

AVERAGE WEEKLY WAGE

Claimant contends that his AWW is $1,135.02. Respondents' argument notwithstanding, the ALJ agrees with Claimant.

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

As determined in Findings of Fact 48 and 49, the ALJ concludes that it is appropriate to exercise his discretion to calculate Claimant's AWW based on Claimant's total earnings for the year prior to the date of injury and dividing by 52 weeks. It is appropriate to exercise the discretion afforded by § 8-42-102(3) because Claimant's weekly hours (and therefore earnings) varied and he was entitled to extra compensation if he exceeded production goals. As found, Claimant's average weekly wage is most fairly calculated as $1135.02.

TEMPORARY TOTAL AND TEMPORARY PARTIAL DISABLITY BENEFITS

Claimant contends that he proved by a preponderance of the evidence that he is entitled to an award of TTD benefits from April 4, 2015 through June 9, 2015 (except for the day of April 9, 2015), and an ward of TPD benefits from June 10, 2015 through June 30, 2015.

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As determined in Findings of Fact 50 through 53 Claimant proved it is more probably true than not that he is entitled to an award of TTD benefits for the periods April 4, 2015 through April 8, 2015 and April 10, 2015 through June 9, 2015 (66 days). As found, Claimant proved that during these periods of time the effects of the industrial frostbite injury disabled him from performing all of the duties of his regular employment, caused him to leave work for a period of time in excess of three shifts and resulted in an actual wage loss. Insurer shall pay Claimant TTD benefits for these periods of time at the statutory rate of sixty-six and two-thirds percent of the AWW of $1,135.02. See § 8-42-105(1), C.R.S.

Section 8-42-106(1), C.R.S., provides as follows:

> In case of temporary partial disability the "employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of injury and the employee's average weekly wage during the continuance of the temporary partial disability."

As determined in Findings of Fact 54 through 56 Claimant proved he is entitled to an award of TTD benefits for the period of June 10, 2015 through June 27, 2015. This is a period of 18 days. If Claimant had worked for the AWW for 18 days he would have earned $2918.70 ($162.15 per day x 18 days). However, the Claimant was temporarily partially disabled during this period of time and he earned only $821.42. The difference between $2918.70 and $821.42 is $2097.28. Sixty-six and two-thirds percent of $2097.28 is $1396.79. Insurer shall pay Claimant $1396.79 in TPD benefits.

MEDICAL BENEFITS

Claimant contends that the medical services rendered by all of the providers in this case were authorized, reasonable and necessary to treat the effects of the frostbite injury. At hearing Respondents took the position that only Concentra providers and their referrals were "authorized" to treat the injury.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). Section 8-43-404(5)(a)(I)(A), C.R.S. gives respondents the right in the first instance to designate the physician or corporate medical provider authorized to treat the injury. Respondents exercise this right by giving the Claimant a list of physicians and/or corporate medical providers from which the claimant may select the physician to attend the injury. *Patton v. Cobb Mechanical Contractors,* WC 4-793-307 and 4-794-075 (ICAO June 18, 2010). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

The respondents' obligation to give the Claimant a list of physicians and/or providers authorized to render treatment arises "forthwith" upon notice of an injury. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987); *Patton v. Cobb Mechanical Contractors, supra*. If the Employer fails to give the claimant a list of providers “forthwith” after notice of an injury the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office, supra*; § 8-43-404(5)(a)(I)(A). Notice of the injury occurs when the Employer has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Medical treatment that a claimant receives before the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office, supra*.

WCRP 8-2(A)(1) provides that a copy of “the written designated provider list must be given to the injured worker in a verifiable manner within seven (7) business days following the date the employer has notice of the injury.” The ALJ infers from this rule that the Director of the Division of Workers’ Compensation (DOWC) has determined that for purposes of § 8-43-404(5)(a)(I)(A) respondents act in a “forthwith” manner if they give the claimant a designated provider list within seven (7) days after notice of the injury.

A claimant may obtain “authorized treatment” without giving notice of an injury to the Employer and receiving a list of designated providers if the treatment is necessitated by a bona fide emergency. Once the emergency is over the employer retains the right to designate the first “non-emergency” physician. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). The question of whether a bona fide emergency existed is one of fact and is dependent on the particular circumstances of the case. *Drumm v. Benchmark Sales Agency*, WC 4-697-010 (ICAO July 5, 2007). Application of the emergency doctrine is not limited to situations where the claimant’s life is threatened. *Bunch v. Industrial Claim Appeals Office, supra*; *Drumm v. Benchmark Sales Agency, supra.*

Authorized providers include medical providers to whom the claimant is directly referred by the employer as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

The ALJ concludes the treatment Claimant received at Medcor on April 1, 2015 was “authorized.” As determined in Findings of Fact 59 and 60, the treatment Claimant received at Medcor was the result of a bona fide emergency. As determined in Finding of Fact 61, the treatment was reasonable and necessary to cure and relieve the effects of Claimant’s frostbite injury.

The ALJ concludes that the treatment Claimant received at MCA on April 3, 2015 was authorized. As determined in Findings of Fact 62, the treatment was sought in the context of a bona fide emergency. Claimant was developing serious pain and was not sure whether this pain was work-related or not. He had recently been informed by the

Medcor nurse that he needed “urgent” treatment from his personal physician if the finger condition was not work-related. When Claimant went to the ER he was provided various treatments including medication and “I & D” procedure. This evidence demonstrates Claimant needed prompt attention for an emergent condition that could not be positively identified as work-related. The evidence is sufficient to establish that the April 3, 2015 was “authorized” under the emergency doctrine even though Claimant had not yet reported a work-related injury to the Employer. *Cf. Drumm v. Benchmark Sales Agency, supra*.

As determined in Finding of Fact 63 the treatment provided at the MCA ER on April 3, 2015 was reasonable and necessary to cure and relieve the effects of Claimant’s frostbite injury.

The ALJ concludes the treatment Claimant received at MCA on April 8, 2015 was not authorized and is not compensable. As determined in Finding of Fact 65, by April 8, 2015 Claimant had reported to his supervisor that he sustained a work-related injury to his finger while working in the freezer. This notice triggered Respondents’ right to participate in selection of the ATP by giving the Claimant a list of providers pursuant to § 8-43-404(5)(a)(I)(A). On April 8, 2015 the right of selection had not passed to Claimant because Respondents still had 4 days to provide Claimant with the provider list, and they actually did so on April 8. Moreover, on April 8 Claimant selected Concentra as the authorized provider and actually was treated at Concentra on April 8. For the reasons stated in Findings of Fact 65 the ALJ also determined the visit to MCA on April 8 was not the result of an emergency and is not authorized under the emergency doctrine. Insurer is not liable to pay the cost of this visit to MCA,

The ALJ concludes that Claimant’s visits to MCA on April 10, 2015 and April 21, 2015 were authorized. As determined in Finding 66 PA-C referred Claimant to MCA in the normal progression of authorized treatment. As determined in Finding of Fact 67 the treatment provided by MCA on April 10 and April 21 was reasonable and necessary to cure and relieve the effects of Claimant’s frostbite injury.

The ALJ concludes that, for the reasons stated in Findings of Fact 69 and 70 the treatment provided by Dr. Sollender was authorized, reasonable and necessary to cure and relieve the effects of Claimant’s frostbite injury.

The ALJ concludes that, for the reasons stated in Finding of Fact 71 the treatment provided by Dr. Davis was authorized, reasonable and necessary to cure and relieve the effects of Claimant’s frostbite injury.

LATE REPORTING PENALTY

The respondents seek a penalty against Claimant because he allegedly failed timely to report the injury in writing as required by § 8-43-102(1)(a), C.R.S.

Section 8-43-102(1)(a) provides that an employee who sustains an injury from an accident “shall notify the said employee’s employer in writing of the injury within four days of the occurrence of the injury.” For purposes of this statute a Claimant does not sustain an "injury" until the Claimant as a "reasonable person" would recognize the nature, seriousness and probable compensable character of the injury. *Romero v. Industrial Commission*, 632 P.2d (Colo. App. 1981). If the employee fails to report the injury in writing "said employee may lose up to one day's compensation for each day's failure to so report." Because the statute uses the word "may," imposition of a penalty for late reporting is left to the discretion of the ALJ. *LeFou v. Waste Management,* WC 4-519-354 (ICAO March 6, 2003).

Section 8-43-102(1)(a) also provides as follows: "Any other person who has notice of said injury may submit a written notice to the said person in charge or to the employer, and in that event the injured employee shall be relieved of the obligation to give such notice."

The ALJ concludes that Claimant, as a reasonable person, would not and did not recognize the nature, seriousness and probable compensable nature of his finger condition until April 3, 2015. Between March 25, 2015 and April 3, 2015 Claimant's symptoms were relatively minor and did not cause him to seek medical treatment of any kind until April 1, 2015. When Claimant went to Medcor on April 1, 2015 for an evaluation of his finger he was diagnosed with an "abscess" and the diagnosis of frostbite was not even mentioned. Moreover, on April 1 the Medcor nurse noted that Claimant could not identify "any work- related event" that resulted in injury.

It was not until April 3, 2015 that Claimant began missing work because of his finger symptoms. Tucker's April 5 email establishes that Claimant called into work on April 3, 2015 and left a message stating that he hurt his finger in the freezer and that was the reason he did not work the previous Friday. The ALJ infers from this evidence that by April 3, 2015 Claimant reasonably suspected that his finger condition was caused by working in the freezer and that the injury prevented him from performing his job.

On April 5, 2013 Tucker authored an email to various persons including Rhodes, then the night warehouse manager. The email advised that Claimant had called in and reported that he sustained an injury while working in the freezer, that Claimant missed work on April 3 - 4, 2015 because of the injury and that Tucker had sent Claimant home on April 5 because Claimant had a doctor's excuse. The ALJ concludes that Tucker's April 5, 2015 email constituted a written notice of injury that was addressed to the "employer" or person in charge within the meaning of § 8-43-102(1)(a). Because this written communication was authored within 4 days of the date Claimant sustained the "injury," Claimant was relieved of the obligation to himself report the injury in writing.

However, even if Claimant was obligated to file a written report within 4 days of April 3, 2015, and even if Claimant failed to do so, the ALJ would exercise his discretion not to impose a penalty of one day's compensation for the period of April 4, 2015 through April 8, 2015 (when Claimant completed a written report of injury). There is no credible and persuasive evidence that the Respondent suffered any prejudice, such as the loss of evidence, resulting from Claimant's failure to report the injury in writing until April 8, 2015. Rather, it appears Claimant continued working until April 3, 2015. When

Claimant ceased work on April 3 he orally advised his supervisor (Tucker) of the alleged injury and Tucker advised the employer of the injury by way of the April 5, 2015 email. On April 6, 2015, the day after the email, Rhodes conversed with Claimant about the alleged injury. Thus, it appears the employer received timely notice of Claimant's alleged injury and did not suffer any adverse consequences from the fact that Claimant did not report the injury in writing until April 8, 2015.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. Claimant's average weekly wage is $1,135.02

3. Insurer shall pay Claimant temporary total disability benefits for the periods April 4, 2015 through April 8, 2015 and April 10, 2015 through June 30, 2015. These benefits shall be based on the statutory formula and the average weekly wage.

4. Insurer shall pay Claimant temporary partial disability benefits in the amount of $1396.79.

5. Respondents shall pay reasonable and necessary medical benefits for the medical services rendered by Medcor, Concentra, Dr. Sollender, Dr. Davis and for treatment provided by the Medical Center of Aurora, except for the visit of April 8, 2015.

6. Respondents request for the imposition of penalties for late reporting of the injury is denied.

7. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 22, 2016

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-982-264-02

ISSUES

- Whether Claimant is entitled to Temporary Total Disability benefits (TTD) after being terminated from her employment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was employed by Employer as a hand bindery worker.

2. Claimant had an admitted work related accident on December 3, 2014, while lifting a crate of books.

3. Claimant was diagnosed with a thoracic strain.

4. Claimant was given work restrictions, which Employer accommodated. Claimant did not miss any work and Claimant was paid her full wage.

5. Brandon Kunath is a hand bindery manager with Employer. Mr. Kunath was Claimant's supervisor.

6. Claimant was terminated on March 26, 2015.

7. Mr. Kunath credibly testified that Employer has a policy regarding employee termination and that the policy was followed regarding Claimant's termination.

8. Claimant's employment records were accepted into evidence.

9. According to an "Employee Corrective Action Form" dated April 21, 2014, Claimant received a written warning/reprimand concerning her work on the "Starz job #39066". According to the corrective action form, Claimant "improperly taped a pocket folder," which was sent to the customer with mistakes.

10. According to an "Employee Corrective Action Form" dated August 28, 2014, Claimant received a written warning/reprimand concerning her work on the "Fair Trade Winds job." According to the corrective action form, Claimant "drilled holes on the wrong side of the entire job of Fair Trade Winds, after being shown placement by both supervisor and a previous sample." Additionally, the corrective action form noted that Claimant failed show up at work on Wednesday, August 27, 2014. Claimant also failed to call Employer to let them know she would not be coming to work on August 27, 2014.

11. According to a "Personnel Action Form" dated March 26, 2015, Claimant was terminated for "unsatisfactory work performance" and "persistent quality issues." According to the personnel form, Claimant made mistakes on two additional jobs: "Job #50904 M.W.C.U.A." – was assembled by Claimant missing three pages of the book. "Job #51016 Aircell" – Claimant placed cards in crooked. Both jobs went to the customers with mistakes.

12. Mr. Kunath credibly testified that Claimant's termination was not related to her workers compensation accident/injuries.

13. Mr. Kunath credibly testified that he did not know why Claimant made mistakes on the Fair Trade Winds job or job #50904, in which she assembled a book missing three pages.

14. However, Mr. Kunath credibly testified that Claimant was responsible for quality assurance on the jobs she worked.

15. Claimant did not properly assure the quality of the Fair Trade Winds job, Starz job #39066, job #50904, and job#51016.

16. Claimant continued medical treatment after her termination. On May 12, 2015, Claimant was released to full work/activity duty with no work restrictions.

17. Based on the totality of the evidence, Claimant has failed to meet her burden of proving entitlement to TTD benefits between March 26, 2015 and May 12, 2015.

18. Based on the totality of the evidence, Respondent has satisfied its burden of proving that Claimant was terminated for cause.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See Magnetic *Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

It is the ALJ's sole province to assess the credibility of the witnesses. *Monfort Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

The Colorado Workers' Compensation Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for the termination of the employment relationship. §§ 8-42-103(1)(g) and 8-42-105(4), C.R.S.; *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008).

Whether a claimant is at fault for causing a separation of employment, so as to bar claimant from receiving disability benefits is a factual issue for determination by the ALJ. A finding of fault requires a volitional act, *or* in the alternative, the exercise of a degree of control by a claimant over the circumstances leading to the termination. §§ 8-42-103(1)(g) and 8-42-105(4), C.R.S.; *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

Under the termination statutes, an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment and, thus not entitled to disability benefits. §§ 8-42-103(1)(g) and 8-42-105(4), C.R.S.; *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008).

The ALJ finds the corrective action forms, the personnel action forms and the testimony of Mr. Kunath that Claimant was responsible for quality assurance on the jobs she worked establish that is more likely than not that Claimant exercised of a degree of control over the circumstances leading to her termination. Based upon the credible testimony and persuasive evidence presented by Respondents, Claimant was terminated for cause as of March 26, 2015.

A claimant is eligible for temporary total disability (TTD) benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts for more than three regular working days. §§ 8-42-103(1)(a, b) and 8-42-105(1), C.R.S.; *Anderson v. Longmont Toyota*, 102 P.3d 323, 327 (Colo. 2004).

Claimant has failed to meet her burden of proving that she is entitled to TTD benefits for the time period between March 26, 2015, her termination date, and May 12, 2015, the date Claimant was released to full work/activity duty with no work restrictions.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant was terminated for cause.

2. Claimant is not entitled to TTD benefits from the date of her termination (March 26, 2015) to the date Claimant was released to full duty (May 12, 2015).

3. Issues not expressly decided herein are reserved to the parties for future determination.

4. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 11, 2016

Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STIPULATION

1. The parties stipulate to an average weekly wage of $750.00

ISSUES

Based on the stipulations reached by the parties, the issues remaining for adjudication at hearing are:

> 1. Whether the Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits from April 17, 2015 ongoing.
>
> 2. If the Claimant establishes that he is entitled to temporary total disability benefits, whether the Respondents have established, by a preponderance of the evidence, that the Claimant is responsible for his termination of employment and, therefore, barred from recovering temporary disability benefits under the Act.

FINDINGS OF FACT

1. The Employer was an owner/operator of a specialized commercial vehicle that provided transportation services under contracts with third-party motor carriers. The Employer had started his business about nine (9) months prior to hiring the Claimant. The Employer hired the Claimant in March of 2015 to operate Employer's commercial vehicle over the day shift. The Claimant was Employer's only employee. The Claimant's job duties included the transportation of crude oil for Bridger, LLC under the terms of an Independent Contractor Operation Agreement between Bridger, LLC and Employer.

2. The Claimant testified that he had been performing this type of run under the Bridger contract for a short time prior to his work injury. He testified that he was never told by his Employer that he had to take a specific route to deliver the oil. The Claimant would pick up crude oil and deliver it where he was directed. There was an electronic system in the Employer's commercial vehicle called "PeopleNet Fleet Manager" that provided direction to the driver. Dispatch would program and set the loads through the PeopleNet system. When the Claimant would log in to the system, the loads that the dispatcher had programmed would show up. The Claimant testified credibly that this was how he knew which sites to visit. The Claimant testified that the directions to the sites were provided by the dispatchers. Jarrett Dias, the owner/operator for Employer confirmed that when a driver logged into the PeopleNet system, the screen would display the specific lease for the run and provide a specific route.

3. Mr. Dias testified that when he drove the vehicle, he would write down the route displayed on the screen, drive to the lease, pick up his load and then return on the same route he had driven in. Mr. Dias also testified that once the driver had the information from dispatch, the driver was to check the map for that lease that would provide designated routes for the run. Mr. Dias testified that he put a book in his truck that contained the map with the designated route for the lease. The map was provided by Bridger, LLC. Mr. Dias testified that the map in question for the April 17, 2015 delivery was the same map that is found at Respondents' Exhibit C. Mr. Dias testified that he showed the Claimant where the book was and told the Claimant that he had to follow the map with designated routes. The Claimant testified that prior to the date of the hearing, he had never seen a paper map for the route that he drove on April 17, 2015 and, specifically, that he had never seen the paper map at Respondents' Exhibit C.

4. The Claimant testified that he has no memory of the events of April 17, 2015. He testified that the day prior to April 17, 2015 and the three days following are "fuzzy."

5. According to the Colorado State Patrol Traffic Accident Report (Respondents' Exhibit F) and Employer's First Report of Injury (Claimant's Exhibit 1), the Claimant was travelling westbound on Washington County Road 7 near Washington County Road L, going uphill in extremely muddy conditions. When the vehicle crested the hill, it went off the right side of the road into the ditch, and drove for over 270 feet going downhill. The Claimant apparently tried to steer back on the roadway up an embankment and the vehicle overturned landing on its right side facing west in the ditch. The Claimant suffered lacerations to the back of the head and scalp and injuries to the chest, abdomen and right shoulder. The Claimant was wearing a shoulder and lap belt and was not ejected from the vehicle. There was no suspicion that drugs or alcohol were involved.

6. Mr. Dias testified that the location of the Claimant's April 17, 2015 accident was not on a route approved by Bridger, LLC for transporting crude oil under the lease the Claimant was operating. On cross-examination, Mr. Dias conceded that because he wasn't in the truck with the Claimant, he would not know what route that dispatch would have provided to the Claimant. However, Mr. Dias testified that he does not believe that dispatch would have sent the Claimant on the route where the accident occurred on April 17, 2015 because he has done this run and he was never brought in on this route. Nevertheless, Mr. Dias could not confirm that the Claimant was not brought in by dispatch on the route where the accident occurred.

7. Mr. Dias visited the accident site and reviewed the accident report and, when he spoke to the Claimant, advised the Claimant that the road and weather conditions were contributing factors to causing the accident. Mr. Dias testified that he visited the Claimant in the hospital after his accident to see how he was doing and to wish him well. At that visit, Mr. Dias did not tell the Claimant that he had violated a rule that would result in termination from employment.

8. Mr. Dias testified that he had to let the Claimant go after the accident because the Claimant had taken a route that he was not supposed to be using. Mr. Dias testified that the routes that are set up for transporting the crude oil are chosen because they tend to be wider roads and more well-travelled roads. This way, in the event of a breakdown or other issues, it is easier to respond and provide assistance. Mr. Dias testified that this is why Bridger, LLC set up the route and developed maps. Mr. Dias testified that because it was a policy of Bridger, LLC to use the Bridger routes, it was also a policy of Employer. Mr. Dias testified that he told the Claimant to follow the Bridger routes and he told him that his employment could be terminated if he didn't follow the routes. In the Claimant's employment file, there is an "Acknowledgement Form" signed by the Claimant on March 19, 2015 that he acknowledges receipt of the Bridger Transportation, LLC Manual for Contractors and Their Drivers. By reference, the Manual is incorporated into the Independent Contractor Operation Agreement between Bridger, LLC and Employer. It does provide that "failure to adhere to and perform the Manual's terms could result in disqualification of a driver."

9. Mr. Dias acknowledged that he did not provide anything to the Claimant in writing from Employer that notified the Claimant that failing to follow a designated route was cause for termination. He testified that this was his first time in business and he thought it would be sufficient to place documents from the companies with whom his business contracted in a reference book.

10. Mr. Dias testified that he officially terminated the Claimant's employment on April 21, 2015 after speaking with the safety department for Bridger, LLC. After that conversation, he called the Claimant and spoke with him personally to notify him that he was terminating his employment.

11. With reference to a claim file note entered on April 23, 2015, the claims representative noted a conversation with Mr. Dias. The claim note indicates, "Jarrett advised that while he doesn't tell his drivers exactly which way to drive, this would not normally be a good road for travelling down." Per the claims representative notes, Mr. Dias also stated that "[the Claimant] has not rtw and has multiple injures as again, he knew he got banged up pretty bad" (Claimant's Exhibit 2, p. 2).

12. With reference to a claim file note entered on April 27, 2015, the claims representative noted that, Mr. Dias advised "[the Claimant] was not paid for the shift on 4/17/15 as he didn't finish the job. He also advised that he had to let him go as he had totaled a tractor trailer and for insurance purposes he can't retain him as an employee. Also the company that he contracts with would not allow this as well" (Claimant's Exhibit 3, p. 4). With reference to this note, Mr. Dias testified at the hearing that the main reason he had to terminate the Claimant's employment is that the Claimant didn't follow the designated route.

13. There is a significant deviation between the Claimant's testimony and the testimony of the owner-operator for the Employer regarding the extent of the instruction that the Claimant received regarding designated routes for the transport of crude oil

pursuant to the Bridger, LLC contract. Taking all of the testimony and evidence into account, the weight of the evidence does establish that as between Bridger, LLC and the Employer, there was a clear understanding that the Employer's vehicle needed to travel along designated routes that were established by two means, specific route maps provided by Bridger, LLC and instructions received by way of the PeopleNet system that was located in the Employer's vehicle, which in turn, received pre-loaded information regarding the deliveries and routes to take to accomplish those deliveries. However, as between the Employer and the Claimant, while there was a clear understanding about the use of the PeopleNet dispatch system, the Employer did not take sufficient steps to establish a clear understanding regarding the use of maps and designated routes indicated on those maps. Nor did Employer make it clear to the Claimant that the failure to follow this particular requirement was grounds for termination.

14. After the motor vehicle accident on April 17, 2015, the Claimant was restricted from returning to work and he testified that this has not changed from the date of the accident until the date of the hearing. This is confirmed in the medical records provided as exhibits for this case.

15. On April 27, 2015, the Claimant saw Dr. Robert Nystrom at Concentra. Dr. Nystrom noted that subsequent to a roll over MVA on April 17, 2015, the Claimant first received medical treatment at the Emergency Room and then was seen at Workwell and was seen by Dr. Durbin. Care was transferred to Dr. Nystrom. Dr. Nystrom examined the Claimant and assessed the Claimant with concussion with moderate (1-24 hours) loss of consciousness, scalp laceration, back strain, scapula fracture and strain of shoulder, right. Dr. Nystrom referred the Claimant for a CT scan of the right shoulder including the scapula and he prescribed medications. His activity status was listed as "no work" (Respondents' Exhibit E, pp. 27-30).

16. On September 21, 2015, the Claimant saw Dr. Nystrom who noted that the Claimant had another CT of his shoulder that showed a healing scapula fracture but persistent diastases between the glenoid and scapula. Dr. Nystrom referred the Claimant for additional massage therapy, an optometry referral and additional physical therapy. At this point, the Claimant's activity status was listed as "no work" and his anticipated date of MMI was 6-8 months (Respondents' Exhibit E, pp. 31-34).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

In this case, the Claimant suffered an admitted work injury and established 7that he has missed work and suffered a wage loss. The Claimant suffered injuries in a roll over motor vehicle accident that occurred on April 17, 2015. Because the Claimant did not complete his shift and delivery on April 17, 2015 due to his injury, he was not paid for work performed on that day and suffered a wage loss from April 17, 2015 to the present. The parties stipulate that the Claimant's average weekly wage for the purposes of calculating a wage loss and any temporary disability benefits was $750.00.

Therefore, it is necessary to address Respondents' contention that the Claimant is precluded from receiving temporary indemnity benefits because the Claimant is responsible for his termination.

Responsible for Termination

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

The Claimant sustained a disabling injury on April 17, 2015 in a work related motor vehicle accident. Per the testimony of Mr. Dias, the owner of the Employer, he terminated the Claimant's employment on April 21, 2015. Although the Claimant worked on April 17, 2015, because he did not complete his delivery and his shift that day, the Claimant was not compensated for work performed on April 17, 2015 and his wage loss begins that day. The Respondents contend that the Claimant is "responsible" for this termination and is not entitled to TTD benefits. Relying upon the testimony of Jarrett Dias, the owner of the Employer, the Employer contends that the reason the Claimant is not working for the Employer any longer is that he failed to transport crude oil on a designated route. Mr. Dias testified that, per Bridger, LLC policy, this is a violation that results in termination of employment. Mr. Dias testified that he had advised the Claimant in the use of the PeopleNet dispatch equipment in the Employer's vehicle and that the Claimant was required to travel along designated routes per maps provided by Bridger, LLC.

The Claimant testified that he was familiar with the use of the PeopleNet dispatch equipment which, once he logged in, would provide his deliveries and his routes. However, in contrast with Mr. Dias' testimony, the Claimant testified that he had never seen the Bridger, LLC map with designated routes prior to the day of the hearing. He testified that he was not aware of a specific requirement to use maps indicating designated routes and that the failure to do so would result in the termination of his employment.

While the map with designated routes was admitted as Respondents' Exhibit C, there is no written evidence that the Claimant received a copy of this document on or before April 17, 2015. Nor is there any written or documentary evidence establishing that the Claimant received specific instructions that would have advised him that failure to follow designated routes on a provided map would result in his termination. There is only conflicting testimony regarding whether or not the Claimant was provided a map with designated routes. Although there is evidence in Respondents' Exhibit A that the Claimant signed a document acknowledging receipt of the Bridger Transportation Manual for Contractors and Their Drivers and that he agreed that failure to follow the Manual's terms "could result in disqualification of a driver, or termination of the ICOA, by Carrier," no part of the Manual was offered into evidence. Thus, the ALJ has no way to determine if the Manual contained instructions to the Claimant that would put the Claimant on notice that he was required to use routes designated in the Bridger maps.

It is clear that the Claimant's use of the route for his crude oil delivery on April 17, 2015 was not a designated route. Nevertheless, it has not been established that the Employer took reasonable steps to ensure that the Claimant understood that a requirement of his employment was that he must use designated routes set out in maps provided by Bridger, LLC for the transport of crude oil in the Employer's vehicle.

Alternatively, for the purposes of this claim, the totality of the circumstances must be considered in determining whether the Claimant committed a volitional act warranting termination. The fact that an employer discharged an employee, even in accordance with the employer's policy, does not establish that the Claimant acted volitionally, or exercised control over the circumstances of termination for the purpose of barring the Claimant from receiving TTD benefits pursuant to the Workers' Compensation statutes. See *Gonzalez v. Industrial Commission,* 740 P.2d 999 (Colo. 1987); *Goddard v. EG&G Rocky Flats, Inc*., 888 P.2d 369 (Colo. App. 1994*)(*cited with approval in *Kneffer v. Kenton Manor,* W.C. 4-557-781 (ICAO 3/17/04); *Bookout v. Safeway, Inc.,* W.C. 4-798-629 (ICAO 12/15/2010)(claimant not at fault for termination for violating "no call – no show" policy when wrongly incarcerated); *Hall v. Wal-Mart Stores, Inc.,* W.C. 4-601-953 (ICAO 3/18/04)(The respondents cannot adopt a strict liability personnel policy which usurps the statutory definition of "responsibility" for termination where the claimant engaged in a fight it at work but did not provoke assault); *Bonney v. Pueblo Youth Service Bureau,* W.C. 4-485-720 (ICAO April 24, 2002)(Claimant was not responsible for failure to comply with the employer's absence policy if the claimant was not physically able to notify the employer); *see e.g., Bell v. Industrial Claim Appeals Office, 93 P .3d 584,* (Colo. App. 2004)(The claimant not at fault for termination for refusing to sign settlement agreement waiving statutory rights).

Therefore, even if the Claimant was terminated for failing to deliver product using a route designated by the Contractor Bridger, LLC, this is alone is not sufficient to establish termination for cause which would bar the Claimant from receiving temporary disability benefits. The Claimant must have reasonably known that failing to travel along designated routes would have been a violation of the Employer's rule warranting termination. There was no persuasive evidence establishing that the Claimant's failure to use a designated delivery route would result in his termination. No written Employer rules were admitted nor was any portion of the Contractor Bridger, LLC's Manual admitted. Again, there was only conflicting testimony, and the testimony of Mr. Dias was not more credible than that of the Claimant.

Ultimately, there was no persuasive evidence that the Claimant understood that use of a designated route set forth on a map supplied by Bridger, LLC was a required condition of his continued employment. Rather, the weight of the evidence established that both Mr. Dias and the Claimant relied heavily on the information input by dispatch into the PeopleNet system for determining the route to take for transporting the crude oil. Finally, there was no persuasive evidence to establish by a preponderance of the evidence what route the PeopleNet system actually provided to the Claimant on April 17, 2015. Because no persuasive evidence established the route provided by dispatch, the Respondent also failed to establish by a preponderance of the evidence that the Claimant deviated from that route and engaged in a volitional act in violation of company policy.

For the alternative reasons stated above, the Respondents have not established that the Claimant was responsible for his termination and he is not barred from receiving temporary disability benefits.

ORDER

It is, therefore, ordered that:

1. The Claimant met the initial threshold to establish he was entitled to temporary disability benefits.

2. The Respondents failed to prove that the Claimant was terminated for cause from his employment.

3. Respondents shall pay the Claimant temporary total disability ("TTD") benefits for the time period commencing April 17, 2015 and ongoing until terminated by order, agreement or operation of law pursuant to the statute.

4. Pursuant to the stipulation of the parties, the average weekly wage is $750.00 which results in a corresponding TTD rate of $500.00.

5. Insurer shall pay eight percent (8%) per annum on all compensation not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 21, 2016

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The parties requested that the sole issue to be determined is compensability.

FINDINGS OF FACT

1. On May 28, 2015 the claimant was an employee of the respondent-employer working on assignment as a machine operator.

2. When the workload would subside in her primary duties due to the machine being down or a lack of materials, the claimant would be assigned to "float" duties at the oven or furnace.

3. On May 28, 20915 such was the case and the claimant was working at the oven.

4. The claimant retrieved a tray of cylindrical-like parts containing five parts and was carrying the tray towards the oven. The tray weighed approximately 20 to 25 pounds.

5. As the claimant approached the furnace with the tray, she was unaware that someone had placed a platform-like object on the floor in front of the furnace.

6. The claimant's shoe caught underneath the platform causing the claimant to fall forward towards the furnace. As a result of the claimant losing her balance one end of the tray struck the furnace and the other end forcefully jabbed the claimant in her left pelvic area. She also hurt her right forearm and right elbow.

7. After the claimant's fall she got up and went to the assembly table and told Mr. Derrick (?) that she got hurt. He asked her if she could finish her shift and she did.

8. Benita Snow, a co-worker of the claimant's, was present at the time of the injury and corroborated the claimant's version of the mechanism of injury. He told the claimant to report the injury.

9. On May 29, 2015 within 10 minutes of beginning work the claimant informed someone at work that she had a large purple clot-like area on her pelvic area. She could not urinate and her abdomen and back hurt.

10. The claimant felt like her insides were coming out.

11. The claimant was sent immediately to the hospital.

12. The claimant had a CT scan completed, which revealed that the claimant suffered from a left inguinal hernia.

13. The claimant was told to ice the area.

14. The claimant was then seen at Concentra on June 8, 2015. She was referred for a surgical consult with Dr. David Brown.

15. The claimant was last seen by Dr. Brown on September 9, 2015. Dr. Brown opines that the claimant is in need on a surgical repair of her inguinal hernia.

16. The ALJ finds the claimant to be credible.

17. The ALJ finds that the claimant has established that it is more likely than not that she suffered a left inguinal hernia as a result of an injury arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

2. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002). When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

5. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

6. The ALJ concludes, as found above, that the claimant is credible.

7. The ALJ concludes that the claimant has established, by a preponderance of the evidence, that she suffered an injury on May 28, 2015, that arose out of and occurred in the course of her employment with the respondent-employer that resulted in the claimant suffering from a left inguinal hernia that requires surgical repair.

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable and she is entitled to all benefits commensurate with the Act.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 21, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

➢ Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

➢ If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury?

➢ If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary disability benefits commencing April 17, 2015 and continuing until terminated by law or statute?

FINDINGS OF FACT

1. Claimant is employed with employer as a carpenter. Claimant testified at hearing that he has worked for employer since approximately 2005 or 2006, originally starting as an employee of a temp service before being hired full time by employer after approximately 10 months. Claimant testified that since being hired by employer he has performed various job duties including driving a bobcat and other work from when the construction project is started to when the job is finished. Claimant testified his job with employer requires heavy lifting, including lifting 50-60 pounds or heavier.

2. Claimant testified he began experiencing back pain in February 2013 and reported his back pain to Ms. Powers, the controller and benefits manager for employer. Claimant testified Ms. Powers did not refer claimant for medical treatment. Claimant testified another co-worker recommended massage therapy and claimant was able to return to work following the massage.

3. Claimant testified that on Friday, April 17, 2015, he felt pain in his back while he was working on the construction project at First Presbyterian Church. Claimant testified that while working at the project, claimant was contacted by "Justin" who requested claimant go to Lincoln Park to help prepare the park for a local Arbor Festival.

4. Claimant testified that when he got to Lincoln Park, he helped put up a temporary "snow fence" for the festival. Testimony at hearing established that employer will volunteer on occasion to help set up for various festivals, including putting up fencing materials that include posts hammered into the ground with orange colored plastic fencing to establish areas for the festival.

5. Claimant testified that while at the park, he used a T-Post driver that weighed approximately 25 to 30 pounds to drive posts into the ground. Claimant explained that a T-Post driver is a tube with handles on either side that helps drive the posts into the ground.

6. Claimant testified that he then went back to First Presbyterian Church, took off his sweatshirt, and began working on the punch list. Claimant testified he then had to go up on a ladder and stretch and began feeling pain in his back when he bent over for calking. Claimant testified he reported the back pain to his supervisor, Mr. Mendenhall, but did not request to be referred for medical treatment. Instead, claimant testified he told Mr. Mendenhall he thought the pain would go away with ibuprofen.

7. Claimant testified he returned to work on Monday, April 20, 2015 and continued to work on the punch list but was still experiencing back pain. Claimant testified the reported the continued pain to Mr. Mendenhall. Claimant testified Mr. Mendenhall did not refer him to a physician. Claimant worked again for a full day on April 21, 2015 and testified his pain was getting worse. Claimant testified he took more ibuprofen that night, but couldn't sleep. Claimant testified his wife took him to the emergency room ("ER") at approximately 3:30 or 4:00 a.m. on April 22, 2015.

8. According to the ER records, claimant reported he works in the construction industry and does a lot of heavy lifting. Claimant reported that lately at his construction job he has had to lift heavy doors and place the doors in the fame by himself. Claimant reported he was doing a significant amount of straining while doing this and yesterday, he developed pain in his right lower back and gluteal area after lifting heavy objects. Claimant was diagnosed with acute back pain and radiculopathy. Claimant testified he was given injections at the ER and discharged with instructions to follow up with his family physician. The records document claimant was provided with injections for low doses of ketamine, Dilaudid, and Toradol and was discharged with a prescription for additional medications.

9. Claimant followed up with his personal physician, Dr. Seppi, on April 23, 2015. Dr. Seppi noted that claimant had been seen in the ER for right lower back and buttock pain that had started several days ago. Claimant reported that after his injections at the ER, his pain had now returned. Claimant reported he does construction work, but indicated he did not remember a specific injury. Dr. Seppi recommended conservative care and referred claimant to physical therapy.

10. Claimant was evaluated by Ms. Ford, the physical therapist, on April 30, 2015. Claimant reported to Ms. Ford that his pain began on April 17, 2015 when he was out in the rain due to a work project, and upon returning to work indoors, began feeling pain in the right lumbar region and eventually into his right buttocks. Claimant reported the pain worsened over the next 2 days to the point that he eventually sought treatment in the ER.

11. Claimant returned to Dr. Seppi on May 1, 2015 and reported 80% improvement with the physical therapy. Dr. Seppi released claimant to return to light duty work.

12. Claimant was evaluated by Dr. Campbell on May 6, 2015 and reported worsening back pain despite his physical therapy. Dr. Campbell noted that there was no know original injury, “but seemed to worsen a few weeks ago”. Dr. Campbell referred claimant for x-rays of the lumbar spine and recommended medications including cyclobenzaprine and ibuprofen.

13. The x-rays performed on May 6, 2015 showed degenerative listhesis at the L5-S1 level with an arthrolisthesis of L5 relative to S1.

14. Claimant returned to Dr. Seppi on May 11, 2015 and reported ongoing symptoms in his lower back and right extremity that had been waxing and waning. Based on his ongoing symptoms, Dr. Seppi recommended claimant undergo a magnetic resonance image (“MRI”) of his lumbar spine. Dr. Seppi also recommended claimant continue with ongoing physical therapy.

15. Claimant was evaluated by Dr. Gebhard, an orthopedic surgeon, on June 4, 2015. Dr. Gebhard noted that claimant reported complaints of six weeks of low back pain and right leg pain that began without incident or injury. Dr. Gebhard performed a physical examination and reviewed claimant’s x-rays. Dr. Gebhard diagnosed claimant with an L5-S1 spondylolisthesis with resultant right leg radiculopathy and weakness.

16. Claimant underwent the MRI on June 5, 2015 that demonstrated a broad based disc extrusion causing severe right and moderal left foraminal stenosis at the L5-S1 level.

17. Claimant returned to Dr. Gebhard on June 11, 2015, following the MRI. Dr. Gebhard noted claimant was also complaining of mechanical symptoms feeling like something is popping and moving around in his low back. Dr. Gebhard noted claimant was not interested in pursuing surgery at this time and discussed with claimant proceeding with an injection into the lumbar spine.

18. On July 28, Dr. Gebhard performed a right sided L5-S1 epidural steroid injection. On September 3, 2015, Dr. Gebhard performed a bilateral L5-S1 epidural steroid injection.

19. Dr. Gebhard testified by deposition in this matter. Dr. Gebhard testified that it was his recollection that claimant indicated that there was not one specific event that caused claimant’s symptoms. Dr. Gebhard testified, however, that claimant’s work with employer could have aggravated his underlying pre-existing condition. Dr. Gebhard testified that a person working nine to ten years in heavy construction could cause an aggravation of an underlying spondylolisthesis. Dr. Gebhard testified it was medically probable in this case that claimant’s work experience aggravated his spondylolisthesis. Dr. Gebhard testified that at this point, he was recommending claimant undergo surgery to treat his spondylolisthesis.

20. Dr. Gebhard testified that he sees approximately twenty to thirty cases each year involving a diagnosis of L5-S1 spondylolisthesis. Dr. Gebhard testified that of the 20-30 cases of L5-S1 spondylolisthesis he sees each year, approximately two of the cases are related to a work injury.

21. Respondents presented the testimony of Mr. Esqueda, a shop manager for employer, at hearing. Mr. Esqueda testified he worked at Lincoln Park setting up the safety netting ("snow fence") for the Arbor Festival. Ms. Esqueda testified he put up approximately 500 feet of safety netting for the festival and worked with seven other employees, including claimant. Mr. Esqueda testified claimant was present at Lincoln Park helping set up for the Arbor Festival for approximately one hour. Mr. Esqueda testified claimant was using zip ties to attach the safety netting to the posts and pulling plastic rolls. Mr. Esqueda testified claimant did not use the T-Post driver. The ALJ finds the testimony of Mr. Esqueda to be credible and persuasive.

22. Respondents presented the testimony of Ms. Powers, the controller and benefits manager for employer, at hearing. Ms. Powers testified she met with claimant on approximately June 13, 2015 when claimant informed her that he felt his symptoms were related to his work duties. Ms. Powers testified she asked claimant if there was a specific injury, and claimant indicated there was not a specific injury. Ms. Powers testified she had originally met with claimant to discuss his inquiry regarding his vacation time because claimant said he was going to have surgery and would need 12 weeks off. Ms. Powers testified when she told claimant would try to get claimant some extra time off so he could have 8 weeks off, he inquired whether his injury could be a workers' compensation claim. Ms. Powers testified this was the first she had heard of claimant's back condition being related to work. Ms. Powers testified claimant later told her he thought he hurt with back working at First Presbyterian Church. Ms. Powers testified claimant indicated to her on June 14, 2015 that he was upset because he was out money for co-pays for his medical treatment. Ms. Powers filed a workers' compensation claim on June 23, 2015 based on claimant's statements. The ALJ finds the testimony of Ms. Powers to be credible and persuasive.

23. Mr. Mendenhall, a superintendant for employer, testified at hearing in this case. Mr. Mendenhall testified he took over as the supervisor for the First Presbyterian Church site project for the period of time between April 13, 2015 and April 23, 2015 while another supervisor was on vacation. Mr. Mendenhall testified claimant was working on the punch list during this time and was the only employee on the job site, but was performing mostly touch up items. Mr. Mendenhall testified claimant would not be required to install doors doing this work, as a sub-contractor was responsible for this activity. Mr. Mendenhall testified on cross-examination that claimant could have moved the doors from the truck to where they would be installed, but wouldn't be responsible for installing the doors. Mr. Mendenhall testified he stopped by the job site on April 21, 2015 and noticed claimant appeared to be in pain and asked claimant if he was OK, and claimant replied that his back hurt. Mr. Mendenhall testified he asked claimant if he had hurt his back at work, and claimant replied, "No."

24. Mr. Mendenhall testified claimant called him on April 22, 2015 and told him he was being taken to the hospital and would not be in for work. Mr. Mendenhall testified he spoke with claimant on April 23, 2015 and said he was being seen by Primary Care Physicians. Mr. Mendenhall testified claimant later texted the medical record excusing claimant from work. Mr. Mendenhall testified there was another conversation later when he asked claimant if this was related to something that happened on the job, and claimant again told him, "No." The ALJ finds the testimony of Mr. Mendenhall to be credible and persuasive.

25. The underlying determination in this case comes down to whether claimant's testimony at hearing as to the onset of his symptoms and the activities he performed prior to the development of his symptoms is credible. Claimant's credibility was questioned in this case as he testified that he had reported his symptoms to his supervisor, Mr. Bowers, but admitted on the stand that in his answers to interrogatories he failed to mention Mr. Bowers. Claimant testified he was concerned about reporting his injury as a workers' compensation claim because when he had a prior injury in 2012 while working in Glenwood Springs and reported that he was hurt at work to the physician, his supervisor questioned why claimant would report a work injury when employer provides very good health insurance.

26. However, claimant's explanation for being concerned about reporting the injury as work related does not make sense in the present case when claimant reported to various providers that his pain was caused by work, but was inconsistent with the type of work that caused his pain. For instance, claimant reported to the ER physicians that his pain was caused by lifting doors at work and reported to the physical therapist that his pain was caused after he worked outside in the cold at work. Claimant also reported to Dr. Seppi that he lifts heavy objects at work, but denied a specific injury that he recalled.

27. While Mr. Mendenhall testified that claimant's job did require him to potentially perform heavy lifting, bending and stooping, and Dr. Gebhard testified this type of work could aggravate claimant's underlying pre-existing spondylolisthesis, claimant's testimony at hearing related to a specific injury while using the T-Post driver.

28. Under the circumstances of this case, and in crediting the medical records, the ALJ cannot indicate that claimant's testimony that he injured his low back while pounding in fence posts on April 17, 2015 was credible. In this regard, while this accident history appears to be consistent with a statement claimant made to the physical therapist, it is inconsistent with claimant's reported accident histories to the ER physicians, Dr. Seppi and Dr. Gebhard. Moreover, the ALJ credits the testimony of Mr. Esqueda as being more credible and persuasive then claimant's testimony at hearing.

29. The ALJ further credits the testimony of Mr. Mendenhall that claimant denied that his back condition was work related when he questioned claimant on April 21, 2015 as being credible and persuasive. The ALJ notes that claimant's indication to Mr. Mendenhall that his back condition was not related to his work appears consistent with the testimony of Ms. Powers and the employment records entered into evidence.

The ALJ finds that claimant first reported this injury to employer as related to his work with employer on or about June 13, 2015 when he inquired with Ms. Powers about possible time off for surgery. The ALJ finds that if claimant's condition was related to his work, he would have reported the injury to employer prior to June 13, 2015 as being related to his work. The ALJ further rejects claimant's contention that he was afraid of reporting his injury to his employer based on his prior experience in 2012 involving a work injury as being non-persuasive considering the overall facts of this case.

30. The ALJ likewise rejects the opinions expressed by Dr. Gebhard regarding claimant's condition being aggravated by his work for employer as not persuasive when considering claimant's testimony at hearing and the medical records entered into evidence at hearing.

31. The ALJ therefore determines that claimant has failed to demonstrate that it is more probable than not that he sustained a compensable injury arising out of and in the course of his employment with employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also*

Subsequent Injury Fund v. Thompson, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury arising out of an in the course of his employment with employer. As found, the testimony of Mr. Esqueda, Mr. Mendenhall and Ms. Powers presented at hearing is found to be more credible and persuasive than the testimony of claimant. As found, the medical records and in particular, the medical histories provided by claimant are determined to be more credible and persuasive regarding the onset of claimant's symptoms than claimant's testimony at hearing.

5. As found, claimant has failed to establish by a preponderance of the evidence that his work with employer, caused, aggravated, accelerated or combined with a pre-existing condition to cause the need for medical treatment.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 8, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts

ISSUES

Claimant filed an Application for Expedited Hearing and endorsed compensability and medical benefits. At the commencement hearing, the Claimant argued that he should be permitted to also raise the issue of authorized treating physician (ATP). Claimant asserted that the endorsement of medical benefits is sufficient to notify the Respondents that he intended to litigate designation of an ATP. The ALJ disagreed with Claimant's position and denied the request to address the issue of authorized treating physician.

Thus the issues to be determined are whether the Claimant suffered a compensable work injury, and if so, whether he is entitled to medical benefits to cure and relieve him of the effects of that injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. The Employer's business includes demolishing and building new patio decks, primarily residential.

2. The Employer hired the Claimant on May 26, 2015 as a laborer. Benjamin Campbell was Claimant's supervisor.

3. Claimant worked for Employer for four days between May 26, 2015 and May 29, 2015. All of Claimant's work for Employer was performed at a private home job site where a deck was being demolished and built.

4. Claimant testified that he worked from 9:00 a.m. to 5:00 p.m. over his four days of employment. On May 26, 2015, Claimant performed trash/debris pickup, which involved moving lumber scraps to a dumpster with a wheel barrow.

5. On May 27, 2015, Claimant also performed trash/debris pickup. He also moved some boards and tools.

6. On May 28, 2015, the customer's old deck was demolished. During the morning, Claimant was catching 20-foot long wooden boards that were sawn off of the deck. He would then cut the boards in half so that they were 10 feet long, and take the boards to the dumpster. He took the boards to the dumpster one at a time. During the afternoon, Claimant was moving new 20-foot long boards from the driveway to the backyard where the new deck was being built. He moved the boards two or three at a

time. He carried them on his shoulder. On May 29, 2015, Claimant again moved boards from the driveway to the backyard.

7. Claimant testified that on May 29, 2015, he was feeling run down because it was the end of the week. He testified that he had never done that amount of physical labor before. He stated that his shoulder was sore and that he was very tired.

8. Claimant testified that on May 29, 2015, he felt like he pulled a muscle in his back on the last stack of lumber that he lifted. He stated that he asked Campbell if he could take it easy for the rest of the day. Claimant testified on cross-examination that his exact statement to Campbell was: "I told him I was hurting, I was sore, and I would like to take it easy for the rest of the day" and Campbell granted Claimant's request.

9. Claimant lived next door to Campbell, and rode him with him to work in Campbell's car on May 29, 2015. He testified that during the ride home after work on May 29, 2015, he informed Campbell that he was sore and that his back was hurting. He testified that Campbell responded by stating something to the effect of, "the first week is always the hardest."

10. Campbell agreed that Claimant may have mentioned to him on May 29, 2015 that he was a little sore. Campbell, however, disagreed that Claimant alleged a specific work-related back injury. Campbell testified that soreness was to be expected considering the physical nature of the work.

11. Claimant testified that during the weekend of May 30 and May 31, 2015, he stayed in bed, watched television and played video games, and that he was in pain on those days.

12. Claimant testified regarding the difference between pain and soreness. He testified that soreness was something that was different than pain, and that soreness did not limit him from performing his daily activities. He stated that what he felt on May 29, 2015 was pain, not soreness.

13. In his Worker's Claim for Compensation, Claimant alleged that he hurt himself through "repetitive bending, lifting, and carrying heavy pieces of lumber from 5-26-15 through 5-29-2015." Claimant testified that this was an accurate description of the manner in which he was injured.

14. Claimant testified regarding his answers to interrogatories. He testified that when he was asked regarding how he was injured at work, his answer was as follows:

> At [Employer], the first day was at the end of a project, where I carried leftover lumber to the work trailer, picked up construction trash, and carried tools. The second day I did 'demolition,' standing under the old deck while Ben Campbell as sawing the old deck apart, catching 100 lb. decking pieces, carrying the decking pieces

> to the front of the house, and threw the old decking into the Dumpster. Thursday and Friday, my job was to pick up stacks of lumber about 20' long x maybe 4" wide (for making decks), three (3) boards at a time, from a stack in the customer's driveway, turn to the left, put the stack over my right shoulder, and walk away from the driveway to the backyard of the customer. I would put the stacks of lumber in the backyard by bending down and setting the boards down carefully. Then I would go back to the driveway, pick up another stack and repeat. I did this from nine to five each of those two days. My last day of work was Friday, May 29, 2015. I didn't return to work because of my on-the-job injury.

15. When asked on cross-examination where in the interrogatory answer he identified his injury, Claimant testified that it was the continuous lifting, bending and throwing. He testified that he listed the work he did for the Employer over the four days he worked there, and that it constituted his description of his injury. He admitted that his description did not identify any acute event, including the alleged lifting incident in which he claimed he felt a muscle strain in his back. He admitted that his description did not identify when he began feeling pain.

16. On the morning of June 1, 2015, Claimant, his girlfriend Sara Dietrick, and Campbell engaged in the following text message exchange.

> Claimant: Hey man I can't hardly move [sic] my back is in a lot of pain. I have to go to the hospital
>
> Claimant: My girlfriend is taking me so I can't make it to work today, I'm sorry.
>
> Campbell: Ok well hope you feel better man
>
> Campbell: How'd you hurt your back anyways?
>
> Dietrick: He woke up and started yelling in pain. He's getting an x-ray right now.
>
> Campbell: Geez [sic] well let me know how you're doing when you know what's up
>
> Claimant: I have a torn muscle and two strains in my spine, they told me not to work till [sic] Thursday, they gave me pain killers and told me to do light stretches and no heavy lifting for few days. They said none of my vertebrae are broken but they will examine the x-rays more just to make sure. They just don't wanty [sic] muscle tearing more than it is otherwise I'll have to have surgery.

17. Neither Claimant nor Dietrick ever responded to Campbell's question regarding how Claimant hurt his back. Claimant testified that these texts represented the only communication he had with Campbell on June 1 and June 2, 2015.

18. Claimant testified that he woke up on June 1, 2015 with excruciating pain in his back. He testified that on that morning he could not bend or get out of bed. Dietrick called an ambulance. The EMTs helped Claimant up the stairs and onto a stretcher and took him to Aurora Medical Center.

19. Rural Metro Ambulance records indicated that "Pt states that he has had back pain since he woke up this morning at 0630. Pt states that pain in the middle of his back that radiates over to his left flank. Pt states that he has been having back soreness for the past week after starting his new construction job a week ago." Claimant stated that he had a cough for a week and it hurt his back when he coughed. Claimant's complaints related to the middle of his back, radiating into the left flank.

20. The Aurora Medical Center treatment notes indicate that during the initial assessment, Claimant reported pain at a level 9 out of 10 with an onset date of June 1, 2015.

21. Dr. Jonathan Savage also evaluated the Claimant. The medical notes state: "Pt arrives by ems for back pain. Pt reports that he started a new job this week building decks." Claimant presented with elevated blood pressure and shortness of breath. Dr. Savage noted paraspinal muscle tenderness in the thoracic and lumbar spine, and ordered a chest x-ray. Pain medications were administered to Claimant, and he was discharged. Dr. Savage diagnosed a back strain, and noted that at the time of discharge, Claimant "was able to ambulate in the ED (at their baseline) without difficulty." Dr. Savage recommended no heavy lifting for three days.

22. Claimant testified that the Employer's owner Ray Dertz called him on June 2, 2015, and terminated his employment. Claimant did not work for Employer after that time.

23. Claimant testified that on June 2, 2015, he could not drive his manual transmission car, because when he pushed in the clutch, he experienced shooting pain into his back. Claimant stated that he felt pain at a level of 6-7 out of 10 after trying to use the clutch. He testified that he was able to get to the store by driving his grandfather's truck, which had an automatic transmission. He testified that after he went to the store, he went back home and lied down. He testified that his pain stayed at the same level for approximately two weeks, and that he had difficulty performing activities of daily living.

24. On cross examination, Claimant was confronted with a Facebook post of him "checking in" to a live music venue also on June 2, 2015. Claimant admitted to attending a concert the night of June 2, 2015. Claimant did not have a seat at the

concert. He was able to stand in the general admission section for the entire show. He recalled purchasing a beer because he was standing near the bar.

25. Claimant testified that he spoke with Campbell personally on June 5, 2015, and that Campbell asked him how he hurt his back. Claimant testified that he told Campbell that he hurt his back from "all the heavy lifting, and all the lumber."

26. Campbell testified that the Claimant never appeared hurt during the time they worked together between May 26 and May 29, 2015, nor did the Claimant complain or mention being injured at work. According to Campbell, he knew nothing of an alleged work injury until attorneys became involved in the case.

27. Claimant also asserted in his direct testimony and in his answers to interrogatories that he could no longer engage in certain physical activities after his injury. These activities included running, hiking or other forms of exercise.

28. On or around July 16, 2015, a Facebook video post depicted Claimant running away from fireworks his friend had lit. The video then showed him lying on the ground laughing. Claimant admitted he was in the video running toward the garage to get away from the fireworks.

29. A Facebook post dated September 20, 2015 depicted Claimant hiking at Red Rocks. Claimant testified that he was not really hiking but just walking around. Claimant admitted that he was able to descend and ascend some inclines during the hike or walk. Regardless of whether he was "hiking" or simply walking around, Claimant's activities post-injury are inconsistent with his reported pain levels and inconsistent with his testimony concerning his abilities.

30. The Claimant had no additional medical treatment until August 5, 2015 when he was evaluated by physician's assistant (PA), Thanh Chau, at HealthOne. PA Chau documented that Claimant reported feeling a "pull" in his back when lifting 200 pounds of lumber from the floor and twisting to his left while working on May 29, 2015.

31. Claimant reported to Chau that his pain was a level 9 out of 10; however, he testified that his usual pain level was 3-4 out of 10. PA Chau noted elevated pain behaviors on exam, and pain on palpation to light touch. Claimant disagreed that Chau used "light touch" and instead asserted Chau was "digging in."

32. Claimant testified that his pain level during PA Chau's examination was actually a 5-6 out of 10, but his pain had increased due to the physical examination performed by PA Chau.

33. PA Chau imposed work restrictions and opined that objective findings appear consistent with the work-related mechanism of injury reported by the Claimant. However, Claimant had described a specific work-related lifting event to PA Chau whereas at other times, Claimant asserts that the four days of manual labor brought on his symptoms. It is difficult to ascertain whether Claimant alleges he suffered a specific acute injury or whether he claims he suffered a cumulative trauma condition.

34. Claimant testified that he did not consider the acute event to be separate from lifting, bending and carrying over the course of four days. He testified that his injury happened “over time.” When asked whether or not he suffered an acute event, he then stated that he just “more felt it on Friday [May 29, 2015].” When asked whether he felt like he pulled a muscle on May 27 and May 28, 2015, Claimant testified that he had a sore back on those days. Upon further questioning, Claimant then again reiterated his original position that he felt no pain in his back until May 29, 2015 at the end of the day. Claimant testified that his pain on May 29, 2015 was 7 out of 10. He testified that his pain went down to 4-5 out of 10 on May 30 and 31, 2015. He then felt pain at 9 out of 10 on June 1, 2015 prompting his emergency room visit.

35. Since his work injury, the Claimant has had several different jobs. He worked for Career Strategies for two weeks starting on June 17, 2015. His job included grounds keeping, picking up trash with an extend-an-arm, cleaning windows, sweeping, mopping, using a leaf blower and wiping down washers and dryers. Claimant testified that he was able to perform this job. Claimant also testified that he has had jobs at 7-11 and T-Mobile since the injury. He currently works for T-Mobile five days per week between five and six hours per day. T-Mobile requires him to stand for most of his shift.

36. Claimant testified that he has been in constant pain since May 29, 2015. He claims that his average pain in his low back pain is at a level 3 out of 10, and that it can increase to 7 out of 10 depending upon his activities.

37. Claimant’s grandfather, Dale Freeman, testified regarding his observations of Claimant. Clamant lived with his grandfather on May 29, 2015 and for a time thereafter. Freeman testified that he observed Claimant walking slowly on May 29, 2015. He further testified that he observed Claimant remain in his room for “quite a few days.” He testified that Claimant continued to move slowly until he started to get better. He testified that Claimant was not able to perform his normal household duties and chores, including yardwork, for the first week after he went to the emergency room due to pain. He testified that it took several weeks for Claimant to begin being able to walk normally again. Freeman admitted that he worked full-time and was not able to watch or observe Claimant all of the time.

38. Claimant filed his worker’s claim for compensation on June 12, 2015.

39. Respondents filed a Notice of Contest on July 8, 2015.

40. Claimant has failed to prove by a preponderance of the evidence that he sustained an injury on May 29, 2015 while in the course and scope of his employment. The Claimant has also failed to prove that his pain complaints arose from work-related cumulative trauma between May 26 and May 29, 2015. The ALJ is not persuaded by Claimant’s testimony concerning the alleged events leading up to his emergency room visit on June 1, 2015. The ALJ resolves the conflicting testimony in favor of Campbell in light of Claimant’s other inconsistent reporting and misrepresentations concerning his physical abilities. As such, the ALJ finds that the Claimant did not report any injury to Campbell at any time. This finding is further supported by the fact that Claimant did not

respond to Campbell's direct text inquiry concerning the source of Claimant's back pain. If Claimant had injured himself on the job, it would have made sense he would have documented it in a text to Campbell. The ALJ finds that Claimant merely woke up with increased pain complaints on June 1, 2015, but no persuasive or credible evidence links such symptoms to the work Claimant performed for the Employer from May 26 through or on May 29, 2015.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the ALJ enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

5. As found above, the Claimant has failed to prove by a preponderance of the evidence that he sustained an injury on May 29, 2015 while in the course and scope of his employment. The Claimant has also failed to prove that his pain complaints arose

from work-related cumulative trauma between May 26 and May 29, 2015. The ALJ is not persuaded by Claimant's testimony concerning the alleged events leading up to his emergency room visit on June 1, 2015. The ALJ resolves the conflicting testimony in favor of Campbell in light of Claimant's other inconsistent reporting and misrepresentations concerning his physical abilities. As such, the ALJ finds that the Claimant did not report any injury to Campbell at any time. This finding is further supported by the fact that Claimant did not respond to Campbell's direct text inquiry concerning the source of Claimant's back pain. If Claimant had injured himself on the job, it would have made sense he would have documented it in a text to Campbell. The ALJ finds that Claimant merely woke up with increased pain complaints on June 1, 2015, but no persuasive or credible evidence links such symptoms to the work Claimant performed for the Employer from May 26 through or on May 29, 2015.

ORDER

It is therefore ordered that Claimant's claim for workers' compensation is denied and dismissed. As such any claim for medical benefits is also denied.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 4, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Compensability;

2. Medical Benefits- reasonable and necessary; and,

3. Entitlement to temporary total disability benefits.

Based upon the findings and conclusions below that the claim is not compensable, the ALJ does not reach a decision on the remaining issues.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. The claimant was employed at the respondent-employer's call center on June 19, 2015. She testified that she walked to a single stall bathroom located in the lobby area of the building to use the facilities. She states that she slipped and fell on water or urine while attempting to pull up her pants. The claimant states she was wearing a walking boot on her left ankle at the time of the incident. The claimant also had a lengthy medical history relating to pseudo tumor cerebri for which she had undergone brain surgery to place shunts.

2. The respondent-insurer denied liability for the incident.

3. The claimant provided detailed testimony during direct and cross examination regarding the circumstances of the incident. She maintained that she was certain that the incident had occurred within the bathroom stall and not while standing at the sink or in any other area of the bathroom. The claimant also testified that she lost consciousness and when she woke up she was in so much pain that she had to pull herself out of the restroom. The claimant testified that she called for help while in the bathroom and no one responded.

4. The paramedics were called to the respondent-employer's business on June 19, 2015. In the narrative account of what happened as documented in the

paramedic report, it is noted the claimant reported “she was in the restroom urinating when she found herself on the floor in “water.” The report states that “she doesn’t remember the event, states she was fine before.” The paramedic report documents the claimant “denies any trauma, head pain, neck or back pain.” The claimant reported concern due to the shunts in her head having potentially moved and requested to go to the hospital. The claimant was diagnosed with a syncopal episode. The paramedics did not document any evidence of physical trauma to the claimant’s head or back.

5. When the claimant arrived at Penrose St. Francis Hospital on June 19, 2015, she reported slipping and falling. A CT scan of the head was performed which was reported as showing no intracranial hemorrhage or acute abnormality and showed the shunts to be in position. The claimant also underwent imaging evaluation of her lumbar spine which was reported as showing the potential for transverse process fractures. These “fractures” were later determined to be gas artifact findings in subsequent imaging completed on July 29, 2015. The records from Penrose do not document any signs of physical trauma to the claimant’s head or back. The claimant was released from Penrose and instructed to follow up with her personal physicians.

6. The claimant presented to Dr. Randall Jones at Concentra on June 22, 2015. In her account of the incident to Dr. Jones she reported she had used the rest room and was washing her hands when the “next thing she knew” she was on the floor. She reported an unknown length of a loss of consciousness and stated that she “crawled out the door to call for help.”

7. The claimant presented to Linnea Hughes, PA-C, also on June 22, 2015. In Ms. Hughes report the claimant states that she slipped and fell on some water on the floor and “woke up with paramedics around her.” The claimant returned to Ms. Hughes on July 29, 2015 for “shunt adjustment.” The shunts were reprogrammed and there is no indication of any concern regarding damage to her shunts or placement of the shunts noted in Ms. Hughes report.

8. The claimant was evaluated by Dr. Jeffrey Jenks on July 8, 2015. The claimant reported to Dr. Jenks that she was experiencing cervical, thoracic, and lumbar pain as a result of the alleged incident as well as headaches and cognitive difficulties. The claimant denied experiencing these symptoms previously, attributing her symptoms to the alleged incident of June 19, 2015. The claimant specifically told Dr. Jenks that her headaches were controlled at the time of the June 19, 2015 incident – a statement directly contradicted by a report of Ms. Hughes dated May 28, 2015. At that time, the claimant was still complaining of “chronic migraine headaches with daily pain.” The claimant also reported blurry vision and was recommended to have an evaluation to

check for papilledema. Dr. Jenks discussed concerns regarding the claimant's "significant amount of pain behavior and functional overlay."

9. A security officer, Kim Nettles, was stationed at a desk in very close proximity to the bathroom where the incident took place. Ms. Nettles testified that she could hear activities in the bathroom including running water from the sink faucet and the toilet flushing. Ms. Nettles testified that if anyone had called for help from the bathroom she would absolutely have heard that individual. Ms. Nettles testified that following the incident the claimant approached the security desk in a normal fashion displaying no signs of duress and commented that she had slipped in the bathroom. Ms. Nettles testified she went into the bathroom to inspect it and the only water she saw was a small puddle on the floor under the paper towel dispenser. At no point in any of the accounts of the incident given by the claimant did she allege that she fell in front of the paper towel dispenser. Ms. Nettles testified that the claimant was behaving completely normal during her interactions with Ms. Nettles at the security desk and did not appear to be in any pain or discomfort.

10. Security video from the lobby was also admitted into evidence. It shows that the elapsed time from the claimant's exiting the view of the camera to enter the bathroom and the time that she re-entered the camera view to speak with Ms. Nettles was less than three minutes.

11. During testimony, the claimant denied any issues relating to headaches, dizziness, memory or other cognitive abnormalities prior to the alleged incident of June 19, 2015, stating that the shunts had corrected the issues she was experiencing due to the pseudo tumor.

12. The claimant also denied having experienced symptoms in her cervical, thoracic or lumbar spine prior to the June 19, 2015 incident. However, medical records from Barnes Family Chiropractic document a significant medical treatment history for these body components attributed to an auto accident of October 29, 2010. The claimant testified she had resolved her injuries for this auto accident via legal settlement.

13. In the medical records from Barnes Chiropractic, claimant described neck pain at 8/10, mid back pain at 8/10, low back pain at 8/10 and headaches at 8/10. The claimant failed to mention the October 29, 2010 auto accident to any of the medical providers who evaluated her in connection with the June 19, 2015 injury.

14. Upon cross examination, the claimant made several statements concerning her inability to specifically remember the events in the bathroom when confronted with varying accounts of injury she gave to medical providers. The claimant testified that she had not made the statements that were attributed to her and that the medical providers had written down her information incorrectly. Ultimately, the claimant acknowledged during her testimony that she really didn't know what happened in the bathroom.

15. The claimant underwent an IME at respondents' request with Dr. Eric Ridings. Dr. Ridings testified he had reviewed the medical report of claimant's expert, Dr. Rook, and in his medical opinion Dr. Rook had 1) failed to perform any causation analysis as required by Level II training and 2) Dr. Rook did not have any of the medical information concerning claimant's lengthy pre-existing history. Dr. Ridings testified that he believed Dr. Rook may have reached a different conclusion if he had access to the pre-existing medical records Dr. Ridings was able to review.

16. Dr. Ridings discussed the lack of medical evidence that the claimant experienced any trauma as documented by the medical evaluations on the date of the incident.

17. The ALJ finds Dr. Ridings analyses and opinions to be credible and more persuasive than medical analyses and opinions to the contrary.

18. The ALJ finds that the claimant's testimony and reporting of events is unreliable and therefore not credible.

19. The ALJ finds that the claimant has failed to establish that it is more likely than not that on June 19, 2015 she suffered an injury arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

5. There is a distinction between the terms "accident" and "injury". The term accident refers to an "unexpected, unusual or undersigned occurrence." C.R.S. § 8-40-201(1). In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. See *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). No benefits flow to the victim of an industrial accident unless an "accident" results in a compensable "injury." Compensable injuries involve an "injury" which requires medical treatment or causes disability. See *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). All other "accidents" are not compensable injuries. See *Ramirez v. Safeway Steel Prods. Inc.*, W.C. No. 4-538-161 (Sept. 16, 2003).

6. A preexisting condition does not disqualify a Claimant from receiving worker's compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). The mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the preexisting condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

7. However, where the precipitating cause of an injury is a preexisting condition suffered by the claimant, the injury is not compensable unless a "special hazard" of the employment combines with the pre-existing condition to cause or increase the degree of injury. *See National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 763 (Colo. App. 1992). This principle is known as the "special hazard" rule. *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

8. To be considered an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. *See Id.* (high scaffold constituted special employment hazard to worker who suffered epileptic seizure and fell); *Gates Rubber Co. v. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985) (hard level concrete floor not special hazard because it is a condition found in many non-employment locations). The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's preexisting condition does not bear sufficient causal relationship to the employment to "arise out of" the employment. *Gates v. Rubber Co. v. Industrial Commission, supra; Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999) (injury when preexisting condition caused the claimant to stumble on concrete stairs not compensable because stairs were ubiquitous condition). Claimant provided no testimony that the bathroom stall she was located in at the time of the alleged incident would constitute a special hazard. Claimant testified that the bathroom stall was a "typical" bathroom stall one would find in any location.

9. As found, the claimant's account of the alleged incident is not credible or persuasive. The claimant has provided multiple conflicting accounts of where and how the alleged incident occurred. This conflict in the accounts of the incident, coupled with the lack of any objective medical documentation that would substantiate any injury, i.e.: bruising, tenderness, etc, raises significant concerns regarding the credibility of reporting the incident.

10. The ALJ concludes that Dr. Ridings' analyses and opinions are credible and more persuasive than medical analyses and opinions to the contrary.

11. The ALJ concludes that the claimant's testimony and reporting of events is unreliable and therefore not credible.

12. Based on the preceding findings of fact, the ALJ concludes that the claimant has failed to demonstrate by a preponderance of the evidence that she sustained any injury on June 19, 2015 arising out of and in the course of her employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 15, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on April 7, 2014.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his April 7, 2014 industrial injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period May 11, 2014 until terminated by statute.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $640.00.

FINDINGS OF FACT

1. Employer builds customized storage containers used for shipping items. Randy Williams is the co-owner of Employer.

2. Claimant worked for Employer as a Builder at Employer's Longmont Colorado facility. His job duties involved constructing large crates using plywood and 2x4's. He worked the night shift from 4:30 p.m. until 2:30 a.m. four times each week. The night crew consisted of Claimant and two co-workers.

3. Claimant testified that on April 7, 2014 he was using a nail gun to build a crate base on a workbench. He noted that plywood had been lifted onto a bench and he was nailing framing 2x4's onto one side of the plywood. Claimant was then required to flip the plywood so the risers for the forklift could be applied to the bottom side.

4. While standing at the workbench, Claimant reached forward with a nail gun to apply the last riser. He estimated that the nail gun weighed approximately 25 pounds. Claimant placed the nail gun on the plywood and pulled the trigger to release the nail. However, he testified that he experienced a "pop" in his right shoulder.

5. Claimant subsequently wrote a note on Employer's crate fabrication instructions. He remarked that he had only worked one-half of the day and would be out of work on Wednesday and Thursday because of a "bad shoulder." Claimant then left work. He did not subsequently miss three days of work but performed modified duty employment.

6. In late March 2014 Mr. Williams had accused Claimant and his coworkers on the night shift of intoxication and using marijuana while on the job. Although Employer did not conduct drug or alcohol testing of the employees, Mr. Williams sent a letter to the night crew expressing concerns that they were "pitheads" based on customer complaints. Mr. Williams explained that none of the employees denied the allegations in the letter He suspended Claimant and the other night crew employees without pay.

7. Prior to returning to work after the suspension, Claimant and his co-workers were required to meet with Mr. Williams to discuss reinstatement. During Claimant's meeting he accused other workers of various infractions. Claimant stated that marijuana use "had been going on since Dust was here." "Dust" was a prior supervisor for Employer. Claimant subsequently worked for the following two weeks without incident until the April 7, 2014 incident.

8. On April 16, 2014 Claimant visited Bruce Cazden, M.D. at Workwell Occupational Medicine for a right shoulder evaluation. Claimant reported that he began experiencing right shoulder pain while performing extensive power drilling at work over a period of one or two days. Claimant noted that he then used a nail gun to perform his job duties. While he was reaching and depressing the trigger on the nail gun he felt a sharp, popping pain in his right shoulder. Dr. Cazden diagnosed Claimant with a sprain or strain of the rotator cuff capsule and assigned work restrictions including no use of the right arm and no lifting. He specifically stated that Claimant had suffered an acute right shoulder tear. Dr. Cazden ordered an MRI/arthrogram. He concluded that Claimant's work activities caused his right shoulder symptoms.

9. On April 27, 2014 Claimant completed a Vacation/Absence Request form stating that he was taking a leave of absence from April 29, 2014 until May 11, 2014. In a separate note Claimant commented that he needed to visit his father in Arizona because his father had only two weeks to live.

10. On April 28, 2015 Claimant returned to Dr. Cazden for an evaluation. After reviewing the right shoulder MRI, Dr. Cazden diagnosed Claimant with a superior glenoid labrum lesion or SLAP tear but no rotator cuff tear. He assigned work restrictions including no lifting or reaching with the right arm away from the body or overhead and no lifting in excess of 10 pounds to chest height. Dr. Cazden reiterated that Claimant's work activities caused his right shoulder condition.

11. Claimant subsequently visited his father in Arizona. He returned to work for Employer on May 11, 2015 and was terminated. In fact, Mr. Williams terminated the

entire night crew at Employer's Longmont facility and transferred the functions to Employer's Commerce City, Colorado operation.

12. Mr. Williams authored the termination letters on Friday, May 8, 2014 and distributed them to the night shift employees on May 11, 2014. He explained in the letter that he had been considering termination of the night crew since he had learned they were "potheads." Mr. Williams realized that, because he had knowledge of drug and alcohol use at work, he had made Employer liable for any accidents that might occur. He thus determined that termination of the night crew was warranted. Notably, Employer's Drug and Alcohol Policy provided, in relevant part, that employees were not permitted to be under the influence of drugs or alcohol while performing work-related activities. Violation of the Policy could lead to disciplinary action that included termination.

13. Claimant disagreed with the basis for his termination and testified that he never told Employer he was using marijuana on the job or admitted the infraction. He acknowledged that he has been receiving unemployment benefits in the amount of $405.00 per week since September 2015. The benefits have continued through the date of the hearing in this matter. Claimant has searched for work since his termination but he is still limited in lifting, working overhead and functioning to the side because of his right shoulder injury.

14. On October 27, 2015 Claimant underwent an independent medical examination with James P. Lindberg, M.D. Claimant reported that, while using a nail gun to construct crates at work, he experienced a sharp twinge at the back of his right shoulder. Dr. Lindberg noted that Claimant's right shoulder MRI reflected a labral tear. He explained that lifting a nail gun and pulling the trigger would not cause a significant labral or SLAP tear and biceps tendon anchor disruption. Dr. Lindberg remarked that SLAP tears are generally caused by circumduction under force such as throwing a football or baseball. A SLAP tear is a rotational injury and "[i]t is not possible that pulling a trigger on the nail gun would have caused the lesions seen on the MRI." Dr. Lindberg thus concluded that Claimant's right shoulder condition was not caused by his work activities for Employer. Accordingly, he determined that any surgical intervention should be performed under Claimant's private health insurance.

15. Dr. Cazden testified at the hearing in this matter. He maintained that Claimant suffered a work-related injury to his right shoulder on April 7, 2014. Dr. Cazden explained that Claimant was reaching out to the side and activating his rotator cuff muscles to support the weight of the nail gun. In conjunction with the firing of the nail gun, Claimant experienced rotary force to the hand. Dr. Cazden specified that the head of the humerous abuts the labrum as the arm is extended. The rotary force generated by the impact of the nail gun causes movement of the head of the humerous and possible grinding and pulling of the tendons or labrum.

16. On December 28, 2015 the parties conducted the post-hearing evidentiary deposition of Dr. Lindberg. Dr. Lindberg maintained that Claimant's work activities for Employer on April 7, 2014 did not cause his right shoulder symptoms. Claimant

described to Dr. Lindberg that he was working on a crate wall that was 40 inches by 60 inches on a bench at waist height. Dr. Lindberg testified that the described mechanism of injury was highly unlikely to have caused a SLAP tear in Claimant's right shoulder. In fact, Dr. Lindberg stated that "[b]ased on what he told me in the physical exam, I don't think that there's any way that this could have happened by the injury that he describes." Claimant was working at waist height, he never raised his arm (or anteriorly flexed) above 45 degrees, pulling the trigger involves only muscles below the elbow and no forces are exerted on the shoulder other than holding an eight pound nail gun. The nail gun is stationary against the plywood when the trigger is pulled and it is pointed downward. Dr. Lindberg commented that it is highly unlikely that Claimant would suffer a SLAP tear simply from reaching forward with the nail gun in his hand. Dr. Lindberg remarked that In his 40 years of experience, he has never seen a trivial injury cause a Type 2 SLAP lesion. SLAP tears are caused by large forces with rotational motions of the arm. Holding the gun with his right arm and depressing the trigger did not exert any rotational force on Claimant's right shoulder. Accordingly, Dr. Lindberg concluded that it is not likely to a reasonable degree of medical probability that Claimant's work activities on April 7, 2014 caused his right shoulder injury.

17. Claimant has demonstrated that it is more probably true than not that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on April 7, 2014. Claimant testified that on April 7, 2014 he was using a nail gun to build a crate base on a workbench. While standing at the workbench, Claimant reached forward with a nail gun to apply the last riser. Claimant placed the nail gun on the plywood and pulled the trigger to release the nail. However, he testified that he experienced a "pop" in his right shoulder. On April 16, 2014 Claimant visited Dr. Cazden for a right shoulder evaluation. Claimant reported that he began experiencing right shoulder pain while performing extensive power drilling at work over a period of one or two days. Claimant noted that he then used a nail gun to perform his job duties. While he was reaching and depressing the trigger on the nail gun he felt a sharp, popping pain in his right shoulder. Dr. Cazden subsequently diagnosed Claimant with a superior glenoid labrum lesion or SLAP tear. He concluded that Claimant's work activities caused his right shoulder injury.

18. Dr. Cazden persuasively explained that Claimant was reaching out to the side and activating his rotator cuff muscles to support the weight of the nail gun. In conjunction with the firing of the nail gun, Claimant experienced rotary force to the hand. Dr. Cazden specified that the head of the humerous abuts the labrum as the arm is extended. The rotary force generated by the impact of the nail gun causes movement of the head of the humerous and possible grinding and pulling of the tendons or labrum. Accordingly, Dr. Cazden persuasively maintained that Claimant suffered a right shoulder injury that was caused by his industrial activities for Employer on April 7, 2014.

19. In contrast, Dr. Lindberg commented that it is highly unlikely that Claimant would suffer a SLAP tear simply from reaching forward with the nail gun in his hand. SLAP tears are caused by large forces with rotational motions of the arm. Dr. Lindberg explained that holding the nail gun with his right arm and depressing the trigger did not exert any rotational force on Claimant's right shoulder. Accordingly, he concluded that it

is unlikely that Claimant's work activities on April 7, 2014 caused a right shoulder injury. However, Dr. Lindberg failed to address whether Claimant's right shoulder condition was aggravated by his work activities on April 7, 2014. Moreover, Claimant's credible testimony, the consistent medical records regarding the mechanism of injury and the persuasive opinion of Dr. Cazden reflect that Claimant's work activities on April 7, 2014 triggered a need for right shoulder treatment. Accordingly, Claimant's work activities on April 7, 2014 aggravated, accelerated or combined with a pre-existing right shoulder condition to produce a need for medical treatment.

20. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. Claimant initially obtained medical treatment from Dr. Cazden at Workwell. He subsequently received additional medical treatment for his right shoulder condition. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his April 7, 2014 right shoulder injury. Respondents are thus liable for the preceding medical treatment as well as all additional treatment reasonably necessary to cure or relieve the effects of Claimant's right shoulder injury.

21. Claimant has established that it is more probably true than not that he is entitled to receive TTD benefits for the period May 11, 2014 until terminated by statute. Claimant was unable to earn any wages subsequent to May 11, 2014 because he was terminated by Employer and experiencing the effects of his right shoulder injury. On April 28, 2014 Dr. Cazden assigned work restrictions including no lifting or reaching with the right arm away from the body or overhead and no lifting in excess of 10 pounds to chest height. Claimant has searched for work since his termination but he is still limited in lifting, working overhead and functioning to the side because of his right shoulder injury. He has thus been unable to return to work due to the effects of his April 7, 2014 industrial injury. He has also not reached Maximum Medical Improvement (MMI) for his right shoulder condition.

22. Respondents have failed to demonstrate that it is more probably true than not that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment pursuant to the termination statutes. Mr. Williams authored termination letters on Friday, May 8, 2014 and distributed them to the night shift employees on May 11, 2014. He explained in the letter that he had been considering termination of the night crew since he had learned they were "potheads." Mr. Williams realized that, because he had knowledge of drug and alcohol use at work, he had made Employer liable for any accidents that might occur. He thus determined that termination of the night crew was warranted. Notably, Employer's Drug and Alcohol Policy provided, in relevant part, that employees were not permitted to be under the influence of drugs or alcohol while performing work-related activities. However, Claimant disagreed with the basis for his termination and testified that he never told Employer he was using marijuana on the job or admitted the infraction. Moreover, there was no drug testing or observations to confirm the allegations. Mr. Williams's allegations do not establish a volitional act by Claimant or suggest that he exercised some control over his termination under the totality of the circumstances. Claimant was

thus not responsible for his termination because he did not precipitate the employment termination by a volitional act that he would reasonably expect to cause the loss of employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences

symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on April 7, 2014. Claimant testified that on April 7, 2014 he was using a nail gun to build a crate base on a workbench. While standing at the workbench, Claimant reached forward with a nail gun to apply the last riser. Claimant placed the nail gun on the plywood and pulled the trigger to release the nail. However, he testified that he experienced a "pop" in his right shoulder. On April 16, 2014 Claimant visited Dr. Cazden for a right shoulder evaluation. Claimant reported that he began experiencing right shoulder pain while performing extensive power drilling at work over a period of one or two days. Claimant noted that he then used a nail gun to perform his job duties. While he was reaching and depressing the trigger on the nail gun he felt a sharp, popping pain in his right shoulder. Dr. Cazden subsequently diagnosed Claimant with a superior glenoid labrum lesion or SLAP tear. He concluded that Claimant's work activities caused his right shoulder injury.

8. As found, Dr. Cazden persuasively explained that Claimant was reaching out to the side and activating his rotator cuff muscles to support the weight of the nail gun. In conjunction with the firing of the nail gun, Claimant experienced rotary force to the hand. Dr. Cazden specified that the head of the humerous abuts the labrum as the arm is extended. The rotary force generated by the impact of the nail gun causes movement of the head of the humerous and possible grinding and pulling of the tendons or labrum. Accordingly, Dr. Cazden persuasively maintained that Claimant suffered a right shoulder injury that was caused by his industrial activities for Employer on April 7, 2014.

9. As found, in contrast, Dr. Lindberg commented that it is highly unlikely that Claimant would suffer a SLAP tear simply from reaching forward with the nail gun in his hand. SLAP tears are caused by large forces with rotational motions of the arm. Dr. Lindberg explained that holding the nail gun with his right arm and depressing the

trigger did not exert any rotational force on Claimant's right shoulder. Accordingly, he concluded that it is unlikely that Claimant's work activities on April 7, 2014 caused a right shoulder injury. However, Dr. Lindberg failed to address whether Claimant's right shoulder condition was aggravated by his work activities on April 7, 2014. Moreover, Claimant's credible testimony, the consistent medical records regarding the mechanism of injury and the persuasive opinion of Dr. Cazden reflect that Claimant's work activities on April 7, 2014 triggered a need for right shoulder treatment. Accordingly, Claimant's work activities on April 7, 2014 aggravated, accelerated or combined with a pre-existing right shoulder condition to produce a need for medical treatment.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

11. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. Claimant initially obtained medical treatment from Dr. Cazden at Workwell. He subsequently received additional medical treatment for his right shoulder condition. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his April 7, 2014 right shoulder injury. Respondents are thus liable for the preceding medical treatment as well as all additional treatment reasonably necessary to cure or relieve the effects of Claimant's right shoulder injury.

TTD Benefits

12. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

13. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive TTD benefits for the period May 11, 2014 until terminated by statute. Claimant was unable to earn any wages subsequent to May 11, 2014 because he was terminated by Employer and experiencing the effects of his right shoulder injury. On April 28, 2014 Dr. Cazden assigned work restrictions including no lifting or reaching with the right arm away from the body or overhead and no lifting in excess of 10 pounds to chest height. Claimant has searched for work since his termination but he is still limited in lifting, working overhead and functioning to the side because of his right shoulder injury. He has thus been unable to return to work due to the effects of his April 7, 2014 industrial injury. He has also not reached Maximum Medical Improvement (MMI) for his right shoulder condition.

Responsible for Termination

14. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

15. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment pursuant to the termination statutes. Mr. Williams authored termination letters on Friday, May 8, 2014 and distributed them to the night shift employees on May 11, 2014. He explained in the letter that he had been considering termination of the night crew since he had learned they were "potheads." Mr. Williams realized that, because he had knowledge of drug and alcohol use at work, he had made Employer liable for any accidents that might occur. He thus determined that termination of the night crew was warranted. Notably, Employer's Drug and Alcohol Policy provided, in relevant part, that employees were not permitted to be under the influence of drugs or alcohol while performing work-related activities. However, Claimant disagreed with the basis for his termination and testified that he never told

Employer he was using marijuana on the job or admitted the infraction. Moreover, there was no drug testing or observations to confirm the allegations. Mr. Williams's allegations do not establish a volitional act by Claimant or suggest that he exercised some control over his termination under the totality of the circumstances. Claimant was thus not responsible for his termination because he did not precipitate the employment termination by a volitional act that he would reasonably expect to cause the loss of employment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. On April 7, 2014 Claimant suffered a right shoulder injury during the course and scope of his employment with Employer.

2. Claimant shall receive reasonable and necessary medical treatment to cure or relieve the effects of his right shoulder injury.

3. Claimant earned an AWW of $640.00.

4. Claimant shall receive TTD benefits for the period May 11, 2014 until terminated by statute.

5. Respondents shall receive a credit or offset for unemployment benefits in the weekly amount of $405.00 from September 1, 2015 until terminated by operation of law.

6. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 12, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

➢ Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

➢ If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he received medical treatment that was reasonable and necessary to cure and relieve claimant from the effects of his industrial injury from a physician authorized to treat claimant for his work injury?

➢ If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits?

➢ If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary partial disability ("TPD") benefits?

➢ If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

➢ If claimant has proven a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant sustained a subsequent intervening injury?

➢ If claimant has proven a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to his termination of employment?

FINDINGS OF FACT

1. Claimant was employed with employer as a swamper. Claimant's job duties included hooking up bridals to loads to move to other locations. Claimant testified he was at work on March 27, 2015 when he got his leg pinched between a tail roll of a truck that was backing up and a post on the man camp that he was in the process of moving.

2. Claimant testified his right lower thigh was pinched between the tail roll and a steel post that was welded to the frame of the man camp. Claimant testified his leg was pinched for approximately six seconds. Claimant testified the injury was witnessed and he reported the injury to Mr. Blanscet, the safety supervisor, who

indicated he would file a report. Claimant testified he continued to work following the injury because he was afraid he would get kicked out of the company if he was hurt.

3. Claimant testified he continued working until approximately July, 2015 when he couldn't take the pain any more. Claimant testified he went home and made a doctor's appointment.

4. The medical records demonstrate that claimant was first evaluated on June 23, 2015 at Battlement Mesa Medical Center. Claimant reported a history of having his right thigh pinched between a truck at man camp for 5 seconds one month ago with ongoing complaints of pain with ambulation. Claimant underwent x-rays of the right leg that were normal and was diagnosed with knee pain.

5. Claimant was seen by Ms. Griffith, a nurse practitioner, on June 30, 2015. Ms. Griffith noted no swelling in claimant's lower extremity, but found slight tenderness to palpation on his mid thigh area and the lateral aspect of his patella. Ms. Griffith recommended claimant undergo a magnetic resonance image ("MRI") of his right leg.

6. Claimant was examined by Mr. Zimmerman, a physician's assistant on July 6, 2015. Mr. Zimmerman noted claimant has been unable to work due to his complaints of left knee and thigh pain. The ALJ presumes that Mr. Zimmerman is referring to claimant's right knee as the initial subjective history notes claimant is following up for his right knee, and the assessment addresses right knee and thigh pain. Mr. Zimmerman recommended claimant undergo the MRI and follow up after completion of the MRI. Mr. Zimmerman took claimant off of work as of July 6, 2015 through July 20, 2015.

7. The MRI was performed on July 13, 2015 and demonstrated a posterior horn medial meniscal tear and a possible tear of the anterior cruciate ligament ("ACL").

8. Claimant was examined by Mr. Zimmerman, a physician's assistant, on July 17, 2015.[1] Mr. Zimmerman noted claimant had undergone the MRI and was continuing having difficulty with his knee. Mr. Zimmerman took claimant off of work completely and referred claimant for an orthopedic consultation.

9. Respondents obtained a records review independent medical examination ("IME") from Dr. Isaacs on July 20, 2015. Dr. Isaacs noted claimant claimed that he got his thigh pinched between a truck and a trailer on March 27, 2015, but did not seek treatment until June 23, 2015. Dr. Isaacs opined that getting claimant's thigh pinched between the truck and trailer would not have cause the knee injuries and opined that claimant would be unable to continue working for 3 months before seeking treatment if he had injured his knee on March 27, 2015.

[1] The ALJ notes that the dictated report from this visit lists the date of the visit as July 17, 2015. However, the handwritten WC164 form filled out by Mr. Zimmerman is dated July 16, 2015. The ALJ resolves this difference as finding that the examination took place on July 17, 2015.

10. Respondents' obtained an IME from Dr. Gonzales on November 10, 2015. Dr. Gonzales reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Gonzales notes in his IME report that claimant was working in the field and his thigh got caught between a man camp and a truck with his foot not planted on the ground. Dr. Gonzales notes that claimant did not initially report his injury. Dr. Gonzales noted claimant sought treatment on June 23, 2015 and complained of knee pain for one month.

11. The ALJ finds Dr. Gonzales' report to be flawed in multiple respects. Dr. Gonzales indicates that claimant did not initially report his injury, however, claimant did report the incident to his employer immediately which resulted in an investigation with Mr. Blanscet, the safety supervisor. This further ignores the fact that the incident itself was witnessed. Moreover, while Dr. Gonzales indicates that claimant sought medical treatment on June 23, 2015 and reported he had knee pain for one month, this ignores the more specific accident history he provided on June 23, 2015 of having his right thigh pinched between a man camp and a truck. The ALJ finds the report of Dr. Gonzales to have no persuasive influence in his examination of the evidence in this case.

12. Mr. Zimmerman issued a report dated November 18, 2015 that agreed with the reports from Dr. Gonzales and Dr. Issacs that claimant would most likely have needed to seek treatment for his meniscus and ACL injuries soon after the injury and would have had difficulty working in the immediate days and weeks post injury.

13. Respondents presented the testimony of Mr. Larson, the driver of the truck on March 27, 2015, at hearing. Mr. Larson testified that he was driving the truck and could not see claimant when he heard claimant say "Whoa! Whoa!" Mr. Larson testified he got out of the truck and claimant indicated he was hit in the hip. Mr. Larson testified he did not thing claimant had hurt his knee. Mr. Larson testified he continued working with claimant during the summer of that year and claimant did not seem to have pain in his knee. Mr. Larson testified that in the days after the incident, however, claimant was limping around. However, Mr. Larson testified he was later able to observe claimant jump off trailers chain down rows and walk quickly across locations.

14. Respondents presented the testimony of Mr. Nielsen, claimant's supervisor, at hearing. Mr. Nielsen testified he was present on March 27, 2015 when the incident occurred and saw the winch line was tight against claimant's leg and the post on the man camp. Mr. Nielsen testified the winch line was putting pressure approximately mid way up claimant's thigh. Mr. Nielsen testified claimant didn't appear to have injured his knee and continued to work. Mr. Nielsen denied that claimant appeared to have a limp. Mr. Nielsen testified he told claimant to report the incident to the safety supervisor.

15. Mr. Blanscet, the safety supervisor, testified at hearing that he went to the location of claimant's incident after being informed of claimant's injury on March 27, 2015. Mr. Blancet testified claimant reported getting his leg caught between the roller and the metal pin. Mr. Blancet testified claimant did not report problems with his knee. Mr. Blancet testified he say claimant continuing to work that day, but claimant was not

limping. Mr. Blancet testified he saw claimant work that summer and claimant was not limping. Mr. Blancet testified he followed up with claimant 1-2 weeks later and claimant reported he was doing OK. Mr. Blancet testified that he told claimant that if he were to need treatment he would take him to Parachute or Rifle.

16. Respondents presented the testimony of Mr. Wheeler, a co-worker with claimant, at hearing. Mr. Wheeler testified he was not present when claimant was injured on March 27, 2015, but heard about the incident two weeks later. Mr. Wheeler testified he worked with claimant after the injury and did not see claimant exhibiting signs of a knee injury. Mr. Wheeler testified approximately two months later, claimant told Mr. Wheeler that he was in too much pain to continue working. Mr. Wheeler testified he sent claimant back into the yard after this exchange and noticed claimant had a severe limp and tears in his eyes.

17. The ALJ credits the testimony of claimant at hearing and finds that claimant has established that it is more likely than not that he is sustained a compensable injury arising out of and in the course of his employment with employer. The ALJ credits claimant's testimony at hearing as being credible and persuasive regarding the incident that occurred on March 27, 2015 and his symptoms following the accident. The ALJ finds that claimant's testimony that he did not suffer from knee pain prior to March 27, 2015 is credible and persuasive. The ALJ finds claimant's testimony that he continued to work for employer after the March 27, 2015 injury because he felt he needed to continue to work in order to keep his job to be credible and persuasive.

18. The ALJ notes that the testimony from Mr. Blancet and Mr. Nielsen that claimant was not limping immediately following his injury was contradicted by the testimony of Mr. Larson, the driver of the truck that struck claimant, who indicated claimant did limp for a couple of days following the injury. The ALJ credits the testimony of Mr. Larson in this case over the contrary testimony of Mr. Blancet and Mr. Nielsen and finds that claimant was limping after his injury.

19. Claimant testified at hearing that he applied for disability benefits from Aflac and was told by the Aflac representative that he would not be entitled to benefits unless his injury was not work related. Claimant testified that he indicated to Aflac that "something happened at home" in an attempt to obtain the benefits from Aflac pursuant to this discussion. The ALJ finds claimant's testimony regarding his application for benefits from Aflac to be credible and persuasive. The ALJ notes that claimant provided a consistent accident history to his medical providers when seeking medical treatment and finds that the application for benefits from Aflac does not overcome claimant's sworn testimony at hearing.

20. The ALJ finds claimant has established that it is more likely true than not that the medical treatment he received from Mr. Zimmerman and Ms. Griffith, including the diagnostic treatment, was reasonable medical treatment necessary to cure and relieve the claimant from the effects of his work injury.

21. The ALJ finds claimant has demonstrated that it is more likely than not that he is entitled to TTD benefits beginning July 6, 2015 when he was taken off of work completely by Mr. Zimmerman. The ALJ notes that the wage records indicate claimant worked up until June 29, 2015, but finds that claimant's initial date of TTD benefits should coincide with Mr. Zimmerman taking claimant off of work completely.

22. Claimant testified at hearing that he took his medical reports to his employer and was told by his employer that he could come back when he could work. Employer argued at hearing that claimant was responsible for his termination of employment because he had abandoned his position with employer by not showing up to work. However, the medical records indicate claimant was taken off of work completely by Mr. Zimmerman as of July 6, 2015. The ALJ finds claimant was not required to return to work for employer following that time unless there was an offer of modified employment provided to claimant. The ALJ further finds that there is insufficient evidence presented at hearing to demonstrate that claimant was terminated prior to July 6, 2015.

23. The wage records entered into evidence at hearing demonstrate the claimant earned $19.352.00 in the 26 weeks prior to June 27, 2015. Claimant testified at hearing that he earned approximately $700.00 per week for employer. This appears to be supported by the wage records and the ALJ finds claimant's AWW in this case to be $744.31 per week as testified to by claimant at hearing.

24. Claimant testified that after his injury he has returned to work for a different employer in a marijuana dispensary. Claimant testified he earned $400.00 per week working for his subsequent employer. Claimant testified he is paid cash for his work with the marijuana dispensary. The ALJ credits claimant's testimony and finds that claimant is entitled to TPD benefits for the period of time following his return to work. The ALJ further finds that the physical restrictions set forth by Mr. Zimmerman have remained in place and have not been lifted.

25. The record entered into evidence indicate that employer's designated medical provider includes Grand River Health in Parachute, Colorado and Grand River Medical Care in Rifle, Colorado. The ALJ notes that this is consistent with the testimony of Mr. Blancet at hearing as to his instructions to claimant following the work injury. The ALJ further notes that Mr. Zimmerman and Ms. Griffith work with Grand River Health Clinic West at the address that is listed as a designated physician for claimant for his injuries. The ALJ finds that claimant has proven that it is more probable than not that the medical treatment from Ms. Griffith and Mr. Zimmerman is authorized medical care that is reasonable and necessary to cure and relieve claimant from the effects of his work injury.

26. Claimant denied having any subsequent injury to his right leg following the March 27, 2015 injury. The ALJ finds this testimony credible and holds that respondents have failed to prove that claimant sustained an intervening injury that would sever respondents' liability for providing ongoing workers' compensation benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, the ALJ relies on the testimony of claimant at hearing and finds that claimant has proven by a preponderance of the evidence that he sustained an injury to his right knee on March 27, 2015 while in the course and scope of his employment with employer. The ALJ notes that conflicting testimony was presented as to whether claimant was exhibiting signs of an injury after the March 27, 2015 incident, but credits claimant's testimony that he continued to work and attempted to not show signs of injury because he wanted to continue his work for employer, and only sought medical treatment after the pain became too great, as credible and persuasive.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777

(Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

7. As found, claimant sought treatment with Mr. Zimmerman and Ms. Griffith following his work injury. As found, Mr. Zimmerman and Ms. Griffith are associated with the physicians allowed to treat claimant as designated by employer. As found, the treatment provided by Mr. Zimmerman and Ms. Griffith, including the diagnostic exams, was reasonable and necessary to cure and relieve claimant from the effects of the work injury.

8. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

9. As found, claimant's testimony that he earned approximately $700.00 per week appears to be supported by the wage records entered into evidence and that ALJ finds that claimant's AWW should be $744.31 based on the wage records entered into evidence.

10. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory

requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

11. As found, claimant was taken off of work by Mr. Zimmerman as of July 6, 2015. As found, claimant has demonstrated that he is entitled to an award of TTD benefits as of July 6, 2015 due to claimant having a medical incapacity evidence by a restriction of body function and an impairment of earning capacity demonstrated by claimant's inability to resume his prior work.

12. Claimant subsequently returned to work for a different employer earning less money. Claimant's testimony at hearing that he earned less money than he did with employer was found to be credible.

13. Once a claimant has established a "disability" in the sense that the injury impairs the claimant's ability to perform his regular duties, the right to temporary disability benefits is measured by the claimant's wage loss. *Edgar v. Halliburton Energy Services and Ace American Insurance Company*, W.C. No. 4-971-336-01 (December 22, 2015). Therefore, claimant is entitled to an award of TPD benefits for his loss of earning capacity after he returned to work for the cannabis dispensary.

14. Respondents raise an issue with regard to the award for TPD benefits in their Motion for Corrected Order correctly pointing out that claimant testified that documentation of his earnings were kept on his cell phone. This award of TPD benefits does not require respondents to pay a specific TPD amount, but simply awards TPD benefits in compliance with *Edgar v. Halliburton Energy Service, supra.* Respondents may request documentation be presented from claimant prior to awarding a specific TPD amount, but the case law established by the *Edgar* case holds that if claimant returns to work earning less money following an award of TTD benefits, he is entitled to an award of TPD benefits until terminated by law.

15. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination.

See Padilla v. Digital Equipment Corp., 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

16. As found, respondents have failed to establish that claimant committed a volitional act that resulted in his termination of employment. As found, claimant was taken off of work completely by Mr. Zimmerman on July 6, 2014. While respondents argue that claimant abandoned his job, there was insufficient evidence to establish that claimant had position to abandon as no credible evidence of an offer of modified employment was presented at hearing. As found, respondents have failed to establish that claimant committed a volitional act that he reasonably knew would lead to his termination of employment from employer.

ORDER

It is therefore ordered that:

1. Respondents shall pay the reasonable and necessary medical expenses provided by physicians authorized to treat claimant for his industrial injury, including the treatment provided by Mr. Zimmerman and Ms. Griffith and the diagnostic treatment, pursuant to the Colorado Medical Fee Schedule.

2. Respondents shall pay claimant TTD benefits commencing July 6, 2015 and continuing until terminated by law.

3. Respondents shall pay claimant TPD benefits. Respondents are not ordered to pay any specific amount of TPD benefits pursuant to this Order.

4. Claimant's AWW is determined to be $744.31.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 26, 2016

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether the claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease arising out of and in the course of her employment with the respondent-employer;

2. If so, whether she is entitled to any and all reasonable and necessary medical benefits for her compensable injury; and,

3. If so, whether the treatment rendered at CCOM is reasonable and necessary medical treatment for the compensable injury.

FINDINGS OF FACT

1. The claimant is a case worker manager for the respondent-employer. The claimant is a professional who, in turn, supervises professionals.

2. The essential functions of the claimant's job duties include:

   a. Supervise a full range of intake and ongoing social case work services for a variety of programs.

   b. Supervise a service area consisting of support units, staffed by professional social case workers and paraprofessionals.

   c. Oversee staff scheduling.

   d. Conduct individual group conferences to set and monitor deadlines.

   e. Establish unit goals and tables.

   f. Meet with administration as needed to participate in program meetings.

   g. Organize the work within the unit to assure coverage and efficiency in case load handling.

h. Oversee the budget.

i. Determine the resources required to achieve the goals of the unit.

j. Provide written and verbal instructions to subordinates of program issues.

k. Meet with workers individually and in groups to explain rules, policies, procedures, and laws.

l. Monitor the work of subordinates and review the work of the total unit's effectiveness with regards to plans and programs.

m. Train social workers.

n. Review the performance of workers on a periodic basis and complete their annual performance reviews.

3. The claimant is not considered a word processor or an individual who does nothing but perform data entry.

4. The claimant also described a special project that she performed from January 2015 through May 2015. According to the claimant, this project required her to review numerous disks in preparation for a court proceeding. Specifically, the claimant was required to review these disks on the computer, and, because she is a professional, analyze the information on the disks.

5. According to the Employer's First Report of Injury completed by the claimant, the claimant complained that she developed bilateral upper extremity wrist pain as a result of her work activities. The claimant reported that the onset of these symptoms began on July 21, 2015.

6. Following the report of the injury, the claimant was referred to Emergicare and was seen by Dr. Bradley as the authorized treating physician. Dr. Bradley eventually referred the claimant to Dr. Primack for an evaluation. Dr. Primack indicated that he had spoken with Dr. Bradley subsequent to the referral to ascertain the purposes of the evaluation. Dr. Primack reported that Dr. Bradley was requesting a causality analysis of the claimant's upper extremity complaints.

7. As part of her treatment, the claimant had an MRI performed of her right wrist on August 24, 2015. The MRI revealed that there was no tendon sheath fluid collection. The MRI did reveal that there were three compartment joint effusions identified in the wrist.

8. On August 6, 2015, Sara Nowotny, a qualified rehabilitation counselor, performed a job analysis of the claimant’s position. A job analyses is a report to provide a quantitative, accurate assessment of the physical demands of the job, either for assessing risk factors, return to work, or ergonomic considerations. With regards to the job analysis that she performed of the claimant’s position, Ms. Nowotny obtained the information about the claimant’s essential job functions directly from the claimant. Prior to the evaluation, Ms. Nowotny explained to the claimant that the purpose of the evaluation was to determine the physical demands of her occupation. The claimant also testified as to the job analysis evaluation. The claimant acknowledged that Ms. Nowotny asked questions to her about what the claimant did in her job. The claimant acknowledged that she provided honest, accurate information to Ms. Nowotny during this job evaluation. Ms. Nowotny spent over one hour of time questioning the claimant concerning her general work activities.

9. Ms. Nowotny was of the opinion that her job analysis accurately described the physical requirements of the claimant’s general work activities.

10. The ALJ finds Ms. Nowotny to be credible and persuasive concerning the functions of the claimant’s position with the respondent-employer.

11. As identified by the claimant in her job analysis, the following represent the essential functions of her job as a case worker manager:

a. Participate in staff, supervisory, and community meetings (approximately 10, one to one and a half hour meetings per week) (20-25% of work activity).

b. Process referrals on the computer (25% of work activity).

c. Case/document review, consisting of answering complaints in person, by telephone, or by computer (20-25% of work activity).

d. Attend home visits (1-3 times per month), including driving 30-50 miles a month.

e. Distributing mail by placing paperwork in employee bins outside of their cubicle (5-10% of work activity).

f. Attend court hearings (4-5 times per month) (10% of work activity).

12. According to the job analysis completed by the claimant and Sara Nowotny, the following represents the claimant's job tasks and corresponding physical demands:

a. Meeting attendance – involving taking notes by hand 2-3 pages per hour per meeting.

b. Processing referrals on computers – reviewing information approving activities primarily with mouse operation.

c. Case/document review – read and review files to verify compliance with guidelines. May circle items for change and initial/date document. Places notes on files and returns to table for storage.

d. Home visit attendance – drive to residence and communicate with clients about services or concerns.

e. Mail distribution – may occur several times a day when pages of documentation are delivered around the office to bens next to cubicle.

f. Court hearing attendance – involving preparation of documents for presentation at hearing. Sitting and listening/participating in court proceedings.

13. Based on a combination of Ms. Nowotny's interview of the claimant, as well as her measurement and observation of work activities, Ms. Nowotny determined that, on average, the claimant uses her mouse 2.1 hours per day and uses a keyboard .35 hours per day.

14. Within the Medical Treatment Guidelines for the category of Cumulative Trauma Disorder, the Division has promulgated primary risk factors and secondary risk factors associated with Cumulative Trauma Disorders of the upper extremities. *W.C.R.P. 17, Exhibit 5, Section D.3.b.* The primary risk factors and the secondary risk factors identified in the Medical Treatment Guidelines are also listed in the claimant's job analysis. Based on Ms. Nowotny's professional experience, the claimant's work activities did not rise to the level of the presence of any of the primary risk factors and secondary risk factors listed in the Medical Treatment Guidelines.

15. The ALJ finds that the claimant's testimony is consistent with the August 6, 2015 job analysis completed by the claimant and Ms. Nowotny. The claimant testified that the physical tasks that she performs vary from day to day. The claimant testified that although there are days where she may be required to mouse more than 6 hours

per day, she also stated that depending on her job functions on a particular day, she would be mousing significantly less that day, or not at all.

16. The claimant was evaluated by Dr. Primack on September 8, 2015. In his September 8, 2015 report, Dr. Primack noted that he had reviewed a “physical demands analysis.” At hearing, Dr. Primack confirmed that the “physical demands analysis” that he reviewed was the job analysis performed by Sara Nowotny. In addition, Dr. Primack confirmed that the information identified in the section entitled “Right Upper Extremity” of page 2 of his report was information that he obtained directly from the job analysis. Dr. Primack opined in his September 8, 2015 report that the claimant’s ongoing upper extremity problems were not related to her employment.

17. Dr. Primack provided testimony at hearing in explanation of his opinion. Dr. Primack noted that the August 24, 2015 MRI did not show any fluid along the tendons or within the tendon sheath. Although the MRI did show fluids in the wrist, the MRI did not show any fluid in the tendons, which would lead to the conclusion that the symptoms that the claimant is reporting are not because of repetitive motion. In addition, the MRI did not show that the claimant had any inflammation in the tendons of her hand. As a result, Dr. Primack was of the opinion that based on objective medical evidence the claimant did not have a pathology consistent with repetitive motion.

18. Dr. Primack was of the opinion that based on his review of the job analysis, the claimant did not have a sufficient amount of repetitive motion that would rise to the level of a compensable occupational disease. Dr. Primack testified that the job analysis indicated that the claimant had variability of job tasks. Dr. Primack noted that the claimant writes, she uses a computer, she talks, she walks, and does many other things throughout the day. Dr. Primack further testified that the variability of her tasks would result in different loads across her fingers, in different positions across her fingers, and also rest cycles. As it pertains to rest cycles, Dr. Primack noted that with the variability in tasks, the rest cycles in between the variability allows her tendons to rest. Because the tendons are allowed to rest, these tendons will not get inflamed, which is correlated with the MRI findings.

19. The claimant’s counsel, during cross examination, suggested to Dr. Primack that the claimant’s work activities aggravated her pre-existing de Quervain’s tenosynovitis. However, Dr. Primack disagreed that the claimant properly carried the diagnosis of de Quervain’s tenosynovitis. Specifically, Dr. Primack testified that in order to properly diagnose a person with de Quervain’s tenosynovitis, the MRI must disclose fluids in the tendon, as well as different types of dimensions of the tendon to ascertain any changes in the size of tendons. Because the August 24, 2015 MRI did not show

these pathological findings, he reached the conclusion that the claimant did not have de Quervain’s tenosynovitis. Even if the claimant did carry the diagnosis of de Quervain’s tenosynovitis, Dr. Primack rendered the opinion that, because of the variability of tasks in the claimant’s job activities, the claimant would not have the necessary force, load, and cycle necessary for her work activities to cause or aggravate her de Quervain’s tenosynovitis.

20. The ALJ finds that Dr. Primack’s analyses and opinions are credible and more persuasive than medical evidence to the contrary.

21. The ALJ finds that the claimant has failed to establish that it is more likely than not that the claimant suffers from an occupational disease arising out of and occurring in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The purpose of the Workers’ Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers’ compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence.

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

4. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

5. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

6. Section 8-40-201(14) C.R.S. (2015) defines “occupational disease” as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

7. An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill,* 940 P.2d 1125 (Colo. App. 1997). Occupational diseases are subject to a more rigorous test than accidents or injuries before they can be found compensable. All elements of the four-part test mandated by the statute must be met to ensure the disease arises out of and in the course of employment. The statute imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

8. The hazardous conditions of employment need not be the sole cause of the disease. The existence of a preexisting condition does not defeat a claim for an occupational disease unless it can be shown that a non-industrial cause was an equally exposing stimulus. A claimant is entitled to recovery if he or she demonstrates that the

hazards of employment cause, intensify or aggravate to some reasonable degree, the disability. Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

9. The purpose of this rule "is to ensure that the disease results from the claimant's occupational exposure to hazards of the disease and not hazards to which the claimant is equally exposed outside of employment." *Saenz-Rico v. Yellow Freight System, Inc.,* W.C. No. 4-320-928 (January 20, 1998); see also *Stewart v. Dillon Co.,* W.C. No. 4-257-450 (November 20, 1996). Once the claimant makes such a showing, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

10. Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.*, W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office*, N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines*, W.C. 4-785-790 (ICAO September 9, 2011).

11. Of particular note in the Claimant's case, as this is a right upper extremity claim, is analysis of whether or not she has suffered a work-related cumulative trauma injury which is addressed in Rule 17, Exhibit 5 of the Guidelines.

12. Rule 17, Exhibit 5 (D)(3) provides that,

> The clinician must determine if it is medically probable (greater than 50% likely or

> more likely than not) that the need for treatment in a case is due to a work-related exposure or injury. Treatment for a work-related condition is covered when: 1) the work exposure causes a new condition; or 2) the work exposure causes the activation of a previously asymptomatic or latent medical condition; or 3) the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic condition. In legal terms, the question that should be answered is: "Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place?" If the answer is "yes," then the condition is not work-related. If the answer is "no," then the condition is most likely work-related.

13. The Cumulative Trauma Guidelines then set out the steps the clinician should follow to make a proper causation evaluation. There is a 6-step general causation analysis and a 5-step causation analysis when using risk factors to determine causation.

14. As outlined above, Ms. Nowotny spent an hour obtaining information from the claimant as to her job activities, and the physical demands of each of these job activities. The claimant confirmed that she provided accurate information to Ms. Nowotny during this evaluation.

15. The claimant testified that she needs to perform certain activities frequently and repetitively. However, the claimant also acknowledged that her job activities vary on a daily basis. The claimant also acknowledged that she is a professional, who is supervising professionals. The claimant is not a word processor, or someone that does nothing but data entry. The claimant reviews and analyzes information on a regular basis. Consequently, the claimant's job is not a position where she is continuously performing repetitive activities of her upper extremities with any kind of force or duration.

16. As outlined above, Dr. Primack reviewed the job analyses and, based on the contents of the job analyses, did not believe that the claimant's work activities rose to the level of a compensable occupational disease. As testified to by Dr. Primack, the basis of his opinion is multi-factorial.

17. Dr. Primack's opinion is supported by the Medical Treatment Guidelines. The claimant does not meet any primary risk factors or secondary risk factors articulated in the Medical Treatment Guidelines.

18. The ALJ concludes that Ms. Nowotny is credible and persuasive.

19. The ALJ concludes that Dr. Primack's analyses and opinions are credible and more persuasive than medical analyses and opinions to the contrary.

20. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she suffers from an occupational disease arising out of and in the course of her employment with the respondent-employer.

21. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she is entitled to medical benefits, specifically those medical benefits as provided by CCOM.

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

2. The claimant's claim for medical benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 14, 2016

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. I. No. 2012-008

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DIVISION OF WORKERS' COMPENSATION

IN THE MATTER OF THE APPLICATION OF:

DIVISION OF WORKERS' COMPENSATION,

Applicant,

v.

Employer/Respondent.

On October 7, 2015, the Division of Workers' Compensation (hereinafter the "Division") filed an Application for Hearing in the above-captioned matter, and the Division mailed the Notice of the Hearing set for February 3, 2016, to the Employer at its last known and regular address as follows: [redacted], the last known address on file with the Division, and the notice was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received notice of the hearing.

On December 9, 2015, the Division filed a Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist continuing its business operations for failure to maintain workers' compensation insurance as required by §§ 8-44-101 and 8-43-409, C.R.S. The Division's Motion was mailed to the Employer on December 9, 2015, at its last known address on file with the Division, and it was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received the Division's Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist. . Employer filed **no** timely response to the Motion nor did it file any response whatsoever. The matter was submitted for decision on January 5, 2016.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether the Employer continues business operations without maintaining workers' compensation insurance; and, if so, should the Employer be ordered to cease and desist from continuing to do business.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. On October 7, 2015, the Division of Workers' Compensation filed an Application for Hearing in this matter pursuant to Office of Administrative Courts Rules of Procedure (OACRP), Rule 8, 1 CCR 104-1 and § 8-43-409(1), C.R.S.. The Division mailed a Notice of Hearing to the Employer/Respondent at its last known address on file with the Division [redacted] and the notice was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received notice of the hearing. The hearing has been set for February 3, 2016, at 1:30 PM.

2. On December 9, 2015, the Division filed a Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist ("Motion") pursuant to OACRP, Rule 17 and § 8-43-409, C.R.S. The Division's Motion was mailed to the Employer on December 9, 2015, at its last known address on file with the Division, as herein above detailed, and it was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received the Division's Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist.

3. Pursuant to OACRP, Rule 17, the Employer had 20 days after the date of filing of the Motion to file an objection to the Motion. Employer filed **no** timely response to the Motion nor did it file any response whatsoever.

4. The Employer failed to file a Response to the Motion for Summary Judgment. Accordingly, there are no genuine issues of material fact in dispute for hearing. The Employer failed to provide a written response with supporting documentation to the Division's Motion for Entry of Summary Judgment.

Findings

5. It is undisputed, and the ALJ finds, that the Employer employs employees for whom it must carry workers' compensation insurance under the provisions of the Workers' Compensation Act (hereinafter the "Act")..

6. The Employer does not have a policy of workers' compensation insurance in effect.

7. The Employer continues to operate its business in the absence of workers' compensation insurance coverage.

8. The Employer received legal notice of the hearing set before the Office of Administrative Courts, and the motion for Summary judgment as herein above detailed.

9. The Employer is in default of its workers' compensation insurance obligations under the Act.

Aggravating Factors

10. In an Order, dated January 18, 2012, the Director of the Division imposed a fine in the amount of $16, 405.00 against the Employer for failing to maintain workers' compensation insurance from at least April 27, 2011. The Employer did not appeal the Director's Order and the time for appeal has passed. The Director's Order was recorded as a judgment in Denver District Court Case No. 12CV2895 on May 14, 2012.

Ultimate Findings

11. There are no genuine disputed issues of material fact concerning the fact that the Employer continues to operate its business without insuring its liability for workers' compensation.

12. The Division has proven, by preponderant evidence that there is no genuine issue of disputed material fact that the Employer is aware of its obligation to insure its liability for workers' compensation and has failed to do so for a period of over 4 years, having been fined $16, 405.00 in 2012 for failing to insure its liability for workers' compensation.

13. The Division has proven, by a preponderance of the evidence that the Employer continues business operations without insuring its liability for workers' compensation.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Jurisdiction and Notice

a. The ALJ has jurisdiction of the subject matter and over the parties to this action pursuant to the Workers' Compensation Act of Colorado.

b. As found, the Division's Motion was mailed to the Employer on December 9, 2015, at its last known address on file with the Division, as herein above detailed, and it was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received the Division's Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist. *See Olsen v. Davidson,* 142 Colo. 205, 350 P.2d 338 (1960); *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993).

c. As found, the Employer failed to provide a written response with supporting documentation to the Division's Motion for Entry of Summary Judgment. Accordingly, the facts set forth in the Division's Motion and in the supporting affidavit attached to the Motion for Summary Judgment are deemed undisputed. *WRWC, LLC v. City of Arvada*, 107 P.3d 1002, 1006 (Colo. App. 2004).

d. The Employer is in violation of § 8-44-101(1), C.R.S., by failing to maintain workers' compensation insurance for its covered employees, and is therefore subject to penalties under § 8-43-409, C.R.S.

e. . Section 8-43-409(1)(a), C.R.S., provides that an employer in default of its workers' compensation insurance obligations shall be ordered to cease and desist immediately from continuing its business operations during the period such default continues.

f. The issuance of an order requiring the Employer to cease and desist business operations while in default of its workers' compensation insurance obligations is an appropriate penalty for failure to keep workers' compensation insurance in force.

g. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Motion for Summary Judgment is supported by documents and affidavits. As further found, there were no timely responses to the Motion. 12. Summary judgment is appropriate in this matter because there are no genuine issues of material fact in dispute, and the Division is entitled to entry of judgment as a matter of law. *McCormick v. Union Pacific Resources Co.*, 14 P.3d 346, 348-349 (Colo. 2000); C.R.C.P. 56(c).

h. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the attachments to the Division's Motion for Summary Judgment support the proposition that there is no genuine issue of disputed material fact exist.

i. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, there were no timely responses to the Division's Motion for Summary Judgment. Therefore, the Division is entitled to Summary Judgment, as a matter of law.

Burden of Proof

j. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Division has sustained its burden that there is no genuine issue of disputed material fact concerning the Employer continuing to operate a business without insuring its liability for workers' compensation; and, in doing so the Employer continues to violate a Cease and Desist Order entered in 2012 as herein above described.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Division of Workers' Compensation's Motion for Summary Judgment is hereby granted.

B. The Employer shall cease and desist immediately from continuing its business operations during the period it remains in default of its mandatory obligation to have workers' compensation insurance in force and effect.

C. The hearing in this matter, February 3, 2016, is hereby vacated.

DATED this______day of January 2016.

____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order Granting Summary Judgment in Favor of the Division of Workers' Compensation** on this_____day of January 2016, mailed, postage prepaid, first class, or electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

____
Court Clerk

Wc.sjord